UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

HEIKO GOLDENSTEIN,

Plaintiff,

v.,

REPOSSESSORS INC., CHAD LATVAAHO, SHADY OAK ENTERPRICES, INC., .d/b/a **PREMIER FINANCE ADJUSTERS, PHILIP J. HOURICAN & WILLIAM McKIBBIN,**

Repossessors.

No. 13-cv-02797-JKG

Heiko Goldenstein's Corrected[1] Memorandum of Law in Opposition to Motion for Summary Judgment

Introduction

In *Cash America Net v. Commonwealth of Pennsylvania*, 607 Pa. 432, 8 A.3d 282, 295 (2010), the Pennsylvania Supreme Court ruled that on-line lenders are conducting business in Pennsylvania and had to obey Pennsylvania's usury laws. The present case is about a predatory lender called Sovereign Lending Solutions, LLC, ("Sovereign") that makes auto title loans on-line to Pennsylvania residents at triple digit interest rates in defiance of the Pennsylvania Supreme Court. Sovereign loaned the plaintiff, Hieko Goldenstein, about $1,000 at or about an interest rate of 250% A.P.R. Thereafter, Sovereign had the defendants repossess Mr. Goldenstein's car to coerce the payment of usurious interest.

Sovereign does not care that it is breaking Pennsylvania law because Sovereign is sponsored by an Indian tribe and claims to be protected by tribal immunity. Accordingly, Mr. Goldenstein did not name Sovereign as a defendant. Instead, Mr. Goldenstein is suing the collection agents that

1 This brief is the identical as the one plaintiff previously filed, except that a number of typographical and spelling errors in the original are corrected.

repossessed his car, including Repossessors, Inc. ("Repossessors"), Shady Oaks Enterprises, Inc., t/a Premier Finance Adjusters ("Premier"), Chad Latvaaho, and Phillip Hourican ("Repossessors and Premier are collective referred to as "Repossessors" unless the context dictates otherwise).

Mr. Goldenstein is suing Repossessors under the Fair Debt Collections Practices Act, 15 U.S.C. § 1692f(6), for repossessing his car in the absence of an enforceable right to possession. The individual defendants are the principals behind the corporate defendants, and Mr. Goldenstein is suing them under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(c), for using their companies as RICO enterprises to collect unlawful debt.

For the reasons explained below, the defendants' motion for summary judgment should be denied.

Background

Sovereign Lending Solutions, LLC, is a business entity incorporated under tribal law by the Lac Vieux Desert Band of Lake Superior Chippewa Indians ("Tribe"). Exhibit P-7 at 66. The Tribe occupies a small reservation on Michigan's upper peninsula. The tribe issued Sovereign a license to engage in consumer lending. Exhibit P-7 at 127-28. The license authorizes Sovereign to make loans in accordance with the Tribe's lending code within the tribe's jurisdiction. Exhibit P-7 at 108, 127 & 128 ("A License is a revocable privilege to do business within the jurisdiction of the Lac Vieux desert Band of Lake Superior Chippewa Indians"). Under Tribal law, Sovereign is authorized to issue loans secured by vehicles at interest rates up to 390% per annum. Exhibit P-7 at 122.

In 2012, Sovereign operated a website under the trade name Title Loan America.[2] Complaint, Exhibit P-3. In April 2012, Mr. Goldenstein came across the website and applied for a loan. The application process took place on-line, over the phone, and through the use of a facsimile

2 Plaintiff notes that the Title Loan America website recently came down. Another borrower has recently received communication regarding a Sovereign loan from a new domain "carloan-llc.com."

machine. Everything Mr. Goldenstein did to apply for the loan, he did from Pennsylvania. He never went to the Tribe's reservation in Michigan. Deposition ("Dep.") at 88.

It is Mr. Goldenstein's understanding that he borrowed $1,000. As a result of the transaction, $950 was deposited into Mr. Goldenstein's bank account, Defendant's Exhibit "D," and he believes that Sovereign deducted $50 as a fee for the wire transfer. Mr. Goldenstein was not given a written loan agreement, but he recalls seeing an image of an agreement on-line similar to the one appended to the complaint as Exhibit P-5. Dep. at 86. Exhibit P-5 is also identical to a loan agreement Sovereign admits to giving to borrower Meribeth Ghost about one month later. Exhibit P-7 at 12-13 & 130-32. The loan agreement appears to be a standardized form used in multiple transactions.

According to Sovereign's web site, its loans last approximately one year, and the borrower has a minimum obligation to pay the interest that comes due each month. Complaint Exhibit P-3 (first page under the heading "Easy and Convenient Payback Plan"). The loan form contemplates a 30 day loan that can be extended for additional 30 day periods upon payment of accrued interest. Exhibit P-7 at 130 (under the heading "Renewal Policy" at the bottom of the page).

After receiving the loan, Mr. Goldenstein expected to receive monthly bills, but none appeared. Dep. at 28. Instead, he noticed that a company called "Sovereign Payroll" made withdraws from his account, and he was not certain who the company was. Dep at. 51. Sovereign Payroll withdrew $207.90 on June 1st and again on July, 2, 2012. Defendants' Exhibit "D." Because Mr. Goldenstein was not certain who was making the withdraws, he changed his bank account to stop them. Dep at. 51.

