UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

JOHN S. MACDONALD,

Plaintiff,

v.

CASHCALL, INC.; WS FUNDING, LLC; DELBERT SERVICES CORP.; and J. PAUL REDDAM,

Defendants.

Civil Action No.2:16-cv-02781-MCA-SCM

Motion Date: Dec. 5, 2016

Plaintiff's Memorandum of Law in Opposition to Defendants' Motion to Compel Arbitration or Alternatively, to Dismiss

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Introduction

At this point, the Western Sky arbitration provision should be a dead letter. "[E]very Court of Appeals that has considered" the provision has found it unenforceable and "refused to dismiss the case or compel arbitration." *Smith v. Western Sky Financial, LLC*, 168 F. Supp. 3d 778, 781 (E.D. Pa. 2016); *see Parm v. Nat'l Bank of Cal.*, 835 F.3d 1331 (11th Cir. 2016); *Hayes v. Delbert Services Corp.,* 811 F.3d 666 (4th Cir. 2016); *Inetianbor v. CashCall, Inc.*, 768 F.3d 1346 (11th Cir. 2014); *Jackson v. Payday Financial, LLC*, 764 F.3d 765 (7th Cir. 2014).

That has, unfortunately, not stopped Defendants from insisting that courts enforce its illegal arbitration agreement. Around the country, the Defendants have continued to "boldly ask" courts to compel arbitration, *Inetianbor v. Cashcall, Inc.*, 2016 WL 4702370, *5 (S.D. Fla. Aug. 18, 2016), often supporting such requests "with a selective presentation of cases" that "fail[s] to disclose a broader and more troubling picture." *Smith*, 168 F.Supp.3d at 781. That troubling picture has led most district courts—including two district courts in this Circuit—to roundly reject the Defendants' increasingly tone-deaf play for arbitration. *See Ryan v. Delbert Servs. Corp.*, 2016 WL 4702352 (E.D. Pa. Sept. 8, 2016); *Inetianbor*, 2016 WL 4702370 at *5; *Smith*, 168 F.Supp.3d at 781.

This Court should do the same. It is by now "well-trodden ground," *Ryan*, 2016 WL 4702352 at *2, that the Defendants' arbitration provision suffers from an array of defects: It requires arbitration before an "authorized representative" of the Cheyenne

River Sioux Tribe, a term that is not defined and cannot be satisfied; it requires arbitration under the Tribe's "consumer dispute rules," which, according to numerous courts and Defendants themselves, do not exist; and it expressly forbids an arbitrator from applying any U.S. federal or state law in the arbitration proceeding—a clear (and unlawful) prospective waiver of statutory rights. "With one hand, the arbitration agreement offers an alternative dispute resolution procedure in which aggrieved persons may bring their claims, and with the other, it proceeds to take those very claims away. The just and efficient system of arbitration intended by Congress when it passed the [Federal Arbitration Act] may not play host to this sort of farce." *Hayes*, 811 F.3d at 673-74. "[T]here is little question that the overall arbitration clause, which contains the delegation provision, is unenforceable." *Ryan*, 2016 WL 4702352 at *4.

Defendants' remaining arguments fare no better. Defendants' purported connection to the Cheyenne River Sioux Tribe is a sham, the tribal courts have no jurisdiction over this dispute, and there is no basis for applying tribal law in this matter. Under New Jersey law, the loans at issue in this case are clearly usurious, and the making, servicing, and collecting of those loans violates the Consumer Fraud Act. Additionally, while the complaint contains detailed allegations establishing that the Defendants' corporate structure was the "alter ego" of Defendant J. Paul Reddam, the complaint also adequately pleads RICO claims as an alternative theory. Finally, by virtue of his role as a "key player" in unlawful conduct purposefully directed toward

consumers in New Jersey, Reddam is subject to the personal jurisdiction of this Court. For all of these reasons, the Court should deny Defendants' motion.

Background

1. The Western Sky Enterprise. As detailed in the Class Action Complaint, this case arises from a series of illegal consumer loans made and serviced in New Jersey by a group of individuals and companies referred to as the "Western Sky Enterprise." *See* ECF No. 1, Class Action Complaint ("*Compl.*") ¶ 2, 17. The scheme was concocted by Defendant J. Paul Reddam, the sole owner and chief executive of Defendants CashCall, Inc. ("CashCall"), WS Funding, LLC ("WS Funding"), and Delbert Services Corp. ("Delbert"). *Id.* ¶¶ 2, 7-9, 15. Other participants in the Enterprise included non-parties Western Sky Financial, LLC and its owner, Martin "Butch" Webb. *Id.* ¶ 16. Webb claims to be a member of the Cheyenne River Sioux Tribe of South Dakota (the "CRST"). *Compl.* at ¶ 16. Western Sky Financial, however, is not a tribal entity but instead is a South Dakota limited liability company. *Id.*

The primary object of the Western Sky Enterprise was to make, service, and collect unlawful, usurious loans to consumers in New Jersey and other states, while purporting to be exempt from any state or federal regulation based on fictitious assertions of tribal affiliation. *Id.* ¶¶ 17-20, 24. Loans were executed over the internet in the name of Western Sky Financial, but the loans were financed from an account set up, funded, and maintained by CashCall. *Id.* ¶ 19. After the loan transaction was executed, the loan was immediately sold to CashCall, either directly or through its

subsidiary WS Funding. *Id.* at ¶¶ 19, 40. Western Sky Financial did not accept any loan payments from consumers; instead, it was entitled to a percentage of the face value of each loan transaction, with a minimum monthly payment guaranteed by CashCall. *Id.* ¶ 19. Delbert acted as a collection and servicing arm for the Enterprise. *Id.* ¶ 22. Reddam was the architect of this scheme—in addition to owning and directly controlling CashCall, Delbert, and WS Funding, he approved and signed the contracts and other documents establishing the Western Sky Enterprise. *Id.* ¶ 21, 23.[1]

The Enterprise's claims of tribal affiliation were a sham. *Id.* ¶¶ 20, 24-26. A Cease and Desist Order issued by the New Hampshire Banking Department in 2013 states that Western Sky Financial was "nothing more than a front to enable CashCall to evade licensure by state agencies and to … shield its deceptive business practices from prosecution by state and federal regulators." *Compl.* Ex. 1 at 5. The Order further states that "CashCall, or its wholly-owned subsidiary, WS Funding, is the actual or de facto lender" and that the structure of the Enterprise "constitutes an unfair or deceptive act or practice" intended to cause "confusion or misunderstanding" and as a "shield to evade licensure." *Id.* at 7. As another District Court recently concluded, the Enterprise "was intentionally designed to avoid state

[1] These agreements are described in greater detail in the New Hampshire Cease and Desist Order attached to the Complaint as Exhibit 1 and by the District Court in *CFPB v. CashCall, Inc.*, 2016 WL 4820635, *2-3 (C.D. Cal. Aug. 31, 2016). Reddam's role is described in greater detail in the *CFPB* decision at *11-12.

usury limits and licensing laws." *CFPB v. CashCall, Inc.*, 2016 WL 4820635, *11 (C.D. Cal. Aug. 31, 2016).

