UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

FEDERAL TRADE COMMISSION,	*	
	*	Case No. 3:11-cv-3017-RAL
Plaintiff,	*	
	*	
v.	*	
	*	
PAYDAY FINANCIAL, LLC, et al.,	*	
	*	
Defendants.	*	

DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AS TO COUNTS ONE AND THREE THROUGH SEVEN

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In response to Plaintiff's Motion for Summary Judgment as to Counts One and Three through Seven, and in accordance with Local Civil Rule 56.1(B),[1] Defendants Martin A. Webb, Payday Financial, LLC, Great Sky Finance, LLC, Western Sky Financial, LLC, Red Stone Financial, LLC, Management Systems, LLC, 24-7 Cash Direct, LLC, Red River Ventures, LLC, High Country Ventures, LLC, and Financial Solutions, LLC, (collectively, "Defendants") submit the following:

I. Introduction

Plaintiff the Federal Trade Commission brings this action against Defendants Martin A. Webb, an enrolled member of the Cheyenne River Sioux Tribe, and several of his wholly owned companies, all of which are located entirely within the external boundaries of the Tribe's Reservation.[2] (SF 2-3.) The FTC submits that the Corporate Defendants violated the FTC Act, the Credit Practices Rules, the EFTA, and Regulation E by unfairly and deceptively representing to consumers that the Cheyenne River Sioux Tribal Court had jurisdiction over loans offered from the Tribe's Reservation, and that certain loan terms—although specifically agreed to by consumers—caused those consumers tangible harm. The FTC does not allege, however, that any Defendants used misleading, deceptive, or otherwise inappropriate terms to induce any consumer into a loan. Nor does the FTC allege that any consumer received anything less than what they

[1] Contemporaneous with this Memorandum in Opposition, Defendants file: (1) Response to Plaintiff's Statement of Material Facts; (2) Defendants' Statement of Additional Material Facts; and (3) Declaration of Martin A. Webb.

[2] For ease of reference, citations to Defendants' Statement of Additional Material Facts are denoted as "DF [#]", citations to Defendants' Exhibits are denoted as "DEx. [#] at __", citations to Plaintiff's Statement of Material Facts are denoted as "MF [#]", citations to the Parties Joint Stipulation of Material Facts (ECF No. 53) are denoted as "SF [#]", citations to Plaintiff's Memorandum in Support of its Motion for Summary Judgment are denoted as "Memo at __", and citations to Plaintiff's Proposed Order are denoted as "PO at __".

bargained for. Yet the FTC seeks extensive injunctive and monetary relief against Defendants for giving consumers exactly what they wanted. Further, the FTC attempts to substitute proof that each Defendant violated the law with the unsupported conclusion that the Defendants operated as a common enterprise. This is incorrect. The facts reveal that each Corporate Defendant operated independently, and dealt with consumers on a one-on-one basis. And to be sure, the relief sought here by the FTC is unwarranted as it will serve no rational purpose; Defendants have agreed to cease any potentially offending conduct, and at all times interacted with consumers with good faith and fair dealing.

II. Standard For Summary Judgment

Summary judgment is only appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c). "Material facts are those which might affect the outcome of the lawsuit. A dispute over an issue of fact is 'genuine' if there is sufficient evidence to allow a reasonable jury to find for the non-moving party on that issue." *DuBose v. Kelly*, 187 F.3d 999, 1000-01 (8th Cir. 1999). A reviewing court should view all evidence in the light most favorable to the non-moving party and all inferences should be drawn in that party's favor. *Pecoraro v. Diocese of Rapid City*, 435 F.3d 870, 873 (8th Cir. 2006).

Because Plaintiff the Federal Trade Commission has failed to demonstrate that no genuine issue of fact remains, Defendants respectfully request that this Court enter an order denying Plaintiff's Motion for Summary Judgment.

III. Defendants Should Not Be Held Liable As A Common Enterprise Because Each Defendant Operated Independently, and Plaintiff Failed To Demonstrate Otherwise.

The limited set of facts introduced by the FTC in support of its Motion for Partial Summary Judgment fail to support the theory that the Corporate Defendants share liability for any violations of the FTC Act, the Credit Practices Rule, or EFTA and Regulation E. Indeed, the complete and unabridged facts support the opposite conclusion: that each of the Corporate Defendants operates as a distinct and independent company with its own bank account, employees, advertising, and commercial presence. (DF 10-11, 19-20, 31-32, 46-47, 56-57, 64, 66, 78-79, 89-90, 98-99.) To be sure, the FTC has not—as indeed it cannot—alleged facts showing that any consumer interacted with a "maze of interrelated companies." Instead, a consumer seeking a loan dealt solely with one company, and would have no reason to interact with any of the other Corporate Defendants. The FTC does not attempt to define the "role" that each company played within the purported common enterprise; rather, simply because each company is owned by Martin Webb, it *must* be part of a purportedly unified scheme. This piecemeal formulation lacks the required demonstration of interrelatedness and cohesion among Defendants necessary to prove a common enterprise existed.

To prevent individuals and companies from using corporate structure to circumvent the purpose of the Federal Trade Commission Act, courts have created an exception to general common law principles to hold a common enterprise of defendants jointly and severally liable for violations of the FTC Act. *See P.F. Collier & Son Corp. v. FTC*, 427 F.2d 261, 267 (6th Cir. 1970). Under this doctrine, "[w]hen one or more corporate entities operate as a common enterprise, each may be held liable for the deceptive acts and practices of the others." *FTC v. Think Achievement Corp.*, 144 F. Supp. 2d 993, 1011 (N.D. Ind. 2000), *aff'd* 312 F.3d 259 (7th Cir. 2002).

The existence of a common enterprise depends on an analysis of several factors, including "common control; the sharing of office space and officers; whether business is transacted through a maze of interrelated companies; the commingling of corporate funds and failure to maintain separation of companies; unified advertising; and evidence that reveals that no real distinction exists between the corporate defendants." *FTC v. Nat'l Urological Group, Inc.* 645 F. Supp. 2d 1167, 1182 (N.D.Ga. 2008), *aff'd* 356 Fed. App'x 358 (11th Cir. 2009); *FTC v. Vacation Property Servs.*, No. 11-00595, 2012 WL 1854251, at *5 (M.D.Fla. May 21, 2012) (finding that the FTC failed to demonstrate a common enterprise where "many of these factors are absent or cannot be determined on summary judgment"). "[E]ntities constitute a common enterprise when they exhibit either vertical or horizontal commonality—qualities that may be demonstrated by a showing of strongly interdependent economic interests or the pooling of assets and revenues." *FTC v. Network Servs. Depot, Inc.*, 617 F.3d 1127, 1142-43 (9th Cir. 2010). The common enterprise doctrine is designed for situations where "corporations are so entwined that a judgment absolving one of them of liability would provide the other defendants a clear mechanism for avoiding the terms of the order[.]" *FTC v. Nat'l Urological* 645 F. Supp. 2d at 1182. Stated plainly, the FTC has failed to allege adequate facts to demonstrate that the Corporate Defendants operated as a common enterprise.

Rather than analyzing the panoply of factors routinely analyzed by federal courts, Plaintiff introduced a narrow and incomplete set of facts to paint the Corporate Defendants as a single monolithic entity. But the balance of all of the pertinent facts reveals that each Corporate Defendant operates independently from the others, and thus, joint and several liability is inappropriate. Even taking the FTC's allegations as true, at minimum, there is a factual dispute as to whether there the Corporate Defendants share strongly interdependent economic interests

such that they may be considered a common enterprise. *See FTC v. Network Servs.*, 617 F.3d at 1142-43.

The FTC alleges that "Corporate Defendants shared ownership, control, office space, and addresses . . . ." (Memo at 19.) In support of this contention, the FTC notes that the Corporate Defendants are owned and controlled by Defendant Webb, they operate out of two business locations in Timber Lake, South Dakota, and that "those Defendants that had garnishment departments, Payday Financial/Lakota Cash and Financial Solutions, shared employee training manuals and procedures." (*Id.*) Absent from the FTC's "proof" is a detailed showing that *each* of the Corporate Defendants operated as a common enterprise. Notably, in the FTC's entire section on common enterprise, only three defendants were actually named. (*See id.*) Allegations about the activities of Defendants Western Sky, Management Systems, Red Stone Financial, Red River Ventures, 24-7 Cash Direct, Great Sky Finance, and High Country Ventures are conspicuously missing. In their place, the FTC relies on a bare minimum of facts showing some (unknown) relationship between the companies. The FTC introduced no facts to suggest that Defendants pooled assets or revenues.

