

**UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION**

FEDERAL TRADE COMMISSION,)	
)	
Plaintiff)	
)	Civil Action No. 11-3017
v.)	
)	
PAYDAY FINANCIAL, LLC, et al.,)	DEFENDANTS’ MOTION FOR
)	PARTIAL SUMMARY
Defendants.)	JUDGMENT AND SUPPORTING
)	MEMORANDUM OF LAW
)	

Defendants Payday Financial, LLC, Great Sky Finance, LLC, Western Sky Financial, LLC, Red Stone Financial, LLC, Management Systems, LLC, 24-7 Cash Direct, LLC, Red River Ventures, LLC, High Country Ventures, LLC, Financial Solutions, LLC (collectively, the “Companies”), and Martin A. Webb (“Webb”; together with the Companies, “Defendants”) submit this Motion for Partial Summary Judgment and Supporting Memorandum of Law.

I. INTRODUCTION

This case arises out of the FTC’s Complaint alleging unfair and deceptive trade practices. The Companies, which are all located entirely within the exterior boundaries of the Cheyenne River Sioux Indian Reservation (the “Reservation”), are engaged in the business of making short-term loans to borrowers over the telephone and internet. The FTC alleges, *inter alia*, that Defendants are engaging in an unfair and deceptive practice by bringing collection actions against non-Indian borrowers in the Cheyenne River Sioux Tribal Court (the “Tribal Court”). The FTC also alleges that the Companies’ loan agreements are unfair and deceptive because they include a choice-of-law and venue provisions providing for application of Tribal law and venue

in Tribal Court. Because the U.S. Supreme Court has held that Indian tribes can exercise jurisdiction over contracts between non-Indians and tribal members, the Tribal Court does have jurisdiction over the loan agreements between Defendants and non-Indian borrowers, so the FTC's claims fail as a matter of law.

The parties are engaged in settlement discussions. Those discussions have progressed substantially, but have foundered because the parties cannot agree on whether the Tribal Court has subject matter jurisdiction over claims brought by the Companies against borrowers to enforce the loan agreements. The parties believe that it is likely that they will be able to resolve all remaining issues by agreement if the Court resolves this question of law.

The Tribal Court does have subject matter jurisdiction over such enforcement actions under the Supreme Court's decision in *Montana v. United States*, 450 U.S. 544 (1981). In that seminal decision, the Supreme Court set forth two exceptions to the general rule that tribal courts do not have jurisdiction over non-Indians. The first exception applies here because it permits tribal courts to exercise civil jurisdiction over non-Indians who enter into consensual relationships with tribal members through commercial dealing or contracts.

Here, the borrowers enter into contracts with members of the Cheyenne River Sioux Tribe (the "Tribe") by contacting the Companies on the Reservation to apply for short-term loans. The Companies are owned and operated by Webb, who is an enrolled member of the Tribe, and the Companies are based and operate within the external boundaries of the Reservation. From a borrower's initial contact with one of the Companies, all actions by the Companies, including review of a borrower's application and the lending decision, occur on the Reservation. Loans are funded from Company bank accounts at a bank within the exterior

boundaries of the Reservation. Collection actions in the Tribal Court are directly related to and arise out of the borrowers' consensual relationships with members of the Tribe. Moreover, the borrowers expressly consent to the jurisdiction of the Tribal Court under the terms of the loan agreements, and the Tribal Court's exercise of jurisdiction stems from the Tribe's sovereign authority to regulate economic activity of its members.

Accordingly, Defendants respectfully move this Court to grant partial summary judgment in their favor with respect to the issue of whether the Tribal Court has subject matter jurisdiction over collection actions filed by the Companies.

II. RELEVANT FACTUAL BACKGROUND

Webb is an enrolled member of the Tribe. (Joint Stipulation of Material Facts as to Which There is No Genuine Issue to Be Tried ("SMF"), at ¶ 1.) All of the Companies are limited liability companies organized under the laws of the state of South Dakota, and licensed by the Tribe to do business on the Reservation. (SMF ¶ 2; *see also* Exhibit A (business licenses).) All Companies are wholly owned by Webb. (SMF ¶ 2.) Webb resides, and the Companies are located, within the external boundaries of the Reservation. (SMF ¶ 3.)

