

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO

Civil Action No. 11-cv-00887-REB-KMT

STATE OF COLORADO ex rel. JOHN W. SUTHERS, Attorney General for the State of  
Colorado, and  
LAURA E. UDIS, Administrator, Uniform Consumer Credit Code,

Plaintiffs,

v.

WESTERN SKY FINANCIAL, L.L.C., and  
MARTIN A. WEBB,

Defendants.

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PLAINTIFFS' MOTION TO REMAND

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Plaintiffs, State of Colorado ex rel. John W. Suthers, Attorney General for the  
State of Colorado, and Laura E. Udis, Administrator, Uniform Consumer Credit Code  
(collectively the State), hereby move this Court, pursuant to 28 U.S.C. § 1447(c), to  
remand this case to the Denver District Court. In support, the State states:

**INTRODUCTION**

1. By their Notice of Removal, dated April 5, 2011 (Notice, Doc. 1), defendants,  
Western Sky Financial, L.L.C. (Western Sky), and Martin A. Webb (Webb), invoke this  
Court's federal question jurisdiction under 28 U.S.C. § 1331 (Notice ¶5). They claim  
that the "Indian Commerce Clause . . . and associated tribal law" "completely preempt"  
the State's Complaint, dated January 27, 2011 (Doc. 2) (Notice ¶14).

2. Just as did the removing defendant in *Colo. ex rel. Salazar v. ACE Cash  
Express, Inc.*, 188 F.Supp.2d 1282, 1285 (D. Colo. 2002), defendants here "confuse[]  
what this case *is* and is *not* about" (emphasis in original). Here, the Complaint *strictly*

concerns a *non-tribal* corporation's illegal, usurious, and unlicensed loan-making in Colorado to Colorado consumers in violation of *state* law. It alleges *no* claims arising under *any* federal law, let alone under the Indian Commerce Clause or tribal law.

3. The Court should remand this case back to state court. It also should award the State its costs and expenses, including attorney's fees.

### **FACTS AND PROCEDURAL HISTORY**

4. Western Sky is a limited liability company organized under South Dakota state law. It was formed in May 2009 by the filing of Articles of Organization with the South Dakota Secretary of State. See Exhibit 1 (Western Sky's Articles of Organization). At that time, and up until February 9, 2011, its sole member was another South Dakota limited liability company, PayDay Financial, L.L.C. See Exhibit 2 (PayDay Financial, L.L.C.'s Articles of Organization filed with the South Dakota Secretary of State). On February 9, 2011, Western Sky filed a "dissociation notice" with the South Dakota Secretary of State (Exhibit 3), "dissociating" PayDay Financial as its sole member.

5. Western Sky is not tribally owned or operated. Instead, defendants admit it is privately held and solely managed by Webb. See Exhibits 4 and 5 (affidavit and corporate disclosure statement, respectively, filed in *Comm'r of Fin. Regulation v. Western Sky Fin., LLC*, Civil Action No. 11-cv-00735 (D. Md.)).

6. The State commenced this action on January 27, 2011, by filing its Complaint in Denver District Court. The State alleges that Western Sky makes illegal, usurious, and unlicensed loans in Colorado to Colorado consumers in violation of Colorado's Uniform Consumer Credit Code, § 5-1-101, *et seq.*, C.R.S. 2010 (Code), and Consumer Protection Act, § 6-1-101, *et seq.*, C.R.S. 2010 (CPA). In particular, Western Sky

transacts business in Colorado by making small consumer loans, in amounts ranging from about \$400 to \$2,600, to Colorado consumers via the internet. Western Sky's loans have annual percentage rates from around 140% to over 300%. See Complaint ¶¶6-11. The State seeks injunctive and other relief, including consumer restitution and penalties, pursuant to the Code and CPA. See Complaint ¶1.

7. The State obtained service of summonses and the Complaint upon defendants on March 7, 2011. See Doc. 3.

8. On April 5, 2011, defendants removed this action to this Court. Their Notice asserts that the State's "state-law claims . . . are completely preempted by federal law" (Notice ¶11).

9. Other facts will be stated in the Argument, where appropriate. As the State shows, because no federal statute completely displaces the State's state-law-based claims, and because defendants' tribal sovereignty issues are, if anything, defensive matters, defendants improperly removed. The Court should remand this matter to Denver District Court and award the State its costs, expenses, and attorney's fees.

## **ARGUMENT**

### **A. General Removal Principles**

10. The removal principles are well established. Removal statutes are strictly construed and all doubts are resolved against removal. See, e.g., *Fajen v. Found. Reserve Ins. Co.*, 683 F.2d 331, 333 (10<sup>th</sup> Cir. 1982). The "well-pleaded complaint" rule makes the plaintiff the "master of the claim." E.g., *Karnes v. Boeing Co.*, 335 F.3d 1189, 1192 (10<sup>th</sup> Cir. 2003). The federal question giving rise to jurisdiction "must appear on the face of the complaint," *id.*; unaided by defendant's answer or removal notice.

See, e.g., *Fajen*, 683 F.2d at 333. A defendant “cannot, merely by injecting a federal question into an action that asserts what is plainly a state-law claim, transform the action into one arising under federal law.” *Karnes*, 335 F.3d at 1193, quoting *Caterpillar Inc. v. Williams*, 482 U.S. 386 (1987). Neither a plaintiff’s anticipation of a federal law defense nor a defendant’s assertion of such a defense gives rise to removal jurisdiction. See, e.g., *Schmeling v. NORDAM*, 97 F.3d 1336, 1339 (10<sup>th</sup> Cir. 1996).

11. The burden is on the removing party to show, by a preponderance, that removal jurisdiction exists. See, e.g., *Karnes*, 335 F.3d at 1193; accord, e.g., *West Ridge Group, LLC v. Anselmo*, 2010 WL 2543585, \*1 (D. Colo. 2010).

12. The “complete preemption” doctrine is an exception to the “well-pleaded complaint” rule. “Complete preemption” is “a term of art.” *Schmeling*, 97 F.3d at 1342. Rather than the “ordinary” preemption of state law by federal law, it means the “replacement of a state cause of action with a federal one.” *Id.* (emphasis added). I.e., complete preemption exists only “when a federal statute wholly displaces the state-law cause of action.” *Beneficial Nat’l Bank v. Anderson*, 539 U.S. 1, 8 (2003); accord, *Aetna Health Inc. v. Davila*, 542 U.S. 200, 207-208 (2004). Further, the federal statute must provide “the exclusive cause of action for the claim asserted and also set forth procedures and remedies governing that cause of action.” *Beneficial*, 539 U.S. at 8.<sup>1</sup>

13. The Supreme Court has found complete preemption in only three instances: certain cases under the Labor Management Relations Act, the Employee Retirement

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<sup>1</sup> *Grable & Sons Metal Prods., Inc. v. Darue Eng’g & Mfg.*, 545 U.S. 308 (2005), upon which defendants rely (see Notice ¶12), is not to the contrary. It is an “arising under,” and not a “complete preemption,” case. There, the Court upheld the removal of a quiet title action challenging the validity of an IRS sale of property pursuant to federal tax law. It reasoned that compliance with the tax statutes was “an essential element of [the] quiet title claim.” *Id.* at 315. Here, the Complaint arises *solely* under state law.

