

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,

Court File No. 27-CV-13-12740

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.

**PLAINTIFF'S MEMORANDUM OF LAW
IN SUPPORT OF MOTION FOR
TEMPORARY INJUNCTION**

INTRODUCTION

Defendants CashCall, Inc., WS Funding, LLC, and WS Financial, LLC (collectively "Defendants") are affiliated companies that fund, purchase, service, and collect on loans to Minnesota consumers that accrue triple-digit interest at rates up to *42 times higher* than Minnesota law allows. Defendants seek to evade state licensure, usury, and consumer protection laws by using as a "front" a fourth company—Western Sky Financial, LLC ("Western Sky")—which falsely holds itself out as a tribal entity that illegitimately purports to be exempt from state consumer protection laws under the doctrine of tribal sovereign immunity. After Western Sky supposedly originates the loans, they are immediately assigned to Defendants—before the consumer has even made any payments. Defendants then collect all the payments on the loans, charge and collect interest on the loans at rates far in excess

of those allowed by Minnesota law, and indemnify Western Sky for all costs and penalties associated with any regulatory action taken against the lending scheme. Neither Defendants nor Western Sky are licensed to make consumer loans in Minnesota. Western Sky is not owned or operated by a tribe or for the benefit of a tribe, and the doctrine of tribal sovereign immunity does not apply to these loans. Thus, the loans purportedly made by Western Sky and which Defendants fund and collect payments and interest on are unlawful.

Since 2010, at least eleven other states and the Federal Trade Commission have taken action against Defendants or Western Sky for unlawfully making loans without proper state licensure and in violation of state usury laws, for misrepresentations, and/or for illegal debt collection practices. Every court that has considered Defendants' scheme on the merits has rejected their claim of tribal sovereign immunity. The State of Minnesota, through its Attorney General and its Commissioner of Commerce, seeks a temporary injunction to prohibit Defendants from making, extending, arranging, underwriting, funding, or purchasing any additional unsecured, personal loans to Minnesotans, unless Minnesota licensing, lending, and consumer protection laws are followed.

BACKGROUND

I. HISTORY OF THE DEFENDANT CORPORATIONS.

Defendants are three affiliated companies. CashCall, Inc. ("CashCall") is a California corporation. Bryden Aff., Ex. A. WS Funding, LLC ("WS Funding") is a Delaware limited liability company and a wholly owned subsidiary of CashCall. *Id.*, Exs. B & C at 2. The CEO, president and owner of CashCall is the president of WS Funding. *Id.*, Exs. B, C at 2, D, E at ¶ 6, H at 2, ¶ 1. CashCall sometimes does business under the name WS Financial, LLC ("WS Financial"). *Id.*, Ex. F. The owner and president of CashCall signs contracts as President of WS Financial. *Id.* at WS00237.

Minnesota law generally requires a lender that makes small loans to Minnesota consumers to be licensed with the Minnesota Department of Commerce. Minn. Stat. § 47.60, subd. 3 (prohibiting

unlicensed entities from offering consumer small loans of up to \$1,000 to Minnesotans); Minn. Stat. § 53.04 (granting a properly licensed Industrial Loan & Thrift the authority to make loans of up to \$100,000); Minn. Stat. § 56.01 (prohibiting unlicensed entities from offering loans of up to \$100,000). Defendants are not—and never have been—licensed to offer small, unsecured loans to Minnesota borrowers. Wall Aff., ¶ 2. In addition, the “front” company used by Defendants—the South Dakota limited liability company Western Sky—also is not—and never has been—licensed to offer loans in Minnesota. *Id.*

A. CashCall’s Prior “Rent-A-Bank” Scheme.

Before Defendants devised the lending scheme that is the subject of this lawsuit, CashCall engaged in a similar effort to evade state law through a device known as a “rent-a-bank” or “rent-a-charter” scheme. In that scheme, an unlicensed company unlawfully attempts to evade state laws by engaging in a sham transaction in which it purports to affiliate with a national or state-chartered bank to make consumer loans, claiming federal preemption of state usury and other laws, even though the real party in interest behind the transaction is the unlicensed entity. Federal banking regulators largely put a halt to those schemes by the mid-2000’s.¹

CashCall, however, continued to engage in “rent-a-bank” lending long after other lenders stopped. Accordingly, the West Virginia Attorney General filed suit against CashCall in 2008, alleging that CashCall entered into an improper relationship with a South Dakota bank (First Bank and Trust of Milbank, South Dakota) for purposes of evading West Virginia’s usury and consumer

¹ In 2003, the Office of the Comptroller of the Currency (“OCC”) initiated a series of enforcement actions against national banks that were engaged in such schemes. See OCC Press Release dated January 21, 2003, NR 2003-03 (quoting the Comptroller of the Currency as stating that rent-a-bank schemes are a “matter of great concern to us”). In 2005, the Federal Deposit Insurance Corporation followed suit for state-chartered banks, warning banks about the “credit, operational, legal and reputation risks” that such schemes posed and threatening “enforcement action” against banks engaged in such schemes. FDIC Financial Institutions Letters, Guidelines for Payday Lending, FIL 14-2005, February 2005, at 2. These combined banking regulatory actions are credited with helping to curb “rent-a-bank” or “rent-a-charter” schemes.

protection laws. *West Virginia v. CashCall et al.*, Civil File No. 08-C-1964, Kanawha County Circuit Court, Complaint at ¶¶ 3-7. Bryden Aff., Ex. G. Following a trial, on September 10, 2012, the West Virginia court found that “the purpose of the lending program was to allow CashCall to hide behind the Bank’s charter and its right to export interest rates under federal banking law, as a means for CashCall to deliver its loan product to states like West Virginia, with usury laws.” *West Virginia v. CashCall*, Final Order on Phase II of the Trial: the State’s Usury and Lending Claims, at 25. Bryden Aff., Ex. H. The court found that CashCall was “the de facto lender of such loans” (*id.* at 27) and enjoined it from making loans in West Virginia without a license and from making or collecting usurious loans, imposed a civil penalty of \$730,000, awarded judgment of \$10,045,687, and declared all loans made by CashCall in West Virginia null and void.² Following this regulatory scrutiny, CashCall’s “rent-a-bank” activities ended.

B. CashCall Starts Up the Current “Rent-A-Tribe” Scheme.

In December, 2009—about 13 months after the West Virginia Attorney General sued CashCall for engaging in the “rent-a-bank” scheme and about 18 months after the FDIC took action against one of the “front” banks used by CashCall—Defendants devised the current scheme, often called the “rent-a-tribe” scheme. In this scheme, an unlicensed lender purports to affiliate with an Indian tribe in an improper attempt to claim federal tribal sovereign immunity from state licensure and lending laws. Even the payday lending industry has decried “rent-a-tribe” lending as improper.³

² Around the same time, the FDIC brought an enforcement action against another one of the banks used by CashCall—First Bank of Delaware—for engaging in such a scheme with CashCall and other non-bank lenders. The FDIC issued a Notice of Charges, which sought an order requiring First Bank of Delaware to cease and desist its lending operations with CashCall and to pay restitution and civil penalties for various violations of law. *In the Matter of First Bank of Delaware and CompuCredit Corp.*, FDIC-07-256b, FDIC 257k, Federal Deposit Insurance Corporation, June 10, 2008. Bryden Aff., Ex. I.

³ In February 2011, the Community Financial Services Association of America, which represents the payday lending industry, condemned the practice of affiliating with tribes to circumvent state regulation and announced that it would expel members who engaged in such schemes. *See* Press Release, Community Financial Services Association of America, Storefront Payday Lenders Reject Native American Partnerships (Feb. 10, 2011).

