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and 777 PARTNERS, LLC

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

KATEY HUNTLEY and GARY JACKSON, Individually and On Behalf of All Others Similarly Situated,

Plaintiffs,

v.

ROSEBUD ECONOMIC DEVELOPMENT CORPORATION; ROSEBUD LENDING LZO d/b/a ZOCALOANS; FINTECH FINANCIAL, LLC; TACTICAL MARKETING PARTNERS, LLC; AND 777 PARTNERS, LLC,

Defendants.

Case No. 3:22-cv-01172-L-MDD

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS TACTICAL MARKETING PARTNERS, LLC AND 777 PARTNERS, LLC'S MOTION TO DISMISS

Date: January 9, 2023
Time: 10:30 a.m.
Judge: M. James Lorenz

No oral argument pursuant to local rule

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs have filed this putative class action alleging that their loans constitute "unlawful debt" under the Racketeer Influenced and Corrupt Organizations Act ("RICO") and California law. Plaintiffs' claims against the 777 Partners, LLC and Tactical Marketing Partners, LLC (the "777 Defendants"), at their core, require the Court to accept the conclusion that all those doing business with a lender are responsible for the actions of the lender. But that is not so. As other courts have found, claims against similar service providers (including banks) are deficient as a matter of law. The Court should reach a similar conclusion here, and should, pursuant to Federal Rule of Civil Procedure ("Federal Rules") 12(b)(6), dismiss Plaintiffs' complaint against the 777 Defendants for failure to state a claim.

II. FACTS AND BACKGROUND

Plaintiffs each used the internet to obtain a short-term installment loan from Rosebud Lending LZO d/b/a ZocaLoans ("ZocaLoans"). ZocaLoans is a subsidiary of Rosebud Economic Development Corporation ("Rosebud EDC"). Both ZocaLoans and Rosebud EDC are arms of a sovereign and federally recognized Native American Tribe, the Rosebud Sioux Tribe of the Rosebud Indian Reservation, South Dakota (the "Tribe").[1] Declaration of Patrick O. Daugherty ("Daugherty Decl."), ¶ 4. Plaintiffs each electronically signed their loan agreements with ZocaLoans. Compl. ¶¶ 36, 49; Daugherty Decl., Ex. 1 (Huntley Loan Agreement), Ex. 2 (Jackson Loan Agreement).[2]

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[1] Indian Entities Recognized by and Eligible To Receive Services From the United States Bureau of Indian Affairs, 87 Fed. Reg. 4,636 (Jan. 28, 2022).

[2] The 777 Defendants have lightly redacted certain personal information from each of these loan agreements.

III. ARGUMENT

A. Legal Standard

The Federal Rules require that a complaint set forth "a short and plain statement showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). To survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6), a complaint must provide more than "a formulaic recitation of the elements of a cause of action" and the "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citations omitted). This is because the Federal Rules "do [ ] not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions…." *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009), *on remand*, 574 F.3d 820 (2d Cir. 2009).

A motion under Federal Rule 12(b)(6) must be granted where a complaint lacks well-supported factual allegations that permit the court to "draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 678 (citation omitted). "[A] complaint [does not] suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Id.* (quoting *Twombly*, 550 U.S. at 557). And, in assessing the plausibility of particular allegations, a court must consider obvious alterative explanations for a defendant's behavior. *Eclectic Props. E., LLC v. Marcus & Millichap Co.*, 751 F.3d 990, 996 (9th Cir. 2014) (citing *Ashcroft*, 556 U.S. at 682). Where a court is faced with two such possible explanations, only one of which is true and results in liability, plaintiffs must offer "facts tending to exclude the possibility that the alternative explanation is true, in order to render plaintiffs' allegations plausible." *In re Century Aluminum Co. Secs. Litig.*, 729 F.3d 1104, 1108 (9th Cir. 2013) (internal quotation marks and citation omitted). On a motion to dismiss, a court can properly consider "matters of public record" as well as documents referenced in a complaint, though not attached, without converting the motion

to one for summary judgment. *Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir. 2001) (citation omitted); *see also Barinaga v. JP Morgan Chase & Co.*, 749 F. Supp. 2d 1164, 1169 n.2 (D. Or. 2010) (loan documents offered by defendant that "define the obligations between the parties and are necessarily relied on by [Plaintiff] in asserting her claims" may be considered in a motion to dismiss) (citing *Lee*, 250 F.3d at 688).