2. The Western Sky loan agreement's choice-of-law and arbitration provisions. The Western Sky Enterprise used a form loan agreement (the "Agreement") that purports to contain choice-of-law and arbitration provisions.[2] Among other things, the Agreement purports to disclaim all "state or federal law or regulation" and to be "subject solely to the exclusive laws and jurisdiction" of the CRST. *Compl.* Ex. 3. The Agreement also requires that all disputes be resolved through arbitration, "which shall be conducted by the [CRST] Nation by an authorized representative in accordance with its consumer dispute rules." *Id.* The Agreement goes on to state that the borrower has the right to select either the American Arbitration Association or JAMS "to administer the arbitration." *Id.* These arbitration provisions are completely illusory. The CRST does not authorize arbitration, does not employ arbitrators, and does not have "consumer dispute rules." *Compl.* ¶ 28-31.

3. Plaintiff's usurious loan. On December 18, 2012, Plaintiff borrowed $5,000 from the Western Sky Enterprise. *Id.* ¶ 38. The loan carried an interest rate of 115% and an Annual Percentage Rate (APR) of 116.73%. *Id.* ¶ 39 & Ex. 3 at 4, 6. By April 2016, Defendants had collected from Plaintiff a total of $15,493 in payments on

[2] The text of these provisions are partially reproduced at pages 3-5 of Defendants' Memorandum. The full Agreement is attached to the Complaint as Exhibit 3.

the loan. *Id.* ¶ 42. Of this amount, $15,256.65 was applied as interest on the loan and $197.85 was applied to fees. *Id.* Only $38.50 was applied toward the principal. *Id.*[3] Despite more than $15,000 in payments on the loan over roughly three-and-a-half years, the payoff amount is $7,833.91, or $2,833.91 **more than** the original $5,000 loan. *Id.* at ¶ 43.

Argument

I. Western Sky's tribal-arbitration agreement is unenforceable.

Defendants "boldly ask" this Court to compel arbitration, *Inetianbor v. Cashcall, Inc.*, 2016 WL 4702370, at *5 (S.D. Fla. Aug. 18, 2016), without fully and candidly disclosing that "every Court of Appeals that has considered this loan scheme has refused to dismiss the case or compel arbitration." *Smith,* 168 F. Supp. 3d at 781. The Circuit Courts have done so for good reason: the Agreement requires arbitration in a non-existent forum, under equally non-existent rules, while prohibiting the application of any state or federal law. "The purpose of the arbitration agreement at issue here is not to create a fair and efficient means of adjudicating Plaintiff's claims, but to manufacture a parallel universe in which state and federal law claims are avoided entirely." *Smith*, 168 F. Supp. 3d at 785.

This type of fundamentally unfair, unconscionable arbitration agreement is not enforceable. *See, e.g., Parnell v. CashCall, Inc.,* 2016 WL 3356937, *12 (N.D. Ga. Mar.

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[3] Plaintiff's payment history is attached to the Complaint as Exhibit 4.

14, 2016) ("the arbitration provision [is] unenforceable because it is unconscionable and the selected forum is unavailable"). "Whether the parties have a valid arbitration agreement at all" is a "gateway" question that the court must answer. *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 452 (2003). "Generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2 [of the Federal Arbitration Act]." *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996). In particular, the Third Circuit will not enforce arbitration agreement that is designed "not simply as an alternative to litigation, but as an inferior forum that works to the [company's] advantage." *Parilla v. IAP Worldwide Servs., VI, Inc.*, 368 F.3d 269, 288 (3d Cir. 2004). Such is the case here and, as a result, the Court should decline Defendants' invitation to compel arbitration.

A. The arbitration process described in the agreement does not exist.

The form Western Sky loan agreement that Plaintiff (and numerous other consumers) entered into purports to require arbitration. It states:

> 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.

Comp. Ex. 3 at 9 (the "Arbitration Provision").

This procedure is illusory. There is no "representative" of the tribe "authorized" to conduct arbitration, nor are there any "consumer dispute rules."

Compl. ¶ 29.[4] While the Agreement promises "a process conducted under the watchful eye of a legitimate governing tribal body," it delivers no such thing, for a proceeding subject to tribal oversight "simply is not a possibility." *Jackson*, 764 F.3d at 779. As several courts have already concluded, the arbitration process the Agreement requires is a "sham system unworthy even of the name arbitration," *Hooters of Am. v. Phillips*, 173 F.3d 933, 940 (4th Cir. 1999), and is unenforceable. *See, e.g., Jackson*, 764 F.3d at 779; *Inetianbor*, 768 F.3d at 1354; *Ryan*, 2016 WL 4702352 at *4 ("there is little question that the overall arbitration clause, which contains the delegation provision, is unenforceable").[5]

B. The Agreement requires consumers to waive their statutory rights.

An arbitration agreement cannot be enforced if it "prospective[ly] waive[s]" a "party's right to pursue statutory remedies." *Mitsubishi Motors Corp. v. Soler Chrysler-*

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[4] These allegations are not seriously in dispute—Defendants have conceded them on several previous occasions. *See, e.g.*, *Williams v. CashCall, Inc.,* 92 F.Supp.3d 847, 852–53 (E.D. Wis. 2015) ("CashCall acknowledges that the arbitral forum and associated procedural rules … are not available."); *Inetianbor v. CashCall Inc.*, 962 F.Supp.2d 1303, 1309 (S.D. Fla. 2013) ("CashCall conceded that … [the tribe] does not have any consumer dispute rules.").

[5] Defendants made minor alterations to their form loan agreement over time. But every version of the agreement contained nearly identical invalidating language requiring arbitration before a representative of the CRST pursuant to the tribe's consumer dispute rules. *See Parm*, 835 F.3d 1331; *Hayes*, 811 F.3d at 670; *Inetianbor*, 768 F.3d at 1348; *Jackson*, 764 F.3d at 769; *Ryan*, 2016 WL 4702352, at *1; *Inetianbor*, 2016 WL 4702370, at *3-4 (noting that although there are "different versions" of the agreement, they all contain the same offensive terms); *Smith*, 168 F. Supp. 3d at 784; *Parnell*, 2016 WL 3356937, at *4.

