Exhibit 1

DISTRICT COURT, DENVER COUNTY, STATE OF COLORADO City and County Building 1437 Bannock, Denver, CO 80202	DATE FILED: April 15, 2013 ▲ **COURT USE ONLY** ▲
Plaintiffs: STATE OF COLORADO ex rel. JOHN W. SUTHERS, ATTORNEY GENERAL FOR THE STATE OF COLORADO, AND LAURA UDIS, ADMINISTER UNIFORM CONSUMER CREDIT CODE v. **Defendants:** WESTERN SKY FINANCIAL, LLC, AND MARTIN A. WEBB	Case Number: 11 CV 638 Courtroom: 259
ORDER	

THIS MATTER is before the Court on Plaintiffs the State of Colorado ex rel. John W. Suthers, Attorney General for the State of Colorado, and Laura Udis, Administer, Uniform Consumer Credit Code's (the "State") Motion for Partial Summary Judgment – Second Claim for Relief, filed December 27, 2012. Defendants Western Sky Financial, LLC ("Western Sky"), and Martin A. Webb ("Webb") (collectively "Defendants") filed their Response on January 31, 2013. The State filed its Reply on March 8, 2013. The Court has reviewed the Motion, the pleadings in support and opposition, the case file, and the relevant authority, and, being fully informed, finds and orders as follows:

BACKGROUND

This dispute arises over allegedly illegal, usurious, and unlicensed loans, issued over the Internet, in Colorado to Colorado consumers. The State alleges that Western Sky, a South Dakota limited liability company, has conducted business, through the Internet, to make loans to Colorado consumers in amounts ranging from $400 to $2,600 with annual percentage interest

rates ("APR") of approximately 140% to 300%. Webb is the sole manager and owner of Western Sky. Further, Webb is an enrolled member of the Cheyenne River Sioux (the "Tribe") and resides on the Cheyenne River Indian Reservation (the "Reservation") in South Dakota.

In 2010, Western Sky made more than 200 such loans to Colorado consumers. Following an investigation, the State determined that Western Sky was making "unlicensed supervised loans" and imposing excessive finance charges. After Western Sky failed to comply with a demand that it cease and desist from making further loans, the State filed suit against Defendants seeking injunctive relief and damages.

UNDISPUTED FACTS

1. Western Sky is a South Dakota company. Webb is Western Sky's sole manager, sole executive officer, and sole owner. Webb directs, controls, manages, participates in, supervises, is responsible for, and authorizes Western Sky's activities.

2. Western Sky is principally engaged in the business of making small, short-term personal loans to consumers.

3. Via the Internet and television advertising, Western sky offers and enters into loans with Colorado consumers.

4. According to its website, Western Sky offers personal loans of up to $2,600.00.

5. Also according to its website and a loan agreement with a Colorado consumer the loans have APRs from 140% to over 300%. The loan agreement with the Colorado consumer reflects a loan for $400.00 with over 330% APR. *See* Exhibits 1 and 2 to the affidavit of Jodie Robertson. (Robertson Aff., attached to the State's Motion as Exhibit 2).

6. Colorado Consumers apply for loans directly through Western Sky's Website.

7. Western Sky electronically deposits the loans' proceeds into the consumers' bank accounts.

8. Pursuant to the loan agreements, consumers authorize Western Sky to withdraw funds electronically from the consumers' bank accounts.

9. In 2010 alone, Western Sky made over 200 loans to Colorado consumers.

10. Western Sky is not, and at no relevant time was, licensed as a supervised lender in Colorado authorized to make supervised loans pursuant to Colorado's Uniform Consumer Credit Code, C.R.S. § 5-1-101, *et seq*. (the "Code").

11. In November 2010, Administrator Udis (the "Administrator") demanded that Western Sky cease making any new loans. The Administrator also demanded that Western Sky make refunds to consumers of all of its loans' improper and excess finance charges.

12. Western Sky did not comply with the Administrator's demands.

STANDARD OF REVIEW

Summary judgment is appropriate when, based on the pleadings, no genuine issue as to any material fact exists and the moving party is entitled to judgment as a matter of law. C.R.C.P. 56(c); *Cotter Corp. v. American Empire Surplus Lines Ins. Co.*, 90 P.3d 814, 819 (Colo. 2004). The purpose of summary judgment is to permit the parties to pierce the formal allegations of the pleadings and save the time and expense associated with trial when, as a matter of law, one party could not prevail. *Peterson v. Halsted*, 829 P.2d 373, 375 (Colo. 1992). The nonmoving party must receive the benefit of all favorable inferences that may be reasonably drawn from the undisputed facts, and all doubts are resolved against the moving party. *Clementi v. Nationwide Mut. Fire Ins. Co.*, 16 P.3d 223, 225-26 (Colo. 2000).

A party may move for summary judgment on an issue it would not bear the burden of proof upon at trial. *Casey v. Christie Lodge Owners Ass'n, Inc.*, 923 P.2d 365, 366 (Colo. App. 1996). In such an instance, the burden is on the moving party to establish the "nonexistence of a genuine issue of material fact." *Civil Serv. Comm'n v. Pinder*, 812 P.2d 645,649 (Colo. 1991) (*citing Continental Airlines, Inc. v. Keenan*, 731 P.2d 708, 712 (Colo. 1987)). This burden may be satisfied by "demonstrating that there is an absence of evidence in the record to support the

nonmoving party's case." *Id.* "An affirmative showing of specific facts, un-contradicted by any counter affidavits, leaves a trial court with no alternative but to conclude that no genuine issue of material fact exists." *Civil Serv. Comm'n*, 812 P.2d at 649 (*citing Terrell v. Walter E. Heller & Co.*, 439 P.2d 989, 991 (Colo. 1968)).

ANALYSIS

The State requests that this Court enter summary judgment regarding Defendants' liability on its second claim for relief, "Refunds to Consumers – Code Unlicensed Lender." Specifically, the State contends that Defendants made and collected supervised loans without a supervised lender's license, in violation of § 5-2-301 the Code, and therefore, Defendants are subject to penalty under the Code.

The Code prohibits a person from making or collecting supervised loans without a supervised lender's license, providing that:

> (1) Unless a person . . . has first obtained a license from the administrator authorizing him or her to make supervised loans, he or she shall not engage in the business of:
>
> (a) Making supervised loans or undertaking direct collection of payments from or enforcement of rights against consumers arising from supervised loans he or she has previously made.

Code § 5-2-301(1)(a). Where a creditor has violated the Code regarding the authority to make supervised loans contained in Code § 5-2-301:

> the consumer is not obligated to pay the finance charge and has a right to recover from the person violating this code . . . a penalty in an amount to be determined by the court not in excess of three times the amount of the finance charge . . . .

Code § 5-5-201(1). Further, Code § 5-6-114 authorizes the State to seek these amounts on the consumers' behalves and provides that the Administrator may "bring an action against a creditor

for making or collecting charges in excess of those permitted by this code" and, if "an excess charge has been made, the court shall order the respondent to refund to the consumer the amount of the excess charge and to pay a penalty to the consumer as provided in [§] 5-5-201."

Code § 5-1-301(47) defines a "supervised" loan as a consumer loan with an APR in excess of 12%. In turn, a consumer loan is a loan in which: (1) the consumer is a person other than an organization; (2) the principal does not exceed $75,000; (3) a loan finance charge is made; and (4) the debt is incurred primarily for personal, family, or household purposes. *See* Code § 5-1-301(15)(a).

Here, the undisputable facts before the Court confirm that Western Sky makes and collects unlicensed supervised loans to Colorado citizens, thereby subjecting Defendants to liability under the Code.[1] However, Defendants assert that the State's Motion fails because: (1) Mr. Webb is a Native American who conducts business within the boundaries of the Reservation, and therefore, Webb and his company, Western Sky, are subject to tribal immunity and federal preemption, not subject to state jurisdiction and control; and, (2) in its Motion, the State improperly "relies heavily on the non-binding stipulation [of fact] in an unrelated federal court case [*FTC v. Payday Financial, LLC*, Case No. 11 CV 03017 (D.S.D. May 18, 2012) (the "South Dakota Case")]."

I. Defendants' contention that the State's Motion fails because it improperly relies on the Non-Binding Stipulation in the South Dakota Case is not persuasive.

Defendants assert that the State improperly relied on the stipulation from the South Dakota Case. Specifically, Defendants maintain that the State's contentions, based on the

[1] While Defendants deny certain of Plaintiff's allegation with respect to Defendants making and collecting supervised loans without a license, their denials are simply not supported by the record before the Court.

stipulation, that Western Sky: (a) "makes withdrawals from the consumer's bank account'" (b) "initiates collection procedures if the consumer foes not pay the loan;" and, (c) "collected illegal and unlicensed supervised loans," are clearly disputed and contradicted by the record before the Court. Therefore, Defendants assert that summary judgment is not appropriate.

However, in its Motion, the State contends that the facts are "taken principally from the Complaint's allegations that [D]efendants admit in their Answer." While the aforementioned facts, as alleged by the State derive from the stipulation in the South Dakota Case, other salient facts come from Defendants' own documents, their discovery responses, sworn affidavits, and deposition testimony. Further, as discussed in greater detail below, the disputed facts referenced above with respect to Defendants' withdrawal and collection procedures are not material to resolving the present issue before the Court – whether Defendants are liable under the Code – as there is ample undisputed evidence before the Court to establish that Defendants have engaged in unlicensed supervised loans and are not entitled to tribal immunity or federal preemption with respect to their business activities.

II. Defendants are not entitled to Tribal Immunity or Federal Preemption.

Turning next to Defendants' contention that they are entitled to tribal immunity because they are conducting business on the Reservation, the Court concludes that Defendants' argument is without merit. This Court addressed this very argument in its Order dated, April 17, 2012, denying Defendants' Motion to Dismiss, rejecting Defendants' assertion that the State is attempting to reach into and regulate on-reservation activity. Defendants' recycling of this same argument here is equally unpersuasive.

Specifically, in the April 17, 2012 Order, this Court found *State ex rel. Suthers v. Cash Advance & Preferred Cash Loans*, 205 P.3d 389 (Colo. App. 2008) ("*Cash Advance I*") instructive on this issue, where, in a near identical factual scenario to this action, the State attempted to investigate a tribal entities alleged usurious internet loan making to Colorado consumers in violation of Colorado's Consumer Credit Code and Consumer Protection Act. *Id.* at 394, *aff'd sub nom. Cash Advance & Preferred Cash Loans v. State*, 242 P.3d 1099 (Colo. 2010).

In *Cash Advance I*, the Court of Appeals determined that business conducted via the internet, which is identical to the type of business conducted by Western Sky here, was sufficient to confer jurisdiction to the State and demonstrated that the business activity constituted off-reservation activity. *See Cash Advance I*, 205 P.3d at 400. Observing that violations of Colorado's Consumer Credit Code and Consumer Protection Act would have significant off-reservation effects that would require the State's intervention, the Court of Appeals held that the State had jurisdiction to "investigate, criminally prosecute, seek declaratory and injunctive relief, and pursue civil remedies for conduct occurring within its borders." *See id.* at 403.

Nevertheless, Defendants maintain that the application of the five-factor test, set forth in *Cash Advance I*, as applied to their business activities here, establish that Western Sky's lending activities occur within the boundaries of the Reservation, thereby preventing the State's enforcement efforts in accordance with tribal immunity. The Court does not agree.

In *Cash Advance I*, the Court of Appeals provided the following factors for courts to consider when determining whether lending activity took place off-reservation: (1) where the contract was entered into; (2) where the contract was negotiated; (3) where performance will

occur; (4) where the subject matter of the contract is located; and, (5) where the parties reside. 205 P.3d at 400. However, in *Cash Advance I* the Court of Appeals did not rely on those factors. Rather, as set forth above, the Court of Appeals employed a long-arm analysis, to conclude that "[b]usiness conducted over the Internet that would confer jurisdiction on a state court also demonstrates that the business activity constitutes off-reservation activity." *Id.* Further, an application of the *Cash Advance I* factors to the uncontroverted facts presented here leads this Court to no contrary conclusion that Defendants' lending activities occur off-reservation.

Similarly, Defendants' contention that Webb is individually protected by tribal immunity as a member of the Tribe is in vain. Again, the Court addressed this very contention in its April 17, 2012 Order, denying Defendants' Motion to Dismiss. 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. *See Puyallup Tribe, Inc. v. Dep't of Game*, 433 U.S. 165, 171,72 (1977) (holding that the "doctrine of sovereign immunity . . . does not immunize individual members of [a] tribe.").

Defendants also contend that the State has no regulatory authority of Webb because Webb conducts business through a legally recognized business entity, and the State has alleged no facts sufficient to pierce the corporate veil with respect to Webb. Conversely, the State maintains that Webb's individual liability is not dependent on any "piercing the corporate veil" or "alter ego" theory. Rather, the State contends that Webb's liability flows from the long and well-established principle that those responsible for corporate wrongdoing are personally liable for the corporation's wrongful acts.

In support of its contention, the State directs the Court to several cases from other persuasive jurisdictions. First, in *F.T.C. v. Amy Travel Serv., Inc.*, 875 F.2d 564 (7th Cir. 1989), the Seventh Circuit affirmed a judgment holding individual shareholder and officer defendants liable for consumer restitution and other remedies to the same extent as their businesses. *Id.* at 566, 573-74. In doing so, the Seventh Circuit held that where the individuals participated in the businesses' unlawful acts, "or had authority to control them," the individuals were personally liable. *Id.* at 573. Similarly, in *Texas v. Am. Blastfax, Inc.*, 164 F.Supp.2d 892, 899 (W.D. Tex. 2001), in a state regulatory action brought under the federal Telephone Consumer Protection Act, the court held the individual officers, directors, and shareholders jointly and severally liable with the defendant corporation for monetary judgment and injunctive relief. There, the federal court rejected the defendants' proposition that individual liability for corporate acts required piercing the corporate veil, holding that those who "participate in or authorize the commission of a wrongful act, even if the wrongful act is done on behalf of the corporation, . . . may be personally liable . . . [T]o hold otherwise would allow the individual defendants to simply dissolve the [corporation], set-up a new shell corporation, and repeat their conduct." *Id.* at 897-898.

The State provided the Court with countless other examples of courts holding individual defendants liable for a business's violations under similar circumstances without requiring that the plaintiff pierce the corporate veil. *See, e.g., U.S. v. Pollution Abatement Serv., Inc.*, 763 F.2d 16, 23-25 (2nd Cir. 7985); *McCown v. Heidler*, 527 F.2d 204 (10th Cir. 1975); *Mead v. Johnson & Co. v. Baby's Formula Serv., Inc.*, 402 F.2d 19, 23 (5th Cir. 1968); *Wash v. Ralph Williams' N.W. Chrysler Plymouth, Inc.*, 553 P.2d 423, 439 (Wash. 1979).

This principle is equally established in Colorado. In *Snowden v. Taggart*, 17 P.2d 305 (Colo. 1932) the Colorado Supreme Court held that an officer of a corporation involved with the commission of the corporation's wrongdoing is personally liable, providing:

> This principle is absolutely without exception, and is founded upon the soundest legal analogies, and the wisest public policy. To permit an agent of a corporation, in carrying on its business, to inflict wrong and injuries upon others, and then shield himself from liability behind his vicarious character, would often both sanction and encourage the perpetration of flagrant and wanton injuries by agents of insolvent and irresponsible corporations.

Id. at 307 (internal quotations omitted).

This principle was reiterated in *Sanford v. Kobey Bros. Constr. Corp.*, 689 P.2d 724 (Colo. App. 1984), where the Court of Appeals reversed a trial court's entry of judgment in favor of an individual defendant because the facts presented did not permit the plaintiffs to pierce the corporate veil. In reaching its conclusion, the Court of Appeals provided that:

> Neither the doctrine of *respondeat superior* nor the fiction of corporate existence bars imposition of individual liability for individual acts of negligence, even when the individual is acting in a representative capacity . . . Rather, a servant may be held personally liable for his individual acts . . ., as so may an officer, director, or agent of a corporation for his or her tortious acts, regardless of the fact that the master or corporation also may be vicariously liable.

Id. at 725-26.

Here, it is uncontroverted that Webb is the sole manager, executive director, owner, and principal of Western Sky. It is further undisputed that Webb directs, controls, manages, participates in, supervises, is responsible for, and authorizes Western Sky's activities. Finally, the record before the Court confirms that Webb has general responsibility and final decision making authority for *all* of Western Sky's business operations. Accordingly, because Webb has

the exclusive authority to control the actions of Western Sky, he may also be held individually liable for Western Sky's violations of the Code.

To the extent that Defendants contend that "Indian businesses operating on a reservation are not subject to state jurisdiction and control" and are thus preempted by federal law, the Court is not persuaded.

Again, this very contention was rejected by this Court in its April 17, 2012 Order denying Defendants' Motion to Dismiss. As discussed above, the record before the Court confirms that Defendants' conduct does not involve the regulation of Indian affairs on an Indian reservation. Further, as discussed in the Court's April 17, 2012 Order, the Court finds the federal court's determination in *State ex rel. Suthers v. Western Sky, LLC*, 845 F.Supp.2d 1178, 1182 (D. Colo. 2011), regarding Defendants' preemption argument particularly instructive:

> Defendants argue that Congress has completely preempted the regulation of Indian affairs on a reservation. However, even if that were so, it begs the question of whether the conduct of which [the State] complain[s] involved regulation of Indian affairs on a reservation. I find and conclude that it did not. [The State] allege[s], and defendants do not dispute, that defendants were operating via the Internet .... The borrowers do not go to the reservation in South Dakota to apply for, negotiate or enter into loans. They apply for loans in Colorado by accessing defendants' website. They repay the loans and pay the financing charges from Colorado; Western Sky is authorized to withdraw the funds electronically from their bank accounts. The impact of the allegedly excessive charges was felt in Colorado. Defendants have not denied that they were doing business in Colorado for jurisdictional purposes, nor does it appear that they could. *See* [*Cash Advance I*, 205 P.3d at 400]. "Business conducted over the Internet that would confer jurisdiction on a state court also demonstrates that the business activity constitutes off-reservation activity." [*Id.*]

Moreover, notwithstanding the above, it is well settled that tribes are subject to state law when engaged in off-reservation activity. *See, e.g., Nevada v. Hicks*, 533 U.S. 353 (2001); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973); *Organized Vill. Of Kake v. Egan*, 369 U.S. 60, 62-63, 75-76 (1962).

C.R.S. § 5-1-201(1) provides that the Code "applies to consumer credit transactions made in this state." The Code further provides that a consumer credit transaction is made in this state if:

> (b) A consumer who is a resident of this state enters into a transaction with a creditor who has solicited or advertised in this state by any means, including but not limited to mail, brochure, telephone, print, radio, television, internet, or any other electronic means.

Code § 5-1-201(1)(b).

Here, it is undisputed that Defendants operate a website and engage in television advertising in this state, thereby soliciting and advertising their lending business in Colorado. It is further, undisputed that Defendants have entered into loan agreements with Colorado residents.

Accordingly, because Defendants' business activities are conducted off-reservation and because Defendants solicit and advertise their business in Colorado and have, in fact, entered into loan agreements with Colorado citizens, Defendants are not entitled to tribal immunity or federal preemption. Rather, based on the undisputed facts before the Court, the Court concludes that Defendants are subject to the Code's previsions and are thereby liable for any violation thereof. Specifically, because Western Sky is not, and has never been, licensed as a supervised lender, and because unlicensed lenders are not authorized to charge a finance charge on

supervised loans, Defendants' liability for restitution to consumers of all finance charges, including penalties, on all unlicensed loans made or collected with respect to Colorado citizens, is established as a matter of law.

III. The State is entitled to Attorney's Fees incurred in Replying to Defendants' Tribal Immunity and Preemption Arguments in their Response.

The State requests that this Court grant its request for Attorney's fees pursuant to C.R.S. § 13-17-101, *et seq.*, for fees incurred in replying to Defendants' tribal immunity and federal preemption arguments, raised in their Response. C.R.S. § 13-17-102 provides, in pertinent part, that a court may award reasonable attorney fees against a party who brings an action "that lacks substantial justification." *See* C.R.S. § 13-17-102(2). Under this statute, the term "lacks substantial justification" means substantially frivolous, substantially groundless, or substantially vexatious. C.R.S. § 13-17-102(4).

Here, as discussed above, the crux of Defendants' argument is that they are entitled to tribal immunity and federal preemption because their business activities are conducted on the Reservation. This very argument has been raised twice previously by these Defendants, and was rejected in each instance. Defendants first raised this argument in *Suthers*, 845 F.Supp.2d at 1182, where the federal court determined that "[D]efendants' repeated argument that [this] case involves regulation of Indian Affairs on an Indian Reservation" so lacked an "objectively reasonable basis" as to entitle the State to its costs and attorney's fees. *Id.* Defendants raised this same argument in the present litigation in their Motion to Dismiss. This argument was again rejected by this Court in its April 17, 2012 Order, denying Defendants' Motion to Dismiss. In their Response to the State's Motion for Summary Judgment, Defendants now raise this same argument for a third time, seemingly undeterred by the federal court's ruling in *Suthers*, as well

as this Court's prior ruling here. While Defendants purportedly provide additional facts concerning the details of their loan making process in support of their tribal immunity and preemption arguments, a review of the additional information provided by Defendants leads the Court to no contrary conclusion. Rather, these additional materials confirm what this Court, along with the *Suthers* court, already determined – that Defendants' actions in offering and entering into loans with Colorado consumers, via the Internet, does not constitute on-reservation business activity.

Defendants' continued assertions that they are entitled to tribal immunity and federal preemption, which have been repeatedly rejected by this Court and the Federal Courts, evince stubbornly litigious and substantially vexatious defense of this action and warrant and assessment of attorney's fees. *Mitchell v. Ryder*, 104 P.3d 316, 320-21 (Colo. App. 2004). Where, as the Court has found here, an attorney or party has brought or defended an action, or any part thereof, which lacked substantial justification, the Court shall assess attorney's fees. C.R.S. § 13-17-102(4). Any such award is properly entered in favor of the State and against Defendants and their counsel, jointly and severally. C.R.S. § 13-17-102(3).

Accordingly, because Defendants tribal immunity and federal preemption arguments lack substantial justification, the State is entitled to recover its attorney's fees expended in replying to Defendants Response insofar as the State can establish the reasonable fees incurred in addressing Defendants' tribal immunity and preemption arguments.

CONCLUSION

WHERFORE, in light of the reasoning stated above, the State's Motion for Partial Summary Judgment – Second Claim for Relief is hereby GRANTED. It is further ordered that,

in light of the voluminous unlicensed loans extended by Defendants in violation of the Code, estimated at over 4,000, the State's request that a special master be appointed to determine the number of, and extent to which, consumers have been adversely affected by Defendants' unlawful activity in this matter is GRANTED. The Parties shall submit a joint list of three potential Special Masters, not later than 14 days from the date of entry of this Order, and the Court will select one from that list. If the parties cannot agree on a list of potential Special Masters, the Court will appoint someone of the Court's choosing. Further, in accordance with the Court's findings herein, the State shall file an Affidavit of Attorney's fees incurred in replying to Defendants' tribal immunity and federal preemption arguments in their Response, not later than 14 days from the date of entry of this Order.

DONE this 15th day of April, 2012.

BY THE COURT:

MICHAEL A. MARTINEZ
District Court Judge

Exhibit 2

BEFORE THE MARYLAND COMMISSIONER OF FINANCIAL REGULATION

COMMISSIONER OF FINANCIAL REGULATION	*	CASE NO. CFR-FY2011-182
v.	*	
WESTERN SKY FINANCIAL, LLC,	*	OAH NO. DLR-CFR-76A-47146
GREAT SKY FINANCE, LLC,	*	
PAYDAY FINANCIAL, LLC,	*	
MARTIN A. WEBB, ET AL.	*	
Respondents.	*	

* * * * * * * * * * * *

OPINION AND FINAL ORDER

This matter came before the Maryland Commissioner of Financial Regulation ("Commissioner") for argument on Exceptions filed by Respondents Western Sky, Financial, LLC; Great Sky Finance, LLC; Payday Financial, LLC; the collective d/b/a's and a/k/a's; and Martin A. Webb; to the Proposed Order of August 30, 2012. On June 22, 2012, Administrative Law Judge Neile S. Friedman ("ALJ") filed a Proposed Decision and Recommended Order in which she recommended that the Respondents permanently cease and desist from making or entering into agreements to make unlicensed consumer, installment, or any other loans to Maryland consumers; that the Respondents permanently cease and desist from collecting or attempting to collect on any loans previously made to Maryland consumers, including but not limited to, collecting or attempting to collect any principal, interest, finance charges, or any other fees related to transactions involving Maryland consumers; that the Respondents permanently cease and

desist from selling, assigning, or transferring to any third party their interest in any loans which the Respondents previously made to Maryland consumers; that the Respondents pay a civil penalty in the amount of $137,000; that all consumer loans made by the Respondents to Maryland consumers are illegal and unenforceable; that the Respondents may not receive or retain any principal, interest, or any other compensation related to those consumer loans made by the Respondents to Maryland consumers and shall fully refund to Maryland consumers all amounts collected (including principal, finance charges/service fees, and any other money related to those consumer loans), which includes providing full refunds to certain named Maryland consumers in certain specified amounts; and that the Respondents take corrective action to remove any adverse or negative information that the Respondents or third party collection agencies acting on the Respondents' behalf had previously submitted to credit reporting agencies.

On August 30, 2012, the Commissioner issued a Proposed Order that adopted the Proposed Decision and Recommended Order in its entirety. The Respondents were sent a copy of the Proposed Order and notified of their right to file exceptions to it within 20 days of the postmark date of the mailing.

The Respondents filed timely exceptions in their own names and for all the d/b/a and a/k/a names or entities listed in the action.

A hearing on the Exceptions was held by Mark A. Kaufman, Maryland Commissioner of Financial Regulation, on February 22, 2013. The Respondents appeared through their counsel, Claudia Callaway, Esq., and Christina Grigorian, Esq. W. Thomas Lawrie, Assistant Attorney General, represented the Commissioner as

litigation counsel at the exceptions hearing. The proceedings were electronically recorded, and a transcript of the hearing has been made available to the Commissioner.

EVIDENCE

The following documents were before the Commissioner:

1. The exhibits from the Office of Administrative Hearings;
2. The transcript of the hearing;
3. Respondents' Closing Brief and Proposed Findings;
4. Proposed Findings and Closing Brief of the Commissioner of Financial Regulation;
5. Reply Brief of the Commissioner of Financial Regulation;
6. Proposed Order of the Commissioner, including the Proposed Decision and Recommended Order of the Administrative Law Judge;
7. Respondents' Exceptions, Memorandum in Support of Exceptions, and Exhibits thereto.

DISCUSSION

I. Background.

On February 15, 2011, the Deputy Commissioner of Financial Regulation issued a Summary Order to Cease and Desist to Western Sky Financial, LLC; Great Sky Finance, LLC; Payday Financial, LLC; and their collective d/b/a's and a/k/a's; and Martin A. Webb. The Order was based on a series of consumer complaints from Maryland consumers regarding short-term, high-interest loans made by the Respondents. The Deputy Commissioner alleged that the Respondents had violated cited sections of the Commercial Law Article, Title 12, Subtitle 3, and cited sections of the Financial Institutions Article, Title 11, Subtitle 2, of the Annotated Code of Maryland.

The Respondents responded to the Summary Order on March 3, 2011 with a motion to dismiss, which the Deputy Commissioner treated as a request for a hearing on the Summary Order. The Respondents then removed the administrative action to federal court by filing a notice of removal in the U.S. District Court for the District of Maryland. The Commissioner's Office filed a Motion to Remand, and the Respondents filed an opposition to that Motion. The matter was fully briefed by both sides. On October 12, 2011, U.S. District Judge William D. Quarles, Jr., granted the Motion to Remand, finding that the Respondents' assertions of federal jurisdiction were invalid. He did not decide the Respondents' Motion to Dismiss the regulatory case, remanding that with the underlying Summary Order back to the Commissioner's Office for further action.

The Commissioner's Office then delegated authority to the Office of Administrative Hearings (OAH) to hear the matter, and issue proposed findings of fact and conclusions of law, and a recommended order. This hearing was held on January 31 and February 1, 2012. The Respondents did not appear at the hearing, but were represented by their counsel Charles S. Hirsh, Esq. After the hearing, written closing arguments were submitted by both parties.

The judge subsequently issued a Proposed Decision and Recommended Order, which was adopted by the Commissioner as a Proposed Order. This Order was served on the Respondents, and they filed joint written exceptions. In the exceptions, they claimed that the Proposed Order failed to account for certain facts that they alleged were dispositive; that the Commissioner lacked jurisdiction over the claims based on tribal member immunity; and that the Respondents had not been properly served.

II. Facts.

Martin A. Webb is the sole owner and manager of three business entities and their related d/b/a's and a/k/a's – Western Sky Financial, LLC, Great Sky Finance, LLC, and Payday Financial, LLC. All of the companies were organized and registered under South Dakota law. They are all in the business of making high-interest loans to consumers via the internet. (FOF 1-6). All have the same principal place of business – 612 E Street, Timber Lake, South Dakota 57656. (FOF 7).

Mr. Webb is a three thirty-seconds Cheyenne River Sioux by blood; he lives on the Cheyenne River Sioux Reservation, and the businesses are located on the Reservation. (Affidavit of Martin A. Webb, Exhibit 1 to Respondent's Memorandum in Support of Exceptions.) The Cheyenne River Sioux Tribe did not create any of the business entities under tribal law, although they hold business licenses from the Tribe in order to do business on the Reservation. The Tribe does not have any ownership interest or operating role in Mr. Webb's companies. He is not a tribal officer of the Tribe. (FOF 8 and 9; Webb Affidavit).

The Respondent companies advertise on television and on the internet that they provide loans to consumers. Their advertising could be seen by consumers in Maryland. (FOF 10). Based on these advertisements, a number of Maryland residents applied for loans via computers located in Maryland. Their correspondence with the Respondent companies was by e-mail from their computers or by telephone; they never traveled to the Reservation, or anywhere out of the State of Maryland, for any reason related to the application, execution, or funding of the loans. (FOF 12 and 13). The Respondent companies funded the loans by transmitting money to Maryland residents' bank accounts

located in Maryland. They required that the Maryland residents repay their loans through ACH (Electronic Funds Transfer) authorization debit or check, whereby the companies took payments from the same Maryland bank accounts. (FOF 13). The Respondent companies communicated with the Maryland residents by e-mails sent to the consumers in Maryland or by calling them on telephone numbers with Maryland area codes. (FOF 14).

The record reflects 26 Maryland consumers who sought and received loans from the Respondent companies from April 2009 through June 2011. Annual interest rates on the loans ranged from a low of 120% to a high of 1,825%. (FOF 18 and 37). In four instances, the borrowers' employers were contacted by the Respondent companies and told that they were authorized to garnish that individual's wages, even though the required Maryland process for garnishment of wages had not been followed. (FOF 16, 20, 21, and 38).

None of the Respondents has ever been licensed by the Commissioner to make consumer loans in the State, nor have they ever held any other type of license issued by the Commissioner. (FOF 41). The maximum annual interest rate that may be charged in connection with a consumer loan in Maryland is 33% on unpaid balances up to $1,000, and 24% on unpaid balances over $1,000. (FOF 42; Commercial Law Article, §12-306). The Respondents failed to comply with numerous other statutory requirements related to consumer loans. (FOF 43-48).

The Respondents made loans to at least 5 Maryland residents after the Deputy Commissioner had issued a Summary Cease and Desist Order. They also continued to collect on the consumer loans after that Order was issued. They did not produce

documents and records to the Commissioner's Office as required by the Order to Produce. (FOF 49 and 50).

III. Exceptions.

Respondents list three "principal errors" in the Proposed Order as the basis for their Exceptions. The first relates to Mr. Webb's status as an enrolled member of the Cheyenne River Sioux Tribe, and a resident of the Tribe's Reservation in South Dakota. A Second Affidavit of Martin A. Webb was submitted as Exhibit 1 to the Respondents' Memorandum in Support of their Exceptions. The Commissioner has accepted that document, as well as the exhibit thereto entitled Certificate of Blood, into the record in this case, and this Final Order is premised on Mr. Webb's status and residence as set forth in those documents.[1]

The second "principal error" is the alleged refusal to acknowledge that the entity Respondents are located on the Cheyenne River Sioux Reservation.[2] These matters are again set forth in Mr. Webb's Second Affidavit, and the Commissioner accepts them, and premises this Final Order on the fact that the businesses are located on the Reservation.[3]

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[1] The ALJ was not required to accept an affidavit from a party into evidence for the purpose of establishing certain facts. In this case, the Respondents chose not to offer evidence other than through an Affidavit submitted by counsel. The Commissioner has accepted certain facts set forth in the Second Affidavit, but in no way faults the ALJ for her decision in this regard.

[2] While the ALJ did not consider Mr. Webb's status as an enrolled tribal member, his residence, and the location of the businesses in her legal analysis, she did consider the fact that the businesses were in no way tribal activities under the case law cited in Section IV. The absence of this connection defeats the claim of tribal immunity regardless of the status and residence of Respondent Webb.

[3] Respondents also claimed in their written exceptions that the ALJ erred by putting the burden on them to prove that they did not violate State law, although they did not argue this point at the Exceptions hearing. This assertion is not supported by the ALJ's statement on page 17 of the Proposed Decision and

IV. Legal Analysis.

A. Immunity.

The Respondents' third "principal error" is their contention that the Commissioner has no jurisdiction over the Respondents based on the fact that Mr. Webb is an enrolled member of the Cheyenne River Sioux Tribe and a resident of that Reservation; that all of the Respondents are located and operated exclusively on the Cheyenne River Sioux Reservation pursuant to their tribal business licenses; and that the loans at issue were made on the Reservation as a matter of Maryland law.

The Respondent Martin A. Webb is the sole owner and manager of the three named business entities and their a/k/a's and d/b/a's. According to the Cheyenne River Sioux Tribe Certificate of Indian Blood that he submitted in connection with the Exceptions, he is three thirty-seconds Cheyenne River Sioux. He resides on the Cheyenne River Sioux Reservation, where all his businesses are located. He is not a tribal officer of the Cheyenne River Sioux Tribe. The businesses were created under the law of the State of South Dakota. The Cheyenne River Sioux Tribe does not own or operate or have any financial interest in any of the business entities. The businesses do not offer any products to residents of the reservation, or in fact to any residents of the State of South Dakota. (Transcript of Exceptions Hearing at 32).

The businesses advertise on television and the internet that they provide loans to consumers. Based on the experiences of the Maryland consumers, these loans were for short periods of time, and carried annual interest rates of up to 1825%. When consumers were unable to repay the loans and related interest, the businesses would in some

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Recommended Order that the CFR has "the burden of proof, by a preponderance of the evidence to demonstrate that the Respondent violated the statutory and regulatory sections at issue."

instances contact the consumer's employer and arrange for garnishment of their wages, without first complying with the relevant Maryland law.

There is nothing in the record to indicate that the businesses act as arms of the Tribe or that Mr. Webb's activities were taken on behalf of the Tribe. The only reference to the Tribe's involvement is in Mr. Webb's second affidavit where he says that the companies are licensed by and under the Tribe's Business Ordinance to conduct their lending operations. Even the Respondents do not argue that this general licensing makes the businesses arms of the Tribe for the purposes of immunity from state enforcement action. Instead, they claim that Mr. Webb has tribal immunity by being an enrolled member of the Tribe and operating his companies on the Reservation, an immunity that flows to, and protects, all of these businesses.

The case law, however, does not support this position. As the Supreme Court of Colorado stated in *Cash Advance and Preferred Cash Loans v. State*, 242 P.3d 1099, 1111 (2010), "It is undisputed that tribal sovereign immunity does not protect individual tribal members. *Puyallup Tribe*, 433 U.S. at 171-72." The court goes on to describe the immunity that might be available to a tribal officer, a status that Mr. Webb does not claim or possess.

The cases relied on by the Respondents in claiming tribal immunity for Mr. Webb and his companies do not address that issue. *Williams v. Lee*, 359 U.S. 217 (1959); *Montana v. United States*, 450 U.S. 544 (1981); *McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164 (1973). All involve the question of what jurisdiction may appropriately regulate, or tax, certain activities that occur on a reservation. There was no analysis of the immunity of a tribe, a tribal officer, or a member of a tribe claiming

immunity through the tribe. Rather, they concern the question of whether certain activity can be addressed by the exercise of state jurisdiction or solely through the tribal law or its courts, in effect, the issue of tribal sovereignty as opposed to tribal immunity. None of the cases offer support for the argument that Mr. Webb, a tribal member operating internet businesses with no ties to any tribe, is entitled to tribal immunity.

Respondents also rely on *Pourier v. South Dakota Department of Revenue*, 658 N.W.2d 395 (S.D.2003), aff'd in part and vacated in part on other grounds, 674 N.W.2d 314 (2004), cert. denied 541 U.S. 1064 (2004), for the proposition that a corporation owned by an enrolled member of a tribe and operated on the reservation is entitled to assert tribal sovereign immunity. The facts that the court relied on in that case make it clear that the holding is inapposite. The corporation was licensed by the Oglala Sioux Tribe to do business on the reservation, it exclusively sold its fuel at its retail gas station on the reservation, and 90% of purchasers from the corporation were Indians who resided on the reservation. The court's holding was that "[a] corporation owned by the tribe or an enrolled tribal member residing on the Indian reservation and doing business on the reservation for the benefit of reservation Indians is an enrolled member for the purpose of protecting tax immunity." 658 N.W.2d at 404.

However, in this case, Mr. Webb set up his businesses specifically to do business outside the reservation, in fact, outside the state of South Dakota. He marketed over the internet to customers as far away as Maryland, where at least 26 individuals entered into agreements with one of his companies. The fact that his businesses have a physical location on the Reservation is purely incidental to the type of business they transact.

Thus, there is no support for the argument that Mr. Webb has tribal immunity that he can, in turn, confer on his businesses.

B. Jurisdiction.

Respondents' related argument is that the State of Maryland cannot regulate the activities of Mr. Webb and his businesses because only the Tribe has jurisdiction over their activities. The Supreme Court has considered this question in a number of cases. In *Williams v. Lee*, cited above and by the Respondents in their Brief in Support of Exceptions, the Court found that the state could not exercise jurisdiction over a transaction that a non-Indian had with an Indian on the Reservation. It said, "There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves. It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there." 358 U.S. 217, 223. In the subsequent case of *Montana v. U.S.*, the Court found that "A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political, the economic security, or the health or welfare of the tribe." 450 U.S. 544, 566. In *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), a case involving two non-Indian corporations operating timber-hauling operations solely on the Fort Apache Reservation, the Court found that Arizona's attempt to apply its motor carrier license and use fuel taxes to the businesses was pre-empted by federal law, which specifically addressed harvesting of timber of the reservation, activities carried out in part by a tribal enterprise created under the approval of the Secretary of the Interior and with

the aid of federal funds. It cited two independent, but related, factors either of which would preclude state regulatory authority over tribal reservations and members: "First, the exercise of such authority may be pre-empted by federal law. (citations omitted). Second, it may unlawfully infringe 'on the right of reservation Indians to make their own laws and be ruled by them.'" (citations omitted). Id at 139. A similar result was reached in *New Mexico et al. v. Mescalero Apache Tribe*, 462 U.S. 324 (1983), where the Court found that the "exercise of concurrent jurisdiction by the State would effectively nullify the Tribe's unquestioned authority to regulate the use of its resources by members and nonmembers, interfere with the comprehensive tribal regulatory scheme, and threaten Congress' firm commitment to the encouragement of tribal self-sufficiency and economic development. Given the strong interests favoring exclusive tribal jurisdiction and the absence of state interests which justify the assertion of concurrent authority, we conclude that the application of the State's hunting and fishing laws to the reservation is pre-empted." Id at 344.

On the other hand, when the Court was faced with state tax laws applied against nonmembers of the tribes arising out of transactions with no substantial connection to reservation lands, it upheld the state's position. *Washington et al. v. Confederated Tribes of the Colville Indian Reservation et al.*, 447 U.S. 134 (1980). It said, "It can no longer be seriously argued that the Indian Commerce Clause, of its own force, automatically bars all state taxation of matters significantly touching the political and economic interests of the Tribes. (citation omitted). That Clause may have a more limited role to play in preventing undue discrimination against, or burdens on, Indian commerce. But Washington's taxes are applied in a nondiscriminatory manner to all transactions within

the State. And although the result of these taxes will be to lessen or eliminate tribal commerce with nonmembers, that market existed in the first place only because of a claimed exemption from these very taxes. The taxes under consideration do not burden commerce that would exist on the reservations without respect to the tax emption." Id. at 156. See also *Nevada v. Hicks*, 533 U.S. 353, 409 - 410 (2001), where the Court cited this case with approval: "When, however, state interests outside the reservation are implicated, States may regulate the activities even of tribe members on tribal land, as exemplified by our decision in *Confederated Tribes*."[4]

This is the more relevant precedent to the instant case. Instead of using the Reservation to sell untaxed cigarettes to non-Indians as in the *Confederated Tribes* case, the Respondents are operating loan businesses from the Reservation that are directed at non-Indians across the country, while specifically avoiding offering loans to Indians on the same Reservation. Application of state laws to their operations is nondiscriminatory, and in no sense "burdens commerce that would otherwise exist on the reservation." With respect to Maryland, the 26 consumers applied for their loans from the State, communicated with the Respondent companies from the State, received their loan proceeds in their bank accounts in the State, repaid the loans through debits to their bank accounts in the State, and in some instances had their Maryland employers contacted with regard to garnishing their salaries.

The Maryland legislature has enacted substantial protections for Maryland consumers in the area of consumer loans. Commercial Law Article, §12-301 et seq. It is

[4] Respondents have cited the Supreme Court case of *Worcester v. Georgia*, 31 U.S. 515 (1832) in support of their legal arguments. However, the Court in *Nevada v. Hicks* specifically distinguished this early case from later precedents by saying, "Though tribes are often referred to as "sovereign" entities, it was "long

the Commissioner's obligation to enforce these provisions against lenders who offer their products in the State, to the detriment of Maryland consumers. Under the facts present in this case, the Commissioner has jurisdiction to enforce Maryland laws against the Respondents.

C. Service of Process.

Respondents argue that service was ineffective because it was not performed in accordance with the rules of the Tribal Council. There is no requirement that the Commissioner use rules of service other than those applicable to cases under his jurisdiction. The law simply does not give a party the right to choose which rules will apply. Further, Mr. Webb, as sole owner of the business entities, was the appropriate person to receive service on their behalf. Not surprisingly, Respondents can cite no legal precedent for their position. The Maryland case they do cite, *Sheehy v. Sheehy*, 250 Md. 181 (1968), turns on the validity of service under Maryland law, and does not address conflicting service requirements of another jurisdiction.

D. Conclusion.

For the foregoing reasons, the Commissioner finds that the Exceptions filed by the Respondents are without merit, and must be denied.

ORDER

The Commissioner of Financial Regulation orders:

A. That the Findings of Fact in the Recommended Order are adopted, and two additional Findings of Fact have been made based on the Affidavit of Martin A. Webb

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ago" that the Court departed from Chief Justice Marshall's view that 'the laws of [a State] can have no force' within reservation boundaries." 533 U.S. 353 at 409.

attached as Exhibit 1, and the Certificate of Blood attached thereto, to the Memorandum in Support of Exceptions:

1. Individual Respondent Martin A. Webb is three thirty-seconds Cheyenne River Sioux by blood, is an enrolled member of the Cheyenne River Sioux Tribe, and resides on the Cheyenne River Sioux Reservation..

