SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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PEOPLE OF THE STATE OF NEW YORK, by ERIC T. SCHNEIDERMAN, Attorney General of the State of New York,

Petitioner,

-against-

WESTERN SKY FINANCIAL, LLC, MARTIN WEBB, CASHCALL, INC., WS FUNDING LLC, and J. PAUL REDDAM,

Respondents.

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Index No. 451370/2013

IAS Part_____

Assigned to Justice _____

MEMORANDUM OF LAW IN SUPPORT OF THE VERIFIED PETITION

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES AND ADMINISTRATIVE PROCEEDINGS

STATE STATUTES

MISCELLANEOUS AUTHORITIES

Petitioner, the People of the State of New York, by Eric T. Schneiderman, Attorney General of the State of New York, submits this Memorandum of Law in support of the Verified Petition pursuant to Executive Law § 63(12) against Respondents Western Sky Financial, LLC ("Western Sky"), Martin Webb ("Webb"), CashCall, Inc. ("CashCall"), WS Funding LLC ("WS Funding"), and J. Paul Reddam ("Reddam") (collectively referred to as "Respondents") for their illegal and fraudulent conduct and deceptive acts and practices in connection with the making and collection of usurious loans.

PRELIMINARY STATEMENT

Respondents have engaged in an illegal and deceptive scheme to originate high-interest, personal loans to consumers in New York. Respondents originate loans over the Internet and by phone that carry annual percentage rates of interest ("APRs") ranging from 89.26% to more than 355%. These rates far exceed New York's civil usury rate of 16% and its criminal usury rate of 25%.

Western Sky, CashCall, and WS Funding, acting in concert, have each engaged in a different portion of this scheme -- Western Sky offers and makes the high-interest loans, WS Funding buys the loans from Western Sky, and CashCall, acting as the servicer of the loans, collects the usurious interest, fees, and principal from consumers.

However, despite Respondents' convoluted scheme, each company has engaged in conduct that is illegal in New York. New York State's licensed lender law and civil and criminal usury laws prohibit both making and collecting interest on usurious loans in New York. See Banking Law §§ 340-361; General Obligations Law ("GOL") § 5-501; Penal Law § 190.40. By originating and collecting on high-interest loans without a license, Western Sky, CashCall, and WS Funding have each repeatedly and persistently violated the licensed lender law. CashCall

and WS Funding have also repeatedly and persistently engaged in illegal conduct by collecting interest at rates that far exceed the civil and criminal usury caps of 16% and 25%.

Moreover, the Respondent companies originate loans in the name of Western Sky while concealing that Western Sky is the lender of these loans in name only. CashCall and WS Funding offer and arrange for the loans in Western Sky's name, provide the capital for the loans, and bear all of the risk of lending. As the true parties in interest behind these loans, CashCall and WS Funding are also liable for their origination.

Respondents Webb and Reddam, the principals and sole owners of the Respondent companies, orchestrated the companies' scheme to originate and collect on usurious loans, including executing the agreements that established the scheme. Webb and Reddam are therefore individually liable for their companies' illegal conduct.

Respondents' business preys upon vulnerable New York consumers facing financial hardships with limited financial options. Substantial origination fees make early repayment of the loans difficult. Consumers end up indebted for between one and seven years, repaying finance charges that are in some cases several times the principal of the loan.

For the reasons set forth below, in the Verified Petition, and in the Affirmation of Assistant Attorney General Jordan S. Adler (the "Adler Affirmation" or "Aff.") and the exhibits annexed thereto, the Attorney General requests that the Court: (a) permanently enjoin Respondents from the illegal, fraudulent, and deceptive acts and practices alleged in the petition; (b) declare Respondents' usurious loans with New Yorkers void; (c) require that Respondents pay full restitution and damages to all injured New York consumers; (d) require that Respondents disgorge all profits illegally acquired; (e) require that Respondents pay penalties for their deceptive practices and statutory costs; and (f) grant other relief that the Court deems just

and proper.

STATEMENT OF FACTS

Western Sky, CashCall, and WS Funding are in the business of making and collecting on high-interest loans to consumers. Since at least early 2010, the companies have originated high-interest loans in New York using Western Sky's name. See Aff. ¶ 17. Respondents have offered several loan products to consumers, with principal amounts ranging from $400 to $9,925. See Aff. ¶ 18. The repayment period and interest rates for these products vary based on the size of the loan, but all of the loans carry exorbitant rates of interest, with APRs of between 89.26% and 355.27%. See id. Respondents have made at least 17,970 loans to New York consumers, lending more than $38 million in principal in total. See Aff. ¶¶ 63 - 64. The interest and fees owed on these loans is nearly $185 million. See id. None of the Respondent companies are licensed by the State of New York. See Aff. ¶ 14.

The loans are advertised in New York through television commercials for Western Sky loans and through the Western Sky website at <www.westernsky.com>. See Aff. ¶ 20. Consumers in New York apply for the loans by completing an application form on the Western Sky website or by calling a toll-free number. See Aff. ¶ 22. Consumers whose applications are approved are then directed back to the Western Sky website to sign the loan document electronically while in New York. See Aff. ¶ 23. After the loan is executed, the principal of the loan is electronically transferred into the consumer's bank account in New York. See Aff. ¶ 25.

However, Western Sky is the lender of these loans in name only. According to contracts between the Respondent corporations, the loans are offered by CashCall in Western Sky's name, arranged by CashCall, funded using an account opened and maintained by WS Funding, and sold almost immediately to CashCall and WS Funding for collection of all interest, principal, and fees

due on the loan. See Aff. ¶¶ 40 - 48. WS Funding also indemnifies Western Sky for all costs arising or resulting from the lending. See Aff. ¶ 45.

Pursuant to the Respondent companies' agreements, shortly after the loans are funded they are purchased by CashCall's subsidiary, WS Funding. See Aff. ¶ 26. CashCall acts as the servicer of the loans on behalf of WS Funding, handling all interactions with the consumers. See Aff. ¶ 27. Each month CashCall electronically debits an installment payment from the consumer's bank account through an ACH transaction. See Aff. ¶ 28. Consumers who miss a loan payment are hounded by CashCall's debt collection phone calls, e-mails, and letters. See Aff. ¶ 36. CashCall's collection calls are frequent, often daily. If the consumer does not answer the phone, the consumer may be called several times per day, at home and at work. See id. Consumers have also been told that they would be visited in person and "served" with papers, that their references would be called, and that a warrant would be issued for their arrest, all of which is untrue. See id.

Throughout this process, Respondents falsely represent to consumers that New York laws do not apply to their loans. Every consumer that applies for a loan through the Western Sky website is presented with a message that states that Western Sky is "a Native American-owned business operating within the boundaries of the Cheyenne River Sioux Reservation, a sovereign nation located within the United States of America." See Aff. ¶ 22. The message also states that the consumer is subject "exclusively to the laws and jurisdiction of the Cheyenne River Sioux Tribe." See id. Consumers who contact CashCall to inquire about the interest rates they have been charged receive a form letter that similarly claims that the "laws of the Cheyenne River Sioux Tribe apply exclusively to the terms and conditions of" the loan. See Aff. ¶ 39.

