UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN
MILWAUKEE DIVISION

ERIC WILLAMS *ET AL*.,

Plaintiffs,

Case No. 14-cv-903-WED

vs.

CASHCALL, INC,

Defendant.

PLAINTIFFS' BRIEF IN RESPONSE TO DEFENDANTS' MOTION TO DISMISS OR COMPEL ARBITRATION

PROCEDURAL HISTORY

Plaintiffs Eric Williams and Lisa Walker filed this class action against CashCall Inc. in Milwaukee County Circuit Court on June 20, 2014. CashCall removed the action to the District Court on July 30, 2014 and filed a Motion to Dismiss or in the Alternative to Compel Arbitration on August 6, 2014.

INTRODUCTION

The case arises after the Plaintiffs entered into high interest loans with CashCall Inc. In their Motion to Dismiss, the Defendant argues three different the court should compel arbitration or dismiss the case: 1) a purported arbitration clause, 2) an allegation that Wisconsin law cannot be applied, and 3) an argument that the District Court is not the correct forum under the Doctrine of Tribal Exhaustion.

While the Defendant is seeking to enforce a specific arbitration clause, forum selection clause, and application of tribal law, the Seventh Circuit has expressly rejected the identical contractual clauses in a case stemming from the Northern District of Illinois. *Jackson v. Payday Financial, LLC*, [No. 12-2617, August 22, 2014] __ F.3d.__ (7th Cir. 2014). For the same reasons enumerated in *Jackson*, this court must reject the arguments of the Defendant and deny their Motion.

BACKGROUND

The players in this case fall into three groups - consumers, Western Sky, and CashCall. Western Sky acts as nothing more than a straw man, crafting an illusory picture of tribal involvement to shield CashCall from liability for its usurious lending practices. These actions prompted the Banking Department of the State of New Hampshire to state in their "Order to Cease and Desist:"

> After detailed review of the respondents' business scheme, it appears that Western Sky is nothing more than a front to enable CashCall to evade licensure by state agencies and to exploit Indian Tribal Sovereign Immunity to shield its deceptive business practices from prosecution by state and federal regulators. Western Sky holds itself out to the public as a stand alone tribal entity which provides small loans and payday loans to consumers. In reality, however, CashCall creates all advertising and marketing materials for Western Sky and reimburses Western Sky for administrative costs. CashCall reviews consumer applications for underwriting requirements. CashCall funds the loans. CashCall services the loans. Western Sky does not receive any payment from consumers for the loans.

Miller Aff., Exhibit A, p 5.

New Hampshire's Banking Department found that there are three ways that consumers can take out loans with CashCall and/or Western Sky: though a call center, CashCall's website, or Western Sky. However, CashCall is the provider of the Western Sky website, reimburses

Western Sky for costs Western Sky incurred from its server, and pays for Western Sky's promotional material. Office supplies, the fax number, and the toll free number for Western Sky are paid for by CashCall. *Id.* at p 3.

Additionally New Hampshire's Banking Department found out that after a request for funding from a consumer is received, CashCall does the review for underwriting requirements. While the loans are promissory notes executed by Western Sky, the actual money comes from a "Reserve Account," which is funded and maintained by CashCall. After the "funding" of the loan, CashCall must purchase the promissory note. *Id.* at p 3-4.

The findings of the Banking Department go on to state:

> As compensation for services provided, Western Sky pays CashCall 2.02% of the face value of each approved and executed loan transaction plus any additional charges with a net minimum payment of $100,000 per month. Conversely, in consideration for the terms of the agreement setting up the Reserve Account, CashCall agrees to pay Western Sky 5.145% of the face value of each approved and executed loan credit extension and/or renewal. Additionally, CashCall pays Western Sky a minimum monthly administration fee of $10,000.

