

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N :

MARGARET SMITH and RON ORIET

Plaintiffs

- and -

NATIONAL MONEY MART COMPANY and DOLLAR FINANCIAL GROUP, INC.
Defendants

Proceedings under the *Class Proceedings Act, 1992*

**STATEMENT OF DEFENCE AND COUNTERCLAIM OF
NATIONAL MONEY MART COMPANY**

1. The Defendant National Money Mart Company (“Money Mart”) admits the allegations in paragraphs 10, 23, 25, 27, 30, 32, 33, 37 and 41 of the Further Fresh Statement of Claim (the “Statement of Claim”).
2. Except where admitted herein, Money Mart specifically denies each and every allegation contained in the Statement of Claim and puts the Plaintiffs to the strict proof thereof.

Money Mart’s Business

3. Money Mart provides financial services to ordinary Canadians. It has done so for more than 25 years throughout Canada. It offers a whole range of financial services. These services include cheque cashing, Western Union money transfers and money orders (Money Mart is the largest Western Union agent in Canada), foreign currency exchange, bill

payments (Money Mart customers can make bill payments to more than 1,000 businesses and utilities), mailbox rentals, money orders, tax preparation and discounting (Money Mart is the only tax discounting company which provides consumers with a guaranteed same-day refund, in cash), and unsecured short term loans sometimes known as “Fast Cash Advances” or payday loans (herein referred to as “Loans” or a “Loan”).

4. Money Mart began as an entrepreneurial venture in 1982 in Edmonton, Alberta. It was incorporated under the laws of Nova Scotia, and its head office is located in Victoria, British Columbia. Money Mart’s goal from the outset was to provide excellent customer service, convenience and quality financial products and services. Most Money Mart store locations are open seven days a week and many are open 24 hours a day.

Money Mart’s Cheque Cashing Service

5. Since Money Mart’s inception in 1982, cheque cashing has been Money Mart’s core business. It is the oldest and largest part of Money Mart’s business. Money Mart cashes both first party cheques and second party cheques. A first party cheque is a cheque written by the customer on his/her own account. A second party cheque is a cheque written for the benefit of the customer by another party. These include payroll cheques, personal cheques, U.S. cheques, travelers cheques and Government cheques.

6. A significant advantage of Money Mart’s cheque cashing service is that Money Mart does not put a “hold” on any cheques. That is, Money Mart does not wait for the cheques to clear before making cash available to the customer. Rather, Money Mart provides the customer with his or her cash right at the time of the transaction.

7. Money Mart's cheque cashing fee is comprised of two components, a per item fee (i.e. a flat fee for each cheque cashed) and a fixed percentage of the amount of the cheque to be cashed. The cheque cashing fees are different for a first party cheque and a second party cheque, to reflect the different risks of non-payment between the two types of cheques.

Money Mart's Loans

8. In 1996, Money Mart began offering Loans. The Money Mart Loan operates as set out below:

- (a) Qualified Money Mart customers may borrow up to a percentage of their net pay cheque for a term up to their next pay period.
- (b) Interest is charged on the principal amount of the loan at an effective annual interest rate of less than 60% per year.
- (c) At the time of obtaining a loan, a customer signs a written agreement (the "Loan Agreement") and provides a post-dated cheque drawn on his/her bank (or equivalent) account in an amount equal to:
 - (i) the principal of the Loan;
 - (ii) the interest on the Loan; and
 - (iii) Money Mart's standard first party cheque cashing fee.

9. The Loan service and the cheque cashing service (described above) are two separate and independent services offered to customers. The cheque cashing service can be, but does not have to be, used in conjunction with a Loan. It is an optional service subject to its own charges. It can be used at the discretion of the borrower.

10. A customer may always repay a Loan on or before the due date. In those instances the customer is only required to pay the loan principal plus interest pro-rated to the date of payment. The customer's post-dated cheque is returned to the customer. Since the cheque cashing service is not being used where the customer repays a Loan on or before the due date, the customer pays none of the cheque cashing fees associated with that service. On average, approximately 25% of Ontario Loan customers have repaid their loans in this manner at one time or another.

