No. 15-1170 & 15-1217

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JAMES HAYES, et al.,
Plaintiffs-Appellants-Cross-Appellees,

— v. —

DELBERT SERVICES CORPORATION,
Defendant-Appellee-Cross-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

BRIEF OF *AMICI CURIAE* NATIONAL CONSUMER LAW CENTER, CENTER FOR RESPONSIBLE LENDING, AND THE NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS IN SUPPORT OF PLAINTIFFS-APPELLANTS AND SEEKING REVERSAL OF THE DISTRICT COURT'S DECISION

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CERTIFICATE OF INTEREST AND CORPORATE DISCLOSURE STATEMENT

Hayes v. Delbert Services Corporation – Nos. 15-1170 & 15-1217

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NOT APPLICABLE.

/s/Tara Twomey

Dated: June 15, 2015

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/s/ Geoff Walsh

Dated: June 15, 2015

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Hayes v. Delbert Services Corporation – Nos. 15-1170 & 15-1217

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NOT APPLICABLE.

/s/ Ellen Harnick

Dated: June 15, 2015

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STATEMENT OF INTEREST

The National Consumer Law Center (NCLC) is a public interest, non-profit law office established in 1969 and incorporated in 1971, with its main office in Boston, MA and a separate office in Washington DC. It is a national research and advocacy organization focusing specifically on the legal needs of low income, financially distressed and elderly consumers. NCLC works to defend the rights of consumers, concentrating on advocating for fairness in financial services, wealth building and financial health, a stop to predatory lending and consumer fraud, and protection of basic energy and utility services for low income families. NCLC devotes special attention to vulnerable populations including immigrants, elders, homeowners, former welfare recipients, victims of domestic violence, military personnel, and others, on issues from access to justice, auto fraud, bankruptcy, credit cards, debt collection abuse, predatory lending, mortgage and payday lending, refund anticipation loans, Social Security, and more.

Incorporated in 1992, the National Association of Consumer Bankruptcy Attorneys ("NACBA") is a non-profit organization of more than 3,000 consumer bankruptcy attorneys nationwide. NACBA's corporate purposes include education of the bankruptcy bar and the community at large on the uses and misuses of the consumer bankruptcy process. NACBA and its membership have a vital interest in the outcome of this case. Western Sky Financial, LLC, and its affiliates have sought

to use their purported tribal affiliation to evade state licensing and usury laws, and then sought to enforce mandatory arbitration clauses against debtors in the bankruptcy forum.

The Center for Responsible Lending (CRL) is a non-profit, non-partisan research and policy organization that works to protect homeownership and family wealth by helping to eliminate abusive financial practices. CRL is affiliated with the Center for Community Self-Help, a non-profit community development financial institution whose other affiliates include the Self-Help Credit Union. For thirty years, Self-Help has focused on creating asset-building opportunities for low-income, rural, women-headed, and minority families, primarily through safe, affordable home loans and small business loans. Self-Help has provided $6 billion in financing to 70,000 homebuyers, small businesses and non-profit organizations and serves more than 80,000 mostly low-income families through 30 retail credit union branches in North Carolina, California, and Chicago. High-cost loans targeted at financially vulnerable individuals generally exacerbate financial distress, and strip desperately needed resources from struggling families and communities.

CONSENT

Appellants and Appellees have consented to the filing of this amicus brief.

CERTIFICATION OF AUTHORSHIP

Pursuant to FRAP 29(c)(5), the undersigned counsel of record certifies that this brief was not authored by a party's counsel, nor did party or party's counsel contribute money intended to fund this brief and no person other than NACBA contributed money to fund this brief.

SUMMARY OF ARGUMENT

The arbitration at issue here is part and parcel of a larger scheme developed by a high-cost lender, which masquerades as an affiliate of a Native American tribe. The purported tribal association is a ruse to evade state lender licensing and usury laws. At least seventeen states have initiated formal proceedings to stop Western Sky/CashCall's operations affecting their residents. More than ten states, including two in this Circuit, have already issued cease and desist orders against Western Sky's internet lending operations. The arbitration is designed to ensure that Western Sky, its affiliates, successors and assigns can continue its abusive lending and collection practices without oversight.

ARGUMENT

I. Introduction

In 2012 Appellants James Hayes, Debra Grant, and Herbert White each applied for and obtained loans from Western Sky Financial, LLC. JA:200-01 The cost of each of the loans was extremely high.[1] Mr. White's loan had an effective annual percentage rate of 233.84%. One-third, or $500, of Mr. White's $1500 loan was retained by Western Sky as an origination fee. JA:167. Mr. White's loan agreement stated that after an initial payment of $62.08, monthly payments of nearly $200 were required for two years in order to pay off the loan. JA:166-167. Mr. Hayes' and Ms. Grant's loans accrued at an annual percentage rate of 139.12% and 139.13%, respectively. JA:152, 159. The Hayes loan, with an initial principal balance of $2600 (including a $75 origination fee), required an initial payment of $253.50, followed by nearly four years of monthly payments at $294.46. JA:152-153. The Grant loan similarly required monthly payments of $294.46 for four years to pay off the initial $2600 loan. JA:159-160.

[1] By comparison, the average annual percentage rate for 30-year, fixed mortgage loans is approximately 4%, automobile loans generally range from 2% to 6%, and the average fixed-interest credit card APR is approximately 13%. Freddie Mac Primary Mortgage Market Survey, *available at* http://www.freddiemac.com/pmms/ (June 11, 2015) (average thirty-year, fixed-rate mortgages had an interest rate of 4.04% with .6 points); Bankrate, National Auto Loan Rates for June 11, 2015, *available at* http://www.bankrate.com/finance/auto/rate-roundup.aspx; Bankrate, National Credit Card Rates for June 11, 2015, *available at* http://www.bankrate.com/finance/credit-cards/rate-roundup.aspx.

On the face of the loan agreements Western Sky Financial, LLC, identified itself as "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." The Loan Agreements contained the following statement:

> **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 this 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.

JA:152, 159, 166. (emphasis in original).

The Loan Agreements contained an "Agreement to Arbitrate" under which any dispute involving the Agreements must be subject to 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." JA:155, 162, 169.

Within days after loan origination, Western Sky Financial, LLC, assigned each loan to an affiliated entity, WS Funding, LLC. At the time of assignment, Mr. Hayes, Ms. Grant, and Mr. White were each directed to make payments the loan servicer,

CashCall in Anaheim, California. JA:208, 214, 220. Nine to twelve months after obtaining each loan, WS Funding, LLC, assigned the loans to Consumer Loan Trust. JA:227-228. Consumer Loan Trust in turn designated Delbert Services Corporation as the servicer of the loan, and each borrower was directed to make payments to Delbert. JA:227-228, 230, 234, 238.

II. The Absence of a Legitimate Arbitration Forum Precludes Arbitration in this Case.

A. Western Sky as a Typical High-Cost, Small-Dollar Lender

Plaintiffs' loans were typical of many high-cost, small dollar loans made to low and moderate income Americans. The combination of high fees, high interest rates, and/or short terms make these loans extraordinarily expensive. *See generally* Nathalie Martin, *1000% Interest – Good While Supplies Last: A Study of Payday Loan Practices and Solutions*, 52 ARIZ. L. REV. 563 (Fall 2010). These high-cost lenders target individuals who have regular income from earnings or government benefits. Online lenders require agreements authorizing electronic fund transfers from the borrower's checking account to the lender.[2]

Typical borrowers are low-income consumers who are living paycheck to paycheck. Martin, 52 ARIZ. L. REV. at 608. Borrowers seldom understand the loan

[2] Conditioning credit on such an agreement violates the Electronic Funds Transfer ("EFT") Act, 15 U.S.C. § 1693k. The standard Western Sky/CashCall Loan Agreement contains such a provision (JA:156, 163 170) and violates the EFT. *CashCall, Inc. v. Morrisey*, 2014 WL 2404300, *4 (W. Va. May 30, 2014); *F.T.C. v. PayDay Financial, LLC*, 989 F. Supp. 2d 799, 812-13 (D.S.D. Sept. 30, 2013).

terms. *Id* at 599-606. A high proportion of borrowers default on their repayment obligations. For example, in a survey of 292 West Virginia borrowers, the state's Attorney General's Office recently found that 212 were in default on online payday loans made in violation of that state's long-standing usury cap. *Morrisey*, 2014 WL 2404300 at *1. In addition, recent research by amici Center for Responsible Lending, in an examination of loans by licensed payday lenders in North Dakota, found that nearly half of all borrowers defaulted within two years of their first loans. Payday Mayday: Visible and Invisible Payday Lending Defaults, Center for Responsible Lending (Mar. 31, 2015), *available at* http://www.responsiblelending.org/payday-lending/research-analysis/payday-mayday-visible-and.html.

