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STATE OF MINNESOTA **DISTRICT COURT**

COUNTY OF HENNEPIN **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

OPPOSITION TO PLAINTIFFS' MOTION FOR TEMPORARY INJUNCTION

I. INTRODUCTION

Defendants CashCall, Inc. and WS Funding, LLC[1] oppose the motion of the State of Minnesota ("State") for a temporary injunction.[2] The State has not shown that it is entitled to injunctive relief, either under the five part *Dahlberg* standards or otherwise. The State cannot

[1] There is no entity known as WS Financial, LLC. The inclusion of that name on a document was a drafting error which was subsequently detected and corrected. *See* Affidavit of Dan Baren at ¶4.

[2] Defendants do so without waiving the jurisdictional defenses asserted in their Motion to Dismiss and herein. A defendant is free to proceed on the merits of a case without fear of waiving the defense so long as the court has been provided an opportunity to determine the validity of the defense. *Patterson v. Wu Family Corp.*, 608 N.W.2d 863, 869 (Minn. 2000); *see also Anderson v. Mikel Drilling Co.*, 102 N.W.2d 293, 300 (1960).

apply its laws to regulate loans that were consummated on the Cheyenne River Sioux Reservation under the Dormant Commerce Clause and federal law establishing tribal member immunity. Further, the State is estopped from suing Defendants over the same loans as to which it dismissed a prior enforcement action against Western Sky. The State's theory that Defendants are the de facto lenders has no basis in Minnesota law or federal Indian law. Finally, if the Defendants are liable at all as assignees of the loans, they may assert all of Western Sky's defenses. For these reasons, the State's motion for temporary injunction should be denied.

II. RELEVANT FACTUAL BACKGROUND

A. Western Sky Financial, LLC Made The Subject Loans From The Reservation and Defendants Purchased and/or Serviced The Loans.

This case begins with loans that were made by Western Sky Financial, LLC. The State, however, has not named Western Sky as a Defendant in this matter, likely because, as discussed below, the State previously agreed to dismiss **with prejudice** a prior action it brought against Western Sky for the Minnesota loans at issue in this litigation. While Western Sky is not a party to this action, affidavits recently filed by Western Sky in other actions establish the basic factual background this Court needs to understand. *See* Affidavit of Tawny Lawrence dated August 12, 2013 and filed in *State of Georgia v. Western Sky Financial, LLC, et al.,* Civil Aciton File No.: 2013-CV-234310 ("Lawrence Aff.")

Western Sky is a financial services company, formed under the laws of the State of South Dakota as a limited liability company. (Lawrence Aff. at ¶5.) Martin A. Webb is the managing and sole member of Western Sky. (*Id.* at ¶3.) Mr. Webb is an enrolled member of the Cheyenne River Sioux Tribe, a federally recognized Native American Tribe, and he resides on the Cheyenne River Indian Reservation. (*Id.* at ¶3.) There is no mechanism for tribal-member companies like Western Sky to incorporate under the Cheyenne River tribal code, but Western

Sky filed its Articles of Organization with the Office of the Secretary of the Cheyenne River Sioux Tribe and it is licensed to operate on the Cheyenne River Indian Reservation by the Cheyenne River Sioux Tribe. (*Id.* at ¶5.)

All of Western Sky's business activities are conducted from within the external boundaries of the Cheyenne River Indian Reservation. (*Id.* at ¶5.) Western Sky has employed as many as 80 individuals, almost all enrolled members of the Cheyenne River Sioux Tribe, who take loan applications, review and underwrite these applications, communicate credit decisions and other information to borrowers, and fund accepted loan applications. (*Id.* at ¶7.) These employees all operate from facilities located wholly within the Cheyenne River Indian Reservation. (*Id.* at ¶6) Western Sky reviews loan applications, approves or rejects loan applications, and communicates approval to a consumer all from the Reservation. (*Id.* at ¶9.) All loan funding decisions are made on the Reservation and Western Sky maintains its own bank account and conducts its own banking activities to fund those loans. (*Id.* at ¶¶8 and 9.)

CashCall is a financial services company incorporated in and located in California. (Affidavit of Dan Baren, "Barren Aff." at ¶ 3.) WS Funding, LLC is a Delaware limited liability company and a wholly-owned subsidiary of CashCall. (*Id.* at ¶ 4.) WS Funding purchases installment loans from various lenders, including Western Sky, and CashCall services the Western Sky loans purchased by WS Funding. (*Id.* at ¶ 4.) CashCall and WS Funding have never made short-term consumer loans to Minnesota residents. (*Id.* at ¶ 5.) CashCall and WS Funding do not accept loan applications from applicants who list a Minnesota address, do not approve loans to applicants who list a Minnesota address, and do not fund loans by depositing money in bank accounts located in Minnesota. (*Id.* at ¶ 6.) CashCall and WS Funding are separate corporations from Western Sky. CashCall and WS Funding hold no ownership interest

in Western Sky. No officers of CashCall and WS Funding are officers of Western Sky. (*Id.* at ¶ 7.)

B. The State's Case Against Western Sky Regarding Minnesota Loans Was Originally Dismissed With Prejudice by ALJ Lipman on August 30, 2012.

