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

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 for Lack of Personal Jurisdiction or, in the Alternative, Dismiss for Failure to State a Claim filed by Defendant Scott Tucker ("Tucker").

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. Defendant Tucker attempts to shield himself from liability for the illegal conduct alleged herein through the use of corporate entities over which he exercises complete control, including but not limited to AMG Capital Management, LLC; Partner Weekly, LLC; Black Creek Capital, LLC; and Broadmoor Capital Partners, LLC, that advertise, market, distribute, collect or sell usurious payday loans in Maryland. In violation of strong Maryland public policy, Defendant has targeted Maryland consumers

with these loans, lent money in Maryland, and collected money from Marylanders. Nevertheless, Tucker contests personal jurisdiction here. Such an argument must be soundly rejected because Defendant's activity in this matter has concretely targeted Marylanders in violation of Maryland law.

Tucker also moves in the alternative that this Court dismiss this action for failure to join parties in violation of Fed. R. Civ. Proc. 19(b) and 19(c); to dismiss Counts II (Maryland Usury Act), III (Maryland Consumer Debt Collection Act) and IV (Maryland Consumer Protection Act) for failure to state a claim; and to dismiss the EFTA claim asserted in Count V based upon the statute of limitations. These arguments should be rejected because the Plaintiff has alleged facts sufficient to withstand a motion to dismiss for each of these counts.

For the reasons set forth below this motion should be denied.

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. Defendant Tucker is a natural person who resides in Overland Park, Kansas. *Id.* at ¶ 14.

Defendant Tucker attempts to shield himself from liability for the illegal conduct alleged herein through the use of corporate entities over which he exercises complete control, including but not limited to AMG Capital Management, LLC; Partner Weekly, LLC; Black Creek Capital, LLC; and Broadmoor Capital Partners, LLC. *Id.* at ¶ 15. None of these entities are registered to do business in Maryland. *Id.* None of these entities is licensed as either a consumer loan lender or an installment loan lender in Maryland. *Id.*

Tucker is a signatory on the accounts of each of these corporate entities. *Id.* at ¶ 16. Defendant Tucker is the manager of Broadmoor Capital Partners, LLC; Black Creek Capital, LLC, and Level 5 Motorsports, LLC. *Id.* at ¶ 17. Defendant Tucker is the president, secretary, treasurer, and director of Black Creek Capital Corporation. *Id.* at ¶ 18.

Defendant Tucker is also the operator and effective owner of AMG Services, Inc., Tribal Financial Services and MNE Services, Inc., entities claiming to be organized under the laws of the Miami Tribe of Oklahoma. *Id.* at ¶ 19. Using these corporate and tribal lending entity fronts, Defendant Tucker provides usurious payday loans through fictitious entities named "AmeriLoan" and "UnitedCashLoans." *Id.* at ¶ 19. Defendant Tucker claims to be a mere"employee" of AMG Services, Inc. *Id.* at ¶ 20.

At all times material to this complaint, acting alone or in concert with others, Defendant Tucker has formulated, directed, controlled, had authority to control, participated in the acts and practices of AMG Services, Inc., Tribal Financial Services, MNE Services, Inc., AMG Capital Management, LLC, Level 5 Motorsports, LLC, LeadFlash Consulting, LLC, PartnerWeekly, LLC, Black Creek Capital Corp, Black Creek Capital, LLC, and Broadmoor Capital Partners, LLC. *Id.* at ¶ 21. AMG Services, Inc. operates out of an office complex in Overland Park, Kansas, the same office that Tucker lists as his own in Securities and Exchange Commission filings. *Id.* at ¶ 60. AMG Services, Inc. also paid the property tax on Defendant Tucker's $8 million vacation retreat in Aspen, Colorado. *Id.* at ¶ 61. Tucker and his brother Blaine Tucker are the only two people able to sign for the bank accounts of MNE Services, Inc., and/or Tribal Financial Services, and or AMG Services, Inc. according to bank records. *Id.* at 62.

Tucker and his brother Blaine Tucker are the only two people able to sign for the bank accounts of Broadmoor Capital Partners, LLC; Black Creek Capital, LLC, and Level 5 Motorsports, LLC. *Id*. at 62.