Income Security Act, and the National Bank Act. *See id.*, at 6-11.<sup>2</sup>

14. The touchstone is congressional intent: did Congress, in the federal law, intend to create removal jurisdiction? Absent such “clear congressional intent,” prudence compels remand. *Schmeling*, 97 F.3d at 1342, quoting *Caterpillar*, *supra*.

### **B. Defendants Improperly Removed**

15. Here, the State’s Complaint “presents no federal question on its face.” *Colo. ex rel. Salazar*, *supra*, 188 F.Supp.2d at 1284. Instead, as there, the Complaint here alleges defendants make unlicensed, usurious loans in violation of the Code and CPA. *See id.* Just as there, the Complaint “strictly is about . . . violations of state law. It alleges no claims” under any federal statute. *Id.* at 1285 (emphasis in original).

16. Defendants do not even so claim. Their Notice *nowhere* cites a federal statute in which Congress “wholly displace[d]” the State’s state-law causes of action and in which it provided “procedures and remedies governing that cause of action.” *Beneficial*, 539 U.S. at 8. This, alone, should compel remand.

17. Lacking a completely-preemptive statute, defendants instead rely on various tribal sovereignty principles. These include: tribal immunity; the Indian Commerce Clause; and unspecified “associated tribal law.” Notice ¶¶11, 13, 14. Even assuming defendants can avail themselves of such tribal sovereignty principles – a point to which the State returns, *see infra*, ¶¶33-37 – these principles aid defendants naught.

18. For nearly 100 years, the U.S. Supreme Court has held that tribal sovereignty issues are defensive matters that do not give rise to federal question

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<sup>2</sup> The Court noted that it also found federal jurisdiction to hear possessory land claims brought by Indian tribes, *see id.* at 8 n.4; but the analysis in that special circumstance did not aid the complete preemption analysis, *see id.*

jurisdiction. See *Taylor v. Anderson*, 234 U.S. 74, 75 (1914) (federal statutes restricting alienation of tribal allotments did not create federal question jurisdiction), cited in *Aetna*, *supra*, 542 U.S. at 207.

19. Specifically, over twenty years ago, in *Okla. Tax Comm'n v. Graham*, 489 U.S. 838 (1989), the Court expressly rejected the claim that tribal immunity provided removal jurisdiction. There, Oklahoma sued an Indian tribe in state court to collect unpaid taxes. The tribe removed to federal court, asserting federal question jurisdiction based on its status as an immune sovereign. The Tenth Circuit affirmed the district court's refusal to remand the case, concluding that Oklahoma's complaint, "although facially based on state law, contained the 'implicit federal question' of tribal immunity." *Id.* at 839-840.

20. The Supreme Court reversed. After discussing *Caterpillar's* "well-pleaded complaint" rule, it held that, while a tribe's status as an immune sovereign

may provide a federal defense to Oklahoma's claims . . . it has long been settled that the existence of a federal immunity to the claims asserted does not convert a suit otherwise arising under state law into one which, in the statutory sense, arises under federal law.

*Id.* at 841. Because the "jurisdictional question . . . is not affected by the fact that tribal immunity is governed by federal law," the Court held the case "was improperly removed." *Id.* at 841-842 (citing *Gully v. First Nat'l Bank*, 299 U.S. 109 (1936)).

21. Defendants' Indian Commerce Clause reliance fares no better. The Indian Commerce Clause has no preemptive powers whatsoever, let alone is it *completely* preemptive. For example, in *Muscogee (Creek) Nation v. Okla. Tax Comm'n*, 611 F.3d 1222 (10<sup>th</sup> Cir. 2010), the Tenth Circuit dismissed a tribe's claim, based on the Indian

Commerce Clause, that Oklahoma could not enforce its “cigarette tax enforcement scheme to interfere with [the tribe’s] vehicles while transporting cigarettes between Indian country.” *Id.* at 1236. It held that it “cannot seriously [be argued] that the Indian Commerce Clause, *of its own force*, automatically bars or preempts a state from enforcing its tax laws outside Indian country.” *Id.* at 1237 (emphasis in original).

22. Instead, the Indian Commerce Clause is but an enabling clause: it provides Congress with the “*power to legislate in the field of Indian affairs.*” *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989) (emphasis added); *see also id.*, 192-193 (contrasting Interstate and Indian Commerce Clauses).

23. In a case very similar to that here, the court in *Idaho ex rel. Wasden v. Native Wholesale Supply Co.*, 2009 WL 940731 (D. Idaho 2009), rejected the claim the Indian Commerce Clause was completely preemptive. There, Idaho brought a state court tax collection case against a corporation wholly owned by a tribal member and located on a reservation. The corporation removed, asserting federal question jurisdiction under the Indian Commerce Clause. The court was unimpressed. Observing that Idaho’s complaint “only asserts violation of state law” and that the corporation “failed to present any statute or treaty expressing Congress’s intent to regulate the entire field of Native American commerce,” *id.* at \*\*2, 3; it remanded.

24. So, too, in *Wiener v. Wampanoag Aquinnah Shellfish Hatchery Corp.*, 223 F.Supp.2d 346 (D. Mass. 2002), the court remanded a town zoning official’s state-court case against a tribe alleging the tribe violated town zoning laws in connection with the tribe’s fish hatchery. The tribe removed the case, claiming that the town’s case implicated the Federal Wampanoag Settlement Act and gave rise to federal question

jurisdiction. The court disagreed. Noting that the “federal government has not completely preempted the field of Indian affairs,” 223 F.Supp.2d at 352 n.10 (citing *Graham, supra*); the court held that the right the town sought to vindicate was one “created by the state.” *Id.* at 353.<sup>3</sup>

25. Third, defendants claim that “tribal sovereignty,” “tribal law,” and “tribal rights” prevent the State from regulating “commercial activity on Indian lands” (Notice ¶¶11, 13). They rely on the Complaint’s allegations that recite various provisions and representations in defendants’ loan agreements and websites. These provisions and representations purport to make defendants’ loans governed by the Indian Commerce Clause and tribal law, purport to subject the consumer to these laws and the “exclusive . . . jurisdiction” of a tribal court, and assert that defendants operate within reservation boundaries (Notice ¶8). Defendants contend that whether Colorado law governs over tribal law or whether a consumer’s consent to tribal over state court jurisdiction is enforceable “will depend on application of federal law” (Notice ¶13). Because these are, if anything, *defensive* matters, they do not provide removal jurisdiction. *See, e.g., Taylor, supra*. These claims also fail on their merits.

