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

JENNAFER KEMPH, DAN DEHMLOW, and GLENN ALLHOFF, for themselves and those similarly situated,	)	
Plaintiffs,	)	Case No. 1:13:cv-6785
v.	)	Hon. Marvin E. Aspen
JOHN PAUL REDDAM, CASHCALL, INC., WS FINANCIAL, LLC, WS FUNDING, LLC, DELBERT SERVICES CORPORATION, CESAR GUZMAN, SUNSHINE THAYER, GREG DALTON, MELISSA DALTON, AND DOES 1-10,	)	Magistrate Judge Young B. Kim
Defendants.	)	

DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR RENEWED MOTION TO DISMISS OR TO COMPEL ARBITRATION

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November 6, 2014

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INTRODUCTION

In this case, three Illinois Plaintiffs have sued California, Nevada, and Delaware Defendants who purchased or serviced loans issued by Western Sky, a non-party lender operating from the tribal lands of the Cheyenne River Sioux Tribe ("CRST") in South Dakota. Plaintiffs submitted their application for a loan through Western Sky's website or by telephone. Each Western Sky Loan Agreement clearly disclosed in plain English the principal balance of the loan, the interest rate, the annual percentage rate, and the term of the loan. Plaintiffs do not allege they were deceived by the disclosures or contract documents. Plaintiffs now sue to void the loans on the ground that their interest rates exceed the rate allowed under Illinois law.

The Complaint is defective for several reasons. *First*, plaintiffs' contracts (the "Loan Agreements") require arbitration of all of Plaintiffs' claims. *Second*, this Court is an improper venue under the federal venue statutes. *Third*, this Court lacks personal jurisdiction over Defendants. *Fourth*, the Dormant Commerce Clause bars applying Illinois law to the Western Sky loans, which are consummated outside of Illinois. *Fifth*, even if Illinois law applies, Plaintiffs have failed to plead essential elements of each of their claims.[1]

BACKGROUND

Plaintiffs, three Illinois residents, took out installment loans from non-party Western Sky Financial, LLC ("Western Sky"). (Cmplt. ¶¶ 25-27, 48-50.) Western Sky is a South Dakota limited liability company incorporated under the laws of the State of South Dakota and licensed to do business by the CRST on the Cheyenne River Indian Reservation ("Reservation") in South

[1] At the end of this brief, Defendants argue that this Court should dismiss this case due to the Loan Agreement's forum-selection clause and under the tribal exhaustion doctrine. Defendants acknowledge that the Seventh Circuit's recent decision in *Jackson v. Payday Financial, LLC*, 764 F.3d 765 (7th Cir. 2014) precludes this Court from granting a motion to dismiss on those grounds, but include these arguments for preservation purposes. For the reasons explained in Section I below, however, *Jackson*'s invalidation of the arbitration clause at issue in that case has no relevance here given crucial differences between the arbitration clauses in both cases.

Dakota. (*Id.*, Ex. A at 1, Ex. B at 1; Ex. 1, Lawrence Aff. ¶¶ 3-4.) Western Sky is owned by Martin A. Webb, an enrolled CRST member. (Cmplt. ¶ 25 & Ex. I at 6; Ex. 1 ¶ 3.) Plaintiffs allege that Western Sky offered loans to Illinois consumers through its website and radio and television advertising. (Cmplt. ¶ 25.) In each Loan Agreement, Plaintiffs "expressly agree[d] that this Agreement is executed and performed solely within the exterior boundaries of the Cheyenne River Indian Reservation," not in Illinois. (Ex. B at 3.)[2]

According to the Complaint, Defendants CashCall, Inc. ("CashCall") and WS Financial, LLC ("WS Financial")[3] are incorporated under California law and have their principal place of business there; WS Funding, LLC ("WS Funding") is a Delaware corporation with its registered agent and office there; and Delbert Services Corporation ("Delbert") is a Nevada corporation with its principal place of business there. (Cmplt. ¶¶ 10-14.) The Complaint alleges that Defendant Reddam is a citizen of California; Guzman is a citizen of either California or Nevada; and Thayer, Melissa Dalton, and Greg Dalton are citizens of Nevada. (*Id.* ¶¶ 9, 16-19.) While certain of these allegations are inaccurate, no Defendant is a citizen of Illinois.

Plaintiffs allege that their Western Sky loans were funded by CashCall, WS Financial, and WS Funding, that "the lending process was controlled entirely by these defendants, under the direction of [defendant] Reddam," and that "CashCall, [WS] Financial and [WS] Funding

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[2] Exhibits B-D, Plaintiffs' Loan Agreements, are attached to the Affidavit of Tawny Lawrence. (Ex. 1.) Concerning the issues presented in this Motion, the Loan Agreements are substantively identical. For simplicity, this Motion will only cite Exhibit B. Every reference to Exhibit B may be understood as including Exhibits C and D as well, unless context indicates otherwise. Under Rule 12(b)(6), the Court may consider, in addition to the Complaint and any documents attached to it, documents referred to in the Complaint and central to the Plaintiffs' claims, such as the Loan Agreements. *See Hobbs v. John*, 722 F.3d 1089, 1091 n.2 (7th Cir. 2013) (quoting *Wright v. Associated Ins. Cos.*, 29 F.3d 1244, 1248 (7th Cir. 1994); *Tierney v. Vahle*, 304 F.3d 734, 738 (7th Cir. 2002) ("[T]he concern is that . . . the plaintiff could evade dismissal under Rule 12(b)(6) simply by failing to attach to his complaint a document that proved that his claim had no merit.").

[3] In fact, no entity called "WS Financial LLC" even exists, at least as relates to this case. Plaintiffs' inclusion of WS Financial LLC as a defendant appears the result of a typographical error in one contract involving Western Sky, which is attached to the Complaint. (Cmplt., Ex. B.)

assumed virtually all responsibility for the loans made, nominally, by Western Sky." (*Id.* ¶¶ 26, 32; Ex. 1, Lawrence Aff. ¶¶ 6, 9.) Plaintiffs allege that they made payments to CashCall or Delbert as servicers of the loans. (Cmplt. ¶¶ 49, 51, 54-55, 58.) Plaintiffs do not attach their Loan Agreements to the Complaint, but refer to the terms of the Loan Agreements. (*Id.* ¶¶ 48, 52, 56.) The Loan Agreements, which defendants attach to this Motion, contain comprehensive arbitration clauses. (Exs. B-D.) (*See* Section I below.)

According to Plaintiffs, the interest rates on their loans exceed 100%, and exceed the rate allowed under Illinois law. (Cmplt. ¶¶ 27-29.) On behalf of a purported class, Plaintiffs allege that by servicing their loans Defendants violated the: (1) Illinois Interest Act, 815 ILCS 205/6 (Count I, Cmplt. ¶¶ 60-61); (2) Illinois Consumer Installment Loan Act ("CILA"), 205 ILCS 670/20(d) (Count II, Cmplt. ¶¶ 70-73); (3) Illinois Consumer Fraud Act and Deceptive Business Practices Act ("CFA"), 815 ILCS 505/2 (Count III, Cmplt. ¶¶81-85); and (4) Racketeer Influenced and Corruption Organizations Act ("RICO"), 18 U.S.C. § 1962(c), (d) (Count IV, Cmplt. ¶¶ 93-102). Each claim depends on the allegation that the loans' interest rates exceed the rate authorized by Illinois law. (*Id.* ¶¶ 61, 70-71, 82, 97.)

ARGUMENT

I. This Court Should Compel Arbitration.

A. The Loan Agreements' Arbitration Clause.

The Loan Agreements' arbitration clause requires that all disputes arising out of the Agreement be resolved in binding arbitration.[4] The arbitration clause begins:

> **WAIVER OF JURY TRIAL AND ARBITRATION.**
>
> **PLEASE READ THIS PROVISION OF THE AGREEMENT CAREFULLY.** Unless you exercise your right to opt-out of arbitration in the manner described below,

[4] The Court may consider evidence outside the pleadings when resolving a motion to compel arbitration. *Faulkenberg v. CB Tax Franchise Sys., LP*, 637 F.3d 801, 810 (7th Cir. 2011).

> any dispute you have with Western Sky or anyone else under this loan agreement will be resolved by binding arbitration. Arbitration replaces the right to go to court, including the right to have a jury, to engage in discovery (except as may be provided in the arbitration rules), and to participate in a class action or similar proceeding. In Arbitration, a dispute is resolved by an arbitrator instead of a judge or jury. Arbitration procedures are simpler and more limited than court procedures. Any Arbitration will be limited to the dispute between yourself and the holder of the Note and will not be part of a class-wide or consolidated Arbitration proceeding.

(Ex. B at 3-4 (emphasis in original).) None of the Plaintiffs exercised the contractual right to opt-out of the arbitration clause.

Other sections of the Loan Agreements elaborate upon this clause. The Loan Agreements define the "Dispute[s]" subject to mandatory arbitration in the "broadest possible" way as "any controversy or claim between you and Western Sky or the holder or servicer of the Note." (Ex. B at 4.) Covered Disputes include "any claim based upon . . . the handling or servicing of [Plaintiffs'] account[s]" regardless of the legal basis of the claim. (*Id.*) The Loan Agreements delegate to the arbitrator the authority to decide any Dispute as to "the validity, enforceability, or scope of this loan or the Arbitration agreement." (*Id.*)

The Loan Agreements define the parties against whom Plaintiffs must arbitrate to include "any controversy or claim between you and Western Sky or the holder or servicer of the Note." (*Id.*) They define the term "holder" to "include Western Sky or the then-current note holder's employees, officers, directors, attorneys, affiliated companies, predecessors, and assigns, as well as any marketing, servicing, and collection representatives and agents." (*Id.*) That broad definition encompasses all Defendants here. The Loan Agreements obligate Defendants to pay all filing fees and any costs or fees of the arbitrator, and provide that the arbitration can occur within 30 miles of Plaintiffs' residence. (*Id.* at 4.)

