

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION**

NORMAJEAN WEIDLEY and
ELLEN OKRZESIK,

Plaintiff,

v.

AANIIH NAKODA FINANCE, LLC
d/b/a BRIGHT LENDING, et al.

Defendants.

Case No. 5:22-cv-00905-LCB

**DEFENDANT AANIIH NAKODA
FINANCE, LLC'S BRIEF IN
SUPPORT OF MOTION TO
DISMISS SECOND AMENDED
COMPLAINT**

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Defendant Aaniiih Nakoda Finance, LLC (ANF) is an economic development enterprise and arm of the Fort Belknap Indian Community of the Fort Belknap Reservation of Montana (FBIC or the Tribe), a federally recognized Indian tribal community comprising the Assiniboiné (Nakoda) and Gros Ventre (Aaniiih) Tribes. *See* 87 Fed. Reg. 4636-02 (Jan. 28, 2022) (listing federally recognized tribes). It is well settled that federally recognized Indian tribes such as FBIC and their arms and instrumentalities such as ANF enjoy sovereign immunity from unconsented lawsuits. *See, e.g., Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014); *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 760 (1998); *Alabama v. PCI Gaming Auth.*, 801 F.3d 1278, 1287-88 (11th Cir. 2015). This broad immunity covers the claim(s) asserted against ANF in the Second Amended Complaint (SAC, Dkt. 83) and deprives the court of subject matter jurisdiction over them. The court therefore should dismiss Plaintiffs' claim(s) against ANF with prejudice.

Plaintiffs' claims also should be dismissed due to lack of standing. The SAC shows that both Ms. Weidley and Ms. Okrzesik have borrowed more from ANF than they have repaid. Accordingly, neither Plaintiff has suffered a cognizable injury sufficient to confer standing.

Finally, Plaintiffs' claims should be dismissed pursuant to Rule 19 because the Tribe is a required party that cannot be joined due to sovereign immunity.

FACTUAL BACKGROUND

I. The Arms of the Tribe

The Fort Belknap Reservation is located in a remote part of northern Montana. Declaration of Jeffrey Stiffarm (Stiffarm Decl.), filed herewith, ¶ 3. Due to its remote location, the Reservation presents limited opportunities for local economic development and governmental revenue for the FBIC. *Id.* Poverty rates on the Fort Belknap Reservation hover near 50%, while national poverty rates are less than 15%.¹ In an effort to improve the economic situation of its members, the FBIC has established several tribal business instrumentalities pursuant to tribal law. *Id.* ¶ 4. These include the Fort Belknap Planning and Development Corporation, d/b/a Island Mountain Development Group (IMDG), and Defendant ANF, as well as additional tribally owned and operated entities like Aaniiih Nakoda Servicing, LLC (ANS) and GVA Holdings, LLC (GVA Holdings) that support IMDG and ANF. *Id.*

A. IMDG

The FBIC, through the Fort Belknap Indian Community Council (the Council) that constitutes the Tribe's governing body, created IMDG years ago to coordinate the Tribe's business planning and development activities, provide training resources and economic opportunities for tribal members on the Fort Belknap Reservation,

¹ This data, which is published on the website for the Federal Reserve Bank of Minneapolis (*see* <https://www.minneapolisfed.org/indiancountry/resources/reservation-profiles/fort-belknap-reservation>, last visited Aug. 1, 2023), is subject to judicial notice as it may be readily determined from a source the accuracy of which cannot reasonably be questioned. *See* Fed. R. Evid. 201(b)(2).

generate revenue for the tribal government, and benefit tribal members. *Id.* ¶ 5 & Ex. A. IMDG was established and chartered under tribal law by Council resolution. *Id.* ¶ 5 & Exs. A-B.

Pursuant to its charter, ownership in IMDG is “limited, as the intent of the Fort Belknap Community Council in establishing this organization is to create a corporation, wholly owned by the Fort Belknap Community Council, or its members, employees or contractors, for the people of the Fort Belknap Indian Reservation.” *Id.* ¶ 6. IMDG remains and has always been wholly under tribal ownership and control since its inception. *Id.* The Council must approve any new or amended IMDG bylaws. *Id.* The Council retains the rights to fill any vacancies on the IMDG Board, to remove any member of the IMDG Board, and to override any action of the Board to remove one of its own members. *Id.* In fact, the current IMDG Board consists exclusively of members of the Council. *Id.* ¶ 7; ANF 30(b)(6) Deposition Transcript (ANF 30(b)(6)), filed herewith as Ex. A to Declaration of Mark Reeves, at 71:21-25, 72:12-15. IMDG’s charter also requires it to file quarterly and annual reports with the Council regarding its financial situation and all business activities that it has undertaken or plans to undertake. Stiffarm Decl. ¶ 6. The Tribe has authorized IMDG to “sue and be sued, on any contract claim ... *to the extent and only to the extent* specifically set forth in any such contract.” *Id.*, Ex. B, ¶ 11.A (emphasis added).

IMDG was “specifically organized for the purpose of making a profit on its operations to benefit the people of the Gros Ventre and Assiniboine Tribes of the Fort Belknap Indian Community.” *Id.*, Ex. C at 1 & Ex. B ¶ 3. In furtherance of this goal, IMDG has undertaken a variety of business ventures including the acquisition and leasing of off-reservation commercial real estate, residential construction, public and private consulting and contracting services, and online consumer lending. Declaration of Evan Azure (Azure Decl.) ¶ 5. IMDG also has established the Montana Native Growth Fund, a community development financial institution situated on the Fort Belknap Reservation that promotes sustainable tribal home ownership through financial education and credit access, and it has partnered with the Fort Belknap Tribal Housing Authority to build and remediate homes for tribal members on the Reservation. *Id.* It also funds and oversees multiple non-profit entities, including a high school internship program and a college scholarship program, for tribal members. *Id.*

IMDG distributes 20% of its net income from these business ventures directly to the Tribe to support the Tribe’s provision of governmental services and uses the remainder to invest in tribal economic development programs, including reinvestment in the business managed by IMDG, or to fund direct distributions to tribal members. *Id.* ¶ 6; ANF 30(b)(6) at 66:20-23. IMDG distributions typically account for approximately 75% of the Tribe’s total non-federal budget. Stiffarm

Decl. ¶ 9. The Tribe's lending entities generate over 90% of IMDG's revenue. Azure Decl. ¶ 8. Any reduction in IMDG revenues would adversely affect the Tribe's ability to fund governmental services for its members. *Id.* These services include general funding for the tribal land department and communications, the Tribal Employment Rights Office, and tribal electric, waste, and sewer programs. *Id.* ¶ 8.