B. The Choice-of-law Provision in the Loan Agreement Must Be Enforced.

Each Plaintiff signed a loan agreement containing a choice-of-law provision selecting the laws of the Tribe as the applicable law. Daugherty Decl., Ex. 1 at 3, Ex. 2 at 4. The provisions state:

> **LAW THAT APPLIES**. The laws of the Rosebud Sioux Tribe ("Tribal Law") will govern this Agreement, without regard to the laws of any state or other jurisdiction, including the conflict of laws rules of any state. You agree to be bound by Tribal Law, and in the event of a bona fide dispute between you and us, Tribal Law shall exclusively apply to such dispute.

Rather than follow the contracts, Plaintiffs seek to apply the laws of the state in which they reside to the exclusion of the law they agreed to in their loan contracts. Plaintiffs' Complaint does not assert that the laws of the Tribe contain an interest rate cap. While this free-market approach has not been adopted by California, the Tribe is hardly an outlier. Many states similarly do not set a rate cap for loans similar to those obtained by the Plaintiffs.[3]

[3] For example, when the Consumer Financial Protection Bureau ("CFPB") briefly challenged the authority of a tribal lender to do business in 2017, it named just 17 of the 50 states as places where online tribal lenders were allegedly subject to an interest rate cap or licensing requirements. *See* Complaint ¶¶ 128-29, *CFPB v. Golden Valley Lending, Inc.*, No. 2:17-cv-2521 (D. Kan. Apr. 27, 2017), ECF No. 1. The CFPB later voluntarily dismissed this suit without obtaining any ruling on the merits or relief. Notice of

[Footnote continued on next page]

Indeed, the underlying lawfulness of these loans under the laws of the Tribe should end the inquiry if the sovereignty of a Native American tribe, and its ability to legislate free from interference from co-equal sovereigns (i.e., states such as California), is to be respected as Congress and the U.S. Supreme Court have required. *See, e.g.*, *Hoopa Valley Tribe v. Nevins*, 881 F.2d 657, 659 (9th Cir. 1989) ("If the state law interferes with the purpose or operation of a federal policy regarding tribal interests, it is preempted." (citation omitted)); *see also Williams v. Big Picture Loans, LLC*, 929 F.3d 170, 185 (4th Cir. 2019) (the application of concepts like tribal sovereignty and sovereign immunity "does not depend on a court's evaluation of the respectability of the business in which a tribe has chosen to engage.").

Accordingly, the interest rates charged to Plaintiffs were not usurious under the laws Plaintiffs agreed to in their loan agreement. As such, Plaintiffs' claims under the California Laws must be dismissed. And Plaintiffs' claims under 18 U.S.C. Section 1962 must all also fail because the interest charged to Plaintiffs was not "at least twice the enforceable rate" permitted under the laws of the Tribe. 18 U.S.C. § 1961(6) (defining an "unlawful debt" under RICO).

To the extent the Court nonetheless feels compelled to undertake a conflict of law analysis, both California conflicts law and federal common law follow the approach outlined by the Restatement (Second) of Conflict of Laws (the "Restatement") to resolve choice-of-law questions. *See Huynh v. Chase Manhattan Bank*, 465 F.3d 992, 997 (9th Cir. 2006); *Shannon-Vail Five Inc. v. Bunch*, 270 F.3d 1207, 1210 (9th Cir. 2001). Under

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Voluntary Dismissal, *CFPB v. Golden Valley Lending, Inc.*, No. 2:17-cv-2521 (D. Kan. Jan. 18, 2018), ECF No. 101. Notably, the CFPB has not taken any subsequent action suggesting that it views loans made over the internet by tribal businesses to be unlawful.