The arbitration clause further states that, "except as provided below," the arbitration "shall be conducted by the Cheyenne River Sioux Tribal Nation by an authorized representative

in accordance with its consumer dispute rules and the terms of this Agreement." (*Id*. at 4.) "[P]rovided below" that statement, however, the arbitration clause gave Plaintiffs the right, "[r]egardless of who demands arbitration, . . . to select . . . the American Arbitration Association . . . ; JAMS . . . ; or an arbitration organization agreed upon by [Plaintiffs] and the other parties to the Dispute." (*Id.*) The "arbitration will be governed by the chosen arbitration organization's rules and procedures applicable to consumer disputes, to the extent that those rules and procedures do not contradict either the law of the Cheyenne River Sioux Tribe or the express terms of this Agreement to Arbitrate[.]" (*Id.*) Thus, the arbitration clause gave Plaintiffs the right to select arbitration before either (a) an authorized representative of the CRST *or* (b) an arbitrator selected using AAA, JAMS, or another mutually agreeable arbitration organization. (*Id.*)

Each arbitration clause states that "[i]f any of this Arbitration Provision is held invalid, the remainder shall remain in effect[.]" (*Id.* at 5.) It also states: "This Arbitration provision will survive: (i) termination or changes in this Agreement, the Account, or the relationship between us concerning the Account; (ii) the bankruptcy of any party; and (iii) any transfer, sale or assignment of my Note, or any amounts owed on my account, to any other person or entity." (*Id.*) Further, the arbitration clause states that it "survives any termination, amendment, expiration, or performance of any transaction between you and us and continues in full force and effect unless you and we otherwise agree in writing." (*Id.*)

B. This Court Should Enforce The Arbitration Clause.

The arbitration clause requires arbitration of Plaintiffs' entire Complaint because it alleges a "controversy or claim" over whether the defendants violated "federal [and] state . . . statute[s]" when servicing Plaintiffs' loans. (*Id.* at 4.) The Seventh Circuit has held that similarly broad arbitration clauses referring to "any dispute" encompass all conflicts between the

parties. *See Cont'l Cas. Co. v. Am. Nat'l Ins. Co.*, 417 F.3d 727, 733-34 (7th Cir. 2005); *Int'l Union of Operating Eng'rs, Local Union 103 v. Ind. Constr. Corp.*, 13 F.3d 253, 254 (7th Cir. 1994). That rule applies to the broad arbitration clause here.

Plaintiffs can avoid arbitration only if they prove a valid defense to the arbitration clause. Section 2 of the Federal Arbitration Act ("FAA") provides that written agreements to arbitrate "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The purpose of the FAA "is to ensure that private agreements to arbitrate are enforced according to their terms." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 682 (2010) (quotations omitted); *see also Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 270 (1995). The FAA enunciates a "strong federal policy in favor of enforcing arbitration agreements." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 217 (1985). "[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration," including when "constru[ing] . . . the contract language itself." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983).

To meet their burden to show that their arbitration clause is unenforceable, Plaintiffs must show that a generally applicable contract law defense allows them to avoid their obligation to arbitrate. *See Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996). Applying that principle, the Supreme Court has held that the FAA preempts a state law that "prohibits outright the arbitration of a particular type of claim" or that is "applied in a fashion that disfavors arbitration." *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1747 (2011). *Concepcion* applied that principle to hold that the FAA preempts a state law unconscionability defense as applied to an arbitration clause. *Id.* at 1748.

It is not enough, moreover, for Plaintiffs to allege that their entire Loan Agreement is unenforceable. *See Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967). They must show that the arbitration clause *itself* is subject to a valid defense. *See Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 449 (2006). Further, because Plaintiffs' arbitration clause contains a delegation provision giving the arbitrator the authority to decide whether the arbitration clause is enforceable, Plaintiffs must also show that the *delegation provision* is invalid. *See Rent-a-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 71-72 (2010).

The Seventh Circuit's decision in *Jackson v. Payday Financial, LLC*, 764 F.3d 765 (7th Cir. 2014), which held that a different arbitration clause in other Western Sky loans is unenforceable, does not apply here. *Jackson* held that the arbitration clause there was invalid because it required arbitration before a CRST tribal forum, but the district court found there that the CRST does not conduct arbitrations. That ground does not apply to this case. Although Plaintiffs' arbitration clause permits arbitration before an "authorized representative" of the CRST, it also gives Plaintiffs "the right to select any of the following arbitration organizations to administer the arbitration: the American Arbitration Association . . .; JAMS . . .; or an arbitration organization agreed upon by [Plaintiffs] and the other parties to the Dispute," using the rules of the selected organization. (Ex. B at 4.) Because those fora are plainly available, the Seventh Circuit's decision in *Jackson* to hold unenforceable the arbitration clause at issue in that case—which did not permit arbitration before the AAA or JAMS—is not controlling. Further, even if the designated forum were unavailable, Section 5 of the FAA, 9 U.S.C. § 5, would require this Court to appoint a substitute arbitrator if the parties could not agree upon one rather than invalidate the arbitration clause entirely. *See Green v. U.S. Cash Advance Ill., LLC*, 724 F.3d 787, 800-01 (7th Cir. 2013).

II. This Court Is An Improper Venue Under The Federal Venue Statutes.

This Court is an improper venue under the venue statutes. In a RICO case, a plaintiff "may properly lay venue in accordance with" either RICO's special venue provision, 18 U.S.C. § 1965(a), or under the general venue statute, 28 U.S.C. § 1391. *City of New York v. Cyco.Net, Inc.*, 383 F. Supp. 2d 526, 544 (S.D.N.Y. 2005). Plaintiffs bring their RICO claim only against the individual Defendants, not the corporate Defendants. Thus, even if Plaintiffs establish that this Court is a proper venue under RICO for claims against the individual Defendants, Plaintiffs still must establish venue under Section 1391 over the corporate Defendants.

A. Venue Is Improper Under RICO.

RICO's venue statute provides that "[a]ny civil action … may be instituted in the … district in which [the defendant] resides, is found, has an agent, or transacts his affairs." 18 U.S.C. § 1965(a). If any defendant meets that test, a plaintiff can rely upon RICO's nationwide service of process provision to bring the other defendants before the district court, but only if "the ends of justice require" nationwide service. 18 U.S.C. § 1965(b). Here, the Complaint does not allege that any Defendant "resides" in this district, is "found" here, or has an "agent" here. To establish venue under RICO, therefore, Plaintiffs must show that an individual Defendant "transacts his affairs" in this district. *Id.*

The only specific allegation in the Complaint connecting any Defendant to this district is the allegation that the corporate Defendants contacted Plaintiffs in Illinois to inform them to make payments to either CashCall or Delbert. (Cmplt. ¶¶ 25, 49, 51, 54-55, 58.) The Complaint makes no allegation that any *individual* Defendant did anything in this district. RICO does not give "venue over individual officers of a corporation under 1965(a) … merely because venue exists for the corporation under that statute." *Abeloff v. Barth*, 119 F.R.D. 315, 328 (D. Mass. 1988). Venue over "individual defendants who are agents of the corporate defendant [depends

on] whether the individual defendants were in a position within the corporation such that it could be said that the corporation's affairs were, in reality, their affairs," meaning "the individuals had actual power to control and exercised the power to control the corporation's transaction of business in the forum." *Id.*

This district is not a proper venue over the individual Defendants. There is no plausible allegation that Defendants Guzman, Thayer, Melissa Dalton and Greg Dalton were "in a position within the corporation such that it could be said that the corporation's affairs were, in reality, their affairs." *Id.* They are just employees of Delbert. (Cmplt. ¶¶ 16-19.) As to Defendant Reddam, the Complaint alleges that he is the owner and senior official of all the corporate Defendants. (*Id.* ¶ 9.) Even assuming the corporate Defendants' acts are imputable to Reddam under *Abeloff*, for the reasons described below, the corporate Defendants' contacts with this district are insufficient for venue to lie here.

Corporate defendants transact their affairs within a district if the "defendants regularly transact business of a substantial and continuous character within the district." *Gatz v. Ponsoldt*, 271 F. Supp. 2d 1143, 1158 (D. Neb. 2003) (quotation omitted); *Abeloff*, 119 F.R.D. at 328 (same); *Dody v. Brown*, 659 F. Supp. 541, 545 (W.D. Mo. 1987) (same). Defendants' contacts with the forum district relating to the case at issue are not enough. *Id.* at 545-46; *Follett College Stores Corp. v. Fernandez*, 587 F. Supp. 1051, 1052 (N.D. Ill. 1984). Further, where the majority of acts underlying the claim took place outside the district, venue is improper. *Id.* at 1052-53. In *Follett*, for example, the defendant's alleged wrongdoing took place entirely outside of the Northern District of Illinois; the only contacts with the district were mailings and telephone calls. *Id.* at 1053. The court held those contacts insufficient under RICO because those contacts were "miniscule" in comparison to the defendants' out-of-district contacts. *Id.*

Under those principles, no corporate Defendant transacts business in this district. The Complaint makes clear that all of Defendants' activities here took place from Defendants' offices in California or Nevada. Further, the Loan Agreements formed on the Reservation, non-party Western Sky conducted its underwriting there, and any collection communications took place from California or Nevada. (Cmplt. ¶¶ 49, 51, 54-55, 58; Ex. B at 3; Ex. 1, Lawrence Aff. ¶¶ 5-6.) The only alleged events in this district were (1) "advertising" in Illinois by *non-party* Western Sky; (2) contacts initiated *by Plaintiffs* with Western Sky to take out a loan; and (3) contacts from Defendants alerting Plaintiffs to send their payments to Defendants' offices outside of Illinois. (Cmplt. ¶¶ 25, 48-58.) Western Sky is not a party, so its contacts with this district are irrelevant. *Gatz*, 271 F. Supp. 2d at 1158 (focusing on defendants' conduct). As to the corporate Defendants, the *only* conduct alleged with respect to this district is that CashCall or Delbert contacted Plaintiffs in this district and instructed them to direct their payments to CashCall or Delbert. (Cmplt. ¶¶ 49, 51, 54-55, 58.) At most, those contacts "give rise to" Plaintiffs' claims, and therefore "alone are [not] sufficient … to constitute regular, substantial and continuous business activity within this district." *Dody*, 659 F. Supp. at 545. In any event, mail or phone calls to a district are not sufficient to establish venue under RICO. *Follett College Stores Corp.*, 587 F. Supp. at 1053.

Further, any Illinois contacts are outweighed by the out-of-forum conduct at the center of this dispute. *See id.* at 1052-53. Courts have held that even where a corporation has an office that performs "general administrative business functions" in the district, that is not enough to establish "significant, substantial, and continuous" contacts. *Gatz*, 271 F. Supp. 2d at 1158. The isolated contacts at issue here surely do not suffice under that standard.

B. Venue Is Improper Under Section 1391.

Plaintiffs also cannot establish that venue is proper under the general venue statute, 28 U.S.C. § 1391, which as relevant here permits venue in a district where "a substantial part of the events or omissions giving rise to the claim occurred." *Id.* § 1391(b)(2). That "analysis centers on where the Defendants' acts took place." *Johnson v. Masselli*, 2008 WL 111057, at *4 (N.D. Ind. Jan. 4, 2008). Venue is not proper where "the overwhelming majority of the events" underlying the claim occurred outside the district. *United Fin. Mortg. Corp. v. Bayshores Funding Corp.*, 245 F. Supp. 2d 884, 896 (N.D. Ill. 2002). Specifically, the location where the plaintiff suffers harm is not necessarily a proper venue because otherwise "a plaintiff could always bring suit at its home base on the premise that it has suffered harm there," which would "eviscerat[e]" Congress's conscious choice not to allow venue on the basis of the plaintiff's place of residence. *Fin. Mgmt. Servs., Inc. v. Coburn Supply Co.*, 2003 WL 255232, at *2 (N.D. Ill. Feb. 5, 2003) (emphasis removed).

Here, for the reasons discussed above, "though some events related to the contract occurred in Illinois, and [P]laintiff[s] may have felt the impact of" Defendants' alleged conduct "here, Illinois is not where a substantial part of the events underlying the … claims occurred." *Moran Indus., Inc. v. Higdon*, 2008 WL 4874114, at *5 (N.D. Ill. June 26, 2008).