The consequences of taking out a high-cost loan can be severe. Despite terms of the written agreements, lenders refuse to honor borrowers' requests to cease electronic funds transfers. *Morrisey,* 2014 WL 2404300 at *12. Lenders can be extremely abusive debt collectors. Certain borrowers surveyed by the West Virginia Attorney General had received over 1,000 harassing collection calls from CashCall, sometimes twenty or more per day, including calls to neighbors and employers. *Morrisey,* 2014 WL 2404300 at *4, *11-13.

Not surprisingly, there is a strong correlation between high-cost lending and recourse to bankruptcy. Nathalie Martin & Koo Im Tong, *Double Down-and-Out: The Connection Between Payday Loans and Bankruptcy*, 30 SW. U. L. REV. 785, 803 (2010) (statewide study finds payday loan usage rates for bankruptcy debtors at four to five

times that of the general population); Paige Skiba & Jeremy Tobacman, *Do Payday Loans Cause Bankruptcy?* Vanderbilt U. Law School, Law & Economics Working Paper No. 11-13 (2011) (for borrowers with low credit scores access to high-cost loans causes rate of chapter 13 filings over the next two years to double).[3]

B. State Regulation of High-Cost and Payday Lenders

Most states regulate small dollar, high-cost loans. Maryland caps the rate of interest for small loans at 33%[4] and North Carolina at from 18% to 30%.[5] West Virginia regulates such loans under its Small Loan Act, which sets a 31% interest cap on loans under $2,000.[6] Virginia does not permit payday loans of over $500, sets a 36% simple interest rate cap (while also allowing significant additional fees), and limits the number and sequence of loans to one borrower.[7] South Carolina law prohibits loans over $550 that employ post-dated checks, and the state statute sets limits on the number and sequence of such loans.[8]

High-cost lenders have devised various strategies to avoid the reach of state laws such as those in effect in all states within the Fourth Circuit. One strategy has been to affiliate with a national bank. Federal statutes regulating national banks often

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[3] Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1266215
[4] Md. Code Ann. Com. Law § 12-306(a)(2) (the 2.75% monthly cap for small loans comes to approximately 33% APR); Md. Code Ann. Com. Law §§ 12-317, 12-306 (a 2% monthly cap applies to loans over $500).
[5] N.C. Gen. Stat. § 53-176 (limiting interest rates on high cost loans to 18-30%).
[6] W. Va. Code § 46A-4-107(2). *See generally* W.Va. Code §§ 46A-4-107 to 46A-4-113.
[7] Va. Code Ann. §§ 6.2-1816 and 6.2-1817.
[8] S.C. Code Ann. § 34-39-180.

preempt state usury laws, or, at a minimum allow a national bank to select a home state with banking laws that leave interest rates substantially unregulated. The West Virginia courts examined this type of "rent-a-bank" scheme in, *Morrisey*, 2014 WL 2404300 at *6-7. The West Virginia Supreme Court affirmed the lower court ruling that had found that the lender, CashCall, effectively controlled all significant aspects of the loan transactions it originated through a national bank and used the bank solely as a front in order to evade state banking laws.

C. High-Cost Lenders and the Tribal Immunity Scheme

Another tactic high-cost lenders have used to evade state laws has been to cloak themselves in tribal immunity. Native American tribes enjoy a broad immunity from suits brought by individuals and states. *Michigan v. Bay Mills Indian Community*, *et al*, --- U.S. --, 134 S. Ct. 2024 (2014) (refusing to reconsider *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998)). In a variation on the "rent-a-bank" scheme, certain small dollar lenders have created entities that purport to be affiliated with Native American tribes. The lenders originate high-cost loans through these nominal tribal entities. Shortly after origination, the loans are transferred directly to the true lender. The tribal entity serves as a front for the lender, supporting a dubious claim of immunity from federal and state laws for all aspects of the lending operation. Nathalie Martin and Joshua Schwartz, *The Alliance Between Payday Lenders and Tribes: Are Both Tribal Sovereignty and Consumer Protection at Risk?,* 69 WASH. & LEE L. REV. 751

(2012); Heather L. Petrovich, *Circumventing State Consumer Protection Laws: Tribal Immunity and Internet Payday Lending*, 91 N.C. L. REV. 326 (2012).

These schemes provide high-cost lenders with a low-cost way to avoid complying with state law, while retaining the bulk of the economic benefit of the transactions. The true loan companies are typically headquartered far from the reservations, and it is the owners of these companies that receive the overwhelming share of income derived from the loans. *See* Petrovich, 91 N.C. L. REV. at 342; Martin & Schwartz, 69 WASH. & LEE L. REV. at 777. Most tribes want no part of this scheme. Responsible Native American leaders see the affiliations with these lenders not as an economic boon to their communities but as a practice that undermines public acceptance of genuine claims for Native American sovereignty. Martin & Schwartz, 69 WASH. & LEE L. REV. at 787. Native American groups have documented the harms predatory loans inflict on Native American borrowers.[9] Others have noted the risks to tribal interests of permitting businesses to use tribal relationships for the express purpose of evading state law. Martin & Schwartz, 69 WASH. & LEE L. REV. at 787.

The tribal immunity stratagem has served to shield certain lenders from state actions to enforce consumer protection laws. *Cash Advance and Preferred Cash Loans v.*

[9] A study by First Nations Development Institute found that payday loans and other predatory lending are significant problems in Native American communities. First Nations Dev. Inst., *Borrowing Trouble: Predatory Lending in Native American Communities* (2008), http://www.firstnations.org/KnowledgeCenter/CombatingPredatoryLending/PredatoryLendingResearch.

State, 242 P.3d 1099, 1108 (Colo. 2010), *on remand* 2012 WL 3113527 (Colo. Dist. Ct. Feb. 18, 2012); *Ameriloan v. Superior Court*, 86 Cal. Rptr. 3d 572 (Cal. Ct. App. 2008), further decision following remand, 166 Cal. Rptr. 3d 800 (Cal. Ct. App. 2014) (affirming trial court determination that lenders were acting as arm of tribe), *review granted* 324 P.3d 834 (Cal. May 21, 2014). Many states have devoted extensive resources to efforts to control internet lenders that misuse tribal immunity claims. Typically, these proceedings involve years of litigation over enforcement of subpoenas and protracted efforts by the lenders to dismiss proceedings for lack of jurisdiction. Petrovich, 91 N.C. L. REV. at 339. The proceedings often focus on whether the lender acts legitimately as an "arm of the tribe" or whether the tribal nomenclature is a sham. State investigators have consistently found that Western Sky, and its affiliates, fit into the latter category.

D. Western Sky's Discredited Claim to be a "Tribal" Lender

The key players in Western Sky's tribal immunity scheme are: (1) CashCall, Inc., the true lending entity; (2) WS Funding, LLC, a wholly owned subsidiary of CashCall, Inc.; (3) Delbert Services Corporation, an affiliate of CashCall, Inc., and (4) Western Sky Financial, LLC., the nominal tribal entity named on the website and in television ads through which loan products are marketed. All the named Plaintiffs in this case entered into loan agreements with Western Sky Financial, LLC. Shortly, thereafter Western Sky Financial, LLC, assigned the loans to WS Funding, LLC, with CashCall,

Inc. servicing the loans. Later, Delbert Services Corporation became servicer of the loan.

