

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA**

COMMONWEALTH OF PA, by
Attorney General KATHLEEN G. KANE,

Plaintiff,

v.

THINK FINANCE, INC., et al.,

Defendants.

Civil Action No. 1:18-mc-00024-MLH

**(Original E.D. Pa. Case No.:
2:14-cv-07139-JCJ)**

**THINK FINANCE DEFENDANTS' MEMORANDUM IN OPPOSITION TO
NON-PARTY MOBILOANS, LLC'S MOTION TO QUASH SUBPOENA**

Think Finance, Inc., TC Loan Service, LLC, Tailwind Marketing, LLC, TC Decision Sciences, LLC, and Financial U, LLC (collectively "Think Finance"), by and through their undersigned counsel, respectfully file this Memorandum in Opposition to MobiLoans, LLC's ("MobiLoans") Motion To Quash Think Finance's June 13, 2018 Subpoena for Deposition Testimony in civil action *Commonwealth Pennsylvania v. Think Finance, Inc. et al.*, No. 14-cv-07139 (E.D. Pa.).¹ In support, Think Finance states the following:

PRELIMINARY STATEMENT

MobiLoans is a wholly-owned entity of the Tunica-Biloxi Tribe of Louisiana, a federally recognized Indian Tribe. (Mot. To Quash, Ex. A-1.) According to its Second Amended LLC Operating Agreement, MobiLoans is an economic arm of the Tunica-Biloxi Tribe and its purpose is to engage in lending and related activities that generate revenue for the Tribe. (*Id.*, Ex. A-2 at 1.) The Tunica-Biloxi Tribe vested MobiLoans with all of the privileges and immunities of the

¹ A copy of the operative Complaint in the Pennsylvania case is attached as Exhibit A.

Tribe, including, without limitation, “immunity from suit in any state, federal, or tribal court.” (*Id.* at 5.)

Think Finance entered into contractual agreements with MobiLoans to perform certain enumerated services to MobiLoans in support of MobiLoans’s lending activities. The Pennsylvania Attorney General brought a civil suit against Think Finance challenging the legality of Think Finance’s provision of these services to MobiLoans under Pennsylvania law. To assist Think Finance’s defense of these allegations, Think Finance seeks limited discovery from MobiLoans—*i.e.*, a single deposition of a MobiLoans corporate representative. Think Finance seeks this information, which is exclusively within MobiLoans’s possession and would be helpful to Think Finance’s defense against the Pennsylvania Attorney General’s allegations.

Accordingly, following unsuccessful efforts to obtain testimony voluntarily, Think Finance served a Rule 45 subpoena on MobiLoans on June 13, 2018. The subpoena directs a corporate representative of MobiLoans to appear for deposition on five discrete topics. (Mot. To Quash, Ex. B.) Upon receipt, MobiLoans filed the pending Motion To Quash. MobiLoans argues that this Court cannot enforce the subpoena because: (1) the Tunica-Biloxi Tribe, as a recognized federal tribe, possesses sovereign immunity from suit; (2) MobiLoans, as a tribal arm, enterprise, and entity of the Tunica-Biloxi Tribe, shares in the Tribe’s sovereign immunity from suit; and (3) that “immunity from suit” extends to all aspects of judicial process, including third-party subpoenas and all third-party discovery. (*Id.* at 3–4.) MobiLoans argues that the Court lacks jurisdiction to enforce the subpoena. (*Id.* at 4.)

MobiLoans’s arguments are not persuasive. First, MobiLoans is *not* a party to the federal Pennsylvania litigation; as a result, MobiLoans is not “subject to any suit” for purposes of triggering sovereign immunity protection. Non-party discovery is not “a suit” for purposes of

tribal sovereign immunity. Think Finance seeks to engage in limited third-party discovery to supplement its defenses with information exclusively within the possession of MobiLoans. MobiLoans, for example, has critical, unique evidence as to certain aspects of its internal day-to-day governance that have been placed at issue in the lawsuit against Think Finance. In addition, the revenue MobiLoans returned to the Tunica-Biloxi Tribe and the Tribe's use of that revenue have also been placed at issue in the lawsuit. Second, the Court should permit Think Finance to depose a corporate representative of MobiLoans under a Rule 45 balancing test because Think Finance's right to prepare a defense and obtain evidence in the federal Pennsylvania litigation substantially outweighs MobiLoans's tenuous allegation that complying with the subpoena, and participating in a single deposition, could diminish its tribal or economic interests. For these reasons, the Court should deny MobiLoans's Motion To Quash.

ARGUMENT

I. Sovereign Immunity Does Not Protect MobiLoans From a Non-Party Subpoena.

There is no question that MobiLoans, as an arm of the Tunica-Biloxi Tribe, is immune from suit because of the Tribe's status as a sovereign nation. Think Finance, however, is not seeking to sue MobiLoans or the Tribe. Think Finance seeks a limited Rule 45 deposition on five discreet topics for purposes of defending allegations made by a state government in a federal district court sitting in Pennsylvania.

A tribe's immunity is intended to protect its "economic development, self-sufficiency, and self-governance." *Three Affiliated Tribes v. Wold Eng'g, P. C.*, 476 U.S. 877, 894 (1986). "The general rule is that a suit is against the sovereign if the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration." *Dugan v. Rank*, 372 U.S. 609, 620 (1963) (quoting *Land v. Dollar*, 330 U.S. 731 (1947)). Although the federal circuits

are split on this issue, some federal courts have held that service of a federal subpoena on a tribe does not constitute a suit.

