No. 16-6348

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

KEITH FINN

Appellant/Plaintiff

v.

GREAT PLAINS LENDING, LLC

Appellee/Defendant

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA
CASE NO. CIV-16-415-M
THE HONORABLE VICKI MILES-LaGRANGE

APPELLEE'S ANSWER BRIEF

ORAL ARGUMENT REQUESTED

Stuart D. Campbell
Sara E. Potts
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

Saba Bazzazieh
Rosette, LLP
1100 H Street, NW
Washington, D.C. 20005
Tel. (202) 567-2941 | Fax (202) 525-5261
Email: sbazzazieh@rosettelaw.com

Attorneys for Appellee/Defendant

February 27, 2017

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Appellee makes the following disclosure statement:

Great Plains Lending, LLC, is wholly owned by the Otoe–Missouria Tribe of Indians, a federally recognized Indian tribe. It has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

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JURISDICTIONAL STATEMENT

Appellant Keith Finn's First Amended Complaint asserted that the District Court had subject matter jurisdiction under 28 U.S.C. § 1331 because his claims arose under federal law. On November 3, 2016, the District Court issued a final decision holding that it lacked subject matter jurisdiction because Appellee Great Plains Lending, LLC, as an arm of the Otoe–Missouria Tribe of Indians, has tribal sovereign immunity. The District Court further held that jurisdictional discovery was not appropriate, based on its consideration of the evidence submitted.

This Court has appellate jurisdiction under 28 U.S.C. § 1291 to review the District Court's final decision denying the jurisdictional discovery request.

STATEMENT OF THE ISSUE

Appellant argued before the District Court that Appellee is not an arm of the Otoe–Missouria Tribe of Indians and thus not entitled to sovereign immunity. In doing so, Appellant relied on accusations from an unrelated judicial proceeding and other submissions that the District Court considered yet found to be unpersuasive. After examining all submissions from both parties, the District Court found that Appellee *was* in fact an arm of the Otoe–Missouria Tribe and further denied Appellant's request for jurisdictional discovery. The issue presented is: Did the District Court commit an abuse of discretion in denying Appellant's request for jurisdictional discovery?

STATEMENT OF THE CASE

A. Establishment of Great Plains Lending, LLC

The Otoe–Missouria Tribe of Indians ("Tribe") is a federally recognized Indian tribe located in rural Oklahoma. 81 Fed. Reg. 5019, 5022; *see* Declaration of Vice-Chairman Ted Grant ("Grant Decl."), ¶ 1, Appellant's Appendix ("Aplt. App.") at 110. Its principal governing body is the Tribal Council, which exercises lawmaking authority pursuant to the Tribe's Constitution. Grant Decl., Aplt. App. at 110, ¶ 3.

Among the Tribal Council's myriad responsibilities is the duty to promote tribal economic development and self-determination. *See id.* at ¶ 5, Aplt. App. at 110. To that end, the Tribal Council enacted the Otoe–Missouria Tribe of Indians Limited Liability Company Act ("Tribal LLC Act"), allowing it to establish wholly owned tribal LLCs for the purposes of advancing the Tribe's economy. *Id.*; *see also* Tribal LLC Act, Aplt. App. at 122–56. In instances where the Tribe is the sole shareholder, the Tribal LLC Act explicitly states that "such LLC shall possess the Tribe's sovereign immunity from suit except to the extent otherwise provided in its Articles of Organization or Operating Agreement, or as expressly waived pursuant to [tribal law]." Tribal LLC Act, § 108(5), Aplt. App. at 131. These tribal business entities are considered arms and instrumentalities of the Tribe.

Grant Decl., ¶ 5, Aplt. App. at 110–11; *see* Tribal LLC Act, § 102, Aplt. App. at 127.

One such entity created under the Tribal LLC Act is Appellee Great Plains Lending, LLC ("Great Plains"). The Tribal Council created Great Plains in May 2011 pursuant to duly enacted Tribal Council Resolution #54293, as a wholly owned and operated arm of the Tribe. Grant Decl. ¶ 6, Aplt. App. at 111; Tribal Council Resolution #54293, Aplt. App. at 157–59. As stated in the Tribal Council Resolution, Great Plains was established to advance the Tribe's economy and to "address[] issues of public safety, health and welfare." Resolution #54293, Aplt. App. at 158; *see also* Grant Decl., ¶ 9, Aplt. App. at 111–12. Great Plains accomplishes these goals through providing employment opportunities to tribal members and generating revenues for the Tribe that are used for funding important governmental services, such as housing and educational programs. Grant Decl., ¶ 9, Aplt. App. 111–12.

