

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 11-cv-00887-REB-KMT

COLORADO ex rel. JOHN W. SUTHERS,
Attorney General for Colorado, and
LAURA E. UDIS, Administrator, Uniform
Consumer Credit Code,

Plaintiffs,

v.

WESTERN SKY FINANCIAL, L.L.C., and
MARTIN A. WEBB,

Defendants.

MOTION TO DISMISS

Defendants Western Sky Financial, L.L.C. (“Western Sky”) and Martin A. Webb (“Webb”) move to dismiss the Complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).¹

INTRODUCTION

“The policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation’s history.” *McClanahan v. State Tax Commission of*

¹ Because this Motion is filed under Federal Rule of Civil Procedure 12, the conferral requirement of D.C.COLO.LCivR 7.1A does not apply. Furthermore, because the defect in the Complaint is not correctable by the filing of an amended pleading, the conferral requirement in this Court’s Civil Practice Standards, REB Civ. Practice Standard H.2.a, also is inapplicable.

Arizona, 411 U.S. 164, 168 (1973), *quoting Rice v. Olson*, 324 U.S. 786, 789 (1945). By bringing this case, and attempting to regulate activity of Indians on an Indian reservation, the Colorado Attorney General and the Administrator of the Uniform Consumer Credit Code (collectively the “State”) have violated this fundamental principle.

Defendant Webb is a member of the Cheyenne River Sioux Tribe (the “Tribe”), and is the sole owner and operator of Defendant Western Sky. Western Sky enters into loan agreements that provide for the exclusive application of Tribal law, under the authority of the Indian Commerce Clause of the United States Constitution, and for the exclusive jurisdiction in the Tribal court. Nonetheless, the State alleges that Defendants violated Colorado licensing and consumer protection laws by entering into loan agreements with Colorado residents. The State claims that Colorado law not only applies on the Cheyenne River Sioux Reservation (the “Reservation”), but also supersedes Tribal law regarding lending activity there.

Federal law prohibits and preempts the State’s attempt to reach into the Reservation and regulate commercial activity. Because Tribal immunity, and the federal law that underpins it, extend to Tribal members and their businesses, the State’s claims fail as a matter of law. Furthermore, pervasive federal law and policy bar the State from superseding Tribal regulation of economic activity on the Reservation by Tribal members.

BACKGROUND

The State filed its Complaint in the District Court for the City and County of Denver. Defendants timely removed the case to this Court.

In its Complaint [Dkt. No. 2], the State cites Western Sky's website and a sample loan agreement from that website which states that Western Sky "is a Native American-owned business operating within the boundaries of the Cheyenne River Sioux Reservation, a sovereign nation located within the United States of America."² Complaint ¶ 16. The Complaint acknowledges that the sample agreement states that it is "governed by the Indian Commerce Clause of the Constitution of the United States of America and the laws of the Cheyenne River Sioux Tribe." Complaint ¶ 16 (quoting sample loan agreement). The Complaint goes on to state that

[s]imilarly, Western Sky's website states that all loans "will be subject solely to the exclusive laws and jurisdiction of the Cheyenne River Sioux Tribe, Cheyenne River Indian Reservation" and that all consumers "must consent to be bound to the jurisdiction of the Cheyenne River Sioux Tribal Court, and further agree that no other state or federal law or regulation shall apply to this Loan Agreement, its enforcement or interpretation."

Complaint ¶ 15. With little more than bald assertions that Western Sky "solicited" or "made" loans in Colorado, Complaint ¶¶ 4, 7, this action was instituted in contravention of the intent of the contracting parties and of Tribal and federal law.

² The State relies on statements from Western Sky's website, and the sample loan agreement downloaded from it, to make several factual averments. At no point does the State suggest that any of the statements is untrue.

