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STATE OF MINNESOTA

COUNTY OF HENNEPIN

DISTRICT COURT

FOURTH JUDICIAL DISTRICT

Case Type: Other Civil
(Consumer Protection)

State of Minnesota, by its Attorney General, Lori Swanson and its Commissioner of Commerce, Michael Rothman,

Plaintiff,

vs.

CashCall, Inc., a California corporation; WS Funding, LLC, a Delaware limited liability company, doing business in its own name and/or as a division or subsidiary of CashCall; and WS Financial, LLC, doing business in its own name and/or as an incorporated or unincorporated division or subsidiary of CashCall,

Defendants.

Court File No. 27-CV-13-12740

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS PURSUANT TO RULE 12.02(E)

With its attempt to apply Minnesota law to loans issued on the Cheyenne River Sioux Reservation, the State of Minnesota (the "State") acts in contravention of one of the fundamental principles of federal constitutional law – namely, that a state may not extend the reach of its laws beyond its borders in order to regulate contracts formed "extraterritorially." Thus, even assuming for the purpose of this Motion that the facts as the State alleges them in its Complaint are accurate, the Dormant Commerce Clause of the United States Constitution prohibits the State from regulating loans consummated outside of Minnesota's borders. Assignment of the loans to the Defendants here did not act to transform the loans into "Minnesota consummated" loans; nor did it invalidate the application of Cheyenne River Sioux Tribal law to those loans. Moreover,

federal law provides that tribal members and their businesses have immunity from these types of suits. And the State's dismissal of its own action against the entity which made the subject loans served to estop it from bringing the instant action based upon assignment of those loans.

For the reasons set forth below, this action must be dismissed in its entirety under Minn. R. Civ. P. 12.02(e).

STATEMENT OF FACTS[1]

Western Sky Financial, LLC

Western Sky Financial, LLC ("Western Sky") is a lender located outside of the State of Minnesota.[2] Western Sky is owned by Martin A. Webb, a member of the Cheyenne River Sioux Tribe.[3] Western Sky makes loans from outside of Minnesota to consumers who reside in Minnesota.[4] With its Complaint, the State has not alleged that any Western Sky loan was consummated in the State of Minnesota.[5]

Defendants WS Funding LLC and CashCall, Inc.[6]

WS Funding, LLC ("WS Funding") is a Delaware limited liability company owned by CashCall, Inc. ("CashCall").[7] CashCall is a California corporation located at 1600 S. Douglass

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1 For purposes of a Rule 12.02(e) Motion to Dismiss, all facts asserted by a plaintiff must be taken as true. *See Bodah v. Lakeville Motor Express, Inc.*, 663 N.W.2d 550, 553 (Minn. 2003). Notwithstanding acceptance of these allegations for purposes of the Motion, Defendants reserve all rights, claims and defenses available to them, including but not limited to the ability to contest allegations made by the State in the complaint, and to provide facts that serve to outline the legal framework under which the subject loans were made.

2 *See* Complaint ("Compl.") at ¶23.

3 *Id.*

4 *Id.* at ¶35.

5 *See generally* Compl.

6 While the Complaint lists "WS Financial, LLC" as a Defendant, there is not such entity related to either of WS Funding or CashCall.

Road, Anaheim, California 92806.[8] WS Funding purchases loans made by Western Sky, and CashCall services the Western Sky loans purchased by WS Funding.[9] Upon sale of a Western Sky loan to WS Funding, a borrower who resides in the State of Minnesota receives a Notice of Assignment, Sale or Transfer of Servicing Rights which informs the Western Sky borrower that her loan has been purchased by WS Funding, and will be serviced by CashCall.[10]

The State's Dismissal of Its July 2012 Action Against Western Sky

On July 12, 2012, the State of Minnesota sent a Notice of and Order for Hearing, Order for Prehearing Conference and Statement of Charges to Western Sky to determine whether Western Sky had engaged in unlicensed consumer small loan activity in the State of Minnesota, in violation of Minn. Stat. ¶47.60, subd. 3 (2010).[11] After receiving argument from Western Sky that the State of Minnesota did not have personal or subject matter jurisdiction to regulate Western Sky, and after the Department of Commerce sent an email to him stating "The department has agreed that Western Sky Financial... may be dismissed," Administrative Law Judge Eric L. Lipman issued an Order of Dismissal With Prejudice on August 31, 2012.[12] This matter was thus presumed resolved: the State recognized that Western Sky did not require a license to make loans to consumers residing in Minnesota, and did not order Western Sky to cease making loans to consumers who reside in Minnesota.

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7 Compl. at ¶6.

8 *Id.* at ¶5.

9 *Id.* at ¶¶19, 38.

10 *Id.* at 38.

11 *See* July 12, 2012 Notice of and Order for Hearing, Order for Prehearing Conference and Statement of Charges, OAH Docket No. 8-1005-22937-2 ("July 2012 Notice"), attached as Exhibit 1.