IMDG also directly funds tribal capital projects to benefit tribal members—for example, IMDG is developing and managing a tribal wellness center and recently dedicated more than \$2.5 million to developing housing for FBIC members above and beyond its standard income distribution to the Tribe. *Id.* ¶ 10; Azure Decl. ¶ 7; ANF 30(b)(6) at 67:11-19. No entity outside the Tribe has any interest or share in the profitability of IMDG. Stiffarm Decl. ¶ 11; ANF 30(b)(6) at 71:14-17.

In addition to its direct financial support of the Tribe, IMDG is a major employer of tribal members. Azure Dec. ¶ 9. It currently employs approximately 243 enrolled tribal members, notably including its CEO, Defendant Evan Azure, as well as several tribal member spouses and descendants. *Id.*

B. ANF

In furtherance of its efforts to generate economic development opportunities, the Tribe began engaging in online consumer lending in 2011. *Id.* ¶ 10; ANF 30(b)(6) at 15:4-13. Initially, the Tribe relied on third parties to help the Tribe build capacity and develop an understanding of the online consumer lending business and

regulatory framework so that it could ultimately assume full management responsibility for its lending operations. Azure Decl. ¶ 10; ANF 30(b)(6) at 16:9—18:20, 22:7-19. At the end of 2017, the Tribe felt that it had learned the business well enough to manage it on its own, so it terminated its third-party management agreement and established a new tribal lending entity in the form of ANF. Azure Decl. ¶ 11; ANF 30(b)(6) at 22:20—23:3.

The Tribe established ANF as a limited liability company under tribal law. *See* Azure Decl. ¶ 12, Ex. A at 1, & Ex. B ¶ 2.1. The FBIC, through GVA Holdings, is the sole the member/owner of ANF.² *Id.* ¶ 13, Ex. A at 1, & Ex. B ¶ 1.9; ANF 30(b)(6) at 22:7-23:11, 37:20—38:3. ANF is a manager-managed LLC managed exclusively by the Tribe through IMDG since its formation. Azure Decl. ¶ 13, Ex. A at 1, & Ex. B ¶ 1.8; ANF 30(b)(6) at 37:20—38:8, 71:21-25. IMDG’s

² GVA Holdings is a limited liability company established by the Tribe pursuant to tribal law. *See* Azure Decl. ¶ 17, Ex. C, & Ex. D ¶ 1.9. It is a manager-managed LLC that is wholly owned by the Tribe and managed by IMDG. *See id.*; ANF 30(b)(6) at 23:8-11, 35:8—37:13, 57:1-9, 72:7-11. IMDG makes all management and financial decisions involving GVA. Azure Decl. ¶ 17; ANF 30(b)(6) at 57:1—58:4. All GVA services are provided through leased IMDG employees, and any profit that it generates is transferred to IMDG. Azure Decl. ¶ 17; ANF 30(b)(6) at 55:8-15, 56:6-10. The Tribe expressly intended for GVA to share the Tribe’s sovereign immunity. Azure Decl. ¶ 17 & Ex C at 1.

ANS, the service provider for ANF, is also fully owned and managed by the Tribe through IMDG. *See* Azure Decl. ¶ 18 & Ex. E ¶¶ 1.8 & 1.9; ANF 30(b)(6) at 54:25—56:25. ANS was also formed under tribal law with the express intent that it would share in the Tribe’s sovereign immunity. Azure Decl. Ex. F ¶¶ 1, 4, 6-7. All ANS services are provided through leased IMDG employees, IMDG makes all decisions regarding the disposition of ANS revenues, and all ANS profitability is passed through to IMDG. *Id.* ¶ 18 & Ex F ¶ 8.1; ANF 30(b)(6) 55:8—56:20. ANS is “obviously a tribal entity,” ANF 30(b)(6) at 56:21-22, and “there’s not a lot of distinction between GVA Holdings, ANS, and [IMDG].” *Id.* at 55:8-10.

responsibilities include full oversight of the day-to-day management of ANF's affairs, IMDG's Board serves as the Board of ANF, and all ANF employees are leased from IMDG, including many tribal members. Azure Decl. ¶ 13; ANF 30(b)(6) at 47:25—48:11; 50:14—51:5, 52:11—53:10, 57:1-12. All management decisions for ANF—specifically including the language in loan documents, the interest rates charged, the parameters for loan approval, and the amounts that can be borrowed—are made by IMDG subject to limitations set forth in tribal law. Azure Decl. ¶ 13; ANF 30(b)(6) at 60:25—61:17, 65:23—66:19, 74:22—75:7, 79:7-17.

ANF is licensed by the FBIC Tribal Regulatory Authority and operates pursuant to the FBIC Tribal Online Lending Code. Azure Decl. ¶ 14; ANF 30(b)(6) at 79:18-20. Its organizational documents explicitly provide that the FBIC intended for ANF “to enjoy the Tribe’s sovereign immunity since it is wholly owned by the Tribe.” Azure Decl. Ex A ¶ 7.