Plymouth, Inc., 473 U.S. 614, 637 n.19 (1985) (warning that "we would have little hesitation in condemning" such an agreement). The oft-repeated lesson boils down to the following: An arbitration agreement that "forbid[s] the assertion of certain statutory rights" cannot be enforced. *American Express Co. v. Italian Colors Rest.*, 133 S.Ct. 2304, 2310 (2013) (The FAA's "effective vindication" exception to the enforceability of arbitration agreements "would certainly cover" this type of arbitration agreement); *see also In re Cotton Yard Antitrust Litig.*, 505 F.3d 274, 289 (4th Cir. 2007) ("While statutory claims are arbitrable unless Congress has specifically provided otherwise, agreements to arbitrate statutory claims may nonetheless be unenforceable if the terms of the agreement prevent the plaintiff from effectively vindicating his statutory rights."). The Agreement here violates this rule.

First, as explained above, the arbitration process is a sham—it would be impossible to obtain relief for any federal or state law claims in Defendants' tribal-arbitration system because it would be impossible to arbitrate *any* claims in that system. It simply doesn't exist. That alone justifies invalidating the Agreement—an agreement that "waive[s] access to a neutral forum" would "surely ... violate the law" because it leaves a party "at the mercy of the [company's] good faith." *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1482 (D.C. Cir. 1997).

But, even if arbitration in accordance with the contract were possible, the Agreement, as written, prohibits a consumer from arbitrating any federal or state law claims. A section in the Agreement titled "**Applicable Law and Judicial Review**,"

states that it "SHALL BE GOVERNED BY THE LAW OF THE CHEYENNE RIVER SIOUX TRIBE." *Compl.*, Ex. 3 at 11. It goes on to require that "[t]he arbitrator will apply the laws of the Cheyenne River Sioux Tribal Nation and the terms of this Agreement." *Id.* Were there any doubt, the Agreement also contains a separate clause that asserts that "no United States state or federal law" will apply. *Id.* at 8. In short, the Agreement clearly, and repeatedly, prohibits ***any*** federal or state law from applying—an "as written" prospective waiver that violates *Mitsubishi Motors* and the FAA itself. *See Booker v. Robert Half Int'l, Inc.*, 413 F.3d 77, 79 (D.C. Cir. 2005) (arbitration provision "unenforceable as written" where it "purport[s] to limit" substantive statutory rights).

Multiple courts have held that Defendants' agreement—a document that categorically waives all federal and state statutory claims and remedies—cannot be enforced. *See, e.g., Hayes*, 811 F.3d at 675 ("a party may not underhandedly convert a choice of law clause into a choice of no law clause"); *Ryan*, 2016 WL 4702352, at *5 ("The wholesale waiver of federal and state law thus dooms both the delegation provision and the arbitration clause."); *Smith*, 168 F. Supp. 3d at 785 ("The purpose of the arbitration agreement at issue here is not to create a fair and efficient means of adjudicating Plaintiff's claims, but to manufacture a parallel universe in which state and federal law claims are avoided entirely."). Under the Agreement, no party can bring, let alone obtain relief for, federal or state statutory claims, and no arbitrator hearing such a claim would be empowered to decide it or award statutory relief. This

is the definition of an agreement that "forbid[s] the assertion of certain statutory rights," and cannot be enforced under the Federal Arbitration Act. *American Express*, 133 S. Ct. at 2310.

C. Allowing AAA or JAMS to "administer" the arbitration does not save the invalid Arbitration Provision.

Defendants do not even attempt to defend the Arbitration Provision, nor do they bother to address the impermissible waiver of statutory rights discussed above. Instead, they simply argue that an arbitral forum is available pursuant to other language in the Agreement. Specifically, Defendants cite the following provision:

> 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 …; JAMS …; or an arbitration organization agreed upon by you and the other parties to the Dispute.

Compl. Ex. 3 at 10 (the "Administration Provision") (emphasis added). Defendants argue that this language modifies the earlier Arbitration Provision by replacing the non-existent tribal-representative arbitrator with either AAA or JAMS.[6] It doesn't; but even if it did, a sham arbitration proceeding administered by a legitimate organization is still a sham.

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[6] Defendants argue that the Arbitration Provision's use of the phrase "except as provided below" modifies the requirement of a tribal representative as arbitrator. *Def's Memo.* at 9. The Eleventh Circuit rejected this reading, noting that it ignores a basic "principle of English usage" and would "effectively eliminate the agreement's express requirement that the arbitrator be a representative of the CRST." *Parm*, 835 F.3d 1331. As the court explained in *Parm*, the phrase "except as provided below" modifies "dispute," not the requirement of a tribal representative as arbitrator. *Id.*

To begin, an arbitration administrator is just that—an **administrator**, not an **arbitrator**. The administrator "oversees" and "manages" the administrative aspects of arbitration. *See* Alan S. Gutterman, *Business Transaction Solutions* § 101:39 (2015) ("Such administration usually involves activities such as screening communications with the arbitrator, scheduling hearings, arranging for the filing and service of briefs and other documents, and collecting arbitrator compensation."); *see also* AAA Consumer Arbitration Rules[7] at 39 ("The Administrator's role is to manage the administrative aspects of the arbitration."). An administrator "does not decide the merits of a case." *Id.* Thus, allowing AAA or JAMS to "administer" the arbitration does not supplant the agreement's requirements for, or its limitations on, the arbitration proceeding; particularly the mandate that the arbitration "shall be conducted by" an "authorized representative" of the CRST. *Comp.* Ex. 3 at 9; *see also Parm*, 835 F.3d 1331 (rejecting argument "that AAA or JAMS could appoint any arbitrator, regardless of his or her affiliation with the tribe"); *Williams*, 92 F.Supp.3d at 852–53 ("Providing that an organization like the AAA or JAMS will administer an arbitration is not necessarily the same as providing that an arbitrator from that organization will conduct the arbitration. …. [A]rbitrations are 'conducted' by the arbitrators themselves—not the administering organization."). The "Choice of Arbitrator" clause "does not allow for a

[7] Available at: https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTAGE2021425&

choice of arbitrator—only a choice of arbitration administrator." *Parnell*, 2016 WL 3356937 at *12.[8]

Moreover, even if the agreement could be judicially re-written to allow AAA or JAMS to appoint a substitute arbitrator to stand in for the non-existent "authorized representative" of the CRST, that arbitrator would still be obligated to apply the equally non-existent "consumer dispute rules" of the CRST and "the terms of this agreement," which specifically provides that that "no United States state or federal law" will apply. *Id.* at 8. In other words, the only decisional rules that can be applied are a set of illusory tribal rules that do not exist. As the Seventh Circuit explained in *Jackson*, "it hardly frustrates the FAA" to refuse enforcement of an arbitration agreement that "contemplates a proceeding for which the entity responsible for conducting the proceeding has no rules, guidelines, or guarantees of fairness." 764 F.3d at 779. That is why courts across the country refused to enforce arbitration agreements when the arbitration rules that supposedly apply are "unascertainable." *Penn v. Ryan's Family Steak Houses, Inc.*, 269 F.3d 753, 759 (7th Cir. 2001); *see Floss v.*

[8] The rule requiring that the arbitration must be conducted pursuant to the terms of the agreement comes directly from the FAA itself. Section 4 empowers a court to order a party to arbitration only "in accordance with the terms of the agreement"—no more, no less. 9 U.S.C. § 4; *see also Inetianbor,* 768 F.3d at 1353 ("[T]he only way to enforce the arbitration agreement 'in accordance with the terms of the agreement' is to compel arbitration before an authorized representative of the Tribe." (quoting 9 U.S.C. § 4)).