12 *See* August 31, 2012 Order of Dismissal With Prejudice, attached as Exhibit 2.

Nearly a year later – on July 9, 2013 – the Commissioner of Commerce issued a revised order,[13] holding that Administrative Judge Lipman "does not have the authority to issue a final decision, including a dismissal with prejudice," and that Administrative Law Judge Lipman's Order of Dismissal was a "recommendation to the Commissioner." Assistant Commissioner Dennis Ahlers dismissed the matter against Western Sky *without* prejudice to refiling.[14]

The Instant Lawsuit: Suing WS Funding and CashCall on Loans Made by Western Sky

Two days later, on July 11, 2013, the State filed Complaint naming WS Funding and CashCall – but not Western Sky. The Complaint seeks to apply Sections 8.31, 47.601, 53.01 *et seq.*, 56.01 *et seq.* and 334.01 of the Minnesota Statutes to the Western Sky loans purchased by WS Funding and serviced by CashCall; seeks relief under the Consumer Fraud Act and Uniform Deceptive Trade Practices Act; and asserts a claim for unjust enrichment.[15] While each of the claims is premised upon the loans being subject to Minnesota law, the Complaint (rightfully) does not allege that any of the subject loans were consummated in the State of Minnesota.[16]

ARGUMENT

Rule 12 of the Minnesota Rules of Civil Procedure allows a defendant to assert a defense of failure to state a claim upon which relief can be granted by motion as a responsive pleading.[17] A motion to dismiss for failure to state a claim will be granted if it appears to a reasonable

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13 *See* July 9, 2013 Order of Dismiss Without Prejudiced, attached as Exhibit 3.

14 *Id.*

15 *See generally* Compl.

16 *Id.*

17 Minn. R. Civ. P. 12.02(e).

certainty from the Complaint that no facts exist consistent with the Complaint that could be introduced to support granting the relief demanded in the Complaint, as a matter of law.[18]

Although the *sine qua* non for each of the State's claims is a finding that the loans which form the basis of the Complaint were consummated in Minnesota, the State does not allege this in its Complaint. Instead, it argues that advertising that can be accessed by a consumer living in the State of Minnesota, and collection on loans made to a Minnesota resident, is enough to warrant application of Minnesota law. However, because the loans at issue here were consummated outside of Minnesota, Minnesota law does not apply. The Supreme Court of the United States and numerous federal courts have consistently held that the Dormant Commerce Clause, U.S. Const. art. I, § 8, cl. 3, prohibits a state from regulating interstate commerce that occurs outside of its borders, even where a state claims to have a compelling public policy or other interests related to such commerce.

Moreover, the assignment of the subject loans to WS Funding did not transform the loans into "Minnesota" loans: as assignee, WS Funding "stands in the shoes" of Western Sky. And CashCall's subsequent servicing of loans that are not themselves subject to Minnesota law cannot, then, bring WS Funding or CashCall within the State's regulatory purview.

Finally, due to its dismissal with prejudice of its licensing action against Western Sky, the State is estopped from suing Defendants on the same loans that the State determined it had no authority over. The State's subsequent, peculiar "redo" of the dismissal after nine months does not remedy this legal consequence.

For the reasons set forth below, the Complaint must be dismissed with prejudice as a matter of law.

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[18] *See Northern States Power Co. v. Franklin*, 265 Minn. 391, 394-95, 122 N.W.2d 26, 29 (1963).

I. THE STATE'S ATTEMPT TO APPLY MINNESOTA LAW TO LOANS MADE OUTSIDE OF MINNESOTA IS PROHIBITED BY THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION.

The Commerce Clause of the United States Constitution expressly authorizes Congress to "regulate Commerce with foreign Nations, and among the several States." *Quill Corp. v. North Dakota By and Through Heilkam*, 504 U.S.298, 309 (1992). The Commerce Clause has long been read as having a negative or dormant sweep as well. "[T]he Commerce Clause dictates that no State may force an out-of-state merchant to seek regulatory approval in one State before undertaking a transaction in another." *Midwest Title Loans, Inc. v. Mills*, 593 F.3d 660, 663 (7th Cir. 2010), *cert. den'd*, 131 S.Ct. 83 (2010), *citing, inter alia, West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 192-94 (1994). The *Healy* Court further explains:

> Taken together, our cases concerning the extraterritorial effects of state economic regulation stand at a minimum for the following propositions: **First, the 'Commerce Clause ... precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State,'** *Edgar*, 457 U.S. at 642–43, 102 S.Ct. 2629 (plurality opinion); *see also Brown–Forman*, 476 U.S. at 581–583, 106 S.Ct. 2080, and, specifically, a State may not adopt legislation that has the practical effect of establishing 'a scale of prices for use in other states,' *Seelig*, 294 U.S. at 528, 55 S.Ct. 497. **Second,** a statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State's authority and is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature. **The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State.** *Brown–Forman*, 476 U.S. at 579, 106 S.Ct. 2080. **Third, the practical effect of the statute must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation.** Generally speaking, the Commerce Clause protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State. *Cf. CTS Corp.*, 481 U.S. at 88–89, 107 S.Ct. 1637. **And, specifically, the Commerce Clause dictates that no State may force an out-of-state merchant to seek regulatory approval in one State before undertaking a transaction in another.** *Brown–Forman*, 476 U.S. at 582, 106 S.Ct. 2080.

