No. 23-2097

In The United States Court Of Appeals
For The Fourth Circuit

LULA WILLIAMS,
Plaintiff-Appellee

v.

MATT MARTORELLO,
Defendant-Appellant,

On Appeal From The United States District Court
For The Eastern District Of Virginia (Robert E. Payne)
(3:17-cv-00461-REP)

REPLY BRIEF OF APPELLANT

Steven D. Gordon
Holland & Knight LLP
800 17th Street, N.W., Suite 1100
Washington, D.C. 20006
Telephone: (202) 955-3000
Facsimile: (202) 955-5564
E-mail: steven.gordon@hklaw.com

February 26, 2024

Counsel for Appellant

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

ARGUMENT

Plaintiffs' brief is notable for the amount of space it devotes to vilifying Mr. Martorello by selectively citing disputed evidence that played no role in the grant of summary judgment and is irrelevant to deciding the issues before this Court. This "endeavor to demonize [him] is wholly inappropriate, unfair, and dispiriting." *Perez v. Cuccinelli*, 949 F.3d 865, 880 (4th Cir. 2020) (en banc). In addition, plaintiffs' characterization is inaccurate and misleading.

Plaintiffs cast themselves as "victims" of a "predatory high-interest online lending scheme" that loaned them money "with annual percentage rates above 700%—nearly 60 times Virginia's legal limit." (Br. at 1). In reality Virginia permits payday loans and its legal limit for licensed lenders is 688% for a 14-day loan.[1] Far from being victims, plaintiffs received exactly what they bargained for – quick access to money for an emergency need on terms that were fully disclosed, fully compliant with federal law, and to which they voluntarily agreed. In fact, "[t]he Internet empowers consumers vis-à-vis sellers. Power in a commercial relationship depends on knowledge and choice." ABA, *Achieving Legal and Business Order in Cyberspace: A Report on Global Jurisdictional Issues Created by the Internet*, 55 The Business Lawyer 1801, 1829 (2000).

[1] *See* Va. Code § 6.2-1816; Consumer Federation of America, "Payday Loan Information for Consumers: Virginia," https://paydayloaninfo.org/states/virginia/.

Furthermore, these loans were not made by Mr. Martorello but by Big Picture Loans, LLC ("Big Picture"), an arm of the Lac Vieux Desert Band of the Lake Superior Chippewa Indians ("the Tribe"). The loans were made on the Tribe's reservation in Michigan and they comply with tribal law. Plaintiffs allege that the loans are "unlawful debt" and the tribal loan operation is an illegal enterprise under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), but this depends entirely on their argument that the loans are governed by Virginia law rather than tribal law. That is the lead issue on this appeal.

Plaintiffs persist in their false narrative that the tribal lending enterprise is a rent-a-tribe scheme for Mr. Martorello's benefit rather than a legitimate tribal business venture. This Court rejected that narrative five years ago when this case first came before it. *See Williams v. Big Picture Loans, LLC*, 929 F.3d 170 (4th Cir. 2019). The Court rejected the contention – which is nevertheless repeated in plaintiffs' brief here – that the tribal entities were formed "for the real purpose of helping Mr. Martorello … to avoid liability, rather than to help the Tribe start a business." *Id.* at 178. The Court also rejected the contention that the tribal entities "*primarily* benefit individuals and entities outside the Tribe,." *id.* at 182 (emphasis in the original), noting that "in only a few years, not only will all revenue belong to the Tribe, but it will own outright all of the components of the commercial lending enterprise." *Id.* at 181.

In attacking Mr. Martorello personally, plaintiffs seek to obfuscate the true issues before the Court in this case. The first two issues – whether tribal law governs the loans and whether this case must be dismissed pursuant to Fed.R.Civ.P. 19 – turn on the interests of the Tribe and its business entities, not Mr. Martorello. Nor are plaintiffs' personal attacks relevant to the third issue – whether alleged violations of the RICO unlawful debt prohibition require proof of scienter.

I. Tribal Law Governs The Loans At Issue.

Whether tribal or Virginia law governs loans made by Big Picture on the Tribe's reservation implicates tribal sovereignty and requires an analysis of the state, federal, and tribal interests at stake. *See White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145 (1980). But the district court did not engage in a *Bracker* analysis. Instead, it ruled that "[b]inding Fourth Circuit precedent [*Hengle v. Treppa*, 19 F.4th 324 (4th Cir. 2021)] makes clear that online tribal lending is considered 'off-reservation conduct." (JA2706). Plaintiffs defend that ruling here, arguing *Hengle* held that "online lending activity 'clearly constitutes off-reservation conduct' and so 'substantive state law applies.'" (Br. at 17). This is not correct.

