

**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.

**DEFENDANTS' BRIEF IN  
SUPPORT OF MOTION TO  
DISMISS**

Defendants move to dismiss this action in its entirety for improper venue pursuant to Rule 12(b)(3) of the Federal Rules of Civil Procedure; dismiss or stay this action pursuant to the doctrine of tribal exhaustion; dismiss certain of Plaintiffs' claims pursuant to Rule 12(b)(6); or dismiss certain Defendants for lack of personal jurisdiction pursuant to Rule 12(b)(2).

**NATURE OF THE CASE AND STATEMENT OF THE FACTS**

Plaintiffs bring this putative class action against their lender Western Sky, its owner Martin Webb, the loan servicer CashCall, and the twenty-one remaining Defendants (the "Uninvolved Entities"), whose only link to this litigation is that they are owned by Mr. Webb. Plaintiffs applied for, and received, installment loans from Western Sky and now seek to recover damages for receiving exactly what they bargained for. And despite the plain notice in each loan contract stating

that it was subject to the exclusive laws and jurisdiction of the Cheyenne River Sioux Tribe, Plaintiffs brought this case in North Carolina federal court contending that North Carolina law entitles them to actual and treble damages, declaratory relief, restitution, attorneys' fees, and prejudgment interest.

Plaintiffs' Complaint contains nine claims for relief: (1) declaratory judgment invalidating an arbitration agreement;<sup>1</sup> (2) violation of the North Carolina Consumer Finance Act; (3) usury; (4) unfair and deceptive trade practices; (5) unjust enrichment; (6) alter ego liability; (7) fraudulent conveyance; (8) civil conspiracy; and (9) violation of the Truth in Lending Act.

In support of these claims, Plaintiffs allege that Defendants<sup>2</sup> made usurious "payday" loans to Plaintiffs pursuant to loan agreements (the "Loan Agreements" (Exs. 1, 2)). (Compl. ¶ 1). Plaintiffs discuss the alleged evils of the payday lending industry at length in their Complaint. (*See id.* ¶¶ 44-73). Plaintiffs' other allegations demonstrate that they did not, in fact, receive payday loans from Western Sky. Instead, Plaintiffs entered into contracts for installment loans. (*See* Compl. ¶ 66 (discussing payment of loan in "scheduled monthly installments"));

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<sup>1</sup> Defendants expressly reserve their right to seek arbitration under the agreements at issue. Defendants will file a Motion to Stay and Compel Arbitration contemporaneously with this Motion.

<sup>2</sup> Plaintiffs allege that "Defendants" loaned the funds to Plaintiffs, but each Loan Agreement plainly provides that the agreement is between Western Sky and a Plaintiff. (Ex. 1 at 1; Ex. 2 at 1).

Compl. Ex. 5 (Western Sky website stating that it is not a payday lender, but an installment lender); Exs. 1, 2 (providing for monthly payments)).

Both Loan Agreements unambiguously state that Western Sky is a “lender organized under and authorized by the laws of the Cheyenne River Sioux Tribal Nation and the Indian Commerce Clause of the United States of America,” and that neither the Loan Agreements nor Western Sky “is subject to the laws of the United States.” (Ex. 1 at 1, 3; Ex. 2 at 1, 3). The Loan Agreements provide that they are governed by the laws of the Cheyenne River Sioux Tribe. (*Id.*). In six separate provisions of her Loan Agreement,<sup>3</sup> Ms. Johnson agreed that any dispute under the agreement would be decided by an arbitration panel, or in the alternative a tribal judge, of the Cheyenne River Sioux Tribal Courts. (Ex. 1). The Loan Agreement allows Ms. Johnson to appear at arbitration by telephone or video conference without traveling to the reservation. (*Id.* at 4). Likewise, Mr. Brown agreed to arbitrate his claims before AAA, JAMS, or tribal arbitrators. (Ex. 2 at 2). The Loan Agreement allows Mr. Brown to choose to arbitrate within thirty miles of his home or on the reservation. (*Id.*).

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<sup>3</sup> Although there are differences in the provisions in the two Loan Agreements, each Loan Agreement refers to a judicial or arbitral forum in Cheyenne River Sioux Tribal Courts in paragraphs entitled: Governing Law; Agreement to Arbitrate; Choice of Arbitrator; Waiver of Rights; Applicable Law and Judicial Review; and Small Claims Exception. These paragraphs are collectively the “Forum Provisions.”

## **QUESTIONS PRESENTED**

- I. WHETHER THE PARTIES' PRESUMPTIVELY VALID FORUM-SELECTION CLAUSE REQUIRES DISMISSAL OF THIS ACTION FOR IMPROPER VENUE?
- II. WHETHER THE DOCTRINE OF TRIBAL EXHAUSTION REQUIRES THE DISMISSAL OF THIS ACTION TO ALLOW THE TRIBAL COURT TO EXAMINE ITS OWN SUBJECT MATTER JURISDICTION?
- III. WHETHER PLAINTIFFS HAVE FAILED TO STATE CLAIMS FOR ALTER EGO LIABILITY, FRAUDULENT TRANSFER, CIVIL CONSPIRACY, AND UNJUST ENRICHMENT?
- IV. WHETHER THIS COURT MAY EXERCISE PERSONAL JURISDICTION OVER THE TWENTY-ONE NAMED DEFENDANTS FOR WHOM PLAINTIFFS HAVE NOT ALLEGED ANY CONTACTS WITH THE FORUM STATE?

## **ARGUMENT**

- I. BECAUSE PLAINTIFFS EXPRESSLY AGREED TO VENUE IN THE TRIBAL COURT, DEFENDANTS ARE ENTITLED TO DISMISSAL OF THE COMPLAINT FOR IMPROPER VENUE.

In their loan contracts, Plaintiffs agreed that, to the extent their claims could not be arbitrated, the Cheyenne River Sioux Tribal Court was the exclusive judicial forum for claims arising out their loans. (Ex. 1 at 4; Ex. 2 at 4). Defendants move to enforce the parties' choice of venue and, because this Court lacks authority to transfer the action to the tribal court, dismiss this action in its entirety for improper venue. *See* Fed. R. Civ. P. 12(b)(3); *NC Contracting, Inc. v. Munlake Contractors, Inc.*, No. 5:11-CV-766-FL, 2012 WL 5303295, at \*7 (E.D.N.C. Oct. 25, 2012)

(dismissing all claims arising from parties' agreement where court lacked authority to transfer venue).

“When venue is challenged on a motion to dismiss, the plaintiff bears the burden of showing that venue is proper.” *Jackson v. Leake*, No. 1:05CV00691, 2006 WL 2264027, at \*9 (M.D.N.C. Aug. 7, 2006). Forum-selection clauses are presumed valid and enforceable. *Allen v. Lloyd's of London*, 94 F.3d 923, 928 (4th Cir. 1996) (citing *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972)). Plaintiffs may only avoid dismissal for improper venue if they can make a “clear showing” that the Forum Provisions are unreasonable. *Id.* To prove that the forum-selection clause is unreasonable, Plaintiffs must show that (1) the forum-selection provision itself “was induced by fraud or overreaching”; (2) they will be deprived of their day in court “because of the grave inconvenience or unfairness of the selected forum”; or (3) “enforcement would contravene a strong public policy of the forum state.” *See id.*<sup>4</sup> Plaintiffs cannot meet this burden.

A. Plaintiffs Have Not Even Alleged That the Forum Provisions Were Procured by Fraud or Overreaching.

“To show that the forum-selection clause is unreasonable based on fraud, Plaintiff[s] would need to show that inclusion of the forum-selection clause *itself*

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<sup>4</sup> *Allen* articulates a third factor, “the fundamental unfairness of the chosen law,” that appears to concern choice-of-law provisions, rather than the choice-of-venue provision at issue here. *See Allen*, 94 F.3d at 928.

was the product of fraud or coercion.” *Bassett Seamless Guttering, Inc. v. GutterGuard, LLC*, No. Civ. 1:05CV00184, 2006 WL 156874, at \*4 (M.D.N.C. Jan. 20, 2006) (unpublished); *see Allen*, 94 F.3d at 928. Plaintiffs do not contend that their Loan Agreements, let alone the Forum Provisions themselves, were procured by fraud or overreaching. Plaintiffs generally contend that the “Cheyenne River Sioux Tribal Nation is a biased and improper arbitral forum,” and that the Forum Provisions are ambiguous. (Compl. ¶¶ 110, 125). These allegations are insufficient to show that the Forum Provisions themselves—which were set forth in six separate places—were procured by fraud or overreaching. To the contrary, Plaintiffs had notice of the terms of the contracts and “presumably retained the option of rejecting the contract[s] with impunity.” *See Carnival Cruise Lines, Inc. v. Schute*, 499 U.S. 585, 595 (1991).

