RECORD NO. 18-1827

In The
United States Court of Appeals
For The Fourth Circuit

LULA WILLIAMS; GLORIA TURNAGE; GEORGE HENGLE; DOWIN COFFY; FELIX GILLISON, JR., on behalf of themselves and all individuals similarly situated,

Plaintiffs – Appellees,

v.

BIG PICTURE LOANS, LLC; ASCENSION TECHNOLOGIES, LLC,

Defendants – Appellants,

and

MATT MARTORELLO; DANIEL GRAVEL; JAMES WILLIAMS, JR.; GERTRUDE MCGESHICK; SUSAN MCGESHICK; GIIWEGIIZHIGOOKWAY MARTIN,

Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA AT RICHMOND

REDACTED REPLY BRIEF OF APPELLANTS

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Big Picture Loans, LLC ("Big Picture") and Ascension Technologies, LLC ("Ascension") (collectively, "Tribal Defendants"), appearing specially, submit this reply brief supporting their appeal.

INTRODUCTION

The Tribal Defendants have explained in detail why they are arms of the Lac Vieux Desert Band of Lake Superior Chippewa Indians, a federally-recognized tribe ("Tribe"), and thus entitled to sovereign immunity from unconsented suit. In response, Plaintiffs spend many pages disparaging the small-dollar lending industry, criticizing "payday lending" in general and *faux* tribal-lending models in particular. But this appeal is not a policy debate about consumer finance, or whether state or tribal law governs Plaintiffs' consumer loan agreements. It is a case about tribal sovereign immunity and two specific tribal entities: Big Picture and Ascension. As arms of the Tribe, they are immune from suit. The District Court erred holding otherwise. This case must be dismissed.

STATEMENT OF FACTS

Unfortunately, Plaintiffs operate outside the rules and distort the record:

First, Plaintiffs cite deposition testimony and documents that were not part of the record below. Plaintiffs' Response Brief ("Pls.' Br."), Dkt. No. 33 at 8-9, 13-14. Those improper citations include misleading snippets from the *deposition* of Matt Martorello, taken months *after* the District Court issued the opinion on appeal here.

Those citations are improper. *See Laroque v. United States*, No. 86-7705, 1987 U.S. App. LEXIS 18767, at *5 (4th Cir. June 22, 1987) (refusing to consider evidence not before district court). The record below does include any deposition from Martorello, only his declaration. JA 1096-1112.

Second, Plaintiffs rely on the District Court's statements as "proof" of facts that cannot be proven through the record. *See* Pls.' Br. at 3, 11, 13-14, 16, 21-25, 27-29, 38-42, 44, 46, 49-52, 54. Yet, the District Court's unfounded inferences are part of the issue here. Plaintiffs cannot substantiate those inferences simply by repeating them.

Third, Plaintiffs cite portions of the record that do not actually stand for the propositions for which they are cited.[1] While space does not allow a full exposition of the problem, Plaintiffs' record citations should be carefully checked.

Fourth, in their Statement of Issues, Sections A and B, Plaintiffs discuss state regulation of "payday" lenders and prior enforcement efforts against "rent-a-tribe" schemes. But, facts drawn from other cases about other types of lending are irrelevant here.

[1] [redacted].

Fifth, in Section C, Plaintiffs claim that Martorello's intent was to avoid individual liability under state usury law. But Plaintiffs' record citations do not support their claim. Moreover, *Martorello's* purpose does not affect the *Breakthrough* analysis, which asks only about the *Tribe's* purpose. *See infra* at II.B.

Sixth, Section D comments on the Tribe's participation in a 2013 lawsuit challenging New York regulators, *Otoe-Missouria Tribe of Indians v. New York State Dep't of Fin. Servs.*, 974 F. Supp. 2d 353 (S.D.N.Y. 2013), *aff'd*, 769 F.3d 105 (2d Cir. 2014). But, the focus in *Otoe-Missouria* was the *location* of the loan transaction, not whether the lenders were arms of the Tribe. The case is irrelevant.

Finally, Plaintiffs' Statement of Issues generally argues that the Tribal Defendants' personnel, operations, and revenue structure weigh against immunity. But, as shown below, Plaintiffs' facts are both incomplete and unpersuasive.

ARGUMENT

I. Plaintiffs bear the burden of proof.

Sovereign immunity, including tribal immunity, deprives a court of jurisdiction; and, when jurisdiction is challenged, plaintiffs bear the burden of proof:

- "The issue of tribal immunity is indeed jurisdictional…." *Bonnet v. Harvest (US) Holdings, Inc.*, 741 F.3d 1155, 1158 (10th Cir. 2014).
- "[P]laintiff bears the burden of persuasion if subject matter jurisdiction is challenged…." *Williams v. United States*, 50 F.3d 299, 304 (4th Cir. 1995) (case involving federal sovereign immunity).
- "When a Rule 12(b)(1) motion challenge is raised to the factual basis for subject matter jurisdiction, the burden of proving subject matter jurisdiction is on the plaintiff." *Richmond, Fredericksburg & Potomac R.R. v. United States*, 945 F.2d 765, 768 (4th Cir. 1991).