Ryan's Family Steak Houses, Inc., 211 F.3d 306, 315-16 (6th Cir. 2000); *Hooters*, 173 F.3d at 939.

D. Plaintiff has specifically challenged the delegation clause.

In *Parnell v. CashCall, Inc.*, 804 F.3d 1142, 1147-49 (11th Cir. 2015), the Eleventh Circuit rejected a consumer's challenge of the Western Sky arbitration provision, concluding that because the provision delegated to the arbitrator the task of determining the validity of the arbitration provision, the plaintiff was required to challenge the validity of the "delegation clause" as a threshold issue, which the plaintiff in that case had failed to do. The court in *Banks v. CashCall, Inc.*, 2016 WL 3021749, *5 (M.D. Fla. May 26, 2016), reached the same conclusion.[9]

Defendants do not raise this threshold issue as a basis to compel arbitration in their opening brief, and therefore have waived it. *See Anspach ex rel. Anspach v. City of Philadelphia*, 503 F.3d 256, 258 n.1 (3d Cir. 2007) ("failure to raise an argument in one's opening brief waives it"). Even if Defendants had raised this issue, any such

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[9] At first glance, the decisions in *Parnell* and *Banks* appear at odds with the overwhelming authority invalidating the Western Sky arbitration provision. However, the decisions in *Parnell* and *Banks* are "procedural rather than substantive." *Smith*, 168 F.Supp.3d at 786. Moreover, the Eleventh Circuit in *Parnell* went out of its way to point out that the plaintiff should be given leave to amend to cure the procedural deficiency, 804 F.3d at 1149 and n.2, which he subsequently did, 2016 WL 3356937 at *10-11. Similarly, the district court in *Banks* noted that "in light of the *Parnell* decision, the Court explicitly gave Plaintiff an opportunity to amend its pleadings, yet despite such prompting, Plaintiff elected to rest on his prior briefing." 2016 WL 3021749 at *5. Both decisions are therefore distinguishable from the present matter, where Plaintiff has explicitly challenged the delegation clause. *Compl.* ¶ 32.

argument would be unavailing because, unlike the plaintiffs in *Parnell* and *Banks*, here Plaintiff has directly challenged the delegation clause. *Compl.* ¶ 32. And, as explained by the courts in both *Smith* and *Ryan*, the delegation clause suffers from the same defect as the arbitration provision, making it "equally illusory" because it would "place an arbitrator in the impossible position of deciding the enforceability of the agreement *without* authority to apply any applicable federal or state law." *Smith*, 168 F.Supp.3d at 786; *see also Ryan*, 2016 WL 4702352 at *5-6.

E. The unconscionable Arbitration Provision cannot be enforced.

The Western Sky arbitration scheme is rotten to its core, and the offending provisions cannot be severed. "[T]he offending provisions go to the core of the arbitration agreement. It is clear that one of the animating purposes of the arbitration agreement was to ensure that Western Sky and its allies could engage in lending and collection practices free from the strictures of any federal law." *Hayes*, 811 F.3d at 675–76; *see also* Smith, 168 F. Supp. 3d at 785 (purpose of the agreement was "not to create a fair and efficient means of adjudicating Plaintiff's claims, but to manufacture a parallel universe in which state and federal law claims are avoided entirely"). In cases such as this, where "unconscionability permeates the agreement," the Third Circuit has held that the "cumulative effect of so much illegality prevents us from enforcing the arbitration agreement." *Alexander v. Anthony Int'l, L.P.*, 341 F.3d 256, 271 (3d Cir. 2003). Defendants motion to compel arbitration should be denied. *Accord Inetianbor*, 2016 WL 4702370 at *5 ("Defendants' motion to compel … Plaintiffs to arbitrate

their claims in an imaginary forum with imaginary rules pursuant to contractual provisions already deemed unenforceable, if not unconscionable and a sham, is clearly nothing more than the latest in their brazen attempts to delay this litigation and avoid reaching the merits of the case. The Court finds no basis for granting such a motion.").

II. This Court is a proper venue for this action.

Defendants argue that this matter should be litigated in the tribal courts of the CRST, arguing that tribal court is the proper venue for Plaintiff's claims pursuant to *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). But as the court in *Dolgencorp* recognized, tribal jurisdiction is limited to "what is necessary to protect tribal self-government or to control internal relations." *Id.* at 172 (quoting *Montana v. United States*, 450 U.S. 544, 564 (1980)). This is not such a case.

Dolgencorp in inapplicable here. That case involved a thirteen-year-old member of a tribe who was sexually molested while working at a Dollar General store on a reservation, and sought to assert claims in tribal court for this on-reservation conduct. 746 F.3d at 167. "It is surely within the tribe's regulatory authority to insist that a child working for a local business not be sexually assaulted by the employees of the business." *Id.* at 173–74. In contrast, the loans at issue here "do not implicate the sovereignty of the tribe over its land and its concomitant authority to regulate the

activity of nonmembers on that land," and therefore "the tribal courts do not have jurisdiction over the Plaintiffs' claims." *Jackson*, 764 F.3d at 782. As a neighboring district court recently held, any connection to the CRST is a "legal fiction" and tribal courts "do not have jurisdiction over Plaintiff's claims." *Smith*, 168 F.Supp.3d at 783; *see also Inetianbor,* 2016 WL 4702370, at *7 ("Plaintiffs' actions do not fall within the Tribe's adjudicative authority, and without subject matter jurisdiction, the CRST Court is not a proper venue to adjudicate Plaintiffs' claims.").

As a fallback, Defendants argue that the tribal court should decide the venue issue in the first instance under the doctrine of tribal exhaustion. Consistent with their habit of "selective presentation of cases,"[10] Defendants fail to inform the Court that both the Fourth and Seventh Circuits have rejected this argument unequivocally. *See Jackson*, 764 F.3d at 786; *Hayes*, 811 F.3d at 676 n.3; *see also Smith*, 168 F. Supp. 3d at 783-84 (rejecting tribal exhaustion). As stated by the Seventh Circuit:

> The present dispute does not arise from the actions of nonmembers on reservation land and does not otherwise raise issues of tribal integrity, sovereignty, self-government, or allocation of resources. There simply is no colorable claim that the courts of the Cheyenne River Sioux Tribe can exercise jurisdiction over the Plaintiffs. Tribal exhaustion, therefore, is not required.

