IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

BEN SCHERR,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 1:13CV1841
	)	
WESTERN SKY FINANCIAL LLC, *et al*,	)	Hon. Robert W. Gettleman, presiding
	)	
Defendants.	)	

PLAINTIFF'S RESPONSE TO RENEWED MOTION TO DISMISS

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I. INTRODUCTION

CashCall Inc. contracted with Western Sky Financial LLC and Martin Webb – Western Sky's sole founder, member, owner and decision-maker – to make high-interest loans to consumers. (Doc. 1-1, ¶¶2-22, 49-52; see *Jackson v. Payday Financial LLC*, 764 F.3d 765, 768-773 (7th Cir. 2014); and *FTC v. Payday Financial LLC*, 989 F.Supp.2d 799, 805-810 (D.S.D. 2013).) Ben Scherr received a loan from this program on October 29, 2012 charging an annual interest rate of 89.63% – which is usurious under Illinois law, where Scherr received the loan.

Jackson, 764 F.3d at 775 n.23, reviewed the same lending scheme, considered briefs from the Illinois Attorney General and the Federal Trade Commission, and held "that the loan agreements' choice of law clause should not be enforced and that Illinois law ought to govern the parties' dispute."[1] This Court should reject defendants' repeated claims that *Jackson* erred, and claims that this Court may ignore the Seventh Circuit Court of Appeals and the *amici curiae* that Court relied on. (Doc. 40-1 at 21 ("although CashCall acknowledges that *Jackson* binds this Court, *Jackson* is incorrect"); *id.* at 25 ("*Jackson* erred in holding that a non-member [of a tribe] must… enter a reservation for tribal jurisdiction to exist"); and *id.* ("*Jackson* independently erred by requiring" some effect on the Tribe's "internal relations"). See *id*. at 16 ("although… *Jackson* has subsequently suggested that tribal law may not govern the loans – a proposition with which defendants respectfully disagree – [defendants] had a… good-faith basis to believe the loan was not governed by Illinois law").) Any debates about points decided in *Jackson* are now closed; the result requires denial of the motion to dismiss, as defendants violated Illinois law.

The lending scheme was an attempt to permit CashCall to evade state regulation, by (1) having loans it funded nominally made by Western Sky and (2) attempting to graft the Cheyenne

[1] Curiously, *Jackson* – which discussed several of defendants' arguments, and largely disposed of them – is not listed in the table of authorities preceding their brief. (See Doc. 40-1 at iii-vii.)

River Sioux Tribe's law onto the loans given Western Sky's location on reservation land, pursuant to CashCall's "arrangement with [Western Sky and Webb] by which it would purchase or service all loans made by those lenders." (Doc. 1-1, ¶¶19-20.) Discovery will show that Western Sky's involvement in the process was minimal, as CashCall would give the money to be loaned to Western Sky, and then purchase the loans immediately after Western Sky gave them.[2]

This plan is slightly different from CashCall's prior attempts to "rent" the charters of banks in Delaware and South Dakota, as a way to benefit from those states' laws. That plan failed. See *In re CashCall Inc.*, No. DFR EU 2009 184, 2012 WL 6653839 (Md. Comm'r Fin. Reg. Nov. 8, 2012) ($5.65 million awarded after three years of investigation); *CashCall Inc. v. Morrisey*, No. 12-1274, 2014 WL 2404300 (W.Va. May 30, 2014) (*per curiam*) ($14 million awarded after seven years of investigation). In short, the new plan represented CashCall's wager that trying to claim tribal law would work better than contracting with banks in certain states.

CashCall lost this bet. When Scherr got his loan, defendants were being investigated by the FTC and authorities in at least five states. One state – Kansas – order defendants to pay over $3 million in penalties. *In re Western Sky Financial LLC*, No. 2011-312 (Kan. Bank Comm'r May 22, 2012) (Exhibit 2).[3] In fact, when defendants removed this case (Doc. 1), the Illinois

[2] See Exhibit 1. As things are, the complaint's allegations control the fate of defendants' Fed.R.Civ.P. 12 motion. Per *Carlson v. CSX Transp. Inc.*, 758 F.3d 819, 826-827 (7th Cir. 2014) the pleading is considered in a light most favorable to Scherr, with allegations taken as true, inferences drawn in his favor, and the motion being granted only if no plausible claim is made. The contracts are presented here only to show the likely result of discovery.

[3] See *Colorado v. Western Sky Financial LLC*, 845 F.Supp.2d 1178 (D.Colo. 2011); *Western Sky Financial LLC v. Maryland Comm'r of Fin. Reg.*, No. 1:11CV1256, 2011 WL 4894075 (D.Md. Oct. 12, 2011), and 2012 WL 3126863 (D.Md. July 31, 2012); *Missouri v. Webb*, No. 4:11CV1237, 2012 WL 1033414 (E.D.Mo. March 27, 2012); *In re Western Sky Financial LLC*, DFI No. C 11 0810 12 SC01; 2012 WL 5893038 (Wash. Dept. Fin. Insts. Oct. 18, 2012). (Exhibit 2; see Doc. 1-1, ¶16.) Scherr submits that discovery will show that Western Sky has been, or is currently, the subject of investigation by authorities in at least seventeen states.