Many courts and state regulatory agencies have examined Western Sky/CashCall's tribal affiliation claim. At least three U.S. districts courts rebuffed attempts to remove state proceedings to federal court based on a claim of complete immunity from state enforcement. *Missouri v. Webb*, 2012 WL 1033414 (E.D. Mo. Mar. 27, 2013); *Maryland Commissioner of Financial Regulation v. Western Sky Financial*, LLC, 2011 WL 4894075 (D. Md. Oct. 12 2011) (rejecting a complete immunity claim based on the promissory note purporting to incorporate the Indian Commerce Clause and tribal law); *Colorado v. Western Sky Financial*, LLC, 845 F. Supp. 2d 1178, 1182 (D. Colo. 2011). After the state proceedings resumed, Colorado and Maryland courts found that the tribal sovereignty claims were meritless. Ultimately these two states entered cease and desist orders against Western Sky's lending to state residents, voided past loans to residents, and imposed other sanctions.[10] The Colorado court assessed attorneys' fees and costs against Western Sky for persisting in its frivolous claim to be a legitimate tribal entity.[11]

[10] Colorado *ex rel* Struthers v. Western Sky Financial, LLC, *et al,* No. 11-CV-638 (Denver Co. Dist. Ct. April 15, 2013) (Addendum A-1); Maryland Comm'r of Fin. Regulation v. Western Sky Financial, LLC *et al*, No. CFR-FY2011-182, 2013 WL 318996 (Md. Comm'r Fin. Reg. May 23, 2013) (Final Order and Opinion);
[11] Colorado *ex rel* Struthers v. Western Sky Financial, LLC, *et al,* No. 11-CV-638 (Denver Co. Dist. Ct. April 15, 2013) (Addendum. A-1).

The New Hampshire Banking Department also tossed aside Western Sky/CashCall's purported tribal law shield. *In re CashCall, Inc. et al*, No. 12-308, 2013 WL 3465250 (N.H. Banking Dept. June 4, 2013). The New Hampshire agency found that CashCall controlled and funded Western Sky Financial, LLC's loan origination operations. Under their business model, Western Sky solicited borrowers on a website managed by CashCall. Western Sky assigned loans shortly after origination to WF Funding, LLC, a subsidiary of CashCall. In this arrangement, CashCall was the actual or de facto lender, not Western Sky. *Id* at *2. The Department reviewed the language of Western Sky's promissory note that stated that the contract was subject solely to tribal law. *Id* at *3. According to the Department, "After detailed review of the respondents' business scheme, it appears that Western Sky is nothing more than a front to enable CashCall to evade licensure by state agencies and to exploit Indian Tribal Sovereign Immunity to shield its deceptive business practices from prosecution by state and federal regulators." *Id.* The State of New Hampshire entered a cease and desist order against CashCall's lending to state residents, ordered disgorgement of finance charges paid by 787 borrowers, and assessed an administrative fine of $1,967,500 against the affiliated entities. *Id* at *4.

The State of Maryland made similar findings when it entered a cease and desist order against Western Sky. *Maryland Commissioner of Financial Regulation v. Western Sky Financial, LLC et al*, 2013 WL 3188996 (Md. Comm'r Fin. Reg. May 22, 2013). The Maryland regulator found that no evidence supported the claim that an Indian tribe

had an ownership interest in or an operating role in Western Sky's lending operation. *Id* at *3. Western Sky was not an arm of any tribe. *Id.* The state agency ordered restitution of payments and imposed a fine of $173,000. *Id.* at *8.

In addition to Missouri, Colorado, Maryland and New Hampshire, five other states have issued cease and decease orders against the Western Sky/CashCall operation. These include: Illinois, Massachusetts, Nevada, Oregon, and Washington.[12] New York and Connecticut recently entered into consent orders that stopped the CashCall/Western Sky operations in those two states.[13] In several of these rulings the states ordered restitution to borrowers, voided loans, and imposed significant monetary penalties. Over the past twelve months, seven other states—California,

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[12] *In re* Western Sky Fin., LLC, No. 13 CC 265 (Ill. Dept. Fin. & Prof. Reg. Mar. 8, 2013) (Addendum A-2); *In re* CashCall, Inc. *et al*, 2013 WL 1737075 (Mass. Consumer Affairs and Bus. Reg. Office April 4, 2013) (disgorgement ordered); *In re* Western Sky Fin., LLC *et al*, 2013 WL 1737086 (Mass. Consumer Affairs and Bus. Reg. Office April 4, 2013) (same); *In re* Western Sky Fin., LLC, 2013 WL 3864655 (Nev. Bus. & Indus. Dept. June 28, 2013) (declaring loans void, ordering restitution); *In re* Western Sky Fin., No. I-12-0039, 2012 WL 6927415 (Or. Cons. & Bus. Servs. Dept. Dec. 13, 2012); *In re* CashCall, Inc., Wash. Dept. of Fin. Inst. No. C.-11-0810-12-SC01 Office Admin. Hrgs. No. 2011-DFI-0041 (Wash. Off. Admin Hrgs. Oct. 18, 2012) http://www.dfi.wa.gov/CS%20Orders/C-11-0810-12-SC01.pdf.

[13] People of New York v. Western Sky Fin., LLC, *et al* No. 451370/2013 N.Y. Supreme Court, New York County Jan. 24, 2014); Summary of settlement at http://www.ag.ny.gov/press-release/ag-schneiderman-announces-settlement-western-sky-financial-and-cashcall-illegal-loans (terms include order to cease collection of finance charges on outstanding loans, refund charges collected (estimated at up to $35 million in debt relief to 18,000 borrowers), and $1.5 million penalty); *In re CashCall, et al,* Conn. Dept. of Banking Findings of Fact, Conclusions of Law & Consent Order April 2, 2014 (restitution to 3,800 borrowers, $400,000 in penalties) text at http://www.ct.gov/dob/cwp/view.asp?a=2246&q=543054.

Florida, North Carolina, Arkansas, Michigan, Georgia, and Minnesota—brought actions to stop Western Sky/CashCall's tribal lending scheme.

E. "Tribal Arbitration" is an Extension of Western Sky/Cash Call's Deceptive Tribal Immunity Scheme

Two federal courts recently gave in to demands of Western Sky/CashCall and their related entities and referred litigation to tribal arbitration. *Inetianbor v. CashCall, Inc.*, 923 F. Supp. 2d 1358 (S.D. Fla. 2013); *Jackson v. Payday Financial, LLC, et al,* 2012 WL 2722024 (N.D. Ill. July 9, 2013). After initially directing the consumer's complaint to arbitration, the Florida district court in *Inetianbor* reconsidered its order. After reconsideration and two failed attempts at arbitration, the court found that there were no rules to apply under Western Sky's purported arbitration system. *Inetianbor v. CashCall, Inc.*, 962 F. Supp. 2d 1303, 1309 (S.D. Fla. Aug. 19, 2013). Ultimately the Florida court vacated its referral to arbitration, concluding that the evidence demonstrated that "1) the arbitral forum does not exist, and 2) rules governing the purported forum do not exist." *Id.*

In *Jackson,* Illinois borrowers brought a class action challenging the lending practices of Western Sky/CashCall and several related internet based high-cost lenders. The district court initially ordered tribal arbitration. *Jackson*, 2012 WL 2722024, at *3-4. The plaintiffs appealed this decision. *Jackson v. Payday Financial, LLC, et al*, No. 12-2617 (7th Cir.). After the Seventh Circuit certified a question back to the Illinois district court as to whether any valid arbitration system existed under the

Western Sky/CashCall operation, the district court vacated the referral. The district court concluded that some evidence supported a finding that, albeit with varying degrees of difficulty, parties might be able to track down some identifiable tribal laws. *Jackson v. Payday Financial, LLC,* No. 11 C 9288 (N.D. Ill. August 28, 2013) (District Court's Response to Court of Appeals Remand for Findings of Fact, Doc. No. 95) (Addendum A-3). However, the district court found the evidence "abundantly clear" that there was no viable arbitration option. The court determined that Western Sky/CashCall used the tribal law verbiage in its contracts as part of a scheme to evade federal and state laws. Findings at p.6. The court concluded, "the intrusion of the Cheyenne River Sioux Tribal nation into the contractual arbitration provision appears to be merely an attempt to escape otherwise applicable limits on interest charges." *Id.* According to the court, "the promise of a meaningful and fairly conducted arbitration is a sham and an illusion." *Id.*

III. The District Court Correctly Held that the Arbitration Provision Failed Due to the Absence of a Legitimate Arbitral Rules and Arbitrator But Erred in Holding that the Reference to a Non-tribal Administer Compelled Arbitration of Plaintiffs' Claims.

