IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
CIVIL ACTION NUMBER 1:13-CV-00255-WO-JLW

THOMAS BROWN, ***et al.,***	)
	)
Plaintiffs,	)
	)
v.	)
	)
WESTERN SKY FINANCIAL, LLC,	)
et al.,	)
	)
Defendants.	)

PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Plaintiff hereby responds to Defendants' Motion to Dismiss Pursuant to Rules 12(b)(2), (3), and (6) of the Federal Rules of Civil Procedure filed May 21, 2013 (Doc. 31). The motion should be denied for the reasons stated herein.

I. NATURE OF THE MATTER BEFORE THE COURT.

Defendants rely on a form contract replete with false statements in an effort to continue their payday lending scheme in North Carolina. Defendants proclaim to this Court that Western Sky is a "lender organized under and authorized by the laws of the Cheyenne River Sioux Tribal Nation and the Indian Commerce Clause of the United States of America" (Def. Br. 3) when in fact Western Sky is organized under South Dakota law (Complaint ¶ 12 and see corporate filings filed as an Exhibit with Plaintiffs' brief opposing the arbitration motion) and not a tribal entity at all. Baldly denying they engage in payday lending (Def. Br. 2), Defendants would have this Court simply ignore multiple orders to the contrary (Complaint ¶ 61) not to mention how one of their

companies is named Payday Financial, LLC. (Complaint ¶ 27). Defendants would have this Court ignore North Carolina's strong public policy to prohibit usury and loan subterfuges, which is expressly stated by statute (N.C. Gen. Stat. § 24-2.1(g) ("It is the paramount public policy of North Carolina to protect North Carolina resident borrowers through the application of North Carolina interest laws.")) when the presence of a strong public policy constitutes grounds to void a forum selection clause. Defendants ask this Court to buy into their blatantly false representation in their loan agreements that the loans were "executed and performed solely within the …. Reservation" (Doc. 1-1, p. 3), when the consumer was in North Carolina, Defendants marketed their loans over the internet and television ads in North Carolina, loan funds were sent to North Carolina and payments were made from here, and in fact Defendants refuse to make loans to tribal members or anyone who resides on the reservation or even in South Dakota. (Complaint ¶¶ 57-65, 91). The combination of overreaching, false statements and violation of a strong public policy on the present facts is remarkable and compels the conclusion that the forum selection clause herein is unreasonable and unenforceable.

II. STATEMENT OF FACTS.

Plaintiffs incorporate the statement of facts set forth in their Brief in Opposition to Defendants' Motion to Stay Proceedings and to Compel Arbitration, filed herewith.

III. ARGUMENT.

A. Venue Is Proper in This Court.

"[A] motion to dismiss based on a forum-selection clause should be properly treated under Rule 12(b)(3) as a motion to dismiss on the basis of improper venue."

Aggarao v. MOL Ship Mgmt. Co., Ltd., 675 F.3d 355, 365 n.9 (4th Cir. 2012) (*quoting Sucampo Pharmaceuticals, Inc. v. Astellas Pharma, Inc*., 471 F.3d 544, 550 (4th Cir. 2006)). On a Rule 12(b)(3) motion, the court views the facts in the light most favorable to the plaintiff and may consider evidence outside the pleadings. *Aggarao*, 675 F.3d at 365-66.[1] "[A] federal court interpreting a forum selection clause must apply federal law in doing so." *Albermarle Corp. v. AstraZeneca UK Ltd*., 628 F.3d 643, 650 (4th Cir. 2010). "[T]he presumption of enforceability that forum selection and choice of law provisions enjoy is not absolute and, therefore, **may be overcome by a clear showing that they are 'unreasonable' under the circumstances**." *Allen v. Lloyd's of London*, 94 F.3d 923, 928 (4th Cir. 1996) (*quoting Bremen v. Zapata Off-Shore Co*., 407 U.S. 1, 10 (1974)) (emphasis added):

> Choice of forum and law provisions may be found unreasonable if (1) their formation was induced by fraud or overreaching; (2) the complaining party "will for all practical purposes be deprived of his day in court" because of the grave inconvenience or unfairness of the selected forum; (3) the fundamental unfairness of the chosen law may deprive the plaintiff of a remedy; or (4) their enforcement would contravene a strong public policy of the forum state.

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[1] "On a motion to dismiss under Rule 12(b)(3), the court is permitted to consider evidence outside the pleadings. A plaintiff is obliged, however, to make only a prima facie showing of proper venue in order to survive a motion to dismiss. In assessing whether there has been a prima facie venue showing, we view the facts in the light most favorable to the plaintiff." *Id.* at 366 (citations omitted).