On December 28, 2009, CashCall or its affiliates entered into three agreements with Western Sky, a South Dakota limited liability company:

First, under an agreement entitled “Agreement with Western Sky Financial for the Assignment and Purchase of Promissory Notes,” Western Sky purports to originate loans to consumers, but then sells the loans to WS Funding or WS Financial on a daily basis. Bryden Aff., Ex. F, WS00233-237. Western Sky warrants to WS Financial that borrowers will not have made *any* payments on the loans before their purchase by WS Financial. *Id.*, WS00235 at ¶ 7(c). WS Financial or WS Funding then assumes all rights of Western Sky to collect on the loans. *Id.*, WS00236 at ¶ 10. Defendants fund the loans originated by Western Sky by maintaining a deposit account in Western Sky’s name with a balance equal to the full value of two days of loans made to consumers. *Id.*, WS00235 at ¶ 8. Money in this account is used to fund the loans to borrowers. *Id.* Defendants bear all the risk of loss on the loans, and indemnify Western Sky for “all costs arising or resulting from any and all civil, criminal or administrative claims or actions, including but not limited to fines, costs, assessments and/or penalties” and attorney’s fees. *Id.*, WS00236 at ¶ 11.

Second, under an “Agreement for Service” between WS Financial and Western Sky, Defendant WS Financial agrees to conduct the underwriting review of loan applications, to provide inbound and outbound customer-service support including communication with borrowers by telephone, email and text message during the origination and servicing of the loans, to provide website hosting and technical support, to provide a toll-free telephone and facsimile number, and to service the loans in all other respects. *Id.* at WS00241-42. In addition, Western Sky grants to CashCall the right to use its artwork, designs, trademarks, slogans, logos and other advertising material to engage in advertising online, on television, on the radio, and in print. *Id.* at WS00240, ¶ 3.

Third, under a “Promissory Note,” Defendant WS Financial provides the working capital used by Western Sky to run its operations. *Id.* at WS00238.

II. CASH CALL USES WESTERN SKY—WHICH IS NOT A TRIBAL ENTITY—TO EXPLOIT THE DOCTRINE OF TRIBAL SOVEREIGN IMMUNITY.

Despite funding the loans, underwriting the loans, immediately buying the loans, collecting the interest and principal on the loans, and controlling virtually every aspect of the lending, CashCall routes these loans through Western Sky to give the false appearance of being exempt from state laws by tribal sovereign immunity. Defendants do this to skirt state usury and consumer protection laws.

Under the doctrine of tribal sovereign immunity, certain legitimate activity actually carried out by Indian tribes on tribal reservations for the benefit of a tribe is exempt from certain state regulations. Western Sky, however, is not owned or operated by an Indian tribe, is not a tribal entity, and does not exist for the benefit of a tribe. *Bryden Aff.*, Ex. J. Instead, Western Sky is a limited liability company created under South Dakota law, and its sole member is an individual named Martin Webb. *Id.*, Exs. J & K at 2, ¶ 1. While Mr. Webb holds himself out as a member of the Cheyenne River Sioux Tribe, no approval was required from the Cheyenne River Sioux Tribe for Western Sky to become a South Dakota limited liability company. *Id.*, Ex. J. The profits made by Western Sky are distributed to Mr. Webb, and Western Sky does not operate for the benefit of an Indian tribe. *Id.*, Exs. J & K at 10. The doctrine of tribal sovereign immunity does not apply to the loans made by Western Sky to Minnesota consumers.

At least eleven states, as well as the federal government, have taken enforcement actions against Defendants or Western Sky, relating to this lending scheme:

First, **Colorado** sued Western Sky on January 27, 2011, alleging that Western Sky's loans to Coloradans were illegal, violated Colorado's usury laws, and that Western Sky unlawfully made consumer loans to Coloradans without the required license. *Colorado v. Western Sky Fin., LLC et al.*, Case No. 11CV638, Denver County District Court, Complaint. The Denver County District Court ruled in favor of Colorado on its summary judgment motion, holding that "Webb, as an enrolled

member of the Tribe, is not individually entitled to immunity, nor does his membership in the Tribe confer such immunity upon Western Sky.” *Colorado v. Western Sky Fin., LLC et al.*, Case No. 11CV638, Denver County District Court, April 15, 2013 Order at 8. Bryden Aff., Ex. K. In addition to granting Colorado’s motion for summary judgment, the court rejected Western Sky’s assertion of tribal sovereign immunity and ordered Western Sky to pay Colorado’s attorney fees incurred litigating the sovereign immunity issue. *Id.* at 14.

Second, on June 4, 2013 the State of **New Hampshire** issued a Cease and Desist Order against WS Funding and CashCall. The State of New Hampshire found that CashCall and/or WS Funding are the de facto lender for the loans and that the companies deceptively concealed their relationship. The Order required CashCall and WS Funding to disgorge any finance charges already collected, to pay restitution to New Hampshire consumers, and to pay a fine of approximately \$1.9 million. Bryden Aff., Ex. C.

Third, on April 4, 2013 **Massachusetts** issued Cease and Desist Orders against CashCall, WS Funding and Western Sky ordering them to cease and desist from engaging in this scheme. The Order further directed CashCall and WS Funding to cease and desist from collecting on loans made to Massachusetts consumers and to refund to consumers all interest, finance charges, and fees already collected. Bryden Aff., Ex. E.

Fourth, the **Maryland** Commissioner of Financial Regulation issued an Opinion and Final Order dated June 22, 2012 ordering Western Sky to cease and desist from making loans in Maryland, from collecting on loans already made, to refund all amounts collected from Maryland consumers, and to pay a civil penalty. *Comm’r v. Western Sky Fin. et al.*, Case No. CFR-FY2011-182, OAH No. DLR-CFR-76A-47146, Opinion and Final Order dated May 22, 2013. Bryden Aff., Ex. L. In rejecting Western Sky’s sovereign immunity defense, the Commissioner held that it “is undisputed that

tribal sovereign immunity does not protect individual tribal members.” (quoting *Cash Advance and Preferred Cash Loans v. State*, 242 P.3d 1099, 1111 (Colo. 2010)). *Id.* at 9.

Fifth, **Oregon**’s Division of Finance and Corporate Securities issued a Final Order to Cease and Desist against Western Sky in 2012, requiring Western Sky to cease lending in Oregon, cease collection of interest in Oregon, and to pay a \$2,500 civil penalty for each loan given to an Oregon borrower. Bryden Aff., Ex. M.

Sixth, the **Illinois** Department of Financial & Professional Regulation issued a Cease and Desist Order against Western Sky dated March 8, 2013. This Order found that Western Sky had been advertising in Illinois on multiple television networks, had sent email communications to borrowers in Illinois, and had solicited loans to Illinois consumers from its website. As Western Sky was not licensed to offer such loans in Illinois, the Order instructed Western Sky to cease from all lending to Illinois borrowers. Bryden Aff., Ex. N.

Seventh, the **Missouri** Attorney General has a pending enforcement action against Western Sky and other entities owned by Mr. Webb. Bryden Aff., Ex. O. When Western Sky tried to remove the Missouri action to federal court, the United States District Court for the Eastern District of Missouri remanded, holding that “Webb, as an enrolled member of the Tribe, is not individually entitled to immunity, nor does his membership in the Tribe confer such immunity upon the Lending Companies.” *Id.*, Ex. P at 8 (citing *Puyallup Tribe, Inc. v. Dep’t of Game*, 433 U.S. 165, 171-72 (1977)).

