IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

CHAD MARTIN HELDT, CHRISTI W. JONES, SONJA CURTIS, and CHERYL A. MARTIN, individually and on behalf of all similarly situated individuals *Plaintiffs*, v. PAYDAY FINANCIAL, LLC, d/b/a Lakota Cash and Big Sky Cash; WESTERN SKY FINANCIAL, LLC, d/b/a Western Sky Funding, Western Sky, and Westernsky.com; CASHCALL, INC; and WS FUNDING, LLC, *Defendants*.	*	Case 3:13-cv-3023-RAL

Memorandum in Support of Proposed Intervenors' Motion to Intervene to Object to the Proposed Settlement and to Continue the Preliminary Approval Hearing by 90 days

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INTRODUCTION

Within the past few days, consumer advocates, state attorneys general, and banking regulators across the country got wind of a proposed national class-action settlement that would wipe out dozens of pending lawsuits against one of the most notorious predatory lenders of the past decade, CashCall, its sham Tribal lender Western Sky, and related debt-collection affiliates (collectively, "Western Sky," "the Western Sky entities," or "Defendants"). If approved, the settlement would stop all lawsuits against these companies dead in their tracks, permanently enjoin any consumer who obtained a Western Sky loan from pursuing future litigation, and bar any borrower from seeking a benefit through lawsuits or settlements under the laws of *all 50 states*—even though the plaintiffs here brought claims under only four states' laws.

Judging from the docket, the parties filed their proposed settlement on November 4, and, that same day, asked for a preliminary-approval hearing before Thanksgiving. They told no one. The Western Sky defendants informed no other court or party—even though the same lawyers that represent them here are also defending them in dozens of cases around the country. State and federal officials remained largely in the dark until only a day or two ago, despite a clear requirement under federal law that notice be served "[n]ot later than 10 days after a proposed settlement of a class action is filed in court." 28 U.S.C. § 1715(b). And the defendants flatly refused to agree to a continuance of the preliminary approval hearing, offering no meaningful rationale for opposing the request.[1]

[1] Proposed intervenors acknowledge and appreciate the district court's order postponing the preliminary-approval hearing, which was issued in the midst of finalizing this brief. *See* Dkt. No. 79. Still, intervenors file this motion because a 90-day continuance is warranted in light of the numerous and difficult legal questions that are implicated by the proposed settlement, in addition to the other relief requested herein.

What explains the rush? Perhaps this: There are dozens of pending private and public-enforcement actions against CashCall challenging its illegal Western Sky loan and debt-collection practices. Those actions include six separate class-action lawsuits brought in Florida, Georgia, North Carolina, Kentucky, Illinois, and Wisconsin, in which the plaintiffs and their counsel have quickly collaborated to bring this motion. In addition, more than half the states across the country have launched enforcement actions against CashCall/ Western Sky, as have the Federal Trade Commission and the Consumer Financial Protection Bureau. The liability is also piling up. More than a dozen states have reached settlements that provide consumers with meaningful relief from abusive lending and collection practices; and more are on the way. In those states that have reached settlement, many (like Maryland and Vermont) have completely invalidated the loans, and others (like Massachusetts and California) reduce the balance on the loans to, at most, the state's maximum interest-rate cap. Those states that have pending actions are looking to cancel the loans and impose massive penalties. Defendants are, in short, facing a tidal wave of potential liability.

Faced with this onslaught, what has happened here appears to be an intentional effort by Defendants to hold a reverse auction on its pending liabilities. Cash Call picked the one case in Western Sky's home state, with a small team of plaintiffs' lawyers, that, unlike the currently pending state cases, sought to certify a nationwide class; it then negotiated a deal "in the hope that the district court will approve a weak settlement that will preclude other claims against the defendant." *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 282 (7th Cir. 2002). We have all seen this strategy before: the settlement offers the class pennies on the dollar, the plaintiffs' lawyers "are happy to sell out a class" in exchange for "generous attorneys' fees"—in this case up to $3.5 million (on a capped $7

million fund that likely will end up worth far less)—and the "defendants are happy to pay the generous attorneys' fees since all they care about is the bottom line." *Id.*

This Court should not place its imprimatur on this cynical strategy. In the short time since discovering the proposed settlement, advocates from around the country have dropped everything and made extraordinary efforts to collaborate and speak with a single voice in these papers. The proposed intervenors here—who hail from Florida to Wisconsin and beyond—face a serious threat from this proposed settlement. If approved, every one of the intervenors' narrowly tailored cases will be obliterated. Given these stakes, more time is needed to evaluate the implications of the settlement—not only for the intervenors, but also for state and federal regulators, and national consumer advocacy groups. Accordingly, we respectfully request that the Court permit intervention in this action and continue the preliminary-approval hearing by at least 90 days.

Even in the short time since intervenors learned of the settlement, however, it has become clear that the proposed nationwide settlement is riddled with intractable problems. Therefore, we respectfully request that the Court treat these papers as formal objections to preliminary approval of the proposed settlement. We also reserve the rights to supplement these papers and to join additional intervenors as appropriate.

STATEMENT OF THE CASE

A. CashCall's illegal Western Sky lending scheme targeting consumers in nearly all fifty states.

Despite their ubiquitous presence as defendants on PACER, CashCall's Western Sky enterprise is of fairly recent vintage. In 2009, Martin Webb and his company, Western Sky, began using a purported association with the Cheyenne River Sioux Tribe of South Dakota to pedal low-dollar loans to thousands of consumers through marketing

"designed to reach potential borrowers who reside off the Reservation and outside of South Dakota." *F.T.C. v. Payday Fin., LLC*, 935 F. Supp. 2d 926, 930 (D.S.D. 2013) ("*FTC I*"); *see also F.T.C. v. PayDay Fin. LLC*, 989 F. Supp. 2d 799, 806 (D.S.D. 2013) ("*FTC II*"). CashCall, looking for a new partner after its prior "rent-a-bank" scheme was shut down, entered into a "rent-a-tribe" agreement with Western Sky, using Western Sky as a front to claim Tribal immunity.[2]

But these low-dollar loans came at a high cost: massive up-front fees, lengthy repayments terms, and annual interest rates topping out at nearly 350%. In a typical loan, a consumer borrows $1,000 but has to "repay Western Sky $1,500 and 149% interest, for an effective interest rate of 233.10% per annum" and a total amount owed of $4,893. *Moses v. CashCall, Inc.*, 781 F.3d 63, 66 (4th Cir. 2015). Although "clearly illegal" under both state and federal law, *id.*, Defendants premised their lending scheme on one crucial factor: a claimed ability to avoid liability by cloaking its activities in tribal immunity, citing the Indian Commerce Clause of the Constitution and the laws of the Cheyenne River Sioux Tribe. *See* Petrovich, *Circumventing State Consumer Protection Laws: Tribal Immunity and Internet Payday Lending*, 91 N.C. L. Rev. 326 (2012). Yet Webb "is not an official of the Tribe," and "does not represent or act on behalf of the Tribe." *FTC I*, 935 F. Supp. 2d at 929. And, as this Court observed in *FTC I*, the Indian Commerce Clause "does not provide a basis for tribal jurisdiction over non-Indians." *Id.* at 931 n.3.[3]

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[2] *See* Order at 25, *W. Virginia v. CashCall*, No. 08-C-1964, (W. Va. Kanawha County Circuit Court, Sept. 10, 2012) (finding after a bench trial that "the purpose of the lending program was to allow Cash Call to hide behind the Bank's charter . . . as a means for CashCall to deliver its loan product to states like West Virginia with usury laws"), *available at* http://bit.ly/1l70fb4.

[3] Native American advocacy groups have condemned Western Sky's cynical efforts to play games with tribal sovereignty, explaining that Western Sky "does not

"[A]mid mounting legal battles" with federal and state regulatory authorities—as well as a raft of private lawsuits challenging its lending and business practices—CashCall shut down the Western Sky lending business in September 2013.[4]

B. Federal regulators bring enforcement proceedings.

The Federal Trade Commission brought enforcement actions against the loan originators, alleging that various Webb-owned companies including Western Sky "sought to unfairly and deceptively manipulate the legal system and force debt-burdened consumers throughout the country to travel to South Dakota and appear before a tribal court that did not have jurisdiction over their cases," along with a host of illegal collection practices.[5] After this Court concluded that Western Sky violated various federal consumer-protection laws, *see FTC II*, 989 F. Supp. 2d at 805, Western Sky agreed to a settlement with the FTC under which they paid almost $1 million in penalties for their "unfair and deceptive tactics to collect on payday loans."[6]

At the same time, the CFPB brought enforcement actions against Western Sky's backers—CashCall, and its affiliates, WS Funding LLC and Delbert Services

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operate under tribal law or abide by tribal regulatory bodies and is not wholly-owned by a federally-recognized tribe." *See* NAFSA Applauds New York Attorney General Decision to File Suit Against Lender Circumventing Tribal Law (Aug. 13, 2013), http://bit.ly/1BrO6iN.