2. The business address of the Respondent companies is located on the Cheyenne River Sioux Reservation.

B. That the Respondents violated Commercial Law Article, §§12-302, 12-306(a) – (d), 12-313(a)(1), 12-307(b), 12-308(a) and (b), and 12-314(a); and Financial Institutions Article, §11-204, Annotated Code of Maryland;

C. That the Respondents are subject to civil penalties, the payment of restitution, and a final Cease and Desist Order for their violations of Commercial Law Article, §12-314(b), and Financial Institutions Article, §§2-114 and 2-115, Annotated Code of Maryland;

D. That the Respondents permanently Cease and Desist from making or entering into agreements to make unlicensed consumer, installment, or any other loans to Maryland consumers;

E. That the Respondents permanently Cease and Desist from collecting or attempting to collect on any loans previously made to Maryland consumers, including but not limited to collecting or attempting to collect any principal, interest, finance charges, or any other fees related to transactions involving Maryland consumers;

F. That the Respondents permanently Cease and Desist from selling, assigning, or transferring to any third party their interest in any loans that the Respondents previously made to Maryland consumers;

G. That the Respondents pay a civil penalty in the amount of $137,000, based on the considerations set forth in pages 25 to 26 of the Proposed Decision and Recommended Order;

H. That the Respondents may not receive or retain any principal, interest, or other compensation related to the consumer loans made by the Respondents to Maryland consumers, and that the Respondents shall fully refund to Maryland consumers all amounts collected (including principal, finance charges/service fees, and any other money related to those consumer loans), which includes providing full refunds to the Maryland consumers listed on pages 28 and 29 of the Proposed Decision and Recommended Order in the amounts set forth therein;

I. That the Respondents take corrective action to remove any adverse or negative information that the Respondents or third party collection agencies acting on the Respondents' behalf had previously submitted to credit reporting agencies; and

J. That the records and publications of the Commissioner of Financial Regulation reflect this Order.

5/22/13
Date

Mark A. Kaufman
Commissioner

COMMISSIONER OF	*	BEFORE THE
FINANCIAL REGULATION	*	COMMISSIONER OF
V.	*	FINANCIAL REGULATION
WESTERN SKY FINANCIAL, L.L.C., et al	*	CFR FILE NO.: CFR-FY2011-182
RESPONDENTS	*	OAH FILE NO.: DLR-CFR-76A-11-47146

* * * * * * * * * * * * * * *

PROPOSED ORDER

The Proposed Decision (the "Proposed Decision") of the Administrative Law Judge, issued on June 22, 2012 in the above captioned case, having been considered in its entirety, it is **ORDERED** by the Commissioner of Financial Regulation (the "Commissioner") this 30th day of August, 2012 that the Proposed Decision shall be and hereby is adopted as a Proposed Order.

Pursuant to COMAR 09.01.03.09, Respondent has the right to file exceptions to the Proposed Order and present arguments to the Commissioner. Respondent has twenty (20) days from the postmark date of this Proposed Order to file exceptions with the Commissioner. COMAR 09.01.03.09A(1). The date of filing exceptions with the Commissioner is the date of personal delivery to the Commissioner or the postmark date on mailed exceptions. COMAR 09.01.03.09A(2).

Unless written exceptions are filed within the twenty (20)-day deadline noted above, this Order shall be deemed to be the final decision of the Commissioner.

Mark Kaufman
Commissioner of Financial Regulation

MARYLAND COMMISSIONER OF	*	BEFORE NEILE S. FRIEDMAN
FINANCIAL REGULATION	*	AN ADMINISTRATIVE LAW JUDGE
v.	*	OF THE MARYLAND OFFICE OF
WESTERN SKY FINANCIAL, L.L.C., et al.	*	ADMINISTRATIVE HEARINGS
RESPONDENTS	*	OAH CASE NO: DLR-CFR-76A-11-47146

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PROPOSED DECISION

STATEMENT OF THE CASE
ISSUES
SUMMARY OF THE EVIDENCE
FINDINGS OF FACT
DISCUSSION
CONCLUSIONS OF LAW
RECOMMENDED ORDER

STATEMENT OF THE CASE

On February 15, 2011, the Maryland Commissioner of Financial Regulation (CFR or Commissioner), Department of Labor, Licensing and Regulation (DLLR or Agency), issued a Summary Order to Cease and Desist (Summary Order) and Order to Produce to Western Sky Financial, L.L.C. a/k/a Western Sky Funding, L.L.C. a/k/a Western Sky, a/k/a westernsky.com; Great Sky Finance, L.L.C., a/k/a Great Sky Finance, a/k/a GS Finance, a/k/a Great Sky d/b/a GSky, d/b/a Great Sky Cash (a/k/a GreatSkyCash.com); Payday Financial, L.L..C d/b/a Lakota Cash (a/k/a Lakota Cash, L.L.C., a/k/a lakotacash.com) d/b/a Lakota Cash, L.L.C., d/b/a Big Sky Cash (a/k/a bigskycash.com), d/b/a Big $ky Cash (a/k/a bigskycash.com), d/b/a Western Sky Financial, L.L.C. (a/k/a westernsky.com), d/b/a Western Sky Funding, L.L.C., d/b/a Western Sky, d/b/a Great Sky Finance, L.L.C., d/b/a Great Sky Finance, d/b/a GS Finance, d/b/a Great Sky, d/b/a GSky, d/b/a Great Sky Cash (a/k/a GreatSkyCash.com), d/b/a Red Stone Financial,

L.L.C., d/b/a Red River Ventures, L.L.C., d/b/a Management Systems, L.L.C. (d/b/a GSky), and Martin A. Webb, Respondents. The CFR alleges that the Respondents violated cited sections of the Commercial Law Article, Title 12, Subtitle 3, and cited sections of the Financial Institutions Article, Title 11, Subtitle 2, of the Annotated Code of Maryland, collectively the "Maryland Consumer Loan Law (MCLL)." The CFR seeks action under Md. Code Ann., Fin. Inst. §§ 2-115(a) and (b) (1) and (3) and 11-215(b) (2011) and Md. Code Ann., Com. Law §§12-314(b) (2005).

The Respondents sent to the CFR a response to the Summary Order dated March 3, 2011 with a motion to dismiss, which the CFR treated as a request for a hearing in this matter. Soon afterward, the Respondents removed the CFR's administrative action to federal court by filing a Notice of Removal in the U.S. District Court for the District of Maryland. The CFR subsequently filed a Motion to Remand in U.S. District Court, and the Respondents filed a Motion to Dismiss. On October 12, 2011, U.S. District Judge William D. Quarles, Jr., granted the Commissioner's Motion to Remand, thereby remanding the Summary Order back to the CFR for further administrative action. The Court did not decide the Respondents' Motion to Dismiss, but instead remanded the motion with the underlying Summary Order back to the CFR for further action.

On November 8, 2011, the CFR delegated authority to the Office of Administrative Hearings (OAH) to issue proposed findings of fact and conclusions of law, and a recommended order, in this matter as to all Respondents named in the Summary Order.

On January 31 and February 1, 2012, I held a hearing at the OAH in Hunt Valley, Maryland on the Summary Order and proposed penalties. Assistant Attorney General Thomas Lawrie appeared on behalf of the CFR. The Respondents did not appear, but they were

represented by Charles S. Hirsh, Esq.[1] Parties presented written closing arguments, which I received on March 15, 2012 (the Commissioner's argument), April 2, 2012 (the Respondents' argument), and on April 4, 2012 (the Commissioner's reply).

I heard this case pursuant to Sections 11-518 and 11-616 of the Financial Institutions Article, Annotated Code of Maryland (2011). Procedure in this case is governed by the Administrative Procedure Act, Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2009 & Supp. 2011), OAH's Rules of Procedure, COMAR 28.02.01, and COMAR 09.01.03.

ISSUES

Should I grant the Respondents' motion to dismiss?

Did the Respondents violate the Commercial Law and Financial Institutions Articles?

If so, what is the appropriate sanction?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following documents into evidence on behalf of the CFR:

Exhibit No.	Description	Admitted	Not Admitted
1	CFR Summary Order, Feb. 15, 2011	X	
2	Special Appearance and Request for a Hearing, Mar. 2, 2011	X	
3	CFR Delegation Letter, Nov. 7, 2011	X	
4	OAH Hearing Notice, Dec. 14, 2011	X	
5	Carmen Rivera Affidavit of Service	X	
6	JoAnn Simpson Affidavit of Service	X	
7	CFR Request for Hearing Subpoenas	X	
8	AAG Lawrie E-mail to Charles Hirsch re Subpoenas	X	
9	OAH Subpoenas *Duces Tecum*, Jan. 17. 2012	X	
10	CFR Request for Revised Subpoenas	X	
11	OAH Subpoenas *Duces Tecum*, Jan. 20, 2012	X	
12	Respondents' Motion to Quash Subpoenas	X	

[1] Code of Maryland Regulations (COMAR) 28.02.01.08 provides that a hearing shall proceed in the absence of a Respondent.

13	Agency Response to Motion to Quash	X	
14	Docket Sheet and All Filings from U.S. District Court for the District of Maryland: 1:11-cv-00735	X	
15	Docket Sheet and All Filings from U.S. District Court for the District of Maryland: 1:11-cv-01256	X	
16	AAG Lawrie Ltr. to Charles Hirsch providing Revised Consumer List	X	
17	Agency Consumer File for [redacted] Jorge	X	
18	Agency Consumer File for [redacted] Tina	X	
19	Agency Consumer File for [redacted], Tyricia	X	
20	Agency Consumer File for [redacted], Erica	X	
21	Agency Consumer File for [redacted], Tangette	X	
22	Agency Consumer File for [redacted], Arthur	X	
23	Agency Consumer File for [redacted], Neriska	X	
24	Agency Consumer File for [redacted], Adrienne	X	
25	Agency Consumer File for [redacted] Virginia	X	
26	Agency Consumer File for [redacted], Kevin	X	
27	Agency Consumer File for [redacted], Sylvia	X	
28	Agency Consumer File for [redacted], Brittany	X	
29	Agency Consumer File for [redacted], Cynthia	X	
30	Agency Consumer File for [redacted], Patricia	X	
31	Agency Consumer File for [redacted], Peter	X	
32	Agency Consumer File for [redacted], Ronald	X	
33	Agency Consumer File for [redacted] Carlos	X	
34	Agency Consumer File for [redacted], Bethany	X	
35	Agency Consumer File for [redacted], Nicole	X	
36	Agency Consumer File for [redacted], Janis	X	
37	Agency Consumer File for [redacted], Nicole	X	
38	Agency Consumer File for [redacted], Eleanor	X	
39	Agency Consumer File for [redacted] Sheronda	X	
40	Agency Consumer File for [redacted] Tamara	X	
41	Agency Consumer File for [redacted] Shaqueata	X	
42	Agency Consumer File for [redacted] Phyllis	X	
43	1868 Treaty	X	
44	1889 Laws, 50th Congress, Sess II., Ch. 405	X	
45	Colorado U.S. Dist. Court Order to Remand, Case No. 1:11-cv-00887	X	
46	Colorado State and Federal Case Filings	X	
47	W.V. Circuit Court of Kanawha County, Final Order Granting State's Petition to Enforce Investigative Subpoena, Civil Action No. 10-MISC-372	X	
48	W.V. Verified Petition for Writ of Prohibition and Joint Appendix, Civil Action No. 10-MISC-372	X	
49	FTC Filings in South Dakota U.S. Dist. Court, Case No. 3:11-cv-03017	X	

50	Missouri State and Federal Case Filings	X	
51	Mary Olive Johnson Ltr. to Colorado A.G. with Attached Article, Apr. 18, 2011		X
52	Cheyenne River Sioux Tribal Court, Small Claims Court Verified Complaint against Nicole [redacted] Dec. 20, 2011	X	

I admitted the following document into evidence on behalf of the Respondents:

Respondents' #1: Affidavit of Martin A. Webb

Testimony

The following persons testified on behalf of the CFR:

Jorge [redacted]

Peter [redacted]

Tamara [redacted]

Suzanne Elbon, CFR Investigator

The Respondents did not call any witnesses.

FINDINGS OF FACT

Having considered the testimony and exhibits presented, I find the following facts by a preponderance of the evidence:

1. Individual Respondent Martin A. Webb is the sole owner and manager of the following group of related or interconnected business entities: Western Sky Financial, L.L.C. (Western Sky), Great Sky Finance, L.L.C. (Great Sky), and Payday Financial, L.L.C. (Payday) (collectively, the "Respondent business entities").

2. Western Sky and Great Sky were organized and registered under South Dakota Law on May 15, 2009. Payday was organized and registered under South Dakota Law on

October 22, 2007. Martin A. Webb is the sole managing member of Payday. Payday, in turn, is the sole member of Western Sky and Great Sky.

3. Western Sky has also been referred to at various times as Western Sky Funding, L.L.C., Western Sky Financial, and westernsky.com.

4. Great Sky has also been referred to at various times as Great Sky Finance, GS Finance, and Great Sky. At various times, it has done business in its own name, and also as GSky, Great Sky Cash, Great Sky Cash Store 2, and GreatSkyCash.

5. At various times, Payday has done business in its own name, and also has done business as Lakota Cash, Lakota Cash VIP, Lakota Cash, L.L.C., Big Sky Cash, and Big $ky Cash.

6. The Respondents are all engaged in the business of making high-interest loans to consumers via the internet.

7. All of the Respondents have the same principal place of business: 612 E Street, Timber Lake, South Dakota 57656.

8. The Cheyenne River Sioux Tribe did not create any of the Respondent business entities under tribal law. The Cheyenne River Sioux Tribe does not own or operate or have any financial interest in any of the Respondent business entities.

9. Respondent Webb is not a tribal officer of the Cheyenne River Sioux Tribe.

10. Respondents advertise on television and on the internet that they provide loans to consumers. Respondents' television and internet advertising can be viewed by individuals who are located in Maryland.

11. As a result of the Respondents' television and internet advertising in Maryland, Maryland residents seeking to obtain consumer loans contacted the Respondents. The Maryland

residents applied for loans offered by the Respondents via the internet from computers located in Maryland, and corresponded with the Respondents by email from the consumers' computers located in Maryland, and/or by telephone from telephones located in Maryland.

12. The applications for the consumer loans obtained by the Maryland residents involved in the instant case originated in Maryland. None of these Maryland residents traveled to the Cheyenne River Reservation in South Dakota for any reason related to the application, execution, or funding of these loans, and none of these Maryland residents ever left the State of Maryland for any reason related to the application, execution, or funding of these loans.

13. The parties' obligations with regard to these loans were required to be performed in Maryland. Respondents funded the loans by transmitting money to Maryland residents' bank accounts located in Maryland. In turn, Respondents required that the Maryland residents repay their loans through ACH (Electronic Funds Transfer) authorization debit or check, whereby Respondents took payments from these same Maryland bank accounts.

14. Respondents sent emails to consumers in Maryland, and they contacted Maryland residents by calling them on phone numbers with Maryland area codes.

15. On October 5, 2010, Respondents made a consumer loan in the amount of $2,525.00 to Jorge [redacted], a Maryland resident who applied for the loan via the internet from his residence in Maryland after seeing an advertisement on television. The loan agreement stipulated that the annual interest rate would be 139.32%. Respondents funded the loan by transferring money into Mr. [redacted]'s bank account in Maryland, and they required repayment from this same bank account via ACH debits. By May 2011, Mr. [redacted] had repaid $5,021.13 on his loan.

16. In May 2010, Respondents made a high-interest consumer loan in the amount of $500.00 to Tina [redacted], a Maryland resident who applied for the loan via the internet from a computer in Maryland. The annual interest rate was 1,369.00%. Respondents funded the loan by transferring money into Ms. [redacted]'s bank account in Maryland, and they required repayment from this same bank account via ACH debits. By September 20, 2010, Ms. [redacted] had repaid $1,225.00 on her loan. On October 7, 2010, Ms. [redacted] was advised that her account had been transferred to Alliance Funding L.L.C.'s collections department in order to have her wages garnished to ensure repayment of the loan.

17. On March 8, 2011, Respondents made a high-interest consumer loan in the amount of $1,500.00 to Tyricia [redacted], a Maryland resident who applied for the loan via the internet from a computer in Maryland. The annual interest rate was 193.08%. Respondents funded the loan by transferring money into Ms. [redacted]'s bank account in Maryland, and they required repayment from this same bank account via ACH debits. Ms. [redacted] repaid $120.00 on her loan.

18. On November 8, 2010, Respondents made a high-interest consumer loan in the amount of $1,500.00 to Erica [redacted], a Maryland resident who applied for the loan via the internet from a computer in Maryland. The Respondents only transferred $1,000.00 of the money into Ms. [redacted]'s bank account, however, maintaining that they were keeping $500.00 as a prepaid finance charge/origination fee. The interest rate was 120.00%. Respondents funded the loan by transferring the money into Ms. [redacted]'s bank account in Maryland, and they required repayment from this same bank account via ACH debits. Ms. [redacted] repaid $300.00 on her loan.

19. On March 4, 2011, Respondents made a high-interest consumer loan in the amount of $200.00 to Tangette [redacted], a Maryland resident who applied for the loan via the internet from a computer in Maryland. The exact interest rate is unknown. Respondents funded the loan by transferring money into Ms. [redacted]'s bank account in Maryland, and they required repayment from this same bank account via ACH debits. Ms. [redacted] repaid $400.00 on her loan.

20. Respondents made a high-interest consumer loan to Arthur [redacted], a Maryland resident who applied for the loan via the internet from a computer in Maryland. Respondents funded the loan by transferring money into Mr. [redacted]'s bank account in Maryland, and they required repayment from this same bank account via ACH debits. It is unknown how much Mr. [redacted] repaid on his loan. The exact interest rate is unknown. In or around August 2010 the Respondents notified Mr. [redacted]'s employer that they were authorized to garnish from Mr. [redacted]'s pay the amount of $485.00 and that the employer must mail the garnished wages to the Respondents. The Respondents did not obtain a court judgment prior to seeking the garnishment.

21. In January 2010, Respondents made a high-interest consumer loan in the amount of $350.00 to Neriska [redacted], a Maryland resident who applied for the loan via the internet from a computer in Maryland. The annual interest rate was 644.00%, and when the loan automatically renewed following Ms. [redacted]'s payment of the minimum payment on the loan, it was 782.143%. Respondents funded the loan by transferring money into Ms. [redacted]'s bank account in Maryland, and they required repayment from this same bank account via ACH debits. It is unknown how much Ms. [redacted] repaid on her loan. In March or April 2010, the Respondents notified Ms. [redacted]'s employer that they were authorized to garnish Ms.

[redacted]'s wages in the amount of $755.00 and instructing the employer to mail the garnished wages to the Respondents. The Respondents did not obtain a court judgment prior to seeking the garnishment.

22. In or around May 2011, Respondents made a high-interest consumer loan in the amount of $150.00 to Adrienne [redacted], a Maryland resident who applied for the loan via the internet from a computer in Maryland. The exact interest rate is unknown. Respondents funded the loan by transferring money into Ms. [redacted]'s bank account in Maryland, and they required repayment from this same bank account via ACH debits. Ms. [redacted] repaid $250.00 on her loan. The Respondents contacted Ms. [redacted]'s employer with a garnishment request.

23. On August 31, 2010, Respondents made a high-interest consumer loan in the amount of $2,525.00 to Virginia [redacted] a Maryland resident who applied for the loan via the internet from a computer in Maryland. The annual interest rate was 139.31%. Respondents funded the loan by transferring money into Ms. [redacted]'s bank account in Maryland, and they required repayment from this same bank account via ACH debits. Ms. [redacted] repaid $591.44 on her loan.

24. On or about September 27, 2010, Respondents made a high-interest consumer loan in the amount of $1,500.00 to Kevin [redacted], a Maryland resident who applied for the loan via the internet from a computer in Maryland. The exact interest rate is unknown. The Respondents only transferred $1,000.00 of the money into Mr. [redacted]'s bank account, however, maintaining that they were keeping $500.00 as a prepaid finance charge/origination fee. Respondents funded the loan by transferring the money into Mr. [redacted]'s bank account in Maryland, and they required repayment from this same bank account via ACH debits. It is unknown how much Mr. [redacted] repaid on his loan.

25. On October 11, 2010, Respondents made a high-interest consumer loan in the amount of $2,525.00 to Sylvia [redacted], a Maryland resident who applied for the loan via the internet from a computer in Maryland. The annual interest rate was 139.32%. Respondents funded the loan by transferring money into Ms. [redacted]'s bank account in Maryland, and they required repayment from this same bank account via ACH debits. Ms. [redacted] repaid $850.00 on her loan.

26. On November 26, 2010, Respondents made a high-interest consumer loan in the amount of $400.00 to Brittany [redacted], a Maryland resident who applied for the loan via the internet from a computer in Maryland. The exact interest rate is unknown. Respondents funded the loan by transferring money into Ms. [redacted]'s bank account in Maryland, and they required repayment from this same bank account via ACH debits. Ms. [redacted] repaid $1,045.00 on her loan.

27. On September 15, 2010, Respondents made a high-interest consumer loan in the amount of $400.00 to Cynthia [redacted], a Maryland resident who applied for the loan via the internet from a computer in Maryland. The annual interest rate was 730.00%. Respondents funded the loan by transferring money into Ms. [redacted]'s bank account in Maryland, and they required repayment from this same bank account via ACH debits. Ms. [redacted] repaid $1,234.00 on her loan.

28. On February 28, 2011, Respondents made a high-interest consumer loan in the amount of $500.00 to Patricia [redacted], a Maryland resident who applied for the loan via the internet from a computer in Maryland. The exact interest rate is unknown. Respondents funded the loan by transferring money into Ms. [redacted]'s bank account in Maryland, and they required repayment from this same bank account via ACH debits. Ms. [redacted] repaid $500.00 on her loan.

29. On March 3, 2011, Respondents made a high-interest consumer loan in the amount of $2,525.00 to Peter [redacted], a Maryland resident who applied for the loan via the internet from a computer in Maryland. The annual interest rate was 139.31%. Respondents funded the loan by transferring money into Mr. [redacted]'s bank account in Maryland, and they required repayment from this same bank account via ACH debits. By November 2011, Mr. [redacted] had repaid $3,013.19 on his loan.

30. On September 24, 2010, Respondents made a high-interest consumer loan in the amount of $400.00 to Ronald [redacted], a Maryland resident who applied for the loan via the internet from a computer in Maryland. The annual interest rate was 608.33%. Respondents funded the loan by transferring money into Mr. [redacted]'s bank account in Maryland, and they required repayment from this same bank account via ACH debits. It is unknown how much Mr. [redacted] repaid on his loan.

31. On March 4, 2011, Respondents made a high-interest consumer loan in the amount of $2,525.00 to Carlos [redacted], a Maryland resident who applied for the loan via the internet from a computer in Maryland. The annual interest rate was 139.31%. Respondents funded the loan by transferring money into Mr. [redacted]'s bank account in Maryland, and they required repayment from this same bank account via ACH debits. Mr. [redacted] repaid $870.88 on his loan.

32. On February 17, 2011, Respondents made a high-interest consumer loan in the amount of $2,525.00 to Bethany [redacted], a Maryland resident who applied for the loan via the internet from a computer in Maryland. The annual interest rate was 139.33%. Respondents funded the loan by transferring money into Ms. [redacted]'s bank account in Maryland, and they

required repayment from this same bank account via ACH debits. Ms. [redacted] repaid $117.00 on her loan.

33. On October 8, 2010, Respondents made a high-interest consumer loan in the amount of $260.00 to Nicole [redacted], a Maryland resident who applied for the loan via the internet from a computer in Maryland. The exact interest rate is unknown. Respondents funded the loan by transferring money into Ms. [redacted]'s bank account in Maryland, and they required repayment from this same bank account via ACH debits. It is unknown how much Ms. [redacted] repaid on her loan.

34. On January 20, 2011, Respondents made a high-interest consumer loan in the amount of $400.00 to Janis [redacted], a Maryland resident who applied for the loan via the internet from a computer in Maryland. The annual interest rate was 1,564.29%. Respondents funded the loan by transferring money into Ms. [redacted]'s bank account in Maryland, and they required repayment from this same bank account via ACH debits. Ms. [redacted] repaid $737.00 on her loan.

35. On December 19, 2010, Respondents made a high-interest consumer loan in the amount of $2,525.00 to Nicole [redacted], a Maryland resident who applied for the loan via the internet from a computer in Maryland. The annual interest rate was 139.33%. Respondents funded the loan by transferring money into Ms. [redacted]'s bank account in Maryland, and they required repayment from this same bank account via ACH debits. Ms. [redacted] repaid $925.82 on her loan.

36. Respondents made a high-interest consumer loan to Eleanor [redacted], a Maryland resident who applied for the loan via the internet from a computer in Maryland. The exact interest rate is unknown. Respondents funded the loan by transferring money into Ms.

[redacted]'s bank account in Maryland, and they required repayment from this same bank account via ACH debits. It is unknown how much Ms. [redacted] repaid on her loan. At some point prior to June 1, 2010, Ms. [redacted] discovered that her employer had been contacted in order to have her wages garnished to ensure repayment of the loan.

37. On April 9, 2009, Respondents made a high-interest consumer loan in the amount of $400.00 to Sheronda [redacted], a Maryland resident who applied for the loan via the internet from a computer in Maryland. The annual interest rate was 1,825.00%. Respondents funded the loan by transferring money into Ms. [redacted]'s bank account in Maryland, and they required repayment from this same bank account via ACH debits. Ms. [redacted] repaid $1,130.00 on her loan.

38. On November 29, 2010 and again on January 18, 2011, Respondents made high-interest consumer loans to Tamara [redacted], a Maryland resident who applied for the loans via telephone and facsimile applications while located in Maryland. The first loan was in the amount of $400.00 and the second of $1,500.00. In connection with the second loan, the Respondents only transferred $1,000.00 of the money into Ms. [redacted]s bank account, maintaining that they were keeping $500.00 as a prepaid finance charge/origination fee. The annual interest rate on the second loan was 193.79%. Respondents funded the loans by transferring money into Ms. [redacted]'s bank account in Maryland, and they required repayment from this same bank account via ACH debits. Ms. [redacted] repaid $236.95 on her loans. In or around March 2011, the Respondents notified Ms. [redacted] s employer that they were authorized to garnish from Ms. [redacted]s pay the amount of $550.00 and that the employer must mail the payments to the Respondents. The Respondents did not obtain a court judgment prior to seeking the garnishment.

39. On July 30, 2011, Respondents made a high-interest consumer loan in the amount of $2,500.00 to Shaqueata [redacted], a Maryland resident who applied for the loan via the internet from a computer in Maryland. The exact interest rate is unknown. Respondents funded the loan by transferring money into Ms. [redacted]'s bank account in Maryland, and they required repayment from this same bank account via ACH debits. Ms. [redacted] repaid $597.88 on her loan.

40. On April 14, 2010, Respondents made a high-interest consumer loan in the amount of $350.00 to Phyllis [redacted], a Maryland resident who applied for the loan via the internet from a computer in Maryland. The annual interest rate was 1,216.67%. Respondents funded the loan by transferring money into Ms. [redacted]'s bank account in Maryland, and they required repayment from this same bank account via ACH debits. Ms. [redacted] repaid $650.00 on her loan.

41. The Respondents have never been licensed by the Commissioner to make consumer loans, nor have they ever held any other type of license issued by the Commissioner. The Respondents are not exempt from licensing in Maryland.

42. In Maryland, on a consumer loan with a principal balance of $2,000.00 or less, the lender may charge 2.75% interest on the unpaid balance not more than $1,000.00 and 2.00% interest per month on that part of the unpaid balance that is more than $1,000.00. A lender is permitted to charge a maximum annual interest rate of 33% on unpaid balances up to $1,000.00 and 24% on unpaid balances over $1,000.00.

43. In Maryland, a lender may collect from a borrower a fee not exceeding $15.00 if payment is dishonored on the second presentment.

44. In Maryland, lenders have the duty to provide, at the time the loan is made, a written statement to borrowers quoting specific language and provisions of Maryland consumer

loan law concerning legal amounts of interest that may be charged, fees that may be charged, circumstances under which a lender may collect insurance premiums, and prohibited charges and transactions.

45. Lenders also have the duty to provide receipts for payments, the obligation to permit prepayment of the loan, in full or in part, without penalty, the duty to provide specific documents after full repayment of the loan and the duty to provide a written statement of the account upon request from the borrower.

46. Respondents' written agreements with Maryland consumers do not include the statements and disclosures set forth in paragraph 44 above.

47. Respondents did not provide Maryland residents with receipts for payments.

48. Respondents' written agreements authorized Respondents to collect fees for returned checks or where the borrower's bank account had insufficient funds to cover an ACH authorization debit ranging from $29.00-$30.00.

49. The Respondents made loans to at least 5 Maryland residents after the Summary Order to Cease and Desist was issued. They also continued to collect on the consumer loans after the Summary Order was issued, both through third party collection agencies such as CashCall, Greystone Alliance, and Autobon Financial, as well as by filing collection cases in Cheyenne River Sioux Tribal Court, such as the Small Claims Court Verified Complaint that Respondents filed against Nicole [redacted] in Cheyenne River Sioux Tribal Court on December 20, 2011.

50. The Respondent did not produce documents and records to the CFR as required by the February 15, 2011 Order to Produce.

DISCUSSION

The CFR conducted an investigation into the business activities of the Respondents and, as a result of the investigation, the CFR has alleged that the Respondents violated specific provisions of the Commercial Law and the Financial Institutions Articles. Based on the alleged violations, the CFR seeks a final order that requires the Respondents to immediately cease and desist from making unlicensed consumer, installment, or any other loans to Maryland consumers; from collecting or attempting to collect on any loans previously made to a Maryland consumer; and from selling, assigning or transferring to any third party their interest in any loans previously made to Maryland consumers. It further seeks a civil penalty of $138,000.00 and $19,815.29 restitution to Maryland consumers.

The CFR, as the moving party on the charges, has the burden of proof, by a preponderance of the evidence, to demonstrate that the Respondent violated the statutory and regulatory sections at issue and, as a result, that the Commissioner may issue a final cease and desist order against the Respondent and impose a civil penalty. *See, e.g.*, Md. Code Ann., State Gov't § 10-217 (2009); *Comm'r of Labor and Indus. v. Bethlehem Steel Corp.*, 344 Md. 17 (1996).

The Respondents did not appear at the hearing and, other than submitting into evidence an affidavit of Respondent Webb, Respondents' counsel presented no evidence. Counsel did argue that I should grant Respondent's earlier motion to dismiss, on which I deferred ruling until now.

Motion to Dismiss

In their March 3, 2011 motion to dismiss, the Respondents moved to dismiss this matter on jurisdictional grounds. COMAR 28.02.01.12C governs motions to dismiss. Subsection .12C states the following:

> C. Motion to Dismiss. Upon motion, the judge may issue a proposed or final decision dismissing an initial pleading which fails to state a claim for which relief may be granted.

Respondents renewed arguments on their motion to dismiss in their closing argument, and relied upon exhibits and testimony offered at the hearing. Accordingly the motion is more appropriately one for judgment, pursuant to COMAR 28.02.01.12E. I am going to deny the motion.

The Respondents argument is that the CFR did not have jurisdiction over its activities because Respondent Webb is an enrolled Tribal Member of the Cheyenne River Sioux Tribe and therefore is exempt from state law enforcement actions, including this one. Respondents further argued that the Respondent companies are also exempt since they are wholly owned and managed by Respondent Webb and since they are physically located within the boundaries of the Reservation.

The Respondents' arguments must fail because they presented no credible evidence that Respondent Webb is an enrolled Tribal Member of any Tribe, that Respondent Webb or the Respondent companies reside on or are located on any Reservation, or that there is any Tribal connection with the Respondent business entities. The only evidence offered by the Respondents to support those facts is a self-serving affidavit, purportedly of Martin A. Webb, identifying himself as an enrolled Tribal Member residing on the Reservation and his companies as being operated on the Reservation. Without the testimony of Respondent Webb, however, I was unable to judge the credibility and reliability of the statements contained in the affidavit, which

contained language similar to that contained in Respondents' briefs and therefore seemed to be carefully crafted by or at least with the assistance of counsel. Moreover, the Respondents presented into evidence no independent documentation, such as Tribal records or maps, indicating Respondent Webb's enrollment status or his residency and pinpointing the location of the Respondents' offices and whether they are on a Reservation. Respondents ask me to assume, as it seems others have, that Respondent Webb is an enrolled Tribal member and that he resides on and that his companies' offices are located or operated on a Reservation. However, my job is to find facts, not assume them, and I have no evidentiary basis to conclude that Respondent Webb is an enrolled Tribal member, that he lives on a Reservation, or that his companies' offices are located or operated on a Reservation.

Moreover, there is no evidence in this case of any connection between any Tribe and the Respondent businesses. Western Sky, Great Sky, and Payday were organized and registered under South Dakota Law; not under Tribal law. In fact, neither the Cheyenne River Sioux Tribe nor any other Tribe owns or operates or has any financial interest in any of the Respondent business entities, which were created by Respondent Webb, not the Tribe or any Tribal authority. And Respondent Webb is not a tribal officer of the Cheyenne River Sioux Tribe.

Concomitant with their sovereignty, Indian Tribes have retained immunity from various aspects of state and federal law. *See*, *Williams v. Lee*, 358 U.S. 217 (1959). In *Williams*, the Supreme Court held that a non-Indian that operated a store on an Indian reservation could not bring suit against his Indian patrons in state court. *Id. at* 223. The Court reasoned that allowing the suit against a member of the Indian tribe in state court would violate the Tribe's sovereignty to govern its own affairs. *Id.* at 223. Recently, the Colorado Supreme Court established its own criteria for determining the availability of tribal immunity to corporations owned and operated by

Indians. The court applied a three-part test which asked, in part, whether the corporation was registered under state or tribal law. *Cash Advance and Preferred Cash Loans v. State*, 242 P.3d 1099, 1109-1111 (Colo. 2010). Despite the longstanding tradition of tribal immunity and the recent developments in the law, the Respondents in this case have failed to establish Respondent Webb's status as an enrolled Tribal member or that he or his companies have any connection whatsoever with a Tribe. Accordingly, I cannot find that any Tribal immunity exists, and Respondents' motion must be denied.

Request to Vacate

In their closing brief, Respondents request that I vacate the summary order against Respondent Webb because there is no allegation that he personally made loans to Maryland residents. The request is denied. As the CFR pointed out in its reply brief, the Respondents have conceded that Respondent Webb is the sole owner, officer, manager, and member of the Respondent business entities and that he operates them. As the person who oversees, directs, and controls the allegedly illegal conduct of the Respondent companies, Respondent Webb is subject to joint and several liability with those business entities under the MCLL. *Bayly Crossing, LLC v. Consumer Protection Div.*, 188 Md. App. 299, 330-31, 981 A. 2d 777, 795 (2009).

Statutory Charges

In light of the Respondents' failure to appear and to present evidence, the essential facts are not in dispute. The Respondents advertised to residents of Maryland via television and the internet that it offered consumer loans of $6,000.00 or less obtainable via the internet. At least 26 Marylanders saw these advertisements and applied for loans online. In all cases, the loan applications originated in Maryland; in no case did a Maryland resident travel to South Dakota for any reason related to their application for a loan. Communications between the parties were

via email and telephone to the borrowers in Maryland. All transactions in connection with the loans were required to be performed in Maryland, including the Respondents' transmission of money into borrowers' bank accounts in Maryland and the repayment of the loans via ACH authorization from these same Maryland bank accounts. Any person making a loan to borrowers in Maryland under those circumstances is subject to the MCLL, and must be licensed, unless exempt, by the CFR. Md. Code Ann., Com. Law § 12-302. Conversely, unless a person is licensed by the CFR, the person may not make such a loan. Md. Code Ann., Fin. Inst. § 11-204. The Respondents were not licensed and were not exempt from licensing.

The specific Maryland borrowers and amounts they paid[2] to the Respondents are presented in the following chart[3]:

Name	Total Paid ($)
Jorge [redacted]	5,021.13
Tina [redacted]	1,225.00
Tyricia [redacted]	120.00
Erica [redacted]	300.00
Tangette [redacted]	400.00
Arthur [redacted]	0
Neriska [redacted]	0
Adrienne [redacted]	250.00
Virginia [redacted]	591.44
Kevin [redacted]	0
Sylvia [redacted]	850.00
Brittany [redacted]	1,045.00
Cynthia [redacted]	1,234.00
Patricia [redacted]	500.00

[2] Because the Respondents failed to provide borrowers' loan documents requested by the CFR, much of the CFR's information regarding specific amounts paid by borrowers and the exact interest rates charged was incomplete.
[3] One loan was made per borrower except as noted in the chart.

Peter [redacted]	3,013.19
Ronald [redacted]	0
Carlos [redacted]	870.88
Bethany [redacted]	117.00
Nicole [redacted]	0
Janis [redacted]	737.00
Nicole [redacted]	925.82
Eleanor [redacted]	0
Sheronda [redacted]	1,130.00
Tamara [redacted] (2 loans)	236.95
Shaqueata [redacted]	597.88
Phyllis [redacted]	650.00
Totals	**$19,815.29**

In addition to not being licensed, the Respondents also charged interest rates well above those allowed by the Commercial Law article. The annual interest rates charged to the consumers in this case ranged from 120% to 1,825%, far in excess of rates permitted by Maryland's usury law, which limits annual interest to a maximum of 33% on unpaid balances up to $1,000.00 and 24% on unpaid principal balances over $1,000.00. Md. Code Ann., Com. Law § 12-306. The interest rates charged by the Respondents violated Sections 12-306(a)-(d), 313(a) and 314(a) of the Commercial Law article. Accordingly the loans are illegal and unenforceable. Section 314(b)(1). In addition, the Respondents are prohibited from collecting or retaining the principal amount of the loans or from collecting or retaining any other money related to these loans. Section 314(b)(2).

The Respondents also charged a financial charge/service fee of $29.00 or $30.00 if a check or ACH payment was dishonored by a borrower's bank. Pursuant to Section 12-313(a)(1) of the Commercial Law Article, a lender may not "[d]irectly or indirectly contract for, charge, or

receive any interest, discount, fee, fine, commission, charge, brokerage, or other consideration in excess of that permitted by the this subtitle." Since the Respondents charged a fee that exceeded $15.00 on the second presentment, they violated Sections 307(b) as well as Section 313(a)(1).

Section 12-308 sets forth various duties that lenders have towards borrowers, such as the duty to provide a statement containing specific language and provisions at the time the loan is made-(Md. Code Ann., Com. Law § 12-308(a)), the duty to provide receipts for payments (Md. Code Ann., Com. Law § 12-308(b)), the obligation to permit prepayment of the loan, in full or in part, without penalty (Md. Code Ann., Com. Law § 12-308(c)), and the duty to provide a written statement of the account upon request from the borrower (Md. Code Ann., Com. Law § 12-308(e)). In reviewing copies of the Respondents' loan agreement documents, I find that the Respondents violated Sections 12-308(a) and (b) because the loan documents do not contain the information required, and because the Respondents failed to provide receipts for payments. I cannot find that the Respondents violated Sections 12-308(c) or (e) because the documents do seem to permit the prepayment of the loan without penalty and because CFR did not present any evidence about whether the Respondents provided an accounting if requested.

In addition, the Respondents violated the CFR's Summary Order. The Respondents made loans to at least five Maryland residents after the Summary Order to Cease and Desist was issued. They also continued to collect on the consumer loans after the Summary Order was issued, both through third party collection agencies such as CashCall, Greystone Alliance, and Autobon Financial, as well as by filing collection cases in Cheyenne River Sioux Tribal Court. In addition, the Respondents did not produce documents and records to the CFR as required by the February 15, 2011 Order to Produce.

The Respondents also engaged in irresponsible and illegal business practices with Maryland consumers. For example, they sent garnishment notices directly to borrowers' employers attempting to garnish wages of Maryland residents who were in default on their loans without first obtaining a court order.

Sanctions

The CFR has requested a final cease and desist order. The statute authorizes such an order, where, as here, after notice and hearing it is found that a party "*has engaged* in an act or practice constituting a violation of a law. . . ." Md. Code Ann., Fin. Inst. § 2-115(b). There is no requirement that the party be found to persist in that behavior at the time of the hearing, yet in this case the Respondents persisted in the behavior well after the Summary Order was issued. Since the Respondent engaged in acts in violation of Maryland law, I will recommend that the CFR issue a final cease and desist order.

The statute further provides for the imposition of a civil penalty, in the discretion of the CFR, in the maximum amount of $1,000.00 for a first violation and $5,000.00 for each subsequent violation. Md. Code Ann., Fin. Inst. § 2-115(b)(3). In determining the amount of financial penalty, the statute directs the CFR to consider the following factors:

1. The seriousness of the violation;
2. The good faith of the violator;
3. The violator's history of previous violations;
4. The deleterious effect of the violation on the public and the industry involved;
5. The assets of the violator; and
6. Any other factors relevant to the determination of the financial penalty.

Md. Code Ann, Fin. Inst. § 2-115(c).

The CFR has not specifically addressed these factors in its penalty request. It describes the Respondents' conduct as "egregious" and willful. I agree. The Respondents' conduct was extremely serious. The Respondents engaged in predatory lending and collection activities against Maryland consumers by providing "payday" loans at extremely high rates of interest, with many loans having interest rates in excess of 1,000%. The Respondents were not licensed by the CFR. The Respondents acted in bad faith when they continued to make illegal, usurious loans to Maryland consumers even after being notified by the CFR that the loans violated Maryland laws. In addition, they engaged in illegal and irresponsible collection activities, including attempts to garnish consumers' wages without a court judgment. It is also important to consider the Respondents' failure to attend the hearing and respond to the Order for Production. There are important policy concerns and the CFR is justified in taking action against persons who knowingly and willfully violate State law to the detriment of Maryland consumers.

For the twenty-seven consumer loans that the Respondents illegally made to Maryland consumers while unlicensed and which contained rates of interest which far exceeded the allowable interest rate caps, the CFR proposes a penalty of $1,000.00 be assessed for the first consumer loan, and $5,000.00 for each of the twenty-six subsequent consumer loans for a penalty of $131,000.00. The CFR also proposes a penalty of $1,000.00 for the Respondent's failure to comply with the Production Order plus $1,000.00 fine for each of the five loans that Respondents made to Maryland residents after the Summary Order was issued. The CFR therefore proposes a total penalty of $137,000.00.

The evidence shows a serious negative impact on borrowers who availed themselves of Respondents' services. The borrowers who testified, as well as the borrowers who made written complaints, described how they had a difficult, extremely stressful time attempting to extricate

themselves from the huge burden of the loans they had incurred. While it is clear that the borrowers who testified and the borrowers who filed written complaints suffered terrible consequences as a result of taking the loans facilitated by the Respondent, these consequences must be related to the actual violations in order to justify the penalties proposed. The Respondents' most serious, and most egregious, violation was their central business purpose -- to make loans to consumers at rates greatly in excess of the Maryland interest cap. I find this violation both extremely serious and deleterious to the public. Since the loans violated the public policy embodied in the usury laws, in making such loans, the Respondents violated the public interest and the consequences to the public were directly related to the violations.

The effect of the Respondents' failure to comply with licensing requirements is similarly egregious. Had they applied for a license, the Respondents' business practices may have more immediately come to the attention of the CFR, thereby protecting the public more promptly from their lending practices. The Respondent's practice of making unlicensed loans to consumers is in violation of Maryland public policy and warrants a substantial penalty. I will therefore recommend a civil penalty of $137,000.00.

The CFR also requests restitution in the amount of $19,815.29, which reflects the amounts paid by the Maryland consumers to the Respondent. Based on the evidence presented, I find that the CFR has established Respondent's violations of the law and that the Maryland consumers identified in the above chart as having paid sums in this case to the Respondents are entitled to restitution. Md. Code Ann., Com. Law § 12-314(b).

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude as a matter of law that the Respondents violated Md. Code Ann., Com. Law §§ 12-302, 12-306(a)-(d), 12-313(a)(1), 12-307(b), 12-308(a) and (b) and 12-314(a); and Md. Code Ann., Fin. Inst. § 11-204.

I further conclude as a matter of law that the Respondent is subject to civil penalties, the payment of restitution, and a final Cease and Desist Order for its violations of the Financial Institutions and Commercial Law Articles. Md. Code Ann., Fin. Inst. §§ 2-114 and 2-115 and Md. Code Ann., Com. Law § 12-314(b).

