UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA

(1) KEITH FINN, *Plaintiff,* v. (1) GREAT PLAINS LENDING, LLC, *Specially-Appearing Defendant.*	: : : : : : : : : :	CIVIL ACTION NO. 5:16-cv-00415-M

DEFENDANT GREAT PLAINS LENDING LLC'S SPECIAL APPEARANCE AND FED. R. CIV. P. 12(b) MOTION TO DISMISS WITH BRIEF IN SUPPORT

Stuart Campbell, OBA No. 11246
Sara E. Potts, OBA No. 32104
DOERNER, SAUNDERS, DANIEL & ANDERSON, L.L.P.
Two West Second Street, Ste. 700
Tulsa, Oklahoma 74103
Tel. (918) 582-1211 | Fax (918) 925-5250
Email: scampbell@dsda.com
Email: spotts@dsda.com

Robert Rosette (pro hac vice pending)
Saba Bazzazieh (pro hac vice pending)
ROSETTE, LLP
1100 H Street, NW
Washington, D.C. 20005
Tel. (202) 567-2941 | Fax (202) 525-5261
Email: rosette@rosettelaw.com
Email: sbazzazieh@rosettelaw.com
ATTORNEYS FOR SPECIALLY-APPEARING DEFENDANT GREAT PLAINS LENDING, LLC

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COMES NOW by special appearance Great Plains Lending, LLC, ("Great Plains"),[1] a wholly-owned and operated instrumentality of the Otoe-Missouria Tribe of Indians (the "Tribe"), a federally-recognized Indian tribe located in Red Rock, Oklahoma, and hereby moves to dismiss Plaintiff Keith Finn's ("Plaintiff") First Amended Complaint (Doc. No. 9), pursuant to Fed. R. Civ. P. 12(b)(1). Specially-appearing Defendant Great Plains makes this Motion to Dismiss on the grounds that

[1] Great Plains files this Motion for the limited purpose of contesting this tribunal's jurisdiction to preside over the proceedings at hand. Such limited or special appearance shall not be construed as waiving any arguments that Great Plains has with regard to its sovereign immunity or this tribunal's lack of jurisdiction. Indeed, courts have routinely recognized that a sovereign's limited appearance in legal proceedings for the purpose of seeking dismissal for lack of jurisdiction does not waive any claims to sovereign immunity. *See e.g., Kansas v. United States*, 249 F.3d 1213, 1220 (10th Cir. 2001); *Zych v. Wrecked and Abandoned Vessel*, 960 F.2d 665, 667-68 (7th Cir. 1992); *Lac Du Flambeau Band of Lake Superior Chippewa Indians, et al. v. Norton*, 327 F. Supp. 2d 995, 1000 (W.D. Wis. 2004); *Wyandotte v. Kansas City*, 200 F. Supp. 2d 1279, 1287 (D. Kan. 2002); *Miami Tribe of Okla. v. Walden*, 206 F.R.D. 238 (S.D. Ill. 2001).

Great Plains, as a wholly-owned and operated economic arm of a federally-recognized Indian tribe, retains sovereign immunity from all judicial processes, including the instant action and because Plaintiff lacks standing to bring his claims before this forum.

BACKGROUND

As a wholly-owned arm of the Tribe, Great Plains retains the Tribe's rights and privileges, including immunity from unconsented suit. Plaintiff first became aware of this fact in August 2015, but he has proceeded nonetheless to attempt to force not one, but now two, tribunals to assume jurisdiction over this matter. The facts are clear that Plaintiff is simply unable to do so and dismissal of the instant action is warranted.

As stated above, the Otoe-Missouria Tribe of Indians is a federally-recognized Indian tribe located in Red Rock, Oklahoma. *See* Declaration of Ted Grant ("Grant Decl."), *attached as* "Exhibit 1," at ¶ 1 and Exhibit A attached thereto. The Tribe's Constitution assigns lawmaking authority to the Tribal Council, and this includes the authority to create new business enterprises for the Tribe. *Id.* at ¶¶ 2- 3. In an exercise of this sovereign authority, the Tribal Council enacted the Otoe-Missouria Tribe of Indians Limited Liability Company Act ("Tribal LLC Act"). *Id.* at ¶ 4 and Exhibit B attached thereto. The Tribal LLC Act enables the Tribe to establish wholly-owned tribal enterprises for the purposes of developing the Tribe's economy and improving the health, safety, and welfare of the Tribe's members. *Id.* at ¶¶ 5, 9. Businesses created under the Tribal LLC Act are deemed economic arms and instrumentalities of the Tribe. *Id*. at ¶ 5.