In contrast, the undisputed facts of each Defendant's business model and operation reveal that the Corporate Defendants operate independently, rather than as a common enterprise:

- Each corporate defendant (while operational) maintained its own bank account, and thus there was no commingling of funds (DF 10, 19, 31, 46, 56, 64, 78, 89, 98);
- No evidence that the Corporate Defendants shared employers; rather, there was little, if any, employee crossover (DF 11, 20, 32, 47, 57, 66, 79, 90, 99);
- Each Corporate Defendant advertised its business independently (DF 109);

- Business models vary from company to company (*Compare, e.g.* DF 2-3 *with* DF 38-52; 49, 86);
- Each Corporate Defendant dealt independently with consumers (*Compare, e.g.* DF 2-3 *with* DF 38-52);
- Defendant 24-7 Cash Direct was never operational (DF 2);
- Defendant Great Sky Finance never communicated with a consumer's employer, never sent a wage assignment package, and never sued a customer in Cheyenne River Sioux Tribal Court (DF 21-23, 26);
- Defendant High Country Ventures was only operation for roughly two months, never communicated with a consumer's employer, never sent a wage assignment package, never offered a loan containing a wage assignment clause, never collected any funds, and never sued a consumer in Cheyenne River Sioux Tribal Court (DF 29, 33-37);
- Defendant Management Systems offered payroll and accounting services, never offered a loan, never sent a wage assignment package, never communicated with a consumer, never communicated with a consumer's employer, never collected any funds, and never sued a consumer in Cheyenne River Sioux Tribal Court (DF 39-45, 48, 52);
- Defendant Red River Ventures was only operation for roughly two months, never communicated with a consumer's employer, never sent a wage assignment package, never offered a loan containing a wage assignment clause, never collected any funds, and never sued a consumer in Cheyenne River Sioux Tribal Court (DF 54, 58-62);
- Defendant Red Stone Financial never offered a loan containing a wage assignment clause, never communicated with a consumer's employer, never sent a wage assignment

package, never collected any funds, and never sued a consumer in Cheyenne River Sioux Tribal Court (DF 67, 69-75);

- Defendant Western Sky Financial never communicated with a consumer's employer, never offered a loan containing a wage assignment clause, never sent a wage assignment package, operates partly out of a separate facility, and has never sued a consumer in Cheyenne River Sioux Tribal Court (DF 81-85);
- Defendant Financial Solutions never offered a loan (DF 88).

Thus, the Corporate Defendants operated wholly distinct and independent commercial businesses. And from a consumer's perspective, each of the Corporate Defendants would appear to be just that: wholly separate entities. As in *FTC v. Vacation Property Servs.*, the FTC has failed to allege sufficient facts to demonstrate on summary judgment that the Corporate Defendants operated as a common enterprise. In that case, the court concluded, in part, that because there was no evidence that "business was transacted through a maze of interrelated companies," "each company appear[ed] to have dealt independently with its own customers[]," and "the record does not establish that the entities commingled corporate funds," the FTC had failed to demonstrate a common enterprise on summary judgment. *FTC. v. Vacation Property Servs.*, 2012 WL 1854251, at *5. So too here.

IV. To Condemn A Practice As "Unfair" Or "Deceptive" Under Section 5, The FTC Was Required To Demonstrate That The Practice Caused Or Will Likely Cause Cognizable Consumer Harm. Because The FTC's Failed To Demonstrate Any Cognizable Harm, It Is Not Entitled To Summary Judgment.

The FTC argues that it has found roughly two unfair and deceptive practices, and seeks on the basis of these findings vast injunctive relief under Section 5 of the FTC Act. The first practice concerns Defendants' invocation of tribal court jurisdiction over contract claims

between Defendants and their borrowers.[3] (Memo at 7-10, 13-15.) To the FTC, it is beyond question that tribal courts are without jurisdiction even though Defendants are tribal member owned and operated entities and the contracts at issue are formed on the Reservation. (Memo at 8.) The FTC thus calls it deceptive to represent to borrowers that tribal court jurisdiction exists, and unfair to bring contract claims in tribal court. (Memo at 7-10, 13-15.) The second practice, since abandoned for business reasons, was Defendants use in some instances of contractual wage assignments to satisfy delinquent debts. (Memo at 5-7, 12-13.) Without explaining why, the FTC insists that such assignments can only be enforced through a court order (albeit, not a tribal court order). (Memo at 5-7.) And so the FTC paints the fact that the assignments made no mention of a necessity of going to court as deceptive, and the practice of enforcing the assignments without going to court as unfair. (Memo at 5-7, 12-13.)

Respectfully, the FTC is wrong; neither practice is unfair or deceptive. Each was fully disclosed, expressly agreed to, and transparently implemented. (*See, e.g.,* DEx. 15 at Payday120133; DF 92-93) And each was based on a legal premise—(1) that tribal courts have jurisdiction over Reservation-formed contracts involving tribal entities and (2) that applicable law does not require a court order to enforce a contractual wage assignment—that is almost certainly correct and that was arrived at in good and reasonable faith. To stretch the meaning of unfair and deceptive to cover these practices is to render those terms meaningless. *See generally FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 385, 85 S.Ct. 1035, 1042-43, 13 L.Ed.2d 904 (1965) ("the words 'deceptive practices' set forth a legal standard and they must get their final

[3] Defendants use the term "Defendants" in this section for readability's sake. It is not intended to imply that all of the FTC's allegations concern conduct by all Defendants. Only Payday Financial and Great Sky Financial loan contracts contained wage assignments and only Payday Financial and Financial Solutions ever exercised a wage assignment.

meaning from judicial construction”). That would not only itself be unfair, but it would be contrary to Section 5.

A. The Scope Of The FTC’s Unfair and Deceptive Authority: Broad, But Not Unbounded.

Although Section 5 provides the FTC with considerable authority to monitor consumer transactions, “[t]he Commission is hardly free to write its own law of consumer protection . . . .” *Nat’l Petroleum Refiners Ass’n v. FTC*, 482 F.2d 672, 693 (D.C. Cir. 1973).

The FTC cannot condemn just any practice it dislikes as unfair, but only those that at a minimum are (1) likely to cause a substantial injury to consumers that (2) *is not reasonably avoidable by consumers themselves* and that (3) is not outweighed by countervailing benefits to consumers or to competition. *FTC v. IFC Credit Corp.*, 543 F.Supp.2d 925, 937 (N.D.Ill. 2008) (citing 15 U.S.C. § 45(n)). Element two is decisive in this case, for alleged unfairness that arises from a contractual term that is properly disclosed and readily agreed to is not punishable under Section 5. *See IFC Credit,* F.supp.2d at 950-51 (“as to the forum selection clause there was nothing interfering with the capacity [of the consumers] . . . from making an informed choice”). Element one is also important, as establishing “substantial injury” requires more than alleging ordinary “emotional impact and other [] subjective types of harm”. *See Am. Fin. Servs. Ass’n v. FTC*, 767 F.2d 957, 972 (D.C. Cir. 1985) (citing Letter from Federal Trade Commission to Senators Ford and Danforth (Dec. 17, 1980) at 36, *reprinted in* H.R.Rep. No. 156, Pt. 1, 98th Cong., 1st Sess., *appended to In re. Int’l Harvester*, 104 FTC 949 (1984)). To establish “substantial injury” the Commission is required to substantiate “monetary harm.” *See id.*

The standard for assailing a practice as deceptive is even more exacting: “To establish that an act or practice is deceptive, the [FTC] must establish that: (1) a reasonably prudent person

would *rely* on the deceptive . . . practices or representations; (2) the . . . practices or representations were widely disseminated; and (3) consumers purchased the product." *FTC v. P.M.C.S., Inc.*, 21 F.Supp.2d 187, 190 (E.D.N.Y. 1998) (emphasis added). Reliance is the operative element here—although proof of individual subjective reliance is not necessary, the FTC must show that consumers "likely" took or would take detrimental action "*but for* the deception". *FTC v. Magazine Solutions, LLC*, CIVA 7-692, 2010 WL 1009442, at *12 (W.D. Pa. Mar. 15, 2010) (emphasis added) *aff'd,* 432 F. App'x 155 (3d Cir. 2011); *see also FTC v. Pantron I Corp.*, 33 F.3d 1088, 1102 n.33 (9th Cir. 1994) (first element requires "misrepresentations of a kind reasonable people rely on").

