

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

CONSUMER FINANCIAL PROTECTION
BUREAU,

Plaintiff,

v.

GOLDEN VALLEY LENDING, INC.,
SILVER CLOUD FINANCIAL, INC.,
MOUNTAIN SUMMIT FINANCIAL,
INC., AND MAJESTIC LAKE
FINANCIAL, INC.,

Defendants.

Civil Case No. 1:17-cv-03155

Hon. Thomas M. Durkin

**DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR MOTION TO TRANSFER
VENUE TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF
KANSAS UNDER 28 U.S.C. § 1404(a)**

This case arises out of an unconstitutionally-structured agency’s misguided attempt to nullify a sovereign Indian Nation’s efforts to attain political self-determination and economic self-sufficiency using online commerce. Other courts and the United States Department of Justice have recognized that the unprecedented structure of the Consumer Financial Protection Bureau (CFPB or Bureau) violates the Constitution and creates a “great[] risk of arbitrary decisionmaking and abuse of power.”¹ The CFPB’s actions here vividly illustrate the type of overreach that the Constitution’s structural protections are designed to prevent.

The CFPB has targeted four arms of the Habematolel Pomo of Upper Lake (“HPUL” or “Tribe”²) that provide consumer loans over the internet pursuant to the laws of the Tribe. Like the United States or any of the fifty States, the Tribe has exercised its sovereign prerogative by promulgating a financial services ordinance that draws in many instances from federal banking and consumer protection laws and creating a regulatory commission to oversee the Tribe’s lending businesses and protect consumers. But rather than working collaboratively with the Tribe and the Commission on a government-to-government basis—an option the Tribe has repeatedly offered—the Bureau has rushed into court seeking to deprive the Tribe of its sovereign rights to regulate its businesses and to engage in e-commerce. The Complaint ignores the foundational principle of tribal sovereignty, incorrectly presuming that Defendants—arms of the Tribe—are subject to the

¹ *PHH Corp. v. CFPB*, 839 F.3d 1, 8 (D.C. Cir. 2016), *reh’g en banc granted* Feb. 16, 2017; *see also CFPB v. D & D Mktg., Inc.*, No. 15-cv-9692-PSG-E, Dkt. No. 57 at 6-8 (C.D. Cal. Nov. 17, 2016); Brief for the United States as Amicus Curiae at 2-3, *PHH Corp. v. CFPB*, No. 15-1177 (D.C. Cir. Mar. 17, 2017), 2017 WL 1035617.

² The CFPB has not sued the Tribe, and the Habematolel Pomo of Upper Lake is therefore not a defendant in this case. Nevertheless, the Bureau is pursuing this action against four lending portfolios, each of which the Bureau acknowledges are “owned and incorporated by the [Tribe].” Compl. ¶ 7.

laws the Bureau seeks to enforce. The Bureau also claims not only the power to enforce state usury and licensing laws without the States' consent (laws the States themselves could not enforce against the Tribe) but also that arms of the Tribe and fully informed consumers cannot freely choose to have their contracts governed by tribal law.

For these reasons, and several others that Defendants will set forth in a motion to dismiss at a later date, this lawsuit should be dismissed. But there is a further problem with the Complaint that should be addressed before delving into these substantive problems: It does not belong in *this* Court. It is not apparent from the face of the Complaint why the CFPB chose to file this lawsuit in Illinois. But taking at face value the assertions of the Complaint, the District of Kansas is clearly a more “convenient” forum under 28 U.S.C. § 1404(a). Defendants do not conduct any significant operations in Illinois; no important witnesses reside here; and the CFPB’s lead attorneys do not practice here. By contrast, while Defendants direct and control their businesses from tribal land—which consumers access via the internet—many of the businesses’ administrative functions are supported by employees of Upper Lake Processing Services (“ULPS”). ULPS is a separate, tribally owned and operated company that is also directed and controlled from tribal land and employs more than 100 people in Kansas. ULPS’s administrative support functions in Kansas are what the CFPB’s complaint itself points to in asserting that “Defendants’ operations are largely conducted by . . . employees in Kansas,” Compl. p.11, and that “[t]he majority of people who work on behalf of Defendants work in Kansas,” *id.* ¶ 75.

