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Hennepin County Civil, MN

STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF HENNEPIN | FOURTH JUDICIAL DISTRICT

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

Plaintiff,

v.

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

Defendant.

Judge Kathleen D. Sheehy

ORDER

Court File No. 27-CV-13-12740

This matter came before the Court at 8:30 a.m. on August 22, 2013, on Plaintiff's Motion for Temporary Injunction. Deputy Attorney General Nathan Brennaman, Esq., appeared for Plaintiff; Scott Benson, Esq., Briol & Associates, appeared on behalf of Defendants. Daniel Baren, Esq., appeared and offered testimony as Defendants' general counsel.

Based on the records, files, and proceedings herein, as well as the arguments and submissions of counsel, and for the reasons explained in the Memorandum attached and incorporated herein, the Court makes the following:

ORDER

1. Plaintiff's Motion for Temporary Injunction is GRANTED.

2. Effective from the date of this Order, Defendants CashCall, Inc., WS Funding, LLC, and

their agents, servants, employees, successors, and assigns are enjoined from:

a. Making, extending, arranging for, underwriting, funding, or purchasing any unsecured, personal loans to Minnesota borrowers that purport to be originated by Western Sky Financial, LLC or any other entity owned or controlled by Martin Webb that is not properly licensed to lend to Minnesota borrowers; and

b. Making, extending, arranging for, underwriting, funding, or purchasing any unsecured, personal loans to Minnesota borrowers that purport to be originated by any other entity not properly licensed to lend to Minnesota borrowers; and

c. Directly making, arranging for, underwriting, funding, or purchasing any unsecured, personal loans to Minnesota borrowers without becoming and remaining properly licensed to lend to Minnesota borrowers and otherwise complying with Minnesota's lending and usury laws.

3. Defendants are further enjoined from servicing any unsecured, personal loans that are originated on or after the date of this Order by any lender or entity that is not properly licensed to lend to Minnesota borrowers or is otherwise prohibited from lending to Minnesota borrowers.

4. Such injunction shall be effective until further order of the Court.

IT IS SO ORDERED.

BY THE COURT:

Dated: September 6, 2013

Kathleen D. Sheehy
Judge of District Court

MEMORANDUM

I. INTRODUCTION

This case involves allegations that Defendants routinely violate Minnesota's lending and consumer protection statutes. The State seeks a temporary injunction to prevent Defendants from purchasing and servicing any new loans made by another entity, Western Sky Financial, LLC, to Minnesota borrowers.

II. BACKGROUND

The State of Minnesota brought this action through Lori Swanson, its Attorney General, and Michael Rothman, its Commissioner of Commerce. The Defendants are two business entities: (1) CashCall, Inc., a California corporation; and (2) WS Funding, LLC, a Delaware limited liability company (Defendants). WS Funding is CashCall's wholly owned subsidiary.[1]

Both Defendants work closely with a third entity, Western Sky Financial, LLC, (Western Sky), and that relationship forms the basis of this lawsuit. Western Sky is a South Dakota limited liability company and its sole owner is Martin Webb, an enrolled member of the Cheyenne River Sioux Tribe. The Cheyenne River Sioux Tribe does not have any legal mechanism for creating a business entity under its tribal laws. Western Sky is, however, licensed to operate on the Cheyenne River Sioux's reservation. It also filed its "Articles of Organization" with the Office of the Secretary of the Cheyenne River Sioux Tribe. As such, Western Sky holds itself out as a Native American business that is immune from state and federal law.[2]

By claiming to be subject only to tribal law and therefore exempt from state and federal lending statutes and regulations, Western Sky charges extremely high interest rates on its loans. For example,

[1] The State's Complaint also refers to a third Defendant, WS Financial, LLC. According to Defendants' Memorandum in Opposition to the State's Motion for a Temporary Injunction, Defendants say that WS Financial, LLC, does not exist and that its name appeared on a document solely as the result of a "drafting error." *See* Baren Aff. ¶ 4.

[2] *E.g.*, Bryden Aff., Ex. V; Palumbo Aff. ¶¶ 5–6, Exs. A–C (stating that "Western Sky Financial, LLC, is a 100% Native American-owned business operating on a Native American Reservation").

Western Sky offered an $850 "loan product" to Minnesota consumers.[3] Western Sky charged a $350 loan origination fee and a 342.86% annual percentage rate on the full $850 principal amount.[4] Western Sky charged a $500 fee on a $1,500 loan bearing a 234.25% APR.[5] These loan products ranged up to a $10,000, loan on which the company charged 89.68% APR interest.[6]

Defendants work closely with Western Sky under several contracts.[7] These contracts create a relationship pursuant to which Defendants purchase promissory notes that Western Sky purports to execute with individual consumers in Minnesota and in various other states. One of the contracts requires Defendants to automatically purchase all of the loans that Western Sky "originates," without any limitation. These purchases occur on a daily basis when Western Sky essentially pays itself by deducting the value of the loan principal extended that day from a demand-deposit account maintained by Defendants.

In addition to guaranteeing to immediately purchase each and every loan that Western Sky extends, Defendants provide numerous services to Western Sky. These services include communicating with customers, maintaining communications infrastructure (for example, maintaining Western Sky's website and telephone lines), and even assisting with "underwriting requirements review."[8] With this "administrative support," Western Sky advertised on television, radio, and Internet media in multiple states, including Minnesota. It actively solicited Minnesota borrowers.

After Western Sky approves a loan application, it deposits funds into the borrowers' local bank accounts and then immediately sells the promissory note and all collection rights to Defendants. Western Sky's involvement with the loans ends completely at this point. Defendants always contact the borrowers within 24 hours of loan approval to notify them of the assignment. After purchasing the loans,

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[3] Bryden Aff., Ex. X.

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *See generally* Bryden Aff., Ex. F.

[8] Bryden Aff., Ex. F, Service Agreement WS00241.

Defendants undertake aggressive collection efforts. The State's affidavit testimony indicates that Defendants routinely ignore state and federal debt collection statutes, telling borrowers that the loans are exempt from those provisions and subject only to Cheyenne River Sioux tribal law.

The State claims that, by funding and facilitating all of Western Sky's activities, Defendants are essentially lending to Minnesotans at rates that far exceed those allowed by state law. Defendants also allegedly violate Minnesota laws by demanding payment on these loans, including illegal terms in the loan contracts, and engaging in deceptive trade practices. In support of this Motion for Temporary Injunction, the State submitted fifteen affidavits from Minnesota borrowers attesting to Defendants' conduct and activities.

Numerous other states have taken similar actions against these Defendants and/or Western Sky for the same alleged lending-related activity. These states include Colorado, Georgia, Illinois, Maryland, Massachusetts, Missouri, New Hampshire, New York, Oregon, Pennsylvania, and Washington.

III. PROCEDURAL POSTURE

The State initiated this case by filing its Complaint with this Court on July 11, 2013. On August 2, 2013, the State filed this Motion for a Temporary Injunction. Defendants did not submit an answer but instead filed a motion to dismiss pursuant to Rule 12.02(e) of the Minnesota Rules of Civil Procedure. That motion is scheduled to be heard October 1, 2013.[9]

IV. ANALYSIS

A. Defendants' Relationship with Western Sky

As an initial matter, the Parties dispute whether Defendants can be held accountable for the terms and content of Western Sky's loans. Defendants argue that they do not and never have made loans to

[9] Although oral arguments will not occur on Defendants' motion to dismiss until October 2013, both parties have already filed memoranda relating to that motion. Defendants relied heavily on their memorandum in support of the motion to dismiss while presenting its oral argument against the State's requested temporary injunction. As such, this Memorandum also relies on the arguments and authorities presented in the Parties' briefings related to both this Motion and the Defendants' motion to dismiss.