Great Plains is wholly owned and controlled by the Tribe. Grant Decl., ¶¶ 6–7, Aplt. App. at 111. Day-to-day management is overseen by a Board of Directors, members of which are appointed by the Tribal Council and removable at any time, with or without cause. Grant Decl., ¶ 8, Aplt. App. at 111; *see also* Operating Agreement of Great Plains Lending, LLC, § 3.5, Aplt. App. at 164. All profits and losses inure to the Tribe as the sole shareholder, as explicitly provided

in the Operating Agreement. Grant Decl., ¶ 9, Aplt. App. at 111–12; *see also* Operating Agreement, § 5.1, Aplt. App. at 164.

In addition to operational control over Great Plains, the Tribe has independent *regulatory* oversight over Great Plains. The regulatory framework is substantially modeled on the Tribe's regulation of its gaming enterprises. Grant Decl., ¶¶ 12–13, Aplt. App. at 112. The Tribe has established comprehensive regulatory guidelines for its consumer finance activities, set forth in a duly enacted tribal law designated as the Otoe–Missouria Consumer Finance Services Regulatory Commission Ordinance ("Ordinance"). Grant Decl., ¶ 12, Aplt. App. at 112; *see* Ordinance, Aplt. App. at 169–78. The Ordinance is strictly enforced by an independent tribal regulatory agency, the Otoe–Missouria Consumer Finance Services Regulatory Commission ("Commission"). Grant Decl. at ¶ 12, Aplt. App. at 112. The Commission ensures that entities operating under its jurisdiction—i.e., Great Plains—conduct business responsibly and in accordance with tribal law and applicable federal consumer protection laws. *Id.*; *see generally* Ordinance, Aplt. App. at 169–78.

The Tribe unambiguously conferred to Great Plains all of the privileges and immunities enjoyed by the Tribe itself, including immunity against unconsented suit. Grant Decl., ¶ 11, Aplt. App. at 112. Neither the Tribe nor Great Plains has

waived this immunity, whether by tribal resolution, contract, or any other means. *Id*. ¶ 15, Aplt. App. at 113.

B. Procedural History

Appellant Keith Finn filed this suit in the U.S. District Court for the Western District of Oklahoma,[1] claiming that Appellee committed violations of the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227. He requested statutory and treble damages as well as injunctive relief. Amended Complaint, Aplt. App. at 11–17.

Appellee filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1), asserting that the District Court lacked subject matter jurisdiction because under this Court's decision in *Breakthrough Management Group Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173 (10th Cir. 2010), Appellee is an arm of the Tribe and thus has sovereign immunity against unconsented suit.[2] Specially Appearing Defendant's Motion to Dismiss Plaintiff's Amended Complaint, Appellee's Supplemental Appendix ("Aplee. Supp. App.") at

[1] Appellant first brought suit in the United States District Court for the Eastern District of Pennsylvania. That case was dismissed on the basis that the court lacked personal jurisdiction over Appellee. *Finn v. Great Plains Lending, LLC*, 2016 WL 705242 (E.D. Pa. Feb. 23, 2016).

[2] Appellee also argued that Appellant lacked standing, as he had not adequately pleaded a "concrete injury" under the Supreme Court's recent decision in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016). The District Court did not address that argument, instead resolving the case on the grounds of sovereign immunity.

2-4, 6-11. In making this factual challenge[3] to the District Court's subject matter jurisdiction, Appellee provided the relevant tribal laws and resolutions, a declaration of the Tribe's Vice-Chairman, and multiple documents demonstrating Appellee's status as a wholly owned and operated arm of the Tribe.

Appellant countered that sovereign immunity should not apply on the theory that Appellee does not satisfy the arm-of-the-tribe test under *Breakthrough*. *See generally* Plaintiff's Response to Defendant's Motion to Dismiss with Brief in Support, Aplee. Supp. App. at 6-11. With no direct evidence to support this assertion, Appellant instead relied mainly on the pleadings in unrelated litigation pending in the U.S. District Court for the Eastern District of Pennsylvania in the case of *Commonwealth of Pennsylvania v. Think Finance, Inc.*, No. 2:14-cv-07139. He also pointed to unauthenticated media publications from the Huffington Post and Bloomberg Business as well as material from a social media account allegedly created by a former employee of Think Finance, Inc. ("Think Finance"). Appellant additionally requested jurisdictional discovery.

