

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

ALICIA EVERETTE,

*

Plaintiff

*

v.

* **Civil Action No. 1:15-cv-1261**

JOSHUA MITCHEM, et al.

*

*

Defendants.

* * * * *

**PLAINTIFF’S OPPOSITION TO DEFENDANTS MITCHEM’S AND SHAFFER’S
MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION, OR, IN THE
ALTERNATIVE, COMPEL ARBITRATION
AND REQUEST FOR HEARING**

Plaintiff, Alicia Everette, on behalf of herself and all others similarly situated, by her undersigned counsel, submits this memorandum of law in opposition to the motion to dismiss filed on behalf of Defendants Joshua Mitchem (“Mitchem”) and Jeremy D. Shaffer (“Shaffer”).

INTRODUCTION

This lawsuit seeks to recover damages arising from unconscionable, unlicensed, usurious payday loans made by Defendants to Plaintiff and the class of Marylanders she seeks to represent. Defendants Mitchem and Shaffer do business as a variety of fictions entities such as “Action PayDay” and “Bottom Dollar PayDay” in Maryland and other states. In violation of strong Maryland public policy, Defendants have targeted Maryland consumers with these loans, lent money in Maryland, and collected money from Marylanders. Nevertheless, Defendants contest personal jurisdiction. Such an argument must be rejected since Defendants activity in this matter has concretely targeted Marylanders in violation of Maryland law. Defendants also request in the alternative that this Court compel arbitration of this matter, but

have failed to establish the existence of an agreement to arbitrate.

APPLICABLE LEGAL STANDARDS

Defendants have moved to dismiss Plaintiff's complaint pursuant to Fed. R. Civ. P. 12(b)(2). When a court's personal jurisdiction is properly challenged by motion under Rule 12(b)(2), the jurisdictional question thereby raised is one for the judge, with the burden on the plaintiff ultimately to prove grounds for jurisdiction by a preponderance of the evidence. *Mylan Labs., Inc. v. Akzo, N.V.*, 2 F.3d 56, 59–60 (4th Cir.1993). “[If] the district court decides a pretrial personal jurisdiction dismissal motion without an evidentiary hearing, the plaintiff need prove only a prima facie case of personal jurisdiction.” *Id.* To prove a prima facie case of personal jurisdiction, the plaintiff “need not present evidence” and “[m]ere allegations are sufficient” to satisfy the pleading requirements for personal jurisdiction. *See Dowless v. Warren-Rupp Houdailles, Inc.*, 800 F.2d 1305, 1307-08 (4th Cir. 1986). “If the existence of jurisdiction turns on disputed factual questions, the court may resolve the challenge on the basis of a separate evidentiary hearing, or may defer ruling pending receipt at trial of evidence relevant to the jurisdictional question.” *See Combs v. Bakker*, 886 F.2d 673, 676 (4th Cir.1989). In determining whether personal jurisdiction exists, the court must draw all reasonable inferences arising from the proof, and resolve all factual disputes, in the plaintiff's favor. *See Mylan Labs.*, 2 F.3d at 59–60; *Mitrano v. Hawes*, 377 F.3d 402, 406 (4th Cir. 2004); *Combs*, 886 F.2d at 676.

ALLEGATIONS OF THE COMPLAINT

Plaintiff Alicia Everette (“Ms. Everette”), a Maryland citizen, is a consumer recipient of payday loans used to make ends meet with personal and household bills, food and other necessities when she was short on cash. Complaint at ¶ 11. Defendants Joshua Mitchem

(“Mitchem”) and Jeremy D. Shaffer (“Shaffer”) are natural persons who reside in Kansas. *Id.* at ¶ 12. Defendants Mitchem and Shaffer do business as “Action PayDay,” “Action PDL Services,” “Bottom Dollar PayDay,” and “BD PDL Services” – all of which are fictitious entities. *Id.* Defendants Mitchem and Shaffer are not licensed as either a consumer loan lender or an installment loan lender in Maryland. *Id.* At all times material to this complaint, acting alone or in concert with others, Defendants Mitchem and Shaffer advertised, marketed, distributed, collected or sold usurious payday loans to Plaintiff and the class she seeks to represent in Maryland. *Id.* Defendants Mitchem and Shaffer further acted as collectors because they collected and attempted to collect these consumer payday loans from Plaintiff. *Id.*

