UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

DANA DUGGAN, individually and on behalf of persons similarly situated,

Plaintiff,

v.

MATT MARTORELLO, et al,

Defendants.

No. 1:18-cv-12277-JGD
(Leave to file granted 5/6/2021)

DEFENDANTS' REPLY MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS UNDER FED. R. CIV. PROC. 19

Defendants Matt Martorello ("Martorello") and Eventide Credit Acquisitions, LLC ("Eventide") (collectively "Defendants") respectfully submit this reply in support of their motion to dismiss under Rule 19.

PRELIMINARY STATEMENT

Big Picture Loans, LLC ("Big Picture"), Ascension Technologies, LLC ("Ascension") ("collectively, the "Tribal Entities"), and the Lac Vieux Desert Band of Lake Superior Chippewa Indians ("Tribe") are indispensable tribal parties and this action should not proceed without them. Plaintiff's ("Duggan") claims arise out of consumer loans made by Big Picture, allegedly with the help of Ascension and Defendants, and she initially named the Tribal Entities as defendants, reflecting their indispensability. ECF No. 1. After the Fourth Circuit held the Tribal Entities share the Tribe's immunity, Duggan entered a settlement agreement ("Settlement Agreement") with them and others. Duggan then dismissed the Tribal Entities and filed her Second Amended Complaint, maintaining their alleged roles. ECF Nos. 112, 118.

Now, in her Opposition to Defendants' Motion to Dismiss under Rule 19, Duggan furtively

tries to limit tribal sovereign immunity by arguing that a tribe waives legal protections over tribal activity by choosing to settle litigation. To do so, she relies on Rule 19 decisions that neither involve sovereign government nor apply federal Indian law and policy regarding immunity. The Court should reject her gambit and grant Defendants' motion to dismiss.

ARGUMENT

I. Rule 19 Applies to the Tribe and Tribal Entities

Duggan cites a variety of out-of-context Rule 19 cases that do not involve absent tribal parties, or an attempt to litigate tribal conduct, to make two faulty arguments: (1) Rule 19 does not apply to settled parties; and (2) Rule 19's purpose, avoiding prejudice to absent parties, is not served if a party is absent because of settlement. But there are no such Rule 19 exceptions and a plaintiff cannot abrogate tribal immunity by, in effect, forcing a tribe to make the lose-lose choice between asserting their inherent immunity (leaving issues of tribal sovereignty to be litigated by non-Indian commercial partners while risking the viability of the governmental fisc), or waiving immunity and expending limited government time and money in defense of their rightful conduct.

A. Settling Does Not Exclude the Tribe and Tribal Entities from Rule 19.

Duggan contends that Rule 19 does not apply to the Tribe and Tribal Entities because they settled, thereby "settl[ing] their interests related to this litigation." ECF No. 204, at 5-6. It is the opposite, because the Settlement Agreement created the obligation to continue lending and collecting on tribal loans for at least two years to pay Duggan and the purported class. The Tribe and Tribal Entities cannot fulfill those obligations if the loans are illegal. Though not required, the Tribal Entities asserted their sovereign interests here . ECF Nos. 27-34. Duggan presumes the Tribal Entities settled because they have no interest in the ongoing litigation rather than crediting their beliefs that their sovereignty precludes state law and that they are a necessary party. *Williams*

v. Big Picture Loans, LLC, No. 3:17-cv-00461 (E.D. Va.), ECF Nos. 611-12; *Galloway, et al. v. Martorello, et al.*, No. 3:19-cv-00314 (E.D. Va.), ECF No. 248. A tribe asserting and defending its inherent identity should not be taken as permission to litigate its conduct, laws and agreements.

Duggan neither cites anything supporting a general "settled party" exception to Rule 19, nor anything specifically supporting that parties who settled after challenging a court's authority are exempt from Rule 19. For example, in *United States ex rel. Morongo Band of Mission Indians v. Rose*, a plaintiff tribe sued one of its members and a non-Indian consultant who partnered to run a bingo game on the member's property on the reservation. 34 F.3d 901, 903-04 (9th Cir. 1994). During the litigation, the tribe voluntarily dismissed its claims against its member while maintaining its claim against the consultant. *Id.* at 904. The consultant argued the member was an indispensable party based on either the tribe not being able to obtain complete relief or the member not being able to adequately protect his interests post-settlement. *Id.* at 907-08. The court disagreed with both, noting that the member obtaining voluntary dismissal reflected that he was not concerned about any inability to protect his interests. *Id.* at 908.

