IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MARYLAND COMMISSIONER OF FINANCIAL REGULATION	*	
Plaintiff	*	
v.	*	**Civil No. WDQ-11-CV-00735**
WESTERN SKY FINANCIAL, LLC, ET AL	*	
Defendants.	*	

* *

DEFENDANTS' OPPOSITION
TO PLAINTIFF'S MOTION TO REMAND

Defendants, Western Sky Financial, LLC, Great Sky Finance, LLC, Payday Financial, LLC, and Martin A. Webb (collectively, "Defendants"), respectfully oppose Plaintiff's Motion to Remand and state as follows:

INTRODUCTION

Plaintiff concedes in its state court complaint that its right to proceed against Defendants hinges on whether Defendants are entitled to Native American Tribal immunity. Although it is beyond dispute that the determination of Tribal immunity is a federal question — and that Native American affairs are the province of federal courts — Plaintiff contends that its Complaint is not removable. Plaintiff's arguments ignore the common sense approach adhered to by both the United States Supreme Court and the Fourth Circuit in determining whether substantial federal issues should be heard in federal court. As a result, its Motion to Remand must be denied.

BACKGROUND

The Maryland Commissioner of Financial Regulation ("Plaintiff" or the "Commissioner") initiated this action by issuing a summary order to cease and desist and order to

produce (the "Complaint") against Defendants on February 15, 2011. Plaintiff alleges in the Complaint that Defendants violated Maryland licensing and usury laws in the course of entering into loan agreements with Maryland residents. Complaint ¶¶ 47-51. Plaintiff acknowledges, however, that Defendants reside on the Cheyenne River Reservation (the "Reservation"), home to the Cheyenne River Sioux Tribe, a federally recognized Native American Tribe. Complaint ¶ 30. Plaintiff further concedes that the Tribe is entitled to immunity from state law enforcement actions, such as Plaintiff is attempting to undertake in this case against Defendants. Id. Nevertheless, Plaintiff alleges that Defendants are not entitled to immunity and, therefore, are subject to regulation by the State of Maryland, because only the Tribe itself, and not members of the Tribe or corporations owned by Tribe members, are immune. Id. at ¶ 31.

On March 18, 2011, Defendants timely removed Plaintiff's Complaint to this Court because the Complaint necessarily raises a dispositive substantial and disputed federal issue — namely, whether Defendants are entitled to tribal immunity.[1] On April 18, 2011, Plaintiff filed a motion to remand predicated on three grounds: (1) the Complaint is not removable because the Office of Plaintiff ("OCFR") is not a "state court" for purposes of 28 U.S.C. § 1441(a); (2) the Tribal immunity issue is a federal defense that cannot support removal; and (3) even if this Court has jurisdiction, it should abstain from hearing this matter. Plaintiff's arguments are unavailing and should be rejected.

[1] Defendants filed a motion to dismiss on March 25, 2011.

ARGUMENT

I. REMOVAL IS PROPER BECAUSE THE OFFICE OF THE COMMISSIONER IS THE FUNCTIONAL EQUIVALENT OF A STATE COURT AND THE FEDERAL INTERESTS IN THIS MATTER PREDOMINATE OVER THE STATE INTERESTS.

Plaintiff argues that removal was not proper here because 28 U.S.C. § 1441 only permits removal of a "civil action brought in a State court," and the OCFR is an administrative agency and not a State court. Plaintiff's Memorandum at 7. However, both the Fourth Circuit and this Court have recognized that administrative actions are removable when the administrative agency at issue functions like a court and, more importantly, the federal interests in the matter predominate over the state interests. These factors comprise what is referred to as the "functional test." Plaintiff questions whether the functional test is applicable and claims that, even if it does apply, it does not support removal here. Plaintiff is wrong.