Despite these representations, Western Sky is neither owned nor operated by the

Cheyenne River Sioux Tribe -- it is a limited liability company organized and registered under South Dakota law. See Aff. ¶ 51. The company is not immune from state regulation and enforcement. Indeed, courts and regulators have uniformly rejected claims of immunity made by Western Sky and Webb and held that Respondents are subject to state law.[1]

Respondents' high-interest lending has been the subject of enforcement actions and orders by Attorneys General and regulators in at least twelve states. See Aff. ¶¶ 66-74. Banking regulators in Maryland, New Hampshire, Kansas, Massachusetts, Illinois, Oregon and Washington have all issued or obtained orders directing one or more of the Respondents to cease and desist from engaging in unlicensed lending and other unlawful activities.[2][3] See Aff. ¶¶ 71-74. In addition, Attorneys General of Colorado, Missouri, Minnesota, Georgia, and West Virginia have initiated enforcement actions or investigations against one or more of the Respondents for making usurious and/or unlicensed loans. See Aff. ¶¶ 67-69. In fact, the court in Colorado granted partial summary judgment against Western Sky and Webb in April 2013. Colorado v. Western Sky, April 2013 Order. Webb also settled with the state of West Virginia, agreeing to cease lending in the state and to make full refunds of excess interest that had been

[1] See Colorado v. Western Sky Fin., LLC, No. 11-cv-638, at 8 (Dist. Ct. Denver Co., Colo. April 15, 2013) aff'd by May 23, 2013 Order ("Colorado v. Western Sky, April 2013 Order"); Western Sky Fin., LLC, No. CFR-FY2011-182, at 9 (Md. Comm'r of Fin. Reg. May 22, 2013) (Opinion and Final Order) ("Maryland Order"); Missouri v. Webb, No. 11SL-CC01680-1, at 1 (Cir. Ct. St. Louis Co., Mo. Oct. 15, 2012) ("Missouri v. Webb, Oct. 2012 Order"); West Virginia v. Payday Loan Resource Center, LLC, No. 10-MISC-372 (Cir. Ct. Kanawha Co., W.Va. Oct. 24, 2011) ("West Virginia v. Payday Loan, Oct. 2011 Order"). Copies of these opinions are attached hereto as Exhibits 1-4, respectively.

[2] See Maryland Order; In re CashCall, Inc., Case No. 12-308 (N.H. Banking Dep't June 4, 2013) (Order to Cease and Desist) ("New Hampshire Order"); Western Sky Fin., LLC, No. 2011-312 (Kan. Office of State Bank Comm'r May 22, 2012) (Summary Order to Cease and Desist) ("Kansas Order"); CashCall, Inc., No. 2013-10 (Mass. Comm'r of Banks Apr. 4, 2013) (Cease Order) ("Mass. Order to CashCall"); Western Sky Fin., LLC, No. 2013-11 (Mass. Comm'r of Banks Apr 4, 2013) (Cease Order) ("Mass. Order to Western Sky"); Western Sky Fin., LLC, No. 13 CC 265 (Ill. Dep't of Fin. & Prof'l Regulation Mar. 8 2013) (Cease and Desist Order) ("Ill. Order"); Western Sky Fin., LLC, No. I-12-0039 (Or. Dep't of Consumer and Bus. Servs. Dec. 13, 2012) (Final Order to Cease and Desist) ("Oregon Order"); and CashCall, Inc., No. C-11-0701-12-SC03 (Wash. Dep't of Fin. Insts. Jan. 30, 2013) (Order Granting Department's Motion for Summary Judgment) ("Wash. Order"). Copies of these orders are attached hereto as Exhibits 2 and 5-11, respectively.

[3] On August 5, 2013, the New York State Department of Financial Services also sent a letter to Western Sky directing the company to cease and desist offering and originating illegal loans in New York. A copy of the letter is available at http://www.dfs.ny.gov/about/press2013/pr1308061.htm.

collected. See Aff. ¶ 69. Actions in Missouri, Minnesota, and Georgia are pending. See Aff. ¶ 68.

Respondents' scheme is also similar to another CashCall arrangement that was the basis of an action brought by the Attorney General of West Virginia in 2008. In the 2008 action, the Attorney General of West Virginia alleged that CashCall and Reddam had partnered with a state-chartered bank to make high-interest loans in an attempt to evade the state's lender licensing and usury laws through the improper use of federal preemption. West Virginia v. CashCall, Inc., No. 08-C-1964, at 3, 6 (Cir. Ct. Kanawha Co., W. Va. Sept. 10, 2012) (Final Order on Phase II of Trial: The State's Usury and Lending Claims).[4] The West Virginia court agreed, finding that CashCall was the de facto lender and therefore liable for violations of the state's laws. Id. at 17.

The evidence of Respondents' fraudulent and illegal scheme is extensive. As set forth below and in the Adler Affirmation and Exhibits thereto, the evidence includes consumer affidavits with attached loan contracts, bank statements, and correspondence with CashCall (see Adler Aff. Exhibits A-1 – A-12); consumer complaints (see Adler Aff. Exhibits B1 – B8); contracts between Western Sky, CashCall, and WS Funding establishing the Respondents' deceptive lending arrangement (see Adler Aff. Exhibits F and G), 17,970 loan contracts reflecting loans to New Yorkers (see Adler Aff. Exhibits H-1 – H-15); and screenshots of web pages from the Western Sky website (see, e.g., Adler Aff. Exhibit I).

ARGUMENT

I. RESPONDENTS' ACTIVITIES CONSTITUTE REPEATED AND PERSISTENT FRAUD AND ILLEGALITY IN VIOLATION OF EXECUTIVE LAW § 63(12)

Executive Law § 63(12) empowers the Attorney General to bring a special proceeding for

[4] Two orders issued by the West Virginia court, styled Final Order on Phase I of Trial: The State's Debt Collection Claims and Final Order on Phase II of Trial: The States' Usury and Lending Claims, are attached hereto as Exhibits 12 and 13, respectively.

permanent injunctive relief, restitution, and damages whenever a person or business engages in "repeated or persistent fraud or illegality." "Repeated" is defined as conduct which affects more than one person. People v. Empyre Inground Pools, Inc., 227 A.D.2d 731, 733 (3d Dep't 1996). The Attorney General is not required to establish that a large percentage of the person's or business's transactions were fraudulent or illegal. State v. Princess Prestige Co., 42 N.Y.2d 104, 107 (1977) (finding 16 out of 3,600 total transactions a sufficient basis to proceed under Executive Law § 63(12)).

A special proceeding under Executive Law § 63(12) is "plenary as an action, culminating in a judgment, but is brought on with the ease, speed and economy of a mere motion." David D. Siegel, N.Y. Practice § 547, at 943 (4th ed. 2005). The legislative purpose for allowing a special proceeding under Executive Law § 63(12) is to further the public interest by giving the Attorney General an expeditious means to enjoin fraudulent or illegal activity and to obtain relief for its victims, including *ex parte* relief. People v. B.C. Assocs., Inc., 22 Misc. 2d 43, 44-46 (Sup. Ct. N.Y. Co. 1959). A special proceeding goes right to the merits.

A. Respondents Have Engaged in Repeated and Persistent Illegality within the Meaning of Executive Law § 63(12) By Originating Usurious Loans and Collecting Usurious Rates of Interest

A violation of state law constitutes illegality within the meaning of Executive Law § 63(12) and is actionable thereunder when persistent or repeated. See Princess Prestige, 42 N.Y.2d at 107; Empyre Inground Pools, 227 A.D.2d at 733; Lefkowitz v. E.F.G. Baby Prod., 40 A.D.2d 364, 366 (3d Dep't 1973). Violations of criminal law are likewise actionable under § 63(12). See, e.g., Freedom Discount Corp. v. Korn, 28 A.D.2d 517 (1st Dep't 1967) (violation of Penal Law §§ 1370 and 1371); State v. World Interactive Gaming Corp., 185 Misc. 2d 852 (Sup. Ct. N.Y. Co. 1999) (promoting gambling in violation of New York Penal Law Article 225

and federal Wire and Travel Acts, 18 U.S.C. §§ 1084, 1952, 1953); State v. ITM, Inc., 52 Misc. 2d 39 (Sup. Ct. N.Y. Co. 1966) (violation of Penal Law §§ 1370 and 1371); State v. Colorado State Christian Coll. of the Church of the Inner Power, Inc., 76 Misc. 2d 50 (Sup. Ct. N.Y. Co. 1973) (violation of Penal Law § 950).