Department of Financial and Professional Regulation ("IDFPR") ordered Western Sky to cease and desist. *In re Western Sky Financial LLC*, 13 CC 265 (IDFPR March 8, 2013) (Exhibit 3). This conforms to IDFPR orders given against unlicensed lenders, regardless of whether they were in Illinois,[4] on Native American reservations,[5] or on non-tribal land outside of Illinois.[6]

II. DEFENDANTS HAVE NO GROUNDS FOR BELIEVING THAT ILLINOIS LAW DID NOT APPLY TO SCHERR'S LOAN, OR THAT THEY COULD NOT BE MADE TO ANSWER FOR THEIR CONDUCT IN AN ILLINOIS COURT

Scherr lives in Buffalo Grove (within the Northern District of Illinois), and lived there on October 29, 2012 when he received the usurious consumer loan from Western Sky. He entered into the loan from his home by signing an agreement online; he then received funds from the loan into his at a bank near his home. (Doc. 1-1, ¶¶7, 25, 26 and Exhibit A.) Western Sky and Webb (who reside on the Cheyenne River Sioux Tribe's reservation in South Dakota) offered

[4] See *In re Federal Acceptance*, 13 CC 511 (IDFPR Dec. 17, 2013); *In re Courtesy Loans*, 13 CC 513 (IDFPR Dec. 17, 2013); and *In re Bell Funding*, 12 CC 560 (IDFPR Nov. 5, 2012). (Exhibit 4.) Courtesy Loans was fined for lending from its Charleston, Illinois store on a suspended license.

[5] See *In re MNE Servs.*, 13 CC 499 & 13 CC 503 (IDFPR Dec. 17, 2013) (based on the reservation of the Miami Tribe in Oklahoma); *In re Great Eagle Lending*, 13 CC 508 (IDFPR Nov. 18, 2013) (Big Valley Pomo (Cal.)); *In re North Star Finance*, 13 CC 501 (IDFPR Nov. 18, 2013) (Fort Belknap (Mont.)); *In re American Web Loan*, 13 CC 450 (IDFPR Oct. 10, 2013) (Otoe-Missouria (Okla.)); *In re Bottom Dollar Payday*, 13 CC 395 (IDFPR June 19, 2013) (Flandreau Santee Sioux (S.D.)); *In re Fireside Cash*, 12 CC 567 (IDFPR Dec. 10, 2012) (Oglala Sioux (S.D).); *In re Red Leaf Ventures*, 12 CC 569 (IDFPR Dec. 5, 2012) (Flandreau Santee Sioux); and *In re VIP Loan Shop*, 12 CC 573 (IDFPR Dec. 5, 2012) (Flandreau Santee Sioux). (Exhibit 5.) Notable among these is American Web Loan; as discussed *infra*, an attempt to block regulation by New York State was rejected by the Second Circuit Court of Appeals last month.

[6] See *In re Saint Armands Servs.*, 14 CC 100 (IDFPR Apr. 4, 2014) (based in Kansas); *In re Insight Capital*, 13 CC 512 (IDFPR Dec. 19, 2013) (Ala.); *In re Goldline Funding*, 13 CC 515 (IDFPR Dec. 12, 2013) (Kan.); *In re Joro Resources*, 13 CC 504 (IDFPR Nov. 15, 2013) (British Virgin Islands and Texas); *In re Hydrafund.org*, 13 CC 339 (IDFPR May 3, 2013) (Nev.); *In re Hammock Cred. Servs.*, 12 CC 581 (IDFPR Nov. 26, 2012) (Fla.); *In re Integrity Advance*, 12 CC 444 (IDFPR Oct. 5, 2012) (Del.); *In re Kenwood Servs.*, 12 CC 445 (IDFPR Oct. 5, 2012) (Del.); *In re Mountain Top Servs.*, 12 CC 423 (IDFPR Oct. 5, 2012) (Nev.); and *In re Global Payday Loan*, 07 CC 119 (IDFPR May 30, 2007) (Utah). (Exhibit 6.)

loans through web and television advertising directed at Illinois residents, which reached Scherr here and induced his loan. (Doc. 1-1, ¶¶5, 7, 8-16, 23-24.) CashCall (a California corporation with no Tribal status) immediately bought the debt, and later sent a collection e-mail. (Doc. 1-1, ¶¶3-5, 17-21 and Exhibit B.) No defendant held an Illinois license. (Doc. 1-1, ¶¶2-3, 30, 34-36.)

When Scherr's loan was made on October 29, 2012, defendants knew their conduct could lead to a lawsuit in an Illinois court, for claims under Illinois law. As described *supra*, (1) CashCall's attempts to evade state laws by its "rent-a-bank-charter" scheme failed, (2) defendants' program was under federal investigation, and (3) defendants' scheme was subject to investigation by authorities in at least six states (and already resulted in an adverse judgment in Kansas). In addition, defendants were parties to *Jackson* months before making a loan to Scherr:

> Defendants knew that [the] loan to Mr. Scherr was unenforceable and fraudulent under Illinois law. Defendants specifically knew this no later than February 2, 2012, when CashCall was served with process in [the *Jackson* case], which claimed that CashCall was liable for conduct similar to that which was alleged herein. Mr. Webb and Western Sky were similarly put on notice several months [earlier], by service of the same suit upon them…. [Doc. 1-1, ¶28; see *id*., ¶47. See *Jackson*, 764 F.3d at 768-769 [description of loans made to *Jackson* plaintiffs in 2010 and 2011.]

(a) Venue and personal jurisdiction are proper

Jackson, 764 F.3d at 786, held that "the district court… erred in granting the defendants' motion to dismiss for improper venue." Defendants' new argument – that "Illinois is not where a substantial part of the events… underlying the claims occurred" – deserves no credit, for *Caldera Pharmas. Inc. v. Los Alamos Nat'l Sec. LLC*, 844 F.Supp.2d 926, 929 (N.D.Ill. 2012), held that,

> for venue to be proper under [28 U.S.C. §1391(b)(2)], **a majority of the events giving rise to the claim need not occur in the venue, only a "substantial" part….** "If the… district's contacts are 'substantial,' it should make no difference that another's are more so, or the most so." *Chemical Waste Management Inc. v. Sims*, 870 F.Supp. 870, 875 (N.D.Ill.1994). [28 U.S.C. §1391(b)(2)] "may be satisfied by a communication transmitted to or from the district in which the cause of action was filed, given a sufficient relationship between the communication and the cause of action." *Consolidated Ins. Co. v. Vanderwoude*, 876 F.Supp. 198, 200-201 (N.D.Ind.1995). [Emphasis added.]

