UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

COMMONWEALTH OF PA, by Attorney General KATHLEEN G. KANE,	:	CIVIL ACTION
Plaintiff,	:	NO. 14-cv-07139-JCJ
v.	:	
THINK FINANCE, INC., et al.	:	
Defendants.	:	

COMMONWEALTH OF PA, by Attorney General KATHLEEN G. KANE,	:	CIVIL ACTION
Plaintiff,	:	NO. 15-cv-00092-JCJ
v.	:	
THINK FINANCE, INC., et al.	:	
Defendants.	:	

MEMORANDUM OF LAW OF DEFENDANT KENNETH E. REES
IN OPPOSITION TO
PLAINTIFF'S MOTION TO REMAND CASE TO STATE COURT

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I. INTRODUCTION

This action was appropriately removed to this Court, and should remain here. The central issue in the Complaint concerns the interest rates charged on loans made by a state-chartered and federally insured bank and three Native American tribes to consumers in Pennsylvania. With respect to the loans made by the bank, the issue of whether the interest rates charged were improper is completely preempted by federal law. With respect to the loans made by the Native American tribes, the issue of whether the interest rates charged violated Pennsylvania usury laws raises substantial federal questions which must be decided in federal court. The Commonwealth's contention that neither preemption applies nor substantial federal questions exist because the Commonwealth chose not to name the bank or the tribes as defendants is specious. In short, the Commonwealth's selective choice of targets and artful pleading cannot alter the issues raised in the Complaint. Accordingly, the Commonwealth's Motion to Remand this Case to State Court ("Motion to Remand") must be denied. Alternatively, Kenneth Rees requests that the Court schedule an oral argument on the pending Motions to be scheduled at the Court's convenience.

II. BACKGROUND

A. Procedural History

Kenneth E. Rees ("Rees") is the current Chairman of the Board and former Chief Executive Officer of Think Finance ("Think"). Think's business, in part, is to provide support services to banks or non-bank lenders who use Think's technology to create and deliver leading products.

On November 13, 2014, the Commonwealth of Pennsylvania, acting through its Office of Attorney General and Special Counsel (the "Commonwealth"), sued Rees, Think, and other

individuals and entities (referred collectively as "Defendants") in Pennsylvania state court alleging violations of three statutes – the Pennsylvania Corrupt Organizations Act (18 Pa.C.S. §§ 911 *et seq.*), the Pennsylvania Fair Credit Extension Uniformity Act (73 P.S. §§ 2270.1 *et seq.*), and the Pennsylvania Unfair Trade Practices and Consumer Protection Law (73 P.S. §§ 201-1 *et seq*). The heart of the Commonwealth's Complaint is that the interest rates charged on the loans made by the First Bank of Delaware ("FBD") and three Native American tribes, the Chippewa Cree Tribe of the Rocky Boy's Indian Reservation, Montana, the Otoe Missouri Tribe of Indians, and the Tunica Biloxi Tribe ("the Tribes"), violated Pennsylvania's usury laws.[1] While the Complaint deems both FBD and the Tribes to be "nominal" lenders, its allegations, together with the facts detailed in the Declaration of Kristen M. Hensley, demonstrate that the true lenders of these loan transactions were, respectively, FBD and the Tribes. (*See* Compl. at ¶¶ 31-36, ECF No. 1, Ex. A; Decl. of Kristen M. Hensley in Supp. of Notice of Removal, Dec. 17, 2014, ECF Nos. 1-9 and 1-10.) On December 17, 2014, Defendants Think Finance, Inc., TC Loan Service, LLC, and Financial U, LLC, with the consent of the remaining Defendants including Rees, removed this case to federal court pursuant to 28 U.S.C. § 1331. (*See* Notice of Removal, Dec. 17, 2014, ECF No. 1 (Case No. 14-cv-07139-JCJ).)[2] On March 11, 2015, the Commonwealth filed its Motion to Remand, retaining the joint caption for both removal actions. (*See* Case No.

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[1] There are many factually incorrect assertions against Rees in the Complaint, including the allegations that he "retains a controlling interest and operational role in Think Finance," that he "personally has designed and directed the business activity described herein," and that "ThinkCash, Inc. was formed by Defendant Rees." (Compl. at ¶¶ 15, 31.) The Commonwealth has been advised that these contentions are erroneous. Rees did not join ThinkCash until 2004, and he did not "personally" design the business activity.

