No. 16-6348

IN THE
United States Court of Appeals
FOR THE TENTH CIRCUIT

KEITH FINN,
PLAINTIFF-APPELLANT,
v.

GREAT PLAINS LENDING, LLC
DEFENDANT-APPELLEE.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA
Honorable Vicki Miles-LaGrance
Civil Acion No. 5:16-CV-00415-M

BRIEF OF PLAINTIFF-APPELLANT

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Date: January 24, 2017

ORAL ARGUMENT IS NOT REQUESTED
SCANNED PDF FORMAT ATTACHMENTS ARE INCLUDED

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Appellant represents that he does not have any parent entities, does not issue stock, and is not a limited liability company.

Date: January 24, 2017

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PRIOR AND RELATED APPEALS

There are no prior or related appeals.

STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1291. The District Court had jurisdiction over this case pursuant to 28 U.S.C. § 1331, because Plaintiff asserted claims under laws of the United States. The District Court issued a final order disposing of Plaintiff's claims on November 3, 2016. Plaintiff timely filed his Notice of Appeal on December 2, 2016.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Did the trial court err in not properly considering the Appellant Keith Finn's request for limited discovery?

2. Did the trial court err in not granting Appellant Keith Finn's request for limited discovery?

STATEMENT OF THE CASE

Appellant, Keith Finn (hereinafter "Mr. Finn") brought claims under the Telephone Consumer Protection Act, 47 U.S.C. §227 *et seq.* ("TCPA") against Appellee, Great Plains Lending, LLC (hereinafter "Great Plains") for placing calls to his cellular telephone using an automatic telephone dialing system and/or pre-recorded or artificial voice. Mr. Finn alleged that he requested that calls cease, but Great Plains continued to call him in violation of the TCPA.

Great Plains filed a Motion to Dismiss, asserting that it was entitled to tribal sovereign immunity as an arm of the Otoe-Missouria Tribe. In opposition to the Motion to Dismiss, Mr. Finn requested the Motion be denied or that limited jurisdictional discovery be allowed regarding the operation and control of Great Plains before the court issued its decision. Mr. Finn asserted that such limited discovery should be granted to gather evidence that Great Plains is effectively controlled by non-tribal entities that use it as a front to avoid state usury laws, essentially renting tribal immunity and as such is not an arm of the Otoe-Missouria Tribe.

The District Court's decision granted Great Plains' Motion to Dismiss, but did not address Mr. Finn's request for limited discovery at all and by granting the Great Plains' Motion effectively denied that request. This appeal followed.

INTRODUCTION

The instant appeal essentially boils down to one question: should a payday loan company allegedly operated by a Native American tribe be granted blanket sovereign immunity without *any* opportunity for discovery even when there are attendant facts and circumstances suggesting that the payday loan company is actually controlled by and operated for the benefit of a private entity? Appellant, Keith Finn (hereinafter "Mr. Finn"), has brought the instant appeal asserting that such answer is unequivocally "no."

Mr. Finn has pleaded that Appellee, Great Plains Lending, LLC (hereinafter "Great Plains"), is a payday loan company who violated the Telephone Consumer Protection Act or "TCPA" by automatically dialing his cellular telephone without consent. In response to Mr. Finn's Complaint, Great Plains asserted that it was immune from suit as it is functionally part of a Native American tribe.

In response to Great Plains' assertion of immunity, Mr. Finn pointed to many sources which support that Great Plains is mainly controlled by a private entity named "Think Finance" who uses Native American tribes to circumvent usury laws.[1]

[1] Such practice is not uncommon in the payday lending industry where almost one quarter of online payday loans now at least nominally involve a tribal lender. See Walsh, Ben, "Outlawed by the States, Payday Lenders Take Refuge on Reservations," p. 2, Huffington Post, 29 June 2015, Updated 8 September 2015, Web 23 December 2015, <http://www.huffingtonpost.com/2015/06/29/online-payday-lendersreservations_n_7625006.html>.