On July 14, 2012, the Office of Administrative Hearings for the Department of Commerce issued a Notice of and Order for Hearing, Order for Prehearing Conference and Statement of Charges ("Notice") beginning a contested case hearing against Western Sky concerning the loans that are the subject of this current action. A copy of the Notice is attached to the Affidavit of Scott A. Benson ("Benson Aff.") as Exhibit A. On August 9, 2012, Western Sky Financial, LLC ("Western Sky") submitted a special or limited appearance for the purpose of objecting to the assertion of personal and subject matter jurisdiction. (Benson Aff. at Exhibit B.) In the Special Appearance, Western Sky noted:

> The State of Minnesota, through the Department of Commerce or otherwise, lacks personal and subject matter jurisdiction to regulate Western Sky. Enrolled tribal members and the entities that they own are entitled to self-governance and/or tribal immunity. The reasons supporting immunity or the lack of jurisdiction include, but are not limited to, the following. Western Sky is a limited liability company owned exclusively by Martin A. Webb, an enrolled Tribal Member of the Cheyenne River Sioux Tribe (the "Tribe"). Western Sky is located and operates within the Cheyenne River Indian Reservation (the "Reservation") in the State of South Dakota. Final review and approval of loan underwriting by Western Sky occurs on the Reservation. Western Sky communications concerning the extension of credit come from Western Sky's offices on the Reservation. Western Sky loans are funded through directives made at the Reservation. Western Sky loan contracts specify that Cheyenne River Sioux Tribal law applies.
>
> Additionally, the Department of Commerce lacks jurisdiction to maintain this action against Western Sky because service was insufficient under the applicable Rules of Civil Procedure of the Cheyenne River Sioux Tribe.
>
> WHEREFORE, through counsel, Western Sky enters a limited or special appearance for the sole purpose to dismiss and terminate all proceedings regarding the Notice based on a lack of personal and subject matter jurisdiction; the laws and regulations governing immunity for Indian tribes and enrolled members; and/or insufficient service.

(Benson Aff. at Exhibit B, pp. 1 – 2 (footnotes omitted).)

On August 28, 2012, after receiving the Special Appearance, Michael Tostengard, the attorney for the Department of Commerce representing the Department in the contested case hearing, called counsel for Western Sky and stated that that he had contacted Judge Lipman and told him that the Department will not pursue this action against Western Sky. (Benson Aff. at ¶4.) Mr. Tostengard stated that he believed there had to be a more specific waiver of immunity in order to pursue the case against Western Sky. (*Id.* at ¶4.) Mr. Tostengard indicated that he would send Western Sky's counsel an email confirming this conversation. (*Id.* at ¶4.)

On August 30, 2012, Mr. Tostengard sent an email to Judge Lipman stating: "The Department has agreed that Western Sky Financial (No. 8-1005-23-34-2) may be dismissed." (*Id.* at Exhibit C.) That same day, Judge Lipman responded with an email attaching a draft order dismissing the matter **with prejudice** and requesting that the attorneys let him know their views as to the proposed order. (*Id.* at Exhibit D.) Western Sky's counsel agreed with Judge Lipman's proposed order as did apparently Mr. Tostengard, as Judge Lipman entered the Order dismissing this matter **with prejudice.** (*Id.* at Exhibit E.)

Over nine months later, on June 7, 2013, Nancy Leppink, Assistant Commissioner – Enforcement for the Minnesota Department of Commerce, wrote a letter to Dennis D. Ahlers, Assistant Commissioner of the Minnesota Department of Commerce, asserting that the parties were not offered an opportunity to submit argument or exception to the Recommendation of the Office of Administrative Hearings dated August 31, 2012 and requested that the Department invite the parties to make argument or exceptions by a certain date. (*Id.* at F) This was a strange request since the parties had agreed to the dismissal and Judge Lipman had circulated his proposed order to counsel for both parties dismissing the case with prejudice to which both

parties apparently agreed. Assistant Commissioner Ahlers requested that the parties submit argument or exceptions by June 26, 2013. Counsel for Western Sky submitted argument detailing the procedural background as noted above and arguing:

> For all of the reasons asserted in the Special Appearance, the Department continues to lack jurisdiction over Western Sky. Further, the dismissal with prejudice is now binding on the Department. The Department had full and fair opportunity to engage in the contested case hearing before Judge Lipman. Instead, upon receipt of the Special Appearance and after reviewing the arguments made therein, the Department agreed that it lacked jurisdiction over Western Sky and agreed to dismissal of this matter with prejudice. The Department cannot now, ten months later, reverse course.
>
> Minn. Stat. § 14.59 provides that a contested case can be informally disposed of by consent, agreement, settlement or arbitration between the parties. In this case, the parties came to an agreement to dismiss this case with prejudice and promptly submitted their consent and agreement to Judge Lipman. That procedure is provided for by Minn. Rules pt. 1400.5900. As such, any further proceedings should be cancelled and no further report or recommendation should be filed by the Department. 21 Minn. Prac., Administrative Prac. & Proc. § 9.20 (2d ed.).
>
> The Department is bound by its agreement that it lacks jurisdiction and this case is dismissed with prejudice. Judge Lipman's Order, in adhering to the agreement of the parties, is *res judicata* or the Department is collaterally estopped from proceeding further with this matter.

(*Id.* at Ex. G.) Contrary to the actual facts established by the emails among Judge Lipman and the parties, Ms. Leppink submitted a letter to Assistant Commissioner Ahlers stating that the "Department did not request that the Office of Administrative Hearings dismiss the matter 'with prejudice.'" (*Id.* at Ex. H.) On July 9, 2013,more than ten months after the case against Western Sky was dismissed by agreement of the parties **with prejudice,** Assistant Commissioner Ahlers issued an order which purported to change the dismissal with prejudice to which the parties previously agreed, to a dismissal without prejudice. (*Id.* at Ex. I.) Two days later, the Minnesota Attorney General and the Commissioner of Commerce filed the present action.

C. Much of the State's "Evidence" is Inadmissible and the State Fails to Cite the Opinion of the U.S. District Court for South Dakota Which is Adverse to its Theories.