Eighth, the **Washington** Department of Financial Institutions has a pending enforcement action against Western Sky and other entities owned by Mr. Webb. Bryden Aff., Ex. Q.

Ninth, the **Georgia** Attorney General reached an agreement in 2012 with Western Sky that it would no longer lend to Georgians. Bryden Aff., Ex. R.

Tenth, on June 18, 2013, the **Pennsylvania** Department of Banking and Securities entered into a Consent Agreement and Order with Mr. Webb, Western Sky, and two other lending entities owned

by Mr. Webb. Bryden Aff., Ex. S. According to the Consent Order, Western Sky was lending in Pennsylvania without the required license and was charging Pennsylvania borrowers more interest than is allowed under Pennsylvania law. The Consent Order requires Western Sky to cease and desist from making loans to Pennsylvania borrowers, from collecting interest in excess of 6% on outstanding loans, and *inter alia* to cease and desist from filing negative credit reports regarding any loan made to a Pennsylvania resident. *Id.*

Eleventh, on August 5, 2013 the **New York State Department of Financial Services** sent a letter to Western Sky regarding “Illegal Online Payday Loans Offered and Sold to New York Consumers.” Bryden Aff., Ex. T. According to the letter, loans supposedly originated by Western Sky to New York borrowers violated New York law by charging usurious interest rates. Accordingly, the letter demanded that Western Sky cease and desist from all such lending to New York borrowers. *Id.*

Twelfth, on September 6, 2011 the **Federal Trade Commission** filed a lawsuit against Western Sky and other entities owned by Mr. Webb. The Amended Complaint alleges that the entities’ loan contracts contain illegal provisions calling for wage garnishment if the borrower defaulted, unlawfully conditioned the extension of credit on borrowers agreeing to “pre-authorized transfers” out of their bank accounts, and falsely asserted that the Cheyenne River Sioux Tribal Court had jurisdiction to enter judgment against borrowers who defaulted on their loans. The lawsuit is pending in the United States District Court for the District of South Dakota. *Federal Trade Comm’r v. Payday Fin., LLC et al.*, Civil Docket No. 3:11-CV-03017-RAL, United States District Court for the District of South Dakota.⁴

⁴ Similarly, West Virginia rejected the sovereign immunity defense asserted by other lending entities owned by Mr. Webb. In so doing, the court held that business conducted by an entity organized under South Dakota law, owned by an individual rather than a tribe, and conducted over the Internet was not protected by the doctrine of tribal sovereign immunity. *State of West Virginia v. Payday Loan Resource Center, LLC*, Kanawha County Circuit Court, West Virginia, No. 10-MISC-372, Oct. 28, 2011 Final Order Granting State’s Petition To Enforce Investigative Subpoena. Bryden Aff., Ex. U.

III. THE LOANS ARE IMMEDIATELY SOLD TO CASHCALL.

Great lengths are taken to give the misleading impression to consumers that Western Sky is a tribal entity subject to tribal sovereign immunity, and that consumers have no state law protections. For example, Western Sky's logo is the sun setting behind three teepees, which is prominently displayed in its advertising and online. Palumbo Aff., Ex. A. Its website states that it is "a Native American business operating within the exterior boundaries of the Cheyenne River Sioux Reservation, a sovereign nation located within the United States of America."⁵ Bryden Aff., Ex. V.

Minnesota consumers who receive a loan are almost immediately sent a Notice of Assignment, Sale or Transfer of Servicing Rights which states "your loan has been sold to WS Funding, LLC" and that "effective today, your loan is now owned by WS Funding, LLC and will be serviced by a company called CashCall." Opem Aff., ¶ 3 & Ex. B; Turnquist Aff., ¶ 6 & Ex. C. They are also told that "[g]oing forward, CashCall will handle the servicing of your loan, which means collecting your payments and handling related issues." *Id.* The Notice tells Minnesota consumers that, "[u]nless you dispute the validity of the debt, or any portion thereof, within thirty days after receipt of the notice, CashCall will assume the debt to be valid." *Id.*

CashCall routinely calls borrowers shortly after completion of their loan application to tell them that it now owns the loan. For example, CashCall called Bradford Frieler, a security company manager from Sartell, before the loan was even deposited into his bank account and told him to make his loan payments to CashCall, not Western Sky. Frieler Aff., ¶ 3. Elizabeth Newbauer received a telephone call simultaneously informing her that her loan application was approved and that CashCall would handle her loan. Newbauer Aff., ¶ 3. "Almost immediately" after receiving her loan, CashCall called Oleremi Ereku, a case manager for an insurance company, to tell her to make her payments to

⁵ Similarly, the loan contract is designed to give the borrower the false impression that the loan is protected by tribal sovereign immunity. (*See, e.g.*, Bryden Aff., Ex. W at pages 1, 3, 4 & 5 of Loan Agreements.)

CashCall. Ereku Aff., ¶ 3. CashCall told Melissa Turnquist during the application process that it was merely “processing the application for Western Sky.” Turnquist Aff., ¶ 4. The next business day, however, she received an email from CashCall advising her that it owned her loan and to make payments to it. *Id.* ¶ 6.

IV. THE UNDERLYING LOANS VIOLATE MINNESOTA LAW BECAUSE NEITHER DEFENDANTS NOR WESTERN SKY ARE LICENSED TO MAKE THESE LOANS TO MINNESOTA BORROWERS.

Defendants and Western Sky advertise on television and radio in Minnesota.⁶ On its website, www.westernsky.com, Western Sky offers loans to Minnesotans that range from \$850 to \$10,000 and bear annual percentage rates of between 89.68 and 342.86 percent. Bryden Aff., Ex. V. The following chart from Western Sky’s website sets forth the loan products it offers to Minnesotans:

Loan Product	Borrower Proceeds	Loan Fee	APR	Number of Payments	Payment Amount
\$10,000	\$9,925	\$75	89.68%	84	\$743.49
\$5,075	\$5,000	\$75	116.73%	84	\$486.58
\$2,600	\$2,525	\$75	139.22%	47	\$294.49
\$1,500	\$1,000	\$500	234.25%	24	\$198.19
\$850	\$500	\$350	342.86%	12	\$150.72

See <http://www.westernsky.com/General/Rates.aspx>; Bryden Aff., Ex. X. Defendants have extended these types of loans to Minnesota borrowers,⁷ even though neither they nor Western Sky are licensed

⁶ See Ereku Aff., ¶ 2; Gomez Aff., ¶ 2; Frielefer Aff., ¶ 2; Newbauer Aff., ¶ 2; Palumbo Aff., ¶¶ 2-6; Thoraldson Aff., ¶ 2; Torgerson Aff., ¶ 4.