[4] *See* Danielle Douglas, *Payday lender Western Sky Financial to stop funding loans on Sept. 3*, Wash. Post (Aug. 26, 2013), http://wapo.st/1X4NeuF.

[5] *See* FTC Charges That Payday Lender Illegally Sued Debt-Burdened Consumers in South Dakota Tribal Court Without Jurisdiction (March 7, 2013), http://1.usa.gov/1X4Ouhu.

[6] *See* Payday Lenders That Used Tribal Affiliation to Illegally Garnish Wages Settle with FTC (April 11, 2014), http://1.usa.gov/1NZx5X1.

Corporation.[7] The CFPB alleged that CashCall marketed, financed, and collected on loans that required customers to repay more than five times the amount borrowed.[8] These loans, according to the CFPB, violated a host of state usury laws, by obliterating interest-cap rates and ignoring licensing requirements. *Id.* ¶¶ 11–18, 26–31. The CFPB enforcement action is currently pending in the United States District Court for the Central District of California.[9]

C. Private consumers and state regulators undertake a series of state-by-state challenges to Western Sky's scheme.

There are multiple pending private class-action lawsuits in various states challenging Western Sky's loan and debt-collection practices. These lawsuits allege that Western Sky repeatedly violated the usury and consumer-protection laws of the states in which they were filed. Several of these lawsuits are substantially further along than this case. For example, a putative class of Illinois borrowers is currently litigating claims against Western Sky under Illinois criminal usury and consumer-protection statutes. In that case, the Seventh Circuit held the tribal arbitration clause illusory and unenforceable, and concluded that tribal exhaustion was inappropriate because the tribe had no jurisdiction over plaintiffs' claims. *Jackson v. Payday Fin.*, 764 F.3d 765 (7th Cir. 2014), *cert denied*, 135 S. Ct. 1894 (2015). The district court then denied Western Sky's motion to dismiss, *see Jackson v. Payday Fin.*, 79 F. Supp. 3d 779 (N.D.Ill. Feb. 3, 2015), and

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[7] *See* CFPB Sues CashCall for Illegal Online Loan Servicing (Dec. 16, 2013), http://1.usa.gov/1EAEgew.

[8] First Am. Compl. at ¶¶ 21, 25., *CFPB v. CashCall, Inc.*, No. 2:15-cv-07522 (C.D. Cal. filed Sept. 25, 2015), available at http://1.usa.gov/1HZGxDt.

[9] The CFPB action was originally filed in December 2013 in the United States District Court for the District of Massachusetts. The case was transferred to the Central District of California in September 2015. *See* No. 2:15-cv-07522, Dkt. No 62.

set a November 17, 2015 discovery cut-off date. The *Jackson* parties "were well on their way to completing discovery by, or shortly after this date, when defendants' counsel informed plaintiffs' counsel that they could not take or defend any depositions until December. . . . Counsel learned of the *Heldt* settlement shortly thereafter." Add. 103.[10]

The declarations and statements of interests of plaintiffs in the private statewide actions—contained in the addendum to this motion—explain in detail the claims alleged and current status of those actions. *See* Add. 1–81 (North Carolina); 82–101 (Florida); 102–07 (Illinois); 108–19 (Kentucky); 120–23 (Wisconsin); 124–38 (Georgia). Those facts are incorporated herein.

A number of state regulators have also stepped in to challenge the Western Sky lending scheme on a state-by-state basis. Like the FTC and CFPB, these regulators have determined that Western Sky's lending and collection activities violated state usury and consumer-protection laws. The New Hampshire Banking Department, for instance, concluded that "Western Sky was 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." *In re Cashcall, Inc.*, Case No. 12-308, (N.H. Banking Dept. June 4, 2013), at 5. Similarly, the Florida Attorney General alleged that CashCall and its affiliated entities "seek to evade the State of Florida's usury and consumer protection laws by using as a front . . . Western

[10] Similarly, proposed Florida Intervenor Inetianbor was already litigating his claim against CashCall in Florida for a year when the *Heldt* complaint was filed on July 11, 2013. Add. 83–86. And materials from his ongoing action were attached as exhibits to the *Heldt* amended complaint. *See* Dkt. No. 30, Exs. A-B.

Sky[, which] has falsely held itself out as a Tribal entity that purports to be exempt from state laws under the doctrine of Tribal Sovereign Immunity."[11]

Many of these state enforcement actions have already yielded substantial benefits for consumers—including declarations that Western Sky's outstanding loans are void and unenforceable, as well as tens of millions of dollars in restitution for consumers. Specifically, at least eighteen states (California; Colorado; Connecticut; Illinois; Iowa; Kansas; Maryland; Massachusetts; Michigan; Missouri; Nevada; New Hampshire; New York; Oregon; Pennsylvania; Vermont; Washington; and West Virginia) have reached either judgments or consent decrees with CashCall and/or Western Sky entities. For the Court's benefit, we briefly summarize below the significant relief obtained by state regulatory agencies.

- ***California:*** Final judgment entered in February 2015. Major elements of relief include: (1) Cease and desist order from violating several state consumer-protection statutes; (2) Various injunctive requirements concerning prospective loan activities, including mandatory minimum loan amount of $2,600; (3) Pay $125 to every borrower who obtained a loan from 2008-2014 and whose prepayment was not applied to initial monthly payments; and (4) Pay California approximately $1 million in penalties and fines.[12]

- ***Colorado:*** Settlement entered in January 2014. Major elements of relief include: (1) Permanent injunction prohibiting Western Sky from performing any loan-related (including collection) activities in the State; and (2) Disgorgement to the State in the amount of $565,000.[13]

- ***Connecticut:*** Consent order entered in March 2014. Major elements of relief include: (1) Permanent injunction prohibiting Western Sky from performing any loan-related activities that would violate State law; (2) Restitution for interest

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[11] Complaint at 5, *Office of the Att'y Gen. v. Western Sky Fin., LLC* (filed Dec. 23, 2013), *available at* http://bit.ly/1PwIcrK.

[12] http://bit.ly/1ObZKq9.

[13] http://bit.ly/1MMXuqb.

collected over 12%; and (3) Pay State approximately $400,000 in penalties and fines.[14]

- ***Illinois:*** Cease and desist order entered in March 2013. Major elements of relief include: (1) Finding that Western sky violated Illinois consumer-protection and lending laws; and (2) Prohibits Western Sky from offering, making, or arranging loans to Illinois consumers.[15]

- ***Iowa:*** Division of Banking negotiated settlement in October 2014. Major elements of relief include: (1) Pay $1.5 million in fines, some of which will be used to provide restitution to consumers; (2) Revocation of CashCall's loan company license number; (3) Cease and desist order from making any loans to Iowa consumers, and from making any credit reports to credit agencies; and (4) Reset interest rates on the outstanding principal balance of all covered loans to 4%.[16]

- ***Kansas:*** Cease and desist order entered in May 2012. Major elements of relief include: (1) Cease and desist from any loan-related (including collection) activities in the State; (2) Pay a civil penalty of approximately $1.5 million; (3) Provide the state with a written report of all supervised loans; (4) Prohibition from future applications for lending license; and (5) Pay restitution of at least $1.5 million to Kansas consumers.[17]

- ***Maryland:*** Commissioner of Financial Regulation enters settlement in June 2014. Major elements of relief include: (1) Pay $1.7 million into a restitution fund for eligible borrowers; (2) Cancel remaining balances on any loans by Western Sky to a Maryland borrower; and (3) Pay State approximately $80,000 in fines.[18]

- ***Massachusetts:*** Final judgment order entered in October 2015. Major elements of relief include: (1) Permanent injunction prohibiting Western Sky from performing any loan-related (including collection) activities in the State; (2) Refund eligible borrowers for any interest charged that exceeds the legal rate; (3) Pay state approximately $450,000 in fines, penalties, and attorneys' fees'; (4) Removal of any credit reporting by Western Sky corresponding to covered loans; (5) Order modifying terms of outstanding loans (e.g., recalculation of payments with a 12% interest rate and loan term of 24 months; option for consumers to pay

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[14] http://1.usa.gov/1H4HEXG; http://1.usa.gov/1LiqHnj.

[15] http://bit.ly/1X97gUR.

[16] http://bit.ly/1NXtj0o

[17] *In re Western Sky Fin., LLC*, No. 2011-312 (Kan. Bank Comm'r May 22, 2012).

