IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

NICOLE MARIE SWIGER, *on behalf of herself and all individuals similarly situated*, Plaintiff, v. JOEL ROSETTE, TED WHITFORD, TIM MCINERNEY, and KENNETH E. REES, Defendants.	Civil Action No. 2:19-cv-12014-BAF-RSW Hon. Bernard A. Friedman Magistrate Judge R. Steven Whalen

PLAINTIFF'S RESPONSE IN OPPOSITION AND OBJECTION TO

"DEFENDANT KENNETH E. REES' MOTION

TO TRANSFER VENUE UNDER 28 U.S.C. §1412"

Submitted by:

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RESPONSE TO MOTION

Plaintiff opposes the Motion of Defendant Rees for Transfer of Venue to the Northern District of Texas, where purportedly "related" bankruptcy proceedings are subject to a settlement that has received preliminary approval by the court and where the creditors' vote on a reorganization plan is underway and ballots will be ready for tabulation on October 30, 2019 (Exhibit 8-1). The grounds for opposing the Motion are detailed in the accompanying Brief in Opposition to this Motion.

OBJECTION TO MOTION

It is a complete falsehood that, as asserted by defendant Rees' counsel, "the nature of the motion and its legal basis were explained" to undersigned counsel in accordance with L.R. 7.1(a)(1). A copy of the September 30, 2019 e-mail communication on the subject from Rees' lead counsel to plaintiff's counsel (Exhibit 8-2) reflects that no "legal basis" whatsoever for this motion was identified or cited.

In *Reliable Carriers, Inc. v. Taylor Online Marketing* (E.D.Mich. No. 12-cv-10770, June 13, 2012) this Court summarized the requirements of L.R. 7.1(a)(1):

> Local Rule 7.1 requires a party who desires to file a motion to first attempt to obtain the opposing party's concurrence, to apprise the court in its motion of its efforts in that regard, and to provide the court with a separate brief that concisely states the issues presented and the controlling authority for the motion. E.D. Mich. LR 7.1(a)(1)-(2); (d)(1). * * *
>
> Here, Taylor's letter conforms to none of these rules. The format of his letter lacks any of the requirements of the Local Rules. He makes no

> statement regarding an attempt to confer with Reliable, nor does he make a concise statement of the issues presented or provide any controlling legal authority.

Here, similarly, counsel's September 30, 2019 e-mail contains no description of the issues to be raised regarding transfer of venue, no reference to pertinent facts, and identifies no controlling legal authority for undersigned counsel to evaluate in deciding whether to concur or not.

The Motion has therefore been improperly filed without compliance, or a good faith effort to comply, with this Court's rules. This Court would be justified in denying the relief requested accordingly. *United States v Ramesh* (E.D.Mich. No. 02-80756 March 26, 2009) ("Inasmuch as Ramesh has failed to comply with this Local Rule [7.1(a)(1)] prior to filing this motion, the Court must deny the relief that he seeks to obtain.")

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

NICOLE MARIE SWIGER, *on behalf of herself and all individuals similarly situated*, Plaintiff, v. JOEL ROSETTE, TED WHITFORD, TIM MCINERNEY, and KENNETH E. REES, Defendants.	Civil Action No. 2:19-cv-12014-BAF-RSW Hon. Bernard A. Friedman Magistrate Judge R. Steven Whalen

PLAINTIFF'S BRIEF IN OPPOSITION TO

"DEFENDANT KENNETH E. REES' MOTION

TO TRANSFER VENUE UNDER 28 U.S.C. §1412

Submitted by:

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[COUNTER-]STATEMENT OF THE ISSUES PRESENTED

A. Is Defendant Rees' claim for indemnification bogus, because Rees always lacked "no reasonable cause to believe his conduct was unlawful"?

Plaintiff answers "yes".

B. Where, by his own admission, defendant Rees ceased acting as officer, agent, or director of Think Finance, and Plain Green ceased its formal relationship with Think Finance, 3 years before plaintiff Swiger's usurious loan, does Rees' liability arises from his individual rather than corporate wrongdoing and thus fall outside the scope of the Indemnification Agreement?

Plaintiff answers "yes" and "yes".

C. Has Rees failed to satisfy the statutory grounds for transfer of venue ?

Plaintiff answers "yes".

D. To the extent being "related to" a pending bankruptcy matter is a factor in transferring venue of a case, is this case is NOT "related to" the pending Think Finance bankruptcy?

Plaintiff answers "yes".

E. Even if this case were considered "related to" the Think Finance bankruptcy, that is only one factor in relation to transfer of venue, and do the other factors combine to outweigh that lone justification for changing venue herein?

Plaintiff answers "yes".

F. Even if Rees surmounted all prior objections to transfer of venue, as applied to Rees' criminal conduct within the State of Michigan, is the Indemnification Agreement void as against public policy and thus unable to support a transfer?

Plaintiff answers "yes".

CONTROLLING AUTHORITIES

With regard to the Motion to Transfer Venue, the following authorities are most central (those which are controlling[1] are marked with an asterisk (*)):

Issue A: Delaware General Corporation Law, §145(a); *Green v. Westcap Corp. of Del*., 492 A.2d 260 (Del. Super. 1985); *Silsbee v. Stockle*, 44 Mich. 561, 572; 7 NW 160 (1880)*; *Michigan v. Bay Mills Indian Cmty*., 572 U.S. ___, 134 S.Ct. 2024 (2014)*; *United States v Dumeisi*, 424 F.3d 566 (7th Cir. 2005).

Issue B: *Baranowski v. Strating*, 72 Mich.App. 548, 250 N.W.2d 744 (1976); *Browning-Ferris Indus. of Il. v. Ter Mat*, 195 F.3d 953 (7th Cir. 1999).

Issue C: *Reese v. CNH Am. LLC*, 574 F.3d 315 (6th Cir. 2009)*; *Thiam v. Holder*, 677 F.3d 299 (6th Cir.2012)*;.

Issue D: *Gibbs v. Stinson* (E.D.Va. No. 17:cv676, September 30, 2019); *Mich. Emp't Sec. Com'n v. Wolverine Radio Co. (In re Wolverine Radio Co.)*, 930 F.2d 1132 (6th Cir. 1991)*; *Celotex Corp. v. Edwards*, 514 U.S. 300 (1995)*.

Issue E: *Citizens Ins. Co. of America v. FCA U.S.*, LLC (No 15-14393, issued

[1] Defendant Rees identifies a single decision by Hon. M. Hannah Lauck of the Eastern District of Virginia as his "controlling authority". However, no decision by another district court could ever be "controlling", still less by one outside the 6th circuit's geographical boundaries. Only decisions by the Supreme Court (or the Michigan Supreme Court on points of Michigan law) or by the 6th Circuit Court of Appeals can be "controlling" (along with decisions of other courts that have received the 6th Circuit's imprimatur). In any event, Judge Lauck's more recent decision in a companion case supersedes her earlier decision on which defendant relies and reaches an antipodal conclusion that wholly supports Plaintiff's position.