[2] Defendants William Weinstein, Weinstein, Pinson & Riley P.S., and Cerastes, LLC, separately removed the case to federal court as well, creating a separate docket at Case No. 15-cv-00092-JCJ. Since the removal of this action from Philadelphia County to the Eastern District of Pennsylvania, the Commonwealth has agreed to the dismissal of Elevate Credit, Inc., William Weinstein, Weinstein, Pinson and Riley, P.S. and Cerastes, LLC. (*See* Case No. 14-cv-07139-JCJ, ECF Nos. 35, 43; Case No. 15-cv-00092-JCJ, ECF Nos. 10, 14.) Thus, while the Notice of Removal in Case No. 15-cv-00092-JCJ is present on the docket, these Defendants are no longer part of the Commonwealth's case.

14-cv-07139-JCJ, Mar. 11, 2015, ECF No. 42.)[3]

B. Business Relationship with FBD

TC Loan Service, LLC, conducting business as ThinkCash (which eventually became Think Finance, Inc. and hereinafter referred to as "Think"), entered into a contractual relationship with the First Bank of Delaware ("FBD"), a state-chartered, federally insured, FDIC-regulated bank, whereby FBD loaned money to consumers with Think providing certain services to FBD in support of those loans. (Compl. at ¶¶ 11, 30, 31-36, ECF No. 1, Ex. A.) Specifically, FBD as the lender, provided underwriting criteria, rollbacks, funding, and payment processing, and set the pricing and terms of the loans. (*See* Decl. of Kristen M. Hensley in Supp. of Notice of Removal, ECF No. 1-10, Attach. 2, at 4-7.) Think was the "marketer/servicer" for the loan program, providing consumer marketing, application processing, ongoing customer support, and collections services. (*Id.*) Think had a marketing and servicing agreement with FBD and received a one-time fee for each new loan made to a customer. (*See* Compl. at ¶¶ 32, 36, ECF No. 1, Ex. A.) These loans, the Commonwealth contends, provided for interest rates in excess of those allowed by Pennsylvania law (Compl. at ¶¶ 31-36, ECF No. 1, Ex. A.) The role Think played in servicing the loans was approved by the Department of Banking. (*See* Decl. of Kristen M. Hensley, ECF No. 1-9.) In short, TC Loan Services applied for and obtained a credit services loan broker license under the Credit Services Act. (*See* Decl. of Kristen M. Hensley and Attachments thereto, ECF Nos. 1-9, 1-10.) That application detailed the loans being made by FBD, the interest rates being charged, and also described Think's role in the lending relationship. The Complaint also includes a lengthy description of FDIC actions against FBD, (Compl. at

[3] The Commonwealth agreed to the dismissal of the Defendants in Case No. 15-cv-00092-JCJ; therefore, the second removal action is effectively mooted by the dismissal, without prejudice, of those Defendants. (*See* Case No. 14-cv-07139-JCJ, Mar. 5, 2015, ECF No. 41; Case No. 15-cv-00092-JCJ, Mar. 13, 2015, ECF No. 14.) Although the parties have retained the joint caption for both removal actions, the documents filed in Case No. 14-cv-07139-JCJ will be cited for the purpose of the instant Brief in Opposition to the Motion to Remand.

¶¶ 33-39), which, as conceded by the Commonwealth, are irrelevant to the claims asserted or the issue of removal and remand. (*See* Pl.'s Mem. of Law in Supp. of Motion to Remand, Mar. 11, 2015, ECF No. 42, at 5 n.3.) The Think Finance-FBD relationship ended in approximately 2011.

C. Business Relationship with Native American Tribes

After the FBD relationship ended, Think entered into a similar relationship with three tribes – the Chippewa-Cree of the Rocky Boy's Indian Reservation, Montana; the Otoe-Missouria Tribe of Indians; and the Tunica-Biloxi Tribe of Louisiana ("the Tribes") – in which the Tribes made installment loans and issued lines of credit to consumers and Think provided the same services in support of those loans as described above with FBD. (*See* Compl. at ¶ 47; Compl. at Ex. I.) The Commonwealth asserts that the interest rates charged on these transactions violate Pennsylvania usury laws. (Compl. at ¶ 1.) The loan documents signed by Pennsylvania consumers provide that the transactions are subject to tribal law. (*See*, *e.g.*, Compl. at Exs. D–F.) The Plain Green Loan Agreement and the Great Plains Lending Agreement state that the borrowers "consent to the sole subject matter and personal jurisdiction" of the lending tribe and "further agree that no other state or federal law or regulation" applies to the loan agreement, its enforcement, or any interpretation. (Compl. at ¶¶ 57, 59; Compl. at Exs. D–E.) These agreements expressly state that they are not subject to any state law and the third tribe's agreement included similar provisions: "MobiLoans, LLC is an entity owned and operated by the Tunica-Biloxi tribe of Louisiana, the credit issued to you and information provided under this agreement by MobiLoans is done so solely under the provisions of laws of the Tunica-Biloxi tribe of Louisiana and applicable federal law." (Compl. at ¶ 67; Compl. at Ex. F.) Moreover, in a section of the form agreement entitled "Governing Law," consumers are informed that: "Neither this Agreement nor the Lender is subject to the laws of any State of the United States." (Compl. at ¶ 67; Compl. at Ex. F.)

