IN THE UNITED STATES COURT OF APPEALS

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE**

CONSTITUTION

FEDERAL STATUTES

RULES AND REGULATIONS

MISCELLANEOUS

INTEREST OF AMICUS CURIAE

The Federal Trade Commission ("FTC" or "Commission") submits this brief in response to the Court's invitation of May 10, 2013. In it, we seek to assist the Court in understanding the grounds for the FTC's law enforcement action against payday lenders who are also defendants in this case, and we suggest ways in which the arguments that the FTC is making in that action may inform the Court's analysis in this case.

The FTC is the federal agency with principal responsibility for the protection of consumers from unfair and deceptive trade practices. The Commission enforces Section 5 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. axw42y 198.M3m3(tSpan)TjEMC 8/P ^MCI(.)6( )]T9008 Tw9

against payday lenders for practices that violate these laws and harm consumers.

STATEMENT

Court. Following the filing of the initial complaint, the Commission learned that the defendants have been invoking forum selection clauses in their loan contracts to file collection actions against borrowers in the Cheyenne River Sioux Tribal Court ("Tribal Court") on the Cheyenne River Sioux Reservation ("Reservation") in South Dakota. The amended complaint alleges that, in their loan contracts, the defendants have violated the FTC Act's prohibition on deceptive practices by misrepresenting that the Tribal Court can legitimately adjudicate such suits and issue valid judgments. The amended complaint also alleges that the defendants' practice of suing borrowers in a distant court that lacks jurisdiction is an unfair practice prohibited by Section 5 of the FTC Act. *See* FTC Amended Complaint at 20-21(Doc. 44 in Case No. 3:11-cv-03017-RAL (D.S.D.)).

The defendants moved for partial summary judgment on whether the Tribal Court has subject matter jurisdiction over their collection actions against borrowers. Significantly, the defendants do not lend either to tribe members or to residents of South Dakota, and thus all borrowers are non-members of the tribe and reside outside of South Dakota. The defendants nonetheless argued that jurisdiction exists

On August 29, 2013, the district court transmitted its findings of fact

Opening Brief at 9. The defendants' loan contracts also state that the "transaction involve[es] the Indian Commerce Clause of the Constitution of the United States of America"; that the loan contract "is governed by the Indian Commerce Clause of the United States of America and the laws of the Cheyenne River Sioux Tribe"; and that the lender is "organized under and authorized by the laws of Cheyenne River Sioux Tribe and Indian Commerce Clause."[3] [Cite.]

Invoking these contract provisions, the defendants have filed at least 1,123 collection actions in Tribal Court against borrowers who have purportedly defaulted. The defendants have obtained sixty-one default judgments; only two consumers have appeared to defend the lawsuits.[4]

In the FTC Act litigation, the Commission maintains that the defendants have misled consumers about their legal rights, and have

---

[3] There is some variation in the wording of the defendants' loan contracts, but they all contain similar language invoking the Indian Commerce Clause and the authority of the Tribal Court.

[4] *See* Payday Financial's Responses to Plaintiff's Second Interrogatories at 3-4, attached as Ex. 11-F to Declaration of Victoria M.L. Budich in Support of Plaintiff's Motion for Summary Judgment (Doc. 99-2 in Case No. 3:11-cv-03017-RAL (D.S.D.)).

College, 434 F.3d 1127, 1132 (9th Cir. 2006) (*en banc*) ("where the nonmembers are *defendants*, the Court has thus far held that the tribes lack jurisdiction, irrespective of whether the claims arose on Indian lands") (emphasis in original).

The Supreme Court has recognized two limited exceptions to this general rule,[5] the first of which the defendants argue applies here: "[a] tribe may regulate . . . the activities of nonmembers who enter into consensual relationships with the tribe or its members, through commercial dealings, contracts, leases, or other arrangements." *Montana*, 450 U.S. at 565.[6] As the Supreme Court has explained, "*Montana* and its progeny permit tribal regulation of *nonmember conduct inside the reservation* that *implicates the tribe's sovereign interests*."