Minn. R. Civ. P. 65.02(b) provides that a "temporary injunction may be granted if by affidavit, deposition testimony, or oral testimony in court, it appears that sufficient grounds exist therefor." The rule does not allow for otherwise inadmissible evidence to be offered as the primary basis to prove an essential element. But that is exactly what the State does in its Memorandum in Support of it Motion for Temporary Injunction. On pages 7 – 9 of the "fact" section of its Memorandum, the State cites ten Cease and Desist Orders or opinions of various state officials as evidence or proof if the State's theory that CashCall used Western Sky, which the State claims was not a tribal entity, to allegedly exploit the doctrine of tribal sovereign immunity. These opinions containing hearsay and double hearsay are inadmissible and should not be considered by the Court.

For example, the Cease and Desist Order issued by the State of New Hampshire on June 4, 2013, attached to the Affidavit of Daniel Bryden as Exhibit C, does not present any facts to the court. Instead, the Order presents the conclusions and opinions of the New Hampshire Banking Department. As can be seen from the face of the New Hampshire Document, it was issued **without a hearing** and is likely to change when actual evidence is submitted and considered. Moreover, the "Findings" in the New Hampshire Document are merely conclusions grounded only upon what the New Hampshire Banking Department contends it "has reasonable cause to believe." (Id. at pp. 6, 7.) This is particularly objectionable because, since July 16, 2013, a hearing has been scheduled (for October) to address the conclusory allegations. The conclusions and opinions of the New Hampshire Banking Department are not facts and are prohibited as hearsay. *See Dahlbeck v. DICO Co., Inc.*, 355 N.W.2d 157, 164 (Minn. Ct. App. 1984) (citing

Barnes v. Northwest Airlines Inc., 233 Minn. 410, 433, 47 N.W.2d 180, 193 (1951)) (Public records containing expressions of opinion or the exercise of judgment and discretion are not within public records exception to the hearsay rule).

Likewise, in the April 4, 2013 Cease and Desist Order from Massachusetts (Bryden Aff. at Ex. E) also falls outside the hearsay exceptions. The Massachusetts Order relies solely on the opinions and conclusions of the author, not any facts. (*Id.* at ¶41.) Those conclusions are not definitive and have no factual value. Instead, those conclusions and opinions about CashCall and Western Sky are hearsay and are inadmissible as evidence in support of a temporary injunction.

Similarly, the allegations and opinions expressed in Exhibits L, M, N, P, Q, R, S, and T attached to the Bryden Affidavit should not be allowed into evidence. "Evidence of another crime, wrong, or act is not admissible to prove the character of a person in order to show action in conformity therewith." Minn. R. Evid. 404. There is no probative value to those exhibits and they should be excluded.

While the State spends much time with these inadmissible opinions of State regulators, it fails to cite the Court decision of the United States District Court for the District of South Dakota, although the State acknowledges the proceeding on page 9 of it Memorandum. A copy of the Court's opinion, *F.T.C. v. Payday Fin., LLC*, ___ F.Supp.2d ___, CIV 11-3017-RAL, 2013 WL 1309437 (D.S.D. Mar. 28, 2013), is attached as Exhibit J to the Benson Affidavit. Despite the fact that the State represented to this Court that "every court" that has considered these issues has rejected Defendants' arguments, Judge Lange upheld Defendants' positions finding that the contract provisions at issue here are "not unfair and deceptive when the non-Indian has entered into 'consensual relationships [with tribal] members' with sufficient

connection to on-reservation activities to make the consent to jurisdiction and forum selection provisions enforceable under the first *Montana* exception." *Id.* at p. *1

Significantly, the Court determined that loan agreements made over the Internet, by telephone, or mail between borrowers and Western Sky when doing business on the Indian reservation were formed and consummated on the reservation. The Court found:

> Here, the contract between the Borrowers and Lending Companies 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.,* 80 S.D. 26, 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.").

Id. at p. 10. Although the borrowers signed their loan applications electronically while they were not on the reservation, the Court concluded that the loans were made on the reservation rejecting the FTC's argument (the same argument advanced by the State here) that the physical location of the borrower and the location of the borrower's activity are dispositive. *See id.* at pp. *10 – 11. The Court also rejected the analysis of *Colorado v. Western Sky Financial LLC,* 845 F.Supp. 2d 1178 (D.Colo. 2011), which is relied upon the State in its Memorandum, noting that the District Court in Colorado only considered the borrowers side of the transaction and that if both sides of the transaction are considered, the forum selection clause ought to be enforced.

See id. at pp. *13 - 14.

D. The State Ignores Evidence of the Benefits of These Loan Products.

While the State has submitted affidavits of some borrowers who express discontent with the loans they entered into with Western Sky, the State fails to discuss in its motion the countervailing evidence concerning the benefits of Western Sky's loan product. In fact, a staff

report of the Federal Reserve Bank of New York found that loans, like the ones offered by Western Sky, are mainstream financial products in high demand throughout the country because customers can obtain these loans to pay bills that would otherwise go unpaid, resulting in the shut-off of utilities services, the repossession of a car, or simply the deterioration of the customer's credit score. (*See* Benson Aff. Ex. K, Donald P. Morgan & Michael R. Strain, "Payday Holiday: How Households Fare after Payday Credit Bans" (Federal Reserve Bank of New York Staff Reports No. 309, Feb. 2008) at p. 7.[3])

The Federal Reserve reviewed and reported on short term consumer loans like those offered by Western Sky and found that they are a valuable source of consumer credit and that residents of states that have banned payday credit "have bounced more checks, complained more about lenders and debt collectors and have filed for Chapter 7 ("no asset") bankruptcy at a higher rate." (*Id.* p. 26) The findings of the study conducted by the Federal Reserve "contradict the debt trap/addiction hypothesis against payday lending" and "are consistent with alternative hypothesis that payday credit is cheaper than the bounce "protection" that earns millions for credit unions and banks." (*See id.*)

Another study by the Federal Reserve Bank of Kansas City concludes that much concern has been expressed about the high cost of loan products, like those offered by Western Sky: "Yet, restricting payday lending could deny consumer access to credit, limit their ability to maintain formal credit standing, or force them to seek more costly alternatives." (*See* Benson Aff. Ex. L, Kellly D. Edmiston, "Could Restrictions on Payday Lending Hurt Consumers?"