Allen, 94 F.3d at 928 (*citing Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 595 (1991), and *Bremen, supra*).[2]

There are two loan contracts before the Court; one for Ms. Johnson and one for Mr. Brown. *See* Doc. 1-1 and 32-1 (Johnson), 1-2 and 32-2 (Brown). Defendants' characterization of the "choice of venue" provision clearly distinguishes any arbitration issues:[3] "Plaintiffs agreed that, <u>to the extent their claims could not be arbitrated</u>, the Cheyenne River Sioux Tribal Court was the exclusive judicial forum for claims arising out their loans." Def. Br. 4 (emphasis added). The clause at issue is found in a paragraph titled "Waiver of Rights" which states: "the validity, effect and enforceability of this waiver of class action lawsuit and class-wide Arbitration is to be determined solely by a court of competent jurisdiction located within the Cheyenne Rivers Sioux Tribal Nation, and not by the arbitrator." Doc. 1-1, p. 4, Doc. 1-2, p. 4. There are related provisions elsewhere in the Johnson and Brown agreements, discussed further below. Applying the *Allen* factors, the Court should decline to enforce the venue clause because it is unreasonable and unfair when the factors are reviewed as discussed below *seriatim.*

<u>Fraud and overreaching</u> **–** The facts reflect overreaching as well as false and fraudulent statements. *See Dove Air, Inc. v. Bennett,* 226 F.Supp.2d 771, 774 (W.D.N.C. 2002) (enforcement of forum clause was unreasonable where facts showed unequal

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[2] *Accord, Vulcan Chem. Tech., Inc. v. Barker*, 297 F.3d 332, 339 (4th Cir. 2002) (forum selection clause may not be enforced upon "a showing that the chosen forum is unreasonable or was imposed by fraud or unequal bargaining power").

[3] Defendants have separately moved to enforce the arbitration clause in their motion at Doc. 33. Plaintiffs are separately responding to that motion.

bargaining power and overreaching). In *Dove*, reviewing an agreement regarding the sale of an airplane, the court noted that the plaintiff was experiencing severe financial problems, of which defendant was aware. *Id.* at 774-75. Likewise here, the Plaintiffs were in adverse financial circumstances when they entered into the agreements. Complaint ¶¶ 78-83. Indeed financial hardship is what drives people to these high-interest loans and distinguishes these facts from run-of-the-mill contexts where there is an adhesive form contract and unequal bargaining power: here, Defendants' very business model deliberately targets individuals who are in dire financial condition. This unique factual context aligns the case with others in which courts have found overreaching.

The *Dove* court noted the presence of false statements in the agreement: although the agreement referred to Augusta Packing as the entity which would purchase the aircraft, there was no such entity. 226 F.Supp.2d at 774-75.[4] The court found that "[t]he language of the agreement supports Plaintiffs' arguments of overreaching." *Id.* at 775. In other words, the defendant in *Dove* leveraged its superior bargaining power vis-à-vis a financially desperate person to obtain an agreement that contained false statements.

Just as in *Dove*, the agreement here includes false statements. First, it states: "By executing this agreement, you hereby expressly agree that this agreement is executed and performed solely within the exterior boundaries of the Cheyenne River Indian Reservation, a sovereign Native American Tribal Nation." Doc. 1-1, p. 3 in paragraph

[4] "Duncan also avers that although the agreement refers to Augusta Packing as the entity which would purchase the aircraft, there was no such legal entity and no aircraft were ever purchased by Augusta Packing." *Id.*

titled, "Governing Law." That is a false statement. Defendants loaned the money by depositing it into Plaintiffs' bank accounts in North Carolina. Plaintiffs made payments from North Carolina. They did not go to South Dakota. Rather they were enticed by Defendants' website on their computers in North Carolina. Defendants electronically debited money directly from North Carolina banks. *See* Complaint ¶¶ 11, 65, 82, 91. There are no "exterior boundaries of the … Reservation" in North Carolina. This false statement is not collateral to the forum provision but related to it since it seeks to force Tribal jurisdiction by a pretense that the customer was on the reservation.[5]

A second material false statement is the prominent assertion on page one of the agreement that "Neither this Agreement nor Lender is subject to the Laws of the United States." Doc. 1-1, p. 1. Defendants in this case have raised a host of United States laws in an effort to shield themselves from suit, while previously seeking to chill consumers from suit by misrepresenting that no laws of our country apply.

A third false statement is that Western Sky is "a lender organized under and authorized by the laws of Cheyenne River Sioux Tribe and Indian Commerce Clause of the Constitution of the United States of America." Doc. 1-1, p. 1. The "Indian Commerce Clause" is a grant of Constitutional authority to Congress, and not to any private entity or tribe.[6] Western Sky is a limited liability company organized under South Dakota law not

[5] In this regard a 2006 Tribal Court handbook limits jurisdiction to "claims and disputes arising on the reservation." Complaint ¶ 103 & Ex. 14.

[6] The "Indian Commerce Clause" states that Congress shall have the power "[t]o regulate commerce with foreign Nations, and among the several States, and with the

"organized under ... the laws of Cheyenne River Sioux Tribe" as the contract misrepresents. Complaint ¶ 12. Other courts have invalidated forum selection clauses based on facts showing overreaching and unfair and unreasonable conduct.[7]

***<u>Deprived of day in court due to grave inconvenience</u>* --** The Cheyenne River Sioux Tribal Nation is located near Butte, South Dakota. Butte is approximately 1,603 miles from Greensboro, North Carolina. The contract involves a small usurious loan. The provision has the effect of preventing a Plaintiff from being able to have his day in court. Beyond that, there is the grave inconvenience of the fact that the tribal law that

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Indian Tribes." U.S. Const. art. I, § 8, cl. 3. It allows Congress to legislate regarding Indian tribes. *See United States v. Lara*, 541 U.S. 193, 200 (2004).

