

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

ALICIA EVERETTE,

*

Plaintiff

*

v.

*

Civil Action No. 1:15-cv-1261

JOSHUA MITCHEM, et al.

*

*

Defendants.

* * * * *

**PLAINTIFF’S OPPOSITION TO DEFENDANTS MOBILOANS, LLC’S AND
RIVERBEND FINANCE, LLC’S MOTIONS TO DISMISS
AND REQUEST FOR HEARING**

Plaintiff, Alicia Everette, on behalf of herself and all others similarly situated, by her undersigned counsel, submits this memorandum of law in opposition to the motion to dismiss filed on behalf of Defendant Mobiloans, LLC (“Mobiloans”), ECF 21, and the motion to dismiss filed on behalf Defendant Riverbend Finance, LLC (“Riverbend”), ECF 22.

INTRODUCTION

It is unquestioned that a State generally has the authority to prohibit corrupt and unfair business practices perpetrated within its boundaries against its citizens. *See, e.g.,* Leah A. Plunkett & Ana Lucía Hurtado, *Small-Dollar Loans, Big Problems: How States Protect Consumers from Abuses and How the Federal Government Can Help*, 44 SUFFOLK U. L. REV. 31 (2011) (examining state regulation of payday lenders). Payday loans are among the most predatory products peddled against consumers and create a vicious debt trap. *See, e.g.,* Leslie Parrish & Uriah King, Center for Responsible Lending, *Phantom Demand: Short-Term Due Dates Generate Need for Repeat Payday Loans, Accounting for 76% of Total Volume 15-16* (2009), available at <http://www.responsiblelending.org/payday-lending/research-analysis/>

phantom-demand-short-term-due-date-generates-need-for-repeat-payday-loans-accounting-for-76-of-total-volume.html (demonstrating how the structure of payday loans creates a debt-trap for borrowers); Lauren K. Saunders et al., National Consumer Law Center, *Stopping the Payday Loan Trap: Alternatives that Work, Ones that Don't* 4-6 (2010), available at <http://www.nclc.org/issues/stopping-the-payday-loan-trap.html> (describing payday loans and the harms they cause for consumers); Karen E. Francis, Note, *Rollover, Rollover: A Behavioral Law and Economics Analysis of the Payday Loan Industry*, 88 TEX. L. REV. 611 (2010) (describing how consumers may get “caught in the ‘debt trap’ of extending the loan for multiple terms”).

Payday loans are characterized by small loans with exorbitant interest rates and short repayment periods. *See id.*; Heather L. Petrovich, *Circumventing State Consumer Protection Laws: Tribal Immunity and Internet Payday Lending*, 91 N.C. L. REV. 326 (December 2012). Traditional lenders evaluate borrower’s ability to repay before funding the loan and will not extend a loan if they do not believe the borrower can repay. However, this initial evaluation does not take place in the payday lending industry. Rather, payday lenders target poor Americans who are less likely to repay timely, increasing the payday lender’s revenue through even more interest and fees. *Id.* The Federal Reserve Board reported in 2007 that the median income of payday borrowers was just above \$30,000. *Id.* Payday lenders also disproportionately target the elderly, minorities, and those who are dependent on government benefit programs for their main source of income. *Id.*; Scott A. Hefner, *Payday Lending in North Carolina: Now You See It, Now You Don't*, 11 N.C. BANKING INST. 263, 267 (2007) (describing typical payday loan borrowers). Interest rates are perverse, ranging from 391 percent to 782 percent. *See Petrovich* at 332; Saunders, et al. at 4. These loans also include a

lack of transparency of loan terms, leaving the majority of borrowers unaware of the actual terms of their lending agreements. *See* Nathalie Martin, *Payday Loans: Why This Should Make the CFPB's Short List*, 2 HARV. BUS. L. REV. ONLINE 44, 47-48 (2011), available at <http://www.hblr.org/wp-content/uploads/2011/07/Martin-Payday-Loans.pdf>; Petrovich at 332. Payday loan borrowers frequently allege that their lender failed to disclose various harmful loan terms before they entered into the agreement. *See id.*; *see also* Creola Johnson, *Payday Loans: Shrewd Business or Predatory Lending?*, 87 MINN. L. REV. 1, 119-20 (2002).

Maryland is one state that prohibits payday loans. *See* Md. Code Ann., Com. Law (“CL”) § 12-101, *et seq.*; Maryland Consumer Loan Law (“MCLL”), at Md. Code Ann., Com. Law (“CL”) § 12-301, *et seq.*, and Fin. Inst. (“FI”) § 11-201 *et seq.* Defendants Mobiloans, LLC and Riverbend, LLC are notorious payday lenders located in Louisiana and Montana, respectively. Despite Maryland’s prohibitions against payday loans, Defendants have made illegal and usurious payday loans in Maryland to Ms. Everette and the class of Maryland consumers she seeks to represent. There is no dispute that these loans are illegal and usurious under Maryland law. In fact, Defendant Riverbend acknowledges that its loans are perversely and grossly usurious. *See* ECF 22-2, Exhibits 1-C, 1-D. These documents disclose APRs of 602.87 percent and 621.96 percent, respectively. *Id.*

