IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

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

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

Plaintiff's Response presents a classic case of jousting at windmills. Plaintiff offers no legal or factual support to counter the reality that Defendant Riverbend Finance LLC is an arm of a sovereign federally-recognized American Indian tribe and shares in the Tribe's immunity, thus depriving this Court of subject-matter jurisdiction. Instead, Plaintiff mischaracterizes Riverbend and its products and asks this Court to disregard well-established principles of federal Indian law on various entirely illusory "policy" grounds, grounds often considered and always rejected by the U.S. Supreme Court and federal appellate courts across the country.

With sweeping, biased generalizations, Plaintiff seeks to paint Riverbend as part of some perceived soulless armada of predatory "payday lenders" who "target poor Americans who are less likely to timely repay." Response at 1-4. Leaving aside that loaning money to people one believed incapable or unlikely to repay their loans would seem to be a very poor business model, Plaintiff's hyperbolic characterizations of the entire lending industry are inaccurate on many levels and her characterizations of Riverbend are false.

Riverbend's loans are not debt traps. Nor did Riverbend make any payday loans to Ms. Everette. Riverbend made two closed-end, fully-amortizing installment loans to Ms. Everette, both of which were in compliance with the applicable governing law set forth in the Loan Agreements she executed. Doc. No. 22-2, Ex. 1-C; Ex. 1-D.[1] Ms. Everette's Riverbend loans were not the sort of "rollover" products decried in her Response, nor did Ms. Everette's Riverbend loans include any auto-renewal provisions.[2] With respect to both her Riverbend loans, Ms. Everette was proactive about her loan repayment and reduced her payment obligations by putting extra money toward principal payments and repaying her loans early. Doc. 22-2 at ¶23. Riverbend also worked with Ms. Everette on the one occasion she requested a payment postponement because of a workplace injury. *Id*.

[1] Although Plaintiff claims she does not recall seeing her Loan Agreements (Doc. No. 40-2 at ¶9), she does not dispute their validity or deny executing the Loan Agreements from the IP addresses indicated in Riverbend's business records. Plaintiff acknowledges visiting lenders' websites to obtain loan information. *Id*. at ¶9. Plaintiff called Riverbend sixteen times over the life of her Riverbend loans to manage her loan repayment process. Doc. 22-2 at ¶23. Plaintiff clearly knew how to access information regarding her Riverbend loans.

[2] Contrary to Plaintiff's repeated unsubstantiated implications, there is nothing nefarious about the Tribe's sovereign determination to make its territory a favorable forum for credit practices that might be disfavored by other sovereigns. This sort of economic engineering is commonplace for corporate-friendly forums such as the states of Delaware and South Dakota, which routinely "export" their corporate-favorable state laws to out-of-state customers who live in states or territories with more restrictive state laws. *See Marquette Nat'l Bank v. First of Omaha Serv. Corp., 439 U.S.* 299 (1978) (concluding that that national banks can charge the highest interest rate allowed in the bank's home state, regardless of where the borrower lives).

Plaintiff's Response refrain that her Riverbend Loan Agreements were inconsistent with Maryland law is of no moment. Maryland law does not apply to her Riverbend Loan Agreements; Tribal law does, as Ms. Everette and Riverbend agreed in contract. That a body of law other than the law of the borrower's home state applies to loan is routine. State usury law is regularly preempted. United States law permits national banks (12 U.S.C. § 85), Federal Deposit Insurance Corporation-insured state-chartered banks (12 U.S.C.A. § 1831d), and certain other classes of lenders (e.g., first-lien residential lenders under 12 U.S.C.A. §1735f-7a), to make loans to state residents without regard to state usury law. This concept of federal preemption of state interest rates is rooted in the power of Congress, and "has always been implicit in the structure of the National Bank Act, since citizens of one State were free to visit a neighboring State to receive credit at foreign interest rates." *Marquette Nat'l Bank*, 439 U.S. at 318. Loans by sovereign Indian tribes represent another category of loans under United States law that may be made to residents of states without regard to state usury law.

These facts demonstrate that Plaintiff's effort to lump her Riverbend loans in with completely different consumer loan products discussed in the dated[3] media and law review articles cited in her Response is disingenuous. Instead, based on her repayment activity and the notices in her Riverbend Loan Agreements,[4] Ms. Everette was aware of and managed the costs of her financial products. She never complained to Riverbend about any matter and never initiated, much less exhausted, pursuit of the remedies available to her under applicable Tribal law. Had she done so, it would have been the Tribe's custom and policy to simply grant her complete relief on her individual claim by employing "very liberal loan-forgiveness and work-out policies." Doc. 22-3 at ¶17. Plaintiff has ignored and continues to ignore the Tribal remedies available to her.

Plaintiff asks the Court to entirely discount the available Tribal remedies Plaintiff has elected not to pursue. Plaintiff urges the Court to disregard Riverbend's sovereign immunity on meritless grounds that: Riverbend is a corporate organizational arm of the Tribe and not the constitutional government of the Tribe; Riverbend's activities are not sufficiently "traditional" in Plaintiff's estimation; Riverbend's activities are not gaming regulated by the Indian Gaming

[3] The materials Plaintiff cites do not refer to Riverbend or the Ft. Belknap Indian Community and predate even Riverbend's formation by the Tribe in 2012. Nor do the materials address the types of installment products offered by Riverbend.

[4] Ms. Everette's Riverbend Loan Agreements provided:

> **YOUR LOAN IS AN EXPENSIVE FORM OF BORROWING**
> **YOU CAN SAVE FINANCE CHARGES BY PAYING OFF YOUR LOAN EARLY EITHER IN PART OR IN FULL**
> **YOUR LOAN IS DESIGNED TO ASSIST YOU IN MEETING SHORT-TERM CASH NEEDS, IT IS NOT A SOLUTION FOR LONGER TERM FINANCIAL PROBLEMS**

Doc. No. 22-2, Ex. 1-C; 1-D (emphasis in originals).