Plaintiffs cannot avoid their forum-selection clauses by arguing that because the Loan Agreements are allegedly illegal, enforcing the choice of forum would constitute Plaintiffs’ consent to a crime. (*See* Compl. ¶¶ 91-94). That argument would require this Court to consider the merits of Plaintiffs’ claims before reaching the threshold question of venue. In a similar case, a federal district court in Illinois rejected this argument, holding that “the alleged illegality of the Loan Agreement has no bearing on the validity of the forum selection clause.” *See Jackson v. Payday Fin., LLC*, No. 11 C 9288, 2012 WL 2722024, at \*2 (N.D. Ill. July 9,

2010); accord *Tuscan Downs, Inc. v. Culinary Sch. of Fort Worth, LLC*, No. 5:08-CV-584F(3), 2010 WL 3394768, at \*4 (E.D.N.C. Aug. 26, 2010) (distinguishing enforceability of contract overall from validity of forum-selection clause). The *Jackson* court then granted the defendants' Rule 12(b)(3) motion, holding that the plaintiffs had failed to show that their "freely contracted choice to litigate their dispute in the Tribal forum" should not be enforced. 2012 WL 2722024, at \*3.

B. The Forum Provisions Do Not Deprive Plaintiffs of an Opportunity to Participate in the Adjudication of Their Claims.

Second, Plaintiffs cannot show that enforcement of the Forum Provisions would "deprive[] [them] of an opportunity to participate in the adjudication" of their claims. See *Mercury Coal & Coke, Inc. v. Mannesmann Pipe & Steel Corp.*, 696 F.2d 315, 319 (4th Cir. 1982). To this end, Plaintiffs assert that enforcement of the Forum Provisions would require them to travel to the reservation in South Dakota. (Compl. ¶ 131). This allegation is insufficient to demonstrate that litigation in the tribal court would be so "gravely inconvenient" as to override the parties' forum-selection clause. See *Allen*, 94 F.3d at 928 (quotation omitted). Because this case is founded on diversity of citizenship, "no matter which forum is selected, one side of the other will be burdened with bringing themselves and their witnesses from far away." *Brock v. Entre Computer Ctrs., Inc.*, 933 F.2d 1253, 1258 (4th Cir. 1991). As such, "the expense of litigation is insufficient to

invalidate a forum-selection clause.” *Gita Sports Ltd. v. SG Sensortechnik GmbH & Co. KG*, 560 F. Supp. 2d 432, 439 (W.D.N.C. 2008).

The fact that the Loan Agreements require that Plaintiffs’ disputes be litigated or arbitrated in a foreign court is likewise insufficient to show grave inconvenience. The Fourth Circuit has enforced forum-selection clauses requiring litigation overseas. *See, e.g., Albemarle Corp. v. AstraZeneca UK Ltd.*, 628 F.3d 643, 651-53 (4th Cir. 2010) (United Kingdom); *Sucampo Pharm., Inc. v. Astellas Pharma, Inc.*, 471 F.3d 544, 547 (4th Cir. 2006) (Japan); *see also Ada Liss Grp. (2003) Ltd. v. Sara Lee Corp.*, No. 1:06CV610, 2010 WL 4904666, at \*3 (M.D.N.C. Nov. 24, 2010) (France). Contrary to Plaintiffs’ assertions, the Cheyenne River Sioux Tribal Courts do exist and provide Plaintiffs a viable forum to assert their consumer claims. *See, e.g., Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 322-23 (2008) (deciding appeal from Cheyenne River Sioux Tribal Courts involving consumer claims). For these reasons, Plaintiffs cannot show that enforcement of the Forum Provisions would deprive them of their day in court.

C. The Forum Provisions Do Not Offend North Carolina Public Policy.

Plaintiffs cannot avoid the Forum Provisions on public policy grounds. *See Allen*, 94 F.3d at 928. A federal court sitting in diversity applies federal law to determine the enforceability of forum-selection clauses. *Albemarle Corp.*, 628



F.3d at 652. While North Carolina has declared that forum-selection clauses requiring litigation or arbitration outside the state are unenforceable as to contracts formed in North Carolina, N.C. Gen. Stat. § 22B-3, that statute does not render a forum-selection clause unreasonable under federal law. *See James C. Greene Co. v. Great Am. E&S Ins. Co.*, 321 F. Supp. 2d 717, 721 (E.D.N.C. 2004) (plaintiff cannot avoid forum-selection clause “solely based” on section 22B-3). Moreover, to the extent section 22B-3 purports to impose state procedural rules on this Court, the statute is preempted by federal law. *See Albemarle Corp.*, 628 F.3d at 652.

First, Plaintiffs cannot show that section 22B-3 applies to their Loan Agreements. Section 22B-3 “applies only when the contract was entered into in North Carolina.” *NC Contracting*, 2012 WL 5303295, at \*6 n.8 (quotation omitted). The Loan Agreements provide that they are considered executed on the reservation. (Compl. Exs. 1, 2). In *NC Contracting*, a North Carolina federal court noted that section 22B-3 did not apply to a contract that recited it was executed in Missouri. 2012 WL 5303295, at \*6 n.8. A South Dakota federal district court recently held that contracts similar to Plaintiffs’ Loan Agreements were formed on the Cheyenne River Sioux Reservation. *See FTC v. Payday Fin., LLC*, \_\_ F. Supp. 2d \_\_, 2013 WL 1309437, at \*10 (D.S.D. Mar. 28, 2013).

Second, even assuming that Plaintiffs’ contracts were executed in North Carolina, that fact alone would not preclude enforcement of the Forum Provisions.

*See Cable-La*, 104 F. Supp. 2d at 576; *Gita Sports*, 560 F. Supp. 2d at 440-41. In any event, “the balance of the *Allen* factors favors the enforcement of the clause.” *Gita Sports*, 560 F. Supp. 2d at 441. As such, Plaintiffs cannot make the clear showing required to defeat the Forum Provisions. Because this Court’s authority under 28 U.S.C. § 1404 permits transfer of venue only to another federal district court, Defendants are entitled to dismissal pursuant to Rule 12(b)(3). *See Bassett*, 2006 WL 156874, at \*4 n.5, \*7.

## II. THE TRIBAL EXHAUSTION DOCTRINE REQUIRES THAT PLAINTIFFS’ ACTION BE DISMISSED TO ALLOW THE TRIBAL COURT TO CONSIDER ITS OWN SUBJECT MATTER JURISDICTION.

Under the doctrine of tribal exhaustion, when a party challenges the subject matter jurisdiction of a tribal court, the tribal court must have a full opportunity to determine whether it may appropriately exercise jurisdiction. *See Nat’l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 856 (1985). Tribal exhaustion is a matter of comity—it need not be the case that the federal district court *lacks* subject matter jurisdiction. *See Madewell v. Harrah’s Cherokee Smokey Mountains Casino*, 730 F. Supp. 2d 485, 489 (W.D.N.C. 2010). Rather, “[w]hen there is a colorable question as to whether a tribal court has subject matter jurisdiction over a civil action, a federal court should stay or dismiss the action so as to permit a tribal court to determine in the first instance whether it has the power to exercise subject matter jurisdiction.” *Id.* at 488 (internal quotations omitted).

Tribal exhaustion applies even where a dispute is subject to an arbitration clause. *Bank One, N.A. v. Shumake*, 281 F.3d 507, 515 (5th Cir. 2002). The doctrine of tribal exhaustion is animated by federal policy “promoting tribal self-government” and related concerns for preserving “proper respect for tribal legal institutions.” *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16 (1987).

