IN IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA

WILLIAM BLAKLEY, *et al.* Plaintiffs, v. CELADON GROUP, INC., *et al*, Defendant.	No. 1:16-cv-00351-LJM-TAB

PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS COUNTS IV, V, AND VI OF PLAINTIFFS' AMENDED COMPLAINT

I. Introduction

Plaintiffs, who are former over-the-road drivers who were classified as independent contractors by Defendants, have filed suit against Defendants alleging that they were employees of Defendants but misclassified as contractors, denied minimum wage, subjected to violations of the Truth in Leasing Act, subjected to unlawful wage deductions, and, relevant to Defendants' instant motion, subject to unlawful loan agreements and subject to unlawful wage assignments.

With respect to Plaintiffs' claims asserting unlawful loans, Plaintiffs have pled that Defendants have regularly provided payday advances to them and other drivers whereby Defendants charge loan finance charges which exceed the maximum amounts permitted by the Uniform Consumer Credit Code, Ind. Code §24-4.5-1-101, et al. (the "Loans Act").

Plaintiffs have further asserted that Defendants provided small loans, specifically loans which are at least $50 and are not more than $550, and in which Defendants receive from Plaintiffs written authorization to debit their escrow accounts for the amount of the loan plus the loan finance charge. In Indiana, small loans are heavily regulated under the Small Loans Act, Ind. Code §24-

4.5-1-7-101, *et al.* Plaintiffs allege that Defendants have violated numerous provisions of the Small Loans Act, and as a consequence, are liable to Plaintiffs for statutory and other damages. *Am. Complaint* at ¶¶99-117 (ECF Doc. No. 21). Because Plaintiffs have provided detailed averments showing that Defendants' conduct has violated such statutes, Defendants' motion should be denied with respect to Counts IV and V.

In Count VI, Plaintiffs further assert that Defendants have violated the Indiana Wage Assignment Act by taking assignments of Plaintiffs' earnings for leases, fuel payments, advances, and other charges. Defendants have quixotically argued that they are exempt from the Indiana Wage Assignment Act because they *are* Plaintiffs' employer, even though Defendants have denied that assertion in their Answer to Plaintiffs' Amended Complaint. Regardless, while the primary regulations of the Indiana Wage Assignment Act do apply only to non-employers who take wage assignments, the Act does provide certain regulations that apply to employers, and which Defendants violated. Specifically, the Wage Assignment Act prohibits wage assignment agreements that purport to allow assignment of wages for more than 30 days; in the instant matter, the charges imposed by Defendants against Plaintiffs' earnings were indefinite, and could last beyond 30 days. Moreover, Plaintiffs have pleaded that the finance charges Defendants imposed upon Plaintiffs for loans, advances, and other deductions violated the Wage Assignment Act's interest rate cap of 8%. While this claim would require a finding that some or all of Defendants are not Plaintiffs' employer, such a claim is consistent with Defendants' denials of employment status and is pleaded in the alternative to Plaintiffs' analogous claim of unlawful charges under the Indiana Wage Payment Act. Accordingly, the Court should deny Defendants' motion for judgment on the pleadings with respect to the Indiana Wage Assignment Act as well.

II. Legal Argument

a. Standard of Review

A motion for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c) follows the same framework as the more common 12(b)(6) motion to dismiss for failure to state a claim. The motion to dismiss must be considered in light of the liberal pleading standard of Rule 8(a)(2), which requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." "Specific facts are not necessary; the statement need only give the defendant fair notice of what the claim is and the grounds upon which it rests." *Erickson v. Pardus*, 551 U.S. 89, 93, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007) (per curiam) (internal citations and alterations omitted). Determination of the sufficiency of a claim must be made "on the assumption that all allegations in the complaint are true (even if doubtful in fact)." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007).