A. Understanding the Arbitration Process

There are a variety of alternative dispute resolution mechanisms, one of which is arbitration. Arbitration agreements may be simple or complex, voluntary or mandatory, binding or non-binding. Mandatory predispute arbitration agreement results from a contract provision that generally requires the parties to take any claims

that may arise to arbitration instead of the court. These arbitration provisions are often contained in contracts of adhesion—standardized, preprinted form contracts presented to consumers on a take-it-or-leave-it basis. In binding arbitration the arbitrator is empowered to issue a final ruling on the merits of a claim, subject only to limited judicial review provided by the Federal Arbitration Act or state law. 9 U.S.C. §§ 10, 11 (describing situations in which arbitration awards may be vacated or modified).

Key components of the arbitration process include: (1) the arbitral rules, (2) the administrator, (3) the arbitrator, and (4) the substantive rules to be applied to the merits of the case. The arbitral rules dictate the procedures under which the arbitration is conducted. Unless specified otherwise in the contract, these rules may define how the arbitration process is initiated, how the arbitrator is selected, how the case will proceed, and what fees are involved. The administrator's role is to manage the administrative aspects of the arbitration, such appointing the arbitrator, coordinating schedules, arranging a location for the parties to present their arguments, making decisions with respect to administrative requests, and handling the fees associated with the arbitration. The administrator does not decide the merits of a case or make any rulings on issues and cannot change an arbitrator's decision. *See* AAA Consumer Arbitration Rules, Glossary (defining the role of the administrator).

In theory, the arbitrator is a neutral and independent decisionmaker. Except where the parties reach their own settlement, the arbitrator, accepts evidence, listens

to each party, applies the relevant substantive rules, and makes the final, binding decision regarding the dispute. Unless the contract specifies otherwise, the arbitrator may grant any remedy, relief, or outcome that the parties could have in court, including awards of attorney's fees. The substantive rules guide the arbitrators decision on the merits of the case.

B. Western Sky's Contract Explicitly Provides for Arbitral Rules and an Arbitrator That Do Not Exist.

The Loan Agreements at issue in this case contain identical language regarding arbitration. The agreements specify the arbitral rules, the arbitrator, and the applicable substantive law.

> **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 Nation by an authorized representative in accordance with its consumer dispute rules and the terms of this Agreement.

By the plain terms of the agreement, arbitration must be conducted under the "consumer dispute rules" of the Cheyenne River Sioux Tribal Nation. Further, the arbitrator must be an "authorized representative" of the Tribe. JA: 155.

The loan agreements further provide that neither state nor federal law applies to the agreements. JA:154. Rather, the arbitrator is mandated to apply the "laws of the Cheyenne River Sioux Tribal Nation." JA: 156. Finally, the loan agreements permit the borrowers to select one of two arbitration associations to administer the arbitration. JA:155.

Appellants ably argue that there are no legitimate arbitrators who are authorized representatives of the Tribe, and there are no Tribal consumer dispute rules. *See* Appellants' Brief, Parts I.A.1 & I.A.2. Thus, two key components of the arbitration process—the arbitral rules and the arbitrator—are functionally missing. Accordingly, the District Court correctly held that the arbitration provision failed on two counts because the Tribe "did not appoint authorized arbitrators nor did it have 'consumer dispute rules.'" JA:268. This holding is consistent with a growing number of court decisions and regulatory investigations, *see* Parts I.C, I.D, and I.E, *supra*.

The District Court erred, however, in concluding that the borrowers' ability to select an arbitration administrator, or the parties' ability to agree upon an administrator, cured the fundamental flaws in the arbitration process described in the contract. The administrator manages the arbitration process in accordance with the terms of the contract. Designating a national organization to manage a process that is "a sham from stem to stern" cannot legitimize the arbitration provision in Western Sky's loan agreement. *Jackson v. Payday Financial, LLC*, 764 F.3d 765, 779 (2014), *cert. denied*, 135 S. Ct. 1894 (2015); *see* Appellants' Brief, Part II.

CONCLUSION

For the foregoing reasons, the judgment of the District Court should be reversed.

Respectfully Submitted,

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CERTIFICATION OF COMPLIANCE WITH TYPE-VOLUME LIMITATION

I hereby certify that the foregoing Brief contains 4,706 words, excluding the parts of the Brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

The foregoing Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it was prepared in a proportionally spaced typeface using Microsoft Word in 14-point Garamond font.

Dated: June 15, 2015

/s/ Tara Twomey
Tara Twomey

CERTIFICATE OF SERVICE

I certify that on June 15, 2015, the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

/s/ Tara Twomey
Tara Twomey

June 15, 2015

ADDENDUM A

DISTRICT COURT, DENVER COUNTY, STATE OF COLORADO City and County Building 1437 Bannock, Denver, CO 80202	DATE FILED: April 15, 2013 ▲ **COURT USE ONLY** ▲
Plaintiffs: STATE OF COLORADO ex rel. JOHN W. SUTHERS, ATTORNEY GENERAL FOR THE STATE OF COLORADO, AND LAURA UDIS, ADMINISTER UNIFORM CONSUMER CREDIT CODE v. **Defendants:** WESTERN SKY FINANCIAL, LLC, AND MARTIN A. WEBB	Case Number: 11 CV 638 Courtroom: 259
ORDER	

THIS MATTER is before the Court on Plaintiffs the State of Colorado ex rel. John W. Suthers, Attorney General for the State of Colorado, and Laura Udis, Administer, Uniform Consumer Credit Code's (the "State") Motion for Partial Summary Judgment – Second Claim for Relief, filed December 27, 2012. Defendants Western Sky Financial, LLC ("Western Sky"), and Martin A. Webb ("Webb") (collectively "Defendants") filed their Response on January 31, 2013. The State filed its Reply on March 8, 2013. The Court has reviewed the Motion, the pleadings in support and opposition, the case file, and the relevant authority, and, being fully informed, finds and orders as follows:

BACKGROUND

This dispute arises over allegedly illegal, usurious, and unlicensed loans, issued over the Internet, in Colorado to Colorado consumers. The State alleges that Western Sky, a South Dakota limited liability company, has conducted business, through the Internet, to make loans to Colorado consumers in amounts ranging from $400 to $2,600 with annual percentage interest

rates ("APR") of approximately 140% to 300%. Webb is the sole manager and owner of Western Sky. Further, Webb is an enrolled member of the Cheyenne River Sioux (the "Tribe") and resides on the Cheyenne River Indian Reservation (the "Reservation") in South Dakota.

In 2010, Western Sky made more than 200 such loans to Colorado consumers. Following an investigation, the State determined that Western Sky was making "unlicensed supervised loans" and imposing excessive finance charges. After Western Sky failed to comply with a demand that it cease and desist from making further loans, the State filed suit against Defendants seeking injunctive relief and damages.

UNDISPUTED FACTS

1. Western Sky is a South Dakota company. Webb is Western Sky's sole manager, sole executive officer, and sole owner. Webb directs, controls, manages, participates in, supervises, is responsible for, and authorizes Western Sky's activities.

2. Western Sky is principally engaged in the business of making small, short-term personal loans to consumers.

3. Via the Internet and television advertising, Western sky offers and enters into loans with Colorado consumers.

4. According to its website, Western Sky offers personal loans of up to $2,600.00.

5. Also according to its website and a loan agreement with a Colorado consumer the loans have APRs from 140% to over 300%. The loan agreement with the Colorado consumer reflects a loan for $400.00 with over 330% APR. *See* Exhibits 1 and 2 to the affidavit of Jodie Robertson. (Robertson Aff., attached to the State's Motion as Exhibit 2).

6. Colorado Consumers apply for loans directly through Western Sky's Website.

7. Western Sky electronically deposits the loans' proceeds into the consumers' bank accounts.

8. Pursuant to the loan agreements, consumers authorize Western Sky to withdraw funds electronically from the consumers' bank accounts.

9. In 2010 alone, Western Sky made over 200 loans to Colorado consumers.

10. Western Sky is not, and at no relevant time was, licensed as a supervised lender in Colorado authorized to make supervised loans pursuant to Colorado's Uniform Consumer Credit Code, C.R.S. § 5-1-101, *et seq*. (the "Code").

11. In November 2010, Administrator Udis (the "Administrator") demanded that Western Sky cease making any new loans. The Administrator also demanded that Western Sky make refunds to consumers of all of its loans' improper and excess finance charges.

