IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
CIVIL ACTION NUMBER 1:13-CV-00255-WO-JLW

THOMAS BROWN, *et al.*,	)
	)
Plaintiffs,	)
	)
v.	)
	)
WESTERN SKY FINANCIAL, LLC, *et al.*,	)
	)
	)
Defendants.	)

PLAINTIFFS' BRIEF IN SUPPORT OF MOTION TO AMEND

Plaintiffs hereby submit their brief in support of their motion to amend. A copy of the Proposed First Amended Complaint ("FAC") is attached as Exhibit A to the motion.

I. STATEMENT OF THE CASE.

The original complaint was filed on March 28, 2013. Defendants filed motions to dismiss on arbitration and venue grounds on May 22, 2013, and Plaintiffs filed opposition briefs on June 21, 2013. (Docs. 37, 40). Plaintiffs also moved for preliminary discovery. (Docs. 38-39). Plaintiffs request leave to amend based on facts as cited below. Plaintiffs have not previously sought to amend the Complaint.

II. STATEMENT OF THE FACTS.

Since the original complaint was filed, Plaintiffs' ongoing investigation has uncovered additional facts and law supporting amending the Complaint in various respects. A summary is given below.

A. New Hampshire Cease and Desist Order Dated June 4, 2013.

A Cease and Desist Order was entered by the State of New Hampshire Banking Department, Case No. 12-308, on June 4, 2013. (Exhibit 16 to FAC). In it, the Department finds that "Western Sky is nothing more than a front to allow CashCall to evade licensure by state agencies and to exploit Indian Tribal Sovereign Immunity to shield its deceptive business practices from prosecution by state and federal regulators." *Id.* at p. 10 (emphasis added). The Order includes findings from discovery by the Department supporting its conclusion that Western Sky is a "front" for CashCall:

- Pursuant to a contract between CashCall and Western Sky, CashCall provides the website hosting services for Western Sky Financial, LLC. Order at p. 3. CashCall reimburses Western Sky for costs associated with the server. *Id.*

- CashCall reimburses Western Sky for its office, personnel and postage. *Id.* It provides Western Sky with a toll-free number and fax number and provides an array of marketing services including TV and radio and internet ads. *Id.*

- CashCall reviews loan applications to the "Western Sky" website for underwriting requirements. *Id.* CashCall funds a reserve account for Western Sky from which Western Sky ostensibly funds the loans. *Id.* The reserve account is set up in the name of Western Sky but CashCall maintains and funds it. *Id.*

- After the loan is funded, CashCall is obligated by agreement to purchase the promissory note from Western Sky. CashCall contacts consumers within a day of their loan application. Western Sky does not accept payments from consumers under the scheme. *Id.* at p. 4.

- CashCall pays Western Sky a monthly administration fee. CashCall indemnifies Western Sky against all civil or criminal claims or actions. CashCall is responsible for tracking consumer complaints. *Id.* at p. 4.

There is no reason to believe Defendants used any different business methods and arrangements in North Carolina than they used in New Hampshire. The very same

Western Sky website (westernsky.com) markets the loans nationwide and is cited both in the Complaint herein and in the New Hampshire Order. (*See id.* at p. 3).

The New Hampshire Order respondents including John Paul Reddam, the President and CEO of CashCall who also owns 100% of its stock, Order ¶ 2, p. 2, and WS Funding, LLC, Order ¶ 3, p. 2.[1]

B. Massachusetts "Cease Order" dated March 21, 2013.

The Massachusetts Commissioner of Banks entered a "Cease Order" dated March 21, 2013, in *In re CashCall, Inc. and WS Funding, LLC,* Docket No. 2013-010 (FAC Exhibit 17). The Order states that "WS Funding is a wholly owned subsidiary of CashCall," that "at all relevant times John P. Reddam was and is the sole director and 100% owner of CashCall" and that "Reddam was and is the sole member and 100% owner of WS Funding." Order, ¶¶ 3-7. Further, "CashCall was engaged in the business of servicing small loans on behalf of its wholly owned subsidiary WS Funding" and the loans were void under Massachusetts law. Order, ¶¶ 10-11.