A. This Court has not decided that online tribal lending is governed by the law of the borrower's state.

Hengle did not decide whether tribal or state law governs online tribal lending. Instead, it addressed a different issue: whether tribal sovereign immunity barred the adjudication of claims for injunctive and declaratory relief against tribal officials

who allegedly engaged in off-reservation conduct with respect to internet loans. Because the complaint alleged the officials had marketed their lending businesses throughout the country and had collected loan payments from plaintiffs in Virginia from bank accounts maintained there, the Court rejected defendants' contention that the conduct at issue took place on the reservation. The Court concluded that "[t]hese activities are 'directly analogous to the lending activity that other courts have found to clearly constitute off-reservation conduct subject to nondiscriminatory state regulation.'" 19 F.4th at 348-49. Accordingly, it rejected the officials' claim of immunity and held that the case could proceed. It summarized its ruling as "substantive state law applies to off-reservation conduct, and although the Tribe itself cannot be sued for its commercial activities, its members and officers can be." *Id.* at 349.

The issue here is completely different. Mr. Martorello does not assert an immunity defense, and plaintiffs do not seek prospective relief limiting the actions he may take in Virginia with respect to Big Picture loans. Rather they seek to have all of Big Picture's loans to Virginia consumers from June 22, 2013 to December 20, 2019 retrospectively held to be illegal – and to subject Mr. Martorello to punitive RICO penalties -- on the grounds that the loans are governed by Virginia rather than tribal law.

Hengle did not address this issue. It focused exclusively on the off-reservation

conduct at issue there without considering the on-reservation aspects of the loan transactions at all. Consequently, the Court did not analyze or whether one side of the loan transactions was "firmly rooted" on the reservation, or weigh the respective state, federal, and tribal interests regarding the loans. Those issues were simply not before it. Had the Court considered those issues, it doubtless would have discussed the Supreme Court's decision in *Bracker* and the Second Circuit's decision in *Otoe-Missouria*, but neither of those decisions is even mentioned. In short, *Hengle* did not decide this case, nor does it provide guidance on how this case should be decided.

B. The Federal and Tribal interests at stake outweigh Virginia's interest.

In order to decide this case, a *Bracker* analysis must be performed. The relevant precedent is *Otoe-Missouria Tribe of Indians v. N.Y. State Dep't of Fin. Servs.*, 769 F.3d 105 (2d Cir. 2014), which concluded that internet loans by a tribal lender constitute on-reservation activity and are governed by tribal law if the lender is "firmly rooted" there. *See id.* at 115.

Here, Big Picture is firmly rooted on the Tribe's reservation. It is an arm of the Tribe which operates entirely on the reservation, is managed and staffed by Tribal members, and originates its loans on the reservation.[2] (JA228). Moreover,

[2] Plaintiffs argue that Mr. Martorello misled the district court about certain aspects of the "lending scheme" and cite an opinion issued by the district court after this Court's 2019 decision. (Br. at 10-12). But plaintiffs do not contend that the alleged misrepresentations affected the district court's findings about the mechanics of the

Big Picture "ha[s] promoted the Tribe's self-determination through revenue generation and the funding of diversified economic development." *Williams*, 929 F.3d at 185. Invalidating and penalizing Big Picture's loans would "weaken the Tribe's ability to govern itself according to its own laws, become self-sufficient, and develop economic opportunities for its members." *Id.* Therefore, applying Virginia law would impermissibly infringe on the "compelling federal and tribal interests" in promoting tribal sovereignty, self-sufficiency and economic development. *See California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 222 (1987); *see also Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 807 (2014) (Sotomayor, J., concurring) ("If Tribes are ever to become more self-sufficient, and fund a more substantial portion of their own governmental functions, commercial enterprises will likely be a central means of achieving that goal").

Moreover, Virginia has no valid interest in applying its usury laws to Big Picture's loans. The Supreme Court has held that "citizens of one State [a]re free to visit [another jurisdiction] to receive credit at foreign interest rates." *Marquette Nat. Bank of Minneapolis v. First of Omaha Service Corp.*, 439 U.S. 299, 318 (1978). The usury law of the borrower's state cannot be applied to such loans, even where

---

loan application and approval process, the location of Big Picture's employees and servers, and the place where the loans originate. Nor did this Court rely on any statements by Mr. Martorello in ruling that Big Picture and Ascension Technologies, LLC ("Ascension") are bona fide arms of the Tribe.

the borrower utilizes "the convenience of modern mail" to "receive loans without visiting [another state]." *Id.* at 311. Although "the ease with which interstate credit is available" impairs the effectiveness of state usury laws, "the protection of state usury laws is an issue of legislative policy" that must be addressed to Congress, not the courts. *Id.* at 318-19. To date, Congress has not chosen to regulate internet lending to protect state usury laws, or to permit states to do so. Plaintiffs conspicuously fail to address *Marquette* anywhere in their brief because they have no answer to it.