A. The Functional Test Applies

Although Plaintiff acknowledges that this Court has applied the functional test to determine removability of administrative actions, it suggests that the Fourth Circuit would not apply the functional test. Plaintiff's Memorandum at 8-9. Plaintiff fails to provide any support for its assertion, and none exists. To the contrary, as this Court explained in Rockville Harley-Davidson v. Harley-Davidson Motor, 271 F. Supp. 2d 673, 676 (D. Md. 2002), the Fourth Circuit applied the functional test in reversing the remand of a removal in Kolibash v. Comm. on Legal Ethics of the West Virginia Bar, 872 F.2d 571, 575-576 (4th Cir. 1989) because the case "involved the 'paramount' federal interest in 'protecting federal officials in the performance of their federal duties.'" Rockville Harley-Davidson, 271 F. Supp. 2d at 679-680. Here, just as in Kolibash, it is undisputed that the paramount federal question is whether Defendants are entitled to their federally protected Tribal immunity. Therefore, based on the Fourth Circuit's functional test decision in

Kolibash and this Court's functional test decisions in Rockville Harley-Davidson and Gottlieb v. Lincoln National Life Insurance Co., 388 F. Supp. 2d 574 (D. Md. 2005), the functional test should be utilized here to determine whether the present action was properly removed.

B. Plaintiff Failed to Properly Apply the Functional Test

As Judge Motz explained in Rockville Harley-Davidson, the functional test involves the consideration of two factors: (1) how the functions of the administrative agency compare with the functions of a court; and (2) whether the federal issues predominate over the state issues in the case. 217 F. Supp. 2d at 676. It is the second factor — whether federal issues predominate — that carries greater weight in the analysis as the "more critical inquiry." Id. at 679. Plaintiff fails to recognize the importance of the second factor and incorrectly analyzes both factors.

1. The Federal Issue Predominates In This Case.

Unlike in Rockville Harley-Davidson and Gottlieb v. Lincoln National, 388 F. Supp. 2d 574 (D. Md. 2005), which is relied upon heavily by Plaintiff, the basis for removal in the case at bar is the existence of a substantial federal question — whether Tribal immunity insulates Defendants from state regulation and enforcement. In Rockville Harley-Davidson and Gottlieb, removal was based solely on diversity of citizenship. No federal questions were involved. 217 F. Supp. 2d at 679 ("[n]o issue of federal law is involved"); 388 F. Supp. 2d at 582 (same). Because the resolution of these cases depended solely on state law, the determination of the critical second factor of the functional test was simple — state law interests clearly predominated.

The case at bar presents the opposite situation. Here, the superseding issue is the federal question of whether Defendants are shielded from the intrusion of state enforcement because of their asserted Tribal immunity. If the answer is yes, the inquiry ends. If the answer is no, the state law issues — whether the corporate Defendants were licensed to make loans to Maryland

residents and whether the loans were usurious — will be simple and straightforward. Therefore, the federal issue in this case clearly predominates over the state issues.

This Court need look no further than the Fourth Circuit's decision in Kolibash for commanding support for Defendants' removal in the current case. For, in Kolibash, despite the fact that "[r]egulation of the legal profession admittedly implicate[d] significant state interests," the Fourth Circuit held that "the federal interest in protecting federal officials in the performance of their federal duties [was] paramount." 872 F.2d at 575. Here, despite the state's interest in protecting Maryland consumers from paying usurious interest, there is a paramount federal interest in protecting Native Americans from state intrusion violating their federally protected Tribal immunity. For this reason, the Fourth Circuit's cogent holding in Kolibash applies with equal emphasis here:

> It is not necessary for us to decide whether immunity attaches to this case and if it does to what degree. At the very least, a colorable claim of immunity exists, the validity of which should be judged by federal standards in a federal district court.

872 F.2d at 575.

2. The Office Of The Commissioner Functions As A Court.

Plaintiff concedes that its agency (OCFR) has adjudicative powers, but contends that it does not function like a court because it cannot enforce its orders, subpoenas or injunctive authority without petitioning the Circuit Court. Plaintiff's Memorandum at 9-10. Plaintiff relies on this Court's decision to remand a proceeding removed from the Maryland Insurance Agency ("MIA") in Gottlieb, arguing that its power (and the limitations thereto) are the same as the MIA. Id. Plaintiff's argument fails for several reasons. First, as noted above, the MIA proceeding in Gottlieb was removed based on diversity jurisdiction and contained no federal question.

