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

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

**DEFENDANT RIVERBEND FINANCE, LLC'S**
**MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS**

Defendant Riverbend Finance, LLC, dba Riverbend Cash ("Riverbend") respectfully submits this Memorandum in Support of Its Motion to Dismiss for Lack of Subject Matter Jurisdiction under Federal Rule of Civil Procedure 12(b)(1), for failure to join an indispensable party under Federal Rule of Civil Procedure 19(b), and for failure to exhaust tribal remedies under *National Farmers Union Insurance Companies v. Crow Tribe*, 471 U.S. 845 (1985) (the "Motion").

## INTRODUCTION

Plaintiff Alicia Everette (the "Plaintiff" or "Ms. Everette") is a frequent user of small-dollar loans, including two such loans that she obtained from Riverbend in 2013. Plaintiff paid these loans, sought to obtain additional loans from Riverbend (which it declined to provide) and never complained about the loans she did obtain. Until now. She has filed a complaint, styled as a putative class action, in which she seeks to assert a bevy of consumer claims that challenge Riverbend's loans.

All of the Plaintiff's claims fail as a matter of law for at least three reasons:

**First**, Riverbend has sovereign immunity—a fact expressly disclosed in Plaintiff's loan documents. Riverbend is an economic arm and instrumentality of the Fort Belknap Indian Community (the "Tribe"), which is a federally-recognized sovereign American Indian tribe headquartered at the Fort Belknap Agency, Montana. *See* 79 Fed. Reg. 4750 (Jan. 29, 2014) (providing periodic list of all federally-recognized tribes in the United States). As an economic arm of the Tribe, Riverbend shares the Tribe's sovereign immunity and may not be sued without express and unequivocal consent, which neither the Tribe nor Riverbend has provided. *See, e.g.*, *Michigan v. Bay Mills Indian Community*, 134 S.Ct. 2024 (2014) (holding that tribal sovereign immunity applied to off-reservation business activities); *Allen v. Gold Country Casino,* 464 F.3d 1044, 1046 (9th Cir. 2006) (holding that this sovereign immunity also extends to tribal subsidiaries); *United States v. Jones*, 225 F.3d 468, 469 (4th Cir. 2000) ("Sovereign immunity deprives a court of jurisdiction.").

**Second**, Plaintiff's claims against Riverbend fail under Rule 19(b). The outcome of this litigation could have a substantial detrimental effect on the Tribe's revenue and ability to provide basic government services to the Tribe's citizens. The Tribe is therefore a necessary and indispensible party that—because of its sovereign immunity—cannot be joined. Thus, Plaintiff's claims against Riverbend should be dismissed.

**Third**, Plaintiff's claims fail because she failed to exhaust her tribal remedies. The federal policy of developing and supporting tribal self-government requires federal courts to defer to tribal bodies when there is a colorable claim of tribal jurisdiction. Here, Plaintiff has sued a wholly-owned tribal subsidiary and the underlying contracts provide exclusively for tribal dispute resolution. Plaintiff has not initiated, let alone exhausted, any tribal remedies. Under these circumstances, her claims must be dismissed.

For these reasons, and as explained below, Plaintiff's claims against Riverbend should be dismissed.

## FACTUAL BACKGROUND[1]

**Plaintiff Alicia Everette.** Plaintiff appears to be a frequent user of small-dollar, unsecured loans. In her Complaint, she alleges that the she obtained at least eight such loans in 2013, for a total of several thousand dollars. *See* Complaint ¶¶ 43, 48, 69, 93, 107, 121. Ms. Everette is now suing several unrelated lenders and financial service providers, including Riverbend, alleging that loans extended to Ms. Everette violated Maryland law. *See* Complaint ¶¶ 134-161.

**Riverbend is a sovereign tribal lender.** Riverbend is an enterprise of the Fort Belknap Indian Community, formed under Tribal law to provide desperately needed revenue to the Tribe and economic activities to its remote and impoverished Reservation. *See* Ex. 2 at ¶¶ 4, 7, 8. This annual income is crucial because the Tribal government is without access to another stable revenue base needed to provide essential public services for its citizens. *Id*. More traditional methods of governmental revenue-raising, such as property, sales or income taxation, are generally unavailable to the Tribe. *Id*.

Fort Belknap has turned to online lending as an important revenue source to fund Tribal government and to capitalize basic infrastructure and public works. *See* Ex. 2 at ¶ 8. Because of this fact, the Tribe is proactive and conservative with its lending business, constantly working to innovate, create better products, and fundamentally, to treat the Tribe's customers well, to

[1] Where indicated, the facts set forth herein are based upon the Declaration of Michelle M. Fox, attached hereto as Exhibit 1, and the Declaration of Mark L. Azure, attached hereto as Exhibit 2. Exhibit 1, and its attached exhibits, as well as Exhibit 2, are all incorporated herein by reference.

employ the best consumer protection standards and to earn Riverbend's customers' repeat business and the solid, positive reputation that the Tribe's lending business enjoys. *Id*. at ¶ 11.

