

RECEIVED

STATE OF WEST VIRGINIA ex rel.
DARRELL V. McGRAW, JR.,
Attorney General,

OCT 28 2011

Petitioner,

ATTORNEY GENERAL'S OFFICE

v.

Civil Action No. 10-MISC-372
Judge Louis H. Bloom

2011 OCT 24 PM 4:10
CATHY S. GATSON, CLERK
KANAWHA COUNTY CIRCUIT COURT

FILED

Payday Loan Resource Center, LLC;
Moe Tassoudji; DirectROI d/b/a Cash West Payday Loans;
Mike Brewster; First American Credit; Loan Pointe, LLC;
Eastbrook, LLC d/b/a Ecash and GeteCash; Joe E. Strom,
Benjamin J. Lonsdale, James C. Endicott, Mark S. Lofgren;
National Title Loans d/b/a National Cash 12; Payday Financial, LLC
d/b/a www.LakotaCash.com; Martin Webb; Payday Loan – ACH d/b/a
www.ACHLoans.com,

Respondents.

**FINAL ORDER GRANTING STATE'S PETITION TO ENFORCE
INVESTIGATIVE SUBPOENA**

On June 22, 2011, came the Petitioner, State of West Virginia ex rel. Darrell V. McGraw, Jr. ("the State"), and the Respondents, Payday Financial, LLC ("Payday Financial") and Martin A. Webb ("Mr. Webb"), by counsel, Richard Neely, for a hearing before this Court upon the State's Petition to Enforce Investigative Subpoena and for Related Relief ("Petition").

Whereupon, the State called three witnesses, all residents of West Virginia, who testified that they obtained payday loans from Payday Financial, LLC d/b/a Lakota Cash via the Internet. The Respondents were also given the opportunity to present witnesses and evidence, but they did not do so.

Upon consideration of the State's evidence presented at the hearing, the pleadings and memoranda of law filed herein, the oral arguments of counsel, and the applicable law, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. On January 14, 2010, the State issued an investigative subpoena (“Subpoena”), pursuant to W.Va. Code § 46A-7-104(1), directing the Respondents to produce certain documents or information to the Attorney General’s Consumer Protection Division in Charleston, West Virginia, on or before February 1, 2010.

2. The Subpoena was duly served upon the West Virginia Secretary of State in accordance with West Virginia’s long-arm statutes and was delivered to the Respondents on January 19, 2011, at their corporate office in Timber Lake, South Dakota.

3. Payday Financial and Mr. Webb did not comply with the Attorney General’s Subpoena.

4. On August 18, 2010, the Attorney General filed the above-styled Petition against certain persons and companies who had allegedly failed to comply with similar investigative subpoenas issued by the Attorney General, including Payday Financial and Mr. Webb.

5. The Attorney General’s Petition was duly served upon the West Virginia Secretary of State in accordance with West Virginia’s long-arm statutes and was delivered to the Respondents on April 4, 2011, at their corporate office in Timber Lake, South Dakota.

6. On May 19, 2011, Payday Financial and Mr. Webb filed a Special Appearance to Seek Dismissal of Petition for Lack of Jurisdiction and Request to File Memorandum of Law in Reply to the Memorandum Filed by Petitioner (hereinafter “Special Appearance”).

7. In the Special Appearance, the Respondents assert, in pertinent part, the following arguments:

- a. Mr. Webb is an enrolled Tribal Member of the Cheyenne River Sioux Tribe (“the Tribe”) and resides on the Cheyenne River Indian Reservation (“the Reservation”) in South Dakota;
- b. Mr. Webb, as an enrolled Tribal Member of the Tribe, living and working on the Reservation, is entitled to the protection of the applicable treaties between the Tribe

and the United States government and, therefore, can only be served with process through the Tribal Courts of the Reservation or the Federal Courts;

- c. Mr. Webb is the sole owner of Payday Financial;
- d. Payday Financial is physically located and operates within the exterior boundaries of the Reservation;
- e. Payday Financial has been licensed to conduct business by the Tribe since June, 2007, as evidenced by the Businesses Licenses annexed as Exhibit A to the Respondent's Reply;
- f. The Internet payday loans made to persons residing in West Virginia were accepted and entered into on the Reservation and are governed solely by Tribal law and the Indian Commerce Clause of the United States Constitution;
- g. The Respondents are immune from suit or regulation by the State under the doctrine of Native American Tribal Immunity; and
- h. The State's Subpoena and Petition were not properly served upon the Respondents in the manner prescribed by Tribal law.