Jackson, 764 F.3d at 786. Defendants' tribal-exhaustion argument has no merit and should be rejected here.

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[10] *Smith,* 168 F. Supp. 3d at 781.

III. Plaintiff's claims are governed by New Jersey law.

Despite a multitude of decisions finding that the Western Sky Enterprise's claims of tribal affiliation are nothing more than a sham intended to shield the Enterprise's illegal practices from state and federal authorities, Defendants nonetheless maintain that the CRST has a "substantial relationship" to this matter and a "strong interest" in seeing its law applied in this case. Nothing could be further from the truth. The CRST has no relationship to the issues presented in this matter and no interest in seeing its law applied to a transaction that occurred between a California-based lender and consumers in New Jersey.

Defendants concede that CRST law cannot be applied if either (1) the CRST "has no substantial relationship to the parties or the transaction and there is no other reasonable basis for" application of CRST law ***or*** (2) application CRST law "would be contrary to a fundamental public policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue ...." *North Bergen Rex Trans., Inc. v. Trailer Leasing Co.*, 158 N.J. 561, 568 (1999) (citing the Restatement (Second) Conflicts of Laws § 187(2)(1969)). Here, both exceptions are satisfied and the choice of law provision should not be enforced. In addition, even if enforceable, the choice-of-law provision—by its plain terms—does not apply to non-contract claims and is therefore inapplicable in this case.

A. The CRST has no substantial relationship to the parties or the transaction.

None of the parties to this litigation or the loan agreement have a substantial relationship with the CRST. Defendants CashCall, WS Funding, and Reddam reside in California. *Compl.* ¶¶ 6-8. Delbert is based in Nevada. *Id.* at ¶ 9. Plaintiff is a resident of New Jersey. *Id.* at ¶ 5. Although Plaintiff's loan agreement purports to identify Western Sky Financial as the nominal "lender," this representation was a sham—"CashCall is the actual or de facto lender." *Compl.* ¶ 17 & Ex. 1 at 7. CashCall supplied the funds; CashCall bore the risk of loss; CashCall was obligated to purchase the notes; CashCall indemnified Western Sky for any liability; CashCall provided technical and administrative support and marketing services; CashCall received all payments from consumers. *Compl.* Ex. 1 at 7. "CashCall, not Western Sky, was the true lender." *CFPB*, 2016 WL 4820635, at *6; *see also Smith*, 168 F.Supp.3d at 783 (rejecting CRST affiliation as a "legal fiction").

The only apparent reason for the contractual choice of CRST law is Defendants' desire to shield themselves from state usury, licensing, and consumer protection laws. *Smith*, 168 F. Supp. 3d at 785. Examining a full factual record on summary judgment, the *CFPB* court held that the CRST did not have a substantial relationship with the parties or the transaction and that there was no other reasonable basis to apply CRST law. 2016 WL 4820635, at *7 ("after applying the principles of Restatement § 187(2)(a), the Court concludes that the tribal choice of law provision is

unenforceable."). Further, even if Western Sky Financial were a legitimate predecessor-in-interest rather than a sham front for an illegal operation, New Jersey law would still apply in this case. *See Lehman Comm. Paper, Inc. v. Karagjozi*, 2008 WL 5451051, *7 (D.N.J. Dec. 30, 2008) (holding that the chosen forum's law did not apply where both parties were citizens of other states and the chosen forum of Ohio was selected "because the agreement was entered into by . . . Plaintiff's predecessor in interest … that is located in Ohio.").

B. Application of CRST law would be contrary to a fundamental public policy of New Jersey and New Jersey has a greater interest in this matter than the CRST.

New Jersey has a fundamental public policy of protecting its residents from the type of unconscionable, usurious loans at issue here. "A fundamental policy may be embodied in a statute which makes one or more kinds of contracts illegal or which is designed to protect a person against the oppressive use of superior bargaining power." Restatement (Second) of Conflict of Laws § 187, cmt. g (1971); *see also Networld Commc'ns, Corp. v. Croatia Airlines, D.D.*, 2014 WL 4662223, *3 (D.N.J. Sept. 18, 2014) (existence of a statute concerning the subject matter of the lawsuit "clearly evidences New Jersey's public policy…" with regard to that issue.). New Jersey has expressly prohibited consumer contracts with interest rates greater than 16%. N.J. Stat. § 31:1-1(a). In fact, New Jersey's interest in regulating these types of transactions is so great that the state has criminalized the act of charging consumers an interest rate greater than 30%. *See* N.J. Stat. § 2C:21-19. New Jersey also requires that

consumer lenders be licensed by the state. *See* N.J. Stat. § 17:11C-1 *et seq*. This public policy is so strong that a violation of this statute voids the underlying loan agreement. *See* N.J. Stat. § 17:11C-33. The existence of these statutes shows that New Jersey has a fundamental public policy against usurious consumer loan contracts by unlicensed lenders.

The CRST, on the other hand, has no interest in this matter. Defendants blindly ignore the fact that the substance of the transactions involved here were between consumers in New Jersey and a predatory lender based in California. *Compl.* Ex. 1 at 7; *CFPB*, 2016 WL 4820635 at *6; *Smith*, 168 F.Supp.3d at 783. Instead, the only purported tribal interest advanced by Defendants is that the CRST's "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." *Def's Memo.* at 14. While that may be true in cases involving legitimate business transactions with CRST residents and businesses, such is not the case here. Indeed, the Native American Financial Services Association has disavowed the Western Sky Enterprise, noting that its purpose is to "profiteer" and that it "does not operate according to tribal law, and breaks the covenants meant to benefit tribal governments and their members." *Compl.* Ex. 2. In short, the CRST "does not have a significant interest in the application of its law when Western Sky is neither a tribally-owned corporation, nor the true lender." *CFPB,* 2016 WL 4820635 at *7.

C. The choice-of-law provision does not apply to non-contract claims.

Even if the choice-of-law provision in the agreement were enforceable, by its plain terms it does not apply to the claims in this case. The agreement, in a section titled **GOVERNING LAW**, states, "[t]his Agreement is governed by the Indian Commerce Clause of the Constitution of the United States of America and the laws of the [CRST]." *Compl.* Ex. 3 at 8. It goes on to state that "this agreement shall be subject to and construed in accordance only with the provisions of the laws of the [CRST]." *Id.* This court has made clear that choice-of-law provisions using this phrasing do not apply to non-contract claims. *See Board of Ed. of the Twnshp of Cherry Hill, Camden County v. Human Resource Microsystems, Inc.*, 2010 WL 3882498, at *3-4 (D.N.J. Sept. 28, 2010) ("*HR Microsystems*").