In considering a motion to dismiss pursuant to Fed. R. Civ. P. 12(c), a Court may review the pleadings and documents attached or referred to the pleadings. Documents which are referred to in the plaintiff's complaint, are central to his claim, and are properly authenticated (or authenticity is conceded)" may be considered by the Court. *Markin v. Chebemma, Inc.*, 2010 U.S. Dist. LEXIS 30072, 2010 WL 1191868, at *5 (N.D. Ill. 2010); *see Tierney v. Vahle*, 304 F.3d 734, 738-39 (7th Cir. 2002). The Seventh Circuit "has been relatively liberal in its approach to the rule articulated in *Tierney* and other cases." *Hecker v. Deere & Co.*, 556 F.3d 575, 582 (7th Cir. 2009); *e.g., Wright v. Associated Ins. Cos.*, 29 F.3d 1244, 1248 (7th Cir. 1994) (upholding consideration of an agreement quoted in the complaint and central to the question whether a property interest existed for purposes of 42 U.S.C. § 1983); *Venture Assocs.*, 987 F.2d at 431 (admitting letters, to which the complaint referred, that established the parties' contractual relationship); *Ed Miniat, Inc. v. Globe Life Ins. Group, Inc.*, 805 F.2d 732, 739 (7th Cir.

1986) (permitting reference to a welfare plan referred to in the complaint in order to decide whether the plan qualifies under ERISA).

Moreover, while a plaintiff must provide allegations in the pleadings that are enough to raise a right to relief beyond the speculative level, "a plaintiff need not put all of the essential facts in the complaint." *PharMerica Chi., Inc. v. Meisels*, 772 F. Supp. 2d 938, 945 (N.D. Ill. 2011); *Hrubec v. Nat'l R.R. Passenger Corp.*, 981 F.2d 962, 963 (7th Cir. 1992). Instead, the plaintiff "may add them by affidavit or brief in order to defeat a motion to dismiss if the facts are consistent with the allegations of the complaint," *Help at Home Inc. v. Medical Capital, LLC*, 260 F.3d 748, 752-53 (7th Cir. 2001); *PharMerica Chi, Inc.*, 772 F. Supp. 2d at 945; *see Cruz v. Cross*, 2010 U.S. Dist. LEXIS 94457, 2010 WL 3655992, at *2 (N.D. Ill. 2010).

Here, Plaintiffs seek the Court to review the allegations made in the Complaint, settlement statements which are properly authenticated and which are referred to in the Complaint, the Service Agreements between Named Plaintiffs and Defendants (which were attached to Defendants' pleadings) and declarations from the Named Plaintiffs.

b. Defendants' Conduct Violation the Consumer Loans Act and the Small Loans Act.

i. Neither the Consumer Loans Act or the Small Loans Act exempt employers from coverage.

Defendants argue that the Court should dismiss Plaintiffs' claims asserting violations of the Indiana Small Loans Act and the Consumer Loans Act because Defendants argue that employers are exempt from the statute.

Noticeably missing from Defendants' brief is any assertion that the statutory language provides that an employer provided loan is exempted from the Indiana Small Loans Act or the Consumer Loans Act. This is because the alleged exemption is found *nowhere* in the statute and such a reading is inconsistent with the very principles and public policies expressed by the statute.

The Indiana legislature, in drafting the Small Loans Act, drafted Section 202 entitled "Exempt transactions and persons" and provided 15 types of transactions and/or persons exempt from the Indiana Consumer Loans Act, including, for example, extensions of credit to government or governmental agencies or instrumentalities, and the sale of insurance by an insurer. Ind. Code §24-4.5-1-202. The Indiana Legislature clearly could have exempted loans provided by an employer, but it did not. Thus, Defendants' entire argument that because they are an employer they are exempt from the law is not supported by the statute, and the statute is unambiguous on this point.

As the Indiana Supreme Court has explained, courts in Indiana follow the principle of statutory construction known as *expressio unius est exclusion alterius*, under which, where the legislature explicitly drafted an exemption to a statute, it is to be inferred that no exemptions other than those specified were intended by the legislature. *State v. Am. Family Voices, Inc.*, 898 N.E.2d 293, 298 (Ind. 2008) ("[N]o language in the statute exempts non-consumer and non-commercial calls from its reach and we decline to read such an exemption into the Law for at least two additional reasons. First, the Legislature provides an exemption for some non-consumer and noncommercial calls in the statute (e.g., messages from school districts to inform parents), from which we infer it intended no exemption for all other non-commercial calls. This reflects the principle of statutory construction known as expressio unius est exclusio alterius - in this case, the Legislature's exemption of certain specified calls excludes all other calls from that exemption.").

