UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

STATE OF MISSOURI, ex rel.	)	
CHRIS KOSTER	)	
Attorney General,	)	
	)	
Plaintiff,	)	**Case No. 4:11-cv-1237-AGF**
	)	
v.	)	
	)	
MARTIN A. WEBB, aka	)	
BUTCH WEBB, et al.	)	
	)	
Defendants.	)	

PLAINTIFFS' RESPONSE TO MOTION TO DISMISS

Plaintiff, State of Missouri ex rel. Attorney General Chris Koster, Attorney General for the State of Missouri, by and through his Assistant Debra K. Lumpkins, hereby responds to defendant's Motion to Dismiss dated July 25, 2011.

INTRODUCTION

Defendants confuse what this case is and is not about. This case is not about the State's attempt to reach into and regulate activity of Indians on an Indian reservation. It involves neither tribes nor on-reservation activity. Instead, this is a straightforward case about a non-tribal corporation that uses the internet to make illegal, usurious, and unlicensed loans in Missouri to Missouri consumers in violation of Missouri consumer protection law.

FACTS AND PROCEDURAL HISTORY

Defendant Martin A. Webb is the owner, organizer, president, and chief executive officer of the defendant companies. See Def. Mem. In Support of Mot. to Dismiss, p. 2; Complaint, ¶2 .

Defendant companies are all limited liability companies organized under the laws of South Dakota. See Complaint, ¶¶ 3–41.

On December 28, 2010, the Missouri Attorney General was notified by the Missouri Division of Finance, that defendant Lakota Cash was making loans in Missouri to Missouri consumers via the internet without a license. See Complaint, Exhibit E. The loans were small, high cost loans, in principal amounts from $300 to $3,000 with annual percentage rates above 250%. See Complaint, ¶ 49. Because defendants were not licensed in Missouri to make these loans, and because the loans otherwise violated the laws of Missouri, the Missouri Division of Finance, on November 22, 2010, requested that defendant Lakota Cash obtain a license to lend. Lakota Cash failed to do so. See Complaint, Exhibit D, ¶ 4.

Accordingly, in April 2011, the State commenced this action in the Twenty-First Circuit Court of Saint Louis County. The State seeks injunctive and other relief, including consumer restitution and penalties, pursuant § 407, RSMo. See Complaint ¶1.

Other facts will be stated in the Argument, where appropriate. As the State shows: (1) defendants are not entitled to tribal sovereign immunity; (2) this case strictly is about defendants' off-reservation activity; making loans to Missouri consumers; (3) defendants may not rely on their loans' choice-of-law and choice-of-forum provisions; and (4) Missouri's consumer protection laws are not preempted.

ARGUMENT

Initially, because of the State's pending Motion to Remand, dated August 6, 2011, the Court should not entertain defendants' Motion. Instead, the remand motion, founded on this Court's lack of subject matter jurisdiction should take precedence because "'any order remanding a matter to state court for lack of subject matter jurisdiction necessarily denies all

other pending motions.'" *Carlson v. Arrowhead Concrete Works, Inc.*, 443 F.3d 1046, 1052–53 (8th Cir. 2006) (quoting *Dahiya v. Talmidge Int'l, Ltd.*, 371 F.3d 207, 210 (5th Cir. 2004)(omission marks not shown). All else, including defendants' Motion, should be subordinate. *See, e.g., In Re C & M Props., LLC,* 563 F.3d 1156, 1162 (10th Cir. 2009) (because remand could render "continued litigation over those claims . . . 'a futile thing'" and "'so much hot air,'" a district court "should not take action on pending motions before or after remand").

I. Plaintiff Presented a Well-Pleaded Complaint.

Defendants cite various authorities that state the standard for a well-pleaded complaint. In citing these cases, defendants seem to argue that plaintiff's complaint is conclusory, or is not above the speculative level. However, defendants do not point out what allegations are conclusory or speculative, nor do defendants state which violations of Missouri law are not well-pleaded.

Plaintiff's complaint contains highly-detailed factual allegations in paragraphs 48–78, which provide the basis for the violations discussed in paragraphs 79–117. Therefore, the cases cited by the Defendants in Section I of their Argument are completely inapposite to the present matter. Instead, the Complaint exceeds the requirements of Fed. R. Civ. P. 8(a)(2), which merely requires "a short and plain statement of the claim showing that the pleader is entitled to relief ." *See Braden v. Walmart Stores, Inc.*, 588 F.3d 585, 594 (8th Cir. 2009). Therefore, Defendants' Motion to Dismiss should be denied on the grounds raised in Section 1 of the Defendants' Argument.

