UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

MASHKIKII-BOODAWAANING, INC.

Plaintiff,

v. Case No. 23-CV-086

CHIPPEWA VALLEY AGENCY, LTD.,
D/B/A CHIPPEWA VALLEY BANK,

Defendant.

DEFENDANT'S BRIEF IN SUPPORT OF ITS MOTION TO DISMISS THE FIRST AMENDED COMPLAINT

INTRODUCTION

This case concerns Chippewa Valley Agency, Ltd. d/b/a Chippewa Valley Bank (the "Bank") and its decision to deny Mashkikii-Boodawaaning, Inc.'s ("Medicine Fireplace") application for a commercial checking account. The Bank denied the application because of the significant expense and administrative burden placed on it for operating an account associated with the use of peyote, even where such use is legal under federal law. Nevertheless, Medicine Fireplace claims that this amounts to race discrimination under Section 1981 of the Civil Rights Act of 1866 ("Section 1981") and religious discrimination under Wisconsin's public accommodations law. The First Amended Complaint, however, fails to allege any facts that could support a finding that the Bank acted with the requisite discriminatory intent. Instead, the First Amended Complaint alleges only that the Bank denied Medicine Fireplace's application because of its use of peyote, which is not a proxy for one's Native American identity and does not entitle Medicine Fireplace to open an account at the financial institution of its choosing.

The Bank maintains a branch location on the Lac du Flambeau Reservation, does business with Native American customers and has Native American shareholders, directors, and officers, including its Chief Executive Officer. The Bank does not challenge whether Medicine Fireplace is a *bona fide* chapter of the Native American Church of North America ("NACNA") or whether it engages in the lawful use of peyote. But the simple fact that Medicine Fireplace does not engage in illegal activity does not mean that opening an account for Medicine Fireplace would not subject the Bank to any business risk or compliance obligations. Peyote is a Schedule I controlled substance subject to a narrow exception for nondrug use during religious ceremonies of the NACNA. Opening a commercial checking account for Medicine Fireplace would therefore subject the Bank to ongoing oversight required by federal law.

The Bank's reason for denying Medicine Fireplace's application is not, on its face, discriminatory. Absent any factual allegations supporting Medicine Fireplace's assertion that race or religion, not peyote, was the reason why the Bank denied Medicine Fireplace's application, the Court should dismiss the First Amended Complaint's First and Second Causes of Action for failure to state a claim upon which relief can be granted.

BACKGROUND

I. Medicine Fireplace.

Medicine Fireplace is a not-for-profit religious and charitable organization affiliated with the NACNA. (ECF No. 11 ¶¶ 4, 7.) Medicine Fireplace's principal office is in Lac du Flambeau, Wisconsin (*Id.* ¶ 6.) As a part of its religious and spiritual tradition, Medicine Fireplace administers spiritual rituals that involve the use of peyote. (*Id.* ¶ 7.)

II. Legislative and Regulatory History of Applicable Peyote Exemptions.

Peyote is regulated under Schedule I of the Controlled Substances Act ("CSA"). 21 U.S.C. § 812(c), Schedule 1(c)(12). In 1971, the predecessor to the Drug Enforcement

Agency published regulations implementing the CSA, including the following exemption for peyote use:

> The listing of peyote as a controlled substance in Schedule I does not apply to the nondrug use of peyote in bona fide religious ceremonies of the Native American Church, and members of the Native American Church so using peyote are exempt from registration. Any person who manufactures peyote for or distributes peyote to the Native American Church, however, is required to obtain registration annually and to comply with all other requirements of law.

21 C.F.R. § 1307.31.

In 1994, Congress passed a statute extending the peyote exemption to every "member of an Indian tribe" and foreclosed "the United States or any State" from prohibiting its lawful use. *See* 42 U.S.C. § 1996a(b)(1), (c)(1).