[3] Motions to dismiss for lack of subject matter jurisdiction fall into one of two categories—facial or factual. When the motion is based on the defense of tribal sovereign immunity, it is considered *factual*, as it challenges the facts upon which subject matter jurisdiction depends. In such a case, the District Court should "not presume the truthfulness of the complaint's factual allegations." *Holt v. United States*, 46 F.3d 1000, 1003 (10th Cir. 1995). Rather, the District Court will have "wide discretion to allow affidavits, other documents, and a limited evidentiary hearing to resolve disputed jurisdictional facts . . . ." *Id.*

In reply, Appellee argued that the purported "evidence" submitted by Appellant was hearsay not subject to an exception, and in any event, was irrelevant to the issue at hand.[4] Specially Appearing Defendant's Reply in Support of Motion to Dismiss, at 5–7, Aplee. Supp. App. at 1-2, 5-7. Appellee maintained that even if the District Court did consider this "evidence" it should not change the outcome, as the documents and testimony submitted by Appellee clearly satisfied the arm-of-the-tribe standard.

The District Court, in an opinion issued on November 3, 2016, acknowledged that under United States Supreme Court precedent as well as precedent from this Court, tribes and their instrumentalities are "subject to suit only where Congress has authorized suit or the tribe has waived its immunity." Order Granting Specially Appearing Defendant's Motion to Dismiss (hereinafter "Order"), 2–3 (citing *Kiowa Tribe of Okla. v. Mfg. Tech., Inc.*, 523 U.S. 751, 754 (1998)), Aplt. App. at 21–21. As the District Court explained, in cases where tribal sovereign immunity has not been waived by the tribe or abrogated by Congress, subject matter jurisdiction is lacking, mandating dismissal under Rule 12(b)(1).

[4] The Tenth Circuit has held that jurisdiction must be supported "by competent proof." *Pytlik v. Prof. Resources, Ltd.*, 887 F.2d 1371, 1376 (10th Cir. 1989). None of Appellant's "evidence" should have been considered competent, as it was hearsay not subject to any exception. *See infra* nn.7–9. Nonetheless, as explained herein, the District Court found these submissions to be unpersuasive—a finding that can be reviewed only for clear error. *See* Fed. R. Civ. P. 52(a)(6).

Order, 2, Aplt. App. at 20. The District Court did not analyze the hearsay objection directly, but nonetheless decided to take Appellant's "evidence" into consideration—ostensibly because in the District Court's view, the submissions were unpersuasive. Order at 4–5, Aplt. App. at 22–23. That is, the District Court held that Appellee satisfied the arm-of-the-tribe standard based on *all* of the documents submitted—including the "evidence" offered by Appellant. Order at 5, Aplt. App. at 23. Examining these documents closely, the District Court found that each and every factor under *Breakthrough* weighed in Appellee's favor, and thus, the District Court concluded that Appellee was an arm of the Tribe and immune from suit. Order at 4–5, Aplt. App. at 22–23.

The District Court additionally denied Appellant's request for jurisdictional discovery, stating that "jurisdictional discovery and an evidentiary hearing is not required, as the Court has determined that it lacks jurisdiction to hear this matter based on the documents submitted." Order at 3 n.5, Aplt. App. at 21.

Appellant then filed this appeal.

STANDARD OF REVIEW

District Court decisions regarding requests for discovery are reviewed under the abuse-of-discretion standard.[5] *GWN Petrol. Corp. v. OK-Tex Oil & Gas, Inc.*,

[5] Appellant erroneously asserts that this Court should exercise *de novo* review. Brief of Plaintiff–Appellant ("Aplt. Br."), 23. Appellant is incorrect, as this appeal

998 F.2d 853, 858 (10th Cir. 1993). This standard applies to review of discovery requests made at any stage of litigation, including requests for jurisdictional discovery made by a plaintiff opposing a motion to dismiss for lack of subject matter jurisdiction. *Breakthrough*, 629 F.3d at 1189 ("As with the court's handling of discovery in other stages of litigation, in the context of a 12(b)(1) motion, we give the district court much room to shape discovery.") (citation omitted). An abuse of discretion will be found only when the District Court has rendered a decision that is "arbitrary, capricious, whimsical, or manifestly unreasonable." *Coletti v. Cudd Pressure Control*, 165 F.3d 767, 777 (10th Cir. 1999).

The party seeking jurisdictional discovery has the burden of demonstrating a legal entitlement to it, i.e., the burden to demonstrate that an abuse of discretion did, in fact, occur. *Breakthrough*, 629 F.3d at 1189 n.11. And to the extent aspects of the District Court's analysis hinge on factual findings, those findings are reviewed for clear error. *Ohio Nat'l Life Ins. Co. v. United States*, 922 F.2d 320, 326 (10th Cir. 1990).

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is a challenge to the District Court's *denial of jurisdictional discovery*. *See id.* at 7 (describing the issues presented as whether the trial court "err[ed] in not properly considering" or "err[ed] in not granting" Appellant's request for jurisdictional discovery); *see also id.* at 24 (arguing that "[t]his matter should be remanded to the District Court and limited discovery on the issue of tribal sovereign immunity should be permitted."). As stated herein, the Tenth Circuit has squarely held that the abuse-of-discretion standard applies to appellate review of a District Court's denial of a jurisdictional discovery request. *GWN Petrol. Corp.*, 998 F.2d at 858.