Consumer lending is closely regulated in New York. New York has both a civil usury rate, set at 16% interest per year, and a criminal usury rate, set at 25% interest per year. See GOL § 5-501; Banking Law § 14-a; Penal Law § 190.40. Lenders licensed by New York State can engage in the business of making personal loans of $25,000 or less to consumers in New York and charge, contract for, or receive a rate of interest above 16%, but in no event can they charge more than 25%. See Banking Law §§ 340 and 356. As the Court of Appeals has explained, these laws serve to protect vulnerable members of the public from predatory lending:

> The purpose of usury laws, from time immemorial, has been to protect desperately poor people from the consequences of their own desperation. Law-making authorities in almost all civilizations have recognized that the crush of financial burdens causes people to agree to almost any conditions of the lender and to consent to even the most improvident loans. Lenders, with the money, have all the leverage; borrowers, in dire need of money, have none.

Schneider v. Phelps, 41 N.Y.2d 238, 243 (1977).

By originating and collecting on personal, high-interest loans, Respondents have repeatedly and persistently violated Banking Law §§ 340 and 356, GOL §5-501, and Penal Law §190.40. These repeated and persistent violations are actionable under Executive Law § 63(12).

1. Respondents Western Sky, CashCall, and WS Funding Repeatedly and Persistently Violated Banking Law §§ 340 and 356 By Originating Loans Without a License at Interest Rates Far Exceeding the Civil Usury Rate of 16%

The licensed lender law, Banking Law §§ 340 - 361, regulates lenders that engage in the

business of making personal loans to consumers at interest rates above 16%.[5] Two sections of the licensed lender law in particular are relevant to Respondents' conduct: Banking Law § 340, which prohibits "engag[ing] in the business of making" personal loans of $25,000 or less and "charg[ing], contract[ing] for, or receiv[ing]" interest above 16% without a license; and Banking Law § 356, which prohibits "charg[ing], contract[ing] for, or receiv[ing]" interest above 16% on personal loans of $25,000 or less without a license. Banking Law § 340 provides, in part:

> No person or other entity shall engage in the business of making loans in the principal amount of twenty-five thousand dollars or less for any loan to an individual for personal, family, household, or investment purposes and in a principal amount of fifty thousand dollars or less for business and commercial loans, and charge, contract for, or receive a greater rate of interest than the lender would be permitted by law to charge if he were not a licensee hereunder except as authorized by this article and without first obtaining a license from the superintendent.

A person or entity engages in the business of making loans in New York "if it solicits loans in the amounts prescribed by this section within this state and, in connection with such solicitation, makes loans to individuals then resident in this state." Banking Law § 340. The maximum rate of interest a lender may charge without triggering the licensed lender law is 16%. See GOL § 5-501, Banking Law § 14-a.

The language of Banking Law § 356 tracks that of Banking Law § 340:

> No person or other entity, other than a licensee under [Article 9 of the Banking Law], shall directly or indirectly charge, contract for, or receive any interest, discount, or consideration greater than the person or other entity would be permitted by law to charge if it were not a licensee hereunder upon a loan not exceeding the maximum amounts prescribed in section three hundred forty of this article.

Western Sky, CashCall, and WS Funding, acting in concert, have repeatedly and persistently violated Banking Law §§ 340 and 356 by originating illegal loans under Western Sky's name to New York consumers without a license. It is undisputed that Western Sky,

[5] Banks chartered outside of New York are not subject to New York's usury and licensed lender laws.

CashCall, and WS Funding are not licensed by the State of New York. See Aff. ¶ 14. Yet Respondent companies solicit loans in New York, through television commercials and the Western Sky website, and make loans of $25,000 or less to New York consumers with interest rates far greater than 16%. See Aff. ¶¶ 18, 20, 41, 47, 48. The companies have repeatedly engaged in this behavior by making loans to thousands of New Yorkers.

In addition, although the loans here bear Western Sky's name, as the true parties in interest, CashCall and its subsidiary WS Funding are also liable for their origination. Where a party attempts to circumvent the usury laws by disguising its interest in a loan, New York courts will look to the reality of the lending arrangement to determine the true lender, "with the key factor being 'who had the predominant economic interest.'" See State v. County Bank of Rehoboth Beach, Del., 45 A.D.3d 1136, 1138 (3d Dep't 2007). Here, CashCall and WS Funding fund the Western Sky loans, are obligated to purchase those loans, and have agreed to fully indemnify Western Sky for the lending. See Aff. ¶¶ 42 - 45. The companies also collect all of the principal, interest, and fees. See Aff. ¶¶ 28, 42. CashCall and WS Funding are therefore also responsible for engaging in the business of making these loans without a license and contracting for interest at rates above 16%, in violation of Banking Law §§ 340 and 356.[6]

Attorneys General and banking regulators from several states have taken action to enforce their respective state's lending laws against one or more of the Respondents for making the same high-interest loans at issue here without a license. See Aff. ¶¶ 66-74. In each matter in which a court or regulator has issued an order addressing the alleged violations, the Respondent

[6] CashCall has already been found to be the de facto lender in another arrangement remarkably similar to the one at issue here. See West Virginia v. CashCall, Final Order on Phase II at 25. In West Virginia v. CashCall, the West Virginia Attorney General alleged that CashCall had partnered with a bank to make high-interest loans to evade the state's lender licensing and usury laws. Id. at 3. The court agreed, finding that CashCall held the predominant economic interest in the loans. The court relied in part on agreements between CashCall and the bank, which included provisions similar to Respondents' agreements here, including provisions requiring that (1) CashCall purchase all loans from the bank, (2) CashCall maintain a "Settlement Reserve" account with the bank, and (3) CashCall indemnify the bank against all losses. Id. at 17-19.

has been found to have violated state law. See id. For example, in an enforcement action brought by the Colorado Attorney General against Western Sky and Webb over allegations of unlicensed lending over the Internet to Colorado consumers, a Colorado court recently held that "the undisputable facts before the Court confirm that Western Sky makes and collects unlicensed supervised loans to Colorado citizens, thereby subjecting Defendants to liability under [Colorado law]." Colorado v. Western Sky, April 2013 Order at 2, 5.

Regulators from a half-dozen states have also issued or obtained orders against one or more of the Respondents for offering and making high-interest loans in violation of state licensing and usury laws. All of the orders directed the Respondents to cease and desist from their lending activities, and most directed respondents to pay restitution and penalties:

- Following administrative hearings, the Maryland Commissioner of Financial Regulation found that Western Sky and Webb had violated Maryland licensing, usury, and consumer protection laws and directed the respondents to cease unlicensed lending activities, refund all amounts collected from Maryland consumers, and pay civil penalties. Maryland Order at 15-16.

- The Kansas Office of the State Bank Commissioner found that Western Sky and Webb had engaged in Internet and television solicitation in Kansas, resulting in at least 1,038 loans to Kansas consumers, and that the respondents had violated Kansas law by engaging in the business of making loans without a license. Kansas Order at 1. Respondents were directed to provide restitution and pay a penalty of more than $1.5 million. Id. at 3.

