No. 21-2116

In the United States Court of Appeals for the Fourth Circuit

MATT MARTORELLO,
Defendant-Appellant,

v.

LULA WILLIAMS, GLORIA TURNAGE, GEORGE HENGLE, DOWIN COFFY, MARCELLA P. SINGH, Administrator of the Estate of Felix M. Gillison, Jr., on behalf of themselves and all individuals similarly situated,
Plaintiffs-Appellees.

On Appeal from the United States District Court
for the Eastern District of Virginia at Richmond
Case No. 3:17-cv-00461-REP (The Honorable Robert E. Payne)

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CORPORATE DISCLOSURE STATEMENT

Plaintiffs-Appellees Lula Williams, Gloria Turnage, George Hengle, Dowin Coffy, Marcella P. Singh, and Administrator of The Estate of Felix M. Gillison, Jr. are all individuals that have no corporate parent and do not issue stock.

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INTRODUCTION

This is the latest in a series of cases in which operators of low-dollar, high-interest lending websites have tried to evade liability for illegal loans by cloaking their operations in tribal law. The scheme, orchestrated by defendant Matt Martorello, made loans to Virginia consumers with annual percentage rates above 700% nearly 60 times Virginia's legal limit. Although Martorello makes no claim of tribal affiliation, he sought to renounce state and federal laws with a contract purporting to limit borrowers to claims under tribal law and to a tribal claims procedure that, by its express terms, provides no "procedural or substantive rights." JA1937.

In this interlocutory appeal, Martorello invokes the contract's terms to challenge the district court's order certifying a class of borrowers who fell prey to this scheme. The court, he argues, should instead have enforced a contract provision waiving the borrowers' right to participate in class actions. But this Court has encountered contracts like this many times before and has consistently held that, where a party drafts a contract "in a calculated attempt to avoid the application of state and federal law," the agreement is invalid as a prospective waiver of rights. *Dillon v. BMO Harris Bank, N.A.*, 856 F.3d 330, 337 (4th Cir. 2017). Such agreements, the Court has explained, are a "farce," designed "to avoid state and federal law" and deployed "to game the entire system." *Hayes v. Delbert Servs. Corp.*, 811 F.3d 666, 674, 676 (4th Cir. 2016). And because that "forbidden purpose … goes to the core of the

agreement," a court cannot "sever the invalid clauses." *Hengle v. Treppa*, 19 F.4th 324, 344 (4th Cir. 2021). As a result, the "*entire* … agreement is unenforceable." *Gibbs v. Haynes Invs., LLC*, 967 F.3d 332, 344 (4th Cir. 2020) (emphasis added). As the district court recognized, that includes the class-action waiver.

Even if the contract were enforceable, it would not help Martorello here. The plain language of its class-action waiver extends only to claims against tribal-lending entities, their "parent companies and affiliated entities," and other denominated third parties. Martorello argues that he is an "affiliated entity" because he once provided the tribal lenders with consulting services. But he offers no definition of the phrase that arguably extends that far. Nobody would refer to a human consultant as an "affiliated entity."

Martorello's fallback argument challenges the district court's finding that common issues predominate under Rule 23(b)(3). The only "individualized" issues he identifies, however, are supposed variations in the interest collected from each borrower and changes in Martorello's day-to-day responsibilities over the class period facts that, even if true, have no bearing on the elements or evidence needed to establish the plaintiffs' claims.

More damning for Martorello is the district court's finding that he "was not telling the truth" on these points. JA1233. The court based that conclusion on "substantial" and "largely unrebutted" record evidence and on its own first-hand

observations of "Martorello's demeanor and conduct" over the course of a two-day evidentiary hearing. JA1233, 1695. It found that, although Martorello tried to disguise his involvement by originating loans in the name of tribal entities, he received the vast majority of borrower payments 98% of net income from the loans and was heavily involved in the scheme's operation over the entire class period. JA1695 96, 1718 20.

Martorello acknowledges that this Court reviews the district court's factfinding only for clear error. Beyond a conclusory assertion (at 54 n.10) that "all of the district court's conclusions … are wrong," however, he makes virtually no attempt to rebut the court's findings or the evidence on which it relied. Instead, he argues that the district court's findings violate this Court's mandate in an earlier appeal by contradicting the factual record as it existed at the time. But this Court's decision there a purely legal holding on the sovereign immunity of tribal defendants who have since been dismissed had nothing to do with predominance. And even if it did, this Court's decision would not freeze the record at the motion-to-dismiss stage of the case. To hold otherwise would abrogate the district court's authority and responsibility under Rule 23 to make specific findings on the propriety of class certification. The district court did everything right here, and this Court should affirm.

STATEMENT OF THE ISSUES

Class-action waiver

1. The loan contract here unambiguously waived borrowers' statutory rights under federal and state law by providing that tribal law "solely and exclusively" governed its terms. JA1936 37. The contract also bound borrowers to a tribal dispute-resolution process as the "sole and exclusive" remedy for disputes, even though the process gave borrowers "no procedural or substantive rights." JA1936 37. Are these terms like indistinguishable provisions this Court has reviewed in previous cases a prospective waiver of rights that render the entire contract unenforceable?

2. Assuming that the contract is enforceable, is Martorello an individual not affiliated with any tribe a "parent company or affiliated entity" of a tribal lender under the contract's plain language and thus entitled to enforce the contract's class-action waiver?

Predominance

3. Did the district court clearly err when it concluded that Rule 23(b)(3)'s predominance requirement is satisfied based on its finding of fact in reliance on unrebutted documentary evidence and its own first-person evaluation of Martorello's live testimony that Martorello was not telling the truth?

4. Did the district court violate this Court's mandate by making the factual findings required by Rule 23 before certifying the class?

STATEMENT OF THE CASE

A. Factual background

1. Martorello's tribal-lending scheme. This case involves an illegal tribal-lending enterprise created and operated by Martorello a Chicago entrepreneur with no claim to any tribal affiliation. JA132. Although Virginia caps interest on loans at 12% APR, *see* Va. Code § 6.2-303(A), these loans carried triple-digit rates of more than 700%, JA143. As in other tribal-lending schemes, Martorello relied on a "byzantine corporate structure" of more than a dozen interrelated entities to evade liability for violating state usury laws like Virginia's. JA1659; *see* JA1168 79.

Back in 2008, Martorello first "became involved in payday lending using a company called MMP Finance." JA1221. This endeavor offered loans with interest rates that "would be usurious under state laws," and, in an effort to circumvent such laws, used a choice-of-law provision selecting "the laws of Costa Rica." JA1222. Three years later, "Martorello became interested in the tribal lending concept" a "new device to evade state usury laws" that "used Native American tribal entities" as "the nominal lender in an effort" to "preclude enforcement of the interest rap caps in state usury laws." JA1221 (citing Nathalie Martin & Joshua Swartz, *The Alliance Between Payday Lenders and Tribes: Are Both Tribal Sovereignty and Consumer Protection at Risk?*, 69 Wash. & Lee L. Review 751, 785 (2012)).

At an online lending conference, a mutual colleague introduced Martorello to

Robert Rosette, who was "a very well-known attorney" involved in the tribal lending model. JA2478. Rosette and his business partner offered to connect Martorello with the Lac Vieux Desert Band of Lake Superior Chippewa Indians (LVD), a federally recognized tribe, to offer loans over the internet to consumers across the country. The men explained that, under the operation, there would be two entities one, called Bellicose VI LLC, owned by Martorello and one, called Red Rock Tribal Lending LLC, owned by the tribe. Martorello's entity, they advised him, "would be the servicer for the lending operation" and the company owned by the tribe would not be "involved in the business." JA2489 90. Martorello asked for clarification and they told him that, although "representatives from the tribe" would be considered "managers" of the tribe-owned entity, it was Martorello's company, Bellicose, that would "operate[] the business completely." JA2490.

Martorello gave the green light for the endeavor. In October 2011, his company Bellicose entered into a "servicing" agreement with the newly created tribal entity Red Rock. JA2502. The contract gave Martorello nearly complete control over the operations of Red Rock.[1] In exchange for running virtually all

[1] For example, the contract provided that Bellicose "shall have the authority and responsibility over all communication and interaction whatsoever between [Red Rock] and each service provider, lender and other agents of [Red Rock]." JA2509. Bellicose also had the authority to "collect all gross revenues and other proceeds connected with or arising from the operation" of Red Rock. JA2519. And Bellicose had the contractual right to "sweep [Red Rock's] bank account amounts into

aspects of the business, Bellicose received 98% of the net income collected on the loans. JA2511. Red Rock received 2% of the net revenue from the loans, less charge offs. JA2509. [redacted]

Soon after Red Rock began issuing loans, Martorello grew concerned over his risk of liability from mounting enforcement actions against tribal-lending schemes across the country. JA1240 47; JA2544. In late 2012, he posed some "some urgent questions" to a business expert about how to value businesses that were "illegal, yet very profitable," like online poker sites, medical marijuana stores, and a "drug cartel." JA2544. Martorello explained that the "[tribal lending] industry is going to be living in the grey area of its legality for another year or two," and that he had already "received dozens of letters from State AGs saying we need to be licensed and sending Cease and Desist orders." JA2545. In addition to that risk, Martorello revealed that the law firm Greenberg Traurig had provided him with a 20-page legal opinion concluding that Martorello could be liable for "**aiding and abetting felony crime**" in states like Georgia. JA2545 (emphasis in original).