Acting in concert with these entities, Defendant Tucker advertised, marketed, distributed, collected or sold usurious payday loans to Plaintiff and the class she seeks to represent in Maryland. *Id*. Tucker further acted as a collector because he collected and attempted to collect from Plaintiff and the class she seeks to represent an alleged debt arising out of a consumer transaction. *Id*.

"UnitedCashLoans" and "AmeriLoan" are owned, operated and controlled by Defendant Tucker through a web of corporate entities. *Id*. at ¶ 52. Through these entities Defendant Tucker has attempted to skirt liability for his illegal and unlicensed payday lending activities. *Id*. at ¶ 53. Defendant Tucker directs payments to the Miami Tribe of Oklahoma of a nominal fee to use their name in order to cloak his unscrupulous lending activities under the guise of tribal sovereign immunity. *Id*. On information and belief, the vast majority of the economic benefit of "UnitedCashLoans" and "AmeriLoan" ultimately goes to Defendant Tucker. The tribal entities receive only one percent of the gross revenues of "UnitedCashLoans" and "AmeriLoan" while Defendant Tucker retains the "net cash flow of the Lending Business." See Complaint at ¶ 56.

On information and belief, "UnitedCashLoans" and "AmeriLoan" do not provide for the Miami Tribe of Oklahoma's autonomy and economic development. *Id*. at ¶ 57. Rather, they mostly profit Defendant Tucker. *Id*. In particular, "UnitedCashLoans" and "AmeriLoan" fund the professional race car driving career of Defendant Tucker. *Id*. at ¶ 58. The entries controlled and owned by Defendant Tucker persistently commingle

funds, many of which are ultimately funneled to his auto racing team, Level 5 Motorsports, LLC. *Id.* at ¶ 58. On information and belief, the Miami Tribe of Oklahoma is not subject to any potential liability for the acts and practices of "UnitedCashLoans" and "AmeriLoan." *Id.* at ¶ 66.

In this manner, Defendant Tucker has engaged in the acts, practices and violations of law alleged below with respect to "UnitedCashLoans" and "AmeriLoan." Defendant Tucker has conducted the business practices described below through an interrelated network of companies that have common ownership, business functions, and employees and have commingled funds. Defendant Tucker has formulated, directed, controlled, had the authority to control, had knowledge of, or participated in the acts and practices of these entities to create a common enterprise. *Id.* at ¶ 22.

MNE Services, Inc., Tribal Financial Services, and AMG Services, Inc. do not hold tribal property in their own name. *See* Complaint at ¶ 67. Nor are they closely linked through the governance structure of the Miami Tribe of Oklahoma. *Id.*

Given their relationship with Defendant Tucker, MNE Services, Inc., Tribal Financial Services, and AMG Services, Inc. are legally separate and distinct from the Miami Tribe of Oklahoma, and are organized for commercial purposes that provide little benefit, if any, to the tribe. *Id.* at ¶ 68. No federal Indian law policy intended to promote tribal self-determination is furthered through the existence of MNE Services, Inc., Tribal Financial Services, and AMG Services, Inc. *Id.*

During 2013, Plaintiff Alicia Everette obtained payday loans from both "AmeriLoan" and "UnitedCashLoans" which she partially paid. *Id.* at 69.

Plaintiff obtained these loans in Maryland by using a computer in Maryland to

access the interactive websites for "AmeriLoan," https://ameriloan.com, and "UnitedCashLoans," https://unitedcashloans.com. These websites have online loan applications, and allow users to engage in online chat with "AmeriLoan" and "UnitedCashLoans" representatives. In fact, the chat function is an automatic popup. *Id.* at 70.

Neither website conspicuously discloses that either "AmeriLoan" or "UnitedCashLoans" are Native American lenders subject to sovereign immunity. At the bottom of each website, hidden in small and obscure fine print, is a disclosure that "AmeriLoan" and "UnitedCashLoans" are owned by MNE Services, Inc., which the fine print alleges is a sovereign tribal lending entity wholly owned by the Miami Tribe of Oklahoma. *Id.* at 71. However, the disclosure makes no mention of sovereign immunity, and makes no indication that Maryland residents would not be able to seek recourse under Maryland laws for the usurious and unlicensed loans that "AmeriLoan" and "UnitedCashLoans" made in Maryland. *Id.* These loans were for under $6,000. *Id.* at 72.

