NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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LETTER OPINION

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Re: *Commonwealth of Virginia v. NC Financial Solutions of Utah, LLC*
Case No. CL-2018-6258

Dear Counsel:

This cause comes before the Court on motion of NC Financial Solutions of Utah, LLC ("Net Credit" or "Defendant") for a Change of Venue and on its Demurrer to the

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Complaint of the Commonwealth of Virginia ("Commonwealth" or "Plaintiff"), alleging multiple violations of the Virginia Consumer Protection Act ("VCPA"). The Court is presented with the question whether unlicensed entities engaged in noncommercial personal financial lending activities to Virginia consumers are exempt from application of the VCPA as "small loan companies." For the reasons as more fully stated herein the Court holds as follows: 1) venue is proper in Fairfax County as the Complaint alleges violations of the VCPA respecting several consumer transactions in this jurisdiction, Defendant admits making consumer loans in Fairfax County, and Net Credit has failed to overcome the factual inference of a sufficient nexus to Fairfax County derived from the pleadings of the Plaintiff, despite being in the position as lender to posit to the Court with particularity the exact number of customers with whom it has transacted business in this forum; 2) the exemption contained in the VCPA for "small loan companies," a term synonymous with "consumer finance companies," does not apply to Defendant because it is unlicensed in Virginia, and not regulated *and* supervised by the State Corporation Commission or comparable federal regulating body; 3) the choice of Utah law provided in Defendant's loan agreement with its Virginia customers is unenforceable as neither supported by the required nexus to Utah nor overcoming the strong public policy that deceptive consumer trade practices not escape remedy under the VCPA; and 4) the Commonwealth has adequately pled misrepresentations by Net Credit in violation of the VCPA. Accordingly, the Motion of Defendant to Change Venue is denied and its Demurrer is overruled.

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BACKGROUND

The case before the Court is an action brought by the Commonwealth against Net Credit for violations of the Virginia Consumer Protection Act, Virginia Code §§ 59.1-96 - 59.1-207. The Commonwealth's Complaint alleges Net Credit violated the VCPA by misrepresenting to consumers they were required to make payments on their loans after filing for bankruptcy, collecting payments in violations of the automatic stay pursuant to 11 U.S.C. § 362(a)(6), misrepresenting its licensure by the Utah Department of Financial Institutions ("DFI"), misrepresenting that its lending in Virginia was regulated by the Utah DFI, misrepresenting its Virginia loans were governed by the Utah Consumer Credit Code and not subject to the law of Virginia, and misrepresenting the legality of charging more than twelve percent (12%) annual interest. *See* Compl. ¶ 76(a)-(g).

Net Credit is a Chicago-based, internet lender which has allegedly provided closed-end installment loans to over 47,000 Virginia consumers at annual interest rates ranging from 35% to 155% between 2012 and 2018. *Id.* ¶ 1. Net Credit is not a Virginia-licensed consumer finance company, and relies on a Utah choice-of-law contractual clause in defense of this case. The Commonwealth posits this choice-of-law provision is void, as the purpose of the loan agreements with Virginians bears no reasonable relationship to Utah and further violates Virginia public policy against usury. *Id.* ¶ 41-43. Plaintiff also alleges Net Credit misrepresented to Virginia consumers in bankruptcy they were required to pay loans which had been stayed or discharged, and that Net Credit continued to collect against Virginians in derogation of their filing for bankruptcy. *Id.* ¶ 62-71.

The Commonwealth is seeking restitution, civil penalties, attorneys' fees, and injunctive relief.

ANALYSIS

I. Venue is proper in Fairfax County.

As a preliminary matter, Net Credit challenges the propriety of venue in Fairfax County, maintaining this Court should transfer the case to the Circuit Court for the City of Richmond. A county or city is a permissible venue "[p]rovided there exists any practical nexus to the forum including, but not limited to, the location of fact witnesses, plaintiffs, or other evidence to the action, wherein the defendant regularly conducts substantial business activity...." Va. Code § 8.01-262(3). There is a rebuttable presumption Plaintiff's choice of venue is correct. *See Norfolk & W. Ry. Co. v. Williams*, 239 Va. 390, 394, 389 S.E.2d 714, 717 (1990); *see also Hernandez v. E. Coast Barge & Boat Co.,* 85 Va. Cir. 103, 103-04 (Norfolk 2012). The Court may, upon motion by a party and for good cause shown, transfer an action to any fair and convenient forum having jurisdiction within Virginia. Va. Code § 8.01-265. "Good cause shall be deemed to include, but not to be limited to, the agreement of the parties or the avoidance of substantial inconvenience to the parties or the witnesses, or complying with the law of any other state or the United States." *Id.* Moreover, "[t]he party objecting to venue has the burden to establish that the venue chosen by the plaintiff was improper." *Hawthorne v. VanMarter*, 279 Va. 566, 581 (2010) (citing *Barnett v. Kite*, 271 Va. 65, 69, 624 S.E.2d 52, 54 (2006); *Meyer v. Brown*, 256 Va. 53, 57, 500 S.E.2d 807, 809 (1998)).

The Commonwealth asserts venue is proper in Fairfax County because Net Credit conducts "substantial business activity" in the forum, as "several" consumers who reside in the County have received loans from Net Credit and continue to pay on those loans. Compl. ¶ 2-3. Plaintiff does not, however, specify how many of the 47,000 Virginians given loans by Net Credit reside in Fairfax County. Taking the facts alleged in the Complaint as true, Net Credit conducts substantial business activity in Fairfax County as several of those Virginians with whom it conducts business reside in the forum. Further, Net Credit has admitted Fairfax County is a proper venue. Mot. ¶ 3. Moreover, in oral argument of this Motion, Net Credit admitted doing business in Fairfax. It did not avail itself of the opportunity to persuade the Court of the absence of substantial business connection to the jurisdiction despite the fact that, inferentially as a purveyor of loans, Defendant knows exactly from how many customers it collects loan repayments and their location.