RECOMMENDED ORDER

I **RECOMMEND** that the CFR:

ORDER that the Respondents permanently cease and desist from making or entering into agreements to make unlicensed consumer, installment, or any other loans to Maryland consumer;

ORDER that the Respondents permanently cease and desist from collecting or attempting to collect on any loans previously made to Maryland consumers, including but not limited to collecting or attempting to collect any principal, interest, finance charges, or any other fees related to transactions involving Maryland consumers;

ORDER that the Respondents shall permanently cease and desist from selling, assigning or transferring to any third party their interest in any loans which the Respondent previously made to Maryland consumers;

ORDER that the Respondents pay a civil penalty in the amount of $137,000.00;

ORDER that all consumer loans made by the Respondents to Maryland consumers are illegal and unenforceable;

ORDER that the Respondents may not receive or retain any principal, interest or any other compensation related to those consumer loans made by the Respondent to Maryland consumers and that the Respondents shall fully refund to Maryland consumers all amounts collected (including principal, finance charges/service fees and any other money related to those consumer loans) which includes providing full refunds to the following Maryland consumers in the amounts indicated:

Name	Ordered Refund
Jorge [redacted]	5,021.13
Tina [redacted]	1,225.00
Tyricia [redacted]	120.00
Erica [redacted]	300.00
Tangette [redacted]	400.00
Arthur [redacted]	0
Neriska [redacted]	0
Adrienne [redacted]	250.00
Virginia [redacted]	591.44
Kevin [redacted]	0
Sylvia [redacted]	850.00
Brittany [redacted]	1,045.00
Cynthia [redacted]	1,234.00
Patricia [redacted]	500.00
Peter [redacted]	3,013.19
Ronald [redacted]	0
Carlos [redacted]	870.88
Bethany [redacted]	117.00
Nicole [redacted]	0
Janis [redacted]	737.00
Nicole [redacted]	925.82
Eleanor [redacted]	0

Sheronda [redacted]	1,130.00
Tamara [redacted]	236.95
Shaqueata [redacted]	597.88
Phyllis [redacted]	650.00
Totals	$19,815.29

ORDER that the Respondents take corrective action to remove any adverse or negative information which the Respondents or third party collection agencies acting on the Respondents' behalf had previously submitted to credit reporting agencies; and

ORDER that the records and publications of the CFR reflect this decision.

June 22, 2012
Date Decision Mailed

Neile S. Friedman
Administrative Law Judge

Doc# 132472

Exhibit 3

IN THE CIRCUIT COURT OF THE COUNTY OF ST. LOUIS
STATE OF MISSOURI

STATE OF MISSOURI, ex rel. Attorney General Chris Koster	)	
Plaintiff,	)	Cause No. 11SL-CC01680-1
vs.	)	Division 13
MARTIN A. WEBB a/k/a BUTCH WEBB et al.,	)	
Defendant.	)	

ORDER

This matter is before the Court on the defendants' Motion to Dismiss or, in the Alternative, Motion for Summary Judgment. The Motion was called, heard and taken under submission on September 5, 2012. Having heard the arguments of counsel, having read the statements of facts, memoranda of law and exhibits submitted, and being now duly advised, the Court finds the defendants are not entitled to tribal immunity or non-sovereign tribal immunity, and therefore, the Court has subject matter jurisdiction over the issues in this case. *See State of Colorado v. Western Sky Financial, LLC*, 11CV638 Order denying Defendant's Motion to Dismiss (attached to Supplement to Plaintiff's Response to Defendants' Motion to Dismiss); *see also Puyallup Tribe, Inc. v. Dep't of Game of State of Wash.*, 433 U.S. 165, 173 (1977) (doctrine of sovereign immunity does not immunize individual tribe members); *Hagen v. Sisseton-Wahpeton Cmty. Coll.*, 205 F.3d 1040, 1043 (8th Cir. 2000) (discussing whether entities are "arms of the tribe" for purposes of immunity).

Further, the Court finds the plaintiff has pled sufficient facts to subject the defendants, including defendant Webb, to Missouri's long-arm jurisdiction. The Petition, affidavits and exhibits submitted by the plaintiff allege the defendants have transacted business and committed tortious acts within Missouri, and in the course of this business and these acts, have communicated and transacted business with borrowers, banks and employers (for actual and attempted garnishments) within Missouri. *See* section 506.500, RSMo.; *Bryant v. Smith Interior Design Group, Inc.*, 310 S.W.3d 227, 231 (Mo. 2010). The Petition further alleges sufficient facts to state a claim for piercing the corporate veil, which would attribute the relevant contacts of the corporate defendants to defendant Webb and thereby submit defendant Webb to the jurisdiction of this Court. *See Grote Meat Co. v. Goldenberg*, 735 S.W.2d 379, 386 (Mo. App., E.D. 1987).

Accordingly, the defendants' Motion to Dismiss or, in the Alternative, Motion for Summary Judgment is DENIED.

SO ORDERED:

10/15/12
Date

Barbara W. Wallace, Judge

cc: Debra Lumpkins
Assistant Attorney General
Attorney for Plaintiff

Jane Dueker
John Grellner
Crystal Hall
Attorneys for Defendants

Exhibit 4

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA ex rel.
DARRELL V. McGRAW, JR.,
Attorney General,

Petitioner,

v.

Civil Action No. 10-MISC-372
Judge Louis H. Bloom

Payday Loan Resource Center, LLC;
Moe Tassoudji; DirectROI d/b/a Cash West Payday Loans;
Mike Brewster; First American Credit; Loan Pointe, LLC;
Eastbrook, LLC d/b/a Ecash and GeteCash; **Joe E. Strom,**
Benjamin J. Lonsdale, James C. Endicott, Mark S. Lofgren;
National Title Loans d/b/a National Cash 12; **Payday Financial, LLC**
d/b/a www.LakotaCash.com; **Martin Webb; Payday Loan – ACH** d/b/a
www.ACHLoans.com,

Respondents.

FINAL ORDER GRANTING STATE'S PETITION TO ENFORCE INVESTIGATIVE SUBPOENA

On June 22, 2011, came the Petitioner, State of West Virginia ex rel. Darrell V. McGraw, Jr. ("the State"), and the Respondents, Payday Financial, LLC ("Payday Financial") and Martin A. Webb ("Mr. Webb"), by counsel, Richard Neely, for a hearing before this Court upon the State's Petition to Enforce Investigative Subpoena and for Related Relief ("Petition"). Whereupon, the State called three witnesses, all residents of West Virginia, who testified that they obtained payday loans from Payday Financial, LLC d/b/a Lakota Cash via the Internet. The Respondents were also given the opportunity to present witnesses and evidence, but they did not do so.

Upon consideration of the State's evidence presented at the hearing, the pleadings and memoranda of law filed herein, the oral arguments of counsel, and the applicable law, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. On January 14, 2010, the State issued an investigative subpoena ("Subpoena"), pursuant to W.Va. Code § 46A-7-104(1), directing the Respondents to produce certain documents or information to the Attorney General's Consumer Protection Division in Charleston, West Virginia, on or before February 1, 2010.

2. The Subpoena was duly served upon the West Virginia Secretary of State in accordance with West Virginia's long-arm statutes and was delivered to the Respondents on January 19, 2011, at their corporate office in Timber Lake, South Dakota.

3. Payday Financial and Mr. Webb did not comply with the Attorney General's Subpoena.

4. On August 18, 2010, the Attorney General filed the above-styled Petition against certain persons and companies who had allegedly failed to comply with similar investigative subpoenas issued by the Attorney General, including Payday Financial and Mr. Webb.

5. The Attorney General's Petition was duly served upon the West Virginia Secretary of State in accordance with West Virginia's long-arm statutes and was delivered to the Respondents on April 4, 2011, at their corporate office in Timber Lake, South Dakota.

6. On May 19, 2011, Payday Financial and Mr. Webb filed a Special Appearance to Seek Dismissal of Petition for Lack of Jurisdiction and Request to File Memorandum of Law in Reply to the Memorandum Filed by Petitioner (hereinafter "Special Appearance").

7. In the Special Appearance, the Respondents assert, in pertinent part, the following arguments:

   a. Mr. Webb is an enrolled Tribal Member of the Cheyenne River Sioux Tribe ("the Tribe") and resides on the Cheyenne River Indian Reservation ("the Reservation") in South Dakota;

   b. Mr. Webb, as an enrolled Tribal Member of the Tribe, living and working on the Reservation, is entitled to the protection of the applicable treaties between the Tribe

and the United States government and, therefore, can only be served with process through the Tribal Courts of the Reservation or the Federal Courts;

c. Mr. Webb is the sole owner of Payday Financial;

d. Payday Financial is physically located and operates within the exterior boundaries of the Reservation;

e. Payday Financial has been licensed to conduct business by the Tribe since June, 2007, as evidenced by the Businesses Licenses annexed as Exhibit A to the Respondent's Reply;

f. The Internet payday loans made to persons residing in West Virginia were accepted and entered into on the Reservation and are governed solely by Tribal law and the Indian Commerce Clause of the United States Constitution;

g. The Respondents are immune from suit or regulation by the State under the doctrine of Native American Tribal Immunity; and

h. The State's Subpoena and Petition were not properly served upon the Respondents in the manner prescribed by Tribal law.

See Reply of Payday Financial, LLC and Martin Webb.

8. In response to the Respondents' Special Appearance and Reply, the State asserts in pertinent part the following:

a. Payday Financial is a limited liability company that filed its Articles of Organization with the South Dakota Secretary of State on October 27, 2007;

b. Mr. Webb is the sole managing member and owner of Payday Financial;

c. Payday Financial is not a federally-recognized Native American Tribe; it is not a tribal entity or corporation; and it was not created by nor is it owned, operated or managed by the Cheyenne River Sioux Tribe or any other federally-recognized Native American Tribe;

d. The Internet payday loans that are the subject of the State's Petition were entered into and to be performed in West Virginia and our governed by West Virginia law;

e. Any provision that may be contained in the standard loan contracts of Payday Financial stating that the transactions are governed by Tribal law is unenforceable because the contracts bear no substantial relationship with the Cheyenne River Sioux Tribe and application of Tribal law would offend West Virginia's strong public policy against usury; and

f. The State was not a party to the loan contracts in question and any choice of law provisions contained therein are not binding upon the State nor may they limit the State's ability to bring police actions to enforce state consumer protection law.

See State's Response to Respondent's Special Appearance.

9. Mr. Webb is an enrolled member of the Cheyenne River Sioux Tribe in South Dakota. Mr. Webb is the sole managing member and owner of Payday Financial, LLC.

10. On October 22, 2007, Mr. Webb filed "Articles of Organization of Payday Financial, LLC" with the South Dakota Secretary of State. Exhibit I, State's Memorandum of Law in Opposition to Special Appearance.

11. On October 22, 2007, the South Dakota Secretary of State issued a Certificate of Organization to Payday Financial, LLC. Article Three of the Articles of Incorporation of Payday Financial provides: "Payday Financial, LLC shall has those powers provided for in the South Dakota Limited Liability Company Act, SDCL Chpt. 47-34A." Ex. I, State's Memorandum of Law in Opposition to Special Appearance.

12. The State's witnesses each testified to the following facts: (1) they were residents of West Virginia at the time they obtained loans from Payday Financial; (2) they applied for loans from Payday Financial by entering personal information into computers located in West Virginia; (3) they signed their names electronically to documents furnished by Payday Financial at computers located in West Virginia; (4) the amounts loaned to them by Payday Financial were deposited electronically into their personal bank accounts located in West Virginia; and (5) Payday Financial collected loan payments from them by making electronic debits from their personal bank accounts located in West Virginia. Thus, the Court finds that the Internet payday loans made by Payday Financial were made and to be performed in West Virginia. *See* Discussion, *infra*.

13. The Respondents presented no evidence at the hearing, testimonial or otherwise, but instead argued both orally and in their memorandum of law that this Court lacks jurisdiction to grant the Petition because as an enrolled Tribal member of the Cheyenne Sioux River Tribe, Mr. Webb and his company, Payday Financial, are entitled to Tribal immunity.

STANDARD OF REVIEW

To obtain judicial backing for the enforcement of an administrative subpoena, the agency must prove that (1) the subpoena is issued for a legislatively authorized purpose, (2) the information sought is relevant to the authorized purpose, (3) the information sought is not already within the agency's possession, (4) the information sought is adequately described, and (5) proper procedures have been employed in issuing the subpoena. Once these requirements are satisfied, the subpoena is presumed valid and the burden shifts to the party opposing the subpoena to show its invalidity. Such party seeking to quash the subpoena must disprove by facts and evidence the presumed validity of the subpoena. Syl. pt. 1, *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 483 S.E.2d 12 (1996).

DISCUSSION

1. The Respondents argue, in pertinent part, that the State's Petition should be denied because this Court lacks jurisdiction to grant the Petition because the "final act" to consummate the loan agreements between Payday Financial and West Virginia consumers, Payday Financial accepting the agreements, was executed on the Reservation, which invokes tribal immunity. The Respondents also argue that they are entitled to tribal immunity from any action by the State because Mr. Webb is an enrolled tribal member of the Cheyenne River Sioux Tribe and the sole owner of Payday Financial, and the loan agreements were consummated on the Reservation. In support of its position that Payday Financial is entitled to tribal sovereign immunity, the

Respondent's cite *Pourier v. South Dakota Dept. of Revenue*, 658 N.W.2d 395 (S.D. 2003), *overruled, in part, on other grounds, following rehearing,* 658 N.W.2d 395 (S.D. 2003). However, the Court finds the facts presented in *Pourier* are distinguishable from the facts in the present action.

2. In *Pourier*, a corporation whose sole shareholder was an enrolled member of a tribe asserted tribal sovereign immunity from the state's attempt to tax its on-reservation activities. The court in *Pourier* held that "[a] corporation owned by the tribe or an enrolled tribal member residing on the Indian reservation and doing business on the reservation for the benefit of reservation Indians is an enrolled member for the purpose of protecting tax immunity." 658 N.W.2d at 404 (emphasis added). In so holding, the court in *Pourier* made several observations that are instructive in the present action. First, the corporation in question in *Pourier* was licensed by the Oglala Sioux Tribe to do business on the reservation. Second, the corporation exclusively sold its fuel at its retail gas station on the reservation. Third, approximately 90% of purchases from the corporation were Indians who resided on the reservation.

3. Unlike the corporation at issue in *Pourier*, Payday is organized and incorporated under the laws of South Dakota. Also, all of Payday Financial's business activities occurred off the Reservation over the Internet in the individual consumers' home state. *See Zippo*, *infra*. Furthermore, Payday Financial's customers are non-tribal members who are residents of states. Finally, there is no evidence in the record to support that Payday Financial's business is for the benefit of reservation Indians and not just a for-profit corporation to benefit its sole owner, Martin Webb. Thus, the *Pourier* decision actually supports the inapplicability of tribal sovereign immunity to Payday Financial and its business activities.

4. Another persuasive authority that supports the inapplicability of tribal immunity in the present case is *State ex rel. Suthers v. Cash Advance and Preferred Cash Loans,* 205 P.3d 389 (Colo. App., 2008). In *Suthers*, the Colorado Court of Appeals addressed nearly identical issues as those raised by the Respondents. The Colorado State Attorney General opened an investigation against two Internet lending companies to determine whether their lending practices involving making payday loans to Colorado residents violated the Uniform Commercial Credit Code and the Colorado Consumer Protection Act. *Suthers*, 205 P.3d at 394. Upon the failure of the businesses to comply with administrative subpoenas, the Colorado Attorney General initiated contempt proceedings and the owners of the two Internet payday lending companies joined in a motion to dismiss, each asserting it was incorporated by an Indian tribe and thus, immune from any enforcement action by the Colorado Attorney General based on the doctrine of tribal sovereign immunity.

In deciding *Suthers*, the Colorado Court of Appeals stated that the threshold question is whether the conduct being investigated occurred on or off the Reservation and found that the trial court's conclusion that the conduct being investigate, i.e. payday loans made to Colorado residents by the companies, occurred off the respective Reservations was supported by competent evidence. *Id.* at 400. The Court noted that evidence showed that both companies asserting tribal immunity engaged in transactions over the Internet with consumers located in Colorado. The Court further stated that there was evidence showing that the contracts were entered into and negotiated in Colorado; and performance was to occur in Colorado because the consumers were to repay the principal and interest in Colorado. *Id.* at 400-401. The Colorado Court of Appeals found that the off-Reservation conduct fell into an area where the legislature and the Colorado Attorney General indicated there was an important need for regulation. *Id.* at

401 (citing *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 336, 103 S.Ct. 2378 (1983)(stating that "[a] State's regulatory interest will be particularly substantial if the State can point to off-reservation effects that necessitate State intervention.")). Thus, the Colorado Court of Appeals found that the Internet payday loans did constitute off-reservation activity and that tribal sovereign immunity did not prevent enforcement of the Colorado Attorney General's subpoenas.

5. The evidence presented in this case is nearly identical to that in *Suthers, supra.* Like the facts in *Suthers*, the testimony and evidence presented by the State's witnesses indicate that the Internet payday loans made by Payday Financial to West Virginia consumers were made and to be performed in West Virginia, not on the Reservation. The undisputed testimony shows that Payday Financial intentionally reached out beyond the Reservation to conduct business with West Virginia residents and just because the business was conducted over the Internet is of no consequence. *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F.Supp. 1119, 1124 (citing *Burger King v. Rudzewicz*, 471 U.S. 462, 475, 105 S.Ct. 2174, 2183-84 (1985)). The United States Supreme Court has stated that its cases recognize that tribal sovereignty contains a "significant geographical component," and thus, the off-Reservation activities of Indians are generally subject to the prescriptions of a nondiscriminatory state law in the absence of express federal law to the contrary. *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 336, 103 S.Ct. 2378, 2387-2388 (1983)(internal citations omitted). Furthermore, the United States Supreme Court in cases addressing tribal immunity has stated that individual tribal members are not covered by sovereign tribal immunity for conduct beyond the reservation's borders. Suthers, 205 P.3d at 407 (citing *Citizen Band Potawatomi Tribe*, 498 U.S. at 514, 111 S.Ct. 905; *Puyallup Tribe, Inc. v. Department of Game of State of Wash.*, 433 U.S. 165, 171-172 (1977)). In the present action,

Payday Financial was clearly doing business over the Internet by entering into contracts with West Virginia residents off the Reservation that involved the knowing and repeated transmission of computer files over the Internet. *See Zippo*, 952 F.Supp at 1124; *Suthers, supra.*

6. Finally, notwithstanding the fact that the subject conduct of Payday Financial leading to the State's investigation occurred off-Reservation, the Respondents presented no evidence that Payday Financial is a corporation formed by or for the benefit of the Cheyenne River Sioux Tribe or is acting as an arm of the Tribe. *See Pourier, supra; See also, Baraga Products, Inc. v. Commissioner of Revenue*, 971 F.Supp. 294 (W.D. MI., 1997).[1] As stated above, Payday Financial is organized under the laws of South Dakota, not tribal laws, and is not controlled by the tribe, but by an individual who happens to be an enrolled Tribal member. Furthermore, there is no evidence that Mr. Webb operates Payday Financial for the benefit of the Cheyenne Sioux River Tribe, but instead operates such business for his own individual benefit and profit.

CONCLUSIONS OF LAW

1. The Court concludes that the Subpoena issued by the State to Payday Financial, LLC, was issued for a legislatively authorized purpose; the information sought is relevant to the authorized purpose; the information sought is not already within the State's possession; the information sought is adequately described; and proper procedures have been employed by the State in issuing the Subpoena.

2. The Court further concludes that Payday Financial, LLC, is not a federally recognized Indian tribe and it is not a tribal entity or an arm of the Cheyenne River Sioux Tribe or any other Indian tribe. Payday Financial, LLC, is a corporate entity organized under the laws of South

[1] The court in *Baraga* stated that it is possible for a corporation owned by Indian shareholders to be entitled to the same sovereign immunity as the Indian Tribe when it is organized under tribal laws; it is controlled by the tribe; and it is operated for tribal purposes. Furthermore, a corporation may be entitled to the protections of an Indian Tribe if it is acting as the Tribe's agent. 971 F.Supp at 296-297.

Dakota. Therefore, based upon the foregoing Discussion, Payday Financial, LLC, is not entitled to tribal sovereign immunity or tribal immunity, and as such, has not presented a lawful excuse for its failure to comply with the State's Subpoena.

3. The Court also concludes that the Internet payday loans made by Payday Financial were made and to be performed in West Virginia, and therefore, are governed by West Virginia law.

4. The Court also concludes that Mr. Webb, individually, as owner and single shareholder Payday Financial is not subject to the State's Petition in the present action.

DECISION

Accordingly, the Court does hereby **ORDER** the following:

1. The State's Petition is **GRANTED** as to Payday Financial, LLC, but is **DENIED** as to Respondent Martin A. Webb.

2. Respondent Payday Financial, LLC, shall comply in full with the State's investigative Subpoena within thirty (30) days after entry of this Order.

3. Payday Financial, LLC, is **ENJOINED** from making or collecting any payday loans in West Virginia until such time as it complies in full with the State's Subpoena.

There being nothing further, the Court does **ORDER** that the above styled action be **DISMISSED** and **STRICKEN** from the docket of this Court. The objections of any party aggrieved by Order are noted and preserved.

The Clerk is **DIRECTED** to send a certified copy of this Order to all counsel of record.

ENTERED this 24 day of October, 2011.

Louis H. Bloom, Judge

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE COPY FROM THE RECORDS OF SAID COURT.
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 27th DAY OF
CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

Exhibit 5

STATE OF NEW HAMPSHIRE **BANKING DEPARTMENT**

In re CashCall, Inc.,
John Paul Reddam, President and CEO of CashCall, Inc.,
and WS Funding, LLC.

Case No. 12-308

ORDER TO CEASE AND DESIST

Now comes the State of New Hampshire Banking Department (the "Department"), commencing an adjudicative proceeding under the provisions of RSA Chapter 399-A and RSA Chapter 541-A against the respondents, CashCall, Inc. ("CashCall"), John Paul Reddam, President and CEO of CashCall, and WS Funding, LLC ("WS Funding").

JURISDICTION

Under RSA Chapter 399-A, the Department licenses and regulates persons "engage[d] in the business of making small loans, title loans, or payday loans in this state or with consumers located in this state . . . ." RSA 399-A:2, I. The Department "may issue a cease and desist order against any licensee or person who it has reasonable cause to believe has violated . . . the provisions of [RSA Chapter 399-A] or any rule or order under [RSA Chapter 399-A]." RSA 399-A:8, I. Additionally, the Bank Commissioner has exclusive jurisdiction to investigate charges and fees associated with payday and small loans that may constitute an unfair or deceptive act under RSA Chapter 358-A. RSA 399-A:12, VIII. The Bank Commissioner may also "by order, upon due notice and opportunity for a hearing, assess penalties [for violating RSA Chapter 399-A] . . . if it is in the public interest." RSA 399-A:7, I(i).

RESPONDENTS

1. CashCall is located at 1600 South Douglass Road, Anaheim, CA 92806. CashCall is licensed by the Department as a mortgage banker under RSA Chapter 397-A. CashCall does not hold any other license from the Department.
2. John Paul Reddam is the President and CEO of CashCall. Mr. Reddam owns 100% of CashCall's corporate stock. Mr. Reddam has a mailing address of 1600 S. Douglass Road, Anaheim, CA 92806. Mr. Reddam is not licensed as a small loan lender with the Department.
3. WS Funding is a wholly-owned subsidiary of CashCall according to documents obtained from CashCall. It is unclear where WS Funding is located or incorporated. The Department does not have a mailing address for WS Funding. WS Funding is not licensed with the Department.

FACTS

On or about February 21, 2012, the Department commenced a routine examination of CashCall pursuant to RSA 397-A:12. During the course of the examination, the examiner discovered that CashCall appeared to be engaged in the business of purchasing and servicing small loans and/or payday loans in association with Western Sky Financial, LLC ("Western Sky"). Western Sky is wholly owned by an individual tribal member of the Cheyenne River Sioux Tribe and operates within the exterior boundaries of the Cheyenne River Sioux Reservation, a sovereign nation, located in South Dakota. See Western Sky Home page, http://www.westernsky.com.

The Department sent a letter to CashCall outlining the Department's findings from the examination and issued an administrative subpoena *duces tecum* to CashCall seeking a variety of

documents related to CashCall's relationship with Western Sky. CashCall complied with the administrative subpoena and produced the requested documents.

Upon review of those documents, the Department concluded that CashCall and Western Sky operate as follows. Consumers apply for small loans or payday loans through a call center, CashCall's website, or www.westernsky.com.[1] Pursuant to an agreement between Western Sky and WS Funding, CashCall provides website hosting and support services for Western Sky. Additionally, CashCall reimburses Western Sky for all costs of maintenance, repair and/or update costs associated with Western Sky's server. CashCall also reimburses Western Sky for its office, personnel, and postage and provides Western Sky with a toll free telephone and fax number. CashCall also provides an array of marketing services to Western Sky, including but not limited to creating and distributing print, internet, television, and radio advertisements and other promotional materials.

Once a consumer application for a small or payday loan is received via the call center, CashCall's website, or www.westernsky.com, CashCall reviews the application for underwriting requirements. When an application is approved, Western Sky executes a promissory note and debits a so-called "Reserve Account" to fund the promissory note. The Reserve Account is a demand-deposit bank account set up in the name of Western Sky which carries a balance equal to the full value of two days promissory notes calculated on the previous month's daily average. Under an agreement between Western Sky and WS Funding, CashCall is required to set up, fund, and maintain the balance in the Reserve Account. The initial balance in the Reserve Account must be $100,000.

[1] A "WHOIS" search on www.godaddy.com demonstrates that www.westernsky.com is registered to Butch Webb, Payday Financial, LLC, Timber Lake, South Dakota. Butch Webb is the signatory for Western Sky Financial on the Agreement for the Assignment and Purchase of Promissory Notes" between WS Funding, LLC, a subsidiary of CashCall, and Western Sky Financial, LLC.

After a loan is funded, CashCall is obligated by agreement to purchase the promissory note from Western Sky. The agreement between WS Funding and Western Sky provides that Western Sky can debit the Reserve Account in payment for these purchased promissory notes at the end of every business day. The timeframe for when the purchase occurs is not specified in any agreement between WS Funding and Western Sky. However, consumer complaints indicate that CashCall generally makes contact with the consumer within one business day of the consumer filing an application for the small loan or payday loan. Western Sky does not accept any payment from consumers on notes made under this business scheme.

As compensation for services provided, Western Sky pays CashCall 2.02% of the face value of each approved and executed loan transaction plus any additional charges with a net minimum payment of $100,000 per month. Conversely, in consideration for the terms of the agreement setting up the Reserve Account, CashCall agrees to pay Western Sky 5.145% of the face value of each approved and executed loan credit extension and/or renewal. Additionally, CashCall pays Western Sky a minimum monthly administration fee of $10,000.

Under the terms of the agreement between WS Funding and Western Sky, CashCall agrees to 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 which may arise in any jurisdiction. Additionally, CashCall is responsible for tracking all consumer complaints regarding these payday and small loans and notifying Western Sky of these complaints.

The Department has received five consumer complaints from New Hampshire residents against Western Sky and CashCall. Additionally, CashCall provided the Department with a list

of 787 New Hampshire consumers who received small loans or payday loans under the business scheme outlined above, including the five consumers who filed complaints with the Department.

The respondents have taken substantial steps to conceal this business scheme from consumers and state and federal regulators. Western Sky does not identify its relationship with CashCall or WS Funding on its website or in any marketing materials. The promissory notes identify the "lender" as Western Sky with an address of Timber Lake, South Dakota. The promissory notes state that the loan agreement is "subject solely to the exclusive laws and jurisdiction of the Cheyenne River Sioux Tribe, Cheyenne River Indian Reservation." Additionally, the Department has taken enforcement action against Western Sky in the past. E.g., In re Impact Cash, Case No. 10-011 (Order to Show Cause and Cease and Desist, Sept. 23, 2011). Western Sky sought dismissal of the action for lack of jurisdiction, citing the sovereign status of individual members of Indian Tribes under United States Supreme Court case law.

After detailed review of the respondents' business scheme, it appears that Western Sky is nothing more than a front to enable CashCall to evade licensure by state agencies and to exploit Indian Tribal Sovereign Immunity to shield its deceptive business practices from prosecution by state and federal regulators. Western Sky holds itself out to the public as a stand alone tribal entity which provides small loans and payday loans to consumers. In reality, however, CashCall creates all advertising and marketing materials for Western Sky and reimburses Western Sky for administrative costs. CashCall reviews consumer applications for underwriting requirements. CashCall funds the loans. CashCall services the loans. Western Sky does not receive any payment from consumers for the loans.

GOVERNING LAW

Under RSA 399-A:2, I, "[n]o person shall engage in the business of making small loans, title loans, or payday loans . . . with consumers located in [New Hampshire] without first obtaining a license from the [Bank Commissioner]." "If in the making or collection of a loan[,] the person [fails to obtain a license from the Department], the loan contract shall be void and the lender shall have no right to collect, receive, or retain any principal, interest or charges whatsoever." RSA 399-A:2, IV. The provisions of RSA Chapter 399-A "apply to any person who seeks to evade its application by any device, subterfuge, or pretense, including without limitation . . . [u]sing any agents, affiliates, or subsidiaries in an attempt to avoid the application of the provisions of [RSA Chapter 399-A]." RSA 399-A:2, VI(b).

Courts look to the substance of a transaction, rather than the formal loan documents, to identify the actual or de facto lender who makes the loan. Ubaldi v. SLM Corp., 852 F. Supp. 2d 1190, 1196 (N.D. Cal. 2012); State of West Virginia, et al. v. CashCall, Inc., et al., No. 08-C-1964, slip op. at 10-11 (Sept. 10, 2012). Specifically, courts consider, among other things, which party: (1) supplies the funds for the loans; (2) bears the risk of loss on the loans; (3) makes the underwriting decisions, i.e., the decisions to lend or not to lend to a particular applicant; (4) develops and uses forms, brands, and platforms; (5) collects the vast majority of fees and interest on loans. Ubaldi, 852 F. Supp. 2d at 1195; see RSA 399-A:2, VI(c)(indicating that New Hampshire courts should look to which entity maintains a "preponderance economic interest" in the revenues generated by the loan).

FINDINGS

The Department has reasonable cause to believe that the substance of the transactions with New Hampshire consumers shows that CashCall, or its wholly-owned subsidiary, WS

Funding, is the actual or de facto lender for the payday or small loans. CashCall supplies funds for the loans through the Reserve Account. CashCall bears the risk of loss on the loans in that it is obligated to purchase the promissory notes from Western Sky and CashCall has agreed to indemnify Western Sky for any liability associated with the business scheme. CashCall reviews all consumer applications for underwriting requirements. CashCall provides website site hosting, server maintenance, marketing services, and administrative support services to Western Sky. Finally, CashCall receives all payments from consumers for the loans. For these reasons, the Department has reasonable cause to believe that the respondents knowingly or negligently violated RSA 399-A:2, I when they engaged in the business of making payday loans or small loans without obtaining a license from the Department.

Additionally, the Department has reasonable cause to believe that the respondents' business scheme constitutes an unfair or deceptive act or practice. See RSA 399-A:12, VIII. The respondents appear to have enacted the business scheme to cause a likelihood of confusion or misunderstanding as to the affiliation, connection, or association between CashCall, WS Funding, and Western Sky. See RSA 358-A:2, III. This business scheme prevents consumers from understanding which entity is making the loans. Moreover, the respondents apparently have used the business scheme as a shield to evade licensure from the Department by exploiting Indian Tribal Sovereign Immunity.

Pursuant to RSA 399-A:7, I, this Order is necessary and appropriate to the public interest, for the protection of consumers, and consistent with the purposes fairly intended by the policy and provisions of RSA Chapter 399-A.

ORDER

Accordingly, the Commissioner orders as follows:

1. The respondents shall cease and desist from violating RSA Chapter 399-A and any rules or order under RSA Chapter 399-A;
2. The respondents shall disgorge any finance charges, delinquency charges, or collection charges associated with the loans made to New Hampshire consumers under the business scheme outlined above;
3. The respondents shall notify all New Hampshire consumers with loans made under the above-referenced business scheme of the disgorgement of any finance charges, delinquency charges, or collection charges associated with those loans via letter;
4. The respondents shall pay restitution to all New Hampshire consumers who received loans under the business scheme outlined above; and
5. The respondents shall be assessed an administrative fine of $1,967,500 for 787 knowing or negligent violations of RSA 399-A:2, I. RSA 399-A:7, I(i); RSA 399-A:8, I; RSA 399-A:18, II; RSA 399-A:18, V.

NOTICE OF RIGHT TO A HEARING

The respondents have a right to request a hearing in writing on this Order to Cease and Desist. If requested, "[a] hearing shall be held not later than 10 days after the request for such hearing is received by the commissioner . . . ." RSA 399-A:8, I.

If the respondent "fails to request a hearing within 30 calendar days of receipt of such order, then such person shall likewise be deemed in default, and the order shall, on the thirty-first day, become permanent, and shall remain in full force and effect until and unless later modified or vacated by the commissioner, for good cause shown." Id.

RECOMMENDED by:

June 4, 2013
Date

/s/
Emelia A.S. Galdieri
N.H. Bar #19840
Hearings Examiner
State of New Hampshire Banking Department

ORDERED by:

June 4, 2013
Date

/s/
Glenn A. Perlow
Bank Commissioner
State of New Hampshire Banking Department

CERTIFICATE OF SERVICE

I, Emelia A.S. Galdieri, hereby certify that on June 5, 2013, a copy of this Order to Cease and Desist was sent to the following parties via U.S. Certified Mail First Class:

Claudia Callaway, Esq.
Katten Muchin Rosenman, LLP
2900 K Street NW, North Tower – Suite 200
Washington, DC 20007-5118

J. Paul Reddam
CashCall, Inc.
1600 S. Douglass Road
Anaheim, CA 92806

/s/
Emelia A.S. Galdieri
N.H. Bar #19840
Hearings Examiner
State of New Hampshire
Banking Department

Exhibit 6

STATE OF KANSAS
BEFORE THE OFFICE OF THE STATE BANK COMMISSIONER
CONSUMER AND MORTGAGE LENDING DIVISION
TOPEKA, KANSAS

IN THE MATTER OF: Western Sky Financial, L.L.C., at: 612 E. Street Timber Lake, South Dakota 57656-0370 mailing address: P.O. Box 370 Timber Lake, South Dakota 57656-0370 and Martin A. Webb, in his capacity as Executive Officer/ Manager/Owner/Member of Western Sky Financial, L.L.C., and all other Owners, Partners, Directors, Officers and Shareholders of Western Sky Financial, L.L.C., Respondents.	)	**Case Number: 2011-312**

SUMMARY ORDER TO CEASE and DESIST, PAY CIVIL PENALTY (FINE), TO BAR FROM FUTURE APPLICATION FOR LICENSURE, TO PROVIDE A REPORT OF ALL SUPERVISED LOANS, TO PAY RESTITUTION FOR VIOLATIONS, and TO TAKE AFFIRMATIVE CORRECTIVE ACTION
(In Accordance with K.S.A. 16a-6-108, and K.S.A. 77-537)

Pursuant to Kansas Uniform Consumer Credit Code (at K.S.A. 16a-1-101 through K.S.A. 16a-9-102, as amended (hereinafter the "Code")), and Kansas Administrative Procedure Act (at K.S.A. 77-501 *et seq.*, as amended (hereinafter "KAPA")), Kevin C. Glendening, Administrator of the Kansas Uniform Consumer Credit Code and the Deputy Commissioner of the Consumer Mortgage and Lending Division (hereinafter "Administrator"), hereby makes the following findings of fact, conclusions of law, and orders against Western Sky Financial, L.L.C., and Martin A. Webb, in his capacity as Executive Officer/Manager/Owner/Member of Western Sky Financial, L.L.C., and all other Owners, Directors, Partners, Officers and Shareholders of Western Sky Financial, L.L.C. (hereinafter "Respondents"):

Findings of Fact:

1. Since February 9, 2010, the Respondents have engaged in the business of making, and/or undertaking direct or indirect collection of payments from supervised loans, as defined by K.S.A. 16a-1-301(46), with Kansas consumers on the internet in Kansas, without first having obtained a license from the Administrator. Respondents have engaged in such business by direct internet and television solicitation to Kansas consumers in Kansas, resulting in at least one thousand thirty-eight (1,038) violations each of K.S.A. 16a-2-301 and K.S.A. 16a-2-310(m).

2. Since February 9, 2010, Respondents have engaged in the business of making, and/or undertaking direct or indirect collection of payments from supervised loans, as defined by K.S.A. 16a-1-301(46), with Kansas consumers without filing or maintaining an adequate surety bond with the Administrator, resulting

in at least one (1) violation each of K.S.A. 16a-2-302(2), and K.A.R. 75-6-31 and K.S.A. 16a-2-310(m).

3. Since February 9, 2010, Respondents have engaged in the business of making, and/or undertaking direct or indirect collection of payments from supervised loans, as defined by K.S.A. 16a-1-301(46), with Kansas consumers and failed to pay the Administrator the annual supervised lender license fee as required, resulting in at least two (2) violations each of K.S.A. 16a-2-302(1)(b) and K.S.A. 16a-2-310(m).

4. Since March 12, 2010, Respondents have failed to file notification with the Administrator within 30 days after commencing business in Kansas as required, resulting in at least three (3) violations each of K.S.A. 16a-6-202 and K.A.R. 75-6-32 and K.S.A. 16a-2-310(m).

5. Since April 30, 2010, Respondents have failed to pay the Administrator the annual fee as required, resulting in at least three (3) violations each of K.S.A. 16a-6-203 and K.S.A. 16a-2-310(m).

6. Since August 29, 2011, Respondents have not complied with the Administrator's inquiries issued July 20, 2011, and August 12, 2011, to produce documents and information concerning the Respondents' supervised loan activity with Kansas consumers, resulting in at least two (2) violations of K.S.A. 16a-6-106.

7. Since February 9, 2010, Respondents have engaged in the business of making, and/or undertaking direct or indirect collection of payments from supervised loans, as defined by K.S.A. 16a-1-301(46), and have failed to give the Kansas "Notice to Consumer" on any written loan agreement, resulting in at least one thousand thirty-eight (1,038) violations each of K.S.A. 16a-3-202 and K.S.A. 16a-2-310(m).

8. Since February 9, 2010, Respondents have charged or attempted direct or indirect collection of payments from at least one thousand thirty-eight (1,038) Kansas consumes for a supervised loan finance fee in excess of the maximum amount permitted under Kansas law, resulting in at least one thousand thirty-eight (1,038) violations each of K.S.A. 16a-2-401(2) and K.S.A. 16a-2-310(m).

9. Since February 9, 2010, Respondents have charged or attempted direct or indirect collection of payments from at least one thousand thirty-eight (1,038) Kansas consumes for supervised loan late fees in excess of the maximum amount permitted under Kansas law, resulting in at least one thousand thirty-eight (1,038) violations each of K.S.A. 16a-2-502 and K.S.A. 16a-2-310(m).

10. Since February 9, 2010, Respondents have engaged in the business of making, and/or undertaking direct or indirect collection of payments from supervised loans, as defined by K.S.A. 16a-1-301(46), with Kansas consumers while using an unconscionable arbitration clause in their written loan agreements which is not compliant with the Kansas Uniform Arbitration Act at K.S.A. 5-401 *et seq.*, resulting in at least one thousand thirty-eight (1,038) violations each of K.S.A. 16a-5-108 and K.S.A. 16a-6-111 and K.S.A. 16a-2-310(m) .

11. Since February 9, 2010, Respondents have charged or attempted direct or indirect collection of payments from at least one thousand twenty-seven (1,027) Kansas consumes for a supervised loan prepaid finance charge in excess of the maximum amount permitted under Kansas law, resulting in at least one thousand twenty-seven (1,027) violations each of K.S.A. 16a-2-401(6) and K.S.A. 16a-2-310(m).

Conclusions of Law:

1. In aggregate, the violations of the Code, cited above in the Findings of Facts 1. through 11., warrant the Administrator's belief that the Respondents would not operate a supervised loan business honestly and fairly within the purpose of the Code, justifying the Administrator's bar of the Respondents from future application for licensure as a supervised lender, ordering the Respondents to cease and desist their supervised lending activity with Kansas consumers in Kansas, ordering the Respondents to provide a report of their supervised loan activity with Kansas consumers, ordering the Respondents to pay

restitution, ordering the Respondents to take affirmative corrective action, and fining the Respondents for past violations of the Code, pursuant to K.S.A. 16a-6-108.

IT IS THEREFORE ORDERED, pursuant to K.S.A. 16a-6-108, that:

1. Respondents shall immediately cease and desist engaging in the business of making, and/or undertaking direct or indirect collection of payments from supervised loans, as defined by K.S.A. 16a-1-301(46), with Kansas consumers in Kansas, and with Kansas consumers over the internet in Kansas. All signage for supervised loans/advances to Kansas consumers must be removed and any advertisements, including internet and television solicitations, must be withdrawn from circulation.

2. Respondents shall immediately pay a civil penalty (fine) in the amount of one million five-hundred fifty-seven thousand dollars ($1,557,000.00) made payable to the Kansas Office of the State Bank Commissioner.

3. Respondents shall provide the Administrator, within ten (10) days of the effective date of this order, with a written report of all supervised loans made by Respondents with Kansas residents, or supervised loans Respondents have taken assignment of for direct or indirect collection of payments from Kansas consumers. Such report shall include the loan date, loan amount, finance charge and any other fees or charges collected in connection with the loan. In addition, the report shall include the borrower's name, address and telephone number. A copy of the loan contract shall also be provided for each loan listed on the report.

4. Respondents shall be barred from future application for licensure as a supervised lender pursuant to the Code.

5. Respondents shall take affirmative corrective action and conduct a self-audit for all of the Respondents' opened and closed supervised loans, and pay restitution by making the necessary restitution payments on all opened and closed supervised loans to the corresponding Kansas consumers within ten (10) days of the effective date of this order, for all payments, profits and/or interest fees received as the result of engaging in the business of making, and/or undertaking direct or indirect collection of payments from supervised loans, as defined by K.S.A. 16a-1-301(46). The restitution payments shall at least be to the one thousand thirty-eight (1,038) Kanas consumers known to the Administrator and at least total one million five-hundred twenty-three thousand sixty-one dollars and seventy-four cents ($1,523,061.74).

6. Respondents shall take affirmative corrective action and make the self-audit restitution checks, payable to said Kansas consumers and send such to the Administrator within ten (10) days of the effective date of this order, in unsealed envelopes, postage prepaid, and pre-addressed to the individual consumers. The Administrator's address shall be listed on the envelopes as the return address. The restitution checks and envelopes shall be accompanied by a letter to the individual consumers approved by the Administrator. The letter shall state "this restitution payment is the result of an administrative order from the Kansas Office of the State Bank Commissioner, and any questions concerning this refund should be directed to Danny J. Vopat, Staff Attorney, at the Office of the State Bank Commissioner, at 700 S.W. Jackson, Suite 300, Topeka, Kansas 66603-3796 or by phone (toll free) at 1-877-387-8523 or 785-296-2266, ext. 215" and "the enclosed check must be deposited within 90 days from the date of the check or it is invalid."

7. Respondents shall provide the Administrator with a written report within ten (10) days of the effective date of this order, of the self-audit results from Order paragraph 5., above, itemizing all loans reviewed by the Kansas consumer's name, whether a refund was made, and the amount of the refund on the reviewed loans.

8. Respondents shall provide the Administrator within hundred (100) days of the effective date of this order, with a written report setting forth the Kansas consumers who deposited the required refund checks and a copy of the cancelled checks for such Kansas consumers. Any required refund check that a Kansas consumer has not cashed prior to the date of such report shall be presumed "abandoned" property, as defined by K.S.A. 58-3935, irrespective of the statutory holding period. In order to avoid the expense of stopping payment on all un-cashed refund checks, the Respondents may open an account dedicated to the consumer refunds and within hundred (100) days of the effective date of this order, the Respondents shall close the account and forward the balance of the abandoned property to the Administrator in a check made payable to the Kansas State Treasurer in accordance with the Disposition of Unclaimed Property Act, K.S.A. 58-3934 *et seq*, and specifically according to the procedure set out in K.S.A. 58-3960 (b). Such property shall be accompanied by a report, prepared in accordance with K.S.A. 58-3950, on forms provided by the State Treasurer.

BY THE ADMINISTRATOR IT IS SO ORDERED.

Date: May 22nd, 2012.

