IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

GLENDORA MANAGO, *et al., individually and on behalf of all others similarly situated,* *Plaintiffs,* v. **CANE BAY PARTNERS VI, LLLP, *et al.,*** *Defendants.*	Case No. 1:20-cv-00945-LKG

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT UNDER RULE 12(b)(6)

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I. INTRODUCTION

This is a case about Defendants'[1] scheme to make online short-term loans that carry triple-digit interest rates, often exceeding 800%, which are illegal in many states. In a tribal lending scheme such as the one alleged here, a non-tribal lender affiliates with a Native American tribe in an attempt to enhance the appearance of tribal ownership and insulate the scheme from federal and state law through the tribe's sovereign legal status and general immunity from suit under federal and state laws. Here, non-tribal Cane Bay Defendants ran the lender Makes Cents, a purportedly tribal entity of the Mandan, Hidatsa, and Arikara Nation (collectively, the "MHA Nation" or the "Tribe") that made usurious loans throughout the United States, including to Plaintiffs.

In the operative complaint, Plaintiffs[2] have sued Tribal Defendants and the Cane Bay Defendants alleging violations of RICO, state usury laws and consumer protection statutes. As to the Tribal Defendants, Plaintiffs seek only injunctive and declaratory relief under both RICO and state law. Plaintiffs seek damages from the Cane Bay Defendants. Pursuant to the Fourth Circuit's recent decision in *Hengle v. Treppa*, 19 F.4th 324, 356 (4th Cir. 2021), Plaintiffs' claims for declaratory and injunctive relief under RICO against the Tribal Defendants are no longer viable and must be dismissed. But *Hengle* does not impact the viability of Plaintiffs' claims against the Cane Bay Defendants. Nor does it impact the viability of Plaintiffs' state law claims against the Tribal Defendants for injunctive and declaratory relief.

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[1] Defendants are Kirk Chewning, David Johnson, Cane Bay Partners VI, LLLP ("Cane Bay") (Chewning, Johnson, and Cane Bay collectively are the "Cane Bay Defendants"), Richard Mayer, Karen Rabbithead, David Blacksmith, Wesley Scott Wilson (the "Tribal Lending Defendants"), Mark Fox, Cory Spotted Bear, Sherry Turner-Lone Fight, Mervin Packineau, V. Judy Grugh, Fred Fox, and Monica Mayer (the "Tribal Business Council Defendants"). The Tribal Lending Defendants and the Tribal Business Council Defendants together are the "Tribal Defendants." The Tribal Defendants and the Cane Bay Defendants are collectively the "Defendants."

[2] Plaintiffs are Glendora Manago, Karen Peterson, Diana Costa, Colleen Hunter, Sharon Davis, Leslie Turner, Camilla Vernon, and Lashaunya Morris.

Plaintiffs have plausibly pled all their claims against the Cane Bay Defendants as well as their state law claims for injunctive and declaratory relief against the Tribal Defendants. The Defendants' motion to dismiss Plaintiffs' RICO claims and Plaintiff Manago's state law claims (ECF No. 91 ("Mot.")) should be denied for at least four reasons.

First, Plaintiffs' RICO claims against the Cane Bay Defendants are plausibly alleged. Plaintiffs' First Amended Complaint (ECF No. 40, "FAC") sets forth in detail the lending scheme and the conspiracy among the Defendants to engage in usurious lending and collect unlawful debt. Plaintiffs have alleged the common purpose of profiting off the collection of unlawful debt, and well-defined roles for each of the scheme's members. Courts in this Circuit have routinely denied motions to dismiss in similar cases involving tribal lending schemes. The Cane Bay Defendants' argument that Plaintiffs have not satisfied the "distinctiveness" requirement and that the RICO claim is barred by the intracorporate conspiracy doctrine is wrong. Plaintiffs allege no corporate familial relationship between the Cane Bay Defendants and Makes Cents. The Cane Bay Defendants are alleged to be neither Makes Cents' parents nor its principals. To the contrary, Plaintiffs allege that the Tribe and Uetsa Tsakits, Inc. (another tribal entity) retained authority and control over Makes Cents. Plaintiffs also allege the Cane Bay Defendants entered into an agreement with the Tribe to collect on debt that is unlawful, both for purposes of RICO and Maryland state law. Plaintiffs have thus alleged a distinct enterprise, and a conspiracy that is not barred by the intracorporate conspiracy doctrine.

Second, Plaintiff Manago has plausibly pled her Maryland Consumer Loan Law ("MCLL") and Maryland Consumer Protection Act ("MCPA) claims. Contrary to Defendants' claim, the MCLL provides a private right of action. The MCLL prohibits unlicensed lenders from making small loans and limits the interest rates that can be charged for such loans. Plaintiff Manago

alleged that the Cane Bay Defendants control and operate the lending entity that issued usurious loans, MaxLend. Thus, Plaintiff Manago has plausibly alleged that the Defendants violated the MCLL. Plaintiff Manago also adequately alleges "unfair, abusive, or deceptive trade practices" in violation of the MCPA. Among other things, Plaintiff Manago alleges Defendants' failure to disclose the *fact* that they were not licensed as a lender in Maryland. This omission, standing alone, constitutes a sufficiently unfair and deceptive practice to satisfy the requirements of the MCPA.

Third, Plaintiffs' claims for unjust enrichment and civil conspiracy are properly alleged. The Cane Bay Defendants were unjustly enriched by these loans, retaining nearly all the profits as a result of their charging and collecting on illegal, usurious interest rates. Defendants all further engaged in a conspiracy to violate state lending laws. Nothing more is required at this stage in the case.

Finally, Plaintiffs' claims for injunctive and equitable relief against the Tribal Defendants for violations of *state law*, including the MCLL, are properly asserted under *Hengle*, 19 F.4th at 349. Defendants offer no meritorious argument otherwise.

Defendants' tribal lending scheme is neither novel nor ingenious. Numerous courts have upheld similar allegations to Plaintiffs' as sufficient under Rule 12. While *Hengle* impacted Plaintiffs' RICO claims against the Tribal Defendants for injunctive relief, Plaintiffs' remaining allegations about the illegality of Defendants' scheme to issue and collect on usurious loans more than exceed the plausibility standard required at this stage. Accordingly, with the exception of Plaintiffs' claims for equitable relief under RICO against the Tribal Defendants, Defendants' motion should be denied in full.

II. FACTS

This case is one of many cases in recent years that has challenged nominally "tribal" lending schemes. In this case, the Cane Bay Defendants sought to use the MHA Nation in North Dakota to insulate their predatory lending scheme from federal and state law by piggy-backing on the Tribe's sovereign legal status. (FAC ¶¶ 1–11, 110.) Nearly all states in the United States, including Maryland, prohibit usurious lending and require lenders to be licensed by the state. Maximum interest rates on unsecured and/or small loans are set between 10% and 33%. (*See* FAC ¶¶ 39-79.)

Defendants Johnson and Chewning organized Cane Bay for the purpose of evading state usury laws and collecting illegal interest on illegal short-term loans from consumers throughout the United States. (*Id.* ¶ 79.) In addition to organizing Cane Bay, Johnson and Chewning own a consulting firm, which offers "turnkey" lending solutions to payday lenders and is affiliated with an information system technology company, TranDotCom, where Defendants Johnson and Chewning were executives, that keeps records for online payday lenders. (*Id.* ¶¶ 81–82.)

To circumvent state usury and licensing laws, the Cane Bay Defendants affiliated their company with the MHA Nation as early as 2011. (*Id.* ¶¶ 88–91.) As part of the scheme to evade these laws, the MHA Nation holds itself out as a tribal lender through its nominally tribal company, Makes Cents, Inc., which operates under the name "MaxLend" (a subsidiary of the Tribe since 2013). (*Id.* ¶¶ 83–84, 89, 106.) Beginning in 2013, MaxLend offered short term loans, charging up to 841.4532% in annual interest on loans up to $2,500. (*Id.* ¶¶ 85, 94, 95.)

Although MaxLend serves as the nominal lender of the loans, it is merely a front for Johnson's and Chewning's business, which is operated through non-tribal entity Cane Bay and other non-tribal companies associated with Defendants Johnson and Chewning. (*Id.* ¶¶ 86, 100.) The Cane Bay Defendants, along with other entities affiliated with Defendants Johnson and

Chewning, run the lending business and, along with TranDotCom, direct the operations of the Tribe's lending websites, including MaxLend.com. This includes securing funding, registering domains, designing the websites, marketing the business, underwriting and approving loans, and analyzing returns to adjust lending algorithms. (*Id.* ¶¶ 87, 95–96.) Makes Cents' executive staff, its Board of Directors, and the Tribal Business Council, however, retain authority and control over Makes Cents. (*Id.* ¶ 107.)

