United States Court of Appeals

for the

Third Circuit

No. 24-1908

RASHONNA M. RANSOM,
on behalf of herself and those similarly situated,

Plaintiff- Appellee.

– v. –

GREATPLAINS FINANCE, LLC, d/b/a CASH ADVANCE NOW, and JOHN DOES 1 to 10,

Defendants- Appellants.

ON APPEAL FROM AN ORDER ENTERED IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY IN CASE NO. 2:22-CV-01344-WJM-JBC BEFORE THE HONORABLE WILLIAM J. MARTINI, U.S.D.J.

BRIEF OF PLAINTIFF-APPELLEE

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1. INTRODUCTION

Defendant GreatPlains Finance, LLC, d/b/a Cash Advance Now (hereinafter "GPF") operates a payday lending agency that makes money by charging exorbitant and unlawful interest rates on loans in states which regulate usury. GPF does so with impunity because, as an economic entity associated with a Native American Tribe ("Tribe"), GPF asserts it is afforded immunity by the doctrine of tribal immunity. But while tribal immunity can extend to "arms of the tribe," GPF is not an arm of the Tribe. As GPF admits, it was designed "to provide revenue for the [non-tribal] manager and for the [non-tribal] servicer . . . with no need for GreatPlains to retain . . . profitability." (Ex 1 to Guzik Cert., Deposition Transcript of GPF's Rule 30(b)(6) Corporate Representative Dana Pyette at T37:4-9, A480).[1] Thus, GPF has been managed and controlled by non-tribal entities for the benefit of non-tribal entities. GPF is not entitled to immunity because it is not closely aligned with the Tribe.

GPF claims it shares its profits with the Tribe. Yet despite its alleged access and control over GPF, the Tribe has failed to produce a single financial record reflecting the purportedly shared profits. Indeed, there is no evidence on record before the Court showing that GPF shared any revenue with the Native American

[1] All references to "A" are to the Appendix filed by GreatPlains.

community. On the contrary, the record shows GPF's illegal loans only benefitted non-tribal entities.

Between 2012 and 2017, GPF was controlled by two non-tribal entities—Dater Management ("Dater") and Cash Advance Servicing ("Cash Advance" or "CAS"). In fact, GPF took over Cash Advance's existing business, including its name, website, and servicing infrastructure. Dater, Cash Advance, and GPF's lender then pocketed virtually all the generated profits. Under its contracts, GPF was entitled to maximum compensation of $2.16 per loan. However, there is no evidence on record that Dater and CAS even allowed GPF to recover their de minimis compensation.

In 2017, the Tribe ostensibly bought out GPF; however, between 2017 and 2023, GPF was still not managed by the Tribe or for the Tribe's benefit. The Tribe's own council reports that GPF was run in secret by an ad hoc executive committee ("Ad Hoc Committee") to usurp the Tribe's decision-making authority. The Ad Hoc Committee engaged in financial impropriety and, when discovered, attempted to transfer the lending business from Wyoming to a Sioux tribe in South Dakota. Once the Ad Hoc committee was removed by the Tribe, Newport Funding ("Newport" or "NF")—GPF's lender—took control of GPF's assets and business for nearly a year. Newport claimed an event of default stemming from the

committee's removal which, under the Loan Agreement, gave Newport power of attorney over GPF.

For ten years, GPF has been outside tribal control for the benefit of non-tribal entities. Therefore, GPF is not an arm of the tribe and GPF is not entitled to tribal immunity. The lower court's ruling was correct and should be affirmed.

2. STATEMENT OF ISSUES

ISSUE I: Did the lower court correctly find that GPF failed to meet its burden to prove that it was an "arm of the Tribe" where GPF was controlled by non-tribal entities for their benefit? Determining whether a party has tribal immunity involves questions of fact and law. Thus, this Court should review the District Court's factual findings for clear error and review its legal conclusions de novo. *Somerlott v. Cherokee Nation Distribs.*, 686 F.3d 1144, 1148 (10th Cir. 2012)

.(Order denying GPF's Motion to Dismiss, A10).

ISSUE II: Did the lower court correctly deny GPF's Motion for Reconsideration as to the issue of sovereign immunity after GPF submitted evidence that was: (1) improperly submitted for the first time on reconsideration; and (2) did not change the Court's analysis over the level of control exerted by non-tribal entities over GPF? The Court reviews the denial of a motion to

reconsider for abuse of discretion. *United States v. Dupree*, 617 F.3d 724, 732 (3d Cir. 2010). (Order denying GPF's Motion for Reconsideration, A16).

3. RELATED CASES AND PROCEEDINGS

This case is before the Court for the first time. Appellee is not aware of any other related cases or proceedings pending before this Court.

4. STATEMENT OF THE CASE

4.1 Payday Lenders and the Rent-a-Tribe Scheme

Between the 1980s and the 2000s, the payday lending industry boomed via a loophole to state regulation which allowed payday lenders to couple with national banks to avoid state usury laws.[2] This scheme, coined "rent-a-bank," allowed payday lenders to charge high interest loans in states that barred high interest loans by exporting the national banks' interest rates, as allowed by federal law. Eventually, increased state and federal scrutiny drove payday lenders to a new scheme and the "rent-a-tribe" was born. "Rent-a-tribe" followed the same concept as "rent-a-bank." Instead of banks, however, payday lenders targeted Native American tribes for their sovereign immunity to state law.

[2] Jayne Munger, *Crossing State Lines: The Trojan Horse Invasion of Rent-a-Bank and Rent-a-Tribe Schemes in Modern Usury Laws*, The George Washington Law Review 87:2 (March 2019), available at: https://www.gwlr.org/wp-content/uploads/2019/04/87-Geo.-Wash.-L.-Rev.-468.pdf

"Rent-a-tribe" has proven to be very lucrative.[3] Unlike national banks, Native American tribes have very little bargaining power because their communities are struggling economically. Recognizing the need for economic development, payday lending companies opportunistically provide tribes the investment capital to start online payday businesses.[4] However, because the enterprise is almost entirely financed by outside capital, most revenues flow to nontribal contractors as opposed to the tribe. Ultimately, the tribe retains but a small commission in exchange for providing the lender with sovereign immunity.

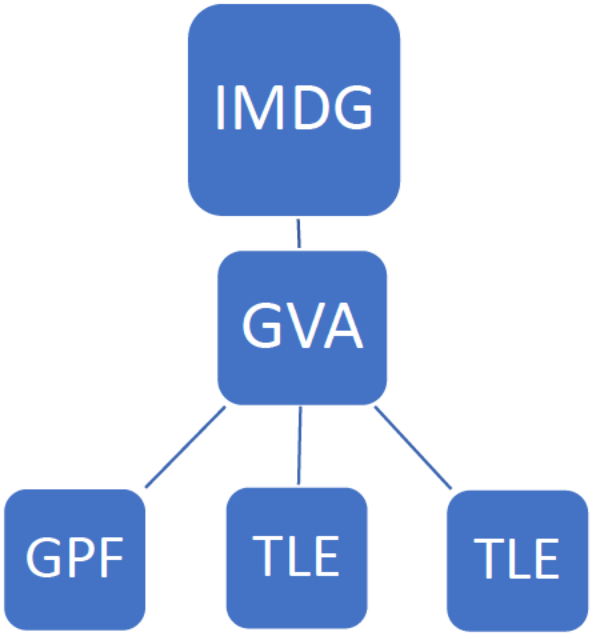
4.2 Great Plains Finance Exemplifies the Rent-A-Tribe Scheme Because GPF Was Operated by Non-Tribal Entities for the Benefit of Non-Tribal Entities.

In 2011, the Tribe and Dater—a non-tribal entity—entered into a Management Agreement to create a tribal lending business. (Ex. 1 to Guzik Cert., Rule 30(b)(6) Deposition of GPF Corp. Rep. Dana Pyette at T13:13-19, A474). The Tribe created a few entities to perform this purpose, notably including GVA Holdings—a holding company for the lending businesses (Ex. 2 to Guzik Cert.,

[3] Jessica Silver-Greenberg, *Payday Lenders Join with Indian Tribes*, Wall St. J. (Feb. 10, 2011), http://online.wsj.com/article/SB10001424052748703716904576134304155106320.html (noting that in 2010, 35 of the 300 companies making payday loans through the internet were owned by American Indian tribes, and these tribal lenders generated $420 million in payday loans that year).

