UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

ALICIA EVERETTE,	*	
Plaintiff,	*	
vs.	*	**No. 1:15-cv-01261-CCB**
JOSHUA MITCHEM, et al,	*	
Defendants.	*	

MEMORANDUM IN SUPPORT OF DEFENDANT TUCKER'S MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION, OR, IN THE ALTERNATIVE, COMPEL ARBITRATION, OR, IN THE ALTERNATIVE, DISMISS FOR FAILURE TO STATE A CLAIM

Defendant Scott Tucker ("Tucker"), by his undersigned counsel, for his Memorandum in Support of his Motion to Dismiss for Lack of Personal Jurisdiction, or, in the alternative, to dismiss for failure to join required parties and failure to state a claim, states as follows:

I. Introduction

Tucker moves to dismiss the allegations against him in Plaintiff's Complaint for lack of personal jurisdiction because he does not have contacts with Maryland that subject him to the jurisdiction of Maryland courts. Alternatively, Tucker moves to dismiss the complaint pursuant to Rules 12(b)(7) and 19 because Plaintiff has failed to join required parties to the litigation, and pursuant to Rule 12(b)(6) because Plaintiff has failed to adequately plead causes of action under the relevant Maryland statutes that form the predicates of Counts II, III, and IV. Lastly, Tucker joins Defendants Mitchem and Shaffer's motion to dismiss the claim in Count V for violation of the Electronic Funds Transfer Act because the claim is barred by limitations. under the Electronic Fund Transfer Act, 15 U.S.C. § 1693, *et seq.* ("EFTA"), in that it is facially conclusive from the Complaint that her EFTA claims are time barred.

II. The Complaint Does Not Allege Sufficient Facts to Establish Personal Jurisdiction Over Tucker

Plaintiff alleges that she obtained illegal payday loans through websites and entities that are "owned and operated" by, among others, United Cash Loans and AmeriLoan ('the Lenders"). Complaint, ¶51. The Complaint asserts that the Lenders are "fictitious entities purportedly owned and operated by MNE Services, Inc. and/or Tribal Financial Services, and or AMG Services, Inc." *Id.* Conceding that AMG Services, Inc., Tribal Financial Services, Inc. and MNE Services "claim to be organized under the laws of the Miami Tribe of Oklahoma,"[1] Complaint, ¶19, Plaintiff nevertheless asserts that the Lenders are "actually owned, operated and controlled by" Tucker "through a web of corporate entities." Complaint, ¶52. Plaintiff does not identify the corporate entities comprising the supposed "web." The Complaint does name certain entities allegedly affiliated with Tucker, such as Level 5 Motorsports, LLC (¶¶21,58), Broadmoor Capital Partners, LLC, Black Creek Capital LLC (¶¶21,63), Black Creek Capital Corp (¶21), Partner Weekly (¶¶15, 21), and Lead Flash Consulting LLC (¶21) but does not explain how they allegedly functioned to "own, operate or control" the Lenders. Lastly, the Complaint alleges that in July 2008, the Lenders "became affiliated" with MNE Services, Inc. and/or Tribal Financial Services and or AMG Services when some or all of them entered into a management agreement with N.M. Service Corp. (NMS), alleged to be a "Tucker-controlled entity." ¶54.

In any event, neither of the Lenders nor any of the entities alleged to purportedly or actually own or control them is named as a party to the Complaint.[2] Only Tucker has been sued, and Plaintiff does not claim that she entered into any lending transaction with Tucker individually. The Complaint expressly concedes that Tucker is a resident of Kansas, not Maryland. Compl. ¶ 14.

[1] The Miami Tribe of Oklahoma is a federally recognized Indian Tribe. *See*, Federal Register, Vol. 80, No. 9, available at www.bia.gov/cs/groups/western/documents/document/idc1-029026.pdf.

[2] Elsewhere in this motion, Tucker has moved to dismiss the complaint for failure to join required parties in violation of Rule 19. *See* §II.D., *infra.*

Plaintiff asserts that personal jurisdiction over Tucker exists simply because in 2013 she obtained an undisclosed number of loans from both of the Lenders by making applications using a computer located in Maryland. Complaint, ¶70.

