No.

In the Supreme Court of the United States

MATT MARTORELLO, PETITIONER

v.

LULA WILLIAMS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Indian Commerce Clause preempts state regulation of loans made on an Indian reservation, by an arm of a tribe, when the borrower contracts via the internet.

2. Whether a violation of the unlawful debt prohibition of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962, requires scienter for civil liability.

PARTIES TO THE PROCEEDING

Petitioner (defendant-appellant below) is Matt Martorello.

Respondents (plaintiffs-appellees below) are Lula Williams; Gloria Turnage; George Hengel; Dowin Coffy; and Marcella P. Singh, Administrator of the Estate of Felix M. Gillison, Jr.

RELATED CASES

Williams v. Big Picture Loans, LLC, No. 3:17-cv-00461, U.S. District Court for the Eastern District of Virginia. Judgment entered September 22, 2023.

Williams v. Martorello, No. 23-2097, U.S. Court of Appeals for the Fourth Circuit. Judgment entered July 16, 2025.

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PETITION FOR A WRIT OF CERTIORARI

Matt Martorello respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-28a) is reported at 143 F.4th 555. The opinion of the district court (App., *infra*, 29a-97a) is reported at 693 F. Supp. 3d 610.

JURISDICTION

The judgment of the court of appeals was entered on July 16, 2025. A petition for rehearing was denied on August 12, 2025 (App., *infra*, 101a-02a). On November 4, 2025, Chief Justice Roberts extended the

time within which to file a petition for a writ of certiorari to and including January 9, 2026. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent constitutional and statutory provisions are reproduced in the appendix to this petition. App., *infra*, 103a-20a.

STATEMENT

A. Proceedings Below

1. In this case, a class of Virginia borrowers challenged the legality of short-term loans they obtained from a tribal lender, Big Picture Loans, LLC ("Big Picture"), and its predecessor, Red Rock Tribal Lending, LLC ("Red Rock"), via the internet. Big Picture and Red Rock are arms of the Lac Vieux Desert Band of the Lake Superior Chippewa Indians ("the Tribe") and the loans were made on the Tribe's reservation in Michigan. App., *infra*, 3a-4a. Petitioner Matt Martorello, through companies he owned, provided essential support services for the loans. *Id.* at 34a. The loans fully comply with Tribal law and federal law (Truth In Lending Act, etc.), but the borrowers alleged that the loans are governed by Virginia law and violate a Virginia civil usury statute. The borrowers asserted that the loans are therefore "unlawful debt" under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961

et seq., and that defendants violated RICO by collecting the loans. *Id*. at 3a-4a.

The borrowers filed this action in 2017 against Big Picture and another tribal entity, Ascension Technologies, LLC ("Ascension"), together with Mr. Martorello and other individuals not relevant to this appeal. Plaintiffs sought declaratory relief that the choice of law and forum-selection provisions in the loan agreements—which specified Tribal law and a Tribal forum—were void and unenforceable under Virginia law, and asserted claims for violations of RICO and the Virginia usury law, and for unjust enrichment. App., *infra*, 4a, 30a-31a.

2. Big Picture and Ascension moved to dismiss based on tribal sovereign immunity. Following jurisdictional discovery, the district court denied their motion. The Fourth Circuit reversed, ruling that both entities were arms of the Tribe and therefore immune. *Williams v. Big Picture Loans, LLC*, 929 F.3d 170, 174 (4th Cir. 2019). The court rejected plaintiffs' "rent-a-tribe" argument that the Tribal entities were formed "for the real purpose of helping Martorello . . . to avoid liability, rather than to help the Tribe start a business." *Id.* at 178. Likewise, the court rejected the contention that the Tribal entities "*primarily* benefit individuals and entities outside the Tribe." *Id.* at 182 (emphasis in original). The court concluded that Big Picture and Ascension are arms of the Tribe which

"serve the purposes of tribal economic development and self-governance[.]" *Id*. at 182.

Subsequently, all of the individual defendants except Mr. Martorello were dismissed pursuant to a settlement. The district court granted plaintiffs' motion for class certification and a second appeal to the Fourth Circuit ensued, which addressed the class certification ruling and certain other rulings made by the district court. The circuit court affirmed these rulings. *Williams v. Martorello*, 59 F.4th 68, 73 (4th Cir. 2023).

Thereafter, the parties filed cross-motions for summary judgment. Plaintiffs contended that (1) the loans are governed by Virginia law, are usurious under Virginia law, and so are "unlawful debt" under RICO; (2) the participants in the Tribal lending operation—including Mr. Martorello, the Tribe, Big Picture, and Ascension—constitute a RICO enterprise; and (3) Mr. Martorello and others associated with the enterprise collected, and conspired to collect, "unlawful debt" in violation of RICO. Plaintiffs asserted that Mr. Martorello was liable regardless of whether he believed that the loans were governed by Tribal law and that they were lawful. App., *infra*, 36a-44a.

Mr. Martorello contended that the loans are governed by Tribal law. App., *infra*, 16a-17a, 37a, 40a. Alternatively, he argued that he believed in good faith that the loans were lawful and so he lacked the requisite scienter to violate RICO. *Id*. at 20a, 41a, 56a, 59a-62a, 77a. Mr. Martorello noted that the

Tribal loan operation had been structured by, and then operated under, the advice and guidance of two separate sets of reputable lawyers, who represented, respectively, him and his companies, and the Tribe and its entities. Those attorneys—who were experienced in the applicable law—consistently advised that the loans were governed by Tribal law. *Id*. at 62a-66a.

B. The Tribal Lending Business

1. The structure and evolution of the Tribe's lending business were analyzed in the circuit court's 2019 decision.[1] The Tribe began online lending in 2011 when it organized Red Rock as a Tribally owned LLC. Red Rock provided loans to consumers from its offices on the Tribe's reservation. Red Rock contracted with Mr. Martorello's company, Bellicose Capital, LLC ("Bellicose"), to provide it with vendor management services, compliance management assistance, marketing material development, and risk modeling and data analytics development. *See* 929 F.3d at 174. Bellicose's compensation for its services amounted to a substantial portion of the loan revenues that Red Rock received. App., *infra*, 34a.

In 2014-2015, the Tribe reorganized its lending operation and essentially bought out Mr. Martorello.

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[1] The subsequent decision at issue here includes only "a bird's-eye description of the underlying facts, which have been more extensively set out in the prior appeals." App., *infra*, 3a. Thus, this factual summary is drawn from the circuit court's original decision.

The Tribe created three new entities: (1) Big Picture as a lender; (2) Ascension as a company to provide marketing, technological, and vendor services (as Bellicose had); and (3) Tribal Economic Development Holdings, LLC ("TED"), to operate all of the Tribe's lending companies. *See* 929 F.3d at 174-75. The Tribe purchased Bellicose's data and software through a seller-financed transaction. Most of Big Picture's revenues were used to pay for the acquisition, after portions were first distributed to the Tribe and reinvested in growing Big Picture's loan portfolio. *See id.* By September 2017, nearly $5 million had been distributed to the Tribe. *See id.* at 175.

The three Tribal entities—TED, Big Picture and Ascension—all have their headquarters on the reservation. Big Picture employs 15 Tribal members on the reservation. Ascension employs 31 individuals, most of whom work off the reservation, and handles certain day-to-day aspects associated with Big Picture's loan operations. Members of the Tribal Council co-manage all three companies from the reservation, although Ascension's president is a non-Tribal member. *See* 929 F.3d at 175. "[W]hile Ascension does manage many of the day-to-day activities associated with Big Picture's lending," nonetheless "Big Picture remains in control of its essential functions." *Id.* at 182-83.

2. The mechanics of loan processing were summarized by the district court in its decision on the motion to dismiss. Big Picture has its principal place of business on the Tribe's reservation; all of its employees are located there, as are the servers for Big

Picture's websites. Because all loan applications are approved by Big Picture employees on the reservation, all consumer loans are originated there. *Williams v. Big Picture Loans, LLC*, 329 F. Supp. 3d 248, 264 (E.D. Va. 2018), *rev'd*, 929 F.3d 170 (4th Cir. 2019).

To obtain a loan, consumers must log onto the company's website and complete and submit an application. Big Picture then conducts a review using a software-based underwriting process and either accepts or denies the application. If an application is accepted, the borrower must complete several more steps before the loan is finalized: (1) select the desired loan amount; (2) select the term of the loan and receive an estimated annual percentage rate based on the underwriting software's determination of an applicant's repayment ability; (3) review Big Picture's standard loan agreement; (4) acknowledge their review of, and agree to, the loan agreement, including the choice-of-law clause; and (5) select the payment method. 329 F. Supp. 3d at 264.

Once a borrower signs the loan agreement, it is reviewed by Big Picture employees on the reservation to verify the applicant's information. If there are no issues, the employee manually enters the date of disbursal of funds, which authorizes electronic approval of the agreement. This also causes the loan to be originated and triggers the transmission of instructions to a third-party payment processor,

which then disburses the funds to the consumer. 329 F. Supp. 3d at 264-65.

C. The Decisions Below

1. The district court granted summary judgment for plaintiffs on the RICO substantive count and RICO conspiracy count, under 18 U.S.C. § 1962(c) and (d), and awarded treble damages in the amount of $43,401,817.47. App., *infra*, 45a.[2] It ruled that the loans are governed by Virginia law because online tribal lending constitutes off-reservation conduct which can be regulated by the states. The court held that Mr. Martorello is liable under RICO because the statutory text does not require knowledge that the loans were unlawful. It acknowledged that there is evidence "probative of Martorello's assertion that he believed that Tribal law governed the loans at issue . . . ." *Id*. at 64a. But the court refused to permit Mr. Martorello to defend himself on this basis, ruling that such a "mistake of law defense" was impermissible. *Id*. at 56a-95a.

2. The Fourth Circuit affirmed. It ruled that the loans are governed by Virginia law. The court reasoned that:

> The Tribe's online lending activities . . . were broadly marketed online and in direct mailings to consumers. The Borrowers lived off the reservation when they applied for and made payments

[2] Plaintiffs dismissed their remaining claims without prejudice. App., *infra*, 45a.

> under the loans. The effect of the challenged conduct was also felt off the reservation through collection and other actions. And the Borrowers are not Tribe members.

App., *infra*, 19a. Consequently, it opined, the loans were "off-reservation conduct subject to nondiscriminatory state regulation." *Id.* (citations omitted).

The court of appeals also concluded that "a mistake-of-law defense would not negate any element of the Borrowers' civil RICO claims." App., *infra*, 22a. It noted that the RICO statute, 18 U.S.C. § 1962, does not expressly require proof of a particular *mens rea*. And it refused to imply a *mens rea* element. The court reasoned that no presumption of *mens rea* exists in the civil context and that "the distinction between the civil and criminal contexts effectively ends our inquiry." *Id*. at 25a. "[E]ven assuming that a *mens rea* requirement should be implied to obtain some criminal RICO convictions, it does not follow that such a requirement exists in a civil RICO claim." *Id*. at 26a.

3. The court of appeals subsequently denied Mr. Martorello's petition for rehearing en banc. App., *infra*, 101a-02a.

REASONS FOR GRANTING THE PETITION

1. Indian tribes are sovereigns which can "regulate . . . the activities of nonmembers who enter consensual relationships with the tribe or its

members, through commercial dealing, contracts, leases, or other arrangements." *Montana v. United States*, 450 U.S. 544, 565 (1981). A tribe can exercise authority over a nonmember who "enters tribal lands or conducts business with the tribe." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 142 (1982).

Congress alone can "regulate Commerce . . . with the Indian Tribes[.]" U.S. Const. art. I, § 8, cl. 3 (the "Indian Commerce Clause"). States can regulate on-reservation transactions between a non-Indian and a tribe within the state only where an analysis under *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980) shows that the state's interest outweighs the relevant tribal and federal interests. The Court has precluded states from regulating commerce that generates value on the reservation because "[s]elf-determination and economic development are not within reach if the Tribes cannot raise revenues and provide employment for their members." *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 219 (1987).

This case presents a circuit split regarding whether internet lending by a tribal lender to a borrower outside the reservation is an on-reservation transaction to which the *Bracker* test applies. The Second Circuit has recognized that, if the tribal lender is "firmly rooted" on a reservation, such loans may be subject to *Bracker*, and may be exempt from state regulation. *See Otoe-Missouria Tribe of Indians v. N.Y. State Dep't of Fin. Servs.*, 769 F.3d 105 (2d Cir. 2014). Without addressing this decision, the Fourth

Circuit instead ruled that such loans constitute off-reservation conduct subject to state control, and that "a *Bracker* analysis would not have been appropriate . . . ." App., *infra*, 19a.

The Fourth Circuit's decision cripples the ability of tribal enterprises to engage in e-commerce. It empowers the states "wholly to supplant tribal regulations" and "to dictate the terms on which nonmembers are permitted to utilize the reservation's resources." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 338 (1983). It contravenes the Indian Commerce Clause, this Court's jurisprudence, and the Second Circuit's decision in *Otoe-Missouria.* The decision below thwarts the constitutional authority of Congress and stymies the congressional goal of tribal self-sufficiency and economic development. "[T]ribal business operations are critical to the goals of tribal self-sufficiency because such enterprises in some cases 'may be the only means by which a tribe can raise revenues[.]'" *Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 810 (2014) (Sotomayor, J., concurring) (citation omitted).

2. The Fourth Circuit also construed RICO in an unprecedented, erroneous manner. The court held that no *mens rea* is required for a civil RICO "unlawful debt" violation, making the defendant's good faith belief that the loans were lawful irrelevant. This ruling conflicts with two recent Second Circuit decisions opining that a defendant must know that the debt at issue is unlawful in order to violate RICO. *See United States v. Grote*, 961 F.3d 105, 121 (2d Cir.

2020); *United States v. Moseley*, 980 F.3d 9, 19 (2d Cir. 2020).

The Fourth Circuit dismissed these opinions as dicta and distinguished them by reasoning that no *mens rea* is required for a civil RICO violation even if it is required for a criminal violation. This unprecedented distinction between the elements of a RICO violation in a civil versus a criminal context contravenes the plain statutory language. It also contravenes the rule that courts "must interpret [a] statute consistently, whether we encounter its application in a criminal or noncriminal context." *Sessions v. Dimaya*, 584 U.S. 148, 164 (2018) (quoting *Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004)).

The circuit court's decision transforms civil usury violations into RICO offenses, and authorizes the imposition of treble damages on lenders who have made innocent mistakes or acted on flawed legal advice. Further, it sharply expands the liability for usury—which generally is limited to the lender—because RICO liability extends to anyone who participates or conspires to participate in the enterprise which collects the unlawful debt.

The Court should grant the petition and reverse on both of these issues.

A. The Court Of Appeals Erred In Holding That State Law Governs Loans Made By A Tribal Lender On A Reservation That Are Contracted Via The Internet

1. "Indian tribes are domestic dependent nations that exercise inherent sovereign authority." *Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 788 (2014) (internal quotation marks and citations omitted). Consequently, "[a] tribe may regulate . . . the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Montana v. United States*, 450 U.S. 544, 565 (1981). A tribe can exercise authority over a nonmember who "enters tribal lands or conducts business with the tribe." *Merrion,* 455 U.S. at 142. Tribal "laws and regulations may be fairly imposed on nonmembers . . . if the nonmember has consented, either expressly or by his actions." *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 554 U.S. 316, 337 (2008).

"[T]ribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States." *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 154 (1980). The Constitution stripped the States of authority to regulate trade with Indians and granted Congress exclusive power to "regulate Commerce . . . with the Indian Tribes[.]" U.S. Const. art. I, § 8, cl. 3. "[T]he Indian Commerce Clause accomplishes a greater transfer of power from the States to the Federal Government than does the Interstate Commerce

Clause." *Seminole Tribe v Florida*, 517 U.S. 44, 62 (1996). "While under the Interstate Commerce Clause, States retain 'some authority' over trade, . . . 'virtually all authority over Indian commerce and Indian tribes' lies with the Federal Government." *Haaland v. Brackeen*, 599 U.S. 255, 273 (2023) (quoting *Seminole Tribe*, 517 U.S. at 62). In sum, "States have virtually no role to play in managing interactions with Tribes." *Id.* at 318 (Gorsuch, J., concurring).

Thus, "'absent governing Acts of Congress,' a State may not act in a manner that 'infringe[s] on the right of reservation Indians to make their own laws and be ruled by them.'" *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engr'g*, 476 U.S. 877, 890 (1986) (alteration in original) (citation omitted). "[E]ven when federal law does not preempt state jurisdiction under ordinary preemption analysis, preemption may still occur if the exercise of state jurisdiction would unlawfully infringe upon tribal self-government." *Oklahoma v. Castro-Huerta*, 597 U.S. 629, 649 (2022).

2. Whether states can regulate on-reservation transactions between a non-Indian and a tribe or tribal member depends on "a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law." *Bracker*, 448 U.S. at 145. "[S]tate jurisdiction is pre-empted . . . if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state

interests at stake are sufficient to justify the assertion of state authority." *Cabazon,* 480 U.S. at 216 (ellipses in original) (citation omitted). "The inquiry is to proceed in light of traditional notions of Indian sovereignty and the congressional goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development." *Id.* (citation omitted).

While states can *tax* "non-Indian purchasers of goods that are merely retailed on a reservation," *Dep't of Taxation and Finance of N.Y. v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61, 73 (1994), this Court has rejected state efforts to *regulate* commerce on a reservation because "[s]elf-determination and economic development are not within reach if the Tribes cannot raise revenues and provide employment for their members." *Cabazon*, 480 U.S. at 219. For example, tribal gaming "generat[es] value on the reservations through activities in which [the tribes] have a substantial interest," *id.* at 220, and does not "merely market[] an exemption from state gambling laws." *Id.* at 219.

Tribal lending is also a *bona fide* product that generates value on the reservation.[3] It is "far

[3] "The largest categories of short-term loans are 'payday loans,' which are generally short-term loans required to be repaid in a lump-sum single payment on receipt of the borrower's next income payment, and short-term vehicle title loans." Payday Loan Rule, 85 Fed. Reg. 44382, 44383 (July 22, 2020). The Consumer Financial Protection Bureau published a Payday Lending Rule in November 2017, but later partially repealed it.
(footnote continued on next page)

removed from those situations, such as on-reservation sales outlets which market to nonmembers goods not manufactured by the tribe or its members, in which the tribal contribution to an enterprise is *de minimis*." *Mescalero*, 462 U.S. at 341. Accordingly, states cannot regulate loans made by a tribal lender to state residents who visit a reservation to obtain the loans. As in *Cabazon*, the tribal and federal interests in promoting tribal sovereignty, self-sufficiency and economic development outweigh the state's regulatory interest.

This result accords with the long-established law governing lending more generally. "[C]itizens of one State [a]re free to visit a neighboring State to receive credit at foreign interest rates." *Marquette Nat. Bank of Minneapolis v. First of Omaha Service Corp.*, 439 U.S. 299, 318 (1978). And a lender can "legitimately lend funds outside the state, and stipulate for repayment in [the state] in accordance with its laws, and at the rate of interest there lawful . . . ." *Seeman v. Philadelphia Warehouse Co.*, 274 U.S. 403, 407 (1927).

See id. Currently 32 states permit payday loans. *Id.* Virginia is one of those states. During the period at issue here (June 2013 – December 2019) it permitted annual percentage rates of more than 300% on such loans. *See* The Pew Charitable Trusts, *How Virginia's 2020 Fairness in Lending Act Reforms Small-Dollar Loans* 2 (Oct. 2020), https://www.pew.org/-/media/assets/2020/10/consumerfinance/howvafairnesslendingactreformssmalldollarloans_v4.pdf.

3. The question presented here is whether the activity the state seeks to regulate involves on-reservation conduct, in which case *Bracker* applies, or off- reservation, in which case *Bracker* does not apply. This Court has not previously addressed this issue. Rather, to date, the Court's *Bracker* jurisprudence has involved cases where non-Indians physically visited the reservation to conduct business or engage in recreation. But the analysis does not change where, instead, the parties use modern technology to facilitate the transaction. A tribe has regulatory jurisdiction over a nonmember who "enters tribal lands *or conducts business with the tribe*." *Merrion*, 455 U.S. at 142 (emphasis added).

"Nowhere in *Merrion* or in subsequent cases has the Court limited the definition of nonmember conduct on tribal land to physical entry or presence." *Lexington Ins. Co. v. Smith*, 94 F.4th 870, 881 (9th Cir. 2024). Thus, "a tribe may regulate nonmembers' contractual relationships with the tribe or tribal members apart from any physical entry that takes place under those contracts." *Id.* "The tribes' ability to regulate such consensual relationships makes sense in our contemporary world in which nonmembers, through the phone or internet, regularly conduct business on a reservation and significantly affect a tribe and its members without ever physically stepping foot on tribal land." *Id.* Focusing on the physical presence of the nonmember "does not align analytically with" the realities of "[m]odern e-commerce." *South Dakota v. Wayfair*, 585 U.S. 162, 180 (2018).

The loans at issue here were made by the tribal lender on the reservation. *See Marquette*, 439 U.S. at 311-12 (a Nebraska bank made loans *in Nebraska* by extending credit to credit card holders in Minnesota). The tribal lender's conduct in making these loans occurs entirely on the reservation and is exactly the same as when the borrower applies in person. The only difference is on the borrower side, i.e., the loan application is submitted via the internet rather than in person. Moreover, loans contracted by internet "have the same effect on the nonmember [borrower], the tribe, the lender, and the reservation" as loans contracted in person. *F.T.C. v. Payday Financial, LLC*, 935 F.Supp.2d 926, 940 (D.S.D. 2013).

Accordingly, these loans occurred on tribal lands and can be regulated by a state only if a *Bracker* analysis establishes that the state's legitimate interest outweighs the relevant tribal and federal interests. The tribal and federal interests are the same as when the borrower submits the loan application in person to the tribal lender. In contrast, the state's interest in regulating these loans is weak because the reservation is not located within its boundaries, and states lack authority to prevent their residents from visiting another jurisdiction to obtain credit at foreign interest rates. *See Marquette*, 439 U.S. at 318.

4. The Second Circuit examined tribal internet lending in 2014 in a case involving the Tribe. It observed that "[l]oans brokered over the internet seem to exist in two places at once. Lenders extend credit from reservations; borrowers apply for and

receive loans without leaving [their] State." *Otoe-Missouria*, 769 F.3d at 114. The court noted that the loan transactions involve the collection as well as the extension of credit, and that collection takes place in New York. Nonetheless, "[a] court might ultimately conclude that, despite these circumstances, the transaction being regulated by New York could be regarded as on-reservation, based on the extent to which one side of the transaction is firmly rooted on the reservation." *Id.* at 115. If the tribal lender was firmly rooted on the reservation, a *Bracker* analysis would determine whether the state could regulate the loans. *See id.* at 114. In that event, "[a] court might well find that the tribes' sovereign interest in raising revenue militate in favor of prohibiting a separate sovereign from interfering in their affairs." *Id.* at 112 n.4.

The Second Circuit noted that "[f]actual questions . . . pervade every step of the analysis required by the Indian Commerce Clause. A court must know who a regulation targets and where the targeted activity takes place." *Id.* at 114. However, the record before it was limited because *Otoe-Missouria* was an interlocutory appeal from a preliminary injunction. The court concluded that there was "insufficient evidence to establish . . . that the internet loans should be treated as on-reservation activity." *Id.* at 115. In particular, the supporting affidavits were too conclusory to show that the loans were approved on the reservations because "nowhere do they state what specific portion of a lending transaction took place at any facility physically located on a reservation . . . or

where the servers hosting the websites were located." *Id.*[4] But the fundamental lesson of *Otoe-Missouria* is that tribal internet lending may constitute on-reservation activity to which *Bracker* applies if the lending is "firmly rooted" on the reservation.

