FILED
2023 Oct-06 PM 03:05
U.S. DISTRICT COURT
N.D. OF ALABAMA

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

NORMAJEAN WEIDLEY and ELLEN OKRZESIK,

Plaintiff,

v.

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

Defendants.

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

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

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As set forth in its initial brief in support of its motion to dismiss (Dkt. 103), Defendant Aaniiih Nakoda Finance, LLC d/b/a Bright Lending (ANF) is an arm of the Fort Belknap Indian Community (FBIC or the Tribe) entitled to sovereign immunity from the claims alleged in Plaintiffs' Second Amended Complaint (SAC, Dkt. 83). Accordingly, Plaintiffs' claims against ANF must be dismissed for lack of subject matter jurisdiction. Moreover, because the FBIC is a required party under Rule 19 and neither it nor any representative of its interests can be joined due to tribal sovereign immunity, Plaintiffs' remaining claims against the BorrowWorks defendants and the individual capacity defendants must be dismissed pursuant to Rule 12(b)(7).

In their opposition brief (Dkt. 121), Plaintiffs do not discuss the arm of the tribe analysis, and do not meaningfully contest ANF's status as an arm of the FBIC entitled to share in the Tribe's immunity. Instead, they revisit broad, generalized attacks on the doctrine of tribal sovereign immunity that the United States Supreme Court has repeatedly rejected. Similarly, they minimally address the Rule 19 factors and do not dispute the general proposition that the FBIC has interests in this litigation that must be represented. Rather, they argue only that the Tribe's interests can be adequately represented by ANF or the tribal officials sued in their official capacities (the Official Defendants) and that dismissal under Rule 19 would be inappropriate because it would leave Plaintiffs without an adequate remedy. They thus effectively

(and correctly) concede that the FBIC in some capacity is a Rule 19 required party. Given this, the weight of the Rule 19(b) factors dictates that the entire case must be dismissed if the Court dismisses the claims against ANF and the Official Defendants.

BACKGROUND[1]

Plaintiffs open their brief with a bald assertion that ANF's business model is "basically the same as the one in *Dunn v. Global Trust Management, LLC*, 506 F. Supp. 3d 1214, 1222-23 (M.D. Fla. 2020)," followed by an extended quotation from that opinion decrying the ostensible evils of "payday lending." Dkt. 121 at 1-2. In truth, the *Dunn* opinion contains no discussion of the business model at issue in that case, nor did that case include any tribe or tribal lending entity (TLE) as a party. It involved litigation against a non-tribal third party that had purchased past due debt from a TLE and allegedly violated the law when attempting to collect that debt. *Dunn*, 506 F. Supp. 3d at 1223. Rather than being "basically the same" as the instant case, *Dunn* is wholly inapposite.

This is not the last strained characterization or outright error in Plaintiffs' brief. First, rather than focus on the defendant in this case and its relationship to the Tribe, Plaintiffs devote significant attention to the structure and operation of other TLEs that the Tribe owned before it established ANF in 2017. *See* Dkt. 121 at 7-9;

[1] ANF set forth all facts necessary to grant its motion in its initial brief and supporting declarations and exhibits. This section addresses and clarifies certain background matters presented in Plaintiffs' opposition brief.

Rule 30(b)(6) Deposition of ANF (ANF Dep.)[2] at 22:4-23:3. As ANF explained during its Rule 30(b)(6) deposition, outside service providers were more involved in the day-to-day operation of the Tribe's early TLEs, but from "the inception of ANF" the Tribe, through IMDG, assumed "day-to-day management oversight of ANF where that was provided by the service providers for the other lending entities… [ANF] was approached very differently than the previous lending entities." ANF Dep. at 52:19-22, 53:9-10. How the Tribe ran other entities while it learned the consumer lending business and the "very different[]" relationships those entities had with third parties has no bearing on nor relevance to Plaintiffs' claims against ANF in this case nor ANF's relationship to the Tribe. As set forth in its principal brief, ANF has been a wholly tribally owned and managed subsidiary since its inception. Dkt. 103 at ECF 22; Declaration of Evan Azure, Dkt 103-1, ¶¶ 11-13, 16.