To accomplish the scheme, the Tribal Defendants acquiesce in, and facilitate the illegal lending enterprise, and enable the Cane Bay Defendants to exploit tribal sovereign immunity and shield the usurious loans from perceived liability. (*Id.* ¶¶ 101–13.) In return for the appearance of sovereignty, the MHA Nation receives a tiny percentage of the revenue generated from loans made through MaxLend—likely less than 2%. (*Id.* ¶ 100.)

With the "tribal" lending scheme in place, MaxLend issued loans to Plaintiffs, including Plaintiff Manago, at rates far above the limit allowed by each Plaintiff's state usury laws. Plaintiff Manago is a resident of Maryland, and the other Plaintiffs are residents of Florida, Texas, North Carolina, Oregon, Michigan, and South Carolina. All Plaintiffs took out a loan or loans with MaxLend over the internet with interest rates well in excess of those allowed by state usury laws, and made payments on those loans. (*Id.* ¶¶ 114–34.) Plaintiffs bring claims on behalf of a National Class of U.S. residents who entered into loan agreements with MaxLend and subclasses comprised of the respective residents of each state where the Named Plaintiffs reside. (*Id.* ¶¶ 135–42.)

Plaintiff Manago filed her initial class action complaint against the Cane Bay Defendants, alleging claims under RICO and Maryland law. (ECF No. 1.) Following the Cane Bay Defendants' first motion to dismiss, Plaintiffs filed the First Amended Complaint, adding additional Plaintiffs and also alleging claims against the Cane Bay Defendants and the Tribal

Defendants under RICO and each Plaintiff's respective state law. (FAC, ECF No. 40.) In the FAC, Plaintiffs allege that the Cane Bay Defendants violated RICO and state usury laws and consumer protection statutes, were unjustly enriched, and engaged in civil conspiracy. (FAC, Causes of Action I–XVIII.) Plaintiffs seek damages, treble damages, disgorgement of illegal gains, injunctive relief, and attorneys' fees and costs from the Cane Bay Defendants. Plaintiffs also allege that the Tribal Defendants violated RICO and the same state laws, and seek related injunctive and declaratory relief from the tribal officials in their official capacities only. (FAC, Causes of Action XIX–XXI.)

While the Fourth Circuit decided issues relevant to this case in *Hengle v. Treppa*, 19 F.4th 324 (4th Cir. 2021), this Court stayed Defendants' response to the FAC. (ECF No. 83.) Following the Fourth Circuit's decision in *Hengle*, Defendants filed the motions to dismiss for lack of personal jurisdiction (ECF No. 90) and for failure to state a claim (ECF No. 91), which are currently at issue. Plaintiffs now respond, opposing Defendants' motions. While Plaintiffs agree that injunctive relief against the Tribal Defendants under RICO is unavailable post-*Hengle*, and that Count XIX should be dismissed, Plaintiffs' remaining claims, including Counts XX and XXI, which seek injunctive relief under state law, remain viable.

III. LEGAL STANDARD

To survive a Fed. R. Civ. P. 12(b)(6) motion to dismiss, a complaint need only allege enough facts to state a plausible claim for relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is plausible when "the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556). When evaluating the sufficiency of a complaint's allegations, the court must accept the factual allegations

as true and construe them in the light most favorable to the plaintiff. *Nemet Chevrolet, Inc. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 253 (4th Cir. 2009); *Lambeth v. Bd. of Comm'rs of Davidson Cnty.*, 407 F.3d 266, 268 (4th Cir. 2005) (citations omitted).

IV. ARGUMENT

A. Plaintiffs Plead a RICO Claim Against the Cane Bay Defendants.

1. Plaintiffs Plead a RICO Enterprise, Including the Purpose and Roles of the Enterprise's Members.

Plaintiffs allege a RICO enterprise that includes the Cane Bay Defendants and Tribal Defendants (along with the unnamed officers, executives, and other employees of Cane Bay, MaxLend, and Cane Bay Defendants' other companies involved in the scheme), which sought to shield Defendants' usurious loans from liability using the Tribe's sovereign immunity.

A RICO "enterprise is an entity, for present purposes a group of persons associated together for a common purpose of engaging in a course of conduct." *United States v. Turkette*, 452 U.S. 576, 583 (1981). To satisfy RICO "an association-in-fact enterprise must have at least three structural features: a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise's purpose." *United States v. Boyle*, 556 U.S. 938, 946 (2009). Defendants challenge only the first two structural features, contending that Plaintiffs have not alleged the enterprise's common purpose or the roles of its members. (ECF No. 91-1 ("Defs.' 12(b)(6) Br.") at 9.) But in doing so, Defendants misinterpret caselaw and focus narrowly on only some of Plaintiffs' enterprise allegations, rather than considering the complaint as a whole. *See Pizzella v. Peters*, 410 F. Supp. 3d 756, 762 (D. Md. 2019) ("In considering a Rule 12(b)(6) motion, a court must examine the complaint as a whole, consider the factual allegations in the complaint as true, and construe the factual allegations in the light most favorable to the plaintiff.").

As to the enterprise's purpose, Plaintiffs have alleged that the purpose of the enterprise was to "profit[] off of the collection on unlawful debt by offering and collecting on loans to consumers throughout the United States through the online lender MaxLend." (FAC ¶ 151.) Defendants "Johnson and Chewning organized Cane Bay for the purpose of evading state usury laws, and collecting illegal interest on short-term loans from customers located throughout the United States . . . ." (*Id.* ¶ 79.) And "[r]ather than complying with state lending and licensing requirements, Cane Bay Defendants entered into a tribal lending scheme with the [MHA] Nation." (*Id.* ¶ 83.) "In a tribal lending scheme, the lender affiliates with a Native American tribe to attempt to enhance the appearance of tribal ownership and insulate the scheme from federal and state law by piggy-backing on the tribe's sovereign legal status and the tribe's general immunity from suit under federal and state laws." (*Id.* ¶ 6.) Here, Makes Cents is the tribal entity operationalized to shield the scheme from state usury laws. (*Id.* ¶¶ 96, 110.)

Plaintiffs also allege Defendants' specific roles in the enterprise. The Cane Bay Defendants and their other companies involved in the scheme direct the lending business, while the Tribal Defendants serve as the nominal lender of the usurious loans in an attempt to provide the appearance of sovereign immunity. As Plaintiffs allege, "Johnson, Chewning, Cane Bay, and other entities affiliated with Johnson and Chewning, run the lending business, including securing funding registering domains, designing websites, marketing the business, underwriting and approving loans, and analyzing returns to adjust the lending algorithms." (FAC ¶ 87.) Makes Cents, which is owned by the Tribe and Uetsa Tsakits, Inc. (where the Tribal Defendants serve as officers, on the Board of Directors, or on the Tribal Business Council), is "the nominal lender" of the usurious loans as "part of a coordinated effort intended to enable Cane Bay Defendants to exploit Tribal sovereign immunity and shield usurious loans from perceived liability under state

and federal law." (*Id.* ¶¶ 11, 28–38, 103, 105–06, 110.) The Tribal Defendants still maintain control over the lender. (*Id.* ¶¶ 107–08.)

Plaintiffs have adequately alleged an enterprise under RICO, including a common purpose and its members' roles. As confirmed by numerous other similar tribal lending cases, these allegations are sufficient. *See Hengle v. Asner*, 433 F. Supp. 3d 825, 897–98 (E.D. Va. 2020), *aff'd sub nom. Hengle v. Treppa*, 19 F.4th 324 (4th Cir. 2021) (denying motion to dismiss RICO claims against non-tribal participants where alleged facts showed defendants "did not merely participate in the alleged enterprise through their ordinary business activity, but helped to devise and structure an associated group of individuals and businesses that issued and collected unlawful debts under the auspices of the Tribe while in fact funneling most of the revenues to nontribal entities and individuals"); *Gibbs v. Haynes Invs., LLC*, 368 F. Supp. 3d 901, 932-33 (E.D. Va. 2019), *aff'd*, 967 F.3d 332 (4th Cir. 2020) (denying motion to dismiss where defendants "helped design and implement the Tribal lending business"); *Solomon v. Am. Web Loan*, No. 17-145, 2019 WL 1320790, at *6–7 (E.D. Va. Mar. 22, 2019) (denying motion to dismiss RICO claim in tribal lending case); *MacDonald v. CashCall, Inc.*, No. 16-2781, 2017 WL 1536427, at *13–14 (D.N.J. Apr. 28, 2017) (denying motion to dismiss where defendants were "deeply involved in—and integral to—the operation of the enterprise, with each of them performing specific acts in furtherance of a scheme with the express purpose of making, servicing, and collecting on usurious loans") (internal quotation marks omitted).