The majority of ANF’s cash profitability goes to IMDG as payment for the management and other services that it provides to ANF. *Id.* ¶ 15; ANF 30(b)(6) at 46:3-6; 55:16—56:10. The remaining, minority share of ANF’s cash profitability is paid to BorrowWorks for use of its customized, proprietary loan and underwriting system management technology. Azure Decl. ¶ 15; ANF 30(b)(6) at 44:4-25, 53:2—54:14. No other third party receives payment from ANF based on any sort of profit sharing or transactional basis. Azure Decl. ¶ 15; ANF 30(b)(6) at 58:5-18. The Tribe

provided the majority of ANF's initial capitalization through IMDG. Azure Decl. ¶ 16; ANF 30(b)(6) at 38:13—39:11. The remainder of ANF's initial capitalization was provided through a third-party loan that was repaid in full in November 2018. Azure Decl. ¶ 16; ANF 30(b)(6) at 38:13—39:23. At no point did that third-party or any other lender or vender acquire or hold any ownership interest in ANF, nor did any vender other than BorrowWorks receive profit-based payments. Azure Decl. ¶ 16; ANF 30(b)(6) at 41:2-22, 58:5-18.

II. The Loans at Issue

Plaintiff Weidley opened a \$700 loan with ANF on or about November 5, 2020. SAC ¶ 40. She has made a total of \$344.48 in payments on her \$700 loan. Azure Decl. ¶ 19. The balance of Plaintiff Weidley's loan has been written off, and no further efforts are being or will be made to collect it. *Id.*

Plaintiff Okrzesik opened two loans with ANF. SAC ¶¶ 50-51. The first, for \$500, was opened on or about October 15, 2021, and has been repaid in full. *Id.* Plaintiff Okrzesik made a total of \$548.07 in principal and interest payments on her \$500 loan. Azure Decl. ¶ 20. Plaintiff Okrzesik opened a second loan with ANF, this one for \$600, on or about October 22, 2021. SAC ¶ 51. Plaintiff Okrzesik made two payments on that loan totaling \$253.60. Azure Decl. ¶ 20. ANF has written off the balance of Plaintiff Okrzesik's second loan, and no efforts are being or will be made

to collect it. *Id.* Plaintiff Okrzesik has received a total of \$1100 from ANF and made total repayment of \$801.67. *Id.*

Each time that Plaintiffs opened a loan with ANF, they received and signed a standard ANF loan agreement. Azure Decl. ¶ 21. Each loan agreement clearly stated the amount being borrowed, the annual percentage rate that the borrower would pay, and the total amount of payments that the borrower would make. *Id.* Each loan agreement further provided that the lender is “a sovereign enterprise that is an economic development arm of, and wholly and controlled by the Fort Belknap Indian Community (the “Tribe”), a federally-recognized sovereign American Indian Tribe.” *Id.* ¶ 21 & Exs. G-I. Each loan agreement also stated that it was governed exclusively by Tribal law and contained a paragraph with the bold-faced heading **Sovereign Immunity** that provided as follows:

This Loan Agreement and all related documents are being submitted by you to us as an economic arm, instrumentality, and limited liability company of the Tribe. The Tribe is a federal-recognized American Indian Tribe and enjoys governmental sovereign immunity. Because we and the Tribe are entitled to sovereign immunity, you will be limited in the claims, if any, you may be able to assert against the Tribe and us. To encourage resolution of consumer complaints, any complaint may be submitted by you or on your behalf to the Tribe for review as described below.

Id. Exs. G-I. Each loan agreement further stated, in bold, all-caps font, “**NEITHER THE TRIBE NOR WE ARE SUBJECT TO SUIT OR SERVICE OF PROCESS IN ANY COURT OR ADMINISTRATIVE PROCEEDING. THE**

EXCLUSIVE MEANS OF DISPUTE RESOLUTION AVAILABLE TO YOU IS THIS BORROWER COMPLAINT RESOLUTION PROCEDURE.” *Id.*

Despite agreeing to these provisions, neither Plaintiff submitted any complaint to the Tribe under the Loan Agreement. Azure Decl. ¶ 21.

STANDARD FOR MOTION TO DISMISS

When deciding a motion to dismiss, the court generally assumes the facts set forth in the operative complaint to be true for purposes of the motion and construes them in favor of the plaintiffs. *Coral Ridge Ministries Media, Inc. v. Amazon.com, Inc.*, 406 F. Supp. 3d 1258, 1268 (M.D. Ala. 2019) (citations omitted). In addition to such facts, the court may consider matters of public record and documents attached to or referenced in the complaint, as well as documents attached to the motion provided that those documents are central to the complaint and their authenticity is undisputed. *Horsely v. Feldt*, 304 F.3d 1125, 1134 (11th Cir. 2002); *Harris v. Ivax Corp.*, 182 F.3d 799, 802 n.2 (11th Cir. 1999). Additionally, where, as here, a defendant makes a factual challenge to allegations of subject matter jurisdiction, “no presumptive truthfulness attaches to [the] plaintiff’s allegations,” and the court is free to consider evidence beyond the pleadings in order to determine its jurisdiction. *Willett v. United States*, 24 F. Supp. 3d 1167, 1173 (M.D. Ala. 2014) (quoting *Lawrence v. Dunbar*, 919 F.2d 1525, 1529 (11th Cir. 1990)).

To withstand a motion to dismiss, a complaint’s allegations must set forth a claim of relief that is “plausible on its face.” *Willet*, 24 F. Supp. 3d at 1180 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). The allegations “must be enough to raise a right to relief above the speculative level;” the use of mere “labels and conclusions ... will not do.” *Twombly*, 550 U.S. at 555. “Crucially, the court need not accept as true ‘conclusory allegations, unwarranted deductions of facts or legal conclusions masquerading as facts.’” *Coral Ridge*, 406 F. Supp. 3d at 1268 (quoting *Oxford Asset Mgmt., Ltd. v. Jaharis*, 297 F.3d 1182, 1188 (11th Cir. 2002)).

ARGUMENT

Plaintiffs’ claims should be dismissed for several, independent reasons. Defendant ANF and its manager, IMDG, are arms and instrumentalities of the FBIC and thus are entitled to sovereign immunity from Plaintiffs’ claims. Plaintiffs also have not suffered a cognizable injury, and thus lack standing. Additionally, because the FBIC is a necessary party that cannot be joined due to sovereign immunity, all of Plaintiffs’ claims should be dismissed on Rule 19 grounds.

