IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

PEOPLE OF THE STATE OF ILLINOIS, by LISA MADIGAN, ILLINOIS ATTORNEY GENERAL,	)	
Plaintiff,	)	
-vs-	)	**No. 14 C 2783**
CMK INVESTMENTS, INC d/b/a ALL CREDIT LENDERS, INC., an Illinois Corporation	)	**Judge Sara Ellis**
Defendant.	)	

PLAINTIFF'S RESPONSE TO DEFENDANT'S
MOTION TO DISMISS PLAINTIFF'S COMPLAINT

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I. INTRODUCTION

Defendant mischaracterizes the claims alleged in Plaintiff's Complaint as merely involving disclosures. However, Plaintiff's action alleges multiple unfair, deceptive and abusive acts by Defendant that implicate many claims other than disclosure.

First, Plaintiff alleges that Defendant offers a loan product that violates section 2F of the Consumer Fraud and Deceptive Business Practices Act ("Consumer Fraud Act"), 815 ILCS 505/2F, by charging an interest rate exceeding the cap allowable in the Illinois Financial Services Development Act ("FSDA"), 205 ILCS 675/3. Defendant's loan product charges a Required Account Protection Fee ("Required Fee") that is nothing more than interest and, at any rate, under the provisions of the FSDA must be included in the interest rate on consumers' loans for purposes of that Act. 205 ILCS 675/6; Compl. ¶¶ 45-59. Plaintiff alleges that, when the Required Fee is properly factored into the interest rate on consumers' loans, the rate is between 350% and 500%, well over the 36% interest rate cap in the FSDA. Compl. ¶¶ 112, 142, 163; 205 ILCS 675/3.

Second, in addition to charging consumers a Required Fee that is really interest, Plaintiff alleges multiple claims against Defendant for offering a structurally unfair and abusive product. Compl. ¶¶ 178, 182. For instance, Plaintiff alleges that Defendant violates the Consumer Fraud Act by charging an expensive fee that is of little to no benefit to consumers and that makes it impracticable for the consumers to ever pay off the loan. *Id.* at ¶ 178. Similarly, under the Dodd-Frank Act count, Plaintiff alleges that Defendant commits an abusive act or practice by taking unreasonable advantage of the consumers' lack of understanding of, for example, the loan's features, including the true cost and nature of the Required Fee, and the impracticability of

paying off the loan. Compl. ¶ 182; Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. § 5301 *et seq.* ("Dodd-Frank Act").

Third, Plaintiff alleges a series of misrepresentations Defendant made pursuant to the Consumer Fraud Act. Compl. ¶ 179. For example, Plaintiff alleges that Defendant commits unfair and deceptive acts or practices by misrepresenting important characteristics of the loan, such as, how expensive the Required Fee is, the lack of benefit obtainable by the Required Fee, and how consumers can actually pay off their loan. *Id.*

Distinct from disclosure, the features of Defendant's loan product and the functions of the Required Fee form the basis of Plaintiff's claims. Thus, contrary to Defendant's assertions, none of Plaintiff's alleged claims are defeated by mere disclosures—whether pursuant to the Truth in Lending Act ("TILA"), or otherwise. 15 U.S.C. § 1601 *et seq*. Indeed, Plaintiff has alleged numerous claims that are untouched by any purported disclosure defenses.

Defendant additionally argues that Plaintiff's claims are barred by *res judicata* due to a settlement agreement between Defendant and the Illinois Department of Financial Institutions ("DFI"). Plaintiff's action is not barred by *res judicata* because: 1) There is no final judgment on the merits; 2) DFI does not possess any enforcement authority over Plaintiff's claims in the instant action; and, 3) DFI and Plaintiff are separate and distinct entities.

II. LEGAL STANDARD FOR 12(B)(6) MOTION TO DISMISS

Plaintiff is required to provide a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

When considering a Rule 12(b)(6) motion to dismiss, the complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'"

Ashcroft v. Iqbal, 556 U.S. 662, 663 (2009) (quoting *Twombly*, 550 U.S. at 570). "Factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all of the complaint's allegations are true…(even if doubtful in fact)." *Twombly*, 550 U.S. at 555.

As explained below, Plaintiff's Complaint more than adequately alleges facts that establish a cause of action under the Consumer Fraud Act and Dodd Frank Act that, if proven at trial, would entitle her to relief.