2. The Tribal and Non-Tribal Members of the Enterprise are Distinct From Each Other.

Plaintiffs also allege an enterprise that is distinct from its members, which includes both tribal and non-tribal entities. Liability under Section 1962(c) requires "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." *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 161 (2001). "A 'person' can be an individual or corporate entity." *Chambers v. King Buick GMC, LLC*, 43 F. Supp. 3d 575, 588 (D. Md. 2014). The "person" who violates Section 1962(c) must be distinct from the "enterprise," which is the tool used to carry out illegal activity. *Cedric Kushner*, 533 U.S. at 162–63. To be distinct, Section 1962(c) "requires no more than the formal legal distinction between 'person' and 'enterprise' (namely, incorporation) . . . ." *Id.* at 165.

Here, the enterprise consists of "each named Defendant and the unnamed officers, executives, and other employees of Cane Bay, MaxLend, and Cane Bay Defendants' other companies involved in the scheme . . . ." (FAC ¶¶ 151, 164; *see also* ¶ 254.) Because this enterprise includes "persons" that are legally distinct from one another, the enterprise is distinct from its members. *See Hengle*, 433 F. Supp. 3d at 897–98 (tribal and non-tribal entities were distinct where the non-tribal entities "performed nearly all of the operations of the Tribal Lending Entities" while engaged in a coordinated effort "to shield the entities from perceived liability"), *aff'd sub nom. Hengle*, 19 F.4th 324 (4th Cir. 2021); *Solomon*, 2019 WL 1320790, at *6–7 (tribal entities that "created tribal business[es]" and "serve[d] as the nominal lender of the illegal loans" were distinct from the non-tribal entities that "provided [the] financial backing . . . [and] direct[ed] the scheme"); *MacDonald*, 2017 WL 1536427, at *14 ("limited liability company" owned by member of the tribe that "entered into contracts with the RICO Defendants and received a percentage of . . . each executed loan" was "a separate legal entity with a different owner than Defendants," despite allegations that it was a front for the lending scheme), *aff'd* 883 F.3d 220 (3d Cir. 2018).

Defendants assert that Makes Cents (a tribal entity) cannot be considered distinct from the Cane Bay Defendants (non-tribal entities), because Makes Cents is alleged to be a front for the

Cane Bay Defendants. (Defs.' 12(b)(6) Br. at 10.) But Defendants are wrong that mere allegations that one entity exerts *some control* over another entity is sufficient to defeat *distinctiveness* under RICO. *See MacDonald*, 2017 WL 1536427, at *14 (rejecting argument that a tribal entity could not be distinct from the defendants because it was a front for the tribal lending scheme, because the tribal entity's "tribal connection was used by Defendants to evade state and federal laws"), *aff'd* 883 F.3d 220 (3d Cir. 2018); *United States v. Bergrin*, 650 F.3d 257, 266 (3d Cir. 2011) (holding an enterprise "comprised of members that are a mixture of individual persons and 'entities that they control'" can "satisfy the 'distinctiveness' requirement") (citation omitted); *Lewis Family Grp. Fund LP v. JS Barkats PLLC*, No. 16-5255, 2021 WL 1203383, at *6 (S.D.N.Y. Mar. 31, 2021) (finding the plaintiffs "sufficiently pleaded that the RICO persons and enterprise are distinct" with one defendant "owning and controlling" the other two defendants) (citation omitted), *R&R adopted* 2021 WL 4341080 (S.D.N.Y. Sept. 23, 2021).

Indeed, the cases Defendants cite do not hold that entities are indistinct from the enterprise merely because one supposedly "controlled" the other. Instead, they turn on formal corporate relationships not alleged here. *See Ray v. Spirit Airlines, Inc.*, 836 F.3d 1340, 1357 (11th Cir. 2016) ("[N]o distinction between the corporate defendant and an enterprise composed of the corporation and some of its corporate officers."); *Bailey v. Atl. Auto. Corp.*, 992 F. Supp. 2d 560, 582–83 (D. Md. 2014) (no distinctiveness for an enterprise consisting of a "parent and its wholly owned subsidiaries"); *Mitchell Tracey v. First Am. Title Ins. Co.*, 935 F. Supp. 2d 826, 843 (D. Md. 2013) (denying motion to dismiss because the defendant and its title agents comprised an enterprise "separate and distinct" from the defendant); *Myers v. Lee*, No. 10-131, 2010 WL 3745632, at *4 (E.D. Va. Sept. 21, 2010) (no distinctiveness when "[t]here is a complete overlap between the defendants, their alleged agents, and the enterprise"); *Khurana v. Innovative Health*

Care Sys., 130 F.3d 143, 155 (5th Cir. 1997) (corporate parent and its subsidiary, employees, and agents are not distinct), *vacated as moot, Teel v. Khurana*, 525 U.S. 979 (1998).

And, in any event, Defendants ignore allegations showing that Makes Cents is controlled by the Tribe and Uetsa Tsakits, Inc., not the Cane Bay Defendants. (FAC ¶ 108 (alleging "[a]uthority and control over Makes Cents and its operations remain at all times with Makes Cents' executive staff, its Board of Directors, and the Tribal Business Council.").) Even though Makes Cents is a front for the Cane Bay Defendants' business of issuing and collecting on illegal loans, the authority and control over Makes Cents remain in tribal entities that are distinct from the Cane Bay Defendants.

For the same reasons, Defendants' reliance on *Inetianbor v. Cashcall, Inc.*, No. 13-60066, 2016 WL 4250644 (S.D. Fla. Apr. 5, 2016), *appeal dismissed* 2017 WL 4863112 (11th Cir. Jun. 19, 2017), is also misplaced. Not only was the court in *Inetianbor* considering Florida state law, not the federal RICO statute pleaded here, but the plaintiffs there alleged that the de facto lender, "CashCall[,] 'controlled and supported' [the nominal lender], and that the activities of [the nominal lender] therefore may be attributed to CashCall." *Id.* at *6. There are no such allegations here. The tribal entities here still maintain control over the lender itself.

Defendants further argue that "Plaintiffs fail to allege that the 'the unnamed officers, executives, and other employees' of the entities within the alleged enterprise do anything other than conduct Cane Bay's and the other entities' normal business functions" and therefore distinctiveness is lacking. (Defs.' 12(b)(6) Br. at 12.) But, as explained above, the members of the enterprise are neither agents nor employees of one another. In addition, issuing and collecting unlawful debt are not part of a corporation's "regular affairs." *See Mitchell Tracey v. First Am. Title Ins. Co.*, 935 F. Supp. 2d 826, 844 (D. Md. 2013) (the unlawful acts of the defendant and its

title agents "deliberately overcharg[ing] and misappropriate[ing]" funds for title insurance in violation of state law "are not conducted in the ordinary course of business") (citing *Levine v. First Am. Title Ins. Co.*, 682 F. Supp. 2d 442, 461 (E.D. Pa. 2010)).

B. Plaintiffs Plead a RICO Conspiracy Involving the Cane Bay Defendants.

Plaintiffs have plausibly pleaded a RICO conspiracy that the Cane Bay Defendants conspired with the Tribe to collect unlawful debt under 18 U.S.C. § 1962(d). "[T]o prove a RICO conspiracy, two things must be established: '(1) that two or more people agreed to commit a substantive RICO offense and (2) that the defendant knew of and agreed to the overall objective of the RICO offense.'" *Solomon*, 2019 WL 1320790 at *11 (quoting *United States v. Posada-Rios*, 158 F.3d 832, 857 (5th Cir. 1998)). "Proof of an agreement to commit the overall objective of the RICO offense 'may be established solely by circumstantial evidence.'" *Solomon*, 2019 WL 1320790, at *11 (quoting *Posada-Rios*, 158 F.3d at 857).

Here, as Plaintiffs allege, "[b]y 2011, Johnson, Chewning, and Cane Bay had approached the MHA Nation to set up online lending websites," and by "[n]o later than 2013, the Tribe entered into an agreement with Cane Bay to provide 'management consulting, service provider analysis, and risk management services' to Makes Cents, Inc. and to operate a number of lending websites" to issue and collect on usurious loans throughout the United States. (FAC ¶¶ 88, 95.) The existence of this agreement is supported by the Cane Bay Defendants' running of the Makes Cents lending business, and the specific steps Defendants took to create the entities that function together to achieve the conspiracy to violate state law. (FAC ¶¶ 85–96, 100.)