Scherr received, in this district, communications from Western Sky (the loan agreement) and CashCall (the collection e-mail). These are facts defendants conveniently omit from their argument. (Compare, *e.g.*, Doc. 1-1, ¶¶2-5, 7 and Exhibits A & B to Doc. 40-1 at 4-5.) Beyond that, Scherr signed the agreement at his home here, and received money from the loan in his bank account here. When added to defendants' advertising here, this means that the number of events that occurred in this District are substantial, and that venue is proper.

Personal jurisdiction over defendants is also proper. *Felland v. Clifton*, 682 F.3d 665, 673 (7th Cir. 2012) held that personal jurisdiction can be asserted if "(1) the defendant… purposefully availed himself of the privilege of conducting business in the forum state or purposefully directed his activities at the state, (2) the alleged injury [arose] from the defendant's forum-related activities, and (3) the exercise of jurisdiction [comports] with traditional notions of fair play and substantial justice." *Accord, WAV Inc. v. Walpole Island First Nation*, __ F.Supp.2d __, No. 1:13CV9133, 2014 WL 2566842, *3-*4 (N.D.Ill. June 6, 2014) (Canadian tribe subject to Illinois jurisdiction based on contract made after phone calls and e-mails here).

Defendants' conduct satisfies all three factors. They loaned money to an Illinois resident (as they had for years prior), which gave rise to the violation of Scherr's rights under Illinois law – rights which, as shown *infra*, cannot be waived by contract. Making defendants answer for alleged violations of Illinois law, committed in Illinois against one of its citizens, in an Illinois court is more than fair. See *Specht v. Google Inc.*, 660 F.Supp.2d 858, 866-867 (N.D.Ill. 2009) ("it is enough to establish that the events that took place in Illinois were part of the historical predicate"); and *Olson v. Jenkens & Gilchrist*, 461 F.Supp.2d 710, 723 (N.D.Ill. 2006) (similar, following *Purdue Research Foundation v. Sanofi-Synthelabo SA*, 338 F.3d 733 (7th Cir. 2003).

Holding that personal jurisdiction is proper would be informed by many findings in cases under the Fair Debt Collection Practices Act (15 U.S.C. §1692 *et seq*.) that approve of suits brought where a consumer lives and receives a communication – like Scherr did here. *McQueen v. Huddleston*, __ F.Supp.2d __, No. 1:13CV302, 2014 WL 1716244 (W.D.N.Y. April 30, 2014); *Fagan v. Lawrence Nathan Assocs. Inc.*, 957 F.Supp.2d 784 (E.D.La. 2013); *Weakley v. Redline Recovery Servs.*, 723 F.Supp.2d 1341 (S.D.Cal. 2010); *Vlach v. Yaple*, 670 F.Supp.2d 644 (N.D.Ohio 2009); *Maloon v. Schwartz Zweban & Slingbaum LLP*, 399 F.Supp.2d 1108 (D.Haw. 2005); *Brink v. First Credit Resources Int'l Inc.*, 57 F.Supp.2d 848 (D.Ariz. 1999); and *Sluys v. Hand*, 831 F.Supp. 321 (S.D.N.Y. 1993). This is true here, given a long-arm statute that includes a "catch-all provision" permitting exercise of jurisdiction "on any basis permitted by the Illinois and United States Constitutions." *Vlasak v. Rapid Collection Systems Inc.*, 962 F.Supp. 1096, 1100-1101 (N.D.Ill. 1997); 735 ILCS 5/2-209. All these cases are applicable here.

Defendants say that because Scherr's claim against Webb is "based solely on [the] fact that he owns Western Sky," he is not subject to personal jurisdiction. (Doc. 40-1 at 20.) The complaint goes further than that, however:

> The actions of Western Sky are controlled, and are under the personal direction of, Martin A. Webb or employees of his, acting at his direction or on his behalf. Specifically, and at all times material to this complaint, acting alone or in concert with others, Webb has formulated, directed, controlled, had the authority to control, or participated in the acts and practices set forth in this complaint, including particularly the decision to make loans to Illinois residents, the decision to advertise to Illinois residents, and the rates of interest charged. [Doc. 1-1, ¶11. See *Payday Financial LLC*, 989 F.Supp.2d at 805-810.]

Defendants' arguments for applying to Webb the "fiduciary shield doctrine" – set out in *Rollins v. Ellwood*, 141 Ill.2d 244, 276; 565 N.E.2d 1302, 1318 (1990) – cannot be accepted. *Zurich Capital Markets Inc. v. Coglianese*, 388 F.Supp.2d 847, 860 (N.D.Ill. 2004), held that

> the fiduciary shield doctrine is discretionary or equitable, rather than an absolute entitlement. See *Burnhope v. National Mortgage Equity Corp.*, [208 Ill.App.3d 426, 439-440; 567 N.E.2d 356, 363-364 (1st Dist.1990)]. There are two exceptions to the doctrine: "(1) the shield is removed if the individual's personal interests motivated his actions, and (2) the shield generally does not apply when the individual's actions are discretionary." *Jones v. Sabis Educational Systems Inc.*, 52 F.Supp.2d 868, 883 (N.D.Ill.1999).

Brujis v. Shaw, 876 F.Supp. 975, 980 (N.D.Ill. 1995), held that

> *Rollins* and its progeny convince us that personal gain, discretionary actions, and ownership of most of a corporation's stock are all significant factors that the Illinois Supreme Court would consider in determining whether to exercise jurisdiction, but the cases also reinforce our conclusion that no single factor is determinative. Rather, the test is whether, on the basis of the defendant's conduct in Illinois or acts affecting Illinois interests, it would be fair to require him to defend an action in Illinois.

