

KILPATRICK TOWNSEND & STOCKTON LLP

Frederick L. Whitmer (FW 8888)
1114 Avenue of the Americas
New York, NY 10036
Telephone: (212) 775-8700
Facsimile: (212) 775-8800

Rob Roy Smith (pro hac vice)
Bree Black Horse (pro hac vice)
1420 Fifth Ave., Suite 3700
Seattle, WA 98101
Telephone: (206) 467-9600
Facsimile: (206) 623-6793
rrsmith@kilpatricktownsend.com
brblackhorse@kilpatricktownsend.com

Mark H. Reeves (pro hac vice)
Enterprise Mill
1450 Greene St., Suite 230
Augusta, GA 30901
Telephone: (706) 823-4206
Facsimile: (706) 828-4488
mreeves@kilpatricktownsend.com

*Attorneys for Defendant
GreatPlains Finance, LLC d/b/a
Cash Advance Now*

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY**

RASHONNA M. RANSOM,

Plaintiff,

v.

GREATPLAINS FINANCE, LLC d/b/a
CASH ADVANCE NOW

Defendant.

§ Civil Action No. 2:22-cv-01344
§ (WJM)

§ **DEFENDANT GREATPLAINS**
§ **FINANCE, LLC d/b/a CASH**
§ **ADVANCE NOW’S BRIEF IN**
§ **SUPPORT OF MOTION TO**
§ **DISMISS**

§ **Motion Day: October 2, 2023**

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INTRODUCTION

Defendant GreatPlains Finance, LLC d/b/a Cash Advance Now (GPF) is an economic development enterprise and arm of the Fort Belknap Indian Community of the Fort Belknap Reservation of Montana (FBIC or the Tribe), a federally recognized Indian tribal community comprising the Assiniboine (Nakoda) and Gros Ventre (Aaniiih) Tribes. *See* 87 Fed. Reg. 4636-02 (Jan. 28, 2022) (listing federally recognized tribes). It is well settled that federally recognized Indian tribes such as the FBIC and their arms and instrumentalities such as GPF enjoy sovereign immunity from unconsented lawsuits. *See, e.g., Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014); *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 760 (1998). This broad immunity covers the claims asserted against GPF in this case and deprives the court of subject matter jurisdiction over them. The court therefore should dismiss Plaintiff's claims against GPF with prejudice.

The Court also should dismiss all claims against fictitious John Doe Defendants under Federal Rule of Civil Procedure 21 or 19 because Plaintiff has made no effort to amend its complaint to identify such defendants and because the case cannot proceed in equity and good conscience without the involvement of the Tribe, which cannot be joined due to its sovereign immunity.

FACTS

I. The Arms of the Tribe

The Fort Belknap Reservation is located in a remote, rural part of northern Montana. Transcript of GPF Rule 30(b)(6) Deposition (GPF 30(b)(6)), filed herewith as Exhibit A to the Declaration of Mark Reeves, at 14:1-7. Due to its remote location, the Reservation presents limited opportunities for local economic development and governmental revenue for the FBIC. *Id.*; Jeffrey Stiffarm Declaration (Stiffarm Decl.) ¶ 2. Poverty rates on the Fort Belknap Reservation hover near 50%, while national poverty rates are less than 15%.¹ To improve the economic prospects of its members, the Tribe has established several for-profit tribal business instrumentalities under tribal law. Stiffarm Decl. ¶ 3. These include Defendant GPF as well as additional, interrelated tribally owned and operated entities like the Fort Belknap Planning and Development Corporation, d/b/a Island Mountain Development Group (IMDG) and GVA Holdings, LLC (GVA Holdings). *Id.*

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

A. GPF

The Tribe established GPF in 2012 as a member-managed LLC under tribal law. Evan Azure Declaration (Azure Decl.) ¶ 10 & Ex. A & C (GPF Articles of Organization & GPF Authorizing Resolution). GPF is and always has been wholly owned by the Tribe through GVA Holdings, Inc., another tribally chartered and owned entity. Azure Decl. ¶ 10 Ex. A, ¶¶ 6-7 (GPF Art. of Org.), & Ex. B, ¶ 1.8 (GPF Articles of Operation); GPF 30(b)(6) at 69:1-10. The Tribe created GPF to generate revenue to fund tribal governmental services and to offset the Tribe's lack of a tax base. GPF 30(b)(6) at 13:23-14:7. In its resolution approving the formation of GPF, the Council explicitly indicated that GPF was intended to “engage in an internet-based consumer loan business” to promote “economic development opportunities” and that it would be “wholly owned and managed by the Tribe” through GVA Holdings. Azure Decl. Ex. C (GPF Authorizing Res.). The Tribe further expressly stated its intent for GPF to share in the Tribe's sovereign immunity. Azure Decl. Ex. A (Art. of Org.), ¶ 7.

When the Tribe initially established GPF, it had little experience in the consumer lending business. GPF 30(b)(6) at 13:10-22; Azure Decl. ¶ 11. Accordingly, it initially partnered with a third party, Dater Management Company (Dater), to manage GPF while the Tribe learned the business and grew its capacity. GPF 30(b)(6) at 13:19-16:9; Azure Decl. ¶ 11. While Dater served as GPF's

manager, the Tribe had designated members working with Dater to learn the lending business. GPF 30(b)(6) at 18:12-19:18; Azure Decl. ¶ 13. Dater retained another company, Cash Advance Servicing (CA Servicing), to service GPF's loan portfolio. GPF 30(b)(6) at 16:21-17:22; Azure Decl. ¶ 11. CA Servicing was also required to hire and train tribal member employees, beginning with 2 and eventually growing to 25. *Id.* at 21:2-6, 26:1-5; Azure Decl. ¶ 13. During the term of its contracts with Dater and CA Servicing, the Tribe received a flat fee payment for each transaction (*i.e.*, each loan taken and each payment made) completed by a GPF customer. GPF 30(b)(6) at 35:6-22; Azure Decl. ¶ 12.