[7] *See Cox v. Dine-A-Mate, Inc*., 129 N.C. App. 773, 501 S.E.2d 353, 355 (N.C. Ct. App. 1998) (affirming trial court's finding "that the forum selection clause in the agreement was the product of unequal bargaining power and that enforcement of the clause would be unfair and unreasonable"); *Bell Atl. Tricon Leasing Corp. v. Johnnie's Garbage Serv*., 113 N.C. App. 476, 480-81, 439 S.E.2d 221, 224-25 (N.C. Ct. App. 1994) (holding that enforcement of forum clause would be unreasonable where there was "no bargaining over the terms of the contract," parties were "far from equal in bargaining power," contract was "one page pre-printed form," "there was no place for defendant to sign or initial" the clause, and it was not explained to him); *High Life Sales v. Brown-Forman Corp*., 823 S.W.2d 493, 497 (Mo. 1992) ("Many courts have refused to enforce a forum selection clause on the grounds of unfairness if the contract was entered into under circumstances that caused it to be adhesive."); *Preferred Capital, Inc. v. Sarasota Kennel Club*, No. 1:04 CV 2063, 2005 WL 1799900 (N.D.Ohio July 27, 2005) (finding clause unenforceable where a "product of fraud or overreaching"); *Preferred Capital, Inc. v. Aetna Maint. Inc.,* No. 1:04CV2511, 2005 WL 1398549 (N.D.Ohio June 14, 2005) (same); *SRH, Inc. v. IFC Credit Corp*., 619 S.E.2d 744, 746 (Ga. Ct. App. 2005) (accord); *Jelcich v. Warner Bros, Inc*., 1996 WL 209973, *2 (S.D.N.Y. Apr. 30, 1996) (refusing to enforce forum clause when employer bullied employee who was not a sophisticated businessperson); *Kolendo v. Jerell, Inc*., 489 F.Supp. 983, 986 (S.D.W.Va. 1980) (refused to enforce forum clause after finding unequal bargaining power between employer and employee); *Colonial Leasing Co. of New England v. Best,* 552 F.Supp. 605, 607-08 (D. Or. 1982) (adhesive forum selection clause not enforced).

Defendants claim must apply is not accessible. Complaint ¶¶ 101-04. Also, to the extent the law can be found, it indicates the tribal courts lack jurisdiction. *Id.* ¶¶ 101-04. Further, prior courts have rejected claims of one or more of the Defendants herein that tribal law applies. Complaint ¶ 61 & n.1 and see orders filed at Docs. 1-6 to 1-12.[8]

Unfairness of chosen law **–** Here, "the fundamental unfairness of the chosen law may deprive the plaintiff of a remedy." *Allen*, 94 F.3d at 928. The unfairness is reflected by the fact that the tribal laws cannot readily be located, and to the extent they can, they indicate the tribal courts lack jurisdiction and/or do not regulate the internet loans herein, which means that consumers would be left with no remedy. Complaint ¶¶ 101-04.[9]

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[8] *See also Colorado ex rel. Suthers v. Western Sky Financial, LLC*, Order dated April 15, 2013, No. 11-CV-638, District Court, Denver County, Colorado (granting summary judgment that defendants violated Colorado lending law, finding at p. 12 that "because Defendants' business activities are conducted off-reservation and because Defendants solicit and advertise their business in Colorado and have, in fact, entered into loan agreements with Colorado citizens, Defendants are not entitled to tribal immunity or federal preemption."); and amended order dated May 23, 2013 (**Exhibit 1**).

[9] *See Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985) (noting that in the event the "choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy"); *Vimar Seguros y Reaseguros v. M/V Sky Reefer*, 515 U.S. 528, 540 (1995) (same); *Jitterswing, Inc. v. Francorp, Inc.*, No. ED93045, 2010 WL 933763, *1-2 (Mo. App. Mar. 16, 2010) ("We find that in enforcing the forum selection clause in the contract between Jitterswing and Francorp would create an unfair result…. If required to bring its claim in Illinois, Jitterswing would be without recourse, as this is a tort claim created by a Missouri statute and the courts of Illinois would be without jurisdiction."); *Fairfield Lease Corp. v. Liberty Temple Universal Church of Christ, Inc.*, 221 N.J.Super. 647, 653, 535 A.2d 563 (N.J. Super. 1987) ("Provisions requiring litigation in a foreign country or another state, especially where plaintiff would be disadvantaged by the law of the foreign forum, have been held unenforceable.").

Contravenes public policy **–** "A contractual choice-of-forum clause should be held unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision." *Bremen,* 407 U.S. at 15.[10] Here, enforcement would contravene several strong public policies.

