UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DEBORAH JACKSON, LINDA GONNELLA, and JAMES BINKOWSKI, on behalf of themselves and the class members described below Plaintiffs v. PAYDAY FINANCIAL, LLC, d/b/a Lakota Cash, Big Sky Cash, and Big $ky Cash; WESTERN SKY FINANCIAL, LLC, d/b/a Western Sky Funding, Western Sky, and Westernsky.com; GREAT SKY FINANCE, LLC, d/b/a Great Sky Cash, Great $ky Cash, and Gsky; RED STONE FINANCIAL, LLC, d/b/a Red Stone Cash; MANAGEMENT SYSTEMS, LLC, d/b/a Gsky; 24-7 CASH DIRECT, LLC; RED RIVER VENTURES, LLC; HIGH COUNTRY VENTURES, LLC; FINANCIAL SOLUTIONS, LLC; MARTIN A. ("Butch") WEBB; and DOES 1-5, d/b/a WS Funding LLC and under other names, Defendants.	)	Case Number: 11−cv−09288 Judge Charles P. Kocoras Magistrate Judge Jeffrey Cole

REPLY IN SUPPORT OF MOTION TO DISMISS OR STAY THE CASE

The question before the Court is straightforward: whether the present case legally can proceed in this forum, in its present form. The answer is similarly straightforward: it cannot. Based on this fact, Defendants Payday Financial, LLC, Western Sky Financial, LLC, Great Sky Finance, LLC, Red Stone Financial, LLC, Management Systems, LLC, 24-7 Cash Direct, LLC, Red River Ventures, LLC, High Country Ventures, LLC, Financial Solutions, LLC, and Martin A. Webb (collectively, the "Payday Defendants") filed a Motion To Dismiss Or Stay The Case [Doc. No. 25] ("Payday Defendants' Motion").[1]

In the Loan Agreement,[2] Plaintiffs agreed: (1) to assert any claims arising out of the agreement in arbitration or, in the alternative, to proceed in Tribal Court; (2) to adjudicate all claims on the Cheyenne River Sioux Reservation; (3) to be bound exclusively by the laws of the Cheyenne River Sioux Tribe; and (4) to forego the class action form and a jury trial.[3]

Plaintiffs seek to avoid each of these obligations in their Response To Motion To Dismiss Or Stay The Case Brought By The Webb Entities [Doc. No. 37] ("Plaintiffs' Response"). Their positions are founded on a misunderstanding and misstatement of the case law and undisputed facts of this case. Furthermore, Plaintiffs' arguments depend on inconsistent positions regarding which law applies – variously embracing Tribal law, federal law, Illinois statutory law, and Illinois common law. These machinations are an effort to avoid the unavoidable: Plaintiffs have agreed to adjudicate their claims outside of the class action mechanism in court.

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[1] Co-Defendant, CashCall Inc. filed a separate Motion to Dismiss in this case on February 24, 2012 [Doc. No. 33]. The Payday Defendants adopt and join in CashCall's arguments.

[2] Defined terms, denoted by capital letters, have the same meanings as provided in the Payday Defendants' Motion.

[3] Because the Plaintiffs have entered into agreements with one of the Payday Defendants, this case differs in significant ways from the regulatory actions that Plaintiffs cite. (*See* Plaintiffs' Response at 1.)

A. Plaintiffs Fail to Refute That Tribal Exhaustion Requires That the Case Be Dismissed or Stayed.

The Payday Defendants' Motion demonstrates that the doctrine of "tribal exhaustion" requires Plaintiffs to assert their claims first to a Tribal arbitrator – or, in the very least, to a Tribal court – before going to federal court. (*See generally* Payday Defendants' Motion at 3-5.) Plaintiffs' response is three-fold: (1) they claim that there are no tribal participants, despite Plaintiffs' own allegations and case law to the contrary; (2) they claim that tribal adjudicative bodies do not have jurisdiction over the case because there is no tribal interest involved, ignoring the cases cited in the Payday Defendants' Motion and Plaintiffs' own Response; and (3) they claim that there is some unspecified "bad faith" at play, even though such bare assertions cannot support their objection. (*See* Plaintiffs' Response at 4-6.)

1. The Payday Defendants Are Tribal Members.

Plaintiffs admit that "Mr. Webb is a member of the Cheyenne River Sioux Tribe" and "is the sole owner and manager of each Webb entity." (Plaintiffs' Response at 1; *see also* Am. Compl. – Class Action [Doc. No. 14] ("Am. Compl.") ¶¶ 17-22, 24-25.) Plaintiffs name Mr. Webb as a defendant and claim that he had personal involvement in the alleged activities. (*See* Am. Compl. ¶¶ 24-25.) However, in making their argument, Plaintiffs ignore the presence of Mr. Webb and contend that this case involves only "non-Indians." (Plaintiffs' Response at 5-6.) Until the Plaintiffs dismiss Mr. Webb from this case, there is not even a colorable argument that only "non-Indians" are parties.

Moreover, even if Mr. Webb were dismissed from the case, Plaintiffs' Response demonstrates that tribal exhaustion is appropriate. According to Plaintiffs, "'tribal courts probably lack jurisdiction over civil cases involving only non-Indians in most situations, ***since it would be difficult to establish any direct impact on Indians or their property***.'" (Plaintiffs'

Response at 5 (quoting *A-1 Contractors v. Strate*, 76 F.3d 930, 939 (8th Cir. 1996)) (emphasis added).) It is not "difficult to establish any direct impact on Indians or their property" in the present case. In fact, Plaintiffs themselves have done so through their description of the involvement and ownership interests of Martin Webb in the entity Payday Defendants.

Furthermore, Plaintiffs' argument about the nature of the entity Payday Defendants is incorrect. Courts have generally held that entities owned by tribes or tribal members take on the tribal characteristics of their owners, even if they are formed under state, rather than tribal, law. *Pourier v. S.D. Dep't of Revenue*, 658 N.W.2d 395, 403-05 (S.D. 2003), *vacated in part on other grounds*, 674 N.W.2d 314 (2004); *see Giedosh v. Little Wound Sch. Bd.*, 995 F. Supp. 1052, 1059 (D.S.D. 1997); *Flat Ctr. Farms, Inc. v. State Dep't of Revenue*, 49 P.3d 578, 581-82 (Mont. 2002); *Colorado v. Cash Advance*, No. 05CV1143, slip op. at 10 (Denver Dist Ct. Feb. 18, 2012) (same) (attached at Exhibit A). To decide otherwise ignores Congressional recognition of Indian corporations, federal policy favoring economic development on reservations, and other examples where entities assume the identities of their owners. *See Pourier*, 658 N.W. 2d at 404-05. To decide otherwise prevents the Tribe from regulating the on-Reservation commercial activity of its own members who happen to act through the entity form.

Against the one thirty-year-old case that Plaintiffs cite, *Airvator, Inc. v. Turtle Mountain Mfg. Co.*, 329 N.W.2d 596 (N.D. 1983), there are several that take the opposite view and superimpose one's identity onto his/her entity. *See, e.g.*, *Eastern Navajo Indus., Inc. v. Bureau of Revenue*, 552 P.2d 805 (N.M. App. 1976); *see also Cosgrove v. Bartolotta*, 150 F.3d 729 (7th Cir. 1998) (LLC assumes owner's citizenship for diversity-jurisdiction purposes); *Guides, Ltd. v. Yarmouth Group Property Mgmt., Inc.*, 295 F.3d 1065, 1072 & n.2 (10th Cir. 2002) (corporation assumes racial characteristics of owner); *Gersman v. Group Health Ass'n, Inc.*, 931 F.2d 1565

(D.C. Cir.1991), *vacated on other grounds*, 502 U.S. 1068 (1992) (same); *Hudson Valley Freedom Theater, Inc. v. Heimbach*, 671 F.2d 702, 706 (2d Cir. 1982) (same); *Howard Security Services v. Johns Hopkins Hospital*, 516 F. Supp. 508 (D. Md. 1981) (same); 26 C.F.R. § 301.7701-2(a) (single-member LLCs assume owner's identity for tax purposes).

2. Important Tribal Interests Are Involved in This Case.

Plaintiffs' Response appears to accept the proposition that, if a Tribal member is involved in this case, there exists a Tribal interest sufficient to confer subject-matter jurisdiction on Tribal courts. (*Cf.* Plaintiffs' Response at 4-5.) The previous discussion settles this question.

As explained in the Payday Defendants' Motion, the Tribe in this case also has an interest in the integrity of its courts and the application of it laws to economic activity within its boundaries. *Cf. Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 16 (1987) ("[T]ribal courts are best qualified to interpret and apply tribal law.").

3. Bald Allegations of "Bad Faith" Are Not Enough to Avoid Tribal Exhaustion.

It is true that Courts will not apply tribal exhaustion where "an assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith." *Burlington N. R.R. Co. v. Red Wolf*, 196 F.3d 1059, 1065 (9th Cir.1999). Plaintiffs claim that "the attempt to assert tribal authority now, and the inclusion of such provisions in the contract, are nothing more than acts of bad faith on the part of the defendants." (Plaintiffs' Response at 6.) Putting aside for the moment the fact that Defendants' actions do not constitute bad faith under any reasonable definition of the term, Plaintiffs' assertion fails because they misunderstand the "bad faith" exception.