[18] http://bit.ly/1NR0H8V.

off loan in full *without interest* within two months); and (6) Mark all modified loans as "Paid in Full" after 24 months with $0 balance and discharged without additional collection activity .[19]

- ***Michigan:*** Settlement entered in May 2015. Major elements of relief include: (1) Cease and desist from any loan-related activities until complaint with state consumer-protection laws; (2) Cease and desist from making any negative credit reports, and removal of any pre-existing credit reports; (3) Permanent reduction of interest rates on all Western Sky loans to 7%; and (4) Pay $2.2 million into settlement fund to be distributed pro rata to eligible Michigan consumers.[20]

- ***Missouri:*** Settlement reached in March 2015. Major elements of relief include: (1) Permanent injunction against all loan-related activity in the state; (2) Cancel existing loan balances for Missouri customers; (3) Remove any credit reporting information; and (4) Pay $270,000 in restitution and $30,000 in civil penalties to the State.[21]

- ***Nevada:*** Consent order entered in December 2013. Major elements of relief include: (1) Cease and desist order from performing any loan-related activities until Western Sky obtains a state lending license; (2) Pay $50,000 in administrative fines; and (3) Release any claims to enforce, validate, or collect against any Nevada borrower.[22]

- ***New Hampshire:*** Cease and desist order entered in June 2013. Major elements of relief include: (1) Cease and desist from violating state consumer-protection laws; (2) Disgorge any finance or collection charges associated with loans made to New Hampshire consumers; (3) Pay restitution to New Hampshire consumers who received unlawful loans; and (4) Pay administrative fine of approximately $1.97 million.[23]

- ***New York:*** Settlement reached in January 2014. Major elements of relief include: (1) Cease and desist order from collecting interest from eligible New York borrowers; (2) Pay into settlement fund to distribute refunds to borrowers who paid more than legal interest rate; (3) Permanent injunction prohibiting Western Sky from performing any loan-related (including collection) activities in the State

[19] http://1.usa.gov/1H4QZi8.

[20] http://bit.ly/1PL1FDE.

[21] http://on.mo.gov/1OdFioT.

[22] http://bit.ly/1SxgWqY.

[23] http://1.usa.gov/1QK5ycW.

until it complies with New York law and obtains license; and (4) Pay $1.5 million penalty to State.[24]

- ***Oregon:*** Cease and desist order entered in December 2012. Major elements of relief include: (1) Cease and desist from violating state consumer-protection laws; (2) Cease and desist from any collection activities related to interest or charges for loans in excess of legal interest rate; and (3) Pay civil penalties of $17,500.[25]

- ***Pennsylvania:*** Consent decree entered in June 2013. Major elements of relief include: (1) Cease and desist from advertising, soliciting or making loans to Pennsylvania residents until properly licensed; (2) Not eligible to be licensed to make loans to Pennsylvania consumers for three years; (3) Permanently modify the interest rates to 6% annual interest on outstanding loans; (4) Request to credit reporting agencies the removal of all reports made by CashCall and its affiliates; and (5) Pay the department $1 million to provide restitution to Pennsylvanians who paid in excess of the allowed 6% annual interest rate on their loans with the companies, as well as to recoup investigation and litigation costs.[26]

- ***Vermont:*** Settlement entered in April 2014. Major elements of relief include: (1) Permanent injunction on conducting loan-related business in State until in compliance with state consumer-protection laws; (2) Cancel all outstanding loans, and agree to not take any efforts to collect on these loans; (3) Pay into a settlement fund to provide refunds to eligible Vermont borrowers; and (4) Pay $50,000 to State in penalties and costs.[27]

- ***Washington:*** Consent decree entered in October 2015. Major elements of relief include: (1) Cease and desist from loan-related (including collection) activities; (2) Pay restitution in the amount of $1.9 million; (3) Pay $100,000 in administrative costs; and (4) Prohibition on selling, transferring, assigning or otherwise disposing of any consumer installment loans.[28]

- ***West Virginia:*** Series of orders entered 2012-2013 against CashCall regarding rent-a-bank lending; affirmed in May 2014. Major elements of relief include: (1) Permanent injunction prohibiting CashCall from violating state consumer-protection laws; (2) Pay approximately $10 million in restitution; (3) Pay

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[24] http://on.ny.gov/1ObXz5Y.

[25] http://bit.ly/1j44R0l.

[26] http://bit.ly/1PKHeH9.

[27] http://bit.ly/1PKHbLx.

[28] http://1.usa.gov/1Sxgqt4.

approximately $1.5 million in civil penalties; and (4) Declaration that all loan contracts entered between CashCall and West Virginia consumers were void.[29]

At least six additional state regulators (in Arkansas[30]; the District of Columbia[31]; Florida[32]; Georgia[33]; Minnesota[34]; and North Carolina[35]) have enforcement actions pending against Western Sky and its affiliates. Like the actions brought by state agencies that have already resulted in relief, these lawsuits seek to permanently prohibit Western Sky from loan-related activities in their respective states, to declare all loans made in violation of state usury and consumer-protection laws void and unenforceable, and/or to order Western Sky to pay restitution and civil penalties.

D. The *Heldt* plaintiffs—residents of Minnesota, Texas, and Virginia—file this putative nationwide class action in South Dakota.

One of the private consumer actions brought against Western Sky was this action, filed in July 2013 by named plaintiffs Chad Martin Heldt, of Minnesota, Christi Jones and Sonja Curtis, of Texas, and Cheryl Martin, of Virginia. Unlike most of the other statewide class actions, however, the *Heldt* litigation was brought on behalf of a putative nationwide class. The putative class was defined as: "All individuals whose loan agreement with Western Sky was made or formed using Defendants webservers located in

[29] http://bit.ly/1H4QLrb.

[30] http://bit.ly/1NZDbXu.

[31] http://bit.ly/1SYCtJV.

[32] http://bit.ly/1PwIcrK.

[33] http://1.usa.gov/1PKIvhh.

[34] http://bit.ly/1WWaYq4.

[35] http://bit.ly/1LikRT0.

the State of California and collected on a loan at more than 8% interest at any time in the two years prior to the filing of this lawsuit."[36] Compl. 8. The plaintiffs also proposed creating three sub-classes, comprised of those individuals who resided in Minnesota, Texas, or Virginia when they entered into a loan transaction with Western Sky.

The *Heldt* plaintiffs alleged that Western Sky's lending scheme violated the usury laws of California, Minnesota, Texas, and Virginia, and the California State Constitution. *See* Compl. 14–16. These state laws vary widely, as evidenced by the allegations in plaintiffs' own complaint. For instance, whereas Minnesota "limits the interest rate for personal or consumer loans to 8% for loans under $100,000," "Texas law specifies . . . [that] the maximum rate of interest is 10 percent a year." *Id.* 15. And Virginia law holds any agreement under which a borrower pays more than the maximum rate of 8% void as against public policy. *Id.* Notably, the plaintiffs alleged that a question of law common to the *nationwide* class is "whether Defendants made and collected loans that violated Minnesota, Texas, or Virginia usury laws." *Id.* 12.

The *Heldt* plaintiffs also claimed that Western Sky's lending scheme violated the consumer-protection laws of Minnesota, Texas, and Virginia. *Id.* 18–21. These statutes too differ substantially with respect to the type of conduct covered, the required elements to establish a violation, and potential forms of relief. *Id.*

One month after the complaint was filed, Defendants moved to dismiss the *Heldt* action under Rule 12(b), to stay proceedings, and to compel arbitration. This Court

[36] The original complaint was filed on July 11, 2013, meaning that the class would run from July 11, 2011 onward. But the parties' proposed preliminary approval order would certify a broader class: "All individuals who obtained a loan from Western Sky that was subsequently purchased by WS Funding at any time between February 10, 2010 and September 8, 2013." Dkt. No. 64-3. This revised class would—without explanation—tack on a-year-and-a-half of class members, while omitting the prior complaint's only purported basis for a national claim (i.e., the allegations relating to California webservers).

dismissed without prejudice the motions to dismiss and to compel arbitration, instead ordering the proceedings stayed pending tribal court exhaustion.[37] *See* Dkt. No. 58. After the district court's order staying the proceedings, the *Heldt* parties—allegedly not in this Court, but in the tribal court—"engaged in discovery," which, according to the parties' joint motion, consisted of "various depositions and . . . nearly 12,000 pages of documents." Dkt. No. 64, Prelim. App. Mot. 5. In contrast, putative class counsel's declaration states that counsel "reviewed hundreds of pages of documents relating to Defendants' loan policies and practices along with their marketing materials" and conducted three depositions. Dkt. No. 64-2, Wanta Decl. 2. Neither the joint motion nor counsel's declarations provide any detail regarding the information derived from this discovery, or how it factored into counsel's assessment of the strengths and weakness of the class claims and the likelihood of success in litigation.