The State recognizes that Defendant Webb is a member of the Tribe. The Complaint states that Western Sky “is a Native American-owned business operating within the boundaries of the Cheyenne River Sioux Reservation”; the Complaint also avers that “Webb is, and at all relevant times was, Western Sky’s sole manager, sole executive officer, and, directly or indirectly, its sole member and owner.” Complaint ¶¶ 5, 16. By simple deduction, the allegations demonstrate that Mr. Webb is a Native American. In case there was any doubt, the attached certification by the Tribe indicates that Mr. Webb is, in fact, a member of the Tribe. See Certificate of Indian Blood, attached as Exhibit A.³

ARGUMENT

1. MOTION TO DISMISS STANDARD

On a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), the Court must determine whether the allegations of the complaint are sufficient to state a claim. *Spacecon Specialty Contractors, LLC v. Bensinger*, No. 09-cv-02080-REB-KLM, 2010 WL 3720166, at *1 (D. Colo. Sept. 15, 2010). Although the Court must accept well-pled allegations in the State’s Complaint as true, it is not required to accept conclusory factual allegations. See *Ruiz v. McDonnell*, 299 F.3d 1173, 1181 (10th Cir. 2002). Nor is the Court required to consider unsupported legal conclusions or legal

³ The Court may take judicial notice of this fact of public record without the need to convert the present motion from a Rule 12 motion to one under Rule 56. See *Tal v. Hogan*, 453 F.3d 1244, 1264 n.24 (10th Cir. 2006).

conclusions disguised as factual allegations. *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1950 (2009); *Spacecon Specialty Contractors*, 2010 WL 3720166, at *1.

A complaint must “contain[] enough facts to state a claim to relief that is plausible on its face.” *Ridge at Red Hawk, L.L.C. v. Schneider*, 493 F.3d 1174, 1177 (10th Cir. 2007) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). “[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not shown – that the pleader is entitled to relief.” *Iqbal*, 129 S. Ct. at 1950.

2. DEFENDANTS ARE ENTITLED TO TRIBAL IMMUNITY

Tribal immunity prevents the State from pursuing a state law enforcement action against the Tribe. *See Puyallup Tribe, Inc. v. Washington Game Dep’t*, 433 U.S. 165, 172-73 (1977). “[I]n the absence of federal authorization, tribal immunity, like all aspects of tribal sovereignty, is privileged from diminution by the States.” *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng’g*, 476 U.S. 877, 891 (1986). Defendants are entitled to rely on this immunity because the actions about which the State complains took place on the Reservation, Webb is an enrolled member of the Tribe, and the loan agreements at issue admittedly provide for the exclusive application of Tribal law and the exclusive jurisdiction of the Tribal court. Accordingly, the Defendants are not subject to Colorado law or its enforcement by the State.

The Tribe’s sovereignty is derived from its aboriginal status as a Native American Tribe, and was recognized by the Fort Laramie Treaty of 1868 (15 Stat. 635), which established the Great Sioux reservation, and an act of Congress in 1889 (25 Stat.

888), which established the Cheyenne River Sioux Reservation. *South Dakota v. Bourland*, 508 U.S. 679, 682 (1993); *Solem v. Bartlett*, 465 U.S. 463, 466-69 (1984).

While the State neglected to attach to the Complaint copies of any of the 200 loan agreements Defendants allegedly entered into with Colorado residents, the State avers that Defendants' sample loan agreement from its website provides that:

- the agreement is subject solely to the exclusive laws and regulations of the Tribe;
- borrowers consent to the exclusive jurisdiction of the Tribal Court;
- the agreement is governed by the Indian Commerce Clause of the United States Constitution and the laws of the Tribe;
- the lender is not subject to the laws of any state.

See Complaint ¶¶ 14-16.

Under the terms of the agreement and the structure of Defendants' business, as pled in the Complaint, any agreement with a Colorado resident would have been entered into on the Reservation and would be governed solely by Tribal law. Therefore, the State has no jurisdiction over Defendants. "Congress has . . . acted consistently upon the assumption that the States have no power to regulate the affairs of Indians on a reservation." *Williams v. Lee*, 358 U.S. 217, 220 (1959). In *Williams*, a non-Indian who operated a general store on the Navajo Indian Reservation filed suit against Navajo Indians (Mr. and Mrs. Williams) in state court in Arizona to recover for goods sold in the store on credit. Judgment was entered against Mr. and Mrs. Williams in the trial court, and the Supreme Court of Arizona affirmed the judgment. The United States Supreme Court reversed, holding that, unless Congress expressly grants power

to a state,⁴ the state has no authority to govern the affairs of Indians on a reservation.