Great Plains is a limited liability company that is wholly-owned by the Tribe and established by the Tribe pursuant to tribal law—specifically, the Tribal LLC Act. *Id.* at ¶

6 and Exhibit C attached thereto. Great Plains was established with the express purpose of growing the Tribe's economy and to aid in addressing issues of public health, safety, and welfare. *Id.* at ¶ 9. The Tribe is the sole member of Great Plains and all profits inure directly to the Tribe's benefit through the tribal government's use of Great Plains' income for a wide array of social services, such as housing and educational programs. *Id.* at ¶ 9. Great Plains is located and operates from the Tribe's Indian lands held in Oklahoma. *Id.* at ¶ 10.

Similar to tribal casino enterprises, Great Plains is subject to strict regulatory oversight by the tribal government. To accomplish this regulation, the Tribe enacted the Otoe-Missouria Consumer Finance Services Regulatory Commission Ordinance (the "Ordinance") and established the Otoe-Missouria Consumer Finance Services Regulatory Commission (the "Commission"). *Id.* at ¶ 12. The Ordinance sets forth a number of substantive regulatory guidelines which must be adhered to by the Tribe's consumer finance enterprises, such as Great Plains. *Id.* at ¶¶ 12-13 and Exhibit E attached thereto. The Commission is an independent tribal regulatory agency charged with enforcing the Ordinance. *Id.* at ¶ 12. The Commission oversees Great Plains and monitors its business for compliance with the Ordinance and adherence to applicable federal consumer protection laws. *Id.* at ¶ 13. In this way, the Tribe essentially modeled its consumer finance regulatory agency based on its already-existing tribal gaming commission. *Id.* at ¶ 13.

As a wholly-owned arm of the Tribe, the Tribe conferred to Great Plains all privileges and immunities enjoyed by the Tribe, including immunity from unconsented

suit. *Id.* at ¶ 11. It is undisputed that this immunity has never been waived, either implicitly or explicitly by the Tribe or by Great Plains. *Id.* at ¶ 15.

Notwithstanding Great Plains' sovereign immunity, on August 17, 2015, Plaintiff Keith Finn, a resident of Florida, filed suit against Great Plains in the United States District Court for the Eastern District of Pennsylvania (the "Pennsylvania Action"), alleging violations of the Telephone Consumer Protection Act, 47 U.S.C. § 227 ("TCPA"). Plaintiff requested statutory damages and injunctive relief. He did not claim that any of the alleged misconduct took place within the State of Pennsylvania. Great Plains sought dismissal based on lack of subject matter jurisdiction, lack of personal jurisdiction, improper venue, and failure to state a claim upon which relief may be granted. On February 23, 2016, the District Court granted Great Plains' motion to dismiss on the grounds that the court lacked personal jurisdiction. *Finn v. Great Plains Lending, LLC*, 2016 WL 705242 (E.D. Pa. Feb. 23, 2016). The Court did not opine on the other grounds for dismissal.

Several months later, on April 22, 2016, Plaintiff filed a virtually identical complaint against Great Plains with this Court. Indeed, both Plaintiff's original complaint as well as the First Amended Complaint ("FAC") filed on August 5, 2015 allege that personal jurisdiction over Great Plains exists because "Defendant conducts business in the Commonwealth of Pennsylvania." Complaint (Doc. No. 1), at 1, ¶ 2; *see also* FAC (Doc. No. 9), at 1, ¶ 2. In attempting to serve Great Plains with the original complaint, Plaintiff also used the identical summons from the Pennsylvania Action.

In refiling the Pennsylvania Action here in Oklahoma, Plaintiff hopes that this Court will ignore the following glaring jurisdictional defects of his First Amended Complaint, which preclude this Court from assuming subject matter jurisdiction over this action. First, subject matter jurisdiction is lacking because Plaintiff has failed to allege any concrete injury sufficient to establish Article III standing. Second, as previously stated, Great Plains is an arm of a federally-recognized tribe and is immune from all unconsented judicial process, including the instant action, likewise depriving this Court of subject matter jurisdiction. *See* Fed. R. Civ. P. 12(b)(1). For either of these reasons, dismissal of Plaintiff's First Amended Complaint is necessary and appropriate and should be done with prejudice.