Here, the record shows that the loans are "firmly rooted" on the Tribe's reservation. The district court found that Big Picture and all of its employees are located on the reservation, that the servers for its websites are stored there, and that all consumer loans are approved and originated there. 329 F. Supp. 3d at 264. Likewise, the court found that "Red Rock provided loans to consumers from its offices on the Reservation, and its employees, computers, and records were all located there." *Id.* at 255. Accordingly, a *Bracker* analysis must be conducted to determine whether Virginia can regulate these loans.

5. Instead, the Fourth Circuit ignored whether the lender was "firmly rooted" on the reservation and considered only the borrower's side of the ledger. It reasoned that the loans are "off-reservation conduct subject to nondiscriminatory state regulation" because they "were broadly marketed online and in direct mailings to consumers;" the borrowers lived off the reservation when they applied for and made payments; and "[t]he effect of the challenged conduct was also felt off the reservation through collection and other actions." App., *infra*, 19a. Thus, it concluded,

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[4] The litigation ended after the Second Circuit denied the tribes' appeal and so a full record was never developed about whether the loans were firmly rooted on the reservations.

"a *Bracker* analysis would not have been appropriate . . . ." *Id.* This is tantamount to a *per se* rule that all lending from a reservation to off-reservation borrowers is governed by state law.

The Fourth Circuit did not address the decision in *Otoe-Missouria*, and its reasoning cannot be squared with the Second Circuit's fact-specific inquiry into the lender's roots on tribal land. Further, the Fourth Circuit's rationale does not withstand scrutiny. It argued that state law applied because the loans were marketed beyond the reservation, the borrowers lived off the reservation, and the effect of the loans was felt off the reservation. But these same points could be made about loans obtained by borrowers who physically visit the reservation to apply. Yet it is clear under *Cabazon* that a state cannot regulate those transactions.

Moreover, in deciding whether a state regulation is subject to the Indian Commerce Clause, a court must carefully scrutinize whom the regulation targets and whether *the regulated activity* occurs on or off the reservation. *See Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 101 (2005) ("the 'who' and the 'where' of the challenged [regulation] have significant consequences"). In *Wagnon*, for example, the Court upheld a state tax only after concluding that the tax was being imposed on motor fuel distributors' (off-reservation) receipt of the fuel rather than their (on-reservation) sale or delivery of the fuel to the tribe. *See id.* at 107-09. Here, in contrast, the Virginia usury statutes are not aimed at the off-reservation conduct that the Fourth Circuit identified. Rather

they target conduct that occurs on the reservation. The general interest rate cap provides that, except as otherwise permitted, "no contract shall be made for the payment of interest on a loan at a rate that exceeds 12 percent per year." Va. Code § 6.2-303(A) (effective October 1, 2010 to December 31, 2020).[5] Here the loan contracts were made on the reservation. Another statute imposes liability for usury on "the person taking or receiving [loan] payments." Va. Code § 6.2-305(A). Here this conduct also occurs on the reservation. The state lacks authority to regulate such on-reservation conduct.

6. By focusing only on the borrower, the Fourth Circuit ruled, in effect, that cross-jurisdiction loans made by a tribal lender are always governed by the law of the state where the borrower resides. This is not the general rule applied to other cross-jurisdiction loans and disfavors tribal lenders. In *Marquette*, for example, Minnesota residents obtained loans (via credit card) from a Nebraska bank without ever visiting Nebraska. Nonetheless, this Court reasoned the loans were extended in Nebraska and were governed by Nebraska law because the credit cards were issued there, merchant sales drafts were honored there, finance charges were assessed there, and payments were remitted there. *See* 439 U.S. at 311. The general rule is that loans are governed by the law of the state where the loan is to be repaid

[5] Va. Code § 6.2-303 was subsequently amended in 2020 and 2024. However, neither amendment changed the language quoted above.

unless another state, under specified principles, has a more significant relationship to the transaction and the parties. Restatement (Second) of Conflict of Laws § 195 (1971).

To reach its conclusion, the Fourth Circuit ignored all the parts of the loan transactions that occur on-reservation. In the e-commerce world, this approach would enable the states to regulate almost all commerce between their citizens and tribal businesses operating on a reservation. The circuit court's decision would empower the states "wholly to supplant tribal regulations" and "to dictate the terms on which nonmembers are permitted to utilize the reservation's resources." *Mescalero*, 462 U.S. at 338. In short, it would stand the Indian Commerce Clause on its head.

Cross-jurisdiction commerce has existed since the founding of the nation and the Framers assigned its regulation to Congress. This commerce has steadily grown with advances in technology that have made it easier to conduct. During the 1970's, for example, the Court noted that "the convenience of modern mail" permits residents of one state to receive loans at foreign interest rates without visiting another state. *Marquette*, 439 U.S. at 311. And the subsequent advent of the internet has made cross-jurisdiction transactions even easier and faster. In some instances, Congress has regulated internet commerce to safeguard state interests. For example, it prohibited internet gambling that is either initiated or received within a state where such gambling is unlawful under that state's laws. *See* Unlawful

Internet Gambling Enforcement Act, 31 U.S.C. § 5361, *et seq*. However, Congress has not chosen to regulate internet lending to protect state usury laws. And the Indian Commerce Clause prohibits states from unilaterally regulating internet lending by tribal lenders.

7. Tribes, as sovereigns, have the power "to undertake and regulate economic activity within the reservation[.]" *Mescalero*, 462 U.S. at 335 (citations omitted). The Tribal lending at issue here involves "economic activity within the reservation," and so requires a *Bracker* analysis of the respective state, federal, and Tribal interests at stake to determine whether it can be subjected to state regulation. The constitutional limitations imposed by the Indian Commerce Clause cannot be ignored by simply proclaiming, as the Fourth Circuit did, that transactions between a tribal business on the reservation and a consumer off the reservation constitute off-reservation conduct that is governed by state, not tribal, law.

"Indians going beyond reservation boundaries" are subject to generally applicable state laws. *Bay Mills*, 572 U.S. at 795 (citation omitted). But this Court has never held that Indians subject themselves to state law whenever they transact business from the reservation with an off-reservation customer. To the contrary, it has reasoned that a tribe can regulate a nonmember who conducts business with that tribe. *See Merrion*, 455 U.S. at 142.

This Court has underscored "Congress' overriding

goal of encouraging 'tribal self-sufficiency and economic development.'" *Mescalero*, 462 U.S. at 335 (quoting *Bracker*, 448 U.S. at 143). Congress has repeatedly reaffirmed this goal in recent years.[6] "[A]s a necessary implication of this broad federal commitment" to self-sufficiency and economic development, "tribes have the power . . . to undertake and regulate economic activity within the reservation." *Id.* Permitting states to regulate and veto tribal commerce with their citizens would undermine this "overriding" congressional objective. "[T]ribal business operations are critical to the goals of tribal self-sufficiency because such enterprises in some cases 'may be the only means by which a tribe can raise revenues[.]'" *Bay Mills*, 572 U.S. at 810 (Sotomayor, J., concurring) (citation omitted).[7]

The Fourth Circuit's decision thwarts both the constitutional authority of Congress and its goal of

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[6] Congress enacted the Native American Business Development, Trade Promotion and Tourism Act (2000), to "facilitat[e] the movement of goods to and from Indian lands and the provision of services by Indians." 25 U.S.C. § 4301(b)(1)(B); *see also* Indian Community Economic Enhancement Act (2020), Pub. L. No. 116-261, 134 Stat. 3306. And in 2025 Congress created the Office of Tribal Economic Development and mandated that it create a strategic plan for tribal economic development. Pub. L. No. 118-272, § 2227, 138 Stat. 2992, 3192.

[7] "Indian nations need to earn profits from . . . tribally owned economic entities because they almost totally lack the ability to acquire income from taxation to fund their governments like state and federal governments are able to do." Robert J. Miller, *Tribal Sovereignty and Economic Efficiency versus The Courts*, 97 Wash. L. Rev. 775, 803-04 (2022).

tribal self-sufficiency and economic development. This Court should grant review to resolve the circuit conflict over the applicability of the *Bracker* test, and reverse the judgment below to prevent these adverse consequences.

B. The Court Of Appeals Erred In Holding That No Scienter Is Required For A RICO Unlawful Debt Offense Where Civil Liability Is At Stake

1. The Fourth Circuit also erred by holding Mr. Martorello liable for violating RICO regardless of whether he knew that the loans were unlawful. He presented evidence that he believed in good faith that the loans were governed by Tribal law and so were lawful. The circuit court ruled it irrelevant whether he knew that the debts were unlawful. To reach this startling result, it drew an unprecedented distinction between a civil RICO violation and a criminal RICO violation. The court's ruling conflicts with this Court's teaching that a statute must be interpreted consistently, whether in a criminal or civil context. *See, e.g., Sessions v. Dimaya*, 584 U.S. at 164. And it conflicts with a long line of decisions from lower courts which recognize that "[t]he standard is the same for both criminal and civil RICO violations." *United States v. Shifman*, 124 F.3d 31, 35 n.1 (1st Cir. 1997); *see, e.g., St. Paul Mercury Ins. Co. v. Williamson*, 224 F.3d 425, 446 n.15 (5th Cir. 2000) (the substantive requirements of § 1962(c) are the same for a criminal prosecution as a civil suit); *Babst v. Morgan Keegan & Co.*, 687 F. Supp. 255, 258 (E.D.

La. 1988) ("It is clear that civil RICO requires that the defendant's state of mind be the same as that required in a criminal prosecution."); *Sunlight Elec. Contracting Co., Inc. v. Turchi*, 918 F.Supp.2d 392, 402 (E.D. Pa. 2013) ("The elements of an offense under RICO are identical whether the case is civil or criminal[.]"); *Costantino v. TRW, Inc.*, 773 F.Supp. 34, 45 (N.D. Ohio 1991) (same); *Kaufman v. Chase Manhattan Bank, N.A.*, 581 F.Supp. 350, 357 (S.D.N.Y. 1984) (same).

2. RICO sets forth "prohibited activities" in 18 U.S.C. § 1962. The two alleged violations at issue here involve subsections (c) and (d), which respectively prohibit participation in the conduct of a RICO enterprise's affairs through collection of unlawful debt, and conspiracy to do so. "Unlawful debt" is defined as a debt which is unenforceable because of the laws relating to usury, and where the usurious rate is at least twice the enforceable rate. 18 U.S.C. § 1961(6).

"Section 1962 renders certain conduct 'unlawful'; § 1963 and § 1964 impose consequences, criminal and civil, for 'violations' of § 1962." *Sedima, S.P.R.L, v. Imrex Co., Inc.*, 473 U.S. 479, 489 (1985). Thus, the elements of a RICO offense are set forth entirely in § 1962 and are the same regardless of whether a criminal or civil action is being pursued.

3. When this Court "interpret[s] criminal statutes, we normally 'start from a longstanding presumption, traceable to the common law, that Congress intends to require a defendant to possess a

culpable mental state.'" *Ruan v. United States*, 597 U.S. 450, 457-58 (2022) (citation omitted). The Court "presume[s] 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*, 588 U.S. 225, 233 (2019). Accordingly, because RICO is silent on the issue of *mens rea*, a court must read into it "that *mens rea* which is necessary to separate wrongful conduct from otherwise innocent conduct." *Ruan*, 597 U.S. at 458 (quoting *Elonis v. United States*, 575 U.S. 723, 736 (2015)). A defendant must "possess a culpable mental state regarding 'each of the statutory elements that criminalize otherwise innocent conduct.'" *Rehaif*, 588 U.S. at 229 (quoting *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72 (1994)).

This Court has recognized that certain federal offenses require proof that the defendant knew he was violating another law. For example, in *Liparota v. United States*, 471 U.S. 419 (1985), the Court "required the Government to prove that the defendant knew that his use of food stamps was unlawful—even though that was a question of law." *Rehaif*, 588 U.S. at 234. Likewise, the Court recently construed the offense of firearm possession by an alien "illegally or unlawfully in the United States" in a similar fashion. It ruled that "[a] defendant who does not know that he is an alien 'illegally or unlawfully in the United States' does not have the guilty state of mind that the statute's language and purposes require." *Id.* at 235. Although the person's immigration status is an issue of law, knowledge of it makes the difference between

innocent and criminal conduct. "Without knowledge of that status, the defendant may well lack the intent needed to make his behavior wrongful. His behavior may instead be an innocent mistake to which criminal sanctions normally do not attach." *Id.* at 232.

Here, in order for a loan to constitute "unlawful debt" and trigger RICO penalties, a defendant must know that (1) the debt was unlawful and (2) the rate charged was at least twice the legally enforceable rate. Although the legality of the debt and the legally enforceable rate are issues of law, they make the difference between innocent and criminal conduct. This is why the Second Circuit opined in two recent cases that the defendant must know that the debt at issue is unlawful. *See United States v. Grote*, 961 F.3d 105, 121 (2d Cir. 2020); *United States v. Moseley*, 980 F.3d 9, 19 (2d Cir. 2020).

In *Grote*, the Second Circuit disavowed its earlier decision in *United States v. Biasucci*, 786 F.2d 504 (2d Cir. 1986) which had held that RICO does not require any *mens rea* beyond that encompassed in its predicate acts. Because some civil usury statutes lack any scienter requirement, the court noted in *Grote* that *Biasucci's* construction of RICO could result in a violation that requires no proof of scienter at all.[8]

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[8] Most alleged RICO violations involve predicate federal criminal offenses like mail fraud or wire fraud which themselves have a scienter requirement to separate wrongful from innocent conduct. In those cases there is no need for a court to read into RICO any additional scienter requirement. However, a RICO "unlawful debt" violation is premised on state usury provisions

(footnote continued on next page)

This would "authorize conviction under RICO of a defendant who neither knew the rate of interest charged *nor that the rate charged was illegal*." 961 F.3d at 119 (emphasis added). It could "produce criminal liability for racketeering for unexceptionable conduct." *Id.* at 121. The circuit court had "serious doubts that such a rule appropriately 'separate[s] wrongful conduct from otherwise innocent conduct,'" as required by this Court's precedents. *Id.* (alteration in original) (quoting *Elonis*, 575 U.S. at 736). However, it did not decide this issue because it was applying the plain error standard and there was overwhelming evidence that the defendants in that case had acted willfully. *Id.*

Shortly thereafter, the circuit court decided *Moseley*, another RICO case involving the collection of unlawful debt. It reiterated its concerns that a scienter requirement must be read into the statute. *See* 980 F.3d at 19. It assumed, without deciding, that the government had to prove the defendant knew that the debt was unlawful, and assessed the sufficiency of the evidence against that standard.

The Fourth Circuit disparaged the scienter analysis in the Second Circuit's opinions as "speculative dicta." App., *infra*, 26a n.7. But they are hardly that; they are instead "rulings self-consciously designed . . . to promote clarity—and observance—of [applicable] rules." *Camreta v. Greene*, 563 U.S. 692,

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that are usually civil in nature and that typically do not require any scienter.

704-05 (2011). The Second Circuit did not casually or gratuitously repudiate its prior decision in *Biasucci*; it was obliged to do so when it examined the sufficiency of the evidence in *Grote* and *Moseley* in light of this Court's *mens rea* jurisprudence.[9]

4. Further, the Fourth Circuit deemed *Grote* and *Moseley* inapposite because they involved criminal prosecutions. It asserted, without citation to any authority, that the *mens rea* required for "a *criminal* RICO conviction . . . is far removed from what a plaintiff must prove about § 1962(c) and (d) to establish *civil* liability for a RICO violation under § 1964." App., *infra*, 26a n.7 (emphases in original). The court opined that, "even assuming that a *mens rea* requirement should be implied to obtain some criminal RICO convictions, it does not follow that such a requirement exists in a civil RICO claim." *Id.* at 26a. This purported distinction between a civil and

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[9] The Second Circuit decisions in *Grote* and *Mosley* conflict not only with the decision below but also with a Third Circuit case, *United States v. Neff*, 787 F. App'x 81 (3d Cir. 2019). In that case, the court held that a RICO conviction only requires knowledge that the debt collected had the characteristics that brought it within the statutory definition of "unlawful debt," but not that the defendant knew that the debt was unlawful. *Id.* at 89-90. The Third Circuit reasoned that "those engaged in the business of debt collection . . . should be aware of the laws that apply to them . . . ." *Id.* at 89. *Neff* was wrongly decided. But its existence makes it all the more important that this Court grant certiorari in order to resolve the circuit split on the scienter required for an unlawful debt violation.

a criminal violation of RICO is unprecedented and creates a split with all of the federal courts that, as explained above, have held the contrary.

The Fourth Circuit's reasoning conflicts with the statutory language, which articulates one set of violations that are criminal in nature. RICO "created *four new criminal offenses* involving the activities of organized criminal groups in relation to an enterprise. §§ 1962(a)-(d)." *RJR Nabisco, Inc. v. European Community*, 579 U.S. 325, 329 (2016) (emphasis added);[10] *accord Hemi Group, LLC v. City of New York*, 559 U.S. 1, 6 (2010) ("Section 1962 . . . contains RICO's criminal provisions."). In addition, RICO "created a new civil cause of action for '[a]ny person injured in his business or property by reason of a violation' of those prohibitions." *RJR Nabisco*, 579 U.S. at 329 (alteration in original) (quoting § 1964(c)). The issues in a civil RICO case are (1) whether the defendant committed one of the offenses created in § 1962 and, if so, (2) whether the plaintiff was injured as a result of that violation. RICO provides no basis for interpreting § 1962 differently depending on whether the proceeding is civil or criminal. To the contrary, the statute requires a civil plaintiff to prove that the defendant committed a criminal offense prohibited by § 1962. Thus, the scienter requirements read into § 1962 in criminal cases must also apply to civil cases.

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[10] RICO was enacted as part of The Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922 (1970) and is codified as Chapter 96 of the federal criminal code, U.S. Code Title 18.

5. The Fourth Circuit's reasoning also conflicts with the rules of statutory construction. This Court has rejected "the dangerous principle that judges can give the same statutory text different meanings in different cases." *Clark v. Martinez*, 543 U.S. 371, 386 (2005). "[T]he meaning of words in a statute cannot change with the statute's application. To hold otherwise would render every statute a chameleon[.]" *United States v. Santos*, 553 U.S. 507, 522 (2008) (citation and internal quotation marks omitted). Rather, courts "must interpret [a] statute consistently, whether we encounter its application in a criminal or noncriminal context." *Sessions v. Dimaya*, 584 U.S. at 164 (quoting *Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004)).

Accordingly, where a statute imposes both criminal and civil penalties, this Court applies the rules of construction applicable to criminal laws even where a civil violation is at issue. For example, the Court recently applied this principle in construing the reporting requirements in the Bank Secrecy Act. Although civil penalties were at issue, the Court noted that a violation could also trigger criminal liability and therefore applied the rule of lenity. It reasoned that "[t]he term 'violation' or 'violating' is a constant between [the civil and criminal] provisions. Accordingly, if the government were right that violations accrue on a per-account rather than a per-report basis under [civil] § 5321, the same rule would apply under [criminal] § 5322." *Bittner v. United States*, 598 U.S. 85, 103 (2023).

Because a RICO violation can trigger either

criminal or civil penalties (or both), it must be construed uniformly regardless of whether the case is criminal or civil. This requires application of the stricter rules of construction applicable to criminal statutes, including proof of a culpable *mens rea*.

6. As this case illustrates, RICO's civil penalties are "drastic." *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 233 (1989). Thus, "clarity and predictability in RICO's civil applications are particularly important [and] it is also true that RICO, since it has criminal applications as well, must, even in its civil applications, possess the degree of certainty required for criminal laws[.]" *Id.* at 255 (Scalia, J., concurring).

7. The Fourth Circuit's misguided ruling dramatically lowers the bar for establishing RICO liability. It enables drastic RICO penalties to be imposed in situations where there has been no criminal violation whatsoever, neither a crime as defined by RICO nor some underlying state or federal offense. It transforms civil usury violations, which often do not require any scienter, into RICO offenses.

The circuit court authorizes the imposition of RICO treble damages on lenders who have made innocent mistakes or acted on flawed legal advice. A lender can be held liable whenever it runs afoul of

state usury laws that are varied,[11] often complex,[12] and that make compliance difficult.[13] These risks are compounded for cross-jurisdiction loans by conflict of law issues: a lender faces RICO liability if it—or its counsel—incorrectly analyzes which jurisdiction's law governs the loan. *See* 9 Fletcher Cyc. Corp. § 4290 (2025) ("The conflict of laws rules relating to usury are difficult because of the peculiar nature of the usury laws.").

In addition, the circuit court's ruling greatly expands the circumstances in which participants in the loan industry can potentially face liability for a usury violation, even when they were not the lender. State usury laws generally impose liability only on the lender and/or the entity that collects the loan at

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[11] "Every state has some type of usury law, but there is tremendous variation among them both in terms of what types of lenders, borrowers, and products are covered, and in terms of the level of the prohibited charge." Adam J. Levittin, *The New Usury: The Ability-to-Repay Revolution*, 92 Geo. Wash. L. Rev. 425, 438 (2024).

[12] For example, California's usury law "is complex and is riddled with so many exceptions that the law's application itself seems to be the exception rather than the rule." *Ghirardo v. Antonioli*, 8 Cal.4th 791, 807 (1994). New York's usury law is composed of "complex and cross-referencing statutes." *In re Venture Mortgage Fund, L.P.*, 282 F.3d 185, 189 (2d Cir. 2002).

[13] "[T]he tremendous variety and ambiguity of methodologies used by states to calculate [credit price] price caps . . . makes compliance difficult." Christopher L. Peterson, *Usury Law, Payday Loans, and Statutory Sleight of Hand: Salience Distortion in American Credit Pricing Limits*, 92 Minn. L. Rev. 1110, 1116 (2008).

issue. *See* 47 C.J.S. *Interest & Usury* § 404 (2025). Courts have refused to expand usury liability to alleged aiders and abettors. *See Clarke v. Horany*, 212 Cal. App. 2d 307, 311 (1963); *Dillon v. BMO Harris Bank, N.A.*, 16 F.Supp.3d 605, 619 (M.D.N.C. 2014); *Greenburg v. Commonwealth ex rel. Atty. Gen. of Virginia*, 499 S.E.2d 266, 270 (Va. 1998) (chairman of a lender not personally liable for its illegal loans). RICO reaches far more broadly. Section 1962(c) imposes liability on anyone who participates in the operation or management of an unlawful loan enterprise. *See Reves v. Ernst & Young*, 507 U.S. 170, 178-79 (1993). And the conspiracy provision, § 1962(d), reaches still further, to anyone who knowingly agrees to facilitate others who operate or manage such an enterprise. *See Smith v. Berg*, 247 F.3d 532, 538 (3d Cir. 2001). Moreover, none of the conspirators need actually perform an overt act in furtherance of the conspiracy. *See Salinas v. United States*, 522 U.S. 52, 63 (1997).

In sum, the circuit court's construction of RICO amplifies state usury provisions exponentially. It multiplies the penalties that attach to usury violations and sharply expands the universe of potential defendants who can be held liable for them. If permitted to stand, this decision hangs the sword of Damocles over the lending industry and "makes a generous gift to the plaintiffs' bar." *National Aeronautics and Space Admin. v. Nelson*, 562 U.S. 134, 169 (2011) (Scalia, J., concurring).

