UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

FEDERAL TRADE COMMISSION, Plaintiff v. PAYDAY FINANCIAL, LLC, et al., Defendants.	)	**Civil Action No. 11-3017** **DEFENDANTS' REPLY IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT**

I. INTRODUCTION

Defendants moved for Partial Summary Judgment that the Cheyenne River Sioux Tribal Court has subject-matter jurisdiction over lawsuits brought by Defendants, all of whom are members of the Tribe, to collect on loans in which (1) borrowers reach onto the Reservation[1] over the Internet or phone to contact a Defendant to apply for a loan, (2) a Defendant located on the Reservation considers and approves those applications, (3) the loans are electronically funded from the Reservation, and (4) the loan contracts provide for application of Tribal law and exclusive jurisdiction for the Tribal Court.

Defendants' Motion for Partial Summary Judgment demonstrated that borrowers' level of contact with the Reservation is more than sufficient to provide jurisdiction to the Tribal Court over conflicts that arise out of their loans. In its opposition, the FTC argues that this is not so, attempting to frame the loans as occurring exclusively off of the Reservation. The FTC ignores critical facts linking each loan closely to the Reservation. The FTC also attempts to distract the Court by raising irrelevant facts such as the cost for a borrower to travel to the Reservation.

[1] All capitalized terms not specifically defined herein have the same meaning as in the Motion.

In short, the FTC argues that the fact that the borrowers reside off the Reservation means that the loan agreements must be formed off the Reservation. The FTC further contends that borrowers do not engage in any conduct on the Reservation and, thus, the Tribal Court lacks jurisdiction over such borrowers. These arguments fail because the FTC incorrectly focuses only on the physical location of the borrowers and their bank accounts. Under a proper analysis regarding the location of the contracts – i.e., the location of formation through offer and acceptance – the undisputed facts of this case demonstrate that the loan agreements are formed, and thus located, on the Reservation.

Even if each agreement were not formed on the Reservation (which it is), the borrowers engage in sufficient on-Reservation activity to be subject to Tribal Court jurisdiction. In sum, because borrowers initiate contact, negotiate, and enter into contracts with a Tribal member on the Reservation and further engage in on-Reservation activity, the Tribal Court has jurisdiction over suits arising from and related to those contracts.

Equally unavailing is the FTC's emphasis on the cost of travel to the Reservation in connection with defending collection suits. The FTC raises this argument as an apparent attempt to color such suits as unfair. In truth, the cost of travel to the reservation is completely irrelevant to the question of whether the Tribal Court has jurisdiction. Moreover, such travel is unnecessary because litigants are permitted to appear telephonically in Tribal Court.

II. ARGUMENT AND CITATION TO AUTHORITY

A. The Tribal Court Has Jurisdiction Because the Loan Agreements Are Formed on the Reservation and Borrowers Otherwise Engage in On-Reservation Activity.

As the Supreme Court has held, "Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations," including over "the activities of nonmembers who enter consensual relationships with the tribe or its members,

through commercial dealing, contracts, leases, or other arrangements." *Montana v. United States*, 450 U.S. 544, 565-66 (1981).

The FTC asserts that the dispositive issue "is whether the *nonmember* . . . engages in conduct or activity on the reservation." Opposition at 8 (emphasis in original). The FTC's claim that there is no Tribal Court jurisdiction over borrowers incorrectly assumes that the borrowers do not engage in any on-Reservation activity. For example, the FTC contends that loan transactions with the Companies occur off the Reservation. This argument is incorrect as a matter of fact and law. The undisputed facts demonstrate that the loan transactions occur on the Reservation and that borrowers engage in other on-Reservation activity throughout the course of their contractual relationship with the Companies. Accordingly, borrowers engage in on-Reservation activity and the Tribal Court has jurisdiction over them.

