UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

FEDERAL TRADE COMMISSION,	*	
	*	Civil Case No. 11-3017
Plaintiff,	*	
	*	
v.	*	
	*	
PAYDAY FINANCIAL, LLC, et al.,	*	
	*	
Defendants.	*	

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiff Federal Trade Commission ("FTC") respectfully requests that the Court deny Defendants' Motion for Partial Summary Judgment (Doc. No. 52) ("Motion for Summary Judgment" or "Defendants' Motion").

I. INTRODUCTION

Defendants have engaged in a variety of illegal payday lending and collection practices that target financially-distressed consumers seeking short-term, high-interest payday loans. Among these illegal practices is a particularly invidious one at issue in the Motion for Summary Judgment. Defendants have been filing debt collection lawsuits against consumers who live in distant states (such as Virginia and Maryland) in a court – the Cheyenne River Sioux Tribal Court ("Tribal Court") on the Cheyenne River Sioux Indian Reservation ("Reservation") in South Dakota – that is both remote to consumers

and, more importantly, without subject matter jurisdiction over the claims.[1] Defendants sue their consumers in Tribal Court despite the fact that none of their consumers are members of the Cheyenne River Sioux Tribe ("Tribe"), and none live in South Dakota or have ever entered, or engaged in any activity on, the Reservation in connection with their loans. Under those circumstances, the Tribal Court lacks subject matter jurisdiction to entertain Defendants' debt collection lawsuits, and Defendants' conduct in connection with threatening and filing these meritless collection suits is both deceptive and unfair under Section 5 of the FTC Act. (*See* Am. Compl. ¶¶ 62-67).

Defendants' contention that the Tribal Court has jurisdiction over nonmember consumers who never enter or engage in any activity on the Reservation is plainly wrong and ignores well-established authority. Indeed, Defendants fail to cite a single case holding that Internet-based lending to nonmember borrowers outside the Reservation (or any kind of transaction by a tribal business with a nonmember consumer off the reservation) is within the subject matter jurisdiction of a tribal court. To the contrary, the Supreme Court and the Eighth Circuit have made clear that tribal courts have no

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[1] The effect of Defendants' filing actions in this inaccessible location is that it makes it nearly impossible for cash-strapped consumers to defend themselves against such claims. The cost for consumers to travel to South Dakota to defend the lawsuits often far exceeds the amount in dispute. For example, Defendants have sued Maryland and Virginia consumers to recover amounts as little as $320 and $580 respectively. The average cost for these consumers to travel from their home states to South Dakota and then drive to the Reservation exceeds $900 for a plane ticket, rental car, and hotel. In addition to those costs, consumers would likely have to retain counsel.

subject matter jurisdiction over matters – like the instant case – involving non-tribal members' activities occurring off the Reservation. And two courts have specifically held that *these* Defendants' payday lending activities constitute off-reservation conduct. It would work a serious injustice to allow payday lenders like Defendants to drag financially vulnerable, distant consumers – who by Defendants' admission did nothing more than visit Defendants' website or telephone Defendants – into Tribal Court merely because Defendants are located on the Reservation and Defendants' principal is a Tribal member.

II. FACTS[2]

Every relevant fact regarding Defendants' loans occurs off the Reservation.[3] Defendants make short-term, payday loans *exclusively* to consumers who are located *outside* of the Reservation and the state of South Dakota. (SMF ¶¶ 4, 6). None of the consumers to whom Defendants make payday loans are members of the Tribe. (SMF ¶ 6). Defendants target these out-of-state, off-reservation consumers with Internet and television advertisements. (SMF ¶¶ 5-6). Prospective consumers respond to these

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[2] The parties have submitted a Joint Stipulation of Material Facts ("SMF") (Doc. No. 53) for purposes of Defendants' Motion. The FTC also has submitted Plaintiff's Statement of Supplemental Material Facts ("PMF") pursuant to LR 56.1.B, which provides two additional facts that Defendants have admitted in their Answer to the Amended Complaint.

[3] Plaintiff has stipulated for purposes of this motion that *Defendants'* activities occur on the Reservation. The *consumers'* activities occur only outside the Reservation, and, as demonstrated below, the existence of subject matter jurisdiction in the Tribal Court depends on the location of the consumers' activities.

advertisements by contacting Defendants over the telephone or Internet to inquire about, and apply for, a payday loan. (SMF ¶¶ 7a-b).