Healy, 491 U.S. at 336–37, 109 S.Ct. 2491 (emphasis added, format of internal citations modified).

In determining whether activity occurs "wholly outside" of a state, the courts are clear that the analysis must center on where the transaction being regulated was *consummated*, not other in-state contacts that might be used as a "hook" to attempt justify the regulation. In *Eric M. Berman, P.C. v. City of New York*, 895 F.Supp.2d 453 (E.D.N.Y. 2012), the United States District Court for the Eastern District of New York analyzes the body of cases concerning wholly extraterritorial activity as follows:

> Thus, following the line that has been established in these cases, **the Court looks to where the transaction being regulated was consummated to determine whether the application of a law impermissibly regulates extraterritorial commerce**. *Cf. Regan*, supra, at 1899 (noting that the extraterritoriality principle is concerned with "the location of the regulated behavior itself"). **Quite simply, if the transaction is consummated out of state, a state may not regulate it without violating the dormant Commerce Clause. This is the case regardless of whether some other aspect of the commercial activity occurs within the state**—whether it be the use of the product or service within the state, *cf. Mills*, 593 F.3d at 668-69; *SPGGC*, 505 F.3d at 193–94, the subsequent in-state sale of the product or service, *cf. Pharm. Research*, 406 F.Supp.2d at 67–71; *Abrams*, 720 F.Supp. at 287–88, **prior negotiations or advertising in-state that lead to the formation of the contract out-of-state**, *cf. Carolina Trucks*, 492 F.3d at 491–92; *Dean Foods*, 187 F.3d at 617–19, **or the fact that one of the parties is a state resident**, *cf. Quik Payday*, 549 F.3d at 1308–09; *Carolina Trucks*, 492 F.3d at 489–90, a domestic corporation, *cf. S.K.I. Beer*, 443 F.Supp.2d at 319–20, or has significant in-state contacts, *cf. Dean Foods*, 187 F.3d at 618–19. By the same token, **the in-state presence of one party to the transaction cannot be used as justification to regulate the other party**, *cf. A.S. Goldmen*, 163 F.3d at 786–87, nor, critically to this case, can the in-state performance of a counterparty be used to regulate the other party, *cf. Mills*, 593 F.3d at 668-69; *Ripley*, 616 F.Supp.2d at 904–06 & n. 5. **If the transaction at issue is consummated out of state, none of these in-state "hooks" will permit a state to regulate the extraterritorial commerce**. Even a de minimis regulation may fall afoul of the Constitution. *Cf. Abrams*, 720 F.Supp. at 287–88 (holding that notice requirement for malfunctioning vehicles, "[i]nnocuous as it is," violated the Commerce Clause).

Eric M. Berman, P.C., 895F. Supp.2d at 483 (emph. added).

Because the loans in question were consummated on the Cheyenne River Sioux Indian Reservation, they are not subject to the regulatory authority of Minnesota, and the State's attempt to apply Minnesota law in Counts I through VI of the Complaint is prohibited by the Dormant Commerce Clause. The "in-state hooks" that the State attempts to apply to justify its unconstitutional regulation, including the residency of the borrowers, do not affect the analysis. Regardless of these "in-state hooks," when the transaction was consummated on the Reservation, the transaction, for Dormant Commerce Clause purposes, occurred wholly outside the state of Minnesota.

A. The Loans At Issue Were Consummated on the Cheyenne River Sioux Indian Reservation, Not in Minnesota.

The ultimate question in this case, then, is to determine where the loan agreements that WS Funding purchased, and which CashCall serviced, were *consummated.* In making that determination, it is indisputable under Minnesota that the loan contracts that form the basis of the State's claims against Defendants were all consummated on the Cheyenne River Sioux Indian Reservation.