BRIEF IN SUPPORT OF MOTION TO DIMSISS

Subject matter jurisdiction is glaringly lacking in this action for two fundamental and compelling reasons: (1) Plaintiff lacks standing to assert her claims in this Court; and, (2) as a wholly-owned and operated economic instrumentality of a federally-recognized tribe, Great Plains possesses sovereign immunity from this suit, depriving this Court of subject matter jurisdiction.

I. PLAINTIFF HAS NOT ALLEGED AN INJURY-IN-FACT SUFFICIENT TO ESTABLISH ARTICLE III STANDING.

Article III of the U.S. Constitution limits the jurisdiction of federal courts to "cases" and "controversies." Const., Art. III, § 2. This case-or-controversy requirement has given rise to the rule that a plaintiff must have "standing" to bring a suit in federal court. To demonstrate standing, a plaintiff must prove three elements. The plaintiff must

have (1) suffered an injury-in-fact, (2) that is fairly traceable to the challenged actions of the defendant, and (3) that is likely to be redressed by the requested relief. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). The plaintiff bears the burden of establishing these elements. *Nova Health Systems v. Gandy*, 416 F.3d 1149, 1154 (10th Cir. 2005).

To establish the first element—injury-in-fact—the plaintiff must demonstrate that he or she has suffered "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, nor conjectural or hypothetical." *Lujan*, 504 U.S. at 560 (internal citations and quotation marks omitted). Absent such an injury, there can be no Article III standing. *See id.* (characterizing the three elements as an "irreducible constitutional minimum").

Recently, in *Spokeo v. Robins*, 136 S. Ct. 1540 (2016), a case brought pursuant to the Fair Credit Reporting Act, the Supreme Court held that a plaintiff failed to satisfy the "concrete injury" requirement because he had alleged merely "a bare procedural violation." *Id.* at 1550. The plaintiff in *Spokeo* had alleged that a "people search engine" disseminated false information about him, including "misinformation about his education, family situation, and economic status." *Id.* at 1556 (Ginsburg, J., dissenting) (summarizing the allegations). The Court explained that these allegations alone could not suffice to establish standing. Rather, for the complaint to allege a concrete injury, the injury "must be 'de facto'; that is, it must actually exist." *Id.* at 1548 (majority opinion).

In the wake of *Spokeo*, federal courts have justifiably tightened the pleading requirements for TCPA claims. As the Southern District of California's recent decision

in *Romero v. Dep't Stores Nat'l Bank* makes clear, it is no longer permissible for plaintiffs to establish Article III standing through allegations of a "bare violation" of the TCPA. *Id.*, 2016 WL 4184099, at *6 (S.D. Cal. Aug. 5, 2016). Indeed, the analysis in *Romero* closely tracks the case at hand.

Romero involved a plaintiff who owed payments on her Macy's credit card. *Id.* at *1. According to her Complaint, following default, the defendants (her creditors) began calling her cell phone using an automated telephone dialing system ("ATDS"). *Id.* The plaintiff only answered three of these calls. The first time she answered was in June 2014, at which time she told the defendants to stop calling her. *Id.* Nevertheless, according to the complaint, over the next six months the defendants continued to call her—approximately 290 times—finally stopping in December 2014. *Id.*

The plaintiff soon thereafter brought suit alleging, *inter alia*, violations of the TCPA. She claimed that the defendants' conduct resulted in the following:

> "severe and substantial emotional distress, including physical and emotional harm, including but not limited to: anxiety, stress, headaches (requiring ibuprofen, over the counter health aids), back, neck and shoulder pain, sleeping issues (requiring over the counter health aids), anger, embarrassment, humiliation, depression, frustration, shame, lack of concentration, dizziness, weight loss, nervousness and tremors, family and marital problems that required counseling, amongst other injuries and negative emotions."

Id. According to her deposition, she also suffered "nervousness, a lot of tension, problems with my husband, headaches, my neck, and they would go down to my back and to my back and I would lose my appetite. I lost weight." *Id.* The defendants argued

that these "injuries" were insufficient to establish standing, and accordingly moved to dismiss plaintiff's suit.