As intended, the Tribe quickly developed the knowledge and expertise to run the tribal lending business on its own. GPF 30(b)(6) at 33:17-34:7; Azure Decl. ¶ 14. Accordingly, it ended the contracts with Dater and CA Servicing and installed IMDG as GPF's manager and servicing agent in 2017. GPF 30(b)(6) at 25:16-25, 33:17-23; Azure Decl. ¶ 14. From 2017 forward, no non-tribal entities have managed GPF or serviced its portfolio, and all of GPF's profits have gone directly to IMDG, the Tribe's economic development arm.² GPF 30(b)(6) at 39:14-18; Azure Decl. ¶¶ 14-16. GPF leases all its employees from IMDG, and IMDG's Board, which consists entirely of members of the FBIC Council, serves as GPF's Board. GPF

² See *infra* for a more detailed discussion of IMDG and its relationship to the Tribe. Given IMDG's relationship to GPF, the Court may find a thorough understanding of IMDG's status as an arm of the Tribe relevant to its analysis of GPF's status.

30(b)(6) at 87:12-88:11, 100:15-23; Azure Decl. ¶ 15. IMDG's Board, as it has always done throughout GPF's existence, sets the parameters for GPF's loans subject to tribal law, including the types of products offered, loan amounts, and APR. GPF 30(b)(6) at 42:11-43:18, 74:14-24; Azure Decl. ¶¶ 13, 15. No third party, including Dater or CA Servicing, has ever set the parameters for the loans offered by GPF. *Id.* at 42:11-43:18; Azure Decl. ¶¶ 13, 15.

B. IMDG

The Tribe created IMDG in approximately 2006 to coordinate the Tribe's business planning and development activities, provide training resources and economic opportunities for tribal members on the Fort Belknap Reservation, generate revenue for the tribal government, and benefit tribal members. Stiffarm Decl. ¶¶ 3-4 & Ex. A (IMDG Authorizing Resolution). IMDG was established and chartered under tribal law by a resolution of the Tribe's governing body, the FBIC Council. *Id.* ¶ 4 & Exs. A-B (IMDG Auth. Res. & Charter).

Pursuant to its charter, ownership in IMDG is "limited, as the intent of the Fort Belknap Community Council in establishing this organization is to create a corporation, wholly owned by the Fort Belknap Community Council, or its members, employees or contractors, for the people of the Fort Belknap Indian Reservation." *Id.* ¶ 5 & Ex. B (IMDG charter). IMDG remains and has always been wholly under tribal ownership and control since its inception. *Id.* ¶ 5. The FBIC

Council must approve any new or amended IMDG bylaws, and it retains the rights to fill any vacancies on the IMDG Board, to remove any member of the IMDG Board, and to override any action of the Board to remove one of its own members. *Id.* The current IMDG Board consists exclusively of members of the Council. *Id.* ¶ 6. The FBIC Council also retains the authority to hire and fire IMDG’s CEO, a role currently filled by tribal member Evan Azure. *Id.* IMDG’s charter requires it to file quarterly and annual reports with the Council regarding its finances and all business activities that it has undertaken or plans to undertake. *Id.* ¶ 5. The Tribe has authorized IMDG to “sue and be sued, on any contract claim ... *to the extent and only to the extent* specifically set forth in any such contract.” *Id.*, Ex. B (IMDG charter), ¶ 11.A (emphasis added).

IMDG was “specifically organized for the purpose of making a profit on its operations to benefit the people of the Gros Ventre and Assiniboine Tribes of the Fort Belknap Indian Community.” *Id.*, ¶¶ 3-4, Ex. C (IMDG Art. of Inc.) at 1, & Ex. B (IMDG charter) ¶ 3. In furtherance of this goal, IMDG has undertaken a variety of business ventures including the acquisition and leasing of off-reservation commercial real estate, residential construction, public and private consulting and contracting services, on-reservation retail, and online consumer lending. Azure Decl. ¶ 4. IMDG also has established the Montana Native Growth Fund, a community development financial institution situated on the Fort Belknap Reservation that

promotes sustainable tribal home ownership through financial education and credit access, and it has partnered with the Fort Belknap Tribal Housing Authority to build and remediate homes for tribal members on the Reservation. *Id.* It also funds and oversees multiple non-profit entities, including a high school internship program and a college scholarship program for tribal members. *Id.*

IMDG distributes 20% of its net income from these business ventures directly to the Tribe to support the Tribe's provision of governmental services and uses the remainder to invest in tribal economic development programs, including reinvestment in the business managed by IMDG, or to fund direct distributions to tribal members. *Id.* ¶ 5; GPF 30(b)(6) at 31:8-32:19. IMDG distributions typically account for approximately 75% of the Tribe's total non-federal budget, Stiffarm Decl. ¶ 8, and the Tribe's lending entities generate approximately 90% of IMDG's revenue. Azure Decl. ¶ 7. Any reduction in IMDG revenues would adversely affect the Tribe's ability to fund governmental services for its members. Stiffarm Decl. ¶ 8. These services include general funding for the tribal land department and communications, the Tribal Employment Rights Office, and tribal electric, waste, and sewer programs. *Id.* ¶ 7.