Riverbend's loans are originated from the Fort Belknap Indian Reservation by Tribal personnel. Ex. 1 at ¶ 8, 15. The Tribe employs dozens of Tribal members at a call center on the Tribe's Reservation and dozens more in compliance and oversight functions on the Reservation. Ex. 2. at ¶ 10. Riverbend provides the Tribe with significant annual income, which is critical to the Tribe's approximately 7,000 citizens, many of whom experience significant lack of employment opportunities. *Id.* Riverbend is subject to robust Tribal regulations and management, including the Tribe's mandatory best practices. Ex. 1 at ¶ 8 and Ex. 2 at ¶ 10.

As an extension and economic arm of the Tribe, Riverbend is protected by the Tribe's sovereign immunity and may not be sued without the Tribe's consent. *See* Ex. 1-A at ¶ 7. No waiver of Riverbend's or the Tribe's sovereign immunity has been granted to Plaintiff by Riverbend or the Tribe.

**Plaintiff's Riverbend loans.** Ms. Everette applied for and received two small-denomination, unsecured installment loans from Riverbend in 2013. *See* Exhibit 1, ¶¶ 18, 20, 22. Ms. Everette obtained her first Riverbend loan on September 11, 2013, as reflected on Loan Agreement #001489298-00. Ex. 1-C. Riverbend transmitted a $225.00 credit by wire transfer to her bank account on that date. Ex. 1, ¶ 20. On December 18, 2013, Ms. Everette executed a second Loan Agreement with Riverbend, for $500, as reflected on Loan Agreement #001703440-00. Ex. 1-D. Riverbend funded that $500 loan by automated clearing house transfer on December 19, 2013. Ex. 1, ¶ 22. These Loan Agreements (collectively the "Loan Agreements") are attached to the Declaration of Michelle M. Fox as Exhibits 1-C and 1-D.

Ms. Everette repaid both loans ahead of schedule, and they were fully closed on March 7, 2014. Ex. 1, ¶ 24. Ms. Everette has never expressed dissatisfaction to Riverbend or made any complaint to Riverbend, through its customer service system or otherwise, regarding the financial product Riverbend provided to her, or regarding Riverbend's customer service or any other matter. *Id*. at ¶ 27; Ex. 2, ¶ 14. Ms. Everette also made no effort to initiate an action or seek any relief through the exclusive Tribal dispute resolution mechanisms set forth in her Riverbend Loan Agreements. *Id*. at ¶ 28; Ex. 2, ¶¶ 14-17.

**Plaintiff's Loan Agreements Disclosed Riverbend's Sovereign Immunity.** The Loan Agreements signed by Ms. Everette disclosed Riverbend's status as an extension of the Ft. Belknap Tribal government and the implications of this status for the remedies that would be available in the event of a dispute. Ex. 1-C; 1-D. In the very first paragraph of these Loan Agreements, before the information regarding the amount borrowed or the payment schedule, is a statement that Riverbend is an arm of the Tribe and that the decision to approve the loan takes place on the Fort Belknap Indian Reservation:

> In this Loan Agreement (hereinafter this "Loan Agreement") the words "you" and "your" mean the borrower who has electronically signed it. The words "we", "us" and "our" mean Riverbend Finance, LLC dba Riverbend Cash. We are an economic development arm of, instrumentality of, and a limited liability company wholly owned and controlled by, the Ft. Belknap Indian Community of the Ft. Belknap Reservation Montana (the "Tribe").
>
> There will be no binding contract formed between you and us until your application is received by us and approved by our underwriting department, located on the Ft. Belknap Reservation.

Ex. 1-C, p.1; Ex. 1-D, p.1.

The Loan Agreements further disclose that Riverbend is not subject to suit:

> **SOVEREIGN IMMUNITY:** This Loan Agreement and all related documents are being submitted by you to us as an economic arm, instrumentality, and limited liability company of the Tribe. The Tribe is a federally-recognized American

> Indian Tribe and enjoys governmental sovereign immunity. Because we and the Tribe are entitled to sovereign immunity, you will be limited as to what claims, if any, you may be able to assert against the Tribe and us. To encourage resolution of consumer complaint, any complaints may be submitted by you or on your behalf to the Tribe for review as described below.
>
> **PRESERVATION OF SOVEREIGN IMMUNITY:** It is the express intention of the Tribe and us operating as an economic arm of the Tribe, to fully preserve, and not waive either in whole or in part, exclusive jurisdiction, sovereign governmental immunity, and any other rights, titles, privileges, and immunities, to which we and the Tribe are entitled. To protect and preserve the rights of the parties, no person may assume a waiver of sovereign immunity. No waiver is or can be made except by express written declaration of the Tribe's Tribal Council specifically authorizing a waiver for the matter in question. No such waiver has been made with respect to either your Loan Agreement or any ACH Authorization.

Ex. 1-C and Ex. 1-D at 2.

