UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

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| JOHN S. MACDONALD, | : | |
| | : | Civil Action No. 2:16-cv-02781-MCA-SCM |
| Plaintiff, | : | |
| | : | |
| v. | : | |
| | : | |
| CASHCALL, INC.; WS FUNDING, LLC; DELBERT SERVICES CORP.; and J. PAUL REDDAM, | : | **Oral Argument Requested** |
| | : | |
| Defendants. | : | Motion Date: October 3, 2016 |

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**DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF MOTIONS TO COMPEL ARBITRATION OR ALTERNATIVELY, TO DISMISS**

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Defendants CashCall, Inc. ("CashCall"), WS Funding, LLC ("WS Funding"), Delbert Services Corp. ("Delbert"), and J. Paul Reddam ("Reddam") (collectively, "Defendants") respectfully submit this Memorandum of Law in Support of their Motions: (1) to compel arbitration of the claims set forth in the Complaint (D.E. 1) by Plaintiff John S. MacDonald ("Plaintiff"); or (2) to dismiss for improper venue pursuant to Federal Rule of Civil Procedure 12(b)(3); (3) to dismiss Defendant Reddam for lack of personal jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(2); (4) to dismiss on the ground that New Jersey law does not apply to the claims asserted by Plaintiff; and (5) to dismiss the Complaint for failure to state a claim upon which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6).

## INTRODUCTION

Plaintiff filed the six-count Complaint on May 17, 2016. The Complaint seeks to allege claims under: New Jersey usury laws (Count I); the New Jersey Consumer Finance Licensing Act ("CFLA") (Count II); the New Jersey Consumer Fraud Act ("CFA") (Count III); restitution and unjust enrichment based upon alleged usury (Count IV); a declaration that tribal law and forum do not apply, that the arbitration clause is void, and that any purported class waiver is void (Count V); and the federal Racketeer Influenced and Corrupt Organizations Act ("RICO") (Count V).[1] *See* Complaint ("Compl.") at ¶¶ 56, 63, 72, 75, 81, 89-90.

Plaintiff's claims relate to a loan he obtained from Western Sky Financial, LLC ("Western Sky"), a company owned by an enrolled member of the Cheyenne River Sioux Tribe ("CRST") that operates from the Cheyenne River Indian Reservation (the "Reservation") under CRST law. Compl. ¶¶ 16, 38. Plaintiff's loan was subsequently sold and assigned to CashCall and then Delbert for servicing. *Id.* at ¶¶ 40-41. The loan is memorialized in the "Western Sky

[1] The Complaint refers to Count V twice.

Consumer Loan Agreement" executed by Plaintiff on December 18, 2012 ("Loan Agreement"). A copy of the Loan Agreement is attached to the Declaration of Andrew Muscato as Exhibit A. The Loan Agreement contains comprehensive dispute resolution provisions that render this Court an improper forum and require tribal law to apply to any dispute. Indeed, this Court should enforce the provisions of the Loan Agreement and dismiss the Complaint for five separate reasons.

*First*, the Loan Agreement contains a comprehensive arbitration provision (the "Arbitration Clause") that mandates that this entire case be sent to arbitration. Loan Agreement at 8-12. The Arbitration Clause applies to all claims relating to the Loan Agreement, and requires arbitration of any dispute as to the validity, enforceability, or scope of the Arbitration Clause itself. The Arbitration Clause also requires that arbitration occur in available arbitral forums, including the American Arbitration Association ("AAA") or Judicial Arbitration and Mediation Services ("JAMS"). Under the Federal Arbitration Act ("FAA"), this Court should enforce the Arbitration Clause and dismiss the Complaint.

*Second*, the Complaint should be dismissed for improper venue, because Plaintiff "consent[ed] to the sole subject matter and personal jurisdiction of the Cheyenne River Sioux Tribal Court" for all in-court adjudication relating to the "Loan Agreement, its enforcement or interpretation." Loan Agreement at 3. Under the venue selection clause of the Loan Agreement, every aspect of any dispute relating to the Loan Agreement, the Loan Agreement's enforcement, or the Loan Agreement's interpretation that is not subject to arbitration is to be resolved in tribal court. This Court should enforce this mandatory venue clause.

*Third*, CRST law, rather than New Jersey law, applies to the Loan Agreement such that all of Plaintiff's claims brought under New Jersey law, Counts I, II, III and IV, should be

dismissed. And, even if the Court should find that New Jersey law was in any way applicable, the New Jersey law claims fail to state a claim upon which relief can be granted.

*Fourth*, the Complaint does not allege facts sufficient to support its RICO claim and that claim should also be dismissed. Plaintiff seeks to invoke RICO's harsh penalties to resolve what are essentially contract disputes (including disputes with non-parties), but fails to define an enterprise distinct from the Defendants.

*Finally*, the Complaint should be dismissed as to Defendant Reddam because he does not have sufficient minimum contacts with New Jersey and thus is not subject to personal jurisdiction in this Court. The pleading alleges no conduct by Reddam other than conduct expected of the CEO of any corporation; New Jersey law is clear that this is not sufficient to subject him to jurisdiction in New Jersey courts.

For all of these reasons, as set forth more fully below, the Court should grant Defendants' Motion to Compel Arbitration and Motion to Dismiss in full.

## BACKGROUND

On December 18, 2012, Plaintiff entered into the Loan Agreement with Western Sky, a company licensed by and operating within the boundaries of the CRST. Loan Agreement at 2. Plaintiff obtained a Western Sky loan of $5,000. Compl. ¶ 38. Plaintiff obtained his loan directly from Western Sky and electronically executed the Loan Agreement. *Id.* at ¶¶ 38-39.

The Loan Agreement contains comprehensive forum selection and choice-of-law provisions. Indeed, the very first sentence of the Loan Agreement states, in clear and conspicuous type, that the Loan Agreement "**is subject solely to the exclusive laws and jurisdiction of the Cheyenne River Sioux Tribe, Cheyenne River Indian Reservation**." Loan Agreement at 3 (emphasis in original). Plaintiff further agreed that:

> [b]y 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.

*Id.* Moreover, the Loan Agreement contains an additional paragraph providing that tribal law governs the parties' agreement:

> 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 . . . 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.

*Id.* at 3.

The Loan Agreement also contains a clearly-identified, comprehensive arbitration provision requiring every dispute relating to the loan to be arbitrated:

> **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**.