Instead, plaintiffs deny that the Tribe has a valid interest in having its law govern Big Picture's loans. They analogize this case to *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980), and contend that Big Picture is simply offering an exemption from state regulation. (Br. at 29). This argument misses the mark. *Colville* held that states can require tribal retailers to enforce a state tax which falls on non-Indian purchasers of goods that are merely retailed on a reservation. Its rationale was that "States have a valid interest in ensuring compliance with lawful taxes that might easily be evaded through purchases of tax-exempt cigarettes on reservations; that interest outweighs tribes' modest interest in offering a tax exemption to customers who would ordinarily shop elsewhere." *Dep't of Taxation and Finance of N.Y. v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61, 73 (1994).

However, enforcing lawful state taxes on non-Indians "stands on a markedly different footing from a [state] tax imposed directly on Indian traders, on enrolled tribal members or tribal organizations, or on 'value generated on the reservation by activities involving the Tribes[.]'" *Milhelm*, 512 U.S. at 73. *Colville* decided only "that States may impose on reservation retailers minimal burdens reasonably tailored to the collection of valid taxes from non-Indians." *Id.* In contrast, "[i]f the legal incidence of an excise tax rests on a tribe or on tribal members for sales made inside Indian country, the tax cannot be enforced absent clear congressional authorization." *Oklahoma Tax Com'n v. Chickasaw Nation*, 515 U.S. 450, 459 (1995).

Likewise, *Cabazon* "held that States lacked any regulatory authority over gaming on Indian lands." *Bay Mills*, 572 U.S. at 794. The Court rejected the state's contention that the tribes were "merely marketing an exemption from state gambling laws." *Cabazon*, 480 U.S. at 219. Instead, the tribes were "generating value on the reservations through activities in which they have a substantial interest." *Id.* at 420. The Court explained that "[s]elf-determination and economic development are not within reach if the Tribes cannot raise revenues and provide employment for their members." *Id.* at 219. It noted that the tribes' reservations contained no natural resources and that gaming was a major source of employment and tribal revenues. *See id.* at 218-19.

This case is governed by *Cabazon*, not *Colville*. No state tax is at issue.

Rather, plaintiffs seek to apply Virginia law to outlaw certain loans that Big Picture originated on the Tribe's reservation. Big Picture's loan operation is directly analogous to the tribal gaming enterprises at issue in *Cabazon*. It generates substantial value on the reservation, provides employment for a number of Tribe members, and is a major source of tribal funding. Accordingly, as in *Cabazon*, the application of Virginia law would impermissibly infringe on the compelling federal and tribal interests in promoting tribal sovereignty, self-sufficiency and economic development.

The Tenth Circuit reached exactly this conclusion in a case where Utah sought to exercise its police power to prohibit billboards on tribal land that was leased to a private advertiser. The court found *Colville* inapplicable because the tribe "ha[d] not marketed an exemption from state taxation" and instead "ha[d] a significant economic interest in the land at issue." *Shivwits Band of Paiute Indians v. Utah*, 428 F.3d 966, 983 (10th Cir. 2005). It concluded that "allowing the State to exercise control over the land at issue would 'threaten Congress' overriding objective of encouraging tribal self-government and economic development.'" *Id.* (quoting *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 341 (1983)).

In sum, the loans here are governed by tribal law, which means that plaintiffs have no viable cause of action and this case must be dismissed.

II. This Case Must Be Dismissed Pursuant To Rule 19.

This case must also be dismissed pursuant to Fed.R.Civ.P. 19(b) because the Tribe, Big Picture and Ascension are indispensable parties in whose absence this case cannot be adjudicated. Big Picture, as a party to all of the loan agreements at issue, "is the paradigm of an indispensable party." *Gunvor SA v. Kayablian*, 948 F.3d 214, 221 (4th Cir. 2020). Ascension is a required party because "all parties who may be affected by the determination of [an] action [to set aside a contract] are indispensable." *Dawavendewa v. Salt River Project Agr. Imp. & Power Dist.*, 276 F.3d 1150, 1156 (9th Cir. 2002). The Tribe is a required party because "any judgment … would threaten 'to impair the [Tribe]'s contractual interests … as well as 'its sovereign capacity to negotiate contracts and, in general, to govern' the reservation.'" *Yashenko v. Harrah's NC Casino Co., LLC*, 446 F.3d 541, 553 (4th Cir. 2006) (citation omitted). Further, the Tribe's "interests may well be affected as a practical matter by the judgment that its operations are illegal." *Am. Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1024 (9th Cir. 2002). (emphasis in original).