It is a hallmark of Minnesota law that a contract is "made" or "consummated" where the last act necessary for its formation occurs. *Fitzgerald v. Economic Laboratory, Inc.,* 216 Minn. 296, 12 N.W. 2d 621 (1943). The advent of the Internet does not vary this well-settled principle. Here, the loan contracts were consummated when executed by Western Sky at its offices on the Reservation. Thus, as a matter of Minnesota law, the loan contracts were consummated on the Reservation

Consistent with the above, in *FTC v. Payday Financial, LLC*, the United States District Court for the District of South Dakota, Central Division, found that Western Sky's loans are, in fact, made on the Reservation:

> Here, the contract between the Borrowers and [Western Sky] appears to be formed on the Reservation in South Dakota. "The test of the place of a contract is the place where the last act is done by either of the parties which is necessary to complete the contract and give it validity. *O'Neill Farms, Inc. v. Reinert*, 2010 S.D. 25, ¶12, 780 N.W.2d 55, 59 (quoting *Briggs v. United Servs. Life Ins. Co.*, 117 N.W.2d 804, 807 (S.D. 1962)); *see also* 2 Williston on Contracts §6:62 (4th ed.) ("[T]he general principle applicable to this and any similar question is that the place of the contract is the place where the last act necessary to the completion of the contract was done.").

___ F.Supp.3d ___, 2013 WL 1309437 at *10. Whether considered under South Dakota law (where the *Payday Financial* court is located and whose choice of law jurisprudence it must follow, *Id.*) or Minnesota law, the result is the same: Western Sky's loans were consummated on the Reservation.

In its Complaint, the State does not – and cannot – allege that the loans which form the basis of its Complaint were consummated in Minnesota. The borrowers each knowingly reached outside of Minnesota to obtain their loans, and their loan agreements clearly and repeatedly identify the Reservation as the place where the loans are made, and the law of the Tribe as the controlling law. *See generally, Payday Financial.*

Additionally, there is perhaps no better or more constitutionally sound test or framework to determine the location of where a consumer loan is made than that set forth by the federal government in the consumer banking context. And as that framework makes clear, Western Sky loans would be deemed to have been "made" in its place of business – which is not Minnesota:

> On May 13, 1998, the FDIC issued General Counsel Opinion No. 11, Interstate Charges By Interstate State Banks, ("GCO No. 11") interpreting § 521 (12 U.S.C. § 1831d). GCO No. 11 essentially adopts the "non-ministerial function" test set out in OCC 822 with respect to the determination of which state's interest charges apply. GCO No. 11 provides (p.6):
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> > If an out-of-state branch or branches of an Interstate State Bank in a single host state performs all the non-ministerial functions (approval of an extension of credit, extension of the credit, and dispersal of loan proceeds to a customer) related to a loan, it "makes" the loan to the customer for the purposes of the Interstate Banking Statutes and the loan shall be governed

> by the usury provisions of the host state. If the three non-ministerial functions occur in different states or if some of the non-ministerial functions occur in an office that is not considered to be the home office or branch of the bank, the home state rates may be used.

MorEquity, Inc. v. Naeem, 118 F.Supp.2d 885, 898 (N.D. Ill. 2000) (quoting FDIC General Counsel Opinion No. 11, Interstate Charges by Interstate Banks).

Judge Posner's opinion for the United States Court of Appeals for the Seventh Circuit in *Midwest Title Loans, Inc.* is instructive as well. In *Midwest Title Loans*, Indiana sought to regulate loans advertised to Indiana borrowers who then crossed the border to obtain the loans in Illinois. The court rejected Indiana's attempt to project its regulatory authority beyond its borders, holding instead that the Commerce Clause prohibits a state from regulating commercial activity in another state even when the activity has effects in the state attempting to exert regulatory power. *See also Dean Foods Co. v. Brancel*, 187 F.3d 609, 619-20 (7th Cir. 1999) (holding that "the fact that a particular transaction may affect or impact a state does not license that state to regulate commerce which occurs outside of its jurisdiction"). While that court's decision addressed loans obtained from a storefront located in Illinois, rather than from an Internet lender with no offices in Indiana, the fact of where the loan was consummated does not differ: it is the place where the last act necessary for formation of the contract occurred.

The loans that form the basis of the State's Complaint were not consummated in the State of Minnesota. Consequently, there is no legitimate basis for Minnesota to impose its regulatory authority over those loans, and the Complaint must be dismissed.

II. FEDERAL LAW PROHIBITS THE STATE FROM APPLYING ITS OWN LAW AND JURISDICTION TO LOANS MADE ON THE CHEYENNE RIVER SIOUX INDIAN RESERVATION.

While not naming Western Sky as a defendant in this matter, the State nonetheless needlessly denigrates the ethnicity and heritage of its owner, and conflates the sovereign

immunity that an Indian tribe and its wholly-owned subsidiaries enjoy with the Tribal member immunity to which Western Sky and its owners are entitled.

"Congress has . . . acted consistently upon the assumption that the States have no power to regulate the affairs of Indians on a reservation." *Williams v. Lee*, 358 U.S. 217, 220 (1959). In Williams, a non-Indian who operated a general store on the Navajo Indian Reservation filed suit against Navajo Indians (Mr. and Mrs. Williams) in state court in Arizona to recover for goods sold in the store on credit. Judgment was entered against Mr. and Mrs. Williams in the state trial court, and the Supreme Court of Arizona affirmed the judgment.