This Court should grant review to resolve the circuit conflict about whether scienter is needed for a

RICO unlawful debt offense, and to repudiate the Fourth Circuit's aberrant ruling that the elements of a RICO offense can differ as between a criminal and a civil case. The Court should reverse the judgment below to prevent the adverse consequences that will flow from the circuit court's decision.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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JANUARY 2026

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 23-2097

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

Plaintiffs-Appellees,

v.

MATT MARTORELLO,

Defendant-Appellant,

and

BIG PICTURE LOANS, LLC; ASCENSION TECHNOLOGIES, INC.; DANIEL GRAVEL; JAMES WILLIAMS, JR.; GERTRUDE MCGESHICK; SUSAN MCGESHICK; GIIWEGIIZHIGOOKWAY MARTIN,

Defendants.

Appendix A

Appeal from the United States District Court
for the Eastern District of Virginia, at Richmond.
(3:17-cv-00461-REP).
Robert E. Payne, Senior District Judge.

May 7, 2025, Argued
July 16, 2025, Decided

Before DIAZ, Chief Judge, and GREGORY and AGEE, Circuit Judges. Judge Agee wrote the opinion in which Chief Judge Diaz and Judge Gregory join.

Affirmed by published opinion. Judge Agee wrote the opinion in which Chief Judge Diaz and Judge Gregory join.

AGEE, Circuit Judge:

This case returns to us for a third time following entry of final judgment against Matt Martorello in the class action lawsuit against him for violating civil provisions of the Racketeering Influenced and Corrupt Organizations Act (RICO). *See* 18 U.S.C. §§ 1962(c)-(d), 1964. Martorello challenges three rulings made by the district court that led to entry of judgment against him. First, he contends the district court abused its discretion in denying his motion to dismiss under Federal Rule of Civil Procedure 19 for failure to join necessary and indispensable parties. Second, he asserts the district court erred in concluding that Virginia, rather than tribal, law applied when determining whether the challenged loans were unlawful. And third, he maintains that the district court erred in rejecting the "mistake of law" defense that he wanted to present to negate what he termed a *scienter* element of a

federal civil RICO claim. For the reasons set forth below, we reject each of these challenges and affirm the district court's judgment.

I.

This case has an extensive history, interspersed with multiple interlocutory appeals and complicated by findings of material misrepresentations by Martorello. To resolve the limited focus of the current issues before the Court, we rely on a bird's-eye description of the underlying facts, which have been more extensively set out in the prior appeals. *See generally Williams v. Big Picture Loans, LLC* (*Williams I*), 929 F.3d 170 (4th Cir. 2019); *Williams v. Martorello* (*Williams II*), 59 F.4th 68 (4th Cir. 2023).

Matt Martorello was the architect behind this particular "'Rent-A-Tribe' scheme in which a payday lender partners with a Native American tribe to cloak the lender in the sovereign immunity of the tribe, thereby precluding enforcement of otherwise applicable usury laws that cap interest rates." *Williams II*, 59 F.4th at 73. In this iteration of the scheme, "[t]he Lac Vieux Desert Band of Chippewa Indians (the "Tribe") purportedly created businesses under tribal law to make small-dollar, high-interest rate loans to [the class of Virginia consumers and to other consumers around the country] via the internet." *Id.* When Martorello and the Tribe began operating in January 2012, loans were made through Red Rock Tribal Lending, LLC, but the Tribe—at Martorello's direction—eventually restructured that company into Big Picture Loans, LLC, and Ascension Technologies (collectively "the tribal entities"). *Id.* at 74. Throughout the scheme,

including the restructuring, Martorello arranged the lending business so that he "continued to keep almost all the profits . . . while retaining substantial control of the lending operation through" his companies. *Id.* (citation omitted).

In 2017, five Virginia citizens ("the Borrowers") who had obtained payday loans from Red Rock or Big Picture filed a putative class action complaint in the U.S. District Court for the Eastern District of Virginia against Martorello, Big Picture, Ascension, and others, alleging that their enterprise violated federal civil RICO law and seeking damages as relief. The complaint also originally raised other claims—namely, declaratory judgment and state law claims—but those were dismissed earlier in the litigation and are not before us in this appeal.

The first interlocutory appeal in this case involved the claims against the tribal entities, and we held that they were arms of the Tribe and thus entitled to tribal sovereign immunity. *Williams I*, 929 F.3d at 185. We reversed the district court's contrary holding and remanded with instructions to grant the tribal entities' motion to dismiss for lack of subject matter jurisdiction. *Id.*

Following our decision in *Williams I*, the parties to this case and others, as well as non-parties with interests in the litigation, engaged in settlement negotiations.[1]

1. By way of background, this case was not the only one brought by individuals who had obtained loans from the tribal entities and Martorello. At one point, nine cases were pending in the Eastern District of Virginia and across the country relating to the above-described lending arrangement. Generally speaking,

Those negotiations resulted in the named plaintiffs (including the Borrowers in this case), acting on behalf of a class of approximately 491,018 individuals, entering into a Class Action Settlement Agreement and Release (the "Settlement Agreement" or "Agreement") with Big Picture, Ascension, individual Tribe members, and others. Although the Tribe itself was not a party to the Agreement, its officials and individual members as well as several of its lending businesses participated in the negotiations. Moreover, potential claims against the Tribe arising from the above-described payday-loan arrangement were part of the negotiated release of claims. *E.g.*, J.A. 305 ("'Released Parties' shall include the Tribe and its current and former Tribal Officials . . . ."); 336 ("The Tribe . . . will not invoke sovereign immunity as a defense to the enforcement of the Settlement Agreement."). Among the many claims that the negotiated Settlement Agreement were designed to "fully, finally, and forever resolve," were the claims against Big Picture and Ascension that were "pending and dismissed" in this litigation—"*Lula Williams, et al. v. Big Picture Loans, LLC, et al.*, No. 3:17-cv-00461 (E.D. Va.)," J.A. 297. When the district court approved the Settlement Agreement, it too recognized what the plain language of the Settlement Agreement provided: that it would, in relevant part, resolve the claims brought by the Borrowers in this litigation against Big Picture and Ascension. J.A. 377. We recognized the same in *Williams II*. 59 F.4th at 75 n.4.

While those settlement negotiations were underway, this case had been returned to the district court for

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they all asserted violations of RICO statutes or state usury laws, among other things, based on the terms of the loans.

further proceedings consistent with our prior decision. That meant that the district court followed the Court's instruction to dismiss Big Picture and Ascension from this suit. It also heard argument and received evidence relating to the Borrowers' contention "that Martorello had misrepresented certain facts in an earlier declaration" that it and this Court had relied on when resolving whether the tribal entities were entitled to immunity. *Williams II*, 59 F.4th at 75-76. The court found that Martorello had made material misrepresentations related to how the lending operations worked and, specifically, to the benefits to the Tribe arising from the arrangement. Although the district court "recognized it could not change the immunity issue decided by this Court's prior opinion, it determined that in analyzing all pending and future motions in the litigation, it would consider the misrepresentation findings." *Id.* at 76 (cleaned up). Last, the district court also ruled that the Borrowers "did not waive their right to participate in a class-action suit against" Martorello and then granted class certification. *Id.* (cleaned up).

Thereafter, Martorello filed a second interlocutory appeal challenging the district court's finding that he had made material misrepresentations, its ruling that the Borrowers had not waived their right to pursue the class-action litigation against him, and its grant of class certification. We affirmed as to each of these issues and remanded for further appropriate proceedings. *See id.* at 76-92.

Martorello challenges three of the district court's rulings. First, its denial of his motion to dismiss under Rule 19 for lack of necessary and indispensable parties.

Williams v. Big Picture Loans, LLC, No. 3:17-cv-461, 2021 U.S. Dist. LEXIS 267963, 2021 WL 11709552, at *1 (E.D. Va. May 20, 2021). Second, its determination that Virginia (not tribal) law governed the loans. *Williams v. Big Picture Loans, LLC*, 693 F. Supp. 3d 610, 622-24 (E.D. Va. 2023). And third, its rejection of Martorello's argument that he could assert "mistake of law" as a defense to the civil RICO claim. *Id.* at 626-43. In light of these rulings, the parties resolved all remaining issues, largely through Martorello's contingent stipulations to the remaining elements of the federal civil RICO claim. The court consequently granted summary judgment to the Borrowers' certified class and awarded damages in the amount of $43,401,817.47.

Martorello noted a timely appeal, and the Court has jurisdiction under 28 U.S.C. § 1291.

II.

This appeal is from the district court's denial of Martorello's motion to dismiss and the grant of summary judgment to the Borrowers.

We review for abuse of discretion the district court's denial of a motion to dismiss under Federal Rule of Civil Procedure 19. *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Rite Aid of S.C., Inc.*, 210 F.3d 246, 250 & n.7 (4th Cir. 2000). In so doing, we review its underlying factual findings for clear error. *Id.*

We review de novo the district court's grant of summary judgment. *Sylvia Dev. Corp. v. Calvert Cnty.*, 48

F.3d 810, 817 (4th Cir. 1995). This means that we apply the same standard that bound the district court, and summary judgment is warranted "if," viewing the facts in the light most favorable to Martorello, the Borrowers have shown "that there is no genuine issue of material fact and [they are] entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Sylvia Dev. Corp.*, 48 F.3d at 817.

III.

While federal RICO law may be more familiar for its "racketeering activity" provisions, it also prohibits individuals from being "employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through [the] collection of unlawful debt." 18 U.S.C. § 1962(c). It's also unlawful to conspire to violate that provision. § 1962(d). RICO defines "unlawful debt" to include "a debt . . . which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury" and "which was incurred in connection with . . . the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate." *Id.* § 1961(6).

At the time of judgment, the only claims remaining against Martorello were the Borrowers' civil RICO claims. Specifically, the Borrowers alleged that Martorello both engaged in and conspired to engage in "the collection of unlawful debt," in violation of § 1962(c) and (d).

Appendix A

A. Rule 19 Motion to Dismiss

Martorello argues that the district court abused its discretion in denying his motion to dismiss the complaint under Federal Rules of Civil Procedure 12(b)(7) and 19 based on the failure and inability to join the Tribe, Big Picture, and Ascension as party defendants. In Martorello's view, these three entities were both necessary and indispensable parties to the litigation and, since they could not be joined due to tribal sovereign immunity, the complaint must be dismissed. The district court denied the motion for three reasons. *See Williams*, 2021 U.S. Dist. LEXIS 267963, 2021 WL 11709552, at *1. First, it relied on the reasoning of several district court decisions that had rejected similar arguments in other rent-a-tribe cases. *Id.* Second, it endorsed the principle that joint tortfeasors are not necessary parties in the context of a civil RICO claim. *Id.* And third, it noted that Rule 19 was inapplicable as to the tribal entities because they had, in fact, been parties to this litigation, but had settled the claims brought against them. *Id.*

Rule 19 sets forth a two-part inquiry. "[A] district court asks first whether the nonjoined party is necessary under Rule 19(a) and then whether the party is indispensable under Rule 19(b)." *Gunvor SA v. Kayablian*, 948 F.3d 214, 218 (4th Cir. 2020). "[I]f the nonjoined party is both necessary and indispensable," then "[d]ismissal, though a drastic remedy that should be employed only sparingly, is required." *Id.* at 219 (cleaned up).

Determining whether a non-party is both necessary and indispensable is a fact-specific inquiry that considers

various factors relevant to assessing the fairness of proceeding without it. *See* Fed. R. Civ. P. 19(a), (b); *Nat'l Union Fire Ins. Co.*, 210 F.3d at 250 (stating that a district court "must proceed pragmatically, examining the facts of the particular controversy to determine the potential for prejudice to all parties, including those not before it" (cleaned up)). Among the factors courts consider when assessing indispensability are: "the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties," "whether a judgment rendered in the person's absence would be adequate," and "whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder." Fed. R. Civ. P. 19(b)(1), (3), (4). These factors guide courts in their overarching inquiry into whether the case can "in equity and good conscience" proceed without a nonjoined party. Fed. R. Civ. P. 19(b).

Martorello argues that the district court abused its discretion as to both prongs of the Rule 19 analysis. With respect to being necessary parties, Martorello contends that Big Picture and Ascension were both contracting parties to the loans alleged to be usurious, so their rights are at issue in this case. He maintains that because the Tribe owns both companies, it too is a required party with an interest in protecting its sovereign interests in making and enforcing its contract laws, along with a substantial economic interest in the lending practices under review. As for the indispensability of the tribal entities and Tribe, Martorello points to *Republic of Philippines v. Pimentel*, 553 U.S. 851, 128 S. Ct. 2180, 171 L. Ed. 2d 131 (2008), and related cases to assert that the inability to join a necessary party because it is entitled to tribal immunity

demonstrates why that nonjoined party can be viewed as indispensable to the litigation under Rule 19(b). He also posits various ways in which the Tribe and its entities may be prejudiced by a judgment entered against him given that he does not represent their interests and they have an interest in the enforceability of the challenged loans. Last, he contends that the Settlement Agreement is irrelevant to the Rule 19 analysis because Rule 19 focuses on the nonjoined parties' interests in the pending litigation, which were unchanged by the Agreement. In addition, Martorello notes that the Tribe was never part of this litigation or a signatory to the Settlement Agreement, and Big Picture and Ascension were dismissed from this case on the basis of immunity, not settlement.

The district court did not abuse its discretion in denying Martorello's motion. At the outset, we are skeptical of his argument that the Tribe or its entities are necessary parties to this action. Civil RICO claims provide plaintiffs with a statutory tort remedy. *Mid Atl. Telecom, Inc. v. Long Distance Servs., Inc.*, 18 F.3d 260, 263 (4th Cir. 1994). And it "has long been the rule that it is not necessary for all joint tortfeasors to be named as defendants in a single lawsuit." *Temple v. Synthes Corp.*, 498 U.S. 5, 7, 111 S. Ct. 315, 112 L. Ed. 2d 263 (1990). That "rule" has led the Supreme Court to recognize that potential joint tortfeasors are not *ipso facto* "necessary" parties under Rule 19(a), meaning that "the threshold requirements" for dismissal under Rule 19 have not been met. *Id.* at 8.[2]

2. Other factors could render a joint tortfeasor "necessary," but those factors do not fall into that category by virtue of joint-

But even assuming that the Tribe or tribal entities were necessary parties, Martorello still has not shown that they were indispensable ones. *See Am. Gen. Life & Accident Ins. Co. v. Wood*, 429 F.3d 83, 92 (4th Cir. 2005) (observing that the burden of showing that a "person who was not joined is needed for a just adjudication" falls on the person asserting Rule 19 nonjoinder (quoting 7 Charles A. Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure* § 1609 (3d ed. 2001))). Put another way, he has not shown that the district court abused its discretion in concluding, "in equity and good conscience," that this action could proceed in their absence. Fed. R. Civ. P. 19(b). Specifically, Martorello has not shown that the district court abused its discretion in finding that the absence of the Tribe or its entities would prejudice them. That's largely because of the Settlement Agreement, in which Big Rock and Ascension "fully, finally, and forever resolve[d]" the claims that had been brought against them in this very litigation. J.A. 297.

As an initial matter, we reject Martorello's contention that we can sidestep the traditional Rule 19(b) factor-based weighing analysis given the Supreme Court's discussion in *Pimentel*. There, the Supreme Court considered how to apply Rule 19 when two originally named defendants had been dismissed because they were entitled to foreign

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tortfeasor status alone. *See, e.g., Home Buyers Warranty Corp. v. Hanna*, 750 F.3d 427, 434 (4th Cir. 2014) ("Although joint tortfeasors from a state court proceeding are not automatically necessary parties to a federal case under Rule 19, the Builders' interest in this case extends even beyond the possibility of tort liability." (citation omitted)).

sovereign immunity. 553 U.S. at 854-55. At the outset of its indispensability analysis, the Court recognized its precedent as holding that "[a] case may not proceed when a required-entity sovereign is not amenable to suit" because "where sovereign immunity is asserted, and the claims of the sovereign are not frivolous, dismissal of the action must be ordered where there is a potential for injury to the interests of the absent sovereign." *Id.* at 867. In so holding, the Supreme Court impressed that "proper weight" must be given to "compelling claim[s] of sovereign immunity" when considering, under Rule 19(b), the potential prejudice to a non-party with proceeding in the litigation without them. *Id.* at 869.

Since *Pimentel*, some of our sister circuits have interpreted it to mean that when the absent party is a sovereign, there is "very little need" to perform a traditional factor-based inquiry under Rule 19(b), while others roll its implications into considering potential prejudice to the missing party. *Compare Dine Citizens Against Ruining Our Env't v. Bureau of Indian Affs.*, 932 F.3d 843, 857 (9th Cir. 2019), *with De Csepel v. Republic of Hungary*, 27 F.4th 736, 749-50, 456 U.S. App. D.C. 119 (D.C. Cir. 2022). Martorello urges us to take the former approach, but we need not resolve that open question in this circuit in order to resolve this case. Under either view, *Pimentel*'s driving concern was that "proper weight" be given to the interest of an absent sovereign who was entitled to immunity because proceeding with the case in their absence may prejudice that sovereign's interests. That is not the case here chiefly because of the Settlement Agreement, in which Big Rock and Ascension "fully,

finally, and forever resolve[d]" the claims that had been brought against them in this very litigation. J.A. 297.

As our recitation of the procedural history recounted, although Big Rock and Ascension were dismissed from this litigation on account of tribal immunity, that did not end the matter. Despite that action, they elected to enter into a settlement agreement regarding the claims in this and other related cases. All the interests Martorello now purports to assert on their behalf as a reason why they are indispensable to further adjudication of the claim against him—from tribal immunity and the ability of a separate sovereign to contract to the enforceability of the loans at the heart of this case—are matters that the tribal entities have separately resolved to their satisfaction as part of the Settlement Agreement. As a result of the Agreement, the Borrowers have released the tribal entities from any claims arising from these loans. Similarly, the tribal entities have agreed to certain modifications and caps to their loan collections, and they established a settlement fund from which the Borrowers may be eligible for payment. In short, given the terms of the Settlement Agreement, we see no grounds in which a judgment entered solely against Martorello in this case might prejudice the tribal entities. Consequently, the district court did not abuse its discretion in so ruling.

Nor did the district court abuse its discretion in concluding the same as to the Tribe because, although it was not a signatory to the Settlement Agreement, its officials and entities were active participants in the negotiations and its interests have been fully protected

and finally resolved by it. Notably, all claims against the Tribe arising from these loans were part of the released claims (though the Tribe did not waive immunity), so—as but one example—the Borrowers could not attempt to sue it as a result of any judgment entered in this case. Further, the Tribe's interests in the loans at the heart of this litigation, either as a sovereign or as a commercial actor, have already been addressed through the Settlement Agreement. Accordingly, the Tribe's absence from this case will in no way prejudice it. Or, to use *Pimentel*'s language, the Settlement Agreement means that there is no colorable "potential for injury to the interests of the absent sovereign" by proceeding with the litigation against Martorello. 553 U.S. at 867. The Borrowers are seeking only monetary damages against Martorello. Such a judgment would have no impact on the Tribe and its entities, nor could it given the terms of the Settlement Agreement.[3]

Last, the district court correctly determined that the Borrowers *would* be prejudiced if this litigation were dismissed for nonjoinder of the Tribe and the tribal entities. That course would leave the Borrowers with no relief against Martorello, the principal participant and conspirator in the lending scheme at the heart of this case. This is not a case where the same claims could be pursued against him, the Tribe, and its entities in another forum. *See, e.g., Nat'l Union Fire Ins. Co.*, 210 F.3d at 253-54 (concluding dismissal would leave the plaintiff with an

3. While prejudice to Martorello would also be an appropriate Rule 19(b) inquiry, he has not argued that the absence of the Tribe or its entities would somehow prejudice him.

adequate remedy because the claims could be brought in state court against all the necessary parties). And given the Settlement Agreement, all that could ever proceed are claims against Martorello.

For all these reasons, the equities in this case are not at all as Martorello portrays them. The Tribe and its entities are not indispensable parties, and the extreme remedy of dismissal for nonjoinder under Rule 19 was not warranted. Consequently, the district court did not abuse its discretion in denying Martorello's motion. *Gunvor SA*, 948 F.3d at 219 (reiterating that dismissal is required only when a nonjoined person is both necessary *and* indispensable).

B. Applicability of Virginia Law

Next, Martorello asserts that the district court erred in relying on Virginia, not tribal, law to assess whether the challenged lending practices involved the collection of unlawful debt. He argues that applying Virginia's usury laws to tribal lending practices violates the Indian Commerce Clause because tribal law is subordinate to only federal, not state, law. He maintains that the district court should have applied the test set out in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 100 S. Ct. 2578, 65 L. Ed. 2d 665 (1980), to identify the federal, tribal, and state interests at stake before deciding what usury laws apply to the Tribe's online lending practices. And he contends that, had the district court undertaken the proper *Bracker* analysis, it would have concluded that tribal interests in offering a *bona fide* commercial product

such as the loans at issue here precluded application of state law.

The Indian Commerce Clause grants Congress—not the States—the power "[t]o regulate Commerce . . . with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3. "This congressional authority and the 'semi-independent position' of Indian tribes have given rise to two independent but related barriers to the assertion of state regulatory authority over tribal reservations and members." *Bracker*, 448 U.S. at 142. "First, the exercise of such authority may be pre[]empted by federal law." *Id.* "Second, it may unlawfully infringe 'on the right of reservation Indians to make their own laws and be ruled by them.'" *Id.* (quoting *Willams v. Lee*, 358 U.S. 217, 220, 79 S. Ct. 269, 3 L. Ed. 2d 251 (1959)). Because tribal sovereignty "is dependent on, and subordinate to, only the Federal Government, not the States," "state laws may be applied to tribal Indians on their reservations if Congress has expressly so provided." *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207, 107 S. Ct. 1083, 94 L. Ed. 2d 244 (1987) (quoting *Washington v. Confederated Tribes of Colville Indian Rsrv.*, 447 U.S. 134, 154, 100 S. Ct. 2069, 65 L. Ed. 2d 10 (1980)). And since "the question [of] whether a particular state law may be applied to an Indian reservation or to tribal members" involves a complex analysis of tribal, federal, and state interests, "no rigid rule" exists to resolve it. *Bracker*, 448 U.S. at 142. Instead, in *Bracker*, the Supreme Court articulated a broad set of general principles to help courts frame and perform the requisite analysis. *See id.* at 143-45.

Consistent with *Bracker* and its framework, however, is the long-held recognition that, "[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49, 93 S. Ct. 1267, 36 L. Ed. 2d 114 (1973) (collecting cases); *accord Bracker*, 448 U.S. at 144 n.11. Thus, it is entirely consonant with the Indian Commerce Clause, tribal sovereignty, and *Bracker* to recognize that state laws are generally enforceable against tribal entities for activities they undertake off the reservation.

We recognized this distinction in *Hengle v. Treppa*, 19 F.4th 324 (4th Cir. 2021), when we held that a tribe operates off the reservation when it engages in online lending activities with non-Indians such that those activities are subject to non-discriminatory state laws. In *Hengle*, the defendant tribal officials had argued that their online lending practices occurred on the reservation because they and the tribal lending entities were located on the reservation and each loan agreement said it was "made and accepted" on the reservation. *Id.* at 348. We rejected that argument after observing that the challenged conduct was not limited to where the loan agreements were "made and accepted." *Id.* Instead, looking at the totality of the circumstances, we concluded that the defendants' online lending activities occurred off the reservation because they marketed online lending throughout the country, plaintiffs resided off the reservation when they applied for the loans, the tribal officials and entities collected loan payments from off-reservation bank accounts while

plaintiffs continued to reside off the reservation, and the effects of the challenged conduct were felt by plaintiffs off the reservation. *Id.* at 348-49.