I. Claims against ANF should be dismissed due to sovereign immunity

A. Indian Tribes have sovereign immunity from suit

“‘Indian tribes are domestic dependent nations that exercise inherent sovereign authority over their members and territories.’” *PCI Gaming*, 801 F.3d at 1287 (quoting *Okla. Tax Comm’n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 509 (1991)). Accordingly, they possess “‘the common-law immunity

from suit traditionally enjoyed by sovereign powers.” *PCI Gaming*, 801 F.3d at 1287 (quoting *Florida v. Seminole Tribe of Fla.*, 181 F.3d 1237, 1241 (11th Cir. 1999)). Tribal sovereign immunity applies with full force regardless of the nature or location of the activity underlying the putative claim against a tribe—*i.e.*, it applies just as much to off-reservation commercial activity as on-reservation governmental conduct. *See, e.g., Bay Mills*, 572 U.S. at 790 (holding that tribal sovereign immunity applies to “suits arising from a tribe’s commercial activities, even when they take place off Indian lands”); *Kiowa Tribe*, 523 U.S. at 760; *Jamul Action Comm. v. Simermeyer*, 974 F.3d 984, 991 (9th Cir. 2020), *cert. denied*, 142 S. Ct. 83, *reh’g denied*, 142 S. Ct. 636 (2021). The Eleventh Circuit has repeatedly dismissed claims against federally recognized tribes based on sovereign immunity. *See, e.g., PCI Gaming*, 801 F.3d at 1287; *Furry v. Miccosukee Tribe of Indians of Fla.*, 685 F.3d 1224, 1236-37 (11th Cir. 2012). Simply put, “a suit against an Indian tribe is barred unless the tribe has clearly waived its immunity or Congress has expressly and unequivocally abrogated that immunity.” *Furry*, 685 F.3d at 1226.

Here, there is no allegation of federal abrogation of the FBIC’s tribal sovereign immunity. And while the SAC alleges, in passing, that the Defendants have waived their tribal sovereign immunity by offering allegedly unlawful loans in Alabama, *see* Dkt. 83 ¶¶ 49, 60, and 68, it offers no support for this bald statement. This alone is fatal to Plaintiffs’ waiver argument, as such “conclusory allegations”

are not entitled to any presumption of validity and find no support in the SAC. *See Coral Ridge*, 406 F. Supp. 3d at 1268. But even if that were not the case, the SAC makes no allegation of an express waiver of tribal sovereign immunity and instead asks this court to infer such a waiver from the Defendants' alleged conduct. This the court cannot do, as "[t]he Supreme Court has made it plain that waivers of tribal sovereign immunity cannot be implied on the basis of a tribe's actions, but must be unequivocally expressed." *Furry*, 685 F.3d at 1234 (quoting *Sanderlin v. Seminole Tribe of Fla.*, 243 F.3d 1282, 1286 (11th Cir. 2001)). There being no viable grounds for finding a waiver or abrogation of tribal sovereign immunity, it follows that the FBIC would be immune from any claims alleged in the SAC.

B. Tribal sovereign immunity extends to arms of the tribe

Just as the existence and extent of tribal sovereign immunity is settled beyond dispute, so too is the fact that tribal sovereign immunity extends to tribal enterprises that function as arms of a tribe. "[A]n entity that functions as an arm of a tribe shares in the tribe's immunity." *PCI Gaming*, 801 F.3d at 1287-88. Numerous other federal and state appellate courts have held likewise. *See, e.g., Williams v. Big Picture Loans, LLC*, 929 F.3d 170 (4th Cir. 2019); *Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173 (10th Cir. 2010); *Great Plains Lending, LLC v. Dept. of Banking*, 259 A.3d 1128 (Conn. 2021); *Cash Advance & Preferred Cash Loans v. Colorado*, 242 P.3d 1099, 1108 (Colo. 2010) (en banc)

(“[T]ribal sovereign immunity protects subordinate secular or commercial entities acting as arms of a tribe.”). Accordingly, IMDG and ANF are entitled to tribal sovereign immunity from Plaintiffs’ claims so long as they are arms of the FBIC.

C. ANF and IMDG are arms of the FBIC³

While the Eleventh Circuit has not yet adopted a test for ascertaining whether an entity is an arm of a tribe entitled to share in the tribe’s immunity, courts typically apply one of two multi-factor tests. The Supreme Court of Colorado, sitting *en banc*, has adopted a three-factor test that considers whether (1) the tribe created the entity pursuant to tribal law, (2) the tribe owns and operates the entity, and (3) applying immunity to the entity would protect the tribe’s sovereignty. *Cash Advance*, 242 P.3d at 1110. Other courts have adopted slightly differing variations of the non-exclusive, six-factor test first enumerated by the Tenth Circuit in *Breakthrough*, which considers (1) the method of the entity’s creation, (2) the entity’s purpose, (3) the entity’s “structure, ownership, and management, including the amount of control the tribe has over the entities,” (4) whether the tribe intended for the entity to have sovereign immunity, (5) the financial relationship between the tribe and the entity, and (6) whether extending immunity to the entity would serve the purposes of tribal

³ In apparent tacit acknowledgement of its sovereign immunity, Plaintiffs allege no claims directly against IMDG, instead naming its CEO and Board members (the IMDG defendants). *See generally* SAC, Dkt. 83. But because Plaintiffs have not explicitly conceded IMDG’s immunity and that immunity is potentially relevant to their claims against both ANF and the IMDG defendants, ANF addresses it here.

sovereign immunity.” *Breakthrough*, 629 F.3d at 1181; *see also Big Picture*, 929 F.3d at 177 (adopting the first five *Breakthrough* factors but concluding that the sixth “overlaps significantly with the first five” and should “inform the entire analysis” rather than being considered independently); *Great Plains*, 259 A.3d at 1143 (following the Fourth Circuit’s approach from *Big Picture*). Because the applicable test remains an open question in this Circuit and the *Breakthrough* factors effectively encompass all of the factors considered by other courts, ANF will address the applicability of each of those factors here.