Plaintiffs have explicitly asserted that the Cheyenne River Sioux Tribal Court lacks jurisdiction. (Compl. ¶ 103). At a minimum, however, there is a colorable question as to the tribal court’s jurisdiction. *See Madewell*, 730 F. Supp. 2d at 488. The Supreme Court has recognized that “a tribe may regulate . . . the activities of nonmembers,” such as Plaintiffs, “who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.” *Montana v. United States*, 450 U.S. 544, 565 (1981). The tribal courts presumptively have subject matter jurisdiction over claims arising from the activities of non-Indians on reservation lands. *See LaPlante*, 480 U.S. at 18. Even off-reservation activity may be subject to tribal exhaustion if it impacts directly upon tribal affairs. *See Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.*, 207 F.3d 21, 32 (1st Cir. 2000) (citations omitted).

Here, Plaintiffs are non-Indians who entered into contracts over the internet with a company owned by an enrolled member of the Cheyenne River Sioux Tribe. (See Compl. ¶¶ 10-11, 56, 69, Ex. 5). While Plaintiffs allege that the lender,

Western Sky, is a South Dakota limited liability company (*id.* ¶ 12), they cannot fairly contend that this is an agreement between two non-Indian parties given their allegations that Western Sky is a mere alter ego of Mr. Webb. (*See id.* ¶¶ 170-83). Further, Plaintiffs' contracts expressly provide that they are to be considered executed on the reservation. Ex. 1 at 3; Ex. 2 at 1; *see Payday Fin.*, 2013 WL 1309437, at \*10. If the execution of the contracts is an act that occurred on the reservation, the tribal court presumptively has subject matter jurisdiction. *See LaPlante*, 480 U.S. at 18. This Court need not decide whether the instant dispute arises on the reservation. *See Landmark Golf Ltd. P'ship v. Las Vegas Paiute Tribe*, 49 F. Supp. 2d 1169, 1175 (D. Nev. 1999). Because the allegations of the Complaint raise a colorable issue as the subject matter jurisdiction of the tribal court, Defendants request that Plaintiffs' claims be stayed or dismissed to allow the tribal court to consider, in the first instance, whether it may exercise subject matter jurisdiction over Plaintiffs' claims. *See Madewell*, 730 F. Supp. 2d at 488.

### III. PLAINTIFFS' ALLEGATIONS CONCERNING ALTER EGO LIABILITY, FRAUDULENT TRANSFER, CIVIL CONSPIRACY, AND UNJUST ENRICHMENT FAIL TO STATE CLAIMS UPON WHICH RELIEF CAN BE GRANTED.

Even if this Court does not dismiss this action pursuant to Rule 12(b)(3), several of Plaintiffs' claims are subject to dismissal for failure to state a claim upon which relief can be granted. *See Fed. R. Civ. P.* 12(b)(6). While this Court accepts

Plaintiffs' nonconclusory factual allegations as true for purposes of this motion, the Court does not accept Plaintiffs' legal conclusions. *See Aziz v. Alcolac, Inc.*, 658 F.3d 388, 391 (4th Cir. 2011). Defendants are entitled to dismissal unless Plaintiffs' allegations "raise a right to relief above the speculative level." *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

A. Plaintiffs Cannot Maintain a Cause of Action for Alter Ego Liability.

Plaintiffs' complaint includes allegations, styled as a separate claim for "alter ego liability and individual liability of Martin Webb," concerning Mr. Webb's alleged control of the Western Sky defendants. (Compl. ¶¶ 169-83). "[P]iercing the corporate veil . . . is not an independent cause of action." *Strawbridge v. Sugar Mountain Resort, Inc.*, 243 F. Supp. 2d 472, 479 (W.D.N.C. 2003); *see also E. Mkt. Square, Inc. v. Tycorp Pizza IV, Inc.*, 625 S.E.2d 191, 200 (N.C. Ct. App. 2006) (referring to veil piercing as a "theory of liability" (internal quotation omitted)). To the extent Plaintiffs attempt to plead an independent cause of action for alter ego liability or veil piercing, Defendants are entitled to dismissal of that claim under Rule 12(b)(6).

B. Plaintiffs' Fraudulent Transfer Claim Fails Because it Does Not Meet the Pleading Requirements of Rule 9(b).

In order to state a fraudulent transfer claim, Plaintiffs must allege "(1) the conveyance of property; (2) by a debtor; (3) made with the intent to hinder, delay,

or defraud; (4) a creditor of the debtor.” *Outer Banks Beach Club Ass’n, Inc. v. Festiva Resorts Adventure Club Member’s Ass’n, Inc.*, No. 1:11cv246, 2012 WL 4321324, at \*4 (W.D.N.C. June 18, 2012). Plaintiffs’ claim under the North Carolina Uniform Fraudulent Transfer Act, N.C. Gen. Stat. § 39-23.1 *et seq.*, “sound[s] in fraud.” *Id.* As such, to avoid dismissal, Plaintiffs “must plead with particularity the circumstances constituting fraud.” *Id.* (applying Fed. R. Civ. P. 9(b)); *see Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 783 n.5 (4th Cir. 1999) (failure to meet Rule 9(b) requirements is failure to state a claim).

Plaintiffs do not allege even one specific transfer of funds among any of the Defendants. (*See* Compl. ¶¶ 184-89). Plaintiffs’ sole factual allegation in support of a fraudulent transfer of property is that “[u]pon information and belief, Defendant Webb and/or entities under his control, have received funds from the operations of the enterprise in North Carolina.” (*Id.* ¶ 185). By lumping Mr. Webb and/or other Defendants together, Plaintiffs fail to state a claim against any of the Defendants. *See Tuck v. Off Shore Inland Marine & Oilfield Co.*, No. 12-0379-WS-M, 2013 WL 81135, at \*4 n.8 (S.D. Ala. Jan. 4, 2013). In *Outer Banks*, the district court allowed a fraudulent transfer claim to proceed where, in contrast, the plaintiffs did allege a specific conveyance of property; even then, the court suggested that the plaintiffs’ “sparse factual allegations . . . push[ed] the limits of a properly pled claim.” 2012 WL 4321324, at \*4. Plaintiffs’ allegations do not meet

this minimum level of specificity and thus fail to state a claim for relief. *See Twombly*, 550 U.S. at 556-57.

C. Plaintiffs' Civil Conspiracy Claim Is Deficient Because it Does Not Allege Facts to Support an Agreement to Commit Unlawful Acts.

To state a claim for civil conspiracy, Plaintiffs must allege “(1) an agreement between two or more individuals; (2) to do an unlawful act or to do a lawful act in an unlawful way; (3) resulting in injury to [Plaintiffs] inflicted by one or more of the conspirators; and (4) pursuant to a common scheme.” *In re Fifth Third Bank, N.A.—Vill. of Penland Litig.*, 719 S.E.2d 171, 181 (N.C. Ct. App. 2011). To survive a motion to dismiss, Plaintiffs must do more than assert “claims from which mere possibility [of an agreement] can be inferred.” *Feldman v. Law Enforcement Assocs. Corp.*, 778 F. Supp. 2d 472, 500 (E.D.N.C. 2011). Plaintiffs must “plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009)).

In this case, Plaintiffs fail to allege sufficient facts to “raise a right to relief above the speculative level.” *See Twombly*, 550 U.S. at 555. First, it is not clear who the parties to the alleged conspiracy might be. Plaintiffs assert that “[a]ll Defendants . . . entered into a conspiracy to violate North Carolina law by agreeing to perform acts in violation of North Carolina law . . . i.e., engage in unlawful

lending.” (Compl. ¶¶ 191-92). Throughout the Complaint, Plaintiffs ascribe various acts simply to “Defendants.” However, “Defendants” cannot be read to implicate *all* Defendants to this action—for example, Plaintiffs allege that “Defendants falsely claim to consumers that they are entitled to tribal sovereignty as an Indian-owned business operating ‘within the exterior boundaries’ of the Tribe.” (*Id.* ¶ 55). In that allegation, “Defendants” can be reasonably read to refer only to what Plaintiffs otherwise call “the Western Sky entities” (*see id.* ¶ 33)—it is undisputed that CashCall is headquartered in California, (*see id.* ¶ 34).