Minnesota consumers. Instead, Defendants claim that they merely purchase and service loans originated by Western Sky. The State argues that Defendants are the "de facto lender" behind these loans and that an injunction against them (as opposed to Western Sky) is therefore appropriate. The State pointed the Court to a California case involving claims against a defendant who serviced allegedly illegal loans made by another party.[10] In that case, the court concluded that neither party had provided any sufficiently persuasive authority on the issue. Instead of deciding the "de facto lender" question, that court merely allowed the plaintiff to continue with discovery to search for factual support.[11]

Regardless of whether a "true lender" or "de facto lender" test applies, the State has made a strong factual showing that, together, the Defendants and Western Sky are likely violating Minnesota law on a regular basis. For example, the existing record includes three agreements between Defendants and Western Sky: (1) an Agreement for the Assignment and Purchase of Promissory Notes (the "Assignment Agreement"); (2) a Promissory Note; and (3)an Agreement for Service (the "Service Agreement").

In the Assignment Agreement, the parties commit to a financing mechanism. First, Defendants promised to purchase every loan that Western Sky funds.[12] Defendants pay for the loans from a demand-deposit bank account known as the "Reserve Fund."[13] The Assignment Agreement requires Defendants to create, fund, and maintain this account.[14] Defendants must maintain the Reserve Fund with "an amount equal to the full value of two (2) days purchased notes calculated on the previous month's daily average."[15] Western Sky is authorized to pay itself at the end of every business day by deducting the amount of that day's executed loans from the Reserve Fund.[16] Defendants do not choose whether to purchase a specific loan from Western Sky—instead, they are obligated by the Assignment Agreement to

[10] *Ubaldi v. SLM Corp.*, 852 F.Supp.2d 1190, 1202–03 (N.D. Cal. 2012).

[11] *Id.*

[12] Bryden Aff., Ex. F, Assignment Agreement ¶ 8.

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.*

purchase each and every loan. In return, Western Sky promises that each borrower will meet certain criteria and that none of the borrowers will have made any payments on the loans.[17] Defendants pay Western Sky a minimum of $100,000 per month under this Agreement, an additional "minimum monthly administration fee" of $10,000, and "any and all fees associated with such assignment and purchase, including but not limited to any additional office or personnel costs . . . ACH, wiring or other bank fees."[18] Finally, Defendants indemnify Western Sky "for all costs arising or resulting from any and all civil, criminal or administrative claims or actions . . . ."[19]

In their Service Agreement, Defendants promise to provide a wide range of operational support to Western Sky. These services include website hosting/support, inbound/outbound customer service support (including "underwriting requirements review"), and electronic communications to customers.[20] Defendants also provide Western Sky's toll free telephone number and pay to maintain and update Western Sky's server equipment.[21]

Defendants' General Counsel, Dan Baren testified at the hearing. During his testimony, Baren acknowledged that the agreements in the record were either the ones currently in force between Defendants and Western Sky or that they did not differ from the current agreements in any material way.

The affidavit testimony in the record also supports the State's claim. Defendants submitted an affidavit from one of Western Sky's employees.[22] That affidavit is more notable for what it does not say than for what it does. Although it attempts to show that Western Sky's operations are independent, its hedged wording gives the impression that Western Sky is a mere shell to facilitate Defendants' activities. In comparison, the State submitted affidavits indicating that Defendants participated in lending and

[17] *Id.* ¶ 7.

[18] *Id.* ¶¶ 3b, 5.

[19] *Id.* ¶ 11.

[20] Bryden Aff., Ex. F, Service Agreement WS00241.

[21] *Id.* at WS00241; Assignment Agreement ¶ 6.

[22] Lawrence Aff.

underwriting decisions. For example, Defendants' employees contacted several Minnesota consumers to request more information to facilitate a decision on their loan applications.[23]

Finally, the Court notes that each of the loan contracts in the record specifically defines the term "Lender" as including Western Sky and "any subsequent holder of this Note."[24]

While there is a larger factual dispute regarding the actual extent of the Defendants' involvement in the lending process, the terms of the operating agreements and loan contracts establish that Defendants have at least the authority to participate in lending and underwriting decisions and have done so on occasion. These documents also show that the loans are inextricably linked to the Defendants' funding mechanism and operational support. In addition, the affidavit testimony from Minnesota borrowers supports the State's argument that Defendants effectively control most of Western Sky's business decisions.

B. The State is Entitled to a Temporary Injunction

District courts may grant temporary injunctions under Minn. R. Civ. P. 65.02(b) if the party seeking the injunction establishes that it has no adequate legal remedy and that the injunction is necessary to prevent an irreparable injury.[25] The moving party can establish its entitlement to injunctive relief by making a prima facie showing of an injury of such a nature that money damages alone will not be a sufficient remedy.[26]

This determination "is committed to the trial court's discretion" based upon a review of the available facts, although the factual record may consist of necessarily provisional and preliminary material.[27] The court's findings regarding a party's entitlement to an injunction will only be set aside if

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[23] *E.g.*, Krueger Aff. ¶ 3; Trelstad Aff. ¶ 3; Turnquist Aff. ¶ 3.

[24] *E.g.*, Stevens Aff., Ex. A.

[25] *Cherne Indus., Inc. v. Grounds & Assocs., Inc.*, 278 N.W.2d 81, 91 (Minn. 1979); *U.S. Bank Nat. Ass'n v. Angelon Corp.*, 615 N.W.2d 425, 435 (Minn. Ct. App. 2000).

[26] *Carl Bolander & Sons Co. v. City of Minneapolis*, 502 N.W.2d 203, 209 (Minn. 1993); Thompson v. Barnes, 294 Minn. 528, 533, 200 N.W.2d 921, 925 (1972); *Morse v. City of Waterville*, 458 N.W.2d 728, 729–30 (Minn. Ct. App. 1990), *rev. denied* (Minn. Sept. 28, 1990).

[27] *Carl Bolander & Sons*, 502 N.W.2d at 209; *Dahlberg Bros., Inc. v. Ford Motor Co.*, 272 Minn. 264, 274, 137 N.W.2d 314, 321 (1965).

clearly erroneous.[28] However, the trial court must evaluate specific factors before granting injunctive relief—failure to do so is a clear error.[29]

This analysis consists of the five so-called "*Dahlberg* factors": (1) the parties' likelihood of success on the merits, (2) the relative harm that would result from either the issuance or denial of injunctive relief, (3) the preexisting relationship between the parties, (4) any public interest or public policy involved in the determination, and (5) the administrative burdens implicated by judicial supervision and enforcement.[30]

In some cases in which the parties agree that a Minnesota statute applies and explicitly allows for injunctive relief to remedy a violation, trial courts need not undertake the full *Dahlberg* analysis.[31] However, if a party disputes whether a specific statute providing for injunctive relief applies to its conduct, the trial court must consider the full set of *Dahlberg* factors—even though the statute itself suggests a less rigorous analysis like in *Wadena*.[32]

While a temporary injunction should generally seek to maintain the status quo while a court considers the full merits of a dispute, courts also "ha[ve] the power to shape the relief in a manner which protects the basic rights of the parties, even if in some cases it requires disturbing the status quo."[33]

Here, the State argues that several provisions of the Minnesota Statutes entitle it to an injunction to prevent possible future violations. CashCall, however, disputes whether these statutes even apply to it or its alleged business practices. As a result, the State must satisfy all five *Dahlberg* factors to establish its entitlement to a temporary injunction on any of its six counts against Defendants.

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[28] *Haley v. Forcelle*, 669 N.W.2d 48, 55 (Minn. Ct. App. 2003); *Carl Bolander & Sons*, 502 N.W.2d at 209 (Minn. 1993); *see also U.S. Bank National Ass'n v. Angeion Corp.*, 615 N.W.2d 425, 434 (Minn. Ct. App. 2000) (citing *AMF Pinspotters, Inc. v. Harkins Bowling, Inc.*, 260 Minn. 499, 504, 110 N.W.2d 348, 351 (1961)).

