UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

MASHKIKII-BOODAWAANING
(MEDICINE FIREPLACE), INC.

Plaintiff,

v.

Case No. 23-CV-086

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

Defendant.

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

INTRODUCTION

The allegations in the First Amended Complaint do not support an inference of racial or religious discrimination. They support only one conclusion—that Chippewa Valley Agency d/b/a Chippewa Valley Bank (the "Bank") denied Mashkikii-Boodawaaning (Medicine Fireplace) Inc.'s ("Medicine Fireplace") commercial checking account application due to additional oversight and reporting requirements necessitated by Medicine Fireplace's use of peyote. Peyote is not a proxy for Native American identity and therefore cannot permit the interference of but-for causation required to plead a race discrimination claim under Section 1981 of the Civil Rights Act of 1866 ("Section 1981"). And while peyote may be central to Medicine Fireplace's religious practice, that fact alone is not enough to establish an inference of intentional creed-based discrimination under the Wisconsin public accommodations law. Accordingly, 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.

I. Medicine Fireplace's Allegations Regarding the Bank's Reference to its Peyote Use Do Not Support an Inference of Race Discrimination.

The pleading standard for a Section 1981 claim is not as minimal as Medicine Fireplace suggests. To survive a motion to dismiss, Medicine Fireplace must do more than merely allege that the Bank was aware of its Native American identity and denied its application due to its use of peyote. (ECF No. 11 ¶¶35 – 50.)

For example, in *Petrovic v. Enterprise Leasing Co. of Chicago*, a case cited by Medicine Fireplace, the Seventh Circuit reversed the district court's dismissal of a Section 1981 claim because the plaintiff alleged that "[an Enterprise] site manager told him that the company cannot rent to him without proof of income 'because he is white'" and that the same site manager "did rent cars to a comparable black man and a Hispanic woman." 513 F. App'x 609, 610-11 (7th Cir. 2013). On the other hand, in *Mir v. State Farm Mutual Automobile Insurance*, the Seventh Circuit *affirmed* the district court's dismissal of a Section 1981 claim because the plaintiff merely alleged that State Farm "knew about his East-Indian/Pakistani race" and "motivated by discrimination against him," denied him uninsured-motorist benefits. 847 F. App'x 347, 350 (7th Cir. 2021). Similarly, in *Labor One, Inc. v. Staff Management Solutions, LLC*, the district court dismissed the plaintiffs Section 1981 claim even though the complaint contained allegations that the defendant "did not want African American workers," who it referred to as "those people," because the defendant's stated reason for terminating the contract—failure to enter time correctly—was, on its face, unrelated to race. No. 17 C 7580, 2019 WL 3554412, at *7, * 8 (N.D. Ill. Aug. 5, 2019).

The allegations in the First Amended Complaint are more akin to those alleged in *Mir* and *Labor One* than *Petrovic*. Like the plaintiff in *Mir* and *Labor One*, Medicine Fireplace does little more than allege that the Bank was aware of its Native American identity and was, upon

information and belief, motivated by racial animus when it denied its application. (ECF No. 11 ¶¶ 61, 68, 69.) Unlike the plaintiff in *Petrovic*, Medicine Fireplace has not alleged facts capable of demonstrating that the Bank denied its application because of its Native American identity as opposed to its use of peyote. For example, Medicine Fireplace does not allege that a Bank representative used racially derogatory language or did, in fact, open an account for a similarly situated, non-Native American applicant. Instead, Medicine Fireplace alleges that the Bank *would* open accounts for applicants who are *not* similarly situated. (ECF No. 11 ¶¶ 66-67; ECF No. 15 at. 3 "[The Bank] *would* clearly open a bank account for the Catholic Church or for a clinic…." (emphasis added).)

Allegations that certain Bank representatives informed Medicine Fireplace that the Bank had denied Medicine Fireplace's application due to its "peyote use" do not, standing alone, support an inference of racial discrimination. (ECF No. 11 ¶ 41, 43.) Medicine Fireplace acknowledges that not all Native Americans are members of the Native American Church of North America and that some "highly controversial" non-Native Americans use peyote. (*See* ECF No. 15 at 10 – 11, n.2.) The First Amended Complaint contains allegations that the Bank maintains a branch location on the Lac du Flambeau Reservation, (ECF No. 11 ¶ 8), and that the Bank's Chief Executive Officer, who himself is Native American, informed Medicine Fireplace that the Bank does business with Native American customers and has Native American shareholders and board members (*Id.* ¶ 48).[1] Medicine Fireplace also alleges that the rationale offered by the Bank's Chief Executive Officer was unrelated to race, *i.e.*, "[the Bank's] limited resources to assure proper control is being provided and proper handling of an account by a

