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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CONSUMER FINANCIAL PROTECTION BUREAU, Petitioner, v. GREAT PLAINS LENDING, LLC, MOBILOANS, LLC & PLAIN GREEN, LLC, Respondents.	No. 2:14-cv-02090-MWF-PLA The Hon. Michael W. Fitzgerald **RESPONDENTS' JOINT SURREPLY MEMORANDUM OF LAW IN OPPOSITION TO THE PETITION TO ENFORCE CIVIL INVESTIGATIVE DEMANDS** Date: Mon., May 12, 2014 Time: 11:30 A.M. Room: 1600

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INTRODUCTION

In its Reply Memorandum, Petitioner Consumer Financial Protection Bureau advances several new arguments that are wrong or that deviate from precedent (or both). First, the Bureau's account of the CFPA's legislative history is inaccurate; the real legislative history turns out to support Respondents. Second, the Bureau retreats from the Ninth Circuit's binding precedent on what constitutes an "arm of the tribe" and instead relies on the test for determining when an entity is an arm of a *State*—an altogether different test that does not apply. Third, the Bureau proposes several limitations to the presumption that sovereigns are not "persons," but these limitations lack any precedential support and, in fact, are contrary to the reasoning of the Supreme Court and Ninth Circuit. Finally, the Bureau asserts that the Ninth Circuit and other courts have applied *Coeur d'Alene* and jettisoned the *Stevens* presumption when interpreting the word "person" in a statute, but that is not so. Should it accept the Bureau's arguments, this Court would be the first.

The Bureau's new arguments, in short, stretch precedent beyond recognition. And they do so in support of an extraordinarily aggressive outcome: If the Bureau's arguments prevail, its reach will be vastly expanded, covering not just Indian Tribes but also the thousands of different consumer-facing activities that the 50 State Governments engage in every day. It is difficult to imagine that Congress—through its use of the word "person" and reference to "company"—intended to intrude so forcefully on state prerogatives in a statute that takes the trouble to emphasize, again and again, that States (and Tribes) are *co-regulators*. The fact that the Bureau's position would vastly expand federal authority in ways Congress never once mentioned is reason enough to be suspicious of its claims. That the Bureau is attempting to do so against the text of the CFPA and explicit pronouncements from the Supreme Court is fatal to its arguments.

I. THE BUREAU MISCONSTRUES THE LEGISLATIVE HISTORY OF THE CFPA.

The Bureau argues that the legislative history of the CFPA "demonstrates an intent by Congress to bring Indian tribes within the definition of 'person.'" Reply 15. According to the Bureau, an "early draft of the CFPA contained a definition of 'person' that expressly excluded states," and the "drafters *struck* that excluding language in a subsequent version of the bill." *Id.* at 15-16. It further asserts that the "Senate struck that language at the same time it added a definition for 'State' that included Indian tribes." *Id.* at 16. Based on these assertions, the Bureau draws an inference in its favor: "That Congress removed the exclusion for states from the definition of 'person' at the same time it defined 'State' to include Indian tribes suggests that Congress took care *not* to exempt tribes from the definition of 'person.'" *Id.* But the Bureau's legislative history is simply inaccurate.

The bill that became the CFPA originated in the House and had a definition of "person" identical to the one ultimately enacted—a definition that did not mention States, one way or another. *See* H.R. 3126, 111th Cong. § 101(25) (introduced on July 8, 2009). In December 2009, Representative Frank incorporated that bill into a larger financial reform bill, H.R. 4173, 111th Cong. (introduced Dec. 2, 2009), which was introduced to the House and ultimately passed by both houses to become the Dodd-Frank Act, *see* Pub. L. No. 111-203, 124 Stat. 1376, 1376 (July 21, 2010); "H.R. 4173, The Dodd-Frank Wall Street Reform and Consumer Protection Act," House Committee on Energy & Commerce (noting that H.R. 4173 incorporated H.R. 3126).[1] The House amended H.R. 4173 in December 2009, shortly after its introduction, to define "State" to expressly include Tribes. *See* H.R. Rep. No. 111-370, at 36 (2009); 155 Cong. Rec. H14,729 (daily ed. Dec. 10, 2009). When a version of Dodd-Frank was ultimately

[1] *Available at* http://democrats.energycommerce.house.gov/index.php?q=bill/hr-4173-the-dodd-frank-wall-street-reform-and-consumer-protection-act.

introduced in the Senate in April 2010, it was a version that tracked the House bill in its definitions of both "person" and "State." *See* S. 3217, 111th Cong., tit. X, § 1002(17), (25) (introduced on April 15, 2010). Thus, neither house of Congress ever formally considered a bill that expressly excluded States from the definition of "person."