SUMMARY OF THE ARGUMENT

In our federal judiciary, District Courts possess broad discretion, particularly in matters of discovery. Accordingly, when a District Court's decision to deny a discovery request is appealed, this Court will review such a decision under the most lenient of all standards of review—abuse of discretion. *See Pierce v. Underwood*, 487 U.S. 552, 558 & n.1 (1988) (explaining the three traditional categories of standards of review).

Appellant bears the burden of showing that the denial of his request constituted an abuse of discretion, and that in turn requires that he demonstrate that he has suffered prejudice. *Breakthrough*, 629 F.3d at 1189 n.11. Prejudice can be shown only when the pertinent jurisdictional facts are controverted or when a more satisfactory showing of the facts is necessary. *See Sizova v. Nat'l Institute of Standards & Tech.*, 282 F.3d 1320, 1326 (10th Cir. 2002) (citation omitted). Of course, such an analysis requires reference to the District Court's factual findings, and those findings are to be reviewed for clear error. *Ohio Nat'l Life Ins. Co. v. United States*, 922 F.2d 320, 326 (10th Cir. 1990).

In this case, the District Court correctly denied Appellant's request for jurisdictional discovery and plainly did not abuse its discretion in doing so. The court took into consideration all of the submissions from both parties and appropriately held that that the evidence demonstrated that Great Plains is an arm

of the Otoe–Missouria Tribe and thus immune from suit. In holding so, the court faithfully applied the arm-of-the-tribe test set forth in *Breakthrough* to the facts before it. Finding that each contested factor—the entity's purpose; its structure, ownership, and management; the financial relationship between the entity and the Tribe; and the principles of immunity doctrine generally—weighed in favor of holding that Great Plains is an arm of the Tribe, the court dismissed the case for lack of subject matter jurisdiction and denied Appellant's request for jurisdictional discovery, as it was unnecessary.

The factual findings upon which the District Court's ruling depended—again, reviewable only for clear error—have not been controverted. Appellant admits as much in his opening brief, conceding that he has only offered "areas of inquiry." Aplt. Br. at 24. Indeed, his speculative theories were based on a variety of submissions that the District Court correctly found to be "non-authoritative." Order at 4 n.6, Aplt. App. at 22. These submissions for the most part barely alluded to the Tribe or Great Plains at all, as the allegations pertained primarily to other parties. Essentially, as the District Court pointed out, they were "mere accusations." Order at 5, Aplt. App. at 23.

Nor was a more satisfactory showing of facts necessary. Appellee supplied a significant body of authenticated evidence demonstrating that it meets each factor under the *Breakthrough* test. In fact, the evidence is substantially similar to

evidence that has been accepted in other arm-of-the-tribe cases involving tribal lending entities. *E.g.*, *Everette v. Mitchem*, 146 F. Supp. 3d 720, 723 (D. Md. 2015). It also accords with precedent from this Court involving factual proof sufficient to establish the requisite connection between a tribe and its economic entities. *See Native Am. Distrib. v. Seneca–Cayuga Tobacco Co.*, 546 F.3d 1288 (10th Cir. 2008). Hence, because the pertinent jurisdictional facts are not controverted and because a more satisfactory showing of facts is unnecessary, Appellant has clearly not demonstrated any prejudice so as to justify finding that the District Court abused its discretion.

Aside from the lack of prejudice to the Appellant, jurisdictional discovery was particularly unwarranted, and indeed, not an available option in this case because of the sovereign status of the defendant. Appellee is an arm and instrumentality of a federally recognized tribe. As such, Appellee has immunity not just against liability from judgment, but against *all* aspects of the judicial process. *Osage Tribal Council v. Dep't of Labor*, 187 F.3d 1174, 1179 (10th Cir. 1999). Indeed, in cases such as this one, when the defendant is a sovereign entity, it is well-established that "speculative arguments" are an insufficient basis to order jurisdictional discovery. *White v. Univ. of Cal.*, 765 F.3d 1010, 1025 (9th Cir. 2014).

For all of these reasons, it was a proper exercise of the District Court's discretion to deny Appellant's request for jurisdictional discovery.

ARGUMENT

The sole issue in this appeal is whether the District Court abused its discretion in denying Appellant's request for jurisdictional discovery, even after having engaged in a thorough analysis of the submissions from both parties. For the reasons that follow, the District Court's denial of the jurisdictional discovery request was plainly *not* an abuse of discretion, and therefore, its ruling should be affirmed.