26. Defendants seemingly claim that the State, by its allegations reciting their loans’ and websites’ provisions, admits that these provisions govern. Quite the

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<sup>3</sup> Defendants’ cases (see Notice ¶11) are inapposite. Only one, *Gaming Corp. of Am. v. Dorsey & Whitney*, 88 F.3d 536 (8<sup>th</sup> Cir. 1996), involved removal. There, the Eighth Circuit held the Indian Gaming Regulation Act completely preempted “the field of Indian gaming regulation.” *Id.* at 539; *but see, e.g., County of Madera v. Picayune Rancheria of the Chukchansi Indians*, 467 F.Supp.2d 993, 1002 (E.D. Cal. 2006) (IGRA did not support removal of county’s nuisance abatement suit against tribal casino); *First Am. Casino v. Eastern Pequot Nation*, 175 F.Supp.2d 205, 208-209 (D. Conn. 2000) (IGRA did not provide removal jurisdiction for breach of gaming management contract suit against non-federally recognized tribe). Their other cases do not involve removal or complete preemption, and none involved a state’s regulation of off-reservation conduct.

opposite. These allegations simply provide the factual predicate underlying the State's claims that, by these provisions, defendants deceive consumers and violate Colorado law. See, e.g., Code § 5-1-201(8) (invalidating choice-of-law and choice-of-forum provisions); see also *Colo. ex rel. Salazar v. Cash Now Store, Inc.*, 31 P.3d 161, 166 (Colo. 2001) (the Code is to be "liberally construed" to protect consumers "against unfair practices by some suppliers of consumer credit").

27. Nor does defendants' inclusion of these provisions make them so. Here, by this action the State is exercising its police powers and enforcing Colorado's public policy, embodied in the Code and CPA, to protect Colorado consumers against illegal, usurious, and unlicensed lending. In doing so, the State is not bound by defendants' contractual provisions. See, e.g., *Penn. Dep't of Banking v. NCAS, LLC*, 948 A.2d 752, 759 (Pa. 2008) (state regulator, in enforcing state law, not bound by payday lender's choice-of-law provision);<sup>4</sup> *BankWest, Inc. v. Oxendine*, 598 S.E.2d 343, 347 (Ga. Ct. App. 2004) (lender who makes loans to forum state's consumers cannot by virtue of loan agreement's choice-of-law provision exempt itself "from investigation for potential violations of [forum state's] usury laws"); see also *Brack v. Omni Loan Co.*, 80 Cal.Rptr.3d 275, 284-285 (Cal. Ct. App. 2008) (California public policy set forth in its consumer lending law could not be circumvented by Nevada lender's choice-of-law provision in consumer loan agreement).

28. So, too, and defendants notwithstanding, the State is not regulating "commercial activity on Indian lands in South Dakota" or otherwise "interfer[ing]" with on-reservation affairs (Notice ¶11; see *id.* ¶13). This case strictly is about defendants'

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<sup>4</sup> Notably, the Ballard Spahr firm, defendants' lawyers here, represented the payday lender there. See *id.*, 948 A.2d at 754.

Colorado activities; it concerns defendants' *Colorado* loan making *in Colorado to Colorado consumers*. I.e., it involves *off-reservation* activity.

29. Defendants effectively concede as much. In their Motion to Dismiss, dated April 12, 2011 (Doc. 9), defendants did not assert any personal jurisdictional defenses; they waived any such defenses. See Fed. R. Civ. P. 12(h)(1). Thus, they concede that, by their loan making, they transacted business *in Colorado* and subjected themselves to Colorado's jurisdiction.

30. Dispositive is *Colo. ex rel. Suthers v. Cash Advance*, 205 P.3d 389 (Colo. App. 2008), *aff'd*, 242 P.3d 1099 (Colo. 2010). There, the State sought to investigate allegedly tribal entities' usurious loan making via the internet in Colorado to Colorado consumers in violation of the Code and CPA. See *id.*, 205 P.3d at 394. Observing that "[v]iolations of the [Code] and [CPA] would have significant off-reservation effects that would require the [State's] intervention," the court held that internet loan making to Colorado consumers (1) constituted off-reservation activity, and (2) fell within Colorado's statutory regulatory regime; and that, therefore, the State had jurisdiction to "investigate, criminally prosecute, seek declaratory and injunctive relief, and pursue civil remedies for conduct occurring within its borders." *Id.* at 400, 401, 403.

31. Similarly, in *Quik Payday, Inc. v. Stork*, 509 F.Supp.2d 974 (D. Kan. 2007); *aff'd*, 549 F.3d 1302 (10<sup>th</sup> Cir. 2008), *cert. denied*, 129 S.Ct. 2062 (2009), the court rejected a Utah-based internet lender's challenge that Kansas was attempting to "extraterritorially" enforce Kansas law by regulating the lender's loan making to Kansas consumers. Citing Tenth Circuit and other law dating to the 1970's, including *Aldens, Inc. v. Ryan*, 571 F.2d 1159 (10<sup>th</sup> Cir. 1978), it held that, by making loans to Kansas

consumers, the lender necessarily engaged in conduct occurring in Kansas and that Kansas properly could regulate the lender's in-Kansas activity. See *Quik Payday*, 509 F.Supp.2d at 981-982, 984-985; see also, e.g., *Triumph Fin. Servs., LLC v. Colorado*, Case No. CV-01-105-S-BLW (D. Idaho, Sept. 6, 2001), slip op. at 5 (memorandum decision and order)<sup>5</sup> (rejecting Idaho-based internet lender's claim that State sought to regulate lender's "exclusively in Idaho" activities; State instead was regulating "the actual extension of credit to Colorado residents"); *Cash Am. Net, LLC v. Pa. Dep't of Banking*, 8 A.3d 282, 293-296 (Pa. 2010) (Nevada-based lender, who had no physical presence in Pennsylvania but made loans via the internet to Pennsylvania consumers, subjected itself to Pennsylvania consumer lending law and regulatory jurisdiction).<sup>6</sup>

32. Thus, defendants, in claiming the State is interfering with on-reservation Indian affairs, again confuse what this case *is* and *is not* about.

33. Finally, despite defendants' claims, this case does not implicate tribal issues. First, Western Sky is not a tribal corporation and cannot avail itself of any tribal sovereign attributes. The Tenth Circuit, in *Breakthrough Mgmt. Group, Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173, 1187 (10<sup>th</sup> Cir. 2010), *petition for cert. filed* (U.S. May 9, 2011) (No. 10-1389), set forth a multi-factor test that a corporation must satisfy in order to be an "arm of the tribe" entitled to a tribe's sovereignty. Two of these factors are whether the corporation is created under tribal law and whether the tribe owns and manages the corporation. See *id.*

34. Here, Western Sky fails these two tests: it was not created under tribal law, but instead is a state-chartered company; and it is privately held and wholly managed

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<sup>5</sup> This decision is attached as Exhibit 6.

<sup>6</sup> The Ballard Spahr firm also represented the lender in *Cash Am. Net*. See *id.* at 284.

by Webb. See Exhibits 4, 5.<sup>7</sup>

35. Nor does Webb's status as a tribal member invest him with any tribal sovereign attributes. To the contrary, in *Puyallup Tribe, Inc. v. Dep't of Game*, 433 U.S. 165, 171-172 (1977), the Court held that the "doctrine of sovereign immunity . . . does not immunize the individual members of the Tribe." Even tribal officers – which Webb does not claim to be – are "not protected by the tribe's immunity from suit." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 59 (1978).

