RECORD NO. 21-2116

In the United States Court of Appeals for the Fourth Circuit

LULA WILLIAMS ; GLORIA TURNAGE ;
GEORGE HENGLE ; DOWIN COFFY ; MARCELLA P. SINGH,
ON BEHALF OF THEMSELVES AND ALL INDIVIDUALS SIMILARLY SITUATED,

Plaintiffs-Appellees

v.

MATT MARTORELLO,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA, NO. 3:17-CV-00461 (PAYNE, R.)

BRIEF OF APPELLANT

BERNARD R. GIVEN II
WILLIAM N. GROSSWENDT
LOEB & LOEB LLP
10100 Santa Monica Blvd.
Suite 2200
Los Angeles, CA 90067
(310) 282-2000
bgiven@loeb.com
wgrosswendt@loeb.com

JOHN D. TALIAFERRO
LOEB & LOEB LLP
901 New York Ave. NW
Suite 300
Washington, DC 20001
(202) 618-5000
jtaliaferro@loeb.com

Counsel for Appellant

CORPORATE DISCLOSURE STATEMENT

Defendant-Appellant Matt Martorello is an individual and as such has no corporate parent and does not issue stock.

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INTRODUCTION

This case should have ended in 2019 after this Court held that Big Picture Loans, LLC ("Big Picture") and Ascension Technologies, LLC ("Ascension") were arms of the Lac Vieux Desert Band of Lake Superior Chippewa Indians (the "Tribe") and instructed the district court to dismiss them. The district court refused to do so, and has now certified a class against Matt Martorello, a one-time consultant to Red Rock Tribal Lending, LLC ("Red Rock") (a predecessor of Big Picture) and current creditor of the tribal businesses, based on its finding that he was the "de facto head" of the Tribe's lending business for the entire class period.

To get to this point, the district court entertained claims made by the Plaintiffs (the "Borrowers") that Big Picture and Ascension made misrepresentations to support their sovereign immunity arguments rather than dismissing them. After Big Picture and Ascension settled with the Borrowers, the district court turned to whether Martorello, made misrepresentations to support Big Picture and Ascension's sovereign immunity arguments. Over Martorello's strenuous objections and evidentiary briefing, the district court found that he had and that Martorello – not the Tribe – had "de facto control" of the Tribe's lending

operations from 2013 through 2019. The district court then relied on its broad conclusions about "de facto control" to certify classes against Martorello.

Notwithstanding this, for this interlocutory appeal, the central question is whether the Borrowers' loan agreements and the Tribal Consumer Financial Services Regulatory Code (the "Code") operate together to prospectively waive the Borrowers' right to pursue federal claims in the Tribal Dispute Resolution Procedure (the "TDRP"). They do not. Unlike all prior agreements previously considered by this Court, the loan agreements and the Code do not preempt application of federal law and, instead, allow for its application. No prior agreement expressly invoked application of federal law like the loan agreements do. Every one of the prior agreements involved arbitration (not tribal administrative proceedings) and limited an arbitrator to only applying tribal law, but the Tribal Financial Services Regulatory Authority (the "Authority"), the Tribe's subdivision responsible for regulating financial services activities, and the Tribal Court are not so limited. Rather than being a means to prevent consumers from effectively vindicating any federal statutory claim, the TDRP was set up to give consumers a venue

for litigating tribal and federal claims against otherwise immune entities.

The district court also erred in its Rule 23(b) predominance analysis. First, because individualized tracing will be required to determine whether interest payments of Borrowers ever made their way to the companies managed by Martorello, which were paid based on the overall monthly profitability of the tribal businesses, not individual loans, and then to Martorello through distributions from these companies. Second, by not accounting for Martorello's changing role over the class period based on the broad conclusion that he was the "de facto head of [the Tribe's] lending operations at all relevant times."

Finally, the Misrepresentation Opinion, a basis for granting class certification, reconsiders facts and questions of law that were affirmed and resolved by this Court.

JURISDICTIONAL STATEMENT

The Borrowers invoked the district court's jurisdiction under 28 U.S.C. §§ 1332(d)(2) and 1367 and 18 U.S.C. § 1965. JA134.

This Court has appellate jurisdiction over the Class Certification Order (JA1725) under 28 U.S.C. § 1292(e).

This Court may exercise pendent jurisdiction over the Misrepresentation Opinion (JA1218-1256), where the district court wrongly and improperly concluded that Martorello lied to the district court in a 2017 declaration (the "Martorello Declaration") about facts related to if the Tribal entities were arms of the Tribe. JA1251-56. The district court rebuked Martorello for "fail[ing] to take any of the Court's findings [in the Misrepresentation Opinion] into account" and relying on evidence corroborating the Martorello Declaration and findings and conclusions affirmed and resolved by this Court in granting class certification. JA1696. As a substantial basis for the Class Certification Order, the Misrepresentation Order is "so interconnected with [the Class Certification Order] that [it] warrant[s] concurrent review." *EQT Prod. Co. v. Adair*, 764 F.3d 347, 364 (4th Cir. 2014); *see also Rux v. Republic of Sudan*, 461 F.3d 461, 476 (4th Cir. 2006).

STATEMENT OF ISSUES

1. Did the Borrowers waive their right to bring class claims against Martorello?

2. Do the loan agreements prospectively waive the Borrowers' right to bring federal claims, making the class action waiver unenforceable? This issue involves three separate, dispositive questions:

   a. Does prospective waiver apply to tribal administrative proceedings?

   b. Do the loan agreements and the Code preempt application of federal law in the TDRP, even though they expressly invoke federal law and authorize the Authority and Tribal Court to apply federal law?

   c. Is the prospective waiver issue even ripe?

3. Do common issues predominate under Rule 23(b) given the Tribe's control of Red Rock and Big Picture at all relevant times and Martorello's role decreasing over time until ceasing altogether when the Tribe bought his business in 2016?

4. Did the district court violate the mandate rule in the Misrepresentation Opinion by altering binding conclusions and factual findings that were affirmed on appeal by this Court?

STATEMENT OF THE CASE

I. Factual Background

The Tribe is a federally recognized Indian tribe whose members reside near their ancestral home in Watersmeet, Michigan (the "Reservation"). JA238. The Tribe is a sovereign "independent tribal entity" and governs itself according to its own laws and regulations. *Id.*

A. Before meeting Martorello, the Tribe enacted broad consumer protection regulations.

On July 8, 2011, the Tribe enacted the Code, which authorizes consumer lending entities that are (i) wholly owned by the Tribe, (ii) operate from the Reservation, and (iii) operate exclusively to "improve [the Tribe's] economic self-sufficiency, to enable [the Tribe] to better serve the social, economic, educational, and health and safety needs of its members." JA3070 (§§ 1.1(a), (d), (h)), JA3071-72 (§ 1.3), JA 3072 (§ 2.4), JA3084 (§ 5.1). Any person engaging in consumer financial services must be licensed under the Code, including vendors to licensees. JA3084 (§ 5.1(a)). All licensees, including vendors, must comply with federal law. JA3073 (§ 2.11), JA3090 (§ 6.1), JA3091-92(§ 6.6(a)(3), § 6.6(b)(5)).

The Authority enforces compliance with the Code and federal law. JA3079-80 (§ 4.13). The Authority has enforcement authority to address

violations of the Code and federal law, JA3094-95 (§ 8), and oversees licensees and consumer protection. JA181; JA3075-83 (§ 4).

The TDRP sets out a three-step tribal alternative dispute resolution process for consumers that culminates in appellate review by the Tribal Court. JA3095-98 (§ 9). Unlike any other jurisdiction, under the Code a trial lender must participate in discovery or will be defaulted. JA182; JA3096-97 (§§ 9.3(e)(i), 9.3(h)).

First, an aggrieved consumer must raise their dispute directly with the licensee to give the licensee an opportunity to resolve the dispute. JA180; JA3095 (§ 9.2).

Second, if the consumer remains dissatisfied, the consumer may request formal administrative review of their complaint by the Authority. JA180; JA3095-97 (§ 9.3).

In this second step, the parties "are given the opportunity to make opening and closing statements [at a hearing], present witnesses and evidence, testify and cross-examine testimony. On its own or by request, the parties may be allowed to file post-hearing briefs." JA3097 (§ 9.3(f)). "The Authority may grant or deny any [appropriate] relief," not only tribal law or remedies. (Id.) The Authority then "issue[s] a written

decision and order that is binding on a licensee and includes [] factual findings, conclusions of law, its decision on the complaint, and a notice of the right to appeal to the LVD Court." JA182; JA3097 (§ 9.3(f)).

Third, the consumer may appeal any decision to the Tribal Court. JA182; JA3098 (§ 9.4). The Tribal Court "must allow oral argument over any appeal, and reviews the administrative record and decision according to the codified standards. In a written decision and order, the LVD Court may affirm, reverse, or remand the Authority's decision upon a finding that the Authority's decision is arbitrary, capricious, not supported by evidence, or conflicts with the applicable law or the Tribe's Constitution. JA182; JA3098 (§§ 9.4(b), (f), (g)). The Tribal Court must "issue an opinion and order as a final decision in the matter which exhausts a consumer's administrative remedies." JA183; JA3098 (§ 9.4(g)).