The FTC has not demonstrated facts—and to be sure, cannot demonstrate facts—capable of satisfying either test for either of Defendants' practices.

B. Defendants Representations About The Existence Of Tribal Jurisdiction Were Not Deceptive Under Section 5 Because (1) Tribal Courts Have Jurisdiction To Hear Contract Claims Arising From Contracts Formed On A Reservation Between Tribal Members And Non-Indians, And (2) Even If This Court Rules Against Tribal Jurisdiction There Is No Evidence Of Detrimental Consumer Reliance On Jurisdiction.

The FTC doesn't argue anew that the Cheyenne River Sioux tribal courts lack jurisdiction to hear the relevant contract claims. Instead it adopts its prior argument, distilling it as follows: "Tribal Courts are of only limited subject matter jurisdiction, and cannot exercise authority over off-reservation activities involving non-members of the tribe." (Memo at 8.) But even if that's an accurate statement of law,[4] it doesn't decide this case. And that the FTC thinks it does reveals the flaw in the FTC's reasoning.

[4] Although some cases indicate that a tribal court can *never* exercise jurisdiction over off-reservation non-member conduct, *see, e.g., Attorney's Process & Investigation Services, Inc. v. Sac & Fox Tribe of the Mississippi in Iowa*, 809 F. Supp. 2d 916, 928 (N.D. Iowa 2011),

Regardless of whether tribal civil jurisdiction can or cannot exist over non-member off-reservation conduct, Defendants' argument to the Court was that tribal jurisdiction is present because of the borrowers' *on-reservation* conduct. *See* Defendants' Motion for Partial Summary Judgment and its Reply in support thereof (ECF Nos. 52, 60). The FTC's argument is only responsive then if what is meant by it is that a non-member must by physically present on the reservation to undertake on-reservation conduct. But for that to be true, "conduct" would have to mean something radically different in the context of Indian reservations than it means in any other legal context. Whereas state and federal law generally takes a functional approach to defining and understanding "conduct" such that conduct is not rigidly and illogically tied to physical presence, the Indian reservation meaning of conduct that the FTC implicitly urges is limited only to a person's immediate physical actions. This is regressive.

As the Supreme Court wrote in 1985, well before the proliferation of the Internet, "it is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines, *thus obviating the need for physical presence within a State in which business is conducted*." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476, 105 S. Ct. 2174, 2184, 85 L. Ed. 2d 528 (1985) (emphasis added). The takeaway is clear—conduct and presence are two distinct things. The absence of the latter does not negate the existence of the former. *See Kelly Law Firm, P.C. v. An Attorney for You*, 679 F. Supp. 2d

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Defendants disagree that such a bright line properly exists. The better approach is set forth by the First Circuit in its oft-cited opinion in *Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.*, wherein jurisdiction for an "off-the-reservation claim" *can* exist when the claim "impact[s] directly upon tribal affairs." 207 F.3d 21, 32 (1st Cir. 2000). As *Ninigret* implies, there is a qualitative difference between off-reservation conduct that is bound up in a duty to an on-reservation Indian that is defined or shaped in part by the fact that the Indian is on a reservation, and off-reservation conduct that merely affects an Indian who happens to be on a reservation. Defendants would be happy to brief this further, but Defendants believe the jurisdictional dispute in this case can and should be decided based on the borrowers' on-reservation conduct.

755, 764 (S.D. Tex. 2009) ("Internet-based businesses . . . can conduct business in a state without ever having a physical presence there."). The Court has repeatedly stressed this point when analyzing personal jurisdiction: "So long as a commercial actor's efforts are "purposefully directed" toward residents of another State, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there." *Id.* (quotations and citations omitted); *see also Heritage House Restaurants, Inc. v. Cont'l Funding Group, Inc.*, 906 F.2d 276, 283 (7th Cir. 1990) ("Continental created a relationship which is naturally based on telephone and mail contacts rather than physical presence, and it should not be able to avoid jurisdiction based on that distinction."). It would be odd if the Court intended that, all of its personal jurisdiction cases notwithstanding, conduct for the purposes of tribal subject matter jurisdiction should be defined exclusively by physical presence. It would be odder still given that "[t]he Court's 'consensual relationship' analysis under *Montana* resembles the Court's Due Process Clause analysis for purposes of personal jurisdiction." S*mith v. Salish Kootenai Coll.*, 434 F.3d 1127, 1138-39 (9th Cir. 2006).

The distinction between presence and conduct abounds outside of personal jurisdiction as well. The act of libel, for instance, occurs not where the actor is located, but where the libel is published. *Crane v. New York Zoological Soc.*, 894 F.2d 454, 457 (D.C. Cir. 1990) ("libel occurs in the place where published"). Likewise with money laundering, which because it "generally involves the electronic transfer of funds across national borders * * * [c]ourts that have addressed this issue have held that the defendant's physical presence in the United States is not necessary to conclude that a defendant's conduct occurred in part in the United States". *United States v. Galvis-Pena*, 1:09-CR-25-TCB-CCH-4, 2011 WL 7268437, at *7 (N.D. Ga. Dec. 6, 2011) *report and recommendation adopted as modified*, 1:09-CR-25-TCB-CCH-4, 2012 WL

425240 (N.D. Ga. Feb. 9, 2012) (quotations and citations omitted). In the vast world of torts if "an individual's conduct occurs in one district but has intended effects elsewhere, the act 'occurs' in the jurisdiction where its effects are directed." *See, generally,* R*euber v. United States*, 750 F.2d 1039, 1047 (D.C. Cir. 1984) (*citing Forest v. United States*, 539 F.Supp. 171 (D.Mont. 1982)); *see also Sanchez ex rel. Rivera-Sanchez v. United States*, 600 F. Supp. 2d 19, 23 (D.D.C. 2009). And perhaps most salient here, at common law the breach of a contract to pay money occurs not where the debtor (i.e., the breaching party) is located, but where the payment is due (in this case, the Reservation). *See Excel Ins. Co. v. Brown*, 406 So. 2d 534, 535 (Fla. Dist. Ct. App. 1981) ("A cause of action on a contract accrues and venue is proper in the county where performance is required."); *Janet's Reporting & Video Serv. v. Rauchman*, CA89-10-150, 1990 WL 70929, at *1 (Ohio Ct. App. May 29, 1990) ("Unless there is an agreement that payment be made elsewhere, a breach involving the payment of money occurs at the residence or office of the payee."); *Hanna v. Breese Trenton Min. Co.*, 114 Ill. App. 3d 657, 660-61, 449 N.E.2d 226, 228-29 (1983) (same).

Taken together, Defendants' borrowers all voluntarily and knowingly acted on the Reservation. Each—with unequivocal notice that Defendants are exclusively-on-Reservation tribal lenders—reached out to Defendants through the phone and Internet. Each solicited credit from Defendants, and to obtain it, each made numerous representations as part of a comprehensive loan application sent to Defendants' Reservation offices. (SF 7.) All expressly agreed that tribal law would govern their loans. (SF 8.) All expressly consented to tribal court jurisdiction. (SF 9.) And all promised to pay their loans back to Defendants on the Reservation. (*See, e.g.* DEx. 15 at Payday120138.)

To argue that tribal courts do not have jurisdiction to hear claims arising from those contractual promises simply because the borrowers' on-Reservation conduct—their application conduct, their execution conduct, and their future performance conduct—did not include physically entering the Reservation is to deny Tribes and their Members the ability to engage in interstate commerce as co-equal participants. If Defendants were not residents of the Reservation but instead of State X, nobody would dispute that their borrowers had transacted commerce, had undertaken conduct, and had acquired contractual duties to perform, all in State X. The FTC offers no reason why the result should be different here—which is to say, the FTC offers no reason why this Court should adopt an antiquated, anachronistic conception of the word "conduct" that is based entirely on physical presence and that applies only to Indian reservations. Respectfully, no good reason exists.

In what is widely known as the "pathmaking" case (not an adjective usually ascribed to cases that limit existing judicial jurisdiction, as the FTC maintains it did) of *Montana v. U. S.*, the Supreme Court confirmed that "Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands." 450 U.S. 544, 565-66, 101 S. Ct. 1245, 1258, 67 L. Ed. 2d 493 (1981). The Court elaborated that civil jurisdiction exists specifically in two types of situations, the first of which involves consensual commercial dealings between Indians and non-Indians and applies here: "A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Id; see also Dish Network Serv. LLC v. Laducer*, CIV.A. 09-10122, 2012 WL 2782585, at *6 (D.N.D. July 9, 2012) ("This dispute arises out of [a non-

Indian's] consensual contractual relationship with . . . a tribal member. Therefore, the first *Montana* exception applies.").