Regulatory Act; and that Plaintiff incorrectly assumes that damage to Riverbend would not harm the Ft. Belknap Indian Community.

Plaintiff also wholly incorrectly cites to myriad federal Indian law cases in support of her "policy" arguments. Sovereign immunity is akin to pregnancy in that there are no degrees of immunity. An entity cannot be a little bit sovereign immune; if an entity is established by a sovereign, as an extension of the government, it is one to which sovereign immunity attaches and entitled to an immunity defense. *See Okla. Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe*, 498 U.S. 505, 510 (1991); *Kiowa Tribe v. Mfg. Techs., Inc*., 523 U.S. 751, 758 (1998) (both refusing to distinguish tribal commercial enterprises from tribal governments with respect to tribal sovereign immunity). Riverbend's Motion to Dismiss demonstrated, supported by unrebutted evidence, that Riverbend is an arm of the Ft. Belknap Indian Community established by the Tribe, for the Tribe, and under Tribal law. Riverbend thus shares in the Tribe's sovereign immunity, which requires dismissal of Plaintiff's claims against Riverbend.

ARGUMENT

All of Plaintiff's arguments against Riverbend's sovereign immunity presenting a bar to this Court's subject-matter jurisdiction ring hollow. Tribal sovereign immunity is an absolute defense. *Freemanville Water Sys., Inc. v. Poarch Band of Creek Indians*, 563 F.3d 1205, 1207 (11th Cir. 2009).

I. Plaintiff's Suggestion that Riverbend Is Not an Arm of the Tribe Is Baseless.

Without citation to any supporting legal authority whatsoever, Plaintiff contends at Response pages 5-8 that Riverbend cannot claim sovereign immunity because it is not the constitutional governing body of the Tribe, because she finds Riverbend's lending activities

somehow lacking in some degree of "tradition" she inexplicably asserts should attach to tribal governmental activities; and because she asserts that the panoply of cases in which federal courts have recognized the sovereign immunity of tribal gaming corporate entities are distinguishable as "special" because Congress established a federal gaming regulatory regime. In an alternative argument at Response pages 13-17, Plaintiff invents out of whole-cloth a new proposed arm-of-the-tribe test, but fails to recognize that under both her invention, and the widely accepted legal test, Riverbend is unequivocally an arm of the Ft. Belknap Indian Community based on uncontested evidence. Plaintiff's only support for this alternative argument is her own entirely unsubstantiated list of rhetorical questions about Riverbend's commercial success, which is irrelevant under any arm of the tribe test, including Plaintiff's. Each of Plaintiff's 'identity' contentions is without merit.

A. For Purposes of Sovereign Immunity, "Arms" Are No Different From Tribes.

As Riverbend's Motion to Dismiss explained, it is settled law that an entity considered an "arm" of the sovereign receives the same treatment as the sovereign itself. Doc. No. 22, pp. 7-14; *see Cash Advance & Preferred Cash Loans v. State*, 242 P.3d 1099, 1109 (Colo. 2010) ("Recognizing that Congress has not imposed any limitation on the application of tribal sovereign immunity to entities acting as arms of a tribe, all the federal courts of appeals that have addressed this issue have held that such entities are entitled to immunity"). Plaintiff's facile argument that Riverbend cannot have tribal sovereign immunity because it is not the constitutional incarnation of the Tribe has no support in the law of any jurisdiction. Instead, delegation of power is fundamental to the exercise of sovereignty. Federal, state and tribal governments routinely delegate powers to subordinate entities – in many different forms – in

order to ensure the successful exercise and implementation of those sovereign powers. Given that reality, sovereign immunity applies not only to the sovereign itself, but also extends to entities properly considered arms of the sovereign.

Over and over, federal courts reject invitations such as Plaintiff's to treat these entities used by the sovereigns to advance their governmental prerogatives as anything other than the sovereign itself, regardless of whether they are labeled as agencies, arms, enterprises, authorities, utilities, or something else. Indeed, the equal treatment of sovereigns and their arms is firmly engrained in Supreme Court precedent. *See Va. Office for Prot. & Advocacy v. Stewart*, 131 S. Ct. 1632, 1640 (2011) ("The specific indignity which sovereign immunity protects is the insult to a [sovereign] of being haled into court without its consent"); *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 788 (2000) (because the underlying sovereignty considerations were the same as to both categories, no "State (or state agency)" could be subject to False Claims Act liability); *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 70 (1989) (neither a state nor "governmental entities that are considered 'arms of the State'" could bring § 1983 claims). The principle is so well established that it barely merited mention in *Inyo County*. *Inyo Cnty. v. Paiute-Shoshone Indians*, 538 U.S. 701 (2003) (rejecting invitation to treat sovereign as a person entitled to sue under 42 U.S.C. § 1983). In fact, the Court dropped a footnote stating that an Indian gaming corporation was "an 'arm' of the Tribe." 538 U.S. at 705 n.1.

Each of these cases flows from the foundational principle of sovereign immunity: governmental immunity from suit is 'inherent' to sovereignty. "It is inherent in the nature of sovereignty, not to be amenable to the suit of an individual without its consent. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of

sovereignty, is now enjoyed by the government of every state in the union." The Federalist No. 81 (Alexander Hamilton) (Jacob E. Cooke ed., Wesleyan U. Press 1961). Tribal sovereign immunity is no less inherent than any other governmental immunity and indeed, "predates the birth of the Republic." *R.I. v. Narragansett Indian Tribe,* 19 F.3d 685, 694 (1st Cir. 1994).