Plaintiff's allegations are insufficient to establish personal jurisdiction. The issue is not what Plaintiff did, but what Tucker did. Even construing the Complaint liberally in favor of the Plaintiff, the most that is alleged is that Tucker "owned or controlled" companies that "owned or controlled" other companies (the Lenders) that had websites that Plaintiff accessed from a computer located in Maryland. This is insufficient to support a claim of personal jurisdiction over Tucker, and the Complaint should be dismissed.

A party may assert by a motion that a court lacks personal jurisdiction. Fed. R. Civ. P. 12(b)(2). The plaintiff bears the burden of making a prima facie showing that personal jurisdiction exists. *Universal Leather, LLC v. Koro AR, S.A.,* 773 F.3d 553, 558 (4th Cir. 2014). The court may consider affidavits and other documentary evidence to resolve a motion to dismiss based on personal jurisdiction. *Id.* In doing so, the court may disregard "conclusory assertions" of personal jurisdiction. *Carefirst of Maryland, Inc. v. Carefirst Pregnancy Centers, Inc.,* 334 F.3d 390, 402 (4th Cir. 2003). *See also Masselli & Lane, PC v. Miller & Schuh, PA,* No. 992440, 2000 WL 691100, at *1 (4th Cir. May 30, 2000) (in determining personal jurisdiction, "the court need not 'credit conclusory allegations or draw farfetched inferences' (quoting *Ticketmaster-New York, Inc. v. Alioto,* 26 F.3d 201, 203 (1st Cir.1994))).

Federal courts follow the law of the state in which they sit to determine personal jurisdiction. *Daimler AG v. Bauman,* 134 S. Ct. 746, 753 (2014). *See also* Md. Code Ann., Cts. & Jud. Proc. §§ 6-102,-103 (enumerating the grounds for personal jurisdiction in Maryland). State statutory grounds for jurisdiction are properly exercised only if doing so "comports with the limits imposed by federal due process." *Daimler AG,* 134 S. Ct. at 753. *See also Carefirst,* 334 F.3d at

396 (stating that "[t]he Maryland courts have 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").

To satisfy due process, a nonresident defendant must have "certain minimum contacts" with the forum state "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Int'l Shoe Co. v. State of Wash.,* 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer,* 311 U.S. 457, 463 (1940)). These contacts may be established through either general or specific jurisdiction, both of which are construed narrowly. *See generally Daimler AG,* 134 S. Ct. at 746 (clarifying that only in exceptional cases will general jurisdiction exist), *Walden v. Fiore,* 134 S. Ct. 1115 (2014) (in specific jurisdiction analysis the focus is on the defendant's connection with the forum).

Tucker is not subject to the general jurisdiction of this Court because he is resident and domiciled in Kansas. Complaint, ¶14, Exhibit 1, Declaration of Scott Tucker ¶¶ 2. *See also Goodyear Dunlop Tires Operations, S.A. v. Brown,* 131 S. Ct. 2846, 2853 (U.S. 2011) ("[for an individual, the paradigm forum for the exercise of general jurisdiction is the individual's domicile"); *Midtown Pers., Inc. v. Dave,* No. PWG-13-3493, 2014 WL 3672896, at *6 (D. Md. July 22, 2014) (noting that domicile for personal jurisdiction analysis is "physical presence and an intent to remain"). Plaintiff has alleged no facts demonstrating that Tucker has or ever has had any physical presence in Maryland or any intent to take up residence here.

III. The Court Does Not Have Specific Jurisdiction Over Tucker

The Fourth Circuit "employs a three-part test to determine whether the exercise of specific personal jurisdiction over a nonresident defendant comports with the requirements of due process." *Universal Leather, LLC,* 773 F.3d at 559. The analysis considers "(1) the extent to which the defendant purposefully availed itself of the privilege of conducting activities in the forum state; (2)

whether the plaintiff's claims [arose] out of those activities; and (3) whether the exercise of personal jurisdiction is constitutionally reasonable."' *Id.* (quoting *Tire Eng'g & Distribution, LLC v. Shandong Linglong Rubber Co.*, 682 F.3d 292, 302 (4th Cir. 2012)). The Supreme Court recently explained that "the defendant's suit-related conduct must create a substantial connection with the forum State." *Walden*, 134 S. Ct. at 1121. Because the due process limitations are intended to protect nonresident defendants, jurisdictional determinations are based on the defendant's contacts with the forum—not the plaintiff's. *Id.* at 1122. Furthermore, the "analysis looks to the defendant's contacts with the forum State itself, not the defendant's contacts with persons who reside there." *Id.* The issue is "whether the defendant's conduct connects him to the forum in a meaningful way." *Id.* at 1125. Plaintiff has not alleged any action of any kind on the part of Tucker that took place in Maryland or was otherwise purposefully directed by him individually towards Maryland. By his affidavit, Tucker has expressly disclaimed any such activity. *See* Ex. 1, ¶¶ 3-15.