Plaintiffs do not dispute that the Tribe, Big Picture, and Ascension possess interests in this case that are protected by Rule 19. Instead, they contend that those interests have been disclaimed. They argue that "the 'best evidence' that the tribal entities no longer claim an interest in the litigation … is their decision to settle." (Br. at 34). Their argument mischaracterizes both the applicable law and the facts of this

case.

A. The Tribe, Big Picture, and Ascension have not disclaimed the interests in this case that make them required parties.

Rule 19 does not require that an absent party affirmatively claim an interest in the litigation. It speaks of a person who "claims an interest relating to the subject of the action," but this "means nothing more than appears to have such an interest." *Tell v. Trustees of Dartmouth College*, 145 F.3d 417, 419 (1st Cir. 1998). "In all likelihood, the word 'claims' was used by the drafters not to suggest that a necessary party had to come forward—such 'parties' are commonly not heard from at all—but to debar any inference that the necessary party had to have a proven interest as opposed to a colorable claim to one." *Id.* at n.2. "Though a nonparty may formally claim an interest in an action, a 'court with proper jurisdiction may also consider sua sponte the absence of a required person and dismiss for failure to join.'" *Gunvor*, 948 F.3d at 220 (quoting *Republic of Philippines v. Pimentel*, 553 U.S. 851, 861(2008)). "[C]ourts must take into account the possible prejudice to all parties, including those not before it." *Home Buyers Warranty Corp. v. Hanna*, 750 F.3d 427, 433 (4th Cir. 2014) (internal quotation and citation omitted).

Moreover, the Tribe, Big Picture, and Ascension did not settle out of this case. The Tribe was never made a party to this case (because it obviously was immune

from suit) and it was not a party to the settlement agreement.[3] Big Picture and Ascension were dismissed from this case based on their immunity, pursuant to this Court's 2019 decision, not based on the settlement. The settlement agreement was reached many months after this Court's ruling; it resolved other pending litigation against Big Picture and Ascension, not this case. Thus, contrary to plaintiffs' contention, this case is directly akin to *Pimentel*, where the Supreme Court held that Rule 19 precluded a suit from proceeding after necessary parties who possessed sovereign immunity were dismissed from it.

Plaintiffs invoke the rulings in *Duggan v. Martorello*, 596 F.Supp.3d 195, 204 (D. Mass. 2022) and *Smith v. Martorello*, 2021 WL 5910652 (D. Or. Dec. 14, 2021), which refused to dismiss those cases pursuant to Rule 19. Those courts reasoned that "[b]y entering into the Settlement Agreement and stipulating to their dismissal, the Tribal Entities cannot be said to 'claim an interest in the subject' of this action, as Rule 19(a)(1)(B) requires." *Duggan*, 596 F.Supp.3d at 204. But there is no such stipulation in this case -- Big Picture and Ascension were dismissed based on their immunity, not pursuant to their settlement with the plaintiffs.

Moreover, the rulings in *Duggan* and *Smith* – which Mr. Martorello has not yet had the opportunity to appeal – are unpersuasive. They proceed from the

[3] Plaintiffs note that the settlement agreement was signed by the Tribal Chairman and other tribal officials (Br. at 35), but they do not assert that the Tribe itself was a party to the agreement.

erroneous premise that an absent party must affirmatively "claim an interest" in the action. Further, they fail to take account of the unique set of interests possessed by Big Picture and Ascension stemming from their tribal immunity. They assume that a defendant who settles is thereby disclaiming any remaining interest in the outcome of that action. This is logical if the court has jurisdiction over the defendant because, absent a settlement, the court would proceed to adjudicate the issues affecting the defendant. But this inference does not follow where the court cannot adjudicate issues affecting the defendant because the defendant is immune from the court's jurisdiction. "It is wholly at odds with the policy of tribal immunity to put [a] tribe to th[e] Hobson's choice between waiving its immunity or waiving its right not to have a case proceed without it." *Wichita and Affiliated Tribes of Oklahoma v. Hodel*, 788 F.2d 765, 776 (D.C. Cir. 1986).

In both *Duggan* and *Smith,* Big Picture and Ascension asserted their tribal immunity and filed motions to dismiss. Those motions were still pending when the settlement agreement was reached.[4] Meanwhile this Court had upheld their claim of tribal immunity and the courts in the remaining cases would have reached the same conclusion eventually. Big Picture and Ascension settled simply to avoid the expense and distraction of having to continue to litigate their immunity in each

[4] *See Duggan v. Martorello*, No. 1:18-cv-12277 (D. Mass.), ECF Nos. 27, 29, 112, 114; *Smith v. Martorello*, No. 3:18-cv-01651 (D. Or.), ECF Nos. 39, 46, 96.

remaining case until they were dismissed on that basis. The settlement was a cost-effective shortcut to secure their dismissal in a situation where their motions to dismiss were languishing and the costs of litigation – about which Big Picture and Ascension had already complained to the court below -- were mounting.