At no point during the marketing, application, or collections process do Defendants' consumers enter South Dakota or the Reservation in connection with their payday loans. (SMF ¶¶ 6-7). Instead, all of consumers' communications or other contacts with Defendants regarding the loans are made over the telephone, via mail, or through the Internet. (*Id.*). Consumers send their loan applications and background information to Defendants via telephone, mail, or the Internet. (SMF ¶¶ 7a-c). Consumers also sign their loan agreements electronically (PMF ¶ 1) and receive approval or denial of their loan applications via telephone or Internet. (SMF ¶ 7f). Once they have taken out a loan, consumers continue to make all subsequent communications with Defendants regarding customer service or any other issues from off the Reservation. (SMF ¶¶ 7 & 7a). Further, to the extent Defendants communicate with consumers to collect payments that consumers have failed to make in a timely fashion, Defendants make these communications via the telephone, mail, or the Internet. (SMF ¶ 7a). For every transaction, consumers make any and all decisions regarding their application and loan from off the Reservation. (SMF ¶ 7e).

Additionally, any loans made to consumers are transferred to consumers' bank accounts located outside of the Reservation and South Dakota. (SMF ¶ 7g). To the extent Defendants make withdrawals from consumers' bank accounts for the repayment of loans, those withdrawals are also taken from

these off-reservation consumer accounts. (SMF ¶ 7h). If consumers fail to make timely repayments of their loans, they hold any funds owed to Defendants off the Reservation and outside of South Dakota. (SMF ¶¶ 7g-i).

When a consumer fails to repay his or her loan in a timely fashion, in some instances, Defendants initiate collection efforts. (SMF ¶ 7i). As part of their collection efforts, Defendants sometimes file collection lawsuits against consumers in Tribal Court, which is located on the Reservation. (PMF ¶ 2).

III. STANDARD OF REVIEW

Summary judgment is appropriate where the admissible evidence, viewed in the light most favorable to the non-moving party, shows that "no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law." *Davidson v. City of Minneapolis, Minn.*, 490 F.3d 648, 654 (8th Cir. 2007) (citation omitted); FED. R. CIV. P. 56(a). Summary judgment is not appropriate if there are factual disputes that may affect the outcome of the case under the applicable substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). An issue of material fact is genuine if the evidence would allow a reasonable jury to return a verdict for the non-moving party. *Id.* Furthermore, "[w]here the unresolved issues are primarily legal rather than factual, summary judgment is particularly appropriate." *Aucutt v. Six Flags Over Mid-America, Inc.*, 85 F.3d 1311, 1315 (8th Cir. 1996) (citing *Crain v. Bd. of Police Comm'rs,* 920 F.2d 1402, 1405-06 (8th Cir. 1990)).

IV. ARGUMENT

Defendants' Motion – narrowly limited to the issue of whether the Tribal Court has subject matter jurisdiction over their debt collection lawsuits against nonmembers and nonresidents of the Tribe – should fail as a matter of law. As demonstrated in Part IV.A below, courts clearly hold that tribal jurisdiction does not extend to the activities or conduct of nonmembers that occur *off the reservation.* As shown in Part IV.B, all activities of the nonmembers in this case (*i.e.*, Defendants' consumers) occur off the Reservation.

A. The Supreme Court And Eighth Circuit Hold That Tribal Jurisdiction Is Limited And Does Not Include the Activities Of Nonmembers Occurring Off The Reservation

The determination of whether a tribal court has jurisdiction over a nonmember is a federal question appropriate for adjudication by this Court. *See Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 324 (2008). Further, Defendants bear the burden of demonstrating that tribal jurisdiction exists. *See id.* at 330 ("The burden rests on the tribe to establish . . . tribal authority to regulate nonmembers . . . ."); *Progressive Specialty Ins. Co. v. Burnette*, 489 F. Supp. 2d 955, 958 (D.S.D. 2007) (same). Defendants fail to satisfy this burden.

The Supreme Court has long held that "'the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe,'" and that therefore "efforts by a tribe to regulate nonmembers . . . are 'presumptively invalid.'" *Plains Commerce*, 554 U.S. at 330 (2008) (*quoting Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 651 (2001) and *Montana v. United States*, 450 U.S.