The lack of a statutory exemption thus dooms Defendants' argument, especially in light of the statute containing specific exemptions (none of which are applicable here). But it is also worth noting that Defendants' narrow construction of the Indiana Loans Act is inconsistent with the statute, which provides that it "should be liberally construed and applied to promote its underlying purposes and policies." Ind. Code §24-4.5-1-102(1). Defendants fail to explain how prohibiting employers from charging extraordinary interest rates to their employees, and by requiring employers to follow the same disclosure requirements as non-employers with respect to such loans would somehow be inconsistent with the underlying policies and purposes of the Indiana Consumer Loans Act and the Indiana Small Loans Act.

Even though Defendants argue an employer cannot be held to be a "lender" under the statute, Defendants fail to cite the statutory language defining "lender" in their brief. "[L]ender' means a person regularly engaged in making consumer loans." A person is "regularly engaged" in making such loans if the lender makes at least 25 consumer loans per year, and is "regularly engaged" in making small loans if the lender makes at least one small loan each year. Ind. Code §24-4.5-7-102(7); Ind. Code §24-4.5-1-301.5(39). Thus, there is nothing in the definition of "lender" which would preclude an employer from being a lender.

Additionally, it should be noted that while Plaintiffs aver that Defendants were their employer, Defendants deny same. Thus, even if the Court were to read an exemption into the statute, it would be premature to dismiss Plaintiffs' claims on this basis as Plaintiffs may plead claims in the alternative.

Thus, the Court should deny Defendants' invitation to rewrite the statutes and read into the statute an exemption which the legislature did not create.

ii. Because they payroll advances resulted in Plaintiffs becoming "indebted" to Defendants, the payroll advances constitute loans.

Defendants next argue that a payroll advance – complete with a finance charge bearing an over 100% APR interest rate, is not a loan because the loans provided by Defendants do not create debt. Defendants' position here is frivolous.

The Service Agreements between Named Plaintiffs and Defendants are filed with the Court, were attached to Defendants' pleadings, and were referenced explicitly in Plaintiffs' Complaint. Thus, the Court may consider the Service Agreements when ruling on Defendants' motion to dismiss.

In the Service Agreement written by Defendants, Defendants explain that they "will have a right . . . to apply all or any portion of Contractor's Escrow Account to the payment of any charges of indebtedness as provided in Section 5.05." *Service Agreement* at §10.04 (ECF Doc. No. 24-1 and 24-2 at §10.04). And Section 5.05 lists "**advances and other extensions of credit** by Carrier to Contractor" as a basis to withhold compensation and withdraw money from Plaintiffs' escrow accounts. (ECF Doc. No. 24-1 and 24-2 at §5.05). Moreover, pursuant to Section 10.05, at the time of termination of the agreement, "the Escrow Account will be applied to reduce any **indebtedness** of Contractor to Carrier as described in Section 5.05 hereof. In the event that Contractor is **indebted** to Carrier in an amount greater than that held by Carrier in the Escrow Account, Contractor's **indebtedness** will be reduced by the amount in the Escrow Account and Contractor will remain liable to Carrier for any **indebtedness**." (ECF Doc. No. 24-1 and 24-2 at §10.05). (Emphasis added).

Defendants' argument that the advances are "an early payment of compensation for services rendered" is thus at odds with the Service Agreement, which explains that the advances are "extensions of credit" which result in "indebtedness" of the driver and which Defendants may satisfy by (1) debiting from the drivers' settlement; (2) debiting from the drivers' escrow account; or (3) taking other legal measures to obtain full payment. Consequently, Defendants' request that the Court construe payday loans to be anything other than loans should be denied.

iii. The loans were primarily for personal, household, or familial purposes.

