IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

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

DEFENDANT MOBILOANS' REPLY IN SUPPORT OF ITS MOTION TO DISMISS

Ms. Everette's claims against MobiLoans should be dismissed because MobiLoans is a tribally-chartered arm of the Tunica-Biloxi Indian Tribe that is cloaked in the Tribe's sovereign immunity. The Supreme Court has repeatedly and recently explained that tribal sovereign immunity is "a broad principle" that applies with equal force to both commercial and governmental activities undertaken by tribes. *Michigan v. Bay Mills Indian Cmty.*, 134 S.Ct. 2024, 2031 (2014). And every federal appellate court to consider the issue has held that tribal arms and enterprises share their tribes' immunity. Because MobiLoans has sovereign immunity from suit, the Court lacks subject matter jurisdiction over Ms. Everette's claims against it and should grant the motion to dismiss.

In her response (Doc. 40), Ms. Everette erroneously contends that tribal sovereign immunity is a narrow, strictly cabined doctrine. She alleges that it applies only to tribes

as tribes or, in the alternative, that it is applicable only to tribal entities performing governmental functions or tribal casinos. At the very least, she argues, it does not apply to MobiLoans, either because MobiLoans lacks sufficiently close ties to the Tribe or because recognizing MobiLoans' immunity allegedly would leave her without a remedy. Ms. Everette's arguments, which are unsupported by the facts and the overwhelming weight of relevant case law, are unavailing.

I. MobiLoans shares in the Tribe's sovereign immunity.

Contrary to Ms. Everette's contentions, MobiLoans possesses sovereign immunity because it is a tribally-chartered and controlled arm or enterprise of the Tunica-Biloxi Indian Tribe. Many courts, including the Fourth Circuit, have recognized with little need for discussion that, in addition to tribes themselves, "Tribal entities … are also shielded by sovereign immunity."[1] *Thomas v. Dugan*, 168 F.3d 483 (4th Cir. 1998); *see also*, *e.g.*, *Alabama v. PCI Gaming Auth.*, --- F.3d ----, Case No. 14-12004, slip op. at 13 (Sept. 3, 2015) ("[W]e agree with our sister circuits that have concluded that an entity that functions as an arm of a tribe shares in the tribe's immunity."); *Miller v. Wright*, 705 F.3d 919, 923-924 (9th Cir. 2013), *cert denied*, 133 S. Ct. 2829 (2013); *Ninigret Dev. Corp. v.*

[1] Ms. Everette attempts to distinguish the Fourth Circuit's opinion in *Dugan* by claiming that it "does not address tribal 'arms' and provides no analysis of what constitutes a 'tribal enterprise' or 'tribal entity.'" Pl. Br., Doc. 40, at 6 n.2. While this carefully worded assertion may be technically correct, it offers Ms. Everette no aid. That the Fourth Circuit did not use the word "arms" is wholly irrelevant, and the fact that it did not believe it necessary to provide an extended discussion of its explicit declaration that "Tribal entities … are also shielded by sovereign immunity" only shows that it viewed the proposition as uncontroversial.

Narragansett Indian Wetoumuck Hous. Auth., 207 F.3d 21, 29 (1st Cir. 2000); *Weeks Constr., Inc. v. Oglala Sioux Hous. Auth.*, 797 F.2d 668, 670-671 (8th Cir. 1986); *Kosceliak v. Stockbridge-Munsee Cmty.*, 811 N.W.2d 451, 456 (Wis. Ct. App. 2012). These decisions illustrate the broad acceptance and uncontroversial nature of the notion that tribal sovereign immunity extends to tribal arms and enterprises. And this rule makes perfect sense, as "tribal business operations are critical to the goals of tribal self-sufficiency" that underlie the tribal immunity doctrine. *Bay Mills*, 134 S. Ct. at 2043 (Sotomayor, J., concurring); *see also* 25 U.S.C. § 2701(4) ("[A] principal goal of federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government."). Based on this authority, the Court could grant MobiLoans' motion without further discussion.