When the Bureau says that an "early draft" of the CFPA contained a definition of "person" that did expressly exclude States, it is relying on a committee print circulated in a Senate committee, but never introduced on the Senate floor. And when the Bureau says that "*Congress* removed the exclusion for states from the definition of 'person' at the same time it defined 'State' to include Indian tribes," Reply 16, it is not in fact describing anything that *Congress* did at all. It is merely describing the Senate committee's decision to introduce a bill that was identical to the House bill in all relevant respects—one that incorporated the definitions of "person" and "State" already present in H.R. 4173—and discard the committee print. The Bureau errs in drawing any inferences about the intent of *Congress* from any of this history.

The Bureau's attempt to fashion a relationship between the addition of Tribes as "States" and the Senate's purported change to the definition of "persons" similarly flounders. The House added Tribes to the definition of "State" in its own bill, H.R. 4173, which never excluded States from its definition of "person." And that addition occurred in December 2009, months before the Senate committee abandoned the committee print in April 2010 and introduced a bill substantively identical to the House bill instead. The Bureau's claim that these events occurred "at the same time," Reply 16, or that there is any link between them at all, is flatly contradicted by the facts.

In any event, the failure of the committee print to gain any traction actually *supports* Respondents here. As noted, that committee print expressly excluded States from the definition of "person." But at the same time, that draft bill lacked

the Tribes/States equivalence provision in the House bill that was ultimately enacted into law in the CFPA. *See* Restoring American Financial Stability Act of 2009, S. ----, 111th Cong, tit. X, § 1002 (Comm. Print), *cited in* Reply 16 n.58. Thus, the text of the committee print reflected an intent to distinguish between "persons" and "States" and was silent as to Tribes. Courts have construed similarly worded statutes, which expressly exclude States but remain silent on Tribes, to apply to Tribes. *See Donovan* v. *Coeur d'Alene*, 751 F.2d, 1113, 1115 & n.1 (9th Cir. 1985) (holding that Tribes were not exempt from OSHA, in part because "Congress expressly excluded only 'the United States or any State or political subdivision of a State' from the broad definition of 'employer'"); *Menominee Tribal Enters*. v. *Solis*, 601 F.3d 669, 670 (7th Cir. 2010) (same); *cf. Tennessee Valley Auth.* v. *Hill*, 437 U.S. 153, 188 (1978) ("[U]nder the maxim *expressio unius est exclusio alterius*, we must presume that these were the only [exemptions] Congress intended[.]").[2]

But that is not what Congress did here. In enacting H.R. 4173 as the Dodd-Frank Act, Congress maintained the distinction between "persons" and "States" by separately defining "State" in the CFPA and making them co-regulators in the statutory scheme. Crucially, Congress went even further and was not silent as to Tribes (unlike the committee print). Congress made clear that Tribes fell on the "States" side of the line by expressly including Tribes in the definition of "State." *Cf. Dobbs* v. *Anthem Blue Cross & Blue Shield*, 475 F.3d 1176, 1178 (10th Cir. 2007) (holding that Congress's decision to amend ERISA to expressly include

[2] *See* 29 U.S.C. § 652(5) (OSHA: excluding the "United States or any State or political subdivision of a State" from the definition of "employer"); *id.* § 152(2) (NLRA: same); *id.* § 1002(32) (1988) (ERISA: defining "governmental plans," plans that are excluded from almost all of ERISA's provisions, to include federal and state governmental plans but not including tribal plans), *as amended*, *id.* § 1002(32) (2008) (amended to include tribal plans as "governmental plans"); 42 U.S.C. §§ 12181(6), 12131(1) (ADA: defining "private entity" as any entity other than a "public entity" and defining "public entity" to include, *inter alia*, "any State or local government" and any agency or instrumentality thereof).

some tribal plans in the definition of "governmental plans" represented Congress's intent to exempt them from ERISA). Thus, if the legislative history shows anything, it shows that a committee print under which Tribes would have been considered "persons" was never introduced, while a bill that expressly included Tribes in the definition of "State" was enacted into law. That history supports Respondents, not the Bureau.

II. THE BUREAU APPLIES THE WRONG "ARM OF" TEST AND RESPONDENTS ARE ARMS OF THEIR RESPECTIVE TRIBES.

In its initial filing, the Bureau assumed Respondents were arms of their respective Tribes. Mem. 6. In its Reply, the Bureau changes course and argues that Respondents are *not* arms of their Tribes, relying on a five-factor test set forth in *United States ex rel. Ali* v. *Daniel, Mann, Johnson & Mendenhall*, 355 F.3d 1140, 1147 (9th Cir. 2004). *See* Reply 16-17. According to the Bureau, *Ali* sets forth the test for "assessing whether a *sovereign-affiliated entity* benefits from the *Stevens* presumption." *Id.* at 17 (emphasis added).