1. Method of Creation

The method of creation factor focuses “on the law under which the entities were formed.” *Big Picture*, 929 F.3d at 177; *see also Breakthrough*, 629 F.3d at 1191; *Great Plains*, 259 A.3d at 1143. Where an entity is created under tribal law, this factor weighs in favor of immunity. *Id.* Here, both ANF and IMDG were established by the Council under tribal law. *See* Stiffarm Decl. ¶ 5 & Ex. A-B; Azure Decl. ¶ 12 & Ex. A. This factor thus supports their status as arms of the Tribe.

2. Purpose

The purpose factor “incorporates both the stated purpose for which the Entities were created as well as evidence related to that purpose.” *Big Picture*, 929 F.3d at 178; *see also Breakthrough*, 629 F.3d at 1192; *Great Plains*, 259 A.3d at 1143-44. “The stated purpose need not be purely governmental to weigh in favor of

immunity as long as it relates to broader goals of tribal self-governance.” *Big Picture* 929 F.3d at 178. Accordingly, courts have held that purposes such as “to financially benefit the tribe and enable it to engage in various governmental functions” suffice even if the entity in question is engaged in exclusively commercial activities. *Id.*; see *Breakthrough*, 629 F.3d at 1192. Using commercial activity to fund tribal governance makes perfect sense—and indeed is frequently necessary—given that tribal governments frequently lack the tax base that other sovereigns rely on to fund governmental services. See *Great Plains*, 259 A.3d at 1144. When, as here, a tribe owns or manages one of its enterprises through another tribal enterprise, the purposes of both enterprises should be read together. *Applied Scis. & Info. Sys., Inc. v. DDC Constr. Servs., LLC*, 2020 WL 2738243, at *3 (E.D. Va. Mar. 30, 2020).

IMDG was created to serve as the FBIC’s economic development arm, and it was “specifically organized for the purpose of making a profit on its operations to benefit the people of the Gros Ventre and Assiniboine Tribes of the For Belknap Indian Community.” Stiffarm Decl. ¶ 5 & Ex. C ¶ 3. In keeping with this purpose, IMDG uses its profits to (1) distribute money directly to the Tribe and its members, (2) fund projects such as housing and wellness centers that benefit tribal members, and (3) reinvest in tribal business enterprises and create additional economic development opportunities for the Tribe and its members. *Id.* ¶¶ 8-10; Azure Decl. ¶¶5-7; ANF 30(b)(6) at 66:20—67:24, 70:19—71:17.

ANF's organizing documents do not contain an explicit statement of purpose, but evidence establishes that it was organized after the Tribe spent years learning the online consumer lending business in partnership with third parties for the purpose of establishing a new tribal lending entity that was fully managed and controlled by—and thus more profitable to—the Tribe through IMDG. ANF 30(b)(6) at 22:7—23:3; Stiffarm Decl. ¶¶ 4-6.

IMDG and ANF exist to generate revenues to fund FBIC tribal governmental services and create economic opportunities for the Tribe and its members. Stiffarm Decl. ¶¶ 4-5; Azure Decl. ¶¶ 5-7, 9-15. They unquestionably serve this purpose in practice. The majority of ANF's cash profitability goes to IMDG, which uses all the revenues that it receives from ANF and other tribal enterprises to: (1) directly distribute to the Tribe to fund governmental services; (2) directly funding programs, including housing and a wellness center, that benefit tribal members; (3) reinvest in tribal businesses and economic development initiatives; or (4) directly distribute badly needed funds to tribal members. ANF 30(b)(6) 58:15—59:7, 66:20—68:3; Stiffarm Decl. ¶¶ 4-10; Azure Decl. ¶¶ 5-8. IMDG and ANF further fulfill their purpose of promoting economic opportunities for the Tribe and its members by employing approximately 243 tribal members and by offering job training and scholarship programs to tribal member students.⁴ Azure Decl. ¶¶ 5-9; Stiffarm Decl.

⁴ ANF leases its employees from IMDG. Azure Decl. ¶ 13.

¶¶ 9-10; *see, e.g., Applied Scis.*, 2020 WL 2738243 at *3 (finding that a tribal subsidiary satisfied its purpose of creating economic opportunity for tribal members in part by employing 4 members). This factor thus weighs in favor of finding that ANF and IMDG are arms of the Tribe. *See, e.g., Big Picture*, 929 F.3d at 178; *see also Breakthrough*, 629 F.3d at 1192; *Applied Scis.*, 2020 WL 2738243, at *3; *Everette v. Mitchem*, 146 F. Supp. 3d 720, 724 (D. Md. 2015) (holding that another FBIC lending entity created “to financially benefit the tribes and fund governmental services” was an arm of the tribe); *Great Plains*, 259 A.3d at 1143-44.

3. Structure, Ownership, and Management

The structure, ownership, and management factor, sometimes referred to as the “control” factor, considers “the entities’ formal governance structure, the extent to which the entities are owned by the tribe, and the day-to-day management of the entities.” *Big Picture*, 929 F.3d at 182; *see also Applied Scis.*, 2020 WL 2738243, at *3; *Everette*, 146 F. Supp. 3d at 724. Facts found to support immunity under this factor include (1) tribal ownership of the entity, (2) having tribal members on the entity’s board or serving as its CEO, (3) entity employment of tribal members, (4) tribal council authority to appoint or remove board members, and (5) the entity being managed by the tribe or another tribal entity. *Big Picture*, 929 F.3d at 182; *Applied Scis.*, 2020 WL 2738243, at *3; *Everette*, 146 F. Supp. 3d at 724; *Great Plains*, 259 A.3d at 1137-38. Here, a plethora of evidence regarding the IMDG and ANF’s

structure, ownership, and management firmly establishes the Tribe's control over those entities.