Second, because Plaintiffs maintain that all Defendants other than CashCall are owned and controlled by Mr. Webb (*see* Compl. ¶¶ 33-34, 170), Plaintiffs cannot proceed on a civil conspiracy claim by alleging an illegal agreement among those entities or Mr. Webb. *See Iglesias v. Wolford*, 539 F. Supp. 2d 831, 835-36 (E.D.N.C. 2008) (dismissing civil conspiracy claim where all defendants constituted single legal entity). To plead an agreement between two or more entities, Plaintiffs must allege facts to support a conspiracy between CashCall and another entity. Plaintiffs’ sole factual allegations regarding the relationship between CashCall and any other Defendant are that (1) some Western Sky loans were made through a server owned or operated by CashCall; and (2) Western Sky assigns loans to CashCall. (Compl. ¶¶ 75-76). These allegations do not support an agreement to do an unlawful act—Plaintiffs do not allege that an agreement to



assign loan contracts is unlawful or share an internet server is unlawful. They merely invite the Court to speculate that there was a conspiracy. Such “pure speculation” is insufficient to save Plaintiffs’ conspiracy claim from dismissal. *See Feldman*, 779 F. Supp. 2d at 501.

D. Plaintiffs’ Express Contracts Bar Their Unjust Enrichment Claim.

To state a claim for unjust enrichment, Plaintiffs must allege that (1) a measurable benefit was conferred on the defendant; (2) the defendant consciously accepted that benefit; and (3) the benefit was not conferred gratuitously. *Booe v. Shadrick*, 369 S.E.2d 554, 556 (N.C. 1988). Where an express contract exists, that contract, not an unjust enrichment claim, governs the relationship between the parties. *See id.* Plaintiffs have alleged an express contract with Western Sky. (*See* Compl. ¶¶ 78, 83 (incorporating Plaintiffs’ loan contracts)). As such, they cannot maintain an unjust enrichment claim.

Plaintiffs’ claim fails even in the absence of an express contract because Plaintiffs have not even attempted to plead the elements of unjust enrichment. *See Booe*, 369 S.E.2d at 554. Instead, Plaintiffs simply assert that “Defendants engaged in unconscionable transactions and/or contracts in violation of public policy, void *ab initio* or voidable at the consumer’s option, and/or unenforceable,” and were thus unjustly enriched. (Compl. ¶¶ 167-68).

Finally, to the extent Plaintiffs attempt to plead a separate cause of action for

rescission and restitution, that claim fails because “[r]escission itself is not a cause of action; it is a remedy to be sought where a party alleges to have been fraudulently induced into entering into a contract.” *Synovus Bank v. Okay Props., LLC*, No. 1:11cv330, 2012 WL 3745280, at \*7 (W.D.N.C. Aug. 28, 2012).

IV. THIS COURT CANNOT EXERCISE PERSONAL JURISDICTION OVER THE TWENTY-ONE UNINVOLVED ENTITIES WHERE PLAINTIFFS HAVE NOT ALLEGED ANY CONTACTS WITH THE FORUM STATE.

While Plaintiffs have joined twenty-three Defendants to this action, for twenty-one of those Defendants, Plaintiffs have alleged no actions directed at North Carolina. As such, the remaining twenty-one Defendants, who are not subject to personal jurisdiction in this Court, respectfully request that they be dismissed from this action. *See* Fed. R. Civ. P. 12(b)(2).

When a defendant moves to dismiss for lack of personal jurisdiction, “[t]he burden is on the plaintiff to establish jurisdiction. . . . In assessing whether a plaintiff has made the requisite prima facie showing, a court must accept the facts alleged in the complaint as true and must draw all reasonable inferences in the plaintiff’s favor.” *IHFC Props., LLC v. APA Marketing, Inc.*, 850 F. Supp. 2d 604, 615 (M.D.N.C. 2012). North Carolina’s long-arm statute, N.C. Gen. Stat. § 1-75.4., allows the exercise of jurisdiction to the full extent allowed by the Due Process Clause. *Cambridge Homes of N.C., LP v. Hyundai Constr., Inc.*, 670 S.E.2d 290, 295 (N.C. Ct. App. 2008). Due process permits the exercise of

personal jurisdiction over a defendant only where the defendant “purposefully established minimum contacts within the forum State” and the exercise of jurisdiction “would comport with ‘fair play and substantial justice.’” *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985) (quoting *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 320 (1945)). Put differently, “[j]urisdiction is proper . . . where the contacts proximately result from actions by the defendant *himself* that create a substantial connection with the forum State.” *Id.* at 475 (internal quotation omitted).

To avoid this motion to dismiss, Plaintiffs must show that each of the twenty-one Defendants somehow purposefully availed itself of the privilege of conducting business in North Carolina. *See id.* at 476; *ALS Scan, Inc. v. Digital Serv. Consultants, Inc.*, 293 F.3d 707, 712 (4th Cir. 2002). However, Plaintiffs have not pled any facts suggesting that any of the Uninvolved Entities participated in the loan transactions, interacted with Plaintiffs, or otherwise availed themselves “of the privilege of conducting activities directed at” North Carolina. *See ALS Scan*, 293 F.3d at 712.

Any conceivable argument for personal jurisdiction over the Uninvolved Entities must then emanate from Plaintiffs’ claim that “[a]ll Defendants” conspired to commit unlawful acts directed at North Carolina. (*See* Compl. ¶ 191). To succeed on a “conspiracy theory of jurisdiction,” Plaintiffs must make a plausible

claim: “(1) that a conspiracy existed; (2) that the [Uninvolved Entities] participated in the conspiracy; and (3) that a coconspirator’s activities in furtherance of the conspiracy had sufficient contacts with [North Carolina] to subject that conspirator to jurisdiction in [North Carolina].” *See Unspam Techs., Inc. v. Chernuk*, \_\_ F.3d \_\_, 2013 WL 1849080, at \*6 (4th Cir. May 3, 2013). Plaintiffs cannot rely on “bare allegations” to support a conspiracy theory of jurisdiction. *Id.*

For the reasons stated above in support of Defendants’ motion to dismiss the civil conspiracy claim, Plaintiffs have failed to adequately plead the existence of a conspiracy. *See supra* III.C. This failure is fatal to a conspiracy theory of jurisdiction. *See Unspam Techs.*, 2013 WL 1849080, at \*6.

Moreover, Plaintiffs have not made a plausible claim that the Uninvolved Entities participated in any alleged conspiracy. *See id.* Plaintiffs allege no facts suggesting that any of the Uninvolved Entities were engaged in any of the activities related to Plaintiffs’ loan transactions.

### **CONCLUSION**

For the reasons stated above, Defendants respectfully request that the Court dismiss for improper venue, or grant the other relief requested in this Motion.

This the 21st day of May, 2013.

/s/ Paul K. Sun, Jr.

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*Counsel for Defendants*

**CERTIFICATE OF SERVICE**

I hereby certify that on 21 May 2013, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

This the 21st day of May, 2013.

/s/ Paul K. Sun, Jr.

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*Counsel for Defendants*

# **EXHIBIT 1**

## WESTERN SKY CONSUMER LOAN AGREEMENT

Loan No.: 7329873	Date of Note: August 17, 2011
	Expected Funding Date: August 17, 2011
Lender: Western Sky	Borrower: MONICA JOHNSON
Address: P.O. Box 370 Timber Lake, SD 57656	Address: 2026 MEGAN CT APT A CLEMMONS, NC 27012

In this Consumer Loan Agreement ("Agreement"), the words "you" and "your" mean the person signing as a borrower. "We," "us," "our," and "Lender" mean Western Sky, a lender organized under and authorized by the laws of the Cheyenne River Sioux Tribal Nation and the Indian Commerce Clause of the Constitution of the United States of America, and any subsequent holder of this Note ("Western Sky"). All credit and lending decisions were made by Western Sky, LLC, and this loan will be funded by Western Sky. Neither this Agreement nor Lender is subject to the laws of the United States.

### TRUTH IN LENDING ACT DISCLOSURE STATEMENT

<b>ANNUAL PERCENTAGE RATE</b>	<b>FINANCE CHARGE</b>	<b>AMOUNT FINANCED</b>	<b>TOTAL OF PAYMENTS</b>
<i>The cost of your credit as a yearly rate</i>	<i>The dollar amount the credit will cost you</i>	<i>The amount of credit provided to you</i>	<i>The amount you will have paid after all payments are made as scheduled</i>
<b>139.13 %</b>	<b>\$11,460.87</b>	<b>\$2,525.00</b>	<b>\$13,985.87</b>

### PAYMENT SCHEDULE

One payment of \$146.25 on September 01, 2011.

