UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

MATTHEW HOWARD, Plaintiff, – against– PLAIN GREEN, LLC AND TRANSUNION, LLC, Defendant(s).	Civil No. 2:17-cv-00302-RBS-DEM **PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO PLAIN GREEN, LLC'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT**

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

Plaintiff Matthew Howard ("Plaintiff") respectfully submits this Memorandum of Law in opposition to Defendant Plain Green, LLC's ("Defendant" or "Plain Green") Motion to Dismiss.

I. INTRODUCTION AND FACTUAL BACKGROUND

This lawsuit is the result of Defendant's violations of the Fair Credit Reporting Act, 15. U.S.C. § 1681, et seq. (the "FCRA"). In particular, despite discharging $410.00 of Plaintiff's consumer debt, Defendant continues to negatively report Plaintiff's account on his credit report; in particular, this account is being reported as "Charge Off" with a balance of $721.00 and a past due balance of $721.00. However, the account was settled and paid in full, and as such, must be reported as settled with a $0.00 balance. The status of this tradeline severely impacts Plaintiff's

credit score and his ability to procure any type of credit. Defendant fails to recognize the detrimental effects its actions has on Plaintiff and refuses to properly update its reporting of Plaintiff's Plain Green account.

Defendant's Motion to Dismiss attempts to steer this Court's attention to arguments that are patently improper and untimely. First and foremost, Defendant's conduct with Plaintiff clearly transpired outside of tribal territory and any contention that tribal immunity existed is severely misguided. Secondly, Defendant's position that it never received notice from Trans Union is unsubstantiated and currently unproven. In addition, whether Defendant received notice from Trans Union is only one part of the equation since Defendant must also show that it never received notice from any other credit reporting agency. At this time, without reference to additional documentation and significant discovery, Defendant cannot absolve itself from liability.

II. LEGAL ARGUMENT

A. Standard of Review

A motion to dismiss for failure to state a claim for relief should not be granted unless it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of his claim. *Johnson v. Mueller*, 415 F.2d 354, 355 (4th Cir. 1969) (citing *Conley v. Gibson*, 355 U.S. 41 (1957). In considering a Rule 12(b)(6) motion, the Court must construe the complaint in the light most favorable to the plaintiff, read the complaint as a whole, and take the facts asserted therein as true. *Mylan Labs., Inc. v. Matkari*, 7 F.3d 1130, 1134 (4th Cir. 1993). The usual starting point for an analysis of a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) involves a district court accepting all well-pleaded allegations in a

plaintiff's complaint as true and drawing all reasonable factual inferences from those facts in the plaintiff's favor. As a result, the court therefore may only grant dismissal when it is beyond doubt that the plaintiff can prove no set of facts in support of his claim which will entitle him to relief. *Edwards v. City of Goldsboro*, 178 F.3d 231, 244 (4th Cir. 1999).

III. PLAIN GREEN IS NOT IMMUNE FROM SUIT

A. Tribal Sovereignty is Not Absolute When Practicing Off Reservation Commercial Activities

It is in the federal government's interest to maintain a balance between both consumer protection and tribal governments. Although the promotion of tribal growth and prosperity is important, so are protecting consumer rights and preventing consumer exploitation. It is unreasonable to allow a tribe, or entity of a tribe, to conduct business off the tribal reservation and not be liable to the laws of which the business is conducted. A foreign state is normally immune from the jurisdiction of federal and state courts, 28 U. S. C. § 1604, subject to a set of exceptions specified in §§ 1605 and 1607. Those exceptions include actions in which the foreign state has explicitly or impliedly waived its immunity, § 1605(a)(1), and actions based upon commercial activities of the foreign sovereign carried on in the United States or causing a direct effect in the United States, § 1605(a)(2). *Verlinden B.V. v. Cent. Bank of Nig.*, 461 U.S. 480, 488-89 (1983). When one of these or the other specified exceptions applies, "the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances," § 1606. *Id*.

Although tribal sovereign immunity is important for the maintenance of tribal culture, it does not grant tribes exemption from all U.S. laws. "The principle of tribal sovereignty in

American law exists as a matter of respect for Indian communities. It recognizes the independence of these communities as regards internal affairs, thereby giving them altitude to maintain traditional customs and practices. But tribal sovereignty is not absolute autonomy, permitting a tribe to operate in a *commercial capacity* without legal constraint." *San Manuel Indian Bingo and Casino v. National Labor Relations Board*, 475 F.3d 1306, 1314-15 (D.C. Cir. 2007) (emphasis added).