Plaintiff's Loan Agreements also provide an exclusive dispute resolution provision, stating in all caps as follows:

> THIS DISPUTE RESOLUTION OPPORTUNITY WITH THE TRIBAL COUNCIL IS INTENDED AS THE SOLE DISPUTE RESOLUTION MECHANISM FOR DISPUTES AND CLAIMS ARISING UNDER THIS LOAN AGREEMENT.

Ex. 1-C, p.2; Ex. 1-D, p.3.

Moreover, the Loan Agreements state in the "Governing Law" section of each that: "You agree to be bound by Tribal law, and in the event of a bona fide dispute between you and us, Tribal law shall exclusively apply to such dispute."

Ex. 1-C, p.2; Ex. 1-D, p.2.

Again, Plaintiff has never availed herself of these dispute resolution procedures. Ex. 1, ¶¶ 27-28; Ex. 2., ¶¶ 14-18.

## ARGUMENT

### A. THIS COURT LACKS SUBJECT MATTER JURISDICTION BECAUSE RIVERBEND HAS SOVERIGN IMMUNITY.

#### 1. Standard of Review Under Rule 12(b)(1).

Sovereign immunity is an issue of subject matter jurisdiction. "If the defendant challenges the factual predicate of subject matter jurisdiction, "[a] trial court may then go beyond the allegations of the complaint and in an evidentiary hearing determine if there are facts to support the jurisdictional allegations . . . ." *Kerns v. U.S.*, 585 F.3d 187, 192 (4th Cir. 2009) (emphasis removed). "In that situation, the presumption of truthfulness that is normally accorded a complaint's allegations does not apply, and the district court is entitled to decide disputed issues of fact with respect to subject matter jurisdiction." *Id.* The plaintiff bears the burden of proving that subject matter jurisdiction exists. *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982).

Here, Plaintiff offers only conclusory allegations regarding the Court's subject matter jurisdiction, and Riverbend challenges the factual predicate of those allegations. Accordingly, the Plaintiff's allegations are not entitled to the deference. *See Kerns*, 585 F.3d at 192. Instead, the Court may consider extrinsic evidence, such as the Declarations and exhibits attached to this Motion. As explained below, this evidence demonstrates that Plaintiff cannot satisfy her burden, and her claims against Riverbend should be dismissed.

#### 2. Tribes and "Arms of the Tribe" Have Sovereign Immunity.

Tribal sovereignty is a foundational principle of federal law and the cornerstone of the legal and political existence of American Indian tribes. "Among the core aspects of sovereignty that tribes possess . . . is the 'common-law immunity from suit traditionally enjoyed by sovereign

powers.'" *Michigan v. Bay Mills Indian Community*, 134 S.Ct. 2024, 2028 (2014) (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978)). From the earliest years of the republic, courts have recognized the political independence and self-governing status of Indian tribes. *See Cherokee Nation v. Georgia*, 30 U.S. 1 (1831) (classifying tribes as "domestic dependent nations"); *Worcester v. Georgia*, 31 U.S. 515, 559 (1832) (explaining that the tribes are "distinct independent political communities, retaining their original natural rights" and not dependent on federal law for their powers of self-government). "That immunity, we have explained, is 'a necessary corollary to Indian sovereignty and self-governance.'" *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, P.C.*, 476 U.S. 877, 890 (1986) (internal citations omitted); cf. The Federalist No. 81, p. 511 (B. Wright ed. 1961) (A. Hamilton) (It is 'inherent in the nature of sovereignty not to be amendable' to suit without consent.)."

Tribal sovereign immunity extends to tribes both when acting as regulators—such as when they adopt consumer lending codes that differ from those of the state of Maryland—and when acting as commercial participants. "Tribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation." *Kiowa Tribe of Oklahoma v. Mfg. Technologies, Inc.*, 523 U.S. 751, 760 (1998). The United States Supreme Court recently reaffirmed tribal sovereign immunity in both the regulatory and commercial spheres. In *Michigan v. Bay Mills Indian Community*, 134 S.Ct. 2024, 2028 (2014), the Court found that sovereign immunity barred a suit against a tribal casino that was allegedly operating outside the statutory framework laid out in the Indian Regulatory Gaming Act, and rejected the arguments of more than a dozen states asking the Court to limit sovereign immunity to strictly on-reservation governmental activity. More specifically, the Court held:

> The question in this case is whether tribal sovereign immunity bars Michigan's suit against the Bay Mills Indian Community for opening a casino outside Indian lands. We hold that immunity protects Bay Mills from this legal action. Congress has not abrogated tribal sovereign immunity from a State's suit to enjoin gaming off a reservation or other Indian lands. And we decline to revisit our prior decisions holding that, absent such an abrogation (or a waiver). Indian tribes have immunity even when a suit arises from off-reservation commercial activity.

*Id*. at 2028 (emphasis added).

Following *Bay Mills*, courts have continued to recognize the broad sweep of sovereign immunity. *See e.g.*, *Cayuga Indian Nation of New York v. Seneca Cnty., N.Y.*, 761 F.3d 218, 220 (2d. Cir. 2014) ("This treatment of tribal sovereign immunity from suit is an unavowedly 'broad principle,' . . . and the Supreme Court . . . has 'thought it improper suddenly to start carving out exceptions' to that immunity, opting instead to 'defer' to the plenary power of Congress to define and otherwise abrogate tribal sovereign immunity from suit." *Id.* (quoting *Bay Mills Indian Community*, 134 S.Ct. at 2031) (internal citations omitted).