Further, consumer complaints brought to light that "Western Sky Funding, LLC" was involved with "CashCall … servicing the loan made by Western Sky." The loan terms were just like those here – "a loan in the amount of $2,525" with "an origination fee of $75" and "an interest rate of 139.12 % per annum." Order, ¶¶ 23-26. "Delbert Services Corporation" was involved as a debt collector on the loans and "Reddam was

[1] The June 4, 2013 Order discussed above (Exhibit 16 to FAC), cites a prior New Hampshire Banking Department Order regarding Western Sky. *In re Impact Cash, LLC*, "Order to Show Cause and Cease and Desist," New Hampshire Banking Department, No. 10-011, dated September 23, 2011. (Exhibit 24 to FAC). This 2011 Order alleges Webb founded "interconnected business entities." (Order ¶¶ 3, 5).

and is the sole director and 100% owner of Delbert Services." Order, ¶¶ 30-31. Delbert was "conducting its business in an unsafe and unsound manner." Order, ¶ 32. The Order directed CashCall and WS Funding to cease and desist from their loans. Order, ¶¶ 45-47.

C. **West Virginia Litigation.**

This litigation reveals that Reddam and CashCall first proceeded under the subterfuge of a "rent-a-bank" business model, then once that was barred, switched to the "rent-a-tribe" arrangement. West Virginia shut that down as well.

Rent-a-bank case: The State filed a complaint in West Virginia State Court on November 17, 2008. Defendants removed the case to Federal Court, which rejected their contentions by remand order dated March 11, 2009. *West Virginia v. CashCall, Inc.,* 605 F.Supp.2d 781 (S.D.W. Va. 2009). The Court described how the State alleged that CashCall and Reddam participated in an alleged "rent-a-bank" scheme designed to avoid West Virginia usury laws. CashCall entered into a Marketing Agreement with a bank chartered in South Dakota, the First Bank and Trust of Milbank. The State alleged that CashCall's overall involvement rendered it the *de facto* lender of the loans and that the interest rates exceeded the West Virginia usury limit. 605 F.Supp.2d at 783.

In September 2012, the Court after a bench trial awarded over $15 million for violations of the West Virginia Consumer Credit Protection Act and other laws. The Court found that CashCall engaged in unlawful debt collection, required consumers to consent to automatic debits as a condition for loan approval (voiding 292 loans and assessing $3 million in penalties). The Court found that CashCall made loans exceeding the state interest limit of 18%, and awarded four times the assessed interest

(approximately $10 million). *West Virginia v. CashCall, Inc.,* Case No. 08-C-1964, see Trial Court Orders dated Sept. 10, 2012. (Exs. 27 & 28 to FAC). The first Order found:

- Reddam was sole owner and shareholder of CashCall (Order, finding of fact ¶ 1).

- CashCall threatened customers with arbitration proceedings in their debt collection efforts. Order, p. 36, ¶ 60. This conduct violated the West Virginia UDAP statute. *Id.* In one example "CashCall threatened it could take [the consumer's] home, his car, his bank accounts, anything he owned, and threatened him with arbitration"). *Id.* This is overreaching and unlawful conduct going specifically to the arbitration clause itself and supporting Plaintiffs' claim herein that the clause is void.

- CashCall claimed consumers could opt-out of the arbitration but no consumers ever did. Order, p. 36, ¶ 61. This evidence reflects that the opt-out clause is a sham and that CashCall never informed consumers adequately about the clause.

- CashCall sent 262 written threats that it was going to or had started an arbitration against customers. Order, p. 36, ¶ 62. In fact, CashCall had only really started 11 arbitrations, in 2007, and dropped all of them. *Id.* CashCall used the arbitration clause as an unlawful threat in the collections process. Further CashCall did not notify any of the consumers when it had dropped the arbitration proceedings against them. This is further evidence the arbitration procedure contemplated by the CashCall is a sham and unconscionable.

- The Court found that CashCall made "false threats of arbitration." CashCall made numerous threats of litigation which were in bad faith since under the arbitration clause the parties were supposed to arbitrate not litigate. Order, p. 36, ¶¶ 60-66.

See Order found at Exhibit 27 to FAC.

Judge Bloom issued a second order, on the usury claims. (Exhibit 28 to FAC). Judge Bloom noted how the loans ranged from approximately $1000 to $5000 with monthly payments at high APRs. Order, p. 9, ¶ 17. Discovery had shown how CashCall under its contract with the "rent-a-bank" had to indemnify the bank against any claims and bore the entire economic risk. Order, p. 11, ¶ 22-23; p. 19, ¶ 40(h). Thus, the

ostensible bank was just a "front man" for the real lender, which was CashCall. The same applies here with Western Sky and other Webb entities "fronting" for CashCall.[2]

Reddam was a named Defendant along with CashCall in the West Virginia case and was deposed. *See* Order at Ex. 3, pp. 3-4, ¶ 9, p. 11, ¶ 24.[3]