36. Further, tribal members going off-reservation are subject to state law as is any other person. Citing *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), the Court in *Nevada v. Hicks*, 533 U.S. 353, 362 (2001), stated that, when "state interests outside the reservation are implicated, States may regulate the activities even of tribe members on tribal land." There, the Court rejected the notion that federal law prevented state officials from "investigat[ing] or prosecut[ing] violations of state law occurring off the reservation." *Id.* at 366. It explained that upholding the state's authority to do so "is necessary to 'prevent [reservations] from becoming an asylum for fugitives from justice.'" *Id.* at 364 (quoting *Fort Leavenworth R. Co. v. Lowe*, 114 U.S. 525, 533 (1885)). See, e.g., *Mescalero*, 411 U.S. at 147-149 (upholding state's authority to tax tribe's commercial, off-reservation activity, holding that "[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State"

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<sup>7</sup> Defendants' reliance on *Pourier v. S.D. Dep't of Revenue*, 658 N.W.2d 395 (S.D. 2003) (see Notice ¶11) is misplaced. There, the court held only that, for purposes of whether a state could tax *on-reservation* fuel sales between Indians, a corporation wholly owned by an enrolled tribe member was considered a tribe member. See *id.* at 403-404.

and rejecting as “particularly treacherous” the broad generalization that states are prohibited from enforcing their laws “whether the [tribal] enterprise is located on or off tribal land”); *Organized Vill. of Kake v. Egan*, 369 U.S. 60, 62-63, 75-76 (1962) (state properly could enforce licensing and police power laws over off-reservation tribal fishing activities; “state regulation of off-reservation fishing certainly does not impinge on treaty-protected reservation self-government”).

37. Thus, Webb’s status as a tribal member avails defendants naught.

38. In sum, the State’s Complaint concerns solely state-law claims arising out of in-Colorado conduct in violation of Colorado law. If federal law applies at all, it is only in matters of defense. Accordingly, defendants improperly removed the case.

### **C. The State Should Be Awarded Its Costs**

39. The Court should award the State its costs and expenses, including attorney’s fees, pursuant to 28 U.S.C. § 1447(c).

40. In deciding whether to award fees, the standard is whether there exists an “objectively reasonable basis” for removal: fees should be awarded “where the removing party lacked an objectively reasonable basis for seeking removal. Conversely, when an objectively reasonable basis exists, fees should be denied.” *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 141 (2005). Bad faith or frivolousness is not required. See *id.* at 138 (rejecting a narrow standard); *Excell, Inc. v. Sterling Boiler & Mech., Inc.*, 106 F.3d 318, 322 (10<sup>th</sup> Cir. 1997) (bad faith not required; central factor is removal’s “propriety”); accord, *Whitmore v. Statguard, LLC*, 2009 WL 5216941, \*3 (D. Colo. 2009), amended by 2011 WL 1322000 (D. Colo. 2011).

41. Here, no “objectively reasonable basis” for removal exists: (a) this action

strictly is about off-reservation conduct in violation of state law; (b) defendants cite no federal statute completely displacing the State's state-law claims or otherwise expressing Congressional intent to permit removal; (c) the U.S. Supreme Court over twenty years ago held that sovereign immunity is a defense and does not give rise to removal jurisdiction; (d) neither the Indian Commerce Clause nor other tribal law supports removal; and (e) Western Sky is not tribal at all, and Webb's tribal membership matters nil.

42. Just as in *Wasden*, 2009 WL 940731 at \*4, because, since 1914, U.S. Supreme Court cases "clearly foreclosed . . . removal" and federal law "has not completely preempted state law" (citing *Taylor and Graham*); a costs and fees award is appropriate. See *Wasden*, at \*\*3-4 (awarding fees).

43. Further, during a May 9, 2011, telephone call between counsel, the State offered defendants the opportunity voluntarily to remand this case. Defendants refused. This weighs in favor of a costs award. See *Excell, supra*, 106 F.3d at 322.

44. The State reserves the right to supplement its costs and fees request should the Court deem an award appropriate. See, e.g., *In Re C & M Props., L.L.C.*, 563 F.3d 1156, 1162 n.2 (10<sup>th</sup> Cir. 2009) (court may determine in separate proceeding award of fees after remand); *Leoff v. XYZ Subdivision Land Co.*, 2011 WL 686364, \*1 (D. Colo. 2011) (granting motion for fees made after remand); see also *Whitmore v. Statguard, LLC*, 2010 WL 3715133, \*2 (D. Colo. 2010) (court retains jurisdiction to consider sanctions after remand).

#### **D. Compliance with D.C.Colo.LCivR 7.1(A)**

45. Pursuant to D.C.Colo.LCivR 7.1(A), on several occasions beginning on April

11, 2011, including the May 9<sup>th</sup> conversation referred to above, ¶43, undersigned conferred with Roger P. Thomasch, Esq., defendants' counsel, about this motion and advised that the State would be filing it. Defendants oppose it.

**CONCLUSION**

WHEREFORE, the State requests that the Court (i) grant this motion in all respects; (ii) remand this action to the Denver District Court; and (iii) award the State its costs and expenses, including attorney's fees, together with all such further relief as the Court deems just.

Dated: Denver, Colorado  
May 20, 2011

JOHN W. SUTHERS  
Attorney General

s/ Paul Chessin  
\_\_\_\_\_  
PAUL CHESSIN, #12695\*  
Senior Assistant Attorney General  
Consumer Credit Unit  
Consumer Protection Section  
Attorneys for Plaintiffs  
1525 Sherman Street, 7th Floor  
Denver, Colorado 80203  
Telephone: (303) 866-4494  
\*Counsel of Record

AG ALPHA: LW UC HZHEQ  
AG File: P:\UC\UCCHESPZ\UCCC\WESTERN SKY\FEDERAL CASE\MOTION TO REMAND.DOCX

CERTIFICATE OF SERVICE

This is to certify that on May 20, 2011, the foregoing Plaintiffs' Motion to Remand, dated May 20, 2011, was filed with the Clerk of Court using the CM/ECF system, which will send notification to all parties, as follows:

Roger P. Thomasch, Esq.  
Matthew R. Lasek, Esq.  
Ballard Spahr LLP  
1225 17<sup>th</sup> Street, Suite 2300  
Denver, Colorado 80202

s/ Ruth Seminara

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AG ALPHA: LW UC HZHEQ  
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366 5058 05/19/2009

Receipt Number: 1911362

File Number **DL018925**



**ARTICLES\_OF\_ORGANIZATION**

For

**WESTERN SKY FINANCIAL, L.L.C.**

Filed at the request of:

**ERIC H BOGUE  
BOGUE & BOGUE LAW OFFICES  
PO BOX 250  
FAITH SD 57626**

*State of South Dakota  
Office of the Secretary of State*

Filed in the office of the Secretary of State on: **Friday, May 15, 2009**

Secretary of State

Fee Received: \$125.00

366 5059 05/19/2009

# State of South Dakota



## OFFICE OF THE SECRETARY OF STATE

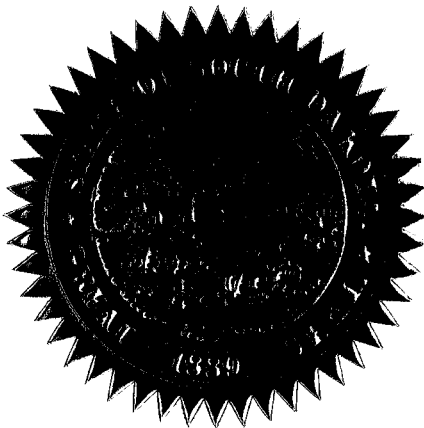
### Certificate of Organization Limited Liability Company

ORGANIZATIONAL ID #: DL018925

I, Chris Nelson, Secretary of State of the State of South Dakota, hereby certify that the Articles of Organization of **WESTERN SKY FINANCIAL, L.L.C.** duly signed and verified, pursuant to the provisions of the South Dakota Limited Liability Company Act, have been received in this office and are found to conform to law.