Defendants next assert that Plaintiffs have not alleged or provided a factual basis to provide an inference that the payday loans were provided for consumer purposes. To make such an argument, Defendants point the Court to a different section of the Complaint which alleges that Defendants made unlawful wage deductions from Plaintiffs' pay for work-related expenses. That Defendants made certain withholdings form Plaintiff's compensation that were not for small loans does not somehow mean, however, that Defendants did not provide small loans to Plaintiffs. Indeed, the evidence, even at this early stage, clearly indicates that such loans were for personal and familial purposes.

A Court may consider documents referenced in the pleadings when ruling on a Rule 12 motion. Named Plaintiffs herein submit settlement statements issued by Defendants which further evidence that the loans at issue were for personal purposes. As the settlement statements provide, Defendants issued numerous types of loans to Plaintiffs, which include loans for fuel and leases, expenses which Defendants argue are not for personal expenses.

But beyond those loans, Defendants also issued loans to Plaintiffs which were labeled as "PAYROLL ADVANCE" and "PERSONAL MONEY." *See, e.g.* Exhibit A of Helen Blakley's Declaration (attached as Exhibit 1), Exhibit A of William Blakely's Declaration (attached as Exhibit 2), and Exhibit A of Kim Smith's Declaration (attached as Exhibit 3). As such labels make clear, these loans were for personal purposes. Such facts are reasonable inferences to be drawn from the settlement statements, especially considering that loans for work-related expenses are separate labeled and separately issued. *See*, e.g. Ex. 1-A, showing deductions for Fuel, Prepass, Air/Cuff, etc.

Moreover, as stated above, "a plaintiff need not put all of the essential facts in the complaint." *PharMerica Chi., Inc.*, 772 F. Supp. 2d at 945 (N.D. Ill. 2011); *Hrubec*, 981 F.2d at 963. Instead, the plaintiff "may add them by affidavit or brief in order to defeat a motion to dismiss if the facts are consistent with the allegations of the complaint," *Help at Home Inc. v. Medical Capital, LLC*, 260 F.3d 752-53 (7th Cir. 2001); *PharMerica Chi, Inc.*, 772 F. Supp. 2d at 945.

Here, Plaintiffs recognize that the purpose of such loans is not stated explicitly in the Complaint (though the settlement statements provide same). Consequently, Plaintiffs request the Court consider the declarations of the Named Plaintiffs which further explain their settlement statements and the purpose and amount of the loans provided by Defendants. Provided the Court does not permit Plaintiffs to submit additional evidence, then Plaintiffs respectfully request the Court grant leave for Plaintiffs to amend the Complaint which would add the additional facts that are provided in Plaintiffs' declarations.

As all the Named Plaintiffs have explained in their declarations, Celadon provided loans to them in cash while they were working for Celadon, which were different than loans provided for fuel or other work-related expenses (which were not provided in cash). The Named Plaintiffs have provided declarations testifying that they were not required to provide any receipts to Celadon for such loans and that Celadon did not require the loaned money be spent on work-related expenses. Named Plaintiffs were permitted to treat the loans as their own money as if it "were payroll or personal money." *See* Ex. 1 at ¶6; Ex. 2 at ¶6; Ex. 3 at ¶6. Named Plaintiffs used the money on personal items including food, clothes, rent, and utility payments. *Id.*

Thus, because the payday advances were provided for personal purposes, they constitute consumer loans pursuant to the Consumer Loans Act and the Small Loans Act.

iv. The Complaint and Service Agreements demonstrate that the Loans meet the statutory definition of "Small Loans" as defined by the Small Loans Act.

Defendants further argue that Plaintiffs have not alleged or shown that the loans at issue meet the statutory definition of a "small loan." Pursuant to Section 104 of the Small Loans Act, a "small loan" is a loan:

> (a) with a principal loan amount that is at least fifty dollars ($50) and not more than five hundred fifty dollars ($550); and
>
> (b) in which the lender holds the borrower's check for a specific period, **or receives the borrower's written authorization to debit the borrower's account** (other than as a result of default) under an agreement, either express or implied, for a specific period, before the lender:
>
> (1) offers the check for deposit or presentment; or
>
> (2) exercises the authorization to debit the borrower's account."