The interest rate for the subject loan exceeded the maximum interest rate allowed in Maryland pursuant to Md. Code, Com. Law § 12-103, which is 24 percent. *Id.* at 73. On information and belief, the interest rate exceeded at least 100 percent. *Id.*

On information and belief, "AmeriLoan" and "UnitedCashLoans" conditioned the extension of credit on repayment by means of preauthorized electronic fund transfers. *Id.* at 74. Since "AmeriLoan" and "UnitedCashLoans" 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 75.

ARGUMENT

I. PERSONAL JURISDICTION EXISTS OVER DEFENDANT SCOTT TUCKER

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.

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, Defendant Tucker attempts to shield himself from liability for the illegal conduct alleged herein through the use of corporate entities over which he exercises complete control, including but not limited to AMG Capital Management, LLC; Partner Weekly, LLC; Black Creek Capital, LLC; and Broadmoor Capital Partners, LLC. Complaint at ¶ 15. Defendant Tucker operates and effectively owns of AMG Services, Inc., Tribal Financial Services and MNE Services, Inc., entities claiming to be organized under the laws of the Miami Tribe of Oklahoma.See Complaint at ¶ 19. Using these corporate and tribal lending entity fronts, Defendant Tucker provides usurious payday loans through fictitious entities named "AmeriLoan" and "UnitedCashLoans." Complaint at ¶ 19. AMG Services, Inc., Tribal Financial Services and MNE Services, Inc. claim to be organized under the laws of the Miami Tribe of Oklahoma. *Id.* at ¶ 19. Using these corporate and tribal lending entity fronts, Defendant Tucker provides usurious payday loans through fictitious entities named "AmeriLoan" and "UnitedCashLoans." *Id.* at ¶ 19.

The Defendant's reliance upon *Harte-Hanks Direct Mktg./Baltimore, Inc. v. Varilease Tech. Fin. Grp., Inc.*, 299 F. Supp. 2d 505 (D. Md. 2004) is misplaced. In that

case the court held that "[p]ersonal jurisdiction over an individual officer, director, or employee of a corporation does not automatically follow from personal jurisdiction over the corporation." 299 F. Supp. 2d at 513. This case is different from *Harte-Hanks* because in this case personal jurisdiction is based upon Tucker's conduct, not merely his status as an officer, director, employee, and owner of several of the shell corporations that own the fictitious entities "AmeriLoan" and "UnitedCashLoans."

In this regard, the present case is more similar to *Oliver v. Crump*, No. CIV.A. ELH-11-1925, 2011 WL 4351559, at *2 (D. Md. Sept. 15, 2011), where the court held that personal jurisdiction existed over the corporate officers because it was their various acts of misconduct or malfeasance in their roles as corporate officers that constituted the persistent contacts and activities within Maryland that supported personal jurisdiction.

In this case, the complaint alleges that the corporate entities are merely shells and that Tucker is the mastermind behind the corporate shell game and therefore individually responsible for the alleged wrongful conduct. *Cf, AGV Sports Grp., Inc. v. Protus IP Solutions, Inc.*, No. CIV A RDB 08-3388, 2009 WL 1921152, at *7 (D. Md. July 1, 2009) (finding no jurisdiction over corporate officers because the complaint was "entirely lacking allegations as to how the Individual *Protus* Defendants were individually responsible for the alleged wrongful conduct.").

"UnitedCashLoans" and "AmeriLoan" were originally registered to Tucker to advertise and market payday loans several years before these names became affiliated with MNE Services, Inc., and/or Tribal Financial Services, and/or AMG Services, Inc. Complaint at ¶ 54. In July 2008, MNE Services, Inc., and/or Tribal Financial Services, and or AMG Services, Inc. entered into management agreements with a Tucker-

controlled company, N.M. Service Corp (NMS) to direct and operate their lending activities. Defendant Tucker, however, totally controls and operates "UnitedCashLoans" and "AmeriLoan." *Id.* at ¶ 54. "UnitedCashLoans" and "AmeriLoan" fund Tucker's professional race car driving career. The entities Tucker owns and controls persistently commingle funds, many of which are ultimately funneled to his auto racing team, Level 5 Motorsports, LLC. *Id.* at ¶ 58.