Instead, Plaintiff attempts a sort of alchemy: acknowledging that Tucker does not formally own or operate any of the Lenders, she alleges that because Tucker is the supposed "real" owner of the Lenders and the Lenders made loans available to her by allowing her to access their websites from a computer located in Maryland, Tucker himself must be subject to the personal jurisdiction of a Maryland court. This simply doesn't work. *Even if* Tucker were a shareholder or officer of a corporation that could be sued in Maryland[3], neither status alone would subject him to suit in Maryland. *Harte-Hanks Direct Marketing/Baltimore, Inc. v. Varilease Technology Finance Group, Inc.*, 299 F. Supp. 2 505, 513-4 (D. Md. 2004) ("Personal jurisdiction over an individual officer, director or employee of a corporation does not automatically follow from personal jurisdiction over the corporation. [citations omitted] Likewise jurisdiction over a shareholder of a corporation cannot be predicated on jurisdiction over the corporation.")

[3] Of course, for reasons discussed elsewhere in this Memorandum, it is not at all apparent that the Lenders themselves are subject to suit in Maryland – or, for that matter, anywhere given their tribal sovereign immunity.

Plaintiff broadly asserts that Tucker "advertised, marketed, distributed, collected or sold usurious payday loans to Plaintiff and the class she seeks to represent in Maryland." Compl. ¶ 14. But she fails to state a single fact demonstrating how he supposedly did any of these things, and her vague conclusory allegations need not be credited by the Court. *Carefirst,* 334 F.3d at 402; *MasseIli & Lane, PC,* 2000 WL 691100, at *1. Plaintiff alleges that she obtained the loans by accessing the Lenders' website and that the sites "allow users to engage in online chat" with representative of the Lenders. Plaintiff does not allege that she herself actually engaged in any such "chat" and certainly does not claim to have "chatted" with Tucker. In fact, Tucker (a) does not know or has never communicated with Plaintiff, (b) has never loaned money to a Maryland resident, and (c) is not an owner or employee of either of the Lenders. Ex. 1, Declaration of Scott Tucker.

Dismissal is required because the Complaint does not identify any specific conduct by Tucker personally that was directed towards Maryland and related to the Complaint. Further, as this Court recognized in *Harte-Hanks Direct Mktg./Baltimore, Inc.,* courts in the Fourth Circuit "may not exercise personal jurisdiction over a corporation's agent if the agent's only connection to the forum state is as an officer or employee of a non-resident corporation that committed a tort in the state, and if the agent's own involvement in that tort occurred outside of the forum state." *Harte-Hanks Direct Mktg./Baltimore, Inc. v. Varilease Tech. Fin. Grp., Inc.,* 299 F. Supp. 2d 505, 514 (D. Md. 2004) *Also see Stokes v. JPMorgan Chase Bank, NA,* No. 8:11-CV-02620, 2012 WL 527600, at *4 (D. Md. Feb. 16, 2012) (ruling that "[t]he jurisdiction this court has over [defendant LLC], which sold a loan to [Plaintiff] in Maryland, does not pass to [individually named defendant] merely because he was a principal of [defendant LLC] in the absence of any individual contacts between [individually named defendant] and the State of Maryland"); *Birrane v. Master Collectors, Inc.,* 738 F. Supp. 167, 169 (D. Md. 1990) (noting that "there is no basis whatsoever for holding that merely because a

corporation transacts business...or has other substantial contacts with the state, an individual who is its principal should be deemed to have engaged in those activities personally").

IV. Plaintiff's Failure to Comply with Rule 19 Requires Dismissal

Plaintiff has sued on the basis of alleged loans but deliberately has not joined the Lenders as defendants.[4] Rule 19(c) unmasks, and guts, Plaintiff's tactic. The rule affirmatively compels a plaintiff to state "the name, if known, of any person who is required to be joined if feasible but is not joined," and "the reasons for not joining that person." *Id.*

The purpose of subpart (c) is to aid the court in determining whether all persons who should be joined are before the court and, if they are not and their joinder is not feasible, whether the court may proceed in their absence in light of the analysis required by Rule 19(b). If the court decides that there are nonparties who cannot be joined and who must be regarded as "indispensable," the action must be dismissed. CHARLES ALAN WRIGHT AND ARTHUR MILLER, 7 FED. PRAC. & PROC. CIV. § 1625 (3d ed.).