On August 8, 2012, Sovereign sought to make another withdraw of $214.83 that was declined for insufficient funds. Defendants' Exhibit "D." It turns out that the withdraws were for Sovereign Lending Solutions, but instead of calling Mr. Goldenstein about the declined payment, Sovereign immediately made arrangements to repossess Mr. Goldenstein's vehicle. Motion for

Summary Judgment ¶ 30. Repossessors admits to receiving Sovereign's request to repossess Mr. Goldenstein's vehicle on August 20, 2012, less than 30 days after Mr. Goldenstein's payment was declined. *Id.*

Sovereign told Repossessors that the balance due on the loan as of August 20, 2012, was $1,358.07. *Id.* & Defendant's Exhibit "G" ¶ 9.[3] In other words, despite receiving $414 in payments, the balance did not decrease; it increased by $357.07. This demonstrates that the $414 Mr. Goldenstein paid was applied exclusively to interest since the balance never went down to account for the funds. A $207 monthly interest payment on a $1,000 loan equates to an interest rate of about 250% A.P.R. ($1,000 x 2.5% = $2,500 ÷ 12 = $208.33). This rate is in line with the rate Sovereign admits to charging Ms. Ghost listed as 261% on the face of her loan agreement. Exhibit P-7 at 130.

At 6% per annum, the maximum rate of interest an unlicensed lender may collect under Pennsylvania law, Sovereign had the right to charge Mr. Goldenstein $5 per month on a $1,000 loan balance. ($1,000 x 0.06% = $60 ÷ 12 = $5.00). After receiving $414 from Mr. Goldenstein in June and July, the balance on the loan should have decreased to about $600. By August 20th when Sovereign retained Repossessors, Sovereign had the right to assess about $8 in additional interest for July and part of August. So the loan balance by August 20, 2012, should have been about $608.

Repossessors subcontracted the repossession to Premier which repossessed Mr. Goldenstein's car on October 6, 2014, at his place of employment, the Wyndham Garden Hotel in Exton Pennsylvania. Motion for Summary Judgment ¶ 32; Dep. at 61. The repossession was witnessed by most of Mr. Goldenstein's coworkers at the hotel, and Mr. Goldenstein was mortified with embarrassment. Dep. at 60-63. Within 24 hours every employee at the hotel knew that Mr. Goldenstein's car was repossessed, and coworkers teased him about the repossession for months. *Id.*

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3 This document is the affidavit of Michael Jansons. Attached to the affidavit as Exhibit "B" is a print out that Mr. Jansons says is from Sovereign. On page two of that exhibit, Sovereign states that the amount of Mr. Goldenstein debt as of August 1, 2012, was "$1358.07."

Within a couple days, Mr. Goldenstein got his car back. He called Premier who told him where his car was and how much money he needed to bring to redeem it. Dep. at 66-67. Documentation he received at the time of the redemption indicates that he paid $2,143 to satisfy the loan to Sovereign plus $250 in towing and storage fees. Complaint Exhibit P-6 (final page at the bottom); Dep. at 70, lines 15-23.[4] He paid these sums to a representative of Premier at a lot in Pottstown where he went to retrieve the vehicle. Dep. at 72-73, 75. As a condition for the return of his car, Mr. Goldenstein was made to sign a release, *id.,* but he did not receive anything in exchange for the release. Dep. at 85-86. He still had to pay the full price for the redemption of his automobile. *Id.*

In sum, Mr. Goldenstein borrowed $1,000, but only received $950, and had to pay $2,808.80 to satisfy the debt. At the time of the repossession, the balance due on the loan was about $615 including the interest that would have accrued in July, August and September at $5 per month. Nevertheless, the defendants required Mr. Goldenstein to pay $2,393 for the return of his car.

Repossessors, Inc., admits to accepting the repossession assignment without performing any due diligence into the legality of the transaction or its right to repossess the vehicle. Defendants' Exhibit "G." Repossessors never reviewed the loan agreement or payment history; it just took the creditor's word that the repossession was lawful. *Id.*

4 Another copy of Exhibit P-6 was the same document Mr. Goldenstein was referring to in the deposition.

Argument

I. THE REPOSSESSION WAS ILLEGAL UNDER PENSNYLVANIA LAW WHICH GOVERNS THE DISPUTE AND FORBIDS USURY.

(a). *The Payment of Usurious Interest is not Enforceable under Pennsylvania Law.*

In *Cash America Net v. Commonwealth of Pennsylvania*, 607 Pa. 432, 8 A.3d 282, 295 (2010), the Pennsylvania Supreme Court held unequivocally that internet lenders were doing business in Pennsylvania and subject to its usury laws.