either formulation, where a contractual choice-of-law is included in the agreement between the parties, that clause "encompasses all causes of action arising from or related to that agreement, regardless of how they are characterized…." *Frenzel v. Aliphcom*, No. 14-CV-03587-WHO, 2015 WL 4110811, at *6 (N.D. Cal. July 7, 2015) (citing *Nedlloyd Lines B.V. v. Super. Ct.*, 3 Cal.4th 459, 470 (Cal. 1992)). To the extent that a claim falls within this broad scope—as it does here—a court first considers whether there is a "reasonable basis for the parties' choice-of-law," including whether the selected forum "has a substantial relationship" to the parties or their transaction. *Id.* at *7 (citing *Wash. Mut. Bank, FA v. Super. Ct.*, 24 Cal.4th 906, 916 (Cal. 2001)).[4] If either of those tests are satisfied, the contractual choice-of-law "generally will be enforced unless the [party opposing the clause] can establish *both* the chosen law is contrary to a fundamental policy of California and that California has a materially greater interest in the determination of the particular issue." *Abat v. Chase Bank USA, N.A.*, No. SACV07-01476-CJCANX, 2010 WL 11465416, at *1 (C.D. Cal. Oct. 28, 2010) (quoting *Wash. Mut. Bank*, 24 Cal.4th at 917).

Here, Plaintiffs' causes of action all arise from their loan agreements containing the choice-of-law provision. The laws selected by the choice-of-law provision also have a substantial relationship to the Plaintiffs' lender. Specifically, ZocaLoans is owned and

[4] To the extent the Court finds that there is no substantial relationship, the Court would revert to the standard conflict of laws analysis absent such a contractual clause. *See Shannon-Vail*, 270 F.3d at 1210. Under California law, "A contract is to be interpreted according to the law and usage of the place where it is to be performed; or, if it does not indicate a place of performance, according to the law and usage of the place where it is made." Cal. Civ. Code § 1646. However, under that analysis, the result will ultimately be the same. The contracts were formed on the Tribe's reservation, funds were disbursed from the reservation, payments sent to the Tribe's business on the Tribe's reservation, where the lender is located and has its headquarters. Plaintiffs' loan agreements all acknowledge these facts and arguments to the contrary are not a basis for a different conclusion. Given similar facts, the Ninth Circuit has found that under Section 1646, the law of the lender's home state will apply. *Shannon-Vail*, 270 F.3d at 1211. An identical conclusion should be reached here.

operated by the Tribe and was incorporated under the laws of the Tribe. This incorporation under tribal law establishes both a substantial relationship to, and a reasonable basis for the selection of Tribe's laws. *Nedlloyd Lines*, 3 Cal.4th at 467 (incorporation of two parties to a transaction in foreign forum established both substantial relationship and reasonable basis for choice of foreign law); *Petters Co. Inc. v. BLS Sales Inc.*, No. C 04-02160 CRB, 2005 WL 2072109, at *3 (N.D. Cal. Aug. 26, 2005) (finding the substantial relationship test satisfied where the lender is located in the selected forum). Accordingly, the choice-of-law provision should be given effect unless Plaintiffs can demonstrate that application of the laws of the Tribe are: (1) contrary to a California fundamental public policy; and (2) California has a materially greater interest in resolution of this matter. Plaintiffs can do neither.

First, application of the laws of the Tribe as selected in the Plaintiffs' loan agreements will not contravene a fundamental public policy of California. As California courts have pointed out, while there is a public policy against usury, there is "no strong public policy against a particular rate of interest so long as the charging of that rate is permitted by law to the specific lender." *Gamer v. duPont Glore Forgan, Inc.*, 65 Cal. App. 3d 280, 287 (Cal. Ct. App. 1976). Indeed, state and federal courts in California have enforced choice-of-law provisions in loan contracts notwithstanding that the selected forum requires payment of interest at rates above those permissible under California law. *See Petters Co.*, 2005 WL 2072109, at *4-5 (enforcing choice of Minnesota law provision over objection that chosen law did not recognize usury defense and would thus violate fundamental public policy of California because there was a substantial relationship to the chosen forum and Minnesota law was "similar in purpose and effect to California's decision to exempt certain classes of financial institutions." (citation omitted)); *Green*

Horizon Mfg. LLC v. Meridian Working Capital, No. A138781, 2014 WL 4594507, at *4-5 (Cal. Ct. App. Sept. 16, 2014) (unpublished) (enforcing choice-of-law clause selecting the laws of Arizona in favor of unlicensed lender even where Arizona permitted higher interest rates and fewer statutory exceptions than the usury laws of California); *Ury v. Jewelers Acceptance Corp.*, 227 Cal. App. 2d 11, 20 (Cal. Ct. App. 1964) (noting in conflict of laws analysis that given the numerous statutory exceptions to California Constitutional provision addressing usury, "California does not have such a strong public policy against any and all contracts which would be usurious if they were made and to be performed here ….").