First, North Carolina has a strong public policy to protect its residents from usurious loans as reflected in the Consumer Finance Act, N.C. Gen. Stat. § 53-164 *et seq.*, as well as the interest and usury laws, *see* N.C. Gen. Stat. § 24-2.1(g) ("**It is the paramount public policy of North Carolina to protect North Carolina resident borrowers through the application of North Carolina interest laws**.") (emphasis

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[10] *See also Mercury Coal & Coke. Inc. v. Mannesmann Pipe & Steel Corp.*, 696 F.2d 315, 317 (4th Cir. 1982) (noting "a strong public policy of the forum ... might result in invalidation"); *High Life Sales v. Brown-Forman Corp.*, 823 S.W.2d 493, 495-98 (Mo. 1992) (refusing to enforce forum provision against liquor distributor -- "It is very much within the interest of the state of Missouri to protect its licensed liquor distributors from unwarranted or unjustified termination of their franchise."); *Cutter v. Scott & Fetzer Co.*, 510 F.Supp. 905, 909 (E.D.Wis. 1981) (declining to enforce forum selection clause because it would defeat underlying remedial purpose of Wisconsin's Fair Dealership Law intended to provide remedies beyond those available at common law); *Lulling v. Barnaby's Family Inns, Inc.*, 482 F.Supp. 318, 320-21 (E.D.Wis. 1980) (declining to enforce forum clause in franchise agreement in light of public policy reflected in Wisconsin Franchise Investment Law); *Wimsatt v. Beverly Hills Weight Loss Clinics Int'l, Inc.,* 32 Cal.App.4th 1511, 38 Cal.Rptr.2d 612 (1995) (declining to enforce Virginia forum selection clause in California suit against Virginia franchisor per strong public policy underlying California's Franchise Investment Law); *Kubis & Perszyk Associates, Inc. v. Sun Microsystems, Inc.*, 680 A.2d 618, 146 N.J. 176, 192-93 (N.J. 1996) ("We are persuaded that enforcement of forum-selection clauses in contracts subject to the Franchise Act would substantially undermine the protections that the Legislature intended to afford to all New Jersey franchisees. We hold that such clauses are presumptively invalid because they fundamentally conflict with the basic legislative objectives of protecting franchisees from the superior bargaining power of franchisors and providing swift and effective judicial relief against franchisors that violate the Act."); *Morris v. Towers Financial Corp.*, 916 P.2d 678 (Colo. Ct. App. 1996) (forum clause enforcement would contravene strong public policy reflected by Colorado Wage Claim Act).

added); *Cooper v. NCCS Loans, Inc.,* 174 N.C. App. 630, 624 S.E.2d 371, 378 (N.C. Ct. App. 2005) (citing "paramount public policy" and finding "Defendants' practice of offering usurious loans was a clear violation of this policy."). Defendants' forum clause violates that paramount public policy by seeking to evade the state law. Defendants' conduct violates both the Consumer Finance Act and the usury statutes.[11]

Second, North Carolina has a strong public policy to protect residents against adhesive forum selection clauses. N.C. Gen. Stat. § 22B-3 provides:

> Except as otherwise provided in this section, any provision in a contract entered into in North Carolina that requires the prosecution of any action or the arbitration of any dispute that arises from the contract to be instituted or heard in another state is against public policy and is void and unenforceable. This prohibition shall not apply to non-consumer loan transactions or to any action or arbitration of a dispute that is commenced in another state pursuant to a forum selection provision with the consent of all parties to the contract at the time that the dispute arises.

N.C. Gen. Stat. § 22B-3.[12] *See Dove Air, Inc.,* 226 F.Supp.2d at 776 ("Thus, the undersigned finds that the forum selection clause is also unreasonable pursuant to the

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[11] *See also Odell v. Legal Bucks, LLC*, 665 S.E.2d 767, 779-82 (N.C. Ct. App. 2008) (noting "for an unlicensed lender to charge a rate of interest on a small loan greater than the rates permitted is a violation both of the Consumer Finance Act, and of Chapter 24's prohibitions on usury" and Defendants' contract with Plaintiff for an illegal advance violated "the paramount public policy of North Carolina to protect North Carolina resident borrowers through the application of North Carolina interest laws"). It is difficult to imagine how a public policy could be more strongly expressed.

[12] Although this Court has held that the FAA may preempt this statute on arbitration issues, the instant motion involves a court forum selection clause; and, this Court was careful to note that a forum selection clause can be voided for unfairness. *Newman ex rel. Wallace v. First Atlantic Resources Corp*., 170 F.Supp.2d 585, 593 (M.D.N.C. 2001) (enforcing clause "[b]ecause the FAA preempts NCGS § 22B-3 and unfairness does not result from compliance with the forum-selection clause…." Emphasis added). The statute may be compared to S.C. Code § 15-7-120 which states,

State's public policy as expressed in N.C. Gen. Stat. § 22B-3.").[13] By contrast, the tribal courts do not have an interest in this matter.[14] The contracts were executed, if at all, here, thereby distinguishing cases in which the contract was executed elsewhere.[15]