Deeper inquiry leads to the same result. When courts do offer detailed analysis of whether a particular tribal business entity such as MobiLoans is entitled to sovereign immunity, the overwhelming majority apply a multi-factor balancing test. *See, e.g.*, *Breakthrough Mgmt. Group, Inc. v. Chuckchansi Gold Casino & Resort*, 629 F.3d 1173, 1181 (10th Cir. 2010); *Allen v. Gold Country Casino*, 464 F.3d 1044, 1046-47 (9th Cir. 2006); *J.L. Ward Assocs., Inc. v. Great Plains Tribal Chairmen's Health Bd.*, 842 F. Supp. 2d 1163, 1176 (D.S.D. 2012); *Cash Advance & Preferred Cash Loans v. Colorado*, 242 P.3d 1099, 1110 (Colo. 2010) (*en banc*). The Tenth Circuit's opinion in

Breakthrough, which provided a detailed survey of existing case law in the course of identifying and applying six relevant factors, is often regarded as the leading federal case on this issue.[2] *See* 629 F.3d at 1183-95. It considered: (1) the method of the entity's creation – *i.e.*, whether under tribal or state law; (2) the entity's purpose; (3) the entity's structure, ownership, and management, including the degree of control that the tribe has over the entity; (4) whether the tribe intended for the entity to have sovereign immunity; (5) the financial relationship between the entity and the tribe; and (6) whether granting immunity to the entity would serve the purposes of tribal sovereign immunity. *Id.* at 1191. Because these factors constitute a balancing test, they need not all weigh in favor of immunity for an entity to qualify as a tribal arm or enterprise; if the weight of the factors favors immunity, then the entity has immunity. *See, e.g.*, *id.* at 1191-95; *J.L. Ward*, 842 F. Supp. 2d at 1176-77. In this case, however, all of the factors support MobiLoans' entitlement to sovereign immunity.

As to the first factor, MobiLoans is organized and chartered under the laws and inherent sovereign authority of the Tunica-Biloxi Indian Tribe rather than under state law. *See* Declaration of Marshall Pierite, Doc. 21-2, ¶ 6. The Tribal Council Resolution

[2] *See, e.g., White v. Univ. of Cal.*, 765 F.3d 1010, 1025 (9th Cir. 2014) (reciting and applying *Breakthrough* factors); *J.L. Ward Assocs., Inc. v. Great Plains Tribal Chairmen's Health Bd.*, 842 F. Supp. 2d 1163 (D.S.D. 2012) (same); *Am. Prop. Mgmt. Corp. v. Superior Court*, 206 Cal. App. 4th 491, 501 (2012) ("We agree that the list of factors set forth by the Tenth Circuit is helpful and … they accurately reflect the general focus of the applicable federal and state case law.").

adopting MobiLoans' current operating agreement explicitly relies upon the Tribe's "inherent governmental power" to "establish and regulate arms of the Tribe" and refers to MobiLoans as "an arm of the Tribe for business purposes." *See* April 8, 2014 Tribal Council Resolution, Doc. 21-4 at 1. Courts consistently recognize that an entity's creation or incorporation under tribal law and pursuant to inherent tribal authority supports its entitlement to immunity. *See White v. Univ. of Cal.*, 765 F.3d 1010, 1025 (9th Cir. 2014); *Breakthrough*, 629 F.3d at 1191-92; *Cook v. AVI Casino Enters., Inc.*, 548 F.3d 718, 726 (9th Cir. 2008); *Weeks*, 797 F.2d at 670-671 (8th Cir. 1986); *Barker v. Menominee Nation Casino*, 897 F. Supp. 389, 393 (E.D. Wis. 1995) (affirming immunity of tribally chartered corporate enterprises); *Cash Advance*, 242 P.3d at 1110.

On the second factor, the "primary purpose" of MobiLoans "is to engage in lending and related activities that will generate additional revenues for the Tribe." *See* MobiLoans Operating Agreement (OA) § 2.1, Doc. 21-4 at 3. These revenues have been used to fund tribal educational, health care, and social services and to pay for tribal government operating expenses. *See* Pierite Dec., Doc. 21-2 ¶ 7. When an entity is created "for the financial benefit of the Tribe and to enable it to engage in various governmental functions," the second factor "weighs strongly in favor of immunity." *Breakthrough*, 629 F.3d at 1192; *see also Cook*, 548 F.3d at 726; *Allen*, 464 F.3d at 1047; *Warren v. United States*, 859 F. Supp. 2d 522, 541 (W.D.N.Y. 2012) (holding that

tribally chartered entity shared tribe's immunity, in part, because it was "created to generate income to provide for the general welfare" of tribal members).