554 U.S. 316, 332 (2008) (emphasis added); *see id*. ("*Montana* expressly

members of a tribe may be considered a tribal entity for purposes of jurisdiction." 434 F.3d at 1133

community was not a tribal entity where the tribe did not organize or incorporate it and did not manage or direct its activities).

Furthermore, *Montana* requires nonmember conduct "inside the reservation." *Plains Commerce Bank*, 554 U.S. at 332; *see id*. at 334 ("our *Montana* cases have always concerned nonmember conduct on the land"). Here, however, the defendants market payday loans exclusively to consumers outside of the Reservation (indeed, outside of South Dakota entirely). And borrowers' activities in applying for, executing, and repaying their payday loans take place entirely off the Reservation. Other courts have found that this amounts to off-reservation commercial activity:

> [D]efendants were operating via the Internet. . . . The borrowers do not go to the reservation in South Dakota to apply for, negotiate or enter into loans. They apply for loans in Colorado by accessing defendants' website. They repay the loans and pay the financing charges from Colorado;

question); *Western Sky II*, *supra*, slip op. at 11 (the defendants' payday lending activities "implicate neither tribes nor on-reservation activity");

defendants' claim that

In short, the FTC maintains, there is no basis for the defendants' claims that the Tribal Court has authority over nonmember borrowers of these payday loans. Borrowers have not

are unlikely to have the means to appear and defend themselves.[14] Not only is this forum geographically distant, but consumers may also have difficulty obtaining the Tribal Court's substantive or procedural laws.[15] Perhaps most importantly, the defendants' practice of subjecting consumers to collection actions in this remote and unfamiliar court

---

[14] The defendants assert that borrowers can appear telephonically. But, even assuming that the rules of the Tribal Court allow this (and assuming further that such mode of participation would suffice to protect borrowers' interests), there is no mention of telephonic participation in the summons served upon borrowers notifying them of the defendants' suit and ordering them to appear at a hearing in Tribal Court.

[15] Following plaintiffs' claims that they had difficulty finding copies of the relevant tribal law, this Court remanded for the limited purpose of resolving this factual issue and one other. On remand, the court below found that tribal law "can be acquired by reasonable means," because both plaintiffs and defendant were ultimately able to obtain copies of the Tribal Code. District Court's Response to Court of Appeals Remand for Findings of Fact at 2 (Doc. 95). The court noted, however, that the plaintiffs were able to secure a copy of the Tribal Code only after numerous failed attempts and at a greater cost than the cost to the defendants. These findings do not address whether the Tribal Court's procedural rules, presumably governing the collection lawsuits initiated there by the defendants, are readily available to consumers. Furthermore, the district court's conclusion about the availability of applicable tribal law is not undisputed. Another district court examining the sole arbitration occurring under the terms the defendants' loan contracts recently found that the Tribe's "consumer dispute rules" referenced in the defendants' loan contracts do not exist. *Inetianbor v. CashCall, Inc.*, __ F. Supp. 2d ___, 2013 WL 4494125, at *5-6 (S.D. Fla. Aug. 19, 2013).

likely pressures many consumers into abandoning defenses or counterclaims they could have asserted in a more accessible court of competent jurisdiction. That may help explain why, of the 1,123 consumers sued by the defendants in Tribal Court, only two have appeared to defend the lawsuit. *See Am. Fin. Servs. Ass'n v. FTC*, 767 F.2d 957, 973-75 (D.C. Cir. 1985) (upholding FTC's determination that provisions in consumer credit contracts authorizing deduction of

provisions that consumers are powerless to modify if they wish to obtain a needed loan. Borrowers do not even see the contract's forum selection and choice of law provisions until late in the loan process,[17] and, even assuming they notice these provisions, are unlikely to understand them, a problem exacerbated by the confusing wording of these contracts. *See FTC v. Payday Fin., LLC*, 2013 WL 1309437, at *14 (describing the contracts' inconsistent and confusing language). And if consumers do not perceive a harm embedded in obscure contractual language, they cannot be said to have a reasonable opportunity to avoid that harm. *See Am. Fin. Servs. Ass'n*, 767 F.2d at 976-77 (injury not reasonably

---

F.2d at 1365-66. "[W]hether some consequence is 'reasonably avoidable' depends not just on whether [consumers] know the physical steps to take in order to prevent it, but also whether they understand the necessity of actually taking those steps." *In re Int'l Harvester Co.*, 104 F.T.C. at 1066. "The focus is on 'whether consumers had a free and informed choice that would have enabled them to avoid the unfair practice'." *J.K. Publ'ns*, 99 F. Supp. 2d at 1201; *Orkin*, 849 F. 2d at 1365.