Ind. Code §24-4.5-7-104.[1]

Defendants have argued, however, that the Small Loans Act claims must be dismissed because Plaintiffs have not pled that Plaintiffs provided written authorization to Defendants to debit from their account. But Defendants are incorrect that Plaintiffs have not pled such facts, and moreover, the documents attached to Defendants' pleadings and which are before the Court demonstrate that Plaintiffs provided written authorization to Defendants to debit from their account to pay for the debt incurred by the payday advance.

Specifically, the Complaint alleges "Under the terms of the Agreements signed by Named Plaintiffs and Class Plaintiffs, Defendants secured the repayment of all loan(s) made to Named

[1] "**[A] loan that does not qualify as a small loan under section 104 of this chapter . . . is subject to this article**." Ind. Code §24-4.5-7-102. (emphasis added). Thus, even if the payroll advances were not small loans, Defendants would still be liable under the Consumer Loans Act.

Plaintiffs and Class Plaintiffs by allowing itself to take the amount(s) owed from Named Plaintiffs' and Class Plaintiffs' escrow accounts." *Amended Complaint* at ¶101 (ECF Doc. No. 21). Because the instant motion was filed by Defendants as a Rule 12 motion, the allegation stated in paragraph 101 of the Complaint must be accepted as true and disposes of Defendants' argument that the loans at issue are not "small loans" under the Indiana Small Loans Act. However, the documents referenced by the Complaint further evidence this allegation.

Specifically, the Service Agreement signed by the Named Plaintiffs and Class Plaintiffs compels the drivers to fund an "Escrow Account," which remains the property of Named Plaintiffs and Class Plaintiffs but which is held by Defendants. Specifically, the Service Agreement requires Named Plaintiffs and Class Plaintiffs to "deposit and maintain with [Celadon] . . . an Escrow Account in the amount of One Thousand-Five Hundred Dollars ($1,500) . . ." *Service Agreement* §10.01; *see also* §19 (ECF Doc. No. 24-1 and 24-2). The Service Agreement compels Defendants to pay interest to Named Plaintiffs and Class Plaintiffs on the balance of their Escrow Account. *Id.* at §10.02. Celadon provides Named Plaintiffs and Class Plaintiffs an accounting of the Escrow Account on a monthly basis, and Named Plaintiffs and Class Plaintiffs may demand an accounting at any time. *Id.* at §10.03 (ECF Doc. No. 24-1 and 24-2). After forty-five days of the termination of the Service Agreement, the balance of the Escrow Account (after deductions) is returned to the driver. *Id.* at §10.06 (ECF Doc. No. 24-1 and 24-2). The Service Agreement further makes clear that the Escrow Account belongs to the driver. *See, e.g. id.* at §10.05 and §13 (referring to the Escrow Account as the "Contractor's Escrow Account.").

The Service Agreement further provides Defendants may "apply all or any portion of the Contractor's Escrow Account to the payment of any charges or indebtedness as provided in Section

5.05…" *Id.* at §10.04. And Section 5.05 in turn states that Defendants may deduct for "Advances and other extensions of credit by Carrier to Contractor." *Id.* at §5.05.

Consequently, the Service Agreement provides written authorization from Plaintiffs permitting Defendants to debit their escrow accounts to cover the debt incurred as a result of the payroll advances. As a consequence, the loans provided meet the requirement of the Small Loans Act and constitute small loans under the statute.

v. Defendants have charged Plaintiffs impermissibly high loan finance charges.

Defendants further assert that the Defendants did not charge impermissibly high interest rates on the loans because the interest was incurred at the time the loan was made. According to Defendants, unless the interest continues to run each time a default occurs, no interest has been charged. Defendants argue that a lender can avoid liability and exposure to Indiana's consumer protection and usury laws by simply relabeling interest as a finance charge. Unfortunately for Defendants, such a loophole does not exist in the law, as the legislature was competent enough to foresee such abuse and made clear the statute could not be evaded by simply changing terminology.