Big Picture and Ascension did not waive their claim of immunity by settling. To the contrary, they reasserted their tribal immunity in the settlement agreement and denied that any federal court had jurisdiction over them in the pending actions. (JA299 (¶ 1.4), JA308 (¶ 3.2)). They waived their immunity only for the limited purposes of (1) enforcing the settlement agreement, (JA 299 (¶1.6)), and (2) providing loan data if a class action was certified. (JA 313 (¶ 6.3)).[5]

The settlement did not extinguish the protected interests of the Tribe, Big Picture, or Ascension in the remaining litigation against Mr. Martorello. It did not bring an end to Big Picture's challenged lending practices; to the contrary, the settlement is predicated on Big Picture and Ascension continuing in business. Thus, for purposes of Rule 19, the Tribe, Big Picture and Ascension remained in the same position as before the settlement, *i.e.*, disposing of the action in their absence "may,

[5] Absent this provision, once they were dismissed as parties, Big Picture and Ascension could have asserted tribal immunity in response to document subpoenas. *See Bonnet v.* Harvest *(U.S.) Holdings, Inc.*, 741 F.3d 1155, 1157 (10th Cir. 2014); *Alltel Commc'ns, LLC v. DeJordy*, 675 F.3d 1100, 1102 (8th Cir. 2012); *United States v. James*, 980 F.2d 1314, 1319 (9th Cir. 1992).

as a practical matter impair or impede [their] ability to protect [their] interest[s]" in not having the loan agreements held unlawful, and in not having the tribal lending business adjudicated to be a criminal RICO enterprise.

Nor does the settlement agreement contain any provision in which Big Picture or Ascension (much less the Tribe) disclaims or waives its Rule 19 interests in any remaining litigation against Mr. Martorello. The general rule is that a party must "unambiguously disclaim" its interests under Rule 19. *Ross Dress for Less, Inc. v. Makarios–Oregon, LLC*, 2018 WL 2452957, at *8 (D. Or. May 31, 2018). There is no such disclaimer here.

Instead, plaintiffs contend that Big Picture and Ascension implicitly disclaimed their interests by entering into the settlement. They argue that Big Picture and Ascension knew that the claims against Mr. Martorello would proceed and agreed to provide data for the purpose of identifying and distributing funds to class members in the event that a class action judgment or settlement was obtained. But knowing that the litigation would proceed in their absence does not constitute agreement that it should proceed all the way to a judgment. This is especially true here, where it was obvious that the absence of Big Picture and Ascension would trigger a Rule 19 motion to dismiss.

Furthermore, the notion that the Tribe, Big Picture, and Ascension have implicitly consented to the adjudication of this case in their absence runs headlong

into the applicable law, which forbids implicit waivers of tribal sovereign immunity.[6] Tribal immunity gives a tribe or tribal entity the right not to have its legal duties judicially determined without its consent. *See Shermoen v. United States*, 982 F.2d 1312, 1317 (9th Cir. 1992). The law is settled that any waiver of tribal sovereign immunity "cannot be implied but must be unequivocally expressed." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). Waiver will not be implied from a tribe's conduct in litigation, even litigation that it commences. *See Quinault Indian Nation v. Pearson*, 868 F.3d 1093, 1097-99 (9th Cir. 2017).

Plaintiffs could have bargained for an explicit waiver of the Rule 19 interests of Big Picture and Ascension in the continuing litigation. *See Bay Mills*, 572 U.S. at 796-97 (a party in contract negotiations with a tribe must bargain for a waiver of immunity). As discussed above, the settlement agreement does include two limited waivers of immunity by Big Picture and Ascension. But plaintiffs cannot now construe the settlement agreement to contain implicit waivers of tribal interests that are not spelled out therein.

Nowhere have the Tribe, Big Picture, or Ascension unequivocally consented to the adjudication of this action in their absence. Accordingly, they remain required parties under Rule 19.

---

[6] Plaintiffs bear the burden to prove that tribal immunity has been abrogated or waived. *Williams*, 929 F.3d at 177.

B. The district court abused its discretion in concluding that the Tribe, Big Picture, and Ascension are not indispensable.

Plaintiffs contend that, even if the Tribe and its entities are required parties, the district court reasonably concluded that they are not indispensable. There are two fatal flaws in this argument: the first is legal and the second is factual.

