UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

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| STATE OF MISSOURI ex rel. CHRIS KOSTER, Attorney General, | ) | |
| Plaintiff, | ) | |
| v. | ) | No. 4:11-cv-01237-AGF |
| MARTIN A. WEBB, aka BUTCH WEBB, PAYDAY FINANCIAL, L.L.C., d/b/a LAKOTA CASH, d/b/a BIG SKY CASH, 24-7 CASH DIRECT, L.L.C., GREAT SKY FINANCE, L.L.C., FINANCIAL SOLUTIONS, L.L.C., d/b/a LAKOTA CASH, HIGH COUNTRY VENTURES, L.L.C., MANAGEMENT SYSTEMS, L.L.C., d/b/a GSKY, RED RIVER VENTURES, L.L.C., RED STONE FINANCIAL, L.L.C., WESTERN CAPITAL, L.L.C., and WESTERN SKY FINANCIAL, L.L.C., | ) | |
| Defendants. | ) | |

**DEFENDANTS' REPLY BRIEF IN SUPPORT OF THEIR MOTION TO DISMISS**

This case is about commercial activity on the Cheyenne River Indian Reservation (the "Reservation") by a Tribal member, Defendant Martin Webb, and his entities. Defendants are immune from prosecution by Missouri's Attorney General, acting on behalf of the State (collectively, the "State"). Further, federal and Tribal law preempt the Missouri consumer laws relied upon by the State.

The State attempts to regulate Defendants' activity by declaring that it occurred in Missouri, without regard for the actual facts in the record. Rather than offer concrete facts that establish activity in Missouri, the State simply insists that it is so. Instead, the allegations show that the loan agreements that are the subject of the State's Petition were entered into on the Reservation and provide that they are subject to Tribal law. The State's generalized and conclusory assertions cannot overcome the Tribal immunity to which Defendants are entitled. Therefore, the Petition should be dismissed.

## DEFENDANTS ARE ENTITLED TO IMMUNITY.

### A. Defendants Are Entitled To Immunity For On-Reservation Activity.

The State misunderstands Defendants' argument. Defendants do not claim immunity as Tribal officers or arms of the Tribe. Instead, Defendants invoke the Tribe's immunity because the actions about which the State complains took place on the Reservation, Defendants qualify as Tribal members, and Tribal law controls.

Without Congressional consent, States may not govern the affairs of Indians on a reservation or interfere with contracts between Indians and non-Indians there. *Montana v. United States*, 450 U.S. 544, 565 (1981); *Williams v. Lee*, 358 U.S. 217, 220-223 (1959). In *Montana* and *Williams*, individual Indians were protected by tribal immunity without reference to an "arm-of-the-tribe" or tribal-officer analyses. The focus is on Tribal members' right, as individuals, to be governed by Tribal law on the Reservation, and not on whether individuals are acting as or on behalf of the Tribe.

> To be sure, when Congress has legislated on Indian matters, it has, most often, dealt with the tribes as collective entities. But those entities are, after all, composed of individual Indians, and the legislation confers individual rights. This Court has therefore held that the question has

> always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.

*McClanahan v. State Tax Comm'n*, 411 U.S. 164, 181 (1973) (quotation marks omitted); *see Williams*, 358 U.S. at 220. As a Tribal member, Webb's on-Reservation activity is protected by his Tribal immunity.

The immunity available to Tribal members for on-Reservation activities extends to the entities they own, even if those entities are formed under state law. *Pourier v. S.D. Dep't of Revenue*, 658 N.W. 2d 395, 403-05 (S.D. 2003), *vacated in part on other grounds*, 674 N.W. 2d 314 (2004); *Giedosh v. Little Wound Sch. Bd.*, 995 F. Supp. 1052, 1059 (D.S.D. 1997). Focusing on Congressional recognition of Indian corporations, federal policy favoring economic development on reservations, and other examples in which courts allow entities to assume the racial identities of their owners, *Pourier* concluded that a corporation owned by a tribal member was itself a tribal member. *Pourier*, 658 N.W. 2d at 404-05; *see also Flat Ctr. Farms, Inc. v. State Dep't of Revenue*, 49 P.3d 578, 581-82 (Mont. 2002) (holding that Indian-owned corporation was entitled to immunity). To decide otherwise would discourage economic development and prevent the Tribe from regulating the on-Reservation commercial activity of its own members who happen to act through the entity form.