Despite such obvious violations of clear Maryland law, these out-of-state Defendants claim that they cannot be held liable for their actions due to tribal sovereign immunity. This claim must be rejected. Defendants are not Native American tribes. Rather, they are limited liability companies. The Supreme Court has only granted tribal sovereign immunity to tribes, but not to tribally-chartered corporations (especially not those engaging in predatory lending). This Court should decline Defendant’s request to expand this federal common law doctrine. In

addition, though some lower courts have expanded sovereign immunity to non-tribes, it generally has been expanded only to entities that perform functions of traditional government agencies, such as housing authorities, colleges, health boards, or (in the context of tribes) gaming authorities (e.g. casinos), which Congress has regulated and encouraged tribes to establish through the Indian Gaming Regulation Act, 25 U.S.C. § 2701, *et seq.* However, Defendants are off-reservation payday lenders. Moreover, to maintain comity with state sovereign immunity jurisprudence under the 11th Amendment, this Court should not extend tribal sovereign immunity to entities that protect the tribe's assets through limited liability. In addition, this Court should reject sovereign immunity under *Michigan v. Bay Mills Indian Community*, 134 S.Ct. 2024, 188 L.Ed.2d 1071 (2014) because, as a private litigant, Ms. Everette has no other recourse for the civil wrongs perpetrated against them by Defendants. Finally, in the event that the Court decides to adopt a further "arm of the tribe" balancing test as advocated by Defendants, the facts before the Court weigh against Defendants.

APPLICABLE LEGAL STANDARDS

Defendants have moved to dismiss Plaintiff's complaint pursuant to Fed. R. Civ. P. 12(b)(1). In determining whether jurisdiction exists, the Court is to regard the allegations in the complaint as "mere evidence" and may consider evidence outside the pleadings without converting the motion into one for summary judgment. *Richmond, Fredericksburg & Potomac R.R. Co.*, 945 F.2d 765, 768 (4th Cir. 1991). A 12(b)(1) motion should be granted if, after engaging in any necessary fact-finding, the court determines that the movant is entitled to prevail as a matter of law. *Demetres v. East West Const., Inc.*, 776 F.3d 271, 272 (4th Cir. 2015). Though the burden of establishing subject matter jurisdiction rests with the plaintiff, the court should grant a Rule 12(b)(1) motion to dismiss "only if the material jurisdictional facts

are not in dispute and the moving party is entitled to prevail as a matter of law.” *Evans v. B.F. Perkins Co.*, 166 F.3d 642, 647 (4th Cir. 1999) (internal quotation marks omitted). “[I]n some instances, if subject-matter jurisdiction turns on contested facts, the trial judge may be authorized to review the evidence and resolve the dispute on her own. If satisfaction of an essential element of a claim for relief is at issue, however, the jury is the proper trier of contested facts.” *Demetres*, 776 F.3d at 272 (quoting *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006)).

ARGUMENT

I. DEFENDANTS ARE NOT ENTITLED TO TRIBAL SOVEREIGN IMMUNITY BECAUSE THEY ARE NOT TRIBES, NOR ARE THEY TRADITIONAL GOVERNMENT AGENCIES OR CONGRESSIONALLY-SANCTIONED CASINOS.

Defendant Mobiloans, LLC and Defendant Riverbend Finance, LLC each claim that they are entitled to tribal sovereign immunity. This argument has a simple fatal flaw. Neither Mobiloans nor Riverbend are Native American tribes. They are limited liability companies. Mobiloans and Riverbend do not contend that they are actual Native American tribes and acknowledge their status as limited liability companies. Defendants cannot be entitled to tribal sovereign immunity because they are not tribes. The United States Supreme Court has never expanded tribal sovereign immunity to a tribally-chartered corporation engaging in off reservation commercial activity.¹ Quite simply, Mobiloans and Riverbend are outside the scope

¹ Riverbend incorrectly cited *Inyo County v. Paiute-Shoshone Indians of Bishop Community of Bishop Colony*, 538 U.S. 701, 705 n. 1 (2003) for the proposition that tribal sovereign immunity extends to corporate subsidiaries of tribes. This footnote does not stand for this proposition, but rather states that “The United States maintains, and the County does not dispute, that the Corporation is an “arm” of the Tribe for sovereign immunity purposes.” The issue of tribal sovereign immunity for a tribal corporate affiliate has never been before the Supreme Court.

of the Supreme Court's tribal sovereign immunity doctrine.

Mobiloans and Riverbend ask the court to expand tribal sovereign immunity to them because they are "arms of the tribe." However, the "arm of the tribe" balancing test advanced by Defendants and adopted by some other Circuits generally has not been applied to business entities such as payday lenders who engage in commercial activity far away from tribal lands. Notably, this balancing and has not been adopted by the Fourth Circuit.² Among those Circuit and state appellate courts that have analyzed "arms of the tribe," generally only non-tribes such as gaming authorities (e.g. casinos) and governmental institutions such as housing authorities and colleges have been granted tribal sovereign immunity.³ With respect to the latter governmental institutions, the following summary of Eighth Circuit precedent is instructive:

The Eighth Circuit has found that a tribe's sovereign immunity may extend to a tribal entity or agency. *Hagen*, 205 F.3d at 1043 (college that was chartered, funded, and controlled by tribe to provide education to tribal members on Indian land was tribal agency entitled to sovereign immunity); *Dillon v. Yankton Sioux Tribe Hous. Auth.*, 144 F.3d 581, 583

² Mobiloans incorrectly cites *Thomas v. Dugan*, 168 F.3d 483 (4th Cir. 1998) (unpublished) for the proposition that sovereign immunity applies to tribal arms, enterprises and entities. This short, unpublished opinion addresses the immunity of Indian tribes, but does not address tribal "arms" and provides no analysis of what constitutes a "tribal enterprise" or "tribal entity."