The FTC conceded when tribal jurisdiction was first briefed that the contract claims at issue arose from consensual, contractual relationships between Defendants and their borrowers. But it insisted that tribal jurisdiction nonetheless didn't exist because the phrase "non-Indians on their reservations" in *Montana's* prefatory sentence purportedly erected a static physical presence requirement. According to the FTC, then, *Montana* actually disavowed tribal jurisdiction over most or all interstate commercial dealings, contracts, leases, and other arrangements between Indians and non-Indians.

That's a lot of (covert) significance to accord to a few pre-Internet words in a single sentence otherwise dedicated to confirming the survival of tribal sovereignty. Admittedly, the word "on" does in popular usage often connote a physical relationship. But in this case the use of "on" was a grammatical necessity—conduct occurs "in" a state, but "on" a reservation. Further, far from intending to limit the civil jurisdiction announced earlier in the sentence, it appears that "on their reservation" was merely setting up the expansion of jurisdiction immediately following it: "even on non-Indian fee lands." Or perhaps "on their reservation" was included to clarify that tribes, unlike states and the federal government, are without "extraterritorial jurisdiction," which is jurisdiction over some narrow types of truly extraterritorial conduct. *See, generally, Skiriotes v. State of Florida*, 313 U.S. 69, 78-79, 61 S. Ct. 924, 930, 85 L. Ed. 1193 (1941) ("When its action does not conflict with federal legislation, the sovereign authority of the State over the conduct of its citizens upon the high seas is analogous to the sovereign authority of the United States over its citizens in like circumstances.").

Whatever the case may be, to read into "on their reservation" a physical presence requirement would eviscerate tribal court jurisdiction over all (or nearly all) interstate transactions between Indians and non-Indians. More pointedly, it would prevent tribal courts from hearing civil claims that state and federal law considers to have occurred on their reservations and that unquestionably arise "from the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." Nothing in *Montana* compels such irrationality. Certainly it cannot sensibly be squared with what the Supreme Court referred to, one year after *Montana*, as a "Tribe's general authority, as sovereign, to control economic activities within its jurisdiction . . . ." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 102 S. Ct. 894, 898, 71 L. Ed. 2d 21 (1982).

The better approach is to retain the modern distinction between presence and conduct and condition the tribal court civil jurisdiction over non-Indians enunciated in *Montana* on the location of the non-Indian conduct, not simply on the location of the non-Indian himself. Under this approach, the Cheyenne River Sioux tribal courts properly have (and correctly exercised) jurisdiction over the contract claims arising between Defendants and their borrowers. Defendants' motion for partial summary judgment should therefore be granted and the FTC's motion for judgment declaring deceptive Defendants' representations about the existence of tribal jurisdiction should be denied.

1. Even If The Court Finds That Tribal Courts Are Without Jurisdiction, Defendant's Prior Representations That Jurisdiction Existed Cannot Be Punished Under Section 5 Because There Is No Evidence Of Detrimental Consumer Reliance.

Because tribal court civil jurisdiction exists over Defendants' contract claims, it was not deceptive for Defendants to have said so. But if the Court were to rule against tribal jurisdiction, the FTC (not contented with the elimination of jurisdiction) asks for summary judgment

declaring Defendants representations about jurisdiction retroactively deceptive. (Memo at 7-9.) This is overreaching—just because a representation, particularly one that is quintessentially a legal opinion, might later be found to be incorrect does not make it punishable under Section 5. To be punishable, the representation must have (at a minimum) caused or been likely to have caused, reasonable consumers to take detrimental action. Yet the FTC offers no support—much less the sort of support capable of demonstrating that "there is no genuine issue as to any material fact"—that any consumers, real or hypothetical, detrimentally relied on Defendants' representations.

Instead the FTC offers a few one sentence musings about how a hypothetical consumer might respond to hearing that tribal court jurisdiction exists. First the FTC theorizes that "[s]uch false claims [about tribal court jurisdiction] likely would induce consumers to abandon any defenses they would otherwise be able to assert." (Memo at 7.) Why? What is so (cognizably) scary about tribal court (which consumers can appear in by telephone) that it would cause a reasonable person who would fight in state court to concede at the idea of tribal jurisdiction? The FTC doesn't say. Then the FTC conjures up a very different hypothetical consumer, one who if "sued in tribal court is likely to expend time, money, and effort to defend the case in tribal court . . . ." (Memo at 9-10.) But do defendants really (reasonably) make the decision to defend or default based on the plaintiff's pre-suit representations about the court's jurisdiction? The FTC offers no evidence one way or the other.

Put another way, the FTC is asking the Court to rule as a matter of law that a hypothetical consumer in (say) Kentucky would likely have taken detrimental action based on representations about the existence of tribal court jurisdiction that he would not have taken had the representations been about the existence of South Dakota state court jurisdiction. But what is so

uniquely pernicious about tribal courts that they cause reasonable people to act against their interests in ways that other courts don't. To obtain summary judgment, the FTC was required to answer that question, and to support its answer with facts. It made no attempt to do so.

Finally, the FTC is wrong to analogize this case to those involving debt collectors who "affirmatively mislead[] consumers about their legal rights" by making specific representations that were unequivocally proscribed by federal statute. (Memo at 7.) In *White v. Goodman*, the principal case relied on by the FTC, the court noted that the Federal Fair Debt Collection Practices Act expressly prohibits debt collectors from representing to consumers that a third party is involved in a debt collection when it's not because doing so "might induce debtors to abandon legitimate defenses." 200 F.3d 1016, 1018 (7th Cir. 2000) (citing 15 U.S.C. § 1692(a)). Here there is no similar express prohibition on the exercise of tribal court jurisdiction over the relevant contract claims. Even if the Court finds that Defendants' representations about the existence of tribal court jurisdiction are ultimately incorrect, they were at the very least reasonable and made in good faith. It's not as if Defendants insisted on the existence of moon jurisdiction. They simply asserted that their local courts had jurisdiction over their locally-arising claims—jurisdiction the tribal courts repeatedly agreed existed.

For these reasons, the FTC's request for summary judgment declaring Defendants' assertions of the existence of tribal court jurisdiction to be deceptive should be denied.

B. Bringing Contract Claims In Tribal Court Was Not An Unfair Practice Under Section 5 Because Facing Suit For Breach Of Contract Is Not A Cognizable Injury, And Even If It Is, It Is Entirely Avoidable.

Next the FTC alleges that Defendants' limited practice of bringing claims in tribal court to enforce their contractual wage assignments was "unfair" under Section 5. Again, no evidence is offered. Instead, the FTC claims unfairness because, in its view, 1) tribal court is a distant

forum imposing "obvious" travel expense on consumers, and 2) consumers do not have easy access to tribal law and procedure. (Memo at 13-15.) But even if those allegations are true, and neither is, Section 5 only applies to practices causing "substantial injury" that cannot "reasonably be avoided." Facing suit for breaching a contract in a court whose jurisdiction was expressly consented to is not a cognizable injury. It is, however, fully avoidable.

Defendants identify themselves as tribal lenders in all their advertising and borrower communications. The first sentence of a typical loan agreement reads "Great Sky Finance, LLC is a wholly Native American owned limited liability company located within the exterior boundaries of the Cheyenne River Sioux Tribe, a sovereign Native American nation." (*See, e.g.,* DEx. 15 at Payday120129.) Because borrowers apply for loans on the phone or over the Internet, borrowers have as much time as they want in whatever environment they choose (e.g. their living room) to read and consider the terms of the draft agreements, including the prominently and repeatedly disclosed tribal choice of forum provisions. There is no duress or pressure to agree to things they don't understand. Tribal jurisdiction cannot, then, be said to come as a surprise. *See FTC v. IFC Credit,* F.supp.2d at 950-51 ("Long-standing principles of contract and sound public policy impose a duty on contracting parties to understand the obligations they are assuming, and if they do not, they cannot be heard to later complain about a lack of understanding.").