⁷ Blask Aff., ¶ 3 & Ex. A (received \$2,525 loan with a \$75 fee and 135% annual interest rate); White Aff., ¶ 4 & Ex. A (received \$500 loan, with a \$350 fee and 169% annual interest rate); Ereku Aff., ¶ 3 & Ex. A (received \$1,000 loan with a \$500 fee and 120% annual interest rate); Frieler Aff., ¶ 2 & Ex. A (received \$2,525 loan with a \$75 fee and 135% annual interest rate); Gomez Aff., ¶ 2 & Ex. A (received \$2,525 loan with a \$75 fee and 135% annual interest rate); Krueger Aff., ¶ 3 (received \$2,500 loan); Newbauer Aff., ¶ 4 & Ex. A (received \$5,000 loan with a \$75 fee and 115% annual interest rate); Opem Aff., ¶ 2 & Ex. A (received \$2,525 loan with a \$75 fee and 135% annual interest rate); Rhone Aff., ¶ 3 & Ex. A (received \$2,525 loan with a \$75 fee and 135% annual interest rate); Stevens Aff., ¶ 3 (received \$2,525 loan with a \$75 fee and 139% annual interest rate); Thoraldson Aff., ¶ 3 (received \$2,500 loan); Torgerson Aff., ¶ 4 & Ex. A (received \$1,000 loan with a \$500 fee and 120% annual interest rate); Trelstad Aff., ¶ 4 & Ex. B (received \$1,000 loan with a \$500 fee and 120% annual interest rate); Turnquist Aff., ¶ 5 & Ex. B (received \$1,000 loan with a \$500 fee and 120% annual interest rate).

to do so.⁸ Because Defendants failed to obtain the required state license before making these types of loans to Minnesotans, their lending is unlawful and should be enjoined.

V. DEFENDANTS' LOANS ARE USURIOUS AND CONTAIN OTHER UNLAWFUL LOAN TERMS.

A. Defendants' Loans of up to \$1,000 Contain Fees, Interest Rates, and Terms that Violate Minnesota Law.

Loans for up to \$1,000 are governed by Minn. Stat. § 47.601. Defendants purchase, fund, underwrite, and collect on at least one loan product to Minnesotans under \$1,000, namely, a \$850 loan. For this loan, the borrower pays \$350 as a "loan fee," which Defendants take off the top off the loan. In other words, borrowers who receive an \$850 loan from Defendants actually only receive \$500, but Defendants accrue interest on the entire \$850 principal balance. Bryden Aff., Ex. W. As shown in the Argument section below, these fees and interest rates far exceed those permitted under Minnesota law. The terms and conditions of Defendants' loans of under \$1,000 violate numerous other provisions of Minnesota law. For example, Defendants' contracts all contain choice-of-forum and choice-of-law clauses prohibited under Minnesota law. *Id.*, Ex. W (at pages 3-5 of Loan Agreements).

B. Defendants' Loans of Greater than \$1,000 Contain Fees and Interest Rates that Violate Minnesota Law.

The interest rates and fees Defendants charge and collect on loans over \$1,000 are also many times higher than allowed under Minnesota Statutes chapters 53 and 56. Defendants routinely charge a 233.40% annual percentage rate on \$1,500 loans. Torgerson Aff., ¶ 4 & Ex. A; Trelstad Aff., ¶ 4 & Ex. B; Vulcan Aff., ¶ 3. Moreover, the interest rates set forth in Minn. Stat. § 47.59, subd. 3 are only available to lenders who have become properly licensed as either an Industrial Loan & Thrift under

interest rate); Vulcan Aff., ¶ 3 (received \$1,000 loan). *See also* Bryden Aff., Ex. W (additional examples of loan contracts with Minnesota borrowers for \$850 with 336.20% annual percentage rate).

⁸ As discussed further in the Argument section below, in order to make these types of loans in Minnesota, a lender must be licensed under chapter 53 or 56 of the Minnesota Statutes, or registered under the consumer small loan statute, Minn. Stat. §§ 47.60 & 47.601. Defendants are not licensed under these statutes. *See, e.g.*, Wall Aff., ¶ 2.

chapter 53 of the Minnesota Statutes or a Regulated Lender under chapter 56 of the Minnesota Statutes or otherwise licensed as a financial institution under Minnesota law. Because neither Defendants nor Western Sky have such a license, their loans are subject to Minnesota's more general usury statute set forth at Minn. Stat. § 334.01, which caps annual interest rates at 8%. Defendants' annual interest rates are many times higher than 8%, with the APR on their \$850 loans—342.86%—more than 42 times the annual interest rate set forth in Minn. Stat. § 334.01.

VI. DEFENDANTS' USURIOUS LOAN FEES AND INTEREST RATES HARM MINNESOTANS.

The impact of Defendants' illegal fees and interest can be partially understood by doing the math. The chart from Western Sky's website (set forth above) states that when a borrower takes out an \$850 loan, the borrower pays an immediate fee of \$350, only receives \$500, and then must pay back \$1,808.64 over the next 12 months ($\$150.72 \times 12$), paying a 169% annual interest rate on the entire \$850.⁹ On a \$1,500 loan, the borrower immediately pays a fee of \$500, only receives \$1,000, and must pay back \$4,756.56 over the next 24 months ($\$198.19 \times 24$), paying a 149% annual interest rate on the entire \$1,500.¹⁰ On a \$2,600 loan, the borrower receives \$2,525 and must pay back \$13,841.03 over the next 47 months ($\$294.49 \times 47$). On a \$5,075 loan, the borrower receives \$5,000 and must pay back a whopping \$40,872.72 over the next 84 months ($\$486.58 \times 84$). On a \$10,000 loan, the borrower receives \$9,925 and must pay back \$62,453.16 over the next 84 months ($\$743.49 \times 84$).

These unlawful interest rates harm borrowers who are struggling financially. Submitted with this Memorandum are affidavits of 15 Minnesota consumers, which detail the harm of these usurious loans. The financial situation of Beverly Krueger, who suffered a stroke and receives long-term disability, is "*much worse than it was two years ago*" when she received the CashCall loan. Krueger

⁹ White Aff., Ex. A. The "APR" set forth on the chart from Western Sky's website above is a different number from the annual interest rate that CashCall accrues on the principal balance. Both rates far exceed what is allowed under Minnesota law. This brief will focus primarily on the annual interest rates, which accrue on both the principal and fees of CashCall's loans.

¹⁰ Torgerson Aff., Ex. A.

Aff., ¶ 6. Ms. Krueger, who would have to pay back \$11,000 to receive a \$2,500 loan, testified that the monthly payments to CashCall are a “*significant reason*” for her financial woes. Krueger Aff., ¶¶ 6-7. She and her husband have had to put their Eden Prairie home, which they have lived in since 1989, up for sale due in part to the financial burden caused by CashCall’s illegal loan. *Id.*

Tami Torgerson, a medical assistant from Hopkins, received \$1,000 from Defendants in 2012 to help care for her disabled son, and she has already paid over \$2,000 on the loan (she would have to pay nearly \$5,000 total under the contract). Torgerson Aff., ¶¶ 1-5, Ex. A. CashCall issued negative credit reports against her to the credit bureaus that have severely damaged her credit. *Id.* at ¶¶ 5, 9. With her credit tarnished, Ms. Torgerson says “[*t*]his is very difficult for me because if I cannot qualify for a mortgage, I will not be able to move into housing that is more appropriate for my son and his condition.” *Id.*

Similarly, Pamela Blask has paid \$1,600 to CashCall toward a \$2,600 loan, but only \$35 of her payments have gone toward paying down the principal balance. Ms. Blask’s financial situation is “*much worse*” than before she obtained the loan, which she describes as an “*enormous long-term burden on our finances.*” Blask Aff., ¶¶ 8-9. *See also* Stevens Aff., ¶ 9 (“*Even given how desperate I was for money when I took out the loan from Western Sky, if I knew then what I know now, I would never have taken out the loan. It has been a horrible experience...*”); Vulcan Aff., ¶ 6 (“*[o]ur family cannot afford to pay thousands of dollars in interest to CashCall on a \$1,000 loan*”).