III. ARGUMENT

A. DEFENDANT'S MOTION TO DISMISS SHOULD BE DENIED BECAUSE PLAINTIFF HAS ADEQUATELY PLEAD CAUSES OF ACTION, AND NONE OF DEFENDANT'S SUBSTANTIVE ARGUMENTS DEFEAT THEM

1. Plaintiff Has Adequately Plead that Defendant's Revolving Line of Credit Violates the FSDA's Substantive Prohibition on Charging Interest in Excess of 36%

Defendant explores the legislative history of the FSDA when it was enacted in 1989, including interpretative letters addressing the 1989 law, but overlooks the underlying policy of the 2011 amendment to the FSDA, capping interest at 36%. Def's. Mem. in Supp. of Mot. to Dismiss, 4-6. In fact, as Plaintiff alleges, in 2005, to contend with the largely unregulated low-dollar, high-cost loans, the Illinois legislature enacted the Payday Loan Reform Act to protect consumers against long term cycles of debt. Compl. ¶¶ 12-14; 815 ILCS 122/1-10 *et seq*. Similarly, in 2011, recognizing a lack of consumer protections in both the consumer installment loan and revolving line of credit markets, the legislature enacted interest rate caps in the Consumer Installment Loan Act ("CILA"), 205 ILCS 670/17.2, and the Financial Services Development Act, respectively. All of these legislative actions were designed to combat abusive small-dollar loan products sold to vulnerable Illinois consumers that place them in an endless

cycle of debt. To that end, the 2011 amendment to the FSDA, the act regulating revolving lines of credit, capped the allowable interest rate at 36%.

The FSDA states that CILA licensees are "prohibited from charging interest in excess of 36% per annum for any extension of credit under this Act." 205 ILCS 675/3(a). Notably, Defendant selectively quotes from Section 6 of the FSDA, but fails to include the pertinent language applicable in Plaintiff's action. Def's. Mem. in Supp. of Mot. to Dismiss, 5. In fact, Section 6 of the FSDA provides that a "financial institution may, if the agreement governing the revolving credit plan so provides, charge and collect ***as interest***, in such manner or form as the plan may provide, an annual or other periodic fee for the privileges made available to the borrower…" 205 ILCS 675/6 (emphasis added). Thus, according to the plain language of the FSDA, any Required Fees that Defendant charges must be included *as interest* in the interest rate, which is capped at 36%. As such, as alleged in detail in the Complaint, Defendant's product violates the FSDA's substantive prohibition on lending a revolving line of credit.

Indeed, the FSDA's inclusion of fees as interest under that Act is supported by Illinois case law defining interest in a manner that includes the Required Fee. In *Equitable Life Assurance Society of the U.S. v. Scali*, 232 N.E.2d 712, 715 (Ill. 1967), the court defined interest as including all charges that are exacted as an additional cost for the use of money. Although in *Equitable Life Assurance* the court held that the premiums for required credit life insurance did not constitute interest under the Interest Act because the insurance also inured to the benefit of the borrower, it stated an important caveat: The outcome would be different if there was a showing from examining the entire transaction that the insurance requirement was a mere device to collect usurious interest. *Id*. In addition, "[a] lender may not evade the statute under the guise

of assessing charges for the use of the money and terming the charges something other than interest." *Andrews v. Cramer*, 629 N.E.2d 133, 136 (Ill. App. Ct. 1993).

Plaintiff alleges that Defendant's revolving line of credit violates Section 2F of the Consumer Fraud Act by charging interest in excess of the 36% cap imposed by the FSDA. 815 ILCS 505/2F; Compl. ¶ 179. Defendant argues that the Required Fee is something other than interest, but that is simply not the case. The plain language of the FSDA requires the Fee to be interest. Moreover, as Plaintiff alleges, the Required Fee functions as interest in its calculation—charging, for example, $10 per every $50 of the consumer's outstanding balance per billing cycle—and provides no additional value to the borrower. Compl. ¶¶ 41-42. Thus, the Required Fee is merely a subterfuge in order to get around the 36% interest cap in the FSDA. Compl. ¶¶ 62-65. As such, just as the court reasoned in *Equitable Life* and *Andrews*, Defendant cannot charge consumers the Required Fee and claim it is something other than interest to evade the FSDA.

Defendant claims the annual percentage rate on the revolving line of credit is 18% or 24% without the Required Fee. Compl. ¶¶ 41-42. When the Required Fee is factored into the interest rate, as it should be, the rate is really as high as 300-500%. Compl. ¶¶ 71, 112, 142, 163. As such, Defendant's revolving line of credit violates the FSDA's interest rate cap, thereby violating Section 2F of the Consumer Fraud Act.

Defendant's assertion that Plaintiff's claims should be dismissed due to any of Defendant's purported disclosures, or due to its purported compliance with TILA, is wrong. No disclosure can remedy an illegal product. As such, Defendant's reliance on *Lanier v. Associates Fin., Inc.*, 499 N.E.2d 440 (Ill. 1986), and its progeny is misplaced. In *Lanier,* the court held that Defendant's disclosure of interest using the Rule of 78's did not violate the Consumer Fraud Act,

but the facts of *Lanier* are distinguishable to those at bar in several ways. *Id.* First, the Rule of 78's is allowable under the law. *Id.* at 442. Selling a revolving line of credit product with an interest rate over 36% under the FSDA is illegal. Second, unlike the claims in the instant matter, *Lanier* is a case involving only disclosure claims. *Id.* at 444. Third, the claims in *Lanier* involve a general violation of the Consumer Fraud Act, rather than a violation of a specific consumer lending statute. *Id.* Here, Plaintiff has plead a specific violation of the FSDA. Fourth, the *Lanier* Court noted that the disclosure requirements in certain Illinois consumer credit statutes indicate a consistent policy against extending disclosure requirements beyond those mandated by TILA. However, the substantive prohibition in Section 3 of the FSDA, capping interest at 36%, is of a different character. The Illinois legislature passed the 2011 amendment to the FSDA, along with similar interest-rate cap legislation in other statutes over the preceding ten years, to provide substantive protections beyond disclosures to borrowers of small-dollar loans in Illinois. It is this policy of substantive protections, beyond disclosures, at issue in this case, unlike the pure disclosure regime being examined in *Lanier*.