Like Congress, the Wisconsin legislature enacted a statute exempting "the nondrug use of peyote and mescaline in the bona fide religious ceremonies of the Native American Church" from the Wisconsin Controlled Substances Act. Wis. Stat. § 961.115.

III. Summary of Medicine Fireplace's Factual Allegations.[1]

On or around March 30, 2022, Charles Carufel[2] ("Carufel") applied for a commercial checking account for Medicine Fireplace at the Bank's Lac du Flambeau branch location. (ECF No. 11 ¶ 37.) Along with the application, Carufel submitted several corporate documents that referenced Medicine Fireplace's Native American membership, religious character, and sacramental peyote use. (*Id.* ¶ 38.)

In early April 2022, a Bank representative notified Carufel that the Bank had denied Medicine Fireplace's application and cited Medicine Fireplace's peyote use as the reason for the

[1] For purposes of its motion to dismiss, the Bank accepts all well-pleaded factual allegations as true. *Bultasa Buddhist Temple of Chi. v. Nielsen*, 878 F.3d 570, 573 (7th Cir. 2017).

[2] Carufel is one of the three members of the Lac du Flambeau Band of Lake Superior Chippewa Indians ("Lac du Flambeau Tribe") who helped established Medicine Fireplace in September 2020. (Am. Compl. ¶¶ 28-29.)

denial. (*Id.* ¶ 41.) Carufel asked to speak with the Bank representative's supervisor to request reconsideration of the denial. (*Id.* ¶ 42.) Shortly thereafter, a supervisor at the Bank's Bruce branch location reiterated that the Bank's denial of Medicine Fireplace's application was due to Medicine Fireplace's peyote use. (*Id.* ¶ 43.)

On April 26, 2022, counsel for Medicine Fireplace sent a letter to the Bank demanding that the Bank open a commercial checking account for Medicine Fireplace and accusing the Bank of engaging in unlawful discrimination. (*Id.* ¶ 46.)

On May 3, 2022, the Bank's Chief Executive Officer, Rick Gerber ("Gerber"), sent a letter to counsel for Medicine Fireplace denying the allegations of discrimination. (*Id.* ¶ 48.) In the letter, Gerber stated that the Bank does business with Native American customers and has Native American shareholders and board members. (*Id.*) Gerber also stated that the Bank's decision to deny Medicine Fireplace's application was due to "Chippewa Valley Bank's limited resources to assure proper control is being provided and proper handling of an account by a customer." (*Id.*) Gerber also referenced federal and state regulatory requirements and financial risks "including but not limited to ongoing responsibilities of a bank after an account is open." (*Id.* ¶ 49.) For example, the Bank Secrecy Act requires federally insured banks to file suspicious activity reports if they know, suspect, or have reason to suspect that any transaction: involves funds derived from illegal activity or is an attempt to disguise funds derived from illegal activity;

is designed to evade regulations promulgated under the Bank Secrecy Act, or lacks a business or apparent lawful purpose. *See* 31 C.F.R. § 1020.320.[3]

PROCEDURAL HISTORY

Medicine Fireplace filed its initial Complaint in the above-captioned matter on February 6, 2023. (ECF No. 1.) On February 28, the Bank filed a motion to dismiss the Complaint's First and Second Causes of Action. (ECF No. 5.) On March 21, Medicine Fireplace filed its First Amended Complaint as a matter of course pursuant to Rule 15(a)(1)(B). (ECF No. 11). The Bank now moves to dismiss the First Amended Complaint's First and Second Causes of Action on the grounds set forth below.

LEGAL STANDARD

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "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." *Iqbal*, 556 U.S. at 678. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* If a complaint does not meet these requirements, a district court

[3] Like peyote, marijuana is regulated under Schedule I of the CSA. 21 U.S.C. § 812(c), Schedule 1(c)(10). The Financial Crimes Enforcement Network has issued guidance clarifying how financial institutions can provide services to marijuana-related businesses consistent with their obligations under the Bank Secrecy Act and directs financial institutions to file particular suspicious activity reports based on its customer due diligence and the nature of the marijuana-related business. FinCen, FIN-2014-G001, *BSA Expectations Regarding Marijuana-Related Businesses* (Feb. 14, 2014), https://www.fincen.gov/resources/statutes-regulations/guidance/bsa-expectations-regarding-marijuana-related-businesses.

may dismiss the complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6).