Indeed, the Consumer Loan Act and the Small Loans Act limit not just "interest" on a loan, but instead limit the amount a lender may charge as a "loan finance charge" on a given loan, a term which is much broader than Defendants argue to the Court. "Loan finance charge" means "the sum of: "(a) ***all* charges payable directly or indirectly by the debtor and imposed directly or indirectly by the lender as an incident to the extension of credit**, including any of the following types of charges which are applicable: interest or any amount payable under a point, discount, or other system of charges, however denominated, premium or other charge for any guarantee or insurance protecting the lender against the debtor's default or other credit loss; and (b) charges incurred for investigating the collateral or credit-worthiness of the debtor." Ind. Code §24-4.5-3-109(1) (emphasis added).

Section 201 provides that the Consumer Loan Act "does not limit or restrict the manner of contracting for the loan finance charge, whether by add-on, discount, or otherwise, so long as the rate of the loan finance charge does not exceed" 25% per year, calculated according to the actuarial method, unless the loan is a supervised loan. The loan finance charge is calculated on the assumption that all scheduled payments will be made when due. *Id.* §201(a).

The Consumer Loan Act provides that supervised loans may be provided at a higher interest rate than the standard rate applicable to most other loans. A "supervised loan" is a loan "in which the loan finance charge exceeds twenty-five percent (25%) per year…" Ind. Code §24-4.5-3.501. A lender who engages in supervised loans must be licensed by the state. Ind. Code §24-4.5-3.502. Here, Defendants are not supervised lenders and have no license to issue consumer loans. *Am. Complaint* at ¶¶4, 99. Moreover, a supervised loan may not have a loan finance charge exceeding 36% per year where the loan is $2,000 or less. Ind. Code §24-4.5-3.508.

Meanwhile, a licensed lender who follows the provisions of the Small Loans Act may charge a finance charge of an amount up to 15% of the principal of the first $250 of the loan (which is not calculated on a yearly APR). Ind. Code §24-4.5-7-201.[2]

The loans provided to Named Plaintiffs far exceed the 25% maximum amount generally applicable to non-supervised loans, and further exceed the maximum charges permitted for supervised loans. While Defendants have charged an amount which appears to be permitted under the Small Loans Act, Defendants' violations of the Small Loans Act renders such loans unlawful under the Small Loans Act for a myriad of other reasons. *See Am. Complaint* at ¶¶99-113.

---

[2] Ironically, if the loans are not small loans, then the interest rate charged to Plaintiffs constitutes felony loansharking. Ind. Code An. §35-45-7-2.

For example, on June 7, 2015, Celadon provided a payroll advance (which Celadon labelled on Plaintiffs' settlement statement "PERSONAL MONEY") to Plaintiff William Blakley for $50, plus a $7.50 loan finance charge. The loan was repaid on the next payday, 12 days later, on June 19, 2015. Thus in a period of just 12 days, Plaintiff Blakely was charged a loan finance charge equal to 15% of the loan; said differently, this amounts to 1.25% interest *per day*. (15% / 12 days). Multiplying the 1.25% daily interest into an annual interest rate results in an APR of 456.25% (1.25% * 365 days).

Similarly, on September 2, 2015, Defendants issued a $100 payroll advance to Named Plaintiff Smith. *Am. Complaint* at ¶124. Defendants charged Named Plaintiff Smith a $3 loan finance charge for the loan, and the loan was repaid at the next regular payday 9 days later. Thus, in a period of 9 days, Plaintiff Smith was charged a loan finance charge equal to 3% of the loan; said different this amounts to .333% interest *per day* (3% / 9 days). Multiplying the .333% daily interest rate into an annual interest rates results in an APR of 121.7%. *Id.*

The cases relied on by Defendants further support Plaintiffs' position that single payment loans with a precalculated loan finance charge are subject to the limitations imposed by Indiana law. Defendants rely on *Payday Today, Inc. v. Defreeuw*, 903 N.E.2d 1057 (Ind. Ct. App. 2009), to argue that the loans here do not violate the Small Loans Act. In *Payday Today*, the lender provided a $125 loan which was due in 2 weeks and which required the debtor to repay the loan plus an additional $18.75 service charge. Because the debtor did not pay, the lender sent a letter which demanded the debtor repay more than just the loan and the service fee, but also attorney's fees and other expenses. Such threats are prohibited by the statute. Thus, even though the lender was not permitted to charge additional service fees, the loan was still subject to the Small Loans Act, and the Court held that the lender violated the statute.