Plaintiffs' allegations are not merely "conclusory," as characterized by Defendants. (Defs.' 12(b)(6) Br. at 13-14.) The single case Defendants cite to argue that Plaintiffs' allegations are insufficient involved threadbare allegations of an agreement, supported only by a declaration filed

in an entirely different case that was silent on the existence of an agreement. *See Rojas v. Delta Airlines, Inc.*, 425 F. Supp. 3d 524, 538 & n.8 (D. Md. 2019). Here, Plaintiffs' conspiracy allegations are far more detailed, and adequately plead a conspiracy to violate RICO. *See Hengle*, 433 F. Supp. 3d at 898 (finding allegations of "multiple business arrangements" between the defendants and other entities in the enterprise adequate to allege a RICO conspiracy to collect unlawful debts); *Day v. DB Capital Grp.*, No. 10-1658, 2011 WL 887554, at *7 (D. Md. Mar. 11, 2011) (finding conspiracy allegations sufficient where plaintiff's complaint referenced specific instances when alleged co-conspirators met and engaged in acts to defraud plaintiff). Defendants' motion to dismiss Plaintiffs' RICO conspiracy claim should be denied.

Defendants' effort to apply the intracorporate conspiracy doctrine to bar Plaintiffs' claims fails. (Defs.' 12(b)(6) Br. at 13.) In Defendants' view, when the Cane Bay Defendants conspired with the other tribal and non-tribal entities in the enterprise to collect unlawful debt, they were really just conspiring with themselves. This is nonsense. Numerous courts have rejected the application of the intracorporate conspiracy doctrine to civil RICO conspiracies.[3] Even assuming it is applicable here, the doctrine does not apply where members of the conspiracy are separate corporate entities affiliated only through the conspiracy. "The intracorporate conspiracy doctrine recognizes that a corporation cannot conspire with its agents because the agents' acts are the corporation's own." *Painters Mill Grille, LLC v. Brown*, 716 F.3d 342, 352 (4th Cir. 2013). Thus,

[3] In *Cedric Kushner*, the Supreme Court held that the intracorporate conspiracy doctrine "turns on specific antitrust objectives" and thus does not apply to Section 1962(c). 533 U.S. at 166. Following this decision, the Eleventh Circuit held that the doctrine also does not apply to civil RICO conspiracies under Section 1962(d). *Kirwin v. Price Commc'ns Corp.*, 391 F.3d 1323, 1327 (11th Cir. 2004) ("[T]he intracorporate conspiracy doctrine cannot be invoked to defeat a § 1962(d) claim. Corporations and their agents are distinct entities and, thus, agents may be held liable for their own conspiratorial actions.") (citing *Cedric Kushner*, 533 U.S. at 163). The Fourth Circuit has not decided the doctrine's viability in the context of Section 1962(d).

it is only when there is "a conspiracy between a corporation and its agents, acting within the scope of their employment" that the doctrine applies. *Marmott v. Maryland Lumber Co.*, 807 F.2d 1180, 1184 (4th Cir. 1986).

Defendants seek to extend the intracorporate conspiracy doctrine from agents and subsidiaries to any "other corporate affiliate[]," Defs.' 12(b)(6) Br. at 13, but the doctrine does not extend that far, and the case Defendants cite for that proposition stands for no such thing. In *Bailey*, the Court held that the intracorporate conspiracy doctrine applied to "sister corporations wholly owned by the same parent," and the fact that one of the defendants "100%-owned" the other conspirators barred the conspiracy claim. 992 F. Supp. 2d at 567–68. *Bailey* did not purport to apply the intracorporate conspiracy doctrine beyond agents and subsidiaries. The Cane Bay Defendants and the Tribal Defendants are not alleged to be in a principal-agent or parent-subsidiary relationship. The Cane Bay Defendants consist of Defendants Johnson and Chewning and their company, Cane Bay Partners VI, LLLP. (FAC ¶ 11.) The Tribal Defendants are officers, on the Board of Directors, or on the Tribal Business Council of the Tribe and Uetsa Tsakits, Inc., which own Makes Cents. (*Id.* ¶¶ 103–06.) Neither an agent nor a parent/subsidiary relationship is alleged here, so *Bailey* is inapplicable.

For the same reason that the Cane Bay Defendants' use of Makes Cents for their usurious lending business does not make them the same entity for purposes of RICO's distinctiveness requirement, it also does not make Makes Cents an agent or subsidiary of the Cane Bay Defendants for purposes of the intracorporate conspiracy doctrine. *See Commonwealth of Pa. v. Think Finance, Inc.*, No. 14-7139, 2016 WL 183289, at *18 (E.D. Pa. Jan. 14, 2016) (finding the intracorporate conspiracy doctrine did not bar a rent-a-bank and rent-a-tribe conspiracy involving the non-tribal defendants, a federal bank, and tribes). The intracorporate conspiracy doctrine does

not bar Plaintiffs' RICO conspiracy claim.

C. Plaintiff Manago States a Claim Under the Maryland Consumer Loan Law.

Plaintiff Manago asserts that both the Cane Bay Defendants and Tribal Defendants violated the MCLL.[4] Consistent with Supreme Court law interpreting statutes with language nearly identical to the MCLL, the Court should find that the MCLL provides Plaintiff Manago a private right of action and that she has plausibly pleaded that both the Cane Bay Defendants and the Tribal Defendants violated the law.

1. MCLL Sections 12-302, 12-306, and 12-314 Provide a Private Right of Action.

The MCLL provides a private right of action to borrowers to hold unlicensed lenders and lenders that charge usurious rates accountable. The statutory text does not expressly state that a borrower can bring an action, however, by declaring that loans that violate the law are "void and unenforceable" and that lenders may not retain any compensation with respect to such a loan, the text of Section 12-314 plainly implies a private right of action. Other sections of the MCLL expressly empower the courts to order a refund of such monies directly to a borrower.

To determine whether a Maryland statute provides a private cause of action, "'[t]he central inquiry remains whether [the legislative body] intended to create, either expressly or by implication, a private cause of action.'" *Baker v. Montgomery Cty.*, 50 A.3d 1112, 1123 (Md. 2012) (quoting *Touche Ross & Co. v. Redington*, 442 U.S. 560, 575 (1979)). Under Maryland law, courts look at several factors:

[4] Defendants only move under Rule 12(b)(6) to dismiss Plaintiff Manago's claims under Maryland state law. Defendants do not move to dismiss under Rule 12(b)(6) any other Plaintiff's state law claims, instead proceeding solely on the theory that those state law claims must be dismissed for lack of jurisdiction. (*See* Defs.' 12(b)(6) Br. at 3 n.5.) That contention is wrong, as described in the concurrently filed opposition to Defendants' motion to dismiss the out-of-state Plaintiffs' claims for lack of personal jurisdiction and improper venue. This memorandum therefore only addresses the Maryland state law claims raised by Plaintiff Manago.

> First, is the plaintiff one of the class for whose especial benefit the statute was enacted. Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff?

Baker, 50 A.3d at 1122. Overall, "[t]he question whether a statute creates a cause of action, either expressly or by implication, is basically a matter of statutory construction." *Transamerica Mortg. Advisors, Inc. (TAMA) v. Lewis*, 444 U.S. 11, 15 (1979); *Fangman v. Genuine Title, LLC*, 136 A.3d 772, 786 (Md. 2016) ("[T]he question of whether a private right of action exists is a matter of statutory construction.").

a. Plaintiffs are part of the class for whom the MCLL was enacted.

Here, Defendants concede that the Plaintiffs are one of the classes of people for whom the MCLL was enacted. (Defs.' 12(b)(6) Br. at 18 n. 14.) This conclusion is self-evident. The purpose of the MCLL is to protect borrowers from the ills caused by unregulated small-dollar, high interest lenders and Plaintiffs are those borrowers. This factor weighs heavily in finding an implied right-of-action: "If a statute's language provides a right to a particular class of persons, there is a strong inference that the legislature intended the statute to carry an implied cause of action." *Baker*, 50 A.3d at 1123.

b. The statutory text implies that the Legislature intended to provide a private right of action.

The MCLL provisions at issue in this case contemplate a private right of action in the plain text of the statute. The MCLL expressly empowers "courts to order a refund to a borrower of moneys collected in violation of this subtitle." Md. Comm. L. Code § 12-316.1(c). Sections 12-302, 12-306, and 12-314 are contained within the same "subtitle" as Section 12-316.1—Subtitle 3 of Title 12 of the Maryland Commercial Law. Section 12-302 contains a licensing requirement while Section 12-306 limits the interest rates that can be charged on certain loans. Section 12-314

enumerates the specific remedies available for violations of Sections 12-302 and 12-306 by providing that a loan "is void and unenforceable if" "a person contracts for a loan that has a rate of interest, charge, discount, or other consideration greater than that authorized under State law" or "[a] person who is not licensed under or exempt from the licensing requirements [referenced in Section 12-302] made the loan." Md. Comm. L. Code § 12-314(b)(1)(i). Section 12-314 then enumerates the rights of a borrower as to a lender who has made a "void and unenforceable" loan, providing that the lender may not "receive or retain any principal, interest, fees, or other compensation with respect to" such a loan, "[c]ollect or attempt to collect, directly or indirectly, any amount from the borrower;" or "[e]nforce or attempt to enforce the contract against any property securing the loan," among other penalties. *Id.* § 12-314(b)(2), (d).