11. A borrower may also elect to repay the loan by using Money Mart's cheque cashing service. If a customer does not repay a Loan in cash on or before the due date, the customer has elected to use Money Mart's cheque cashing service, and authorized Money Mart to deposit the customer's cheque. The customer's first party cheque, which includes an amount in respect of Money Mart's fees for cashing a first party cheque, is then cashed by Money Mart.

12. The cheque cashing fee which is charged in those circumstances is not part of the cost of the Loan. It is charged for the separate cheque cashing service. It is a fee the customer chooses to incur for the benefit and convenience of not having to return to the Money Mart outlet to repay the Loan.

Money Mart's Best Business Practices

13. Money Mart adheres to a set of "best business practices" in offering its Loan and other services. Money Mart's Best Business Practices are now incorporated into the Code of Conduct of the Canadian Payday Loan Association. Money Mart has been instrumental in the formation of the Canadian Payday Loan Association (the "Association"). The

Association is a national group of payday lenders which represents more than half of the 1350 payday loan outlets in Canada.

14. Money Mart and the other members of the Association have agreed to abide by the Association's Code of Conduct. A copy of the Association's Code of Conduct is posted in all Money Mart stores and on the Association's website and includes the practices described below.

- (a) Borrowers must have a chequing account and employment income.
- (b) Loans are limited to a set percentage of the borrower's net pay.
- (c) Customers may not extend or "rollover" a loan i.e. they are not permitted to use the proceeds of another advance to repay an existing loan.
- (d) If a customer is dissatisfied in any way with a loan, including any fees or interest that are to be paid, a customer may simply return the principal amount of the loan prior to the close of business the following day and the customer will not be charged any interest or fees of any kind.
- (e) Default fees and charges on a loan in default cannot exceed the maximum NSF fees charged by the major banks and there are restrictions on the interest that can be charged on default.
- (f) A loan cannot be made to a customer based on social assistance payments to be received by the customer.
- (g) The cost of the loan must be displayed prominently on all loan documentation.

15. The federal and provincial governments recognize the need for service providers such as Money Mart. Both the federal and provincial governments have passed or are in the process of passing legislation that will permit the payday loan industry to continue to carry on business in a regulated environment.

Money Mart's Franchisees

16. With reference to allegations in paragraphs 3, 16, 17, 18, 19 and 67 of the Statement of Claim, Money Mart says that during the material period it licensed eight persons (the "Franchisees") to carry on business in Ontario as franchisees of Money Mart. Money Mart's Franchisees carry on business in stores (the "Franchisee Stores") that were neither owned nor operated by Money Mart. Any transactions between Franchisee Stores and its customers involve agreements between those customers and the Franchisees and do not involve any agreements between Money Mart and those customers.

17. From time to time Money Mart is paid royalties by Franchisees. Money Mart denies that it has received from Franchisees any amounts except those that Money Mart was and is lawfully entitled to receive. Money Mart specifically denies that it has received from Franchisees any amounts in or to which any Class Member has or can have claim.

Dollar Financial and Money Mart Operate Independently of Each Other

18. In further answer to the whole of the Statement of Claim, and in particular paragraphs 3, 5, 6, 16, 17, 18, 19 and 54 - 65, Money Mart pleads the facts set out in the paragraphs below.

19. The defendant Dollar Financial Group Inc. (“Dollar Financial”) was founded in 1979. It was incorporated in the State of New York, U.S.A., with its principal place of business currently in Berwyn, Pennsylvania.

20. Dollar Financial does not own the shares of Money Mart. In November 1996, the shares of National Money Mart Inc. were purchased by Dollar Financial Canada Ltd. (“DFC”), an Alberta company and a wholly-owned subsidiary of Dollar Financial. In May 1997, National Money Mart Inc., DFC and two other companies amalgamated to become National Money Mart Company (i.e., Money Mart). The shares of the new company, Money Mart, were issued to DFG International, Inc. (“DFG International”), a wholly-owned subsidiary of Dollar Financial. DFG International is one of 23 subsidiaries owned by Dollar Financial.