Mr. Finn pointed to other entities which Think Finance asserted were operated by Native American tribes but were really operated mainly for the benefit of Think Finance. Mr. Finn also provided evidence of connections between Think Finance and Great Plains. Mr. Finn did not assert that such evidence conclusively proved that Great Plains was not entitled to sovereign immunity; Mr. Finn argued that there was sufficient evidence to entitle him to limited discovery regarding the issue of Great Plains' sovereign immunity due to the possibility that Great Plains was part of what has been referred to as a "rent-a-tribe" scheme.[2]

Despite the evidence put forth by Mr. Finn, the District Court dismissed Mr. Finn's Complaint for lack of jurisdiction without granting any limited discovery. The District Court held that Mr. Finn's evidence was "unauthenticated." However, the District Court suggested that an operating agreement between Think Finance and Great Plains could have been sufficient, authenticated evidence to invalidate a finding of sovereign immunity.

An operating agreement is the very kind of evidence that Mr. Finn aims to uncover with limited discovery. Such discovery is extremely narrow, focused, and will provide a definitive answer on whether or not Great Plains should be entitled to

[2] See generally Id. (outlining the history of payday loan companies paying only a small portion of their profits to either a bank or a Native American tribe in an effort to circumvent usury laws and describing them as "rent-a-bank" or "rent-a-tribe" schemes.

tribal immunity. Despite these considerations, the District Court failed to grant Mr. Finn's request for limited discovery and even failed to meaningfully address Mr. Finn's request for limited discovery. Mr. Finn now respectfully requests that this Honorable Court remand this matter and direct the District Court to allow limited discovery on Great Plains' alleged tribal immunity.

FACTUAL BACKGROUND & PROCEDURAL HISTORY

Mr. Finn filed his Complaint against Great Plains under the Telephone Consumer Protection Act, 47 U.S.C. §227 *et seq.* ("TCPA") in the United States District Court for the Western District of Oklahoma on April 22, 2016 and an Amended Complaint on August 5, 2016. See Aplt. App. at 6, 11.

Mr. Finn filed his Complaint because, beginning in or around November 2014 and continuing through March 2015, he received repeated automated and/or prerecorded calls on his cellular telephone number from Great Plains. See Aplt. App. at 12, 13 at ¶11 & ¶12. When Mr. Finn answered the telephone, an automated message would play identifying Great Plains by name and then the call would either hang up or a representative would come on the line. Id. at ¶13. In late November 2014, the Mr. Finn spoke with Great Plains and told them to stop calling him on his cellular phone. Id. at ¶15. But Great Plains ignored Mr. Finn's direction to stop calling and continued to call repeatedly. Id. at ¶18. Great Plains called Mr. Finn an average of two to three times a day through early February 2015. Id.

Great Plains filed a Motion to Dismiss in response to Mr. Finn's Amended Complaint alleging that the Great Plains violated the TCPA by making automated collection calls to Mr. Finn. See Aplt. App. at 11. Great Plains claims sovereign immunity as a company wholly owned by a federally registered Indian tribe, the Otoe-Missouria, and operated to provide the tribe with revenue to benefit its members. See Docket Entry No. 15. The Otoe-Missouria tribe is a federal recognized Indian tribe and as such enjoys blanket immunity from suit unless explicitly waived by the tribes or Congress. Michigan v. Bay Mills Indian Community et al., 134 S. Ct. 2024, 2030-2031 (2014). Great Plains is an online lending company owned and operated by the Otoe-Missouria Indian Tribe.

Great Plains was established on May 4, 2011, by the Otoe-Missouria Tribe of Indians. See Aplt. App. at 110 at ¶4. As such, Great Plains alleges that it is entitled to the tribe's sovereign immunity as a wholly owned subsidiary of the Otoe-Missouria which is under the control of the tribe, is operated by tribal members, and from which "all profits inure to the benefit of the Tribe." See Aplt. App. at 111 at ¶9.