*Id.* at 9-10 (heading bolding in original; all other emphasis added). Accordingly, pursuant to this arbitration provision, Plaintiff agreed to arbitrate all claims arising from the Loan Agreement, including all claims against the holder of the underlying note "as well as any marketing, servicing, and collection representatives and agents." *Id.* at 10. The Loan Agreement further provided that Western Sky "may assign or transfer this Loan Agreement or any of our rights under it at any time to any party." *Id.* at 9. Plaintiff agreed to be bound by the terms and conditions of the Loan Agreement by signing it in accordance with the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. § 7001, *et seq. Id.* at 7.

In executing the Loan Agreement, MacDonald affirmatively agreed to the following by placing a "✓" in the box beside each statement:

> 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.**

*Id.* at 14 (capitals and bold in original).

On December 26, 2012, Western Sky sent Plaintiff an email informing him that: his loan had been sold to WS Funding; the loan would be serviced by CashCall; and CashCall would collect payments under the Loan Agreement. Compl. ¶ 40. Subsequently, on August 13, 2013, Delbert sent Plaintiff an email informing him that thereafter the loan would be serviced by Delbert and that Plaintiff should direct future loan payments to Delbert. *Id.* at ¶ 41.

Plaintiff improperly brought suit in this Court despite the clear and comprehensive dispute resolution provisions in the Loan Agreement, and as a result, this Court should compel arbitration and dismiss the Complaint.

## ARGUMENT

As set forth below, Plaintiff's claims are centered on a Loan Agreement under which Plaintiff agreed to arbitrate "any controversy or claim" between him and, *inter alia*, the holder of the note and "any marketing, servicing and collection representatives and agents" – which includes the Defendants. Loan Agreement at 9-10. The Loan Agreement also contains a broad forum selection and choice-of-law clause that requires all in-court disputes to be heard only by the courts of the Cheyenne River Sioux Tribe and for CRST law to apply to these disputes. Therefore, this action should be dismissed.

## I. PLAINTIFF'S CLAIMS SHOULD BE ARBITRATED AND THIS CASE DISMISSED.

Federal law favors arbitration and requires courts to compel arbitration where parties have agreed to resolve their disputes by arbitration. The FAA specifically 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; *see also Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 664 (2010) (the central purpose of the FAA "is to ensure that private agreements to arbitrate are enforced according to their terms") (internal quotation marks and citation omitted); *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 270-71 (1995). ["It intended courts to "enforce [arbitration] agreements into which parties had entered," ibid. (footnote omitted), and to "place such agreements 'upon the same footing as other contracts," *271]

The U.S. Supreme Court has explained that the FAA enunciates a "strong federal policy in favor of enforcing arbitration agreements" that requires courts to "rigorously enforce agreements to arbitrate." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 217, 221 (1985); *see also DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 471 (2015). "[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration," including when "construe[ing] . . . the contract language itself." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983). "[C]ourts must place arbitration agreements on an equal footing with other contracts, and enforce them according to their terms." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (citation omitted). The FAA "leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues" covered by an arbitration agreement. *Dean Witter Reynolds*, 470 U.S. at 218.

A. **The Arbitration Clause Requires Arbitration Of This Entire Case.**

The plain language of the Loan Agreement requires that this case be resolved in arbitration. Specifically, the Loan Agreement defines the "Disputes" subject to mandatory arbitration in the "broadest possible" manner, including (but not limited to): (a) "all claims or demands . . . based on any legal or equitable theory (tort, contract, or otherwise)"; and (b) "any claim based upon . . . the handling or servicing of [Plaintiff's] account whether such Dispute is based on a tribal, federal or state constitution, statute, ordinance, regulation, or common law." Loan Agreement at 9-10. Issues "concerning the validity, enforceability, or scope of the loan or [the] Arbitration agreement" also must be resolved in arbitration. *Id*. at 10.

The Arbitration Clause requires arbitration of Plaintiff's entire Complaint, which alleges that the Defendants have violated federal and state laws in the course of servicing Plaintiff's loan. The Arbitration Clause includes the claims asserted against the Defendants. The Arbitration Clause requires Plaintiff to arbitrate "any controversy or claim between you and Western Sky or the holder or servicer of the Note." *Id*. at 9. As such, Plaintiff's claims against the Defendants are squarely within the ambit of the Arbitration Clause. Indeed, all of Plaintiff's claims, including his challenges to the enforceability of the Arbitration Clause, are subject to arbitration.

**B. An Arbitral Forum Is Available For Plaintiff.**

Plaintiff's Loan Agreement permits arbitration by AAA, JAMS or another arbitration organization agreed upon by the parties. Nonetheless, the Complaint does not even address the AAA/JAMS arbitration provision. *See generally* Compl. The Loan Agreement states, in relevant part: "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."

Loan Agreement at 9 (emphasis added). The phrase "except as provided below," refers, *inter alia*, to a subsequent paragraph titled "Choice of Arbitrator," which reads in part:

> 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.

*Id.* at 10 (emphasis added).

Both AAA and JAMS provide available arbitral fora for Plaintiff to arbitrate his claims. Indeed, various District Courts have found this exact arbitration provision valid and enforceable and have compelled arbitration of claims similar to those here:

- *Banks v. CashCall, Inc.*, No. 6:14-cv-488, 2016 WL 3021749, at *2, *6 (M.D. Fla. May 26, 2016) (compelling arbitration because the AAA/JAMS provision provides borrowers "the option to submit [their] disputes to [AAA], JAMS, or any other arbitration organization");

- *Chitoff v. CashCall, Inc.*, No. 0:14-cv-60292, 2014 WL 6603987, at *1 (S.D. Fla. Nov. 17, 2014) (compelling arbitration because the same arbitration provision at issue here "only requires that a tribal representative administer arbitration *except as otherwise provided*, and a subsequent portion of the agreement allows for arbitration to be administered by [AAA] or by [JAMS]");

- *Kemph v. Reddam*, No. 13-cv-6785, 2015 WL 1510797, at *5-6 (N.D. Ill. Mar. 27, 2015) (compelling arbitration, holding that "since Plaintiffs' loan agreements permit arbitration to be administered by a third party such as AAA or JAMS pursuant to that organization's consumer dispute rules, the concerns in *Jackson* are inapplicable");