MobiLoans' structure, ownership, and management likewise indicate that it is an arm of the Tribe entitled to immunity. This is indisputable. MobiLoans' Charter, adopted pursuant to a resolution of the Tribe's Tribal Council, provides that MobiLoans "shall at all times be one hundred percent (100%) owned in total by the Tribe." MobiLoans Charter, Doc. 21-3 at 1. MobiLoans is operated in accordance with its Charter and its Operating Agreement, which can only be amended by a resolution of the Tribal Council. *See id.* at 3. It is governed by a four person board consisting exclusively of enrolled tribal members, at least two of whom must be sitting members of the Tribal Council. *See* OA § 3.2, Doc. 21-4 at 4. The Tribal Council has the exclusive authority to appoint or remove members of MobiLoans' board. *See id.* The board is required to meet with the Tribal Council at least quarterly and to submit monthly financial statements to the Tribal Council. *Id.* §3.2.2, Doc. 21-4 at 5. The Tribal Council retains the unfettered authority to appoint and remove all officers of MobiLoans, and the Council must approve MobiLoans' annual budget and business plan. *Id.* § 3.5, Doc. 21-4 at 5-6. The Tribe's ownership and pervasive control over MobiLoans strongly support the latter's entitlement to immunity. *See, e.g.*, *Breakthrough*, 629 F.3d at 1193; *Cook*, 548 F.3d at 726; *Allen*, 464 F.3d at 1046 (holding that a plaintiff's insistence that the district court "scrutinize the

nature of the relationship between the Tribe and the Casino fails to accord sufficient weight to the undisputed fact that the Casino is owned and operated by the Tribe"); *Warren*, 859 F. Supp. 2d at 541.

It is also clear that the Tribe intended for MobiLoans to have sovereign immunity. The Operating Agreement adopted by the Tribal Council provides that MobiLoans, as "an arm of the Tribe, an entity wholly-owned by the Tribe and as a Tribally-chartered entity … is clothed by tribal and federal law with all the privileges and immunities of the Tribe … including sovereign immunity from suit …." OA § 6.1, Doc. 21-4 at 7; *see also* Charter Art. X, Doc. 21-3 at 2. Accordingly, the fourth factor also supports MobiLoans' immunity. *See, e.g.*, *Breakthrough*, 629 F.3d at 1193-94; *Koscielak*, 811 N.W.2d at 457 (holding that "[t]he case for immunity is all the stronger" where the entity's tribally-approved charter indicates that the entity is to have sovereign immunity).

The fifth factor, which calls for consideration of the financial relationship between MobiLoans and the Tribe, likewise supports MobiLoans' immunity. MobiLoans exists primarily to provide revenues to the Tribe. *See* Pierite Dec., Doc. 21-2 ¶¶ 4-5, 7; OA § 2.1, Doc. 21-4 at 3. As Mr. Pierite explains in his uncontradicted declaration, "the Tribe is heavily dependent upon revenue from certain business enterprises that operate as a vital and integral part of the Tribe and tribal government. … One of the business enterprises that helps fund the Tribe and its government is MobiLoans." Pierite Dec.,

Doc. 21-2 ¶¶ 4-5. Mr. Pierite further declared that since MobiLoans' creation in 2011, its revenues have funded tribal educational, social, and health care services. *Id.* ¶ 7. A monetary judgment against MobiLoans would adversely affect the funding that the Tribe uses to provide these services. This weighs in favor of MobiLoans' immunity from suit.[3] *See, e.g.*, *Breakthrough*, 629 F.3d at 1195; *Warren*, 859 F. Supp. 2d at 541.

Finally, recognizing MobiLoans' immunity would serve the tribal sovereign immunity doctrine's purposes of promoting tribal self-governance and economic self-sufficiency. As the Wisconsin Court of Appeals succinctly explained in concluding that tribally chartered business enterprises share in tribal immunity:

> Tribes must surmount many developmental challenges, including tribal remoteness, lack of a tax base, capital access barriers, and the paternalistic attitudes of federal policymakers. *Cash Advance*, 242 P.3d at 1107. "Because of these barriers … tribal economic development—often in the form of tribally owned and controlled business—is necessary to generate revenue to support tribal government and services." *Id.* Tribal immunity promotes this economic development, as well as tribal self-determination and cultural autonomy.