In addition to distributing revenues that fund the Tribe's provision of governmental services, IMDG also directly funds tribal capital projects to benefit tribal members. Stiffarm Decl. ¶ 9; Azure Decl. ¶ 6. For example, IMDG is

developing and managing a tribal wellness center and recently dedicated more than \$2.5 million to developing housing for FBIC members above and beyond its standard income distribution to the Tribe. *Id.* No entity outside the Tribe has any ownership interest or share in the profitability of IMDG. Stiffarm Decl. ¶ 10; GPF 30(b)(6) at 31:8-15.

IMDG is also a major employer of tribal members. Azure Dec. ¶ 8. It currently employs approximately 243 enrolled tribal members, notably including its CEO, Evan Azure, as well as several tribal member spouses and descendants. *Id.* All IMDG employees are compensated on an hourly or salary basis; none have any right to share in IMDG's profits. GPF 30(b)(6) at 47:21-48:6.

In January 2023, the FBIC Council—the Tribe's governing body—exercised its authority over IMDG by replacing the then-existing IMDG Board with a new slate of Board members, all of whom are members of the Council. *Id.* at 55:1-14; Azure Decl. ¶ 19. IMDG operations, and the operations of GPF and other entities that IMDG manages and services, have continued uninterrupted.³ *Id.* at 55:22-24; Azure Decl. ¶ 20.

³ A third-party with whom GPF currently has a credit facility initially objected to the change in IMDG leadership and issued an event of default notice in response, but GPF contested the putative default, and the notice has not affected the management or operations of GPF under the new Board's leadership. GPF 30(b)(6) at 55:22-24, 61:14-24; Azure Decl. ¶¶ 19-20. The FBIC Council and IMDG's actions in and since January underscore the existence and exercise of the Tribe's control over its subsidiary economic development instrumentalities.

C. GVA Holdings

GVA Holdings is a limited liability company established by the Tribe pursuant to tribal law. *See* Azure Decl. ¶ 18, Ex. D (GVA Art. of Org.), & Ex. E (GVA Art. of Operation) ¶ 1.9. It is a manager-managed LLC that is wholly owned by the Tribe and managed by IMDG. *See id.*; GPF 30(b)(6) at 24:2-25:6. IMDG makes all management and financial decisions involving GVA Holdings, all GVA Holdings services are provided through leased IMDG employees, and any profit that GVA Holdings generates is passed through to IMDG. Azure Decl. ¶ 18; GPF 30(b)(6) at 24:2-25:6. The Tribe established GVA Holdings to engage in online consumer lending through subsidiary entities such as GPF in order to generate revenue for the tribal government, and it expressly intended for GVA to share the Tribe’s sovereign immunity. Azure Decl. ¶ 18, & Exs. C (GPF Authorizing Resolution) & D (GVA Art. of Org.) ¶ 7; *see also* GPF 30(b)(6) at 24:2-25:6.

II. The Plaintiff’s Loans

The Plaintiff obtained two loans from GPF, one in 2015 for \$300 and another in 2016 for \$450. *See* Compl. ¶¶ 22-33; Azure Decl. ¶ 21 & Exs. F & G. In each case, she signed GPF’s standard loan agreement, which explicitly stated in bold-face type that here loans were “an expensive form of borrowing” and that the Tribe and GPF “are entitled to sovereign immunity” that would “limit[] what claims, if any” Plaintiff could assert against the Tribe or GPF. *See* Azure Decl. ¶ 22 & Exs. F & G

at 2, 4. Both agreements that Plaintiff signed further included a detailed Tribal Dispute Resolution Procedure and a capitalized, bold-faced disclaimer that that process was “the sole dispute resolution mechanism for disputes and claims arising under this loan agreement. This means that you are effectively waiving your right to a jury trial.” *See id.* Exs. F & G at 4. Ms. Ransom has not invoked the Tribal Dispute Resolution process. Azure Decl. ¶ 22.

STANDARD

“A motion to dismiss for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1) must be granted if the court lacks subject matter jurisdiction to hear a claim.” *Deal v. Velez*, 244 F. Supp. 3d 435, 440 (D.N.J. 2017) (citation omitted). When a claim is barred by tribal sovereign immunity, the court lacks subject matter jurisdiction to hear it. *See, e.g., Acres Bonusing, Inc. v. Marston*, 17 F.4th 901, 908 (9th Cir. 2021) (“[W]hen a defendant timely and successfully invokes tribal sovereign immunity, we lack subject matter jurisdiction.”); *Amerind Risk Mgmt. Corp. v. Malaterre*, 633 F.3d 680, 684 (8th Cir. 2011) (“[T]ribal sovereign immunity is a threshold jurisdictional question.”); *Miner Elec., Inc. v. Muscogee (Creek) Nation*, 505 F.3d 1007, 1009 (10th Cir. 2007) (“Tribal sovereign immunity is a matter of subject matter jurisdiction, which may be challenged by a motion to dismiss under Fed. R. Civ. P. 12(b)(1).” (citation omitted)); *Bynon v. Mansfield*, No. 15-00206, 2015 WL 2447159, at *1 (E.D. Pa. May 21, 2015).

Where, as here, a defendant makes a factual challenge to allegations of subject matter jurisdiction, “a presumption of truthfulness does not attach to a plaintiff’s allegations,” *Deal*, 244 F. Supp. 3d at 440 (quoting *Mortensen v. First Fed. Sav. & Loan Ass’n*, 549 F.2d 884, 891 (3d Cir. 1977)), and “the court may consider evidence outside the pleadings.” *Wilson v. N.J. Dep’t of Corr.*, No. 16-7915 (RBK/JS), 2017 WL 4618156, at *2 (D.N.J. Oct. 13, 2017) (citation omitted).