**ACCORDINGLY** and by virtue of the authority vested in me by law, I hereby issue this Certificate of Organization and attach hereto a duplicate of the Articles of Organization.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Great Seal of the State of South Dakota, at Pierre, the Capital, this May 15, 2009.



*Chris Nelson*

Chris Nelson  
Secretary of State

Litho. in U.S.A.

366 5060 05/19/2009

Filed this 15th day of May, 2009  
Chi. Nelson  
SECRETARY OF STATE

ARTICLES OF ORGANIZATION  
OF  
WESTERN SKY FINANCIAL, L.L.C.

RECEIVED  
MAY 15 2009  
S.D. SEC. OF STATE

We, the undersigned hereby form a Limited Liability Company under SDCL Chap. 47-34A, and adopt as the Articles of Organization for such corporation the following:

ARTICLE ONE

The name of the Limited Liability Company is Western Sky Financial, L.L.C..

ARTICLE TWO

The period of its duration shall be perpetual from the date of filing of these Articles of Organization with the Secretary of State of the State of South Dakota or until the earlier dissolution of the Western Sky Financial, L.L.C., in accordance with the provisions of its Operating Agreement.

ARTICLE THREE

Western Sky Financial, L.L.C., shall have those powers provided for in the South Dakota Limited Liability Company Act, SDCL Chpt. 47-34A.

ARTICLE FOUR

The Limited Liability Company will not commence business until it has received the initial contribution for membership in cash, property, or services in the total amount of \$ 10,000.00. The total amount of cash initially required from the organizational members shall be \$ 10,000.00 each. Upon the receipt of said amount the Limited Liability Company shall have one (1) membership interest issued upon incorporation. Western Sky Financial, L.L.C., may provide, or the members may provide in the Operating Agreement, that additional contributions shall be made at such times and in such amounts as stated therein.

ARTICLE FIVE

On each matter on which the membership interest is entitled to vote, a member will have one (1) vote or a fraction of one vote per one percent of membership interest or fraction of membership interest owned by the member, as adjusted from time to time to properly reflect any additional contributions or withdrawals by the member. The valuation of such membership interests shall be set in accordance with the Operating Agreement.

2118925

366 5061 05/19/2009

#### ARTICLE SIX

The street or physical address of the initial designated office and principal place of business of the limited liability company is Western Sky Financial, L.L.C., 612 E. St., Timber Lake, South Dakota 57656. The mailing address of the initial designated office and registered office of the limited liability company is Western Sky Financial, L.L.C., P.O. Box 370, Timber Lake, South Dakota 57656. The registered agent of the limited liability company is Martin A. Webb whose street address is the same as the initial designated office of the limited liability company.

#### ARTICLE SEVEN

Western Sky Financial, L.L.C., shall be managed by the members. The names and addresses of the initial members and organizers are as follows:

PayDay Financial, LLC  
P.O. Box 128  
Timber Lake, SD 57656

#### ARTICLE EIGHT

The initial Operating Agreement will be adopted by unanimous consent of the members. The powers to alter, amend, or repeal the Operating Agreement or adopt a new Operating Agreement is vested in the members by unanimous vote of the members.

#### ARTICLE NINE

To the full extent permitted by South Dakota law, no manager or member of Western Sky Financial, L.L.C., shall be liable to Western Sky Financial, L.L.C., or its members for monetary damages for an act or omission in such manager's or member's capacity as a manager or member of Western Sky Financial, L.L.C., except that this Article does not eliminate or limit the liability of a manager or member to the extent the manager or member is found liable for (i) a breach of the manager's or member's duty of loyalty to the Company or its members; (ii) an act or omission not in good faith that constitutes a breach of duty of the manager or member to the Company or an act or omission that involves intentional misconduct or a knowing violation of the law; (iii) a transaction from which the manager or member received an improper benefit whether or not the benefit resulted from an action taken within the scope of the manager's or member's office; or (iv) an act or omission for which the liability of a manager or member is expressly provided by an applicable statute. Any repeal or amendment of this Article by the members of the Company shall be prospective only and shall not adversely affect any limitation on the liability of a manager or member of the company existing at the time of such repeal or amendment. The foregoing elimination of the liability to Western Sky Financial, L.L.C., or its members for monetary damages shall not be deemed exclusive

366 5062 05/19/2009

of any other rights or limitations of liability or indemnity to which a manager or member may be entitled under any other provision of the Articles of Organization or the Operating Agreement of Western Sky Financial, L.L.C., contract or agreement, vote of members and/or disinterested managers of Western Sky Financial, L.L.C., or otherwise.

#### ARTICLE TEN

Additional persons may be admitted to Western Sky Financial, L.L.C., as members and membership interests may be created and issued to those persons and to existing members at the direction of a majority of the members, on such terms and conditions as the members may determine at the time of admission. The terms of admission or issuance must specify the Sharing Ratios and the Commitments applicable thereto and may provide for the creation of different classes or groups of members and having different rights, powers and duties. The members shall reflect the creation of any new class or group in an amendment to these Articles indicating the different rights, powers, and duties, and such an amendment must be executed by the members. Any such admission also must comply with the requirements described elsewhere in these Articles and is effective only after the new member has executed and delivered a document which includes the new member's notice address, its agreement to be bound by these Articles and the Operating Agreement, and its representation and warranty that the representation and warranties required of new members are true and correct with respect to the new members. The provisions of this Article shall not apply to dispositions of membership interests.

#### ARTICLE ELEVEN

These Articles of Organization may be amended, modified supplemented, or restated in any manner permitted by law and approved by the affirmative vote of all of the membership interest.

Dated this 13<sup>th</sup> day, of May, 2009.

PayDay Financial, LLC

By: Martin A. Webb  
Martin A. Webb, Authorized Member



366 5064 05/19/2009

CONSENT OF APPOINTMENT BY THE REGISTERED AGENT

I, Martin A. Webb, hereby give my consent to serve as the registered agent for Western Sky Financial, LLC.

Dated this 13<sup>th</sup> day of May, 2009.