[29] *State ex rel. Hatch v. Cross Country Bank, Inc.*, 703 N.W.2d 562, 572 (Minn. Ct. App. 2005); *Wadena Implement Co. v. Deere & Co., Inc.*, 480 N.W.2d 383, 388–89 (Minn. Ct. App. 1992).

[30] *Mounds View v. Metro. Airports Comm'n*, 590 N.W.2d 355, 357–58 (Minn. Ct. App. 1999); *Dahlberg Bros*, 272 Minn. at 274–75, 137 N.W.2d at 321–22.

[31] *Wadena*, 480 N.W.2d at 389.

[32] *State by Ulland v. Int'l Assoc. of Entrepreneurs of Am.*, 527 N.W.2d 133, 137 (Minn. Ct. App. 1995).

[33] *Miller v. Foley*, 317 N.W.2d 710, 712 (Minn. 1982); *N. Star State Bank of Roseville v. N. Star Bank Minn.*, 361 N.W.2d 889, 895 (Minn. Ct. App. 1985), *rev. denied* (Minn. Apr. 1985).

1. Likelihood that the State Will Prevail

The factual record strongly suggests that the State is particularly likely to prevail on at least four of its six claims.[34] Defendants did not present specific arguments relating to any of these counts. Instead, they rely on broad claims that various doctrines render them immune or exempt from Minnesota law. Those arguments are addressed below.

a. Violations of Minn. Stat. § 47.601

The State argues that Defendants regularly violate Section 47.601 of the Minnesota Statutes by making small short-term consumer loans of $1,000 or less—without a license and at rates far in excess of those allowed under the statute's provisions.

Minn. Stat. § 47.601 applies to consumer short-term lenders and assignees. A consumer short-term loan is any loan "which has a principal amount . . . of $1,000 or less and requires a minimum payment within 60 days of loan origination . . . or more than 25 percent of the principal balance." Defendants service a product that fits these criteria, i.e., the $850 loan offering.[35] By requiring borrowers to pay a $350 fee upon approval, Defendants receive what is essentially a payment of more than 25 percent of the principal balance. The Western Sky loan contracts that Defendants purchase and service refer to this obligation as a "prepayment."[36]

A "'consumer short-term lender' means an individual or entity engaged in the business of making or *arranging* consumer short-term loans, other than a state or federally chartered bank, savings bank, or credit union."[37] Although Defendants argue that they cannot be considered to be any kind of "lender," this claim fails as discussed above because the agreements between Defendants and Western Sky, combined with affidavit testimony, show that Defendants have at least a right to participate in Western Sky's lending business and have on occasion exercised that right. Moreover, the statute explicitly applies to

[34] The Court does not comment on the State's ability to prevail on the last two claims—the likely outcome of these four counts is sufficient to support the State's request for an injunction at this stage of litigation.

[35] White Aff. ¶¶ 4–5, Ex. A.

[36] *See, e.g.*, White Aff., Ex. A (itemizing a "prepaid" charge of $350).

[37] Minn. Stat. § 47.601, Subd. 1(e) (emphasis added).

entities who "arrang[e]" consumer short-term loans as well as the current holders or assignees of such loans.[38] Thus, although the evidence strongly suggests that Defendants at least arrange the loans by providing the financing mechanism and what appears to be almost all of Western Sky's business infrastructure, the requirements of Minn. Stat. § 47.601 also apply to them as the assignee. By promising to automatically purchase and accept assignment of all of Western Sky's loans to Minnesota consumers, Defendants bring themselves within the coverage of section 47.601.

The statute also clearly applies to Defendants' loans in terms of geography. "For the purposes of [Minn. Stat. § 47.601], a consumer short-term loan transaction is deemed to take place in Minnesota if the borrower is a Minnesota resident and the borrower completes the transaction, either personally or electronically while physically located in the state of Minnesota."[39] Many of the loans that Defendants serviced were originated in exactly this manner.[40]

Under section 47.601, a consumer short-term loan contract may not contain any of the following: (1) a provision selecting anything other than Minnesota law for construing or enforcing the loan; (2) a provision designating a forum other than Minnesota for dispute resolution; (3) a provision purporting to limit class action claims against the lender; and (4) a provision imposing rates, fees, or charges exceeding those allowable under section 47.59, subdivision 6 or 47.60, subdivision 2.[41] Two different combinations of rates and fees are permissible. First, lenders and assignees can charge the fees and rates outlined in Minn. Stat. § 47.59, subd. 6: a one-time $25 loan fee for closed-end credit and interest at an annual rate of 21.75% 33% on the first $750 of unpaid principal and 19% on the remaining unpaid principal exceeding $750.[42] Second, on a hypothetical $850 loan like the ones serviced by Defendants, a lender or assignee

[38] Minn. Stat. § 47.601, Subd. 2(d).

[39] Minn. Stat. § 47.601, Subd. 5.

[40] *E.g.*, White Aff. ¶ 3.

[41] Minn. Stat. § 47.601, Subd. 2(a).

[42] Minn. Stat. § 47.59, Subds. 3, 6.

could charge a one-time fee equal to six percent of the proceeds (or $51) plus a $5 fee.[43] This statute also allows an annual interest rate of 33% (2.75% interest per month).[44]

The statute also forbids any consumer short-term lending unless it is conducted by an entity licensed by the commissioner of commerce to make or arrange small loans.[45] Violations render loans void and unenforceable.[46]

Based on the factual record available to the Court, Defendants appear to violate section 47.601 on a regular basis and plan to continue violating it in the future. Neither Defendants nor Western Sky have received the requisite licenses for participating in the Minnesota loan market.[47] Defendants' loan contracts include clauses that purport to designate the laws of the Cheyenne River Sioux Tribe as the governing authority.[48] Similarly, the Defendants' contracts claim to limit the borrowers' available dispute resolution remedies to arbitration.[49] The contracts' arbitration provision also purports to waive borrowers' rights to participate in class action claims relating to the content of the agreement.[50] The Defendants charge $350 fees and 342.86% annual percentage rates on the $850 loans—these fees and rates dramatically exceed those allowed under applicable Minnesota law.[51] Finally, Defendants routinely enforce these contracts by collecting upon them and making frequent phone calls to borrowers—even though Minn. Stat. § 47.601 specifically states that they are void and unenforceable.[52]

All of these apparent contract terms and other allegations, supported by affidavits in the record, show that Defendants likely violated Minn. Stat. § 47.601. The State is likely to prevail on this Count.

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[43] Minn. Stat. § 47.60, Subd. 2(a)(4).

[44] Minn. Stat. § 47.60, Subd. 2.

[45] Minn. Stat. § 47.601, Subd. 2(a)(3)(i).

[46] Minn. Stat. § 47.601, Subd. 6.

[47] Wall Aff. ¶ 2.

[48] White Aff., Ex. A.

[49] *Id.*

[50] *Id.*

[51] *Id.*

[52] White Aff. ¶¶ 7–10.

b. Violations of Chapters 53 and 56

The State's second claim against Defendants is that they routinely violate Chapters 53 and 56 of the Minnesota Statutes by soliciting and receiving payments on loans for sums larger than $1,000 that contain illegal provisions. The Court concludes that State is likely to prevail on this claim as well because the loans comprising Defendants' business in Minnesota are illegal, regardless of whether Defendants acted effectively as lenders or merely as assignees.

Chapters 53 and 56 require entities to hold proper licenses before charging interest on unsecured loans for sums in excess of $1,000. The statutes also limit the amount of interest that any person or entity can receive from those loans.