D. Commonwealth Claims Against Defendants[4]

The Commonwealth's central allegation is that the "Defendants illegally solicit, arrange, fund, purchase, service and/or collect loans and cash advances made to Pennsylvania citizens over the Internet" and "[t]hese loans and cash advances charge well in excess of the usury ceiling established by Pennsylvania law." (Compl. at ¶ 1.) The Complaint alleges that the interest rates charged were usurious and violated Section 201 of Pennsylvania's Loan Interest and Protection Law. (*Id.* at ¶¶ 1, 31-32, 44, 48.) The Complaint further alleges that "[t]o evade licensure, usury and consumer protection laws, Defendants Think Finance, Inc., TC Loan Service, LLC, Elevate Credit, Inc., Financial U, LLC and Kenneth Rees … have used affiliations with a rogue bank and Native American tribes as vehicles for this illegal activity." (*Id.* at ¶ 2.) The Commonwealth's Complaint details five separate claims arising from this core conduct.

The three claims arising under the Pennsylvania Corrupt Organizations Act, 18 Pa.C.S. § 911 (Counts One through Three), essentially contend that: 1) the Defendants participated in the affairs of an Enterprise by making, servicing and collecting illegal loans in violation of Pennsylvania law; 2) the income from the Enterprise was re-invested in the venture; and 3) the Defendants entered into a conspiracy to do so.[5] (*See* Compl. at ¶¶ 13, 97-98.) The fourth claim asserts that the Defendants collection of these alleged usurious loans violated the Pennsylvania Fair Credit Extension Uniformity Act ("PFCEUA"), 73 P.S. § 2270.1 *et seq.*, and Pennsylvania Unfair Trade Practices and Consumer Protection Law ("UTPCPL"), 73 P.S. §§ 201-1 *et seq.* (*See* Compl. at ¶¶ 118-143.) Finally, the Commonwealth claims that all of Think's conduct

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[4] The Commonwealth's claims are both factually and legally deficient, and will be addressed in a future Motion to Dismiss the Complaint.

[5] The Commonwealth alleges in the Complaint that this investment went into the following entities: ThinkCash, Inc., TC Loan Service, LLC, Think Finance, Inc., Elevate Credit, Inc. and Financial U, LLC. This is inaccurate: Elevate Credit, Inc. was never the intended investment entity for an alleged illegal conduct.

supporting its business relationships with FBD and the Tribes violates the UTPCPL. As for Rees, the Commonwealth contends that he is the "mastermind' and architect of the aforementioned scheme. (Compl. at ¶ 15.)

III. ARGUMENT

A. Legal Standard

A federal district court has subject matter jurisdiction to hear claims "arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331; *Grable & Sons Metal Products, Inc. v. Darue Eng'g & Mfg*., 545 U.S. 308, 312 (2005). A claim brought in state court may be removed to federal court under 28 U.S.C. § 1441(a) if it is an action in which the federal court would have had original jurisdiction. *See, e.g., Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1987); *Franchise Tax Board v. Constr. Laborers Vacation Trust,* 463 U.S. 1, 19 n.18 (1983); *Trent Realty Associates v. First Fed. Sav. & Loan Assoc*., 657 F.2d 29, 36 (3d Cir. 1981).

Pursuant to 28 U.S.C. § 1447(c), a party may seek to remand a civil action to state court based on an alleged defect in the removal procedure or lack of subject matter jurisdiction. When remand is challenged, the removing party bears the burden of showing that removal was proper. *Boyer v. Snap–On Tools Corp*., 913 F.2d 108, 111 (3d Cir. 1990); *see also Dukes v. U.S. Healthcare, Inc*., 57 F.3d 350, 359 (3d Cir. 1995) ("[T]he burden of establishing removal jurisdiction rests with the defendant.")

