UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

KANITA PERKINS,	§	
	§	
Plaintiff,	§	
	§	
v.	§	SA-19-CA-1281-FB (HJB)
	§	
EQUIFAX INFORMATION SERVICES, LLC; EXPERIAN INFORMATION SOLUTIONS, INC; CREDIT MANAGEMENT, LP; RADIUS GLOBAL SOLUTIONS, LLC; and MISSOURI HIGHER EDUCATION LOAN AUTHORITY d/b/a MOHELA,	§	
	§	
Defendants.	§	

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

To the Honorable Fred Biery, United States District Judge:

This Report and Recommendation concerns the Motion for Judgment on the Pleadings filed by Defendant Higher Education Loan Authority of the State of Missouri d/b/a MOHELA ("MOHELA"). (Docket Entry 34.) This case has been referred to the undersigned for the consideration of pretrial matters pursuant to 28 U.S.C. § 636(b). (*See* Docket Entry 37.) For the reasons set out below, I recommend that the Motion for Judgment on the Pleadings (Docket Entry 34) be **DENIED**.

I. Jurisdiction.

Plaintiff asserts claims under the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. §§ 1681 *et seq*., and the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. §§ 1692, *et seq*. (Docket Entry 1.) This Court exercises jurisdiction over federal claims pursuant to 28 U.S.C. § 1331. I have authority to issue this Report and Recommendation pursuant to 28 U.S.C. § 636(b).

II. Factual Background.

In May 2018, while applying for financial aid to go to dental school, Plaintiff became aware of several fraudulent loans that were taken out in her name. (Docket Entry 1, at 13.) Plaintiff, an Air Force veteran, filed an Identity Theft Report with the Federal Trade Commission ("FTC"), explaining that she had her personal information stolen and that there were several inaccuracies on her credit report involving student loans. *(Id.)* Plaintiff also filed a police report detailing the identity theft. (*Id.* at 14.) The police report was later sent to the credit agencies Equifax, Experian, and TransUnion in the summer of 2018. (*Id.*)

Both the Equifax and Experian reports listed several student loans from MOHELA. Contrary to the reports, Plaintiff had not previously taken out take out any student loans, and had had no prior business transactions with MOHELA. (Docket Entry 13, at 14.)

On or about September 2018, Plaintiff contacted MOHELA by phone, explaining that she was the victim of identity theft and requested that she not be held responsible for the fraudulent student loans. (Docket Entry 13, at 14.) Plaintiff filled out forms as instructed by MOHELA, but MOHELA failed to discharge Plaintiff from further loan responsibility. (*Id.*) Plaintiff began receiving notices from debt collectors, threatening her for her nonpayment of debt. It was not until the end of April 2019 that Plaintiff received a letter from MOHELA, finally acknowledging that Plaintiff was the victim of identity theft, and her loans were to be discharged due to aforementioned fraud. (*Id.* at 15.) Plaintiff forwarded MOHELA's discharge letter to Equifax and Experian, but the credit agencies continued to report the fraudulent loans on Plaintiff's credit reports. (*Id.* at 16.)

In October 2019, Plaintiff brought this lawsuit against Equifax, Experian, MOHELA, and others alleging violations of the FCRA and FDPCA. (Docket Entry 1.) Plaintiff subsequently

dismissed the FDPCA claim against MOHELA, and is currently pursuing only the FCRA claim against the loan authority. (*See* Docket Entry 1, at 33–36; Docket Entry 49.) MOHELA has moved for judgment on the pleadings, arguing that it is immune from FCRA suit under the Eleventh Amendment. (Docket Entry 34.)

III. Analysis.

The Eleventh Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI. MOHELA argues that, as an arm of the State of Missouri, it is entitled to Eleventh Amendment Immunity, and therefore that this Court lacks jurisdiction over Plaintiff's FCRA claim against it. (Docket Entry 34.)

In *Clark v. Tarrant Cty.*, the Fifth Circuit held that Eleventh Amendment sovereign immunity applies not only to the State itself, but also to "an arm of the state." 798 F.2d 736, 744 (5th Cir. 1986); *see Cutrer v. Tarrant Cty. Local Workforce Develop. Bd.*, 943 F.3d 265, 270–73 (5th Cir. 2019) (discussing *Clark*). The *Clark* Court identified six factors that influence the determination of whether an entity constitutes an "arm of the state":

(1) whether the state statutes and case law view the entity as an arm of the state;

(2) the source of the entity's funding;

(3) the entity's degree of local autonomy;

(4) whether the entity is concerned primarily with local, as opposed to statewide, problems;

(5) whether the entity has the authority to sue and be sued in its own name; and

(6) whether the entity has the right to hold and use property.