[4] Gabrille (Gabe) Crofford, *Selling Sovereignty: How Corporations Used Tribal Sovereign Immunity to Evade Regulation and Exploit Consumers*.

Dater Management Contract at GPF 82, A508), as well as individual tribal lending entities (TLEs) like Defendant GPF. (Ex. 1 to Guzik Cert., Rule 30(b)(6) Deposition of GPF Corp. Rep. Dana Pyette at T16:4-20, A474). Tribe's Island Mountain Development Group (IMDG)—an economic development entity—was the controlling parent company. *See* illustration below.



Dater was the exclusive manager of GVA Holdings and the TLEs. Rule 30(b)(6) Deposition of GPF Corp. Rep. Dana Pyette at T18:8-11, A475. Dater would find established payday businesses and connect them with a newly created tribal entity so that the payday lenders were able to skirt state law. (Ex. 1 to Guzik Cert., Rule 30(b)(6) Deposition of GPF Corp. Rep. Dana Pyette at T99:24 – 100:8, A495). The loan servicer reaped the profits from the loan business, Dater received

a Management Fee for each loan originated, and the Tribe was left with a couple pennies on the dollar. *Id*.

Dater created GPF in 2012 via the Tribe. (Ex. 3 to Guzik Cert., GPF's Articles of Organization and Operation, A542-A558). GPF then served as a vehicle for Cash Advance Servicing ("CAS")—a non-tribal Delaware LLC—to continue its existing payday lending business under the guise of a tribal entity. On the same date of GPF's creation, Dater assigned GPF's servicing rights to CAS and contracted with Certified Tribal Lending, LLC (CTL) (also a non-tribal Delaware LLC) for a $12 million revolving credit promissory note. (Ex. 20 to Guzik Cert., April 16, 2012, Revolving Credit Promissory, Note between GreatPlains Finance LLC and Certified Tribal Lending LLC, A912-A919). GPF absorbed the existing CAS business—an online payday lender in operation for years. Cash Advance Now Domain Records (Ex. 4 to Guzik Cert., Domain Records indicating CashAdvanceNow.com was created back in 1999, A559-A560). GPF took over Cash Advance's website, began using the Cash Advance name, and hired the existing Cash Advance business to service GPF's loans. (Ex. 1 to Guzik Cert., Rule 30(b)(6) Deposition of GPF Corp. Rep. Dana Pyette at T77:19 – 78:5, A490, T104:17 - 105:8, A496-A497; T106:24 – 107:11, A497) (Ex. 5 to Guzik Cert., CAS Servicing Agreement at GPF 189, A568).

For five years, GPF was run by Dater as the LLC's exclusive manager with Cash Advance as its servicer. (Ex. 1 to Guzik Cert., Rule 30(b)(6) Deposition of GPF Corp. Rep. Dana Pyette at T18:7-11, A475; Ex. 5, CAS Servicing Agreement at GPF 185, A564). Dater had the authority to enter into contracts and otherwise act on GPF's behalf. (Ex. 1 to Guzik Cert., Rule 30(b)(6) Deposition of GPF Corp. Rep. Dana Pyette at T94:11-16, A494). These entities were ostensibly governed by tribal law (i.e., they could not exceed Tribal limits on maximum loan amounts or interest rates) but otherwise operated independent of tribal leadership. (Ex. 1 to Guzik Cert., Rule 30(b)(6) Deposition of GPF Corp. Rep. Dana Pyette at T73:18 – 75:1, A489).

4.2.1 GPF Was Created To Produce Revenue For The Non-Tribal Entities – There Is No Evidence That The Tribe Received Any of GPF's Revenue.

GPF admitted it was created "mainly to provide, you know, revenue for the [non-tribal] manager and the [non-tribal] servicer." (Ex. 1 to Guzik Cert., Rule 30(b)(6) Deposition of GPF Corp. Rep. Dana Pyette at T37:4-8, A480). Except for a $4 per loan Origination Fee, CAS received all the profits from GPF's lending business. (Ex. 1 to Guzik Cert., Rule 30(b)(6) Deposition of GPF Corp. Rep. Dana Pyette at T36:7-24, A479). The Origination Fee was divided between a litigation reserve ($.40 per loan), and Dater's Management Fee ($1.44 per loan). *Id*. The

remainder was supposed to go to IMDG. *Id*. (There is no evidence CAS or Dater made these payments). Under this structure, GPF made no profit. *Id*.

4.2.2 The New Ad Hoc Committee Takes Over Management from Dater and CAS But Its Tenure Is Marked by Lack of Financial Transparency, "Unexplained Debts and Evidence of Potentially Serious Financial Improprieties."

In 2017, several board members resigned from IMDG and management of the tribal lending business was assigned to the Ad Hoc Committee consisting of Mr. Tracy "Ching" King and Mr. Christopher "Smiley" Guardipee. (Ex. 1 to Guzik Cert., Rule 30(b)(6) Deposition of GPF Corp. Rep. Dana Pyette at T59:9-61:6, A485-486). The Ad Hoc Committee decided to take over GPF's management. On December 31, 2017, the Ad Hoc Committee ended the Management Agreement with Dater. (Ex. 1 to Guzik Cert., Rule 30(b)(6) Deposition of GPF Corp. Rep. Dana Pyette at T24:14:17, A476).

Between 2017 and 2023, the Tribe did not have access to basic information regarding GPF or IMDG because the Ad Hoc Committee kept the Tribe in the dark. (Ex. 19 to Guzik Cert., IMDG's Complaint against Greenberg Taurig, at ¶¶ 3, 57, A842, A853) ("The Council had called a special meeting to appoint a Board of Directors for IMDG because it had become increasingly concerned about expiration of board terms, the significant debts IMDG had incurred, and the lack of information the IMDG Board and their legal counsel, Jennifer Weddle, was providing to the Council regarding IMDG's commercial activities... The Council

addressed the Prior Board appointments because their appointments had expired but also were concerned about the Prior Board's persistent failure to provide financial information when the Council had requested regarding information regarding its business activities and its financing arrangements with the Lenders."). The Tribe pursued multiple "discussions with the Prior Board . . . in an unsuccessful attempt to gain full access to the requested financial records of IMDG, to which the Tribal Council was entitled." (Ex. 19 to Guzik Cert., IMDG's Complaint against Greenberg Taurig, at ¶¶ 62-79, A855-A859). The Tribe was refused access to fundamental documents such as resolutions approving Mr. King's and Mr. Guardipee's appointment as board members, IMDG's compensation to board members, and copies of third-party lending agreements. (Exhibit C to IMDG's Complaint at 3, ¶ 2, A898) *(*"Difficulty in locating the parallel resolutions appointing the other four IMDG Board members, including Tracy "Ching" King and Christopher "Smiley" Guardipee, was part of the reason for President Stiffarm's letter to you.")

Finally, on January 20, 2023, the Tribe replaced the Committee with new council members after it discovered "unexplained debts and evidence of potentially serious internal financial improprieties." (Ex. 9 to Guzik Cert., IMDG's March 7, 2023, Press Release, A211-A213). In a press release, the Tribe's Council described the Committee's tenure as follows:

> [L]ong sought answers and greater financial transparency from past IMDG Boards and leadership, and these past boards have always refused on the basis of 'confidentiality'. The recent admissions before the Council immediately shed light on why IMDG's past board would be so protective of its 'confidentiality'. Improperly reported payments, unwise investments, unexplained Board expenses, "donations", and other improprieties are clearly behind IMDG's mounting – and previously hidden – debts. *Id*.

4.2.3 GPF Is Currently Governed By A Loan Agreement With Non-Tribal Entity Newport Funding, LLC Which Solely Benefits Non-Tribal Entities And Restricted The Tribes Ability To Govern Its Lending Business.

On November 23, 2021, GPF obtained a loan for $10 million from various non-tribal lenders acting under the administrative agent Newport Funding, LLC. (Ex. 12 to Guzik Cert., Loan and Security Agreement at GPF 379, A642). Under the terms of the Loan Agreement, GPF was required to designate Carmel Solutions, a non-tribal Indiana LLC, as a servicer. (Ex. 13 to Guzik Cert., Master Services Agreement re Carmel Solutions at GPF 854, A775).