ARGUMENT

Plaintiff’s claims should be dismissed in their entirety. Claims against Defendant Great Plains should be dismissed because it is an arm and instrumentality of the FBIC and thus is entitled to sovereign immunity. And any putative claims that Plaintiff attempts to assert against any John Doe defendant should be dismissed on Rule 19 grounds because the FBIC is a necessary party that cannot be joined.⁴

I. Facts prior to filing of the complaint are not relevant to immunity.

As an initial matter, it is important to clarify the time for assessing an entity’s assertion of sovereign immunity. Plaintiff will likely contend that GPF’s immunity should be assessed based on the facts as they existed in 2016 or some other time in the past. That is incorrect.

⁴ Given the Plaintiff’s failure to identify any of the alleged John Doe defendants or take any steps to amend her complaint during the 17 months that this action has been pending before the Court, including months of jurisdictional discovery, it would be appropriate for the Court to dismiss those defendants pursuant to Rule 21 without reaching the Rule 19 question. *See, e.g., Blakeslee v. Clinton County*, 336 F. App’x 248, 250-51 (3d Cir. 2009) (affirming dismissal of John Doe defendants when plaintiff had not identified them or amended her complaint after discovery).

While there is a split of authority regarding precisely when an assertion of sovereign immunity should be assessed, that split revolves around whether the inquiry is based on facts as they existed at the time of filing of the complaint or at the time of the motion asserting immunity. *See Iowa Tribe of Kan. & Neb. v. Salazar*, 607 F.3d 1225, 1232 (10th Cir. 2010) (discussing a split of authority as to whether sovereign immunity should be “examined as of the time plaintiffs filed and served their complaint” or “must be reassessed after filing” and adopting the time of filing rule); *see also, e.g., Mun v. Univ. of Alaska*, 291 F. App’x 115, 117 (9th Cir. 2008) (holding that a post-complaint statutory change revoked any potential waiver of immunity by the defendant and affirming the defendant’s sovereign immunity based on that post-complaint change); *In re Internet Lending Cases*, 53 Cal. App. 5th 613, 623 (2020) (holding that “the status of a tribe or tribal entity’s immunity is appropriately assessed by the court at the time of the motion to dismiss based on immunity”). Regardless of which approach this Court adopts, in no event are the facts as they existed prior to the filing of the complaint germane to the present assessment of GPF’s immunity.

Accordingly, any argument that Plaintiff may offer regarding GPF’s status as an arm of the tribe from 2012-17, while the Dater and CA Servicing contracts were in effect, is irrelevant to the question before the Court. Those contracts were terminated well before Plaintiff’s complaint in this case, and IMDG has had full

managerial control and oversight of GPF and rights to all GPF profits at all times possibly relevant to the arm of the tribe analysis in this case.⁵

II. Claims against GPF should be dismissed due to sovereign immunity.

A. Indian Tribes have sovereign immunity from suit.

“Indian tribes are ‘domestic dependent nations’ that exercise inherent sovereign authority over their members and territories.” *Okla. Tax Comm’n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 509 (1991) (citation omitted). “Among the core aspects of sovereignty that tribes possess ... is the ‘common-law immunity from suit traditionally enjoyed by sovereign powers.’” *Bay Mills*, 572 U.S. at 788 (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978)).

Tribal sovereign immunity applies with full force regardless of the nature or location of the activity underlying the putative claim against a tribe—*i.e.*, it applies just as much to off-reservation commercial activity as on-reservation governmental conduct. *See Bay Mills*, 572 U.S. at 790 (holding that tribal sovereign immunity applies to “suits arising from a tribe’s commercial activities, even when they take place off Indian lands”); *Kiowa Tribe*, 523 U.S. at 760; *Jamul Action Comm. v. Simermeyer*, 974 F.3d 984, 991 (9th Cir. 2020), *cert. denied*, 142 S. Ct. 83, *reh’g*

⁵ To be clear, GPF has always qualified as an arm of the tribe, including while the contracts with Dater and CA Servicing were in effect. However, the analysis became even more clear when IMDG took over as GPF manager and servicing agent.

denied, 142 S. Ct. 636 (2021). Simply put, “[s]uits against Indian tribes are thus barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation” of tribal sovereign immunity. *Okla. Tax*, 498 U.S. at 509. Here, there is no allegation of federal abrogation or waiver of the FBIC’s tribal sovereign immunity, so it is undisputed that the Tribe would have sovereign immunity from all asserted claims if Plaintiff had sued it directly.

B. Tribal sovereign immunity extends to arms of the tribe.

Just as the existence and extent of tribal sovereign immunity is settled beyond dispute, so too is the fact that tribal sovereign immunity extends to tribal enterprises that function as arms of a tribe. “[A]n entity that functions as an arm of a tribe shares in the tribe’s immunity.” *Alabama v. PCI Gaming Auth.*, 801 F.3d 1278, 1287-88 (11th Cir. 2015); *see Williams v. Big Picture Loans, LLC*, 929 F.3d 170 (4th Cir. 2019); *Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173 (10th Cir. 2010); *Great Plains Lending, LLC v. Dep’t of Banking*, 259 A.3d 1128 (Conn. 2021); *Cash Advance & Preferred Cash Loans v. Colorado*, 242 P.3d 1099, 1108 (Colo. 2010) (en banc) (“[T]ribal sovereign immunity protects subordinate secular or commercial entities acting as arms of a tribe.”);⁶ *Bynon*, 2015

⁶ Despite its similar name, this case involved an unrelated tribal lending arm of the Otoe-Missouria Tribe, not Defendant GPF.

WL 2447159, at *1. Accordingly, GPF is entitled to tribal sovereign immunity from Plaintiffs' claims so long as it qualifies as an arm of the FBIC.

