UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA

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

SPECIALLY-APPEARING DEFENDANT GREAT PLAINS LENDING, LLC'S REPLY IN SUPPORT OF MOTION TO DISMISS

INTRODUCTION

Plaintiff Keith Finn's renewed attempt to drain the governmental funds of the Otoe–Missouria Tribe of Indians, a federally-recognized Indian tribe (the "Tribe") through another baseless lawsuit against the Tribe's wholly owned economic instrumentality, Great Plains Lending, LLC ("Great Plains"), should be rejected for two compelling reasons. As explained in its Motion to Dismiss ("Motion"), Great Plains is an arm of the Tribe, and therefore has immunity against unconsented suit—immunity that has neither been waived by the Tribe nor abrogated by Congress. This quasi-sovereign immunity notwithstanding, Plaintiff also lacks Article III standing. Both of these reasons demonstrate that this Court lacks subject matter jurisdiction and this case, therefore, cannot proceed.

Finding no support in the law, Plaintiff's Response to Great Plains' Motion to Dismiss, Doc. No. 16 ("Response") attempts to draw this Court's attention to a new, irrelevant and inadmissible body of "evidence" aimed to denigrate Great Plains and the Tribe in general. It is inflammatory and has no relation to the case at hand. Indeed, the new information introduced for the first time by the Plaintiff is hearsay, irrelevant, and goes beyond the original pleadings as filed, and thus cannot be considered by the Court, nor relied upon as grounds for jurisdictional discovery.

For the reasons explained below, this Court should grant Great Plain's Motion and deny Plaintiff's improper and unfounded request for jurisdictional discovery.[1]

[1] Plaintiff's request for jurisdictional discovery violates both Local Rules 7.1(c) and 37.1 and should be rejected for this reason alone. Plaintiff's Response includes a request for

ARGUMENT

Rather than addressing the substantive legal arguments and binding precedent set forth in the Motion, Plaintiff improperly directs the Court to a variety of unauthoritative and irrelevant "evidence." Because this new information is both irrelevant and inadmissible, the bulk of the Response should be ignored entirely. Insofar as Plaintiff does attempt to offer legal argument, as explained below, it suffers from glaring defects and should be rejected.

I. Great Plains is an arm of a federally recognized tribe, and Plaintiff's unfounded speculations suggesting otherwise are inadmissible and irrelevant.

A. Great Plains is an arm of the Otoe–Missouria Tribe of Indians.

Plaintiff does not deny that Great Plains was formed by the Tribe pursuant to tribal law; nor does Plaintiff deny that the Tribe vested Great Plains with sovereign immunity against suit. Response, Doc. No. 16, at 20–24. Plaintiff does argue, however, that Great Plains does not satisfy the remaining factors of the arm-of-the-tribe test as set forth in *Breakthrough Mgmt. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173 (10th Cir. 2010): (2) the entity's purpose; (3) the entity's structure, ownership and management; (5) the financial relationship between the tribe and the entity; and (6) the purposes of tribal sovereign immunity. As to these factors, Plaintiff grossly misrepresents the facts and

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jurisdictional discovery and seeks affirmative relief from this Court. This request is in clear violation of Rule 7.1(c), which provides "[a] response to a motion may not also include a motion or a cross-motion made by the responding party." Local Civ. R. 7.1(c). Moreover, Counsel for Plaintiff has not conferred with Defendant's counsel regarding its request for jurisdictional discovery as required pursuant to Local Rule 37.1. These very clear and blatant violations of the local rules warrant a rejection of the Plaintiff's improper request for jurisdictional discovery.

misapplies the law. Properly understood, each factor clearly weighs in favor of finding that Great Plains is an arm of the Tribe.

As to the second *Breakthrough* factor—the entity's purpose—Great Plains provided considerable evidence proving that it was formed to advance economic development. The tribal resolution creating Great Plains expressly states that it was created "to advance tribal economic development to aid [in] addressing issues of public safety, health and welfare." Motion, Doc. No. 15, Exhibit 1, at 50. Great Plains Operating Agreement verifies that its mission is "to further the economic goals and initiatives of the Tribe." *Id.* at 53. As the Tribe's Vice-Chairman elaborated, Great Plains' purpose is to create "employment opportunities and a revenue stream for the funding of important governmental programs . . . such as housing and educational programs." *Id.* at 3–4.