Finally, Defendant references the introduction of House Bill 6019 ("HB 6019") into the Illinois legislature to claim that Plaintiff is "attempting to legislate and change the law via the present lawsuit." Def's. Mem. in Supp. of Mot. to Dismiss, 25. However, the filing of HB 6019 is irrelevant. Courts do not consider merely filed legislation for the good reason that a legislature's intent cannot be determined from a pending bill where no action has been taken. *See United States v. Am. Trucking Ass'ns*, 310 U.S. 534, 550 (1940). Legislation is filed for all sorts of reasons, and any conjecture with respect to a pending bill is highly speculative. Moreover, Plaintiff has no knowledge of the background or filing of the bill, including the

stakeholders responsible for the filing. Most importantly, HB 6019 is inconsequential to Plaintiff's claims.

2. Plaintiff has Adequately Plead that Defendant's Loan Violates Section 2 of the Consumer Fraud Act and the Abusive Standard of the Dodd-Frank Act

a) TILA Does Not Bar Plaintiff's Claims

Defendant incorrectly asserts that Plaintiff's Consumer Fraud Act and Dodd-Frank Act claims circumvent TILA. Def's. Mem. in Supp. of Mot. to Dismiss, 18, 21. Defendant's reliance on TILA compliance is a red herring. Separately from Plaintiff's allegation that Defendant violated Section 2F of the Consumer Fraud Act by violating the FSDA, Plaintiff alleges that Defendant violated Section 2 of the Consumer Fraud Act and Section 5536(a)(1)(B) of the Dodd-Frank Act in a variety of ways. Plaintiff has alleged that Defendant makes various misrepresentations about its product, and that the product is also structurally unfair and abusive because Defendant: 1) charges a very expensive Required Fee, unbeknownst to the consumer, that is of no benefit to the consumer and makes it impracticable for the borrower to ever pay off the loan; and, 2) places consumers in a payment plan that has no pay-off deadline, again, unbeknownst to consumers, causing them to be in an endless cycle of debt. Compl. ¶ 178. In attempting to legitimize its product, Defendant relies on various sections of Regulation Z concerning debt suspension coverage. Def's. Mem. in Supp. of Mot. to Dismiss, 19. However, Plaintiff alleges that Defendant's Required Fee is not a *bona fide* product and has features violating the Consumer Fraud Act's prohibition on unfair practices. Compl. ¶¶ 178-179.

In addition, Plaintiff alleges that Defendant misrepresents a series of characteristics of the loan (including the Required Fee and pay-off schedule), and that Defendant abusively sells the loan to consumers in a manner and with features that take advantage of consumers' lack of understanding of the product. Compl. ¶¶ 178-182. As such, the practices at issue in Plaintiff's

lawsuit do not concern mere disclosures, and TILA or its accompanying Regulation Z cannot bar this action.

The Section 2 Consumer Fraud Act claims and Dodd-Frank Act claims fall squarely within consumer protection statutes, have nothing to do with disclosure, and Defendant cannot simply immunize itself from liability by claiming compliance with TILA.

Even the plain language of TILA does not preclude Plaintiff's Consumer Fraud Act and Dodd-Frank Act claims. Only state disclosure laws inconsistent with TILA are preempted, and only to the extent of their inconsistency. 15 U.S.C. § 1610(a)(1).

> Obviously, compliance with both the TILA and the Consumer Fraud Act is not a physical impossibility—compliance with the TILA does not imply a violation of the Consumer Fraud Act. It also seems that the Consumer Fraud Act promotes rather than hinders the goals of the TILA. The Consumer Fraud Act prohibits, *inter alia,* "deceptive practices [employed] in the conduct of any trade or commerce ...thereby promoting the TILA's goal of "the informed use of credit," 15 U.S.C.A. § 1601(a) (West 1982), in a range of conduct larger than that covered by the disclosure provisions in the TILA.

Heastie v. Cmty. Bank of Greater Peoria, 690 F. Supp. 716, 721 (N.D. Ill. 1988).

Again, the Consumer Fraud Act and Dodd-Frank Act claims in this action do not concern disclosures, but rather, concern consumer protection issues more broadly.