Koscielak, 811 N.W.2d at 456; *see also Cash Advance*, 242 P.3d at 1107 ("The modern realities of tribal sovereignty explain the broad applicability of the doctrine of tribal sovereign immunity."). By directly providing economic benefits that are used to fund

[3] Even though a monetary judgment against MobiLoans might not directly affect the Tribe's treasury, that does not mean that there is not a financial relationship between the Tribe and MobiLoans' that supports the latter's immunity. *See, e.g., Warren*, 859 F. Supp. 2d at 541; *J.L. Ward*, 842 F. Supp. 2d at 1176; *see also infra*, Part II.B.

tribal governmental services for tribal members, MobiLoans furthers the critically important policies of tribal self-governance and economic development that lie at the heart of the tribal sovereign immunity doctrine. *See, e.g.*, *Bay Mills*, 134 S. Ct. at 2041 (Sotomayor, J., concurring) ("If Tribes are ever to become more self-sufficient … commercial enterprises will likely be a central means of achieving that goal."); *Breakthrough*, 629 F.3d at 1195; *Allen*, 464 F.3d at 1046-47. Recognizing MobiLoans' right to share in the Tribe's immunity promotes the purposes that such immunity is intended to serve.

Based on the overwhelming weight of authority and the undisputed facts set forth in the documents filed in support of its motion, MobiLoans is an arm and enterprise of the Tribe that is entitled to share in the Tribe's immunity. It is organized and chartered under tribal law for the primary purpose of raising revenues to fund the Tribe's governmental activities. It is wholly owned and controlled by the Tribe. The Tribe intended for it to have sovereign immunity, and recognition of its immunity promotes the doctrine's purposes of encouraging tribal economic development, self-governance, and self-sufficiency. Accordingly, the Court should dismiss Ms. Everette's claims against MobiLoans due to lack of subject matter jurisdiction.

II. Ms. Everette's arguments against MobiLoans' immunity are flawed.

In her response, Ms. Everette attempts to sidestep the well-settled and broadly accepted legal principles governing tribal sovereign immunity. To do so, she relies on a mixture of non-binding Supreme Court dissents, state law cases setting forth minority rules, and strained readings of cases that, when fairly read, are directly in line with MobiLoans' arguments. None of her arguments are compelling, and they fall well short of overcoming the weight of factors supporting MobiLoans' immunity.

A. Tribal sovereign immunity is not limited to tribal governments and casinos.

Ms. Everette first contends that MobiLoans cannot have sovereign immunity because it is not an Indian tribe. *See* Doc. 40 at 5-6. While she is correct that the Supreme Court has never explicitly ruled on the immunity of tribal arms and enterprises, that does not mean that the doctrine's applicability is truly open to question. As set forth in detail *supra*, multiple federal courts of appeals, including the Fourth Circuit, have unanimously held that tribal arms and entities share in tribal immunity. *See* Part I, *supra* at 2-3.

Impliedly conceding that tribal sovereign immunity is not limited to tribes themselves, Ms. Everette quickly pivots to the assertion that courts "generally" have only recognized immunity for (a) tribal casinos and (b) tribal governmental institutions such as housing authorities. Doc. 40 at 6. This argument fares no better than her first contention for several reasons.

Ms. Everette's assertion that immunity for tribal entities is limited to "traditional governmental arms" relies on a summary of Eighth Circuit case law set forth in *J.L. Ward*. *See* Doc. 40 at 6-7. Even the language that she quotes undermines her argument, however, as shown by the district court's observation that "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." *J.L. Ward*, 842 F. Supp. at 1171 (quoted in Doc. 40 at 7). In this "critical" respect, MobiLoans is situated identically to the entities that the Eighth Circuit deemed tribal arms entitled to immunity. *See supra* at 4-5. It is not "a mere business," but rather a tribally chartered and controlled economic enterprise intended to provide revenues to the Tribe and to fund tribal economic development and independence.

The Supreme Court has instructed that "tribal immunity extends beyond what is needed to safeguard tribal self-governance. This is evident when tribes take part in the Nation's commerce." *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 758 (1998). The fact that MobiLoans engages in commercial activity that funds tribal government rather than itself performing a tribal governmental function thus is wholly irrelevant. *See, e.g.*, *Bay Mills*, 134 S. Ct. 2037-39; *Kiowa*, 523 U.S. at 758; *Allen*, 464

F.3d at 1046 ("The question is not whether the activity may be characterized as a business, which is irrelevant under *Kiowa* ….").

