United States Court of Appeals

for the

Third Circuit

Case No. 24-1908

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

– v. –

GREATPLAINS FINANCE, LLC, doing business as Cash Advance Now;
JOHN DOES 1-10 GreatPlains Finance, LLC,

Appellants.

ON APPEAL FROM AN ORDER OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

REPLY BRIEF FOR DEFENDANT-APPELLANT

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Ms. Ransom's response highlights the weakness of her argument that GreatPlains is not an arm of the Fort Belknap Indian Community (FBIC or the Tribe). Rather than address GreatPlains' arguments head on, Ms. Ransom, as she did below, tries to shift the focus to GreatPlains' management when it was first established many years ago, before the events giving rise to this case, and to creditor rights provisions of GreatPlains' third-party credit facility. She also makes repeated reference to salacious allegations—which she presents as established fact—from a since-dismissed complaint in an unrelated lawsuit to which neither GreatPlains nor the FBIC was a party. Ms. Ransom focuses on these stale, irrelevant, and unproven matters because the actual, current facts relevant to the tribal sovereign immunity balancing analysis strongly support GreatPlains' entitlement to immunity as an arm of the FBIC.

ARGUMENT & CITATIONS OF AUTHORITY

I. Ms. Ransom cites unsubstantiated and irrelevant putative evidence.

Before turning to Ms. Ransom's individual arguments, GreatPlains notes two recurrent, overarching problems with her brief. First, Ms. Ransom relies extensively upon and cites as fact allegations drawn from the complaint in a since-dismissed lawsuit brought against IMDG's prior legal counsel by IMDG and several

individuals—proceedings to which neither GreatPlains nor the FBIC was a party.[1] Ms. Ransom cites no rule or precedent that contemplates treating the unproven allegations of a complaint as evidence in subsequent proceedings involving wholly different parties, and GreatPlains is aware of none. The Court should disregard the substantial body of otherwise unsupported allegations from the *Weddle* lawsuit that Ms. Ransom treats as proven facts in this case.

Second, Ms. Ransom devotes substantial space to discussing GreatPlains' management and financial arrangements immediately following its establishment more than a decade ago, when the Tribe was first learning the consumer lending business.[2] She does not allege that these management and financial arrangements remain in place or were in effect when she filed suit or at any time during this litigation. Indeed, she concedes that IMDG ended those unfavorable arrangements years ago once it developed sufficient expertise to manage GreatPlains' operations and no longer needed to outsource those responsibilities.[3] The Court should ignore these stale, outdated facts that have no relevance to Ms. Ransom's claims or to GreatPlains' current status as an arm of the FBIC.

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[1] *See, e.g.*, Ransom Br. 9-11, 44-45 (citing complaint filed in *IMDG v. Weddle*, Case No. 4:23-cv-00054-BMM (D. Mont. Sept. 11, 2023), A838 *et seq.*).

[2] *See* Ransom Br. 6-10, 21-22, 24, 26-27, 33; *see also* GreatPlains Rule 30(b)(6) Deposition Transcript (GreatPlains 30(b)(6) Tr.) 24:6-25:25, A476-77.

[3] Ransom Br. 10 (acknowledging that IMDG, the FBIC entity that now manages GreatPlains, bought out these unfavorable agreements in 2017); GreatPlains 30(b)(6) Tr. 24:14-25:21, A476-77.

II. GreatPlains is an arm of the FBIC under the *Breakthrough* test.[4]

As explained in GreatPlains' principal brief, each of the *Breakthrough* factors supports GreatPlains' entitlement to tribal sovereign immunity as an arm of the FBIC. Ms. Ransom's contrary arguments, which rely on a hodgepodge of unsupported and irrelevant facts and questionable authority, are unavailing.

A. *Ms. Ransom mischaracterizes the standard of review.*

At the outset of her argument, Ms. Ransom baldly states that GreatPlains' "claims of sovereign immunity present a fact question for the Court,"[5] implying a deferential standard of review. This is incorrect. The parties largely agree on the facts to the extent they are supported by competent evidence adduced during jurisdictional discovery below; GreatPlains' appeal primarily (albeit not exclusively) challenges the district court's application of the law—*i.e.*, the *Breakthrough* standard—to the facts. This is a legal question subject to *de novo* review, and as the Fourth Circuit's recent *Williams* decision demonstrates, an appellate court can reverse a district court's overly restrictive application of the *Breakthrough* test without rejecting the lower court's factual findings. *Williams v.*

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[4] The parties agree that this Court has jurisdiction over GreatPlains' appeal pursuant to the collateral order doctrine and that the multi-factor balancing test adopted in *Breakthrough Management Group, Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173 (10th Cir. 2010), is the appropriate tool for determining whether GreatPlains is an arm of the Tribe. *See* Ransom Br. 23-24.

[5] *Id.* at 20.