1. The Loan Agreement Is Formed on the Reservation and Constitutes On-Reservation Activity.

The FTC primarily argues that, because the loans were entered into over the Internet and telephone with borrowers who reside off the Reservation, the transactions must have occurred off-Reservation. But, the manner of communication and the location of the borrowers (or their bank accounts) does not establish the location of the transaction. Instead, the location of a contract is the location where the offer to enter into the contract is accepted. *See Dean Foods Co. v. Brancel*, 187 F.3d 609, 617-18 (7th Cir. 1999); *see also* RESTATEMENT (FIRST) CONTRACTS § 74 (1932); 16 AM. JUR. 2D *Conflict of Laws* § 87 (2011) ("An 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."); 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.").

Here, it is undisputed that borrowers apply for loans directly through the Defendants' websites by completing an application. Joint Stipulation of Material Facts as to Which There is No Genuine Issue to be Tried ("SMF") at ¶¶ 7(b)-(c). These applications constitute offers to enter into a loan transaction. *See Manning v. First Fed. Sav. & Loan Ass'n*, 441 N.W.2d 294, 926 (S.D. 1989); *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).

It is also undisputed that Defendants' operations occur on the Reservation. *See* SMF ¶ 2. Therefore, an application (*i.e.*, offer) is received, reviewed, and accepted – thus forming a contract – or rejected on the Reservation.[2] *Id.* ¶¶ 7(b) – (d). 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.[3] *See id.* ¶¶ 8-9; *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)).

2. Borrowers Otherwise Engage in Sufficient On-Reservation Conduct Such That They Are Subject to the Jurisdiction of the Tribal Court.

Regardless of whether the Court agrees that the loan agreements are formed on the Reservation, borrowers nevertheless engage in sufficient on-Reservation conduct to be subject to the jurisdiction of the Tribal Court. Borrowers reach into the Reservation over the telephone and

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[2] Notice of acceptance or rejection is thus communicated from the Reservation as well. *See* SMF ¶¶ 7(d); 7(f).

[3] Contrary to the FTC's assertion, *see* Opposition at 9-10, Defendants do not assert that choice-of-law and forum-selection clauses can, by their own authority, subject nonmember borrowers to Tribal jurisdiction. Instead, these clauses and the borrowers' agreement to these clauses, when considered together with the parties other actions, merely corroborate that the loan transactions occurred on the Reservation.

Internet to initiate contact with the Companies (located within the exterior boundaries of the Reservation) to apply for a loan. SMF ¶ 7(b). Borrowers submit loan applications and background information to the Companies. *Id.* ¶ 7(c). Loans are funded from a bank located within the exterior boundaries of the Reservation. *Id.* ¶ 7(g). In repaying their loans, borrowers direct all communications and payments to the Companies on the Reservation. *Id.* ¶ 7(a), (h). Finally, as noted above, the parties to the loan agreement agree that the contract is governed by Tribal law and Tribal Courts. *Id.* ¶¶ 8-9. Therefore, regardless of where the loan agreements are formed, the borrowers conduct sufficient activity on the Reservation in connection with the loans to be subject to Tribal Court jurisdiction.

3. The FTC Fails to Establish that All Activity Occurred Off the Reservation.

Ignoring these facts, the FTC argues that there is no on-Reservation activity because Defendants: (1) solicit loans from borrowers outside the Reservation via television and the Internet; (2) make loans, including communicating approval or denial of loan applications, to borrowers located outside the Reservation using Defendants' websites and the telephone; (3) electronically transfer funds directly into and out of borrowers' bank accounts, which are located outside the Reservation. Opposition at 11-12.

These facts, while true, are not dispositive. To the extent that some solicitation of borrowers occurred outside of the Reservation, it is not enough to place a loan transaction off-Reservation. To begin with, solicitations are far removed from any actual loan dispute. Advertisements generally are not offers, *see* 17A AM. JUR.2D *Contracts* § 52 (2011), nor is the solicitation of an application. *See Master Palletizer Sys., Inc. v. T.S. Ragsdale Co., Inc.*, 725 F. Supp. 1525, 1531 (D. Colo. 1989). Instead, 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).

