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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) Hon. James B. Clark **GREATPLAINS FINANCE, LLC'S REPLY IN SUPPORT OF MOTION TO DISMISS**

Table of Contents

Page

Table of Authorities

Page

Cases

I. The Court's Sovereign Immunity Inquiry Is Limited To Present Day

Plaintiff spends substantial time weaving a lurid tale about Defendant GreatPlains Finance, LLC's ("GPF") lending operations and management by Island Mountain Development Group ("IMDG"), the economic development entity of the Fort Belknap Indian Community ("Tribe"), from 2012 through early 2023. This tale is largely irrelevant to the Court's arm of the tribe sovereign immunity inquiry, however, which is limited to the Tribe's present-day control of GPF and GPF's fulfillment of its stated purpose and financial relationship with the Tribe.

It is well settled that circumstances that existed prior to, or even at the time of, a complaint are not determinative of a defendant's entitlement to sovereign immunity. "[S]overeign immunity is an ongoing inquiry rather than a determination to be made based on the existence of a waiver at the time of filing" because a sovereign can withdraw its consent to be sued. *Iowa Tribe of Kan. and Neb. v. Salazar*, 607 F.3d 1225, 1237 (10th Cir. 2010) (rejecting plaintiff's time-of-filing rule, following U.S. Supreme Court guidance from *Beers v. Arkansas*, 61 U.S. (20 How.) 527, 529, 15 L. Ed. 991 (1857)); *see also Maysonet–Robles v. Cabrero*, 323 F.3d 43 (1st Cir. 2003) (citing *Beers* and rejecting a time-of-filing rule with respect to sovereign immunity determinations).[1]

[1] Construing the same argument arising under a Quiet Title Act case, the Third Circuit elected to "conclude that jurisdiction under § 2410 is determined by looking to the facts existing at the time the suit was filed." *Kabakjian v. United States*, 267

At least two courts have expressly applied this temporal sovereign immunity rule to the arm of the tribe analysis in the tribal lending context. In *Colorado v. Cash Advance*, No. 05CV143, 2012 WL 3113527 (Colo. Dist. Ct. Feb. 18, 2012), a Colorado court found that "the tribal immunity issue in this particular case is trapped in the present… because tribal immunity is in the nature of subject matter jurisdiction, and a court must always be concerned about subject matter jurisdiction." *Id*. at *6. The court further explained "[t]his is why the last two arm-of-the-tribe factors are phrased in the present tense. What matters is whether the tribes *now* own and operate the entities, not whether they owned and operated them at any other time… it is the current state of affairs that matters[.]" *Id.* (emphasis in original).

Likewise, in *In re Internet Lending Cases*, 53 Cal. App. 5th 613, 267 Cal. Rptr. 3d 783 (2020), a California appellate court held that "the status of a tribe's or tribal entity's immunity is appropriately assessed by the court at the time of the motion to dismiss based on immunity." *Id*. at 625. When addressing the third *Breakthrough* factor concerning "the entity's structure, ownership, and

F.3d 208, 212 (3d Cir. 2001). The approach in *Kabakjian* is, however, of little application here given that it analyzed jurisdiction under a statute not implicated here. Time-of-filing rules generally are only applicable in federal diversity cases, and this Court's jurisdiction does not depend upon diversity of citizenship. *See Connectu LLC v. Zuckerberg*, 522 F.3d 82, 92 (1st Cir. 2008). And, even if this Court were to follow *Kabakjian*, the only relevant time period is from March 11, 2022, forward.

management, including the amount of control the Tribe has over the entities," the appellate court specifically noted that although a third party controlled the tribal entity prior to 2012, "since 2012 the Tribe had taken numerous steps to reassert its control," and "[t]hus, at the time of the hearing, the Tribe did indeed control [the tribal lending entity], a circumstance weighing in favor of its arm-of-the-tribe status." *Id*. at 627. Consistent with this precedent, this Court should evaluate the evidence relevant to GPF's immunity as an arm of the Tribe at the time GFP filed the pending dismissal motion—August of 2023. Dkt. 51.