Clark, 798 F.2d at at 744–45; *Cutrer*, 943 F.3d at 270. "Rather than forming a precise test, the *Clark* factors help . . . balance the equities and determine as a general matter 'whether the suit is in reality a suit against the state itself.'" *Williams v. Dallas Area Rapid Transit*, 242 F.3d 315, 318 (5th Cir. 2001) (citation omitted).

Because it does not create a precise test, none of the six *Clark* factors is dispositive. *Cutrer*, 943 F.3d at 270; *Williams*, 242 F.3d at 318. Nevertheless, some factors "are more important than others." *Williams,* 242 F.3d at 318. The second factor—the source of funds, or "money factor"—is the one that deserves "the most weight." *Cutrer*, 943 F.3d at 270 (quoting *Black v. N. Panola Sch. Dist.*, 461 F.3d 584, 596 (5th Cir. 2006)). This is because, as *Clark* recognized, "an important goal of the Eleventh Amendment is the protection of state treasuries." *Cutrer*, 943 F.3d at 270 (quoting *Clark*). On the other hand, the fifth and sixth factors—whether the agency has authority to enter into litigation and hold property—are less important. *Williams,* 242 F.3d at 318. When considering the balance of *Clark* factors, the Court places the burden on the entity claiming immunity. *Cutrer*, 943 F.3d at 270; *see also Skelton v. Camp*, 234 F.3d 292, 297 (5th Cir. 2000) (collecting cases).

Applying these six factors to the present case, some clearly favor MOHELA, while others favor Plaintiff. The first factor and fourth factors appear to fall in MOHELA's favor, as it is created and governed by Missouri statutory provisions, and it is concerned with statewide higher education funding, not with any particular locality within the state. See MO. REV. STAT. ANN. §§ 173.360, 173.387 (West 2007). The fifth and sixth factors favor Plaintiff, as MOHELA has the right to hold property, and to sue and be sued. MO. REV. STAT. ANN. §§ 173.385 .1(3), (14) (West 2007). The third factors is mixed, as MOHELA is given a great deal of autonomy by state statute, but its board

is made up entirely of Governor appointees and state officials. *Compare* MO. REV. STAT. ANN. § 173.385 *with* MO. REV. STAT. ANN. § 173.360.

Overriding all these other factors, however, is the paramount second factor—the "money factor." *Cutrer*, 943 F.3d at 270. Under this factor, an entity may be considered an arm of the state if the state is the source of the entity's funds, or if the state treasury would be liable for a potential judgment against the entity. *Black*, 461 F.3d at 597. MOHELA is not funded by the State of Missouri, and MOHELA candidly admits that "there is no statute that requires the State to cover a judgment" against it. (Docket Entry 34, at 11.) These circumstances would seem to weigh heavily against MOHELA on this "most important" issue. *Williams*, 242 F.3d at 319.

MOHELA argues, however, that the second *Clark* factor does not necessarily require a showing that "payment would be directly out of the state treasury." (Docket Entry 34, at 10 (quoting *United States ex rel. King v. Univ. of Texas Health Sci. Ctr.-Houston*, 544 F. App'x 490, 496 (5th Cir. 2013)). Instead, it suggests that "the crucial question" is whether a damage award, even if paid by non-treasury funds, "would interfere with the fiscal autonomy and political sovereignty of the State." (Docket Entry 34, at 10 (citing *King* and *United Carolina Bank v. Bd. of Regents of Stephen F. Austin State Univ.*, 665 F.2d 553, 561 (5th Cir. Unit A. 1982).)

Even by this standard, however, MOHELA's argument as to the second factor fails. As is clear from Missouri law, MOHELA's finances are completely independent from state funds:

> No asset of [MOHELA] shall be considered to be part of the revenue of the state[,] . . . and no asset of [MOHELA] shall be required to be deposited into the state treasury, and no asset of [MOHELA] shall be subject to appropriation by the general assembly . . . . The assets of the authority shall remain under the exclusive control and management of [MOHELA] . . . . Student loan notes purchased or financed shall not be considered to be public property.