This broad reach of tribal sovereign immunity extends to corporate subsidiaries of tribes. In *Cash Advance & Preferred Cash Loans v. State*, 242 P.3d 1099 (Co. 2010), the Colorado Supreme Court stated that "[a]lthough the U.S. Supreme Court has not addressed this issue, it has acknowledged that the United States has taken the position that corporate entities may be arms of the tribe entitled to the tribe's sovereign immunity." *Id*. at 1110 (citing *Inyo County v. Paiute-Shoshone Indians of Bishop Community of Bishop Colony*, 538 U.S. 701, 705 n. 1 (2003)). "When the tribe establishes an entity to conduct certain activities, the entity is immune if it functions as an arm of the tribe." *Allen v. Gold Country Casino*, 464 F.3d 1044, 1046 (9th Cir. 2006). "Tribal immunity extends to subdivisions of a tribe, and even bars suits arising from a tribe's commercial activities." *Native American Distrib. v. Seneca–Cayuga Tobacco Co.,* 546 F.3d 1288, 1292 (10th Cir. 2008). Indeed, established law from the First, Sixth, Eighth, Ninth,

Tenth Circuits, along with various states, makes it clear that sovereign immunity is not limited to tribes themselves, but it also extends to entities that are owned by a tribe, established under tribal law, and operate as "arms of the tribe."[2] *See*, *e.g*., *Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.,* 207 F.3d 21, 29 (1st Cir. 2000); *Memphis Biofuels, LLC v. Chickasaw Nation Indus., Inc.,* 585 F.3d 917, 920–21 (6th Cir. 2009); *Hagen v. Sisseton–Wahpeton Cmty. Coll.,* 205 F.3d 1040, 1043 (8th Cir. 2000); *Allen v. Gold Country Casino,* 464 F.3d 1044, 1046 (9th Cir. 2006); *Native American Distrib.,* 546 F.3d at 1292; *Cash Advance,* 242 P.3d at 1107-08.

**3. <u>Riverbend Is An Arm of the Tribe and Has Sovereign Immunity.</u>**

Courts have adopted a variety of overlapping multifactor tests for determining whether an entity is an "arm" of a tribe. In the Colorado Supreme Court case of *Cash Advance,* 242 P.3d 1099 (Co. 2010), the court distilled these various tests into three factors – all of which focus on the relationship between the tribal entities and the tribe. Each of these factors is satisfied here.

The first factor is "whether the tribes created the entities pursuant to tribal law." *Id.* at 1110. Numerous courts have recognized that, when a tribe incorporates an entity under tribal law, rather than incorporating it under state law, that is a factor that weighs strongly in favor of a finding that the entity shares the tribe's sovereign immunity. *See Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173, 1191 (10th Cir. 2010) ("The first factor, the method of creation of the Authority and the Casino, weighs in favor of the conclusion that these entities are entitled to tribal sovereign immunity."); *Cook v. AVI Casino Enterprises, Inc.*, 548 F.3d 718, 726 (9th Cir. 2008) (finding that tribal sovereign immunity applies to a casino incorporated under tribal law); *Warren v. United States*, 859 F. Supp. 2d 522, 540 (W.D.N.Y.

[2] "Arm of the tribe" is one of several phrases courts have adopted to signify tribal agencies or businesses that share the tribe's sovereign immunity. *See Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173, 1185 n.9 (10th Cir. 2010).

2012) aff'd, 517 F. App'x 54 (2d Cir. 2013) (identifying the fact that an entity is organized under tribal constitution or laws as factor weighing in favor of tribal sovereign immunity); *Wright v. Colville Tribal Enter. Corp*., 147 P.3d 1275, 1279 (Wash. 2006) ("Essentially, tribal sovereign immunity protects tribal governmental corporations owned and controlled by a tribe, and created under its own tribal laws.").[3]

Here, Riverbend was created by the Tribe under Tribal law, as a wholly-owned subsidiary operated by the Tribe (through its Tribal holding company, GVA Holdings LLC). Ex. 1 and Ex. 2. More specifically, the Tribe organized Riverbend on July 17, 2012 by delivering Articles of Organization to the Council Secretary of the Fort Belknap Indian Community Council in accordance with Tribal Law. Ex. 1 at ¶ 13; *see also* Ex. 1-A. This factor therefore weighs in favor of finding that Riverbend has sovereign immunity.

The second factor is whether the tribe owns and operates the entity at issue. *Cash Advance*, 242 P.3d at 1110. Riverbend satisfies this factor as well. The first paragraph of Plaintiff's Loan Agreement states that "we" are "an economic development arm of, instrumentality of, and a limited liability company wholly owned and controlled by, the Ft. Belknap Indian Community of the Ft. Belknap Reservation Montana." Ex.1-C; Ex. 1-D. The Tribe is the sole member of Riverbend, and thus, the Tribe is in complete control of Riverbend.

