

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

ALICIA EVERETTE,)
)
 Plaintiff,) Civil Action No. 1:15-cv-1261-CCB
v.)
)
 JOSHUA MITCHEM, et al.)
)
 Defendants.)

**Defendant MobiLoans, LLC’s Memorandum of Law in
Support of its Motion to Dismiss**

Defendant MobiLoans, LLC (“MobiLoans”), is a wholly owned economic entity of the Tunica-Biloxi Indian Tribe (“the Tribe”) organized and chartered under the laws and inherent sovereign authority of the Tribe. As recently and repeatedly reaffirmed by the United States Supreme Court, federally recognized Indian tribes have sovereign immunity and cannot be sued absent an express waiver or abrogation of that immunity. This immunity applies with equal force to tribal arms and enterprises such as MobiLoans. Accordingly, the Plaintiff’s claims must be dismissed on the basis of lack of subject matter jurisdiction.

FACTUAL BACKGROUND

The Plaintiff’s lawsuit asserts that MobiLoans engaged in unlawful consumer lending and collection activities. *See* Compl. ¶¶ 27, 106-113. She acknowledges that

MobiLoans “claims to be a tribal lending entity wholly owned by the Tunica-Biloxi Tribe of Louisiana,” a/k/a the Tunica-Biloxi Indian Tribe. *Id.* ¶ 101. She then asserts, solely on information and belief and presumably in an effort to circumvent sovereign immunity, that MobiLoans is not operated or controlled by the Tribe, does not “provide for the autonomy and economic development” of the Tribe, and is not “closely linked” to the Tribe’s government. *Id.* ¶¶ 102-104. This is incorrect.

The Tribe is a federally recognized Indian tribe with a reservation near Marksville, Louisiana. *See* 80 Fed. Reg. 1942 (Jan. 14, 2015) (including the Tribe on a list of federally recognized Indian tribes); Declaration of Marshall Pierite (Pierite Dec.), attached as Ex. A, ¶ 2.¹ Like many federally recognized tribes, the Tribe provides governmental services, including educational, health, and social services, to its members. Pierite Dec., ¶ 3. Funding for the Tribe’s governmental services comes from a variety of sources, including the Tribe’s operation of business enterprises. *Id.* ¶ 4. One of those business operations is Defendant MobiLoans. *Id.* ¶ 5. The principal purpose of MobiLoans is to engage in lending and related activities to generate revenues for the Tribe. *Id.* ¶ 7.

¹ Defendant MobiLoans presents a factual challenge to the Plaintiff’s allegations in support of subject matter jurisdiction. Accordingly, materials outside of the pleadings, including the declaration of Mr. Pierite, attached as Ex. A, are properly considered. *See, e.g., United States ex rel. Vuyyuru v. Jadhav*, 555 F.3d 337, 348 (4th Cir. 2009).

MobiLoans was organized and chartered pursuant to the laws and inherent sovereign authority of the Tribe in 2011. *Id.* ¶ 6. Its charter, attached as Ex. A-1, explicitly vests it with all of the “privileges and immunities” of the Tribe itself, including immunity from suit. *Id.* MobiLoans is wholly owned and controlled by the Tribe as an economic arm of the Tribe. *Id.* ¶ 5. In fact, MobiLoans’ operating agreement, attached as Ex. A-2, expressly provides that it “is created by the Tribal Council as an economic arm of the tribe” and that the Tribe is and at all times shall be the entity’s sole owner and member. *Id.* ¶ 5, Ex. A-2, §§ 2.1, 3.4. MobiLoans is managed by Board of Managers, all members of which must be enrolled members of the Tribe. *Id.* ¶ 8. MobiLoans is required to obtain the approval of the Tribe’s Tribal Council before undertaking any substantial business activity. *Id.* The Tribe has sole and exclusive authority to appoint and remove MobiLoans’ officers. *Id.* When the Plaintiff asserts, on information and belief, that MobiLoans does not provide for the economic development of the Tribe and is not operated or controlled by the Tribe, she is simply incorrect. *Id.* ¶¶ 4-10; Complaint ¶¶ 102-103.

STANDARD

When, as here, a defendant mounts a factual challenge to the plaintiff’s allegation of subject matter jurisdiction in a motion to dismiss pursuant to Rule 12(b)(1), “the plaintiff bears the burden of proving the truth of such facts by a preponderance of the

evidence.” *United States ex rel. Vuyyuru v. Jadhav*, 555 F.3d 337, 347 (4th Cir. 2009). The court is allowed to “go beyond the allegations of the complaint and resolve the jurisdictional facts in dispute by considering evidence outside the pleadings, such as affidavits.” *Id.* at 348. Here, MobiLoans has presented indisputable factual evidence that the Court lacks subject matter jurisdiction over the Plaintiff’s claims against MobiLoans, so the Plaintiff now bears the burden of proving the existence of jurisdiction by a preponderance of the evidence.

