UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

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

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

DEFENDANTS THINK FINANCE, INC., TC LOAN SERVICES, LLC, AND FINANCIAL U, LLC'S OPPOSITION TO PLAINTIFF THE COMMONWEALTH OF PENNSYLVANIA'S MOTION TO REMAND CASE TO STATE COURT

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STATUTES

Defendants Think Finance, Inc. ("Think Finance"), TC Loan Service, LLC ("TC Loan Service"), and Financial U, LLC (collectively, the "Think Finance Defendants") hereby oppose the Attorney General of the Commonwealth of Pennsylvania's Motion to Remand Case to State Court (ECF Nos. 42 (Motion), 42-1 ("Memorandum" or "Mem.")).

INTRODUCTION

This lawsuit is about loans that borrowers made with the First Bank of Delaware ("FBD") and with three Native American tribal lenders. These loans were legal under federal and tribal law, but the Attorney General claims that they violated Pennsylvania usury law. The problem for the Attorney General is that the Pennsylvania law she relies on does not apply to those lenders or to the loans. The solution that the Attorney General has come up with is to sue the lenders' service providers—the Think Finance Defendants. As the Attorney General alleges, the lenders contracted with the Think Finance Defendants to provide the kind of services that all lenders require, such as "technology platform[s]" and "payment processing" "infrastructure." Despite the Attorney General's over-the-top rhetoric, unsupported and false "information and belief" allegations, and overarching attempts to evade the applicable federal and tribal law, the Complaint fails. Most immediately, and of relevance here, her core "usury" claims arise under federal law, and therefore belong in federal court.

The Attorney General's motion for remand should be denied and this case should remain in federal court for two principal reasons. First, the claims regarding FBD's allegedly "usurious" loans give rise to federal jurisdiction because the claims "arise under" the federal cause of action for usury in the Depository Institution Deregulation and Monetary Control Act, 12 U.S.C. § 1831d. Second, the Complaint explicitly challenges the interest rates that the tribal lenders charged. But these lenders' agreements with their customers specifically provide that only tribal law, and not state law, applies. Whether those choice-of-law and forum-selection provisions apply is a matter of federal law that gives rise to federal question jurisdiction under *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308 (2005).

Throughout the remand motion, the Attorney General willfully ignores the federal elements in the Complaint. That the Attorney General claims merely to be attempting to enforce state law, and that she has decided to sue only the service providers and not the lenders, are beside the point. The Complaint raises federal questions in the context of federal banking and tribal law. It is thus removable. The Attorney General's efforts to plead around federal law should be rejected, and her motion to remand should be denied.

FACTUAL BACKGROUND

A. The FBD Partnership

In 2007, TC Loan Service (doing business as ThinkCash) applied for a credit services loan broker license with the Pennsylvania Department of Banking. (Declaration of Kristen M. Hensley in Supp. of Not. of Removal ("Hensley Decl.") Ex. A (Docket No. 1-9).)[1] As part of that application, TC Loan Service provided a thorough description of a new proposed contractual relationship with FBD. (*Id*.) The purpose was to connect consumers to short-term installment loans that could help them build credit "without the alleged more abusive characteristics of payday loans." (*Id*. and at Attachment 2.)

FBD was the lender, and as such would provide underwriting criteria, rollbacks, funding, and payment processing. (*Id*.) It would also set the pricing and terms of the loan. (*Id.*) It did not anticipate charging any origination fee to the consumer. (*Id*.) TC Loan Service would be the "marketer/servicer" for the program, providing consumer marketing, application processing, ongoing customer support, and collections services. (*Id*.) TC Loan Service specifically noted that it had a marketing and servicing agreement with FBD and would receive a one-time fee for

[1] In determining whether a complaint includes any claims that are completely preempted, a "court may 'look beyond the face of the complaint to determine whether a plaintiff has artfully pleaded his suit so as to couch a federal claim in terms of state law.'" *Pryzbowski v. U.S. Healthcare, Inc.*, 245 F.3d 266, 274 (3d Cir. 2001) (quoting *Jass v. Prudential Health Care Plan, Inc.*, 88 F.3d 1482, 1488 (7th Cir. 1996)); *see Pascack Valley Hosp., Inc. v. Local 464A UFCW Welfare Reimbursement Plan*, 388 F.3d 393, 399-402 (3d Cir. 2004) (considering evidence extrinsic to the complaint to determine whether complete preemption applied and created federal jurisdiction); *Palmer v. Kraft Foods Global, Inc.*, No. 13-6260, 2014 U.S. Dist. LEXIS 10700, at *9-15 (E.D. Pa. Jan. 29, 2014) (same).

each new loan made by a customer. (*Id.*) The Department of Banking approved TC Loan Service's application and issued it a license. (Hensley Decl. Ex. B.)

Plaintiff's Complaint references a 2008 FDIC consent order that FBD entered into, implying that the order shows that the FBD/Think Finance relationship was somehow illegal after 2008. (Not. of Removal Ex. A ("Compl.") ¶¶ 37-40. (Docket No. 1-1).) That order has no bearing on this action except to confirm that the FDIC acknowledged that FBD, and not TC Loan Service, was the lender. In summary, the order required FBD to terminate "*certain* third-party lending programs and third-party providers that exhibit the characteristics of a 'Rent-a-BIN' or 'Rent-a-ICA' arrangement." (Compl. Ex. A. at p. 4 ¶ 9 (emphasis added), *id*. at Ex. C to Ex. A ¶¶ 16, 18; *see* Not. of Removal ¶ 19.)[2] According to the FDIC, such programs involve arrangements between banks and third parties related to the rental of a bank's "BIN" or "ICA," which are numbers issued by a card association, such as Visa or MasterCard, to identify the bank for various processes. (*See* Not. of Removal ¶ 19.) The arrangement between FBD and the Think Finance Defendants did not have "Rent-a-BIN" or "Rent-a-ICA" characteristics because it related to FBD's offering of short-term loans, not to any activities related to credit cards. (*Cf.* Compl. ¶¶ 1, 32, 36.) Indeed, the FDIC's order specifically authorized FBD to continue doing business with additional Think Finance-related entities, including the Think entities "Marketing provider Tailwind Marketing, LLC" and "Software provider TC Decision Sciences, LLC." (*Id.* at Ex. C to Ex. A ¶¶ 16, 18.) Eventually, the Think Finance Defendants and the FBD ceased working together.

[2] The Attorney General implies that the FDIC ordered FBD to cease its relationship with TC Loan Service. (Compl. ¶ 39.) That is inaccurate. As discussed above, FBD was only ordered to cease operating "certain" of its third-party relationships, i.e., those related to "Rent-a-BIN" or "Rent-an-ICA" relationships, which includes credit card-related businesses and not the loan business which is the subject of the Attorney General's lawsuit.

B. The Tribal Lender Partnerships

In 2011, the Think Finance Defendants started working with federally recognized Native American tribes, the Chippewa Cree of the Rocky Boy's Indian Reservation, the Otoe-Missouria Tribe of Indians, and the Tunica-Biloxi Tribe of Louisiana. As the Complaint acknowledges, at least one of these tribes was already in the lending business, and simply switched service providers to Think Finance at that time. (Compl. ¶ 52.)