Given that the tribal jurisdiction provisions in Defendants' loan agreements were clearly disclosed, all a borrower wishing to avoid even the possibility of being sued in tribal court had to do was not take out a loan. Or, they could have taken out a loan and simply paid it back. And if they weren't able to pay it back, they could have contacted Defendants in good faith to work out an alternative payment plan. Failing all that, they could have at least *not ignored* Defendants' own offers to find a way to satisfy the debt. No borrower who did any of those things was ever

sued. (*See* DF 92-93, 100.) Nor was any borrower who asked to cancel his wage assignment, either within the 10 day revocation period or, as a matter of policy, anytime thereafter. (DF 27, 92, 100.) That some borrowers did none of these things and subsequently faced suit in tribal court for money they contractually owed is not an injury caused by Defendants, but an avoidable consequence of those borrowers' actions.

As to the veracity of the FTC's specific unfairness allegations, facing claims in tribal court did not impose *any* travel costs on consumers because they could appear by telephone, a fact they were notified of at the outset of any proceedings. (DF 102.) That said, even if the tribal court's telephonic appearance policy were not so lenient, litigation travel costs cannot serve as the basis for a Section 5 violation. Courts already have a built-in fairness test for whenever someone is sued in courts outside of their home state, and that test was satisfied here: Personal jurisdiction over the borrowers. Because the tribal court had personal jurisdiction owing to the borrower's on-Reservation conduct, the FTC's travel cost argument is akin to arguing for dismissal for *forum non conveniens*. That's fine to argue, but a defendant doesn't get sanctions for demonstrating that a plaintiff's choice of forum, while proper, is inconvenient. For the same reason, the FTC cannot get sanctions under Section 5 because it perceives tribal court to be inconvenient.

Finally, the FTC's allegation that it is difficult for consumers to access the Tribe's laws and procedures is at best misleading. All tribal court defendants have free access to the local Legal Aid office, which is staffed with an attorney well versed in tribal law. And as any attorney would have explained, or a small amount of Internet research would have revealed, the relevant procedural law is a slightly modified version of the Federal Rules of Civil Procedure and the relevant substantive law is very similar to South Dakota's version of Article 9 of the UCC (as

adopted by the Tribe). *See* South Dakota Tribal Court Handbook at 18, 20.[5] It is unclear then, how tribal court (which is very debtor friendly and accommodating) would have prejudiced a borrower. But again, if a borrower had wanted to avoid tribal court entirely, and its procedures and its geography, he was empowered to do so in all the ways discussed above.

In short, because facing suit for breaching a contract in an agreed upon forum is not a cognizable injury, and because it is in all events avoidable, Defendants did not violate Section 5's prohibition on unfair practices by filing contract claims in tribal court.

C. Because Defendants Did Not Need A Court Order To Enforce Their Contractual Wage Assignments, The FTC's Claim That It Was Deceptive To Represent That No Court Order Was Needed Is Nonsensical.

The FTC's next Section 5 charge—that it was deceptive to represent to consumers and their employers that Defendants did not need a court order to enforce their wage assignments—fails because the representations were true. The FTC claims that Defendants were required to get a court order before enforcing the assignment. (Memo at 5-7.) But nowhere does the FTC actually cite a law creating such a requirement.

By way of background, on some occasions when borrowers breached their contracts and refused to work with Defendants on an alternative payment plan, rather than file suit in tribal court Defendants sent wage garnishment packets to the borrowers' employers in an attempt to exercise their wage assignments. In the letters, Defendants explained that under the Indian Commerce Clause and the laws of the Cheyenne River Sioux Tribe, Defendants did not need a court order before they could enforce the wage assignments. (Memo at 5.) This is true, even if a little awkwardly stated.

[5] *Available at* http://www.sdjudicial.com/uploads/downloads/IBook/IndianLaw%20Handbook.pdf.

The awkward part is the reference to the Indian Commerce Clause, which the Commission correctly notes authorizes Congress to regulate commerce with Indian Tribes. (citing U.S. Const. art. I § 8). Obviously, the Indian Commerce Clause does not address wage assignments between Indians and non-Indians. But it does give Congress the power to regulate them, and so it's relevant that Congress has not passed any law requiring a court order before a wage assignment can be enforced.

The material part of the representation, meanwhile, that tribal law does not require a court order to effect a wage assignment is unambiguous and unassailable. Article 9 of the UCC, as adopted by the Tribe, comprehensively regulates security agreements and how secured interest may be perfected or enforced. But it expressly does not apply to wage assignments. *See* 16-9-104(4). No court order or other judicial action is required to exercise them.

In lieu of citing (or being able to cite) a law imposing the requirement the FTC insists exists, the Commission appears to rely on *FTC v. LoanPointe, LLC* to do the heavy lifting. No. 10-CV-225, 2011 WL 4348304 (Sept. 16, 2011 D.Utah). But *LoanPointe* is distinguishable. In that case a non-tribal Utah based lender sent out garnishment letters that, though admittedly similar to those sent by Defendants, were altogether different in the area that matters. *LoanPointe,* 2011 WL 4348304, at *2. The *LoanPointe* letters were deceptive because they identified the lender as a federal agency and stated that because the lender was a federal agency it was permitted to garnish a debtor's pay without a court order under the Debt Collection Improvement Act (DCIA) of 1996. *Id.* The problem was that the lender was not a federal agency and, as such, the DCIA did not apply. *Id.* at 2, 4-5.

Here Defendants' letters neither misrepresented themselves nor the applicable law. Unlike the DCIA vis-a-vis the *LoanPointe* lender, tribal law does permit Defendants to enforce

wage assignments without a court order. And because it does, Defendants' representations to that effect were not deceptive.

D. It Was Not Unfair To Send Wage Garnishment Packets To Delinquent Borrowers' Employers Because The Wage Assignments Were Consensual And Were Exercised Only After A Borrower Defaulted And Refused To Even Discuss Payment.

The FTC's final Section 5 claim is that it was unfair to send wage garnishment packets to the employers of certain borrowers because revealing the existence of a delinquent debt can cause embarrassment or otherwise impact the employee-employer relationship. (Memo at 12-13.) But as with being sued after breaching a contract, having one's voluntary wage assignment enforced is also not a cognizable injury. It's simply a consequence of breaching a contract, and one that the breaching party could have avoided by taking any number of reasonable actions.

Put differently, if the receipt of a garnishment package by an employer amounted to a cognizable consumer injury, then *all* garnishments would be unfair. That would include the federal government's garnishments under the DCIA. It would also include any garnishments authorized by court order, as an order does not remove the necessity of sending the packet. So it cannot be the case that sending a garnishment packet, without something more, is an unfair practice under Section 5.

The more the FTC suggests here is that some consumers did not have knowledge that Defendants were sending the packets or did not consent to their being sent. (Memo at 12-13.(In this FTC's words, this amounted to "a denial of [the consumers'] due process." (Memo at 13.) But the FTC seems to misunderstand the facts.

No garnishment packet was ever sent without a borrower's express (and unrevoked) consent. (*See* DF 27, 92; *see also, e.g.,* DEx. 15 at Payday120133.) Thus, anyone whose employer received a packet had knowledge at least of the possibility a packet would be sent (and

certainly knowledge of their own default), and yet took to no action. And before sending a packet to an employer, Defendants would send multiple written notices to the addresses and contact information provided by the borrower whose debt was at issue to discuss the debt and any intent to potentially exercise the wage assignment. (DF 93.) If a borrower did not receive actual notice of an imminent intent to exercise a wage assignment, it's only because they did not provide their current address or were purposely ignoring Defendants' communications.

Finally, in the same way borrowers could avoid tribal court, borrowers could avoid any harms associated with their employer's receiving a garnishment packet. That is, a potential borrower could have not taken out a loan, not breached his agreement, revoked at any time his wage assignment, or made any good faith effort to work out an alternative payment plan. Only borrowers who did none of these things received (or had their employers receive) garnishment packages. And only for amounts they indisputably owed.

Because the wage assignments were consensual and because any harms associated with them were avoidable, it was not unfair under Section 5 for Defendants to send garnishment packets to the employers of borrowers' who refused to pay back their loans.