III. This Court Does Not Have Personal Jurisdiction Over Defendants.

A. This Court Lacks Personal Jurisdiction Over The Corporate Defendants.

Plaintiffs bear the burden of demonstrating personal jurisdiction. *Purdue Research Found. v. Sanofi-Synthelabo, S.A.*, 338 F.3d 773, 782 (7th Cir. 2003). To establish personal jurisdiction here, Plaintiffs must show that each Defendant "has minimum contacts with Illinois such that requiring [that Defendant] to defend against this lawsuit in the state 'does not offend

traditional notions of fair play and substantial justice.'" *be2 LLC v. Ivanov*, 642 F.3d 555, 558 (7th Cir. 2011) (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)).[5]

As the Complaint shows, the corporate Defendants do not have sufficient contacts with Illinois to establish personal jurisdiction here. The only allegations in the Complaint that connect Defendants to Illinois are that CashCall or Delbert contacted Plaintiffs and instructed them to direct their payments to CashCall or Delbert in California or Nevada. (Cmplt. ¶¶ 49, 51, 54-55, 58.)[6] These interstate phone or email communications are insufficient to show that the corporate Defendants "voluntarily invoked the protections and benefits of the laws of" Illinois. *Unterreiner v. Pernikoff*, 2011 IL App (5th) 110006, ¶ 9 (quotation omitted). Plaintiffs thus cannot establish that this Court has personal jurisdiction over the corporate Defendants.

B. This Court Lacks Personal Jurisdiction Over The Individual Defendants.

This Court does not have personal jurisdiction over the individual Defendants. Federal Rule of Civil Procedure 4 provides that a federal court has personal jurisdiction over a defendant to the same extent a court of the state in which the federal court sits would have personal jurisdiction. Under Illinois law, the fiduciary shield doctrine provides that "the conduct of a person in a representative capacity cannot be relied upon to exercise individual personal jurisdiction over that person." *Rollins v. Ellwood*, 141 Ill. 2d 244, 276 (1990) (quotation omitted). The doctrine thus "precludes exercising personal jurisdiction over . . . individual

[5] Plaintiffs cannot rely upon RICO's nationwide service-of-process provision, 18 U.S.C. § 1965(b), to establish personal jurisdiction over the corporate Defendants because Plaintiffs bring the RICO claim only against the individual Defendants. (Cmplt. ¶ 93.) Defendants explain in the next section, however, that the provision is inapplicable to the individual Defendants as well.

[6] As with venue, non-party Western Sky's contacts with Illinois—including its alleged advertising here—are irrelevant to whether this Court has personal jurisdiction over *Defendants*. Illinois does not allow a plaintiff to impute a co-conspirators' contacts (assuming without conceding there was a conspiracy here) to another conspirator for personal jurisdiction purposes. *Smith v. Jefferson Cnty. Bd. of Educ.*, 378 F. App'x 582, 585-86 (7th Cir. 2010) (unpublished) (citing *Ploense v. Electrolux Home Prods., Inc.*, 377 Ill. App. 3d 1091, 1105 (4th Dist. 2007)).

defendants based on actions they took as employees or shareholders" of a corporate entity. *Petrich v. MCY Music World, Inc.*, 371 Ill. App. 3d 332, 345 (1st Dist. 2007).

Here, the only allegations are that non-party Western Sky advertised in Illinois, that Plaintiffs in Illinois took out loans from Western Sky, and that CashCall and Delbert collected on the loans from residents in Illinois. (Cmplt. ¶¶ 25, 32, 43, 48-58.) Even if those allegations were made as to any *individual* Defendant—and they were not—and even if those allegations are sufficient to establish personal jurisdiction over the corporate Defendants—and they are not—those contacts may not be imputed to the individual Defendants. There is thus no basis for personal jurisdiction over the individual Defendants. *Rollins*, 141 Ill. 2d at 276, 280-81.

RICO's nationwide service of process provision does not give personal jurisdiction over the individual Defendants. (*See* Cmplt. ¶ 5.) RICO permits nationwide service of process in any civil RICO action "in which it is shown that the ends of justice require" resort to nationwide service. 18 U.S.C. § 1965(b). The Complaint contains no allegation that the "ends of justice" require nationwide service here. Given that all Defendants can be pursued in arbitration, justice does not support haling non-residents with no Illinois contacts into this Court. *Lisak v. Mercantile Bancorp, Inc.*, 834 F.2d 668, 671 (7th Cir. 1987).

Defendants acknowledge that under Seventh Circuit precedent, if nationwide service were appropriate this Court would have personal jurisdiction. *Id.*; *Robinson Eng'g Co., Pension Plan & Trust v. George*, 223 F.3d 445, 450 (7th Cir. 2000). As to this point, Defendants respectfully submit that *Lisak* and *Robinson* were wrongly decided, and include this argument to preserve a challenge to those decisions on appeal. But under *Lisak* and *Robinson*, should this Court dismiss the RICO claim, it should relinquish pendent personal jurisdiction over Plaintiffs' state law claims. *Robinson* based its acceptance of the pendent personal jurisdiction doctrine by

analogizing it to supplemental subject matter jurisdiction under 28 U.S.C. § 1367. *Robinson*, 223 F.3d at 450. Section 1367 gives a court discretion to relinquish state law claims if it dismisses for lack of jurisdiction the claim over which it has original jurisdiction. 28 U.S.C. § 1367(c)(3). "As a general matter, a court will decline supplemental jurisdiction if the underlying claims are dismissed before trial." 13D Wright & Miller, Fed. Prac. & Proc. § 3567.3 (3d ed. 2004).

IV. Plaintiffs Fail To State A Claim Because The Dormant Commerce Clause Precludes Applying Illinois Law To Plaintiffs' Loan Agreement.

The Constitution's Commerce Clause grants Congress broad authority to "regulate Commerce . . . among the several States, and with the Indian Tribes." U.S . CONST. ART. I, SEC. 8, CL. 3. By granting authority over interstate commerce exclusively to Congress, the Commerce Clause necessarily withholds that authority from the States. *Midwest Title Loans, Inc. v. Mills*, 593 F.3d 660, 664-65 (7th Cir. 2010).

The Dormant Commerce Clause limits the permissible "extraterritorial effects of state economic regulation." *Healy v. Beer Institute*, 491 U.S. 324, 336 (1989). "[N]o State may force an out-of-state merchant to seek regulatory approval in one State before undertaking a transaction in another." *Midwest Title Loans*, 593 F.3d at 665 (quoting *Healy*, 491 U.S. at 337); *Brown–Forman Distillers Corp. v. N.Y. State Liquor Authority*, 476 U.S. 573, 582 (1986). The "Commerce Clause . . . precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State." *Healy*, 491 U.S. at 336 (quoting *Edgar v. MITE Corp.*, 457 U.S. 624, 642-643 (1982)). States may not apply their laws to wholly extraterritorial conduct as a *per se* rule: a "class of nondiscriminatory local regulations is invalidated *without a balancing of local benefit against*

out-of-state burden . . . where states actually attempt to regulate activities in other states." *Midwest Title Loans*, 593 F.3d at 665 (emphasis added).

The Seventh Circuit has held that under the Dormant Commerce Clause, a contract occurs "wholly outside of the State's borders," and therefore falls outside the State's regulatory authority, *Healy*, 491 U.S. at 336, if the contract forms in another jurisdiction. *See Midwest Title Loans*, 593 F.3d 660. *Midwest Title Loans* addressed whether, consistent with the Dormant Commerce Clause, Indiana could apply a car title lending statute to an Illinois lender where the loan agreements with Indiana residents were formed outside Indiana, at the lender's Illinois office. 593 F.3d at 662-63. The Seventh Circuit held that the Indiana statute could not constitutionally apply to the loans because they were consummated in Illinois. "The contract was, in short, made and executed in Illinois, and that is enough to show that the [statute] violates the commerce clause." *Id.* at 669.

Likewise, in *Dean Foods Co. v. Brancel*, 187 F.3d 609 (7th Cir. 1999), Wisconsin sought to apply its regulations to milk purchases by Dean Foods. Dean Foods had previously bought milk from dairy farmers at their farms in Wisconsin. However, when Wisconsin enacted new regulations, Dean Foods modified its practice to take title to the milk *in Illinois* solely to circumvent the new Wisconsin regulations. The Seventh Circuit held that Wisconsin could not apply its regulations to these sales where farmers reached outside Wisconsin to transact business in Illinois. *Id.* at 619. "No agreement or meeting of the minds, as is required by contract principles, occurred regarding the purchase of any shipment of milk until the product actually arrived in Illinois." *Id.* Even though the farmers were physically located in Wisconsin at the time of the sales in Illinois (the farmers "arranged to have haulers pick up their milk" to transport it to

Illinois solely to effectuate a transfer of title outside Wisconsin, *id*. at 612), Wisconsin still had no jurisdiction over the sales.

Under Seventh Circuit law, therefore, the question is simple: did the Loan Agreements form outside Illinois? Under generally applicable principles of contract law, they did. "[T]he place of contracting is the place where occurred the last act necessary . . . to give the contract binding effect[.]" Restatement (Second) of Conflict of Laws § 188 cmt. e. (1971); *see also* 2 Williston on Contracts § 6:62 (4th ed.) ("the place of the contract is the place where the last act necessary to the completion of the contract was done"). Illinois applies that rule: "'The long-established rule in Illinois governing the making of contracts is that the place where the last act necessary to give validity to the contract is done is the place where the contract is made.'" *Ideal Ins. Agency, Inc. v. Shipyard Marine, Inc.*, 213 Ill. App. 3d 675, 681 (2d Dist. 1991) (quoting *Youngstown Sheet & Tube Co. v. Industrial Comm'n*, 79 Ill. 2d 425, 433 (1980)).[7] Under this principle, the place of contracting for every Western Sky loan was the Reservation in South Dakota: in the Loan Agreements, the Plaintiffs "expressly agree[d] that this Agreement is executed and performed solely within the exterior boundaries of the Cheyenne River Indian Reservation[.]" (Ex. B at 3.) That acknowledgement is consistent with the facts: the last act necessary to form each Loan Agreement was Western Sky's final underwriting review and decision to fund each loan, which occurred at Western Sky's offices on the Reservation and outside Illinois. (Ex. 1 ¶ 5.)