ARGUMENT

I. Medicine Fireplace Fails to State a Claim for Race Discrimination Under Section 1981.

To establish a claim under Section 1981, a plaintiff must show that (1) the plaintiff is a member of a racial minority[4]; (2) the defendant had an intent to discriminate on the basis of race; and (3) the discrimination concerned one or more of the activities enumerated in the statute (i.e., the making and enforcing of a contract). *Morris v. Off. Max, Inc.*, 89 F.3d 411, 413 (7th Cir. 1996). Section 1981 plaintiffs can prove discriminatory intent using direct proof or the indirect, burden-shifting approach articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *O'Neill v. Gourmet Sys. of Minn., Inc.*, 213 F. Supp. 2d 1012, 1018 (W.D. Wis. 2002). Regardless which method is used, plaintiffs must plead and prove that race was the but-for cause of the discrimination as mixed-motive claims are not available under Section 1981. *Comcast Corp. v. Nat'l Ass'n of African Am.-Owned Media*, 140 S. Ct. 1009 (2020).

Medicine Fireplace's Section 1981 claim fails because it pleads no facts capable of showing that the Bank denied Medicine Fireplace's application solely because of its Native American identity. "In order to survive a motion to dismiss, plaintiffs cannot plead intentional discrimination in a conclusory fashion." *Payne v. Abbott Labs.*, 999 F. Supp. 1145, 1152 (N.D. Ill. 1998). For example, in *Mir v. State Farm Mutual Automobile Insurance*, the Seventh Circuit found that allegations of an insurance company knowing about a plaintiff's "East-

[4] For purposes of its motion to dismiss, the Bank presumes Medicine Fireplace has acquired a Native American racial identity because it was formed to provide a place of worship for tribal members and each of its founders is a member of a Native American tribe. (Am. Compl. ¶¶ 28-29.) *See Amber Pyramid, Inc. v. Buffington Harbor Riverboats, L.L.C.*, 129 F. App'x 292, 294 (7th Cir. 2005) (allowing corporation owned by two African–American sisters to maintain Section 1981 claim).

Indian/Pakistani race" and being "motivated by discrimination" when it denied benefits were not enough to nudge a Section 1981 claim across the line from conceivable to plausible. 847 F. App'x 347, 350 (7th Cir. 2021), *reh'g denied* (Mar. 11, 2021). Similarly, in *Labor One, Inc. v. Staff Management Solutions, LLC*, the court found that plaintiff's allegations that defendant terminated a contract because defendant "did not want African American workers," who it referred to as "those people," did not satisfy Section 1981's discriminatory intent requirement. *Lab. One, Inc. v. Staff Mgmt. Sols., LLC*, No. 17 C 7580, 2019 WL 3554412, at *7, 8 (N.D. Ill. Aug. 5, 2019).

Like the plaintiffs in *Mir* and *Labor One*, Medicine Fireplace failed to allege factual allegations capable of establishing intent to discriminate on the basis of race. The First Amended Complaint contains no factual allegations capable of supporting the conclusion that the Bank held any animosity against Medicine Fireplace because of its Native American identity. To the contrary, in his letter to Medicine Fireplace's counsel, Mr. Gerber emphasized that the Bank does business with Native American customers and has Native American shareholders and board members. (ECF No. 11 ¶ 48.)