Big Picture Loans, LLC, 929 F.3d 170, 177 (4th Cir. 2019) ("[W]e find no clear error in the district court's factual findings. Reviewing the district court's legal conclusions de novo, however, we hold that the [e]ntities are entitled to sovereign immunity as arms of the Tribe and therefore reverse …."). That is what this Court should do.

B. *GreatPlains' method of creation supports immunity.*

As the district court held, GreatPlains' establishment pursuant to FBIC tribal law supports its entitlement to tribal sovereign immunity. Ms. Ransom disagrees, arguing that GreatPlains is a mere continuation of a preexisting, non-tribal lending entity and that the first *Breakthrough* factor thus weighs against immunity. Ms. Ransom is wrong.

Multiple federal appellate courts have held that a tribe's establishment of an entity pursuant to tribal law weighs in favor of the entity having tribal sovereign immunity.[6] The FBIC created GreatPlains pursuant to FBIC law,[7] so the district court correctly held that this factor supports immunity.

Opposing this settled federal appellate authority, Ms. Ransom cites a factually inapposite, unpublished district court opinion from Oregon,[8] a district court opinion

[6] GreatPlains Br. 25 (citing several federal appellate opinions).
[7] GreatPlains' Articles of Organization, A99-100.
[8] *Hunter v. Redhawk Network Sec., LLC*, No. 6:17-cv-0962-JR, 2018 WL 4171612 (D. Or. Apr. 26, 2018).

from Virginia that relied on since-reversed authority,[9] and a state court opinion from California.[10] *Hunter*, the Oregon opinion, involved a defendant entity that was owned by a tribe but chartered under state law rather than tribal law. 2018 WL 4171612, at *3. The court's holding that a tribe's ownership of a state-chartered entity does not confer immunity on the entity is wholly irrelevant to entities such as GreatPlains that are created by a tribe through exercise of its sovereign authority pursuant to its own law.

In the Virginia case, the court held a tribal entity's merger with pre-existing, state-law companies acquired by the tribe rendered the first *Breakthrough* factor neutral as to immunity. *Solomon*, 375 F. Supp. 3d at 653-54. GreatPlains did not merge with any state law entity, so *Solomon* is also distinguishable. Moreover, the *Solomon* court based its holding on the inapposite *Hunter* opinion and the district court opinion in *Williams v. Big Picture Loans, LLC*, 329 F. Supp. 3d 248 (E.D. Va. 2018), which the Fourth Circuit subsequently reversed due to its erroneously stringent application of the *Breakthrough* factors. *See Williams*, 929 F.3d at 177 (reversing and remanding with instructions to dismiss all claims due to tribal sovereign immunity). Given its factual dissimilarity and heavy reliance on subsequently reversed authority, *Solomon* has minimal precedential value.

[9] *Solomon v. Am. Web Loans*, 375 F. Supp. 3d 638 (E.D. Va. 2019).
[10] *People v. Miami Nation Enters.*, 2 Cal. 5th 222 (2016).

Miami Nation, the California state opinion Ms. Ransom cites, conceded that an entity's creation under tribal law "appear[ed] to weigh in favor of immunity" but found the factor "equivocal" because much of the tribal entity's intellectual property was previously held and used by a non-tribal entity that continued to play a major role in the tribal entity's management and operations. 2 Cal. 5th at 255-56. Here, no pre-existing, non-tribal entity had any role in GreatPlains' management or operations at any time relevant to this lawsuit, and the only putative evidence that GreatPlains' intellectual property was previously used by a non-tribal entity is a bald statement in Ms. Ransom's brief unsupported by any citation.[11] And even if *Miami Nation* were directly on point, it could not overcome the weight of federal appellate authority holding that an entity's creation under tribal law decisively tips the first *Breakthrough* factor in favor of immunity.

C. *GreatPlains' purpose supports its sovereign immunity.*

As discussed in GreatPlains' principal brief, federal courts considering the second *Breakthrough* factor always look to a tribal entity's stated purpose and sometimes also consider the extent to which the entity has fulfilled that purpose.[12] Ms. Ransom seems to dispute this, citing case law that looks to both stated purpose and related evidence while ignoring case law addressing only the entity's stated

[11] Ransom Br. 25.
[12] GreatPlains Br. 26-27.

purpose.[13] Her selective citations do not change the fact that courts have taken both approaches.

Regardless of which approach this Court adopts, this factor supports GreatPlains' sovereign immunity. GreatPlains' stated purpose— "to generate additional revenues and economic opportunities for the tribal government and its members"[14] —weighs strongly in favor of immunity, and the district court erred in disregarding it. *Breakthrough*, 629 F.3d at 1192; *see Williams*, 929 F.3d at 178.