This is especially true when the tribe's actions are involved in commerce outside of said tribe's land. Tribes are not free from regulation when they conduct economic activities off their reservations. *State ex rel. Suthers v. Cash Ad. And Pref. Cash Loans*, 205 P.3d 389 (2008) (citing *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-149 (1973). Business conducted over the Internet that would confer jurisdiction on a state court also demonstrates that the business activity constitutes off-reservation activity *Id.* (internal citations omitted); *see State ex rel. Suthers*, 205 P.3d at 400 (holding that a Tribe's lottery is not on Indian lands when the wager is placed by telephone from off the reservation).

In the context of contractual law, to determine whether an activity was conducted off the reservation, courts generally look to where (1) the contract was entered into; (2) the contract was negotiated; (3) performance is to occur; (4) the subject matter of the contract is located; and (5) the parties reside. *Emerson v. Boyd*; 805 P.2d 587, 588 (Mont. 1991); *see Wood Bros. Homes, Inc. v. Walker Adjustment Bureau*, 601 P.2d 1369, 1372-73 (Colo. 1979) (adopting same five-part test from Restatement (Second) Conflict of Laws & 193 (1971) to resolve conflict of law issues involving contracts). In a Colorado District court decision analyzing this issue, the court held that

the conduct of the suit did not involve regulation of Indian affairs on a reservation when the borrowers did not go to the reservation to apply for, negotiate, or enter into loans. *Colorado v. Western Sky Financial, LLC*, 845 F.Supp.2d 1178 (D. Colo. 2011). The loans were applied for by accessing the defendant's website; the funds were withdrawn electronically from bank accounts; and the impact of the excessive charges were felt off the reservation. *Id.*

Plaintiff and Plain Green entered into a settlement agreement on March 24, 2016, in Virginia, where Plaintiff resides. Plaintiff contacted Plain Green regarding his 0156 account and the parties negotiated a settlement agreement in which Plaintiff would make three monthly payments totaling $410.00 to settle and close his Plain Green account. The account was negotiated in New York, where Plaintiff's debt settlement company resides. These payments would be performed via electronic payments through Mr. Howard's trust account to Plain Green. The subject matter of the settlement agreement is located electronically, including the payments and the 0156 account. Plain Green has a principal place of business located at 93 Mack Road, Ste. 600, Box Elder, MT 59521, but a c/o correspondence address on the settlement checks of 1900 Frost Rd, Ste 100, Bristol, PA 19007; Mr. Howard resides in Norfolk, VA. Based on where the contract in question was entered, the contract was negotiated, the location of the subject matter of the action, the benefits of the bargain would be utilized, the locations of the parties and the electronic nature of the settlement agreement, the actions of the agreement were unequivocally conducted off the Chippewa Cree Tribe reservation and subjects Defendant to jurisdiction in Virginia.

The Defendant relies on *Meyers v. Oneida Tribe of Indians of Wisconsin*, 836 F.3d 818, 827 (7th Cir. 2016), to allege that tribal immunity was not abrogated by Congress through the FCRA. However, the facts and circumstances of *Meyers* are inherently distinct from those of the current suit. The entire suit arose from actions and business transactions occurring on and within the tribal lands of the Oneida Tribe of Indians of Wisconsin. The Plaintiff in *Meyers* entered Oneida Tribe owned locations, the Oneida Travel Center and two Oneida One Stop retail locations in and around Green Bay, Wisconsin. Meyers used his credit card to make purchases in each of these stores. The cause of action occurred in these store locations when the receipts provided by each store allegedly violated FACTA, an amendment to the FCRA. Meyers willingly entered the tribal stores to enter into contracts with the stores and subjected himself to the laws of the lands on which he stood. Unlike Meyers, Plaintiff never entered tribal land or a tribal store, nor did he knowingly subject himself to the laws of tribal governance. Plaintiff did not go to the reservation in Montana to apply for, negotiate, or enter into a settlement agreement and the impact of the incorrect credit report was felt, not on tribal land, but in Virginia.

The federal government has an interest to balance both consumer protection and tribal governments. It is unreasonable that a party, i.e. a tribe, can enter into contracts with borrowers virtually anywhere in the country, and not be liable under the terms of the party's own contract. As the Supreme Court stated, these tribes are subject to regulation when conducting business off the reservation. Under the five-factor test, Plain Green has conducted economic activities off the reservation and is subject to the FCRA.

B. The Relationship Between the Chippewa Cree Tribe and Plain Green is not Sufficiently Close Enough to Permit Plain Green to Share in the Chippewa Cree Tribe's Tribal Sovereign Immunity

Plain Green does not have a sufficiently close relationship to the Chippewa Cree Tribe, when taking into account both formal and functional aspects of the relationship, in order to permit Plain Green to share in the tribal sovereign immunity of the Chippewa Cree Tribe. "Tribal sovereign immunity may extend to subdivisions of a tribe, including those engaged in economic activities, provided that the relationship between the tribe and the entity is sufficiently close to properly permit the entity to share in the tribe's immunity." *Everette v. Mitchem*, 146 F.Supp.3d 720, 723 (D. Md. 2015) (citing *Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173, 1183 (10th Cir. 2010)).

