

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

CHRISTOPHER GRAHAM, and ELLEN
RUSSO, on Behalf of Themselves and All
Others Similarly Situated,

Plaintiffs,

v.

BMO HARRIS BANK, N.A., NATIONAL
BANK OF CALIFORNIA, N.A., FIRST
INTERNATIONAL BANK & TRUST, a
North Dakota State-Chartered Bank, FIRST
PREMIER BANK, a South Dakota State-
Chartered Bank, MISSOURI BANK AND
TRUST, a Missouri-Chartered Bank, and
NORTH AMERICAN BANKING
COMPANY, a Minnesota State- Chartered
Bank,

Defendants.

Case No. 3:13-cv-01460 (WWE)

March 6, 2014

**DEFENDANT FIRST INTERNATIONAL BANK & TRUST'S MEMORANDUM OF
LAW IN SUPPORT OF ITS MOTION TO DISMISS, FILED IN THE
ALTERNATIVE TO ITS MOTION TO COMPEL ARBITRATION**

PRELIMINARY STATEMENT

Plaintiff Ellen Russo (“Plaintiff”) entered into an agreement for a short-term loan with OneClickCash, a lender wholly owned and operated by a federally recognized Indian tribe, the Santee Sioux Nation of Nebraska. Plaintiff brings this putative class action alleging that the loan she obtained from OneClickCash was illegal under the law of her home state, Connecticut. However, instead of suing OneClickCash directly, Plaintiff has brought suit against First International Bank & Trust (“First International”), the bank that processed the payments she made toward her loan from OneClickCash.

First International has moved to compel arbitration because Plaintiff’s loan agreement requires her to arbitrate claims not only against her lender, but also against her lender’s servicers and agents. (Doc. Nos. 64–66.) First International respectfully requests that the Court first decide its motion to compel arbitration. However, as noted in its Motion To Modify October 4, 2013 Order on Pretrial Deadlines (Doc. No. 71), First International recognizes that several other defendants in this action have brought motions to dismiss and that, should the Court elect to reach those motions, it may be more efficient for the Court to consider all defendants’ motions to dismiss at once. Accordingly, First International submits this motion to dismiss, in the alternative, for the reasons set forth below.

First, Plaintiff’s claims should be dismissed for failure to join an indispensable party under Rules 12(b)(7) and 19. Courts have repeatedly recognized that OneClickCash is an arm of an Indian tribe, and cannot be sued in federal court under governing principles of tribal sovereign immunity. Where a suit seeks to adjudicate the contractual rights of an absent sovereign, that sovereign must be joined, and if it cannot be joined due to its sovereign immunity, the suit must be dismissed. A party cannot avoid sovereign immunity by seeking to have the rights of the sovereign adjudicated in its absence. Second, Plaintiff’s claims should be dismissed under Rule 12(b)(6) for failure to state a claim under the Racketeer Influenced and Corrupt Organizations Act (“RICO”) or state law.

ARGUMENT

To avoid burdening the Court with duplicative briefing, First International incorporates by reference the authorities and legal arguments cited in Defendant BMO Harris Bank, N.A.'s Memorandum of Law (Doc. No. 115) and Reply Memorandum of Law (Doc. No. 171) in Support of its Rule 12(b)(6)-(b)(7) and Rule 19 Motion to Dismiss (collectively, "BMO's Motion to Dismiss"). First International will limit this memorandum to providing information specific to Plaintiff's claims against First International: in particular, the status of her lender OneClickCash as an arm of a federally recognized Indian tribe that is entitled to tribal immunity from suit in federal court and therefore cannot be joined as a party in this action.

BMO's Motion to Dismiss outlines the reasons why Plaintiff's RICO and state law claims fail as a matter of law under Rule 12(b)(6). Those reasons are equally applicable to First International. Plaintiff's RICO causes of action fail because she has not sufficiently alleged that (1) First International was "associated with any enterprise"; (2) First International "conduct[ed] or participate[d] . . . in the conduct of [the purported] enterprise's affairs"; (3) First International engaged in "collection of unlawful debt"; or (4) First International had knowledge of the purportedly unlawful conduct. (18 U.S.C. § 1962(c); *see* Doc. No. 115 at 8-19; Doc. No. 171 at 3-7.) Plaintiff has similarly failed to sufficiently allege under Connecticut law that: (1) First International knowingly aided and abetted OneClickCash's purported violations of Connecticut's usury statute and small loan law; (2) First International "retained" the funds that were debited from Plaintiff's account or benefited from purportedly retaining the funds, in order to sufficiently plead a claim for assumpsit; or (3) there was a general business practice or proximate cause of the alleged harm to Plaintiff by First International's purportedly unfair practices, necessary for a claim under Connecticut's Unfair Trade Practices Act. (*See* Doc. No. 115 at 19-23; Doc. No. 171 at 7-10.)