[1] In fact, the Bank does business with numerous Native American individuals and several Native American Tribes and related entities in Wisconsin and Michigan and its largest shareholder group is Native Americans.

customer" and "Federal and State Regulation requirements and financial risks of [the Bank] including but not limited to ongoing responsibilities of a bank after an account is open."[2] (*Id.* ¶¶ 48-49.) These allegations undermine the probative force of Medicine Fireplace's claim that its race, not its use of peyote, was the reason for the Bank's action. *See Piccioli v. Plumbers Welfare Fund Loc. 130.*, No. 19-CV-00586, 2020 WL 6063065, at *6 (N.D. Ill. Oct. 14, 2020) (dismissing a Section 1981 claim because the plaintiff "pleaded himself out of court" by alleging that a health and welfare plan sponsor interfered with his ability to contract with *all* Blue Cross Blue Shield Insurance medical providers, not just his Indian doctor).

Peyote is *not* a proxy for race and, taken together with the allegations in the First Amended Complaint, cannot permit the inference of but-for causation, which is required to plead and ultimately prove a Section 1981 claim. *Comcast Corp. v. Nat'l Ass'n of African Am.-Owned Media*, 140 S. Ct. 1009 (2020). "[A] plaintiff cannot survive a motion to dismiss upon a showing that racial discrimination was one factor among many in a defendant's decision." *Piccioli*, 2020 WL 6063065, at *6. Having failed to allege facts capable of creating the inference that Medicine Fireplace's race, not its peyote use, was the reason for the Bank's decision, Medicine Fireplace has effectively conceded that the Bank denied its application without regard to its Native American identity.

[2] Medicine Fireplace argues that "there is no statute, regulation, or other authority that would somehow make Medicine Fireplace's peyote use relevant to the Bank" and that the Bank "has never been able to articulate a legitimate, non-discriminatory reason for denying Medicine Fireplace's application" (ECF No. 15 at 13, 15.) However, Medicine Fireplace also acknowledges the Bank's position that the Bank Secrecy Act and its implementing regulations served as the basis for its decision to deny Medicine Fireplace's application. (*Id.* 13 – 14; *see also* ECF No. 14 at 4 – 5, n.3.) The Court should disregard Medicine Fireplace's baseless assertion that the Bank's interpretation of its legal obligations "stem[s] from gross stereotypes of Native Americans." (ECF No. 15 at 14.)

II. Medicine Fireplace's Allegations Do Not Support the Inference of Intentional Creed-Based Discrimination, Only Disparate Impact.

The Bank does not dispute whether Medicine Fireplace's use of peyote is a fundamental aspect of its religious practice. (ECF No. 15 at 14.) But that fact alone is not enough to establish a plausible claim for religious discrimination under the Wisconsin public accommodations law. The Wisconsin public accommodations law does not prohibit the Bank, or any other proprietor, from operating its businesses in a way that would have a disparate impact on the tenets of an individual's religious beliefs; many of which are "non-public" and "highly individualized." *See Akiyama v. U.S. Judo Inc.*, 181 F. Supp. 2d 1179, 1184 – 85 (W.D. Wash. 2002). Instead, it prohibits *intentional* discrimination on the basis of creed.

The fact that the Native American Church is "the only organization legally allowed to administer the peyote sacrament" does not, as Medicine Fireplace suggests, subject its public accommodations claim to a different pleading standard. (ECF No. 15 at 15.) Taken together, the allegations in the First Amended Complaint support the inference that the Bank denied Medicine Fireplace's application because its use of peyote would subject the Bank to oversight and reporting requirements. (ECF No. 11 ¶¶ 48-49.) That, on its own, is not enough to advance Medicine Fireplace's public accommodations claim past the pleadings.

Like the plaintiff in *Jalal v. Lucille Roberts Health Clubs Inc.*, Medicine Fireplace has failed to allege that the Bank selectively denied its application while granting applications submitted by similarly situated applicants, *i.e.*, those whose businesses would subject the Bank to similar oversight and reporting requirements. 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. 29, 2017) (No. 17-1936). It has only alleged that the Bank's rationale has a disparate impact on members of the Native American Church of North America in the same way a

restaurant's decision not to keep a Kosher kitchen would have a disparate impact on certain members of the Jewish faith. *See Akiyama*, 181 F. Supp. 2d at 1185. This shortcoming is fatal to Medicine Fireplace's public accommodations claim.

CONCLUSION

For the foregoing reasons, and those articulated in the Bank's principal brief in support of its motion to dismiss, 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.

Dated this 4th day of May, 2023.

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