Elizabeth Newbauer, a store manager, lives with her daughter and parents in Centerville. Newbauer Aff. ¶ 1. She is to pay CashCall \$41,107.77 over seven years on her \$5,000 loan—in other words, \$36,107.77 in interest and fees. *Id.*, Ex. A. After paying \$3,759.30 on her \$5,000 loan, CashCall informed her that even if she were to pay off the loan now, years ahead of schedule, she would still have to pay an additional \$6,329.96 to satisfy the loan in full. *Id.* at ¶ 8. After she missed a couple of payments, CashCall hounded her with collection calls, and even instructed her to sell her

personal belongings and pay it money. *Id.* at 5. Struggling to pay CashCall's illegal interest and fees, Ms. Newbauer notes, "*has been a serious financial problem for me.*" *Id.*

Donna Marie Gomez of St. Paul suffered from complications from her spinal surgery and became paralyzed from the waist down. Gomez Aff. ¶ 4. During her lengthy hospital stay, she missed a monthly payment to CashCall. CashCall began calling her at the hospital on her cell phone. *Id.* at 6. Each time CashCall called her, Ms. Gomez explained that she had recently had surgery and was recovering in the hospital, but CashCall "*did not seem to care one bit*" and continued to call multiple times a day demanding money and adding fees to her account. *Id.*, ¶ 4.¹¹ The other borrower affidavits submitted with this Memorandum tell similar stories of harm from Defendants' illegal fees and interest.

VII. DEFENDANTS DECEPTIVELY ASSERT TRIBAL LAW TO GOUGE CONSUMERS.

Through their contracts and correspondence with consumers, Defendants aggressively assert tribal law in order to justify the high interest rates and fees of their loans and to deny consumers their state law rights to contest the loans. This assertion of tribal law and Defendants' entire rent-a-tribe scheme is deceptive and fraudulent and violates Minnesota's consumer protection laws.

Defendants' loan agreements with Minnesota borrowers provide that:

This Loan Agreement is subject solely to the exclusive laws and jurisdiction of the Cheyenne River Sioux Tribe, Cheyenne River Indian Reservation. By executing this loan Agreement, you . . . consent to the sole subject matter jurisdiction and personal jurisdiction of the Cheyenne River Sioux Tribal Court, and that no other state or federal law or regulation shall apply to this Loan Agreement, its enforcement or interpretation.

See Bryden Aff., Ex. W at 1. The loan agreements also provide, "[y]ou further agree that you have executed the Loan Agreement as if you were physically present within the exterior boundaries of the

¹¹ Other affiants similarly report that Defendants engage in abusive collection tactics with struggling Minnesotans, such as CashCall representatives who would "*yell at me, belittle me about the money I owe, tell me they were going to ruin my credit, and then demand that I borrow money from family or friends to pay back the loan.*" Stevens Aff., ¶ 6. Other CashCall representatives would "*threaten to tell my family and friends about my financial problems*" and would call "*fifteen to twenty times a day.*" Newbauer Aff., ¶ 5.

Cheyenne River Indian Reservation.” *Id.* The agreement also provides that borrowers waive their right to a jury trial and agree to arbitrate disputes through a process administered by the Tribe, or bring their claims to Cheyenne River Sioux Tribal Small Claims Court. *Id.* (Loan Agreements at pp. 3-5).

When consumers correspond with CashCall to contest their loan or otherwise assert their rights, CashCall aggressively asserts tribal jurisdiction to deny borrowers their right to state consumer law protections. For example, when the Attorney General’s Office wrote to CashCall with concerns about Oluremi Ereku’s loan, it responded that “the loan documents clearly indicate that the laws of the Cheyenne River Sioux Tribe apply exclusively to the loan terms and conditions of Ms. Ereku’s loan, and she further accepted this choice of law and jurisdiction. . . .” Ereku Aff. ¶ 5, Ex. A. CashCall would not help Ms. Ereku. *Id.* Likewise, when Donna Marie Gomez complained, “*Western Sky responded with a letter from an attorney in Washington D.C. that claimed Minnesota has no jurisdiction over Wesetern Sky.*” Gomez Aff., ¶ 8. CashCall responded to Jackie Opem’s inquiry by stating: “Western Sky Loans are initiated, approved, issued and disbursed within the confines of the Cheyenne River Sioux Tribe Indian Reservation. Western Sky does not have any physical presence in your state or any other State in the Union.” Opem Aff., Ex. C. Other Minnesotans have had the same experience. *See* Blask Aff. ¶ 7 (received CashCall letter asserting tribal jurisdiction); Stevens Aff., Ex. A (same); Thoraldson Aff., ¶ 5 (received a letter which stated “Minnesota lacks jurisdiction” and that “Cheyenne River Sioux Tribal law applies.”); Torgerson Aff. ¶ 8 (reporting that CashCall wrote that “the loan was valid and enforceable under tribal law.”); Trelstad Aff. ¶ 8, Ex. D (same). In addition, CashCall and Western Sky add Indian-themed artwork to their advertising and website to further deceive consumers about the purported tribal connection.¹²

¹² As set forth in the Agreement for Services between CashCall and Western Sky, CashCall’s subsidiary hosts Western Sky’s website and advertises in its name. Bryden Aff., Ex. F at WS00240, ¶ 3.

Defendants' scheme, however, appears to be at odds even with the very tribal law that they claim governs their loans. Western Sky's contracts purport to require disputes to be settled by arbitration, which "shall be conducted by the Cheyenne River Sioux Tribal Nation by an authorized representative in accordance with its consumer dispute rules...". See, e.g., Stevens Aff., Ex. A (arbitration provision at page 4 of Loan Agreement). Yet, a magistrate for the Cheyenne River Sioux Tribe recently wrote a letter to the plaintiff in a lawsuit against CashCall which stated that "...the Cheyenne River Sioux Tribe, the governing authority does not authorize arbitration as defined by the American Arbitration Association (AAA) here on the Cheyenne River Sioux Reservation." Bryden Aff., Ex. Y. Similarly, the Cheyenne River Sioux Tribal Code appears to make it a criminal offense to charge annual interest rates in excess of 18%. Law & Order Code, Cheyenne River Sioux Tribe, § 3-4-52 (1978 Revision).¹³ Defendants' deception is made worse in that Defendants know that every court which has considered the issue on the merits has held that state law *does* apply to their lending.

ARGUMENT

Defendants' collection on and extension of these loans, and its use of Western Sky as a "front" for its lending, violate numerous Minnesota lending and consumer protection statutes. Consequently, the Court should grant a temporary injunction to bring CashCall's lending in compliance with Minnesota law and to stop CashCall from harming additional Minnesotans.

I. DEFENDANTS' LOANS VIOLATE STATE LENDING AND CONSUMER PROTECTION LAWS.

By failing to become licensed or registered, and by otherwise failing to abide by other lending requirements, Defendants have violated numerous state lending laws. Through their "rent-a-tribe" scheme, Defendants also deceive consumers, in violation of Minnesota consumer protection laws.

¹³ Bryden Aff., Ex. Z. Counsel for the State of Minnesota recently discussed this provision of the Tribal Code with an attorney for and member of the Cheyenne River Sioux Tribe, Ms. Tracey Zehpier, and she reported that to the best of her knowledge, section 3-4-52 of the Tribal Code is currently in force. Bryden Aff., ¶ 29.

