UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

SOPHIA BOOKER,

Plaintiff,

v. **Case No. 8:20-cv-00959**

PLAIN GREEN, LLC, *and*
HARLAN GOPHER BAKER,

Defendants.
_____/

PLAINTIFF'S MOTION FOR REMAND AND ATTORNEY'S FEES PURSUANT TO 28 U.S.C. § 1447(C), AND SUPPORTING MEMORANDUM OF LAW

Plaintiff, Sophia Booker ("**Plaintiff**"), by and through undersigned counsel, respectfully moves this Court to enter an order remanding this case back to the County Court of the Thirteenth Judicial Circuit, in and for Hillsborough County, Florida, from which it was removed. Additionally, because Defendants' attempt to remove this case lacks an objectively reasonable basis, pursuant to 28 U.S.C. §1447(c), Plaintiffs seek an award of just costs and actual expenses, including attorneys' fees, incurred because of Defendants' removal. In support, Plaintiff states as follows:

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Defendant Plain Green, LLC ("**Plain Green**") claims on its website, https://www.plaingreenloans.com, to be a tribal lending entity, wholly owned by the Chippewa Cree Tribe of the Rocky Boy's Indian Reservation, Montana. Plain Green advertises that it has funded more than $1 billion in loans since 2011.

On or about January 4, 2019, Plaintiff took out a loan with Plain Green in the principal amount of $1,000.00, to be repaid bi-weekly in 30 installments of $138.19. Doc. # 1-1 at ¶ 10. Plaintiff's loan thus charged an interest rate of at least **378%** - for a total collection of $4,145.70 over a period of a little more than one year. The terms of Plain Green's loan to Plaintiff are clearly set forth in an email sent to Plaintiff on January 8, 2019, Doc. # 1-1, Exhibit A. Plain Green later attempted to collect this loan via telephone calls and emails to Plaintiff, and by reporting the account to at least one credit reporting agency, Trans Union, LLC.

Plaintiff filed her Complaint and Jury Trial Demand in the County Court of the Thirteenth Judicial Circuit, in and for Hillsborough County, Florida on December 4, 2019. Plaintiff's initial Complaint alleged that Defendant Plain Green violated the Florida Consumer Collection Practices Act, Section 559.55, Florida Statutes, *et. seq.* ("**FCCPA**") when they asserted the existence of a legal right which does not exist, specifically the right to collect an online payday loan requiring 378% annual interest, when such loans are null and void and contrary to public policy in Florida.

On or about January 2, 2020, Plaintiff filed her First Amended Complaint (Doc. # 1-1), therein adding Harlan Gopher Baker ("**Baker**") (collectively with Plain Green, "**Defendants**") as a defendant to this action. In addition to Plaintiff's FCCPA claim against Plain Green, Plaintiff further alleged that both Plain Green and Baker violated Florida's Civil Remedies for Criminal Practices Act, Section 772.104, Florida Statutes ("**FCRCPA**"). Plaintiff's Amended Complaint alleges that Plain Green violated the FCRCPA "when it knowingly engaged in a pattern where it made loans well in excess of

45% interest per annum . . . and then proceeded to collect these unlawful debts and obtain proceeds therefrom." Doc. # 1-1 at ¶ 137. Plaintiff similarly alleges that Baker violated the FCRCPA when he knowingly participated, both directly and indirectly, in Plain Green's collection of an unlawful debt from Ms. Booker. Doc. # 1-1 at ¶ 141. As the FCCPA and FCRCPA are Florida statutes, Plaintiff solely brings claim under state law.

On March 31, 2020, the Parties filed a Joint Stipulation Regarding Service of Process through which Defendants agreed to waive formal service of process and accept service of process through counsel, effective March 30, 2020. Defendants thereafter timely removed this case to the present Court, via Notice of Removal filed April 27, 2020. Doc. # 1. However, as set forth in more detail herein, this Court lacks subject matter jurisdiction over Plaintiff's claims, and this case must be remanded back to the County Court of the Thirteenth Judicial Circuit, in and for Hillsborough County, Florida.

MEMORANDUM OF LAW

I. Tribal Sovereign Immunity is a Federal Defense that Cannot be the Basis of Defendants' Removal

"Federal courts are courts of limited jurisdiction,' possessing 'only that power authorized by Constitution and statute.'" *Gunn v. Minton*, 133 S. Ct. 1059, 1064 (2013) (*quoting Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994)). Federal subject matter jurisdiction "cannot be consented to or waived, and its presence must be established in every cause under review in the federal courts." *Firstenberg v. City of Santa Fe, N.M.*, 696 F.3d 1018, 1022 (10th Cir.2012). Indeed, "[i]t is to be presumed that a cause lies outside this limited jurisdiction, and the

burden of establishing the contrary rests upon the party asserting jurisdiction." *Kokkonen*, 511 U.S. at 377.