The district court also erred in concluding that GreatPlains failed to demonstrate that it serves its stated purpose. In fact, evidence shows that GreatPlains serves its stated purpose in several ways, including by leasing employees from IMDG, the Tribe's economic development arm that employs 60% tribal members.[15] Supporting tribal member employment and paying a tribal enterprise for leased employees are directly tied to GreatPlains' stated purpose of generating economic opportunities for the Tribe and its members. And as explained by GreatPlains' *amicus*, the Conference of Tribal Lending Commissioners (CTLC), housing employees in one tribal enterprise and leasing them to other tribal business entities

[13] Ransom Br. 28.
[14] GreatPlains Br. 27 n.47.
[15] *Id.* at 28; *see also* GreatPlains 30(b)(6) Tr. 25:16-26:10, A477 (explaining, in response to questioning from Ms. Ransom's counsel, that in 2017 GreatPlains leased approximately 25 tribal member employees from IMDG).

is commonplace.[16] GreatPlains' leasing of FBIC tribal member employees from another FBIC tribal enterprise supports its entitlement to tribal sovereign immunity.

Ms. Ransom's bald statement that "there is no evidence that [GreatPlains] ever leased any employee" is unequivocally false, as is her assertion that "there is no evidence [GreatPlains] ever paid IMDG for leasing an employee."[17] Dana Pyette, GreatPlains' Rule 30(b)(6) deponent, repeatedly testified that GreatPlains leases employees from IMDG, and Ms. Ransom's counsel questioned Ms. Pyette about financial documents reflecting GreatPlains' payments to IMDG for leased employees.[18] Ms. Ransom's reliance on fabricated, easily refuted allegations underscores the weakness of her argument.

Ms. Ransom's statement that leasing employees from another tribal entity that employs 60% tribal members does not benefit the Tribe or its members is puzzling. She apparently assumes, absent any explanation or support, that IMDG would

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[16] CTLC Amicus Br. 9-10.

[17] Ransom Br. 31.

[18] *See, e.g.*, GreatPlains 30(b)(6) Tr. 24:24-25:3, A476-77 ("[W]e have leased employees from [IMDG] to the lending entities. So we have our call center operations and other operations leased to the lending entity."); 48:12-16, A323 ("All employees are paid from [IMDG], so he's leased to GreatPlains but he's paid by [IMDG]."); 97:11-15, A349 ("So, again, [IMDG] employees were leased to each of the lending entities, including GreatPlains. So there would've been always [IMDG] employees working on the portfolio of GreatPlains."); 100:9-25, A352 (discussing documentary evidence of GreatPlains' payments to IMDG for leased employees); *see also* Azure Decl. ¶ 3, A375-76 (describing the shared services model that the Tribe employs with IMDG and GreatPlains).

employ the same number of tribal members and derive the same amount of income from employee leasing regardless of whether it leased employees to GreatPlains. Uncontradicted testimony regarding revenue that GreatPlains pays to IMDG for leased employs belies this baseless assumption.[19]

Finally, it is undisputed that the Tribe, through IMDG, is entitled to any profits that GreatPlains distributes. Despite acknowledging this fact, Ms. Ransom argues at length—once again relying on California state law rather than ample federal appellate precedent—that this factor weighs against immunity because there is insufficient evidence of how much revenue GreatPlains distributes to the Tribe.[20] She tries to buttress this argument by noting that in GreatPlains' early days—under arrangements that have been defunct since 2017—GreatPlains received relatively small payments for each loan generated and that now GreatPlains pays its debts before it realizes profits.[21] These arguments are unpersuasive.

When the Tribe receives all of GreatPlains' profits, the amount of those profits is irrelevant. To hold otherwise would impose a requirement that tribal businesses be successful and profitable to have tribal sovereign immunity and would prevent tribal enterprises from reinvesting proceeds to grow their businesses for fear of

[19] *See id.*
[20] Ransom Br. 29-30.
[21] *Id.* at 30-31.

losing immunity. No court has done this, and it would make no sense.[22] Tribal businesses can serve their purpose of generating economic opportunity for their tribal governments and members without distributing huge profits. In fact, courts have recognized that tribal enterprises served the purpose of benefiting their tribal owners even when they lost money or were not sufficiently profitable to make distributions. *See In re Internet Lending Cases*, 53 Cal. App. 5th 613, 627 (2020); *Applied Scis. & Info. Sys., Inc. v. DDC Constr. Servs., LLC*, No. 2:19-cv-575, 2020 WL 2738243, at *3 (E.D. Va. Mar. 30, 2020). Whatever profits GreatPlains generates go to the Tribe, and even if GreatPlains is not profitable at any given time it still benefits the Tribe by supporting tribal member employment and by reinvesting profits to grow its business and expand tribal economic development opportunities.[23]

Ms. Ransom's efforts to undercut GreatPlains' status as an arm of the FBIC by citing its long since discontinued business arrangements with its initial third-party manager and loan servicing company and its current debt payment policies are equally meritless. The Tribe terminated GreatPlains' relationships with its initial manager and loan servicing agent and assumed full operational control of

[22] Indeed, the district court acknowledged that "no case law provides that 'a tribe must receive a certain percentage of revenue from a given entity for the entity to constitute an arm of the tribe." Dkt. 72, A6 (quoting *Williams*, 929 F.3d at 180).