BMO's Motion to Dismiss also explains why Plaintiff's claims should be dismissed under Rule 12(b)(7) and Rule 19 for failure to join her lender, which is an indispensable party. The inquiry for failure to join an indispensable party is a three-step process. First, the Court

must determine whether the absent party is “necessary” under Rule 19(a). Fed. R. Civ. P. 19(a) (prescribing three situations in which the absent party will be found to meet the definition of a necessary party). The second step is to determine whether joinder of the absent party is feasible without destroying subject matter jurisdiction. When a party is considered necessary and joinder is not feasible, the Court must proceed to the third step to decide whether the absent party is indispensable, such that the action must be dismissed. Fed. R. Civ. P. 19(b) (setting forth criteria for determining whether a party is indispensable).

For the reasons explained in BMO’s Motion to Dismiss, OneClickCash is a necessary and indispensable party to Plaintiff’s suit. OneClickCash is a party to the loan agreement at issue in this case. (Doc. No. 115 at 5-7.) Each of Plaintiff’s claims is predicated on requiring the Court to conclude that her loan agreement with that lender is illegal and invalid. (*Id.* at 6-8.) OneClickCash has significant and particular interests to protect, as Plaintiff seeks a permanent injunction that would prohibit First International “from serving as an ODFI for Out-Of-State Payday Lenders” and would require First International to divert to Plaintiff and other borrowers funds otherwise belonging to OneClickCash. (*See id.* at 7-8; Compl. ¶ 259.)

Once First International has shown that OneClickCash is a necessary party, it is Plaintiff’s burden to prove that OneClickCash is not immune from suit and therefore can be joined. *See Tassone v. Foxwoods Resort Casino*, No. 3:11cv1718 (WWE), 2012 U.S. Dist. LEXIS 71882, at *2 (D. Conn. May 23, 2012) (“Once the question of jurisdiction is raised, the burden of establishing subject matter jurisdiction rests on the party asserting such jurisdiction.”) (citing *Thomson v. Gaskill*, 315 U.S. 442, 446 (1942)); *Colorado v. Cash Advance*, No. 05CV143, 2012 WL 3113527, at 4-5 (D. Colo. Feb. 18, 2012) (granting motion to dismiss and explaining plaintiff had failed to meet its burden of proving the two tribal entities were not immune).

Notwithstanding that it is Plaintiff’s burden to show that OneClickCash is subject to suit in this case, First International submits the following evidence demonstrating that OneClickCash’s tribal immunity prevents it from being joined in this action. As a matter of

federal law, absent congressional authorization or an Indian tribe's consent to suit, a federally recognized Indian tribe is immune from suit, even if the activity that is the subject of the lawsuit is purely commercial in nature. *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 754–755 (1998). That immunity extends to a tribe's for-profit business entities when the entity is operating as an “arm of the tribe.” *See id.* at 760; *Tassone*, 2012 U.S. Dist. LEXIS 71882, at *2 (“An arm of the tribe is treated the same as the tribe for jurisdictional purposes.”).

Plaintiff's lender is a tribal lending entity named SFS, Inc., which uses the trade name “OneClickCash.” (Declaration of Rita Lin in Support of Motion to Dismiss Ex. 1, Declaration of Chairman Roger Trudell, Santee Sioux Nation (“Trudell Decl.”) ¶¶ 7, 11 & Exs. B-C; Doc. No. 66-1 at 18, 22, 25.) Because Plaintiff's complaint refers to her lender using its trade name “OneClickCash,” First International refers to SFS, Inc. as “OneClickCash” in this brief to avoid confusion.

OneClickCash is wholly owned and operated by the Santee Sioux Nation (“Santee Sioux Nation” or the “Tribe”), a federally recognized Indian tribe. (Trudell Decl. ¶ 7; Exs. B-C.) Courts have uniformly held that OneClickCash is an arm of an Indian tribe and entitled to sovereign immunity. *See Cash Advance*, 2012 WL 3113527, at 7-11 (granting defendant's motion to dismiss and concluding defendant was immune from suit as a wholly owned tribal entity created by the Santee Sioux Tribe pursuant to tribal law); *People v. Miami Nation Enters.*, 223 Cal. App. 4th 21, 24 (2014) (affirming dismissal for lack of subject matter jurisdiction in action against OneClickCash and another tribal lender because the “tribal entities and their cash-advance and short-term-loan businesses are sufficiently related to their respective Indian tribes to be protected from this state enforcement action under the doctrine of tribal sovereign immunity”).