[17] After consumers submit loan applications to the defendants, containing their social security numbers, bank account numbers, and other personal information, the defendants send to approved consumers a loan agreement. By this point, consumers will have supplied the

avoidable, given consumers' "lack of understanding of contractual terms" and inability to bargain over boilerplate contract provisions, and because "default is ordinarily the product of forces beyond a debtor's control").

The defendants' practice of subjecting consumers to collection actions in a distant court that lacks jurisdiction also satisfies the last element of unfairness: it produces no countervailing benefits for consumers or competition. *See J.K. Publ'ns*, 99 F. Supp. 2d at 1201 (third prong of unfairness test is met "when a practice produces clear adverse consequences for consumers that are not accompanied by an increase in services or benefits to consumers or by benefits to competition"). In the FTC's litigation, the defendants have not identified any such benefits that might justify this practice notwithstanding the adverse consequences for consumers. Indeed, there is no legitimate benefit to suing consumers in a court that lacks jurisdiction.

III. The Defendants' Practice of Requiring Tribal Arbitration of Disputes Also May Be Deemed Unfair and Unconscionable.

Under the Federal Arbitration Act ("FAA"), arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. This provision "permits agreements to arbitrate to be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability," provided those defenses do not "apply only to arbitration or . . . derive their meaning from the fact that an agreement to arbitrate is at issue." *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1746 (2011) (internal quotation marks omitted).

Whether the defendants can require arbitration of claims initiated by consumers is not directly at issue in the FTC's case. But unfairness under the FTC Act resembles the "generally applicable contract defense" (*id.*) of unconscionability. Accordingly, the factors that make it unfair for the defendants to induce consumers into tribal court to defend collection actions are also relevant to whether the arbitration

in combination may well support a conclusion that the arbitration

487 (1990)

unconscionability). Taken together, these factors undermine borrowers' agreement to tribal arbitration.

Grounds also exist for finding that the loan contracts' requirement

dispute rules . . . .” *Id*. at *1. But the court found that the arbitration proceeding conducted on the Reservation did not comply with these terms. For one

Webb and his daughter works for one of the lending entities—are inconsistent with the role of a disinterested and unbiased arbitrator and with arbitration generally. Dist. Ct. Findings at 3-4.

The district court also pointed to the conclusions of the New Hampshire Banking Department, which issued a Cease and Desist order after finding that defendant Western Sky Financial, LLC, "was nothing more than a front" for Cashcall "to evade licensure by state agencies and exploit Indian Tribal Sovereign Immunity to shield its deceptive practices . . . ." *Id.* at 5. As a result, the New Hampshire Banking Department concluded that the scheme to employ Western Sky in this manner constituted an "unfair or deceptive act or practice . . . ." The court below found this determination persuasive and unrebutted by any of the parties. The district court therefore concluded that the

terms supplied by the defendants, dictate a

effectively deprives [borrowers] of their day in court").[22] Thus, both the arbitration and forum selection clauses in the defendants' loan

unfair and deceptive under the FTC Act are relevant to an unconscionability inquiry.

Respectfully submitted,

JONATHAN E. NUECHTERLEIN
General Counsel

JOHN F. DALY
Deputy General Counsel for Litigation

s/ Michele Arington
MICHELE ARINGTON
BURKE W. KAPPLER
Attorneys
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, DC 20580
(202) 326-3157

Dated: September 13, 2013

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Fed. R. App. 32 (a)(7)(B), in that it contains 6,709 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Century Schoolbook 14-point font.

s/ Michele Arington
MICHELE ARINGTON

CERTIFICATE OF SERVICE

I hereby certify that on September 13, 2013 I filed and served the foregoing with the Court's appellate CM-ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ Michele Arington
MICHELE ARINGTON