The district court did not err in relying on *Hengle* and the other principles recounted above to conclude that Virginia law applies to the transactions at issue without running afoul of the Indian Commerce Clause or *Bracker*. Contrary to Martorello's contention, a *Bracker* analysis was not required under the circumstances presented here because that analysis aids courts in determining when state laws can be applied to a tribe's conduct on a reservation or toward its own members. *See Bracker*, 448 U.S. at 141-42. Neither of those scenarios is implicated in this case. The Tribe's online lending activities—like those of the tribal officials at issue in *Hengle*—were broadly marketed online and in direct mailings to consumers. The Borrowers lived off the reservation when they applied for and made payments under the loans. The effect of the challenged conduct was also felt off the reservation through collection and other actions. And the Borrowers are not Tribe members. Under *Hengle* and the Supreme Court precedent cited there and earlier in this opinion, a *Bracker* analysis would not have been appropriate as Martorello's challenged conduct was clearly part of the Tribe's "off-reservation conduct subject to nondiscriminatory state regulation." *Hengle*, 19 F.4th at 349 (quoting *Hengle v. Asner*, 433 F. Supp. 3d 825, 876 (E.D. Va. 2020)).

For these reasons, we reject Martorello's contention that the loans at issue here constitute on-reservation conduct to which the *Bracker* analysis applies. The district court therefore did not err in applying Virginia law.

C. Mistake-of-Law Defense

Martorello challenges the district court's ruling that he could not assert a mistake-of-law defense to the Borrowers' civil RICO claims. To understand his argument first requires some background discussion about those claims and the type of defense Martorello wanted to present.

In the district court and now, Martorello argued that, to prove their claims, the Borrowers needed to show that he willfully collected an unlawful debt, i.e., that he (a) knew that the loans charged interest in an amount that would be "unenforceable under State or Federal law . . . because of the laws relating to usury" and (b) knowingly lent money "at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate." 18 U.S.C. § 1961(6). Martorello argues that he should be able to tender evidence that he acted under the good-faith (but ultimately incorrect) belief that the loans at issue were not "unlawful" because he believed them to be governed by tribal law, which permitted the high interest rates charged. If he was merely mistaken about the governing law, his argument goes, he lacked the requisite *mens rea* to be held liable for a civil RICO violation.

The Borrowers moved for summary judgment and asserted that such a mistake-of-law defense was not available as a defense to their civil RICO claims. The district court agreed with the Borrowers after concluding that a civil RICO claim (and its attendant conspiracy claim) did not require proof that Martorello possessed

a particular *mens rea*. *Williams*, 693 F. Supp. 3d at 626-43. And because the underlying act—violation of Virginia's usury laws—did not require a specific *mens rea* either, this meant in essence that evidence relating to a mistake-of-law defense would be legally irrelevant at any forthcoming trial on the substantive and conspiracy civil RICO claims.[4]

At the outset, the district court held that the premise underlying Martorello's defense was erroneous because a civil RICO claim did not require proof of the defendant's *mens rea* separate and apart from any *mens rea* required by the predicate acts (i.e., whatever laws were relied on as the "racketeering activity" or "collection of unlawful debt"). In so holding, the court relied on the statutory language, the standard jury instructions for a civil RICO claim, the differences between civil and criminal claims generally and between civil and criminal RICO claims specifically, the persuasiveness of other court decisions related to this question, and the elements of the underlying Virginia usury laws. *Id.* at 630-41. The court further determined that all that a civil RICO claim required the Borrowers to prove was that "Martorello . . . knowingly engage[d] in the activity itself, but [not that he knew] that, by doing so, he would break the law." *Id.* at 641. Accordingly, it concluded that Martorello's proposed mistake-of-law defense would not be probative

4. Martorello does not challenge the district court's interpretation of Virginia's usury statute, Va. Code § 6.2-303(A). Accordingly, the only issue before us on appeal is whether a federal civil RICO claim contains a *mens rea* requirement separate from the underlying violation of state law.

of any aspect of the civil RICO claims against him. In light of these conclusions, the court held that Martorello's proposed defense had no bearing on whether he committed a substantive civil RICO violation, or conspired to do so.

We agree with the district court that a mistake-of-law defense would not negate any element of the Borrowers' civil RICO claims. Our understanding begins with the statutory language pertaining to a RICO violation found in 18 U.S.C. § 1962. In relevant part, § 1962(c)'s substantive RICO violation requires proof of the "collection of an unlawful debt." And § 1961(6) defines "unlawful debt" to be a debt that is "unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury" and that was "incurred in connection with . . . the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate." This statutory language has no requirement that the defendant knew that the debt being collected was "unlawful." Our interpretation of the statutory language is consistent with that of the other circuit courts of appeals to recognize that § 1962 "on its face is silent on the issue of *mens rea*." *United States v. Scotto*, 641 F.2d 47, 55 (2d Cir. 1980); *accord United States v. Blinder*, 10 F.3d 1468, 1477 (9th Cir. 1993); *Genty v. Resol. Tr. Corp.*, 937 F.2d 899, 908 (3d Cir. 1991); *United States v. Pepe*, 747 F.2d 632, 675-76 (11th Cir. 1984).

Courts "ordinarily resist reading words or elements into a statute that do not appear on its face." *Bates v. United States*, 522 U.S. 23, 29, 118 S. Ct. 285, 139 L. Ed.

2d 215 (1997). Consistent with that principle and in light of § 1962's silence, several courts of appeals have stated even in the context of criminal RICO convictions that § 1962 "imposes no additional mens rea requirement beyond that found in the predicate crimes." *United States v. Biasucci*, 786 F.2d 504, 512 (2d Cir. 1986); *Pepe*, 747 F.2d at 675-76; *see also Genty*, 937 F.2d at 908 (assuming the same for purposes of a civil RICO claim). Nothing in § 1962 itself suggests that Congress intended to require a specific *mens rea*.[5]

Martorello acknowledges that § 1962 itself does not expressly require proof of a particular *mens rea*. Instead, he contends that such an element should be implied based on general principles of criminal law, which he contends are relevant to understanding § 1962 because violations of RICO can carry either criminal or civil penalties. He relies on the principle that, when interpreting criminal statutes, courts will usually read a *mens rea* requirement into a statute when it is otherwise silent, absent evidence that Congress intended otherwise. That concept derives from the common law presumption that criminal defendants must be shown to have "possess[ed] a culpable mental state." *Ruan v. United States*, 597 U.S. 450, 458, 142 S. Ct. 2370, 213 L. Ed. 2d 706 (2022) (quoting *Rehaif v. United*

5. In addition, and as the district court noted, the model jury instructions relating to civil RICO violations do not "mention that willfulness is an element to be proved" to establish a violation under § 1962(c). *Williams*, 693 F. Supp.3d at 631; *accord Modern Federal Jury Instructions (Civil)*, § 84-23. And nothing in the scholarly discussions of a civil RICO conspiracy's elements contains a "willfulness" component either.

States, 588 U.S. 225, 229, 139 S. Ct. 2191, 204 L. Ed. 2d 594 (2019)); *see Staples v. United States*, 511 U.S. 600, 605-06, 114 S. Ct. 1793, 128 L. Ed. 2d 608 (1994) ("[T]he common-law rule requiring *mens rea* has been followed in regard to statutory crimes even where the statutory definition did not in terms include it." (quoting *United States v. Balint*, 258 U.S. 250, 251-52, 42 S. Ct. 301, 66 L. Ed. 604, T.D. 3375 (1922))). But no such analogous presumption exists in the civil context. Indeed, this principle is itself a narrow, though longstanding, exception to the more "common maxim" followed in the American legal tradition "that ignorance of the law will not excuse any person, either civilly or criminally." *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 581, 130 S. Ct. 1605, 176 L. Ed. 2d 519 (2010) (quoting *Barlow v. United States*, 32 U.S. 404, 411, 8 L. Ed. 728 (1833) (opinion for the Court by Story, J.)); *Cheek v. United States*, 498 U.S. 192, 199, 111 S. Ct. 604, 112 L. Ed. 2d 617 (1991) (reiterating the "general rule" that "ignorance of the law or a mistake of law is no defense"). Thus, whatever circumstances may give rise to an implied *mens rea* requirement before obtaining a criminal conviction have no footing in the civil context.

Further supporting our understanding of the elements of a civil RICO claim, we note that when Congress has intended for civil liability to be based on proof that a defendant acted with knowledge that his conduct violated the law, it has used language expressly calling for such proof. The Supreme Court has, for example, generally understood Congress's use of the word "willful" when discussing a defendant's conduct to express its intent to

"excuse mistakes of law." *Jerman*, 559 U.S. at 584 (citing cases). But when Congress uses language that falls short of such an explicit requirement, then civil liability may attach "even if the actor lacked actual knowledge that her conduct violated the law." *Id.* at 582-83.[6] In short, Congress knows how to demand proof of actual knowledge of unlawfulness when crafting civil statutes. But Congress refrained from including such language in § 1962, and this absence matters for purposes of understanding what a plaintiff must prove to establish a civil RICO violation.

To reiterate, the distinction between the civil and criminal contexts effectively ends our inquiry. Civil claims need not have a *mens rea* element, § 1962 does not expressly provide for one as part of what constitutes a substantive RICO violation or a conspiracy to commit such a violation, and we have no basis for implying such a requirement from statutory silence when § 1962 is used as the basis for establishing a civil RICO claim under § 1964. In the absence of such an element, Martorello›s purported belief that the loans at issue were lawful is simply irrelevant for purposes of establishing (or defending against) his civil RICO violation.

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6. In *Jerman*, for example, the Supreme Court observed that Congress had "intended to provide a mistake-of-law defense to civil liability" in the Fair Debt Collection Practice Act when it incorporated by reference regulations that explicitly limited liability to when a "debt collector acts with actual knowledge or knowledge fairly implied on the basis of objective circumstances that its action was prohibited by the FDCPA." 559 U.S. at 583-84 (cleaned up).

As noted, Martorello resists this conclusion by arguing that we should read § 1962 in tandem with §§ 1963 and 1964 to implicitly require proof of a specific *mens rea* as part of establishing every RICO violation under § 1962, regardless of whether it results in civil or criminal liability.

We disagree with Martorello's novel position. No circuit court of appeals has adopted this understanding of how the RICO statutes operate.[7] And even assuming that a *mens rea* requirement should be implied to obtain some criminal RICO convictions, it does not follow that such a requirement exists in a civil RICO claim. This is not a case like those Martorello relies on where we must interpret existing statutory language in a way that will be applied in both civil and criminal contexts. *See, e.g.*, *Sessions v. Dimaya*, 584 U.S. 148, 164, 138 S. Ct. 1204, 200 L. Ed. 2d 549 (2018) (quoting *Leocal v. Ashcroft*, 543 U.S. 1, 12 n.8, 125 S. Ct. 377, 160 L. Ed. 2d 271 (2004)). Instead, he urges that we infer the existence of an unstated and entirely new element into the statute. As noted above, other circuit courts have not required a separate showing

7. Lacking direct support for his position in the case law, Martorello points to dicta in criminal cases arising in the Second Circuit. In a handful of cases, and as recently articulated in *United States v. Grote*, 961 F.3d 105 (2d Cir. 2020), that court has pondered whether the absence of a *mens rea* requirement for usury-based RICO violations could result in a criminal conviction without any findings as to the defendant's *mens rea*. *Id.* at 117-21. This speculative dicta arose only in the context of what might be necessary to obtain a *criminal* RICO conviction, and thus is far removed from what a plaintiff must prove about § 1962(c) and (d) to establish *civil* liability for a RICO violation under § 1964. *See id.*

of *mens rea* beyond what the predicate acts require in the criminal context. They have held as much despite the presumption that arises in the criminal context that some *mens rea* should be found to support a conviction. No similar presumption of *mens rea* exists in the civil context and Congress has not included express language that would require a *mens rea* finding to establish a civil RICO claim.[8]

In the end, a civil RICO claim does not hinge on evidence of the defendant's *mens rea* apart from whatever requirements the predicate acts impose. Here, it is unchallenged that Virginia's usury laws impose no such *mens rea* requirement. Consequently, the Borrowers did not have to establish that Martorello acted willfully, i.e., that he knew that the loans would be subject to Virginia law or that their terms violated Virginia's usury laws.

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8. We find additional support for our conclusion in *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 98 S. Ct. 2864, 57 L. Ed. 2d 854 (1978). Like the RICO statutes, the antitrust statutes authorize "[b]oth civil remedies and criminal sanctions . . . with regard to the same generalized definitions of the conduct proscribed . . . without reference to or mention of intent or state of mind." *Id.* at 438. Even so, *Gypsum* held that proof of *mens rea* was required for a criminal violation of the Sherman Act. *Id.* at 435. But its decision "le[ft] unchanged the general rule that a civil violation [of the antitrust laws] can be established by proof of . . . an anticompetitive effect"—in other words, without proof of intent. *Id.* at 436 n.13. Though the same proscribed conduct could give rise to civil or criminal liability under the antitrust laws, the presumption against strict liability crimes and the rule of lenity prompted a *mens rea* requirement for a criminal antitrust violation, *id.* at 436-38, but not for a civil one.

Evidence relating to a mistake-of-law defense would therefore be irrelevant to establishing the Borrowers' civil RICO claim against Martorello, and the district court did not err in disallowing the defense as part of its summary judgment ruling.

IV.

For the reasons set forth above, we affirm the judgment of the district court in favor of the Borrowers.

AFFIRMED

APPENDIX B

UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Case No. 3:17cv461

LULA WILLIAMS, *et al.*,

Plaintiffs,

v.

BIG PICTURE LOANS, LLC, *et al.*,

Defendants.

September 22, 2023, Decided
September 22, 2023, Filed

Robert E. Payne, Senior United States District Judge.

AMENDED MEMORANDUM OPINION

This matter is before the Court on the PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT ("Plaintiffs' Motion") (ECF No. 1165). By ORDER entered on June 16, 2023 (ECF No. 1328), Plaintiffs' Motion was

granted in part. This MEMORANDUM OPINION further explains the reasons for so doing.[1]

BACKGROUND

A. Factual Background

This class action proceeding concerns a "lending scheme allegedly designed to circumvent state usury laws." *Williams v. Martorello*, 59 F.4th 68, 72 (4th Cir. 2023) [hereinafter *Williams II*). Plaintiffs, representing a class of borrowers,[2] allege that the defendant, Matt Martorello ("Martorello"), conspired with the Lac

1. It also explains subsequent orders that were based on the resolution of the Plaintiffs' Motion.

2. The Court certified the following classes:

(a) **Big Picture RICO Class**: All Virginia consumers who entered into a loan agreement with Big Picture where a payment was made from June 22, 2013 to December 20, 2019.

(i) **Big Picture Usury Sub-class**: All Virginia consumers who paid any principal, interest, or fees on their loan with Big Picture from June 22, 2015 to December 20, 2019.

(ii) **Big Picture Unjust Enrichment Sub-class**: All Virginia consumers who paid any amount on their loan with Big Picture from June 22, 2014 to December 20, 2019.

(b) **Red Rock RICO Class**: All Virginia consumers who entered into a loan agreement with Red Rock where a payment was made from June 22, 2013 to December 20, 2019.

(i) **Red Rock Usury Sub-class**: All Virginia consumers who paid any principal, interest, or fees on their loan with Red Rock from June 22, 2015 to December 20, 2019.

Vieux Desert Band of Chippewa Indians ("the Tribe") and various other entities and individuals to issue high-interest loans through the internet to consumers within the Commonwealth of Virginia. Plaintiffs brought a five count CLASS ACTION COMPLAINT ("Compl.") (ECF No. 1) against Martorello. COUNT ONE seeks a Declaratory Judgment that "the choice of law and forum-selection provisions are void and unenforceable under Va. Code § 6.2-1541(A) and as a matter of Virginia's well-established public policy." Compl. at ¶ 94.[3] COUNT TWO seeks relief under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(c), COUNT THREE seeks relief under RICO, 18 U.S.C. § 1962(d). COUNT FOUR is based on violations of Virginia Usury Laws. COUNT FIVE presents a claim for unjust enrichment under Virginia law. Compl. at 20-31.

The Plaintiffs Motion seeks summary judgment on COUNT THREE, the RICO conspiracy claim[4] based on 18 U.S.C. § 1962(d) which provides that:

> (ii) **Red Rock Unjust Enrichment Sub-class**: All Virginia consumers who paid any amount on their loan with Red Rock from June 22, 2014 to December 20, 2019.

Class Certification Order (ECF No. 1111) which was affirmed by the United States Court of Appeals for the Fourth Circuit in *Williams II*.

3. COUNT ONE will be dismissed pursuant to PLAINTIFFS' CONSENT MOTION TO DISMISS COUNT ONE OF THE COMPLAINT (ECF No. 1400).

4. PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR MOTION FOR PARTIAL SUMMARY JUDGMENT ("Pls. Memo. in Supp.") at 3 n.1 (ECF No. 1169). An unsealed version is filed at ECF No. 1166.

> It shall be unlawful for any person to conspire to violate any of the provisions of subsection . . . (c) of this section.

18 U.S.C. § 1962(d).

The Plaintiffs' Motion also seeks summary judgment on certain elements of COUNT TWO based on 18 U.S.C. § 1962(c): participation in the affairs of the RICO enterprise. Section 1962(c) provides that:

> It shall be unlawful for any person employed by or associated with an enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. § 1962(c).

Section 1962(c) is also the RICO section that is charged as that which was violated by the conspiracy that is alleged in COUNT THREE. A brief summary of the factual underpinnings of Plaintiffs' RICO claims is necessary to an understanding of the issues that are the subject of this MEMORANDUM OPINION.

According to Plaintiffs and supported by the record offered in support of Plaintiffs' Motion, and not much materially disputed, Martorello began engaging in the

online lending business in 2008. In 2011, Martorello, working with Robert Rosette, a well-known lawyer in the tribal lending business, established a relationship with the Tribe. The alleged purpose of this relationship was to establish a so-called "rent-a-tribe" online lending operation. The online lending operation was conducted by the alleged RICO enterprise, which was comprised of Martorello, several entities created and controlled by Martorello, several of his friends and relatives, the Tribe, and several entities created by the Tribe.

The purpose to be served by the relationship Martorello sought with the Tribe was to imbue a forthcoming online lending operation with the Tribe's sovereign immunity. If that could be accomplished, Martorello envisioned that he (and entities that he would control and use to make high interest, usurious loans that violated the laws of most states and RICO) would be immune from civil and criminal liability for such violations.

There is undisputed evidence that, through the alleged RICO enterprise, the alleged RICO conspiracy made high interest loans.[5] First, under the name of Red Rock Tribal Lending, LLC ("Red Rock"), and then in the name of Big Picture Loans, LLC ("Big Picture Loans"). Both of those entities are considered arms-of-the-tribe. *Williams v. Big Picture*, 929 F.3d 170 (4th Cir. 2019) [hereinafter *Williams I*].

5. I.e., loans that were unlawful under Virginia law and 18 U.S.C. § 1961(6).

However, the loans were funded by Martorello's company, Bellicose VI and then Bellicose Capital, LLC ("Bellicose Capital"). The record shows that Bellicose VI and then SourcePoint VI, LLC ("SourcePoint") (Bellicose VI's subsidiary), which were owned and controlled by Martorello, handled the day-to-day operation of the business of the tribal entities and, for all practical purposes, underwrote, issued, and serviced the loans made online by the alleged RICO enterprise. For most of the time at issue, the Tribe received approximately 2% of the net revenue from loan payments.[6] Martorello's companies received the rest. And, ultimately, those companies sent the money to Martorello and his family through offshore trusts that Martorello established to receive the proceeds of the unlawful loans.

The undisputed evidence shows that Martorello was the founder and Chief Executive Officer of Bellicose Capital. There is no material dispute that Martorello created Bellicose VI and Bellicose for the purpose of funding, making, and collecting the alleged unlawful loans made by the alleged RICO enterprise.

Nor is it disputed that, in 2014 and 2015, Martorello knew about enforcement actions taken by various state agencies against unrelated, but similar, rent-a-tribe operations engaged in online lending operations such as the one being operated by Martorello's entities and the Tribe. So, in January 2016, Martorello arranged a restructuring

6. Late in the timeframe, the Tribe's percentage was increased slightly, to 4%, following a restructuring of the enterprise that will be discussed below.

of the online lending operation in which Martorello, his entities, and the Tribe were involved. As part of that restructuring, the Tribe acquired Bellicose Capital, and Martorello's entities and the Tribe entered into several related contracts that facilitated the continuation of their allegedly illegal online lending activities.[7]

After the restructuring, most of the proceeds from the online lending enterprise continued to flow to Martorello and his family through a series of companies and trusts. Throughout the entire course of the alleged RICO enterprise, its purpose was to make and collect unlawful debts (i.e., loans on which the interest rate exceeded the usury rate permitted under Virginia law and which met the definition of "unlawful debt" in 18 U.S.C. § 1961(6)). There is substantial evidence to support that Martorello was extensively involved in the affairs of the alleged RICO enterprise.

It is important to keep in mind that the Tribe enjoyed sovereign immunity. Therefore, even if it made loans that exceeded permissible usury rates, it could not be sued. The same is true of entities organized by the Tribe to participate in the RICO enterprise's online lending scheme. *See Williams I*, 929 F.3d at 185. The record contains substantial, undisputed evidence, that Martorello's purpose in making online loans under the so-called "rent-a-tribe model" was to attempt to clothe the alleged RICO enterprise with the sovereign immunity which the Tribe and its entities possessed.

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7. Under the restructured lending arrangements, the Tribe was to receive approximately 4% of the gross revenues.

There is evidence to show that Martorello (the alleged mastermind and principal beneficiary of the rent-a-tribe scheme), the entities that make and collect the usurious loans and that distribute the loan payments, and the people who run these various entities comprise the alleged RICO enterprise. The present action focuses on Martorello because he is said to have conceived of, and set up, the unlawful online lending arrangements, and spearheaded efforts to make them appear to be of tribal origin. But allegedly, in fact, it was his business entities and Martorello himself who were conducting the affairs of the alleged RICO criminal enterprise. And, it was Martorello and his family and investors who ultimately received the funds generated by the unlawful usurious loans.

B. Procedural Background

This case has a long procedural history. It has twice been to the United States Court of Appeals for the Fourth Circuit. On the first occasion, the Fourth Circuit considered the question of tribal sovereign immunity and dismissed the two tribal entity defendants, Big Picture Loans and Ascension Technologies, LLC ("Ascension"). *Williams I*, 929 F.3d at 185; *see also* Dismissal Order (ECF No. 668) (dismissing Big Picture Loans and Ascension). On the second, and more recent occasion, the Fourth Circuit affirmed this Court's class certification order. *Williams II*, 59 F.4th at 73. Thereafter, the parties conducted extensive discovery on the merits of the case after which the Plaintiffs and Martorello both filed motions for summary judgment.

Appendix B

1. Martorello's Motion for Summary Judgment

Martorello requested summary judgment that:

(1) Tribal law applied to the loans;

(2) Martorello could not be held liable under Virginia's usury laws; and

(3) Martorello could not be held liable for unjust enrichment.[8]

On June 26-27, 2023, the Court heard oral argument on Martorello's Motion for Summary Judgment (June 26, 2023 Minute Entry (ECF No. 1351)). That motion was denied in its entirety. June 28, 2023 ORDER (the "June 28 ORDER") (ECF No. 1354). On July 11, 2023, a MEMORANDUM OPINION (ECF No. 1392) was issued explaining that decision.