The Loan Agreement restricts the Tribe's ability to govern the payday lending business. It provides that any of the following are "Adverse Tribal Actions" and constitute a default on the Loan:

a. REDACTED

b. REDACTED

c. REDACTED

d. REDACTED

e. REDACTED

f. REDACTED

g. REDACTED

(Ex. 12 to Guzik Cert., NF Loan and Security Agreement at GPF 362 – 365, A625-A628.)

Moreover, the Loan Agreement negotiated by Newport requires that GPF pay non-tribal entities first. (Opinion Denying GPF's Motion to Dismiss dated January 22, 2024, A3.) Before GPF or any tribal entity receives any money, GPF must first compensate Newport and the backup servicer, Carmel Solution in full. (Ex. 12 Guzik Cert., NF Loan and Security Agreement at GPF 389-390, A652-653.)

The fees to Newport and Carmel Solutions are substantial. Newport is entitled to an Upfront Fee of $100,000 for obtaining financing,[5] a Monthly Audit Fee of $2,500 (irrespective of whether any audits actually occur),[6] interest of 21% per Annum on the outstanding balance,[7] as well as a "Facility Fee" based on the difference between the Maximum Loan Amount and the amount GPF borrows (the less GPF borrows, the higher the Facility Fee).[8] It is a lucrative deal for NF, earning it REDACTED in just one calendar year.[9]

Carmel is also well paid, receiving both $4,500 a month as a Servicer Provider Fee and a monthly commission of 3.5% on all unpaid balances on accounts. (Ex. 13 to Guzik Cert., Carmel Solutions Master Services Agreement at GPF 858, A779). The outstanding balance on loans as of 11/22/21 was REDACTED (Ex. 12 to Guzik Cert., NF Loan and Security Agreement at GPF 480, A743). As the lower court noted, it is questionable whether GPF has *any profitability* under this (or any prior) arrangement. Opinion Denying GPF's Motion to Dismiss dated January 22, 2024, A6.

4.2.4 Following the Ad Hoc Committee's Ouster and a Failed Attempt To Transfer the Payday Business To a South Dakota Tribe, NF

[5] Ex. 14 Guzik Cert., Fee Letter at GPF 310, A791.
[6] Ex. 12 Guzik Cert., NF Loan and Security Agreement at GPF 415, A678.
[7] Ex. 14 Guzik Cert., Fee Letter at GPF 310, A791.
[8] Ex. 14 to Guzik Cert., Fee Letter at GPF 310-11, A791-A792.
[9] Ex. 15 to Guzik Cert., Distributions from GPF to NF per Loan at GPF 170, A796-A797.

Controlled GPF and Its Assets for the Year Preceding the Lower Court's Ruling.

As the Tribe attempted to have the Ad Hoc Committee removed, GPF's leadership, including "former legal counsel, former board members [the Ad Hoc Committee], and former staff," attempted to transfer the Tribe's lending business out of the state and into the Rosebud Sioux Tribe in South Dakota. (Ex. 16 to Guzik Cert., April 12, 2023, Letter from IMDG CEO Evan Azure to President and Councilmembers of the Fort Belknap Indian Community Council, A214-A218). As IMDG alleged:

> [Jennifer Weddle] advised certain Prior Board members to sign documents dated January 22, 2023, effectively authorizing conversion of all IMDG tribal online lending businesses—including all IMDG's assets, businesses, and jobs—out of the state of Montana to the Rosebud Sioux Tribe in South Dakota.
>
> Defendant Weddle was working on a list of assets to take to the Rosebud Sioux Tribe, and a timeline to make the transfer of IMDG's assets. In addition, she was also drafting a request to Rosebud to allow certain IMDG Senior management staff to transfer to jobs at Rosebud.
>
> Mr. King, also at the direction of Defendant Weddle, further signed documents as a member of the ad hoc committee authorizing Mr. Brockie to set up a new bank account for the purpose of transferring IMDG money into the new account... Mr. King further ordered all computer servers and personnel information be removed from the IMDG business premises.

Ex. 19 to Guzik Cert., IMDG's Complaint against Greenberg Taurig, at ¶¶ 85-95, A861-A864.

The Ad Hoc Committee asked NF to assign the lending assets to another tribe's LLC so the business could continue with an apparently more favorable tribal association. (Ex. 1 to Guzik Cert., Rule 30(b)(6) Deposition of GPF Corp. Rep. Dana Pyette at T58:7- 61:7, A485-A486). Though these attempts failed, they demonstrate that GPF was and is not an arm of the Tribe. GPF is a payday lender willing to jump ship to another tribe (and state) if it means continuing to profit on its usurious business. GPF was not left powerless, however. The morning after the Ad Hoc Committee was replaced, NF served a declaration of an Event of Default of the Loan Agreement on the Tribe. (Ex. 1 to Guzik Cert., Rule 30(b)(6) Deposition of GPF Corp. Rep. Dana Pyette at T61:14-22, A486.) Under the Event of Default, NF exercised "immediate control over GPF's financial accounts." (Ex. 1 to Guzik Cert., Rule 30(b)(6) Deposition of GPF Corp. Rep. Dana Pyette at T61:14-22, A486.) NF directed GPF's financial institutions to "prevent the withdrawal, transfer, disposition of, or other exercise of… Collateral without Newport's prior written consent". *Id*.

NF also had Power of Attorney under the Loan Agreement and could:

a. Indorse GPF's name "upon any and all checks, drafts, money orders and other instruments for the payment of money…"

b. Execute on GPF's behalf "any financing statements, amendments to financing statements, schedules to financing statements… assignments, instruments… that such Borrower Party is obligated

to execute…"

c. "Do such other and further acts and deeds… that Administrative Agent [NF] may deem necessary to make, create, maintain, continue, enforce, or perfect the Liens on or rights to Collateral…" including directing payors to pay Collections to Newport Funding.

(Ex. 12 to Guzik Cert., NF Loan and Security Agreement, at GPF 397, A660). GPF remained under this state of default and NF's control through January 29, 2024. (Ex. 1 to Guzik Cert., Rule 30(b)(6) Deposition of GPF Corp. Rep. Dana Pyette at T61:14-22, A486).

4.2.5 Seven Days After the Lower Court Found No Sovereign Immunity, GPF and NF Allegedly Signed a Waiver of the Event of Default.

One week after the lower court issued its Order denying sovereign immunity, GPF and NF allegedly signed a waiver of the event of default restoring control to GPF. (Opinion Denying GPF's Motion for Reconsideration, dated April 18, 2024, A12.). However, GPF redacted NF's name and signature from the Waiver Agreement. *Id*. As a result, the District Court noted, it could not determine "whether the Waiver Agreement was even properly executed." (Opinion Denying GPF's Motion for Reconsideration, dated April 18, 2024, A12-A13.). Moreover, under the Waiver Agreement, NF was free to reinstate the Event of Default at any time. *Ibid.* Thus, the District Court reasoned that the Waiver was not "irrevocable," as argued by GPF. *Ibid.*

5. PROCEDURAL HISTORY

The Court allowed Ransom to conduct jurisdictional discovery prior to briefing tribal immunity. After the May 15, 2023 deadline for jurisdictional discovery, GPF filed their Motion to Dismiss, arguing tribal immunity. The parties subsequently briefed whether GPF was an "arm of the Tribe," including NF's then recent Event of Default. GPF did not rebut Ransom's evidence that NF was exercising full control over its payday loan business.

The lower court denied GPF's Motion to Dismiss on January 22, 2024. Opinion Denying GPF's Motion to Dismiss dated January 22, 2024, A3. GPF responded by filing a Motion for Reconsideration on March 4, 2024. GPF justified the Motion based on "newly available evidence"—*to wit*, the January 29th Waiver Agreement between GPF and NF. Ransom opposed the Motion for Reconsideration and asked to reopen jurisdictional discovery in order to investigate the Waiver Agreement. The lower court, without reopening discovery, denied the Motion for Reconsideration, concluding that GPF "has not met its burden of proof or shown new previously unavailable evidence that requires reconsideration and reversal of that decision." (Opinion accompanying Order Denying Motion to Reconsider at 3, A15).