May 11, 2016).

Issue F: *Stone Surgical, Inc. v. Stryker Corp.*, 858 F.3d 383 (6th Cir. 2017)*; *American States Ins. Co. v. Borbor*, 826 F.2d 888 (9th Cir. 1987); *Tew v. Chase Manhattan Bank, N.A.*, 728 F.Supp. 1551 (S.D.Fla. 1990); *Orzel by Orzel v. Scott Drug Co.*, 449 Mich. 550; 537 N.W.2d 208, 212 (1995)*; *Pantely v. Garris, Garris & Garris, P.C.*, 180 Mich.App. 768, 447 N.W.2d 864 (1989); *Morrison v McCann*, 301 F.Supp.2d 647 (E.D.Mich. 2003).

RESPONSE TO "INTRODUCTION"

Defendant Rees opens his brief by citing the opinion of Hon. M. Hanna Lauck, granting Mr. Rees' motion to transfer venue in *Gibbs v. Rees*, 2018 WL 1460705 (E.D.Va. March 23, 2018) ("*Gibbs 1*")—failing to mention that Judge Lauck subsequently took an opposite view and denied transfer. *Gibbs v. Stinson* (E.D.Va. No. 17:cv676, September 30, 2019) (Exhibit 8-3, pp. 9-14) ("*Gibbs 2*") (see below, pp. 19-20 and footnote 17 for detailed discussion).

RESPONSE TO "BACKGROUND"

Counsel for Rees indulge themselves in an orgy of name-calling, using loaded terminology like "copycat" and "plagiarize" to denigrate plaintiff Swiger and her counsel in a transparent effort to demonize Rees' opposition. Their diatribe is long on invective and short on fact—although, for example, they claim that the complaint in *Gibbs 1* (PageID 217-248) involves "the same factual allegations and theories of liability" as the Complaint here (PageID 28-66), without quoting either pleading or summarizing the respective claims.[2]

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[2] The *Gibbs 1* Complaint concerns Virginia's *civil* usury law (¶¶21-22, 72, 84), Virginia lender licensing requirements (¶¶23-26, 73, 86), loans made both by Plain Green, LLC *and* Great Plains Lending, LLC (Otoe-Missouria tribe of Oklahoma) (¶¶89-90), allegations that Kenneth Rees "directly and actively managed the activities of Think Finance" (¶101), a challenge to the validity of arbitration and choice of law clauses (¶¶88-95). There are two counts under RICO, one under Virginia usury law, and a declaratory judgment count.

In contrast, the Complaint herein concerns Michigan's *criminal* usury law (¶9), *nothing* about lender licensing, Great Plains Lending, or Rees' actions as a

The next claimed "fact"—that the *Gibbs* complaint filed in bankruptcy court has even more similarities to the Complaint herein—rings hollow, as it relies on Rees' Motion Exhibit B (Page ID 249-304), an adversary proceeding claim filed by Think Finance and related entities against Victory Park and related entities wherein the word "Gibbs" nowhere appears.

Rees follows with excerpts—taken out of contractual, legal and factual context—from his claimed Indemnification Agreement (Page ID 305-313). The pertinent portions of the Indemnification Agreement are quoted below in conjunction with the legal arguments to which they are pertinent.

To summarize: indemnification is not available to Kenneth Rees and transfer of venue is not justified for reasons detailed below in Parts A-F.

ARGUMENT

A. Defendant Rees' claim for indemnification is bogus because Rees always lacked "no reasonable cause to believe his conduct was unlawful".

Defendant Rees claims indemnification under an Agreement which in pertinent part provides (PageID 306):

B. Under Delaware law, a director's right to be reimbursed for the costs of

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manager of Think Finance (only Rees's personal wrongdoing is featured, ¶22). There are 4 RICO claims, a usury claim, an unjust enrichment claim, a declaratory judgment claim, an Electronic Funds Act Claim, a Michigan Consumer Act claim, and a Quo Warranto claim. While there are natural similarities (since both cases derive from the same nationwide conspiracy), this lawsuit is neither "copycat" nor "plagiarized" and the facts and theories of liability are narrowly tailored to Michigan-centered matters, except in minor particulars.

> defense of criminal actions * * * is permitted if the director satisfies the applicable standard of conduct.
> C. Indemnitee is a director of the Company and his/her willingness to serve in such capacity is predicated, in substantial part, upon the Company's willingness to indemnify him/her in accordance with the principles reflected above, to the fullest extent permitted by the laws of the state of Delaware, and upon the other undertakings set forth in this Agreement.

Section 145(a) of the Delaware General Corporation Law sets out the relevant requirements for indemnification by a corporation:

> A corporation shall have power to indemnify any person who was or is a party . . . to any threatened, pending or completed action, suit or proceeding, whether civil, criminal, administrative or investigative . . . by reason of the fact that the person is or was a director, officer, employee or agent of the corporation, . . . against expenses (including attorneys' fees) * * * if the person acted in good faith and in a manner the person reasonably believed to be in or not opposed to the best interests of the corporation . . . .

The settled construction of this statute was summarized in *Green v. Westcap Corp. of Del*., 492 A.2d 260, 264 (Del. Super. 1985) (boldfaced emphasis added):

> [I]ndemnification under this subsection is dependent on his having acted in good faith and in a manner he reasonably believed to be in or not opposed to the best interests of the corporation, **and in the case of a criminal proceeding he additionally must have had no reasonable cause to believe his conduct was unlawful.** * * *

Granting *arguendo* that violation of Michigan's usury laws (or any other lucrative criminal enterprise) would be hugely profitable and thus not antithetical to the "corporation's best interests", what is lacking is "no reasonable cause to believe his conduct was unlawful."

Michigan holds that "Every man is presumed, nay bound to know the law",

Silsbee v. Stockle, 44 Mich. 561, 572; 7 NW 160 (1880). Defendant Rees necessarily knew that, by conspiring to market usurious loans to Michigan residents, he was violating a criminal statute, MCL 438.240[3]. That Plain Green, as an arm of the Chippewa Cree Tribe, is immune from criminal prosecution by Michigan or federal authorities[4], is irrelevant—such sovereign immunity applies only to the tribe, not to agents or non-Indian conspirators like Kenneth Rees whose Michigan crimes are perpetrated off the Rocky Boy's reservation.