- The Oregon Department of Consumer and Business Services issued a Final Order to Cease and Desist to Western Sky, concluding that Western Sky had violated state law by conducting a business in which it made consumer finance loans without first obtaining a license and by making loans to Oregon residents at a rate of interest exceeding the state's usury limit. Oregon Order at 5. The agency assessed a penalty of $2,500 per loan, the maximum permitted under Oregon law. Id. at 6.

- The New Hampshire Banking Department found that there was reasonable cause to believe that CashCall and WS Funding were the de facto lenders of Western Sky loans, and had therefore engaged in the business of making loans without a license, stating that "[a]fter detailed review of the respondents' business scheme, it appears that Western Sky is nothing more than a front to

> enable CashCall to evade licensure by state agencies." New Hampshire Order at 5-7. The agency directed CashCall, WS Funding, and Reddam to pay restitution to the 787 New Hampshire consumers who received a loan and assessed a fine of more than $1.9 million. Id. at 8.

See also Ill. Order at 3 (finding that Western Sky engaged "in the business of offering, making or arranging loans to Illinois consumers" without a license); Mass. Order to Western Sky at ¶ 22 (directing Western Sky to cease from engaging in the small loan company business).

Respondents' repeated and persistent violations of the Banking Law constitute repeated and persistent illegality in violation of Executive Law § 63(12). See People v. JAG NY, LLC, 18 A.D.3d 950, 953 (3d Dep't 2005) (holding that payday loan scheme constituted repeated and persistent violations of Banking Law § 340, in violation of Executive Law § 63(12)).

2. Respondents CashCall and WS Funding Repeatedly and Persistently Violated GOL § 5-501 and Banking Law § 356 By Collecting Interest at Rates Far Exceeding the Civil Usury Rate of 16%

Pursuant to the civil usury statute, GOL § 5-501, an unlicensed lender that "charge[s], take[s], or receive[s]" an annual rate of interest above 16% commits usury under civil law. See GOL § 5-501; Banking Law § 14-a. Specifically, GOL § 5-501(2) provides that "[n]o person or corporation shall, directly or indirectly, charge, take or receive any money, goods or things in action as interest on the loan or forbearance of any money, goods or things in action at a rate exceeding" that which is prescribed in Banking Law § 14-a. That section sets the maximum rate of interest at sixteen per centum per annum (16%). See, e.g., Seidel v. 18 East 17th St. Owners, Inc., 79 N.Y.2d 735, 740 (1992); Matias v. Arango, 289 A.D.2d 459, 460 (2d Dep't 2001). Conduct proscribed by GOL § 5-501 can also run afoul of Banking Law § 356, described above, which prohibits "charg[ing], contract[ing] for, or receiv[ing]" interest above 16% on personal loans of $25,000 or less without a license. See Banking Law § 356.

Respondents CashCall and WS Funding have repeatedly and persistently violated GOL §

5-501 and Banking Law § 356 by collecting interest at rates above 16%. In particular, CashCall, acting as the servicer for WS Funding, the owner of the loan, has repeatedly and persistently debited money from the bank accounts of thousands of New York consumers in New York as interest and otherwise collected interest payments on loans at rates ranging from over 89% to more than 355%. See Aff. ¶ 18, 28. CashCall's conduct constitutes "charg[ing], tak[ing], or receiv[ing]" money as interest at rates exceeding the civil usury rate of 16%, in violation of GOL § 5-501. See People v. JAG NY, LLC, No. 5302-04, at 3, 12 (Sup. Ct. Alb. Co. Jan. 20, 2005)[7] (holding that respondents' payday loan scheme, which included respondents' collection of usurious interest by depositing checks drawn on consumers' bank accounts, violated GOL § 5-501), aff'd in part, rev'd in part, 18 A.D.3d 950 (3d Dep't 2005). CashCall's collection of interest also violates Banking Law § 356, which prohibits "charg[ing]" or "receiv[ing]" interest above 16% on these loans without a license. WS Funding in turn has repeatedly and persistently violated GOL § 5-501 and Banking Law § 356 through CashCall's collection of illegal interest on its behalf. See GOL § 5-501 (no person or corporation shall "*directly or indirectly*, charge, take or receive" illegal interest) (emphasis added).

Regulators in other states have also found that CashCall and WS Funding violated their respective states' usury and licensing laws by collecting on high-interest loans purchased from Western Sky. For example, in an administrative proceeding initiated by the Washington Department of Financial Institutions, an administrative law judge found that CashCall had violated the state's usury act by collecting interest at rates between 95% and 169% on 2,200 "Western Sky" loans to Washington residents. Wash. Order at 4, 6. The Massachusetts Division of Banks also issued an order against CashCall and WS Funding directing the companies to cease and desist from collecting on loans and to refund all interest and fees collected, after

[7] A copy of this opinion is attached hereto as Exhibit 14.

determining that CashCall "was engaged in the business of servicing small [Western Sky] loans on behalf of its wholly owned subsidiary WS Funding." Mass. Order to CashCall at ¶¶ 29, 38, 39, 47, 48.

Respondents' repeated and persistent violations of GOL § 5-501 and Banking Law § 356 constitute repeated and persistent illegality in violation of Executive Law § 63(12). See People v. JAG NY, LLC, 18 A.D.3d at 953 (holding that respondents' payday loan scheme constituted repeated and persistent violations of GOL § 5-501 in violation of Executive Law § 63(12)).

3. Respondents CashCall and WS Funding Repeatedly and Persistently Violated Penal Law § 190.40 By Collecting Interest at Rates Far Exceeding the Criminal Usury Rate of 25%

Penal Law § 190.40, New York's criminal usury statute, provides:

> a person is guilty of criminal usury in the second degree when, not being authorized or permitted by law to do so, he knowingly charges, takes or receives any money or other property as interest on the loan or forbearances of any money or other property, at a rate exceeding twenty-five per cent per annum or the equivalent rate for a longer or shorter period.

By collecting and receiving interest in excess of 25%, Respondents CashCall and WS Funding have repeatedly and persistently violated Penal Law § 190.40. In particular, CashCall has repeatedly and persistently debited money from the bank accounts of thousands of New York consumers in New York as interest, and otherwise collected interest payments on loans at rates ranging from over 89% to more than 355%. See Aff. ¶ 18. CashCall collected this illegal interest on behalf of WS Funding, the stated owner of the loans. Both CashCall and WS Funding charged these rates knowingly because the rates were stated on the face of the loan contracts and documents. See Fareri v. Rain's Int'l, Ltd., 187 A.D.2d 481, 482 (2d Dep't 1992) (holding that "the loan agreement was usurious on its face, and thus, usurious intent may be implied"). Moreover, the criminally usurious interest rates pervade CashCall's business, as it has offered and arranged for the loans, communicated the terms of the loans to borrowers, and collected

usurious rates of interest. See Aff. ¶¶ 28, 35 47, and 48.

Respondents' violations of Penal Law § 190.40 constitute repeated and persistent illegality in violation of Executive Law § 63(12). See State v. ITM, 52 Misc. 2d 39 at 61 (Penal Law violations constituted persistent illegality under Executive Law § 63(12)).