Whether a particular case arises under federal law turns on the "well-pleaded complaint" rule, which provides that "federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." *Caterpillar, Inc.,* 482 U.S. at 392, (citing *Gully v. First Nat'l Bank*, 299 U.S. 109, 112–13 (1936)); *see also Aetna Health Inc. v. Davila,* 542 U.S. 200, 207 (2004). This rule was designed to make the plaintiff "master of the claim." *Caterpillar Inc*., 482 U.S. at 392. And, while a defendant may not remove on the basis of a

federal defense, neither may a plaintiff defeat removal by failing to plead necessary federal questions. *Id.* "Under the artful-pleading doctrine, a federal court will have jurisdiction if a plaintiff has carefully drafted the complaint so as to avoid naming a federal statute as the basis for the claim, and the claim is in fact based on a federal statute." *Mikulski v. Centerior Energy Corp*., 501 F.3d 555, 561 (6th Cir. 2007) (citing *Franchise Tax Bd*., 463 U.S. at 22). Indeed, it is black letter law that "[a] plaintiff cannot avoid federal court simply by omitting a necessary federal question in the complaint; in such a case the necessary federal question will be deemed to be alleged in the complaint." 6 James Wm. Moore et al., *Moore's Federal Practice* ¶ 103.43 (3d ed. 2005).

The complete preemption doctrine is an "independent corollary of the well-pleaded complaint rule." *Caterpillar, Inc.*, 482 U.S. at 393; *see also In re U.S. Healthcare*, 193 F.3d 151, 160 (3d Cir. 1999); *Dukes*, 57 F.3d at 354; *Joyce v. RJR Nabisco Holdings, Corp.,* 126 F.3d 166, 171 (3d Cir. 1997). The doctrine applies when the preemptive force of a federal statute is so "extraordinary" that it converts a complaint solely asserting state law claims into one raising a federal question. *Caterpillar, Inc.*, 482 U.S. at 393. Accordingly, "[o]nce an area of state law has been completely pre-empted, any claim purportedly based on that pre-empted state law is considered, from its inception, a federal claim, and therefore arises under federal law." *Id.*

In addition to complete preemption, federal jurisdiction exists where the case involves substantial federal questions and satisfies the four-pronged test enunciated in *Grable & Sons. Metal Prods., Inc.,* 545 U.S. 308 (2005). *See Manning v. Merrill Lynch Pierce Fenner & Smith, Inc*., 772 F.3d 158, 163 (3d Cir. 2014). "[F]ederal jurisdiction over a state law claim will lie if 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."

Id.

The Supreme Court has recognized "the common-sense notion that a federal court ought to be able to hear claims recognized under state law that nonetheless turn on substantial questions of federal law, and thus justify resort to the experience, solicitude, and hope of uniformity that a federal forum offers on federal issues." *Grable*, 545 U.S. at 312. Federal question jurisdiction lies over claims that may sound in state law but implicate significant federal issues. *Id.*

B. Federal Jurisdiction is Proper Because the Complete Preemption Doctrine Applies to the Complaint and a Substantial Federal Question Exists.

Federal jurisdiction exists here, and the removal was proper for two reasons. First, whether interest rates charged by FBD in its loans to Pennsylvania consumers violated state usury laws is a central issue in the Complaint. This issue is completely preempted by federal law. Second, the Complaint also challenges the interest rates on loans made by Native American tribes, and accordingly, raises substantial federal questions. The agreements between the Native American tribes and Pennsylvania consumers contain forum selection and choice-of-law provisions which the Commonwealth claims are inoperative under the circumstances. Determining whether these provisions control invokes a substantial federal question because it will significantly impact the rights of sovereign tribal nations.

1. The Complaint's Challenge to the Amount of Interest Charged by FBD on its Loans is Completely Preempted by Federal Law.

The Complaint was appropriately removed to this Court because it falls under the "complete preemption" exception to the well-pleaded complaint rule. This complete preemption doctrine allows for the removal of cases in which the "pre-emptive force of [federal law] is so 'extraordinary' that it 'converts an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule.'" *Caterpillar, Inc.*, 482 U.S. at

393 (internal citation omitted). Interest rates charged by federal banks, as well as state-chartered, federally insured banks, are subject to federal law. Thus, state law usury claims are completely preempted by these federal statutes.

FBD was a federally insured, state-chartered bank existing under the laws of Delaware. Therefore, it was subject to the provisions of § 521 of the Depository Institution Deregulation and Monetary Control Act ("DIDA"), 12 U.S.C. §§ 1831 *et seq*. Under DIDA, "a state-chartered, federally-insured bank is authorized to impose finance charges and late fees under the governance of the usury laws of the state where the bank is located. *Id*. "DIDA creates a federal remedy in favor of borrowers who are charged rates in excess of the limit established in [§ 1831d(a)]." *Hill v. Chem. Bank*, 799 F. Supp. 948, 951 (D. Minn. 1992). Determining the appropriateness of FBD's conduct at issue here must be made under DIDA, with reference to Delaware law, the state in which FBD was chartered.