It is not enough for the Bank to have known prior to denying Medicine Fireplace's application that Medicine Fireplace has Native American members or is affiliated with the NACNA. (ECF No. 11 ¶ 61.) *See Mir*, 847 F. App'x at 350. Nor is it enough to allege, as Medicine Fireplace does "[o]n information and belief," that the Bank's decision was "motivated by racial animus against Native Americans." (ECF No. 11 ¶ 68.) That the Bank has opened commercial checking accounts for other not-for-profit organizations is similarly unavailing, as it does not tend to show that Medicine Fireplace's Native American racial identity (as opposed to its peyote use) is the reason why the Bank denied its application. (*Id.* ¶ 65.)

The First Amended Complaint also lacks factual allegations capable of establishing discriminatory intent under the *McDonnell Douglass* burden-shifting approach. Medicine Fireplace cannot establish a *prima facie* case of race discrimination because it has not alleged that the Bank has granted an application submitted by a similarly-situated *non-Native American* business that also uses peyote or any other Schedule I controlled substance. *See O'Neill*, 213 F. Supp. 2d at 1021 (holding that, in the retail or commercial context, Section 1981 plaintiffs must show that "(a) the plaintiff was deprived of services while similarly situated persons outside the protected class were not deprived of those services, and/or (b) the plaintiff received services in a markedly hostile manner and in a manner which a reasonable person would find objectively unreasonable."). Medicine Fireplace's failure to provide more than conclusory assertions that the Bank's non-discriminatory business justifications were "pretextual" also prevents it from proving discriminatory intent under this framework.

Medicine Fireplace cannot rescue its claim with new allegations regarding *hypothetical* comparators. In its First Amended Complaint, Medicine Fireplace alleges, for the first time, that the Bank "would" open a commercial checking account for a non-Native American organization even if the organization engaged in the lawful use or distribution of controlled substances (*e.g.*, a pharmacy, clinic, or hospital) or provided substances to its members that were regulated by federal and state law (*e.g.*, a Catholic Church). (ECF No. 11 ¶¶ 66-67.) These allegations should not influence the Court's determination for two reasons.

First, Medicine Fireplace cannot use hypothetical comparators to establish a *prima facia* case of race discrimination. A complaint does not suffice if it tenders "naked assertions devoid of further factual enhancement." *Iqbal*, 556 U.S. at 678 (quoting *Bell Atl. Corp.* 550 U.S. at 557. Even if taken as true, speculative allegations regarding what the Bank "would" do under

hypothetical circumstances cannot sustain Medicine Fireplace's claim. *See Grayson v. O'Neill*, 308 F.3d 808, 819 (7th Cir. 2002) (disregarding as "speculation" plaintiff's theory that a hypothetical comparator "may have at some time" participated in the same behavior and should have been disciplined); *Karim v. H & M Int'l Transp., Inc.*, No. 08-cv-2332, 2009 WL 3188064, at *18 (N.D. Ill. Sept. 30, 2009) (doubting whether case law allows a plaintiff to establish comparator evidence by pointing to "some hypothetical employee").

Second, Medicine Fireplace does not allege that the hypothetical, non-Native American pharmacy, clinic, hospital or Catholic Church uses a Schedule I controlled substance like peyote in connection with its business. *See* 21 U.S.C. § 812(b)(1) (noting that a Schedule I controlled substance "has a high potential for abuse," "has no currently accepted medical use in treatment in the United States" and lacks "accepted safety for use … under medical supervision."). Therefore, even if the Bank "would" do business with these entities, they are not similarly situated to Medicine Fireplace. Absent allegations that the Bank has, in fact, opened commercial checking accounts for similarly situated, non-Native American applicants, Medicine Fireplace cannot establish a *prima facie* case of race discrimination under Section 1981.

Viewed in the light most favorable to Medicine Fireplace, the allegations in the First Amended Complaint support only one conclusion—that the Bank knew Medicine Fireplace was affiliated with the NACNA and denied Medicine Fireplace's application because of Medicine Fireplace's use of peyote and certain risks and oversight requirements associated with it opening a commercial checking account. (*See* ECF No. 11 ¶¶ 41, 43, 45, 48-49, 63-64.) On its face, that reason is unrelated to race.