[23] GreatPlains 30(b)(6) Tr. 25:22-25, A477 (testifying that GreatPlains currently reinvests profits to grow its business); 31:8-32:19, A478; Azure Decl. ¶¶ 15-16, A94.

GreatPlains in 2017,[24] years before Ms. Ransom filed suit, rendering irrelevant any facts regarding those defunct relationships. And the fact that GreatPlains pays its vendors and creditors before realizing profits is basic business accounting that in no way prevents it from being an arm of the FBIC. Any business that distributed revenues to its members or shareholders before paying vendors and creditors would be short lived.

Ms. Ransom's arguments ultimately boil down to second-guessing the business decisions of GreatPlains' Board, which consists entirely of FBIC Tribal Council members. But "policy considerations of tribal self-governance and self-determination counsel against second-guessing a financial decision of the Tribe." *Williams*, 929 F.3d at 181. Moreover, Ms. Ransom's proposed hyper-focus on GreatPlains' monetary contributions to the Tribe causes this factor to overlap substantially, if not become completely redundant with, the fifth *Breakthrough* factor that examines the financial relationship between a tribe and tribal enterprise. The second *Breakthrough* factor looks at the entity's purpose, not its finances.

GreatPlains was created to provide economic opportunity for the FBIC and its members, and it has shown that it fulfills that purpose. The second *Breakthrough* factor supports GreatPlains' immunity, and the district court misapplied the law in holding otherwise.

[24] *Id.* 24:14-25:21

D. *The Tribe fully controls GreatPlains.*

The third *Breakthrough* factor, frequently called the control factor, considers an entity's "structure, ownership, and management." *Breakthrough*, 629 F.3d at 1193. Extensive evidence shows that the Tribe owns, manages, governs, and controls GreatPlains.[25] In fact, the district court correctly found that GreatPlains "is wholly owned by the Tribe and since 2017 was structured to be managed entirely by the Tribe through IMDG."[26] Ms. Ransom attempts to counter this evidence by citing stale details of GreatPlains' long discontinued business relationships with its initial manager and support entities and mischaracterizing the implications of GreatPlains' credit facility with its current lenders and their administrative agent (the Agent).[27] The district court erroneously accepted Ms. Ransom's mischaracterization of the Agent's authority over GreatPlains and compounded that error with its additional analysis and by refusing to credit new evidence on reconsideration. As a result, it incorrectly held that the control factor weighs against immunity.

Ms. Ransom concedes that the Tribe owns GreatPlains, as she must.[28] But she contends that, despite owning GreatPlains and filling its Board with Tribal Council members, the Tribe does not control it. Instead, she says, GreatPlains was first

[25] GreatPlains Br. 32-42 (discussing evidence of tribal control of GreatPlains).
[26] Opinion, A7; *see also* Opinion on Reconsideration, A14 ("[GreatPlains] is wholly owned by the Tribe and managed by the Tribe through IMDG.").
[27] Ransom Br. 32-35.
[28] *Id.* at 32.

controlled by outside entities, then an Ad Hoc Committee of its Board (also consisting of FBIC Tribal Council members), and now, since 2023, by the Agent.[29] Once again, Ms. Ransom assertions are irrelevant or wrong.

As discussed *supra*, Ms. Ransom's allegations concerning control of GreatPlains in its early years are irrelevant to GreatPlains' present-day sovereign immunity. And Ms. Ransom's allegations regarding the Ad Hoc Committee, in addition to being based on hearsay and unproven allegations from the *Weddle* complaint, do not establish a lack of tribal control over GreatPlains. On the contrary, Ms. Ransom states that the Tribe, upon learning of alleged misconduct by tribal members serving on the Ad Hoc Committee, removed those members and replaced them on IMDG/GreatPlains' Board with other members of the FBIC Tribal Council.[30] The Tribe's exercised authority to remove allegedly rogue Board members demonstrates its control over GreatPlains, not a lack thereof.

Ms. Ransom next erroneously argues—and the district court erroneously concluded—that the Tribe does not control GreatPlains because of the terms of its third-party credit facility. The facility authorizes the Agent to take certain defined steps—such as seizing collateral and requiring GreatPlains to execute deposit account control agreements—to protect creditor collateral in response to an event of

[29] *Id.* at 33-34.
[30] *Id.* at 10.

default. But such security terms are frequently required by commercial lenders and do not grant the lenders control of the borrower entity.[31] They simply provide security for the lenders' investment. Moreover, as explained in the CTLC amicus brief and demonstrated by the facts of this case, Agent powers triggered by an event of default involve only short-term intervention to protect lender collateral; they do not contemplate or result in the creditors' long-term or day-to-day managerial involvement with or control of the borrower entity.[32] Here, the Agent played no role in the day-to-day management of GreatPlains while the Event of Default was in effect, and the Event of Default was waived, terminating the Agent's authority, prior to the filing of GreatPlains' motion for reconsideration.[33] Neither the terms of GreatPlains' third-party credit facility nor the temporary invocation of the Agent's authority pursuant to a declared Event of Default obviated the Tribe's control of GreatPlains.