[3] The loans at issue here are not payday loans but are lower interest installment loans that can be prepaid without penalty. Nonetheless, the principles found by the Federal Reserve still apply.

(Federal Reserve Bank of Kansas City, Economic Review, First Quarter, 2011) at p. 69.) This article concluded:

> The results of its (the article's) empirical analysis support the idea that restricting payday lending may indeed have costs. The evidence showed that consumers in low income counties may have limited access to credit in the absence of payday loan options. As a result, they may be forced to seek more costly sources of credit. The evidence also showed that, in counties iwhout access to payday lending, consumers have a lower credit standing than consumers in counties with access.
>
> The preponderance of evidence suggests that some consumers will likely face adverse effects if payday lending is restricted.

Id. at p. 83.

III, ARGUMENT

A. The State Is Not Entitled To A Temporary Injunction.

The State did not prove it is entitled to a temporary injunction. "A temporary injunction is an extraordinary equitable remedy that preserves the status quo pending a trial on the merits." *Cent. Lakes Educ. Assoc. v. Indep. Sch. Dist. No. 743, Sauk Centre,* 411 N.W.2d 875, 878 (Minn.Ct.App.1987), *review denied* (Minn. Nov. 13, 1987). "A temporary injunction should be granted only when it is clear that the rights of a party will be irreparably injured before a trial on the merits can be held." *Webb Publ'g Co. v. Fosshage,* 426 N.W.2d 445, 448 (Minn.Ct.App. 1988). The State's attempt to avoid the strictures and requirements for obtaining a temporary injunction because it has alleged that a statute has been violated and enjoining the violation would fulfill the purpose of the statute is misplaced. This exception was first articulated in *Wadena Implement Co. v. Deere & Co., Inc.,* 480 N.W.2d 383 (Minn.Ct.App. 1992). But as the Minnesota Court of Appeals has explained:

> In *Wadena Implement Co.,* the parties did not dispute the applicability of the underlying law sought to be enforced. By contrast, where the parties do dispute the applicability of the underlying statute, as is the case here, statutory entitlement to a temporary injunction is not automatic and the trial court must consider all five

> *Dahlberg* factors. *Pacific Equip. & Irrigation, Inc. v. Toro Co.,* 519 N.W.2d 911, 918 (Minn.App.1994), *pet. for rev. denied* (Minn. Sept. 16, 1994). Here, the crux of the parties' dispute is whether appellants are subject to the insurance laws the Commissioner seeks to enforce. As a result, according to this court's decision in *Toro,* statutory entitlement to a temporary injunction is not automatic and the court must make *Dahlberg* findings.

State By Ulland v. Int'l Ass'n of Entrepreneurs of Am., 527 N.W.2d 133, 137 (Minn. Ct. App. 1995). Here too, the crux of the Defendants case is that the statutes cited by the State do not apply to them. In such cases, the Court of Appeals held that "[w]here the trial court fails to analyze the *Dahlberg* factors in granting a temporary injunction, the court commits error." *Id,* 527 N.W.2d at 135.

Therefore, in evaluating whether a temporary injunction is warranted, this Court must consider the five *Dahlberg* factors: (1) the nature and background of the relationship between the parties; (2) the balance of harm to the parties; (3) the likelihood that the party seeking the injunction will prevail on the merits of the action; (4) whether there are public-policy considerations; and (5) whether there are any administrative burdens involved in judicial supervision and enforcement of the temporary injunction. *Metro. Sports Facilities Comm'n,* 638 N.W.2d at 220-21 (quoting *Dahlberg Bros. v. Ford Motor Co.,* 272 Minn. 264, 274-75, 137 N.W.2d 314, 321-22 (1965)). While each of the five factors articulated in *Dahlberg* is important, the probability of success in the underlying action is a "primary factor" in determining whether to issue a temporary injunction. *Minneapolis Fed'n of Teachers v. Minneapolis Pub. Schs.,* 512 N.W.2d 107, 110 (Minn.ct.App.1994), *review denied* (Minn. Mar. 31, 1994). Additionally, failure to show irreparable harm is, by itself, a sufficient ground for denying a temporary injunction. *Morse v. City of Waterville,* 458 N.W.2d 728, 729 (Minn.App.1990), *review denied* (Minn. Sept. 28, 1990).

1. The State is unlikely to prevail on the merits of its claims.

In the first instance, the State's request for a temporary injunction does not meet the initial requirement that a temporary injunction preserve the status quo until trial. *Cent. Lakes Educ. Assoc.*, 411 N.W.2d at 878. Rather, the State's request changes the status quo prior to any determination by this Court as to whether the laws the State seeks to impose against the Defendants should even apply to them. As Defendants argued in their Memorandum in Support of their Motion to Dismiss filed concurrently herewith and incorporated herein by reference, the State does not allege this in its Complaint that the loans at issue were consummated in Minnesota or even that the Defendants themselves made the loans at issue. 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 loans were consummated on the Cheyenne River Sioux Indian Reservation with Western Sky, which is owned by an enrolled member of the Tribe and, therefore, entitled to Tribal member immunity. Finally, due to its dismissal with prejudice of its licensing action against Western Sky, the doctrine of collateral estoppel prohibits the State from suing Defendants on the same loans that the State determined it had no authority over.