Minn. Stat. § 53.04 authorizes entities to organize as an industrial loan and thrift to make loans "at the rates and on the terms and other conditions permitted under Chapters 47 and 334" and "in amounts in compliance with section 53.05, clause (7) [i.e., not exceeding $100,000]."[53] As stated above, section 47.59 caps the interest rates that licensed lenders may charge on loans within the state. Lenders may charge either: (1) 21.75% or (2) 33% on the first $750 of unpaid principal and 19% on the unpaid principal exceeding $750.[54]

Chapter 56 also authorizes entities to become licensed to participate in the loan market to offer loans of $100,000 or less: "Except as authorized by this chapter and without first obtaining a license from the commissioner [of commerce], no person shall engage in the business of making loans . . . ."[55] Likewise, "[n]o person, except as authorized in this chapter, shall, directly or indirectly, charge, contract for, or receive any interest . . . greater than the lender would be permitted by law to charge . . . ."[56] Loans that violate Chapter 56 "shall [not] be enforced by a licensee in this state, and every person in anywise participating therein in this state shall be subject to the provisions of this chapter" unless the loan was

[53] Minn. Stat. § 53.04.

[54] Minn. Stat. § 47.59, Subd. 3.

[55] Minn. Stat. § 56.01(a); Minn. Stat. § 56.131, Subd. 1(a).

[56] Minn. Stat. § 56.18.

legally made in another state.[57] Like Chapter 53, Minn. Stat. § 56.131 incorporates the interest rate restrictions in Minn. Stat. § 47.59, subd. 3, limiting the amount that lenders or assignees can charge or receive to either: (1) 21.75% or (2) 33% on the first $750 of unpaid principal and 19% of the unpaid principal above that amount.

The State alleges that the Defendants violated both statutes by failing to secure the required licenses before participating in the Minnesota loan market, either as a lender or an assignee. Further, the State claims that Defendants violated (and will continue to violate) the statutes by routinely charging and receiving interest far in excess of the amounts allowed in Minn. Stat. § 47.59. Defendants rely upon their arguments that the Dormant Commerce Clause, tribal immunity doctrines, and various estoppel theories show that the State is unlikely to succeed on these claims—but Defendants do not present any arguments specifically relating to alleged violations of Chapters 53 and 56.

It is undisputed that neither the Defendants nor Western Sky are licensed as an industrial loan and thrift.[58] Likewise, it is undisputed that none of these entities has ever held any license under Chapter 56.[59] Despite an apparently undisputed lack of statutory authority to lend or charge interest in the Minnesota loan market, the extensive affidavit testimony shows that the Defendants made or serviced numerous loan contracts with Minnesotans.

The affidavits and other exhibits (including loan documents and recent images of Western Sky's website) show that Defendants charge interest far in excess of the rates allowed in Minn. Stat. § 47.59. For example, Western Sky's website advertised several loan products to Minnesota consumers, all of which charged an APR between 89.68% and 234.25%.[60] Affiant Donna Gomez said that Defendant CashCall charged monthly payments of $294 on a $2,500 loan—consistent with the advertised rate of

[57] Minn. Stat. § 56.18. Defendants do not argue that their loans were legally made in another state. Instead, they argue that the borrowers consummated the loans on tribal territory—an argument that appears likely to fail on the merits, as discussed in more detail below.

[58] Wall Aff. § 2.

[59] *Id.*

[60] Bryden Aff., Ex. X.

139.13% APR listed in her loan contract.[61] Affiant Elizabeth Newbauer received a $5,000 loan with an APR of 116.73% and Defendant CashCall charged her $587 per month.[62] The State submitted numerous other affidavits attesting to the existence of similar loans on which Defendants are still charging illegal interest payments.

For the purposes of determining whether the State is likely to prevail on its claims under Chapters 53 and 56, it does not matter whether Defendants effectively functioned as the lender. It is enough that Defendants are currently unlicensed to participate in the Minnesota loan market but that they continue to charge interest at illegal rates as an assignee.[63] However, as discussed in more detail elsewhere, the Court believes that all of Western Sky's lending activities are inextricably tied to Defendants' funding mechanisms and financial support.[64] The arrangement between these entities makes CashCall effectively the lender. This factual reality further demonstrates the State's likely success on the merits.

Based on the available record consisting largely of affidavit testimony and the apparently undisputed fact that Defendants routinely continue to charge interest rates that dramatically exceed the amounts allowed by Minnesota law in Chapters 53 and 56, the State is likely to prevail on this claim.

c. Violations of Minn. Stat. § 334.01

The State also claims that Defendants regularly violate Minnesota's usury laws by charging more than 8% interest without meeting the requirements for any applicable statutory authorization for a higher rate. Defendants once again decline to specifically address the likelihood of the State's ability to prevail on this count.

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[61] Gomez Aff. ¶¶ 2–3, Ex. A.

[62] Newbauer Aff., ¶¶ 3–4, Ex. A.

[63] *See* Minn. Stat. § 56.18 ("No person, except as authorized in this chapter, shall, directly or indirectly, charge, contract for, or receive any interest, discount, or consideration greater than the lender would be permitted by law to charge . . . .").

[64] The Court also notes that Western Sky itself defines Defendants as the "Lender" in all of its loan documents. "'We,' 'us,' 'our,' and 'Lender' mean Western Sky Financial, LLC . . . and any subsequent holder of this Note." *E.g.*, Aff. Gomez, Ex. A.; Aff. Newbauer, Ex. A.

In the absence of a specific source of authority to the contrary, Minn. Stat. § 334.01 imposes a default cap on interest rates. The statute limits interest to "the rate of $6 upon $100 for a year, unless a different rate is contracted for in writing." The statute goes on to say "[n]o person shall directly or indirectly take or receive in money . . . or in any other way, any greater sum, or any greater value, for the loan or forbearance of money . . . than $8 on $100 for one year."[65] As the baseline limit on interest rates in Minnesota, this statute applies wherever a more specific provision (e.g., Minn. Stat. § 47l.601 or the licensing provisions of Chapters 53 and 56) does not. This includes situations in which a person or entity who lacks a license to lend or charge interest under Minnesota law nevertheless attempts to do so.

Based on the factual record, it appears likely that Defendants violate this statute as well. Defendants do not claim that they have any license to operate under another specific Minnesota statute.[66] Nevertheless, they (at a minimum) facilitate Western Sky's loans to Minnesotans by promising to purchase all originated loans without limitation.

According to the affidavits and exhibits currently in the record, including Western Sky's loan documents, it appears undisputed that the interest rates involved in Defendants' participation in the Minnesota loan market greatly exceed the 8% cap in Minn. Stat. § 334.01. For example, Marcelle White's affidavit shows that Defendants charged interest (and aggressively sought to collect) on a loan bearing an APR of 342.86%.[67] Many of the other affidavits attest to Defendants' ongoing involvement with loans bearing APRs of more than 100%.[68]

Here, again, it does not matter for the purposes of Minn. Stat. § 334.01 whether Defendants are effectively the lender or whether they merely "take or receive" money from Western Sky's borrowers. The alleged violation is Defendants' ongoing efforts to "receive" interest payments at a rate that exceeds 8%. As a result, the State is likely to prevail on this claim.

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[65] Minn. Stat. §334.01, Subd. 1 (2012).

[66] Wall Aff. ¶ 2.

[67] White Aff. ¶¶ 6–10, Ex. A.

[68] *E.g.*, Gomez Aff., Ex. A; Newbauer Aff., Ex. A.

d. Violations of Minn. Stat. § 324D.44

Finally, the State is also likely to prevail on its claim under the Uniform Deceptive Trade Practices Act ("UDTPA"), Minn. Stat. § 324D.44. The State argues that Defendants violated the UDTPA by misrepresenting Western Sky's affiliation with the Cheyenne Western Sioux Tribe.