Second, Plaintiff's primary argument — that the OCFR does not function like a court because it cannot enforce its own orders — is belied by decisions of the Fourth Circuit and Seventh

Circuit. In Kolibash, the Fourth Circuit held that a "state investigative body" is the functional equivalent of a court if it "operates in an adjudicatory manner." 872 F.2d at 576. Specifically, the Fourth Circuit found the following functions determinative: holding evidentiary hearings; subpoenaing witnesses; taking testimony under oath in an adversary proceeding; making factual findings; and recommending a decision. Id. The OCFR performs all of the same functions. Md. Code Ann., Fin. Inst. §§ 2-113-115; State Gov't §§ 10-201 et seq. Therefore, the Fourth Circuit has not required that an administrative agency be able to enforce its own orders to be considered the functional equivalent of a court, as Plaintiff erroneously suggests. Similarly, as the Seventh Circuit recognized in Floeter v. C.W. Transport, Inc., 597 F.2d 1100, 1102 (7th Cir. 1979) in expressly rejecting such a limitation as a basis for defeating removal, "the [administrative agency's] need to resort to the court system for enforcement of its orders does not change the essentially judicial character of the proceedings."

Third, the critical factor in finding that the Motor Vehicle Administration ("MVA") was not functioning as a court in Rockville Harley-Davidson was the fact that "[n]either declaratory relief, injunctive relief, or monetary damages [were] available for violations of" the statute. 217 F. Supp. 2d at 677. Here, by stark contrast, not only are such remedies available to the OCFR, but, in fact, they are seeking **all of them**, namely, that: (1) Defendants be ordered to "cease and desist" from making loans to Maryland consumers; (2) a final order be entered declaring that Defendants' loans to Maryland consumers were "illegal and unenforceable"; (3) a penalty order be entered against Defendants "imposing a civil penalty up to $1,000 for a first violation and up to $5,000 for each subsequent violation"; (4) a final order be entered requiring Defendants "to provide restitution to Maryland consumers" for any illegal principal, interest or other amounts paid by them; and (5) a final order be entered requiring Defendants "to forfeit to Maryland consumers the greater of . . .

three times the amount of interest and charges" illegally collected or "the sum of $500." Complaint at pages 22-23 and 27-28. Simply stated, here, unlike in Rockville Harley-Davidson, the OCFR is seeking the full panoply of injunctive, declaratory and monetary damage relief allegedly available under the applicable statute. Accordingly, in this case, it is beyond dispute that the OCFR is functioning as a court.[2]

Therefore because the OCFR functions like a court and because the federal question in this case predominates over any state interest, removal was proper under 28 U.S.C. § 1441.

II. REMOVAL IS PROPER BECAUSE PLAINTIFF'S COMPLAINT ARISES UNDER FEDERAL LAW

Plaintiff also claims that the case at bar must be remanded because it does not "arise under" federal law. Plaintiff's Memorandum at 12-14. Defendants explained in their Notice of Removal that federal jurisdiction exists because Plaintiff's state law claims are preempted by federal law **and** because Plaintiff's right to relief depends on the application of federal law. Although Plaintiff unsuccessfully argues that its state law claim is not preempted, it fails to even address in its Memorandum Defendants' argument that Plaintiff's right to relief is dependent on the application of federal law. Under either theory, the Complaint states a federal claim, and removal is proper.

A. Federal Jurisdiction Exists Because Plaintiff's Right To Relief Is Dependent On The Application Of Federal Law

Regardless of whether the Court finds that Plaintiff's state law claim is preempted, federal jurisdiction still exists because Plaintiff's claim raises a dispositive and substantial federal

[2] Furthermore, as Judge Motz recognized in Rockville Harley-Davidson, 217 F. Supp. 2d at 678 n.9, the Fourth Circuit permitted removal of an administrative proceeding from the MVA concerning the termination of a dealership to this Court. Central GMC Inc. v. General Motors Corp., 946 F.2d 327, 330 (4th Cir. 1991).

issue. Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing, 545 U.S. 308, 312-314 (2005); Ormet Corp. v. Ohio Power Co., 98 F.3d 799, 806-07 (4th Cir. 1996).

In Grable, as here, the defendant (Darue) removed a state law claim filed in state court by the Plaintiff (Grable). Grable moved to remand, claiming (as Plaintiff has done here) that removal was improper because the underlying cause of action (quiet title) was purely a state law action. Darue countered that, although an action to quiet title was a state law cause of action, the ultimate resolution of the case was dependent on whether the IRS had given Grable proper notice under a federal statute when it seized Grable's property as part of a tax sale years earlier. 545 U.S. at 310-311. The District Court agreed with Darue and denied Grable's motion to remand. The Sixth Circuit affirmed, as did the Supreme Court. Id. at 311-312.