II. GPF Is An Arm Of The Tribe Immune From Plaintiff's Suit

A. The Circumstances of GPF's Creation Favor Immunity

Plaintiff argues that the first *Breakthrough* factor—method of creation—weighs against immunity because GPF temporarily worked with Cash Advance Servicing ("CAS") from 2012 to 2017 while GPF learned the consumer lending business. Dkt. 61 at 27-29.[2] CAS's short-term provision of certain services and

[2] To the extent Plaintiff asks the Court to rely on or take judicial notice of the archived webpage from the Wayback Machine she references at Dkt. 61 at 28 n. 63, it would be error to do so. *Weinhoffer v. Davie Shoring, Inc.*, 23 F.4th 579, 584 (5th Cir. 2022) (finding the district court erred in taking judicial notice of archived internet webpage maintained by Wayback Machine "because a private internet archive falls short of being a source whose accuracy cannot reasonable be questioned as required by [Fed. R. Evid.] 201."); *see also id.* (requiring testimony to authenticate the archived webpage pursuant to Fed. R. Evid. 901).

products to GPF many years ago does not, however, weigh against immunity because GPF has only ever existed as a Tribally-chartered and owned corporation.

The cases Plaintiff cites effectively illustrate the critical difference between the Tribal creation of GPF on the one hand, and the non-tribal creation of entities found not to be immune on the other. In *Hunter v. Redhawk Network Security, LLC*, No. 6:17-cv-0962-JR, 2018 WL 4171612 (D. Or. Apr. 26, 2018), the entity at issue was not originally chartered by the tribe under tribal law; instead, the business entity was first chartered under state law entirely unconnected to the tribe and was later acquired by a tribal business, which the court found weighed against immunity. *Id*. at *2-3. Simliarly, in *Solomon v. American Web Loan*,[3] 375 F. Supp. 3d 638 (E.D. Va. 2019), the entities were pre-existing, non-tribal private corporations that were merged with a tribal business after purchase, which the court found neutral in the arm of the tribe analysis. *Id*. at 653-54. In contrast, GPF was originally chartered by the Tribe under Tribal law and has always been Tribally

[3] The *Solomon* court issued its order denying a motion to dismiss for lack of subject matter jurisdiction based on tribal sovereign immunity before the Fourth Circuit Court of Appeals issued its opinion in *Williams v. Big Picture Loans, LLC*, 929 F.3d 170 (4th Cir. 2019). In *Williams*, the Fourth Circuit reversed and remanded a district court's order denying tribal entities' motion to dismiss for lack of subject matter jurisdiction based on tribal sovereign immunity. The district court in *Solomon* relied heavily upon the now-overturned district court order in *Williams* and the opinion of the California Supreme Court in *People v. Miami Nation Enterprises*, 2 Cal. 5th 222, 386 P.3d 375 (2016), which also pre-dates the Fourth Circuit's *Williams* opinion. *See Solomon*, 375 F. Supp. 3d at 653-61. *Solomon* thus has little if any persuasive value.

owned and operated since its inception. Dkt. 52 at 1-4; *id.*, Exs. A-C; GPF 30(b)(6) at 69:1-10. Plaintiff's cases are simply inapposite.

Plaintiff also attempts to undermine GPF's immunity by inviting this Court to second-guess business decisions the Tribe made shortly after it created GPF. Dkt. at 27-29. Federal appellate courts routinely decline such invitations, and this Court should follow suit. *See Bank of Okla. v. Muscogee (Creek) Nation*, 972 F.2d 1166, 1169 (10th Cir. 1992); *Williams*, 929 F.3d at 181. Indeed, federal courts recognize that tribal entities like GPF may have to contract with non-tribal parties to initially operate and learn a business, and this standing alone does not tip the scales against immunity. *See Williams*, 929 F.3d at 182; *see also Solomon*, 375 F. Supp. 3d at 655.

B. GPF Fulfills Its Stated Purpose Of Serving Tribal Economic Development And Self-Governance

Plaintiff claims that GPF has not provided enough information about the fulfillment of its stated purpose—tribal economic development and self-governance—for the Court to evaluate this factor. Dkt. 61 at 29-30.[4] Plaintiff's issue seems partly rooted in a continued misunderstanding of GPF's structure and

[4] Plaintiff does not dispute that the stated purpose for which the Tribe created GPF weighs in favor of immunity. *See Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173, 1192-93 (10th Cir. 2010) (the second factor incorporates both the stated purpose for which the entity was created and evidence that relates to that purpose).