V. Plaintiff Cannot Establish Any Violation Of The Credit Practices Rule.

It is notable at the outset that the Credit Practices Rule does not make wage assignment clauses *per se* unlawful. Rather, § 444.2(a)(3) generally prohibits lenders from including wage assignment clauses unless the clause (i) is, by its terms, revocable at the will of the debtor; (ii) is a payroll deduction plan or preauthorized payment plan, commencing at the time of the transaction, in which the consumer authorizes a series of wage deductions as a method of making each payment; or (iii) applies only to wages or other earnings already earned at the time of the assignment. The FTC failed to put forth *any* facts showing that Defendants 24-7 Cash Direct,

Western Sky Financial Solutions, Management Systems, Red River Ventures, Red Stone Financial, High Country Ventures, and Webb ever offered a loan containing a wage assignment clause, much less a clause violating the Credit Practices Rules. These Defendants simply did not offer a loan containing such a clause. (*See* DF 3, 33, 39, 58, 67, 88, 104.) Indeed, Defendants 24-7 Cash Direct, Financial Solutions, Management Systems, and Webb never offered a loan at all. (*See* DF 3, 39, 88, 104.)

As the FTC acknowledges, the wage assignment clause at issue was revocable by its terms within ten days of the issuance of the loan. (Memo at 29.) In practice, consumers had the ability to opt of out of the wage assignment clause at any time. (DF 27, 92 (Garber Dep. 24:9-12: "Q: Beyond collections and garnishment, did Financial Solutions engage in any other activities? A: We set up payment plans with our customers so that they could work with us rather than being garnished.").) Nor did Defendants require the opt-out to be in writing; rather, Defendants allowed consumers to opt-out freely. (*See* DF 97.) Consumers opted-out by email, call, and letter. *Id.* Thus, in practice and in fact, even those Defendants who offered loans that included a wage assignment clause allowed consumer to revoke the clause at any time. Indeed, it was Defendants' practice to work with consumers in any way possible.

As explained by the FTC, the Credit Practices Rule was promulgated to protect consumers from wage assignments that occur without the procedural safeguards of a court hearing and an opportunity for debtors to assert defenses or counterclaims. This risk was not present in consumer transactions with Defendants. Consumers could, and in practice did, opt-out of the wage assignment clause at any time. And Defendants provided best possible notice to consumers before contacting their employers to initiate wage assignment proceedings. Defendants called numerous times, emailed, and sent registered mail to inform consumers of

their responsibility under their loan contract prior to assigning wages. Stated plainly, the policy underlying the Credit Practices Rule is not violated under the facts here.

VI. Plaintiff Has Not Demonstrated That Any Defendant Violated The EFTA Or Regulation E Because No Defendant Conditioned The Extension of Credit On Electronic Funds Transfers.

In alleging that nine Corporate Defendants and one individual Defendant each violated EFTA and Regulation E, the FTC provides an excerpt from exactly one loan contract offered by exactly one Defendant. (Memo at 17.) In other words, the FTC wholly ignores that many Defendants did not offer loans, and instead implies that the sample language they provided was representative of each Defendant that did offer loans. (*See* DF 3, 39, 88, 99 (showing that Defendants 24-7 Cash Direct, Management Systems, Financial Solutions, and Webb never offered consumer loans); DF 80.)

First, it is beyond doubt that Defendant Western Sky's electronic funds transfer clause satisfies the requirements of both the EFTA and Regulation E. Under EFTA regulations, "[n]o . . . person may condition an extension of credit to a consumer on the consumer's repayment by preauthorized electronic fund transfers." 12 C.F.R. § 204.10(e). The Western Sky Financial electronic funds transfer clause reads, in pertinent part:

> You understand that you can cancel this authorization at any time (including prior to your first payment due date) by sending written notification to us. Cancellations must be received at least three business days prior to the applicable due date. This EFT debit authorization will remain in full force and effect until the earlier of the following occurs: (i) you satisfy all of your payment obligations under this Loan Agreement or (ii) you cancel this authorization.

(DF 80.) It is evident that this clause allows a consumer to opt-out at any point; indeed, the contract specifically states that the consumer may cancel the authorization prior to the first

payment due date. Consequently, the Western Sky Financial electronic funds transfer clause cannot be seen to violate either EFTA or Regulation E.

What is more, in practice *no Defendant* conditioned the extension of credit on a consumer agreeing to electronic funds transfers. The clause cited by the FTC was provided for the consumer's convenience, and was revocable at any time. And finally, Defendants amended their electronic funds clause to explicitly include such an opt-out and to reflect what had always been Defendants' practice.

VII. The Relief Sought By The FTC Has No Logical Relationship To Defendants' Conduct.

A. Monetary Relief Is Incidental And Would Serve No Purpose.

Section 13(b) (15 U.S.C. § 53(b)) gives courts discretion to enjoin violations of the FTC Act, and grants equitable authority to dispense additional ancillary relief, including the award of monetary relief in the form of restitution or disgorgement. *FTC v. Direct Mktg. Concepts, Inc.*, 648 F. Supp. 2d 202, 213 (D. Mass 2009), *aff'd* 624 F.3d 1 (1st Cir. 2010); *FTC v. Gem Merchandising Corp.*, 87 F.3d 466, 469-70 (11th Cir. 1996). "In cases where the FTC seeks injunctive relief, courts deem *any monetary relief sought as incidental to injunctive relief*." *FTC v. Freecomm Communications, Inc.*, 401 F.3d 1192, 1202 n.6 (10th Cir. 2005) (emphasis added).

1. Disgorgement Is Not Warranted Where Defendants Only Received Money Pursuant To Consensual Consumer Loans.

Beneath the complex arguments and factual disputes presented by the FTC lies a basic transaction: a consumer borrowed money from a Defendant in exchange for the payment of interest. The FTC does not contest the underlying legality of this agreement yet seeks disgorgement of money *that borrowers agreed to repay*. (Memo at 26-28.) Even if the FTC's

allegations are correct, it is undeniable that Defendant collected no more than consumers voluntarily agreed to pay. Thus, disgorgement is unsuitable relief where the money collected by Defendants should not logically be considered "ill-gotten gains."

The primary purpose of disgorgement is to deprive the wrongdoer of his ill-gotten gains. *SEC v. Blatt*, 583 F.2d 1325, 1335 (5th Cir. 1978) ("The court's power to order disgorgement extends only to the amount with interest by which the defendant profited from his wrongdoing. Any further sum would constitute a penalty assessment."); *see also SEC v. Manor Nursing Centers, Inc.*, 458 F.2d 1082 (2d Cir. 1972) (finding defendant should only disgorge wrongfully obtained profits and interests); *CTFC v. Hunt*, 591 F.2d 1211, 1222 (7th Cir. 1979) ("[D]isgorgement does not penalize, but merely deprives wrongdoers of ill-gotten gains."). Courts distinguish between illegally obtained profits and legally obtained profits when considering the amount of disgorgement. *FTC v. Verity Int'l, Ltd.*, 443 F.3d 48, 70 (2d Cir. 2006); *SEC v. First City Fin. Corp., Ltd.*, 890 F.2d 1215, 1231 (D.C. Cir. 1989) ("Therefore, the SEC generally must distinguish between legally and illegally obtained profits.") (citations omitted).

FTC v. Verity is instructive. In that case, the Second Circuit concluded that it would be improper to use the total amount of defendant's profit as the basis point for determining the defendant's unjust gains. 443 F.3d at 69. Instead, the court decided that only that portion of profits that was *illegal* should be disgorged:

> Here, because some fraction of consumers who paid the bills incurred through the defendants-appellants' billing system *actually used or authorized others to use the services at issue*, the amount of the defendants-appellants' unjust gains is only a fraction of the amount of their overall gains from the billing system. A reasonable approximation of the defendants-appellants' unjust gains must take this into account.

Id.; see also id. at 68; (noting that the two-step burden shifting framework for establishing disgorgement relief first requires the FTC to show its calculations reasonably approximated the amount of unjust gains). The message for this case is clear: it would be illogical, and indeed inappropriate, to grant monetary relief for money that consumers actually (and legally) owed Defendants.

What the FTC *does not allege* here is particularly revealing. This is not a case where a company made material misrepresentations that induced consumer to purchase worthless products. *See e.g. FTC v. Security Rare Coin & Bullion Corp.*, 931 F.2d 1312 (8th Cir. 1991); *FTC v. Figgie Intern., Inc.*, 994 F.2d 595 (9th Cir. 1993). There is no allegation that consumers were coerced or prompted to pay anything beyond what was specifically describe in the loan agreements. Yet the FTC is now seeking to recover money that consumers explicitly owed under the plain terms of their loans. Accordingly, it would be unjust to award the FTC money Defendants were entitled to collect, even if, assuming *arguendo*, the FTC can prove its claims.