The Supreme Court held in Grable that a state law claim constitutes a federal cause of action, and is therefore removable, if a substantial and disputed federal issue must be decided to resolve the state law claim. Id. at 314-315. As the Supreme Court held in Grable:

> There is, however, another longstanding, if less frequently encountered, variety of federal "arising under" jurisdiction, this Court having recognized for nearly 100 years that in certain cases federal-question jurisdiction will lie over state-law claims that implicate significant federal issues. The doctrine captures the commonsense notion that a federal court ought to be able to hear claims recognized under state law that nonetheless turn on substantial questions of federal law, and thus justify resort to the experience, solicitude, and hope of uniformity that a federal forum offers on federal issues.

Id. at 312 (citations omitted). The same result applies to the case at bar. Plaintiff concedes that if Defendants were entitled to Tribal immunity, it could not bring its enforcement action against them. Complaint ¶ 30. However, Plaintiff contends Defendants are not entitled to immunity, which Defendants dispute. Complaint ¶ 31. Plaintiffs cannot deny that the applicability of Tribal immunity is a substantial federal issue. Therefore, under Grable, federal jurisdiction exists and

removal was proper. Id. at 315 ("The meaning of the federal tax provision is an important issue of federal law that sensibly belongs in a federal court.").

The law of the Fourth Circuit is in direct accord. In Ormet, the Fourth Circuit held that federal jurisdiction existed because the resolution of the case depended on a substantial federal question. The Ormet Court made clear that, although the Clean Air Act, itself, did not create a private federal cause of action, federal jurisdiction nevertheless existed because:

> [F]ederal-question jurisdiction is not limited to cases where federal law creates the cause of action. There is a small class of cases where, even though the cause of action is not created by federal law, the case's resolution depends on a resolution of a federal question sufficiently substantial to arise under federal law within the meaning of 28 U.S.C. § 1331.

98 F.3d at 806. Given the undeniable federal issue of Tribal immunity, this is such a case.

Moreover, the question of whether Tribal immunity may be raised as a defense by Defendants is irrelevant. The determinative factor is whether the federal issue is essential to the resolution of the matter, as is the case here:

> Whether one accepts the plaintiff at his word, however, and looks upon the federal statute as an essential ingredient of the plaintiff's claimed cause of action, or whether one looks upon the federal statute, as construed by the plaintiff, as stripping away the state created absolute immunity of the defendant, leaving it open to plaintiff's attack, should make no difference. A determination whether a federal question is appropriately alleged in the plaintiff's complaint should not depend upon subtle choices of emphasis. The situation should be viewed realistically.

Garvin v. Alumax of South Carolina, Inc., 787 F.2d 910, 913 (4th Cir. 1986), cert. denied, 479 U.S. 914 (1986).

Plaintiff's reliance on Oklahoma Tax Com'n v. Graham, 489 U.S. 838 (1989) does not support remand for two reasons. First, Graham, having been decided in 1989, cannot overrule the Supreme Court's 2005 decision in Grable. If there is any conflict between the two decisions,

Grable, as the later decision, must prevail. Second, Graham decided removal was improper because of the well-pleaded complaint rule. 489 U.S. at 841. Here, applying the well-pleaded complaint rule, removal was proper. For, Plaintiff's own allegations in paragraphs 30 and 31 of his Complaint place Tribal immunity at issue. Thus, the threshold issue in Plaintiff's Complaint is whether Defendants are entitled to Tribal immunity – an issue which, at least preliminary, supersedes all other issues. Accordingly, for this reason alone, removal was proper.

B. Federal Jurisdiction Exists Because Plaintiff's Complaint is Preempted

Plaintiff does not dispute that removal is proper if its administrative action is preempted by federal law. Plaintiff's Memorandum at 13. Instead, Plaintiff disputes Defendants' underlying basis for preemption — that the loans at issue were entered into on the Reservation. Id. at 13-14. Plaintiff's assertion is wrong.