Courts frequently find implied private rights of action in statutory provisions that void illegal contracts. For example, the Supreme Court considered whether similar language in the Investment Advisers Act of 1940, 15 U.S.C. § 80b–1, *et seq*. created a private right of action where the Act "does not explicitly provide any private remedies whatever." *TAMA*, 444 U.S. at 18. The Court held that "[b]y declaring certain contracts void," "the statutory language itself fairly implies a right to specific and limited relief in a federal court." *Id.* (emphasis added). The Court stated that "[a] person with the power to void a contract ordinarily may resort to a court to have the contract rescinded and to obtain restitution of consideration paid." *Id.* The Court thus held that "when Congress declared in § 215 that certain contracts are void, it intended that the customary legal incidents of voidness would follow, including the availability of a suit for rescission or for an injunction against continued operation of the contract, and for restitution." *Id.* at 19. *See also Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 388 (1970) (holding that § 29(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78cc(b), confers a "right to rescind" a contract void under the

criteria of the statute); *Oxford Univ. Bank v. Lansuppe Feeder, LLC*, 933 F.3d 99, 104 (2d Cir. 2019) (holding that statutory language declaring certain contracts to be "unenforceable" "unambiguously evinces Congressional intent to authorize a private action"); *Charles O. Bradley Trust v. Zenith Capital LLC*, No. 04-02239, 2008 WL 3400340, *2 (N.D. Cal. Aug. 11, 2008) (agreeing with *TAMA* that statute declaring contracts void provided equitable remedies including "rescission of the investment adviser's contract, which includes return of all consideration.").

Here, the remedies set forth in Section 12-314 are similar to the "customary legal incidents of voidness," which the Supreme Court observed in *TAMA*, such as "a suit for rescission," "an injunction against continued operation of the contract," and "restitution." In short, the text and structure of the MCLL indicates a legislative intent to provide wronged borrowers with remedies against those making illegal loans.

Defendants posit that there is "nothing in the MCLL's legislative history that the legislature intended to create an implied private right of action." (Defs.' 12(b)(6) Br. at 20.) This is wrong for several reasons. First, MCLL in some form has been present in Maryland law for over 100 years. *Price v. Murdy*, 198 A.3d 798, 800 (Md. 2018) ("Maryland's licensing requirement for lenders of small loans dates to a 1912 Act."). In 1912, "the General Assembly sought to protect consumers of small loans against far more than just usury: the Act, among other things, required licensing of 'petty loan brokers,' capped certain fees depending on the amount borrowed, and mandated disclosure of the loan's terms to the borrower." *Id.* Various additional protections were added to the Law over the years and in 1975, it was renamed the Maryland Consumer Loan Law. *Id.* The MCLL consists of Subtitle 3 of Chapter 12 of Maryland Commercial Law Code and the licensing provisions set forth in Subtitle 2 of Chapter 11 of the Maryland Commercial Law Code. Md. Comm. L. Code § 12-317. Given the age and history of the statute, it is unsurprising that

there is no legislative discussion of whether the MCLL creates private rights of action, especially since the modern test for implied rights of action was not articulated until 1975 in *Cort v. Ash*, 422 U.S. 66 (1975).

Second, as various courts have noted, there is a "sparsity of legislative history accompanying Maryland state legislation" as compared to federal Congressional acts. Courts have therefore found that legislative history carries "little weight." *IVTx, Inc. v. United Healthcare of Mid-Atl., Inc.*, 112 F. Supp. 2d 445, 447 (D. Md. 2000); *see also Scull v. Drs. Groover, Christie & Merritt, P.C.*, 45 A.3d 925, 932 (Md. Ct. Spec. App. 2012), *reversed in part on other grounds*, 76 A.3d 1186 (Md. 2013) (noting sparseness of Maryland legislative history).

Against this backdrop—namely an old Maryland state statute enacted prior to the Supreme Court's decision in *Cort*, it is worth considering the way the MCLL has been viewed (and used) since its enactment. For years, aggrieved borrowers have brought actions for violations of the MCLL (and its predecessors). Reported decisions date back to 1932. *Liberty Fin. Co., Inc. v. Catterton*, 158 A. 16 (Md. 1932). The *Liberty* court described the purpose of the Law as "to afford to the borrower the greatest practicable measure of protection" against the "callous and cruel greed" and "wrongful, oppressive, fraudulent, or extortionate exactions by the lender." *Id.* at 17-18. Less than four years ago, the Maryland Court of Appeals (in an opinion that describes the history of the MCLL in detail) found that the statute of limitations for bringing a claim for failure to be licensed under Md. Comm. L. Code § 12-302 was 12 years. *Price*, 198 A.3d at 806. In doing so, the Court also noted that damages owed to a borrower for a MCLL violation were "readily ascertainable" based on the provisions of § 12-314(b)(2) that provide that a person without a license "may not receive or retain any principal, interest, or other compensation with the respect to any loan that is unenforceable under this subsection." *Id.* at 805-06. Defendants ignore the long

history of private MCLL actions, instead encouraging the Court to embrace a myopic view of narrowly circumscribed legislative history. The Court should decline Defendants' invitation and should instead view the legislative history through the proper historical backdrop, namely one which takes account of the entire 100 year history of the statute and its use.

c. A private remedy under Section 12-314 is consistent with the legislative scheme.

A private right of action under Section 12-314 is also consistent with the MCLL's scheme and underlying purpose to protect borrowers from illegal and predatory lending practices. The legislature commanded that the MCLL "shall be interpreted and construed to effectuate its general remedial purpose." Md. Comm. L. Code § 12-315; *Liberty*, 158 A. at 17-18 (noting purpose of Act was "to afford to the borrower the greatest practicable measure of protection that the act was passed"). The remedial purpose of the statute would not be effectuated by making consumers solely dependent on the Maryland Commissioner of Financial Regulation (the "Commissioner") (as Defendants would have it) to enforce their rights under the MCLL and to obtain "any principal, interest, fees, or other compensation" retained by lenders with respect to such loans and to be free from any collection attempts. Md. Comm. L. Code § 12-314(b)(2), (d). The legislature thus provided for enforcement in court as well. In the absence of a private right of action, borrowers who were victimized by small-dollar, high interest loans would have little meaningful recourse.

The fact that different remedies are provided in Section 12-312(e)(3) of the MCLL does not suggest that the legislature did not intend a private right of action for other violations of the MCLL. (Defs.' 12(b)(6) Br. at 19.) Section 12-312 concerns insurance requirements for certain types of loans and Section 12-312(e)(3) places restrictions on the insurance requirements mortgage lenders can place on borrowers, especially as to whether a lender can insist that a specific insurance company be used or require insurance above the replacement amount of the property. The broad

remedies provided in Section 12-314 (such as recission) do not fit a scenario where a mortgage lender is improperly imposing certain insurance requirements. Thus, the legislature created a more targeted remedy. Nothing about the specific and limited remedies in Section 12-312(e) suggest that the broad remedies in Section 12-314 are unavailable to consumers through private lawsuits.

The fact that the Commissioner is also empowered to enforce provisions of the MCLL also does not suggest that the Law does not contain a private right of action. The statute itself expressly contemplates the two mechanisms for relief together in Section 12-316.1(c), which authorizes "the Commissioner ***or the courts*** to order a refund to a borrower of moneys collected in violation of this subtitle." (emphasis added). Both the Commissioner and the Court, therefore, may order relief directly *to a borrower*.

Finally, the decision in *Clark v. Bank of America*, No. 18-3672, 2021 WL 4310957 (D. Md. Sept. 22, 2021) is inapposite. *Clark* did not involve claims under the MCLL, but instead a provision that requires mortgage lenders to provide interest on escrow accounts under Subtitle 1 of Chapter 12 of the Maryland Commercial Code. In its analysis, the Court noted that while there was a general private right of action for usury, there was no specific provision related for the three statutory provisions that regulated escrow accounts. *Id.* at *8. Here, in contrast, unlike the escrow provisions at issue in *Clark*, there is a general provision that provides remedies for unlicensed lending and for lending at usurious interest rates, namely Section 12-314. A more analogous situation to that in *Clark* would be if the limited remedy related to insurance practices in Section 12-312(e)(3) was not present in the statute and the court was tasked with figuring out whether Section 12-312(e)(3) implied a private right of action.