Net Credit argues that Fairfax County does not have a practical nexus to this case, and cites *Williams* to substantiate that claim. Mot. ¶ 10. *Williams*, however, specified that the lack of a practical nexus alone is not enough to prove good cause to transfer the case. *Williams*, 239 Va. at 396, 389 S.E.2d at 717-18. This view expressed in *Williams* was affirmed in later decisions. *See Virginia Elec. & Power Co. v. Dungee*, 258 Va. 235, 246, 520 S.E.2d 164, 170 (1999); *Kollman v. Jordan*, 60 Va. Cir. 293, 295 (Chesterfield 2002). The requisite nexus to Fairfax is further enhanced beyond Net Credit's business activities in that Plaintiff has an office in the chosen forum. With all relevant factors considered, Fairfax County is thus a permissible venue for adjudication of this case.

Net Credit did not meet its countervailing burden of proving good cause to transfer the case to the Circuit Court for the City of Richmond. That both parties have counsel in Richmond which location might also constitute a practical venue for adjudication of this case is not a factor to be considered in determining good cause for transfer. *City of Danville v. Virginia State Water Control Bd.*, 18 Va. App. 594, 599, 446 S.E.2d 466, 469 (1994). In addition, Net Credit did not proffer substantial inconvenience to the parties were the case to be tried in Fairfax beyond the statement that more customers live in the Richmond metropolitan area than in Fairfax County. As the Commonwealth points out, this broad statement is not enough to show good cause to transfer without identifying witnesses who will actually be inconvenienced. *See Bradley v. Kellum*, 55 Va. Cir. 397, 399 (Charlottesville 2001). While Net Credit claims Richmond is a more convenient forum, it has not met its burden to demonstrate good cause to transfer venue in this case.

II. Net Credit's Demurrer is overruled.

Net Credit demurs to the Commonwealth's Complaint. A demurrer admits the truth of the facts contained in the pleading to which it is addressed, as well as any facts that may be reasonably and fairly implied and inferred from those allegations. *See McDermott v. Reynolds*, 260 Va. 98, 100, 530 S.E.2d 902, 903 (2000). A demurrer does not, however, admit the correctness of the pleader's conclusions of law. *Yuzefovsky v. St. John's Wood Apartments*, 261 Va. 97, 102, 540 S.E.2d 134, 137 (2001). To survive a challenge by demurrer a pleading must be drafted with sufficient demarcation to enable the court to find the existence of a legal basis for its judgment. While it is "unnecessary for the pleader to descend into statements giving details of proof in order to withstand demurrer," the

complaint must state a viable cause of action. *CaterCorp, Inc. v. Catering Concepts, Inc.*, 246 Va. 22, 24, 431 S.E.2d 277, 279 (1993) (citing *Hunter v. Burroughs*, 123 Va. 113, 129, 96 S.E. 360, 365 (1918)).

A. Net Credit is not exempt from the VCPA as a "small loan company" pursuant to Virginia Code § 59.1-199(D), for Defendant is neither licensed nor regulated and supervised by the State Corporation Commission or comparable federal regulating body.

Net credit asserts it is a "small loan company," and pursuant § 59.1-199(D) of the Code of Virginia, is therefore exempt from application of the VCPA. The Virginia statutory scheme regulating entities engaged in financial transactions with consumers has an overarching elegance in its construction in melding regulatory supervision with enforcement by suit in the courts for those entities which do not submit to regulation. This legislative intent is most evident in the manner in which the General Assembly incorporated the VCPA into the regulatory scheme existing at the time of its enactment. It is clear the General Assembly on the one hand sought to ensure consumers are not defrauded and nefarious actors are deterred by the teeth of the VCPA bite. On the other hand the Act sought to free businesses which are under the supervisory oversight of the State Corporation Commission ("SCC") from needless litigation where direct regulatory enforcement action is already available as an alternate mechanism to discipline the marketplace.

This carefully enacted balance seamlessly apportioning legal action against deceptive trade practices between direct regulation under other provisions and enforcement under the VCPA, is challenged by Defendant in its demurrer. Defendant

posits it need not be licensed to make consumer loans in Virginia, and is at the same time exempt from regulation of fraudulent conduct under the VCPA exception applicable to "small loan companies," found in § 59.1-199(D) of the Code of Virginia. In short, Defendant's position is that there exists a gap in the statutory scheme where lenders engaging in fraud may operate with impunity, subject neither to regulatory supervision nor the disciplining balm of adjudication of VCPA claims in the courts. This Court finds the General Assembly created no such gap in Virginia law through which fraudulent actors may operate in a "wild west" loan environment, unfettered from regulatory supervision or court enforcement.

Net Credit argues the Commonwealth's claim is barred by Virginia Code § 59.1-199(D). That statute provides the VCPA does not apply to

> Banks, savings institutions, credit unions, small loan companies, public service corporations, mortgage lenders as defined in § 6.2-1600, broker-dealers as defined in § 13.1-501, gas suppliers as defined in subsection E of § 56-235.8, and insurance companies regulated and supervised by the State Corporation Commission or a comparable federal regulating body.

The Defendant argues the Commonwealth's claim is proscribed by this section because Net Credit calls itself a "small loan company." Defendant could not, however, state to this Court a coherent and objective, limiting principle defining what should be deemed a "small loan company" under the exempting section. Defendant instead cites to a recent circuit court opinion which held a "small loan company" is one "which issue[s] small loans." *Commonwealth v. Allied Title Lending, LLC*, No. CL17-4286, 2018 Va. Cir. LEXIS 71, at *7 (Richmond Jan. 22, 2018) (hereinafter "*Allied Title*"). The Complaint alleges Net Credit "provides closed-end installment loans of $1,000 to $10,000," with short terms "between

6 and 60 months," and that Net Credit posits such loans make it an exempt "small loan company." Compl. ¶ 9.

It is presumed "the General Assembly, in framing a statute, chose its words with care." *Halifax Corp. v. First Union Nat'l Bank*, 262 Va. 91, 100, 546 S.E.2d 696, 702 (2001). "When statutory terms are plain and unambiguous, [courts] apply them according to their plain meaning without resorting to rules of statutory construction." *Smith v. Commonwealth*, 282 Va. 449, 454-55, 718 S.E.2d 452, 455 (2011) (citing *Halifax Corp.*, 262 Va. at 99-100, 546 S.E.2d at 702). However, just like one person's feast may be another's famine, the term "small" applied in the herein financial context is relative, and thus may not be easily ascribed a plain meaning definition.