47 monthly payments of \$294.46 beginning on October 01, 2011.

**Late Charge:** If a payment is more than 15 days late, you will be charged \$29.00.

**Prepayment:** If you pay off this loan early, you will not have to pay any penalty.

Please see the remainder of this document for additional information about nonpayment, default and any required repayment in full before the scheduled date.

### ITEMIZATION OF AMOUNT FINANCED



Amount Financed:	\$2,525.00
Amount Paid to Borrower Directly:	\$2,525.00
Prepaid Finance Charge/Origination Fee:	\$75.00

You promise to pay to the order of Western Sky or any subsequent holder of this Note the sum of **\$2,600.00**, together with interest calculated at **135.00 %** per annum and any outstanding charges or late fees, until the full amount of this Note is paid. You promise to repay this loan by making, at a minimum, the payments described on the payment schedule listed above.

Payments will be applied first to any outstanding charges or late fees, then to earned interest and finally to principal. The payment schedule described above may change in the event you do not make all payments as scheduled or in the event you accrue any fees.

Interest is calculated on a 360/360 simple interest basis. This means that interest is calculated by dividing the annual Interest Rate by 360, multiplying that number by the outstanding principal balance, and multiplying that number by the number of days the principal balance is outstanding.

You may prepay all or any part of the principal without penalty.

If you fail to make any payment due hereunder, the holder of this Note shall have the right, after a 30-day grace period, to declare this note to be immediately due and payable. If you file for an assignment for the benefit of creditors, or for bankruptcy, the holder of this Note shall have the right to declare this Note to be immediately due and payable.

Except as may be provided in the "Arbitration" section of this Note, if we are required to employ an attorney at law to collect any amounts due hereunder, you will be required to pay the reasonable fees of such attorney to protect our interest or to take any other action required to collect the amounts due hereunder.

The Prepaid Finance Charge disclosed above is fully earned upon loan origination and is not subject to rebate upon prepayment or acceleration of this Note.

**LATE FEES.** You will be subject to a late fee of \$29.00 if you fail to make your payment within 15 days of the due date. We can collect any late fees immediately via Electronic Funds Transfer (EFT) from your bank account.

**INSUFFICIENT FUNDS.** You will be subject to a fee of \$29.00 if any payment you make is returned by your bank for insufficient funds.

**E-SIGN/ELECTRONIC COMMUNICATIONS.** Although federal law does not apply to this Agreement, this Note is in original format an electronic document fully compliant with the Electronic Signatures In Global and National Commerce Act (E-SIGN) and other applicable laws and regulations, and the one, true original Note is retained electronically by us. All other versions hereof, whether electronic or in tangible format, constitute facsimiles or reproductions only. You understand that you have previously consented to receive all communications from us, including but not limited to all required disclosures, electronically.

**CREDIT REPORTS.** You agree that we may obtain credit reports on you on an ongoing basis as long as this loan remains in effect. You also authorize us to report information concerning this account to credit bureaus and anyone else we believe in good faith has a legitimate need for such information. Late payments, missed payments, or other defaults on this account may be reflected in your credit report.

**CALL MONITORING/RECORDING.** You understand that, from time to time, we may monitor or record telephone calls between us for quality assurance purposes. You expressly consent to have your calls monitored or recorded.

**TELEPHONE CALLS.** You hereby agree that in the event we need to contact you to discuss your account or the repayment of your loan, we may telephone you at any number, including any cell phone number provided, and that we may leave an autodialed or prerecorded message or use other technology to make that contact or to communicate to you the status of your account.

**VERIFICATION.** You authorize us to verify all of the information you have provided in obtaining approval of this Loan.

**GOVERNING LAW.** This Agreement is governed by the Indian Commerce Clause of the Constitution of the United States of America and the laws of the Cheyenne River Sioux Tribe. We do not have a presence in South Dakota or any other states of the United States. Neither this Agreement nor Lender is subject to the laws of any state of the United States of America. By executing this Agreement, you hereby expressly agree that this Agreement is executed and performed solely within the exterior boundaries of the Cheyenne River Indian Reservation, a sovereign Native American Tribal Nation. You also expressly agree that this Agreement shall be subject to and construed in accordance only with the provisions of the laws of the Cheyenne River Sioux Tribe, and that no United States state or federal law applies to this Agreement. You agree that by entering into this Agreement you are voluntarily availing yourself of the laws of the Cheyenne River Sioux Tribe, a sovereign Native American Tribal Nation, and that your execution of this Agreement is made as if you were physically present within the exterior boundaries of the Cheyenne River Indian Reservation, a sovereign Native American Tribal Nation.

**ASSIGNMENT.** We may assign or transfer this Loan Agreement or any of our rights under it at any time to any party.

#### **WAIVER OF JURY TRIAL AND ARBITRATION.**

**PLEASE READ THIS PROVISION OF THE AGREEMENT CAREFULLY.** Unless you exercise your right to opt-out of arbitration in the manner described below, any dispute you have with Western Sky or anyone else under this loan agreement will be resolved by binding arbitration. Arbitration replaces the right to go to court, including the right to have a jury, to engage in discovery (except as may be provided in the arbitration rules), and to participate in a class action or similar proceeding. In Arbitration, a dispute is resolved by an arbitrator instead of a judge or jury. Arbitration procedures are simpler and more limited than court procedures. Any Arbitration will be limited to the dispute between yourself and the holder of the Note and will not be part of a class-wide or consolidated Arbitration proceeding.

**Agreement to Arbitrate.** You agree that any Dispute, except as provided below, will be resolved by Arbitration, which shall be conducted by the Cheyenne River Sioux Tribal Nation by an authorized representative in accordance with its consumer dispute rules and the terms of this Agreement.

**Arbitration Defined.** Arbitration is a means of having an independent third party resolve a Dispute. A "Dispute" is any controversy or claim between you and Western Sky or the holder or servicer of the Note. The term Dispute is to be given its broadest possible meaning and includes, without limitation, all claims or demands (whether past, present, or future, including events that occurred prior to the opening of this Account), based on any legal or equitable theory (tort, contract, or otherwise), and regardless of the type of relief sought (i.e. money, injunctive relief, or declaratory relief). A Dispute includes, by way of example and without limitation, any claim based upon marketing or solicitations to obtain the loan and the handling or servicing of my account whether such Dispute is based on a tribal, federal or state constitution, statute, ordinance,

regulation, or common law, and including any issue concerning the validity, enforceability, or scope of this loan or the Arbitration agreement. For purposes of this Arbitration agreement, the term "the holder" shall include Western Sky or the then-current note holder's employees, officers, directors, attorneys, affiliated companies, predecessors, and assigns, as well as any marketing, servicing, and collection representatives and agents.

**Choice of Arbitrator.** Any party to a dispute, including related third parties, may send the other party written notice by certified mail return receipt requested at the address appearing at the top of this Loan Agreement of their intent to arbitrate and setting forth the subject of the dispute along with the relief requested, even if a lawsuit has been filed. Arbitration shall be conducted in the Cheyenne River Sioux Tribal Nation by a panel of three Tribal Elders and shall be conducted in accordance with the Cheyenne River Sioux Tribal Nation's consumer rules and the terms of this Agreement. You may appear at Arbitration via telephone or video conference, and you will not be required to travel to the Cheyenne River Sioux Tribal Nation. The party receiving notice of Arbitration will respond in writing by certified mail return receipt requested within twenty (20) days. You understand that if you demand Arbitration, you must inform us of your demand of the Arbitrator you have selected. You also understand that if you fail to notify us, then we have the right to select the Arbitrator.

**Cost of Arbitration.** We will pay the filing fee and any costs or fees charged by the arbitrator regardless of which party initiates the Arbitration. Except where otherwise provided by the law of the Cheyenne River Sioux Tribal Nation, each party will be responsible for its own attorneys' fees and other expenses. Unless prohibited by law, the arbitrator may award fees, costs, and reasonable attorneys' fees to the party who substantially prevails in the Arbitration.