A. Defendants' Loans of \$1,000 and Less Violate Minn. Stat. § 47.601.

Minnesota Statute Section 47.601, entitled "Consumer Short-Term Loans," applies to loans of \$1,000 and less and defines such a loan as: "a loan to a borrower which has a principal amount, or an advance on a credit limit, of \$1,000 or less and requires a minimum payment within 60 days of loan origination or credit advance of more than 25 percent of the principal balance or credit advance." Minn. Stat. § 47.601. Defendants' \$850 loan product, which it has extended to Minnesotans, meets the definition of a consumer short-term loan because it is less than \$1,000, and because a fee of \$350 (more than 25%) is incurred and charged concurrently with the extension of \$500 in credit. *See Bryden Aff., Ex. W.*

Defendants are "consumer short-term lenders" under Minn. Stat. § 47.601 because they are "entit[ies] engaged in the business of making or arranging consumer short-term loans." Minn. Stat. § 47.601. As noted above, WS Financial's contract with Western Sky shifts nearly every aspect of arranging, making, underwriting, and funding the loans to Defendants. *Bryden Aff., Ex. F* at WS00241-42. Accordingly, Defendants are unquestionably engaged in the business of "making" and "arranging" those loans under the broad definitional language of Minn. Stat. § 47.601, subd. 1(e). Defendants are also subject to § 47.601 as assignees of the loans. *See Minn. Stat. § 47.601, subd. 2(d)* ([The] assignee of . . . a consumer short-term loan takes the instrument subject to all claims by and defenses of the borrower against the consumer short-term lender.").

Defendants' loans of \$1,000 and less do not comply with Minn. Stat. § 47.601. Section 47.601, subdivision 2(a)(3)(ii) gives lenders the option of charging the fees and interest rates allowed in Minn. Stat. § 47.59, subd. 6 or the fees and interest rates set forth in Minn. Stat. § 47.60, subd. 2. Under the former provision, consumer small lenders may only charge a one-time \$25 loan fee for closed end credit. Minn. Stat. § 47.59, subd. 6 (d). Under the latter provision, on a \$850 loan, the lender could charge a one-time fee equal to six percent of the loan proceeds, which is \$51, plus a \$5 fee, for total of

\$56. Minn. Stat. § 47.60, subd. 2(a)(4). In either case, Defendants' loan fee of \$350 is at least six times greater than is allowed under Minn. Stat. § 47.601, subd. 2(a)(3)(ii).

Furthermore, **interest rates** on these types of loans are governed by Minn. Stat. § 47.601, subd. 2(a)(3)(ii), which again gives lenders the option of charging the fees and interest rates allowed in Minn. Stat. § 47.59, subd. 6 or the fees and interest rates set forth in Minn. Stat. § 47.60, subd. 2. Under the former provision, a lender may charge an annual interest rate of 21.75% or 33% on the first \$750 of unpaid principal, and 19% on the unpaid principal exceeding \$750. Minn. Stat. § 47.59, subd. 3. Under the latter provision, a lender may charge the \$56 fee calculated above and then may charge 2.75 percent per month interest, which is a 33% annual interest rate. Minn. Stat. § 47.60, subd. 2. Defendants, however, charge an annual percentage rate of 342.86% on their \$850 loan, which is more than ten times the annual interest rate allowed under Minn. Stat. § 47.601, subd. 2(a)(3)(ii).¹⁴

B. Defendants' Loans Violate Minnesota Statutes Chapters 53 and 56.

Chapter 53 of the Minnesota Statutes permits entities to organize and become licensed as "Industrial Loan and Thrift" companies. Chapter 56 permits entities to organize and become licensed as "Regulated Lenders." Both statutes allow these entities to provide small loans of up to \$100,000 to Minnesotans. Minn. Stat. § 53.04 (granting a properly licensed Industrial Loan & Thrift the authority to make loans of up to \$100,000); Minn. Stat. § 56.01 (prohibiting unlicensed entities from offering loans of up to \$100,000). Such lenders are then subject to various restrictions on their lending, including the interest rate caps set forth in Minn. Stat. § 47.59. Minn. Stat. § 53.04 (allowing Industrial Loan & Thrifts to charge the interest rates set forth in Minnesota Statutes Chapter 47); Minn. Stat. § 56.131 (setting forth interest rate caps for Regulated Lenders, and incorporating by

¹⁴ The terms of Defendants' \$850 loans also violate numerous other provisions of § 47.601. Defendants' contracts contain choice-of-forum and choice-of-law clauses that purport to restrict consumers to the law and forum of the Cheyenne River Sioux Tribe. *See, e.g.,* Bryden Aff., Ex. W (pages 3-5 of Loan Agreements). These clauses are specifically barred by Section 47.601, subd. 2(1) & (2). Also, Section 47.601 requires consumer short term lenders to register and report to the Commissioner of Commerce, which Defendants failed to do. Minn. Stat. § 47.601, subd. 2(3)(i) & subd. 4.

reference Minn. Stat. § 47.59); Minn. Stat. § 56.18 (prohibiting Regulated Lenders from violating interest rate caps). Both statutes require lenders to be licensed by the Minnesota Commerce Commissioner. Minn. Stat. §§ 53.04 & 56.01:

Chapters 53 and 56 incorporate by reference the interest rate limits set forth in Minnesota Statutes Chapter 47, whose limits are set forth at Minn. Stat. § 47.59. Minn. Stat. § 53.04, subd. 3a (a); Minn. Stat. § 131, subd. 1 (a). Under Minn. Stat. § 47.59, a lender may charge an annual interest rate of 21.75% or 33% on the first \$750 of unpaid principal, and 19% on the unpaid principal exceeding \$750. Minn. Stat. § 47.59, subd. 3. Defendants charge rates of interest far higher than what is allowed under statute. For example, Defendants' 139% annual interest rate on a \$2,600 loan is roughly six times the rate allowed under Minnesota law, and Defendants' 116.73% annual interest rate on \$5,000 loans is still almost six times what is allowed under Minn. Stat. § 47.59, subd. 3.

While the CashCall/Western Sky scheme purports to have Western Sky make the loan, CashCall funds the loan, services the making of the loan, underwrites the loan, and buys the loan before any payments are made. As such, CashCall is the "true" or "de facto" lender. The "de facto lender" behind a loan transaction cannot evade state law by engaging in these sorts of deceptive relationships. In determining if a party is the "true lender," courts consider the substance of the transaction. *See Ubaldi v. SLM Corp.*, 852 F. Supp. 2d 1190, 1196 (N.D. Cal. 2012); *State of West Virginia, et al. v. CashCall, Inc.* (Bryden Aff., Ex. H). In the West Virginia lawsuits that involved CashCall, noted above, the Court applied the "de facto" lender analysis and found, "CashCall bore the predominant economic risk of the subject loans made to West Virginia consumers and thus, was the true lender of such loans, not the Bank". *Id.* at 25.

In all substantive respects, Defendants are the lender and the real party in interest to the loan transactions. As it relates to loans purportedly made by Western Sky to Minnesota consumers, Defendants: (1) supply the funds for the loans; (2) bear the risk of loss on the loans; (3) make the

underwriting decisions, i.e., the decisions to lend or not to lend to a particular applicant; (4) develop and use forms and brands, and platforms; (5) immediately purchase the loans before any payments are made; and (6) collect the vast majority of fees and interest on loans, among other things. Bryden Aff., Ex. F. Accordingly, Defendants are the “de facto” lender of the loans made to Minnesota borrowers, and should therefore be licensed under, and comply with the loan limits of, Chapters 53 and 56. *See* Bryden Aff., Ex. C at 6-7 (holding that CashCall is the “de facto” lender).