Tribal sovereign immunity extends not only to the Indian tribes themselves but also to those for-profit commercial entities that function as "arms of the tribes." *Somerlott v. Cherokee Nation Distributors, Inc.*, 686 F.3d 1144, 1148 (10th Cir. 2012) (quoting *Native Am. Distrib. v. Seneca–Cayuga Tobacco Co.,* 546 F.3d 1288, 1292 (10th Cir. 2008)). *See also Kiowa*, 523 U.S. at 760 (holding that tribal sovereign immunity applies regardless of whether the suits "involve[s] governmental or commercial activities"); *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2039 (2014) (reaffirming *Kiowa* and declining to "create a freestanding exception to tribal immunity for all off-reservation commercial conduct"); *Ameriloan v. Superior Court*, 169 Cal. App. 4th 81, 97 (2008); *Allen v. Gold Country Casino*, 464 F.3d 1044, 1046 (9th Cir. 2006) ("When the tribe establishes an entity to conduct certain activities, the entity is immune if it functions as an arm of the tribe").

The fact that Riverbend is a limited liability company is of no consequence to an arm-of-the-tribe analysis. No case cited by Plaintiff stands for the proposition that the arm-of-the-tribe test does not apply to tribal business entities generally. To the contrary, the overwhelming majority rule in this country is that corporate structure is immaterial to sovereign immunity analysis. *See Am. Vantage Companies, Inc. v. Table Mountain Rancheria*, 292 F.3d 1091, 1099 (9th Cir. 2002), *as amended on denial of reh'g* (July 29, 2002) ("A tribe that elects to incorporate does not automatically waive its tribal sovereign immunity by doing so"); *Miller v. Wright*, 705

F.3d 919, 923-24 (9th Cir. 2013) ((holding that the tribe could impose cigarette sales taxes on non-Native-Americans in Indian country and the tribe enjoyed sovereign immunity from suit and noting '"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,"' quoting *Cook v. AVI Casino Enters., Inc*., 548 F.3d 718, 725 (9th Cir.2008) (holding that tribal employees were immune from dram shop liability/claims that they performed their tribal duties in a grossly negligent way)); *Aleksic v. Clarity Servs., Inc.*, No. 13 C 7802, 2014 WL 7793410, at *1 (N.D. Ill. Dec. 2, 2014) (denying class certification for suit brought against tribal lending corporations, citing *Puyallup Tribe, Inc. v. Dep't of Game of State of Wash*., 433 U.S. 165, 172 (1977), and finding "[A]ny or all of the [defendant consumer] lenders is a tribal entity, and thus, immune from state regulation"); *Wright v. Colville Tribal Enter. Corp.*, 147 P.3d 1275, 1279 (2006) (holding that a tribal corporation that was constructing a waterline was immune from suit because it was an arm of the tribe, finding "[T]ribal sovereign immunity protects tribal governmental corporations owned and controlled by a tribe, and created under its own tribal laws. 'Tribal law corporations are assumed to be a subdivision of the tribal government"' and quoting Dao Lee Bernardi–Boyle, *State Corporations for Indian Reservations*, 26 Am. Indian L. Rev. 41, 49 (2001)); *Native Am. Distrib. v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, 1290 (10th Cir. 2008) (holding that tobacco manufacturer created by Indian tribe was an economic arm of the tribe immune from suit); *Memphis Biofuels, LLC v. Chickasaw Nation Indus., Inc*., 585 F.3d 917, 921 (6th Cir. 2009) (tribal conglomerate was an arm of the tribe immune from suit); *Koscielak v. Stockbridge-Munsee Cmty*., 811 N.W.2d 451, 455 (Wis. Ct. App. 2012) (tribal sovereign immunity extended to a tribally owned golf course and supper club as a business arm of the tribe); *Multimedia Games, Inc. v. WLGC*

Acquisition Corp., 214 F. Supp. 2d 1131, 1135 (N.D. Okla. 2001) (holding tribal business development agency was an arm of the tribe immune from suit and finding "The ability to contract as an economic entity impacts the tribe's fiscal resources by binding or obligating the funds of the tribe. . . . [C]orporate contractual provisions are actually economic matters which directly affect a sovereign's right of self government. In this way, the business entity is simply the tribe's alter ego; and thus, the real party in interest is the tribe because the vulnerability of the tribe's coffers is at issue when contracting in a commercial environment").[5]

B. There Is No Legal Requirement that Tribal Governmental Activities Be Attended by "Tradition," and Even If There Were, It Is the Very Essence of Sovereignty to Provide for the General Welfare of Citizens, Including Through Commercial Financial Services.

Like any government, the Ft. Belknap Indian Community strives to develop its economy to provide for the welfare of its people. Doc. No. 22-3 at ¶¶ 4, 7. Unlike most state and municipal governments, however, the Tribe lacks a sufficient tax base to do so. *Id*.; s*ee also* Matthew L.M. Fletcher, *In Pursuit of Tribal Economic Development as a Substitute for Reservation Tax Revenue,* 80 N.D. L. REV. 759 (2004). This, coupled with its geographically-isolated, rural location, rampant poverty, unemployment hovering at 85% on some portions of