B. Respondents Have Engaged in Repeated and Persistent Fraud within the Meaning of Executive Law § 63(12)

Executive Law § 63(12) prohibits "repeated or persistent fraud." Within the context of Executive Law § 63(12), the term "fraud" has its own meaning. The statute defines the words "fraud" or "fraudulent" to include "any device, scheme or artifice to defraud and any deception, misrepresentation, concealment, suppression, false pretense, false promise, or unconscionable contractual provisions." Courts have consistently applied an extremely broad view of what constitutes fraudulent conduct in proceedings brought by the Attorney General under Executive Law § 63(12). See, e.g., Lefkowitz v. Bull Investment Group, 46 A.D.2d 25, 28 (2d Dep't 1974), aff'd, 35 N.Y.2d 647 (1975); People v. 21st Century Leisure Spa Int'l Ltd., 153 Misc. 2d 938, 943 (Sup. Ct. N.Y. Co. 1991). It is well-settled that it is not necessary to establish the traditional elements of common law fraud, such as intent to deceive and reliance, in order to establish liability for statutory fraud under Executive Law § 63(12). People v. Apple Health & Sports Clubs, Ltd., Inc., 206 A.D.2d 266, 267 (1st Dep't 1994), appeal denied, 84 N.Y.2d 1004 (1994); State v. Ford Motor Co., 136 A.D.2d 154, 158 (3d Dep't 1988), aff'd, 74 N.Y.2d 495 (1989); 21st Century Leisure Spa, 153 Misc. 2d at 944.

The test of fraudulent conduct under Executive Law § 63(12) is whether the act "has the capacity or tendency to deceive, or creates an atmosphere conducive to fraud." People v. Applied Card Sys., Inc., 27 A.D.3d 104, 106 (3d Dep't 2005), aff'd on other grounds, 11 N.Y.3d 105 (2008) (quoting People v. Gen. Elec. Co., 302 A.D.2d 314 (1st Dep't 2003)). Executive

Law § 63(12) thus protects the credulous and the unthinking as well as the cynical and intelligent, the trusting as well as the suspicious. See Guggenheimer v. Ginzburg, 43 N.Y.2d 268, 273 (1977); Applied Card, 27 A.D.3d at 106; Gen. Elec., 302 A.D.2d at 314.

In this case, the evidence submitted by Petitioner overwhelmingly demonstrates that Respondents have engaged in actionable repeated and persistent fraudulent conduct.

1. Respondents Western Sky, CashCall, and WS Funding Contracted for and Enforced Unconscionable Contractual Provisions

Respondents Western Sky, CashCall, and WS Funding engaged in repeated fraudulent conduct by contracting for and enforcing contractual provisions for usurious rates of interest on thousands of loans. See Aff. ¶ 64. Usurious interest rates are unconscionable and constitute fraud under Executive Law § 63(12). See Executive Law § 63(12) (defining "fraud" to include "unconscionable contractual provisions"); People v. JAG NY, LLC, No. 5302-04, at 13 (N.Y. Sup. Ct. Alb. Co. Jan. 20, 2005) (holding that "usurious loans are 'unconscionable contractual provisions' and therefore are fraud pursuant to Executive section 63(12)").

2. Respondents Western Sky, CashCall, and WS Funding Offered, Contracted For, and Collected Illegal Interest and Misrepresented that New York Law Does Not Apply

Respondents Western Sky, CashCall, and WS Funding also engaged in repeated fraud by offering, contracting for, and collecting on personal loans carrying interest rates that are illegal in New York. By offering, contracting for, and collecting on personal loans with rates of interest from 89% to more than 355%, Respondent companies implicitly represent that they can legally lend money in New York and charge these rates of interest. See Kidd v. Delta Funding Corp., 2000 N.Y. Misc. LEXIS 29, at *26-27 (Sup. Ct. N.Y. Co. Feb. 22, 2000) (holding that by imposing and collecting illegal fees, defendant had impliedly represented it was entitled to such fees). In fact, New York State's usury and licensing laws prohibit Respondents from making and

enforcing these loans. See supra §§ I(A)(1)-(3). Respondent companies' conduct is therefore deceptive and fraudulent because it misrepresents the legality of their lending. See Kidd v. Delta Funding Corp., 2000 N.Y. Misc. LEXIS 29, at *26-27 (imposition of mortgage processing fees in violation of law a deceptive practice under GBL § 349); Walts v. First Union Mortgage Corp., 259 A.D.2d 322, 323 (1st Dep't 1999), appeal dism'd, 94 N.Y.2d 795 (1999) (charging consumers premiums in violation of law held to be a deceptive practice); Negrin v. Norwest Mortg., Inc., 263 A.D.2d 39, 50 (2d Dep't 1999) (allegations of the "unilateral imposition of illegal and/or unwarranted fees upon [] customers states a valid claim of consumer fraud"); Lefkowitz v. E.F.G. Baby Products, 40 A.D.2d at 364 (charging consumers a cancellation fee prohibited by law is deceptive).

Western Sky and CashCall are also liable because the companies falsely represent to New York consumers, expressly and by implication, that New York law does not apply to these loans. Specifically, every consumer that applies for a loan online is told that they are subject "exclusively to the laws and jurisdiction of the Cheyenne River Sioux Tribe." In addition, CashCall deceptively claims that the loans are governed "exclusively" by the laws of the Cheyenne River Sioux Tribe. See Aff. ¶¶ 22, 39. Contrary to the Respondents' claims, all of the loans are subject to New York lending law. Respondents solicited loans in New York, made loans to New York consumers in New York, and collected usurious rates of interest from bank accounts in New York, among other things. See Aff. ¶¶ 20, 23, 25. Respondents' conduct in and contact with New York implicates the state's licensing regulations and civil and criminal usury caps. See Banking Law § 340 (a person or entity engages in the business of making loans in New York, and is subject to the licensed lender law, "if it solicits loans . . . within this state and, in connection with such solicitation, makes loans to individuals then resident in this state").

3. CashCall Threatened to Take Action to Enforce Loans That the Company Did Not Take or Intend To Take

CashCall also engaged in repeated fraudulent conduct by threatening to take action to enforce loans that it did not take or intend to take. CashCall personnel made a variety of claims to intimidate consumers who were delinquent on loan payments, including that warrants would be issued for consumers' arrest and that an agent would personally "serve" a consumer with papers. See Aff. ¶ 36. CashCall had no intention of undertaking any of these actions. The company has never filed a lawsuit against a New York borrower or referred a New York consumer to law enforcement. See Ex. D to Adler Aff at ¶¶ 16-17. Federal courts have found such false threats deceptive under Section 5 of the FTC Act. See FTC v. Check Enforcement, 2005 U.S. Dist. LEXIS 34349, at *26-27 (D.N.J. July 15, 2005) (holding misrepresentations made to intimidate consumers into paying debts, including threats of arrest and false threats to file lawsuits, violated Section 5 of the FTC Act), aff'd, 502 F.3d 159 (3d Cir. 2007); Trans World Accounts, Inc. v. FTC, 594 F.2d 212, 216 (9th Cir. 1979) (substantial evidence supported FTC finding that letters threatening legal action when no such action was contemplated violated Section 5 of the FTC Act).[8] CashCall's threats constitute actionable repeated fraud.

CashCall has been sanctioned for similar conduct in the past. In West Virginia v. CashCall, Inc., the court found that CashCall had engaged in a variety of unlawful debt collection practices to induce consumers to make payments on usurious loans, including threatening to take actions that it did not intend to take. West Virginia v. CashCall, Final Order on Phase I at 41. CashCall's false threats included threatening consumers with legal action and threatening to visit consumers at their places of employment or at their homes. See id. at 13.

[8] The interpretation of the FTC Act has long been viewed as a guide for construing what constitutes fraudulent conduct under Executive Law § 63(12) and deceptive business practices under GBL § 349. See Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, 85 N.Y.2d 20, 26 (1995); Applied Card, 27 A.D.3d at 107; State v. Feldman, 210 F. Supp. 2d 294, 302 (S.D.N.Y. 2002); Colorado State Christian Coll., 76 Misc. 2d at 55.