The Tribal Defendants' use of Rule 12(b)(1) to challenge jurisdiction was appropriate. *Pistor v. Garcia*, 791 F.3d 1104, 1111 (9th Cir. 2014). Thus, Plaintiffs should have borne the burden of proving jurisdiction. Indeed, that was the conclusion in two recent district court decisions in this Circuit granting motions to dismiss filed by tribal lending arms. *Everette v. Mitchem*, 146 F. Supp. 3d 720 (E.D. Va. 2015); *Howard v. Plain Green, LLC*, No. 2:17cv302, 2017 U.S. Dist. LEXIS 137229 (E.D. Va. Aug. 7, 2017).

Plaintiffs claim this settled jurisdictional principle does not apply because, unlike subject matter jurisdiction, tribal immunity can be waived. But, the ability to waive a jurisdictional defense cannot be controlling. *Personal* jurisdiction can also be waived; however, when personal jurisdiction is challenged, the plaintiff bears the burden of proof. *Grayson v. Anderson*, 816 F.3d 262, 267 (4th Cir. 2016) ("[T]he plaintiff bears the burden of demonstrating personal jurisdiction at every stage following such a challenge."). Plaintiffs also never explain how they bear the burden of proof on personal jurisdiction yet seek to place the burden of proof on the Tribal Defendants for the *more fundamental* issue of sovereign immunity.

Plaintiffs claim the Tribal Defendants should bear the burden of proof because they hold facts supporting immunity. But, the Tribal Defendants produced those facts, supporting their motion to dismiss with 44 exhibits.[2] Plaintiffs never challenged the veracity of that evidence, nor explained why they needed more. Nonetheless, they were permitted extensive jurisdictional discovery, which eliminated any concern about asymmetric information.

Plaintiffs cite *Hutto v. S.C. Retirement System*, where this Court held that *Eleventh Amendment* immunity "is akin to an affirmative defense, which the defendant bears the burden of demonstrating." 773 F.3d 536, 543 (4th Cir. 2014)

[2] Those exhibits show, *inter alia*, the creation of the Tribal Defendants under tribal law, the Tribe's purpose in creating those entities and its ownership of them, and the Tribe's intent to share immunity. *See* JA (Table of Contents), JA-372-742.

(citing multiple circuits). But, "tribal immunity implicates wholly different concerns than are raised by Eleventh Amendment immunity." *Contour Spa at the Hard Rock, Inc. v. Seminole Tribe of Fla.*, 692 F.3d 1200, 1208 (11th Cir. 2012) (citing *Lapides v. Bd. of Regents*, 535 U.S. 613, 623 (2002)). Indeed, at least one circuit cited in *Hutto* has ruled the other way on *tribal* immunity. *See Pistor*, 791 F.3d at 1111; *accord Hagen v. Sisseton-Wahpeton Cmty. College*, 205 F.3d 1040, 1043 (8th Cir. 2000) (tribal immunity is not "an affirmative defense that unless raised in an answer is waived").[3] This Court should follow *Hagen* and *Pistor*, decline to treat tribal immunity as an affirmative defense, and hold that Plaintiffs bear the burden of proof.

Finally, Plaintiffs do not refute the fact that the allocation of the burden of proof played a core role in the District Court's analysis of the *Breakthrough* factors. Thus, even standing alone, correctly allocating the burden of proof requires reversal. *See* Open. Br. at 30-31.

II. Plaintiffs' use of *Breakthrough* is flawed.

The key test for determining whether an entity is an arm of the tribe is found in *Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d

[3] "Tribal immunity is not synonymous with a State's Eleventh Amendment immunity, and parallels between the two are of limited utility." *Bodi v. Shingle Springs Band of Miwok Indians*, 832 F.3d 1011, 1020 (9th Cir. 2016) (citing *Three Affiliated Tribes*, 476 U.S. at 890 ("[B]ecause of the peculiar 'quasi-sovereign' status of the Indian tribes, the Tribe's immunity is not congruent with that which the Federal Government, or the States, enjoy.")).

1173, 1187 (10th Cir. 2010). While Plaintiffs purport to follow *Breakthrough*, they often deviate and use criteria not found there, but instead in a California variation, *People v. Miami Nation Enters*., 386 P.3d 357, 371 (Cal. 2016), which is effectively a different test, more intrusive and demanding than *Breakthrough*.

But, it is *Breakthrough* – not *Miami Nation* – that provides the prevailing federal standard, having been adopted by the Tenth and Ninth Circuits and by two federal district courts within *this* circuit. *See White v. Univ. of Cal.*, 765 F.3d 1010, 1025 (9th Cir. 2014);[4] *Everette*, 146 F. Supp. 3d at 722; *Howard*, 2017 U.S. Dist. LEXIS 137229, at *4. While the Tribal Defendants are immune under both *Miami Nation* and *Breakthrough*, there is no reason to follow the California state court. The prevailing *federal* standard should be used.