As things grew worse for the industry, Martorello approached Rosette about

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[Bellicose's] bank accounts" to receive its share of the proceeds and, as a result, had "sole signatory and transfer authority over such bank accounts." JA2517, 2519.

restructuring the business to reduce his liability. The New York Department of Financial Services had ordered Red Rock to cease and desist its lending in New York and a court had found that Red Rock was "subject to the State's non-discriminatory anti-usury laws" because the "undisputed facts demonstrate[d]" that the illegal activity was "taking place in New York, off of the Tribes' lands." *Otoe-Missouria Tribe v. N.Y. Dep't of Fin. Servs.*, 974 F. Supp. 2d 353, 361 (S.D.N.Y. 2013). As a result, he asked Rosette to "zero in asap on minimizing my risk for being individually liable." JA2548.

Martorello began to think that the way forward was to exploit sovereign immunity. JA2168. In an e-mail dated October 14, 2013, with the subject heading "LVD to take ownership of Bellicose VI," Martorello presented options for a restructure in an attempt to allow Bellicose to share in the LVD's immunity. JA2168. Martorello proposed that Bellicose would "[a]ssign today LVD 51% of Bellicose via Equity only membership interest tied to the SPVI subsidiary only." JA2168. (underline in original). Anticipating the business would be shut down, Martorello further proposed that a separate trust entity of his, called BlueTech, would "own 49% equity, but 100% profits interests until month 49" thus guaranteeing that Martorello would retain the profits until the business was gone. JA2168. Martorello's e-mail candidly asserted that the transaction must be "structured to provide all entities sovereign immunity." JA2168. In a contemporaneous email to the LVD

tribal council, Martorello explained that the "Current Manager (myself) will be locked in as the decision maker for 48 months, at which point they will hire a new Manager to replace me." JA2170.

Finally, Martorello settled on the following plan. To acquire the protection of tribe's sovereign immunity for himself and his companies, Martorello orchestrated a transaction creating the appearance that he had sold Bellicose to the tribe. JA1240 4. The transaction involved two newly created entities: Ascension Technologies, a tribal entity purportedly created to take over Bellicose's business, and Eventide Credit Acquisitions, a non-tribal entity through which Martorello planned to continue running the lending operation. JA253. Under the terms of the transaction, the tribe purported to purchase Bellicose for $300 million, while Eventide purported to loan the tribe the same amount. JA252 54. But rather than pay typical interest payments on the loan, the tribe agreed to continue paying Martorello his usual percentage of net profits. JA254 55.

The upshot was that little changed: No money changed hands for the sale, and Martorello continued to keep almost all the profits (now deemed loan payments) while retaining substantial control of the lending operation through Eventide. *See Williams v. Big Picture Loans, LLC*, 2019 WL 1983048, at *6 (E.D. Va. May 3, 2019) (describing the "sham transaction"). For example, Martorello insisted that, as "the seller," he would "have to keep a final say so in business decisions to protect the

business from being destroyed by the new owner before paid." JA2194; *see also* JA4225 (confirming that "[a]s far as I know, the [tribal] Manager's don't really do anything" and instructing that they should "really only [be] involved per the [operating agreement] to get feedback from the [non-tribal] CEO/President"). And Martorello made clear he did not want any changes, explaining that there was "[n]o need to reinvent the wheel or shake things up, just need to keep it alive and then use the earnings from it to take risks with and do other things." JA2194; *see also* JA2785 (stating that that "the Bellicose Companies will be sold only 'as is', with existing Management in place and the company remaining substantially the same"); JA2242 (noting that, the deal was "take it or leave it" and that, if LVD "was to cut" Martorello and his team "out of the picture, then [it] simply cannot perform as a business").

The merger closed in January 2016. JA2803. At that point, the loans were originated in the name of Big Picture Loans a name, website, brand, and set of operational materials that had been previously developed by Martorello for another tribe. *See, e.g.*, JA1250. [redacted]

Ultimately, as the foregoing makes clear, although some of the tribal-lending companies were formally owned by the tribe, Martorello was heavily involved in

their creation, asserted substantial control over the lending business, and received the vast majority 95% to 98% of their net income. JA1225 51, 1695 96, 1719.

2. The loan contract. In a second component of his scheme to avoid liability for violations of state usury laws, Martorello relied on a contractual web of liability shields including choice-of-law provisions, forum-selection clauses, and dispute-resolution procedures set forth in a standard form loan contract. JA1934 38. It worked like this: *First,* the contract included a "WAIVER OF JURY TRIAL" provision that, in addition to waiving the right to a jury, also provided that "NO LITIGATION OR ARBITRATION IS AVAILABLE" and prohibited participation in a class action in "ANY DISPUTE ALLEGED AGAINST US OR RELATED THIRD PARTIES." JA1937.

Second, the contract contained choice-of-law provisions stating that its terms were governed exclusively by tribal law. Its first sentence stated: "IMPORTANT NOTICE: This Loan Agreement … is governed by the laws of the Lac Vieux Desert Band of Lake Superior Chippewa Indians." JA1934. Its "GOVERNING LAW AND FORUM SELECTION" section reiterated that the "Agreement will be governed by the laws of the Lac Vieux Desert Band of Lake Superior Chippewa Indians ('Tribal law'), including but not limited to the Code as well as applicable federal law." JA1936. And its "IMPORTANT ACKNOWLEDGMENTS" section made clear that tribal law was the *only* law that applied: "You acknowledge and agree that this

Agreement is subject solely and exclusively to the Tribal law and Jurisdiction of the Lac Vieux Desert Band of Lake Superior Chippewa Indians." JA1938.

Third, the contract provided a total of eight times that the "Tribal Dispute Resolution Procedure" was the "sole and exclusive dispute resolution mechanism for disputes and claims related to or arising under this Agreement" JA1937. That procedure provided that aggrieved borrowers could submit a written complaint to the lender (that is, Red Rock or Big Picture). JA1937. But it also stated that the procedure was provided only as "a courtesy to consumers." JA1937. A borrower's complaint was "considered similar in nature to a petition for redress submitted to a sovereign government, without waiver of sovereign immunity and exclusive jurisdiction, and does not create any binding procedural or substantive rights for a petitioner." JA1937.[2]

[2] *See also* JA1936 ("All disputes shall be solely and exclusively resolved pursuant to the Tribal Dispute Resolution Procedure set forth in Section 9 of the Code … ."); JA1937 ("YOU … AGREE TO BE BOUND SOLELY BY THE TRIBAL DISPUTE RESOLUTION PROCEDURE FOUND IN THE CODE"); JA1937. ("To encourage resolution of consumer complaints, and pursuant to Section 9 of the Code, all complaints lodged, filed, or otherwise submitted by You or on Your behalf must follow the Tribal Dispute Resolution Procedure, as described herein."); JA1936 ("The Tribe and Lender intend and require, to the extent permitted by Tribal law, that any complaint lodged, filed, or otherwise submitted by You or on Your behalf to follow the Procedure."); JA1937 ("All disputes arising out of, relating to, or in connection with this Agreement shall be finally settled under the Tribal Dispute Resolution Procedure."); JA1937 ("YOU … HAVE READ AND AGREE TO BE BOUND SOLELY BY THE TRIBAL DISPUTE RESOLUTION PROCEDURE FOUND IN THE CODE"); JA1938 ("You acknowledge and agree that the Tribal

B. Procedural history

1. The plaintiffs in this case represent a class of Virginia residents who obtained loans originated by Red Rock or Big Picture at interest rates above the legal rate in Virginia. JA1725 ¶ 26. Their complaint asserts violations of RICO and Virginia's usury law against Martorello, two tribal entities (Big Picture and Ascension), and other defendants not relevant here. JA131 ¶ 61.

