UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

Civil Action No. 4:16-MC-5-CVE-TLW

JAMES DILLON,

Plaintiff,

vs.

BMO HARRIS BANK, N.A., *et al.*,

Defendants.

Magistrate Judge T. Lane Wilson

DEFENDANT BMO HARRIS BANK, N.A.'S OPPOSITION TO MOTION TO QUASH SUBPOENA

INTRODUCTION

Defendant BMO Harris Bank, N.A. ("BMO Harris") issued a third-party subpoena to John Shotton to obtain his deposition testimony for an evidentiary hearing set for January 27, 2016 in an action in federal court in North Carolina. That court set the hearing to assess the accuracy of declarations that Mr. Shotton had provided earlier in that case to authenticate the plaintiff's loan agreements. BMO Harris has invoked arbitration provisions in those agreements.

The Otoe-Missouria Tribe's motion to quash the subpoena to Mr. Shotton on grounds of tribal sovereign immunity should be denied. Mr. Shotton may be a tribal official,but he waived any immunity from testifying regarding the subject of his declarations by voluntarily providing them to the North Carolina court. Courts have recognized that a tribe (or tribal official) cannot testify regarding a topic and then claim immunity from answering additional inquiries on that topic, as Mr. Shotton is attempting to do here.

Accordingly, BMO Harris respectfully requests that the Otoe-Missouria Tribe's motion to quash be denied, and Mr. Shotton directed to appear at a deposition on the topic covered by his declarations—the authenticity of the North Carolina plaintiff's loan agreements.

BACKGROUND

A. Mr. Shotton Provides Two Declarations Proffering Testimony For The North Carolina Action To Authenticate The Plaintiff's Loan Agreements.

BMO Harris is a defendant in a consumer class action pending in the U.S. District Court for the Middle District of North Carolina. *See Dillon v. BMO Harris Bank, N.A.*, No. 1:13-cv-897-CCE (M.D.N.C.). The plaintiff in that action, North Carolina resident James Dillon, alleges that he used the Internet to borrow money from lenders—mostly operated by Native American tribes—on terms that he claims violate North Carolina usury law. Attachment 1, Decl. of Frank M. Dickerson III, Ex. 1 ¶¶ 2-5 (complaint from North Carolina action). One of those tribal lenders is Great Plains Lending, LLC ("Great Plains"). *Id.* ¶¶ 16(c); 81-84.

Neither Great Plains nor any of the other lenders are defendants in the North Carolina action. Instead, Mr. Dillon has chosen to sue banks—including BMO Harris—that allegedly played a role in the sequence of funds transfers between Mr. Dillon's and the lenders' bank accounts using the Automated Clearing House ("ACH") network. *Id.* ¶¶ 81-103. That network is used to process millions of debit and credit transactions each day. *Id.* ¶ 39. Mr. Dillon contends that by allegedly helping to process some of those ACH transfers, BMO Harris violated the Racketeering Influenced and Corrupt Organizations Act and various North Carolina consumer-protection laws and common-law doctrines. *Id.* ¶¶ 111-127; 178-234.

BMO Harris responded to the complaint by invoking the arbitration provisions in Mr. Dillon's loan agreements with Great Plains. Dickerson Decl. ¶¶ 4-5 & Exs. 2-3 (BMO Harris motions to compel arbitration). In support, BMO Harris relied upon declarations from Mr. Shotton, the chairman of the tribal council of the Otoe-Missouria Tribe and the secretary and treasurer of Great Plains. *Id.* Exs. 4-5 (Mr. Shotton's declarations).

In each declaration, Mr. Shotton swears "under penalty of perjury under the laws of the United States" that he "make[s] this declaration based on personal knowledge of the facts set forth herein, and ***if called as a witness, [he] could and would testify to the following facts***." *Id.* Ex. 4 ¶ 1 & p. 5 (emphasis added); *see also id.* Ex. 5 ¶ 1 & p. 1 (same). Mr. Shotton then authenticates copies of Mr. Dillon's loan agreements from the records of Great Plains. *Id.* Ex. 4 ¶ 9 (authenticating Mr. Dillon's August 2013 loan agreement); *id.* Ex. 5 ¶ 9 (December 2012 agreement).

B. The North Carolina Court Schedules An Evidentiary Hearing To Hear Mr. Shotton's Testimony On Whether The Loan Agreements Are Authentic.

On January 11, 2016, the court in the North Carolina action scheduled an evidentiary hearing for January 27, 2016, to determine "[w]hether the document proffered by BMO Harris at Doc. 104-1"—*i.e.*, the Great Plains loan agreement attached to Mr. Shotton's declaration—"is an actual copy of the loan agreement entered into by Great Plains Lending and Mr. Dillon." Dickerson Decl. Ex. 6, at 5. The court explained that "Mr. Dillon has challenged the authenticity of these documents," and noted that when Mr. Dillon attempted to "depose" Mr. Shotton, Mr. Shotton "asserted tribal immunity."[1] *Id.* at 1-2. The court indicated that it therefore had "questions as to whether . . . Mr. Shotton's declarations are truthful[.]" *Id.* at 2.

The court further indicated that BMO Harris's failure to call a witness during the January 27, 2016 evidentiary hearing with personal knowledge about how the Great Plains loan agreements were created and maintained "will likely result in a finding that the purported loan

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[1] Mr. Dillon did not attempt to obtain a court ruling on that assertion of tribal sovereign immunity. As the Otoe-Missouria Tribe notes in its brief, when it moved to quash Mr. Dillon's subpoena on tribal immunity grounds, Mr. Dillon simply withdrew the subpoena voluntarily. Mot. 6 n.3.

document is inadmissible," resulting in the denial of BMO Harris's motion to compel arbitration. *Id.* at 5.