B. The Tribe formed Red Rock in September 2011 and contracted with Bellicose VI for assistance.

In September 2011, the Tribal Council created Red Rock to provide consumers with unsecured, small-dollar loans pursuant to the Code and federal law. JA3015; JA3017. Red Rock was organized under Tribal law, wholly owned by the Tribe, and functioned as an arm of the Tribe. JA1390; JA3015; JA3017. Red Rock's LLC managers and operations

managers worked from the Reservation and were members of and controlled by the Tribal Council. JA3255; JA3582-83; JA13015; JA3017.

For assistance developing and growing the online lending businesses, the Tribe contracted with Bellicose VI, a non-tribal LLC founded and operated by Martorello that provided vendor management services, compliance management assistance, marketing material development, and risk modeling and data analytics development. JA505. Bellicose VI and Martorello were required to be licensed under the Code to enter into the Servicing Agreement. JA2506 (§ 1.6). To ensure the lawfulness of the loans, Martorello engaged the most prominent Indian law lawyer that he could find, Jennifer Weddle, co-head of Greenberg Traurig LLP's Indian law department, to structure Bellicose VI's relationship with the Tribe. JA3107-08, JA3110-11; JA3762-64. Bellicose VI consulted with Red Rock regarding day-to-day operations and Red Rock's operations managers approved all operation objectives and managed Red Rock's offices and personnel on the Reservation. JA1390; JA3545.

C. Red Rock began lending in January 2012 and expanded its role in the lending business over time.

On January 17, 2012, Red Rock began making consumer loans, all of which were authorized and made by Red Rock JA3066-67; JA4007; JA503.

Also in 2012, Bellicose VI assigned its rights under its servicing contracts with Red Rock to its affiliate, SourcePoint VI, LLC ("SourcePoint"). SourcePoint's relationship with Red Rock mirrored Bellicose VI's, and although SourcePoint could make recommendations, "all final decisions about operations were made by [Red Rock's] managers." JA3065; JA3962.

As part of improving the Tribe's "self-sufficiency," as Red Rock learned from SourcePoint, Red Rock took in-house more and more of the Servicing Agreement's delegated tasks. JA1393-1400; JA1892-95. Red Rock independently developed and implemented its own compliance management systems. *Id.* Red Rock began directly engaging lead providers and data sources. *Id.* Red Rock increased its role in independently identifying vendors. Red Rock took on more responsibilities related to marketing. JA3951.

D. The Tribe bought Bellicose Capital from Eventide in 2016.

In 2014 and 2015, the Tribe created Big Picture and Ascension to guarantee the continuation of the lending operation. JA513. Then, in 2016, the Tribe acquired SourcePoint's parent, Bellicose Capital, from Eventide in a seller-financed deal in which Eventide provided a loan to the Tribe to be repaid over seven years of variable repayments based on the overall monthly profitability of Big Picture and Ascension. JA505-06. At the end of the seven years, any remaining balance would be forgiven. JA505. After the 2016 sale, Martorello had no role in the Tribe's business. JA4039 (¶¶ 10-16); JA3974-77.

E. Eventide did not receive payments from Big Picture from November 2018 to July 2020.

Between approximately November 2018 to July 2020, Tribal Economic Development, LLC stopped paying Eventide, defaulting on its promissory note. JA3114; JA3401-04.

II. Procedural History

A. The Complaint.

In June 2017, the Borrowers brought a putative class action against Big Picture, Ascension, Martorello, and other individuals, alleging that

Big Picture charged interest rates higher than would be allowed "if Virginia law were applicable." JA503.

Big Picture and Ascension moved to dismiss for lack of subject matter jurisdiction on the basis that they were entitled to sovereign immunity as arms of the Tribe. *Id.* The district court found that Big Picture and Ascension did not prove that they were entitled to tribal sovereign immunity. *Id.* Instead, the driving force behind the formation of Big Picture and Ascension was supposedly "to shelter outsiders from the consequences of their otherwise illegal actions." *Id.*; JA308.

B. Big Picture and Ascension successfully appealed the district court's order.

On appeal, this Court reversed the district court on July 3, 2019 and held that it erred in determining that Big Picture and Ascension were not arms of the Tribe. JA503. The factors set forth in *Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173 (10th Cir. 2010) supported that Big Picture and Ascension were arms of the Tribe. JA509.

Method of Creation. The Fourth Circuit focused "on the law under which the entities were formed" and acknowledged it is "undisputed that Big Picture and Ascension were 'created under tribal

law.'" JA510-11. That is because "Big Picture and Ascension were both organized through resolutions by the Tribe Council, exercising powers delegated to it by the Tribe's Constitution, and the Entities operated pursuant to the Tribe's Business Ordinance." *Id.* The Court rejected that Martorello's alleged ideation had any significance here. *Id.*

Purpose of Creation. The Fourth Circuit focused on: "the stated purpose for which the Entities were created as well as evidence related to that purpose." JA511. The Fourth Circuit identified the stated purpose for which Big Picture and Ascension were created by relying exclusively on recitals by the Tribal Council in their articles of organization. JA512. Martorello's alleged purpose had no relevance. JA513. As for the second aspect, the Fourth Circuit listed by bullet the specific Tribal activities that Big Picture's revenue funded, ultimately concluding that "the evidence indicates that the Tribe's general fund has in fact benefited significantly from the revenue generated." JA515-16. The Court rejected the district court's conclusion that the Tribe's purpose of creating Big Picture and Ascension was to insulate Martorello from liability, because "the Tribe created Big Picture and Ascension so that its

lending operations could continue, along with the economic benefits associated with that continuation." JA511-14.

Control. The Fourth Circuit looked to "the structure, ownership, and management of the entities," in particular "the entities' formal governance structure, the extent to which the entities are owned by the tribe, and the day-to-day management of the entities." JA520. It determined the formal governance structure assured "that Big Picture is answerable to the Tribe at every level" despite the servicer's "dominant role in Big Picture's lending operations," and detailed that the Intratribal Servicing Agreement, identical to the one between SourcePoint and Red Rock, left Big Picture in control as the lender, and the servicer providing support. JA521-22. Based on these facts, the Fourth Circuit determined this weighed in favor of immunity for Big Picture, while also stating that "while Ascension does manage many of the day-to-day activities associated with Big Picture's lending, an entity's decision to outsource management in and of itself does not weigh against tribal immunity." JA521. The Court further noted that the Tribal managers exercised "with frequency" their "broad power" power over "Big Picture's important business and management." JA522-23.

Intent to Share Immunity. This was undisputed. The Tribe intended to share its immunity with Big Picture and Ascension. JA524.

Financial Relationship between the Tribe and the Entities. The "heart of this analysis" is whether a judgment against Big Picture and Ascension "could in fact significantly impact the tribal treasury." JA515-16. It would, "[g]iven that 10% of the Tribe's general fund comes from Big Picture." JA525.

Federal Policies. In addition to these five *Breakthrough* factors, the Fourth Circuit noted the "sixth *Breakthrough* factor, whether the purposes underlying tribal sovereign immunity would be served by granting an entity immunity" was too important and so it must inform the entire analysis. JA510. Giving "due consideration of the underlying policies of tribal sovereign immunity," the Fourth Circuit determined that "[t]he evidence here shows that the Entities have increased the Tribe's general fund, expanded the Tribe's commercial dealings, and subsidized a host of services for the Tribe's members." JA526. The Fourth Circuit concluded that "[a] finding of no immunity in this case . . . would weaken the Tribe's ability to govern itself according to its own laws, become self-sufficient, and develop economic opportunities for its

members." Id. The district court had failed to properly apply federal policy to further and protect efforts of tribal economic development. JA526-27.

The Court reversed the district court and remanded with instructions to grant Big Picture and Ascension's motion to dismiss. JA527.

C. After oral argument, the Borrowers alleged that Big Picture and Ascension made misrepresentations affecting the *Breakthrough* factors.

Meanwhile, two weeks after this Court held oral argument, on May 20, 2019 the Borrowers raised their claim that Big Picture and Ascension had made misrepresentations impacting various *Breakthrough* factors in *Galloway v. Big Picture Loans, LLC, et al.*, ("*Galloway I*"), a related case before the district court. JA434-34.

After raising these alleged misrepresentations in *Galloway I*, the Borrowers informed this Court of the alleged misrepresentations and requested the Court allow the district court to re-evaluate its ruling in light of new and relevant evidence. JA454. Big Picture and Ascension responded that the Borrowers were attempting to raise irrelevant

materials that had long been in the possession of the Borrowers in an attempt to manufacture an issue out of nothing. JA464.

This Court ignored the Borrowers' request when it reversed and instructed the district court to dismiss Big Picture and Ascension. JA527. The Borrowers did not seek *en banc* review to press their contentions about alleged misrepresentations.