Because California does not have a fundamental policy against the application of foreign laws requiring the payment of interest rates higher than those permissible under California law, the inquiry ends here and the Court should require application of the laws of the Tribe. Plaintiffs' Complaint does not allege that, under the Tribe's laws, the rates charged to Plaintiffs are unlawful or usurious. This undercuts the legal theory underpinning Plaintiffs' causes of action, and requires their dismissal.[5]

C. Plaintiffs' RICO Claims Are Deficient As a Matter of Law.

Plaintiffs' attempts to hold the 777 Defendants liable under RICO are plainly improper as a matter of law because they attempt to impose liability on the 777 Defendants by looking to the alleged acts of alleged RICO enterprise as a whole. But under RICO, a "Person" that can be liable under the statute must be separate from the enterprise as a whole, and the acts of the "Person" are what matter for liability purposes. This

[5] Plaintiffs may argue that their TCPA claims in Count II do not depend upon the Court disregarding the choice of law provisions in the contract. Even if that is correct, Plaintiffs still fail to offer any reason to hold the 777 Defendants liable for the alleged TCPA violations other than the bare and insufficient assertion that ZocaLoans is "run by" the 777 Defendants. *See* discussion in Section C.2.b *infra*.

fundamental misapplication of the RICO statute undercuts Plaintiffs' RICO claims against the 777 Defendants in full. First, Plaintiffs lack standing to bring a civil RICO claim because they were not proximately harmed by a violation of the statute by the 777 Defendants. Second, Plaintiffs fail to demonstrate that the 777 Defendants have undertaken the predicate act of collecting an unlawful debt from Plaintiffs. On this point, Plaintiffs also fail to demonstrate that the debts collected by the lender are unlawful under RICO.[6] As such, dismissal of the RICO claims against the 777 Defendants is appropriate.

1. Plaintiffs Lack RICO Standing for Their Claims Against the 777 Defendants.

Private plaintiffs have standing to sue under RICO only when "injured in his business or property by reason of a violation of section 1962 …." 18 U.S.C. § 1964(c). This standing requirement demands that a plaintiff demonstrate that a defendant's collection of an unlawful debt is both the but-for and legal cause of a plaintiff's injury. *Resolution Trust Corp. v. Keating*, 186 F.3d 1110, 1117 (9th Cir. 1999). "Mere 'but-for' or factual causation is insufficient. So too is a link that is too remote, purely contingent, or indirect." *Mitsui O.S.K. Lines, Ltd. v. SeaMaster Logistics, Inc.*, 691 F. App'x 416 (9th Cir. 2017) (internal citations and quotation marks omitted) (holding that proximate cause under Section 1964(c) did not exist even where false mail and wire transmissions facilitated an overall illegal arrangement because the actions of others more directly caused the plaintiff's injuries.). This is because, "[t]he Supreme Court has repeatedly confirmed that 'the general tendency of the law' in regards to proximate cause inquiries under RICO 'is

[6] 18 U.S.C. Section 1961(6) defines unlawful debt as, a debt which is (1) unenforceable under State or Federal Law in whole or in part as to principal or interest because of the laws relating to usury; (2) which was incurred in the business of lending money or a thing of value; and (3) at a rate of interest at least twice the enforceable rate. 18 U.S.C. § 1961(6). Given the enforceable choice-of-law provision, however, the debts are not at twice the enforceable rate under the laws of the Native American lenders.

not to go beyond the first step."' *Tatung Co., Ltd. v. Shu Tze Hsu*, 43 F. Supp. 3d 1036, 1058 (C.D. Cal. 2014) (emphasis added) (citing *Hemi Grp., LLC v. City of New York*, 559 U.S. 1, 8-12 (2010)). Indeed, as the Ninth Circuit recently recognized, the Supreme Court's decision in *Hemi* "emphasized that a claim would not meet RICO's direct relationship requirement if it required the Court to move beyond the first step in the causal chain." *Fields v. Twitter, Inc.*, 881 F.3d 739, 745 (9th Cir. 2018) (citing *Hemi*, 559 U.S. at 8-12). And, under a Section 1962(a) claim, a plaintiff must properly allege "an investment injury separate and distinct from the injury flowing from the predicate act." *Sybersound Records, Inc. v. UAV Corp.*, 517 F.3d 1137, 1149 (9th Cir. 2008).