Id. at p 5. Thus, a situation is created wherein CashCall is doing the work, providing the funds, and then compensating Western Sky for acting as the straw man. The Banking Department concluded that they "ha[ve] reasonable cause to believe that the substance of the transactions with New Hampshire consumers shows that CashCall, or its wholly-owned subsidiary, WS Funding, is the actual or de facto lender for the payday or small loans... Additionally, the Department has reasonable cause to believe that the respondents' business scheme constitutes an unfair or deceptive act or practice." *Id.* at p 6-7.

CashCall, which is incorporated in California and is not owned or operated by a member of the Cheyenne River Sioux Tribe, has been told by the Seventh Circuit Court of Appeals that

the contractual terms that they have used are not enforceable. This court should look past CashCall's ruse and deny their motion.

ISSUE PRESENTED

If a party has drafted a forum selection, choice-of-law, arbitration and waiver of class actions rights, should such clauses be enforceable if they operate together, as a part of a scheme, to (a) evade consumer protection statutes, (b) require arbitration in a forum outside the jurisdiction of the federal judiciary, (c) impose a procedurally and substantively unfair forum selection clause, (d) invoke the Doctrine of Tribal Exhaustion when no tribal interest are at play, and (e) to ultimately deny any form of relief to Wisconsin consumers?

FACTUAL ISSUES

In 2011 and 2012 Plaintiffs took out high interest loans from a company called "Western Sky Financial, LLC." Immediately after funding the loans, Western Sky sold the loans to a company called "CashCall, Inc." which was the last entity to service and collect on the loans. The loan taken out by Mr. Williams had an annual percentage rate (APR) in excess of 233%, and the loan to Ms. Walker had an APR in excess of 139%. Defendant CashCall has freely admitted to the purchase and servicing of these loans, as well as their APR. [Dkt. 12, Ex. A & B.]

Wis. Stat. §138.09(1m)(a) states that "[b]efore any person may do business under this section, charge the interest authorized by sub. (7), or assess a finance charge on a consumer loan in excess of 18% per year, that person shall first obtain a license from the division [of banking]." Defendant CashCall has not applied for or received a license under Wis. Stat. §138.09(1m)(a).

The Defendant's justification for violating this statute is that the laws of Wisconsin do not apply to them.

After the Defendant initially submitted their brief in support of their Motion, the Seventh Circuit Court of Appeals issued a decision wherein CashCall was a defendant. The holding of that decision rendered some of the arguments in their initial brief inapplicable and both parties agreed that an opportunity to submit a new brief and extension of the deadlines was appropriate.

APPLICABLE STANDARD OF REVIEW

Defendant CashCall stated that their Motion to Dismiss was based on "Rule 12." Should Plaintiffs' good faith assumptions about the relevant sections of Rule 12 discussed below prove wrong, they will seek leave to file a sur reply to address any argument raised by the Defendant. Because the Defendant removed the case under Class Action Fairness Act, the case is one based on "minimal diversity." 28 U.S.C. § 1332(d)(2).

Fed. R. Civ. P. 12(b)(3)

Defendant could assert Rule 12(b)(2) for lack of personal jurisdiction. If so, the Plaintiffs must prove that CashCall had sufficient "minimum contacts" such that maintenance of a lawsuit in Wisconsin "does not offend traditional notions of fair play and substantial justice." *International Shoe Co. v. State of Washington*, 326 U.S. 310, 316, (1945). "Minimum contacts" requires each defendant to have "purposefully availed [themselves] of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." *Hanson v. Denckla*, 357 U.S. 235, 253, (1958). The Supreme Court recently shed additional light on conduct that conveys personal jurisdiction over a defendant. See *Waldon v.*

Fiore, 134 S. Ct. 1115 (2014). Writing for a unanimous court, Justice Thomas stated "the proper question is not where the plaintiff experienced a particular injury or effect but whether the defendant's conduct connects him to the forum in a meaningful way." *Id*. at 1125.