Not all Native Americans are members of the NACNA, and the plain language of the federal regulation and Wisconsin statute exempting certain forms of peyote use is not limited by

race or tribal affiliation. *United States v. Boyll*, 774 F. Supp. 1333, 1338 (D.N.M. 1991); *State v. Mooney*, 2004 UT 49, ¶ 21, 98 P.3d 420; Wis. Stat. § 961.115. The federal regulation exempts from criminal prosecution the "nondrug use of peyote in bona fide religious ceremonies of the Native American Church" by "members of the Native American Church" who are not necessarily Native American. 21 C.F.R. § 1307.31; *see Boyll*, 774 F. Supp. at 1336 ("The vast majority of Native American Church congregations, like most conventional congregations, maintains an 'open door' policy and does not exclude persons on the basis of their race."). The Wisconsin regulation similarly exempts the nondrug use of peyote during "bona fide religious ceremonies of the Native American Church," not the nondrug use of peyote *by Native Americans* during the same ceremonies. Wis. Stat. § 961.115.

Peyote use is not, as Medicine Fireplace suggests, synonymous with one's Native American identity. And even if it were, Medicine Fireplace has failed to plead facts capable of showing that race was the but-for cause of its injury and that the non-discriminatory justifications proffered by the Bank had absolutely no impact on its decision to deny Medicine Fireplace's application. *See Comcast Corp.*, 140 S. Ct. 1009. Therefore, evidence that the Bank denied Medicine Fireplace's application because of its peyote use cannot serve as a proxy for the discriminatory intent needed to support its Section 1981 claim.

II. Medicine Fireplace Fails to State a Claim for Religious Discrimination under Wisconsin's Public Accommodations Law.[5]

Medicine Fireplace's claim under the Wisconsin Public Accommodations Law, Wisconsin Statutes § 106.52, also fails because Medicine Fireplace does not plead facts capable

[5] If the Court grants the Bank's motion to dismiss Medicine Fireplace's Section 1981 claim, it should decline to exercise jurisdiction over Medicine Fireplace's claim under Wisconsin's public accommodations law. *Groce v. Eli Lilly & Co.*, 193 F.3d 496, 500 (7th Cir. 1999) (district court has discretion to retain or to refuse jurisdiction over state law claims).

of showing that the Bank denied Medicine Fireplace's application because it is a recognized chapter of the NACNA. Wisconsin's public accommodations law prohibits discrimination in places of public accommodation "because of . . . creed." Wis. Stat. 106.52(3)(a)1, 2. The Wisconsin Labor and Industry Review Commission has interpreted the Wisconsin public accommodations law as requiring discriminatory intent. *See Khan v. Value Vill.*, ERD Case No. CR201300919 (LIRC Dec. 4, 2014) (affirming "no probable cause" determination where there was no direct evidence that the respondent held any animosity against the complainant because of a protected category or that a protected category was a "motivating factor"); *Tabatabai v. Wis. Physicians Serv. Health Ins.*, ERD Case No. CR201101185 (LIRC Feb 29, 2012) ("It is clear that the public accommodation discrimination law prohibits certain conduct if it is motivated by race or national origin; the law expressly identifies these as proscribed motives."). In the context of religious discrimination claims, courts have similarly interpreted the federal analog to Wisconsin's public accommodations law—Title II of the Civil Rights Act of 1964 ("Title II")—as requiring discriminatory intent. *Jalal v. Lucille Roberts Health Clubs Inc.*, 254 F. Supp. 3d 602, 606 (S.D.N.Y. 2017), *vacated as moot by Stipulation of Settlement & Discontinuance*, ECF No. 29, 33, 34 (2d Cir. Aug. 28, 2017) (No. 17-1936).