HR Microsystems is instructive. There, the court examined a provision stating "[t]his agreement shall be governed by…," *id.*, nearly identical language to the provision at issue here. The court noted that "when a choice-of-law provision is intended to apply not only to the interpretation and enforcement of the contract but also to any claims related to the contract, the language used is broader." *Id.* Accordingly, the court held that the choice-of-law provision at issue in *HR Microsystems* did not apply to the plaintiff's non-contract claim. *Id.* Here, because Plaintiff has not pled any contract-based claims, the choice-of-law provision is similarly inapplicable.

IV. Plaintiff has stated claims under New Jersey law.

Defendants move to dismiss Counts I, II, and III of Plaintiff's complaint under Fed. R. Civ. P. 12(b)(6).[11] In considering a Rule 12(b)(6) motion to dismiss, the court accepts as true all of the facts in the complaint and draws all reasonable inferences in favor of the plaintiff. *Phillips v. Cnty. of Allegheny,* 515 F.3d 224, 231 (3d Cir.2008). Moreover, dismissal is inappropriate even where "it appears unlikely that the plaintiff can prove those facts or will ultimately prevail on the merits." *Id.* A complaint will survive a motion to dismiss if it provides a sufficient factual basis such that it states a facially plausible claim for relief. *Ashcroft v. Iqbal,* 556 U.S. 662 (2009).

Plaintiff recognizes that in light of this court's decisions in *Jubelt v. United Mortg. Bankers, Ltd.*, 2015 WL 3970227 (D.N.J. June 30, 2015) and *Veras v. LVNV Funding, LLC*, 2014 WL 1050512 (D.N.J. Mar. 17, 2014), the Court is unlikely to recognize a standalone cause of action for violation of the Consumer Finance Licensing Act (Count II). However, Plaintiff's Complaint is more than adequate to state claims for Usury (Count I) and violation of the Consumer Fraud Act (Count III).

[11] Defendant's Memorandum also refers to dismissal of Count IV, but Defendants provide no argument or authority in support of dismissal of this Count, and the issue is therefore waived. *See Sportscare of Am., P.C. v. Multiplan, Inc.*, 2011 WL 589955, *1 (D.N.J. Feb. 10, 2011).

A. The Complaint states a claim for Usury.

Defendants argue that Plaintiff "has failed to state sufficient allegations" to support his usury claim. *Def's Memo.* at 17. A usury claim under New Jersey law has three elements: "(1) a loan of money, (2) an absolute obligation to repay the principal and (3) the exaction of a greater compensation than that allowed by law for the use of the money." *Dopp v. Yari*, 927 F.Supp.814, 820 (D.N.J. 1996). Defendants do not contend that Plaintiff has failed to allege all three elements. Instead, the only supposed deficiency that Defendants point to is the contention that "[t]he Complaint does not address whether Plaintiff is in default of his obligation." *Id.* at 17-18. In other words, Defendants do not dispute that the applicable usury cap is 16% and that Plaintiff was absolutely obligated to pay—and did pay—more than 16%. This is usury, plain and simple.

Defendants' "default" argument misrepresents a series of cases holding that penalties that apply upon default cannot be added to the regular interest rate on the note to produce a usury claim where the rate charged prior to default is not usurious. *See Pegasus Blue Star Fund, LLC v. Canton Prods., Inc.*, 2009 WL 3246616, *3 (D.N.J. Oct. 6, 2009); *Loigman v. Keim*, 250 N.J. Super. 434, 437, 594 A.2d 1364, 1366 (Law. Div. 1991). But here, the usurious rate is not some accumulation of interest and default penalties—it is the rate that applies on the face of the note. *See Compl.* Ex. 3 at 6 (requiring the payment of "interest calculated at 115% per annum").

That Plaintiff actually paid this usurious rate of interest for well over three years is also clearly alleged. *See Compl.* ¶¶ 38-43. Indeed, Plaintiff's payment history during this time is attached as an exhibit to the complaint, showing that he paid more than $15,000 in unlawful interest between December 2012 and April 2016 under the terms of the loan. *Compl.* ¶ 42 & Ex. 4. There is no merit to Defendants' contention that Plaintiff has not stated a claim for usury.[12]

B. The Complaint states a claim under the Consumer Fraud Act.

The Consumer Fraud Act ("CFA") prohibits, among other things, the "act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, suppression or omission of any material fact … in connection with the sale or advertisement of any merchandise." N.J. Stat. § 56:8-2. The CFA's prohibitions extend to the provision of consumer credit. *Lemelledo v. Ben. Mgmt. Corp. of Am.*, 150 N.J. 255, 265, 696 A.2d 546, 551 (1997).

Defendants argue that the Complaint does not satisfy the heightened pleading requirements of Fed. R. Civ. P. 9(b) applicable to causes sounding in fraud. Assuming for the sake of argument that Rule 9(b) applies, *but see In re NorVergence, Inc.,* 424 B.R.

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[12] Even less meritorious is Defendants' suggestion that the usurious interest rate was somehow the product of "a good faith mistake and not by intent to evade the usury laws." *Def's Memo.* at 18 (quotation omitted). The purpose of the Western Sky Enterprise was to serve as "a front … to evade licensure by state agencies and … to shield its deceptive business practices from prosecution." *Compl.* Ex. 1 at 5.

663, 694 (Bankr. D.N.J. 2010) (Rule 9(b) does not apply to claim for unconscionable conduct, which does not sound in fraud), Plaintiff's detailed Complaint, along with the attached Exhibits, more than suffices.

"[T]he most basic consideration for a federal court in making a judgment as to the sufficiency of a pleading for purposes of Rule 9(b) … is the determination of how much detail is necessary to give adequate notice to an adverse party and enable that party to prepare a responsive pleading." 5A Wright & Miller, Federal Practice & Procedure § 1298 (3d ed. April 2016 update). In the context of fraudulent schemes under the CFA, this standard is satisfied when the complaint "sufficiently communicates the details of the alleged scheme, its time period, and each Defendant's alleged role." *Zodda v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 2015 WL 926221, *9 (D.N.J. Mar. 4, 2015).