C. GPF is an arm of the FBIC.

While the Third Circuit has not yet adopted a test for ascertaining whether an entity is an arm of a tribe entitled to share in the tribe's immunity, courts typically apply one of two multi-factor tests. The Supreme Court of Colorado, sitting *en banc*, has adopted a three-factor test that considers whether (1) the tribe created the entity pursuant to tribal law, (2) the tribe owns and operates the entity, and (3) applying immunity to the entity would protect the tribe's sovereignty. *Cash Advance*, 242 P.3d at 1110. Other courts have adopted slightly differing variations of the non-exclusive, six-factor test first enumerated by the Tenth Circuit in *Breakthrough*, which considers (1) the method of the entity's creation, (2) the entity's purpose, (3) the entity's "structure, ownership, and management, including the amount of control the tribe has over the entities," (4) whether the tribe intended for the entity to have sovereign immunity, (5) the financial relationship between the tribe and the entity, and (6) whether extending immunity to the entity would serve "the purposes of tribal sovereign immunity." *Breakthrough*, 629 F.3d at 1181; *see also Big Picture*, 929 F.3d at 177 (adopting the first five *Breakthrough* factors but concluding that the sixth "overlaps significantly with the first five" and should "inform the entire analysis" rather than being considered independently); *Great Plains*, 259 A.3d at 1143

(following the Fourth Circuit’s approach from *Big Picture*). Because the applicable test remains an open question in this Circuit and the *Breakthrough* factors effectively encompass all of the factors considered by other courts, GPF will address the applicability of each of those factors here.

1. Method of Creation

The method of creation factor focuses “on the law under which the entities were formed.” *Big Picture*, 929 F.3d at 177; *see also Breakthrough*, 629 F.3d at 1191; *Great Plains*, 259 A.3d at 1143. Where an entity is created under tribal law, this factor weighs in favor of immunity. *Id.* Here, GPF was established by the Council under FBIC Tribal law. Azure Decl. ¶ 10. This factor thus supports GPF’s status as an arm of the Tribe.⁷

2. Purpose

The purpose factor “incorporates both the stated purpose for which the Entities were created as well as evidence related to that purpose.” *Big Picture*, 929 F.3d at 178; *see also Breakthrough*, 629 F.3d at 1192; *Great Plains*, 259 A.3d at 1143-44. “The stated purpose need not be purely governmental to weigh in favor of immunity as long as it relates to broader goals of tribal self-governance.” *Big Picture* 929 F.3d at 178. Accordingly, courts have held that purposes such as “to financially

⁷ IMDG and GVA Holdings were also established by the Tribe pursuant to tribal law. *See* Azure Decl. ¶ 18; Stiffarm Decl. ¶ 4.

benefit the tribe and enable it to engage in various governmental functions” suffice even if the entity in question is engaged in exclusively commercial activities. *Id.*; see *Breakthrough*, 629 F.3d at 1192. Using commercial activity to fund tribal governance makes perfect sense—and indeed is frequently necessary—given that tribal governments frequently lack the tax base that other sovereigns rely on to fund governmental services. See *Great Plains*, 259 A.3d at 1144. When, as here, a tribe owns or manages one of its enterprises through another tribal enterprise, the purposes of both enterprises should be read together. *Applied Scis. & Info. Sys., Inc. v. DDC Constr. Servs., LLC*, No. 2:19-cv-575, 2020 WL 2738243, at *3 (E.D. Va. Mar. 30, 2020).

The Tribe made the decision to pursue online consumer lending because the remote location of its Reservation and lack of tax base left it with very limited options for raising badly needed governmental revenues. GPF 30(b)(6) at 13:23-14:7; Stiffarm Decl. ¶¶ 2-3. The Tribe established GVA Holdings and GPF as its arms for engaging in this line of business. Azure Decl. ¶¶ 9-10 & Ex. C (GPF Auth. Res.); GPF 30(b)(6) at 23:22-24:13. IMDG, which manages GPF and supplies all GPF employees, was created to serve as the Tribe’s overall economic development arm, and it was “specifically organized for the purpose of making a profit on its operations to benefit the people of the Gros Ventre and Assiniboine Tribes of the

For Belknap Indian Community.” Stiffarm Decl. ¶¶ 3-4, Ex. C (IMDG Art. of Inc.) ¶ 3; GPF 30(b)(6) at 87:12-88:11.

In short, GPF and its related tribal entities exist to generate revenues to fund FBIC tribal governmental services and create economic opportunities for the Tribe and its members. They unquestionably serve this purpose in practice. One-hundred percent of GPF’s cash profitability is either reinvested directly into GPF or passed through to IMDG, which uses all the revenues that it receives from GPF and other tribal enterprises in one of four ways: (1) direct distribution to the Tribe to fund governmental services; (2) directly funding programs, including housing and a wellness center, that benefit tribal members; (3) reinvestment in tribal businesses and economic development initiatives; or (4) direct distribution of badly needed cash assistance to tribal members.⁸ Azure Decl. ¶¶ 5-6; Stiffarm Decl. ¶¶ 7-9; GPF 30(b)(6) at 31:8-32:19.