Additionally, the facts presented herein show that the State is not entitled to the relief it seeks. For example, the State alleges that the Defendants somehow violated Minnesota's Consumer Protection Statutes because Western Sky's loan agreement might "give borrowers the misleading impression that the loans are subject to tribal law and tribal jurisdiction." First, the contracts at issue are between non-defendant Western Sky and the borrowers, not the

Defendants. More importantly, the loans are subject to tribal law and tribal jurisdiction as the South Dakota Court found in the *FTC v, Payday Finance* case.

Finally, as discussed in the Section II. B. above, 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. (Benson Aff. at Ex. A). Aware of Western Sky's lending and its assignment of loans to WS Funding, the State did not order Western Sky to cease making loans, or selling loans to WS Funding. Instead, it dismissed the action *with prejudice*. (*Id.* at Exhibits D and E.) This action served to estop the State from filing the same suit against the entities to whom those loans were assigned.

A party seeking to establish equitable estoppel against a government entity must establish four elements:

> First, there must be "wrongful conduct" on the part of the authorized government agent. Second, the party seeking equitable relief must reasonably rely on the wrongful conduct. Third, the party must incur a unique expenditure in reliance on the wrongful conduct. Finally, the balance of the equities must weigh in favor of estoppel.

City of North Oaks v. Sarpal, 707 N.W.2d 18, 25 (Minn. 2011) (citations omitted). Here, each element is clearly present. The unique expenditure made by WS Funding was the purchase of loans made by Western Sky to consumers who reside in the State of Minnesota. WS Funding's reliance upon the dismissal in its purchase of Western Sky's loans was reasonable: with its August 31, 2012 dismissal *with prejudice*, the State itself had determined that it could not apply Minnesota law to Western Sky's loans. (Baren Aff. at ¶8.) As the assignee "stands in the shoes" of the assignor, it is entitled to rely upon such rulings. *See Ill. Farmers Ins. Co. v. Glass Serv. Co.*, 683 N.W.2d 792, 803 (Minn. 2004) and *Mountain Peaks Fin. Servs., Inc. v. Roth-Steffan*, 778 N.W.2d 380, 385 (Minn. Ct. App. 2010). By waiting ten months after agreeing to a

dismissal with prejudice to raise the issue and then filing the instant action concerning Western Sky's assigned loans after dismissing the same action against Western Sky with prejudice thereby inducing reasonable reliance by Defendants is a wrongful – and a clear attempt to apply Minnesota law to on-reservation conduct. And the equities weigh in favor of estoppel: Parties in commerce must be permitted to rely upon the public legal pronouncements of an agency that administers a set of laws. *See Department of Human Services of Stat. of Minn. V. Muriel Humphrey Residences*, 436 N.W.2d 110, 118 (Minn. Ct. App. 1989) (reasonable of party to rely on statements made by agency regarding licensing requirements).

Analysis of the timeline of the State's "redo" of its Western Sky dismissal would lead one to believe that it was engineered to allow the State to then go and file suit against the assignee of the loan – as the State surely recognized that the dismissal with prejudice was binding on the assignee as well as the assignor. The State's "end around" is simply repugnant to the notions of fair play and substantial justice that form the basis of due process.

2. The State failed to show that anyone will suffer irreparable injury absent a temporary injunction.

The State made no showing that irreparable injury will occur should it not be granted an injunction. The party requesting a temporary injunction must demonstrate that there is no adequate legal remedy and that an injunction is necessary to prevent irreparable injury. *See U.S. Bank Nat'l Ass'n v. Angeion Corp.*, 615 N.W.2d 425, 434 (Minn. Ct. App. 2000), *review denied* (Minn. Oct. 25, 2000). "An injunction will not issue to prevent an imagined injury which there is no reasonable ground to fear. The threatened injury must be real and substantial." *Hollenkamp v. Peters,* 358 N.W.2d 108, 111 (Minn. Ct. App. 1984) (quoting *AMF Pinspotters, Inc. v. Harkins Bowling, Inc.*, 260 Minn. 499, 504, 110 N.W.2d 348, 351 (1961)). Further, to be granted an injunction, the moving party must offer more than a "mere statement that it is suffering or will

suffer irreparable injury." *Carl Bolander & Sons v. City of Minneapolis,* 502 N.W.2d 203, 209 (Minn. 1993). Money damages are generally not independently sufficient to provide a basis for injunctive relief. *Miller v. Foley,* 317 N.W.2d 710, 713 (Minn. 1982).

The only harm cited by the State should the injunction not be granted is that financial hardship may continue for some borrowers. This ignores the fact that some borrowers may be better off from their ability to obtain the loan product offered by Western Sky as detailed in the Federal Reserve Report. Benson Aff. at Ex. K. Further, the harm cited by the State is relieved by the provision of money damages.

In weighing the harms to each party, the State also ignores the actual injury to Defendants and Minnesota residents from the imposition of an injunction which is immediate and serious. All parties to loan contracts freely entered into are harmed when orderly and regular loan servicing of those contracts is prevented. Western Sky is not prohibited from issuing loans to applicants who list Minnesota as their residence on their application. Who will service those loans? Should the loan product offered by Western Sky be prohibited, what will become of the customers who the Federal Reserve Bank and other studies indicate? What size bond is the State prepared to post to cure the damages that will arise if his temporary injunction is improvidently granted?