In *Leong v. SAP America Inc.*, 901 F.Supp.2d 1058, 1064-1065 (N.D.Ill. 2012) a senior officer of a company, allegedly liable for a discretionary decision she made, was denied the benefit of the fiduciary shield. See *Hach Co. v. Hakuto Co. Ltd.*, 784 F.Supp.2d 977, 983-988 (N.D.Ill. 2011) and *Interlease Aviations Investors II (Aloha) LLC v. Vanguard Airlines Inc.*, 262 F.Supp.2d 898, 912-913 (N.D.Ill. 2003). Webb is more like a boss directing strategy in his discretion (*Leong*) than a police officer pursuing a criminal (*Rollins*).[7] Webb decided that Western Sky could make loans in Illinois, even though he was on notice that such conduct could subject Western Sky, and himself, to liability under Illinois law awarded by an Illinois court.

Meanwhile, under *FTC v. World Media Brokers*, 415 F.3d 758, 764 (7th Cir. 2005), if "individual defendants either participated directly in the deceptive acts or practices or had authority to control them," and if they "knew or should have known about the deceptive practices [by showing] actual knowledge of material misrepresentations, reckless indifference to the truth or falsity of such misrepresentations, or an awareness of a high probability of fraud along with an intentional avoidance of the truth," they are subject to liability under the FTC Act (15 U.S.C. §41

[7] *Rollins*, 141 Ill.2d at 279-280, concerned a Maryland police officer who incorrectly authorized an Illinois county jail to hold an alleged fugitive, and then came to Illinois to transfer the falsely-identified man. Such conduct is distinguishable from Webb's conduct here.

et seq). *Accord*, *FTC v. QT Inc.*, 448 F.Supp.2d 908, 972-974 (N.D.Ill. 2006); *FTC v. RCA Credit Servs. LLC*, 727 F.Supp.2d 1320, 1339 (M.D.Fla. 2010); and *FTC v. Kennedy*, 574 F.Supp.2d 714, 722 (S.D.Tex. 2008). As 815 ILCS 505/2 directs, when interpreting the Consumer Fraud Act, "consideration shall be given to the interpretations of the [FTC] and the federal courts relating to [15 U.S.C. §45]." See *People ex rel Hartigan v. Knecht Servs. Inc.*, 216 Ill.App.3d 843, 853-854; 575 N.E.2d 1378, 1385 (2d Dist. 1991). *World Media Brokers* and related cases may be relied on here, and support holding Webb to account in an Illinois court.

(b) Illinois law must be applied

As venue and jurisdiction are proper here, Illinois's choice-of-law rules should be used. *Thomas v. Guardsmark Inc.*, 381 F.3d 701, 705-706 (7th Cir.2004) (cited in *Jackson*, *supra*, 764 F.3d at 775 n.23). Under those rules, choice-of-law clauses are unenforceable if they are unconscionable, immoral, illegal, contrary to Illinois's public policy, or injurious to the public welfare. *Thomas*, *supra*; *Phoenix Ins. Co. v. Rosen*, 242 Ill.2d 48, 55-60; 949 N.E.2d 639, 646-648 (2011) (cited in *Jackson*, 764 F.3d at 777-778); *Hussein v. LA Fitness Int'l LLC*, 2013 IL App (1st) 121426, ¶11; 987 N.E.2d 460, 464-465 (1st Dist. 2013); *In re Heinrich*, 2014 IL App (2d) 121333, ¶51; 7 N.E.3d 889, 905 (2d Dist. 2014); and *Sun Life Assurance Co. of Canada v. Great Lakes Bus. Credit LLC*, 968 F.Supp.2d 898, 910 (N.D.Ill. 2013). Illinois courts protect the public policy of Illinois. *Thomas*, *Hussein* and *Heinrich*, *supra*. Choice-of-law clauses also cannot be enforced if "plaintiffs would be deprived of any remedy or treated unfairly." *Philips Electronics NV* v. *New Hampshire Ins. Co.*, 312 Ill.App.3d 1070, 1085; 728 N.E.2d 656, 667 (1st Dist. 2000) (citing *Roby v. Corporation of Lloyd's*, 996 F.2d 1353, 1363 (2d Cir. 1993)).

Contracts entered into by an unlicensed entity, where such a license is required by law, are unenforceable. *First Mortgage Co. LLC v. Dina*, 2014 IL App (2d) 130567, ¶¶18-23, 11

N.E.3d 343, 347-348 (2d Dist. 2014) (following *Chatham Foot Specialists PC v. Health Care Serv. Corp.*, 216 Ill.2d 366, 381; 837 N.E.2d 48, 57 (2005)). High-interest lenders must have an IDFPR license. Specifically, if a lender wants to charge an Illinois consumer over 9% in interest, it must fall under one of the exceptions found in the Interest Act (815 ILCS 205/.01 *et seq.*).

Under 815 ILCS 205/4(1), one such exception is a loan "authorized by the Consumer Installment Loan Act [205 ILCS 670/1 *et seq*. ("CILA")]…." Under 205 ILCS 670/1,

> no person, partnership, association, limited liability company, or corporation shall engage in the business of making loans of money in a principal amount not exceeding $40,000, and charge, contract for, or receive on any such loan a greater rate of interest, discount, or consideration therefor than the lender would be permitted by law to charge if he were not a licensee hereunder, except as authorized by this Act after first obtaining a license from the Director of Financial Institutions.

The issuance of a CILA license is not done for the sake of being bureaucratic, but to protect consumers' interests; under 205 ILCS 670/4,

> upon the filing of an application and the payment of the fee, the Director shall investigate to determine (1) that the reputation of the applicant, including managers of a limited liability company, partners, owners, officers or directors thereof is such as to warrant belief that the business will be operated honestly and fairly within the purposes of this Act and (2) that the applicant meets the positive net worth requirement set forth in [205 ILCS 670/2]. Unless the Director makes findings hereinabove enumerated, he or she shall not issue a license and shall notify the applicant of the denial and return to the applicant the sum paid by the applicant as a license fee, but shall retain the $300 application fee.