The Complaint in this matter is more than sufficient. The Complaint contains detailed allegations regarding the unlawful consumer lending scheme of the Western Sky enterprise, including the role of each defendant within that scheme, *Compl.* ¶¶ 15-23, the false representations made by the Enterprise, *Id.* ¶¶ 24-33, and Plaintiff's specific interaction with the Enterprise, *Id.* ¶¶ 37-43. The Complaint also identifies the specific practices employed by the Enterprise that constitute violations of the CFA. *Compl.* ¶¶ 67-68. Finally, the Complaint also attaches, and incorporates by reference, the New Hampshire Banking Department's Cease and Desist Order, which concludes that Defendants' "business scheme constitutes an unfair or deceptive act or practice"

and includes detailed factual findings supporting that conclusion. *Compl.* n.1 & Ex. 1. The Complaint is more than sufficient to provide Defendants with adequate notice of the unconscionable practices that form the basis of Plaintiff's claim under the CFA.[13]

Furthermore, it is a crime in New Jersey to charge an interest rate of more than 30%. N.J. Stat. § 2C:21-19. Doing so is also an "unconscionable practice" that violates the CFA as a matter of law. *Green v. Continental Rentals*, 292 N.J. Super. 241, 257, 678 A.2d 759, 766 (Ch. Div. 1994). The Complaint alleges that Defendants did just that, and describes in detail the scheme they used to do it and the role of each Defendant in that scheme. This alone is sufficient to sustain a claim under the CFA as a matter of law. *Green*, 678 A.2d at 766.

In short, the Complaint satisfies Rule 9(b). It describes in detail "the who, what, when, where, and how" of the Western Sky Enterprise, *In re Advanta Corp. Sec. Litig.*, 180 F.3d 525, 534 (3d Cir. 1999) (quotation omitted), and is more than sufficient 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).

[13] Defendants' contention that the Complaint contains "collectivized allegations," *Def's Memo.* at 19, while technically true in some instances, is not dispositive. As explained above, the Complaint also contains detailed allegations describing "the details of the alleged scheme … and each Defendant's alleged role." *Zodda*, 2015 WL 926221, at *9.

V. Plaintiff's RICO claims are sufficiently pled.

In addition to claims under New Jersey law, the Complaint also asserts claims under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1962(c) & (d). *Compl.* ¶¶ 89-90. None of Defendants' arguments seeking dismissal of Plaintiff's RICO claims have merit.

First, Defendants' argument that the Complaint does not meet the pleading requirements for a "fraud-based RICO claim" is irrelevant. *Def's Memo.* at 21. Plaintiff's RICO claims are not based on fraud, they are based on "the collection of unlawful debt," a separate category of prohibited activity. *See Compl.* ¶¶ 83-84, 88-90; *see also H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 232 (1989) (RICO requires "proof either of 'a pattern of racketeering activity' or of 'collection of an unlawful debt.'"); 18 U.S.C. § 1962(a)-(c) (generally prohibiting "a pattern of racketeering activity" or the "collection of unlawful debt."). RICO claims not based on fraud are not subject to Rule 9's pleading requirements. *Proctor v. Metro. Money Store*, 645 F.Supp.2d 464, 476 (D. Md. 2009).[14] But even if Rule 9(b) applied, it would be satisfied for the reasons described above in relation to Plaintiff's claims under the Consumer Fraud Act.

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[14] Defendants rely on *Warden v. McLelland*, 288 F.3d 105, 114-115 (3d Cir. 2002), a case that involved racketeering activity in the form of "mail fraud and wire fraud," which triggered the "heightened pleading requirement of Rule 9(b)." While it is likely that Defendants engaged in mail fraud and wire fraud in conducting the criminal lending scheme of the Western Sky Enterprise (*see* N.J. Stat. § 2C:21-19 (criminal usury)), those fraudulent activities are not presently the basis of Plaintiff's RICO claims.

Second, Defendants' argument that Plaintiff has not stated facts showing the collection of unlawful debt is wrong. "Only one act of collecting or attempting to collect unlawful debt is necessary to establish that predicate act." *United States v. Eufrasio*, 935 F.2d 553, 576 (3d Cir. 1991). The debt is "unlawful" for purposes of RICO if it was loaned at twice the lawful usury rate. 18 U.S.C. § 1961(6). The maximum interest rate chargeable to consumers under New Jersey law is 16%. N.J. Stat. § 31:1-1(a). The Complaint alleges that Defendants collected debt on a loan with more than a 100% rate of interest, easily more than double the lawful 16% rate. *See Compl.* ¶¶ 39-43. The debt was therefore clearly an "unlawful debt" under RICO. *See Proctor*, 645 F.Supp.2d at 482 ("the allegedly high interest rates charged by Defendants constitute the collection of an 'unlawful debt'").[15]

Third, Defendants' assertion that Plaintiff's claims do not satisfy RICO's "distinctness" requirement also fail. Defendants' first contention—that the enterprise is "coextensive with the Defendants and their agents"—is factually incorrect. *Def's Memo.* at 23. The RICO enterprise described in the complaint—the "Western Sky Enterprise,"—is defined to include each individual Defendant **and** non-party Western Sky Financial. *See Compl.* ¶¶ 82, 86; *see also Jacobson v. Cooper*, 882 F.2d 717, 720 (2d Cir.

[15] Defendants' cases are inapposite. *Bey v. DaimlerChrysler Servs.*, involved a loan at 12.21% interest, which is not usurious under New Jersey law. 2005 WL 1630855, *6 (D.N.J. July 8, 2005). The *pro se* plaintiff in *Souders v. Bank of Am.*, did not allege any unlawful activity. 2012 WL 7009007, *12-13 (M.D. Pa. Dec. 6, 2012). As described above, the interest rates charged here are not just unlawful, they are criminal.

1989) ("Where the overlap between the defendants and the alleged RICO enterprise is only partial, a RICO claim may be sustained."); *St. Paul Mercury Ins. Co. v. Williamson*, 224 F.3d 425, 447 (5th Cir. 2000) ("a defendant may be both a person and a part of an enterprise"); *Brokerage Concepts, Inc. v. U.S. Healthcare, Inc.*, 1995 WL 455969, *6 (E.D. Pa. July 27, 1995) ("part of the whole does not share identity with the whole"). Defendants do correctly note that the "heart" of Plaintiff's Complaint is essentially that the entire Western Sky Enterprise was a sham established by Defendant Reddam to operate as his "alter ego" for purposes of circumventing the law. *See Def's Memo.* at 23. However, Plaintiff's RICO claims are pled as an alternative to the "alter ego" theory. *See Compl.* ¶ 82. The pleading of alternative and inconsistent theories is allowed. *Sahoury v. Meredith Corp.*, 2012 WL 3185964, *8 (D.N.J. Aug. 2, 2012) ("Defendants' argument ignores that Rule 8(d)(2) permits plaintiffs to plead alternative and inconsistent claims in a complaint.").[16]

Finally, Defendants' arguments to dismiss the conspiracy claim under section 1962(d) also lack merit. Defendants first argue that the conspiracy claim must fail due