Relying on this inapplicable precedent, Duggan boldly asserts that Rule 19 does not apply to settled parties. ECF No. 204, at 6. As a threshold matter, Duggan's reasoning conflicts with federal Indian law and policy when addressing Rule 19 involving the law and conduct of tribal government entities, including *Dine Citizens Against Ruining Our Env't v. Bureau of Indian Affairs*, 932 F.3d 843, 857 (9th Cir. 2019) ("virtually all the cases to consider the question appear to dismiss under Rule 19, regardless of whether [an alternate] remedy is available, if the absent parties are Indian tribes invested with sovereign immunity.").[1] The stipulated dismissal in which

[1] Even Congress must "unequivocally" express an intent to abrogate sovereign immunity in order to do so. *In re Greektown Holdings, LLC*, 917 F.3d 451, 456 (6th Cir. 2019).

the member of the tribe in *Morongo* did not feel it was in his interest to remain a party while being sued by his tribe is unlike the Settlement Agreement resulting in Duggan dismissing the Tribal Entities, because *Morongo* did not involve any issues of sovereign immunity and here the Tribal Entities have steadfastly maintained they share the Tribe's immunity from suit.[2] The Tribal Entities prioritizing immunity over defending the legality of the lending should not open a backdoor to undermining tribal immunity. Excluding the Tribe and Tribal Entities from Rule 19 would undermine the core purpose of immunity – protection from the burdens of standing trial. *See Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc*., 506 U.S. 139, 144 (1993); *Bowen v. Doyle*, 880 F. Supp. 99, 134 (W.D.N.Y. 1995).

Finally, Duggan filed her notice of voluntary dismissal under Rule 41(a). ECF No. 112. Absent that, the Court would have considered whether Rule 19 precluded their dismissal. *See Mayes v. Fujimoto*, 181 F.R.D. 453, 456-58 (D. Haw. 1998) (denying motion for voluntary dismissal under Rule 41(a) because party was "indispensable" under Rule 19, and dismissing entire action because indispensable party destroyed diversity jurisdiction); *Edwards v. General Electric Co*., No. C 10-02431-SI, 2011 WL 479991, at *4 (N.D. Cal. Feb. 7, 2011). Thus, Rule 19 applies to parties, such as the Tribal Entities, who are dismissed pursuant to Rule 41(a).

B. Settling Does Not Eliminate the Interests of the Tribe and Tribal Entities.

Duggan treats the Tribal Entities as run-of-the-mill defendants like in *Morongo*, instead of tribal ones immune from suit by claiming Rule 19 concerns are not present when an absent party was "actually involved in the litigation and settled the plaintiff's claims." ECF No. 204, at 6. But

[2] The other cases do not apply because neither involves defendants claiming they were not subject to suit. *See Hill v. Mallinckrodt LLC*, No. 1:19CV532, 2020 WL 956589, at *2-3 (M.D.N.C. Feb. 27, 2020) (contractor that settled pre-suit was not necessary party in wrongful death action); *Shropshire v. Canning*, No. 10-CV-01941-LHK, 2012 WL 13658, at *4-6 (N.D. Cal. Jan. 4, 2012) (copyright co-owner not necessary party in infringement action).

naming and dismissing a tribe, however, does not create a loophole to Rule 19. The Tribal Entities' involvement here consisted of asserting their bona fide governmental status. ECF Nos. 27-34. Thus, Rule 19's purposes were not addressed by the Settlement Agreement, given that the Tribe and Tribal Entities cannot exercise their right to be heard without waiving immunity.