2. Plaintiff Manago Has Pleaded Facts Showing the Cane Bay Defendants and Tribal Defendants Are Liable Under the MCLL.

Defendants argue that Plaintiff Manago cannot state a claim under the MCLL against the

Cane Bay Defendants or Tribal Business Council Defendants, because the statute applies only to "lenders," a term Defendants wrongly contend is strictly limited to the entity that *makes* the loans. That is not the standard under the law, and even if it was, Defendants ignore Plaintiffs' detailed allegations that the Cane Bay Defendants control and operate the entity that makes the loans, MaxLend.

"Lender" in the MCLL is used in provisions that regulate the lending entity's conduct before the loan is extended, while the loan is extended, and after the loan is extended, such as collection activities and the transfer or assignment of the loan. *See, e.g.*, Section 12-308 (defining "lender's duties" "[a]t the time a loan is made," "at the time a lender receives a payment on account of a loan," and "[a]fter full repayment of a loan"). Accordingly, it is clear that the term "lender" as used in the MCLL does not encompass merely the entity that makes the loans, but also entities that perform actions prior to, during, and after a loan is consummated.

Here, Cane Bay Defendants are alleged to have a significant and controlling role throughout the entire life of the illegal loans, including both making the loans and collecting the debt. Plaintiffs allege that the Cane Bay Defendants developed a scheme "to make online short-term loans that carry triple-digit interest rates, often exceeding 800%, and that are illegal in many states." (FAC ¶ 1.) "In a tribal lending scheme" like that alleged here, "the tribe sets up a company that purportedly makes the loans while entering into an agreement with a servicing or consulting company that controls the entire business and retains the vast majority of the revenue from the scheme, leaving the tribe with one or two percent of the revenue." (*Id.* ¶ 9.) Plaintiffs specifically allege that the Cane Bay Defendants "ran the lender" MaxLend and that MaxLend "is operated through" Cane Bay Defendants. (*Id.* ¶¶ 11, 86.) Plaintiffs further specifically allege that the Cane Bay Defendants' roles include "securing funding, registering domains, designing the websites,

marketing the business, underwriting and approving loans, and analyzing returns to adjust the lending algorithms." (*Id.* ¶ 87. *See also id.* ¶¶ 95–100.) On a motion under Rule 12(b)(6), the Court must "accept as true all well-pleaded allegations [in] the complaint . . . and reasonable inferences drawn therefrom." *Schultz v. Braga*, 290 F. Supp. 2d 637, 646 (D. Md. 2003). Given the detailed allegations in the FAC about the Cane Bay Defendants' actions and their relationship to MaxLend, Plaintiff Manago has sufficiently pled that the Cane Bay Defendants are liable as "lenders" under the MCLL.

Defendants' interpretation of "lender" would have perverse consequences. If "lenders" are limited solely to entitles who nominally "make" the loans, a partner of a loan maker, or an agent hired after the loan was made, would be free to violate the MCLL while only the entity that officially made the loan would be liable. The law is not so easily evaded. *See Nationstar Mortg. LLC v. Kemp*, 258 A.3d 296, 311, 319 (Md. 2021) (interpreting "lender" as used in the Usury Law to regulate "conduct that occurs later in the life of the loan," to include "assignee" of a loan to prevent assignee from acquiring "greater rights as 'lender' under the deed of trust than its assignor").

Even according to the case Defendants rely on, which the court in *Nationstar Mortg.* disagreed with, a person who "play[s] *any role* in making the loan" may be a "lender" under Maryland law. *Flournoy v. Rushmore Loan Mgmt. Servs., LLC*, No. 19-407, 2020 WL 1285504, at *5 (D. Md. Mar. 17, 2020). Plaintiffs meet even that limited "play any role" standard, because they allege that the Cane Bay Defendants "play a role" in making loans by both *underwriting loans* and *approving them*. (FAC ¶ 87.) The allegations here are not like those in *Flournoy*, which concerned claims by homeowners against a defendant who had been assigned their mortgage loan *after* it was made. In *Flournoy*, the Court considered whether the assignee was a "lender" under

the Usury Statute, which has a similar definition for "lender" as that under the MCLL. The Court dismissed the claim after finding that defendants "acquire[d] the loan once made," and did "not play any role in *making* the loan." 2020 WL 1285504 at *5. The temporal sequency in *Flournoy* is not present here.

Further, despite Defendants' contention, Plaintiffs' allegations are not premised on aiding or abetting liability. (Defs.' 12(b)(6) Br. at 23.) Instead, they are premised both on the Cane Bay Defendants' direct role in making, underwriting, and approving the loans and collecting Plaintiffs' loan payments. They are also premised on the Cane Bay Defendants' joint interest in MaxLend. Under the MCLL, a lender is a "person," which is defined broadly to include, inter alia, a "partnership" or "two or more persons having a joint or common interest." Md. Comm. L. Code § 12-301(f) (emphasis added). As alleged, Cane Bay Defendants have a joint interest in MaxLend, the ostensible "maker" of the loan, with the Tribal Defendants. Thus, the Cane Bay Defendants are a "person that has a joint interest" in a "lender." There is thus ample basis to hold the Cane Bay Defendants liable as a "lender."

Defendants do not contend, nor could they, that the Tribal Lending Defendants, i.e., the officers and directors of Makes Cents, are not "lenders" under the MCLL. However, *all* Tribal Defendants, including the Tribal Business Council Defendants, are liable as "lenders" under the law even though they are not alleged to be involved in the day-to-day activities of Makes Cents. The Tribal Business Council Defendants are alleged to own and hold complete and ultimate authority over Makes Cents. (FAC ¶¶ 93, 101-09, 113.) Again, under the MCLL, a lender is a "person," which broadly includes "two or more persons having a joint or common interest" or "any other legal or commercial entity." Md. Comm. L. Code § 12-301(f). The Tribal Business Council, and each of the individuals that comprise it, are part of the legal entity that comprises Make Cents,

the ostensible "maker" of the loans at issue, and have a joint interest in MaxLend with the Cane Bay Defendants. For these reasons, the Cane Bay Defendants and all Tribal Defendants may be liable as the "lender" under the MCLL.

D. Plaintiff Manago States a Claim Under the MCPA.

Maryland's Consumer Protection Act prohibits a person from "engag[ing] in any unfair, abusive, or deceptive trade practice" in, among other things, "[t]he extension of consumer credit" or "[t]he collection of consumer debts." Md. Comm. L. Code § 13-303. The General Assembly enacted the MCPA "to set certain minimum statewide standards for the protection of consumers across the State." Md. Comm. L. Code § 13-102; *Lloyd v. Gen. Motors Corp.*, 916 A.2d 257, 276 (Md. 2007) (citing § 13–101) (explaining that the legislature's intent for the MCPA was to protect consumers). The MCPA is liberally construed in order to achieve its consumer protection objectives. Md. Comm. L. Code § 13-105. *Marchese v. JPMorgan Chase Bank, N.A.*, 917 F. Supp. 2d 452, 465 (D. Md. 2013).

The Financial Consumer Protection Act of 2018 amended the MCPA to include "abusive" practices along with "unfair" or "deceptive" trade practices. The amendment was intended "to close a possible loophole" in the MCPA to provide liability for "trade practices that, in isolation, may not be specifically defined as unfair or deceptive but may, nevertheless, be implemented in an abusive manner." Fiscal and Policy Note at 4, 2018 MD H.B. 1634 (NS), Maryland 438th Session of the General Assembly, 2018.

"Unfair, abusive, or deceptive trade practices" are defined as false or misleading representations that have "the capacity, tendency, or effect of deceiving or misleading consumers." Md. Comm. L. Code § 13–301(1). The MCPA prohibits not only active misrepresentations, but also the failure to disclose, or omission of, a material fact. *See* Md. Comm. L. Code § 13-301(3),

(9); *Bank of Am., N.A. v. Jill P. Mitchell Living Tr.*, 822 F. Supp. 2d 505, 534 (D. Md. 2011). While Defendants assert that a failure to disclose a material fact is not a violation of the MCPA unless the "alleged failure [was] accompanied by a legal duty to disclose," that is an incorrect statement of the requirements of the MPCA. (Defs.' 12(b)(6) Br. at 27).[5] Instead, an omission is material under the MCPA "if a significant number of unsophisticated consumers would find [the] information important in determining a course of action." *Green v. H&R Block, Inc.*, 735 A.2d 1039, 1059 (Md. 1999). A consumer can be said to have "relied" on an omission "where it is substantially likely that the consumer would not have made the choice in question had the commercial entity disclosed the omitted information." *Bank of Am.*, 822 F. Supp. 2d at 535. Notably, "the question of materiality is one of fact, to be decided by a jury, and should not be treated by the court as a matter of law." *Smith v. Cap. One Auto Fin., Inc.*, No. 11-1023, 2011 WL 3328565, at *4 (D. Md. Aug. 2, 2011).