The court agreed that the plaintiff had not established sufficient standing to withstand defendants' motion to dismiss, as the plaintiff had not sufficiently alleged an injury in fact. The court noted that under *Spokeo*, an allegation of a mere statutory violation, in and of itself, cannot form the basis of the sort of "concrete" injury required to establish standing. *Id.* at *3 ("Article III standing requires a concrete injury even in the context of a statutory violation.") (quoting *Spokeo*, 136 S. Ct. at 1549). The court also noted that under the TCPA, each of the alleged 290 calls was "a separate claim, meaning that [the plaintiff] must establish standing for each violation, which in turn means that [the plaintiff] must establish an injury in fact caused by each individual call. In other words, for each call [the plaintiff] must establish an injury in fact as if that was the only TCPA violation alleged in the complaint." *Id.* Accordingly, the plaintiff's injury cannot be tied to the aggregate quantity of calls; each injury must instead be tied to an individual call. *Id.*

The court then trifurcated the plaintiff's allegations into three groups of calls: (1) those where she did not hear the phone ring; (2) those that she heard ring, but did not answer; and (3) those that she answered. *See id.* at *4–5. As to those calls that she did not hear ring, the court held that they could not satisfy the "concrete injury" component, as "[a] plaintiff cannot have suffered an injury in fact as a result of a phone call she did

[not][2] know was made." *Id.* at *3. Indeed, the court held that for a phone call to have caused the types of injuries claimed by the plaintiff, "she must, at the very least, have been aware of the call when it occurred." *Id.* at *4.

Furthermore, even with regard to the phone calls which she may have heard but did not answer, after reiterating that an injury must be tied to *each* call, the court held that "[n]o reasonable juror could find that one unanswered telephone call could cause lost time, aggravation, distress, or any injury sufficient to establish standing. When someone owns a cell phone and leaves the ringer on, they necessarily expect the phone to ring occasionally." *Id.* Finally, even with regard to those phone calls that the plaintiff answered, the court held that the plaintiff did not tie the answered calls to any injury, as there was "no evidence demonstrating that the use of an ATDS to dial her number caused her greater lost time, aggravation, and distress . . . ." *Id.* at *5.

In this case, as in *Romero*, Plaintiff's claims of TCPA violations fail to establish any concrete injury for the purposes of Article III standing.[3] In fact, the allegations of injury are even barer than in *Romero*. The only allegation that even comes close to resembling an injury is in paragraph 18 of the First Amended Complaint, where Plaintiff alleges that he was "[f]rustrated by the continued calls." FAC (Doc. No. 9), at 3, ¶ 18. This allegation fails to reach the level of concreteness required under Article III.

First, Plaintiff's "frustration" is entirely unadorned. Any plaintiff can allege frustration, but without any explanation of *how* they were frustrated, it amounts to a

[2] The court's opinion refers to calls that a plaintiff "did know was made." However, in context, it is clear that omission of the word "not" is merely a scrivener's error.

[3] Defendant does not admit the truth of those allegations, but simply argue that even if assuming *arguendo* that they were true, Plaintiff's allegations would be insufficient to establish standing.

generalized and unadorned grievance, the kind of which is far too generic to suffice under Article III. Indeed, boilerplate language such as "frustration" without any description of the injury itself, cannot be considered "concrete." *See Lujan*, 504 U.S. at 564 (holding that an "actual or imminent" injury cannot be established when the plaintiff does not offer any "specification" or "description of concrete plans").

Second, the bulk of the calls actually identified with specific dates and times could not possibly have caused any concrete injury because Plaintiff was not even aware of them when they occurred. *See* FAC, 3 at ¶ 18. Indeed, those calls were blocked by a call blocker application. *Id.* As the court in *Romero* made clear, calls such as these cannot form the basis of a concrete injury under the TCPA. To be sure, Plaintiff could not have been "frustrated" by calls that she was not even aware of until *after* she checked her call blocker application log. *See Romero*, 2016 WL 4184099, at *4 (holding that, for a plaintiff to suffer "lost time, aggravation, and distress, [the plaintiff] must, at the very least, have been aware of the call when it occurred").

Finally, any "frustration" would have been the result of alleged "*continued* calls," meaning the aggregate total of calls. This, of course, is insufficient to establish an injury, because each individual call must be the cause of a specific injury. *See Romero*, 2016 WL 4184099, at *3. Plaintiff has provided no explanation whatsoever as to how any of the individual calls has caused any frustration.