Make no mistake—the Chippewa Cree Tribe has ***no*** privilege or right to violate Michigan or federal law; it is simply immune from prosecution (and civil liability) for doing so. The distinction is important, as the Supreme Court made plain in *Kiowa Tribe of Okla. v. Mfg. Techs., Inc*., 523 U.S. 751, 755 (1998):

> To say substantive state laws apply to off-reservation conduct ... is not to say that a tribe no longer enjoys immunity from suit. * * * There is a difference between the right to demand compliance with state laws and the means available to enforce them.

Thus, *Michigan v. Bay Mills Indian Cmty*., 572 U.S. ___, 134 S.Ct. 2024 (2014) held that individual Indians, but not the Tribe, can be sued for violations of

[3] And by using interstate facilities to accomplish the criminal scheme, violating the Travel Act, 18 U.S.C. §1952(a)(3), as well as RICO, 18 U.S.C. §§1961 *et seq*.

[4] "Indian tribal sovereignty includes "common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978), and extends to "arms of the tribe" like Plain Green. *Kiowa Tribe of Okla. v. Mfg. Techs., Inc*., 523 U.S. 751, 754-5 (1998) (no distinction "between governmental and commercial activities of a tribe").

state law committed "beyond reservation boundaries." 134 S.Ct. at 2034-35.[5].

Kenneth Rees, a non-Indian, was instrumental in helping Plain Green design and establish its usurious business model and launching violations of Michigan (and federal) law. Inasmuch as Plain Green's individual Indian agents may be held liable civilly or criminally for violating Michigan usury law *inter alia*, non-Indian co-conspirators like Kenneth Rees can hardly fare better. *United States v Dumeisi*, 424 F.3d 566, 580-81 (7th Cir. 2005)[6]. Kenneth Rees could not *reasonably* understand his rent-a-tribe concept would not run afoul of Michigan criminal law.

Indeed, the very phrasing of the Indemnification Agreement makes abundantly clear the contracting parties were *planning to embark upon criminal activity*, and Rees ought not now be heard to deny having "reasonable cause" to

[5] Sovereign immunity protects sovereigns, not those who act wrongfully in their name. "[A]n instrumentality of government he might be and for the greatest ends, but the agent, because he is agent, does not cease to be answerable for his acts." *Sloan Shipyards Corp. v. United States Shipping Board Emergency Fleet Corp*., 258 U.S. 549, 567 (1922). Thus, , individual Indians may be sued under 42 U.S.C. §§1983-1985 notwithstanding Indian *tribes*' exemption from both civil rights statutes and Constitutional provisions aimed at limiting powers of federal and state government. *Thompson v. New York*, 487 F.Supp. 212, 216 (ND NY, 1979) ("Likewise, the *Talton* [*v. Mayes*, 163 U.S. 376 (1896)] line of authority would not limit the amenability of individual Indians to be sued.").

[6] Agent of Islamic Republic of Iran held criminally liable for acting as agent of a foreign government in violation of 18 U.S.C. §951 by conspiring with Iranian officials having accredited diplomatic status at the UN and themselves immune from liability), citing *United States v Melekh*, 193 F.Supp. 586, 592 (N.D. Ill. 1961) (UN employee, personally immune from having to register with the Attorney General as agent of a foreign government under 22 U.S.C. §288, liable to prosecution for conspiring to violate the statute with a person not immune).

expect he would be committing a crime. Criminal activity is the *only* subject of ¶B *and of the entire Indemnification Agreement*.[7]

Therefore, Mr. Rees' intentional criminality herein falls outside the scope of indemnification allowed by Delaware law, and there is accordingly no justification for transferring the venue of this case to facilitation filing such a prohibited claim.

B. By his own admission, defendant Rees ceased acting as officer, agent, or director of Think Finance, and Plain Green ceased its formal relationship with Think Finance, 3 years before plaintiff Swiger's usurious loan; therefore, Rees' liability arises from his individual rather than corporate wrongdoing and falls outside the scope of the Indemnification Agreement.

On September 3, 2019, Rees' attorney Richard L. Scheff, e-mailed plaintiff's counsel (Exhibit 8-5)[8], claiming Rees terminated active operational involvement with Think Finance in May, 2015, while Plain Green ceased doing business with Think Finance on June 1, 2016, whereas plaintiff Swiger's loan did

[7] Undersigned counsel (with over 100 years of legal practice experience between them) have never previously seen an indemnification agreement in which possible criminal activity was the only covered subject matter. A Google search for "indemnification clause" produced these exemplars as "common" or "typical":

Law Insider: " * * * anything done or omitted by the Warrant Agent in the execution of this Agreement, except as a result of the Warrant Agent's gross negligence, willful misconduct or bad faith."

Nolo (Legal Encyclopedia): "any loss, cost, or damage of any kind (including reasonable outside attorneys' fees) to the extent arising out of its breach of this Agreement, and/or its negligence or willful misconduct."

An examination of numerous webpages on the topic produced none that even referenced criminal activity, other than to exclude it.

[8] Undersigned counsel take issue with most everything Scheff asserted therein, but rely on the adoptive admissions per FRE 801(2)(c) and (d) for present purposes.

not occur until December 13, 2018. This makes clear that Mr. Rees' liability herein arises from his *individual* wrongdoing (failure to withdraw from an ongoing criminal conspiracy post-May, 2015), not his corporate-form criminality—as ¶22 of the Complaint (PageID 33) charges. But in any case, as held in *Baranowski v. Strating*, 72 Mich.App. 548, 560, 250 N.W.2d 744 (1976):

> Whether defendant Strating was acting on his own behalf or as an officer or agent of the corporation, he is personally liable for torts in which he actively participated, [*internal citations omitted*].

Federal jurisprudence on this point is identical:

> Two issues are relatively simple and we address them first. One is whether an individual can shield himself from liability for operating a hazardous-waste facility merely by being an officer or shareholder of a corporation that also operates the facility. The answer is no. **The principle of limited liability shields a shareholder from liability for the debts (including debts arising from tortious conduct) of the corporation in which he owns shares** (with the exception discussed later for "veil piercing" situations), **but not for his personal debts, including debts arising from torts that he commits himself. In other words, the status of being a shareholder does not immunize a person for liability for his, as distinct from the corporation's, acts**. *E.g., Sidney S. Arst Co. v. Pipefitters Welfare Education Fund*, 25 F.3d 417, 420 (7th Cir. 1994); *Spartech Corp. v. Opper*, 890 F.2d 949, 953 (7th Cir. 1989); *Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489, 1503 (11th Cir. 1996); *Aronson v. Price*, 644 N.E.2d 864, 867 (Ind. 1994). **There is no liability shield at all for an officer. If he commits an act that is outside the scope of his official duties, his employer may not be liable; but he is whether or not the act was within that scope**. *E.g., Itofca, Inc. v. Hellhake*, 8 F.3d 1202, 1204 (7th Cir. 1993); *Carter-Jones Lumber Co. v. Dixie Distributing Co.*, 166 F.3d 840, 846-47 (6th Cir. 1999); *United States v. Northeastern Pharmaceutical & Chemical Co.*, 810 F.2d 726, 744 (8th Cir. 1986).