[5] Plaintiff's reliance on outlier cases from New York and Alaska is misplaced because of the controlling and contrary Supreme Court and Fourth Circuit precedents. These states have found that tribal sovereign immunity may not extend to any entity that is protected by limited liability. *Sue/Perior Concrete & Paving, Inc. v. Lewiston Golf Course Corp*., 25 N.E.3d 928, 935 (N.Y. 2014); *Runyon ex rel. B.R. v. Ass'n of Vill. Council Presidents*, 84 P.3d 437, 440 (Alaska 2004). The New York Court of Appeals adopted this rule in a 4-3 decision, while recognizing that it was in direct conflict with a Second Circuit precedent which found that an enterprise of the same tribe did have sovereign immunity. The majority acknowledged this discrepancy, but boldly proclaimed that "[c]ontrary to the dissent, New York State courts are not bound by the decisions of federal courts, other than the United States Supreme Court, on questions of federal constitutional law." *Sue/Perior Concrete.*, 25 N.E.3d at 936. As discussed in Section I.B, *Sue/Perior Concrete* flies in the face of the Supreme Court's recent decision in *Bay Mills*, 134 S. Ct. 2024.

the Ft. Belknap Reservation,[6] and static or declining federal assistance, has left the Tribe in dire need for economic development. Doc. No. 22-3 at ¶¶ 4, 7. Riverbend is part of the "ray of hope" that e-commerce represents to the Tribe, supporting a stable governmental revenue base. *Id*. at ¶4. The monies the Tribe earns through Riverbend provide "essential services to [Tribal] members (e.g., police, ambulance, fire services)" and support the Tribe's economic diversification. Doc. No. 22-3 at ¶8.

Despite being confronted in the Azure and Fox Declarations with the harsh economic realities facing the Tribe and its citizens, Plaintiff implies that the Tribe's revenue-raising methods must remain frozen in time, asserting that in her estimation, consumer lending is not "historical" and the Tribe should simply do something else "out of all the possible forms of off-reservation commercial activity," as if there is some vast quantity of viable available economic development opportunities Plaintiff believes should be preferable to the Tribe. Response at 7-8, 14-15. Plaintiff's flippant criticisms ignore that Tribal sovereignty is a foundational principle of federal law and the cornerstone of the legal and political existence of American Indian tribes. Indeed, as the Solicitor General has explained, "[t]he sovereignty of Tribes is therefore no less a first principle than the sovereignty of the States; or of the United States; and although subject to the plenary authority of Congress, it is not subject to judicial defeasance." Brief for the United States at *15, *Kiowa*, 523 U.S. 751 (No. 96-1037), 1997 WL 523859 (Aug. 25, 1997).

From the earliest years of the republic, federal courts have recognized the political independence and self-governing status of Indian tribes. *See Cherokee Nation v. Georgia*, 30

[6] This very high rate of unemployment is regrettably typical in Indian Country. *Unemployment on Indian Reservations at 50 Percent: The Urgent Need to Create Jobs in Indian County: Hearing Before the S. Comm. on Indian Affairs*, 11th Cong. (2010), *available at* http://www.indian.senate.gov/public/_files/January2820102.pdf.

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). An Indian tribe's sovereignty is not the result of reparations or a specific grant of authority by Congress, but rather the "inherent powers of a limited sovereignty which has never been extinguished." *United States v. Wheeler*, 435 U.S. 313, 322-323 (1978); *see also Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 60 (1978) ("As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority").

Because a tribe retains all inherent attributes of sovereignty that have not been divested by Congress, the proper inquiry with respect to a tribe's exercise of its sovereignty is whether Congress—which exercises plenary power over Indian affairs—has limited that sovereignty in any way. *See Nat'l Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845, 852-53 (1985); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130,148-149 n.11 (1982); Felix Cohen's Handbook of Federal Indian Law, § 6.02[1] (2005). No such limitation exists as to Riverbend's activities.

Indeed, the Supreme Court has recently recognized that commercial enterprises like Riverbend are essential tools for tribal governments and strongly supported by Congressional policy. In her *Bay Mills* concurring opinion, Justice Sotomayor stated that "both history and proper respect for tribal sovereignty – or comity" required the result in *Bay Mills*. 134 S.Ct. at 2041. She explained: "A key goal of the Federal Government is to render Tribes more self-sufficient, and better positioned to fund their own sovereign functions, rather than relying on

federal funding." *Id*. at 2043. She further explained that the Court's hands-off approach to tribal sovereign immunity is exactly in keeping with the policies established by Congress:

> [T]ribal business operations are critical to the goals of tribal self-sufficiency because such enterprises in some cases 'may be the only means by which a tribe can raise revenues,' Struve, *36 Ariz. St. L. J., at 169*. This is due in large part to the insuperable (and often state-imposed) barriers Tribes face in raising revenue through more traditional means.

Id. at 2043. The unique nature of tribal business operations, Justice Sotomayor found, would preclude any commercial activity exception to sovereign immunity, no matter how successful the businesses are at generating revenues, reasoning that tribal commercial operations "cannot be understood as mere profit-making ventures that are wholly separate from the Tribes' core governmental functions." *Id*.

Justice Sotomayor's observations were wholly accurate. For example, in 2000, Congress presented definite and unambiguous support for the unencumbered development of tribal economies in the Native American Business Development Act, which, among other things, encouraged exactly the sort of off-reservation development in which Riverbend engages:

> the United States has an obligation to assist Indian tribes with the creation of appropriate economic and political conditions with respect to Indian lands to—
>
> (A) encourage investment from outside sources that do not originate with the tribes; and
>
> (B) *facilitate economic ventures with outside entities that are not tribal entities*;