"Notwithstanding a provision in a contract requiring a cause of action arising under it to be brought in a location other than as provided in this title and the South Carolina Rules of Civil Procedure for a similar cause of action, the cause of action alternatively may be brought in the manner provided in this title and the South Carolina Rules of Civil Procedure for such causes of action." That statute has been construed to reflect an enforceable public policy. *See Consolidated Insured Benefits, Inc. v. Conseco Medical Ins. Co.,* 370 F.Supp. 2d 397, 401 (D.S.C. 2004) (declining to enforce forum selection clause in light of South Carolina public policy per S.C. Code § 15-7-120(A): "the statute embodies South Carolina's policy against forum selection clauses by what it expressly allows"); *Spinks v. The Krystal Co.,* No. 6:07-2619-HMH, 2007 WL 2822788, at *1 (D.S.C. Sept. 26, 2007) (citing S.C. Code § 15-7-120(A); "While this statute is not controlling, the court finds it is evidence of a strong public policy in South Carolina of non-enforcement of a forum selection clause that would deprive a South Carolina litigant of his choice of forum."); *Ins. Prod. Mktg., Inc. v. Indianapolis Life Ins. Co.,* 176 F.Supp.2d 544, 549-50 (D.S.C. 2001) (under S.C. Code § 15-7-120, "the legislature of South Carolina did not agree with the federal courts' favorable view of forum selection clauses and desired to insulate South Carolina litigants from their effect").

[13] *See also Gita Sports Ltd. v. Sg Sensortechnik Gmbh & Co. Kg*, 560 F.Supp.2d 432, 440 (W.D.N.C. 2008) ("North Carolina has a well-recognized and strong public policy against forum-selection clauses." Citing Section 22B-6.).

[14] *Compare Republic Mortg. Ins. Co. v. Brightware, Inc.,* 35 F.Supp.2d 482, 484-86 (M.D.N.C. 1999) (enforcing clause, court noted North Carolina's interest in the litigation, but found that "California's interest ... must be considered, and it likely has an interest in a dispute in which a corporation that has its principal place of business in California allegedly is not paid for its services"). Here however the Defendant corporate entities are not chartered by the tribe but by the states of South Dakota and California.

[15] *Compare Key Motorsports v. Speedvision Network, L.L.C.*, 40 F.Supp.2d 344, 349 (M.D.N.C. 1999) (forum selection clause enforced; contract "was 'made' in Connecticut; therefore, it was not 'entered into' in North Carolina and does not contravene the public policy enunciated in N.C.Gen.Stat. § 22B-3."). Here, the contract was never signed by any Defendant, and Plaintiffs' conduct (including any electronic signature) occurred in North Carolina.

Third, the public policy followed is not to enforce illegal and criminal contracts. As shown, the contract here contains demonstrably false statements. Further, the loans are usurious and unlicensed, a criminal law violation. Further, there are unusual indicia of fraud and criminality in this matter as discussed in Plaintiffs' briefs opposing the arbitration motion and supporting Plaintiffs' motion for discovery, filed herewith.[16]

B. The Case Should Not Be Stayed or Dismissed Under Tribal Exhaustion.

Numerous courts have found that Defendants are not entitled to protection by tribal law. Complaint ¶ 61.[17]

Exhaustion in appropriate circumstances "is required as a matter of comity, not as a jurisdictional prerequisite." *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16 n.8 (1987); *Madewell v. Harrah's Cherokee Smokey Mountains Casino*, 730 F.Supp.2d 485, 489

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[16] Making small loans without a license is a Class 1 misdemeanor. N.C. Gen. Stat. § 53-166 ("Any person not exempt from this Article … who … violates any of the provisions of this Article … shall be guilty of a Class 1 misdemeanor. Each violation shall be considered a separate offense."). Courts have refused to give effect to forum selection clauses where a contract was tainted with illegality. *See Snider v. Lone Star Art Trading Co.*, 672 F.Supp. 977, 983 (E.D. Mich. 1987) (finding "it would be unfair to enforce … a [forum selection] clause where the entire contract was tainted with fraud").

[17] *See State ex rel. Suthers v. Western Sky, LLC*, 845 F.Supp.2d 1178 (D. Colo. 2011) (rejecting Western Sky arguments of tribal law protection). The Tribal law does not regulate these loans nor have the Tribal courts indicated any interest at all in overseeing any of the multiple actions that have been brought against the Western Sky organization. There is no colorable argument that this Court must give up its clear jurisdiction over the matter under the Class Action Fairness Act. Western Sky is not owned or operated by a tribe and therefore not an "arm" of the tribe entitled to tribal sovereign immunity. *E.g., Breakthrough Management Group, Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173, 1185 (10th Cir. 2010). As an individual Indian, Webb is not entitled to immunity. *Puyallup Tribe, Inc. v. Department of Game*, 433 U.S. 165, 171 (1977). The Western Sky company that the contract falsely says is organized under Tribal law is actually a South Dakota LLC.

(W.D.N.C. 2010) ("This 'tribal exhaustion doctrine' is not jurisdictional in nature, but rather is a matter of comity."). Because the exhaustion rule does not impair jurisdiction, and instead is "analogous to principles of abstention articulated in *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976)," *LaPlante,* 480 U.S. at 16 n.8, the doctrine must be interpreted narrowly in light of the "virtually unflagging obligation of federal courts to exercise the jurisdiction given them." *Garcia v. Akwesasne Housing Authority*, 268 F.3d 76, 80 (2nd Cir. 2001) (*citing Colorado River*, 424 U.S. at 817).