With respect to the final point, the State has not offered to post a bond should it be granted a temporary injunction, but Minn. R. Civ. P. 65.03(a) states:

> No temporary restraining order or temporary injunction shall be granted except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.

In the present case, if a temporary injunction issues, a substantial bond will be necessary to protect Defendants from significant losses.

3. The nature and background of the relationship between the parties preexisting the dispute giving rise to the request strongly disfavors injunctive relief.

As discussed at length above, last year, the State, through its Commissioner of Commerce, agreed to dismiss its enforcement action against Western Sky with prejudice. Eleven months later, the State is demanding a Temporary Injunction to stop the loans that it believed it had no right to stop when it first brought suit in 2012. The Defendants relied upon the State's actions and continued to fund and service the loans issued by Western Sky which the State itself agreed could continue. It is wholly inequitable to for the State to now request injunctive relief given its past dealings with Western Sky and the Defendants herein. Indeed, given that the State, under its current theories, could have stopped the lending and servicing almost a year ago, it is difficult to understand what exigencies compel this court to grant the State the extraordinary relief of a temporary injunction.

4. The administrative burdens imposed by the injunction will be high.

The State requests such an overly broad and far reaching injunction that the administrative burdens imposed on the Court in enforcing the injunction will be extremely high. In the first instance, the injunction applies not only to Defendants but to their agents, servants, employees, successors, and assigns making it difficult to determine to whom enforcement ought to apply. Further, the difficulties of dealing with the terms of the injunction as described above relating to confusion and acceptance of payments will make for an administrative nightmare.

5. Public Policy favors enforcing contracts freely entered into.

Public policy favors enforcing the plain terms of a contract. Parties who sign plainly written documents must be held liable, otherwise such documents "would be entirely worthless and chaos would prevail in our business relations." *Watkins Prod., Inc. v. Butterfield,* 274 Minn.

378, 380, 144 N.W.2d 56, 58 (1966)

B. The State Alleges that Defendants are Liable as the "De Facto" Lender, a Theory that Has No Basis In Minnesota or Federal Indian Law.

The State's allegations against CashCall, and its subsidiary, WS Funding, are, in part, predicated, upon an unsupportable application of a *de facto* or true lender test to determine "true lender" identity. By using this "test," which has no basis in Minnesota or federal Indian law, the State alleges that CashCall, and not Western Sky, was the de facto lender and that Minnesota law therefore applies to the loans in issue. Use of this test, however, is wholly without basis: not only is the commercial relationship between Western Sky and WS Funding typical of relationships that support consumer lending operations, the de facto lender test is not mentioned in any Minnesota statute or regulation and has never been applied by or considered by a Minnesota court or a federal court in the context of lending by a tribal member on a reservation.

Instead of citing relevant Minnesota authority, the State provides the Court with a number of administrative agency decisions from other states which purport to find that CashCall is liable as the "de facto" lender. These decisions are not authority for the proposition that Minnesota law imposes such a test. In fact, when the Minnesota regulatory agency considered pursuing claims based on the loans at issue in the State's complaint, it pursued a claim not against CashCall, but against the actual lender, Western Sky Financial. (That regulatory action was subsequently dismissed as discussed above).

The State cites only two court decisions in support of its theory. In one case, the court did not hold that a de facto lender theory was the law, but allowed the parties to proceed to discovery in order to develop the facts regarding such a claim, so that the court could make a decision on a complete record. *Ubaldi v. SLM Corp.*, 852 F. Supp. 2d 1190, 1202-03 (N.D. Cal. 2012). The court held open the possibility that the National Banking Act would preempt state law and

therefore not allow a claim against a purported "de facto" lender instead of the national bank that made the loan. *Id.* The other case upon which the State relies upon to further its unfounded basis for liability is one that is on appeal to the West Virginia Supreme Court. *State ex rel McGraw v. CashCall, Inc.*, No. 08-C-1964 (Cir. Ct. Kanawha County, WV Sept. 10, 2010), *appeal pending before Supreme Court of W.Va.* As such, not only is the lower court's decision not final, it involves a *West Virginia* case, based upon facts that are largely distinguishable from these, and is premised in *West Virginia* law, not Minnesota law. Moreover, the facts in both these cases involve loans made by federally insured depository institutions, not loans made by tribal members who possess tribal immunity.

1. **The commercial relationship between Western Sky and CashCall, through its subsidiary, WS Funding, is typical of commercial relationships entered into by consumer lenders and should not be re-characterized in a manner that has no basis in market realities.**

The State's allegation that CashCall, through its subsidiary, was the de facto lender boils down to the following: although CashCall did not issue the loans, it is the actual lender because it was obligated contractually to provide certain loan servicing-related functions to Western Sky, including some communications with customers, bought loans underwritten by Western Sky, and used collection letters when operating as holder, or assignee, of the consumer notes in order to collect upon the contractual obligations contained therein.

To conclude that Western Sky is *not* the true lender is simply wrong. The State does not cite any evidence to support its theory. Instead, it cites an administrative order issued by the New Hampshire State Banking Department. (State Br. at 21, *citing* Bryden Aff. Ex. C.) That administrative order is not evidence nor is it binding on this Court. *See supra.* at pp. 7 – 8. In order to demonstrate that it has a likelihood of success on the merits of its claims, the State is obligated to put forth some evidence.