- *Narula v. Delbert Servs. Corp.*, No. 2:13-cv-15065, 2014 WL 3752797, at *2-3 (E.D. Mich. July 30, 2014) (compelling arbitration because "[a]rbitration may be conducted by the AAA, JAMS, or any other mutually agreeable arbitration organization");

- *Williams v. CashCall, Inc.*, 92 F. Supp. 3d 847, 854 (E.D. Wis. 2015) (compelling arbitration of plaintiff Williams' claims because his loan agreement provides "the option of choosing to arbitrate any claims that he has relating to his agreement before the AAA, JAMS, or another mutually acceptable organization, applying the consumer dispute rules of the selected administering organization and conducted by an arbitrator from the selected organization's system");

- *Yaroma v. Cashcall, Inc.*, 130 F. Supp. 3d 1055, 1061-66, 1068 (E.D. Ky. 2015) (compelling arbitration because AAA or JAMS may conduct the arbitration instead of a CRST representative, such that "a proper arbitral forum exists, and therefore the arbitration provisions are enforceable and will not deprive Yaroma of a meaningful way of resolving her dispute").[2]

Defendants respectfully submit that there is no basis for this Court to reach a different conclusion. Accordingly, Defendants request that the Court compel Plaintiff to arbitrate his claims and dismiss this action.

## II. ALTERNATIVELY, THE COURT SHOULD CONCLUDE THAT PLAINTIFF IS PROCEEDING IN AN IMPROPER VENUE.

Transfer is not available when a forum selection clause specifies a non-federal forum; instead, the district court should dismiss the action so it can be filed in the appropriate forum. *See Salovaara v. Jackson Nat'l Life Ins. Co.*, 246 F.3d 289, 298 (3d Cir. 2001) ("Transfer is not available, however, when a forum selection clause specifies a non-federal forum. In that case, it seems the district court would have no choice but to dismiss the action so it can be filed in the appropriate forum so long as dismissal would be in the interests of justice.")

Forum selection clauses "are *prima facie* valid and should be enforced" unless the opposing party makes a "strong showing," under specified legal standards, that enforcement

[2] Defendants acknowledge that other courts have found the AAA/JAMS arbitration provision to be invalid. *See*, *Hayes v. Delbert Servs. Corp*. 811 F.3d 666 (4th Cir. 2016); Opinion, *Parm v. Nat'l Bank of Cal.*, __ F.3d __, No. 15-12509 (11th Cir. Aug. 29, 2016); Order Denying Mot. to Dismiss & Compel Arbitration, *Inetianbor v. CashCall, Inc.*, No. 13-60066 (S.D. Fla. Aug. 18, 2016); *Smith v. W. Sky Fin., LLC*, No. 15-3639, 2016 WL 1212697 (E.D. Pa. Mar. 4, 2016), *appeal dismissed*, No. 16-1786 (3d Cir. Apr. 19, 2016). However, the weight of authority across the country supports compelling arbitration in most cases, including here.

would be "unreasonable under the circumstances." *Hunt Optics & Imaging, Inc. v. Greene*, CV No. 10-503, 2010 WL 3303792, at *2 (W.D. Pa. Aug. 19, 2010) (quoting *Foster v. Chesapeake Ins. Co., Ltd.*, 933 F.2d 1207, 1219 (3d Cir. 1991)). The party seeking to avoid the forum selection clause has the burden of proving that it is unreasonable, and therefore invalid. *Krauss v. Steelmaster Bldgs., LLC*, No. 06-796, 2006 WL 3097767, at *2 (E.D. Pa. Oct. 27, 2006).

Plaintiff's Loan Agreement selects the CRST Tribal Court, a non-federal forum, as the proper venue for any disputes that are not otherwise subject to arbitration. The Loan Agreement states:

> 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 of federal law or regulation shall apply to this Loan Agreement, its enforcement or interpretation.

Ex. A at 3. Significantly, Plaintiff has failed to allege any basis to suggest that enforcing the clause and requiring him to proceed in Tribal Court would be unfair or unreasonable. As a result, even if Plaintiff's claims were not all subject to arbitration, Plaintiff would be required to proceed in the CRST Tribal Court, rather than this Court, because that is the forum to which he expressly agreed. *See generally Dolgencorp, Inc. v. Mississippi Band of Choctaw Indians*, 746 F.3d 167 (5th Cir. 2014), *aff'd by equally divided court sub nom., Dollar Gen. Corp. v. Mississippi Band of Choctaw Indians*, 136 S. Ct. 2159 (2016) (upholding tribal court jurisdiction over non-tribe members arising from consensual relationships). "That there may not have been actual negotiations over the clause does not affect its validity." *Foster*, 933 F.2d at 1219.

The Fifth Circuit's *Dolgencorp* decision confirms that this entire action should be dismissed because the CRST Tribal Court is the proper and agreed upon venue for Plaintiff's

claims. Moreover, if the Court has any doubt as to whether CRST Tribal Court is the proper venue, then the Court should permit the CRST court to resolve the issue pursuant to the doctrine of tribal exhaustion, which entitles the tribal court the first opportunity to answer the question. *See, e.g.*, *Brown v. W. Sky Fin., LLC*, 84 F. Supp. 3d 467, 480-82 (M.D.N.C. 2015) (dismissing the proceeding to give the CRST Tribal Court "a full and fair opportunity to determine the extent of its own jurisdiction" over the proceedings); *Heldt v. Payday Fin., LLC*, 12 F. Supp. 3d 1170, 1186-87 (D.S.D. 2014) (requiring determination by tribal court of whether jurisdiction exists over plaintiff).

## III. PLAINTIFF'S CLAIMS ARE GOVERNED BY CRST LAW AND NOT NEW JERSEY LAW.

Plaintiff's claims under New Jersey's usury laws, the CFLA, and the CFA (Counts I, II, III and IV) fail because they depend on the incorrect premise that New Jersey's interest rate limits apply to Plaintiff's loan. The Loan Agreement contained a valid choice-of-law clause stating that the laws of the CRST govern the Loan Agreement, and that choice-of-law clause is enforceable separate and apart from the arbitration clause. Indeed, courts enforce and apply tribal law where the contract provides for its application. *See Corp. Comm'n of Mille Lacs Band of Ojibwe Indians v. Money Ctrs. of Am., Inc.*, No. 12-1015 (RHK/LIB), 2013 WL 5487419, at *5 n.2 (D. Minn. Sept. 30, 2013) (choice-of-law provision).