The State argues that *Pourier* is distinguishable because, in that case, "90% of the purchasers are Indians who reside on the reservation." Plaintiff's Resp. to Mot. to Dismiss ("State's Response") at 6-7. However, the court in *Pourier* did not cite this fact as important to the issue at hand, namely, whether an entity owned by a tribal member is itself a tribal member. Instead, the court referenced this fact in determining who was subject to the state regulation at issue. *See Pourier*, 658 N.W. 2d at 403 n.4. In the present case, there is no question that the

State is attempting to apply its regulations to the Defendants, so this aspect of *Pourier* is immaterial.[1]

**B. Defendants' Alleged Activity Occurred on the Reservation.**

Federal law "precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State." *Healy v. Beer Institute*, 491 U.S. 324, 336 (1989) (quotation and alteration marks omitted). Under federal law, the location of a contract is the place where an offer is accepted.[2] *See Dean Foods Co. v. Brancel*, 187 F.3d 609, 617-18 (7th Cir. 1999); *see also* Restatement (First) Contracts § 74 (1932). Therefore, "an element of the actual contract formation must occur within a state for that contract to come within the purview of the state's laws." *Midwest Title Loans, Inc. v. Ripley*, 616 F. Supp. 2d 897, 904 (S.D. Ind. 2009) (citing *Dean Foods*, 187 F.3d at 620). Indeed, "[a]n informal contract consisting of an offer in one state and an acceptance in another is usually regarded as having been made in the latter state." 16 AM. JUR. 2D *Conflict of Laws* § 87 (2011); *see* 2 WILLISTON ON CONTRACTS § 6:62 (4th ed.) ("It is thus fair to say as a general rule that the place of contracting is the place of acceptance.").

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1 The facts of this case are stronger than in *Pourier*. In *Pourier,* the State of South Dakota attempted to regulate activity on a reservation located within South Dakota. Here, the State of Missouri is attempting to reach on-Reservation activity in another state.

2 The result is the same under state law. *See Osage Homestead, Inc. v. Sutphin*, 657 S.W.2d 346, 352 (Mo. App. 1983) ("The place where the final act occurs which makes a binding contract is the place of contract.").

The State alleges that "[c]onsumers apply for loans directly through the Defendants' websites" by completing an application.[3] Petition ¶ 52. Advertisements generally are not offers. *See* 17A AM. JUR. 2D *Contracts* § 52 (2011). Consumer applications, however, are. *See Griffin v. State Farm Fire & Cas. Co.*, 104 P.3d 283, 285 (Colo. App. 2004) (citing cases); *Applegate-Leason & Co. v. Reilly*, 377 N.E.2d 1135, 1137 (Ill. App. 1978); *see also Neuner v. Gove*, 133 S.W.2d 689, 694 (Mo. App. 1939).[4]

The State concedes that Defendants' operations occur on the Reservation. *See* Petition ¶ 62, 63, 67. Therefore, applications (*i.e.*, offers) are received, reviewed, and accepted – thus forming a contract – or rejected on the Reservation.[5] Not only is any loan contract necessarily formed on the Reservation, but the parties to that contract provide that it is governed by Tribal law and Tribal Courts.[6] *See* Petition, Ex. C (sample loan agreement) at 1; *cf. Denver Truck Exchange*, 307 P.2d at 810 ("[T]he place of making a contract is determined according to the parties' intention." (citing 17 C.J.S., Contracts, § 356, p. 813)). Because the Petition does not allege that any part of the formation of a loan contract occurred in Missouri, the Petition fails to

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[3] Solicitation of an application is not an offer. *See Master Palletizer Sys., Inc. v. T.S. Ragsdale Co., Inc.*, 725 F. Supp. 1525, 1531 (D. Colo. 1989). An "offer" must "justify another person in understanding that his assent to that bargain is invited and will conclude it." Restatement (Second) Contracts § 24 (1981).

[4] Defendants cite state law, not because they concede that it is binding, but rather as persuasive authority for the determination under federal law.

[5] Notice of acceptance or rejection is thus communicated from the Reservation as well.

[6] Contrary to the State's assertion, *see* State's Response at pgs. 9-11, Defendants do not assert that choice-of-law and forum-selection clauses can, by their own authority, divest all regulatory jurisdiction from a state. Instead, Defendants show that these clauses have this effect because they establish that the transactions occurred on the Reservation and not in Missouri.

meet the State's burden to establish its jurisdiction over Defendants in light of their invocation of Tribal immunity.[7]

The State cites three bases for claiming that transactions occurred in Missouri:

> The state alleges that defendants (1) via the internet solicit loans in Missouri to Missouri consumers; (2) make loans in Missouri via their website; (3) electronically deposit and withdraw funds directly into and from Missouri consumers' bank accounts.