Id. at 220-223. The *Williams* court concluded its opinion by stating:

There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves. It is immaterial that respondent [*i.e.* the store owner bringing suit] is not an Indian.

Id. at 223; *see also Puyallup*, 433 U.S. at 172-73; *Three Affiliated Tribes*, 476 U.S. at 891.

The Supreme Court reaffirmed this holding in *Montana v. United States*, 450 U.S. 544 (1981), where it further emphasized that state law does **not** govern contracts between Indians and non-Indians:

To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of non-members who enter ***consensual relationships with the tribe or its members, through commercial dealing, contracts***, leases, or other arrangements.

Id. at 565 (emphasis added).

The holdings in *Williams* and *Montana* are dispositive here. The loan transactions took place on the Reservation and are explicitly governed by Tribal law. Defendant Webb – the person who owns and operates Defendant Western Sky – is a member of the Tribe. The Supreme Court has held that its decisions and federal law confer rights on ***individual*** Indians, as well as Tribes. “[W]hen Congress has legislated

⁴ Defendants are not aware of any such authority granted by Congress to Colorado.

on Indian matters, it has, most often, dealt with the tribes as collective entities. ***But those entities are, after all, composed of individual Indians, and the legislation confers individual rights.*** This Court has therefore held that ‘the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.’” *McClanahan*, 411 U.S. at 181 (*quoting Williams*, 358 U.S. at 220) (emphasis added).⁵

Likewise, there is no requirement that Western Sky be owned by the Tribe or be incorporated under Tribal law to be entitled to the protection of Tribal law. Webb is a member of the Tribe and he owns and controls Western Sky, which is located on the Reservation. See Complaint ¶¶ 5, 16. Congress has recognized the special nature of Indian-owned corporations, regardless of where they are incorporated, by enacting the Indian Business Development Program to “establish and expand profit-making Indian-owned economic enterprises.” 25 U.S.C. § 1521 (2006). The regulations to that statute restrict participation to “Indians, Indian Tribes, Indian Partnerships, corporations, or cooperative associations ***authorized to do business under State, Federal or Tribal Law.***” 25 C.F.R. § 286.3 (emphasis added). Therefore, the State’s attempt to enforce Colorado law against Defendants here is no less an infringement of Indian rights than the conduct of the Arizona courts in *Williams* or *McClanahan*.

Similarly, federal courts – including the Tenth Circuit – have recognized that a corporation incorporated under state law can acquire the racial attributes of its

⁵ *Williams* and *Montana* involved individual Indians. *McClanahan* expressly recognizes that ***individual*** Indians are free of unwarranted state jurisdiction.

owner. For example, in *Guides, Ltd. v. Yarmouth Group Property Management, Inc.*, the Tenth Circuit held that a corporation had standing to sue under 42 U.S.C. §§ 1981 and 1982 where it suffered harm as a result of discrimination against an African American owner and employee. 295 F.3d 1065, 1072 & n.2 (10th Cir. 2002); see also *Gersman v. Group Health Ass'n, Inc.*, 931 F.2d 1565 (D.C. Cir.1991), *vacated on other grounds*, 502 U.S. 1068 (1992); *Hudson Valley Freedom Theater, Inc. v. Heimbach*, 671 F.2d 702, 706 (2d Cir. 1982); *Howard Security Services v. Johns Hopkins Hospital*, 516 F. Supp. 508 (D. Md. 1981). These courts essentially held that the entities took on the racial identity of the owner or employee. This holding applies with equal emphasis here, as Western Sky has taken on the Native American identity of Webb.