12. Western Sky did not comply with the Administrator's demands.

STANDARD OF REVIEW

Summary judgment is appropriate when, based on the pleadings, no genuine issue as to any material fact exists and the moving party is entitled to judgment as a matter of law. C.R.C.P. 56(c); *Cotter Corp. v. American Empire Surplus Lines Ins. Co.*, 90 P.3d 814, 819 (Colo. 2004). The purpose of summary judgment is to permit the parties to pierce the formal allegations of the pleadings and save the time and expense associated with trial when, as a matter of law, one party could not prevail. *Peterson v. Halsted*, 829 P.2d 373, 375 (Colo. 1992). The nonmoving party must receive the benefit of all favorable inferences that may be reasonably drawn from the undisputed facts, and all doubts are resolved against the moving party. *Clementi v. Nationwide Mut. Fire Ins. Co.*, 16 P.3d 223, 225-26 (Colo. 2000).

A party may move for summary judgment on an issue it would not bear the burden of proof upon at trial. *Casey v. Christie Lodge Owners Ass'n, Inc.*, 923 P.2d 365, 366 (Colo. App. 1996). In such an instance, the burden is on the moving party to establish the "nonexistence of a genuine issue of material fact." *Civil Serv. Comm'n v. Pinder*, 812 P.2d 645,649 (Colo. 1991) (*citing Continental Airlines, Inc. v. Keenan*, 731 P.2d 708, 712 (Colo. 1987)). This burden may be satisfied by "demonstrating that there is an absence of evidence in the record to support the

nonmoving party's case." *Id*. "An affirmative showing of specific facts, un-contradicted by any counter affidavits, leaves a trial court with no alternative but to conclude that no genuine issue of material fact exists." *Civil Serv. Comm'n*, 812 P.2d at 649 (*citing Terrell v. Walter E. Heller & Co.*, 439 P.2d 989, 991 (Colo. 1968)).

ANALYSIS

The State requests that this Court enter summary judgment regarding Defendants' liability on its second claim for relief, "Refunds to Consumers – Code Unlicensed Lender." Specifically, the State contends that Defendants made and collected supervised loans without a supervised lender's license, in violation of § 5-2-301 the Code, and therefore, Defendants are subject to penalty under the Code.

The Code prohibits a person from making or collecting supervised loans without a supervised lender's license, providing that:

> (1) Unless a person . . . has first obtained a license from the administrator authorizing him or her to make supervised loans, he or she shall not engage in the business of:
>
> (a) Making supervised loans or undertaking direct collection of payments from or enforcement of rights against consumers arising from supervised loans he or she has previously made.

Code § 5-2-301(1)(a). Where a creditor has violated the Code regarding the authority to make supervised loans contained in Code § 5-2-301:

> the consumer is not obligated to pay the finance charge and has a right to recover from the person violating this code . . . a penalty in an amount to be determined by the court not in excess of three times the amount of the finance charge . . . .

Code § 5-5-201(1). Further, Code § 5-6-114 authorizes the State to seek these amounts on the consumers' behalves and provides that the Administrator may "bring an action against a creditor

for making or collecting charges in excess of those permitted by this code" and, if "an excess charge has been made, the court shall order the respondent to refund to the consumer the amount of the excess charge and to pay a penalty to the consumer as provided in [§] 5-5-201."

Code § 5-1-301(47) defines a "supervised" loan as a consumer loan with an APR in excess of 12%. In turn, a consumer loan is a loan in which: (1) the consumer is a person other than an organization; (2) the principal does not exceed $75,000; (3) a loan finance charge is made; and (4) the debt is incurred primarily for personal, family, or household purposes. *See* Code § 5-1-301(15)(a).

Here, the undisputable facts before the Court confirm that Western Sky makes and collects unlicensed supervised loans to Colorado citizens, thereby subjecting Defendants to liability under the Code.[1] However, Defendants assert that the State's Motion fails because: (1) Mr. Webb is a Native American who conducts business within the boundaries of the Reservation, and therefore, Webb and his company, Western Sky, are subject to tribal immunity and federal preemption, not subject to state jurisdiction and control; and, (2) in its Motion, the State improperly "relies heavily on the non-binding stipulation [of fact] in an unrelated federal court case [*FTC v. Payday Financial, LLC*, Case No. 11 CV 03017 (D.S.D. May 18, 2012) (the "South Dakota Case")]."

I. Defendants' contention that the State's Motion fails because it improperly relies on the Non-Binding Stipulation in the South Dakota Case is not persuasive.

Defendants assert that the State improperly relied on the stipulation from the South Dakota Case. Specifically, Defendants maintain that the State's contentions, based on the

[1] While Defendants deny certain of Plaintiff's allegation with respect to Defendants making and collecting supervised loans without a license, their denials are simply not supported by the record before the Court.

stipulation, that Western Sky: (a) "makes withdrawals from the consumer's bank account'" (b) "initiates collection procedures if the consumer foes not pay the loan;" and, (c) "collected illegal and unlicensed supervised loans," are clearly disputed and contradicted by the record before the Court. Therefore, Defendants assert that summary judgment is not appropriate.

However, in its Motion, the State contends that the facts are "taken principally from the Complaint's allegations that [D]efendants admit in their Answer." While the aforementioned facts, as alleged by the State derive from the stipulation in the South Dakota Case, other salient facts come from Defendants' own documents, their discovery responses, sworn affidavits, and deposition testimony. Further, as discussed in greater detail below, the disputed facts referenced above with respect to Defendants' withdrawal and collection procedures are not material to resolving the present issue before the Court – whether Defendants are liable under the Code – as there is ample undisputed evidence before the Court to establish that Defendants have engaged in unlicensed supervised loans and are not entitled to tribal immunity or federal preemption with respect to their business activities.

II. Defendants are not entitled to Tribal Immunity or Federal Preemption.

Turning next to Defendants' contention that they are entitled to tribal immunity because they are conducting business on the Reservation, the Court concludes that Defendants' argument is without merit. This Court addressed this very argument in its Order dated, April 17, 2012, denying Defendants' Motion to Dismiss, rejecting Defendants' assertion that the State is attempting to reach into and regulate on-reservation activity. Defendants' recycling of this same argument here is equally unpersuasive.

Specifically, in the April 17, 2012 Order, this Court found *State ex rel. Suthers v. Cash Advance & Preferred Cash Loans*, 205 P.3d 389 (Colo. App. 2008) ("*Cash Advance I*") instructive on this issue, where, in a near identical factual scenario to this action, the State attempted to investigate a tribal entities alleged usurious internet loan making to Colorado consumers in violation of Colorado's Consumer Credit Code and Consumer Protection Act. *Id.* at 394, *aff'd sub nom. Cash Advance & Preferred Cash Loans v. State*, 242 P.3d 1099 (Colo. 2010).

In *Cash Advance I*, the Court of Appeals determined that business conducted via the internet, which is identical to the type of business conducted by Western Sky here, was sufficient to confer jurisdiction to the State and demonstrated that the business activity constituted off-reservation activity. *See Cash Advance I*, 205 P.3d at 400. Observing that violations of Colorado's Consumer Credit Code and Consumer Protection Act would have significant off-reservation effects that would require the State's intervention, the Court of Appeals held that the State had jurisdiction to "investigate, criminally prosecute, seek declaratory and injunctive relief, and pursue civil remedies for conduct occurring within its borders." *See id.* at 403.

Nevertheless, Defendants maintain that the application of the five-factor test, set forth in *Cash Advance I*, as applied to their business activities here, establish that Western Sky's lending activities occur within the boundaries of the Reservation, thereby preventing the State's enforcement efforts in accordance with tribal immunity. The Court does not agree.

In *Cash Advance I*, the Court of Appeals provided the following factors for courts to consider when determining whether lending activity took place off-reservation: (1) where the contract was entered into; (2) where the contract was negotiated; (3) where performance will

occur; (4) where the subject matter of the contract is located; and, (5) where the parties reside. 205 P.3d at 400. However, in *Cash Advance I* the Court of Appeals did not rely on those factors. Rather, as set forth above, the Court of Appeals employed a long-arm analysis, to conclude that "[b]usiness conducted over the Internet that would confer jurisdiction on a state court also demonstrates that the business activity constitutes off-reservation activity." *Id*. Further, an application of the *Cash Advance I* factors to the uncontroverted facts presented here leads this Court to no contrary conclusion that Defendants' lending activities occur off-reservation.