Kevin C. Glendening
Deputy Commissioner (Administrator)
Officer of the State Bank Commissioner
700 SW Jackson, Suite 300
Topeka, Kansas 66603-3714
(785) 296-2266; FAX (785) 296-0168

NOTICE AND RIGHT TO HEARING

PLEASE TAKE NOTICE that this is a Summary Order pursuant to K.S.A. 77-537. Respondents have the right to request a hearing pursuant to K.S.A. 77-542. A party to an agency proceeding may request a hearing on the Summary Order by filing a request with this agency by mail, fax, or hand delivery at:

Office of the State Bank Commissioner
700 S.W. Jackson, Suite 300
Topeka, KS 66603-3796
FAX (785) 296-0168

A request for hearing must be received within 15 days, plus 3 days mailing time if mailed, from the date on the Certificate of Service. *See* K.S.A. 77-531; K.S.A. 60-206(d).

If a hearing is not requested, this order shall become effective as a Final Order, without further notice. Failure to timely request a hearing may preclude further judicial review. Once this Order becomes effective it shall remain in effect indefinitely or until such time as the agency head modifies or terminates the Order.

Pursuant to K.S.A. 77-613(e), the State Bank Commissioner is the agency officer designated to receive service of a petition for judicial review on behalf of the agency. If you have questions concerning this notice please consult an attorney.

CERTIFICATE OF SERVICE

I, Erica Sextro, hereby certify that I personally caused a true and correct copy of this Summary Order To Cease and Desist, Pay Civil Penalty (Fine), To Bar From Future Application For Licensure, To Provide A Report Of All Supervised Loans, To Pay Restitution For Violations, and To Take Affirmative Corrective Action, to be placed in first class mail, postage prepaid, on this 23rd day of May, 2012, addressed at the last known address to the following:

Western Sky Financial, L.L.C.
612 E. Street
P.O. Box 370
Timber Lake, South Dakota 57656-0370
Respondents

Martin A. Webb, Register Agent for
Western Sky Financial, L.L.C.
612 E. Street
Timber Lake, South Dakota 57656-0370
Respondents

Cheryl F. Laurenz-Bogue
Bogue & Bogue, LLP Law Officers
Ziebach County Courthouse
200 Main Street
P.O. Box 400
Dupree, South Dakota 57623-0400
Out-of-State Counsel for Respondents

Erica Sextro

Erica Sextro, Legal Assistant
Office of the State Bank Commissioner
700 S.W. Jackson, Suite 300
Topeka, Kansas 66603
(785) 296-2266 Fax: (785) 296-0168

Exhibit 7

CashCall, Inc., Anaheim, CA & WS Funding, LLC, Anaheim, CA - Cease Order

By the Division of Banks

COMMONWEALTH OF MASSACHUSETTS

Suffolk, SS.

COMMISSIONER OF BANKS
SMALL LOAN LICENSING
Docket No. 2013-010

CEASE ORDER

In the Matter of
CASHCALL, INC.
Anaheim, CaliforniaAnaheim, California

&

WS FUNDING, LLC
Anaheim, California

The Commissioner of Banks (Commissioner) is charged with the administration of Massachusetts General Laws chapter 140, sections 96 through 114A, inclusive and applicable regulations found and 209 CMR 20.00 *et seq*., and 209 CMR 26.00 *et seq*., relating to the licensing and regulation of small loan companies. The Commissioner is also charged with the administration of Massachusetts General Laws chapter 93, sections 24 through 24G and the Division's regulation 209 CMR 18.00 *et seq*., relating to the registration of third party loan servicers. Pursuant to the authority granted by Massachusetts General Laws chapter 140 and Massachusetts General Laws chapter 93, sections 24 through 24G, the Commissioner has reviewed information relative to the activities of CASHCALL, INC., (CashCall) located at 1600 South Douglas Road, Anaheim, California and its wholly owned subsidiary WS FUNDING, LLC (WS Funding) to determine if CashCall and WS Funding have engaged in the business of, or are about to engage in, acts or practices constituting violations of Massachusetts General Laws chapter 140, and Massachusetts General Laws chapter 93, sections 24 through 24G. Based upon such review, the Commissioner hereby issues the following CEASE ORDER as a result of the findings alleged herein.

A. FINDINGS OF FACT

1. The Division of Banks (Division), through the Commissioner, has jurisdiction over the licensing and regulation of persons and entities engaged in the small loan company business in Massachusetts pursuant to Massachusetts General Laws chapter 140, sections 96 through 114A inclusive and its implementing regulation 209 CMR 20.00 *et seq*.
2. The Division also has jurisdiction over the registration and regulation of persons and entities engaged in the business of third party loan servicing in Massachusetts, pursuant to Massachusetts General Laws chapter 93, sections 24 through 24G inclusive and its implementing regulation 209 CMR 18.00 *et seq*.
3. CashCall is, and at all relevant times, has been a foreign corporation doing business in the Commonwealth of Massachusetts with a principal office located at 1600 South Douglas Road, Anaheim, California.
4. WS Funding is, and at all relevant times, has been a foreign corporation doing business in the Commonwealth of Massachusetts.
5. Based upon information and belief WS Funding is a wholly owned subsidiary of CashCall.
6. According to the Division's records, at all relevant times John P. Reddam was and is the sole director and 100% owner of CashCall.
7. Based upon information and belief, John P. Reddam was and is the sole member and 100% owner of WS Funding.

I. Regulatory Background

8. On or about December 6, 2010, CashCall submitted a Massachusetts mortgage lender license application to the Division.
9. On November 21, 2011 and April 20, 2012, the Division's Consumer Assistance Unit received one consumer complaint

on each date (Complaints) against CashCall regarding the Corporation's business activities in Massachusetts.

10. The Complaints filed by two Massachusetts consumers indicated that CashCall was engaged in the business of servicing small loans on behalf of its wholly owned subsidiary WS Funding.

11. Upon review of the Complaints, it was revealed that the loan terms for both loans triggered the licensing requirements of the small loan law, violated the small loan rate order and are void subject to the provisions of Massachusetts General Laws chapter 140, section 110. Additionally, based upon the Division's records, CashCall was not registered as a third party loan servicer.

12. On May 8, 2012, as a result of information received through the Complaints, the Division sent CashCall a Cease Letter (Cease Letter) directing CashCall and WS Funding to cease engaging in the small loan company business and as a third party loan servicer until such time as the Corporation obtained the relevant small loan company license and loan servicer registration.

13. The Cease Letter referenced a February 15, 2012 telephone conversation with Daniel Barren, General Counsel of CashCall and stated that the Division remained concerned with the activities being conducted by CashCall and WS Funding, and their applicability to small loan statutory licensing requirements of Massachusetts General Laws chapter 140 section 96.

14. The Cease Letter further required CashCall and WS Funding, to complete affidavits certifying that neither entity would engage in the small loan company business or loan servicer business until both entities obtained the requisite small loan company license or loan servicer registration and/or provided satisfactory evidence that both entities were exempt from the requirements.

15. By letters dated January 1, 2012 and May 29, 2012, CashCall submitted responses to the November 21, 2011 and April 20, 2012 Complaints in which the Corporation agreed to reduce the interest rates for the unsecured personal loans to 20% and 15% respectively.

16. By letter dated June 4, 2012, counsel for CashCall submitted a letter in which the Corporation claimed that upon examination of Massachusetts General Laws chapter 140, section 96, CashCall was "not aware of any provision that require[d] a company that is not located in the Commonwealth, and that purchases or services loans made on a federally recognized Indian Reservation…to obtain any license in the Commonwealth."

17. On June 27, 2012, CashCall submitted a request to withdraw the Corporation's pending mortgage lender license application. On July 2, 2012, the Corporation's pending mortgage lender license application was withdrawn.

18. To date, CashCall and WS Funding have failed to complete the affidavits requested in the Division's correspondence referenced in paragraph 14 of this Cease Order.

II. Engaging in Unlicensed Activity and Violation of the Small Loan Rate Order

19. Massachusetts General Laws 140, sections 96 through 114A, inclusive, the "Small Loans Law," requires entities to be licensed by the Commissioner of Banks if they are engaged, directly or indirectly, in the business of making loans of $6,000.00 or less and the interest and expenses paid on the loan exceed in the aggregate 12% per annum of the loan amount.

20. Massachusetts General Laws chapter 140, section 96 relative to the licensing requirements for entities engaged in the small loan business states:
No person shall directly or indirectly engage in the business of making loans of six thousand dollars or less, if the amount to be paid on any such loan for interest and expenses exceeds in the aggregate an amount equivalent to twelve per cent per annum upon the sum loaned, without first obtaining from the commissioner of banks, in sections ninety-six to one hundred and fourteen, inclusive, called the commissioner, a license to carry on the said business in the town where the business is to be transacted... The buying or endorsing of notes or the furnishing of guarantee or security for compensation shall be considered to be engaging in the business of making small loans within said sections[.]

21. Massachusetts General Laws chapter 140, section 110 states in part:
Whoever, not being duly licensed as provided in section ninety-six on his own account or on account of any other person not so licensed, engages in or carries on, directly or indirectly, either separately or in connection with or as a part of any other business, the business of making loans or buying notes or furnishing endorsements or guarantees, to which sections ninety-six to one hundred and eleven, inclusive, apply, shall be punished by imprisonment in the state prison for not more than ten years or in a jail or house of correction for not more than two and one half years, or by a fine of not more than ten thousand dollars, or by both such fine and imprisonment. **Any loan made or note purchased or endorsement or guarantee furnished by an unlicensed person in violation of said sections shall be void**. [emphasis added].

22. The Division's regulation at 209 CMR 26.01(a) establishes the Small Loan Rate Order and states in part:
All persons subject, in whole or in part, to the provisions of M.G.L. c. 140, §§ 96 through 113, may charge, contract for, and receive the following maximum interest charges for loans not in excess of $6,000:
(a) 23% per annum of the unpaid balances of the amount financed calculated according to the actuarial method plus an administrative fee of $20 upon the granting of a loan. An administrative fee is not permitted to be assessed to a borrower more than once during any 12 month period.

i. Massachusetts Consumer Complaints

23. Between February 12, 2013 and February 21, 2013 the Division's consumer assistance unit received at least two additional consumer complaints regarding the activities of CashCall and WS Funding.

24. A review of one of the consumer complaints filed included correspondence from CashCall which identified Western Sky Funding, LLC (Western Sky) as the lender. A review of the complaint indicated that CashCall was servicing the loan made by Western Sky, and was a loan that had been purchased from Western Sky by WS Funding. (Consumer A).

25. A review of the documents provided by Consumer A revealed that the loan terms triggered the licensing requirements of the small loan law and also violated the small loan rate order. The consumer obtained a loan in the amount of $2,525 and was charged an origination fee of $75 for a total amount financed of $3,000 at an interest rate of 139.12 % per annum.

26. A review of the second consumer complaint filed included a loan agreement which identified Western Sky as the lender. A review of the complaint indicated that CashCall was servicing the loan made by Western Sky, and based upon information and belief the loan had been purchased from Western Sky by WS Funding. (Consumer B).

27. A review of the documents provided by Consumer B revealed that the loan terms triggered the licensing requirements of the small loan law and also violated the small loan rate order. The consumer obtained a loan in the amount of $1,000 and was charged an origination fee of $500 for a total amount financed of $1,500 at an interest rate of 149% per annum.

28. Both consumers referenced in the paragraph 23 of this Cease Order stated that they were being contacted by CashCall.

29. The Division's review of the information reflected in the consumer complaints indicated that CashCall is currently engaged in the business of servicing small loans on behalf of WS Funding. The loan terms in each of the loan agreements trigged the small loan licensing requirements and violated the small loan rate order.

ii. Investigation of Unlicensed Activity

30. Pursuant to Massachusetts General Laws chapter 93 section 24D, beginning November 27, 2012 and continuing through February 11, 2013, the Division conducted an examination of the books, accounts, papers, records, and files maintained by Delbert Services Corporation (Delbert Services), a licensed debt collector, to evaluate the Delbert Services' compliance with the laws, regulations, and regulatory bulletins applicable to the conduct of the debt collector business in Massachusetts (2012 examination).

31. According to the Division's records, at all relevant times John P. Reddam was and is the sole director and 100% owner of Delbert Services.

32. Books and Records reviewed by the Division's examiner during the 2012 examination revealed that Delbert Services failed to maintain the financial responsibility character, reputation and integrity to conduct the debt collector business in the Commonwealth by conducting its business in an unsafe and unsound manner by collecting consumer debt that was made, owned and or serviced by unlicensed small loan companies including CashCall and WS Funding.

33. Books and records reviewed during the 2012 examination revealed that WS Funding purchases small loans from Western Sky, an unlicensed small loan company and thereafter assigns those loans to CashCall for servicing.

34. Based upon information and belief, CashCall also sells those loans made by Western Sky to other debt purchasers.

35. During the 2012 examination, the Division's examiner reviewed consumer loan agreements (loan agreements) for accounts currently in collection by Delbert Services. A review of a sample of loan agreements revealed that Delbert Services has been collecting on at least 17 accounts on behalf of CashCall (CashCall accounts).

36. The Division's review of detailed account information provided by Delbert Services revealed that the CashCall accounts reviewed were consumer loans owned by WS Funding. The review indicated that the loans were unsecured consumer loans made to Massachusetts residents with loan amounts under $6,000 and the interest rate exceeded 12% per annum.

37. The Division's examiner reviewed the loan terms for the CashCall accounts and determined that the interest rates for all accounts ranged from 59% to 169%, with annual percentage rates ranging from 59.88% to 337.97% in violation of 209 CMR 26.01.

38. According to the Division's records, as of the date of this Cease Order, CashCall is not licensed as a small loan company nor has the Corporation filed an application with the Division to obtain a small loan company license.

39. According to the Division's records, as of the date of this Cease Order, WS Funding is not licensed as a small loan company nor has the Company filed an application with the Division to obtain a small loan company license.

III. Violation of Loan Servicer Registration Requirements

40. Massachusetts General Laws chapter 93 sections 24 through 24G and its implementing regulation 209 CMR 18.00 *et seq.,* requires all entities engaged in the business of receiving scheduled periodic payments from Massachusetts consumers pursuant to the terms of a loan and making those payments to the owner of the loan or other third party with respect to the amounts received from the consumer to be registered as a loan servicer.

41. Based upon the information reflected in paragraphs 8 through 39 of this Cease Order, CashCall appears to be engaged in the business of a loan servicer by servicing small loans owned by its wholly owned subsidiary WS Funding.

42. According to the Division's records, as of the date of this Cease Order, CashCall is not registered as a loan servicer nor has the Corporation filed an application with the Division to register as a small loan servicer.

IV. Violation of the Massachusetts Criminal Usury Statute

43. Massachusetts General Laws chapter 271, section 49 establishes that it is usury in Massachusetts to hold a loan contract which calls for an interest rate exceeding a twenty percent annual percentage rate (APR). However, said section 49 further states that loans in excess of twenty percent are permissible provided that the lender registers with the Office of the Attorney General.

44. Based upon information and belief, neither CashCall or WS Funding have registered with the Office of the Attorney General.

V. CEASE ORDER

45. CashCall and WS Funding are hereby directed to CEASE AND DESIST from engaging in the small loan company business until such time that both entities have obtained a license issued by the Commissioner of Banks for the small loan company business in Massachusetts.

46. CashCall is hereby directed to CEASE AND DESIST from engaging in the business of a loan servicer until such time that the Corporation has obtained the appropriate registration to engage in the business of a loan servicer in Massachusetts.

47. CashCall and WS Funding are hereby directed to immediately CEASE AND DESIST from collecting or attempting to collect, directly or indirectly on any loans previously made to Massachusetts consumers, including but not limited to collecting or attempting to collect any principal, interest, finance charges, or any other fees related to transactions involving Massachusetts consumers.

48. Within forty-five (45) days of the effect date of this Cease Order, CashCall and WS Funding are hereby directed to refund any interest, finance charges, or any other fees including but not limited to, administrative fees, origination fees, late fees and returned check fees collected from Massachusetts consumers within four years of the issuance of this Cease Order.

    a. Within forty-five (45) days of the effective date of this Cease Order, CashCall and WS Funding shall submit to the Commissioner a list of all consumers to whom a reimbursement is owed by CashCall and WS Funding in accordance with this Paragraph of the Cease Order; and

    b. Within ninety (90) days of the effective date of this Cease Order, CashCall and WS Funding shall submit evidence of all reimbursements issued to consumers pursuant to this Paragraph of the Cease Order, including the consumers' names, check numbers, the amount of the reimbursements and certified mail receipts to illustrate the consumers' receipt of the reimbursement.

49. CashCall are WS Funding are hereby directed to immediately CEASE AND DESIST from selling, assigning, or transferring to any third party its interest in any loans which CashCall and/or WS Funding previously made to Massachusetts consumers.

50. Within 15 days of the receipt of this CEASE ORDER, Cashcall and WS Funding are directed to produce the following:

    a. Information or documents setting forth the total number of loans made and/or serviced by CashCall and/or WS Funding to Massachusetts consumers within four years of the issuance of this Cease Order, broken down by calendar year.

    b. Information or documents describing the following for each loan made or serviced by CashCall and/or WS Funding to Massachusetts consumers within four years of the issuance of this Cease Order:

        i. the name of the consumer;

        ii. the consumer's phone number(s), home address, and e-mail address;

        iii. the date that the agreement with CashCall and/or WS Funding was executed;

        iv. the name of the lender, and the lender's account number;

        v. the original principal amount of the loan;

        vi. all fees and other interest payments that the consumer was required to make on the loan;

        vii. the total annual interest rate on the loan;

        viii. the APR on the loan;

        ix. the date that the funds were originally disbursed to the consumer;

        x. the date that initial payment was due on the loan;

        xi. the number of times that the loan was renewed, refinanced or extended;

        xii. for each renewal, refinancing, or extension of the loan, information or documents describing the following: each new loan or account number, all fees and other interest payments that were required, and the dates those payments were due;

xiii. the payment history for each loan transaction, including the date and amount of each payment made by the consumer, and how that money was applied to the loan balance (i.e. whether it was applied to interest, to principal, to late fees or other penalties, etc.);

xiv. the total amount of money paid by the consumer on the loan, including any principal, finance charges, interest, or any other fees that were paid;

xv. the status of the loan, including the following for each transaction:

i. whether the loan was paid in full, or if still open, whether it is current or allegedly in default,

ii. whether the account was referred to a third party collection agency (if so, provide the name of the collection agency);

iii. whether the loan (i.e., the debt) was sold to another party (if so, information or documents detailing the name of the party to whom it was sold); and

xvi. information or documents detailing whether CashCall, WS Funding or any third party collection agency has ever submitted any negative or adverse information pertaining to the loan to any consumer reporting agency.

c. Information or documents which provide the following for any business entity or individual (hereinafter, debt buyer) to whom CashCall or WS Funding have assigned or sold any of the loans referenced above (i.e., loans made by CashCall or WS Funding to Massachusetts consumers within four years of the issuance of this Cease Order; hereinafter, the Loans): the name of the debt buyer; the total number of Loans sold or assigned by CashCall or WS Funding to the debt buyer; the total amount paid by the debt buyer or by any other party to CashCall or WS Funding for the sale or assignment of the Loans to the debt buyer; the date that CashCall or WS Funding and the debt buyer (the parties) entered into an agreement for the debt buyer to purchase or otherwise acquire Loans; and a copy of all written contracts, agreements, documents, or correspondences between the parties which describe or specify the parties' rights or obligations pertaining to the debt buyer's purchase or acquisition of the Loans from CashCall or WS Funding.

BY ORDER AND DIRECTION OF THE COMMISSIONER OF BANKS:

Dated at Boston, Massachusetts, this 4th day of April, 2013

By:
David J. Cotney
Commissioner of Banks
Commonwealth of Massachusetts

Exhibit 8

Western Sky Financial, LLC, a/k/a Western Sky Funding, LLC, a/k/a Western Sky, a/k/a Western Sky.com, Timber Lake, SD - Cease Order

By the Division of Banks

COMMONWEALTH OF MASSACHUSETTS

Suffolk, SS.

COMMISSIONER OF BANKS
SMALL LOAN LICENSING
Docket No. 2013-011

CEASE ORDER

In the Matter of
WESTERN SKY FINANCIAL, LLC
a/k/a WESTERN SKY FUNDING, LLC
a/k/a WESTERN SKY
a/k/a WESTERNSKY.COM

Timber Lake, South Dakota

The Commissioner of Banks (Commissioner) is charged with the administration of Massachusetts General Laws chapter 140, sections 96 through 114A, inclusive and applicable regulations found and 209 CMR 20.00 *et seq*., and 209 CMR 26.00 *et seq*., relating to the licensing and regulation of small loan companies. Pursuant to the authority granted by Massachusetts General Laws chapter 140, the Commissioner has reviewed information relative to the activities of WESTERN SKY FINANCIAL, LLC, a/k/a WESTERN SKY FUNDING, LLC, a/k/a WESTERN SKY, a/k/a WESTERNSKY.COM (collectively known as Western Sky or the Company) located at 612 E Street, Timber Lake, South Dakota, to determine if Western Sky has engaged in the business of, or is about to engage in, acts or practices constituting violations of Massachusetts General Laws chapter 140. Based upon such review, the Commissioner hereby issues the following CEASE ORDER as a result of the findings alleged herein.

A. FINDINGS OF FACT

1. The Division of Banks (Division), through the Commissioner, has jurisdiction over the licensing and regulation of persons and entities engaged in the small loan company business in Massachusetts pursuant to Massachusetts General Laws chapter 140, sections 96 through 114A inclusive and its implementing regulation 209 CMR 20.00 *et seq*.

2. Western Sky is, and at all relevant times, has been a foreign corporation doing business in the Commonwealth of Massachusetts with a principal office located at 612 E Street, Timber Lake, South Dakota

I. Engaging in Unlicensed Activity and Violation of the Small Loan Rate Order

3. Massachusetts General Laws 140, sections 96 through 114A, inclusive, the "Small Loans Law," requires entities to be licensed by the Commissioner of Banks if they are engaged, directly or indirectly, in the business of making loans of $6,000.00 or less and the interest and expenses paid on the loan exceed in the aggregate 12% per annum of the loan amount.

4. Massachusetts General Laws chapter 140, section 96 relative to the licensing requirements for entities engaged in the small loan business states:
   No person shall directly or indirectly engage in the business of making loans of six thousand dollars or less, if the amount to be paid on any such loan for interest and expenses exceeds in the aggregate an amount equivalent to twelve per cent per annum upon the sum loaned, without first obtaining from the commissioner of banks, in sections ninety-six to one hundred and fourteen, inclusive, called the commissioner, a license to carry on the said business in the town where the business is to be transacted... The buying or endorsing of notes or the furnishing of guarantee or security for compensation shall be considered to be engaging in the business of making small loans within said sections[.]

5. Massachusetts General Laws chapter 140, section 110 states in part:
   Whoever, not being duly licensed as provided in section ninety-six on his own account or on account of any other person not so licensed, engages in or carries on, directly or indirectly, either separately or in connection with or as a part of any other business, the business of making loans or buying notes or furnishing endorsements or guarantees, to

which sections ninety-six to one hundred and eleven, inclusive, apply, shall be punished by imprisonment in the state prison for not more than ten years or in a jail or house of correction for not more than two and one half years, or by a fine of not more than ten thousand dollars, or by both such fine and imprisonment. **Any loan made or note purchased or endorsement or guarantee furnished by an unlicensed person in violation of said sections shall be void**. [emphasis added].

6. The Division's regulation at 209 CMR 26.01(a) establishes the Small Loan Rate Order and states in part:
All persons subject, in whole or in part, to the provisions of M.G.L. c. 140, §§ 96 through 113, may charge, contract for, and receive the following maximum interest charges for loans not in excess of $6,000:
(a)23% per annum of the unpaid balances of the amount financed calculated according to the actuarial method plus an administrative fee of $20 upon the granting of a loan. An administrative fee is not permitted to be assessed to a borrower more than once during any 12 month period.

i. Regulatory Background

7. Beginning on or about June 1, 2011 and continuing on through February 21, 2013, the Division's Consumer Assistance Unit received at least eight consumer complaints regarding the activities of Western Sky.

8. The Division's review of information provided in conjunction with seven of the consumer complaints revealed that Western Sky was engaged in the business of making unsecured personal loans to Massachusetts consumers. A review further revealed that the loan terms for all seven loans made to Massachusetts consumers, triggered the licensing requirements of the small loan law, violated the small loan rate order and are void subject to the provisions of Massachusetts General Laws chapter 140, section 110 as further detailed in this Cease Order.

   a. **Consumer A**

      i. On June 11, 2011, Consumer A filed a complaint with the Division regarding the activities of Western Sky.

      ii. Consumer A obtained a loan in the amount of $2,525 and was charged an origination fee of $75 for a total amount financed of $3,000 at an interest rate of 135 % per annum.

   b. **Consumer B**

      i. On November 21, 2011, Consumer B filed a complaint with the Division regarding the activities of Western Sky.

      ii. Consumer B obtained a loan in the amount of $2,525 and was charged an origination fee of $75 for a total amount financed of $3,000 at an interest rate of 135 % per annum.

   c. **Consumer C**

      i. On May 9, 2012, Consumer C filed a complaint with the Division regarding the activities of Western Sky.

      ii. Consumer C obtained a loan in the amount of $2,525 and was charged an origination fee of $75 for a total amount financed of $3,000 at an interest rate of 135 % per annum.

   d. **Consumer D**

      i. On May 21, 2012 Consumer D filed a complaint with the Division regarding the activities of Western Sky.

      ii. Consumer D obtained a loan in the amount of $1,500, and had made 19 payments of $166 for a total of $3,154. The consumer was still obligated to make 10 more payments on the personal loan for a total of $4,814. Based upon the information reviewed, the consumer would be paying an interest rate of 220.93% per annum.

   e. **Consumer E**

      i. On May 30, 2012, Consumer E filed a complaint with the Division regarding the activities of Western Sky.

      ii. Consumer E obtained a loan in the amount of $2,525 and was charged an origination fee of $75 for a total amount financed of $3,000 at an interest rate of 135 % per annum.

   f. **Consumer F**

      i. On February 12, 2013, Consumer F filed a complaint with the Division regarding the activities of Western Sky.

      ii. Consumer F obtained a loan in the amount of $2,525 and was charged an origination fee of $75 for a total amount financed of $3,000 at an interest rate of 139.12 % per annum.

   g. **Consumer G**

      i. On February 21, 2013, Consumer G filed a complaint with the Division regarding the activities of Western Sky.

      ii. Consumer G obtained a loan in the amount of obtained a loan in the amount of $1,000 and was charged an origination fee of $500 for a total amount financed of $1,500 at an interest rate of 149% per annum.

9. On November 13, 2011 and May 15, 2012, as a result of the extensive number of complaints, the Division sent Western Sky Cease Letters (Cease Letters) directing the Company to cease engaging in the small loan company business until such time as Western Sky had obtained the relevant small loan company license in Massachusetts.

10. The Cease Letters stated that the Division remained concerned with the lending activities being conducted by Western Sky, and their applicability to small loan statutory licensing requirements of Massachusetts General Laws chapter 140 section 96.

11. The Cease Letters further required Western Sky to complete affidavits certifying that the Company would cease engaging in the small loan company business until Western Sky obtained the requisite small loan company license and/or provided satisfactory evidence that the entity was exempt from the requirements.

12. By letters dated December 2, 2011 and May 29, 2012, counsel for Western Sky submitted responses to the Cease Letters issued by the Division and claimed that Western Sky was operating solely and exclusively under Federal Indian Law and the laws and regulations of the Cheyenne River SiouxTribe, a position that the Division disputes.

13. To date, Western Sky has failed to complete the affidavits.

ii. Investigation of Unlicensed Activity

14. Pursuant to Massachusetts General Laws chapter 93 section 24D, beginning November 27, 2012 and continuing through February 11, 2013, the Division conducted an examination of the books, accounts, papers, records, and files maintained by Delbert Services Corporation (Delbert Services), a licensed debt collector, to evaluate Delbert Services' compliance with the laws, regulations, and regulatory bulletins applicable to the conduct of the debt collector business in Massachusetts (2012 examination).

15. Books and Records reviewed by the Division's examiner during the 2012 examination revealed that Delbert Services failed to maintain the financial responsibility character, reputation and integrity to conduct the debt collector business in the Commonwealth by conducting its business in an unsafe and unsound manner by collecting consumer debt that was made by unlicensed small loan companies including Western Sky.

16. During the 2012 examination, the Division's examiner reviewed consumer loan agreements (loan agreements) for accounts currently in collection by Delbert Services. A review of a sample of loan agreements revealed that several unlicensed entities purchased unsecured personal loans from Western Sky. Delbert Services has been collecting on at least 23 accounts for unsecured personal loans made by Western Sky.

17. The Division's review of detailed account information provided by Delbert Services revealed that the loans were unsecured personal loans made to Massachusetts residents with loan amounts under $6,000 and interest rates exceeding 12% per annum.

18. The Division's examiner reviewed the loan terms for the loans made by Western Sky and determined that the terms triggered the licensing requirements of the small loan law, violated the small loan rate order and are void subject to the provisions of Massachusetts General Laws chapter 140, section 110. The interest rates for all loans ranged from 120% to 169%, with annual percentage rates ranging from 194.01% to 337.97% in violation of 209 CMR 26.01.

19. According to the Division's records, as of the date of this Cease Order, Western Sky is not licensed as a small loan company nor has the Company filed an application with the Division to obtain a small loan company license.

II. Violation of the Massachusetts Criminal Usury Statute

20. Massachusetts General Laws chapter 271, section 49 establishes that it is usury in Massachusetts to hold a loan contract which calls for an interest rate exceeding a twenty percent annual percentage rate (APR). However, said section 49 further states that loans in excess of twenty percent are permissible provided that the lender registers with the Office of the Attorney General.

21. Based upon information and belief, Western Sky has not registered with the Office of the Attorney General.

III. CEASE ORDER

22. Western Sky is hereby directed to CEASE AND DESIST from engaging in the small loan company business until such time that the Company has obtained a license issued by the Commissioner of Banks for the small loan company business in Massachusetts.

23. Western Sky is hereby directed to immediately CEASE AND DESIST from collecting or attempting to collect, directly and indirectly, on any loans previously made to Massachusetts consumers, including but not limited to collecting or attempting to collect any principal, interest, finance charges, or any other fees related to transactions involving Massachusetts consumers.

24. Within forty-five (45) days of the effect date of this Cease Order, Western Sky is hereby directed to refund any interest, finance charges, or any other fees including but not limited to, administrative fees, origination fees, late fees and returned check fees collected from Massachusetts consumers within four years of the issuance of this Cease Order.

    a. Within forty-five (45) days of the effective date of this Cease Order, Western Sky shall submit to the Commissioner a list of all consumers to whom a reimbursement is owed by Western Sky in accordance with this Paragraph of the Cease Order; and

    b. Within ninety (90) days of the effective date of this Cease Order, Western Sky shall submit evidence of all reimbursements issued to consumers pursuant to this Paragraph of the Cease Order, including the consumers' names, check numbers, the amount of the reimbursements and certified mail receipts to illustrate the consumers' receipt of the reimbursement.

25. Western Sky is hereby directed to immediately CEASE AND DESIST from selling, assigning, or transferring to any third party its interest in any loans which Western Sky previously made to Massachusetts consumers.

26. Within 15 days of the receipt of this CEASE ORDER, Western Sky is directed to produce the following:

    a. Information or documents setting forth the total number of loans made and/or serviced by Western Sky to Massachusetts consumers within four years of the issuance of this Cease Order, broken down by calendar year.

    b. Information or documents describing the following for each loan made or serviced by Western Sky to Massachusetts consumers within four years of the issuance of this Cease Order:

        i. the name of the consumer;

        ii. the consumer's phone number(s), home address, and e-mail address;

        iii. the date that the agreement with Western Sky was executed;

        iv. the name of the lender, and the lender's account number;

        v. the original principal amount of the loan;

        vi. all fees and other interest payments that the consumer was required to make on the loan;

        vii. the total annual interest rate on the loan;

        viii. the APR on the loan;

        ix. the date that the funds were originally disbursed to the consumer;

        x. the date that initial payment was due on the loan;

        xi. the number of times that the loan was renewed, refinanced or extended;

        xii. for each renewal, refinancing, or extension of the loan, information or documents describing the following: each new loan or account number, all fees and other interest payments that were required, and the dates those payments were due;

        xiii. the payment history for each loan transaction, including the date and amount of each payment made by the consumer, and how that money was applied to the loan balance (i.e. whether it was applied to interest, to principal, to late fees or other penalties, etc.);

        xiv. the total amount of money paid by the consumer on the loan, including any principal, finance charges, interest, or any other fees that were paid;

        xv. the status of the loan, including the following for each transaction:

            i. whether the loan was paid in full, or if still open, whether it is current or allegedly in default,

            ii. whether the account was referred to a third party collection agency (if so, provide the name of the collection agency);

            iii. whether the loan (i.e., the debt) was sold to another party (if so, information or documents detailing the name of the party to whom it was sold); and

        xvi. information or documents detailing whether Western Sky or any third party collection agency has ever submitted any negative or adverse information pertaining to the loan to any consumer reporting agency.

    c. Information or documents which provide the following for any business entity or individual (hereinafter, debt buyer) to whom Western Sky has assigned or sold any of the loans referenced above *(i.e.,* loans made by Western Sky to Massachusetts consumers within four years of the issuance of this Cease Order; hereinafter, the Loans): the name of the debt buyer; the total number of Loans sold or assigned by Western Sky to the debt buyer; the total amount paid by the debt buyer or by any other party to Western Sky for the sale or assignment of the Loans to the debt buyer; the date that the Western Sky and the debt buyer (the parties) entered into an agreement for the debt buyer to purchase or otherwise acquire Loans; and a copy of all written contracts, agreements, documents, or correspondences between the parties which describe or specify the parties' rights or obligations pertaining to the debt buyer's purchase or acquisition of the Loans from Western Sky.

BY ORDER AND DIRECTION OF THE COMMISSIONER OF BANKS:

Dated at Boston, Massachusetts, this 4th day of April, 2013

By:
David J. Cotney
Commissioner of Banks
Commonwealth of Massachusetts

Western Sky Financial, LLC, a/k/a Western Sky Funding,

Exhibit 9

STATE OF ILLINOIS
DEPARTMENT OF FINANCIAL & PROFESSIONAL REGULATION
DIVISION OF FINANCIAL INSTITUTIONS

In the Matter of	)	
Western Sky Financial, LLC	)	No. 13 CC 265
	)	

To: Western Sky Funding Group, Ltd.
612 E Street
Timber Lake, SD 57656

CEASE AND DESIST ORDER

The DEPARTMENT OF FINANCIAL AND PROFESSIONAL REGULATION, DIVISION OF FINANCIAL INSTITUTIONS ("Department"), having conducted an examination of facts related to activities performed by Western Sky Financial, LLC ("Western Sky"), pursuant to the Payday Loan Reform Act, 815 ILCS 122/1 et seq., and the Consumer Installment Loan Act, 205 ILCS 670/1 et seq., hereby issues this order:

STATUTORY PROVISIONS

A. Payday Loan Reform Act ("PLRA")

1. Section 1-15(a) of PLRA states, in pertinent part:

> [T]his Act applies to any lender that offers or makes a payday loan to a consumer in Illinois. 815 ILCS 122/§1-15(a).

2. Section 1-10 of PLRA states, in pertinent part:

> "Lender" and "licensee" mean any person or entity, including any affiliate or subsidiary of a lender or licensee, that offers or makes a payday loan, buys a whole or partial interest in a payday loan, arranges a payday loan for a third party, or acts as an agent for a third party in making a payday loan, regardless of whether approval, acceptance, or ratification by the third party is necessary to create a legal obligation for the third party, and includes any other person or entity if the Department determines that the person or entity is engaged in a transaction that is in substance a disguised payday loan or a subterfuge for the purpose of avoiding this Act. 815 ILCS 122/§1-10.

3. Section 3-3(a) of PLRA states, in pertinent part:

> [A] person or entity acting as a payday lender must be licensed by the Department as provided in this Article. 815 ILCS 122/§3-3(a).

4. Section 4-10(e) of PLRA states, in pertinent part:

> The Secretary [of the Department] may issue a cease and desist order to any licensee or other person doing business without the required license, when in the opinion of the Secretary the licensee or other person is violating or is about to violate any provision of this Act or any rule or requirement imposed in writing by the Department as a condition of granting any authorization permitted by this Act. 815 ILCS 122/§4-10(e).

B. Consumer Installment Loan Act ("CILA")

5. Section 1 of CILA states, in pertinent part:

> License required to engage in business. No person, partnership, association, limited liability company, or corporation shall engage in the business of making loans of money in a principal amount not exceeding $40,000, and charge, contract for, or receive on any such loan a greater rate of interest, discount, or consideration therefor than the lender would be permitted by law to charge if he were not a licensee hereunder, except as authorized by this Act after first obtaining a license from the Director of Financial Institutions (hereinafter called the Director). 205 ILCS 670/§1.

6. Section 20.5(a) of CILA states, in pertinent part:

> The Director may issue a cease and desist order to any licensee, or other person doing business without the required license, when in the opinion of the Director, the licensee, or other person, is violating or is about to violate any provision of this Act or any rule or requirement imposed in writing by the Department as a condition of granting any authorization permitted by this Act. 205 ILCS 670/§20.5(a).

7. Section 20.5(b) of CILA states, in pertinent part:

> The Director may issue a cease and desist order prior to a hearing. 205 ILCS 670/§20.5(b).

8. Section 20.5(h) of CILA states, in pertinent part:

> The powers vested in the Director by this Section are additional to any and all other powers and remedies vested in the Director by law, and nothing in this Section shall be construed as requiring that the Director shall employ the power conferred in this Section instead of or as a condition precedent to the exercise of any other power or remedy vested in the Director. 205 ILCS 670/§20.5(h).

FACTUAL FINDINGS

9. On or about March 6, 2013, Western Sky sent an email communication to an Illinois consumer soliciting an application for a PLRA or CILA loan.

10. On or before March 2013, Western Sky solicited applications for PLRA and CILA loans from Illinois consumers through its website, www.westernsky.com.

11. On or before March 2013, Western Sky advertised PLRA and CILA loans to Illinois consumers on multiple television networks.

12. On or before March 2013, Western Sky was engaged in the business of offering, making, or arranging PLRA loans to Illinois consumers.

13. On or before March 2013, Western Sky was engaged in the business of offering, making, or arranging CILA loans to Illinois consumers.

14. Western Sky has never been licensed by the Department to offer, make, or arrange PLRA loans to Illinois consumers.

15. Western Sky has never been licensed by the Department to offer, make, or arrange CILA loans to Illinois consumers.

LEGAL FINDINGS

16. Western Sky violated Section 3.3 of the Payday Loan Reform Act by offering, making, or arranging PLRA loans to Illinois consumers without first applying for, and obtaining the required license from the Department.

17. Western Sky violated Section 1 of the Consumer Installment Loan Act by offering, making, or arranging CILA loans to Illinois consumers without first applying for, and obtaining the required license from the Department.

NOW IT IS HEREBY ORDERED:

I. Pursuant to Section 4-10(e) of the Payday Loan Reform Act, Western Sky shall immediately **CEASE AND DESIST** offering, making, or arranging PLRA loans to consumers in Illinois.

II. Pursuant to Section 20.5 of the Consumer Installment Loan Act, Western Sky shall immediately **CEASE AND DESIST** offering, making, or arranging CILA loans to consumers in Illinois.

III. Western Sky is ordered to **PRODUCE DOCUMENTS** to the Department consisting of any and all records, files, account statements, communications, and documents containing information relevant to the accounts of all active and inactive Illinois consumers. Western Sky shall provide copies of all print and electronic advertising, mailings, fliers, email communications, website pages, and any other type of solicitation or advertisement that Western Sky is using or has used to solicit consumers in Illinois. All documents requested pursuant to this paragraph shall be produced by **March 29, 2013**, and delivered to the Consumer Credit Supervisor at the Illinois Department of Financial and Professional

Regulation, Division of Financial Institutions, 100 W. Randolph Street, 9th Floor, Chicago, IL 60601.

Pursuant to Section 4-10(e) of PLRA and Section 20.5(c) of CILA, notice shall be made either personally or by certified mail. Service by certified mail shall be deemed completed when the notice is deposited in the U.S. mail. Western Sky may request, in writing, a hearing on the Order within 15 days after the date of service.

Dated this 8th day of March 2013

_____

Roxanne Nava, Director
Division of Financial Institutions

Exhibit 10

STATE OF OREGON
DEPARTMENT OF CONSUMER AND BUSINESS SERVICES
DIVISION OF FINANCE AND CORPORATE SECURITIES

BEFORE THE DIRECTOR OF THE DEPARTMENT OF CONSUMER AND BUSINESS SERVICES

In the Matter of:	**I-12-0039**
Western Sky Financial, LLC,	**FINAL ORDER TO CEASE AND DESIST, FINAL ORDER SUSPENDING COLLECTION ACTIVITIES, AND FINAL ORDER ASSESSING CIVIL PENALTY ENTERED BY DEFAULT**
Respondent.	

On April 20, 2012, the Director of the Department of Consumer and Business Services for the State of Oregon (hereinafter "the Director"), acting pursuant to the authority of the Oregon Consumer Finance Act, ORS Chapter 725, issued Administrative Order No. I-12-0039, ORDER TO CEASE AND DESIST, ORDER SUSPENDING COLLECTION ACTIVITIES, PROPOSED ORDER ASSESSING CIVIL PENALTY, AND NOTICE OF OPPORTUNITY FOR AN ADMINISTRATIVE HEARING (the "Proposed Order") against Respondent Western Sky Financial, LLC ("Western Sky").

On April 20, 2012, the Proposed Order was sent to Western Sky, by certified United States Mail, postage prepaid to the following two addresses: (1) P.O. Box 370, Timber Lake, SD 57656 (Article No. 7008 1830 0003 3147 4250); and (2) 612 E Street, Timber Lake, SD 57656 (Article No. 7008 1830 0003 3147 4267). The Proposed Order was also sent to Western Sky via regular mail to the addresses noted above, by fax at 1-888-324-4430 and by email at info@westernsky.com.

On May 21, 2012, the Oregon Division of Finance and Corporate Securities ("DFCS") received a "Special Appearance to Seek Dismissal for Lack of Jurisdiction" ("Special Appearance Request") from Western Sky's counsel, Cheryl Laurenz-Bogue of the South Dakota law firm of Bogue & Bogue, LLP. The Special Appearance Request

Division of Finance and Corporate Securities
Labor and Industries Building
350 Winter Street NE, Suite 410
Salem, OR 97301-3881
Telephone (503) 378-4387

was dated May 18, 2012.

On May 24, 2012, DFCS responded to Ms. Laurenz-Bogue informing her that neither the Oregon Administrative Procedures Act nor the Oregon Administrative Rules governing administrative contested cases provide for a Special Appearance Request. Additionally, DFCS requested that Ms. Laurenz-Bogue confirm no later than close of business on June 1, 2012, whether Western Sky intended its Special Appearance Request to serve as a request for a hearing on the issues in the Proposed Order issued against Western Sky on April 20, 2012. Also, DFCS explained to Ms. Laurenz-Bogue that OAR 137-003-0550 requires that Western Sky be represented by an Oregon licensed attorney or an attorney granted permission to appear in the matter pursuant to Oregon Uniform Trial Court Rule 3.170, and that if Western Sky intended its Special Appearance Request to serve as its hearing request, such request must be ratified in writing by a person licensed to practice law in Oregon within 28 days of DFCS receiving the hearing request. Otherwise, a default order will be issued.

On June 1, 2012, Ms. Laurenz-Bogue responded to DFCS' May 24, 2012 correspondence stating that Western Sky "is requesting a hearing for the sole purpose of the Special Appearance to Seek Dismissal for Lack of Jurisdiction." Additionally, Ms. Laurenz-Bogue states that Western Sky will retain local counsel to represent its interest in this matter within the prescribed time line outlined in DFCS' letter.

On July 31, 2012, DFCS sent Ms. Laurenz-Bogue a letter informing her that DFCS records do not reflect a written ratification of Western Sky's May 18, 2012 hearing request by a person licensed to practice law in Oregon as required by OAR 137-003-0550 and that DFCS intends to issue a final order by default if Western Sky is unable to provide proof of such ratification.