This Court is cognizant that reasonable judges may disagree in resolution of particularly vexing legal questions. Nevertheless, with much consideration, this Court respectfully finds the holding in *Allied Title* unpersuasive. The *Allied Title* opinion held the exemption from the VCPA applies to "small loan companies," without requiring they be licensed entities doing business in Virginia, applying the plain meaning rule of statutory interpretation. The opinion does not, however, delineate what makes a loan "small." The Defendant has not alleged in this cause that the range of loan amounts it extends to consumers is identical to those in *Allied Title*. Thus, it is difficult to conclude whether the court in *Allied Title* would rule similarly when considering Net Credit's practices. Without more persuasive guidance from the court in *Allied Title*, this Court is left to conduct its own inquiry of the meaning of the statutory term "small loan companies."

The Supreme Court of Virginia provides the following guidance:

> An undefined term must be "given its ordinary meaning, given the context in which it is used." *Dep't of Taxation v. Orange-Madison Coop. Farm Serv.*, 220 Va. 655, 658, 261 S.E.2d 532, 533-34 (1980). "The context may be examined by considering the other language used in the statute." *City of Virginia Beach v. Bd. of Supervisors of Mecklenburg County*, 246 Va. 233, 236-37, 435 S.E.2d 382, 384 (1993).

Sansom v. Bd. of Supervisors, 257 Va. 589, 594-95, 514 S.E.2d 345, 349 (1999). In analyzing § 59.1-199(D) of the Code of Virginia, this Court must assume "'the legislature chose, with care, the words it used *when it enacted the relevant statute*,'" and this Court is 'bound by those words.'" *City of Va. Beach v. ESG Enters.*, 243 Va. 149, 153, 413 S.E.2d 642, 644 (1992) (emphasis added) (quoting *Barr v. Town & Country Props.*, 240 Va. 292, 295, 396 S.E.2d 672, 674 (1990)). "Where the same term is used in different places within a statutory scheme, [courts must] apply the same meaning unless the legislature clearly intended a different one." *Lawlor v. Commonwealth*, 285 Va. 187, 237, 738 S.E.2d 847, 875 (2013). Thus, this Court is not permitted to apply the plain meaning rule to the term "small loan companies," not further defined in the VCPA itself, and must instead turn to the broader statutory scheme to discern the meaning of such term.

The Consumer Finance Act ("CFA") and the VCPA are part of a comprehensive statutory, financial, and regulatory structure dating back to at least 1918, at which time the predecessor Small Loan Act came into effect and contained some provisions analogous to those later seen in the CFA and VCPA. Citing but one example, the Small Loan Act proscribed "false or deceptive advertisements," a prohibition now more broadly addressed in the VCPA. 1918 Va. Acts, ch. 402, sec. 13; Cf. Va. Code § 59.1-200. The 1918 Small Loan Act defined a "small" loan to be that of three hundred dollars ($300) or a lesser amount. The evident purpose of the 1918 Act was to regulate "small loan

companies," i.e., companies making noncommercial "small" loans. The General Assembly stated need for the enactment because "the conduct of such business has long been the cause of general complaint and of much hardship and injustice to borrowers, and there is no regulation or provision of law which has proved effective for the protection of borrowers and for the punishment of usurious money lenders." 1918 Va. Acts, ch. 402.

At the time the VCPA was enacted in 1977, the Small Loan Act defined a "small" loan as follows:

> No person shall engage in the business of *lending in amounts of the then established size of loan ceiling or less*, and charge, contract for, or receive, directly or indirectly, on or in connection with any loan, any interest, charges, compensation, consideration or expense which in the aggregate are greater than the rate otherwise permitted by law except as provided in and authorized by this chapter and without first having obtained a license from the Commission.

Va. Code § 6.1-249 (1974) (emphasis added). Before 1977 the loan ceiling delineating the confines of a small loan was statutorily assigned to be determined by the SCC according to a prescribed guiding formula, and no longer set directly by statute. Va. Code § 6.1-271 (1974). Significant about this development is that it became axiomatic the loan ceiling was set by the SCC for licensed and thus *supervised* entities. This further imparts the depths of supervision to which "small loan companies" were continually subjected by the SCC under the Small Loan Act at the time of the creation of the VCPA in 1977.

In 1977, the Small Loan Act still governed "small loan companies." 1977 Va. Acts, ch. 635. In 1981, the Small Loan Act was replaced with the Consumer Finance Act, and "small loan companies" became synonymous with "consumer finance companies." 1981 Va. Acts, ch. 55. The General Assembly directed that "[w]herever in the Virginia Acts of Assembly or in the Code of Virginia the phrase 'Small Loan Act' shall appear, it shall be

taken to mean the Consumer Finance Act." Va. Code § 6.1-244 (1981). The renaming of the Act did not disrupt the continuity of the SCC's regulation and supervision of companies making "small loans" through its licensing requirements. In 2010, the Consumer Finance Act was reformulated and re-codified at §§ 6.2-1500 to 6.2-1543, while maintaining regulatory continuity with preceding enactments. 2010 Va. Acts, ch. 794; Va. Code § 6.2-1503(3). The size of the loan regulated for consumer finance companies is no longer limited to just those which are "small." Instead, since at least 2001, licensees have been merely required to charge no more than thirty-six percent (36%) annual interest on loans of $2,500.00 or less, and otherwise may charge the amount of annual interest stated in their loan agreements when higher sums of principal are involved. *See* Va. Code §§ 6.2-1520(A) (2010) and 6.1-272.1 (2001). The size of the transaction is thus no longer relevant but is instead only limited to the statutorily consistent nature of the personal noncommercial lending activity of small loan companies now considered consumer finance companies.

Virginia Code § 6.2-1501(A) requires all who engage in the business of making noncommercial personal loans in Virginia to be licensed, and therefore regulated and supervised by the SCC. The Legislature intended such lenders be subject to distinct scrutiny, including examination of their affairs and records no less than once every three years. Va. Code § 6.2-1531. No distinction is made in the statute between domestic or foreign-based lending entities. No exception is provided for the loans made under choice-of-law provisions purporting to apply the substantive laws of another state to adjudicate disputes among contracting parties. If the General Assembly intended to exempt out-of-state noncommercial lenders from licensing, it would have so stated.