A judgment applying state usury laws to the lending activity of the Tribe and Tribal Entities would prejudice them. The Settlement Agreement requires they continue loan collection at rates exceeding Massachusetts's usury laws. ECF No. 200-1 § 11.2. The Court finding that the choice of law, forum selection, and tribal dispute resolution provisions in the loan agreements are "void and unenforceable" would plainly harm the Tribe and Tribal Entities by impugning the lending business as a whole and the legality of loans coming after the end of the class period. Such a judgment could also create an enforcement action from the CFPB, from which the Tribe has no immunity, and would also prejudice the Tribe and Tribal Entities in future litigation over individual claims. ECF No. 118 ¶¶ 15, 153-57; *Picciotto v. Cont'l Cas. Co.*, 512 F.3d 9, 16 (1st Cir. 2008) ("[E]ven without a direct preclusive effect, an adverse judgment could be 'persuasive precedent in a subsequent proceeding, and would weaken [the absent party's] bargaining position for settlement purposes.'" (alteration in original) (citation omitted)).

Furthermore, the Settlement Agreement undermines Duggan's argument that there is no "threat of repeated lawsuits on the same matter," or "prejudice to the settled part[ies]." ECF No. 204, at 5. Under the Settlement Agreement, class members do not release individual claims against the Tribal Entities and the other settling parties unless they receive payment from the settlement fund. ECF No. 200-1 §§ 12.3-12.4; *Galloway, et al. v. Williams, et al., 3:19-cv-00470 (E.D. Va.) ("Galloway III")*, ECF No. 105 at 3. Only class members who paid off loans and paid more than 2.5 times the principal amount may receive payment from the settlement fund bankrolled by *future*

borrowers' interest payments. ECF No. 200-1 § 2.32; *Galloway III*, ECF No. 105, at 3, ECF No. 114, at 6. Approximately 361,731 of 491,018 members of the class are not eligible to receive payment because they have outstanding loans. *Galloway III*, ECF No. 114, at 5-6. Because there is a material threat of repeat lawsuits by most of the class, the Tribe and Tribal Entities are necessary parties. *See Burns v. Scottsdale Ins. Co.*, No. C08-1136-RSL, 2009 WL 86549, at *1-2 (W.D. Wash. Jan. 7, 2009); *Beavertail, Inc. v. United States*, No. 4:12-cv-610-BLW, 2017 WL 3749446, at *12 (D. Idaho Aug. 29, 2017).

II. The Tribe and Tribal Entities Are Necessary Parties Under Rule 19(a).

A. The Tribe and Tribal Entities Claim Interests Relating to the Subject of this Action that Would Be Impaired By Disposing of this Action in Their Absence.

First, complete relief cannot be accorded between the existing parties because Duggan seeks to invalidate terms in Big Picture's loan agreements with Duggan and others, but "a district court cannot adjudicate an attack on the terms of a negotiated agreement without jurisdiction over the parties to that agreement." *Clinton v. Babbitt*, 180 F.3d 1081, 1088 (9th Cir. 1999).

Relying on *Commonwealth of Pennsylvania v. Think Finance, Inc* and *Dillon v. BMO Harris Bank, N.A.*, Duggan contends that this Court can accord complete relief because her case involves "nothing more than a party seeking damages from a joint tortfeasor." ECF No. 204, at 9. While "not necessary for all joint tortfeasors to be named as defendants in a single lawsuit," *Temple v. Synthes Corp., Ltd.*, 498 U.S. 5, 7 (1990), *Temple* "did not establish that Rule 19 lacks application to all who are alleged to share liability for a wrong," *Two Shields v. Wilkinson*, 790 F.3d 791, 797 (8th Cir. 2015). Moreover, each case is distinguishable.

In *Think Finance*, the Commonwealth alleged entities used a "rent-a-tribe" scheme to violate usury laws and the court concluded that the tribes and tribal companies were not necessary because the plaintiff sought "a declaration that the Defendants' conduct violates a number of state

and federal laws" rather than "a declaration that the contracts themselves are illegal"." 2016 WL 183289, at *1, 4. Because Duggan tries to invalidate provisions of the loan agreements by "seek[ing] a declaratory judgment that various provisions in Big Picture's loan agreement are void and unenforceable," ECF No. 118, ¶¶ 15, 153-57, *Think Finance* is inapposite. *Cf. Ward v. Apple Inc.*, 791 F.3d 1041, 1048-49 (9th Cir. 2015).