E. The *Heldt* plaintiffs agree to a settlement that releases any claims in all fifty states, and prohibits class members from receiving benefits from any completed or pending private, state, and federal actions.

Over the course of several months in 2015, Defendants and the *Heldt* plaintiffs reached a settlement agreement that, if approved, would wipe out the claims of more than 300,000 consumers nationwide, in return for far more modest relief than that obtained in prior settlements with and verdicts against the Western Sky entities.

The *Heldt* plaintiffs and Defendants began settlement negotiations in January 2015. Wanta Decl. 2. The parties then conducted two mediation sessions in June 2015;

[37] The parties claim in their preliminary approval motion that, pursuant to this Court's order, they initiated a suit in tribal court seeking a declaratory judgment on the threshold question whether tribal jurisdiction applied. Mot 4–5. Now, in connection with the proposed settlement, the parties have "jointly stipulated to dismissal of the Tribal Court action." *Id.* 5. The parties provide no further information about the tribal court proceedings.

during these sessions, the *Heldt* counsel noted that plaintiffs "faced serious obstacles to establishing the court's jurisdiction or the application of state law to the action, and were also confronted with the possibility that further developments could undermine their claims." Dkt. No. 64-1, Green Decl. 3. Shortly after the mediation, the parties agreed on a term sheet for a final, nationwide settlement. *Id.*

The proposed settlement defines the class as: "All individuals who obtained a loan from Western Sky that was subsequently purchased by WS Funding at any time between February 10, 2010 and September 8, 2013." Dkt. No. 64-3, Settlement Agreement, § 3.2. Under the settlement, the class must release all claims against Western Sky, "whether arising under local, state, federal or Indian tribal law," including claims that class members "do not know or suspect to exist" at the time of the settlement's effective date. *Id.* § 4.1. And the settlement includes a broad injunction prohibiting members from:

> [F]iling, commencing, prosecuting, maintaining, intervening in, participating in (as class members or otherwise), or *receiving any benefits from any other lawsuit* or proceeding in any jurisdiction against the Released Parties *based on or relating to* the claims or causes of action, or the facts or circumstances relating thereto, in this Action and/or the Released Claims, unless and until any such persons have timely excluded themselves from the Settlement Class.

Id., Ex. A, ¶ 22 (emphasis added). This broad injunction appears to preclude class members from participating in any ongoing or prospective action against Western Sky—or receiving benefits from judgments already obtained in private lawsuits or state enforcement actions—unless the class member affirmatively opts-out of the settlement.

The settlement also details the process by which class members can opt-out or object. *Id.* §§ 8.3, 8.4. Defendants retain the right to declare the settlement void if a certain number of class members opt-out of the settlement; however, "[t]he agreement concerning the Opt-Out limit will be contained in a confidential side letter to this

Settlement and will be available for *in camera* inspection by the District Court." *Id.* § 8.3(d). "The parties agree to maintain the Opt-Out Limit and the confidential side-letter . . . in strict confidence." *Id.* The settlement also imposes onerous conditions on class members who wish to object; for instance, objectors must "respond [to any discovery] and must appear for deposition within 14 days." *Id.* § 8.4(a). Objectors who "fail to respond to discovery demands or make themselves available for deposition shall be deemed to have waived any objections." *Id.*

In exchange for agreeing to the nationwide release of claims and the broad injunction, the settlement provides class members with the following relief:

- A prospective interest-rate reduction, down to 18%, on all outstanding loans. *Id.* § 3.4(1)(b).
- A pro-rata payment out of a $7 million capped fund to any claimant who made excess payments (over and above the amount owed if the loan had been made at an 18% interest rate) and who complete and return claim forms. *Id.* § 3.4(2)(b).
- A requirement that Defendants request that "any credit reporting" about Western Sky loans made to credit reporting agencies be removed, but ending after six months. *Id.* 3.4(1)(a).

The settlement also states that the *Heldt* plaintiffs' counsel may seek a fee award of up to $3.5 million, a request for which must be made before the deadline for filing objections, and which, if approved, would be paid in addition to the fund. *Id.* § 3.7.

Notably, unlike the settlements that numerous state regulators reached with Western Sky, the proposed settlement does not cancel any outstanding loans, or affirmatively state that the loans will be changed to reflect a "zero" balance and no collection efforts will be allowed —even in those states where usurious loans are presumptively void and unenforceable under state law. And neither the joint motion for

preliminary approval nor the proposed settlement documents—not even the proposed long-form class notice—makes any reference whatsoever to the pending and completed federal, state, and private actions against Western Sky.

ARGUMENT

I. The Court should continue the hearing by 90 days.

The parties first filed their proposed nationwide class settlement on November 4, 2015. *See* Dkt. No. 64. That same day, they asked the Court to set a preliminary approval hearing before Thanksgiving, on November 20. *See* Dkt. No. 65. But the stakes of this case, and the proposed settlement, are enormous: The parties have proposed a nationwide settlement class that is extraordinary in scope and effect. If approved—even preliminarily—it would immediately enjoin all class members (including those with pending actions elsewhere in the country) and *any other person* from participating in any litigation even remotely touching on the Western Sky/CashCall illegal loan scheme. *See* Dkt. No. 64, Ex. A, ¶ 22. And, if approved, it would call into doubt every single state- and federal-enforcement action taken against Western Sky and CashCall over the last half-decade. Given these implications, together with the short timeline between the parties' initial filing and request for preliminary approval, the Court should continue the preliminary-approval hearing by at least 90 days.

Courts and commentators alike counsel against rushing into preliminary approval. In the class action settlement context, preliminary approval hearings are critical: once approved, a proposed settlement gains "an initial presumption of fairness" that can be difficult to overcome later in the process, after costs are incurred. *In re Gen. Motors Corp. Pick–Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 785 (3d Cir. 1995). At the preliminary-approval stage, courts must be "particularly scrupulous," because Rule 23

"imposes on the trial judge the duty of protecting absentees, which is executed by the court's assuring the settlement represents adequate compensation for the release of the class claims." *Martin v. Cargill, Inc.*, 295 F.R.D. 380, 383 (D. Minn. 2013). Absent class members are particularly at risk during this stage and so "are akin to wards of the court," *Zients v. LaMorte*, 459 F.2d 628, 630 (2d Cir. 1972), and "the court plays the important role of protector of the absentees' interests, in a sort of fiduciary capacity," *In re Orthopedic Bone Screw Prods.*, 246 F.3d 315, 321 (7th Cir. 2001). That is especially true for settlement classes, which "require closer scrutiny" and impose a "*higher* showing of fairness." *Martin*, 295 F.R.D. at 385. (emphasis in original). To rush the preliminary-approval process without due consideration of the potential objections from interested stakeholders would be inconsistent with the Court's important role.

Providing potential objectors more time to review the proposed settlement is all the more critical in light of the broad injunction the settling parties request as part of the preliminary approval order. The proposed injunction would have extraordinary preclusive effect, prohibiting all class members—over 300,000 borrowers nationwide—from "participating in . . . or receiving any benefits from any other lawsuit or proceeding in any jurisdiction against" Western Sky and its affiliates. Dkt. No. 64, Ex. A, ¶ 22. Courts should not "simply sign the moving parties' proposed preliminary approval order without focusing on the fact that they are thereby enjoining parallel litigation." 4 Newberg on Class Actions § 13:19 (5th ed.). Instead:

> Courts should be on the lookout for such provisions and wary about signing them. Quite often, the presence of such a provision in a preliminary approval order is evidence that the parties are settling the present case precisely to enjoin collateral litigation, a practice that raises a red flag about whether the present settlement is a collusive suit aimed at foreclosing a stronger suit in the collateral forum.

Id. The broad injunction here is such a "red flag," and it alone justifies a 90-day continuance of the preliminary approval hearing.

This Court should also grant a continuance because the settling parties failed to adequately provide timely notice of the proposed settlement to all appropriate state and federal officials. The Class Action Fairness Act requires that, "[n]ot later than 10 days after a proposed settlement of a class action is filed in court, each defendant that is participating in the proposed settlement shall serve upon the appropriate [state and federal official] a notice of the proposed settlement." 28 U.S.C. § 1715(b). This provision requires defendants to serve notice "within 10 days of filing of the proposed settlement with the court, rather than 10 days of the court's approval of the settlement." *Adoma v. Univ. of Phoenix, Inc.*, 913 F. Supp. 2d 964, 972–73 (E.D. Cal. 2012).