21. Money Mart had a very strong management team at the time of its acquisition which was left intact to operate the business. Money Mart has always had complete autonomy to carry on its business in the same manner as prior to the acquisition.

22. At the time of this acquisition, Money Mart was already offering most of its current products and services including Loans. The Loan offered by Money Mart had been developed and implemented independently by Money Mart prior to Money Mart’s acquisition by DFC in November 1996. Dollar Financial was not involved in any manner in this planning, development or implementation of the Loan.

23. Contrary to the allegations in the Statement of Claim, Dollar Financial does not operate Money Mart as if it was functionally part of Dollar Financial. It does not operate

Money Mart as if it and Money Mart are a single entity. It does not operate Money Mart as its “alter ego.”

24. From the date the shares of Money Mart were acquired by DFC to the present, all decisions concerning the day-to-day business of Money Mart, the products offered by Money Mart and how they are offered, have been made by Money Mart. The relationship between Dollar Financial and Money Mart has been a typical parent/indirect-subsiary relationship.

25. Dollar Financial does not and has never exercised effective or actual control or management of Money Mart’s business. Money Mart is a separate corporation and operates autonomously.

26. Dollar Financial’s officers and directors do not control Money Mart. Dollar Financial conducts the affairs of its board of directors separately and independently from the affairs of Money Mart. Money Mart’s operations are not supervised or conducted by the board of directors of Dollar Financial.

27. Money Mart is separately financed and has separate bank relationships and separate lines of credit from those of Dollar Financial. Dollar Financial does not deposit any of its funds into Money Mart accounts, nor does Money Mart deposit any of its funds into Dollar Financial accounts. Dollar Financial does not pay any of its bills with Money Mart funds, nor does Money Mart pay any of its bills with Dollar Financial funds. Employees of Dollar Financial and employees of Money Mart are paid by their respective employers from each company’s own separate bank accounts. Staff meetings are entirely separate and independent of each other.

28. With reference to paragraphs 56 - 58 of the Statement of Claim, Money Mart admits that Dollar Financial's annual reports from time to time contain certain statements about Money Mart. However:

- (a) the form and contents of Dollar Financial's annual reports and other regulatory filings are dictated by U.S. law;
- (b) its annual reports are prepared and filed so as to meet the requirements of regulations promulgated by the U.S. Securities and Exchange Commission (the "SEC") pursuant to the *Securities Exchange Act of 1934*; and
- (c) such regulatory filings of Dollar Financial are in keeping with SEC requirements and reflect normal reporting practices followed by similar companies the United States, as a result of the requirements of U.S. law.

Money Mart specifically denies all other allegations in paragraphs 56 – 58. In any event, these allegations fail to plead material facts disclosing a cause of action against Money Mart.

29. With reference to paragraphs 59 – 64 of the Statement of Claim, Money Mart says that:

- (a) Money Mart and Dollar Financial are parties to a written royalty agreement dated July 1, 1999 (the "Royalty Agreement"), which was amended by an amending agreement dated July 1, 2000;
- (b) pursuant to the terms of the Royalty Agreement (as amended), Money Mart is required to pay and Dollar Financial is entitled to receive an annual royalty fee from Money Mart equal to 2.5% of Money Mart's annual revenue from all sources;

- (c) Money Mart and Dollar Financial are also parties to a written management agreement;
- (d) Money Mart has, from time to time, in accordance with its legal obligations and lawfully, paid amounts to Dollar Financial.

Money Mart specifically denies all other allegations in paragraphs 59 – 64 of the Statement of Claim.

30. Money Mart specifically denies that, at any material time it has reported to Dollar Financial, except where such reporting required by law, in which case Money Mart reported in accordance with, and to the extent required by, its legal obligations.