operation. To be clear, the Tribe owns GPF and manages it through IMDG; GPF leases Tribal employees from IMDG, the majority of whom are Tribal members; and GPF's revenue is distributed to IMDG, which in turn distributes a portion of its profits to the Tribal treasury and reinvests the remainder in the Tribal community. *See* Dkt. 51-1 at 6-12. This is precisely the type of evidence the Fourth Circuit in *Williams* held adequate to demonstrate that tribal lending entities fulfilled their purpose of tribal economic development and self-determination, thus favoring immunity. 929 F.3d at 179-82. Evidence establishing that through IMDG, revenue from GPF contributes to the Tribal treasury and significantly impacts the Tribal community by way of employment, housing, and healthcare shows that GPF fulfills its stated purpose of tribal economic development and self-governance. *Id*. at 179-80; *see also Everette v. Mitchem*, 146 F. Supp. 3d 720, 724 (D. Md. 2015). And, as the appellate court noted in *Williams*, the exacting financial documentation Plaintiff seeks is squarely at odds with policy considerations of tribal economic development and self-governance underlying the doctrine of tribal sovereign immunity. *Id*. at 179 ("[O]ne of the primary purposes underlying tribal immunity is the promotion of tribal self-governance, which counsels against courts demanding exacting information about the minutiae of a tribe's budget."); *see also Everette*, 146 F. Supp. 3d at 723-24.

Plaintiff also raises the long-since retired financial agreements between GPF and third parties and GPF's more recent reinvestment of profits into the business and loan repayment terms in an attempt to argue that GPF does not currently fulfill its stated purpose. Dkt. 61 at 30-32. None of these reasoned Tribal business decisions weighs against finding that GPF fulfills its stated purposes. Tellingly, Plaintiff cites no authority suggesting that a tribe must receive a certain percentage of revenue from a given entity for it to adequately fulfill its purpose of promoting tribal economic development or self-governance, or that reinvesting in a tribal business somehow does not promote tribal economic development or self-governance. *Id*. And, as explained above, the now-ended business arrangements that enabled GPF to learn the consumer lending business prior to 2017 are irrelevant to the Court's determination. More importantly, "policy considerations of tribal self-governance and self-determination counsel against second-guessing a financial decision of the Tribe," particularly where the evidence indicates that the Tribal treasury and Tribal community benefit significantly from the revenue generated by an entity, as is the case here. *Williams*, 929 F.3d at 181; *see also id*. at 179-82. In sum, GPF fulfills its stated purpose of tribal economic development and self-governance, and this factor weighs in favor of immunity.

C. The Tribe Controls GPF Through IMDG

Plaintiff again attempts to resurrect defunct business arrangements in an effort to convince the Court that the third *Breakthrough* factor—control—weighs against immunity. Dkt. 61 at 32-35. It does not.

First, Plaintiff's reliance on the business relationship GPF maintained with CAS from 2012 to 2017 is misplaced. Again, the now-terminated contract with CAS that enabled GPF to learn the consumer lending business is irrelevant to the Court's evaluation of the current structure, ownership, and management of GPF. *Williams*, 929 F.3d at 182-83 (evaluating "control" factor based on present structure, management, ownership, and control of tribal entities); *see also Breakthrough*, 629 F.3d at 1193 (same). Regardless, "an entity's decision to outsource management in and of itself does not weigh against tribal immunity[.]" *Williams*, 929 F.3d at 182; *see also Solomon*, 375 F. Supp. 3d at 655.

Plaintiff also relies heavily on the so-called "Ad Hoc Committee" to supposedly show that the Tribe did not sufficiently control GPF prior to January 2023. Dkt. 61 at 33. Although irrelevant to the Tribe's current control of GPF, the Tribe's response to the Ad Hoc Committee's[5] business choices clearly demonstrates the total control the Tribe exercises over IMDG and GPF: in January 2023, the Fort

[5] Unlike the governing boards and individuals of the entities found to have insufficient tribal control in *Solomon*, *Hunter*, and *Miami Nation*, the Ad Hoc Committee was comprised of enrolled Tribal members and Tribal Council members.

Belknap Community Council ("Tribal Council")—the elected governing body of the Tribe—eliminated the so-called Ad Hoc Committee by replacing the IMDG Board of Directors with sitting Tribal Council members, who in turn appointed Evan Azure, a Tribal member, to serve as IMDG CEO in April of 2023. Dkt. 52 at 7.