The tribal defendants moved to dismiss, arguing that they were entitled to sovereign immunity as arms of the tribe. After abbreviated jurisdictional discovery, the parties briefed the sovereign-immunity issue based on the record developed in that discovery. JA456. Martorello filed a declaration in support of the motion, in which he characterized Red Rock and Big Picture as being almost exclusively run by the tribe. JA1251 ¶ 56. Among other things, he stated that the tribe had independently created Red Rock without his involvement, that it was the driving force behind the creation of Big Picture, and that it controlled all aspects of the lending operation. JA1225 ¶ 26, 1230, 1247 ¶ 48. At the same time, Martorello minimized his own involvement in the operation and claimed to have ended his involvement entirely in 2016. JA1248.

Dispute Resolution Procedure is the sole and exclusive forum for resolving disputes and/or claims arising from or relating to this Agreement.").

The district court denied the motion. In its factual findings, the court, "relying principally on Martorello's affidavit," largely adopted Martorello's characterizations of the lenders' operations. JA1230. But the court concluded that the entities had failed to prove that they were arms of the tribe. JA315. This Court reversed. *See Williams v. Big Picture Loans, LLC*, 929 F.3d 170 (4th Cir. 2019). The Court found "no clear error in the district court's factual findings." *Id.* at 177. And it acknowledged that Martorello played a role in, and stood to benefit from, the creation of the tribal entities. *See id.* But it concluded, as a matter of law, that Martorello's involvement was not sufficient to deprive the tribal entities of sovereign immunity. *See id.*

2. On remand, the district court dismissed the tribal entities, JA705, but the case remained against Martorello, who has no claim to sovereign immunity and was not a party to the appeal. In their statement of position on how the case should proceed, the plaintiffs informed the court that: (1) individuals, like Martorello, cannot assert a defense of sovereign immunity; and (2) even if he could, extensive third-party discovery conducted while the appeal was pending had revealed that Martorello's declaration included false and misleading statements on material issues, and that those statements had influenced the court's findings on the motion to dismiss. JA507 40, 707, 1469 70. Treating this charge as "a most serious matter," the court ordered the plaintiffs to submit proof of their allegations. JA461 62, 1222 23. Martorello, in

answer, demanded a "full and fair opportunity to respond" to the plaintiffs' allegations "through an evidentiary hearing and briefing." JA1470.

The court agreed to Martorello's requests, accepting evidentiary briefing and holding a two-day hearing that included Martorello's live testimony. JA1470. The court then issued more than thirty pages of factual findings in which it found "substantial (and largely unrebutted) evidence" that Martorello had significantly misled the court on many relevant aspects of the lending scheme. JA1218 ¶ 56, 1695. The court based that conclusion on documentary and deposition evidence and on its first-hand observations of "Martorello's demeanor and conduct when answering questions" at the evidentiary hearing, which it found "compel[led] the conclusion that Martorello was not telling the truth." JA1233. For example, Martorello claimed in his declaration that he "was not involved in the creation of Red Rock." JA1225. But the evidence showed that Martorello's lawyer had drafted the papers establishing the entity, that Martorello had approved those papers before they were filed, and that he had even chosen the name "Red Rock." JA1226 ¶ 29. Martorello also claimed that the tribe was the driving force behind the creation of Big Picture. JA1247 ¶ 48. In reality, Martorello created the company for use with a different tribe and transferred it to the LVD when that project was put on hold. JA1248 ¶ 51.

"[H]ad the facts not been misrepresented," the court wrote, some of its findings on the motion to dismiss "simply could not have been made." JA1253. The

court did not overrule any of its prior orders, but wrote that it would "take into account the record about the misrepresentations" in resolving future motions. JA1256, 1474.

3. The court then turned to the plaintiffs' motion for class certification, entering two opinions relevant to this issue. In the first, the court rejected Martorello's argument that the loan contract's class-waiver provision precluded certification. JA1656 74. The waiver did not apply, the court held, because Martorello had not shown that he was a "related [] party" under the contract's terms in particular because, as an individual, he was not an "affiliated entity." JA1660 67. But even if the loan contract did cover Martorello, the court concluded that that the waiver would be unenforceable because the contract "operate[d] to functionally waive a consumer's right to vindicate federally protected statutory rights." JA1672 73. Although Martorello did not request "severance of any part" of the contract, the court held that there would in any event "be no way to sever the offending provisions." JA1673 n.12. In so holding, the court followed multiple decisions from this Court and other circuits concluding that similar tribal loan contracts were unenforceable in their entirety. JA1669 70 (citing *Haynes Invs.*, 967 F.3d at 332; *Gibbs v. Sequoia Capital Operations, LLC*, 966 F.3d 286 (4th Cir. 2020); *Dillon*, 856 F.3d 330; *Hayes*, 811 F.3d at 666).

In its second decision, the district court performed the required "rigorous" analysis of the prerequisites for class certification under Rule 23. JA1696 97 (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 51 (2011)). On the question of predominance under Rule 23(b)(3), the court found that common issues predominate because the borrowers' claims are based entirely on "standardized loan contracts and standardized conduct by Martorello." JA1715. The court rejected Martorello's argument that his changing role in the lending scheme over the class period would require "a series of complicated mini-trials to determine which class members can recover." JA1694. That argument, the court noted, relied on the same claims about his minimal role that the court had already found to be false. JA1694 96. Martorello did not "play[] only a minor, supporting role," it found, because "Martorello was the de facto head of the LVD's lending operations at all relevant times." JA1720.

After finding the other Rule 23 factors satisfied, the court granted the plaintiffs' motion, certifying separate classes representing Virginia consumers who had borrowed either from Red Rock or Big Picture at above the maximum interest rate permissible under Virginia law. JA1725 28.

SUMMARY OF THE ARGUMENT

I. The class-action waiver that Martorello seeks to enforce is part of "a calculated attempt to avoid the application of state and federal law" and is therefore invalid as a prospective waiver of rights. *Dillon*, 856 F.3d at 337. This Court has

repeatedly held indistinguishable tribal-lending contracts unenforceable, calling them a "farce" designed to renounce federal and state law. *Hayes*, 811 F.3d at 674, 676. The same is true here. Martorello's argument that the contract applies federal law founders on the contract's plain language, which says that tribal law "solely and exclusively" governs. His reliance on the terms of the contractual dispute-resolution procedure likewise fails because the contract is clear that the procedure gives borrowers "no procedural or substantive rights."

Martorello's remaining efforts to evade the weight of this Court's precedent are just as unpersuasive. His claim that past decisions are limited to arbitration agreements under the FAA runs headlong into this Court's holding that the unenforceability of prospective waivers is required by generally applicable contract principles. *See Haynes Invs.*, 967 F.3d at 340. Meanwhile, the tribal-exhaustion doctrine a rule of federal abstention has no relevance here. Nothing in that doctrine suggests a court's authority to read a new appellate remedy into the terms of a private contract.

Even assuming that the class-action waiver is enforceable, its plain language does not cover Martorello. Martorello argues that the contract requires the term "disputes" to be construed broadly, but the waiver applies only to disputes against the tribal-lending entities (Red Rock or Big Picture), their "parent companies and affiliated entities," and other denominated third parties. Martorello's claim that an

individual can be considered an "entity" ignores context here, which limits the term to *business* entities. Even if Martorello could be an "entity," he could not reasonably be considered a "parent company or affiliated entity" under the contract's plain language.

II. Predominance is easily established here based on the overwhelmingly common issues of liability, damages, and class-wide proof. The plaintiffs' claims arise from a form contract common to the entire class. And damages can be shown based on aggregate records, with no need to resolve questions of reliance or other complex issues. The district court in these circumstances did not abuse its discretion in certifying the class, as other courts in similar tribal-lending cases have also done.

Martorello's attempt to drive wedges between class members based on claimed variations in his own behavior are both irrelevant and wrong. They are irrelevant because minor variations in the interest that Martorello collected or in his day-to-day activities are irrelevant to his liability under the plaintiffs' claims. And they are wrong because the district court found overwhelming and uncontested evidence demonstrating that Martorello was not telling the truth on these points. Martorello's generalized objections to those findings fall far short of demonstrating the clear error he is required to show for reversal.

Finally, the district court was not bound in its findings at class certification by this Court's mandate in a previous appeal. That appeal involved different parties, a

different issue, and an earlier stage of the case. It had nothing to do with predominance. The district court is, of course, bound by this Court's holding that the former tribal defendants are arms of the tribe entitled to sovereign immunity. But the Court's decision on that issue did not decide the issues presented in this appeal. Nor did it freeze the record to the facts as they existed at the motion-to-dismiss stage. And it did not limit the district court's obligation to conduct a rigorous factual review before certifying a class. What's more, even if the mandate rule applied, the unique facts of this case where a party is arguing that his own misrepresentation binds the district court is a rare situation where relief from the rule is necessary to avoid manifest injustice.