Rent-a-tribe case: This second case was brought against Webb and Payday Financial, LLC d/b/a Lakota Cash, as well as other defendants. Judge Bloom found that Webb's company was organized under the laws of South Dakota, and not a tribal entity. Lakota Cash did not provide evidence that it operated for the benefit of Webb's tribe, as opposed to his individual profit. The loans, processed over the Internet, were performed in West Virginia not on a reservation. *State of West Virginia ex rel. McGraw v. Payday Loan Resource Center, LLC, et al.,* Case No. 10-MISC-372 (Circuit Court of Kanawha County, W. Va., order dated Oct. 24, 2011, at p. 10, finding that "Payday Financial, LLC, is not entitled to tribal sovereign immunity or tribal immunity") (FAC Exhibit 12).

D. *CashCall, Inc. v. CIGPF I Corp.* Case.

In the Complaint in *CashCall, Inc. v. CIGPF I Corp.*, Case No. 1:07-cv-07332-JGK, filed August 16, 2007, Reddam was a co-Plaintiff. (FAC Exhibit 18). The

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[2] In fact Plaintiffs Ms. Johnson and Mr. Brown were both told the loans had gone to CashCall almost immediately after they applied. (Doc. 37-3, Brown Affidavit, Johnson Declaration).

[3] While the State did not seek damages against Reddam, the Court kept him in as a party and the facts reflected his involvement. Reddam personally guaranteed the arrangements between CashCall and its "rent-a-bank" partner. *See* Order at Ex. 3, p. 11, ¶ 23. Reddam personally guaranteed the obligations per his net worth of $25 to $30 million during that time period. *Id.* p. 16, ¶ 37; p. 17, ¶ 40(a).

allegations show how CashCall makes loans itself and how Reddam claims direct involvement in company business. They alleged that CashCall "provides unsecured installment loans to individual customers." *Id.* p. 2, ¶ 7. Allegedly Defendant was wrongfully keeping $6,063,000 in funds that belonged to CashCall, *id.* p. 11, ¶ 37, and so "CashCall cannot fund any new loans." *Id.* p. 11, ¶ 39(a). "CashCall has had to shut down its website and stop taking loan applications." *Id.* p. 12, ¶ 39(g). Employees were "servicing loans in a $700 million portfolio." *Id.* p. 12, ¶ 39(i). Plaintiffs also claimed that Defendant's misconduct was jeopardizing a $530 to $710 million valuation CashCall had received. *Id.* p. 12, ¶ 39(a). Clearly then CashCall is a large enterprise which actively engages in payday loans.

E. *Scott v. Delbert Services* Case.

In her Complaint filed August 28, 2012, Ms. Scott sought to sue a collection agency, Delbert Services Corp. for alleged violations of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et seq*. including by subjecting her to a seemingly endless series of collection calls. *Agnes Scott v. Delbert Services Corp., et al.,* E.D. Wisc. Case No. 12-C-0871, Complaint, ¶¶ 22-78. Delbert filed a motion to dismiss asserting that Ms. Scott was a debtor on "a Note entered into on October 13, 2011 with Western Sky Financial, LLC…." (Brief filed at Doc. 7 in that case, p. 2). The "Note" dated October 11, 2011 includes terms similar to those found in Plaintiffs' contracts herein. (See selected filings from the Scott case attached as **Exhibit 1**).

Delbert claimed that Western Sky assigned its interest in the Note to "WS Funding, LLC" on October 17, 2011; WS Financial, LLC assigned the servicing rights to

CashCall, Inc. at the same time; Cuzco Capital Investment Management, LLC purchased the Note in March 2012 and was the current holder; and Cuzco had assigned the servicing rights to Delbert. Brief at Doc. 7, p. 2. Delbert claimed it could invoke the Western Sky arbitration clause and so the Court had to dismiss the case. *Id.*, p. 3. Delbert filed a Declaration from CashCall employee Sean Bennett supporting its assertions. Doc. 9.