Second, in addition to focusing on irrelevant businesses, Plaintiffs overstate the degree of involvement that Defendants Gatzke and the BorrowWorks entities (collectively, BorrowWorks) have in the operation and management of ANF. The record shows that BorrowWorks' involvement with ANF is far more limited than portrayed in Plaintiffs' brief. It reflects that a company affiliated with Mr. Gatzke provided a minority of ANF's initial capitalization in 2017 via a loan that was repaid

[2] The ANF Rule 30(b)(6) deposition transcript has been filed with the Court under seal. *See* Dkts. 99-100.

in full in 2018, ANF Dep. at 38:13-39:23, and that ANF uses a customized version of proprietary BorrowWorks software to assist in its operations. *Id.* at 44:9-12, 61:23-623:8. BorrowWorks also provides program and technical support for its software, *id.* at 38:10-12, and it "may propose changes" to ANF's marketing materials, but only IMDG can actually authorize any such changes. *Id.* at 81:16-21.

Contrary to Plaintiffs' assertions, Dkt. 121 at 9-10, BorrowWorks is not involved in ANF's day-to-day management and operations. Again, this was explained in the Rule 30(b)(6) deposition of ANF, where the witness testified that for ANF, BorrowWorks "ha[s] a much lesser role… their scope of services provided is limited to the—what's defined in that contract rather than, you know, day-to-day management." ANF Dep. at 53:14-22. The record establishes that "[a]ll decision-making" for ANF comes from ANF's manager, IMDG, and that IMDG drafts all of "the terms" and "all verbiage" in ANF's loan documents. *Id.* at 57:10-12, 61:6-17; *see also* Dkt. 103 at ECF 20; Dkt. 103-1, ¶ 13. IMDG, not BorrowWorks, sets all parameters for determining loan eligibility, interest rates, amounts available for borrowing, and so forth consistent with the requirements of applicable tribal and federal law; BorrowWorks merely provides the customized software to implement those tribally established parameters. ANF Dep. at 66:1-22, 74:22-75:15, 79:7-17; Dkt 103 at ECF 20. And BorrowWorks, again contrary to Plaintiff's assertion, Dkt.

121 at 10, does not own the www.brightlending.com domain or related trademarks. ANF Dep. at 54:18-24; Declaration of Benjamin Gatzke, Dkt. 104-1, ⁋ 14.

Finally, Plaintiffs imply that ANF has misled the Court regarding its ownership, its payment of its expenses, and the control of ANF's core business functions. *See* Pls. Br. at 5-6. The facts are that ANF is, as it has always maintained, a wholly owned and managed subsidiary of the Tribe[3], Dkt. 103-1, ⁋⁋ 11-13; Dkt. 78, ⁋⁋ 6, 8; ANF Dep. at 23:8-11, 46:9-11, 48:6-9, it directly pays its own costs or fully reimburses vendors for costs that they incur on ANF's behalf, Dkt. 78, ⁋ 6; ANF Dep. at 78:1-24, and either itself performs or maintains full oversight and control over the performance of all core functions rather than delegating or assigning them wholesale to third parties, as Plaintiffs have alleged. *See* Dkt. 103-1, ⁋⁋ 13-18; Dkt. 78, ⁋ 6; ANF Dep. at 71:21-25. To the extent that any of these facts may have been stated unclearly in filings by ANF's prior counsel, the record has been clarified by declarations and through Plaintiffs' Rule 30(b)(6) deposition of ANF such that

[3] To the extent that Plaintiffs intend to imply that the FBIC's use of a layered corporate structure somehow prevents the Tribe from being considered ANF's owner or disqualifies ANF from being an arm of the Tribe, precedent dictates otherwise. *See, e.g.*, *Williams v. Big Picture Loans, LLC*, 929 F.3d 170, 175 (4th Cir. 2019) (affirming the immunity of a TLE whose sole member was a tribal economic development LLC like IMDG rather than the tribe itself); *Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173, 1180-81 (10th Cir. 2010) (affirming the immunity of a casino that was wholly owned by a tribe's gaming authority rather than directly by the tribe itself).

Plaintiffs had full opportunity to test and develop the facts before preparing the SAC.[4]

ARGUMENT

I. ANF has sovereign immunity as an arm of the FBIC.

Plaintiffs do not contest the Tribe's sovereign immunity or IMDG's status as an arm of the Tribe. Nor do they meaningfully contest ANF's status as an arm of the Tribe or engage in any analysis of the factors used to assess an entity's status as such.[5] Instead, they argue that tribal sovereign immunity must yield to Alabama law and the State's interests in controlling allegedly intrastate commerce and protecting its citizens. As the Supreme Court and the Eleventh Circuit have repeatedly held, however, that simply is not the law.