> It is well established that public policy in this Commonwealth prohibits usurious lending, and this prohibition has been recognized for over 100 years. . . .
>
> [Cash America Net] argues that by remaining physically outside of Pennsylvania, there is no limit on the interest it can charge to Pennsylvania residents, and that it may operate at an advantage to in-state lenders by charging far more than the CDCA permits licensed, in-state lenders to charge. . . . ***[W]e reject this argument.*** . . .
>
> . . .
>
> Cash America has not attempted to become . . . licensed pursuant to the CDCA because it does not aspire to operate in Pennsylvania by the same rules that apply to Pennsylvania corporations or foreign domesticated corporations. . . . Nor is Cash America arguing that it is being shut out of Pennsylvania and is unable to obtain a license to do business in the state. . . . Cash America wants the benefits of doing business with Pennsylvania residents while evading the regulations. Instead of seeking equal treatment, Cash America is trying to bypass state usury laws and consumer protections by doing business in Pennsylvania without a license.

Cash America Net, 607 Pa. at 449-53 8 A.3d at 292-95.

As a citizen of Pennsylvania, Mr. Goldenstein was not at liberty to waive the protection of the Commonwealth's usury statute. "***Notwithstanding any other law*** [which would include tribal law], *the provisions of this act may not be waived by any oral or written agreement executed by any person." Id.* § 408 (emphasis added).

> The statute against usury forms a part of the public policy of the state and *cannot* be evaded by any circumvention or *waived by the debtor*. *Moll v. Lafferty*, 302 Pa. 354, 359, 153 A. 557. . . . As usury is generally accompanied by subterfuge and circumvention of one kind or another to present the color of legality, it is the duty of the court to examine the substance of the transaction as well as its form, ... In *Hartranft v. Uhlinger*, 115 Pa. 270, page 273, 8 A. 244, page 246, it is said: "It is, indeed, wholly immaterial under what form or pretence usury is concealed, if it can by any means be discovered, ***our courts will refuse to enforce its payment."***

Simpson v. Penn Discount Corp., 335 Pa. 172, 5 A.2d 796, 798 (1939) (emphasis added).

Pennsylvania courts have consistently struck down obstacles that inhibit enforcement of the Commonwealth's usury laws. In *Dept. of Banking v. NCAS of Delaware,* 948 A.2d 752, 761 & n.9 (2008), the Pennsylvania Supreme Court held that a lender could not evade regulation under Pennsylvania's usury laws through the use of a choice-of-law clause. *Id.* ("this Court has recognized that choice-of-law agreements can be avoided when the terms offend Commonwealth public policy even in disputes between contracting parties"), *see also Kaneff v. Delaware Title Loans,* 587 F.3d 616, 624 (3d Cir. 2009) (same). Waivers of all kind, including waivers granted after the usury was paid, have been struck down. In *Thompson v. Prettyman,* 231 Pa. 1, 5-6, 79 A. 874, 876 (1911), the court refused to give effect to a release that was entered into after the usurious interest had been paid. *Id.* Nor does the failure to raise usury as an affirmative defense constitute waiver in a lawsuit. *Olwine v. Torrens,* 236 Pa. Super 51, 56, 344 A.2d 665, 668 (1975). The Pennsylvania Supreme Court has even held that public policy in favor of recovering usury can overcome the finality of judgments, permitting a plaintiff to set aside a series of confessed judgments on usurious debts. *Moll v. Laffer*ty, 302 Pa. 354, 359, 153 A. 557, 559 (1931). *See also, Simpson v. Penn Discount Corp.,* 335 Pa. 172, 175, 5 A.2d 796, 798 (1939) (refusing to apply the parole evidence rule where it would interfere with the ability to establish the usurious nature of a loan). *Cf. Thomas v. First Nat'l Bank of Scranton,* 101 A.2d 910 (Pa. 1954) (holding contractual provisions exculpating banks from liability to be unenforceable as against public policy).

Several provisions of Pennsylvania's usury statute, Act 6, 41 P.S. § 201 *et seq.,* are relevant to the instant case. The first is section 201, which sets the maximum rate of interest chargeable by an unlicensed lender at 6% per annum. 41 P.S. § 201. Section 408 makes the protections afforded by the statute unwaivable. *Id.* § 408. Section 501 provides that interest beyond the lawful rate need not be paid, and provides the borrower with a self-help remedy to deduct excess interest on notice to the creditor. *Id.* § 501. Borrowers who do not exercise the self-help remedy have the right under section 504 to sue:

> Any person affected by a violation of the act shall have the substantive right to bring an action on behalf of himself individually for damages by reason of such conduct or violation, together with costs including reasonable attorney's fees and such other relief to which such person may be entitled under law.

41 P.S. § 504. Section 502 specifies that the damages recoverable in such a suit include triple the amount of any usurious interest a borrower paid. *Id.* § 502.

In *Grigsby v. Thorp Consumer Discount Co.,* 127 B.R. 759 (E.D. Pa. 1991), this court held that section 502 was mandatory.

> I therefore conclude that the section does not provide the court with discretion to award damages but instead provides for the mandatory recovery of damages under its provisions if the borrower's payments meet the definition of "excess interest" discussed below.

Id. at 764. The court went on to hold that usurious interest under section 502 encompassed the excess interest included in each installment of a usurious loan.

> I conclude that the interpretation of *section 502* [41 P.S. § 502]which gives effect to the purposes of the section is that which calculates "excess interest" under the statute as interest paid in excess of that due on any given payment rather than interest due over the term of the entire loan.