Not true. What *Ali* sets forth is a test for determining whether an entity is an "arm-of-the-*state*." *Ali*, 355 F.3d at 1147 (emphasis added). The Ninth Circuit applies a *different* test for determining whether an entity is the arm of a *Tribe*. *See* Opp'n 11 (setting forth the arm-of-the-tribe test). And that makes sense, because the two tests implement different principles of sovereign immunity: In the case of *state* entities, the test tracks existing Eleventh Amendment jurisprudence. *See Will* v. *Mich. Dep't of State Police*, 491 U.S. 58, 70 (1989); *Stoner* v. *Santa Clara Cnty. Office of Educ.*, 502 F.3d 1116, 1121-22 (9th Cir. 2007). In the case of *tribal* entities, by contrast, the test tracks principles of *tribal* sovereignty. *See Allen* v. *Gold Country Casino*, 464 F.3d 1044, 1046-47 (9th Cir. 2006). Under the Ninth Circuit's governing arm-of-the-*tribe* test, Respondents are indisputably arms of their respective Tribes. *See* Opp'n 11-12.

Indeed, the United States has previously argued for a *Stevens* test that closely mirrors the Ninth Circuit's arm-of-the-tribe test. That test looked to three factors for assessing whether an entity was an arm of the tribe: (1) the nature of the entity; (2) the extent to which the entity functions autonomously from the sovereign; and (3) whether the sovereign would be liable for a money judgment against the entity. Br. for United States 11-12, *Inyo Cnty.* v. *Paiute-Shoshone Indians*, 538 U.S. 701 (2003) (No. 02-281), 2003 WL 252549 (Jan. 23, 2003). And under those factors, Respondents here clearly qualify as arms of their respective Tribes. *See id.* at 13 (arguing that the third factor was met because "any money judgment against the [gaming] Corporation would necessarily deplete what would otherwise be tribal funds"). *Contra* Reply 17 ("tribes would not be liable for judgments against Respondents").

III. PRECEDENT FORECLOSES EACH OF THE BUREAU'S PROPOSED LIMITATIONS ON *STEVENS*.

The Bureau proposes a number of ways to limit application of the *Stevens* presumption. None can be squared with precedent.

1. The Bureau offers the claim that the *Stevens* presumption is "not implicated when the federal government sues." Reply 9. But as the Ninth Circuit has noted, "[n]othing in the [Supreme] Court's opinion [in *Stevens*] purports to limit its scope solely to * * * suits brought by private parties." *Donald* v. *Univ. of Cal. Bd. of Regents*, 329 F.3d 1040, 1042 n.3 (9th Cir. 2003). Nor should the meaning of "person" change depending on the identity of the party bringing suit. In *United States* v. *Menominee Tribal Enterprises*, 601 F. Supp. 2d 1061 (E.D. Wis. 2009), the Government made the same argument with respect to the False Claims Act that the Bureau advances now with respect to the CFPA: that "while *Stevens* applies when private individuals sue states (or tribes), the presumptions used by the [*Stevens*] majority are inapplicable when the government itself is the plaintiff." *Id.* at 1069. The district court in *Menominee* squarely rejected that

argument, holding that the "meaning of a specific term in a statute does not change depending on who the plaintiff is." *Id.* The Bureau contends that footnote 3 of *Menominee* indicates otherwise. Reply 10 n.37. But the text accompanying footnote 3 eviscerates the Bureau's reading of *Menominee*. There, the court stated:

> [A]lthough at least a few unpublished district court opinions would seem to allow an FCA lawsuit by the United States against a state entity, *neither of these cases—nor the United States—has explained how the definition of a specific word in a statute could change based upon who is on the left side of the "v" in the caption*. In other words, *Stevens* construed the term "person," and in doing so it did not limit its analysis to the sovereign immunity issue, nor did it intend that the definition could change based on the identity of the plaintiff.