The irrelevance of the commercial/governmental function distinction urged by Ms. Everette is underscored by her accompanying argument that tribal sovereign immunity is limited to tribal casinos. *See* Doc. 40 at 7-8. Casinos are commercial enterprises that many tribes use to aid in funding their tribal governments. In this regard, tribal casinos are exactly like MobiLoans. But tribal casinos are different, Ms. Everette contends, "because Congress has explicitly endorsed them to advance tribal economic development." *Id.* at 7. This last part is true enough. Congress has declared that "a principal goal of federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government," and it has endorsed gaming as one way for tribes to pursue that goal. 25 U.S.C. § 2701(4). But neither Congress nor any court of which MobiLoans is aware has indicated that gaming is the only commercial avenue that tribes can or should pursue to achieve the goals of economic development and self-sufficiency. Nor has Congress indicated that tribal sovereign immunity should be abrogated or disregarded when tribes engage in other, non-gaming commercial activity.

The Supreme Court has, however, broadly indicated that tribal sovereign immunity applies even when tribes engage in off-reservation commercial activity. *See Bay Mills*, 134 S. Ct. 2039; *Kiowa*, 523 U.S. at 760. In light of this settled legal landscape, it makes

no sense to contend that tribal arms and enterprises retain immunity when engaging in one type of commercial activity but not others. The Court should reject this argument out of hand.

B. MobiLoans' incorporation does not abrogate its immunity.

Ms. Everette next argues that MobiLoans cannot have immunity because a judgment against it will not reach the Tribe's assets. She characterizes this as "a critical threshold inquiry" and contends that any separately incorporated entity is automatically disqualified from sharing in its tribe's immunity. Doc. 40 at 8. She cites no federal authority for this position, instead relying on state court opinions from New York and Alaska. *Id.* at 9 (quoting *Sue/Perior Concrete & Paving, Inc. v. Lewiston Golf Course Corp.*, 25 N.E. 3d 928, 935 (N.Y. 2014) and *Runyon ex rel. B.R. v. Ass'n of Vill. Council Presidents*, 84 P.3d 437, 441 (Alaska 2004)).

With all due respect to the courts of New York and Alaska, their idiosyncratic application of a settled federal doctrine cannot overcome the extensive federal authority to the contrary. Federal courts, as well as numerous state courts, have indicated that formal corporate separation between a tribal enterprise and its tribe is only one of several factors to be considered in this analysis, and several of them have explicitly rejected the approach espoused in *Lewiston Golf* and *Runyon*. *See, e.g., Breakthrough*, 629 F.3d 1186-88 ("[T]he district court erroneously treated the financial impact on a tribe of a

judgment against its economic entities as a threshold inquiry."); *J.L. Ward*, 842 F. Supp. 2d at 1175-76; *Warren*, 859 F. Supp. 2d at 541; *In re Womelsdorf*, 2015 WL 3643477 at *3 (Bankr. D. Or. June 11, 2015). Indeed, most courts hold that the creation of a separate entity under tribal law – the method used to create MobiLoans – weighs heavily *in favor* of the entity's being protected by the tribe's immunity. *See supra* at 4-5.

Moreover, to the extent that the minority position adopted by the state courts of New York and Alaska trammels tribes' authority to create distinct commercial entities that share the tribes' immunity, it constitutes an impermissible interference with tribal sovereignty and an improper state limitation on tribal sovereign immunity. The Supreme Court of Colorado recognized as much in *Cash Advance*, where it chose to "follow the federal courts of appeals" by conducting a multi-factor balancing inquiry that was "consistent with federal law and … not likely to function as a state diminution of tribal sovereign immunity." 242 P.3d at 1110. This is in stark contrast with the New York Court of Appeals' approach in *Lewiston Golf*, which pointedly emphasized that "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." 25 N.E.3d at 936. Given the Supreme Court's repeated reaffirmation that "tribal immunity 'is a matter of federal law and is not subject to diminution by the States,'" state court decisions that

apply the doctrine more narrowly than their federal counterparts are particularly suspect.[4] *Bay Mills*, 134 S. Ct. at 2031 (quoting *Kiowa*, 523 U.S. at 756).

Finally, Ms. Everette argues that "comity concerns" should cause this Court to follow the minority state court position rather than the majority rule adopted by every federal appellate court that has addressed the immunity of tribal arms and enterprises. She contends that a majority of Supreme Court justices so indicated in *Bay Mills*, and she implies that Supreme Court precedent supports treating the immunity of tribally-chartered corporations similarly to that of state-chartered corporations under the 11th Amendment. Doc. 40 at 10. These arguments, at best, are woefully misguided.