Mr. Finn does not dispute the Otoe-Missouria's sovereign immunity; he argues that Great Plains is not entitled to tribal immunity because despite being created and operated by the tribe, there is also significant evidence to suggest that Great Plans is actually controlled by a non-tribal third party, a company called Think

Finance, which siphons off most of the profits and essentially uses the tribe as a pass through to avoid usury laws. See Docket Entry No. 16. In support of Mr. Finn's contention, he pointed to several pieces of evidence.

Great Plains filed its Motion to Dismiss for Lack of Jurisdiction on August 26, 2016. See District Court Docket Entry No. 15. On November 3, 2016, after a full and complete briefing of the issues, Judge Vicki Miles-LaGrange of the United States District Court for the Western District of Oklahoma issued her order granting Great Plains' Motion to Dismiss under Fed. R. Civ. P. 12(b)(1) based on lack of subject matter jurisdiction due to tribal sovereign immunity. See Aplt. App. at 19.

A. The Pennsylvania Office of Attorney General has filed suit against Think Finance, Great Plains, and other alleged Native American payday lenders asserting a conspiracy to circumvent usury laws through tribal immunity

First, Mr. Finn showed the government agencies have filed complaints against Think Finance and Great Plains alleging that Great Plains is essentially acting as a pass through for Think Finance. Specifically, in 2015, the Commonwealth of Pennsylvania's Office of Attorney General brought two lawsuits, now consolidated, against Think Finance and several of its affiliates alleging that they conspired to violate Pennsylvania usury laws by running a "rent-a-tribe" scheme through which loans would nominally be made by the Otoe-Missouria's tribe's Great Plains (Appellee here), the Chippewa Cree Tribe of the Rocky Boy's Indian Reservation's Plain Green, LLC, and the Tunica-Biloxi Tribe of Louisiana's MobiLoans, LLC. See

Aplt. App. at 25, First Amended Complaint in Commonwealth of Pennsylvania v. Think Finance, Inc. et al., 2:14-cv-07139 at ¶¶43-46; See also Commonwealth of Pennsylvania v. Think Finance Inc., et al., 2:15-cv-00092, and Commonwealth of Pennsylvania v. Think Finance Inc., et al., 2:14-cv-07139. According to the Complaint:

> Under the scheme the loans are made in the name of a lender affiliated with one of these tribes, but the Think Finance Defendants provide the infrastructure to market, fund, underwrite, and collection the loans, providing the following: customer leads, the technology platform, investors who fund the loans, and/or the payment processing and collection mechanisms used to obtain payments from consumers. Once made, the loans are transferred to a non-tribal entity which, upon information and belief, the Think Finance Defendants have an interest or affiliation, including GPL Serving, Ltd., a Cayman Islands Company."

Id. at ¶47.

The Commonwealth of Pennsylvania supported its allegations with a copy of the term sheet governing Think Finance's agreement with the one of the three tribes, the Chippewa Cree Tribe, which provided that: (1) the tribe would establish a company called "Plain Green LLC" to "provide for a broader array of lending products"; (2) "TF [Think Finance] will license its software to the tribe...[and] will also provide risk management, application, processing, and ongoing customer service support..."; (3) "the initial product will be an installment loan with a maximum amount of $2,500 and a minimum repayment period of two months and a

maximum repayment of two years...Interest rates on the loans will vary from an APR of 60% to 360% based upon the repayment history of the borrower and the term of the loan..."; (4) "Haynes [a Think Finance affiliate] will arrange to provide funding to the Tribe to enable it to make each of the loans"; (5) "GPLS" [allegedly an affiliate of Think Finance] may from time to time purchase participation interests in each Loan that meets agreed upon criteria within two days of the funding of the Loan at 100% par value"; (6) "GPLS shall pay the tribe 4.5% of cash revenue received on account of the Loans for which GPLS has acquired a participation interest..."; and (7) "For the 1% of the loan portfolio retained by the Tribe, the Tribe will receive 100% of the cash revenue minus 100% of the losses." See Aplt. App. at 68.