On August 24, 2012, DFCS received a letter from Joel A. Mullin an Oregon licensed attorney with Stoel Rives, LLP informing DFCS that he has been retained by

Division of Finance and Corporate Securities
Labor and Industries Building
350 Winter Street NE, Suite 410
Salem, OR 97301-3881
Telephone (503) 378-4387

Western Sky in this matter. In his letter, Mr. Mullin does not provide any proof that Western Sky's May 18, 2012 hearing request was ratified by an attorney licensed to practice law in Oregon or by an out-of-state attorney who has been granted permission to appear in the matter pursuant to Oregon Uniform Trial Court Rule 3.170, in writing, within 28 days of the date the request was received by DFCS, nor does Mr. Mullin attempt to ratify such previous hearing request or otherwise make a new request for a hearing. Rather Mr. Mullin merely asserts that the Department failed to properly serve its Proposed Order on Western Sky because the Cheyenne River Sioux Tribal Rules of Civil Procedure requires personal service and that the Department lacks the jurisdiction necessary to issue the Proposed Order against Western Sky based on tribal sovereign immunity.

Based on DFCS records, Western Sky's May 18, 2012 hearing request was not ratified by an attorney licensed to practice law in Oregon or by an out-of-state attorney who has been granted permission to appear in the matter pursuant to Oregon Uniform Trial Court Rule 3.170, in writing, within 28 days of the date the request was received by DFCS, and the time to make a timely hearing request has now expired.

NOW THEREFORE, after consideration of the file in this matter maintained by the Oregon Department of Consumer and Business Services, including any materials that Western Sky may have submitted, the Director hereby issues the following Findings of Fact, Conclusions of Law, and Orders.

I.

FINDINGS OF FACT

The Director FINDS that:

1. Western Sky is organized as a limited liability company under the laws of South Dakota. According to documentation filed with the South Dakota Secretary of State, Western Sky's principal executive office is located at 612 E Street, Timber Lake,

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Labor and Industries Building
350 Winter Street NE, Suite 410
Salem, OR 97301-3881
Telephone (503) 378-4387

South Dakota 57656-0370. Western Sky lists its mailing address as PO Box 370, Timber Lake, South Dakota, 57656-0370. Martin A. Webb ("Webb") is listed as the registered agent for Western Sky. The addresses listed for Webb are the same as those listed for Western Sky.

2. At all times relevant to this matter, Western Sky offered and provided loans of less than $50,000 to Oregon residents that were unsecured and that had periodic payments and terms longer than 60 days (hereinafter referred to as a "consumer finance loan").

3. Between April 2010 and July 2011, Western Sky made consumer finance loans to at least seven Oregon residents.

4. Each of the consumer finance loans made to the seven Oregon residents had an annual percentage rate ranging from 139 percent to 194 percent.

5. According to Western Sky's website, www.westernsky.com, Western Sky offers the following loan options to Oregon residents:

Loan Product	Borrower Proceeds	Loan Fee	APR	Number of Payments	Payment Amount
$10,000 Loan	$9,925	$75	89.68%	84	$743.49
$5,075 Loan	$5,000	$75	116.73%	84	$486.58
$2,600 Loan	$2,525	$75	139.22%	47	$294.46
$1,500 Loan	$1,000	$500	234.25%	24	$198.19
$850 Loan	$500	$350	342.86%	12	$150.72

6. At all times relevant to this matter, Western Sky was not licensed in Oregon with the Director to provide consumer finance loans.

II.

CONCLUSIONS OF LAW

The Director CONCLUDES that:

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7. The loans made by Western Sky to the seven Oregon residents are consumer finance loans as defined in ORS 725.010(2) because such loans were unsecured and had periodic payments and terms longer than 60 days.

8. Western Sky violated ORS 725.045(1) by conducting a business in which it made consumer finance loans as defined by ORS 725.010(2) to Oregon residents without first obtaining a license under ORS Chapter 725. Each instance Western Sky made a consumer finance loan to an Oregon resident without first obtaining a license is a separate and distinct violation of ORS 725.045(1).

9. Western Sky violated ORS 82.010(3)(b) by making loans to Oregon residents at an annual rate of interest exceeding the greater of 12 percent, or five percent in excess of the discount rate on 90-day commercial paper in effect at the Federal Reserve Bank in the 9th District, the District that serves South Dakota and where Western Sky is located, on the date the loan or the initial advance of funds under the loan was made. From April 1, 2010, to August 1, 2011, the 90-day commercial paper rate reported by the Federal Reserve Bank ranged from a high of .57 percent on June 1, 2010, to a low of .12 percent on June 27, 2011; June 29, 2011; and July 1, 2011.

III.

ORDERS

NOW, THEREFORE, THE DIRECTOR ISSUES THE FOLLOWING ORDERS:

Final Order to Cease and Desist

10. Pursuant to the authority of ORS 725.400, the Director hereby ORDERS Western Sky, all entities owned or controlled by Western Sky, their successors and assignees, and all entities or persons that own or control Western Sky, their successors and assignees, to CEASE AND DESIST from violating any provision of the Oregon Consumer Finance Act, ORS Chapter 725, OAR 441-730-0000 through 441-730-0320, or any rule, order, or policy issued by the Director under that chapter or ORS 82.010.

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Final Order Suspending Collection Activities

11. Pursuant to the authority of ORS 82.010(4), the Director ORDERS Western Sky, all entities owned or controlled by Western Sky, their successors and assignees, and all entities or persons that own or control Western Sky, their successors and assignees, to suspend all collection activities for the interest on, or any fees or charges for loans made to any Oregon resident with an annual rate of interest exceeding the greater of 12 percent, or five percent in excess of the discount rate on 90-day commercial paper in effect at the Federal Reserve Bank in the 9th District, the District that serves South Dakota and where Western Sky is located, on the date the loan or the initial advance of funds under the loan was made.

12. The requirement to suspend collection activities does not prohibit Western Sky, all entities owned or controlled by Western Sky, their successors and assignees, and all entities or persons that own or control Western Sky, their successors and assignees, from collecting the principal amount borrowed by an Oregon resident.

Final Order Assessing Civil Penalty

13. Pursuant to the authority of ORS 725.910, the Director may assess a CIVIL PENALTY in an amount determined by the Director of not more than $2,500 per violation against any person who violates any provision of the Oregon Consumer Finance Act, ORS Chapter 725. Pursuant to this provision, the Director hereby assesses Western Sky a CIVIL PENALTY in the amount of $17,500 (seventeen thousand five hundred dollars) for seven violations of providing consumer finance loans to Oregon residents without first obtaining a license as required by ORS 725.010(2).

14. The entry of this Order in no way limits further remedies which may be available to the Director under Oregon law.

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IT IS SO ORDERED.

Dated this 13th day of December, 2012 at Salem, Oregon NUNC PRO TUNC April 20, 2012.

PATRICK M. ALLEN, Director
Department of Consumer and Business Services

/s/ David Tatman
David C. Tatman, Administrator
Division of Finance and Corporate Securities

NOTICE OF RIGHT TO APPEAL

Western Sky is entitled to seek judicial review of this order. Judicial review may be obtained by filing a petition for review with the Oregon Court of Appeals within sixty (60) days from the service of this final order. Judicial review is pursuant to the provisions of ORS 183.482.

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Exhibit 11

STATE OF WASHINGTON
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF FINANCIAL INSTITUTIONS

IN THE MATTER OF DETERMINING Whether there has been a violation of the Consumer Loan Act of Washington by: **CASH CALL, INC.,** **Respondent.**	**OAH Docket No. 2011-DFI-0041** **DFI No. C-11-0701-12-SC03** **ORDER GRANTING DEPARTMENT'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

I. ISSUES PRESENTED

1.1 Whether CashCall, Inc. violated the Washington Usury Act by transacting loan contracts with interest rates in excess of 12%.

1.2 Whether CashCall, Inc. violated the Washington Consumer Loan Act by transacting loan contracts with interest rates in excess of 25%.

1.3 Whether CashCall, Inc.'s transactions are unfair acts or practices that harm Washington consumers such that an order revoking CashCall, Inc.'s license under the Washington Consumer Loan Act and directing CashCall, Inc. to immediately cease and desist collecting usurious interest is appropriate.

1.4 Whether the orders suspending and revoking CashCall, Inc.'s Maryland mortgage lending license are an independent basis for the Director to protect Washington consumers by revoking CashCall, Inc.'s license and imposing other relief.

1.5 Whether, pursuant to the foregoing, to grant the Department of Financial Institutions' Motion for Partial Summary Judgment.

II. ORDER SUMMARY

2.1 CashCall, Inc. violated the Washington Usury Act by transacting loan contracts with interest rates in excess of 12%.

2.2 CashCall, Inc. violated the Washington Consumer Loan Act by transacting loan contracts with interest rates in excess of 25%.

2.3 CashCall, Inc.'s transactions are unfair acts or practices that harm

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Washington consumers such that an order revoking CashCall, Inc.'s license under the Washington Consumer Loan Act and directing CashCall, Inc. to immediately cease and desist collecting usurious interest is appropriate.

2.4 The orders suspending and revoking CashCall, Inc.'s Maryland mortgage lending license are an independent basis for the Director to protect Washington consumers by revoking CashCall, Inc.'s license.

2.5 Pursuant to the foregoing, the Department of Financial Institutions' Motion for Partial Summary Judgment is granted.

III. HEARING

3.1 **Hearing Date:** January 10, 2013

3.2 **Administrative Law Judge:** Terry A. Schuh

3.3 **Respondent:** CashCall, Inc.

3.3.1 **Representatives:** David B. Bukey, Attorney; and Claudia Callaway, Katten Muchin Rosenman LLP, Attorneys. Also present were John Black, Katten Muchin Rosenman LLP, Attorneys; and Dan Baren, General Counsel, CashCall, Inc.

3.4 **Agency:** Department of Financial Institutions

3.4.1 **Representative:** Kim O'Neal, Assistant Attorney General. Also present was Mark Olson, Financial Legal Examiner, Department of Financial Institutions.

3.5 **Record relied upon:** Department's Motion for Partial Summary Judgment, with declarations and attachments; CashCall's Opposition to the Department's Motion for Partial Summary Judgment, with declarations and attachments; Department's Reply in Support of motion for Partial Summary Judgment, with declarations and attachments; oral argument on January 10, 2013; and the pleadings and documents filed in this matter with the Office of Administrative Hearings.

IV. FACTS AS A MATTER OF LAW

I find the following facts based on the uncontested pleadings, party admissions, and all reasonable inferences in favor of the non-moving party.

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Jurisdiction

4.1 The Department of Financial Institutions ("the Department") issued a Statement of Charges and Notice of Intention to Enter an Order to Cease and Desist, Revoke or Suspend License, Impose Fine, Order Affirmative Action, and collect Investigation Fee ("Statement of Charges") to CashCall, Inc. ("CashCall") on August 15, 2011. Subsequently, the Department has twice amended the Statement of Charges.

4.2 On September 1, 2011, the Department received CashCall's Application for Adjudicative Hearing.

4.3 The Department filed its Motion for Partial Summary Judgment on December 3, 2012.

CashCall's Washington loan activities

4.4 CashCall is a California corporation licensed since 2003 in Washington by the Department under the Consumer Loan Act ("CLA").

4.5 Western Sky Financial, LLC ("Western Sky") is a consumer lender wholly owned by Martin Webb, an enrolled member of the Cheyenne River Sioux Tribe. Its facilities are located on the tribal reservation and most of its employees are tribal members.

4.6 Western Sky advertises in Washington, offering to provide consumer loans to Washington residents. Western Sky has entered into numerous such consumer loans with Washington residents and then sold those loans to CashCall, typically within days of their origination.

4.7 Western Sky loan applications are received, reviewed, and accepted or denied at its facility on the tribal reservation. Washington residents are contacted by advertising in Washington, complete and execute loan documents in Washington, receive the loan proceeds by means of deposit in their Washington accounts, and make loan payments from their Washington accounts.

4.8 Western Sky advertisements and other communications specify that it is owned by a Native American and is located on a tribal reservation. Moreover, the loan documents provide that only tribal law governs the loan transaction and that any borrower consents to tribal law and the jurisdiction of the Cheyenne River Sioux Tribal Courts.

4.9 The interest rates on the loans Western Sky made to Washington residents ranged from a low of 95% to a high of 169%. In contrast, since at least

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March 2010, the highest rate allowed under the Washington Usury Act ("Usury Act") has been 12% and the highest rate available to licensees lending pursuant to the CLA has been 25%.

4.10 CashCall purchased from Western Sky in excess of 2200 of these loans, totaling more than $4.4 million and has been collecting or attempting to collect on them. Beginning March 2010 through January 2012, CashCall collected over $2 million in interest from Washington residents. CashCall continues to collect on these loans.

Maryland's suspension and revocation

4.11 In August 2010, CashCall applied to the Maryland Department of Labor, Licensing, and Regulation ("the Maryland DLLR") for a mortgage lending license.

4.12 The Maryland DLLR approved the application and issued CashCall a license in October 2010.

4.13 Shortly thereafter, CashCall notified the Maryland DLLR that CashCall needed to amend a disclosure on its application. It did so and the Maryland DLLR subsequently renewed CashCall's license.

4.14 However, in May 2011, the Maryland DLLR suspended CashCall's license for having allegedly made two material misstatements on its licensing application. Following CashCall's appeal, on June 1, 2012, the Maryland DLLR issued a Final Order revoking CashCall's license.

4.15 CashCall appealed that decision. On August 7, 2012, the Circuit Court of Maryland issued an order staying the revocation but ordering a suspension of CashCall's license until it completed its review.

4.16 On December 13, 2012, the Department issued a Second Amended Statement of Charges in this matter, seeking to revoke CashCall's CLA license in Washington because of the revocation/suspension in Maryland.

V. CONCLUSIONS OF LAW

Based upon the foregoing, I make the following Conclusions of Law:

Jurisdiction

5.1 I have jurisdiction over the parties and subject matter herein pursuant to chapter 31.04 RCW, chapter 34.05 RCW chapter 208-620 WAC, and chapter 208-08 WAC.

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Summary Judgment

5.2 "Summary judgment is appropriate 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.' CR 56(c)." *American Legion Post #149 v. Washington State Dept. of Health*, 164 Wn.2d 570, 584, 192 P.3d 306 (2008).

5.3 "The facts and reasonable inferences therefrom are construed most favorably to the nonmoving party." *Korslund v. Dycorp Tri-Cities Services, Inc.*, 156 Wn.2d 168, 177, 125 P.3d 119 (2005) (citations omitted).

5.4 "Summary judgment should be granted if reasonable persons could reach but one conclusion from the evidence presented." *Korslund,* 156 Wn. 2d at 177.

5.5 "The burden is on the moving party to demonstrate there is no issue as to a material fact, and the moving party is held to a strict standard." *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 811, 828 P.2d 549 (1992) (citation omitted).

5.6 If the moving party meets this initial showing and, as here, does not have the burden of proof at the forthcoming evidentiary hearing on the merits, then the nonmoving party must set forth specific facts that remain at issue to establish that here is a genuine issue to be resolved at the forthcoming hearing. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225-226, 770 P.2d 182 (1989) (citations omitted).

CashCall violated the Usury Act and the Consumer Protection Act

5.7 The purpose of the Usury Act is "to protect the residents of this state from debts bearing burdensome interest rates". RCW 19.52.005.

5.8 The state treasurer computes monthly the highest rate of interest permissible under RCW 19.52.20. RCW 19.52.025.

5.9 Beginning March 2010 and thereafter, and for some undetermined time before, that interest rate cap has never exceeded 12%.

5.10 An interest rate subject to the Usury Act that exceeds the interest rate cap is not legal. RCW 19.52.020.

5.11 The interest rate on the Western Sky loans collected by CashCall since March 2010 meets or exceeds 95%. Accordingly, if CashCall is subject to the

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Usury Act, the interest rates it has collected on the Western Sky loans violated the Usury Act and were not legal.

5.12 CashCall argued that it was not subject to the Usury Act primarily because the loans allegedly were not made in Washington.

5.13 However, "[w]henever a loan or forbearance is made outside Washington state to a person then residing in this state the usury laws found in chapter 19.52 RCW, as now or hereafter amended, shall be applicable in all courts of this state to the same extent such usury laws would be applicable if the loan or forbearance was made in this state." RCW 19.52.034.

5.14 CashCall argued that the foregoing statute violates the federal constitution, more specifically the Commerce Clause. However, an administrative law judge lacks authority to find any statute or regulation to be in violation of either the state or the federal constitution. The administrative law judge is bound to apply the statute or regulation as written. Thus, I cannot reach CashCall's argument that RCW 19.52.034 violates the federal constitution. Moreover, I must apply the statute.

5.15 CashCall also argued that the Western Sky loans were exempt from the Usury Act on other grounds, invoking and incorporating those arguments from its Motion for Partial Summary Judgment. First, CashCall argued that the Western Sky loans were exempt from the Usury Act because they are retail installment contracts under the Washington Retail Installment Sales of Good and Services Act ("RISA"). Second, CashCall argued that Western Sky is a tribal lender operating on an Indian reservation and so federal Indian law insulates Western Sky, and subsequently CashCall as assignee, from Washington usury law. In my Order Denying CashCall, Inc.'s Motion for Partial Summary Judgment, incorporated herein by this reference, I held that CashCall failed to establish that the Western Sky loans were goods or services as contemplated by RISA and subject to RISA. I also held that CashCall failed to establish that federal Indian law insulated Western Sky and CashCall from Washington usury law when they reached into Washington and made loans to and transacted loans with Washington residents. For the same reasons, those arguments are not persuasive defenses to the plain language of the statutes.

5.16 Accordingly, the Western Sky loans made to Washington residents are subject to the Usury Act.

5.17 Furthermore, by transacting loans – by collecting interest – in excess of the interest cap generated by application of the Usury Act, CashCall violated the Usury Act.

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5.18 Furthermore, transacting a usurious contract is an unfair act or practice in violation of the consumer protection act found in chapter 19.86 RCW. RCW 19.52.036. Thus, CashCall also violated the Consumer Protection Act.

CashCall violated the CLA

5.19 An entity licensed under the CLA violates the CLA if it "[d]irectly or indirectly engage[s] in any unfair or deceptive practice toward any person." RCW 31.04.027(2).

5.20 Moreover, effective June 27, 2012, an entity licensed under the CLA violated the CLA if it violated "any other applicable state or federal statutes or regulations". RCW 31.04.027(12).

5.21 In violating the Usury Act and the Consumer Protection Act, CashCall committed unfair acts or practices and it violated applicable state statutes. Accordingly, CashCall thereby violated the CLA as well.

The Department may immediately revoke CashCall's license and order CashCall to cease and desist

5.22 "The director [of the Department of Financial Institutions] may suspend or revoke a license issued under [the CLA] if the director finds that [t]he licensee, either knowingly or without exercise of due care, has violated any provision of [the CLA] or any ruled adopted under [the CLA]". RCW 31.04.093(3)(b).

5.23 "The director [of the Department of Financial Institutions] may issue an order directing the licensee, its employee or loan originator, or other person subject to [the CLA] to [c]ease and desist from conducting business in a manner that is injurious to the public or violates any provision of this chapter". RCW 31.04.093(5)(a).

5.24 Here, CashCall recklessly, if not knowingly, collected interest rates in violation of the Usury Act and other Washington laws and in doing so harmed Washington residents. The interest rates are so high that many of the debtors will spend years paying off a comparatively small loan unless they can somehow acquire funds sufficient to pay the loan off and avoid the monthly cycle of interest. Therefore, the foregoing authority provides the Department with authority to immediately suspend or revoke CashCall's CLA license and to immediately order CashCall to cease and desist from collecting usurious interest.

5.25 Thus, CashCall's conduct provides the Department with the authority and discretion to revoke or suspend CashCall's CLA license. CashCall's conduct also provides the Department with authority and discretion to order CashCall to

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cease and desist from collecting usurious interest.

5.26 An Administrative Law Judge ("ALJ") has the authority to review an administrative agency's exercise of its discretion. *Conway v. Washington State Dept. of Social and Health Svcs.*, 131 Wn. App. 406, 419, 120 P.3d 103 (2005). However, the ALJ may not substitute his or her judgment for that of the agency and impose a different remedy. *Id.* Rather, the ALJ is restricted to determining whether the agency abused its discretion. *Id.* "An agency abuses its discretion when it exercises its discretion in an arbitrary and capricious manner." *Id* (citation omitted). "A decision is arbitrary and capricious if it is '"willful and unreasoning action in disregard of facts and circumstances."'" *Id* at 420 (citations omitted).

5.27 The Department's decision to revoke CashCall's license and to order CashCall to cease and desist collecting usurious interest does not demonstrate willful and unreasoning action in disregard of facts and circumstances. On the contrary, it is logical, based upon statute, and specifically in view of facts and circumstances. Therefore, I hold that the Department did not abuse its discretion. Thus, the Department's intention to revoke CashCall's license and order it to cease and desist collecting usurious interests should be upheld.

5.28 Thus, the Department may immediately revoke or suspend CashCall's CLA license. Moreover, the Department may immediately order CashCall to cease and desist from collecting usurious interest.

Maryland's suspension of CashCall's mortgage lender license provides the Department with basis sufficient to revoke CashCall's Washington CLA license

5.29 The Department may deny an application for a license under the CLA if another state has suspended or revoked a similar license possessed by the applicant. RCW 31.04.093(2)(c).

5.30 The Department shall issue a license only if the applicant has met several requirements including that the applicant not have had a similar license revoked or suspended by this or any other state within five years of application. RCW 31.04.055(1)(c).

5.31 The Department may suspend or revoke a license issued under the CLA if a "fact or condition exists that, if it had existed at the time of the original application for the license, clearly would have allowed the director to deny the application for the original license." RCW 31.04.093(3)(c).

5.32 Maryland revoked CashCall's mortgage lender license by order issued June 7, 2012. Subsequently, pursuant to an appeal, that revocation was stayed

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and a suspension entered pending resolution of the appeal.

5.33 The parties argued regarding whether Maryland's orders have preclusive effect in Washington and, if so, based upon which state's law. I decline to be distracted by that argument because preclusion is not at issue here. The authority referenced above clearly provides the Department with the authority and the responsibility to consider other state licensing action and determine whether it should revoke or suspend accordingly.

5.34 The parties argued regarding whether the Maryland disciplinary action should be characterized as a revocation, suspension, or retroactive denial of the license. Although Washington might have correctly characterized the Maryland action as a revocation before the order issued in August 2012 stayed the revocation and ordered a suspension, it cannot correctly characterize the Maryland action now as a revocation. On the other hand, CashCall's argument that the Maryland action is a retroactive denial of its application is not persuasive. The law recited in the Maryland administrative order references Financial Institutions Article § 11-517(a), which says that the Commissioner may "suspend or revoke" the license of any licensee that makes any material misstatement in an application for a license. Moreover, no where in that order appears the phrase or concept of retroactive denial of an application. Maryland did not characterize its disciplinary action as a retroactive denial of an application. Nor will I.

5.35 CashCall provided two arguments regarding why the Department should not revoke or suspend CashCall's license, if at all, until after the appeal process in Maryland is concluded. In the first place, immediate revocation or suspension will substantially harm CashCall but delay will not harm the Department. Secondly, the information allegedly not disclosed in Maryland was disclosed in Washington and that information, when disclosed in Washington, did not cause the Department to seek disciplinary action. However, if Maryland was not concerned about an immediate risk, it would have simply stayed the revocation without a suspension. It did not. Therefore, the Department's interest in an immediate revocation or suspension is warranted as well. Secondly, the Department's concern with the apparently failed disclosure in Maryland need not be limited to the information that was not disclosed. Rather, the Department understandably may be concerned with the failed disclosure itself and what it may represent. Thus, I am persuaded that the Department is justified in seeking immediate discipline.

5.36 CashCall correctly pointed out that the Department's decision to discipline is discretionary. An Administrative Law Judge ("ALJ") has the authority to review an administrative agency's exercise of its discretion. *Conway v. Washington State Dept. of Social and Health Svcs.*, 131 Wn. App. 406, 419, 120 P.3d 103

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(2005). However, the ALJ may not substitute his or her judgment for that of the agency and impose a different remedy. *Id.* Rather, the ALJ is restricted to determining whether the agency abused its discretion. *Id.* "An agency abuses its discretion when it exercises its discretion in an arbitrary and capricious manner." *Id* (citation omitted). "A decision is arbitrary and capricious if it is '"willful and unreasoning action in disregard of facts and circumstances."'" *Id* at 420 (citations omitted).

5.37 The Department's decision to revoke CashCall's license does not demonstrate willful and unreasoning action in disregard of facts and circumstances. On the contrary, it is logical, based upon statute, and specifically in view of facts and circumstances. Therefore, I hold that the Department did not abuse its discretion. Thus, the Department's intention to revoke CashCall's license should be upheld.

5.38 The Department also proposed that it be allowed to impose other relief. However, the Department did not identify what other relief it proposed much less the basis for doing so. Accordingly, the Department's intention to impose other relief cannot be adjudicated pursuant to this motion.

Motion granted

5.38 The Department's Motion for Partial Summary Judgment is GRANTED.

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ORDER

IT IS HEREBY ORDERED THAT:

The Department of Financial Institutions' Motion for Partial Summary Judgment is **GRANTED.**

CashCall, Inc. shall immediately cease and desist collecting or attempting to collect interest in excess of the Washington Usury Act cap, currently set at 12% interest, and CashCall, Inc. shall immediately cease and desist collecting or attempting to collect fees or penalties in excess of the maximum allowed by state law.

Pursuant to RCW 31.04.093(3), Consumer Loan License No. CL-38512, issued

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to CashCall, Inc. by the Washington State Department of Financial Institutions, Division of Consumer Services, is hereby revoked.

Signed and Issued at Tacoma, Washington, on the date of mailing.

Terry A. Schuh
Administrative Law Judge
Office of Administrative Hearings

CERTIFICATION OF MAILING IS ATTACHED

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Certificate of Service
OAH Docket No. 2011-DFI-0041

I certify that true copies of this document were served from Tacoma, Washington upon the following as indicated:

Kim O'Neal **Senior Counsel** **Office of the Attorney General** **1125 Washington Street SE** **PO Box 40100** **Olympia, WA 98504-0100**	☒First Class US mail, postage prepaid ☐Certified mail, return receipt ☐Campus Mail ☐Facsimile ☐1st Class, postage prepaid, Certified mail, return receipt
Charles Clark **Enforcement Unit** **Department of Financial Institutions** **Division of Consumer Services** **PO Box 41200** **Olympia, WA 98504-1200**	☒First Class US mail, postage prepaid ☐Certified mail, return receipt ☐Campus Mail ☐Facsimile ☐1st Class, postage prepaid, Certified mail, return receipt
Claudia Callaway, Partner **Katten Muchin Rosenman LLP** **2900 K Street NW** **Washington, DC 20007**	☒First Class US mail, postage prepaid ☐Certified mail, return receipt ☐Campus Mail ☐Facsimile ☐1st Class, postage prepaid, Certified mail, return receipt
CashCall, Inc. **c/o Claudia Callaway, Partner** **Katten Muchin Rosenman LLP** **2900 K Street NW** **Washington, DC 20007**	☒First Class US mail, postage prepaid ☐Certified mail, return receipt ☐Campus Mail ☐Facsimile ☐1st Class, postage prepaid, Certified mail, return receipt
David B. Bukey **Law Offices of David B. Bukey** **1501 Fourth Avenue, Suite 2150** **Seattle, WA 98101-3225**	☒First Class US mail, postage prepaid ☐Certified mail, return receipt ☐Campus Mail ☐Facsimile ☐1st Class, postage prepaid, Certified mail, return receipt

Date: January 30, 2013

Cynde Michelena
Office of Administrative Hearings

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Exhibit 12

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA ex rel.
DARRELL V. McGRAW, JR.,
ATTORNEY GENERAL,
Plaintiff,

v.

Civil Action No.: 08-C-1964
Judge Louis H. Bloom

CASHCALL, INC., and
J. PAUL REDDAM, in his capacity as president and CEO of CashCall, Inc.
Defendants.

FINAL ORDER ON PHASE I OF TRIAL: THE STATE'S DEBT COLLECTION CLAIMS

On October 31 and November 1, 2011, came the Plaintiff, the State of West Virginia ex rel. Darrell V. McGraw, Jr., Attorney General ("State" or "Attorney General"), by Norman Googel and Douglas Davis, Assistant Attorney Generals, and the Defendants, CashCall, Inc. ("CashCall") and J. Paul Reddam ("Mr. Reddam" or collectively "Defendants"), by counsel, Charles L. Woody, Bruce M. Jacobs, and Eric N. Whitney, *pro hoc vice*, for a bench trial pursuant to W. Va. Code § 46A-7-112, upon the "Amended Complaint for Injunction, Consumer Restitution, Civil Penalties, and Other Appropriate Relief" ("Amended Complaint") in the above-styled action. Upon the parties' agreement, the Court bifurcated for trial the counts of the Plaintiff's Amended Complaint. On October 31 and November 1, 2011, the Court heard all of the evidence on the State's debt collection claims, as set forth in the fifth through fifteen causes of action in the Amended Complaint. On January 3, 2012, the Court heard all of the evidence on the State's usury and lending claims, as set forth in the second through fourth causes of action in the Amended Complaint. Upon review of the evidence, including the testimony offered at trial, the pleadings of record, the parties' proposed findings of fact and conclusions of law, and the

applicable law, the Court makes the following findings of fact and conclusions of law, as to the State's debt collection claims.

FINDINGS OF FACT

Background and Procedural History

1. In 2007, the State opened a formal investigation of CashCall and Mr. Reddam, its sole owner and shareholder, after receiving many complaints from West Virginia consumers about CashCall's usurious interest rates and its debt collection practices.

2. On August 30, 2007, the Attorney General issued an investigative subpoena, as authorized by W. Va. Code § 46A-7-104, directing CashCall to produce all of its lending and debt collection activities in West Virginia.

3. By letter dated October 22, 2007, CashCall responded but did not comply with the subpoena. In the letter, CashCall asserted that it was not the lender, but was merely a "marketing agent" for the state-chartered bank, First Bank & Trust, Milbank, South Dakota ("Bank").[1] Ex. C, Amended Complaint, Subpoena Response Letter, p. 3.

4. Based upon its investigation of the consumer complaints, CashCall's responses and its independent review of the applicable law, the State concluded that the lending program established by CashCall with the Bank was essentially a sham intended to make improper use of federal preemption in order to unlawfully evade West Virginia's lender licensing and usury laws. The State also concluded that CashCall's debt collection practices violated numerous provisions of the West Virginia Consumer Credit and Protection Act ("WVCCPA"). *See* Amended Complaint. Based on its conclusions, the State demanded that CashCall cease the continued

[1] The State originally included a claim for failure to comply with the subpoena against CashCall ("First Cause of Action"), but agreed to dismiss this claim as moot. *See* Pre-Trial Order.

collection of its loans and make appropriate restitution to aggrieved consumers. CashCall declined to do so.[2]

5. On October 8, 2008, the State commenced the above-styled civil action by filing a "Complaint for Injunction, Consumer Restitution, Civil Penalties and Other Appropriate Relief" ("Complaint") against the Defendants.

6. On November 17, 2008, the Defendants removed the case to federal court, asserting that the Bank is the real party in interest and as such the State's usury law claims against CashCall are completely preempted by §27 of the Federal Deposit Insurance Act ("FDIA"), 12 U.S.C. §1831d. Defendant's Notice of Removal.

7. By order entered March 11, 2009, U.S. District Court Judge Joseph R. Goodwin found that because the State only asserts state law claims against CashCall, a non-bank entity, "the claims do not implicate the FDIA, the FDIA does not completely preempt the state-law claims, and there are no federal questions on the face of the Complaint." *West Virginia v. CashCall, Inc.*, 605 F.Supp.2d 781 (S.D.W. Va. 2009). The case was remanded back to this Court. *See id.*

8. The State filed a motion for leave to amend its Complaint, which was granted by this Court by order entered June 4, 2010. It is the Amended Complaint that is before the Court in this trial.

9. On October 27, 2011, the Court entered a Pre-Trial Order by which it granted, in part, and denied, in part, the Motion to Dismiss filed by the Defendant, J. Paul Reddam. Specifically, the Court found that because there is no allegation in the Amended Complaint, except ¶ 13, referencing the Defendant J. Paul Reddam as a party and that the State does not seek any relief

[2] CashCall made and/or collected the loans in West Virginia from August 2006 to March 2007. Ex. C, Amended Complaint, Subpoena Response Letter, p. 2; Transcript of January 3, 2012 Trial ("Tr. Vol. III"), p. 105.

against Defendant Reddam, the Court would not impose any liability on Defendant Reddam. However, Defendant Reddam was ordered to remain a party to the action. Pre-Trial Order, ¶ 2.

10. The Court ordered the trial be bifurcated into two phases: (1) Phase I on the State's debt collection claims; and (2) Phase II on the alleged violations of West Virginia usury and lending laws by CashCall. This Final Order only addresses Phase I of the trial.

DISCUSSION[3]

Overview of State's Staff Witnesses

1. After conclusion of the testimony of the 10 consumers, the State presented the testimony of Raquel Gray and Angela B. White, both long-time paralegals with the Attorney General's Consumer Protection Division. Ms. Gray was tasked with reviewing documents that came from consumer files provided by CashCall during discovery. She went through each file on the computer, page by page, to search for specific letters that had been identified. October 31, 2011, Trial Transcript ("Tr. Vol. I"), p. 245. She characterized these letters as employment verification letter, breach letter, 48-hour notice letter, broken promise letter, arbitration letter, field visit letter, and final demand letter. Tr. Vol. I, p. 245. She explained her methodology in locating the letters and compiling total numbers of each type of letter found in each consumer's file. *See generally* Tr. Vol. I, pp. 245-253.

2. A total of 292 loans were made to West Virginia consumers and collected by CashCall, beginning in August 2006 up to and including March 2007. Joint Ex. 1. Three types of

[3] A detailed summary of the testimony of all of the witnesses presented by the State and CashCall, including transcript cites was attached as an Appendix to the "State's Proposed Memorandum Opinion and Order." The Court hereby incorporates by reference and adopts the Appendix, a copy of which is attached to the Order.

loans were made in West Virginia: (1) loans in the amount of $1,000 at 89% interest; (2) loans in the amount of $2,525 at 96 % interest; and (3) loans in the amount of $5,000 at 59% interest. Tr. Vol. III, p. 23; Joint Ex. 1. There were a total of 292 loans made to West Virginia consumers, consisting of 15 loans of $1,000; 214 loans of $2,525; and 63 loans of $5,000. *See* Joint Ex. 1.

3. The evidence shows that to date, West Virginia consumers made total payments of $1,201,366.12 to CashCall throughout the duration of the lending program. *See* Joint Ex. 1. The total amount of interest "agreed to be paid" by West Virginia consumers (as distinguished from the amount actually paid) is $2,511,421.99. *See* Joint Ex. 1.

4. The State next presented the testimony of Angela B. White, who was tasked with reviewing and compiling certain data from the service logs for West Virginia accounts produced by CashCall during discovery. Tr. Vol. I, p. 293. She said she was tasked with identifying the total number of all outbound calls made to West Virginia consumers by CashCall. The service logs for every consumer file produced by CashCall were reviewed. Tr. Vol. I, p. 295.

5. She did not personally review all service logs, but oversaw a process that involved eight or ten people, who reviewed the records by highlighting each instance in which outbound calls were made by CashCall. After this process was completed, the data was entered by four professional data entry people employed by the Attorney General's Office. Tr. Vol. I, p. 295. Although the persons working on this project were instructed to count every call regardless of whether contact was made with the consumer, if it could not be absolutely determined whether it was a phone call or not, it was not counted. Tr. Vol. I, p. 298. The data entry persons also made a second review before a questionable call was counted and entered into data. Tr. Vol. I, pp. 289-299. She said that they erred on the side of being conservative when counting the calls and,

if anything, the total counted "might be a little under" the actual number. Tr. Vol. I, pp. 298-299. She was also tasked with reviewing the service logs in an effort to determine any time there was mention of a notice of arbitration that was sent to consumers, any time consumers' references were contacted, and any time calls were made to consumers' place of employment. Tr. Vol. I, p. 304.

6. After the data was entered, she prepared a document called State's Summary Exhibit B ("Summary Ex. B") that contains such information as total number of calls made to each consumer, total number of days each consumer was called, the total number of calls made to each consumer per day, and the date of the first and last calls made to each consumer. In compiling total numbers of calls made per day, she explained that this was broken down into categories consisting of days when consumers received 20 or more calls, 15-19 calls, 10-14 calls, 5-9 calls, and 1-4 calls. Tr. Vol. I, p. 300.

7. Using the file of Brenda Baylous as an example, she explained that CashCall made 20 or more calls to her on two days; 15-19 calls to her on five days; 10-14 calls to her on 12 days; 5-9 calls to her on 71 days; and 1-4 calls to her on 143 days. Altogether CashCall made a total of 1, 071 calls to Ms. Baylous over a period of 233 days beginning September 22, 2006, through June 2, 2009. She explained that the same type of data was compiled for all of the West Virginia consumers from the documents that CashCall produced. Tr. Vol. I, p. 301-302.

8. She also found information in the service logs indicating that notices of arbitration were sent 262 times, consumers references were called 540 times, and calls were made to consumers' places of employment. At the conclusion of Ms. White's testimony, Summary Ex. B was admitted into evidence. Tr. Vol. I, p. 310.

Overview of CashCall's Witnesses[4]

9. Elissa Chavez is the director of fraud prevention and dispute resolution for CashCall. Ms. Chavez handles disputes, fraud claims, identity theft, customer resolution and complaints. She has worked for CashCall for almost six years. November 1, 2011, Trial Transcript ("Tr. Vol. II"), p. 5-6. She admitted that CashCall required consumers to agree to make payments by electronic funds transfers as a condition of obtaining the loan. She also said that CashCall sends a "welcome letter" and makes a welcome call to consumers to remind them about the date of their first electronic debit. She acknowledged that these "welcome" communications do not advise consumers that they can cancel the debit or how to do it or that their account may be debited subsequent times if the initial debit bounces. She also explained that the reason CashCall might make a large volume of calls to consumers, even 11 to 20 times per day, is to make contact with the consumer. She also asserted that an oral request from consumers to stop calls at work would be sufficient and that references would only be called if they are trying to make contact with the consumer. She was not able to point to any specific references to these practices in CashCall's policy manual as she did not have it with her.

9. Sean Bennett is employed as a "business analyst" for CashCall. He has worked at CashCall since December 2003 and his primary responsibilities have included supervision and management of collection employees, loss mitigation employees, skip tracing employees, and payment processing employees. Tr. Vol. II, p. 76. Mr. Bennett confirmed that if the initial account debit bounces, CashCall will make at least two subsequent attempts to debit the consumer's account during that month. He acknowledged that the subsequent debits are not disclosed in CashCall's loan contract or any other written or oral communications furnished to

[4] *See* footnote 3, *supra.*

consumers. CashCall's collection employees, including collection supervisors, are paid on an hourly basis but also receive an incentive based upon amounts collected.

10. CashCall honors verbal requests to stop further calls at work, but if the consumer asks not to be called on their cell phone during working hours, a written request is required. He also said CashCall's purpose in calling third parties is to establish contact with consumers. It is CashCall's policy to call references and other third parties even if it has accurate location information for consumers if it is necessary to make a direct contact with a consumer.

11. Although Mr. Bennett stated that CashCall has an elaborate formal training program for its employees, he admitted that he previously testified at a March 31, 2010, deposition taken by the State that CashCall had no formal training for every employee at that time. Although Mr. Bennett testified that CashCall made a training manual available to all employees, he admitted that he previously testified at the same deposition that he was unaware whether the training manual was made available to every employee at that time. Mr. Bennett also asserted that it was his understanding that CashCall failed to follow through with the eleven arbitration claims it had initiated because of the Attorney General's investigation.

12. Immediately following the conclusion of Mr. Bennett's testimony, CashCall indicated that it had planned to call CashCall's general counsel, Dan Baron, as a witness. However, Mr. Whitney proffered that the only purpose of his testimony in this phase of the proceedings would be to confirm that it was also his understanding, as was the case with Mr. Bennett, that CashCall "ultimately abandoned" the eleven arbitration proceedings "based on the pendency of the investigation by the Attorney General." Tr. Vol. II, p. 229.

Applicable Legal Standard in Determining Whether Debt Collection Practices Are Unlawful

13. Under W. Va. Code § 46A-2-122(d), a "'debt collector' means any person or organization engaging directly or indirectly in debt collection." Debt collection is "any action, conduct or practice of soliciting claims for collection or in the collection of claims owed or due or alleged to be owed or due by a consumer." W. Va. Code § 46A-2-122(c). There is no dispute in this case that CashCall, as an entity collecting its own debts, meets the definition of a "debt collector" as defined by W. Va. Code § 46A-2-122(d) and W. Va. Code § 46A-6-104. Therefore, CashCall is subject to the debt collection provisions outlined in the WVCCPA, which is enforced by the Attorney General.

14. Before discussing the specifics of the State's causes of action, the Court finds it necessary to address the applicable legal standards in evaluating whether debt collection practices are unlawful. A substantial body of case law concerning abusive debt collection practices has been developed by federal courts in cases arising under the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692, et seq. The prohibited debt collection practices enumerated in the WVCCPA largely mirror and in many instances are identical to the provisions in the FDCPA. One important difference between the laws is that the FDCPA only covers outside collection agencies, including debt buyers, whereas the WVCCPA covers all debt collectors, including original creditors collecting their own debts. *See id.* § 1692a(6); W. Va. Code § 46A-2-122(d).

15. It is also important to note the West Virginia Legislature's intentions when enacting the WVCCPA, wherein it declared,

> It is the intent of the legislature that, in construing this article, the courts be guided by the interpretation given by the federal courts to the various federal statutes dealing with the same or similar matters. To this end, the article shall be liberally construed so that its beneficial purposes may be served.

See, W. Va. Code § 46A-6-101(1). It is with this proviso in mind that this Court reviewed the body of case law developed by federal courts in cases arising under the FDCPA in search of guidance in determining whether CashCall's practices were unlawful and, if so, in fashioning appropriate remedies, including restitution and civil penalties if warranted.

16. The FDCPA creates liability for "conduct the natural consequence of which is to harass, oppress or abuse any persons in connection with the collection of a debt. *Kerwin v. Remittance Assistance Corp.*, 559 F.Supp.2d 1117, 1123-1124 (D.Nev. 2008) (quoting 15 U.S.C. § 1692(d)). Continuing, the court held "An act's 'natural consequences' are evaluated according to their likely effect on the least sophisticated consumer." *Id.* (citing *Baker v. G.C. Services Corp*, 677 F.2d 775, 778 (9th Cir. 1982)) (emphasis added).

17. The least sophisticated consumer standard was best explained in *Jeter v. Credit Bureau, Inc.*, 760 F.2d 1168, 1172-1173 (11th Cir. 1985). In that case, the court was seeking to determine whether an allegedly misleading written collection communication violated the FDCPA. The court noted that the FTC Act "was enacted to protect unsophisticated consumers, not only 'reasonable consumers' who could otherwise protect themselves in the marketplace." *Jeter*, 760 F.2d at 1172. Continuing, the court explained

> That law [FDCPA] was not 'made for the protection of experts, but for the public—that vast multitude which includes the ignorant, the unthinking, and the credulous.' And the 'fact that a false statement may be obviously false to those who are trained and experienced

> does not change its character, nor take away its power to deceive others less experienced.'

Jeter, 760 F.2d at 1172-1173 (citations omitted). In *Joseph v. J.J. MacIntyre Companies, LLC*, 238 F.Supp.2d 1158, 1168 (N.D.Cal. 2002), a case evaluating whether repeated telephone calls violated the FDCPA, the court noted "claims under the FDCPA are evaluated under a least sophisticated consumer standard," (citing *Jeter*, 760 F.2d at 1179 ("[W]e hold that claims § 1692d [including telephone harassment] should be viewed from the perspective of a consumer whose circumstances makes him relatively more susceptible to harassment, oppression, or abuse.")).

18. The Fourth Circuit Court of Appeals has adopted the least sophisticated consumer standard when evaluating whether conduct violates the FDCPA. In *United States v. National Financial Services, Inc.*, 98 F.3d 131, 136 (4th Cir., 1996), the court held that "evaluating debt collection practices with an eye to the 'least sophisticated consumer' comports with basic consumer protection principles." Continuing, the court explained,

> The basic purpose of the least sophisticated consumer standard is to ensure that the FDCPA protects all consumers, the gullible as well as the shrewd. This standard is consistent with the norms that courts have traditionally applied in consumer protection law.