6. SUMMARY OF ARGUMENT

6.1 GPF Has Not Met Its Burden To Prove It Was an "Arm of the Tribe" Because GPF Was Controlled by Non-Tribal Entities for the Benefit Of Non-Tribal Entities.

GPF bears the burden of proof to demonstrate it is an "arm of the Tribe." *Williams v. Big Picture Loans, LLC*, 929 F.3d 170, 176 (4th Cir. 2019). Courts determine whether an entity is an "arm of the tribe" based on the six-factor test articulated in

Breakthrough Mgmt. Grp., Inc. v. Chukchansl Econ. Dev. Auth.

The *Breakthrough* test weighs the following six factors: (1) the entity's method of creation; (2) its purpose; (3) its structure, ownership, and management, including the amount of control the tribe has over it; (4) whether the tribe intended for the entity to have tribal sovereign immunity; (5) the financial relationship between the tribe and the entity; and (6) whether the purposes

of tribal sovereign immunity are served by granting immunity to the entity. *Breakthrough Mgmt. Grp., Inc. v. Chukchansl Econ. Dev. Auth.*, 629 F.3d 1173, 1186 (10th Cir. 2010).GPF cannot meet its burden of proof because these factors weigh against the necessary close relationship between GPF and the Tribe.

The first factor (method of creation) weighs against GPF. GPF is nothing more than the pre-existing non-tribal payday lender, Cash Advance Servicing, repackaged and disguised as a tribal entity as of 2012. CAS had operated as an

online payday lender for years. CAS assigned its website (www.cashadvancenow.com) to GPF. GPF operated under the CAS name and hired CAS to service GPF's loans. (Ex. 1 to Guzik Cert., Rule 30(b)(6) Deposition of GPF Corp. Rep. Dana Pyette at T77:19 – 78:5, A490, Ex. 5 to Guzik Cert., CAS Servicing Agreement at GPF 189, A568.). CAS then received the vast majority of GPF's profits. Tribal immunity is not conferred on an existing business simply because the tribe has taken over. *Hunter v. Redhawk Network Sec., LLC*, No. 6:17-CV-0962-JR, 2018 WL 4171612, at *2 (D. Or. Apr. 26, 2018)

. Consequently, this factor does not favor "arm of the tribe" status for GPF.

The second factor (its purpose) also weighs against GPF. As the lower court noted, GPF failed to present any evidence to support GPF's alleged purpose of economically benefiting the Tribe. By all accounts, GPF's online payday loan business should be very profitable. However, GPF has failed to show that any money earned has been directed back to the Tribe or the Tribe's economic development arm, IMDG. This is because GPF has structured its business to bring revenue for non-tribal entities, initially Dater Management and CAS, now NF and Carmel Solutions. GPF is not an "arm of the Tribe" because its purpose is not to benefit the Tribe.

The third factor (structure, ownership, and management) weighs against GPF. Throughout its history, GPF has been controlled by and for non-tribal

entities. It was originally run by non-tribal entities Dater Management and CAS. When GPF severed ties in 2017, it was run by the Ad Hoc Committee outside of the control of the Tribe. The Ad Hoc Committee ran GPF for the benefit of non-tribal entities and, upon their imminent removal, attempted to transfer GPF to a different tribe in South Dakota. When the Tribe finally dislodged the Ad Hoc Committee in 2023, non-tribal entity NF took over total control of GPF for the year preceding the lower court's ruling. GPF is not an "arm of the Tribe" because it has been primarily controlled by outside parties.

The fourth factor (intent to benefit GPF) weighs in GPF's favor. The Tribe intended for GPF to share in tribal immunity.

The fifth factor (financial relationship) weighs against GPF. This factor considers whether an adverse judgment would primarily harm the Tribe's coffers or a third party's revenues. First, there is no evidence GPF has ever distributed any revenue to the Tribe. Second, under its current contractual arrangements, GPF must divert all revenue to pay off NF's loan and Carmel Solutions' servicing fees. An adverse judgment would only impair the non-trial entities' earnings and would have no effect on GPF's coffers because no money is flowing back to the Tribe at this time anyway.

The final factor (whether the purposes of tribal sovereign immunity are served) also weighs against GPF. Tribal immunity is intended to serve the

protection of tribe monies, preservation of tribal autonomy, and promotion of commerce between native and non-native peoples. *Breakthrough* at 1188. But this interest is balanced against the rights held by states to regulate commercial activity within the State but outside tribal lands. "[A] tribe has no legitimate interest in selling an opportunity to evade state law." *Otoe-Missouria Tribe of Indians v. New York State Dep't of Fin. Servs.*, 769 F.3d 105, 114 (2d Cir. 2014). GPF exists for the sole purpose of evading state usury laws. Affording GPF immunity for its acts would not serve the purpose of tribal immunity.

6.2 The Lower Court Did Not Abuse Its Discretion by Denying GPF's Motion for Reconsideration Because the Waiver Was Not Properly Executed and the Waiver Did Not Change the Court's Analysis over the Level of Control Exerted by Non-Tribal Entities over GPF.

A week after the court issued an Order denying tribal immunity, GPF allegedly signed a "Waiver Agreement" with NF. GPF then claimed the Waiver Agreement to be "newly obtained evidence" and asked for reconsideration. The lower court correctly denied GPF's Motion on two grounds: (1) the Court could not determine whether the Waiver Agreement was properly executed because GPF redacted NF's alleged signature; and (2) the Waiver Agreement, even if enforceable, did not alter the tribal immunity analysis because NF could exert immediate control over GPF at any time.

The court did not abuse its discretion when it found the Waiver Agreement was of questionable validity. According to the underlying loan agreement, any

"amendments or waivers" needed to be in writing and signed by NF. However, GPF redacted NF's purported signature from the Waiver Agreement and subsequently failed to provide any explanation for the redaction. And it is axiomatic that the Waiver Agreement remains unenforceable without NF's signature.

Moreover, even if the Waiver Agreement is valid, it does not remove the history of control by non-tribal parties (e.g., Dater and CAS). Nor does it alter the relationship between NF, GPF, and the Tribe. Under its Loan Agreement, NF exerts significant control over the Tribe's basic autonomy and sovereign powers. NF took over GPF for a year simply because the Tribe removed the Ad Hoc Committee—an unelected board engaged in financial impropriety which hid loan documents and refused to provide the Tribe basic financial information about its payday loan business. While NF gave up total control for a second shot at tribal immunity, the Waiver does not prevent NF from reinstating the Event of Default at any time. Non-tribal entities can still exercise significant control over GPF even with the Waiver, therefore reconsideration was not warranted.

7. ARGUMENT

7.1 The Court Has Jurisdiction Where the Denial of Tribal Immunity Is a Collateral Order and GPF'S Timely Filed Motion for Reconsideration Tolled the Deadline to Appeal the Denial.

The District Court's Order denying GPF's Motion to Dismiss and finding no tribal immunity arose from a jurisdictional issue and a collateral order and is therefore appealable. *See Bonnet v. Harvest (U.S.) Holdings, Inc.*, 741 F.3d 1155, 1158 (10th Cir. 2014) (finding denial of tribal immunity to be a collateral order because it conclusively resolves the sovereign immunity question, it is a defense separate from the merits of the case, and denial of immunity is unreviewable after final judgment). The lower court issued its Order on January 22, 2024, A10. GPF was required to appeal the decision within 30 days. *See Weimer v. Cnty. of Fayette, Pennsylvania*, 972 F.3d 177, 184 (3d Cir. 2020)

. While GPF did not file their Notice of Appeal until four months later (May 13, 2024), GPF did timely file a Motion for Reconsideration pursuant to D.N.J. Local Rule 7.1(i). The Motion for Reconsideration tolled the appellate deadline. *See Lora v. O'Heaney*, 602 F.3d 106, 110 (2d Cir. 2010)

; *Frew v. Young*, 992 F.3d 391, 395 (5th Cir. 2021)

(noting certain post judgment motions can toll appellate deadline for collateral orders). Following the lower court's ruling, GPF submitted its Notice of Appeal, A17-A18.