MO. REV. STAT. ANN. § 173.425 (West 2007). This separation of assets from the state treasury is similarly emphasized by another provision of MOHELA's governing statutes:

> Notwithstanding any other provision of law, [MOHELA] shall not have the power or authority to cause any asset of [MOHELA] to be used for the payment of debt incurred by the state, and [MOHELA] shall not have the power or authority to distribute any asset of [MOHELA] to any fund of the state of Missouri for the purpose of payment of debt incurred by the state.

MO. REV. STAT. ANN. § 173.386 (West 2007). The financial separation of MOHELA established by Missouri law strongly militates against finding MOHELA to be an "arm of the State."

MOHELA contends that, despite the lack of any state obligation to cover its debts, the second *Clark* factor may still weigh in its favor because there is "no statutory *prohibition* against the State of Missouri paying a judgment." (Docket Entry 34, at 11 (emphasis added).) This contention fails. In the absence of either legal obligation or evidence that the State has ever paid any such judgment, MOHELA's argument presents nothing more than a hypothetical possibility. The Fifth Circuit has warned against allowing such hypothetical "suppositions about a judgment's effect on state treasuries" to inform the Eleventh Amendment inquiry. *United States ex rel. Barron v, Deloitte & Touche, L.L.P.*, 381 F.3d 438, 440–41 (5th Cir. 2004) (collecting cases).

MOHELA also argues that an entity may be entitled to immunity when the state "is functionally liable, even if not legally liable." (*Id.* at 10 (quoting *United States ex rel. Oberg v. Pennsylvania Higher Educ. Assistance Agency*, 745 F.3d 131, 137 (4th Cir. 2014) (emphasis omitted) and *Stoner v. Santa Clara Cnty. Office of Educ.*, 502 F.3d 1116, 1122 (9th Cir. 2007)). It suggests this "functional liability" test applies here, because it is obligated to pay money to a Missouri state fund for education projects, called the Lewis and Clark Discovery Fund. See MO. REV. STAT. ANN. §§ 173.425, 173.385.1(9), 173.385.2; *cf.* MO. REV. STAT. ANN. § 173.392

(establishing Fund). MOHELA reasons that, if it is forced to pay judgments to litigants like Plaintiff, it might be unable to pay its obligations to the Fund, thus impacting upon the Missouri treasury. (Docket Entry 34, at 10–11.)

This argument may have had force some years ago, but not anymore. Under the cited statutory provisions, MOHELA's obligation to transfer assets to the Fund expired in September 2013. MO. REV. STAT. ANN. § 173.385.2. While MOHELA is still permitted to transfer assets to the Fund under § 173.185.1(9), it is no longer under any obligation to do so. The supposition that MOHELA *might* want to transfer assets in the future, and that this desire *might* be frustrated by a judgment against it, is too attenuated to invoke the protections of sovereign immunity. *Barron*, 381 F.3d at 440–41. "The Eleventh Amendment was fashioned to protect against federal judgments requiring payment of money that would interfere with the state's fiscal autonomy and thus its political sovereignty." *King*, 544 F. App'x at 497 (quoting *Jagnandan v. Giles*, 538 F.2d 1166, 1176 (5th Cir. 1976)). That is simply not the case here.

The reasoning above is similar to that of the Fourth Circuit in *Oberg*. In *Oberg*, the court of appeals considered sovereign immunity claims put forth by student loan entities from three states: Pennsylvania, Vermont, and Arkansas. 745 F.3d at 138–44. It concluded that one entity (from Arkansas) was entitled to immunity; the others (from Pennsylvania and Vermont) were not. *Id.* In reaching this conclusion, the court focused on the money factor: it found that segregation of a loan entities' funds from the general state funds, as in MOHELA's case, "counsel[ed] against establishing arm-of-the-state status." *Id.* at 138–39. This was true even when the state had a general duty to "support and maintain" the entity. *Id.* at 141. By contrast, where money received by the entity was declared to be "revenues of the State," the court of appeals found that sovereign immunity applied.