544, 565 (1981)). The Court has recognized only two narrow exceptions[4] to the presumption against tribal court subject matter jurisdiction, namely when (1) nonmembers enter into a consensual commercial relationship with the tribe or a tribal member, or (2) nonmembers' conduct directly threatens the political integrity, the economic security, or the health or welfare of the tribe (*Montana*, 450 U.S. at 565-66) – but those exceptions still require the nonmembers' conduct to take place on the reservation,[5] circumstances Defendants admit are not present here. (SMF ¶¶ 3-7). Applying this precedent, the Eighth Circuit and other courts in this Circuit have issued a bright-line rule that "[n]either *Montana* nor its progeny purports to allow Indian tribes to exercise civil jurisdiction over the activities or conduct of non-Indians occurring *outside their reservations*." *Hornell Brewing Co. v. Rosebud Sioux Tribal Court*, 133 F.3d 1087, 1091 (8th Cir. 1998).[6] In other words, the transaction or occurrence in

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[4] *Plains Commerce*, 554 U.S. at 330 (*quoting Atkinson*, 532 U.S. at 647, 655) ("[t]hese exceptions are 'limited' ones, and cannot be construed in a manner that would 'swallow the rule'"); *see also Nevada v. Hicks*, 533 U.S. 353, 367 (2001) ("Tribal courts, it should be clear, cannot be courts of general jurisdiction."); *Strate v. A-1 Contractors*, 520 U.S. 438, 445 (1997) ("absent express authorization by federal statute or treaty, tribal jurisdiction over the conduct of nonmembers exists only in limited circumstances").

[5] *See Plains Commerce*, 554 U.S. at 332 ("*Montana* and its progeny permit tribal regulation of nonmember *conduct inside the reservation* that implicates the tribe's sovereign interests.") (emphasis added); *Montana*, 450 U.S. at 565 (holding that exceptions allow tribal courts to exercise "some forms of civil jurisdiction over non-Indians *on their reservations*") (emphasis added).

[6] *See also Attorney's Process & Investigation Services, Inc. v. Sac & Fox Tribe of the Mississippi In Iowa*, 809 F. Supp. 2d 916, 928 (N.D. Iowa 2011) ("[T]ribal jurisdiction is lacking where the nonmember conduct at issue did not occur on the tribe's reservation."); *Yankton Sioux Tribe Head Start Concerned*

dispute must be viewed from the nonmember's perspective, and the location of the nonmember's activity is dispositive. *Id.*[7]

Defendants' Motion ignores the location of the nonmembers' activity in this case, arguing instead that the Tribal Court has subject matter jurisdiction merely because Mr. Webb is a member of the Tribe and Defendants' operations are located on the Reservation.[8] Controlling precedent, however, has made it clear that the dispositive factual issue is whether the *nonmember*, not the tribal member, engages in conduct or activity on the reservation.[9] Thus, for the

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Parents v. Longview Farms, LLP, No. 08-CIV-4058, 2009 WL 891866, at *3 (D.S.D. Mar. 31, 2009) (same); *Progressive Specialty*, 489 F. Supp. 2d at 958 (same); *Christian Children Fund, Inc. v. Crow Creek Sioux Tribal Court*, 103 F. Supp. 2d 1161, 1166 (D.S.D. 2000) (same).

[7] *See also, e.g., Hornell*, 133 F.3d 1087, 1091 (8th Cir. 1998)(holding that tribal jurisdiction did not exist because the nonmember brewery had not conducted any activities on the reservation); *Attorney's Process*, 609 F.3d 927, 940-41 (8th Cir. 2010), *remanded to* 809 F. Supp. 2d at 929-31 (holding that tribe failed to demonstrate the existence of tribal jurisdiction over nonmembers' unauthorized receipt of payment for on-reservation security services because tribe failed to show that the nonmembers' receipt and retention of the payment occurred on the reservation); *Yankton Sioux Tribe Head Start*, 2009 WL 891866 at *3 (holding that tribe may not regulate construction of facility where facility – *i.e.*, the subject of the dispute and the location of nonmembers' activity – is located off reservation); *Progressive Specialty*, 489 F. Supp. 2d at 955, 958 (D.S.D. 2007)(holding that no tribal jurisdiction existed over claim of bad faith by tribal members against out-of-state insurance company regarding car accident on reservation, because insurer never entered or maintained a presence on the reservation); *Christian Children Fund*, 103 F. Supp. 2d at 1161,1167 (D.S.D. 2000)(holding there was no tribal jurisdiction over dispute between aid group located on reservation and out-of-state aid group which engaged in no activity on the reservation).

[8] *See* Defs.' Mem. at 8-11.

[9] *Supra* notes 6-7 and accompanying text; *see also Attorney's Process*, 609 F.3d at 937 ("The *Montana* exceptions focus on the activities of nonmembers or

purposes of a jurisdictional analysis, neither Mr. Webb's membership in the Tribe nor Defendants' operations on the Reservation overcomes the key fact that nonmember consumers never enter or engage in activity on the Reservation. Accordingly, Defendants' argument that the first *Montana* exception applies to this case is invalid.[10] Indeed, the cases relied upon by Defendants – where courts held there to be tribal jurisdiction – all arose from nonmember conduct *on Indian reservations*.[11] Likewise, *Plains Commerce* offers no support for Defendants' claim of tribal jurisdiction – the Court in that case found that the tribal court lacked subject matter jurisdiction. The Court made this finding even though that matter arose from nonmember conduct (*i.e.*, the sale of property) on the reservation. *See* 554 U.S. at 334-336.