As to the third factor—structure, ownership, and management—Great Plains offered substantial evidence in its Motion proving that it is wholly owned and controlled by the Tribe. Defendant was created under the Tribal LLC Act, which "authorize[s] to be created, by a duly adopted resolution of the Tribal Council, LLCs *wholly owned* by the Tribe." Motion, Doc. No. 15, Exhibit 1, at 43 (emphasis added). The Tribal Council did just that—enacting a resolution creating Great Plains as a "company *wholly owned* by the Tribal government." *Id.* at 50 (emphasis added). The Operating Agreement, approved by the Tribe's Chairman, confirms that the Tribe is the "*sole Member*" of the LLC. *Id.* at 56 (emphasis added). Further, the Vice-Chairman (who also serves as President of Great Plains) expressly declared that Great Plains is "a *wholly owned* corporate entity of the

Tribe and an arm of the Tribe." *Id.* at 3 (emphasis added). As to control, the Operating Agreement mandates that Great Plains' "business and affairs . . . shall be managed by its [Board of] Directors." *Id.* at 57. The Board is comprised entirely of tribal members, whom the Tribal Council may remove at any time and for any reason. *Id.* at 3. And in addition to control over business operations, the Tribe also has *regulatory* control over Great Plains, through the Otoe–Missouria Consumer Finance Services Regulatory Commission, an independent tribal regulatory agency. *Id.* at 4.

As to the fifth factor—the financial relationship between the entity and the Tribe—Defendant provided considerable evidence proving the existence of a beneficial financial relationship.[2] The Vice-Chairman attested that "all profits inure to the benefit of the Tribe and its members." Motion, Doc. No. 15, Exhibit 1, at 3. The Operating Agreement confirms this relationship, explicitly providing that "[a]ll Profits and Losses shall be allocated to the Tribe as Sole Member." *Id.* at 56.

As to the sixth factor—the purposes of the doctrine of tribal sovereign immunity—in light of the fact that Great Plains has established that it was created to advance tribal economic development, it naturally follows that granting immunity to Great Plains serves the purposes of the doctrine of tribal sovereign immunity. Indeed, in *Everette v. Mitchem*, 2015 WL 7351498, at *8 (D. Md. Nov. 20, 2015), a case in which the District Court for the District of Maryland held that two lending entities were arms of their

[2] Of course, analysis of this factor is similar to analysis of the factor regarding the purpose of the entity, because in this case the entity's purpose *is* to financially benefit the Tribe. *See Everette v. Mitchem*, 2015 WL 7351498, at *4 (D. Md. Nov. 20, 2015) (analyzing the fifth *Breakthrough* factor).

respective tribes, the court explained: "Extending sovereign immunity to [tribal] lending companies would protect a significant source of the tribes' revenue from suit, thereby directly protect[ing] the sovereign Tribe's treasury, which is one of the historic purposes of sovereign immunity in general." The same rationale applies here.

Indeed, in view of this abundance of evidence, one federal court in this Circuit has already expressly held that Defendant Great Plains "serves as an economic arm of the Tribe." *Dillon v. BMO Harris Bank, N.A.*, 2016 WL 447502, at *1 (N.D. Okla. Feb. 4, 2016). Plaintiff offers no reason for this Court to hold differently.

B. Plaintiff's newly introduced evidence is inadmissible, and in any event does not negate Great Plains' arm-of-the-Tribe status.

Plaintiff has introduced a variety of new information in a far-reaching attempt to prove that Great Plains is "part of [a] 'rent-a-tribe' arrangement with a company called Think Finance and its affiliates." Response, Doc. No. 16, at 5–6. The allegations include pleadings in a case filed by the former Pennsylvania Attorney General[3] against Think Finance, an article from the Huffington Post, two articles from Bloomberg Business, and the LinkedIn profile of an alleged former Think Finance employee. Response at 4–11. None of these are admissible, as the Federal Rules of Evidence bar the admission of hearsay, defined as an out-of-court statement offered for the truth of the matter asserted, unless an exception to the hearsay rule applies. Fed. R. Evid. 801(c), 802. No exception exists in this case.