The requirement of licensure for non-commercial lenders doing business in Virginia is not a discriminatory restraint on trade, but rather a prudent exercise of the constitutional police power afforded each of the several states of the Union to regulate fraudulent activity occurring within their borders. This general obligation to obtain a license to engage in the business of making personal noncommercial loans and thus be subject to the supervisory eye of the SCC, is harmonized in Virginia Code § 59.1-199(D), which states,

> § 59.1-199. Exclusions. — Nothing in this chapter shall apply to:
>
> . . .
>
> D. Banks, savings institutions, credit unions, small loan companies, public service corporations, mortgage lenders as defined in § 6.2-1600, broker-dealers as defined in § 13.1-501, gas suppliers as defined in subsection E of § 56-235.8, and insurance companies *regulated and supervised by the State Corporation Commission or a comparable federal regulating body*.

Va. Code § 59.1-199(D) (emphasis added). On its face, all the entities qualifying for exemption under § 59.1-199(D) are already *required* to be subject to either licensure or regulatory oversight elsewhere in the Code. *See* Va. Code §§ 6.2-898 (empowering the SCC to examine banks no less than once every three years), 6.2-1191 (subjecting savings institutions to SCC supervision), 6.2-1308 (subjecting credit unions to SCC supervision and regulation), 6.2-1501 (requiring consumer finance companies be licensed by the SCC), 6.2-1601 (requiring mortgage lenders be licensed by the SCC), 13.1-504 (requiring brokers-dealers be registered with the SCC), 38.2-1024 (requiring insurance companies to be licensed by the SCC), 56-35 (empowering the SCC to supervise and regulate public service corporations), and 56-235.8(F) (requiring gas suppliers be licensed by the SCC). The General Assembly has expressed the intent

dating back at least to 1918 that most financial institutions doing business in Virginia either be licensed in the case of those extending noncommercial personal loans or otherwise be "regulated by appropriate laws." *See* 1918 Va. Acts, ch. 402, sec. 19.

Net Credit is a "consumer finance company" as it is "engaged in the business of making loans to individuals for personal, family, household, or other nonbusiness purposes." Virginia Code § 6.2-1500. By failing to obtain a license from the SCC prior to doing business in Virginia, Defendant chose to forego the generous exemption it would be afforded from the general usury, annual interest rate cap of twelve percent (12%). *See* Va. Code § 6.2-1520(A) (allowing licensees to charge up to thirty-six percent (36%) per annum for loans or $2,500 or less, and not limiting the interest rate for larger loans). Virginia Code § 59.1-199(D) enumerates for exemption only businesses which are already licensed or regulated elsewhere in the Code. By its choice to remain unlicensed in derogation of Code § 6.2-1501, Net Credit created the risk of having its loan contracts with Virginians deemed void pursuant to Code § 6.2-1541, of being subjected to suit for practices prohibited by the VCPA, and of not benefiting from other statutory exemptions afforded similar businesses which comply with Virginia law. Independent of the prerequisite of licensure to gain benefit of the safe harbor from suit pursuant to the blanket requirement in Virginia Code § 6.2-1500, section 59.1-199(D) itself further accentuates the exception for "small loan companies" applies *only* if they are already regulated *and* supervised by the SCC or a *comparable* federal regulating body.

Defendant reads Virginia Code § 59.1-199(D) to mean all small loan companies are exempt, regardless of whether they are not regulated and supervised by the SCC or comparable federal regulating body. Moreover, Net Credit avers that *only* insurance

companies are subject to the extra prerequisite for exemption from the VCPA, that they comply with being regulated and supervised as specified. Defendant maintains the words "regulated and supervised" in § 59.1-199(D) must be preceded by a comma in order to apply to all the exempt businesses listed before "insurance companies." Net Credit again points this Court to the decision in *Allied Title,* which held "small loan companies" need not be regulated or supervised to gain exemption from the VCPA. That opinion applied the doctrine of statutory interpretation known as the Rule of the Last Antecedent to reach its decision. This Court is respectfully unpersuaded such analysis supplants by dint of reference to a mere purported drafting practice the otherwise evident intent of the Legislature.

The Rule of the Last Antecedent, rather than hard and fast, is little more than a presumed "grammatical practice," which is flexible enough to avoid an interpretation which "would involve an absurdity, do violence to the plain intent of the language, or if the context for other reason requires a deviation from the rule." *Link, Inc. v. City of Hays*, 266 Kan. 648, 654, 972 P.2d 753, 757-58 (1998) (quoting *In re Petition of School District of Omaha*, 151 Neb. 304, 307-08, 37 N.W.2d 209 (1949)). In addition, the reliability of the application of the "rule" itself has been authoritatively questioned. Kenneth A. Adams, author of *A Manual of Style for Contract Drafting, Fourth Edition* (ABA 2017), has been critical of the Rule of the Last Antecedent for its inconsistent application and as being contrary to many manuals of style.

> [T]he Rule of the Last Antecedent is not in fact a rule of punctuation. Instead, it is one of the canons of construction used by courts, sporadically and inconsistently, to resolve what would otherwise be ambiguities in statutes and contracts.

> Anyone contemplating invoking the Rule of the Last Antecedent should consider that it is inconsistent with how writers use commas and how manuals of style say writers should use commas.
>
> Manuals of style recognize that the comma is used to indicate a slight break in a sentence. But according to the Rule of the Last Antecedent, adding a comma after a series of antecedents not only doesn't sever the modifier from the last noun or phrase in the series, it in fact operates remotely on all the antecedents, binding them to the modifier. Nothing in the general literature on punctuation suggests such a mechanism.

Kenneth A. Adams, *Behind the Scenes of the Comma Dispute*, Globe and Mail, Aug. 28, 2007.

