

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

WESTERN SKY FINANCIAL, LLC,
GREAT SKY FINANCE, LLC,
PAYDAY FINANCIAL, LLC and
MARTIN A. WEBB,

Plaintiffs,

v.

MARYLAND COMMISSIONER OF
FINANCIAL REGULATION,

Defendant.

Civil Action: 1:11-cv-01256-WDQ

**COMMISSIONER OF FINANCIAL REGULATION'S REPLY TO
PLAINTIFFS' OPPOSITION TO THE COMMISSIONER'S
MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT**

The Maryland Commissioner of Financial Regulation (the "Commissioner"), by and through his undersigned counsel, submits the following Reply to Plaintiff's Opposition to the Commissioner's Motion to Dismiss Plaintiff's Amended Complaint for Declaratory Judgment:

ARGUMENT

A. THE COMMISSIONER'S MOTION TO DISMISS WAS NOT A "MOTION FOR RECONSIDERATION," DESPITE PLAINTIFFS' ARGUMENTS TO THE CONTRARY.

To the extent that it has any bearing on this case, Plaintiffs have incorrectly characterized the Commissioner's Motion to Dismiss Plaintiffs' Amended Complaint as a Motion for Reconsideration. ECF 21, at 1. First, it should be noted that the standards set forth in the applicable Federal Rules of Civil Procedure and the relevant case law are completely

different for these two different types of motions. Moreover, the Commissioner is not asking this Court to reconsider any of its previous rulings. Instead, the Motion to Dismiss instead had four purposes:

1) To reassert and preserve those arguments previously made in the Commissioner's Motion to Dismiss the Plaintiffs' [Original] Complaint for Declaratory Judgment, including (but not limited to) those grounds for dismissal that have never previously been determined by the Court (*i.e.*, the *Younger* abstention doctrine, and the Court's broad discretion to decline to exercise jurisdiction over the Plaintiffs' declaratory judgment action), which are now ripe for determination by this Court;

2) To supplement the Commissioner's arguments with regard to *Younger* abstention by providing updated information applicable to two of the three prongs of the *Younger* test, thereby giving further support for dismissing the action based on *Younger* abstention;

3) To provide the Court with recent decisions from other jurisdictions which bear on highly relevant issues material to the present action, including the appropriateness of dismissal as to all of the Plaintiffs (with those courts concluding that the Plaintiff business entities were organized under South Dakota law; that the internet-based lending activities of the Plaintiffs constitute off-reservation conduct; and that neither Martin A. Webb, nor the Plaintiff business entities, are entitled to tribal sovereign immunity); and

4) To address an issue that this Court had raised in its Memorandum Opinion of April 9, 2012 in the present action on the limited question of dismissing just the Plaintiff business entities (ECF No. 17, pp. 10-11) (namely, whether the Plaintiff LLCs in the

present action are distinct from their owners under the applicable state law), with the answer being that, under the applicable state law (S.D. Codified Laws § 47-34A-201), the Plaintiff business entities are considered legal entities distinct from their owners (or members).

The first purpose indicated above provides a basis to dismiss the present action as to all Plaintiffs for various independent reasons: based on lack of federal jurisdiction and failure to state a claim; based on *Younger* abstention doctrine; and based on the Court's broad discretion to decline to exercise jurisdiction over the Plaintiffs' declaratory judgment action. The second purpose supplements the Commissioner's previous arguments related to *Younger* abstention with new developments in the Commissioner's administrative action against the Plaintiffs (*i.e.*, the remanded case, Civil Action: 1:11-cv-00735). The third purpose (namely, providing decisions from other jurisdictions) supports dismissing this action based on lack of federal jurisdiction and failure to state a claim, or alternatively provides appropriate rationale for the Court to decline to exercise jurisdiction over this declaratory judgment action (if, in fact, the Court determines that it does have jurisdiction). The fourth purpose relates solely to the limited issue of dismissing only the Plaintiff business entities based on lack of federal jurisdiction and failure to state a claim. All of these independent bases for dismissing the present declaratory judgment action are based on new decisions from other jurisdictions, on new developments in this matter's sister case (the administrative action that was previously remanded by this Court), or on legal arguments in response to issues raised by this Court; thus, the Commissioner has not simply attempted to "re-argue issues that have already been decided," despite Plaintiffs' assertion to the contrary (ECF 21, at 2).