GPF further fulfills its purpose of promoting economic opportunities for the Tribe and its members by leasing employees from IMDG, which employs

⁸ Before IMDG took over as manager of GPF in 2017, GPF received a per-transaction fee for each loan origination and payment and paid a minority percentage of that fee to Dater for its management services, and any additional profitability went to CA Servicing. GPF 30(b)(6) at 35:6-36:20; Azure Decl. ¶ 12. Those payments ended once the Tribe gained sufficient experience and capacity to take over full responsibility for running GPF and terminated the Dater and CA Servicing contracts; since then, all GPF profits have gone to IMDG. *Id.* at 32:9-33:4, 39:14-18; Azure Decl. ¶¶ 14, 16.

approximately 243 tribal members.⁹ Azure Decl. ¶ 8; *see, e.g., Applied Scis.*, 2020 WL 2738243, at *3 (finding that a tribal subsidiary satisfied its purpose of creating economic opportunity for tribal members in part by employing 4 members). Tribal members assigned to GPF include its portfolio manager and assistant portfolio manager, among many others, and IMDG CEO Evan Azure, who acts as GPF’s CEO, is also an enrolled tribal member. *See* GPF 30(b)(6) at 44:5-45:3; Azure Decl. ¶ 1. This factor thus weighs in favor of finding that GPF is an arm of the Tribe. *See, e.g., Big Picture*, 929 F.3d at 178; *see also Breakthrough*, 629 F.3d at 1192; *Applied Scis.*, 2020 WL 2738243 at *3; *Everette v. Mitchem*, 146 F. Supp. 3d 720, 724 (D. Md. 2015) (holding that another FBIC tribal lending entity created “to financially benefit the tribes and fund governmental services” was an arm of the tribe); *Great Plains*, 259 A.3d at 1143-44.

3. Structure, Ownership, and Management

The structure, ownership, and management factor, sometimes referred to as the “control” factor, considers “the entities’ formal governance structure, the extent to which the entities are owned by the tribe, and the day-to-day management of the entities.” *Big Picture*, 929 F.3d at 182; *see also Applied Scis.*, 2020 WL 2738243 at

⁹ Even when the Tribe’s management contract with Dater was in effect, tribal members worked with Dater and its retained servicing agent, CA Services, to guide GPF’s activities and to develop experience that the Tribe would need to eventually assume full responsibility for GPF’s day-to-day operations. GPF 30(b)(6) at 18:12-18, 21:2-6, 26:1-5, 97:5-98:3; Azure Decl. ¶ 13.

*3; *Everette*, 146 F. Supp. 3d at 724. Facts found to support immunity under this factor include (1) tribal ownership of the entity, (2) having tribal members on the entity's board or serving as its CEO, (3) entity employment of tribal members, (4) tribal council authority to appoint or remove board members, and (5) the entity being managed by the tribe or another tribal entity. *Big Picture*, 929 F.3d at 182; *Applied Sciences*, 2020 WL 2738243, at *3; *Everette*, 146 F. Supp. 3d at 724; *Great Plains*, 259 A.3d at 1137-38. Here, a plethora of evidence regarding GPF's structure, ownership, and management firmly establishes the Tribe's control.

GPF is and has always been wholly owned by the Tribe through GVA Holdings.¹⁰ Azure Decl. ¶ 10, Ex. A (GPF Art. of Org.) at 1, & Ex. B (GPF Art. of Op.) § 1.8; GPF 30(b)(6) at 69:1-10. GPF is a manager-managed LLC, and since 2017 it has been managed exclusively by the Tribe through IMDG.¹¹ Azure Decl. ¶¶ 11, 14-15 & Ex. A (GPF Articles of Organization) at 1; GPF 30(b)(6) at 25:13-21. The Tribe treats both IMDG and GPF as component units of the Tribe for accounting purposes. GPF 30(b)(6) 32:9-19, 40:23-41:4. IMDG provides full oversight of the day-to-day management of GPF's affairs, IMDG's Board provides board-level

¹⁰ See pp. 8-9, *supra*, regarding GVA Holdings.

¹¹ Prior to 2017, when the Tribe was still learning the lending business, GPF was managed by Dater and its portfolio was serviced by CA Servicing. Azure Decl. ¶ 11; GPF 30(b)(6) at 17:4-18:24, 24:2-22. Even then, IMDG employees and tribal members worked with those entities to gain necessary expertise, the Tribe retained full authority to set the parameters for lending activity, and the Tribe retained full ownership of GPF. Azure Decl. ¶¶ 10, 13; GPF 30(b)(6) at 17:24-19:14, 21:2-6, 26:1-5, 69:5-10, 97:5-98:3.

oversight for GPF, and all GPF employees are leased from IMDG, including many tribal members. Azure Decl. ¶¶ 8, 15; GPF 30(b)(6) at 24:2-25:6, 94:22-95:5. All management decisions for GPF—specifically including the language in loan documents, the interest rates charged, the parameters for loan approval, and the amounts that can be borrowed—are made by IMDG subject to limitations set forth in tribal law. Azure Decl. ¶¶ 13, 15; GPF 30(b)(6) at 42:11-43:18. GPF is licensed by the FBIC Tribal Regulatory Authority and operates pursuant to the FBIC Tribal Online Lending Code. Azure Decl. ¶ 17; GPF 30(b)(6) at 81:23-83:17. And any vendor that does more the \$50,000 of business per year with GPF is also required to obtain approval from the Tribal Regulatory Authority. Azure Decl. ¶ 17; GPF 30(b)(6) at 83:18-85:5.

IMDG’s charter states that ownership in IMDG is “limited, as the intent of the Fort Belknap Community Council in establishing this organization is to create a corporation, wholly owned by the Fort Belknap Community Council, or its members, employees or contractors, for the people of the Fort Belknap Indian Reservation.” Stiffarm Decl. Ex. B (IMDG Charter) ¶ 4. IMDG has been wholly owned and controlled by the Tribe since its inception. *Id.* ¶ 5 & Ex. B (IMDG Charter) ¶ 1. Its Board consists entirely of members of the Council, and the Council retains the rights to fill any vacancies on the Board, to remove any member of the Board, and to override any action of the Board to remove one of its own members.