The District Court did not commit an abuse of discretion in denying jurisdictional discovery.

With regard to a District Court's denial of a jurisdictional discovery request, an abuse of discretion will be found only if "the denial results in prejudice to [the plaintiff]." *Sizova*, 282 F.3d at 1326 (citation omitted). Prejudice will be shown only when "pertinent facts bearing on the question of jurisdiction are controverted . . . or where a more satisfactory showing of the facts is necessary." *Id.* (citation omitted). Furthermore, when the defendant is a sovereign government or instrumentality thereof, jurisdictional discovery is especially disfavored, as permitting discovery "would undermine the purposes of the sovereign immunity doctrine." *Everette*, 146 F. Supp. 3d at 723.

In this case, the District Court's ruling was based on a reasoned analysis of the evidence submitted by both parties.[6] There was no prejudice to the Appellant, as the pertinent factual findings were not legitimately controverted, nor was a more satisfactory showing of facts necessary. Moreover, in light of Appellee's interest in immunity against *all stages* of litigation, it was entirely appropriate for the District Court to have denied jurisdictional discovery in this case. It would be improper for this Court to second-guess that determination. *See Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257 (1981) (explaining that appellate courts should not "lose sight of [the abuse-of-discretion standard], and substitute[] [their] own judgment for that of the District Court").

1. The District Court made a sound factual finding regarding Appellee's arm-of-the-tribe status.

In resolving Appellee's factual challenge to subject matter jurisdiction, the District Court ably fulfilled its role as the "finder of jurisdictional facts." *See Husnay v. Enviromaster Int'l Corp.*, 275 F. Supp. 2d 265, 266 (N.D.N.Y. 2003).

[6] Appellant incorrectly asserts that "the Court's November 3, 2016 Order granting Great Plains' Motion to Dismiss was completely silent concerning Mr. Finn's request for limited discovery." Aplt. Br. at 19. To the contrary, the District Court explicitly stated that "jurisdictional discovery and an evidentiary hearing is not required, as the Court has determined that it lacks jurisdiction to hear this matter based on the documents submitted." Order at 3 n.5, Aplt. App. at 21. Hence, the District Court directly addressed Appellant's request and denied it, because the evidence in the record decisively proved that Appellee is an arm of the Tribe, making jurisdictional discovery unnecessary.

Indeed, far from "arbitrary, capricious, whimsical, or manifestly unreasonable," *see Coletti*, 165 F.3d at 777, the District Court's denial of jurisdictional discovery was based on a thorough consideration of the submissions from both parties.

The District Court engaged in a thoughtful analysis of each factor of the arm-of-the-tribe test set forth in the *Breakthrough* decision. As explained in the court's order, that test requires consideration of six factors: (1) method of creation of the entity; (2) the entity's purpose; (3) the structure, ownership, and management of the entity; (4) whether the tribe intended the entity to have sovereign immunity; (5) the financial relationship between the tribe and the entity; and (6) the purposes of the doctrine of tribal sovereign immunity generally. Order at 4 (citing *Breakthrough*, at 1181), Aplt. App. at 22. Noting that Appellant did not challenge Appellee's method of creation or the Tribe's intent for Appellee to have immunity against suit (factors 1 and 4), the District Court focused on the other factors.

As to the second factor—the entity's purpose—the court found that Great Plains was created "to advance tribal economic development to aid in addressing issues of public safety, health and welfare . . . ." Order at 4, Aplt. App. at 22. In support of this finding, the court took note of Tribal Council Resolution #54293, which sets forth the Tribal Council's intent in creating Appellee for the purposes of developing the Tribe's economy. *Id.*

As to the third factor—structure, ownership, and management—the court found that Great Plains is "a limited liability company wholly-owned by the Tribal government." Order at 4, Aplt. App. at 22. The court also found that under Great Plains' Operating Agreement, the Tribe "is the sole member of Great Plains, and Great Plains is managed by its Board of Directors, who are appointed by the Tribal Council of the Otoe–Missouria Tribe." Order at 5, Aplt. App. at 23.

As to the fifth factor—the financial relationship between the entity and the tribe—the court found that "all profits and losses of Great Plains are allocated to the Otoe–Missouria Tribe." Order at 5, Aplt. App. at 23. In making this finding, the court again took note of the Operating Agreement, which explicitly states that "[a]ll Profits and Losses shall be allocated to the Tribe as the sole Member" of Great Plains. *Id.*

As to the sixth factor—whether granting immunity to the entity would serve the purposes of immunity doctrine—the court acknowledged that extending immunity to Great Plains would serve to protect the tribal treasury, "which is one of the historic purposes of sovereign immunity in general." Order at 5, Aplt. App. at 23. For this proposition, the court cited the *Breakthrough* decision, which squarely held that extending immunity to tribal economic instrumentalities serves the purposes of immunity doctrine. *See id.* (citing *Breakthrough*, 629 F.3d at 1195).