25 U.S.C. § 4301(a)(9) (emphasis supplied).

That there is strong policy support for sovereign economic ventures is not surprising. Tribes are not unique among sovereigns in providing financial services. States too engage in

thousands of consumer-facing lending activities each year, from housing to student loans. *See e.g.*, Arkansas Student Loan Authority, www.asla.info/home (last visited Aug. 31, 2015); Rhode Island Student Loan Authority, www.risla.com (last visited Aug. 31, 2015). Some also have lending programs for state employees, veterans and other targeted populations. *See e.g*., CalVet Home Loans, www.calvet.ca.gov/HomeLoans (last visited Aug. 31, 2015); New Jersey Pension Loans, www.nj.gov/treasury/pensions/loanshome.shtml (last visited Aug. 31, 2015); North Dakota Veterans Aid Loan Program, www.nd.gov/veterans/benefits/loan-programs (last visited Aug. 31, 2015). And all fifty States plus the District of Columbia have housing finance agencies. *See e.g.*, Alabama Housing Finance Authority, www.ahfa.com (last visited Aug. 31, 2015); Alaska Housing Finance Corporation, www.ahfc.us (last visited Aug. 31, 2015); Colorado Housing and Finance Authority, www.chfainfo.com (last visited Aug. 31, 2015); District of Columbia Housing Finance Agency, www.dchfa.org (last visited Aug. 31, 2015). Likewise, there are numerous federally-charted and state-chartered lending institutions. *See* http://www.occ.gov/topics/licensing/national-bank-lists/index-active-bank-lists.html (last visited Aug. 31, 2015) (listing 1081 National Banks, 10 Credit Card Banks, 62 trust banks; and 425 Federal Savings Associations); https://www5.fdic.gov/idasp/warp_download_all.asp (accessed Aug. 31, 2015) (listing 27,599 state-charted, FDIC-insured financial institutions). There are also numerous sovereign-owned banks. *See e.g.*, http://www.potawatomi.org/enterprises/banking (accessed Aug. 31, 2015). Given this vast array of governmental lending activities, Riverbend's business would seem to be sufficiently "traditional" among sister sovereigns. Moreover, the Supreme Court has expressly held that an entity that engages in commercial lending activities

can be an arm of the sovereign. *College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd*., 527 U.S. 666 (1999).

In any event, the Fourth Circuit has explained that "the critical inquiry" in considering whether sovereign lending agencies are immune from suit is not how the entity is organized, but rather whether it is "subject to sufficient [sovereign] control to render them a part of the [sovereign]." *United States ex rel. Oberg v. Ky. Higher Educ. Student Loan Corp.*, 681 F.3d 575, 579 (4th Cir. 2012). Riverbend has conclusively established the Tribe's sole ownership of Riverbend and that the Tribal Council "closely monitor[s] and regulate[s] Riverbend," which operates under the "guidance, regulation and direction of the Tribal Council." Doc. No. 22-3, ¶¶ 8, 13. President Azure described Riverbend as "vital to the Tribe's ability to meet basic health and safety needs" in the Ft. Belknap community, thus motivating the Tribe's conservative, consumer-friendly approach to Riverbend's operations. *Id*. He indicated that Riverbend "is exactly like any other agency, arm or extension of the Tribe." *Id*. at 13. These facts establish that Riverbend meets the Fourth Circuit's *Oberg* test.

C. Tribal Sovereign Immunity Is Not Limited to Gaming Enterprises, Nor Does Tribal Economic Development Activity Require Congressional Authorization.

Plaintiff's attempt to limit the arm-of-the-tribe doctrine to casinos and a handful of other particular types of entities is unavailing. Plaintiff has not identified any case which finds that a tribal enterprise is not an arm of the tribe because it is not a casino, and the most recent case on the application of sovereign immunity to off-reservation commercial activity, *Bay Mills,* dealt with a casino that was operating outside the framework of IGRA. 134 S. Ct. 2029. The application of arm-of-the-tribe sovereign immunity outside the context of casinos is well-established, as noted above at Sections I.A and I.B.

Similarly, Plaintiff baselessly states in a footnote that cases that dealt with corporations organized under Section 17, rather than tribal law, "are factually different than the instant limited liability companies." Response at 6, n.3. Plaintiff cites no authority for her distinction. In fact, cases dealing with entities incorporated under tribal law routinely rely on Section 17 cases and vice versa. *See e.g.*, *Cook.*, 548 F.3d at 726, note 5 (stating that "[w]e see no importance in the distinction that here ACE is a tribal corporation while the casino in Allen may have been unincorporated" and citing a Section 17 corporation case, *American Vantage Cos.*, 292 F.3d at 1098, for that proposition); Karen J. Atkinson and Kathleen M. Nilles, *Tribal Business Structure Handbook*, U.S. Department of the Interior, Office of Indian Energy & Tribal Economic Development (2008).

Plaintiff's proposed limitation on arm-of-the-tribe analysis to casinos, Section 17 corporations, housing authorities, colleges and health boards is unsupported by any authority, and is inconsistent with the many cases that have applied sovereign immunity outside those contexts, including cases regarding consumer lending. The classic case that established that tribal sovereign immunity extends to off-reservation commercial activity, *Kiowa*, for example, fell into none of Plaintiff's categories but instead dealt with the tribe's signature on a promissory note to secure the purchase of stock in an aviation company. 523 U.S. at 753-54.

D. Under Any Test, Riverbend Is an Arm of the Tribe.

Unrefuted evidence demonstrates the Tribe's unequivocal intention that Riverbend is an "arm" of the Tribe and vested with the Tribe's sovereign immunity: "being wholly owned by the Tribe, [Riverbend] is to enjoy the Tribe's sovereign immunity … to the same extent that the Tribe would have such sovereign immunity if it engaged directly in the activities undertaken by

[Riverbend]." Doc. No. 22-2, Ex. 1-A, ¶7. "[Riverbend] is wholly-owned by the Tribe and established by the Tribal government under Tribal law to exist as an economic arm and instrumentality of the Tribe." Doc. No. 22-3, ¶5. The Supreme Court has found that such intention is the central inquiry in arm-of-the-sovereign analysis. *U.S. Postal Serv. v. Flamingo Indus. (USA) Ltd*., 540 U.S. 736, 744 (2004) (finding key question was whether the sovereign treated the entity as an "arm"). Riverbend plainly meets the "intention" test.