Id. ¶¶ 5-6. IMDG is required to file quarterly and annual reports with the Council regarding its financial situation and all business activities that it has undertaken or plans to undertake. *Id.* ¶ 5. Any proposed amendments to IMDG’s bylaws require Council approval. *Id.* The Board has the authority to hire IMDG’s CEO, who is also a tribal member. *Id.* ¶ 6. The CEO has the authority to hire and fire other IMDG employees and oversees IMDG’s day-to-day management. *Id.*; Azure Decl. ¶ 3.

In sum, the Tribe owns, exercises full control over, and is actively involved in the day-to-day management of GPF. This factor thus weighs strongly in favor of immunity.

4. Tribal Intent

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

Here, the Tribe explicitly intended for GPF to share the Tribe’s immunity from the moment of GPF’s creation. GPF’s Articles of Organization provide that GPF, “being wholly owned by the Tribe, is to enjoy the Tribe’s sovereign

immunity.” Azure Decl. Ex A (GPF Art. of Org.) ¶ 7; *see Everette*, 146 F. Supp. 3d at 725 (holding that substantially similar language from another FBIC lending entity’s articles of organization established intent to share the Tribe’s immunity). This factor thus weighs in favor of immunity for GPF.

5. Financial Relationship to the Tribe

The fifth factor of the arm of the tribe analysis “considers the financial relationship between the tribe and the entities.” *Big Picture*, 929 F.3d at 184. While the question of whether a judgment would directly reach tribal assets is relevant, “direct tribal liability for an entity’s actions ‘is neither a threshold requirement for immunity nor a predominant factor in the overall analysis.’” *Id.* (citation omitted). Courts instead look to whether and to what extent to which the tribe relies on the entity for revenue to fund tribal governmental functions, support tribal members, or pursue other economic development opportunities. *Id.*; *Breakthrough*, 629 F.3d at 1194. A tribe need not be wholly reliant on the entity for this factor to favor immunity; for example, the Tenth Circuit found that this factor supported immunity when a tribal lending entity funded 10% of a tribe’s general fund. *Big Picture*, 929 F.3d at 184-85; *see also Everette*, 146 F. Supp. 3d at 725 (finding that this factor supported immunity for another FBIC tribal lending entity because “the tribes use revenue from [the entity] to fund the provision of governmental services to tribal members”); *Great Plains*, 259 A.3d at 1148 (finding that this factor supported

immunity despite the absence of “a detailed accounting of each entity’s financial records or the degree to which each entity generates profits that support specific tribal activities”).

The Tribe depends on GPF and IMDG to fund its governmental services and economic development activities. Online consumer lending is by far the most profitable of the Tribe’s various economic development activities, accounting for approximately 90% of IMDG’s revenues.¹² Azure Decl. ¶ 7. In turn, IMDG’s distributions to the Tribe typically account approximately 75% of the Tribe’s total non-federal tribal budget—without considering the millions of additional dollars that IMDG spends to directly fund tribal member housing and wellness initiatives. *Id.* ¶¶ 5-7; Stiffarm Decl. ¶¶ 7-8. The Tribe uses revenue from IMDG to fund core governmental services such as general funding for its land department Tribal Employment Rights Office, tribal communications, and tribal electricity, sewer, and waste programs. Stiffarm Decl. ¶ 7. Any reduction in GPF or IMDG revenue would directly affect the Tribe’s ability to continue funding those services. *Id.* ¶ 8; Azure Decl. ¶ 7. This factor thus weighs in favor of immunity.

¹² From 2011-2017, lending activity accounted for an even larger share of IMDG’s revenues. GPF 30(b)(6) at 47:9-17.

6. The Purposes of Tribal Sovereign Immunity

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

Discussion of this factor in case law underscores the *Big Picture* court's conclusion regarding its significant overlap with the first five factors. In *Breakthrough*, the Tenth Circuit found this factor supported immunity because the tribal entities were "so closely related to the Tribe that their 'activities are properly deemed to be those of the tribe'" and they "plainly promote[d] and fund[ed] the Tribe's self-determination through revenue generation and the funding of diversified economic development." 629 F.3d at 1195 (citation omitted). The *Everette* court similarly concluded that this factor supported immunity when "[e]xtending sovereign immunity to the lending companies would protect a significant source of the tribes' revenue from suit, thereby 'directly protecting the sovereign Tribe's treasury.'" 146 F. Supp. 3d at 725 (citation omitted). In light of the evidence presented above, there can be no doubt that GPF is closely related to the FBIC, that

it promotes and funds the Tribe's economic development and provision of governmental services, and that a judgment against it would adversely affect the Tribe's treasury. Accordingly, the purposes underlying the doctrine of tribal sovereign immunity weigh in favor of recognizing that GPF is an arm of the FBIC, and the court should so hold.

III. Rule 19 requires dismissal of all claims.

Plaintiffs' claims also should be dismissed because the Tribe is a required party under Fed. R. Civ. P. 19(a) and adjudication of the case in its absence could not provide an adequate remedy without prejudicing the its interests. Rule 19(b) thus requires dismissal of the entire case.