As with their partnership with FBD, the Think Finance Defendants provide services to the tribes, and the tribal lenders make short-term online loans from their reservations. Specifically, the Complaint admits that the tribal lenders are the entities that "accept" and "make" the loans, and thus that borrowers owe the borrowed money to the tribal lenders, and not to Think Finance. (*See* Compl. ¶¶ 48, 77-79.) Think Finance's role, on the other hand, is to provide "services to the three tribal entities," including "infrastructure," a "technology platform," and "payment processing and collection mechanisms." (*Id.* ¶¶ 48, 51.) Think Finance is *not* alleged to itself underwrite, fund, or originate any loans to Pennsylvania borrowers. (*See id.*)

The agreements that borrowers signed with each of the tribes reflect this reality. The loan agreements are subject to tribal law, and tribal law only. Two of the tribes employed loan agreements in which borrowers "consent[ed] to the sole subject matter and personal jurisdiction" of the lending tribe and "further agree[d] that no other state or federal law or regulation" applies to the loan agreement, its enforcement, or its interpretation. (*See id*. ¶¶ 57, 59; *id*. Ex. D (Plain Green Loan Agreement), Ex. E (Great Plains Lending Agreement).) The agreements specifically provide that they are not subject to any state law. (*Id*. Exs. D-E.) The third tribe's agreement contained similar provisions. (*See* Compl. ¶ 67; *id*. Ex. F at XVI. Transfer of Rights; Maintenance of Register ("[T]his agreement shall remain exclusively subject to the laws and courts of the Tribe. As an integral component of accepting this Agreement, you irrevocably consent to the jurisdiction of the Tribal courts for the purposes of this Agreement."), XVIII. Governing Law (stating that the agreement is governed by tribal law, the Indian Commerce

Clause, and other applicable federal law).) Again, the agreement is not subject to the laws of any state. (*Id*.)

C. The Attorney General's Allegations

The Complaint attacks the Think Finance Defendants' provision of services to FBD and the three Native American tribes who offered online loans. It alleges that the Think Defendants associated with the bank and the three tribes in order "[t]o evade licensure, *usury* and consumer protection laws" regulating payday loans offered to Pennsylvania consumers. (Compl. ¶ 2 (emphasis added).)

The Complaint asserts a two-part "scheme." Under the "first phase," the FBD relationship is cast as a so-called "rent-a-bank" model. (*Id*. ¶ 32.) The Complaint further acknowledges that under the partnership, Think Finance[3] served "as the supposed servicing agent of the bank," implicitly conceding that FBD actually made the loans. (*Id*. ¶ 36.) The Attorney General does not allege that the Think Finance Defendants determined the interest rate or controlled the terms and conditions of the loans issued by FBD. According to the Complaint, the "rent-a-bank scheme" continued in spite of a Federal Deposit Insurance Corporation ("FDIC") cease and desist order until 2011. (*Id*. ¶¶ 37-40.)

The Attorney General alleges that under the "second phase" of the "scheme," the Think Finance Defendants adopted a so-called "rent-a-tribe" model, in which three Native American tribes were "nominal lender[s]." (*Id*. ¶ 45.) According to her, the tribes offered "usurious loan products." (*Id*. ¶ 44.) In exchange, the Think Finance Defendants allegedly provided servicing support, such as a technology platform, connection with investors who fund loans, and payment-processing and collection mechanisms. (*Id*. ¶ 48.) As discussed above, the Attorney General does not allege that the Think Finance Defendants originated the loans, determined the interest rate, or controlled the terms and conditions of the loans issued by the tribes.

[3] Prior to 2010, Think Finance was known as ThinkCash, Inc. (Compl. ¶ 30.)

Under either phase of the alleged "scheme," the core of the Attorney General's allegations is that the interest that FBD and the tribes charged on their loans to Pennsylvania consumers was usurious and in violation of section 201 of Pennsylvania's Loan Interest and Protection Law, 41 P.S. § 201. (*See, e.g.*, Compl. ¶¶ 1, 31-32, 44, 48.) The Attorney General variously describes the loans as "illegal" and "usurious." (*See id*. ¶ 2 ("illegal loans that flout Pennsylvania law"), ¶ 3 ("illegal loans made through this scheme to Pennsylvania residents"), ¶ 18 ("illegal usurious loans"), ¶ 19 (same), ¶ 39 ("illegal loans"), ¶ 42 ("illegal, usurious loans"), ¶ 44 (describing Tribal loans as "usurious loan products").) Each of the Attorney General's five claims turn, at least in part, on this alleged charging of illegal interest. The Attorney General's first three claims for violations of Pennsylvania's Corrupt Organizations Act ("PA COA"), 18 Pa. C.S.A. § 911, are premised on the underlying "racketeering activity" of collecting interest at a rate that exceeds 25% per year where not allowed by law. (Compl. ¶¶ 93, 97, 106, 113.) The Attorney General's fourth claim, for violation of the Fair Credit Extension Uniformity Act ("FCEUA"), 73 P.S. § 2270.1 *et seq*., is predicated upon Defendants' collection of interest in excess of the limits created by Pennsylvania's usury law, whether as debt collectors or creditors. (Compl. ¶¶ 122-124.) Finally, under the Attorney General's fifth claim, Defendants are alleged to have violated the Consumer Protection Law, 73 P.S. § 201-1 *et seq*., "because the credit offered is unlawful in Pennsylvania." (Compl. ¶ 132.)

D. Procedural History

On December 1, 2014, the Think Finance Defendants removed the Complaint from the Philadelphia County Court of Common Pleas. The Notice of Removal is based on federal question jurisdiction under 28 U.S.C. § 1331. (*See* Not. of Removal.) All remaining Defendants consented to the removal. (*Id*. ¶ 34.)

After removal, the Attorney General dismissed four defendants by stipulation. (Docket Nos. 35, 43.) The Attorney General filed her motion to remand on March 11, 2015. (Docket No. 42.)

ARGUMENT

A defendant may remove from state court any civil action over which a federal district court has original jurisdiction. 28 U.S.C. § 1441(a). District courts have jurisdiction over civil cases arising under the Constitution, laws, and treatises of the United States. 28 U.S.C. § 1331. "If the requirements of the removal statute are met, the right to remove is absolute." *Regis Assocs. v. Rank Hotels (Mgmt.), Ltd*., 894 F.2d 193, 195 (6th Cir. 1990); *see also Breuer v. Jim's Concrete of Brevard, Inc.*, 538 U.S. 691, 698 (2003) (There is "no question that whenever the subject matter of an action qualifies for removal [e.g., in a federal question case], the burden is on plaintiff to find an express exception."). Accordingly, a federal court should "be cautious about remand, lest it erroneously deprive a defendant of the right to a federal forum." *Hunter v. Greenwood Trust Co.*, 856 F. Supp. 207, 211 (D.N.J. 1992) (internal quotation marks and citation omitted).

Federal question jurisdiction exists when an action presents a claim "arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. Under the well-pleaded complaint rule, a claim ordinarily arises under federal law only when a federal question is presented on the face of the complaint. *See Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987). Courts, however, are "required to look beyond the plaintiffs' artful attempts to characterize their claims to avoid federal jurisdiction." *Phipps v. FDIC*, 417 F.3d 1006, 1011 (8th Cir. 2005). This is to determine whether any exception to the well-pleaded complaint rule applies, including complete preemption and federal question jurisdiction. Complete preemption supports federal jurisdiction when a federal statute completely displaces a state-law cause of action. *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 8 (2003). Federal question jurisdiction arises where a state-law claim requires resolution of a substantial and disputed issue of federal law that is appropriately decided in a federal forum. *Gunn v. Minton*, 133 S. Ct. 1059, 1065 (2013).