The District Court thereby found that each factor weighed in Appellee's favor, and thus concluded that Appellee had proven its status as an arm-of-the-tribe. And though the court acknowledged that Appellant had offered several pieces of "evidence" in rebuttal to Appellee, as explained below, it properly found these submissions to be unpersuasive.

2. Appellant has not demonstrated prejudice as the pertinent facts have not been controverted.

Appellant has failed to satisfy his burden of demonstrating any prejudice in being denied jurisdictional discovery, as he cannot show that the pertinent facts bearing on jurisdiction are controverted. *See Sizova*, 282 F.3d at 1326. In fact, Appellant forthrightly admits that he "does not assert that he has proven that sovereign immunity is inappropriate at this stage." Aplt. Br. at 24. Instead, Appellant offers merely "particularized areas of inquiry" which he theorizes might possibly lead to a finding that Appellee is not an arm of the Tribe. *See id.*

Appellant's theories are based on what the District Court properly characterized as "non-authoritative submissions." Order at 4 n.6, Aplt. App. at 22. Primarily, Appellant relies on the complaint and accompanying exhibits from the case of *Commonwealth of Pennsylvania v. Think Finance, Inc.*, No. 2:14-cv-07139, currently pending in the U.S. District Court for the Eastern District of Pennsylvania. In that case, the Pennsylvania Attorney General brought suit against

a company called Think Finance and its affiliates, claiming violations of state usury laws.

At the outset, it should be noted that Appellant misrepresents Appellee's connection (or lack thereof) to the *Think Finance* lawsuit. Appellant claims that "[t]he Pennsylvania Office of Attorney General has filed suit against . . . Great Plains." Aplt. Br. at 13. This is patently false. Appellee Great Plains was never a defendant in the *Think Finance* litigation.

Even if the allegations of attenuated connections to the Tribe and Great Plains were not hearsay—which they are[7]—they could not be deemed to legitimately controvert the facts set forth by Appellee. Indeed, none of the allegations furthered by Appellant in relation to the Otoe–Missouria Tribe or Great Plains are supported by any reliable documentation. In fact, the bulk of the allegations in the *Think Finance* complaint do not involve the Otoe–Missouria Tribe or Appellee whatsoever. Rather, they involve an entirely separate tribe, the Chippewa–Cree, and its lending entity, Plain Green, LLC. In short, as the District Court correctly noted, Appellant's theories are extrapolated from "mere

[7] *E.g., 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, 609–10 (8th Cir. 1968)) ("Complaints, and the charges and allegations they contain, are hearsay under the Federal Rules of Evidence.").

accusations" made by the Pennsylvania Attorney General. Order at 5, Aplt. App. at 23.

Nor do the articles from Huffington Post or Bloomberg Business controvert the pertinent jurisdictional facts. Even disregarding for the moment their hearsay status,[8] those articles do no more than set forth the same kind of inflammatory accusations as made in the *Think Finance* complaint. The same is true with regard to the LinkedIn profile of an alleged former employee of Think Finance; even if the social media profile was not hearsay,[9] it would prove nothing.

In any event, hearsay objections aside, the District Court *did* consider this "evidence," and found it to be unpersuasive. In no sense can the District Court's interpretation of the parties' submissions be deemed clearly erroneous, and therefore this Court has no grounds upon which to find that the Appellant has controverted the pertinent jurisdictional facts. *See Planned Parenthood Ass'n of Utah v. Herbert*, 839 F.3d 1301, 1308 (10th Cir. 2016) (Gorsuch, J., dissenting from denial of rehearing *en banc*) (explaining that "[t]his deferential [clear error]

[8] *See New England Mut. Life Ins. Co. v. Anderson*, 888 F.2d 646, 650 (10th Cir. 1989) (explaining that "[t]he fact that [a] statement was in the form of a newspaper account reinforces its hearsay character . . . .").

[9] *Cf. United States v. Brinson*, 772 F.3d 1314, 1320–21 (10th Cir. 2014) (Facebook posts were not hearsay, but only because they were deemed admissions of a party-opponent under Federal Rule of Evidence 801(d)(2)(A)).

standard applies even when the district court makes factual findings concerning documentary proof rather than live testimony").

3. A more satisfactory showing of the facts is not necessary.

In addition to his failure to controvert the pertinent jurisdictional facts, Appellant likewise cannot demonstrate that a more satisfactory showing of the facts is necessary. *See Sizova*, 282 F.3d at 1326. To the contrary, the District Court's factual findings—again, to be reviewed for clear error—are based on a substantial body of evidence submitted by Appellee.