The State alleges that Defendants violated the UDTPA by claiming both that Western Sky is subject only to tribal law and that this status renders Defendants' purchased loans exempt from state and federal law. Defendants allegedly make these misrepresentations to consumers in the loan contracts, correspondence, and advertising materials—all of which seek to intentionally deceive consumers regarding the existence of a specific status, affiliation, or connection with a Native American tribe. Consistent with their approach throughout this matter, Defendants do not attempt to rebut the State's arguments specific to this claim but instead argue that various other doctrines make it unlikely that the State can succeed on the merits.

Section 325D.44 of the Minnesota Statutes states that:

> A person engages in a deceptive trade practice when, in the course of business, vocation, or occupation, the person . . . represents that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have or that a person has a . . . status, affiliation, or connection that the person does not have.[69]

For the purposes of Minnesota's consumer protection statutes, the State can establish deceptiveness by showing that conduct has a "tendency or capacity to deceive."[70]

The existing record does show apparent instances in which Defendants referred to Western Sky's alleged status as a "Native American business."[71] While these references do not explicitly say that Western Sky is owned by a tribe or functions as an "arm of a tribe, it appears that Defendants intended them to strongly imply that status or connection. At a minimum, these statements have a "tendency or

[69] Minn. Stat. § 324D.44, Subd. 1(5) (2012).

[70] *See State ex rel. Swanson v. Am. Family Prepaid Legal Corp.*, 2012 WL 2505843 at *6 (Minn. Ct. App. July 2, 2012) (affirming trial court's interpretation of the Minn. Stat. § 324D.44 standard as "the tendency or capacity to deceive").

[71] *E.g.*, Bryden Aff., Ex. V; Palumbo Aff. ¶¶ 5–6, Exs. A–C (stating that "Western Sky Financial, LLC, is a 100% Native American-owned business operating on a Native American Reservation").

capacity" to give consumers the false impression that Defendants' interest rates and loan-servicing tactics are exempt from Minnesota and federal law.

More importantly, the context of these representations suggests that Defendants intend to mislead consumers about the legal consequences of Western Sky's asserted status. For example, the loans that CashCall automatically purchases from Western Sky refer frequently to the Cheyenne River Sioux Tribal Nation—despite the absence of any affiliation whatsoever between Western Sky and the tribe.[72] On the first page, the loan contract states in bold type that "[the] Loan Agreement is subject solely to the exclusive laws and jurisdiction of the Cheyenne River Sioux Tribe, Cheyenne River Indian Reservation."[73] Further, Western Sky's advertising materials rely heavily on images, motifs, and language that strongly suggest affiliation with an actual tribe.[74] According to the factual record as it currently exists, these materials did lead Minnesota consumers to actually believe that Western Sky belonged to the tribe itself instead of to an individual member.[75]

Western Sky's website does include a disclaimer at the bottom of its pages, stating that Western Sky is owned by an individual tribal member but not by the tribe itself.[76] Even this disclaimer, however, includes references capable of deceiving a consumer. Although the website says that Western Sky is not owned by the tribe, it still states "Western Sky Financial is a Native American business."[77] By highlighting an association with a tribal member and referring to itself as a "Native American business" or "100% Native American-owned business" without explaining the significance (or lack thereof) of

[72] *See, e.g.*, Bryden Aff., Ex. W.

[73] *Id.*

[74] Palumbo Aff. ¶¶ 5–6, Exs. A–C (stating that "Western Sky Financial, LLC, is a 100% Native American-owned business operating on a Native American Reservation").

[75] *E.g.*, Blask Aff. ¶ 2; Ercku Aff. ¶ 2; Rhone Aff. ¶ 2 (stating that a potential borrower "was under the impression that Western Sky was affiliated with or owned by an Indian Tribe); Stevens Aff. ¶ 2 ("From the television commercial I saw and Western Sky's website, I believed that Western Sky was affiliated with an Indian Tribe."); Thoraldson Aff. ¶ 2 ("I believed that Western Sky was owned or affiliated with an Indian tribe. It was not until recently that I learned Western Sky is not owned or operated by an Indian tribe, which was a big surprise to me."); Trelstad Aff. ¶ 3.

[76] Bryden Aff., Ex. V.

[77] *Id.*

either representation, it appears Western Sky deliberately used language with "the tendency or capacity to deceive" consumers.

The record also shows numerous instances in which Defendants referred to Western Sky's status or affiliation in communications with borrowers—specifically with regard to the borrowers' rights and remedies.[78] In conjunction with specific representations regarding Western Sky's affiliation or status, Defendants' conduct appears calculated to further deceive consumers regarding the characteristics of the loans and the borrowers' collection-related rights.[79]

Based on the factual material currently in the record and the "tendency or capacity to deceive" standard applicable to consumer protection statutes in Minnesota, the Court concludes that the State is sufficiently likely to prevail on this claim as well.

2. Potential Harm to be Suffered by Either Party

The second *Dahlberg* factor also weighs strongly in favor of granting the injunction. The State's proposed injunction would prevent Defendants from making, funding, purchasing, or servicing unsecured, personal loans originated by unlicensed or otherwise noncompliant lenders, including Western Sky. The State does not seek an injunction preventing Defendants from servicing existing loans—the bar would only apply to loans originated on or after the date of the injunction.

The State argues that this injunction would only require the Defendants do what they should have done long ago—become compliant with Minnesota's lending and usury laws. Preventing Defendants from making, purchasing, or servicing any new loans in Minnesota would protect consumers from a range of harms. These potential harms include irreparable consequences resulting from being held to usurious loans. For example, the State presented several affidavits attesting to the harm that Defendants'

[78] *E.g.*, Frieler Aff. ¶ 6 ("I received a telephone call from a woman at CashCall . . . [who] told me that Minnesota law did not apply because the loan was protected by the doctrine of tribal sovereign immunity [and that] I could not bring a lawsuit against CashCall unless I brought it in tribal court on the Cheyenne River Sioux Reservation."); Opem Aff. ¶¶ 6–7, Ex. C ("Western Sky is a wholly Cheyenne River Sioux Tribal Member owned business . . . ."); Stevens Aff. ¶ 6.

[79] *E.g.*, Trelstad Aff. ¶ 3 ("I figured there must be an affiliation between CashCall and Western Sky. It was unclear to me whether the loan originated with Western Sky from South Dakota or CashCall from California."); Turnquist Aff. ¶ 3 ("Shortly after submitting my application, I started receiving e-mails from [CashCall] . . . This was very confusing to me because I was under the impression I was working with Western Sky.).

collection activities have caused Minnesotans—i.e., paying many times the amount of the loan's principal within just several years of origination.[80] Many consumers suffered harms properly considered irreparable (i.e., harms that are not compensable by money damages).[81] The prospect that other consumers would experience similar hardship and harm is "real and substantial." By comparison, the State argues that denying the injunction will allow Defendants to continue their pattern of illegal business. Finally, the Court notes that the State has made a credible showing that Western Sky's borrowing is inextricably dependent upon Defendants' promise to automatically purchase all loans without limitation. If Defendants are prevented from funding and purchasing Western Sky's loans to Minnesotans, it is likely that Western Sky will stop attempting to lend to Minnesota consumers.

Defendants argue that some borrowers may be better off, that money damages would remedy any harm to consumers, that Western Sky's ability to lend would be damaged, and that preventing "orderly and regular loan servicing" would harm all parties to the contracts. Even giving these arguments every benefit of the doubt, they do not outweigh the likely harm posed by Defendants' ongoing activities. First, even if some consumers might be better off, the State's affidavit testimony shows that the large majority are likely to be harmed. Second, money damages are not a realistic remedy for many of the harms cited by the State, including damage to credit scores, home foreclosures, and the overall financial fall-out of attempting to make payments on loans bearing APRs in excess of 100%. Finally, the State's requested injunction would apply only to new loans—it would not prevent Defendants from servicing existing loans that they have already purchased.