As one court put it, "the bad faith exception is not as broad as Plaintiff contends – . . . it is meant to apply primarily to actions of the Tribal Court, not the actions of litigants or other

branches of tribal government." *Grand Canyon Skywalk Dev., LLC v. 'SA' NYU WA*, No. CV12–8030–PCT–DGC, 2012 WL 911549, at *2 (D. Ariz. March 19, 2012); *see id.* at *2-7 (citing cases). Plaintiffs do not even allege that the Tribal arbitrators or the Tribal court have acted in bad faith. In fact, the very case that Plaintiffs cite in this context knocks the legs out from under their argument. (*See* Plaintiffs' Response at 6 (citing *Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Housing Auth.*, 207 F.3d 21, 33-34 (1st Cir. 2000)).) As the First Circuit in *Ninigret* explained, where a party "offers no evidence of affirmative misleading or other misconduct . . . we must presume the tribal court to be properly constituted, competent, and impartial." *Ninigret*, 207 F.3d at 34. Moreover, "[m]erely crying 'foul' is not enough to show bad faith." *Ninigret*, 207 F.3d at 34. Therefore, Plaintiffs' bad faith argument falters.

B. The Plaintiffs Fail to Offer a Viable Basis for Invalidating the Arbitration Agreement.

1. Tribal Law Applies

The arbitration agreement in the parties' loan documents adopts Cheyenne River Tribal law. Plaintiffs do not refute the Payday Defendants' contention that Cheyenne River Sioux Tribal Courts look to federal law, such as the Federal Arbitration Act (or "FAA"), for guidance in applying Tribal law, or that the procedural provisions of the FAA, such as 9 U.S.C. § 3, dictate the manner in which this Court should examine the present Motion, even though the parties' substantive rights are governed by Tribal law.

Plaintiffs simply assume that Tribal law does not apply. The basis for this contention appears to be contained in a footnote which misunderstands the status of Tribal law and the Payday Defendants' obligations. (*See* Plaintiffs' Response at 7 n.4.) First, Native American Tribes are not "foreign nations"; they are "***domestic*** dependent nations." *United States v. Jicarilla Apache Nation*, --- U.S. ----, 131 S. Ct. 2313, 2325 (2011) (emphasis added).

Therefore, Federal Rule of Civil Procedure 44.1, by its terms, does not apply. *See Sunstar, Inc. v. Alberto-Culver Co.*, 586 F.3d 487, 495 (7th Cir. 2009). Even if Rule 44.1 did apply, the Court's reliance on it is discretionary. *See Bodum USA, Inc. v. La Cafetiere, Inc.*, 621 F.3d 624 (7th Cir. 2010).

Moreover, a court can ascertain the laws of the Cheyenne River Sioux Tribe the same way it would for a state: survey the statutes and case law, both which are published and publicly available.[4] *See, e.g.*, WESTLAW database CRSIOUX-CS. Even when it comes to foreign law from obscure countries, the Seventh Circuit has expressed a preference for these types of materials over expert testimony and assertions by the parties. *See Sunstar*, 586 F.3d at 495-96.

As explained in the Payday Defendants' Motion, the Tribe has not adopted a distinct arbitration code. In response, Plaintiffs would like to throw out Tribal law altogether and put in its place Illinois common law. Inexplicably, Plaintiffs believe that a clause in the contract disclaiming all state laws precludes application of Illinois statutory law but somehow allows the application of Illinois common law.[5]

While there is no reasoned basis for this approach, Plaintiffs' purpose is clear: they want the law that, as much as possible, decreases their chances of having to honor their contractual obligation to arbitrate. However, the proper approach in such a circumstance is for the Court to do what it typically does when faced with an unanswered question of law – do its best to ascertain that law based on indications in available sources. *Cf. Auto-Owners Ins. Co. v.*

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[4] These materials are available in libraries throughout the country.

[5] Although incorrect, an assertion that the Illinois Arbitration Act applies rather than Illinois common law at least has some basis in logic. *Cf.* 70 ILCS 5/1 (2011).

Websolv Computing, Inc., 580 F.3d 543, 547-48 (7th Cir. 2009) (discussing similar approach where Iowa law, which was selected by the parties, had not addressed a specific question).

In trying to fill in the gaps of Tribal law, Tribal and federal courts look to federal law. *See* Cheyenne River Sioux Tribe R. Civ. P. 1(c) ("Any procedures or matters which are not specifically set forth herein shall be handled in accordance with the Federal Rules of Civil and Appellate Procedure, insofar as such are not inconsistent with these rules, and with general principles of fairness and justice as prescribed and interpreted by the court of the Cheyenne River Sioux Tribe."); *see also Ducheneaux v. Cheyenne River Sioux Tribe Election Bd.*, 2 Am. Tribal Law 39 (Cheyenne River Sioux C.A. May 25, 1999); *Deschuquette v. Cheyenne River Sioux Tribe Housing Auth.*, 1 Am. Tribal Law 53 (Cheyenne River Sioux C.A. Feb. 20, 1998) (appointment of counsel); *Stillaguamish Tribe of Indians v. Pilchuck Group II, L.L.C.*, No. C10–995RAJ, 2011 WL 4001088, at *6 (W.D. Wash. Sept. 7, 2011); *cf.* 116 AMJUR. TRIALS § 395, *Arbitration in Indian Country—Settling Business Disputes with Native American Tribes* (discussing order of persuasiveness of authority).

Therefore, any gaps in Tribal law regarding arbitration should be filled with federal law, namely the FAA.

2. The Agreement to Arbitrate Is Legal and Binding.

Plaintiffs admit that "under the FAA illegality of the contract as a whole due to noncompliance with licensing requirements may not void the arbitration clause." (Plaintiffs' Response at 12). Yet again, however, they attempt to interject Illinois common law into the equation, even though they have no reasonable basis for doing so.

3. The Arbitration Agreement Is Not Racially Discriminatory

The appointment of Tribal members or Tribal council members as adjudicators is a well-established and accepted practice. *See Ninigret Dev. Corp.*, 32 F. Supp. 2d at 504, 505 (1999),

rev'd on other grounds, 207 F.3d 21; *Clement v. Le Compte*, No. 93–009–A (Chy. Rv. Sx. Tr. Ct. App. 1994). In fact, before Plaintiffs can expect to prevail by impugning or maligning Tribal institutions and members, they must have evidence which supports their thinly veiled assumption that Tribal institutions and members would be biased or incapable. *See Ninigret*, 207 F.3d at 34 ("The requirements for this exception are rigorous: absent tangible evidence of bias – and none has been proffered here – a party cannot skirt the tribal exhaustion doctrine simply by invoking unfounded stereotypes.").

Rather than evidence of bias or incompetence, the selection of Tribal Elders and council members actually increases the chances of a fair and accurate application of Tribal law. In other contexts, courts have enforced arbitration clauses which name members of a particular ethnic group based on their knowledge of the applicable law. *See Meshel v. Ohev Sholom Talmud Torah*, 869 A.2d 343 (D.C. 2005) (enforcing contract provision under which certain claims are to be referred to a "Beth Din" of Orthodox Jewish rabbis for a binding decision according to Jewish law); *see id.* at 363-64 (citing cases).

Plaintiffs' position – that the mere selection of a Tribal adjudicator creates an impermissible racial distinction – if accepted, completely precludes the selection of any Tribal-based adjudicative body from ever being selected to adjudicate a matter. This simply is not the standard. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 66 (1978) ("Nonjudicial tribal institutions have also been recognized as competent law-applying bodies.").

Finally, as the Payday Defendants argued previously, even if Plaintiffs could establish that this Choice of Arbitrator clause was in some way deficient, that would not invalidate the entire agreement. Instead, as required by the Arbitration Agreement's severance clause, "[i]f any of this Arbitration Provision is held invalid, the remainder shall remain in effect." (Loan

Agreement at 6.); *see Mori*, 2011 WL 2518966, at *5 (noting that severance clause allowed court to strike portion of Arbitration Agreement regarding the identity of the Arbitrator). In such a case, the Court can designate an Arbitrator. *See* 9 U.S.C. § 5 (2006).[6]

C. The Plaintiffs Cannot Invalidate the Forum-Selection Clause.

The Payday Defendants' Motion demonstrates that the forum-selection clause is enforceable under Tribal and federal law. Plaintiffs' Response shows that it is also enforceable under state law. For example, Plaintiffs cite *Calanca v. D & S Mfg. Co.*, 510 N.E.2d 21, 23 (1st Dist. 1987), for the proposition that "a forum selection clause is not enforceable where enforcement would contravene the strong public policy of the forum or the chosen forum is seriously inconvenient for the trial of the action." (Plaintiffs' Resp. at 9.) Although Plaintiffs later claim that there is no value in cases such as *Bremen v. Zapata Off–Shore Co.*, 407 U.S. 1 (1972), the court in *Calanca* disagreed; it cited the *Bremen* case for the same propositions that the Payday Defendants did in their Motion, as well as the statement cited by Plaintiffs above.