Lanier v. Associates Fin., Inc., is equally inapplicable here, in the context of Plaintiff's Section 2 Consumer Fraud Act and Dodd-Frank Act claims. It is well settled that mere compliance with a federal statute does not bar liability under the Consumer Fraud Act. *See Price v. Philip Morris, Inc.*, 848 N.E.2d 1, 36 (Ill. 2005) (rejecting Defendant's assertion that section 10b(1) [of the Consumer Fraud Act] operates to bar plaintiffs' claim merely because Defendant may have been in compliance with applicable federal law); *Martin v. Heinold Commodities, Inc.,* 643 N.E.2d 734, 742 (Ill. 1994) (holding that a broker's failure to reveal the true nature of fees was not authorized by the CFTC or its regulations and, therefore, could be [actionable] under the

Consumer Fraud Act, [because], "a customer may be deceived about [material facts] despite receipt of the information required by [the Commission's regulations.]" (citation omitted)); *Jenkins v. Mercantile Mortgage Co.*, 231 F. Supp. 2d 737, 752 (N.D. Ill. 2002) ("The *Lanier* court did not hold, as [Defendant] seems to contend, that merely because a party does not violate a federal law, it does not violate [the Consumer Fraud Act].").

Moreover, in *Heastie v. Cmty. Bank of Greater Peoria*, a relatively unsophisticated elderly woman, faced with the threat of foreclosure on her home, signed papers refinancing her home wherein FAMCO misrepresented itself as a lender, when in fact, an entirely different lender entered the picture at closing allowing FAMCO to receive hefty brokerage fees. *Heastie,* 690 F. Supp. at 716. In *Heastie*, Defendant argued that Plaintiff's claims were preempted by TILA and the accompanying Regulation Z requirements since the disclosure of the lender was made to the borrower in accordance with TILA. The court rejected Defendant's argument holding that "preemption does not extend to general statutes prohibiting fraud." *Id.* at 720. The *Heastie* court went on to conclude that, "[w]hile compliance with federal regulations may be a complete defense to Consumer Fraud Act complaints centering on particular technical issues (as in cases [such as *Lanier*]), it should not be a complete defense to allegations of fraudulent schemes." *Id.* at 721.

Similarly, here, Plaintiff alleges consumer illustrations showing Defendant issued this loan product to consumers who needed assistance in paying their bills. Compl. ¶¶ 97-164. In reality, as detailed above, and as alleged in Plaintiff's Complaint, consumers received a structurally unfair loan that Defendant misrepresented with features that make it impracticable to pay off. As such, Defendant's argument that purported TILA compliance defeats Plaintiff's Complaint fails.

In spite of the well-settled case law that TILA does not preempt consumer protection statutes combatting fraud more comprehensive than mere disclosure, Defendant argues that the CFPB Director, Richard Cordray, has "explained, when a disclosure does not violate TILA, the disclosure does not violate the Dodd-Frank Act's prohibition on abusive acts or practices." Def's. Mem. in Supp. of Mot. to Dismiss, 20. With respect to what Defendant calls the Director's "clear statement on the meaning of 'abusive,'" such a characterization is simply not true. Def's. Mem. in Supp. of Mot. to Dismiss, 1, 20. Absolutely nothing in the record in Director Cordray's Statement expresses an opinion or statement that compliance with TILA is non-actionable under the Dodd-Frank Act's abusive standard. Because Dodd-Frank is a consumer protection statute like the Consumer Fraud Act, it is irrational to claim that mere compliance with TILA simply washes away an entire statutory scheme Congress created to protect consumers from abusive products like Defendant's.

Defendant's TILA arguments do not support a bar on Plaintiff's Consumer Fraud Act and Dodd-Frank Act claims.

b) Defendant's Factual Assertions to Counter Plaintiff's Well-Plead Facts Cannot Support a Dismissal

The Court should dispose of Defendant's alleged factual explanations of the adequacy of its disclosures regarding minimum payments, the mechanics of how the Required Fee works, and any purported "benefit" to the borrower. Def's. Mem. in Supp. of Mot. to Dismiss, 17, 23. Whether or not the Required Fee provides any benefit to consumers, or whether Defendant adequately communicated "the minimum payment option" to consumers are questions of fact, ripe for discovery. Def's. Mem. in Supp. of Mot. to Dismiss, 17. Defendant's arguments that Plaintiff's allegations are false with respect to any features or benefits of the product are inappropriate considerations on a 12(b)(6) motion to dismiss where Plaintiff's well-pleaded facts

are taken as true. If Defendant takes issue with specific allegations in the Complaint, the appropriate response is a denial in an Answer. Such assertions, even when thinly veiled as arguments, do not defeat Plaintiff's claims.

c) Defendant's Constitutional Argument Against The Dodd-Frank Count Is Meritless

Finally, Defendant offers an alternative argument in Footnote 11 of its Memorandum on page 20, that the Dodd-Frank's abusive standard should be voided for vagueness, and as such is unconstitutional.[1] Defendant's argument is wrong. The Act proscribes specific prohibitions on what constitutes abusiveness and, therefore, provides Defendant "fair warning of what is proscribed." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.,* 455 U.S. 489, 503 (1982). Further, as the Illinois Supreme Court observed in rejecting a similar vagueness challenge to the Federal Trade Commission Act, "…unfair…acts or practices…has a venerable history of interpretation and definition by the Federal Courts, and now can be said to have a well-settled meaning in Federal trade-regulation law." *Scott v. Ass'n. for Childbirth at Home, Intl.*, 430 N.E.2d 1012, 1018 (Ill. 1981).