The following facts are undisputed: Defendant Webb is an enrolled member of the Cheyenne River Sioux Tribe who resides on the Reservation. He owns Defendants Western Sky Financial LLC, Great Sky Finance LLC and Payday Financial LLC (the "Corporate Defendants"), which are operated by Webb on the Reservation. As explained in Defendants' Memorandum in Support of its Motion to Dismiss (Document 4-1), which is incorporated by reference herein, all of the loans at issue are subject solely to the exclusive laws and regulations of the Cheyenne River Sioux Tribe and are governed by the Indian Commerce Clause of the United States Constitution. In addition, all of the borrowers have consented to the exclusive jurisdiction of the Cheyenne River Sioux Tribal Court. Document 4-1 at 4; Exhibits 1-10 attached thereto.

Nevertheless, Plaintiff contends that the loans did not take place on the Reservation because the Corporate Defendants allegedly advertised in Maryland, disbursed loan proceeds into

banks located in Maryland, and obtained repayment from funds in Maryland banks.[3] Plaintiff's Memorandum at 13. However, Plaintiff cites no authority to support its position. Nor does Plaintiff explain how activities occurring before and after the loan transactions were consummated could impact where the loan originated. To the contrary, the activities described above do not contradict Defendants' position that the loans were entered into on the Reservation.

Moreover, Plaintiff has admitted in his Complaint that the Maryland consumers "had **applied** for their loans from [Defendants] by completing and submitting on-line **applications** while these consumers were located in Maryland." Complaint ¶ 35 (emphasis added). Given this admission, Plaintiff cannot contest – at least not in good faith – that the on-line applications were, in fact, accepted by Defendants on the Reservation. See Motion to Dismiss Ex. 9 (Document 4-11) at pages 1 (first paragraph) and 3 (Governing Law).

As a result, the State of Maryland cannot bring an enforcement action against Defendants: "Congress has … acted consistently upon the assumption that the States have no power to regulate the affairs of Indians on a reservation." Williams v. Lee, 358 U.S. 217, 220 (1959). In Williams, a non-Indian who operated a general store on the Navajo Indian Reservation filed suit against Navajo Indians (Mr. and Mrs. Williams) in state court in Arizona to recover for goods sold in the store on credit. Judgment was entered against Mr. and Mrs. Williams in the trial court, and the Supreme Court of Arizona affirmed the judgment. The United States Supreme Court reversed, holding that, unless Congress expressly grants power to the states,[4] the states have no authority to

---

[3] Plaintiff's allegations are based on an affidavit of an investigator (Plaintiff's Memorandum, Exhibit 2) – not from the borrowers themselves. Accordingly, the affidavit is inadmissible hearsay.

[4] Defendants are not aware of any such authority granted by Congress to the State of Maryland.

govern the affairs of Indians on a reservation. Id. at 220-223. The Williams court concluded its opinion by stating:

> There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves. It is immaterial that respondent [i.e. the store owner bringing suit] is not an Indian.

Id. at 223.

The Supreme Court reaffirmed this holding in Montana v. United States, 450 U.S. 544 (1981), where it further emphasized that state law does **not** govern contracts between Indians and non-Indians:

> To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of non-members who enter **consensual relationships with the tribe or its members, through commercial dealing, contracts**, leases, or other arrangements.

Id. at 565 (emphasis added); See also, Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, 476 U.S. 877, 891 (1986) (In finding state court rule preempted, the Supreme Court held: "[I]n the absence of federal authorization, tribal immunity, like all aspects of tribal sovereignty, is privileged from diminution by the States."); New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 341-43 (1983) (State law regulating hunting and fishing by non-tribe members on reservation held preempted).

Federal Preemption in the areas of Native American affairs is based, in part, on "Congress' overriding goal of encouraging 'tribal self-sufficiency and economic development.'" Mescalero Apache Tribe, 462 U.S. at 335, quoting White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143 (1980). This rationale applies with equal force here. Defendants should not be subject to State laws when they operate their businesses on the Reservation and enter into consensual

agreements with non-Tribe members who consent to the jurisdiction of, and agree to be bound by, Tribal law. Montana v. U.S., 450 U.S. at 565. Plaintiff's Complaint, therefore, is preempted, and removal was proper for this reason as well.