The district court did not follow this Court's instruction. Instead, over the objections of Big Picture and Ascension, JA622-30; JA676-84, individual Tribal defendants, JA622-30; JA669-75, and Martorello, JA640-49; JA650-68, that the *Williams* decision should end the case, the district court ordered briefing and set an evidentiary hearing on the claimed misrepresentations by the Tribal entities for October 28, 2019. 530-33. Before this Court had issued its decision, the Borrowers filed a brief detailing what they contended were misrepresentations made by Big Picture and Ascension that affected the *Breakthrough* factors. JA466-99. Big Picture and Ascension hotly contested the claimed misrepresentations and laid out why the allegations were spurious. JA534-84. Martorello also filed a response to the alleged misrepresentations laying out the extensive evidence corroborating his

statements. JA587-621. Faced with a district court unwilling to execute this Court's mandate, Big Picture and Ascension settled with the Borrowers before the hearing. JA702-04.

On February 18, 2020, almost seven months after entry of this Court's mandate, the district court dismissed Big Picture and Ascension for lack of subject matter jurisdiction "[i]n accordance with, and as instructed by, the Judgement of the United States Court of Appeals for the Fourth Circuit entered on July 3, 2019, (JA528-29), and the mandate entered on July 25, 2019 (JA528-29)." JA705.

D. Two days after dismissing Big Picture and Ascension, the district court turned its attention to Martorello.

Two days later, the district court pivoted to whether Martorello made misrepresentations related to the *Breakthrough* factors and if an evidentiary hearing on the alleged misrepresentations was necessary. JA708-09. Martorello again asserted that the Borrowers were "not permitted to relitigate the Fourth Circuit's conclusions in this case with new evidence" and that the misrepresentations were a sham. *Id.* "No evidentiary hearing is needed to reach the conclusion that Plaintiffs' Filing, on the whole, lacks merit." JA710-11. Martorello closed by saying:

> [I]f the Court is inclined to consider Plaintiffs' Filing in relation to this matter (which Martorello contends it should not), Martorello should be provided a full and fair opportunity to respond through an evidentiary hearing and briefing.

JA713. The Borrowers requested an evidentiary hearing to address the alleged misrepresentations. JA717.

After the Borrowers submitted briefing on the alleged misrepresentations, JA759-811, Martorello responded with extensive evidentiary briefing to refute the alleged misrepresentations. JA924-84. He submitted an exhibit that provided evidence corroborating the truth of each alleged misrepresentation. JA812-72. After the July 2020 hearing on the alleged misrepresentations, Martorello again rebutted the alleged misrepresentations in posthearing briefings. JA1149-60; JA1161-85; JA1186-1217.

The district court entered the Misrepresentation Order on November 18, 2020, JA1218-56, and ordered new briefing on class certification. JA1257. The Borrowers filed their renewed motion for class certification on December 23, 2020, JA1302-04; JA1305-46, Martorello filed his opposition on February 23, 2021, JA1377-1426, and the Borrowers filed their reply on March 22, 2021. JA1427-66.

E. The district court granted class certification.

On July 20, 2021, the district court granted class certification. JA1725-28. The district court issued two opinions that it relied on in connection with its order.

First, the district court concluded that the Borrowers did not waive their right to participate in a class action against Martorello. JA1656-74. The class action waiver contained in the Borrowers' loan agreements did not apply to Martorello because he was neither a signatory to the loan agreement between Red Rock or Big Picture and the Borrowers nor an "affiliated entity," "servicer," or "consultant" of Red Rock or Big Picture. JA1670-68. Even if the class action waiver could apply to Martorello, the district court concluded that the waiver was unenforceable because of the prospective waiver doctrine. JA1664-72.

Second, the district court concluded that the Borrowers met the requirements under Rule 23 for class certification. JA1689-1724. In particular, the district court found that common issues predominate because the Borrowers' claims are entirely based on standardized conduct by Martorello. JA1715. The district court disagreed with Martorello that the Borrowers' inability to show that Martorello

uniformly received loan payments from all of the proposed class members because Bellicose Capital and Eventide were compensated based on the monthly net profitability of the tribal businesses, not interest paid on particular loans, was enough for common issues to predominate. JA1717. Martorello did not "play[] only a minor, supporting role in the LVD's lending operations" or had a role that "changed meaningfully between June 22, 2013 and December 22, 2019," because "Martorello was the de facto head of the LVD's lending operations at all relevant times." *Id.*

F. This appeal.

On August 3, 2021, Martorello timely filed a Rule 23(f) petition with this Court seeking interlocutory appeal of the Class Certification Order. JA1754. Martorello also requested this Court exercise pendent jurisdiction over the Misrepresentation Opinion. JA1745-46.

On October 7, 2021, this Court granted Martorello's petition. JA1873.

STANDARD OF REVIEW

This Court reviews de novo legal contract interpretation, *Sky Angel U.S., LLC v. Discovery Comm'cns., LLC*, 885 F.3d 271, 277-78 (4th Cir. 2018), including whether choice-of-law and forum selection provisions in

an agreement prospectively waive a party's right to pursue federal statutory remedies. *Hengle v. Treppa*, Nos. 20-1062, 20-1063, 20-1358, 20-1359, 2021 U.S. App. LEXIS 33964, at *11-12 (4th Cir. Nov. 16, 2021).

This Court also reviews de novo whether a district court contravened the mandate rule and whether this Court's mandate has been "scrupulously and fully carried out." *S. Atl. Ltd. P'ship of Tenn., L.P v. Riese*, 356 F.3d 576, 583 (4th Cir. 2004).

This Court reviews a district court's decision to certify a class for abuse of discretion. *EQT Prod. Co.*, 764 F.3d at 357. A district court abuses its discretion when it materially misapplies the requirements of Rule 23, *see Gunnells v. Healthplan Servs.,* 348 F.3d 417, 424 (4th Cir. 2003), or clearly errs in its factual findings. *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 317 (4th Cir. 2006).

This Court reviews the Misrepresentation Opinion under a mixed standard of review because it includes errors of fact and law: "factual findings may be reversed only if clearly erroneous, while conclusions of law are examined de novo." *Plasterers' Local Union No. 96 Pension Plan v. Pepper*, 663 F.3d 210, 215 (4th Cir. 2011)

SUMMARY OF ARGUMENT

I. The Borrowers waived their right to bring a class action related to their loan agreements against Martorello in multiple ways. In the loan agreements, the Borrowers waived the right to bring class actions in disputes related to the loan agreements or against consultants, servicers, or affiliated entities of the tribal lenders. The district court erred by focusing on Martorello not being a party to the loan agreements; the Borrowers are instead estopped from disclaiming the waiver because their claims arise out of the agreement and alleged concerted misconduct by Martorello and Red Rock and Big Picture. The district court also erred by finding that Martorello was the "de facto head of the [Tribe's] lending operations" but not a consultant, servicer, or affiliated entity.

II. In contrast to all of the prior loan and arbitration agreements considered by this Court, the Borrowers' loan agreements and the Code do not preempt application of federal law in the TDRP, so there is no prospective waiver. The district court wrongly concluded that the "animating purpose" of the relevant provisions in the loan agreements and Code was to "allow the making of consumer loans free from the strictures of federal law." JA1673. Unlike all prior loan agreements, the

Borrowers' loan agreements are governed by federal law. Unlike all prior arbitration agreements, the Code does not limit the Authority or Tribal Court to applying tribal law. Read together, the agreements and Code allow, rather than forbid, federal claims related to the loan agreements in the TDRP. And if there is any uncertainty, prospective waiver is not ripe.

III. Common issues do not predominate over the classes. First, because Bellicose Capital and Eventide were not paid based on interest payments from individual loans, but based on the overall monthly profitability of the tribal businesses. At times, Bellicose Capital and Eventide were not paid at all, so determining whether interest payments of individual Borrowers reached Martorello requires individualized tracing that does not predominate.

Second, the district court erred by glossing over Martorello's changing role by relying on the conclusory finding that "Martorello was the de facto head of the LVD's lending operations at all relevant times." This conflicts with this Court's prior conclusion that The Tribe controls Big Picture , substantial evidence submitted by Martorello, and the faulty conclusions of the Misrepresentation Opinion.

IV. In the Misrepresentation Opinion, the eventual main basis for class certification, the district court erred by improperly reconsidering prior factual findings and conclusions reached by this Court in *Williams*. This Court remanded with instruction that the district court dismiss Big Picture and Ascension for lack of subject matter jurisdiction. The district court did not do so and is now operating under an entirely new set of facts than this Court affirmed on appeal.