STANDARD OF REVIEW

This Court "review[s] a district court's decision to certify a class only for clear abuse of discretion." *Berry v. Schulman*, 807 F.3d 600, 608 (4th Cir. 2015). "An error of law or clear error in finding of fact is an abuse of discretion." *Id.* "But short of such error," the Court "give[s] substantial deference to a district court's certification decision, recognizing that a district court possesses greater familiarity and expertise than a court of appeals in managing the practical problems of a class action." *Id.* The Court reviews a district court's interpretation of the Court's mandate de novo. *Volvo Trademark Holding Aktiebolaget v. Clark Mach. Co.*, 510 F.3d 474, 481 (4th Cir. 2007).

ARGUMENT

I. The plaintiffs have not waived their right to bring a class action against Martorello.

Martorello's lead argument is that the plaintiffs waived the right to participate in a class action when they agreed to the loan contract's terms. He is wrong for two independent reasons. *First*, because the animating purpose of the contract is to deprive consumers of all their rights under federal and state law, the entire agreement including the class-action waiver is unenforceable. *Second*, even if the waiver were enforceable, its plain language would not cover Martorello because, as an individual with no tribal affiliation, he is not a "parent company or affiliated entity" of a covered tribal-lending business.

A. The loan contract's prohibited choice-of-law and choice-of-forum provisions renders the entire loan contract unenforceable.

Under the "so-called 'prospective waiver' doctrine," a contract "that prospectively waives a party's right to pursue statutory remedies is unenforceable as a violation of public policy." *Hengle*, 19 F.4th at 334. In five recent decisions, this Court has applied the doctrine in "refus[ing] to enforce" contracts that, like this one, "limit a party's substantive claims to those under tribal law." *Id.* at 335; *see also Haynes Invs.*, 967 F.3d at 332; *Sequoia,* 966 F.3d at 286; *Dillon*, 856 F.3d at 337; *Hayes*, 811 F.3d at 676. Such agreements, the Court has explained, are a "farce," designed "to avoid state and federal law" and deployed "to game the entire system." *Hayes*, 811 F.3d at 674,

676. They are thus "unenforceable as a violation of public policy." *Hengle*, 19 F.4th at 338.[3]

No less than the others this Court has examined, the tribal-lending contracts here unambiguously forbid a consumer from pursuing any federal or state statutory claim. That is evident from the contract's first sentence, which provides the "IMPORTANT NOTICE" that the agreement is "governed by the laws of the Lac Vieux Desert Band of Lake Superior Chippewa Indians." JA1934. Although this language does not, standing alone, explicitly preclude application of federal law, this Court has held that its practical effect is to "provide that tribal law preempts the application of any contrary law including contrary federal law." *Haynes Invs.*, 967 F.3d at 342.

[3] Martorello relies (at 38, 47) on the Ninth Circuit's decision in *Brice v. Plain Green, LLC*, 13 F.4th 823 (9th Cir. 2021). But "[a]s the Ninth Circuit acknowledged" there, "our Court has reached the opposite conclusion when considering 'identical' loan agreements." *Hengle*, 19 F.4th at 336 n.2. And this Court's approach, unlike the Ninth Circuit's, is consistent with the "weight of circuit authority." *Haynes Invs.*, 967 F.3d at 341 n.5. Every other circuit to have examined these contracts has, like this Court, held them unenforceable. *See, e.g.*, *Gingras v. Think Fin., Inc.*, 922 F.3d 112, 127 (2d Cir. 2019) (holding tribal-lending agreements unenforceable because they "foreclose[d] [borrowers] from vindicating rights granted by federal and state law"); *see also Williams v. Medley Opportunity Fund II, LP*, 965 F.3d 229, 243 (3d Cir. 2020); *Macdonald v. Cashcall, Inc.*, 883 F.3d 220, 232 (3d Cir. 2018); *Parm v. Nat'l Bank of Cal., N.A.*, 835 F.3d 1331, 1338 (11th Cir. 2016); *Parnell v. W. Sky Fin., LLC*, 664 F. App'x 841 (11th Cir. 2016); *Jackson v. Payday Fin., LLC*, 764 F.3d 765, 779 (7th Cir. 2014); *Inetianbor v. Cashcall, Inc.*, 768 F.3d 1346, 1354 (11th Cir. 2014). The Ninth Circuit's decision in *Brice* is the sole outlier.

The contract also makes that point expressly. It provides in its "IMPORTANT ACKNOWLEDGEMENTS" section that disputes under the agreement are "subject *solely and exclusively* to the Tribal law and Jurisdiction of the" tribe. JA1938 (emphasis added). This Court in *Hayes* interpreted an equivalent provision (stating that the arbitrator will not apply "any law other than the law of the Cheyenne River Sioux Tribe") as a "categorical rejection of the requirements of state and federal law." 811 F.3d at 668; *see also Dillon*, 856 F.3d at 336 (reaching the same conclusion as to a contract providing "no other state or federal law or regulation shall apply"). Where "the arbitration agreement mandates that only tribal law applies in arbitration, federal law does not" apply. *Williams*, 965 F.3d at 240.

Taken together, these two provisions — one "requiring … tribal law" and one "prohibiting application of any other law" — unambiguously "demand[] exclusive application of tribal law, thereby preempting application of other authority." *Hengle*, 19 F.4th at 339. Indeed, the provisions are indistinguishable from the clauses at issue in *Hayes*, *Dillon*, and *Hengle*. "Instead of selecting the law of a certain jurisdiction to govern the agreement, as is normally done with a choice of law clause," these clauses use "'choice of law' provision[s] to waive all of a potential claimant's" rights. *Hayes*, 811 F.3d at 675. Because the contract here takes the "plainly forbidden" step of "disavow[ing] the application of all state and federal law," the agreement is "unenforceable as a matter of law." *Dillon*, 856 F.3d at 334, 336.

But the contract goes further still, consigning borrowers to a forum that lacks any mechanism to enforce their rights. As part of its waiver of jury trials, the contract provides that "NO LITIGATION OR ARBITRATION IS AVAILABLE." JA1937. Instead, it states no fewer than eight times throughout the contract that the "Tribal Dispute Resolution Procedure" is the contract's "*sole and exclusive* dispute resolution mechanism for disputes and claims related to or arising under this Agreement." JA1937 (emphasis added). Yet that procedure, the contract says, "does not create *any* binding procedural or substantive rights." JA1937 (emphasis added). Rather, it is provided only "as a courtesy to consumers," with borrower complaints being "considered similar in nature to a petition for redress submitted to a sovereign government, without waiver of sovereign immunity and exclusive jurisdiction." JA1937.

It is difficult to imagine a more blatant prospective waiver than one that expressly renounces *all* binding procedural and substantive rights and treats borrower claims like petitions to a sovereign subject to rejection for any reason or no reason at all.[4] That is just the sort of "farce" that this Court has repeatedly condemned a scheme that, "[w]ith one hand … offers an alternative dispute

[4] The Tribal Code reinforces this point. It provides that the tribe may "investigate the [consumer's] dispute[s] in any manner it chooses." JA1923. It also requires that, "[i]n any proceeding" related to a transaction, the lender or licensee's "rights and remedies shall be granted" based on the "business records maintained," and a "consumer may only defend on the basis of payment." JA1921.

resolution procedure in which aggrieved persons may bring their claims, and with the other … proceeds to take those very claims away." *Hayes*, 811 F.3d at 673 74, 676; *see also, e.g.*, *Gingras*, 922 F.3d at 128. The "brazen nature" of these provisions lays bare the contract's true purpose: to exempt tribal lenders and their associates from all federal and state laws while depriving consumers of any meaningful ability to pursue their rights. *Hayes*, 811 F.3d at 676. The process, in short, is a "sham from stem to stern." *Jackson*, 764 F.3d at 779.[5]

B. Martorello's efforts to distinguish this Court's decisions get him nowhere.

1. Without addressing any of the contract's unambiguous language, Martorello claims (at 2) that the loan agreements here are "[u]nlike all prior agreements previously considered by this Court" because they do "not preempt application of federal law and, instead, allow for its application." But the provision

[5] Martorello does not argue that the class-action waiver could be saved by severing it from the remainder of the contract. Nor could he. Unlike other tribal-lending contacts examined by this Court, *see, e.g.*, *Hengle*, 19 F.4th at 344, the contract here contains no severability clause. And even if it did, such a clause could not save the contract. "It is a basic principle of contract law that an unenforceable provision cannot be severed when it goes [to] the 'essence' of the contract." *Hayes*, 811 F.3d at 675 76. As every court to have considered the question has held, the "animating purpose[]" of tribal-arbitration contracts is to ensure that the defendants "could engage in lending and collection practices free from the strictures" of any state or federal law. *Id.* And when a contract is drafted "in a calculated attempt to avoid the application of state and federal law," the "*entire* … agreement is unenforceable." *Dillon*, 856 F.3d at 337 (emphasis added). That includes the class action waiver. *See Gibbs v. Stinson*, 2021 WL 4812451, at *9 (E.D. Va. Oct. 14, 2021); *MacDonald v. Cashcall, Inc.*, 2019 WL 5617511, at *15 (D.N.J. Oct. 31, 2019).

on which Martorello relies actually says that the agreement is "governed by the laws of the Lac Vieux Desert Band of Lake Superior Chippewa Indians ('Tribal law'), including but not limited to the Code as well as applicable federal law." JA1936. That, by its plain language, says that *tribal* law, not federal law, governs the agreement. The reference to "include[ed] … federal law," on which Martorello relies, does not say that federal law *independently* applies, but just recognizes that tribal law and in particular, the Tribal Consumer Financial Services Regulatory Code "includ[es]" federal law that might be "applicable" to a consumer's claim.