Similarly, Defendants' contention that Webb is individually protected by tribal immunity as a member of the Tribe is in vain. Again, the Court addressed this very contention in its April 17, 2012 Order, denying Defendants' Motion to Dismiss. Webb, as an enrolled member of the Tribe, is not individually entitled to immunity, nor does his membership in the Tribe confer such immunity upon Western Sky. *See Puyallup Tribe, Inc. v. Dep't of Game*, 433 U.S. 165, 171,72 (1977) (holding that the "doctrine of sovereign immunity . . . does not immunize individual members of [a] tribe.").

Defendants also contend that the State has no regulatory authority of Webb because Webb conducts business through a legally recognized business entity, and the State has alleged no facts sufficient to pierce the corporate veil with respect to Webb. Conversely, the State maintains that Webb's individual liability is not dependent on any "piercing the corporate veil" or "alter ego" theory. Rather, the State contends that Webb's liability flows from the long and well-established principle that those responsible for corporate wrongdoing are personally liable for the corporation's wrongful acts.

In support of its contention, the State directs the Court to several cases from other persuasive jurisdictions. First, in *F.T.C. v. Amy Travel Serv., Inc.*, 875 F.2d 564 (7th Cir. 1989), the Seventh Circuit affirmed a judgment holding individual shareholder and officer defendants liable for consumer restitution and other remedies to the same extent as their businesses. *Id.* at 566, 573-74. In doing so, the Seventh Circuit held that where the individuals participated in the businesses' unlawful acts, "or had authority to control them," the individuals were personally liable. *Id.* at 573. Similarly, in *Texas v. Am. Blastfax, Inc.*, 164 F.Supp.2d 892, 899 (W.D. Tex. 2001), in a state regulatory action brought under the federal Telephone Consumer Protection Act, the court held the individual officers, directors, and shareholders jointly and severally liable with the defendant corporation for monetary judgment and injunctive relief. There, the federal court rejected the defendants' proposition that individual liability for corporate acts required piercing the corporate veil, holding that those who "participate in or authorize the commission of a wrongful act, even if the wrongful act is done on behalf of the corporation, . . . may be personally liable . . . [T]o hold otherwise would allow the individual defendants to simply dissolve the [corporation], set-up a new shell corporation, and repeat their conduct." *Id.* at 897-898.

The State provided the Court with countless other examples of courts holding individual defendants liable for a business's violations under similar circumstances without requiring that the plaintiff pierce the corporate veil. *See, e.g., U.S. v. Pollution Abatement Serv., Inc.*, 763 F.2d 16, 23-25 (2nd Cir. 7985); *McCown v. Heidler*, 527 F.2d 204 (10th Cir. 1975); *Mead v. Johnson & Co. v. Baby's Formula Serv., Inc.*, 402 F.2d 19, 23 (5th Cir. 1968); *Wash v. Ralph Williams' N.W. Chrysler Plymouth, Inc.*, 553 P.2d 423, 439 (Wash. 1979).

This principle is equally established in Colorado. In *Snowden v. Taggart*, 17 P.2d 305 (Colo. 1932) the Colorado Supreme Court held that an officer of a corporation involved with the commission of the corporation's wrongdoing is personally liable, providing:

> This principle is absolutely without exception, and is founded upon the soundest legal analogies, and the wisest public policy. To permit an agent of a corporation, in carrying on its business, to inflict wrong and injuries upon others, and then shield himself from liability behind his vicarious character, would often both sanction and encourage the perpetration of flagrant and wanton injuries by agents of insolvent and irresponsible corporations.

Id. at 307 (internal quotations omitted).

This principle was reiterated in *Sanford v. Kobey Bros. Constr. Corp.*, 689 P.2d 724 (Colo. App. 1984), where the Court of Appeals reversed a trial court's entry of judgment in favor of an individual defendant because the facts presented did not permit the plaintiffs to pierce the corporate veil. In reaching its conclusion, the Court of Appeals provided that:

> Neither the doctrine of *respondeat superior* nor the fiction of corporate existence bars imposition of individual liability for individual acts of negligence, even when the individual is acting in a representative capacity . . . Rather, a servant may be held personally liable for his individual acts . . ., as so may an officer, director, or agent of a corporation for his or her tortious acts, regardless of the fact that the master or corporation also may be vicariously liable.

Id. at 725-26.

Here, it is uncontroverted that Webb is the sole manager, executive director, owner, and principal of Western Sky. It is further undisputed that Webb directs, controls, manages, participates in, supervises, is responsible for, and authorizes Western Sky's activities. Finally, the record before the Court confirms that Webb has general responsibility and final decision making authority for *all* of Western Sky's business operations. Accordingly, because Webb has

the exclusive authority to control the actions of Western Sky, he may also be held individually liable for Western Sky's violations of the Code.

To the extent that Defendants contend that "Indian businesses operating on a reservation are not subject to state jurisdiction and control" and are thus preempted by federal law, the Court is not persuaded.

Again, this very contention was rejected by this Court in its April 17, 2012 Order denying Defendants' Motion to Dismiss. As discussed above, the record before the Court confirms that Defendants' conduct does not involve the regulation of Indian affairs on an Indian reservation. Further, as discussed in the Court's April 17, 2012 Order, the Court finds the federal court's determination in *State ex rel. Suthers v. Western Sky, LLC*, 845 F.Supp.2d 1178, 1182 (D. Colo. 2011), regarding Defendants' preemption argument particularly instructive:

> Defendants argue that Congress has completely preempted the regulation of Indian affairs on a reservation. However, even if that were so, it begs the question of whether the conduct of which [the State] complain[s] involved regulation of Indian affairs on a reservation. I find and conclude that it did not. [The State] allege[s], and defendants do not dispute, that defendants were operating via the Internet . . . . The borrowers do not go to the reservation in South Dakota to apply for, negotiate or enter into loans. They apply for loans in Colorado by accessing defendants' website. They repay the loans and pay the financing charges from Colorado; Western Sky is authorized to withdraw the funds electronically from their bank accounts. The impact of the allegedly excessive charges was felt in Colorado. Defendants have not denied that they were doing business in Colorado for jurisdictional purposes, nor does it appear that they could. *See* [*Cash Advance I*, 205 P.3d at 400]. "Business conducted over the Internet that would confer jurisdiction on a state court also demonstrates that the business activity constitutes off-reservation activity." [*Id.*]

Moreover, notwithstanding the above, it is well settled that tribes are subject to state law when engaged in off-reservation activity. *See, e.g., Nevada v. Hicks*, 533 U.S. 353 (2001); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973); *Organized Vill. Of Kake v. Egan*, 369 U.S. 60, 62-63, 75-76 (1962).

C.R.S. § 5-1-201(1) provides that the Code "applies to consumer credit transactions made in this state." The Code further provides that a consumer credit transaction is made in this state if:

> (b) A consumer who is a resident of this state enters into a transaction with a creditor who has solicited or advertised in this state by any means, including but not limited to mail, brochure, telephone, print, radio, television, internet, or any other electronic means.

Code § 5-1-201(1)(b).

Here, it is undisputed that Defendants operate a website and engage in television advertising in this state, thereby soliciting and advertising their lending business in Colorado. It is further, undisputed that Defendants have entered into loan agreements with Colorado residents.

Accordingly, because Defendants' business activities are conducted off-reservation and because Defendants solicit and advertise their business in Colorado and have, in fact, entered into loan agreements with Colorado citizens, Defendants are not entitled to tribal immunity or federal preemption. Rather, based on the undisputed facts before the Court, the Court concludes that Defendants are subject to the Code's previsions and are thereby liable for any violation thereof. Specifically, because Western Sky is not, and has never been, licensed as a supervised lender, and because unlicensed lenders are not authorized to charge a finance charge on

supervised loans, Defendants' liability for restitution to consumers of all finance charges, including penalties, on all unlicensed loans made or collected with respect to Colorado citizens, is established as a matter of law.

III. The State is entitled to Attorney's Fees incurred in Replying to Defendants' Tribal Immunity and Preemption Arguments in their Response.