Even if Defendants were not the “de facto” lender, they are still violating Minnesota law as the assignee and servicer of Western Sky’s illegal loan contracts. Minnesota follows the widely recognized rule of contract law that the assignees of a contract assume the legal obligations of the assignor. *Ill. Farmers Ins. Co. v. Glass Serv. Co.*, 683 N.W.2d 792, 803 (Minn. 2004) (noting that an assignment “operates to place the assignee in the shoes of the assignor”); *Mountain Peaks Fin. Servs., Inc. v. Roth-Steffan*, 778 N.W.2d 380, 385 (Minn. Ct. App. 2010) (same). Accordingly, any violation of Minnesota law as to the Western Sky loan contracts may be asserted against Defendants. *See also* Restatement (Second) of Contracts, § 336(1) & (3) (“Where the right of an assignor is subject to discharge or modification in whole or in part by... public policy... the right of the assignee is to that extent subject to discharge or modification...”). The fact that the loans were supposedly originated by Western Sky does not insulate Defendants from the numerous illegalities set forth in the loan contracts.

C. Defendants’ Loans Violate the State’s Usury Cap in Minn. Stat. § 334.01.

Minnesota’s usury law sets a baseline cap on the rate of interest that can be charged, where no other higher statutory rate of interest is allowed. *Trapp v. Hancuh*, 530 N.W.2d 879, 885 (Minn. App. Ct. 1995) (citing *Citizen’s Nat’l Bank v. Taylor*, 368 N.W.2d 913, 918 (Minn. 1985); *see also Miller v. Colortyme*, 518 N.W.2d 544, 549-50 (Minn. 1994)). Minnesota’s usury law provides:

Rate of Interest. Subdivision 1. General. The interest for any legal indebtedness shall be at the rate of \$6 upon \$100 for a year, unless a different rate is contracted for in writing. No person shall directly or indirectly take or receive in money, goods, or things in action,

or in any other way, any greater sum, or any greater value, for the loan or forbearance of money, goods, or things in action, than \$8 on \$100 for one year. Minn. Stat. § 334.01.

As noted above, Defendants are not registered as a consumer short-term lender or licensed with the Commissioner of Commerce as either an Industrial Loan and Thrift Corporation (ch. 53) or a Regulated Lender (ch. 56). Accordingly, there is no applicable statutory scheme under which Defendants are entitled to charge a rate of interest higher than the baseline usury rate of 8% on contractual debt. Defendants routinely charge a far higher amount than this baseline usury rate of 8% annual interest. *See, e.g.*, Ereku Aff., Ex. A at 4 (120% annual interest); Newbauer Aff., Ex. A. at 1 (115% annual interest); Torgerson Aff., Ex. A at 1 (149% annual interest). Accordingly, Defendants have violated Minn. Stat. § 334.01 and should be enjoined from making such usurious loans pursuant to Minn. Stat. § 334.05.

D. Defendants Violated Minnesota's Consumer Protection Statutes.

The following conduct by a business is a violation of the Minnesota Prevention of Consumer Fraud Act ("CFA"):

The act, use, or employment by any person of any fraud, false pretense, false promise, misrepresentation, misleading statement or deceptive practice, with the intent that others rely thereon in connection with the sale of any merchandise, whether or not any person has in fact been misled, deceived, or damaged thereby....

Minn. Stat. § 325F.69. The term merchandise is defined in the statute and specifically includes "loans" and "services." Minn. Stat. § 325F.68. The Uniform Deceptive Trade Practices Act ("UDTPA") provides, in part, that:

A person engages in a deceptive trade practice when, in the course of business, vocation, or occupation, the person:

(5) represents that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation, or connection that the person does not have;

Minn. Stat. § 325D.44. The purpose of Defendants' "rent-a-tribe" scheme is to give borrowers the misleading impression that the loans are subject to tribal law and tribal jurisdiction, thereby excepting

the loans from state lending limits and depriving borrowers of their state law rights. But as Defendants know through their substantial litigation on this issue, tribal law does not apply to the loans, and borrowers do not forsake their state law rights.

Defendants' representations in their contracts, their correspondence with consumers, and the content of their advertisements and website violate the CFA and UDTPA because they deceive consumers about their legal rights and mislead consumers to believe they are dealing with a tribal entity.¹⁵ Borrowers rely on these assertions and, as a consequence, pay higher fees and interest on their loans and abandon or fail to assert other state law protections they are misled to believe do not apply. Consumers are surprised that they are not dealing with an Indian tribe. For instance, when Joseph Thoraldson learned six months after taking the loan that Western Sky was not owned or operated by an Indian tribe, it came as a "big surprise" to him. Thoraldson Aff. ¶ 2. Many of Defendants' borrowers have been deceived. See Johnson Aff., ¶ 4; Newbauer Aff., ¶ 2; Rhonc Aff., ¶ 2; Stevens Aff., ¶ 2; Trelstad Aff., ¶ 3. Defendants' "rent-a-tribe" scam is especially deceptive and misleading because as noted above, Defendants apparently do not even comply with the laws of the Cheyenne River Sioux Tribe. (See Background Section VII, above).

In short, Defendants knowingly evade borrowers' state law protections and deprive borrowers of their state legal rights even though they know their tribal immunity claim is meritless.

II. DEFENDANTS ARE NOT ENTITLED TO TRIBAL SOVEREIGN IMMUNITY.

The State does not anticipate that Defendants will defend this suit on the basis that their loans comply with Minnesota lending statutes—they plainly do not. Defendants instead will likely claim tribal sovereign immunity, but that assertion is baseless.

¹⁵ Minnesota's consumer protection laws were enacted "to address the unequal bargaining power often present in consumer transactions." *Ly v. Nystrom*, 615 N.W.2d 302, 308 (Minn. 2000). They "are generally very broadly construed to enhance consumer protection." *State by Humphrey v. Philip Morris Inc.*, 551 N.W.2d 490, 495-96 (Minn. 1996). To establish deception, the State need only prove that the conduct has the "tendency or capacity to deceive." *State v. Am. Family Prepaid Legal Corp.*, 2012 WL 2505843 at *6 (Minn. Ct. App. Jul. 2, 2012) (Bryden Aff., Ex. AA).

In certain limited legitimate circumstances, such as where the lender is an Indian tribe and where the lender is owned by and operated for the benefit of an Indian tribe, the doctrine of tribal sovereign immunity *may* provide an exemption from state law. *See Cash Advance and Preferred Cash Loans v. State*, 242 P.3d 1099, 1107 (Colo. 2010) (describing doctrine of tribal sovereign immunity). It is well-established, however, that such immunity is only conferred on the tribe itself, or on a tribal entity that is acting as an arm of the tribe, and not on individuals. *See Puyallup Tribe, Inc. v. Dep't of Game*, 433 U.S. 165, 171-72 (1977). This has been established through the very cases that have dealt with Defendants' deceptive scheme. *See, e.g., Missouri v. Webb et al.*, 2012 WL 1033414, *4 (E.D. Mo. March 27, 2012) (rejecting Western Sky et al.'s attempt to remove to federal court based on tribal immunity) (Bryden Aff., Ex. P); *Colorado v. Western Sky Fin., LLC et al.*, Case No. 11CV638, Denver Cnty. Dist. Ct., April 15, 2012 Order at 8 (rejecting Western Sky's sovereign immunity defense) (Bryden Aff., Ex. K).

Western Sky is not owned or operated by an Indian tribe, was not created pursuant to tribal law, does not exist for the benefit of a tribe, and its profits are not distributed to any Indian tribe. *See* Bryden Aff., Ex. J (articles of organization for Western Sky). While Mr. Webb holds himself out as a member of the Cheyenne River Sioux Tribe, no approval was required from the Cheyenne River Sioux Tribe for Western Sky's formation. *Id.* Furthermore, Western Sky is only a "front," and Defendants—who themselves have no claim to tribal affiliation whatsoever—are the "de facto" lenders, as described above. *See* Argument Section I.B, above. CashCall, a for-profit California corporation, should not be allowed to invoke immunity by shielding itself with a "front" company, when CashCall controls almost every aspect of the lending, including its funding, underwriting, advertising, and servicing.