This is the precise conclusion recently reached by the South Dakota Supreme Court in *Pourier v. South Dakota Department of Revenue*, 658 N.W.2d 395 (S.D. 2003), *aff'd in part and vacated in part on other grounds*, 674 N.W.2d 314 (2004), *cert. denied*, 541 U.S. 1064 (2004). In *Pourier*, the South Dakota Supreme Court relied on some of the foregoing authority to hold that a corporation incorporated under South Dakota law, rather than Tribal law, was an enrolled member of the tribe for purposes of tax immunity because it was owned by an enrolled member of the tribe and operated on the reservation. *Id.* at 403-405; see also *Giedosh v. Little Wound Sch. Bd.*, 995 F. Supp. 1052, 1059 (D.S.D. 1997) (fact that school board was incorporated under South Dakota law did “not affect its status as an ‘Indian tribe’”).

In *Pourier*, the South Dakota Supreme Court held that the State of South Dakota had no power to impose a fuel tax on a business operated on a reservation by

an enrolled member of the Oglala Sioux tribe. 658 N.W. 2d at 397, 402-403. In holding that the State of South Dakota could not impose the tax on an Indian operating on a reservation – as contrasted to a non-Indian on a reservation – the *Pourier* court relied on the holding in *Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450, 458 (1995):

When a state attempts to levy a tax directly on an Indian tribe ***or its members inside Indian country***, rather than on non-Indians, we have employed, instead of a balancing inquiry, a more categorical approach: ***Absent cession of jurisdiction or other federal statutes permitting it***, we have held, a State is without power to tax reservation lands and reservation Indians.

Pourier, 658 N.W.2d at 400 (emphasis added). Here, given the absence of any cession of jurisdiction by the Tribe or federal statute permitting the State to act, the State has no authority to regulate the activities of Western Sky, which has the same rights and immunities enjoyed by Webb, an enrolled Tribal member.

3. PREEMPTION OF COLORADO LAW

The Supreme Court has identified “two independent but related barriers” to a state’s assertion of regulatory authority over tribal lands and members: federal preemption of state law, and the danger that states will “unlawfully infringe ‘on the right of reservation Indians to make their own laws and be ruled by them.’” *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980) (citations omitted). “The two barriers are independent because either, standing alone, can be a sufficient basis for holding state law inapplicable to activity undertaken on the reservation or by tribal members.” *Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue of N.M.*, 458 U.S. 832, 837-38 (1982) (quoting *White Mountain Apache*, 448 U.S. at 143).

The State's Complaint seeks to nullify the choice-of-law and forum-selection provisions in the sample loan agreement. These provisions, on their face, are enforceable and should not be disregarded, even without consideration of the special status of Defendants as Tribal members. Under federal law, forum-selection clauses are presumed valid and should be enforced unless enforcement would be unreasonable under the circumstances. *See Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 589, 591 (1991) (citing *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12-13, 15 (1972)); *see also Yavuz v. 61 MM, Ltd.*, 465 F.3d 418, 430 (10th Cir. 2006).

The fact that the forum-selection and choice-of-law provisions call for application of Tribal law in Tribal Court to Tribal members causes the State's Complaint also to run squarely into the preemption barrier discussed in *White Mountain Apache*.

Congress has "broad power to regulate tribal affairs under the Indian Commerce Clause, Art. 1, § 8, cl. 3." *White Mountain Apache*, 448 U.S. at 142. In exercising this broad power, Congress has "jealous regard for Indian self-governance," so much so that a law that conditioned access to North Dakota state courts on the forfeiture of tribal self-governance, was preempted by federal law. *Three Affiliated Tribes*, 476 U.S. at 887-91. Congress has used its broad power under the Indian Commerce Clause to fully occupy the field of regulation of Indian commerce on reservations. *See, e.g.*, 25 U.S.C. §§ 261-264 (2006) (limiting who could trade with Indians); 25 U.S.C. § 305, *et seq.* (2006) (economic development promoting Indian arts and crafts); 25 U.S.C. §§ 450, *et seq.* (2006) (Indian Self-Determination and Education Assistance Act of 1975); 25 U.S.C. §§ 461, *et seq.* (2006) (Indian