As in *Hengle*, "context … confirms this interpretation." 19 F.4th at 340. To read the provision as fully importing federal law into the agreement would bring it into irreconcilable conflict with the unambiguous and unqualified statements at the beginning and end of the contract both in bold and labeled "IMPORTANT" that that the agreement "is governed by the laws of the Lac Vieux Desert Band of Lake Superior Chippewa Indians" and is "subject *solely and exclusively*" to tribal law. JA1934, 1938 (emphasis added). Given this "context of the [contract] as a whole," a single reference to federal law cannot "be construed to save [it]." *Hengle*, 19 F.4th at 340; *see Gingras*, 922 F.3d at 127 (holding that the incorporation of "some federal law or [state] law does not save the agreements"). It also cannot override a clause that unequivocally provides that consumers have no "procedural or substantive rights" under the sole dispute resolution procedure permitted by the contract. JA1937.

2. Martorello next asserts (at 41) that the terms of the Tribal Consumer Financial Services Regulatory Code confirm that "consumers can bring federal claims." But this Court in *Haynes Investments* examined indistinguishable tribal procedures and found them "to stymie the vindication of the federal statutory claims," not vindicate them. *Sequoia*, 966 F.3d at 294 (examining *Haynes Investments*). All the problems that the Court identified with the procedures there are equally present in this case.[6]

Martorello first relies on section 6.1 of the code, which he says (at 40) "requires licensees of the Tribal lending business [to] comply with federal law." But that section just provides the administrative procedure under which the tribe regulates licensees. *See* JA3090. This Court in *Haynes Investments* catalogued the problems with reliance on such procedures to vindicate consumer claims. Like the procedures in that case, section 6.1 regulates only entities licensed by the Authority to "engage in the business of providing consumer financial services." JA3090. It "says nothing about other non-tribal entities or individuals associated with the lenders who may have violated" the law. *Haynes Invs.*, 967 F.3d at 343. And although the section lists some federal statutes with which licensees must comply, RICO on which the plaintiffs' federal claims are based "is noticeably absent from the list." *Id.*; *see*

[6] The consistency between the tribal laws is no surprise, given that the same law firm, Rosette, crafted both codes. *See, e.g.*, JA2632.

JA3090. State laws like Virginia's usury statute are also absent. The section prohibits licensees only from charging "interest … greater than any applicable limitation, if any, *prescribed in this Code*." JA3090 (emphasis added). Yet the code never prescribes such limits.

Even as to the federal statutes listed, section 6.1 does not mandate compliance: It requires licensees only to "conduct business in a manner *consistent with principles* of …the law[s]," while expressly not conceding the "applicability of [those] laws" to licensees or the tribe. JA3090; *see Haynes Invs.*, 967 F.3d at 343 (explaining that the section "does not constitute consent … to the applicability of federal laws"). And when those "principles" are violated, the section provides no private cause of action and no mechanism for awarding damages or other remedies. The only enforcement mechanisms are fines (payable to the tribe) of up to $5,000 and license revocation. JA3094. Given this setup, Martorello's insistence that the section gives borrowers an opportunity to vindicate their federal statutory claims is absurd.

Martorello also relies on section 9, which unlike section 6.1 at least purports to be about "resolving borrower disputes." JA3095. But for the same reasons as the indistinguishable provision in *Haynes Investments*, that section, too, provides no mechanism under which a "consumer could meaningfully pursue any claims." 967 F.3d at 344. Because the procedure is limited to borrowers "aggrieved by an action or inaction of a Licensee," JA3095, the section again excludes third parties like

Martorello. In addition, the section provides only for a "determination of compliance with the *Code*," JA3095 (emphasis added). It never mentions federal or state law, much less "establish[es] any private right of action for violations." *Haynes Invs.*, 967 F.3d at 344. "And to the extent a borrower could pursue a claim, a tribal commission overseeing such a claim is permitted to 'grant or deny any relief as [it] deems appropriate.'" *Id.*; *see* JA3097. "Thus, it is clear that a claimant would be unable to assert a RICO claim against entities associated with a tribal lender and that, even if he or she were able to assert such a claim, the relief he or she would seek namely, treble damages as permitted by RICO would remain unavailable." *Haynes Invs.*, 967 F.3d at 344.

Bottom line: The dispute-resolution procedure in section 9 does not provide any right to bring the plaintiffs' claims in this case (under either RICO or Virginia's usury statute); does not permit claims of any kind against Martorello; and does not provide for treble damages or any other relief unless the tribe chooses, in its unregulated discretion, to award it. The section is, in other words, consistent with the contract's description of the provision as one that "does not create any binding procedural or substantive rights." JA1937.

3. Martorello makes a second attempt (at 34) to distinguish this Court's decisions wholesale on the ground that they all involved "arbitration" agreements rather than "tribal administrative proceedings." According to Martorello (at 35), the

prospective-waiver doctrine is a narrow exception to the FAA with no application beyond agreements covered by the Act.[7]

Both this Court and the Supreme Court, however, have held that the prospective-waiver doctrine is not limited to arbitration, but can "invalidate *any* contract arbitration or otherwise that attempts to foreclose the assertion of certain statutory rights." *Haynes Invs.*, 967 F.3d at 340 (emphasis added); *see Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 241 (2013). That has to be true because the FAA requires courts to "enforce arbitration agreements on an equal footing with other contracts." *Haynes Invs.*, 967 F.3d at 340. The prospective-waiver doctrine can thus apply to arbitration agreements only because it is "[o]ne such generally applicable defense." *Hengle*, 19 F.4th at 334. Prospective waivers are unenforceable "whether in an arbitration agreement or *any other contract*." *Am. Express Co.*, 570 U.S. at 241 (emphasis added).

[7] Martorello does not define "tribal administrative proceedings" or explain why they are not subject to the FAA. Whether a procedure is "arbitration" under the FAA "depends upon how closely it resembles classic arbitration." *Evanston Ins. Co. v. Cogswell Props., LLC*, 683 F.3d 684, 693 (6th Cir. 2012). Whatever label Martorello chooses to give the scheme here, it bears the hallmarks of arbitration because the parties have agreed to "empower[] a third party to render a decision settling their dispute." *Salt Lake Tribune Publ'g Co. v. Mgmt. Planning*, 390 F.3d 684, 689 (10th Cir. 2004). Indeed, this Court has referred to contracts imposing indistinguishable tribal procedures as "arbitration agreements." *See Haynes Invs.*, 967 F.3d at 335; *Sequoia*, 966 F.3d at 288. Because it makes no difference to the analysis, however, the plaintiffs did not object to Martorello's characterization below.

Martorello suggests only one reason (at 36) why a "tribal administrative proceeding" requires different treatment than an arbitration agreement: because, under the tribal-exhaustion doctrine, "the borrowers may sue in federal court after exhausting remedies available to them in a tribal forum." But the tribal-exhaustion doctrine permits no such thing. It is a doctrine of abstention, requiring plaintiffs who seek to enjoin a tribal court's exercise of jurisdiction to first give the tribal forum an opportunity to weigh in on its own jurisdiction's scope. *See Nat'l Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 857 (1985). But this case involves no questions of tribal jurisdiction. As this Court recognized in *Hayes*, there is no arguable basis for such jurisdiction in a case against a non-tribal party that does "not involve an Indian-owned entity," does "not occur on the Tribe's reservation," and does "not threaten the integrity of the Tribe." 811 F.3d at 676 n.3.