³ Unrelated cases also evaluate the tribal immunity of so-called "Section 17 corporations." These are corporations chartered by the secretary of the Interior under Section 17 of the Indian Reorganization Act. In the 1930s, the Office of Indian Affairs (OIA) encouraged tribes forming governments under Section 16 of the Indian Reorganization Act to establish alter ego corporations under Section 17. Section 17 corporations are factually different than the instant limited liability companies because they were explicitly encouraged by Congress to be "alter egos" of the Tribe, similar to Congressionally-approved gaming authorities under the Indian Gaming Regulation Act, 25 U.S.C. § 2701, *et seq.*

In addition, a variety of federal district court opinions have gone in various directions on tribal sovereign immunity. However, Defendants' claim that *Bynon v. Mansfield*, No. 15-00206, 2015 WL 2447159 (E.D. Pa. May 21, 2015), is "on all fours" with the instant case is incorrect. *Bynon* is inapplicable because sovereign immunity for the Tribe or for the corporate entity were not contested in that matter.

(8th Cir. 1998) (a tribal housing authority, established by a tribal council pursuant to its powers of self-government, is a tribal agency and is therefore entitled to sovereign immunity); *Weeks Const., Inc. v. Oglala Sioux Hous. Auth.*, 797 F.2d 668, 670-671 (8th Cir. 1986) (tribal housing authority created by a tribal ordinance to develop and administer housing projects on the Pine Ridge Indian Reservation was a tribal agency entitled to sovereign immunity). In *Hagen, Dillon, and Weeks*, the Eighth Circuit considered it critical to the issue of entitlement to sovereign immunity that the organizations served as “arms of the tribe” and were established by tribal councils pursuant to the councils’ powers of self-government. *See Hagen*, 205 F.3d at 1043 (“[T]he College serves as an arm of the tribe and not as a mere business and is thus entitled to tribal sovereign immunity.”); *Dillon*, 144 F.3d at 583 (tribal housing authority established by tribal council pursuant to its powers of self-government was a tribal agency rather than “a separate corporate entity created by the tribe.”); *Weeks*, 797 F.2d at 670-71 (“As an arm of tribal government, a tribal housing authority possesses attributes of tribal sovereignty and suits against an agency like the housing authority normally are barred absent a waiver of sovereign immunity.”) (internal citation omitted; *see also Native Am. Council of Tribes v. Weber*, No. Civ. 09-4182, 2010 WL 1999352, at *9 (D. S.D. May 18, 2010) (“For a tribal agency to have sovereign immunity, the agency must be established by a tribal council pursuant to its powers of self-government and serve as an arm of the tribe.”)).

J.L. Ward Associates, Inc. v. Great Plains Tribal Chairmen’s Health Bd., 842 F.Supp.2d 1163, 1171-72 (D. S.D. 2012) (granting sovereign immunity to a tribal health board). However, Mobiloans and Riverbend are not traditional governmental arms such as housing authorities, colleges, or health boards. They are commercial payday lenders financing usurious loans in Maryland and other states. Defendants do not serve as arms of their respective tribal governments, but rather, as the Eighth Circuit distinguished, are each “a mere business” and “a separate corporate entity.” *See Hagen*, 205 F.3d at 1043; *Dillon*, 144 F.3d at 583.

In addition to traditional government agencies, many other leading cases have only extended sovereign immunity to gaming authorities such as casinos. However, casinos raise a special concern because Congress has explicitly endorsed them to advance tribal economic development. *See Indian Gaming Regulation Act (IGRA)*, 25 U.S.C. § 2702. The IGRA creates a

framework for regulating gaming activity on Indian lands. The Act divides gaming into three classes. Class III gaming, the most closely regulated, includes casino games, slot machines, and horse racing. *See* 25 U.S.C. § 2703(8). A tribe may conduct such gaming on Indian lands only pursuant to, and in compliance with, a compact it has negotiated with the surrounding State. *See* 25 U.S.C. § 2710(d)(1)(C). A compact typically prescribes rules for operating gaming, allocates law enforcement authority between the tribe and the State, and provides remedies for breach of the agreement's terms. *See* 25 U.S.C. §§ 2710(d)(3)(C)(ii), (v). Such explicit Congressional approval differentiates casinos and gaming from other forms of commercial activity. Moreover, casinos and gaming are explicitly sanctioned by the states in which they operate pursuant to the compact reached between the tribe and the state.

Mobiloans and Riverbend are not casinos or traditional governmental agencies. Neither Mobiloans nor Riverbend provide educational, health care, social or historical services on the to tribe members. Defendants are payday lenders making illegal payday loans in Maryland far away from tribal lands. It is not the function of a tribal government to provide illegal pay day lending services in Maryland — far away from these Louisiana and Montana reservations. For this reason alone, this Court need not adopt a detailed “arm of the tribe” balancing test and should deny Defendants’ Motions to Dismiss.

II. TRIBAL SOVEREIGN IMMUNITY CANNOT APPLY TO LIMITED LIABILITY COMPANIES BECAUSE A JUDGMENT AGAINST DEFENDANTS WILL NOT TOUCH THE TRIBE’S ASSETS.