Defendants seek removal under 28 U.S.C. § 1441(a), asserting that this Court has original jurisdiction over Plaintiff's claims. Doc. # 1 at ¶ 4 ("A civil action for which a district court has original jurisdiction founded upon a claim or right arising under the laws of the United States is removable without regard to citizenship or residence of the parties.")

28 U.S.C. § 1441(a) provides that "any civil action brought in a State court of which the district courts of the United States have original jurisdiction may be removed by the defendant or the defendants to the district court of the United States for the district and division embracing the place where such action is pending." *See also, Pers. Physician Care, P.A. v. Fla. Physicians Tr., LLC*, Case No: 6:16-cv-452-Orl-28DAB, at *5 (M.D. Fla. Aug. 16, 2016).

"[T]he question whether a claim 'arises under' federal law must be determined by reference to the 'well-pleaded complaint.'" *Pers. Physician Care, P.A. v. Fla. Physicians Tr., LLC*, at *6 (*citing Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 808 (1986)). Defendants acknowledge in their Notice of Removal that Plaintiff's Amended Complaint exclusively pleads state law claims, stating "the above-mentioned action is a civil action for *state law claims*…" Doc. # 1 at ¶ 6. Thus, on the face of Plaintiff's Complaint, this Court lacks jurisdiction.

However, the Supreme Court, in *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308, 312 (2005), acknowledged that "in certain cases federal-question jurisdiction will lie over state-law claims that implicate significant

federal issues." It is upon this exception that Defendants base their removal of the present action, stating, "Defendants are affiliated with federally recognized Native American tribes; as a result of this affiliation, Defendants are shielded from liability under the FCCPA and FCRCPA by the *federal doctrine of tribal sovereign immunity*." Doc. # 1 at ¶ 7 (*citing Kiowa Tribe v. Mfg. Techs.*, 523 U.S. 751 (1998)) (Emphasis added). Defendants allege that tribal sovereign immunity is a disputed federal question of law warranting removal of this action. Doc. # 1 at ¶ 8.

Defendants' position is without merit. "The Supreme Court has singled out tribal sovereign immunity as a type of federal defense that **does not convert a suit otherwise arising under state law into one which, in the [§ 1331] sense, arises under federal law**." *Becker v. Ute Indian Tribe of the Uintah & Ouray Reservation*, 770 F.3d 944, 948 (10th Cir. 2014) (*citing Oklahoma Tax Commission v. Graham*, 489 U.S. 838, 841 (1989)) (Emphasis added). Indeed, "tribal immunity may provide a federal defense to [the plaintiff's] claims….[b]ut it has long been settled that the existence of a federal immunity to the claims asserted **does not convert a suit otherwise arising under state law into one which, in the statutory sense, arises under federal law**." *Oklahoma Tax Commission v. Graham* 489 U.S. at 841. (Emphasis added).

This Court, in *Pers. Physician Care, P.A. v. Fla. Physicians Tr., LLC*, recently upheld the opinions in *Becker* and *Oklahoma Tax Commission v. Graham*, finding "At best, defendants may be (albeit vaguely) asserting a defense based on federal law, but removal under 28 U.S.C. § 1441 *cannot be based on a defense*." The court relied upon yet another

Supreme Court opinion - *Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 808 (1986) ("A defense that raises a federal question is inadequate to confer federal jurisdiction.").

Although out of district, a nearly identical action to the present case was reviewed by the Eastern District of Missouri in *Missouri v. Webb*, No. 4:11CV1237 AGF (E.D. Mo. Mar. 27, 2012). In *Webb*, the plaintiff sought relief under the Missouri Merchandising Practices Act against numerous online lenders, referred to throughout the opinion as the "Lending Companies." The Lending Companies charged interest rates in excess of 250% annually. *Id.* at *2. As with the present matter, the defendants sought removal, and plaintiff motioned for remand. The court, in concluding that it lacked subject matter jurisdiction, found that the plaintiff's complaint did not allege a federal cause of action and that "issues relating to tribal immunity and sovereignty have long been deemed defensive matters insufficient to transform a state court suit into a federal one for purposes of removal." *Id.* at * pp. 7; 10.