Applying those principles, a federal district judge recently found just that. In *F.T.C. v. Payday Financial, LLC*, 935 F. Supp. 2d 926 (D.S.D. 2013) the court addressed claims brought

[7] That is the rule applied by all of the jurisdictions whose laws even arguably could apply to this case. *See Bank of Hoven v. Long Family Land & Cattle Co.*, 32 Indian L. Rep. 6001, 6004 (CRST Ct. App. 2004) (applying Restatement principles); *O'Neill Farms, Inc. v. Reinert*, 2010 S.D. 25, ¶ 12, 780 N.W.2d 55, 59 (under South Dakota law, "[t]he test of the place of a contract is the place where the last act is done by either of the parties which is necessary to complete the contract and give it validity").

by the FTC against numerous companies owned by Mr. Webb that operated from the Reservation, including Western Sky. *Id.* at 930-31. Applying a site-of-contract-formation analysis, and noting the extent of activity directed at the Reservation by those who borrow from Western Sky and similar Reservation-based lending companies, the court rejected the FTC's argument that the physical presence of the borrowers outside the Reservation was dispositive as to whether the CRST Court had jurisdiction. *Id.* at 938-40. While the court completed its analysis with different considerations because of the different claims at issue in that case, the *Payday Financial* analysis of where Western Sky's loans were made—where the commerce occurred—is directly on point: "Here, the contract between the Borrowers and Lending Companies appears to be formed on the Reservation in South Dakota." *Id.* at 938.

It does not matter that some activities *related to* the Loan Agreements occurred in Illinois given that the Loan Agreements *formed* outside Illinois. In *Midwest Title Loans*, for example, it did not matter that the Illinois lender engaged in collection activities in Indiana, advertised in Indiana, registered its security interests in collateral with the Indiana Bureau of Motor Vehicles, and even auctioned off repossessed automobiles in Indiana. 593 F.3d at 663, 669. Nor did it matter in *Dean Foods* that the effect of the sales was "felt, perhaps even predominantly, in Wisconsin" because "the fact that a particular transaction may affect or impact a state does not license that state to regulate commerce which occurs outside of its jurisdiction." 187 F.3d at 619-20.

A recent decision from the Southern District of New York illustrates well the principle that mere activity in a state *relating to* a contract does not vest that state with authority to regulate the contract. In *Eric M. Berman, P.C. v. City of New York*, 895 F. Supp. 2d 453 (E.D.N.Y. 2012), the court held that New York City did not have authority to apply its short-

term lender regulations to out-of-state entities that purchased and attempted to collect on loans made to residents of the city. Explaining that the decisive consideration for whether "application of a law impermissibly regulates extraterritorial commerce" is simply "where the transaction being regulated was consummated," the court concluded that a state may not regulate a transaction consummated out of state "regardless of whether some other aspect of the commercial activity occurs within the state[.]" *Id.* at 483. The court held that the "use of the product or service within the state," "the subsequent in-state sale of the product or service," "prior negotiations or advertising in-state that lead to the formation of the contract out-of-state," and "the fact that one of the parties is a state resident" did not bring an extraterritorial transaction within the purview of the state. *Id*. "[T]he in-state presence of one party to the transaction cannot be used as justification to regulate the other party . . . *nor, critically to this case, can the in-state performance of a counterparty be used to regulate the other party.*" *Id*. (emphasis added). Thus, the fact that Plaintiffs are Illinois residents who took out their loans while residing in Illinois is irrelevant.

V. Alternatively, Plaintiffs Fail To State A Claim Because They Fail To Allege Essential Elements Of Each Claim.[8]

A. The Interest Act Claim And The Derivative RICO Claim Fail.

1. The Interest Act Only Applies To Loans Made By A "Person Or Corporation In This State."

Plaintiffs bring a claim under the Interest Act on the ground that the Loan Agreements contain interest rates in excess of the Interest Act's 9% cap. (Cmplt. ¶¶ 27, 61.) Plaintiffs' RICO claim for collecting an "unlawful debt" is based on the allegation that the Loan Agreements violate the Interest Act. (*Id.* ¶ 97.)

[8] Plaintiffs allege that Illinois law applies here. Defendants dispute that contention and, should this case proceed, will demonstrate that Illinois law does not apply under basic choice-of-law principles.

The Complaint fails to state an Interest Act (and therefore a RICO) claim. The Interest Act's 9% limit only applies to loans issued by lenders operating "in this state": "[I]n all written contracts it shall be lawful for the parties to stipulate or agree that 9% per annum, or any less sum of interest, shall be taken and paid . . . in any manner due and owing from any person *to any other person or corporation in this state*." 815 ILCS 205/4(1) (emphasis added).

The Interest Act thus applies only to loans by *in-state* lenders. The Complaint never alleges that any Defendant operates from "this state." To the contrary, the Complaint alleges just the opposite: that each Defendant operates from either the Reservation in South Dakota or from California. (Cmplt. ¶¶ 9-12, 14, 16-19.)

The Illinois General Assembly thus chose to respect the limits on Illinois's regulatory authority under the Dormant Commerce Clause by applying the Interest Act only to lenders that operate in Illinois. This limitation is consistent with the approach to state usury laws applied by federal and state courts throughout this country. Those courts recognize that businesses and lenders doing business in multiple states across the country must be permitted to invoke the laws of their home jurisdictions. As one court held with respect to an interstate credit card lender whose rates exceed usury limits in some states but not that of its own domicile: "courts have noted the importance of enforcing choice of law provisions for businesses with nationwide customers to limit the risk and expenses of litigation under different laws in every state." *Abat v. Chase Bank USA*, 738 F. Supp. 2d 1093, 1096 (C.D. Cal. 2010). *See also Shannon-Vail Five Inc. v. Bunch*, 270 F.3d 1207 (9th Cir. 2001); *Cont'l Mortg. Investors v. Sailboat Key, Inc.*, 395 So. 2d 507, 509 (Fla. 1981); *State v. Rivers*, 206 Minn. 85, 287 N.W. 790 (1939); *cf. Marquette Nat'l Bank v. First of Omaha Serv. Corp.*, 439 U.S. 299 (1978). Western Sky should not be deprived of the protection of its chosen jurisdiction's laws and thrust into an unlawful, indeed

unconstitutional, competitive disadvantage as against other similarly situated businesses just because its jurisdiction is an out-of-state Indian Reservation. Because Illinois's usury statutes expressly apply only to in-state lenders, those laws do not apply to the loans at issue here.

2. The Interest Act Claim Fails Because Plaintiffs Fail To Allege Facts Showing That Defendants "Knowingly" Received Unlawful Interest.

Even if the Interest Act applied here—it does not—the statute requires that Defendants have "knowingly contract[ed] for or receive[d], directly or indirectly, . . . unlawful interest." 815 ILCS 205/6. The Complaint fails to allege an Interest Act claim (and thus also fails to allege a RICO claim) because it fails to plead the relevant mental state.

Under Illinois's usury statutes, "[w]hether a loan is usurious depends on whether the party intended to charge unlawful interest." *Saskill v. 4-B Acceptance*, 117 Ill. App. 3d 336, 340 (1st Dist. 1983). A defendant "knowingly" commits an unlawful act, therefore, only if "the act was performed consciously and intelligently, with actual knowledge of the facts *and the law's requirements*." *People v. Arnold*, 3 Ill. App. 3d 678, 682 (1st Dist. 1972) (emphasis added). To adequately plead an Interest Act violation, therefore, Plaintiffs must plead that Defendants had "actual knowledge" that Illinois law governed the loans and that the loans are illegal under Illinois law.

The Complaint does not allege facts to suggest plausibly that Defendants had actual knowledge that the loans were unlawful. *Id.*; *Casaccio v. Habel*, 14 Ill. App. 3d 822, 825-26 (1st Dist. 1973); *see generally United States v. Phillips*, 731 F.3d 649, 652-53 (7th Cir. 2013) (en banc). It alleges in cursory fashion that Defendants "knew or recklessly disregarded" the fact that the loans were "usurious and unenforceable." (Cmplt. ¶ 47.) The sole fact alleged in support of that allegation is that prior suits brought by Plaintiffs' attorneys and state regulators put Defendants "on notice" that their loans were illegal. (*Id.*) But the Complaint's allegations

plausibly support only one inference: that Defendants understood the loans to be legal under tribal law. The Loan Agreements make clear that they are governed by tribal law. (Ex. B at 1.) To allege the required state of mind, therefore, the Complaint would have to allege facts suggesting that Defendants had actual knowledge that either (1) the loans were illegal under tribal law, or (2) that contrary to the Loan Agreements' terms Defendants knew that Illinois law nonetheless applied and knew that the Loan Agreements violated Illinois law.

As to the first point, the Complaint never alleges that Defendants knew or believed the Loan Agreements were illegal under tribal law—the Complaint ignores the applicability of tribal law entirely—and Defendants have always maintained (and still maintain) that the Agreements are legal under tribal law. As to the second, Plaintiffs do not allege *facts* showing that Defendants had actual knowledge that Illinois law applied and that the loans were illegal under Illinois law. Plaintiffs point only to a single Illinois civil suit and several administrative enforcement actions as proof of Defendants' knowledge of the Loan Agreements' illegality under Illinois law. (Cmplt. ¶ 47.) But these cases have not established that as an incontestable fact. The Complaint does not allege that the cases have been resolved in such a manner that Defendants would have had actual knowledge that the loans are illegal under Illinois law at the time Defendants made, purchased, or collected on the loans.

Far from believing that their loans are illegal or that Illinois law even applied, Defendants have aggressively defended, in good faith, the legitimacy of their loans on the ground that the loans are lawful under governing tribal law. A federal district judge has held that Defendants' belief that the Loan Agreements are governed by tribal, not Illinois, law is reasonable. In *Heldt v. Payday Financial, LLC*, Judge Lange of the District of South Dakota held that there is at least a plausible argument that CRST jurisdiction over Western Sky loans is proper under federal Indian

law, and thus ordered the plaintiffs there to exhaust their remedies in tribal court before they could challenge tribal jurisdiction in federal court (that tribal action is ongoing). 2014 WL 1330924, at *14-15 (D.S.D. Mar. 31, 2014). In a related case, that same judge noted that a number of facts, including that the agreements "form[] on the Reservation," show that under basic choice-of-law principles tribal law may govern the loans. *Payday Fin.*, 935 F. Supp. 2d at 939, 941-42. The concurrence of a federal district judge thus demonstrates that Defendants have a good faith basis for believing Western Sky loans are subject solely to tribal—and thus not Illinois—law.

To be sure, the Seventh Circuit's recent decision in *Jackson* is contrary to Defendants' belief that tribal law governs Western Sky loans. But other rulings are contrary to the Seventh Circuit on this point and Defendants continue to believe that the Seventh Circuit erred in this finding. In any event, that does not change the fact that when Western Sky issued Plaintiffs' loans, WS Funding bought them, and CashCall bought or attempted to collect on them, each had a reasonable, good faith basis to believe the loans were not governed by Illinois law. Indeed, even absent Defendants' Indian law arguments, Defendants have a compelling argument that under Seventh Circuit law interpreting the Dormant Commerce Clause, Illinois law *cannot* apply to Western Sky loans. (*See* Section IV above.) The Complaint thus fails to allege that Defendants "knowingly" attempted to collect unlawful interest. Both the Interest Act claim and the federal RICO claim—which depends on the Interest Act claim—should be dismissed.

B. This Court Should Dismiss The Consumer Fraud Act (CFA) Claim.

To state a CFA claim, Plaintiffs must allege facts demonstrating an unfair or deceptive act or practice by the defendant that proximately caused their injuries. 815 ILCS 505/2; *Parks v. Wells Fargo Home Mortg., Inc.*, 398 F.3d 937, 943 (7th Cir. 2005); *Zekman v. Direct Am.*

Marketers, Inc., 182 Ill. 2d 359, 373 (1998). Plaintiffs fail to allege a CFA claim for multiple reasons.