Mitchem and Shaffer are also the operators and effective owners of FSST Financial Services, LLC, an entity claiming to be a tribal lending entity organized under the laws of the Flandreau Santee Sioux Tribe. *Id.* at ¶ 13. On information and belief, however, it is actually owned and controlled by Defendants Joshua Mitchem and Jeremy D. Shaffer. *Id.* at ¶ 13.

“Action PayDay” and “ActionPayDay.com” are purportedly owned and operated by FSST Financial Services, LLC, which is allegedly a tribal lending entity wholly owned by the Flandreau Santee Sioux Tribe, and list a South Dakota P.O. Box as an address. *Id.* at ¶ 29. “Bottom Dollar PayDay” and “BottomDollarPayday.com” are also purportedly owned and operated by FSST Financial Services, LLC. *Id.* at ¶ 30.

However, “Action PayDay” and “Bottom Dollar PayDay” are actually owned and operated by Defendants Mitchem and Shaffer. Each of these fictitious entities does business as, including but not limited to, BD PDL Services, LLC, International Equities Group, LLC, Paradise Cash Advance, Action PDL Services, PDL Support, LLC, Platinum B Services, LLC, and PDL Support Services, LLC. *Id.* at ¶ 31.

Defendants Mitchem and Shaffer own and control the websites and business operations of “Action PayDay” and “Bottom Dollar PayDay.” *Id.* at ¶ 32. The website www.bottomdollarpayday.com is registered to Josh Mitchem, 3543 Broadway, Kansas City, MO 64111. *Id.* at ¶ 33.

At one time, Defendants Mitchem and Shaffer purportedly created entities located in the island nation of Nevis. However, this smoke and mirrors tactic failed to insulate Defendants Mitchem and Shaffer from regulatory actions from numerous state attorneys general. These actions have failed to deter Defendants Mitchem and Shaffer, who continue to profit widely on usurious loans. *Id.* at ¶ 34.

Defendants Mitchem and Shaffer now have switched to a different smoke and mirrors technique, Rent-a-Tribe. On information and belief, “Action PayDay” and “Bottom Dollar PayDay” are not wholly owned and operated by the Flandreau Santee Sioux Tribe or any tribal lending entity. Rather, Defendants Mitchem and Shaffer pay the Flandreau Santee Sioux to use their name in order to cloak their unscrupulous lending activities in the guise of tribal sovereign immunity. *Id.* at ¶ 35.¹ On information and belief, the vast majority of the economic benefit of “Action PayDay” and “Bottom Dollar PayDay” goes to Defendants Mitchem and Shaffer. *Id.* at 36. On information and belief, “Action PayDay” and “Bottom Dollar PayDay” do not provide for tribe’s autonomy and economic development. Rather, they mostly profit Defendants Mitchem and Shaffer in continuing their unconscionable lending practices. *Id.* at 37. On information and belief, “Action PayDay” and “Bottom Dollar PayDay” are not operated or controlled by the tribe. The tribe makes no significant business, financial, personnel, or

¹ In fact, in their Motions to Dismiss, Defendants Mitchem and Shaffer do not claim that “Action PayDay” and “Bottom Dollar PayDay” are tribal entities, nor have they advanced any argument for tribal sovereign immunity.

management decisions. Rather, virtually all decisions are made by Defendants Mitchem and Shaffer. *Id.* at 38.

On information and belief, FSST Financial Services, LLC does not hold property in its own name. Nor is FSST Financial Services, LLC closely linked through the governance structure of the tribe. Given its relationship with Defendants Mitchem and Shaffer, the entity is legally separate and distinct from the tribe, and it is organized for commercial purposes that provide little benefit, if any, to the tribe. No federal Indian law policy intended to promote tribal self-determination is furthered through the existence of FSST Financial Services, LLC. *Id.* at 39.