See Reply of Payday Financial, LLC and Martin Webb.

8. In response to the Respondents' Special Appearance and Reply, the State asserts in pertinent part the following:

- a. Payday Financial is a limited liability company that filed its Articles of Organization with the South Dakota Secretary of State on October 27, 2007;
- b. Mr. Webb is the sole managing member and owner of Payday Financial;
- c. Payday Financial is not a federally-recognized Native American Tribe; it is not a tribal entity or corporation; and it was not created by nor is it owned, operated or managed by the Cheyenne River Sioux Tribe or any other federally-recognized Native American Tribe;
- d. The Internet payday loans that are the subject of the State's Petition were entered into and to be performed in West Virginia and are governed by West Virginia law;
- e. Any provision that may be contained in the standard loan contracts of Payday Financial stating that the transactions are governed by Tribal law is unenforceable because the contracts bear no substantial relationship with the Cheyenne River Sioux Tribe and application of Tribal law would offend West Virginia's strong public policy against usury; and

- f. The State was not a party to the loan contracts in question and any choice of law provisions contained therein are not binding upon the State nor may they limit the State's ability to bring police actions to enforce state consumer protection law.

See State's Response to Respondent's Special Appearance.

9. Mr. Webb is an enrolled member of the Cheyenne River Sioux Tribe in South Dakota. Mr. Webb is the sole managing member and owner of Payday Financial, LLC.

10. On October 22, 2007, Mr. Webb filed "Articles of Organization of Payday Financial, LLC" with the South Dakota Secretary of State. Exhibit I, State's Memorandum of Law in Opposition to Special Appearance.

11. On October 22, 2007, the South Dakota Secretary of State issued a Certificate of Organization to Payday Financial, LLC. Article Three of the Articles of Incorporation of Payday Financial provides: "Payday Financial, LLC shall have those powers provided for in the South Dakota Limited Liability Company Act, SDCL Chpt. 47-34A." Ex. I, State's Memorandum of Law in Opposition to Special Appearance.

12. The State's witnesses each testified to the following facts: (1) they were residents of West Virginia at the time they obtained loans from Payday Financial; (2) they applied for loans from Payday Financial by entering personal information into computers located in West Virginia; (3) they signed their names electronically to documents furnished by Payday Financial at computers located in West Virginia; (4) the amounts loaned to them by Payday Financial were deposited electronically into their personal bank accounts located in West Virginia; and (5) Payday Financial collected loan payments from them by making electronic debits from their personal bank accounts located in West Virginia. Thus, the Court finds that the Internet payday loans made by Payday Financial were made and to be performed in West Virginia. *See* Discussion, *infra*.

13. The Respondents presented no evidence at the hearing, testimonial or otherwise, but instead argued both orally and in their memorandum of law that this Court lacks jurisdiction to grant the Petition because as an enrolled Tribal member of the Cheyenne Sioux River Tribe, Mr. Webb and his company, Payday Financial, are entitled to Tribal immunity.

STANDARD OF REVIEW

To obtain judicial backing for the enforcement of an administrative subpoena, the agency must prove that (1) the subpoena is issued for a legislatively authorized purpose, (2) the information sought is relevant to the authorized purpose, (3) the information sought is not already within the agency's possession, (4) the information sought is adequately described, and (5) proper procedures have been employed in issuing the subpoena. Once these requirements are satisfied, the subpoena is presumed valid and the burden shifts to the party opposing the subpoena to show its invalidity. Such party seeking to quash the subpoena must disprove by facts and evidence the presumed validity of the subpoena. Syl. pt. 1, *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 483 S.E.2d 12 (1996).

DISCUSSION

1. The Respondents argue, in pertinent part, that the State's Petition should be denied because this Court lacks jurisdiction to grant the Petition because the "final act" to consummate the loan agreements between Payday Financial and West Virginia consumers, Payday Financial accepting the agreements, was executed on the Reservation, which invokes tribal immunity. The Respondents also argue that they are entitled to tribal immunity from any action by the State because Mr. Webb is an enrolled tribal member of the Cheyenne River Sioux Tribe and the sole owner of Payday Financial, and the loan agreements were consummated on the Reservation. In support of its position that Payday Financial is entitled to tribal sovereign immunity, the

Respondent's cite *Pourier v. South Dakota Dept. of Revenue*, 658 N.W.2d 395 (S.D. 2003), *overruled, in part, on other grounds, following rehearing*, 658 N.W.2d 395 (S.D. 2003) .