ARGUMENT

I. The Borrowers Waived The Right To Bring A Class Action Against Martorello.

The Borrowers waived their ability to bring or participate in a class action for all disputes related to or arising under the loan agreement in the Waiver of Jury Trial provision:

> **WAIVER OF JURY TRIAL:** The Dispute Resolution Procedure has been created by the Tribe as a courtesy to consumer and is the sole and exclusive dispute resolution mechanism for disputes and claims relate to or arising under this Agreement. **THEREFORE, YOU ACKNOWLEDGE AND AGREE AS FOLLOWS:**
>
> * * *
>
> 2. You acknowledge and agree that by agreeing to this Waiver of Jury Trial provision: . . . **(c) you are giving up your right to serve as a representative, as a private attorney general, or in any other representative capacity, and/or to participate as a member of a class of claimants, in any lawsuit filed against us and/or related parties.**

> 3. All disputes including any Representative Claims against Us and related third parties shall be resolved by the TRIBAL DISPUTE RESOLUTION PROCEDURE only on an individual basis with You as provided for pursuant to Tribal law. **THEREFORE, NO LITIGATION OR ARBITRATION IS AVAILABLE AND NO JUDGE OR ARBITRATOR SHALL CONDUCT CLASS PROCEEDINGS; THAT IS, YOU SHALL BE INELIGIBLE TO SERVE AS A CLASS ACTION REPRESENTATIVE, AS A PRIVATE ATTORNEY GENERAL, OR IN ANY OTHER REPRESENTATIVE CAPACITY FOR OTHERS IN LITIGATION OR ARBITRATION.**

JA1937 (emphasis in original).[1]

In this provision, "dispute" is given the "broadest possible meaning," and includes:

> (a) all claims, disputes, or controversies involving the parties to this Agreement and Our employees, servicers, and agents, including but not limited to consultants, banks, payment processors, software providers, data providers and credits bureaus;
>
> (b) all claims, dispute, or controversies arising from or relating directly or indirectly to Your application, this Agreement, the validity and scope of these provisions and any claim or attempt to set aside these provisions;
>
> * * *
>
> (f) all claims based upon a violation of any Tribal, state or federal constitution, statute, regulation or ordinance;
>
> * * *
>
> (j) all claims asserted by You as a private attorney general, as a representative and member of a class of persons, or in any other

[1] The Borrowers all agreed to agreements with similar or identical waivers. JA1695.

> representative capacity, against Us and/or related third parties (hereinafter referred to as "Representative Claims");[2]
>
> * * *
>
> (n) all claims related to setting aside the Waiver of Jury Trial provision or the Tribal Dispute Resolution Procedure provision, including claims about such provisions' validity and scope.

JA1937 (Waiver of Jury Trial at ¶ 1(a)-(b), (f), (j), (n)).

The waiver applies to the class action claims against Martorello. First, the claims are "disputes" attempting to set aside various provisions in the loan agreements and raising state and federal claims. *Id.* at 1(b), (f), (n). Martorello not being party to the agreement is irrelevant; the Borrowers may not disclaim their class action waiver because their claims against Martorello both arise out of the loan agreement and allege concerted misconduct by Martorello and Red Rock and Big Picture, signatories to the loan agreement. *Am. Bankers Ins. Group v. Long*, 453 F.3d 623, 627-28 (4th Cir. 2006); *Brantley v. Republic Mortg. Ins. Co.*, 424 F.3d 392, 395-56 (4th Cir. 2005). Second, because Martorello is an

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[2] "Related third parties" means "any of [Big Picture's] employees, agents, directors, officers, shareholders, governors, managers, members, parent company or affiliated entities." JA1937 (Waiver of Jury Trial at ¶ 1(h)). The loan agreement does not define "agent," but, earlier in the loan agreement, "agent" is described to include but not be limited to "consultants, banks, payment processors, software providers, data providers and credit bureaus." *Id.* (¶ 1(a)).

"consultant," "servicer," or "affiliated entity" of Red Rock and Big Picture that the Borrowers agreed to not participate in a class action against. *Id.* at ¶ 1(a), (j).

A. The Borrowers may not disclaim their class waiver for disputes and claims related to the agreements.

The Borrowers' claims against Martorello are "disputes" related to the loan agreements and their validity and scope. This Court and the district court both recognized this. JA503; JA1658. Accordingly, their claims are "disputes" under the loan agreement. JA1937 at ¶ 1(b), (f), (n).

The district court held that, Martorello could not enforce the class action waiver against the Borrowers because he was not a party to the agreements. JA1567-70; JA1661-62.[3] The district court erroneously burdened Martorello with establishing he was a third-party beneficiary of the agreements when, instead, the Borrowers must show they are not estopped from disclaiming the waiver.

[3] If Martorello could rely on these definitions, the district court conceded that he would be covered. JA1567-68 ("[I]f he were a party to the loan, then your argument would be good. But he's not a party to the loan.").)

A nonsignatory may compel a signatory to comply with contractual provisions despite not being party to the contract. *See Aggarao v. MOL Ship Mgmt. Co.,* 675 F.3d 355, 373 (4th Cir. 2012). A signatory is estopped from disclaiming a term in the contract if the signatory's claims "arise out of and relate directly to the written agreement" or the signatory alleges "substantially interdependent and concerted misconduct" by the nonsignatory defendant and another signatory. *Am. Bankers Ins. Group v. Long*, 453 F.3d 623, 627-28 (4th Cir. 2006) (estoppel only requires claim based on contract, not breach of contract); *Brantley*, 424 F.3d at 395-56.

In particular, estoppel applies when signatories attempt to duck a class action waiver at the class certification stage, because they may not "rely on their contracts to assert [their claims], yet repudiate the clauses within those contracts that preclude certain members from participating in [] class action litigation." *In re Titanium Dioxide Antitrust Litig.*, 962 F. Supp. 2d 840, 852-53 (D. Md. 2013) (holding that nonsignatory defendant may enforce class action waiver at class certification). To permit otherwise would "allow class members to have their cake and eat it too—in other words, to rely on the contract when it works to their advantage, while 'repudiating it' when it works to their disadvantage."

Id. (quotes omitted); *see also Wachovia Bank N.A. v. Schmidt*, 445 F.3d 762, 769 (4th Cir. 2006).

First, the Borrowers' claims indisputably "arise out of and relate directly to [the loan agreements]." *See Am. Bankers Ins. Grp.*, 453 F.3d at 630 (holding that it would be inequitable for a signatory to allege claims based on contract against a nonsignatory while denying that a nonsignatory could enforce the contract's arbitration provision). No one disputes the centrality of the loan agreements to this dispute and the agreements require disputes be brought under the TDRP.

Second, the Borrowers' claims allege "substantial interdependent or concerted misconduct" between a nonsignatory and signatory, because they still maintain that Martorello "rented" the Tribe's sovereignty via Red Rock and Big Picture so that he could "cloak [himself] in the sovereign immunity of" the Tribe to preclude enforcement of state law interest rate caps. JA1658.

Either way, the Borrowers waived their right to bring a class action against Martorello.

B. The Borrowers waived their ability to bring a class action against Martorello based on his roles with Red Rock and Big Picture.

To certify a class against Martorello, and in conflict with this Court's prior holding, the district court found that Martorello was the "de facto head of the LVD's lending operations at all relevant times" over the class period. JA1720. But at the same time, the district court bent over backward to find that Martorello was not a "consultant," "servicer," or "affiliated entity" of the tribal lender that the Borrowers waived their right to bring a class action against. JA1662-68. Martorello cannot be the ongoing mastermind of a lending operations through his old companies that provided consulting and servicing to Red Rock and his current one that is a creditor of the tribal businesses, without being considered a consultant, servicer or affiliated entity.

First, Martorello is a "consultant." JA1937 (Waiver of Jury Trial at ¶ 1(a)). The district court even said so earlier in the case. JA243-44 ("The Tribe had identified Martorello as a potential consultant in mid-2011 . . . . Then, on October 25, 2011, Red Rock contracted with Bellicose VI, LLC—a subsidiary of [Bellicose Capital]—for it to provide Red Rock with [various consulting services]."). This Court also recognized that

Martorello was a consultant. JA504-05 (Bellicose Capital and its subsidiaries were "Martorello's consulting companies" that were sold to the Tribe in 2016). Martorello was plainly a "consultant."[4]

Second, Martorello is also a "servicer." JA1937 (Waiver of Jury Trial at ¶ 1(a)). Bellicose VI entered into a "Servicing Agreement" with Red Rock on October 25, 2011, JA2505, and Martorello was its president. JA2538. The Servicing Agreement defined Bellicose VI as Red Rock's "Servicer." JA2505.

Third, Martorello, whom the Borrowers still claim was the "architect of the rent-a-tribe lending scheme" with "direct personal involvement in the creation and day-to-day operations of the illegal enterprise," JA135 (¶ 14), is also an "affiliated entity" or "agent." JA1937 (Waiver of Jury Trial at ¶ 1(h)).