[3] Many cases dealing with the sovereign immunity of tribal entities involve "Section 17 corporations," incorporated under a federal law 25 U.S.C. § 477. *See Amerind Risk Mgmt. Corp. v. Malaterre*, 633 F.3d 680, 685 (8th Cir. 2011) ("As discussed above, Amerind was incorporated by three Charter Tribes and issued a federal charter under 25 U.S.C. § 477."); *Native Am. Distrib..*, 546 F.3d at 1292 (" Tribal immunity extends to subdivisions of a tribe, and even bars suits arising from a tribe's commercial activities."); *Memphis Biofuels, LLC v. Chickasaw Nation Indus., Inc.*, 585 F.3d 917, 921 (6th Cir. 2009) ("In sum, we conclude that the better reading of Section 17 is that it creates 'arms of the tribe' that do not automatically forfeit tribal-sovereign immunity."); *Sanchez v. Santa Ana Golf Club, Inc.*, 104 P.3d 548, 551(N.M. 2005) ("Corporations formed under Section 17 enjoy sovereign immunity."). The analysis is fundamentally the same in these cases.

Riverbend's Articles of Organization require as much and also prohibit the admission of additional members to the LLC. Thus, complete control resides, now and forever, with the Tribe. Ex. 1, ¶¶ 6, 14; Ex. 2, ¶ 13. Thus, this second factor weighs in favor of tribal sovereign immunity.

The third factor is "whether the entities' immunity protects the tribes' sovereignty." *Cash Advance*, 242 P.3d at 1110. One of primary purposes of recognizing sovereign immunity for tribal enterprises is to "enable the Tribe to develop self-sufficiency, promote tribal economic development, and generate jobs and revenues to support the Tribe's government and governmental services and programs," *Allen*, 464 F.3d at 1046-47 (quoting 25 U.S.C. § 2702(1)). "Immunity of the [business] directly protects the sovereign Tribe's treasury, which is one of the historic purposes of sovereign immunity in general." *Id*. at 1047. "Not only has Congress expressed a strong policy in favor of encouraging tribal economic development, but extending immunity to the [tribal business] directly protects the sovereign Tribe's treasury, which is one of the historic purposes of sovereign immunity in general." *Breakthrough Mgmt. Grp.*, 629 F.3d at 1195 (quotations omitted).[4]

[4] At least one court has rejected any limitations on the sovereign immunity of tribal enterprises on "policy" grounds, as inconsistent with Supreme Court precedent that has repeatedly held that the only body that has the authority to limit tribal sovereign immunity in the name of "policy" is Congress. *Cash Advance*, *supra*, specifically held that under binding Supreme Court precedent, particularly *Kiowa Tribe of Oklahoma*, 523 U.S. at 754-55, "the entity's purpose and its activities [were] irrelevant to the determination whether it qualifies for immunity," because "[c]onsideration of the entity's purpose would function as a state-imposed limitation on tribal sovereign immunity, in contravention of federal law." *Cash Advance*, 242 P.3d at 1111. Any arguments that "no federal Indian law policy intended to promote tribal self-determination is furthered through the existence of Defendant Riverbend," Complaint at ¶ 119, must be addressed to Congress, as the only branch of government with the authority to abrogate tribal sovereign immunity. *Bay Mills*, 134 S.Ct. at 2031. "The baseline position, we have often held, is tribal immunity," and "from which we thought it improper suddenly to start carving out exceptions." *Bay Mills*, 134 S.Ct. at 2031. "To abrogate such immunity, Congress must unequivocally express that purpose." *Id*. (quotations omitted). *Bay Mills* dealt directly with a casino that was

This factor is satisfied here. Again, Riverbend was formed to provide desperately needed revenue to the Tribe and economic activities to its remote and impoverished Reservation. Ex. 2 at ¶ 4. The income derived through Riverbend is critical to the Tribe because the Tribe lacks access to any other stable stream of revenue. Accordingly, such income is needed to provide essential public services for its citizens. *Id*. at ¶ 8. More traditional methods of governmental revenue-raising, such as property, sales or income taxation, are generally unavailable to the Tribe. *Id*. at ¶ 4. Thus, the third factor also supports a finding that Riverbend has sovereign immunity.

**4. Case Law Supports the Conclusion that Riverbend has Sovereign Immunity.**

Tribal lending enterprises, such as Riverbend, have previously been found to be "arms of the tribe" and therefore immune from suit. In *Cash Advance*, for example, the Colorado Supreme Court reversed an order enforcing an investigative subpoena against a tribal lending enterprise because the state had no authority to issue subpoenas to other sovereign governments. *Cash Advance*, 242 P.3d at 1102. The facts in that case were almost identical to those presented here, except that the argument for breaching tribal sovereign immunity in that case was stronger because it involved a government subpoena rather than a private suit: "We are charged with applying the doctrine of tribal sovereign immunity in the context of a state investigative subpoena enforcement action against two entities operating under the trade names Cash Advance and Preferred Cash Loans and asserting they are entitled to immunity as 'arms' of the Miami Nation of Oklahoma and the Santee Sioux Nation, both federally recognized Indian tribes." *Id*.