B. Think Finance's agreement with the Chippewa Cree's Plain Green, LLC designates vast control of the lending operation to Think Finance

Moreover, press reports show the agreement between Think Finance and Plain Green, LLC gives even more control and profit to Think Finance, with the Huffington Post quoting a Chippewa Cree tribe member and former Plain Green executive as stating that all he did was sign off on loan's approved by Think Finance's software. Walsh at 7. Thus, Think Finance, not the tribe, made underwriting decisions. Further, Plain Green LLC did not recruit borrowers before they were approved or denied by Think Finance's software. Instead, it relied on another Think Finance affiliate, Tailwind Marketing, for leads at a cost of "$100 plus tax for to Tailwind for every approved borrower Tailwind refers." Id. Finally, once the new

customers called Plain Green they rarely dealt with call center employees on the reservation, where only fifteen staff were employed, but instead spoke with non-Native representatives on off reservation call centers based in other states for which Plain Green spent "approximately $3.6 million in 2013" alone. Id.

C. Great Plains' agreement with Think Finance was entered into under similar circumstances to the agreement between Think Finance and Plain Green, LLC

There is every reason to believe Think Finance has substantially the same arrangement with the Great Plains as it does with Plain Green, LLC. For example:

- After signing the agreement with the Chippewa Cree in March 2011, Think Finance reached out to the Otoe-Missouria in Oklahoma. Walsh at 6.
- Think Finance was introduced to the Otoe-Missouria by Mark Curry (hereinafter "Mr. Curry") of MacFarlane Group, Inc. Faux, Zeke. "Behind 700% Loans, Profits Flow Through Red Rock to Wall Street," p. 2, Bloomberg Business, 24 November 2014, Web. 23 December 2015, <http://www.bloomberg.come/news/articles/2014-11-24/payday-loanfortune-backed-by-medley-found-behind-indian-casino>.
- In 2010, Mr. Curry had entered into an agreement with the Otoe-Missouria and then-tribal vice chairman Charles Moncooyea (hereinafter "Mr. Moncooyea") to create an online payday lender called American Web Loan, which generated over $100 million in profit with only about 1% going to the

tribe. Id. Mr. Moncooyea later stated about this arrangement that "As time went on, I realized that we didn't have any control at all." Id.

- Still, on May 4, 2011, the Otoe-Missouria created Great Plains Lending, LLC. See Aplt. App. at 110 ¶4.
- Great Plains offers the same services as Plain Green LLC, which was created a few months earlier in March 2011 and use a standard form contract that is nearly identical. See Aplt. App. at 88, 94.
- Great Plains and Plain Green, LLC have extremely similar websites and Think Finance has also listed both Plain Green's website and Great Plain's website as its products. See Aplt. App. at 99, 101, 103.
- The publicly available LinkedIn pages for a former employee identifies Great Plains and Plain Green as Think Finance products on which work was performed in "all areas of business (Release, Management, Development, Compliance, Loan Ops, etc.)". See Aplt. App. at 104 the LinkedIn Page of Eric McLean, Former QA Lead, Think Finance.
- On December 19, 2013, the Consumer Financial Protection Bureau ("CFPB") as part of an investigation into illegal online payday lending issued a civil investigative demand to Think Finance, Inc. seeking information on the services it provided to our Great Plains, Great Plains Lending, LLC, to Green Plains LLC, and to MobiLoans, LLC. In Re Great Plains Lending, LLC;

Mobiloans LLC, and Plain Green, LLC, Decision and Order on Petition of Great Plains Lending, LLC; Mobiloans Lending LLC; and Plain Green, LLC to Set Aside Civil Investigative Demands, 2013- MISC-Great Plains Lending-0001.