"[A]ffiliated entity" is not defined in the Borrowers' loan agreements. *Id.* (Waiver of Jury Trial at ¶ 1(h)). Despite that, the district

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[4] There is no basis for the district court's claim that Martorello only raised that he was a consultant (or a servicer) for the first time at oral argument. JA1663. Martorello raised this in his Opposition: "Martorello-managed companies were 'servicers' and consultants to the Tribe's business" and "Martorello and companies he managed were 'affiliated entities' because they provided consulting and servicing assistance to the Tribal Lender prior to the sale of Bellicose." JA1380.

court held that "affiliated entity" could not include Martorello. JA1666-67. While an "affiliate" or "entity" can refer to a natural person, "affiliated entity" apparently cannot and must be a business organization. *Id.*[5] The Court should reject the district court's tortured construction to reach the intuitive conclusion that Martorello, someone who has been in business relationships with Red Rock and Big Picture for the past decade, is an "affiliated entity" of both.[6]

Whether Martorello is a consultant, servicer, agent or affiliated entity the Borrowers waived their right to bring a class action against him. If there is any doubt, giving "dispute" the required "broadest

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[5] Though the district court cited two cases purportedly reaching the same conclusion, JA1667, neither did. *See Bd. of Trs. of the Leland Stanford Junior Univ. v. Agilent Techs.*, No. 18-cv-01199-VC, 2019 U.S. Dist. LEXIS 172127, at *3-4 (N.D. Cal. Aug. 13, 2019) (parent company was an affiliated entity of a wholly owned subsidiary); *Silva v. Butori Corp.*, No. CV-19-04904-PHX-MTL, 2020 U.S. Dist. LEXIS 81367, at *12-13 (D. Ariz. May 8, 2020) (commonly owned, interdependent companies were closely connected enough to be affiliated entities).

[6] An entity can be both a business organization and a natural person. *See, e.g., Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 161 (2001) ("to establish liability under § 1962(c) one must allege and prove the existence of two distinct entities: (1) a 'person'; and (2) an 'enterprise' that is not simply the same 'person' referred to by a different name").

possible meaning" means that Martorello is covered. JA1937 (Waiver of Jury Trial at ¶ 1).

II. The Class Action Waiver Is Valid And Enforceable.

The Supreme Court and the Fourth Circuit have repeatedly found class action waivers like the one in the loan agreements to be valid and enforceable. *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 351–52 (2011); *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 238 (2013); *Muriithi v. Shuttle Express, Inc.*, 712 F.3d 173, 180 (4th Cir. 2013).

To depart from this, the district court erroneously held that the class action waivers in the Borrowers' loan agreements were unenforceable under the prospective waiver doctrine. The district court found that, read together, provisions in the loan agreements and the Code effectively prevented the Borrowers from vindicating any federal statutory claims. JA1673. But the district court is wrong for at least three reasons. One, the prospective waiver doctrine only applies to arbitration, and cannot be extended to tribal administrative proceedings. Second, even if the prospective waiver doctrine could apply, tribal law does not preempt federal law in the TDRP and so there is no prospective

waiver. Third, at most, the loan agreements and Code only introduce uncertainty about the Borrowers' right to pursue federal statutory claims, so the prospective waiver issue is not yet ripe.

A. The prospective waiver doctrine only applies to arbitration, not a tribal administrative proceedings.

The Supreme Court has repeatedly recognized that the prospective waiver doctrine is a "judge-made exception to the FAA" in which courts may invalidate arbitration agreements where the choice-of-law and choice-of-forum clauses prevent effective vindication of federal rights by foreclosing the availability of any remedy. *Italian Colors*, 570 U.S. at 235; *see also Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 637 n.19 (1985) ("in the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the [arbitration] agreement as against public policy"). Prospective waiver "comes into play only when the FAA is alleged to conflict with another federal law." *Italian Colors*, 570 U.S. at 252 (Kagan, J., dissenting) (emphasis removed).

Despite this, the district court extended the doctrine to the TDRP, the first time prospective waiver has been applied to a tribal

administrative proceeding. JA1668-70.[7] To reach this conclusion, the district court failed to address a critical distinction between arbitration and a tribal forum—the Borrowers may sue in federal court after exhausting the administrative remedies available to them in Tribal Court, so there is no waiver.

Under the tribal exhaustion doctrine, "[u]ntil petitioners have exhausted the remedies available to them in the Tribal Court system, it would be premature for a federal court to consider any relief." *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 857 (1985). After a tribal court addresses whether it has jurisdiction over a plaintiff's claims, the plaintiff may sue in federal court to challenge whether the tribal court exceeded its jurisdiction. *Id.* at 855-56. Tribes may exercise jurisdiction over non-members that: (1) enter into consensual commercial dealings, such as contracts with the tribe or its members; or (2) engage in conduct that threatens the political integrity, economic security, or the health and welfare of the tribe." *Montana v. United States*, 450 U.S. 544, 565-66 (1981).

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[7] Troublingly, the district court did so in the absence of any tribal party to defend the Tribe's vital sovereign interests. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 14–15 (1987).

The Tribe has jurisdiction over the Borrowers, so any dispute must first be raised under the TDRP, even one involving Martorello. The Borrowers consensually entered into loan agreements with the Tribal Lenders that contain a forum selection provision requiring all disputes related to the loan agreements be brought pursuant to the TDRP. JA1937. By suing Martorello, the Borrowers still challenge the legality of the Tribe's lending operations, which is an attack on the Tribe's political integrity and economic security.

After exhausting their dispute in the TDRP, individual Borrowers could then file suit in federal court. *Nat'l Farmers Union Ins. Cos.*, 471 U.S. at 857. Because this avenue remains open, there is no waiver of any federal statutory rights at all and the prospective waiver doctrine does not apply.

B. The prospective waiver doctrine, if it can apply, does not apply to the Borrowers' loan agreements.

For there to be prospective waiver, the Borrowers' loan agreements must do away with the Borrowers' "*right to pursue* [federal] statutory remedies." *Italian Colors*, 570 U.S. at 235 (emphasis in original) (quoting *Mitsubishi Motors*, 473 U.S. at 637 n.19); *see also Hengle*, 2021 U.S. App. LEXIS 33964, at *11 (an agreement is unenforceable if it prospectively

waives "a party's right to pursue statutory remedies"). It is not enough for an agreement to make it "more difficult *to prove* a statutory remedy," because that does not "eliminate the right *to pursue* that remedy." *Brice v. Plain Green, LLC*, 13 F.4th 823, 828 (9th Cir. 2021) (emphases in original). This Court has "refused to enforce arbitration agreements that limit a party's substantive claims to those under tribal law, and hence forbid federal claims from being brought." *Hengle*, 2021 U.S. App. LEXIS 33964, at *12 (internal quotations omitted). The Borrowers are not limited to bringing tribal law claims in the TDRP and may bring federal statutory claims, so there is no prospective waiver.

1. There is no prospective waiver if tribal law does not preempt federal law in the TDRP.

An agreement does not run afoul of the prospective waiver doctrine if it "acknowledges it is subject to the laws of the United States" by stating that tribal and applicable federal law govern the agreement and contemplates federal law applying in arbitration. *Gibbs v. Stinson*, 421 F. Supp. 3d 267, 303-04 (E.D. Va. 2019).

In *Stinson*, the court addressed whether a loan agreement governed by the laws of an Indian tribe and applicable federal law was unenforceable under the prospective waiver doctrine. The court

determined that "applicable federal law" only meant "federal law having direct relevance to the issue at hand," and was not meant as a limitation.[8] The court then considered whether only claims arising under tribal law could be brought. *Id.* at 304. Because the arbitration agreement allowed the arbitrator to apply federal law, the court concluded that consumers could bring tribal and federal claims in arbitration. *Id.* Because federal law governed the loan agreement and federal claims could be brought in arbitration, there was no prospective waiver. *Id.*

For the same reasons, the Borrowers' loan agreements are also enforceable. Like in *Stinson*, both the Code and applicable federal law expressly govern the agreements:

> This Agreement will be governed by the laws of [the Tribe] ("Tribal law"), including but not limited to the Code as well as applicable federal law."

JA1936.

Second, because the Borrowers' loan agreements and the Code allow federal claims to be brought pursuant to the TDRP. The agreements provide for the TDRP to be the "sole and exclusive dispute

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[8] The court canvassed usage of the term across the federal courts and concluded it was not a restriction. *Id.*

resolution mechanism for disputes and claims related to or arising under this Agreement." JA1937. In particular, "disputes" subject to the TDRP include "all Tribal and U.S. federal or state law claims, disputes or controversies, arising from or relating directly or indirectly to . . . the Agreement . . . and any past Agreement or Agreements between You and Us" and "all claims based upon a violation of any Tribal, state or federal constitution, statute, regulation or ordinance." Because the agreements designate application of federal law, the Borrowers may bring federal claims related to the agreements pursuant to the TDRP. *Id.*

The Code, which contains the TDRP, confirms this. JA3070 (§ 1.4); JA3090 (§ 6.1); JA3095-98 (§ 9). The Code requires licensees of the Tribal lending business comply with federal law, consistent with the loans being governed by federal law. JA3090 (§ 6.1). Martorello was obligated to comply with federal law in providing consulting services to Red Rock.[9] Individual Borrowers must first attempt to informally resolve their complaints with Martorello, but, if not satisfactorily resolved, may then

[9] Bellicose VI represented in the Servicing Agreement with Red Rock that it, "along with all other members of the management as well as employees having any responsibility for the business of [Red Rock]" (i.e., Martorello), were licensed pursuant to the Code as a requirement for entry into the Servicing Agreement. JA2506 (¶ 1.7).

initiate a formal dispute resolution procedure with the Authority in which they can raise that he did not comply with the Code. JA3095-96 (§§ 9.2-9.3(a)). In other words, because the Code requires compliance with federal law and the Authority may grant any appropriate relief, consumers can bring federal claims under the TDRP. *Stinson*, 421 F. Supp. 3d at 304; JA3097 (§ 9.3(f)).