Id. The Fourth Circuit noted that this principle was rooted in a 1937 United States Supreme Court case which held,

> [T]he fact that a false statement may be obviously false to those who are trained and experienced does not change its character, nor take away its power to deceive others less experienced. There is no duty resting upon a citizen to suspect the honesty of those with whom he transacts business. Laws are made to protect the trusting as well as the suspicious.

Id. (citing *Clomon v. Jackson*, 988 F.2d. 1314, 1318 (2nd Cir., 1993)); *see also Federal Trade Commission v. Standard Education Society*, 302 U.S. 112, 116 (1937).

19. As explained herein above, the Legislature stated its intent that the courts be guided by the interpretation given by the federal courts to the various federal statutes dealing with the same or similar matters when construing the WVCCPA. Accordingly, this Court finds that the question of whether CashCall's debt collection practices violate the WVCCPA will be evaluated according to their capacity to deceive or their likely effect on the least sophisticated consumer.

Discussion of Pertinent Evidence

20. The Court finds a remarkable consistency in the testimony provided by the State's ten witnesses concerning their experiences with CashCall. All of the witnesses who obtained loans from CashCall testified that they were required to agree to automatic debits from their accounts as a condition of receiving the loan.[5] All of the consumers who obtained loans from CashCall reported that they were harmed by the requirement of making payments by automatic debits. Each of them was charged overdraft fees by their banks when CashCall's debits failed to clear. Many of them contacted CashCall to ask that the debits be stopped, but did not succeed in doing so. Many of them reported that CashCall debited their account on dates other than the date agreed upon, usually an earlier date, which caused the debit to bounce. Many of them also reported that CashCall would try again to debit their account multiple times after the initial debit bounced, sometimes on the same day or within the first two to three days. The end result for each person was the involuntary closure of their account by their bank, closure of the account by

[5] JoAnn McKinney testified about CashCall's contacts with her concerning the loan obtained by her son, James Stollings. She did not obtain a loan from CashCall.

the consumer, or a permanent stop payment order from their bank prohibiting further debits by CashCall.

21. The consumers' accounts of alleged telephone harassment by CashCall were also remarkably similar. All of the consumers reported having received a high volume of telephone calls from CashCall, including large numbers of calls per day, high volumes of calls over a period of weeks and months, and multiple telephone calls at their places of employment which continued even after they asked CashCall to stop. Most of the consumers testified that CashCall had contacted other parties to leave messages for them to call CashCall, even though each one of them had the same mailing address and telephone numbers throughout their dealings with CashCall. Several consumers also testified that CashCall disclosed their alleged account delinquency when calling third-parties.

22. The consumers also testified that CashCall's repeated and continued calls to their places of employment interfered with their work, created friction with their employers, and caused them to suffer embarrassment and humiliation in front of their supervisors and co-employees. One consumer testified that she believed CashCall's calls caused her to be laid off before other employees, although she had a good employment record for many years. *See* Terrie McCann-Bushroe, Tr. Vol. I, pp. 64-65. Collectively, the consumers testified about having received many types of threats from CashCall over the telephone, including threats of arbitration proceedings, legal action, garnishment of wages, loss of home and other property, threats to contact their employer in person or over the phone, and threats to visit consumers at their places of employment or at their homes.

23. One consumer testified that CashCall faxed a letter to her place of employment at Cabell-Huntington Hospital threatening to visit her there and to charge her $55 to $150 for that visit and each subsequent visit. *See* Brenda Baylous, Tr. Vol. I, pp. 191-193. CashCall characterized the letter as a "fugitive letter" and denied sending it. While it is likely that the letter was not authorized by CashCall, it is obvious that the letter, whether authorized or not, was sent by a CashCall employee as it contained the correct name, address, and account number for the consumer. If the letter was not authorized, it stands as evidence of CashCall's lack of control over its collection employees.

24. The testimony of the State's witnesses concerning the volume of calls is consistent with the data produced by CashCall and compiled by the State in Summary Ex. A. Overall, the Court finds all of the State's consumer witnesses to be credible. In reviewing Summary Ex. A, the Court notes the following totals of significance: CashCall made more than 20 calls per day to a West Virginia consumer on 16 occasions; CashCall made 15-19 calls to a West Virginia consumer on 130 occasions; CashCall made 10-14 calls in a day to a West Virginia consumer on 910 occasions; CashCall made 5-8 calls in a day to a West Virginia consumer on 5,036 occasions; and CashCall made 1-4 calls in a day to a West Virginia consumer on 18,929 occasions. CashCall also made a total of 84,371 telephone calls to West Virginia consumers. The total number of calls figure is actually skewed downward because the figure includes persons who did not default on their loans and therefore received very few if any collection calls. For example, 102 persons received 50 or less calls; 52 of them received 10 or less calls.

25. In contrast, 16 persons received more than 1,000 calls, including Jay Heiss (2,445), Ricky Fox, Sr. (1,653), Brenda Baylous (1,071), Dwayne Thornton (1,445), and James Stollings (1,020). In addition, 40 persons received between 500 and 1,000 calls, including Bryant Creighton (999), Brenda Hall (955), Terrie McCann-Bushroe (704), Robert Cadle (580), and Denise Soccorsi (532). Also, 86 persons received between 200 and 500 calls, including Nancy Pickens (447). Summary Ex. B also indicates that CashCall sent 262 notices of arbitration, contacted consumers' references 542 times, and contacted consumers at work 172 times.[6]

26. The State's evidence of the volume and pattern of CashCall's calls is largely undisputed by CashCall and, in fact, is wholly supported by the documents CashCall produced during discovery. Although Ms. Chavez indicated that some of the outbound calls counted by the State may have been "welcome calls" or other non-collection calls, it is equally likely that the State failed to count other collection calls due to the occasional difficulty in deciphering CashCall's service logs. The Court finds that the number of calls as reported by the State in Summary Ex. B is substantially accurate to enable the Court to pass judgment on CashCall's collection practices.

27. Both of CashCall's witnesses testified that an oral request was sufficient to stop calls at work, but that position is contradicted by the credible evidence of the State's representative witnesses. If that was CashCall's formal policy, the Court finds that the policy was not followed by its collection employees or enforced by CashCall's management.

[6] The latter figure is likely far less than the actual times CashCall contacted consumers at work based upon the testimony of the nine consumers in Court.

28. The testimony also supports the contention that CashCall had a pattern of calling references and other third parties in an effort to "make contact" with consumers or to leave messages for them. CashCall's loan applications collected the names and contact information for numerous references from each consumer who applied for a loan. But the consumers did not authorize CashCall to contact the references in the event of a default. While consumers were led to believe that CashCall might contact their references in connection with their loan application, there is no evidence that CashCall ever contacted references for that purpose. Instead, it is clear that CashCall's intent was to contact references when consumers' accounts became delinquent or when they defaulted.

29. CashCall's pattern of calling references and other third parties to establish "contact" with a consumer is of concern to the Court. The FDCPA, which CashCall claims to train its employees on, prohibits a debt collector from calling third parties except to acquire "location information." *See* 15 U.S.C. § 1692b. But Mr. Bennett confirmed that CashCall called third parties regularly to establish "contact" even when it had location information.[7] *See generally* Sean Bennett, Tr. Vol. II, pp. 184-191. As an explanation, Mr. Bennett stated that if it could not force the consumer into a "direct" contact, CashCall made these calls to third parties to establish "contact." Tr. Vol. II, p. 189. This practice is a fundamental violation of the general prohibition against calling third parties in the FDCPA and the WVCCPA. *See* 15 U.S.C. § 1692c(b) ("Except as provided in § 1692b of this title . . . a debt collector may not communicate, in connection with the collection of any debt, with any person other than the consumer . . . .");

W. Va. Code § 46A-2-126. CashCall's admitted practice serves to explain the relentless volume of calls that CashCall unleashed upon West Virginia consumers. It is clear that CashCall either misunderstood, misapplied, or deliberately violated the prohibition against calling third parties.

Fifth Cause of Action
(Conditioning Extension of Credit Upon Consumers' Agreement to Electronic Account Debits)

30. The State alleged in its fifth cause of action that CashCall required consumers to agree to make payments by electronic debits as a condition of obtaining the loan, in contravention of the policy established by the federal Electronic Funds Transfer Act ("EFTA"), 15 U.S.C. § 1693, et seq. In doing so, the State alleged that CashCall engaged in unfair or deceptive practices in violation of the WVCCPA, W. Va. Code § 46A-6-104. Specifically, the EFTA contains the following express prohibition against compulsory use of electronic fund transfers,

> No person may—
> (1) condition the extension of credit to a consumer on such consumer's repayment by means of preauthorized electronic fund transfers; or
> (2) require a consumer to establish an account for receipt of electronic fund transfers with a particular financial institution as a condition of employment or receipt of a government benefit.

See EFTA § 1693k (emphasis added). The EFTA states in its Congressional findings and declaration of purpose that "the primary objective of this subchapter . . . is the provision of individual consumer rights" *See* 15 U.S.C. § 1693(b) (emphasis added). Further, the EFTA provides that "a violation of any requirement this chapter [EFTA] imposed" under the EFTA is

[7] All of the State's representative witnesses testified that their home and employment "location information" (i.e., their home and work telephone numbers, cell phone numbers, and addresses) remained the same during the entire time they were dealing with CashCall.

an unfair or deceptive act or practice as defined by the Federal Trade Commission Act, 15 U.S.C. § 41 et seq. *See* 15 U.S.C. § 93o(c) (emphasis added).

31. In this case, the record is replete with evidence of harm caused by CashCall's policy of requiring consumers to agree to electronic debits of their accounts as a condition of getting the loan. Virtually every representative consumer witness encountered bounced debits from CashCall that resulted in hundreds of dollars in overdraft fees from their banks. In most cases, the consumers were forced to close their accounts if their banks had not already involuntarily done so. *See* Nancy Pickens, Tr. Vol. I, p. 16 (testifying that her account was so far overdrawn she could not deposit money to pay her bills); Lori Anello, Tr. Vol. I, pp. 80-82 (testifying that CashCall's debits bounced at least ten times causing her a $27.50 fee each time, CashCall would try again to debit her account within two to three days, and the bounced debits caused "charges and charges, and I just couldn't get out from under that,"); Brenda Hall, Tr. Vol. I, p. 103 (testifying that CashCall "would run the check back through several times" causing her additional fees before she had a chance to cover it; she called CashCall to tell them to stop, but it continued to run the checks through); Denise Soccorsi, Tr. Vol. I, pp. 120-123 (testifying that it "got out of control," her bank charged her $31 each time, CashCall's bounced debits caused so many overdraft fees that her bank would take her entire paycheck, and to this day she owes $1,200 in overdraft fees caused by CashCall); Bryant Creighton, Tr. Vol. I, pp. 141-143 (testifying that CashCall would debit his account two days before the agreed upon date, each bounced debit resulted in a $36 fee from his bank and a $15 fee from CashCall, and his bank closed his account); Dwayne Thornton, Tr. Vol. I, pp. 174-175 (testifying that CashCall refused to honor his request to stop the debits, which forced him to close his account); and Robert Cadle,

Tr. Vol. I, p. 213 (testifying that CashCall would try to debit his account two days before his paycheck went in and would hit his account multiple times, twice in one day on one occasion; he incurred about $200 in overdraft fees).

32. All of the State's representative witnesses testified that CashCall required them to agree to electronic debits to get the loan. CashCall's loan application required consumers to disclose the name of their bank, bank account number, and check routing number. CashCall's "welcome letter" advised "You will be making this payment by electronic funds transfer unless you elect to terminate the electronic funds transfer on your account." Elissa Chavez, Tr. Vol. II, p. 9. CashCall's standard loan contract required each consumer to authorize electronic debits from their account. Elissa Chavez, Tr. Vol. II, p. 41. Most importantly, CashCall admitted that consumers must agree to electronic fund transfers to get the loan. Elissa Chavez, Tr. Vol. II, p. 60.

33. A federal court in California recently upheld a claim in a class action suit against CashCall in which the plaintiffs alleged, as the State has done here, that CashCall wrongfully required consumers to agree to make payments by automatic debits as a condition of obtaining a loan. The court in *O'Donovan v. CashCall*, No. C 08-03174 MEJ, 2009 WL 1833990 (N.D.Cal. June 24, 2009), scrutinized the same provisions that were used by CashCall in its contracts with West Virginia consumers here. There, as here, CashCall asserted as its defense that plaintiffs failed to state a claim under the EFTA because its contract permitted a consumer "to cancel an EFT authorization at any time, including prior to the first scheduled payment." *Id.* at *3. Thus, CashCall argued that the extension of credit is not conditioned on the use of EFTs for payment. *Id.* Significantly, the court in *O'Donovan* held "the right to later cancel EFT payments does not

allow a lender who conditions the initial extension of credit on such payments to avoid liability." *Id.* Thus, the court found that the plaintiff's complaint stated a claim for relief under 15 U.S.C. § 1693(k).[8] *Id.*

34. Based upon all of the foregoing, this Court finds that CashCall did require consumers to agree to make payments by automatic debits as a condition of obtaining the loans. The Court also finds that the fact that consumers could cancel the debits at a later date does not relieve CashCall from liability for conditioning the initial extension of credit on making payments by electronic fund transfer. In fact, the testimony here indicated that CashCall refused or resisted efforts made by consumers to cancel the automatic debits. This Court also finds that CashCall, by requiring consumers to agree to electronic fund transfers as a condition of obtaining the loan, has engaged in unfair or deceptive acts or practices in violation of W. Va. Code § 46A-6-104 as alleged by the State in its fifth cause of action.

Sixth Cause of Action
(Threatening Garnishment of Wages
Without Informing the Consumer that
There Must be in Effect a
Judicial Order Permitting Such Garnishment)

35. In its sixth cause of action, the State alleges that CashCall made unlawful threats of garnishment of wages to coerce payment of debts. W. Va. Code § 46A-2-124 contains a broad prohibition against the use of any threat, coercion, or attempts to coerce in the collection of debts

[8]The court later entered an order granting class certification on the claim that CashCall unlawfully required consumers to agree to electronic funds transfers as a condition of obtaining the loan. The class is limited to loans originated in California. *See O'Donovan v. CashCall*, No. C 08-03174 MEJ, 2009 WL 1833990 (N.D.Cal. June 24, 2009).

and outlines certain conduct that is expressly prohibited but the statute is not limited to the delineated conduct.[9] The State specifically cites W. Va. Code § 46A-2-124(e)(2) which prohibits

> [t]he threat that nonpayment of an alleged claim will result in the: (2) Garnishment of any wages of any person or the taking of other action requiring judicial sanction, without informing the consumer that there must be in effect a judicial order permitting such garnishment or such other action before it can be taken.

(emphasis added.) The Court construes this claim to not only encompass unlawful threats of garnishment but also unlawful threats to seize or attach other property, both personal and real, that would require judicial action. The Court also construes this statute as intending to prohibit a debt collector from leading a consumer to believe, falsely, that wages can be garnished or that personal or real property can be seized or attached, without the necessity of the underlying creditor proving its claim in court.

36. The testimony of certain witnesses presented by the State, undisputed by CashCall, indicates that CashCall made the types of unlawful threats as alleged. *See* Nancy Pickens, Tr. Vol. I, p. 11 (testifying that when she called CashCall to ask what the arbitration letters meant, CashCall told her it meant that they could take her house and her car); Denise Soccorsi, Tr. Vol. I, p. 127 (testifying that she asked CashCall why it would send one of its representatives to her place of work in Morgantown, as it threatened to do; CashCall said, "Because we are going to garnish your wages . . . we were going to talk to your employer"); Bryant Keith Creighton, Tr. Vol. I, p. 147 (testifying that CashCall told him "they could take my home, they could take my car . . . take my bank account . . . they could take—anything that I own as a possession, they had

[9] Although the WVCCPA enumerates specific conduct that is prohibited, this and other provisions contain the phrase "[w]ithout limiting the general application of the foregoing." W. Va. Code § 46A-2-124. Thus, the conduct

a right to take it away from me"); and JoAnn McKinney, Tr. Vol. I, p. 239 (testifying that when attempting to reach her son, James Stollings, CashCall threatened about four or five times that it would come to her house "and take stuff out of [her] house because James had a loan").

37. Upon the basis of the undisputed testimony of these consumers, the Court finds that CashCall engaged in a pattern of making unlawful threats to garnish wages and seize personal or real property, in violation of W. Va. Code § 46A-2-124(e)(2) and W. Va. Code § 46A-6-104, as alleged by the State in its sixth cause of action.

Seventh Cause of Action
(Threatening to Take Action Prohibited by the WVCCPA and Other Laws Regulating the Debt Collector's Conduct)

38. In its seventh cause of action, the State alleges that CashCall engaged in other threats or coercion in violation of W. Va. Code § 46A-2-124 and W. Va. Code § 46A-6-104. The State specifically alleges that CashCall violated W. Va. Code § 46A-2-124(f), which prohibits "[t]he threat to take any action prohibited by this chapter or other law regulating the debt collector's conduct." This statute paints a broad brush and may encompass many of the threats that the State's witnesses testified to at trial. Evidence of CashCall's violations of this statute may also be found in some of the form letters used by CashCall and admitted into evidence without objection.

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enumerated is not intended to be all inclusive.

39. Garnishment of wages and seizure of personal or real property cannot occur without judicial sanction and due process for the consumer. Thus, a threat to do these things that cannot lawfully be done without first going through the court also violates W. Va. Code § 46A-2-124(f) and W. Va. Code § 46A-6-104.

40. The WVCCPA, particularly W. Va. Code § 46A-2-126, prohibits a debt collector from unreasonably publicizing information relating to any alleged indebtedness of a consumer.[10] It specifically prohibits disclosure, publication, or communication of a consumer's alleged indebtedness to an employer or his agent, or to relatives or family members not residing with the consumer, except through proper legal action, process or proceeding. *See* W. Va. Code § 46A-2-126(a) and (b). The Court heard much testimony that CashCall violated these provisions by contacting and leaving messages with third parties without any legal justification. *See* Nancy Pickens, Tr. Vol. I, p. 17 (testifying that CashCall left a message with her secretary at work saying that they were trying to collect a debt); Terrie McCann-Bushroe, Tr. Vol. I, pp. 62-63 (testifying that CashCall called her at work and left messages for her to "call CashCall"); Brenda Hall, Tr. Vol. I, p. 98 (testifying that CashCall continued to call her at work after she told them not to; she was forced to take the calls in a room where five or six people were present who could overhear her telling CashCall such things as "I can't pay it now" or "I will send it . . . get the money in the bank as soon as possible"); Denise Soccorsi, Tr. Vol. I, p. 127 (testifying that CashCall told her it was just about to send one of its representatives to her place of work in Morgantown to "talk to your employer"); Bryant Creighton, Tr. Vol. I, p. 146 (testifying that

[10] The unlawful publication of all alleged indebtedness to third parties is discussed more specifically below in the Court's consideration of the State's ninth cause of action.

CashCall called him repeatedly at work after he asked it not to, leaving written messages with other employees for him to call CashCall; he said CashCall's calls were causing his personal information to be "spread amongst employees, that I was behind . . . this loan payment, because everybody can walk by my desk and look at the note that another employee had written"); Dwayne Thornton, Tr. Vol. I, pp. 170-171, 172-174 (testifying that CashCall called him multiple times at work every day after he asked it not to leaving messages disclosing his indebtedness; he said people at work "knew everything. They knew more than I did [about CashCall] . . . he would come to work and there would be about three different little notes . . . everybody thought it was a joke;" CashCall also disclosed Mr. Thornton's indebtedness to his girlfriend and his uncle); Brenda Baylous, Tr. Vol. I, pp. 191-193 (testifying a letter was faxed to her place of work seemingly from a CashCall employee that disclosed her indebtedness to two persons who work under her supervision; the letter also threatened that someone was being sent to her place of employment and that she would be charged from $55 to $150 for the trip); Robert Cadle, Tr. Vol. I, p. 216, 220-221 (testifying that CashCall contacted his supervisor at work; CashCall also disclosed his alleged indebtedness to his first ex-wife and called a friend to relay a message that CashCall had called).

41. Based upon the testimony of these consumers, undisputed by CashCall, the Court finds that CashCall threatened to take and did take action prohibited by the WVCCPA and other laws regulating a debt collector's conduct in violation of W. Va. Code § 46A-2-124(f) and W. Va. Code § 46A-6-104 as alleged by the State in its seventh cause of action.

Eighth and Eleventh Causes of Action (Harassing Consumers Repeatedly or Continually by Telephone)

42. In its eighth and eleventh causes of action, the State alleges that CashCall engaged in unlawful oppression and abuse of consumers through repeated phone calls. W. Va. Code § 46A-2-125 generally prohibits a debt collector from unreasonably oppressing or abusing any person in connection with the collection of or attempt to collect an alleged debt. The State specifically alleges that CashCall violated W. Va. Code § 46A-2-125(d) that prohibits a debt collector from: "causing a telephone to ring or engaging any person in telephone conversation repeatedly or continuously, or at unusual times or at times known to be inconvenient, with intent to annoy, abuse, oppress or threaten any person at the called number."

43. All of the State's representative consumer witnesses testified that CashCall contacted them repeatedly and continuously at home, at work, on their cell phones, and at times or places that CashCall knew, or should have known, were inconvenient. The Court notes with particular concern that CashCall continued to contact the consumers at work after they unequivocally asked CashCall to stop. *See* Nancy Pickens, Tr. Vol. I, p. 17 (testifying that CashCall only called her once at work after she asked it not to, but the one call was so upsetting that she sat and cried for 30 minutes while at work); Terrie McCann-Bushroe, Tr. Vol. I, pp. 63-64 (testifying that CashCall called her multiple times at work after she asked it to stop, the calls interfered with her work as she was a classroom instructor and was forced to leave the classroom to take the calls; she believed the calls caused her to lose her job); Brenda Hall, Tr. Vol. I, p. 98 (testifying that CashCall repeatedly called her at work after she asked it to stop because she worked in an open office where she was forced to take the calls in the presence of other persons which resulted in

disclosure of her indebtedness); Bryant Creighton, Tr. Vol. I, p. 146 (testifying CashCall contacted him repeatedly at work after he asked it not to because American Electric Power did not like its phone lines being tied up with personal business and because the calls caused disclosure of his indebtedness to his co-employees); Dwayne Thornton, Tr. Vol. I, p. 168, 171-172 (testifying CashCall called him repeatedly at work after he asked it not to and when it knew that any calls there would not be convenient because it was a facility that served individuals with mental disabilities or who were facing various crises; the calls were so voluminous that his indebtedness was universally disclosed throughout his office); Robert Cadle, Tr. Vol. I, p. 216 (testifying CashCall contacted him repeatedly at work, and contacted his supervisor after he asked it not to).

44. The total number of calls to consumers at all places, including their homes and places of employment, is so voluminous as to defy description and would be difficult to believe if not confirmed by the records produced by CashCall to the State during discovery. The Court first examines the total number of calls and the time period during which they were made to the ten representative consumers who testified in Court in the order of their appearance:

> Nancy Pickens, 447 calls from January 29, 2008 - June 3, 2009;
> Terrie McCann-Bushroe, 704 calls from December 11, 2006 - June 26, 2008;
> Lori Anello, 106 calls from February 1, 2007 - May 1, 2009;
> Brenda Hall, 955 calls from November 30, 2006 - June 2, 2009;
> Denise Soccorsi, 532 calls from November 13, 2006 - June 3, 2009;
> Bryant Creighton, 999 calls from January 17, 2007 - April 4, 2009;
> Dwayne Thornton, 1,445 calls from September 28, 2006 - June 1, 2009;
> Brenda Baylous, 1,071 calls from September 22, 2006 - June 2, 2009;
> Robert Cadle, 580 calls from January 15, 2007 - September 30, 2008; and
> JoAnn McKinney, 1,020 calls made to reach her son, James Stollings, from December 21, 2006 - December 2, 2008.

See State's Summary Ex. B.

45. The volume of calls made by CashCall to other consumers whose accounts became delinquent or who allegedly defaulted is equally alarming. As noted above, 16 consumers received more than 1,000 calls from CashCall, ranging from a low of 1,020 (James Stollings) to a high of 2,445 (Jay Heiss). In addition, 40 persons received between 500 and 1,000 calls, and 86 persons received between 200 and 500 calls. The State's Summary Ex. A also discloses that CashCall made at least 20 calls per day to a West Virginia consumer on 16 occasions, 15 to 19 calls on 130 occasions, 10-14 calls on 910 occasions, 5 to 8 calls on 5,036 occasions, and 1 to 4 calls in a day on 18,929 occasions.

46. During cross examination of the State's paralegal, Angela B. White, and through the direct testimony of its witness, Sean Bennett, CashCall tried to show that the State may have over counted the number of outbound telephone calls by including so-called "welcome calls," other non-collection calls, or by including other calls that were not connected due to technical difficulties. On the other hand, Ms. White indicated that the Attorney General erred on the side of not counting a call when it was questionable. The Court finds and concludes that the total number of calls made by CashCall to consumers as reported in Summary Ex. B are substantially accurate and that the number of non-collection calls that may have been counted by mistake are so *de minimis* that they would not affect the Court's conclusion about CashCall's telephone collection practices based upon the volume of calls.

47. The FDCPA provision governing telephone abuse and harassment, 15 U.S.C. § 1692d(5) is identical to the comparable provision in the WVCCPA, W. Va. Code § 46A-2-125(d). Significantly, both provisions require a finding that the telephone calls were made "with intent to annoy, abuse, oppress or threaten any person at the called number." *Id.* at § 125(b). The

decisions of federal courts evaluating whether telephone communications constitute violations of the FDCPA are particularly helpful to this Court in how they deal with the issue of intent.

48. Most recently, U.S. District Judge Irene C. Berger was asked to determine whether J. P. Morgan Chase Bank "acted with the requisite intent to annoy, abuse, oppress or threaten the person at the called number based upon having made more than 100 collection calls to the plaintiff during a particular period" *Elisabeth Duncan v. J.P. Morgan Chase Bank, N.A.*, No. 5:10-cv-01049, slip op. at 8 (S.D.W. Va., Nov. 4, 2011) (emphasis in original). In so doing, the court found,

> The plain language of the statute aptly sets forth that a statutory violation can be bourne from the mere volume of calls placed to a debtor. This is so, based on the statute's reference to calls which are repeated or continuous. Placed in the proper context, the volume of calls made to a debtor can be demonstrative of an intent to annoy, abuse or oppress, where, as in this case, those calls were repeated after Plaintiffs advised Defendant that they wished only to be contacted in writing, desired to have the autodialer to stop placing calls to their phones, or that future communications were to be with their attorney.

Id. (emphasis added). Continuing, the court noted that it is not always necessary to glean "intent" from the "continuous nature of the calls by highlighting a distinctive pattern, such as the number of calls placed in one day, or the time in which those calls were placed, these factors are not required in every case." *Id.* Thus, she concluded that the Plaintiff had made a requisite showing on the issue of the Defendant's intent for purposes of a motion for summary judgment given the number of calls alone "which were repeatedly placed to his telephone." *Id.* at 9.

49. Other courts have taken similar approaches over the years when evaluating whether the repeated telephone calls violate the FDCPA. *See, e.g., Krapf v. Nationwide Credit, Inc.*, No. SACV 09-00711 JVS (MLGx), 2010 WL 2025323, at *2-3 (C.D.Cal. May 21, 2010) (finding four to eight calls per day for two months stated a claim; it did not matter that the Plaintiff could not recall the precise dates of calls when the frequency and volume of the telephone calls can show the intent to annoy, abuse, and harass); *Gilroy v. Ameriquest Mortgage Company*, 632 F.Supp.2d 132, 135, 137 (D.N.H. 2009) (finding three calls per night for one year, a total of approximately 468 calls, stated a claim; when defendant made 200 calls after the consumer said he could not pay and asked that the calls stop, each of the 200 calls after that violated the FDCPA; intent may be inferred by the volume or content of calls); *Kerwin v. Remittance Assistance Corp.*, 559 F.Supp.2d 1117, 1124 (D.Nev. 2008) ("intent to annoy, abuse, or harass may be inferred from the frequency of phone calls, the substance of the phone calls, or the place to which phone calls are made."); *Sanchez v. Client Services, Inc.*, 520 F.Supp.2d 1149, 1160-1161 (N.D.Cal. 2007) (finding a total of fifty-four calls, including seventeen in one month and six calls in one day, stated a claim; the content or substance of the calls made are irrelevant to the issue of harassment); *Prewitt v. Wolpoff & Abramson, LLP*, No. 05-CV-725S (F), 2007 WL 841778, at *3 (W.D.N.Y. Mar. 19, 2007) (finding four calls per day during a three-month period, and one to two calls per day during a 200 day period state a claim); *Akalwadi v. Risk Management Alternatives, Inc.*, 336 F.Supp.2d 492, 505-506 (N.D. Md. 2004) (finding whether twenty-five calls in a two-month period state a claim is a question of fact for a jury; "whether there is actionable harassment or annoyance turns not only on the volume of calls made, but also on the pattern of calls."); *Joseph v. J.J. MacIntyre Companies, LLC*, 238 F.Supp.2d 1158, 1168-

1169 (N.D.Cal. 2002) (finding 200 calls during a 19-month period, including some days when there were multiple calls states a claim).

50. CashCall admitted that 10-20 calls per day, and 1,000 calls over several months, were not unusual or unreasonable. Based upon all of the foregoing, the Court finds that CashCall engaged in a pattern and practice of making repeated and continuous telephone calls or at times known to be inconvenient to consumers with the intent to annoy, abuse, oppress or threaten consumers, in violation of W. Va. Code § 46A-2-125(d), as alleged by the State in its eighth and eleventh causes of action.

Ninth and Twelfth Causes of Action
(Unreasonable Publication of Information Relating to Alleged Indebtedness of Consumers)

51. In its ninth and twelfth causes of action, the State alleges that CashCall unreasonably publicized information relating to alleged indebtedness of consumers or unjustifiably contacted third parties in violation of W. Va. Code § 46A-2-126. The latter provision makes it unlawful for a debt collector to disclose the alleged indebtedness of a consumer to any person except: (i) upon the express and unsolicited request of a relative or family member who resides with the consumer or (ii) through proper legal action, process or proceeding. The record herein is replete with undisputed testimony that CashCall unlawfully disclosed consumers' alleged indebtedness by repeatedly contacting consumers at work after they asked not to be contacted there, by repeatedly leaving messages for consumers to "call CashCall" at their places of employment, and by repeatedly calling references and other third parties without any legal justification and leaving messages for consumers to "call CashCall" (in some cases directly disclosing that the call was

about a debt). Much of this conduct has already been enumerated in the discussions above concerning the State's seventh and eighth causes of action.

52. To briefly recap, the following witnesses testified about conduct by CashCall that would violate W. Va. Code § 46A-2-126: Nancy Pickens testified that CashCall left a message with her secretary at work that they were calling to collect a debt from her, Tr. Vol. I, p. 17, and she also discovered that CashCall had contacted one of her neighbors and her mother about her account, Tr. Vol. I, p. 69; Lori Anello testified that CashCall's repeated calls to her at work forced her to discuss the account in an office that was not private and in the presence of others, Tr. Vol. I, pp. 85-85; Brenda Hall testified that CashCall's repeated calls to her at work after she asked not to be called there forced her to discuss her account in an office area where her conversation was overheard by others, Tr. Vol. I, p. 98; Bryant Creighton testified that CashCall called him repeatedly at work after he asked not to be called there and left messages to call CashCall, disclosing the debt to others who worked there, Tr. Vol. I, p. 146; Dwayne Thornton testified that CashCall's repeated calls to him at work after he asked not to be called there disclosed his indebtedness to virtually everyone who worked at his office, Tr. Vol. I, pp. 170-172; Brenda Baylous testified that a letter was faxed to her at her place of employment at a hospital expressly disclosing her indebtedness and threatening that someone would be sent to her place of employment to discuss the account was seen by two persons who work under her supervision, Tr. Vol. I, pp. 191-192; Robert Cadle testified that CashCall disclosed his indebtedness by calling his supervisor at work, his first ex-wife, and his friend, Tr. Vol. I, pp. 216, 220-221; JoAnn McKinney testified that CashCall disclosed the account of her son, James Stollings, by

repeatedly calling and threatening her about his account; although he resided with her she had no knowledge of the loan until CashCall called, Tr. Vol. I, pp. 236-238.

53. On the basis of the foregoing undisputed testimony, the Court finds that CashCall unreasonably and unlawfully publicized information relating to consumers' alleged indebtedness in violation of W. Va. Code § 46A-2-126, as alleged by the State in its ninth and eleventh causes of action.

Tenth Cause of Action
(Collecting, Attempting to Collect, or Representing that it May Collect a Debt Collector's Fee or Charge for Services Rendered)

54. In its tenth cause of action, the State alleges that CashCall collected, attempted to collect, or represented that it may collect a debt collector's fee or charge for services rendered. Whether a debt collector can charge a debt collector's fee to a consumer is a matter strictly governed by state law. While some states permit a collection fee to be added (usually requiring written authorization in the underlying contract), West Virginia does not. Specifically, it is unlawful in West Virginia for a debt collector to collect, attempt to collect, or even to represent that it can collect, a debt collector's fee or charge for services rendered. *See* W. Va. Code § 46A-2-127(g), W. Va. Code § 46A-2-128(c), and W. Va. Code § 46A-2-128(d).

55. There are two exceptions to the near total ban on fees. W. Va. Code § 46A-2-128(c) permits a debt collector to charge collection fees and attorney's fees when necessary "for the collection of any amount due upon delinquent educational loans made by any institution of higher education within this state," but only when such charges are authorized by the terms of the obligation. In addition, W. Va. Code § 46A-2-128(d) permits a debt collector to collect such fees or charges if it is "expressly authorized by the agreement creating the obligation and by

statute." (emphasis added). Thus, a fee for a dishonored check may be collected because it is authorized by a separate statute, W. Va. Code § 61-3-39e. A fee that is not authorized by statute cannot be collected even if it is included in the terms of the obligation.

56. When collecting debts in West Virginia, CashCall used a particular letter called "Field Call Notice Letter - 323" which was admitted into evidence at trial as an attachment to State's Summary Ex. A. The letter notifies the consumer (apparently falsely) that CashCall has sent a field representative to meet with the consumer at his or her home or place of employment due to alleged failure to return calls or respond to other communications. The letter also states: "The cost of this field visit may range from $55 to $150 depending on your location, and you may be charged for this and any other subsequent field visits." *See* Field Call Notice Letter -323. Although the State failed to produce any evidence that CashCall actually charged the fee threatened in the Field Call Notice Letter, the fee in question is an unlawful debt collection fee that could not be charged under any circumstances. Thus, CashCall violated W. Va. Code § 46A-2-127(g) by representing that such a fee could be charged, even if it had no intention of ever attempting to collect such a fee.

57. The State's evidence indicates that the Field Call Notice Letter was sent to at least four persons in September and November 2007, namely, Brian Blankenship, Ricky Fox, Sr., Jay Heiss, and Douglas Steele. Brenda Baylous also testified that a similar letter was faxed to her at her place of employment in about January 2008. Although the letter received by Brenda Baylous is not identical to the Field Call Notice Letter produced by CashCall, and CashCall disclaims the letter, the Court finds that the letter must have been sent by a CashCall employee as it contained the correct name, address, and account number for Ms. Baylous. The first paragraph of the

"Notice of Field Visit" received by Ms. Baylous is almost identical to CashCall's official Field Call Notice Letter - 323 and contains the same threat to charge her $55 to $150 for this and any other subsequent field visits. On this basis, the Court concludes that CashCall sent a debt collection communication threatening to charge unlawful collection fees to West Virginia consumers on at least five occasions.

58. Based upon the foregoing, the Court finds that CashCall represented that it could collect unlawful fees and charges, specifically charges for a threatened visit at their home or place of employment, in violation of W. Va. Code § 46A-2-127(g) and W. Va. Code § 46A-6-104.

Thirteenth Cause of Action
(False Threats of Legal Action)

59. In its thirteenth cause of action, the State alleges that CashCall made false threats of legal action in violation of W. Va. Code § 46A-2-124 and § 46A-6-104. The WVCCPA provides that a debt collector shall not employ the means "of any threat, coercion, or attempt to coerce" in the collection of alleged debts. The State specifically alleges that CashCall made certain threats of legal action that violate § 46A-2-124(f), which prohibits the threat to take any action prohibited by this chapter [WVCCPA] or other law regulating the debt collector's conduct. The State also alleges that CashCall's threats constituted unfair or deceptive acts or practices, as defined by § 46A-6-104. In light of the testimony and evidence presented at trial, the Court construes this cause of action so as to encompass threats that may constitute fraudulent, deceptive or misleading representations in violation of § 46A-2-127.

60. The Court heard testimony from several of the State's representative witnesses that CashCall threatened them with legal action, arbitration proceedings, non-judicial seizure of property, and other actions that it did not intend to take or that are prohibited by the WVCCPA. *See* Nancy Pickens, Tr. Vol. I, pp. 13-19 (testifying that CashCall sent two letters threatening arbitration); Lori Anello, Tr. Vol. I, p. 83 (testifying CashCall threatened to "take legal action" against her); Brenda Hall, Tr. Vol. I, p. 106 (testigying CashCall threatened "you will be receiving a letter from a lawyer"); Bryant Creighton, Tr. Vol. I, pp. 149-150 (testifying CashCall threatened it could take his home, his car, his bank accounts, anything he owned, and threatened him with arbitration); Dwayne Thornton, Tr. Vol. I, p. 177 (testifying CashCall threatened unless he paid they would take "legal action"); Brenda Baylous, Tr. Vol. I, p. 195 (testifying a letter she believed originated from CashCall was faxed to her at work threatening that someone was being sent to her place of employment and that she would be charged $55 to $150 for the trip); JoAnn McKinney, Tr. Vol. I, pp. 239-240 (testifying CashCall threatened to come to her house to take her belongings unless her son, James Stollings, paid his loan).

61. The State has argued that all of the threats of "legal action" were unlawful because CashCall did not intend legal action and, in fact, CashCall waived its right to take consumers to court because of a binding mandatory arbitration provision included in the contract. Although the loan contract afforded consumers an opportunity to "opt out" of the mandatory arbitration clause, CashCall admitted during discovery that not a single West Virginia consumer opted out of mandatory arbitration. CashCall has argued and its witnesses have asserted that when it threatened "legal action" orally or through its collection letters (see discussion below) it really meant "arbitration proceedings." But arbitration and court proceedings cannot possibly mean the

same thing. By including the mandatory arbitration provision in its contracts, CashCall has given up its right to litigate its claims against consumers in court. If the terms meant the same thing, then CashCall's arbitration clause would be meaningless.

62. The State also argues that CashCall repeatedly threatened to initiate arbitration proceedings when it had no intention of doing so. Angela B. White's analysis of the service logs produced by CashCall during discovery indicate that CashCall sent at least 262 written communications threatening arbitration or advising consumers that arbitration has already commenced. *See* Summary Ex. B. As it turns out, CashCall did initiate eleven arbitration proceedings against West Virginia consumers. The first three were initiated on May 30, 2007. The other arbitration proceedings were initiated in June, July, October, and the last one initiated on December 17, 2007. *See* Summary Ex. A. But CashCall abandoned all of the arbitration proceedings; thus, none of the proceedings ever resulted in awarding CashCall a claim against a consumer. However, Mr. Bennett did testify it was his "understanding" that CashCall failed to pursue the arbitration proceedings because of the Attorney General's investigation. Tr. Vol. II, p. 163.

63. The Court is not convinced of the reason given by CashCall for failing to follow through on its arbitration claims. The Attorney General's investigative subpoena was issued on August 30, 2007. Tr. Vol. I., p. 225. But CashCall commenced four arbitration proceedings after receiving the Attorney General's Subpoena (three in October and one in December 2007). *See* Summary Ex. A. Moreover, there is no evidence that CashCall notified the consumers that the arbitration proceedings would be dismissed.

64. CashCall responded to the Subpoena by letter dated October 22, 2007, and advised the Attorney General that "federal law preempts these provisions [the WVCCPA] and thus it is impossible for CashCall to violate them. Therefore, we respectfully submit that the Attorney General lacks probable cause to conduct this investigation and to exercise jurisdiction over CashCall." *See* Complaint, Ex. C, Letter from Eric N. Whitney at 11. Moreover, CashCall had every reason to believe that the Attorney General did not intend to pursue this matter further after receiving the letter from Whitney since it did not file the Complaint until more than one year later, on October 8, 2008. As stated above, CashCall's service logs indicate that CashCall sent at least 262 letters threatening to commence arbitration proceedings against consumers. *See* Summary Ex. B.

65. In addition to the testimony of the State's representative witnesses, CashCall made threats of legal action in various form letters that it sent to consumers. The form collection letters that CashCall produced during discovery indicate that CashCall used at least two letters that threatened legal action. *See* F.S. Final Attempt Letter - 316 ("[S]ince you have not given us any cooperation In our efforts to resolve your loan, it has now become necessary for us to review this account for litigation proceedings."); and Final Demand 48 Hour Letter - 562 ("[W]e have given you every opportunity to arrange for payment without the possibility of legal action. . . . If arrangements have not been made to pay all sums due within Forty-Eight (48) hours of this letter, we will review this account for litigation proceedings."). CashCall's records indicate that it sent the Final Demand 48 Hour letter out 60 times to 57 consumers and sent the Final Attempt Letter out 53 times to 12 consumers. *See* Attachments, State's Summary Ex. A.

66. Regardless of the real reason CashCall failed to complete the arbitration proceedings, it appears to the Court that CashCall used the threats of arbitration as a collection tactic to induce payments. Since CashCall had waived its right to take consumers to court, filed very few arbitration claims, and failed to complete any of them, the Court finds that CashCall made false threats of arbitration.

67. Federal courts have considered whether unintended threats to take legal action or other deceptive threats violate the FDCPA. Therein consumers typically alleged that the deceptive threats violate 15 U.S.C. § 1692e(5) (threat to take any action that cannot legally be taken or that is not intended to be taken) and/or 15 U.S.C. § 1692e(10) (the use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer). These provisions closely mirror the conduct prohibited by the WVCCPA, W. Va. Code § 46A-2-124 (prohibition of threats, coercion, or attempts to coerce) and W. Va. Code § 46A-2-127 (prohibition against use of any fraudulent, deceptive or misleading representation or means to collect a debt or to obtain information concerning consumers). The decisions in these cases help to guide this Court in deciding whether CashCall has violated the WVCCPA.

68. In *Pipiles v. Credit Bureau of Lockport, Inc.*, 886 F.2d 22 (2d Cir. 1989), the debt collector sent a letter to the consumer implying that legal action already had or would be taken when the evidence indicated that none was intended. *Id.* at 24. Although the language in the collection letter was vague, the court concluded,

> The clear import of the language, taken as a whole, is that some type of legal action has already been or is about to be initiated and can be averted from running its course only by payment. The only 'action' underway was the dispatching of the Notice itself, and the

> only prospective future 'action' for this indebtedness was an attempt at telephone contact (which in fact occurred).

Id. at 25-26. In *Creighton v. Emporia Credit Service, Inc.*, 981 F.Supp. 411 (E.D.Va. 1997), the court considered whether a letter making an unintended threat to report an account to the credit bureau violated the FDCPA. In concluding that it did, the court noted, "The test is the capacity for the statement to mislead; evidence of actual deception is unnecessary." *Id.* at 416 (citing *U.S. v. National Financial Services, Inc.*, 98 F.3d 131, 139 (4th Cir. 1996)). In *National Financial Services*, the court found that a letter from a collection lawyer stating that he had "the authority to see that suit is filed against you in this matter" when such was not the case was a false representation or deceptive means to collect a debt in violation of § 1692e(10) of the FDCPA. The court also noted "Courts have consistently found that falsely representing that unpaid debts would be referred to an attorney for immediate legal action is a deceptive practice." *Id.* (citing *Jeter v. Credit Bureau, Inc.*, 760 F.2d 1168, 1175 (11th Cir. 1985)). Significantly, the court in *National Financial Services* also noted,

> Turning to injury to the pubic, the government need not prove actual harm to consumers in order to assess penalty. Threats of legal action are likely to be intimidating to consumers, and cause distress and anxiety. Stress resulting from false threats of suit have been recognized as a compensable injury in private suits under the FDCPA. Consumers might elect to pay a debt that they do not owe in order to avoid the threatened lawsuit. The court concluded that the millions of notices sent out bearing the violative language caused significant injury to the public.