A plaintiff must demonstrate that each defendant—not the enterprise as a whole—meets the proximate cause requirement. *See Shaw v. Nissan N. Am., Inc.*, 220 F. Supp. 3d 1046, 1053 (C.D. Cal. 2016) ("[A] plaintiff must show not only that the defendant's violation was a 'but for' cause of his injury, but that it was the proximate cause as well.") (quoting *Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1481 (9th Cir. 1997)). The RICO proximate cause element is "used to limit a person's responsibility for the consequences of that person's own acts." *Holmes v. Sec. Inv. Prot. Corp.*, 503 U.S. 258, 268 (1992). Where a plaintiff fails to demonstrate proximate causation as to a defendant, they cannot recover from that defendant.

Plaintiffs have failed to demonstrate that the 777 Defendants, as opposed to the enterprise as a whole, has proximately caused them harm. At no point are the 777 Defendants alleged to have collected any debts from Plaintiffs or have otherwise interacted with any consumer. As such, to the extent any Plaintiffs could have suffered any harm, such harm would have been proximately caused by the entities actually collecting Plaintiffs' debts, not the 777 Defendants. But the entity that actually collected loans from

Plaintiffs is the sovereign arm-of-the-tribe lending company ZocaLoans owned and operated by the Tribe that created it. To that end, there is no monetary or equitable relief available from such entities under RICO, as sovereign entities are not "Persons" under RICO from whom relief is available. *Cf. Inyo Cnty. v. Paiute-Shoshone Indians of the Bishop Cmty. of the Bishop Colony*, 538 U.S. 701, 709 (2003) (Native American tribe, like a state, is not a "person" that could be sued under 42 U.S.C. § 1983); *Genty v. Resol. Tr. Corp.*, 937 F.2d 899, 914 (3d Cir. 1991) (plaintiffs could not maintain private civil action under RICO against municipality as the municipality could not be liable for the treble damages imposed in such an action).

Finally, determinative of Plaintiffs' Section 1962(a) claims is their failure to allege any separate injury (apart from their proposed injuries flowing from the collection of unlawful debts) that was caused by an investment by the 777 Defendants. Indeed, the theory Plaintiffs advance here, that the alleged investment permitted the enterprise to continue lending, has been explicitly rejected by the Ninth Circuit. *Sybersound Records, Inc.*, 517 F.3d at 1149 (holding that "[r]einvestment of proceeds from alleged racketeering activity back into the enterprise to continue its racketeering activity is insufficient to show proximate causation." (citation omitted)).

Plaintiffs' alleged harm was caused by others. But the actions of others cannot create standing to pursue such claims against the 777 Defendants. ZocaLoans, not the 777 Defendants, originated and collected loans made to Plaintiffs—the loan contracts make clear that all acts of collection on the loans were performed by the lenders. Daugherty Decl., Exs. 1, 2. Plaintiffs' theory of liability against the 777 Defendants stretches the chain of proximate causation well beyond the reach of RICO. *See Fields*, 881 F.3d at 745.

2. The Complaint Fails to Establish a Violation of Section 1962 by the 777 Defendants.

Beyond the lack of standing, perhaps a more fundamental flaw in Plaintiffs' Complaint is that it fails to actually allege a substantive violation of RICO's conduct provision, Section 1962, by the 777 Defendants. Under Section 1962(a), (b), and (c), a plaintiff must prove that each defendant: (1) invested in, acquired an interest in, or operated (2) an enterprise that affects interstate commerce (3) through a pattern (4) of racketeering activity which (5) the proximately harmed the victim. *See Synopsys, Inc. v. Ubiquiti Networks, Inc.*, 313 F. Supp. 3d 1056, 1076 (N.D. Cal. 2018) (citing *Eclectic Properties*, 751 F.3d at 997); *Monterey Bay Mil. Hous., LLC v. Ambac Assurance Corp.*, No. 17-cv-4992-BLF, 2018 WL 3439372, at *13 (N.D. Cal. July 17, 2018) ("Plaintiffs should allege facts showing what predicate acts each Defendant committed and how those acts injured each Plaintiff." (citation omitted)). Yet Plaintiffs' Complaint fails to allege that the 777 Defendants—as opposed to some other defendant—invested in, maintained an interest in, participated in the operation or management of any purported enterprise. Worse still, the Complaint fails to allege that the 777 Defendants purported investment, acquisition, or operation of an enterprise was done through the collection of an unlawful debt. These are bedrock elements of any RICO claims, and their absence of such key and necessary factual allegations in the Complaint requires dismissal of the RICO claims against the 777 Defendants.