Plaintiff filed an opposition brief contesting the arbitration agreement. Brief dated Oct. 12, 2012, Doc. 12, p. 1. In its Reply, Delbert submitted a Declaration of Martin Webb. (See Reply dated Oct. 25, 2012, Doc. 13 and Webb Dec. at Doc. 14 therein). Webb averred under penalty of perjury that "Western Sky Financial, LLP assigned the Note to Cash Call, LLC on October 17, 2011." Webb Dec. ¶ 10. Webb also claimed that Ms. Scott was bound by "electronically signing the Note in strict compliance with the Electronic Signatures in Global and National Commerce Act (E-Sign Act)." Webb Dec. ¶ 7. Webb did not seek to explain how the company could seek to enforce Ms. Scott's clicking a website box as a legally enforceable signature, by invoking a United States statute, while at the same time claiming his company cannot be sued under U.S. law.[4]

In the *Scott* action, CashCall and Webb contradict each other:

> Bennett Dec. ¶ 2: "WS Funding, LLC bought the note executed between Western Sky Financial, LLC and Agnes Scott ... from Western Sky Financial, LLC on October 17, 2011 and assigned the Note service to CashCall."

[4] This is a specific basis to allow the Court to declare the arbitration clause void and unenforceable, as well as all other clauses in the "contract" – Western Sky cannot rely on a federal statute to deem the consumer assented, and at the same time declare federal law does not apply and Tribal law alone applies.

> Webb Dec. ¶ 10: "Western Sky Financial, LLP assigned the Note to Cash Call, LLC on October 17, 2011."

(Both documents are attached hereto as part of Ex. 1). Obviously Western Sky could not simultaneously assign its note to CashCall and WS Funding, LLC. Noting this deficiency, by Order dated March 21, 2013 (Doc. 16), Judge Lynn Adelman found:

> [I]mmediately we run into a problem when we try to identify the entity to whom Western Sky made the assignment. Western Sky's owner states that Western Sky assigned the "loan in its entirety" to an entity known as CashCall, Inc. (Webb Decl. ¶ 10.) However, Sean Bennett, who describes himself as the "business analyst manager" of CashCall, Inc., offers conflicting testimony. He states that Western Sky assigned its rights under the agreement to an entity known as WS Funding, LLC, rather than to CashCall. (Decl. of Sean Bennett ¶ 2.) According to Bennett, WS Funding then assigned the "Note service" (whatever that is) to CashCall. (Id.) Bennett then tells us that WS Funding sold its rights under the agreement to an entity known as Cuzco Capital Investment Management, LLC. (Id. ¶ 3.) However, Bennett does not explain how he came to know that WS Funding assigned its rights to Cuzco—was he told that by someone at WS Funding, did he see a document memorializing the assignment, or what?

See Order dated March 21, 2013 (attached as part of Ex. 1). Thus in very recent filings, co-Defendants Western Sky and CashCall contradict each other on how their business arrangement works. This evidence supports adding WS Funding, LLC as an additional Defendant. It also supports the contention that the business arrangement is a sham.

F. Other State Agency Claims and Orders.

Plaintiffs have compiled a list of state agency proceedings and orders pertaining to CashCall and Western Sky. (This is attached as Exhibit 3 to Plaintiffs' brief in support of their motion for class certification, filed herewith). As shown in that list, eleven different states (California, Colorado, Georgia, Illinois, Maryland, Massachusetts, Missouri, New Hampshire, Oregon, Washington State, West Virginia), and the FTC have

declared Western Sky and/or CashCall's practices unlawful. With knowledge of all of these orders finding their enterprise unlawful, Defendants have continued it regardless.

G. *Inetianbor* matter.

Mr. Inetianbor is currently in arbitration over his Western Sky/CashCall loan which he received in Florida. The progress of this arbitration to date provides compelling evidence of the illegitimacy and unconscionability of the arbitration clause. Among other things, it has become apparent that there are no "consumer dispute rules" and the statement in the Western Sky loan agreement that such rules exist is false. The first hearing in the arbitration occurred on Friday, June 21, 2013. The arbitrator tape-recorded the proceedings, as did Mr. Inetianbor with the arbitrator's consent. Plaintiffs believe the ongoing Inetianbor matter raises compelling evidence of the unconscionability of the purported arbitration clause and process.

III. QUESTION PRESENTED

Should this Court allow the complaint to be amended?