Likewise, Riverbend fits squarely into the category of tribal enterprises that have repeatedly been recognized as arms-of-the-tribe, enjoying sovereign immunity: "(1) whether the tribes created the entities pursuant to tribal law; (2) whether the tribes own and operate the entities; and (3) whether the entities' immunity protects the tribes' sovereignty." *Cash Advance & Preferred Cash Loans*, 242 P.3d at 1102. Plaintiff has developed her own list of four factors: "(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." Response at 13.

Under either test, Riverbend's status as an arm of the Tribe is clear. Plaintiff does not attempt to dispute that Riverbend satisfies her first and third factors. As Riverbend's CEO and the Tribal President attested,[7] Riverbend is a single member LLC, formed under Tribal law, wholly-owned and operated by the Tribe. They also attested that Riverbend was formed to serve the governmental purpose of providing revenue to fund essential government services on the

[7] *See* Doc. No. 22-2, Ex 1-C, 1-D. Although Plaintiff eschews these as "largely conclusory affidavits," they are formal, sworn statements by the highest company official of Riverbend and the highest government official of the Tribe, both of which set out uncontroverted facts establishing Riverbend's status as an arm of the Tribe and its sovereign immunity. Plaintiff cannot defeat this evidence simply by claiming that she is not sure the factual representations in the record are accurate. She must submit rebuttal evidence and she offers nothing.

Reservation, a purpose that is sufficiently "governmental" to treat the enterprise as a sovereign arm. *Allen*, 464 F.3d at 1046-47 (quoting 25 U.S.C. § 2702(1), and finding commercial enterprise "enable[d] 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'").

Finally, "the following factors are helpful in informing our inquiry . . . (5) the financial relationship between the tribe and the entities." *Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173, 1187 (10th Cir. 2010). Plaintiff attempts to present this factor as a searching inquiry into Riverbend's profitability and business relationships, but the "financial relationship" factor, as applied by the courts, is nothing more complicated than the simple question of whether the Tribe owns the business and is entitled to its profits. As the Ninth Circuit explained "the economic benefits produced by the [enterprise inure to the Tribe's benefit because [the enterprise's] articles of incorporation state that all capital surplus from the [enterprise] shall be deposited in the Tribe's treasury and because the Tribe, as the sole shareholder, enjoys all of the benefits of an increase in the [enterprise's] value." *Cook*, 548 F.3d at 726. The Tribe is the sole member and owner of Riverbend, so all of its economic benefits inure to the Tribe.

Plaintiff attempts to turn this "financial relationship" factor into a license to conduct far-reaching discovery into Riverbend's business affairs, with questions that all go to whether Riverbend is a successful business. Plaintiff cites no law saying such factors are relevant. Plaintiff appears to be asserting that the sovereign immunity of a tribal enterprise depends upon the amount of revenue it generates. Under this test, a tribal business that is hugely profitable and

provides large revenues for the tribal government would presumably be guaranteed sovereign immunity, while a tribal business that is struggling, or newly established, would not. Because the Tribal lending operations employs 70 of the 7000 members of the Tribe—a major employer in a rural, agricultural economy—Plaintiff argues that it cannot be an arm of the Tribe. This is absurd. Many, even most, tribal enterprises are small scale operations. As the Azure declaration described, Riverbend has been successful in providing revenues and employment to the Tribe, but even if that were not the case, Riverbend would still be an arm of the Tribe. Tribal sovereign immunity does not turn on how useful or important a particular business is to the tribe; rather "[a]mong the core aspects of sovereignty that tribes possess—subject, again, to congressional action—is the 'common-law immunity from suit traditionally enjoyed by sovereign powers.'" *Bay Mills*, 134 S.Ct. at 2030.

Similarly, there is no exception to tribal sovereign immunity based on the types of management contracts or other contracts the tribal enterprise enters into. Just like federal and state sovereigns, tribal enterprises routinely outsource business functions or even rely entirely on experienced management companies, with no diminution of the sovereign immunity of those entities. *See e.g. Native Am. Distrib*., 546 F.3d at 1294 (observing that a "resolution approved an agreement with Humble, Riggs & Associates for the management of the tobacco company"); *Cabazon Band of Mission Indians v. Riverside Cnty., State of Cal.*, 783 F.2d 900, 901 (9th Cir. 1986) *aff'd and remanded sub nom. California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) (observing that "[t]he games are operated by non-Indian professional operators, who receive a percentage of the profits"); *Breakthrough Mgmt. Grp*., 629 F.3d at 1177 (adjudicating a dispute between a tribal enterprise and an outside business consulting firm it had hired). The

only "financial factor" that is relevant here is that Riverbend is wholly-owned by the Tribe, formed by act of the Tribal Council to provide government revenue and economic development.

Lastly, Plaintiff's vague conclusion that the Tribe could possibly engage in some other type of economic development effort (Response at 14-15) has nothing to do with any arm-of-the-tribe test or sovereign immunity analysis. Rather, because Riverbend "acts as an arm of the tribe … its activities are properly deemed to be those of the tribe." *Allen*, 464 F.3d at 1046.

II. It Is Axiomatic that a Judgment Against Riverbend Would Harm the Tribe.

Tribal Council President Mark Azure submitted the following testimony:

> I cannot overstate how important the Tribe's lending business is to the Community. Our Tribal citizens working in the lending business are not reliant on the Tribal government for assistance, and indeed, typically support not only themselves and their immediate families on their modest wages, but also support extended family members. Our estimates are that each job in the Tribe's lending business supports nine Tribal citizens in our Reservation community. The Tribe has more than 7,000 enrolled citizens and **the lending business is the lifeblood of our economy**.