In *Michigan v. Bay Mills Indian Community*, 572 U.S. 782 (2014), the State of Michigan, like Plaintiffs here, argued that tribal sovereign immunity did not bar a suit seeking to enforce state laws forbidding a tribe's off-reservation, commercial

[4] As for Plaintiffs' claim that ANF's prior counsel filed a "false" certificate of good standing for ANF, testimony explained that the Tribe's standard practice is to identify the Chairman of the Board of IMDG, ANF's manager, when identifying a TLE's board chair in a certificate of good standing. ANF Dep. at 76:23-77:19.

[5] Plaintiffs' failure to address these arguments waives or abandons any challenge to them. *See, e.g.*, *Abraham v. Greater Birmingham Humane Soc'y, Inc.*, No. 2:11-cv-4358-SLB, 2013 WL 1346534, at *4 (N.D. Ala. Mar. 28, 2013) ("Generally, the failure to respond to arguments constitutes abandonment or waiver of the issue."); *Faught v. Am. Home Shield Corp.*, No. 2:07-CV-1928-RDP, 2010 WL 10959225, at *4 (N.D. Ala. July 21, 2010) (same).

activity. *Id.* at 797. The Supreme Court was unimpressed by these "retreads of assertions we have rejected before," *id.* at 799, and reiterated that its precedent "could not [be] any clearer: 'We decline to draw [any] distinction' that would 'confine [immunity] to reservations or to non-commercial activities.'" *Id.* at 800 (quoting *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 758 (1998) (second and third modifications in original)); *see also Alabama v. PCI Gaming Auth.*, 801 F.3d 1278, 1287-88 (11th Cir. 2015) (rejecting the State's argument that an arm of a tribe did not share in the Tribe's immunity because it was "a business entity separate from the Tribe that engages in commercial, not governing, activities"). This precedent squarely forecloses Plaintiffs' arguments that tribal sovereign immunity is either "territorially limited" or limited to preservation of the Tribe's "interest in self-governance." Dkt. 121 at 14, 15.

To the extent Plaintiffs argue that ANF (or IMDG/the Tribe) is subject to Alabama's non-discriminatory laws of general applicability, *see* Dkt. 121 at 13-14, their argument misses the mark. Indian tribes may be subject to laws of general applicability under appropriate circumstances, but

> *whether an Indian tribe is subject to a statute and whether the tribe may be sued for violating the statute are two entirely different questions.* As the Supreme Court bluntly stated in *Kiowa Tribe* … "there is a difference between the right to demand compliance with state laws and the means available to enforce them."

Williams v. Poarch Band of Creek Indians, 839 F.3d 1312, 1323 (11th Cir. 2016) (quoting *Kiowa Tribe*, 523 U.S. at 755) (emphasis in original) (holding that the ADEA applied to Indian tribes, but tribal sovereign immunity barred plaintiff's suit); *see also Fla. Paraplegic Ass'n, Inc. v. Miccosukee Tribe of Indians of Fla.*, 166 F.3d 1126 (11th Cir. 1999) (holding that the ADA applied to tribes, but tribal sovereign immunity barred a private enforcement action).

The cases Plaintiffs cite do not hold otherwise and are easily distinguished. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 146 (1973), and *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 138 (1980), for example, addressed whether federal law preempted certain state taxes on tribes and tribal member activity; neither had anything to do with tribal sovereign immunity. *Gingras v. Think Finance, Inc.*, 922 F.3d 112, 121 (2d Cir. 2019), involved claims against individuals, not a tribe or tribal entity. Similarly, *Western Sky Financial, LLC v. State ex rel Owens*, 300 Ga. 340, 366 (2016), involved an assertion of sovereign immunity by an individual who claimed tribal membership and a state-chartered entity that he owned, not a tribally-owned or chartered entity.[6] And *Otoe-Missouria Tribe of Indians v. New York State Department of Financial Services*, 769 F.3d 105

[6] Moreover, to the extent that the Georgia Supreme Court opined that state law could limit tribal sovereign immunity, any such holding runs afoul of the settled principal that "'tribal immunity is a matter of federal law and is not subject to diminution by the States.'" *PCI Gaming*, 801 F.3d at 1293 (quoting *Bay Mills*, at 572 U.S. at 789).