Requiring Defendants to disgorge money collect as repayment of consumers' loans should best be viewed as a penalty, and would not be, as the FTC suggests, equitable in nature. The "power to order disgorgement extends only to the amount with interest by which the defendant profited from his wrongdoing." *SEC v. ETS Payphones, Inc.*, 408 F.3d 727, 735 (11th Cir. 2005) (quoting *SEC v. Blatt*, 583 at 1335). And courts' equitable power may only properly be exercised over property that is causally related to the illegal actions of the defendant; thus, "the loss complained of must proceed *directly* and proximately from the violation claimed and not be attributable to some supervening cause." *SEC v. Bilzerian*, 814 F. Supp. 116, 121 (D.D.C. 1993), *aff'd* 29 F.3d 689 (D.C. Cir. 1994) (citations omitted) (emphasis in original); *FTC v. LoanPointe, LLC*, No. 10-225, 2011 WL 4348304, at *12-13 (D.Utah Sept. 16, 2011) (reducing

disgorgement figure to amount collected through garnishment in excess of principal). Here the FTC's disgorgement figure constitutes money already owed by consumers to Defendants, a fact implicitly recognized by the FTC's failure to allege that any other terms of loan repayment were misleading, deceptive, or otherwise inappropriate. Hence, this Court's equitable power should not be exercised to grant disgorgement.

2. A Civil Penalty Would Be Inappropriate Because Defendants' Good Faith Conduct Does Not Warrant Such Extreme Punitive Measures.

Despite the facts plainly demonstrating that Defendants' commercial ventures operated within the regulatory framework established by the Cheyenne River Sioux Tribe and that Defendants have voluntarily ceased any possibly offensive behavior, the FTC now implores the Court to impose a civil penalty of nearly $4 million dollars against Defendants. (Memo at 28-30.) In assessing the need for a civil penalty, courts routinely consider: (1) the good or bad faith of the defendants, (2) the injury to the public, (3) the defendants' ability to pay, (4) the benefits derived from the violations, and (5) the necessity of vindicating the authority of the FTC. *See, e.g. FTC v. Hughes*, 710 F. Supp. 1524, 1529 (N.D. Tex. 1989); *U.S. v. Prochnow*, No. 07-10273, 2007 WL 3082139, at *3 (11th Cir. Oct. 22, 2007); *see also U.S. v. Am. Hosp. Supply Corp.*, No. 85-8371, 1987 WL 12205, at *3 (N.D. Ill. June 8, 1987) (court took "cognizance of all . . . aspects of the case" and reduced award from the requested $2,250,000 to $600,000). Each of these factors mitigates against awarding a civil penalty against Defendants.

At the outset, it is important to recognize that the sole basis for the FTC's request is the Defendants' alleged violation of the Credit Practices Rule, 16 C.F.R. Part 444, which in fact does not make wage assignment clauses *per se* unlawful. Instead, § 444.2(a)(3) generally prohibits lenders from including wage assignment clauses unless certain terms are included. As explained

above, the FTC failed to set forth *any* facts showing that Defendants 24-7 Cash Direct, Western Sky Financial Solutions, Management Systems, Red River Ventures, Red Stone Financial, High Country Ventures, and Webb ever offered a loan containing a wage assignment clause, much less a clause violating the Credit Practices Rules. (*See* DF 3, 33, 39, 58, 67, 88, 104.) Indeed, Defendants 24-7 Cash Direct, Financial Solutions, Management Systems, and Webb never offered a loan at all. (*See* DF 3, 39, 88, 104.)

For those Defendants that did include a wage assignment clause, all explicitly allowed consumer to opt-out within ten days of the issuance of the loan. In practice, however, consumers had the ability to opt of out of the wage assignment clause at any time. (DF 27, 92.) Nor did Defendants require the opt-out to be in writing; rather, Defendants allowed consumers to opt-out freely. (DF 97.) Consumers opted-out by email, call, and letter. *Id.* Thus, in practice and in fact, even those Defendants who offered loans that included a wage assignment clause allowed consumer to revoke the clause at any time. Indeed, it was Defendants' practice to work with consumers in any way possible. In any event, Defendants have since voluntarily agreed to remove wage assignment clause from all consumer loan contracts and so any risk of future harm to consumers is nonexistent.

Even assuming Plaintiff can show that a Defendant violated the Credit Practices Rule, each of the facts routinely considered by courts in assessing whether a civil penalty is appropriate counsels against imposing a penalty here. First, Defendants acted in good faith. Defendants included the wage assignment clauses in their contracts because wage assignment is fully legal and accepted practice under Cheyenne River Sioux Tribal law. The alleged violations occurred over a relatively short period of time and have now stopped entirely. Once the FTC filed its action, Defendants agreed to cease all wage assignment-related activities and to remove

the wage assignment clause from any of their loan contracts. No Defendant is accused of using misleading terms to induce consumers to enter contracts they did not seek. And Defendants only collected funds that consumers explicitly agreed repay.

Second, the potential injury to the public is minimal. As explained above, every consumer sought out a Defendant company to borrow money, and agreed to repay the loan under certain terms. Defendants allowed consumers to opt-out of the wage assignment clause at any time, and never conditioned the extension of a loan on that provision. Because Defendants agreed to stop collecting any money through wage assignment and removed the clause from all loan contracts, there is no risk of future consumer injury going forward.

Third, Defendants' paying the FTC's suggested civil penalty will have a manifestly negative impact on Defendants' ability to continue doing business. All told, the FTC is seeking over $4 million dollars in disgorgement and civil penalty. Defendants employ almost 150 individuals in Timber Lake and Eagle Butte, South Dakota. Both communities suffer roughly 80% unemployment. If required to pay the penalty sought by the FTC, Defendants may be unable to continue its growth as one of the community's leading private employers.

Fourth, the benefits derived from the violations pale in comparison to the large penalty the FTC is seeking. Even using the figures set forth by the FTC (and assuming *arguendo* that any violations can be shown), the amount of money gained improperly by Defendants amounted to $417,740, which the FTC purports to be the amount collected in excess of principal for which they seek disgorgement. In contrast, the FTC seeks $3,800,000 as a civil penalty. In other words, the FTC hopes to impose a penalty *over nine times* as large as any alleged consumer injury.

Last, there is little necessity of vindicating the authority of the FTC. Defendants have not challenged the FTC's authority and respect the FTC's responsibility to consumers. Defendants

did not oppose the entry of a preliminary judgment in this action, and agreed to cease any wage assignment-related activities.

As demonstrated above, it would be inappropriate to levy a civil penalty against Defendants for any alleged violation of the Credit Practices Rule.

B. The Vast Injunctive Relief The FTC Requests Bears No Reasonable Or Proportional Relationship To The Violations Of Law The FTC Alleges. It Should Be Denied.

In addition to over $3.8 million in fines, the FTC also seeks a vast and manifestly punitive permanent injunction. (Memo at 22-24.) It should be denied for two reasons. First, the FTC is not entitled to *any* permanent injunctive relief because it has failed to demonstrate that Defendants are likely to violate the law in the future. Second, even if an injunction tailored to the specific violations alleged by the FTC might theoretically be appropriate, the FTC is not seeking such an injunction. The draft permanent injunction the FTC submitted bears no reasonable or proportional relationship to any of the FTC's allegations. One draft provision, for example, enjoins Defendants from violating the Truth In Lending Act (TILA) even though TILA has never been mentioned in these proceedings, much less alleged to have been violated. (PO at 16-17.)

For these reasons, and as explained more fully below, the requested injunctive relief should be denied in its entirety.

1. Because There Is No Reasonable Expectation That Any Of The Alleged Wrongs Will Be Repeated, Permanent Injunctive Relief Is Inappropriate.

The purpose of an injunction "is to preserve the status quo, not to punish a defendant." *People ex rel. Edgar v. Miller*, 110 Ill. App. 3d 264, 270, 441 N.E.2d 1328, 1332 (Ill. App. Ct 1982) (citations omitted); *see also Dyer v. Sec. & Exch. Comm'n*, 291 F.2d 774, 780-81 (8th Cir. 1961) ("The purpose of an injunction is to prevent future violations"); *Mitchell v. Bland*, 241

F.2d 808, 810 (5th Cir. 1957) ("The nature of injunctive relief is that it is prospective, prophylactic, preventive,- not punitive."). To obtain a permanent injunction then, a moving party "must satisfy the court that relief is needed" by demonstrating "that there exists some cognizable danger of recurrent violation, something more than the mere possibility" that the defendant might err in the future. *United States v. W. T. Grant Co.*, 345 U.S. 629, 633, 73 S. Ct. 894, 897-98, 97 L. Ed. 1303 (1953).