The United States Supreme Court reversed, holding that, unless Congress expressly grants power to a state, the state has no authority to govern the affairs of Indians on a reservation. Id. at 220-223. The Williams court concluded its opinion by stating:

> There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves. It is immaterial that respondent [i.e. the store owner bringing suit] is not an Indian.

Id. at 223; *see also Puyallup Tribe, Inc. v. Washington Game Dep't*, 433 U.S. 165, 172-73 (1977). "[I]n the absence of federal authorization, tribal immunity, like all aspects of tribal sovereignty, is privileged from diminution by the States." *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g*, 476 U.S. 877, 891 (1986).

The Supreme Court reaffirmed this holding in *Montana v. United States*, 450 U.S. 544 (1981), where it further emphasized that state law does not govern contracts between Indians and non-Indians:

> To be sure, 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. 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. at 565 (emphasis added).

The holdings in *Williams* and *Montana* are dispositive here. As noted by the South Dakota federal court, the loan agreements that the State seeks to regulate were made on the Reservation and are explicitly governed by Tribal law. Martin A. Webb—the owner and operator of Western Sky, the maker of the loans—is a member of the Tribe. The Supreme Court has held that its decisions and federal law confer rights on individual Indians, as well as Tribes. "[W]hen Congress has legislated on Indian matters, it has, most often, dealt with the tribes as collective entities. But those entities are, after all, composed of individual Indians, and the legislation confers individual rights. This Court has therefore held that 'the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.'" *McClanahan*, 411 U.S. at 181 (*quoting Williams*, 358 U.S. at 220) (emphasis added).

Likewise, there is no requirement that an entity be owned by a Tribe or be incorporated under Tribal law in order for its activities to be governed by Tribal law. Webb is a member of the Tribe and he owns and controls the maker of the loans – Western Sky – which is located on the reservation. *See Payday Financial*, ___ F.Supp.3d at *2. Congress has recognized the special nature of Indian-owned corporations, regardless of where they are incorporated, by enacting the Indian Business Development Program to "establish and expand profit-making Indian-owned economic enterprises." 25 U.S.C. § 1521 (2006). The regulations to that statute restrict participation to "Indians, Indian Tribes, Indian Partnerships, corporations, or cooperative associations authorized to do business under State, Federal or Tribal Law." 25 C.F.R. § 286.3 (emphasis added). Therefore, the State's attempt to apply Minnesota law to loans made by Western Sky – and later purchased by WS Funding and serviced by CashCall – is no less an infringement of Indian rights than the conduct of the Arizona courts in *Williams* or *McClanahan*.

Moreover, federal courts have explicitly recognized that a corporation may acquire the racial attributes of its owner and may invoke the race-based protections provided to others under federal law. *See Guides, Ltd. v. Yarmouth Group Property Management, Inc.*, 295 F.3d 1065, 1072 & n.2 (10th Cir. 2002) (holding that a corporation had standing to sue under Civil Rights statutes where it suffered harm as a result of discrimination against an owner and employee); *Gersman v. Group Health Ass'n, Inc.*, 931 F.2d 1565 (D.C. Cir.1991), vacated on other grounds, 502 U.S. 1068 (1992); *Hudson Valley Freedom Theater, Inc. v. Heimbach*, 671 F.2d 702, 706 (2d Cir. 1982); *Howard Security Services v. Johns Hopkins Hospital*, 516 F. Supp. 508 (D. Md. 1981). Of note, the Eighth Circuit, in *Oti Kaga, Inc. v. South Dakota Housing Development Authority*, allowed a corporation to invoke and vindicate the federal Civil Rights protections of its Native American owners. 342 F.3d 871, 880-82 (8th Cir. 2003). The court explained that such a position was important in order to effectuate the purpose of the federal laws at issue. *Id.*

Similarly, in *Pourier v. South Dakota Dept. of Revenue*, 658 N.W.2d 395 (S.D. 2003), *aff'd in part and vacated in part on other grounds*, 674 N.W.2d 314 (2004), *cert. denied*, 541 U.S. 1064 (2004), the South Dakota Supreme Court relied on some of the foregoing authority to hold that a corporation incorporated under South Dakota law, rather than Tribal law, was an enrolled member of the tribe for purposes of tax immunity because it was owned by an enrolled member of the tribe and operated on the reservation. *Id.* at 403-405; *see also Giedosh v. Little Wound Sch. Bd.*, 995 F. Supp. 1052, 1059 (D.S.D. 1997) (fact that school board was incorporated under South Dakota law did "not affect its status as an 'Indian tribe'").