This Court, and other courts in this District, have recognized time and again that transfer is proper where it enhances “the relative convenience of the parties and non-party witnesses.” *A & R Logistics Holdings, Inc. v. Curl*, No. 15 C 7106, 2015 WL 5561179, at *5 (N.D. Ill. Sept. 21, 2015) (Durkin, J.); *see infra* at 9-10 (collecting cases). Applying that analysis here to the

allegations in the Complaint, the Court should transfer this case to the United States District Court for the District of Kansas.

BACKGROUND

This case arises out of a sovereign Indian Nation's efforts to achieve political self-determination and economic self-sufficiency and provide its citizens with employment, critical programs, services, and infrastructure, including housing assistance and education. More than 200 years of tragic interactions with the federal government have left the Habematolel Pomo of Upper Lake with virtually no land and no traditional tax base from which to generate governmental revenues. Exhibit A, Declaration of Sherry Treppa ("Treppa Declaration") ¶¶ 15-17.³ The Tribe sought to overcome these geographic limitations by entering the online consumer financial services business to generate the revenue needed to carry out the essential government functions common to all sovereigns. *Id.* ¶¶ 19-20. Today, Defendants—four lending entities incorporated under tribal law, owned and operated by the Tribe, and directed and controlled from tribal land—provide consumers with unsecured, short-term, small-dollar-amount installment loans that help them meet immediate financial needs. *Id.* ¶ 22. Defendants issue these loans to customers who choose to do business within the Tribe's jurisdiction by entering into consensual contracts with Defendants via the internet. *Id.* ¶¶ 22-23.

³ In ruling on a motion to transfer, the Court is "not limited to the allegations in the complaint and may consider affidavits." *Simonian v. Monster Cable Prods., Inc.*, 821 F. Supp. 2d 996, 998 (N.D. Ill. 2010); see also *Bd. of Trs. of the Auto. Mechs.' Local No. 701 Union & Industry Welfare Fund v. Brown*, No. 12-cv-10268, 2014 WL 4057367, at *1 (N.D. Ill. Aug. 14, 2014) ("In [ruling on a motion to transfer], the court may consider facts presented by way of affidavit, deposition, stipulation, or other relevant documents." (internal quotations omitted)); *Allstate Ins. v. Regions Bank*, No. 13 C 5140, 2014 WL 440253, at *1 n.3 (N.D. Ill. Feb. 4, 2014) ("In addressing [a] motion to transfer, the Court is not obligated to limit its consideration to the pleadings.").

The Tribe's history underscores the importance of the online consumer financial services business to the Tribe's day-to-day operations and efforts to overcome its historical mistreatment. In 1850, after centuries of living peacefully in Upper Lake, California, the ancestral Habematolel Pomo peoples were slaughtered and almost entirely annihilated by the U.S. Cavalry. *Id.* ¶¶ 4-5. The few remaining survivors were then forcibly relocated to a reservation with 11 other tribes. *Id.* ¶ 7. In the decades that followed, the federal government recognized these few remaining descendants as a Tribe and maintained a government-to-government relationship with them, including by setting aside a Rancheria in Upper Lake, California that ultimately grew to 564 acres. *Id.* ¶¶ 8-11. But in 1958, the pendulum of federal policy swung back when the federal government wrongfully terminated the Tribe's recognition, revoked its Constitution, and caused it to lose its reservation lands. *Id.* ¶ 11. Nevertheless, through the incredible perseverance of tribal leaders—over nearly ten years of litigation and two and a half additional decades of bureaucratic entanglement—the Tribe restored its federal recognition, approved a new Constitution, elected an Executive Council, and succeeded in having the government take an 11.24-acre parcel of land into trust for the Tribe. *Id.* ¶¶ 11-16. But this tragic 200-year history has left the Tribe with only a small tract of land and no traditional tax base, forcing it to generate governmental revenues by operating various commercial businesses. *Id.* ¶ 17. In 2012, the Tribe opened a casino, which provides employment to many tribal citizens and surrounding community members and makes contributions to the county and local agencies. *Id.* ¶ 18. But because of its remote location, the casino does not generate meaningful revenue to support the Tribe's governmental functions. *Id.*