The Rule of the Last Antecedent is often cited as gospel to courts in statutory construction disputes, with little reference to its origins and the caveats set forth by its primary originator. While courts invoked the principle previously, it was Jabez Gridley Sutherland, a noted attorney, legislator, judge and politician, who in 1891 in his influential treatise stated, "Relative and qualifying words and phrases, grammatically and legally, where no contrary intention appears, refer solely to the last antecedent." J. Sutherland, Statutes and Statutory Construction, § 420 (1891) (footnote citations omitted). Sutherland, however, qualified his proposed rule. He noted, "[i]t is better always to adhere to a plain, common-sense interpretation of the words of a statute than to apply to them a refined and technical grammatical construction. It is not always safe to assume that the draftsman of an act understood the rules of grammar." *Id.* § 259. "Qualifying words have been applied to several preceding sections where the nature of the provisions and the obvious sense required it." *Id.* § 267. He noted further that where there is "improbability of a contrary design[,] . . . an independent proposition" may apply alike to all antecedents

which are of the "same class." *See id.* (applying the principle to "officers"). Thus, "[w]here the intention is manifest, a proviso . . . when inserted in one section . . . may be applied to the matter of another section." *Id.*

The Defendant maintains the absence of a comma in Virginia Code § 59.1-199(D) between the terms "insurance companies" and "regulated and supervised by the State Corporation Commission or a comparable federal regulating body" means the Legislature intended that only unlicensed insurance companies would be excluded from VCPA exemption, while all other unlicensed financial institutions listed would be exempt. Such interpretation suggested by Net Credit is disproved by the cited language "or a comparable federal regulating body." "[I]nsurance companies are regulated [only] by the States in which they do business." *See N. Cent. Life Ins. Co. v. Commissioner*, 92 T.C. 254, 256 (1989) (discussing common aspects of the regulatory scheme for insurance companies applicable in all the states of the Union).

The Legislature is aware of Virginia's exclusive supervisory role over the insurers doing business in the State, having enacted statutes regulating the industry, so the General Assembly could not have been specifying insurance companies would be exempt when supervised by "a federal regulating body," knowing that only state bodies regulate *and supervise* such entities. *See, e.g.,* Va. Code § 38.2-1024. There is no "federal regulating body" supervising insurance companies, nor is there a historical precedent to suggest such distinct role of states in regulating insurers is likely to change. The VCPA cannot be turned into an incongruity which thwarts the legislative intent that Defendant be regulated by the SCC or a comparable federal regulating body before gaining exemption from the VCPA. The language "or a comparable federal regulating body" was

clearly intended by the General Assembly to pertain to the listed entities preceding "insurance companies" which are federally regulated, such as banks. Therefore, the mere absence of a comma in this instance, cannot be the basis for concluding the phrase that follows "insurance companies" only conditions such term.

This Court concludes in application of these principles it would be erroneous for the Court to apply the Rule of the Last Antecedent to Virginia Code § 59.1-199(D), and thereby find that "small loan companies" which are not regulated and supervised by the SCC are exempt from the VCPA. "A contrary rule of construction is that when a clause follows several words in a statute and is applicable as much to the first word as to the others in the list, the clause should be applied to all of the words which preceded it." *Bd. of Trs. v. Judge*, 50 Cal. App. 3d 920, 926, 123 Cal. Rptr. 830, 834 (1975) (citing *Wholesale T. Dealers* v. *National etc. Co.*, 11 Cal. 2d 634, 659, 82 P.2d 3, 17 (1938)). Determination of legislative intent "also requires that the courts should be guided by the context in which [the word or phrase] is used." *Protestant Episcopal Church v. Truro Church,* 280 Va. 6, 21, 694 S.E.2d 555, 563 (2010) (internal citations and quotation marks omitted). The qualifier phrase bestowing exemption from the VCPA applies only to the listed entities specified in § 59.1-199(D), all of which are of a *financial* "class," as long as they are both "regulated and supervised by the State Corporation Commission or a comparable federal regulating body." Va. Code § 59.1-199(D).

Net Credit also contends that, notwithstanding its status as an unlicensed "small loan company," it nonetheless qualifies for the exemption under the VCPA because it is regulated and supervised by the federal Consumer Financial Protection Bureau ("CFPB"),

an assertion this Court finds without merit. Net Credit maintains that as a subsidiary of Enova it is regulated and supervised by the CFPB. To support this contention, Net Credit relies on a CFPB Consent Order pertaining to debt collection by Cash America International, Inc. ("Cash America") in Ohio. *See* Consent Order, Cash America Int., Inc., CFPB No. 2013-CFPB-0008, ¶¶ 7, 12 (Nov. 20, 2013). Enova was a then-subsidiary of Cash America. The time period for compliance with the Order, however, ended in 2016. Consent Order ¶ 59. This Order cannot be read to mean that Net Credit's lending activity in Virginia is currently supervised by the CFPB, or was ever intended to be supervised by a consent decree between Cash America and the U.S. government. Moreover, Cash America is allegedly no longer Enova's parent company, an argument unrefuted by Defendant. This Court cannot find a current connection between Cash America and Net Credit which would lend support to the belief the CFPB is currently supervising Net Credit's activities in Virginia.

Even if the CFPB were currently subjecting Defendant to regulatory action, this Court finds it is not a "comparable federal regulating body" to the SCC as required under Virginia Code § 59.1-199(D) for exemption. The SCC has significantly unrestricted power to investigate consumer finance companies under Virginia Code § 6.2-1530, a power not shared by the CFPB. "[T]he Commission may at any time investigate the loans, books and records of any" consumer finance company. Va. Code § 6.2-1530(A). Further, in conducting such an investigation, the SCC has "free access to the offices, places of business, books, papers, accounts, records, files, safes, and vaults of all such persons . . . ." Va. Code § 6.2-1530(B)(1). These investigatory rules apply both to those entities licensed with the SCC, as well as those "engaged, or appear[ing] to the

Commission to be engaged, in a business for which the person is required to be licensed and supervised . . . ." Va. Code § 6.2-1530(A)(1). The CFPB, in contrast, does not license companies and has limited supervisory power. The CFPB has the ability to initiate regulatory action against an entity when

> the Bureau has reasonable cause to determine, by order, after notice to the covered person and a reasonable opportunity for such covered person to respond, based on complaints collected through the system under section 1013(b)(3) [12 USCS § 5493(b)(3)] or information from other sources, that such covered person is engaging, or has engaged, in conduct that poses risks to consumers with regard to the offering or provision of consumer financial products or services.

12 U.S.C. § 5514(a)(1)(C). The CFPB, by limitation of its empowering legal mandate, is not a "*comparable* federal regulating body" under Virginia Code § 59.1-199(D), and therefore Defendant does not qualify under that stated exemption.

B. The choice-of-law provision in Defendant's loan agreement with its Virginia customers is unenforceable as neither supported by the required nexus to Utah, nor overcoming the strong public policy that deceptive consumer trade practices not escape remedy under the VCPA.