Doc. No. 22-3 at ¶11 (emphasis supplied). Nonetheless, Plaintiff argues that because Riverbend is an LLC, no harm comes to the Tribe. This is nonsensical. Because Riverbend is wholly owned by the Tribe, any monetary judgment against Riverbend directly harms the Tribe's treasury. *See Cook*, 548 F.3d at 726; Br. For the United States at *13, *Inyo Cnty*., 538 U.S. 701 (No. 02-281), 2003 WL 252549 (Jan. 23, 2003) (explaining that "any money judgment against the [tribal] Corporation would necessarily deplete what would otherwise be tribal funds"). Plaintiff also inexplicably suggests that relief would not harm Riverbend because Riverbend has ceased making loans in Maryland. Response at 15. But Plaintiff is not seeking injunctive relief, she is seeking monetary damages "estimated to be in excess of $75,000" on behalf of a class of

individuals. Complaint at p. 35. The harm to Riverbend is not about the ability to make loans in Maryland in the future; it is the risk of a monetary judgment.

III. No Judicial Remedy Is Available to Plaintiff. U.S. Supreme Court Authority Recognizes Such a Circumstance as a Logical and Acceptable Result of the Application of the Doctrine of Tribal Sovereign Immunity.

The fact that sovereign immunity restricts the availability of certain remedies is inherent in the very nature of sovereign immunity, and is not grounds for abrogating that immunity. "Sovereign immunity may leave a party with no forum for its claims." *Makah Indian Tribe v. Verity*, 910 F.2d 555, 560 (9th Cir. 1990). As the Supreme Court explained, "[t]here is a difference between the right to demand compliance with state laws and the means available to enforce them." *Kiowa*, 523 U.S. at 755. Plaintiff argues that Riverbend's sovereign immunity may leave her without a forum for her complaint, but this is inherent in the nature of sovereign immunity, which is the authority of a sovereign government not to be sued without its consent.

Plaintiff's argument that she is being deprived of any remedy is particularly unpersuasive here because she has never attempted to pursue any remedy besides litigation in this court – not even the simple one of contacting Riverbend and asking for relief – much less the dispute resolution procedures laid out in her loan agreements. *Redding Rancheria v. Superior Court*, 105 Cal. Rptr. 2d 773, 777-78 (Cal. Ct. App. 2001) ("Any unfairness here is largely a product of plaintiff's litigation tactics. Although the Tribe provides a mechanism to resolve civil suits, literally by means of a hearing before the sovereign, the tribal council, plaintiff refused to follow this procedure").

The broad-ranging potential implications of tribal sovereignty have been routinely addressed by the United States Supreme Court, which has consistently left imposition of any

restraints on sovereignty solely before Congress. *See generally Kiowa*, 523 U.S. 751. In fact, where a petitioner has specifically asked the court to "abandon or at least narrow" the doctrine of tribal sovereignty because "tribal businesses had become far removed from tribal self-governance and internal affairs," the Court flatly declined to do so. As stated by the Court: "We retained the doctrine, however, on the theory that Congress had failed to abrogate it in order to promote economic development and tribal self-sufficiency" and while "the rationale, it must be said, can be challenged as inapposite to modern, wide-ranging tribal enterprises extending well beyond traditional tribal customs and activities. . . . In our interdependent and mobile society, however, tribal [sovereignty] … extends beyond what is needed to safeguard tribal self-governance." *Id.* The Court declined to place limitations on tribal sovereignty so as to "defer to the role Congress may wish to exercise in this important judgment." *Id.*

Regardless of the breadth of sovereign immunity's application, Plaintiff did have available remedies under her Loan Agreements with Riverbend, she simply made the choice not to pursue them.

IV. Plaintiff's Riverbend Loan Agreements Are Consensual Relationships That Give Rise to Tribal Civil Regulatory and Adjudicatory Jurisdiction and Necessitating Adherence to the Supreme Court's Tribal Exhaustion Doctrine.

Contrary to Plaintiff's argument, the tribal exhaustion doctrine is not limited to disputes involving Indian land. Instead, to invoke the tribal exhaustion doctrine, an assertion of tribal jurisdiction must simply be plausible. *Stock W. Corp. v. Taylor*, 964 F.2d. 912 (9th Cir. 1992). This principle applies to "claims against tribal entities, including tribally-chartered, wholly tribally-owned corporations, to the same extent as suits to which Indian tribes or their members are parties." *Graham v. Applied Geo Tech.*, 593 F.Supp. 2d 915 (S.D. Miss 2008). Several

courts have applied this doctrine in the context of consumer loan agreements. *See Brown v. W. Sky*, 2015 WL 413774 (M.D. N.C. Jan. 30, 2015); *FTC v. Payday Fin*, 935 F.Supp. 2d 926 (D. S.D. 2013).

The standard for when a tribe has jurisdiction over a dispute was laid out in *Montana v. United States*, which held that a tribe would have jurisdiction over "nonmembers who enter consensual relationships with the tribe or its members." 450 U.S. 544, 565 (1981). If there is a colorable claim of jurisdiction under *Montana*, then there is a requirement to exhaust tribal court remedies. Here, by entering into a contract with an instrumentality of the Tribe, Plaintiff has entered into a "consensual relationship" under *Montana*. "[A]s recognized in a number of cases, the requirement of tribal exhaustion applies to claims against tribal entities, including tribally-chartered, wholly tribally-owned corporations, to the same extent as suits to which Indian tribes or their members are parties." *Graham*, 593 F. Supp. 2d at 920 (collecting cases).