a. *The 777 Defendants did not collect of unlawful debts.*

Plaintiffs' Complaint fails to even allege that the 777 Defendants engaged in any acts prohibited under the statute. It is black letter law that in order to face liability under RICO Section 1962(a), (b), or (c), a proper defendant must be shown to have engaged in either a pattern of racketeering activity or the collection of an unlawful debt. 18 U.S.C. §

1962(a)-(c); *see also Oxford St. Props., LLC v. Robbins*, No. CV 10-2999-VBF(RZX), 2010 WL 11549864, at *3 (C.D. Cal. Sept. 15, 2010) ("The RICO statute requires 'a pattern of racketeering activity' on the part of each defendant."); *United States v. Bergrin*, 650 F.3d 257, 267 (3d Cir. 2011) ("It is the 'person' charged with the racketeering offense—not the entire enterprise—who must engage in the 'pattern of racketeering activity.'" (citing *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 244 (1989))). "RICO does not criminalize engaging in a pattern of racketeering or collecting unlawful debt, but rather criminalizes participation in the affairs of an enterprise through those means." *United States v. Pepe*, 747 F.2d 632, 661 n.48 (11th Cir. 1984); *see also In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 372 (3d Cir. 2010) (holding that a defendant must conduct or participate in the enterprise's affairs "through—that is, by means of, by consequence of, by reason of, by the agency of, or by the instrumentality of—a pattern of racketeering activity." (internal quotation marks and citation omitted)). Stated differently, demonstrating that the 777 Defendants actually collected an unlawful debt, and that such action was the method through which the 777 Defendants invested in, acquired an interest in, or participated in the affairs of the enterprise, are essential elements of any RICO claim. *Abraham v. Singh*, 480 F.3d 351, 355 (5th Cir. 2007) ("Regardless of subsection, RICO claims under § 1962 have three common elements: (1) a person who engages in (2) a pattern of racketeering activity, (3) connected to the acquisition, establishment, conduct, or control of an enterprise." (internal quotation marks and citation omitted)).

The Complaint fails to allege that the 777 Defendants have engaged in a pattern of racketeering activity or the collection of an unlawful debt. This is fatal to all of Plaintiffs' RICO claims. The unlawful conduct alleged in the Complaint is the collection of unlawful debts. *See* Compl. ¶¶ 81, 85. As other courts have found, that conduct only occurs when a

defendant takes an action that "would tend to induce another to repay an unlawful debt…." *See United States v. Eufrasio*, 935 F.2d 553, 576 (3d Cir. 1991). But nowhere in the Complaint are the 777 Defendants, as opposed to the enterprise as a whole, alleged to have collected any debts from Plaintiffs or taken any action that would have induced any of the Plaintiffs to repay a debt. As the loan agreements make clear, Plaintiffs only owed a debt to ZocaLoans and not to any other entity. Lacking the key factual allegation that the 777 Defendants—as opposed to the enterprise as a whole—collected debts from Plaintiffs, the 777 Defendants cannot be liable under Section 1962(a), (b), or (c).

b. *The Complaint fails to allege the 777 Defendants invested in, acquired, or operated any enterprise through the collection of unlawful debts.*

RICO also requires more than the commission of predicate acts by a defendant. This is because, "RICO does not criminalize engaging in a pattern of racketeering or collecting unlawful debt, but rather criminalizes participation in the affairs of an enterprise through those means." *Pepe*, 747 F.2d at 661 n.48 (11th Cir. 1984); s*ee also In re Ins. Brokerage Antitrust Litig.*, 618 F.3d at 372 (holding that a defendant must conduct or participate in the enterprise's affairs "through—that is, by means of, by consequence of, by reason of, by the agency of, or by the instrumentality of—a pattern of racketeering activity." (internal quotation marks and citation omitted)). RICO, however was never meant to be used to turn general contract disputes into federal causes of action. *See, e.g.*, *Flip Mortgage Corp. v. McElhone*, 841 F.2d 531, 538 (4th Cir. 1988). This is particularly true where the underlying predicate is the collection of unlawful debts because, as the Ninth Circuit has cautioned, "RICO is concerned with evils far more significant than the simple practice of usury." *Sundance Land Corp. v. Cmty. First Fed. Sav. & Loan Ass'n*, 840 F.2d 653, 666 (9th Cir. 1988) (quoting *Durante Bros. & Sons, Inc. v. Flushing Nat'l Bank*, 755 F.2d 239,