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operating on off-reservation land, in alleged violation of Michigan law, suggesting that when the Supreme Court said that it was "improper suddenly to start carving out exceptions," that rule applies to any and all enterprises of a tribe.

The court nevertheless held that "tribal sovereign immunity applies to this state investigative subpoena enforcement action." *Cash Advance*, 242 P.3d at 1108.

The recent district court opinion in *Bynon v. Mansfield*, No. 15-00206, 2015 WL 2447159 (E.D. Pa. 2015), also applied sovereign immunity to a tribal lending enterprise similar to Riverbend – a title lending company organized under the laws of the Lac Vieu Desert Band of Lake Superior Chippewa Indians. The court held that the tribe's sovereign immunity "extends to a tribe's subordinate economic entities and to tribal officials who are acting in their official capacity and within the scope of their authority," *id*. at *1, and rejected the plaintiff's attempt to "circumvent" this immunity by suing the individual who managed the company rather than the company itself, *id*. at *2. This case thus represents another direct application of these doctrines to facts that are indistinguishable from the present litigation.

**B. THIS ACTION ALSO SHOULD BE DISMISSED UNDER RULE 19 FOR FAILURE TO JOIN THE TRIBE AS AN INDISPENSIBLE PARTY.**

Failure to join an indispensable party is grounds for dismissal. Fed. R. Civ. P. 12(b)(7). "A finding of indispensability under Federal Rule of Procedure 19(b) has three parts." *N. Arapaho Tribe v. Harnsberger*, 697 F.3d 1272, 1278 (10th Cir. 2012). The moving party must prove (1) that "a prospective party is 'required to be joined' under Rule 19(a)"; (2) "that the required party cannot feasibly be joined"; and (3) that "the required-but-not-feasibly-joined party is so important to the action that the action cannot 'in equity and good conscience' proceed in that person's absence." *Id*. at 1278-79 (quoting Fed. R. Civ. P. 19(b)). "In determining whether to dismiss a complaint, a court must proceed pragmatically, 'examin[ing] the facts of the particular controversy to determine the potential for prejudice to all parties, including those not before it.'" *Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Rite Aid of S. Carolina, Inc*., 210 F.3d

246, 250 (4th Cir. 2000) (quoting *Teamsters Local Union No. 171 v. Keal Driveaway Co.*, 173 F.3d 915, 918 (4th Cir.1999)).

Rule 19 often has been applied to dismiss litigation, like this one, that could have a financial impact on a tribe. The Tenth Circuit in *Northern Arapaho Tribe v. Harnsberger*, 697 F.3d 1272 (10th Cir. 2012), for example, applied the Rule 19 factors to conclude that the Eastern Shoshone Tribe was a necessary party to litigation that would determine the external boundaries of its own Indian reservation. Similarly, in *Dawavendewa v. Salt River Project & Power Dist.*, 276 F.3d 1150 (9th Cir. 2002), a member of the Hopi Tribe sued the Salt River Project Agricultural Improvement and Power District alleging that it was violating Title VII of the Civil Rights Act of 1964 by adhering to provision in its lease with the Navajo Nation requiring it to give a hiring preference to members of the Navajo Nation. *Id.* at 1153. The Ninth Circuit dismissed the case, finding that "[b]ecause Dawavendewa challenges the Nation's ability to secure employment opportunities and income for the reservation—its fundamental consideration for the lease with SRP—the Nation, like the Hopi Tribe in *Kescoli*, claims a cognizable economic interest in the subject of this litigation which may be grievously impaired by a decision rendered in its absence." *Id*. at 1157 (citing *Kescoli v. Babbitt*, 101 F.3d 1304, 1309 (9th Cir. 1996)).

The Fourth Circuit follows the *Dawavendewa* rule: "In analyzing whether the Tribe is both a necessary and an indispensable party . . . we find persuasive a recent Ninth Circuit case that presents facts materially indistinguishable from those at issue here." *Yashenko v. Harrah's NC Casino Co., LLC*, 446 F.3d 541, 552 (4th Cir. 2006) (citing *Dawavendewa v. Salt River Project Agric. Improvement & Power Dist*., 276 F.3d 1150 (9th Cir. 2002)). As the Fourth Circuit explained, "[t]he Ninth Circuit held that the tribe was a necessary party because the

plaintiff could not obtain complete relief without suing the tribe; a judgment in the plaintiff's favor would only bind him and the private employer and would not prevent the tribe from continuing to enforce its tribal preference policy on its own property, . . . any judgment on such a claim would threaten 'to impair the [Tribe]'s contractual interests, and thus, its fundamental economic relationship with' the private party, as well as 'its sovereign capacity to negotiate contracts and, in general, to govern' the reservation," and "[e]xactly the same conclusions must be reached here." *Id*. at 552-53 quoting *Dawavendewa*, 276 F.3d at 1157. The court went on to find that the tribe was also an indispensable party because any judgment on the plaintiff's claim "would prejudice the Tribe's economic interests in the Management Agreement . . . and its interests as a sovereign in negotiating contracts and governing its reservation," and it was impossible to mitigate the prejudice. *Id*. at 553.