Plaintiff's Amended Complaint exclusively seeks relief under two Florida statutes – the FCCPA and the FCRCPA. Defendants seek removal of the case to this Court on the basis of their unsubstantiated claim that they are shielded from liability under the FCCPA and FCRCPA by the federal doctrine of tribal sovereign immunity. Doc. # 1 at ¶ 7. However, as set forth *infra*, it is well established that sovereign immunity is a federal defense and cannot be the sole basis upon which a federal court exercises jurisdiction. As such, this Court should remand this case to the County Court of the Thirteenth Judicial Circuit, in and for Hillsborough County, Florida.

II. Alternatively, Defendants have failed to adequately support their assertion of immunity

Assuming, *arguendo,* that tribal sovereign immunity can be the basis upon which this Court exercises jurisdiction under the *Grable* doctrine, Defendants have failed to adequately plead a basis for immunity, and this case should be remanded.

As aforementioned, Defendants attempt to invoke federal jurisdiction on the basis that Plaintiff's state law claims necessarily raise a "substantial question" of disputed federal law. Doc. # 1 at ¶ 8. "To invoke this so-called "substantial question" branch of federal question jurisdiction, a plaintiff must show that "a federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress." *Becker*, 770 F.3d at 947. "It is to be presumed that a cause lies outside [federal] jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction." *Kokkonen*, 511 U.S. at 377 (citations omitted).

Defendants, despite bearing the burden of establishing federal jurisdiction, rely solely on the barebones conclusory allegation that "Defendants are affiliated with federally recognized Native American tribes; as a result of this affiliation, Defendants are shielded from liability under the FCCPA and FCRCPA by the federal doctrine of tribal sovereign immunity." Doc. # 1 at ¶ 7. Defendants provide zero factual support for this conclusion and do nothing to suggest that a federal issue is necessarily raised or that this matter is capable of being resolved in federal court without disrupting the federal-state balance.

Plaintiff's Amended Complaint does make clear that Defendants' tribal affiliation is disputed, as Plaintiff devotes a significant portion of her Complaint to factual allegations

relating to Defendants' adoption of a "Rent-A-Tribe" scheme whereby Defendants merely claim tribal affiliation for purposes of avoiding state usury laws. However, legal precedent makes clear that Plaintiff's anticipation of a defense does nothing to change the fact that a federal defense is still insufficient as the sole basis of federal jurisdiction, especially whereas here, the Defendants have provided no factual support for their claim. *See Caterpillar Inc. v. Williams*, 482 U.S. 386, 393, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987) ("Nor can federal question jurisdiction depend solely on "a federal defense ... *even if the defense is anticipated in the plaintiff's complaint*, and even if both parties concede that the federal defense is the only question truly at issue.") (*citing Grable*, 545 U.S. at 315) (Emphasis added).

Defendants bear the burden of establishing that a substantial question of federal law will be necessarily raised in this matter and have failed to do so, presenting nothing more than a conclusory statement that such issue of federal law exists due to tribal sovereign immunity. As Defendants have failed to meet their burden, this matter should be remanded.

III. Defendants' Motion Fails Because Tribal Sovereign Immunity does not apply to Defendant Baker

It is well established that an *individual* member of a tribe is not entitled to that tribe's immunity when sued in their individual capacity. *See Lewis v. Clarke*, 137 S. Ct. 1285 (2017) ("We hold that, in a suit brought against a tribal employee in his individual capacity, the employee, not the tribe, is the real party in interest and the tribe's sovereign immunity is not implicated"); *see also Puyallup Tribe, Inc. v. Dep't of Game*, 433 U.S. 165, 171-72 (1977) (holding that the "doctrine of sovereign immunity . . . does not immunize

individual members of [a] Tribe"); *Missouri v. Webb*, No. 4:11CV1237 AGF at *8 ("Webb, as an enrolled member of the Tribe, is not individually entitled to immunity…") The Supreme Court in *Lewis v. Clarke* further held "that an employee…acting within the scope of his employment at the time the tort was committed is not, on its own, sufficient to bar a suit against that employee on the basis of tribal sovereign immunity." *Lewis v. Clarke*, 137 S. Ct. 1285.

Count III of Plaintiff's Amended Complaint is brought against Mr. Harlan Gopher Baker as an individual and seeks damages for his violation of the FCRCPA, stating "[Baker] knowingly participated, both directly and indirectly, in Plain Green's collection of an unlawful debt from Ms. Booker." Count III does *not* seek damages from Plain Green, and should Plaintiff prevail, only Mr. Baker would be liable. The fact that Baker was employed by or associated with Plain Green, as per the Supreme Court's ruling in *Lewis v. Clarke*, does not entitle him to the protections of tribal sovereign immunity. To the contrary, his direct, personal involvement in usurious lending renders him liable under the FCRCPA.