2. The Plaintiffs' Motion for Partial Summary Judgment

To some extent, the issues presented for decision in the Plaintiffs' Motion evolved over time because of the positions asserted in the briefs[9] and even in argument.

8. DEFENDANT MATT MARTORELLO MEMORANDUM OF LAW OF IN SUPPORT OF HIS MOTION FOR PARTIAL SUMMARY JUDGMENT ("Martorello Memo. in Supp.") at 18, 32, 35 (ECF No. 1255).

9. PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR MOTION FOR PARTIAL SUMMARY JUDGMENT

Accordingly, it is necessary to explain the evolution of the issues from inception to decision.

The brief supporting the Plaintiffs' Motion originally specified that the only entire count presented for summary judgment was COUNT THREE, the RICO conspiracy claim under 18 U.S.C. § 1962(d) (Plaintiffs' Opening Memo, ECF No. 1169, p. 3 n.1). However, later in their brief, the Plaintiffs also presented Argument VI which was entitled: "Summary judgment should be granted that a violation of § 1962(c) [COUNT TWO] occurred."[10] However, an examination of Plaintiffs' opening and reply briefs make it clear that Argument VI was addressed only to certain elements of COUNT TWO (the § 1962(c) claim); and that the Plaintiffs' Motion only sought summary judgment on those elements, not on COUNT TWO as a whole. With that clarification in mind, the Plaintiffs' Motion sought partial summary judgment:

(ECF No. 1169); DEFENDANT MATT MARTORELLO REPLACEMENT MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT (ECF No. 1218); and PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION FOR PARTIAL SUMMARY JUDGMENT (ECF No. 1244). At the request of Martorello, (ECF Nos. 1216 and 1217), a replacement memorandum (ECF No. 1218) was filed in an effort to remove from the decisional process the need to decide whether Martorello's original filing was objectionable for failure to satisfy the requirement of a local rule of civil procedure. The replacement memorandum was filed with the consent of the Plaintiffs, and it is intended to respond to the Plaintiffs' motion for partial summary judgment (the brief for which is ECF No. 1169).

10. (ECF No. 1169, pp. 36-40).

- On the choice of law issue (ECF No. 1169, pp. 26-31) ;

- On the tribal immunity defense presented by Martorello (ECF No. 1169, pp. 31-32); and

- That Martorello had violated § 1962(d) (ECF No. 1169, pp. 32-36) based on the assertions that: (A) Martorello knew about the alleged RICO scheme and (B) Martorello furthered the scheme and knowingly took millions of dollars therefrom; and

- On certain elements of COUNT TWO, to-wit:

  (i) an enterprise existed; and

  (ii) the loans made by the enterprise are unlawful debts; and

  (iii) persons associated with the enterprise engaged in collection of those debts.[11]

11. Again, it is appropriate to keep in mind that at the time the Plaintiffs' Motion was filed, the Plaintiffs acknowledged the existence of a disputed issue of fact respecting whether Martorello participated in the management of the enterprise and therefore did not seek summary judgment on COUNT TWO, the alleged violation of 18 U.S.C. § 1962(c).

In response, Martorello substantively addressed some of those issues, stipulated as to some of them, and ignored others. It is thus necessary to sort out where Martorello now stands on those issues.

First, Martorello's response to the Plaintiffs' Motion took the position that Tribal law (not Virginia law) applied to the loans at issue because FEDERAL PREEMPTION PRECLUDES APPLICATION OF VIRGINIA LAW (ECF No. 1218, pp. 21-31). That argument is comprised of several subparts which are as follows:

- [The Tribe's] sovereignty rights require application of tribal law because of provisions in the so-called "Indian Commerce Clause;" and

- Application of Virginia law is at odds with the Native American Business Development Act ("NABDA") (ECF No. 1218, pp. 26-28); and

- The Economics of a Deal do not Change the Preemption Analysis; and

- The National Bank Act Preemption supports application of federal law; and

- The prospective waiver provisions in the choice of forum clause in the loan agreements do not render the tribal choice of law clause unenforceable; and

- *Hengle v. Treppa* is distinguishable and not controlling.

Second, Martorello opposed the requested partial summary judgment by claiming that he was entitled to present a mistake of law to the RICO claims and that therefore those claims were not amenable to summary judgment.

On June 7 and 8, 2023, the Court heard oral argument on Plaintiffs' Motion and the parties' respective motions *in limine*.[12] June 7, 2023 Trans. (ECF No. 1316); June 8, 2023 Trans. (ECF No. 1317). In his briefing and at oral argument, Martorello stipulated that:

(1) if the Court determined that Virginia law applies, the loans constituted unlawful debts within the meaning of RICO (18 U.S.C. § 1961(6));

(2) Martorello knew that there was an enterprise, as defined by 18 U.S.C. § 1961(4); and

(3) "persons associated with the enterprise engaged in the collection of unlawful debt."

Hearing Trans, at 171-73. In addition, Martorello clarified that he no longer was claiming tribal immunity. *Id.* at 165.

Subsequently, the parties agreed that, based on the foregoing stipulations by Martorello and the Court's ruling on the choice of law issue, the only remaining questions as to the claim under 18 U.S.C. § 1962(d) (COUNT THREE)

12. For a complete list of all matters heard during the June 7-8 hearings, *see* May 24, 2023 ORDER (ECF No. 1267).

were whether Martorello could present a mistake of law defense (that tribal law applied) and, relatedly, whether the Plaintiffs had to prove that Martorello had to know that the loans were illegal. *Id.* In some iterations, the latter contention was whether he had to know that the specific interest rate was illegal. At other times, the contention was merely a repetition of the belief that tribal law applied.

On June 16, 2023, the Court granted summary judgment in favor of the Plaintiffs as to:

(1) The choice of law issue (¶ I(1));

(2) Tribal immunity issue (¶ I(2));

(3) Martorello's mistake of law defense (¶ I(3));[13] and

(4) The following elements of the claim under 18 U.S.C. §§ 1962(c) (COUNT TWO):[14]

"(a) The loans in question are 'unlawful debts' as

13. As explained below, MATT MARTORELLO'S ANSWER AND AFFIRMATIVE DEFENSES TO PLAINTIFFS' COMPLAINT ("Martorello's Answer") (ECF No. 23) refers to the defense as one of "good faith," and the parties' briefs used the terms "good faith," "advice of counsel," and "mistake of law" interchangeably, but, at oral argument, both agreed that the defense actually was "mistake of law."

14. And, to the extent that § 1962(c) is alleged as part of the § 1962(d) RICO conspiracy claim, to that aspect of COUNT THREE.

defined in 18 U.S.C. §§ 1961(6), 1962(c); and

(b) An 'enterprise' existed as defined in 18 U.S.C. §§ 1961(4), 1962(c); and

(c) Persons engaged in the enterprise collected unlawful debts; and

(d) There is no willfulness element for a civil cause of action under 18 U.S.C. §§ 1962(c)-(d)." [15]

June 16, 2023 ORDER at 2-3 ("June 16 ORDER") (ECF No. 1328). This MEMORANDUM OPINION will further explain the reasoning on which those decisions were based.

After the June 16 ORDER was issued, Plaintiffs filed a request for reconsideration and asked the Court to amend the June 16 ORDER "to reflect that summary judgment is granted in favor of Plaintiffs as to 18 U.S.C. § 1962(d)'s elements that Martorello: (1) knew about; and (2) facilitated the usurious lending enterprise."[16] Martorello conceded that, after the Court's ruling that the loans are governed by the law of Virginia and that a mistake of law defense is not available as a defense to

15. By ORDER (ECF No. 1397), this part of the ORDER (ECF No. 1328) was deleted.

16. PLAINTIFFS' NOTICE AND REQUEST FOR RECONSIDERATION OF COURT'S RULING ON SATISFACTION OF THE 1962(d) ELEMENTS at 2 (ECF No. 1340).

liability, "there are no remaining triable issues of fact on Plaintiffs' § 1962(d) claim [COUNT THREE]."[17] In perspective of that concession, the June 16 ORDER was amended to read: "Summary judgment is granted in favor of the Plaintiffs as to all elements of Plaintiffs' 18 U.S.C. § 1962(d) Claim [COUNT THREE]." June 26, 2023 ORDER (ECF No. 1350).[18]

Following the Court's June 26, 2023 oral ruling that "control is not a prerequisite for purposes of [18 U.S.C] § 1962(c) liability," Martorello stipulated:

> that, for the entire class period, he was associated with an association-in-fact enterprise the activities of which affect, interstate or foreign commerce, and Mr. Martorello participated in the operation of the affairs of the enterprise through the collection of "unlawful debt"[19]

He also informed the Court that "there are no remaining triable issues of material fact regarding Plaintiffs'

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17. DEFENDANT MATT MARTORELLO'S RESPONSE TO PLAINTIFFS' NOTICE AND REQUEST FOR RECONSIDERATION OF COURT'S RULING ON SATISFACTION OF THE 1962(d) ELEMENTS (ECF No. 1345).

18. The June 26, 2023 ORDER was later amended to correct a scrivener's error. July 5, 2023 ORDER (ECF No. 1362).

19. DEFENDANT MATT MARTORELLO'S STIPULATION REGARDING REMAINING ELEMENTS OF RICO 1962(c) CLAIM (ECF No. 1359).

§ 1962(c) claim [COUNT TWO]." *Id.* Thereafter, the Court granted summary judgment on COUNT TWO of the Complaint (the claim under 18 U.S.C. § 1962(c)). July 7, 2023 ORDER (ECF No. 1373).

Then, on July 10, 2023, for purposes of simplifying the forthcoming trial, Plaintiffs moved to dismiss the state law counts without prejudice, COUNTS FOUR and FIVE.[20] The Court granted that motion, and dismissed COUNTS FOUR and FIVE without prejudice. July 10, 2023 ORDER (ECF No. 1390).

Also, on July 10, 2023, the parties stipulated "that the damages amount for the § 1962 (c) claim [COUNT TWO] is $43,401,817.47." JOINT NOTICE AND STIPULATION REGARDING § 1962(c) DAMAGES (ECF No. 1389). They then stipulated "that the damages for [the] § 1962(c) claim [COUNT TWO] are the same as the damages for the § 1962(d) claim [COUNT THREE]." (ECF No. 1389).

After conferring with the parties in a conference call, July 10, 2023 Call Trans. (ECF No. 1393), and "understanding that there are no remaining triable issues," the Court canceled the trial that had been set to begin with jury selection on July 12, 2023. (July 11, 2023 ORDER (ECF No. 1391)).

With the foregoing background in mind, we return to explaining the decisions on Plaintiffs' Motion.

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20. PLAINTIFFS' CONSENT MOTION TO DISMISS USURY AND UNJUST ENRICHMENT CLAIMS WITHOUT PREJUDICE PURSUANT TO RULE 41(a)(2) (ECF No. 1387).

Appendix B

DISCUSSION

A. Legal Framework

Rule 56 sets forth the familiar standard for summary judgment, providing that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The Supreme Court has construed Rule 56(c) to "mandate the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an essential element to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). The Court explained that, "[i]n such a situation, there can be no genuine issue as to any material fact, since a complete failure of proof concerning an essential element of the nonmoving party's case renders all other facts immaterial." Id. at 323, 106 S. Ct. 2548; see also *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

In reviewing a motion for summary judgment, a court must view the facts and any inferences drawn from these facts in the light most favorable to the nonmoving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986);

Seabulk Offshore, Ltd. v. Am. Home Assurance Co., 377 F.3d 408, 418 (4th Cir. 2004). The nonmoving party must demonstrate that there are specific facts that would create a genuine issue for trial. See *Anderson*, 477 U.S. at 250, 106 S. Ct. 2505. "Where . . . the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, disposition by summary judgment is appropriate." United States v. Lee, 943 F.2d 366, 368 (4th Cir. 1991).

B. Analysis

This MEMORANDUM OPINION principally addresses two issues on which the Plaintiffs sought summary judgment: (1) the applicable law (the choice of law issue); and (2) the availability of a mistake of law defense to a claim for civil liability for conspiracy under RICO: 18 U.S.C. § 1962(d). It also resolves aspects of the Plaintiffs' Motion in Plaintiffs' favor because Martorello did not contest them.

1. Choice of Law: Tribal Law or Virginia Law

The parties dispute what law applies to the loans that were made by the alleged RICO enterprise. Plaintiffs argue that Virginia law governs because: (1) all Plaintiffs in this class resided in Virginia when they took out the loans and the effects of the loan were felt by Plaintiffs in Virginia and (2) the loan agreement's choice of law clause (which specifies tribal law as the governing law) is unenforceable. Pls. Memo, in Supp. at 27, 30.[21] So, the

21. This dispute is also related to Plaintiffs' Motion *in Limine*

Plaintiffs ask for summary judgment that Virginia law applies to the loan agreements.[22]

In response, Martorello argues that various federal preemption principles preclude the application of Virginia law and, instead, that the loans at issue are governed by tribal law because of the Indian Commerce Clause, U.S. Const. Art. 1, § 8, and the federal preemption principles[23] said to derive from the NABDA and the National Bank Act ("NBA"). Martorello also argues that, even if the Indian Commerce Clause, the NABDA, and/or the NBA do not require the application of tribal law, the choice of law clauses in the loan agreement, specifying the application of tribal law, are enforceable under federal law.[24]

3, MEMORANDUM IN SUPPORT OF PLAINTIFFS' OMNIBUS MOTIONS *IN LIMINE* at 4 (ECF No. 1174) (requesting the Court to "Exclude Argument or Suggestion that Tribal Law Governs the Loans or Virginia law does not apply to the loans, or that the Class Action Waivers are Enforceable") (emphasis removed), and *id.* at 6 (requesting the Court to "Exclude Any Suggestion that Federal Policy Supports these Commercial Activities") (emphasis removed). Over Martorello's opposition, DEFENDANT MATT MARTORELLO'S MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' OMNIBUS MOTION *IN LIMINE* at 2-3 (ECF No. 1205), the Court granted both these Motions *in Limine*. June 16, 2023 ORDER at 3 (ECF No. 1328).

22. Pls. Memo. in Supp. at 26.

23. Martorello Memo. in Supp. at 18.

24. DEFENDANT MATT MARTORELLO REPLACEMENT MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT ("Martorello Response") at 29 (ECF No. 1218).

Appendix B

(a) The Indian Commerce Clause, the NABDA, the NBA

Martorello argues that, instead of engaging in the usual choice of law analysis (which admittedly would not apply tribal law), the Court should engage in an Indian Commerce Clause analysis. Martorello Response at 21-22. Under that analysis, says Martorello, tribal law governs the loans, and any attempt to apply Virginia law to the loans violates the Tribe's sovereign authority and preempts federal law. *Id.* at 26.[25]

The Indian Commerce Clause states: "The Congress shall have Power . . . To regulate Commerce. . . with the Indian Tribes." U.S. Const. Art. I, § 8, cl. 3. Under that clause, "Congress has broad power to regulate tribal affairs," and federal law concerning tribal affairs preempts state law. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142, 100 S. Ct. 2578, 65 L. Ed. 2d 665 (1980). Federal preemption and the "tradition of Indian sovereignty over the reservation and tribal members" together serve to limit the states' ability to interfere in tribal affairs. *Id.* at 143.

Tribal affairs are implicated when states attempt to regulate "activity undertaken on the reservation or by tribal members." *Id.* at 143; *see also California v. Cabazon*

25. Martorello reiterated these same arguments in his Motion for Summary Judgment. *See* DEFENDANT MATT MARTORELLO MEMORANDUM OF LAW OF IN SUPPORT OF HIS MOTION FOR PARTIAL SUMMARY JUDGMENT at 18, 28 (ECF No. 1255).

Band of Mission Indians, 480 U.S. 202, 205, 107 S. Ct. 1083, 94 L. Ed. 2d 244 (1987) (discussing regulation of "non-Indians coming onto the reservations"). When tribal affairs are implicated, the Supreme Court has instructed that a multi-faceted test is to be employed to determine if state laws can apply. *Id.* at 145; *Otoe-Missouria Tribe of Indians v. N.Y. Dep't of Fin. Servs.*, 769 F.3d 105, 112 (2d Cir. 2014).

However, the Supreme Court has made clear that the *Bracker* test does not apply where a state imposed a regulation on "a non-Indian" engaging in "a transaction that occurs off the reservation." *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 99, 126 S. Ct. 676, 163 L. Ed. 2d 429 (2005). And, "[u]nless federal law provides differently, Indians going beyond reservation boundaries are subject to any generally applicable state law." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 795, 134 S. Ct. 2024, 188 L. Ed. 2d 1071 (2014) (citation omitted).

Binding Fourth Circuit precedent makes clear that online tribal lending is considered "off-reservation" conduct. *Hengle v. Treppa*, 19 F.4th 324, 348-49 (4th Cir. 2021). Here, as in *Hengle*, the office of the entities that (at least nominally) issued the loans, Red Rock and Big Picture Loans, were "located on tribal land,"[26] but it is not disputed that the Plaintiffs in this case (the targets of the lending activity) "reside[d] on non-Indian lands when they applied for their loans online. . . and the effects of

26. Loan Agreement at 2 (ECF No. 1-1).

Defendants' allegedly illegal activities were felt by the Plaintiffs in Virginia," not on tribal land. *Hengle*, 19 F.4th at 348-49 (citing *Gingras v. Think Fin., Inc.*, 922 F.3d 112, 121 (2d Cir. 2019); *Otoe-Missouria Tribe of Indians v. N.Y. State Dep't of Fin. Servs.*, 974 F. Supp. 2d 353, 360-361 (S.D.N.Y. 2013); *Colorado v. W. Sky Fin., LLC*, 845 F. Supp. 2d 1178, 1181 (D. Colo. 2011); *United States v. Hallinan*, No. 16-cr-130, 2016 U.S. Dist. LEXIS 179625, 2016 WL 7477767, at *1 n.2 (E.D. Pa. Dec. 29, 2016)); *see* Pls. Memo. in Supp. at ¶ 140; Martorello Response at ¶ 140.[27]

The undisputed record in this case establishes that the loan activities in this case are "directly analogous to the lending activity that other courts have found to clearly constitute off-reservation conduct subject to nondiscriminatory state regulation." *Hengle*, 19 F.4th at 348-49 (citation omitted). And, there is no assertion that Martorello is a tribal member. Thus, on this record, the *Bracker* Indian Commerce Clause test is inapplicable.

Martorello also points to the NABDA and the NBA, arguing that these federal laws preempt the application of state law. Martorello Response at 26-29. But, he has

27. When citing to the Plaintiffs' statement of facts, Pls. Memo. in Supp. at 5-26, the Court will refer to the numbered paragraphs therein. Martorello submitted both a "Counterstatement of Undisputed Material Facts," Martorello Response at 2-15, and a "Response to Plaintiffs' Statement of Facts," *id.* at 15-21, both of which use numbered paragraphs. All citations to numbered paragraphs in Martorello's Response correspond to the section titled "Response to Plaintiffs' Statement of Facts," not to Martorello's "Counterstatement."

identified neither a statutory provision nor a court decision that would permit a finding that those statutes preempt state usury laws. *Id.* Martorello also mentions, in passing, that "[t]he economics of a deal do not change the pre-emption analysis." *Id.* at 28. That conclusory argument cites authorities that, upon examination, have no bearing on the issues in this case. Indeed, that argument, like the NABDA and the NBA arguments, is so lacking in merit as to warrant summary rejection.

Therefore, unless there is an enforceable choice of law clause providing otherwise, Virginia law applies. The analysis turns next to that question.

(b) The Choice of Law Clauses in the Loan Agreements

The Loan Agreement's tribal choice of law clause states:

> This *Agreement* will be *governed* by the laws of the Lac Vieux Desert Band of Lake Superior Chippewa Indians ("*Tribal law*"), including but not limited to the [Tribal Consumer Financial Regulatory] Code as well as applicable federal law. All disputes shall be solely and exclusively resolved pursuant to the Tribal Dispute Resolution Procedure set forth in Section 9 of the Code and summarized below for Your convenience.

Loan Agreement at 4 (ECF No. 1-1) (emphasis added).

Appendix B

Because "the parties have not provided the Court with any tribal law concerning contract interpretation," the Court "will apply the contract interpretation principles of the forum, Virginia." *Hengle*, 19 F.4th at 340 n.5; *see also Williams II*, 59 F.4th at 77-78 n.7. Choice of law clauses are often enforceable under Virginia law, *Hengle*, 19 F.4th at 349; however, those clauses are not given effect when enforcement is "contrary to compelling public policy." *Id.*

The choice of law clause in these loan agreements is contrary to public policy for two reasons. First, the clause violates federal public policy under the prospective waiver doctrine. Second, the clause violates Virginia's strong public interest against usurious loans.

As explained by the Fourth Circuit, "[t]he prospective waiver doctrine invalidates agreements that prospectively waive a party's right to pursue statutory remedies in certain circumstances" because such a wavier "violates public policy." *Williams II*, 59 F.4th at 80. In this case, the Fourth Circuit has found that this choice of law clause runs afoul of the prospective waiver doctrine. In so doing, the Fourth Circuit held that, notwithstanding its references to federal law, the Loan Agreement "in general" is "governed *exclusively* by Tribal law." *Id.* at 84 (emphasis added). And, although it is true that the Tribe's Regulatory Code[28] incorporates some federal consumer protection laws, it does not include the federal statute (RICO) at issue in this litigation. Thus, under the terms of the Loan Agreement,

28. Lac Vieux Desert Band of Lake Superior Chippewa Indians Tribal Consumer Financial Services Regulatory Code ("Tribe's Regulatory Code") § 6.2 (ECF No. 1207-6).

Plaintiffs would not be able to "effectively vindicate their federal statutory rights" to relief under RICO. *Id.* at 85.

By denying Plaintiffs the ability to pursue those federal statutory remedies, the choice of law clause in these loan agreements violates the prospective waiver doctrine. The clause is therefore unenforceable for that reason alone. *Id.*

The choice of law clause in the loan agreements also is unenforceable because it is contrary to the Commonwealth of Virginia's public policy. The Tribe's Regulatory Code states:

> Except as otherwise specified in this Code, a consumer financial services transaction may provide for such price, interest, time price differential, rent, fees, filing fees, and other charges as agreed upon by the parties.

Tribe's Regulatory Code § 7.2(b). The Tribe's Regulatory Code provides for no limitation on the interest charged on small loan transactions. *Id.* at § 11.[29] Virginia, on the other hand, has a "compelling public policy against unregulated usurious lending" and caps general interest rates at 12%. *Hengle*, 19 F.4th at 350, 352 (citing Va. Code Ann. § 6.2-303

29. It appears that only vehicle loans are subject to a usury cap under the Tribe's Regulatory Code. Vehicle loans may not be subject to more than 390% annual interest rates. Tribe's Regulatory Code § 12.2(b).

(A)).[30] Therefore, as the Fourth Circuit has recognized, "unregulated usurious lending of low-dollar short-term loans at triple-digit interest rates to Virginia borrower-unquestionably 'shocks. . . one's sense of right' in view of Virginia law." *Id.* at 352 (quoting *Tate v. Hain*, 181 Va. 402, 25 S.E.2d 321, 325 (Va. 1943)); *see also Radford v. Cmty. Mortg. & Inv. Corp.*, 226 Va. 596, 312 S.E.2d. 282, 285 (Va. 1984) ("The usury statutes represent a clarification of the public policy of the state that usury is not to be tolerated . . . ." (citation omitted)). Thus, under Virginia's compelling public policy, the choice of law clause is unenforceable.