In *Beneficial National Bank v. Anderson,* the Supreme Court held that §§ 85 and 86 of the National Bank Act ("NBA") completely preempts state law usury claims against national banks. 539 U.S. 1, 11 (2003). The Third Circuit followed *Beneficial National Bank* and held that § 521 of DIDA "completely preempts any state law attempting to limit the amount of interest and fees a federally insured-state chartered bank can charge." *In re Cmty. Bank of N. Vir.*, 418 F.3d 277, 295 (3d Cir. 2005) (explaining that § 521 contains an express preemption clause and "incorporates verbatim the language of § 85 of the NBA); *see also Greenwood Trust Co. v. Com. of Mass.,* 971 F.2d 818, 824 (1st Cir. 1992) (explaining that the terms "interest" and "interest rates" as used in provision of DIDA preempting state regulation of interest and interest rates include late fees charged by a bank for delinquent credit card accounts, and Act preempts state statute prohibiting late fees)

Relying upon *In re Community Bank*, the Commonwealth contends that because FBD is not a defendant, the NBA and DIDA are not applicable to this case. (*See* Pl.'s Mem. of Law in Supp. of Motion to Remand, Mar. 11, 2015, ECF No. 42, at 8.) The Commonwealth's contention is wrong. *In re Community Bank* involved a challenge to the amount of interest charged on loans made by a non-bank. 418 F.3d at 296-97. Further, the complaint at issue in that case did not assert usury claims under Pennsylvania law. *Id*. Based upon those facts, the court found no basis for complete preemption and removal. *Id*. The Complaint here, unlike the complaint in *In re Community Bank*, specifically identifies the interest rates charged by FBD for the FBD-issued loans as the basis for the Complaint's allegations that Defendants violated Pennsylvania's usury laws. (*See* Compl. at ¶ 36, Ex. B.) Therefore, *In re Community Bank* supports the Defendants', not the Commonwealth's, arguments for removal of this case.

Moreover, several courts have found that state law usury claims are preempted by federal law when the loans at issue were made by federal banks or state-chartered and federally insured banks, as they were here. The Eighth Circuit, in *Krispin v. May Dep't Stores Co*., held that where a complaint challenges a bank's interest rate, complete preemption may arise even though the bank itself is not a defendant. 218 F.3d 919, 924 (8th Cir. 2000) (allegations of usury where consumers challenged department store's credit card). The loans were issued by a national bank, thus complete preemption under the NBA was deemed proper by the court despite the fact that there were no claims against a bank. *Id.* Despite the fact that the store purchased the bank's receivables daily, it made "sense to look to the originating entity (the bank), and not the ongoing assignee (the store)" to decide if NBA applied. *Id*; *see also Sawyer v. Bill Me Later, Inc.*, 23 F.Supp.3d 1359 (D. Utah May 23, 2014) (where bank originated loans, state usury claims against non-bank service provider were preempted by federal law even though plaintiff alleged that bank

was not the true lender and program was intentionally structured to evade certain state usury laws); *Hudson v. ACE Express, Inc*., No. 01-1336-C, 2002 WL 1205060, at *4 (S.D. Ind. May 30, 2002) (finding claims preempted by [NBA] despite accepting as true plaintiff's claims that a state-chartered bank played an "insignificant" role in a lending program that a nonbank had "designed for the sole purpose of circumventing Indiana usury law"). Here, similarly as in *Krispin*, FBD originated the loans (which the Commonwealth admits) and charged interest rates as authorized by Delaware law, the state in which it was chartered. Consequently, removal is appropriate based on complete preemption.

Claims against non-bank defendants have been preempted where they challenge a federally permitted power of a bank. *See SPGGC, LLC v. Ayotte*, 488 F.3d 525, 532 (1st Cir. 2007) (holding that NBA preempted state law prohibiting sales of gift cards even where cards were sold through the agent of a national bank); *see also State Farm Bank v. Reardon*, 539 F.3d 336, 349 (6th Cir. 2008). Unlike these cases, the claims against FBD's interest rates under federal law are direct.