This Court also need not espouse a multi-factor “arm of the tribe” balancing test because Defendants would fail a critical threshold inquiry: they are limited liability companies, and therefore a judgment against Defendants will not reach the Tribes’ assets. Among the Courts that have adopted a multi-factor balancing test, New York holds that as a threshold inquiry, a

tribally-chartered company cannot be an arm of the tribe if the tribe is protected by the corporate shield. The New York Court of Appeals rejected sovereign immunity in *Sue/Perior Concrete & Paving, Inc. v. Lewiston Golf Course Corp.*, 25 N.E. 3d 538 (N.Y. 2014), holding that the financial relationship considerations were the most important of the “arm of the tribe” factors, so much so that this factor alone was fatal to the tribally-owned golf course’s claim of sovereign immunity because the Tribe’s assets were not at risk from a judgment against its golf course corporation:

If a judgment against a corporation created by an Indian tribe will not reach the tribe’s assets, because the corporation lacks “the power to bind or obligate the funds of the tribe, then the corporation is not an “arm” of the tribe. However if a tribe is legally responsible for a corporation’s obligations, the tribe is “the real party in interest.”

Id. at 550. The court noted that the financial relationship was the most significant factor for tribal sovereign immunity “just as ‘the vulnerability of the State’s purse’ is considered ‘the most salient factor’ in determinations of a State’s Eleventh Amendment immunity. *Id.* (quoting *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 48, 115 S.Ct. 394, 130 L.Ed.2d 245 (1994)).

The Supreme Court of Alaska followed the same reasoning:

[A] tribe might, for commercial purposes, wish to form a corporation exposed to suit in order to cultivate trust with business partners.... The tribes’ use of the corporate form protects their assets from being called upon to answer the corporation’s debt. But this protection means that they are not the real party in interest.

Runyon ex rel. B.R. v. Association of Village Council Presidents, 84 P.3d 437, 441 (Alaska 2004).

This Court should adopt the approaches of New York and Alaska over the approaches of the Tenth and Ninth Circuits, and the state of Colorado, which only look at “the vulnerability of the State’s purse” as one of many factors to weigh, because only the New York and Alaska

approaches are consistent with the comity considerations present in the federal common-law tribal sovereign immunity doctrine. Comity has always been a leading concern for the Supreme Court with respect to Native American sovereignty (including in the cases cited *infra* in Section V regarding the tribal exhaustion doctrine). In fact, in *Bay Mills*, the Court's United States Supreme Court's most recent sovereign immunity decision, five members of the Court expressed comity concerns in their reasoning. *See Bay Mills*, 134 S.Ct. at 2040-2045 (Sotomayor, J., concurring); *Id.* at 2045-55 (Thomas, J., dissenting); *Id.* at 2055-56 (Ginsburg, J. dissenting)..

Comity considerations factor heavily in tribal sovereign immunity questions. In *Bay Mills*, each opinion expressed a concern that comity needed to exist between tribal sovereign immunity and state sovereign immunity. These five Justices were troubled by asymmetries between states suing tribes under tribal sovereign immunity and tribes suing states under state sovereign immunity. *See id.* Relatedly, the standards for suing a state-chartered corporation under the 11th Amendment should not be asymmetric with the standards for suing a tribally-chartered corporation under tribal sovereign immunity. As the New York Court of Appeals noted, since the Supreme Court's *Hess* decision looks to limited liability as a threshold inquiry under the 11th Amendment, this threshold inquiry also must exist with respect to tribal sovereign immunity.

Since both Defendants are limited liability companies, tribal sovereign immunity must be rejected under this threshold inquiry. A judgment against these entities will not reach the tribes' assets, and therefore the tribes are not the real parties in interest.

III. TRIBAL SOVEREIGN IMMUNITY CANNOT APPLY UNDER *BAY MILLS* BECAUSE NO ALTERNATIVE REMEDIES EXIST FOR PRIVATE LITIGANTS.

Tribal sovereign immunity is a federal common-law doctrine that the Supreme Court itself has noted “developed almost by accident” in a footnote, and the case typically cited as the doctrine’s source “simply does not stand for that proposition.” *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 756-57, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998) (citing *Turner v. United States*, 248 U.S. 354, 39 S.Ct. 109, 63 L.Ed. 291 (1919)). Far from defending the doctrine, the *Kiowa* majority “doubt[ed] the wisdom of perpetuating the doctrine,” particularly as it may apply to tribes engaging in commercial activity off the reservation. *Id.* at 758. The *Kiowa* Court offered no substantive justification for granting tribes sovereign immunity for off-reservation commercial activity. Three members would not have expanded immunity in this manner. *Id.* at 760 (Stevens, J., dissenting). The other six members expressed hope that Congress would overrule the Court’s decision. *Id.* at 758-59.

The Court narrowly upheld *Kiowa* in *Michigan v. Bay Mills Indian Community*, 134 S.Ct. 2024, 188 L.Ed.2d 1071 (2014). In a 5-4 opinion, the majority repeated the Court’s acknowledgement in *Kiowa* of “reasons to doubt the wisdom of perpetuating the doctrine as to off-reservation commercial conduct,” and upheld *Kiowa* purely on *stare decisis* grounds. The *Bay Mills* Court narrowly held that a state could not sue a tribe for off-reservation commercial conduct concerning illegal casino operations, and justified this holding largely because a state has other options unique to the state to prevent the operation of an illegal casino, such as injunctive relief under *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), criminal prosecution, and negotiation through the Indian Gaming Regulation Act 25 U.S.C. § 2701, *et seq.* *See id.* at 2036.