Because there is no applicable federal statute authorizing nationwide service, applicable Wisconsin law will govern personal jurisdiction over the Defendants. Fed. R. Civ. P. 4(k)(1)(A); see also *Citadel Group Ltd. v. Wash. Reg'l Med. Ctr*., 536 F.3d 757, 760 (7th Cir. 2008). Because "Wisconsin's long-arm statute, Wis. Stat. § 801.05, has been interpreted to confer jurisdiction 'to the fullest extent allowed under the due process clause'" the Defendant should be subject to the personal jurisdiction of this court. *Felland v. Clifton*, 682 F.3d 665, 678 (7th Cir. 2012) (quoting *Daniel J. Hartwig Assocs., Inc. v. Kanner*, 913 F.2d 1213, 1217 (7th Cir. 1990)). Under Wisconsin's long-arm statute "it is well established that injury through mail or electronic communications satisfies section 801.05(3)." *Felland* at 679; see also *Stein v. Ill. State Assistance Comm'n*, 194 Wis.2d 775, (Wis. App. 1995).

Plaintiffs' factual assertions of the complaint must be construed as true, for purposes of a Motion to Dismiss. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). Because the Plaintiffs have alleged that they entered into a contract via electronic means with the Defendant, therein creating injury to the Plaintiffs, they have engaged in sufficient "minimum contacts" with the State of Wisconsin to subject themselves to the long-arm provisions of Wis. Stat. § 801.05.

Fed. R. Civ. P. 12(b)(6)

While it does not appear that the Defendant is relying on Rule 12(b)(6) for their Motion to Dismiss, the Plaintiffs will briefly outline why dismissal under 12(b)(6) is inappropriate at this time. To defeat a Motion to Dismiss, a plaintiff must provide a statement to "only give the

defendant fair notice of what the…claim is and the grounds upon which it rests." *Erickson v. Pardus*, 551 U.S. 89, 93 (2007). Plaintiffs have alleged that Defendant CashCall has violated specific provisions of applicable Wisconsin Statutes governing the Defendants conduct. Because Defendant has offered no specific reasons or details regarding a basis for dismissal, the Plaintiffs have nothing more to state at this time.

ARGUMENT

Defendant has alleged that one contract (hereinafter the "Williams Contract") is subject to a mandatory arbitration provision. They have also argued, for the purpose of preserving their record for appeal, that the second contract (hereinafter the "Walker Contract') is also subject to a mandatory arbitration clause. Defendant recognized that the arbitration clause contained in the Walker Contact has previously been invalidated by the Seventh Circuit, but nevertheless invited Ms. Walker to forgo her rights to a class action and a jury trial and instead subject herself to undesired arbitration. Ms. Walker rejects the invitation.

Secondly, the Defendant argues that the Dormant Commerce Clause requires that Wisconsin law be ignored. Finally, they argued that the contract was subject to an underlying forum selection clause and furthermore, that the Doctrine of Tribal Exhaustion precludes this court from any jurisdiction over the matter. Plaintiffs will show that each of these arguments is not supported by the law or facts, and most of the arguments have already been expressly rejected by the Seventh Circuit Court of Appeals.

I. The Arbitration Clause is Not Enforceable

While the Seventh Circuit has already held the "arbitration" clause in the Walker Contract is unenforceable, the Defendant has addressed the issues for purposes of preserving the record for appeal. In reviewing the contractual provisions related to arbitration, this court must "'rigorously enforce'" arbitration agreements according to their terms. *Am. Express Co. v. Italian Colors Restaurant*, 133 S.Ct. 2304, 2309, (2013) (quoting *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985)). However, just because an arbitration clause is present does not mean that the court must provide automatic enforcement of the provision. Instead, since the case is based on diversity of citizenship, the court must look to the substantive law of the state in which the district court sits. *Wachovia Sec., LLC v. Banco Panamericano, Inc*., 674 F.3d 743, 751 (7th Cir. 2012), *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78, (1938).

Under precedent from the Seventh Circuit, the court should apply the substantive law contained within the forum selection clause contained in the contract between the parties. See *IFC Credit Corp. v. United Bus. & Indus. Fed. Credit Union*, 512 F.3d 989, 991 (7th Cir.2008). The problem for the Defendant is that in this specific case, the Seventh Circuit has held that the substantive law provisions in the contract between the parties point to a non-existent body of tribal law, thereby requiring the application of federal law. *Jackson*.