[16] Citing out-of-circuit authority, Defendants also argue that the Complaint fails to allege "that Delbert, WS Financial, or CashCall had any management role in the alleged enterprise." *Def's Memo.* at 24. But the Third Circuit has held that the "operation or management" test is satisfied where the defendant had "substantial involvement in the criminal activities" of the enterprise. *United States v. Parise*, 159 F.3d 790, 796-97 (3d Cir. 1998). Here, the Complaint contains detailed allegations regarding the substantial involvement of each entity in the scheme to collect unlawful interest. *See Compl.* ¶¶ 15-23, 38-41, & Ex. 1.

to the alleged failure of the underlying RICO violation. *Def's Memo.* at 24. But, as explained above, Defendants' arguments regarding the underlying violation are unavailing. Defendants next argue that Plaintiffs "alter ego" allegations doom his conspiracy claim because, in effect, Reddam cannot conspire with himself. *See Def's Memo.* at 24-25. But, as explained above, the RICO claim is pled as an alternative to the "alter ego" theory and the pleading of alternative, inconsistent theories is allowed.

VI. This Court has personal jurisdiction over Defendant Reddam.

Reddam argues that this Court lacks personal jurisdiction over him, arguing that the exercise of jurisdiction by a New Jersey court violates due process. *See Def's Memo.* at 25-28. As is his wont, Reddam fails to inform the Court that he made the identical argument to the *Inetianbor* court, which squarely rejected his argument and found that "the exercise of personal jurisdiction over Reddam comports with the Due Process Clause." *Inetianbor v. CashCall, Inc.*, No 13-cv-60066-JIC, ECF No. 193 at 22 (S.D. Fla. April 5, 2016) ("*Inetianbor Slip Op.*").[17]

Due process is satisfied where the defendant has "minimum contacts" with the forum state such that the exercise of jurisdiction comports with "traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quotation omitted). In cases involving intentional torts, due process allows for jurisdiction over a non-resident defendant where the defendant was a "primary

[17] Attached to the Declaration of Patricia A. Barasch as Exhibit A.

participant[] in an alleged wrongdoing intentionally directed at a [forum-state] resident." *Calder v. Jones*, 465 U.S. 783, 790 (1984). "Physical presence within the forum is not required." *IMO Indus., Inc. v. Kiekert AG*, 155 F.3d 254, 259 (3d Cir. 1998).

Multiple courts have concluded that Reddam was a primary participant in the unlawful Western Sky lending scheme. The *Inetianbor* court concluded that "by signing documents establishing the relationship between CashCall, Western Sky, and WS Financial, Reddam was a primary participant in creating and setting up a usurious lending operation." *Inetianbor Slip Op.* at 19. The court in the CFPB matter held that Reddam "both participated directly in and had the authority to control CashCall's and Delbert Services' deceptive acts." *CFPB v. CashCall, Inc.*, 2016 WL 4820635, at *11. The Complaint in this matter similarly alleges that, among other things, Reddam:

- intentionally orchestrated and controlled the actions of the other defendants and directed their activities to the marketing, offering, making, servicing, and collecting of unlawful loans in New Jersey;

- was the key player responsible for the perpetration of the unlawful and harmful conduct that occurred in New Jersey;

- approved and signed the key documents facilitating the Western Sky Enterprise and setting up Western Sky Financial as the sham "front" for this Enterprise.

Compl. ¶¶ 13, 21.

Reddam does not seriously dispute these allegations, nor does he dispute that the Western Sky Enterprise purposefully and knowingly lent money to residents of

New Jersey. Instead, he argues that he simply acted in his "corporate capacity as CEO of CashCall." *Def's Memo.* at 26.[18] But the so-called "corporate shield" is not absolute. *See Calder,* 465 U.S. at 790 ("status as employees does not somehow insulate them from jurisdiction."). "[A] corporate officer will be subject to personal jurisdiction" when the officer was a "key player" in the unlawful activity directed toward the forum state. *Mendelsohn, Drucker & Associates v. Titan Atlas Mfg., Inc.*, 885 F. Supp. 2d 767, 784 (E.D. Pa. 2012). Reddam has not—and cannot—refute his role as **the** key player in the Western Sky Enterprise, and therefore he is subject to personal jurisdiction in this Court.

But, in a sense, this entire discussion is purely academic because Reddam readily acknowledges that he is subject to personal jurisdiction in this Court via the nationwide service of process provision of the Federal RICO statute. *See Def's Memo.* at 28 (citing 18 U.S.C. § 1965(d)). Under this provision, "where a district court has personal jurisdiction over one RICO defendant, it can exert personal jurisdiction over all RICO defendants who have minimum contacts with the United States." *Pop Test Cortisol, LLC v. Univ. of Chicago*, 2015 WL 3822237, *4 (D.N.J. June 18, 2015). There is

[18] In portraying himself as a simple corporate officer, Reddam grossly understates his role in the scheme. "Reddam is the founder, sole owner, and president of CashCall, the president of CashCall's wholly-owned subsidiary WS Funding, and the founder, owner, and CEO of Delbert Services." *CFPB*, 2016 WL 4820635, at *11. As the sole owner of all of the relevant entities, his assertions that he has "never personally benefitted from any loan payments made by MacDonald or any other Western Sky borrower in New Jersey" defies credibility. Reddam Aff. ¶ 11, ECF No. 11-4.

no dispute that this Court has personal jurisdiction over the other Defendants, and Reddam, a California resident, clearly has minimum contacts with the United States. Thus, even if the Court lacks jurisdiction under New Jersey's long-arm statute, it has independent personal jurisdiction over Reddam under RICO.[19]

VII. Leave to Amend.

As explained above, Defendant's motion to dismiss Counts I, II, III, and the RICO claim under Rule 12(b)(6) rests on the incorrect premise that the Complaint does not contain sufficient factual detail to state a claim for relief. However, to the extent the Court agrees with any of the contentions advanced by Defendant, Plaintiff respectfully requests leave to amend his complaint to cure any pleading deficiencies. *See Phillips v. Cty. of Allegheny*, 515 F.3d 224, 228 (3d Cir. 2008) ("in the event a complaint fails to state a claim, unless amendment would be futile, the District Court must give a plaintiff the opportunity to amend her complaint").

Conclusion

For the foregoing reasons, Defendants' motion should be denied. In the alternative, if the Court finds that Plaintiff has failed to state a claim, Plaintiff respectfully requests leave to amend his Complaint.

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[19] This jurisdiction also applies to Plaintiffs pendant claims. *See IUE AFL-CIO Pension Fund v. Herrmann*, 9 F.3d 1049, 1056 (2d Cir. 1993) (describing the doctrine of pendant personal jurisdiction).

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*admitted *pro hac vice*

***pro hac vice* motion to be filed