II. The Defendants are not Entitled to the Defense of Tribal Sovereign Immunity.

Defendants err in asserting that tribal immunity prevents the State from enforcing its laws against them. Defendants are not the tribe, one is a tribal member, and the others are his wholly owned corporations doing business in Missouri, and thus are subject to Missouri State Law.

The U.S. Supreme Court has ruled that sovereign immunity prevents actions against the tribe, but "does not immunize the individual members of the tribe." *Puyallup Tribe, Inc. v. Dep't of Game*, 433 U.S. 165, 171–72 (1977). The Supreme Court ruled that the tribe cannot be prosecuted for violating fishing laws; however, individuals are not protected. *Id.* Here, Webb is an individual member of the tribe, and thus the Attorney General can bring an action against him in Missouri State Court for violating Missouri State Laws with respect to his loan-making activities in this state.

Tribal Sovereign Immunity is extended to tribal agencies if they are an arm of the tribe, *Hagen v. Sisseton-Wahpeton Community College*, 205 F.3d 1040, 1043 (8th Cir. 2000), however, here defendants are separate business entities that do not qualify as an arm of the tribe. Missouri and the Eighth Circuit have never ruled on the exact requirements of what constitute an "arm of the tribe," but there are representative cases which show that the business entity defendants are separate from the tribe.

The relevant inquiry when determining whether an entity is an arm of the tribe is whether the purported arm of the tribe is created and controlled by the tribe. For instance, in a case deciding that a college should be granted sovereign immunity for being an arm of the tribe, this circuit acknowledged that the college was "chartered, funded, and controlled by the Tribe to provide education to tribal members on Indian land." *Id.* at 1043. Likewise, in *Dillon v. Yankton Sioux Tribe Housing Authority*, 144 F.3d 581 (8th Cir. 1998), the court ruled that a housing

authority was an arm of a tribe because it was created by the "tribal council pursuant to its powers of self-government." *Id.* at 583; *See also*, *Weeks Construction, Inc. v. Oglala Sioux Housing Authority,* 797 F.2d 668, 670 (8th Cir. 1986) (ruling that the breach of contract action between a contractor and a housing authority — which was created by tribal ordinance to develop and administer housing projects on the reservation — should be heard in tribal court rather than federal district court). Unlike in those three cases, here, the tribe has no involvement in defendants' business, and does not receive any services from the defendants. Instead, the business entities of defendants were incorporated under South Dakota State Law by an individual, completely funded and controlled by this individual, and providing loans outside of tribal land to individuals that are not members of the tribe. The mere fact that this individual claims to be a member of an Indian Tribe does not grant immunity from Missouri State law for the actions that his business conducts in the state.

This court should apply Colorado's test for Indian Sovereign Immunity, which provides similar outcomes with a more exact rule for when an "entity acts as an arm of the tribe so that its activities are properly deemed to be those of the tribe." *See Cash Advance and Preferred Cash Loans v. State*, 242 P.3d 1099, 1109 (Colo. 2010) (citing *Allen v. Gold Country Casino*, 464 F.3d 1044, 1046 (9th Cir. 2006)). In synthesizing the case law from the various federal appellate courts on the subject, the Colorado Supreme Court determined that there were three factors that should be considered when determining whether tribal entities "act as arms of the tribes so that their activities are properly deemed to be those of the tribes: (1) whether the tribes created the entities pursuant to tribal law; (2) whether the tribes own and operate the entities; and (3) whether the entities' immunity protects the tribes' sovereignty." Cash Advance, 242 P.3d at 1110. Further, it is clear that tribal sovereign immunity does not protect individual tribal

members. *See Cash Advance*, 242 P.3d at 1111-12 (citing *Puyallup Tribe, Inc., v. Dep't of Game*, 97 S.Ct. 2616 (U.S. 1977)).

Here, applying this three part test, defendants' business entities are not arms of the Cheyenne River Sioux, and are thus not entitled to the Cheyenne River Sioux's tribal sovereign immunity. For the first prong, the Defendants' business entities were organized by Martin A. Webb under the laws of South Dakota – and not by the Cheyenne River Sioux Tribe under tribal law. For the second prong, defendants' business entities are neither owned nor operated by the Cheyenne River Sioux Tribe. Webb is the sole owner of the businesses, and he maintains full control of the businesses. For the third prong, the tribe does not maintain any influence over the businesses, and does not receive any services from the businesses. One lone individual controls the businesses, which provide loans in Missouri to Missouri residents. It logically follows that the tribe's sovereignty would not in any way be protected were the Defendants' business entities given tribal sovereign immunity.