C. BMO Harris Subpoenas Mr. Shotton To Obtain His Testimony For The Evidentiary Hearing.

The day after the North Carolina court scheduled the hearing, counsel for BMO Harris informed counsel for Mr. Shotton and requested Mr. Shotton's attendance at the hearing or, alternatively, his deposition testimony. Dickerson Decl. Ex. 7. On January 19, 2016, counsel for Mr. Shotton responded that her "client is not available to attend the evidentiary hearing scheduled on January 27th due to scheduling conflicts." *Id.* Ex. 8. Accordingly, counsel for BMO Harris served Mr. Shotton with a subpoena for his deposition to obtain his testimony for the hearing. *Id.* Ex. 9.

In response, the Otoe-Missouria Tribe and Great Plains commenced this action to move to quash the subpoena on grounds of tribal sovereign immunity. Mr. Shotton's counsel further indicated that Mr. Shotton would not attend the hearing in North Carolina.

ARGUMENT

BMO does not dispute that, as a general matter, the Otoe-Missouria Tribe enjoys tribal sovereign immunity, including immunity from third-party subpoenas for discovery in civil litigation. As the Eighth Circuit has explained, "a federal court's third-party subpoena in private civil litigation is a 'suit' that is subject to Indian tribal immunity." *Alltel Commc'ns, LLC v. DeJordy*, 675 F.3d 1100, 1106 (8th Cir. 2012).

But tribal sovereign immunity can be "waived." *Ute Indian Tribe v. Utah*, 790 F.3d 1000, 1009 (10th Cir. 2015). For example, a tribe can waive immunity in a contract. *See, e.g., Stifel, Nicholaus & Co. v. Godfrey & Kahn*, 807 F.3d 184, 202-03 (7th Cir. 2015). And a tribe

can waive immunity by voluntarily participating in litigation. For instance, the Supreme Court has held that if a tribe files a lawsuit in state court, "tribal immunity does not extend to protection from the normal processes of the state court in which it has filed suit." *Three Affiliated Tribes of Ft. Berthold Reservation v. Wold Eng'g*, 476 U.S. 877, 891 (1986).

That principle applies here. Mr. Shotton has waived tribal sovereign immunity from being deposed regarding the topics in his declarations—specifically, the authenticity of Mr. Dillon's loan agreements—by submitting those declarations for use in the North Carolina action. In his declarations, Mr. Shotton specifically affirmed that "if called as a witness," he "***could and would testify to the following facts***[.]" *E.g.*, Dickerson Decl. Ex. 4 ¶ 1 (emphasis added). A witness cannot provide testimony about a topic and then invoke immunity to avoid cross-examination on that topic.

Other courts have recognized this principle. For example, in *Knox v. U.S. Department of the Interior*, 2012 WL 465585 (D. Idaho Feb. 13, 2012), the court enforced third-party subpoenas calling for the depositions of three officials of the Shoshone Bannock Tribes Gaming Commission. *Id.* at *1. The court explained that the three officials had filed "Declarations . . . that discussed the Tribes' gaming operations." *Id.* Although "the filing of these documents did not waive the Tribes' sovereign immunity generally," the court added, "it did waive the right" of these individuals "to resist a deposition limited to the topics covered in their Declarations." *Id.*; *see also, e.g.*, *United States v. Velarde*, 40 F. Supp. 2d 1314, 1317 (D.N.M. 1999) ("[T]he Tribe has waived sovereign immunity as to the tribal police records and testimony by tribal police and census officials. The Tribe voluntarily provided a tribal records check, tribal enrollment information, tribal incident reports, and interviews with tribal police to federal officials. A tribe

expressly waives its sovereign immunity with respect to a particular agency when that agency voluntarily provides documents to the Government relevant to the case.").

In fact, one of the cases that the Otoe-Missouria Tribe cites (Mot. 5-6) reflects this limitation on immunity. In *United States v. James*, 980 F.2d 1314 (9th Cir. 1992), the Quinault tribe had provided some documents to the federal government to assist with a prosecution of a crime committed on the reservation. *Id.* at 1316, 1319-20. Although the Ninth Circuit held that the tribe had not waived immunity as to different documents produced to a different agency, the Ninth Circuit made clear that the tribe did "waive[] its immunity" as to the documents provided to the prosecution: "The Quinault Indian Nation cannot selectively provide documents and then hide behind a claim of sovereign immunity when the defense requests different documents from the same agency." *Id.* at 1320.

By contrast, the other cases that the Otoe-Missouria Tribe cites in which courts had quashed subpoenas to tribes are inapposite. Mot. 5-6 (citing, *e.g.*, *Alltel*, 675 F.3d at 1105-06). In none of those cases had the tribe "waived" tribal immunity by consenting to the "'processes of the court.'" *E.g.*, *Alltel*, 675 F.3d at 1103, 1106 (quoting *Three Affiliated Tribes*, 476 U.S. at 891).

In sum, by submitting declarations authenticating Mr. Dillon's Great Plains loan agreements, Mr. Shotton waived tribal sovereign immunity from providing testimony on that limited topic. Accordingly, the Otoe-Missouria Tribe's motion to quash the subpoena should be denied, and Mr. Shotton should be directed to submit to a deposition on whether Mr. Dillon's loan agreements are authentic.

CONCLUSION

For the foregoing reasons, BMO Harris respectfully requests that the motion to quash the subpoena issued to Mr. Shotton be denied.

Dated: January 26, 2016

Respectfully submitted by,

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CERTIFICATE OF SERVICE

I certify that on this 26th Day of January, 2016, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system, which will send notification of the filing to the attorneys on that system.

By: */s/ Mark K. Blongewicz*