III. REMOVAL IS PROPER BECAUSE YOUNGER ABSTENTION IS NOT APPLICABLE

Finally, Plaintiff argues that, even if removal were otherwise proper, this case still should be remanded based on the Younger abstention doctrine. Once again, Plaintiff is wrong. As this Court has noted, "'abstention from the exercise of federal jurisdiction is the exception, not the rule.'" Larsen v. CIGNA HealthCare Mid-Atlantic, Inc., 224 F. Supp. 2d 998, 1006 (D. Md. 2002) (quoting Haw. Housing Auth. v. Midkiff, 467 U.S. 229, 236 (1984)); see Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 813, 817 (federal courts have a "virtually unflagging obligation . . . to exercise the jurisdiction given them").

Younger abstention only applies if **all** of the following elements exist: (1) an ongoing state judicial proceeding, instituted prior to any substantial progress in the federal proceeding; that (2) implicates important, substantial, or vital state interests; and (3) provides an adequate opportunity to raise the federal claim advanced in the federal lawsuit. Laurel Sand & Gravel, Inc. v. Wilson, 519 F.3d 156, 165 (4th Cir. 2008) (citing Moore v. City of Asheville, 396 F.3d 385, 390 (4th Cir. 2005)). Here, however, none of these elements are present. As a result, Plaintiff's motion to remand must be denied.

A. There Is No Ongoing State Case

The linchpin of Younger abstention is the existence of a pending state case. Ankenbrandt v. Richards, 504 U.S. 689, 705 (1992) ("Absent any *pending* proceeding in state tribunals, therefore, application by the lower courts of Younger abstention was clearly erroneous.") (emphasis in original). However, a removed case cannot satisfy this requirement: "Removal under

28 U.S.C. § 1441 simply does not leave behind a pending state proceeding that would permit Younger abstention." Village of DePue v. Exxon Mobil Corp., 537 F.3d 775, 783 (7th Cir. 2008); see also In re Burns & Wilcox, Ltd, 54 F.3d 475, 477-78 (8th Cir. 1995); Kirkbride v. Cont'l Cas. Co., 933 F.2d 729, 734 (9th Cir. 1991); Noonan South, Inc. v. County of Volusia, 841 F.2d 380, 382 (11th Cir. 1988). Indeed, as the Fourth Circuit has made clear, once a case is removed, it is no longer pending in the state court.[5] Yarnevic v. Brink's, Inc., 102 F.3d 753, 754 (4th Cir. 1996) ("A proper filing of a notice of removal immediately strips the state court of its jurisdiction.").

Plaintiff relies primarily on this Court's decision in Ward v. Simpers, 2008 U.S. Dist. LEXIS 42172 (D. Md. May 29, 2008) for its contention that there is an ongoing state case. Plaintiff's Memorandum at 16-18. Plaintiff's reliance, however, is misplaced because Ward did not involve a removed case. Instead, the defendants in the state administrative proceedings in Ward filed a separate federal court action while the administrative proceedings were pending. Id. at *7-8. Therefore, when this Court addressed abstention in Ward, there were two administrative proceedings pending, including the original state administrative proceeding. Id. at *7-8; 13-14. In the case at bar, there are no state court or administrative actions pending. Therefore, Younger abstention simply does not apply. Village of DePue, 537 F.3d at 783.

B. The Federal Interest Regarding Tribal Immunity Overwhelms Any State Interest.

Even if Plaintiff could satisfy the first prong of the Younger doctrine — which it clearly cannot — abstention would not be appropriate because the federal issue of Tribal immunity predominates over any state issues: "When there is an overwhelming federal interest . . . no state interest, for abstention purposes, can be nearly as strong at the same time." Harper v. Public Serv.

[5] Plaintiff admits that it ceased prosecuting its administrative action once it was removed to this Court. Plaintiff's Memorandum at 4-5.

Comm'n of W. Va., 396 F.3d 348, 356 (4th Cir. 2005). The effect of Tribal immunity on a state's authority to regulate activity is fundamentally a federal issue. Winnebago Tribe v. Stovall, 341 F. 3d 1202, 1205 (10th Cir. 2003) (affirming TRO enjoining state enforcement action to collect fuel tax and holding that questions of federal preemption and Tribal immunity were "central and threshold issues," which had to be resolved before the state enforcement action could proceed); see also Sycuan Band of Mission Indians v. Roache, 54 F.3d 535, 541 (9th Cir. 1995) ("[T]he threshold jurisdictional issue, whether the State had authority to regulate, was a question of federal, not state law.").