During 2013, Plaintiff Alicia Everette obtained payday loans from both "AmeriLoan" and "UnitedCashLoans" which she partially paid. *Id.* at ¶ 69. Plaintiff obtained these loans in Maryland by using a computer in Maryland to access the interactive websites for "AmeriLoan," https://ameriloan.com, and "UnitedCashLoans," https://unitedcashloans.com. These websites have online loan applications, and allow users to engage in online chat with "AmeriLoan" and "UnitedCashLoans" representatives. In fact, the chat function is an automatic popup. *Id.* at ¶ 70.

Defendant Tucker, through this web of corporate entities he controls, has solicited Maryland residents. Defendant Tucker has lent money to Maryland residents. Defendant Tucker has collected money from Maryland residents, including the Plaintiff. 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.

Furthermore, any claim of "inconvenience" to Defendant Tucker 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."). Defendant has made no showing that travel to Maryland is "so gravely difficult and inconvenient" that a party unfairly is at a "severe disadvantage" in comparison to his opponent. *Id.* at 478, 2185. Defendant Tucker makes no suggestion that he cannot get a fair trial in this Court.

These details are sufficient to establish personal jurisdiction over Defendant Tucker. However, if the Court believes that additional information is necessary, specific facts about how Defendant Tucker operates his fictitious entities are not available to Plaintiff at this juncture, and Plaintiff would need discovery in order to determine the structure and organization of "AmeriLoan" and "UnitedCashLoans" etc. pursuant to Rule 56(d). *See* **Exhibit 1**, Declaration of Steven B. Isbister.

Finally, a court may pierce the corporate veil for jurisdictional purposes if the circumstances would allow piercing of the corporate veil generally. S*ee Birrane v. Master Collectors, Inc.*, 738 F.Supp. 167, 169–70 (D.Md.1990) (declining to pierce the corporate veil to establish personal jurisdiction over the principal of a corporation); *Quinn v. Bowmar Publ'g Co.*, 445 F.Supp. 780, 786–87 (D.Md.1978) (same). The Maryland courts will pierce the corporate veil when necessary to prevent fraud or to enforce a paramount equity. *See Residential Warranty Corp. v. Bancroft Homes Greenspring Valley, Inc.*, 126 Md.App. 294, 728 A.2d 783, 789 (1999). Among the factors to be considered in determining whether the corporate veil must be pierced to enforce a paramount equity are gross undercapitalization of the corporation, a dominant shareholder's siphoning of corporate funds, the absence of corporate records, or other indicators that the corporation is merely a facade for the shareholder's operations. *See*

id. Again, to the extent that the court concludes that the allegations of the complaint are not yet sufficient to establish the requisite undercapitalization and siphoning, the Plaintiff should be provided with the opportunity to conduct discovery on these issues.

II. RULE 19 DOES NOT APPLY

Under Rule 19(b) "[d]ismissal of a case is a drastic remedy, however, which should be employed only sparingly. *Nat. Union Fire Ins. Co. of Pittsburgh, PA v. Rite Aid of South Carolina, Inc.*, 210 F.3d 246, 250 (4th Cir. 2000). Here, the moving party must prove (1) that "a prospective party is 'required to be joined under Rule 19(a);" (2) "that the required party cannot feasibly be joined;" and (3) that "the required-but-not feasibly-joined party is so important to the action that the action cannot 'in equity and good conscience' proceed in that person's absence." *N. Arapaho Tribe v. Harnsberger*, 697 F.3d 1272, 1278 (10th Cir. 2012).

To determine whether an absent person is a "required party" that court examines whether:

> (A) in that person's absence, the court cannot accord complete relief among existing parties; or
>
> (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:
>
> (i) as a practical matter impair or impede the person's ability to protect the interest; or
>
> (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

Fed R. Civ. P. 19(a)(1). If the Court determines that a required person cannot feasibly be joined, the Court then considers the factors in Rule 19(b) for whether the action should be dismissed.

A. "AmeriLoan" and "UnitedCashLoans" Are Not <u>Required Parties</u>

Here, Plaintiff has alleged that "AmeriLoan" and "UnitedCashLoans" are completely controlled by Defendant Tucker. *See* Complaint at ¶ ¶ 52-68. While Defendant Tucker's name may or may not appear on the Plaintiff's loan contract, Defendant Tucker is the effective lender. This Court can accord complete relief among Ms. Everette and the class she seeks to represent against Defendant Tucker because her contracts are with shell corporations completely controlled by Defendant Tucker. A final adjudication on the merits will accord complete relief among the existing parties.