3. Defendant's Purported Contract Disclosures Do Not Defeat Plaintiff's Section 2 Consumer Fraud Act Claims

Defendant additionally argues that Plaintiff's claims should be dismissed because Defendant purportedly disclosed that the minimum payment did not include principal in the contracts with consumers. Def's. Mem. in Supp. of Mot. to Dismiss, 14-18. In support of Defendant's argument, Defendant relies upon inapplicable cases concerning contractual disputes. *Id*. In addition, Defendant's argument is, again, based on the denial of factual allegations,

[1] The Federal Rules require that, if a party questions the constitutionality of a federal statute in a pleading or filing, the party must immediately file a notice of constitutional question and serve the notice on the United States Department of Justice. Fed. R. Civ. P. 5.1(a). To date, Defendant has not filed or served a notice of constitutional question as required by Rule 5.1.

specifically that Defendant's contract adequately discloses the minimum payment, which does not defeat Plaintiff's Complaint on a 12(b)(6) motion to dismiss.

Defendant's attempts to convert the Attorney General's complaint into a private, contractual dispute are unavailing. First, simply because Plaintiff refers to the agreement or contract in reciting her claims does not make the claim contract-based when other unfair or deceptive practices are alleged. *Bires v. WalTom, LLC*, 662 F. Supp. 2d 1019, 1036 (N.D. Ill. 2009). Second, when the Attorney General files suit under Section 2 of the Consumer Fraud Act, the claim is not one brought on behalf of individual consumers for disputes regarding their individual contracts. "The [Consumer Fraud] Act was intended to reach practices of the type which affect consumers generally and is not available as an additional remedy to redress a purely private wrong." *People ex rel. Hartigan v. Lann*, 587 N.E.2d 521, 524 (Ill. App. Ct. 1992) (citation omitted). In *Lann*, the Court noted that:

> Even though the transactions underlying this action arose between individual consumers and defendant, the action stems from the Attorney General's duty to enforce the Consumer Fraud Act. An action filed by the Attorney General under the Act is essentially a law enforcement action designed to protect the public, not to benefit private parties.

Id. Thus, each of the cases Defendant cites for the proposition that contractual terms are determinative is distinguishable at least because those cases are private, contractual claims, distinct from an Attorney General law enforcement action. Def's. Mem. in Supp. of Mot. to Dismiss, 16. To hold Defendant's cases analogous to the case at bar would diminish the Attorney General's power to police the marketplace for unfair, deceptive or abusive acts and practices, as expressed in *Lann.*

In this case, although Defendant's loan agreement is involved, Plaintiff's claims are based on unfair, deceptive and abusive practices beyond what is stated in the contract, rather than

contractual claims. For example, Plaintiff alleges consumer illustrations that show that consumers were deceived by, for example, the payment schedules provided to the consumers, and did not know that the minimum payment did not include principal. Compl. ¶¶ 74-84, 97-164.

In addition, Defendant would like this Court to believe that the only inquiry it should make regarding Plaintiff's claims is the four corners of the consumers' contracts because Defendant argues that any party is bound by its contractual terms under any circumstances. Def's. Mem. in Supp. of Mot. to Dismiss, 16. But courts routinely inquire into such factors as the sophistication of the parties and circumstances surrounding the contracting process when the statute at issue proscribes such inquiries.

For instance, in *State ex rel. King v. B & B Inv. Grp., Inc et al*, the New Mexico Attorney General sued B&B Investment Group,[2] over an unsecured loan product that charged extremely high interest rates. *State ex rel. King v. B & B Inv. Grp., Inc et al*, No. 34,266, 2014 WL 2893304 (N.M. June 26, 2014). The New Mexico Supreme Court found the interest rates charged on the loans substantively unconscionable under the New Mexico Unfair Practices Act. *Id.* at *1. Similar to the Dodd-Frank Act, under the New Mexico Unfair Practices Act, unconscionable trade practices are defined in part as "an extension of credit…that to a person's detriment takes advantage of the lack of knowledge, ability, experience or capacity of a person to a grossly unfair degree." NMSA 1978, Sections 57-12-2(E). Here, Plaintiff has also alleged Defendant violated the Dodd Frank Act by "taking unreasonable advantage of a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product." Compl. ¶ 182. Illinois courts also look behind the face of contracts to determine

[2] The New Mexico Supreme Court Opinion makes clear that B & B Investments Group and Defendant are operated by the same family. *B & B Inv. Grp.,* 2014 WL 2893304, at *1.

unfairness or unconscionability. *See People ex rel. Hartigan v. Knecht Servs*., 575 N.E.2d 1378, 1385 (Ill. App. Ct. 1991) (charging unconscionably high prices for little or no services where consumer has no real alternatives, and after advertising a particular minimum charge). Based on the Dodd-Frank Act, the language of which fundamentally mirrors unconscionability or unfairness, Defendant's argument that nothing matters except a consumer's signature on a contract page rings hollow.