In *Pourier*, the South Dakota Supreme Court held that South Dakota had no power to impose a fuel tax on a business operated on a reservation by an enrolled member of the Oglala Sioux tribe. 658 N.W. 2d at 397, 402-403. In so holding, the *Pourier* court relied on the United

States Supreme Court's holding in *Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450, 458 (1995):

> [W]hen a State attempts to levy a tax directly on an Indian tribe or its members inside Indian country, rather than on non-Indians, we have employed, instead of a balancing inquiry, a more categorical approach: Absent cession of jurisdiction or other federal statutes permitting it, we have held, a State is without power to tax reservation lands and reservation Indians.

Pourier, 658 N.W.2d at 400 (emphasis added).

Additionally, the claims set forth in Counts IV (under the Consumer Fraud Act) and (V) (under the Uniform Deceptive Trade Practices Act) of the State's Complaint are premised upon the State's unfounded allegations that Defendants – rather than Western Sky – operated as the "true lender." But the State knows that to be false – as the Federal Trade Commission has stipulated, and as the Court in *Payday Financial* determined:

- Western Sky is owned by an enrolled member of the Cheyenne River Sioux Tribe, is licensed by the Tribe to do business, and operates within on the Reservation (*Payday Financial*, ___ F.Supp.3d at *2);
- "During the entirety of a loan transaction and the entirety of the relationships between the Borrowers and [Western Sky], [Western Sky] and [its] employees are located within the exterior boundaries of the Reservation" (*Id.* at *3);
- In a "typical" loan transaction, the "potential Borrower sends his or her application . . . to [Western Sky], which then considers the application to determine whether to approve the application" (*Id.*)
- "Lending decisions by [Western Sky] are made within the exterior boundaries of the Reservation. . . . (*Id.*)

- The loan agreements entered into between [Western Sky] and the Borrowers include provisions stating that the Tribal Court has exclusive jurisdiction over enforcement actions." (*Id.* at *4).

While Counts IV and V rise and fall exclusively on whether the Western Sky loans were consummated in Minnesota, to the extent that the State endeavored to avoid a Rule 12 motion by alleged fraud or deceptive acts, its efforts were premised upon inaccuracies which cannot be reconciled with acknowledged fact and case law.

Here, the State cannot demonstrate that the Tribe has ceded jurisdiction to it, and there is no federal statute permitting the State to act. Thus, the State has no authority to regulate the loans made by Western Sky – including upon assignment. "Enforcement actions [like the present action], unlike criminal prosecutions, are 'suits' to which federally recognized Indian nations are immune. **Indian nations and their members** are subject to nondiscriminatory application of state and federal criminal laws for their conduct off Indian lands, *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 149-49 (1973), but they **cannot be forced in American courts to respond to civil suits, and enforcement actions are civil suits.**" *Colorado v. Cash Advance,* Case No. 05cv1143 (Feb. 14, 2012) (*citing Cash Advance v. State ex rel. Suthers,* 242 P.3d 1099, 1108 (Colo. 2010) and *Oklahoma Tax Comm'n*, 498 U.S. at 510-11) (emphasis added).

III. BECAUSE THE WESTERN SKY LOANS WERE NOT SUBJECT TO MINNESOTA LAW WHEN MADE, THEY DID NOT BECOME SUBJECT TO MINNESOTA LAW UPON ASSIGNMENT.

Usury is a static condition: If a contract is not usurious when it is made, it cannot become usurious later. *See Linne v. Ronkainen*, 228 Minnesota 316, 319, 37 N.S.2d 237, 239 (Minn. 1949); *see also, Egbert v. Peters*, 35 Minn. 312, 29 N.W.134; *Strickland v. First State Bank*, 162 Minn. 235, 239, 202 N.W. 727, 729. For that reason, assignment of a contract cannot render it

usurious: Minnesota law holds that an assignment operates to place the assignee in the shoes of the assignor, and provides the assignee with the same legal rights as the assignor had before assignment. *Illinois Farmers Insurance Co. v. Glass Service Co.*, 683 N.W.2d 792, 803 (Minn. 2004.) "Contractual rights and duties are generally assignable, including the rights to receive payment on debts, obtain non-monetary performance, and recover damages." *Mountain Peaks Financial Services, Inc. v. Roth-Steffen*, 778 N.W.2d 380, 385 (Minn. App. 2010).

In light of the above, the mere fact of assignment (to a non-Minnesota defendant, no less) does not render the loans suddenly subject to Minnesota law. S*ee generally Fed. Deposit Ins. Corp. v. Lattimore Land Corp.*, 656 F.2d 139, 148-49 (5th Cir. 1981) ("The non-usurious character of a note should not change when the note changes hands."); *see also Nichols v. Fearson*, 32 U.S. 103, 109, 8 L. Ed. 623 (1833) (referring to this as one of the two "cardinal rules in the doctrine of usury"). The Fifth Circuit's opinion in *Lattimore* is instructive. In that case, the Fifth Circuit concluded that Tennessee's interest rate limit of 10% would not apply because a "transfer of a pre-existing debt to a national bank does not cause the National Bank Act to mandate the application of the usury law of the state where the national bank is located." *Lattimore*, 656 F.2d at 147. Likewise, the transfer of the pre-existing loans to CashCall does not mandate the application of the usury law of the state (here, Minnesota) where the consumers are located. This is especially true where a consumer knowingly consented to the sole application of another jurisdiction's laws, in this case the law of the Cheyenne River Sioux Tribe. (*See, e.g. Payday Financial* at 18.) In simple terms, a loan cannot be considered usurious unless it was usurious when it was made, and Western Sky's loans do not violate the usury laws of Minnesota or any other state.