It is well established that a federal court sitting in diversity must apply the choice-of-law rules of the forum state to determine the controlling substantive law. *See Klaxon Co. v. Stentor Elec. Mfg. Co., Inc.*, 313 U.S. 487, 496 (1941); *Maniscalco v. Brother Int'l (USA) Corp.*, 709 F.3d 202, 206 (3d Cir. 2013). New Jersey law provides that a choice-of-law clause in a contract will be honored unless either "(a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice," or "(b) application

of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which would be the state of the applicable law in the absence of an effective choice of law by the parties." *N. Bergen Rex Transp., Inc. v. Trailer Leasing Co.*, 730 A.2d 843, 847-48 (N.J. 1999) (quoting Restatement (Second) of Conflict of Laws § 187 (1969)). Here, the CRST has a "substantial" relationship to the parties and the transaction, and there was a reasonable basis for the choice of law provision. Moreover, Plaintiff has not demonstrated — because he cannot — that New Jersey has a materially greater interest than the CRST in determining the issues. Accordingly, the choice of CRST law in Plaintiff's Loan Agreement must be enforced, and all of Plaintiff's claims must be dismissed.[3]

### A. The CRST Has A Substantial Relationship To The Parties And Transaction And There Was A Reasonable Basis For Selecting CRST Law.

Where one of the parties to the contract is located in the state whose law has been chosen, New Jersey courts have found that state has a substantial relationship to the parties or the transaction. *See, e.g., id.* at 848 ("The substantial relationship standard under the *Restatement* has been met in the present case because [one party] is headquartered in [the chosen state]."); *Instructional Sys., Inc. v. Comput. Curriculum Corp.*, 614 A.2d 124, 133 (N.J. 1992). Similarly, a reasonable basis for the choice of law exists when parties choose the law of the place where a party has its principal place of business, or where the contract is formed so long as its formation

[3] On August 21, 2016, the federal court in the Central District of California granted partial summary judgment to the Consumer Financial Protection Bureau in a case involving federal claims against the Defendants, holding that the law of the state where the borrower resided (including New Jersey) controlled, rather than CRST law. *See* Order, *Consumer Fin. Prot. Bureau v. CashCall, Inc.*, No. CV 15-7522-JFW (RAOx) (C.D. Cal. Aug. 31, 2016). That decision is not binding on this Court, and for the reasons set forth in this motion, Defendants maintain that a proper choice-of-law analysis requires that CRST law apply to the subject loans.

there is not wholly fortuitous. Restatement (Second) of Conflict of Laws § 187(2) cmt. f (1971). Here, the CRST has a substantial relationship to the parties and the loan transaction, and there was a reasonable basis for choosing CRST law, because Plaintiff plainly entered into a consensual commercial relationship with Western Sky, a company licensed by the CRST, owned by a tribal member, and operating on the Reservation. The Loan Agreement, which Plaintiff executed, made clear to Plaintiff that he was engaging in commerce with a tribal member that would be consummated on the Reservation. Loan Agreement at 8. Plaintiff agreed that he entered into the Loan Agreement as if he were physically present within the boundaries of the CRST and that the Loan was fully performed within the boundaries of the CRST. Loan Agreement at 3.

Clearly, if the Loan Agreement's choice-of-law provision selected the law of any State under the same factual circumstances, the Court would summarily enforce it. The fact that CRST law is selected makes no difference. *See, e.g.*, *DIRECTV, Inc.*, 136 S.Ct. at 468 ("In principle, [parties] might choose to have portions of their contract governed by the law of Tibet, the law of pre-revolutionary Russia, or (as is relevant here) the law of California.").

**B. New Jersey Does Not Have A Materially Greater Interest Than The CRST.**

New Jersey does not have a materially greater interest than the CRST in determining the issues here. Indeed, the CRST has a strong interest in enforcing a contract that explicitly designates the application of its law. *See Montana v. United States*, 450 U.S. 544, 565 (1981) ("A tribe may regulate . . . the activities of nonmembers who enter consensual relationships with the tribe or its members, through . . . contracts, leases, or other arrangements."). It is crucial to the CRST's autonomy and economic vitality that its residents and businesses be able to transact business on an interstate basis with certainty that courts will respect the choice of the Tribe's law. "[T]ribes across the country, as well as entities and individuals doing business with them,

have for many years relied on [precedent preserving tribal sovereignty], negotiating their contracts and structuring their transactions against a backdrop of [that precedent]." *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2036 (2014). Decisions by this or any other court that CRST law does not apply to arms-length transactions between consumers and CRST-licensed corporations, despite clear choice-of-law provisions to the contrary, can affect interstate transactions involving CRST corporations for years or decades to come.

Furthermore, as the Second Restatement makes clear, in multistate transactions the "[p]rime objectives of contract law" – "to protect the justified expectations of the parties and to make it possible for them to foretell with accuracy what will be their rights and liabilities under the contract" – are best attained by letting the parties choose the governing law. Restatement (Second) of Conflict of Laws § 187(2) cmt. e (1971); *see also* 19 Charles A. Wright et al., Federal Practice & Procedure § 4514, 135 (2d ed. Supp. 2001) ("[T]he law ordinarily allows parties to a contract to structure their affairs by choosing to have their contract governed by the body of law that best suits their needs . . . ."). While states do have an interest in the enforcement of their usury laws with respect to contracts entered into by their citizens, that interest typically does not outweigh interests favoring enforcement of contractual choice of law provisions. *See Barnes Grp., Inc. v. C & C Prods., Inc.*, 716 F.2d 1023, 1031 (4th Cir. 1983) (citing numerous cases in which "the parties' choice of law has been held to validate interest rates that would be usurious and unenforceable in the jurisdiction whose law would prevail absent the contractual stipulation of controlling law").

Accordingly, the choice-of-law provision in the Loan Agreement should be enforced, and the Court should conclude that CRST law applies to Plaintiff's Loan Agreement such that Plaintiff cannot bring his claims under New Jersey law. If CRST law does not apply, then

California law should apply by virtue of the Plaintiff's allegations in the Complaint. *See, e.g.*, Compl. ¶¶ 24-25.

## IV. EVEN IF NEW JERSEY LAW WERE APPLIED, COUNTS I, II III AND IV FAIL TO STATE A CLAIM AND SHOULD BE DISMISSED.

If the Court were to conclude that Plaintiff may bring his claims under New Jersey law, which it should not, the Court should dismiss Counts I, II, III and IV pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted.