Defendants High Country Ventures, LLC, Great Sky Finance, LLC, Payday Financial, LLC, Red River Ventures, LLC, Redstone Financial, LLC, and Western Sky Financial, LLC (the "Lending Companies") made or make short-term loans to borrowers outside of South Dakota. (SMF ¶ 4.) All loans that are involved in this lawsuit are made by the Lending Companies. (SMF ¶ 4.)

Borrowers are not members of the Tribe and reside outside South Dakota. (SMF ¶ 6.)

In a typical loan transaction a potential borrower contacts a Lending Company on the Reservation over the telephone or the Internet to apply for a loan. (SMF ¶ 7b.) All communications between the Lending Companies (located within the exterior boundaries of the Reservation) and borrowers occur over the telephone or the Internet. (SMF ¶ 7a.)

A potential borrower sends his or her application and background information to a Lending Company, which then considers the application to determine whether to approve it. (SMF ¶ 7c.) All lending decisions are made on the Reservation. (SMF ¶ 7d.) The approval or denial of a loan application is communicated to a potential borrower over the telephone or the Internet from the Reservation. (SMF ¶ 7f.) If a potential borrower's application is approved and the borrower accepts the loan, the loan is funded from a bank located within the exterior boundaries of the Reservation. (SMF ¶ 7g.)

The loan agreements entered into between the Lending Companies and the borrowers provide for the exclusive jurisdiction of the Tribal Court over enforcement actions. (SMF ¶ 8.)

A typical loan agreement provides as follows:

This Loan Contract is subject solely to the exclusive laws and jurisdiction of the Cheyenne River Sioux Tribe, Cheyenne River Indian Reservation. By executing this Loan Contract, you, the borrower, hereby acknowledge and consent to be bound to the terms of the Loan Contract, [and] consent to the sole subject matter and personal jurisdiction of the Cheyenne River Sioux Tribal Court

. . .

You . . . expressly agree to the sole application of the Indian Commerce Clause of the US Constitution and the laws of the Cheyenne River Sioux Tribe regarding this Agreement . . . and the sole jurisdiction of the Cheyenne River Sioux Tribal Court regarding any and all matters arising therefrom.

(SMF ¶ 9.)

The FTC filed its Amended Complaint on March 1, 2012, alleging, *inter alia*, that the Defendants' practice of filing collection lawsuits against borrowers to enforce the loan agreements in the Tribal Court is an unfair and deceptive practice prohibited under Section 5(a) of the FTC Act, 15 U.S.C. § 45(a). The FTC also alleges that the loan agreements are unfair and deceptive because the choice-of-law and venue provisions provide for application of Tribal law and the exclusive jurisdiction of the Tribal Court. The FTC alleges that these practices are unfair and deceptive because the Tribal Court lacks subject matter jurisdiction over borrowers, who are nonmembers of the Tribe. *Id.* ¶¶ 37, 65-66. If the Tribal Court has jurisdiction over the nonmember borrowers, the FTC's claims in this regard necessarily fail as a matter of law.

III. ARGUMENT AND CITATION TO AUTHORITY

A. Legal Standard

Summary judgment is proper where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Passions Video, Inc. v. Nixon*, 458 F.3d 837, 840 (8th Cir. 2006). "Where unresolved issues are primarily legal rather than factual, summary judgment is particularly appropriate." *Mansker v. TMG Life Ins. Co.*, 54 F.3d 1322, 1326 (8th Cir. 1995).

B. Tribal Jurisdiction Over Non-Indians Under *Montana v. United States*.

The federal government has long encouraged tribal self-government, in recognition of Indian tribes as distinct cultural and political communities. *Plains Commerce Bank v. Long Family Land and Cattle Co., Inc.*, 491 F.3d 878, 884 (8th Cir. 2007), *rev'd on other grounds*, 554 U.S. 316 (2008). As part of their residual sovereignty, tribes retain power to legislate and to tax activities on the reservation, including certain activities by nonmembers. *Plains Commerce*

Bank v. Long Family Land and Cattle Co., Inc., 554 U.S. 316, 327 (2008). As a general rule, tribal authority, including the jurisdiction of tribal courts, generally does not extend to nonmembers. *Id.* at 340.