Defendants also argue that the business should be given immunity, much like the business in *Pourier v. South Dakota Department of Revenue*. 658 N.W.2d 395 (S.D. 2003). Defendants argue that they should receive immunity like the business in *Pourier* because, like the businesses in *Pourier*, they are both incorporated under South Dakota law, and are operated by a sole Indian, on a reservation. This argument is flawed and erroneous. First, this argument is erroneous because in *Pourier*, the gasoline was sold strictly on the reservation, *id.* At 397, whereas here, the business does not provide payday loan services to ANY Indian on the reservation, and loans are made strictly outside of the reservation and the state of South Dakota. *See, e.g.,* Complaint, Exhibit D, p.2, last sentence. Thus, as discussed in detail in the next section, the business is not "on the reservation." Secondly, this argument is flawed because in

Pourier, "90% of the purchasers are Indians who reside on the reservation." *Id.* Here, 0% of the loans are made to Indians who reside on the reservation. Therefore, because defendants do not provide services to ANY Indians on the reservation, the present case is distinguished from the tribal corporation in *Pourier*.

What is more, one of the Defendants' businesses (Management Systems, LLC), obtained a Missouri lending license and even at the time the Petition was filed in state court, held itself out as operating under Missouri law, "the loan agreement will be governed by the laws of the state of Missouri." Complaint, Exhibit A, p. 2, last paragraph.

III. Plaintiff is not Reaching Into or Regulating On-Reservation Activity, and thus Tribal Law does not Preempt State Law

Defendants' principal contention is that, by this lawsuit, the State is attempting to unlawfully regulate on-reservation activity. (Motion, p. 12; *see*, *e.g.*, *id.* p. 5 (actions about which State complains "took place on the Reservation"); p. 6 (claiming Missouri loans were "entered into on the Reservation"); p. 7 (transactions "took place on the Reservation"); p. 13 (claiming Congress restricted state jurisdiction "on Indian reservations"). Because this contention rests on a faulty premise, it, and all contentions flowing there from, fail.

Here, the State is not "reaching into" and "regulating" on-reservation conduct. The Complaint focuses solely on defendants' off-reservation loan making in Missouri to Missouri consumers. 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. In short, by their loan making, defendants transact business in Missouri.

Defendants effectively so concede. In their Motion, defendants did not raise, and thus waived, any personal jurisdictional defense. *See* Fed. R. Civ. P. 12(h)(1). They therefore concede they do business and are subject to jurisdiction in Missouri.

Defendants also claim that the State's Complaint "is barred" and cannot "nullify" their loans because Missouri law "is preempted" (Motion pp.12–14). They assert that the State claims that "Missouri law not only applies on the . . . Reservation . . . but also supersedes the Tribe's legislative and judicial jurisdiction regarding lending activity there" (Motion p. 2)."

The State does not so claim. Again, defendants confuse what this case is about. At the risk of belaboring the point, the State is not here applying Missouri law on "the Reservation," nor is it "superseding" some unspecified "Tribal law" regarding on-reservation lending activity. This case strictly is about off-reservation illegal lending in Missouri to Missouri consumers.

Defendants cannot rely on the Indian Commerce Clause to preempt Missouri law. The Tenth Circuit rejected such a claim in *Muscogee (Creek) Nation v. Okla. Tax Comm'n*, 611 F.3d 1222 (10th Cir. 2010). There, the court dismissed a tribe's claim, based on the Clause, that Oklahoma could not enforce its "cigarette tax enforcement scheme to interfere with [the tribe's] vehicles while transporting cigarettes between Indian country." *Id.* at 1236. It held that it "cannot seriously [be argued] that the Indian Commerce Clause, *of its own force*, automatically bars or preempts a state from enforcing its tax laws outside Indian country." *Id.* at 1237 (emphasis in original).

And, while the Clause may authorize Congress to legislate "in the field of Indian affairs," *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989); Congress has *not* "completely preempted the field." *Wiener v. Wampanoag Aquinnah Shellfish Hatchery Corp.*,

223 F.Supp.2d 346, 352 n.10 (D. Mass 2002); *see also Idaho ex rel. Wasden v. Native Wholesale Supply Co.*, 2009 WL 940731, *3 (D. Idaho 2009) (observing lack of "any statute or treaty expressing Congress's intent to regulate the entire field of Native American commerce"). Although defendants cite several statutes in which Congress has exercised its Clause-granted powers (*see* Motion p. 13), they cite not one in which Congress has "occupied the field" of a non-tribal corporation's (let alone a *tribe's*) off-reservation lending activity to the exclusion of state law.

For all of the above reasons, the Court should reject defendants' preemption claim.