248 (2d Cir. 1985)). Indeed, Courts must be weary of RICO claims in such situations because RICO "has an almost inevitable stigmatizing effect on those named as defendants," and in the interests of fairness to those labeled as racketeers, "courts should strive to flush out frivolous RICO allegations at an early stage of the litigation." *Figueroa Ruiz v. Alegria*, 896 F.2d 645, 650 (1st Cir. 1990).

Rather, Section 1962(c) is violated only when the collection of an unlawful debt is the "means by which [a] defendant 'participate[s], directly or indirectly, in the conduct of [the] enterprise's affairs.'" *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d at 371 (quoting 18 U.S.C. § 1962(c)) (alterations in original). "Mere participation in the activities of [an] enterprise is insufficient," to impose liability under Section 1962(c). *Goren v. New Vision Int'l, Inc.*, 156 F.3d 721, 727 (7th Cir. 1998); *see also Reves v. Ernst & Young*, 507 U.S. 170, 179 (1993) and *Int'l Bus. Machines Corp. v. Brown*, 134 F.3d 377 (9th Cir. 1998) (unpublished) ("Evidence that the defendant knew of the scheme or even benefitted from the scheme is not enough to impose RICO liability." (citation omitted)). In this context, Congress did not intend for liability to arise under Section 1962(c) for those that aid or abet an enterprise, but rather only those who take part "in directing the enterprise's affairs …." *Reves*, 507 U.S. at 178-79; *see also In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prod. Liab. Litig.*, No. MDL 2672 CRB (JSC), 2017 WL 4890594, at *12 (N.D. Cal. Oct. 30, 2017) (noting that under *Reves*, "RICO requires more than aiding and abetting conduct to give rise to liability.").

On this point, numerous courts have found, the proper defendant under Section 1962(c) "must do more than simply provide, through its regular course of business, goods and services that ultimately benefit the enterprise." *George v. Urban Settlement Servs.*, 833 F.3d 1242, 1251 (10th Cir. 2016) (citation omitted); *Dahlgren v. First Nat'l Bank of*

Holdrege, 533 F.3d 681, 690 (8th Cir. 2008) ("A bank's financial assistance and professional services may assist a customer engaging in racketeering activities, but that alone does not satisfy the stringent 'operation and management' test of *Reves*." (citation omitted)). But, at best, that is all Plaintiffs can allege as to the 777 Defendants.

The Supreme Court has repeatedly confirmed that "liability [under RICO] depends on showing that the defendants conducted or participated in the conduct of the 'enterprise's affairs,' not just their *own* affairs." *Reves*, 507 U.S. at 185 (emphasis in the original); *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d at 371 ("More precisely, one is not liable under [§ 1962(c)] unless one has participated in the operation or management of the enterprise itself." (internal quotation marks and citation omitted)). As the Supreme Court confirmed, in order for a defendant to face liability he or she must play "*some* part in directing the enterprise's affairs …." *Reves*, 507 U.S. at 179 (emphasis in original). Yet the Complaint makes no such allegation as to the 777 Defendants. Rather, the entire section of the Complaint dedicated to demonstrating the 777 Defendants' purported participation in the entity alleges only that ZocaLoans is "**run by**" the 777 Defendants. Compl. ¶ 23 (emphasis added). Similarly vague claims have been found to be "fatal" to similar RICO claims. *Manago v. Cane Bay Partners VI, LLLP*, No. 20-CV-0945-LKG, 2022 WL 4017299, at *6 (D. Md. Sept. 2, 2022) (appeal pending) ("While Plaintiffs generally allege that the . . . Defendants 'run the lending business' at issue in this case, the amended complaint does not state the nature of the roles and responsibilities that the . . . Defendants had in carrying out the alleged RICO enterprise. . . . The absence of this factual detail is fatal to Plaintiffs' RICO claims."). In any event, allegedly assisting an enterprise is not the same thing as directing the enterprise's affairs. *See Moss v. BMO Harris Bank, N.A.*, 258 F. Supp. 3d 289, 306 (E.D.N.Y. 2017) (dismissing RICO claims against ACH providers because, in

part, "a person may not be held liable merely for taking directions and performing tasks that are necessary and helpful to the enterprise, or for providing goods and services that ultimately benefit the enterprise." (internal quotation marks and citation omitted)).