Defendants assert that they "have complied with this requirement." Dkt. No. 78 (Ltr. from defense counsel, dated Nov. 18, 2015). But the parties mischaracterized that "requirement" in the settlement document, claiming that "[i]n conformity" with CAFA, "Defendants shall be responsible for serving written notice of the proposed class settlement . . . within 10 days *of the date of this order*." Dkt. No. 64, Ex. A, ¶ 12 (emphasis added). That is, of course, not what § 1715(b) says. And, as of the date of this filing, many relevant officials, to our knowledge, have not yet received notice. Even those state officials who have received notice were left in the dark about the terms of this proposed settlement until just a few days ago. Adequately complying with CAFA's notice requirement is critical to the preliminary-approval process. Indeed, "delay" in providing notice under § 1715(b) "makes it questionable whether [a] Court even has the authority to issue an order giving final approval to the proposed settlement." *True v. Am. Honda Motor Co.*, 749 F. Supp. 2d 1052, 1083 (C.D. Cal. 2010). Congress intended that § 1715(b) notice serve as a

crucial "safeguard" for "plaintiff class members' rights," by providing state and federal officials with an opportunity to "voice concerns if they believe that the class action settlement is not in the best interest of their citizens." S. Rep. 109–14, § III at *5 (2005); *see also* 3 Newberg on Class Actions, § 8:18 (5th ed. 2013) (when government officials receive notice of "problematic class actions settlements . . . those [] officials might be able to act on behalf of their constituents in opposing the settlement in some way"). And, here, state and federal agencies have played a critical role in policing Western Sky's illegal lending activities and in returning meaningful relief to consumers.

The settlement's nationwide scope and its unprecedented impact on ongoing and settled litigation—taken together with the parties' apparent failure to adequately provide CAFA's required notice in a timely manner—justifies a 90-day continuance of the preliminary-approval hearing. This additional time would undoubtedly benefit all stakeholders—while prejudicing none—and assist this Court in discharging its own obligation to ensure that absent class members' interests are thoroughly considered.

II. The Court should allow the proposed intervenors to intervene.

Absent class members who have pending cases that would be directly affected by a proposed settlement—like the one here—are classic intervenors as of right under Rule 24(a). The Court should grant their request to intervene.

A. To begin, under the Federal Rules, intervention as a matter of right is allowed on timely motion when anyone "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." Fed. R. Civ. P. 24(a)(2); *S. Dakota ex rel. Barnett v. U.S. Dep't of Interior*, 317 F.3d 783, 785 (8th Cir. 2003). In short, the rule provides

that a party seeking mandatory intervention must establish that: (1) it has a recognized interest in the subject matter of the litigation; (2) the interest might be impaired by the disposition of the case; and (3) the interest will not be adequately protected by the existing parties. *Id.* Motions to intervene in a class action should be construed liberally in favor of the proposed intervenors. *In re Uponor, Inc., F1807 Plumbing Fittings Prods. Liab. Litig.*, 716 F.3d 1057, 1065–66 (8th Cir.2013).

All of Rule 24(a)'s factors are easily met by the proposed intervenors here. *First*, the motion is timely—intervenors have "filed to intervene" only "shortly after becoming aware of the litigation and proposed settlement"—and there "has not been any significant delay in seeking intervention." *Cullan & Cullan LLC v. M-Qube, Inc.*, 2014 WL 347034, at *8 (D. Neb. Jan. 30, 2014). *Second*, the intervenors have an interest in "the subject of this action"—they all have currently pending cases raising substantially similar claims against the Western Sky entities. *See generally* Add. 1–138. *Third*, the intervenors' cases are directly threatened by this proposed settlement: By its terms, the settlement would permanently enjoin the intervenors from continuing to litigate their state actions while at the same time releasing all claims nationwide against any of the Western Sky defendants arising out of their illegal lending scheme. *See* Dkt. No. 64, § 4.1; *id.* Ex. A ¶ 22. And, *finally*, the "differences" among the states' consumer-protection and usury laws "make it less likely that the intervenors' interests, and those of the putative class they seek to represent, can be adequately protected" by the named plaintiffs in this case. *Cullan*, 2014 WL 347034, at *8. The intervenors' cases involve carefully tailored claims alleging that the Western Sky defendants violated specific state consumer-protection and lending laws. None of the named plaintiffs in this case, though, allege that the Western Sky entities violated any the

intervenors' state's laws. Yet the proposed settlement would release any claim based on these laws. That alone is sufficient to justify intervention.

B. Even were intervention as of right unavailable, the federal rules provide that "[o]n timely motion, the court may permit anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). That standard is satisfied here. As explained in the attached statement and declarations, the proposed intervenors' cases all involve allegations that the very same defendants in this case violated specific state laws when they sold, and then collected on, loans to consumers—a clear example of claims that "share[] a common question of . . . fact with the main action." *Midland Funding, LLC v. Brent*, 2011 WL 1882507, at *5 (N.D. Ohio May 17, 2011). Allowing intervention here—where "there is no question that the intervenors' interests are not adequately represented by the existing parties"—would ensure that the absent class members' valuable claims are protected. *Beer v. XTO Energy, Inc.*, 2010 WL 2773311, at *5 (W.D. Okla. July 13, 2010). It also would cause no prejudice or undue delay to the rights of the original parties. Courts routinely permit parties to intervene to participate fully in class action settlement proceedings. *See* 5 Newberg on Class Actions § 16.10 (4th ed. 2002).

III. The settlement should not be approved.

Even in the short time intervenors have had to review the proposed settlement, it has become clear that the settlement does not meet the standards for preliminary approval. We thus respectfully request that these papers be treated as objections to preliminary approval of the settlement and that the proposed settlement not be preliminarily approved.

When a court is first asked to approve a proposed settlement in a class action, it has one "ultimate responsibility:" to "ensure that the interests of class members are not subordinated to the interests of either the class representatives or class counsel." *Maywalt v. Parker & Parsley Petroleum Co.*, 67 F.3d 1072, 1078 (2d Cir. 1995). At the preliminary-approval stage, this means that a court must evaluate whether the proposed settlement "discloses grounds to doubt its fairness" or contains other "obvious deficiencies" that remove it from the "range of possible approval." *Thomas v. NCO Fin. Sys.*, 2002 WL 1773035, at *5 (E.D. Pa. July 31, 2002). The job is "demanding because the adversariness of litigation is often lost after the agreement to settle." *Manual for Complex Litigation* § 21.61. And, in cases where settlement negotiations precede class certification, and approval for settlement and certification are sought simultaneously, courts must be "even 'more scrupulous than usual' when examining the fairness of the proposed settlement." *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 534 (3d Cir. 2004) (citing *In re Gen. Motors*, 55 F.3d at 805). Put another way: What's required is "exacting and thorough" review, not a "rubber stamp of the parties' agreement." *Martin*, 295 F.R.D. at 383.

This proposed settlement in this case falls well short of the "range of possible approval." Although the intervenors have had only limited time to study the proposed settlement and to consider its impact and effect, there are many aspects of this extraordinary settlement that are independently unlawful or undermine the validity of the settlement as a whole. Below we provide a preliminary analysis of the proposed settlement's defects, any one of which is reason enough to reject. If a proposed settlement "appears obviously deficient"—as this one does—a decision rejecting the settlement "should be issued before rather than after the parties incur the administrative expense to

publish notice to the class and handle any objections." *Zimmerman v. Zwicker & Assocs., P.C.*, 2011 WL 65912, at *3 n.5 (D.N.J. Jan. 10, 2011).

A. The proposed class cannot be maintained on a nationwide basis. The complaint in this case seeks to certify a nationwide class based not on any substantive federal law, but instead on three states' usury laws and California's constitution. Am. Compl., Dkt. No. 30, at 17-19. Rule 23, however, will typically "not be satisfied" where "the class claims must be decided on the basis of the laws of multiple states." Wright & Miller, 7AA Fed. Prac. & Proc. Civ. § 1780.1 (3d ed.). The reason is simple: Common issues generally "do not predominate in a multi-state class action based on state law when there is significant variation in the laws of the various jurisdictions." 2 Newberg on Class Actions § 4:61 (5th ed. 2011). It is well established that—unless the plaintiffs can show otherwise—where "[t]he law applicable to each class member would be the consumer-protection statute of that member's state," a nationwide class generally cannot be maintained. *Perras v. H & R Block*, 789 F.3d 914, 918 (8th Cir. 2015); *see also Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 590–94 (9th Cir. 2012). (holding that California's consumer protection laws could not be applied to nationwide class).