1. A Party Does Not Commit An Unfair Or Deceptive Act Where "Legitimate Disagreement" Exists About Whether The Conduct At Issue Is Unlawful.

"The Consumer Fraud Act prohibits deception, not error." *Stern v. Norwest Mortg., Inc.*, 284 Ill. App. 3d 506, 513 (1st Dist. 1996). To state a CFA claim, "there must be a claim seated in deceptive acts rather than a reasonable difference of opinion as to" the legality of the conduct at issue. *Id.* Where there is "uncertainty about the applicable law" or the law is "arguably ambiguous," no CFA claim exists. *Lee v. Nationwide Cassel, L.P.*, 174 Ill. 2d 540, 550-51 (1996); *Cahnman v. Agency Rent-A-Car Sys., Inc.*, 299 Ill. App. 3d 54, 60 (1st Dist. 1998).

A CFA claim cannot rest on a "legitimate disagreement" about the law even if the defendant is ultimately wrong and the conduct at issue is unlawful. *Stern*, 284 Ill. App. 3d at 512-13. In *Stern*, the Illinois Appellate Court held that the defendant violated the Illinois Mortgage Escrow Account Act by charging an escrow waiver fee, but dismissed the plaintiffs' CFA claim based on the escrow statute. The court held that although "defendant has urged upon us a position with which we do not agree [regarding whether its conduct violated the escrow statute], we cannot say that such a position is the result of any 'unfair or deceptive acts or practices' nor can the acts of defendant be characterized as 'fraud, false pretense, false promise' or concealment of any material fact." *Id.* at 512. Rather, the defendant had a "reasonable difference of opinion as to the meaning of" the escrow statute, which cannot support a CFA claim. *Id.* at 513.

That principle supports dismissal here. Plaintiffs base their CFA claim on the allegation that Defendants (a) "collect[ed] finance charges, interest and fees from Illinois consumers in excess of the amounts permitted by Illinois law," and (b) "falsely represent[ed] that the loans,

and the charges imposed by them, were lawful and enforceable when they were not." (Cmplt. ¶ 82.) Plaintiffs ground their CFA claim in a disagreement over whether Illinois law applies to the loans and whether those loans were legal. (*Id*.)

That fails to state a CFA claim. The Loan Agreements state that they are governed by tribal, not Illinois, law. (Ex. B at 1, 3.) As noted above, a federal judge has held that Defendants have plausible arguments that tribal—and thus not Illinois—law applies to Western Sky loans. *See* pp. 21-22 above; *Payday Fin.*, 935 F. Supp. 2d at 939, 941-42. Although *Jackson* casts doubt on that conclusion, the question is whether Defendants had a legitimate belief the loans were legal *when they made, purchased, or collected on those loans.* There is no question they did. Plaintiffs' CFA claim thus fails because there is at the very least a "reasonable difference of opinion" as to the loans' legality. *Stern*, 284 Ill. App. 3d at 513.

2. A CFA Claim Cannot Be Based On A Violation Of The Interest Act Or CILA.

Plaintiffs base their CFA claim on the contention that it violates *the CFA* to make a loan with an interest rate higher than the Interest Act or CILA allow. (Cmplt. ¶ 82.) As discussed above and below, Plaintiffs have failed to state an Interest Act or CILA claim, so the CFA claim fails for the same reasons as well. But in addition, the CFA claim is doomed because the CFA does not allow recovery for a violation of either statute.

The CFA enumerates particular statutes that, if violated, give rise to a CFA claim. 815 ILCS 505/2Z. Neither the Interest Act nor CILA are on that list. A basic principle of statutory interpretation is "[w]hen a statute lists the things to which it refers, there is an inference that all omissions should be understood as exclusions, despite the lack of any negative words of limitation." *In re C.C.*, 2011 IL 111795, ¶ 34. A statute reaches unenumerated things only when the legislature makes clear that the enumerated list is non-exclusive by using a word like

"including." *Paxson v. Bd. of Educ. of School Dist. No. 87, Cook Cnty.*, 276 Ill. App. 3d 912, 921 (1st Dist. 1995). Based on those principles, the Illinois Appellate Court has held that a plaintiff cannot base a CFA claim on the violation of a statute that is not specifically enumerated in the CFA. *People ex. rel. Daley v. Grady*, 192 Ill. App. 3d 330, 333 (1st Dist. 1989) (violation of Real Estate Act not actionable under CFA). Because the CFA's list does not include the Interest Act or CILA, those statutes may not form the basis of a CFA claim.

3. Plaintiffs Do Not Plausibly Allege That Defendants' Alleged Deception Proximately Caused Their Injuries.

Plaintiffs must allege that Defendants' alleged deception "proximately caused [their] injury." *Zekman*, 182 Ill. 2d at 373. Plaintiffs' Complaint does not allege proximate cause.

First, Plaintiffs fail to allege that they would not have taken out their loans in the absence of Western Sky's allegedly false statement that the loans were legal. Plaintiffs must allege "that 'but for' the defendants' [unlawful] conduct, [they] would not have been damaged, i.e., [they] would not have" taken out the loans. *Siegel v. Shell Oil Co.*, 612 F.3d 932, 935 (7th Cir. 2010). Plaintiffs never allege, however, that had Western Sky informed them that the loans (as Plaintiffs claim) contain unlawful interest rates, they would have forgone their loans.

Second, in addition to alleging that they would have not taken out the loans, Plaintiffs must allege "that they would have been in a materially better position had they done so." *Wiegel v. Stork Craft Mgf., Inc.*, 946 F. Supp. 2d. 804, 809 (N.D. Ill. 2013). Plaintiffs do not allege any facts suggesting that they would have been better off without having taken out the loans in the first place. The Loan Agreements contain interest rates of over 100% (Cmplt. ¶¶ 48, 52, 56 & Ex. B at 1.) The Loan Agreements warned Plaintiffs that "**THIS LOAN CARRIES A VERY HIGH INTEREST RATE. YOU MAY BE ABLE TO OBTAIN CREDIT UNDER MORE FAVORABLE TERMS ELSEWHERE."** (Ex. B at 6.) The only plausible inference from the

fact that Plaintiffs took out loans with such terms is that they needed the money for compelling reasons and could not find financing on better terms. This Court can plausibly infer that without the loans Plaintiffs would have suffered corresponding harm. In light of that reasonable inference, Plaintiffs must allege specific facts to show how they would have been better off without the loan funds. They allege no facts in that regard, and so fail to allege that Defendants proximately caused them any injury.

Third, Plaintiffs cannot allege proximate cause from an alleged misrepresentation of law. The basis of Plaintiffs' CFA claim is that Defendants' deceived them as to the legality of their loans. But "[g]enerally, a deceptive representation or omission of law does not constitute a violation of the Consumer Fraud Act because both parties are presumed to be equally capable of knowing and interpreting the law." *Capiccioni v. Brennan Naperville, Inc.*, 339 Ill. App. 3d 927, 933 (2d Dist. 2003). Because Plaintiffs are "presumed to be equally capable of knowing and interpreting the law," Plaintiffs necessarily took out the loans knowing whether the loans were legal or not. *Id.* Any alleged misstatements about the legality of Plaintiffs' loans (and there were none) thus could not have induced them to take out the loans.

C. This Court Should Dismiss The Consumer Installment Loan Act (CILA) Claim Because Plaintiffs' Loan Was Not Made "Pursuant To" CILA And CILA Does Not Provide A Cause Of Action Against Defendants.

The Complaint alleges that Plaintiffs' loans violate the Consumer Installment Loan Act because Western Sky and CashCall do not hold an Illinois CILA license. (Cmplt. ¶¶ 71-73.) CILA provides that "if any person who does not have a license issued under this Act makes a loan pursuant to this Act to an Illinois consumer, then the loan shall be null and void and the person who made the loan shall have no right to collect, receive, or retain any principal, interest, or charges related to the loan." 205 ILCS 670/20(d). This claim is defective in two ways.

First, CILA provides no remedy against any Defendant here because none is the original lender. CILA only provides a claim against the "person who made the loan," *i.e.*, the lender. The Complaint acknowledges, however, that only non-party Western Sky "made the loan" to Plaintiff, not any other Defendant. (Cmplt. ¶¶ 32, 48, 52, 56.) CILA therefore provides no claim against any Defendant, since none are the original lender.

Second, Plaintiffs' loans were not made "pursuant to" CILA, as the statute requires. The phrase "pursuant to" means "under the authority of." *Washington Economic Dev. Fin. Auth. v. Grimm*, 837 P.2d 606, 610 (Wash. 1992). Illinois authorities use the phrase "pursuant to" in that way.[9] So do other provisions of CILA.[10] CILA therefore does not reach loans made "pursuant to" the laws of a separate jurisdiction, such as the CRST.

The contrast between CILA and Illinois's PayDay Loan Reform Act makes clear that the General Assembly did not intend CILA to apply to every consumer installment loan taken out by Illinois consumers. The PayDay Loan Reform Act expressly provides that it "applies to any lender that offers or makes a payday loan to a consumer in Illinois." 815 ILCS 122/1-15(a). That shows that when the General Assembly intends to regulate loans issued by out-of-state lenders to Illinois consumers, it says so in unequivocal terms. CILA, by contrast, contains no such express statement. Reading CILA's "pursuant to" phrase as reaching any consumer installment loan taken out by an Illinois resident would ignore the General Assembly's conscious choice of different language when it intends to regulate all loans to Illinois residents. *Id.* Here, the Loan

[9] *See In re Skidmore*, 2011 IL App (2d) 100730, ¶ 24 ("A deed executed pursuant to a judicial sale is made under the authority of a specific order of court.") (quotation omitted); *cf. Bremen Cmty. High School Dist. No. 228 v. Cook Cnty. Comm'n on Human Rights*, 2012 IL App (1st) 112177, ¶ 18 ("[T]he Commission operates pursuant to the exclusive authority of").

[10] 205 ILCS 670/9(a)(1) (providing for disciplinary action against licensee that "fail[s] to comply with any provision of this Act or any order, decision, finding, rule, regulation or direction of the Director lawfully made *pursuant to the authority of* this Act"); 205 ILCS 670/11(a) (allowing regulators to inspect books and records to determine "whether the licensee is complying with … the rules and regulations promulgated *pursuant to* this Act") (emphases added).

Agreements make clear that they were made pursuant to the "exclusive laws and jurisdiction of the" CRST, not CILA. (Ex. B at 1 (emphasis removed).) The CILA claim therefore fails.

VI. This Court Should Dismiss The Complaint Under The Forum-Selection Clause And The Tribal Exhaustion Doctrine (For Preservation Only).