IV. ARGUMENT.

Under Rule 15(a)(2), "a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires."[5] "Leave to amend will be denied only if (1) the amendment would

[5] *See Foman v. Davis,* 371 U.S. 178, 182 (1962); *Booth v. Maryland*, 337 Fed.Appx. 301, 312 (4th Cir. 2009) (per curiam); *Simmons v. United Mortgage and Loan Investment, LLC*, 634 F.3d 754, 769 (4th Cir. 2011); *Alexander v. City of Greensboro*, 762 F.Supp.2d 764, 779 (M.D.N.C. 2011) (leave to amend freely given when justice so requires); *Robinson v. Equifax,* No. 4:10-CV-84-BO, E.D.N.C. Order filed Jan. 26, 2011 (noting "Rule 15's liberal spirit of granting amendments to the pleadings"); *Gambelli v.*

prejudice the opposing party, (2) there is bad faith on the part of the moving party, or (3) the amendment would be futile."[6]

Rule 20 governs joinder of additional parties. In construing the Rule, "the impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties and remedies is strongly encouraged." *King v. Ralston Purina Co.*, 97 F.R.D. 477, 479-80 (W.D.N.C. 1983) (quoting *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 724 (1966)).[7]

A. The Facts Support Adding Reddam and WS Funding as Defendants.

The facts recited above clearly support adding Reddam and WS Funding as Defendants. Reddam was personally involved in the unlawful scheme and dominates and controls CashCall. WS Funding is purportedly a corporate entity which is involved in the loans. Accordingly it is proper to add them to the case.

United States, 904 F.Supp. 494, 498-99 (E.D. Va. 1995) (motions to amend should be granted liberally), *aff'd*, 87 F.3d 1308 (4th Cir. 1996).

[6] *Alexander,* 762 F.Supp.2d at 779 (M.D.N.C. 2011) (*citing Laber v. Harvey*, 438 F.3d 404, 426 (4th Cir. 2006) (en banc)); *Equal Rights Center v. Niles Bolton Assocs.*, 602 F.3d 597, 603 (4th Cir. 2010); *Davis v. Piper Aircraft Corp.*, 615 F.2d 606, 613 (4th Cir. 1980); *Ward Electronics Service, Inc. v. First Commercial Bank*, 819 F.2d 496, 497 (4th Cir. 1987).

[7] Rule 20(a)'s requirement that claims asserted against joined parties arise out of the same transaction or occurrence permits all reasonably related claims for relief by or against different parties to be tried in a single proceeding. *Saval v. BL Ltd.*, 710 F.2d 1027, 1031 (4th Cir. 1983); *Rumbaugh v. Winifrede R.R. Co.,* 331 F.2d 530, 537 (4th Cir. 1964) (stating that Rule 20(a) serves "the salutary principles of avoiding a multiplicity of suits and expediting the final determination of litigation").

B. The Facts Support Adding A Claim Based on the EFTA.

The Electronic Fund Transfer Act ("EFTA"), 15 U.S.C. § 1693 *et seq.* states that its "primary objective … is the provision of individual consumer rights." 15 U.S.C. § 1693(b). *See also* Federal Reserve Regulation E, 12 C.F.R. § 205. Under the EFTA, any action may be brought "within one year from the date of the occurrence of the violation." 15 U.S.C. § 1693m(g). Mr. Brown got his loan on July 5, 2012 and made payments for about 3 months. (See Docs. 1-2, 37-3). Therefore his claim is within the EFTA statute.

Under 15 U.S.C. § 1693k(1), "No person may … condition the extension of credit to a consumer on such consumer's repayment by means of preauthorized electronic fund transfers…." Defendants violated this statute because they conditioned loans on repayment by means of preauthorized electronic fund transfers.[8] *See O'Donovan v. Cashcall, Inc.*, No. C 08-03174 MEJ, 2011 WL 5573845 (N.D. Cal. Nov. 14, 2011), Order at p. 22 (finding common class issue regarding "CashCall's practice of requiring borrowers to consent to EFT payments").[9]

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[8] *See generally* "Collecting Consumer Debts: The Challenges of Change," Consumer Federation of America (June 20, 2007) (**Exhibit 2**), at p. 5: "The FTC Credit Practices Rule outlaws credit contract provisions analogous to check holding, such as wage assignments…. The Electronic Funds Transfer Act prohibits conditioning the extension of credit on requiring electronic payment of debts for periodic payment loans…." The EFTA prohibits any person "to require, as a condition of the extension of credit, repayment by the means of preauthorized electronic fund transfer. Under the Federal Reserve's Reg E rules, this prohibition applies to recurring electronic payments." *Id.*, p. 34. Defendants' business model is based on sucking consumers' bank accounts dry every month when they receive employment pay or disability or other benefits and access to their checking accounts electronically is vital to the enterprise.

