

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA**

COMMONWEALTH OF PENNSYLVANIA,

Plaintiff,

v.

THINK FINANCE, INC., et al.,

Defendants.

Misc. Action No. 1:18-MC-00024-MLH
(Original E.D. Pa. No. 14-cv-7139-JCJ)

**NON-PARTY MOBILOANS' REPLY IN SUPPORT OF ITS
MOTION TO QUASH SUBPOENA TO MOBILOANS TO TESTIFY
AT DEPOSITION IN A CIVIL ACTION**

Non-Party MobiLoans, LLC (“MobiLoans”), hereby submits this Reply in Support of its Motion to Quash Defendant Think Finance, Inc.’s (“Think Finance”) June 13, 2018 Subpoena to MobiLoans to Testify at a Deposition in a Civil Action (the “Subpoena”) in the matter of *Commonwealth Pennsylvania v. Think Finance, Inc., et al.*, No. 14-cv-7139 (E.D. Pa. filed Dec. 17, 2014). In its opposition, Defendant Think Finance concedes that MobiLoans is an arm of the Tribe protected by the Tribe’s sovereign immunity. Think Finance’s only remaining arguments are that the Subpoena is not a “suit” triggering sovereign immunity and that the Rule 45 “balancing test” weighs in its favor. Because neither argument overcomes MobiLoans’ sovereign immunity, the Subpoena should be quashed.

I. THE THINK FINANCE SUBPOENA IS BARRED BY MOBILOANS’ SOVEREIGN IMMUNITY.

Think Finance does not dispute that the Tribe possesses sovereign immunity or that MobiLoans is an arm of the Tribe entitled to sovereign immunity from suit. (Def.’s Mem. in Opp’n to Mot. to Quash (“Opposition”) at 1, 3.) Rather, Think Finance asks the Court to find that a non-party subpoena in a civil suit is not a “suit” triggering immunity and that its litigation

defense interests outweigh a tribal sovereign's right to its immunity. Neither assertion has any merit.

A. A Non-Party Subpoena in a Civil Action is a "Suit" Triggering Immunity.

The Subpoena is a "suit" against MobiLoans. Think Finance acknowledges that the weight of the law considers a federal subpoena a suit against a tribe, but nevertheless relies on one criminal case and dicta in a footnote as the "most reasoned" view. (Opp. at 2-3.) Both citations are misleading and do not support its position.

The federal district case on which it relies, *U.S. v. Juvenile Male I*, 431 F. Supp. 2d 1012 (D. Ariz. 2006), and the dicta in a footnote in *Miccosukee Tribe of Indians of Fla. v. United States*, 730 F. Supp. 2d 1344, 1349 n.7 (S.D. Fla. 2010), have at least two distinguishing facts: the federal subpoenas were served (1) by a criminal defendant and the United States, respectively, and (2) on custodians of records. Here, Think Finance is a civil defendant with no heightened constitutional rights or federal sovereign status. Moreover, its Subpoena seeks a Rule 30(b)(6) deposition, which requires MobiLoans to designate an employee to testify "on its behalf." (Mot. To Quash, Ex. B.) Although Think Finance asserts that it is not suing MobiLoans, its Subpoena seeks to bind it, which would compel MobiLoans to act if enforced. *See Catskill Development LLC v. Park Place Entertainment Corp.*, 206 F.R.D. 78, 87-88 (S.D.N.Y. 2002) (enforcement of federal civil subpoena against a tribe, like a federal agency, would compel it to act and was thus a suit "against the sovereign" barred by sovereign immunity absent express waiver) (citing and quoting *USEPA v. General Elec. Co.*, 197 F.3d 592, 593-97 (2d Cir. 1999), *vacated in part on other grounds*, 212 F.3d 689 (2000)). Accordingly, the Think Finance Subpoena is a suit against MobiLoans, and immunity is thereby triggered.

B. A Balancing Test is Not Necessary or Appropriate Here.

In its effort to override MobiLoans' clear entitlement to sovereign immunity from compliance with its Subpoena, Think Finance seeks to introduce the concept of a "Rule 45 balancing test." Such a balancing test is unnecessary in this context. Even if it were, MobiLoans' sovereign interests outweigh Think Finance's civil litigation interests.