While claiming that FBD was only a nominal lender for the loans at issue, the Complaint acknowledges that the Defendants were service providers for the FBD-issued loans. (*See* Compl. at ¶¶ 1-2, 37.) As noted *supra*, Section 27 of DIDA states that a bank that has a state charter and is federally insured may impose finance charges and late fees in accordance with usury laws in the state where the bank is located. *See* 12 U.S.C. § 1831(d). Section 1867(c) applies when a depository institution "causes to be performed for itself, by contract or otherwise, any services authorized under the Act, whether on or off its premises." *Bill Me Later*, 23 F.Supp.3d at 1367; (citing 12 U.S.C. §§ 1861 *et seq*.) As an FDIC-insured, state-chartered bank, FBD was a "depository institution" covered by Section 1867(c). *Id.* (citing 12 U.S.C. §§ 1813(a)(1)-(2);

1813(c)). Thus, when FBD contracted with Defendant service providers, the performance of such services for the loans at issue was "subject to regulation and examination by such agency to the same extent as if such services were being performed by the depository institution itself on its own premises." *Id.* (quoting 12 U.S.C. § 1867(c)(1)). As a result, loans serviced with third-parties such as the Defendants in this case are included within the definition of "any loan" under Section 27 of DIDA "and are therefore expressly preempted by the federal statute." *Id.*

The failure of the Commonwealth to name FBD as a defendant does not resolve the question of complete preemption and removal. "[P]laintiffs may not avoid removal jurisdiction by artfully casting their essentially federal claims as state-law claims." *Mikulski*, 501 F.3d at 560; *see also* 6 *Moore's Federal Practice* ¶ 103.43. The Commonwealth's pleading choice, however, cannot defeat federal jurisdiction over this case. Complete preemption arises here because the Complaint alleges state law claims of unlawful interest on loans made by a state-chartered, federally insured bank.

2. The Commonwealth's Claims Relating to the Tribes Raise Substantial Federal Questions and Removal Is Proper.

A second exception to the well-pleaded complaint rule arises where a "substantial federal question" is necessarily raised in a state court action otherwise arising out of state law. For this exception to apply, a defendant must demonstrate that a federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) resolution in federal court will not disrupt any congressionally approved balance of state and federal judicial responsibilities. *Grable*, 545 U.S. at 314. Whether this exception applies in light of these four factors requires the court to "apply common sense" and consider the factors "in light of the totality of the circumstances." *See Mass. v. Wampanoag Tribe of Gay Head*, 36 F.Supp.3d 229, 233 (D. Mass. 2014) (citing *One & Ken Valley Hous. Grp. v. Maine State Hous. Auth.*, 716 F.3d 218, 224 (1st Cir. 2013)).

First, federal-question jurisdiction turns on the right to relief, not the form of relief. As a result, the Court should not rely exclusively on the dispute as it is framed by the Commonwealth, and should be wary of attempts by any party to convert a claim that is federal in nature to a state cause of action and vice versa. *See Wampanoag Tribe of Gay Head*, 36 F.Supp.3d at 233-34 (explaining that while Commonwealth of Mass. framed issue as breach of contract that did not necessarily raise any question of federal law, the right to relief depended on whether the Commonwealth or the Tribe has jurisdiction over the Settlement Lands at issue which was "clearly a matter of federal law").

Here, Defendants have identified two (2) federal issues that meet the requirements of this test:

> (1) Whether tribal or PA law governs the loan agreements at issue which contain a choice-of-law provision stating that Tribal law applies; and
>
> (2) Whether this is a valid exercise of tribal jurisdiction over non-tribe members, specifically, Pennsylvania consumers entering into the loan agreements at issue here.

(Notice of Removal at ¶¶ 26-32, ECF No. 1.) Resolution of these issues is necessary in order to evaluate the Commonwealth's claims. Similar issues are arising in courts across the country that constitute a frontal attack to tribal sovereignty. *See*, *generally*, Jennifer H. Weddle, NOTHING NEFARIOUS, THE FEDERAL LEGAL AND HISTORICAL PREDICATE FOR TRIBAL SOVEREIGN LENDING, 61 FED. LAW. April 2014 at n.1 ("State and federal suspicion and disapproval of tribal lending has taken many forms in recent years, including investigative efforts by state consumer protection agencies and attorneys general and failed litigation attempts to enforce civil investigative subpoenas, and publicity and letter-writing campaigns aimed to indiscriminately "choke off" all online lenders from banking and payment processing services needed to sustain

their businesses, regardless of the legal predicate for such businesses or their actual lending practices.") Resolution by federal courts will provide greater predictability in similar contexts and consistency in the application of federal and state law where appropriate.

a. Federal Issues are "Necessarily Raised" by Commonwealth's State Court Action.