[Tribal] immunity protects a tribe as an entity from unconsensual civil actions against it. The service of a federal subpoena on an employee of an entity of a tribe is neither a suit, nor one against a tribe.

U.S. v. Juvenile Male 1, 431 F. Supp. 2d 1012, 1016 (D. Ariz. 2006) (internal citations omitted) (emphasis added); *see also Miccosukee Tribe of Indians of Fla. v. United States*, 730 F. Supp. 2d 1344, 1349 n.7 (S.D. Fla. 2010) (a non-party federal subpoena is not a “suit against the sovereign”) (quoting *Dugan*, 372 U.S. at 620 (alterations in original omitted)). This view is the most reasoned and requires enforcement of the subpoena.

II. Think Finance’s Right to Evidence from a Non-Party Outweighs the Assertion of Invasion/Hardship of Tribal Interests Under a Rule 45 Balancing Test.

The Court should also enforce the non-party federal subpoena against MobiLoans under its Rule 45 balancing test. Pursuant to Rule 45, Courts often apply a balancing test to address claims that certain privileges or immunities, including tribal immunity, shield a party from discovery. *See, e.g., United States v. Snowden*, 879 F. Supp. 1054, 1057 (D. Or. 1995); *see also United States v. Velarde*, 40 F. Supp. 2d 1314, 1316 (D.N.M 1999) (“[C]ourts often perform this type of balancing where sovereign immunity is asserted in an effort to quash a subpoena.”).

In *United States v. Bryan*, the Supreme Court held that “the great power of testimonial compulsion [is] necessary to the effective functioning of courts” and that “the public ... has a right to every man’s evidence.” 339 U.S. 323, 330 (1950). Courts have balanced these interests in the context of obtaining information from a sovereign entity—such as a federal agency. *Id.* at 332 (noting that a determination of whether the “substantial individual interest” of the person refusing to respond to a subpoena “outweigh[s] the public interest in the search for truth.”). The *Bryan* test

has been incorporated into Rule 45, which provides that a court “must quash or modify a subpoena that” is unreasonable. Fed. R. Civ. P. 45(c)(3)(A)(iv).

Here, MobiLoans does not allege that any substantial tribal interest(s) (tribal self-governance and/or economic interest) will be negatively impacted in complying with the federal non-party subpoena for deposition testimony. As noted above, Think Finance’s non-party subpoena directs a corporate representative of MobiLoans to appear for deposition testimony for a few hours. Think Finance has not made an accompanying request for any documents. As a result, MobiLoans’s argument that the federal non-party subpoena infringes on alleged tribal interests, and that said interests outweigh Think Finance’s right to obtain evidence in its defense, is unpersuasive. The litigation pending in the Eastern District of Pennsylvania requires Think Finance to gather all evidence related to the benefits the MobiLoans program returned to the Tunica-Biloxi Tribe and the details of MobiLoans’s intracompany governance to defend against the allegations the Pennsylvania Attorney General has brought. The subpoena for deposition testimony at issue seeks precisely the type of information that Think Finance requires to develop its defense. This information is not publicly available and is exclusively within the possession of MobiLoans.

Even assuming that MobiLoans’s impacted interests include both financial and strategic interests in quashing the subpoena, MobiLoans’s interests do not outweigh Think Finance’s right to prepare its defense and obtain necessary evidence. *See, e.g., United States v. Nixon*, 418 U.S. 683, 713 (1974) (a “generalized assertion of privilege must yield to the demonstrated specific need for evidence”). Pursuant to Rule 45 of the Federal Rules of Civil Procedure, the Court should deny MobiLoans’s Motion To Quash.

CONCLUSION

Think Finance requests that the Court deny MobiLoans, LLC's Motion To Quash because MobiLoans is not "a party to a suit," and a federal non-party discovery subpoena does not warrant tribal immunity protection. Further, Think Finance's right to obtain necessary evidence and build its defense in the pending Pennsylvania litigation outweighs MobiLoans's interests for not complying with the subpoena under Rule 45. For the reasons stated above, Think Finance requests that the Court deny MobiLoans's Motion To Quash, and order that MobiLoans comply with the federal non-party subpoena and produce a corporate representative for deposition on a date mutually agreeable to the parties to occur within forty-five (45) days from the date of this Court's ruling.

Respectfully submitted,

**HELLER, DRAPER, PATRICK,
HORN & MANTHEY, L.L.C.**

/s/ Warren Horn

WARREN HORN (#14380)
650 Poydras Street, Suite 2500
New Orleans, LA 70130-6103
Telephone: (504) 299-3300

Attorneys for Defendants

**THINK FINANCE, INC.
TC LOAN SERVICE, LLC
TAILWIND MARKETING, LLC
TC DECISION SCIENCES, LLC, and
FINANCIAL U, LLC**

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing has been forwarded to all counsel of record by either hand delivery, electronic mail, fax transmission or by depositing a copy of the same, properly addressed and First-Class postage prepaid, in the United States Mail on this 9th day of July, 2018.

/s/ Warren Horn

WARREN HORN