IV. Defendant's "Choice of Law" provision does not govern

The Defendants improperly argue that the inclusion of a choice of law and choice of forum provision in the contract indicates that the loan agreement is governed by tribal law, and therefore the State is precluded from exercising jurisdiction in this matter. Defendants claim that because the loan included statements such as "the agreement is subject solely to the exclusive laws and regulations of the [Tribe]," and "the borrowers consent to the exclusive jurisdiction of the tribe," that Missouri cannot enforce Missouri consumer protection laws in Missouri State Court. The inclusion of these provisions does not mean that they govern. On the contrary, public policy dictates that these provisions are not given any weight.

This action, too, is a regulatory police power action. The State brings it to enforce Missouri's public policy, codified in Chapter 407, to protect Missouri consumers against illegal, usurious, and unlicensed lending. Thus, the State is not bound by defendants' loans' provisions. *See*, *e.g.*, *Pa. Dep't of Banking v. NCAS*, *LLC*, 948 A.2d 752, 759 (Pa. 2008) (state regulator, in exercise of police power to enforce state law public policy, not bound by lender's choice-of-law provision); *BankWest, Inc. v. Oxendine*, 598 S.E.2d 343, 347 (Ga. Ct. App. 2004) (lender who

makes loans to forum state's consumers cannot by virtue of loan agreement's choice-of-law provision exempt itself from state regulator's "investigation for potential violations of [forum state's] usury laws").

From its inception, "Missouri courts have emphasized that Chapter 407. . . should be liberally construed to protect consumers." *State ex rel. Nixon v. Continental Ventures Inc*, 84 S.W.3d 114, 117 (Mo.App. W.D. 2002). *See, e.g., State ex rel. Webster v. Myers,* 779 S.W.2d 286, 290 (Mo.App. W.D.1989) (stating that "statutes enacted for the protection of life and property, or which introduce some new regulation conducive to the public good . . . are generally given a liberal construction"). In *Electrical and Magneto Service Co. v. AMBAC International Corp.,* the Eighth Circuit went even further to state that "the public policy involved in Chapter 407 is so strong that parties will not be allowed to waive its benefits." 941 F.2d 660, 664 (8th Cir.1991). Therefore, even though Defendants attempted to impose illegal loans in Missouri on Missouri consumers by placing choice-of-forum and choice-of-law provisions in the contracts, these provisions do not apply. The public policy of enforcing Missouri's consumer protection laws is so strong that they cannot be waived by these clauses.

Missouri courts have also refused to enforce a forum selection clause on the grounds of unfairness or unreasonableness. *High Life Sales Co. v. Brown–Forman Corp.,* 823 S.W.2d 493, 498 (Mo. 1992). Two factors that Missouri Courts analyze to determine unfairness of a forum selection clause are the reciprocal nature of the provision and equal bargaining power. See *id.* Here, a corporation is forcing a take it or leave it contract onto consumers with a dire need for money. Public policy would dictate that this is unfair. Also, the provision is non-reciprocal, since under the provision all cases would be under the sole jurisdiction and law of the Sioux

tribe. The agreement is non-reciprocal, as cases would always be brought in Defendant's home court.

It would also be unreasonable to apply these clauses to Missouri consumers on public policy grounds. Missouri has a strong interest in giving its residents the protection of its consumer protection laws. Allowing a waiver of these protections would be against public policy because "having enacted paternalistic legislation designed to protect those that could not otherwise protect themselves, the Missouri legislature would not want the protections of Chapter 407 to be waived by those deemed in need of protection." *Huch v. Charter Communications, Inc.*, 290 S.W.3d 721, 725–26 (Mo. 2009). In *Huch,* the plaintiffs brought a claim under Chapter 407, the Merchandise Protection Act, and the court refused to apply the forum selection clause, stating:

> The Missouri statutes in question, relating to merchandising and trade practices, are obviously a declaration of state policy and are matters of Missouri's substantive law. To allow these laws to be ignored by waiver or by contract, adhesive or otherwise, renders the statutes useless and meaningless.

Huch 290 S.W.3d at 726. Choice of law and choice of forum clauses cannot waive the protections of the Merchandise Protection Act; therefore this court should refuse to apply them.

This case deals strictly with Defendants' activities in Missouri. Defendants are making loans in Missouri to Missouri consumers, and Missouri consumers should be protected from Defendants' activities. Therefore, the choice-of-law and choice-of-forum clauses should not be given any weight.

CONCLUSION

For all the foregoing reasons, the Court should deny defendants' Motion in all respects and award the State all such further relief as the Court deems just.

Respectfully submitted,

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ATTORNEYS FOR PLAINTIFF

Certificate of Service

I hereby certify that on the 6th day of August, 2011, the foregoing was served electronically with the Clerk of the Court using the CM/ECF system upon all counsel of record.

Debra K. Lumpkins
Assistant Attorney General