B. PLAINTIFFS' ARGUMENTS AGAINST DISMISSING THE PLAINTIFF LIMITED LIABILITY COMPANIES ARE COMPLETELY WITHOUT MERIT.

There is no merit to the Plaintiffs' arguments against dismissing the Plaintiff business entities, all of which are limited liability companies, in the present matter. First, it is clear that the Plaintiff business entities were organized under South Dakota law. The federal and state court decisions from Colorado, Missouri, and West Virginia support this conclusion, as do various documents that were filed in the related federal action that this Court previously remanded (Civil Action: 1:11-cv-00735, ECF Nos. 10-7 through 10-9). Further, the Plaintiffs do not dispute this in their Response, and in fact appear to concede this point by citing to South Dakota case law (though their reliance on those cases is completely misplaced).

Therefore, the only question is whether an LLC under South Dakota law is considered a distinct legal entity from its owner ("member" in the context of an LLC). The answer is clear and unambiguous: pursuant to South Dakota's Uniform Limited Liability Company Act, "[a] limited liability company is a legal entity distinct from its members." (S.D. Codified Laws § 47-34A-201.) Therefore, since LLCs organized under South Dakota law, such as the Plaintiff business entities, are considered legal entities distinct from their owners (*i.e.*, members), the Plaintiff business entities cannot be considered members of the Cheyenne River Sioux Tribe based on Plaintiff Webb's purported tribal membership. *See Baraga Prods., Inc. v. Comm'r of Revenue*, 156 F.3d 1228 (table), 1998 WL 449674, *2 (6th Cir. 1998), as cited by this Court in its Memorandum Opinion issued on April 9, 2012 in the present action (ECF No. 17, pp. 9-11). As such, the Plaintiff business entities should be dismissed from the present matter based on lack of subject matter jurisdiction and failure to state a claim upon which relief may be granted.

Further, the cases cited by the Plaintiffs to the contrary are completely distinguishable. Without belaboring all of the differences between the cases cited by the Plaintiff and the present matter – cases that have been discussed numerous times throughout the Parties’ various pleadings – the most telling point is that none of these cases interpreted or applied South Dakota’s Uniform Limited Liability Company Act (“SDULLCA”), which has clear and unambiguous statutory language to the effect that a limited liability company is a legal entity distinct from its members. (S.D. Codified Laws § 47-34A-201.) Instead, the cases cited by the Plaintiffs all relate to corporations that are subject to other South Dakota statutes – not to the SDULLCA – each of which has different statutory language and different underpinning policy considerations.

CONCLUSION

For the reasons stated herein, as well as for those set forth in the Commissioner’s Motion to Dismiss Plaintiffs’ Amended Complaint and Memorandum in Support (ECF Nos. 20 and 20-2, respectively), the Commissioner’s Motion to Dismiss and Memorandum in Support (ECF Nos. 5 and 5-1, respectively), and in the Commissioner’s Reply brief (ECF No. 8), the Maryland Commissioner of Financial Regulation respectfully requests that this Court dismiss the present action with prejudice.

DOUGLAS F. GANSLER
Attorney General of the State of Maryland



W. THOMAS LAWRIE
Assistant Attorney General

Federal Bar # 28226

Office of the Attorney General
Department of Labor, Licensing and
Regulation

500 N. Calvert Street, Suite 406
Baltimore, Maryland 21202-3651

Phone No: 410-230-6115

Fax No: 410-333-6503

Attorneys for the Maryland Commissioner
of Financial Regulation

CERTIFICATE OF SERVICE

I hereby certify that, on this 29th day of May, 2012, the foregoing Maryland Commissioner of Financial Regulation's Reply to Plaintiffs' Opposition to the Commissioner's Motion to Dismiss Plaintiffs' Amended Complaint for Declaratory Judgment was electronically filed and served via the Court's CM/ECF system.

W. Thomas Lawrie

W. Thomas Lawrie