Ultimately, Plaintiffs' challenge to the forum-selection clause fails because they have not met their burden in establishing that the enforcement of the forum-selection clause contravenes a strong public policy of the forum, or that the chosen forum is sufficiently inconvenient. *Calanca*, 510 N.E.2d at 23; *see also Penn, L.L.C. v. New Edge Network, Inc.*, No. 03 C 5496, 2003 WL 22284207, at *1 (N.D. Ill. Oct. 3, 2003). Plaintiffs fail to identify any Illinois cases which indicate that there is a contradictory "strong public policy" implicated in this case. *But cf. Amaro v. Capital One Bank*, No. 97 C 4638, 1998 WL 299396, at *7-8 (N.D. Ill. May 21, 1998)

[6] In the spirit of compromise, and in an effort to address many of the plaintiffs' stated concerns, the Payday Defendants offered to arbitrate in Illinois. (*See, e.g.*, Payday Defendants' Moton at 8.) This was not, as Plaintiffs contend, some sort of concessions by the Payday Defendants. (*See* Plaintiffs' Response at 6.) It was, rather, an effort to resolve this issue without the necessity of the Court ruling on a contested motion.

(Grady, J.) (under Illinois law, consumer protection and usury laws do not constitute public interests). Plaintiffs also fail to demonstrate a sufficient level of uncontemplated inconvenience. *Cf. Calanca*, 510 N.E.2d at 23 ("[E]ven when one party claims inconvenience, if both parties freely entered the agreement contemplating such inconvenience should there be a dispute, one party cannot successfully argue inconvenience as a reason for rendering the forum clause unenforceable."). Because the agreement clearly and unambiguously identifies the location for resolution of any disputes, Plaintiffs cannot claim to have been surprised in this regard.

D. Illinois State Law Does Not Apply To This Case.

The Payday Defendants' Motion points out that the Loan Agreement signed by Plaintiffs contains choice-of-law provisions selecting the laws of the Cheyenne River Sioux Tribe. (*See* Plaintiffs' Motion at 13 (citing Loan Agreement 2, 5, 6.) Plaintiffs argue that Illinois law governs despite the parties' choice. Even though this Court is directed by precedent to apply Illinois choice-of-law rules, "Illinois courts generally adhere to a contract's choice of law provisions." *Sound of Music Co. v. Minnesota Min. & Mfg. Co.*, 477 F.3d 910, 915 (7th Cir. 2007); *see also Mori v. East Side Lenders, LLC*, No. 1:11–CV–01324, 2011 WL 2518966, at *5 (N.D. Ill. June 24, 2011) (citing *Auto–Owners Ins. Co. v. Websolv Computing, Inc.*, 580 F.3d 543, 547 (7th Cir. 2009)).[7]

"The rule in Illinois is that 'the parties' choice of law will be given effect unless it would violate fundamental Illinois public policy and Illinois has a materially greater interest in the

[7] The rule is similar under Tribal law: "In civil disputes, the governing law is determined by many factors, one of which may include a specific choice-of-law provision in a contract. While tribal codes do not replicate the comprehensive statutory schemes legislated by states, tribal courts generally apply competing laws in this order of preference: (1) Contractual choice-of-law, (2) Federal law, (3) Tribal constitutions, charters, ordinances, resolutions, usages, and customs (unless contradicted by federal law), (4) State law." 116 AMJUR. TRIALS § 395, *Arbitration in Indian Country—Settling Business Disputes with Native American Tribes*.

litigation than the chosen state." *Amaro v. Capital One Bank*, No. 97 C 4638, 1998 WL 299396, at *7-8 (N.D. Ill. May 21, 1998) (Grady, J.) (quoting *Demitropoulos v. Bank One Milwaukee, N.A.*, 915 F. Supp. 1399, 1413 (N.D. Ill. 1996). Illinois "courts [have] refused to override the contractual choice of law provision in favor of the Illinois consumer fraud statute." *Amaro*, 1998 WL 299396, at *8 (citing *Demitropoulos*, 915 F. Supp. at 414; *Potomac Leasing Co. v. Chuck's Pub, Inc.*, 156 Ill. App. 3d 755, 758-759, 509 N.E.2d 751, 754 (2nd Dist. 1987). The cases cited by Plaintiffs are inapposite because they discuss the public policy surrounding Illinois' franchise law. (*See* Plaintiffs' Response at 7 (citing *Bixby's Food Systems, Inc. v. McKay*, 193 F. Supp. 2d 1053, 1060 (N.D. Ill. 2002), and other cases).

E. Plaintiffs' Class Claims Should Be Dismissed Based on the Class-Action-Waiver Provision in the Loan Agreement.

Plaintiffs, citing *Kinkel v. Cingular Wireless, LLC*, 223 Ill. 2d 1, 857 N.E.2d 250, 264 (2006), contend that the class-action waiver in the Loan Agreement is substantively unconscionable. (*See* Plaintiffs' Response at 14.) According to *Kinkel*, substantive unconscionability:

> concerns the actual terms of the contract and examines the relative fairness of the obligations assumed. Indicative of substantive unconscionability are contract terms so one-sided as to oppress or unfairly surprise an innocent party, an overall imbalance in the obligations and rights imposed by the bargain and significant cost-price disparity.

Kinkel, 857 N.E.2d at 267.

Pursuant to the choice-of-law provision discussed above, *Kinkel* does not apply to the Loan Agreement in this case and, in any event, issues regarding the class-action waiver will be addressed by the tribunal that ultimately hears this case.

Nonetheless, *Kinkel* has been overruled in part by the United States Supreme Court's decision in *AT&T Mobility LLC v. Concepcion*, --- U.S. ----, 131 S. Ct. 1740 (2011). Section 2

of the FAA "permits agreements to arbitrate to be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability, but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *Concepcion*, 131 S. Ct. at 1746 (quotation marks omitted). *Concepcion* expanded on this rule and held that states may not institute "rules that stand as an obstacle to the accomplishment of the FAA's objectives," including its "principal purpose" of "ensur[ing] that private arbitration agreements are enforced according to their terms." 131 S. Ct. at 1746. Therefore, *Kinkel*'s unconscionability analysis cannot invalidate the agreed-upon terms of the Loan Agreement's arbitration clause.[8]

In any event, even under the *Kinkel* analysis, the class-action-waiver provision in the Loan Agreement is not substantively unconscionable. In determining whether a class-waiver is unconscionable, the Court in *Kinkel* considered whether the claim in question would be obvious to a consumer. *See* 857 N.E.2d at 268. The Court held that a complex liquid damages theory would not be obvious to the average consumer. *See Kinkel*, 857 N.E.2d at 268. Here, however, Plaintiffs simply claim that they were charged too much interest. They are told upfront, the amount and percentage of interest involved with the loan. The concept of usury is centuries-old and it requires no analysis to determine the usury rates they invoke. Therefore, the class action waiver is not unconscionable based on obviousness concerns.

Kinkel also considered the amount of each plaintiff's claim compared with the cost of individualized litigation. *See* 857 N.E.2d at 268. The *Kinkel* Court found that a litigation cost of

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[8] As discussed repeatedly in the context of the Payday Defendants' Motion, these rules apply in this case because Tribal law looks to and incorporates federal law on such matters.

$125 – where the claim was $150 – militated in favor of a finding of unconscionability. *See Kinkel*, 857 N.E.2d at 268.

The Loan Agreement in the present case states that the filing and arbitrator fees will be covered by the lender. (*See* Amended Compl. – Class Action [Doc. No. 14] , Ex. A at 5.) Therefore, the cost of litigation is greatly reduced. *Cf. Kinkel*, 857 N.E.2d at 269-72 (citing cases demonstrating that payment of litigation costs on behalf consumers reduces chances of a finding of unconscionability).

Not only are costs lower for the present Plaintiffs, they also have a great deal more to gain in litigation against a Payday Defendant. For example, each Plaintiff asks that their loans $2525 loans be invalidated and that all amounts paid to date be refunded. (*See* Amended Compl. – Class Action [Doc. No. 14] at 11-15 & ¶¶ 48-50.) Plaintiffs also ask for statutory damages, punitive damages, and reimbursement of attorney's and costs of litigation. (*See* Amended Compl. – Class Action at 11-15.) All told, rather than the $150 at stake in *Kinkel*, each Plaintiff seeks to recover several thousand from the Payday Defendants. Therefore, to the extent that *Kinkel* applies in this case, the class action waiver in the Loan Agreement is not unconscionable under the analysis from that case.

II. CONCLUSION

WHEREFORE, Defendants Payday Financial, LLC, Western Sky Financial, LLC, Great Sky Finance, LLC, Red Stone Financial, LLC, Management Systems, LLC, 24-7 Cash Direct, LLC, Red River Ventures, LLC, High Country Ventures, LLC, Financial Solutions, LLC, and Martin A. Webb respectfully request that the Court dismiss this case or, in the alternative, stay the matter until Arbitration can be completed under the terms of the Arbitration Agreement.

DATED this 4th day of April 2012.