Since Jackson was initially briefed, the Supreme Court has provided additional guidance related to the application of forum selection clauses, giving it "controlling weight in all but the most exceptional cases." *Atl Marine Constr. Co. v. U.S. Dist. Court for W. Dist. of Tex*., 134 S. Ct. 568, 581 (2013) (quoting *Stewart Organization, Inc. v. Ricoh Corp*., 487 U.S. 22 (1988)) (quoting (KENNEDY, J., concurring)). The heart of the test provided by the Court is this: would the interests of the public be protected by denial of the forum selection clause.

While Jackson relies on *M/S Bremen v. Zapata Off-Shore Co*., 407 U.S. 1, 92 (1972), that analysis is not inconsistent with the structure required of *Atlantic Marine,* as is indicative of why this court should not enforce the arbitration provisions: "The Cheyenne River Sioux Tribe 'does not authorize Arbitration,' it 'does not involve itself in the hiring of arbitrator[s],' and it does not have consumer dispute rules. We have no hesitation concluding that an illusory forum is unreasonable under M/S Bremen." *Jackson*. Considering the complete dearth of any form of arbitration for consumer dispute rules under tribal law, the provisions of the contract are clearly against the interests of the public at large. Accordingly, this court should deny the arbitration as to the Walker Contract.

The court should also deny the arbitration provision as to the Williams contract. The enforcement of that contractual arbitration clause would require an arbitrator to apply nonexistent tribal law in enforcing the agreement. Under *Atlantic Marine,* the court must determine if the public interests would be furthered by denying arbitration. See also 9 U.S.C. 2 (arbitration clause "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity") (emphasis added). The absence of tribal laws regarding consumer disputes points to a finding that public interests are furthered by denying arbitration as to this clause. As discussed *infra*, the absence of any implication of tribal sovereignty or entry upon tribal lands, point to need to deny arbitration as to the Williams Contract.

Also, the issue turns on judicial economy. Plaintiff Walker expressly rejects the notion of arbitration. To bifurcate the named Plaintiffs and require one to arbitrate a violation of the same body of law is a waste of resources. Allowing both parties to proceed in this lawsuit is a better course of action. Additionally, if the Court were to require arbitration of the Williams contract,

that arbitration would not be binding on the Walker Contract. Thus, at minimum, the Walker Contract should continue in this Court and should not be stayed.

II. The Dormant Commerce Clause is Inapplicable

The Plaintiffs do not seek to regulate conduct outside the borders of the State of Wisconsin, but rather CashCall's conduct within Wisconsin. Since the loans were not entered into on tribal land, the application of the Dormant Commerce Clause is incorrect.

"The Commerce Clause dictates that no State may force an out-of-state merchant to seek regulatory approval in one State before undertaking a transaction in another." *Healy v. Beer Institute*, 491 U.S. 324, 337, (1989); see also *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573, 582-84 (1986); *Baldwin v. G.A.F. Seelig, Inc*., 294 U.S. 511, 521 (1935); *Dean Foods Co. v. Brancel*, 187 F.3d 609, 614-20 (7th Cir. 1999); *Morley-Murphy Co. v. Zenith Electronics Corp*., 142 F.3d 373, 378-80 (7th Cir. 1998); *IMS Health Inc. v. Ayotte*, 550 F.3d 42, 62-64 (1st Cir. 2008); *Carolina Trucks Equipment, Inc. v. Volvo Trucks of North America, Inc*., 492 F.3d 484, 488-90 (4th Cir. 2007); *PSINet, Inc. v. Chapman*, 362 F.3d 227, 239-41 (4th Cir. 2004); *American Booksellers Foundation v. Dean*,342 F.3d 96, 102-04 (2d Cir. 2003); *National Collegiate Athletic Ass'n v. Miller*, 10 F.3d 633, 638-40 (9th Cir. 1993).