The Complaint here falls within the two exceptions to the well-pleaded complaint rule: the complete preemption doctrine and the substantial federal question doctrine.

I. THE COMPLAINT ARISES UNDER FEDERAL LAW BECAUSE SECTION 521 COMPLETELY PREEMPTS THE ATTORNEY GENERAL'S CLAIMS.

The Think Finance Defendants properly removed the Complaint because the "complete preemption" exception to the well-pleaded complaint rule applies. The complete preemption doctrine permits the removal of actions 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*, 482 U.S. at 393 (citation omitted). Once an area of state law has been completely preempted, any claim purportedly based on that preempted state law is considered a federal claim arising under federal law. *Id*. (analyzing *Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 24 (1983), *superseded by statute on other grounds*, 28 U.S.C. § 1441(e)).

In particular, it is well established that federal law completely preempts state-law challenges to the amount of interest that state-chartered, federally insured banks charge customers. Just like such claims against national banks, such claims against state-chartered, federally insured banks arise *only* under federal law. In *Beneficial*, the Supreme Court held that sections 85 and 86 of the National Bank Act ("NBA") completely preempt state-law usury claims against national banks. 539 U.S. at 11. The court explained that "because §§ 85 and 86 provide the exclusive cause of action for [usury] . . . claims, there is, in short, no such thing as a state-law claim of usury against a national bank. . . . This cause of action against national banks only arises under federal law . . . ." *Id*. Thus, even though the complaint pleaded only state-law claims alleging the charge of excessive interest, it nonetheless was properly removed. *Id*.

Courts universally extend the complete preemption holding of *Beneficial* to state-chartered, federally insured banks. The Depository Institution Deregulation and Monetary Control Act ("DIDA"), 12 U.S.C. § 1831d, regulates such banks. Like the NBA, "DIDA creates a federal remedy in favor of borrowers who are charged rates in excess of the limit established in § 521(a)." *Hill v. Chem. Bank*, 799 F. Supp. 948, 951 (D. Minn. 1992). In *In re Community Bank of Northern Virginia*, 418 F.3d 277 (3d Cir. 2005) ("*In re Community Bank*"), the Third Circuit extended *Beneficial* to state-chartered banks, reasoning that because § 521 of DIDA

contains an express preemption clause and "incorporates verbatim the language of § 85 of the NBA," it "completely preempts any state law attempting to limit the amount of interest and fees a federally insured-state chartered bank can charge." *Id*. at 295; *cf*. *Greenwood Trust Co. v. Massachusetts*, 971 F.2d 818, 824, 827 (1st Cir. 1992) (noting that parallel provisions of DIDA and the NBA should be read in *pari materia* and holding that § 521 expressly preempts state laws regulating interest).

Here, FBD was a federally insured, state-chartered bank existing under the laws of Delaware. (*See* Compl. ¶ 35; *id*. Ex. A at p. 1, p. 2 ¶ 4; Declaration of Ira N. Richards in Supp. of Not. of Removal ("Richards Decl.") Ex. A (FDIC, Demographic Information, First Bank of Delaware) (Docket No. 1-8).) As such, section 521 of DIDA clearly applied to FBD.

Here, the Complaint was properly removed under *Beneficial* and *In re Community Bank* for the simple reason that the Complaint explicitly challenges the amount of the interest charged on loans that FBD made. DIDA section 521 completely preempts the Attorney General's claims, and federal jurisdiction therefore arises. The Attorney General resists this conclusion on the grounds that (1) she has not sued FBD and (2) Defendants did not identify a federal cause of action that replaces her state causes of action. Both of these arguments lack merit.

A. Whether the Attorney General Sued a Bank Is Irrelevant—DIDA Completely Preempts Her State-Law Claims of Usurious Interest by a Bank.

The Attorney General argues that none of her claims are completely preempted under *In re Community Bank* because she did not sue any bank. (Mem. at 26-27.) The Attorney General misconstrues *In re Community Bank*. Complete preemption arises here because the Complaint asserts state-law claims of unlawful interest on loans that FBD made.

To analyze whether complete preemption arose, the Court of Appeals in *In re Community Bank* focused on whether the complaint "alleged state law claims of unlawful interest by a nationally or state chartered bank." 418 F.3d at 296. The court declined to find such claims in the complaint before it because (1) the complaint challenged interest rates on loans made by a non-depository institution, not a national or state-chartered federally insured bank, and (2) the

complaint did not assert any usury claims against any party under state law. *Id*. Consideration of these factors in this case shows that complete preemption is proper.

1. The Complaint Challenges Loans That FBD Made.

As in *In re Community Bank*, the Complaint does not directly assert claims against a bank, but nonetheless alleges state-law claims of unlawful interest by FBD. *See id*. The Third Circuit explained that the complaint before it asserted no claims that challenged a bank's interest rate because the loans at issue were made by a non-depository institution, and then bought by another non-bank in the secondary market. *Id*. at 296-97. In contrast, here, the Complaint attacks the interest rate charged on loans *made by* FBD.

a. FBD Was the Lender.

As a threshold matter, the Complaint concedes that under the first phase of the Think Finance Defendants' alleged "scheme," FBD made the loans issued to Pennsylvania consumers, while TC Loan Service served as the servicing agent. (*See* Compl. ¶ 36; *see also* ¶ 37 (claiming that the FDIC ordered FBD to cease its "lending program" with the Think Finance Defendants).) Moreover, the Pennsylvania Department of Banking explicitly approved of the Think Finance Defendants' relationship with FBD, in which FBD was the acknowledged lender.

The Attorney General nonetheless makes the vague and conclusory allegation that the Think Finance Defendants used FBD as a "nominal" lender to evade state usury laws. (*Id*. ¶ 32.) In fact, the Attorney General's only allegation in support of this this claim actually undermines it. The Attorney General alleges that in 2008, the FDIC ordered FBD to cease its "'lending programs offered, marketed, administered, processed and/or serviced by third-parties,' specifically the bank's agreement with 'TC Loan Service, LLC d/b/a ThinkCash.'" (*Id*. ¶ 37 (internal citation omitted).) This allegation on its face concedes that FBD was, in fact, serving as the lender in the programs it had in place with various third parties.

Moreover, as discussed above, the FDIC order *expressly authorized* FBD to continue to do business with the Think-related entities "Marketing provider Tailwind Marketing, LLC" and "Software provider TC Decision Sciences, LLC." (*Id*. at Ex. C to Ex. A ¶¶ 16, 18.) The

Attorney General's allegations that the FDIC ordered FBD and the Think Finance Defendants to terminate their arrangement, and that FBD and Think continued to operate illegally after 2008, is, therefore, flat wrong. Accordingly, there are no viable allegations in the Complaint to even suggest that FBD served as anything other than the lender in a legitimate lending program, for which the Think Finance Defendants provided ancillary services. Thus, unlike in *In re Community Bank*, the Attorney General's claims directly challenge the interest rate of bank-made loans.

b. The Department of Banking Specifically Approved FBD and TC Loan Service's Relationship.