For all of these reasons, Plaintiff clearly cannot establish a concrete injury. The First Amended Complaint merely alleges a "bare procedural violation," which is non-

justiciable for lack of standing under *Spokeo*. This Court accordingly lacks subject matter jurisdiction and this action must be dismissed with prejudice.

II. GREAT PLAINS' SOVEREIGN IMMUNITY FROM SUIT DEPRIVES THIS COURT OF SUBJECT MATTER JURISDICTION.

A. Standard of Review under Rule 12(b)(1).

The defense of tribal sovereign immunity is properly resolved through a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1). *Miner Elec., Inc. v. Muscogee (Creek) Nation*, 505 F.3d 1007, 1009 (10th Cir. 2007). Such motions are considered *factual* challenges, as they attack the subject matter jurisdiction of the Court apart from the pleadings. *See Holt v. United States*, 46 F.3d 1000, 1003 (10th Cir. 1995). The plaintiff bears the burden of persuasion to convince the court that subject matter jurisdiction exists, and the Court "may not presume the truthfulness of the complaint's factual allegations." *Id.*

B. Great Plains, as an arm of a federally-recognized tribe, is immune from this suit.

As sovereign governments, federally-recognized tribes possess common-law immunity from suit. *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2029 (2014). The doctrine of tribal sovereign immunity has been recognized by the Supreme Court "for well over a century" and has been reaffirmed many times throughout that period. *Id.* at 2040 (Sotomayor, J., concurring); *see also Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751 (1998); *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505 (1991); *Puyallup Tribe v. Dep't of Game of Washington*, 433 U.S. 165 (1977); *United States v. U.S. Fidelity & Guaranty Co.*, 309 U.S. 506 (1940); *Parks v. Ross*, 11

How. 362 (1851). Tribal sovereign immunity is, by now, "firmly ensconced in our law." *Allen v. Gold Country Casino*, 464 F.3d 1044, 1046 (9th Cir. 2006).

Indeed, immunity is among one of the "core aspects" of tribal sovereignty. *Bay Mills*, 134 S. Ct. at 2030. It is subject to diminution only at the hands of Congress, which has "plenary authority" over Indian affairs. *Id.* at 2031–32; *see also United States v. Kagama*, 118 U.S. 376, 381–82 (1886) (upholding a federal statute regarding on-reservation crime against a constitutional challenge that the law had no relation to the Indian Commerce Clause or any other enumerated power). Thus, absent an unequivocally clear waiver, e.g., through a contractual agreement, only Congress can authorize a suit against a nonconsenting tribe. *Bay Mills*, 134 S. Ct. at 2037 ("[I]t is fundamentally Congress's job, not ours, to determine whether or how to limit tribal immunity.").

Though susceptible to complete nullification by Congress, barring such a drastic legislative action, tribal sovereign immunity remains far-reaching. It applies to both "governmental" activities as well as "commercial" activities, regardless of whether the activity in question took place on- or off-reservation. *Kiowa*, 523 U.S. at 760. Immunity also extends to a tribe's political and economic subdivisions, including its wholly-owned business entities, which are treated under the law as "arms of the Tribe." *See Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173 (10th Cir. 2010).

In determining whether a tribal entity is an arm of the tribe, courts consider several factors, including: (1) the method of creation of the entity; (2) the purpose of the entity;

(3) the entity's structure, ownership, and management, including the Tribe's control over the entity; (4) whether the Tribe intended for the entity to have sovereign immunity; (5) the financial relationship between the Tribe and the entity; and (6) whether the purposes of tribal sovereign immunity are served by granting sovereign immunity to the entity. *Breakthrough Mgmt.*, 629 F.3d at 1187.