That general rule applies here. The named plaintiffs in *Heldt*—all of whom reside in Minnesota, Texas, and Virginia—allege violations only under specific states' laws (California, Minnesota, Texas, and Virginia). But the intervenors' lawsuits all advance claims against Western Sky under *other states'* usury and consumer-protection laws—which vary widely in scope and potential remedies. And the plaintiffs here have made no showing—none—that those differences can be overcome. In cases implicating the law of multiple states, "more than a perfunctory analysis is required to determine whether state law variations pose insuperable obstacles to class certification; the issue can be resolved

only by first specifically identifying the applicable state law variations and then determining whether such variations can be effectively managed through creation of a small number of subclasses grouping the states that have similar legal doctrines." Wright & Miller, 6A Fed. Proc., L. Ed. § 12:211. In the absence of any compelling explanation for why those differences don't matter here, this court "must respect these differences rather than apply one state's law to sales in other states with different rules." *In re stone/Firestone, Inc.*, 288 F.3d 1012, 1018 (7th Cir. 2002).

Another problem, however, lurks just behind the plaintiffs' bid for nationwide class certification here: it is premised on a defective jurisdictional theory that California is the "place of contract formation of the loan agreements" for loans extended by Western Sky and its affiliates and assigns. Am. Compl., Dkt. No. 30, at 19. That is wrong. As the Seventh Circuit has explained, consumers who obtained Western Sky loans formed their contracts in their home states: Consumers "apply for the loans, negotiate the loans, [and] execute the documents" in their home state. *Jackson*, 764 F.3d at 782. Perhaps that explains why the parties themselves changed the proposed class definition from "All individuals whose loan agreement with Western Sky was made or formed using Defendants [sic] webservers located in the State of California," Am. Compl. at 11, to "All individuals who obtained a loan from Western Sky that was subsequently purchased by WS Funding." Settlement Agreement (Dkt. No. 64) § 3.2. Regardless, with California no longer connected to the class definition, even the plaintiffs' purported basis for maintaining a nationwide class has evaporated.

And what to make of the fact that none of the named plaintiffs here have alleged claims under any states' law other than California, Minnesota, Texas, and Virginia? The settlement purports to release all claims under the laws of *every state*—including the release

of claims that the plaintiffs themselves never brought. It should go without saying that, in class litigation, the class representative (or, more precisely put, class counsel) cannot trade off the claim of one class member for that of another. *See Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 857–58 (1999) (overturning class certification, among other reasons, because of impermissible tradeoff among class members). Yet the proposed settlement blesses precisely that form of bargaining here—an untenable outcome under Rule 23 and the Due Process Clause. Claims held by absent class members are a form of "property" that, under the Due Process clause of the Fifth Amendment, may not be arbitrarily deprived. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982). And courts have long recognized that that the release of a claim "not shared alike by all class members" will render a settlement defective under Rule 23. *TBK Partners, Ltd. v. Western Union Corp.*, 675 F.2d 456, 461 (2d Cir. 1982) (internal quotations omitted).

B. The proposed settlement purports to interfere with public-enforcement actions and settlements. As described above, there have been at least twenty-two state enforcement actions targeting the same core facts at issue in the *Heldt* litigation: Western Sky's illegal practice of extending payday loans with interest rates far exceeding that permitted under state usury laws, and its unfair and deceptive practices in collecting on those loans. In sixteen of those actions, state regulators have achieved substantial and meaningful relief for consumers in their states. In Maryland, for instance, Western Sky agreed to cancel all Maryland borrowers' outstanding loan balances and to pay $1.7 million in restitution; in West Virginia, to take another example, the state's highest court affirmed lower-court orders requiring Western Sky to pay approximately *$10 million* in restitution, and to declare all loan contracts entered with West Virginia consumers void and unenforceable.

But the proposed settlement here purports to broadly preclude all consumers—in all fifty states—who borrowed a loan from Western Sky from "participating in . . . or receiving any benefits from" these public enforcement actions unless they affirmatively exclude themselves from the settlement. Dkt. No. 64, Ex. A, ¶ 22. Preliminary approval of the proposed settlement would interfere with those actions; class members who are entitled to substantial relief under the settlements Western Sky reached with state regulators may now forfeit all such relief. This problem is amplified by the fact that the proposed class notice does not even *mention* the existence of the state enforcement actions, leaving class members totally uninformed about their options.

The settlement's broad injunction also raises novel and thorny questions regarding the extent to which a private, nationwide class settlement can supplant the relief obtained by state regulators. For example, in those state settlements where restitution was calculated by reference to the number of consumer violations, must the restitution recovery be diminished by the number of class members who participate in the proposed settlement? Likewise, numerous state settlements required Western Sky to reduce the interest charged on outstanding loans to the rate permitted by state law (in every instance, less than the 18% provided in this settlement). Would class members bound by the settlement still be required to pay the 18% interest rate on outstanding loans, even though the state has determined that the maximum rate Western Sky may charge is significantly lower—indeed, even though the loans in some states were declared null and unenforceable *ab initio*?

Even worse, the settlement requires consumers in those states that have yet to reach a conclusive settlement to *prospectively* opt out on the possibility that a better settlement may come—an option that few, if any, class members will likely find

appealing. This could irreparably undermine pending enforcement actions by the CFPB and six states, as well as potential actions being considered by regulators in other states. And the settlement may preclude class members even from participating in cases brought against other defendants, and for other conduct, where the case involves a Western Sky loan. *See* Ex. A, ¶ 22 (enjoining class members from participating in any lawsuit "based on or relating to the claims or causes of action, or the facts or circumstances relating thereto, in this Action").

That the settlement would interfere with state and federal enforcement actions is, standing alone, reason enough to deny this settlement preliminary approval. At the very least, these concerns—particularly in combination with the settling parties' failure to notify interested courts or parties, or even state and federal authorities as required by CAFA—justify a 90-day continuance to provide class members and state regulators sufficient time to respond to the unprecedented preclusive effect of this settlement. *See Figueroa v. Sharper Image Corp.*, 517 F. Supp. 2d 1292, 1328 (S.D. Fla. 2007) (noting that "the singular appearance of the Attorneys General of thirty-five states . . . representing hundreds of thousands, if not millions, of eligible class members" and "the vigor and substance of the[ir] objections," counseled against approving the settlement there).

C. The proposed settlement is not fair, reasonable, or adequate. When considering a class action settlement, the court "acts as a fiduciary who must serve as guardian of the rights of absent class members." *In re Gen. Motors*, 55 F.3d at 785. The burden is on the settling parties to show that the settlement is fair, adequate, and reasonable. *Id.* Here, however, the settling parties have made little effort to meet that burden, as shown by their barebones memorandum in support of preliminary approval. Given the weakness of the benefits offered and the notice provided, the Court should

reject the proposed settlement out of hand. Although the settlement offers those class members who file a claim pennies on the dollar for overpaid interest on the loans, it neither voids those loans (even though they are usurious) nor bars the Western Sky entities from collecting on them—at an interest rate *higher* than many states' caps. *E.g.*, V.A. Code § 6.2-306 (8% maximum rate). That result, if approved, will be a remarkably bad deal for consumers.

1. The proposed settlement is unfair to the class. Many consumers will end up worse off under this settlement than had this case never been brought. Consider, for example, Maryland consumers. In June 2014, Maryland's Commission of Financial Regulation entered into a settlement with the Western Sky defendants that cancelled *all* remaining balances on any Western Sky loans purchased by Maryland consumers and created a $1.7 million reimbursement fund. *See* http://bit.ly/1NR0H8V. Under the *Heldt* proposed settlement, though, it's not at all clear whether a Maryland consumer who does not opt out of this settlement could obtain relief under her state's settlement. *Compare* § 3.8 (stating that class members whose "extensions of credit have already been modified . . . pursuant to an agreement . . . with any of the states . . . shall not be eligible to the Interest Rate Reduction for such extensions of credit, but may be eligible for a Cash Award") *with* Ex. A, ¶ 22 (enjoining all class members from "receiving any benefit from any other lawsuit or proceeding in any jurisdiction against the Released Parties based on or relating to the claims or causes of action, or the facts or circumstances relating thereto, in this Action and/or the Released Claims, unless and until any such persons have timely excluded themselves from the Settlement Class"). Needless to say, a settlement like this—one that leaves consumers worse off than no settlement at all—may not be approved as fair, reasonable, and adequate.

What's more, the injunctive provisions contained in this settlement raise additional serious red flags about the fairness to the class. Recall that preliminary approval of this settlement would, by its terms, immediately enjoin any ongoing litigation against the defendants anywhere in the country. *See id.* In response to the question whether "the preliminary approval of a proposed settlement ought to trigger some judicial action against parallel litigation," one of the leading commentators on class actions explained that "[i]n all but very rare circumstances, the answer to that question should be "no." 4 Newberg on Class Actions § 13:19 (5th ed.). The reasons are straightforward: "[A]t the preliminary stage of a class action settlement, the court has not given notice to the class, not heard objections to the settlement, not weighed the settlement's strengths and weaknesses in an adversarial setting, and likely not finally certified a class; in short, there is no final judgment." *Id.* Ultimately, "enjoining collateral litigation based on an interlocutory preliminary review order issued under a very low standard would be an extraordinary measure best reserved for extraordinary circumstances." *Id.* This is not one of them.