7.2 GPF Failed To Meet Its Burden To Establish That It Is an "Arm of the Tribe" and Entitled to Tribal Immunity.

Native American tribes are afforded a form of sovereign immunity from suit. This tribal immunity is "unique and limited." *Michigan v. Bay Mills Indian Cmty.,* 572 U.S. 782, 815 (2014) (quoting *United States v. Wheeler*, 435 U.S. 313, 323 (1978)).

While it can be extended to tribal businesses, it only applies to economic units which are so sufficiently close that they are properly considered an "arm of the tribe." *Breakthrough* at1183.

"Unlike the tribe itself, an entity should not be given a presumption of immunity until it has demonstrated that it is in fact

an extension of the tribe." *Williams v. Big Picture Loans, LLC*, 929 F.3d 170, 177 (4th Cir. 2019). The Defendant must prove that its relationship with the Tribe is analogous to that of a government agency instead of a business instituted for private profit. *Breakthrough* at 1184. GPF bears the burden of proving it is an "arm of the tribe" and is therefore entitled to tribal immunity.

While the Third Circuit has not yet adopted a test, other circuit courts have used the *Breakthrough* factors to determine whether an economic entity should be afforded tribal immunity. See *Private Sols. Inc. v. SCMC, LLC*, No. 15-3241 (AET), 2016 WL 2946149, at *5, 2016 U.S. Dist. LEXIS 67696 (D.N.J. May 20, 2016); see also *Bynon v. Mansfield*, No. 15-00206, 2015 WL 2447159, at *1 (E.D.

Pa. May 21, 2015); *In re Money Ctr. of Am., Inc*., 565 B.R. 87, 97–98 (Bankr. D. Del. 2017). Under this test, the Court parses the relationship between the entity and the tribe by considering: (1) the entity's method of creation; (2) its purpose; (3) its structure, ownership, and management, including the amount of control the tribe has over it; (4) whether the tribe intended for the entity to have tribal sovereign immunity; (5) the financial relationship between the tribe and the entity; and (6) whether the purposes of tribal sovereign immunity are served by granting immunity to the entity. *Breakthrough Mgmt. Grp., Inc.,* 629 F.3d at 1186.

7.2.1 GPF's Method of Creation—De Facto Absorption of CAS's Existing Lending Business—Weighs Against Immunity

GPF proposes that this factor only considers "the law under which the entities were formed" and, as such, weighs in favor of immunity. GPF's Brief at 25, A25. But this element is more nuanced than a "checkbox" for whether the business was incorporated under state or tribal law. The Court must also consider the "circumstances under which the entity's formation occurred, including whether the tribe initiated or simply absorbed an operational commercial enterprise." *Solomon v. Am. Web Loan*, 375 F. Supp. 3d 638, 653 (E.D. Va. 2019) (relying on the *Breakthrough* factors); *People v. Miami Nation Enterprises,* 2 Cal. 5th 222, 246 (2016). Considering the totality of the circumstances, this factor favors denial of tribal immunity.

GPF is CAS's commercial payday lending enterprise repackaged as a tribal entity. CAS operated as an online payday lender for years. On the same day GPF was formed, GPF absorbed CAS's name, website, and servicing capabilities. (*See* Ex. 1 to Guzik Cert., Rule 30(b)(6) Deposition of GPF Corp. Rep. Dana Pyette at T77:19 – 78:5, A490; T104:17: - 105:8. A496-A497; T106:24 – 107:11, A497; *see also* Ex. 5 to Guzik Cert., GPF 189, A568.). GPF also received funding via CAS's parent corporation. (Ex. 5 to Guzik Cert., CAS Servicing Agreement at GPF 213, A592.). After GPF's formation, the Cash Advance Now website continued to represent that it was business as usual: "Our website is undergoing some changes, but you can still get a Cash Advance Now payday loan."[10]

Courts have found this factor does not weigh in favor of immunity for tribal entities which are, in reality, reconstituted commercial enterprises. This is because tribal immunity is not conferred on an existing business simply because the tribe has taken over. *See Hunter v. Redhawk Network Sec., LLC*, No. 6:17-CV-0962-JR, 2018 WL 4171612, at *2 (D. Or. Apr. 26, 2018).

In a near analogous fact pattern, AWL II (a tribal payday lender) sought immunity as an "arm of the tribe." *Solomon*, 375 F. Supp. 3d at 653. AWL II was created by "absorb[ing] several existing, non-tribal entities" involved in payday

[10] Cash Advance Now's cached website from June 6, 2012, available at: https://web.archive.org/web/20120413205913/http://www.cashadvancenow.com/

lending. Even though AWL II was created under tribal law, the court found the factor was "neutral at best." (It did not find the factor favored denial of immunity because, unlike the present case, the entity could plausibly be seen as a tribal holding company and therefore distinct from the absorbed enterprises.)

Where the tribal entity is a one-for-one match of a preexisting business, courts have gone farther and found the factor weighs against immunity. In *Hunter v. Redhawk Network Sec., LLC*, the method of creation did not support the jurisdiction defense where an existing business, Redhawk, merged with a tribal entity. *Hunter, supra* at *3.

Similarly, in *People v. Miami Nation Enterprises*, the California Supreme Court ruled against the tribal entity on this factor because "the capital and intellectual property on which [the] lending business were founded did not come from either tribe… [but] from an outside commercial entity that continued to play a significant role in the lending operations after [the tribal entities] formally took ownership." *People v. Miami Nation Enterprises*, 2 Cal. 5th, 222 at 255-256 (2016). Like *Hunter* and *People v. Miami Nation Enterprises*, GPF's continuation of CAS's existing lending business weighs against tribal immunity.

Here, the District Court erred in finding this factor weighed in GPF's favor. The District Court's conclusion arises from a misunderstanding of the underlying record. *To wit*, The District Court incorrectly found CAS, as GPF's servicing

agent, merely registered a website and then transferred the website to GPF. But as explained herein, CAS was a preexisting online payday lender which only nominally transferred its operating website to GPF and continued to service loans obtained through the CAS website. Even after the transfer, CAS continued to tell customers that they could continue to get "Cash Advance Now Payday loan[s]." CAS, for all intents and purposes, continued its pre-existing operation under the guise of GPF's ownership. Thus, the first factor weighs against tribal immunity.

7.2.2 There Is No Evidence Before the Court To Show that GPF Was Created for the Purpose of Benefitting the Tribe

The second factor considers both "the stated purpose for which the entity was created **and the degree to which the entity actually serves that purpose**." *People v. Miami Nation Enterprises*, 2 Cal. 5th at 246 (emphasis added). Defendant argues that courts "sometimes" base their determination on whether the entity actually serves its stated purpose. GPF's Brief at 26-27. However, in determining the second factor, "**courts look at both** the stated purpose for which the entity was created as well as evidence related to that purpose." *Applied Scis. & Info. Sys. v. Ddc Constr. Servs.,* No. 2:19-cv-575, 2020 U.S. Dist. LEXIS 94435, *7 (E.D. Va. Mar. 30, 2020) (emphasis added); *see also Williams v. Big Picture Loans, LLC, supra*, 929 F.3d at 178; *Breakthrough*, at 1192-93.

Here, the stated purpose is to further economic development. To prove the entity serves this purpose, defendants generally show "the number of jobs it creates

for tribal members or the amount of revenue it generates for the tribe." *See Miami Nation Enterprises*, 2 Cal. 5th at 247-248. On the other hand, evidence indicating that the entity "operates to enrich primarily persons outside the tribe or only a handful or tribal leaders" weighs against immunity. *Id*. The record before the Court is clear—GPF does not serve to further the Tribe's economic development.

Starting with the glaring absence of records—there are no financial records memorializing GPF's cash flow, profits, or revenue. There are no records demonstrating GPF ever shared any money with the Tribe (directly or indirectly). There are no records showing GPF created any jobs for tribal members or that it leased a single tribal employee for its purposes. Outside GPF's self-serving affidavit, there are no records to support GPF's claims that it serves to financially benefit the Tribe.

Moreover, GPF's affidavit discusses IMDG, a separate entity, at length but fails to provide any details relating to GPF and the Tribe. GPF claims that IMDG "directly distributes 20% of its net income directly to the Tribe," but says nothing about GPF's income or revenue, the funds distributed from GPF to the Tribe, or funds distributed from GPF to IMDG. Declaration of Evan Azure at ¶ 5, A91. Moreover, the affidavit does not discuss GPF's employment of tribal members—likely because GPF does not have employees.