Net Credit next contends that its loans are governed by Utah law pursuant to a choice-of-law provision of its lending contracts. If such were the case, the allegations in Complaint paragraph 76, subparts (d) through (g) are not false and therefore, Defendant argues, not misrepresentations.

The Commonwealth attached a sample loan agreement to its Complaint. That sample agreement states, "*This Agreement is made pursuant to Section 70C of the Utah Consumer Credit Code.*" Compl. Ex. 2 at 1 (emphasis in original). The agreement also states, "The parties agree that this Agreement is made in accordance with and subject to

the Utah Consumer Credit Code, U.C.A. 70-C-1-101, *et seq*. All matters arising under or relating to this Agreement shall be governed by and construed in accordance with the laws of the State of Utah." *Id.*

If a contract specifies the substantive law of another jurisdiction governs its interpretation or application, the parties' choice of substantive law should generally be applied. *Paul Bus. Sys., Inc. v. Canon U.S.A., Inc.*, 240 Va. 337, 342, 397 S.E.2d 804, 807 (1990) (citing *Union Cent. Life Ins. Co. v. Pollard*, 94 Va. 146, 151-52, 26 S.E. 421, 422 (1896)). "[C]ontractual provisions limiting the place or court where potential actions between the parties may be brought are prima facie valid and should be enforced, unless the party challenging enforcement establishes that such provisions are unfair or unreasonable, or are affected by fraud or unequal bargaining power." *Paul Bus. Sys., Inc.*, 240 Va. at 342, 397 S.E.2d at 807 (citing *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10, 12 (1972); Restatement (Second) of Conflict of Laws (1988 Revisions) § 80 (Supp. 1989); 31 A.L.R.4th at 415). Irrespective, "[a] contractual choice-of-forum clause should be held unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision." *Bremen*, 407 U.S. at 15 (citing *Boyd* v. *Grand Trunk W. R.R. Co.*, 338 U.S. 263 (1949)).

The Commonwealth well summarized the analysis of the aforementioned case law, stating,

> choice of law clauses, like forum-selection clauses, will be considered prima facie valid absent special circumstances raised by the challenger, e.g., where such a clause would be unfair, unreasonable, would contravene a strong public policy of the forum state, or where the chosen state is not reasonably related to the purpose of the agreement.

Opp'n to Dem. at 8. Special circumstances compel this Court to reject application of Utah law, namely, that the chosen law of the State of Utah is not reasonably related to the purpose of Net Credit's agreement with Virginia consumers, and is also barred by the strong public policy of the forum state, Virginia.

The first special circumstance the Court finds is that Defendant's Utah choice-of-law provision is unenforceable inasmuch as Net Credit does not possess a reasonable nexus to the State of Utah respecting its Virginia business. The Supreme Court of Virginia held in *Hooper v. Musolino* that, where a chosen forum state is "reasonably related to the purpose of the agreement," the Court will enforce a choice-of-law provision. 234 Va. 558, 566, 364 S.E.2d 207, 211 (1988). Net Credit lists seven factors as a basis for its "reasonable relationship" between its loan contracts and the State of Utah: 1) Net Credit is organized in Utah; 2) Net Credit holds a Salt Lake City, Utah, Commercial Business license for its place of business; 3) the purpose of the agreements is to loan money in accordance with the law of Utah; 4) Net Credit has been registered with the Utah Department of Commerce since 2012; 5) Net Credit has both submitted the Consumer Credit Notification to the Utah DFI and maintained a Consumer Credit Notification Acknowledgement from the Utah DFI annually since 2012; 6) Net Credit has been authorized to extend consumer loans under the Utah Consumer Credit Code; and 7) Net Credit is subject to regulation and supervision by the Utah DFI. *See* Reply in Supp. of Dem. at 10. The Commonwealth maintains, however, that "Net Credit has no relationship to Utah other than its attempt to use Utah law to avoid Virginia's usury statutes." Opp. to Dem. at 10. According to the Commonwealth, Net Credit is headquartered in Illinois, along with all of its "family of companies." Compl. ¶ 30-34. The Complaint also states

"Defendant's website . . . is hosted from a server located in the State of Illinois," "Defendant's Virginia loans are funded by a related entity which is located in Chicago, Illinois," and "Defendant's customer service representatives are located in Chicago, Illinois." *Id.* ¶¶ 25-26, 28. In addition, Defendant was a Delaware limited liability company from its creation in 2012 until February 1, 2017. *Id.* ¶ 44. When, however, the Defendant received the Commonwealth's Notice of Violation letter, Net Credit commenced to change its state of organization from Delaware to Utah. *Id.* ¶ 47. At the hearing before this Court, Defendant further maintained it recently added a call center in Utah to transact business with its Virginia customers.

In the context of demurrer, the Court cannot generally consider Defendant's claimed changing landscape of facts at issue, and even if it could, the Court notes the adding of a Utah call center accentuates the Plaintiff's position that, prior to 2017, Defendant had little or no relation with Utah. The Defendant's actions delineated by the Commonwealth in the Complaint suggest Net Credit has been attempting to remedy its lack of sufficient nexus to the State of Utah in contemplation of anticipated enforcement actions by the Attorney General of Virginia, and those which may ensue from others, including suit from individual consumers.

Furthermore, any loan contracts Net Credit made with Virginians prior to the February 1, 2017 change of its state of organization are clearly not subject to the Utah choice-of-law provision. This case is analogous to *Winston v. Academi Training Ctr.,* 2013 U.S. Dist. LEXIS 34850 (E.D. Va. Mar, 13, 2013), cited by the Commonwealth in its Opposition. In that case, the defendant, a Delaware company headquartered in Virginia, sought to enforce a New York choice-of-law provision in a contract. *Id.* at *7. The

contracts, however, related to services to be provided in North Carolina. *Id.* The Court there invoked the "reasonable relationship" test of *Hooper* to find "exceptional circumstances" sufficient to disregard the choice-of-law provision. *Id.* at *6-7. The case at bar poses similar facts. Net Credit is headquartered in Illinois, was a Delaware corporation prior to receiving the Notice of Investigation in February 2017, and made loans to Virginians who made payments from Virginia bank accounts. Compl. ¶¶ 7-8, 27. There is not a "reasonable relationship" under these facts to find the Utah choice-of-law provision enforceable for the contracts entered into prior to February 1, 2017.