While it is true that courts sometimes invoke a balancing test when weighing claims of sovereign immunity against the interests of discovery, this balancing test is triggered and has tilted in favor of a party seeking discovery only in a criminal context when there are constitutional rights of a criminal defendant at issue. The cases on which Think Finance relies for the use of this test arose in a criminal context where a defendant had constitutional rights being impacted. *See United States v. Snowden*, 879 F. Supp. 1054, 1057 (D. Or. 1995); *see also United States v. Velarde*, 40 F. Supp. 2d 1314, 1316 (D.N.M. 1999). If there is no threshold showing to raise a constitutional issue, there is no conflict between tribal sovereign immunity and a constitutional right. *See Catskill Development LLC*, 206 F.R.D. at 87-88 (rejecting the introduction of a balancing test that weighed sovereign immunity against constitutional rights in light of Second Circuit holding in *General Electric* that a subpoena is a suit against the sovereign and is barred by sovereign immunity). This absence itself serves as a basis to distinguish this case from *Snowden* and *Velarde*.

Even assuming Think Finance had raised a constitutional issue or a balancing test was appropriate, MobiLoans' sovereign immunity outweighs Think Finance's interest in the Rule 30(b)(6) subpoena. Despite Think Finance's asserted "right to prepare its defense and obtain necessary evidence" (Opp. at 5), courts recognize that a subpoena in a civil context "has much lower stakes and does not impact the constitutional rights of any of the parties." *Dillon v. BMO*

Harris Bank, N.A., 2016 WL 447502, at *4 (N.D. Okla. Feb. 4, 2016). In fact, Think Finance concedes that this requested deposition would merely be “helpful” and “supplement its defenses.” (Opp. at 2-3.) With respect to its “limited Rule 45 discovery deposition on five discreet [sic] topics”¹ (*see* Mot. To Quash, Ex. B), Think Finance further concedes the very first requested topic in its Opposition and then fails to acknowledge that the remaining four topics are addressed to some degree in the sworn Declaration and Exhibits filed in support of MobiLoans’ Motion to Quash. *See* Mot. To Quash, Ex. A. Any further probing into these matters is merely a “fishing expedition,” which does not justify an invasion of the sovereignty of the Tribe and MobiLoans and its confidential and proprietary information regarding the use of its revenues for its tribal members. Accordingly, the Think Finance Subpoena should be quashed.

II. CONCLUSION

Think Finance, a private party with no constitutional rights at issue, is attempting to enforce a federal civil subpoena against MobiLoans, a non-party arm of a tribal sovereign. This it cannot do. A civil subpoena is a “suit” against a sovereign and is thus barred by sovereign immunity. Even if a balancing test were necessary, which it is not in this civil context where no constitutional rights are at issue, the undue burden on the sovereign rights of MobiLoans outweighs any alleged interests of Think Finance to supplement its civil case. MobiLoans

¹ The requested five Topics For Examination are:

1. Whether Mobiloans, LLC (“Mobiloans”) is an arm-of-the-tribe entity and whether it is entitled to full sovereign immunity protection.
2. Mobiloans’ activities in establishing and operating the installment loan program for which it utilized certain financial technology support services provided by one or more of the Think Defendants (the “Line of Credit Program”).
3. The Tunica-Biloxi Tribe’s (the “Tribe”) oversight and management of Mobiloans.
4. The importance of Mobiloans and the Line of Credit Program to the Tribe’s economic development and to other tribal interests.
5. The Tribe’s use of revenue from Mobiloans and the Line of Credit Program.

respectfully requests that this Court grant its Motion to Quash the Subpoenas to MobiLoans to Testify at Deposition in a Civil Action.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of July, 2018, a true and correct copy of MobiLoans' Motion to Dismiss Proceedings Without Prejudice was sent via email and a true and correct copy was sent via United States mail, first-class postage prepaid to each of the following:

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