Similarly, *Livingston v. Fast Cash USA, Inc.* 753 N.E. 2d 572 (Ind. 2001), the Indiana Supreme Court determined that payday lenders, who provided single payment loans where a service charge was precomputed, were violating the Consumer Loans Act where such fees resulted in interest rates significantly higher than permitted under the Consumer Loans Act.[3] There, the lenders argued the service charges which well exceeded 36% per year provided on short-term payday loans did not constitute interest and thus were permissible under the Consumer Loans Act. But the Indiana Supreme Court disagreed and held that under the Consumer Loans Act, a lender "may contract for and receive a loan finance charge . . . **provided the resulting APR does not exceed the interest limit established by 3-508(2) [36%] or Indiana's loansharking statute [72%]**." *Id.* at 577 (emphasis added).

Thus, Defendants' argument that they have not violated the Indiana Consumer Loan Act or the Small Loans Act because, according to Defendants, the finance charge does not constitute "interest" is meritless. The statutes limit permissible charges which can be made by a lender, regardless of whether the charge is labelled as interest or some other service fee. Here, the facts at this stage leave undisputed that the loan finance charges exceeded the maximum permissible under the Indiana Consumer Loans Act. Accordingly, Plaintiffs respectfully request the Court deny Defendants' motion to dismiss Counts IV and V of the Amended Complaint.

c. Defendants' Conduct Violated the Indiana Wage Assignment Act

Defendants have also moved to dismiss Plaintiffs' claims under the Indiana Wage Assignment Act, arguing that the Wage Assignment Act excludes employers from its coverage. The Court should reject Defendants' arguments for two reasons: first, by its very language, the Wage Assignment Act restricts not only "wage brokers" but also "any other person" from

[3] The Small Loans Act was passed a year later, which is presumably why such loans were not reviewed under the Small Loans Act.

receiving a wage assignment unless the wage assignment is executed and in writing. Second, Defendants have answered Plaintiffs' Amended Complaint by **denying** they are an employer, and Plaintiffs were permitted to plead violations of the Wage Assignment based on Defendants **not being** an employer as an alternative to Plaintiffs' claims under the Indiana Wage Deduction Act, plead as Count II.

As Defendants' point out, the Wage Deduction Act regulates and prohibits employers from making certain deductions/wage assignments from their employees' wages. For instance, assuming Defendants are Plaintiffs' employer, the pay advances in the instant case violate the Wage Deduction Act because (a) they are not revocable at any time upon written notice to Defendants; *see* Ind. Code §22-2-6-2(a)(1); Amended Complaint at ¶133; and (b) the interest charged on these advances is in excess of the Wage Deduction's interest limitation of the prime rate plus four percent (4%). *See* Ind. Code §22-2-6-2(c); Amended Complaint at ¶134. Plaintiffs have pleaded that Defendants' loans/advances to Plaintiffs constitute unlawful deductions that violate the Wage Deduction Act in Count II. Defendants have not moved for judgment on the pleadings as to Count II.