As in these cases, the Tribe is an indispensible party that cannot be joined, which requires dismissal of the Plaintiff's Complaint as to Riverbend. A party is "required to be joined" if "that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may . . . as a practical matter impair or impede the person's ability to protect the interest." Fed. R. Civ. P. 19(a). The Tribe satisfies this requirement given that the Tribe's consumer lending business is a vital source of Tribal revenue and this lawsuit threatens that revenue. Ex. 1 at ¶ 7 and Ex. 2 at ¶¶ 4, 8.

The second requirement also is satisfied. As shown, the Tribe is protected by sovereign immunity. "Tribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation." *Kiowa Tribe of Oklahoma v. Mfg. Technologies, Inc*., 523 U.S. 751, 760 (1998). "[I]f the tribe is

an indispensable party, and cannot be joined due to its immunity, the claim may not proceed." *Wichita & Affiliated Tribes of Oklahoma v. Hodel*, 788 F.2d 765, 771 (D.C. Cir. 1986).

The third requirement involves balancing several factors, including the extent of prejudice to the absent-but-required party and whether the plaintiff has some other adequate remedy. Fed. R. Civ. P. 19(b). "Some courts have noted, however, that when the necessary party is immune from suit, there is very little need for balancing Rule 19(b) factors because immunity itself may be viewed as the compelling factor." *Confederated Tribes of Chehalis Indian Reservation v. Lujan*, 928 F.2d 1496, 1499 (9th Cir. 1991). Nevertheless, the Rule 19(b) factors support dismissal here. A judgment rendered in the absence of the Tribe would prejudice the Tribe by threatening an important source of revenue and employment, and it is difficult to see how the Court could craft a remedy that would mitigate this prejudice. The fact that the Tribe might have a right to intervene as a defendant in the litigation does not mitigate this prejudice because to intervene fully in the litigation it would "have had to waive their tribal immunity." *Wichita & Affiliated Tribes of Oklahoma v. Hodel*, 788 F.2d 765, 776 (D.C. Cir. 1986). "It is wholly at odds with the policy of tribal immunity to put the tribe to this Hobson's choice between waiving its immunity or waiving its right not to have a case proceed without it." *Id*. The final factors, which ask whether there is an alternative remedy in the case of dismissal, also is satisfied, in that Plaintiff may pursue her Tribal remedies, as set forth in her Loan Agreements.

### C. THE TRIBAL EXHAUSTION DOCTRINE REQUIRES THAT TRIBAL REMEDIES MUST BE EXHAUSTED PRIOR TO ANY FEDERAL COURT REVIEW.

When a civil matter is brought "arising out of business transactions commenced on tribal lands," the court is "required to abstain from exercising its diversity jurisdiction" until the tribal forum has "resolved the substantial questions of tribal sovereignty presented." *Stock W. Corp. v.*

*Taylor*, 964 F.2d 912, 920 (9th Cir. 1992). This doctrine applies whenever there is a "colorable" claim of tribal jurisdiction, when "the assertion of tribal court jurisdiction is plausible and appears to have a valid or genuine basis." *Id*. at 919. "The requirement of exhaustion of tribal remedies is not discretionary; it is mandatory." *Burlington N. R. Co. v. Crow Tribal Council*, 940 F.2d 1239, 1245 (9th Cir. 1991).

The tribal exhaustion doctrine was established by the Supreme Court in *National Farmers Union Insurance Companies v. Crow Tribe*, 471 U.S. 845 (1985), where the Court "recognized that Congress is committed to a policy of supporting tribal self-government and self-determination" and held that this policy would be furthered by requiring federal courts to stay their hands while the tribal court first considered whether it would hear the case. *Id*. "Moreover the orderly administration of justice in the federal court will be served by allowing a full record to be developed in the Tribal Court before either the merits or any question concerning appropriate relief is addressed." *Id*. The only exceptions are "where an assertion of tribal jurisdiction "is motivated by a desire to harass or is conducted in bad faith," *cf. Juidice v. Vail*, 430 U.S. 327, 338 (1977), or where the action is patently violative of express jurisdictional prohibitions, or where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction." *Nat'l Farmers*, 471 U.S. at 857 n. 21.

Cases following *National Farmers* have held that federal courts should, indeed must, stay their hands to allow tribal bodies to consider matters that may be within their jurisdiction, even when no action is pending before a tribal forum. *See, e.g.*, *Fid. & Guar. Ins. Co. v. Bradley*, 212 F. Supp. 2d 163, 166-67 (W.D.N.C. 2002) ("Nor is a different result required because there is no

pending action in tribal court.").[5] Courts also have applied the doctrine to tribal businesses operating off the reservation. *See, e.g.*, *Ninigret Dev. Corp*, 207 F.3d at 32 (finding that a tribe's off-reservation dealings with the plaintiff "bore directly on the use and disposition of tribal resources," and thus, triggered application of the exhaustion doctrine); *see also Tsosie*, 92 F.3d at 1041 ("Where comity concerns are present, jurisdiction presumptively lies in the tribal court ... unless Congress has expressly limited that jurisdiction.").