The determination of whether tribal law and jurisdiction applies to Pennsylvania consumers is a matter of federal law. *See Peabody Coal Co. v. Navajo Nation*, 373 F.3d 945, 950-51 (9th Cir. 2004) (explaining that cases involving contracts between "Native sovereigns" and "non-Natives" raised the federal question of the tribe's authority to apply tribal law to commercial activities of non-Indians). Although tribes generally lack legal authority over persons who are not tribal members, an exception applies here: "A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Montana v. United States*, 450 U.S. 544, 565 (1981). In this case, the Court must evaluate whether this exception applies and allows the Tribes to exercise the regulatory and judicial authority asserted by the loan contract provisions.

The validity of the choice-of-law and jurisdictional provisions in the Tribes' loan agreements – a federal question – is a determination that will govern the entirety of this case as it relates to Think's relationship with the Tribes. The Court cannot reach the asserted state law claims without first determining whether Tribal or state law applies to the loans made to Pennsylvania consumers. If tribal jurisdiction is valid under the loan agreements at issue here, then tribal law applies and the Commonwealth claims will fail. *See*, *e.g.*, *Wampanoag Tribe of Gay Head*, 36 F.Supp.3d at 233-34 (concluding that adjudication of the plaintiff's declaratory

judgment request necessarily requires determination as to whether state or Tribe has jurisdiction over subject lands, which is "*clearly a matter of federal law*.") (emphasis added).

b. Federal Issues are Actually Disputed.[6]

In its Motion to Remand, the Commonwealth acknowledges that federal issues are actually disputed in this matter. (Pl.'s Mem. of Law in Supp. of Motion to Remand, ECF No. 42, at 17 n.9.) Clearly the issue of whether tribal or state law applies is "actually disputed" – the Commonwealth argues that it has jurisdiction over the loans made to Pennsylvania consumers during the alleged "lending scheme," while Defendants rely on the terms of the loan agreements in arguing that Tribal law governs these claims. By challenging the lawfulness of the Tribes' loans in Pennsylvania court as opposed to the Tribal courts, the Commonwealth necessarily disputes the validity of the Tribal loan agreements, including the provisions mandating that the loans are subject to Tribal law and jurisdiction. Whether Tribal law or Pennsylvania law applies is the central point of dispute that governs this action. *See Wampanoag Tribe of Gay Head*, 36 F.Supp.3d at 234 (finding issue of whether state or Tribe has jurisdiction over gaming on lands at issue is central point of dispute) (citing *Gunn v. Minton*, 133 S. Ct. 1059, 1065 (2013)).

c. The Federal Issues are "Substantial."

"The substantiality inquiry under *Grable* looks . . . to the importance of the issue to the federal system as a whole." *Gunn*, 133 S. Ct. at 1066. In addition, courts consider "whether the federal law issue is central to the case in conducting the substantiality analysis." *Gilmore v. Weatherford*, 694 F.3d 1160, 1175 (10th Cir. 2012).

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[6] The Commonwealth "assumes for the purposes of the motion" that the federal issues are "actually disputed." In a corresponding footnote, the Commonwealth argues that regardless, Pennsylvania law governs, citing *Kaneff v. Delaware Title Loans, Inc.*, 587 F.3d 616 (3d Cir. 2009). In *Kaneff*, the plaintiff-consumer brought an action for violation of state usury law where the loan agreement included choice-of-law provisions that Delaware law applied. The Court concluded that Pennsylvania law applied, however, the opinion was specifically limited by the Court to choice-of law provisions in the context of arbitration clauses and moreover, plaintiff sued under Class Action Fairness Act ("CAFA").

The Commonwealth's requested relief in this case seeks to block the Tribes from exercising jurisdiction over, and applying its laws to, its business transactions with Pennsylvania consumers. The ability of the Tribes to exercise jurisdiction and rely upon their own law in the operation of their businesses is a substantial federal issue. *See National Farmers Ins. Companies v. Crow Tribe of Indians*, 471 U.S. 945 (1985) (clearly, the question of whether a tribe can compel a non-Indian to submit to tribal civil-adjudicatory jurisdiction "must be answered by reference to federal law and is a 'federal question' under § 1331").

"The policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history." *Rice v. Olson*, 324 U.S. 786, 789 (1945). "As 'domestic dependent nations,' Indian tribes exercise sovereignty subject to the will of the Federal Government." *Michigan v. Bay Hills Indian Community*, 134 S. Ct. 2024, 2039 (2014); *see also California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987) ("The Court has consistently recognized that Indian tribes retain 'attributes of sovereignty over both their members and their territory', and that 'tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States'") (internal citations omitted).