The structure, ownership, and management of GPF closely resembles that of the Big Picture tribal lending entity the Fourth Circuit in *Williams* determined was sufficiently controlled by the tribe. 929 F.3d at 182-84. Like Big Picture, GPF is managed by Tribal Council members who also sit as members of the IMDG (and *de facto* GPF) Board of Directors and who are appointed by majority vote of the Tribal Council and must be removed in the same way. *See* Dkt. 51-1 at 7-10. Moreover, through IMDG, GPF employs Tribal members, including a Tribal member who serves as IMDG's CEO and thus the *de facto* CEO of GPF; GPF conducts the majority of its operations on the Fort Belknap Indian Reservation; and IMDG makes all of GPF's management decisions. *Id*.; *see also Everette*, 146 F. Supp. 3d at 724-25. Accordingly, the control factor weighs in favor of immunity.[6]

[6] The Court should disregard Plaintiff's theoretical musings regarding the role of a third party with which GPF holds a credit facility in the future given the evidence that IMDG "has continued its normal business operations uninterrupted" under the leadership of the current IMDG Board and CEO, and that "GPF's operations and management have not been affected." Dkt. 52 at 7. If the Court gives weight to Plaintiff's hypothetical argument, however, then the "control" factor is merely neutral in terms of the weight it should be given in the *Breakthrough* balancing test given the balance of evidence in the record regarding Tribal control of GPF.

D. Plaintiff Agrees That The Tribe Intended GPF To Possess Immunity From Her Suit

This undisputed factor weighs in favor of immunity. *See* Dkt. 61 at 35.

E. The Financial Relationship Between The Tribe, IMDG And GPF Favors Immunity

Plaintiff once more criticizes the financial information provided by GPF as well as the business expenses GPF pays to third parties related to its lending operation as reasons to find the fifth *Breakthrough* factor weighs against immunity. Dkt. 61 at 36. As explained above, however, GPF is not required to provide the type of exacting financial information baselessly demanded by Plaintiff, and the Court should not second-guess the Tribe's business decisions. More critically though, Plaintiff's arguments are untethered to the Court's analysis under fifth *Breakthrough* factor. This factor requires consideration of "the extent to which the tribe 'depends on the entity for revenue to fund its governmental functions, its support of tribal members, and its search for other economic development opportunities.'" *Id*. at 184 (quoting *Breakthrough*, 629 F.3d at 1195); *see also Everette*, 146 F. Supp. 3d at 725. Plaintiff's arguments about unnecessary financial documentation and now-terminated business relationships are simply irrelevant to the fifth *Breakthrough* factor.

Lastly, Plaintiff makes a wholly hypothetical claim that a judgment against GPF "would not impair the Tribe's assets" based on the unexercised terms of a

credit facility GPF holds. Dkt. 61 at 37. But, under the financial relationship *Breakthrough* factor, whether a judgement against an entity would reach the tribe's assets "'is neither a threshold requirement for immunity nor a predominant factor in the overall analysis.'" *Williams*, 929 F.3d at 184 (quoting *Miami Nation*, 386 P.3d at 373). Rather, this factor "considers the extent to which the tribe 'depends on the entity for revenue to fund its governmental functions, its support of tribal members, and its search for other economic development opportunities.'" *Id*. at 184 (quoting *Breakthrough*, 629 F.3d at 1195). And that is precisely where the Court should look to conclude that this factor favors immunity.

The evidence shows that the Tribe depends on GPF revenue to fund governmental functions and other Tribal community development. *Id*. GPF exists primarily to provide revenues to the Tribe, and the Tribe is heavily dependent on the revenue generated from consumer lending activities to fund essential governmental services. Dkt. 52 at 2, 5; *id*., Ex. A. Given that IMDG contributes its revenue to the Tribe's general fund, which includes revenue from GPF's lending activities, a judgment against GPF would in fact impact the Tribal treasury, which is at the heart of the analysis. *Id*. Where, as here, the revenue from IMDG's consumer lending activities, including revenue generated by GPF, is critical to funding essential Tribal governmental and community services like employment, healthcare, housing, and education, and a judgment against GPF could significantly impact the Tribe's

treasury, the financial relationship between the Tribe and GPF weighs in favor of finding it an arm of the Tribe. *Everette*, 146 F. Supp. 3d at 725; *Breakthrough*, 629 F.3d at 1195.