In sum, neither the Indian Commerce Clause, the NABDA, the NBA, nor the choice of law provision in the loan agreements precludes application of Virginia's usury laws. For those reasons, the Court held that Plaintiffs are entitled to summary judgment on the choice of law issue. And that judgment is that Virginia law applies and governs, *inter alia*, the lawful interest rate. And, under RICO, any rate that exceeds twice the rate allowed by state law offends the RICO statute and is an unlawful debt.[31]

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30. There are circumstances in which Virginia law allows interest rates in excess of 12%, but these loans do not fall within any exception. Martorello does not contend otherwise.

31. After the Court found that Virginia law applied to the loans, June 16, 2023 ORDER (ECF No. 1328), Martorello conceded that the loans in question were "unlawful debt," as defined by 18 U.S.C. § 1961(6), June 7, 2023 Hearing Trans. at 171-72. Virginia caps interest rates at 12%, Va. Code Ann. § 6.2-303. Therefore, all loans in excess of 24% are "unlawful debts" under RICO. Here, it is undisputed that the "average [Annual Percentage Rate] for the

2. Mistake of Law Defense and Knowledge That Loans Were Unlawful

Martorello argues that he can assert, as a defense to RICO civil liability under § 1962(c) and § 1962(d), that he acted as he did on a mistaken belief of law that (1) the loans made by the alleged RICO enterprise were governed by tribal law and that, therefore, (2) those loans were legal under tribal law. Martorello Response at 33-34. Relatedly, Martorello also argues that to be liable under § 1962(d), "Plaintiffs must prove that *Martorello knew that the loans were unlawful* and, with that knowledge, intentionally conspired with co-conspirators to collect them." Martorello Response at 33 (emphasis added).

Plaintiffs assert that there is no "mistake of law" defense to liability under § 1962(c) or § 1962(d).[32] They also take the view that neither § 1962(c) nor § 1962(d) requires proof that Martorello knew that the loans in question were unlawful. *Id.*

(a) Mistake of Law

The mistake of law defense seems to have its genesis in Martorello's SEVENTH AFFIRMATIVE DEFENSE which is:

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consumer loans was 727.80%" and the lowest was 34.8887%. Pls. Memo. in Supp. at ¶ 146; Martorello Response at ¶ 146.

32. PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION FOR PARTIAL SUMMARY JUDGMENT at 19-27 (ECF No. 1241).

> Defendant, Matt Martorello, at all times relevant acted in good faith and in a lawful manner towards consumers in conformity with all applicable laws and regulations.[33]

During the course of the case and in their summary judgment briefs, the parties confused the record respecting the true nature of the defense because they variously referred to it as a "good faith" defense, a "mistake of law" defense, the "scienter question," or "advice of counsel." Indeed, the parties used all of those terms interchangeably to refer to what seemed to be the same issue: whether Martorello's alleged mistaken belief that tribal law governed the legality of the collected debt [the loans] at issue is available as a defense to COUNT TWO and COUNT THREE.

Of course, good faith, advice of counsel, scienter, and mistake of law are somewhat different, albeit sometimes related, concepts. So, at the June 7 hearing, the Court sought to understand the true nature of the defense that, in the briefs, bore these various sobriquets.[34]

At the June 7 hearing, counsel for Martorello clarified that, notwithstanding the various references made in the briefs and pleadings, Martorello indeed was relying on a

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33. MATT MARTORELLO'S ANSWER AND AFFIRMATIVE DEFENSES TO PLAINTIFFS' COMPLAINT (ECF No. 35, p. 23).

34. Martorello advised that he was not presenting an advice of counsel defense.

mistake of law defense and whether such a defense was available to Martorello in defense of COUNT TWO and COUNT THREE. June 7, 2023 Hearing Trans, at 8, 45-46, 60-61 (ECF No. 1316). Counsel for the Plaintiffs agreed that was the issue.

But then, counsel for Martorello stated: "when I have conceived of this argument and I've drafted it, I did not refer to it as a mistake of law. So I may not use that terminology, but I'm certainly on the same page with what we're discussing and what we're arguing here." June 7, 2023 Hearing Trans, at 61.

> MS. SIMMONS: Okay. So the threshold question we believe here is - and Your Honor has - has conceived of it as a mistake of law.
>
> The question we think that the Court has to answer is-
>
> THE COURT: Just a minute. Just a minute. I didn't conceive of it. You all conceived of it. He [Plaintiffs' counsel] agreed with that's what it was. The plaintiffs agreed that's what it was. It's in your briefs. It is articulated in three different ways, advice of counsel, good faith, mistake of law, but its predominant thesis is it's a mistake of law.
>
> * * *
>
> MS. SIMMONS: . . . The question is does section 1962(d), the conspiracy section of the

> RICO statute, have a scienter element that would place the burden on Plaintiffs to show that Martorello willfully agreed that he, or some member of the alleged RICO conspiracy, would engage in the collection of unlawful debt. And we submit that it does have that scienter requirement as the first point.
>
> So in the *United States* --
>
> THE COURT: Mark that right there. I need to have that typed up.
>
> That isn't how these briefs read.
>
> MS. SIMMONS: I think that it is how the --
>
> THE COURT: It's a refinement on it that I don't think is quite in the papers.
>
> MS. SIMMONS: It's certainly the intention of the portion of our opposition to their motion for summary judgment on this point.

(June 7, 2023 Transcript ("June 7 Tr."), pp. 60-64.

Martorello's counsel then turned to *United States v. Mouzone*, 687 F.3d 207, 218 (4th Cir. 2012). There, the Court of Appeals, when deciding that a conviction for violating § 1962 (d) did not require that the defendant have a role in directing the RICO enterprise, also made the statement that the § 1962(d) criminal liability charge

had as an element that "each defendant knowingly and willfully agreed that he or some other member of the conspiracy would commit at least two racketeering acts." *Id.* at 218; June 7 Tr. at 62.

And counsel for Martorello continued:

> MS. SIMMONS: And so the existence of Mr. Martorello's good faith belief goes to the question of whether or not he could have engaged in willful conduct.
>
> In [another] case,[35] in a footnote, the Court said, "Willfulness generally requires a showing of knowledge of unlawfulness." And it did so in the citation to the Supreme Court's decision in Bryan v. United States at 524 U.S. 184.
>
> So *if we are correct*, and we think we are, that a section *1962(d) claim requires a showing of willfulness* to engage in the collection of unlawful debt, then *Mr. Martorello should be entitled to present evidence of his good faith belief.*
>
> THE COURT: *Good faith belief of what*?
>
> MS. SIMMONS: That he was not engaging in the collection of unlawful debt, that he - that he had a *good faith belief that tribal law would apply to the loans.*

35. *United States v. Grote*, 961 F.3d 105 (2d Cir. 2020).

* * *

> THE COURT: So it's mistake of law.
>
> MS. SIMMONS: Yes, Your Honor.
>
> THE COURT: *He made a mistake of law.*
>
> MS. SIMMONS: *Yes, Your Honor.*
>
> THE COURT: Okay.
>
> MS. SIMMONS: But the case law saying that mistake of law is not a defense we submit doesn't apply here because there is a willfulness element, which, in and of itself, allows a defendant to present evidence of his good faith belief that it wasn't unlawful. And so that's why this type of evidence is relevant.

(June 7 Tr., pp. 63-65) (emphasis added).

Thus, when all is said, Martorello wanted to defend against RICO liability by asserting the mistaken belief that tribal law, not Virginia law, governed whether the loans were unlawful (i.e., whether the debt being collected was unlawful). So, sobriquets notwithstanding, the issue to be decided is whether there is a mistake of law defense to the RICO civil conspiracy claim under § 1962(d), and to the claim under § 1962(c).

As matters now stand, Martorello's mistake of law defense has two purposes. First, he wishes to present the mistake of law argument to defend against a perceived willfulness element that Martorello says is in § 1962 (d). Second, he wishes to use the mistake of law argument to defend against what he asserts to be the knowledge of illegality of the debt (the loans) element in § 1962(c) (which is alleged to be the object of the § 1962(d) conspiracy).

(b) The Mistake of Law Defense: Factual Basis

Before addressing those two issues, it is necessary to understand the factual basis for the mistake of law defense as Martorello presents it in the case. Because of the broad and vague text of Martorello's SEVENTH AFFIRMATIVE DEFENSE in his Answer and the varying sobriquets attached to it in subsequent discovery responses and briefs, Martorello was ordered to submit a statement detailing his mistake of law defense and produce all documents reflecting the sources of his belief that tribal law applied (ECF No. 1247). In response, Martorello submitted fifty documents that purportedly reflected written advice, or the substance of oral advice, provided to Martorello to support his belief that tribal law applied to the loans at issue and that, therefore, the debt being collected was not unlawful.[36]

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36. DEFENDANT MATT MARTORELLO'S STATEMENT OF POSITION REGARDING GOOD FAITH DEFENSE PURSUANT TO ORDER AT DOCKET NO. 1247 at 9-17 (ECF No. 1275) (unsealed version at ECF No. 1261).

Appendix B

For various reasons set forth on the record, the Court sustained the Plaintiffs' objections to the use of most of the proffered documents. In so doing, the Court narrowed those documents to seven exhibits.[37]

Those documents fit into three categories:[38] (1) letters from lawyers who are counsel to online tribal lending expressing the view that tribal laws govern the loans;[39] (2) communications showing that, in 2013 and 2014, Martorello was aware of the decision in *Otoe* that was adverse to rent-a-tribe online lending that, in turn, necessitated the decision to suspend the Martorello/Tribe online lending in New York;[40] and (3) a 2015 letter from Rosette, LLP, counsel for many tribes, including the Tribe, outlining a strategy to deal with the *Otoe* decision.[41]

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37. BB (ECF No. 1264-13; *refiled at* ECF No. 1396 with email attachment per ECF No. 1394), EE (ECF No. 1261-31), KK (ECF No. 1264-18), MM (ECF No. 1264-20; *refiled at* ECF No. 1396-1 with email attachment per ECF No. 13 94), CCC (if foundation was provided) (ECF No. 1264-29; *refiled at* ECF No. 1396-2 with email attachment per ECF No. 1394), HHH (ECF No. 1264-32), and JJJ (ECF No. 1261-62). *See* June 7 Hearing Trans. at 270-272, 284, 286, 297, 298, 3030, 307-08, 310, 313, 318.

38. some of the exhibits of which do not reflect that Martorello even received or saw them and for which that foundation must be laid if they are to be admitted.

39. Exhibits BB, KK, and JJJ.

40. Exhibits EE and MM.

41. Exhibit KK.

Assuming that those documents are admissible (i.e., that Martorello was aware of them at the relevant times), they are probative of Martorello's assertion that he believed that Tribal law governed the loans at issue (the debt being collected). However, those documents are not the only evidence pertaining to the mistake of law defense.

For example, in his briefing, Martorello says that he knew "tribal lending. . . was under legal and regulatory attack in some quarters throughout the relevant period of time." Martorello Response at 35.[42] And, the record as a whole reflects that Martorello knew that he was operating in, at-best, a grey area of the law. In fact, in 2012, he said that the tribal lending "industry is going to be living in the grey area of its legality for another year or two" and noted that "[w]e have received dozens of letters from State AGs saying we need to be licensed and sending Cease and Desist order." Martorello to Argyros Email at 13-14 (ECF No. 1266-1); *see also* Connecticut Cease & Desist Letter (ECF No. 1166-20).

Martorello closely followed successful lawsuits against, and criminal prosecutions of, other players in the rent-a-tribe lending industry. Martorello to Argyros Email at 12; Martorello to Rosette Email at 1 (ECF No. 1166-19); Martorello to Wichtman Email (ECF No. 1166-26). Martorello was so concerned about his own liability that he asked two attorneys to put together an opinion letter detailing his potential for personal *criminal* liability for the online lending rent-a-tribe involved in this case. In

42. Exhibits EE and MM confirm that to be so.

response, the attorneys stressed "[t]here isn't a bright-line answer here from a legal standpoint" and informed him that " [i]t is *possible* that individual or third-party service-providers *could be held liable* for criminal violations of Georgia [and other states'] law." Weddle & Compton Email & Memo to Martorello at 2, 14 (ECF No. 1270-2) (emphasis added). Martorello summed up the content of this email and the accompanying memorandum to say "something like . . . 'yes it is possible the state will come after you for helping the tribe lend against their [the state's] laws and charge YOU for aiding and abetting as a felony crime in their state (in some instances penalty could be jail time), but we don't think it's going to happen.'" Martorello to Argyros Email at 14 (ECF No. 1266-1). Another attorney advised Martorello that "it will be an uphill battle" to persuade a court that the loans were legal in a civil proceeding. Wichtman to Martorello Email at 3 (ECF No. 1166-22).

In sum, Martorello knew that the online rent-a-tribe operation in which he was engaged was of questionable legality; that courts had held that tribal law did not apply to tribal online lending; that, in a civil proceeding, it would be difficult ("uphill") to persuade a court that the loans were legal; and that, if he persisted in asserting that tribal law governed the loans, he might face state felony prosecution. And, he knew that the tribal lawyers knew as much even while asserting their belief that tribal law applied.[43] With that knowledge, and aware that online

43. Exhibits BB, EE, KK, MM, CCC, HHH, and JJJ cited on p. 31, *supra*.

tribal lenders had been found to be wrong by the federal courts in New York, Martorello deliberately took the risk that his guess about what law would apply might well be wrong.

Of course, Martorello's mistake of law defense cannot rest on documentary evidence alone. In particular, because his defense depends on his knowledge and subjective belief, Martorello cannot rely on his mistake of law defense unless he testifies to what his belief was and why he held it.

Considering that this Court and the Court of Appeals has held that Martorello previously has lied under oath about topics that are pertinent to the mistake of law defense,[44] it would be quite surprising if Martorello were to testify at trial. If he does not, there could be no mistake of law defense. However, counsel has represented that Martorello will testify at trial. So, at this stage, it must be assumed that he will and that he would say that he held the belief that tribal law governed whether the loans were unlawful debt.

That, in sum, is the factual predicate for what Martorello calls the mistake of law defense. Whether that fact basis could constitute a mistake of law defense is not now before the Court. But, assuming that it could, the question is whether that defense is even available to Martorello in defense of the RICO counts.

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44. *Williams v. Big Picture Loans, LLC*, No. 3:17-cv-461, 2020 U.S. Dist. LEXIS 216792, 2020 WL 6784352 (E.D. Va. Nov. 8, 2020); *Williams II*, 59 F.4th at 89-90.

(c) Willfulness and the Mistake of Law Defense

To assess Martorello's position on his mistake of law defense, it is necessary to understand the elements of § 1962(c) and (d). Subsection (c) is involved in the analysis of liability under COUNT TWO and under COUNT THREE because COUNT THREE alleges a conspiracy to violate § 1962(c).

The starting point is the statutory text.

Section 1962(c) reads, in full:

> It shall be unlawful for *any person* employed by or associated with *any enterprise engaged* in, or the activities of which affect, *interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs* through a pattern of racketeering activity or *collection of unlawful debt*.

18 U.S.C. § 1962(c) (emphasis added). To establish the collection of unlawful debt, Plaintiffs must show that the defendant "(1) conducted [or participated in conducting] the affairs of an enterprise (2) through the collection of unlawful debt (3) while employed by or associated with (4) the 'enterprise engaged in, or the activities of which affect, interstate or foreign commerce.'"[45] *Gibbs v.*

45. It is undisputed that the loans involved interstate or foreign commerce. There is also no dispute that Plaintiffs were

Stinson, 421 F. Supp. 3d 267, 312 (E.D. Va. 2019), *aff'd on different grounds sub nom. Gibbs v. Sequoia Cap. Operations, LLC*, 966 F.3d 286 (4th Cir. 2020) (quoting § 1962(c)); *see also Salinas v. United States*, 522 U.S. 52, 62, 118 S. Ct. 469, 139 L. Ed. 2d 352 (1997) (holding that "[t]he elements predominant in a subsection (c) violation are: (1) the conduct (2) of an enterprise (3) through a pattern of racketeering activity [like the collection of unlawful debt").

Section 1962(c) does not mention willfulness. In that situation, it is often helpful to examine what the instructions would be if the case were to go to trial.

A widely used instruction on civil RICO liability delineates the elements of § 1962(c) as follows:

> In order to prove that the defendant violated section 1962(c), plaintiff must establish by a preponderance of the evidence each one of the following five elements:
>
> First, that an *enterprise existed* as alleged in the complaint;
>
> Second, that the enterprise *affected interstate* or foreign *commerce*;
>
> Third, that the *defendant* was *associated with*, or employed by, *the enterprise*;

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injured by the alleged RICO violation. *See Nunes v. Fusion GPS*, 531 F. Supp. 3d 993, 1012-1013 (E.D. Va. 2021).

> Fourth, that the *defendant engaged* in a pattern of racketeering activity (*or the collection of an unlawful debt*); and
>
> Fifth, that the *defendant* conducted, or *participated in, the conduct of the enterprise through* that pattern of racketeering activity (*or collection of an unlawful debt*).

Modern Federal Jury Instructions (Civil), § 84-23 (emphasis added).

The instruction, like the statutory text, does not mention that willfulness is an element to be proved in establishing a civil claim under Section 1962(c),[46] Accordingly, Martorello's purported purpose to use a mistake of law defense to counter a willfulness element in a Section 1962(c) claim is not supportable.

But, were willfulness an element of a Section 1962(c) claim, the jury would be told that:

> The term "willfully," as used in these instructions to describe the alleged state of mind of defendant . . . means that he acted knowingly, deliberately and intentionally as contrasted with accidentally, carelessly, or unintentionally.

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46. Section 1962(c) is both a claim in its own right and is also necessary to the § 1962(d) claim, which requires proof that the object of the RICO conspiracy was to violate § 1962(c).

1A O'Malley, Grenig & Lee, *Federal Jury Practice and Instructions*, § 17.05 (6th ed. 2008). The "mistake of law" defense, as Martorello would present it, would not be probative to refute that Martorello's participation in directing the affairs of the enterprise was knowing, deliberate, and intentional.

More importantly, mistake of law defenses are heavily disfavored in civil cases and should not be allowed here. The Supreme Court has "long recognized the 'common maxim, familiar to all minds, that ignorance of the law will not excuse any person, either civilly or criminally.'" *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, L.P.A.*, 559 U.S. 573, 581, 130 S. Ct. 1605, 176 L. Ed. 2d 519 (2010) (quoting *Barlow v. United States*, 32 U.S. 404, 7 Pet. 404, 411, 8 L. Ed. 728 (1833) (opinion for the Court by Story, J.)); *see also id.* at 582 n.5 (referring to the "'venerable principle' that ignorance of the law generally is no defense") (quoting Ratzlaf v. United States, 510 U.S. 135, 149, 114 S. Ct. 655, 126 L. Ed. 2d 615 (1994)); *United States v. Evans*, 74 F.4th 597, [slip op.] at 13 (4th Cir. 2023).

As a result, individuals are nonetheless liable for their actions even if they, in good faith, believe that they are acting in accordance with the law. *See United States v. Fuller*, 162 F.3d 256, 261-62 (4th Cir. 1998). Indeed, as the Supreme Court has made clear, American "law is . . . no stranger to the possibility that an act may be 'intentional' for purposes of civil liability, even if the actor lacked actual knowledge that her conduct violated the law." *Jerman*, 559 U.S. at 582-83. The "background presumption must be that 'every citizen knows the law.'" *Fuller*, 162 F.3d at

262 (quoting *Bryan v. United States*, 524 U.S. 184, 193, 118 S. Ct. 1939, 141 L. Ed. 2d 197 (1998)).

There are, of course, some instances when ignorance of the law may be a defense to civil liability under federal law. However, "when Congress has intended to provide a mistake of law defense to civil liability, it has often done so more explicitly than here." *Jerman*, 559 U.S. at 583 (discussing the Fair Debt Collection Practices Act). Congress did not do so when it enacted RICO. Martorello does not contend otherwise.

Martorello's mistake of law defense does not fare better under Section 1962(d) which provides that:

> It shall be unlawful for any person *to conspire to violate* any of the provisions of *subsection . . . (c)* of this section.

18 U.S.C. § 1962(d) (emphasis added). The statutory text of § 1962(d) does not mention willfulness. "[T]o prove a RICO conspiracy, the Plaintiffs must establish: (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." *Blackburn v. A.C. Israel Enters.*, No. 3:22cv146, 2023 U.S. Dist. LEXIS 127517, 2023 WL 4710884, at *31 (E.D. Va. July 24, 2023) (quoting *Solomon v. Am. Web Loan*, No. 4:17cv145, 2019 U.S. Dist. LEXIS 48420, 2019 WL 1320790, at *11 (E.D. Va. March 22, 2019)) (emphasis added); *see also Mao v. Global Trust Mgmt., LLC*, No. 4:21CV65, 2022 U.S. Dist. LEXIS 61179, 2022 WL 989012, at *12 (E.D.

Va. March 31, 2022). RICO conspiracy does not require "some overt act or specific act" and is therefore "even more comprehensive" than the general conspiracy statute. *Salinas*, 522 U.S. at 63. "The partners in the criminal plan must agree to pursue the same criminal objective . . . ," "even if a conspirator does not agree to commit or facilitate each and every part of the substantive offense." *Id.* at 63-64.

RICO does not include a definition of "conspiracy," but we are not without guidance. "When Congress uses a term with a well-established meaning, we presume—absent evidence otherwise—that Congress intends to adopt that meaning, because Congress is presumed to be aware of judicial interpretations." *Jackson v. Home Depot U.S.A., Inc.*, 880 F.3d 165, 171 (4th Cir. 2018), *aff'd*, 139 S. Ct. 1743, 204 L. Ed. 2d 34 (2019); *see also Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 652, 128 S. Ct. 2131, 170 L. Ed. 2d 1012 (2008) (describing "the presumption that Congress intends to adopt the settled meaning of common-law terms"). By adopting "terms of art in which are accumulated the legal tradition and meaning of centuries of practice," Congress "presumably knows and adopts the cluster of ideas that were attached to each borrowed word." *Morissette v. United States*, 342 U.S. 246, 264, 72 S. Ct. 240, 96 L. Ed. 288 (1952). "Conspiracy" is, of course, a legal term of art with "a settled common-law meaning." *Bridge*, 553 U.S. at 652.

Of course, "[t]he function of a conspiracy claim differs in criminal and civil cases." *Beck v. Prupis*, 162 F.3d 1090, 1099 n.18 (11th Cir. 1998), *aff'd*, 529 U.S. 494, 501-03, 120

S. Ct. 1608, 146 L. Ed. 2d 561 (2000). So, the question becomes: when determining the meaning of RICO conspiracy as alleged in this civil action, do we look to the civil common law or the criminal common law? The answer depends upon which enforcement provision is the basis for the action. If an action is being brought pursuant to 18 U.S.C. § 1963, setting forth criminal penalties for RICO violations, the criminal common law applies. *Salinas*, 522 U.S. at 63 ("When Congress uses well-settled terminology of criminal law, its words are presumed to have their ordinary meaning and definition."). But, if the action is being brought pursuant to 18 U.S.C. § 1964,[47] providing for civil remedies, we look to the civil common law. *Beck*, 529 U.S. at 501 n.6 (holding that, when interpreting § 1962(d) in conjunction with § 1962(c), "[t]he obvious source in the common law for the combined meaning of these provisions is the law of civil conspiracy"). Because this case is a civil action, we look to the civil common law definition of "conspiracy."