IMDG's charter states that ownership in IMDG is "limited, as the intent of the Fort Belknap Community Council in establishing this organization is to create a corporation, wholly owned by the Fort Belknap Community Council, or its members, employees or contractors, for the people of the Fort Belknap Indian Reservation." Stiffarm Decl. Ex. B ¶ 4. IMDG has been wholly owned and controlled by the Tribe since its inception. Stiffarm Decl. ¶ 6. Its Board consists entirely of members of the Council, and the Council retains the rights to fill any vacancies on the Board, to remove any member of the Board, and to override any action of the Board to remove one of its own members. *See id.* ¶¶ 6-7; ANF 30(b)(6) 71:21-25, 72:12-15. IMDG is required to file quarterly and annual reports with the Council regarding its financial situation and all business activities that it has undertaken or plans to undertake. Stiffarm Decl. ¶ 6. Any proposed amendments to IMDG's bylaws require Council approval. *Id.* The Board has the authority to hire IMDG's CEO, who is also a tribal member. *Id.* ¶ 7; ANF 30(b)(6) at 73:8-11. The CEO has the authority to hire and fire other IMDG employees and oversees the day-to-day management of the entity. Stiffarm Decl. ¶ 7.

ANF is wholly owned by the FBIC through GVA Holdings.⁵ Azure Decl. ¶ 13, Ex. A at 1, & Ex. B ¶ 1.9; ANF 30(b)(6) at 22:7-23:11, 37:20—38:3. ANF has been managed exclusively by the Tribe through IMDG since it was formed. Azure Decl. ¶ 13, Ex. A at 1, & Ex. B ¶ 1.8; ANF 30(b)(6) at 37:20—38:8, 71:21-25. IMDG oversees the day-to-day management of ANF’s affairs, its Board serves as the Board of ANF, and all ANF employees are leased from IMDG, including many tribal members. Azure Decl. ¶¶ 9, 13; ANF 30(b)(6) at 47:25—48:11; 50:14—51:5, 52:11—53:10, 57:1-12. All management decisions for ANF—specifically including the language in loan documents, the interest rates charged, the parameters for loan approval, and the amounts that can be borrowed—are made by IMDG subject to limitations set forth in tribal law. Azure Decl. ¶ 13; ANF 30(b)(6) at 60:25—61:17, 65:23—66:19, 74:22—75:7, 79:7-17. ANF is licensed by the FBIC Tribal Regulatory Authority and operates pursuant to the FBIC Tribal Online Lending Code. Azure Decl. ¶ 14; ANF 30(b)(6) at 79:18-20. And Plaintiffs admit that ANF is “supervised and directed” by IMDG “on behalf of the Fort Belknap Indian Community,” SAC ¶ 11, that “IMDG is the *de facto* manager of ANF,” and that IMDG “decides which states ANF will lend money into, the amounts of those loans and rates of interest for those loans.” SAC ¶ 93.⁶

⁵ See n. 2, *supra*, regarding GVA Holdings.

⁶ Allegations in a complaint are binding judicial admissions. *See, e.g., Best Canvas Prods. & Supplies, Inc. v. Ploof Truck Lines, Inc.*, 713 F. 2d 618, 621 (11th Cir. 1983).

In sum, the Tribe owns, exercises full control over, and is actively involved in the day-to-day management of both ANF and IMDG, and no non-tribal entity owns or controls either entity. This factor thus weighs strongly in favor of immunity.

4. Tribal Intent

The tribal intent factor “assesses the tribe’s intent to extend its immunity to the entities.” *Big Picture*, 929 F.3d at 184; *see Great Plains*, 259 A.3d at 1146. While such intent is sometimes directly stated in an entity’s organizational documents, such a direct statement is not necessary; rather, intent “can also be inferred from ‘the tribe’s actions or other sources.’” *Great Plains*, 259 A.3d at 1146 (citation omitted). The rationale underlying the tribe’s intent is irrelevant; the factor considers “‘solely’ the tribe’s intent.” *Id.* (quoting *Big Picture*, 929 F.3d at 184).

Here, the Tribe explicitly intended for ANF to share the Tribe’s immunity. ANF’s Articles of Organization provide that ANF “is to enjoy the Tribe’s sovereign immunity since it is wholly owned by the Tribe.” Azure Decl. Ex A ¶ 7; *see Everette*, 146 F. Supp. 3d at 725 (holding that substantially similar language from another FBIC lending entity’s articles of organization established intent to share immunity).

A similar intent for IMDG to share the Tribe’s immunity is easily inferred from IMDG’s corporate charter, which provides that IMDG enjoys the power to sue and be sued on any contract “to the extent and only to the extent specifically set forth in any such contract.” Stiffarm Decl. Ex. B ¶ 10.B. The Charter then goes on to state

specify that this “*limited waiver* contained in any such contract creates no other liability” on the part of the Tribe or IMDG. *Id.* (emphasis added). By providing a “limited waiver” of IMDG’s immunity from suit only to the extent that IMDG explicitly agreed to such waiver in the terms of a given contract, the FBIC clearly indicated an intent for IMDG to otherwise share in the Tribe’s immunity. This conclusion is further supported by evidence of IMDG’s purpose—*i.e.*, to provide financial support and economic opportunity for the FBIC government and tribal members. Stiffarm Decl. ¶¶ 4-5, 9. The Tribe would not and did not create an entity for the express purpose of providing critical governmental funding and choose not share its immunity with that funding source. Instead, the Tribe intended for its immunity to protect the critical revenues that it derives from IMDG’s economic development activities. *Id.* ¶ 9.