Those loans by Net Credit to Virginia consumers made after February 1, 2017, the date Net Credit changed its state of organization, are nevertheless also not bound by the Utah choice-of-law provision of its contracts. While Net Credit supplied the Court with ample argument as to *its own* relationship to Utah, there is nothing to show *Utah* is reasonably related to *the purpose of the loan agreements* Net Credit has with Virginia consumers, as required by *Hooper*. For instance, Net Credit relies on a Utah "commercial business license," which it did not receive until October 2017, months after being given notification of the Commonwealth's investigation and years after Defendant's lending began in Virginia. *See* Reply in Supp. of Dem., Ex. G. Moreover, while Net Credit is registered with the Utah DFI, such registration does not apply to loans with Virginia consumers, and the Utah DFI does not even license noncommercial consumer lenders. Compl. ¶ 51-52. Therefore, Defendant's argument that the chosen State of Utah adequately supervises extra-territorial lending practices is not validly sustained by the facts alleged by the Commonwealth. In sum, the choice of Utah law is unsupported by a

reasonable relationship and sufficient nexus to the purpose of the contracts with Virginians, and is therefore unenforceable respecting Virginia loans.

The second special circumstance this Court finds barring Net Credit's Utah choice-of-law provision is that Defendant's contracts violate Virginia's public policy against usury, and of court enforcement directed at vitiating deceptive trade practices victimizing Virginians. The Commonwealth reasons Net Credit chose its contracts to be governed by Utah law because Utah does not have a cap on loan interest or a prohibition against usury. *See* Utah Code Ann. § 70C-2-101 ("Except where restricted or otherwise covered by provisions of this title, the parties to a consumer credit agreement may contract for payment by the debtor of any finance charge and other charges and fees."). Virginia, however, statutorily protects against usury by imposing a twelve percent (12%) cap on lenders, unless they qualify for an exception as a listed licensed, regulated or supervised entity. Va. Code § 6.2-303. Virginia has long-recognized a public policy against allowing usury by unregulated lenders.

> The usury laws serve a beneficial public purpose and are to be liberally construed with a view to advance the remedy and suppress the mischief. *Whitworth & Yancey v. Adams*, 26 Va. (5 Rand.) 333 (1827). "[T]he usury statutes represent a clarification of the public policy of the state that usury is not to be tolerated, and the court should therefore be chary in permitting this policy to be thwarted." *Heubusch and Reynolds v. Boone*, 213 Va. 414, 421, 192 S.E.2d 783, 789 (1972).

Radford v. Cmty. Mortg. & Inv. Corp., 226 Va. 596, 601-02, 312 S.E.2d 282, 285 (1984).

The General Assembly nevertheless exempts certain entities from the general usury cap. Common to these entities is the pre-condition they are all in some fashion regulated by a Virginia governmental body. *See* Va. Code § 6.2-303(B) (setting out laws that permit payment of interest at a rate that exceeds twelve percent (12%) per year). The

Legislature further explicitly prohibits waiver by contract of Virginia's provisions against usury. "Any agreement or contract in which the borrower waives the benefits of this chapter [Interest and Usury] or releases any rights he may have acquired under this chapter shall be deemed to be against public policy and void." Va. Code § 6.2-306(A).

Looking beyond the laws respecting usury, the Court notes the General Assembly enacted a statutory scheme regulating deceptive trade practices encompassing the inducement, terms, and collection of loans in general. The public policy applicable to this cause thus is not merely that pertaining just to usury, but also to policing deceptive trade practices connected to a usurious loan transaction. In enacting the VCPA to address deceptive trade practices beyond the scope of the common law, the Legislature expressed a strong public policy to "expand the remedies afforded to consumers and to relax the restrictions imposed upon them by the common law." *Owens v. DRS Auto. Fantomworks*, 288 Va. 489, 497, 764 S.E.2d 256, 260 (2014). This public policy of Virginia may not be swept away contractually to exclude foreign unlicensed entities from accountability for practices alleged by the Commonwealth in its Complaint, if they be true, which include by way of example and not limitation, significant allegations of fraud.

Defendant additionally argues the choice of Utah substantive law in its contract insulates it from suit under the VCPA irrespective of *any* public policy of Virginia, citing *Settlement Funding v. Von Neumann-Lillie,* 274 Va. 76, 645 S.E.2d 436 (2007) as precedent. *Settlement Funding* is not controlling or even applicable to this cause, as the facts in that litigation are distinguishable from those in the instant action. The contract in *Settlement Funding* specified "the loan transaction was completed in Utah, that the lender, WebBank, was doing business in Utah, and that the borrower agrees that 'any

and all disputes arising from or concerning this Agreement . . . shall be determined in accordance with the laws of the State of Utah.'" *Settlement Funding,* 274 Va. at 80-81, 645 S.E.2d at 438. The transaction involved a loan from a Utah bank secured by lottery proceeds, which bank later assigned the right to such proceeds to Settlement Funding, a Georgia company. The Supreme Court of Virginia's holding in the case was narrow, taking issue with the trial court's determination it had insufficient evidence of Utah law so as to apply the same. "[C]itations to Utah law provided the circuit court with sufficient information regarding the substance of Utah law. *See also* Code § 8.01-386. Therefore, the circuit court erred in refusing to apply Utah law in the construction of the loan agreement." *Settlement Funding,* 274 Va. at 81, 645 S.E.2d at 439. The Supreme Court never reached the issue of whether the choice of Utah law in the context of gaining exemption from the VCPA would be against Virginia public policy. That issue was simply not before the Court. Moreover, even if it had been before the trial court, the Utah bank was presumably regulated by the U.S. Federal Reserve, and thus might have qualified under the VCPA exemption if the supervision afforded was similar to that of the Virginia SCC.

Defendant asserts its Utah choice-of-law provision is absolute in divesting Virginia of application of any of its laws which would otherwise be brought to bear as a matter of strong public policy. For example, Defendant posited that even if Net Credit's loan agreements referencing Utah choice-of-law were to contain hypothetically a provision customers prevailing against it in litigation would be required to pay Net Credit's costs and attorneys' fees, such provision would remain enforceable notwithstanding Virginia public policy to the contrary. *See McIntosh v. Flint Hill Sch.*, No. CL-2018-1929, 2018 Va.