Browning-Ferris Indus. of Il. v. Ter Mat, 195 F.3d 953, 955-956 (7th Cir. 1999).

Individual liability clearly falls *outside* the scope of the Indemnification Agreement, which defines " 'Indemnifiable Claim' " (PageID 307) as

> "any Claim based upon, arising out of or resulting from (i) any actual, alleged, or suspected act or failure to act by Indemnitee in his or her capacity as a director, officer, employee or agent of the Company * * * (ii) any actual, alleged or suspected act or failure to act by Indemnitee in respect of any business transaction, communication, filing, disclosure or other activity of the Company or any other entity or enterprise referred to in clause (i) of this sentence, or (iii) Indemnitee's status as a current or former director, officer, employee or agent of the Company * * * or any actual, alleged, or suspected act or failure to act by Indemnitee in connection with any obligation or restriction imposed upon Indemnitee by reason of such status.

By its terms, the Indemnification Agreement simply does not cover Rees' individual liabilities. And absent a viable claim for indemnification, there is simply no legal basis for the motion to transfer venue, which entirely hinges on Rees' ability to demand indemnification from Think Finance.

C. The statutory grounds for transfer of venue are <u>not</u> satisfied.

28 U.S.C. §1412 permits transfer of "a case or proceeding under title 11" "in the interest of justice or for the convenience of the parties." This is not a "case or proceeding under title 11".[9] But assuming *arguendo* the statute permits transfer of this non-Chapter 11 case, Rees' Motion makes no contention venue is not proper in this Court, yet he relies expressly on 28 U.S.C. §1412—indeed, that statute is the

[9] In the one Sixth Circuit case to address this statute, the appeals were both from cases that originated in bankruptcy court, the subject of Title 11. *Thompson v. Greenwood*, 507 F.3d 416, 420, 423 (6th Cir. 2007). *Thompson* held that §1412 properly applies only when venue is otherwise *proper*.

central basis for his Motion (see Motion brief, pp. i, 2, and 8, PageID 194, 200, and 204). Therefore, venue may be transferred *only* if this Court first determines that "transfer is in the interest of justice or for the convenience of the parties[10]." *Id.* at 421, quoting F.R.Bkrptcy.P. 1014(a)(1).

That brings us to "interest of justice". To begin, in evaluating "interest of justice" in relation to venue, "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." *Reese v. CNH Am. LLC*, 574 F.3d 315, 320 (6th Cir. 2009) (quoting *Dowling v. Richardson-Merrell, Inc*., 727 F.2d 608, 612 (6th Cir. 1984)).

One relevant factor is that counsel for plaintiff(s) are both Michigan attorneys, each with a single Michigan office, one in Birmingham, one in Okemos.[11] Thus, transfer would be disproportionately costly to plaintiff(s)' counsel and financially irrelevant to defense counsel, which militates against transfer. *Thiam v. Holder*, 677 F.3d 299, 302 (6th Cir.2012); *Cordova-Soto v*

[10] Plainly, "convenience of the parties" cannot support transfer to Texas—plaintiff is a Michigan resident (Complaint, ¶17, PageID 32), the parties include Michigan borrowers as a class (*id*., ¶110, PageID 50), three Montana defendants, and Kenneth Rees, a Texas resident. Indeed, Rees does not even argue regarding convenience. See also Exhibit 8-3, pp. 15-16.

[11] In contrast, lead counsel for defendant Rees, although based in Denver, is a Michigan-licensed attorney associated with a national law firm headquartered in Philadelphia, PA, with offices in Denver, CO, Jefferson City, MO, Kansas City, MO, St. Louis, MO, Las Vegas, NV, and New York, NY, which promotes itself as having multiple office locations "strategically placed to offer a full" range of litigation services anywhere in the United States.

Holder, 732 F.3d 789, 792 (7th Cir. 2013); *Sorcia v. Holder*, 643 F.3d 117, 122 (4th Cir.2011).

Correlatively, plaintiff lacks the means to testify in person or attend any trial in Texas, let alone to defray her attorneys' expenses of attending court in Texas (where neither is admitted to practice) as the law requires, MRPC 1.8(e)(1)—Exhibit 8-4—whereas defendant Rees has demonstrated the wherewithal to retain a white shoe Philadelphia law firm with a nationwide operation, and has made no protestation about the expense of attending court in Michigan for either himself or his attorneys (no less than five of whom signed the Motion to Transfer Venue, demonstrating that litigation expense is not even a consideration for a plutocrat like Kenneth Rees). *Thiam, supra*[12].

D. To the extent being "related to" a pending bankruptcy is a factor in transferring venue, this case is NOT "related to" the Think Finance bankruptcy.

Rees contends that there is a split of authority among District Courts in the 6th Circuit, and among other Circuits generally, regarding the "related to bankruptcy proceedings" test for transfer of venue derived from 28 U.S.C. §1334(b), citing *KFC Corp. v. Wagstaff*, 502 B.R. 484, 499 (W.D. Ky. 2013). Again, Rees misreads a statute, as well as the case law he cites. Note the *KFC* case

[12] "Thiam also makes a strong policy argument that an applicant should be able to avail herself of all of her due process rights, including appearing in person before an IJ, without fear of deleterious side effects like a change in the circuit law applied."

was already in bankruptcy; the question was whether part of the case should be transferred to *another* bankruptcy court. Meanwhile, 28 U.S.C. §1334(b) provides:

> (b) * * * the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

Under this statute, this Court has original jurisdiction of any civil proceeding arising under, arising in, or "related to" the Bankruptcy Code (Title 11). So even if this case is any of those things, this Court has proper jurisdiction and is also a Court of proper venue, so any request for transfer to the Northern District of Texas must therefore satisfy the requirements of 28 U.S.C. §1412, because whatever jurisdiction the Texas court may possess is statutorily declared "not exclusive".

The possibility this case might be "related to" the Think Finance bankruptcy merely demonstrates that, if the "interest of justice" requirement of 28 U.S.C. §1412 is otherwise satisfied, this Court *could* transfer the matter to the Northern District of Texas, but under no circumstances would such transfer be mandatory.

Rees contends this case is "related to" the Think Finance bankruptcy, because his claim for indemnification will have to be resolved in the bankruptcy proceeding. As shown above, his claim for indemnification is beyond hopeless on two independent grounds (Parts A and B above). But even assuming *arguendo* Rees might somehow seek indemnification notwithstanding the language of the agreement and his intentional criminal acts, he relies almost exclusively on *Gibbs*

1, supra, as "helpful and compelling" under the heading of "controlling authority" (PageID 198). *Gibbs 1* is no longer persuasive even to its author, and is also readily distinguishable. *Gibbs 2* is not readily distinguishable but is persuasive.