The Tribe thus began researching the online consumer financial services industry, recognizing that online commerce represented a way for the Tribe to generate governmental revenue despite the travesty of having lost virtually all its historical lands. *Id.* ¶ 19. The Tribe's

decision to enter the business helped effectuate the federal government’s policy of encouraging “the twin goals of economic self-sufficiency and political self-determination for Native Americans” by promoting “the formation of new businesses by eligible entities, and the expansion of existing businesses.” 25 U.S.C. §§ 4301(a)(12), (b)(1)(A). The Tribe exercised its sovereign rights by drafting its own financial services and corporate codes (which incorporated substantive standards of many federal banking and consumer protection laws). Treppa Declaration ¶¶ 20-21. Like federal law and several States’ laws, the Tribe’s consumer financial services ordinance does not set arbitrary limits on interest rates or finance charges to which lenders and their willing customers may agree. *See* Exhibit B (Tribal Consumer Financial Services Regulatory Ordinance).

The Tribe also established the Tribal Consumer Financial Services Regulatory Commission (“Commission”) to exercise oversight and ensure a fair and transparent market for consumers. Treppa Declaration ¶ 21. That Commission licenses all tribal lending businesses. *Id.* In order to preserve their licenses, tribal lending businesses must maintain a compliance management system to ensure adherence to applicable laws, including the substantive standards of federal law that the Tribe incorporates as a matter of tribal law,⁴ as well as internal controls and processes to allow the Commission to exercise meaningful oversight. *Id.* Tribal lending businesses are subject to being audited by the Commission, which has the power to take corrective action to address shortcomings, including by imposing fines or revoking a lender’s license. *Id.*

⁴ Tribal businesses must adhere to the substantive standards in the following federal laws by virtue of the Tribe’s regulatory scheme: the Truth in Lending Act, the Equal Credit Opportunity Act, the Electronic Fund Transfer Act, the Fair Credit Reporting Act, the Gramm-Leach-Bliley Act, the Fair Debt Collection Practices Act, the Telephone Consumer Protection Act, the Telemarketing Sales Rule, and Section 5 of the Federal Trade Commission Act, which prohibits unfair or deceptive acts or practices. *See* Treppa Declaration ¶ 20.

The Tribe has incorporated—and the Commission has licensed—four lending entities, Defendants in this case. *Id.* ¶ 22. From the start, Defendants’ Boards of Directors reviewed and adopted underwriting criteria and controlled all loan agreements from tribal land. *Id.* ¶ 23. But because the Tribe had very limited experience in the lending industry, it initially enlisted the services of several third-party vendors, including some in the Kansas City area, to provide administrative support to its burgeoning businesses—a fact the CFPB emphasizes. *See id.* ¶ 24; Compl. ¶¶ 39, 74-75, 78-92. But what the CFPB ignores is the further development of the Tribe’s businesses, which represents an unprecedented success story of tribal self-determination. As the Tribe began generating governmental revenue, it internalized more functions within arms of the Tribe. Treppa Declaration ¶ 24. For example, the Tribe incorporated a new tribal entity—ULPS—on tribal land. *Id.* ¶ 25. ULPS, which is owned and operated by the Tribe, then acquired the assets of an administrative support center in Overland Park, Kansas, with which Defendants had previously contracted. *Id.* The Tribe’s lending business is now one of the few completely tribally-operated, vertically-integrated online lending businesses in the country. *Id.* ¶ 24. The revenues generated by the consumer financial services business have helped the Tribe reacquire portions of its former lands (including its ancestral cemetery), operate a Tribal Education Center, provide benefits to tribal elders, confer scholarships to certain tribal youth, and contribute to the surrounding community. *Id.* ¶ 30. In other words, the Tribe utilizes those revenues to perform its sovereign functions by helping its citizens break out of generations of poverty and other social challenges created by failed federal policies. *Id.* ¶¶ 30-32.