(2d Cir. 2014), involved denial of a preliminary injunction in an affirmative suit by a tribe challenging the validity of certain state lending laws on Indian Commerce Clause grounds, not a suit where a tribe asserted its immunity defensively. None of these cases, nor any others cited in Plaintiffs' brief, undermines ANF's tribal sovereign immunity from Plaintiffs' claims.

Tribal sovereign immunity bars unconsented suits against Indian tribes and their arms and enterprises regardless of where the underlying activity takes place, whether it is commercial or governmental in nature, or whether it is ostensibly barred by a state law of general applicability. Because ANF is an arm of the FBIC, *see* Dkt. 103 at ECF 16-27, it is entitled to sovereign immunity from Plaintiffs' claims. The Court should dismiss all claims against ANF for lack of subject matter jurisdiction.

II. The Tribe is a Rule 19 required party that cannot be joined.

As set forth in ANF's principal brief, *id.* at ECF 29-32, the FBIC is a required party under Rule 19 that cannot be joined due to sovereign immunity. Plaintiffs do not dispute that their claims could potentially prejudice the Tribe's interests or that the Tribe cannot be joined. Instead, they argue that dismissal under Rule 19 would be improper because (1) the Tribe's interests are represented by ANF and the Official Defendants who are sued in their official capacities as FBIC President and IMDG

Board members and (2) dismissal would leave Plaintiffs without an adequate remedy. *See* Dkt. 121 at 16-19. Both arguments are unavailing.

As to the representation of the Tribe's interests by existing parties, Plaintiffs appear to misunderstand ANF's argument. ANF acknowledges that it, as an arm of the Tribe, could represent the Tribe's interests in this case for Rule 19 purposes if it were to remain a party. And Plaintiffs are correct that some case law holds that tribal officials sued in their official capacities can adequately represent an absent tribe's interests for Rule 19 purposes. *See* Dkt. 121 at 17-19. However, both ANF and the Official Defendants have moved to dismiss all claims against them.[7] Should the Court grant those motions and dismiss Plaintiffs' claims against ANF due to tribal sovereign immunity and their lone state-law claim against the Official Defendants due to lack of personal jurisdiction or for any other reason, then the Tribe's interests would be left wholly unrepresented.[8] In that circumstance, the substantive Rule 19

[7] As Plaintiffs clarify in their brief in opposition to the individual defendants' motion to dismiss, the only claim against the Official Defendants is Count IV of the SAC, which seeks declaratory and injunctive relief for alleged violations of the Alabama Small Loans Act. Dkt. 123 at 2, 13 (explaining that all but Count IV of the SAC states claims against the tribal officials in their individual capacities); Dkt. 83, Count IV, ¶ 94 (referring to violations of state law). No RICO or other claims are asserted against the Official Defendants. Dkt. 123 at 21 ("The RICO claim is asserted against the tribal officers individually, and the SAC specifically says so.").

[8] ANF explicitly made this point when arguing for dismissal pursuant to Rule 19 in its initial brief. *See* Dkt. 103 at ECF 30 ("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."). ANF is not, as Plaintiffs allege,

analysis set forth in ANF's initial brief would apply, and the claims against the remaining individual and non-tribal entity defendants should be dismissed pursuant to Rule 12(b)(7).

Regarding the substantive Rule 19 analysis, Plaintiffs argue only that dismissal would be inappropriate because it would leave them without an adequate remedy for the claims alleged in the SAC. *See* Dkt. 121 at 19. However, it is well-settled that a plaintiff's lack of an adequate remedy standing alone is not enough to prevent dismissal of a case under Rule 19, particularly where, as here, the absent party cannot be joined due to sovereign immunity.