To begin a proper analysis, Sixth Circuit precedent is a logical starting point. In *Mich. Emp't Sec. Com'n v. Wolverine Radio Co. (In re Wolverine Radio Co.)*, 930 F.2d 1132, 1141-2 (6th Cir. 1991), the Sixth Circuit opined:

> Section 1334 lists four types of matters over which the district court has jurisdiction: * * *. Accordingly, the action before us is not a "case under title 11" within the meaning of section 1334(a). However, we do find that the action was a "proceeding" within the scope of section 1334(b), and thus the bankruptcy court had jurisdiction over this matter.
>
> * * * Therefore, for purposes of determining section 1334(b) jurisdiction, it is necessary only to determine whether a matter is at least "related to" the bankruptcy. *Id*.
>
> In *Robinson*, 918 F.2d at 583, we noted that the circuit courts have uniformly adopted an expansive definition of a related proceeding under section 1334(b) and its substantially identical predecessor under the Bankruptcy Reform Act of 1978, 28 U.S.C. Sec. 1471(b). As the Third Circuit held:
>
> > The usual articulation of the test for determining whether a civil proceeding is related to bankruptcy is whether the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy. Thus, the proceeding need not necessarily be against the debtor or against the debtor's property. An action is related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankrupt estate.
>
> *In re Pacor, Inc.*, 743 F.2d 984, 994 (3d Cir.1984) (emphasis in original; citations omitted). We "have accepted the *Pacor* articulation, albeit with the caveat that 'situations may arise where an extremely tenuous connection to the estate would not satisfy the jurisdictional requirement.' " *Robinson*, 918

> F.2d at 584 (quoting *In re Salem Mortgage Co.*, 783 F.2d 626, 634 (6th Cir.1986)); accord *In re Turner*, 724 F.2d 338, 341 (2d Cir.1983).
>
> * * *
>
> Wolverine argues that property of the estate is at stake in this matter because the purchase agreement between the debtor and JOSI provides that the debtor will indemnify and hold harmless JOSI "from any and all liabilities, loss, cost, expense, damage, set-off or recoupment, including reasonable amounts for attorneys' fees which may be asserted against [the purchaser] arising out of the operation of WRCI-FM on or prior to the Closing Date by reason of the purchase and sale hereunder." Wolverine argues that, to the extent that JOSI could invoke liability under the indemnification section of the purchase agreement, the assets of the debtor and the debtor's estate would be directly affected as a result of this court's decision.
>
> Although several circuit courts have adopted the definition of "related to" that is supplied by the Third Circuit in *Pacor*, the application of that definition has produced varying results. In a case presenting an indemnification scenario similar to the one alleged here by Wolverine, the *Ninth Circuit* declined to find an effect on the estate being administered in bankruptcy: * * * *Quattrone*, 895 F.2d at 926 (quoting *Pacor*, 743 F.2d at 995).

Per *Pacor*, 743 F.2d at 994, "for subject matter jurisdiction to exist... there must be some nexus between the related' civil proceeding and the title 11 case."

Although endorsing *Pacor*, the Supreme Court noted "* * * a bankruptcy court's related to' jurisdiction cannot be limitless." *Celotex Corp. v. Edwards*, 514 U.S. 300, 308 (1995) (citing *Pacor*, 743 F.2d at 994). Thus, [bold emphasis added]

> Mere **potential impact upon the debtor's estate is insufficient**. Contingent liability will not suffice. **The necessity of future action to fix the debtor's liability after resolution of the pending lawsuit precludes the exercise of related to' jurisdiction.**
>
> An indemnification agreement between a defendant and a non-party bankrupt debtor does not automatically supply the nexus necessary for the

> exercise of "related to" jurisdiction. **Only when the right to indemnification is clearly established and accrues upon the filing of the civil action is the proceeding related to the bankruptcy case. Where the right to indemnification is contingent on a factual finding in the action not involving the bankruptcy debtor and requires the commencement of another lawsuit to establish that right, there is no effect on the bankrupt estate.** *In re Federal-Mogul Global, Inc*., 300 F.3d 368, 382 (3d Cir.2002).

Steel Workers Pension Trust v. Citigroup, Inc., 295 B.R. 747, 750 (E.D.Pa. 2003).

This treatment of indemnification *vis à vis* "related to" traces directly back to *Pacor* itself, 743 F.2d at 995:

> **[T]he primary action between Higgins and Pacor would have no effect on the Manville bankruptcy estate, and therefore is not "related to" bankruptcy within the meaning of [the statutory predecessor to § 1334(b)]**. At best, it is a mere precursor to the potential third party claim for indemnification by Pacor against Manville. Yet the outcome of the Higgins-Pacor action would in no way bind Manville, in that it could not determine any rights, liabilities, or course of action of the debtor. Since Manville is not a party to the Higgins-Pacor action, it could not be bound by res judicata or collateral estoppel.

And therein lies yet another fatal flaw in defendant Rees' position. Not only does Rees have no right to indemnification because he knowingly initiated criminal violations of Michigan's usury law, barring himself from claiming indemnification under Delaware law while making himself liable in his individual capacity for his own wrongdoing, but Rees' also has no entitlement to automatic indemnification under the clear terms of his Indemnification Agreement. Section 7 of the Indemnification Agreement (PageID 308), provides in pertinent part:

> (a) To the extent that Indemnitee shall have been successful on the merits or otherwise in defense of any Indemnifiable Claim or any portion thereof or in

> defense of any issue or matter therein, * * * Indemnitee shall be indemnified * * *
>
> (b) To the extent that the provisions of 7(a) are inapplicable to an Indemnifiable Claim that shall have been finally disposed of, any determination of whether Indemnitee has satisfied any standard of conduct under Delaware law * * * shall be made as follows: * * * (A) by a majority vote of the Disinterested Directors * * *, (B) if there are no Disinterested Directors, by Independent Counsel in a written opinion * * *[13]

Thus, until this case results in a decision on the merits, in whole or in part, defendant Rees' cannot even apply for indemnification. So this case, to which Think Finance and related entities are not party, must first be concluded. *Then*, if Rees has prevailed on the merits, he can claim indemnification under §7(a); if Rees has not prevailed, he can try for indemnification under §7(b).