F. Finding GPF Is Immune From Plaintiff's Suit Serves The Purposes Of Tribal Sovereign Immunity

Plaintiff casts the sixth *Breakthrough* factor as a balancing test between tribal and state interests by arguing that tribal sovereign immunity should yield to New Jersey law and the State's interests. Dkt. 61 at 38-40. This is not the inquiry the Court must undertake; rather, the Court examines whether concluding that GPF possesses immunity serves the overall purposes of tribal sovereign immunity. *See Breakthrough*, 629 F.3d at 1195; *Everette*, 146 F. Supp. 3d at 725. Thus, and unsurprisingly, Plaintiff's authority does not inform the Court's analysis under the sixth *Breakthrough* factor. For example, *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 138 (1980), addressed whether federal law preempted certain state taxes on tribes and tribal member activity and did not discuss tribal sovereign immunity. *Rice v. Rehner*, 463 U.S. 713 (1983), did not even involve an Indian tribe or arm of the tribe; rather, the case presented the issue of whether a federally licensed Indian trader who operated a general store on an Indian reservation was required to obtain a state liquor license to sell liquor for off-premises consumption. And *Otoe-Missouria Tribe of Indians v. New York State Department of Financial Services*, 769 F.3d 105 (2d Cir. 2014), entailed denial of

a preliminary injunction in an affirmative suit by a tribe challenging the validity of certain state lending laws on Indian Commerce Clause grounds—not a suit where a tribe asserted its immunity defensively. None of these cases, nor any others cited in Plaintiff's brief, undermines GPF's tribal sovereign immunity from Plaintiff's claims.

III. Tribal Sovereign Immunity Extends To Tribal Arms Conducting Off-Reservation Commercial Activities

Plaintiffs urge this Court to find that tribal sovereign immunity does not apply to tribal economic development activities occurring off reservation based solely on numerous dissenting opinions. As the U.S. Supreme Court has consistently held, however, that simply is not the law.[7]

In *Michigan v. Bay Mills Indian Community*, 572 U.S. 782 (2014), to which Plaintiff cites only the dissent, the State of Michigan argued that tribal sovereign immunity did not bar a suit seeking to enforce state laws prohibiting a tribe's off-reservation commercial activities. *Id*. at 797. The U.S. Supreme Court was unimpressed by these "retreads of assertions we have rejected before," *id*. at 799, and reiterated that its precedent "could not [be] any clearer: 'We decline to draw [any] distinction' that would 'confine [immunity] to reservations or to non-

[7] In addition to the weight of Supreme Court precedent rejecting Plaintiff's restrictive view of tribal sovereign immunity, "Congress has consistently reiterated its approval of the immunity doctrine." *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 510 (1991).

commercial activities.'" *Id*. at 800 (quoting *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 758 (1998) (modifications in original)). This binding precedent squarely forecloses Plaintiff's argument that tribal sovereign immunity is territorially or business purpose limited.

To the extent Plaintiff argues that GPF, IMDG or the Tribe are subject to New Jersey laws of general applicability, her argument again misses the mark. Dkt. 61 at 34, 37, 40. Although Indian tribes may be subject to federal laws of generally applicability under some circumstances, whether an Indian tribe is subject to a statute and whether the tribe may be sued for violating the statute are two entirely different questions. *Williams v. Poarch Band of Creek Indians*, 839 F.3d 1312, 1323 (11th Cir. 2016). As the U.S. Supreme Court bluntly explained in *Kiowa Tribe*, "there is a difference between the right to demand compliance with state laws and the means available to enforce them." 523 U.S. at 755. The case Plaintiff cites does not hold otherwise. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 146 (1973), addressed whether federal law preempted certain state taxes on tribes and tribal member activity—it had nothing to do with tribal sovereign immunity.

The Court is bound to follow U.S. Supreme Court precedent, not Plaintiff's vision of what the law should be. Tribal sovereign immunity bars unconsented suits against Indian tribes and their arms and enterprises regardless of where the underlying activity takes place, whether it is commercial or governmental in nature,

or whether it is ostensibly barred by a state law of general applicability. Because GPF is an arm of the Tribe, it is entitled to sovereign immunity from Plaintiff's claims. The Court should dismiss all claims against GPF for lack of subject matter jurisdiction.

For the foregoing reasons, GPF respectfully requests this Court grant its motion to dismiss for lack of subject matter jurisdiction based on tribal sovereign immunity, and dismiss Plaintiff's complaint with prejudice.

Dated: October 16, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of October, 2023, I electronically filed the forgoing GreatPlains Finance, LLC's Reply in Support of Motion to Dismiss with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all registered CM/ECF users.

/s/ Frederick L. Whitmer
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