Respectfully submitted,

Payday Financial, LLC, Western Sky Financial, LLC, Great Sky Finance, LLC, Red Stone Financial, LLC, Management Systems, LLC, 24-7 Cash Direct, LLC, Red River Ventures, LLC, High Country Ventures, LLC, Financial Solutions, LLC, and Martin A. Webb,

Defendants.

By: /s/ Jeffrey T. Karek .
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Certificate of Service

Jeffrey T. Karek, an attorney, hereby certifies that on **April 4, 2012**, service of a true and correct copy of this document and any referenced exhibits was accomplished pursuant to ECF on all parties who are Filing Users.

/s/ Jeffrey T. Karek .
Jeffrey T. Karek

EXHIBIT A

<table>
<tr><td>DISTRICT COURT, CITY AND COUNTY OF DENVER,
STATE OF COLORADO
520 W. Colfax Ave.
Denver, Colorado 80204</td><td>EFILED Document
CO Denver County District Court 2nd JD
Filing Date: Feb 18 2012 10:47AM MST
Filing ID: 42592187
Review Clerk: Nik Zender</td></tr>
<tr><td>STATE OF COLORADO, et al.,

Applicants,

v.

CASH ADVANCE, et al.,

Respondents.</td><td>Case No. 05CV1143

COURTROOM 5B</td></tr>
<tr><td colspan="2">AMENDED ORDER</td></tr>
</table>

For the reasons articulated below, and based on the Colorado Supreme Court's remand in *Cash Advance v. State ex rel. Suthers*, 242 P.3d 1099 (Colo. 2010), and on the hearing I conducted on November 22, 2011 in accordance with that remand, the motions to dismiss filed on July 20, 2005 and November 16, 2006, by Respondents Miami Nations Enterprises, Inc., and SFS, Inc., are GRANTED, the administrative subpoenas issued by Applicants to those Respondents are HEREBY QUASHED, the contempt citations aimed at those Respondents are HEREBY DISCHARGED and the bench warrants for the arrest of those Respondents' tribal officers are HEREBY VACATED.[1]

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[1] This Amended Order corrects my inadvertent inversion of the 1% fee discussed in Part IV, contained in my original Order dated February 13, 2012. I apologize to counsel and their clients for that mistake. Although this correction makes the "sham" issue closer as a factual matter, I persist in my conclusions that the State has not proved that the tribal

I. INTRODUCTION

In 2003, the Colorado Attorney General's Office began getting complaints from Colorado residents about two different online businesses making so-called "payday loans." The complainants reported that the two websites through which they obtained these loans listed the businesses as "Cash Advance" and "Preferred Cash Loans," respectively, and listed very similar addresses for both businesses in Carson City, Nevada. Cash Advance's address was listed as "2533 North Carson Street, Suite 4976," while Preferred Cash Loans was listed as "2533 North Carson Street Suite 5024." No entities with these names or any individuals or entities doing business as these names were licensed to make payday loans in Colorado, as required by § 5-3.1-116 of the Colorado Deferred Deposit Loan Act, §§ 5-3.1-101 et seq. ("the DDLA"). It also appeared from the consumer complaints that these two online payday loan businesses had committed several substantive violations of the DDLA, including violating the prohibition against renewing loans, contained in § 5-3.1-108(1).

Accordingly, in November 2004, the Attorney General's Office, on behalf of Laura Udis, the administrator of the Colorado Uniform Commercial Code (collectively, "the State"), sent cease and desist letters to the two businesses at their Nevada addresses. Cash Advance never responded. Preferred Cash Loans did respond, indicating that it "adjusted the consumer's account and therefore considered the matter closed." Verified Ex Parte Application, filed February 14, 2005, ¶ 8, ff. 000015.[2]

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entities are currently sham owners of these payday loan businesses, and that even if they were that characterization would not displace their tribal immunity.

[2] "ff. ____" refers to the Bates-stamped pages of the official appellate record.

The State then determined that there was probable cause to believe both Cash Advance and Preferred Cash Loans had engaged and/or were still engaging in violations of the DDLA and the Colorado Consumer Protection Act, §§ 6-1-101 et seq., and therefore directed that administrative subpoenas be issued and served on both businesses pursuant to §§ 5-6-106(1) and 6-1-108. Those administrative subpoenas were issued on January 7, 2005, each listing the targets, respectively, as Cash Advance and Preferred Cash Loans.

The administrative subpoenas directed these two businesses to produce, among other things, their "articles of incorporation, bylaws, corporate or other minutes, corporate reports, trade name registrations or other organizational documents," all documents relating to their "officers, directors, owners, members or other principals," and all documents relating to their "licenses, permits, notifications, bonds, authorities or other filings [they] received from or submitted to any governmental or regulatory authority." Administrative Subpoenas, Exhibits A, ¶¶ 1, 2 and 4, at ff. 000009 and 000022. The administrative subpoenas also asked for many other categories of documents related directly to the payday loan businesses, including any pleadings from any legal proceedings, any consent decrees, training and operating manuals, advertising and marketing materials, Internet materials, and, perhaps most broadly, "all documents constituting, concerning, reflecting, referring, or relating to all loans you offered or made to any Colorado consumer." *Id*. at ¶ 9, ff. 000010 and 000023. The administrative subpoenas directed Cash Advance and Preferred Cash Loans to provide these documents to the State by January 25, 2005.

At these early stages of the investigation the State did not know who or what these target businesses were, that is, whether they were entities or individuals or other entities doing business as these names. All the State knew was that Colorado consumers had obtained payday loans from websites that used the names "Cash Advance" and "Preferred Cash Loans," and the subpoenas

were therefore directed to these two target names. The subpoenas were served in Nevada, by the Carson City Sheriff, at the Carson City addresses that had appeared on the websites, and to which the cease and desists letters had been sent. They were served on a person named Jamie Webster, described in the returns of service as the businesses' "Manager." ff. 000012 and 000025.

Neither of the targets responded to the subpoenas, and the State brought an action seeking orders enforcing the subpoenas pursuant to §§ 5-6-104 and 6-1-109(1).[3] On February 4, 2005, my predecessor in Courtroom 280 entered Orders under §§ 5-6-106(3) and 6-1-109(1) enforcing the subpoenas.[4] Those enforcement Orders directed Cash Advance and Preferred Cash Loans to respond to the administrative subpoenas within seven days after service of the Order, on pain of contempt. Although the enforcement Orders by their terms purported to allow service of them by certified mail, the State also served them personally, again at the Carson City addresses and again on Jamie Webster as "Manager." ff. 000034 and 000042.

Neither Cash Advance nor Preferred Cash Loans responded to the enforcement Orders, and on June 20, 2005, the State filed verified motions for the issuance of contempt citations. By this time, however, the State had discovered that the Nevada addresses for these two businesses corresponded to the registered addresses of two Nevada corporations. The Cash Advance address was the registered address of a Nevada corporation called C.B. Services Corp. ("CBSC"). The Preferred Cash Advance address was the registered address of a Nevada corporation called Executive Global Management, Inc. ("Executive"). The State therefore sought contempt citations

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[3] Actually, the State brought separate actions against the entities—05CV1143 against Cash Advance and 05CV1144 against Preferred Cash Loans. The two actions were consolidated into 05CV1143 by Order dated July 22, 2005, ff. 000076.

[4] This case is a Courtroom 280 case. This Order is captioned in Courtroom 5B because I moved to that criminal courtroom in January 2012. Because I presided over the tribal immunity hearing in November 2011, Judge Elliff, who now presides in Courtroom 280, and I agreed that I should retain this case for the limited purpose of ruling on tribal immunity and related issues.

not just against Cash Advance and Preferred Cash Loans but also against CBSC, Executive, and Executive's president, James Fontano.[5] ff. 000030 and 000038.

My predecessor issued both citations on June 20, 2005, returnable to July 22, 2005. ff. 000046-51. The State served the citations in Nevada on CBSC, Executive and Fontano, all by serving Laughlin & Associates, which the returns describe as these targets' "Resident Agent." ff. 188, 189, 204 and 205.

On July 20, 2005, two days before the return date, two tribal corporations—Miami Nations Enterprises, Inc. ("MNE") and SFS, Inc. ("SFS") (together, "the tribal entities")—responded to the contempt citations with the subject motions to dismiss, claiming that they do business as Cash Advance and Preferred Cash Loans, respectively, that they own the payday businesses targeted by the administrative subpoenas, that they are wholly-owned subdivisions of federally-recognized Indian tribes, and that they are therefore immune from the subpoenas and enforcement orders under the doctrine of tribal sovereign immunity.[6] In particular, MNE claims it is an arm of the Miami Tribe of Oklahoma, a federally-recognized Indian nation of the Miami people. SFS claims it is an arm of the Santee Sioux Nation, a federally-recognized Indian nation of the Santee Sioux people.

For almost two years the parties then wrangled over the question of whether the tribal entities could be forced to produce some preliminary information bearing on the tribal immunity issue. The tribal entities took the position that they were immune even from these preliminary requests, but nonetheless voluntarily produced certain documents which they claimed demonstrated their immunity, including tribal constitutions, ordinances, resolutions and licenses.

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[5] The State originally also sought a citation against Mr. Fontano as president of CBSC, but later admitted he was only president of Executive.