Ms. Ransom next argues that the credit facility itself countermands the Tribe's control of GreatPlains because it allows the Agent to declare an event of default if the Tribe takes certain actions, including governmental actions, that the Agent deems adverse to the lenders' interests.[34] The district court erroneously accepted this

[31] *See generally* CTLC Amicus Br. 14-17.
[32] *Id.* at 16.
[33] Azure Decl. ¶¶ 4, 7-9, A376-78.
[34] Ransom Br. 11-12, 34.

argument despite an obvious and fatal flaw.[35] The credit facility does not limit the Tribe's ability to act in any way; it simply allows the Agent to take steps to protect collateral if the Tribe exercises its control of GreatPlains in ways that the Agent deems adverse. Here, the Agent issued an Event of Default in response to the Tribe's removal and replacement of the prior IMDG/GreatPlains Board.[36] The Agent's displeasure with the Tribe's exercise of its authority over GreatPlains did not prevent the Tribe from acting; the old Board members were removed, and the new Board consisting exclusively of current Tribal Council members remains in place and continues to direct GreatPlains' business with no day-to-day Agent involvement even while the Event of Default was in effect. Far from demonstrating a lack of tribal control, this series of events proves that the Tribe does control GreatPlains and will manage it in the way that the Tribal Council sees fit regardless of any possible consequences under the credit facility.

In sum, the Tribe wholly owns, governs, and oversees the day-to-day management of GreatPlains and has done so at all times since 2017. It also possesses and has exercised the authority to remove and replace GreatPlains' leadership when it did not act in accordance with the Tribe's wishes. The district court erred, both

[35] Opinion on Reconsideration, A14 (finding that "restrictions in the Loan Agreement … effectively limit the Tribe's autonomy over management of [GreatPlains]").
[36] *See* Ransom Br. 15; Agent Correspondence, A802-04.

initially and on reconsideration, by giving too much weight to the Agent's limited ability to protect lender collateral in response to the Tribe's exercise of its control over GreatPlains and by disregarding the fact that the Tribe actually exercises such control. The third *Breakthrough* factor supports GreatPlains' tribal sovereign immunity.

E. *The FBIC intended for GreatPlains to have sovereign immunity.*

Ms. Ransom concedes, and the district court held, that the FBIC intended for GreatPlains to share in the Tribe's immunity.[37] The fourth *Breakthrough* factor thus supports immunity and dismissal.

F. *GreatPlains financially benefits the Tribe.*

The fifth *Breakthrough* factor examines the financial relationship between entity and tribe. GreatPlains' principal brief sets forth in detail the ways in which IMDG, which is entitled to all of GreatPlains' net profits that are not reinvested in growing GreatPlains' business,[38] financially benefits the FBIC and its members both through direct cash distributions and through the funding of programs and infrastructure that cater to and support tribal members.[39] When a tribal entity helps a tribe "fund its governmental functions, … support tribal members, and … search

[37] Ransom Br. 35.
[38] Azure Decl. ¶ 16, A94; GreatPlains 30(b)(6) Tr. 31:8-24, A478.
[39] GreatPlains Br. 9-10, 44-45.

for other economic development opportunities," this factor supports immunity. *Breakthrough*, 629 F.3d at 1195; *Williams*, 929 F.3d at 184 (quoting *Breakthrough*).

Mr. Ransom concedes that under *Breakthrough*, the Tribe's entitlement to all of GreatPlains' profits supports its immunity.[40] But she nonetheless argues that this factor weighs against immunity because, she claims, the most important consideration is whether a judgment would affect the Tribe's assets.[41] As authority for this claim, she cites the district court opinion in *Williams* while failing to note that the Fourth Circuit reversed that opinion, holding that potential effects on the tribal treasury can strongly support immunity but the absence of such effects "has little significance in the analysis." *Williams*, 929 F.3d at 184. The district court here made a similar error in applying *Breakthrough*, holding that this factor "weighs against immunity" because the court could not "conclude that a judgment against [GreatPlains] would meaningfully impact the Tribe or its treasury."[42] The district court's misapplication of this factor disregards *Breakthrough* and *Williams* and constitutes reversible error.

Ms. Ransom next reiterates her arguments from the second *Breakthrough* factor, contending that GreatPlains has not shown how much money it has distributed to the Tribe and that it cannot have sovereign immunity when it

[40] Ransom Br. 35 (citing *Breakthrough*, 629 F.3d at 1187).
[41] *Id.* at 35.
[42] Opinion 7-8, A7-8.

supposedly shares its profits with non-tribal entities.[43] These arguments remain unavailing.