Menominee, 601 F. Supp. 2d at 1069 (emphasis added). Thus, as *Donald* suggests and *Menominee* demonstrates, the *Stevens* statutory presumption applies regardless of whether the United States is the plaintiff.[3]

2. The Bureau offers as another claim the view that the *Stevens* presumption applies only when a Tribe is a *plaintiff*, as opposed to a *defendant*. Reply 8. But that contention is refuted by *Stevens* itself, in which the Court applied the presumption to hold that States could not be sued as *defendants* under the False Claims Act. *See Vermont Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 780-81 (2000). The Bureau's contention is also refuted by

[3] Further, the fact that the Federal Government is the plaintiff could not possibly matter because according to binding Ninth Circuit precedent, the plaintiff in *Stevens* was the *United States*. The Ninth Circuit has recognized that "in a *qui tam* action, the government is the real party in interest" and the true plaintiff. *United States ex rel. Killingsworth* v. *Northrop Corp.*, 25 F.3d 715, 720 (9th Cir. 1994); *United States ex rel. Fine* v. *Chevron, U.S.A., Inc.*, 39 F.3d 957, 963 (9th Cir. 1994), *vacated on other grounds*, 72 F.3d 740 (9th Cir. 1995). The Bureau's argument is thus foreclosed by previous decisions of the Ninth Circuit because this civil action by the Bureau is no different from the *qui tam* action brought by the United States' agent in *Stevens*: In both cases, the true plaintiff is the Federal Government.

countless other cases, which have applied the presumption the same way *Stevens* did. *See, e.g.*, *Will*, 491 U.S. at 64 (holding that a State is not a "person" amenable to suit under 42 U.S.C. § 1983); *Stoner*, 502 F.3d at 1123 (holding that arms of the State are not "persons" subject to suit under the False Claims Act).

The fact that the defendant here is a Tribe—and not a State as in *Stevens*—makes no difference in the *Stevens* analysis, given that the *Stevens* presumption applies to *all* sovereigns. In fact, the only two courts to have addressed the argument the Bureau now advances—that the *Stevens* presumption does not apply when a Tribe is sued as a defendant—have roundly rejected that argument. *See United States ex rel. Howard* v. *Shoshone Paiute Tribes*, 2012 WL 6725682, at *2 (D. Nev. Dec. 26, 2012); *Menominee*, 601 F. Supp. 2d at 1067-69.

In short, a sovereign *being sued* falls within the core of the *Stevens* presumption. No court has suggested to the contrary—and, until this case, neither had the United States. In *Inyo County*, for example, the Solicitor General acknowledged that the *Stevens* presumption applied when the sovereign Tribe and its arm were *defendants*; the only issue in that case was whether the presumption should be *extended* to a situation where they were *plaintiffs*. Br. for United States at 7-9, 11-14, *Inyo Cnty.*, 538 U.S. 701 (No. 02-281), 2003 WL 252549 (Jan. 23, 2003); *see also Inyo Cnty.*, 538 U.S. at 709 ("[T]he parties agree, and we will assume for purposes of this opinion, that Native American tribes, like States of the Union, are not subject to suit under § 1983. The issue pivotal here is whether a tribe qualifies *as a claimant* * * * under § 1983.") (citation omitted). The Bureau never explains why it is reversing the United States' position in this case, or whether it has the authority to do so in the teeth of an explicit position taken by the U.S. Solicitor General.

3. In a last-ditch effort to distinguish *Stevens*, the Bureau suggests that the *Stevens* presumption applies only when a Tribe is acting in a "sovereign capacity." Reply 9. The only court of appeals to have considered this contention

has rejected it. *See Virginia Office for Prot. & Advocacy* v. *Reinhard*, 405 F.3d 185, 190 (4th Cir. 2005). And for good reason: Contrary to the Bureau's contention, neither *Inyo County* nor *Skokomish Indian Tribe* v. *United States*, 410 F.3d 506 (9th Cir. 2005), turned on whether the Tribe or tribal entity was acting in a "sovereign capacity." Reply 9. Instead, those cases addressed whether, in bringing suit under a statute, a Tribe or tribal entity was "advanc[ing] a sovereign's prerogative," *Inyo County*, 538 U.S. at 712, or "asserting rights * * * reserved to it as a sovereign," *Skokomish*, 410 F.3d at 516. That is precisely what Respondents are doing here: "advanc[ing] a sovereign's prerogative" to engage in self-government and "asserting rights * * * reserved to [them] as sovereign[s]" to regulate their own economic affairs. Moreover, to the extent the Bureau is suggesting that there should be a commercial-activities exception to the *Stevens* presumption, that suggestion cannot be squared with the Supreme Court's repeated rejection of such an exception to tribal sovereignty. *See, e.g.*, *Kiowa Tribe of Okla.* v. *Mfg. Techs, Inc.*, 523 U.S. 751, 759-60 (1998).