However, Defendants alleged liability under the Wage Deduction Act does not preclude liability under the Wage Assignment Act, given that employers are also covered by several provisions of the Wage Assignment Act. Plaintiffs agree that the Wage Assignment Act defines and regulates "wage brokers" and excludes from the definition of "wage brokers" a wage earner's employer." *See* Ind. Code §22-2-7-1. However, Wage Assignment Act also regulates not only "wage brokers" (which excludes employers) but **any other person** making or participating in a wage assignment. *See, e.g.,* Ind. Code §§22-2-7-2, 22-2-7-3, 22-2-7-8, The Wage Assignment Act voids any wage assignment made between any wage earner and any person (wage broker or non-wage broker) unless the assignment is for a fixed and definite part of the wages or salary earned or to be earned during a period not exceeding thirty (30) days immediately following the date of the assignment. *See* Ind. Code §22-2-7-2. Similarly, the Wage Assignment Act prohibits any person (wage broker or non-wage-broker) from charging transaction fees or interest that amounts to more than 8% of the balance of the wage assignment on wage assignments between a wage earner and wage broker. *See* Ind. Code §22-2-7-3. Finally, the Wage Assignment Act provides that a non-compliant wage assignment, whether between a wage earner and a wage broker or a non-wage-broker, is null and void. *See* Ind. Code §22-2-7-8.

Accordingly, Plaintiffs have valid claims under the Wage Assignment Act for lease payments, fuel purchases, insurance purchases, and payroll advances because the agreements arranging for such assignments exceeded thirty days in length, *see* Amended Complaint at ¶137, and were therefore null and void. *See* Ind. Code §§22-2-7-2, 22-2-7-8. These claims are cognizable regardless of whether any or all of Defendants are proven to be Plaintiffs' employer, as Plaintiffs have argued they are.

Moreover, while Defendants have *rhetorically* admitted their employment status for *purposes of responding to this motion*, all Defendants have **denied** that they were Plaintiffs' employers in their Answer. If some or all of Defendants were not Plaintiffs' employers, then as non-employers, they would qualify as "wage brokers" to the extent they received wage assignments. The same is true if some but not all of Defendants are found to be Plaintiffs' employers. Accordingly, Plaintiffs have pleaded additional Wage Assignment Act claims in the alternative to their Wage Deduction Act claims, in the event that some or all of Defendants are found to not be employers of Plaintiffs.

For instance, Defendant Quality Equipment Leasing is a division of Defendant Celadon which leases the vehicles used by the Plaintiffs to the Plaintiffs, and, in return, receives lease payments from Plaintiffs that are received as a wage assignment out of Plaintiffs' settlement amounts. *See* Amended Complaint at ¶¶17, 58. If Defendant Quality Equipment is able to demonstrate that it is not Plaintiffs' employer, as a recipient of lease payment wage assignments, Defendant Quality would constitute a "wage broker" under the Wage Assignment Act, and neither Defendant Celadon nor Defendant Quality could charge as compensation or interest an amount exceeding 8% of the amount advanced. *See* Ind. Code §22-2-7-3 ("and no commission, compensation or charges in addition to the [8% annual interest] above named shall be asked, demanded or received by said wage broker or any other person for making or securing said advancement or loan.") Plaintiffs have pleaded that the transaction fees Defendants charged for the wage assignments resulted in interest rates exceeding 8% per year. *See* Amended Complaint at ¶134.

Plaintiffs are permitted to plead legal claims in the alternative. *See, e.g., FDIC v. Kime*, 12 F. Supp. 3d 1113, 1125 (S.D. Ind. 2014) (noting that alternative pleadings are permitted and need not be specifically designated as such). Because certain Defendants may be able to demonstrate that they were not Plaintiffs' employers, Plaintiffs were permitted to plead that the wage deductions Defendants made from Plaintiffs' settlements were wage assignments remitted to non-employer "wage brokers," and accordingly, violated the Wage Assignment Act for the reasons set forth above.

III. Conclusion

As set forth herein, Plaintiffs have pled and provided sufficient facts to demonstrate that Defendants are not exempt from the Indiana Wage Assignment Act, the Indiana Consumer Loans Act, or the Indiana Small Loans Act. Additionally, Plaintiffs have provided detailed averments regarding how Defendants' conduct violated each of these statutes. Thus, for the reasons stated above, Plaintiffs respectfully request that Defendants motion be denied in its entirety.

Respectfully submitted,

/s Justin L. Swidler

SWARTZ SWIDLER, LLC
1101 Kings Hwy N. Ste. 402
Cherry Hill, NJ 08034
Phone: (856) 685-7420
Fax: (856) 685-7417

September 6, 2016