Plaintiff alleges that "Ameriloan" and "UnitedCashLoans" have no distinct interests to protect because they are merely shell corporations created for the benefit of Tucker. Tucker relies on a string of cases holding that contracting parties are necessary parties in disputes over contract. The *Rite Aid* case, for instance, held that, "the district court did not err in concluding that permitting this suit to proceed without Rite Aid will 'impair or impede' Rite Aid's ability as a contracting party to protect a claimed interest relating to the subject of the action." *Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Rite Aid of S. Carolina, Inc.*, 210 F.3d 246, 251 (4th Cir. 2000). Rite Aid, therefore was not a necessary party simply because its name appeared on the insurance contract at issue in the case. It was a necessary party because it had legally cognizable interests to protect. Rite Aid is not a shell corporation. "Ameriloan" and "UnitedCashLoans" are shell

corporations created by Tucker so that he could avoid personal liability for making usurious payday loans, and they should not be afforded the same protections as legitimate businesses.

B. The Miami Tribe of Oklahoma is Not a Required Party

The Miami Tribe of Oklahoma has no interest in this lawsuit. Plaintiff has not alleged that the Miami Tribe of Oklahoma is a party to Plaintiff's contracts with Defendant Tucker. In fact, Plaintiff alleged that Defendant Tucker, and not The Miami Tribe of Oklahoma, operates and controls payday lenders "UnitedCashLoans" and "AmeriLoan." *See* Complaint at ¶ 64. Plaintiff has alleged that the Miami Tribe of Oklahoma has its own economic sub-division, Miami Nation Enterprises, created to pursue economic development opportunities for the good of the Miami Nation and its citizens. *See* Complaint at ¶ 65. However, "UnitedCashLoans," "AmeriLoan," and MNE Services, Inc., Tribal Financial Services, and AMG Services, Inc. do not appear anywhere on the Miami Nation Enterprises website as companies of Miami Nation Enterprises or the Miami Tribe of Oklahoma. *See* Complaint at ¶ 65. On information and belief, the Miami Tribe of Oklahoma is not subject to any potential liability for the acts and practices of "UnitedCashLoans" and "AmeriLoan." *See* Complaint at ¶ 66. Given their relationship with Defendant Tucker, MNE Services, Inc., Tribal Financial Services, and AMG Services, Inc. are legally separate and distinct from the Miami Tribe of Oklahoma, and are organized for commercial purposes that provide little benefit, if any, to the tribe. *See* Complaint at ¶ 68. No federal Indian law policy intended to promote tribal self-

determination is furthered through the existence of MNE Services, Inc. , Tribal Financial Services, and AMG Services, Inc. *See* Complaint at ¶ 68.

This court can accord complete relief among the existing parties without The Miami Tribe of Oklahoma, because that tribe was not involved in any of the illegal payday lending activities detailed in Plaintiff's Complaint. The Plaintiff is not aware of any interests The Miami Tribe of Ohio may have in the outcome of this lawsuit. In fact, joining the Tribe would hurt its financial interests because it is currently protected by the corporate shield.

Tucker also alleges that the Plaintiff did not sue the tribe because of tribal immunity. As Plaintiff has described above, however, Plaintiff alleged that the tribe's involvement in Defendant Tucker's scheme was minimal or nonexistent. *See* Complaint ¶ 68 ("Given their relationship with Defendant Tucker, MNE Services, Inc., Tribal Financial Services, and AMG Services, Inc. are legally separate and distinct from the Miami Tribe of Oklahoma, and are organized for commercial purposes that provide little benefit, if any, to the tribe.").

Defendant Tucker alleges that a judgment against Tucker will threaten the tribe's interest in its lending portfolios.This argument is a red herring. Reduced revenue for a corporate owner has never rendered that owner a required party.

In sum, "Ameriloan" and "UnitedCashLoans" only exist so that Tucker can avoid personal responsibility for providing usurious payday loans, and he pays the Miami Tribe of Oklahoma in attempt to afford these shell companies sovereign immunity. Neither "Ameriloan," "UnitedCashLoans," nor The Miami Tribe of Oklahoma have any

legitimate interest in the present litigation, and they are not necessary parties required to be joined under Rule 19.