Courts have set forth different factors for determining when an organization is entitled to share in tribal immunity because it is so closely joined with, and dependent upon, a tribe as to be deemed an "arm of the tribe." *State ex rel. Suthers*, 205 P.3d at 403. If the organizations are not "arms of the tribes," they are not immune. *Id.* To determine whether an entity is entitled to sovereign immunity as an "arm of the tribe," courts examine several factors, including: "(1) their method of creation; (2) their purpose; (3) their structure, ownership, and management, including the amount of control the tribe has over the entities; (4) whether the tribe intended for the entities to have tribal sovereign immunity; (5) the financial relationship between the tribe and the entities; and (6) whether the purposes of tribal sovereign immunity are served by granting immunity to the entities." *Breakthrough*, 629 F.3d at 1181. The sixth factor examines "the policies underlying tribal sovereign immunity and its connection to tribal economic development, and whether those policies are served by granting immunity to the economic

entities." *Breakthrough*, 629 F.3d at 1187. "Those policies include protection of the tribe's monies, as well as preservation of tribal cultural autonomy, preservation of tribal self-determination, and promotion of commercial dealings between Indians and non-Indians." Although *Breakthrough* "recognize[d] that the financial relationship between a tribe and its economic entities is a relevant measure of the closeness of their relationship," it rejected the notion that financial relationship or any other single factor is "a dispositive inquiry" *People v. Miami Nation Enterprises*, 2 Cal. 5th 222, at 238 (citing *Breakthrough*, 629 F.3d at 1187).

In a recent California Supreme Court case, business entities associated with two Indian tribes were found not entitled to tribal immunity as an arm of the affiliated tribe. *Id*. The Court found, "among the five factors, only tribal intent weighs unequivocally in favor of extending tribal immunity to SFS and MNE Services. But tribal intent, as expressed in the entities' articles of incorporation, reveals little about 'whether the entity *acts* as an arm of the tribe so that its *activities* are properly deemed to be those of the tribe.'" *Id*. at 256 (citing *Allen*, 464 F.3d at 1046). "The Tribes' 'self-interested and unsupported claim' that they 'intended their sovereign immunity to extend to [SFS and MNE Services] cannot, without more,' support immunity… and such a formal statement of immunity is not sufficient here to tip the balance in favor of immunity." *Ibid*. (citing *White v. University of California*, 765 F.3d 1010).

Similarly, in the present case, Plain Green has only provided the articles of incorporation, which reveal little about the acts of the entity that properly deem the activities those of the tribe. The formal statement of immunity from Plain Green is not sufficient to "tip the balance in favor of immunity" and, as such, without further information and evidence to support tribal sovereign

immunity, the relationship between the Chippewa Cree Tribe and Plain Green is not sufficiently close enough to permit Plain Green to share in the Chippewa Cree Tribe's immunity.

IV. PLAINTIFF SUCCESSFULLY STATED AN FCRA CLAIM AGAINST PLAIN GREEN

A. Plaintiff Satisfies the Standard of Review by Providing a Short and Plain Statement that is Plausible On Its Face

Under the Federal Rules of Civil Procedure, a pleading that states a claim for relief must contain a short and plain statement of the claim showing that the pleader is entitled to relief. Fed R. Civ. P. 8(a)(2). When evaluating the sufficiency of the complaint, we construe it in the light most favorable to the nonmoving party, accept well-pleaded facts as true, and draw all inferences in her favor. *Reger Dev., LLC v. Nat'l City Bank*, 592 F.3d 759, 763 (7th Cir. Ill. 2010). A complaint must provide "only enough facts to state a claim to relief that is plausible" on its face. In other words, "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Brindley v. Target Corp.*, 761 F. Supp. 2d 801, 803 (N.D. Ill. 2011) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S 544, 570). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

A party may set out two or more statements of a claim or defense alternatively or hypothetically, either in a single count or defense or in separate ones. If a party makes alternative statements, the pleading is sufficient if any one of them is sufficient. Fed. R. Civ. P. 8(d)(2). Each allegation must be simple, concise, and direct. No technical form is required. Fed. R. Civ. P. 8(d)(1).