A consumer installment loan made by an unlicensed lender cannot be "authorized by" the CILA; as defendants hold no CILA license, they cannot claim the exception to the 9% interest rate cap.

CILA was amended, effective January 1, 2013, to make unlicensed loans void and unenforceable, as to interest or principal. 205 ILCS 670/20(d). While not directly applicable to Scherr's loan in October 2012, this revision represents legislative approval of the concept described by the Supreme Court of Illinois in *Chatham Foot Specialists*, which was reiterated

earlier this year by *Dina*. That concept is not controversial – if the law requires a license before doing something, acts done without that license are illegal.

In addition, loans charging over 20% in annual interest, without a license or other exception, is a Class 4 felony under the Illinois Criminal Code (720 ILCS 5/17-59). Per 720 ILCS 5/1-5, Illinois law attaches to any crime if any act in pursuit of the crime occurs here. Given the facts described previously – showing that Scherr lives here, received loan documents here, signed the loan agreement here, received the borrowed money at a bank located here, and received a collection e-mail here – defendants are subject to 720 ILCS 5/17-59.

Criminal contracts are void *ab initio*, and treated as if they did not exist. *Streeter v. Western Wheeled Scraper Co.*, 254 Ill. 244, 251-252; 98 N.E. 541, 544 (1912); *Penn Mutual Life Ins. Co. v. Greatbanc Trust Co.*, 887 F.Supp.2d 822, 830 (N.D.Ill. 2012)). The claim that there is no private right of action for violations of criminal law ignores that a criminal contract is void under ***contract law***; civil relief therefore can be given, as it can for any contract law theory that leads to a contract's invalidation. (Doc. 40-1 at 14; see Doc. 1-1, ¶38 ("as the loan constitutes a criminal act, the loan is unenforceable and void").)

On consumer protection laws, Illinois public policy is clear: waiver of the protections of Illinois law is prohibited. The Consumer Fraud and Deceptive Business Practices Act (815 ILCS 505/1 *et seq*.) instructs that "any waiver or modification of the rights, provisions, or remedies of this Act shall be void and unenforceable." 815 ILCS 505/10c. This provision, like all other parts of the statute, "shall be liberally construed to effect the purposes thereof." 815 ILCS 505/11a. Per 815 ILCS 505/2, any unfair or deceptive commercial conduct, without exception, is illegal.

The Illinois Attorney General argued in *Jackson* that, according to *Bonny v. Society of Lloyd's*, 3 F.3d 156, 160-161 (7th Cir. 1993), an anti-waiver provision in a statute means "that

the public policy of [that law] should not be thwarted." She also cited *Wright-Moore Corp. v. Ricoh Corp.*, 908 F.2d 128, 132 (7th Cir. 1990), which held a similar provision in Indiana franchising law required that the statute cannot be overturned by a contract:

> the public policy articulated in the nonwaiver provisions of the statute is clear: a franchisor, through its superior bargaining power, should not be permitted to force the franchisee to waive the legislatively provided protections, whether directly through waiver provisions or indirectly through choice of law. This public policy is sufficient to render the choice to opt out of Indiana's franchise law one that cannot be made by agreement.

No forum could enforce such a waiver. (See *Jackson v. Payday Financial LLC,* Appeal No. 12-2617 (7th Cir.), Doc. 68 at 22-23 (*amicus* brief of Illinois Attorney General).)

As a result, application of the choice-of-law clause in the contract would not only be contrary to Illinois public policy but, given 815 ILCS 505/11a, illegal outright. Therefore, the loan agreement's choice-of-law clause cannot be enforced, and Illinois law must be applied.

III. DEFENDANTS' COMMERCE CLAUSE ARGUMENT IS FRIVOLOUS

The key part of defendants' scheme was to have the lending process take place, nominally, on a reservation, so it could try to have tribal law apply. In *Jackson*, the plaintiffs and the Illinois Attorney General, relying on *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.*, 473 U.S. 614, 637 n.19 (1985), argued that choice-of-forum and choice-of-law clauses cannot "[operate] in tandem as a prospective waiver" of consumers' rights under state laws. The Attorney General went further, arguing in her brief (cited *supra*) that the choice-of-forum clause could only be enforced if Illinois law were enforced by the tribal forum.

Defendants now attempt to suggest that Illinois law cannot be enforced because of the Commerce Clause. This is frivolous. First, Illinois law can apply to interstate contracts making usurious loans to Illinois residents. Second, the contract was, contrary to defendants' arguments, entered into in Illinois, making pursuit of the claims here proper.

If a state statute "regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." *Pike v. Bruce Church Inc.*, 397 U.S. 137, 142 (1970) (citation omitted). *Accord*, *General Motors Corp. v. Illinois Motor Vehicle Review Board*, 224 Ill.2d 1, 27-28; 862 N.E.2d 209, 227 (2007); *Direct Auto Buying Serv. Inc. v. Welch*, 308 N.W.2d 570 (S.D. 1981). The Consumer Fraud Act has been held to protect a compelling "local public interest." *People ex rel. Hartigan v. Dynasty System Corp.*, 128 Ill.App.3d 874, 882-883; 471 N.E.2d 236, 241-242 (4th Dist. 1984) (citing *Pike*). So have other Illinois laws. *Cavel Int'l Inc. v. Madigan*, 500 F.3d 551 (7th Cir. 2007) (ban on sale of horsemeat); *National Paint & Coatings Assn. v. Chicago*, 45 F.3d 1124, 1130-1132 (7th Cir. 1995) (ban of sale of spray paint in Chicago). See *Interstate Towing Assn. Inc. v. Cincinnati*, 6 F.3d 1154, 1163 (6th Cir. 1993) (consumer protection concerns "have consistently been regarded as legitimate, innately local in nature, and presumptively valid, even where regulations enacted to address those concerns have an impact on interstate commerce").