[9] Defendants also violated the EFTA, because a "preauthorized electronic fund transfer from a consumer's account may be authorized by the consumer only in writing,

The EFTA specifically contemplates consumers being able to bring a class action. 15 U.S.C. § 1693m(a). Because Defendants violated the Act, they are subject to EFTA liability under its private right of action provision including allowance of a class action. In this regard any purported class action ban flouts these substantive federal statutory provisions clearly contemplating a civil class action remedy.

C. <u>The Facts Support A RICO Claim.</u>

Plaintiffs do not allege a RICO claim lightly. However, Plaintiffs respectfully show that the claim is appropriate on the unique facts herein, in light of 1) the newly discovered evidence and findings from the multiple state agency proceedings and FTC proceedings, and 2) the fact that RICO has a little-known provision which expressly makes egregiously usurious lending a violation.

"[T]he RICO statute provides that its terms are to be 'liberally construed to effectuate its remedial purposes.'" *Boyle v. United States*, 556 U.S. 938, 129 S.Ct. 2237, 2242 (2009) (quoting RICO, Pub. L. No. 91-452, § 904(a), 84 Stat. 947 (1970)). See generally *AARP v. American Family Prepaid Legal Corp., Inc.*, 604 F.Supp.2d 785, 790 (M.D.N.C. 2009); *R.J. Reynolds Tobacco Co. v. S K Everhart, Inc.*, No. 1:00CV00260, 2003 WL 21788858, at *3-4 (M.D.N.C. July 31, 2003)). Plaintiffs have brought RICO actions in the past on facts involving claims of usury and excessive fees. *See In re Community Bank of Northern Virginia*, 418 F.3d 277, 280-81 (3rd Cir. 2005) (RICO

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and a copy of such authorization shall be provided to the consumer when made." 15 U.S.C. § 1693e(a). Defendants violated this statute because the void unsigned purported loan agreement did not constitute a proper written signed preauthorization.

class action based on alleged lending scheme claiming defendants violated usury statute); *Drennen v. PNC Bank Nat'l Ass'n (In re Cmty. Bank of Northern Virginia),* 622 F.3d 275, 280 (3rd Cir. 2010) (same); *Young v. Wells Fargo & Co.*, 671 F.Supp.2d 1006, 1027 (S.D. Iowa 2009) (excessive fees).

In this regard, RICO includes a special provision expressly meant to trigger the statute in cases involving egregiously usurious lending. 18 U.S.C. § 1962 provides:

> (a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce....
>
> (b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.
>
> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.
>
> (d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

(Emphasis added). In this case, there is no doubt that Western Sky (and Plaintiffs allege, CashCall and the other Defendants as well, acting in concert and as alter egos), made loans that were unlawful debts. They also, it is alleged, sought to collect on and did

collect on those unlawful debts, including by taking payments on the loans from both of the named Plaintiffs. An "unlawful debt" is defined by 18 U.S.C. § 1961(6) as:

> a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate.

(Emphasis added). Thus, RICO stringently defines an "unlawful debt" for purposes of the statute, as a very high-interest debt indeed – at least two times the usury limit. But that is precisely the case here.[10] Defendants have violated state usury laws and state small loan and consumer loan laws which provide for criminal penalties and Defendants' violations of the usury laws provide predicates to RICO liability. The fact that Defendants have been violating state usury law has been known to them for years as they have been banned in multiple states, however this has not deterred Defendants from continuing their enterprise.

[10] N.C. Gen. Stat. § 24-1.1 described the types of transactions subject to usury restrictions and the maximum interest rate allowed by law. A loan for $25,000 or less must use an interest rate of 16% or less. The interest rates herein were far more than two times this limit. N.C. Gen. Stat. § 24-1.1(a)-(c). During the pertinent times, Defendants' interest rates were at least twice the interest permitted. The loans were incurred in connection with the business of lending money at a rate at least twice the enforceable rate. Furthermore, during the pertinent times, Defendants' interest rates were at least twice the interest permitted under laws of numerous other States in which the Defendants made their loans. This is evidenced from the findings of the state agencies in the states that have made findings against CashCall or Western Sky.