31. If in any respect Dollar Financial and Money Mart function as an integrated business sharing common purposes and objectives, or share networks or systems as alleged (all of which is not admitted but specifically denied), Money Mart does so lawfully, for the purposes of promoting its own business interests and without any intention to harm any Class Member. Money Mart has no liability to any Class Member in respect of such lawful activities.

The Loan Agreements are Valid and Enforceable

32. At all material times, Money Mart has offered the various financial services described in paragraph 3 above to individuals, including the Class Members.

33. Each Loan transaction, including each and every Loan transaction involving a Class Member, is made pursuant to the terms of a written agreement (the "Loan Agreement"), as modified, either orally or in writing, from time to time.

34. Each Class Member, of his or her own accord and without any compulsion by Money Mart, entered into Loan Agreements and received the proceeds of Loans from Money Mart. Each Class Member used the proceeds from the Loans for his or her own personal benefit, in whatever manner he or she saw fit.

35. By the terms of a Loan Agreement the borrower, in consideration of receipt of a cash amount from Money Mart, agrees to pay Money Mart, on or before the due date stated in the Agreement (the "Due Date"), the principal amount of the Loan together with interest calculated at the rate set out in the Agreement.

36. In the period from about December, 1999 to about January, 2006, and in the event that the Loan was not paid on the Due Date, Money Mart agreed, in relation to each Loan transaction, to waive any right to collect interest from and after the Due Date.

37. Each and every Loan Agreement, including in particular each Loan Agreement to which a Class Member was a party, expressly provides the borrower with the right to repay the Loan on or before the Due Date. In those circumstances, the customer pays the principal amount of the Loan plus interest calculated at the rate set out in the Loan Agreement and pro-rated to the date of payment.

38. Where the customer repays a Loan on or before the Due Date, the customer's post-dated cheque is returned to the customer, and the customer pays none of the fees associated with use of Money Mart's cheque cashing services.

39. By the terms of the Loan Agreement, the customer, including in particular each and every Class Member, also has the option, should the customer choose, to repay the amount owing in respect of a Loan by permitting Money Mart after the Due Date to deposit and cash the customer's first party cheque. In those circumstances, and only in those circumstances, and provided further that the customer's cheque is not returned dishonoured, the customer pays the fees associated with the use of the first party cheque cashing service. Any such fees are paid voluntarily by the customer, and each and every Class Member alleged to have paid such fees did so voluntarily, and as a result of his or her own personal choice to exercise his or her contractual right and to repay a Loan using the cheque cashing service.

40. In circumstances where Money Mart deposits a customer's first party cheque and the cheque is returned dishonoured:

- (a) the Loan principal and interest are not repaid on the Due Date, and no first party cheque cashing fee has been paid by the customer or collected by Money Mart;
- (b) Money Mart will give the customer time to pay and satisfy the customer's debt to Money Mart, which time can be as long as a year or more, depending on the circumstances of the customer.

41. In the period material to this action:

- (a) approximately one-half of the persons who are alleged to be Class Members, including the Plaintiff M. Smith, defaulted on one or more of their Loans, and many, including the Plaintiff M. Smith, remain in default;
- (b) no first party cheque cashing fee has been either paid by, or collected by Money Mart from, any Class Member with a Loan or Loans in default.

42. In further answer to the whole of the Statement of Claim and in particular the allegations in paragraphs 6, 19, 26 and 67 Money Mart specifically denies that:

- (a) the fee charged by it in connection with the use of the first party cheque cashing service is a fee paid or payable for the advancing of credit or as part of a Loan transaction;
- (b) the fee charged by it when a customer uses the first party cheque cashing service in connection with the repayment of a Loan is interest as that term is defined under s. 347 of the *Criminal Code*;
- (c) if it collects a fee from any Class Member for such Class Member's use of the first party cheque cashing service in connection with the repayment of any Loan, such Class Member has paid and Money Mart thereby collects interest contrary to the terms of s. 347 of the *Criminal Code*;
- (d) it has profited illegally at the expense of the Class Members.