As previously noted, basing a tribal entity's immunity on the amount of profit that it generates would penalize tribal startups that are attempting to grow their business and marginally profitable or unprofitable entities that nevertheless benefit tribes by employing tribal members or performing functions that are beneficial to the tribe or its members. It would also penalize tribes that may have less experience or expertise in running businesses. This is why the critical question under the fifth *Breakthrough* factor is not how much money the business makes for the tribe, but whether it supports the tribe in performing its governmental functions, helping tribal members, or searching for additional economic development opportunities. GreatPlains does all of these things by supporting tribal member employment, reinvesting revenues to grow its business, and distributing 100% of any net profits to the Tribe through IMDG.[44]

Ms. Ransom finally disputes that all of GreatPlains' profits go to the Tribe, attempting to distinguish on point case law because in those cases, allegedly "unlike

[43] As noted *supra*, Ms. Ransom makes many of the same arguments regarding GreatPlains' profitability in connection with both the second and fifth *Breakthrough* factors. Such arguments are properly considered, if at all, under this factor, and are irrelevant to the second *Breakthrough* factor, which examines the entity's purpose.
[44] Azure Decl. ⁋⁋ 15-16, A94; Declaration of Jeffrey Stiffarm ⁋⁋ 3, 5, 7-9, A161-62; GreatPlains 30(b)(6) Tr. 31:8-15 & 32:9-12, A478.

the case at bar, there was no evidence that profits were shared with non-tribal parties."[45] This argument, which relies on GreatPlains' payments to its creditors and service providers, conflates profits and revenues. GreatPlains readily acknowledges that it pays its bills—using revenues generated through its business operations—before it realizes and distributes profits. And, as with every business, using revenues to cover expenses necessarily diminishes profits. Ms. Ransom may question the wisdom of the Tribe's business arrangements, feeling that GreatPlains' expenses are too high or its profits too low. But as the Fourth Circuit observed, "policy considerations of tribal self-governance and self-determination counsel against second-guessing a financial decision of the Tribe." *Williams*, 929 F.3d at 181. And Ms. Ransom has not adduced a single shred of evidence contradicting sworn testimony that 100% of GreatPlains' net profits are reinvested to grow its business or distributed to IMDG, the Tribe's economic development enterprise.[46]

Breakthrough and its progeny do not mandate that an entity be profitable or establish a fixed minimum amount of profits that it must distribute in order to have sovereign immunity. Here, the uncontradicted evidence establishes that GreatPlains reinvests revenues to grow its business and distributes any profits to the Tribe through IMDG. This should tip the financial relationship factor in favor of sovereign

[45] Ransom Br. 37.
[46] GreatPlains 30(b)(6) Tr. 31:8-15 & 32:9-12, A478; Azure Decl. ¶ 16, A94.

immunity, and at the very least it makes the factor neutral. The district court misapplied the law in holding that this factor weighed against GreatPlains' immunity.

G. *Acknowledging GreatPlains' immunity serves the purposes of tribal sovereign immunity.*

The sixth and final *Breakthrough* factor asks whether recognizing an entity's immunity would serve the purposes underlying the doctrine of tribal sovereign immunity. *Breakthrough*, 629 F.3d at 1187. More recent opinions view this factor as overlapping with and informing the application of the first five and do not analyze it separately, and the district court reasonably followed this approach. *See, e.g.*, *Williams*, 929 F.3d at 177 ("The sixth *Breakthrough* factor … overlaps significantly with the first five …."); *White v. Univ. of Cal.*, 765 F.3d 1010, 1025 (9th Cir. 2014); Order, A5. But because Ms. Ransom addresses the sixth factor independently in her brief, GreatPlains will respond to her argument here.

As the Tenth Circuit explained in *Breakthrough*, there is a strong federal policy of encouraging tribal self-determination and economic development. 629 F.3d at 1195. Extending tribal sovereign immunity to subordinate tribal enterprises that "promote and fund the Tribe's self-determination through revenue generation and the funding of diversified economic development" serves this purpose. The sixth *Breakthrough* factor does not support immunity, however, for "enterprises formed solely for business purposes and without any declared objective of promoting the

[tribe's] general tribal or economic development." *Id.* (alteration original) (citation omitted).

GreatPlains' stated purpose is "to generate additional revenues and economic opportunities for the tribal government and its members,"[47] and, as discussed *supra*, GreatPlains serves this purpose by leasing tribal employees from IMDG, using revenues to grow its tribal business, and distributing any profits to the Tribe through IMDG. GreatPlains' business is thus directly linked to the purposes of tribal sovereign immunity identified in *Breakthrough*, tipping this factor in favor of tribal sovereign immunity.