The loan documents Plaintiff executed clearly disclosed Riverbend's sovereign status, and explained that this would mean that Tribal law applied to the Riverbend Loan Agreements and any dispute would be subject to exclusive Tribal dispute resolution protocols. Doc. No. 22-2, Ex. 1-C, 1-D. Plaintiff admits "generally clicking through terms and conditions" of her Riverbend Loan Agreements, but states the Loan Agreements "do not look familiar. Doc. 40-2 at ¶9. Whether or not Ms. Everette recalls reading specific contract terms is irrelevant; the terms of the contracts she executed bind her. *See Walther v. Sovereign Bank*, 872 A.2d 735, 754 (Md. 2005) (recognizing it is "one of the most commonsensical principles in all of contract law, *i.e.,* that a party that voluntarily signs a contract agrees to be bound by the terms of that contract"). Ms. Everette's consensual relationship with Riverbend gives rise to a colorable claim

of tribal civil regulatory and adjudicatory jurisdiction. Under *National Farmers*, Plaintiff is required to exhaust her Tribal remedies, and she has not.

V. Because the Tribe's Lending Business Is the "Lifeblood"[8] of the Ft. Belknap Economy, the Tribe Is an Indispensable Party and One Which Cannot Be Joined.

In her opposition to Riverbend's Rule 19 motion, Plaintiff minimizes the essential fact that Riverbend is a sovereign entity, part-and-parcel—indeed the "lifeblood"—of an impoverished rural economy, and instead urges the Court to treat it as an ordinary private corporate entity. Response at 21-23. Plaintiff argues that the Tribe is a mere owner, and ignores that any judgment on the Plaintiff's claims "would prejudice the Tribe's economic interests . . . and its interests as a sovereign in negotiating contracts and governing its reservation." *Yashenko v. Harrah's NC Casino Co*., LLC, 446 F.3d 541, 552 (4th Cir. 2006). Plaintiff's Response also meagerly attempts to distinguish *Dawavendewa* and *Yashenko* from the present case by claiming that the absent parties in those cases were parties to the contract at issue. Response at 23. Riverbend's response to both arguments follows, in reverse order.

Plaintiff's support for her argument that the Tribe is not a party to the Riverbend Loan Agreements and is therefore not be an indispensable party to a contract action rests on a quote that references *Lomayaktewa v. Hathaway*, 520 F.2d 1324 (9th Cir. 1975), but includes no discussion and dodges a critical part of the *Lomayaktewa* Court's analysis. In *Lomayaktewa,* the court noted that "[n]o procedural principle is more deeply imbedded in the common law than that, in an action to set aside . . . a contract, all parties who may be affected by the determination of the action are indispensable." *Lomayaktewa* at 1325 (emphasis provided); *see also Jicarilla Apache Tribe v. Hodel*, 821 F.2d 537, 540 (10th Cir. 1987). Plaintiff has not brought any

[8] Doc. No. 22-3, ¶13.

contract claims, but rather various Maryland and federal statutory claims. Complaint at p. 35. Plaintiff's own styling of her Complaint necessarily makes this case one about the bigger picture—whether the Tribe as a sovereign government is free to engage in interstate commerce in accord with its own laws. She cannot have it both ways, ignoring the exclusive dispute resolution provisions of her contracts, but at the same time arguing that only parties to her contracts are necessary participants at her statutory/tort litigation table, regardless of how sovereign interests are impacted. The Tribe is unmistakably a party that will be affected by the determination of this action.

While the Tribe is not a party to the contract, Riverbend is an economic arm of the Tribe and is treated like any other Tribal agency. Doc. No. 22-3, ¶13. The Tribal Council President explained that the Tribe estimates its lending businesses support nine Tribal members per Tribal member employed. *Id*. Risk to Riverbend is risk to the Tribe—risk that the monies Riverbend provides for governmental services such as ambulance, fire, and police services will not be available, risk that the jobs Riverbend makes possible will go away, risk that the more than 600 Tribal members the lending business jobs support will have to find another way to make ends meet. It is obvious that a judgment against Riverbend would prejudice the Tribe's economic and sovereign interests and the Tribe would "be grievously impaired by a decision rendered in its absence." *Dawavendewa v. Salt River Project & Power Dist.,* 276 F.3d 1150 (9th Cir. 2002).

In *Dawavendewa*, 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. 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 issues at stake there were at least as fundamental as those implicated by Maryland usury law. The loss of Riverbend revenues would diminish the funds available for Tribal governmental services, and worse yet, the loss of Riverbend as a viable sovereign business would devastate the Tribal economy. Any judgment against Riverbend would interfere with the Tribe's ability to manage its commercial affairs. The Tribe's sovereignty and economic interests are clearly at stake in this litigation; thus, the Tribe is indispensable.

CONCLUSION

Plaintiff's chockablock "policy" arguments and cramped view of tribal sovereignty are unavailing. Tribal enterprise immunity is not a fluke, but a time-tested doctrine consistently upheld by the Supreme Court and unmolested by Congress. *See generally*, William Wood, *It Wasn't an Accident: The Tribal Sovereign Immunity Story*, 62 AMERICAN UNIV. L. REV. 1587 (2013). Under Supreme Court precedent, tribal sovereign immunity holds firm unless abrogated by Congress or the tribe itself. The Supreme Court has expressly and repeatedly deferred to Congress's judgment with respect to any policy-based encroachment on tribal sovereign immunity and this Court should do the same.

Respectfully submitted this 31st day of August 2015.

RIVERBEND FINANCE, LLC

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Certificate of Service

I hereby certify that on August 31, 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:

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