The court held that CashCall's deceptive threats violated West Virginia's statute prohibiting unfair or deceptive acts or practices. See id. at 41. CashCall's false threats to New York consumers are likewise actionable.

C. Respondents Have Engaged in Repeated and Persistent Illegality within the Meaning of Executive Law § 63(12) By Repeatedly and Persistently Violating GBL § 349

GBL § 349 declares unlawful "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service" in New York. A representation or omission is deceptive pursuant to GBL § 349 if it is likely to mislead a reasonable consumer acting reasonably under the circumstances. Oswego Laborers' Local 214 Pension Fund, 85 N.Y.2d at 26.

Like Executive Law § 63(12), GBL § 349 is "intended to be broadly applicable, extending far beyond the reach of common law fraud." State v. Feldman, 210 F. Supp. 2d at 301. As with statutory fraud under Executive Law § 63(12), the elements of common law fraud need not be established to demonstrate a violation of GBL § 349. Applied Card, 27 A.D.3d at 107; Gen. Elec., 302 A.D.2d at 315; People v. Network Assocs. Inc., 195 Misc. 2d 384, 389 (Sup. Ct. N.Y. Co. 2003); Colorado State Christian Coll., 76 Misc. 2d at 51. A practice may carry the capacity to mislead or deceive a reasonable person, and violate GBL § 349, and not be fraudulent under the common law. Gaidon v. Guardian Life Ins., 94 N.Y.2d 330, 348 (1999).

As described above, Respondents Western Sky, CashCall, and WS Funding have engaged in deceptive acts and practices in violation of GBL § 349 by: (1) repeatedly offering, contracting for, and collecting illegal interest rates and misrepresenting to consumers that the rates of interest they were charged on their loans were legal; (2) repeatedly misrepresenting to consumers that New York law does not apply; and (3) repeatedly threatening to take action to enforce loans that

CashCall and WS Funding did not take or intend to take.

In addition, Western Sky, CashCall, and WS Funding violated GBL§ 349 by repeatedly making and collecting on loans without a license. Operating without a license that is required by the State of New York is a per se violation of GBL§ 349. See Pavlov v. Debt Resolvers USA, Inc., 907 N.Y.S.2d 798, 810 (Civ. Ct. 2010) ("this court has consistently held that the failure to be properly licensed constitutes a deceptive business practice under General Business Law § 349"). Through the aforementioned violations of GBL § 349, Respondents engaged in repeated illegality within the meaning of Executive Law § 63(12).

II. RESPONDENTS J. PAUL REDDAM AND MARTIN WEBB ARE PERSONALLY LIABLE FOR THE RESPONDENT COMPANIES' REPEATED AND PERSISTENT ILLEGAL AND FRAUDULENT ACTS

Executive Law § 63(12) is directed against "any person" who "shall engage in repeated fraudulent or illegal acts." Similarly, GBL § 349 provides that the Attorney General may bring an action to enjoin conduct in violation of GBL § 349 when the Attorney General believes that "any person" has engaged in or is about to engage in such violations, and GBL § 350-d provides that "any person" may be liable for civil penalties for violations of GBL § 349. It is well-settled that corporate officers and directors are liable for illegal or fraudulent acts in violation of Executive Law § 63(12) and GBL § 349 if they personally participate in, or have knowledge of, the illegal or fraudulent acts. See, e.g., Apple Health & Sports Clubs, Ltd., 80 N.Y.2d at 807; People v. Court Reporting Inst., 245 A.D.2d 564 (2d Dep't 1997); People v. Concert Connection Ltd., 211 A.D.2d 310, 320 (2d Dep't 1995); State v. Midland Equities of N.Y., Inc., 117 Misc. 2d 203, 208 (Sup. Ct. N.Y. Co. 1982). Where such liability is found, all relief that can be obtained against a corporate entity can also be obtained against the officers or directors of the corporation, including injunctive relief, restitution, penalties, and costs. See, e.g., State v. Frink

Am. Inc., 2 A.D.3d 1379, 1381 (4th Dep't 2003); Court Reporting Inst., Inc., 245 A.D.2d at 565; People v. American Motor Club, Inc., 179 A.D.2d 277, 284-85 (1st Dep't 1992); State v. Daro Chartours, Inc., 72 A.D.2d 872, 873 (3d Dep't 1979); 21st Century Leisure Spa Int'l Ltd., 153 Misc. 2d at 944.

A. Respondent J. Paul Reddam

Respondent J. Paul Reddam has actual knowledge of and has actively participated in the attempts of CashCall and WS Funding to evade state usury law and collect usurious interest. Reddam is the president of CashCall, the sole member of the company's Board of Directors, the company's only owner, and the president of WS Funding. See Aff. ¶ 60. Reddam described his responsibilities at CashCall in a personal affidavit filed with the State of Colorado in 2010:[9]

> Mr. Reddam runs the day-to-day operations of CashCall which currently originates and services unsecured loans. All of the company's department heads report directly to Mr. Reddam. He is responsible for devising and implementing all major company policies – including its various loan programs and interest rates.

See Aff. ¶ 60. The affidavit was signed only a few months after Reddam executed contracts with Western Sky that instituted Respondents' illegal and deceptive lending arrangement. See id.

Reddam is involved in CashCall's scheme to collect usurious interest in New York using Western Sky's name. In his capacity as president of CashCall and WS Funding, Reddam executed the service agreement between CashCall and Western Sky and the assignment agreement between WS Funding and Western Sky. See Aff. ¶ 61. Through those contracts, CashCall and WS Funding agreed to help originate loans on behalf of Western Sky, provide funding for the Western Sky loans, purchase all Western Sky loans, and indemnify Western Sky for its lending. See Aff. ¶¶ 42 - 45, 47. Reddam is therefore not only aware of the relationship

[9] The personal affidavit was filed as part of a supervised lender's license application for Delbert Services Corporation, an entity owned by Reddam. See Aff. ¶ 60.

between Western Sky, CashCall, and WS Funding, he orchestrated it. Reddam is personally liable for his companies' illegal and deceptive acts.

B. Respondent Martin Webb

Respondent Martin Webb also has actual knowledge of and has actively participated in Western Sky's illegal and fraudulent activities. Western Sky and Webb have represented that:

> Webb is the only officer, director, manager, owner, and principal of Western Sky. He has general responsibility and final decision-making authority for all of Western Sky's business operations.

See Aff. ¶ 62. Indeed, Webb, like Reddam, executed the service agreement and assignment agreement that established the lending relationship between the Respondent companies. See id. Because Webb had actual knowledge of and participated in Western Sky's origination of usurious loans and the deceptive scheme to evade state law, Webb is also liable for the company's conduct. This is consistent with holdings in actions brought against Western Sky and Webb in Colorado and Maryland, which found Webb individually liable for the same conduct at issue here, Western Sky's usurious and unlicensed lending via the Internet. See Colorado v. Western Sky, April 2013 Order at 12-13; Maryland Order at 15. For example, in addressing Webb's liability for Western Sky's conduct, the court in Colorado v. Western Sky held that:

> it is uncontroverted that Webb is the sole manager, executive director, owner, and principal of Western Sky. It is further undisputed that Webb directs, controls, manages, participates in, supervises, is responsible for, and authorizes Western Sky's activities. Finally, the record before the Court confirms that Webb has general responsibility and final decision making authority for *all* of Western Sky's business operations. Accordingly, because Webb has the exclusive authority to control the actions of Western Sky, he may also be held individually liable for Western Sky's violations of [Colorado law].

Colorado v. Western Sky, April 2013 Order at 10-11. Webb should be held individually liable.