But in fact, Western Sky is the lender, as shown by the following facts:

- Western Sky has employed as many as 80 individuals, almost all enrolled members of the Cheyenne River Sioux Tribe, who take loan applications, review and underwrite these applications, communicate credit decisions and other information to borrowers and fund accepted loan applications. (Lawrence Aff. at ¶7)
- Western Sky reviews loan applications, approves or rejects loan applications, and communicates approval to a consumer all from the Reservation. (*Id.* at ¶9)
- All loan funding decisions are made on the Reservation and Western Sky maintains its own bank account and conducts its own banking activities to fund those loans. (*Id.* at ¶¶8 and 9)

As such, nearly every single action that a lender undertakes in connection with customer acquisition is performed by Western Sky, not CashCall. Simply because Western Sky has contracted with a third party (CashCall) to perform limited customer support functions prior to acquisition of a customer, the indicia as to the entity that *made* the loan with the consumer all point to Western Sky Financial.

In addition, it is indisputable that Western Sky was responsible for (and liable for) complying with all applicable laws, like the Truth in Lending Act. (*See* Agreement for the Assignment and Purchase of Promissory Notes, Section 7(d), Bryden Aff. Ex. F ("Assignment Agreement").) The de facto lender theory advanced by the State also ignores its own admission that all of the loans in issue were made by Western Sky in compliance with its underwriting criteria; neither CashCall nor WS Funding participated in any way in the underwriting criteria used by Western Sky. Contractually, Western Sky represented and warranted to WS Funding that

"each borrower will meet the criteria *as set by Western Sky Financial from time to time,* as shown more fully in the Criteria Appendix provided by Western Sky Financial." (Assignment Agreement, Section 7(a).)

Thus, when examined in their totality, all of the components of the lending process cited to above illustrate a transaction that was undertaken by Western Sky Financial with limited marketing and customer service support from CashCall, or its subsidiary, prior to acquisition of the customer relationship. Thus, the de facto lender test – even if it were a viable legal theory in this context – cannot be reconciled with the facts in this case.

The Fourth Circuit applied these same criteria in *Discover Bank v. Vaden* to decide which of two possible defendants was the lender. 489 F.3d 594, 601-03 (4th Cir. 2007), *rev 'd on other grounds,* 556 U.S. 49, 129 S. Ct. 1262, 173 L. Ed. 2d 206 (2009). As the court explained, the lender was the entity "in charge of setting the terms and conditions of lending money" who actually "extended [] credit[.]" *Id.* at 602. The court did not consider a de factor lender or predominant economic interest test. Similarly, the Eighth Circuit in *Krispin v. May Dep't Stores Co.* was required to decide whether the true lender was the bank that underwrote and funded credit for store-branded credit cards or the store that "purchased the bank's receivables on a daily basis." 218 F.3d 919, 923 (8th Cir. 2000). The court held that the bank was the true lender because, even though it retained *no* economic interest in the receivables it generated daily, it was the entity that issued the credit and set the terms. *Id.* at 924. This was so even though the "ongoing assignee (the store)" obviously bore the predominant economic interest in the receivables once it purchased them: "the store's purchase of the bank's receivables [the same day they are created] does not diminish the fact that it is . . . the bank, and not the store, that issues credit, processes and services customer accounts, and sets such

terms as interest and late fees." *Id.* Finally, in an unpublished decision by the U.S. District Court for the Southern District of Indiana, *Hudson v. Ace Cash Express*, 2002 WL 1205060 (May 30, 2002), the court rejected a "true lender" argument, finding that such policy arguments might "appeal to those who believe substance should always trump form in the law" and holding that the "actual" lender argument did not "offer a basis for giving [plaintiff] any relief." *Id.* at 4. When examined collectively, these cases support a position that the de factor lender test does not apply to the facts at hand given that, as stipulated above, Western Sky had sole responsibility for issuing the credit and setting the account terms and only sought assistance from CashCall for "processing" the accounts with respect to limited, enumerated customer service functions.

To see how far the State's proposed "de facto" lender test varies from commercial realities, note that the federal banking regulators, *including* the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency and the Office of Thrift Supervision (no longer active) (collectively, the "Banking Agencies"), have determined that the institutions which they supervise can sell 100% participation interests in the loans they originate. As noted by the Banking Agencies, "[d]epository institutions use loan participations as an integral part of their lending operations. Participations in underlying loans may be sold to enhance an institution's liquidity, interest rate risk management, capital and earnings; diversify its loan portfolio, and serve the credit needs of its borrowers."[4]

[4] *See* Interagency Statement on Sales of 100% Loan Participations, Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, Office of the Comptroller of the Currency, and Office of Thrift Supervision, April 10, 1997. Available at http://www.occ.gov/news-issuances/bulletins/1997/bulletin-1997-21a.pdf.

Given this endorsement of the sale of 100% interests in loans made by the over 7000 banks supervised and examined by the nation's federal banking regulators, it seems far-fetched for the State to cite to the fact that the loans underwritten and funded by Western Sky that were later purchased by WS Funding somehow acquire the "taint" of loans not properly made simply because a consumer lender entered into a commitment with a third party to sell such loans after a contractually prescribed period of time.

One should also consider Fannie Mae, the nation's largest buyer of consumer loans (specifically, of consumer mortgages). By its congressional charter, Fannie is expressly forbidden from itself making loans. 12 U.S.C. § 1719(a)(2). And yet, if a predominant economic interest test applied, Fannie would be the nation's largest consumer lender for *exactly* the same reasons the State concluded CashCall was the true lender here. Fannie's guide titled "Selling Whole Loans to Fannie Mae," published in 2009 while Fannie was in the conservatorship of the federal government, is instructive. *See* Selling Whole Loans to Fannie Mae (2009).[5] It advises lenders of the following:

> If residential mortgages are a major business line for your lending institution, chances are that selling loans in the secondary mortgage market is a component of your strategy. **By tapping into the secondary market, not only are you able to fund more borrowers, you also may be able to offset some or all of the credit risk associated with the loans you originate** and extend your reach by offering products that might not fit with your own institution's investment model.
>
> Selling residential mortgage loans to Fannie Mae can be a valuable strategy for increasing liquidity and managing risk. **Once you sell the loan, you no longer need to worry about the potential mismatch between your cost of funds and interest rate income from borrowers. Generally, we also assume the credit risk,** that is, the risk of loss should borrowers default on their mortgages. You can deliver loans one at a time and receive funds as soon as 24 hours after we receive your completed delivery.