Thus, a plaintiff who ignores Rule 19(c) does so at her peril; although Rule 19(c) poses a "tactical dilemma" for a pleading party, "the pleader must consider the possibility that a failure to comply with Rule 19(c), if discovered, also might result in a dismissal of the case or lead the court to assume facts damaging to the pleader." *Id.* Courts do not hesitate to dismiss a complaint if a required party cannot be joined as a defendant. *See*, e.g., *Philippines v. Pimentel*, 553 U.S. 851, 862¬64 (2008) (discussing the Rule 19(b) factors); *Stevens v. Loomis*, 334 F.2d 775, 779 n.1 (1st Cir. 1964). Lastly, ordinarily a defendant raising a Rule 19 challenge bears the burden to show that dismissal is proper. However, when Rule 19(c) is in play, the initial burden shifts to the

[4] Also notable – and telling – is Plaintiff's failure to attach to her complaint the loan documents evidencing the loans which she claims to have entered into with the Lenders. Because Tucker does not, as Plaintiff avers, own or control the Lenders, Tucker does not have access to those documents. However, on information and belief, Tucker submits that it is likely that those documents include provisions requiring that the loans are subject to the laws of the Miami Tribe of Oklahoma and that any disputes over the loans be submitted to arbitration. Tucker reserves the right to move to compel arbitration of this matter upon inspection of the relevant loan documents.

plaintiff. In other words, if "an initial appraisal" of the face of the Complaint "reveals the possibility" that a necessary party has not been named as a defendant, the burden shifts to the plaintiff to prove that the absent party is not a required party under Rule 19. *See* 7 FED. PRAC. & PROC. CIV. at § 1609; *Fin. Serv. Cas. Corp. v. Settlement Funding*, LLC, 724 F. Supp. 2d 662, 678 (S.D. Tex. 2010) (same). The plaintiff's "failure to meet that burden will result in the joinder of the party or dismissal of the action." *Id*. at § 1609.

A. The Contracting Party Is a Quintessential Necessary and Indispensable Party

Plaintiff alleges that she obtained loans from both of the Lenders, AmeriLoan and United Cash Loan. Complaint, ¶ 69. She has not identified the dates or amounts of any of the loans, except to aver that the loans were for less than $6,000. Complaint, ¶ 72. But, taking Plaintiff at her word, she entered into at least one loan contract with each of the Lenders. *Nat'l Farmers Organization, Inc. v. Kinsley Bank*, 731 F.2d 1464, 1467 (10th Cir. 1984) (a "loan" is a "contract"). All of Plaintiff's claims arise exclusively from these contracts. And, as Plaintiff acknowledges, the named parties to those contracts are her and the Lenders. Complaint, ¶19.

Plaintiff's assertions that the Lender entities are "fictitious" and are only "purportedly" owned by certain tribal entities (Complaint, ¶51) does not change the fact that they are the parties to the contracts, whose rights and obligations under the contracts are central to the issues in this case. Moreover, as detailed above, Plaintiff flings about references to at least nine other parties[5] she claims are in some way participants in the lending activities of the Lenders, but has not named any of them as defendants either. This approach is untenable. Courts consistently reject plaintiffs' tactical decisions to ignore Rule 19(c), especially in cases arising out of a contract, as "'a contracting party is the paradigm of an indispensable party.'" *Nat'l Union Fire Ins. Co. v. Rite Aid*

[5] AMG Capital Management LLC, Partner Weekly LLC, Black Creek Capital LLC, Broadmoor Capital Partners LLC, Level 5 Motorsports LLC, AMG Services, Inc., Tribal Financial Services, Inc., MNE Services, Inc., and the Miami Tribe of Oklahoma.