It is certainly likely that an injunction would pose an economic burden for Defendants in that they will be unable to pursue their current business practices in Minnesota. Because the requested injunction

[80] Frieler Aff.; Krueger Aff.; Stevens Aff.; Torgerson Aff.

[81] Frieler Aff. ¶ 7 (stating that Defendants issued multiple negative credit reports that harmed affiant's credit score); Krueger Aff. ¶ 6 (stating that affiant's financial situation has deteriorated as a result of Defendants' loan); Stevens Aff. ¶ 8 (Defendants threatened to issue negative credit reports); Torgerson Aff. ¶ 9 (attesting to negative credit reporting and the implications of Defendants' collection activities on the affiant's attempts to seek a mortgage).

only requires Defendants to comply with Minnesota law, however, the burden is no heavier than that which all participants in the Minnesota loan market must bear.

Based on this comparison of potential harms, this factor weighs in favor of granting the injunction.

3. Preexisting Relationship

The State has also presented a credible showing that the parties' preexisting relationship also requires the Court to grant the injunction.

Minnesota law tasks the commissioner of commerce with the responsibility to enforce the laws entrusted to its office, in part by acting to enjoin ongoing violations.[82] Similarly, numerous statutes authorize the Attorney General to investigate and put an end to violations of Minnesota law, including "unfair, discriminatory, and other unlawful practices in business, commerce, or trade."[83]

Defendants have profited from their participation in Minnesota's loan market for several years and the record contains a credible showing of numerous loan servicing activities involving Minnesota consumers. As discussed above, the State has also provided a credible showing that Defendants regularly violate Minnesota's lending and consumer protection laws. The State has also established that it confronted Defendants regarding their allegedly unlawful activities in a series of correspondences on behalf of consumers.[84]

In response to these communications from the Attorney General in its regulatory capacity, Defendants aggressively responded that they did not need to comply with Minnesota law and continued charging rates on illegal loans. Defendants also continue to purchase and begin servicing new loans every day.

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[82] Minn. Stat. § 45.027, Subd. 5 (2012); *State by Ulland v. Int'l Assoc. of Entrepreneurs of Am.*, 527 N.W.2d 133, 136 (Minn. Ct. App. 1995).

[83] Minn. Stat. § 8.31, Subd. 1.

[84] Stevens Aff. ¶, Ex. A (stating that the Attorney General's Office contacted Defendant regarding alleged violations and that Defendant responded by aggressively asserting various arguments and insisting that it had the right to continue servicing Affiant Stevens' loan); Trelstad Aff. ¶¶ 7–10 (outlining extensive correspondence between the Attorney General's Office and Defendants). *See also* Blask Aff. ¶¶ 6–7; Ereku Aff. ¶ 5, Ex. A; Gomez Aff. ¶ 8; Newbauer Aff. ¶ 6; Opem Aff. ¶ 8; Thoraldson Aff. ¶ 5; Torgerson Aff. ¶ 8.

Defendants' argument on this factor dealt entirely with the Commissioner of Commerce's actions during a contested hearing involving Western Sky. Specifically, Defendants claim that it is unfair for its relationship with Western Sky to be the basis of a case against them now after an administrative law judge initially recommended dismissing a separate case against Western Sky with prejudice.

In the context of the *Dahlberg* analysis, the more relevant background and nature of the parties' preexisting relationship consists Defendants' lending or collection activities, the State's responsibility to enforce Minnesota law, the communications between the State and Defendants, and Defendants' stated intent to continue servicing new loans in Minnesota. All of these aspects of this relationship weigh in favor of granting the injunction.

4. Public Policy Considerations

The fourth *Dahlberg* factor also supports granting the State's requested injunction. This factor examines the "aspects of the fact situation, if any, which permit or require consideration of public policy expressed in the statutes, State and Federal."[85] When a statute applies to prohibit challenged behavior, public policy considerations favor granting an injunction to prevent further likely violations.[86]

Ongoing and routine violations of Minnesota statutes lie at the center of the State's request for an injunction in this dispute. The Minnesota Attorney General and the Commissioner of Commerce seek an injunction specifically pursuant to the statutes authorizing them to enforce Minnesota's laws. The requested injunction would require Defendants to suspend their business activities in the state until they are compliant with all of Minnesota's statutes, including consumer protection provisions. Absent an injunction, Defendants apparently plan to continue facilitating and purchasing Western Sky's loans. The State's fifteen affidavits from Minnesota borrowers illustrate the harms that can result when businesses violate lending and consumer protection laws—these harms are inconsistent with the public policy goals expressed in those statutes.

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[85] *Dahlberg Bros.*, 272 Minn. at 275, 137 N.W.2d at 321–22.

[86] *See, e.g.*, *Pac. Equip. & Irr., Inc. v. Toro Co.*, 519 N.W.2d 911, 915–916 (Minn. Ct. App. 1994) (affirming the district court's determination that the public policy factor did support granting an injunction where the statute in question did not apply).

Defendants argue that public policy favors enforcing the terms of contracts and that "chaos would prevail in our business relations" without this reliability.[87] The State's requested injunction, however, would only prevent Defendants from facilitating, purchasing, or servicing *new* loans. This injunction does not involve existing contracts or Defendants' ability to attempt to enforce their terms. The injunction does not implicate public policy concerns regarding predictable business relations.

Because the State appears likely to prevail in its underlying statutory claims against Defendants, the ongoing pattern of apparently illegal lending activity weighs heavily in favor of granting the requested injunction.

5. Administrative Burdens

The final *Dahlberg* factor looks at whether an injunction would pose an administrative burden for the Court. This injunction would present, at most, a minimal burden on the Court because it merely requires Defendants to cease their current activities while this litigation proceeds. The Court will not need to supervise Defendants' activities because there should be none. To the extent that this factor weighs in either direction, it favors the State's request for an injunction.

6. Summary of the *Dahlberg* Factors

To summarize, the State is entitled to a temporary injunction because it presented a credible showing that the *Dahlberg* factors weigh in favor of immediate injunctive relief. First, the State established that, based on the existing factual record, it is likely to prevail on four of its six counts against Defendants. Second, a comparison of the potential harms shows that granting the injunction will only require Defendants to suspend their current activities—or bring them into compliance with Minnesota law like any other entity that engages in a similar business in the state. Conversely, denying the injunction would likely result in even more Minnesota borrowers encountering serious hardships, including irreparable injuries (i.e., that money damages alone cannot fully remedy). Third, the background and nature of the relationship between these parties also supports an injunction because the Plaintiffs are the

[87] Opp. Pl.'s Mot. for Temporary Injunction 17 (quoting *Watkins Prod., Inc. v. Butterfield*, 274 Minn. 378, 380, 144 N.W.2d 56, 58 (1966)).

regulators with responsibility to enforce the laws at issue and Defendants are business entities—apparently subject to the statutes the State seeks to enforce. Fourth, public policy considerations weigh in favor of allowing the State to perform its statutory duties by enforcing Minnesota law, including by means of injunctive relief. Finally, this injunction would pose a minimal administrative burden for the Court because it simply requires the Defendants to refrain from facilitating or purchasing new loans in Minnesota.

All of these factors show that an injunction is necessary to prevent further irreparable injuries and that other legal remedies are currently inadequate.

C. Defendants' Other Arguments Are Unavailing

1. Defendants Do Not Qualify Under Tribal Immunity Doctrines

Defendants argue that tribal immunity principles preclude the State's claims against them because the underlying loans involve a company owned by an enrolled tribal member. The United States Supreme Court has recognized that American Indian tribes are "'domestic dependent nations' that exercise inherent sovereign authority over their members and territories."[88] As a result, the doctrine of tribal sovereign immunity insulates tribes from some state laws.[89] Under some circumstances, immunity also applies to tribal agencies and businesses that "serve[] as an arm of the sovereign tribe[]."[90] To qualify for "arm of the tribe" immunity, the entity in question must be more than a "mere business."[91] Instead, the entity must be of a nature "that its activities are properly deemed to be those of the tribe."[92]

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[88] *Ok. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Ok.*, 498 U.S. 505, 509 (1991); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 98 S.Ct. 1670, 1677 (1978).