“Action PayDay” and “Bottom Dollar PayDay” claim that they do not lend to Maryland residents. *Id.* at 40. “Action PayDay” and “Bottom Dollar Payday” claim that they do not lend to Maryland residents because they know that payday loans are illegal in Maryland. *Id.* at 41. “Action PayDay” and “Bottom Dollar Payday” claim that they do not lend to Maryland residents because they know that they do not have a license to make loans in Maryland pursuant to either Md. Code, Fin. Inst. §§ 11-204 or 11-302. *Id.* at 42.

At the beginning of 2013, Plaintiff Alicia Everette obtained payday loans from both “Action PayDay” and “Bottom Dollar PayDay” in Maryland even though neither of these entities are licensed to make loans in Maryland. *Id.* at 43.

Plaintiff obtained these loans in Maryland by using a computer in Maryland to access the interactive websites for “Action PayDay,” www.actionpayday.com, and “Bottom Dollar PayDay,” www.bottomdollarpayday.com. These websites have online loan applications, and allow users to engage in online chat with “Action PayDay” and “Bottom Dollar PayDay” representatives. In fact, the chat function is an automatic popup. *Id.* at 44.

These loans were for under \$6,000. *Id.* at 46. The interest rate for these loans exceeded the maximum interest rate allowed in Maryland pursuant to Md. Code, Com. Law § 12-103, which is 24 percent. *Id.* at 47. Alicia Everette had multiple small loans with “Action PayDay” and “Bottom Dollar PayDay.” She paid at least \$3,815 over the course of 2013 on these loans. For example, during 2013, Alicia Everette borrowed approximately \$1,000 from “Bottom Dollar PayDay,” including two \$500 loans, one rolled into another in order to maximize the lenders’ profits and Ms. Everette’s expense. Ms. Everette paid approximately \$2,552.50 on these loans. She did not pay these loans off, and a balance was still due. If the loans had been paid off, the simple interest rate would have been a usurious 27 percent. However, because the loans were not paid off, the rate was actually much higher, on information and belief far in excess of 50 percent if not 100 percent. *Id.* at 48.

Since “Action PayDay” and “Bottom Dollar PayDay” or any related entity lacked a license to lend in Maryland, and because the loans are usurious, these loans are void and unenforceable. *Id.* at 50.

ARGUMENT

I. PERSONAL JURISDICTION EXISTS OVER DEFENDANTS MITCHEM AND SHAFFER.

Under Federal Rule of Civil Procedure 4(k)(1)(A), a federal court may exercise personal jurisdiction over a defendant in the manner provided by state law. *See ESAB Group, Inc. v. Centricut, Inc.*, 126 F.3d 617, 622 (4th Cir. 1997). For a district court to assert personal jurisdiction over a nonresident defendant, two conditions must be satisfied: (1) the exercise of jurisdiction must be authorized under the state’s long-arm statute; and (2) the exercise of jurisdiction must comport with the due process requirements of the Fourteenth Amendment. *Christian Sci. Bd. of Dirs. of the First Church of Christ v. Nolan*, 259 F.3d 209, 215 (4th Cir.

2001). With regard to the first requirement, this Court must accept as binding the interpretation of Maryland's long-arm statute rendered by the Maryland Court of Appeals. *See Mylan Labs.*, 2 F.3d at 59-60. The Maryland Court of Appeals has consistently held that the state's long-arm statute is coextensive with the limits of personal jurisdiction set by the due process clause of the Constitution. *See Mohamed v. Michael*, 279 Md. 653, 370 A.2d 551, 553 (1977). Thus, the statutory inquiry merges with the constitutional inquiry. *See Stover v. O'Connell Assocs., Inc.*, 84 F.3d 132, 135 (4th Cir. 1996).

A court's exercise of jurisdiction over a nonresident defendant comports with due process if the defendant has "minimum contacts" with the forum, such that to require the defendant to defend its interests in that state "does not offend traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95 (1945).