Courts around the country have consistently recognized that "[r]egardless of how indispensable or essential such services may have been, rendering a professional service by itself does not qualify as participation in a RICO enterprise." *Rosner v. Bank of China*, 528 F. Supp. 2d 419, 431 (S.D.N.Y. 2007) (citation omitted); *see also Chi v. MasterCard Int'l, Inc.*, No. 1:14-CV-614-TWT, 2014 WL 5019917, at *2 (N.D. Ga. Oct. 7, 2014) ("Simply providing financial services or processing credit card transactions is not enough to establish 'operation or management' of an enterprise." (citation omitted)). This line of cases had been particularly well-developed in RICO cases filed against banking entities in connection with loans made to a purported RICO enterprise. *See Indus. Bank of Latvia v. Baltic Fin. Corp.*, No. 93 Civ. 9032(LLS), 1994 WL 286162, at *3 (S.D.N.Y. Jun. 27, 1994) (granting motion to dismiss RICO claim against bank because "provid[ing] banking services—even with knowledge of the fraud—is not enough" to state a RICO claim); *see also Super Vision Int'l, Inc. v. Mega Int'l Com. Bank Co., Ltd.*, 534 F. Supp. 2d 1326, 1338 (S.D. Fla. 2008) ("[b]ankers do not become racketeers by acting like bankers.") (quoting *Terry A. Lambert Plumbing, Inc. v. W. Sec. Bank*, 934 F.2d 976, 981 (8th Cir.1991)); *Renaissance Ctr. Venture v. Lozovoj*, 884 F. Supp. 1132, 1146 (E.D. Mich. 1995) (holding "passive financing arrangements are insufficient to give rise to [RICO] liability," because such an arrangement does not lead to the conclusion that, defendant "manage[d] or direct[ed] the enterprise.").

Most recently, this line of cases includes *Pennsylvania v. Think Finance, Inc.*, where the Pennsylvania court dismissed both substantive and conspiracy-based state-RICO

claims against a lender because "a defendant does not incur liability under the [Corrupt Organizations Act] for merely funding an alleged unlawful enterprise." No. 14-CV-7139, 2018 WL 637656, at *9 (E.D. Pa. Jan. 31, 2018) (citing *Dongelewicz v. PNC Bank Nat'l Ass'n*, 104 F. App'x 811, 817-18 (3d Cir. 2004)). In *Dongelewicz*, the Third Circuit emphasized that even where the terms of a loan agreement granted a lender certain approval rights for the underlying project, no RICO liability would exist, because to hold otherwise "would wreak havoc on the lending industry, for any lender who reasonably wished to protect itself would be forced to run the risk of being sued for the unknown fraudulent acts of its borrowers." 104 F. App'x at 817.

These cases are absolutely clear and counsel against permitting the RICO cause of action to continue against the 777 Defendants. As these cases dictate, the mere funding of a lending business and/or the provision of services to an alleged RICO enterprise is not enough to support liability.

D. The 777 Defendants Reserve the Right to Incorporate by Reference Certain Arguments.

The docket does not reflect that any of the other defendants have been served. The 777 Defendants, pursuant to by Fed. R. Civ. P. 10(c), reserve the right to adopt and incorporate by reference as if fully set forth herein any arguments made in support of a motion to dismiss made by any other defendant.

IV. CONCLUSION

Plaintiffs' Complaint makes claims against the 777 Defendants that are not viable under either California or federal law. On the merits, all of Plaintiffs claims against the 777 Defendants should be dismissed. Indeed, Plaintiffs' loan contracts, and the interest charged thereon, are consistent with applicable choice-of-law principles, and the law of the

Tribe for which Plaintiffs contracted. And, even if this were not so, the remaining factual and legal deficiencies in Plaintiffs' Complaint require dismissal of the remaining claims. If the Court does not grant the 777 Defendants contemporaneously filed Motion to Compel Arbitration (which would render this motion moot), the 777 Defendants respectfully request that this motion to dismiss be granted.

Dated: November 17, 2022

VAN NESS FELDMAN LLP

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