National Financial Services, 98 F.3d at 140 (citations omitted).

69. Many other courts have found that false threats of legal action violate the FDCPA. *See Baker v. G.C. Services Corp.*, 677 F.2d 775, 777-778 (9th Cir. 1982) (finding a debt collector's letter stating that it first attempts to settle matters "out of court before making any decision whether to refer them to an attorney for collection" when only further phone calls and letters were intended created the impression that legal action was a real possibility and the consumer could legitimately believe that further collection procedures meant court action); *Bentley v. Great Lakes Collection Bureau*, 6 F.3d 60, 62 (2nd Cir. 1993) (finding a letter advising consumer that a creditor has "instructed us to proceed with whatever legal means is necessary to enforce collections misled consumer that legal action was imminent when such was not the case violated the FDCPA); *Brown v. Card Service Center*, 464 F.3d 450, 453 (3rd Cir. 2006) (finding a collection letter advising consumer that failure to cooperate "could result in our forwarding this account to our attorney with directions to continue collection efforts" misled the consumer into thinking that legal action was imminent when legal action was rarely taken); and *Antkowiak v. Taxmasters*, 779 F.Supp.2d 434, 449 (E.D.Pa. 2011) (finding a letter threatening legal action from lawyer not licensed to practice law in Pennsylvania on behalf of creditor who rarely filed suit created false impression of litigation in violation of FDCPA). The courts in these cases based their determination that the written communications violated the FDCPA by evaluating whether the letters had the capacity to mislead or deceive the "least sophisticated consumer." *See, e.g.*, *Brown v. Card Service Center*, 464 F.3d at 454; *United States v. National Financial Services*, 98 F.3d at *136*; and *Jeter*, 760 F.2d at 1172-1173.

70. Based upon all of the foregoing, the Court finds that CashCall made false threats of legal action and other actions that were not intended or were prohibited by law in violation of W. Va. Code § 46A-2-124, W. Va. Code § 46A-2-127, and W. Va. Code § 46A-6-104 as alleged by the State in its thirteenth cause of action.

Fourteenth Cause of Action
(Wrongfully Requiring Consumers to
Use Payment Methods Requiring a Fee)

71. In its fourteenth cause of action, the State alleges that CashCall wrongfully required consumers to use payment methods requiring a fee in violation of W. Va. Code § 46A-2-128 and W. Va. Code § 46A-6-104. Several of the State's representative witnesses testified that CashCall required that they make payments by MoneyGram as the only permissible method after they stopped the electronic debits from their account. *See* Terrie McCann-Bushroe, Tr. Vol. I, p. 77 (testifying CashCall required her to make payments by MoneyGram for which she was charged a fee of $13 or $14 each time); Brenda Hall, Tr. Vol. I, pp. 105-112-113 (testifying CashCall required her to make payments by MoneyGram, which cost a fee of $6 to $8 each time—"that's the way they stated they wanted it done"); Robert Cadle, Tr. Vol. I, pp. 214-215 (testifying CashCall refused to accept his checks after he closed his account; "either they were going to debit my account or they were going to take a MoneyGram"). In addition to the testimony of the State's representative witnesses, CashCall employed at least three form collection letters that required consumers whose accounts were in default to make payments only by methods requiring a fee. CashCall's Breach Letter-560 and Broken Promise Notification-355 both require consumers to make payments by MoneyGram, money order, or certified check. CashCall's Final Demand 48 Hour Letter-562 required that consumers may only make payments

by a cashier's check payable to CashCall or a money transfer via MoneyGram. *See* Attachments, State's Summary Ex. A.

72. Because CashCall required consumers who had defaulted to make payments by methods that required a fee, particularly MoneyGram, those consumers who were likely already having financial difficulties were forced to incur additional expenses by having to travel to the nearest Wal-Mart and then by paying an additional fee for the MoneyGram payments. However, Sean Bennett testified that although MoneyGram was the preferred payment method it was not required by CashCall. Tr. Vol. II, p. 114. He also insisted that CashCall will accept a regular check. "It [MoneyGram] might be our preferred method of payment, but "CashCall posts any payment that comes in and will not reject any sort of payment received by the consumer." Tr. Vol. II, p. 112. If Mr. Bennett's testimony is truthful, then CashCall's payment acceptance policies are unlawful in two respects. First, there is strong evidence that CashCall required consumers that defaulted to make payments by MoneyGram. Such a requirement would be an unfair or deceptive act or practice under W. Va. Code § 46A-6-104. If it is true that CashCall would accept payments by any method, then CashCall misled consumers by leading them to believe only payments by MoneyGram would be accepted when such was not the case, in violation of W. Va. Code § 46A-2-127.

73. Upon the basis of the foregoing, the Court finds that CashCall engaged in an unfair or deceptive act or practice by requiring consumers who had defaulted on their account by representing that payments could only be made by methods requiring a fee, particularly MoneyGram, in violation of W. Va. Code § 46A-2-127 and W. Va. Code § 46A-6-104. Although CashCall's policy required consumers to make payments by methods that incurred a

fee, the fee was not a "debt collector's fee" as defined by W. Va. Code § 46A-2-128(c) because the fee was paid to a third party and not to CashCall. Hence, while CashCall's payment method policy violated other provisions of the WVCCPA, as noted by the Court, the MoneyGram fees incurred by consumers were not debt collection fees, unlike the NSF fee discussed herein below.

Fifteenth Cause of Action
(Charging Unlawful NSF Fees)

74. In its fifteenth cause of action, the State asserts that the $15 NSF fee CashCall charged for electronic debits that failed to clear due to insufficient funds was an unlawful debt collection fee and excess charge. The standard loan contract that all West Virginia consumers were required to sign contained the following provision, "I understand that I will be subject to a fee of $15 if any payment I make is returned for non-sufficient funds." Despite the inclusion of this provision in the contract, the Court questioned whether CashCall actually charged the fee when consumers' debits bounced. Mr. Bennett said it did. "They are charged a non-sufficient funds fee of $15" which is disclosed in the contract. Tr. Vol. II, p. 129. At least one consumer also confirmed this practice. *See* Bryant Creighton, Tr. Vol. I, p. 141 (testifying CashCall charged him a $15 fee each time his debit bounced). Mr. Bennett also explained that when a consumer's debit bounces, CashCall makes at least two more attempts to debit the account within the month, but "CashCall only charges an insufficient funds fee after the first returned transaction." Tr. Vol. II, p. 129.

75. As explained above in the discussion on the State's tenth cause of action, the WVCCPA prohibits all debt collection fees, except in the collection of delinquent educational loans made by institutions of higher education within the state "if included in the terms of the loan contract"

or fees that are allowed by other statutes. W. Va. Code § 61-3-39e provides that "the payee or holder of a check, draft or order which has been dishonored for insufficient funds" may impose or collect a fee of $25 on the consumer. (emphasis added). Thus, if a consumer made payment by mailing a paper check to CashCall and the check was dishonored for insufficient funds, CashCall would be authorized to charge the consumer a $25 dishonored check fee. That fee is allowed because it is expressly authorized by statute.

76. The question before the Court is whether CashCall can charge consumers a $15 fee each time an electronic funds transfer fails to clear for insufficient funds. Although the loan contract provides for such a fee, the fee is not lawful unless it is also authorized by statute. The State argues that the terms "check," "draft," "order," and "drawer" that appear in West Virginia's worthless check statute are "terms of art" that are defined in the Uniform Commercial Code. *See, e.g.*, "Drawer," W. Va. Code § 46-3-103(a)(2); "Order," W. Va. Code § 46-3-103(a)(6); "Check," W. Va. Code § 46-3-104(a)(f); and "Demand Draft," W. Va. Code § 46-3-104(k). The State argues that each of these terms of art refer only to a "negotiable instrument" which is a physical thing that one can possess, like a paper check, draft, or order. *See* W. Va. Code § 46-3-103 and § 46-3-104. In contrast, an electronic funds transfer is an entirely different form of payment and is not a check, draft, or order. *See* EFTA, 15 U.S.C. § 1693a(7) ("the term 'electronic funds transfer' means any transfer of funds, other than a transaction originated by check, draft, or similar paper instrument" (emphasis added)).

77. It is undisputed here that CashCall represented that it could charge a $15 insufficient funds fee each time the consumer's electronic funds transfer failed to clear. It is also admitted by CashCall that it did in fact charge this fee, though not necessarily every time to every consumer.

The Court agrees with the State that an electronic funds transfer is not a check, draft, or order as defined by the Uniform Commercial Code. Thus, the Court finds that the $25 fee provided by W. Va. Code § 61-3-39e may only be charged when a paper check, draft, or order is dishonored for insufficient funds. The Court further finds that this statute does not authorize a fee to be charged when an electronic funds transfer fails to clear for insufficient funds. CashCall has not cited any other statutes that would authorize such a fee to be charged. Since CashCall's $15 fee for electronic funds transfer that fail to clear is not authorized by statute, the Court concludes that it is an unlawful debt collection fee as defined by W. Va. Code § 46A-2-128(c) and an unlawful "excess charge" as defined by W. Va. Code § 46A-7-111(1).

78. Based upon the foregoing, the Court finds that CashCall has charged, attempted to charge, and represented that it can charge a $15 fee to consumers when an electronic funds transfer fails to clear their account in violation of W. Va. Code § 46A-2-127(g), W. Va. Code § 46A-2-128(c), W. Va. Code § 46A-2-128(d), W. Va. Code § 46A-7-111(1), and W. Va. Code § 46A-6-104.

Bona Fide Error Defense

79. Having found that CashCall has violated the WVCCPA as alleged by the State in its fifth through fifteenth causes of action, one question that remains is whether CashCall may assert a "bona fide error" defense to the violations. Specifically, the WVCCPA provides a defense as follows,

> If the creditor establishes by a preponderance of evidence that a violation is unintentional or the result of a bona fide error of fact notwithstanding the maintenance of procedures reasonably adapted to avoid any such violation or error, no liability is imposed under

> subsections (1), (2) and (4) of this section and the validity of the transaction is not affected.

See W. Va. Code § 46A-5-101(1). The FDCPA also affords a bona fide error defense to debt collectors if they can show "by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error." *See* 15 U.S.C. § 1692k(c).

80. Although the majority of federal circuit courts have held that the bona fide error defense to violations of the FDCPA is limited to unintentional clerical and factual errors only, some courts had previously extended the defense to mistakes of law. But the scope of the bona fide error defense to violations of the FDCPA has now been definitively settled by the United States Supreme Court. In *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 130 S.Ct. 1605 (2010), the Court held that the bona fide error defense in the FDCPA is limited to unintentional clerical and factual errors only and "does not apply to a violation of the FDCPA resulting from a debt collector's incorrect interpretation of the requirements of that statute." In keeping with the Legislature's intention that West Virginia courts be guided by the interpretation given by federal courts to the various federal statutes dealing with the same or similar matters, W. Va. Code § 46A-6-101(1), this Court holds that the bona fide error defense under the WVCCPA is similarly limited to unintentional clerical errors or mistakes of fact and does not extend to mistakes of law.

81. In the case at bar, it is clear that CashCall's violations of the WVCCPA are the result of intentional actions and are not the result of clerical errors or mistakes of law. In addition to finding that CashCall's acts were willful, this Court further finds that CashCall "has engaged in a course of repeated and willful violations" of the WVCCPA, as set forth in W. Va. Code § 46A-7-

111(2). Accordingly, this Court is authorized to assess a civil penalty against CashCall of up to $5,000 for each violation of the WVCCPA and does so as discussed further herein below.

Appropriate Relief for Consumers and the State

82. Having found that CashCall has violated the WVCCPA in all of the respects as alleged by the State in its Amended Complaint, the Court now considers what relief is appropriate to be granted to the State in order to effectuate the purpose of the WVCCPA to protect the public from an unfair, deceptive, and fraudulent acts or practices arising from consumer transactions. The WVCCPA provides that "the Attorney General may bring a civil action to restrain a person from violating this chapter and for other appropriate relief" *See* W. Va. Code § 46A-7-108 (emphasis added). The West Virginia Supreme Court of Appeals in the *State of West Virginia ex rel. McGraw v. Imperial Marketing*, 506 S.E.2d 799 (W. Va. 1998), examined the Attorney General's authority to seek consumer restitution and other equitable remedies in its enforcement actions. Therein, the court held that the use of the phrase "other appropriate relief" in W. Va. Code § 46A-7-108 "indicates that the Legislature meant the full array of equitable relief to be available in suits brought by the Attorney General." 506 S.E.2d at 812-813 (emphasis added). Thus, the Legislature has authorized the Attorney General to seek and authorized this Court to grant the full array of equitable relief stemming from CashCall's violations of the WVCCPA, including but not limited to, consumer restitution, disgorgement, and debt relief.

83. The State also seeks its attorney's fees and costs for the prosecution of this enforcement action against CashCall. As to relief available under the WVCCPA, the Supreme Court of Appeals of West Virginia held that the use of the phrase "other appropriate relief" in W. Va. Code § 46A-7-108 "indicates that the Legislature means the full array of equitable relief to be

available in suits brought by the Attorney General." *State By and Through McGraw v. Imperial Marketing*, 203 W. Va. 203, 215-216, 506 S.E.2d 799, 811-812 (1998). In his concurring opinion in *Imperial Marketing*, Justice Starcher concluded that the Attorney General would "be entitled to collect the attorneys' fees and costs incurred for the work necessary in the filing and prosecution of [consumer protection] lawsuits." *Id.* at 219, 815, n. 6 (Starcher, J. concurring). Furthermore, the Supreme Court of Appeals of West Virginia has held that "there is authority *in equity* to award to the prevailing litigant his or her reasonable attorneys' fees as 'costs' without express statutory authorization, when the losing party has acted in bad faith, vexatiously, wantonly or for oppressive reasons." Syl. Pt. 3, *Sally-Mike Properties v. Yokum*, 179 W. Va. 48, 365 S.E.2d 246 (1986) (emphasis added). Based on the forgoing, the Court finds and concludes that the Attorney General should be awarded his costs, including reasonable attorney's fees for Phase II of the trial.

DECISION

Based upon all of the foregoing, the Court does hereby **ORDER** as follows:

(1) The State is awarded an injunction against CashCall as authorized by W. Va. Code § 46A-7-108 permanently prohibiting CashCall from violating the WVCCPA and specifically prohibiting CashCall from engaging in the debt collection conduct as alleged by the State in its fifth through fifteenth causes of action.

(2) The State is awarded a judgment against CashCall in the amount of $292,000 for engaging in unfair or deceptive acts or practices stemming from the policy of requiring consumers to consent to automatic debits as a condition of obtaining the loan, failing to disclose that accounts would be debited at least two more times shortly thereafter when

the regularly-scheduled debit fails to clear, failing to timely honor consumer's requests to stop a particular debit or to permanently stop debits, and for subjecting consumers to multiple overdraft fees from their banks frequently resulting in the involuntary closure of their accounts, as alleged by the State in its fifth cause of action. Such amount consists of a civil penalty of $1,000 for each of the 292 West Virginia consumers affected, as authorized by W. Va. Code § 46A-5-101.

(3) The State is awarded a judgment against CashCall in the amount of $1,000,000 for engaging in threatening, coercive, oppressive, abusive, harassing, fraudulent, deceptive, misleading, unfair, or unconscionable debt collection practices, as alleged collectively in the State's sixth through fifteenth causes of action.

(4) The State is awarded a judgment against CashCall in the amount of $1,000,000 as civil penalty for engaging in a course of repeated and willful violations of the WVCCPA in its debt collection practices, as authorized by W. Va. Code § 46A-7-111(2). Such money awarded as a civil penalty shall be placed in the State Treasury to be appropriated by the West Virginia Legislature.

(5) It is further **ORDERED** as authorized by W. Va. Code § 46A-5-105 and by the equitable powers of this Court that any debts still allegedly owed by any West Virginia consumers to CashCall are hereby **CANCELLED** and CashCall shall notify credit bureaus to delete all references to West Virginia accounts from the credit records of West Virginia consumers; provided, however, CashCall is not required to delete the accounts in those instances where it has only reported positive payment history. Further, inasmuch as the subject debts are disputed and the amounts allegedly owed are offset by CashCall's debt

collection violations, CashCall shall not file 1099(c) cancellation of debt forms with the Internal Revenue Service.

(6) It is further **ORDERED** that it is that the amounts awarded to the State in Items 2 and 3 above shall be used to make appropriate restitution to West Virginia consumers who, in the judgment of the Attorney General, have been subjected to unlawful debt collection or other unfair or deceptive acts or practices by CashCall. Any such amount of restitution monies owed to a consumer, but unable to be paid to such consumer, shall be held in a trust account, pending a later determination by this Court as to the proper distribution of such money. In order to enable the Attorney General to carry out this provision, the Court **ORDERS** that CashCall shall, within 30 days after entry of this Order, provide the following additional documents and information to the Attorney General:

a) A report that identifies each instance in which the account of a West Virginia consumer was subjected to an electronic funds transfer by CashCall, including debits that cleared as well as debits that failed to clear for insufficient funds or other reasons.

b) A report that identifies each instance in which a West Virginia consumer was charged a $15 non-sufficient funds fee for a debit that failed to clear, regardless of whether the fee was actually collected by CashCall.

c) A report that identifies each instance in which a West Virginia consumer made a payment to CashCall by MoneyGram or other methods that require a fee. The report shall include, if known by CashCall, the amount of the fee incurred by the consumer from making the payment.

d) Such reports shall identify all consumers and include, at a minimum, the date and amount of each debit or attempted debit, all NSF fees charged, and all MoneyGram or other such payments received by CashCall.

e) CashCall shall also provide the Attorney General with such other documents and information as shall reasonably be requested to assist in determining appropriate restitution to be paid to consumers who were aggrieved by the debt collection and other unfair or deceptive acts or practices.

(7) It is further **ORDERED** that the State is awarded a judgment against CashCall for its costs, including its reasonable attorney's fees, for the prosecution of Phase I of its enforcement action against CashCall. This amount shall be determined by the Court at a later date after entry of the final order concluding all phases of this trial.

The objections of any party aggrieved by this Order are noted and preserved. The Clerk is **DIRECTED** to send a certified copy of this Order to all counsel of record.

ENTERED this 10 day of September, 2012.

Louis H. Bloom, Judge

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT
GIVEN UNDER MY HAND AND SEAL OF SAID COURT
THIS 10 DAY OF SEPTEMBER 2012
CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

Exhibit 13

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA ex rel.
DARRELL V. McGRAW, Jr.,
ATTORNEY GENERAL,
Plaintiff,

v.

Civil Action No.: 08-C-1964
Judge Louis H. Bloom

CASHCALL, INC., and
J. PAUL REDDAM, in his capacity as
President and CEO of CashCall, Inc.,
Defendants.

FINAL ORDER ON PHASE II OF TRIAL: THE STATE'S USURY AND LENDING CLAIMS[1]

On October 31 and November 1, 2011, came the Plaintiff, the State of West Virginia ex rel. Darrell V. McGraw, Jr., Attorney General ("State" or "Attorney General"), by Norman Googel and Douglas Davis, Assistant Attorney Generals, and the Defendants, CashCall, Inc. ("CashCall") and J. Paul Reddam ("Mr. Reddam" or collectively "Defendants"), by counsel, Charles L. Woody, Bruce M. Jacobs, and Eric N. Whitney, *pro hoc vice*, for a bench trial pursuant to W. Va. Code § 46A-7-112, upon the "Amended Complaint for Injunction, Consumer Restitution, Civil Penalties, and Other Appropriate Relief" ("Amended Complaint") in the above-styled action. Upon the parties' agreement, the Court bifurcated for trial the counts of the Plaintiff's Amended Complaint. On October 31 and November 1, 2011, the Court heard all of the evidence on the State's debt collection claims, as set forth in the fifth through fifteen causes of action in the Amended Complaint. On January 3, 2012, the Court heard all of the evidence on the State's usury and lending claims, as set forth in the second through fourth causes of action in

[1] The Court will enter a separate final order on Phase I of the trial regarding the State's debt collection claims against CashCall.

the Amended Complaint. Upon review of the evidence, including the testimony offered at trial, the pleadings of record, the parties' proposed findings of fact and conclusions of law, and the applicable law, the Court makes the following findings of fact and conclusions of law, as to the State's usury and lending claims.

FINDINGS OF FACT

Background and Procedural History

1. In 2007, the State opened a formal investigation of CashCall and Mr. Reddam, its sole owner and shareholder, after receiving many complaints from West Virginia consumers about CashCall's usurious interest rates and its debt collection practices.

2. On August 30, 2007, the Attorney General issued an investigative subpoena, as authorized by W. Va. Code § 46A-7-104, directing CashCall to produce all of its lending and debt collection activities in West Virginia.

3. By letter dated October 22, 2007, CashCall responded but did not comply with the subpoena. In the letter, CashCall asserted that it was not the lender, but was merely a "marketing agent" for the state-chartered bank, First Bank & Trust, Milbank, South Dakota ("Bank").[2] Ex. C, Amended Complaint, Subpoena Response Letter, p. 3.

4. Based upon its investigation of the consumer complaints, CashCall's responses and its independent review of the applicable law, the State concluded that the lending program established by CashCall with the Bank was essentially a sham intended to make improper use of federal preemption in order to unlawfully evade West Virginia's lender licensing and usury laws. *See* Amended Complaint. Based on its conclusions, the State demanded that CashCall cease the

[2] The State originally included a claim for failure to comply with the subpoena against CashCall ("First Cause of Action"), but agreed to dismiss this claim as moot. *See* Pre-Trial Order.

continued collection of its loans and make appropriate restitution to aggrieved consumers. CashCall declined to do so.[3]

5. On October 8, 2008, the State commenced the above-styled civil action by filing a "Complaint for Injunction, Consumer Restitution, Civil Penalties and Other Appropriate Relief" ("Complaint") against the Defendants.

6. On November 17, 2008, the Defendants removed the case to federal court, asserting that the Bank is the real party in interest and as such the State's usury law claims against CashCall are completely preempted by §27 of the Federal Deposit Insurance Act ("FDIA"), 12 U.S.C. §1831d. Defendant's Notice of Removal; *See* Discussion, *infra*.

7. By order entered March 11, 2009, U.S. District Court Judge Joseph R. Goodwin found that because the State only asserts state law claims against CashCall, a non-bank entity, "the claims do not implicate the FDIA, the FDIA does not completely preempt the state-law claims, and there are no federal questions on the face of the Complaint." *West Virginia v. CashCall, Inc.*, 605 F.Supp.2d 781 (S.D.W. Va. 2009). The case was remanded back to this Court. *See id.*

8. The State filed a motion for leave to amend its Complaint, which was granted by this Court by order entered June 4, 2010. It is the Amended Complaint that is before the Court in this trial.

9. On October 27, 2011, the Court entered a Pre-Trial Order by which it granted, in part, and denied, in part, the Motion to Dismiss filed by the Defendant, J. Paul Reddam. Specifically, the Court found that because there is no allegation in the Amended Complaint, except ¶ 13, referencing the Defendant J. Paul Reddam as a party and that the State does not seek any relief

[3] CashCall made and/or collected the loans in West Virginia, as alleged by the State, from August 2006 to March 2007. Ex. C, Amended Complaint, Subpoena Response Letter, p. 2; Transcript of January 3, 2012 Trial ("Tr. Vol. III"), p. 105.

against Defendant Reddam, the Court would not impose any liability on Defendant Reddam. However, Defendant Reddam was ordered to remain a party to the action. Pre-Trial Order, ¶ 2.

10. The Court ordered the trial be bifurcated into two phases: (1) Phase I on the alleged violations of the West Virginia Consumer Credit Protection Act by CashCall and (2) Phase II on the alleged violations of West Virginia usury and lending laws by CashCall. This Final Order only addresses Phase II of the trial.

DISCUSSION

1. CashCall is a California corporation whose principal business office is located in Anaheim, California. CashCall also maintains a facility in Las Vegas, Nevada.

2. The Bank was and is a South Dakota state-chartered bank insured and regulated by the FDIC, at all times pertinent times herein. Pursuant to §27 of the Federal Deposit Insurance Act ("FDIA"), 12 U.S.C. § 1831d, as a state-chartered bank, the Bank may charge interest rates permitted in South Dakota on loans made outside of South Dakota, even if such interest rates are illegal in the state where the loans are made.

3. The marketing, making, and collection of consumer loans is subject to the provisions of the West Virginia Consumer Credit and Protection Act ("WVCCPA"), W. Va. Code § 46A-1-101, et seq., which is enforced by the Attorney General pursuant to W. Va. Code § 46A-7-101, et seq.

4. CashCall and the Bank are completely separate entities. *See* First Amended and Restated Consumer Loan Marketing, Organization, and Sale Agreement, Section 11.8, p. 24, State's Ex. 8. Specifically, the parties' agreement states that the "Bank and CashCall agree they are independent contractors to each other in performing their respective obligations [under the agreement]." *Id.*

5. The West Virginia Legislature created the Lending and Credit Rate Board ("Lending Board") and authorized the Lending Board to prescribe maximum interest rates and charges on loans, credit sales or transactions. W. Va. Code § 47A-1-1, et seq. The maximum interest rate that could be charged to West Virginia consumers on the type of loans at issue is eighteen percent (18%) per annum. Ex. A, Amended Complaint.

6. The State argues that CashCall is the de facto lender of the loans made to West Virginia consumers and that the collective agreements between it and the Bank are nothing more than sham agreements intended to usurp state usury and lending laws by making an improper assertion of federal preemption. Specifically, the State argues that CashCall, as the de facto lender, violated the State's usury and lending laws by making usurious loans with interest rates far exceeding those allowed by West Virginia law. Based upon the testimony presented and the evidence offered, specifically that of the four agreements between CashCall and the Bank, the Court agrees with the State that CashCall was the de facto lender and thus, is subject to West Virginia's usury and lending laws.

7. The four agreements between CashCall and the Bank allocate the risk and define the lending program at issue in this action. State's Ex. 5, 6, 7 and 8 (collectively "Agreement"). The Agreement was admitted by stipulation. Transcript of January 3, 2012, Trial ("Tr. Vol. III"), pp. 40-42.

8. The Agreement established a business model under which CashCall's role was purportedly limited to marketing and servicing the loans, whereas, the Bank's roles was to underwrite and fund the loans. Agreement, Sections 3.1-3.2, pp. 4-6. Because the Agreement characterizes the Bank as the lender, CashCall argues that the interest rates on the subject loans

were governed by the law of the Bank's home state, South Dakota, which has no usury laws, not the laws of West Virginia which caps interest rates for the type of loans at issue at 18%.

9. Under the lending program established by the Agreement, a total of 292 loans were made to West Virginia consumers, beginning in August 2006 up to and including March 2007. Joint Ex. 1. Three types of loans were made in West Virginia: (1) loans in the amount of $1,000 at 89% interest; (2) loans in the amount of $2,525 at 96 % interest; and (3) loans in the amount of $5,000 at 59% interest. Tr. Vol. III, p. 23; Joint Ex. 1. There were a total of 292 loans made to West Virginia consumers, consisting of 15 loans of $1,000; 214 loans of $2,525; and 63 loans of $5,000. *See* Joint Ex. 1.

10. The evidence shows that to date, West Virginia consumers made total payments of $1,201,366.12 to CashCall throughout the duration of the lending program. *See* Joint Ex. 1. The total amount of interest "agreed to be paid" by West Virginia consumers (as distinguished from the amount actually paid) is $2,511,421.99. *See* Joint Ex. 1.

11. The State does not dispute that a national or state-chartered bank may charge whatever interest rates are permitted by its home state and that it would not be required to obtain a lender license from any state other than its home state. *See* § 27 of the FDIA, 12 U.S.C. § 1831d.

Testimony of the State's Expert Witness: Margot Saunders

12. The State called Margot Freeman Saunders as its first and only witness in support of its second through fourth causes of actions ("Phase II of trial"). The State had previously disclosed Ms. Saunders as its expert witness in this case in accordance with the Scheduling Order entered by the Court.

13. Ms. Saunders is a lawyer who currently resides in Charleston, West Virginia, and has been employed by the National Consumer Law Center ("NCLC") from 1991 through the present. Ms. Saunders indicated her expertise includes policy analysis and advocacy in the areas of predatory lending, credit reporting, debt collecting, electronic commerce and benefits transfer, preservation of home ownership, credit math, electronic transaction issues, utility costs for low-income households, and other consumer credit issues. State's Ex. 1, Tr. Vol. III, p. 18 (Ms. Saunder's resume). She has provided written and oral testimony as a witness to Congressional Committees regarding policy issues affecting low-income consumers on at least nineteen occasions. These Committees include the Subcommittee on Financial Institutions and Consumer Credit, House Financial Services Committee, House Ways and Means Committee, Senate Finance Committee, Senate Banking Committee, House Subcommittee on Financial Institutions and Consumer Credit, Senate Committee on Banking, Housing and Urban Affairs, and many others. State's Ex. 1, Tr. Vol. III.[4]

14. As of October 2011, Ms. Saunders provided an expert report, was deposed, and/or provided testimony in court as an expert witness in twenty nine cases involving such subjects as mortgage lending, consumer credit, and predatory lending. *See* State's Ex. 1, Tr. Vol. III. Ms. Saunders was qualified to testify as an expert witness in a predatory mortgage lending case by the Honorable Arthur Recht, Circuit Court of Ohio County, in *Lourie Brown and Monique Brown v. Quicken Loans, Inc., et al.*, Civil Action No. 08-C-36. Tr. Vol. III, p. 8-9. She was also qualified to testify as an expert witness on the subject of predatory lending by the United States Bankruptcy Court in Delaware. *See In re: American Home Mortgage Holdings, Inc., et al.*, U.S.

[4]Ms. Saunders has also served as a presenter and trainer on policy issues relating to such topics as low-income consumers, electronic commerce, predatory mortgage lending, payday lending, interest calculation methods, and other credit issues sponsored by a variety of private associations and government agencies. *See* State's Ex. 1, Tr. Vol. III.

Bankruptcy Court for the District of Delaware, Case No. 07-11047. State's Ex. 1, Tr. Vol. III, p. 9.

15. On cross-examination, Ms. Saunders testified that as part of her analysis in predatory lending cases she regularly examines contracts between the lender and brokers and that the brokers in those cases operate much like CashCall. She testified that she was "quite familiar with interpreting bank contracts . . . and with its agents." Tr. Vol. III, p. 59. Ms. Saunders also testified that she has reviewed contracts between a bank and a purported agent relating to their marketing or assistance in solicitation of loans to the bank. *Id.* For example, Ms. Saunders explained that it is a "standard part of [her] review in mortgage cases to analyze contracts between the lender and brokers to determine such issues as who has the underwriting requirements, who has what obligations to analyze the borrower's income and ability to repay, and who determines the ultimate decision of whether the loan will be made." *Id.* Such analyses are very similar to what she was asked to do as an expert witness in this case.

16. Pending the issuance of this Order, the Court held in abeyance its ruling on the qualifications of Ms. Saunders to testify as an expert witness. Upon review of Ms. Saunders' testimony and in light of her professional experience, as set forth in State's Exhibit 1, the Court now finds that Ms. Saunders is qualified to testify as an expert witness on the subject of consumer lending. The Court further finds that Ms. Saunder's expertise in the field of predatory lending, particularly her analysis of contracts and relationships between lenders and brokers, qualifies her to testify about the contracts and agreements between CashCall and the Bank and to assist the Court in determining those parts of the Agreement that show which party bore the economic risk as between CashCall and the Bank in regards to the subject consumer loans. Such testimony, as well as the Agreement between CashCall and the Bank, assisted the Court in

deciding the ultimate question of which party to the Agreement was the true lender in the loans to West Virginia consumers.

17. Based upon the documents produced by CashCall during discovery, Ms. Saunders was asked to describe the loan amounts offered to West Virginia consumers. She testified that the program offered loans in the amounts of $1,075, at 89% interest; $2,600, at 96% interest; and $5,075, at 59% interest. Tr. Vol. III, p. 23; State's Ex. 2.[5] Ms. Saunders was asked to perform an analysis of what the interest rates charged to West Virginia consumers would have been if the loans had been governed by West Virginia law, with an interest rate of 18%, in comparison to the rates actually charged to consumers. Using a loan of $2600.00 as an illustrative example, Ms. Saunders explained that at an interest rate of 18%, the consumer would make 42 payments of $81.47 per month, with total interest payments of $896.62. In contrast, a consumer who borrowed $2,600.00 at the 96% interest rate would make 42 payments of $216.55, with total interest payments of $6,494.92. State's Ex. 3, Tr. Vol. III; Tr. Vol. III, p. 33.

18. Ms. Saunders also offered an opinion as to how CashCall's business model worked. According to Ms. Saunders, CashCall entered into a contract with a state-chartered bank to use the bank's charter to make loans in states like West Virginia that have usury laws. Under such arrangement, the non-bank entity, in this case CashCall, asserts that it may charge whatever interest rate is allowed by the state-chartered bank's home state under the protection of § 27 of the FDIA. Tr. Vol. III, p. 34. Since the Bank is based in South Dakota, which has no usury laws, there is no limit to the amount of interest that West Virginia consumers could allegedly be charged on the subject loans.

[5] As previously stated, according to the parties' "Joint Exhibit 1," agreed to and submitted by the parties after the close of evidence, the program offered loans in the amounts of $1,000.00; $2,525.00; and $5,000.000.

19. Ms. Saunders also testified that the business model in question here, which has been characterized as "rent-a-bank" or "rent-a-charter," has been under considerable challenge for many years by state regulators and private parties. Tr. Vol. III, p. 36. Ms. Saunders testified that regulators challenged such arrangements by contending that the non-bank entity was the true lender rather than the bank. *Id.* When asked specifically how regulators approach this type of business model, Ms. Saunders explained:

> There would generally be a discussion of whether function follows the form or form follows function. In other words, just because the name of the bank was on the loan, did that indicate that the back was actually the lender? And the analysis often boiled down to which party, the bank or the non-bank lender, had the predominant economic risk in relation to the loans.

Tr. Vol. III, p. 37.

20. Ms. Saunders was also asked to analyze the lending program's underwriting guidelines in connection with her testimony in this case. She testified that she could not find many differences of any significance between CashCall's underwriting guidelines and the Bank's underwriting guidelines. Tr. Vol. III, p. 38. The document containing the underwriting guidelines of CashCall and the Bank analyzed by Ms. Saunders was admitted into evidence as State's Exhibit 4. Tr. Vol. III, p. 40.

21. Ms. Saunders was also asked in connection with her testimony to analyze the Agreements between the Bank and CashCall and to state in her opinion which party bore the economic risk in relation to the loans made to consumers. Tr. Vol. III, p. 47. She testified that she created a table or chart that summarizes the parts of all the agreements that she found relevant to the question of which party bore the economic risk of the loans. Ms. Saunders highlighted the following terms in her testimony: CashCall has the duties of preparing all the advertising materials, soliciting consumers, taking all the applications, verifying the identity of the applicants, providing on the

Bank's behalf all completed adverse action notices, and maintaining all of these applications. Tr. Vol. III, p. 50.

22. Ms. Saunders also testified that CashCall was obligated to deposit with the Bank $1.5 million, or the sum of the loans made in the highest yielding two days in the previous thirty days; CashCall's owner, J. Paul Reddam, in addition, was required to give a personal guarantee of all CashCall's monetary obligations to the Bank under the lending program; the Bank sold all loans to CashCall without recourse; and CashCall was obligated to indemnify the Bank against CashCall's mistakes and the Bank's losses, including all claims that materials or other aspects of the program violate any rule and claims by borrowers. Tr. Vol. III, p. 51; *See* ¶ 50, *infra*. The chart containing Ms. Saunders' summary of the terms from the agreements that are relevant to which party bore the predominant economic risk of the loans was admitted into evidence as State's Exhibit 9. Tr. Vol. III, p. 54.

23. Based upon her review and analysis of the agreements between CashCall and the Bank, Ms. Saunders testified that in her opinion "[i]t appeared that CashCall bore the entire economic risk from these loans." Tr. Vol. III, p. 55.

24. During cross-examination by CashCall's counsel, Ms. Saunders was asked whether she had identified any evidence to demonstrate that it was CashCall and not the Bank that actually made the decision to extend credit. She said she had. Based upon a review of the depositions of J. Paul Reddam (CashCall's owner) and Elissa Chavez (CashCall's director of fraud prevention and dispute resolution), the contracts themselves and the marketing guidelines, she looked for evidence that the Bank had independently made underwriting decisions. She found "different indicia that the Bank really didn't make its own underwriting decisions and instead it was CashCall." Tr. Vol. III, p. 61-62.

25. Ms. Saunders testified that she had consulted with the FDIC in connection with her testimony in this case and that representatives of the FDIC had pointed out two FDIC actions involving CashCall in which it had disallowed this and similar lending programs for unfair trade practices. Tr. Vol. III, p. 64.[6] Ms. Saunders explained that the FDIC's action concerning First Bank of Delaware (the other bank that partnered with CashCall) and CompuCredit outlined the aspects of the bank's third-party lending program "that it deemed problematic and characterized under the unfair trade practices section of its Order." Tr. Vol. III, p. 70. Ms. Saunders explained that the FDIC document identified all of the "third-party lending programs" of concern involving the bank on Exhibit A, one of which was the bank's arrangements with CashCall. Tr. Vol. III, pp. 72-73; Defendant's Ex. 1.

26. CashCall's counsel pressed Ms. Saunders to concede that the FDIC's concerns were only directed at the bank and not CashCall, but she disagreed: "I think that the FDIC's goal here was to shut down the bank's third-party arrangements with CompuCredit and other entities, including CashCall. . . . That's how I read that, and that's what I was told by . . . an employee of the FDIC, what was happening here." Tr. Vol. III at 76. Furthermore, Ms. Saunders testified that "the FDIC thought the bank [First Bank of Delaware] had reputational risks" as distinguished from economic risks in the individual loan transactions. Tr. Vol. III, p. 77.

27. Ms. Saunders also answered affirmatively when the Court observed that "the Bank in question here in the CashCall case had no economic risks as to the individual loans. It was all being indemnified and held harmless by CashCall?" Tr. Vol. III, pp. 77-78. She explained:

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[6] *See In the Matter of First Bank of Delaware, and CompuCredit Corporation, Notice of Charges for an Order to Cease and Desist and for Restitution, Federal Deposit Insurance Corporation*, FDIC-07-256b, June 15, 2008, available at http://www.FDIC.gov/news/press/2008/FBDNoticeofCharges.pdf; *See also In the Matter of First Bank of Delaware, Stipulation and Consent to the Issuance of an Order to Cease and Desist, Order for Restitution, and Order to Pay*, October 3, 2008, available at http://www.FDIC.gov/bank/individual/enforcement/2008-10-20.pdf.

> That's correct. The FDIC shut down the arrangement [third-party arrangements between banks and non-bank entities like CashCall] because of the reputational risk to the banks and because the FDIC was getting quite a bit of heat from members of Congress and consumer groups over allowing these products—practice. . . . And what the FDIC did beginning in 2006 was stop these actions by individual compliance reviews so that the . . . FDIC actions were not public. In fact, I cited in my report the one evidence that we were able to find publicly of these FDIC shut downs that was reported in the Securities, Securities and Exchange Reports.

Tr. Vol. III, pp. 78-79.

Testimony of Dan Baron—CashCall's General Counsel

28. In Phase II of the trial, on the State's usury and lending claims against CashCall, CashCall presented only one witness, Dan Baron, CashCall's general counsel. Mr. Baron has been employed by CashCall since its inception in 2003. He testified that he is in charge of all regulatory matters, all of the litigation that comes in, and has negotiated most, if not all, of the major contracts between CashCall and its financing partners. He also said that he negotiated the agreements between CashCall and the two banks involved in the lending program at issue here. Tr. Vol. III, pp. 94-95.

29. CashCall's headquarters are currently located in Anaheim, California, and CashCall also has a servicing office in Las Vegas, Nevada. CashCall currently employs a little over 1,000 persons. Tr. Vol. III, pp. 97-98. CashCall currently is a direct lender in California only. CashCall secured its first lending license in California in 2003 and has fourteen consumer lending licenses that would allow it to make direct loans in thirteen other states. Tr. Vol. III, pp. 98-99.

30. Mr. Baron testified that CashCall extended its operations beyond California at the urging of its different financing partners. "They didn't like the fact that there was a huge concentration in borrowers, and they wanted us to diversify our service portfolio if we wanted more money

from them, basically." Tr. Vol. III, p. 102. By that time CashCall had secured lending licenses in three or four other states, and it was lending there, but he recounted the difficulties and length of time it took to get state lending licenses. Tr. Vol. III, pp. 102-103. Mr. Baron also testified that CashCall developed all the materials from scratch in connection with its direct lending program prior to entering into any third-party arrangements with banks. Tr. Vol. III, pp. 100-101.

31. Mr. Baron testified that around the time CashCall was diversifying it was approached by First Bank & Trust. They expressed interest in having CashCall market loans for them on a nationwide basis. According to Mr. Baron, CashCall's objective was to expand its loan program nationally, but primarily on the servicing side. The Bank's goal was to start consumer lending, but the Bank could not do that because it did not have the capacity to market or the ability and manpower to service the loans once they were originated. Tr. Vol. III, pp. 103-105.

32. During negotiations to establish the agreements with the Bank, Mr. Baron stated that the Bank was very concerned about how CashCall would be servicing the loans and wanted to make sure that CashCall would not do anything to "embarrass them or jeopardize their charter." Tr. Vol. III, p. 109. Mr. Baron testified that CashCall had the abilities to market and service a high volume of loans because it had been operating on its own with the systems it had created. "It had 100,000 outstanding loans in California at that point." Tr. Vol. III, p. 106.

33. In regards to how the online application process operated for West Virginia consumers, Mr. Baron testified that when a loan applicant clicked on "West Virginia," they would be directed to a website owned by the Bank on the Bank's system. Tr. Vol. III, p. 115. Once the applicant "passed their initial automated underwriting," a system that Mr. Baron stated was developed and controlled by the Bank, the file would get referred to the Bank where it would be

manually underwritten by a Bank underwriter. Mr. Baron testified that all loans were reviewed and approved by a Bank underwriter on Bank property who worked for the Bank with no input whatsoever from CashCall. Tr. Vol. III, pp. 115-116. However, Mr. Baron agreed that CashCall was not obligated to buy loans that deviated from the parties' agreed upon underwriting criteria set forth in the Agreement. Although Mr. Baron stated the Bank could alter the underwriting criteria, he admitted that CashCall was only obligated to purchase loans that met the criteria agreed to by CashCall and the Bank under the program guidelines. Tr. Vol. III, p. 119.

34. When asked his opinion on which party bore the economic risk of the loans under the agreements with the Bank, Mr. Baron explained: "We [CashCall] bore the economic risk. But the Bank was still on the hook for the underlying loan. . . . If there were Regulation Z problems, truth in lending problems, FTC issues, unfair and deceptive practices, the Bank was the entity that was going to get hit, and the Bank was the one who was going to lose its Charter in the event that there was something amiss." Tr. Vol. III, p. 134. He further testified that CashCall did purchase all of the West Virginia loans as required by the Agreement for "a hundred cents on the dollar." Tr. Vol. III, pp. 171-172. When asked about the specific provisions of the Agreement between CashCall and the Bank during cross-examination, Mr. Baron explained that the actual practice of how things sometimes operated deviated from the literal wording or meaning of the Agreement. *See generally* Tr. Vol. III, pp. 165-221.

35. Mr. Baron also admitted that the lending program with the Bank employed the accounting system that "CashCall had built from scratch." CashCall's accounting system tracked loan progress, the number of loans at various stages, the number of loans funded, and the loan amounts. Tr. Vol. III, pp. 179-180. CashCall's accounting system was used "because the Bank didn't want to start from scratch and have to spend God knows how much money or have us

spend God knows how much money to reinvent the wheel. It saw our system and said, 'You know what? The system you have here would work for us.'" Tr. Vol. III, p. 180.

36. In response to questions about the various provisions in the Agreement that required CashCall to pay large sums of money to the Bank, Mr. Baron explained this was because:

> They didn't want to execute a contract and then have CashCall decide to go in a different direction...they're putting their charter at risk. They wanted to make sure that CashCall was invested, that CashCall was committed and that CashCall was going to do the right thing... the Bank expended a lot of money and a lot of time and subjected its charter to potential reputational risk as well as other regulatory issues. They wanted to make sure that they were adequately compensated and that CashCall wasn't going to be a flake about this.