Although a plaintiff need not plead "detailed factual allegations," he or she must provide the "grounds of his entitle[ment] to relief' such that "labels and conclusions, and a formulaic recitation of the elements of a cause of action" are insufficient. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal quotations and citations omitted). Further, a complaint does not "suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 557). In other words, to survive a motion to dismiss, a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. And for claims "alleging fraud or mistake," a plaintiff must "state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). Plaintiff fails to meet this pleading standard.

### A. Plaintiff Fails To State A Claim Under The CFLA.

Plaintiff cannot state a claim under the CFLA because, as this Court has held, there is no private right of action under that statute. *See Jubelt v. United Mortg. Bankers, Ltd.*, No. 13-7150 (ES)(MAH), 2015 WL 3970227, at *14 (D.N.J. June 30, 2015); *Veras v. LVNV Funding, LLC*, No. 13-1745 (RBK/JS), 2014 WL 1050512, at *7-9 (D.N.J. Mar. 17, 2014).

Where, as here, a statute does not explicitly provide for a private right of action, "New Jersey courts have been reluctant to infer" the existence of such a right. *R.J. Gaydos Ins. Agency,*

*Inc. v. Nat'l Consumer Ins. Co.*, 773 A.2d 1132, 1142 (N.J. 2001). New Jersey law further provides that a court should be "especially hesitant" to imply a private right of action against an entity subject to "pervasive regulation by a State agency," *Castro v. NYT Television*, 851 A.2d 88, 95 (N.J. Super. Ct. App. Div. 2004), a category which includes consumer lenders subject to the "pervasive authority" of the Commissioner of Banking and Insurance, *Veras*, 2014 WL 1050512 at *8. Additionally, this Court has explained that, "[i]n addition to a general presumption against finding a civil remedy when none is explicitly conferred, federal courts are reluctant to innovate a state right of action when the state's own courts have not done so." *Sheet Metal Workers Int'l Ass'n Local Union No. 27 v. E.P. Donnelly, Inc.*, 673 F. Supp. 2d 313, 330 (D.N.J. 2009). Since the New Jersey Legislature "has drafted an extensive statutory scheme that tasks the Commissioner with the sole responsibility of enforcing the requirements of the [CFLA]," construing that statute to impliedly authorize a private cause of action would be inappropriate, particularly when New Jersey's courts have not done so. *Veras*, 2014 WL 1050512 at *9.

**B. Plaintiff Fails To State A Claim Under New Jersey's Usury Laws.**

Plaintiff's New Jersey usury claims also fall short. First, as set forth above, the loans are subject to CRST law and not New Jersey state usury laws. Therefore, plaintiff's usury claims must be dismissed. Even if the Court were to accept that New Jersey usury applies, Plaintiff has failed to state sufficient allegations to support his claim. "New Jersey's usury statute 'does not apply to interest on defaulted obligations.'" *Pegasus Blue Star Fund, LLC v. Canton Prods., Inc.*, No. 08-1533 (GEB), 2009 WL 3246616, at *3 (D.N.J. Oct. 6, 2009) (quoting *Loigman v. Keim*, 594 A.2d 1364, 1366 (N.J. Super. Ct. Law Div. 1991)); *see also Stuchin v. Kasirer*, 568 A.2d 907, 911 (N.J. Super Ct. App. Div. 1990) ("[I]t is not illegal to provide for an interest rate higher than that permitted by the usury laws if the rate is only applied after default."). The Complaint

does not address whether Plaintiff is in default of his obligation and thus, the Court cannot determine whether usury law is applicable. Accordingly, Plaintiff's claims under New Jersey's usury laws are insufficient and should be dismissed.

Without knowing whether Plaintiff was in default of his obligation, the Court cannot determine whether the usury statute applies. Accordingly, Plaintiff's claims under New Jersey' usury statute are insufficient and should be dismissed.

It is also important to note that, even if Plaintiff had stated a claim under New Jersey's usury laws, his remedy would be limited to repayment of interest above the legal limit so long as such interest was received by a good-faith mistake and not "by intent to evade the usury laws." *Ditmars v. Camden Tr. Co.*, 92 A.2d 12, 25 (N.J. 1952); *see also Altman v. Altman*, 72 A.2d 536, 540 (N.J. Ch. 1950) ("To constitute usury there must be an unlawful or corrupt intent, an intent to do what the law prohibits . . . ."). As discussed in more detail below, Plaintiff's bare and conclusory allegations that defendants' conduct "was knowing, deliberate, intentional, and willful." Compl. ¶ 56, do not satisfy the required pleading standard, particularly when the contract at issue clearly states that tribal law applies and Plaintiff has alleged no facts to suggest that the parties entered into the agreement other than in good faith.

### C. Plaintiff Fails To Meet Rule 9(b)'s Heightened Pleading Standard For His CFA Claim.

The heightened pleading requirements of Fed. R. Civ. P. 9(b) apply to claims under the CFA, *see, e.g.*, *Daloisio v. Liberty Mut. Fire Ins. Co.*, 754 F. Supp. 2d 707, 709 (D.N.J. 2010), and are not met here. Plaintiff's allegations of unconscionable commercial practices are derivative of his usury claim which must fail for the reasons discussed above, and his vague allegations of "false and deceptive practices" fail to specify any of the circumstances

surrounding these alleged violations, such as the dates or the specific Defendants allegedly involved in them. Accordingly, Plaintiff's CFA claim should be dismissed as well.