- Great Plains sued the New York State Department of Financial Services claiming "that their business collapsed when banks pulled out of the payday lending business" after the state issued a cease and desist letter. Otoe-Missouria Tribe of Indians v. New York State Dept. of Fin. Servs., 769 F.3d 105, 115 (2d Cir. 2014). At the same time, Great Plains paradoxically claimed that its loans were all funded out of "tribally owned bank accounts." Id. The Second Circuit dismissed this statement as not credible, stating "the necessary involvement of non-tribal financial institutions is the very basis of [the] plaintiff's claim…." Id. Thus, Great Plains appears to receive at least some, if not significant, funding from non-tribal sources in order to make its loans.
- In a 2012, interview Ken Rees of Think Finance told Bloomberg Business Service that the company's business strategy was to partner with Native American tribes that "don't have to look to each state's lending laws." See Carter, Dougherty, *Payday Lenders and Indians Evading Laws Draws Scrutiny*, Bloomberg Business, 5 June 2012, Web. 28 December 2015,

<http://www.bloomberg.com/news/articles/2012-06-04/payday-lendersand-indian-tribes-evading-laws-draw-scrutiny-1->.

Mr. Finn, through his Opposition to Motion to Dismiss, specifically requested that the Court hold off on ruling on the Motion to Dismiss and first order limited discovery regarding sovereign immunity and in particular the issue of control of Great Plains Lending. See District Court Docket Entry No. 16. However, the Court's November 3, 2016 Order granting Great Plains' Motion to Dismiss was completely silent concerning Mr. Finn's request for limited discovery. See Aplt. App. at 19. The Court functionally denied the request by granting the Great Plains' Motion, but did not state why Mr. Finn's request for limited discovery was denied or analyze the request in any meaningful way. Id.

Instead, the Court reasoned that Mr. Finn's evidence in opposition to the Great Plains' Motion was "not substantial" and "unauthenticated," therefore it was insufficient to overcome Great Plains' evidence. Id. The Court then noted that if Mr. Finn had presented a contract between Great Plains and Think Finance that could have been substantive evidence to justify discovery. Id.

LEGAL STANDARD

A. The TCPA Generally

The TCPA makes it unlawful without prior express consent "to make any call using any automatic telephone dialing system or an artificial or prerecorded voice to any telephone number assigned to a...cellular telephone service...." See 47 U.S.C. §227(b)(1)(A)(iii). In adopting this provision, Congress recognized such automated calls as harassing and violating consumer's privacy rights, singling them out as particularly invasive and annoying because "these automated calls cannot interact with the consumer" and "do not allow the caller to feel the frustration of the called party." See S. Rep. No. 102-178, at 5 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1968, 1972. Congress therefore created a right of action under the TCPA and provided for statutory damages of $500 per violative call or treble damages of $1,500 per call if Great Plains acted "willfully" or "knowingly". See 47 U.S.C. §227(b)(3)(B) and §227(b)(3)(C).

B. Sovereign and Tribal Immunity

The District Court dismissed Mr. Finn's case for an alleged lack or jurisdiction due to sovereign immunity pursuant to a 12(b)(1) motion. The defense of sovereign immunity is an attack on the subject matter jurisdiction of the Court. Bynon v. Mansfield, 2015 WL 2447159 at *1 (E.D. Pa. May 21, 2015). When considering a 12(b)(1) motion, the Court considers both the evidence in the pleadings and evidence

outside the pleadings from all sources. Gould Electronics, Inc. v. United States, 220 F.3d 169, 178 (3d Cir. 2009). Although the plaintiff ultimately bears the burden of proving that subject matter exists, if the plaintiff can point to specific evidence suggesting subject matter jurisdiction, he is entitled to jurisdictional discovery to "aid the [him] in discharging [his] burden." Compagnie Des Bauxites de Guinee v. L'Union Atlantique S.A. d'Assurances, 723 F.2d 357, 362 (3d Cir. 1983). Finally, this is especially true where the defendant is a company as, "A plaintiff who is a total stranger to a corporation should not be required, unless he has been undiligent to try such issue on affidavits without the benefit of full discovery." Id. (quoting Surpitski v. Hughes-Keenan Corp., 362 F.2d 254, 255-256 (1st Cir. 1966).