Ms. Ransom offers three responses, none of which has merit. First, she contends that "the purpose of tribal sovereign immunity would not be served by an obvious and exploitative rent-a-tribe scheme."[48] Whatever the merits of this statement in the abstract, it has no relevance to GreatPlains—a tribally owned, managed, and controlled business with a Board comprised entirely of FBIC Tribal Council members that leases tribal member employees from another FBIC tribal business enterprise and distributes all of its profits to the Tribe. Ms. Ransom's repeated disregard of the Tribe's business decisions and the significant work that the Tribe has put into learning the online consumer lending business and assuming full,

[47] GreatPlains Br. 27 n.47.
[48] Ransom Br. 38.

active control of GreatPlains' management is borderline offensive. It is, contrary to her apparent belief, possible for Indian tribes to run their own businesses without serving as puppets of non-tribal interests, and the FBIC does so here.

Ms. Ransom's second argument cites a wholly irrelevant legal balancing test used to determine whether particular state laws or regulations are preempted in Indian country.[49] GreatPlains is not arguing that New Jersey's lending laws are preempted and thus inapplicable here. It is arguing that it has sovereign immunity from Ms. Ransom's lawsuit seeking to enforce those laws. As the Supreme Court repeatedly has held, "[t]here is a difference between the right to demand compliance with state laws and the means available to enforce them." *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 755 (1998); *see Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782 (2014) (holding that tribal sovereign immunity barred a state from enforcing its gaming laws against a tribe on non-Indian lands). The arm of the tribe analysis set forth in *Breakthrough* and its progeny governs the question before the Court, not the preemption balancing test that Ms. Ransom cites.

Third, Ms. Ransom makes a policy argument principally based on Justice Thomas's dissenting opinions in *Kiowa Tribe* and *Bay Mills*.[50] Echoing Justice

[49] *See id.* 38-39 (first citing *Rice v. Rehner*, 463 U.S. 713, (1983) and then citing *Washington v. Confederated Tribes of the Colville Indian Rsrv.*, 447 U.S. 134 (1980)).
[50] Ransom Br. 39-42.

Thomas, she asserts that applying tribal sovereign immunity to tribes' off-reservation, commercial conduct is unwise and "will continue to invite problems," so this Court should "no longer immunize business activities committed on state land against state citizens."[51] The dissenting opinions on which Ms. Ransom bases her arguments are just that—dissents. The majority opinions in *Kiowa Tribe* and *Bay Mills*, which are controlling on this Court, are quite clear. The Supreme Court has "time and again treated the 'doctrine of tribal immunity [as] settled law'" and "declined … to make any exceptions for suits arising from a tribe's commercial activities, even when they take place off Indian lands." *Bay Mills*, 572 U.S. at 789 (alternation in original) (quoting *Kiowa Tribe*, 523 U.S. at 756), 790. This Court must do the same.

III. The district court erred in its order denying reconsideration.

After errantly applying the *Breakthrough* factors in its initial opinion below, the district court compounded its error by denying reconsideration based on changed facts and by including additional, erroneous application of the *Breakthrough* factors in its new order. The district court's original opinion relied exclusively on the existence of an active Event of Default under GreatPlains' third-party credit facility to hold that the FBIC did not "currently" control GreatPlains and that the third

[51] *Id.* at 42.

Breakthrough factor thus weighed against immunity.[52] Given the district court's reliance on the active Event of Default in finding that the Tribe did not "currently" control GreatPlains at the time of the court's decision, GreatPlains sought reconsideration after the Agent irrevocably waived the Event of Default.[53] In denying GreatPlains' motion, the district court provided a substantially revised analysis of the third *Breakthrough* factor that continued to misapply the test and relied on mischaracterizations of evidence showing the Tribe's control, as set forth above and in GreatPlains' principle brief.

A. *The Court should review the district court's new application of Breakthrough de novo.*

Before addressing the substance of the district court's revised analysis, it is important to clarify the standard of review. While the standard of review for a district court's decision to grant or deny reconsideration is abuse of discretion, that standard should not apply where, as here, the district court includes substantive new legal analysis in an order purporting to deny reconsideration. Providing substantial new legal analysis in the order ostensibly denying reconsideration effectively amounts to granting reconsideration, then affirming the original ruling after reconsideration.

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[52] Order, A7 ("Although [GreatPlains] is wholly owned by the Tribe and since 2017 was structured to be managed exclusively by the Tribe through IMDG, under the Event of Default [the Agent] now exercises 'immediate control' over [GreatPlains'] financial accounts. … This factor *currently* weighs against finding immunity." (emphasis added)).