"It is well-established that NJCFA claims must meet the heightened pleading requirements of Fed. R. Civ. P. 9(b)." *Lieberson v. Johnson & Johnson Consumer Cos., Inc.*, 865 F. Supp. 2d 529, 539 (D.N.J. 2011).[4] Rule 9(b) provides that "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). The purpose of the rule is to "place the defendants on notice of the precise misconduct with which they are charged." *Seville Indus. Mach. Corp. v. Southmost Mach. Corp.*, 742 F.2d 786, 791 (3d Cir. 1984). Thus, plaintiffs must not only meet Rule 8 by pleading "enough facts to state a claim to relief that is plausible on its face," *Twombly*, 550 U.S. at 570; Rule 9(b) requires plaintiffs, in addition, "to plead the who, what, when, where, and how: the first paragraph of any newspaper story," *In re Advanta Corporation Securities Litigation*, 180 F.3d 525, 534 (3d Cir. 1999) (internal quotation marks and citations omitted). Of particular relevance here, plaintiffs must identify specific Defendants involved in the violations alleged: "Pleadings containing collectivized allegations against 'defendants' do not suffice." *Naporano Iron & Metal Co. v. Am. Crane Corp.*, 79 F. Supp. 2d 494, 511 (D.N.J. 1999). Pleadings also must "indicate the date, time, or place of any misrepresentation," or else "provide an alternative means of injecting precision and some measure of substantiation into the fraud allegations." *See Lum v. Bank of*

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[4] "[C]ourts in this District have recognized that CFA claims targeting allegedly unconscionable commercial conduct are subject to Rule 9(b)'s heightened pleading standards," as are those targeting allegedly fraudulent conduct. *McGarvey v. Penske Auto. Grp., Inc.*, 639 F. Supp. 2d 450, 464 (D.N.J. 2009), *opinion vacated in part on other grounds*, No. 08-5610-JBS/AMD, 2010 WL 1379967 (D.N.J. Mar. 29, 2010) (internal quotation marks and citation omitted); *see also* Elga A. Goodman et al., 50 N.J. Practice Series, Business Law Deskbook § 18:7 (2015-2016 ed.). *But see In re NorVergence, Inc.*, 424 B.R. 663, 694 (Bankr. D.N.J. 2010) (deciding to apply Rule 8(a) to claim for unconscionable conduct under CFA which did not sound in fraud).

*Am.*, 361 F.3d 217, 224 (3d Cir. 2004). The allegations in the Complaint fail entirely to satisfy this standard.

Plaintiff alleges that Defendants (without distinguishing among them) "engaged in other false and deceptive practices," such as: (1) "[o]rganizing and utilizing a deceptive scheme using Western Sky Financial as the 'front'"; (2) "[c]ontinuing to do business in the State of New Jersey" after the "Western Sky Enterprise" and the "'rent a bank' scheme were found to be unlawful[]"; and (3) "[u]sing CashCall personnel in California and other locations outside the boundaries of the Reservation" for servicing activities, and "taking the overwhelming share of the revenues and profits made off the loans, while meanwhile falsely claiming that the loans are governed by Tribal law." Compl. ¶ 68. None of these conclusory allegations include the "who, what, when, where and how," and therefore they are insufficient. *Advanta Corp.*, 180 F.3d at 534. Defendants cannot tell what misrepresentations allegedly were made about the affiliation and role of Western Sky and the Cheyenne River Sioux Tribe, or what role each individual Defendant played in the "Western Sky Enterprise." Plaintiff's allegations fall well short of the standard required by Rule 9(b), or even Rule 8. Allegations of fraud require more than conclusory averments, and Plaintiff has failed to state a claim here.

Plaintiff also alleges that Defendants included "purported tribal arbitration, jurisdiction, and class action ban provisions in the form loan agreement while knowing that such provisions were a sham and no meaningful arbitration mechanism exists under Tribal law." Compl. ¶ 68. But Plaintiff's Loan Agreement contained valid arbitration provisions with the AAA and JAMS. *See supra* Section I. And, again, Plaintiff has not pled the facts surrounding these alleged misrepresentations with any particularity. Therefore, the Court should dismiss the CFA claim in its entirety.

## V. THE COMPLAINT FAILS TO STATE A CLAIM UNDER RICO.

Plaintiff asserts that Defendants violated the Racketeer Influenced and Corrupt Organizations ("RICO") Act, 18 U.S.C. § 1961 *et seq*., but fails to adequately plead any violation thereunder. To allege a prima facie claim under RICO, the Third Circuit has stated: "[A claimant] must allege (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." *Lum*, 361 F.3d at 223. Because Plaintiff presents a fraud-based RICO claim, he must plead with particularity the circumstances of the alleged fraud. *Id*. Plaintiffs may meet this requirement by pleading the "date, place or time" or by "injecting precision and some measure of substantiation into their allegations." *Id*. at 224 (citation omitted).

Plaintiff alleges RICO violations under Sections 1962(c) and 1962(d). Compl. ¶¶ 89-90. Section 1962(c) prohibits conducting the affairs of an enterprise that affects interstate commerce through either a pattern of racketeering activity or the collection of unlawful debt. *See id.* Section 1962(d) prohibits a conspiracy to violate Section 1962(c). Moreover, a violation under subsection (c) requires conducting the affairs of the alleged RICO enterprise. Plaintiff has not alleged facts sufficient to satisfy the elements of a RICO claim against any Defendant, particularly considering the heightened pleading standard for allegations of a fraudulent scheme. *See Warden v. McLelland*, 288 F.3d 105, 114 (3d Cir. 2002) (holding that with respect to RICO claims, plaintiff must allege fraud with the heightened pleading particularity required by Fed. R. Civ. P. 9(b)).

### A. Plaintiff Fails To State A Claim Under Section 1962(c).

RICO prohibits certain racketeering activities established under 18 U.S.C. § 1962, and the statute authorizes a civil action for "[a]ny person injured in his business or property by reason of a violation of section 1962." 18 U.S.C. § 1964(c). Section 1962(c), the primary violation upon which the parties focus most of their attention, prohibits "any person employed by or associated

with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." *Grant v. Turner*, No. 09-2381 (GEB), 2010 WL 4004719, at *2–4 (D.N.J. Oct. 12, 2010). Here, Plaintiff fails to adequately plead each of the necessary elements of a Section 1962(c) violation.

In *Bey v. DaimlerChrysler Servs. of N.A., LLC*, No. 04-6186 (RBK), 2005 WL 1630855, at *6 (D.N.J. July 8, 2005), the court considered RICO claims arising from an allegedly usurious debt collection. The court granted defendant's motion to dismiss because plaintiffs did not plead adequate facts supporting the collection of an "unlawful debt" because the alleged interest rate was not usurious under New Jersey law. Here too, plaintiff's only support for the assertion that the loans constitute "unlawful debt" is that the loan's interest rates are usurious under New Jersey law. Compl. ¶ 88. As set forth above, the loans are not subject to New Jersey usury laws and therefore there is no collection of an "unlawful debt" and no facts supporting a RICO claim. *See also Souders v. Bank of Am.*, No. 1:CV-12-1074, 2012 WL 7009007, at *12–13 (M.D. Pa. Dec. 6, 2012), *report and recommendation adopted*, No. 1:12-CV-1074, 2013 WL 451863 (M.D. Pa. Feb. 6, 2013) (dismissing RICO claims because here was "nothing criminal about securitizing a mortgage loan or assigning a Mortgage," and "broad allegations like Plaintiff's should be disregarded in evaluating a RICO conspiracy claim").