**Waiver of Rights.** YOU HEREBY AGREE THAT YOU ARE WAIVING YOUR RIGHT TO A JURY TRIAL, TO HAVE A COURT DECIDE YOUR DISPUTE, TO PARTICIPATE IN A CLASS ACTION LAWSUIT, AND TO CERTAIN DISCOVERY AND OTHER PROCEDURES THAT ARE AVAILABLE IN A LAWSUIT. The arbitrator has the ability to award all remedies available by statute, at law, or in equity to the prevailing party, except that the parties agree that the arbitrator has no authority to conduct class-wide proceedings and will be restricted to resolving the individual disputes between the parties. The validity, effect, and enforceability of this waiver of class action lawsuit and class-wide Arbitration is to be determined solely by a court of competent jurisdiction located within the Cheyenne Rivers Sioux Tribal Nation, and not by the arbitrator. If the court refuses to enforce the class-wide Arbitration waiver, or if the arbitrator fails or refuses to enforce the waiver of class-wide Arbitration, the parties agree that the Dispute will proceed in tribal court and will be decided by a tribal court judge, sitting without a jury, under applicable court rules and procedures.

**Applicable Law and Judicial Review.** THIS ARBITRATION PROVISION IS MADE PURSUANT TO A TRANSACTION INVOLVING THE INDIAN COMMERCE CLAUSE OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA, AND SHALL BE GOVERNED BY THE LAW OF THE CHEYENNE RIVER SIOUX TRIBE. The arbitrator will apply the laws of the Cheyenne River Sioux Tribal Nation and the terms of this Agreement. The arbitrator must apply the terms of this Arbitration agreement, including without limitation the waiver of class-wide Arbitration. The arbitrator will make written findings and the arbitrator's award may be filed in the Cheyenne River Sioux Tribal Court, which has jurisdiction in this matter. The Arbitration award will be supported by substantial evidence and must be consistent with this Agreement and applicable law or may be set aside by a court upon judicial review.

**Small Claims Exception.** All parties, including related third parties, shall retain the right to seek adjudication in a small claims tribunal in the Cheyenne River Sioux Tribal Small Claims Court for disputes within the scope of such tribunal's jurisdiction. Any dispute, which cannot be adjudicated within the jurisdiction of a small claims tribunal, shall be resolved by binding arbitration. Any appeal of a judgment from a small claims tribunal shall be resolved by binding arbitration.

**Other Provisions.** This Arbitration provision will survive: (1) termination or changes in this

Agreement, the Account, or the relationship between us concerning the Account; (ii) the bankruptcy of any party; and (iii) any transfer, sale or assignment of my Note, or any amounts owed on my account, to any other person or entity. This Arbitration provision benefits and is binding upon you, your respective heirs, successors and assigns. It also benefits and is binding upon us, our successors and assigns, and related third parties. The Arbitration Provision continues in full force and effect, even if your obligations have been paid or discharged through bankruptcy. The Arbitration Provision survives any termination, amendment, expiration, or performance of any transaction between you and us and continues in full force and effect unless you and we otherwise agree in writing. If any of this Arbitration Provision is held invalid, the remainder shall remain in effect.

**Right to Opt Out.** If you do not wish your account to be subject to this Arbitration Agreement, you must advise us in writing at P.O. Box 370, Timber Lake, South Dakota, 57565, or via e-mail at info@westernsky.com. You must clearly print or type your name and account number and state that you reject Arbitration. You must give written notice; it is not sufficient to telephone us. We must receive your letter or e-mail within sixty (60) days after the date your loan funds or your rejection of Arbitration will not be effective. In the event you opt out of Arbitration, any disputes hereunder shall nonetheless be governed under the laws of the Cheyenne River Sioux Tribal Nation.

**THIS LOAN CARRIES A VERY HIGH INTEREST RATE. YOU MAY BE ABLE TO OBTAIN CREDIT UNDER MORE FAVORABLE TERMS ELSEWHERE. EVEN THOUGH THE TERM OF THE LOAN IS 48 MONTHS, WE STRONGLY ENCOURAGE YOU TO PAY OFF THE LOAN AS SOON AS POSSIBLE. YOU HAVE THE RIGHT TO PAY OFF ALL OR ANY PORTION OF THE LOAN AT ANY TIME WITHOUT INCURRING ANY PENALTY. YOU WILL, HOWEVER, BE REQUIRED TO PAY ANY AND ALL INTEREST THAT HAS ACCRUED FROM THE FUNDING DATE UNTIL THE PAYOFF DATE.**

**CAUTION: IT IS IMPORTANT THAT YOU THOROUGHLY READ THIS AGREEMENT BEFORE YOU SIGN IT. YOU ARE ENTITLED TO A COPY OF THIS AGREEMENT.**

<input checked="" type="checkbox"/>	YOU HAVE READ AND UNDERSTAND THE ARBITRATION SECTION OF THIS NOTE AND AGREE TO BE BOUND BY THE TERMS AND CONDITIONS OF THAT SECTION.
<input checked="" type="checkbox"/>	YOU HAVE READ ALL OF THE TERMS AND CONDITIONS OF THIS PROMISSORY NOTE AND DISCLOSURE STATEMENT AND AGREE TO BE BOUND THERETO. YOU UNDERSTAND AND AGREE THAT YOUR EXECUTION OF THIS NOTE SHALL HAVE THE SAME LEGAL FORCE AND EFFECT AS A PAPER CONTRACT.

**CONSUMER COMPLAINTS** - If you have a complaint about our loan, please let us know. You can contact us at P.O. Box 370, Timber Lake, South Dakota, 57656, telephone (877) 860-2274.

#### **ELECTRONIC FUNDS AUTHORIZATION AND DISCLOSURE**

You hereby authorize us to initiate electronic funds transfers ("EFTs") for withdrawal of your scheduled loan payment from your checking account on or about the FIRST day of each month. You further authorize us to adjust this withdrawal to reflect any additional fees, charges or credits to your account. We will notify you 10 days prior to any given transfer if the amount to be transferred varies by more than \$50 from your regular payment amount. You also authorize us to withdraw funds from your account on additional days throughout the month in the event you are delinquent on your loan payments. You understand that this authorization and the services

undertaken in no way alters or lessens your obligations under the Loan Agreement. You understand that you can cancel this authorization at any time (including prior to your first payment due date) by sending written notification to us. Cancellations must be received at least three business days prior to the applicable due date. This EFT debit authorization will remain in full force and effect until the earlier of the following occurs: (i) you satisfy all of your payment obligations under this Loan Agreement or (ii) you cancel this authorization.

In addition, you hereby authorize us and our agents to initiate a wire transfer credit to your bank account to disburse the proceeds of this Loan.



YOU UNDERSTAND OUR PAYMENT COLLECTION PROCEDURE AND AUTHORIZE ELECTRONIC DEBITS FROM YOUR BANK ACCOUNT.

# **EXHIBIT 2**

**QUESTIONS? Call Us at 1-866-SKY-1224**[Home](#) | [Logout](#) | [Loan Status](#) | [Upload Documents](#) | [Change Password](#) | [Rates](#) | [Contact Us](#)**Loan Document****WESTERN SKY CONSUMER LOAN AGREEMENT**

Loan No.:	13881249	Date of Note:	July 05, 2012
		Expected Funding Date:	July 05, 2012
Lender:	Western Sky Financial, LLC	Borrower:	THOMAS W BROWN JR
Address:	P.O. Box 370 Timber Lake, SD 57656	Address:	674 SUN MEADOWS DR KLRNERSVILLE, NC 27284

**This Loan Agreement is subject solely to the exclusive laws and jurisdiction of the Cheyenne River Sioux Tribe, Cheyenne River Indian Reservation.** By executing this Loan Agreement, you, the borrower, hereby acknowledge and consent to be bound to the terms of this Loan Agreement, consent to the sole subject matter and personal jurisdiction of the Cheyenne River Sioux Tribal Court, and that no other state or federal law or regulation shall apply to this Loan Agreement, its enforcement or interpretation.

You further agree that you have executed the Loan Agreement as if you were physically present within the exterior boundaries of the Cheyenne River Indian Reservation, a sovereign Native American Tribal Nation, and that this Loan Agreement is fully performed within the exterior boundaries of the Cheyenne River Indian Reservation, a sovereign Native American Tribal Nation.

In this Loan Agreement, the words "you" and "your" mean the person signing as a borrower. "We," "us," "our," and "Lender" mean Western Sky Financial, LLC, a lender authorized by the laws of the Cheyenne River Sioux Tribal Nation and the Indian Commerce Clause of the Constitution of the United States of America, and any subsequent holder of this Note ("Western Sky").