In *Montana v. United States*, the United States Supreme Court recognized two exceptions to this general rule. 450 U.S. 544 (1981). Under these exceptions, a tribe's civil jurisdiction extends to non-Indians in appropriate circumstances. *Id.* at 565; *see also Fox Drywall & Plastering, Inc., et al. v. Sioux Falls Constr. Co., et al.*, Case No. 12-4026-KES, 2012 WL 1457183, slip op at *5 (D.S.D. Apr. 26, 2012) (attached at Exhibit B); *Bank of Hoven, now known as Plains Commerce Bank v. Long Family Land and Cattle Co., Inc.*, Case No. 03-002-A, R-120-99, slip op. at p. 9-10 (Cheyenne River Sioux Tribal Court of Appeals Nov. 22, 2004) (attached as Exhibit C).

Under the first *Montana* exception,

a tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.

Id. at 565 (citations omitted). Regulation through “other means” includes adjudication of disputes in tribal courts. *See Strate v. A-1 Contractors*, 520 U.S. 438, 451-533 (1997); *Nevada v. Hicks*, 533 U.S. 353, 359 n.3, 372 (2001); *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 654-56 (2001). The Supreme Court has consistently confirmed that the first *Montana* exception encompasses tribal court authority. For example, in *Strate*, the Court called “unremarkable” the proposition that “where tribes possess authority to regulate the activities of nonmembers, civil jurisdiction over disputes arising out of such activities lies in the tribal courts.” 520 U.S. at 453 (brackets and internal quotation marks omitted).

The first *Montana* exception applies in this case. That exception provides for tribal jurisdiction when a nonmember consents to commercial dealings with a tribe or its members, thereby submitting to tribal jurisdiction over matters tied to that relationship. *See, e.g., Hicks*, 533 U.S. at 371-372; *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 142 (1982) (“a tribe has no authority over a nonmember until the nonmember enters tribal lands **or conducts business with the tribe**”; emphasis added). When providing examples of cases that come within this consensual-relationship exception, the Supreme Court cited a case holding that a tribal court had exclusive jurisdiction over a lawsuit that arose from a sales transaction between a member and a nonmember. *Strate*, 520 U.S. at 547 (citing *Williams v. Lee*, 358 U.S. 217 (1959) (declaring tribal jurisdiction exclusive over lawsuit arising out of on-reservation sales transaction between non-Indian plaintiff and Indian defendants)).

A consensual relationship alone is insufficient to confer tribal authority over a non-Indian. *Atkinson Trading*, 532 U.S. at 656; *Strate*, 520 U.S. at 457. In addition to such a relationship, a tribe’s regulation of a non-Indian, whether it be imposition of a tax or adjudication by a tribal court, must have a close nexus to the consensual relationship between the tribe and the nonmember. *Id.* “A nonmember’s consensual relationship in one area does not trigger tribal civil authority in another.” *Id.*

Finally, the Supreme Court has also considered two additional factors in determining whether a tribe may exercise civil authority over nonmembers. First, a nonmember must consent to the tribe’s civil jurisdiction, either expressly or by his actions. *Plains Commerce Bank*, 554 U.S. 316, 337 (2008); *see also Fox Drywall*, Case No. 12-4026-KES, 2012 WL 1457183, *11. Second, “the regulation must stem from the tribe’s inherent sovereign authority to set

conditions on entry, preserve tribal self-government, or control internal relations.” *Montana*, 450 U.S. at 564; *see also Merrion*, 455 U.S. at 137 (recognizing tribe’s “general authority, as sovereign, to control economic activity within its jurisdiction”); *see also Fox Drywall*, Case No. 12-4026-KES, 2012 WL 1457183, *13.

C. The Tribal Court Has Subject Matter Jurisdiction Over Borrowers Who Enter Into Consensual Contractual Relationships with the Lending Companies.