A. This Court Should Enforce The Forum-Selection Clause And Dismiss Plaintiffs' Claims Under Federal Law.

Jackson held that the Loan Agreements' forum-selection clause designating the CRST court for any in-court adjudication is unenforceable because the CRST court does not have jurisdiction over disputes regarding Western Sky loans. 764 F.3d at 781-86. Although CashCall acknowledges that *Jackson* binds this Court, *Jackson* is incorrect.

Forum-selection clauses receive "the same presumption of validity as attends . . . other terms normally found in contracts[.]" *IFC Credit Corp. v. Aliano Bros. Gen. Contractors, Inc.*, 437 F.3d 606, 610 (7th Cir. 2006). Enforcing the parties' agreed-upon forum "protects their legitimate expectations and furthers vital interests of the justice system," and "a valid forum-selection clause should be given controlling weight in all but the most exceptional cases." *Atl. Marine Constr. Co. v. U.S. Dist. Court for W. Dist. of Tex.*, 134 S. Ct. 568, 581 (2013). (quotations and alteration omitted). Further, *Atlantic Marine*, which was a diversity case, made clear that its federal standard applies to determine the enforceability of all forum-selection clauses in all cases in federal court. *See id.* at 583 n.8.

Under *Atlantic Marine*, the public-interest factors require dismissal. *Atlantic Marine* significantly narrowed the grounds that parties may assert to void a forum-selection clause. The Supreme Court held that where the "parties agree to a forum-selection clause, they waive the right to challenge the preselected forum as inconvenient or less convenient for themselves or their witnesses, or for their pursuit of the litigation." 134 S. Ct. at 582. "As a consequence, a district court may consider arguments about public-interest factors only," and "should not

consider arguments about the parties' private interests." *Id.*[11] Here, the Complaint never addresses the public-interest factors, and therefore the forum-selection clause is enforceable under federal law.

B. Alternatively, The Doctrine Of Tribal Exhaustion Requires Dismissal.

Because the CRST court has colorable jurisdiction over this case, Plaintiffs must exhaust their remedies in that court.[12] Under the "tribal exhaustion doctrine," federal court abstention is "mandatory" as a matter of comity if Defendants can establish (a) a colorable claim that tribal jurisdiction is appropriate and (b) that Plaintiffs have not first pursued remedies in tribal court before turning to a federal forum. *See Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18-19 (1987); *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 856-57 (1985).

In *Montana v. United States*, the Supreme Court held that a "tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." 450 U.S. 544, 565-66 (1981) (internal citations omitted). That rule applies here for three reasons. *First*, Plaintiffs' contractual agreements with Western Sky each constitute a "consensual relationship" with Western Sky. *Second*, Western Sky is treated as a CRST member for purposes of tribal jurisdiction because Mr. Webb, the sole member of Western Sky, is an enrolled member of the CRST. (Ex. 1 ¶ 3.) *See* Ex. 2, *Cheyenne River Tel. Co. v. Pearman*,

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[11] *Atlantic Marine* made these statements in the context of "a court evaluating a defendant's § 1404(a) motion to transfer based on a forum-selection clause," 134 S. Ct. at 582, but later noted that "the same standards should apply to motions to dismiss for *forum non conveniens* in cases involving valid forum-selection clauses pointing to state or foreign forums," *id.* at 583 n.8.

[12] The Court may consider evidence outside the pleadings when resolving a motion to dismiss for failure to exhaust tribal remedies. *See Rincon Mushroom Corp. v. Mazzetti*, 490 F. App'x 11, 13 (9th Cir. 2012) (unpublished) (relying on declarations in requiring exhaustion of tribal remedies); *Dish Network Corp. v. Tewa*, WL 5381437, at *2 (D. Ariz. Nov. 1, 2012) (classifying a motion to dismiss for failure to exhaust tribal remedies as an "unenumerated 12(b) motion" that allows the court to look beyond the pleadings).

No. 89-006-A, slip op. at 3 (CRST Ct. App. 1990); *see also Pourier v. S.D. Dep't of Revenue*, 658 N.W.2d 395 (S.D. 2003), *aff'd in part and vacated in part on other grounds*, 674 N.W.2d 314 (2004), *cert. denied*, 541 U.S. 1064 (2004). *Third*, Plaintiffs' interactions with Western Sky constituted on-Reservation activity. As already discussed, a contract forms "where the last act necessary to give validity to the contract is done.'" *Ideal Ins. Agency*, 213 Ill. App. 3d at 681 (quotation omitted). Here, that occurred on the Reservation. (*See* pp. 16-17 above.)

Jackson erred in holding that a non-member must, in all circumstances, physically enter the reservation for tribal jurisdiction to exist. 764 F.3d at 782. The Fifth Circuit recently noted that "the Supreme Court has never explicitly held that Indian tribes lack inherent authority to regulate nonmember conduct that takes place outside their reservations[.]" *Dolgencorp, Inc. v. Miss. Band of Choctaw Indians*, 746 F.3d 167, 176 n.7 (5th Cir. 2014). The Eighth Circuit has applied tribal exhaustion to a claim against a non-member that the court assumed "occurred off tribal lands." *DISH Network Serv. L.L.C. v. Laducer*, 725 F.3d 877, 884 (8th Cir. 2013). Further, *Jackson* ignored the nature of our modern economy. As the *Heldt* court noted: "[I]n today's modern world of business transactions through internet or telephone, requiring physical entry on the reservation" for tribal jurisdiction, "particularly in a case of a business transaction with a consent to jurisdiction clause, seems to be requiring too much." *Heldt*, 2014 WL 1330924, at *14.

Finally, *Jackson* also erred by requiring that, for a tribe to subject a consenting non-member to its laws or courts, the dispute must implicate tribal internal relations or self-rule. *See* 764 F.3d at 782 (interpreting language in *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 337 (2008), to impose such a requirement). *Dolgencorp* is clear, however, that the Fifth Circuit "do[es] not interpret *Plains Commerce* to require an additional showing that

one specific relationship, in itself, intrudes on the internal relations of the tribe or threatens self-rule" to give rise to tribal court jurisdiction: "It is hard to imagine how a single employment relationship between a tribe member and a business could ever have such an impact." *Dolgencorp*, 746 F.3d at 175 (internal quotations omitted); *see also Williams v. Lee*, 358 U.S. 217, 223 (1959) (holding that tribal jurisdiction over a non-member extended to a single loan with a tribal member).

CONCLUSION

Defendants respectfully request that this Court: (1) compel arbitration and stay this case; (2) dismiss this case for improper venue under Rule 12(b)(3); (3) alternatively, dismiss this case for lack of personal jurisdiction under Rule 12(b)(2); (4) alternatively, dismiss this case for failure to state a claim under Rule 12(b)(6); or (5) dismiss this case under the doctrine of *forum non conveniens* under the forum-selection clause or dismiss or stay this case under the tribal exhaustion doctrine.

Dated: November 6, 2014

Respectfully submitted,

Barry Levenstam
Michael T. Brody
Daniel T. Fenske
Jenner & Block LLP
353 North Clark Street
Chicago, Illinois 60654

Defendants John Paul Reddam, CashCall, Inc., WS Funding, LLC, Delbert Services Corporation, Cesar Guzman, Sunshine Thayer, Greg Dalton, and Melissa Dalton

By: /s/ Michael T. Brody
Counsel for Defendants

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

JENNAFER KEMPH, DAN DEHMLOW, and GLENN ALLHOFF, for themselves and those similarly situated,	)	
Plaintiffs,	)	Case No. 1:13:cv-6785
v.	)	Hon. Marvin E. Aspen
JOHN PAUL REDDAM, CASHCALL, INC., WS FINANCIAL, LLC, WS FUNDING, LLC, DELBERT SERVICES CORPORATION, CESAR GUZMAN, SUNSHINE THAYER, GREG DALTON, MELISSA DALTON, AND DOES 1-10,	)	Magistrate Judge Young B. Kim
Defendants.	)	

DEFENDANTS' MEMORANDUM IN SUPPORT
OF THEIR RENEWED MOTION TO DISMISS OR TO COMPEL ARBITRATION

EXHIBITS

Exhibit 1. Affidavit of Tawny Lawrence in Support of Defendants' Renewed Motion to Dismiss or to Compel Arbitration

Ex. A: Western Sky's Tribal Licenses

Ex. B: Western Sky Consumer Loan Agreement between Western Sky Financial, LLC and Jennafer Kemph

Ex. C: Western Sky Consumer Loan Agreement between Western Sky Financial, LLC and Dan Dehmlow

Ex. D: Western Sky Consumer Loan Agreement between Western Sky Financial, LLC and Glenn P. Allhoff

Exhibit 2. *Cheyenne River Telephone Co. v. Pearman*, No. 89-006-A (CRST Ct. App. 1990)

EXHIBIT 1

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

JENNAFER KEMPH, DAN DEHMLOW, and GLENN ALLHOFF, for themselves and those similarly situated,	)	
Plaintiffs,	)	Case No. 1:13:cv-6785
v.	)	Hon. Marvin E. Aspen
JOHN PAUL REDDAM, CASHCALL, INC., WS FINANCIAL, LLC, WS FUNDING, LLC, DELBERT SERVICES CORPORATION, CESAR GUZMAN, SUNSHINE THAYER, GREG DALTON, MELISSA DALTON, AND DOES 1-10,	)	Magistrate Judge Young B. Kim
Defendants.	)	

AFFIDAVIT OF TAWNY LAWRENCE

TAWNY LAWRENCE, being duly sworn, states the following:

1. My name is Tawny Lawrence. I reside in Dewey County, South Dakota. I am over 21 years old and competent to submit this affidavit.

2. I am Senior Supervisor for Western Sky Financial, LLC ("Western Sky"). I was hired to work at Western Sky in June 2011 in the position of Accounting Supervisor. I was promoted to my current position in October 2012. As such, I have personal knowledge of certain facts regarding the organization and operations of Western Sky relevant to this proceeding.

3. Western Sky is a wholly Tribal Member-owned-and-operated consumer installment lender. Specifically, it is owned by Martin A. Webb, an enrolled member of the Cheyenne River Sioux Tribe (the "CRST" or the "Tribe"), and its offices are located in Eagle Butte and Timber Lake, South Dakota, on the Cheyenne River Indian Reservation (the "Reservation").

4. Western Sky made loans to borrowers who contacted and applied for a Western Sky loan either through Western Sky's website or telephonically. Once completed, the application would be submitted for underwriting pursuant to guidelines formulated by Western Sky. All loan agreements entered into by Western Sky with borrowers are explicitly governed by and subject to the laws of the Tribe.

5. Western Sky consummated these loans within the boundaries of the Reservation and, pursuant to certain contractual relationships, subsequently sold the loans to WS Funding, LLC, to be serviced by defendant CashCall, Inc. ("CashCall"). Pursuant to a servicing agreement, which was also governed by the laws of the CRST, certain operations functions were outsourced to CashCall. Whenever CashCall handled intake, for example, the customer would be informed that they were speaking with a CashCall employee on behalf of Western Sky. This arrangement was necessitated, in part, by infrastructure issues on the Reservation. However, in all cases, Western Sky set the underwriting criteria by which potential borrowers were reviewed and made the ultimate decision of whether to extend a loan. The critical final steps to accept loan agreements and fund loans all occurred on the Reservation. This included a final auditing review, performed after the borrower has completed a loan application by electronically signing a loan agreement, to verify that the information provided by the prospective borrower, such as regarding employment, was accurate and complete. If the information was not accurate or complete, the application would not be accepted and the loan would not be funded. If the information was satisfactory to Western Sky, Western Sky would notify its bank to fund the loan from one of Western Sky's bank accounts, none of which were located in Illinois. The borrower would be sent an acceptance notice, informing him or her that the loan proceeds would be electronically disbursed.