Rule 19(a) provides that a party is necessary if it "claims an interest relating to the subject of the action and is so situated that disposing of the action in [its] absence may: (i) as a practical matter impair or impede that [party's] ability to protect the interest; or (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest." Fed. R. Civ. P. 19(a)(1). If a necessary party cannot be joined, Rule 19(b) directs the court to consider whether the case can proceed in its absence, taking into account: (1) whether a judgment rendered in the missing party's absence might prejudice it or existing parties; (2) the extent to which the court could structure a judgment to limit that prejudice; (3) whether a judgment in the missing party's

absence would be adequate; and (4) whether the plaintiff would have an adequate remedy of the case was dismissed for nonjoinder. Fed. R. Civ. P. 19(b). In apply Rule 19(b), “where sovereign immunity is asserted, and the claims of the sovereign are not frivolous, dismissal of the action must be ordered where there is a potential for injury to the interests of the absent sovereign.” *Rep. of Philippines v. Pimentel*, 553 U.S. 851, 867, 869 (2008) (reversing a Ninth Circuit ruling that “did not accord proper weight to the compelling claim of sovereign immunity” when conducting a Rule 19 analysis).

The FBIC is indisputably a necessary party under Rule 19(a). The overarching objective of Plaintiff’s complaint is to force the Tribe to shutter the online consumer lending business that significantly contributes to funding tribal governmental services and to recover monetary damages against the Tribe and its leaders. The Tribe obviously has a significant interest in the continued operation of the economic engines that fund its government and in the preservation of its own treasury. But Plaintiff has not named the Tribe as a party, and her claims against GPF are due to be dismissed on the grounds set forth above, leaving the Tribe and its interests wholly unrepresented. Proceeding in the Tribe’s absence would impair its ability to protect its interests and impermissibly infringe on its sovereign immunity.

Under these circumstances, Rule 19(a)’s pragmatic concerns are easily satisfied. Plaintiff seeks, *inter alia*, an injunction preventing the Tribe from operating

its consumer lending business and entry of declaratory relief voiding loans made with the Tribe's funds. *See, e.g., Fla. Wildlife Fed'n, Inc. v. U.S. Army Corps of Eng'rs*, 859 F.3d 1306, 1316-18 (11th Cir. 2017) (holding that a suit over a Florida water control project could not proceed against a federal agency in the absence of a state entity that operated and maintained much of the project, as in injunction of the former would impede the latter's discretion and impair cooperation between the entities); *N. Arapaho Tribe v. Harnsberger*, 697 F.3d 1272, 1281-82 (10th Cir. 2012) (affirming dismissal of a case brought by one Indian tribe that, if adjudicated, would have prejudiced the interests of another that could not be joined). The Tribe is thus a necessary party under Rule 19(a).

“The balancing of equitable factors under Rule 19(b) almost always favors dismissal when a tribe cannot be joined due to tribal sovereign immunity.” *Jamul Action Comm.*, 974 F.3d at 998; *see also Pimentel*, 553 U.S. at 866. This case is no exception. In addition to being a fundamental “affront to [FBIC’s] sovereignty,” *Fla. Wildlife*, 859 F.3d at 1318, adjudicating this case in the Tribe’s absence would risk inevitably and catastrophically affecting its interests, and there is no way that the Court could tailor or limit any adverse order to avoid that result; GPF’s lending business is either lawful or it is not, and there would be no way to lessen the prejudice that the Tribe would suffer from having that issue decided in its absence. *See Harnsberger*, 697 F.3d at 1282; *Fla. Wildlife*, 859 F.3d at 1318-19; *Pit River Home*

& Agric. Co-op Ass'n v. United States, 30 F.3d 1088, 1101 (9th Cir. 1994) (recognizing propriety of dismissal when tribal defendant could not be joined). Nor would a judgment in the Tribe's absence be adequate, as it would not be binding on the Tribe and thus could not achieve Plaintiffs' aims. *Fla. Wildlife*, 859 F.3d at 1319; *Harnsberger*, 697 F.3d at 1283. And while dismissing the entire case may mean that Plaintiffs lack a remedy for their alleged injuries, that potential prejudice cannot, as a matter of law, outweigh the prejudice the Tribe would suffer in this case proceeded in its absence. *Fla. Wildlife*, 859 F.3d at 1320 (citing *Pimentel*, 553 U.S. at 872); *Harnsberger*, 697 F.3d at 1283-84; *Pit River*, 30 F.3d at 1102-03.

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

CONCLUSION

For all the foregoing reasons, the court should dismiss all claims against GPF pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction and all remaining claims for failure to join the Tribe as a required party under Rule 19. In the alternative, the Court should dismiss all claims against putative John Doe Defendants pursuant to Rule 21.

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Respectfully submitted this 10th day of August, 2023.

By: /s/ Frederick L. Whitmer

Frederick L. Whitmer (FW 8888)
1114 Avenue of the Americas
New York, NY 10036
Telephone: (212) 775-8700
Facsimile: (212) 775-8800
Email: fwhitmer@kilpatricktownsend.com

Mark H. Reeves (Admitted *Pro Hac Vice*)
Kilpatrick Townsend & Stockton, LLP
Enterprise Mill
1450 Greene Street, Suite 230
Augusta, Georgia 30901
Telephone: (706) 823-4206
Facsimile: (706) 828-4488
Email: mreeves@kilpatricktownsend.com

Rob Roy Smith (Admitted *Pro Hac Vice*)
Bree Black Horse (Admitted *Pro Hac Vice*)
Kilpatrick Townsend & Stockton, LLP
1420 Fifth Ave.
Seattle, WA 98101
Telephone: (206) 467-9600
Facsimile: (206) 623-6793
Email: rsmith@kilpatricktownsend.com
brblackhorse@kilpatricktownsend.com

*Counsel for Defendant GreatPlains Finance,
LLC d/b/a Cash Advance Now*

CERTIFICATE OF SERVICE

I hereby certify that on August 10, 2023 a true and correct copy of the foregoing was served upon the counsel of record by filing it electronically with the Court's CM/ECF system.

By: /s/ Frederick L. Whitmer
Frederick L. Whitmer