The Tribal Court has jurisdiction over collection lawsuits filed by the Companies against non-Indian borrowers under the first *Montana* exception. First, the Companies involved in consumer loan transactions are wholly owned by Webb, who is an enrolled member of the Tribe. Second, by entering into loan agreements with the Lending Companies, borrowers are entering into a consensual contractual relationship with a company owned by a member of the Tribe. Third, a collection action filed in the Tribal Court is directly related to, and therefore has a nexus with, the consensual relationship between the Lending Companies and the non-Indian borrower. Fourth, the borrowers’ consent to the jurisdiction of the Tribal Court and the Tribal Court’s exercise of jurisdiction stems from the Tribe’s inherent sovereignty.

1. The Lending Companies are Wholly Owned by a Member of the Tribe.

Borrowers who enter into loan agreements with the Lending Companies are entering into contracts with members of the Tribe. *See, e.g., Plains Commerce Bank v. Long Family Land and Cattle Co., Inc.*, 491 F.3d 878, 886 (8th Cir. 2007), *rev’d on other grounds*, 554 U.S. 316 (2008); *Hagan v. Sisseton-Wahpeton Community College*, 205 F.3d 1040, 1043 (8th Cir. 2000); *Smith v. Salish Kootenai College*, 434 F.3d 1137, 1135 (9th Cir. 2006) (en banc). As the Tribal Court of Appeals noted in the *Plains Commerce Bank* case, “This case is the prototype for a consensual agreement as it involves a signed contract between a tribal member and a non-Indian bank.”

Bank of Hoven, now known as Plains Commerce Bank, Case No. 03-002-A, R-120-99, slip op. at p. 10.

The Lending Companies are wholly owned by Webb, who is an enrolled member of the Tribe. (SMF ¶¶ 1-2.) Entities owned by tribes or tribal members take on the tribal characteristics of their owners, even if they are formed under state, rather than tribal, law. *Pourier v. S.D. Dep't of Revenue*, 658 N.W.2d 395, 403-05 (S.D. 2003), *vacated in part on other grounds*, 674 N.W.2d 314 (2004); *see Giedosh v. Little Wound Sch. Bd.*, 995 F. Supp. 1052, 1059 (D.S.D. 1997); *Flat Ctr. Farms, Inc. v. State Dep't of Revenue*, 49 P.3d 578, 581-82 (Mont. 2002); *Colorado v. Cash Advance*, No. 05CV1143, slip op. at 10 (Denver Dist Ct. Feb. 18, 2012) (same) (attached at Exhibit D); *cf.* 25 U.S.C. § 4302(5) (2006) (“[T]he term ‘Indian-owned business’ means an entity organized for the conduct of trade or commerce with respect to which at least 50 percent of the property interests of the entity are owned by Indians or Indian tribes (or a combination thereof),” with no reference to the laws under which said business is formed.).

This position effectuates Congressional recognition of Indian corporations, federal policy favoring economic development on reservations, and other examples where entities assume the identities of their owners. *See Pourier*, 658 N.W. 2d at 404-05. To decide otherwise would prevent the Tribe from regulating the on-Reservation commercial activity of its own members who happen to act through the entity form.¹

¹ While an occasional case takes a somewhat contradictory position, *see, e.g., Airvator, Inc. v. Turtle Mountain Mfg. Co.*, 329 N.W.2d 596 (N.D. 1983), the weight of authority is in favor of attaching an owner’s identity to his or her entity. *See, e.g., Eastern Navajo Indus., Inc. v. Bureau of Revenue*, 552 P.2d 805 (N.M. App. 1976); *see also Cosgrove v. Bartolotta*, 150 F.3d 729 (7th Cir. 1998) (LLC assumes owner’s citizenship for diversity-jurisdiction purposes); *Guides, Ltd. v. Yarmouth Group Property Mgmt., Inc.*, 295 F.3d (continued...)