Ms. Everette's contention that five justices in *Bay Mills* expressed these "comity concerns" is frankly disingenuous. Justice Thomas's dissent did express the sort of comity concerns that the Plaintiff argues should carry the day here. *See Bay Mills*, 134 S. Ct. at 2047 (Thomas, J., dissenting). But the fifth justice who expressed concerns about comity – Justice Sotomayor – did so from a very different perspective. After joining the majority opinion, she "wr[o]te separately to further detail why both history *and comity counsel against limiting Tribes' sovereign immunity in the manner the principal dissent*

[4] States' inability to limit tribal sovereign immunity also rebuts the Plaintiff's efforts to cast doubt on MobiLoans' immunity by claiming that MobiLoans is violating Maryland law. *See, e.g.*, Doc. 40 at 3. The lawfulness, *vel non*, of MobiLoans' alleged conduct under Maryland law has no bearing on MobiLoans' sovereign immunity under federal law. *See Kiowa*, 523 U.S. at 755.

advances." *Id.* at 2040 (Sotomayor, J., concurring) (emphasis added); *see also id.* at 2041 ("Principles of comity strongly counsel in favor of continued recognition of tribal sovereign immunity, including for off-reservation commercial conduct."). Plainly, Justice Sotomayor in no way shared the *Bay Mills* dissenters' view that "comity concerns" call for the limitation of tribal sovereign immunity. Ms. Everette's attempt to paint the picture differently should not be accepted by the Court.

Rebutting Ms. Everette's contention that tribal sovereign immunity "should not be asymmetric" with state-chartered corporations' immunity under the 11th Amendment requires only the briefest perusal of relevant Supreme Court precedents. "[T]he immunity possessed by Indian tribes is not coextensive with that of the States." *Kiowa*, 523 U.S. at 756; *see also Bay Mills*, 134 S. Ct. at 2037 (rejecting a similar argument by the State of Michigan and noting that "all the State musters are retreads of assertions we have rejected before"). While Ms. Everette may bemoan the "asymmetry" between tribal sovereign immunity and 11th Amendment immunity, it is settled law.

For all of the foregoing reasons, the Court should reject Ms. Everette's contention that MobiLoans' status as a separately incorporated entity divests it of immunity. MobiLoans' incorporation is merely one of several factors to consider, and the majority of courts recognize that its incorporation under tribal law actually weighs in favor of its right to share in the Tribe's sovereign immunity.

C. Ms. Everette misconstrues Supreme Court precedent.

Like many litigants before her, Ms. Everette next attempts to cast doubt on the vitality of tribal sovereign immunity by selectively quoting and mischaracterizing the Supreme Court's decisions in *Kiowa* and *Bay Mills*. First, she implies that this Court should view the doctrine skeptically because "[t]he *Kiowa* Court offered no substantive justification for granting tribes sovereign immunity for off-reservation commercial activity." Doc. 40 at 11. Next, she characterizes the Supreme Court's very recent reaffirmation of tribal sovereign immunity in *Bay Mills* as a "narrow decision" that "narrowly upheld *Kiowa* …." *Id.* at 11-12. Based on these assertions, Ms. Everette posits that "[t]ribal sovereign immunity is not the broad and expansive doctrine that Defendants suggest." *Id.* at 12. The "narrow" version of tribal sovereign immunity that Ms. Everette envisions cannot apply, she contends, if it would result in a party lacking a remedy against a tribal enterprise. *Id.* at 12-13.

Ms. Everette's arguments misapprehend the law. Her views on whether the Supreme Court adequately justified its decision in *Kiowa* are irrelevant, as is the fact that four justices opposed affirming *Kiowa* in *Bay Mills*. The majority opinions in *Kiowa* and *Bay Mills* are the law – well-settled law at that – and they hold that tribal immunity is "a broad principle" that applies equally "to governmental and commercial activities" regardless of where they take place. *Bay Mills*, 134 S.Ct. at 2031; *Kiowa*, 523 U.S. at

760. "[T]he *Kiowa* Court comprehended the trajectory of tribes' commercial activity … and *Kiowa* noted the flourishing of other tribal enterprises, ranging from cigarette sales to ski resorts," yet it held that tribes are entitled to immunity when engaging in such commercial activity unless Congress decides otherwise. *Bay Mills*, 134 S. Ct. at 2037. It is impossible to read the majority opinions in *Kiowa* and *Bay Mills* – the opinions that are binding on this Court and all other federal courts – and conclude that tribal sovereign immunity is anything other than a broad doctrine that encompasses tribal commercial activities. *See Bay Mills*, 134 S. Ct. at 2031; *see also Cash Advance*, 242 P.3d at 1107 (addressing the "broad applicability of the doctrine of tribal sovereign immunity" to "tribally owned and controlled businesses").