5. Financial Relationship to the Tribe

The fifth factor of the arm of the tribe analysis “considers the financial relationship between the tribe and the entities.” *Big Picture*, 929 F.3d at 184. While the question of whether a judgment would directly reach tribal assets is relevant, “direct tribal liability is neither a threshold requirement for immunity nor a predominant factor in the overall analysis.” *Id.* (citation omitted). Courts instead look to whether and to what extent to which the tribe relies on the entity for revenue to fund tribal governmental functions, support tribal members, or pursue other

economic development opportunities. *Id.*; *Breakthrough*, 629 F.3d at 1194. A tribe need not be wholly reliant on the entity for this factor to favor immunity; for example, the Tenth Circuit found that this factor supported immunity when a tribal lending entity funded 10% of a tribe’s general fund. *Big Picture*, 929 F.3d at 184-85; *see also Everett*, 146 F. Supp. 3d at 725 (finding that this factor supported immunity for another FBIC tribal lending entity because “the tribes use revenue from [the entity] to fund the provision of governmental services to tribal members”); *Great Plains*, 259 A.3d at 1148 (finding that this factor supported immunity despite the absence of “a detailed accounting of each entity’s financial records or the degree to which each entity generates profits that support specific tribal activities”).

The Tribe depends on ANF and IMDG to fund its governmental services and economic development activities. Online consumer lending is by far the most profitable of the Tribe’s various economic development activities, accounting for over 90% of IMDG’s revenues. Azure Decl. ¶ 8. IMDG’s distributions to the Tribe typically account for approximately 75% of the Tribe’s total non-federal budget—without considering the millions of additional dollars that IMDG spends to directly fund tribal member housing and wellness initiatives. Stiffarm Decl. ¶ 9; Azure Decl. ¶ 7. The Tribe uses revenue from IMDG to fund core governmental services such as general funding for its land department, Tribal Employment Rights Office, tribal communications, and tribal electricity, sewer, and waste programs. Stiffarm

Decl. ¶ 9. Any reduction in ANF or IMDG revenue would directly affect the Tribe’s ability to continue funding those services. *Id.* ¶¶ 8-9; Azure Decl. ¶ 8. This factor thus weighs in favor of immunity.

6. The Purposes of Tribal Sovereign Immunity

As noted above, many courts do not consider the purposes of tribal sovereign immunity as a discrete factor due to its overlap with the preceding five factors, instead viewing it as informing and providing context for the entire arm of the tribe analysis. *See, e.g., Big Picture*, 929 F.3d at 177 (citing *White v. Univ. of Cal.*, 765 F.3d 1010, 1026 (9th Cir. 2014)); *Great Plains*, 259 A.3d at 1143. To the extent that the court views the purposes of tribal sovereign immunity as an additional factor, however, recognizing the immunity of ANF and IMDG serves those purposes.

Discussion of this factor in case law underscores the *Big Picture* court’s conclusion regarding its significant overlap with the first five factors. In *Breakthrough*, the Tenth Circuit found this factor supported immunity because the tribal entities were “so closely related to the Tribe that their ‘activities are properly deemed to be those of the tribe’” and they “plainly promote[d] and fund[ed] the Tribe’s self-determination through revenue generation and the funding of diversified economic development.” 629 F.3d at 1195 (citation omitted). The *Everette* court similarly concluded that this factor supported immunity when “[e]xtending sovereign immunity to the lending companies would protect a significant source of

the tribes’ revenue from suit, thereby ‘directly protect[ing] the sovereign Tribe’s treasury.’” 146 F. Supp. 3d at 725 (citation omitted). In light of the evidence presented above, there can be no doubt that IMDG and ANF are closely related to the FBIC, that they promote and fund the Tribe’s economic development and provision of governmental services, and that a judgment against them would adversely affect the Tribe’s treasury. Accordingly, the purposes underlying the doctrine of tribal sovereign immunity weigh in favor of recognizing that IMDG and ANF are arms of the FBIC, and the court should so hold⁷.

D. The official capacity defendants are immune from all claims seeking retrospective or monetary relief

As the preceding discussion demonstrates, IMDG is an arm of the FBIC entitled to share in the Tribe’s sovereign immunity. Accordingly, its officers—including its Board and its CEO—are generally immune from suit in their official capacities for actions taken in that capacity. *See, e.g., PCI Gaming*, 801 F.3d at 1288; *Miller v. Wright*, 705 F.3d 919, 927-28 (9th Cir. 2013). The *Ex parte Young* doctrine provides a limited exception to this immunity, allowing official capacity suits against tribal officials only where (1) they are accused of an ongoing violation of law and (2) the requested relief is limited to prospective, non-monetary relief. *PCI Gaming*,

⁷ If relevant to the Court’s analysis, both GVA Holdings and ANS also satisfy the *Breakthrough* factors as arms of the Tribe. *See* n.2, *supra*. Both were created under tribal law to support tribal businesses that generate revenue for tribal government and member benefit, both are owned, controlled, and managed by the Tribe, generate revenues that are used exclusively for tribal benefit, both use IMDG employees, and the Tribe intended for them to have immunity. *See id.*

801 F.3d at 1288; *Summit Med. Assocs., P.C. v. Pryor*, 180 F.3d 1326, 1336-37 (11th Cir. 1999). The doctrine specifically does not allow suits “seeking retrospective or compensatory relief” or any other relief that “is the functional equivalent of money damages.” *Summit Med.*, 180 F.3d at 1337. Here, Plaintiffs seek relief including the return, or disgorgement, of “all sums collected, received, or retained” in connection with loans made by ANF as well as actual and treble damages. *See* SAC, Prayer for Relief. Such relief is not available under *Ex parte Young*. *Summit Med.*, 180 F.3d at 1337; *see also Miller*, 705 F.3d at 928 (“[T]o the extent the complaint seeks monetary relief, such claims are barred under *Ex parte Young*.”). To the extent that Plaintiffs seek any retrospective or monetary relief from any tribal or IMDG officials in their official capacities, those claims are barred by tribal sovereign immunity.

II. Plaintiffs lack standing

Based on the allegations of the SAC, both Plaintiffs have borrowed more from ANF than they have repaid. Accordingly, neither Plaintiff has suffered any cognizable injury, both Plaintiffs lack standing to pursue their claims, and this court lacks subject matter jurisdiction. This argument is set forth in more detail in the motion to dismiss and supporting brief filed contemporaneously herewith on behalf of the IMDG official defendants, which is incorporated herein by reference.