[53] Brief in Support of Reconsideration, A367, *et seq.*

Holding otherwise would prevent the appropriate, *de novo* review of district courts' legal analysis of the merits so long as the lower courts deferred that analysis until ruling on a motion for reconsideration. So, while GreatPlains does not dispute that the decision to grant or deny reconsideration rests in the sound discretion of the district court, the district court's "update[d] … analysis … for purposes of a potential appeal" should be reviewed *de novo* despite being included in an order denying reconsideration.[54]

B. *The district court erred in its order on reconsideration.*

On appeal, Ms. Ransom adopts the erroneous new analysis from the district court's order denying reconsideration by (1) questioning the validity of the Event of Default waiver and (2) arguing that the waiver is irrelevant because the terms of the credit facility limit the Tribe's control of GreatPlains.[55] She also offers an additional, equally meritless argument, asserting that the waiver does not "erase the historical evidence" allegedly showing that the Tribe did not control GreatPlains in the past.[56] All three arguments are unavailing.

Both the district court and Ms. Ransom question the validity of the waiver because the Agent's signature was redacted pursuant to confidentiality provisions of

[54] Order, A13.
[55] Ransom Br. 42-46.
[56] *Id.*at 44.

GreatPlains' credit agreement.[57] Ms. Ransom goes a step further by explicitly asserting that the waiver is invalid without the Agent's signature.[58] But redaction of a signature is not absence of a signature. GreatPlains submitted a sworn declaration attesting that the waiver was "executed," and it produced a redacted, executed copy of the waiver to Ms. Ransom before moving for reconsideration.[59] Ms. Ransom neither objected to the redaction of the Agent's signature nor offered any evidence or allegation that GreatPlains' affiant falsely testified regarding the waiver's execution. Given uncontradicted evidence of the waiver's execution, the district court erred to the extent that it questioned the waiver's validity, and Ms. Ransom's direct attack on the waiver's enforceability fails.

The district court and Ms. Ransom also misunderstand or mischaracterize how GreatPlains' credit facility affects the Tribe's control of GreatPlains. For example, Ms. Ransom cites the district court's finding that the Tribe is not permitted to change GreatPlains' management without the Agent's permission.[60] The facts of this case demonstrate that this is incorrect. The Tribe can change and *has changed* GreatPlains' management without the Agent's permission and over the Agent's express objection. As explained above, the credit facility may authorize the Agent

[57] *Id.* at 43; Order, A13.
[58] Ransom Br. at 43-44.
[59] Azure Decl. ¶ 8, A377.
[60] Ransom Br. 45 (citing A14).

to take certain steps to protect lender collateral if the Tribe operates or manages GreatPlains in a manner that the Agent believes imperils that collateral, but it does not give the Agent control of GreatPlains or limit the Tribe's ability, as GreatPlains' sole owner and manager, to control, operate, and manage the entity as it sees fit. The district court committed clear error and abused its discretion in finding otherwise, and it erred in relying on that and similar erroneous findings as grounds for denying GreatPlains' motions to dismiss and for reconsideration.

In a final argument, Ms. Ransom once again cites unproven, hearsay allegations about GreatPlains' historic management to attempt to justify the district court's erroneous control analysis.[61] The *Weddle* lawsuit allegations that Ms. Ransom cites are not conclusive proof of the matters asserted. And even if this Court were to accept the allegations at face value, they cannot bear the weight that Ms. Ransom places on them. Regardless of how or by whom GreatPlains may have been managed in the past, the facts show that it was managed and controlled by IMDG, an FBIC tribal enterprise governed by a Board consisting exclusively of Tribal Council members, at all times relevant to GreatPlains' motion to dismiss.

The district court erred in its application of the third *Breakthrough* factor both in its initial order and it its order denying reconsideration, and to the extent that its initial analysis hinged on the Agent's ostensible exercise of "immediate control"

[61] *Id.* at 44.

over GreatPlains pursuant to the Event of Default, it abused its discretion in denying reconsideration based on the waiver of that default.

CONCLUSION

The district court committed clear error in finding that GreatPlains' credit facility destroyed the Tribe's control of GreatPlains and it repeatedly misapplied the *Breakthrough* factors in holding that GreatPlains is not an arm of the FBIC. This Court should reverse the district court's erroneous orders and remand the case with instructions to dismiss Ms. Ransom's claims against GreatPlains due to tribal sovereign immunity.

Respectfully submitted,

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CERTIFICATION OF ADMISSION TO BAR

I, Mark H. Reeves, certify as follows:

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

2. Pursuant to 28 U.S.C. § 1746, I certify under penalty of perjury that the foregoing is true and correct.

Dated: November 19, 2024

By: */s/ Mark H. Reeves*
MARK H. REEVES

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). This brief contains 6,272 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii) of the Federal Rules of Appellate Procedure.

This brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type style requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

This brief complies with the electronic filing requirements of Local Rule 31.1(c) because the text of this electronic brief is identical to the text of the paper copies, and the Vipre Virus Protection, version 3.1 has been run on the file containing the electronic version of this brief and no viruses have been detected.

Dated: November 19, 2024

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CERTIFICATE OF SERVICE

I certify that on November 19, 2024, I am causing this Reply Brief to be filed electronically with this Court's CM/ECF system. All participants are registered CM/ECF users and will be served by the Appellate CM/ECF system.

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