These contacts may be established through a showing of either general or specific jurisdiction. In determining whether specific jurisdiction exists, the court considers (1) the extent to which the defendant has purposefully availed itself of the privilege of conducting activities in the state; (2) whether the plaintiffs' claims arise out of those activities directed at the state; and (3) whether the exercise of personal jurisdiction would be constitutionally "reasonable." *See ALS Scan Inc. v. Digital Serv. Consultants, Inc.*, 293 F.3d 707, 711-12 (4th Cir. 2002); *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 & n. 8, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984). If, however, the defendant's contacts with the state are not also the basis for the suit, then jurisdiction over the defendant must arise from the defendant's general, more persistent, but unrelated contacts with the state. To establish general jurisdiction, the defendant's activities in the state must have been "continuous and systematic."

ALS Scan, 293 F.3d at 712; *see Helicopteros*, 466 U.S. at 414 & n. 9, 104 S.Ct. 1868.

Here, specific jurisdiction exists. Defendants Mitchem and Shaffer do business as “Action PayDay,” “Action PDL Services,” “Bottom Dollar PayDay,” and “BD PDL Services” – all of which are fictitious entities. Complaint at ¶ 12. Defendants Mitchem and Shaffer advertised, marketed, distributed, collected or sold usurious payday loans to Plaintiff and the class she seeks to represent in Maryland. *Id.* There is no corporate shield in this manner. The personal jurisdiction distinction that Defendants draw between a corporation and its officers or directors does not apply. Mitchem and Shaffer are the real parties in interest who own and operate these fictitious entities. “Action PayDay,” “Action PDL Services,” “Bottom Dollar PayDay,” and “BD PDL Services” claim to be owned and operated by FSST Financial Services, LLC and also do business as, including but not limited to, BD PDL Services, LC, International Equities Group, LLC, Paradise Cash Advance, Action PDL Services, PDL Support, LLC, Platinum B Services, LLC, and PDL Support Services, LLC. *Id.* at ¶¶ 13; 31. However, “Action PayDay” and “Bottom Dollar PayDay,” as fictitious entities, are actually owned and operated by Mitchem and Shaffer. In fact, the website www.bottomdollarpayday.com is registered to Mitchem. *Id.* at ¶ 33.

Plaintiff obtained payday loans with Mitchem and Shaffer from “Action PayDay” and “Bottom Dollar PayDay” from her home in Maryland. *See Exhibit 1* (Declaration of Alicia Everette) at ¶ 2; Complaint at ¶ 43. When she first attempted to get payday loans online, she would “google” the phrase “payday loans” and click on search results from her computer at home in Baltimore, Maryland. Declaration of Alicia Everette at ¶ 4. These search results would lead Ms. Everette to various generic websites such as “paydayloans.com” or something to similar effect. From these websites, she would fill out an online form with her personal

information such as her name, address, social security number, driver's license, etc. *Id.* ¶ 5.

After filing out one of these initial inquiries, Defendants targeted Ms. Everette through a telephone solicitation call to her in Maryland. From these initial inquiries, Mitchem and Shaffer knew that Ms. Everette was a Maryland resident. They had her address. They purposefully availed themselves to jurisdiction in Maryland by targeting a Maryland consumer.

From there, Ms. Everette spoke with someone at "Action PayDay" and "Bottom Dollar PayDay" who sent her additional documentation to her in Maryland. *Id.* ¶ 6. This documentation requested Ms. Everette's bank information, and after she completed and returned that documentation, her loans were funded, usually within 24 hours. *Id.* ¶ 7. Thus, Defendants not only targeted Ms. Everette through a phone solicitation, they also sent her documentation in Maryland, and sent money to her Maryland bank.

After Ms. Everette obtained her initial loans from Defendants, she would then go directly to their website for additional loans. *Id.* at ¶ 8. These websites have online loan applications, and allow users to engage in online chat with "Action PayDay" and "Bottom Dollar PayDay" representatives. In fact, the chat function is an automatic popup. Complaint at ¶ 44.