III. Rule 19 requires dismissal of all claims

The SAC should be dismissed as to all defendants because the FBIC is a required party under Fed. R. Civ. P. 19(a) and adjudication of the case in its absence could not provide an adequate remedy without prejudicing the Tribe's interests. Rule 19(b) therefore requires dismissal of the entire case.

Rule 19(a) provides that a party is necessary if it “claims an interest relating to the subject of the action and is so situated that disposing of the action in [its] absence may: (i) as a practical matter impair or impede that [party’s] ability to protect the interest; or (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.” Fed. R. Civ. P. 19(a)(1). “[P]ragmatic concerns, especially the effect on the parties and the litigation, control’ this analysis.” *Fla. Wildlife Fed’n Inc. v. U.S. Army Corps of Eng’rs*, 859 F.3d 1306, 1316 (11th Cir. 2017)). If a necessary party cannot be joined, Rule 19(b) directs the court to consider whether the case can proceed in its absence, taking into account: (1) whether a judgment rendered in the missing party’s absence might prejudice it or existing parties; (2) the extent to which the court could structure a judgment to limit that prejudice; (3) whether a judgment in the missing party’s absence would be adequate; and (4) whether the plaintiff would have an adequate remedy if the case was dismissed for nonjoinder. Fed. R. Civ. P. 19(b). Where the missing party cannot be joined due to sovereign immunity,

courts are required to give special solicitude to its interests under this test “out of recognition that any consideration of the merits in the sovereign’s absence is ‘itself an infringement on ... sovereign immunity.’” *Fla. Wildlife*, 859 F.3d at 1318 (citation omitted).

The FBIC is indisputably a necessary party under Rule 19(a). The overarching objective of the SAC is to force the Tribe to shutter the online consumer lending business that significantly contributes to funding tribal governmental services and to recover monetary damages against the Tribe and its leaders. The Tribe obviously has a significant interest in the continued operation of the economic engines that fund its government and in the preservation of its own treasury. But Plaintiffs have not named the Tribe as a party, and their claims against ANF and their official capacity claims against the tribal officials are all due to be dismissed on the grounds set forth above, leaving the Tribe and its interests wholly unrepresented. Proceeding in the Tribe’s absence would impair its ability to protect its interests and impermissibly infringe on its sovereign immunity. *See Fla. Wildlife*, 859 F.3d at 1318.

Under these circumstances, Rule 19(a)’s pragmatic concerns are easily satisfied. A decision on the merits could potentially result in an injunction preventing the Tribe from operating its consumer lending business or entry of a monetary judgment against the Tribe’s officials that would have the same effect. *See, e.g., id.* at 1316-17 (holding that a suit over a Florida water control project could not proceed

against a federal agency in the absence of a state entity that operated and maintained much of the project, as an injunction of the former would impede the latter's discretion and impair cooperation between the entities); *N. Arapaho Tribe v. Harnsberger*, 697 F.3d 1272, 1281-82 (10th Cir. 2012) (affirming dismissal of a case brought by one Indian tribe that, if adjudicated, would have prejudiced the interests of another that could not be joined); *Hardy v. IGT, Inc.*, 2011 WL 3583745, at *5 (M.D. Ala. Apr 15, 2011). Or an injunction against non-tribal parties could bar them from taking actions that they are required to take under existing contracts with the Tribe, leaving them subject to multiple, conflicting obligations. The Tribe is thus a necessary party under Rule 19(a).

“The balancing of equitable factors under Rule 19(b) almost always favors dismissal when a tribe cannot be joined due to sovereign immunity.” *Jamul Action Comm.*, 974 F.3d at 998; see *Republic of the Phil. v. Pimentel*, 553 U.S. 851, 866 (2008). This case is no exception. In addition to being a fundamental “affront to [FBIC’s] sovereignty,” *Fla. Wildlife*, 859 F.3d at 1318, adjudicating this case in the Tribe’s absence would risk inevitably and catastrophically affecting its interests, and there is no way that the Court could tailor or limit any adverse order to avoid that result. *Id.* at 1318-19; *Pit River Home & Agric. Co-op Ass’n v. United States*, 30 F.3d 1088, 1101 (9th Cir. 1994) (recognizing propriety of dismissal when tribal defendant could not be joined); *Rosales v. United States*, 2007 WL 4233060, at *5

(S.D. Cal. Nov. 28, 2007) (holding that a tribe was indispensable to a suit against federal officials seeking to enjoin the tribe’s activities); *see also Hardy*, 2011 WL 3583745, at *6 (noting that the Rule 19(b) prejudice test is “essentially the same as the practical impediment of an interest test under Rule 19(a)”). Nor would a judgment in the Tribe’s absence be adequate, as it would not be binding on the Tribe and thus could not achieve Plaintiffs’ aims. *Fla. Wildlife*, 859 F.3d at 1319; *Hardy*, 2011 WL 3583745, at *7. And while dismissing the entire case may mean that Plaintiffs lack a remedy for their alleged injuries, that potential prejudice cannot, as a matter of law, outweigh the prejudice the Tribe would suffer if this case proceeded in its absence. *Fla. Wildlife*, 859 F.3d at 1320 (citing *Pimentel*, 553 U.S. at 872); *Pit River*, 30 F.3d at 1102-03; *Hardy*, 2011 WL 3583745, at *7.

Simply stated, there is no way that this case fairly could or should move forward without the Tribe’s participation, which cannot be required. Thus, the court should dismiss the entire case pursuant to Rule 19.

CONCLUSION

For all the foregoing reasons, the court should dismiss all claims against ANF pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction and all remaining claims for failure to join the Tribe as a required party under Rule 19.

Respectfully submitted this 3rd day of August, 2023.

/s/ Alfred F. Smith, Jr.

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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of August 2023, I electronically filed the foregoing Defendant Aaniiih Nakoda Finance, LLC's Brief in Support of Motion to Dismiss Second Amended Complaint with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

/s/ Alfred F. Smith, Jr.

Alfred F. Smith, Jr.