Cir. LEXIS 321, at *1 (Cir. Ct. Sept. 17, 2018) (holding that a contractual clause imposing the loser's attorneys' fees on the party prevailing in suit to be against Virginia public policy). Defendant maintains that through choice-of law-provisions it can insulate itself from strong Virginia public policy to police financial fraud and deceptive trade practices occurring in Virginia, even if Net Credit is only tangentially based in Utah. There is no principle of which this Court is aware which *automatically* yields the public policy of Virginia to another state by dint of a mere choice-of-law contractual provision between private parties. The *Settlement Funding* case does not give dispensation for such a result to defang the VCPA from application to unlicensed, foreign lending entities doing business in Virginia.

C. The Commonwealth is not required to establish reliance damages in its Complaint.

Defendant further claims the Complaint fails to allege reliance and resultant damages, therefore barring suit by the Attorney General of Virginia. Defendant cites *Owens*, to claim the VCPA requires the Commonwealth plead reliance on alleged misrepresentations and the resulting damages. 288 Va. at 498, 764 S.E.2d at 261. That case, however, was based on a VCPA claim brought by an individual, whereas here the claim is brought by the Attorney General of Virginia. *Id.* at 492, 764 S.E.2d at 257. Virginia Code § 59.1-204(A) states, "Any person who suffers loss as the result of a violation of [the VCPA] shall be entitled to initiate an action to recover actual damages . . . ." The Commonwealth may bring suit to enjoin any violation of the VCPA, and "it shall not be necessary that damages be proved." Va. Code § 59.1-203(A). The Commonwealth is also entitled to seek restitution of "any money or property, real, personal, or mixed, tangible or

intangible," as well as civil penalties for violations of the VCPA. *See* Va. Code §§ 59.1-205 and 59.1-206. The U.S. Bankruptcy Court for the Eastern District of Virginia, Alexandria Division, expressly addressed the issue of when the proving of reliance damages is required to maintain a VCPA claim.

> [T]he listed practices are indeed *per se* unlawful and the Attorney General of Virginia may enjoin those prohibited acts without demonstrating any reliance by consumers resulting in a loss. Unlike the Commonwealth, however, a private claimant ... is not entitled to damages, either actual or statutory, unless he can demonstrate loss caused by the unlawful practice which, of course, necessarily requires a showing of reliance.

Cooper v. GGGR Invs., LLC, 334 B.R. 179, 189 (E.D. Va. 2005). The statutory language and interpretive precedent respecting the VCPA make clear the Commonwealth is not required to plead reliance damages in its Complaint against Net Credit.

D. The Commonwealth has adequately pled misrepresentations by Net Credit in violation of the VCPA.

Under the VCPA, it is unlawful for a supplier to misrepresent "the source, sponsorship, approval, or certification of goods or services," the "affiliation, connection, or association of the supplier, or of the goods or services, with another," and "that goods or services have certain quantities, characteristics, ingredients, uses, or benefits." Va. Code § 59.1-200(A)(2), (3), and (5). In its Complaint the Commonwealth alleged, among other things, Net Credit violated the VCPA by misrepresenting: (1) that it is licensed by Utah DFI; (2) that its lending activity in Virginia is regulated by Utah DFI; (3) that its loans to Virginians are governed by Utah law; and (4) that its loan to Virginians are not subject to Virginia law. Compl. ¶¶ 76(c), (d), (e), and (f). Net Credit argues there have not been facts pled sufficient to prove these allegations. However, it is manifest that in the context

of a challenge to Plaintiff's Complaint by demurrer the Defendant admits the facts pled, including those which "fairly can be viewed as impliedly alleged," and "may be fairly and justly inferred." *CaterCorp, Inc.,* 246 Va. at 24, 431 S.E.2d at 279 (quoting *Rosillo v. Winters*, 235 Va. 268, 270, 367 S.E.2d 717, 717 (1988)).

The Complaint sufficiently alleges Net Credit misrepresented by its affirmative statements regarding its relationship to Utah that its loans are not subject to Virginia law, and that Net Credit's Virginia lending activity is regulated by Utah DFI. *See* Compl. ¶¶ 41, 50-52. Virginia jurisprudence recognizes that "if a statement by design is made in such a way to naturally lead the person to whom it is made to suppose the existence of a certain state of facts, it is as much a fraudulent representation as if the statement of an untrue fact were made in express terms." *Tidewater Marina Holdings, LC v. Premier Bank, Inc.*, 2015 Va. Cir. LEXIS 258, at *3 (Westmoreland, 2015). As such, the Complaint has sufficiently alleged unlawful misrepresentations by Net Credit under the VCPA.

CONCLUSION

This Court has considered the motion of NC Financial Solutions of Utah, LLC for a Change of Venue and its Demurrer to the Complaint of the Commonwealth of Virginia, alleging multiple violations of the Virginia Consumer Protection Act. The Court is presented with the question whether unlicensed entities engaged in noncommercial personal financial lending activities to Virginia consumers are exempt from application of the VCPA as "small loan companies." For the reasons as more fully stated herein the Court holds as follows: 1) venue is proper in Fairfax County as the Complaint alleges violations of the VCPA respecting several consumer transactions in this jurisdiction,

Defendant admits making consumer loans in Fairfax County, and Net Credit has failed to overcome the factual inference of a sufficient nexus to Fairfax County derived from the pleadings of the Plaintiff, despite being in the position as lender to posit to the Court with particularity the exact number of customers with whom it has transacted business in this forum; 2) the exemption contained in the VCPA for "small loan companies," a term synonymous with "consumer finance companies," does not apply to Defendant because it is unlicensed in Virginia, and not regulated *and* supervised by the State Corporation Commission or comparable federal regulating body; 3) the choice of Utah law provided in Defendant's loan agreement with its Virginia customers is unenforceable as neither supported by the required nexus to Utah nor overcoming the strong public policy that deceptive consumer trade practices not escape remedy under the VCPA; and 4) the Commonwealth has adequately pled misrepresentations by Net Credit in violation of the VCPA. Consequently, the Motion of Defendant to Change Venue is DENIED and its Demurrer is OVERRULED.

This Court shall enter a separate order incorporating its ruling herein, and THIS CAUSE CONTINUES.

Sincerely,

David Bernhard
Judge, Fairfax Circuit Court

OPINION LETTER