Here, the FTC fails to offer any reasonable explanation for why Defendants would, if this Court ruled that they had violated the law, seek to re-implement the violations in the future. To the contrary, Defendants voluntarily agreed to the FTC's request for a preliminary injunction, and have fully complied ever since. This is not a case like *FTC v. Gill*, where a permanent injunction was necessary because "Defendants' continuously ignored . . . the preliminary injunction in this case." 265 F.3d 944, 957 (9th Cir. 2001). Indeed, far from acting "hostile or defiant" towards their obligations under federal law, Defendants on their own initiative amended the language the FTC claims violates EFTA and ceased using wage garnishments thus eliminating any potential issues under the Credit Practices Rule and Section 5. *See generally U.S. Dept. of Agric. v. Fed. Labor Relations Auth.*, 876 F.2d 50, 52 (8th Cir. 1989) (permanent injunction unnecessary because nothing in the record shows that Defendants will not comply with the court's order).

Even apart from the ethical obligation to comply with the Court's ruling, compliance makes eminent business sense as well. All of Defendants' alleged violations arose straightforwardly out of certain provisions in their loan agreements and certain actions taken to effect those provisions—so it could not be any easier for the FTC to identify future violations of

the Court's order. It need only consult Defendants' loan agreements to see if the allegedly offensive provisions had returned.

In short, "the usual basis for injunctive relief, that there exists some cognizable danger of recurrent violation, is not present here." *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 59, 95 S. Ct. 2069, 2076, 45 L. Ed. 2d 12 (1975) (internal quotations and citations omitted). The FTC's Request for a permanent injunction should therefore be denied.

2. The FTC's Permanent Injunction Request Should Also Be Denied Because It Bears No Reasonable Or Proportional Relationship To Any Alleged Violations And Serves No Apparent Purpose Other Than To Pillory Defendants.

Although the equitable remedies available under the FTC Act are broad, they do not include injunctions that bear "no reasonable relation to the unlawful practices found to exist." *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 394-95, 85 S. Ct. 1035, 1048, 13 L. Ed. 2d 904 (1965). And yet, bearing in mind that the only *allegations* of wrongdoing in this case are a technical and easily cured violation of EFTA, a technical and easily cured violation of the Credit Practices Rule, and simple and easily cured violations of Section 5, the FTC's proposed order seeks the following vast, unrelated, and disproportionate injunctive relief:

- A permanent ban on using legal wage assignments. In addition, a permanent ban on (for all intents and purposes) working with any entity who uses wage assignments. (PO at 9-12.)
- A permanent ban on violating any provision of the Credit Practices Rule, even though the law itself bans any violations and only one provision of the Credit Practices Rule was at issue in this case. (PO at 12.)

- A permanent ban on filing consumer claims in tribal court and, more broadly, a permanent ban on using choice of forum provisions in consumer contracts. (PO at 13-14.)
- A permanent ban on violating any provision of EFTA and Regulation E, even though the law itself bans any violations and only one provision of EFTA was at issue in this case. (PO at 15.)
- A permanent ban on a variety of practices that appear to be state law matters but that in all events were never mentioned in this case and are impossible to understand given their ambiguous wording. (PO at 15-16.)
- A permanent ban on violating TILA even though the law itself bans any violations and the FTC never alleged any TILA violations in this case. (PO at 16-17.)
- An order requiring Defendants to submit to onerous reporting and compliance requirements essentially permitting the FTC (on behalf of itself and any agency it shares information with) to keep Defendants in unlimited discovery for the next 20 years. (PO at 19-24.)

The FTC makes no serious attempt to justify this relief grab, but instead generically notes that in some cases courts issue injunctions that are broader than the underlying violations. (Memo at 23.) What the FTC fails to acknowledge is that the *limited* over breadth of those injunctions was designed to prevent defendants with clear law breaking proclivities from scheming around the letter of a narrowly tailored injunction. For example, in *FTC v. Gill*, the main case relied on by the FTC, the defendant's attack on the breadth of the permanent injunction was rejected because he had not only repeatedly violated the terms of the narrower preliminary injunction, but he had also rearranged his operations in an attempt to continue his

misdeeds while avoiding the preliminary injunction on technical grounds. *Gill*, 265 F.3d at 957 (9th Cir. 2001).

Gill and its ilk do not support injunctive relief sought here, which has nothing to do with the FTC's alleged violations (e.g. the FTC's requests for TILA and state law injunctive relief) and which is at any rate far broader than what is necessary to remedy narrow statutory violations that Defendants have shown no desire to replicate by other means (e.g. the FTC's request to enjoin any and all lawful use of wage assignments). A statutory violation might as a general matter warrant a limited injunction, but as the saying goes it is not "in for a penny, in for a Pound."

Nor is there any justification for an injunction permanently enjoining Defendants from violating a list of statutes. The statutes themselves prohibit their violation, so an injunction of this sort serves no legal purpose. It seems designed only to stigmatize and embarrass Defendants. That is punitive, not preventive.[6] It too should be denied. *See Dyer,* 291 F.2d at 780-81; *Mitchell*, 241 F.2d at 810.

a. Like The FTC's Proposed Bans, The FTC's Onerous And Unbounded "Monitoring and Compliance" Scheme Also Bears No Reasonable Or Proportional Relationship To Any Alleged Violation.

Last, the FTC seeks to grant itself and anyone it shares documents with a 20 year right to unlimited discovery from Defendants, purportedly to "monitor compliance":

> Within 14 days of receipt of a written request from a representative of the Commission-each Defendant must: submit additional compliance reports or other requested information, which must be sworn under penalty of perjury; appear for

[6] For the same reason, Defendants object to the FTC's proposed "Order Acknowledgement" provision under which Defendants must obtain written acknowledgement from every one of Defendants' "employees, agents, and representatives" in the next five years confirming that they have received a copy of the injunction. (PO at 19.) Besides embarrassing Defendants, this serves no purpose.

> depositions; and produce documents, for inspection and copying. The Commission is also authorized to obtain discovery, without further leave of court, using any of the procedures prescribed by Federal Rules of Civil Procedure . . . . (PO at 23-24.)

In addition to the unlimited 20 year discovery, the FTC demands written reports in real time detailing, among other things, nearly every significant business decision Defendants make outside of personnel decisions. None of this bears any reasonable or proportional relationship to any alleged violations.

As with its proposed injunction generally, the FTC also makes no serious attempt to justify this "compliance monitoring" other than to note in the abstract that in a few disparate cases courts have included monitoring provisions in final orders. (Memo at 25-26.) But none of those cases, all of which apportion roughly one to two sentences to the topic of monitoring, support what the FTC is asking for here. *See, e.g., FTC v. Direct Mktg. Concepts, Inc.*, 648 F. Supp. 2d 202, 213 (D. Mass. 2009) *aff'd*, 624 F.3d 1 (1st Cir. 2010) ("Courts have also included monitoring provisions in final orders in FTC cases to ensure compliance with permanent injunctions."). This is especially so because, as noted above, all that is needed to monitor compliance is from time to time to review recent copies of Defendants' loan agreements.

Like the rest of the FTC's proposed permanent injunction, the monitoring provisions serve no legitimate purpose and should be rejected.

Conclusion

For the reasons above, Defendants respectfully request that this Court deny Plaintiff's Motion for Summary Judgment as to Counts One and Three through Seven of Plaintiff's Amended Complaint.

DATED March 4, 2013

Respectfully submitted,

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D.S.D. Civ. LR 7.1.B(1) WORD COUNT COMPLIANCE CERTIFICATE

I, Cheryl Laurenz-Bogue, certify that Defendants' Memorandum of Points and Authorities in Opposition of Plaintiff's Motion for Summary Judgment as to Counts One and Three through Seven complies with the word count limitation in D.S.D. LR. 7.1.B(1) specifying that a court filing shall not be longer than 12,000 words. In preparing this Memorandum, I used Microsoft Word 2010, and this word processing program has been applied specifically to include all text, including headings, footnotes, and quotations in the following word count. I certify that this Memorandum contains 11,955 words.

DATED March 4, 2013

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CERTIFICATE OF SERVICE

I hereby certify that, on March 4, 2013, I caused a copy of the foregoing Memorandum to be served via the Court's electronic filing system upon the following:

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