Id. at 764-65. This holding provides direct support for Mr. Goldenstein's contention that his monthly liability to Sovereign for interest was not more than $5.00.

Section 507 specifies that the remedies provided under Act 6 are not exclusive. 41 P.S. § 507 (“The remedies and penalties provided in this act shall be supplementary to and shall not repeal or

otherwise effect the remedies and penalties provided in any other act"). If usury gives rise to an action under the FDCPA or RICO, that is consistent with the intent of the legislature. Section 505 specifies that usury is a criminal offense. 41 P.S. § 505. The defendants have potential criminal exposure for collecting a usurious loan.

(b). Repossessors Violated the FDCPA by Repossessing Mr. Goldenstein's Car to Coerce the Collection of Usurious Interest.

The FDCPA covers repossession companies by including them within the act's definition of "debt collector." The act refers to repossession companies as businesses that enforce security interests.

> (6) The term "debt collector" means any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts . . . . *For the purpose of section 808(6) [15 USCS § 1692f(6)], such term also includes any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement of security interests.*

15 U.S.C. § 1692a(6) (emphasis added).[5] *Montgomery v. Huntington Bank,* 346 F.3d 693, 700 (6th Cir., 2003). A repossession company is a debt collector for purposes of section 1692f(6) of the FDCPA. *Id.*

Section 1692f(6) regulates unfair collection practices, and states:

> A debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:
>
> . . .
>
> (6) Taking or threatening to take any nonjudicial action to effect dispossession or disablement of property if--
>
> (A) *there is no present right to possession of the property claimed as collateral through an enforceable security interest* . . . .

5 The Pennsylvania Fair Credit Extension Uniformity Act ("FCEUA"), 73 P.S. § 2270.4(a), incorporates the terms of the FDCPA except that it has a broader definition of the term debt collector. This brief will argue the FDCPA claim, but the plaintiff is not waiving his state law claim.

15 U.S.C. § 1692f(6) (emphasis added).

Turning to the present case, both corporate defendants describe themselves on their websites as automobile repossession companies. Complaint Exhibits P-1 & P-2. This conduct qualifies them as debt collectors under the FDCPA, subject to liability for violating section 1692f(6).

Repossessors violated section 1692f(6)(A) by repossessing Mr. Goldenstein's car to collect usurious interest. After Repossessors took the car, it demanded payment from Mr. Goldenstein of $2,143 to redeem the vehicle plus an additional $250 in collection costs. Complaint, Exhibit P-6 (last page at the bottom); Dep. at 70. Having already paid $414 dollars on a $1,000 debt, Mr. Goldenstein only owed about $600, but Repossessors used its possession of the vehicle to leverage a payment three times that amount. Repossessors lacked a present right to possession of Mr. Goldenstein's car to make him pay interest three times the amount of his debt. Repossessors' actions were unfair and unconscionable within the meaning of the FDCPA.

The court's unpublished decision in *Gonzalez v. DRS Towing LLC*, No. 12-cv-5508 (E.D. Pa., Feb. 28, 2013),[6] does not support a contrary position. Ms. *Gonzalez* never redeemed her car, but Mr. Goldenstein did, and Repossessors used its dominion over his automobile to coerce the payment of excess interest.

Gonzalez seemed to say that a debtor has no right to recover usurious interest, but the court did not consider section 504 of Act 6, 41 P.S. § 504, which bestows on Mr. Goldenstein an unqualified right to sue to recover all damages associated with the payment of a usurious loan. *Gonzalez* is in direct opposition to the court's prior published decision in *Grigsby,* 127 B.R. at 764-65, holding that section 502 entitles borrowers to a mandatory recovery of three times the amount of any usurious interest paid.

6 The court in *Collins v. Siani's Salvage*, 2014 WL 1244057 (E.D. Pa., March 26, 2014), relied completely on *Gonzalez* and does not need to be discussed separately. The plaintiff in *Collins* filed an appeal, so the case is presently pending before the Third Circuit.

> [By] enacting the treble damage provision of *section 502* the Pennsylvania legislature warned lenders of the legislature's abhorrence of usurious interest rates. In order to prevent the use of such rates, the legislature unequivocally informed all potential lenders of the consequences flowing from such illegal actions.

Grigsby, 127 B.R. at 764. *Accord Pennsylvania Dep't of Banking v. Ncas of Delaware, LLC,* 995 A.2d 422, 437 (Pa. Commw. Ct., 2010) (borrowers allowed actual damages under section 504 and treble damages under section 502); *Roethlein v. Portnoff Law Associates*, 25 A.3d 1274, 1278 (Pa. Commw. Ct., 2011) (affirming recovery of excess fees and interest under 41 P.S. §§ 502 & 504), *rev'd on other grounds ,* 25 A.3d 1274 (Pa. 2011).

In *Gilbert v. Otterson*, 379 Pa. Super. 481, 550 A.2d 550 (1988), the court gave a borrower credit to recoup usurious interest on a loan in which the *borrower offered to pay usury* as an incentive to get the loan. *Id.* 379 Pa. Super. at 485, 550 A.2d at 552. The court estopped the borrower from recovering treble damages, but did not allow the creditor to benefit from a usurious interest rate even though the rate was set by the borrower.