[3] The Pennsylvania Attorney General has since resigned, after being found guilty of various forms of prosecutorial misconduct, perjury, and criminal conspiracy. The *Think Finance* case is still pending.

The pleadings in *Commonwealth of Pennsylvania v. Think Finance, Inc.*, No. 2:15-cv-07139 (E.D. Pa.), introduced by Plaintiff, are classic hearsay. The assertions in those pleadings relate mostly to Think Finance's alleged business relationship with the Chippewa-Cree Tribe in Montana and their lending business, Plain Green, LLC—a business relationship Plaintiff calls "rent-a-tribe." Plaintiff introduces these assertions to draw an analogy to Great Plains and the Otoe–Missouria Tribe (to whom the pleadings make various tangential references). Essentially, Plaintiff's theory is that if Think Finance has a business relationship with the Otoe–Missouria Tribe resembling the relationship that it allegedly had with the Chippewa–Cree, then it is less likely that Great Plains could be deemed an arm of the Tribe. *See* Response, Doc. No. 16, at 8 (asserting that "there is reason to believe that Great Plains like Plain Green, LLC, is a 'rent-a-tribe' operation"). Hence, the assertions in the *Think Finance* pleadings were introduced with the intention that they be taken for their truth—making them hearsay. Indeed, in a straightforward application of hearsay principles, federal courts have held that "[c]omplaints, and the charges and allegations they contain, are hearsay under the Federal Rules of Evidence." *T.I. Const. Co. v. Kiewit Eastern Co.*, 1992 WL 382306, at *4 (E.D. Pa. Dec. 10, 1992) (citing *Century '21' Shows v. Owens*, 400 F.2d 603 (8th Cir. 1968)).

For essentially the same reason, the articles from Huffington Post and Bloomberg Business are also inadmissible. These articles, which mostly contain allegations about the business practices of Think Finance, were plainly introduced with the intention that they be believed to be true, making them hearsay. *See New England Mut. Life Ins. Co. v. Anderson*, 888 F.2d 646, 650 (10th Cir. 1989) (news articles considered hearsay).

The LinkedIn page of an alleged former employee of Think Finance (Eric McLean) is also hearsay. It is clearly offered for the employee's characterization of Great Plains as a "product" of Think Finance. Ostensibly, Plaintiff's theory is that if this statement were taken as true, the inference would be that Think Finance "owns" Great Plains, thus weighing against arm-of-the-tribe status. Thus, like the other allegations, the statements made on the LinkedIn page are clearly hearsay. *Cf. United States v. Brinson*, 772 F.3d 1314, 1320–21 (10th Cir. 2014) (holding that Facebook posts were not hearsay but only because in the particular case they were admissions of a party opponent); *see also Southco, Inc. v. Fivetech Tech., Inc.*, 982 F. Supp. 2d 507, 514–15 (E.D. Pa. 2013) ("[W]eb postings are also typically inadmissible as hearsay.").

The Tenth Circuit has long held that jurisdiction cannot be based on inadmissible evidence. *Pytlik v. Prof. Resources, Ltd.*, 887 F.2d 1371, 1376 (10th Cir. 1989) (explaining that jurisdiction must be supported "by competent proof"). All of the evidence discussed above constitutes inadmissible hearsay; therefore, the Court may not consider this information in determining whether subject matter jurisdiction exists (i.e., whether Great Plains is an arm of the Tribe).[4]

[4] Even assuming *arguendo* that the evidence was admissible, it has no bearing on whether Great Plains is an arm of the Tribe. In fact, the allegations raised in Plaintiff's Response related to the *Think Finance* case (and related media publications) have little to do with Great Plains at all. Rather, they are almost entirely focused on the Chippewa-Cree Tribe and Plain Green. Even if the allegations pertaining to the Chippewa–Cree were true, not every tribe is the same. And in any event, the allegations in the *Think Finance* complaint have been rejected by a subsequent federal court decision related to a different tribe. The complaint alleged that a company called MobiLoans was part of the same widespread "rent-a-tribe" arrangement; however, in *Everette v. Mitchem*, the District Court expressly held that MobiLoans *is* in fact an arm of the Tunica–Biloxi Tribe, directly rejecting the

C. Plaintiff's Improper Request for Jurisdictional discovery Should be Denied.

Plaintiff's improper and unfounded request for jurisdictional discovery should be denied for several reasons. As noted above, the request violates the Local Rules, and should be denied on that basis alone. *Supra*, n. 1. Notwithstanding this, the abundance of evidence already set forth by Great Plains makes it clear that Great Plains is an arm of the Tribe, refuting the need for discovery. But more fundamentally, to allow jurisdictional discovery in this case would contravene the principles underlying the doctrine of tribal sovereign immunity.