In reaching its narrow decision, the *Bay Mills* majority noted that “special justifications” exist for possible future denial of tribal sovereign immunity for a tribe’s off-reservation commercial activities. The Court noted:

Adhering to *stare decisis* is particularly appropriate here given that the state, as we have shown, has many alternative remedies: It has no need to sue the Tribe to right the wrong it alleges. We need not consider whether the situation would be different if no alternative remedies were available. We have never, for example, specifically addressed (nor, so far as we are aware, has Congress) whether immunity should apply in the ordinary way if a tort victim, or other plaintiff who has not chosen to deal with a tribe, has no alternative way to obtain relief for off-reservation commercial conduct. The argument that such cases would present a “special justification” for abandoning precedent is not before us.

Id. at 2036 n. 8.

Tribal sovereign immunity is not the broad and expansive doctrine that Defendants suggest. Special justifications distinguish the instant case from *Bay Mills*. In addition to the arguments advanced elsewhere in this memorandum, the instant case provides a special justification because Plaintiff, as a private litigant, has no other remedy other than a private lawsuit against Defendant for its illegal conduct. Ms. Everette does not have the alternative remedies available to the State of Michigan in *Bay Mills*. Since the Court’s holding in *Bay Mills* rested on these alternative state remedies not present here, it is inapplicable to the instant case. Plaintiffs only available recourse for Defendants’ predatory, illegal loans is private litigation.

Moreover, with respect to Defendant Mobiloans, private litigation is literally the only remedy available to Ms. Everette and the class she seeks to represent. Mobiloans Second Amended and Restated, LLC Operating Agreement states that it is immune “from suit in any state, federal or tribal court.” ECF 21-4 at Section 6.1. Thus, granting sovereign immunity to

Mobiloans will completely deprive Ms. Everette and the class she seeks to represent of any judicial recourse anywhere.

IV. IN THE ALTERNATIVE, IF THE COURT ADOPTS A BALANCING TEST, DEFENDANTS SOVEREIGN IMMUNITY CLAIM FAILS AS A FACTUAL MATTER, OR AT LEAST RAISES ADDITIONAL QUESTIONS FOR DISCOVERY.

In the alternative, if this Court chooses to engage in the multi-factor “arm of the tribe” analysis advanced by Defendants, the Court must resolve a factual issue. With respect to “arm of the tribe” factors, generally other courts have considered the following:

- (1) whether the entity is organized under the Tribe’s law;
- (2) whether the entity provides functions similar to a tribal government;
- (3) the structure, ownership, management, and control of the entity;
- (4) the financial relationship between the Tribe and the entity.

See, e.g., Sue/Perior Concrete & Paving, Inc. v. Lewiston Golf Course Corp., 25 N.E. 3d 538 (N.Y. 2014); *Matter of Ransom v. St. Regis Mohawk Educ. & Community Fund*, 86 N.Y. 2d 553 (N.Y. 1995); *Breakthrough Mgmt. Grape. Inc. v. Chukchansi Gold Casino and Resort*, 629 F.3d 1173, 1181 (10th Cir. 2010); *White v. University of California*, 765 F.3d 1010, 1025 (9th Cir. 2014) (adopting the 10th Circuit’s factors in *Breakthrough*); *American Prop. Mgmt. Corp. v. Superior Court*, 206 Cal. App. 4th 491, 141 Cal.Rptr.3d 802 (Cal. Ct. App. 2012); *Cash Advance and Preferred Cash Loans v. State*, 242 P.3d 1099, 1111 (Colo. 2010).

Nuances exist between jurisdictions. For example, the 10th and 9th Circuit’s *Breakthrough* test also looks to whether the purposes of sovereign immunity are served by granting immunity to the entity. With respect to the second factor, *Breakthrough* also uses the word “purpose,” which does not result in any substantive distinction. Colorado also looks to

whether immunity protects the tribes' sovereignty.⁴ New York looks to specific structure, ownership, management and control factors such as (1) legal title or ownership of the entity's property, (2) whether tribal officials exercise control over administration or accounting, and (3) whether the tribe's governing body has the power to dismiss members of the entity's governing body. *See Lewiston Golf Course Corp.*, 25 N.E. 3d at 547 (quoting *Ransom*, 86 N.Y. 2d at 559-60). In addition, New York references specific financial factors such as (1) whether the corporate entity generates its own revenue, (2) the impact of the tribe's fiscal resources, and (3) the threshold inquiry noted previously, whether the entity has the power to bind or obligate funds of the tribe.

Defendants have failed to establish immunity under these factors. All they have submitted are largely conclusory affidavits. Although both Mobiloans and Riverbend are chartered under tribal law, neither entity provides functions similar to a tribal government, as discussed earlier. Defendants have also failed to present any credible evidence with respect to any financial factors, only bald conclusions and assertions. As noted previously, a judgment against Defendants will not reach their respective Tribe's assets.

Instead, Defendants argue that their payday lending operations provide financial support for their respective tribes, but this argument is unpersuasive. While these Louisiana and Montana Tribes may have current economic hardships, Defendants cannot argue credibly that — out of all possible forms of off-reservation commercial activity — they must be allowed to engage in illegal, predatory payday lending to private parties far away in Maryland in order to sustain themselves economically. Defendants could engage in many forms of commerce

⁴ This Colorado factor is perplexing and should not be adopted by this Court. Immunity inherently protects sovereignty. Absolute immunity would result in absolute sovereignty, and any rejection of immunity would by definition limit sovereignty to some extent.

other than illegal payday lending. In fact, to the extent that Defendants choose to engage in payday lending, Defendant Riverbend tacitly concedes that peddling these illegal loans in Maryland is not critical to the functioning of the Tribe because it has stopped lending in Maryland without any detrimental effect to the Tribe.