Here, Webb is a member of the Tribe, and each of the Companies is wholly owned by Webb. (SMF ¶¶ 1-2.) Additionally, each of the Companies is a South Dakota limited liability company registered to do business by the Tribe. (SMF ¶ 2.) All of the Companies are located within the exterior boundaries of the Reservation. (SMF ¶ 3.) All of this is clearly indicated on the Companies' websites and in the loan documents. As the Eighth Circuit concluded in *Plains Commerce Bank*, the Companies are therefore tribal in character and treated as members of the Tribe. *Plains Commerce Bank*, 491 F.3d at 886 (8th Cir. 2007).

2. There is a Consensual Contractual Relationship Between the Non-Indian Borrowers and the Lending Companies.

By entering into the loan agreements with the Lending Companies, borrowers enter into a consensual contractual relationship with members of the Tribe. Although the borrowers do not physically enter the Reservation, the loan transaction occurs on the Reservation. Borrowers contact the Lending Companies on the Reservation to submit loan applications through the telephone or internet, and the entirety of the Lending Companies' actions, including the consideration of the borrower's application, the decision to lend, and the funding of the loan, occur on the Reservation. (SMF ¶¶ 7a-7d.) Additionally, each loan is funded from a Bank located within the exterior boundaries of the Reservation. (SMF ¶ 7g.) The Supreme Court in *Montana* specifically contemplated that such contractual relationships could give rise to tribal

(...continued)

1065, 1072 & n.2 (10th Cir. 2002) (corporation assumes racial characteristics of owner); *Gersman v. Group Health Ass'n, Inc.*, 931 F.2d 1565 (D.C. Cir.1991), *vacated on other grounds*, 502 U.S. 1068 (1992) (same); *Hudson Valley Freedom Theater, Inc. v. Heimbach*, 671 F.2d 702, 706 (2d Cir. 1982) (same); *Howard Security Services v. Johns Hopkins Hospital*, 516 F. Supp. 508 (D. Md. 1981) (same); *see also* 26 C.F.R. § 301.7701-2(a) (single-member LLCs assume owner's identity for tax purposes).

court jurisdiction. “[A] tribe may regulate . . . the activities of nonmembers who enter consensual relationships with the tribe or its members, *through commercial dealing, contracts, leases, or other arrangements.*” *Montana*, 450 U.S. at 565-66 (emphasis added).

3. The Exercise of Jurisdiction by the Tribal Court has a Close Nexus to the Parties’ Consensual Relationship.

The adjudication of collection law suits filed in the Tribal Court to enforce the loan agreements arises out of and is closely related to the contractual relationship between the borrowers and Tribal members. A borrower’s relationship with the Tribal member is created and defined by the loan agreement sought to be enforced in the Tribal Court. Just as a tribal court has jurisdiction over claims arising from a sales transaction between a member of the tribe and a nonmember, so too does the Tribal Court have jurisdiction over a loan transaction between a nonmember and a company owned by a member. *See Williams v. Lee*, 358 U.S. 217 (1959) (declaring tribal jurisdiction exclusive over lawsuit arising out of on-reservation sales transaction between nonmember plaintiff and member defendants).

4. Borrowers Consent to Jurisdiction of the Tribal Court and the Exercise of Jurisdiction Stems from the Tribe’s Inherent Sovereign Authority.

As noted above, for a tribe to exercise jurisdiction over a nonmember, the nonmember must also consent to tribal jurisdiction, and the exercise of that jurisdiction must stem from the tribe’s inherent sovereign authority. Here, both of these requirements are met.

First, by entering into a contractual relationship with one of the Companies, a borrower expressly consents to the jurisdiction of the Tribal Court under the explicit terms of the loan agreement. *See Fox Drywall*, Case No. 12-4026-KES, 2012 WL 1457183, *10-12 (finding that subcontractors consented to tribal court jurisdiction and application of tribal law by, *inter alia*,

entering into a contract providing for same). Second, a borrower's activities in entering into a loan transaction with a member of the Tribe is precisely the type of nonmember conduct that the Tribe has a sovereign interest in regulating. *Merrion*, 455 U.S. at 137 (recognizing Tribe's "general authority, as sovereign, to control economic activity within its jurisdiction"); *see also Fox Drywall*, Case No. 12-4026-KES, 2012 WL 1457183, *13 (same).