Defendant's first argument is nothing more than a red herring. Plaintiffs seek the application of Wisconsin law on the Defendant's actions within the State of Wisconsin. In their continual attempt to dodge compliance with applicable state regulations, the Defendant asserts that the last act necessary to enter into a binding contract occurred within the Cheyenne River Sioux Tribe. See *NCR Corp. v. Transport Ins. Co*., 823 N.W. 2d 532 (Wis. Ct. App. 2012). Plaintiffs seek to regulate the conduct of CashCall, for entering into illegal contracts with

Wisconsin residents in Wisconsin. Reliance on *Midwest Title Loans, Inc. v. Mills*, 593 F.3d 660 (7th Cir. 2010) is incorrect and not applicable to facts before the court. In *Midwest Title*, residents of one state physically travelled to another state to enter into a business transaction. They then returned to their home state, wherein their home state attempted to regulate the transaction consummated in the foreign state. Neither Plaintiff traveled to tribal land to sign their contract, a fact that the defendant has admitted [Dkt. 12, P. 16.] Because the contracts between the parties did not take place outside of Wisconsin's borders, the Defendant's argument fails. See *Healy*, 491 U.S. at 336 (quoting *Edgar v. MITE Corp*., 457 U.S. 624, 642-643 (1982)).

Defendant unduly muddies the water on their second argument. CashCall (both in servicing the loan and as the assignee of Western Sky) has purposefully availed themselves of the benefits of entering into business transactions with residents of the State of Wisconsin. As discussed *supra*, the use of mail electronic communication with a Wisconsin resident will bring a Defendant within the scope of Wisconsin's long-arm statute. *Felland* at 679.

The facts of this case are easily distinguished from *Midwest Title Loans.* The Plaintiffs did not enter onto tribal land to enter into the contracts subject to this litigation. Instead CashCall knowingly entered into business transactions with residents of the State of Wisconsin. CashCall also voluntarily removes funds from the bank account of consumers in Wisconsin, as well as participates in collection actions and court cases in Wisconsin. Miller Aff., Exhibit B. These details evidence that CashCall was entering into Wisconsin to do business with residents.

Reliance on *Dean Foods v. Brancel*, 187 F.3d 609 (7th Cir. 1999) will not save the Defendant's argument. In *Dean Foods* the contracts specifically enumerated that no "meeting of the minds" would occur until the goods passed out of Wisconsin into a foreign jurisdiction. No such provision appears on the contracts between the parties here. The Defendant entered into a

contract with the Plaintiffs, where the Plaintiffs never exited Wisconsin as part of that process. The elaborate scheme of the Defendants, including using Western Sky as a smokescreen, is nothing more than an attempt to evade compliance with a host of applicable state regulations.

III. The Forum Selection Clause in not enforceable and the Tribal Exhaustion Doctrine is Inapplicable.

CashCall argues forum selection and the Tribal Exhaustion Doctrine to preserve their rights on appeal after *Jackson*. While this Court is bound by *Jackson*, the Plaintiffs will still respond to the arguments presented by CashCall.

A. The contractual forum selection clause is invalid.

In a case based on diversity, discussed *supra*, a "valid forum-selection clause should be given controlling weight in all but the most exceptional cases." *Atl Marine* at 581. (quotations and alteration omitted). Defendant acknowledges that their arguments to enforce this provision have failed, as the Seventh Circuit has held that their specific forum selection clause is unenforceable. [Dkt. 12, P. 18]. In support of their argument to preserve the issue for appeal, they mischaracterize the holding of *Atlantic Marine* and offer no facts in support of their argument.

Atlantic Marine has an important exception to the assumption that a contractual forum selection clause should be strictly enforced: public policy for maintaining the litigation in the original district. While this court is bound by the Seventh Circuit's recent decision in *Jackson*, the facts specifically support a finding that this case should proceed here, because this court is at

home with the law to be enforced and there is a local interest in having the controversy decided before this court.