The State requests that this Court grant its request for Attorney's fees pursuant to C.R.S. § 13-17-101, *et seq*., for fees incurred in replying to Defendants' tribal immunity and federal preemption arguments, raised in their Response. C.R.S. § 13-17-102 provides, in pertinent part, that a court may award reasonable attorney fees against a party who brings an action "that lacks substantial justification." *See* C.R.S. § 13-17-102(2). Under this statute, the term "lacks substantial justification" means substantially frivolous, substantially groundless, or substantially vexatious. C.R.S. § 13-17-102(4).

Here, as discussed above, the crux of Defendants' argument is that they are entitled to tribal immunity and federal preemption because their business activities are conducted on the Reservation. This very argument has been raised twice previously by these Defendants, and was rejected in each instance. Defendants first raised this argument in *Suthers*, 845 F.Supp.2d at 1182, where the federal court determined that "[D]efendants' repeated argument that [this] case involves regulation of Indian Affairs on an Indian Reservation" so lacked an "objectively reasonable basis" as to entitle the State to its costs and attorney's fees. *Id*. Defendants raised this same argument in the present litigation in their Motion to Dismiss. This argument was again rejected by this Court in its April 17, 2012 Order, denying Defendants' Motion to Dismiss. In their Response to the State's Motion for Summary Judgment, Defendants now raise this same argument for a third time, seemingly undeterred by the federal court's ruling in *Suthers*, as well

as this Court's prior ruling here. While Defendants purportedly provide additional facts concerning the details of their loan making process in support of their tribal immunity and preemption arguments, a review of the additional information provided by Defendants leads the Court to no contrary conclusion. Rather, these additional materials confirm what this Court, along with the *Suthers* court, already determined – that Defendants' actions in offering and entering into loans with Colorado consumers, via the Internet, does not constitute on-reservation business activity.

Defendants' continued assertions that they are entitled to tribal immunity and federal preemption, which have been repeatedly rejected by this Court and the Federal Courts, evince stubbornly litigious and substantially vexatious defense of this action and warrant and assessment of attorney's fees. *Mitchell v. Ryder*, 104 P.3d 316, 320-21 (Colo. App. 2004). Where, as the Court has found here, an attorney or party has brought or defended an action, or any part thereof, which lacked substantial justification, the Court shall assess attorney's fees. C.R.S. § 13-17-102(4). Any such award is properly entered in favor of the State and against Defendants and their counsel, jointly and severally. C.R.S. § 13-17-102(3).

Accordingly, because Defendants tribal immunity and federal preemption arguments lack substantial justification, the State is entitled to recover its attorney's fees expended in replying to Defendants Response insofar as the State can establish the reasonable fees incurred in addressing Defendants' tribal immunity and preemption arguments.

CONCLUSION

WHERFORE, in light of the reasoning stated above, the State's Motion for Partial Summary Judgment – Second Claim for Relief is hereby GRANTED. It is further ordered that,

in light of the voluminous unlicensed loans extended by Defendants in violation of the Code, estimated at over 4,000, the State's request that a special master be appointed to determine the number of, and extent to which, consumers have been adversely affected by Defendants' unlawful activity in this matter is GRANTED. The Parties shall submit a joint list of three potential Special Masters, not later than 14 days from the date of entry of this Order, and the Court will select one from that list. If the parties cannot agree on a list of potential Special Masters, the Court will appoint someone of the Court's choosing. Further, in accordance with the Court's findings herein, the State shall file an Affidavit of Attorney's fees incurred in replying to Defendants' tribal immunity and federal preemption arguments in their Response, not later than 14 days from the date of entry of this Order.

DONE this 15th day of April, 2012.

BY THE COURT:

MICHAEL A. MARTINEZ
District Court Judge

STATE OF ILLINOIS
DEPARTMENT OF FINANCIAL & PROFESSIONAL REGULATION
DIVISION OF FINANCIAL INSTITUTIONS

In the Matter of	)	
Western Sky Financial, LLC	)	No. 13 CC 265
	)	

To: Western Sky Funding Group, Ltd.
612 E Street
Timber Lake, SD 57656

CEASE AND DESIST ORDER

The DEPARTMENT OF FINANCIAL AND PROFESSIONAL REGULATION, DIVISION OF FINANCIAL INSTITUTIONS ("Department"), having conducted an examination of facts related to activities performed by Western Sky Financial, LLC ("Western Sky"), pursuant to the Payday Loan Reform Act, 815 ILCS 122/1 et seq., and the Consumer Installment Loan Act, 205 ILCS 670/1 et seq., hereby issues this order:

STATUTORY PROVISIONS

A. Payday Loan Reform Act ("PLRA")

1. Section 1-15(a) of PLRA states, in pertinent part:

> [T]his Act applies to any lender that offers or makes a payday loan to a consumer in Illinois. 815 ILCS 122/§1-15(a).

2. Section 1-10 of PLRA states, in pertinent part:

> "Lender" and "licensee" mean any person or entity, including any affiliate or subsidiary of a lender or licensee, that offers or makes a payday loan, buys a whole or partial interest in a payday loan, arranges a payday loan for a third party, or acts as an agent for a third party in making a payday loan, regardless of whether approval, acceptance, or ratification by the third party is necessary to create a legal obligation for the third party, and includes any other person or entity if the Department determines that the person or entity is engaged in a transaction that is in substance a disguised payday loan or a subterfuge for the purpose of avoiding this Act. 815 ILCS 122/§1-10.

3. Section 3-3(a) of PLRA states, in pertinent part:

> [A] person or entity acting as a payday lender must be licensed by the Department as provided in this Article. 815 ILCS 122/§3-3(a).

4. Section 4-10(e) of PLRA states, in pertinent part:

> The Secretary [of the Department] may issue a cease and desist order to any licensee or other person doing business without the required license, when in the opinion of the Secretary the licensee or other person is violating or is about to violate any provision of this Act or any rule or requirement imposed in writing by the Department as a condition of granting any authorization permitted by this Act. 815 ILCS 122/§4-10(e).

B. Consumer Installment Loan Act ("CILA")

5. Section 1 of CILA states, in pertinent part:

> License required to engage in business. No person, partnership, association, limited liability company, or corporation shall engage in the business of making loans of money in a principal amount not exceeding $40,000, and charge, contract for, or receive on any such loan a greater rate of interest, discount, or consideration therefor than the lender would be permitted by law to charge if he were not a licensee hereunder, except as authorized by this Act after first obtaining a license from the Director of Financial Institutions (hereinafter called the Director). 205 ILCS 670/§1.

6. Section 20.5(a) of CILA states, in pertinent part:

> The Director may issue a cease and desist order to any licensee, or other person doing business without the required license, when in the opinion of the Director, the licensee, or other person, is violating or is about to violate any provision of this Act or any rule or requirement imposed in writing by the Department as a condition of granting any authorization permitted by this Act. 205 ILCS 670/§20.5(a).

7. Section 20.5(b) of CILA states, in pertinent part:

> The Director may issue a cease and desist order prior to a hearing. 205 ILCS 670/§20.5(b).

8. Section 20.5(h) of CILA states, in pertinent part:

> The powers vested in the Director by this Section are additional to any and all other powers and remedies vested in the Director by law, and nothing in this Section shall be construed as requiring that the Director shall employ the power conferred in this Section instead of or as a condition precedent to the exercise of any other power or remedy vested in the Director. 205 ILCS 670/§20.5(h).

FACTUAL FINDINGS

9. On or about March 6, 2013, Western Sky sent an email communication to an Illinois consumer soliciting an application for a PLRA or CILA loan.

10. On or before March 2013, Western Sky solicited applications for PLRA and CILA loans from Illinois consumers through its website, www.westernsky.com.

11. On or before March 2013, Western Sky advertised PLRA and CILA loans to Illinois consumers on multiple television networks.

12. On or before March 2013, Western Sky was engaged in the business of offering, making, or arranging PLRA loans to Illinois consumers.

13. On or before March 2013, Western Sky was engaged in the business of offering, making, or arranging CILA loans to Illinois consumers.

14. Western Sky has never been licensed by the Department to offer, make, or arrange PLRA loans to Illinois consumers.

15. Western Sky has never been licensed by the Department to offer, make, or arrange CILA loans to Illinois consumers.

LEGAL FINDINGS

16. Western Sky violated Section 3.3 of the Payday Loan Reform Act by offering, making, or arranging PLRA loans to Illinois consumers without first applying for, and obtaining the required license from the Department.