of S.C., 210 F. 3d 246 (4th Cir. 2000), quoting *Travelers Indem. Co. v. Household Int'l Ins.*, 775 F. Supp. 518, 527 (D. Conn. 1991) ("[a] party to a contract is the quintessential 'indispensable party.'"); *Teamsters Local Union No. 171 v. Keal Driveway Co.*, 173 F. 3d 915 (4th Cir. 1999); *United Keetoowah Band v. Kempthorne*, 630 F. Supp. 2d 1296, 1301 (E.D. Okla. 2009); *see* also *Caribbean Telecomms. Ltd. v. Guyana Tel*., 594 F. Supp. 2d 522, 532 (D.N.J. 2009) (same and collecting cases). Here, Plaintiff seeks a declaration that her loans with the Lenders[6] are "void and unenforceable." Complaint, ¶ 140. Clearly, then, the rights of the Lenders are central to the litigation. Indeed, " [n]o procedural principle is more deeply imbedded in the common law than that, in an action to set aside a . . . a contract, all parties who may be affected by the determination of the action are indispensable." *Jicarilla Apache Tribe v. Hodel*, 821 F.2d 537, 540 (10th Cir. 1987) (citation omitted); *see* also *United Keetoowah Band*, 630 F. Supp. 2d at 1301 (same); *LST Financial, Inc. v. Four Oaks Fincorp., Inc., et al,* 2014 WL 3672982 (W.D. Tx. 2014) (borrowers on payday lending contracts were indispensable parties to litigation over proceeds of payday loans frozen at processor banks).

Notwithstanding the clear mandate of Rule 19(c) and the consequences that result when a plaintiff ignores it, a frequent ploy in this context is for a plaintiff to avoid naming tribal entities as defendants because tribal entities are entitled to sovereign immunity and cannot be joined as defendants. *See*, e.g., *Yashenko v. Harrah's NC Casino Co.,* 446 F. 3d 541 (4th Cir. 2006); *Davis ex rel. Davis v. U.S.*, 343 F.3d 1282, 1289-94 (10th Cir. 2003) ("Davis II"); *Citizen Potawatomi Nation v. Norton*, 248 F.3d 993, 997-99 (10th Cir. 2001); *United Keetoowah Band*, 630 F. Supp. 2d at 1303. Indeed, "where sovereign immunity is asserted, and the claims of the sovereign are not frivolous, dismissal of the action must be ordered where there is a potential for injury to the

[6] To be precise, Plaintiff contends that her loans "with respect to each Defendant" are unenforceable. But, as discussed above, Plaintiff had no loans "with respect to" Tucker. She borrowed money from the Lenders, and the loan contracts are between her and the Lenders.

interests of the absent sovereign." *Philippines v. Pimentel*, 553 U.S. 851, 867 (2008) (requiring dismissal under Rule 19*).* Some courts have gone so far as to observe that, "Although Rule 19(b) contemplates balancing the factors, 'when the necessary party is immune from suit, there may be 'very little need for balance Rule 19(b) factors because immunity itself may be viewed as the compelling factor." *White v. University of California*, 765 F. 3d 1010, 1028 (9th Cir. 2014), quoting *Quileute Indian Tribe v. Babbit*, 18 F. 3d 1456 (9th Cir. 1994).

As Plaintiff is no doubt aware, the Miami Tribe's interest in various lending portfolios, specifically including the Lenders named here, has been addressed in state court litigation in which the Tribe asserted that the Lenders were "arms of the tribe." *People v. Miami Nation Enterprises*, 223 Cal. App. 4th 21 (2014) (finding that ¶ Loan and United Cash Loans – the Lenders named in this case – were operated by the Miami Tribe as "arms of the tribe' and were thus protected by tribal sovereign immunity). *See also*, Cash Advance and Preferred Cash Loans v. State, 242 P. 3d 1099 (Co. 2010), reaching the same conclusion as to other loan portfolios operated by the Miami Tribe. It defies logic to think that the Tribe would not seek to protect its interests in this case, as this litigation "would necessarily implicate significant sovereign interests of the Tribe…and risk substantial prejudice to it." *Klamath Claims Comm. v. United States,* 541 Fed. Appx. 974 974 (Fed. Cir. 2013) (unpublished) (text at 2013 WL 4494383).