6. At its peak, Western Sky employed approximately 100 people, many of whom are members of the CRST, making it one of the largest private employers on the Reservation. However, recent litigation, of which this suit is but one example, has forced us to suspend our lending operations and lay off the vast majority of our workforce as of September 3, 2013.

7. These layoffs are especially devastating, both to the terminated employees and to the CRST community at large, because of the dire economic situation that faces the CRST. The CRST is one of the most poverty-stricken Indian tribes in the United States. Over 80% of working age reservation residents are unemployed, and nearly half of all reservation residents have incomes below the federal poverty line and rely on federal assistance to make ends meet. Western Sky was one of the very few private employers on the Reservation, making gainful employment both fervently sought and extremely difficult to obtain.

8. The CRST has not yet adopted model business formation legislation, so Western Sky is registered as a South Dakota limited liability company, licensed and operating under the laws of the Tribe. Western Sky's Articles of Organization are filed with the CRST Secretary of the Tribe. True and correct copies of Western Sky's tribal licenses are attached hereto as Exhibit A.

9. The three Plaintiffs in this case (Jennafer Kemph, Dan Dehmlow, and Glenn Allhoff) entered into loan agreements with Western Sky on May 1, 2012, April 19, 2012, and March 1, 2013, respectively. Western Sky subsequently sold each of Plaintiffs' loans to WS Funding. True and correct copies of Plaintiffs' loan agreements with Western Sky are attached hereto as Exhibits B-D.

10. All three of Plaintiffs' loan agreements gave them the option to opt out of the agreements' arbitration clause by emailing Western Sky at info@westernsky.com "within sixty

(60) days after the date [their] loan funds." None of the Plaintiffs opted out of the arbitration clause.

Dated: November 4, 2014
Dewey County, South Dakota.

Tawny Lawrence

Tawny Lawrence

Sworn before me this
4th day of ~~July~~ November 2014
Betty L Stuhlsatz
Notary Public
My Commission Expires: 07/29/2018

EXHIBIT A

License 292-374
Code 5412

Western Sky Financial, LLC
PO Box 370
Timber Lake SD 57656

CHEYENNE RIVER SIOUX TRIBE
BUSINESS LICENSE

Date 5/13/2009
Renewal Date May 2010

Having made proper application. This business license is hereby issued to the person named. This Business License enables this person to transact whatever business or activity specified on application until this Business License expires or is cancelled.

TRIBAL TREASURER

License 2102-374
Code 5412

Western Sky Financial, LLC
PO Box 370
Timber Lake SD 57656

CHEYENNE RIVER SIOUX TRIBE
BUSINESS LICENSE

Date 4/27/2010
Renewal Date May 2011

Having made proper application. This business license is hereby issued to the person named. This Business License enables this person to transact whatever business or activity specified on application until this Business License expires or is cancelled.

TRIBAL TREASURER

License 2112-374
Code 5412

Western Sky Financial LLC
PO Box 370
Timber Lake SD 57656

CHEYENNE RIVER SIOUX TRIBE
BUSINESS LICENSE

Date 4/27/2011
Renewal Date May 2012

Having made proper application. This business license is hereby issued to the person named. This Business License enables this person to transact whatever business or activity specified on application until this Business License expires or is cancelled.

TRIBAL TREASURER

CHEYENNE RIVER SIOUX TRIBE
BUSINESS LICENSE

Date 4/13/2012

Renewal Date May 2013

License 2122-374

Code 5412

Western Sky Financial, LLC

PO Box 370

Timber Lake SD 57656

Having made proper application. This business license is hereby issued to the person named. This Business License enables this person to transact whatever business or activity specified on application until this Business License expires or is cancelled.

TRIBAL TREASURER

CHEYENNE RIVER SIOUX TRIBE
BUSINESS LICENSE

Date	4/16/2013
Renewal Date	May 2014

License: 2132-374

Code: 5412

Western Sky Financial, LLC

PO Box 370

Timber Lake SD 57656

Having made proper application. This business license is hereby issued to the person named. This business license enables this person to transact whatever business or activity specified on the application until this license expires or is cancelled

TRIBAL TREASURER

EXHIBIT B

WESTERN SKY CONSUMER LOAN AGREEMENT

Loan No.:	8960674	Date of Note:	May 01, 2012
		Expected Funding Date:	May 02, 2012
Lender:	Western Sky Financial, LLC	Borrower:	JENNAFER KEMPH
Address:	P.O. Box 370 Timber Lake, SD 57656	Address:	6045 S KEATING AVE APT 1 CHICAGO, IL 60629

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

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

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

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

TRUTH IN LENDING ACT DISCLOSURE STATEMENT

ANNUAL PERCENTAGE RATE	FINANCE CHARGE	AMOUNT FINANCED	TOTAL OF PAYMENTS
The cost of your credit as a yearly rate	*The dollar amount the credit will cost you*	*The amount of credit provided to you*	*The amount you will have paid after all payments are made as scheduled*
232.67 %	**$3,942.81**	**$1,000.00**	**$4,942.81**

PAYMENT SCHEDULE
One payment of $186.25 on June 01, 2012.

24 monthly payments of $198.19 beginning on July 01, 2012.

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

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

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

ITEMIZATION OF AMOUNT FINANCED	
Amount Financed:	$1,000.00
Amount Paid to Borrower Directly:	$1,000.00
Prepaid Finance Charge/Origination Fee:	$500.00

You promise to pay to the order of Western Sky or any subsequent holder of this Note the sum of **$1,500.00**, together with interest calculated at **149.00 %** per annum and any outstanding charges or late fees, until the full amount of this Note is paid. You promise to repay this loan by making, at a minimum, the payments described on the payment schedule listed above.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

WAIVER OF JURY TRIAL AND ARBITRATION.

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

wide or consolidated Arbitration proceeding.

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

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

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

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

Waiver of Rights. YOU HEREBY AGREE THAT YOU ARE WAIVING YOUR RIGHT TO A JURY TRIAL, TO HAVE A COURT DECIDE YOUR DISPUTE, TO PARTICIPATE IN A CLASS ACTION LAWSUIT, AND TO CERTAIN DISCOVERY AND OTHER PROCEDURES THAT ARE AVAILABLE IN A LAWSUIT. The arbitrator has the ability to award all remedies available by statute, at law, or in equity to the prevailing party, except that the parties agree that the arbitrator has no authority to conduct class-wide proceedings and will be restricted to resolving the individual disputes between the parties. The validity, effect, and enforceability of this waiver of class action lawsuit and class-wide

Arbitration is to be determined solely by a court of competent jurisdiction located within the Cheyenne Rivers Sioux Tribal Nation, and not by the arbitrator. If the court refuses to enforce the class-wide Arbitration waiver, or if the arbitrator fails or refuses to enforce the waiver of class-wide Arbitration, the parties agree that the Dispute will proceed in tribal court and will be decided by a tribal court judge, sitting without a jury, under applicable court rules and procedures.

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

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

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

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

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

reasonable opportunity to act on your termination (generally at least three business days in advance).

THIS LOAN CARRIES A VERY HIGH INTEREST RATE. YOU MAY BE ABLE TO OBTAIN CREDIT UNDER MORE FAVORABLE TERMS ELSEWHERE. EVEN THOUGH THE TERM OF THE LOAN IS 25 MONTHS, WE STRONGLY ENCOURAGE YOU TO PAY OFF THE LOAN AS SOON AS POSSIBLE. YOU HAVE THE RIGHT TO PAY OFF ALL OR ANY PORTION OF THE LOAN AT ANY TIME WITHOUT INCURRING ANY PENALTY. YOU WILL, HOWEVER, BE REQUIRED TO PAY ANY AND ALL INTEREST THAT HAS ACCRUED FROM THE FUNDING DATE UNTIL THE PAYOFF DATE.

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

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

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

Click here to print out a copy of this document for your records.

EXHIBIT C

WESTERN SKY CONSUMER LOAN AGREEMENT

Loan No.:	8658496	Date of Note:	April 19, 2012
		Expected Funding Date:	April 20, 2012
Lender:	Western Sky Financial, LLC	Borrower:	DAN DEHMLOW
Address:	P.O. Box 370 Timber Lake, SD 57656	Address:	1625 NORTH ROCKWELL ST CHICAGO, IL 60647

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

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

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

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

TRUTH IN LENDING ACT DISCLOSURE STATEMENT

ANNUAL PERCENTAGE RATE	**FINANCE CHARGE**	**AMOUNT FINANCED**	**TOTAL OF PAYMENTS**
The cost of your credit as a yearly rate	*The dollar amount the credit will cost you*	*The amount of credit provided to you*	*The amount you will have paid after all payments are made as scheduled*
139.13 %	**$11,421.87**	**$2,525.00**	**$13,946.87**

PAYMENT SCHEDULE
One payment of $107.25 on May 01, 2012.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

WAIVER OF JURY TRIAL AND ARBITRATION.

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

wide or consolidated Arbitration proceeding.

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

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

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

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

Waiver of Rights. YOU HEREBY AGREE THAT YOU ARE WAIVING YOUR RIGHT TO A JURY TRIAL, TO HAVE A COURT DECIDE YOUR DISPUTE, TO PARTICIPATE IN A CLASS ACTION LAWSUIT, AND TO CERTAIN DISCOVERY AND OTHER PROCEDURES THAT ARE AVAILABLE IN A LAWSUIT. The arbitrator has the ability to award all remedies available by statute, at law, or in equity to the prevailing party, except that the parties agree that the arbitrator has no authority to conduct class-wide proceedings and will be restricted to resolving the individual disputes between the parties. The validity, effect, and enforceability of this waiver of class action lawsuit and class-wide

Arbitration is to be determined solely by a court of competent jurisdiction located within the Cheyenne Rivers Sioux Tribal Nation, and not by the arbitrator. If the court refuses to enforce the class-wide Arbitration waiver, or if the arbitrator fails or refuses to enforce the waiver of class-wide Arbitration, the parties agree that the Dispute will proceed in tribal court and will be decided by a tribal court judge, sitting without a jury, under applicable court rules and procedures.

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

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

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

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

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

reasonable opportunity to act on your termination (generally at least three business days in advance).

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

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

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

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

Click here to print out a copy of this document for your records.