The Pennsylvania Department of Banking itself also approved the very relationship between FBD and the Think Finance Defendants the Attorney General now attacks. The Attorney General suggests that the relationship was not legitimate, based, again, on her conclusory allegations that the Think Finance Defendants "marketed, funded, and collected the loan and performed other lender functions." (Compl. ¶ 32.) Defendants, however, explained these alleged activities to the Department of Banking in detail, and the Department of Banking expressly approved them.

As explained above, TC Loan Service (doing business as ThinkCash) applied for a credit services loan broker license with the Pennsylvania Department of Banking. (Hensley Decl. Ex. A.) As part of that application, TC Loan Service provided a fulsome description of its proposed partnership with FBD. (*Id*.) The application stated that TC Loan Service would be the "marketer/servicer" for the program, providing consumer marketing, application processing, ongoing customer support, and collections services. (*Id*. at Attachment 2.) FBD would serve as lender and provide underwriting criteria, rollbacks, funding, and payment processing. (*Id*.) TC Loan Service specifically noted that it had a marketing and servicing agreement with FBD and would receive a one-time fee for each new loan made by a customer. (*Id*.) Ultimately, the Department of Banking approved TC Loan Service's application and issued it a license.

(Hensley Decl. Ex. B) As the department had earlier approved of the Think Finance Defendants' role in their relationship with the lender FBD, the Attorney General's attempt to now cast that same role as illegitimate or illegal fails. The relationship at issue in the Complaint was disclosed, reviewed, and found by the Department of Banking to be *legitimate*. The Attorney General's allegations to the contrary are simply implausible.

All this was included in the Think Finance Defendants' Notice of Removal. (*See* Not. of Removal ¶¶ 19-22.) The Attorney General, however, fails to refute any of the facts. As to the FDIC action, the Attorney General's only response is that she "stands by [her] summary of the FDIC action against the bank" and that the allegations regarding the action were only included for background. (Mem. at 5 n.3.) Those factual allegations, however, provided the only support for the Attorney General's claim that FBD was only a "nominal" lender. (Compl. ¶ 32.) As to the broker license, the Attorney General says only that the Department of Banking did not approve the lending program because TC Loan Service did not receive a license to fund and collect loans. (Mem. at 5 n.3.) Defendants do not disagree about the license received. Moreover, TC Loan Service did not need to apply for a Consumer Discount Company License, as the Attorney General suggests, because TC Loan Service was not making the loans. FBD was. Defendants' point is that the parameters of the relationship now challenged were fully disclosed to and approved by the Department of Banking when it granted the license that would allow TC Loan Service to have the role the application described.

2. The Claims Challenging FBD's Interest Rates Are Completely Preempted.

While the absence of a bank defendant in *In re Community Bank* signaled that the claims were not directed at a bank's exercise of its federally granted powers, no such inference exists here. First, FBD's absence here does not diminish the fact that the Attorney General's Complaint, unlike the complaint in *In re Community Bank*, challenges the interest FBD charged on loans it originated. (*See* Hensley Decl. Ex. A at Attachment 2 ("Although ThinkCash is the marketer/servicer for the program, the bank is the lender.").) The Eighth Circuit has confirmed

that where a complaint challenges a bank's interest rate, complete preemption may arise even though the bank itself is not a defendant. *See Krispin v. May Dep't Stores Co.*, 218 F.3d 919, 924 (8th Cir. 2000). In *Krispin*, holders of a department store's credit card brought a case alleging violation of Missouri's usury laws. The court concluded that removal based upon complete preemption under the NBA was proper because even though there were no claims against a national or state-chartered bank, a national bank had issued the loans. *Id*. It explained that although 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), in determining whether the NBA applies." *Id*. Second, it is questionable whether FBD *could* be added as a defendant—it "is no longer in business." (Compl. ¶ 43; Mem. at 28 (noting that Complaint could not seek relief against FBD because it no longer exists).)

The Attorney General's only response to *Krispin* is to state that the Third Circuit distinguished the case in *In re Community Bank*. (Mem. at 27.) But the Third Circuit's distinction supports the Think Finance Defendants' argument here, not the Attorney General's. Here, unlike in *In re Community Bank*, there is complete preemption because the Attorney General alleges that loans made by a federally insured, state-chartered bank were usurious. The Third Circuit explained that complete preemption arose in *Krispin* because a national bank issued the loans in dispute. 418 F.3d at 296-97. Complete preemption could not likewise arise on the facts before the Third Circuit because the loans at issue were actually made by a non-bank defendant. *Id*. Indeed, later cases have confirmed that where there is no bank defendant, the key inquiry remains whether, nonetheless, "the claims were actually directed against a federally or state-chartered bank." *West Virginia v. CashCall, Inc.*, 605 F. Supp. 2d 781, 783, 785 (S.D.W. Va. 2009) (emphasis added). In those cases, the courts declined to find that the plaintiff's claims were directed at banks because there were plausible allegations that the non-bank defendant was the true lender or that the relationship between the bank and the defendant was illegitimate or

"sham."[4] *See id*. at 782, 785 (alleging that relationship between the defendant and bank was a "sham," as well as facts supporting the fraudulent nature of the relationship); *Flowers v. EZPawn Okla., Inc.*, 307 F. Supp. 2d 1191, 1196, 1205 (N.D. Okla. 2004) (alleging that defendants had "sham" relationship with bank and that even though loan funds purportedly were drawn from bank, defendants exerted "ownership and control" over them, "accept[ed] the ultimate credit risk," and "[were] in fact the primary lender, creditor and collector"); *Ace Cash Express*, 188 F. Supp. 2d at 1284 (plaintiff alleged that non-bank defendant was acting as "unlicensed supervised" lender).

In contrast, for all her rhetoric, the Attorney General here failed to provide anything more than a conclusory allegation, based on flimsy "information and belief" pleading, that FBD was the "nominal" lender. (*See supra* at 9-10); *see Sawyer v. Bill Me Later, Inc.*, 23 F. Supp. 3d 1359, 1363 n.2 (D. Utah 2014) ("the court looks to the substance of the facts alleged and not the rhetoric in which such facts are couched or the conclusory allegations pled"). All of the actual facts alleged point to the opposite conclusion. (*See id.*) Moreover, there are no allegations in the Complaint that the Think Finance Defendants controlled, determined the interest rate of, or otherwise set the terms and conditions of the loans FBD issued. *Cf. CashCall*, 605 F. Supp. at 787 (noting that *Krispin* is distinguishable because there the bank controlled the allegedly usurious charges).

As in *Krispin*, courts have likewise held in the general preemption context that claims against non-bank defendants may be preempted where such claims interfere with the exercise of a bank's authorized powers. As one court succinctly stated, "the question here is not *whom* the [state] statute regulates, but rather, against *what activity* it regulates." *SPGGC, LLC v. Ayotte*, 488 F.3d 525, 532 (1st Cir. 2007) (citing *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1 (2007))

[4] Additionally, two of the cases distinguished *Krispin* on the ground that the bank in that case was a wholly owned subsidiary of the defendant. *See CashCall*, 605 F. Supp. at 787; *Colorado ex rel. Salazar v. Ace Cash Express, Inc.*, 188 F. Supp. 2d 1282, 1284-85 (D. Colo. 2002). This appears to be a distinction that makes no difference. Nothing in the *Krispin* court's reasoning turned on that fact.