A. The method of creation favors immunity.

As Plaintiffs concede, "the first *Breakthrough* factor focuses on the 'law under which the entity was formed.'" Pls.' Br. at 38. Because the Tribal Defendants were created under *tribal* law – not *state* law – this factor favors immunity. The District Court agreed. JA 200. But, Plaintiffs want to attach a new inquiry to *Breakthrough*, asking, "'whether the tribe initiated or simply absorbed an operational commercial enterprise….'' Pls.' Br. at 38 (quoting *Miami Nation*, 386 P.3d at 372). Plaintiffs

[4] The Ninth Circuit uses only five of the six *Breakthrough* factors. *See* Tribal Defendants' Opening Brief ("Open. Br."), Dkt. No. 21 at 21.

assert that, because Big Picture "absorbed" Red Rock and Ascension "absorbed" SourcePoint, the first factor should be minimized. They are mistaken.

Plaintiffs cite *Breakthrough* to support their initiate-or-absorb inquiry (Pls.' Br. at 38), but that case does not even hint at the idea. And, while *Miami Nation* contains the language they quote, that decision neither cites authority nor offers analysis for its new standard (which was not actually used in the *Miami Nation* factual analysis and, thus, is only *dictum*). This Court should apply the first factor as found in *Breakthrough*, not in state court *dictum*.

Plaintiffs' appendage to the first factor is also irrelevant to the facts of this case, and it is contrary to the purposes underlying sovereign immunity. First, Big Picture and Ascension did not "absorb" Red Rock as an on-going business; there was no merger. To the extent that the Tribal Defendants acquired assets of SourcePoint, that acquisition took place in separate steps after Big Picture and Ascension were created.[5] Second, sovereign immunity is intended to promote economic self-sufficiency. Plaintiffs would undercut that goal by limiting tribes to their own "start-up" operations, rather than allowing them to acquire and profit from already-established businesses. Finally, when sovereigns create new arms to

[5] Big Picture was created in August 2014, but it obtained Red Rock assets in February 2016. JA-165, 174. Red Rock then dissolved. JA-165, 174. Ascension was created in February 2015, but its acquisition of SourcePoint's assets from TED did not happen until January 2016. JA-165-68.

"absorb" earlier, non-sovereign entities,[6] the new entities are entitled to immunity even after absorbing their predecessors. *E.g.*, *Maysonet-Robles v. Cabrero*, 323 F.3d 43 (1st Cir. 2003) (Puerto Rico immunity successfully asserted); *Kroll v. Bd. of Trs. of Univ. of Ill.*, 934 F.2d 904 (7th Cir. 1991) (Illinois immunity successfully asserted); *Atl. Richfield Co. v. Pueblo of Laguna*, No. 1:15-cv-56-JAP/KK, 2016 U.S. Dist. LEXIS 192041 (D.N.M. Feb. 22, 2016) (tribal immunity successfully asserted, except where expressly waived).

In sum, the fact that Big Picture and Ascension acquired other assets is irrelevant. Both Tribal Defendants were formed under tribal law. The first factor favors immunity.

B. The purpose factor favors immunity.

The second *Breakthrough* factor examines the "purpose" of the tribal entities. 629 F.3d at 1187. Plaintiffs concede that the Tribe's "stated purpose" in creating the Tribal Defendants was raising revenue for the Tribe and that this favors immunity. *See* Pls. Br. at 39-40. This should be the end of this inquiry. Courts do not typically look behind official statements of legislative purpose to hunt for improper motives. *See, e.g.*, *Va. Uranium, Inc. v. Warren*, 848 F.3d 590, 598 (4th Cir. 2017) ("[C]ourts 'will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive.'") (quoting *United States v. O'Brien*, 391 U.S. 367, 383

[6] While Red Rock was entitled to immunity, the issue was never litigated.

(1968)). But, to distract the Court from the *Tribe*'s purpose in creating those entities, Plaintiffs speculate about *Martorello's* purpose, as a businessman, in dealing with the Tribe. His purposes are irrelevant under *Breakthrough*.

In any business arrangement, each party will enter the deal for its own reasons. Because Martorello's motives are not relevant to sovereign immunity, it is not necessary to respond in detail to Plaintiffs' distorted history.[7] What matters is the *Tribe's* purpose. *See* Open. Br. at 36-38; JA-164-65, 262.