After a hearing on March 5, 2007, my predecessor concluded, in a ruling from the bench, that tribal immunity did not apply at all to administrative subpoenas to investigate tribal activities conducted outside tribal lands. He therefore found that the tribal entities were not immune from the subject administrative subpoenas, denied the motions to dismiss, and issued bench warrants for the arrest of the chief executive officer of MNE and the treasurer of SFS (on whom alias citations had since been served). The tribal entities filed an interlocutory appeal, and my predecessor stayed the bench warrants pending the appeal.

The court of appeals reversed, concluding that tribal immunity does in fact cover administrative subpoenas directed to activities off tribal lands. *State ex. rel. Suthers v. Cash Advance*, 205 P.3d 389 (Colo. App. 2008). It remanded the matter for a determination of whether these two tribal entities are "arms" of their respective Indian nations, setting forth an eleven-part test to make that determination, a test it borrowed from a dissent in a Washington state case. 205 P.3d at 405-406, *citing Wright v. Colville Tribal Enter. Corp.*, 147 P.3d 1275, 1288 (Wash. 2006) (Johnson, J., dissenting). The court of appeals also addressed four other issues to guide the trial court on remand. It held: 1) the trial court had broad authority to compel the tribal entities to produce information relevant to the tribal immunity issue; 2) the individual officers of the tribal entities are not immune even if the tribal entities themselves are immune; 3) the trial court must consider whether the tribes waived tribal immunity for their entities in any fashion, whether by tribal resolution, contracts with consumers or representations made to any third-party; and 4) the State has the burden on remand to prove, by a preponderance of the evidence, that the tribal entities are not immune.

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[6] Actually, this initial motion to dismiss was filed only by MNE. SFS first entered its appearance in the case in a joint "Response to Applicants' Motion to Compel," filed February 27, 2006. Both tribal entities joined in the second motion to dismiss filed November 20, 2006.

The parties cross-petitioned for certiorari. The State sought review of the court of appeals' conclusions that tribal immunity applies to these administrative subpoenas and that the State has the burden of disproving immunity. The tribal entities sought review of the balance of the court of appeals' conclusions (broad discovery, use of the 11-part test for being a tribal "arm," officer immunity, and waiver). The Colorado Supreme Court granted certiorari on each of these six issues.[7]

It concluded: 1) tribal immunity does apply to administrative subpoenas directed at activities off tribal lands; 2) whether the tribal entities are immune depends on whether they are "arms" of the tribes, which in turn is to be determined by a three-part test; 3) officers of immune tribal entities are immune for acts they take within the scope of their tribal authority; 4) the State has the burden of proving, by a preponderance, that the tribal entities are not immune; 5) waivers of tribal immunity must be explicit and unequivocal, and here any agreements the tribal entities had with consumers did not waive tribal immunity as to this investigative action; and 6) the tribal entities have waived immunity for the limited purpose of determining whether they are arms of the tribe, and the State may therefore conduct additional threshold discovery but only to the extent that that discovery is tailored to fall within this limited waiver. The Court remanded the case for a determination of whether the State is entitled to additional discovery under the limited waiver holding, and then whether the tribal entities are arms of the tribes under the announced three-part test.

[7] The Court actually granted certiorari on seven issues, breaking up the burden of proof issue into two parts: whether the court of appeals erred in assigning the burden to the State and whether the court of appeals erred in setting that burden at a preponderance. 242 P.3d at 1105-06, nn. 6 & 7.

On remand, the State sought, and the tribal entities resisted, additional discovery. I granted those requests in part and denied them in part, based on findings I made about whether the additional discovery was tailored to the limited waiver. Order dated August 5, 2011.

At the hearing held on November 22, 2011, neither side called any witnesses, but both sides offered additional exhibits, including those the State obtained in the new round of discovery. I ruled on objections to those additional exhibits, admitting some and excluding others. Counsel for the parties then proceeded to make arguments on whether, given all the admitted exhibits, new and old, the State had met its burden of proving that either of the tribal entities was not an "arm" of its respective tribe, under the three-part test. For the reasons set forth below, I agree with the tribal entities that the State has not met its burden of proving that the tribal entities are not arms of their tribes. I also find that the tribal entities have not waived their immunity. I therefore conclude that the tribal entities are immune, and thus quash the administrative subpoenas and discharge the contempt citations.

II. TRIBAL IMMUNITY GENERALLY

The Court discussed at length the origins of tribal immunity, and the general contours of its application. I summarize that discussion here only to put my findings and conclusions into context.

Indian tribes were of course governing themselves in the New World long before the territorial claims of European colonial powers. Their sovereignty was recognized, if inconsistently and seldom with any fidelity, not just by those European powers but also by the nascent United States. Indeed, the United States Constitution expressly recognizes the existence of Indian tribes.[8]

[8] There are three references to Indians in the Constitution. The first is in the apportionment section of Article I, which provides that "Indians not taxed" are not to be counted for apportionment purposes. U.S. CONST., art. I, § 2, cl. 3. The second reference is in the Commerce Clause, which empowers Congress to "regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes." U.S. CONST., art. I, § 8, cl. 3. The third reference is in the

The United States Supreme Court held as early as 1831 that congressionally-recognized Indian nations retained their sovereignty even as those nations' ancestral lands became absorbed into the United States. *Cherokee Nation v. Georgia*, 5 Pet. (30 U.S.) 1 (1831).

Like all sovereignty vis-à-vis the United States, Indian sovereignty depends entirely on whether Congress has recognized a tribe as a sovereign nation, and whether it continues to do so. Any Indian nation's tribal immunity could be limited or even completely abrogated tomorrow if Congress chose to do so, though such limitations or abrogation must be express and cannot be implied. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978).

Like any sovereign, congressionally-recognized Indian nations are immune from suit, meaning that they can be sued in the courts of the United States or in any state courts only if Congress expressly permits such a suit or the Indian nation waives immunity and consents to the suit. *Kiowa Tribe of Okla. v. Manufacturing Techs., Inc.,* 523 U.S. 751, 754 (1998).

Six corollaries flow from these principles of tribal immunity. First, tribal immunity knows no territorial bounds. That is, in the absence of congressional limitations on tribal immunity, federally-recognized Indian nations are immune from suit period, whether the subject of the suit is activity on or off Indian lands. 242 P.3d at 1107, *citing Kiowa, supra,* 523 U.S. at 745-55.

Second, enforcement actions, unlike criminal prosecutions, are "suits" to which federally-recognized Indian nations are immune. Indian nations and their members are subject to non-discriminatory application of state and federal criminal laws for their conduct off Indian lands, *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973), but they cannot be forced in American courts to respond to civil suits, and enforcement actions are civil suits. 242 P.3d at 1108,

Fourteenth Amendment, but this reference simply revises the apportionment language to take out the three-fifths provision but retain the "Indians not taxed" provision. U.S. CONST., amend. XIV, § 2.

citing Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 498 U.S. 505, 510-11 (1991).

Third, the Colorado Supreme Court recognized, as has the handful of federal courts addressing the matter, that tribal immunity from enforcement actions includes tribal immunity from enforcement of the sort of administrative subpoenas at issue here. 242 P.3d at 1108, *citing United States v. James*, 980 F.2d 1314, 1319 (9th Cir. 1992), and *Catskill Dev., LLC v. Park Place Entm't Corp.*, 206 F.R.D. 78, 86 (S.D.N.Y. 2002).

Fourth, tribal immunity applies to a tribe's governmental and commercial activities alike. That is, a federally-recognized Indian nation cannot be sued in state or federal courts for any of its activities, whether or not those activities relate to tribal governance or to a commercial enterprise. Not only has every federal court of appeals addressing this issue so concluded, but the United States itself has also conceded that a tribe does not lose its immunity simply by engaging in a business through a corporate entity. On the contrary, there is a rich history of federal Indian law whose central premise is that, until and unless Congress decides otherwise, Indian tribes must be free to engage in economic activities in order to generate revenues to support tribal government and services. 242 P.3d at 1107, *citing* Matthew L.M. Fletcher, *In Pursuit of Tribal Economic Development as a Substitute for Reservation Tax Revenue*, 80 N.D. L. REV. 759 (2004).

Because of the regulatory confluence between business and law in and among the United States, these critical tribal economic activities must often be conducted through business entities recognized by state law—corporations, limited liability companies, partnerships, etc. Tribes must therefore be permitted to engage in businesses through these kinds of legal entities without risking their immunity. This is why this threshold question—whether tribes necessarily lose their

immunity when they act through business entities—has been so resoundly answered in the negative.

Instead of depending on the nature of the business a tribe is conducting through a business entity, the question of whether tribal immunity is to be extended to the entity depends on whether, in the language of the federal courts, the entity is an "arm of the tribe." 242 P.3d at 1109, *citing Memphis Biofules, LLC v. Chickasaw Nation Indus., Inc.*, 585 F.3d 917, 920-21 (6th Cir. 2009); *Native Am. Distr. v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, 1292 (10th Cir. 2008); *Allen v. Gold Country Casino*, 464 F.3d 1044, 1046 (9th Cir. 2006); *Hagen v. Sisseton-Wahpeton Cmty. Coll.*, 205 F.3d 1040, 1043 (8th Cir. 2000); *Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.*, 207 F.3d 21, 29 (1st Cir. 2000).