As for the FTC's third argument, the location of the funding and repayment of a loan does not change the place where the loan was made – i.e., where the offer and acceptance occurred. *See, e.g. Golden Plains Feedlot, Inc. v. Great Western Sugar Co.*, 588 F. Supp. 985, 990 (D.S.D. 1984) (in describing South Dakota's general choice-of-law rule, noting that the place of performance is not necessarily the same as the place where a contract is made). Because the undisputed facts show that the loan transactions occurred on the Reservation, borrowers enter into contracts on the Reservation and, therefore, are subject to Tribal Court jurisdiction.

4. The Attorney's Process Cases Do Not Command a Different Result.

The cases cited by the FTC for the proposition that the loan transactions occurred off-Reservation, *see* Opposition 13-14, fail to resolve the question regarding location. For example, the FTC cites the Eighth Circuit and district court opinions in *Attorney's Process and Investigation Services, Inc. v. Sac & Fox Tribe of the Mississippi in Iowa*, 609 F.3d 927 (8th Cir. 2010) ("*Attorney's Process I*"), *remanded to* 809 F. Supp. 2d 916 (N.D. Iowa 2011) ("*Attorney's Process II*"). In *Attorney's Process I* and *II*, a tribe sued Attorney's Process and Investigation Services, Inc. ("API") for conversion, alleging that API had wrongfully taken and refused to return tribal funds, which caused harm to the tribe and tribal property. The tribe sued API in tribal court. API filed an action in the district court and moved for summary judgment on the ground that the tribal court did not have jurisdiction. The district court denied API's motion and granted the tribe's motion to dismiss, finding that the tribal court had jurisdiction under the second *Montana* exception. *Attorney's Process I*, 609 F.3d at 933-34. This exception provides that "[a] tribe may . . . retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana*, 450 U.S. at 565-66. API appealed to the Eight Circuit.

On appeal, in *Attorney's Process I*, the Eighth Circuit held that the second *Montana* exception, which expressly requires on-reservation conduct or activity, did not justify tribal jurisdiction over non-member API because the tribe failed to allege sufficient facts in its complaint to demonstrate that the conduct underlying the conversion claim (i.e., the receipt and retention of tribal funds) occurred on the reservation. *See Attorney's Process I*, 609 F.3d at 940-41. Nonetheless, the Eighth Circuit did not conclude that the tribal court lacked jurisdiction. Rather, the Eighth Circuit remanded the case and instructed the district court to consider whether API had a consensual relationship with the tribe such that jurisdiction was proper under the first *Montana* exception. *Id.* at 941. In remanding the case, it appears that the Eighth Circuit contemplated that the first *Montana* exception may not require any on-reservation conduct at all, and that the mere existence of a consensual relationship with a tribe or tribe member might be sufficient for tribal-court jurisdiction.[4] *See id.*

On remand, the district court in *Attorney's Process II* first considered whether the mere existence of a consensual relationship with the tribe – regardless of whether the conduct at issue occurred on the reservation – could justify the exercise of tribal-court jurisdiction. 809 F. Supp. 2d at 927-28. The district court concluded that a relationship, alone, was insufficient. *Id.* Citing the Eighth Circuit's opinion in *Hornell Brewing Co. v. Rosebud Sioux Tribal Court*, 133 F.3d 1087 (8th Cir. 1998), the court found that there can be no tribal jurisdiction under either *Montana* exception unless the non-member has conducted some activity on the reservation. *Id.* The

[4] While the tribal court of appeals had determined that there was no valid contract between the tribe and AP, the Eighth Circuit remanded the case to consider whether there was a non-contractual consensual relationship with the tribe sufficient to justify jurisdiction under the first *Montana* exception. *Id.* at 933 (reciting the tribal court's holding that the arbitration provision in the contract between API and the tribe could not be enforced because the tribe member that executed the agreement was unauthorized to bind the tribe).

district court emphasized and relied upon the first sentence from *Montana* that suggests that a tribe may only exercise civil jurisdiction over non-members on their reservation. *Id.* at 928 (*quoting Montana*, 450 U.S. at 565-66). Therefore, the district court held that the first *Montana* exception requires that the non-member conduct at issue must have occurred on the reservation.