B. The Alter Ego Assertion Does Not Avoid the Rule 19 Analysis

Plaintiff, in substance, contends that the contracting parties, the Lenders, are merely the alter egos of Mr. Tucker. That claim is immaterial; reliance on the alter ego doctrine does not avoid the mandate of Rule 19. *Glenny v. American Metal Climax, Inc*., 494 F.2d 651 (10th Cir. 1974) instructs that "the alter ego doctrine does not provide a basis for retaining federal jurisdiction." *Reliable Personnel Inc. v. Custom Cartage, Inc*., 1994 WL 406405, *3 (N.D. Ill. Aug. 2, 1994) (discussing Glenny). In *Glenny*, the plaintiffs attempted to sue only the New York

parent of an Oklahoma subsidiary, contending that the subsidiary was not a necessary party because it was merely the alter ego of the parent company. Rejecting this maneuver out of hand, *Glenny* held that a district court should not "retain jurisdiction in a case where diversity is satisfied only by piercing the corporate veil." 494 F.2d at 655; *see* also *Armstrong v. Am. Disposal Servs., Inc*., 1994 WL 544145, *5 (D. Kan. Sept. 1, 1994) (same); *Reliable Personnel Inc*., 1994 WL 406405, *3 (applying Glenny to disregard alter ego assertion).

Indeed, making an alter ego determination requires that the alleged alter ego entity must be included in the lawsuit so that it can defend itself. *Schweyer Import-Schnittholz GmbH v. Genesis Capital Fund, L.P.*, 220 F.R.D. 582 (S.D. Iowa 2004); s*ee* also *Caribbean Telecomms*., 594 F. Supp. 2d at 532 (same); *Polanco v. H.B. Fuller Co.*, 941 F. Supp. 1512, 1518-23 (D. Minn. 1996) (collecting cases); *Dou Yee Enters. v. Advantek, Inc.*, 149 F.R.D. 185, 187-89 (D. Minn. 1993) (same).

V. Plaintiff Has Not Alleged Facts Demonstrating that Tucker Is the Alter Ego of the Lenders Under Maryland Law

Although not alleged as a separate cause of action, Plaintiff's conclusory alter ego theory flows as an undercurrent throughout the Complaint. Plaintiff attempts to raise the alter ego theory, of course, in the hope of keeping Mr. Tucker in the case. But it is apparent that there are no well-pleaded factual allegations connecting Mr. Tucker to Ms. Everette's loans or to the Lenders. Instead, all of Plaintiff's claims hinge entirely on the conclusory theory that the gaggle of entities listed in the Complaint are "controlled by Tucker" and that this somehow supports the conclusion that Tucker is the alter ego of the Lenders.

The Court must first determine which state's law to apply to the conjectural alter ego allegations. Under Maryland choice of law analysis, the Court applies Maryland alter ego law to the contractual allegations in the Complaint because Maryland – as the location of Plaintiff at the time she obtained the loan – is where the contract was formed. *See, e.g., RaceRedi Motorsports*

LLC v. Dark Machinery, Ltd., 640 F.Supp. 2d 660 (D. Md. 2009), *Am. Motorists Ins. Co. v. ARTRA Group, Inc.*, 338 Md. 560, 573 (1995). For other claims alleging various wrongs under Maryland consumer protection statutes, the principle of *lex loci delicti* applies. Since Maryland is the location in which Plaintiff was allegedly injured, Maryland law applies as well. *Proctor v. Washington Metropolitan Transit Auth.*, 412 Md. 691 (2010). .

Under the federal pleading requirements, Plaintiff does not present facts sufficient to demonstrate the required elements of alter ego under Maryland law: (1) "complete domination, not only of the finances, but of policy and business practice in respect to the transaction so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own," (2) that "such control [was] used by the defendant to commit fraud or wrong, to perpetrate the violation of the statutory or other positive legal duty, or dishonest and unjust act in contravention of the plaintiff's legal rights," and (3) that such "control and breach of duty proximately caused the injury or unjust loss." *Hildreth v. Tidewater Equipment Co., Inc.*, 378 Md. 724 (2003). Plaintiff has not presented any evidence of any of these three elements: (1) she does not set forth facts showing "complete domination" and "control" by Mr. Tucker over the Lenders or any of the other entities whose names are scattered throughout the Complaint; (2) she does not provide facts showing that the supposed "control" over the lender was used by Mr. Tucker to perpetrate a fraud or contravene Plaintiff's legal rights; and (3) she does not allege facts showing that the "control" has "proximately caused" her damages (which are, in any event, unquantified).