**TRUTH IN LENDING DISCLOSURES:** The disclosures below are provided to you so that you may compare the cost of this loan to other loan products you might obtain in the United States. Our inclusion of these disclosures does not mean that we consent to application of state or federal law to us, to the loan, or this Loan Agreement.

**TRUTH IN LENDING ACT DISCLOSURE STATEMENT**

<b>ANNUAL PERCENTAGE RATE</b>	<b>FINANCE CHARGE</b>	<b>AMOUNT FINANCED</b>	<b>TOTAL OF PAYMENTS</b>
<i>The cost of your credit as a yearly rate</i>	<i>The dollar amount the credit will cost you</i>	<i>The amount of credit provided to you</i>	<i>The amount you will have paid after all payments are made as scheduled</i>
<b>139.12 %</b>	<b>\$11,577.87</b>	<b>\$2,525.00</b>	<b>\$14,102.87</b>

**PAYMENT SCHEDULE**

One payment of \$263.25 on August 01, 2012.

47 monthly payments of \$294.46 beginning on September 01, 2012.

**Late Charge:** If a payment is more than 15 days late, you will be charged \$29.00.**Prepayment:** If you pay off this loan early, you will not have to pay any penalty.

Please see the remainder of this document for additional information about nonpayment, default and any required repayment in full before the scheduled date.

ITEMIZATION OF AMOUNT FINANCED	
Amount Financed:	\$2,525.00
Amount Paid to Borrower Directly:	\$2,525.00
Prepaid Finance Charge/Origination Fee:	\$75.00

You promise to pay to the order of Western Sky or any subsequent holder of this Note the sum of **\$2,600.00**, together with interest calculated at **135.00 %** per annum and any outstanding charges or late fees, until the full amount of this Note is paid. You promise to repay this loan by making, at a minimum, the payments described on the payment schedule listed above.

Payments will be applied first to any outstanding charges or late fees, then to earned interest and finally to principal. The payment schedule described above may change in the event you do not make all payments as scheduled or in the event you accrue any fees.

Interest is calculated on a 360/360 simple interest basis. This means that interest is calculated by dividing the annual interest rate by 360, multiplying that number by the outstanding principal balance, and multiplying that number by the number of days the principal balance is outstanding, assuming that each full month is comprised of 30 days.

You may prepay all or any part of the principal without penalty.

If you fail to make any payment due hereunder, the holder of this Note shall have the right, after a 30-day grace period, to declare this note to be immediately due and payable. If you file for an assignment for the benefit of creditors, or for bankruptcy, the holder of this Note shall have the right to declare this Note to be immediately due and payable.

Except as may be provided in the "Arbitration" section of this Note, if we are required to employ an attorney at law to collect any amounts due hereunder, you will be required to pay the reasonable fees of such attorney to protect our interest or to take any other action required to collect the amounts due hereunder.

The Prepaid Finance Charge disclosed above is fully earned upon loan origination and is not subject to rebate upon prepayment or acceleration of this Note.

**LATE FEES.** You will be subject to a late fee of \$29.00 if you fail to make your payment within 15 days of the due date. We can collect any late fees immediately via Electronic Funds Transfer (EFT) from your bank account.

**INSUFFICIENT FUNDS.** You will be subject to a fee of \$29.00 if any payment you make is returned by your bank for insufficient funds.

**E-SIGN/ELECTRONIC COMMUNICATIONS.** Although federal law does not apply to this Agreement, this Note is in original format an electronic document fully compliant with the Electronic Signatures in Global and National Commerce Act (E-SIGN) and other applicable laws and regulations, and the one, true original Note is retained electronically by us. All other versions hereof, whether electronic or in tangible format, constitute facsimiles or reproductions only. You understand that you have previously consented to receive all communications from us, including but not limited to all required disclosures, electronically.

**CREDIT REPORTS.** You agree that we may obtain credit reports on you on an ongoing basis as long as this loan remains in effect. You also authorize us to report information concerning this account to credit bureaus and anyone else we believe in good faith has a legitimate need for such information. Late payments, missed payments, or other defaults on this account may be reflected in your credit report.

**CALL MONITORING/RECORDING.** You understand that, from time to time, we may monitor or record telephone calls between us for quality assurance purposes. You expressly consent to have your calls monitored or recorded.

**TELEPHONE CALLS.** You hereby agree that in the event we need to contact you to discuss your account or the repayment of your loan, we may telephone you at any number, including any cell phone number provided, and that we may leave an autodialed or prerecorded message or use other technology to make that contact or to communicate to you the status of your account.

**VERIFICATION.** You authorize us to verify all of the information you have provided in obtaining approval of this



Loan.

**GOVERNING LAW.** This Agreement is governed by the Indian Commerce Clause of the Constitution of the United States of America and the laws of the Cheyenne River Sioux Tribe. We do not have a presence in South Dakota or any other states of the United States. Neither this Agreement nor Lender is subject to the laws of any state of the United States of America. By executing this Agreement, you hereby expressly agree that this Agreement is executed and performed solely within the exterior boundaries of the Cheyenne River Indian Reservation, a sovereign Native American Tribal Nation. You also expressly agree that this Agreement shall be subject to and construed in accordance only with the provisions of the laws of the Cheyenne River Sioux Tribe, and that no United States state or federal law applies to this Agreement. You agree that by entering into this Agreement you are voluntarily availing yourself of the laws of the Cheyenne River Sioux Tribe, a sovereign Native American Tribal Nation, and that your execution of this Agreement is made as if you were physically present within the exterior boundaries of the Cheyenne River Indian Reservation, a sovereign Native American Tribal Nation.

**ASSIGNMENT.** We may assign or transfer this Loan Agreement or any of our rights under it at any time to any party.

**WAIVER OF JURY TRIAL AND ARBITRATION.**

**PLEASE READ THIS PROVISION OF THE AGREEMENT CAREFULLY.** Unless you exercise your right to opt-out of arbitration in the manner described below, any dispute you have with Western Sky or anyone else under this loan agreement will be resolved by binding arbitration. Arbitration replaces the right to go to court, including the right to have a jury, to engage in discovery (except as may be provided in the arbitration rules), and to participate in a class action or similar proceeding. In Arbitration, a dispute is resolved by an arbitrator instead of a judge or jury. Arbitration procedures are simpler and more limited than court procedures. Any Arbitration will be limited to the dispute between yourself and the holder of the Note and will not be part of a class wide or consolidated Arbitration proceeding.

**Agreement to Arbitrate.** You agree that any Dispute, except as provided below, will be resolved by Arbitration, which shall be conducted by the Cheyenne River Sioux Tribal Nation by an authorized representative in accordance with its consumer dispute rules and the terms of this Agreement.

**Arbitration Defined.** Arbitration is a means of having an independent third party resolve a Dispute. A "Dispute" is any controversy or claim between you and Western Sky or the holder or servicer of the Note. The term Dispute is to be given its broadest possible meaning and includes, without limitation, all claims or demands (whether past, present, or future, including events that occurred prior to the opening of this Account), based on any legal or equitable theory (tort, contract, or otherwise), and regardless of the type of relief sought (i.e. money, injunctive relief, or declaratory relief). A Dispute includes, by way of example and without limitation, any claim based upon marketing or solicitations to obtain the loan and the handling or servicing of my account whether such Dispute is based on a tribal, federal or state constitution, statute, ordinance, regulation, or common law, and including any issue concerning the validity, enforceability, or scope of this loan or the Arbitration agreement. For purposes of this Arbitration agreement, the term "the holder" shall include Western Sky or the then current note holder's employees, officers, directors, attorneys, affiliated companies, predecessors, and assigns, as well as any marketing, servicing, and collection representatives and agents.