Finally, Defendants' argument that they can overcome the absence of Tribal Court jurisdiction in this case merely by having consumers sign

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the conduct of non-Indians.") (quotation marks and original emphasis removed).

[10] Defendants make no argument that the second exception applies to the instant case.

[11] *See Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 144 (1982) (holding that tribe had the regulatory authority to impose taxes on non-Indians who were mining oil and gas on tribal reservation land); *Williams* v. *Lee*, 358 U.S. 217, 223 (1959) (holding tribal court had exclusive jurisdiction to adjudicate contract dispute arising from an on-reservation sales transaction brought by a non-Indian against an Indian); *Fox Drywall & Plastering, Inc. v. Sioux Falls Constr. Co.*, No. 12-CIV-4026-KES, 2012 WL 1457183, at *13 (D.S.D. April 26, 2012) (upholding tribal court jurisdiction over third-party complaint related to construction project on tribal land between tribe and non-Indian contractor).

contracts purporting to create jurisdiction is simply wrong.[12] This is because "[m]ere consent to be sued, even consent to be sued in a particular court, does not alone confer jurisdiction upon that court to hear a case if that court would not otherwise have jurisdiction over the suit." *Weeks Constr. v. Oglala Sioux Hous. Auth.*, 797 F.2d 668, 671 (8th Cir. 1986).[13] Accordingly, the provision in Defendants' loan contract purporting to give the consumers' consent to jurisdiction in the Tribal Court is of no consequence.

B. Consumers' Activity With Respect To Defendants' Loans Occurs Entirely Off The Reservation And Thus The Tribal Court Lacks Subject Matter Jurisdiction

The application of the well-established authority above makes clear that no subject matter jurisdiction exists in Tribal Court. Consumers are nonmembers of the Tribe, all consumer activity occurs off the Reservation, and Defendants' payday lending practices have been ruled by two courts as off-reservation activity.

Every action that consumers take to search for, learn about, agree to, negotiate, receive, use, and repay these loans occurs off the Reservation. Further, the loan funds themselves – the funds that are the subject of consumers' contracts with Defendants and the Tribal Court suits – are

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12 *See* Defs.' Mem. at 3, 10-11.

13 *See also Stock West, Inc. v. Confederated Tribes of the Colville Reservation*, 873 F.2d 1221, 1228-29 (9th Cir. 1989) ("[E]ven if the consent of [the party] was adequate to confer personal jurisdiction onto the tribal court, the question of whether the tribal court has subject matter jurisdiction over the case would still not be resolved."); *see also, e.g., Progressive Specialty*, 489 F. Supp. 2d at 957 (parties cannot waive or stipulate to subject matter jurisdiction in any court).

received, held, and repaid from consumer bank accounts which are also located off the Reservation. The critical steps in the loan transaction process include:

- Defendants engage in television and Internet advertising designed to attract exclusively nonmember consumers outside the Reservation and outside of South Dakota. (SMF ¶¶ 5-6).
- Consumers, located outside the Reservation, contact Defendants by calling them on the telephone or submitting information over the Internet. (SMF ¶¶ 7a-b).
- Consumers, located outside the Reservation, submit applications and any other required information via telephone, mail, or the Internet. (SMF ¶¶ 7a-c).
- Consumers, located outside the Reservation, receive approval or denial of their loan applications over the telephone or Internet. (SMF ¶ 7f).
- Consumers, located outside the Reservation, execute their agreements with Defendants electronically. (PMF ¶ 2, SMF ¶ 7).
- Loan funds are transferred into consumer bank accounts located off the Reservation. (SMF ¶ 7g).
- Consumers make payments to Defendants from their off-Reservation bank accounts. (SMF ¶ 7h).
- To the extent consumers fail to repay their loans or fees to Defendants, and Defendants file collection suits to obtain repayment,

the funds at issue in those cases remain in consumers' accounts off the Reservation. (SMF ¶¶ 7g-i).

In sum, all of consumers' activity in connection with their loans constitutes "conduct of non-Indians occurring outside [Indian] reservations." *Hornell,* 133 F.3d at 1091 (emphasis removed).