  
\_\_\_\_\_  
Martin A. Webb

353 5622 10/22/2007

Receipt Number: 1722734

File Number **DL014906**



**ARTICLES\_OF\_ORGANIZATION**

For

**PAYDAY FINANCIAL, L.L.C.**

Filed at the request of:

ERIC BOGUE  
PO BOX 400  
DUPREE SD 57623

*State of South Dakota  
Office of the Secretary of State*

Filed in the office of the Secretary of State on: **Monday, October 22, 2007**

Secretary of State

Fee Received: \$125

2007/10/13 295 553  
All Rights Reserved

# State of South Dakota



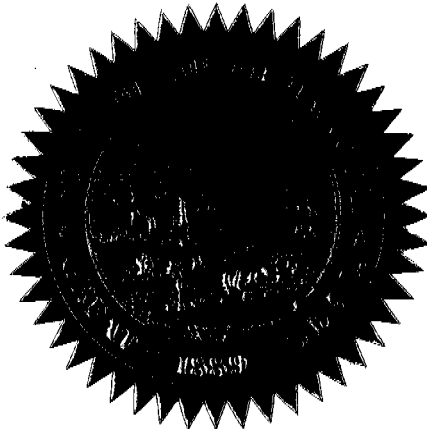
## OFFICE OF THE SECRETARY OF STATE Certificate of Organization Limited Liability Company

ORGANIZATIONAL ID #: DL014906

I, **Chris Nelson**, Secretary of State of the State of South Dakota, hereby certify that the Articles of Organization of **PAYDAY FINANCIAL, L.L.C.** duly signed and verified, pursuant to the provisions of the South Dakota Limited Liability Company Act, have been received in this office and are found to conform to law.

**ACCORDINGLY** and by virtue of the authority vested in me by law, I hereby issue this Certificate of Organization and attach hereto a duplicate of the Articles of Organization.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Great Seal of the State of South Dakota, at Pierre, the Capital, this October 22, 2007.



*Chris Nelson*

**Chris Nelson**  
Secretary of State

Printed in U.S.A.

353 5624 10/22/2007

RECEIVED  
OCT 27 2007  
S.D. SEC. OF STATE

Filed this 22<sup>nd</sup> day of Oct, 2007  
*Chris Nelson*  
SECRETARY OF STATE

**ARTICLES OF ORGANIZATION**  
OF  
**PAYDAY FINANCIAL, L.L.C.**

We the undersigned hereby form a Limited Liability Company under SDCL Chap. 47-34A, and adopt as the Articles of Organization for such corporation the following:

ARTICLE ONE

The name of the Limited Liability Company is PayDay Financial, L.L.C..

ARTICLE TWO

The period its duration shall be perpetual from the date of filing of these Articles of Organization with the Secretary of State of the State of South Dakota or until the earlier dissolution of the PayDay Financial, L.L.C. in accordance with the provisions of its Operating Agreement.

ARTICLE THREE

PayDay Financial, L.L.C., shall have those powers provided for in the South Dakota Limited Liability Company Act, SDCL Chpt. 47-34A.

ARTICLE FOUR

The Limited Liability Company will not commence business until it has received the initial contribution for membership in cash, property, or services in the total amount of \$ 10,000.00. The total amount of cash initially required from the organizational members shall be \$ 10,000.00 each. Upon the receipt of said amount the Limited Liability Company shall have (one) membership interests issued upon incorporation. PayDay Financial, L.L.C. may provide, or the members may provide in the Operating Agreement, that additional contributions shall be made at such times and in such amounts as stated therein.

ARTICLE FIVE

On each matter on which the membership interest is entitled to vote, a member will have one (1) vote or a fraction of one vote per one percent of membership interest or fraction of membership interest owned by the member, as adjusted from time to time to properly reflect any additional contributions or withdrawals by the member. The valuation of such membership interests shall be set in accordance with the Operating Agreement.

*9/10/14906  
1722734*

353 5625 10/22/2007

## ARTICLE SIX

The street or physical address of the initial designated office and principal place of business of the limited liability company is PayDay Financial, L.L.C., 612 E St., Timber Lake, (Dewey County) South Dakota 57656. The mailing address of the initial designated office and registered office of the limited liability company is PayDay Financial, L.L.C., P.O. Box 128, Timber Lake, South Dakota 57656. The registered agent of the limited liability company is Martin A. Webb whose street address is the same as the initial designated office of the limited liability company.

## ARTICLE SEVEN

PayDay Financial, L.L.C., shall be managed by the members. The names and addresses of the initial members and organizers are as follows:

Martin A. Webb  
P.O. Box 356  
Isabel, SD 57633

## ARTICLE EIGHT

The initial Operating Agreement will be adopted by unanimous consent of the Members. The powers to alter, amend, or repeal the Operating Agreement or adopt a new Operating Agreement is vested in the Members by unanimous vote of the members.

## ARTICLE NINE

To the full extent permitted by South Dakota law, no Manager or Member of PayDay Financial, L.L.C., shall be liable to PayDay Financial, L.L.C., or its members for monetary damages for an act or omission in such Manager's or Member's capacity as a Manager or Member of PayDay Financial, L.L.C., except that this Article does not eliminate or limit the liability of a manager or member to the extent the manager or member is found liable for (i) a breach of the manager's or member's duty of loyalty to the Company or its members; (ii) an act or omission not in good faith that constitutes a breach of duty of the manger or member to the Company or an act or omission that involves intentional misconduct or a knowing violation of the law; (iii) a transaction from which the manager or member received an improper benefit whether or not the benefit resulted from an action taken within the scope of the manager's or member's office; or (iv) an act or omission for which the liability of a manager or member is expressly provided by an applicable statute. Any repeal or amendment of this Article by the members of the Company shall be prospective only and shall not adversely affect any limitation on the liability of a manger or member of the company existing at the time of such repeal or amendment. The foregoing elimination of the liability to PayDay Financial, L.L.C., or its members for monetary damages shall not be deemed exclusive of any other rights or

limitations of liability or indemnity to which a manager or member may be entitled under any other provision of the Articles of Organization or the Operating Agreement of PayDay Financial, L.L.C., contract or agreement, vote of members and/or disinterested managers of PayDay Financial, L.L.C., or otherwise.

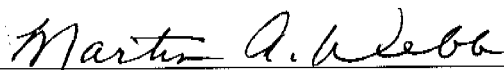
#### ARTICLE TEN

Additional persons may be admitted to PayDay Financial, L.L.C., as members and membership interests may be created and issued to those persons and to existing members at the direction of a majority of the Managers, on such terms and conditions as the Managers may determine at the time of admission. The terms of admission or issuance must specify the Sharing Ratios and the Commitments applicable thereto and may provide for the creation of different classes or groups of members and having different rights, powers and duties. The Managers shall reflect the creation of any new class or group in an amendment to these Articles indicating the different rights, powers, and duties, and such an amendment need be executed only by the Managers. Any such admission also must comply with the requirements described elsewhere in these Articles and is effective only after the new member has executed and delivered to the Managers, a document including the new Member's notice address, its agreement to be bound by these Articles and the Operating Agreement, and its representation and warranty that the representation and warranties required of new members are true and correct with respect to the new members. The provisions of this Article shall not apply to dispositions of membership interests.

#### ARTICLE ELEVEN

These Articles of Organization may be amended, modified supplemented, or restated in any manner permitted by law and approved by the affirmative vote of all of the membership interest.

Dated this 11<sup>th</sup> day, of October, 2007.