First, while Rule 19(b) directs a trial court to weigh four non-exclusive factors to evaluate whether an action can fairly proceed without a required party, there is "very little need for balancing Rule 19(b) factors" where the required party is immune from suit "because immunity itself may be viewed as the compelling factor." *Kescoli v. Babbitt*, 101 F.3d 1304, 1311 (9th Cir. 1996) (citation omitted). "Under Rule 19(b), immunity is deemed a 'compelling factor' to demonstrate that the party is indispensable." *Clark v. Harrah's NC Casino Co., LLC*, 2018 WL 6118624, at *6 (W.D.N.C. Apr. 27, 2018), *adopted*, 2018 WL 4664136 (Sept. 28, 2018). The Supreme Court has said categorically that "[a] case may not proceed when a required-entity sovereign is not amenable to suit." *Pimentel*, 553 U.S. at 867. Accordingly, a suit must be dismissed when a tribe or tribal entity is a required party and cannot be joined because of sovereign immunity. *See Yashenko*, 446 F.3d at 553. The district court lacked discretion to decide otherwise.

Second, the district court did not conduct a Rule 19(b) balancing in this case. Instead, it ruled that the Tribe, Big Picture, and Ascension were not required parties under Rule 19(a). Nor did either of the cases cited by the district court engage in a

balancing of factors under Rule 19(b). *Gingras v. Rosette*, 2016 WL 2932163 (D. Vt. May 18, 2016) concluded that the presence of tribal officials as defendants in an *Ex parte Young* action "satisfies the requirements of Rule 19." *Id.* at *20. *Commonwealth of Pennsylvania v. Think Finance, Inc.*, 2016 WL 183289 (E.D. Pa. Jan. 14, 2016), ruled (incorrectly) that absent tribes were not required parties under Rule 19(a) in the circumstances of that case. *Id.* at *8. Thus, the district court did not explicitly or implicitly weigh the Rule 19(b) factors; it did not engage in any exercise of discretion.

In sum, the district court erred in ruling that this case could proceed in the absence of the Tribe, Big Picture, and Ascension. They are indispensable parties and without them the case must be dismissed

III. RICO Liability Requires Knowledge That The Loans Were Unlawful.

The district court also erred in ruling that Mr. Martorello violated RICO by facilitating the loans at issue regardless of whether he knew the loans were unlawful and that the interest rate being charged was twice the legally enforceable rate. The court transformed the RICO unlawful debt provision into a strict liability offense when it is predicated on violation of a state usury law lacking a scienter requirement. Consequently, the court imposed a $44 million judgment on Mr. Martorello without any proof that he knew what he was doing was wrong. Plaintiffs' efforts to defend this outlandish result don't withstand scrutiny.

A. The same scienter is required for civil and criminal RICO violations.

Plaintiffs contend that the elements of a RICO violation differ as between a civil and a criminal action. This is not so. RICO violations are set forth in 18 U.S.C. § 1962, entitled "Prohibited activities." A violation of § 1962 can give rise to a criminal prosecution and punishment pursuant to 18 U.S.C. § 1963, entitled "Criminal penalties," or to a civil action pursuant to 18 U.S.C. § 1964, entitled "Civil remedies." But the elements of a RICO offense remain the same regardless of whether a criminal or civil action is being pursued. *See RJR Nabisco, Inc. v. European Community*, 579 U.S. 325, 331 (2016).

Plaintiffs misconstrue *Beck v. Prupis*, 529 U.S. 494 (2000) in an attempt to manufacture support for their position. That decision addressed a plaintiff's standing to bring a civil RICO claim under section 1964(c) and so looked to the common law of civil conspiracy to resolve that civil procedural question. *See* 529 U.S. at 500. Nowhere did the Court suggest that civil law should be used to construe the elements of a RICO offense under section 1962.

To the contrary, a court "must interpret [a] statute consistently, whether we encounter its application in a criminal or noncriminal context." *Sessions v. Dimaya*, 138 S.Ct. 1204, 1217 (2018) (quoting *Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004)). Plaintiffs try to downplay the significance of this rule, but it is fundamental. When a statutory interpretation "involves a statute, whose provisions have both civil and

criminal application, our task merits special attention because our interpretation applies uniformly in both contexts." *WEC Carolina Energy Sols. LLC v. Miller*, 687 F.3d 199, 204 (4th Cir. 2012). "[I]n the interest of providing fair warning of what the law intends to do if a certain line is passed," the Court construes the statute strictly in both contexts. *Id.* (internal quotation and citation omitted). Therefore, the scienter required for a RICO offense is the same regardless of whether it is being litigated in a civil or criminal context. It is especially appropriate to apply this rule to RICO because, as this case illustrates, the civil penalties are "drastic." *See H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 233 (1989).