Defendants' violations of the EFTA constitute additional criminal acts which provide predicates to RICO liability.[11] Furthermore, wire fraud can be a predicate to RICO liability as well; Defendants extensively used telephones and the internet to perpetrate their scheme. In this case, particularly with the findings by state agencies that CashCall is using Western Sky as a "front" to evade state law, there are good grounds for a RICO claim. Working together, the companies have engaged in a RICO enterprise. *See Young v. Wells Fargo & Co.*, 671 F.Supp.2d at 1027 (S.D. Iowa, 2009):

> A plaintiff asserting a RICO claim must plead that the pattern of racketeering activity occurred through the "conduct of a RICO enterprise." *Sedima*, 473 U.S. at 496, 105 S.Ct. 3275. The Complaint sets forth that Wells Fargo and the property inspection vendors formed an association-in-fact enterprise which fulfills the statutory requirements of a RICO enterprise. Wells Fargo argues that Plaintiffs cannot establish a RICO claim based on the late fees because the alleged RICO enterprise only encompasses the property inspections fees. As an initial matter, Wells Fargo misconstrues Plaintiffs' allegations. Plaintiffs pleaded that Wells Fargo was engaged in a cohesive scheme in which the predicate acts of mail and wire fraud involved misrepresentations of both excessive late fees and inspection fees.

RICO protects the public from those who would unlawfully use an enterprise as a vehicle through which unlawful activity is committed. *Id.* at 1027-28 (citing *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 164-65 (2001); *United States v.*

[11] Under the EFTA, 15 U.S.C. § 1693n, a defendant who knowingly and willfully gives false or inaccurate information or fails to provide information which he is required to disclose by the EFTA or who otherwise fails to comply with the EFTA, shall be fined not more than $5,000 or imprisoned not more than one year, or both. Defendants in their lending practices violated this statute by leading consumers and banks alike to believe that their loans were proper and that the electronic funds transfers they sought and obtained were on legitimate lawful loans.

Turkette, 452 U.S. 576, 591 (1981); *Nat'l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 259 (1994)).[12]

> An act of racketeering under RICO commonly is referred to as a "predicate act." *Maiz v. Virani*, 253 F.3d 641, 671 (11th Cir.2001). A "pattern" of racketeering activity is shown when a racketeer commits at least two distinct but related predicate acts. *See Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 n. 14, 105 S.Ct. 3275, 87 L.Ed.2d 346 (1985). While private litigants may recover for racketeering injuries under 18 U.S.C. § 1964(c), their injuries must "flow from the commission of the predicate acts." 473 U.S. at 497, 105 S.Ct. 3292.

Walters v. McMahen, 684 F.3d 435, 440 (4th Cir. 2012). Here, as noted, RICO expressly provides that collection of an unlawful debt is a violation. The loans were far over twice the usury limit in North Carolina, and the facts regarding the orders in other states show the same there. In addition, Defendants also committed multiple acts of wire fraud, by their communications and collection efforts. The Western Sky business was a "front" for CashCall, the loan agreement contains false statements, and the business was a scheme to

[12] Community State Bank was later renamed First Bank of Milbank, South Dakota. First Bank was CashCall's bank partner before CashCall moved on to "rent-a-tribe." In a payday lending case, the bank contended that the plaintiffs, who had not brought a RICO claim, could do so if they wanted. *See Community State Bank v. Strong*, 651 F.3d 1241, 1259 (11th Cir. 2011): "We can discern at least one potential basis for federal jurisdiction over the Bank's FAA petition. The dispute between Strong and the Bank could support a potential Federal Racketeer Influenced and Corrupt Organizations ("Federal RICO") claim against the Bank, that would be both well pled and non-frivolous, and which would state a federal issue on its face. Federal RICO prohibits conducting the affairs of an enterprise affecting interstate commerce through the collection of an 'unlawful debt,' that is, charging a usurious rate that is more than twice the enforceable rate under either state or federal law, or conspiring to do the same. 18 U.S.C. §§ 1961-1962."

defraud. If Defendants had disclosed the loans were illegal as they were required to do,[13] the Plaintiffs would not have taken them.[14]

Finally, for the same reasons that there is good cause to amend to add a federal RICO claim, so too can a claim be added under N.C. Gen. Stat. § 75D-1-14. *AARP v. American Family Prepaid Legal Corp., Inc.*, 604 F.Supp.2d 785, 797 (M.D.N.C. 2009) (denying motion to dismiss NC RICO claim).