Alicia Everette had multiple small loans with "Action PayDay" and "Bottom Dollar PayDay." She paid at least \$3,815 over the course of 2013 on these loans. For example, during 2013, Alicia Everette borrowed approximately \$1,000 from "Bottom Dollar PayDay," including two \$500 loans, one rolled into another in order to maximize the lenders' profits and Ms. Everette's expense. Ms. Everette paid approximately \$2,552.50 on these loans. She did not pay these loans off, and a balance was still due. If the loans had been paid off, the simple interest rate would have been a usurious 27 percent. However, because the loans were not paid off, the

rate was actually much higher, on information and belief far in excess of 50 percent if not 100 percent. Complaint at ¶ 48.

Defendants ultimately collected all these usurious loans from Ms. Everette in Maryland. *Id.* ¶ 11; 43; 44; 48.

Defendants targeted Maryland with commercial activity. They solicited, lent and collected usurious loans without a license in Maryland from Plaintiff and the class of Marylanders she seeks to represent. This complaint arises directly from this conduct.

These first two factors weigh so strongly in favor of personal jurisdiction that any claimed “inconvenience” to Mitchem and Shaffer is inconsequential. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477 105 S. Ct. 2174, 2184-85, 85 L.Ed.2d 528 (1985) (“[W]here a defendant who purposefully has directed his activities at forum residents seeks to defeat jurisdiction, he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable.”). Defendants have made no showing that travel to Maryland is “so gravely difficult and inconvenient” that they are at a “severe disadvantage” in comparison to his opponent. *Id.* at 478, 2185. They make no suggestion that they cannot get a fair trial in this Court. Defendants have solicited Maryland residents. They have lent money to Maryland residents. They have collected money from Maryland residents. All of this activity has been in violation of the well-established Maryland licensing and usury laws. *See* Md. Code Ann., Com. Law (“CL”) § 12-301, *et seq.*, and Fin. Inst. (“FI”) § 11-201 *et seq.*; CL § 12-101, *et seq.* Maryland has a strong interest in hearing this matter.

These details are sufficient to establish personal jurisdiction over Defendants. However, if the Court believes that additional information is necessary, additional facts about how Mitchem and Shaffer operate their fictitious entities are not available to Plaintiff at this

juncture, and Plaintiff would need discovery in order to determine the structure and organization of “Action PayDay,” “Bottom Dollar PayDay” and the other related entities. *See Exhibit 2* (Declaration of Max F. Brauer).

II. NO ARBITRATION AGREEMENT EXISTS.

The Court cannot compel arbitration if an agreement to arbitrate does not exist. “[E]ven though arbitration has a favored place, there still must be an underlying agreement between the parties to arbitrate.” *Brent v. Priority 1 Automotive Group, BMW of Rockville*, No. PWG-14-1705, 2015 WL 1611936, at *1 (D. Md. March 3, 2015). “Under Maryland law, a contract exists where there is “mutual assent (offer and acceptance), an agreement definite in its terms, and sufficient consideration.” *Id.* at *2 (quoting *Spauling v. Wells Fargo Bank, N.A.*, 714 F.3d 769 (4th Cir. 2013)). The parties cannot have an agreement to arbitrate without mutual assent. Here, as the Declaration of Alicia Everette notes, Ms. Everette has never before seen the documents Defendant claims are “loan agreements.” *See* Declaration of Alicia Everette at ¶ 9. Ms. Everette could not have assented to an arbitration clause if she has never seen these “loan agreements” before. Nor have Defendants authenticated these loan agreements. In fact, Defendants make no attempt to authenticate these loan agreements.

Since Defendants have failed to demonstrate the existence of an arbitration agreement, their request to compel arbitration must be denied.

CONCLUSION

For the foregoing reasons, Plaintiff requests that this Court deny the motions to dismiss filed by Defendants Mitchem and Shaffer.

REQUEST FOR HEARING

Undersigned counsel request a hearing.

Dated: August 7, 2015

Respectfully Submitted,

/s/ E. David Hoskins

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CERTIFICATE OF SERVICE

I certify that the foregoing document was served electronically through the Court's CM/ECF system upon counsel for all parties.

August 7, 2015.

/s/ Max F. Brauer
Max F. Brauer, Esq.