2. The settlement does not reflect a reasonable value to the class. Nor can it be said that either the proposed settlement agreement or the papers seeking preliminary approval make any serious attempt to quantify the value of the settlement—the "most important consideration" for any court's evaluation of a proposed settlement. *In re Wireless Tel. Fed. Cost Recovery Fees Litig.*, 396 F.3d 922, 933 (8th Cir. 2005). The parties' must "present evidence"—if a court is to approve a proposed settlement—that would allow "possible outcomes to be estimated" and permit "a ballpark valuation" of the settlement. *Martin*, 295 F.R.D. at 384; *see also Custom LED, LLC v. eBay, Inc.*, 2013 WL 4552789, at *9 (N.D. Cal. Aug. 27, 2013) (denying preliminarily approval where parties

"provided the Court with no information as to the class members' potential range of recovery"); *Galloway v. Kansas City Landsmen, LLC*, 2013 WL 3336636, at *4 (W.D. Mo. July 2, 2013) (same); *Sobel v. Hertz Corp.*, 2011 WL 2559565, at * 10 (D. Nev. June 27, 2011) (same).

No evidence has been presented here justifying the parties' settlement, and for good reason: none exists. Take the parties' claim that the relief in this proposed settlement in "substantial." Prelim. App. Mot. 11. The parties contend that the "value of the interest rate reduction is estimated to be approximately $32,000,000," *id.*, but no evidence supports this claim. And that number, even if true (and, to be sure, that number is far lower than if the loans had been cancelled entirely), misses the "principal[]" focus of the analysis: "the claims for damages." *Martin*, 295 F.R.D. at 384 n.4. A court's "valuation" of a consumer class settlement requires looking at the "possible universe of damages"—and assessing where on the spectrum the proposed settlement falls. *Id.* at 385. We know that the dollar amount the parties agreed to in this settlement is a $7 million fund plus up to $3.5 million in attorney's fees. Beyond that, though, "the record contains sparse information"—none, really—about any of the factors necessary to make "an assessment of potential damages" possible. *Id.* at 384. Courts simply may not approve a proposed settlement based "primarily upon [the parties'] *ipse dixit*." *Id.* at 386.

Making matters worse, what evidence exists outside of this case strongly suggests this deal falls well below any realistic estimation of damages amounts. For instance, among those states that have already settled with Western Sky and its affiliates, West Virginia required CashCall to pay "more than $13.8 million in penalties and restitution"—just for CashCall's illegal activity in West Virginia—and to void all

preexisting loans and cancel any debts still owing.[38] Consider, too, that extensive discovery in the *Jackson* case in Illinois revealed that 3025 Illinois residents took out loans for a three-year period from 2008-2011 and CashCall collected $8,066,250 on just those loans. Add. 106. Because the loans "provided for a finance charge of two to three times the amount financed," CashCall's Illinois-based liability is "at least $16 million" and likely much more. *Id.* Some back-of-the-envelope math shows that the average dollar amount collected by CashCall on its Illinois loans in *Jackson* is $2,666. Using the parties' representation here that the size of the proposed class is "approximately 348,000," a very rough "ballpark" liability value—just for average dollar amounts recovered on the loans—is $927,768,000 (348,000 x 2,666).

3. The parties have offered no meaningful explanation for their decision to settle. Monetary valuation aside, the parties have also failed to meaningfully justify their decision to settle based on the "relative strengths and weaknesses of the class's claims and the [defendants'] potential defenses." *Martin*, 295 F.R.D. at 385. The parties' submissions offer mostly "generalities." *Id.* For example, the parties contend that "the Plaintiffs and Class Counsel have concluded that it would be in the best interests of the Settlement Class to enter into this Settlement in order to avoid the uncertainties of litigation and to assure benefits to the Settlement Class." Prelim. App. Mot. 2. But "the same is true in nearly every class action" and so these claims add nothing to the mix. *Martin*, 295 F.R.D. at 385.

So too with the assertion that, "[i]f the case had not settled, the litigation would have continued for a very long time and at great expense to both sides with uncertain

[38] http://bit.ly/1H4QLrb.

results." Green Decl. 3. Settlement is "little more than a discussion of the risks inherent in prosecuting almost any class action." *Galloway*, 2013 WL 3336636, at *5 (citations omitted). There is "always a chance that a court might not certify a class, that the jury might find plaintiffs have not met their burden of proof, or that an appellate court might overturn a verdict." *Id.* The question is, though, "*what is the chance* that one or more of these events will happen in this case?" *Id.* (emphasis added). The parties' explanation is unpersuasive because it is "so generic it could be used to justify a wide range of possible settlements here." *Id.*

To the extent that the parties' offer more specific views about the relative merits, they are easily disproved. Consider the claim that the plaintiffs' case faces "serious difficulties" because "claims under state usury laws fail as a matter of law in light of the express contractual choice-of-law clause set forth in each of plaintiffs' loan agreements." Prelim. App. Mot. 10. No case supports this theory, and the parties cite none. Instead, "the determination of the existence and extent of tribal court jurisdiction must be made with reference to federal law, not with reference to forum-selection provisions." *Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.*, 207 F.3d 21, 33 (1st Cir. 2000). And, as the Seventh Circuit has explained—in an appeal brought by Illinois consumers against Western Sky—"tribal courts are not courts of general jurisdiction," and so a tribal court's authority "to adjudicate claims involving nonmembers concerns its subject matter jurisdiction, not personal jurisdiction." *Jackson*, 764 F.3d at 783 (citing *Nevada v. Hicks*, 533 U.S. 353, 367 (2001)). Forum selection clauses, in short, hold no sway— a conclusion this Court has also reached in this case: "CashCall, Inc. and WS Funding LLC did not enter into loan agreements with the Plaintiffs, and appear to have no legitimate argument to be

considered tribal members or in any way affiliated with the Cheyenne River Sioux Tribe." *Heldt v. Payday Fin., LLC*, 12 F. Supp. 3d 1170, 1187 (D.S.D. Mar. 31, 2014).

But even on its own terms, litigating under Cheyenne law would likely not have posed an obstacle to the plaintiffs' claims. The Tribe's Law and Order Code prohibits usury—making it a criminal offense—and declares that "the rate of interest shall not exceed an 18 percent per annum simple interest rate" on a loan over $100.00. *See* § 3-4-52 of the Law & Order Code Cheyenne River Sioux Tribe 1978 Revision.

Equally unpersuasive is the parties' claim that there are serious questions as to whether class certification would be appropriate for purposes of trial because "each of the loan agreements at issue contains arbitration clauses prohibiting class actions." Mot. 10. Every federal court of appeals that has considered this issue has also rejected it. *See Jackson*; 764 F.3d at 781; *Inetianbor v. CashCall, Inc.*, 768 F.3d 1346, 1353–54 (11th Cir. 2014). And this court cast serious doubt on this argument as well. *Heldt*, 12 F. Supp. 3d at 1188–92 (observing that all versions of this agreement contain "problems" and create a "conundrum[]" that would "give rise" to a "procedural nightmare" and "lack of 'orderly administration of justice"). At this stage of the game, it's not even clear that Western Sky itself believes the arbitration clause is enforceable.

Western Sky's remaining claims for preliminary approval are similarly bereft of support. On the assertion (at 12) that the "financial condition of the defendants . . . weighs in favor of preliminary approval," beyond stating the obvious—that the defendants currently face a raft of litigation throughout the country—evidence of the defendants' actual "financial condition" is entirely absent. Finally, the parties fall back to arguing that class certification would be difficult because "each of the plaintiffs' claims differs by state, making it difficult to sort through the requirements of each state and their

application to the class." Mot. 11). Exactly so—but this is a reason weighing against the certification of a nationwide class action like this one. *See* Section III.B, *supra*.

4. The proposed settlement limits the defendants' liability to a claims-made basis but imposes an unlimited claims release. Adding to the unfairness of this proposed settlement, if approved, Western Sky's liability would be limited on a "claims-made" basis even though its claims release is not. "Far from it"—all class members' rights nationwide "would be obliterated even if only a few submit claims." *Kakani v. Oracle*, 2007 WL 1793774, at *5 (N.D. Cal. June 19, 2007). As in *Kakani*, all affected borrowers' "rights to recover . . . under state or federal law or regulation would be completely extinguished by the proposal . . . whether or not a [borrower] ultimately files a settlement claim or whether or not the notice letter is even mailed to a wrong address or whether or not the [borrower] even receives actual notice of the proposed settlement." *Id.* at *5 (emphasis omitted). That asymmetry is intolerable. *See Moreno v. Regions Bank*, 729 F. Supp. 2d 1346, 1352 (M.D. Fla. 2010) ("The release of an unknown claim unrelated to the claims asserted in the complaint frustrates an assessment the fairness of the benefit provided to the class."); 4 Newberg on Class Actions § 13:7 (5th ed.) ("Claims-made settlements are disfavored because . . . they tend to promise far more than they deliver.").