EXHIBIT D

WESTERN SKY CONSUMER LOAN AGREEMENT

Loan No.:	26862452	Date of Note: Expected Funding Date:	March 01, 2013 March 04, 2013
Lender:	Western Sky Financial, LLC	Borrower:	GLENN P ALLHOFF
Address:	P.O. Box 370 Timber Lake, SD 57656	Address:	2453 KITTRIDGE DRIVE Dundee, IL 60118

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

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

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

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

TRUTH IN LENDING ACT DISCLOSURE STATEMENT

ANNUAL PERCENTAGE RATE	FINANCE CHARGE	AMOUNT FINANCED	TOTAL OF PAYMENTS
The cost of your credit as a yearly rate	*The dollar amount the credit will cost you*	*The amount of credit provided to you*	*The amount you will have paid after all payments are made as scheduled*
116.73 %	**$36,237.46**	**$5,000.00**	**$41,237.46**

PAYMENT SCHEDULE
One payment of $453.93 on April 01, 2013.

83 monthly payments of $486.58 beginning on May 01, 2013.
One payment of $397.39 on April 01, 2020.

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

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

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

ITEMIZATION OF AMOUNT FINANCED	
Amount Financed:	$5,000.00
Amount Paid to Borrower Directly:	$5,000.00
Prepaid Finance Charge/Origination Fee:	$75.00

You promise to pay to the order of Western Sky or any subsequent holder of this Note the sum of **$5,075.00**, together with interest calculated at **115.00 %** per annum and any outstanding charges or late fees, until the full amount of this Note is paid. You promise to repay this loan by making, at a minimum, the payments described on the payment schedule listed above.

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

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

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

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

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

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

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

from your bank account.

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

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

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

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

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

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

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

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

WAIVER OF JURY TRIAL AND ARBITRATION.

PLEASE READ THIS PROVISION OF THE AGREEMENT CAREFULLY. Unless you exercise your right to opt-out of arbitration in the manner described below, any dispute you have with Western Sky or anyone else under this loan agreement will be resolved by binding arbitration. Arbitration replaces the right to go to court, including the right to have a jury, to engage in discovery (except as may be provided in the arbitration rules), and to participate in a class action or similar proceeding. In Arbitration, a dispute is resolved by an arbitrator instead of a judge or jury.

Arbitration procedures are simpler and more limited than court procedures. Any Arbitration will be limited to the dispute between yourself and the holder of the Note and will not be part of a class-wide or consolidated Arbitration proceeding.

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

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

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

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

Waiver of Rights. YOU HEREBY AGREE THAT YOU ARE WAIVING YOUR RIGHT TO A JURY TRIAL, TO HAVE A COURT DECIDE YOUR DISPUTE, TO PARTICIPATE IN A CLASS ACTION LAWSUIT, AND TO CERTAIN DISCOVERY AND OTHER PROCEDURES THAT ARE AVAILABLE IN A LAWSUIT. The arbitrator has the ability to award all remedies available by statute, at law, or in equity to the prevailing party, except that the parties agree that the arbitrator has no authority to conduct class-

wide proceedings and will be restricted to resolving the individual disputes between the parties. The validity, effect, and enforceability of this waiver of class action lawsuit and class-wide Arbitration is to be determined solely by a court of competent jurisdiction located within the Cheyenne Rivers Sioux Tribal Nation, and not by the arbitrator. If the court refuses to enforce the class-wide Arbitration waiver, or if the arbitrator fails or refuses to enforce the waiver of class-wide Arbitration, the parties agree that the Dispute will proceed in tribal court and will be decided by a tribal court judge, sitting without a jury, under applicable court rules and procedures.

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

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

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

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

Payments. You have previously authorized and requested us to initiate an automated clearinghouse or other electronic funds transfer ("EFT") from the bank account identified on your Application (the "Bank Account") to make each payment required hereunder on the day it is due. You also authorize us to initiate an EFT to or from the Bank Account to correct any erroneous payment and, in the event any EFT is unsuccessful, to attempt such payment up to two additional times. You understand that unsuccessful EFTs may result in charges by your bank, and you agree that we are not liable for such charges. We will notify you 10 days prior to any given transfer if the amount to be transferred varies by more than $50 from your regular payment amount. You also authorize us to withdraw funds from your account on additional days throughout the month in the event you are delinquent on your loan payments. Your request and authorization for us to initiate

EFTs is entirely voluntary, and you may terminate this authorization by notifying us in writing via fax (866-347-0666) or email (customer.service@westernsky.com) soon enough to allow us a reasonable opportunity to act on your termination (generally at least three business days in advance).

THIS LOAN CARRIES A VERY HIGH INTEREST RATE. YOU MAY BE ABLE TO OBTAIN CREDIT UNDER MORE FAVORABLE TERMS ELSEWHERE. EVEN THOUGH THE TERM OF THE LOAN IS 85 MONTHS, WE STRONGLY ENCOURAGE YOU TO PAY OFF THE LOAN AS SOON AS POSSIBLE. YOU HAVE THE RIGHT TO PAY OFF ALL OR ANY PORTION OF THE LOAN AT ANY TIME WITHOUT INCURRING ANY PENALTY. YOU WILL, HOWEVER, BE REQUIRED TO PAY ANY AND ALL INTEREST THAT HAS ACCRUED FROM THE FUNDING DATE UNTIL THE PAYOFF DATE.

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

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

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

Click here to print out a copy of this document for your records.

EXHIBIT 2

In the

Cheyenne River Sioux Tribal

Court of Appeals

Cheyenne River Telephone Company, A Tribal Corporation, Plaintiff/Appellee v. Robert Pearman, and Dakota Telecommunications Network, Inc., Defendants/Appellants	)	Memorandum Opinion 89-006-A

I. Background

The Cheyenne River Telephone Company, the Plaintiff/Appellee herein, brought an action against Robert Pearman and Dakota Telecommunications Network, Inc. (DTN), the Defendants/Appellants herein, for a judgment and valuation of the assets transferred by the Defendants/Appellants to the Plaintiff/Appellee. This transfer was part of a reduction of sentence and court ordered restitution determination made by Judge Richard Battey in a federal district court proceeding in which Appellant Pearman pled guilty to the theft of approximately $430,000 from the Appellee.

The trial judge below granted Appellee's motion for summary judgment on or about February 27, 1987, in the amount of $433,300, based on its valuation of assets transferred from

Appellant to the Appellee. Those assets included, inter alia, the assets of Appellee, Dakota Telecommunications Network, Inc. The judgment of the court was based on its determination and weighing of the expert testimony provided by each party as to the valuation of the transferred assets of DTN, Inc. From the accepted valuation, the trial court subtracted liabilities in the amount of approximately $218,862, leaving a net unpaid judgment of $214,438. This appeal followed.

II. Issues

The Appellant raises three issues. They are:

1) Whether the trial court erred in not dismissing the lawsuit because of a lack of jurisdiction;

2) Whether the trial court legally erred in its valuation determination of the Appellant, Dakota Telecommunications Network, Inc., assets and liabilities that were transferred to the Appellee;

3) Whether the trial court improperly admitted certain business record evidence at the trial.

III. Discussion

These issues may be readily disposed of as follows:

1) The Appellant claims the trial court did not have jurisdiction in this matter because DTN is a corporation organized under state law. The Appellant contends that this fact and this fact alone makes it a "non-Indian" corporation subject to the requirement of the Cheyenne River Sioux Tribe's Constitution and Bylaw V(1)(c) which provides:

> This court shall have jurisdiction over all Indians, upon the Reservation and over such disputes or lawsuits as shall occur between Indians on the Reservation or between Indians and non-Indians where such cases are brought before it by stipulation of both parties.

Appellant's reliance on this provision is mistaken for two different and independent sets of reasons. First, the fact that a corporation is organized under the laws of South Dakota is not determinative (or even relevant) as to whether the entity is "Indian" or "non-Indian" under this tribal Bylaw. The key to the identity or character of the corporation is in its ownership. Robert Pearman is Indian and the majority stock owner of the corporation, and therefore DTN is "Indian" for purposes of the Cheyenne River Sioux Tribe's Constitution and Bylaw V(1)(c).

Secondly, and in the alternative, the stipulation requirement was clearly met in this situation. The fact that the Appellant and Appellee entered into a complex and potentially

lucrative business arrangement to be performed completely on the Cheyenne River Sioux Reservation clearly constitutes a sufficient stipulation to subject the Appellee to the jurisdiction of the tribal court. See, for example, this Court's opinions in the cases of First Federal Savings and Loan v. Ducheneaux (#85-022-A) and Becker County, Minnesota, Welfare Department v. Jayme Mestes (#89-001-A). See also Montana v. United States, 450 U.S. 544 (1981), in which the United States Supreme Court recognized tribal court jurisdiction over non-Indians based on consensual agreements with Indians or tribal entities even when performed on fee lands within the reservation.

2) It is a well established general rule that issues of fact in civil cases are to be determined in accordance with the preponderance of the evidence standard. New York Life Insurance Co. v. Garner, 303 U.S. 161 (1938). The term "preponderance of the evidence" means the weight, credit, and value of the aggregate evidence on either side. The application of this standard by a trial court is generally reversible on appeal only if it is shown that the trial court's determination was not supported by substantial evidence or in some cases, was clearly erroneous. The standard, of course, is not a de novo consideration of the weight of the evidence presented at trial.

The Appellant does not identify any appropriate reviewing standard for determining the adequacy of the trial court's

weighing of the evidence, much less the failure of the court to meet the requirements of that standard. Since the burden on appeal rests solely on the Appellant, the Appellant has completely failed to meet its burden on this issue.

3) The Appellant claims that the trial court improperly admitted certain "business records" into evidence in that the witness, J.D. Williams, had no personal knowledge of the records which were introduced through his testimony. While the Cheyenne River Sioux Tribe's Rules of Civil Procedure (CRSTRCP) do not directly address this issue, Rule 18 does permit the use of the appropriate South Dakota Rules of Evidence on questions of admissibility of evidence and the competency of witnesses.

S.D.C.L. § 19-7-12 only requires an accurate reproduction of writings kept in the regular course of business. The witness, Mr. J.D. Williams, was the general manager of the Appellee Cheyenne River Telephone Authority and as such had control over all employees and records of the company. He was also the General Manager of DTN, Inc., and as such had control over all of the employees and records of that business. He testified as manager and custodian of the records of both businesses. He verified that copies were xeroxed from the office records.

There is no need that the witness have knowledge of the actual data contained in the business records, United States v.

Reese, 568 F.2d 1246 (5th Cir., 1977); nor does he have to be the maker of the records, United States v. Rose, 562 F.2d 409 (7th Cir., 1977). Further, he need not have personal knowledge of the actual creation of the documents, United States v. Colyer, 571 F.2d 941 (5th Cir. 1978); nor is it necessary that he be an employee at the time of the record entry, United States v. Evans, 572 F.2d 455 (5th Cir. 1978). Further, there is no indication whatsoever that the trial court's rulings on this evidence constituted an abuse of discretion.

IV. Conclusion

For all the above discussed reasons, the decision of the trial court is hereby affirmed and this appeal is consequently dismissed.

IT IS SO ORDERED.

Mario Gonzalez	Everett Dupris	Frank Sommersheim
Associate Justice	Associate Justice	Associate Justice

Dated: May 18, 1990