[5] *Available at* https://www.fanniemae.com/content/job_aid/selling-whole-loans.pdf.

Id. at p. 7.

The guide goes on to explain "how *a forward commitment to sell loans* helps [the lender] hedge against interest rate risk, [and] how over-committing can expose [the lender] to fallout risk...." *Id.* (emphasis added). And further how lenders "have two options when entering into an agreement (or commitment) to sell whole loans to Fannie Mae for cash." *Id.* at 10. The first is a "mandatory commitment," whereby the lender "agree[s] to deliver a specific dollar amount of loans, which certain tolerances [set by Fannie], to Fannie Mae by a specified future date" for purchase "at an agreed upon price." *Id.* The second is a "best efforts commitment[,]" whereby the lender "agree[s] to deliver a specific loan to Fannie Mae by a specified date if the loan closes." *Id.*

Not only would a de facto, or predominant economic interest, test predicated on loan purchases make Fannie Mae a lender (and therefore in breach of its charter), but it would transform nearly all current lenders into "sham" non-entities and all loan purchasers into "true lenders," the latter of which would include, to name but a few, the Federal Housing Agency, Freddie Mac, and every investment bank, insurance company, and hedge fund (among other types of entities) that contracts to purchase consumer loans of any type. Simply put, treating the purchaser of a loan as the lender, even if the purchaser agrees in advance to purchase loans satisfying certain requirements, cannot be reconciled with the economic marketplace in which consumer lenders find capital and services necessary to make consumer loans. The State is wrong to advance a de facto test with respect to its interpretation of the agreements between Western Sky and CashCall (through its subsidiary, WS Funding).

2. Neither the Minnesota Legislature nor the Minnesota courts have adopted a "de facto" lender test in reviewing loan arrangements between parties.

To this date, no Minnesota court has discussed or applied the "de facto" lender test to examine the relationship between parties engaged in the making of consumer loans, and the Minnesota legislature has remained equally silent. And further, the State has not proffered any legitimate interest in advocating for the application of this test to the situation before the Court.

To be sure, had the Minnesota legislature seen fit to establish such a test applicable to consumer lending, it could have done so. For instance, Georgia Statute 16-17-2(b)(4) states in relevant part that the Code section applies to "any arrangement by which a de facto lender purports to act as the agent for an exempt entity. A purported agent shall be considered a de facto lender if the entire circumstances of the transaction show that the purported agent holds, acquires or maintains a predominant economic interest in the revenues generated by the loan." *See also Bankwest, Inc. v. Baker*, 446 F.3d 1358, 1565 (11th Cir. 2006) (State of Georgia conceded that the statute does not apply to loans made prior to the effective date of the statute). It would be inappropriate now to for this Court to apply *ad hoc* a test that has never been used in this state and that has not been adopted by the legislature. Even if the Court somehow determined that this test was the correct analysis, it would be unfair and illogical for the State to retroactively apply the test to loans made by Western Sky, purchased by WS Funding, and serviced by CashCall.

It is incumbent on the legislature to specify the commercial activity which it wishes to regulate. Because the de facto lender test does not exist in the Minnesota statutes or case law, it would be illogical and unfair to apply it here even assuming *arguendo* that WS Funding held the predominant economic interest in loans in issue. And in any event, the theory should not be allowed to advance because there is no adequate notice to parties that typical commercial lending activities will be regulated in this manner.

C. To the extent CashCall may be liable as an assignee of the notes from Western Sky Financial, it also can assert any of Western Sky's defenses.

Recognizing the inherent weakness in its "de facto" lender theory, the State also asserts that CashCall is liable as the assignee of Western Sky's contracts. The State notes that Minnesota follows the rule that assignees of a contract assume the legal obligations of the assignor. (State Br. at 21, *citing Ill. Farmers Ins. Co. v. Glass Serv. Co.*, 683 N.W.2d 792, 803 (Minn. 2004) and *Mountain Peaks Fin. Servs., Inc. v. Roth-Steffan*, 778 N.W.2d 380, 385 (Minn. Ct. App. 2010).

While this rule of law is well-established, it does not support the State's requested injunction here. The State is seeking an injunction barring CashCall from *making* future loans to Minnesota consumers. But CashCall makes no such loans. To the extent that loans previously made by Western Sky Financial and assigned to CashCall violated the law – and CashCall does not concede that the did so – that would only make CashCall liable for prior conduct. It cannot be barred from making future loans where there is no evidence that it has made loans at all.

The contract-law rules regarding assignment are relevant on the motion, however, to the extent that they provide CashCall with defenses to the State's claims. The 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. *Ill. Farmers Ins.*, 683 N.W.2d at 803. Thus to the extent that Western Sky Financial would have defenses to the State's claims, such as under the doctrine of tribal sovereign immunity, CashCall can now assert those defenses.

IV. CONCLUSION

For the foregoing reasons, Defendants CashCall, Inc. and WS Funding, LLC respectfully request that this Court deny Plaintiff's Motion for Temporary Injunction in its entirety.

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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