The proposed settlement represents "a bonanza" for Western Sky—"[w]ith a single stroke, the company would wipe the slate clean of all its [consumer-protection] liabilities for all affected [borrowers] nationwide." *Kakani*, 2007 WL 1793774, at *5. And "it would also be a bonanza for plaintiffs' counsel," who are entitled to up to $3.5 million in attorneys' fees "regardless of how many claims are actually submitted." *Id.* The court in *Kakani* held that such a claims-made scheme "is so unfair to absent class members that it

cannot pass even the threshold of plausibility required for even preliminary approval under Rule 23." *Id.* at *6. So too should this Court.[39]

D. The proposed settlement violates basic notice requirements. Class notice violates due process if it fails to "apprise the prospective members of the class of the terms of the proposed settlement" so that class members may come to their own conclusions about whether the settlement serves their interests. *Grunin v. Int'l House of Pancakes*, 513 F.2d 114, 122 (8th Cir. 1975) (internal quotation marks omitted). The proposed settlement proposes a class notice that fails this basic test: It nowhere apprises class members that, by not objecting to the settlement, the class member will be barred from obtaining more favorable relief under any state or federal public-enforcement settlement or consent decree. And it nowhere states that dozens of private actions are pending against Western Sky in a number of states.

As proposed, the class notice states only that "[i]f you do not exclude yourself, you will release all your claims having to do with the legality of your Western Sky loans." Dkt. No. 64, Ex. C & Ex. D. But this language says nothing about a class member's right to any benefits obtained by private lawsuits or public-enforcement actions—including loan cancellation and reimbursement—or that the failure to object would result in a release of any right to obtain benefits under other settlements or more favorable state laws. For instance, the proposed class notice provides no information whatsoever to Illinois class members about the fact that their loans are void and unenforceable in Illinois, and instead gives Illinois class members the impression that they have to pay the loans at (what is, for them) an illegal interest rate of 18%. Add. 103.

[39] Another problem: In contrast to the terms contained in various state settlements, the proposed settlement here provides no mechanism for disclosing to class members the status of their loans.

For many class members, the availability of relief from an agency-enforcement settlement or private statewide class action is not just the only vehicle for relief, but also the best. Unlike the parties' proposed settlement here, many states have successfully obtained far better relief—including the cancellation of Western Sky loans for every consumer in the state—than what the parties propose here. *See supra* at 8–11. Other states and federal regulatory agencies are currently seeking similar relief as well. *See supra* at 12. Barring a class member's ability to obtain more favorable relief under a statewide public-enforcement settlement is, therefore, "not just 'any ground on which a class member might object; rather, it is the principal ground." *Vassalle v. Midland Funding LLC*, 708 F.3d 747, 759 (6th Cir. 2013). Because the notice requirement here "fail[s] to mention th[ese] fact[s]," it cannot satisfy due process. *Id.*

E. The proposed settlement contains several illegal provisions related to objections and opt-outs. The proposed settlement includes an onerous discovery provision designed to prevent people from objecting. Specifically, it gives the parties the right to seek discovery from any objecting class member as if "the objector was a party in the Action"—including the right to depose the objector. Dkt. No. 64, § 8.4(a). At least one court has refused to permit this kind of condition. *See Trombley v. Bank of Am. Corp.*, 2011 WL 3740488, at *5 (D.R.I. Aug. 24, 2011) ("The parties cite no case, however, in which a court has adopted all of the proposed objection procedures advocated here, which include waiver of a late-filed objection and the opportunity for discovery conducted by class or defense counsel."); *see also Corpac v. Rubin & Rothman, LLC*, 2012 WL 2923514, at *3 (E.D.N.Y. July 18, 2012) (denying request to depose objector because of concern that "the proposed discovery is being sought to gain a tactical advantage").

The proposed settlement also permits Western Sky to terminate the settlement if a certain number of class members choose to opt-out. But the triggering limit "will be contained in a confidential side letter . . . and will be available for *in camera* inspection" by the district court, and both parties must keep the opt-out limit and the side letter "in strict confidence." Dkt. No. 64, § 8.3(d). This unusual, secret provision violates Rule 23(e)(3)'s requirement that parties seeking approval of a settlement "must file a statement identifying any agreement made in connection with the proposal." That is, parties must disclose to class members "related undertakings that, although seemingly separate, may have influenced the terms of the settlement by trading away possible advantages for the class in return for advantages for others." Fed. R. Civ. P. 23(e)(3), 2003 advisory cmt.

Indeed, several courts have rejected defendants' attempts to keep agreements regarding opt-out limits—so-called "blow" provisions—hidden from class members. *See, e.g.*, *In re Herald, Primeo, & Thema Funds Sec. Litig.*, 2011 WL 4351492, at *2 (S.D.N.Y. Sept. 15, 2011) (explaining that it denied request "to file a so-called 'blow provision' contained in the [proposed settlement] under seal because it contains the confidential agreement that allows the [defendants] to terminate the settlement when the number of opt-out class members reaches a certain level"); *Martin v. FedEx Ground Package Sys., Inc.*, 2008 WL 5478576, at *1 (N.D. Cal. 2008) (noting that a "major shortcoming" of the proposed settlement was that "the proposed form of notice omitted a material term of the settlement, the number of opt-outs that triggered the defendant's right to withdraw from the settlement").

F. The proposed settlement contains an overbroad release. The proposed settlement's broad release is also highly problematic. In particular, it appears to release Delbert, the Western Sky debt-collection entity, from *any* liability in exchange for nothing.

It is now well known that, by early September 2013, CashCall transferred most, if not all, of its remaining WS loans to Delbert. *See* Am. Compl. ¶ 41, *Consumer Fin. Prot. Bureau v. CashCall, Inc.*, No. 13-cv-13167 (D. Mass. Mar. 21, 2014). But the settlement only requires the "Defendants" to "reduce the interest rate prospectively on all outstanding loans owned on the Effective Dates *by Defendants* to 18%." Dkt. No. 64, § 3.4(1)(b) (emphasis added). By its terms, then, any loans actually owned by Delbert—which is not even a defendant in this case—would not be subject to this condition.

Yet the settlement would explicitly eliminate any liability for Delbert because it defines "Released Party" to include Delbert. *Id.* § 2.29. In the event this settlement is approved, the class will be "deemed" to have "released all claims, causes of action, or liabilities . . . based upon the facts asserted in the Amended Complaint as to the Released Parties." *Id.* § 4.1. In other words, no class member could sue Delbert for any claim arising out of its purchased loans—even though Delbert is not obliged to reduce affected borrowers' interest rates or provide any other form of relief. "[A] broad general release" that "does not track the breadth of the allegations in th[e] action and releases unrelated claims, whether known or unknown, that the Plaintiffs may have" is not fair or reasonable. *Ambrosino v. Home Depot U.S.A, Inc.*, 2014 WL 1671489, at *3 (S.D. Cal. Apr. 28, 2014).

G. The proposed settlement raises a number of other difficult questions. Aside from the numerous objections detailed above, the proposed settlement raises difficult questions that proposed intervenors are not yet equipped to answer given the very short amount of time they have had to evaluate the settlement. For example, are the named plaintiffs adequate class representatives for absent class members who live in different states and/or have raised different state-law claims? Do the named plaintiffs or

putative class counsel have any conflicts of interests that warrant the creation of additional subclasses? Novel legal questions also arise from the proposed settlement's apparent revival of loans that are void under state law. For instance, can a class member who declares bankruptcy contest the loan obligation, given that it is void under his State's law? And may class members subjected to harassing collection practices raise the claim of under the Fair Debt Collection Practices Act when such claims are based on an illegal loan? The absence of information regarding the tribal-court proceedings raise additional questions; for example, the proposed settlement is unclear as to which law should be applied to loans that are modified and collected after the settlement is in effect, as well as the forum for bringing any enforcement proceeding in furtherance of such collection efforts. Ninety days of additional time would allow intervenors adequate opportunity to develop answers to these questions and present thoughtful objections, thus better enabling this Court to fulfill its role "as a fiduciary who serves as guardian of the rights of the absent class members." *Cody v. Hillard*, 88 F. Supp. 2d 1049, 1056 (D.S.D. 2000).

CONCLUSION

For the foregoing reasons, the Court should grant the intervenors' motion to intervene, continue the preliminary approval hearing by 90 days, and disapprove the proposed settlement.

Respectfully submitted,

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