However, the Court finds the facts presented in *Pourier* are distinguishable from the facts in the present action.

2. In *Pourier*, a corporation whose sole shareholder was an enrolled member of a tribe asserted tribal sovereign immunity from the state's attempt to tax its on-reservation activities. The court in *Pourier* held that “[a] corporation owned by the tribe or an enrolled tribal member residing on the Indian reservation and doing business on the reservation for the benefit of reservation Indians is an enrolled member for the purpose of protecting tax immunity.” 658 N.W.2d at 404 (emphasis added). In so holding, the court in *Pourier* made several observations that are instructive in the present action. First, the corporation in question in *Pourier* was licensed by the Oglala Sioux Tribe to do business on the reservation. Second, the corporation exclusively sold its fuel at its retail gas station on the reservation. Third, approximately 90% of purchases from the corporation were Indians who resided on the reservation.

3. Unlike the corporation at issue in *Pourier*, Payday is organized and incorporated under the laws of South Dakota. Also, all of Payday Financial's business activities occurred off the Reservation over the Internet in the individual consumers' home state. *See Zippo, infra*. Furthermore, Payday Financial's customers are non-tribal members who are residents of states. Finally, there is no evidence in the record to support that Payday Financial's business is for the benefit of reservation Indians and not just a for-profit corporation to benefit its sole owner, Martin Webb. Thus, the *Pourier* decision actually supports the inapplicability of tribal sovereign immunity to Payday Financial and its business activities.

4. Another persuasive authority that supports the inapplicability of tribal immunity in the present case is *State ex rel. Suthers v. Cash Advance and Preferred Cash Loans*, 205 P.3d 389 (Colo. App., 2008). In *Suthers*, the Colorado Court of Appeals addressed nearly identical issues as those raised by the Respondents. The Colorado State Attorney General opened an investigation against two Internet lending companies to determine whether their lending practices involving making payday loans to Colorado residents violated the Uniform Commercial Credit Code and the Colorado Consumer Protection Act. *Suthers*, 205 P.3d at 394. Upon the failure of the businesses to comply with administrative subpoenas, the Colorado Attorney General initiated contempt proceedings and the owners of the two Internet payday lending companies joined in a motion to dismiss, each asserting it was incorporated by an Indian tribe and thus, immune from any enforcement action by the Colorado Attorney General based on the doctrine of tribal sovereign immunity.

In deciding *Suthers*, the Colorado Court of Appeals stated that the threshold question is whether the conduct being investigated occurred on or off the Reservation and found that the trial court's conclusion that the conduct being investigate, i.e. payday loans made to Colorado residents by the companies, occurred off the respective Reservations was supported by competent evidence. *Id.* at 400. The Court noted that evidence showed that both companies asserting tribal immunity engaged in transactions over the Internet with consumers located in Colorado. The Court further stated that there was evidence showing that the contracts were entered into and negotiated in Colorado; and performance was to occur in Colorado because the consumers were to repay the principal and interest in Colorado. *Id.* at 400-401. The Colorado Court of Appeals found that the off-Reservation conduct fell into an area where the legislature and the Colorado Attorney General indicated there was an important need for regulation. *Id.* at

401 (citing *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 336, 103 S.Ct. 2378 (1983)(stating that “[a] State’s regulatory interest will be particularly substantial if the State can point to off-reservation effects that necessitate State intervention.”)). Thus, the Colorado Court of Appeals found that the Internet payday loans did constitute off-reservation activity and that tribal sovereign immunity did not prevent enforcement of the Colorado Attorney General’s subpoenas.