Unable to refute this logic, Plaintiffs pretend the Tribe's only purpose was to help Martorello. But Plaintiffs never explain why the Tribe would be so altruistic. Besides, not even the District Court went that far. Indeed, the District Court recognized the Tribe's actions were aimed at "earn[ing] more money," which is decisive on this factor. Open. Br. at 37 (quoting JA-164-65). And, where the District Court conceded that "the Tribe's intent *no doubt* was, in part, to help the Tribe," JA-222 (emphasis added), Plaintiffs leave out that part and, instead, talk only about

[7] Any suggestion that Martorello was motivated to form the lending enterprise to avoid state usury law is unsupported by the record. The Tribe approached Martorello in 2011 after independently deciding to explore tribal lending, *not* the other way around. JA 1098. This was well before the 2014 *Otoe-New York* litigation that the District Court somehow found material. Moreover, Martorello has never had any role in the Tribal Defendants' operations. JA-1108-1110. A chronology of the Martorello-Tribe relationship is found in Martorello's declaration. *See* JA 1096-1112. These facts are significant because the District Court's faulty inferences swayed its decisions on *Breakthrough* factors 1, 2, 4, and 6.

"help[ing] Martorello and Bellicose … avoid liability." Pls.' Br. at 40. The Tribe's documented desire to raise revenue must carry the day.

Plaintiffs' arguments have other flaws. Sovereign immunity is a threshold inquiry, taking place *before* addressing the merits. Plaintiffs want to reverse this settled order by making immunity depend on the merits of their case. And, even then, Plaintiffs' chief focus is not the supposed merits of their case against the Tribal Defendants, but the supposed merits of their case against Martorello. That is not the law.

Relying on *Miami Nation* rather than *Breakthrough*, Plaintiffs invoke a misplaced "effectiveness" test in their "purpose" analysis. Open. Br. at 39-42. Even then, Plaintiffs get it wrong. They list – *conjunctively* – several factors that *Miami Nation* says determine whether the tribal entity serves its stated purpose. Pls.' Br. at 40. But, *Miami Nation* actually uses a *disjunctive* approach:

> An entity whose declared purpose is to further the tribe's economic development may bolster its case for immunity by proving, for example, [1] the number of jobs it creates for tribal members ***or*** [2] the amount of revenue it generates for the tribe.

386 P.3d at 372-73 (emphasis added). The entity need not do both.

Thus, even under *Miami Nation*, the fact that Tribal Defendants do not employ large numbers of tribal members does not make this second factor weigh against

immunity.[8] JA-263. Instead, this factor favors immunity because of the large income stream flowing into tribal coffers from Big Picture. *See infra* at II.E (discussing the fifth factor, financial relationship). The key point is that the Tribal Defendants serve the purpose of raising tribal revenue. Even with the District Court's now-obsolete numbers, 30% of the Tribal treasury's revenue was projected to come from Big Picture. The actual figure for the first three quarters of 2018 was 42%. Soon the figure will exceed 60%. *See id.*

Continuing their misplaced reliance on *Miami Nation*, Plaintiffs say the Tribal Defendants' "operation primarily benefits Martorello and his businesses rather than the tribe." Pls.' Br. at 42. But, they disregard key facts:

- Eventide is the only Martorello-related entity receiving payments from the Tribal Defendants, and those payments are for the *purchase of assets*. For the purchaser to pay a fair price to the seller does not "enrich" one any more than the other. Both parties benefit by the exchange. There is no evidence the purchase price exceeded the value of the assets acquired.

[8] Nor does it matter how many raises Big Picture employees have received or how much each one makes compared to each other or compared to Ascension employees, especially since Plaintiffs point to no evidence that anyone is being paid above or below market wages. *See* Open. Br. at 42.

- Given the payment agreement, the Tribe has *always* received its "off the top" percentages of gross revenues, while at times Eventide has received *nothing*. JA-170-71.
- In January 2023, any unpaid balance of the note must be forgiven, and the money now going to Eventide will flow entirely to the Tribe as profit. Thus, the allocation of revenues favors the Tribe. JA-168-71.

Plaintiffs argue that, under *Breakthrough,* the Tribal Defendants must trace the revenue they generate not only *into* the Tribal treasury but also *out of* the Tribal treasury to "specific allocations." Pls.' Br. at 43. Not so. First, while *Breakthrough* provides some information about how the tribe there allocated its casino revenue among various purposes, it did not say that such itemization was *necessary* to find immunity. Second, even *Breakthrough's* information about revenue allocation is very general, listing only four broad categories: general fund, economic development fund, trust fund, and per capita distributions. 629 F.3d at 1192-93. *Breakthrough* does not consider allocations *out of* the general fund, which is what Plaintiffs fault the Tribal Defendants for not providing here. Third, the Tribal Defendants have shown that 3% of Big Picture's gross revenue go to the general fund, and 2% to reinvestment. JA-168-69. This level of information is no less specific than the facts in *Breakthrough*. *See* 629 F.3d at 1192-93 (describing financial relationship between casino and tribe).

C. Structure, ownership and management favor immunity.

While the third *Breakthrough* factor encompasses three elements, Plaintiffs do not challenge: (1) the tribal business structure; or (2) tribal ownership, effectively conceding that they favor immunity. *See* Pls.' Br. at 43.