A rule requiring borrowers to give notice of their intent to withhold usurious interest as a pre-condition to allowing a suit for recovery has never been required by a Pennsylvania court and would frustrate the intent of the legislature. Most borrowers have no idea when a creditor is demanding payment of usurious interest, and most lenders are going to tell the borrower who gives notice that he or she is required to pay at the contractual interest rate regardless of whether it is illegal. In the present case, Repossessors demanded a redemption payment of $2,393 ($2,143 + $250 (costs) = $2,393), and was not going to release the car for less just because Mr. Goldenstein asked them to. Mr. Goldenstein's choice was to pay Repossessors what they wanted, or not recover his car, and this is the exact behavior the law forbids.

Pennsylvania courts have traditionally set aside obstacles to the recovery of usurious interest, not create them. *Thompson v. Prettyman,* 231 Pa. 1, 5-6, 79 A. 874, 876 (1911) (release

invalid); *Olwine v. Torrens,* 236 Pa. Super 51, 56, 344 A.2d 665, 668 (1975) (usury defense allowed even in the absence of pleading it); *Moll v. Laffer*ty, 302 Pa. 354, 359, 153 A. 557, 559 (1931) (allowing usurious judgments to be set aside) *Simpson v. Penn Discount Corp.,* 335 Pa. 172, 175, 5 A.2d 796, 798 (1939) (refusing to apply the parole evidence rule where it would interfere with the ability to establish the usurious nature of a loan). *Cf. Thomas v. First Nat'l Bank of Scranton,* 101 A.2d 910 (Pa. 1954) (holding contractual provisions exculpating banks from liability to be unenforceable as against public policy).

There is no basis in Pennsylvania law to deny Mr. Goldenstein relief because he never asked to withhold usurious interest. Pennsylvania's prohibition against usury is absolute. Repossessors did not have a present right to possession of Mr. Goldenstein's vehicle to coerce collection of usurious interest.

The FDCPA imposes strict liability upon Repossessors. 15 U.S.C. § 1692k. The only defense under the FDCPA is to show that the violation was unintentional and occurred despite the maintenance of procedures designed to avoid it. *Id.* § 1692k(c). In this case, Repossessors admits to agreeing to repossess Mr. Goldenstein's car without even reviewing the loan agreement. Repossessors failed to verify that the lender had a security interest in Mr. Goldenstein's car much less whether the loan was usurious. The most minimal due diligence would have revealed the Pennsylvania Supreme Count's decision in *Cash America Net v. Commonwealth of Pennsylvania*, 607 Pa. 432, 8 A.3d 282, 295 (2010), holding that Pennsylvania's usury laws apply to the very type of high interest loan Repossessors agreed to enforce against Mr. Goldenstein.

The FDCPA is a remedial law that is supposed to be interpreted liberally in favor of consumers. *Brown v. Card Service Center*, 464 F.3d 450, 453 (3rd Cir. 2006). Section 1692f(6)(A) states without limitation that it is a violation of the act for a debt collector to repossess property "if . . . there is no present right to possession of the property claimed as collateral through an

enforceable security interest . . . ." 15 U.S.C. § 1692f(6)(A). The plain and unambiguous meaning of this language is that a wrongful repossession is actionable for any reason that impairs the debt collector's right to possession. Not only does the provision state that there must be a present right of possession, it has to be through an enforceable security agreement. Any infirmity that deprives a debt collector of a present right to possession or otherwise renders the security agreement unenforceable is actionable.

Congress intended section 1692f(6)(A) to provide an important consumer protection against abusive repossessions. Repossession companies such as the defendants typically take peoples' property without pre-deprivation due process. The lack of due process creates a situation ripe for abuse. Congress crafted the FDCPA to curb abuse by providing consumers a robust post-deprivation remedy, and that remedy is well suited to furnish relief to Mr. Goldenstein for the unlawful repossession of his car.

(c). ***The Release is an Illegal Exculpatory Contract that Violates the Pennsylvania Fair Credit Extension Uniformity Act and the Uniform Commercial Code.***

Even though Repossessors denies its conduct was illegal, it required Mr. Goldenstein to sign a release before it would return his car. In reality, the release is an illegal exculpatory contract that violates Act 6, and the Uniform Commercial Code ("UCC"). It was an unfair debt collection practice to require Mr. Goldenstein to sign it.

The Pennsylvania Supreme Court has already ruled that a party may not skirt liability for usury by requiring a borrower to sign a release. *Thompson v. Prettyman,* 231 Pa. 1, 5-6, 79 A. 874, 876 (1911).

> The release contained in the agreement of May 21, 1906, cannot avail as a defense to the recovery of the usury paid by the plaintiffs. To so hold would be for this court to furnish an effective means to every lender to defeat the declared purpose of the statute and render impotent a law expressive of the public policy of the state.

Id. 231 Pa. at 6, 79 A. at 876; *see also* 41 P.S. § 408 (usury statute cannot be waived in any contract).