(holding that state-law claims against mall defendant that acted as agent for national bank's gift card program were preempted by the NBA because the state law indirectly prohibited the bank from exercising an allowed activity by prohibiting the mall from doing it); *see also State Farm Bank v. Reardon*, 539 F.3d 336, 349 (6th Cir. 2008) (claims based on state statute that regulated independent agents of bank against such agents were preempted under the Home Owners' Loan Act because they had the effect of impinging on bank's exercise of federally granted powers); *Sawyer*, 23 F. Supp. 3d at 1363-64, 1367-68 (where bank originated loans, state usury claims against non-bank service provider were preempted by DIDA even though plaintiff alleged that bank was not the true lender and program was intentionally structured to evade certain state usury laws).

Here, the challenge to FBD's banking power is direct, as the Attorney General predicates each of her claims on violations of state laws that limit interest rates, in contradiction to FBD's power to set interest rates under federal law. (*See* Compl. ¶ 39 (alleging that FBD acted in "willful and deliberate disregard" of federal regulatory authority).) Under the analysis required by the Third Circuit, complete preemption thus arises here because the Complaint "allege[s] state law claims of unlawful interest by a nationally or state chartered bank." *In re Cmty. Bank*, 418 F.3d at 296.

The Attorney General's last effort to avoid federal jurisdiction as to her claims regarding FBD is to ask the Court to set aside the above analysis—which compels federal jurisdiction—because the "only proper focus under the well-pleaded complaint rule" is "to focus on the parties actually named in th[e] lawsuit, the claims actually raised, and the relief actually sought . . . ." (Mem. at 27.) The Attorney General, however, cites no authority for this proposition. Nor could she.

First, as explained above, the absence of a bank defendant is not dispositive of whether complete preemption applies.

Second, the proposition conflicts with the Supreme Court's teaching that federal-question jurisdiction turns on the right to relief, not the form of the relief. *See Franchise Tax Bd. of State*

of Cal., 463 U.S. at 13. The Attorney General argues even if "Defendants' bank preemption *defense* were meritorious . . . that would only limit the magnitude of the disgorgement and restitution relief [the Commonwealth] could obtain as part of the equitable relief it obtains, not its right to enjoin the scheme as it is presently structured." (Mem. at 28.) The Attorney General's contention relates to the effect Defendants' successful assertion of a preemption defense would have on her requested relief. The case is not yet at the stage where Defendants have asserted any defenses, and as the Attorney General emphasizes, removal cannot be based upon potential defenses. The Attorney General's right to her requested remedy at *this* stage turns, at least in part, on her allegations of usurious interest on loans originated by FBD. The claims encompassing those allegations are completely preempted and render federal jurisdiction over this action appropriate.

Third, the "claims actually asserted" in fact give rise to federal jurisdiction. The Attorney General contends that although she seeks one injunction, Defendants have "artificial[ly] deconstruct[ed]" the Complaint into "two different actions," one in the past involving FBD and one involving the current tribal period. (Mem. at 28.) She argues further that any federal question regarding the magnitude of Defendants' potential disgorgement obligations "is simply not sufficient to establish jurisdiction." (*Id.*) Although only part of the time period covered by the Complaint involves FBD, this does not diminish the fact that the Attorney General's state-law claims seek to hold Defendants liable based on the interest rates charged by FBD during that time. There is no "sufficiency" requirement for complete preemption to apply. Instead, these claims give rise to federal jurisdiction simply because they are displaced by an exclusive federal cause of action. *See Guckin v. Nagle*, 259 F. Supp. 2d 406, 410 (E.D. Pa. 2003) (noting that removal is permitted under the artful pleading doctrine where there is complete preemption or a federal question, not pleaded, but *integral* to the complaint).

B. Section 521 of DIDA Completely Preempts the Complaint.

In their Notice of Removal, the Think Finance Defendants stated that § 521 of DIDA completely preempts all of the Attorney General's causes of action. (*See* Not. of Removal ¶¶ 15-

25.) The Attorney General nonetheless argues that complete preemption under *Beneficial* and *In re Community Bank* does not apply here because Defendants did not cite a federal statute that Congress intended to replace each of the causes of action in the Complaint. (Mem. at 29.) In the Attorney General's view, complete preemption only arose in *Beneficial* because the NBA replaced the "parallel" state usury claim asserted by the plaintiffs. (*Id*.) The Attorney General misunderstands complete preemption.

First, DIDA provides a federal cause of action to replace the Attorney General's alleged state-law causes of action. DIDA permits federally insured, state-chartered banks to "export" to their customers on a national basis the "interest" rate permitted by their home state. Section 521(b) of the statute creates an express federal cause of action in the event a state-chartered bank charges interest at a rate that exceeds the amount permitted by its home state. 12 U.S.C. § 1831d(b); *see Hill*, 799 F. Supp. at 951 (explaining that DIDA contains "a federal remedy in favor of borrowers who are charged rates in excess of the limit established in § 521(a)"). Section 521(b) therefore replaces the Attorney General's state-law claims.

Second, as the Ninth Circuit recently explained, "[t]hat the plaintiffs in *Beneficial National* happened to invoke 'expressly' Alabama's usury statute does not mean that the National Bank Act only preempts complaints that cite a state usury law." *Hawaii ex rel. Louie v. HSBC Bank Nev., N.A.*, 761 F.3d 1027, 1036 (9th Cir. 2014). In other words, it is not the label of the state-law claim that is determinative of complete preemption, but whether there is a federal law that provides the exclusive cause of action for the underlying conduct challenged by the plaintiff's state-law claims. *See id*. ("Federal courts are not bound by the labels that litigants attach to completely preempted claims."); *see also Caterpillar*, 482 U.S. at 393 ("Once 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."). Courts routinely find, therefore, that all of a plaintiff's state law causes of action are completely preempted where they are predicated on a claim of usurious interest, even though a state usury claim is not explicitly alleged. *See, e.g.*, *Phipps*, 417 F.3d at 1013 (although plaintiff

brought claims under Missouri's Second Mortgage Loan Act, they were completely preempted under the NBA because at least some of the claims were based on usurious interest); *Forness v. Cross Country Bank, Inc.*, No. 05-CV-417-DRH, 2006 WL 240535, at *1, *3-4 (S.D. Ill. Jan. 13, 2006) (finding federal jurisdiction to be proper where each of the plaintiffs' causes of action—for violation of the Illinois Fraud and Deceptive Practices Act, unjust enrichment and restitution, and breach of the covenant of good faith and fair dealing—was completely preempted under § 521 of DIDA because each of the counts focused, to some extent, on whether the defendant's fees were usurious); *Taylor v. Wells Fargo Home Mortg., Inc*., No. CIV.A. 04-0841, 2004 WL 856673, at *3 (E.D. La. Apr. 20, 2004) (state contract and tort claims completely preempted by the NBA's cause of action for usury where plaintiffs asserted that they were charged excessive fees and charges); *Budnik v. Bank of Am. Mortg.*, No. 03 C 6116, 2003 WL 22964372, at *1, *3 (N.D. Ill. Dec. 16, 2003) (although the plaintiffs expressly disclaimed any usury claims, court denied motion to remand, concluding that claims were completely preempted under the NBA because they were "in fact attacking the overall amount of interest charged by" the bank).