Indeed, Appellee submitted an abundance of evidence demonstrating its arm-of-the-Tribe status, including a declaration of the Tribe's Vice-Chairman; the Tribal LLC Act; the Tribal Council Resolution creating Appellee; the Operating Agreement of Appellee; the Otoe-Missouria Consumer Finance Services Regulatory Ordinance; and Appellee's business license issued by the tribal regulatory commission. *See* Grant Decl. and Exhibits thereto, Aplt. App. at 109–80. As explained *supra*, the District Court's factual findings pertaining to the arm-of-the-tribe analysis were wholly consistent with this evidence.

The District Court is just one of several courts to analyze similar evidence and come to the conclusion that a particular tribal lending entity is an arm of a sovereign tribe. Take for example *Everette v. Mitchem*, a case from the U.S. District Court for the District of Maryland involving two tribal lending entities

formed by the Tunica–Biloxi Tribe and the Fort Belknap Indian Community, respectively. 146 F. Supp. 3d 720 (D. Md. 2015). Applying the *Breakthrough* framework, the District Court in that case looked to the tribal lending entities' operating agreements as well as declarations from the relevant tribal officials—documentation substantially similar to the evidence set forth by Appellee—and came to the sound conclusion that the tribal businesses were arms of their respective tribes, and thus immune from suit. 146 F. Supp. 3d at 724–25; *see also 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).

In addition to the cases specifically involving tribal lending, under this Court's decision in *Native American Distributing v. Seneca–Cayuga Tobacco Co.*, 546 F.3d 1288 (10th Cir. 2008), the evidence in the record was very clearly sufficient for the District Court to resolve this case. The issue in *Native American Distributing* was whether the District Court committed clear error in finding that the Seneca–Cayuga Tobacco Company ("SCTC") was properly considered a subdivision of the Seneca–Cayuga Tribe (as opposed to a subdivision of the tribe's corporate entity).[10] *Id.* at 1292. The District Court received a number of exhibits,

[10] The Seneca–Cayuga Tribe's corporate entity had a charter that included a "sue-and-be-sued" clause, and in that specific litigation it was conceded that the clause

including tribal laws, the tribal corporation's charter, as well as sworn and unsworn affidavits. *Id.* at 1291–92. After reviewing the evidence, the District Court held that SCTC was in fact a subdivision of the tribe, and that the lawsuit was thus barred by sovereign immunity. As in the case at hand, jurisdictional discovery was requested by the plaintiffs but denied on the basis that the evidence before the court was sufficient to render a ruling on subject matter jurisdiction. *Id.*

On appeal, the Tenth Circuit affirmed. As the panel summarized, "the primary evidence that the district court relied upon was the Business Committee[11] resolution that created SCTC." *Id.* at 1293. The court also noted that "the resolution specifically invokes the Business Committee's powers" to act on behalf of the tribe, including the "power to transact business" and act for the tribe's "economic benefit." *Id.* at 1293–94. It was also found noteworthy that "the resolution expressly declares that the tobacco company will function as 'an economic development project to provide employment opportunities and revenue for the Tribe,' and states that the company and its activities 'are essential governmental functions of the Seneca–Cayuga Tribe.'" *Id.* at 1294. In light of this

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constituted a waiver of sovereign immunity. Hence, the dispositive issue was whether the SCTC was a subdivision of the tribe (which *had not* waived its immunity) or of the corporation (which *had* waived its immunity). *See Native Am. Distrib.*, 546 F.3d at 1293 & n.2.

[11] In the Seneca–Cayuga Tribe, the "Business Committee" is akin to what many other tribes call a Tribal Council and functions as Seneca–Cayuga Tribe's governing body. *See Native Am. Distrib.*, 546 F.3d at 1290.

evidence, the panel saw no reason to disagree with the District Court's judgment that SCTC functioned as an instrumentality of the tribal government. *Id.*

Native American Distributing is highly analogous to the instant litigation, as it involves deference to the district court's factual findings, when those findings bear on the district court's judgment that a particular entity is sufficiently linked with the tribal government as to vest that entity with sovereign immunity. Just as the panel in *Native American Distributing* concurred with the District Court's interpretation of the Seneca-Cayuga Tribe's laws and other relevant documents, so too should this Court defer to the District Court's interpretation of the evidence set forth by Appellee.

In sum, in light of this evidentiary record, it cannot be said that a more satisfactory showing of the facts was necessary. The District Court had more than enough evidence before it to make the necessary factual findings, and those findings should not be second-guessed at this stage in the litigation. Accordingly, Appellant has not proven that the denial of jurisdictional discovery caused any prejudice, and thus the District Court did not commit an abuse of discretion.