Ms. Everette's claim that her lack of an alternative remedy somehow divests MobiLoans of immunity is equally misguided. She bases this argument on a footnote in *Bay Mills* wherein the Court stated that it "need not consider whether the situation would be different if no alternative remedies were available" and noted that it had never "specifically addressed" whether tribal immunity would apply "if a tort victim, or other plaintiff *who has not chosen to deal with a tribe*, has no alternative way to obtain relief." *Bay Mills*, 134 S. Ct. at 2036 n.8 (emphasis added). From this, Ms. Everette jumps to the conclusion that her alleged lack of alternative remedies against MobiLoans renders *Bay*

Mills, and apparently all other federal case law affirming the applicability of sovereign immunity to tribal commercial enterprises, distinguishable. *See* Doc. 40 at 12-13.

There are a number of problems with this argument. First, Ms. Everette is not similarly situated to the hypothetical claimant in the *Bay Mills* footnote. She is not a tort victim who involuntarily came into contact with the Tribe; rather, she is a party to a contract with a tribally chartered and owned lending company. *See* Second Declaration of Marshall Pierite, filed contemporaneously herewith, ¶¶ 3-6; *see generally* MobiLoans Credit Agreement Terms & Conditions (MobiLoans T&C) (attached as Exhibit A to Second Pierite Dec.). *Kiowa* clearly held that "Tribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities …." 523 U.S. at 760.

Second, Ms. Everette has an alternative remedy. The contract that she entered into with MobiLoans included an arbitration provision that she declined to invoke. *See* MobiLoans T&C at 1 & § XVII. While Ms. Everette may prefer a putative class action lawsuit to arbitration, she cannot claim that she had no alternative remedy.

Third, even if Ms. Everette lacked an alternative remedy, that would not allow her to overcome MobiLoans' immunity. While the *Bay Mills* Court did wonder whether "special justification" might allow suits against tribal commercial entities in some contexts, the lack of an alternative remedy by itself cannot be such a justification. The

inability to obtain relief against a sovereign entity is an inevitable result of sovereign immunity, and a contrary holding would amount to the abolition of the doctrine. *See, e.g.*, *Florida v. Seminole Tribe of Fla.*, 181 F.3d 1237, 1243-44 (11th Cir. 1999) (citing several cases); *Confederated Tribes of Chehalis Indian Reservation v. Lujan*, 928 F.2d 1496, 1500 (9th Cir. 1991) ("Courts have recognized that a plaintiff's interest in litigating a claim may be outweighed by a tribe's interest in maintaining its sovereign immunity."). Ms. Everette's claim that her alleged lack of an alternative remedy entitles her to proceed with her claims against MobiLoans fails both on the facts and the law.

D. There are no legitimate factual questions regarding MobiLoans' immunity.

Finally, Ms. Everette contends that if the Court applies the multi-factor analysis described in *Breakthrough* and other cases, there are factual questions that prevent it from granting MobiLoans' motion. This argument also misses the mark.

As an initial matter, while Ms. Everette cites federal case law in her discussion of the multi-factor analysis, the factors that she recites more closely resemble those delineated by the Court of Appeals of New York in *Lewiston Golf*. *Compare* Doc. 40 at 13 with *Lewiston Golf*, 25 N.E.3d at 933. The factors set forth in *Breakthrough* provide a more appropriate analytical framework for this question of federal law than a state court decision adopting a minority position. And, as discussed *supra*, those factors support MobiLoans' entitlement to tribal sovereign immunity. Regardless of the factors that the

Court chooses to consider, however, Ms. Everette fails to establish any legitimate factual dispute that would preclude the dismissal of her claims against MobiLoans.

Ms. Everette takes issue with the evidence submitted by MobiLoans in support of its motion, characterizing it as comprising "largely conclusory affidavits." Doc. 40 at 14. This is inaccurate. While MobiLoans did submit a declaration in support of its motion, that declaration attached and described MobiLoans' Charter and Operating Agreement as well as pertinent resolutions of the Tribe's Tribal Council. *See* Docs 21-2 – 21-4. Courts often have found such evidence dispositive of a tribal enterprise's entitlement to immunity. *See, e.g.*, *Breakthrough*, 629 F.3d at 1188-89; *J.L. Ward*, 842 F. Supp. 2d at 1164-65; *Warren*, 859 F. Supp. 2d at 541; *In re Womelsdorf*, 2015 WL 3643477 at *3 ("The provisions of the corporation's charter … establish that the corporation's purpose and activities bring it within the scope of tribal immunity."); *Koscielak*, 811 N.W.2d at 457 (referring to the entity's charter as strong evidence of its right to immunity). The Court should not credit Ms. Everette's efforts to downplay the value of this evidence.