Illinois law regarding high-interest loans applies to all lenders, whether they are located here or not. As shown by the actions of the IDFPR (Exhibits 3-6), the licensing requirements of Illinois law have been evenly applied to domestic and foreign lenders.

A finding that the contract is subject to Illinois is proper under the "last act necessary" rule of contract formation. *Aasonn LLC v. Delaney*, 2011 IL App (2d) 101125, ¶19; 961 N.E.2d 939, 948 (2d Dist. 2011). A form agreement was sent by Western Sky to Scherr, who reviewed

and signed the contract at his Illinois home. This constituted Scherr's acceptance of Western Sky's offer, for the agreement includes this following statement (which appears next to a "check-box" the borrower must click before proceeding):

> **YOU HAVE READ ALL OF THE TERMS AND CONDITIONS OF THIS PROMISSORY NOTE AND DISCLOSURE STATEMENT AND AGREE TO BE BOUND THERETO. YOU UNDERSTAND AND AGREE THAT YOUR EXECUTION OF THIS NOTE SHALL HAVE THE SAME LEGAL FORCE AND EFFECT AS A PAPER CONTRACT.** [Doc 1-1, Exhibit A, PageID 36.]

Upon Scherr's agreement, the putative contract was formed. That event occurred in Illinois, where Scherr was when he electronically accepted Western Sky's offer. Given the standard of review for motions to dismiss, any claim that the contract was "executed and performed solely within the exterior boundaries of the Cheyenne River Indian Reservation," or "made as if [Scherr] were physically present within the exterior boundaries of the Cheyenne River Indian Reservation" cannot prevail. (Doc 1-1, Exhibit A, PageID 31, 33; see, *e.g.*, Doc. 40-1 at 7, 8, 10, 11.) Construing his complaint in the most favorable light requires accepting that he was in Illinois when the loan was made, and that the contract was made here.

This makes *Eric M. Berman PC v. City of New York*, 895 F.Supp.2d 453 (E.D.N.Y. 2012)[8] and *Dean Foods Co. v. Brancel*, 187 F.3d 609 (7th Cir. 1999) inapplicable. As the contract was formed in Illinois, there is no attempt to apply one state's law on a contract formed in another state. At the least, the transaction did not take place "wholly outside of the State's borders," and does not "control conduct beyond the boundaries of the State" (Doc. 40-1 at 6 (citing *Healy v. Beer Institute*, 491 U.S. 324, 326-327 (1989)).

[8] On appeal, the Second Circuit Court of Appeals certified two questions to the New York Court of Appeals as to the ability of New York City to regulate attorney conduct, given the State's authority to license and regulate lawyers. Answers to those questions are pending. *Eric M. Berman P.C. v. City of New York*, __ F.3d __, No. 13-598, 2014 WL 5463229 (2d Cir. Oct. 29, 2014). No Commerce Clause questions were addressed in that decision. *Id*.

Defendants' reliance on *Midwest Title Loans v. Mills*, 593 F.3d 660, 664-665 (7th Cir. 2010), is mistaken. First, *Midwest Title Loans* dealt with an Indiana law which prohibited Illinois title loan providers from lending to Indiana residents, even if they visited Illinois. Indianans could not obtain an Illinois title loan without physically travelling to Illinois, where title lending is legal. *Midwest Title Loans*, 593 F.3d at 666-667. (See Doc. 40-1 at 8.) The borrower would not be within the jurisdiction of Indiana when the targeted action was done. Here, Scherr was in Illinois when he executed the loan and received the borrowed money; he seeks to apply Illinois law to a contract formed here.

More broadly, *Midwest Title Loans*, following *Pike*, held that anyone seeking to have a state law not apply on Commerce Clause grounds "has a steep hill to climb." As later explained in *Grant-Hall v. Calvary Portfolio Services LLC*, 856 F.Supp.2d 929, 937-938 (N.D.Ill. 2012),

> …. In *Aldens Inc. v. LaFollette*, 552 F.2d 745 (7th Cir. 1977), the Seventh Circuit considered a Wisconsin statute establishing maximum finance charges for consumer credit agreements with Wisconsin citizens. *Id.* at 747. The plaintiff, Aldens, was an Illinois company that sold general retail merchandise via mail order to Wisconsin customers. [*Id.*] The statute caused Aldens to prepare Wisconsin-specific catalogs containing Wisconsin-specific credit terms for its Wisconsin customers. *Id.* at 748. The Seventh Circuit upheld the statute under [*Pike*], adopting in full the… opinion in *Aldens Inc. v. Packel*, 524 F.2d 38 (3d Cir.1975). *LaFollette*, 552 F.2d at 749. *Packel* featured the same plaintiff (Aldens) and a materially identical state statute. 524 F.2d at 41-42. The Third Circuit held that the statute survived *Pike* given "the historical recognition that the states may, despite the burden on commerce, enact varying usury laws and varying contract laws," and because Congress had approved of the States' continuing role in regulating consumer credit transactions [within the Truth in Lending Act], see 15 U.S.C. § 1610(b). 524 F.2d at 48-49…. *Aldens Inc. v. Miller*, 610 F.2d 538, 539-540 (8th Cir.1979), and *Aldens Inc. v. Ryan*, 571 F.2d 1159, 1162 (10th Cir.1978), upheld substantially similar laws under *Pike*. See also *Silver v. Woolf*, 694 F.2d 8 (2d Cir.1982) (in rejecting a Commerce Clause challenge to state licensing requirements for debt collectors, citing the State's legitimate interest in regulating debt collection and Congress's specific authorization of state regulation in that area).