State's Response at pg. 7. As to the first two items, as demonstrated above, to the extent that some solicitation of Missouri residents occurred, it is not enough to place a loan transaction in Missouri. As for the third statement, not only is there no allegation in the Complaint that such activity occurred, even if there was, it would not change the place where the loan was made.

Because the record demonstrates that any loans made by Defendants were formed on the Reservation, not in Missouri, the State has no jurisdiction to regulate them. Defendants are entitled to Tribal immunity, and the Petition based on these alleged loans must be dismissed.

**PREEMPTION OF MISSOURI LAW**

Even if the Court concludes that some aspects of Defendants' business activities occurred in Missouri, the State regulations are preempted by federal and Tribal law. "A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts,

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[7] The State suggests that Defendants "effectively concede" that transactions occurred in Missouri because Defendants have not raised a personal jurisdiction defense. State's Resp. at pg. 8. In fact, there are substantial personal jurisdiction and venue defenses. However, rather than risk delaying this action with a non-merits, personal-jurisdiction or venue challenge, Defendants chose to exercise their right of removal and submit the dispositive issues of Tribal immunity and preemption to this Court.

leases, or other arrangements." *Montana*, 450 U.S. at 565-66. By attempting to impose Missouri consumer protection laws on commercial activity on the Reservation, the State is impermissibly infringing on the Tribe's right to regulate such activity. *Cf. Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. State of Wis.*, 668 F. Supp. 1233, 1241 (W.D. Wis. 1987) ("[E]ffective tribal self-regulation of a particular resource or activity precludes state regulation of that resource or activity as to the tribes."). The State's actions further infringe on Tribal members' expectations that laws enacted by their representative government will govern their on-Reservation activities and be enforced by their courts.

"State jurisdiction is preempted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the State interests at stake are sufficient to justify the assertion of State authority." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334 (1983). This standard is informed by traditional notions of tribal sovereignty and requires something less than that required for typical preemption. *White Mountain Apache*, 448 U.S. at 143 (citing *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463, 475 (1976)). "[A]mbiguities in federal law should be construed generously, and federal pre-emption is ***not*** limited to those situations where Congress has explicitly announced an intention to pre-empt state activity." *Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue*, 458 U.S. 832, 838 (1982) (emphasis added).

The State's attempt to regulate Defendants is incompatible with the important federal interest of Tribal self-governance, particularly as it relates to economic matters. *See Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982) (a tribe "control[s] economic activity within its jurisdiction"); *see also White Mountain Apache Tribe v.*

*Smith Plumbing Co., Inc.*, 856 F.2d 1301, 1305 (9th Cir. 1988) ("It is well settled that civil jurisdiction over activities of non-Indians concerning transactions taking place on Indian lands 'presumptively lies in the tribal courts . . . .'" (quoting *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987))).[8] In the face of such conflict, the State's interests must yield. *See Three Affiliated Tribes*, 476 U.S. 877 (tribal self-government interest outweighs state interests in judicial system); *Mescalero Apache Tribe*, 462 U.S. 324 (tribal interest in regulating on-reservation commercial and environmental issues outweighs state interest in the same).

The State is unlawfully infringing on the right of reservation Indians to make their own laws and be ruled by them. Defendants' actions occurred on the Reservation. To the extent that Defendants' actions extended off the Reservation, any attempt by the State to regulate the Defendants is preempted by Federal and Tribal law.

**CONCLUSION**

The State's Petition is barred by Tribal immunity and by the preemption of Missouri law by federal and Tribal law. Defendants' Motion to Dismiss should be granted and the State's Petition should be dismissed with prejudice under Rules 12(b)(1) and/or 12(b)(6).

DATED this 16th day of August 2011.

[8] Congress has demonstrated its belief in the importance of this interest. *See* Memorandum in Support of Defendants' Motion to Dismiss at pg. 13; *see also Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g*, 476 U.S. 877 (1986) (discussing statutes).

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 16th day of August, 2011, I served a copy of the foregoing **DEFENDANTS' REPLY BRIEF IN SUPPORT OF THEIR MOTION TO DISMISS** by way of email, through the Court's electronic filing system (CM-ECF), on the following:

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