In *JW Gaming Dev., LLC v. James*, No. 18-cv-02669-WHO (RMI) (N.D. Cal. Oct. 5, 2018), the defendants, who were numerous tribal officers of the Pinoleville Pomo Nation, sought dismissal of the plaintiff's suit alleging breach of contract, fraud, and violations of the RICO Act. The tribal employees (referred to throughout the court's order as the "Tribal Defendants") moved to dismiss the fraud and RICO claims on sovereign immunity grounds; however, the court, in applying *Lewis v. Clarke*, concluded that the suit was against the Tribal Defendants in their *individual* capacities and that the Tribe was not

the real party in interest, as in the event of an adverse judgment, the individual defendants - not the Tribe - would be bound. *Id.* This decision was upheld by the Ninth Circuit on appeal. *See JW Gaming Dev., LLC v. James*, No. 18-17008 (9th Cir. Oct. 2, 2019).

Count III of Plaintiff's Amended Complaint does not seek to hold Plain Green liable, and as such, Baker cannot invoke the protections of Plain Green's alleged immunity defense. Thus, at a minimum, Count III must be remanded to state court.

IV. Plaintiff is Entitled to an Award of Attorney's Fees and Costs incurred as a Result of Defendants' Improper Removal

Pursuant to 28 U.S.C. § 1447(c), this Court may enter an order "requir[ing] payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." The general rule is that courts may award attorneys' fees under the attorney fee provision of the statute in circumstances where the removing party lacked an "objectively reasonable basis" for seeking removal. *See Martin v. Franklin Capital Corp.*, 126 S. Ct. 704 (U.S. 2005). "A showing of bad faith is not necessary as a predicate to the award of attorney's fees [under 28 U.S.C. § 1447(c)]." *Martin v. Mentor Corp.*, 142 F. Supp. 2d 1346, 1349 (M.D. Fla. 2001); *Tran v. Waste Mgmt.*, 290 F. Supp. 2d 1286, 1292-1293 (M.D. Fla. 2003).

In light of the foregoing authority, it is abundantly clear that Defendants had no basis for the removal of this action. An abundance of legal precedent, including the Supreme Court rulings in *Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 808 (1986) and *Oklahoma Tax Commission v. Graham*, 489 U.S. 838, 841 (1989), have all held that a federal *defense* cannot form the basis of federal "arises under" jurisdiction. The

Defendants' attempt to invoke this Court's jurisdiction, with the sole basis being that the Defendants have a tribal "affiliation" and are thus entitled to sovereign immunity – a federal defense – is thus without merit.

Further, the Defendants' barebones Notice of Removal, which provides nothing beyond a conclusory statement of tribal affiliation, woefully fails to meet Defendants' burden under *Grable*. The Defendants also attempt to group defendant Baker, an individual, with Plain Green, so as to extend their claim of tribal sovereign immunity to a claim against Baker in his individual capacity. However, consistent with the ruling in *Lewis v. Clarke*, an individual tribal officer is *not* accorded the same immunity defense as the tribe itself. This Court thus has no basis for jurisdiction over Plaintiff's state law claim against Baker individually, and Defendant's attempt to invoke federal jurisdiction clearly lacks a reasonable basis. As such, Plaintiff requests an award of her Attorney's Fees and Costs incurred as a result of Defendants' improper removal.

WHEREFORE, Plaintiff, Sophia Booker, respectfully requests this Court enter an Order remanding this case back to the County Court of the Thirteenth Judicial Circuit, in and for Hillsborough County, Florida, and because there is no objectively reasonable basis upon which Defendants can base their improper attempt at removal, Plaintiffs also requests an award of attorneys' fees and costs incurred as a direct result of Defendants' improper attempt to remove this case, and to award any additional relief that the Court deems fair and equitable under the circumstances.

Respectfully submitted on May 21, 2020, by:

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3.01(G) CERTIFICATION

The undersigned certifies that he has conferred with counsel for the Defendants via email on May 20, 2020 and Defendants oppose the relief requested in this motion.

/s/ *Bryan J. Geiger*
Bryan J. Geiger
Florida Bar Number: 119168

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 21, 2020 a true and correct copy of foregoing was filed electronically via the CM/ECF System. A true and correct copy of the foregoing was also sent via e-notice and/or electronic mail to:

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