Accord, *South Dakota ex rel Meierhenry v. Spiegel Inc.*, 277 N.W.2d 298, 301-302 (S.D. 1979).

In one of the *Aldens* cases, the Third Circuit discussed a "door closing" provision as an example of unfairly interfering with interstate commerce; under such provisions, foreign corporations are barred from suing in a state's courts, absent permission from the state. *Packel*, 524 F.2d 38, 49 (3d Cir. 1975). This gives in-state corporations a right that out-of-state corporations do not have. *Id.* The benefit of the bar against suits could not overcome the amount of interference with commerce, and could not survive a Commerce Clause challenge. This is not true here; the license requirement is not bureaucratic, but exists to protect the public interest.

Otoe-Missouria Tribe v. New York State Dept. of Fin. Servs., 769 F.3d 105, ___, 2014 WL 4900363 (2d Cir. Oct. 1, 2014) is useful. The case dealt with the Indian Commerce Clause, not the general Commerce Clause. Per *Otoe-Missouria*, 2014 WL 4900363 at *10 n.9,

> although the Interstate Commerce Clause contains a "dormant" protection that prohibits states from discriminating against interstate commerce, courts have never inferred that the Indian Commerce Clause contains a similar unspoken shield. As Justice Marshall explained in [*Ramah Navajo School Board Inc. v. New Mexico Bureau of Revenue*, 458 U.S. 832, 845-846 (1982)], "existing pre-emption analysis [is] sufficiently sensitive" to the concerns addressed in dormant Interstate Commerce Clause jurisprudence, so that the Court "[did] not believe it necessary to adopt [a] new [dormant Indian Commerce Clause] approach."

Defendants do not argue for application of the Indian Commerce Clause, even though Scherr's agreement says that it is governed by it. (Doc 1-1, Exhibit A, PageID 33.) Yet *Otoe-Missouria*, *id.* at *7-*10, shows that defendants cannot rely on this constitutional provision either:

> a tribe has no legitimate interest in selling an opportunity to evade state law. In [*Washington v. Confed. Tribes of the Colville Indian Reservation*, 447 U.S. 134, 155, 161 (1980)], the Supreme Court held that tribal stores had to collect a state tax on cigarettes sold to non-Native American customers…. [Tribes] did not have any legitimate interest in "marketing an exemption from state taxation to persons who would normally do their business elsewhere." Factual questions, then, pervade every step of the analysis required by the Indian Commerce Clause. A court must know who a regulation targets and where the targeted activity takes place. Only then can it either test for discriminatory laws… or balance competing interests…. Only then can it assess whether a regulation threatens a significant investment… or whether a tribe has merely masked a legal loophole in the cloak of tribal sovereignty....

> [A tribe] would have to show that [a regulator] acted with the intent of regulating tribes, or that its outreach had that effect…. [But] New York's usury laws apply to all lenders, not just tribal lenders, and [the regulator's] letters…. made clear that New York regulators disapproved of the facilitation by banks of high-interest payday lending from outside the state. [Punctuation omitted.]

The actions of the IDFPR against unlicensed internet lenders are parallel to those taken by the State of New York, in both their scope and their uniform application. (Exhibits 3-6.)

IV. SCHERR BRINGS PLAUSIBLE CLAIMS UNDER ILLINOIS LAW

(a) Violations of Illinois statutes

The law is unambiguous in its condemnation of the practices in which defendants engaged. No loan made in Illinois may charge over 9% interest unless an exception applies. 815 ILCS 205/4(1). The only applicable exception for the loans authorized by CILA, from licensed lenders. Under 205 ILCS 670/1, a lender must by licensed by the IDFPR before it may take advantage of the benefits of the CILA, including the right to charge over 9% in annual interest.[9] As they were not licensed, the CILA's benefits, and relief from the Interest Act, are unavailable. For reasons previously described, the loan is also criminally usurious under 720 ILCS 5/17-59.

The Consumer Fraud Act was also violated. 815 ILCS 505/2 makes no exceptions:

> Unfair methods of competition ***and*** unfair or deceptive acts or practices, including but not limited to the use or employment of ***any*** deception, fraud, false pretense, false promise, misrepresentation or the concealment, suppression or omission of ***any*** material fact, with intent that others rely upon the concealment, suppression or omission of such material fact…. in the conduct of ***any*** trade or commerce are hereby declared unlawful whether any person has in fact been misled, deceived or damaged thereby. [Emphasis added.]

Defendants' conduct fails the tests in *Robinson v. Toyota Motor Credit Corp.*, 201 Ill.2d 403, 416-418; 775 N.E.2d 951, 960-961 (2002), for finding a Consumer Fraud Act violation, as

[9] Defendants' attempt to claim that the loan was not made under the CILA is too clever by half. (Doc. 40-1 at 19.) If it does not claim that its loan was made pursuant to CILA, then ***no*** exception to the Interest Act is available to them, and every attempt made by any defendant to collect on the loan after it was made was illegal. This conduct is actionable under the Consumer Fraud Act and the Interest Act, and grounds for voiding the loan as it is criminally usurious.

their conduct "offends public policy," is "immoral, unethical, oppressive, or unscrupulous," and "causes substantial injury to consumers." *Robinson* relied on *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 (1972), which held that "public values beyond simply those enshrined in the letter or encompassed in the spirit" of a consumer protection statute can be considered. *Hill v. Wells Fargo Bank NA*, 946 F.Supp.2d 817, 827 (N.D.Ill. 2013), which dealt directly with a Consumer Fraud Act claim, quoted *Sperry*, 405 U.S. at 244 n.5, and held that courts should consider "whether the practice, without necessarily having been having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise – whether, in other words, it is within at least the penumbra of some common-law, statutory, or other established concept of unfairness." See *People ex rel Hartigan v. Commonwealth Mortgage Corp.*, 732 F.Supp. 885, 893-894 (N.D.Ill. 1990).