  
 \_\_\_\_\_  
 Martin A. Webb, Initial Member



353 5628 10/22/2007

CONSENT OF APPOINTMENT BY THE REGISTERED AGENT

I, Martin A. Webb, hereby give my consent to serve as the registered agent for PayDay Financial, L.L.C..

Dated this 11<sup>th</sup> day of Oct, 2007.

Martin A. Webb

380 3380 02/10/2011

Receipt Number: 2110671

File Number DL018925



**DISSOCIATION**

For

**WESTERN SKY FINANCIAL, L.L.C.**

Filed at the request of:

CHERYL F LAURENZ-BOGUE  
BOGUE & BOGUE LLP  
PO BOX 400  
DUPREE SD 57623

*State of South Dakota*  
*Office of the Secretary of State*

Filed in the office of the Secretary of State on: **Wednesday, February 09, 2011**

Secretary of State

Fee Received: \$10.00

380 3381 02/10/2011

Secretary of State Office  
500 E Capitol Ave  
Pierre, SD 57501  
(605)773-4845

# STATEMENT OF DISSOCIATION DOMESTIC LIMITED LIABILITY COMPANY

Please Type or Print Clearly in Ink

Please submit one Original and one Photocopy

**FILING FEE: \$10** payable to SECRETARY OF STATE

**RECEIVED**  
**FEB 09 2011**  
**S.D. SEC. OF STATE**

Telephone # \_\_\_\_\_  
FAX # \_\_\_\_\_

Filed this 9th day of Feb. 2011  
*Jason Sand*  
SECRETARY OF STATE

The undersigned hereby files this statement of dissociation pursuant to SDCL 47-34A-605.

1. The name of the company is Western Sky Financial, LLC

Note: This must be the exact limited liability company name.

2. The name of the member dissociated from the company is PayDay Financial, LLC

3. A copy of this statement has been delivered to the limited liability company

Dated 2/1/11

*Martin A. Webb*  
(Signature)

Martin A. Webb  
(Printed Name)

Member Owner  
(Title)

UNITED STATES DISTRICT  
COURT FOR THE DISTRICT OF MARYLAND

MARYLAND COMMISSIONER OF  
FINANCIAL REGULATION

Plaintiff,

v.

WESTERN SKY FINANCIAL, LLC,  
GREAT SKY FINANCE, LLC  
PAYDAY FINANCIAL, LLC AND  
MARTIN A. WEBB

Defendants.

Civil Action No. WDQ-11-CV-735

**AFFIDAVIT OF MARTIN A. WEBB**

Martin A. Webb, deposes and states as follows:

1. I am over the age of eighteen years and am competent to testify, upon personal knowledge, to the facts set forth herein.

2. I am an enrolled member of the Cheyenne River Sioux Tribe, a federally recognized Native American tribe. I reside on the Cheyenne River reservation.

3. I am the managing and sole member of Western Sky Financial, LLC, Great Sky Finance, LLC and Payday Financial, LLC, defendants in the above captioned action.

4. True and accurate copies of the loan agreements referenced in Paragraphs 36-44 of the Complaint filed by the Maryland Commissioner of Financial Regulation are attached as Exhibits 1-9 to the Memorandum in Support of Defendants' Motion to Dismiss in the above-captioned action.

I SOLEMNLY AFFIRM, under the penalties of perjury, that the contents of the foregoing Affidavit are true and correct.

Date: 3/24/11

  
Martin A. Webb

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND**

**MARYLAND COMMISSIONER OF  
FINANCIAL REGULATION**

Plaintiff

v.

**Civil No. WDQ-11-CV-735**

**WESTERN SKY FINANCIAL, LLC, ET AL**

Defendants.

\* \* \* \* \*

**DEFENDANTS' CORPORATE AFFILIATION  
AND FINANCIAL INTEREST STATEMENT**

Defendants, pursuant to Local Rule 103.3 and Fed. R. Civ. P. 7.1(a), state as follows:

**A. CORPORATE AFFILIATIONS**

Defendants Western Sky Financial, LLC, Great Sky Finance, LLC and Payday Financial, LLC are wholly owned by Defendant Martin Webb. None are publically traded companies.

**B. THE FINANCIAL INTERESTS IN THE OUTCOME OF LITIGATION**

Defendants are not aware of any business entities who are not party to this case that have a financial interest in the outcome of the litigation.

Respectfully submitted,

/s/ Charles S. Hirsch  
Charles S. Hirsch (Fed ID #06605)  
BALLARD SPAHR LLP  
300 East Lombard Street  
18th Floor  
Baltimore, MD 21202  
Tel: (410).528.5503  
Fax: (410).528.5650  
Attorney for Defendants

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 25<sup>th</sup> day of March, 2011, a copy of the foregoing Defendants' Corporate Affiliation and Financial Interests Statement was filed and served electronically via the Court's CM/ECF system.

          /s/ Charles S. Hirsch  
Charles S. Hirsch

UNITED STATES COURTS  
DISTRICT OF IDAHO

SEP 07 2001

11a M. REED  
LODGED \_\_\_\_\_ FILED \_\_\_\_\_

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF IDAHO

TRIUMPH FINANCIAL SERVICES, )  
L.L.C., an Idaho Limited Liability )  
Company, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
STATE OF COLORADO; KEN )  
SALAZAR, ATTORNEY GENERAL )  
OF COLORADO, and SANDRA F. )  
ROSENBERG, in her Capacity with the )  
Office of the Attorney General of Colorado, )  
 )  
Defendants. )  
\_\_\_\_\_ )

Case No. CV-01-105-S-BLW  
MEMORANDUM DECISION  
AND ORDER

This matter comes before the Court on Defendants' Motion to Dismiss (Docket No. 9).  
The Court heard oral argument on July 25, 2001, and the motion is at issue. The Court finds that  
the motion should be granted, and explains its reasoning below.

**I. Background**

Plaintiff, Triumph Financial Services, L.L.C. ("Triumph") is what is commonly called a  
"payday" or "deferred deposit" lender. Triumph makes small, short-term consumer loans to  
residents of several states. At least some of these clients transact their business with Triumph  
through Triumph's website.

Colorado is one of a number of states that regulate payday lenders. During an examination  
of another such lender, a Triumph affiliate in Colorado, the state agency responsible for state code

251

enforcement found evidence that Triumph made payday loans to Colorado citizens without complying with Colorado's regulations. In February, 2001, the agency notified Triumph by mail of its findings, and ordered Triumph, among other things, to provide the Office of the Attorney General with financial information relating to the Colorado loans and refund any fees collected to its debtors who were Colorado citizens. Triumph commenced this action seeking declaratory and injunctive relief from Defendants' attempt to enforce Colorado's consumer credit law against it.

## II. Analysis

### A. Personal Jurisdiction

The Court first considers whether the defendants have sufficient contact with the State of Idaho to subject them to the jurisdiction of the state and federal courts in Idaho. In order to establish the existence of personal jurisdiction in a diversity case, the plaintiff must show (1) that the long-arm statute of the forum confers personal jurisdiction over the nonresident defendant, and (2) that the exercise of jurisdiction accords with federal constitutional principles of due process.