While this rule was initially set out regarding challenges to personal jurisdiction, it applies equally in cases involving disputed subject matter jurisdiction. Lincoln Ben. Life Co. v. AEI Life, LLC, 800 F.3d 99, 105 (3d Cir. 2015). The idea is not to require a plaintiff to prove subject matter jurisdiction at the outset to get discovery on the matter, but only to show "**some basis to believe jurisdiction exists [to be] entitled to discovery on that issue**." Id. (emphasis added). This standard is fairly low so that a Court should allow jurisdiction discovery "unless the claim is 'clearly frivolous'" if the plaintiff presents evidence with "reasonable particularity." Id. at 108-109. Finally, once jurisdictional discovery is complete, if there is a material question as to the facts underlying subject matter jurisdiction, the court

"must conduct a plenary trial on the contested facts prior to making a jurisdictional determination." Gould at 177.

Here, the issue is specifically tribal sovereign immunity. Federally recognized Indian tribes enjoy blanket common-law immunity from suit unless explicitly waived by the tribes or Congress. Michigan v. Bay Mills Indian Community et al., 134 S.Ct. 2024, 2030-2031 (2014). But corporations, LLCs, and other separate entities created by tribes do *not* automatically share this immunity. Rather, tribal immunity extends to them only where "the entity acts as an arm of the tribe so that its actions are properly deemed to be those of the tribe." Allen v. Gold County Casino, 464 F.3d 1044, 1045 (9th Cir. 2006).

This Circuit has a clear test regarding whether tribal immunity passes to a corporation. That test is highly fact specific and includes several factors: (1) the method of the entity's creation; (2) its purpose; (3) its structure, ownership, and management, including the amount of control the tribe has; (4) whether the tribe intended the entity to have immunity; (5) the financial relationship between the tribe and the entity; and (6) whether the purposes of tribal sovereign immunity are served by granting it to the entity. Breakthrough Financial Management Group, Inc. v. Chukchansi Gold Casino and Resort, 629 F.3d 1173, 1191 (10th Cir. 2012).

Standard of review

This Court has made clear that it reviews a challenge to subject matter jurisdiction such as this *de novo*:

> Accordingly, we review the district court's dismissal for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) de novo. *Williams v. United States*, 957 F.2d 742, 743 (10th Cir.1992). We review the district court's findings of jurisdictional facts for clear error. *Ohio Nat'l Life*, 922 F.2d at 326 ("Where a trial court's ruling on jurisdiction is based in part on the resolution of factual disputes, a reviewing court must accept the district court's findings unless they are 'clearly erroneous.' ").

Holt v. United States, 46 F.3d 1000, 1003 (10th Cir. 1995).

Summary of Argument

Aside from a multifaceted fact pattern, Mr. Finn's argument in this case is relatively simple. In essence, Mr. Finn argues that he is entitled to limited discovery on whether or not sovereign immunity applies to Great Plains, a payday loan company. Great Plains argues that it is immune from suit because it is an entity that is owned and operated by a Native American tribe and exists to benefit such tribe. Mr. Finn argues that Great Plains is in actuality a pass-through company which is operated primarily for a private company called Think Finance, which absorbs the vast majority of the profits from Great Plains business.

This circuit has a six factor test for determining whether or not tribal immunity extends to a corporation. Those six factors are (1) the method of the entity's creation;

(2) its purpose; (3) its structure, ownership, and management, including the amount of control the tribe has; (4) whether the tribe intended the entity to have immunity; (5) the financial relationship between the tribe and the entity; and (6) whether the purposes of tribal sovereign immunity are served by granting it to the entity. Breakthrough Financial Management Group, Inc. v. Chukchansi Gold Casino and Resort, 629 F.3d 1173, 1191 (10th Cir. 2012). Mr. Finn asserts that factors (2), (3), (5), and (6) weigh in favor of his argument that sovereign immunity should not apply to Great Plains. Essentially, Mr. Finn points to significant evidence suggesting that Think Finance has *de facto* control of Great Plains and that Great Plains' primary purpose is to generate profits for Think Finance. For these reasons, the purposes of tribal sovereign immunity would not be met by extending sovereign immunity to Great Plains.