To be sure, Plaintiff recites that Mr. Tucker "exercises complete control" over or is "the effective owner" of various entities. *See* Complaint, ¶15, 19, 21. But absent any <u>facts</u> demonstrating <u>how</u> Tucker allegedly does so – or, indeed, <u>how</u> the myriad entities named in the Complaint even relate to the Lenders' activities – Plaintiff's complaint is mere "sound and fury, signifying nothing."

VI. Plaintiff Fails to State a Claim Under the Maryland Usury Act

Count II of the Complaint purports to make out a claim for violation of the Maryland usury law, Md. Code Ann., Com. Law §12-114(a). In support thereof, Plaintiff avers that "Defendants" (presumably including Tucker or the Lenders) "charged an interest rate far in excess of the legal limit of 24 per cent." Complaint, ¶ 146. Of course, since Plaintiff did not submit the actual loan documents evidencing her loan, it is impossible to determine what interest rate was charged. But, more to the point, Plaintiff's claim for "three times the amount of interest and charges collected in excess of the permitted amount," Complaint, ¶147, fails because Plaintiff has not set forth any facts showing that anything in excess of the permitted amount has been collected from her by Tucker, the Lenders, or anyone else. Plaintiff's nebulous recitation that she obtained loans from the Lenders and "partially paid" them is hardly adequate to show that she has paid anything in excess of her principal, much less any amount in excess of 24%. Accordingly, her claim under Count II must be dismissed.

VII. Plaintiff Fails to State a Claim Under the Maryland Consumer Debt Collection Act

Count III of Plaintiff's Complaint purports to set forth a cause of action under the Maryland Consumer Debt Collection Act, Md. Code Ann. Com. Law § 14-201, *et seq.* ("MCDCA"). Plaintiff alleges that Tucker violated the MCDCA "by attempting to collect the subject debt[7] with knowledge that the right did not exist." Complaint, ¶ 149. More particularly, Plaintiff claims that the "knowledge" arose from the fact that Tucker was not licensed to make loans under Maryland law, specifically Md. Code, Fin. Inst. §§ 11-204 or 11-302. Plaintiff further alleges that Tucker "knowingly collected interest on the subject loans far in excess of Maryland's 24 percent legal limit."

Count II is defective in multiple ways. First, Plaintiff has not described any action whatsoever taken by Tucker personally to collect any debt. Plaintiff simply leapfrogs from her claim that Tucker "is" or "equals" the Lenders to the assertion that any action by either of the Lenders is attributable to Tucker.

[7] Since Plaintiff's claim alleges more than one debt , is it not clear to which Plaintiff refers here. It is unnecessary to resolve this ambiguity since Plaintiff's claim under the MCDCA fails regardless of which debt Plaintiff has in mind.

But, Plaintiff also fails to allege any "attempt" by either of the Lenders to collect any debt owed to them. Instead, Plaintiff simply asserts that she obtained loans from the Lenders and partially repaid them. Complaint, ¶ 69. She does not present any facts demonstrating that either of the Lenders, much less Tucker himself, did anything at all to collect either debt, and certainly not any of the specific kinds of acts prohibited by the MCDCA, such as threatening force or violence, threatening criminal prosecution, engaging in telephone harassment, or the like. She appears to rely exclusively on §14-202(8), which provides that a collector may not "claim, attempt, or threaten to enforce a right with knowledge that the right does not exist." But, it is well-established under Maryland law that liability for attempting to collect a debt" knowing that the right does not exist" requires specific proof that the collector knew that the debt was invalid or acted with reckless disregard with respect to its validity. *Powell v. Palisades Acquisition XVI, LLC,* 782 F. 3d 119 (4th Cir. 2014); *Pruitt v. Alba Law Group, P.A.,* 2015 WL 5032014 (D. Md. 2015); *Kouabo v. Chevy Chase Bank, F.S.B.,* 336 F. Supp. 2d 471 (D. Md. 2004).

Moreover, because "the [MCDCA] focuses on the conduct of the debt collector in attempting to collect on the debt, whether or not the debt itself is valid," *Fontell v. Hassett*, 870 F. Supp. 2d 395, 405 (D. Md. 2012), a claim under the MCDCA "is not a mechanism for attacking the validity of the debt itself." *Id.*at 405. That is precisely what Plaintiff attempts here; indeed, her claim for declaratory judgment is that the court declare her debts "void and unenforceable." The MCDCA is not an appropriate vehicle for such a determination.