Rather than tribal jurisdiction, this case is about the meaning and enforceability of private contractual terms. And the contract could not be clearer that it forecloses *any* federal-court review. It emphatically provides, in bold, that "NO LITIGATION OR ARBITRATION IS AVAILABLE," instead requiring that "[a]ll disputes shall be *solely and exclusively* resolved pursuant to the Tribal Dispute Resolution Procedure." JA1936 ¶ 37. And the code provides only one way to appeal an adverse decision under that procedure: "by filing a written petition for review with the *Tribal Court*" within 90 days. JA1936 ¶ 37 (emphasis added). If there were still

any doubt, the code says expressly that the tribal court's decision "may not be appealed." JA3098. Once the decision issues, a borrower's "remedies are exhausted." JA3098.

Nothing in the tribal-exhaustion doctrine suggests that a court may amend the terms of a contract by adding a new appellate remedy not intended by the parties. When parties agree to resolve a dispute by contract, it is the job of the courts to enforce the contract "according to [its] terms." *Hayes*, 811 F.3d at 674. And if those terms violate public policy by destroying a plaintiffs' federal- or state-law claims, the court's job is not to rewrite the contract but to refuse its enforcement. *See id.* For the reasons above, the Court should also refuse enforcement here.[8]

C. The contract's plain language excludes Martorello.

1. Even if the class-action waiver were enforceable, the district court correctly concluded that it would not be enforceable by Martorello. The contract's language is straightforward. JA1937. The "WAIVER OF JURY TRIAL" section and

[8] Martorello's attempt to enforce the contract fails for another reason it is void under Virginia law. *See* Va. Code § 6.2-306(A). The plaintiffs made this argument below, but the district court did not reach it. JA749 51. In *Hengle*, however, this Court made clear that "unregulated usurious lending of low-dollar short-term loans at triple-digit interest rates to Virginia borrowers … unquestionably 'shock[s] … one's sense of right' in view of Virginia law." 19 F.4th at 352. And, it explained, a loan contract that employs a choice-of-law clause designed to permit this type of lending "violates Virginia's compelling public policy against unregulated usurious lending." *Id.* Because that is precisely what the contract seeks to do here, it is "against public policy and void" under Virginia law. Va. Code § 6.2-306(A).

associated class-action waiver both apply by their terms only to "dispute alleged against Us or related third parties." The contract defines "Us" as the tribal lender itself (Red Rock or Big Picture). JA1934. And it defines "related third parties" as the lender's "employees, agents, directors, officers, shareholders, governors, managers, members, parent company or affiliated entities." JA1937. Because Martorello is none of these things, the class-action waiver does not apply to him.

Martorello responds (at 28 30) that the plaintiffs' reliance on the contract estops them from claiming that he is not entitled to enforce its terms as a party or third-party beneficiary. That misses the point of the district court's holding. The court did not hold that Martorello could not enforce the class-action waiver because he was not a party to the contract. It held that the contract's plain language *excludes* him. JA1664 67. As this Court noted in the case on which Martorello relies, that is a "quite different argument." *Am. Bankers Ins. Grp., Inc. v. Long*, 453 F.3d 623, 630 (4th Cir. 2006). "[E]stoppel does not preclude a party from" arguing "that its claims do not fall within the scope of [an] arbitration clause." *Id.* Whether or not Martorello is entitled to enforce the contract a question that the district court did not reach he is not entitled to change its terms.[9]

[9] In claiming otherwise, Martorello relies (at 28 n.3) on the district court's statement at the certification hearing that his "argument would be good" if "he were a party to the loan." But the court said that during a colloquy about the definition of "disputes," which includes "claims … involving the parties to [the] Agreement."

Martorello's argument (at 31 – 32) that he is a "consultant" or "servicer" under the contract is likewise beside the point. The contract includes those terms in broadly defining the "disputes" that are subject to the contract's choice-of-law and choice-of-forum provisions. JA1937. Even if Martorello could show that he is a "consultant" or "servicer," it would therefore only mean that at most this case is a "dispute" under the contract. The problem for Martorello is that the class-action waiver only applies to "disputes" that are "alleged against Us or related third parties." JA1937. No matter how broadly "disputes" is defined, it cannot swallow that independent contractual limit.

2. The question whether the class-action waiver applies to Martorello thus turns on whether he meets the definition of "related third party" under the contract. Martorello devotes only a few sentences to that dispositive question (at 32 – 33 & n.4), arguing that he is an "affiliated entity" because he and his companies "provided consulting and servicing assistance" to the tribal lenders. Providing assistance to a company, however, does not make one an "affiliated entity."

The contract does not define the term, so the phrase must be given its "usual, ordinary, and popular meaning." *Appalachian Reg'l Healthcare v. Cunningham*, 806 S.E.2d 380, 383 – 84 (Va. 2017). The ordinary meaning of "entity" is an "organization (such

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JA1567 – 70. The issue was still the contract's language, not whether Martorello was entitled to rely on that language.

as a business or a governmental unit) that has a legal identity apart from its members or owners." Entity, *Black's Law Dictionary* (11th ed. 2019). As the district court explained, Martorello, as a natural person, is not an "entity" within that ordinary meaning. JA1664 65. When the contract instead refers to individuals, it uses different language. It defines "related third parties," for example, to include the tribal lender's "employees" and "officers." JA1937. It could easily have done the same for "affiliated entities." But it did not, and that omission has significance. Virginia law does not permit courts to interpret contracts by "adding terms that were not included by the parties." *City of Chesapeake v. States Self-Insurers Risk Retention Grp., Inc.*, 628 S.E.2d 539, 541 (Va. 2006).

In response, Martorello cites language (at 33) from a case that refers to a "person" and an "enterprise" as two "distinct entities." That language uses "entity" in its broadest possible sense, meaning "[s]omething that has separate and distinct existence." Entity, Merriam-Webster Online Dictionary, https://perma.cc/LNE9-KUXU. Under that reading, *anything* that exists could be an "entity." But the contract here uses the term in the more specific sense of a "parent company or affiliated entity." "The term 'affiliate' carries its own, independent legal significance." *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 955 (9th Cir. 2009). It is a "corporation that is related to another corporation by shareholdings or other means of control." Affiliate, *Black's Law Dictionary* (11th ed. 2019) ("[A] subsidiary,

parent, or sibling corporation."). And because "affiliated entity" occurs immediately after the phrase "parent company," it must be understood in the same sense. *See Washington & Old Dominion Ry. v. Westinghouse Elec. & Mfg. Co.*, 89 S.E. 131, 133 (Va. 1916) (explaining that, under the "ejusdem generis rule, ... general terms of a statute or contract are subordinated by the sense of the preceding and connected particulars"). Given that context, the word can only plausibly mean a *business* entity. Martorello is not a business entity, so the class-action waiver does not apply to him.

II. The district court did not abuse its discretion in finding that common issues predominate over individual ones.

A. The plaintiffs' claims are based on form contracts and common proof.

In his other challenge to the district court's certification order, Martorello argues that the court erred in finding that common questions predominate under Rule 23(b)(3). But this case is an easy one for predominance because the plaintiffs' claims turn on the terms of form contracts common to the whole class. JA1715. Despite minor variance in language, Martorello does not dispute that the contracts, as to both Red Rock and Big Picture, are materially identical over the class period. JA1659 n.2. Courts routinely find claims involving such standardized contracts ideal for class treatment. *See, e.g.*, *Sacred Heart Health Sys., Inc. v. Humana Mil. Healthcare Servs., Inc.*, 601 F.3d 1159, 1171 (11th Cir. 2010) ("It is the form contract, executed under like conditions by all class members, that best facilitates class treatment."); *Smilow v. Sw. Bell Mobile*

Sys., Inc., 323 F.3d 32, 42 (1st Cir. 2003) (finding predominance satisfied because "[t]he case turn[ed] on interpretation of the form contract").

Establishing Martorello's liability under the contracts will "involve no questions of individual reliance" and "no complicated contractual obligations." *Krakauer v. Dish Network, L.L.C.*, 925 F.3d 643, 655–56 (4th Cir. 2019); JA1715–17. The only question is whether the contracts charge more than the 12% APR that Virginia permits—"a question of law [that] can be resolved for all the class members in a single action." *Nat'l Coal. of 7-Eleven Franchisees v. The Southland Corp.*, 210 F.3d 384 (9th Cir. 2010). And although interest rates and damages vary among plaintiffs, they easily can "be shown through aggregate records." *Krakauer*, 925 F.3d at 658; JA1715–17. Thus, the plaintiffs "can rely largely on common proof." *Krakauer*, 925 F.3d at 656.

Other courts in similar tribal-lending cases have recognized that, "[u]nder these conditions, questions of law and fact common to the class will predominate" in certifying RICO and usury claims like the plaintiffs' here. *MacDonald v. Cashcall, Inc.*, 333 F.R.D. 331, 349 (D.N.J. 2019). The district court did not abuse its discretion in reaching the same conclusion.