III. PLAINTIFF'S COMPLAINT ALLEGES USURY

Maryland's usury law caps interest rates at 24%.[1] Md. Code, Com. Law § 12-103. Plaintiff's Complaint alleges that the Defendants, including Tucker, have charged an interest rate of far in excess of the legal limit of 24 percent pursuant to Md. Code, Com. Law § 12-103. *See* Complaint at ¶ 146. On information and belief, the interest rate on Plainitff's loans from Defendant Tucker exceeded at least 100 percent. *Id.* at ¶ 146.

Though Defendant Tucker claims that Plaintiff fails to allege that he had any involvement in providing the Plaintiff a usurious payday loan, Plaintiff has alleged that he was involved as follows, ". . . Defendant Tucker provides usurious payday loans through fictitious entities named "AmeriLoan" and "UnitedCashLoans." *See* Complaint at ¶ 19.

IV. MCDCA & MCPA

Plaintiff's Complaint alleges that Defendant Tucker attempted to collect the subject debt with knowledge that the right to collect the subject debt did not exist, in violation of MCDCA § 14-202(8). To support this claim Plaintiff alleged that Tucker attempted to collect the illegal and usurious subject loans when he knew he was not licensed under either the Consumer Loan Law or Installment Loan Law, and therefore

[1] Plaintiff does not have the loan contracts in her possession. Defendant Tucker clearly does because he claims that the Plaintiff's lending contracts contain an arbitration clause. Tellingly, Tucker has failed to produce this lending contract, clearly because the loan contracts will show interest rates far in excess of 24%. In fact, if the loans were not usurious Tucker would have produced the loan documents and filed a motion for summary judgment.

not authorized to collect on the loan. *See* Complaint ¶ 149. Plaintiff additionally alleged that Tucker's loan was usurious and that he was therefore unauthorized to collect or attempt to collect from the Plaintiff. *See* Complaint ¶ 149.

Plaintiff also alleged that collecting on a loan when unlicensed and collecting on a loan with a usurious interest rate constitute unfair and deceptive trade practices that violate the MCPA. Plaintiff alleged that under § 13-301(3) of the MCPA, unfair or deceptive trade practices also include failure to state a material fact if the failure deceives or tends to deceive. *See* Complaint ¶ 155. Plaintiff alleged that Tucker's decision to make an illegal unlicensed loans to Plaintiff without disclosing the fact that these Defendants could not make such loans without a license deceived Plaintiff into thinking the subject loans were legal and legitimate loans. *See* Complaint ¶ 155.

The MCDCA applies to all "collectors," both original creditors and those who collect debts in default.[2]

Section 14–202(8) of the MCDCA states that "[i]n collecting or attempting to collect alleged debt, a collector may not . . . (8) claim, attempt, or threaten to enforce a right with knowledge that the right does not exist." Md. Code Ann., Comm. Law § 14–202(8). If "the statute's language is plain, the sole function of the courts is to enforce it according to its terms." *Sayyed v. Wolpoff & Abramson*, 485 F.3d 226, 230 (4th Cir. 2007). The plain meaning of § 14-202(8) is that a collector may not attempt to exercise

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[2] *See* MCDCA § 14-201(c) ("'Collector' means a person collecting or attempting to collect an alleged debt arising out of a consumer transaction."). "Person" is also defined broadly to include "an individual, corporation, business trust, statutory trust, estate, trust, partnership, association, two or more persons having a joint or common interest, or any other legal or commercial entity." MCDCA § 14-201(d).

any right with the knowledge that the right does not exist. This could include attempting to collect an alleged debt that is not owed – a completely "invalid" debt – and also collecting or attempting to collect more than owed because that is also an attempt to assert a right that does not exist for payment of an amount that is not owed.

Citing, *Fontell v. Hasset,* Tucker argues that that a MCDCA § 14–202(8) claim is not an appropriate vehicle to challenge the collection of the Plaintiff's loan payments because this would be an attempt to attack the validity of the debt itself. Tucker raises this argument even though neither "valid" nor "invalid" appear anywhere in the statute. The proper reading of § 14–202(8) is that a collector who seeks to collect any amount above what a consumer is legally obligated to pay is attempting to enforce a right to collect that does not exist.