Thus, this is a situation wherein "the right to indemnification is contingent on a factual finding in the action not involving the bankruptcy debtor and requires the commencement of another lawsuit to establish that right, there is no effect on the bankrupt estate." per *Federal-Mogul Global*, *supra*, and consequently this primary action between plaintiff(s) and Kenneth E. Rees "has no effect on the bankruptcy estate" and is merely a precursor to an indemnification claim per

[13] Rees also purports to invoke §3 of the Indemnification Agreement as ostensibly obligating the indemnitor (bankrupt) to advance expenses "relating to an Indemnifiable Claim". First, there can be no adequate determination of whether Rees has an "Indemnifiable Claim" until the requirements of §7 are fulfilled. Second, as shown in Parts A and B of this brief, because Rees knowingly and deliberately hatched a scheme to market criminally usurious loans in Michigan (in violation of federal criminal laws, including the Travel Act and RICO), he does not have a colorable claim for indemnification as a matter of law and of contract.

Pacor, supra. This case is therefore ***not*** "related to" the Think Finance bankruptcy.

Turning attention to the "authorities" cited in Rees' Motion, he first relies on *Gibbs 1*, in which his motion to transfer a class action to Texas was granted on the basis of the very same Indemnification Agreement. What readily distinguishes *Gibbs 1* are the key facts:

> "According to Rees, Plaintiffs have already intervened in the bankruptcy cases by filing an adversary proceeding seeking relief against the Think Finance Defendants. Therefore, Rees argues, 'obvious inefficiencies' would result from litigating the case both here and in the Bankruptcy Court. (*Id*. at 4.)"

Plaintiff Swiger has filed, and will file, no such adversary proceeding[14].

[14] On a related note, although he has had 60+ days in which to do so, Rees makes no representation that he has actually filed a claim for indemnification in the Think Finance bankruptcy case in relation to this case, further undercutting his claim to "related to" status. *In re American Home Mortg. Holding*, 477 B.R. 517 (Bkrptcy. D. Del 2012) (noting that in *In re W.R. Grace & Co*., 591 F.3d 164, 168 (3rd Cir. 1984), the Court suggested that "if the third party defendant filed a proof of claim in the debtor's bankruptcy for statutory or contractual indemnification, such that the action's outcome could conceivably have a direct impact upon the debtor's estate, there is some suggestion that the bankruptcy court may possess related to' jurisdiction—at least pre-confirmation."). 477 B.R. at 529 n.62.

Note also that the Think Finance bankruptcy is on the verge of confirmation—ballots were distributed to creditors on or before September 30, 2019 and must be received for tabulation not later than October 30 (Sept. 30, 2019 order in *In re Think Finance, LLC* (No 17-33964, N.D. Tex., Document #1524, ¶¶3 and 11—Exhibit 8-1). The "record date" for establishing creditor status was August 9, 2019 (*id*., ¶6), and it is now too late for either plaintiffs or Kenneth Rees to participate in approving or objecting to the reorganization plan. So the bankruptcy may well be at *post*-confirmation status before this Motion is adjudica-

Moreover, in *Gibbs 1* Judge Lauck, in ruling in Rees' favor, reasoned:

> In this case, Plaintiffs' claims against Rees depend on his involvement with the Think Finance Defendants. Plaintiffs allege that "[d]uring the pertinent times, Rees was the architect of the lending scheme, participated in the day-to-day operations of the scheme, and *controlled the businesses*." (Compl. ¶ 97 (emphasis added).) Plaintiffs claim, *inter alia*, that Rees "formed and used [the Think Finance Defendants and GPL] to engage in unfair, deceptive, and abusive acts that harmed Plaintiffs and the class members." (*Id*. ¶ 98.) They assert that Rees "directly and actively managed the activities" of the Think Finance Defendants and GPL, and that he "participated and knew of the actions of Think Finance in Virginia, which are the subject of this lawsuit." (*Id*. ¶¶ 101-02.)
>
> Plaintiffs' allegations against Rees in this case are premised, at least in part, on actions he took "in his ... capacity as a director, officer, employee or agent of the Think Finance Defendants[“]. Accordingly, this action against Rees is likely covered by the Rees Indemnification Agreement, making it "related to" the Bankruptcy Case.

No such allegations are found in the Complaint filed in this case[15]. To the contrary, the central factual claim regarding the liability of Kenneth Rees is in ¶22 of the Complaint: "Mr. Rees has personally designed and directed the business activity described in this Complaint." That is a claim regarding Mr. Rees' *individual* actions, not his actions in some other capacity, such as President, Director, CEO, or Chairman of the Board of Think Finance or any other entity.

Additionally, in *Gibbs 1* Judge Lauck never examined the limitations of

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ted. [After confirmation, additional steps must be met in order to find "related to" jurisdiction. See *In re Resorts Intl, Inc*., 372 F.3d 154 (3d Cir. 2004).]

[15] Most of these words—"director", "officer", "employee", "agent", "manage"—appear in the Complaint only in connection with Plain Green or identifiable members of the Chippewa –Cree tribe, *never* in relation to Mr. Rees. "Control" appears in relation to Think Finance but not Kenneth Rees.

indemnification imposed by Delaware law when the subject is criminal activity. This is properly attributable, not to any deficiency in Judge Lauck's analysis, but to the limited claims then asserted in *Gibbs 1*, none of which asserted that a crime was committed—**usury is NOT a crime in Virginia.** Va.Code., art. 3, Title 6.2. Thus, Delaware law would not preclude indemnification in *Gibbs 1*. Contrariwise, usury IS a crime in Michigan, MCL 438.41; MCL 438.42, and Delaware law bars indemnification (Section A of this Brief) (ditto Michigan law—Part F below).[16]

Amusingly, Exhibit D to Rees' Motion to Transfer Venue is a copy of a motion (PageID 314-350) filed by Think Finance, Inc. and related entities in the Eastern District of Pennsylvania, identically seeking transfer to the Northern District of Texas and its Bankruptcy Court. Exhibit D (PageID 314-350) functions as a template for the present Motion—so it is of note that the motion was ***denied*** by Judge Joyner, who reasoned (boldfaced emphasis added):

> Lastly, in applying Section 1412, we find that the Think Finance Defendants have failed to carry their burden of demonstrating that transfer is proper. Of course, **the burden is on the party seeking transfer under Section 1412 to show by a preponderance of evidence that transfer is in the interest of justice or for the convenience of the parties**. *Krystal Cadillac*, 232 B.R. at 627-28; 28 U.S.C. § 1412. "**Absent such a showing,**

[16] In footnote 2 of his brief (PageID 202), Rees represents that two other federal courts granted his motions to transfer, but in both cases the opposing parties *stipulated* to the transfers, supposedly in reliance upon or reaction to *Gibbs 1*. Hence, this adds nothing to Rees' argument here, since as shown above *Gibbs 1* is so readily distinguishable on multifarious substantive grounds. Furthermore, no information as to the nature of the claims made in the other two cases has been provided, so no appropriate comparison or analysis is even possible.