B. DEFENDANT'S MOTION TO DISMISS SHOULD BE DENIED BECAUSE IT DOES NOT DEFEAT PLAINTIFF'S CLAIMS PROCEDURALLY BY *RES JUDICATA*

Defendant asserts that Plaintiff's Complaint is barred by *res judicata* because Defendant entered into an agreement with DFI "to dismiss its prior administrative actions and settle the alleged violations asserted in those administrative actions." Def's. Mot. To Dismiss, ¶ 2. The settlement agreement between DFI and Defendant does not bar Plaintiff's claims.

Defendant holds a CILA license, which is overseen by DFI. DFI has the authority to issue and revoke CILA licenses, conduct hearings and examinations, and issue fines pursuant to CILA, and the rules promulgated pursuant to CILA, 205 ILCS 670/1, *et seq*. In May of 2011, DFI began examining Defendant's revolving line of credit product for CILA violations. Def.'s Def's. Mem. in Supp. of Mot. to Dismiss, Ex. C-01. From May 2011 through February 2012, DFI issued several Notices of Intent to Fine and Orders of Fines to Defendant. Def's. Mem. in Supp. of Mot. to Dismiss, Group Ex. C – G. The Notices of Intent to Fine and Orders of Fines were based on violations of CILA and TILA; none were based on the FSDA, Consumer Fraud Act, or Dodd-Frank Act violations. *Id.* In February 2013, DFI entered into a settlement agreement with Defendant resolving the Orders of Fines. Def's. Mem. in Supp. of Mot. to Dismiss, Ex. H-01-02. The settlement agreement provides, in pertinent part:

> The parties agree that the remittance and acceptance of payment fully resolves and settles all matters between DFI and CMK concerning the Orders of Fines…The remaining fines will be void because they were cited under the Consumer Installment Act. The Department acknowledges that credit plans issued pursuant to FSDA should be cited under FSDA instead of CILA.

Def's. Mem. in Supp. of Mot. to Dismiss, Ex. H-02. Pursuant to the settlement agreement, the Administrative Law Judge, entered an order removing the Orders of Fine from the administrative hearing call. *See* Ex. 1, ALJ Order.

Under the doctrine of *res judicata*, "a final judgment on the merits of an action precludes the parties or their privies from re-litigating issues that were or could have been raised in that action" *Campbell v. Illinois Department of Corrections*, 907 F.Supp. 276, 278 (N.D. Ill. 1995) (citing *Allen v. McCurry*, 449 U.S. 90 (1980)); *River Park, Inc. v. City of Highland Park*, 703 N.E.2d 883 (Ill. 1998).

Federal claims are barred by *res judicata* if: "(1) under the law of the forum state the doctrine of *res judicata* would bar the claim and (2) the party against whom the earlier decision is asserted had a full and fair opportunity to litigate the claim." *Campbell*, 907 F.Supp. at 278 (citing *Lolling v. Patterson*, 966 F.2d 230, 235 (7th Cir. 1992)). To satisfy the first element required, for *res judicata* to bar an action brought in Illinois courts: 1) a final judgment on the merits must have been rendered by a court of competent jurisdiction; 2) there must be an identity of cause of action; and, 3) there must be an identity of parties. *Id.* (citations omitted). All three elements must be met to satisfy a claim for *res judicata*. *Goodman v. Hanson,* 945 N.E.2d 1255, 1269 (Ill. App. Ct. 2011). The party seeking to invoke *res judicata* bears the burden of proving its applicability. *Rooding v. Peters,* 92 F.3d 578, 580 (7th Cir. 1996) *(citing Torrasco v. Standard Outdoor Sales, Inc.,* 626 N.E.2d 225, 228-29 (7th Cir. 1993)).

Defendant's argument supporting *res judicata* fails because the settlement agreement with DFI is not a final judgment on the merits and there is no identity of parties. Moreover, DFI does not possess the enforcement authority to adjudicate claims pursuant to the Consumer Fraud Act.

1. The DFI Settlement Agreement is Not a Final Judgment on the Merits Rendered by a Court of Competent Jurisdiction

Illinois case law is split as to whether an action can be barred by a prior settlement agreement. Some cases hold that a prior settlement agreement operates as a final judgment where the settlement agreement dismisses the action with prejudice or the settlement agreement is adopted and incorporated into a final order. *SDS Partners, Inc. v. Cramer*, 713 N.E.2d 239, 241 (Ill. App. Ct. 1999) (citing *In re Marriage of Verdung,* 535 N.E.2d 818 (1989)). Other cases hold that a prior settlement does not operate as a final agreement because a settlement "is not a judicial determination of the parties' rights, but rather is a recordation of the agreement between the parties." *Goodman,* 945 N.E.2d at 1269 (citing *Kandalepas v. Economou,* 645 N.E.2d 543, 548 (Ill. App. Ct. 1994), holding that an agreed order is "merely a recitation" of the agreement between the parties and "may be cancelled, rescinded, or modified by operation of law or by the explicit or implicit agreement of the parties."); *See also Currie v. Wisconsin Central*, 961 N.E.2d 296, 303 (Ill. App. Ct. 2011) (settlement agreements entered by a court do not operate as a final judgment on the merits); *In re Marriage of S.D.*, 980 N.E.2d 1151, 1167 (Ill. App. Ct. 2012). (settlement agreement is a recordation of agreement and not a judicial determination of the parties rights). None of these cases support a finding of *res judicata* here because the settlement agreement between DFI and Defendant did not dismiss claims with prejudice, nor was it incorporated into a judgment. The settlement agreement in this case is merely a recordation of an agreement and nothing more and does not bar the instant action.