B. The issues Martorello identifies have nothing to do with predominance.

Martorello does his best to recharacterize the plaintiffs' straightforward claims as unmanageable ones. Although he identifies no differences among class members, he argues that his *own* role varied as to individual borrowers across the class period.

Even assuming this claim is true, it does nothing to undermine the district court's predominance finding. Whether or not Martorello's role varied in minor ways, no individualized findings are needed to establish his liability across the whole class.

1. Martorello first argues that individual borrowers' interest payments "cannot be traced" to him. That is because, according to Martorello (at 48), the "payments were never made to Bellicose Capital or Eventide," but to the tribal lenders (Red Rock or Big Picture), who then paid Martorello's companies in monthly amounts "based on the overall monthly profitability" of the lending operation. But Martorello does not dispute that, despite his "rather byzantine corporate structure," a "very high percentage of the payments on those loan contracts made their way to" him during the class period. JA1659. Indeed, Martorello's contracts with the tribal entities show that he received 98% of Red Rock's and 95% of Big Picture's revenue from loans across the entire class period. JA1719. As a result, he cannot deny that he personally pocketed tens of millions of dollars from those payments.[10]

[10] Martorello's claim (at 48–49) that he received no "payments at all" during portions of the class period is misleading. As Martorello's counsel conceded at the certification hearing, "it's undisputed that … over time, through various entities, there was some money that passed from … Red Rock or Big Picture that got to him. Some money went from A to B." JA1584–58. Although his "receipt of the funds was delayed" during a period of a dispute with the tribe, he eventually received the withheld funds under the terms of a settlement. JA1583–85. Thus, he "got money from the loans throughout the period except for [that] hiatus," ultimately *was* paid for funds received during that period, and "then he got money from the loans after that." JA1585.

Martorello nevertheless argues that, since he didn't receive *all* the payments borrowers made, the payments he did receive can be attributed only to "some indefinite sub-set" of borrowers. Martorello Br. 49 50. In other words, the plaintiffs "have no way of knowing which borrower's repayments made their way into Martorello's pocket." JA1719. Even if true, that would make no difference here. Courts in RICO cases "have unanimously concluded that conspirators are jointly and severally liable for amounts received pursuant to their illicit agreement." *United States v. McHan*, 101 F.3d 1027, 1043 (4th Cir. 1996). Thus, Martorello is liable for the *entire* amount of usurious interest paid, regardless of how that interest was distributed between him and his co-conspirators. The same is true as to the plaintiffs' usury claims: "[U]nder Virginia law, when two or more tortfeasors cause a single indivisible injury to a third-party and 'it is impossible to determine in what proportion each contributed to the injury,' then an individual tortfeasor can be held liable for the entire injury." *Gross v. Shearson Lehman Bros. Holdings, Inc.*, 43 F. App'x 672, 677 (4th Cir. 2002) (quoting *Dickenson v. Tabb*, 156 S.E.2d 795, 801 (Va. 1967). Assuming that Martorello is right that there is "no way of knowing" his liability to individual plaintiffs, the consequence is therefore that he is *fully* liable not that he escapes liability altogether.

In any event, Martorello cites no authority suggesting that his liability turns on the plaintiffs' ability to trace payments directly from particular borrowers to his

pocket. "Legally as well as economically, money is fungible if a debtor with $100,000 cash in its general coffers owes $10,000 to someone, there is no meaningful distinction among which of those dollars is actually paid to satisfy the debt." *Hoxworth v. Blinder, Robinson Co., Inc.*, 903 F.2d 186, 195 96 (3d Cir. 1990). And there is likewise no meaningful distinction between money deposited by the tribal lenders and money later paid to Martorello. "Money being fungible," the money he ultimately received "need not be the very same bills or checks" to constitute the borrower's payment. *United States v. Ritchie*, 858 F.3d 201, 215 (4th Cir. 2017). Martorello, as the district court recognized, "may not have got … the same dollar bill," but he nevertheless "got the same *kind* of money" that is, "the money that came from" the borrowers' loans. JA1584 (emphasis added).

And even if Martorello's eccentric approach to accounting made sense, it would still have nothing to do with predominance. Rule 23(b)(3) requires a showing that common issues *predominate* not proof that the plaintiffs will win on those issues. Martorello's argument here depends on the impossibility of tracing particular dollars from any individual plaintiff to Martorello. If such a showing were required, it would equally foreclose the claims of *every* plaintiff. That would mean that the issue is both a central question in the case and susceptible to resolution "in one stroke," making the case, if anything, *better* suited to certification. *Dukes*, 131 S. Ct. at 350. "Rule 23

allows certification of classes that are fated to lose as well as classes that are sure to win." *Schleicher v. Wendt*, 618 F.3d 679, 686 (7th Cir. 2010).

2. In his second attempt to identify an individualized issue (at 50), Martorello argues that his role in the lending scheme decreased over time as Red Rock took on more tasks. At best, this argument is relevant only to the class of Red Rock borrowers; Martorello does not even argue that his role in relation to Big Picture changed during the relevant period. And even as to Red Rock, Martorello never explains how his vague claim of a reduced "role" is relevant to the plaintiffs' claims. Rule 23's predominance inquiry "begins, of course, with the elements of the underlying cause of action." *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 809 (2011). Here, the plaintiffs' usury claims against Martorello require them to show only that he "receiv[ed]" interest above the legal interest rate. Va. Code § 6.2-305. As noted above, there is no dispute that Martorello received the vast majority of borrower payments across the entire class period. Even if he could show that his role varied, it would not affect his liability for receiving those funds.

Likewise, one of the plaintiffs' RICO claims requires only Martorello's "operation or management" of the enterprise, not a role in its day-to-day operations. *Reves v. Ernst & Young*, 507 U.S. 170, 185 (1993). Martorello easily meets that standard. Substantial and unrebutted evidence proves "that Martorello was functionally in charge of the lending business," held the highest position within the enterprise, and

retained full authority to direct its activities and oversee the work of lower-rung members. JA1690 91; JA1695 (finding that Martorello was the operation's "de facto head"); JA1230 40; JA1695 96; *see also* JA2170 (email from Martorello stating "Current Manager (myself) will be locked in as the decision maker … ."). So even if (counterfactually) Martorello delegated to others the responsibility to perform the day-to-day activities, those acts were performed on behalf of Martorello. Any purportedly different role would thus create no individualized issues because Martorello's liability turns on his high-level involvement as the owner and manager of Bellicose.[11]

Martorello's related claim (at 54) that his "support for the Tribe's lending business ended entirely" with the transition from Red Rock to Big Picture in 2016 also does not affect predominance. Assuming that Martorello could prove that his reduced role in the lending scheme absolved him of further liability at some point during the class period, a single finding of that fact would resolve the issue as to all class members. All claims before that date would survive, and all those after would

[11] The analysis is even easier for the plaintiffs' RICO conspiracy claim, which just requires proof that a person "knew about and agreed to facilitate the scheme." *Salinas v. United States*, 522 U.S. 52, 66 (1997). Once this is established, "a defendant who has joined a conspiracy continues to violate the law 'through every moment of [the conspiracy's] existence,' and he becomes responsible for the acts of his co-conspirators in pursuit of their common plot." *United States v. Cornell*, 780 F.3d 616, 631 32 (4th Cir. 2015) (quoting *United States v. Bennett*, 984 F.2d 597, 609 (4th Cir. 1993)). None of the issues identified by Martorello, therefore, even remotely impact the RICO conspiracy claim.

not. Indeed, the district court's certification of separate classes for Red Rock and Big Picture borrowers anticipated precisely this possibility.

C. Martorello's arguments are contradicted by a mountain of evidence and by the district court's finding that he is "not telling the truth."

Martorello's traceability argument depends on his assertion (at 48) that borrower "payments were never made to Bellicose Capital or Eventide." The district court, however, found that "Martorello was not telling the truth" on that point. JA1233. The evidence establishes, the court explained, "that money paid by consumers went into the Bellicose bank account over which only Martorello and his employees had control." JA1233.

The court made similar findings on Martorello's claim that his role in the lending business declined over time. The court found "substantial" and "largely unrebutted" evidence that Martorello was heavily involved in the lending operations "throughout the relevant class periods." JA1695. And as to Martorello's claim that his role in the scheme "ceased" after 2016, the district court found that the record "established quite clearly" that this claim was "not true." JA1239, 1694 96. "Except for a few cosmetic changes," it found, the tribe's "lending operation by way of Big Picture continued as it had under the Red Rock structure." JA1239 40.