III. WESTERN SKY IS NOT ENTITLED TO TRIBAL IMMUNITY

In correspondence with the Office of the Attorney General, Western Sky has asserted that the company is not subject to personal or subject matter jurisdiction in New York because it enjoys tribal immunity. Western Sky's argument has no merit.

Western Sky is not a Native American tribal entity – it is a limited liability company organized under South Dakota law, and it is neither owned nor operated by a Native American tribe. See Aff. ¶ 51. Nevertheless, the company claims that it is immune from suit because it is purportedly a "wholly Native American owned company" and it is "located and operating within the Cheyenne River Indian Reservation." The company has made similar claims in enforcement actions brought in other states over the same conduct at issue here, usurious and unlicensed lending via the Internet. Courts and regulatory agencies have uniformly rejected claims of immunity made by Western Sky and Webb. See Colorado v. Western Sky, April 2013 Order at 8; Maryland Order at 9; Missouri v. Webb, Oct. 2012 Order; West Virginia v. Payday Loan, Oct. 2011 Order.

The decision in Colorado v. Western Sky is instructive. In that case, the Colorado court rejected arguments put forth by Western Sky and Webb that they were entitled to tribal immunity because (i) Webb, the owner of Western Sky, is Native American and (ii) the defendants were located on and conducted business from a Native American reservation. Colorado v. Western Sky, April 2013 Order at 5. The court held that "Webb, as an enrolled member of the Tribe, is not individually entitled to immunity, nor does his membership in the Tribe confer such immunity upon Western Sky." Id. at 8. The court also held that Western Sky's actions in offering and entering into loans with Colorado consumers via the Internet did not constitute "on-reservation" activity and that the company was therefore subject to Colorado law. Id. at 7-8, 14.

The Maryland Commissioner of Financial Regulation similarly found Western Sky's arguments unpersuasive. See Maryland Order at 11. The Commissioner held that there was "no support for the argument that Mr. Webb has tribal immunity that he can, in turn, confer on his businesses." Id. The Commissioner also rejected respondents' claim that only the Native American tribe had jurisdiction over respondents' activities, in part because Maryland consumers were within the state when they applied for their loans and they had received loan proceeds and repaid their loans with bank accounts within the state. Id. at 13.

IV. THE COURT SHOULD GRANT PERMANENT INJUNCTIVE RELIEF, RESTITUTION, DAMAGES, DISGORGEMENT, CIVIL PENALTIES AND COSTS

The Court has broad equitable authority to grant injunctive relief, restitution, disgorgement, damages, civil penalties and costs in proceedings brought pursuant to Executive Law § 63(12) and GBL § 349. See Princess Prestige, 42 N.Y.2d at 107; Daro Chartours, Inc., 72 A.D.2d at 873; State v. Scottish-Am Ass'n, 52 A.D.2d 528 (1st Dep't 1976). Respondents' repeated and persistent fraudulent and illegal acts warrant the imposition of injunctive relief, as well as restitution to the affected consumers, damages, disgorgement, civil penalties, and costs.

A. The Court Should Grant Permanent Injunctive Relief Against Respondents' Illegal and Fraudulent Conduct or in the Alternative Require a Performance Bond

In actions brought pursuant to Executive Law § 63(12), a court's remedial powers are extremely broad, and courts routinely grant permanent injunctive relief in addition to other forms of relief. See Princess Prestige, 42 N.Y.2d at 108; Daro Chartours, Inc., 72 A.D.2d at 873; Scottish-Am. Ass'n, 52 A.D.2d at 528; State v. Management Transition Resources, Inc., 115 Misc. 2d 489 (Sup. Ct. N.Y. Co. 1982); Midland Equities, 117 Misc. 2d at 206.

To ensure that Respondents stop lending at and collecting usurious rates of interest, the

Court should enjoin Respondents from engaging in the fraudulent, deceptive and illegal practices alleged in the Verified Petition, including advertising, offering, originating or contracting for loans in New York State, or charging, taking, or receiving money or other property as interest at rates above 16% without a license from New York State. See People v. JAG NY, LLC, 18 A.D.3d 950, 953 (affirming grant of permanent injunction against payday loan scheme); Midland Equities, 117 Misc. 2d at 208 (permanent injunction issued against engaging in foreclosure consulting services); People v. Helena VIP Pers. Introductions Servs. of N.Y., Inc., 199 A.D.2d 186 (1st Dep't 1993) (permanent injunction issued against engaging in social referral business).

To the extent that Respondents are permitted to engage in any consumer business in New York, the Court should require them to execute and file with the Attorney General a performance bond in the sum of $2,000,000 as a condition of permitting them to advertise, offer, originate, or contract for loans, or charge, take, or receive interest in New York State and to New York consumers. The Court's power to grant equitable relief includes the requirement of a performance bond, and New York courts routinely require businesses that have engaged in illegal, deceptive or fraudulent business practices to file a bond. See People v. Allied Mktg. Group, 220 A.D.2d 370 (1st Dep't 1995); Empyre Inground, 227 A.D.2d at 732.

B. The Court Should Declare Respondents' Usurious Loans With New York Consumers Void And Direct Respondents to Notify Credit Agencies of This Fact

A usurious contract is void *ab initio*. See GOL § 5-511(1); Szerdahelyi v. Harris, 67 N.Y.2d 42, 50 (1986). Moreover, when "any bond, bill, note, assurance, pledge, conveyance, contract, security or any evidence of debt, has been taken or received in violation of [the usury laws], the court shall declare the same to be void, and enjoin any prosecution thereon, and order the same to be surrendered and cancelled." GOL § 5-511(2); Seidel v. 18 East 17th St. Owners, Inc., 79 N.Y.2d 735, 740 (1992). GOL § 5-511 thus relieves borrowers of the repayment of

interest and outstanding principal on usurious loans. Seidel, 79 N.Y.2d at 740 ("New York usury laws historically have been severe . . . reflecting the view of our Legislature that the prescribed consequences are necessary to deter the evils of usury"); see also Szerdahelyi, 67 N.Y.2d at 47-48 (holding note bearing usurious interest void and ordering defendant to return money paid over the legal rate of interest).

Pursuant to GOL § 5-511, the Court should declare null and void any loan or forbearance made or arranged by Respondents with an interest rate exceeding 16%, which is the maximum rate unlicensed lenders are permitted to charge, contract for, take, or receive under state law. The Court should also direct Respondents to notify all credit agencies to which they have reported that all loans made to New York consumers are invalid, and that all reports or scores that reflect these loans should be corrected.

C. Respondents Must Pay Restitution to Aggrieved Consumers

In addition to injunctive relief, the Court should grant restitution to all New York victims who have been injured as a result of Respondents' illegal and fraudulent conduct. Executive Law § 63(12) explicitly provides for restitution to affected consumers as a "means to make the victims of past fraud whole again." Governor's Approval Mem., L 1970, ch 44, 1970 McKinney's Session Laws of NY, at 3074. The scope of the relief granted "is addressed to the sound judicial discretion of the courts." Princess Prestige, 42 N.Y.2d at 108.

Courts have routinely held that illegal, deceptive and fraudulent business conduct warrants restitution to victims. See, e.g., Empyre Inground, 227 A.D.2d at 733-734 (restitution ordered after respondents engaged in misleading advertising and deceptive practices in connection with its door-to-door sales); People v. Telehublink Corp., 301 A.D.2d 1006, 1008-09 (3d Dep't 2003) (restitution ordered for illegal advance fees charged by loan broker);

Management Transition, 115 Misc. 2d at 492 (unlicensed employment agency ordered to pay restitution to consumers who paid fees). In actions brought pursuant to Executive Law § 63(12), courts customarily order restitution to all defrauded victims, even where they are not all identified at the time of the order. See, e.g., Telehublink Corp., 301 A.D.2d at 1007; Gen. Elec., 302 A.D.2d at 316; Scottish-Am. Ass'n, 52 A.D.2d at 529; Midland Equities, 117 Misc. 2d at 208; Management Transition, 115 Misc. 2d at 492.