Even if Plaintiff stated facts supporting the finding of the collection of unlawful debt, he must also plead sufficient facts to show that Defendants were employed by or associated with a RICO enterprise. 18 U.S.C. § 1962(c). The RICO statute defines an "enterprise" as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). Because Plaintiff

defines the enterprise as coextensive with the Defendants and their agents, Plaintiff's RICO claims must fail because the statute requires that the enterprise and the Defendants be distinct. In *Zavala v. Wal–Mart Stores, Inc.*, the U.S. District Court of the District New Jersey explained that "[i]f the members of the enterprise are the same as the persons, the distinctness requirement has not been met, as the 'person' and the 'enterprise' must not be identical." 447 F. Supp. 2d 379, 383 (D.N.J. 2006); *see also Kolar v. Preferred Real Estate Inv., Inc.*, No. 07-3864, 2008 WL 2552860, at *4–5 (E.D. Pa. June 19, 2008), *aff'd*, 361 Fed. App'x 354 (3d Cir. 2010) (finding violation of the distinctiveness rule where the plaintiff alleged that the defendants, a natural person, corporation, and several limited partnerships, were both individual "persons" and the collective "enterprise" for RICO purposes).

Plaintiff's alleged enterprise fails because the heart of Plaintiff's allegations is that all of the entities that made, bought, or serviced the Western Sky loans are companies created and controlled by Defendant Reddam "to avoid state and federal regulation." Compl. ¶ 2. Additionally, Plaintiff claims that "CashCall set up, funded, and maintained" a bank account "set up in the name of Western Sky Financial," Western Sky "does not accept any payments from consumers on the loans," and most importantly, that Western Sky was a front for CashCall. *Id.* at ¶¶ 19-20. Thus, all of the persons and entities Plaintiff claims were "persons" and members of an enterprise, are—according to Plaintiff—either (i) owned, controlled, or employed by Reddam or (ii) Reddam, himself. This is insufficient to state an enterprise for purposes of a RICO claim. An entity cannot be both an enterprise and a defendant under § 1962(c). *Lorenz v. CSX Corp.*, 1 F.3d 1406, 1411 (3d Cir. 1993); *De Lage Landen Fin. Servs., Inc. v. Rasa Floors, LP*, No. 08-00533, 2009 WL 564627, at *10 (E.D. Pa. Mar. 5, 2009) (dismissing claim because "the alleged members of the enterprise are the exact same three entities" alleged to be the "persons" in the

complaint); *see also* Compl. ¶ 85 ("Each defendant is a 'person' as that term is defined in 18 U.S.C. § 1964(3).").

Plaintiff must also show that each Defendant had "*some* part in directing the enterprise's affairs" to fulfill the conduct prong of the RICO Act. *Davis v. Hudgins*, 896 F. Supp. 561, 567 (E.D. Va. 1995), *aff'd*, 87 F.3d 1308 (4th Cir. 1996). At no point does Plaintiff allege that Delbert, WS Financial, or CashCall had any management role in the alleged enterprise. Instead, the Complaint consistently alleges that Delbert, WS Financial, and CashCall were controlled by Reddam. *See* Compl. ¶¶ 2, 4, 13. The Complaint therefore does not and cannot fulfill the conduct prong with respect to Delbert, WS Financial, or CashCall. *See Davis*, 896 F. Supp. at 567.

**B. Plaintiff's RICO Conspiracy Claim Also Fails.**

Plaintiff's conspiracy claim is wholly inadequate for two reasons. To allege a RICO claim based on § 1962(d), a plaintiff must allege (1) an agreement to commit the predicate acts of fraud, and (2) knowledge that those acts were part of a pattern of racketeering activity conducted in such a way as to violate § 1962(a), (b), or (c). *Rose v. Bartle*, 871 F.2d 331, 366 (3d Cir. 1989). Because Plaintiff has failed to state claims for violations of (a), (b), or (c), his claim under (d) must also fail. *McBride v. Hartford Life and Accident Ins. Co.*, No. 05-6172, 2006 WL 279113, at *3 (E.D. Pa. Feb. 3, 2006) (finding "plaintiff's complaint is void of any allegations of an agreement or conspiracy to violate § 1962(a), (b), or (c) . . . . As such, plaintiff's allegations have failed to state a RICO claim based on § 1962(d)"). Second, Plaintiff's failure to distinguish between Defendants and the Western Sky Enterprise also dooms their conspiracy allegations. In fact, the complaint refers to the enterprise as the "alter ego" for Reddam and CashCall, admitting they are indistinguishable. Compl. ¶¶ 23, 82. Plaintiff cannot simultaneously argue that (a) Reddam is indistinguishable from the companies in which he has

an ownership interest and their agents and employees and that (b) Reddam, those companies, and those companies' agents and employees all conspired to violate the RICO Act. *Nordberg v. Trilegiant Corp.*, 445 F. Supp. 2d 1082, 1090 (N.D. Cal. 2006) ("[A]n individual cannot associate or conspire with himself."). This claim should also be dismissed for failure to state a claim upon which relief can be granted.

## VI. DEFENDANT REDDAM SHOULD BE DISMISSED BECAUSE THIS COURT LACKS PERSONAL JURISDICTION OVER HIM.

This Court lacks personal jurisdiction over Mr. Reddam and the claims against him should be dismissed pursuant to Rule 12(b)(2). A federal court applies the jurisdictional long-arm provision of the state in which it is situated. Fed. R. Civ. P. 4(k)(1). New Jersey's long-arm rule provides for personal jurisdiction "consistent with due process of law." N.J. CT. R. 4:4-4. Thus, New Jersey state courts may exercise jurisdiction over a nonresident defendant to the limits permitted by the U.S. Constitution. *See Avdel Corp. v. Mecure*, 58 N.J. 264, 268 (N.J. 1971). Plaintiff bears the burden of proving personal jurisdiction. *Carteret Sav. Bank, FA v. Shushan*, 954 F.2d 141, 146 (3d Cir. 1992). He has not done so here.