Here, despite their labels, each of the Attorney General's causes of action "are in fact usury claims, that is claims challenging the 'rate of interest' charged by an FDIC-insured state bank within the meaning of § 521." *Hill*, 799 F. Supp. at 951; *see Dishman v. UNUM Life Ins. Co. of Am.*, 269 F.3d 974, 983 (9th Cir. 2001) (Plaintiff cannot escape complete preemption by "dressing up [a DIDA usury] claim in the garb of . . . state law [causes of action]."). These causes of action were replaced by § 521(b) of DIDA and are, therefore, completely preempted. *Hill*, 799 F. Supp. at 952.

II. REMOVAL JURISDICTION EXISTS BECAUSE THE COMPLAINT RAISES SUBSTANTIAL FEDERAL QUESTIONS.

This action is also removable under the substantial federal question doctrine. *Franchise Tax Bd. for State of Cal.*, 463 U.S. at 9; *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180, 201-02 (1921). Under the second exception to the well-pleaded complaint rule, a state-law claim gives rise to federal question jurisdiction if the claim presents an issue of federal law that 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."[5] *Gunn v. Minton*, 133 S. Ct. 1059, 1065 (2013); *see Grable*, 545 U.S. at 314. Here, the Complaint was properly removed under *Grable* because the Complaint raises two substantial, dispositive issues of federal law.

The Attorney General objects that the federal issues identified by the Think Finance Defendants fail to meet the *Grable* requirements because: (1) no federal question is necessarily raised; (2) any federal question is not substantial; and (3) removal would disrupt the proper state-federal balance approved by Congress. The Attorney General is incorrect.

A. The Complaint Necessarily Raises and Disputes at Least Two Federal Questions.

This Court has federal question jurisdiction over the Attorney General's Complaint because it necessarily raises and actually disputes at least two substantial federal issues. The alleged misconduct underlying the Attorney General's claims is that the Think Finance Defendants worked with three Indian tribes who made loans and cash advances for which they charged interest in excess of the limits set by Pennsylvania usury law. (Compl. ¶¶ 45, 47-48.) She also alleges that the loans offered by the tribes during the "second phase" were falsely represented as "being purely the product of the lawful exercise of tribal sovereignty, and not subject to any state law. (*Id.* ¶ 129.) As with FBD, the Attorney General concedes that the tribes were the lenders in the lending program at issue. (*Id.* ¶ 48.) The Attorney General also alleges, and exhibits attached to the Complaint show, that the tribes asserted that tribal law governs the loans. (*Id.* ¶¶ 57, 59, 67; *id.* Exs. D, E, F.) To resolve the Attorney General's claims, each of which is premised on a violation of state law, the Court must decide first, whether state law governs the loans and second, whether the tribes' assertion of sovereign jurisdiction is valid.

[5] The Attorney General's assertion that Defendants "fail[ed] to ground their analysis in the four-part test governing" federal question jurisdiction is misguided. (Mem. at 2.) The Think Finance Defendants discussed all four factors in their notice of removal. (*See* Not. of Removal ¶¶ 26-32.)

Whether the loans that the tribes originated are subject to Pennsylvania law raises a substantial and disputed federal issue. "Indian tribes are 'domestic dependent nations' that exercise inherent sovereign authority over their members and territories." *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 509 (1991) (citation omitted). They retain the right to "make their own laws and be ruled by them." *Williams v. Lee*, 358 U.S. 217, 220 (1959). Nonetheless, "Congress has broad power to regulate tribal affairs under the Indian Commerce Clause, Art. 1, § 8, cl. 3." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980). In light of these two principles, the Supreme Court has held that states may regulate tribal activities, but only in a limited manner that considers the tribe's right to self-government and Congress's power to manage tribal affairs. *Id*. at 142-43. Thus, even though the Attorney General's Complaint is premised on violations of Pennsylvania law, the Court must first resort to this federal law to determine whether such laws have any force as to the loans made by the tribes, or whether the loans remain subject to tribal law alone.

The Attorney General's claims will remain unresolved, however, without the Court's decision on a second federal issue. As set forth above, the loan agreements entered into between the tribes and borrowers contain choice-of-law and forum selection provisions that assume the tribes' legal authority over the borrowers. Before the Attorney General's claims—all of which, again, assume that Pennsylvania law applies— may proceed, the Court must also determine whether these provisions are valid. If they are, the Attorney General's claims fail because Pennsylvania law will be inapplicable. *See Andrichyn v. TD Bank*, No. 14-CV-03863, 2015 WL 1279492, at *4 (E.D. Penn. Mar. 20, 2015) (Joyner, J.) (noting that Pennsylvania law will generally honor parties' contracted for choice of law). Moreover, the Attorney General cannot prove her claim that the tribal loans were falsely represented as being subject only to tribal law, (*see* Compl. ¶ 129), without showing that this assertion is wrong.

Whether the provisions are valid requires determining whether they reflect a valid exercise of the tribes' civil jurisdiction over nonmembers, which 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); *United States ex rel. Morongo Band of Mission Indians v. Rose*, 34 F.3d 901, 905 (9th Cir. 1994) ("Tribal jurisdiction over non-Indians is a question of federal law . . . ."); *Chilkat Indian Vill. v. Johnson*, 870 F.2d 1469, 1474-75 (9th Cir. 1989) (concluding that claims for enforcement of the tribe's ordinance arose under federal law because the tribe would necessarily have to prove its disputed federal power to enact and apply the ordinance to non-Indians). The assertion that the loans at issue are only subject to tribal law requires the same determination. As the Supreme Court has explained, although Indian tribes generally lack legal authority over persons who are not tribe members, there are two exceptions to that general rule. *Montana v. United States*, 450 U.S. 544, 565 (1981). The first exception is relevant 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." *Id*. 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 and in the advertising of the loans.

Relying on *Oklahoma Tax Commission v. Graham*, 489 U.S. 838 (1989), and *New York v. Shinnecock Indian Nation*, 686 F.3d 133, 137 (2d Cir. 2012), the Attorney General asserts that these issues are not necessarily raised by the Complaint, but instead are mere defensive assertions of sovereign immunity by Defendants. (Mem. at 15-16, 19-20.) In *Graham*, the Supreme Court explained that state-law claims do not arise under federal law merely because tribal immunity may provide a defense to those claims. In *Shinnecock*, the Second Circuit held that New York's suit against the Shinnecock Indian Nation did "not 'necessarily raise a . . . federal issue'" because the question of whether the Shinnecock's construction of a casino would violate state and local law was separate from whether federal law barred the action or precluded the state from regulating the tribe's activities. *Shinnecock Indian*

Nation, 686 F.3d at 140 (quoting *Grable*, 545 U.S. at 314). The Attorney General is incorrect that these cases preclude federal question jurisdiction here.