IV. CONTRARY TO THE BUREAU'S SUGGESTION, NO COURT HAS APPLIED *COEUR D'ALENE* TO HOLD THAT THE WORD "PERSON" INCLUDES A SOVEREIGN ENTITY.

Finally, the Bureau argues that "the Ninth Circuit and other courts have applied *Coeur d'Alene*—not the presumption that 'person' does not include the sovereign, articulated in cases like *Stevens*—when assessing whether tribes and tribal entities are subject to statutes applicable to 'persons.'" Reply 6. But in none of the cases the Bureau cites was the *Stevens* presumption even at issue. That is because, notwithstanding the Bureau's claim that the word "person" was somewhere lurking in each of the statutes involved, *see id.* at 6-8, the parties (and thus the court) in each case focused instead on the meaning of other terms, which do not carry the same presumption. This case thus presents a novel question, and

ruling in favor of Respondents here would certainly not "fl[y] in the face of decades of Ninth Circuit precedent." *Id.* at 5.[4]

In any event, the *Stevens* presumption would not have applied in any of those cases, even if it had been raised. That is because in each of those cases, the statute (at least at the time of the court's decision) expressly *excluded* from its applicability States and other governmental entities but was *silent* as to Tribes. *See supra* n.2; Opp'n 17. In the statutes the Ninth Circuit has considered, Congress's silence as to Tribes combined with its express exemption of States and other governmental entities implied that Tribes were *included* within the scope of the statute, and thus provided the "affirmative showing of statutory intent to the contrary" necessary to rebut the *Stevens* presumption. *Stevens*, 529 U.S. at 781; *see Tennessee Valley Auth.*, 437 U.S. at 188 (articulating *expressio unius* canon). Here, by contrast, the statute is not silent on the issue of its applicability to Tribes; the CFPA does not exempt only States from the definition of "persons" because it expressly places Tribes in the category with "States." A ruling for Respondents would thus not run afoul of precedent; rather, it would give effect to it and would square with the text of the CFPA.

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[4] Contrary to the Bureau's suggestion, *NLRB* v. *Chapa De Indian Health Program, Inc.*, 316 F.3d 995 (9th Cir. 2003), did not involve an arm of the Tribe. Reply 7 n.23. It is true that Chapa De was a "tribal organization" as defined in the Indian Self-Determination Act. 25 U.S.C. § 450b(*l*). But that means only that it was "sanctioned by" the governing body of a Tribe. *Id.* It does not mean that Chapa De was also an arm of the Tribe. And indeed, it was not funded by the Tribe, was viable independently of the Tribe, and was a non-profit *California* corporation created independently of the Tribe; moreover, none of the directors of the organization, including the CEO, were tribal members. *Chapa De*, 316 F.3d at 1000. The Ninth Circuit has, in later cases, contrasted Chapa De with other entities that were created, owned, funded, and controlled by Tribes. *See Smith* v. *Salish Kootenai College*, 434 F.3d 1127, 1133-35 (9th Cir. 2006) (determining that the college was a "tribal entity" subject to tribal civil jurisdiction by contrasting it with Chapa De). In fact, Chapa De did not even assert that it was an arm of the tribe, but argued instead that it was an arm of the *Federal Government* such that it came within the exclusion of federal entities from the definition of "employer" in the NLRA. *Chapa De*, 316 F.3d at 1001.

The Bureau contends that the CFPA mentions "companies" and thus should cover the entities here. But that argument is foreclosed by *Stevens* itself. There, the Court recognized that corporations are "presumptively covered by the term 'person,'" and yet it held that the word "person" "does less than nothing to overcome the presumption that [sovereigns] are *not* covered." 529 U.S. at 782. Indeed, Congress routinely acts against that background principle, and has abrogated *Stevens* in various statutes by explicitly including Tribes as "persons." *See* Opp'n 16 (providing examples). The Bureau's heavy reliance on the word "companies" thus proves far too much. If accepted, it would transform the Bureau into a vast federal agency with powers to regulate the thousands of consumer-facing decisions that States engage in day in and day out. The word simply cannot bear that weight. *See United States ex rel. Oberg* v. *Ky. Higher Educ. Student Loan Corp.*, 681 F.3d 575, 579 (4th Cir. 2012) (noting that such an argument is completely inconsistent with *Stevens* by "render[ing] every corporation, no matter how close its relationship to a state, a 'person,'" and that the "critical inquiry" is whether the corporate entity is "truly subject to sufficient state control to render [it] a part of the state, and not a 'person'").

CONCLUSION

For these reasons and those stated in Respondents' Opposition, the Court should deny the Bureau's petition to enforce the CIDs.

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Respectfully submitted,

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