[89] *Ok. Tax Comm'n*, 498 U.S. at 510.

[90] *Hagen v. Sisseton-Wahpeton Community College*, 205 F.3d 1040, 1043 (8th Cir. 2000); *Pink v. Modoc Indian Health Project*, 157 F.3d 1185 (9th Cir. 1998), *cert. denied*, 528 U.S. 877, 120 S.Ct. 185, 145 L.Ed.2d 156 (1999).

[91] *Hagen*, 205 F.3d at 1043.

[92] *Allen v. Gold Country Casino*, 464 F.3d 1044, 1046 (9th Cir. 2006).

Contrary to Defendants' argument, immunity does not extend to individual tribal members.[93] Defendant focuses on two United States Supreme Court decisions, claiming that they establish a doctrine of "tribal member immunity."[94] The State responds by arguing that these cases do not create immunity for individual members but instead reiterate longstanding principles of sovereign immunity.[95] For at least the purposes of this dispute over a temporary injunction, the State appears to be correct.

In *Williams v. Lee*, the Supreme Court held that state courts cannot usurp a tribal court's authority over a dispute involving activities that occurred entirely on a reservation—specifically because tribes enjoy sovereign authority over reservations.[96] Similarly, in *Montana v. U.S.*, the Court summarized the limited scope of tribal sovereign immunity (apparently in dicta) before deciding that tribal authority did not apply to allow the tribe to regulate hunting activity by nonmembers on tribal land.[97] Neither decision supports Defendants' claim that tribal members (or their assignees) are immune from state law claims.

Here, Western Sky is a South Dakota limited liability company with offices located on the Cheyenne River Sioux Tribal reservation.[98] The Cheyenne River Sioux Tribe does not provide a legal mechanism for incorporating companies under its tribal code but Western Sky is apparently licensed to operate on the reservation.[99] The Cheyenne River Sioux Tribe does not own, operate, or profit from any of Western Sky's activities. Martin A. Webb, an enrolled member of the tribe, is the sole member of the LLC.[100] As such, all of Western Sky's profits apparently flow solely to him. As such, Western Sky does

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[93] *Puyallup Tribe, Inc. v. Dept. of Game of State of Wash.*, 433 U.S. 165, 97 S.Ct. 2616 (1977); *see also Swenson v. Nickaboine*, 793 N.W.2d 738, 744 n.1 (Minn. 2011) (noting that "the doctrine 'does not immunize the individual members of the tribe'").

[94] Defendants present this argument in their Memorandum in Support of Defendants' Motion to Dismiss Pursuant to Rule 12.02(E). That motion is still pending before the Court—but Defendants also relied on this theory in oral arguments on this motion for a temporary injunction. Defendants' memorandum opposing the State's motion for an injunction refers to "Tribal member immunity" only as part of its argument that the State is unlikely to prevail on any of its claims.

[95] Pl.'s Mem. Opp. Def.'s Mot. Dismiss 17.

[96] 358 U.S. 217, 223, 79 S.Ct. 269, 272 (1959).

[97] 450 U.S. 544, 544, 565–66, 101 S. Ct. 1245, 1248, 1258–59 (1981).

[98] Lawrence Aff. ¶ 5.

[99] *Id.*

[100] *Id.* ¶ 3.

not meet the long-standing criteria for tribal sovereign immunity because it is neither a tribal entity nor an "arm of the tribe." It is not enough that Western Sky is owned by a tribal member or that it is located on tribal land.

Regardless, arguments about Western Sky's entitlement to tribal immunity could not defeat the State's motion for a temporary injunction. The State provided a credible showing that it is likely to succeed on several claims that focus entirely on Defendants' activities as the purchaser and servicer of loan products—independent of any allegations that it is effectively the lender. Specifically, these claims include the State's allegations under Minn. Stat. § 47.601, Chapters 53 and 56 of the Minnesota Statutes, and Minn. Stat. § 334.01. Defendants are likely liable on those claims no matter where the underlying loans originated.

2. The Dormant Commerce Clause Does Not Apply

Defendants also argue that the United States Constitution prohibits Minnesota from enforcing its laws against an out-of-state lender.[101] The "Dormant Commerce Clause" doctrine exists as an implication of Congress's power over interstate commerce under Article 1 of the United States Constitution. "The [Commerce] Clause has long been understood to have a 'negative' aspect that denies the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce."[102]

Under the Dormant Commerce Clause, no state may use its statutes to regulate commercial activities occurring "wholly outside of [its] borders."[103] Notwithstanding this rule, courts throughout the United States have consistently allowed states to regulate the content of loan contracts made by out-of-

[101] Again, this argument appears primarily in Defendants' Memorandum in Support of Defendants' Motion to Dismiss. Defendants refer to this argument to contest whether the State can satisfy the *Dahlberg* factors to receive an injunction.

[102] *State v. Kolla*, 672 N.W.2d 1, 8–9 (Minn. Ct. App. 2003) (*citing Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 98, 114 S.Ct. 1345, 1349 (1994)). *See also Chapman v. Comm'r of Revenue*, 651 N.W.2d 825, 831 (Minn. 2002).

[103] *Healy v. Beer Inst.*, 491 U.S. 324, 335 (1989); *Cotto Waxo Co. v. Williams*, 46 F.3d 790, 793 (8th Cir. 1995); *see also Synergy Mktg., Inc. v. Home Prods. Intern.*, No. Civ. 00-796(JRT/FLN), 2001 WL 1628691 at *5 (D. Minn. Sept. 6, 2001).

state lenders to resident borrowers.[104] Similarly, the Dormant Commerce Clause does not prohibit states from using consumer protection statutes to shield residents from online transactions with out-of-state entities.[105]

In the face of this well-established precedent, Defendants contend that a Dormant Commerce Clause analysis must look at where the transactions at issue were "consummated." This argument is based on Defendants' reading of a case from a New York district court: *Eric M. Berman, P.C. v. City of New York.*[106] Defendants rely on the phrase "if the transaction is consummated out of state, a state may not regulate it without violating the dormant Commerce Clause," claiming that the New York court was articulating a different, more specific standard applicable to this Court.

An examination of the facts of the cases cited by Defendants, however, demonstrates that the doctrine has been invoked in similar circumstances when a state is attempting to regulate a business transaction that physically occurred outside the state.

For example, Defendants cite *Midwest Title Loans, Inc. v. Ripley.*[107] In that case, the Seventh Circuit upheld the district court's decision that Indiana could not apply its regulations to an Illinois lender where the Indiana consumers traveled physically out-of-state to execute loan contracts.[108] Every step of the contract process (with the exception of advertising) occurred in Illinois, rendering the transaction wholly extraterritorial.[109] Defendants also cite *Dean Foods Co. v. Brancel.*[110] That case also involved contracts that the parties executed in Illinois and "wholly outside" Wisconsin.[111]

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[104] *See, e.g., Quik Payday, Inc. v. Stork*, 549 F.3d 1302 (10th Cir. 2008); *Aldens, Inc. v. Packel*, 524 F.2d 38 (3d Cir. 1975), *cert. denied*, 425 U.S. 943 (1976); *Aldens, Inc. v. LaFollette*, 552 F.2d 745 (7th Cir. 1977); *Aldens, Inc. v. Ryan*, 571 F.2d 1159 (10th Cir. 1978); *Equitable Credit & Discount Co. v. Geier*, 342 Pa. 445, 455, 21 A.2d 53, 59 (Pa. 1941).

[105] *E.g., SPGGC, LLC v. Blumenthal*, 505 F.3d 183 (2d Cir. 2007).