Indeed, dismissal of a case under Rule 19 is a routine result when an absent sovereign cannot be joined due to immunity, even where it leaves the plaintiff without an adequate alternative remedy. *See Republic of Philippines v. Pimentel*, 553 U.S. 851, 872 (2008) ("Any prejudice… in this regard is outweighed by prejudice to the absent entities invoking sovereign immunity. Dismissal under Rule 19(b) will mean, in some instances, that plaintiffs will be left without a forum for definitive resolution of their claims."); *Fla. Wildlife Fed'n Inc. v. U.S. Army Corps of Eng'rs*, 859 F.3d 1306, 1320 (11th Cir. 2017) (citing *Pimentel* in holding that lack of an alternative remedy could not overcome the weight of other factors supporting

attempting to "have it both ways," Dkt. 121 at 16, by arguing that it is an arm of the FBIC but cannot represent the FBIC's interests for Rule 19 purposes.

dismissal of claims that could prejudice an absent, immune sovereign). This specifically includes cases where the absent party is an Indian tribe that cannot be joined due to tribal sovereign immunity. In fact, "there is a 'wall of circuit authority' in favor of dismissing actions in which a necessary party cannot be joined due to tribal sovereign immunity—'virtually all the cases to consider the question appear to dismiss under Rule 19 regardless of whether [an alternate] remedy is available.'" *Dine Citizens Against Ruining Our Env't v. Bureau of Indian Affairs*, 932 F.3d 843, 857 (9th Cir. 2019) (alteration in original) (citation omitted); *see also Jamul Action Comm. v. Simermeyer*, 974 F.3d 984, 998 (9th Cir. 2020) ("The balancing of equitable factors under Rule 19(b) almost always favors dismissal when a tribe cannot be joined due to tribal sovereign immunity."); *N. Arapaho Tribe v. Harnsberger*, 697 F.3d 1272, 1283-84 (10th Cir. 2012) (affirming Rule 19 dismissal for failure to join an immune tribe even though it left plaintiff "with no remedy at all, let alone an adequate one"); *United States ex rel. Hall v. Tribal Dev. Corp.*, 100 F.3d 476, 480 (7th Cir. 1996) ("A plaintiff's inability to seek relief, however, does not automatically preclude dismissal, particularly where that inability results from a tribe's exercise of its right to sovereign immunity.").

There can be no doubt that the FBIC has asserted an interest in this litigation that could be prejudiced were the case to be resolved in its absence. Accordingly, should the Court dismiss the pending claims against ANF and the Official

Defendants such that the FBIC's interests are left unrepresented, it should also dismiss all remaining claims pursuant to Rule 12(b)(7) for failure to join a Rule 19 required party.

III. President Stiffarm's Reply Regarding The Limited Role of BorrowWorks In ANF's Lending Activities

In his reply, Defendant President Stiffarm mounts a facial attack to the allegations in Plaintiffs' Second Amended Complaint in support of his motion to dismiss for lack of subject matter jurisdiction. The reply accurately reflects the separation of day-to-day management of the President, as the top executive of the Tribal government, from the operations of IMDG or the companies that IMDG manages, which is solely the task of the IMDG Board of Directors and its professional team. The President argues that if you take Plaintiffs' allegations at face value (that the BorrowWorks Defendants control the lending entity), such a conclusion is antithetical to also arguing that President Stiffarm has liability. *See* Dkt. 126 at 8-10.

The President's citation to Plaintiffs' arguments should not be misconstrued as contradictory to the President's and IMDG's previous filings, and the uncontroverted evidence in record which establishes that Defendants BorrowWorks and Gatzke have no role in the control, management, supervision of ANF's lending activities, or otherwise direct the lending activities of ANF; rather, all control, management, and supervision of ANF's lending activities lies with IMDG and the

FBIC alone. Dkt. 113 at 1-2, 4-6. Defendants BorrowWorks and Gatzke merely provide the proprietary technology ANF utilizes in its lending activities. Dkt. 114-2 at 16 ("Q: Yeah. The decision-making is at the Island Mountain level, but the actual way the forms are created and get to the borrower and all that is part of the Borrowworks program? A: Yes. I mean, they provide the technology that makes that happen."). Thus, the arm of the tribe factor regarding the structure, ownership, and management of ANF—often referred to the "control" factor—continues to weigh strongly in favor of immunity. *See* Dkt. 103 at 20-23. The President's point is simply that Plaintiffs cannot have it both ways; that ANF is an arm of the FBIC is not credibly in dispute. *See* Dkt. 127.

Respectfully submitted this 6th day of October, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of October 2023, I electronically filed the foregoing Defendant Aaniiih Nakoda Finance, LLC's Reply 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.
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