B. A mistake of law precludes the required knowledge that the debt at issue was unlawful.

Plaintiffs argue that RICO has no scienter requirement because the language of 18 U.S.C. § 1962(c) and (d) does not spell out one. However, courts "read into criminal statutes that are silent on the required mental state—meaning statutes that contain no *mens rea* provision whatsoever—that *mens rea* which is necessary to separate wrongful conduct from otherwise innocent conduct." *Ruan v. United States*, 142 S.Ct. 2370, 2377 (2022) (emphasis in the original; internal quotations omitted). Courts "presume that Congress did not intend to impose criminal liability on persons who, due to lack of knowledge, did not have a wrongful mental state." *Rehaif v. United States*, 139 S.Ct. 2191, 2198 (2019).

A defendant must "possess a culpable mental state regarding 'each of the statutory elements that criminalize otherwise innocent conduct.'" *Rehaif*, 139 S.Ct. at 2195 (quoting *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72 (1994)). RICO criminalizes collection (or conspiracy to collect) "unlawful debt" that is (1) unenforceable under state or federal usury laws, and (2) where the usurious rate is at least twice the enforceable rate. Accordingly, a defendant must have culpable knowledge regarding both of these elements in order to be convicted. Otherwise, RICO would "produce criminal liability for racketeering for unexceptionable conduct." *United States v. Grote*, 961 F.3d 105, 121 (2d Cir. 2020). This is why the Department of Justice instructs prosecutors that they must prove both of these points in an unlawful debt prosecution. *Criminal RICO: 18 U.S.C. §§ 1961-1968, A Manual for Federal Prosecutors*, p. 136 (6th rev. ed. 2016).

Plaintiffs argue that, nonetheless, a mistake of law defense "does not follow from the general presumption that Congress includes some *mens rea* requirement in criminal statutes." (Br. at 44). But it is hornbook law that "[a] person who engages in penally prohibited conduct may be relieved of criminal liability if, because of ignorance or mistake of law, he did not entertain the culpable mental state required for commission of the offense[.]" 1 *Wharton's Criminal Law* § 13:3 (16th ed.). The Supreme Court recently reaffirmed that "a mistake of law is a defense if the mistake negates the 'knowledge … required to establish a material element of the offense.'"

Rehaif, 139 S.Ct. at 2198 (quoting Model Penal Code § 2.04, at 27). The Court went on to hold that a mistake of law was a valid defense in that case because a defendant must know that he is an alien "illegally or unlawfully in the United States" in order to violate the firearms possession statute at issue there. *See id.*

The Supreme Court's *mens rea* jurisprudence could not be clearer. It leaves no doubt that scienter is required for a RICO unlawful debt offense. This jurisprudence caused the Second Circuit to repudiate its ruling in *United States v. Biasucci*, 786 F.2d 504 (2d Cir. 1986) and require proof that the defendant knew the debt at issue was unlawful. *See United States v. Grote*, 961 F.3d at 121; *United States v. Moseley*, 980 F.3d 9, 19 (2d Cir. 2020). The court refused to "authorize conviction under RICO of a defendant who neither knew the rate of interest charged nor that the rate charged was illegal." *Grote*, 961 F.3d at 119. Plaintiffs airily dismiss these decisions as "dicta in out-of-circuit criminal cases" and contend that they are irrelevant because this is a civil rather than a criminal RICO case. (Br. at 43). But that dodge doesn't work. These decisions are recent, they are directly on point, and there is no contrary federal decision within the last 30 years except the decision below under review here. The Second Circuit's analysis is persuasive and it devastates plaintiffs' argument.

C. Plaintiffs' invocation of the Illegal Gambling Business Act is irrelevant to the scienter required here.

Plaintiffs contend that this Court should ignore the Supreme Court's

jurisprudence and conclude, contrary to the Second Circuit, that no scienter is required for a RICO unlawful debt offense. They invoke *United States v. Lawson*, 677 F.3d 629, 652-53 (4th Cir. 2012), which held that the Illegal Gambling Business Act, 18 U.S.C. § 1955, is a general intent crime which does not require proof that defendants knew their conduct violated state law. But *Lawson* didn't discuss the Supreme Court's scienter jurisprudence; it simply followed precedent from other circuits. And *Lawson* didn't address RICO at all. In sum, *Lawson* is inapposite to this case.

Further, the gambling offense proscribed by 18 U.S.C. § 1955 is readily distinguishable from an unlawful debt offense under RICO. While section 1955 requires that the gambling at issue must violate state law, when the statute was enacted in 1970 every state except Nevada proscribed such gambling. *See* Wikipedia, "History of gambling in the United States," https://en.wikipedia.org/wiki/History_of_gambling_in_the_United_States (last edited on 24 January 2024, at 15:45 (UTC)). Thus, a defendant's knowledge of a particular state's law didn't spell the difference between innocent and criminal conduct. In contrast, making loans is not a presumptively illegal activity. To the contrary, "legal interest rates vary widely from state to state while some states have no usury laws at all." *United States v. Cheiman*, 578 F.2d 160, 161 (6th Cir. 1978). The difference between innocent and illegal conduct under RICO depends on the

defendant's knowledge that the loans are unlawful under governing law and are at least twice the legally enforceable rate.