Today, Defendants—the four lending portfolios—continue to be directed and controlled from Upper Lake, California. *Id.* ¶ 22. Their Boards control all loan agreements with customers who enter the Tribe’s jurisdiction via the internet. *Id.* ¶ 23. Defendants contract with ULPS to

support many of their administrative operations. *Id.* ¶ 25. As noted above, ULPS was created to allow the Tribe to acquire the assets of an administrative support center in Overland Park, Kansas. *Id.* When ULPS acquired that company’s assets, it made the strategic (and sensible) business decision to hire many of that company’s highly qualified employees and allow them to continue to live in Overland Park. *Id.* ¶¶ 25-26. The CFPB itself emphasizes this fact when it asserts that “[t]he majority of the people who work on behalf of Defendants work in Kansas,” and most of the “day-to-day operations [a]re conducted in Kansas.” Compl. ¶¶ 74-75. Those assertions are incorrect in several respects—all of those people are employees of ULPS, which is not a party, and the Boards of Defendants and ULPS make all significant operational decisions on tribal land, though their members travel to Kansas for business reasons from time to time. Treppa Declaration ¶¶ 25-26. But the CFPB is right to observe that some administrative aspects of Defendants’ operations are supported by individuals in Kansas, and that a significant number of potential witnesses are located in the Kansas City area. *Id.* ¶¶ 26-27. By contrast, Defendants have no significant operations or employees in Illinois. *Id.* ¶ 28. To the extent Defendants have contacts with Illinois, they occur via their websites, which are equally viewable by anyone, anywhere with an internet connection. *Id.*

ARGUMENT

This Case Should Be Transferred To The District Of Kansas Under 28 U.S.C. § 1404(a)

The Court should transfer the case to the United States District Court for the District of Kansas “[f]or the convenience of parties and witnesses” and “in the interest of justice.” 28 U.S.C. § 1404(a); *see Research Automation, Inc. v. Schrader-Bridgeport Int’l, Inc.*, 626 F.3d 973, 977 (7th Cir. 2010) (Section 1404(a) “allow[s] a district court to transfer an action filed in a proper, though not necessarily convenient, venue to a more convenient district.”). That statute requires

courts to “adjudicate motions for transfer according to an individualized, case-by-case consideration of convenience and fairness.” *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 29 (1988) (internal quotations omitted). A motion to transfer “may be filed at any time.” *Bankers Life & Cas. Co. v. Case*, No. 05 C 6532, 2005 WL 3542523, at *1 (N.D. Ill. Dec. 23, 2005); *Carter v. Clark Material Handling Co.*, No. 97 C 4424, 1998 WL 89244, at *2 (N.D. Ill. Feb. 17, 1998) (same).⁵ The CFPB opposes this motion.

All of the relevant factors in the venue analysis support transfer to the District of Kansas. In evaluating the “convenience of parties and witnesses,” 28 U.S.C. § 1404(a), “courts generally consider the availability of and access to witnesses, and each party’s access to and distance from resources in each forum.” *Research Automation*, 626 F.3d at 978. For the parties, the choice between forums does not cut clearly in either direction: The CFPB is a federal agency with jurisdiction throughout the United States and its lead attorneys are located in Washington, D.C., while the members of Defendants’ respective Boards of Directors reside in California. As a result, both parties will have to travel whether this case remains in Illinois or is transferred to Kansas. But members of Defendants’ Boards travel from tribal land to Kansas anyway, in the regular course of business. Treppa Declaration ¶ 26. And the District of Kansas is substantially more convenient for many other potential witnesses. Those factors should be dispositive here. *Rose v. Franchetti*, 713 F. Supp. 1203, 1214 (N.D. Ill. 1989) (“The convenience of witnesses is often viewed as the

⁵ See also 15 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3844 (4th ed. 2017) (“Section 1404(a) sets no limit on the time when a motion to transfer may be made. . . . Thus, Section 1404(a) motions have been held proper, on one end of the spectrum, even before service of process . . .”).

most important factor in the transfer balance.”); *see also* Wright & Miller, *Federal Practice & Procedure* § 3851.