The release is illegal under the UCC. Section 9623 of the UCC specifies the performance required by a debtor to redeem collateral. 13 Pa.C.S. § 9623(b). It states that a debtor "shall" be able to redeem collateral by tendering performance of all secured obligations and paying the reasonable costs and attorney's fees of collection. *Id.* The UCC further specifies in section 9602(11) that the parties' rights and obligations relating to redemption *cannot be waived or varied* from those specified in section 9623. 13 Pa.C.S. § 9602(11).

Mr. Goldenstein thus had an unconditional entitlement to the return of his vehicle upon paying Repossessors all sums demanded for principal, interest and fees. Forcing Mr. Goldenstein to sign a release in addition to making payment was prohibited by 13 Pa.C.S. § 9602(11), so the release is simply illegal.

Mr. Goldenstein received no consideration for the release. Consideration is a necessary element for any release. *Fedun v. Mike's Cafe, Inc.*, 204 A.2d 776, 781, 204 Pa.Super. 356 (1964). A release not supported by consideration is invalid. *Id.* In this instance, Repossessors' release alleges that the only consideration supporting it is the return of the vehicle, and begins with the statement: "In sole consideration of the delivery to me of the above described vehicle and personal property, I agree . . . ." Exhibit P-8 at 26. Regardless, the return of the vehicle was not consideration for the release because Repossessor was obligated to return the car based on Mr. Goldenstein's payment. Repossessor did not give Mr. Goldenstein compensation for the illegal repossession of his car or even a discount on the collection costs. Dep. 85-86. Mr. Goldenstein received nothing extra to serve as consideration for the release, which renders the release invalid.

The lack of consideration is not cured under 33 P.S. § 6. Both of the release documents Mr. Goldenstein signed state they are based on the receipt of actual consideration.

Exhibit P-8 at 25-26. Neither document has a statement in which Mr. Goldenstein acknowledges an obligation to be "legally bound" in the absence of consideration.

Making Mr. Goldenstein sign the release was a violation of the Pennsylvania Fair Credit Extension Uniformity Act ("FCEUA"), 73 P.S. § 2270.3 *et seq*. The FCEUA is a state law that extends the protections of the FDCPA to persons and situations not covered by the federal law. The FCEUA has a broader definition of the term "debt collector" than the FDCPA that includes any "person, not a creditor conducting business within this Commonwealth, acting on behalf of a creditor, engaging or aiding directly or indirectly in collecting a debt owed or alleged to be owed a creditor . . . ." 73 P.S. § 2270.3. The definition includes Repossessors because it "engage[s] . . . directly . . . in collecting . . . debt[s]" by repossessing cars.

In section 2270.4(a), the FCEUA states that it is an unfair or deceptive debt collection practice under Pennsylvania law for a "debt collector" to violate the FDCPA. 3 P.S. § 2270.4(a). The FCEUA thus requires Repossessors to abide by all of the provisions of the FDCPA, not just section 1692f(A)(6).

Repossessors violated section 1692e of the FDCPA by making Mr. Goldenstein sign the release. Section 1692e prohibited Repossessors from making any "false, deceptive, or misleading representation." 15 U.S.C. § 1692e. Repossessors violated section 1692e by falsely representing to Mr. Goldenstein that he was required to sign a release for the return of his car. Repossessors then falsely represented to Mr. Goldenstein in the release that he was giving up the right to sue Repossessors, even though he had not actually given up the right.

The release is an illegal exculpatory contract. Pennsylvania law prohibits the execution of a pre-injury release that relieves a party of liability for reckless, knowing, or intentional wrongdoing. *Tayar v. Camelback Ski Corp.*, 47 A.3d 1190 (Pa., Supreme Ct. 1012). The release Mr. Goldenstein signed is not strictly pre-injury, but it is not post-injury either. Mr. Goldenstein was

compelled to sign the release as part of an ongoing episode of illegal conduct. At no time did Repossessors have a legal right to be in possession of Mr. Goldenstein's vehicle, including when it had Mr. Goldenstein sign the release. Pennsylvania law does not permit someone in the midst of illegal conduct to force the victim to sign a release relieving the perpetrator of liability. *See id.* at 47 A.3d at 1203. A release signed under these circumstances is unconscionable.

The execution of an unconscionable release in the process of debt collection is another violation of the FDCPA that would be actionable by Mr. Goldenstein as a violation of the FCEUA, 73 P.S. § 2270.4(a) (incorporating 15 U.S.C. § 1692f (prohibiting unfair and unconscionable conduct)).

For these reasons, Mr. Goldenstein asserts that the release is not only invalid, but the act of making Mr. Goldenstein sign the release was an illegal debt collection practice.