The district court in *Attorney's Process II* next concluded that, consistent with the Eighth Circuit's findings in its remand order, the tribe failed to allege in its complaint that the receipt or retention of the tribe's funds occurred on the reservation. *Id.* at 929-30. Instead, the tribe alleged generally that the conversion claim arose within the jurisdiction of the Tribe because

> the Tribe brings this suit to cause API to return the funds to the Tribe which API unlawfully has taken and retained, and because API committed torts against the Tribe and harm to tribal real property and to other tribal property on the Settlement.

Id. at 929 (quoting the complaint). Both the Eighth Circuit and the district court found that this allegation failed to allege that the specific conduct at issue, the receipt and retention of the tribe's funds, occurred on the reservation. *Id.*

Contrary to the FTC's portrayal of these cases, the courts in *Attorney's Process I* and *II* did ***not*** hold that API's receipt of funds occurred off the reservation as a matter of law. Rather, the courts merely held that the plaintiff tribe failed to plead any facts that would show that the receipt and conversion occurred on the reservation. The FTC wrongly suggests that the Eighth Circuit in *Attorney's Process I* held that the determinative issue was whether the receipt of funds occurred on the reservation. *See* Opposition 14. While the Eighth Circuit stated that the location of the conduct was the determinative issue, it made this determination based on two alleged actions – the taking and retention of purportedly converted funds – and it did so only with respect to the second *Montana* exception. *Attorney's Process I*, 609 F.3d at 940-41. The Eighth Circuit did not consider facts similar to those in the present case. With respect to the first

Montana exception, the Eighth Circuit appears to have considered the possibility that the mere existence of a contractual relationship with a tribe, alone, may be sufficient to invoke tribal-court jurisdiction, even where the nonmember did not conduct any activity while physically on the reservation. *Id.* at 941.

In *Attorney's Process II*, the district court acknowledged that the location of even the limited conduct at issue there – the transfer and receipt of funds – is amorphous. The district court also acknowledged that this conduct may occur in one or several places, and it is not clearly defined by the nonmember's physical presence on or off the reservation:

> The conduct at issue here – API's receipt and retention of $1 million in tribal funds – is quite different from the nonmember conduct considered in the typical tribal jurisdiction case. The conduct underlying the conversion claim could occur in one exchange or many, at one location or many and could consist even of a simple electronic transaction, making the "location" of such conduct a rather amorphous concept. The leading Supreme Court decisions, by contrast, generally involve nonmember conduct with an obvious or distinct locus.

Id. at 930 n.7.

In this case, there is more conduct at issue than the mere taking and retention of purportedly converted funds. Because much of the conduct occurred electronically or over the telephone, over a period of time, the mere physical location of the consumer does not establish

where the conduct took place.[5] Instead, as the court noted in *Attorney's Process II*, conduct may occur on the reservation even though the nonmember has not physically set foot on the reservation. Accordingly, *Attorney's Process I* and *II* do not support the FTC's argument that the conduct at issue here occurred off the Reservation.

5. The FTC's Reliance on Two Decisions From Litigation Pending in Colorado State Court Concerning Defendants is Misplaced Because These Decisions are Irrelevant.

Finally, while the FTC cites two decisions from litigation brought by the Colorado Attorney General concerning some of the Defendants, these decisions are not relevant here. First, those decisions did ***not*** conclude that there was no on-Reservation activity as part of a loan transaction or that the Tribal Court lacked jurisdiction to entertain a lawsuit arising out of a loan transaction. Rather, they concluded that there was sufficient off-Reservation activity to permit regulation by the state as well. Furthermore, the Colorado litigation is ongoing and Defendants have appealed the state district court's decision regarding tribal immunity, which is the context in which the question of location was raised. *See Western Sky Fin. v. Colorado*, 12CA0919 (Co. Ct. App. May 1, 2012). In addition, other courts that have considered the same issues – i.e., where the loan transaction between borrowers and the Companies occurs – have reached a