The same result should obtain here. Courts in the Second Circuit have identified the following factors as relevant in determining whether an entity is an arm of a tribe:

[T]he entity is organized under tribal constitution or laws (rather than federal law); the organization's purpose(s) are similar to a tribal government's (e.g., promoting tribal welfare, alleviating unemployment, providing money for tribal programs); the organization's managing body is necessarily composed primarily

of tribal officials (e.g., organization's board is, by law, controlled by tribal council members); the tribe's governing body has the unrestricted power to dismiss members of the organization's governing body; the tribe is the legal owner of property used by the organization, with title held in the tribe's name; the organization's administrative and/or accounting activities are controlled or exercised by tribal officials; and a suit against the entity will impact tribal resources.

Warren v. United States, 859 F. Supp. 2d 522, 540 (W.D.N.Y. 2012) (citation omitted).

OneClickCash satisfies all of these factors. OneClickCash is organized under tribal law. The Santee Sioux Nation is a federally-recognized Indian tribe, organized under Section 16 of the Indian Reorganization Act of 1934 and governed by its Constitution as approved, with amendments, by the Secretary of the Interior on August 30, 2002. (Trudell Decl. ¶ 3 & Ex. A; *see also* Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs, 75 Fed. Reg. 60,810–60,812 (Oct. 1, 2010).) To conduct the business for the Tribe, the Santee Sioux Nation created a wholly-owned and controlled Tribal subdivision named “SFS, Inc.”—doing business as “OneClickCash”—which it chartered under the laws of the Santee, pursuant to its sovereign immunity, its authority under Section 16 of the Indian Reorganization Act of 1934, 25 U.S.C. § 476, and the Tribe's Business Corporations Code. (Trudell Decl. ¶ 7 & Exs. B-C.) The Tribe is the legal owner of all shares in OneClickCash. (*Id.* Exs. B-C.) OneClickCash is subject to the Santee Sioux Nation Business Corporations Code, and the Santee Sioux Nation Code on Interest Loans and Debt, a Tribal Code regulating lending activities. (*Id.* ¶ 7 & Exs. D-F.) It is licensed and regulated by tribal regulators. (*Id.* ¶ 13.) OneClickCash's Articles of Incorporation specifically bestow OneClickCash with the Santee Sioux Nation's sovereign immunity, and OneClickCash does not have the power to waive that immunity or the Tribe's sovereign immunity. (*Id.* ¶ 9.)

OneClickCash's purpose is to promote tribal welfare and alleviate unemployment, and if successful, a suit invalidating OneClickCash's entire business would certainly impact tribal resources. (*Id.* ¶¶ 5, 14.) The Santee Sioux Nation is located in a severely economically depressed area of rural Northeastern Nebraska, where disadvantage and poverty are high. (*Id.* ¶¶ 5-6.) In 2012,

23% of individual Tribal members and a third of Santee Sioux Nation families with children under the age of five were living in poverty. (*Id.* ¶ 6.) Unlike state governments, the Santee Sioux Nation has no tax base to provide a revenue source to fund its governmental programs and services, and the Tribe therefore must develop viable economic ventures to provide funding. (*Id.* ¶ 5.) Accordingly, the Tribal Council, which is the governing body of the Santee Sioux Nation, determined that it was in the Tribe's best interests to develop an online lending business, one of the few businesses that are viable in the remote location where the Santee Sioux Nation has been relocated. (*Id.* ¶ 7.) All profits earned by OneClickCash are used to help fund the Tribe's operations, expenditures, and social welfare programs. (*Id.* ¶ 14.) For example, OneClickCash profits assist in funding the Tribal Head Start incentive program, the Tribal Emergency Assistance Program, day care for children of Tribal members, and nutrition programs for the elderly. (*Id.*) Prior to the Tribe's creation of OneClickCash, many of these programs and services either did not exist or were severely underfunded. (*Id.*)

OneClickCash's managing body is necessarily composed primarily of Tribal officials. OneClickCash is governed by a Board of Directors comprised of duly elected members of the Santee Sioux Nation Tribal Council. (*Id.* ¶ 8.) The Tribal Council has unrestricted authority over OneClickCash, and Tribal officials control the administration of OneClickCash's affairs, because the CEO of OneClickCash reports to the Board and the Tribal Council. (*Id.* ¶ 8 & Ex. C.) Moreover, OneClickCash's property is the Tribe's property, because the Tribe is the 100% sole shareholder in OneClickCash. (*Id.*)

In sum, OneClickCash is a necessary and indispensable party that cannot be joined because it is immune from suit as an arm of the Santee Sioux Nation.

II. CONCLUSION

For the foregoing reasons and those outlined in BMO's Motion to Dismiss, First International respectfully submits in the alternative that the Court should dismiss Plaintiff's complaint against First International.

Dated: March 6, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 6, 2014, a copy of the foregoing was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

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