Due process requires that a defendant have "minimum contacts" in the forum state, and that the exercise of jurisdiction comport with "traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (internal quotation marks and citation omitted). The Supreme Court has explained that "minimum contacts must have a basis in some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Asahi Metal Indus. Co., Ltd. v. Superior Court of Cal., Solano Cty.* 480 U.S. 102, 109 (1987) (internal quotation marks and citation omitted). Personal jurisdiction is established only if "the defendant's conduct and connection with the forum State are such that he should reasonably

anticipate being haled into court" in that forum. *World–Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). This standard is not met here.

All of Plaintiff's allegations against Mr. Reddam relate to conduct taken by him in his corporate capacity as the CEO of CashCall, which serviced loans that were offered widely over the Internet to consumers "in the State of New Jersey and elsewhere." Compl. ¶ 2; *see also id.* at ¶ 37. But "[t]he law is clear that a corporate officer or agent who has contact with the forum state only with regard to the performance of corporate duties does not thereby become subject to jurisdiction in his or her individual capacity." *Nicholas v. Saul Stone & Co., LLC*, No. 97-860 (AET), 1998 WL 34111036, at *10 (D.N.J. June 30, 1998), *aff'd*, 224 F.3d 179 (3d Cir. 2000); *see also Sharp Elecs. Corp. v. Hayman Cash Register Co.*, No. 81-2345, 1982 WL 1860, at *1 (D.N.J. May 20, 1982) ("It is the general rule, however, that acts done in a corporate capacity may not form the predicate for jurisdiction over the individual.").

This principle is grounded in due process concerns. The Supreme Court has made clear that "[e]ach defendant's contacts with the forum State must be assessed individually." *See Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 n.13 (1984). If the law were otherwise, "personal jurisdiction based on an officer or director's corporate activities would in effect render corporate officers or directors subject to suit in any state in which their corporation does business and would violate the concept of fundamental fairness which undergirds constitutional due process." *Simkins Corp. v. Gourmet Res. Int'l, Inc.*, 601 F. Supp. 1336, 1344–45 (E.D. Pa. 1985). Thus, "actions taken *within the forum state by a corporate official* in his official capacity may be considered for purposes of establishing jurisdiction over him in his individual capacity," but actions taken in the forum by the corporate entity should not be imputed to an individual defendant for purposes of personal jurisdiction "unless [the plaintiff] has established that the

specific action within New Jersey was taken by [the individual defendant] himself." *Educ. Testing Serv. v. Katzman*, 631 F. Supp. 550, 559 (D.N.J. 1986) (emphasis added).[5]

Reddam is a legal resident and domiciliary of the State of California. Compl. ¶ 6. Although Plaintiff is aware of this fact, his Complaint alleges no direct contact between Reddam and the State of New Jersey. The Complaint does not allege that Reddam had any contacts with New Jersey in his personal capacity, nor that Reddam in his official capacity visited New Jersey, communicated with any person located in New Jersey, or took any other action within New Jersey. Rather, Plaintiff avers generally that "Reddam intentionally orchestrated and controlled the actions of other defendants and directed their activities to the marketing, offering, making, servicing, and collecting of unlawful loans in this state," and that Reddam "was the architect of the sham corporate structures" and "key player" in the alleged harm. Compl. ¶ 13. If such bare allegations established personal jurisdiction, then "corporate officers or directors [would be] subject to suit in any state in which their corporation does business." *Simkins Corp.*, 601 F. Supp. at 1344–45. Plaintiff has failed to plead sufficient facts to subject Reddam to the jurisdiction of this Court consistent with the mandates of due process.

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[5] This limitation on district courts' exercise of personal jurisdiction is distinct from the question of whether a plaintiff may "pierce the corporate veil" for liability purposes. It is worth noting, however, that New Jersey courts "abide by the fundamental propositions that a corporation is a separate entity from its shareholders, and that a primary reason for incorporation is the insulation of shareholders from the liabilities of the corporate enterprise." *Richard A. Pulaski Const. Co. v. Air Frame Hangars, Inc.*, 950 A.2d 868, 877 (N.J. 2008) (internal quotation marks and citation omitted). Plaintiff has not alleged facts that might support disregard of the corporate form, such as "gross undercapitalization . . . failure to observe corporate formalities, non-payment of dividends, the insolvency of the debtor corporation at the time, siphoning of funds of the corporation by the dominant stockholder, non-functioning of other officers or directors, absence of corporate records, and the fact that the corporation is merely a facade for the operations of the dominant stockholder or stockholders." *Craig v. Lake Asbestos of Quebec, Ltd.*, 843 F.2d 145, 150 (3d Cir. 1988) (internal quotation marks and citation omitted).

In addition, the Declaration submitted by Reddam demonstrates that Plaintiff has not—and cannot—fulfill his burden to show Reddam had the requisite minimum contacts with the forum to establish jurisdiction.

Plaintiff also asserts—as his only statutory basis for asserting jurisdiction over Reddam—that the nationwide service of process provision found in the RICO statute supplies personal jurisdiction over Reddam. *See* 18 U.S.C. § 1965(b), (d). Using RICO as a basis of personal jurisdiction presupposes that the RICO claim will remain in the case. *See Taylor v. Bettis*, 976 F. Supp. 2d 721, 751 (E.D.N.C. 2013) (declining to exercise pendant personal jurisdiction over remaining claims when "Plaintiffs have failed to state a claim as to the 'anchor' RICO claims"). Plaintiff has failed to state a RICO claim against Reddam, and 18 U.S.C. § 1965 therefore cannot create personal jurisdiction here. In the event the Court denies the motion to dismiss in whole or in part as to the RICO claim, Reddam reserves the right to argue that the exercise of jurisdiction under § 1965 poses "extreme inconvenience or unfairness" to Reddam in violation of due process. *ESAB Grp., Inc. v. Centricut, Inc.*, 126 F.3d 617, 627 (4th Cir. 1997).

In sum, Plaintiff has not and cannot allege sufficient facts to show that Reddam's contacts with New Jersey establish jurisdiction. Accordingly, Reddam does not have sufficient minimum contacts with the State of New Jersey for this Court to exercise personal jurisdiction over him. Therefore the Court should dismiss the Complaint as to Reddam.

**CONCLUSION**

For all of the foregoing reasons, Defendants respectfully requests that the Court grant their motion to compel arbitration or alternatively, their motion to dismiss.

Dated: September 9, 2016

Respectfully submitted,

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