The CFPB “has not identified any potential witnesses in this district.” *FTC v. Acquinity Interactive, LLC*, No. 13 C 5380, 2014 WL 37808, at *4 (N.D. Ill. Jan. 6, 2014). By contrast (and as the CFPB itself suggests, Compl. p. 11)—witnesses supporting many aspects of Defendants’ administrative operations, including underwriting, marketing, the call center and interactions with customers, collections, and compliance, are located in the Kansas City area. Treppa Declaration ¶¶ 26-27 (listing potential witnesses). To be sure, Defendants’ business operations are directed and controlled by their Boards from tribal land. *Id.* ¶ 23. But the CFPB has asserted that ULPS’s administrative support functions in Kansas—carried out by tribal employees in Kansas—are a focus of its claims. *See* Compl. ¶¶ 59-63 (allegations regarding loan advertising); *id.* at ¶¶ 65-67 (allegations of oral disclosures by call center employees); *id.* at ¶¶ 132-52 (claims that loans are unlawful and not collectible).

Further, these tribal employees in Kansas are not parties to this case—nor are they employees of a party. These potential witnesses could therefore not be subpoenaed to testify at trial in this District. *See* Fed. R. Civ. P. 45(c)(1); Treppa Declaration ¶¶ 26-27. As this Court and others in this District have repeatedly recognized, “the existence of significant third party witnesses outside the particular forum’s subpoena power can be a significant factor in the section 1404(a) analysis.” *A & R Logistics*, 2015 WL 5561179, at *5 (quoting *Acquinity Interactive*, 2014 WL 37808, at *3); *see also, e.g., Guignard v. Nat’l R.R. Passenger Corp.*, No. 11 C 124, 2012 WL 1108242, at *3 (N.D. Ill. Apr. 1, 2012) (“[T]he presence of potential nonparty witnesses outside the subpoena power of the court . . . weighs heavily in a transfer decision.” (quoting *FUL Inc. v. Unified Sch. Dist. No. 204*, 839 F. Supp. 1307, 1312 (N.D. Ill. 1993))); *Sky Valley Ltd. P’Ship v.*

ATX Sky Valley, Ltd., 776 F. Supp. 1271, 1277 (N.D. Ill. 1991) (“The factor weighing most heavily in favor of transfer is the location of the third party witnesses”). All of the employees in Kansas would, however, be subject to a trial subpoena in the District of Kansas. Because this “Court cannot compel any of the parties’ non-party witnesses to testify at trial, the convenience factor weighs heavily in favor of transfer” to the District of Kansas. *Guignard*, 2012 WL 1108242, at *4.⁶

For many of the same reasons, many of “the material events giving rise to the claim[s]” occurred in the District of Kansas, further counseling in favor of transfer. *Tomkins v. Forte Capital Partners LLC*, No. 05 C 5251, 2006 WL 907776, at *5 (N.D. Ill. Apr. 5, 2006); see *A & R Logistics*, 2015 WL 5561179, at *4 (“Other related factors include the location of material events.” (quoting *Research Automation*, 626 F.3d at 978)). The CFPB’s claims arise out of Defendants’ origination, collection, and advertising of loans. Again, Defendants direct and control their businesses from tribal land, but receive administrative support for their operations from individuals in Kansas, as the CFPB itself asserts, Compl. ¶¶ 74-75; see Treppa Declaration ¶ 26-28. By contrast, the CFPB has alleged virtually no ties to this District. The CFPB has not identified a consumer associated with Illinois who had complained to the Bureau about Defendants at the time this lawsuit was filed. Treppa Declaration ¶ 28. They claim only that Golden Valley originated a single loan to a resident of the state, Compl. ¶ 51; that Defendants “had over 36,000 credit inquiries performed on consumers who resided in Illinois,” with no accompanying allegation about how many of those

⁶ Further, if Defendants wanted to call any ULPS witnesses to the stand in this Court, they would have to incur substantial travel costs on behalf of those employees, increasing the already significant financial burdens that this lawsuit has placed on Defendants.

inquiries turned into loans, *id.* ¶ 58; and that Defendants extend credit “to consumers residing in this District and throughout the United States,” *id.* ¶¶ 12, 18, 23, 28. Those allegations do not distinguish this District from most other federal districts, and in any event, some of the administrative activities underlying those allegations took place in Kansas. Treppa Declaration ¶¶ 26-27; *see Acquinity Interactive*, 2014 WL 37808, at *5 (granting transfer to the Southern District of Florida where there was “an alleged nexus of the defendants’ behavior and business dealings” in Florida and there was no evidence that the Northern District of Illinois “was the home of a disproportionate number of injured customers”).