As for the third element – management – Plaintiff distort *Breakthrough* by invoking *Miami Nation*, shifting the focus from the entity's *overall* management to a narrower inquiry: "*day-to-day* management." *Miami Nation*, 386 P.3d at 373 (emphasis added). But, even *Miami Nation* made it clear that "[a]n entity's decision to outsource management to a nontribal third party *is not enough, standing alone, to tilt this factor against immunity*." *Id.* (emphasis added).

Plaintiffs muddle this passage. They quote the part about "outsourc[ing] management to a nontribal third party" but leave out the key part (shown above in italics) that greatly limits the relevance of outsourcing. *See* Pls.' Br. at 46. Moreover, the only "outsourcing" that Plaintiffs mention is Big Picture's outsourcing to Ascension, an entity owned by *the Tribe*. And, Ascension is not a manager. Plaintiffs' analysis also falls short in other ways:

Big Picture: Even though Big Picture is the only lender in this lawsuit – and Big Picture originates all loans, collects on all debts, and provides all customer service – Plaintiffs have little to say about the management of Big Picture. Rather, Plaintiffs want to fault Big Picture for relying heavily on services provided by

Ascension. But there is no fault to be found. Ascension uses analytics to recommend customers to Big Picture, but those recommendations are only implemented upon Big Picture's approval. JA-147. Indeed, the reason the Tribe purchased Bellicose and established Ascension was to bring those services "in-house," thereby promoting cost savings and economic development. JA-166. Moreover, whether it is legal advice, accounting advice, or, as here, other professional advice, companies rely on outside advice all the time. A tribal enterprise's use of this commonly-accepted business practice should not weigh against immunity.

Ascension: Despite the Tribal oversight and limitations on delegated authority, Plaintiffs complain that the *day-to-day management* of Ascension is undertaken by a non-tribal president, McFadden, and they argue that this is conclusive of this entire *Breakthrough* factor. Pls.' Br. at 46-47. But again, not even *Miami Nation* allows such a result. Indeed, if tribal enterprises were required to find top business leadership within the tribe, where population is sparse and educational opportunities notoriously below par, many businesses would be placed beyond tribal reach and tribal economic development would be frustrated. Moreover, Plaintiffs seek to destroy the very income stream needed by the Tribe to educate Tribal members for such sophisticated work.[9]

[9] *See* JA-49, 51 at ¶¶ 102, 116 (seeking injunction "prohibiting Defendants from continuing to engage in the Enterprise; and ordering the dissolution of each entity that has engaged in the Enterprise.").

Plaintiffs further complain that Hazen and Williams, the two tribal members appointed to oversee McFadden, have so far not overridden his decisions. But, McFadden does not work in isolation. Plaintiffs ignore the collaboration that precedes McFadden's recommendations, just as they ignore the scores of recommendation and approval forms in the record. JA-1202-18. As for *overriding* McFadden, what matters is that Hazen and Williams clearly have that authority, as needed. As the District Court noted, McFadden "must report regularly to Hazen and Williams" and "must obtain co-manager approval for changes in operations, personnel, and distributions." JA-175-78. If Hazen and Williams have not overruled McFadden, that only shows that they are satisfied with his management of a business that is indisputably performing well.

Plaintiffs further complain that Ascension has no employees who are Tribal members. Pls.' Br. at 46, 48. But, not even *Miami Nation* says that the third factor looks at *employee* statistics.

Plaintiffs then complain that Ascension "does not typically operate from the tribe's reservation." Pls.' Br. at 48. But, not even *Miami Nation* says it must, and the U.S. Supreme Court has made it clear that tribal immunity is not confined to on-reservation activities. *Kiowa Tribe v. Mfg. Techs.*, 523 U.S. 751, 760 (1998) ("Tribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a

reservation."). Indeed, the Tribe's ancestral home and Reservation is located in Michigan's geographically-remote Upper Peninsula, a difficult place to find the type of technical expertise Ascension needs. The place of Ascension's operations has no bearing on its sovereign immunity.

Plaintiffs distort *Miami Nation* yet again when they equate "a high degree of practical control" by outsiders with the conclusion that the Tribe is not "enmeshed in the direction and control of the businesses." Pls.' Br. at 48. *Miami Nation* treats these as separate considerations. *See* 386 P.3d at 377. Indeed, *Miami Nation* is quite explicit: "[C]ontrol of a corporation need not mean control of business minutiae; the tribe can be enmeshed in the direction and control of the business without being *involved in the actual management*." 386 P.3d at 373 (emphasis added). The Tribe meets that standard here. *See* Open. Br. at 47-50.

In sum, both Tribal Defendants satisfy the third *Breakthrough* factor. *See* Open. Br. at 43-50.

D. The Tribe intended to share its sovereign immunity.

The fourth *Breakthrough* factor asks whether the tribe *intended* to share its immunity with the entity. Here, the Tribe clearly documented that intent. Open. Br. at 50-51. Plaintiffs should simply concede this factor. Instead, they distort it by conflating it with the purpose factor, an entirely separate inquiry. *See supra* at II.B.