In this case, Ms. Everette entered into Loan Agreements that disclosed that Riverbend is a Tribal entity. Ex. 1-C, p.1; Ex. 1-D; p.1. The Agreements are governed by Tribal law and provide for an exclusive Tribal-dispute-resolution procedure. Ex. 1-C, p.2; Ex. 1-D, p.2-3. These facts create a colorable claim to Tribal jurisdiction and require dismissal. *See Montana v. United States*, 450 U.S. 544, 565 (1981).

## CONCLUSION

Riverbend respectfully moves this Court to dismiss all of Plaintiff's claims against it. Riverbend is a tribal enterprise immune from suit; it is a subsidiary and essential governmental economic arm of a federally-recognized Indian tribe not subject to suit, and thus the Tribe is an indispensable party that cannot be joined, and Plaintiff has not initiated, much less exhausted, the exclusive Tribal remedies set forth in her Loan Agreements.

[5] *Accord Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.*, 207 F.3d 21, 31 (1st Cir. 2000) ("Where applicable, this prudential doctrine has force whether or not an action actually is pending in a tribal court."); *see also United States v. Tsosie*, 92 F.3d 1037, 1041 (10th Cir. 1996) ("Moreover, the exhaustion rule does not require an action to be pending in tribal court."); *Crawford v. Genuine Parts Co., Inc*., 947 F.2d 1405, 1407 (9th Cir. 1991) ("Whether proceedings are actually pending in the appropriate tribal court is irrelevant."); *Tom's Amusement Co. Inc. v. Cuthbertson*, 816 F.Supp. 403, 407 (W.D. N.C. 1993) (holding the doctrine applies despite the court being unaware of any pending action before a tribal court).

WHEREFORE, Defendant Riverbend Finance, LLC respectfully requests that the Court grant the Motion, dismiss the Complaint as to Riverbend, and to award Riverbend such other relief as is just and proper.

Respectfully submitted this 6th day of July, 2015.

RIVERBEND FINANCE, LLC

By Counsel

/s/ Thomas J. McKee, Jr.
Michael R. Sklaire (Md. Bar No. 16471)
Thomas J. McKee, Jr. (Md. Bar No. 16517)
GREENBERG TRAURIG LLP
1750 Tysons Blvd Ste 1000
McLean, VA 22102
Phone: (703) 749-1300
Fax: (703) 749-1301
Email: sklairem@gtlaw.com
mckeet@gtlaw.com

Robert J. Herrington, Esq. (*pro hac vice*)
GREENBERG TRAURIG LLP
1840 Centruy Park E Ste 1900
Los Angeles, CA 90067
Phone: (310) 586-7616
Fax: (310) 586-7800
Email: herringtonr@gtlaw.com

*Attorneys for Defendant Riverbend Finance LLC*

**Certificate of Service**

I hereby certify that on July 6, 2015, I electronically filed the foregoing with the clerk of the United States District Court for the District of Maryland via its CM/ECF filing system with the Clerk of Court using the CM/ECF electronic filing system which will send notification of such filing to all listed parties including:

E David Hoskins
Max F. Brauer
The Law Offices of E David Hoskins LLC
16 E. Lombard Street
Suite 400
Baltimore, MD 21202
Phone: (410) 662-6500
Fax: (410) 662-7800
Email: davidhoskins@hoskinslaw.com
maxbrauer@hoskinslaw.com
*Attorneys for Plaintiff Alicia Everette*

David Bryan Applefeld
Adelberg Rudow Dorf and Hendler LLC
Seven Saint Paul St, Ste 600
Baltimore, MD 21202
Phone: (410) 539-5195
Fax: (410) 539-5834
Email: dapplefeld@adelbergrudow.com
*Attorney for Defendants Joshua Mitchem and Jeremy D. Shaffer*

Charles W Galbraith
Gregory Matthew Jacobs
607 14th St NW
Ste 900
Washington, DC 20005
(202) 508-5850
Fax: (202) 204-5601
Email: galbraith@kilpatricktownsend.com
gjacobs@kilpatricktownsend.com

Mark H Reeves
Kilpatrick Townsend and Stockton LLP
Enterprise Mill
1450 Greene St Ste 230
Augusta, GA 30901
Phone: (706) 823-4206
Fax: (706) 828-4488
Email: mreeves@kilpatricktownsend.com

*Attorneys for Defendant Mobiloans, LLC*

/s/ Thomas J. McKee, Jr.
Thomas J. McKee, Jr. (Md. Bar No. 16517)
GREENBERG TRAURIG LLP
1750 Tysons Blvd Ste 1000

McLean, VA 22102
Phone: (703) 749-1300
Fax: (703) 749-1301
Email: mckeet@gtlaw.com