Fifth, a tribal entity engaged in business does not lose its immunity simply by contracting with non-Indian operators of the business. *Native Am. Dist. v. Seneca-Cayuga Tobacco Co*., 546 F.3d 1288, 1296 (10th Cir. 2008) (tribal tobacco company immune despite fact that non-Indians operated company through a management agreement). Here again, the idea is that Indian nations must be encouraged to generate revenues to fund their governments and activities, and must therefore be free to enter into commercial areas where they have no expertise, but can acquire the necessary expertise through non-Indian operators. *See also Cabazon Band of Mission Indians v. Riverside Cnty.*, 783 F.2d 900, 901 (9th Cir. 1986), *aff'd sub. nom.*, *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) (noting with approval that the tribal business was "operated by non-Indian professional operators, who receive a percentage of the profits").

Finally, although a tribe may waive its immunity, in whole or in part, such waiver, just like any congressional limitation or abrogation, must be "explicit and unequivocal." 242 P.3d at 1114, *quoting Santa Clara Pueblo v. Martinez, supra,* 436 U.S. at 58.

III. THE ARM-OF-THE-TRIBE TEST

The Court rejected the court of appeals' stricter 11-part test for whether a tribal entity is an arm of the tribe, and instead adopted a more lenient three-part test. The three parts are:

> 1) whether the tribes created the entities pursuant to tribal law; (2) whether the tribes own and operate the entities; and (3) whether the entities' immunity protects the tribes' sovereignty.

242 P.3d at 1111. The Court further instructed that application of these three factors must be "tailored to the nature of the relationship between the tribal entities and the tribes." *Id.* Before I address each of these factors let me make two observations about both the temporal and substantive nature of this test.

First, as the State conceded at the hearing, the tribal immunity issue in this particular case is trapped in the present, meaning that the question is whether I can at this moment hold these tribal entities in contempt for failing to produce the subpoenaed documents. This is because tribal immunity is in the nature of subject matter jurisdiction, 242 P.3d at 1102, and a court must always be concerned about its subject matter jurisdiction. *J.P. Meyer Trucking & Const., Inc. v. Colorado Sch. Dist. Self Ins. Pool*, 18 P.3d 198, 201 (Colo. 2001). I cannot enforce these subpoenas via contempt citations or otherwise if the tribal entities are immune, quite apart from whether they were or were not immune when the subpoenas, enforcement orders or contempt citations were first issued and served. This is why the last two arm-of-the-tribe factors are phrased in the present test.[9] What matters is whether the tribes *now* own and operate the entities, not whether they owned and operated them at any other time. Likewise, what matters is whether a grant of immunity to the

[9] The first factor is by its very nature historical—were the subject entities created by the tribes pursuant to tribal law?

tribal entities will *now* protect the tribes' immunity, not whether it would have protected that immunity at some earlier time. What has happened in the past can of course be probative of the current state of affairs, but it is the current state of affairs that matters, at least as to the last two arm-of-the-tribe factors.

Second, and somewhat relatedly, the Court's emphasis on the relationship between the tribes and the entities is critical. This is, after all, a test of whether the entity is an arm of the tribe, and the Court reminds us that that inquiry must therefore focus on the relationship between the entity and the tribe. That is to say, the particular businesses in which the entities happen to be engaged is wholly irrelevant. 242 P.3d at 1111, citing *Kiowa Tribe of Okla. v. Manufacturing Techs., Inc., supra,* 523 U.S. at 756.

Let me now address the three arm-of-the-tribe factors.

A. Factor 1: The Tribes Created the Entities Pursuant to Tribal Law

The State expressly conceded, both in its briefs and at the hearing, that both tribal entities were in fact formed by their respective tribes and that such formation was accomplished pursuant to tribal law.

The Miami Tribe of Oklahoma became a federally-recognized Indian nation with the passage of the Oklahoma Indian Welfare Act of 1936, codified at 25 U.S.C. § 501 (2006). The Miami people's ancestral home was spread across Ohio, Indiana, Illinois, lower Michigan and lower Wisconsin. They ceded much of this territory to the United States in a 1795 treaty. They were forcibly removed from their remaining homelands in 1846, and relocated first to present-day Kansas then to present-day Oklahoma. 242 P.3d at 1103.

The constitution of the Miami Tribe of Oklahoma creates a Business Committee, which is expressly authorized to enact resolutions and ordinances "to transact business and otherwise speak

or act on behalf of the tribe in all matters on which the Tribe is empowered to act . . . ." MIAMI CONST., art. VI § 1, Exhibit A. Pursuant to that constitutional authority, on April 15, 2002, the Business Committee adopted a resolution and ordinance creating a tribal corporation called Miami Tribe Business Enterprises ("MTBE"). Exhibits M and N. These organic documents in turn authorized MTBE to engage in, among other things, "[p]roviding sources of revenue, through direct tribal business activities . . . ." Miami Tribe of Oklahoma Business Enterprises Act § 102(a). Exhibit N, at ff. 03821. The Business Committee changed MTBE's name to MNE by a resolution adopted on May 10, 2005. Exhibit D.

The Santee Sioux Nation became a federally-recognized tribe by way of the Indian Reorganization Act of 1934, codified at 25 U.S.C. §§ 461-79 (2006). The Santee Sioux's ancestral home was in present-day Minnesota. They were forcibly relocated first to present-day South Dakota and then to present-day northeastern Nebraska. 242 P.3d at 1104. The Santee Sioux, also known as the Eastern or Dakota Sioux, are one of three main subdivisions among the Sioux, the other two being the Yankton (or Middle or Nakota) Sioux and the Teton (or Western or Lakota) Sioux. WILLIAM K. POWERS, OGLALA RELIGION 11 (Univ. of Nebraska Press, 1977).

The constitution of the Santee Sioux Nation specifically authorizes the tribe to charter subordinate organizations for economic purposes. SANTEE SIOUX CONST., art. IV § 1(k), Exhibit B. The Santee Sioux Nation chartered SFS by way of tribal Resolution No. 2005-27, adopted March 2, 2005. Exhibit C.

I find and conclude based on this uncontradicted evidence that the two tribal entities at issue in this case—MNE and SFS—were indeed duly created by their respective tribes pursuant to tribal law.

B. Factor 2: MNE and SFS are Owned and Operated by their Tribes

Here again, the evidence is undisputed. The State concedes that MNE is a wholly-owned tribal entity of the Miami Tribe of Oklahoma, and that SFS is a wholly-owned tribal entity of the Santee Sioux Nation. The evidence is equally undisputed that the tribes operate the entities.

MNE's board of directors is appointed by the Chief of the Miami Tribe, with the advice and consent of the Business Committee. Resolution No. 05-14, Exhibit D; Amended Miami Nations Enterprise Act § 202(a), Exhibit N. Two of the three directors must be members of the tribe. *Id.* The Business Committee hired MTBE's initial chief operating officer, Don Brady, and Mr. Brady has remained as the CEO of MNE. Mr. Brady's office is located in MNE's headquarters, which in turn is located on tribal lands. Second Supplemental Affidavit of Don Brady ¶¶ 1-5, Exhibit I. MNE currently has numerous other employees, all of whom also work at the MNE headquarters on tribal lands. *Id.* at ¶ 5. Like any CEO, Mr. Brady is in charge of MNE's day-to-day operations, but is answerable to, and is directed in policy matters by, the MNE board of directors, which in turn reports to the tribal council. *Id.* at 7. Similarly, SFS is governed and regulated entirely by a director appointed by the Santee Sioux Nation. Exhibit W.

The State argues that none of the tribal entities' organic resolutions and ordinances expressly authorizes them to engage in payday lending. That contention is not only irrelevant—the tribes have, as set forth above, broadly authorized their entities to engage in any business activities—but it is also plainly incorrect. The Miami Tribe specifically enacted an ordinance to permit MNE to engage in the payday loan business. Resolution No. 04-62, Exhibit O. That ordinance specifically authorized the tribe to issue payday loan licenses to MNE, and the tribe in fact issued those licenses. Exhibit Q. One of those licenses was to operate a payday loan business known as Cash Advance. *Id.* The ordinance also imposed substantive and regulatory requirements on MNE's payday loan business, and charged the tribe's Business Committee with insuring MNE's

compliance with those requirements. Likewise, the Santee Sioux Nation expressly permitted SFS to obtain a tribal license to engage in payday lending, Exhibit W, and issued several different such licenses to SFS, one of which was under the name Preferred Cash Loans. Exhibit U.