2. Each time this Court invalidated an arbitration agreement based on prospective waiver, tribal law preempted federal law in the arbitration.

To find that the Borrowers' loan agreements violated the prospective waiver doctrine, the district court held that the Borrowers' loan agreements were like the agreements invalidated by this Court in recent years that expressly or implicitly disclaimed application of federal law in arbitration. That was wrong, because the Borrowers' loan agreements and the Code repeatedly invoke application of federal law.

First, the Borrowers' loan agreements and the TDRP are not like the loan agreements and arbitration agreements invalidated by this Court in *Hayes v. Delbert Servs. Corp.* and *Dillon v. BMO Harris Bank, N.A.* Those agreements expressly restricted the arbitrator to only being allowed to apply tribal law; federal law was expressly disclaimed.

In *Hayes*, the loan agreement at issue was "subject to and construed in accordance only with the provisions of the laws of [the Indian tribe], and [] no United States state or federal law applies." *Hayes*, 811 F.3d 666, 670 (4th Cir. 2016). The agreement was "subject solely to the exclusive laws and jurisdiction of [the Indian tribe]" and that "no other state or federal law or regulation shall apply to this Loan Agreement, its enforcement or interpretation." *Id.* at 369. The arbitration agreement required the arbitrator to "apply the laws of [the Indian tribe] and the terms of this Agreement" and to not apply "any law other than the law of [the Indian tribe] to this Agreement." *Id.* at 670. The arbitration agreement was unenforceable, because the choice of law clause "waive[d] all of a potential claimant's federal rights" by requiring exclusive application of tribal law, impermissibly "renounc[ing] the authority of the federal statutes to which it is and must remain subject." *Id.* at 675.

Dillon involved similar agreements. The loan agreement was "governed by . . . the laws of [the Indian Tribe]" and "subject solely to the exclusive laws and jurisdiction of [the Indian tribe]," and specified that "no other state or federal law or regulation shall apply to this Agreement, its enforcement or interpretation." *Dillon v. BMO Harris Bank, N.A.*, 856

F.3d 330, 331-32 (4th Cir. 2017). The arbitration agreement stated that "any dispute . . . will be resolved by arbitration in accordance with the law of [the Indian tribe]" and required the arbitrator to "apply the laws of [the Indian tribe]." *Id.* at 331. The Court recognized the close similarity of the provisions at issue to those in *Hayes*, holding the arbitration agreement was unenforceable because the arbitrator could only apply tribal law. *Id.* at 334-35.

The Borrowers' loan agreements and the Code obviously differ. The choice-of-law provision expressly designates federal law, rather than disclaiming it. JA1936. The Borrowers' loan agreement and the Code anticipate Borrowers bringing federal claims in the TDRP, rather than expressly prohibiting them from bringing non-tribal claims. *Supra*, at 38-41. *Hayes* and *Dillon* are inapposite.

Second, the Borrowers' loan agreements and the Code also materially differ from the agreements recently invalidated by this Court in *Gibbs v. Haynes Invs., LLC*, 967 F.3d 332 (4th Cir. 2020), *Gibbs v. Sequoia Capital Operations, LLC*, 966 F.3d 286, 293 (4th Cir. 2020), and *Hengle*, 2021 U.S. App. LEXIS 33964, at *21. Each of these agreements required application of tribal law, but were silent about federal law. Like

in *Hayes* and *Dillon*, tribal law preempted federal law, because the agreements limited the arbitrator to only applying tribal law and awarding damages based on tribal law. *Haynes*, 967 F.3d 332 at 342. Preempting the application of federal law made the agreements unenforceable. *Id.* In contrast, the Borrowers' loan agreements invoke federal law (rather than remaining silent) and the Code allows for the Borrowers to bring claims under federal law (rather than only allowing claims under tribal law), so there is no prospective waiver.

Haynes and *Sequoia* both involved the same agreements, which contained choice-of-law provisions stating the agreements "shall be governed by tribal law," required the arbitrator to "apply tribal law and the terms of this Agreement," and mandated the arbitrator's decision "be consistent with . . . Tribal law," including the "remedies available under Tribal Law." *Haynes*, 967 F.3d at 342; *Sequoia*, 966 F.3d at 293. The agreements' emphasis on tribal law made clear that they preempted federal law, even though the agreements did not disclaim application of federal law. *Id.* Because an arbitrator could only apply tribal law and award tribal law remedies, there was no way that consumers could assert a RICO claim for treble damages. *Haynes*, 967 F.3d at 343; *Sequoia*, 966

F.3d at 293. This preemption of federal law frustrated effective vindication of federal statutory protections and remedies, so the agreements were not enforceable. *Haynes*, 967 F.3d at 344-45; *Sequoia*, 966 F.3d at 294.

Most recently, in *Hengle*, this Court found no material distinction between the agreements at issue and the ones in *Hayes*, *Dillon*, *Haynes* and *Sequoia*, because the choice-of-law clauses in the arbitration provision "mandate[d] exclusive application of tribal law during any arbitration." *Hengle*, 2021 U.S. App. LEXIS 33964, at *20. Again, the relevant arbitration provision stated that any arbitration "will be governed by the laws of the [Tribe]," required the arbitrator to "apply applicable substantive Tribal law," and disallowed "the application of any other law other than the laws of the [Tribe]." *Id.* at *21. This had the same practical effect as in *Haynes* and *Sequoia* – the "arbitration provision demands exclusive application of tribal law, thereby preemption application of other authority. *Id.* at *22. By requiring application of tribal law to the exclusion of federal law, the agreement resulted in prospective waiver. *Id.* at *22-23.

The Borrowers' loan agreements and the Code fundamentally differ from the agreements address in *Haynes*, *Sequoia*, and *Hengle* because they do not require tribal law to preempt federal law in the TDRP and are governed by, and allow application of, federal law. Unlike this Court's precedent, the absence of RICO from the enumerated federal consumer protection laws is irrelevant; the Authority and Tribal Court do not have to look to tribal law to find a basis for a RICO claim, because they can apply federal law to the agreements. *Cf. Haynes*, 967 F.3d at 343. The defendants in *Haynes* were also subject of a licensing carveout, as opposed to Martorello who had to be licensed. JA2506 (§ 1.7). The lack of a private right of action under tribal law only mattered because tribal law preempted federal law. *Haynes*, 967 F.3d at 344. Finally, another tribal code limiting remedies to "actual damages" is unlike the Code's allowance for the Authority to award any appropriate remedy. JA3097 (§ 9.3(f)).

C. Prospective waiver is not ripe if there is ambiguity about whether tribal law preempts federal law.

Unlike these prior cases involving agreements that barred an arbitrator from applying federal law, here there is, at most, uncertainty over whether the Authority will apply federal statutory remedies. But

because there is only uncertainty, "the [Authority] should determine in the first instance whether the choice of law provision would deprive [the Borrowers] of those remedies." *Dillon*, 856 F.3d at 334 (citing *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 540-51 (1995)); *see also 14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 274 (2009) (noting the Court's hesitation to invalidate an ADR agreement based on speculation). For prospective waiver to be ripe, it is "not enough" for a contract to diminish, but not foreclose, the opportunity to gain relief for a federal statutory violation. *Brice v. Plain Green, LLC*, 13 F.3th at 831 n.8 (9th Cir. 2021). Because the Borrowers' loan agreements and the TDRP do not "foreclose[], i.e., *render[] impossible*" Borrowers' pursuit of federal statutory remedies, the Court may not invoke the prospective waiver doctrine. *Id.* at 832 (emphasis in original).

III. Common Issues Do Not Predominate.

Rule 23(b) requires "questions of law or fact common to class members [to] predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). The Supreme Court has noted that "[a]n individual question is one where members of a proposed class will need to present evidence that varies from member to member, while a

common question is one where the same evidence will suffice for each member to make a prima facie showing [or] the issue is susceptible to generalized, class-wide proof." *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 453 (2016) (internal quotation marks omitted). The "predominance requirement applies to damages as well, because the efficiencies of the class action mechanism would be negated if '[q]uestions of individual damage calculations ... overwhelm questions common to the class.'" *In re Modafinil Antitrust Litig.*, 837 F.3d 238, 260 (3d Cir. 2016), as amended (Sept. 29, 2016) (quoting *Comcast*, 133 S.Ct. at 1433).

A. Red Rock And Big Picture made payments based nn the overall monthly profitability of the tribal businesses, not interest payments made by individual Borrowers.

Red Rock or Big Picture—not Martorello—is the lender and originated and collected on the loans. JA521-22. Borrowers' interest payments were never made to Bellicose Capital or Eventide and those companies were not paid based on the individual loans, but instead based on the overall monthly profitability of the tribal businesses, if any. JA1718; JA1161-83 (explaining how money flows from a consumer's payment to Martorello). But for stretches during the class period, Bellicose Capital and Eventide did not receive any consulting fee or note

payments at all, meaning that some of the short-term interest payments made by individual Borrowers never reached Bellicose Capital or Eventide, let alone Martorello. JA3114. More importantly, every individual loan's cash flow is differently situated with respect to Martorello's receipt of funds and cannot be traced.