First, there is sufficient evidence showing a need to have the case tried in Wisconsin, applying and enforcing Wisconsin laws. As discussed *infra*, this case should not be dismissed and subjected to the laws of the Cheyenne River Sioux Tribe. The Plaintiffs have alleged that the Defendant voluntarily availed itself of the forum state by entering into Wisconsin and engaging residents in usurious contracts. Given the stability of law, evidence, and procedure of this court in applying Wisconsin law, the public at large will benefit from retaining jurisdiction here. Also, since the case is postured as a class action, further evidence will support a finding that it is in the best interests of public for this court to retain jurisdiction. Defendant has offered no evidence that the courts of the Cheyenne River Sioux Tribe are able to interpret or apply Wisconsin law, or that they have a judicial system that is at home with the law of this case.

Second, there is a local interest in having this case heard in Wisconsin. The Defendant has created and entered into a series of transactions to mask its true identity in an effort to avoid compliance with Wisconsin law. The fact that they have intentionally created a system to charge usurious interest to Wisconsin residents—and then attempt to make them all travel to a forum with no mechanism or system to try or arbitrate their disputes—points to evidence that there is a broader public policy reason to retain jurisdiction in Wisconsin.

Third, there are many administrative difficulties in the position advocated by the Defendant. They have offered no evidence that there is a judicial system in place within the Cheyenne River Sioux Tribe to handle a class action for violations of a Wisconsin law. They have offered no evidence of a body of law or procedure that would allow for a reasonable hope of proper litigation.

B. The Doctrine of Tribal Exhaustion is Inapplicable

"[T]he inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe" because the tribal courts are not courts of general jurisdiction. *Montana v. United States*, 450 U.S. 544, 565, (1981). See also, *Nevada v. Hicks*, 533 U.S. 353, 367, (2001). Generally, federal courts are requested to "abstain from hearing certain claims relating to Indian tribes until the plaintiff has first exhausted those claims in a tribal court." *Garcia v. Akwesasne Hous. Auth*., 268 F.3d 76, 79 (2d Cir.2001). However, just because a dispute involved a tribe does not mean that mean that tribal doctrine is automatically triggered. Instead the court must allow allow "scope based' objection to the doctrine. *Ninigret Development Corp. v. Narragansett Indian Wetuomuck Housing Authority*, 207 F.3d 21, 31-32 (1st Cir. 2000).

"[O]ff-the-reservation" conduct, the court observed, "must at a bare minimum impact directly upon tribal affairs" in order to trigger the exhaustion requirement. *Id*. at 32. CashCall is not part of the tribe referenced in their brief, nor does their company operate within the geographic confines of the tribe. Neither named Plaintiff is part of the tribe either. CashCall funds all loans from its operation in California to the consumers in Wisconsin, thus not invoking any form of tribal interest. Courts have also said that a "colorable claim" of tribal court authority can trigger the doctrine. See *Elliott v. White Mountain Apache Tribal Court*, 566 F.3d 842 (9th Cir.2009). Considering that it took a non-tribal member wandering onto tribal land and accidentally burning down 400,000 acres in *Elliot* to trigger a "colorable claim" of tribal authority, the Defendant's actions hardly fall within the realm of such conduct. The use of a shell tribal corporation to disguise a corporation is hardly sufficient to trigger the doctrine. The Seventh Circuit expressly held that CashCall has "made no showing that the present dispute

implicates any aspect of 'the tribe's inherent sovereign authority'" in seeking the enforcement of the doctrine. *Jackson*. Accordingly, this court should dismiss this argument by the Defendant.

CONCLUSION

For the foregoing reasons, Plaintiffs moves the Court to (1) deny staying the case or compelling arbitration as to either Plaintiffs; (2) deny dismissal under the Dormant Commerce Clause; and (3) deny dismissal under either the forum-selection clause or the tribal exhaustion doctrine.

Dated: November 14, 2014

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