This interpretation is supported by decisions of numerous courts holding that overcharging consumers may serve as the basis for a claim under the MCDCA § 14-202(8). *See, e.g., Allstate Lien & Recovery Corp. v. Stansbury*, 219 Md. App. 575 (Md. Ct. Spec. App. 2014) (unlawful "processing fee" added to otherwise valid debt); *Allen v. Bank of America, N.A.*, 933 F.Supp.2d 716 (D. Md. 2013) (wrongfully attempting to enforce the right to collect certain payments); *Kouabo v. Chevy Chase Bank, F.S.B.*, 336 F.Supp.2d 471 (D. Md. 2004) (filing Motion for Judgment in the amount of $1,500 for breach of settlement agreement when plaintiff had been making payments pursuant to the settlement agreement); *Spencer v. Hendersen-Webb, Inc.*, 81 F.Supp.2d 582 (D. Md. 1999) (attempting to collect 15% attorney fee when no attorney had worked on the case and attempting to collect waived late charges).

In this case Tucker is alleged to have attempted to collect a loan that may not be

collected because it was made in violation of Maryland law. In other words, the Plaintiff is obligated to pay $0.00 on the loans and the attempts to collect payment of any amount from the Plaintiff is an attempt to enforce a right to collect that amount with knowledge that the right did not exist.

Finally, whether the conduct at issue in this case violated the MCDCA was a factual issue that was to be resolved by the jury. In *Allen v. Bank of Am., N.A.,* the court stated:

> So, whether BANA violated the MCDCA turns on two genuine issues of material fact: (1) whether the Allens did not, in fact, owe the disputed payments (which would mean BANA wrongly attempted to enforce a right) and, relatedly, (2) whether BANA knew or recklessly disregarded the truth that it did not have the right to demand those payments. BANA's own records, which do not reflect these payments, (see Loan History, ECF No. 80–12), suggest it did not have actual knowledge it did not have a right to collect them. However, no evidence in the record conclusively demonstrates that BANA did not act with "reckless disregard" for the true status of the Allens' mortgage account. Alternatively, if BANA did receive the payments, even if it did not apply them to the Allens' mortgage, the fact that the funds were in BANA's custodial account could indicate it had "constructive knowledge" it had no right to demand the payments. *See Kouabo*, 336 F.Supp.2d at 475. These are questions for the jury. Accordingly, neither BANA nor the Allens are entitled to summary judgment on the Allens' MCDCA claim.

933 F. Supp. 2d 716, 730 (D. Md. 2013).

A violation of the MCDCA also constitutes a violation of the MCPA. *See* Md.Code Ann., Com. Law § 13-301(14)(iii). *See also Olson v. Midland Funding, LLC*, 578 F. App'x 248, 251 (4th Cir.2014) ("[a] violation of the MCDCA is a per se violation of the MCPA."); *Bradshaw v. Hilco Receivables, LLC*, 765 F. Supp. 2d 719, 731-32 (D. Md. 2011) ("The Maryland Consumer Protection Act ("MCPA") prohibits "unfair or deceptive trade practices," Md.Code Ann., Com. Law § 13–301, and expressly designates as "unfair

or deceptive trade practices" those that constitute any violation of the MCDCA. *Id.* § 13–301(14)(iii)."); *Fontell v. Hassett*, 2012 WL 2479543 (D. Md. June 28, 2012) (". . . .Defendants' violation of the MCDCA for attempting to collect debts without a license constitutes an 'unfair or deceptive trade practice' under the MCPA, and the management agent and its employees must be found to have violated that statute as well.").

As demonstrated above, the complaint adequately alleged violations of MCDCA §14–202(8). As a matter of law these alleged violations also constitute a violation of the MCPA.

