IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

KATHLEEN CARR, KEEGAN KILLORY, and KELSIE POWELL, individually, and on behalf of all similarly situated persons,	)	
Plaintiffs,	)	
v.	)	**No. CIV-23-99-R**
OKLAHOMA STUDENT LOAN AUTHORITY; and NELNET SERVICING, LLC,	)	
Defendants.	)	

ORDER

Before the Court is Defendant Nelnet Servicing, LLC's ("Nelnet's") Motion to Transfer Venue and/or for Stay (Doc. Nos. 27 and 28) wherein Nelnet seeks to transfer this case to the United States District Court for the District of Nebraska, or, in the alternative, stay these proceedings. Plaintiffs have responded in opposition (Doc. No. 32) and Nelnet has replied (Doc. No. 36). Upon consideration of the filings, the Motion is DENIED for the following reasons.

Plaintiffs brought this class action in the District Court of Oklahoma County against two Defendants: (1) Nelnet, a limited liability company with its principal place of business in Lincoln, Nebraska; and (2) the Oklahoma Student Loan Authority ("OSLA"), a state agency operating under the trust authority of Okla. Stat. tit. 60, §§ 176 *et seq.* *See* Okla. Stat. tit. 70, § 695.3. Nelnet removed the case to this Court based on diversity jurisdiction,

28 U.S.C. §§ 1332(a), 1441, and the Class Action Fairness Act, § 1332(d). (Doc. No. 1, at 3-5, ¶¶ 11-20).[1] Nelnet now seeks to transfer this case to the District Court of Nebraska where twenty-three class action lawsuits related to the same July 2022 data security incident have been consolidated under one action.[2] *See In re: Data Security Cases Against Nelnet Servicing, LLC*, Case No: 4:22-cv-3191 (D. Neb. filed Sep. 7, 2022).

Regardless of the relief sought, a citizen's suit against a state agency is generally barred by the Eleventh Amendment just as if the suit had named the state itself. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984). However, a state may waive its sovereign immunity. *Steadfast Ins. Co. v. Agric. Ins. Co.*, 507 F.3d 1250, 1252 (10th Cir. 2007) (citing *Wis. Dept. of Corrs. v. Schacht*, 524 U.S. 381, 389 (1998)). Oklahoma's Governmental Tort Claims Act ("GTCA") waives sovereign immunity by "extend[ing] governmental accountability to all torts for which a private person or entity would be liable, subject only to the act's specific 'limitations and exceptions.'"[3]

[1] By voluntarily consenting to removal, OSLA invoked this Court's jurisdiction and waived immunity. *Lapides v. Bd. of Regents of Univ. Sys. of Georgia*, 535 U.S. 613, 620, 624 (2002) (holding that a state waives its Eleventh Amendment sovereign immunity when it voluntarily joins in the removal of a case); *see also Abreu v. New Mexico Child., Youth & Fams. Dep't*, 646 F. Supp. 2d 1259, 1268 (D.N.M. 2009) ("if the Defendants' counsel has the authority, under state law, to represent the Defendants—who are state agencies—then counsel may waive the Eleventh Amendment immunity defense by consenting to remove this case to federal court."); (Doc. No. 1, at 2, ¶ 5).

[2] Despite Nelnet's contention that the Consolidated Action was "poised to add OSLA as a named Defendant" as early as June 8, 2023, OSLA is not a defendant in the Consolidated Action as of June 15, 2023.

[3] The GTCA explicitly provides that "[i]n so waiving immunity, it is not the intent of the state to waive any rights under the Eleventh Amendment to the United States Constitution." Okla. Stat. tit. 51, § 152.1.

Anderson v. Eichner, 890 P.2d 1329, 1336 (Okla. 1994). One such limitation regards venue for actions against the State. Under the GTCA,

> [v]enue for actions against the state within the scope of this act shall be either the county in which the cause of action arose or Oklahoma County, except that a constitutional state agency, board or commission may, upon resolution filed with the Secretary of State, designate another situs for venue in lieu of Oklahoma County.

Okla. Stat. tit. 51, § 163(A). An action against the "state" within the scope of the GTCA is an action against "the State of Oklahoma or any office, department, agency, authority, commission, board, institution, hospital, college, university, public trust created pursuant to Title 60 of the Oklahoma Statutes of which the State of Oklahoma is the beneficiary, or other instrumentality thereof." § 152(13). OSLA is "an agency of the State of Oklahoma." Okla. Stat. tit. 70, § 695.3; *see also State ex rel. Oklahoma Student Loan Auth. v. Akers*, 900 P.2d 468, 469 (Okla. Civ. App. 1995) ("[The Oklahoma Student Loan Authority] is a state agency, operating under the trust authority of statute."); 15 Okla. Op. Att'y Gen. 481 (Dec. 22, 1983) ("[T]he State, through an agency (Oklahoma Student Loan Authority), [provides] student loan funds to qualified students."). Accordingly, tort claims against OSLA fall within the scope of the GTCA.[4]

The GTCA provides "the exclusive remedy for an injured plaintiff to recover against a governmental entity in tort." *E.g., Tuffy's, Inc. v. City of Oklahoma City*, 212 P.3d 1158, 1163 (Okla. 2009). While the Act limits venue for actions against the state to specific state

[4] Defendant OSLA's lead counsel appears to acknowledge that OSLA falls within the provisions of the GTCA in representing that "interim lead counsel for the Consolidated Action served the undersigned with a Notice of Claim . . . against OSLA as required by the Oklahoma Governmental Torts Act 51 O.S. § 151 *et seq.*" (Doc. No. 28-1, at 3, ¶ 5).

courts, an exception permits constitutional state agencies, boards, or commissions to designate other venues via resolution. Okla. Stat. tit. 51, § 163(A). Although Nelnet is correct that OSLA is a statutorily created state agency (Okla. Stat. tit. 70, § 695.3), the Court finds no exception under the GTCA permitting statutorily created state agencies to designate alternative venues in lieu of Oklahoma County.