Great Plains easily meets this standard. In fact, the analysis closely tracks that of the most recent arm-of-the-tribe case involving a tribal online lending entity, *Everette v. Mitchem*, 146 F. Supp. 3d 720 (D. Md. 2015), where the District Court for the District of Maryland held that two online lending entities were arms of their respective tribes, applying the exact framework set forth in *Breatkthrough Mgmt.*

As to the first factor—the method of creation—Great Plains was created under tribal law, as it was established pursuant to the Tribal LLC Act and Tribal Council Resolution #54293. Grant Decl., *Exhibit 1*, at ¶ 6. As to the second factor—the entity's purpose—Great Plains was designed to promote tribal economic development and "to aid in addressing issues of public health, safety, and welfare." *Id.* at ¶ 9. The Tribe formed Great Plains with the purpose of enhancing the Tribe's economy, providing employment opportunities, and generating revenue for the benefit of the Tribe and its members. *Id.* These revenues are used to fund important governmental programs and services. *Id.*

As to the third factor—structure, ownership, and management—the business is wholly owned and controlled by the tribal government. *Id.* at ¶¶ 6, 7. Board members may be removed by the Tribal Council at any time, with or without cause. *Id.* at ¶ 8. And in addition to control over the day-to-day operations, the Tribe exercises

independent regulatory control over Great Plains, as Great Plains is subject to the comprehensive oversight of the Commission, an independent tribal regulatory agency. *Id.* at ¶¶ 12–13.

As to the fourth factor—the Tribe's intent—when the Tribe created Great Plains, it expressly stated that it intended to extend its sovereign immunity to Great Plains as an arm of the Tribe. *Id.* at ¶ 11; Tribal LLC Act, Exhibit B *as attached to Exhibit 1*; *see also* Tribal Council Resolution #54293, Exhibit C *as attached to Exhibit 1* ("[The] Tribal Council does hereby form Great Plains Lending, LLC as a limited liability company wholly-owned by the Tribal government pursuant to Part 9 of the Otoe–Missouria Limited Liability Company Act with all the powers and attributes associated therewith including, but not limited to, sovereign immunity."). As to the fifth factor—the financial relationship between the Tribe and the entity—all profits inure to the benefit of the tribal government and its members. As stated above, the funds are used to provide important governmental services to Tribal members. Grant Decl., *Exhibit 1*, at ¶ 9.

Finally, as to the sixth factor, it is clear in this case that the purposes of the doctrine of tribal sovereign immunity are well-served by recognizing Great Plains' sovereign immunity as an arm of the tribe. Great Plains furthers the Tribe's goal of self-determination by encouraging development of the Tribe's economy. Extending immunity to Great Plains thus "protect[s] a significant source of the Tribe's revenue from suit, thereby directly protecting the sovereign Tribe's treasury, which is one of the historic purposes of sovereign immunity in general." *Everette*, 2015 WL 7351498, at *3 (applying the sixth *Breakthrough Mgmt.* factor) (citation omitted).

Indeed, numerous federal courts across the country have repeatedly held that tribal online lending entities have satisfied the arm-of-the-tribe standard. *See, e.g., id.* (holding that two tribal lending entities were arms of their respective tribes); *Bynon v. Mansfield*, 2015 WL 2447159 (E.D. Pa. May 21, 2015) (holding that the manager of a tribal lending entity was immune from suit, as the entity was an arm of the tribe). The state courts of both California and Colorado have taken a similar approach, as both have held that tribal lending entities possessed sovereign immunity, precluding state administrative subpoenas and enforcement proceedings, because the entities qualified as arms of their respective tribes. *See People v. Miami Nation Enterprises*, 166 Cal. Rptr. 3d 800, 817 (Cal. Ct. App. 2014); *see also Cash Advance v. State*, 242 P.3d 1099, 1111 (Colo. 2010), *remanded to Colorado v. Cash Advance*, No. 05CVI143, 2012 WL 3113527 (Colo. Dist. Ct. Feb. 13, 2012) (finding on remand that the tribal lending entity was an arm of the tribe). The Colorado district court reasoned that the tribal lending entities were created pursuant to tribal law; they were owned and operated by their tribes; and conferring immunity upon the tribal lending entities protected the tribal treasury. *Colorado v. Cash Advance*, 2012 WL 3113527 at *13–16. Likewise, the Court of Appeal of California stated it thusly:

> "Absent an extraordinary set of circumstances . . . a tribal entity functions as an arm of the tribe if it has been formed by tribal resolution and according to tribal law, for the stated purpose of tribal economic development and with the clearly expressed intent by the sovereign tribe to convey its immunity to that entity, and has a governing structure both appointed by and ultimately overseen by the tribe. Such a tribal entity is immune from suit absent express waiver or congressional authorization."

Miami Nation Enterprises, 166 Cal. Rptr. 3d at 817.