Under *Montana v. United States*, 450 U.S. 544, 565 (1981), the general rule is that tribal courts may not exercise jurisdiction over non-tribal members: "[T]he inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." Here, Plaintiffs are nonmembers of the tribe. The inherent sovereign powers of the tribe do not extend to them. Nor were they ever on reservation land. Accordingly, the burden is on Defendants to prove that one of the two exceptions applies. They are narrow because "efforts by a tribe to regulate nonmembers, especially on non-Indian fee land, are 'presumptively invalid.'" *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 554 U.S. 316, 330 (2008). The "burden rests on the tribe to establish one of the exceptions to *Montana*'s general rule…." *Id.*[18]

[18] *See also Strate v. A-1 Contractors*, 520 U.S. 438, 445 (1997) ("Our case law establishes that, absent express authorization by federal statute or treaty, tribal jurisdiction over the conduct of nonmembers exists only in limited circumstances."); *Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645 (2001) (tribal court lacked authority to impose tax on nonmember guests of hotel on non-tribal land); *Nevada v. Hicks*, 533 U.S. 353 (2001) (tribal court has no authority to regulate nonmember police officers investigating an off-reservation crime); *Plains Commerce Bank, supra* (tribal court lacked jurisdiction over the sale of non-Indian land by bank to non-Indians); *Merrion v.*

The two exceptions are, first: "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." *Montana*, 450 U.S. at 565. Second: "A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." 450 U.S. at 566.

Here, Defendants cannot prove the exceptions fit because the tribe does not regulate the activity. Tribal jurisdiction only applies if the tribe regulates the activity at issue. Nothing in the record shows that the tribe does this. Regulatory authority must stem from the tribe's "inherent sovereign power" before tribal jurisdiction attaches. 450 U.S. at 565. Here, the tribe has not regulated the out-of-state internet loans. Complaint ¶¶ 102-04.[19] Nor would the tribe have any interest in doing so, since Defendants never make their internet loans to tribal members. Complaint ¶ 58.

Jicarilla Apache Tribe, 455 U.S. 130, 142 (1982) ("[A] tribe has no authority over a nonmember until the nonmember enters tribal lands or conducts business with the tribe."). Here, Plaintiffs did not conduct business with the tribe, but rather with South Dakota and California-incorporated companies. Nor is Webb a tribal officer or agent, instead merely a tribal member. The form contracts for Plaintiffs further represent they contracted with Defendant Western Sky, not Webb. The demonstrably false statement in the contracts that they were made on the reservation should be discounted.

[19] The claims herein are under North Carolina state law, and this Court has subject matter jurisdiction over the subject matter of this action pursuant to the Class Action Fairness Act, 28 U.S.C. § 1332(d). Complaint ¶ 7. *Compare Garcia v. Akwesasne Housing Authority*, 268 F.3d 76, 80 (2nd Cir. 2001) (declining to apply tribal exhaustion, court noted that plaintiff's "theories of liability are grounded (if anywhere) on federal and state law, not 'tribal law'"); *Altheimer & Gray v. Sioux Mfg. Corp.*, 983 F.2d 803, 814

In addition, there is no tribal jurisdiction to exhaust. The tribal courts lack subject matter jurisdiction and tribal law does not apply, rather, it is the small loan laws of the states where Defendants choose to make their internet loans that apply. Complaint ¶¶ 61 (citing cases), 102-04; *compare Fidelity and Guaranty Ins. Co. v. Bradley*, 212 F.Supp.2d 163 (W.D.N.C. 2002) ("There are two issues before this Court: (1) Does the Tribal Court have jurisdiction and; (2) if so, should this Court abstain from exercising its jurisdiction in favor of the doctrine of tribal exhaustion." Emphasis added).[20]

(7th Cir. 1993) (it is "necessary to examine the factual circumstances of each case … in order to determine whether the issue in dispute is truly a reservation affair entitled to the exhaustion doctrine" and refusing to require exhaustion where "the dispute does not concern a tribal ordinance as much as it does state and federal law"); *El Paso Natural Gas Co. v. Netzsosie*, 526 U.S. 473, 476-84 (1999) ("The issue is whether the judicially created doctrine of tribal court exhaustion, requiring a district court to stay its hand while a tribal court determines its own jurisdiction, should apply in this case, which if brought in a state court would be subject to removal. We think the exhaustion doctrine should not extend so far.").