Taking assignment of Western Sky loans can only conceivably provide a basis for action against Defendants if those loans were usurious *at the time* Western Sky made them. And to be sure, they were not. Therefore, because the loans were not usurious when made, they cannot now be deemed to violate the interest rate limit set forth in the Minnesota Usury Statute merely because Western Sky assigned them to WS Funding.

IV. THE STATE IS ESTOPPED FROM FILING SUIT ON THE UNDERLYING LOANS, AS IT DISMISSED ITS OWN ACTION AGAINST WESTERN SKY WITH PREJUDICE.

Nearly a year prior to the filing of this action, the State brought an action against Western Sky, alleging that Minnesota's licensing and usury laws applied to loans made by Western Sky.[19] The State was fully aware of Western Sky's lending and its assignment of loans to WS Funding, yet the State did not order Western Sky to cease making loans, or selling loans to WS Funding. Instead, it dismissed the action *with prejudice*. Despite the State's later attempts to convert that dismissal to a "without prejudice" dismissal, that action bars the State from pursuing the same claims in this action.

A. Collateral Estoppel bars the State from pursuing this action because it was determined that Minnesota law does not apply to the Western Sky loans in the previous action.

The doctrine of collateral estoppel is well-established under Minnesota law, and it "precludes the relitigation of issues which are both identical to those issues already litigated by the parties in a prior action and necessary and essential to the resulting judgment." *Ellis v. Minneapolis Comm'n on Civil Rights*, 319 N.W.2d 702, 704 (Minn. 1982). Collateral estoppel may be applied where four elements are met:

> (1) the issue was identical to one in a prior adjudication; (2) there was a final judgment on the merits; (3) the estopped party was a party or in privity with a

19 *See* July 12, 2012 Notice, attached as Exh. 1.

> party to the prior adjudication; and (4) the estopped party was given a full and fair opportunity to be heard on the adjudicated issue.

Id.; *see also Kaiser v. Northern States Power Co.*, 353 N.W.2d 899, 902 (Minn. 1984). The Supreme Court has also said that it will not "rigidly apply collateral estoppel" and will not apply it if it would "work an injustice on the party to be estopped." *State v. Lemmer*, 736 N.W.2d 650, 659 (Minn. 2007). Each of the elements of collateral estoppel is met here.

First, the determinative issue here is the same as the basis for the dismissal of the prior action. That is, the State agreed that it did not have personal or subject matter jurisdiction to regulate loans made by Western Sky, and on that basis the claim was dismissed. *See* August 31, 2012 Order of Dismissal With Prejudice, attached as Exh. 2. The same issue is presented in this case, as discussed above.

Second, there was a final judgment on the merits in the prior decision, which was dismissed with prejudice. The State's later attempt to convert the with prejudice dismissal to one without prejudice is not valid. This case is similar to the issue confronted by the Minnesota Supreme Court in *Ellis*, in which the party held that there was no final judgment in a prior case. The Supreme Court acknowledged that "as a general rule, a verdict does not operate as an estoppel until it become a judgment," however, "exception to that general rule have been recognized where the parties have acquiesced in the verdict and where, through the lapse of time or other cause, a motion for a new trial or arrest of judgment cannot be granted." *Ellis*, 319 N.W.2d at 704 (internal quotations omitted). Here, the State acquiesced in the prior dismissal, and then waited more than nine months to try to convert that with prejudice dismissal into a without prejudice dismissal. It could not do so under the law. Minn. Stat. § 14.59 provides that a contested case can be informally disposed of by consent, agreement, settlement or arbitration between the parties. The State and Western Sky came to an agreement to dismiss this prior action

with prejudice and promptly submitted their consent and agreement to the decision-maker. That procedure is provided for by Minn. Rules pt. 1400.5900. As such, any further proceedings were to be cancelled and no further report or recommendation could be filed by the Department. 21 Minn. Prac., Administrative Prac. & Proc. § 9.20 (2d ed.).

Third, the State and the Commissioner of Commerce were parties to the prior action and are the plaintiffs in this action. Thus they are estopped by the decision in the prior action. While the elements of collateral estoppel do not require that the defendant be the same party, it does bear noting that, by the State's own admission, the Defendants in this action are in privity with the defendant in the prior action as well. As the assignee of the loans made by Western Sky, the defendants have assumed all legal rights that Western Sky had with respect to those loans. *Ill. Farmers Ins. Co. v. Glass Serv. Co.*, 683 N.W.2d 792, 803 (Minn. 2004).