In short, GPF has fallen short of its burden by failing to submit any GPF records to support its claims. *See People v. Miami Nation Enterprises*, 2 Cal. 5th at 232 (holding that affidavits claiming "all profits earned . . . go to the Santee Sioux to help fund government operations and social welfare programs" without mentioning how much revenue actually reaches the tribe's coffers does not pass muster in the face of evidence that the economic benefit to the tribe is minimal).

By comparison, the evidence demonstrating GPF's failure to meet its goals is readily apparent. Under the agreements with Dater and CAS, GPF could only earn up to $2.16 per loan. (Ex. 1 to Guzik Cert., Rule 30(b)(6) Deposition of GPF Corp. Rep. Dana Pyette at T37:21 – 38:5, A480.). GPF's payments to Dater and CAS (though the actual amounts are unknown) easily eclipse GPF's potential take And while there are no records to show how much GPF actually earned (if anything), it is easy to imagine any profits were quickly swallowed by GPF's interest payments ($891,336) on its loan with CTL (CAS's parent company). (Ex. 8 to Guzik Cert., Distributions from GPF to CTL per Loan at GPF 171, A605-A606.)

GPF may point the Court to the period after GPF left Dater and CAS's services, but that period of management is marked by admittedly "unexplained debts and evidence of potentially serious internal financial improprieties" by the Ad Hoc Committee. (Ex. 9 to Guzik Cert., IMDG's March 7, 2023, Press Release,

A211-A213.). Moreover, GPF represented in its loan documents that all of GPF's profits during that period were retained by GPF—no profits were shared with the Tribe or IMDG. (Ex. 11 to Guzik Cert., Subordination Agreement at GPF 1383, A610.)

Finally, under the Loan Agreement with NF, GPF's revenue is again distributed to non-tribal entities. GPF paid NF over REDACTED in a single year for offering GPF credit. (Ex. 15 to Guzik Cert., Distributions from GPF to NF per Loan at GPF 170, A796-A797.). Carmel Servicing earns a massive monthly collection fee of 3.5% of outstanding loan balances (hundreds of thousands a month). (Ex. 12 to Guzik Cert., NF Loan and Security Agreement at GPF 480, A743; Ex 13, Master Services Agreement re Carmel Solutions at GPF 858, A779.) Based on this evidence, the lower court correctly ruled that GPF had failed to establish it was serving any purpose beneficial to the Tribe. (Ex. 1 to Guzik Cert., Rule 30(b)(6) Deposition of GPF Corp. Rep. Dana Pyette at T37:4-9, A480).

GPF also claims that it benefits the Tribe by "leasing employees" from IMDG. "An entity whose declared purpose is to further the tribe's economic development may bolster its case for immunity by proving, for example, the number of jobs it creates for tribal members." *Miami Nation Enterprises* at 247. But as the lower court concluded, there is no evidence that GPF ever leased any

employee. GPF is an entity run by non-tribal servicers and managers—neither of which was required to hire or lease tribal members.

Moreover, it is unclear how merely leasing employees from another tribal entity benefits the Tribe or its members. Courts have found this factor can weigh in favor of immunity when the entity is "creating" jobs for tribal members. *Id*. But leasing employees avoids creating jobs. After all, IMDG's employees are already employed and are already being compensated by IMDG. Nor is there any financial benefit to IMDG because there is no evidence GPF ever paid IMDG for leasing an employee. At bottom, GPF has failed to meet its burden to show it "actually serves the purpose" alleged.

7.2.3 Tribal Control and GPF's Structure, Ownership, and Management Weighs Against Immunity.

"When a tribe owns an entity, but delegates most of the control of the entity to non-tribal members, that fact weighs against a finding of sovereign immunity." *Hunter,* No. 6:17-CV-0962-JR, 2018 WL 4171612, at *4 (D. Or. Apr. 26, 2018) (citing *Breakthrough* at 1193). The Tribe owns GPF but has delegated said control to non-tribal persons. Consequently, this factor weighs against immunity.

From 2012 through 2017, Dater and CAS operated GPF. As GPF concedes, Dater was both GPF's (and its holding company GVA's) exclusive manager. (Ex. 1 to Guzik Cert., Rule 30(b)(6) Deposition of GPF Corp. Rep. Dana Pyette at T18:8-11, A475). The Tribe exercised limited control over Dater authorizing

certain lending products and setting interest rate caps when the payday lending business first commenced. (Ex. 1 to Guzik Cert., Rule 30(b)(6) Deposition of GPF Corp. Rep. Dana Pyette at T74:9 – 75:1, A489). Dater chose CAS as GPF's servicer, and then CAS ran the day-to-day operations. (Ex. 1 to Guzik Cert., Rule 30(b)(6) Deposition of GPF Corp. Rep. Dana Pyette at T17:18 – 18:11, A475). Dater managed the tribal lending business's finances. (Ex. 1 to Guzik Cert., Rule 30(b)(6) Deposition of GPF Corp. Rep. Dana Pyette at T38:5 – 15, A480). Reliance on non-tribal persons to control the entity, on its own, can weigh this factor against immunity. See *Breakthrough Mgmt. Grp., Inc.*, 629 F.3d at 1193 (holding that the Board of Directors' composition by majority non-tribal persons weighed against immunity).

After GPF terminated Dater and CAS's services, it was run by the Ad Hoc Committee. The tribal council's own statements make clear that the AD Hoc Committee operated outside of the Tribe's control. As the Tribe stated in a press release, it has "long sought answers and greater financial transparency from past IMDG Boards and leadership, and these past boards have always refused." (Ex. 9 to Guzik Cert., IMDG's March 7, 2023, Press Release, A211-A213). GPF cannot claim tribal control if the Tribe only recently discovered "improperly reported payments, unwise investments, unexplained Board expenses, 'donations,' and other improprieties, [including] previously hidden debts" despite long seeking

answers. *Id*. Moreover, the fact that the AD Hoc Committee attempted to assign the entire lending business to another tribe illustrates the Tribe's lack of control over GPF. (Ex. 16 to Guzik Cert., April 12, 2023, Letter from IMDG CEO Evan Azure to President and Councilmembers of the Fort Belknap Indian Community Council, A214—A218).

Finally, NF has controlled GPF under the Notice of Default provision of the Loan Agreement for nearly a year. For virtually all of 2023, NF exercised "control over GPF's financial accounts until such time as Newport, in its sole discretion, has determined the Event of Default cured." (Ex. 17 to Guzik Cert., Notice of Default Letter at GPF 843, A802). It also had Power of Attorney over GPF, allowing it to "[d]o such other and further acts and deeds . . . that Administrative Agent [NF] may deem necessary to make, create, maintain, continue, enforce, or perfect the Liens on or rights to Collateral . . ." including directing payors to pay Collections to Newport Funding." (Ex. 12 to Guzik Cert., NF Loan and Security Agreement at GPF 397, A660).

At bottom, the evidence on record and the Tribe's own statements contradict GPF's conclusory claims that the Tribe exercises full control over and is actively involved in the day-to-day management of GPF. As IMDG CEO Evan Azure admitted in a letter to the Tribe, the Ad Hoc Committee "usurp[ed] decision-making authority from the rest of the newly appointed Board and keep the Council

in the dark". (Ex. 16 to Guzik Cert., April 12, 2023, Letter from IMDG CEO Evan Azure to President and Councilmembers of the Fort Belknap Indian Community Council, A214-A218). *People v. Miami Nation Enterprises*, 2 Cal. 5th at 253 (2016) ("absence of oversight during this period casts doubt on Campbell's assertion that the tribally appointed leadership of SFS exercised significant control over the loan operations."). Clearly, the Tribe was not involved in high level decision making during the Dater era, during the Ad Hoc era, and now during the NF era. *Solomon* at 657 (finding allegations that Curry and the former MacFarlane team do not include the Tribe in high-level discussions weighed against Tribal control). This factor weighs against immunity.