Plaintiffs also distort *Miami Nation* by wrongly implying that, *even for this particular factor*, "a formal statement of immunity is not sufficient to tip the balance in favor of immunity." Pls.' Br. at 49 (quoting *Miami Nation* 386 P.3d at 379). But, the quoted passage of *Miami Nation* simply means that the overall balance must weigh *all* factors, not just this one. The Tribe's unequivocal statements of intent make *this factor* favor immunity.

E. The financial relationship supports immunity.

The fifth *Breakthrough* factor looks at the financial relationship between the tribe and the entities claiming immunity. As Plaintiffs concede, a tribe's treasury need not be directly exposed to enforcement of a judgment in order for this factor to favor immunity. Pls.' Br. at 50. Indeed, tribal liability for a judgment is not even the predominant consideration, as the District Court recognized. JA-222-23.

Plaintiffs offer a two-prong test from *Miami Nation*, asking whether: "(1) a significant percentage of the entity's revenue flows to the tribe, or (2) if a judgment against the entity would significantly affect the tribal treasury." Pls.' Br. at 50 (quoting 386 P.3d at 373). While an entity only need prevail under one prong, the Tribal Defendants prevail under both.[10]

[10] This test implicitly recognizes the Tribe's treasury as the appropriate endpoint for examining the flow of money, underscoring the District Court's error in faulting the Tribal Defendants for not tracing revenue *out of* the treasury to various tribal services. *See* Open. Br. at 40, 53, *infra* at II.E.i.

i. A significant p.ercentage of revenue flows to the Tribe.

The term "revenue," as used by *Breakthrough* must mean "net revenue" or profits, not "gross revenue." Otherwise, it would be a strike against immunity for tribes to engage in enterprises where actual profits are a small fraction of overall revenues, including non-profit and community-oriented entities. The Tribal Defendants already noted the distinction between gross and net revenues. *See* Open. Br. at 53. Plaintiffs offer no rebuttal.

Even so, Plaintiffs persist in focusing on the percentages of Big Picture's *gross revenue* that flow to the Tribe. Pls.' Br. at 50. These percentages are 3% of gross revenue for the general fund and 2% of gross for reinvestment. JA-829, JA-959. That arrangement has brought millions into the Tribal treasury, and there have been *no profits* – for anyone – beyond these sums. That is because, after the Tribe is paid off the top and operating expenses are then paid, the balance, if any, is used to retire the note by which the Tribe acquired the assets of the Martorello companies.[11]

[11] Plaintiffs suggest these note payments are not really asset acquisition payments but are instead profits in disguise. Pls.' Br. at 20. But, the District Court made no such finding. And no such evidence exists. Moreover, for their theory to work, Plaintiffs would need to show, at a minimum, that the asset acquisition costs were unreasonably high. Again, the District Court made no such finding, and even now, Plaintiffs fail to make any such claim about the value of the assets, much less prove it with a record citation.

Moreover, when the note payments cease (January 2023), all revenue now used for acquisition costs will also come to the Tribe as profits. Plaintiffs say that the Court must not consider the future, only the present. Pls.' Br. at 51-52. Plaintiffs offer no authority for such a short-sighted view. Indeed, planning for five or seven years is simply prudent budgeting.

ii. A judgment against the Tribal Defendants would significantly affect the Tribal Treasury.

Plaintiffs try to minimize how a judgment against the Tribal Defendants would affect the Tribal treasury, contending that "*Breakthrough* does not support the argument that *any* reduction in payment is enough." Pls.' Br. at 51. That is wrong. In *Breakthrough*, this factor favored immunity because "*any* reduction in the Casino's revenue that could result from an adverse judgment against it would therefore *reduce the Tribe's income*." 629 F.3d at 1195 (emphasis added). The same is true here.

Searching for a distinction, Plaintiffs claim the casino in *Breakthrough* netted that tribe a "million-per-month," which is more than the Tribe receives in this case. Pls.' Br. at 52. But, the million-per-month claim is inaccurate. *See Breakthrough*, 629 F.3d at 1194-95 ("the district court's finding concerning the minimum payment was clearly erroneous."). Moreover, the purported distinction makes no difference. Sovereign immunity is not just for richer tribes. And, the $5 million (and counting)

received by the Tribe since Big Picture began operations in 2015 is certainly not *de minimis*.

Plaintiffs argue that any monetary losses resulting from a judgment against Big Picture would be felt "primarily" by the noteholder, Eventide, rather than the Tribe. Pls.' Br. at 52. But, regardless of whose payments may now be greater, Plaintiffs are in no position to compare the *needs* of the Tribe versus those of Eventide. Besides, the test is not who would be hurt *the worst* by any judgment against the Tribal Defendants, but simply whether the Tribe would be hurt. Clearly it would be.

iii. The Tribe's dependence on Big Picture continues to grow.

As previously noted, the District Court looked at revenue figures and percentages from September 2017. Open. Br. at 41, n.12. Those figures showed that Big Picture was contributing over 10% of the Tribe's general fund and that, soon, that figure would exceed 30%. *Id.* at 40 (citing JA-179, 208). Even so, in their opening brief (October 2018), the Tribal Defendants noted that the September 2017 assessment figures did not fully reflect their current success, or Tribe's current dependence on Big Picture revenues. *Id.* at 41, n.12.