In *Dillon*, the plaintiff asserted usury claims against banks assisting internet lenders by debiting and crediting borrowers' bank accounts, but, because RICO and Unfair and Deceptive Trade Practices Act claims arose under "statutory schemes analogous to tort law," the internet lenders were "at most joint tortfeasors or co-conspirators" and not "necessary parties under Rule 19.". 16 F. Supp. 3d at 611-13. Duggan alleges RICO claims, but cannot prevail without first establishing that Massachusetts law, not tribal law, governs tribal conduct over the internet. ECF No. 118, ¶ 157. Otherwise, Duggan's loans will not be "unlawful debt[s]" for RICO purposes.[3]

Instead, the Tribe and Tribal Entities' interests here are like *Two Shields*, where the Eighth Circuit affirmed dismissal of an action under Rule 19 despite the plaintiffs calling the United States a joint tortfeasor. Tribal members leased mining rights to land held in trust for them by the United States. *Id*. at 792. The members filed putative class actions against the companies and individuals to which they leased the mining rights, claiming that the United States breached its fiduciary duty by approving the leases, and that defendants aided, abetted, and induced the United States to breach that duty. *Id*. at 792-93. The district court dismissed the action under Rule 19, explaining that to prevail, the members "necessarily would have to prove that the United States has acted illegally

[3] Duggan also cites *Gingras v. Rosette*, No. 5:15-CV-101, 2016 WL 2932163, at *20 (D. Vt. May 18, 2016), where the court held a tribe and tribal lender were not indispensable because tribal officials were named and could represent the tribe and lender's interests. But Duggan settled and dismissed tribal officials, so they cannot represent tribal interests as in *Gingras*.

and breached its fiduciary duty in approving the leases." *Id.* at 795.

On appeal, the Eighth Circuit agreed, finding "whether the United States has acted illegally in approving the oil and gas leases for plaintiffs' allotments 'cannot be tried behind its back.'" *Id.* at 796 (citation omitted). The court rejected that the United States was a mere joint tortfeasor:

> [T]he United States . . . ***claims an interest in the administration, enforcement, and interpretation of its laws and regulations***. *Temple* did not establish that Rule 19 lacks application to all who are alleged to share liability for a wrong. Instead, the rule instructs courts to examine the interests of an absent party . . . to determine whether "as a practical matter" its ability to protect those interests will be hindered.

Id. at 797 (emphasis added). Like the United States in *Two Shields*, the legality of the Tribe's activity should not be tried behind the backs of the Tribe and Tribal Entities. The Tribe and Tribal Entities risk substantial governmental matters and are not mere joint tortfeasors, and their ability to protect those interests will inevitably be prejudiced, even if just "as a practical matter."

Second, an absent party is necessary if it "claims an interest relating to the subject of the action and . . . disposing of the action in [its] absence may[,] as a practical matter impair or impede [its] ability to protect the interest." Fed. R. Civ. P. 19(a)(1)(B). Duggan maintains that the Tribe and Tribal Entities have not claimed an interest, but is wrong because they asserted interests before dismissal that remain at stake. *See* ECF Nos. 28, 30, 32, 34, and 66.[4] An absent party need not

[4] Before settling, the Tribe filed a Rule 19 motion for tribal officers relying on its sovereignty, asserting "A ruling on the lawfulness of Big Picture's loans, without the Tribe and Big Picture at the table, would unquestionably impair and impede Big Picture and the Tribe's ability to protect its interest—here, sovereignty interests [under] Fed. R. Civ. P. 19(a)(1)(B)(i)." Case No. 3:19-cv-00314, ECF No. 248, at 9. They argued "a judgment against McFadden and Liang, whether a declaration or for damages, is necessarily a judgment on the lawfulness of Big Picture's loans made in Big Picture's absence, which would be significantly prejudicial as any such judgment would conflict with the Fourth Circuit Opinion, as well as damage the Tribe's sovereignty." *Id.* at 11. They clarified, "Undoubtedly, should Big Picture 'claim an interest,' Plaintiffs would argue, and the Court would agree, Big Picture has consented to suit. Big Picture does not have to subject itself to suit and 'claim an interest,' in the lawsuit. The Court is well aware of Big Picture's interests and the Fourth Circuit has opined in favor of Big Picture's interests." *Id.* at 8.