Jurisdictional discovery is especially disfavored when the discovery is sought against a sovereign entity. *Breakthrough*, 629 F.3d at 1118 n.11. The rationale is that sovereign immunity applies not only against *judgments*, but against the entire *judicial process*. *Bonnett v. Harvest (US) Holdings*, 741 F.3d 1155, 1161–62 (10th Cir. 2014) (holding that a tribe was immune from discovery requests in the form of subpoenas duces tecum). Indeed, tribal sovereign immunity is a defense against *all* of the burdens of litigation. *Wisconsin v. Ho-Chunk Nation*, 512 F.3d 921, 928 (7th Cir. 2008).

Adhering to these principles, the District Court in *Everette* denied the plaintiff's request for jurisdictional discovery when the plaintiff alleged that two tribal lending entities were not arms of their respective tribes. *Everette*, 2015 WL 7351498, at *2. The court reasoned that the two tribal lending entities had already "filed declarations of tribal members and officers [of the tribal lending entities] attesting to the facts [that the tribes

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allegations in *Think Finance*. 2015 WL 7351498, at *4. This holding, of course, is irreconcilable with Plaintiff's theory that the lending entities discussed in the *Think Finance* case are not arms of their respective tribes.

own, operate, and control the tribal lending entities], as well as copies of tribal resolutions that created the companies." *Id.* This is exactly the kind of evidence that Great Plains has submitted in this case, specifically: a declaration of the Tribe's Vice-Chairman attesting to the Tribe's ownership, operation, and control of Great Plains; tribal resolutions creating Great Plains; the Tribal LLC Act under which Great Plains was created; the Operating Agreement governing Great Plains' operations; and evidence of Great Plains' regulation under the oversight of the tribal regulatory commission.

Moreover, here, as in *Everette*, all the Plaintiff has to offer in rebuttal of this evidence is speculation. Accordingly, here, as in *Everette*, "permitting jurisdictional discovery would undermine the purposes of the sovereign immunity doctrine." *See id.*; *see also White v. Univ. of Cal.*, 765 F.3d 1010, 1025 (9th Cir. 2014) (holding that it was proper for a district court to deny discovery into the question of whether a tribal repatriation committee was an arm of the tribe, as the plaintiff offered only speculative arguments). Plaintiff's request for jurisdictional discovery should therefore be denied.

II. Plaintiff has not pleaded any facts establishing a concrete injury for the purposes of establishing Article III standing.

Plaintiff cites a slew of district court cases decided post-*Spokeo*, maintaining that they support the proposition that a plaintiff can establish Article III standing merely by alleging a violation of the statute along with a statement that he or she has suffered an "invasion of privacy." The cases do not support this proposition.

For instance, in *Juarez v. Citibank, N.A.*, 2016 WL 4547914 (N.D. Cal. Sept. 1, 2016), upon which Plaintiff bases much of his argument, the court still acknowledges that

a plaintiff must "plead[] sufficient facts to show that the unwanted calls he received were an annoyance that caused him to waste time." *Id.* at *3. Further, the court explained, not every "violation of the TCPA will necessarily give rise to Article III standing—for example *calls made to a neglected phone that go unnoticed* or calls that are dropped before they connect may violate the TCPA but not cause any concrete injury." *Id.*

In short, the concrete injury requirement, as understood by federal courts post-*Spokeo*, is not nearly as forgiving as Plaintiff would have it. Because Plaintiff's Complaint suggests that most calls were unnoticed until *after* Plaintiff checked the call blocker application log, it is implausible to infer that Plaintiff suffered any concrete harm.

CONCLUSION

For the reasons stated above, Specially-Appearing Defendant's Motion to Dismiss should be granted and Plaintiff's Complaint should be dismissed, with prejudice.

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CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of September, 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:

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