Unlike in *Graham* and *Shinnecock*—and contrary to the Attorney General's repeated assertions—the Think Finance Defendants are not Native Americans averring that they cannot be sued by the Attorney General because of sovereign immunity. Instead, here, the Attorney General does not dispute that the challenged loans were made by tribes. Nor does the Attorney General dispute that as a condition of extending those loans, the tribes asserted, as an expression of their sovereignty, that the loans be governed by tribal law. This fact necessarily requires resolving the question—absent from both *Graham* and *Shinnecock*—of whether that assertion of jurisdiction is valid, thereby precluding the Attorney General's requested relief.[6]

Indeed, in *Massachusetts v. Wampanoag Tribe of Gay Head*, 36 F. Supp. 3d 229 (D. Mass. 2014), the court rejected the exact argument the Attorney General raises here—that the federal issues in that case were not necessarily raised because they could remain unresolved by the court's conclusion that the defendant complied with the laws alleged to have been violated. (*See* Mem. at 20 & n.12.) Massachusetts sued the Aquinnah Wampanoag Tribe for failure to obtain a license before commencing commercial gaming operations on tribal land. *Wampanoag Tribe*, 36 F. Supp. 3d at 231. Massachusetts asserted only state-law causes of action, but the court nonetheless concluded that the complaint raised a federal question because the state's "right to relief depends on whether it or the Tribe has jurisdiction over gaming on the [tribal l]ands." *Id*. at 233. Resolution of this issue was "unquestionably 'necessary' to [Massachusetts'] case" because the state "would not be responsible for the enforcement of

[6] Although the Attorney General assumes for purposes of her motion that the federal issues are actually disputed, she incorrectly suggests that this question has already been resolved, citing *Kaneff v. Delaware Title Loans, Inc.*, 587 F.3d 616 (3d Cir. 2009). (Mem. at 17 n.9.) The *Kaneff* court applied Pennsylvania law to a loan contract with a Delaware choice-of-law provision. Importantly, the court concluded that its decision about which law controlled applied *only* to the contract's *arbitration clause*. 587 F.3d at 624. Moreover, the case did not address the federal question antecedent to whether the choice-of-law and jurisdiction provisions stick, and that is whether the tribes can assert jurisdiction over loans by made non-members.

gaming laws—and the Tribe would not violate Massachusetts law—if the Tribe, rather than the Massachusetts, had jurisdiction over the [tribal l]ands." *Id*. at 234.

The *Wampanoag Tribe* court reasoned that the federal question could not be avoided by finding that the tribe complied with state law because the Attorney General requested a declaration that the tribe had no right to operate a gaming establishment on the tribal lands without complying with state law. *Id*. This would clearly require the court to determine "whether a state or a federally recognized Indian tribe has jurisdiction over gaming on Indian lands—which is clearly a matter of federal law." *Id*. (citing *Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685 (1st Cir. 1994)). Likewise, the Attorney General here requests a declaration that Defendants have violated the PA COA, the Consumer Protection Law, and the FCEUA. (Compl. Prayer for Relief ¶ A.) The Court cannot make that declaration without first determining whether tribal or Pennsylvania law governs the loans at issue. Moreover, the Attorney General does not explain how showing that Defendants complied with state law resolves the Attorney General's claim that the loans at issue were falsely represented as being only subject to tribal law, and not to any state law. For this claim, the Court must apply federal law to determine whether the assertion of tribal jurisdiction over the loans is false.

The Attorney General nonetheless suggests that the federal issue must be an express element of one of her claims. (*Cf*. Mem. at 18.) That is incorrect, as *Grable* itself explains. All that is required is that the state-law claim "necessarily raise[s] a stated federal issue." *Grable*, 545 U.S. at 314. As just explained, the Attorney General's claims depend on the interpretation and application of federal Indian law. That is sufficient to meet *Grable*'s first requirement.

B. The Causes of Action Raise "Substantial" Federal Questions.

The Attorney General argues that the third *Grable* requirement is not satisfied here because the federal issues in this case are not substantial. She is again incorrect.

First, the federal issues related to whether tribal law applies to the loans at issue are undeniably important and 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. As the

Supreme Court has stated, "Indian sovereignty and the congressional goal of Indian self-government" are "important federal interests." *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216-17 (1987), *superseded by statute on other grounds as stated in Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2034 (2014). Accordingly, courts routinely conclude that issues of Indian sovereignty and self-government—like those raised here—are sufficiently substantial so as to warrant federal jurisdiction over state-law claims. *See*, *e.g.*, *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 852 (1985) ("The question whether an Indian tribe retains the power to compel a non-Indian property owner to submit to the civil jurisdiction of a tribal court is one that must be answered by reference to federal law and is a 'federal question' under § 1331."); *Wampanoag Tribe*, 36 F. Supp. 3d at 234 (whether a state or federally recognized Indian tribe has jurisdiction over gaming on Indian lands is "substantial" issue of federal law); *Muhammad v. Comanche Nation Casino*, 742 F. Supp. 2d 1268, 1275 (W.D. Okla. 2010) (legal right of Oklahoma to assert civil-adjudicatory authority over conduct by a tribal business occurring on Indian lands was "a substantial question of federal constitutional, statutory, and decisional law").

The Attorney General fails to cite a single case involving a removal based upon a question of federal Indian law. She nonetheless contends that a question is "substantial" only where wrongdoing by a federal agency is alleged. (Mem. at 21.) This contention is simply wrong. Although some federal questions are found to be substantial because they involve a federal agency, such as in *Grable*, the Attorney General's assertion is belied by the case she cites for the proposition, *Mikulski v. Centerior Energy Corp.*, 501 F.3d 555 (6th Cir. 2007). *Mikulski* states that the involvement of a federal agency is just one of the factors that may affect the substantiality analysis. 501 F.3d at 570. The others include: whether the question is important, whether the question will resolve the case, and whether the decision will control numerous cases. *Id*. The first factor was considered above, the latter two are discussed below.

The Attorney General further contends that the alternative way to demonstrate substantiality is whether the federal question is presented as a "'pure issue of law . . . that could

be settled once and for all . . . .'" (Mem. at 22 (quoting *Empire Healthchoice Assur., Inc. v. McVeigh*, 547 U.S. 677, 700 (2006)).) The Attorney General's approach is again too narrow: "*Grable* did not hold that only state law claims that involve constructions of federal statute or pure questions of law belonged in federal court." *Air Measurement Techs., Inc. v. Akin Gump Strauss Hauer & Feld, L.L.P.*, 504 F.3d 1262, 1272 (Fed. Cir. 2007); *see also Adventure Outdoors, Inc. v. Bloomberg*, 552 F.3d 1290, 1299 (11th Cir. 2008) (not only pure legal issues can trigger substantial federal question jurisdiction). Moreover, this action is "poles apart" from the case the Attorney General relies on for her contention. *Empire*, 547 U.S. at 700. In *Empire*, an insurer sought a reimbursement from a beneficiary's state-court settlement. *Id*. at 683. Although federal law provided the health insurance plan, it did not address the reimbursement rights of carriers, contracts did. *Id*. at 683-85. The Supreme Court held federal question jurisdiction did not exist because the insurer's claim was a "nonstatutory issue" that focused on "the share of [a] settlement properly payable to" the insurer. *Id*. at 700-01. While *Empire* did not involve any right created by federal law, this case presents substantial issues involving the scope of Indian rights created *solely* by federal law. Given the federal government's special interest in any determination related to those rights, a federal forum is particularly appropriate here.