Nor do Defendants contend that a judgment against them in this matter would cut off any funding that Defendants may provide to Native American tribes. It is unlikely that a judgment on behalf of Maryland consumers would cripple Defendants' businesses. Defendants make payday loans in many different other states. In fact, some states have legalized payday lending, and the instant case would not jeopardize Defendants continued ability to lend legally in states that do not ban payday lending.

The limited financial information presented by Defendants does not support their argument. The Fort Belknap Indian Community has more than 7,000 enrolled citizens, but Riverbend employs only 70 tribal citizens. *See* Declaration of Mark L. Azure at ¶¶ 10-11. MobiLoans has presented no data as to how much employment they provide the Tunica-Biloxi Tribe. Neither Defendant has provided substantive financial data, but only present conclusory affidavits with respect to financial issues. Defendants have provided no financial records, which leads to obvious questions. How much revenue do Defendants actually generate? How much of this revenue goes to the Tribes? Does a significant part of the revenue go to non-tribal third parties? What percent of Tribal revenues are comprised of revenue from Defendants?

These questions are particularly important given the propensity of unscrupulous third-party pay day lenders to effectively "rent-a-tribe" in an attempt to gain immunity for their usurious and illegal acts, as is alleged here. Typically, a payday lender will reorganize an

existing loan operation under a tribe's name in exchange for monthly payments, usually a small percentage of monthly profits. Tribes seldom get a significant cut of the amount of money generated by this arrangement and do not maintain control over the lending operations. *Complaint* at ¶¶ 2-7 (general allegations); ¶¶ 27-28; 101-128 (allegations with respect to Mobiloans and Riverbend); see also Nathalie Martin and Joshua Schwartz, *The Alliance Between Payday Lenders and Tribes: Are Both Tribal Sovereignty and Consumer Protection at Risk?*, 69 WASH. & LEE L. REV. 751 (Spring, 2012).

Such schemes were of particular concern for four of the Justices in *Bay Mills*. See 134 S.Ct. at 2052 (Thomas, J., dissenting). In fact one internet advertisement explains:

Due to the strict regulations that are hitting the payday loan industry hard, many lenders are now turning to Indian Tribes to help them out. The American Indian Tribes throughout the United States have been granted sovereign immunity which means that they are not held subject to the laws that payday loans are currently going up against. There are 12 states which have banned payday lending but as long as their (sic) is an Indian tribe who runs the operation on this sovereign land, the lenders can continue their business even where payday loans have already been banned. Similar to the Casino boom, payday loans are the new financial strategy that many are using as a loophole through the strict payday loan laws. The revenue is quite high and promising for these tribes who often find themselves struggling. There are approximately 35 online cash advance and payday loan companies that are owned by American Indian tribes. Consumers have taken out approximately 12,500 loans over the last year in which these tribes made approximately \$420 million. It is no surprise that many lending companies are currently seeking out American Indian Tribes in an effort to save their businesses by escaping US lending laws. Tribal leaders are paid a few thousand dollars a month for allowing a payday lender to incorporate on tribal land. The more lenders that tribes allow to move onto their reservation, the larger the profit that they make.

69 WASH & LEE L. REV. at 766-67 (quoting *The Connection Between Indian Tribes and Payday Lending*, Online Cash Advance, <http://www.online-cash-advance.com/financial-news/the-connectionbetweenindian-tribes-and-payday-lending#ixzz1Nt1vQu6h> (last visited Jan. 11, 2012)).

Structure, management and control factors are also inconclusive. Defendants' conclusory affidavits have not foreclosed whether any third-party control exists.

Defendants have not presented a prima facie case for tribal sovereign immunity under a multi-factor "arm of the tribe" balancing test. Most fatally, Riverbend and Mobiloans do not provide functions similar to a tribal government. In addition, predatory payday lending does not support any of the policy considerations behind tribal sovereign immunity. Financial factors also weigh against sovereign immunity. The Tribe's assets are protected from a judgment because Defendants are limited liability companies. Defendants have also failed to provide any evidence of how much revenue they provide to Tribes, rather than to third parties, and the percentage of these revenues in the Tribe's revenues as a whole. More fundamentally, Defendants cannot make a compelling argument that illegal payday lending in Maryland is essential for the Tribe's financial health.

In the alternative, if the Court does (1) adopt a multi-factor balancing test, and (2) conclude that Defendants have made a prima facie claim, the Court should grant Plaintiff's Motion for Discovery, filed contemporaneously herewith. *See also Exhibit 1* (Declaration of Max F. Brauer).

V. THE TRIBAL EXHAUSTION DOCTRINE DOES NOT APPLY BECAUSE TRIBAL COURTS HAVE NO JURISDICTION OVER NONMEMBERS ON NON-INDIAN LAND.