In response, Plaintiffs preemptively seek to minimize updated figures contained in a Tribal Resolution adopted in December 2018. Pls.' Br. at 51, n.9

(discussing Tribal Resolution T2018-086).[12] Plaintiffs complain that the resolution "offers no breakdown how the revenue is allocated to tribal services." *Id.* But, again, no such breakdown is required. *See supra* at II.B. What matters is that, with casino revenue having dried up completely, revenue from Big Picture now accounts for ***42%*** of the Tribe's income, the largest single source of Tribal revenue. The second largest source of revenue (32%) is a management agreement involving another Indian tribe. But, as the 2018 Tribal Resolution notes, that agreement is expected to expire early next year (March 2020), thereby eliminating nearly a third of the Tribe's current income and making the Tribe even more dependent on its Big Picture revenues. Destroying Big Picture and Ascension, as Plaintiffs seek to do, would be catastrophic for the Tribe. JA-179, 208.

F. Big Picture and Ascension fulfill the purposes underlying tribal immunity.

As previously noted, the Ninth and Tenth Circuits are divided on whether the immunity analysis should contain a sixth factor: whether "the policies underlying tribal sovereign immunity … are served by granting immunity to the economic entities." *Breakthrough*, 629 F.3d at 1187-88. This factor, if considered, also

[12] That resolution is the subject of a motion for judicial notice, based on the resolution's status as a tribal government's official record. Although the Court has not yet ruled on that motion (filed contemporaneously with this brief), the Tribal Defendants will discuss the resolution in anticipation of a favorable ruling, especially since Plaintiffs have already done so.

weighs in favor of immunity. *See* Open. Br. at 54-58. In response, Plaintiffs say very little, leaving most of the Tribal Defendants' analysis unanswered.

Not that Plaintiffs could say much. Given the Tribe's increasing dependence on money from Big Picture – and the exponentially greater infusion of cash that will come when the note is paid off in 2023 – it is obvious that immunity serves the policy of "protection of the tribe's monies." *Breakthrough*, 629 F.3d at 1188. Equally obvious is that "commercial dealings between Indians and non-Indians," *id.*, are promoted when the Tribe conducts business with the larger society.

Even so, Plaintiffs recycle their claim that the Tribal Defendants primarily enrich non-tribal entities, Pls.' Br. at 53, but that claim has already been refuted. *See supra* at II.B. Moreover, the relevant question is whether the Tribal Defendants benefit the Tribe (which they clearly do), not whether someone else also may benefit, which is always the case when business transactions are successful.

Nor can Plaintiffs gain ground by pretending to care about the welfare of *hypothetical* tribes, even as they seek to destroy the major source of income for *this* Tribe and attempt to set damaging precedent for untold other tribes through their faulty arguments. Plaintiffs say that immunity should be denied because the deal the Tribe made was not good enough. But who are they to say so? And by what judicial standard do they make their claim? They never say. Indeed, they have disdained use of the business judgment rule, *see* Pls.' Br. at 45 n.8, and the District Court never

sought to apply that rule. *See* Open. Br. at 30, 42. Plaintiffs' approach not only breeds uncertainty, it is the exact sort of paternalistic rationale that has ripped away tribal opportunities for *many* years and that undermines the purposes of tribal sovereign immunity.

G. The overall weight of the factors favors immunity.

In summation, a federal-recognized Indian tribe created two business entities under Tribal law (factor one), with the purpose of making money for the Tribal treasury (factor two), and with the unambiguous intent of sharing its immunity (factor four). The structure and ownership of the two business entities is 100% tribal (factor three), and even using *Miami Nation*, the Tribe remains "enmeshed in the direction and control of the business," 386 P.3d at 377 (also factor three). As for the financial relationship (factor five), the Tribe depends upon the Tribal Defendants for a major portion of its revenue (42%) to operate its Tribal government and provide essential government programs and services, and that dependence continues to rise. Finally, under these circumstances, "the policies underlying tribal sovereign immunity . . . are served by granting immunity to the economic entities." 629 F.3d at 1187-88 (factor six).

While a tribal enterprise need only prevail on the *overall* balance, the Tribal Defendants prevail on *every* factor – and they do so even if they bear the burden of proof. The decision of the District Court should be reversed.

III. Plaintiffs' *Amici* advance flawed arguments.

Two *amici* groups support the Plaintiffs: a group of States ("*Amici* States") and the Center for Responsible Lending ("CRL"). While the *Amici* come to this case with great zeal, they joust at dragons of their own imagining. Their policy arguments are not only factually misplaced, they have no bearing on the immunity issue before the Court.