7.2.4 The Tribe Purportedly Intended for GPF To Have Tribal Immunity.

The Tribe intended for GPF to have immunity. This factor, which is non-dispositive on its own, weighs in favor of immunity. *Native Am. Distrib. v. Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, 1294 (10th Cir. 2008);

see also *Miami Nation Enterprises*, 2 Cal. 5th at 253.

7.2.5 The Financial Relationship Between the Tribe and GPF Shows that Ransom's Suit Is Not Against the Sovereign Tribe.

The fifth factor considers whether the Tribe "may be financially liable for [GPF's] legal obligations." *Breakthrough*, 629 F.3d at 1187. The primary concern is whether a judgment against the entity would affect the tribe's assets." *Williams*,

329 F.Supp.3d at 280. If the Tribe receives all profits from an entity, the Tribe is more likely to suffer than if the profit share is limited. *Breakthrough*, 629 F.3d at 1187 (Casino sent 100% of profit to tribe, so any reduction in casino revenue would materially reduce the tribe's income). On the other hand, if the profit share is minimal (e.g. less than 5%) the judgment is more likely to reach third party's revenues instead of the Tribes. *Miami Nation Enterprises*, 2 Cal. 5th at 255 (evidence suggesting a very small revenue share supported denial of tribal immunity because judgment unlikely to materially harm the tribe); *Solomon,* 375 F. Supp. 3d at 658 (E.D. Va. 2019).

Despite claiming that the Tribe is dependent on its revenue, GPF has elected not to submit evidence of GPF's revenue share with the Tribe or other tribal entities. What is clear, however, is that third party vendors currently receive all of GPF's revenue. NF made over REDACTED in 2022. (Ex. 15 to Guzik Cert., Distributions from GPF to Newport Funding LLC per Loan at GPF 170, A796-A797). Carmel Servicing also earned significant compensation for its role as servicer on GPF loans—both $4,500 a month as a Servicer Provider Fee and a monthly commission of 3.5% on all unpaid balances on accounts. (Ex. 13 to Guzik Cert., Carmel Solutions Master Services Agreement at GPF 858, A779). The outstanding balance on loans as of 11/22/21 was REDACTED (Ex. 12 to Guzik Cert., NF Loan and Security Agreement at GPF 480, A748.). As the California

Supreme Court held in *Miami Nation Enterprises*, GPF's assertions are "too vague and conclusory to establish that a judgment against the entities would appreciably impair the tribal revenues," particularly in the face of evidence that GPF has, at best, a minimal financial relationship with the Tribe. *Miami Nation Enterprises*, 2 Cal. 5th at 255.

GPF cites two cases (*Great Plains Lending* and *Williams*) to argue that it does not need to produce any financial records to prevail on tribal immunity. But GPF fails to acknowledge that the factual records in *Great Plains Lending* and *Williams* are readily distinguishable because, unlike the case at bar, there was no evidence that profits were shared with non-tribal parties. In *Great Plains Lending v Department of Banking*, "the record . . . does not indicate, and the defendants do not allege, that proceeds from Great Plains or Clear Creek are going to nontribal members." 339 Conn. 112, 135, 259 A.3d 1128, 1144 (2021). The Fourth Circuit's opinion in *Williams* notes the same thing: "the evidence does not indicate that [non-tribal party] Martorello himself has received any substantial economic benefit from Big Picture." *Williams* at 179. In contrast, the record here shows significant payments to non-tribal entities Dater, CAS, NF, and Carmel Servicing. Against this backdrop, GPF had the burden to prove it actually supports the Tribe's economic development instead of serving only non-tribal members. As reasoned by the District Court, GPF failed to meet that burden.

7.2.6 The Purposes of Tribal Immunity Are Not Served by Granting Immunity to GPF Because the Tribe Has No Legitimate Interest in Selling an Opportunity to Evade State Law.

For this final factor, the Court is encouraged to weigh whether granting immunity furthers federal policies including "protection of the tribe's monies . . . preservation of tribal cultural autonomy, preservation of tribal self-determination, and promotion of commercial dealings between Indians and non-Indians." *Breakthrough*, 629 F.3d at 1188. In short, the purpose of tribal sovereign immunity would not be served by an obvious and exploitative rent-a-tribe scheme. And "a tribe has no legitimate interest in selling an opportunity to evade state law." *Otoe-Missouria Tribe of Indians v. New York State Dep't of Fin. Servs.*, 769 F.3d 105, 114 (2d Cir. 2014).

Despite tribal immunity, the Supreme Court has repeatedly confirmed that states retain the ability to regulate off-reservation tribe activity in their states. *Kiowa Tribe v. Mfg. Techs.*, 523 U.S. 751, 755 (1998) ("We have recognized that a State may have authority to tax or regulate tribal activities occurring within the State but outside Indian country.")

In cases where states have a significant interest, the Court has acknowledged that "less weight" may be afforded to the interests favoring tribal sovereignty. *Rice v. Rehner*, 463 U.S. 713, 720 (1983) ("[I]f we determine that the balance of state,

federal, and tribal interests so requires, our pre-emption analysis may accord less weight to the "backdrop" of tribal sovereignty.")

Here, New Jersey has elected to cap payday loans because they are financially harmful to its residents. Against this significant state interest, the Court considers the sovereignty of the Tribe. But courts do not see a material sovereign interest in allowing tribes to market opportunities to evade state law. In *Washington v. Confederated Tribes of the Colville Indian Reservation,* 447 U.S. 134 (1980),

the Supreme Court compelled the tribe to comply with a state tax on cigarette sales to non-tribal customers. In *Otoe-Missouria Tribe of Indians v. New York State Dep't of Fin. Servs.*, *supra* at 114, the Second Circuit denied tribal payday lenders' attempts to enjoin New York's usury laws. It is within the principles of sovereign immunity to compel tribal entities to compliance with state law. Regardless of the independent facts of this case, tribal immunity should not be applied to economic entities engaged in purely off-reservation commercial activity. This relatively recent (since 1998) expansion of the tribal immunity doctrine "is unsupported by any rationale for that doctrine, inconsistent with the limits on tribal sovereignty, and an affront to state sovereignty." *Michigan v. Bay Mills Indian Cmty.,* 572 U.S. 782, 814 (2014) (Thomas, dissenting).Prior to 1998, tribes were bound by generally applicable state laws when they acted off the reservation. See

Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148–49 (1973)

("Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State.").

Then, in *Kiowa*, the Supreme Court elected to immunize the Kiowa Tribe from a breach of contract claim concerning the purchase of land outside the reservation. *Kiowa Tribe of Oklahoma,* 523 U.S. at 753.. Both the dissent and majority, however, recognized various "reasons to doubt the wisdom of perpetuating the doctrine" and concerns with expanding immunity to off-reservation activity, including that "tribal immunity extends beyond what is necessary to safeguard tribal self-governance" and that "immunity can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter, as in the case of tort victims". *Id.* at 755.

Twenty-five years later, these warnings have manifested. Tribal immunity is regularly "exploited in new areas that are often heavily regulated by States,"[11]

[11] *Bay Mills Indian Cmty.*, 572 U.S. at 825, 134 S. Ct. at 2052.

including payday lending[12] and medical patents.[13] Tribal entities can now, unilaterally, deregulate otherwise heavily regulated industries by avoiding the need to respond to litigation. As the four-justice-dissent explained in *Michigan v. Bay Mills Indian Community*, a case considering the interplay between tribal immunity, tribal entities, and commercial acts:

> As the commercial activity of tribes has proliferated, the conflict and inequities brought on by blanket tribal immunity have also increased. Tribal immunity significantly limits, and often extinguishes, the States' ability to protect their citizens and enforce the law against tribal businesses. This case is but one example: No one can seriously dispute that Bay Mills' operation of a casino outside its reservation (and thus within Michigan territory) would violate both state law and the Tribe's compact with Michigan. Yet, immunity poses a substantial impediment to Michigan's efforts to halt the casino's operation permanently. The problem repeats itself every time a tribe

[12] *Id.* ("For instance, payday lenders (companies that lend consumers short-term advances on paychecks at interest rates that can reach upwards of 1,000 percent per annum) often arrange to share fees or profits with tribes so they can use tribal immunity as a shield for conduct of questionable legality.")