Defendants developed a scheme to avoid state usury laws, made loans to vulnerable borrowers that carry triple-digit interest rates, often exceeding 800% (FAC ¶¶ 1-2), and then demanded consumers pay those debts while knowing the loans were illegal under state law (*id.* ¶ 173). These acts and practices are "unfair, deceptive and abusive" and violate Md. Comm. L. Code § 13-301(1), (2), and (3). *See Andrews & Lawrence Pro. Servs., LLC v. Mills*, 223 A.3d 947, 968 (Md. 2020) ("We ... do not read statutory language in a vacuum, nor do we confine strictly our interpretation of a statute's plain language to the isolated section alone. Rather, the plain language must be viewed within the context of the statutory scheme to which it belongs,

[5] Citing *Castle v. Cap. One, N.A.*, No. 13-1830, 2014 WL 176790, at *4 (D. Md. Jan. 15, 2014), considering requirements under the Maryland Mortgage Fraud Protection Act. *See also Waterhouse v. R.J. Reynolds Tobacco Co.*, 270 F. Supp. 2d 678, 680 (D. Md. 2003) (no MCPA claim alleged); *Parker v. Columbia Bank*, 604 A.2d 521, 523 (Md. Ct. Spec. App. 1992) (same); *Maryland Env't Tr. v. Gaynor*, 803 A.2d 512, 513 (Md. 2002) (same).

considering the purpose, aim, or policy of the Legislature in enacting the statute.") (citation omitted).

Plaintiff Manago also alleges that Defendants failed to disclose material facts. Specially, the Cane Bay Defendants, while operating MaxLend on behalf of Tribal Defendants, violated the MCPA by failing to disclose that Defendants were *unlicensed* and hence the loans were illegal in the statue of Maryland. (FAC ¶¶ 156-57, 182.) The *fact* that Defendants *were unlicensed* meant that they did not have the right to make such loans in Maryland and is therefore a material *fact* that a significant number of unsophisticated consumers would find important in determining whether to enter the loan agreements with Defendants. It is substantially likely that Plaintiff Manago and other consumers in Maryland would have decided not to take a loan from Defendants if Defendants had disclosed this information.

Such an omission was approved by the Maryland Court of Appeals as actionable under the MCPA in *Golt v. Phillips*, 517 A.2d 328, 332 (Md. 1986). The court found that the advertisement and rental of a dwelling implicitly represents that the landlord has the proper licensing and that the lease is lawful. *Id.* Per the court, if the landlord is not so authorized, the advertisement is misleading and its publication violates the MCPA. *Id.* ("In our view, advertising and renting an unlicensed dwelling violates § 13–301(1), (2), and (3)."). The landlord in *Golt* failed to disclose the fact that he lacked proper licensing to rent the apartment at issue. *Id.* The Maryland Court of Appeals found the landlord's omission material because "the lack of proper licensing for an apartment under most circumstances is a . . . fact that any tenant would find important in [determining] whether to sign a lease agreement and move into the premises." *Id.*

Defendants rely on *Miller v. Pac. Shore Funding*, 224 F. Supp. 2d 977, 988 (D. Md. 2002), *aff'd*, 92 F. App'x 933 (4th Cir. 2004), to argue that an omission of a legal conclusion is not

actionable under the MCPA. There, the Court dismissed a MCPA claim premised on a theory that a lender's "statement of charges" alone implied that the charges were permitted by law. The Court found that it was not so and distinguished *Golt* because in *Miller*, the lender was licensed whereas the landlord in *Golt* was not. *Id.* The Court also considered the plaintiff's claim that defendant violated the MCPA by failing to state that his loan was "governed by" the Secondary Mortgage Loan Law. The Court also dismissed this claim, finding that such a statement was not material because it was only required where the loan was to be used for commercial purposes, and plaintiff's loan was not commercial. *Id.* at 989. The Court distinguished *Golt* finding that the failure to be licensed was a "material fact" as opposed to a failure to state the applicability of a "material law." *Id.*

This case is far closer to *Golt* than *Miller*. Here, MaxLend offered and entered into loan agreements with Maryland consumers including Plaintiff Manago, implying it had a right to enter such loans with Maryland consumers, and omitting the *fact* that it was not licensed to do so. (FAC ¶¶ 41, 42, 182.) The statements were made by the Cane Bay Defendants on behalf of MaxLend and the Tribal Defendants while they ran and operated MaxLend, including designing the website, marketing the business, and underwriting and approving loans. (*Id.* ¶¶ 11, 86, 87.) Unlike in *Miller*, Plaintiffs here do not allege Defendants had to disclose the applicable legal backdrop or make legally binding statements about the applicable law. Instead, Plaintiffs allege that Defendants had an obligation to disclose the material *fact* of their lack of licensure. Defendants' statements omitted material facts that any borrower would find important in determining whether to sign a loan agreement with Defendants.

E. Plaintiff Manago States a Claim for Unjust Enrichment Under Maryland Law.

Unjust enrichment is a quasi-contractual cause of action that is a remedy "to provide relief

for a plaintiff when an enforceable contract does not exist, but fairness dictates that the plaintiff receive compensation for services provided." *Cty. Comm'rs of Caroline Cty. V. J. Roland Dashiell & Sons, Inc.*, 747 A.2d 600, 607 (Md. 2000). "A claim of unjust enrichment is established when: (1) the plaintiff confers a benefit upon the defendant; (2) the defendant knows or appreciates the benefit; and (3) the defendant's acceptance or retention of the benefit under the circumstances is such that it would be inequitable to allow the defendant to retain the benefit without the paying of value in return." *Benson v. State*, 887 A.2d 525, 546 (Md. 2005).

As described above, the loan agreements between Defendants and Plaintiff Manago are void and unenforceable under Maryland law. However, Plaintiff Manago paid finance charges, principal, and interest to Defendants under those loan agreements. (FAC ¶¶ 115-16.) Plaintiff Manago alleges that the Cane Bay Defendants have been unjustly enriched by collecting those payments. (*See* FAC ¶ 246 (Cane Bay Defendants "have been, and continue to be, unjustly enriched as a result of charging and collecting illegal, usurious interest rates from Plaintiffs and National Class members.").) The Cane Bay Defendants "knowingly, deliberately, intentionally, and willfully" charged the excessive rates. (*Id.* ¶ 156.) Plaintiffs further allege that the Cane Bay Defendants retain nearly all of the profits generated by MaxLend, with only one or two percent going to the Tribal Defendants. (*Id.* ¶¶ 8–9, 100.) "As between the parties, it would be unjust for Cane Bay Defendants to retain the benefits attained by their actions." (*Id.* ¶ 247.)

These allegations are sufficient. *See Hengle*, 433 F. Supp. 3d at 896 (denying motion to dismiss unjust enrichment claim under Virginia law where facts showed defendants "owned and operated companies that received a substantial portion of the revenues"); *Gibbs*, 368 F. Supp. 3d at 933 (denying motion to dismiss unjust enrichment claims where defendants "derived income from the enterprise based on borrowers entering into loan [c]ontracts" with the tribal entities); *see*

also Hill v. Cross Country Settlements, LLC, 936 A.2d 343, 352 (Md. 2007) ("A successful unjust enrichment claim serves to 'deprive the defendant of benefits that in equity and good conscience he ought not to keep, even though he may have received those benefits quite honestly in the first instance, and even though the plaintiff may have suffered no demonstrable losses.'" (citation omitted); *Bank of Am. Corp. v. Gibbons*, 918 A.2d 565, 569 (Md. Ct. Spec. App. 2007) ("'A person who receives a benefit by reason of an infringement of another person's interest, or of loss suffered by the other, owes restitution to him in the manner and amount necessary to prevent unjust enrichment.'").