Lastly, an element of a claim under the MCDCA is that Plaintiff sustain an economic loss. *Richardson v. Rosenberg*, 2014 WL 823655 (D. Md. 2014). Though Plaintiff has included the formulaic recitation that she "suffered economic loss," the Complaint does not demonstrate any such thing. Plaintiff says only that she borrowed some unquantified amounts of money from the Lenders and "partially repaid" them. Complaint. ¶69. Unless Plaintiff repaid more than she received, she – by definition – is ahead of the game, and has not realized any "economic loss." "

VIII. Plaintiff Fails to State a Claim Under the Maryland Consumer Protection Act

Count IV of the Complaint purports to make out a cause of action against Tucker under the Maryland Consumer Protection Act ("MCPA"), Md. Code Ann. Com. L. §13-101, *et. seq.* The MCPA prohibits a laundry list of "unfair or deceptive trade practices," such as false representation of the affiliation of a telephone solicitor or the use of confessed judgment contracts in consumer transactions. As specifically alleged by Plaintiff, one form of "unfair or deceptive practice" is a "failure to state a material fact if the failure deceives or intends to deceive." §13-301(3). The MCPA also makes the violation of certain other statutes, including the MCDCA, discussed above, an "unfair or deceptive trade practice."

The linchpin of Plaintiff's claim under the MCPA is that "Defendants" (presumably including Tucker) did not tell Ms. Everette that they were not licensed to make loans in Maryland, and therefore deceived her into believing the loans she obtained from the Lenders were "legal and legitimate." Complaint, ¶155. She further alleges that "as a direct consequence" of this omission, she suffered "economic loss." But the Complaint is fatally deficient in setting forth a viable cause of action under the MCPA.

First, as discussed above, Plaintiff does not provide any facts demonstrating that Tucker did anything whatsoever with respect to her or the loans she obtained from the Lenders. Her all-encompassing references to conduct of "Defendants" (who include not only Tucker and entities Plaintiff contends Tucker controls, but other persons and entities that even Plaintiff does not maintain are associated with Tucker) are too vague, generic and conclusory to be meaningful. Second, the assertion that Tucker – or anyone else – should have told Plaintiff that the Lenders were not licensed in Maryland transforms the assumption that there was some licensing requirement into a fact, when nothing in the Complaint demonstrates that such licensing was required.

Third, as with her claim under the MCDCA, Plaintiff has invoked the mantra of "economic loss" resulting from ignorance of the fact that the Lenders were not licensed, but the Complaint shows the

contrary. Plaintiff says that she borrowed some unquantified amounts of money from the Lenders and "partially repaid" them. Complaint ¶ 69. Accordingly, Plaintiff did not lose money – she made it. "An aggrieved consumer [must] establish the nature of the actual injury or loss that he or she has allegedly sustained as a result of the prohibited practice." *Citaramanis v. Hallowell*, 328 Md. 142 (1992). An "essential element" of an award under the MCPA is that the defendant was "unjustly enriched." *Id.* Since Plaintiff's Complaint shows only that she received more than she repaid, there is no element of unjust enrichment, and her cause of action fails.

Moreover, the mere fact that a party contracting with a consumer is not licensed to engage in the particular activity does not in and of itself give rise to a claim under the MCPA, if the consumer has received value and would be unjustly enriched by voiding the obligation to pay – or repay. *Id.* Therefore, *even if* Plaintiff could show that some Maryland licensing requirement applied and was not observed, she would still be required to demonstrate some economic loss connected to that omission. Her Complaint utterly fails to do so.

IX. Plaintiff Fails to State a Viable Claim Under the EFTA

This Court should dismiss Count V of the Complaint for failure to state a claim, because Plaintiff's claim under the EFTA is barred on its face by the one-year statute of limitations. Tucker joins in and adopts the motion of Defendants Shaffer and Mitchem on this issue. (ECF 30).

WHEREFORE, Defendant Scott Tucker respectfully requests this Court to dismiss him as a defendant in this lawsuit for lack of personal jurisdiction, or, in the alternative, and without waiving their defense of lack of personal jurisdiction to dismiss the Complaint for the reasons stated herein.

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CERTIFICATE OF SERVICE

The undersigned certifies that on October 21, 2015, a copy of the above and foregoing document was electronically filed with the Clerk of the Court using the CM/ECF system which sent electronic notification of such filing to all those individuals currently electronically registered with the Court.

/s/ Paula M. Junghans
PAULA M. JUNGHANS