[5] Moreover, the cases cited by the FTC do not hold that the non-member must physically enter onto the Reservation in order to conduct activity on the Reservation. *See* Opposition at 8 n.7. While the FTC attempts to portray one case, *Progressive Specialty Insurance Company v. Burnette*, as requiring a physical presence on the reservation, the FTC's parenthetical description of the case is overly narrow. *Id.* (*citing Progressive*, 489 F. Supp. 2d 955 (D.S.D. 2007)). According to the FTC, *Progressive* held that no tribal jurisdiction existed over a nonmember insurer because the "insurer never entered or maintained a presence on the reservation." *Id.* However, the court's opinion in *Progressive* reveals that the court considered many other factors in addition to the insurer's lack of physical presence on the reservation. The court also found that the insurer "had no dealings with the Tribe" and that there was no evidence that the insurer "ever conducted any business with the Tribe." 489 F. Supp. At 958. All of these facts, considered together, led the court to conclude that the insurer conducted no activity on the reservation, that the *Montana* exceptions did not apply, and, therefore, there was no tribal jurisdiction over the nonmember insurer. *Id.*

different conclusion and held that loans made over the Internet may occur on the Reservation. *See Western Sky Fin. LLC v. Maryland Comm'r of Fin. Reg.*, Civ. No. WDQ-11-1256, 2012 U.S. Dist. LEXIS 49771 (D. Md. Apr. 9, 2012) (permitting amendment of complaint and holding that plaintiffs have stated a claim if the loans made to Maryland residents over the Internet occurred on the Reservation).

Because the record demonstrates that any loans made by Defendants were formed on the Reservation, the Tribal Court has jurisdiction over collection suits filed to enforce and collect those loans.

B. Borrowers May Appear in Tribal Court Telephonically, so Travel to the Reservation is Unnecessary.

The FTC spends considerable time in its Opposition arguing that borrowers are unable to defend themselves from collection lawsuits filed in Tribal Court due to the time and expense required to travel to the Reservation. Opposition at 2-3. First, this issue is irrelevant to the issue of whether the Tribal Court has jurisdiction over borrowers. As noted above, the primary issue is whether the borrowers engage in on-Reservation conduct.

Second, the cost of travel to the Reservation is a red herring because litigants are permitted to, and often do, appear in Tribal Court telephonically. In connection with collection suits initiated by the Lending Companies, borrowers are told that they may appear by telephone. *See* Defendant's Statement of Supplemental Material Facts at ¶ 1. Borrowers frequently appear in Tribal Court telephonically, with no need to travel to the Reservation. *Id.* ¶ 2. Therefore, although the FTC emphasizes the potentially high cost of traveling to the Reservation, such travel is entirely unnecessary and irrelevant

VI. CONCLUSION

The Supreme Court has explicitly held that tribal courts possess jurisdiction over non-members who enter into consensual commercial relationships with tribes or tribal members. The Court has never limited this holding to commercial dealings in which all aspects of a transaction are performed on a reservation. In this case, a substantial portion of the commercial dealings – from the formation of the loan agreements through acceptance of a borrower's offer to the funding and acceptance of payments of the loans – occurred on the Reservation. Furthermore, all borrowers explicitly consented to resolution of loan-related disputes in Tribal Court. Disputes over the borrowers' loan agreements with Defendants therefore fall squarely within the Supreme Court's first *Montana* exception, so the Court should grant partial summary judgment in favor of Defendants, finding that the Tribal Court has subject-matter jurisdiction over a collection action initiated by one of the Companies against a nonmember borrower.

DATED July 2, 2012.

/s/ Cheryl Bogue.

Cheryl Bogue
Bogue & Bogue
P.O. Box 50
Faith, SD 57626
(605) 976-2529
boguelaw@faithsd.com

Jonathan Bernhardt
Admitted Pro Hac Vice
Ballard Spahr LLP
1225 17th Street
Suite 2300
Denver, Colorado 80202
(303) 292-2400
bernhardt@ballardspahr.com

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the DEFENDANTS' REPLY IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT was served, on counsel for Plaintiff, by electronic transmission.

DATED July 2, 2012.

_/s/_Cheryl Bogue_____
Cheryl Bogue
Bogue & Bogue
P.O. Box 50
Faith, SD 57626
(605) 976-2529
boguelaw@faithsd.com