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[13] *See* original Complaint ¶ 136, at p. 28 (Doc. 1). A consumer lender in violation of the Consumer Finance Act has the obligation to disclose that its loans violate the Act. *Odell v. Legal Bucks, LLC*, 192 N.C. App. 298, 319-20, 665 S.E.2d 767, 781 (2008); *State ex rel. Cooper v. NCCS Loans, Inc.*, 174 N.C. App. 630, 641, 624 S.E.2d 371, 378 (2005). In *Cooper* the court noted: "We observe that [the] defendants did not inform consumers that they were executing documents in violation of North Carolina's Consumer Finance Act. On all the facts of this case, we conclude that [the] defendants' contracts 'had the capacity to deceive.'" *Id.* at 640-41, 624 S.E.2d at 378 (quoted in *Odell*). In *Odell* the court found: "Although Defendants disclosed the terms of the advance to Plaintiff, Defendants did not inform Plaintiff that she was executing a contract that violated the Consumer Finance Act. Therefore, Defendants' conduct 'had the capacity to deceive,' as Defendants did not disclose the actual nature of the transaction to Plaintiff. Further, Defendants' contract with Plaintiff for an illegal advance violated 'the paramount public policy of North Carolina to protect North Carolina resident borrowers through the application of North Carolina interest laws.' N.C. Gen. Stat. § 24-2.1(g) (2007). On these facts, we hold that Defendants committed unfair and deceptive trade practices as a matter of law." 665 S.E.2d at 781. Here, the "actual nature of the transaction" as Defendants were well aware, was a prohibited usury loan, but Defendants hid its actual nature under the "front" of Western Sky and Tribal law.

[14] *See American Chiropractic v. Trigon Healthcare*, 367 F.3d 212, 233 (4th Cir. 2004) (discussing standard for RICO detrimental reliance and that mail and wire fraud qualify as racketeering activity under 18 U.S.C. § 1961(1)); *Caldwell v. Collins Entertainment Co.*, 199 F.3d 710, 722 (4th Cir. 1999) (video poker enterprise alleged to violate state law; court noted how RICO wire fraud claim can be based on proof of a scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises); *Eplus Technology, Inc. v. Aboud,* 313 F.3d 166, 181-83 (4th Cir. 2002) (affirming verdict finding RICO mail and wire fraud in computer credit scheme); *Southwood v. Credit Card Solution,* No. 7:09-CV-81-F (E.D.N.C. Oct. 23, 2012) (credit repair enterprise found to violate RICO).

D. The Facts Provide Additional Support for Striking the Arbitration, Forum Selection and Choice of Law Clauses.

Plaintiffs should be allowed to amend the Complaint to strengthen their claims that the arbitration, choice of law and forum clauses are all void and unenforceable. New Hampshire has recently found that the arrangement by which CashCall makes loans via Western Sky is a sham and, in that Order's words, a "front." The provisions in the loan agreement regarding Tribal law and a Tribal forum applying and arbitration are all hinged on the assumption that Western Sky is a legitimate business. Because this is not in fact so, there is no reasonable relationship[15] between the choice of law and forum clauses and the underlying internet loan and no reason why this Court cannot hear the matter here.

Further, as noted there is evidence that CashCall has misused its powers under loan arbitration clauses in the past by threatening false arbitrations (the West Virginia action), and that Western Sky has done so as well by sending out bogus garnishment papers presumably under its small claims court provision in the arbitration agreement (the FTC action). In addition, the currently ongoing Inetianbor arbitration is revealing how indeed, there are no "consumer dispute rules," there is no Tribal-approved or Tribal Court-authorized arbitration procedure, and the parties to the Inetianbor arbitration are literally "making up the rules as they go along." Plaintiffs submit that the known facts suffice for the Court to declare the arbitration clause and other clauses of the loan agreements void, or, at the minimum allow the Plaintiffs to undertake discovery.

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[15] *See Cable Tel. Servs., Inc. v. Overland. Contr'g, Inc.*, 154 N.C. App. 639, 642, 574 S.E.2d 31, 33 (2002) (forum clause is unenforceable where "the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice").

CONCLUSION

Plaintiffs respectfully request that their motion to amend be granted. A proposed order is attached as **Exhibit 3.**

Respectfully submitted, this the 26th day of June, 2013.

/s/ Aaron F. Goss
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CERTIFICATE OF SERVICE

I hereby certify that on June 26, 2013, I electronically filed the foregoing PLAINTIFFS' BRIEF IN SUPPORT OF MOTION TO AMEND with the Clerk of Court using the CM/ECF system which will send notification of such to all counsel of record.

This the 26th day of June, 2013.

/s/ Aaron F. Goss
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LIST OF EXHIBITS

1. Filings from *Agnes Scott v. Delbert Services Corporation et al.,* E.D. Wisc. Case No. 12-C-0871 – Agnes Scott loan agreement, Bennett Declaration, Webb Declaration, Order filed March 21, 2013.

2. "Collecting Consumer Debts: The Challenges of Change," Consumer Federation of America (June 20, 2007).

3. Proposed order.