The Court also has wide latitude to fashion an appropriate form of restitution. Thus, in actions brought pursuant to Executive Law § 63(12), courts frequently order the creation of a restitution fund for distribution to affected consumers and sometimes also specify how consumers should be notified and how restitution should be distributed. See, e.g., People v. Life Science Church, 113 Misc. 2d 952, 970-71 (Sup. Ct. N.Y. Co. 1982); In re State v. Bevis Indus., 63 Misc. 2d 1088, 1091 (Sup. Ct. N.Y. Co. 1970). In other cases, courts direct the parties to suggest a mechanism for identifying and notifying affected consumers and distributing restitution in their settling of an order. See, e.g., Princess Prestige, 42 N.Y.2d at 108; Gen. Elec., 302 A.D.2d at 316. Courts also frequently order respondents to provide an accounting to identify affected consumers and the amounts paid by them. See, e.g., Telehublink Corp., 301 A.D.2d at 1007; People v. P.U. Travel, Inc., 2003 N.Y. Misc. LEXIS 2010 (Sup. Ct. N.Y. Co. June 19, 2003); 21st Century Leisure Spa Int'l, Ltd., 153 Misc. 2d at 945.

In this case, the Court should direct Respondents to provide an accounting identifying Respondents' New York consumers and the amounts paid by each. The Court should also direct Respondents to refund to each New York consumer all interest paid above 16%, which is the maximum rate unlicensed lenders are permitted to charge, contract for, take, or receive, and all fees Respondents charged, whether for insufficient funds, late payments, or otherwise.

D. Respondents Must Disgorge Profits From Illegal Loans

The Court should also order disgorgement of funds earned as a result of Respondents' illegal and fraudulent conduct. Disgorgement is "an equitable remedy distinct from restitution" that compels a respondent to relinquish the "profits that the respondent[] derived from all New York consumers." People v. Applied Card Sys., Inc., 11 N.Y. 3d 105, 125 (2008), citing SEC v. Fischbach Corp., 133 F.3d 170 (2d Cir. 1997) ("As an exercise of its equity powers, the court may order wrongdoers to disgorge their fraudulently obtained profits"); and Official Comm. of Unsecured Creditors of WorldCom, Inc. v. SEC, 467 F.3d 73 (2d Cir. 2006). The primary purpose of disgorgement is to deter law violations by depriving violators of their ill-gotten gains. Worldcom, 467 F.3d at 81. Disgorgement is appropriate here to ensure Respondents do not profit from their illegal conduct and their deceptive and fraudulent scheme to circumvent New York law. Disgorgement will also serve to discourage other opportunistic companies acting over the Internet from engaging in similar tactics. The Court should also direct Respondents to provide an accounting of the profits earned from New York consumers.

E. The Court Should Order Respondents to Pay $5,000 in Penalties Per Violation for Repeated Illegal Conduct

GBL § 350-d provides for the assessment of a civil penalty of up to $5,000 for each deceptive act in violation of Article 22-A. Courts routinely award penalties in enforcement cases brought by the New York Attorney General. See, e.g., Telehublink Corp., 301 A.D.2d 1006; In re People v. Wilco Energy Corp., 284 A.D.2d 469, 474 (2d Dep't 2001); Allied Mktg. Group, 220 A.D. 2d at 370. Because civil penalties are paid to the State, their purpose is to deter future violations and to punish illegal conduct, not to compensate the injured party. See Meyers Bros. Parking Sys., Inc. v. Sherman, 87 A.D.2d 562, 563 (1st Dep't 1982), aff'd, 57 N.Y.2d 653 (1982). The penalty should not be so small as to merely represent a cost of doing business; to the

contrary, the penalty should be large enough to serve as a warning to discourage the prohibited act. See id. at 563.

In this case, Respondents engaged in numerous deceptive acts and practices in violation of GBL § 349, including (i) offering, contracting for, and collecting illegal interest rates and misrepresenting to consumers that the rates of interest they were charged on their loans were legal; (ii) misrepresenting to consumers that New York law does not apply; and (iii) threatening to take action to enforce the loans that the Respondents did not take or intend to take. Through these misrepresentations, Respondents deceived borrowers in order to collect rates of interest far higher than that permitted in New York. In addition, the Respondents operated without a license, which is a per se violation of GBL § 349. See supra § I(C).

The Respondents engaged in these practices with knowledge that their loans are illegal, as evidenced by correspondence from the OAG concerning New York's laws. See Aff. at ¶ 53. Moreover, the nature of the Respondents' convoluted scheme -- the origination of loans by Western Sky, the sale of the loans to WS Funding, and the collection of interest by CashCall -- indicates that Respondents intentionally structured their business in an attempt to evade state consumer protection laws. CashCall and Reddam have a history of such conduct, having illegally engaged in a prior scheme that disguised CashCall loans as bank loans. West Virginia v. CashCall, Final Order on Phase II at 17.

Furthermore, the Respondents have targeted New York's most financially vulnerable citizens. Advertisements urge consumers "facing a cash emergency" and who "don't know where to turn" to apply for an installment loan from Western Sky. See Aff. at ¶ 20. Consumers who take on these loans are facing financial hardships, such as eviction, the loss of a job, and medical bills. See Aff. at ¶ 21. And the lending has inflicted substantial financial injury on New

York consumers, leaving many worse off than before they took on the loans. One consumer closed his bank account to prevent CashCall from continuing to debit money from his account because "[w]ith each month [he] was falling further and further into debt." See Adler Aff. Ex A-5, ¶ 8. Other consumers have also stated that they could not afford to continue making the monthly payments. See Adler Aff. Ex A-4, ¶ 7; Ex. A-10 at Ex. A.

Given the willful nature of Respondents' deceptive conduct, Respondents' prior history of extending illegal and usurious loans, and the widespread injury to New York's consumers, the Court should impose the maximum penalty under GBL § 350-d of $5,000 for each violation. Cf. West Virginia v. CashCall, Final Order on Phase II at 28-29 (awarding $5,000 per loan for making and collecting usurious loans without a license in violation of consumer protection act). The maximum penalty will also send a strong message that New York State will not condone conscious violations of New York law to the detriment of our most vulnerable citizens.

F. Respondents Should be Ordered to Pay Costs

CPLR § 8303(a)(6) provides that the court may award the Attorney General "a sum not exceeding two thousand dollars against each defendant" in a special proceeding pursuant to Executive Law § 63(12). Courts have routinely granted these costs. See, e.g., Daro Chartours, 72 A.D.2d at 873; Midland Equities, 117 Misc. 2d at 208; State v. Hotel Waldorf-Astoria Corp., 67 Misc. 2d 90, 92 (Sup. Ct. N.Y. Co. 1971). Therefore, an award of additional costs in the amount of $2,000 against each Respondent should also be granted.

CONCLUSION

For the reasons set forth in this memorandum, the Court should make a summary determination in Petitioner's favor on all causes of action and grant the relief requested in the Verified Petition.

Dated: August 12, 2013

Respectfully submitted,

ERIC T. SCHNEIDERMAN
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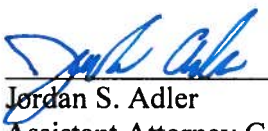
Attorney for Petitioner

By: 

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