For the foregoing reasons, sovereign immunity should not be extended to Great Plains at this time. While Mr. Finn does not assert that he has proven that sovereign immunity is inappropriate at this stage, he has pointed to clear, particularized areas of inquiry which would easily determine whether or not Great Plains should be immune from suit with minimal discovery. This matter should be remanded to the District Court and limited discovery on the issue of tribal sovereign immunity should be permitted.

ARGUMENT

As set forth in the factual background section above, Mr. Finn has pointed to significant factual material to suggest that Think Finance likely retains most of the control of Great Plains and siphons off most of the profits, rebutting the allegation that Great Plains is an arm of the Otoe-Missouria Tribe and entitled to share in tribal sovereign immunity. Specifically, Mr. Finn submits that the facts showing Think Finance's control of Great Plains cause this Circuit's six-factor test for whether or not tribal immunity should extend to a business entity to weigh in favor of not extending immunity. Such a finding entitles Mr. Finn to jurisdictional discovery in this matter.

While Great Plains is a tribally-created entity, evidence suggests the tribe very well may have little control over its management and operations, that the vast majority of the profits earned by Great Plains are siphoned off to the non-tribal companies that control it, and that a major purpose of Great Plains' formation and operations is to allow non-tribal companies to "rent" tribal immunity. This evidence is material to deciding whether tribal immunity extends to Great Plains as a separate entity created by the tribe as the determination is highly fact specific and includes six factors: (1) the method of the entity's creation; (2) its purpose; (3) its structure, ownership, and management, including the amount of control the tribe has; (4) whether the tribe intended the entity to have immunity; (5) the financial relationship

between the tribe and the entity; and (6) whether the purposes of tribal sovereign immunity are served by granting it to the entity. Breakthrough Financial Management Group, Inc. v. Chukchansi Gold Casino and Resort, 629 F.3d 1173, 1191 (10th Cir. 2012). Most of these factors weigh against granting immunity to Great Plains as follows.

A. Factor No. 3 - Control:

Since tribal immunity is only properly extended to separate entities created by a tribe when "the entity acts as an arm of the tribe so that its actions are properly deemed to be those of the tribe," control is arguably the most important factor to consider. See Gould at 1045. Here, as outlined in the proceeding Factual Background section of Mr. Finn's Opposition, Great Plains has associated with a non-tribal lender named Think Finance, Inc. as shown by news reports, documents, web sites, and court records. Evidence suggests that Think Finance provides the infrastructure to market, fund, underwrite, and collect loans (customer leads, technology platform, etc.), provides investors who fund the loans, and does the payment-processing and operates the collection mechanisms used to obtain payments from consumers. Once made, the loans are transferred to a non-tribal entity, likely GPL Serving, Ltd., a Cayman Islands Company, which owns them and pays the Great Plains only a fraction of the proceeds. See Aplt. App. at 39-38, at ¶¶47-51. Thus, there is at least

a material question of fact as to whether Great Plains or Think Finance has meaningful control over Great Plains' payday loan business.

B. Factor No. 5 - Financial Relationship

The financial relationship of the entity to the tribe also weighs against Great Plains. To determine whether the financial relationship between the tribe and the entity suggests immunity should apply, Courts look at whether the money generated by the entity goes to the tribe, as opposed to generating profit for non-tribal actors. Breakthrough at 1194; American Property Management Corp. v. Superior Court, 206 Cal. App.4th 491, 502-504 (Cal.App. 2012); See also Sue/Perior Concrete & Paving Inc. v. Lewiston Golf Course Corp., 24 N.Y.3d 538, 545-546 (Ct.App. 2014). The idea is that tribes have a legitimate interest in promoting economic development for tribal benefit. Breakthrough at 1194-1195. Prior to creating Great Plains, the Otoe-Missouria entered into an agreement with a non-tribal entity lead by Mark Curry to form American Web Loan. See Faux at 2. While that company made $100 million in 2013, only about 1% went to the tribe. Id. Mark Curry introduced the Otoe-Missouria to Think Finance and as a result Great Plains was created. Id.