The fact that the Interest Act and the CILA are not named in the Consumer Fraud Act is of no importance. 815 ILCS 505/11a, and *Connick v. Suzuki Motor Co. Ltd.*, 174 Ill.2d 482, 504; 675 N.E.2d 584, 594 (1996), instruct courts to construe the Consumer Fraud Act liberally. Excusing a practice actionable under 815 ILCS 505/2, because a statute expressing Illinois public policy is not named, does not conform. This is underscored by the anti-waiver provision of 815 ILCS 505/10c, which applies to all misconduct without exception.[10] (See Doc. 40-1 at 16-17.)

(b) Absence of a "reasonable difference of opinion" about the law

Defendants' attempt to claim there was a "reasonable difference of opinion" on what these laws mean is mangled. Defendants fraudulently revise plaintiff's Consumer Fraud Act

[10] Defendants claims that "because plaintiff is presumed to be equally capable of knowing and interpreting the law, under [his] allegations he took out the loans knowing whether the loans were legal or not." (Doc 40-1 at 18.) This ignores the fact that the protections of the Consumer Fraud Act cannot be waived by contract; this means that neither defendants' ***nor*** plaintiff can agree to their waiver. This serves the purpose of the statute quite well, as consumers who are in a desperate financial situation are perhaps most deserving of the law's protections.

claim as being based in "a disagreement over whether Illinois law applies to the loans and whether those loans were legal." (Doc. 40-1 at 15.) Yet a case cited for this doctrine – *Stern v. Norwest Mortgage Inc.*, 284 Ill.App.3d 506, 513; 672 N.E.2d 296, 302 (1st Dist. 1996) – held that "there must be a claim seated in deceptive acts rather than a reasonable difference of opinion ***as to the meaning of an act of the Illinois General Assembly."*** (Emphasis added.) The question defendants raise is whether Illinois law applies, not what that law means. If Illinois law applies, then a claim against defendants is more than plausible. See *Jackson*, 764 F.3d at 775 n.23 ("the Loan Entities tacitly admit that the licensure requirements may call the contract into question"). There is ***zero*** "uncertainty about the applicable law," contrary to such a finding made in *Lee v. Nationwide Cassel LP*, 174 Ill.2d 540, 550-551; 675 N.E.2d 599, 604 (1996).

Meanwhile, *Stern* dealt with disputes about what are, and are not, ***deceptive*** practices. *Robinson, supra*, considered what is and is not ***unfair*** under the Consumer Fraud Act. Claims that are deceptive, or unfair, or both are all actionable under 815 ILCS 505/2. Scherr has stated a claim that defendants conduct is unfair, both under the common meaning of the word (as permitted by *Sperry* and *Hill*) and as defined by the Illinois Supreme Court in *Robinson*.

For the Consumer Fraud Act to not apply under *Stern* and similar cases, a claimed difference of opinion must be "reasonable" and "legitimate." Defendants' claims about a supposed "difference of opinion" are neither. *Stern*, 284 Ill.App.3d at 512-513, added that "we do not reject or mean to affect those cases which have properly stated that an innocent misrepresentation can be actionable under the Consumer Fraud Act." The foul here was not innocent, but planned out to achieve defendants' business objectives. Thus, defendants' claim that "when Western Sky issued Plaintiff's loan and CashCall attempted to collect on it, both had

a reasonable, good faith basis to believe the loan was not governed by Illinois law" (Doc. 40-1 at 16) is a total fraud.

So is their claim that, for liability to attach under 815 ILCS 205/6, they must be found to have "knowingly" violated the Interest Act, and that such a claim cannot be pled. Being advised of the content of the law, and being shown how that law was being violated by their conduct, defendants continued that conduct for months after being served with the *Jackson* complaint, and despite numerous governmental investigations into their scheme. If that is not knowing misconduct, then nothing is. At best, defendants' conduct was profoundly reckless, and done with total indifference to the real possibility that state laws they knew about did apply; this, under *Sperry, World Media Brokers, Robinson* and similar cases would be more than enough. At any rate, defendants fail to accurately recite *United States v. Phillips*, 731 F.3d 649, 652-652 (7th Cir. 2013), which held that "***it is for a jury to determine*** what the defendants understood to be the meaning" of the law. (Emphasis added.) Defendants' point that plaintiff cannot plausibly allege that defendants "knowingly" violated the law is not only incredible, but premature. A fact question is not properly considered on a motion to dismiss.

(c) Pleading of proximate cause and damage

The claim that plaintiff has not alleged proximate cause is also fraudulent. Scherr made several detailed allegations about the false and fraudulent statements made in his loan agreement – all of which represented that the loan was legal and enforceable, either in the contract itself or in CashCall's subsequent e-mail to Scherr stating that payments were needed. (See Doc. 1-1, ¶¶27-28, 39-47.) Defendants complain that "plaintiff never alleges… that had Western Sky informed him that the loans (as Plaintiff claims) contain an unlawful interest rate, he would have forgone his loan." That is absurd, as is defendants' claim that plaintiff "does not allege any facts

suggesting that he would have been better off without having taken out the loans in the first place." (Doc. 40-1 at 17-18.) Defendants acknowledge that Scherr made a payment on his loan (see Doc. 40-1 at 1); as the loan is void, Scherr had no obligation to pay any principal or interest back, and was damaged by defendants' violation of Illinois statutes.

V. CONCLUSION

Scherr has stated a plausible claim. The renewed motion to dismiss should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that the preceding document was filed and served upon counsel for defendants, Michael Brody (mbrody@jenner.com) and Daniel Fenske (dfenske@jenner.com) on November 6, 2014, through the Court's electronic filing system.

/s/ Thomas E. Soule
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