Motions to transfer venue are governed by 28 U.S.C. § 1404(a) which provides that "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented." Here, all parties have not consented to transfer venue, therefore, the Court must determine whether the District of Nebraska is a district where this case "might have been brought." § 1404(a).

Venue in a diversity action is usually governed under 28 U.S.C. § 1391(b). This general statute applies to all civil actions "[e]xcept as otherwise provided by law." § 1391(a). Here, the Oklahoma Legislature unambiguously provided by law that its waiver of sovereign immunity limits venue for tort actions against state agencies to "either the county in which the cause of action arose or Oklahoma County." Okla. Stat. tit. 51, § 163(A). This limitation is permissible as "[a] State's constitutional interest in immunity encompasses not merely *whether* it may be sued, but *where* it may be sued." *Pennhurst*, 465 U.S. at 99; *see also Franchise Tax Bd. of California v. Hyatt*, 139 S. Ct. 1485, 1492 (2019) (holding that "States retain their sovereign immunity from private suits brought in the courts of other States," overruling *Nevada v. Hall*, 440 U.S. 410 (1979)).

"[T]he power of a District Court under [28 U.S.C.] § 1404(a) to transfer an action to another district is made to depend not upon the wish or waiver of the defendant but, rather, upon whether the transferee district was one in which the action 'might have been brought' by the plaintiff." *Hoffman v. Blaski*, 363 U.S. 335, 343-44 (1960); *see also Chrysler Credit Corp. v. Country Chrysler, Inc.*, 928 F.2d 1509, 1515 (10th Cir. 1991) ("§ 1404(a) does not allow a court to transfer a suit to a district which lacks personal jurisdiction over the defendants, even if they consent to suit there."). Thus, a transfer should be denied where some defendants would not be subject to jurisdiction or where the venue would be improper in the transferee forum as to any defendant. *Hoffman*, 363 U.S. at 343-44. Consequently, it makes no difference that OSLA presently consents to transferring this case to Nebraska; Plaintiffs did not have the right to bring this action against OSLA in the District Court of Nebraska when the suit was commenced. *See* Okla. Stat. tit. 51, § 163(A). Accordingly, the Court declines to transfer this action to the District Court of Nebraska.

Alternatively, Defendant Nelnet requests that the Court stay these proceedings pending the outcome of the first-filed Consolidated Action against Defendants Nelnet and EdFinancial Services, LLC in the District Court of Nebraska. *See In re: Data Security Cases Against Nelnet Servicing, LLC*, Case No: 4:22-cv-3191 (D. Neb. filed Sep. 7, 2022). Nelnet represents that if it reaches a settlement in the Consolidated Action, Plaintiffs will be part of the settlement class and entitled to either recover damages under the settlement or opt out and proceed on an individual basis. (Doc. No. 28, at 12). Plaintiffs oppose the request because Nelnet has not shown that it would suffer hardship or inequity absent a stay. (Doc. No. 32, at 31-32).

"[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants[.]" *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). In exercising this power, the Court "must weigh competing interests and maintain an even balance." *Id.* at 255. The movant seeking the stay "must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to some one else." *Id.*; *see also In re Samsung Top-Load Washing Mach. Mktg., Sales Pracs. & Prod. Liab. Litig.*, No. 17-ML-2792-D, 2018 WL 3676971, at *6 (W.D. Okla. Aug. 2, 2018). The Tenth Circuit provides the following guidance:

> In assessing the propriety of a stay, a district court should consider: whether the [movants] are likely to prevail in the related proceeding; whether, absent a stay, the [movants] will suffer irreparable harm; whether the issuance of a stay will cause substantial harm to the other parties to the proceeding; and the public interests at stake.

United Steelworkers of Am. v. Oregon Steel Mills, Inc., 322 F.3d 1222, 1227 (10th Cir. 2003) (citing *Battle v. Anderson*, 564 F.2d 388, 397 (10th Cir. 1977)). Nelnet does not address whether it is likely to prevail in the Consolidated Action; instead, it acknowledges the possibility of settlement and the Plaintiffs' potential recovery. Moreover, Nelnet does not set forth whether it will suffer irreparable harm absent a stay. Although Nelnet has asserted that the Plaintiffs would not be harmed by a stay and that it would favor the public's interests in conserving judicial resources, promoting efficiency, and preventing inconsistent decisions, the Court concludes that Nelnet has not set forth its own clear case

of the hardship or inequity it faces should this case proceed. Nelnet's motion for stay pending the outcome of the Consolidated Action is therefore denied.

Accordingly, Defendant Nelnet's Motion to Transfer Venue and/or for Stay (Doc. Nos. 27 and 28) is DENIED.

IT IS SO ORDERED this 16th day of June 2023.

DAVID L. RUSSELL
UNITED STATES DISTRICT JUDGE