(d). *The Evidence Supports Claims Against Mr. Latvaaho and Mr. Hourican for Racketeering.*

The eradication of loan sharking was among Congress' primary objectives when it enacted RICO, *U.S. v. Biasucci*, 786 F.2d 504, 512 (2d Cir., 1986), and the statute applies to Mr. Latvaaho and Mr. Hourican's effort to collect a usurious loan from Mr. Goldenstein. Congress made loan sharking the simplest activity to prosecute under RICO. The collection of unlawful debt is the only predicate act native to the RICO statute, and the only RICO offense actionable on a single wrongful act. *U.S. v. Weiner*, 3 F.3d 17 (1st Cir. 1993); *U.S. v. Giovanelli*, 945 F.2d 479, 490 (2d Cir. 1991); *United States v. Vastola*, 899 F.2d 211, 228 n.21 (3d Cir. 1990), *vacated and remanded on other grounds*, 497 U.S. 1001 (1990); *Proctor v. Metropolitan Money Store Corp.*, 645 F. Supp. 2d 464, 481 (D. Md., 2009).

Section 1962(c) reads as follows:

> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or

> foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through . . . collection of unlawful debt.

18 U.S.C. § 1962(c).

All of the elements outlined in this section are satisfied in the present case. The RICO claim is being brought against Mr. Latvaaho and Mr. Hourican, and they are persons.

Mr. Latvaaho and Mr. Hourican are alleged to have participated in a total of three enterprises involving their corporations. Mr. Latvaaho participated in Repossessors. Mr. Hourican participated in Premier. Both Mr. Latvaaho and Mr. Hourican participated together in a third enterprise formed through the combination of Repossessors and Premier.

With respect to Repossessors, Mr. Latvaaho admits to being its owner and president, Exhibit P-8 at 10, ¶ 8, so it is clear he was employed by or associated with Repossessors. Mr. Hourican admits to being the owner and manager of Premier. Premier's Answer to Complaint ¶ 6.

Repossessors and Premier both qualify as enterprises based on their status as corporations. *Id.* § 1961(4). In *Cedric Kushner Promotions, LTD., v. Don King,* 533 U.S. 158 (2001), the Supreme Court specifically held that a small closely held corporation qualifies as an enterprise.

> The corporate owner/employee, a natural person, is distinct from the corporation itself, a legally different entity with different rights and responsibilities due to its different legal status. And we can find nothing in the statute that requires more "separateness" than that. *Cf. McCullough v. Suter,* 757 F.2d 142, 144 (CA7 1985) (finding either formal or practical separateness sufficient to be distinct under § 1962(c)).

Cedric Kushner Promotions, 533 U.S. at 163. The status of Repossessors and Premier as corporations means by definition they possess a legal structure with an existence distinct from their respective principals. Repossessors thus qualifies as a RICO enterprise, and Premier also qualifies as a RICO enterprise.

Both Repossessors and Premier are engaged in interstate commerce. In this very case, Pepossessors and Premier repossessed Mr. Goldenstein's vehicle for a creditor located in Michigan who also seems to have offices in Florida.

Mr. Latvaaho and Mr. Hourican conduct or participate in the conduct of their respective corporations' affairs through the collection of unlawful debt. As the President of Repossessors, it may be inferred that Mr. Latvaaho approved or ratified Repossessors' decision to take possession of Mr. Goldenstein's vehicle to collect a debt for Sovereign. Mr. Hourican admits directly to making the decision for Premier to repossess Mr. Goldenstein's car. Exhibit P-9 at 8, ¶ 10. As a result of that decision, Premier directly collected unlawful debt from Mr. Goldenstein who paid Premier in cash for the return of the car. Dep. at 78.

The loan Sovereign made to Mr. Goldenstein constitutes unlawful debt as that term is defined in section 1961(6).

> (6) "unlawful debt" means a debt (A) . . . which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with . . . the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate . . . .

18 U.S.C. § 1961(6). Substantially all interest Sovereign charged Mr. Goldenstein was unenforceable because it is usurious under Pennsylvania law pursuant to *Cash America Net v. Commonwealth of Pennsylvania*, 607 Pa. at 432, 8 A.3d at 282. The written policy of the Tribe is to allow Sovereign to make loans at interest rates up to 390% per annum. Exhibit P-7 at 122. It can be inferred from tribal policy that lending at triple digit interest rates is part of Sovereign's regular business.

Mr. Latvaaho and Mr. Hourican participated together in a third enterprise formed by the combination of Repossessors and Premier (the "Repossession Enterprise"). Repossessors and Premier admit to joining together by entering into a subcontract for Premier to repossess Mr. Goldenstein's car to

collect unlawful debt for Sovereign. The combination of the two corporations pursuant to the subcontract constitutes an association-in-fact enterprise. *United States v. Navarro-Ordas,* 770 F.2d 959, 969 n.19 (11th Cir.1985) (group of corporations may constitute association-in-fact enterprise), *cert. denied,* 475 U.S. 1016 (1986); *United States v. Bergrin*, 650 F. 257, 265 (3d. Cir. 2011) (an association-in-fact enterprise is a group of persons associating together for a common purpose of engaging in a course of conduct). Mr. Latvaaho and Mr. Hourican participated in the Repossession Enterprise as an extension of their role as the presidents of their respective corporations, and they used the Repossession Enterprise to collect unlawful debt.

The evidence is also sufficient to support the claim that Mr. Latvaaho and Mr. Hourican were in a conspiracy with each other to operate one or more enterprises for the collection of unlawful debt.