5. The evidence presented in this case is nearly identical to that in *Suthers, supra*. Like the facts in *Suthers*, the testimony and evidence presented by the State’s witnesses indicate that the Internet payday loans made by Payday Financial to West Virginia consumers were made and to be performed in West Virginia, not on the Reservation. The undisputed testimony shows that Payday Financial intentionally reached out beyond the Reservation to conduct business with West Virginia residents and just because the business was conducted over the Internet is of no consequence. *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F.Supp. 1119, 1124 (citing *Burger King v. Rudzewicz*, 471 U.S. 462, 475, 105 S.Ct. 2174, 2183-84 (1985)). The United States Supreme Court has stated that its cases recognize that tribal sovereignty contains a “significant geographical component,” and thus, the off-Reservation activities of Indians are generally subject to the prescriptions of a nondiscriminatory state law in the absence of express federal law to the contrary. *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 336, 103 S.Ct. 2378, 2387-2388 (1983)(internal citations omitted). Furthermore, the United States Supreme Court in cases addressing tribal immunity has stated that individual tribal members are not covered by sovereign tribal immunity for conduct beyond the reservation’s borders. *Suthers*, 205 P.3d at 407 (citing *Citizen Band Potawatomi Tribe*, 498 U.S. at 514, 111 S.Ct. 905; *Puyallup Tribe, Inc. v. Department of Game of State of Wash.*, 433 U.S. 165, 171-172 (1977)). In the present action,

Payday Financial was clearly doing business over the Internet by entering into contracts with West Virginia residents off the Reservation that involved the knowing and repeated transmission of computer files over the Internet. *See Zippo*, 952 F.Supp at 1124; *Suthers, supra*.

6. Finally, notwithstanding the fact that the subject conduct of Payday Financial leading to the State's investigation occurred off-Reservation, the Respondents presented no evidence that Payday Financial is a corporation formed by or for the benefit of the Cheyenne River Sioux Tribe or is acting as an arm of the Tribe. *See Pourier, supra*; *See also, Baraga Products, Inc. v. Commissioner of Revenue*, 971 F.Supp. 294 (W.D. MI., 1997).¹ As stated above, Payday Financial is organized under the laws of South Dakota, not tribal laws, and is not controlled by the tribe, but by an individual who happens to be an enrolled Tribal member. Furthermore, there is no evidence that Mr. Webb operates Payday Financial for the benefit of the Cheyenne Sioux River Tribe, but instead operates such business for his own individual benefit and profit.

CONCLUSIONS OF LAW

1. The Court concludes that the Subpoena issued by the State to Payday Financial, LLC, was issued for a legislatively authorized purpose; the information sought is relevant to the authorized purpose; the information sought is not already within the State's possession; the information sought is adequately described; and proper procedures have been employed by the State in issuing the Subpoena.

2. The Court further concludes that Payday Financial, LLC, is not a federally recognized Indian tribe and it is not a tribal entity or an arm of the Cheyenne River Sioux Tribe or any other Indian tribe. Payday Financial, LLC, is a corporate entity organized under the laws of South

¹ The court in *Baraga* stated that it is possible for a corporation owned by Indian shareholders to be entitled to the same sovereign immunity as the Indian Tribe when it is organized under tribal laws; it is controlled by the tribe; and it is operated for tribal purposes. Furthermore, a corporation may be entitled to the protections of an Indian Tribe if it is acting as the Tribe's agent. 971 F.Supp at 296-297.

Dakota. Therefore, based upon the foregoing Discussion, Payday Financial, LLC, is not entitled to tribal sovereign immunity or tribal immunity, and as such, has not presented a lawful excuse for its failure to comply with the State's Subpoena.

3. The Court also concludes that the Internet payday loans made by Payday Financial were made and to be performed in West Virginia, and therefore, are governed by West Virginia law.

4. The Court also concludes that Mr. Webb, individually, as owner and single shareholder Payday Financial is not subject to the State's Petition in the present action.

DECISION

Accordingly, the Court does hereby **ORDER** the following:

1. The State's Petition is **GRANTED** as to Payday Financial, LLC, but is **DENIED** as to Respondent Martin A. Webb.

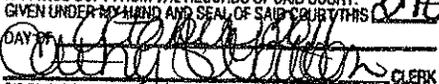
2. Respondent Payday Financial, LLC, shall comply in full with the State's investigative Subpoena within thirty (30) days after entry of this Order.

3. Payday Financial, LLC, is **ENJOINED** from making or collecting any payday loans in West Virginia until such time as it complies in full with the State's Subpoena.

There being nothing further, the Court does **ORDER** that the above styled action be **DISMISSED** and **STRICKEN** from the docket of this Court. The objections of any party aggrieved by Order are noted and preserved.

The Clerk is **DIRECTED** to send a certified copy of this Order to all counsel of record.

ENTERED this 24 day of October, 2011.

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT.
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 24th
DAY OF OCTOBER 2011.

CATHY S. GATSON, CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA


Louis H. Bloom, Judge