Tr. Vol. III, p. 184.

37. Mr. Baron did acknowledge that J. Paul Reddam was obligated to personally guarantee all of CashCall's obligations to the Bank under the subject lending program and that he was required to do so in CashCall's other financing agreements. He estimated Mr. Reddam's net worth was about $25-$30 million at the time of CashCall's agreement with the Bank. Tr. Vol. III, pp. 192-193. He further acknowledged that no state banks are currently partnering with CashCall or any companies like CashCall to do marketing and loan purchases in the United States. Tr. Vol. III, p. 186. However, Mr. Baron testified that it had nothing to do with that FDIC order [referring to CompuCredit]. It was over the crisis in Wall Street at that particular point. *Id.*

38. To the extent that Mr. Baron's testimony is inconsistent with the Court's finding that CashCall bore the entire economic risk of the loan program and thus, was the de facto lender, hiding behind the Bank's charter, the Court finds such testimony not credible. In making such determination, the Court notes the fact that CashCall was required to purchase and did in fact purchase all of the loans which met the program guidelines agreed to by CashCall for "one

hundred cents on the dollar" within three business days of the origination date, as Mr. Baron testified.

The Agreement between CashCall and the Bank[7]

39. Even if the Court were to find and conclude that Ms. Saunders is not qualified to testify and offer an expert opinion on the subject of consumer lending and specifically, on the relationship between CashCall and the Bank, the Court finds and concludes that the Agreement between CashCall and the Bank, as well as, the practical application and implementation of the business arrangement between the Bank and CashCall, fully support the Court's finding that CashCall is the de facto lender of the subject loans, as it clearly bore the economic risk of the loans. *See Discussion, infra.*

40. The First Amended and Restated agreement confirms that the entire financial burden and risk of the loans to West Virginia consumers under the program was placed upon CashCall. Such conclusion is supported by at least twenty four provisions in the First Amended and Restated Agreement, including the following:

a. CashCall's sole owner and stockholder, J. Paul Reddam, is the "Guarantor" of all of CashCall's monetary obligations to the Bank. *See* Article I, Section 1.1, Definitions, p. 2.

b. CashCall is obligated to purchase, and did purchase, all loans from the Bank within three (3) days after the loan was allegedly originated and funded by the Bank. The purchase price for each loan to be paid by CashCall was required to be equal to the outstanding balance due on each loan, including all principal, interest, origination fees, and other charges or sums owed by the borrower. *See* Article VI, Section 6.1, p. 9.

c. CashCall is responsible for the marketing and solicitation of the loans at its own expense through use of the approved Advertising and Program Materials prepared by CashCall. *See* Article III, Section 3.1(b), p. 4.

[7] State's Exhibits 5-8, the four contracts between CashCall and the Bank.

d. CashCall shall pay bank the Bank's reasonable attorneys' fees associated with the Bank's compliance review of the Advertising Materials and Program Materials prepared by CashCall. *See* Article III, Section 3.1(k), p. 5.

e. CashCall shall maintain at its expense employee dishonesty coverage and the general comprehensive liability policy, each with a financially sound and reputable insurer reasonably acceptable to Bank, with coverage of not less than $3 million and $1 million, respectively, together with commercial umbrella coverage with a general aggregate limit of not less than $3 million. *See* Article III, Section 3.1(n), p. 6.

f. CashCall is obligated to pay all reasonable attorney fees associated with review of the Program Materials prepared by CashCall for compliance with applicable Rules, subject to an annual cap of $30,000. *See* Article IV, Section 4.1, p. 7.

g. CashCall shall develop and maintain, at its own cost and expense, a comprehensive accounting and loan tracking system to accurately and immediately reflect all Applications, Loans, and related information regarding the Program to satisfy the information requirements of Bank, Regulatory Authorities, and Bank's internal and external auditors, as such information requirements have been disclosed to CashCall. *See* Article VI, Section 4.2, p. 8.

h. CashCall is obligated to pay the Bank a non-refundable Program Implementation Fee of the greater of $50,000 or the sum of all itemized costs incurred by the Bank prior to the Commencement Date, including but not limited to reasonable legal costs, equipment costs, due diligence costs, and facility costs (the "Bank Implementation Fee"). The Bank Implementation Fee is due upon executions of the Agreement and shall not exceed $100,000. *See* Article VII, Section 7.1, p. 10.

i. CashCall is obligated to pay the Bank fees characterized as "Minimum Bank Revenue" in accordance with the following schedule during the term of the Program: $30,000 per month for months 1-3; $60,000 per month for months 4-6; $125,000 per month for months 7-12; and $200,000 per month for months 13-18. *See* Article VII, Section 7.3, p. 10.

j. CashCall is obligated to reimburse the Bank for all of its Operational Costs for the Program in excess of 15% of the Net Revenue earned by the Bank. *See* Article VII, Section 7.4, pp. 11-12.

k. Upon execution of the Agreement with the Bank, CashCall must deposit a Settlement Reserve with the Bank in the sum of $500,000 and, thereafter, CashCall must maintain a balance in the Settlement Reserve equal to the sum of the total dollar amount of Loans originated by the Bank but yet to be purchased by CashCall ("loans on book") or $500,000, whichever is greater. CashCall must calculate and replenish the Settlement Reserve on a daily basis. *See* Article IX, Section 9.1(a), pp. 13-14.

l. CashCall must further maintain an additional deposit with the Bank denominated as a "Cash Reserve" in the amount of $1 million. The funds in the Cash Reserve shall be held in a non-interest bearing deposit account and shall be maintained in the name of CashCall, but shall be subject to the sole control of the Bank until such time as any amounts remaining in the account are returned by Bank to CashCall upon termination of the Agreement. CashCall also grants the Bank a security interest and right of offset in the Cash Reserve and all funds held therein and also all other amounts due and owing from Bank to CashCall as security for all of CashCall's obligations owed to the Bank under this Agreement. *See* Article IX, p. 9.1(b), pp. 14-15.

m. CashCall must procure the personal guarantee of Guarantor (Reddam) of all its obligations to Bank, and must compel Guarantor to provide a signed personal financial statement to Bank prior to execution of the agreement and annually thereafter. *See* Article IX, Section 9.2, p. 15.

n. CashCall is obligated to indemnify and hold harmless the Bank against all "losses" arising out of the Agreement, including any claims asserted by Borrowers in connection with the Program. *See* Article XI, Section 11.1(a), p. 18.

41. The previous provisions, when viewed collectively, place the entire monetary burden and risk of the loan program on CashCall and not the Bank. CashCall paid more for each loan than the amount actually financed and "purchased" such loans almost immediately after their origination, so that the Bank had no economic risk on the loans. Presumably, CashCall agreed to such terms on the belief that its business scheme would successfully evade state usury laws and it could reap the benefits of the excessive interest rates charged on each loan. Furthermore, CashCall had to procure the personal guarantee of its sole owner and stockholder, J. Paul Reddam, to personally guarantee all of CashCall's financial obligations to the Bank, including the amounts of the loans prior to "purchase" by CashCall. Also, CashCall had to indemnify the Bank against all "losses" arising out of the Agreement, including claims asserted by borrowers. Clearly, the Agreements do not place any monetary burden or risk on the Bank. Finally, a document called "CashCall, Inc. and Subsidiaries Consolidated Financial Statements, December 31, 2007," prepared by the firm Squar Milner and paid for by CashCall as one of its obligations under its agreement with the Bank, further supports the conclusion that CashCall was the de

facto lender of the subject loans. Specifically, under the heading "Organization and Summary of Significant Accounting Policies," the auditing firm of Squar Milner stated the following:

> CashCall was under contractual obligation to purchase the loans originated and funded by FBT (the South Dakota Bank) only if CashCall's underwriting guidelines were followed when approving the loan. For financial reporting purposes, CashCall treated such loans as if they were funded by CashCall.

(emphasis added). The fact that for financial reporting purposes CashCall considered itself the originator of the loans further supports the finding that CashCall was the de facto lender and the Bank was not the true lender. *See* Appendix, State's Pre-Trial Memorandum, Tab 5.

Discussion of the Predominate Economic Interest Standard and Whether CashCall was the De Facto Lender Subject to the State's usury and lending claims

42. Under W. Va. Code § 46A-7-115, "every person engaged in West Virginia in making consumer loans . . . shall file notification with the state tax department within thirty days after commencing business in this state." The State argues that CashCall violated this statute by serving as the de facto lender in transactions with West Virginia consumers without a business registration certificate from the state tax department. Furthermore, pursuant to W. Va. Code § 47-6-6, all contracts made directly or indirectly for the loan or forbearance of money at a greater interest rate than is permitted by law *shall be void* as to all interest provided and the borrower or debtor may, in addition, recover from the original lender or creditor an amount equal to four times all *interest agreed to be paid* and at least a minimum of one hundred dollars. (emphasis added).

43. In examining what constitutes a usury loan, the Supreme Court of Appeals of West Virginia held: "The usury statute contemplates that a search for usury shall not stop at the mere form of the bargains and contracts relative to such loan, but that all shifts and devices intended to

cover a usurious loan or forbearance shall be pushed aside, and the transaction shall be dealt with as *usurious if it be such in fact.*" Syl. Pt. 4, *Carper v. Kanawha Banking & Trust Company*, 157 W. Va. 477, 207 S.E.2d 897 (1974) (citations omitted) (emphasis added).

44. In attempting to resolve the question of who is the true lender, trial courts and administrative agencies have most often conducted an inquiry to determine which party, as between the bank and the non-bank entity, had the "predominate economic interest" or risk in the loans. Based upon the review of how rent-a-bank cases have been approached by other courts and regulators, the Court concludes that the predominant economic interest standard is the proper standard to determine who the true lender is in the present case.

45. In one of the earliest "rent-a-bank" cases, the North Carolina Commission of Banking was investigating Ace, a storefront payday lender, in connection with its rent-a-bank arrangement with Goleta National Bank. Although the state had not sued the bank, Goleta filed a separate suit against the state agency in federal court asserting federal preemption and seeking to enjoin the state's investigation of Ace. In its order dismissing Goleta's case, the Court in *Goleta National Bank v. Lingerfelt*, 211 F.Supp.2d 711 (E.D.N.C. 2002), framed the precise factual issue that CashCall also raised in its notice of removal:

> Although Ace contends that Goleta is the real maker of the loans at issue, the State contends just the opposite; that Ace is using Goleta's name as mere subterfuge for its own unlawful lending practices. Thus, a sharp factual issue is presented as to whether Goleta, the national bank, is the real lender at issue. <u>If Ace is the de facto lender, then its payday loans may violate the North Carolina Check Casher Act (citation omitted), which prohibits licensed check cashers from making loans</u>.

Id. at 717 (emphasis added). The court in *Lingerfelt* noted that even if Goleta is the true maker of the payday loans, Ace would still have to comply with the North Carolina Loan Broker Act. *Id.* at 718. The latter act, which is very similar to the West Virginia Credit Services

Organizations Act ("CSO ACT"), W. Va. Code § 46A-6C-1, et seq., requires that the loan broker obtain a bond in favor of the State and provide certain written disclosures to prospective borrowers. The Court notes that the State also alleged that CashCall violated the CSO Act by assisting consumers in obtaining extensions of credit from the Bank. *See* Fourth Cause of Action, Amended Complaint.

46. In another case involving Ace, *State of Colorado ex rel. Salazar v. Ace Cash Express, Inc.*, 188 F.Supp.2d 1282 (D.Colo. 2002), the court again sided with the state in its challenge to Ace's rent-a-bank arrangement and similarly found that the state's case was not preempted. In *Salazar*, the state of Colorado sued Ace and did not sue the national bank. Ace, like CashCall in the case at bar, removed the case to federal court on the grounds of federal preemption. Specifically, Ace sought to assert the preemption of Goleta National Bank which was not a party to the case. The court in *Salazar* rejected Ace's argument, stating that the National Banking Act "regulates national banks and only national banks," and also noting that Ace "attempts to circumvent this result by arguing that it is an agent for loans made by Goleta." *Id.* at 1284. In remanding the case to state court, the court in *Salazar* distinguished the case from *Marquette v. Nat'l Bank of Minneapolis v. First of Omaha Serv. Corp.*, 439 U.S. 299, 99 S.Ct. 540 (1978), "where the defendant was a subsidiary of a national bank established to administer its credit card program," and *Krispin v. May Dept. Stores Co.*, 218 F.3d919, 922-24 (8th Cir.2000), where the national bank was a wholly-owned subsidiary of the store. *Salazar*, 188 F.Supp.2d at 1284-85.

47. In *Flowers v. EZPawn Oklahoma, Inc.*, 307 F.Supp.2d 1191 (N.D.Okla.2004), the United States District Court for the Northern District of Oklahoma examined a challenge to a rent-a-bank arrangement in which a non-bank entity removed the case to federal court. As in the present case, the plaintiffs in *Flowers* asserted that the non-bank entity was the real lender. The *Flowers*

court remanded the private class action to state court, citing *Salazar, supra*, with approval and noting that the plaintiffs' complaint was strictly about a non-bank's violation of state law and alleged no claims against a national bank. *Id.* at 1194.

48. In *West Virginia v. CashCall, Inc., supra*, Judge Goodwin followed the precedent of the federal cases discussed above in granting the State's motion to remand. In his reasoning of the conclusion that the State's usury law claim against CashCall is not preempted, Judge Goodwin explained: "If CashCall is found to be a de facto lender, then CashCall may be liable under West Virginia usury laws." 605 F.Supp.2d 781, 787. In making this observation, Judge Goodwin legitimized the State's position that the Court must conduct an inquiry to determine whether CashCall, the non-bank entity, was the de facto lender, and if so, the State will prevail on these claims. Pertinent to this Court's review, Judge Goodwin also found that "CashCall and the Bank are completely separate entities." *Id.* at 786. Further acknowledging the legitimacy of the State's claim that the key inquiry is whether CashCall was the de facto lender, Judge Goodwin stated: "I cannot determine which entity is the true lender based on the record before the Court. Therefore, even assuming that the Bank's definite status as the true lender would be dispositive of the complete preemption question, CashCall has not sustained its burden of establishing that fact." *Id.* at 797, n. 9 (referring to the defendant's burden of establishing federal jurisdiction).

Federal Regulatory Efforts to End Rent-a-Bank

49. During this litigation CashCall has stated and implied that the subject lending program was approved by the FDIC, the primary federal agency that regulates state-chartered banks such as the Bank in question in the present case. *See* Subpoena Response Letter, pp. 1-2. However, CashCall never produced any evidence that the FDIC had approved its practices. In fact, the evidence of record and the legal authority presented indicate that both the Office of the

Comptroller of the Currency ("OCC"), the agency that primarily regulates national banks, and the FDIC issued directives and took other actions intended to terminate the practice characterized as "rent-a-bank," including enforcement action against CashCall's former partner, First Bank of Delaware, and CompuCredit. Furthermore, the FDIC document identified all of the objectionable "third-party lending programs" in which the Delaware bank was involved, one of which was the bank's arrangements with CashCall. *See* Testimony of Ms. Saunders, *supra.*

50. The OCC's concerns about the misuse of bank charters in rent-a-bank arrangements with payday lenders and other non-bank entities to evade state usury laws is also evidenced in its Preemption Determination issued May 23, 2001 to clarify the extent of national bank preemption in response to questions and concerns from state regulators and other parties. Among other things, the OCC clarified that national banks may use the services of agents and other third parties in connection with its lending activities, even when agents undertake those activities at sites other than the main office or branch office of the bank. But the OCC noted a distinction applicable to facts of this case: "This is not a situation where a loan product has been developed by a non-bank vendor that seeks to use a national bank as a delivery vehicle, and where the vendor, rather than the bank, has the preponderant economic interest in the loan." *See Preemption Determination*, 66 Fed. Reg. 28,593 (May 23, 2001), p. 28,595, n.6. (emphasis added). Although the loans offered by CashCall are installment loans as opposed to payday loans, the business model used by CashCall is essentially the same as the rent-a-bank arrangements subject to scrutiny and termination actions by federal regulatory agencies, as the arrangement between CashCall and the Bank was designed to enable a non-bank entity, CashCall, to make improper use of the Bank's federal preemption status to evade states' usury laws.

51. Based on the documentary and testimonial evidence produced during Phase II of the trial and the prevailing law on the subject matter as set forth above, the Court makes the following findings of fact:

a. That 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;

b. That CashCall was not the agent of the Bank, but was an independent contractor;

c. 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;

d. That CashCall established the subject lending program with the purpose to deliver the loan product CashCall had already been offering in other states prior to its relationship with the Bank in an attempt to evade the lender licensing and usury laws of West Virginia;

e. That the maximum allowable interest rate under West Virginia law for the loans in question was 18%;

f. That the loans made by CashCall to West Virginia consumers under the lending program greatly exceeded the maximum allowable interest rates under West Virginia and are usurious loans;

g. That CashCall made loans in West Virginia, directly or indirectly, without obtaining a business registration certificate from the State Tax Department, in violation of W. Va. Code § 46A-7-115;

h. That CashCall, by the making and the collecting of usurious loans and excess charges without a license, has engaged in unfair or deceptive acts or practices in violation of W. Va. Code § 46A-6-104; and

i. That CashCall has engaged in a course of repeated and willful violations of the WVCCPA, specifically, repeatedly and willfully violating W. Va. Code § 46A-7-115 (making loans in West Virginia without a license) and §46A-6-104 (unfair or deceptive acts or practices), as to warrant assessment by this Court of a civil penalty of up to $5,000 for each violation, as set forth in W. Va. Code § 46A-7-111(2).

Overview of Relief for Consumers and the State

52. Generally, the State seeks a final order from the Court permanently enjoining CashCall from engaging in unlawful lending and debt collection practices as alleged in the Amended Complaint, as authorized by W. Va. Code § 46A-7-108.[8] The State also asks that a Final Order be entered that: (1) grants the consumers restitution, debt cancellation disgorgement, and other appropriate relief, as authorized by W. Va. Code § 46A-7-108; (2) refunds and awards to the consumers the unlawful interest agreed to be paid by the consumers, as authorized by W. Va. Code § 47-6-6; (3) finds that CashCall engaged in a course of repeated and willful violations of the WVCCPA and awards the State a civil penalty of up to $5,000.00 for each violation, pursuant to W. Va. Code § 46A-7-111; and (4) grants reimbursement to the State for its attorney's fees and costs expended in connection with investigation and litigation of this action.

53. As stated above, pursuant to W. Va. Code § 47-6-6 the penalty for usury is that all usurious loan contracts shall be void as to all interest and that the borrower, in addition, may recover an amount equal to four times all interest agreed to be paid. The total amount of interest agreed to be paid by West Virginia consumers in relation to the usurious loans is $2,511,421.99. *See* Joint Ex. 1. According to the Court's calculations four times the amount of interest agreed to be paid by all West Virginia consumers is $10,045,687.96.

54. The State also seeks its attorney's fees and costs for the prosecution of this enforcement action against CashCall. As to relief available under the WVCCPA, the Supreme Court of Appeals of West Virginia held that the use of the phrase "other appropriate relief" in W. Va. Code § 46A-7-108 "indicates that the Legislature means the full array of equitable relief to be available in suits brought by the Attorney General." *State By and Through McGraw v. Imperial*

[8] Under W. Va. Code § 46A-7-108, "the attorney general may bring a civil action to restrain a person from violating this chapter and for other appropriate relief."

Marketing, 203 W. Va. 203, 215-216, 506 S.E.2d 799, 811-812 (1998). In his concurring opinion in *Imperial Marketing*, Justice Starcher concluded that the Attorney General would "be entitled to collect the attorneys' fees and costs incurred for the work necessary in the filing and prosecution of [consumer protection] lawsuits." *Id.* at 219, 815, n. 6 (Starcher, J., concurring). Furthermore, the Supreme Court of Appeals of West Virginia has held that "there is authority *in equity* to award to the prevailing litigant his or her reasonable attorneys' fees as 'costs' without express statutory authorization, when the losing party has acted in bad faith, vexatiously, wantonly or for oppressive reasons." Syl. Pt. 3, *Sally-Mike Properties v. Yokum*, 179 W. Va. 48, 365 S.E.2d 246 (1986) (emphasis added). Based on the forgoing, the Court finds and concludes that the Attorney General should be awarded his costs, including reasonable attorney's fees for Phase II of the trial.

CONCLUSIONS OF LAW
(Phase II of Trial)

1. Based on the Court's finding that CashCall bore the predominant economic risk of the lending program and thus, was the de facto lender of such loans, the Court concludes that as the lender of consumer loans CashCall violated W. Va. Code § 46A-7-115 by failing to obtain a business registration certificate from the state tax department.

2. The Court also concludes that the loans made by CashCall to West Virginia consumers were usurious loans, having interest rates that exceeded the maximum legal amount of 18%. Therefore, under W. Va. Code § 47-6-6, the Court concludes that the loan contracts made are void as to all interest set forth in such loan contracts.

3. The Court also concludes that by making and collecting usurious loans without a license, CashCall engaged in unfair or deceptive acts or practices in violation of W. Va. Code § 46A-6-104. As stated above, the Court finds that such violations were repeated and willful violations of the WVCCPA.

4. The Court need not reach the question of whether CashCall violated the CSO Act based on its finding that CashCall was the true lender. However, the Court rejects CashCall's position that it would exempt from the CSO Act because it was a "bank service company," as defined by the Bank Service Company Act. In order to qualify as a bank service company, all of the capital of the company organized to perform such services must be owned by one or more insured depository institutions. 12 U.S.C. § 1861(b)(2)(A)(ii). The Court concludes that CashCall does not meet the definition of a bank service company as defined by the Bank Service Company Act, and thus, would not be exempt from the WV CSO Act.

DECISION

Based upon all of the foregoing, the Court hereby **ORDERS** as follows:

(1) The State is hereby awarded an injunction against CashCall, as authorized by W. Va. Code § 46A-7-108, permanently prohibiting CashCall from violating the WVCCPA and specifically prohibiting CashCall from engaging, directly or indirectly, in making loans in West Virginia without a license, making or collection usurious loans, and collecting or attempting to collect excess charges, as set forth in the WVCCPA.

(2) The State is hereby awarded a civil penalty against CashCall in the amount of $730,000.00 for repeatedly and willfully making loans in West Virginia without a license in violation of W. Va. Code § 46A- 7-115 of the WVCCPA. Such amount consists of a civil penalty of $2,500.00 for each of the 292 loans made to West Virginia consumers.

Such money awarded as a civil penalty shall be placed in the State Treasury to be appropriated by the West Virginia Legislature.

(3) The State is hereby awarded a civil penalty against CashCall in the amount of $730,000 for repeatedly and willfully engaging in unfair or deceptive acts or practices in violation of W. Va. Code § 46A-6-104 of the WVCCPA, by the making and the collecting of usurious loans. Such amount consists of a civil penalty of $2,500.00 for each of the 292 loans made to West Virginia consumers. Such money awarded as a civil penalty shall be placed in the State Treasury to be appropriated by the West Virginia Legislature.

(4) The State is hereby awarded a judgment against CashCall in the amount of $10,045,687.96 for making usurious loans in violation of W. Va. Code §47-6-6, said amount being equal to "four times all interest agreed to paid" by each consumer on each of the 292 loans made in West Virginia as provided in W. Va. Code § 47-6-6. This amount shall be refunded to the consumers in accordance with W. Va. Code § 46A-7-111. Any such refunded money owed to a consumer, but unable to be paid to such consumer, shall be held in a trust account, pending a later determination by this Court as to the proper distribution of such money.

(5) In accordance with the equitable powers of the Court and the policy underlying W. Va. Code § 46A-6-105, the Court **ORDERS** that all of the loan contracts entered into between West Virginia consumers and CashCall are void, that any debts still allegedly owed by any West Virginia consumer to CashCall are cancelled, and that CashCall shall notify credit bureaus to delete all references to West Virginia accounts regarding the subject loan accounts from the credit record of the West Virginia consumers. However, CashCall is not required to delete the accounts in those instances where it has only

reported positive payment history. Furthermore, in light of voidance of the subject loan contracts, CashCall shall not file 1099(c) debt cancellation forms with the Internal Revenue Service.

(6) The Court further **ORDERS** that the State is awarded judgment against CashCall for all of its costs, including its reasonable attorney's fees, for the prosecution of Phase II of the trial. This amount shall be determined at a later date upon petition by the State to be filed within a reasonable time after entry of this Order.

The objections of any party aggrieved by this Order are noted and preserved. The Clerk is **DIRECTED** to send a certified copy of this Order to all counsel of record.

ENTERED this 10 day of September, 2012.

Louis H. Bloom, Judge

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT
GIVEN UNDER MY HAND AND SEAL OF SAID COURT
THIS 10 DAY OF SEPTEMBER 2012
CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

Exhibit 14

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

PEOPLE OF THE STATE OF NEW YORK,
by ELIOT SPITZER, Attorney General
of the State of New York,
Petitioner,

-against-

DECISION AND ORDER
INDEX NO. 5302-04

JAG NY, LLC., d/b/a N.Y. CATALOG
SALES, and JOHN A. GILL, JR.,
Individually and as a Principal
of JAG NR, LLC.,
Respondents.

(Supreme Court, Albany Co. Motion Term - December 6, 2004)
(RJI No. 0104-079381)

(Justice Bernard J. Malone, Jr., Presiding)

APPEARANCES: Hon. Eliot Spitzer
Attorney General of the State of New York
Attorney for Plaintiff
(Mark D. Fleischer, Esq., of Counsel)
The Capitol
Albany, New York 12224

Tuczinski, Cavalier, Burstein & Collura, P.C.
Attorneys for Defendants
(Roland M. Cavalier, Esq., of Counsel)
54 State Street
Suite 803
Albany, New York 12207

MALONE, J:

This is a special proceeding brought by the Attorney General against the respondents JAG NY, LLC, d/b/a N.Y. Catalog Sales (JAG) and John A. Gill, Jr., an alleged principal of JAG, for a permanent injunction, restitution, damages, civil penalties and costs upon

the grounds that the respondents are operating an illegal payday checking service providing short term loans at usurious rates of interest and that they are engaging in improper collection practices.

JAG is a limited liability company that operates three stores in the State of New York, one in the Town of Queensbury and two in Watertown adjoining the Fort Drum Military Reservation Respondents contend that their business is selling merchandise from catalogs and, as a feature of their business, a customer can write a check for an amount in excess of the purchase price of the merchandise or gift certificates and receive cash back. The Attorney General contends that the respondents' actual business is the making of short term payday loans at usurious interest rates and that the catalog sales are a sham to cover the illegal loans. The respondents place advertisements in newspapers and on the radio, publish fliers, place store window signs and use sandwich boards advertising the ability of consumers to obtain money at their stores, regardless of the consumer's credit history. The main thrust of these advertisements is the ability of customers to obtain immediate cash. The references to catalog sales are in much smaller print. In their memorandum of law, the respondents state that JAG does business in the following manner:

> "A customer can qualify to do business with JAG NY by presenting evidence of current employment and an open checking account. At the three JAG NY showrooms, catalogs are available so that customers may browse

through them and select merchandise for purchase. Alternatively, a customer can purchase a catalog for $3 and take the catalog home so that they may browse for merchandise at their convenience and in the comfort of their home[1]. The customer may either order merchandise at the time they enter the store, or may instead purchase a gift certificate for use in ordering merchandise at a later date.[2] Purchases of gift certificates are in preprinted denominations of either $15 or $30. Upon purchasing merchandise or a gift certificate, a customer is entitled to write a check above the amount of merchandise or certificates purchased. The permissible limits are set forth in Exhibit "D" to the Waits Affidavit, but in general, a customer can write for $100 in excess of every $30 of merchandise or gift certificates purchased. There are other limits on the amount of any customer transaction. For instance, the customer's check may not exceed 50% of the customer's net pay.

The checks are deposited in time to be presented against the customer's checking account on his or her next payday. Customers are told that checks will be deposited on their next payday, but that they have option to come back to the store on or before the next payday and pay the amount of their check in cash. This is known as 'picking up' a check. If a customer picks up a check for cash, that customer can enter into another transaction. If the customer allows the check, to be deposited, he cannot enter into another transaction until his check fully clears collection. Many customers engage in repeat transactions, meaning that they will do business with JAG NY several times over the course of a year."

The advertisements inform consumers that they can obtain a cash advance of up to $500.00 by purchasing a gift certificate or catalog merchandise and writing a check in an amount over the costs of the certificate or merchandise. JAG currently uses only one

catalog offering merchandise supplied by an independent wholesaler In the past, the three stores had two catalogs available. Before a customer can write a check in excess of the price of the gift certificate, he or she must complete an application form which includes the consumer's social security number, bank account numbers and personal and professional references.

The petitioner contends that most of the people doing business with JAG are there to obtain short term loans to meet their financial needs until their next payday. Supporting this argument the petitioner asserts that the merchandise offered in the catalog is of dubious quality and can be purchased from other retailers at significantly lower prices. The petitioner further argues that JAG's customers do not redeem most of their certificates. Finally the petitioner states that the practice of requiring a customer to pay $30.00 for what he claims is a worthless gift certificate in order to obtain a $100.00 cash loan is the same as an interest rate of 720 percent per year

Additionally, petitioner asserts that the respondents also engage in illegal collection practices when a customer has insufficient funds to honor his or her check when it makes daily telephone collection calls to the consumer both at home and at work and by also disclosing the consumer's failure to honor a check to customers' employers and colleagues

The petitioner has filed this proceeding pursuant to Executive

Law section 63(12) which provides as follows:

> "Whenever any person shall engage in repeated fraudulent or illegal acts or otherwise demonstrate persistent fraud or illegality in the carrying on, conducting or transaction of business, the attorney general may apply, in the name of the people of the state of New York, to the supreme court of the state of New York, on notice of five days, for an order enjoining the continuance of such business activity or of any fraudulent or illegal acts, directing restitution and damages and, in an appropriate case, cancelling any certificate filed under and by virtue of the provisions of section four hundred forty of the former penal law or section one hundred thirty of the general business law, and the court may award the relief applied for or so much thereof as it may deem proper. The word 'fraud' or 'fraudulent' as used herein shall include any device, scheme or artifice to defraud and any deception, misrepresentation, concealment, suppression, false pretense, false promise or unconscionable contractual provisions. The term 'persistent fraud' or 'illegality' as used herein shall include continuance or carrying on of any fraudulent or illegal act or conduct. The term 'repeated' as used herein shall include repetition of any separate and distinct fraudulent or illegal act, or conduct which affects more than one person."

The Court notes that the fraudulent and illegal activities addressed by the statute include "unconscionable contractual provisions" and conduct affecting more than one person. Clearly, the submissions made by the petitioner have established as a matter of law that the conduct under review affects more than one person. Also, if it is determined that the cash advances being made by the respondents are usurious they would be "unconscionable contractual provisions" under the language of the statute

The first cause of action in the petition alleges a violation of General Obligations Law section 5-501, New York's civil usury

statute, which makes it unlawful to charge interest upon a loan or forbearance of any goods, money or things in action at a rate exceeding that proscribed in Banking Law section 14-a, which rate is currently 16 percent.

The second cause of action alleges a violation of Penal Law section 190.40, New York's criminal usury statute which prohibits a loan at an interest rate exceeding 25 percent

The third cause of action alleges a violation of Banking Law section 340, a statute addressed to unlicensed lending, which prohibits any person or entity to "engage in the business of making loans in the principal amount of $25,000.00 or less for any loan to an individual for personal, family, household, or investment purposes *** and charge, contract for, or receive a greater rate of interest than a lender would be permitted by law to charge if he were not a licensee hereunder except as authorized by this article and without first obtaining a license from the superintendent." It is alleged and not denied that the respondents were not licensed by the New York State Superintendent of Banking at the time of the transactions giving rise to this litigation.

The fourth cause of action alleges a violation of General Business Law article 29-H which prohibits, among other things, a creditor from communicating the nature of a consumer claim to a debtor's employer prior to obtaining final judgment against the debtor and from communicating with a debtor with such frequency as

can be reasonably expected to abuse or harass the debtor.

The fifth cause of action alleges a violation of Executive Law section 63(12) for repeated fraudulent business conduct.

The Court will first address the issue of whether the cash advances made by JAG are loans of money at usurious rates. The "purpose of usury laws from time immemorial, has been to protect desperately poor people from the consequences of their own desperation" (Schneider v Phelps, 41 NY2d 238, 243). "In order for a transaction to constitute a usurious] loan, there must be a borrower and a lender; and it must appear that the real purpose of the transaction was, on the one side, to lend money at usurious interest reserved in some form by the contract and, on the other side, to borrow upon the usurious terms dictated by the lender" (Donatelli v Siskind, 170 AD2d 433, 434). "When a transaction is truly an illegal, usurious loan, there is obviously a motivation to disguise it to look like a legal non-usurious transaction; and thus the fact that the transaction is in form legal and non-usurious will not prevent courts from examining the transaction to see whether the true nature of the transaction is not what its form indicates" (Kuklis v Treister, 83 AD2d 545). "If it appears that the parties are making a loan, then the transaction will be considered a loan without regard to its form or to the fact that the parties call it by some other name" (The Tuition Plan, Inc. v Zicari, 70 Misc2d 918, 921).

In support of his application the petitioner has submitted: copies of the respondents' newspaper advertisements; transcripts of the deposition testimony of Mr. Gill, two current employees of JAG and a former employee of JAG; an affidavit from another former employee of JAG; an affidavit from a former intern with the Attorney General setting forth the results of her internet comparison of the prices for the merchandise in JAG's catalog compared to prices for the same merchandise available from other vendors on the internet; a copy of JAG's employee handbook; JAG's application form for customers to receive cash advances; a report of all consumer transactions at JAG's Queensbury store between May of 2000 through early November 2002; the affidavits of twenty consumers who have done business with JAG; and two affidavits from former employees of JAG

These submissions by the petitioner show to the Court that JAG primarily advertises its service as a method by which employed people can borrow money until their next pay. But, in order to do so those people must also purchase gift certificates or merchandise out of the catalog maintained at respondents' stores. It is quite clear from the voluminous papers submitted (see pp. 15-16 of this decision) that most of the people who use JAG's stores do so to borrow money. It is also clear that a substantial majority of JAG's customers do not redeem a substantial majority of their certificates.

has submitted affidavits of four of its thousands of customers who state they are satisfied with how JAG does business. "The existence of satisfied customers in no way excuses violations of the *** law" (State of New York v Midland Equities of New York, Inc., 117 Misc2d 203, 207 The respondents also submitted affidavits from Mr. Gill and three of GAG's employees alleging that JAG does not make loans, has many customers who use their gift certificates, and that the merchandise in Jag's catalog is sold at comparable prices by other merchants. The respondents also argue that the complaints set forth by the twenty consumers relied upon by the Attorney General constitute only a small proportion of their customers. In the case of State of New York v Princess Prestige Co., Inc., 42 NY 104, 107, the Court of Appeals stated:

> "The record established that respondents by their conduct failed to comply with the statutory requirements as to home solicitation sales. This conclusion is not vitiated by the fact that the proceeding was initiated on the basis of 16 complaints out of what respondents tell us were some 3,600 transactions."

Accordingly, this Court finds that the contention that only twenty customers who have complained of illegal, usurious cash loans is not a basis for failing to find a violation of the usury statutes is legally insufficient to defeat the claim

respondents also argue that their submissions have raised triable issues of fact requiring a hearing and that the denial of that hearing would render Executive Law section 63(12) unconstitutional by depriving the respondents of property without

notice and the opportunity to be heard. A special proceeding such as this is designed for expedited relief and the "same test as applied to a motion for summary judgment is used to determine a special proceeding" (Jones v Marcy, 135 AD2d 887) Unsubstantiated, self-serving assertions will not serve to raise a question of fact requiring a hearing (Matter of People of the State of New York v Telehublink Corp., 301 AD2d 1006, 1008). A telemarketer's conclusory claim that it complied with all relevant laws was insufficient to rebut the petitioner's *prima facie* showing that New York consumers were being subjected to illegal transactions (supra, at 1009). In this Court's view submissions by the respondents fail to raise a triable issue of fact sufficient to require a hearing.

As to the proffered due process defense, the respondents know that they have been investigated by the petitioner Attorney General for years and were clearly apprised of the underlying allegations being made against them. They have had ample opportunity to forth their positions in their voluminous answering papers and also during oral argument. The Court finds that there has been no violation of the Due Process Clauses of either the Federal or State Constitutions (People of the State of New York v Apple Health and Sports Club, Ltd., Inc., 80 NY2d 803).

This Court finds upon the voluminous record before it that the respondents are, as a matter of law, engaged in a scheme to make

loans which are usurious. If "a pretended sale of goods is made the underlying scheme for loaning money upon usury, the courts will be vigilant to judge the transaction by its real character rather than the form and color which the parties have seen fit to give it" (Archer Motor Co. v Relin, 255 AD2d 333, 334). The practice of selling near worthless gift coupons as the basis for advancing cash at an illegal interest rate has long been condemned (Glover v Buchman, 104 SW2d 66). A scheme which seems to be identical to the one before this Court was addressed in the case of Cash Back Catalog Sales, Inc. v Price, 102 FS2d 1375, 1380, 1381, and that court stated:

> "When presented with payday loans like these, the Arkansas Supreme Court reasoned:
> While the agreed statement shows that the articles of merchandise can be ordered through the lender's agent at fair prices, there is no pretense they can be had at bargain prices ... But it is unreasonable to expect needy persons, as a rule, to make full use of such a coupon, exacted from their necessity when they borrow a hundred dollars. Glover v Buckman, 104 S.W.2d 66, 67 (Tex. Civ. App. 1937). A reasonable trier of fact could conclude that the amount of the gift certificates are, in substance, interest charges paid by Price.
> I make no factual finding, but it seems obvious to me that 'check cashing' is the main event. The reduced advance is the hook. The gift certificate only makes it look better. It may be true that customers can buy a gift certificate even if they do not cash a check. Why or how often anyone would do such a thing would be an interesting inquiry. I cannot imagine a brisk business in gift certificates alone."

While the judge in the Cash Back Catalog Sales case declined to determine as a matter of law that the gift certificates were used to conceal a usurious loan, this Justice does not, after due

deliberation, reach the same result The petitioner has submitted overwhelming evidence that almost all of JAG's customers use its services in order to obtain cash to be used by them until their next payday. In the ordinary course of business a merchant receiving checks would deposit those checks as soon as possible If JAG is not operating as a check cashing service why is it agreeing to hold its customers' checks until the next payday? another way, vendors do not simply give their customers vendors' own cash to be held without repayment over a period of time without getting some return on their own money. Accordingly, upon this record, the Court determines that JAG has been and is engaged in making usurious payday loans.

The petitioner is awarded a permanent injunction prohibiting the respondents from cashing check for customers in amounts in excess of the face value of the merchandise or gift certificates that the customers purchase, except upon the condition that the check be deposited by JAG on the same or next business day, is, in the normal course of business

The issuance of a permanent injunction against the respondents is based upon a finding that the respondents violated the civil usury prohibition set forth in General Obligations Law section 5-501. This Court makes no determination, without prejudice to a separate inquiry or proceeding as to whether the respondents violated the criminal usury provisions of Penal Law section 190.40.

The determination that the respondents made usurious loans without appropriate license from the New York State Superintendent of Banking establishes a violation of Banking Law section Further, the usurious loans are "unconscionable contractual provisions" and therefore are fraud pursuant to Executive section 63(12).

With respect to the unlawful collection practices allegation, JAG's own Employee Manual directs its employees to make daily contact with debtors to persuade them to pay. JAG employees admit that they made telephone calls to supervisors and colleagues of debtor soldiers and, if those supervisors and colleagues inquired about the nature of the call, they would disclose information concerning the unpaid debts. That is a violation of General Business Law section 601 (b)

As to Mr. Gill's personal liability, New York law is settled that an officer or director of a corporation may be liable for the fraud of the corporation if he or she participated in it or had actual knowledge of it (People of the State of New York v Apple Health & Sports Club, Ltd., Inc., 80 NY2d 803, 807). Mr. Gill's testimony from his deposition before the Attorney General establishes his culpability for the acts of JAG prior to his resigning his position as managing member, which position this Court equates with that of officer and director for purposes of personal liability.

The petitioner requests that this Court declare null and void any loan made by JAG which charged a usurious interest rate. If a debtor has not made any repayment upon a usurious loan the debtor is released from the obligation to pay both the principal and interest (Russo v Carey, 271 AD2d 889). However, once a borrower starts to repay a usurious loan, the borrower can only recover from the lender the amount of money the borrower paid that is more than the legal interest (Dollar Dry Dock Savings Bank of N.Y. v Bellino, 206 AD2d 499, 500). The determination of each borrower's obligation to repay his or her loan to JAG is going to have to be made on a case by case basis in accordance with the precedents set forth above. The same will be true with respect to the amount of restitution, if any, to be awarded to each of JAG's customers. Upon application the Court will appoint one or more referee to hear and determine each customer's complaints against the respondents The Attorney General, in the first instance, shall pay the referee's fee (Matter of People v Introductions Inc., 252 AD2d 631). Finally, petitioner is entitled to awards of $2,000.00 statutory costs against each respondent

All papers, including this decision and order, are being returned to the Office of the Attorney General. The signing of this decision and order shall not constitute entry, notice of entry or filing under CPLR 2220

This memorandum shall constitute both the decision and the order of the Court.

IT IS SO ORDERED.

DATED: ALBANY, NEW YORK
JANUARY 20, 2005

Bernard J. Malone Jr.

BERNARD J. MALONE, JR., J.S.C

PAPERS CONSIDERED:
notice of petition dated August 27, 2004;
petition verified August 27, 2004, with exhibits;
affidavit of Kylie Seery sworn to September 5, 2003;
affidavit of Laura Silverstein sworn to August 8, 2003;
answer verified October 14, 2204;
affidavit of Nancy Favry sworn to during October 2004;
affidavit of Dawn Musick sworn to during October 2004;
affidavit of John A. Gill, Jr., sworn to October 8, 2004, with exhibits;
affidavit of Deborah Waits sworn to October 12, 2004, with exhibits;
affidavit of Winifred A. Sharrow sworn to October 12, 2004, with exhibit;
affidavit of Amy J. Putnam sworn to October 12, 2004, with exhibits;
affidavit of Andrew C. Maulbetsch sworn to October 13, 2004, with exhibits;
affidavit of Michael Lockaby sworn to October 14, 2004;
affidavit of Cora Lockaby sworn to October 14, 2004;
reply affirmation of Mark D. Fleischer dated November 8, 2004, with exhibits;
affidavit of Nancy Fitzgerald sworn to September 28, 2004;
affidavit of Pamela Wells sworn to September 14, 2004;
affidavit of James Bills sworn to September 27, 2004;
affidavit of Veronica Bounds sworn to September 22, 2004;
affidavit of Vicki Canale sworn to October 15, 2004;
affidavit of Sharon A. Conway sworn to September 10, 2004;
affidavit of Maria Dawkins sworn to October 19, 2004;
affidavit of John Gallagher sworn to September 16, 2004;
affidavit of Danielle Harper sworn to October 18, 2004;
affidavit of Amelia Hill sworn to September 28, 2004;
affidavit of Sarah Hillis sworn to October 4, 2004;
affidavit of Sheri Hughes sworn to September 30, 2004;

affidavit of Thomas Manley sworn to September 28, 2004;
affidavit of Jessica McWain sworn to October 8, 2004;
affidavit of Robert Olcott sworn to October 4, 2004;
affidavit of Sandra Parrow sworn to October 25, 2004;
affidavit of Mark Phillips sworn to September 28, 2004;
affidavit of Jennifer Schermerhorn sworn to September 23, 2004;
affidavit of Zenova St. Louis-Dudley sworn to October 22, 2004;
affidavit of Leslie Stackel sworn to October 22, 2004;
affidavit of Thomas Stackel sworn to October 1, 2004;
affidavit of Michael Sullivan sworn to October 14, 2004;
affirmation of Roland M. Cavalier dated November 18, 2004;
reply affirmation of Roland M. Cavalier dated December 3, 2004;
sur-reply affirmation of Mark D. Fleischer dated November 30, 2004;
reply affidavit of Deborah Waits sworn to November 22, 2004, with exhibit;
affirmation of Roland M. Cavalier dated November 18, 2004;
reply affidavit of Deborah Waits sworn to November 22, 2004, with exhibits.