III. THE STATE IS ENTITLED TO A TEMPORARY INJUNCTION TO STOP DEFENDANTS FROM HARMING ADDITIONAL MINNESOTANS THROUGH THEIR ILLEGAL LENDING.

Because Defendants are not entitled to tribal sovereign immunity, and because their lending violates Minnesota law, Defendants should be enjoined from additional lending unless and until they bring their lending into compliance with Minnesota law.

A. The State's Requested Injunction Is Narrowly Tailored to Prevent Additional Harm to Minnesotans.

In this Motion, the State requests an Order that compels Defendants to become licensed and bring their operations into compliance with Minnesota law before lending to any more Minnesotans, and to otherwise comply with the Minnesota law.

B. The State Is Entitled to an Injunction Irrespective of the *Dahlberg* Factors.

Under Minnesota law, when a statute provides for injunctive relief, an injunction should issue if: 1) the statute has been violated and 2) enjoining the violation would fulfill the purpose the statute. *See, e.g., State v. Cross Country Bank, Inc.*, 703 N.W.2d 562, 572 (Minn. App. 2005) (stating that where injunctive relief is authorized by a statute, the court need only consider whether the defendant violated or was about to violate the statute and whether temporary injunction would serve the legislative purpose of the statute). Here, the applicable statutes provide for injunctive relief.¹⁶

Accordingly, the Court need only find that Minnesota's lending statutes and/or consumer protection statutes have been violated and that an injunction would fulfill the purpose of those statutes in order to enter an injunction on this Motion. Issuing an injunction under the facts of this action

¹⁶ The Attorney General is authorized by Minn. Stat. §§ 8.31, subd. 3, 325D.45, 325F.67 and 325F.70, subd. 1, to obtain injunctive relief for violations of Minnesota's consumer protection laws. The Attorney General may also obtain injunctive relief under the consumer short-term loan law. *See* Minn. Stat. § 47.60, and § 47.601, subd. 6. The Commissioner of Commerce can "enjoin the [illegal] acts or practices and to enforce compliance" whenever it appears to the Commissioner that a party has violated "any law, rule, or order related to the duties and responsibilities entrusted to the commissioner." Minn. Stat. § 45.027, subd. 5. Finally, the state's usury statute also provides for injunctive relief. Minn. Stat. § 334.05.

would advance the purposes of Minnesota's consumer fraud and lending statutes. Accordingly, an injunction should issue to protect additional Minnesotans from harm.

An injunction is a common remedy to stop usurious or illegal lending schemes that are violating state law. See *Pennsylvania v. NCAS of Delaware*, 948 A.2d 752, 755 (Penn. 2008) (upholding trial court's injunction against online lender); *People v. JAG NY, LLC*, 18 A.D.3d 950 (N.Y. App. Div. 2005) (modifying and upholding injunction against usurious lender); *Short on Cash.Net of New Castle, Inc. v. Dep't of Fin. Insts*, 811 N.E.2d 819 (Ind. Ct. App. 2004) (upholding injunction against usurious lending scheme). Indeed, Defendants' scheme has been repeatedly enjoined in other states by regulators. See *In re: CashCall et al.*, Case No. 12-308, State of New Hampshire Banking Department, Order to Cease and Desist, dated June 4, 2013 (Bryden Aff., Ex. C); *In the Matter of CashCall Inc. et al.*, Docket No. 2013-010, Commonwealth of Massachusetts Office of Consumer Affairs and Business Regulation, Cease Order, dated April 4, 2013 (*id.*, Ex. E); *Comm'r v. Western Sky Finan. et al.*, Case No. CFR-FY2011-182, OAH No. DLR-CFR-76A-47146, Maryland Commissioner of Financial Regulation, Opinion and Final Order, dated May 22, 2013 (*id.*, Ex. L).

C. The State Also Meets the *Dahlberg* Factors.

Even if the State were required to satisfy the *Dahlberg* factors, it does so easily here. *Dahlberg Bros., Inc. v. Ford Motor Co.*, 137 N.W.2d 314, 321-22 (Minn. 1965). Each of these factors weighs heavily in favor of granting the State's motion for a temporary injunction.

The first factor is the "nature and background of the relationship between the parties preexisting the dispute giving rise to the request for relief," (*id.* at 321) and this factor weighs heavily in favor of granting the requested relief. The State, through its Attorney General and Commissioner of Commerce, are the state's primary regulators of commercial activity in Minnesota and of small consumer loans more specifically. Defendants are engaged in widespread lending in Minnesota, yet are not in compliance with Minnesota law and are not licensed to engage in such lending. Moreover,

Defendants have been openly defiant of Minnesota law even when contacted by the Minnesota Attorney General's Office, aggressively asserting tribal sovereign immunity even after numerous courts have rejected that argument. This background supports the granting of injunctive relief.

The second factor is the "harm to be suffered by plaintiff if the temporary restraint is denied as compared to that inflicted on defendant if the injunction issues pending trial." *Id.* The State merely seeks an order requiring Defendants to become licensed and bring their operations into compliance with Minnesota law. There is no legally cognizable "harm" that Defendant will suffer if the requested injunction issues, because Defendants should have been complying with Minnesota law already. Defendants know that their illicit evasion of state lending laws has been rejected by jurisdictions that have examined Defendants and Western Sky's lending. In contrast, if the Court denies the injunction, Defendants' illegal lending in Minnesota will continue, causing financial hardship to Minnesotans, as detailed in the numerous affidavits filed with this Motion. These harms are real and tangible and support the State's request for injunctive relief.

The third factor, the "likelihood that one party or the other will prevail on the merits" (*id.*) weighs heavily in favor of the requested relief. Neither Western Sky nor Defendants enjoy tribal sovereign immunity because they are not affiliated with an Indian tribe, and because CashCall is the "de facto" lender. Accordingly, the State is likely to prevail on the merits.

The fourth factor, "aspects of the fact situation, if any, which permit or require consideration of public policy," (*id.* at 321-22) also weighs heavily in favor of the requested injunction. Courts have long recognized the strong public policy behind consumer loan laws. As the Pennsylvania Supreme Court recognized, the regulation of such lending is a core police power of the State:

If there is anything well established in constitutional law it is that regulation of the rate of interest is a subject within the police power of the State, and this is especially true in the case of loans of comparatively small amounts, since the business of making such loans profoundly affects the social life of the community. *Equitable Credit & Discount Co. v. Geier*, 342 Pa. 445, 455, 21 A.2d 53, 59 (Pa. 1941).

Given the financial harm that these usurious loans can cause Minnesotans, as detailed in the 15 affidavits included with this Motion, public policy weighs heavily in favor of granting the State's injunction to stop Defendants' illegal lending.

The fifth factor is the "administrative burden involved in judicial supervision and enforcement of the temporary decree." *Id.* at 322. The requested relief will not impose an administrative burden on the Court. The State only asks the Court to order Defendants to stop harming Minnesota borrowers by bringing their lending into compliance with Minnesota's lending limits and Minnesota law.

CONCLUSION


For the above reasons, Defendants should be enjoined from making, funding, underwriting, buying, or servicing additional loans in Minnesota unless and until they bring their operations into compliance with Minnesota law.

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Respectfully submitted,

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