**Choice of Arbitrator.** Any party to a dispute, including a Holder or its related third parties, may send the other party written notice by certified mail return receipt requested at the address appearing at the top of this Agreement of their intent to arbitrate and setting forth the subject of the dispute along with the relief requested, even if a lawsuit has been filed. Regardless of who demands arbitration, you shall have the right to select any of the following arbitration organizations to administer the arbitration: the American Arbitration Association (1-800 778-7879) <http://www.adr.org>; JAMS (1-800-352-5267) <http://www.jamsadr.com>; or an arbitration organization agreed upon by you and the other parties to the Dispute. The arbitration will be governed by the chosen arbitration organization's rules and procedures applicable to consumer disputes, to the extent that those rules and procedures do not contradict either the law of the Cheyenne River Sioux Tribe or the express terms of this Agreement to Arbitrate, including the limitations on the Arbitrator below. The party receiving notice of Arbitration will respond in writing by certified mail return receipt requested within twenty (20) days. You understand that if you demand Arbitration, you must inform us of your demand and of the arbitration organization you have selected. You also understand that if you fail to notify us, then we have the right to select the arbitration organization. Any arbitration under this Agreement may be conducted either on tribal land or within thirty miles of your residence, at your choice, provided that this accommodation for you shall not be construed in any way (a) as a relinquishment or waiver of the Cheyenne River Sioux Tribe's sovereign status or immunity, or (b) to allow for the application of any law other than the law of the Cheyenne River Sioux Tribe of Indians to this Agreement.

**Cost of Arbitration.** We will pay the filing fee and any costs or fees charged by the arbitrator regardless of which party initiates the Arbitration. Except where otherwise provided by the law of the Cheyenne River Sioux Tribal Nation, each party will be responsible for its own attorneys' fees and other expenses. Unless prohibited by law, the arbitrator may award fees, costs, and reasonable attorneys' fees to the party who substantially prevails in the Arbitration.

**Waiver of Rights.** YOU HEREBY AGREE THAT YOU ARE WAIVING YOUR RIGHT TO A JURY TRIAL, TO HAVE A

COURT DECIDE YOUR DISPUTE, TO PARTICIPATE IN A CLASS ACTION LAWSUIT, AND TO CERTAIN DISCOVERY AND OTHER PROCEDURES THAT ARE AVAILABLE IN A LAWSUIT. The arbitrator has the ability to award all remedies, available by statute, at law, or in equity to the prevailing party, except that the parties agree that the arbitrator has no authority to conduct class wide proceedings and will be restricted to resolving the individual disputes between the parties. The validity, effect, and enforceability of this waiver of class action lawsuit and class wide Arbitration is to be determined solely by a court of competent jurisdiction located within the Cheyenne River Sioux Tribal Nation, and not by the arbitrator. If the court refuses to enforce the class-wide Arbitration waiver, or if the arbitrator fails or refuses to enforce the waiver of class wide Arbitration, the parties agree that the Dispute will proceed in tribal court and will be decided by a tribal court judge, sitting without a jury, under applicable court rules and procedures.

**Applicable Law and Judicial Review.** THIS ARBITRATION PROVISION IS MADE PURSUANT TO A TRANSACTION INVOLVING THE INDIAN COMMERCE CLAUSE OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA, AND SHALL BE GOVERNED BY THE LAW OF THE CHEYENNE RIVER SIOUX TRIBE. The arbitrator will apply the laws of the Cheyenne River Sioux Tribal Nation and the terms of this Agreement. The arbitrator must apply the terms of this Arbitration agreement, including without limitation the waiver of class wide Arbitration. The arbitrator will make written findings and the arbitrator's award may be filed in the Cheyenne River Sioux Tribal Court, which has jurisdiction in this matter. The Arbitration award will be supported by substantial evidence and must be consistent with this Agreement and applicable law or may be set aside by a court upon judicial review.

**Small Claims Exception.** All parties, including related third parties, shall retain the right to seek adjudication in a small claims tribunal in the Cheyenne River Sioux Tribal Small Claims Court for disputes within the scope of such tribunal's jurisdiction. Any dispute, which cannot be adjudicated within the jurisdiction of a small claims tribunal, shall be resolved by binding arbitration. Any appeal of a judgment from a small claims tribunal shall be resolved by binding arbitration.

**Other Provisions.** This Arbitration provision will survive: (i) termination or changes in this Agreement, the Account, or the relationship between us concerning the Account; (ii) the bankruptcy of any party; and (iii) any transfer, sale or assignment of my Note, or any amounts owed on my account, to any other person or entity. This Arbitration provision benefits and is binding upon you, your respective heirs, successors and assigns. It also benefits and is binding upon us, our successors and assigns, and related third parties. The Arbitration Provision continues in full force and effect, even if your obligations have been paid or discharged through bankruptcy. The Arbitration Provision survives any termination, amendment, expiration, or performance of any transaction between you and us and continues in full force and effect unless you and we otherwise agree in writing. If any of this Arbitration Provision is held invalid, the remainder shall remain in effect.

**Right to Opt Out.** If you do not wish your account to be subject to this Arbitration Agreement, you must advise us in writing at P.O. Box 370, Timber Lake, South Dakota, 57565, or via e-mail at info@westernsky.com. You must clearly print or type your name and account number and state that you reject Arbitration. You must give written notice; it is not sufficient to telephone us. We must receive your letter or e-mail within sixty (60) days after the date your loan funds or your rejection of Arbitration will not be effective. In the event you opt out of Arbitration, any disputes hereunder shall nonetheless be governed under the laws of the Cheyenne River Sioux Tribal Nation.

**Payments.** You have previously authorized and requested us to initiate an automated clearinghouse or other electronic funds transfer ("EFT") from the bank account identified on your Application (the "Bank Account") to make each payment required hereunder on the day it is due. You also authorize us to initiate an EFT to or from the Bank Account to correct any erroneous payment and, in the event any EFT is unsuccessful, to attempt such payment up to two additional times. You understand that unsuccessful EFTs may result in charges by your bank, and you agree that we are not liable for such charges. We will notify you 10 days prior to any given transfer if the amount to be transferred varies by more than \$50 from your regular payment amount. You also authorize us to withdraw funds from your account on additional days throughout the month in the event you are delinquent on your loan payments. Your request and authorization for us to initiate EFTs is entirely voluntary, and you may terminate this authorization by notifying us in writing via fax (866-347-0666) or email (customer.service@westernsky.com) soon enough to allow us a reasonable opportunity to act on your termination (generally at least three business days in advance).

**THIS LOAN CARRIES A VERY HIGH INTEREST RATE. YOU MAY BE ABLE TO OBTAIN CREDIT UNDER MORE FAVORABLE TERMS ELSEWHERE. EVEN THOUGH THE TERM OF THE LOAN IS 48 MONTHS, WE STRONGLY ENCOURAGE YOU TO PAY OFF THE LOAN AS SOON AS POSSIBLE. YOU HAVE THE RIGHT TO PAY OFF ALL OR ANY PORTION OF THE LOAN AT ANY TIME WITHOUT INCURRING ANY PENALTY. YOU WILL, HOWEVER, BE REQUIRED TO PAY ANY AND ALL INTEREST THAT HAS ACCRUED FROM THE FUNDING DATE UNTIL THE PAYOFF DATE.**

**CAUTION: IT IS IMPORTANT THAT YOU THOROUGHLY READ THIS AGREEMENT BEFORE YOU SIGN IT. YOU ARE ENTITLED TO A COPY OF THIS AGREEMENT.**

<input checked="" type="checkbox"/>	YOU HAVE READ AND UNDERSTAND THE ARBITRATION SECTION OF THIS NOTE AND AGREE TO BE BOUND BY THE TERMS AND CONDITIONS OF THAT SECTION.
<input type="checkbox"/>	

✓ YOU HAVE READ ALL OF THE TERMS AND CONDITIONS OF THIS PROMISSORY NOTE AND DISCLOSURE STATEMENT AND AGREE TO BE BOUND THERETO. YOU UNDERSTAND AND AGREE THAT YOUR EXECUTION OF THIS NOTE SHALL HAVE THE SAME LEGAL FORCE AND EFFECT AS A PAPER CONTRACT.

**CONSUMER COMPLAINTS** If you have a complaint about our loan, please let us know. You can contact us at P.O. Box 370, Timber Lake, South Dakota, 57656, telephone (877) 860 2274.

[Click here](#) to print out a copy of this document for your records.

**WESTERN SKY FINANCIAL is owned wholly by an individual Tribal Member of the Cheyenne River Sioux Tribe and is not owned or operated by the Cheyenne River Sioux Tribe or any of its political subdivisions. WESTERN SKY FINANCIAL is a Native American business operating within the exterior boundaries of the Cheyenne River Sioux Reservation, a sovereign nation located within the United States of America.**

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