Indeed, the 7th Circuit has also held that an action is not barred by *res judicata* without a judgment, and that "[a] settlement agreement that has not been integrated into a consent decree is not a judgment and cannot trigger *res judicata*." *Carver v. Nall,* 172 F.3d 513, 515 (7th Cir. 1999). The *Carver* court's holding is instructive here. The settlement agreement with DFI was not a final judgment or order, nor was it integrated into a consent decree.

Defendant relies on *SDS Partners* and similar cases, asserting that DFI agreed to settle and "dismiss with prejudice" the pending administrative actions. Def's. Mem. in Supp. of Mot. to Dismiss, 2, 10. However, that assertion is not true. Neither the settlement agreement nor the Exhibits attached to Defendant's Memorandum state that DFI dismissed its actions "with prejudice." In fact, through the settlement agreement, DFI did not adjudicate or issue findings in regards to any claims, but merely voided the fines and "acknowledge[d] that credit plans issued pursuant to FSDA should be cited under FSDA instead of CILA." Def's. Mem. in Supp. of Mot. to Dismiss, Ex. H-02. In fact, there could not have been a dismissal of any kind because there was never even a hearing on the merits of DFI's examinations. Thus, the settlement agreement between DFI and Defendant should not support *res judicata* bar on the instant action.

2. DFI Does Not Possess the Enforcement Authority, nor did it Have a Full and Fair Opportunity to Litigate the Claims in the Instant Action

Under Illinois law, a claim is barred by *res judicata* if the party invoking the doctrine proves that there exists an identity of cause of action with the prior claim. An identify of cause of action exists with the prior claim when, in addition to claims previously decided, claims that could have been brought in the prior action are barred. *Rooding*, 92 F.3d at 580. Therefore, *res judicata* will not bar litigation of claims where a party did not have a full and fair opportunity to litigate the issue in the original case. *Id.* (citing *Charles Koen & Assocs. v. City of Cairo*, 909

F.2d 992, 1000 (7th Cir.1990)). An identity of cause of action does not "extend to situations in which the initial forum did not have the power to award the full measure of relief sought in the later litigation." *Campbell*, 907 F.Supp. at 278; *See also Terry v. Watts Copy Sys.*, 768 N.E.2d 789, 795 (Ill. App. Ct. 2002) (retaliatory discharge action was not barred by prior Illinois Human Rights Commission judgment because the Commission lacked subject-matter jurisdiction over the subsequent claim filed under the Workers' Compensation Act). Further, "[c]laim preclusion does not operate so harshly as to bar whichever set of claims the chosen forum could not hear." *Carver,* 172 F.3d at 515.

Res judicata does not bar the Attorney General's Consumer Fraud Act claims here. When DFI issued the Notices of Intent to Fines and Orders of Fine to Defendant, it did so under its licensing authority only. The Attorney General has no authority to participate in these administrative proceedings regarding licensing, and did not do so here.

DFI does not have jurisdiction or enforcement authority to take action pursuant to the Consumer Fraud Act. Moreover, under CILA, to which DFI's examination powers are confined here, the Director's authority is limited to licensing activity. 205 ILCS 670/1, *et seq*. The previous actions and fines issued to Defendant were not, and could not be, based on unfair and deceptive acts in violation of the Consumer Fraud Act. In fact, the fines were not even issued pursuant to the FSDA or Section 2F of the Consumer Fraud Act, but rather CILA. Def's. Mem. in Supp. of Mot. to Dismiss, Group Ex. C-G. DFI made no attempt to take action to enforce the Consumer Fraud Act because DFI lacks the authority to do so. 815 ILCS 505/7(a). Additionally, the instant action requests broad remedies afforded only to the Attorney General and the States Attorney that include restitution and civil penalties pursuant to her law enforcement authority under the Consumer Fraud Act. 815 ILCS 505/7. None of this was

available in the actions taken by DFI against Defendant, and thus that action should not bar the Attorney General's action here.

3. There is No Identity of Parties

Defendant asserts that "there is plainly an identity of parties or their privies" because "[t]he State of Illinois is the real party in interest in both the present action and the prior administrative actions against All Credit Lenders." Def's. Mem. in Supp. of Mot. to Dismiss, 13. In support of this assertion, Defendant cites cases that hold that a government and its officers and agencies are privies. *Id.* However, Plaintiff and DFI are not in privity for *res judicata* purposes.