ARGUMENT AND AUTHORITY

It is well settled that Indian tribes possess sovereign immunity from suit. The Supreme Court very recently reaffirmed this fact, noting that it has “time and again treated the doctrine of tribal [sovereign] immunity as settled law and dismissed any suit against a tribe absent congressional authorization or a waiver” of immunity by the tribe. *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2030-31 (2014) (internal quotation and punctuation omitted). This immunity applies broadly, and it specifically includes immunity from “suits arising from a tribe’s commercial activities, even when they take place off Indian lands.” *Id.* at 2031. Absent clear congressional abrogation or express tribal waiver of immunity – neither of which has been alleged and neither of which has occurred in this case – tribal sovereign immunity demands that any suit against an Indian

tribe be dismissed. *See id.* at 2031-32; *Fla. Paraplegic Ass'n v. Miccosukee Tribe of Indians of Fla.*, 166 F.3d 1126, 1130-31 (11th Cir. 1999).

Tribal sovereign immunity applies not only to tribes themselves, but also to tribal arms, enterprises, and entities. *See, e.g., Thomas v. Dugan*, 168 F.3d 483 (4th Cir. 1998) (“Tribal entities ... are also shielded by sovereign immunity.”); *Miller v. Wright*, 705 F.3d 919, 923-924 (9th Cir. 2013), *cert denied*, 133 S. Ct 2829 (2013) (“The settled law of our circuit is that tribal corporations acting as an arm of the tribe enjoy the same sovereign immunity granted to a tribe itself.” (internal quotation omitted)); *Freemanville Water Sys., Inc. v. Poarch Band of Creek Indians*, 563 F.3d 1205, 1207 n.1 (11th Cir. 2009); *Madewell v. Harrah's Cherokee Smokey Mtn. Casino*, 730 F. Supp. 2d 485 (W.D.N.C. 2010) (affirming magistrate judge’s recommendation that claims against tribally owned and operated entity be dismissed on sovereign immunity grounds). In determining whether an entity is a tribal arm or enterprise that is entitled to sovereign immunity, the key question is whether the entity’s activities are properly considered activities of the tribe. *See, e.g., Allen v. Gold Country Casino*, 464 F.3d 1044, 1046 (9th Cir. 2006). In answering this question, federal courts consider factors such as: (1) whether the entity is owned and operated by the tribe; (2) the entity’s purpose and the financial relationship between the entity and the tribe; (3) whether the entity was chartered by the tribe or under tribal law; and (4) whether the tribe intended for the entity

to have sovereign immunity. *See id.*; *see also Breakthrough Mgmt. Group, Inc. v. Chuckchansi Gold Casino & Resort*, 629 F.3d 1173, 1191-92 (10th Cir. 2010); *Hagen v. Sisseton-Wahpeton Cmty. College*, 205 F.3d 1040, 1043 (8th Cir. 2000).

MobiLoans easily and indisputably qualifies as an arm of the Tribe under this test and any reasonable definition of the term. It is organized and chartered under tribal law and pursuant to the Tribe's inherent sovereign authority. *Pierite Dec.* ¶ 6. It is wholly owned and controlled by the Tribe. *Id.* ¶¶ 5, 8. Its primary purposes is to engage in lending and related activity to generate revenues for the Tribe, and the revenues that it generates are used to fund the Tribe's governmental activities and services. *Id.* ¶ 7. It is explicitly vested with all of the Tribe's "privileges and immunities." *Id.* ¶ 6. In short, there is no credible reason to consider MobiLoans anything but an arm of the Tribe.² It is thus entitled to sovereign immunity from the Plaintiff's claims.

A very recent case from the Eastern District of Pennsylvania supports this result. *See Bynon v. Mansfield*, Memorandum, Case No. 2:15-cv-00206-GJP (E.D. Pa. May 21, 2015), attached as Ex. B. In *Bynon*, a plaintiff filed a claim similar to those in this case,

² This is consistent with a recent federal district court decision involving civil investigative demands (CIDs) issued to MobiLoans and other tribally owned lenders by the Consumer Financial Protection Bureau (the Bureau). *See Consumer Fin. Prot. Bureau v. Great Plains Lending, LLC*, Order, Case No. CV-14-2090-MWF-(PLAx) (May 27, 2014), stayed pending appeal to Ninth Circuit, Case No. 14-55900, a copy of which is attached as Ex. C. While the court ruled that tribes are not immune from Bureau CIDs, rendering MobiLoans' status as an arm of the Tribe irrelevant in that case, the court made a point of expressing extreme skepticism over the Bureau's argument that MobiLoans should be treated like a privately owned business rather than an Indian tribe. *See id.* at *32 ("Were it necessary to [decide this issue], the Bureau's position is weak.").

alleging that she had obtained an unlawful consumer loan online from a tribally chartered lending company. *See id.* at *1. The court had no difficulty concluding that the lending company was “a subordinate economic entity” of the tribe that shared in the tribe’s sovereign immunity; indeed, it concluded that the tribe’s immunity extended to an employee of the lender whom the plaintiff purported to sue in his individual capacity. *Id.* at **2-3. The same result should follow here.

CONCLUSION

Well settled principles of federal law provide that tribal arms and enterprises such as MobiLoans possess sovereign immunity from unconsented lawsuits. Accordingly, the Court lacks subject matter jurisdiction over the Plaintiff’s claims against MobiLoans, and all such claims should be dismissed pursuant to Rule 12(b)(1).

Respectfully submitted this 6th day of July, 2015.

/s/

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