In defense against this claim, Defendants point again to the legal distinctions they have erected in an attempt to avoid liability for their conduct but which, in practice, have no meaning. Defendants claim that, because Plaintiffs' payments were made to Makes Cents, the Cane Bay Defendants did not unjustly profit. However, Plaintiffs' neither privity nor direct relationship with the Cane Bay Defendants is necessary for Plaintiffs to state an unjust enrichment claim against the Cane Bay Defendants. *See, e.g.*, *Metric Constructors, Inc. v. Bank of Tokyo-Mitsubishi, Limited*, 72 Fed. App'x 916, 923 (4th Cir. 2003) (recognizing unjust enrichment claim against third party where "gravamen of Metric's unjust enrichment claim is that although the Banks were not parties to any contract with Metric, they nevertheless obtained a benefit from Metric's work on the project and that it would be unjust for the Banks to retain that benefit under the circumstances of this case"); *In re Cap. One Consumer Data Sec. Breach Litig.*, 488 F. Supp. 3d 374, 413 (E.D. Va. 2020) (declining to dismiss unjust enrichment claim against data storage provider who provided services to plaintiffs' bank and thereby "profited from its storage and retention of Plaintiffs' PII, uploaded to [defendant's server] via Plaintiffs' relationship with [the bank]"); *Alvarado v. Microsoft Corp.*, No. 09-189, 2010 WL 715455, at *4-6 (W.D. Wash. Feb. 22, 2010) (plaintiff

could state a claim where licensing fees originally paid by plaintiff flowed through third party to defendant). The cases Defendants cite do not support the argument that a benefit must be directly conferred by Plaintiffs to the Cane Bay Defendants. *See Mehul's Inv. Corp. v. ABC Advisors, Inc.*, 130 F. Supp. 2d 700, 709 (D. Md. 2001) (dismissing unjust enrichment claim because plaintiff did not allege that defendants obtained and refused to return plaintiff's funds); *Klassou v. Ejtemai*, No. 1162, 2017 WL 4271674, at *9 (Md. Ct. Spec. App. Sept. 26, 2017) (affirming dismissal of unjust enrichment claim because the allegations did not put "anybody on notice of what it is that has been retained").

As described above, Plaintiffs allege that Defendants collected payments from them on void and unenforceable loans, thereby profiting, and that Cane Bay Defendants retained nearly 99% of the profits from the illegal lending scheme, regardless of the legal entity to which the payments were initially made. No more is needed to plausibly allege that the Cane Bay Defendants were unjustly enriched.

F. Plaintiff Manago States a Claim for Civil Conspiracy Under Maryland Law.

In Maryland, "a civil conspiracy is a combination of two or more persons by an agreement or understanding to accomplish an unlawful act or to use unlawful means to accomplish an act not in itself illegal, with the further requirement that the act or means employed must result in damages to the plaintiff." *BEP, Inc. v. Atkinson*, 174 F. Supp. 2d 400, 408 (D. Md. 2001) (citing *Green v. Washington Sub. San. Comm'n*, 269 A.2d 815, 824 (Md. 1970)). Plaintiff Manago plausibly pleads that the Cane Bay Defendants conspired in violation of Maryland law.

Defendants' reasons for dismissing the claim fail. First, Defendants' arguments regarding the applicability of the intracorporate conspiracy doctrine fail for reasons discussed above. *Supra* section B.1. Second, the Cane Bay Defendants can be held liable for conspiring to violate the

MCLL because, as discussed above, Plaintiffs plausibly allege that the Cane Bay Defendants violated the MCLL as a "lender" under the law. *Supra* section C.2. Third, Plaintiff Manago has adequately alleged the conspiracy and need not do so with particularity under Fed. R. Civ. P. 9(b). Conspiracy claims only need to abide by Rule 9(b)'s requirements to the extent plaintiffs allege there was a conspiracy to commit fraud. *Hill v. Brush Engineered Materials, Inc.*, 383 F. Supp. 2d 814, 821, 823 (D. Md. 2005). Here, Plaintiffs allege that Defendants conspired "to violate state usury and lending laws and profit from those violations." (FAC ¶ 249.) These allegations are not grounded in fraud and do not need to comply with Rule 9(b).

Further, Plaintiff Manago has alleged "adequate factual support for the existence of an agreement to conspire." *Chambers v. King Buick GMC, LLC*, 43 F. Supp. 3d 575, 611 (D. Md. 2014). As discussed above, Plaintiffs identify the years that the Cane Bay Defendants became involved with the Tribal Defendants and the different steps Defendants took to create the entities that functioned together to achieve the conspiracy to violate state law. (*E.g.*, FAC ¶¶ 88–95, 100.) These allegations, which rely in part on publicly available tribal meeting minutes, are far from conclusory and "provide an indication of when and how the agreement was brokered and how each of the defendants specifically were parties to the agreement." *Chambers*, 43 F. Supp. 3d at 611. *See DB Capital Grp.*, 2011 WL 887554, at *7 (finding conspiracy allegations sufficient where plaintiff's complaint referenced specific instances when alleged co-conspirators met and engaged in acts to defraud plaintiff). Plaintiff Manago's claim for civil conspiracy should not be dismissed.

G. Plaintiff Manago's Claims For Declaratory and Injunctive Relief Against the Tribal Defendants Should Not Be Dismissed.

Plaintiff Manago's claim for declaratory and injunctive relief against the Tribal Defendants should proceed because 1) Manago clearly pleads that the Tribal Defendants violated Maryland state law, giving rise to her claims for injunctive and declaratory relief from the Tribal Defendants;

and 2) Plaintiff Manago's claims for injunctive and declaratory relief are proper under state law.[6]

Plaintiff Manago's claims for injunctive and declaratory relief from both the Cane Bay Defendants and the Tribal Defendants for violations of state law are pellucid from the FAC. Count XXI incorporates by reference each allegation contained in Count III, FAC ¶ 281, which contains allegations regarding "Defendants," a defined term which includes the Tribal Defendants, and separately, the Cane Bay Defendants. (*Compare, e.g.*, FAC ¶ 176 (regarding damages claim against the Cane Bay Defendants) *with* FAC ¶ 177 (seeking an injunction enjoining "Defendants" conduct).) Indeed, Defendants understood that Plaintiffs brought state law claims against the Tribal Defendants so well that Defendants filed a separate motion seeking to dismiss all Plaintiffs' state law claims for injunctive relief against the Tribal Defendants (ECF No. 90), a clear acknowledgment that these claims are pleaded in the FAC. Defendants also acknowledge that Plaintiff Manago "may argue that her declaratory and injunctive relief claims [against the Tribal Defendants] can stand because they are premised on an alleged violation of the MCLL." (Defs.' 12(b)(6) Br. at 15 n.12.)

Nevertheless, in spite of these explicit indications that Plaintiff Manago seeks injunctive and declaratory relief from both the Cane Bay Defendants *and* the Tribal Defendants for violations of Maryland state law, Defendants nonsensically insist that the "state law claims in the Complaint are alleged *only* against the Cane Bay Defendants." (*Id*; *see also id.* at 4 (framing Count XXI as a "remedy" rather than a claim for relief); 14 (same).) This is false; Defendants' effort to goad the Court into formalistically reading Plaintiff Manago's claims for declaratory and injunctive relief for violations of state law against the Tribal Defendants out of her complaint must fail.

[6] Defendants do not dispute personal jurisdiction in Maryland as to Plaintiff Manago's claims against the Tribal Defendants.

Manago is entitled to seek injunctive and declaratory relief under state law from the Tribal Defendants under *Ex parte Young*, 209 U.S. 123 (1908). (FAC ¶ 280.) The Fourth Circuit has specifically confirmed that "[t]ribal sovereign immunity does not bar state law claims for prospective injunctive relief against tribal officials for conduct occurring off the reservation." *Hengle*, 19 F.4th at 345. Thus, federal courts may be "called upon to instruct tribal officials on how to conform their conduct to state law." *Id.* at 347; *see also Hengle*, 433 F. Supp. 3d at 879 (denying motion to dismiss claim for declaratory judgment and injunctive relief to declare loans void and enjoin collection against tribal officials). As described above in Sections IV.B, IV.D, IV.E, and IV.F, Plaintiff Manago has sufficiently alleged violations of state law by the Tribal Defendants. Her claims against the Tribal Defendants for injunctive and declaratory relief are thus well pled and allowed by applicable law. To the extent Defendants' motion seeks to dismiss these claims, it should be denied.

V. CONCLUSION

Defendants' Rule 12(b)(6) Motion to Dismiss should be denied, except for Plaintiffs' claims for injunctive relief under RICO against the Tribal Defendants in Count XIX, which Plaintiffs agree should be dismissed on substantive grounds.[7] Should the Court grant any contested portion of Defendants' motion, Plaintiffs respectfully request leave to amend. *See* Fed. R. Civ. P. 15(a)(2) ("The court should freely give leave [to amend] when justice so requires.").

Date: March 4, 2022

/s/John G. Albanese
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[7] In response to Defendants' separately filed motion related to personal jurisdiction, Plaintiffs have agreed that Out-of-State Plaintiffs' state law claims against the Tribal Defendants can also be dismissed for lack of personal jurisdiction.

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