> **the court will not disturb the choice of forum made by plaintiff, as it should be accorded great deference.**" *Id*. at 628.

Commonwealth of Penn.v. Think Finance, LLC (No 14-cv-7139, April 3, 2018, USDC E.D. Pa.). *Yet the refusal of transfer involved the actual company in bankruptcy*, Think Finance, not merely someone like Kenneth Rees with a possible *future* claim against the bankrupt, so *a fortiori* this Motion should be denied.

Here, Michigan law and Michigan consumers are involved, and Michigan has a significant interest[17]. Plaintiff Swiger has a legitimate interest in being able to litigate in her own state, where she can testify, assist counsel at trial by attending court, and enjoy representation by counsel of *her* choice in whom she reposes trust and confidence, rather than some as yet unidentified Texas attorney (if one can be found) of unknown personal and professional qualities and character. *Gibbs 2*.

Rees utterly ignores the most recent opinion and order, denying an effectively identical motion to transfer a related class action involving "rent-a-tribe" skullduggery to the Northern District of Texas, *Gibbs 2* (Exhibit 8-3).[18]

[17] One such interest is "in having trial in a forum that is at home with the law that must govern the action." *Pogue v Principal Life Ins. Co.*, 2015 WL 5680464, at *3 (W.D.Ky. Sept. 25, 2015).

[18] This ruling was also made by Judge Lauck, and while it was available to counsel for Rees (Armstrong Teasdale and attorneys Scheff, Boughrum and Herman are counsel for multiple defendants in *Gibbs 2*) some hours before they filed their Motion to Transfer, the Motion not only makes no mention of it, but likewise they failed to file an addendum to disclose it, as their duty of candor required them to do. MRPC 3.3(a)(1) and (3), applicable here pursuant to L.R. 83.22(b).

Judge Lauck began her *Gibbs 2* ruling on transfer by stating, "Assuming, without deciding, that the cases are related pursuant to §1412, neither the interests of justice nor party convenience favor transfer. Accordingly, the Court will deny the Motion to Transfer." (Exhibit 8-3, pp. 9-10). Then, going through the 7-factor test (footnote 18) for "interest of justice", Judge Lauck, noted that economic and efficient administration of the bankruptcy estate *disfavors* transfer "because the Texas Court has preliminarily approved a settlement in that case" (*id*., pp. 11-13). Eventually, she found 4 factors favor retaining venue in her court (including the "most important" factor of efficient administration of the bankruptcy estate), and only one favoring transfer (*id*., p. 15). It is this contemporaneous analysis that serves as "particularly helpful and compelling", not the 2018 ruling Judge Lauck herself now regards as no longer appropriate in light of subsequent developments.

E. Even if this case were considered "related to" the Think Finance bankruptcy, that is only one factor in relation to transfer of venue, and the other factors combine to outweigh that lone justification for changing venue herein.

In *KFC Corp*., *supra*, consideration of indemnification liability was held to *permit* transfer to the Minnesota bankruptcy court hosting the case involving the indemnitor. 502 B.R. at 499-501. That merely led to analysis of the "interest of justice" by evaluating seven (7) factors[19]: 502 B.R. at 502. It found that factors 1-

[19] "(1) the 'strong presumption' in favor of transfer to the district court where the bankruptcy proceedings are pending; (2) the economics of estate administration; (3) judicial efficiency; (4) the ability to receive a fair trial; (5) the state's interest in

3 favored transfer, 4-6 were neutral, *id*., and #7 in isolation was insufficient justification for retaining the case—because "none of the conduct complained of occurred in the plaintiff's chosen forum, that forum is given little weight." *Id*. at 503.[20]

Regarding plaintiff's chosen forum (*KFC* factor #1 and *Citizens* factor #5), in relation to the subject matter of this lawsuit, Nicole Swiger has *never left the State of Michigan*. *All* the conduct complained of occurred in Michigan. This state of facts represents the diametric reversal of the facts in *KFC*.

Similarly, concerning Michigan's interest in having the controversy resolved within its borders (*KFC* factor #5; *Citizens* factor #7), Texas has no connection to

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having local controversies decided within its borders; (6) the enforceability of any judgment rendered; and (7) the plaintiff's original choice of forum."

[20] This Court (Judge Berg) in *Citizens Ins. Co. of America v. FCA U.S.*, LLC (E.D.Mich. No 15-14393, issued May 11, 2016), identified seven (7) ssimilar factors to be considered, with a different ranking of each factor's weight:

> Factors to be considered include whether transferring venue would promote the efficient administration of the bankruptcy estate, judicial economy, timeliness and fairness. See *In re Barrington Spring House, LLC*, 509 B.R. 587, 604 (Bankr. S.D. Ohio 2014). In particular, courts have considered: (1) whether transfer would promote the economic and efficient administration of the bankruptcy estate; (2) whether the interests of judicial economy would be served by the transfer; (3) whether the parties would receive a fair trial; (4) the willingness and ability of the parties to participate in the case; (5) the plaintiff's choice of forum; (6) the effect of a transfer on the enforceability of a judgment; and (7) whether either forum has an interest in having the controversies resolved within its borders. See *In re Enron Corp*, 317 B.R. 629, (Bankr. S.D.N.Y. 2004); *In re Enron Corp*., No. 01-3626, 2002 WL 32153911, at * 3-4 (Bankr. S.D.N.Y. Apr. 12, 2002); *In re Gurley*, 215 B.R. 703, 709 (Bankr. W.D. Tenn. 1997) (internal citations omitted). Of these many factors, the most important consideration is whether the transfer would promote the "economic and efficient administration of the estate." *Matter of GEXKentucky, Inc*., 85 B.R. 431, 435 (Bankr.N.D.Ohio 1987).

this case (other than as the home state of defendant Rees), while not only do judges in the Northern District of Texas have no familiarity with Michigan usury law, Texas judges have no understanding of the impact of usurious and criminal enterprises on the Michigan economy.[21]

KFC factor #4 (*Citizens* factor #3), ability to receive a fair trial, weighs heavily in favor of venue in this Court. If this case were to be spun off to Texas, plaintiff Swiger will be denied her right to attend and testify at trial in person, and forced to replace current legal counsel (Exhibit 8-4).

And given that settlement has been preliminarily approved in the Think Finance bankruptcy (*Gibbs 2, supra*), transferring this case would only interfere with settlement. Per *Gibbs 2* and the foregoing analysis, *zero* factors favor transfer, two are neutral, and four favor retaining the case in *this* Court.

F. Due to claimed coverage for criminal acts, the Indemnification Agreement is void as against public policy and thus cannot support a transfer.