Whether some portion of the interest payments of individual Borrowers ever reached Martorello or not over the class period requires individualized tracing that does not predominate. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011) ("What matters to class certification . . . is not the raising of common 'questions'—even in droves—but rather, the capacity of a class-wide proceeding to generate common answers"); *see also Pearce v. UBS PaineWebber, Inc.*, No. 3:02-2409-17, 2004 U.S. Dist. LEXIS 30426, at *36-37 (D.S.C. Aug. 13, 2004) (proposed class failed to satisfy predominance requirement, where individual issues overwhelmed common questions).

The district court concluded otherwise because Bellicose Capital and Eventide received a certain percentage of revenue over the whole of the class period. JA1719. But that only shows that interest payments made by some indefinite sub-set of the Borrowers made it to Bellicose

Capital or Eventide, and not to Martorello, so the damages question as to Martorello does not predominate.

B. As Recognized By This Court, Martorello Was Not The "De Facto Head" Of The Tribal Lending Business And His Role Changed During The Class Period.

To sidestep delving into Martorello's changing role, which would reflect the need for mini-trials for different class members, the district court relied on a general conclusion that "Martorello was the de facto head of the LVD's lending operations at all relevant times." JA1695-96, JA1720. To reach this general conclusion, the district court relied on "proof" that (1) "Martorello was functionally in charge of the lending business and the Tribal 'managers' were 'rather meaningless'"; (2) that "even after the LVD restructured the lending operations to avoid regulatory scrutiny, the evidence strongly shows that Martorello was still running the show," and that "[e]xcept for a few cosmetic changes . . ., the LVD lending operation by way of Big Picture continued as it had under the Red Rock structure." JA1695-96.

These conclusions are wrong. First, they are at odds with and usurp this Court's prior conclusion on the control factor that the Tribe was in charge of the lending business. JA520-24. Second, they conflict with

evidence submitted by Martorello. Three, they rely on unsupported and inaccurate conclusions reached in the Misrepresentation Opinion.

1. This Court already rejected the theory that Martorello ran the Tribe's lending business at all relevant times.

By comparing the Borrowers' prior appellate brief against this Court's opinion in *Williams*, the Court will plainly see that it already rejected the theory that Martorello ran the lending business. The Court should do so again.

The Borrowers emphasized Martorello's daily activity in the Tribe's business the last time around. Martorello "set[] up" the lending business and controlled its day-to-day operations. JA383-85. Martorello, rather than the Tribe, restructured the enterprise after state regulators sent a cease-and-desist letter to the Tribe and the Tribe unsuccessfully sought to enjoin further state enforcement. JA386-90. "[L]ittle about the actual lending operation changed" following the sale of Bellicose Capital to the Tribe, and the Tribe did not actually manage or oversee Big Picture or Ascension. JA39-95.

To argue against Big Picture and Ascension being considered arms of the Tribe, the Borrowers pointed to Martorello's alleged role as the de

facto head of the lending business. According to them, Martorello ran the day-to-day operations of Red Rock. JA413-14. They argued it was "Martorello's idea" to create Big Picture and Ascension and that the purpose of "the [lending] operation [was to] primarily benefit[] Martorello and his businesses rather than the tribe." JA414-20. They even claimed that the Tribe created Big Picture and Ascension in order to shelter Martorello "from the consequences of [his] otherwise illegal actions." JA424. Martorello supposedly maintains post-sale control over the lending operation through his longtime friend, the president of Ascension, whom the Tribe needs Eventide's approval to replace. JA421-23. SourcePoint also received too much money from the Tribal business, which therefore primarily enriched Eventide and Martorello. JA425-29. The "bottom line conclusion" advanced by the Borrowers was that "Big Picture and Ascension were created to provide cover for Martorello's illegal lending scheme." JA429.

This Court then rejected all of that.

The Court found that the Tribe created Big Picture and Ascension under Tribal law to ensure the longstanding existence of the Tribal businesses. JA510-14. Proceeds received from the lending business

benefitted the Tribe by funding numerous Tribal programs and services. JA514-16. The Tribe ensured that it secured revenue "both now and in the future." JA517. Outsourcing certain day-to-day aspects was allowed, because the servicing agreements and governance left control with the Tribe, and the tribal managers of Big Picture exercised that control "with frequency." JA521-23. The Tribe intended to share its immunity with Big Picture and Ascension. JA524. The Tribe relied on revenues of Big Picture to fund a substantial amount of its general fund. JA524-26. Finally, Big Picture and Ascension served the policies underlying tribal sovereign immunity, including tribal self-governance and tribal economic development. JA526-27. Finding otherwise would "weaken the Tribe's ability to govern itself according to its own laws, become self-sufficient, and development economic opportunities for its members." JA527.

The district court wrongly went along with the Borrowers' impermissible re-litigation of these conclusions.

2. Martorello's role decreased over time and virtually ended after the 2016 sale of Bellicose Capital to the Tribe.

As detailed above, over the course of their relationship, Red Rock took on tasks from SourcePoint as its knowledge grew, and so

Martorello's role correspondingly decreased. *Supra*, at 9-10; JA1413-16. His support for the Tribe's lending business ended entirely after selling Bellicose Capital to the Tribe in 2016. JA1886-88 (¶¶ 70-97) (detailing Martorello's non-involvement with Big Picture and Ascension).

3. The Misrepresentation Opinion is another faulty basis for concluding that Martorello's role was the same over the entire class period.

To start, aside from making clear error in its conclusions, the Misrepresentation Opinion erred by disturbing the settled law of the case.[10] "[W]hen a higher court reverses [on] one ground and remands a case without disturbing other determinations made by a lower court, the determinations not reversed continue to be the law of the case." *United States v. Kayser-Roth Corp.*, 103 F. Supp. 2d 74, 83 (D.R.I. 2000) (internal citations omitted). A district court may reconsider factual findings affirmed on appeal when the Fourth Circuit reverses with explicit instruction to redo rigorous analysis under Rule 23(a), *Soutter v.*

[10] Martorello contends that all of the district court's conclusions in the Misrepresentation Opinion are wrong and that he did not make any misrepresentations. JA812-72; JA1186-1256. Martorello also contends that the district court got wrong the purported effects of the alleged misrepresentations on the *Breakthrough* factors; none of them affect this Court's analysis in *Williams*. JA818-63.

Equifax Info. Servs., LLC, 307 F.R.D. 183, 191-92 (E.D. Va. 2015), but not after the Court affirmed the district court's factual findings, JA510, and reversed with instructions to dismiss Big Picture and Ascension. JA527. Moreover, the district court overreached in the Misrepresentation Opinion by concluding that Martorello's statements, which relate to disputed factual issues and were supported by substantial corroborating evidence, were misrepresentations. *Cf Soutter v. Equifax Info. Servs., LLC*, 299 F.R.D. 126, 128 (E.D. Va. 2014) (affiant made misrepresentation when affidavit stated he had personal knowledge of facts, but later conceded that he did not).

To grant class certification, the Court relied on three ill-founded conclusions it reached in the Misrepresentation Opinion to find that Martorello was the "de facto head of the LVD's lending operations at all relevant times," JA1719-20: (1) over both class periods, "Martorello was functionally in charge of the lending business and the Tribal 'managers' were rather meaningless"; (2) "even after the LVD restructured the lending operations to avoid regulatory scrutiny, the evidence strongly shows that Martorello was still running the show"; and (3) "[e]xcept for a

few cosmetic changes . . . the LVD lending operation by way of Big Picture continued as it had under the Red Rock structure." JA1694-96.

First, the district court found untrue Martorello's statement that the Servicing Agreement made Red Rock's co-managers ultimately responsible for all decisions regarding Red Rock's operations:

> As a consultant to Red Rock, I made suggestions and offered advice to Red Rock's co-managers. Red Rock's co-managers were ultimately responsible for all decisions regarding Red Rock's operation. I have never made a decision on behalf of Red Rock. No company I own or manage has ever made any decision on behalf of Red Rock. Any action I took on behalf of Red Rock was either authorized by my contractual relationship or delegated to me by Red Rock.

JA1230; JA1877 (¶ 22). The district court's conclusion was based largely on what it found to be the "rather meaningless role played by the Tribe's co-managers." JA1231. But this Court already rejected that argument when the Borrowers made it last time, JA383-85, by finding that outsourcing day-to-day operations was permitted, because the Tribal co-managers retained formal control over Big Picture's operations and that they exercised it with frequency. JA521-23.

The district court also concluded that Martorello lied when he said that he had "never taken any action to collect, in whole or in part, any consumer loan originated by Red Rock." JA1232-33; JA1878 (¶ 26). But

Martorello never took or received any payments from consumers as part of the Tribe's lending business, because "Red Rock was the entity that would collect through taking, receiving, or demanding payment." JA1951-52.[11] Bellicose VI's theoretical right to collect on consumer loans under the Servicing Agreement is irrelevant, JA1232-33, because none of Martorello's companies ever did. JA966-67.