In the Motion to Remand, the Commonwealth relies on the absence of any alleged wrongdoing by a federal agency, as well as the absence of any federal statute or program underlying the Commonwealth's claims, to negate the federal issues raised by Defendants' Notice of Removal. Moreover, the Commonwealth characterizes the issues as insufficient or not "substantial" enough to warrant removal. According to the Commonwealth, the fact that wrongdoing by a federal agency was a key characteristic of the underlying state-law claims in *Grable* and *Smith v. Kansas City Title & Trust Co.,* 255 U.S. 180 (1921), was critical to the court finding federal jurisdiction. However, the "substantiality" of federal issues is not wholly

dependent on the existence or absence of allegations of wrongdoing by a federal actor. While both *Grable* and *Smith* relied upon allegations relating to the validity of federal agency or actor conduct, they are not dispositive of whether a federal issue is "substantial" enough to warrant federal jurisdiction. In *Wampanoag Tribe of Gay Head*, the district court denied the Commonwealth of Massachusetts' motion to remand to state court, concluding that the issues raised relating to whether the state or tribe had jurisdiction over gaming on the relevant land met all of the requirements of the substantial federal question test, including "substantiality." Notably absent from the Commonwealth's complaint were any allegations of wrongdoing by a federal agency or actor.

The federal question raised in this case that invokes the rights of tribal sovereignty is substantial because preserving tribal sovereignty is a key federal interest. *See Michigan v. Bay Mills Indian Cmty*., 134 S. Ct. 2024, 2043 (2014) (Sotomayor, J., concurring) ("A key goal of the Federal Government is to render Tribes more self-sufficient, and better positioned to fund their own sovereign functions, rather than relying on federal funding."). And while expressly acknowledging that similar suits attacking tribal lending have been filed nationwide (Mem. of Law in Supp. of Motion to Remand, ECF No. 42, at 7 n.4), the Commonwealth requests that this court simply ignore the recognized federal interest in the Tribes' rights to conduct business, become self-sufficient, and have self-determination. *See*, *e.g.*, S. REP. 100-446, 13, 1988 U.S.C.C.A.N. 3071, 3083 ("A tribe's governmental interests include raising revenues to provide governmental services for the benefit of the tribal community and reservation residents, promoting public safety as well as law and order on tribal lands, realizing the objectives of economic self-sufficiency and Indian self-determination, and regulating activities of persons within its jurisdictional borders."); NAT'L GAMBLING IMPACT STUDY COMMISSION REPORT, at 6-

5 (1999) (Report made pursuant to Pub.L. 104-169) ("[T]he protection of tribal members and the promotion of their economic and social well-being *is the responsibility of the federal government*.") (*emphasis added*). Resolution of the issues raised by the Commonwealth in this case will have a direct impact on the Tribes and their ability to make loans from their respective reservations; therefore, federal court is the proper place to determine these issues to protect a key federal interest, preserving tribal sovereignty.

d. Resolution of These Issues in Federal Court will not Disrupt the State-Federal Balance of Judicial Responsibilities.

The final *Grable* requirement requires the Court to consider if exercising federal jurisdiction would "herald a potentially enormous shift of traditionally state cases into federal courts" or "attract a horde of original filings and removal cases raising other state claims with embedded federal issues." *Grable*, 545 U.S. at 318-19. There is no reason to believe (and no credible argument is presented by the Commonwealth) that the Court's exercise of jurisdiction over this matter will result in a flood of new cases reaching the Court. Significant federal issues such as tribal sovereignty weigh in favor of removal to federal court. "The 'congressionally approved balance of federal and state judicial responsibilities' as to Indian tribes is *heavily weighted on the federal side*." *Wampanoag Tribe of Gay Head*, 36 F.Supp.3d at 234-35 (*emphasis added*). "Furthermore, the balance of jurisdiction among the federal government, state governments, and Indian tribes is generally a matter for Congress, not the states." *Id.* at 234 (citing *California v. Cabazon Band of Mission Indians*, 480 U.S. at 214). Accordingly, jurisdiction here is proper.

IV. CONCLUSION

For the reasons stated herein, the Commonwealth's Motion to Remand should be denied. Alternatively, Defendant Kenneth Rees requests that the Court schedule oral argument in the above-captioned matter.

Date: April 6, 2015

Respectfully submitted,

By: s/ Richard L. Scheff

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CERTIFICATE OF SERVICE

I, Richard L. Scheff, hereby certify that on this 6th day of April 2015, I filed electronically a copy of the foregoing *Opposition to Plaintiff's Motion to Remand Case to State Court*. This document is available for viewing and downloading from the ECF system and electronic notification has been sent to all counsel of record.

s/ RL Scheff
Richard L. Scheff