There is also convincing evidence in this record that the tribal entities actively engaged in these payday loan businesses, by applying their tribes' articulated lending criteria to requested loans, and in fact by actually approving each payday loan. Second Supplemental Brady Affidavit ¶ 14; Exhibit I. The State argues that tribal officials could not possibly have approved all the loans that were approved by these tribal entities, but I do not find that impossibility argument persuasive. If, as is the State's theory, it was actually the prior non-Indian operators who continued to approve these loans, then somehow they were able to approve them despite their volume. If they could approve them then Indian officials could also have approved them. I see no reason to disbelieve the sworn testimony of tribal officials, particularly when the State has not produced any direct evidence disputing that testimony. Finally, it is worth reiterating that the cases make it clear that tribes do not lose their immunity just by contracting for the special expertise of non-Indian operators; indeed, they are encouraged to do so. *Cabazon Band of Mission Indians v. Riverside Cty.*, *supra,* 783 F.2d at 901; *Native Am. Dist. v. Seneca-Cayuga Tobacco Co.*, *supra,* 546 F.3d at 1294. Thus, even if every pertinent payday loan was approved by the non-Indian operators with no control or even input from the tribes, that would not be dispositive of Factor 2.

It is clear to me from my review of the evidence, and I find, that the Miami Tribe of Oklahoma owns and operates MNE and that the Santee Sioux Nation owns and operates SFS. Stated another way, given the burden of proof, I find that that the State has failed to prove that the tribes do not own and operate these tribal entities.

C. Factor 3: Giving MNE and SFS Immunity Will Protect their Tribes' Immunity

The State has not disproved this third factor. In its briefs, the State relies on the proposition, announced in *Allen v. Gold Country Casino*, *supra,* 464 F.3d at 1046-47 and other cases, that the function of this third factor is to protect the treasury of the tribe. It then argues, without citation, that because the former non-Indian operators of the payday loan businesses have fully indemnified the tribal entities, forcing the tribal entities to incur fees and expenses responding to these administrative subpoenas will not endanger the treasury of the tribes. This proposition is not only not recognized in any reported case I know, it is patently incorrect. Every hour spent by tribal officials producing entity or tribal documents is an hour they cannot spend engaged in tribal business. It is in fact in recognition of this reality that the courts deciding this question, including the Colorado Supreme Court in this very case, have concluded that tribal immunity protects tribes from administrative subpoenas. 242 P.3d at 1108. Whether the tribes could ever recoup these costs from the former non-Indian operators is sheer speculation, for which the State has provided no credible evidence.

Moreover, such a rule would have the perverse effect of discouraging Indian business from insisting that their non-Indian operators indemnify them. Yet federal law is designed to encourage Indians to use the expertise of non-Indian operators, and all reasonable business owners, Indian and non-Indian alike, would insist on indemnification in such circumstances.

There is a plethora of evidence that makes it clear to me that extending the tribes' immunity to MNE and SFS will benefit the tribes, for no other reason than that the tribes have been economically benefitted by the payday loan activities of MNE and SFS. All profits these tribal entities have generated through their payday loan businesses have been used to benefit their respective tribes. Second Supplemental Brady Affidavit ¶ 17, Exhibit I; Second Supplemental Affidavit of Robert Campbell ¶ 12, Exhibit H. In the case of the Miami Tribe, these revenues have

been used, among other things, to build a new headquarters for MNE, to enable MNE to employ tribal members, and to fund various tribal programs, including scholarship program for secondary education. Exhibit I ¶ 17. MNE also distributes some of its profits to the tribe's general fund. *Id*. In the case of the Santee Sioux, payday loan profits have been used, among other things, to buy additional tribal lands, fund head start programs, and create daycare and educational incentive programs. Exhibit H, ¶ 12. Robert Campbell, a member of the Santee Sioux Nation and a member of its tribal council for the last seven years, testified that loss of SFS's payday loan revenues "would be devastating to the Santee Sioux Nation's economy, not to mention the loss of jobs for those employed by SFS." *Id*.

I recognize that the tribal immunity issue before me is a narrow one, limited to the question of whether these tribal entities are immune from the subject administrative subpoenas and their enforcement and contempt consequences. By considering the broader economic relationship between the tribal entities and their tribes in the payday loan context I do not mean to be straying from the narrow immunity issue that confronts me. But neither do I think that I can ignore those economic relationships when I am considering this broadest of the three arm-of-the-tribe factors.

Based on my review of all the evidence, it is clear to me, and I find, that providing MNE and SFS with tribal immunity will protect their respective tribes' immunity.

IV. THE STATE'S "SHAM" ARGUMENT

The State went to great lengths, in all of its briefs and at the hearing, to argue that I should deny immunity to the tribal entities because they are shams. The State claims that these two payday loan businesses are really being operated, as they have always been operated, by a Mr. Scott Tucker and his associates. And indeed, as early as 1998, Tucker and another non-Indian man

named Charles Hallinan formed a Nevada corporation called National Money Services and began making payday loans. In February 2001, Tucker and James Fontano acquired several Nevada shell corporations, among them CBSC and Executive, whom we saw earlier had Carson City addresses identical to the addresses listed on the Cash Advance and Preferred Cash Loan websites, and in fact whom the State decided to include as named contemnors on the contempt citations.

The State has also shown that Tucker was conducting other payday loan businesses in other states, using various corporations doing business under various names, including "Cash Advance" and "Preferred Cash Loans. In early 2003, the Kansas bank commissioner brought an enforcement action against "Cash Advance" for engaging in illegal payday lending in the state of Kansas. In September 2003, the New York Attorney General brought an enforcement action against Hallinan for engaging in illegal payday lending in New York.

In October 2003, just one month after New York commenced its action against Hallinan, and some 10 months after the Kansas enforcement action began, Tucker first approached the Miami Tribe to discuss a proposal involving the payday loan business. He made that approach to MTBE, the predecessor of MNE. MTBE's board eventually agreed to the proposal, Merits Exhibit 6, and on November 14, 2003, MTBE and Tucker (through one of his entities) entered into a Service Agreement, a copy of which was admitted as Merits Exhibit 10.[10]

Under the Service Agreement, whose term was five years, MTBE agreed to retain Tucker's entity, which in turn agreed to provide MTBE with $5 million in working capital, staff, equipment, and advertising services so that MTBE could operate an online payday loan business. MTBE agreed, at its option, to furnish an office on tribal lands staffed by at least one employee to

[10] The State's Exhibits are divided into "Request Exhibits," which consist of the material the tribal entities voluntarily provided in response to the administrative subpoenas and to the State's supplemental requests, and "Merits Exhibits," which were attached to the State's briefs in response to the motions to dismiss.

administer the loan program. Tucker's entity agreed to pay MTBE a monthly fee of 1% of the gross revenues, with a minimum payment of $20,000 per month.

In April 2005, almost a year and a half after executing the Service Agreement and also long after the payday loan activities that triggered the first Colorado consumer complaint, the Miami Tribe adopted its first resolution authorizing its Business Committee to issue licenses and regulations governing its payday lending business. Request Exhibits 6 and 7.

Tucker did not approach the Santee Sioux Nation until early 2005, long after his own companies were already engaged in payday loan businesses using the name Preferred Cash Advance, and of course long after the Kansas and New York investigations began. Merits Exhibit 19. SFS and a Tucker entity entered into a Service Agreement on February 28, 2005. Merits Exhibit 21. That Service Agreement was virtually identical to the Service Agreement Tucker entered into with the Miami Tribe—a five year term, a capital commitment ($3 million for SFS, compared to the $5 million for MNE), and a monthly fee of 1% of gross with a monthly $20,000 minimum).

From all of this evidence, it is clear to me that the State is correct that these two payday loan businesses existed before the tribal entities took them over, that Tucker and his associates owned and operated those businesses, that they did business as "Cash Advance" and "Preferred Cash Loans," among many other names, and that Tucker likely recruited the tribal entities in the mistaken belief that he could shield the businesses with tribal immunity. It is also clear to me that the State has proved, by a preponderance of the evidence, that Tucker and his entities, and not the tribal entities, were the true owners of these payday loan businesses during the terms of the Service Agreements. Nothing is more telling as far as assessing true owners than to follow the money, and the fact that Tucker put up 100% of the capital and enjoyed 99% of the payday revenues makes it

evident that Tucker, and not the tribal entities, continued to own these businesses during the terms of the Service Agreements. But it does not follow from these facts and conclusions that by participating in this scheme the tribal entities have lost their immunity.

First, as discussed in Part II above, the question of tribal immunity is always a question about the present. MNE and SFS terminated their Service Agreements with Tucker's entities in September 2008, and replaced Tucker's entities with operating corporations that are themselves wholly-owned tribal entities. Exhibits H and I. That is, these businesses have evolved in precisely the manner that Congress has intended for Indian businesses to evolve. In the beginning, they were dependent on Tucker and his associates for their capital and expertise, paying a steep price for that capital and expertise; but over time the tribes were able to take over operations completely.

Moreover, even if Tucker still functionally owns and operates these two payday loan businesses—something the State has not proved—I am not at all certain the tribal entities would thereby lose their immunity. The State's syllogism—the real lenders are Tucker and his associates, and therefore protecting them does not protect the tribes—would make perfect sense except that the State eventually directed these subpoenas to these two tribal entities, wants documents from these two tribal entities and seeks contempt citations against these two tribal entities through their tribal officers. What the State has fundamentally misunderstood in this case is that tribal entities are immune, not their particular businesses, and therefore that tribal immunity does not depend in any fashion on the type of business a tribal entity engages in, with whom, or for what ulterior purpose.