[13] See Hunter Malasky, *Tribal Sovereign Immunity and the Need for Congressional Action,* 59 B.C. L. Rev. 2469, 2469–70 (2018) ("In September 2017, the pharmaceutical company Allergan made an unprecedented deal with a Native American Indian tribe. Allergan negotiated to transfer ownership of its six patents for the dry-eye drug Restasis to the St. Regis Mohawk Tribe in upstate New York. As part of the transaction, Allergan paid the St. Regis Mohawk Tribe a large sum of money, and in return, Allergan received an exclusive license to practice the patents. When the logistics of this deal were explained in court, the United States District Court for the Eastern District of Texas stated that it believed Allergan only entered into the deal because Allergan believed the St. Regis Mohawk Tribe could assert tribal sovereign immunity and avoid an *inter partes review* (IPR) at the Patent Trial and Appeal Board.")

> fails to pay state taxes, harms a tort victim, breaches a contract, or otherwise violates state laws, and tribal immunity bars the only feasible legal remedy. Given the wide reach of tribal immunity, such scenarios are commonplace.

Michigan v. Bay Mills Indian Cmty., 572 U.S. at 823–25 (2014) (Thomas, dissenting).

The Doctrine's expansion to off-reservation commercial acts will continue to invite problems and cannot be married with decades of case law affirming that States can regulate tribal activity on their lands. The Doctrine has become detached from its purpose—safeguarding tribal self-governance—and is now regularly used as a tool to gain an unfair advantage in the marketplace. The Court, therefore, should curtail the judicially created defense and no longer immunize business activities committed on state land and against state citizens.[14]

[14] *Lac du Flambeau Band of Lake Superior Chippewa Indians,* 143 S. Ct. 1689, 1703 (2023) (Thomas, dissenting). ("The consequences of the Court's erroneous tribal immunity precedents have only gotten worse over the years. See *Id.*, at 814, 134 S.Ct. 2024 (Scalia, J., dissenting) ("I am now convinced that [*Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998)] was wrongly decided; that, in the intervening 16 years, its error has grown more glaringly obvious; and that *stare decisis* does not recommend its retention"); *id.*, at 831, 134 S.Ct. 2024 (Ginsburg, J., dissenting) ("[T]his Court's declaration of an immunity thus absolute was and remains exorbitant"). Further, the doctrine simply cannot be reconciled with the Court's precedents affirming "that the States have legislative jurisdiction over the off-reservation conduct of Indian tribes, and even over some on-reservation activities." *Kiowa*, 523 U.S., at 762, 118 S.Ct. 1700 (Stevens, J., dissenting) (describing the Court's prior cases). Rather than accepting the flawed premise of tribal immunity

7.3 The District Court Did Not Abuse Its Discretion in Denying the Motion for Reconsideration Because GPF Improperly Submitted an Unsigned Waiver Which Failed To Impact the District Court's Analysis.

A week after the lower court denied GPF tribal immunity, GPF and NF allegedly entered a Waiver of the Event of Default. However, the submitted Waiver has NF's signature redacted. GPF then moved for reconsideration claiming the Tribe had reestablished tribal control. The lower court denied the motion, noting first that because the "name and signature of the Administrative Agent on the Waiver Agreement are redacted," "the Court therefore cannot determine whether the Waiver Agreement was even properly executed," Order Denying GPF's Motion for Reconsideration at 2, A13. But even assuming the Waiver was valid, the court concluded it did not change its prior analysis on outside control over GPF.

The Court reviews the denial of a motion to reconsider for abuse of discretion. *Reisinger v. City of Wilkes-Barre*, 520 F. App'x 77, 82 (3d Cir. 2013). The underlying legal determinations are considered *de novo* and factual determinations are reviewed for clear error. *Romero v. Twp. of Tobyhanna*, No. 21-2886, 2023 WL 2728829, at *2 (3d Cir. Mar. 31, 2023).

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and deciding the abrogation question beyond the looking glass, the Court should simply abandon its judicially created tribal sovereign immunity doctrine.")

To start, the lower court correctly ruled that the Waiver Agreement cannot be considered properly executed due to GPF's redaction of the signature page. The Loan Agreement between NF and GPF requires that "[n]o amendment, waiver or consent shall ... affect the rights or duties of the Administrative Agent under this Agreement or any other Facility Document" unless it is "in writing and signed by the Administrative Agent." Loan Agmt. § 10.3(b), ECF 62-11. Without a signature from the Administrative Agent, the Waiver Agreement is not valid. See *Morton v. 4 Orchard Land Tr.*, 180 N.J. 118, 129 (2004) ("Under the terms of the written contract prepared by plaintiff's realtor, the contract was binding only on 'parties who *sign* it,'… but the defendant did not").

Furthermore, the lower court correctly found the Waiver Agreement (even if enforceable) would not alter the analysis regarding outside control over GPF. To start, the Waiver Agreement cannot erase the historical record demonstrating the Tribe lacked control over its payday lending business. In early 2023, the Tribe replaced the Ad Hoc Committee because it repeatedly refused to provide the Tribe basic information about its payday lending businesses. (Ex. 19 to Guzik Cert., IMDG's Complaint against Greenberg Taurig, at ¶¶ 3, 57, A853). ("The Council had called a special meeting to appoint a Board of Directors for IMDG because it had become increasingly concerned about expiration of board terms, the significant debts IMDG had incurred, and the lack of information the IMDG Board and their

legal counsel, Jennifer Weddle, was providing to the Council regarding IMDG's commercial activities . . . . The Council addressed the Prior Board appointments because their appointments had expired but also were concerned about the Prior Board's persistent failure to provide financial information when the Council had requested regarding information regarding its business activities and its financing arrangements with the Lenders.") In response, the Ad Hoc Committee attempted to transfer the lending business to another Tribe. After that failed, GPF's lender NF exercised "immediate control" via a Notice of Default because IMDG lawfully replaced its board without NF's prior approval. (Ex 12 to Guzik Cert., (ECF 62-12) NF Loan and Security Agreement, at GPF 397, A660). GPF subsequently operated under the Notice of Default for over a year. This only changed after the lower court found GPF was not entitled to tribal immunity. The Waiver simply fails to counter the weight of evidence demonstrating third parties can exercise total control over GPF for something as fundamental as changing tribal leadership.

Additionally, the Waiver fails to affirmatively establish that GPF is under complete tribal management. The lower court was rightly skeptical of the Waiver as a self-serving document intended to restore tribal immunity and avoid this litigation. GPF and NF have a very real incentive to reacquire immunity because without it GPF can no longer continue its business of offering usurious loans and repay its loan from NF. As the court noted, the Waiver does not preclude NF from

reinstating a Notice of Default later. Nor does it limit NF's ability to exercise "immediate control" for any Tribal acts which NF considers to be "materially adverse." (Ex. 13 to Guzik Cert., (ECF 62-12) Master Services Agreement re Carmel Solutions at GPF 854, A775). The Tribe is not permitted to make "change of control or management" in GPF without NF's approval. Order Denying GPF's Motion to Reconsider at 4, A14. These restrictions effectively limit any Tribal autonomy over GPF. *See Solomon v. Am. Web Loan*, *supra*, at 656 (finding similar contractual provisions limiting sovereign power weighed against immunity). Even if the Waiver Agreement was valid, the control exerted by NF still pushed this factor in Ransom's favor.

8. CONCLUSION

Ransom asks the Court to affirm the lower court's decision and find GPF is not entitled to tribal immunity.

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CERTIFICATION OF BAR MEMBERSHIP

I certify that I am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

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CERTIFICATE OF COMPLIANCE

I hereby certify, in reliance on the word count of the word-processing system used to prepare the document, that this brief complies with the Federal and Local Rules in that it contains 10,867 words, was prepared in Microsoft Word, and produced with a proportional serif 14-point font. I further certify that the text of the electronic brief is identical to the text in the paper copies. I further certify that version 4.18.24080.9 of the Windows Security program has been run on the electronic brief, and no virus was detected.

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CERTIFICATE OF SERVICE

I hereby certify that counsel of record for all parties to this appeal are Filing Users of the Court's Electronic Case Filing (ECF) service, and that on this 16th day of December 2024, I caused the Brief of Plaintiff-Appellee Rashonna M. Ransom to be served on counsel of record for all parties via the ECF service.

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