A. The "payday" lending concern is misplaced.

The *Amici* States proclaim their interest in "regulating payday lenders." ECF No. 37 ("State Br.") at 1. The CRL likewise opposes the "harms of payday lending." ECF No. 36 ("CRL Br.") at 2. But, the Tribal Defendants are not "payday lenders." Payday lending "general involves small sums that become *due on the borrowers next payday*." State Br. at 4 (emphasis added). This is not the financial product the Tribal Defendants provide, as shown by Plaintiffs' own Complaint. *See* JA 231-36 (loan agreement with 21-month term).[13]

Moreover, the *Amici's* policy concerns are irrelevant to the arm-of-the-tribe determination. Even *Miami Nation* correctly recognized that "tribal immunity does not depend on [the court's] evaluation of the respectability or ethics of the business in which a tribe or tribal entity elects to engage." 386 P.3d at 375. Indeed, whether

[13] Big Picture loans vary in term-length, up to 48 months. JA-299.

the defendant sovereign is a tribe, a State or the United States, sovereign immunity is only raised in response to a complaint about what the sovereign has done.

B. The *Amici's* regulatory concerns are misplaced.

The *Amici* States "seek to protect their ability to enforce state usury and consumer lending statutes." State Br. at 1. But, *state* authority cannot be enhanced at the expense of tribal sovereignty, which is an aspect of *federal* law. *Kiowa*, 523 U.S. at 755 (tribal immunity "is not subject to diminution by the States."). Thus, state policy interests are simply not a factor in *Breakthrough*. Moreover, States would clearly not accept diminishment of sovereignty if the immunity of their own institutions were at stake. They should not expect Indian tribes to do so. Besides, the issue of sovereign immunity is wholly distinct from the issue of state regulatory jurisdiction. *E.g.*, *Kiowa*, 523 U.S. at 755 ("To say substantive state laws apply … is not to say that a tribe no longer enjoys immunity."). Thus, almost all of the *Amici* States' brief is a red herring.

The *Amici* States also overlook *federal* oversight of tribal lending.[14] Clearly, Congress can regulate tribal lending, just as it can limit tribal immunity. But, any

[14] Despite one circuit's ruling, the breadth of CFPB authority remains unsettled. *See Consumer Fin. Prot. Bureau v. Great Plains Lending, LLC*, 846 F.3d 1049, 1056-58 (9th Cir. 2017) (upholding CFPB's authority to issue civil investigatory demands to tribal-arm lenders). But, no one doubts that federal regulators may enforce current federal consumer protection law against non-sovereign parties if the law has been violated.

such decisions must be left to Congress. In the meantime, courts should apply existing principles of tribal immunity. *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2030-31 (2014) ("[U]nless and 'until Congress acts, the tribes retain' their historic sovereign authority.") (quoting *United States v. Wheeler*, 435 U.S. 313, 323 (1978)).

C. The CashCall/Western Sky cases.

The *Amici's* extensive references to CashCall and Western Sky Funding do not help Plaintiffs. *Amici* States claim those companies made – and lost – immunity arguments "similar to that of appellants here." State Br. 16. That claim is wrong. Arm-of-the-tribe immunity was not – and *could not* have been – an issue because *no Indian tribe* was meaningfully involved with CashCall or Western Sky, only an individual tribal *member*. As one court explained:

> Western Sky "is not owned or operated by an Indian tribe, is not a tribal entity, and does not exist for the benefit of a tribe." Rather, the state alleges that Western Sky is a South Dakota limited-liability company whose sole member holds himself out to be a member of the Cheyenne River Sioux Tribe (the CRST). The CRST did not approve Western Sky's creation, and Western Sky's profits do not benefit the tribe.

State v. Cashcall, Inc., Nos. A13-2086, A14-0028, 2014 Minn. App. Unpub. LEXIS 897, at *4-5 (Minn. Ct. App. Aug. 18, 2014); *see also W. Sky Fin., LLC v. State of Ga.*, 793 S.E.2d 357, 366 (Ga. 2016) (immunity claim based on ownership by tribal *member*); *District of Columbia v. CashCall, Inc.*, No. 2015 CA 006904, 2016 D.C. Super. LEXIS 8, at *9-10 (D.C. Sup. Ct. July 11, 2016) (immunity claim relied on

affidavit "stat[ing] only that Western Sky … had a license to operate on the Reservation."). Attorney General investigations of CashCall are even further removed because CashCall never claimed to be owned by any tribal member, much less a tribe.

Indeed, the Cash Call/Western Sky cases actually undermine *Amici's* argument because they provide examples of state regulators taking effective action against the *faux* tribal lending problem they say concerns them – without infringing on tribal sovereign immunity. Indeed, the facts in the CashCall/Western Sky cases are the *exact opposite* of the case here. The opposite result should also be reached, just as it was in *Howard, supra*, and *Everette*, *supra.*

CONCLUSION

The Court should rule for the Tribal Defendants and grant the relief sought in their Opening Brief.

Respectfully submitted,

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Dated: February 15, 2019

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 15th day of February, 2019, I caused this Redacted Reply Brief of Appellants to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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