Moreover, two courts have specifically held, as a factual matter, that these Defendants' payday lending practices constitute off-reservation commercial activity. *See Colorado v. Western Sky Fin., LLC,* No. 11-CV-00887, 2011 WL 6778797 (D. Colo. Dec. 27, 2011) (*"Western Sky I"*); *Colorado v. Western Sky Fin., LLC,* No. 11-638 (Colo. Dist. Ct. Denver Cty. Apr. 17, 2012) (*"Western Sky II"*) (attached as Exhibit A). The federal district court in *Western Sky I,* when remanding the case to state court for lack of a federal question, held that "this is not a case about commercial activity on Indian lands." *Western Sky I,* 2011 WL 6778797 at *2-3 ("[With regard to] the question of whether the conduct of which plaintiffs complain involved the regulation of Indian affairs on a reservation . . . I find and conclude that it did not."). In so ruling, the court in *Western Sky I* cited the same factors at issue in Defendants' Motion for Summary Judgment, *i.e.*:

> [D]efendants were operating via the Internet. . . . The borrowers do not go to the reservation in South Dakota to apply for, negotiate or enter into loans. They apply for loans in Colorado by accessing defendants' website. They repay the loans and pay the financing charges from Colorado; Western Sky is authorized to withdraw the funds electronically from their bank accounts.

Id. at *2. After the case was remanded, the state court in *Western Sky II* denied Defendants' motion to dismiss – in which Defendants argued that the state claim was barred by tribal immunity and federal preemption. *Western Sky II,* No. 11-638, slip op. at 7-11. In its opinion, the court found that, for the same reasons cited by the federal court above, "the facts alleged in the State's Complaint implicate neither tribes nor on-reservation activity." *Western Sky II,* No. 11-638, slip op. at 11; *see also id.* at 10 ("even tribes . . . are subject to state law when engaged in off-reservation activity") (citing *Hicks*, 533 U.S. 353).

Similarly, the state court in *Suthers v. Cash Advance*, 205 P.3d 389 (Colo. Ct. App. Div. II 2008), recently held that Internet payday lending operations constitute off-reservation activity. *Id.* at 400 (finding issued in connection with defendants' claim of tribal immunity). In so holding, the court relied on several facts nearly identical to those here, including that the defendants "engaged in transactions over the Internet with consumers located [off the reservation]," "the loans are delivered to consumers [off the reservation]," and "performance will occur [off the reservation] because consumers will repay the principal and pay interest [there]." *Id.* at 400-01. Because our Defendants' consumers take no action on the Reservation in connection with the loans (leading two courts to specifically find that the loans are off-reservation transactions), the Tribal Court cannot have jurisdiction in these matters.

Although the wealth of caselaw, the parties' stipulation of facts, and the earlier *Western Sky* factual findings regarding these Defendants are sufficient

to conclude this analysis, the Eighth Circuit and the district court opinions in *Attorney's Process*, 609 F.3d 927, *remanded* to 809 F. Supp. 2d 916, arising out of the unauthorized transfer of tribal funds to a nonmember located off the reservation, also are particularly instructive. *See Attorney's Process, Id.* In holding that the tribe in that case failed to demonstrate that the nonmember's conversion occurred on the reservation, both courts found that the key issue underlying this determination is whether "the receipt or retention of the funds occurred within [the reservation]." *See* 609 F.3d at 941; 809 F. Supp. 2d at 929. [14] Like the tribe's conversion claim in *Attorney's Process*, these Defendants' collection lawsuits are based on the claim that consumers have received and unlawfully retained funds belonging to Defendants. Hence, one key underlying question at hand is similar: whether the receipt or retention of the funds by the nonmember consumers occurred within the reservation. As detailed above, the answer is clearly no. Consumers receive their loans by electronic transfer to their bank accounts off the Reservation and maintain those funds – on which Defendants seek repayment – in these same accounts. Accordingly, the Tribal Court cannot have subject matter jurisdiction over this off-reservation conduct.

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[14] By contrast, in *Attorney's Process*, the tribe's claims relating to nonmembers' conduct that occurred *on the reservation* – the alleged trespass and theft of trade secrets by agents of the defendants inside the casino – were subject to tribal court jurisdiction. *See* 609 F.3d at 939; 809 F. Supp. 2d at 922. Here, there are no similar activities by Defendants' consumers occurring on the Reservation.

V. CONCLUSION

For all of the forgoing reasons, the FTC respectfully requests that this Court deny Defendants' Motion for Partial Summary Judgment.

Dated this 14th day of June, 2012.

Respectfully submitted,

/s LaShawn M. Johnson

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CERTIFICATE OF SERVICE

I, Cheryl Schrempp DuPris, do hereby certify that on this 14th day of June, 2012, I caused copies of the foregoing to be served upon the following, via electronic filing, to-wit:

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