*Haisten v. Grass Valley Medical Reimbursement Fund, Ltd.*, 784 F.2d 1392, 1396 (9th Cir. 1986).

The Idaho long-arm statute provides that a person is subject to personal jurisdiction if, among other things, he transacts business or commits a tort in Idaho and the alleged cause of action arises from that transaction or act. Idaho Code § 5-514. The Idaho legislature, in adopting that statute, intended to exercise all the jurisdiction available to the State of Idaho under the Due Process Clause of the United States Constitution. *Doggett v. Electronics Corp. of Am.*, 93 Idaho 26, 30, 454 P.2d 63, 67 (1969). Thus, the state and federal limits are coextensive, *Data Disc*, 557 F.2d at 1286, and this Court must decide whether the exercise of jurisdiction here accords with constitutional principles of due process. Triumph bears the burden of establishing the existence of

personal jurisdiction in this case. *See AT&T v. Compagnie Bruxelles Lambert*, 94 F.3d 586, 588 (9th Cir. 1996).

Triumph concedes that traditional methods of assessing personal jurisdiction are ill-suited to a situation, as here, where a state official has attempted "extra-territorial" enforcement in the forum state, because such actions cannot be described as "the commission of a tortious act" or "the transaction of any business . . . for the purpose of pecuniary gain." The Court agrees that it is not necessary to determine whether Defendants fall within the precise language of Idaho Code § 5-514, since the statute is an attempt to exercise all jurisdiction available to the State of Idaho under the Due Process Clause of the United States Constitution, and "is to be liberally construed." *Doggett*, 93 Idaho at 26.

Turning, then to the due process limitations on the assertion of personal jurisdiction, the Court notes, as a prefatory matter, that the Due Process Clause of the Fourteenth Amendment ensures the fair and orderly administration of laws while preventing binding state judgments against defendants with which the forum has "no contacts, ties, or relations." *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945). Due process is satisfied when jurisdiction is asserted over a defendant who has certain minimum contacts with the forum state such that the maintenance of the action does not offend the "traditional notions of fair play and substantial justice." *Milliken v. Meyer*, 311 U.S. 457, 463 (1940). This in turn "gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). In determining personal jurisdiction, we focus primarily on "the relationship among the defendant,

the forum, and the litigation." *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977).

A state may exercise either general or specific jurisdiction over a defendant. If a defendant's activities within the forum state are "continuous and systematic" or "substantial," the state has a sufficient relationship with the defendant to assert general jurisdiction. *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 445-47 (1952). If, however, a forum state cannot assert general jurisdiction over the defendant, it may still assert specific jurisdiction depending on the quality and nature of the defendant's contacts with the forum state in relation to the cause of action. *Data Disc*, 557 F.2d at 1287. The Court uses a three-part analysis in determining specific jurisdiction: (1) the nonresident defendant must purposefully direct his activities or consummate some transaction with the forum or residents thereof; or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws; (2) the claim must be one which arises out of or relates to the defendant's forum-related activities; and (3) the exercise of jurisdiction must comport with fair play and substantial justice, i.e. it must be reasonable. *Haisten*, 784 F.2d at 1397; see *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472-76 (1985).

None of these requirements apply to the actions of the defendant in this case. The parties concede that general jurisdiction is not applicable, and that the only action made in Idaho by the defendants is the letter mailed to Triumph. Such an act clearly does not amount to the minimal contact required for special jurisdiction. In *Houghland Farms, Inc. v. Johnson*, 109 Idaho, 72, 82, 803 P.2d 978, 988 (1990), the Idaho Supreme Court held that the defendant's letter to plaintiff in Idaho "does not add any additional support to the exercise of personal jurisdiction over [defendant]. It was merely an isolated circumstance and did not indicate that Johnson had

invoked the benefits and protections of our laws.” It may be argued that the letter in this case was more substantive than the letter in *Houghland Farms*; however, there is no indication that Defendants in this case in any way sought to “invok[e] the benefits and protections” of Idaho law or that they could “reasonably anticipate being haled into court” in Idaho. *World-Wide Volkswagen Corp.*, 444 U.S. at 287. To the contrary, the letter sought information from Triumph, and suggested that the State of Colorado might seek to enforce its own laws against Triumph within that State. *See also, Smalley v. Kaiser*, 950 P.2d 1248 (Idaho 1997) (finding that warning letter from Missouri Department of Social Services together with placement of negative credit report in an Idaho credit bureau was insufficient to subject the Missouri agency to Idaho’s courts); *IMO Industries*, 155 F.3d at 259 n.3 (noting “weight of authority” holds that sending of letter and similar “minimal communication between the defendant and the plaintiff in the forum state, without more, will not subject the defendant to the jurisdiction of that state’s court system;”); *Graphic Controls Corp. v. Utah Med. Prod., Inc.*, 149 F.3d 1382, 1387 (Fed. Cir. 1998) (cease-and-desist letters do not support personal jurisdiction).

Triumph argues, however, that the letter in question is far more than a mere demand or cease-and-desist letter; it constitutes, in Triumph’s view, an effort by Defendants to impose the requirements of Colorado law on Triumph’s operations, which they contend are conducted exclusively in Idaho. However, during oral argument, Defendants pointed out and Triumph failed to dispute that the applicable Colorado law did not attempt to regulate the maintenance of a website in Idaho, but only the actual extension of credit to Colorado residents. Thus, Defendants, in issuing the letter in question, were not attempting to regulate Triumph’s activities in Idaho. Rather, they were attempting to determine whether Triumph had conducted business in Colorado

without complying with applicable Colorado statutes and regulations. This, without more, does not satisfy the minimum contacts requirements of the Due Process Clause.

In sum, the Court finds that Defendants' contact with Idaho are not sufficient to subject them to the jurisdiction of the Idaho courts. Therefore, this case shall be dismissed.


**B. Attorney Fees**

Defendants have requested an award of attorney fees. However, they have not cited to any basis for such an award. For that reason, the Court determines that it is inappropriate to consider the request at this time.

**III. Order**

IT IS HEREBY ORDERED, that Defendants' Motion to Dismiss (Docket No. 9) shall be, and the same is hereby GRANTED.

Dated this 6th day of September, 2001.

  
\_\_\_\_\_  
B. LYNN WINMILL  
CHIEF UNITED STATES DISTRICT JUDGE

**CERTIFICATE OF MAILING**

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this

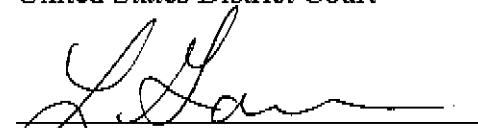
7<sup>th</sup> day of Sept, 2001, to the following parties:

P. Larry Westberg  
WESTBERG MCCABE & COLLINS  
P.O. Box 2836  
Boise, ID 83701

A. Rene Martin  
OFFICE OF ATTORNEY GENERAL  
P.O. Box 83720  
Boise, ID 83720-0010

Paul Chessin  
ATTORNEY GENERAL  
Consumer Credit Unit  
1525 Sherman Street 5th Floor  
Denver, CO 80203

Cameron S. Burke, Clerk  
United States District Court

  
LaDonna Garcia, Deputy Clerk