Reorganization Act of 1934); 25 U.S.C. § 1451 *et seq.* (Indian Financing Act of 1974); 25 U.S.C. §§ 2701–2721 (Indian Gaming Regulatory Act); *cf. Mescalero Apache*, 462 U.S. at 327-28 (“We have stressed that Congress’ objective of furthering tribal self-government encompasses far more than encouraging tribal management of disputes between members, but includes Congress’ overriding goal of encouraging tribal self-sufficiency and economic development.” (Quotation and citations omitted.)).

Congressional restriction on state jurisdiction on Indian reservations is similarly expansive. *See, e.g.*, 25 U.S.C. § 1322(a) (The Indian Civil Rights Act of 1968); *see generally Three Affiliated Tribes*, 476 U.S. 877 (discussing Congress’ control over state jurisdiction on reservations). Because Congress has comprehensively occupied the field of regulation of commercial activity on Indian reservations, Colorado law, as applied to the Defendants and their activities on the Reservation, is preempted.⁶ The State may not nullify, and even criminalize, the choice-of-law and forum-selection provisions in the sample loan agreement.

In addition to its preemption problem, the State’s Complaint is barred because it unlawfully infringes on the right of the Tribe to make its own laws and be ruled by them. *See White Mountain Apache*, 448 U.S. at 142. While there is overlap between this barrier and the preemption barrier, the impact of the State’s case on the

⁶ The case for preemption in the present situation is even stronger than in cases such as *Three Affiliated Tribes*, where the reservations at issue were located within the boundaries of the state which was attempting to regulate activity there. Here, Colorado is geographically disconnected from the Reservation and, arguably, infringes on the rights of South Dakota as well.

self-governance of the Tribe and its members deserves special note. If permitted to proceed under its present Complaint, the State effectively would supersede and supplant the Tribe's commercial and consumer laws, by precluding their application any time a Colorado resident is involved in a transaction. Therefore, the State's attempts to regulate the commercial activity of Tribal members on the Reservation, even those that involve citizens of Colorado, must fail as a matter of law.

CONCLUSION

The State's Complaint is barred by Tribal immunity and by the preemption of Colorado law by federal and Tribal law. Defendants' Motion should be granted and the State's Complaint should be dismissed with prejudice.

DATED this 12th day of April 2011.

Respectfully submitted,

BALLARD SPAHR LLP

By s/ Roger P. Thomasch
Roger P. Thomasch
Matthew R. Lasek
1225 17th Street, Suite 2300
Denver, Colorado 80202
Telephone: (303) 292-2400

**ATTORNEYS FOR DEFENDANTS,
WESTERN SKY FINANCIAL, L.L.C.
AND MARTIN A. WEBB**

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of April 2011, a copy of the foregoing **MOTION TO DISMISS** was electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the service list below:

Paul Chessin, Senior Assistant Attorney General
1525 Sherman Street, 7th Floor
Denver, CO 80203
Attorneys for Plaintiff

s/ Michelle Dawson
Michelle Dawson

EXHIBIT A

Cheyenne River Sioux Tribe
PO Box 590
Eagle Butte, SD 57625

Thursday, April 07, 2011



Certificate of Indian Blood

Name: **Martin Allen Webb**

Date of Birth: **10/08/1956**

Enrollment Status: **Enrolled**

Resolution Number:

Enrollment Number: **CRU-008357**

Resolution Date:

Ethnic Affiliation/Blood Quantum

Total Quantum This Tribe: **3/32**

Total Quantum All Tribes: **3/32**

Ethnic Group: **Cheyenne River Sioux Tribe - (R)**

Blood Quantum: **3/32**

Affiliation: **Sioux**

Charlene Anderson, Enrollment Specialist

Authorizing Signature

I certify that the foregoing is a true and correct copy of a document in the official records of the Cheyenne River Sioux Tribe.

Name Charlene Anderson Title Enrollment Specialist