affirmatively claim an interest to be afforded the protections of Rule 19, rather, "any party may move to dismiss an action under Rule 19(b)." *Republic of Philippines v. Pimentel*, 553 U.S. 851, 861 (2008). A court "may also consider *sua sponte* the absence of a required person and dismiss for failure to join." *Id.*; *Gunvor SA v. Kayablian*, 948 F.3d 214, 220 (4th Cir. 2020).

To claim an interest, an absent party must only have an interest rather than proving its legal validity. *Ins. Co. of State of Pennsylvania v. LNC Communities II, LLC*, No. 11-CV-00649-MSK-KMT, 2011 WL 5548955, at *8 (D. Colo. Aug. 23, 2011), *report and recommendation adopted*, No. 11-CV-00649-MSK-KMT, 2011 WL 5553808 (D. Colo. Nov. 15, 2011). In particular, "the finding that a party is necessary to the action is predicated only on that party having a claim to an interest" and courts "must protect a party's right to be heard and to participate in adjudication of a claimed interest." *Shermoen v. United States*, 982 F.2d 312, 1317-18 (9th Cir. 1992).

The Tribe and Tribal Entities have substantial interest in the loans and regulating their consumer lending entities free from state interference, as reflected by the Fourth Circuit opinion and the evidence submitted by the Tribal Entities in their motions to dismiss. ECF No. 201, at 13.

Despite this, Duggan argues that proceeding absent the Tribe and Tribal Entities "does not hurt their interests" given that they "opt[ed] out" of this case by entering the Settlement Agreement, ignoring the Tribe and Tribal Entities' interest in preserving their immunity. ECF No. 204, at 12-13. The Settlement Agreement also requires the Tribe continue lending at interest rates that exceed Massachusetts' usury laws, and will continue to fund a substantial portion of the Tribe's budget. ECF Nos. 200-1 § 11.2, 28-3 ¶¶ 17–18. Without participating in this action, the Tribe and Tribal Entities cannot protect their continued interest in consumer lending. Holding that they should have waived their immunity to do so would undermine federal law and policy and the purpose of immunity. Proceeding without the Tribe and Tribal Entities will "impair or impede" their ability

to protect their interests. Rule 19(a)(1)(B).

B. The Tribe and Tribal Entities Have Meaningful Interests in Duggan's Claims.

In her final attempt to oppose the Tribe and Tribal Entities' status as necessary parties, Duggan asserts they have "no meaningful interest" in this action for three reasons. ECF No. 204, at 13-14. First, Duggan asserts that she seeks declaratory relief only regarding its "relevance and impact on this dispute" with Defendants. *Id.* at 13. In fact, she seeks declaratory judgment that many provisions in the loan agreements are void and unenforceable. ECF No. 118 ¶ 15, 153-57. While only Defendants remain, this relief would prejudice ongoing lending because "their interests may well be affected as a practical matter by the judgment that [their] operations are illegal." *Am. Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1024 (9th Cir. 2002). It would also prejudice the Tribe and Tribal Entities in lawsuits with borrowers involving individual claims in the future. ECF No. 200-1 § 12.4. *See Picciotto, supra*, 512 F.3d at 16.

Second, Duggan assumes her conclusion by claiming, contrary to the findings of the Eastern District of Virginia and the Fourth Circuit, the Tribe and Tribal Entities have no interest in applying tribal law to loan agreements involving off reservation conduct. ECF No. 26, 4-6. But Tribal Entities and Defendants maintained the opposite – the *lending* conduct to which Duggan seeks to apply state regulatory and usury laws occurs *on* the reservation. *Id.* The Court need not decide where lending occurred, without the Tribe or Tribal Entities available for discovery, to dispose of this motion. Such would prejudice the Tribe and Tribal Entities, and Rule 19 therefore bars deciding this question in their absence.