[20] In *Fidelity and Guaranty Ins. Co.*, the court found tribal exhaustion where it was clear the tribal court had jurisdiction and the facts involved a contract for work on tribal land for the tribe's benefit. *See id*. at 165: "The Tribal Court clearly has jurisdiction over the dispute at issue; a dispute … on tribal land and for the benefit of the Tribe." (Emphasis added). Here, by contrast, the dispute arises over usurious loans, issued over the internet, in North Carolina to North Carolina consumers. Again, in *Tom's Amusement Co., Inc. v. Cuthbertson,* 816 F.Supp. 403, 405 (W.D.N.C. 1993) the facts involved "a contract dispute between two non-Indians operating a gaming establishment on the Eastern Band of Cherokee Indian Reservation pursuant to a gaming license and ordinances established by the Tribe. The Defendant contracted with Plaintiff as a disclosed agent of the Tribe." (Emphasis added). Here, however, neither the tribe nor any agent of it contracted with the Plaintiffs and to the contrary of involving business on reservation land, here the Defendants made internet loans to North Carolina consumers. Other cases are likewise distinguishable. *Lexington Ins. Co. v. Data Aire, Inc*., No. 2:12cv97, p. 3 (W.D.N.C. April 29, 2013) (allowing tribal exhaustion, court found, "the parties do not dispute that the case involves property located within the reservation boundaries; property, moreover, which is involved in tribal gaming"); *Madewell v. Harrah's Cherokee Smokey Mountains Casino*, 730 F.Supp.2d 485, 488 (W.D.N.C. 2010)

Here, the tribe has no jurisdiction over disputes between South Dakota corporate entities and borrowers who do not reside on the tribe's reservation and are non-members. Exhaustion of tribal remedies is not required. Regulation of internet lending is not an important part of tribal sovereignty.[21] None of the Defendants act for the tribe or implicate any tribal interest. Western Sky is "not owned or operated by the Cheyenne River Sioux Tribe or any of its political subdivisions." (Complaint ¶ 56 & Ex. 5). There is no evidence showing that the tribe has any interest in regulating the Defendants. Tribal exhaustion does not apply.

C. Response to Rule 12(b)(6) Motion.

Alter ego **--** Defendants contend the claim for alter ego liability/piercing the corporate veil (Sixth Claim) should be dismissed because it is a theory of liability not an independent cause of action. Def. Br. 13. However it clear this Court recognizes that

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("Although the Plaintiffs' claims against Harrah's NC Casino involve only non-Indian parties, the events which gave rise to these claims occurred on tribal property."). Here, Defendants could have chosen to make loans out of a storefront on the tribal lands. However, their business model is based upon marketing loans through personal computers with the internet in peoples' homes off the reservation.

[21] *Compare Iowa Mutual Ins. Co. v. LaPlante,* 480 U.S. 9 (1987) ("Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty" (emphasis added)); *Krempel v. Prairie Island Indian Community*, 125 F.3d 621, 622 (8th Cir. 1997) (tribal court remedies "must be exhausted before a federal district court should consider relief in a civil case regarding tribal-related activities on reservation land." Emphasis added).

liability theory.[22] Accordingly, Plaintiffs request the Court simply note in its Order that the claim may proceed as a liability theory.

Fraudulent transfer – Defendant contends the fraudulent transfer claim fails because Plaintiffs must more specifically allege details under Rule 9(b). Def. Br. 13-14. *See Bon Aqua Int'l, Inc. v. Second Earth, Inc*., No. 1:10CV169, Order at pp. 59-60 (M.D.N.C. Jan. 29, 2013) (discussing pleading requirements for fraudulent transfer). Plaintiffs ask that the Court allow discovery and hold Defendants' motion in abeyance.

Civil conspiracy **–** Defendant contends the civil conspiracy claim (Eighth Claim) fails because not adequately alleged. Def. Br. 16-17. In fact the allegations state a claim by alleging that an agreement between two distinct actors (Webb/the Webb entities, who make the loans, and CashCall, which buys them) to engage in an unlawful act. Defendants set up this business model betting that they could successfully evade the North Carolina small loan laws, and they continue offering the loans here knowing full well the risk if they are wrong. Meanwhile, they have shut down their loans to selected other states only after Attorney General actions.[23] Plaintiffs have now sued them in North Carolina under Chapter 75 which the state legislature specifically contemplated

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[22] *E.g., Mayes v. Moore*, 419 F.Supp.2d 775, 780-82 (M.D.N.C. 2006) (noting elements of "a veil-piercing claim"); *Holcomb v. Pilot Freight Carriers, Inc.,* 120 B.R. 35, 40-41 (M.D.N.C. 1990) (elements of veil piercing under North Carolina law); *Richmond v. Indalex Inc*., 308 F.Supp.2d 648, 655-56 (M.D.N.C. 2004) (same).

[23] Most recently, Defendants have received cease and desist orders regarding their loans in Illinois and Massachusetts. (**Ex. 1**).

would allow "private attorney general" actions, and if Plaintiffs prove their claims on the merits, there is an adequate basis to find that Defendants entered into a civil conspiracy.[24]

Unjust enrichment – Defendant contends the unjust enrichment claim (Fifth Claim for Relief) fails because Plaintiffs also allege a contract claim. Def. Br. 17-18. However, Plaintiffs are allowed to plead alternative claims.[25] Further, the claim flows from the North Carolina statutes providing that these loans are void meaning the contracts are of no effect and an unjust enrichment remedy is appropriate. Complaint ¶ 150 (loans void under Consumer Finance Act). Finally, rescission and restitution are properly alleged as a remedy that this Court may order upon a finding that monies should be refunded. *See* Complaint ¶ 152; N.C. Gen. Stat. § 53-166(d) (party in violation of small loan law "shall have no right to collect, receive or retain any principal or charges").