In contrast to criminal law, where "the requirement of some *mens rea* for a crime is firmly embedded" in the "background rules of the common law," *Elonis v. United States*, 575 U.S. 723, 744, 135 S. Ct. 2001, 192 L. Ed. 2d 1 (2015) (Alito, J., concurring in part) (quoting *Staples v. United States*, 511 U.S. 600, 605, 114 S. Ct. 1793, 128 L. Ed. 2d 608 (1994)), civil liability is "more strict," *Morissette*, 342 U.S. at 254. When it comes to civil torts,

47. Section 1964 sets forth two forms of civil remedies: proceedings instituted by the Attorney General pursuant to § 1964(b) and proceedings instituted by private individuals pursuant to § 1964(c).

"the defendant's knowledge, intent, motive, mistake, and good faith are generally irrelevant." *Id.* at 270. That principle applies where the claim is one for civil conspiracy. According to the Restatement, an individual is liable for civil conspiracy if:

> (a) the defendant *made an agreement* with another *to commit a wrong*; (b) a tortious or unlawful *act was committed* against the plaintiff in furtherance of the agreement; and (c) the plaintiff *suffered economic loss* as a result.

Restatement (Third) of Torts: Liability for Economic Harm § 27 (Am. Law Ins. 2020) (emphasis added).

The Restatement does not require that the defendant to a civil conspiracy claim know that the purpose to which he agreed was unlawful. Civil conspiracy only requires an agreement to accomplish "an unlawful purpose." Here, Martorello agreed to the collection of debts with interest rates above 24%. Although that was an unlawful purpose, Martorello's civil conspiracy liability does not require proof that he knew that the purpose was unlawful.

No doubt, it must be shown that the defendant knowingly agreed to join the conspiracy alleged under 18 U.S.C. § 1962(d). And, the act of joining the conspiracy would have to be willful on the part of the defendant. But here too the jury would be told:

Appendix B

> The term "willfully," as used in these instructions to describe the alleged state of mind of defendant . . . means that he acted knowingly, deliberately and intentionally as contrasted with accidentally, carelessly, or unintentionally.

1A O'Malley, Grenig & Lee, *Federal Jury Practice and Instructions*, § 17.05 (6th ed. 2008). And, as is the case under § 1962(c), Martorello's mistake of law defense would not be probative to refute that his joining the conspiracy was knowing, deliberate, or intentional.

But, in any event, that is not Martorello's willfulness issue: his willfulness contention is that, although he was aware that tribal law had been held inapplicable to rent-a-tribe online lending operations such as his, he nonetheless subscribed to the view that tribal law governed and, because of that mistake of law, he did not act willfully. For the reasons explained above in discussing the defense as to § 1962(c), the general, well-settled principles of Jerman, *Barlow*, and *Fuller* foreclose such a defense to the claim under § 1962(d), COUNT THREE.

So, as is true of the Section 1962(c) claim in COUNT TWO, there is no place for a mistake of law defense in responding to a willful component of the claim under Section 1962 (d) (COUNT THREE). And, for the reasons previously given,[48] there is no more place for the mistake of law defense in defending the civil conspiracy claim

48. *See* pp. 38-39, *supra*.

under Section 1962(d) than there is in defending the civil Section 1962(c) claim.

A final word about Martorello's citation to *United States v. Mouzone*. Martorello relies on the statement in *Mouzone* that an element of § 1962(d) criminal liability is "that each defendant knowingly and willfully agreed that he or some other member of the conspiracy would commit at least two racketeering acts." 687 F.3d at 218.

Assuming that actually is an element necessary in a criminal case, the willful aspect in that element is attached to the agreement to commit the alleged racketeering act, whatever it might be. Nothing in that formulation requires proof that the defendant knew that the racketeering act to be committed was an unlawful one.

And, in any event, the jury would be told that:

> The term "willfully," as used in these instructions to describe the alleged state of mind of defendant . . . means that he acted knowingly, deliberately and intentionally as contrasted with accidentally, carelessly, or unintentionally.

So, the general rules about mistake of law would apply and a mistake of law would not preclude civil liability under § 1962(d) as alleged in COUNT THREE.

That then brings the analysis to the second aspect of Martorello's theory: using the mistake of law defense to

counter what Martorello perceives (erroneously) to be an element of RICO liability: knowledge that the loan itself was illegal.

(d) Knowledge of Illegality of the Loans

As explained above, Martorello also asserts the mistake of law defense against what he erroneously perceives to be another element of the claims under both Section 1962(c) and Section 1962(d). Specifically, Martorello argues that Plaintiffs must prove that he knew that the loans were unlawful, and that his mistake of law defense is available to counter that element. For the reasons set forth below, this twist on Martorello's mistake of law defense also lacks merit.

To begin, the text of neither § 1962(c) nor § 1962(d) say that knowledge that the loans (the asserted unlawful debt) are illegal is an element of the RICO claims asserted in COUNTS TWO and THREE. Nor does the definition of "unlawful debt" in § 1961(6) say that such knowledge is required. So, the statutory text does not predicate liability on a finding of a defendant's knowledge that the collected debt is an unlawful one. That is not dispositive, but it is helpful in deciding whether Congress intended RICO liability for collecting an unlawful debt to necessitate proof that a defendant knew the debt to be unlawful.

When determining whether knowledge of the illegality of the loans is required, it is helpful to look to the elements of the respective claims. The elements of a § 1962(c) claim do not require knowledge of the illegality of the loans.

Gibbs v. Stinson, 421 F. Supp. 3d at 312 (E.D. Va. 2019); *Mao*, 2022 U.S. Dist. LEXIS 61179, 2022 WL 989012, at *9; *Gibbs v. Elevate Credit, Inc.*, No. 3:20cv632, 2021 U.S. Dist. LEXIS 200197, 2021 WL 4851066, at *15 (E.D. Va. Oct. 17, 2021) (quoting *Slay's Restoration, LLC v. Wright Nat'l Flood Ins. Co.*, 884 F.3d 489, 493 (4th Cir. 2018)); *see also Solomon v. Am. Web Loan*, No. 4:17cv145, 2019 U.S. Dist. LEXIS 48420, 2019 WL 1320790, at *5-6 (E.D. Va. March 22, 2019) (quoting *Dillon v. BMP Hams Bank, N.A.*, 16 F. Supp. 3d 605, 618 (M.D.N.C. 2014)).

Nor do the elements of a § 1962 (d) civil claim bespeak the need for proof of knowledge that the predicate acts (here, collection of unlawful debt) are illegal. To be found liable of RICO conspiracy, a defendant must have "by either words or action, objectively manifested an agreement to participate directly or indirectly in the affairs of the enterprise." *United States v. Tillett*, 763 F.2d 628, 632 (4th Cir. 1985). Plaintiffs "need not establish that each conspirator had knowledge of all the details of the conspiracy but, rather, only that the defendant participated in the conspiracy with *knowledge of the essential nature of the* plan." *Id.* (emphasis added). Unlike the general conspiracy statute, § 1962(d) contains "no requirement of some overt act or specific act." *Salinas*, 522 U.S. at 63. "The RICO conspiracy provision, then, is even more comprehensive than the general conspiracy offense." *Id.*

When evaluating a motion to dismiss, the court found in another civil tribal lending case that "Plaintiffs do not have to allege knowledge of illegality." Mao, 2022 U.S.

Dist. LEXIS 61179, 2022 WL 989012, at *9. Instead, the Plaintiffs must show that the enterprise members, including Martorello, were "associated together for a common purpose of engaging in a course of conduct." *Id.* (*quoting United States v. Turkette*, 452 U.S. 576, 583, 101 S. Ct. 2524, 69 L. Ed. 2d 246 (2009)). The "purpose" requirement "may be [satisfied with a showing that] Defendants associated for the purpose of collecting unlawful debt, *whether they knew that debt was unlawful or not*." *Id.* (emphasis added).

Here too, it is helpful to consider the way in which the jury would be instructed. To secure the views of the parties on that subject, the Court called upon them to provide their views of what the instructions would be on the two RICO claims. (ORDER, ECF No. 1247).

Martorello's provided instructions were from *United States v. Tucker*, No.16-cr-91 (PKC), 2020 U.S. Dist. LEXIS 220578, 2020 WL 6891517 (S.D.N.Y. Nov. 24, 2020), a 2017 criminal RICO case.[49] *Tucker* Jury Instructions (ECF No. 1253-1).[50] On the conspiracy charge, the Court instructed the jury that the Government must prove that "each defendant intentionally joined the conspiracy" and did so "knowingly and willfully. . . for the purpose of

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49. *United States v. Grote*, 961 F.3d 105 (2d Cir. 2020), discussed in further detail below, is related to this case.

50. DEFENDANT'S NOTICE OF FILING PURSUANT TO ORDER AT DOCKET NO. 1247 OF JURY INSTRUCTIONS GIVEN IN OTHER UNLAWFUL DEBT RICO CASES (ECF NO. 1253).

furthering its unlawful object, which is the collection of an unlawful debt." *Id.* at 3287.[51] The *Tucker* Court instructed that "the government must prove. . . that the defendant willfully and knowingly engaged in the collection of unlawful debt." *Id.* at 3296.

Then, as to whether the defendant acted "willfully" and "knowingly," the Court instructed that "[t]he defendant *need not have known that he was breaking any particular law*, but he must have been *aware of the generally unlawful nature of his act*." *Id.* at 3288 (emphasis added). The Government also *did not need "to prove that the defendant knew what the usury rates were* in the states that the borrowers lived." *Id.* at 3293 (emphasis added). The Court in *Tucker* summed up its instructions on that point by stating:

> In this case, *ignorance of the specific terms of any law is no excuse to the charged conduct.* The government can meet its burden on the "willfully" and "knowingly" element by proving that a defendant *acted deliberately, with knowledge of the actual interest rate charged on the loan*. It may also meet its burden by showing a defendant acted deliberately, with an *awareness of the generally unlawful nature of the loan, and also that it was the practice of the business engaged in lending money* to make such loans.

51. The pagination is from the original case transcript.

Id. at 3293-94 (emphasis added).[52] So, even Martorello's view does not necessitate proof that he knew the specific interest rate charged or that the debt being collected was an unlawful one.

Plaintiffs attached four different sets of jury instructions but only two of these had actually been given at trial. PLAINTIFFS' STATEMENT OF POSITION IN RESPONSE TO THE COURT'S ORDER DATED MAY 19, 2023 at 2 (ECF No. 1252). One of the offered instructions comes from *Tucker* and has been discussed. The other given instructions come from the 2019 Northern District of California civil RICO case *Planned Parenthood Federation of America, Inc. v. Center for Medical Progress*, 402 F. Supp. 3d 615 (N.D. Cal. 2019). *Id.* The claim in *Planned Parenthood* involved a theory of "pattern of racketeering activity," rather than collection of unlawful debt. Thus, this does not directly answer the question whether Martorello needed to know that the debts were unlawful. However, in *Planned Parenthood*, the Court did provide guidance on RICO. It instructed

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52. In *Tucker*, the Court did allow for an advice of counsel defense. The Court instructed the jury to:

> consider whether, in seeking and *obtaining advice from lawyers*, [the defendant] *intended for his acts to be lawful*. *If he did so*, a defendant *cannot be convicted of a crime* that requires willful and unlawful intent, even if such advice were an inaccurate description of the law.

Id. at 3301 (emphasis added). However, Martorello is not presenting an advice of counsel defense.

that, to show that a defendant had associated with the enterprise, "Plaintiffs must prove that the Defendant was connected to the enterprise in some meaningful way and that the Defendant *knew* of *the existence of the enterprise and of the general nature of its activities*." *Planned Parenthood* Jury Instructions at 60 (ECF No. 1252-1) (emphasis added). As to the conspiracy question, the Court instructed that:

> One becomes a member of a conspiracy by willfully participating in the unlawful plan with the intent to advance or further some object or purpose of the conspiracy, even if the person does not have full knowledge of all the details of the conspiracy.

Id. at 66. Notably, there is no requirement that the defendant know that the alleged acts of racketeering are illegal.

Neither respected instruction book specifies knowledge of illegality as an element of either 1962(c) or (d). That, of course, teaches that a mistake of law as to the legality of the underlying unlawful debt could be no defense to the Subsection (c) aspect of the conspiracy claim.

The Fourth Circuit has not addressed whether, in a civil RICO case, the defendant must have knowledge of illegality, but other federal courts of appeals have. In 1980, the United States Court of Appeals for the Second Circuit squarely held that RICO "does not include a scienter element over and above that required by the

predicate crimes." *United States v. Boylan*, 620 F.2d 359, 361-62 (2d Cir. 1980). Six years later, in *United States v. Biasucci*, 786 F.2d 504 (2d Cir. 1986), *cert. denied*, 479 U.S. 827, 107 S. Ct. 104, 93 L. Ed. 2d 54 (1986), the Second Circuit rejected an argument that the "government was required to establish that [the defendants] had knowledge of the specific interest rates" on the loans at issue, i.e., knowledge of the illegality of the loans. *Id.* at 512-13. In so doing, the Second Circuit, citing *Boylan*, reiterated that "RICO imposes no additional *mens rea* requirement beyond that found in the predicate crimes." *Id.* at 512. And so, "we look to the *scienter* elements found in the statutory definitions of the predicate crimes to determine the degree of knowledge that must be proved to establish a RICO violation." *Id.*

Finding that the New York usury law (the predicate crime) "does not require specific intent to violate the usury laws," the Second Circuit declined to find that the government had to have proven that the defendant had knowledge of the specific illegal interest rate. *Id.* Thereupon, the Second Circuit approved the district court's instruction that the RICO scienter requirement could be satisfied "*either* by proving *specific knowledge of the interest rates on the usurious loans, or* by showing the defendant's *awareness 'of the general unlawful nature of the particular loan* in question and also that it was the *practice of the lenders to make such loans*.'" *Id.* (emphasis added) (quoting the trial court's jury instructions).

The Second Circuit also found that neither the statutory language nor the policies underlying RICO and

the predicate state law "impel us. . . to require knowledge of the specific interest rates charged on usurious loans." *Id.* Indeed, because "one of Congress' principal aims" in enacting RICO was to eliminate loansharking, and because "Congress expressly commanded that the RICO statute 'be liberally construed to effectuate its remedial purposes,'" it "could not have intended to hobble the government's ability to combat loansharking by requiring it to prove knowledge of the specific interest rates charged." *Id.* (citation omitted) (quoting *U.S. v. Ruggiero*, 726 F.2d 913, 919 (2d Cir. 1984)).

Martorello correctly notes that, in *United States v. Grote*, 961 F.3d 105 (2d Cir. 2020), the Second Circuit, *in dicta*, queried whether *Biasucci* was consistent with a "presumption in favor of a scienter requirement" for criminal statutes, as provided in *Elonis*, 575 U.S. at 727, and *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 115 S. Ct. 464, 130 L. Ed. 2d 372 (1994). *Grote*, 961 F.3d at 117-19.[53] In *United States v. Moseley*, 980 F.3d 9, 19 (2d Cir. 2020), the Second Circuit noted *Grote*, but, like Grote, declined to depart from *Biasucci* concluding only that the defendant must be aware of the unlawful nature of his actions.

In any event, *Elonis* does not help Martorello in his assertion that the mistake of law defense, as he would present it, is available in this case. Indeed, *Elonis* quite

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53. DEFENDANT MATT MARTORELLO REPLACEMENT MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT ("Martorello Response") at 33 (ECF No. 1218).

plainly says that, even in a criminal case, where guilty mind is an element in every crime:

> This is *not to say that a defendant must know that his conduct is illegal* before he may be found guilty. The familiar maxim 'ignorance of the law is no excuse' typically holds true. Instead, our cases have explained that a defendant generally must '*know the facts that make his conduct fit the definition of the offense," [citation omitted] even if he does not know that those facts give rise to a crime.*

Elonis, 575 U.S. at 735 (emphasis added). The dicta in *Grote* notwithstanding, *Elonis* does not support Martorello's view that he can present a mistake of law defense.

The Second Circuit's approach in *Biasucci* has met with approval from the United States Court of Appeals for the Eleventh Circuit. In *United States v. Pepe*, the Eleventh Circuit agreed with *Biasucci* that "[a] plain reading of the statute indicates that RICO *does not contain any separate* mens rea *or scienter elements beyond those encompassed in its predicate acts*." 747 F.2d 632, 675-76 (11th Cir. 1984) (emphasis added). The Eleventh Circuit went on to explain that the district court correctly instructed, as to the § 1962(d) conspiracy charge, that "the defendant with knowledge of the conspiracy, willfully became a member of the conspiracy by agreeing to participate." *Id.* at 676. That instruction would, of course, be given as to COUNT THREE at the trial of this

case, but it certainly does not open the door to a mistake of law defense. And, as to the § 1962(c) charge, the Eleventh Circuit approved the district court's charge that the jury had to find that the "defendant was engaged in a pattern of racketeering activity . . . by knowingly and willfully committing at least two acts of racketeering activity or knowingly and willfully collecting an unlawful debt." *Id.* at 676 (internal quotations omitted). That instruction would be appropriate here as well, but, as the Eleventh Circuit explained, it does not require "a mens rea or scienter requirement beyond those encompassed in the predicate acts." So, if the Virginia law does not require proof that the defendant knew the loan was illegal (and it does not), then neither does § 1962(c). And, as is true with § 1962(c), the willful aspect of the instruction (knowingly and willfully) modifies the act of collecting, not whether the debt was unlawful. And, the instruction certainly does not suggest that a mistake of law defense is available.

In addition to *Mao*, two other district courts within the Fourth Circuit, in deciding civil RICO cases, have endorsed the Second Circuit's *Biasucci* view. The Western District of North Carolina, citing to a District of Connecticut decision governed by *Biasucci*, found that "[t]he plaintiff must demonstrate, with respect to a defendant, both that the defendant committed a predicate offense as delineated in Section 1961 [the definitions section] and that the defendant had the *requisite scienter for the underlying predicate offense*." *Smith v. Chapman*, No. 3:14-cv-00238, 2015 U.S. Dist. LEXIS 113257, 2015 WL 5039533, at *7 (W.D.N.C. Aug. 26, 2015) (emphasis added) (quoting *Interstate Flagging, Inc. v. Town of Darien*, 283 F. Supp. 2d 641, 645 (D. Conn. 2003)). The Middle District

of North Carolina reached the same conclusion, finding "[i]t appears there is no mental state requirement '*beyond that found in the predicate* crimes.'" *Dillon v. BMO Harris Bank, N.A.*, 16 F. Supp. 3d 605, 618 (M.D.N.C. 2014) (emphasis added) (quoting *Biasucci*, 786 F.2d at 514).

Moreover, even in criminal cases, "[t]he presumption in favor of scienter requires a court to read into a statute only that *mens rea* which is necessary to separate wrongful conduct from 'otherwise innocent conduct.'" *Carter v. United States*, 530 U.S. 255, 269, 120 S. Ct. 2159, 147 L. Ed. 2d 203 (2000) (quoting *X-Citement Video*, 513 U.S. at 72). When it comes to general intent crimes, the prosecution only needs to prove "knowledge with respect to the *actus reus* of the crime." *Id.* In other words, a defendant "generally *must 'know the facts that make his conduct fit the definition of the offense,' even if he does not know that those facts give rise to a crime*." *Elonis*, 575 U.S. at 735 (emphasis added) (quoting *Staples v. U.S.*, 511 U.S. 600, 608, 114 S. Ct. 1793, 128 L. Ed. 2d 608 n.3 (1994)). This, of course, is a manifestation of the principle that there is no mental state requirement beyond that found in a predicate crime. It also reinforces the principle that a mistake of law defense is no defense at all.

In *United States v. Lawson*, 677 F.3d 629, 652 (4th Cir. 2012), the Fourth Circuit considered a position like Martorello's under 18 U.S.C. § 1955, which prohibits illegal gambling. Section 1955, which is quite similar to § 1962, provides that "[w]hoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined under this title

or imprisoned not more than five years, or both." The statute goes on to define "illegal gambling business" as a "gambling business which is a violation of the law of a State or political subdivision in which it is conducted." 18 U.S.C. § 1955(b)(1)(i).

In reviewing a defendant's conviction under that provision, the Fourth Circuit rejected the defendant's argument that the jury should have been instructed that she "must have known that her conduct constituted gambling under [applicable state] law." *Laws on*, 677 F.3d at 652. The Court of Appeals reasoned that the "plain language" of the statute sets forth a general intent crime and thus "does not require the government to establish that the defendant knew that their conduct violated state law." *Id.* at 652-53.

The same holds true for § 1962. "Conduct" and "participate," the operative verbs in § 1962, impute the same scienter requirement as § 1955's operative verbs, which include "conduct." In addition, both the definition of "gambling business" and "unlawful debts" incorporate state law. 18 U.S.C. § 1961(6). Mirroring the statutory framework of § 1955, when used in a criminal prosecution, § 1962 is a general intent crime. And, when a general intent crime is involved, a "good-faith instruction [which, in *Lawson*, was based on a mistake of law] . . . is unavailable." *Lawson*, 677 F.3d at 653.

The teaching of *Lawson*, applied in the civil context, is that §§ 1962(c) and (d) do not require knowledge of illegality of the collected debt as an element of either COUNT TWO or COUNT THREE. *Lawson* likewise

teaches that Martorello may not raise a mistake of law defense based on the notion that he did not know the loans were illegal, because he chose to take the view tribal law applied, but guessed wrongly.

In this case, of course, RICO is being asserted as the basis for civil liability. Courts follow much of the same process in determining if a civil statute contains a scienter requirement. First, they look to the language of the statute to ascertain congressional intent. For example, when it has intended to excuse mistakes of law, Congress has required violations to be "willful." *Jerman*, 559 U.S. at 584-85. Even more explicitly, Congress sometimes includes a mistake of law defense. It did so, for instance, in the Fair Debt Collection Practices Act ("FDCPA") by requiring that the defendant acted with "actual knowledge or knowledge fairly implied" that his action was prohibited by the statute. *Id.* at 584 (quoting 15 U.S.C. §§ 45(m)(1)(A), (C)). The RICO statute, on the other hand, contains no provision requiring that the defendant knew his conduct (collection of an unlawful debt) was unlawful. Nor does it provide a mistake of law defense.

The Supreme Court also has had multiple occasions to consider scienter requirements in the various provisions of the Securities and Exchange Act of 1934, making it an especially useful comparison statute. For example, in assessing § 10(b), which makes it unlawful to "use or employ" "any manipulative or deceptive device or contrivance" in connection with the purchase or sale of securities, 15 U.S.C. § 78j(b), the Supreme Court determined that Congress had imposed a scienter requirement for liability under this provision by using

"[t]he words 'manipulative or deceptive'. . . in conjunction with 'device or contrivance . . . .'" *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 197, 96 S. Ct. 1375, 47 L. Ed. 2d 668 (1976). The ordinary meaning of those words, particularly "manipulative," "make unmistakable a congressional intent to proscribe a type of conduct quite different from negligence." *Id.* at 199. "[M]anipulative," so the Supreme Court explained, "connotes international or willful conduct designed to deceive or defraud." *Id.*

In contrast, the Supreme Court found that another provision in the Act, prohibiting "any person from obtaining money or property 'by means of any untrue statement of a material fact or any omission to state a material fact,' is devoid of any suggestion whatsoever of scienter requirement." *Aaron v. Securities & Exchange Comm.*, 446 U.S. 680, 696, 100 S. Ct. 1945, 64 L. Ed. 2d 611 (1980) (quoting § 17(a)(2) of the Securities and Exchange Act of 1934). Likewise, the Supreme Court determined that a prohibition on "'engag[ing] in any transaction, practice, or course of business which *operates* or *would operate* as a fraud or deceit' . . . quite plainly focuses upon the *effect* of particular conduct on members of the investing public, rather than on the culpability of the person responsible." *Id.* at 696-97 (quoting § 17(a)(3) of the Securities and Exchange Act of 1934). Therefore, that provision was found not to contain a scienter requirement.