[21] The City of Detroit, where this Court sits, is still emerging from the largest municipal bankruptcy in U.S. history—a bankruptcy engendered in no small part because the City's tax base dried up, because the metropolitan area suffers high unemployment, which contributes to a high crime rate, which in turn leads to high insurance rates and high interest rates when residents need to borrow just to have the basics of food, clothing and shelter. Predatory lending practices like those orchestrated by defendants herein and their co-conspirators, under the leadership and tutelage of defendant Rees, contribute to this plague, which the judges of this Court see with their own eyes daily as they travel to and from the courthouse. For any judge in the Northern District of Texas (which sits in 6 cites, none of which has gone bankrupt), such difficulties can only be imagined, not experienced. Small wonder defendant Rees wants this case heard by judges and jurors having no connection to and no interest in the community directly affected.

Delaware has no authority, by statute or otherwise, to license anyone to violate Michigan criminal law within Michigan's borders. The Sixth Circuit has recognized, *Stone Surgical, Inc. v. Stryker Corp.*, 858 F.3d 383, 389 (6th Cir. 2017), that Michigan follows §187(2)(b) of the Restatement (Second) of Conflict of Laws. which bars the application of another state's law when "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."[22] *Chrysler Corp. v. Skyline Indus. Servs., Inc.*, 448 Mich. 113, 127-8; 528 N.W.2d 698, 703–04 (1995).

In *Solomon v. American Web Loan*, 375 F.Supp.3d 638, 661 (E.D.Va. 2019), the court rejected a similar motion to transfer venue in a class action lawsuit arising from a copycat "rent-a-tribe" scheme, noting with respect to the movant, one Mark Curry (in the role of a clone of Kenneth E. Rees):

> [I]t is probable that the Tribe would not have to indemnify him for his intentional bad acts or for actions that violate federal or state law, as such a result would be against public policy, as well as unconscionable. Doc. 111. at 48; see also, *e, g,, Globus v. Law Research Serv.. Inc.*. 418 F.2d 1276, 1288-89 (2d. Cir. 1969) ("It is well established that one cannot insure himself against his own reckless, willful or criminal misconduct.").

Here, the relevant contract provision purports to require indemnification for

[22] Plaintiff Swiger is, of course, not a party to the Indemnification Agreement; she is a victim, and she has never agreed or consented to application of Delaware law.

criminal activity, barring judicial enforcement of the contract. *American States Ins. Co. v. Borbor*, 826 F.2d 888 (9th Cir. 1987) held a wrongdoer should not profit from his own wrong, nor be indemnified against the effects of the wrongdoing. Accord: *Globus v. Law Research Serv.. Inc.*. 418 F.2d 1276, 1288-89 (2d. Cir. 1969). Hence, an insurer *cannot* contract to indemnify an insured against the civil consequences of the insured's willful criminal acts. This public policy is "justified by the assumption that such acts would be encouraged, or at least not dissuaded, if insurance were available to shift the financial burden of the loss from the wrongdoer to the insurer." *Id*. at 894. If a Michigan licensed insurer cannot legally insure against criminal activity, *a fortiori* an *unlicensed* insurer like Think Finance cannot do so. MCL 500.108(1); MCL 500.120. Accord: *Silverball Amusement, Inc. v. Utah Home Fire Ins. Co*., 842 F.Supp. 1151, 1164 (W.D.Ark. 1994); *Tew v. Chase Manhattan Bank, N.A.*, 728 F.Supp. 1551, 1563 (S.D.Fla. 1990) ("Public policy precludes enforcement of any agreement whereby one party agrees to indemnity for costs and attorneys' fees arising out of the commission of an intentional tort such as fraud against a third party.").

The outcome might be different if no Michigan resident had been harmed by Rees' criminal wrongdoing. *Black v. Dixie Consumer Products LLC*, (USDC W.D. Ky., No. 1:08CV-00142-JHM, March 2, 2018) (Delaware law applied where no Kentucky resident was adversely affected). Plaintiff Swiger, however,

represents a class of Michigan residents who have paid usurious interest and who are thus directly injured from the criminal enterprise defendant Rees devised.

Michigan applies the Wrongful Conduct Rule and *in pari delicto* principle, which proscribe Rees from maintaining any action for recovery where his own illegal conduct forms the basis for his claim. *Orzel by Orzel v. Scott Drug Co.*, 449 Mich. 550, 557; 537 N.W.2d 208, 212 (1995). See also *Pantely v. Garris, Garris & Garris, P.C.*, 180 Mich.App. 768, 774, 447 N.W.2d 864, 867 (1989)[23]. "To implicate the wrongful-conduct rule, the claimant's conduct must be prohibited or almost entirely prohibited under a penal or criminal statute." *Orzel*, 537 N.W.2d at 214. Rees and Think Finance must therefore each bear their own loss for the consequences of their criminal behavior in relation to Michigan's criminal usury statute, and indemnification is prohibited. See *Morrison v McCann*, 301 F.Supp.2d 647, 657-658 (E.D.Mich. 2003) (Judge Borman).

CONCLUSION

The Motion to Transfer Venue should be denied.

Respectfully submitted,

/s/ *Henry Baskin* /s/*Allan Falk*
Henry Baskin Allan Falk

[23] "*In pari delicto* * * * expresses the principle that wrong-doers ought each to bear the untoward consequences of their wrongdoing without legal recompense or recourse. Suit is barred not because the defendant is right, but rather because the plaintiff, being equally wrong, has forfeited any claim to the aid of the court. See, for example, *Jones v. Chennault*, 323 Mich. 261, 35 N.W.2d 256 (1948)."

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CERTIFICATE OF COMPLIANCE

Allan Falk, as an officer of the Court and counsel of record, certifies that Plaintiff's Response and Brief in Opposition to Defendant Rees' Motion to Transfer Venue complies with L.R. 5.1 in all respects, and has been prepared in 14 pt Times New Roman font on 8.5" X 11" paper with 1" margins on four sides, double spaced except for quotations and footnotes. The Response and Brief in Opposition also comply with L.R. 7.1(c) and (d) and are timely filed in compliance with L.R. 7.1(e)(2)(B).

/s/*Allan Falk*
Allan Falk (P13278)
Co-counsel for Plaintiff(s)

CERTIFICATE OF SERVICE

I, Dana Baskin Coffman (P38168), certify that on October 14, 2019, I electronically filed a copy of *Plaintiff's Response in Opposition and Objection to "Defendant Kenneth E. Rees' Motion to Transfer Venue Under 28 U.S.C. §1412"),* together with *Plaintiff's Brief in Opposition to "Defendant Kenneth E. Rees' Motion to to Transfer Venue Under 28 U.S.C. §1412", with Plaintiff's Supporting*

Exhibits 8-1 through 8-5. These documents are available for viewing and downloading from the ECF system and electronic notification has been sent to all counsel of record via the Court's CM/ECF system.

/s/ *Dana Baskin Coffman*
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