As a result, in cases where, as here, issues of Tribal immunity are present, the state-interest prong of Younger cannot be met and abstention must be denied. Winnebago, 341 F. 3d at 1204-05 (citing cases); see also Sycuan, 54 F.3d at 541; Seneca-Cayuga Tribe of Okla. v. Okla. ex rel. Thompson, 874 F.2d 709, 714 (10th Cir. 1989) (holding that when state court is asked to decide issues of federal law in area in which federal interests predominate, state's interest in litigation is not sufficiently important to allow Younger abstention).

Significantly, in Harper, the Fourth Circuit analogized the "overwhelming federal interest" there involved to the same Tribal immunity federal interest here involved:

> Our sister circuits have recognized, for instance, that the Indian Commerce Clause – part of the *same constitutional provision* creating the national interest in interstate commerce – creates a similarly weighty national interest in regulating Indian affairs.

396 F.3d at 357 n. 3 (italics in original). Thus, the Fourth Circuit relied upon the tribal immunity decisions in Seneca-Cayuga, Winnebago, and Sycuan in reversing a district court's finding of Younger abstention and noted that a strong federal interest, such as Tribal immunity, outweighs even legitimate state interests: "Consequently, the state interest for Younger purposes in such cases is

often not 'important,' even though the states may well have legitimate interests in some parts of the underlying case." Harper, 396 F.3d at 357 n.3.

Indeed, the Tenth Circuit explained in Winnebago that, even a state's interest in enforcing its own laws, such as Plaintiff asserts here (Plaintiff's Memorandum at 17), is insufficient to establish Younger abstention where a strong federal interest is present. Winnebago, 341 F. 3d at 1205. Requiring abstention in every action where the purported state interest is the enforcement of its laws "would swallow the entire analysis because any ongoing state [enforcement] proceeding would no longer be just a factor in the analysis, it would end the analysis." Id. Therefore, Plaintiff cannot establish the second prong of the Younger analysis. Accordingly, the case should not be remanded.

C. It Is Unclear Whether There Would Be An Adequate Opportunity To Raise The Federal Claim In The State Proceeding

Finally, Plaintiff contends that the third prong of Younger abstention is met because Defendants could raise the immunity issue within the state proceeding. Plaintiff's Memorandum at 17. Plaintiff's contention is ironic considering Plaintiff spends several pages of its Memorandum (pp. 7-12) arguing that it is not the equivalent of a state court. More importantly, Plaintiff has already prejudged the matter. Without holding a hearing or receiving any input from Defendants, Plaintiff has already determined that Defendants are **not** entitled to Tribal immunity. Complaint ¶ 31. Regardless, Defendants have the right to have a federal court decide the important issue of Tribal immunity.

Having failed to establish either of the first two prongs of Younger abstention, and barely raising a question about the third, Plaintiff has not demonstrated that Younger abstention applies in this case. Therefore, its Motion to Remand should be denied.

CONCLUSION

The threshold issue, and the very heart of Plaintiff's own Complaint, is whether Defendants are entitled to Tribal immunity. For all the foregoing reasons, Defendants are entitled to have this substantial federal issue heard in this Court. Accordingly, Defendants request that the Court deny Plaintiff's Motion to Remand.

Respectfully submitted,

/s/ Charles S. Hirsch
Charles S. Hirsch (Fed ID #06605)
BALLARD SPAHR LLP
300 East Lombard Street
18th Floor
Baltimore, MD 21202
Tel: (410).528.5503
Fax: (410).528.5650

OF COUNSEL:
David H. Pittinsky
BALLARD SPAHR LLP
1735 Market Street, 51st Floor
Philadelphia, PA 19103
Tel: (215) 665-8500
Fax: (215) 864-8999

Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of May, 2011, a copy of the foregoing Defendants' Opposition to Motion to Remand was filed and served electronically via the Court's CM/ECF system.

/s/ Charles S. Hirsch
Charles S. Hirsch