Riverbend's claim that tribal remedies must be exhausted prior to any federal court review is without merit and unsupported by governing Supreme Court precedent.⁵ As the Court has noted multiple times, most recently in *Plains Commerce Bank v. Long Family Land and Cattle Co., Inc.*, 554 U.S. 316, 128 S.Ct. 2709, 171 L.Ed.2d 457 (2008), tribal courts have a

⁵ The Fourth Circuit has never addressed the tribal exhaustion doctrine.

unique limited jurisdiction that does not extend generally to the regulation of nonmembers whose actions do not implicate tribal lands.⁶ The Court repeatedly has “rejected tribal authority to regulate nonmembers’ activities on land over which the tribe could not ‘assert a landowner’s right to occupy and exclude.’” *Nevada v. Hicks*, 533 U.S. 353, 359, 121 S. Ct. 2304, 2310 150 L.Ed.2d 398 (2001).⁷ As the *Hicks* Court noted “the absence of tribal ownership [of land] has been virtually conclusive of the absence of tribal civil jurisdiction; with one minor exception, we have never upheld under *Montana* the extension of tribal civil authority over nonmembers on non-Indian land.” *Id.* at 360.⁸

Land is critical to the tribal exhaustion doctrine because the doctrine is based

⁶ In fact, every tribal exhaustion case cited by Riverbend is applicable to the instant case because each case involves activity concerning tribal land. *See Nat. Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845, 105 S.Ct. 2447, 85 L.Ed.2d 818 (1985) (minor struck by motorcycle in the parking lot of a school located on the Crow Indian Reservation); *Stock West Corp. v. Taylor*, 964 F.2d 912 (9th Cir. 1992) (sawmill on tribal land); *Burlington Northern R. Co. v. Crow Tribal Council*, 940 F.2d 1239 (9th Cir. 1991) (railroads on tribal land); *Crawford v. Genuine Parts Co., Inc.*, 947 F.2d 1405 (9th Cir. 1991) (automobile accident on tribal lands); *United States v. Tsosie*, 92 F.3d 1037 (10th Cir. 1996) (property located in Indian Country); *Fidelity and Guaranty Ins. Co. v. Bradley*, 212 F. Supp.2d 163 (W.D. N.C. 2002) (construction project for Cherokee Ceremonial Grounds); *Tom’s Amusement Co. Inc. v. Cuthbertson*, 816 F.Supp. 403 (W.D. N.C. 1993) (gaming establishment on reservation).

In fact, Riverbend incorrectly cites *Tsosie* for the proposition that courts have applied the doctrine to tribal businesses operating off the reservation, when in fact “the property at issue is located in Indian country” and the case involved the United States seeking possession of land from two Navajo Tribe members. 92 F.3d at 1039.

⁷ Riverbend’s final citation to *Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.*, 207 F.3d 21, 31 (1st Cir. 2000) is also incorrect because this case is a matter concerning land which a tribe could “assert a landowner’s right to occupy and exclude” because the matter involved a construction contract with the Tribal Housing Authority for low income housing for members of the Tribe on land purchased by the Tribe itself.

⁸ The “one minor exception” is not applicable in the instant case. This exception permitted a tribe to impose a zoning regulation on 3.1 percent of land within a reservation area closed to public entry that was not owned by the tribe. *See Brendale v. Confederated Tribes and Bands of Yakima Nation*, 492 U.S. 408, 443-444, 458-459, 109 S.Ct. 2994, 106 L.Ed.2d 343 (1989) (opinions of Stevens, J., and Blackmun, J.).

exclusively on a tribe's "inherent sovereignty" to regulate its members and its land. *See Montana v. United States*, 450 U.S. 544, 563, 101 S.Ct. 1245, 1257, 67 L.Ed. 2d 493 (1981) (quoting *United States v. Wheeler*, 435 U.S. 313, 323 98 S.Ct. 1079, 1086, 55, L.Ed.2d 303 (1981)). The *Montana* Court noted that "through their original incorporation into the United States as well as through specific treaties and statutes, the Indian tribes have lost many of the attributes of sovereignty" and noted:

The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the *relations between an Indian tribe and nonmembers of the tribe . . .*

These limitations rest on the fact that the dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently to *determine their external relations*. But the powers of self-government, including the power to prescribe and enforce internal criminal laws, are of a different type. They involve *only the relations among members of a tribe*. Thus, they are not such powers as would necessarily be lost by virtue of a tribe's dependent status.

Id. at 564 (emphasis in the original). The Court further reasoned that "in addition to the power to punish tribal offenders, the Indian tribes retain their inherent power to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members. But exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." *Id.* (citations omitted).

Riverbend contends that tribal exhaustion is necessary because her contract elects "tribal dispute resolution" through the "tribal council," but Supreme Court precedent does not give the "tribal council" jurisdiction to hear her dispute because it does not implicate Indian land or otherwise occur within the reservation. Riverbend bases its conclusion on an inapposite

citation to *Montana*. *Montana* actually notes that contractual arrangements between nonmembers and tribes grant jurisdiction to tribal courts when the matters implicate the reservation or tribal lands:

To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. *Williams v. Lee, supra*, at 223, 79 S.Ct., at 272 [concerning nonmember operating store on reservation]; *Morris v. Hitchcock*, 194 U.S. 384, 24 S.Ct. 712, 48 L.Ed. 1030 [tribal tax on nonmembers livestock grazing on tribal lands]; *Buster v. Wright*, 135 F. 947, 950 (CA8) [tribal taxation of nonmembers activity on the reservation]; see *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 152–154, 100 S.Ct. 2069, 2080–2082, 65 L.Ed. 2d 10 [taxation of commerce on the reservation].