At the same time, Ms. Everette offers absolutely no evidence to contradict MobiLoans' declaration and documentation. This is important because MobiLoans has mounted a factual challenge to Ms. Everette's assertion of subject matter jurisdiction. Accordingly, it is she who "bears the burden of proving [the existence of subject matter jurisdiction] by a preponderance of the evidence." *United States ex rel. Vuyyuru v.*

Jadhav, 555 F.3d 337, 347 (4th Cir. 2009), *cert. denied*, 558 U.S. 875 (2009). Ms. Everette has not met her burden with respect to the key jurisdictional facts outlined in the MobiLoans' documentary evidence. This alone is fatal to her argument.[5]

Next, Ms. Everette contends that MobiLoans has no immunity because it has not shown that lending activity in Maryland is necessary for it to sustain itself or the Tribe. *See* Doc. 40 at 14. Tribes and tribal entities are not required to establish that engaging in any particular type of commercial activity is necessary to their economic well-being, and Ms. Everette offers no authority to that effect. The law encourages tribes to pursue economic development, and when they do so themselves or through a tribally-controlled arm or enterprise, it also provides that they are entitled to sovereign immunity. Ms. Everette merely wishes to substitute her judgment about what activities the Tribe and its economic arms should pursue for that of the Tribe's Council. This argument, perhaps more than anything else in her brief, reveals a striking contempt for tribal sovereignty. It certainly does not overcome MobiLoans' sovereign immunity.

[5] MobiLoans addresses Ms. Everette's claim that the Court should allow jurisdictional discovery in a separate filing. Briefly stated, Ms. Everette has offered only speculation as to what she might uncover through her requested discovery, and, under the applicable multi-factor balancing analysis, the information that she has indicated she would seek to discover could not possibly overcome the existing evidence showing that MobiLoans is an arm of the Tribe. *Accord White*, 765 F.3d at 1025 (affirming a district court's denial of jurisdictional discovery in a tribal sovereign immunity case in light of evidence that the entity in question was a tribal arm and the fact that the plaintiff offered only "speculative arguments" to the contrary); *Breakthrough*, 629 F.3d at 1188, 1190 (approving the district court's denial of a jurisdictional discovery "fishing expedition" that "would undermine the purposes behind the immunity doctrine").

Finally, Ms. Everette wrongly argues that her claims should not be dismissed because MobiLoans has not submitted detailed financial data regarding its own revenues and, amazingly, the total revenues of the Tribe. The case law simply does not require this sort of showing. Indeed, requiring the Tribe – a nonparty that unquestionably has sovereign immunity – to produce its confidential and proprietary financial information in order to protect the immunity of one of its economic arms would undermine the very purpose of that immunity. *See Breakthrough*, 629 F.3d at 1188; *see also Siegert v. Gilley*, 500 U.S. 226, 232 (1991) (indicating that discovery should not be allowed until threshold immunity questions are resolved); *Beauchamp v. Maryland*, 2015 WL 4389789 at *9 (D. Md. July 13, 2015). MobiLoans has shown that it is a tribally-chartered entity owned and controlled by the Tribe, that its purpose and effect are to produce revenues that the Tribe uses to fund governmental programs, that the Tribe intended for it to have sovereign immunity, and that preserving its immunity serves the purposes of the doctrine. *See generally* Part I, *supra*. The law requires, and Ms. Everette is entitled to, nothing more.

CONCLUSION

The core of Ms. Everette's argument is that so-called "payday lending" is unsavory, so the Tribe, acting through MobiLoans, should not be allowed to do it. While Ms. Everette is entitled to her opinion, it is not the law. Federal law provides that Indian tribes have sovereign immunity from claims based on their commercial conduct and that

such immunity applies with equal force to tribal arms and enterprises such as MobiLoans. Because MobiLoans has sovereign immunity from Ms. Everette's claims against it, those claims should be dismissed.

Respectfully submitted this 8th day of September, 2015.

/s/

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