Federal courts have required scienter with respect to other elements of the gambling offense that do make a practical difference to a defendant's culpability. As the Sixth Circuit explained, "[t]he penalties for violating § 1955 are much more severe than the penalties for violating the predicate state law crimes." *United States v. Hill*, 55 F.3d 1197, 1202 (6th Cir. 1995). Absent a *mens rea* requirement, "an individual [who] aids an illegal gambling business that, unbeknownst to him, meets the size, scope and duration requirements of § 1955, [] will be convicted as a felon and receive the federal sentence" for conduct that, under state law, would only be a misdemeanor. *Id.* Thus, the Supreme Court's scienter jurisprudence requires that an accomplice know the scope of the illegal gambling enterprise in order to be convicted of the federal offense. *See id.*

These same concerns are amplified here. The conduct at issue in *Hill* was already criminal under state law but the court required scienter in order to elevate that conduct from a misdemeanor to a five-year federal felony. Here, an alleged violation of state usury law that is not a criminal offense is being elevated to a 20-year federal felony. This is patently unjust unless the defendant knew that the loans at issue meet the definition of "unlawful debt" under RICO, *i.e.*, that they are unenforceable under governing law and that the rate of interest is at least twice the

enforceable rate.

D. Assumption of the risk is not a substitute for knowledge.

Finally, plaintiffs contend that Mr. Martorello assumed the risk that the loans were unlawful and ask the Court to affirm their $44 million RICO judgment on that basis. They claim that Mr. Martorello acted recklessly, although the district court did not say so, and it was hardly reckless for Mr. Martorello to rely on the advice of competent counsel in the face of controversy over the loans' legality. In any event, recklessness is not the equivalent of knowledge for purposes of scienter. *See* Model Penal Code § 2.02(2) (distinguishing between "knowingly" and "recklessly"). The Supreme Court construes criminal statutes to require proof that a defendant knew his conduct was unlawful to avoid deterring conduct that lies close to, but on the permissible side of, the criminal line. *See Ruan*, 142 S.Ct. at 2378. Using an assumption of the risk standard does just the opposite.

Mr. Martorello did not violate RICO unless he knew – not merely risked – that the loans were unlawful and that the rate charged for those loans was at least twice the legally enforceable rate. Resolution of those factual issues requires a trial on the merits at which plaintiffs bear the burden of proof and Mr. Martorello can assert a good faith defense, including his reliance on the opinions of reputable counsel.

CONCLUSION

The three issues presented here are linked together by one imperative that the Founders recognized and addressed in the Constitution – the need to safeguard Indian tribes from state attempts to govern them. Here plaintiffs invoke state law for that purpose in order to benefit themselves. They seek to invalidate commercial transactions that they voluntarily engaged in with a tribal lender located on its reservation. This is a patent infringement on tribal sovereignty. Plaintiffs' effort to adjudicate this case in the absence of the Tribe, Big Picture, and Ascension, without their explicit consent, is a distinct infringement on tribal sovereignty. Finally, plaintiffs' invocation of state law to transform a tribal lending business into a criminal RICO enterprise is yet another assault on tribal sovereignty.

Plaintiffs' claims are flawed from start to finish and the $44 million judgment in their favor must be reversed. This case must be dismissed because Virginia law cannot be applied to invalidate the loans at issue and because the Tribe, Big Picture and Ascension are all indispensable parties. Alternatively, the case must be remanded for a trial of the RICO claims at which plaintiffs must prove that Mr. Martorello knew that the loans were unlawful and that the interest charged for those loans was twice the legally enforceable rate.

February 26, 2024

Respectfully submitted,

HOLLAND & KNIGHT LLP

/s/ Steven D. Gordon
Steven D. Gordon
800 17th Street, N.W., Suite 1100
Washington, D.C. 20006
Telephone: (202) 955-3000
Facsimile: (202) 955-5564
E-mail: steven.gordon@hklaw.com

Counsel for Appellant

CERTIFICATE OF COMPLIANCE

1. This Brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B), because this Brief contains 6,179 words, excluding the parts of the Brief exempted by Fed. R. App. P. 32(f).

2. This Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) because this Brief has been prepared in a proportionally spaced typeface using Microsoft Word in Fourteen point, Times New Roman.

/s/ Steven D. Gordon
Steven D. Gordon

Counsel for Appellant