Transfer would also advance “the interest of justice.” 28 U.S.C. § 1404(a). The Seventh Circuit has explained that this “element of the transfer analysis . . . relates to the efficient administration of the court system,” and involves consideration of factors such as “docket congestion.” *Research Automation*, 626 F.3d at 978; *see also Velocity Patent LLC v. Audi of Am., Inc.*, No. 1:13-cv-08418, 2014 WL 4100481, at *5 (N.D. Ill. Aug. 19, 2014) (considering docket congestion in evaluating motion to transfer). While Defendants do not doubt the Court’s ability to manage this case, on average, each judge on the Northern District of Illinois handles nearly two times as many civil filings per year compared to the judges sitting in the District of Kansas. *See* Admin. Office of the U.S. Courts, *U.S. District Courts—Federal Court Management Statistics* (Dec. 31, 2016), available at http://www.uscourts.gov/sites/default/files/data_tables/fcms_na_distcomparison1231.2016.pdf (listing 550 yearly civil filings per judgeship for the Northern District of Illinois, compared to 290 for the District of Kansas). Indeed, the “Northern District of Illinois court is a far busier district, located in the third largest city in the country, compared to the district court in the lesser-populated [Kansas]”—a factor weighing “in favor of transfer.” *Craik v. Boeing Co.*, 37 F. Supp. 3d 954, 963 (N.D. Ill. 2013). Nor does Illinois, which is merely “one of

s[even]teen states whose laws and public interests are implicated by the plaintiff's complaint," have a particularly significant interest in the resolution of this case. *CFPB v. CashCall, Inc.*, No. CV 13-13167-GAO, 2015 WL 5610813, at *1 (D. Mass. Sept. 23, 2015) (transferring to California a case filed by the CFPB in Massachusetts because Massachusetts had a "relatively minor" interest).

Finally, there is no basis for deferring to the CFPB's choice of forum for this lawsuit. As this Court has recognized, the general principle of deference to the plaintiff's forum choice has less weight where the "forum lacks a significant connection to the underlying claims." *A & R Logistics*, 2015 WL 5561179, at *4; *see Acquinity Interactive, LLC*, 2014 WL 38708, at *2; *Opius Techs., Ltd. v. Sears Holding Corp.*, No. 11-cv-8539, 2012 WL 2280696, at *6 (N.D. Ill. June 15, 2012). And as just explained, Illinois has no "significant connection" to this litigation. The CFPB's status as a government agency changes nothing, as the District of Massachusetts recently recognized. *See CashCall*, 2015 WL 5610813, at *1. There, as here, the CFPB filed a lawsuit alleging a violation of the "laws and public interests" of "sixteen States" (here, seventeen). *Id.*; *see* Compl. ¶ 128. And there, as here, some of the "activity at the heart of th[e] case was . . . managed from within" another district, where some of "the most important witnesses" were located. *CashCall*, 2015 WL 5610813, at *1; *see* Compl. ¶¶ 74-75 (alleging that Defendants' employees and operations are based in Kansas). Based on those factors (and others discussed above), the court in *CashCall* refused to defer to the CFPB's forum choice and granted a motion to transfer. *CashCall*, 2015 WL 5610813, at *1. This Court should do the same.

CONCLUSION

The Court should transfer the case to the United States District Court for the District of Kansas under 28 U.S.C. § 1404(a).

By: /s/ Beth A. Wilkinson

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CERTIFICATE OF SERVICE

The undersigned certifies that on June 7, 2017, a true and correct copy of the foregoing DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR MOTION TO TRANSFER VENUE TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS UNDER 28 U.S.C. § 1404(a) and accompanying exhibits was electronically filed with the Clerk of the Court for the United States District Court for the Northern District of Illinois using the Court's CM/ECF system, and that an electronic copy of the foregoing was transmitted to all counsel of record by email or secure file transfer protocol.

By: /s/Beth A. Wilkinson
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