4. Appellant's speculative theories are insufficient to justify ordering jurisdictional discovery against a sovereign defendant.

When a defendant in litigation is a sovereign government or instrumentality thereof, the District Court's discretion to deny jurisdictional discovery takes on

added importance. In such situations, jurisdictional discovery is especially disfavored, as permitting discovery "would undermine the purposes of the sovereign immunity doctrine." *Everette*, 146 F. Supp. 3d at 723. In this case, the District Court correctly decided *not* to impose the burdens of discovery on a defendant that had already provided more than enough evidence to prove its arm-of-the-tribe status. This was a proper exercise of the District Court's discretion, and should be affirmed.

The doctrine of sovereign immunity is meant to protect against all of the burdens of litigation, not just liability from judgment. *Osage Tribal Council v. Dep't of Labor*, 187 F.3d 1174, 1179 (10th Cir. 1999) (explaining that tribal sovereign immunity is "not merely a defense to liability"). For example, as this Court held in *Bonnet v. Harvest (U.S.) Holdings, Inc.*, subpoenas duces tecum served on a tribe—even when the tribe is a non-party to the litigation—are barred by tribal sovereign immunity. 741 F.3d 1155, 1159–60 (10th Cir. 2014). The reason is that tribes are immune from "suit," and "suit" includes *all* aspects of the judicial process. *See id.* at 1160.

Like a subpoena, jurisdictional discovery is unquestionably a burdensome aspect of the judicial process. Hence, the same considerations that caution against ordering enforcement of a third-party subpoena against a tribe likewise caution against ordering burdensome jurisdictional discovery against an economic

instrumentality of the tribe—particularly when the jurisdictional issues can be resolved *without* such discovery

Accordingly, a district court should not permit jurisdictional discovery against a sovereign defendant when the plaintiff merely offers "speculative arguments" as to why the defendant should not be protected by sovereign immunity. *White v. Univ. of Cal.*, 765 F.3d 1010, 1025 (9th Cir. 2014); *see Boschetto v. Hansing*, 539 F.3d 1011, 1020 (9th Cir. 2008) (jurisdictional discovery properly denied when the request was "based on little more than a hunch that it might yield jurisdictionally relevant facts"). And that is all that Appellant has offered in this case—speculation. As the District Court properly noted, speculative theories are insufficient to overcome Appellee's sovereign immunity.

The District Court's decision to deny jurisdictional discovery accords with other federal court precedent containing analogous facts. In *Everette v. Mitchem*, summarized earlier, the District Court for the District of Maryland held that two tribal lending entities were arms of their respective tribes based on the *Breakthrough* test. Holding that the tribal lending entities provided sufficient evidence to prove their status as arms of their respective tribes, the court also denied the plaintiff's request for jurisdictional discovery. The court reasoned that permitting discovery "would undermine the purposes of the sovereign immunity doctrine." 146 F. Supp. 3d at 723. The same is true in this case, where ordering

jurisdictional discovery would interfere with the Tribe's sovereign interest in maintaining its immunity against *all* aspects of the judicial process.

This Court should affirm the decision below, as the District Court clearly did not abuse its discretion in denying jurisdictional discovery.

CONCLUSION

For all of the foregoing reasons, this Court should affirm the District Court's order dismissing Appellant's First Amended Complaint.

Respectfully submitted,

s/*Stuart D. 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
(918) 582-1211
scampbell@dsda.com
spotts@dsda.com

Saba Bazzazieh
ROSETTE, LLP
1100 H Street, N.W., Suite 400
Washington, D.C. 20005
(202)652-0579
sbazzazieh@rosettelaw.com

February 27, 2017

Counsel for Appellee

STATEMENT REGARDING ORAL ARGUMENT

Appellee believes that oral argument will assist the Court in the resolution of the issues raised on appeal and therefore requests the oral argument be scheduled.

STATEMENT OF RELATED CASES

Pursuant to 10th Cir. R. 28.2, Counsel for Appellee/Defendant states that there are no known related cases pending in this Court.

s/*Stuart D. Campbell*
Stuart D. Campbell

February 27, 2017 *Counsel for Appellee*

CERTIFICATE OF SERVICE

I certify that on February 27, 2017, I caused the foregoing Appellee's Answer Brief to be served electronically via the Court's electronic filing system on the following parties who are registered in the system:

Rachel Rebecca Stevens
rstevens@creditlaw.com

Elaine M. Dowling
Dowlinglawoffice@aol.com

s/*Stuart D. Campbell*

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 6,531 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).
2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the typestyle requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word in Times New Roman 14-point font.

s/*Stuart D. Campbell*
Stuart D. Campbell

February 27, 2017 *Counsel for Appellee*