Courts have uniformly held that RICO violations premised on the collection of unlawful debt are actionable on a single transgression.[7] *U.S. v. Weiner,* 3 F.3d 17 (1st Cir. 1993) *U.S. v. Giovanelli*, 945 F.2d 479, 490 (2d Cir. 1991); *United States v. Vastola*, 899 F.2d 211, 228 n.21 (3d Cir. 1990), *vacated and remanded on other grounds*, 497 U.S. 1001 (1990); *Proctor v. Metropolitan Money Store Corp*., 645 F. Supp. 2d 464, 481 (D. Md., 2009). Demonstrating a pattern of activity is not part of Mr. Goldenstein's burden in this case.

Repossessors collected unlawful debt from Mr. Goldenstein by accepting his cash and by repossessing his car. The term "collection" is not defined in RICO, but, on its face, the term encompasses all means of obtaining satisfaction of a debt, including the receipt of currency, seizure of property, or the use of coercion.

It is common parlance in federal statutes for Congress to refer to the seizure of property as a collection activity. For example, when Congress wrote the Internal Revenue Code ("IRC"), it

7 Sovereign routinely makes loans to Pennsylvania residents and has a pattern and practice of doing so, but showing such a pattern is not an element for establishing the collection of unlawful debt.

used the term "collection" to describe the seizure of property for taxes. Under the heading "Seizure of Property for Collection of Taxes," Congress wrote:

> If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary to *collect* such tax . . . by *levy upon all property* and *rights to property* . . . belonging to such person or on which there is a lien provided in this chapter for the payment of such tax.

26 U.S.C. § 6331 (emphasis added). In other words, Congress directed the IRS to collect taxes by seizing property belonging to delinquent taxpayers.

In the FDCPA, Congress specifically called repossession a collection activity.

> § 1692f. Unfair practices
>
> A debt collector may not use unfair or unconscionable means to ***collect*** or attempt to collect any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:
> . . .
>
> (6) Taking or threatening to take any nonjudicial action to ***effect dispossession*** or disablement ***of property*** if--
>
> (A) there is no present right to possession of the property claimed as collateral through an enforceable security interest;

15 U.S.C. § 1692f.

When Congress wrote "collection" of unlawful debt in RICO, it was referring to everything a creditor might do to satisfy a debt including the seizure or repossession of property. Repossessing Mr. Goldenstein's car is literally what Repossessors did to collect Sovereign's debt, and the action resulted in the receipt of $2,393 in cash paid directly to Premier.

Mr. Goldenstein suffered damages as a result of Mr. Latvaaho and Mr. Hourican's operation of their businesses through the collection of unlawful debt. Mr. Goldenstein was coerced to pay $1,808.8 more than he owed. He lost possession of his car for three days. He was embarrassed in front of all of his coworkers.

The evidence supports the contention that Mr. Latvaaho and Mr. Hourican are individually liable for operating their businesses through the collection of unlawful debt and are liable to Mr. Goldenstein for damages under RICO.

II. THE BEST EVIDENCE RULE IS NOT AN IMPEDAMENT TO RECOVERY.

Even without the contract, Mr. Goldenstein is able to show the amount he borrowed and the amount he repaid. That information is enough to show he paid too much.

The defendants purport to have repossessed Mr. Goldenstein's car under the authority of a loan agreement containing a security interest. Without a loan agreement, there is no evidence of a valid security interest in the car, which makes the repossession unlawful without even getting into the usury issue.

III. THE DEFENDANTS ARE NOT PROTECTED BY AN ARBITRTION AGREEMENT.

The Tribe describes its dispute resolution procedure as a petition for redress to a foreign sovereign that carries no enforceable legal rights. Exhibit P-7 at 120. The tribal dispute resolution procedure does not qualify as an arbitration agreement under the Federal Arbitration Act, but if the defendants want to try to enforce the provision as an arbitration agreement, the defendants should file a motion to compel arbitration. To the extent relevant, the plaintiff in *Walker v. Int'l Recovery Systems, Inc.,* 2103 WL 3380579 (E.D. Pa., July 8, 2013), refiled her case in state court where the repossession company's motion for judgment on the pleadings was summarily denied. Exhibit P-10.

Mr. Goldenstein would add that tribal law ends at the reservation boundary. *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 113 (2005). Tribal immunity does not mean that tribal actions are legal, just that the tribe cannot be sued. *Kiowa Tribe of Oklahoma v. Manufacturing Tech*., 523 U.S. 751, 755 (1998). Tribal immunity applies only to tribes as legal entities and to entities they control. *Bucher v. Dakota Fin. Corp. (In re Whitaker)*, 474 B.R. 687, 696-97 (B.A.P. 8th Cir., 2012).

Tribal immunity does not apply to individual indians, *Puyallup Tribe, Inc v. Department of Game of State of Washington*, 433 U.S. 165, 170-173 (1977), and certainly does not apply to corporations such as the defendants with no tribal ties whatsoever.

Conclusion

For the reasons stated above, Mr. Goldenstein requests that defendants' motion for summary judgment be denied, together with any other relief that is just and appropriate.

Respectfully submitted,

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