D. The Supreme Court's Decision in *Plains Commerce Bank* Does Not Foreclose Jurisdiction of Tribal Courts Over Nonmembers.

The Supreme Court's most recent opinion discussing the jurisdiction of tribal courts over non-Indians is *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316 (2008). In *Plains Commerce Bank*, the Supreme Court considered whether the Cheyenne River Sioux Tribal Court (the same Tribal Court at issue in the instant case) had jurisdiction over a discrimination claim brought by Tribal members and the corporation that they owned against a nonmember bank. *Id.* at 322-23. The nonmember bank had a long relationship with the Tribal members and their company. *Id.* at 321. The bank owned property within the exterior boundaries of the Reservation and leased the property to the company. *Id.* at 321-22. When the bank subsequently sold the property to non-Indians, the Tribal members and their company sued the bank in the Tribal Court. *Id.* at 322. The Tribal members and their company asserted several claims against the bank regarding the bank's alleged failure to make loans to them, including claims for breach of contract and bad faith dealings. *Id.* The Tribal members and their company also asserted a discrimination claim challenging the bank's sale of its land to non-Indians. *Id.* After a jury found in favor of the Tribal members and their company, the bank appealed and challenged the Tribal Court's subject matter jurisdiction over the discrimination claim. *Id.* No

question was ever raised regarding the Tribal Court's subject matter jurisdiction over the other claims asserted by the Tribal members and their company – and on which they prevailed. *See id.*

The Cheyenne River Sioux Tribal Court of Appeals found that the Tribal Court had jurisdiction over the discrimination claims. *Id.* at 323-24. This Court and the Eighth Circuit agreed. *Id.*; *see also* 2006 DSD 11, 440 F. Supp. 1070 (D.S.D. 2006); 491 F.3d 878 (8th Cir. 2007). However, the Supreme Court reversed. 554 U.S. at 324. The Supreme Court concluded that *Montana's* consensual relationship exception did not apply and the Tribal Court lacked jurisdiction over the discrimination claim. *Id.* at 340.

While the bank had extensive dealings and a consensual relationship with the Tribal members and their company, the Court found that the adjudication of the discrimination claim did not have a close nexus to that relationship. The discrimination claim was not related to the bank's contractual relationships with the Tribal members and their company. Instead, the Supreme Court concluded that the discrimination claim was a restraint on alienation, and that the Tribe did not have jurisdiction to regulate the sale of non-Indian fee land owned by a non-Indian bank to a non-Indian purchaser. *Id.* at 331-332, 339-340. “[T]here is no reason the Bank should have anticipated that its general business dealings with respondents would permit the Tribe to regulate the Bank's sale of land it owned in fee simple.” *Id.* at 338.

The Supreme Court never considered whether the Tribal Court's jurisdiction over the breach of contract and bad-faith dealing claims was proper. The Bank never challenged the Tribal Court's jurisdiction over those claims, and the Supreme Court declined to speculate as to the answer. *Id.* at 324, 339 n.2; *see also id.* (“The Longs are the first to point out that their breach-of-contract and bad-faith claims, which *do* involve the Bank's course of dealings, are not

before this Court. Only the discrimination claim is before us and that claim is tied specifically to the sale of the fee land.”). The Supreme Court held only that tribal courts may not exercise jurisdiction over a nonmember’s sale of non-Indian fee land. *Id.* at 339. Notably, the dissent indicated that jurisdiction over the contract claims was proper. *Id.* at 348 n.1 (Ginsberg, J., dissenting).

Given that the Supreme Court specifically declined to address the issue presented here, *i.e.* whether the Tribal Court has jurisdiction over claims directly related to the enforcement of a consensual contractual agreement entered into between nonmembers and members, the Supreme Court’s *Plains Commerce Bank* decision does not foreclose jurisdiction over such cases.

VI. CONCLUSION

For the foregoing reasons, Defendants move the Court to 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 May 18, 2012.

/s/ Cheryl Bogue_____.

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CERTIFICATE OF SERVICE

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

DATED May 18, 2012.

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