450 U.S. at 564.

Riverbend’s tribal exhaustion argument must be rejected because a tribal court has no jurisdiction over this matter. Riverbend’s attempt to elect a tribal council in its contract is an impermissible attempt to expand tribal jurisdiction beyond what Congress and the Supreme Court have dictated.

Moreover, Ms. Everette has not elected “tribal dispute resolution” as a matter of fact. Under Maryland law, a contract requires mutual assent (offer and acceptance). See *Spaulding v. Wells Fargo Bank, N.A.*, 714 F.3d 769 (4th Cir. 2013) (quoting *CTI/DC, Inc. v. Selective Ins. Co. of Am.*, 392 F.3d 114, 123 (4th Cir. 2004)). Here, Ms. Everette could not have assented to the terms Riverbend asserts because Ms. Everette has not seen these documents prior to the instant litigation. See **Exhibit 2** (Declaration of Alicia Everette) ¶ 9.

VI. RULE 19(b) DOES NOT APPLY.

Defendant Riverbend also claims that the Fort Belknap Indian Community is an

indispensable party that must be joined pursuant to Rule 19(b). Under Rule 19(b) “[d]ismissal of a case is a drastic remedy, however, which should be employed only sparingly. *Nat. Union Fire Ins. Co. of Pittsburgh, PA v. Rite Aid of South Carolina, Inc.*, 210 F.3d 246, 250 (4th Cir. 2000). Here, 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.’” *N. Arapaho Tribe v. Harnsberger*, 697 F.3d 1272, 1278 (10th Cir. 2012).

To determine whether an absent person is a “required party” that court examines if

(A) in that person’s absence, the court cannot accord complete relief among existing parties; or

(B) 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:

(i) as a practical matter impair or impede the person’s ability to protect the interest; or

(ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

Fed R. Civ. P. 19(a)(1). If the Court determines that a required person cannot feasibly be joined, the Court then considers the factors in Rule 19(b) for whether the action should be dismissed.

Here, Riverbend, LLC is alleged to be owned by the Fort Belknap Indian Community. However, a LLC’s owner is not a required party. Members of limited liability companies and shareholders of corporations are never considered to be required parties. In fact, these owners are protected from suit by the corporate shield. This Court can accord complete relief among Ms. Everette and the class she seeks to represent against Riverbend, LLC because her contract is only with Riverbend, LLC. A final adjudication on the merits will accord complete relief

among the existing parties. Disposing of the action will not impair or impede the ability of the Tribe to protect its interest, nor will it leave an existing party subject to risk of multiple or inconsistent obligations.

In fact, joining the Tribe would hurt its financial interests because it is currently protected by the corporate shield. Thus, a Court cannot dismiss a LLC owner under Rule 19(b) because its absence benefits the owner rather than causes prejudice.

Riverbend again makes a conclusory allegation, without evidence, that a judgment against Riverbend will threaten an important source of revenue for the tribe. Again, this argument is a red herring. In fact, if the Tribe was joined as a Defendant, its own assets would be threatened because it would be giving up its corporate shield. Reduced revenue for a corporate owner has never rendered that owner a required party. Riverbend's absurd logic would require joinder of every shareholder when a corporation is sued and every member when a limited liability company is sued. In addition, under this logic, employees should also be joined when their employer is sued because a judgment against the employer could result in reduced salary (or even layoffs) for the employee, particularly in "bet the company" litigation.

Similarly, an absent person is not a required party if its interest is identical to a joined party, and that joined party is adequately able to protect the absent person's interest. As the Fourth Circuit noted:

If RASC is able adequately to represent Rite Aid's interest, we would be inclined to conclude that Rite Aid's ability to protect its interest is not impaired or impeded by its absence from this suit. *See Washington v. Daley*, 173 F.3d 1158, 1167 (9th Cir.1999); *Tell*, 145 F.3d at 419. A court should hesitate to conclude, however, that a litigant can serve as a proxy for an absent party unless the interests of the two are identical. *See id.*

See Nat. Union Fire Ins. Co. of Pittsburgh, PA, 210 F.3d at 250-51.

A LLC's owner's interest in a matter is identical to the LLC itself. The only difference is

that the owner is protected by limited liability. In this sense, an LLC owner such as the Fort Belknap Indian Community need not be joined.

LLC ownership distinguishes the instant case from the *Dawavendewa* and *Yashenko* matters cited by Riverbend. These matters were decided on the basis of contract. The required but absent parties in these matters did not own any of the existing parties. Rather, the absent parties were parties to the contract at issue in the lawsuit, which mandated discrimination against the Plaintiffs. The tribes were required parties because they mandated in their contracts with third party vendors that the vendors discriminate against employees. As these courts held: “today, we reaffirm the fundamental principle outlined in *Lomayaktewa*: a party to a contract is necessary, and if not susceptible to joinder, indispensable to litigation seeking to decimate that contract.” *Dawavendewa v. Salt River Protect & Power Dist.*, 276 F. 3d 1150, 1157 (9th Cir. 2002); *Yashenko v. Harrah’s NC Casino Co., LLC*, 446 F.3d 541, 552 (4th Cir. 2006) (citing *Id.*).

CONCLUSION

For the foregoing reasons, Plaintiff requests that this Court deny the motions to dismiss filed by Defendant Riverbend and Defendant Mobiloans.

REQUEST FOR HEARING

Undersigned counsel request a hearing.

Dated: August 7, 2015

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that the foregoing document was served electronically through the Court's CM/ECF system upon counsel for all parties.

August 7, 2015.

/s/ Max F. Brauer
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