Similarly, and factually pertinent to these proceedings, in February of this year the District Court for the Northern District of Oklahoma quashed a subpoena issued to the Secretary and Treasurer of Great Plains, John Shotton. *Dillon v. BMO Harris Bank, N.A.*, 2016 WL 447502 (N.D. Okla. Feb. 4, 2016). In so doing, the court explained that Great Plains "serves as an economic arm of the Tribe" and is thus protected by tribal sovereign immunity. *Id.* at *1. Because Shotton was an officer of Great Plains, he too was afforded the protection of the Tribe's sovereign immunity against the subpoena. *Id.* at *6.

In sum, every court to have considered this issue has held that tribal businesses providing online financial services which are created under tribal law and are wholly owned and controlled by a tribe for the purposes of tribal economic development qualify as arms of the tribe, and are thus protected by tribal sovereign immunity. Because Great Plains plainly qualifies as an arm of the Tribe, it retains immunity from suit, thus divesting this Court of jurisdiction to preside over the instant action.

C. The TCPA does not abrogate Great Plains' immunity.

Here, because neither the Tribe nor Great Plains has waived its sovereign immunity to establish subject matter jurisdiction, Plaintiff must show that Congress expressly abrogated tribal sovereign immunity from suit under the TCPA. *Kiowa*, 523 U.S. at 754 ("As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity."). Plaintiff is clearly unable to do so, as nothing in the TCPA indicates congressional intent to abrogate tribal sovereign immunity.

At the outset, it is important to acknowledge a critical distinction—that a federal statute's *applicability* to a tribe is not dispositive of the issue of whether the statute abrogates the tribe's sovereign immunity and thus authorizes private enforcement actions against the tribe. In other words, and as the Eleventh Circuit Court of Appeals explained, "a statute can apply to an entity without authorizing private enforcement actions against that entity." *Fla. Paraplegic Ass'n, Inc. v. Miccosukee Tribe*, 166 F.3d 1126, 1128 (11th Cir. 1999) (finding that the Americans with Disabilities Act applies to tribes, but does not abrogate tribal immunity from suit). Thus, it is not necessary for this Court to determine whether the TCPA's substantive provisions apply to tribes and their instrumentalities; rather, for the purposes of a motion to dismiss for lack of subject matter jurisdiction, the Court need only determine whether the TCPA unequivocally strips tribes and their instrumentalities of sovereign immunity from suit.

Congress must make its intention to abrogate tribal sovereign immunity unmistakably clear. *Bay Mills,* 134 S. Ct. at 2032 ("[C]ourts will not lightly assume that Congress in fact intends to undermine Indian self-government"); *C&L Enters., Inc. v. Citizen Band Potawatomi Tribe of Okla.*, 532 U.S. 411, 418 (2001)("To abrogate tribal immunity, Congress must 'unequivocally' express that purpose.")(citation omitted). When an ambiguity exists as to whether or not tribal sovereign immunity has been abrogated, any ambiguity should be "construed liberally in favor of the Indians [and] interpreted to their benefit." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985). Thus, Plaintiff must show that the TCPA unequivocally abrogates tribal sovereign immunity, and any ambiguities within the TCPA as to whether such abrogation

exists should be construed in favor of upholding the Tribe's (and Great Plains') sovereign immunity. Plaintiff cannot make this showing because there is no evidence to suggest that Congress intended to so abrogate tribal sovereignty through the TCPA.

The United States Supreme Court has recognized that when Congress intends to abrogate tribal sovereign immunity, it does so explicitly. In the first case in which the Supreme Court tackled the issue of whether Congress statutorily abrogated tribal sovereign immunity, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), the Court examined the Indian Civil Rights Act ("ICRA"). Reasoning that "[n]othing on the face of Title I of the ICRA purports to subject tribes to the jurisdiction of the federal courts," the Court held that ICRA did *not* abrogate tribal sovereign immunity for alleged civil rights violations.[4] *Id*. at 59. Consequently, the Court stated that "suits against the tribe under the ICRA are barred by its sovereign immunity." *Id.*

More recently, in *Bay Mills*, the Supreme Court acknowledged that the Indian Gaming Regulatory Act ("IGRA") abrogates tribal sovereign immunity, but only for a very specific cause of action—claims by a State to enjoin gaming "on Indian land" alleged to be in violation of a Tribal–State Compact. *See* 25 U.S.C. § 2710(d)(7)(A)(ii). Thus, when the State of Michigan attempted to sue a tribe for allegedly unlawful gaming *off* Indian lands, the Court held that IGRA did not authorize the suit, and it was therefore barred by sovereign immunity. *Bay Mills*, 134 S. Ct. at 2039.