Third, Duggan contends that tribal law does not provide a legal structure for resolution of the present dispute. This also misses the point of Rule 19. Because the loan agreements include a class action waiver, and that disputes arising out of the agreements shall be resolved pursuant to

the Tribal Dispute Resolution Procedure ("TDRP"), deciding to diminish tribal regulators or courts or invalidate these provisions should not be decided without them. *See* ECF No. 118-1, at 5-6.

III. The Tribe and Tribal Entities Are Indispensable Parties Under Rule 19(b).

The Rule 19(b) factors and immunity favor dismissal.

A. Duggan Fails to Distinguish the Weight Accorded to Sovereign Immunity.

The Tribe has sovereign immunity as a federally-recognized Indian Tribe. *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014). The Tribal Entities submitted evidence that they are arms of the Tribe, ECF Nos. 27-30, and the Fourth Circuit held they are entitled to immunity. *Williams v. Big Picture, LLC*, 929 F.3d 170, 185 (4th Cir. 2019).

When a necessary party asserts immunity, a court must give that "sufficient weight" since "any consideration of the merits in the sovereign's absence is 'itself an infringement on . . . sovereign immunity.'" *Fla. Wildlife Federation Inc. v. United States Army Corps of Engineers*, 859 F.3d 1306, 1318 (11th Cir. 2017) (alteration in original) (quoting *Pimentel*, 553 U.S. at 864-65). "[I]mmunity places a heavy thumb on the scale for dismissal," leaving "little room for balancing" the Rule 19(b) factors because "immunity may be viewed as one of those interests 'compelling by themselves." *Downing v. Globe Direct LLC*, 806 F. Supp. 2d 461, 470 (D. Mass. 2011).

Duggan attempts to distinguish these cases because they do not involve "purely monetary claims against a joint tortfeasor," ECF No. 204, at 17-19, but this case does not involve purely monetary claims because she seeks a declaration that provisions in "Big Picture Loans' loan agreement are void and unenforceable." ECF No. 118 ¶ 15. The Tribe and Tribal Entities interests in governing their own conduct free from diminution by state licensing and regulatory laws does not equate them to a mere joint tortfeasor. *See supra* § II.A

B. The Rule 19(b) Factors Strongly Favor Dismissal.

The Rule 19(b) factors reinforce that the Tribe and Tribal Entities are indispensable parties. For the first one, Duggan claims that the Tribe and Tribal Entities face no prejudice because the Settlement Agreement "demonstrates their lack of concern about the continuation of this case." ECF No. 200, at 15. As detailed above, this claim requires the Tribe to choose between immunity or defending its conduct. Furthermore, the Settlement Agreement reflects Big Picture's continued interest in lending activity subject to federal and tribal law by permitting collection of interest at rates that exceed the caps under state law. ECF No. 200-1 §§ 3.3, 11.2. Application of state law to Big Picture's loans could result in severe harm through "significant cuts to [the Tribe's] government services," "loss of tribal business, and significant unemployment." ECF 28-3, ¶ 25(c).

In support of their Rule 19 motion, Defendants cited cases holding that in an action to **void or rescind** a contract all parties to the contract are indispensable in light of the potential prejudice to their contractual rights. *See* ECF No. 200, at 14-18. Ignoring her express request to "void" contractual provisions, Duggan maintains these cases do not apply because she does not seek rescission. ECF No. 204, at 18-19. But they are analogous because they involve attempts to void contract provisions without joining all parties. *See, e.g., United States. ex rel. Hall v. Tribal Development Corp.*, 100 F.3d 476, 480 (7th Cir. 1996) ("void[ing] contracts between the defendants and the Tribe" absent the tribe, "would likely be extremely prejudicial to the tribes' long term interest"). Duggan also seeks a judgment that the governing law and forum selection clauses in the loan agreements are "void and unenforceable" to recover all monies paid by the putative class, ECF No. 118 ¶¶ 15, 154-57, 162, 165, which would effectively put the borrowers in as good a position as before getting loans, so voiding these terms is no different than rescission.