RICO contains no language that overcomes the presumption against mistake of law defenses. Section 1962(c) contains no scienter requirement, *see supra*, nor does it contain an explicit mistake of law defense like the FDCPA. The language used by § 1962(c)—"conduct or

participate" in conjunction with "collection"—does not connotate the sinister intentions implicit in "manipulative" or "deceptive" as found in § 10b of the Securities and Exchange Act. Instead, these terms are far more similar to "engage," as found in § 17(a)(3) of the Act, which does not excuse mistake of law.

In addition to evaluating statutory text, the Supreme Court has also turned to legislative history to understand Congressional intent. *Hochfelder*, 425 U.S. at 201. Considering the history of § 10(b) of the Securities and Exchange Act, the Supreme Court determined that the legislative history indicated Congress only wanted to impose liability on those who act other than in good faith. *Id.* at 206.

With RICO, on the other hand, the legislative history supports the opposite conclusion. RICO itself contains a provision instructing that "its terms are to be 'liberally construed to effectuate its remedial purposes.'" *Boyle v. United States*, 556 U.S. 938, 944, 129 S. Ct. 2237, 173 L. Ed. 2d 1265 (2009) (quoting § 904(a), 84 Stat. 947, note following 18 U.S.C. § 1961). And supporters of the bill were especially concerned with loansharking. *Turkette*, 452 U.S. at 591-92 & n. 14 (considering RICO's legislative history). Congress's remedial intentions in passing RICO, therefore, would not be advanced by "permit[ting] the defendant to avoid [liability] by simply claiming that he had not brushed up on the law." *Hamling v. United States*, 418 U.S. 87, 123, 94 S. Ct. 2887, 41 L. Ed. 2d 590 (1974).

In sum, the text of §§ 1962(c) and (d) does not require that the defendant knew the loans were illegal, nor does

the legislative history indicate that Congress intended such a result or that a "mistake of law" defense should be available. The Court declines to read into RICO what Congress omitted. Unless the predicate offense contains a scienter requirement,[54] all that RICO requires is that the defendant knew that the loans were issued at a rate above that permitted by 18 U.S.C. § 1961(6) or that Martorello had knowledge of the general illegal nature of the enterprise. *Brice v. Haynes Invs., Inc*, 548 F. Supp. 3d 882, 894 (N.D. Cal. 2021) (holding that defendants must have "knowledge of the purpose" of the scheme or "knowledge of the terms on which the loans would be provided and repayment required"). In other words, Martorello must knowingly engage in the activity itself, but he does not have to know that, by doing so, he would break the law. The next question is whether Virginia's usury statute contains a scienter requirement.

3. Virginia's Usury Statute: Va. Code Ann. § 6.2-303(A)

The underlying Virginia statute, Va. Code Ann. § 6.2-303(A), does not contain a *mens rea* or scienter requirement. Nor has it been interpreted to contain one. The provision states, in full:

> Except as otherwise permitted by law, no contract shall be made for the payment of

54. For example, when pursuing a RICO conspiracy case based on violations of a federal statute prohibiting the *knowing* hiring of unauthorized aliens, 8 U.S.C. § 1324(a)(3), that knowledge requirement is then imputed to RICO. *See Walters v. McMahen*, 684 F.3d 435, 440 (4th Cir. 2012).

> interest on a loan at a rate that exceeds 12 percent per year.

Va. Code Ann. § 6.2-303(A). The statute goes on to clarify that it "shall apply to any person who seeks to evade its application by any device, subterfuge, or pretense whatsoever" followed by a non-exhaustive list of such subterfuges. Va. Code Ann. § 6.2-303(E). The statute provides for only one defense: if the "interest or other charges in excess of those permitted by law were imposed or collected as a result of a bona fide error in computation or similar mistake." Va. Code Ann. § 6.2-305(C).

There is no Virginia decision that addresses whether the current Virginia statute allows for mistake of law defense. But, in 1826, the Supreme Court of Appeals of Virginia interpreted an earlier version of this provision to explicitly exclude a mistake of law defense, stating:

> Wherever such *intention* appears in the taking more than legal interest, it is evidence of the corrupt agreement required by the statute; though the party may never have heard of the law, or *may think that he is steering quite clear of it. Ignorance or mistake of the law excuses no man; but a mistake of fact does excuse.*

Childers v. Deane, 25 Va. 406, 4 Rand. 406, 410-11 (Va. 1826) (emphasis added).[55]

55. The version of the statute in effect at the time reads: "No person shall, upon any contract, take, directly or indirectly, for loan of any money, wares, or merchanize [sic], or other commodity, above the value of six dollar for the forbearance of one hundred

Although *Childers* is an older precedent interpreting an earlier version of the statute, it is in accord with more recent decisions explaining how courts understand the current statute. To make out a claim under Va. Code Ann. §6.2-303(A), plaintiffs need only show that defendants "collected or received payments on loans that violated Virginia's statutory limits." *Gibbs v. Stinson*, 421 F. Supp. 3d at 309. The elements of the statutory cause of action include no reference to the defendants' intent or knowledge.

Modern caselaw reinforces the fact that a creditor's belief that he is acting in accordance with the law is no defense. For example, the Supreme Court of Virginia invalidated a usurious loan even though the issuing bank believed, presumably in good faith, that it fell under one of the statutory provisions exempting it from the usury laws. *Radford v. Cmty. Mortg. & Inv. Corp.*, 226 Va. 596, 312 S.E.2d 282, 285 (Va. 1984). That, of course, is a mistake of law. In so deciding, the Supreme Court of Virginia reaffirmed that "[t]he [Commonwealth's] usury laws. . . are to be liberally construed with a view to advance the remedy and suppress the mischief" and the courts "should therefore be chary in permitting this policy to be thwarted." *Id.*[56]

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dollars for a year." "An act to reduce into one act, the several acts against Usury" (Feb. 24, 1819) § 1, in Revised Code of the Laws of Virginia: Being a Collection of All Such Acts of the General Assembly, of a Public and Permanent Nature, as are Now in Force, ch. 102, pp. 373-74 (1819).

56. There is one easily distinguishable case finding that the lenders' good-faith belief can excuse a usurious debt. In this case,

Looking at the statutory language and the public policy underlying the statute, the Virginia usury statute does not impose a scienter requirement, nor can it be read to allow a mistake of law defense.

C. Summary Judgment: Certain Elements of COUNT TWO

The Plaintiffs' Motion asked for summary judgment on certain elements of the 18 U.S.C. § 1962(c) claim in COUNT TWO (ECF No. 1169, pp. 36-40). In particular, they asked for summary judgment that: (i) "an enterprise existed;" (ii) that "an association-in-fact enterprise existed;" (iii) the loans at issue "constituted 'unlawful debt'" because the interest rates on those loans exceeded 24% (twice the 12% rate permitted by Virginia law; and

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the debtor and creditor engaged in a complicated loan transaction involving real estate liens, corporate debts, and individuals acting on behalf of themselves and partnerships. *Heubusch v. Boone*, 213 Va. 414, 192 S.E.2d 783, 787-88 (1972). On its face, the Supreme Court of Virginia determined that the resulting loan was usurious. *Id.* at 789. However, the debtors in the case were a lawyer and his law firm and had "induce[d] the lender to enter into a usurious agreement that he would not otherwise have made." *Id.* at 789-91. As the debtor/lawyers "were the direct causes of the illegality complained of," the debtors were "estopped from profiting by that illegality of their defense" and the loan was deemed valid. *Id.* at 790. While *Heubusch* does involve a creditor relying in good faith on the advice of counsel, it is readily distinguishable from Martorello's asserted defense. Martorello relied on his own lawyers' advice, not that of the debtor. Martorello's debtors in no way "induce [d]" him to enter into the loans as in *Heubusch*. Thus, that decision does not support the availability of a good-faith defense to Virginia Code Ann. § 6.2-303(A) in this case.

(iv) "persons associated with the enterprise engaged in the collection of the debt." (ECF No. 1169, pp. 36-40, § VIA-C). However, recognizing that there was a material fact dispute over one element of COUNT TWO, Plaintiffs did not seek summary judgment as to COUNT TWO as a whole.

As explained above, Martorello did not respond to the arguments on those points.[57] At oral argument on June 7, Martorello's counsel agreed. June 7 Tr. p. 173. Hence, summary judgment on those points (the elements) in Plaintiffs' favor is appropriate.

CONCLUSION

For the reasons set forth above, the Court granted PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT (ECF No. 1165) in part and denied in part.

Subsequent orders have taken the matter further so that, as of now, summary judgment has been granted as to COUNTS TWO and THREE and COUNTS FOUR and FIVE have been dismissed without prejudice.[58] As

57. Compare PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT (ECF No. 1241, pp. 7, 28-30) with DEFENDANT MATT MARTORELLO REPLACEMENT MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT (ECF No. 1218).

58. June 16, 2023 ORDER (ECF No. 1328), as amended by ECF No. 1350; July 7, 2023 ORDER (ECF No. 1373) (granting summary judgment in favor of the Plaintiffs as to COUNT

a result of this MEMORANDUM OPINION and those ORDERS, a final judgment will be entered separately on COUNTS TWO and THREE.

It is SO ORDERED.

/s/ Robert E. Payne
Robert E. Payne
Senior United States District Judge

Richmond, Virginia
Date: September 22, 2023

TWO); July 10, 2023 ORDER (ECF No. 1390) (dismissing without prejudice COUNTS FOUR and FIVE).

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Civil Action No. 3:17cv461

LULA WILLIAMS, *et al.*,

Plaintiffs,

v.

BIG PICTURE LOANS, LLC, *et al.*,

Defendants.

Filed September 22, 2023

FINAL JUDGMENT ORDER

Having granted the PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT on COUNT THREE of the CLASS ACTION COMPLAINT (ECF No. 1165) as set forth in the ORDER (ECF No. 1328), and the MEMORANDUM OPINION (ECF No. 1398) having granted summary judgment on COUNT TWO of the CLASS ACTION COMPLAINT (ECF No. 1373) and (ECF No. 1350); having ruled on the PLAINTIFFS' OMNIBUS MOTIONS *IN LIMINE* (ECF No. 1173) as

reflected in the ORDER (ECF No. 1328), having denied DEFENDANT MATT MARTORELLO'S MOTION FOR SUMMARY JUDGMENT (ECF No. 1254) as set forth in the ORDER (ECF No. 1354) and the MEMORANDUM OPINION (ECF No. 1392) and having entered the ORDER (ECF No. 1374) and the JOINT NOTICE AND STIPULATION REGARDING § 1962(c) DAMAGES (ECF No. 1389), it is hereby ORDERED that judgment is hereby entered in favor of the Plaintiffs, as representatives of the Certified Class (*see* ORDER (ECF No. 1111) and against the defendant Matt Martorello as follows:

(1) For relief under COUNT TWO of the CLASS ACTION COMPLAINT, Matt Martorello shall pay damages to the Plaintiffs, as representatives of the Certified Class, in the amount of $43,401,817.47 with interest at the federal judgment rate of 5.35% per annum from July 7, 2023 until paid in full (none of which may be setoff based on any prior settlement of any part of the Plaintiffs' Class Claims;[1] and

(2) For relief under COUNT THREE of the CLASS ACTION COMPLAINT, Matt Martorello shall pay damages to the Plaintiffs, as representatives of the Certified Class, in the amount of $43,401,817.47 with

1. Pursuant to 18 U.S.C. § 1964, the total cumulative amount of damages paid for relief under COUNT TWO and COUNT THREE of the CLASS ACTION COMPLAINT shall not exceed $43,401,817.47 with interest at the federal judgment rate of 5.35% per annum from July 7, 2023 until paid in full (none of which may be set off based on any prior settlement of any part of the Plaintiffs' Class Claims).

interest at the federal judgment rate of 5.35% per annum from July 7, 2023 until paid in full (none of which may be set off based on any prior settlement of any part of the Plaintiffs' Classes' Claims.

It is further ORDERED that, upon motion of the Plaintiffs and agreement of Matt Martorello, COUNTS ONE, FOUR, and FIVE of the CLASS ACTION COMPLAINT are dismissed without prejudice and with leave to amend; and

It is further ORDERED that, upon agreement of the parties, the time for filing a bill of costs and petition for attorneys' fees shall be extended until ninety (90) days after final resolution of any appeal.

It is so ORDERED.

/s/ Robert E. Payne
Robert E. Payne
Senior United States District Judge

Richmond, Virginia
Date: September 22, 2023

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 23-2097 (3:17-cv-00461-REP)

LULA WILLIAMS; GLORIA TURNAGE; GEORGE HENGLE; DOWIN COFFY; MARCELLA P. SINGH, ADMINISTRATOR OF THE ESTATE OF FELIX M. GILLISON, JR., ON BEHALF OF THEMSELVES AND ALL INDIVIDUALS SIMILARLY SITUATED,

Plaintiffs-Appellees,

v.

MATT MARTORELLO,

Defendant-Appellant.

and

BIG PICTURE LOANS, LLC; ASCENSION TECHNOLOGIES, INC.; DANIEL GRAVEL; JAMES WILLIAMS, JR.; GERTRUDE MCGESHICK; SUSAN MCGESHICK; GIIWEGIIZHIGOOKWAY MARTIN,

Defendants.

FILED: August 12, 2025

Appendix D

ORDER

The petition for rehearing en banc was circulated to the full court. No judge requested a poll under Fed. R. App. P. 40. The court denies the petition for rehearing en banc.

For the Court

/s/ Nwamaka Anowi, Clerk

APPENDIX E

U.S. Const. Art. I § 8, cl. 3 provides in relevant part:

The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

* * *

Appendix E

18 U.S.C. § 1961(6) provides:

Definitions

As used in this chapter—

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

Appendix E

18 U.S.C. § 1962(c)-(d) provides:

Prohibited activities

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

Appendix E

18 U.S.C. § 1963 provides:

Criminal penalties

(a) Whoever violates any provision of section 1962 of this chapter shall be fined under this title or imprisoned not more than 20 years (or for life if the violation is based on a racketeering activity for which the maximum penalty includes life imprisonment), or both, and shall forfeit to the United States, irrespective of any provision of State law—

(1) any interest the person has acquired or maintained in violation of section 1962;

(2) any—

(A) interest in;

(B) security of;

(C) claim against; or

(D) property or contractual right of any kind affording a source of influence over;

any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962; and

(3) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962.

The court, in imposing sentence on such person shall order, in addition to any other sentence imposed pursuant to this section, that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by this section, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

(b) Property subject to criminal forfeiture under this section includes—

(1) real property, including things growing on, affixed to, and found in land; and

(2) tangible and intangible personal property, including rights, privileges, interests, claims, and securities.

(c) All right, title, and interest in property described in subsection (a) vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing pursuant to subsection (l) that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section.

(d)(1) Upon application of the United States, the court may enter a restraining order or injunction, require

the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection (a) for forfeiture under this section—

(A) upon the filing of an indictment or information charging a violation of section 1962 of this chapter and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section; or

(B) prior to the filing of such an indictment or information, if, after notice to persons appearing to have an interest in the property and opportunity for a hearing, the court determines that—

(i) there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and

(ii) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered:

Provided, however, That an order entered pursuant to subparagraph (B) shall be effective for not more than ninety days, unless extended by the court for good cause shown or unless an indictment or information described in subparagraph (A) has been filed.

(2) A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when an information or indictment has not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than fourteen days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing requested concerning an order entered under this paragraph shall be held at the earliest possible time, and prior to the expiration of the temporary order.

(3) The court may receive and consider, at a hearing held pursuant to this subsection, evidence and information that would be inadmissible under the Federal Rules of Evidence.

(e) Upon conviction of a person under this section, the court shall enter a judgment of forfeiture of the property to the United States and shall also authorize the Attorney General to seize all property ordered forfeited upon such terms and conditions as the court shall deem proper. Following the entry of an order declaring the property forfeited, the court may, upon application of the United States, enter such appropriate restraining orders or injunctions, require the execution of satisfactory performance bonds,

appoint receivers, conservators, appraisers, accountants, or trustees, or take any other action to protect the interest of the United States in the property ordered forfeited. Any income accruing to, or derived from, an enterprise or an interest in an enterprise which has been ordered forfeited under this section may be used to offset ordinary and necessary expenses to the enterprise which are required by law, or which are necessary to protect the interests of the United States or third parties.

(f) Following the seizure of property ordered forfeited under this section, the Attorney General shall direct the disposition of the property by sale or any other commercially feasible means, making due provision for the rights of any innocent persons. Any property right or interest not exercisable by, or transferable for value to, the United States shall expire and shall not revert to the defendant, nor shall the defendant or any person acting in concert with or on behalf of the defendant be eligible to purchase forfeited property at any sale held by the United States. Upon application of a person, other than the defendant or a person acting in concert with or on behalf of the defendant, the court may restrain or stay the sale or disposition of the property pending the conclusion of any appeal of the criminal case giving rise to the forfeiture, if the applicant demonstrates that proceeding with the sale or disposition of the property will result in irreparable injury, harm or loss to him. Notwithstanding 31 U.S.C. 3302(b), the proceeds of any sale or other disposition of property forfeited under this section and any moneys forfeited shall be used to pay all proper expenses for the forfeiture and the sale, including expenses of seizure, maintenance and

custody of the property pending its disposition, advertising and court costs. The Attorney General shall deposit in the Treasury any amounts of such proceeds or moneys remaining after the payment of such expenses.

(g) With respect to property ordered forfeited under this section, the Attorney General is authorized to—

(1) grant petitions for mitigation or remission of forfeiture, restore forfeited property to victims of a violation of this chapter, or take any other action to protect the rights of innocent persons which is in the interest of justice and which is not inconsistent with the provisions of this chapter;

(2) compromise claims arising under this section;

(3) award compensation to persons providing information resulting in a forfeiture under this section;

(4) direct the disposition by the United States of all property ordered forfeited under this section by public sale or any other commercially feasible means, making due provision for the rights of innocent persons; and

(5) take appropriate measures necessary to safeguard and maintain property ordered forfeited under this section pending its disposition.

(h) The Attorney General may promulgate regulations with respect to—

(1) making reasonable efforts to provide notice to persons who may have an interest in property ordered forfeited under this section;

(2) granting petitions for remission or mitigation of forfeiture;

(3) the restitution of property to victims of an offense petitioning for remission or mitigation of forfeiture under this chapter;

(4) the disposition by the United States of forfeited property by public sale or other commercially feasible means;

(5) the maintenance and safekeeping of any property forfeited under this section pending its disposition; and

(6) the compromise of claims arising under this chapter.

Pending the promulgation of such regulations, all provisions of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeitures for violation of the customs laws, and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof. Such duties as are imposed upon the Customs Service or any person with respect to the disposition of property under the customs law shall be performed under this chapter by the Attorney General.

(i) Except as provided in subsection (l), no party claiming an interest in property subject to forfeiture under this section may—

(1) intervene in a trial or appeal of a criminal case involving the forfeiture of such property under this section; or

(2) commence an action at law or equity against the United States concerning the validity of his alleged interest in the property subsequent to the filing of an indictment or information alleging that the property is subject to forfeiture under this section.

(j) The district courts of the United States shall have jurisdiction to enter orders as provided in this section without regard to the location of any property which may be subject to forfeiture under this section or which has been ordered forfeited under this section.

(k) In order to facilitate the identification or location of property declared forfeited and to facilitate the disposition of petitions for remission or mitigation of forfeiture, after the entry of an order declaring property forfeited to the United States the court may, upon application of the United States, order that the testimony of any witness relating to the property forfeited be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged be produced at the same time and place, in the same manner as provided for the taking of depositions under Rule 15 of the Federal Rules of Criminal Procedure.

(l)(1) Following the entry of an order of forfeiture under this section, the United States shall publish notice of the order and of its intent to dispose of the property in such manner as the Attorney General may direct. The Government may also, to the extent practicable, provide direct written notice to any person known to have alleged an interest in the property that is the subject of the order of forfeiture as a substitute for published notice as to those persons so notified.

(2) Any person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United States pursuant to this section may, within thirty days of the final publication of notice or his receipt of notice under paragraph (1), whichever is earlier, petition the court for a hearing to adjudicate the validity of his alleged interest in the property. The hearing shall be held before the court alone, without a jury.

(3) The petition shall be signed by the petitioner under penalty of perjury and shall set forth the nature and extent of the petitioner's right, title, or interest in the property, the time and circumstances of the petitioner's acquisition of the right, title, or interest in the property, any additional facts supporting the petitioner's claim, and the relief sought.

(4) The hearing on the petition shall, to the extent practicable and consistent with the interests of justice, be held within thirty days of the filing of the petition. The court may consolidate the hearing on the petition with a hearing on any other petition filed by a person other than the defendant under this subsection.

(5) At the hearing, the petitioner may testify and present evidence and witnesses on his own behalf, and cross-examine witnesses who appear at the hearing. The United States may present evidence and witnesses in rebuttal and in defense of its claim to the property and cross-examine witnesses who appear at the hearing. In addition to testimony and evidence presented at the hearing, the court shall consider the relevant portions of the record of the criminal case which resulted in the order of forfeiture.

(6) If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that--

> (A) the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or
>
> (B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section;

the court shall amend the order of forfeiture in accordance with its determination.

(7) Following the court's disposition of all petitions filed under this subsection, or if no such petitions are filed following the expiration of the period provided in paragraph (2) for the filing of such petitions, the United States shall have clear title to property that is the subject of the order of forfeiture and may warrant good title to any subsequent purchaser or transferee.

(m) If any of the property described in subsection (a), as a result of any act or omission of the defendant—

(1) cannot be located upon the exercise of due diligence;

(2) has been transferred or sold to, or deposited with, a third party;

(3) has been placed beyond the jurisdiction of the court;

(4) has been substantially diminished in value; or

(5) has been commingled with other property which cannot be divided without difficulty;

the court shall order the forfeiture of any other property of the defendant up to the value of any property described in paragraphs (1) through (5).

Appendix E

18 U.S.C. § 1964 provides:

Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962.

The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

Appendix E

VA Code § 6.2-305 provides:

Recovery of twice total usurious interest paid; limitation of action; injunction to prevent sale of property pending action; effect of errors in computation.

A. If interest in excess of that permitted by an applicable statute is paid upon any loan, the person paying may bring an action within two years from the first to occur of: (i) the date of the last scheduled loan payment or (ii) the date of payment of the loan in full, to recover from the person taking or receiving such payments:

1. The total amount of the interest paid to such person in excess of that permitted by the applicable statute;

2. Twice the total amount of interest paid to such person during the two years immediately preceding the date of the filing of the action; and

3. Court costs and reasonable attorney fees.

B. If the sale of property in which an interest has been conveyed to secure the payment of the debt is scheduled or anticipated, an injunction may be granted to prevent such sale pending the completion of an action brought pursuant to subsection A.

C. Any creditor who proves that interest or other charges in excess of those permitted by law were imposed or collected as a result of a bona fide error in computation or similar mistake shall not be liable for the penalties

prescribed in this section. In such event, the creditor shall only be liable to return to the borrower the amount of interest or other charges collected in excess of the amount permitted by applicable statute.