[4] A separate provision of ICRA *does* authorize suits against Indian tribes, but only in the context of habeas corpus proceedings. *See* 25 U.S.C. § 1303. That provision was not at issue in *Santa Clara*, and is certainly not the issue before this Court.

Federal courts throughout the country, examining a wide array of federal statutes, have refused to find a congressional abrogation of tribal sovereign immunity without a clear expression of that intent. *See, e.g.*, *Chayoon v. Chao*, 355 F.3d 141, 143 (2d Cir. 2004)(holding that the Federal Medical Leave Act does not abrogate tribal sovereign immunity); *accord with Bassett v. Mashantucket Pequot Tribe*, 204 F.3d 343 (2d Cir. 2000); *see also Fla. Paraplegic Ass'n*, 1661 F.3d 1126 (11th Cir. 1999) (regarding the Americans with Disabilities Act); *Larimer v. Konocti Vista Casino Resort, Marina & RV Park*, 814 F. Supp. 2d 952 (N.D. Cal. 2011) (Fair Labor Standards Act); *Freemanville Water System, Inc. v. Poarch Band of Creek Indians*, 2008 WL 80644 (S.D. Ala. 2008) (relating to the Consolidated Farm and Rural Development Act).

The TCPA provides for a private right of action against "persons" that violate its restrictions on the use of automated telephone equipment. 47 U.S.C. § 227(b)(1), (b)(3). The default definition of "persons" utilized by the TCPA, as set forth in Title 47, Chapter 5 of the United States Code, provides that "'person' includes an individual, partnership, association, joint-stock company, trust, or corporation." 47 U.S.C. § 153(39). Clearly, this definition contains no reference to Indian tribes, nor does *any* provision of the TCPA refer to tribes whatsoever. Without an express reference to Indian tribes or tribal sovereign immunity, one cannot reasonably find that Congress intended to abrogate tribal sovereign immunity under the TCPA. *Accord with In re Greektown Holdings, LLC*, 532 B.R. 680, 698–99 (E.D. Mich. 2015)("There is not a single example of a Supreme Court decision finding that Congress intended to abrogate the sovereign immunity of the Indian tribes without specifically using the words 'Indians' or 'Indian tribes.'").

Thus, because the record is clear that Great Plains' sovereign immunity has not been waived by the Tribe nor congressionally abrogated, Great Plains is immune from Plaintiff's claims, depriving this Court of subject matter jurisdiction.

CONCLUSION

For the reasons stated above, Specially-Appearing Defendant's Motion should be granted and Plaintiff's First Amended Complaint should be dismissed, with prejudice.[5]

/s/ Stuart Campbell
Stuart Campbell, OBA No. 11246
Sara E. Potts, OBA No. 32104
DOERNER, SAUNDERS, DANIEL
& ANDERSON, L.L.P.
Two West Second Street, Ste. 700
Tulsa, Oklahoma 74103
Tel. (918) 582-1211 | Fax (918) 925-5250
E-mail: scampbell@dsda.com
Email: spotts@dsda.com

-and-

Robert Rosette (pro hac vice pending)
Saba Bazzazieh (pro hac vice pending)
Rosette, LLP
1100 H Street, NW
Washington, D.C. 20005
(202) 567-2941 (office)
(202) 525-5261 (facsimile)
rosette@rosettelaw.com
sbazzazieh@rosettelaw.com

Attorneys for Specially-Appearing Defendant
Great Plains Lending, LLC

[5] Defendant also requests attorneys' fees in accordance with this Court's equitable discretion to award fees to the prevailing party in a frivolous lawsuit. *See Roadway Exp., Inc. v. Piper*, 447 U.S. 752, 764–65 (1980).

CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of August, 2016, I electronically transmitted the foregoing document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

Rachel Stevens
Kimmel & Silverman PC
rstevens@creditlaw.com

-and-

Elaine M. Dowling
Dowlinglawoffice@aol.com

Attorneys for Plaintiff.

s/ Sara E. Potts