[106] 895 F.Supp.2d 453 (E.D.N.Y. 2012).

[107] 593 F.3d 660 (7th Cir. 2010).

[108] *Id.* at 669.

[109] *Id.*

[110] 187 F.3d 609, 619–20 (7th Cir. 1999).

[111] *Id.* at 619.

Even *Eric M. Berman, P.C.*, the case on which Defendants place the most emphasis, demonstrates that the Dormant Commerce Clause does not apply here. *Berman* involved professional firms who sought to enforce loan contracts executed or "consummated" in states other than New York and then subsequently purchased by debt buyers who were often located completely in another state.[112] This fact scenario demonstrates that, to the extent *Berman* uses a different analysis than *Healy* and cases like *Midwest Title*, its outcome is consistent because it applied the Dormant Commerce Clause only in a case of "wholly" extraterritorial activity. The *Berman* court noted that "[t]his extension of [New York City's regulations] to these out-of-state debt buyers, based on contracts formed outside the state, has the practical effect of exporting New York's domestic policies into other states."[113]

Defendants do not point to any authority that applies the Dormant Commerce Clause to contracts made by out-of-state lenders with borrowers who were located inside the regulating state. Similarly, the Defendants have pointed to no cases in which the Dormant Commerce Clause analysis has been applied to the making or servicing of loans to a state's residents over the Internet.

Because the appropriate standard is that articulated in *Healy* and numerous other decisions, the relevant question is whether the commercial activity that Minnesota seeks to regulate occurred "wholly outside" of the state. Based on the factual record available at this point, many aspects of Defendants' activity occurred within the state. This includes the conduct alleged by the State to constitute violations of Minnesota law. Defendants advertised routinely in Minnesota, making use of Minnesota television and radio outlets in addition to contacting Minnesota consumers with email.[114] The vast majority of loans involving Minnesotan borrowers resulted from applications submitted from within the state, whether online or through Defendants' phone-based application system.[115]

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[112] 895 F.Supp.2d at 463–64. The Court also notes that this case is, at best, persuasive. To the extent that application of its reasoning deviates from the language or effective result in *Healy* and other precedential cases, the Court would decline to follow *Berman*.

[113] *Id.* at 489.

[114] *E.g.*, Vulcan Aff. ¶ 3 (Minnesota consumer receiving unsolicited email advertisement); Krueger Aff. ¶ 2 (television advertisements); Stevens Aff. ¶ 2 (television advertisements); Thoraldson Aff. ¶ 2 (radio advertisements).

[115] *E.g.*, Blask Aff. ¶ 3; Stevens Aff. ¶ 3; Torgerson Aff. ¶ 4.

The affidavits also attest to Defendants' efforts to contact loan applicants before a lending decision occurred. These communications included emails and phone calls to at least three of the Minnesota consumers who submitted affidavits.[116] Lending also occurred by means of deposits into Minnesota banks.[117] Within 24 hours of a lending decision, Defendants apparently contacted every borrower to notify them of the "sale" or "assignment" of their loans. Again, this communication involved Defendants' employees contacting Minnesota consumers inside the state.[118]

Most significantly, Defendants' collection activities also occurred in Minnesota. This activity forms the basis of most of the State's alleged unlawful conduct, including deducting monthly payments from Minnesota bank accounts,[119] discussing repayment with Minnesota borrowers,[120] and other collection-related communications.[121]

All of this affidavit testimony shows that numerous aspects of Defendants' business occurred routinely inside Minnesota. Accordingly, the dormant Commerce Clause, as federal and Minnesota courts have routinely interpreted it, does not apply to block the State's enforcement effort here.

3. The State Is Not Estopped by Earlier Proceedings Involving Western Sky

Defendants present one final set of arguments against the State's requested injunction. Based on the agency's initial dismissal of another action against Western Sky, they claim that various preclusion doctrines bar this case, including collateral estoppel, res judicata, and equitable estoppel. Characterizing the Commerce Commissioner's decision as a "re-do,"[122] Defendants claim there is some unfairness in the agency's decision to dismiss the case without prejudice after the administrative law judge dismissed the

[116] *E.g.*, Krueger Aff. ¶ 3; Trelstad Aff. ¶ 3; Turnquist Aff. ¶ 3.

[117] *E.g.*, Blask Aff. ¶ 3; Newbauer Aff. ¶ 3; Vulcan Aff. ¶ 3.

[118] *E.g.*, Stevens Aff. ¶ 4; Torgerson Aff. ¶ 4.

[119] *E.g.*, Kruger Aff. ¶ 4; Newbauer Aff. ¶¶ 3–4.

[120] *E.g.*, Frieler Aff. ¶ 6.

[121] *E.g.*, Newbauer Aff. ¶¶ 5, 7.

[122] Mem. Opp. Pls'. Mot. Temporary Injunction 15.

contested case with prejudice. Like Defendants' other arguments, they claim that these theories of preclusion or estoppel make it unlikely that the State will prevail on the merits of any of its claims.

Under the Administrative Procedure Act ("APA") codified at Chapter 14 of the Minnesota Statutes, the agency itself issues the final decision in contested case hearings.[123] Administrative law judges only have authority to make recommendations.[124] If the agency adopts that decision or else fails to act within 90 days after the record closes, the ALJ's decision can become a final decision.[125] Otherwise, the final decision comes from the agency itself.

Here, counsel for the Department of Commerce on August 30, 2012, communicated to the Office of Administrative Hearings its intent to dismiss the contested case, after Western Sky expressed its intention to litigate personal jurisdiction. A few minutes later, the administrative law judge circulated by email a proposed order dismissing the matter with prejudice, to which counsel for the Department did not respond. The next day, August 31, 2012, the administrative law judge signed the order dismissing the case against Western Sky with prejudice.[126] The Assistant Commissioner of Commerce allowed the parties to file exceptions on June 12, 2013, and the record closed on June 26, 2013.[127] On July 9, 2013—well within the 90-day time limit—the Commissioner of Commerce issued an order dismissing the case without prejudice.[128] This order was the final decision in that matter.

There is no indication in the record that the Department of Commerce did anything unfair or improper—it merely followed the provisions of the APA. There is also no indication that this order was the result of any kind of settlement between the State and Western Sky. On the contrary, the

[123] Minn. Stat. § 14.61.

[124] Minn. Stat. § 14.50.

[125] Minn. Stat. §§ 14.57, 14.62, Subd.2a. The record closes in a contested case "upon the filing of any exceptions to the report and presentation of argument

[126] Benson Aff., Exs. C, D, E.

[127] Mem. Supp. Defs.' Mot. Dismiss Pursuant to Rule 12.02(E), Ex. 3.

[128] *Id.* The order states specifically: "The Commissioner does not accept the recommendation of the ALJ to dismiss the matter with prejudice, but does accept the conclusion that the matter should be dismissed." *Id.*

administrative record and the Commissioner's order show merely that the State decided not to pursue that case at that time.

As such, the contested hearing against Western Sky does not create any basis for Defendants' various estoppel and preclusion arguments. There is no need to address those arguments more specifically.

CONCLUSION

The State has demonstrated that it is entitled to a temporary injunction to prevent Defendants from purchasing or servicing any new loans to Minnesota consumers. Based on the documents and affidavits in the current record, the State satisfied the five *Dahlberg* factors and has established that irreparable injury will likely occur if the Court does not order temporary injunctive relief.[129]

K.D.S.

[129] Pursuant to Minn. Stat. § 574.18, "[g]overnmental subdivisions are exempt . . . from any requirement of bond as a condition of obtaining injunctive relief." *In re Winona Cnty. Mun. Solid Waste Incinerator*, 439 N.W.2d 56, 58 (Minn. Ct. App. 1989) (citing *State v. Nelson*, 189 Minn. 87, 89, 248 N.W. 751, 752 (1933)).