D. This Court Should Find There Is Personal Jurisdiction.

Defendants contend there is only personal jurisdiction over Defendants Western Sky Financial, LLC, Martin Webb, and CashCall and the remaining entity Defendants

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[24] It was Defendants' deliberate choice to plow forward with their business in North Carolina even after other states with similar laws have shut them down and in the face of the North Carolina Attorney General's clear pronouncement that "there is no lawful basis for 'payday lending.'" Complaint ¶ 48. Defendants have also plowed ahead in the face of court holdings that payday loans under subterfuges and evasive business models are unlawful. *See State ex rel. Cooper v. NCCS Loans, Inc*., 174 N.C. App. 630, 624 S.E.2d 371 (2005) (Attorney General sued the defendants contending that the defendants were making usurious consumer loans under the guise of internet service contracts; summary judgment in favor of the Attorney General was affirmed).

[25] *See* Fed. R. Civ. P. 8(d)(2) ("A party may set out two or more statements of a claim or defense alternatively or hypothetically, either in a single count or defense or in separate ones."); *Bushkin Associates, Inc. v. Raytheon Co.*, 815 F.2d 142, 149 (1st Cir.1987) (plaintiffs "were certainly entitled to plead in the alternative, arguing a quantum meruit theory as well as an express contract theory").

must be dismissed. Def. Br. 1, 18-20. Plaintiffs have alleged that the Webb entities are all commonly owned and controlled, that alter ego liability applies and that they civilly conspired to advance the unlawful enterprise. Complaint ¶¶ 33, 169-83 (alter ego), 190-93 (conspiracy). Such allegations, if proven, can support jurisdiction as well as liability. *See Avanti Hearth Prods., LLC v. Janifast, Inc*., No. 3:10-cv-19-FDW, 2010 WL 3081371, at *4-5 (W.D.N.C. Aug. 6, 2010) (alter ego theory supported personal jurisdiction). Findings in other cases indicate that other Defendants named herein besides Western Sky, Webb and CashCall have been involved in making loans in other states.[26] Western Sky uses the same website nationwide. (See Complaint Ex. 5; pages from www.westernsky.com). It is reasonable for Plaintiffs to believe that if multiple Webb entities were involved in the lending in other states the same also transpired here. In light of the facts shown in these cases and the allegations herein, the Plaintiffs respectfully request that the Court either find that a *prima facie* showing of jurisdiction is made,[27] or, allow personal jurisdiction discovery.

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[26] *See* Order at Doc. 1-12, pp. 2-4 (Payday Financial, LLC, loans in West Virginia); Order at Doc. 1-9, pp. 1-3 (Payday Financial, LLC and Great Sky Finance, LLC, loans in Maryland); Order at Doc. 1-6, pp. 1-5 (24-7 Cash Direct, LLC, Financial Solutions, LLC, Great Sky Finance, LLC, High Country Ventures, LLC, Management Systems LLC, Payday Financial LLC, Red River Ventures, LLC, Red Stone Financial LLC, Western Capital LLC, Missouri); *FTC v. Payday Financial, LLC*, No. 3:11-cv-03017-RAL, D.S.D (nine Webb entities). News articles indicate multiple Webb entities are involved in the internet lending. (News articles are attached to Plaintiffs' brief in support of its motion for discovery).

[27] In ruling on a motion to dismiss for lack of personal jurisdiction, "the plaintiff need prove only a *prima facie* case of personal jurisdiction. In deciding whether the plaintiff has proved a prima facie case of personal jurisdiction, the district court must draw all reasonable inferences arising from the proof, and resolve all factual disputes, in

Plaintiffs make one exception in that they agree that the claim against "Western Sky Dakota Holding Company" should be dismissed. (See Complaint ¶ 32). Plaintiffs have been unable to locate information confirming the association of such an entity with the other Webb entities or that it is organized or incorporated. Plaintiffs ask that Defendant be dismissed without prejudice in the event that discovery reveals other facts.

IV. CONCLUSION.

Wherefore, Plaintiffs respectfully request that the Court deny the Defendants' motion to dismiss. A proposed order is provided herewith at **Exhibit 2.**

Respectfully submitted, this the 21st day of June, 2013.

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the plaintiff's favor." *Mylan Lab., Inc. v. Akzo, N.V.*, 2 F.3d 56, 60 (4th Cir. 1993) (citations omitted). Because "North Carolina's long-arm statute is construed to extend jurisdiction over nonresident defendants to the fullest extent permitted by the Due Process Clause … the dual jurisdictional requirements collapse into a single inquiry as to whether the defendant has such minimal contacts with the forum state that maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Christian Science Bd. of Directors, First Church of Christ, Scientist v. Nolan*, 259 F.3d 209, 215 (4th Cir. 2001) (citations omitted).

CERTIFICATE OF SERVICE

I hereby certify that on June 21st, 2013, I electronically filed the foregoing PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS with the Clerk of Court using the CM/ECF system which will send notification of such to all counsel of record.

This the 21st day of June, 2013.

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LIST OF EXHIBITS

1. Unreported authorities.
2. Proposed order.