Finally, the State had a full and fair opportunity to be heard on this issue. As the plaintiff in the prior action, the State asserted jurisdiction to regulate these loans. But, when challenged, it agreed that jurisdiction was lacking. The State is bound by that decision.

The State's action against the Defendants here cannot proceed if the State does not have jurisdiction to regulate the loans at issue. Because in a prior case the State determined it did not have such jurisdiction, it is barred from relitigating that issue here. There is no injustice against the State in applying collateral estoppel to its claims. There is no injustice to the State in preventing it from exercising regulatory jurisdiction that it does not have. Moreover, there would be injustice to Defendants if collateral estoppel is not applied. As the assignee of Western Sky's loans, they relied on the State's agreement and with prejudice dismissal of the prior case in continuing to take assignments of Western Sky's loans. The State should not be allowed to

change its mind and seek to hold them liable under these circumstances. As a result, the case must be dismissed.

B. The State's claims are also barred by res judicata, which prohibits it from splitting its claims into a new action.

Collateral estoppel bars a party from re-litigating specific issues that were determined in a prior action. Res judicata, however, addresses the "circumstances giving rise to a claim and precludes subsequent litigation – regardless of whether a particular issue or legal theory was actually litigated." *Hauschildt v. Beckingham*, 686 N.W.2d 829, 840 (Minn. 2004). As the Supreme Court describes it:

> Res judicata is a finality doctrine that mandates that there be an end to litigation. *Dorso Trailer Sales, Inc. v. Am. Body & Trailer, Inc.*, 482 N.W.2d 771, 773–74 (Minn.1992). Under res judicata, a party is "required to assert all alternative theories of recovery in the initial action." *Id.* at 774. Res judicata not only applies to all claims actually litigated, but to all claims that could have been litigated in the earlier action. *State v. Joseph,* 636 N.W.2d 322, 327 (Minn.2001).

Id. Thus under the doctrine of res judicata, not only is the State barred from re-litigating the specific issue of its jurisdiction to regulate the loans made by Western Sky and assigned to and serviced by the current defendants. But it is also barred from bringing any additional claims based on the circumstances of those loans, such as its claims under the consumer protection laws, which all arise from the same set of facts.

Res judicata applies if four elements are met: Res judicata applies as an absolute bar to a subsequent claim when (1) the earlier claim involved the same set of factual circumstances; (2) the earlier claim involved the same parties or their privies; (3) there was a final judgment on the merits; (4) the estopped party had a full and fair opportunity to litigate the matter. *Hauschildt*, 686 N.W.2d at 840. All four prongs are met here.

First, the earlier claim against Western Sky arises from the exact same set of factual circumstances – the making of the loans at issue to Minnesota residents. The test here is not

whether the second action involves the exact same legal theories, but whether the claims "arise out of of the same set of factual circumstances. *Hauser v. Mealey*, 263 N.W.2d 803, 807 (Minn. 1978). The test used to evaluate this prong is "whether the same evidence will sustain both actions." *Hauschildt*, 686 N.W.2d at 840-41 (*quoting McMenomy v. Ryden*, 148 N.W.2d 804, 804 (Minn. 1967)). The evidence required here is the same that would have been required in the State's earlier action against Western Sky – that is, the facts and circumstances regarding the solicitation and making of the loans at issue and the terms of those loans. Thus all of the claims the State brings in this action could have been brought in the prior action.

Second, the earlier claim involved the same parties or their privies. The State and the Commissioner of Commerce are the plaintiffs in both actions. And, as explained above, as the assignee of Western Sky's loans, the defendants have assumed all the legal rights and obligations Western Sky had and therefore are in privity with it.

Third, also as explained above, there was a with prejudice dismissal of the earlier action, which operates as a final judgment on the merits. And fourth, the State had the full and fair opportunity to litigate all its claims in that action.

The doctrine of res judicata exists to prevent the type of piecemeal litigation strategy the State is pursuing here. The State, just like any other party, must bring all its claims arising out of the underlying loans in a single action. When the first action was dismissed with prejudice, the State became barred from starting another action arising out of the same circumstances. Thus this case should be dismissed.

CONCLUSION

If the State wishes to preclude its residents from using the Internet to avail themselves of loans made outside of Minnesota, it must look to the United States Congress to enact legislation barring such interstate commerce. The State's present effort to apply Minnesota law to loans

consummated outside of Minnesota is plainly unconstitutional. For the reasons set forth above, the Complaint must be dismissed with prejudice.

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The undersigned hereby acknowledges that costs, disbursements and reasonable attorney and witness fees may be awarded pursuant to Minn. Stat. § 549.211, Subd. 1, to the party against whom the allegations in this pleading are asserted.

Scott A. Benson