Second and third, the district court concluded that "the evidence strongly shows that Martorello was still running the show" after the Tribe "restructured the lending operations to avoid regulatory scrutiny, JA1695; JA1232, and "[e]xcept for a few cosmetic changes . . ., the LVD lending operation by way of Big Picture continued as it had under the

[11] The district court misinterpreted Martorello's testimony that SourcePoint or Bellicose VI were not involved in the process of collecting money from consumers because "we did not take or receive any cash from the consumer." JA1233; JA951-52. There is no evidence that SourcePoint or Bellicose, or any other business associated with Martorello, ever took or received payments directly from consumers, JA1204-05, but the district court determined that Martorello only meant payments made in physical currency and that, instead, Bellicose collected consumer loans originated by Red Rock. JA1233. There is no basis for that conclusion. This uncharitable interpretation is representative of the flaws in the Misrepresentation Opinion as a whole.

Red Rock structure." JA1695-96; JA1239-40.[12] Rather than being tied to any statement in the Martorello Declaration, these conclusions appear to be lifted from a September 2019 declaration by Joette Pete, a former councilmember who was kicked off the Tribal Council in 2016:

> After the inception of the business, it was operated completely by Martorello until government regulators and litigation against competitors began. As these cases proceeded, efforts were made to create the appearance of the Tribe's involvement, but the Tribe had no substantive involvement.

JA1995 (¶¶ 3-4).[13]

The district court erred by relying heavily on a declaration from a disgruntled former member of the Tribal Council that she admitted was not based on her personal knowledge and had been written by the Borrowers' counsel. Ms. Pete was formerly Vice Chairman of the Tribe, but was involuntarily removed on August 12, 2016 as a result of tribal judicial proceedings brought against her. JA1943-44, JA1955. After being expelled, she cut off communications with members of the Tribal Council and stated that she is no longer friends with any member of the

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[12] It makes no sense that everything would stay the same with respect to Martorello's role before and after he sold his consulting companies to the Tribe in 2016.

[13] Before settling, Big Picture and Ascension moved to strike Ms. Pete's declaration. JA685-701.

Tribe, because there is no such thing as a friend because "[n]obody is honest" and "[n]obody is loyal." JA1954-57. Her ill-will toward the Tribe is palpable. *Id.*

Beyond her lingering bias, Ms. Pete later testified that she had no personal knowledge concerning much of the contents of her declaration related to the operations of the lending business, the main basis for the district court concluding that Martorello "ran the show." Despite stating that the lending business "was operated completely by Martorello," JA1995 (¶ 4), Ms. Pete never worked or performed any services for Red Rock, visited its office on the Reservation, or played any role in its day-to-day operations. JA1948-51. She was not sure whether Big Picture was even owned by the Tribe, never visited its office, and did not perform any services for it or had any role in its day-to-day operations. JA1952-53. Despite stating that "Martorello operated Red Rock exclusively for a significant amount of time after its inception," JA1996, she could not say how long that was. JA1991.

That the Borrowers' counsel wrote Ms. Pete's declaration for her makes clear how she was able to parrot the Borrowers' theories despite her lack of relevant personal knowledge. JA1973. The district court

should have rejected this unreliable evidence rather than embracing it, and it is a faulty foundation for finding that Martorello's role never changed over the class period.

IV. The District Court Violated The Mandate Rule In The Misrepresentation Opinion.

In the Misrepresentation Opinion, the district court improperly reconsidered prior factual findings and questions of contract interpretation that had been affirmed and reached by this Court in *Williams* when the Court concluded Big Picture and Ascension were arms of the Tribe and reversed and remanded with instructions to "grant the [Tribal] Entities' motion to dismiss for lack of subject matter jurisdiction."

"Few legal precepts are as firmly established as the doctrine that the mandate of a higher court is 'controlling as to matters within its compass.'" *United States v. Bell*, 5 F.3d 64, 66 (4th Cir. 1993) (quoting *Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 168 (1939)). "The mandate rule prohibits lower courts, with limited exceptions, from considering questions that the mandate of a higher court has laid to rest." *Doe v. Chao*, 511 F.3d 461, 465 (4th Cir. 2007); *Bell*, 5 F.3d at 66 (mandate rule "compels compliance on remand with the dictates of a superior court and

forecloses relitigation of issues expressly or impliedly decided by the appellate court"). Accordingly, "[w]hen matters are decided by an appellate court, its rulings, unless reversed by it or a superior court, bind the lower court." *Ins. Group Comm. v. Denver & Rio Grande W. R.Co.*, 329 U.S. 607, 612 (1947).

In *Williams*, this Court affirmed the district court's factual findings and reversed its legal conclusions. JA510 ("[W]e find no clear error in the district court's factual findings. Reviewing the district court's legal conclusions de novo, however, we hold that the [Tribal] Entities are entitled to sovereign immunity as arms of the Tribe and therefore reverse the district court's decision."). In addition to these rulings, this Court disregarded the Borrowers' invitation to remand for consideration of purported "new evidence," JA455-62, and instead gave the district court clear and unambiguous instructions to do only one thing on remand—"grant the [Tribal] Entities motion to dismiss for lack of subject matter jurisdiction." JA527. These instructions did not authorize reconsideration of factual findings the Fourth Circuit found supported by the record. The Borrowers pursued none of the procedural vehicles that

could have allowed for legitimate review or reconsideration of this Court's prior findings. *See* Fed. R. Civ. P. 60; Fed. R. App. P. 35.

In even entertaining the supposed misrepresentations, and then weighing in on them, the district court violated this Court's mandate. In the Misrepresentation Opinion, the district court identified specific factual findings that "could not have been made" in *Williams v. Big Picture Loans, LLC*, 329 F. Supp. 3d 248 (E.D. Va. 2018). JA1253. When denying Martorello's Motion for Interlocutory Appeal of the Misrepresentation Opinion, the district court claimed that it "simply is not true" that it had overruled previous factual findings on which this Court relied, and that "[n]othing was reversed" and "[n]othing was changed." JA1473. But when Martorello opposed class certification, the district court reprimanded him for "fail[ing] to take any of the Court's findings into account" when he relied on corroborating evidence and the facts affirmed and conclusions reached on appeal by this Court. JA1696. By now, it is obvious that, whatever the district court claims it has done, the district court improperly changed previous factual findings affirmed by this Court and is relying on new ones.

The district court had no foundation for deviating from the mandate rule. Notwithstanding the Borrowers' claim to the contrary, JA1287, there was not "significant new evidence, not earlier obtainable in the exercise of due diligence, [that] has come to light." *Doe*, 511 F.3d at 467. When the Borrowers raised the supposed misrepresentations after oral argument in *Williams*, the Tribal Entities responded that the Borrowers "had the vast majority (34/40) [of the documents that formed the basis of their misrepresentation allegations] in their possession well before [the Fourth Circuit held oral] argument in *Williams*; indeed, many since October 2018." JA464-65. Accordingly, there was no basis to permitting deviating from the mandate rule and the Misrepresentation Opinion should be vacated.

CONCLUSION

For the foregoing reasons, the district court's grant of class certificate should be reversed and the Misrepresentation Opinion vacated. In doing so, the Court should exercise its discretion to reassign

this and the related cases to a different district court judge to ensure faithful implementation of its mandate.[14]

Oral argument is respectfully requested.

Respectfully submitted,

MATT MARTORELLO

/s/ *Bernard R. Given II*

Bernard R. Given II
William N. Grosswendt
LOEB & LOEB, LLP
10100 Santa Monica Blvd., Suite 2200
Los Angeles, California 90067
(310) 282-2000

John D. Taliaferro
LOEB & LOEB, LLP
907 New York Ave. NW, Suite 300
Washington, DC 20001
(202) 618-5000

Attorneys for Appellant

[14] In addition to this case, two related cases are pending before the district court. *Galloway v. Big Picture, LLC*, Case No. 3:18-cv-00406, which involves near identical allegations against Martorello and Eventide. *Galloway v. Justin Martorello*, Case. No. 3:19-cv-00314, which involves allegations that Rebecca Martorello (Matt Martorello's wife) and Justin Martorello (Matt Martorello's brother) are RICO co-conspirators because Rebecca is the beneficiary of a trust into which Eventide transferred monies received from the tribal businesses and Justin was a former Bellicose employee and is a minority owner of Eventide.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B)(i) in that—according to the word-count feature of the word-processing program with which it was prepared (Microsoft Word)—the brief contains 12,356 words, excluding the portions exempted by Rule 32(f).

This brief complies with I further certify that the text of this petition complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a) because it is set in Century Schoolbook and is proportionately spaced with a typeface of 14 points.

/s/ Bernard R. Given II
Bernard R. Given II

CERTIFICATE OF SERVICE

On this 7th day of February, 2022, I electronically filed the foregoing using the Court's appellate CM/ECF system. Counsel for all parties to the case who are registered CM/ECF users will be served by that system.

/s/ Bernard R. Given II
Bernard R. Given II