The Attorney General is not an officer or an agency of DFI or IDFPR, or vice versa. To the contrary, the instant action and the prior DFI administrative proceedings were brought by two distinct government agencies with separate authority, acting under different governing laws. *See City of Chicago v. Illinois Workers' Compensation,* 4 N.E.3d 158, 170 (Ill. App. Ct. 2014) (The Board and the City are different entities for *res judicata* purposes) (citing *Hannigan v. Hoffmeister,* 608 N.E.2d 396, 404 (Ill. App. Ct. 1992) (two state agencies are not the same parties for *res judicata* purposes). Further, neither action was brought on behalf of the other party.

For *res judicata* purposes, privity exists between parties whose interests are greatly identified with one another and sufficiently represented in the prior proceeding. *Jackson v. Callan Pub., Inc.*, 826 N.E.2d 413, 428 (Ill. App. Ct. 2005). Courts have also held that privity exists if the nonparty "fairly and actively participated in the first action." *Diaz v. City of Chicago,* 601 F.Supp. 1251, 1253 (Ill. App. Ct. 1984) (citations omitted).

Although the existence of reported legal authority directly addressing whether or not privity exists between the Illinois Attorney General and another state agency for *res judicata*

purposes is sparse, courts have addressed this issue in the context of discovery. For example, in *New York ex rel. Boardman v. National Railroad Passenger Corp.*, 233 F.R.D. 259 (N.D.N.Y. 2006) ("Amtrak"), the State of New York's Department of Transportation sued Amtrak over a contract dispute. Amtrak requested documents from the New York Comptroller by arguing that state agencies should be subject to party discovery. *Id*. at 262. In refusing to aggregate state agencies and denying Amtrak's discovery request, the court held, "[f]or reasons of federalism and comity, we give great deference to the State and its Legislature to define how governmental entities are to be separate and distinct and how they may be related to one another as a whole; this is uniquely an exercise in state sovereignty." *Id*. at 264 (citations omitted). In fact, several courts addressing whether or not state agencies can be subject to discovery in law enforcement actions brought by state attorneys general have held, relying on *Amtrak*, that an action by the Attorney General does not automatically render all state agencies parties to the lawsuit and subject to discovery burdens. For example, in *Colorado v. Warner Chilcott Holdings Co. III, Ltd,* No. 1:05-cv-02182-CKK-AK, 7-8, (D.D.C. Mar. 24, 2007) several state attorneys general, including the Illinois Attorney General, sued pharmaceutical manufacturers for antitrust violations. Citing *Amtrak*, the court held that state Medicaid agencies were not parties because "where two government agencies are neither interrelated nor subject to common executive control, they will not be aggregated together for purposes of discovery." *Id.* at 8.

DFI actions are administrative licensing actions that do not address the same claims as an Attorney General law enforcement action. DFI operates within IDFPR, with a Director appointed by the Governor. DFI does not operate under the Attorney General, a separately elected official than the Governor. The Attorney General does not have any control or advisory authority over DFI's administrative proceedings or actions. Likewise, the Attorney General's

sovereignty is supported by the Illinois Constitution providing for independence between the Governor and the Attorney General, each with unique roles and responsibilities and exercising control over separate governmental functions. *See* Ill. Const. Art. V, §§ 8, 15 (proscribing separate Sections for the Governor and Attorney General's duties).

Res Judicata does not apply in this case because there is no final judgment on the merits, no identity of cause of action and no identity of parties.

IV. CONCLUSION

For all the foregoing reasons, Plaintiff, THE PEOPLE OF THE STATE OF ILLINOIS, prays that this Honorable Court deny Defendant's 12(b)(6) Motion to Dismiss in its entirety.

Respectfully Submitted,

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Dated: July 21, 2014

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

In the matter of	)	12CC360, 12CC361
CMK Investments	)	
	)	
	)	

To: CMK Investments
2531 Technology Dr. Suite 314
Elgin, IL 60123

ORDER REMOVING FROM THE CALL

This matter coming to be heard for Preliminary, Status, Prehearing, or Formal Hearing, the Department present by Attorney Vince Deligio, the Respondent and/or his Attorney, _____ Present __✓__ Not Present;

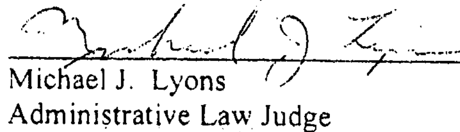
IT IS HEREBY ORDERED THAT:

These matters are removed from the call pursuant to a settlement agreement.

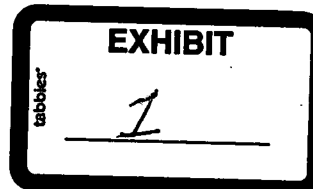
IT IS FURTHERED ORDERED THAT:

____
____
____

Dated: February 13, 2013



Michael J. Lyons
Administrative Law Judge



CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that copies of the Plaintiff's Response to Defendant's Motion to Dismiss Plaintiff's Complaint was served on July 21, 2014 to the individuals listed below in accordance with Fed. R. Civ. P. 5, L.R. 5.5, and the General Order on Electronic Case Filing (ECF) pursuant to the district court's system as to ECF filers:

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