Duggan also claims that Defendants will not be prejudiced by their inability to obtain

discovery from the Tribe and Tribal Entities. *See Alltel Commc'ns, LLC v. DeJordy*, 675 F.3d 1100, 1105 (8th Cir. 2012); *Downing*, 806 F. Supp. 2d at 468. She contends that any potential prejudice is alleviated by the "cooperation pledged under the Settlement Agreement." ECF No. 204, at 16. But the Settlement Agreement only obligates the Tribe and Tribal Entities to participate in discovery *with Duggan*, not Martorello or Eventide,[5] and thus, in fact, magnifies the prejudice to the Defendants who have no such agreement with the Tribe.

The second factor also favors dismissal because prejudice to the Tribe and Tribal Entities cannot be avoided. Duggan argues that awarding monetary damages and holding the governing law and forum selection clauses do not apply to Martorello and Eventide does not prejudice the Tribe and Tribal Entities. ECF No. 204, at 16. But the Court cannot award money damages without ruling that arm of the Tribe *Big Picture's* conduct is not subject to tribal authority, licensure and regulatory oversight, but rather subject to state authority and so the forum selection clauses are unenforceable. Such a ruling would result in banks, credit bureaus, creditors and employees reconsidering their involvement in supporting racketeering conduct. That such rulings would not bind the Tribe and Tribal Entities does not matter. *See Hardy v. IGT, Inc.*, No. 2:10-CV-901-WKW, 2011 WL 3583745, at *7 (M.D. Ala. Aug. 15, 2011); *Picciotto*, 512 F.3d at 16. Duggan's requested relief inevitably prejudices the Tribe and Tribal Entities.

The third factor supports dismissal where, as here, "further lawsuit[s] could be necessary that would require relitigating nearly identical issues." *Downing*, 806 F. Supp. 2d at 469. Because

[5] ECF No. 204, at 16, 3 citing ECF No. 200-1 § 5.3 (stay of proceedings), § 6.3 (agreement to provide loan data *if* class is certified or evidence of availability of such data to plaintiffs), § 6.4 (agreement to negotiate *plaintiffs*' requests for data, documents, and information in good faith), § 12.1 (release for certain claims), § 12.8 (required actions after entry of final fairness approval order), § 15.4 (documents produced and depositions provided in *Williams* and *Galloway I* shall be produced in related cases), and § 15.6 (agreement to withdraw assertion of attorney-client privilege as to certain communications).

the Settlement Agreement contemplates Big Picture continuing to collect interest on loans at rates exceeding Massachusetts's usury laws, more suits on the legality of the loans may arise. *See id.* While Duggan asserts the Settlement Agreement negates the threat of repeat lawsuits, its limited cap on collections and narrow release of individual claims demonstrates that a judgment rendered in the absence of the Tribe and Tribal Entities will be inadequate. *See* ECF 200-1 §§ 11.2, 12.4.

The fourth and final factor favors dismissal because Duggan has an adequate remedy if this action is dismissed. She can pursue relief under the TDRP to which she assented in her loan agreements, allowing the Tribe to defend its interests, and if she prevails, she can then proceed against the Defendants in federal court. *See* ECF Nos. 118-1, at 5-6, 200, at n.7.[6] Defendants need not participate in Duggan adjudicating applicable law with Big Picture to later be subject to liability in federal court should Duggan prevail.[7] *Cf. Dawavendewa v. Salt River Project Agr. Imp. & Power Dist.*, 276 F.3d 1150, 1157 (9th Cir. 2002). After exhausting tribal remedies, Duggan could proceed against the Defendants in federal court.