That mistake seems to have had its origins in the very inception of this case, when the State elected to subpoena phrases—"Cash Advance" and "Preferred Cash Loans"—instead of legal entities. The State wrongly believes that if it shows that these two phrases are businesses that are really being operated by Tucker rather than by the tribal entities, then the tribal entities are

somehow not immune. But it has long been the law, as the state Supreme Court emphasized in this very case, that immunity depends on the relationship between the tribal entities and their tribes, not on the activities the tribal entities undertake. 242 P.3d at 1111, citing *Kiowa Tribe of Okla. v. Manufacturing Techs., Inc., supra,* 523 U.S. at 756. Had MNE or SFS been tribal shams—that is, had the State proved they are not really tribal entities because they were not created by tribal law and/or are not owned and being operated by the tribes—that would be quite a different matter. But once they are arms of the tribes, they are clothed with the tribes' immunity regardless of the particular businesses they operate or the manner of that operation.

Of course, this broad immunity is not unlimited. It does not cover any other legal persons other than the two tribal entities and their officers while acting within the scope of tribal business. If Tucker's grand scheme was to insulate himself from state scrutiny by associating with these tribes, it was not a very good scheme because he and all his non-tribal officer associates remain subject to investigation. The State can subpoena Messrs. Tucker, Fontano, Hallinan and any other non-tribal officer or non-tribal entity to its heart's content, and thus can freely investigate whether Tucker and his associates were and still are the true lenders in this case. But it cannot subpoena these two tribal entities just because it claims the payday loan businesses are really being operated by Tucker, any more than it could subpoena France if it thought Tucker was the real owner and operator of Air France.

Each of the three arm-of-the-tribe factors focuses on the relationship between the tribe and the tribal entity, and none of them, and none of the reported cases I have been able to find addressing them, suggests that immunity is lost if the sole motive of a non-Indian operator is to try to take advantage of a tribe's immunity. On the contrary, the broader purpose of that immunity is to make tribes attractive targets for economic development.

Cries that such an interpretation makes tribes the targets of unscrupulous non-Indians whose only purpose is to rent immunity has three answers. First, and most significantly, my job is to apply the law, not to write it. If Congress does not want Indian nations hiring non-Indian operators to engage in payday loan businesses, or does not want Indian nations in the payday loan business at all, it could limit or eliminate tribal immunity for such businesses tomorrow. *See Cabazon Band of Mission Indians, supra,* 480 U.S. at 202. Second, "renting immunity" will be fundamentally ineffective, as we have seen here, because the allegedly unscrupulous non-Indian operators are never immune. Third, and maybe deepest, the paternalistic days when the law fretted about Indian nations being incapable of distinguishing between good and bad business opportunities are happily behind us. The Miami and Santee people are the ones we must trust, as long as Congress lets us trust them, to know what kinds of business relationships are in their best interests. They do not need the guidance of the State of Colorado, through either its law enforcement officials or its courts.

V. WAIVER

Finally, the State once again raises the question of waiver, this time focusing on its argument that certain so-called "sue-and-be-sued" clauses contained in the tribes' charters expressly waived their tribal immunity. I disagree.

As a threshold matter, it is not at all clear to me that this waiver issue is properly before me on remand. The Court expressly directed me to decide just two issues: whether the State is entitled to additional discovery under the limited waiver and whether the State has proved that the tribal entities are not arms of the tribes. 242 P.3d at 1115.

On the other hand, the State correctly notes that although the Court rejected the court of appeals' broad command that I consider all manner of things to decide the waiver issue, it specifically rejected only one of the waiver arguments—that arbitration provisions in consumer loan agreements amounted to a waiver. *Id.* at 1114. It did not, and neither did the court of appeals, expressly reject the argument that the tribes' own founding documents, by way of their sue-and-be-sued clauses, effected a waiver of tribal immunity. So with no small amount of procedural trepidation, I address that narrow issue here.

It is clear to me that these sue-and-be-sued clauses are not sufficiently explicit or unequivocal to amount to a wholesale waiver of tribal immunity. The Miami charter, adopted in 1940, in a section labeled "Corporate Powers," lists among its powers:

> To sue and be sued; to complain and defend in in [sic] any court; *Provided, however,* That the grant or exercise of such power shall not be deemed a consent by the Tribe or by the United States to the levy of any judgment, lien or attachment upon the property of the Tribe other than income or chattels specially pledged or assigned.

Corporate Charter of the Miami Tribe of Oklahoma ¶ 2(b), Exhibit 20 to Udis Affidavit, at ff. 1093 (emphasis in original). The Santee charter, adopted in 1936, has virtually identical language, also in a section labeled "Corporate Powers":

> To sue and to be sued in courts of competent jurisdiction within the United States; but the grant or exercise of such power shall not be deemed a consent by the said Tribe or by the United States to the levy of any judgment, lien or attachment upon the property of the Tribe other than income or chattels specially pledged or assigned.

Corporate Charter of the Santee Sioux Tribe of Nebraska ¶ 5(i), Exhibit 17 to the Udis Affidavit, ff. 1080.

I realize that in *Martinez v. Southern Ute Tribe*, 374 P.2d 691, 693-94 (Colo. 1962), our state Supreme Court held that language identical to the above-quoted language in the Santee

charter amounted to a broad waiver of tribal immunity. But *Southern Ute* was decided before the United States Supreme Court held in *Santa Clara Pueblo, supra,* 436 U.S. at 58, that waivers of tribal immunity, just like congressional limitations or abrogations of it, must be "explicit and unequivocal." Indeed, our state Supreme Court, in this very case, "caution[s] that any waiver of tribal sovereign immunity must be explicit and unequivocal," and expressly cites *Santa Clara.* 242 P.3d at 1114. Tellingly, the Court never cites its own opinion in *Southern Ute.*

I read these express directions to be an implicit overruling of *Southern Ute*, requiring me to examine the waiver issue anew under the standard that any waiver of tribal immunity must be explicit and unequivocal. Under that standard, neither of these sue-and-be-sued clauses are waivers of tribal immunity. They are not explicit because they do not mention tribal immunity. They are not unequivocal because to reach the waiver conclusion one must engage in the following line of reasoning: the tribes have consented to have money judgments entered against them, but just not to have any such judgments enforceable against their property; therefore, such consent is in effect a partial waiver of tribal immunity. Even if this language unequivocally waived immunity for damage actions, it did not unequivocally waive immunity for non-damage actions such as the one at issue here. Again, some reasoning beyond the mere words is necessary: the tribes waived immunity for damage actions as long as any money judgment could not be collected; therefore they impliedly waived immunity for all action not involving claims for money damages. These lines of reasoning may be perfectly sensible, but the very fact they are necessary shows that the language itself does not unequivocally waive tribal immunity.

My conclusions in this regard are bolstered by two other considerations. First, and most important, most of the tribal immunity waiver cases decided after *Santa Clara* have held that the subject language, or substantially similar language, does not waive tribal immunity. Although one

commentator has described the issue as "arguable," even he admits that "most courts have reasoned that tribal adoption of a charter with such a clause simply creates the power in the corporation to waive immunity, and that adoption of the charter alone does not independently waive tribal immunity." FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW § 7.05(1)(c) (2005 ed.). Among the many post-*Santa Clara* cases that have concluded that this very language, or its equivalent, does not effect a general waiver of tribal immunity are cases decided by several federal circuits. *E.g., Ninigret Dev. Corp. v. Narragansett Indian Wetoumuck Hous. Auth.*, 207 F.3d 21, 30 (1st Cir. 2000); *Garcia v. Akwesasne Hous. Auth.*, 268 F.3d 76, 78 (2nd Cir. 2001); *Hagen v. Sisseton-Wahpeton Cmty. Coll.*, 205 F.3d 1040, 1043-44 (8th Cir. 2000). *Cf. Native Am. Distrib. Co. v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, 1292 (10th Cir. 2008) (not reaching sue-and-be sued issue because tribe conceded waiver). In fact, the State does not cite, and I am unaware of, any circuit case decided after *Santa Clara* that holds that any kind of sue-and-be-sued clause is ipso facto a general waiver of tribal immunity.

Second, though admittedly less important, the tribes here have consistently acted long after adoption of these charters as if they still had tribal immunity. MNE's authorizing ordinance contains its own sue-and-be-sued clause, which specifically provides that its tribal immunity can be waived by contract "only to the extent of the specific terms of the applicable contract or obligation." Miami Resolution No. 05-14 § 302(c), Exhibit D. Even more strictly, when the Santee Sioux Nation formed SFS, it specifically provided in the SFS articles of incorporation that SFS may not take any action to waive the tribe's immunity. Santee Sioux Resolution No. 2005-27, Articles of Incorporation § 13.2, Exhibit C. Neither of these provisions would have been necessary or appropriate had the tribes waived their immunity in their charters more than 70 years ago.

VI. CONCLUSION

The tribal entities' motions to dismiss are GRANTED, the orders enforcing the administrative subpoenas are VACATED, the contempt citations aimed at the tribal entities and their officers are DISCHARGED and the bench warrants associated with the tribal officers' failure to appear at the show cause hearing are VACATED.

DONE THIS 18TH DAY OF FEBRUARY, 2012.

BY THE COURT:

Morris B. Hoffman
District Court Judge

cc: All counsel