V. PLAINTIFF'S EFTA CLAIM IS NOT BARRED BY LIMITATIONS

EFTA claims must be brought "within one year from the date of the occurrence of the violation." 15 U.S.C.A. § 1693m(g). Pursuant to the doctrine of continuing harm, whereby "violations that are continuing in nature are not barred by the statute of limitations merely because one or more of them occurred earlier in time,"[3] the statute of limitations for Plaintiff's EFTA claim should measure from the date of the most recent occurrence of Defendant's EFTA violation.[4]

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[3] *Bacon v. Arey*, 203 Md. App. 606, 655, 40 A.3d 435, 465 (2012); *See also, Consol. Pub. Utilities Co. of Westminster v. Baile*, 152 Md. 371, 136 A. 825, 826 (1927) (holding that where Plaintiffs' harm, which had persisted for five or six years and which Plaintiffs knew about for that duration, was "continuing in nature," their right to bring suit was "not barred by the three year Statute of Limitations for the continuing violation during the three year period prior to the filing of the action").

[4] Due to an oversight, Plaintiff inadvertently failed to raise this argument in response to the motions to dismiss of Defendants Shaffer, Mitchem, Riverbend, and Mobiloans, but it applies to all Defendants in this matter.

Courts have applied the "continuing violation" doctrine to EFTA claims, but there is a split of authority on this issue. *Compare Diviacchi v. Affinion Grp., Inc.*, No. CIV.A. 14-10283-IT, 2015 WL 3631605 (D. Mass. Mar. 11, 2015) report and recommendation adopted, No. 14-CV-10283-IT, 2015 WL 3633522 (D. Mass. June 4, 2015) at *4 (N.D. Cal. Sept. 9, 2015) *with Camacho v. JPMorgan Chase Bank,* No. 5:14-CV-04048-EJD, 2015 WL 5262022, at *4 (N.D. Cal. Sept. 9, 2015).

This court should adopt the reasoning from *Diviacchi* which held:

> In the case at bar, the repeated transfers from plaintiff's bank account are independently actionable even though they all relate to plaintiff's July 1995 enrollment in the membership benefits package and the allegedly unknowing and invalid authorization of the charges. Each transfer constitutes a new harm above and beyond the prior harm of a prior transfer and it amounts to an independent violation of section 1693e. The transfers do not simply continue the initial effects of the first transfer and section 1693e violation that occurred no later than August 2000. Rather, each transfer is an independent violation of section 1693e because it is a new transfer that causes new harm to plaintiff in an amount, albeit only $4.00, "over and above" the prior transfers. Thus, even though the new transfer stems from the initial unknowing authorization in July 1995, it constitutes a new and independent violation because the new transfer is a required element of a section 1693e violation to recover for that transfer. Without a transfer, there is no section 1693e violation. The new transfer is also a new harm "over and above the harm" caused by the earlier transfers. Plaintiff may therefore bring a section 1693e claim for the discrete acts of the purportedly unauthorized transfers that took place within one year of the time plaintiff filed the complaint. Transfers prior thereto, however, are barred by the one year statute of limitations to the extent plaintiff relies on application of the continuing violation doctrine as a means to render them timely. As indicated above, discrete acts cannot serve as a basis to apply the continuing violation doctrine and thereby recapture and recover damages for the untimely acts. *See Gorelik v. Costin*, 605 F.3d 118, 122 (1st Cir.2010) ("discrete discriminatory acts which occur outside the limitations period are time-barred and no longer actionable") (citing *National Railroad Passenger Corporation v. Morgan*, 536 U.S. at 115).

Id. at 2015 WL 3631605, at *10.

Plaintiff has alleged that she obtained multiple loans from Defendant Tucker-controlled "UnitedCashLoans" and "AmeriLoan," in which the extension of credit was conditioned on repayment by means of preauthorized electronic fund transfers in violation of 15 U.S.C. § 1693k(1). With each payment the Plaintiff made by an electronic fund transfer, Defendant Tucker violated EFTA. Even if a portion of Defendant Tucker's EFTA violations are beyond the statute of limitations, any payments the Plaintiff made to the Defendant on or after May 1, 2014, are actionable in this matter.

Defendant Tucker failed to provide any evidence that Plaintiff's last payment to Defendant by means of Defendant's required method of electronic fund transfer was before May 1, 2014, and therefore has failed to establish that the EFTA claim is entirely barred by the statute of limitations.

CONCLUSION

For these reasons Defendant Tucker's motion should be denied.

REQUEST FOR HEARING

Undersigned counsel request a hearing.

Dated:November 9, 2015 Respectfully Submitted,

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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.

November 9, 2015. /s/ E. David Hoskins
E. David Hoskins, Esq.