Mere months before Great Plains' creation, Think Finance entered into a contract with the Chippewa Cree Tribe of the Rocky Boy's Indian Reservation to create Plain Green, LLC with a contract that provided that loans made by Plain Green would be sold to a Think Finance affiliate within days of their creation and only

4.5% would be paid to Plain Green. See Aplt. App. at 25 and 68. Think Finance CEO Ken Rees told Bloomberg Business Service that his company's business strategy was to partner with Native American tribes that "don't have to look to each state's lending laws." See Carter.

Further, Pennsylvania's Office of Attorney General has now sued Think Finance alleging it used Plain Green and Great Plains as fronts to avoid usury laws by having them nominally be the lenders for loans really arranged, financed, and immediately purchased by Think Finance and its affiliates. See Aplt. App. at 25. This evidence suggests that the profits from the vast majority of the loans made by Great Plains are passed through it to the non-tribal Think Finance and thus such profits do not inure to the tribe.

C. Factor No. 2 - Purpose of Entity

The purpose of Great Plains also weighs against immunity. While the stated purpose for its creation in Great Plains' affidavits and in the LLC charter documents is economic development, as explained above there is evidence to suggest that the Great Plains mainly serves to create large amounts of money for a non-tribal actor, Think Finance and its affiliates. As explained in more detail above, Think Finance entered into the arrangement to try to hide behind Great Plains as nominal lender to assert tribal immunity as a means of evading state usury laws. See Aplt. App. at 37

- 40 at ¶¶43-51. The purpose of the entity is therefore overall to make money for Think Finance.

D. Factor No. 6 - Advances Purposes of Sovereign Immunity

Lastly, if Great Plains is just a front for Think Finance, extending tribal sovereign immunity to it clearly does not advance the purposes of sovereign immunity as "a tribe has no legitimate interest in selling an opportunity to evade state law." Otoe-Missouria at 114. For years, high interest installment loans, otherwise called payday loans, have been illegal in many states. Walsh at 2. In Florida, they are banned by F.S. Ch. 687, which sets the maximum rate of interest at 18 percent on loans less than $500,000. See Fla. Stat. §687.03 (2009). Loans from Great Plains exist to get around these prohibitions charging interest well over one hundred percent. See Aplt. App. at 94. That is the entire purpose of "rent-a-tribe" schemes. Walsh at 2. Thus, far from protecting Native American self determination and development, extending immunity to Great Plains would protect profits for the non-tribal Think Finance, undermine state usury laws, and harm poor people who are the victims of predatory loans.

Accordingly, upon consideration of all the evidence, including the documents attached hereto, Mr. Finn has demonstrated that there exists a genuine issue of fact in dispute as to whether Great Plains is entitled to sovereign immunity, particularly since his evidence suggests that Great Plains operates as a front for non-tribal entities

to make otherwise illegal loans contravening the purpose of sovereign immunity; that Great Plains is to a large extent controlled by a non-tribal entity, Think Finance; that Great Plains passes most of its profits to Think Finance; and that Great Plains was created for exactly this purpose. Thus, additional discovery is needed as to the contractual relationship between Think Finance and its affiliated entities and Great Plains, the software used by Great Plains to make loans, the financing of loans, the distribution of profits, the ownership of loans after origination, the use of tribal employees of Great Plains versus non-tribal employees of Think Finance and affiliated companies, etc., in order to resolve the material issue of fact in dispute.

CONCLUSION

For the reasons set forth above, Mr. Finn respectfully requests that this Court remand his case to the District Court to perform limited jurisdictional discovery.

Dated: January 24, 2016

By: /s/ *Rachel Rebecca Stevens*

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ORAL ARGUMENT STATEMENT

Appellant does not request oral argument

/s/ Rachel Rebecca Stevens
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Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on January 24, 2017, I caused the foregoing Brief of Appellant to be served electronically via the Court's electronic filing system on the following parties who are registered in the system:

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Date: January 24, 2017

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