A district court's factual findings are subject to review on appeal only for clear error. *See United States v. Hall*, 664 F.3d 456, 462 (4th Cir. 2012). Here, the district court

issued more than 30 pages of factual findings based on an "extensive factual record," including substantial "documentary and deposition evidence" and "extensive live testimony" at a two-day evidentiary hearing all flatly contradicting Martorello's version of events. JA1223; JA1281. A district court's factual findings cannot be clearly erroneous when, as here, there is "substantial evidence to support its conclusion." *United States v. Moses*, 540 F.3d 263, 268 69 (4th Cir. 2008).

Martorello "offer[ed] no viable evidence to disprove that showing" in the district court. JA1696 n.7. Nor does he do so on appeal. Beyond his sweeping and unsupported assertion (at 54 n.10) that "*all* of the district court's conclusions … are wrong," he addresses the evidence only to challenge the credibility of former tribal councilmember and vice-chairman Joette Pete, who he characterizes (at 58 59) as "disgruntled" and "no longer friends with any member of the Tribe" after being expelled from the council. But in ten pages of factual findings on the issue of who controlled Red Rock, the district court relied on just one paragraph of Pete's declaration. JA1232. It based the rest of its findings on other evidence, including internal emails, an early draft of the servicing agreement, contemporaneous witness statements, and in-person testimony. JA1230 40. In particular, Pete's declaration was corroborated by the statements of a Red Rock manager, tribal lawyers, and Martorello himself, who said that, "[a]s far as I know, the Managers don't really do anything." JA1232 34. Clear error requires this Court to find a clear mistake in the

district court's evaluation of evidence "in light of the record viewed *in its entirety*." *United States v. Patterson*, 957 F.3d 426, 435 (4th Cir. 2020) (emphasis added). Martorello cannot meet that standard by criticizing one piece of evidence and calling it a day.

Even as to Pete, Martorello's own subjective credibility assessment cannot show clear error. It is uniquely the role of the district court to observe witnesses and assess credibility. *See United States v. Abu Ali*, 528 F.3d 210, 232 (4th Cir. 2008). When a district court "credit[s] the testimony of" a witness who "has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error." *Hall*, 664 F.3d at 462. That is what happened here.

Martorello's attack on Pete's credibility rings especially hollow given that the only contrary evidence he identifies is his *own* self-serving declaration a declaration that, unlike Pete's, the district court found not to be credible. The court relied for that finding in part on its own observations of "Martorello's demeanor and conduct when answering questions" at the evidentiary hearing, which the court found to "compel[] the conclusion that Martorello was not telling the truth." JA1233. Because the district court "is in a much better position to evaluate those matters" than a court of appeals, that finding is entitled to "particular deference." *Moses*, 540 F.3d at 268 69. Martorello identifies no reason to question the district court's first-hand observations here or to disturb the customary deference they are owed.

III. This Court's mandate in *Williams* did not bind the district court to the record on the motion to dismiss.

Martorello's main challenge to the district court's evidentiary findings is not based on evidence at all, but on this Court's *legal* holding in a prior appeal that the tribal entities, as arms of the tribe, were entitled to dismissal on grounds of sovereign immunity. The district court's finding on class certification that Martorello masterminded the scheme, he argues, contradicts this Court's mandate in that appeal.

1. Martorello's argument suffers from "a misperception of the mandate rule." *CoreTel Va., LLC v. Verizon Va., LLC*, 808 F.3d 978, 983 (4th Cir. 2015). The rule "is merely a specific application of the law of the case doctrine," which "prohibits lower courts, with limited exceptions, from considering questions that the mandate of a higher court has laid to rest." *Id.* The only matter that this Court "laid to rest" in *Williams* was the legal question of whether *different* defendants — the tribal entities no longer in the case — were entitled to sovereign immunity. The Court did not consider whether that immunity extended to Martorello, who was not a party to the appeal. *See Williams*, 929 F.3d at 175.[12] Nor did it decide any issues relevant to class certification, including the question of whether Martorello's role changed over the

[12] Martorello has not and cannot make any such claim of immunity. *See, e.g.*, *Hengle*, 19 F.4th at 349 (explaining that "although the Tribe itself cannot be sued for its commercial activities, its members and officers can be.").

class period in a way that might bear on predominance. A decision by this Court does not control a district court's subsequent decisions, either under the mandate rule or the law of the case, "when the issue in question was outside the scope of the prior appeal." *Transamerica Leasing, Inc. v. Inst. of London Underwriters,* 430 F.3d 1326, 1332 (11th Cir. 2005).

That this Court relied on the district court's factual findings, in which it found no clear error, *see Williams*, 929 F.3d at 177, did not bind the district court to the factual record as it then existed. This Court's holding "that a particular body of evidence" established tribal immunity would not be offended by a later "finding that a different (albeit overlapping) body of evidence does so prove." *Consolidation Coal Co. v. Latusek*, 717 F. App'x 207, 210 (4th Cir. 2018). The decision "froze … only the *law* of the case," not "the underlying facts." *CoreTel Va.,* 808 F.3d at 983 (emphasis added).

The mandate rule, for example, does not "preclude a district court from granting summary judgment based on evidence after denying a motion to dismiss." *Maraschiello v. City of Buffalo Police Dep't*, 709 F.3d 87, 97 (2d Cir. 2013). And the same is at least as true for a district court's decision to certify a class. "When deciding a motion for class certification, a district court does not accept the plaintiff's allegations in the complaint as true." *Monroe v. City of Charlotesville*, 579 F.3d 380, 384 (4th Cir. 2009). Rather, certification demands a "rigorous analysis," requiring the court to "take a 'close look' at the facts relevant to the certification question and, if necessary,

make specific findings on the propriety of certification." *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 319 (4th Cir. 2006). Even after a class is certified, a district court's certification order is "not final or irrevocable," but remains "inherently tentative." *Officers for Just. v. Civ. Serv. Comm'n*, 688 F.2d 615, 633 (9th Cir. 1982). Rule 23 provides that the order "may be altered or amended" at any time "before final judgment." Fed. R. Civ. P. 23(c)(1)(C). The rule thus encourages a court to revisit the evidence underlying its decision as "discovery progresses and more information is gathered about the nature of the putative class members' claims." *Prado-Steiman ex rel. Prado v. Bush*, 221 F.3d 1266, 1273 (11th Cir. 2000). Binding a court's class certification decision to the record as it existed at the case's earliest stage is thus inconsistent not only with the mandate rule, but also with the plain language of Rule 23.

2. The most troubling aspect of Martorello's argument is that the preliminary factual findings that he claims are binding on the district court were based on his own demonstrated fraud. The district court found extensive and compelling evidence that Martorello's claims in his sworn declaration and under oath at the evidentiary hearing "simply were not true," and that, absent those misrepresentations, the court could not have made the same findings on the motion to dismiss. JA1228. Yet, even in this appeal, Martorello continues to assert facts that the district court found to be untrue. For example, one of Martorello's primary arguments on predominance is that his role in the lending scheme "ceased" after 2016, even though the district court

found that the record "quite clearly" established that the claim is false. JA1239–40; JA1696.

Although the mandate rule is stronger than the ordinary law-of-the-case doctrine, the rule "is not an inexorable command but rather a prudent judicial response to the public policy favoring an end to litigation." *Sejman v. Warner-Lambert Co.*, 845 F.2d 66, 68 (4th Cir. 1988). The doctrine can give way in "exceptional circumstances," including "when significant new evidence … come[s] to light" that was "not earlier obtainable in the exercise of due diligence," or "when a blatant error in the prior decision will, if uncorrected, result in a serious injustice." *Invention Submission Corp. v. Dudas*, 413 F.3d 411, 415 (4th Cir. 2005).

This is such an exceptional case. It is at least exceedingly rare—if not unheard of—for a district court to issue evidentiary findings demonstrating that a party seeking to enforce this Court's mandate is guilty of obtaining that mandate by fraud. It would result in serious injustice to conclude that, because Martorello succeeded in pulling the wool over the district court's eyes at the earliest stages of the case, both the district court and this Court are bound to continue crediting the deception. Such conduct deserves to be censured, not rewarded with the imprimatur of finality that the mandate rule provides.

CONCLUSION

This Court should affirm the district court's decision to certify the class.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 12,502 words, excluding the parts exempted by Rule 32(f). This brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared in proportionally spaced typeface using Microsoft Word in 14-point Baskerville font.

April 20, 2022

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CERTIFICATE OF SERVICE

I hereby certify that on April 20, 2022, I electronically filed the foregoing brief with the Clerk of the Court for the U.S. Court of Appeals for the Fourth Circuit by using the CM/ECF system.

April 20, 2022.

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