To survive a motion to dismiss, a plaintiff claiming religious discrimination under Title II must allege facts supporting an inference of discriminatory motivation. For example, in *Jalal*, a Jewish woman brought a Title II claim against a gym operator for prohibiting her from exercising in a knee-length skirt, which she wore for religious purposes. 254 F. Supp. 3d 602. Although the plaintiff claimed she was treated differently than other gym members based on her religion, the factual allegations in the complaint indicated that she was treated differently because she insisted on wearing an article of clothing that the operator considered inappropriate

gym attire. *Id.* at 606 – 607. The complaint did not allege that the operator "selectively enforced its dress code against Jewish women," nor did it provide any facts to support the plaintiff's conclusory allegation that the gym operator "harassed" other modest Jewish women. *Id.* at 607. Therefore, the court found that the plaintiff had failed to adequately allege discriminatory intent.

Like the plaintiff in *Jalal*, Medicine Fireplace failed to allege any facts to support its conclusory allegation that, by denying its application, the Bank discriminated on the basis of religion. (*See* ECF No. 11 ¶ 44.) Instead, Medicine Fireplace alleges: (1) that the Bank knew about its religious use of peyote; (2) that the Bank denied its application because of its peyote use, underwriting risks, and the Bank's limited ability to provide proper oversight and comply with ongoing responsibilities; and (3) that the Bank has opened accounts for other not-for-profit organizations that do not engage in bona fide religious peyote use. (ECF No. 11 ¶¶ 49, 52, 73-74, 76). Notably, Medicine Fireplace does not allege that the Bank has, in fact, denied similar applications submitted by non-religious organizations or religious organizations that are not affiliated with the NACNA. Instead, the Bank alleges, for the first time in the First Amended Complaint, that the Bank "would" deny such applications. (ECF No. 11 ¶¶ 77-78.) These hypothetical allegations are not facts upon which Medicine Fireplace can rely for purposes of defeating the Bank's motion to dismiss. *See Iqbal*, 556 U.S. at 678.

Medicine Fireplace's allegations do not support an inference that the Bank was motivated by discriminatory intent. Instead, they only support a conclusion that the Bank denied Medicine Fireplace's application to avoid compliance with additional oversight and reporting requirements necessitated by Medicine Fireplace's peyote use. The fact that the Bank has opened similar accounts for other not-for-profit organizations that do not use peyote does not tend to show that the Bank's decision was motivated by religious animus. If it did, then no Bank with not-for-

profit customers would be able to deny an application by Medicine Fireplace or any other chapter of the NACNA without violating Wisconsin's public accommodations law. That is not what the Wisconsin law requires.

Whether the Bank's decision has a disparate impact on members of the NACNA has no bearing on whether Medicine Fireplace's public accommodations claim can survive a motion to dismiss. Claims grounded solely in disparate impact theory are not cognizable under Title II. *Hardie v. Nat'l Collegiate Athletic Ass'n.*, 97 F. Supp. 3d 1163, 1165-69 (S.D. Cal. 2015). This is because "[v]irtually any restriction or regulation imposed by a public accommodation could impinge on a person's religious beliefs because such beliefs, being both malleable and subjective, are of the individual adherent's own making." *Akiyama v. U.S. Judo Inc.*, 181 F. Supp. 2d 1179, 1185 (W.D. Wash. 2002). As articulated by the court in *Akiyama*:

> Absent more, the fact that a proprietor has decided to offer his or her services to the public in a way which could impact a religious practice or belief, whether it be by conducting business only on Sundays, by failing to keep a Kosher kitchen, by failing to include fish on the menu during Lent, or by prohibiting smoking, raises no inference of discrimination or other conduct which Congress sought to censure through the enactment of Title II.

Id. at 1184–85. Absent any factual allegations capable of supporting an inference of discriminatory intent, Medicine Fireplace's public accommodations claim must fail.

CONCLUSION

The First Amended Complaint lacks any factual allegations capable of supporting an inference that the Bank's decision to deny Medicine Fireplace's application was motivated by racial or religious animus. Therefore, the Court should dismiss the First Amended Complaint's First and Second Causes of Action for failure to state a claim upon which relief could be granted.

Dated this 3rd day of April, 2023.

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