Finally, even if Duggan lacks an alternative remedy, dismissal is warranted due to the "paramount importance to be accorded to [a sovereign's] immunity from suit." *Downing*, 806 F. Supp. 2d 461 (2011) (citation omitted); *Wichita & Affiliated Tribes of Oklahoma v. Hodel*, 788

[6] The Tribe's regulatory agency is a co-regulator alongside the CFPB, which knows of the online tribal lending industry. *See* 12 U.S.C. § 5481(27) (including federally recognized tribes within definition of "State"); 12 U.S.C. § 5495 (requiring CFPB to coordinate with State regulators); *see also Working with Tribal Governments*, CFPB, https://www.consumerfinance.gov/tribal/; https://files.consumerfinance.gov/f/documents/cfpb_payday_nprm-2019-reconsideration.pdf at 30 (CFPB "has engaged in consultation with Indian tribes about this [payday loan rule] proposal. The Bureau held a consultation on December 19, 2018, at the Bureau's headquarters. All Federally recognized Indian tribes were invited to this consultation, which generated frank and valuable input from Tribal leaders to Bureau senior leadership and staff about the effects such a proposal could have on Tribal nations and lenders.").

[7] Duggan conflates the jurisdiction of the tribal court with the Tribal Regulatory Authority to claim that Defendants are not subject to the TDRP.

F.2d 765, 777 (D.C. Cir. 1986) (dismissal under Rule 19(b) "less troublesome" when due to tribal immunity because "society has consciously opted to shield Indian tribes from suit").

IV. There Is No "Legal Loophole" Exception to Rule 19.

Duggan maintains that allowing Martorello and Eventide to use "Rule 19 to escape liability would create a legal loophole from accountability for illegal activity and accordingly incentivize widespread misconduct and abuse of the sovereign immunity doctrine." ECF No. 204, at 20. Yet again, Duggan assumes the conclusion of the case in her favor by presuming commercial partners rely on a tribe's inherent immunity, and therefore must have illegal intent, rather than presuming they rely on their inherent sovereign right to operate free from state regulatory laws. The broader purpose of immunity is to make tribes attractive targets for economic development. There is no such thing as "rent-a-tribe" or "escape" from liability under Rule 19, because tribes do not have immunity from the CFPB or Federal Trade Commission.[8] Nonetheless, dismissal of an entire action against multiple defendants due to an absent party's immunity is a common consequence of Rule 19 and was approved by the Supreme Court in *Pimentel*. Under *Pimental*, "where a sovereign party should be joined in an action, but cannot be owing to sovereign immunity, the entire case must be dismissed if there is the potential for the interests of the sovereign to be injured." *Klamath Tribe Claims Comm. v. United States*, 106 Fed. Cl. 87, 96 (2012) (citing *Pimentel*, 553 U.S. at 96); *Am. Greyhound Racing, Inc*, 305 F.3d at 1025. Dismissal is warranted because there is high potential for the Tribe and Tribal Entities to be harmed if this action proceeds without them.

CONCLUSION

Defendants respectfully request that this action be dismissed pursuant to Rule 19.

[8] *See* https://www.consumerfinance.gov/tribal/ (providing "resources which Tribal Regulatory Authorities should find useful as they supervise companies that provide consumer financial products or services"); *see also* footnote 6, *supra*.

Dated: May 11, 2021

Respectfully submitted,

/s/ *Bernard R. Given*
Bernard R. Given (*pro hac vice*)
William N. Grosswendt (*pro hac vice*)
LOEB & LOEB LLP
10100 Santa Monica Blvd., Suite 2200
Los Angeles, CA 90067
Telephone: (310) 282-2348
Facsimile: (310) 742-0414
bgiven@loeb.com
wgrosswendt@loeb.com

Ian D. Roffman
Ian D. Roffman (BBO# 637564)
iroffman@nutter.com
Michael J. Leard (BBO# 681468)
mleard@nutter.com
NUTTER, MCCLENNEN & FISH LLP
Seaport West, 155 Seaport Blvd.
Boston, MA 02210
(617) 439-2000
(617) 310-9000 (fax)

Attorneys for Defendants Matt Martorello & Eventide Credit Acquisitions, LLC

CERTIFICATE OF SERVICE

I hereby certify that on May 11, 2021, a true copy of the above document, including attachments, if any, was served via electronic means using the Court's Electronic Case Filing (ECF) system upon all registered ECF users, and paper copies will be sent to those indicated as non-registered participants.

/s/ Michael J. Leard
Michael J. Leard (BBO# 681468)

5155548.1