Second, 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); *see Mikulski*, 501 F.3d at 570. For example, in *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 (1921), the Supreme Court "recognized federal-question jurisdiction because the principal issue in the case was the federal constitutionality of the bond issue." *Grable*, 545 U.S. at 312. Here, the Attorney General has alleged a "scheme" with two different stages. Because all of the Attorney General's claims are based on alleged usurious loans under Pennsylvania law, the resolution of the federal issues related to Indian law in this case could dispose of the Defendants' purported liability under the second stage of the "scheme" almost in its entirety. *See Koresko v.*

Murphy, 464 F. Supp. 2d 463, 469 (E.D. Pa. 2006) ("The outcome-determinative nature of this issue makes it 'actually disputed and substantial' at this stage of the litigation.").

Third, this case demands the "experience, solicitude, and hope of uniformity that a federal forum offers." *Grable*, 545 U.S. at 312. The tribes involved in the lending program at issue offer online loans nationwide. If this case is remanded, there is a serious risk that the issues of Indian sovereignty involved will be resolved differently in different cases. Inconsistent determinations would wreak havoc on the tribes' ability to do business, as well as to their economic development, contrary to federal interests. *See White Mountain Apache Tribe*, 448 U.S. at 149 (there is a "general federal policy of encouraging tribes 'to revitalize their self-government' and to assume control over their 'business and economic affairs.'") (quoting *Mescalaro Apache Tribe v. Jones*, 411 U.S. 145, 151 (1973))). Because of such risks, the federal issues that are raised here are properly placed under the complete jurisdiction of federal law, to be decided in a federal forum.

Moreover, "Indian law is uniquely federal in nature, having been drawn from the Constitution, treaties, legislation, and an 'intricate web of judicially made Indian law.'" *Wilson v. Marchington*, 127 F.3d 805, 813 (9th Cir. 1997) (quoting *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 206 (1978)). Federal courts thus have the special expertise and competence to resolve the federal issues in this case.

C. Removal of This Action Will Not Disturb the Balance of Federal and State Judicial Responsibilities.

Finally, the Attorney General argues that the last *Grable* requirement is not met because recognizing federal question jurisdiction in this case will purportedly upset the federal-state balance of judicial responsibilities. Specifically, she contends that a lawsuit initiated by a state should remain in state court; the Commonwealth's rights and duties are at issue; a state court is fully competent to evaluate the federal issues; and removal risks reversal. These arguments are unsupported and nonresponsive to the *Grable* factors.

The key inquiry under the final *Grable* requirement—which the Attorney General neglected to address—is whether 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, 319.

The Court's exercise of jurisdiction over this case does not pose this threat, as the amount of cases raising the unique combination of Indian sovereignty issues posed by the Complaint will be minimal. Under similar circumstances, the court in *Muhammad* "perceive[d] no danger" that exercising jurisdiction over a case raising the issue of whether a state court had jurisdiction over a tort action arising on tribal land would "result in a shift of state tort litigation into federal court" or "materially affect the normal division of labor between state and federal courts." 742 F. Supp. 2d at 1277.

While comity concerns always arise when cases are removed from state to federal court, the balance "as to Indian tribes is heavily weighted on the federal side." *Wampanoag Tribe*, 36 F. Supp. 3d at 235. This is especially true where, as here, the federal government has a particular interest in the issues of Indian sovereignty and self-government raised. *See Cabazon Band of Mission Indians*, 480 U.S. at 216-17. The Attorney General is thus wrong that "[t]he tribes' participation in the scheme does nothing to alter the essential state-law nature of the suit." (Mem. at 24.) Although no tribe is a party to this litigation, the Complaint nonetheless requires resolution of issues of federal law of great importance to tribes regarding their rights to sovereignty and freedom from state control.[7]

[7] The Attorney General's contention that the tribes' role as lender does not implicate federal issues because the law is clear that state law applies to tribal business activity conducted off-reservation completely misses the point. (*See* Mem. at 24.) The online loans at issue in this Complaint occurred *on the reservation*. Given that exercising jurisdiction here will not open any floodgates for similar cases, the presence of these uniquely federal issues favors federal jurisdiction.

In arguing that Defendants fail to meet the final *Grable* requirement, the Attorney General also attempts to diminish the centrality of Indian-related issues implicated in the Complaint. She suggests that this case should remain in state court because it is the Attorney General's right and duty to enforce the state laws that are at issue. (Mem. at 24-25.) This contention is unrelated to the final *Grable* requirement's concern about the flooding of the federal courts with new categories of lawsuits. In any event, the contention is unfounded. The Attorney General's alleged right to enforce Pennsylvania laws at issue here can be vindicated equally well in state or federal court.[8] She states no reason why her state-law claims—even if they could survive a motion to dismiss, which they cannot—cannot be appropriately adjudicated in federal court. In contrast, as noted above, federal courts have special expertise and experience in interpreting the uniquely federal law circumscribing the rights of Indians challenged by the Complaint. Remanding this case to state court would eliminate these advantages. *Cf. McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164, 168 (1973) ("[T]he policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history." (internal quotation marks and citations omitted)); *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 313 n.11 (1997) (Souter, J., dissenting) ("[W]hen the plaintiff suing the state officers has been an Indian tribe, the readiness of the state courts to vindicate the federal right has been less than perfect").

Finally, the Attorney General threatens that a "wrong" decision on remand could send this case back to state court after many years of litigation. (Mem. at 25-26.) This is, again, not responsive to any of the *Grable* factors, and in any event, it proves too much. Years of litigation can be undone by an appeal on any number of issues. Defendants' right to a federal forum

[8] If the Attorney General's suggestion that suits brought by a state should only be removed with caution is an attempt to change the standard for evaluating federal question jurisdiction when a state is the plaintiff, it fails. Where a disputed and substantial federal question is necessarily raised by a case, the court has an obligation to assert jurisdiction, regardless of who brought it. *See, e.g.*, *West Virginia ex rel. McGraw v. Eli Lilly & Co.*, 476 F. Supp. 2d 230, 232-33 (E.D.N.Y. 2007) (asserting federal question jurisdiction over state-law claims raising questions of off-label drug use in suit brought by West Virginia).

cannot be discarded based on the far-flung risk that the Court of Appeals would reverse this Court.

In sum, because "there is no good reason to shirk from federal jurisdiction over the dispositive and contested federal issue at the heart of the state-law . . . claim[s]," the Court should deny the Attorney General's motion to remand. *Grable*, 545 U.S. at 319-20.

III. REMOVAL JURISDICTION OVER THE ENTIRE COMPLAINT EXISTS BECAUSE IT INCLUDES A SUBSTANTIAL QUESTION OF FEDERAL LAW.

Removal of these actions is proper if even a single claim is removable. *See Phipps*, 417 F.3d at 1010. Furthermore, to the extent any claims are not independently removable, this Court should exercise supplemental jurisdiction because all the claims in the Complaints "form part of the same case or controversy under Article III." 28 U.S.C. § 1367(a); *see K.S. v. Sch. Dist. of Phila.*, No. Civ.A 05-4916, 2005 WL 3150253, at *2 (E.D. Pa. Nov. 22, 2005); *Kohn v. AT&T Corp.*, 58 F. Supp. 2d 393, 421 (D.N.J. 1999).

CONCLUSION

For all the foregoing reasons, this Court should deny the Attorney General's motion to remand this action to the Philadelphia Court of Common Pleas.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the day of April 6, 2015, the foregoing document was filed electronically via the Court's CM/ECF system, which caused counsel for all parties to be served via email from the ECF system. The document is available for viewing and downloading from the ECF system.

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