17. Western Sky violated Section 1 of the Consumer Installment Loan Act by offering, making, or arranging CILA loans to Illinois consumers without first applying for, and obtaining the required license from the Department.

NOW IT IS HEREBY ORDERED:

I. Pursuant to Section 4-10(e) of the Payday Loan Reform Act, Western Sky shall immediately **CEASE AND DESIST** offering, making, or arranging PLRA loans to consumers in Illinois.

II. Pursuant to Section 20.5 of the Consumer Installment Loan Act, Western Sky shall immediately **CEASE AND DESIST** offering, making, or arranging CILA loans to consumers in Illinois.

III. Western Sky is ordered to **PRODUCE DOCUMENTS** to the Department consisting of any and all records, files, account statements, communications, and documents containing information relevant to the accounts of all active and inactive Illinois consumers. Western Sky shall provide copies of all print and electronic advertising, mailings, fliers, email communications, website pages, and any other type of solicitation or advertisement that Western Sky is using or has used to solicit consumers in Illinois. All documents requested pursuant to this paragraph shall be produced by **March 29, 2013**, and delivered to the Consumer Credit Supervisor at the Illinois Department of Financial and Professional

Regulation, Division of Financial Institutions, 100 W. Randolph Street, 9th Floor, Chicago, IL 60601.

Pursuant to Section 4-10(e) of PLRA and Section 20.5(c) of CILA, notice shall be made either personally or by certified mail. Service by certified mail shall be deemed completed when the notice is deposited in the U.S. mail. Western Sky may request, in writing, a hearing on the Order within 15 days after the date of service.

Dated this 8th day of March 2013

_____

Roxanne Nava, Director
Division of Financial Institutions

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DEBORAH JACKSON, et al.,	)	
	)	
Plaintiff-Appellants,	)	
	)	
vs.	)	11 C 9288
	)	
PAYDAY FINANCIAL, LLC, et al.,	)	
	)	
Defendant-Appellees.	)	

DISTRICT COURT'S RESPONSE TO COURT OF APPEALS REMAND FOR FINDINGS OF FACT

The United States Court of Appeals has remanded two questions to this Court while still retaining jurisdiction of the case. This Court has been asked to make findings of fact as to the following:

1. Whether the Cheyenne River Sioux Tribe has applicable tribal law readily available to the public and, if so, under what conditions; and

2. Whether the Cheyenne River Sioux Tribe has an authorized arbitration mechanism available to the parties and whether the arbitrator and method of arbitration required under the contract is actually available.

The parties were asked to submit their own responses to these questions with any documentary exhibits or attachments they desired to accompany their responsive legal briefs. Each party was content to rely on its submissions without the conduct of additional discovery or presentation of testimony. It is on that record that this Court

has prepared the requested findings of fact. The parties' submissions shall accompany the Court's findings of fact.

As to the question of whether there is applicable tribal law readily available to the public, the parties' submissions differ. After a number of failed attempts, the Plaintiffs acknowledged having obtained a copy of the tribe's 1978 Law and Order Code at a cost of $125 from the National Indian Law Library. Defense counsel avers that a copy of the Cheyenne River Sioux Tribal Code was requested by telephone from the National Indian Law Library and received without any payment required, along with PDF copies of Tribal Resolutions and Ordinances enacted between 1981 and 2000, including the Tribe's Commercial Code.

It is this Court's finding that the answer to the first of the remanded questions is in the affirmative. Each party was able to secure a copy of the Tribal Law, although the Plaintiff's did so less readily. Nevertheless, we believe the law can be acquired by reasonable means.

The second of the remanded questions requires consideration of multifaceted aspects of the concept of arbitration and its mechanisms, and its actual availability to the parties before the Court.

Claims relating to Defendants' loans have been the subject of only one arbitration proceeding which is currently pending. That arbitration is the subject of the case entitled *Inetianbor v. Cash Call, Inc.* No. 13 CV 60066 (S.D. Fla. 2013). The

procedural history of that case and relevant associated materials are included in the Plaintiff's submissions. That lawsuit involved a loan of $2,525 for three years with the total payments due under the contract of $11,024.82. As the contract states, the cost of the credit at a yearly rate was 139.31%. By anybody's definition, this is a usurious rate of interest.

The arbitrator selected in the *Inetianbor* case was Robert Chasing Hawk, a Tribal Elder. He was personally selected by Martin Webb, the man who owns and operates the Webb entities which are run as a common enterprise. Mr. Webb is himself a member of the Tribe. Although denying any preexisting relationship with either party in the case, Robert Chasing Hawk is the father of Shannon Chasing Hawk. Robert Chasing Hawk has acknowledged that his daughter worked for one of the companies run by Martin Webb.

Mr. Chasing Hawk is not an attorney and has not been admitted to the practice of law either in South Dakota or the court of the Cheyenne River Sioux Tribal Nation. He has not had any training as an arbitrator and the sole basis of his selection was because he was a Tribal Elder.

Black's Law Dictionary, DeLuxe Fourth Edition, defines "arbitrator" as "a private, disinterested person, chosen by the parties to a disputed question, for the purpose of hearing their contention, and giving judgment between them; to whose decision (award) the litigants submit themselves either voluntarily, or, in some cases,

compulsorily by order of a court." Freedom from bias and prejudice is a stated criteria of the American Arbitration Association's Criteria to serve as an arbitrator. Similar is JAM's Arbitrators Ethics Guidelines which requires freedom from any appearance of a conflict of interest. Illinois Supreme Court Rule 62 states, in part, that "a judge should respect and comply with the law and should conduct himself or herself at all time in a manner that promotes public confidence in the integrity and impartiality of the judiciary. A judge should not allow the judge's family, social or other relationships to influence the judge's judicial conduct or judgment." It should be no less for an arbitrator.

The selection of Robert Chasing Hawk as the arbitrator in the only comparable case is instructive. No arbitration award could ever stand in the instant case if an arbitrator was similarly selected, nor could it satisfy the concept of a "method of arbitration" available to both parties. The selection of Chasing Hawk in the *Inetianbor* case was a purely subjective selection by only one of the parties to the arbitration. The process was not "methodized" in any reasonable sense of the word. Webb and Chasing Hawk are members of the same tribe. The Plaintiffs are not. The employment by Webb of the arbitrator's daughter cannot be ignored. The conduct permitted by the arbitration provisions in this case could never satisfy the straightforward definition in Black's Law Dictionary.

Equally telling about Payday Financial LLC, Cash Call, Inc., and the Webb Entities operations is the State of New Hampshire Banking Department's Cease and Desist Order. The Department first conducted a routine examination of Cash Call. This was followed by the issuance of an administrative subpoena duces tecum to Cash Call seeking a variety of documents related to Cash Call's relationship with Western Sky. Cash Call complied and produced the requested documents.

Among other findings made by the Department, it determined that the respondents were engaged in a business scheme and took substantial steps to conceal the business scheme from consumers and state and federal regulators. The findings included the fact that Western Sky was nothing more than a front to enable Cash Call to evade licensure by state agencies and to exploit Indian Tribal Sovereign Immunity to shield its deceptive practices from prosecution by state and federal regulators. The Department found a reasonable basis to believe the business scheme described constituted an unfair or deceptive act or practice used as a shield to evade licensure from the Department by exploiting Indian Tribal Sovereign Immunity.

While this Court recognizes that no trial has been held to permit a full exposition of all relevant facts, each party was afforded the opportunity to present whatever evidence it wished. It is abundantly clear that, on the present record, the answer to the

second question is a resounding no. Other than this Court's disagreement with Plaintiffs' position as to the availability of tribal law, pages 8 through 10 of "Plaintiffs' Statement of Relevant Facts, and On Further Discovery Required on Limited Remand by Court of Appeals" fairly describe what the facts show. The scheme described in the New Hampshire Banking Department's Cease and Desist Order has been apparently devised for the purpose of evading federal and state regulation of Defendants' activities. The intrusion of the Cheyenne River Sioux Tribal Nation into the contractual arbitration provision appears to be merely an attempt to escape otherwise applicable limits on interest charges. As such, the promise of a meaningful and fairly conducted arbitration is a sham and an illusion.

We respectfully submit our responses to the questions posed.

Charles P. Kocoras
United States District Judge

Dated: August 28, 2013