Plaintiff provides a brief, concise statement with enough facts that are sufficient for the complaint to be considered plausible on its face. Plain Green provides no evidence that shows otherwise. Plaintiff has brought an alternative statement of a claim against Trans Union as well. Plaintiff's complaint must present both statements in order to diligently represent Plaintiff's interests. Plain Green supports this claim against Trans Union by alleging lack of notification from Trans Union. As such, the court may draw a reasonable inference that there is enough evidence to support both statements of the complaint and should not grant the Motion to Dismiss.

B. Plain Green does not Provide Extrinsic Materials to Support a Conversion of its Motion to Dismiss to a Motion for Summary Judgment

Under narrow circumstances, a court may rely on extrinsic materials to determine a motion to dismiss without converting the proceeding into a motion for summary judgment. Fed. R. Civ. P. 12(d). For example, a court may properly take judicial notice of matters of public record and other information that, under Fed. R. Evid. 201, constitute adjudicative facts. "Generally, the Court will not consider matters outside the pleadings when considering a motion to dismiss. However, if a party presents extraneous documents in support of its motion to dismiss, it is within the Court's discretion to include or exclude the extraneous documents from its consideration. If the Court excludes the extraneous documents from its consideration, the motion to dismiss is preserved. On the other hand, if the Court considers the extraneous documents, the Court shall treat the motion to dismiss as a motion for summary judgment, unless an exception applies." *Johnson v. Student Funding Group and Sergio Sotolongo*, 2015 Del. Super. LEXIS 31 at *2 (Del. Super. 2015). "The first exception is when the document is integral

to the complaint...[t]he second exception is when the document is not being relied upon to prove the truth of its contents." *Ibid.*

Acceptance of extraneous material is discretionary, however, not mandatory; therefore, "[o]nly if the court accepts the additional material is the motion then treated as one for summary judgment." *Truhlar v. John Grace Branch # 825*, 2007 U.S. Dist. LEXIS 23875 at *20 (N.D. Ill. 2007). Thus, where a defendant attaches materials to a Rule 12(b)(6) motion, the court may, at its discretion, either convert the motion into a motion for summary judgment and proceed in accordance with Rule 56, or exclude the materials and continue under Rule 12. Id. at *21; *see also DeLeon v. Beneficial Constr. Co.*, 998 F. Supp. 859, 862 (N.D. III. 1998) (noting that excluding all materials attached to a defendant's Rule 12(b)(6) motion or continuing to proceed under Rule 12 is entirely within the court's discretion).

In this case, the exhibits presented by Plain Green do not fit into either exception discussed above. These exhibits should not be considered because they do not support the subject matter of the complaint. Plain Green only provided Exhibit A, articles of organization of Plain Green, and Exhibit B, an amendment to the articles of organization for Plain Green. The complaint concerns Plain Green's violations of the FCRA. Additional discovery is required to determine whether Plain Green complied with the statutory requirements of the FCRA. As such, the Court may not review Plain Green's extrinsic materials attached to its motion and must reject Plain Green's request to convert its Motion to Dismiss into one for summary judgment.

C. Plain Green is Obligated to Update Plaintiff's Credit Report for All Credit Reporting Agencies

A person who (A) regularly and in the ordinary course of business furnishes information to one or more consumer reporting agencies about the person's transactions or experiences with any consumer; and (B) has furnished to a consumer reporting agency information that the person determines is not complete or accurate, shall promptly notify the consumer reporting agency of that determination and provide to the agency any corrections to that information, or any additional information, that is necessary to make the information provided by the person to the agency complete and accurate, and shall not thereafter furnish to the agency any of the information that remains not complete or accurate. 15 U.S.C. § 1681s-2(a)(2)(A)-(B).

Trans Union is one of three major credit reporting agencies, the others being Experian and Equifax. Plain Green only addresses one of these agencies, Trans Union, as having not given notice to Plain Green. Plaintiff disputed the accuracy of the account with all three credit reporting agencies, as established in Exhibit D. Plain Green should have also received Automated Credit Dispute Verification ("ACDV") notices from these other credit reporting agencies, not just Trans Union. If Plain Green did receive three separate ACDVs, it would be unreasonable for Plain Green to send an update of Plaintiff's account to some of the credit reporting agencies, but not to all the credit reporting agencies. It is more likely that Plain Green did not respond to any ACDV since each credit reporting agency would have received a carbon copy of the response.[1] Therefore, Plain Green did not timely correct the inaccuracy on Mr. Howard's credit report, and as such, violated the FCRA.

[1] "About e-OSCAR," http://www.e-oscar.org/about-e-oscar.aspx (describing the process of updating information relating to a consumer's credit history).

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that this court deny Defendant's Motion to Dismiss Plaintiff's Complaint.

Respectfully submitted,
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By Counsel

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CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of July 2017, an electronic copy of the foregoing will be served using the Court's CM/ECF system on the following:

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