Id. at 143 (citation omitted). Similar to the financially segregated systems considered by *Oberg*, the express financial segregation of MOHELA from any state funds, and the lack of any obligation for the state to pay MOHELA's debts, "strongly" weigh against an application of sovereign immunity.

The distinction set out in *Oberg* likewise distinguishes the Western District of Texas case on which MOHELA relies, *Webb v. Texas Higher Educ. Coordinating Bd.*, No. EP-14-CV-00345-FM, 2014 WL 12594193 (W.D. Tex. Dec. 12, 2014). In *Webb*, the district court considered the immunity claim of the Texas Higher Education Coordinating Board ("THECB"), a state entity authorized to sell bonds to fund a state college access loan program. *Id.* at *7. Unlike MOHELA, the THECB program is directly connected to State coffers: the bonds THECB sells are "general obligation bonds of the State of Texas," and "proceeds from the sale of the bonds are deposited into dedicated funds within the State Treasury." *Id.* Although those treasury funds go to finance student loans, if the student is unable to repay the loans, it "will consequently result in a loss on the bonds[,] and Texas will have to pick up the tab." *Id.* at *8.

By contrast to the THECB program considered in *Webb*, MOHELA's funds are not in any way considered to be part of the revenue of the state. They are not deposited into the state treasury; they are not subject to appropriation by the legislature; and they "remain under the exclusive control and management" of MOHELA. MO. REV. STAT. ANN. § 173.425. MOHELA cannot pay any debt of the state, MO. REV. STAT. ANN. § 173.386, and—as it concedes—the State is in no way obligated to pay any debt that it incurs. (*See* Docket Entry 34, at 11.)[1]

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[1] MOHELA also cites *In re Stout*, 231 B.R. 313 (W.D. Mo. 1999), but similar to *Webb,* the MOHELA-related student debt in that case had been guaranteed by the Missouri Coordinating Board for Higher Education, a state funded agency. *See* MO. REV. STAT. ANN. § 173.005 (West 2018). In this case, there is no debt that has been alleged, let alone one guaranteed by the State itself.

With the second *Clark* factor weighing heavily against it, and the other, lesser factors roughly in equipoise, MOHELA cannot demonstrate that, under the balance of equities, this lawsuit "is in reality a suit against the state itself.'" *Williams*, 242 F.3d at 318. Because the *Clark* factors to do support a finding that MOHELA is an "arm of the State" for purposes of Eleventh Amendment immunity, the motion for judgment on the pleadings should be denied.[2]

IV. Conclusion and Recommendation.

For the reasons set out above, I recommend that MOHELA's Motion for Judgment on the Pleadings (Docket Entry 34) be **DENIED**.

V. Instruction for Service and Notice for Right to Object.

The United States District Clerk shall serve a copy of this Report and Recommendation on all parties by either (1) electronic transmittal to all parties represented by attorneys registered as a "filing user" with the clerk of court, or (2) by mailing a copy to those not registered by certified mail, return receipt requested.

Written objections to this Report and Recommendation must be filed **within fourteen (14) days** after being served with a copy of same, unless this time period is modified by the district court. 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72(b). The party shall file the objections with the clerk of the court, and serve the objections on all other parties. A party filing objections must specifically identify those findings, conclusions or recommendations to which objections are being made and

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[2] Plaintiff argues in the alternative that, if MOHELA was otherwise entitled to immunity, Congress abrogated such immunity when it passed the FCRA. (Docket Entry 50, at 5–9.) Whatever the merits of this alternative argument, *see Densborn v. TransUnion, LLC*, No. 08 C 3631, 2009 WL 331466, at *2 (N.D. Ill. Feb. 10, 2009) (collecting cases that reject it), it need not be considered at this time.

the basis for such objections; the district court need not consider frivolous, conclusive or general objections. A party's failure to file written objections to the proposed findings, conclusions and recommendations contained in this report shall bar the party from a *de novo* determination by the district court. *Thomas v. Arn*, 474 U.S. 140, 149–52 (1985); *Acuña v. Brown & Root, Inc.*, 200 F.3d 335, 340 (5th Cir. 2000). Additionally, failure to file timely written objections to the proposed findings, conclusions and recommendations contained in this Report and Recommendation shall bar the aggrieved party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the district court. *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1428–29 (5th Cir. 1996) (en banc).

SIGNED on May 1, 2020.

Henry J. Bemporad
United States Magistrate Judge