43. If it is found that the Loan agreements are void or unenforceable due to illegality (which is not admitted but specifically denied) neither the Plaintiffs nor the Class Members are entitled to recover any monies in respect of those agreements. Monies paid under an

agreement that is unenforceable due to illegality are not recoverable. Therefore, a party to a contract that is void for illegality is not entitled to relief.

Money Mart's Customers are Educated, Informed and Employed

44. In further answer to the whole of the Statement of Claim and in particular the allegations in paragraphs 3, 67, 69(e), 78, 84 and 85 Money Mart specifically denies that the Class Members:

- (a) have poor credit or are otherwise unable to use traditional banking services;
- (b) are part of an alleged "asset-limited, income-constrained population" in Ontario;
- (c) belong to a "vulnerable segment" of the population;
- (d) are the "poorest and most vulnerable members of society"
- (e) are targeted if they are a single parent, pensioner, on social assistance, among the "working poor" or chronically unemployed;
- (f) are economically vulnerable and in pressing need; or
- (g) were in circumstances of economic vulnerability or pressing need, or were unlawfully exploited.

45. To the contrary and in answer in particular to the allegations in paragraphs 3, 67, 69(e), 78, 84 and 85 of the Statement of Claim, a typical Loan customer, including most or all of the Class Members:

- (a) has a post-secondary education;

- (b) is employed full-time;
- (c) enjoys banking privileges, including a credit card;
- (d) understands the nature of the services offered by Money Mart;
- (e) is capable of reading and understanding the terms of a Loan Agreement;
- (f) if a Loan is taken, makes a deliberate choice to take the Loan rather than refrain from borrowing at all or borrowing from a source other than Money Mart;
- (g) appreciates the convenience and flexibility of a Loan to help with short-term cash needs or satisfy the desire for cash-on-hand;
- (h) knows that loans can be repaid in cash (including using a debit card), without incurring the fee payable when the first-party cheque cashing service is used;
- (i) knows that there are fees associated with the use of the cheque cashing service to repay a Loan by first party cheque; and
- (j) knows the amount of those fees and exercises a deliberate choice to pay them on the occasions they are paid.

No Class Member was on social assistance at the time of a Loan. A significant percentage of Money Mart's Loan customers report an annual income of more than \$40,000 and some report an annual income of more than \$60,000.

No Conspiracy

46. In further answer to the whole of the Statement of Claim and in particular the allegations in paragraphs 7, 68, 69, 70, 71, 73 and 80, Money Mart pleads the facts set out in the paragraphs below.

47. Money Mart specifically denies that at any material time:

- (a) it entered into any agreement or arrangement with any person to breach either s. 347(1) or s. 462.31 of the *Criminal Code*;
- (b) it breached either s. 347(1) or s. 462.31 of the *Criminal Code*.;
- (c) it conspired with any person in the manner alleged in paragraphs 7 and 68-71 of the Statement of Claim or in any manner whatsoever;
- (d) it engaged in any activity the predominant purpose of which was to cause injury to any Class Member (and any alleged injury is not admitted but specifically denied).

48. If Money Mart engaged in any of the activities alleged in the Statement of Claim (and in particular in paragraphs 7 and 68-71), which is not admitted but specifically denied, Money Mart specifically denies that:

- (a) any Class Member has suffered any injury or damage as a result;
- (b) a Class Member's payment of a cheque cashing fee when such Class Member repays by cheque a Loan from Money Mart or a franchisee of Money Mart constitutes an actionable injury or damage in law.

49. If any Class Member has suffered any actionable injury or damage (which is not admitted but specifically denied), Money Mart specifically denies that:

- (a) it engaged in any conduct, either with any Defendant or with any alleged “Co-conspirator,” that was unlawful, and that was directed at the Class Member or Class Members in circumstances where Dollar Financial ought to have known at the material time that injury to the Class Member was likely;
- (b) any injury to any Class Member was likely;
- (c) it ought to have known at any material time that any injury was likely;
- (d) it intended that such Class Member suffer any such injury or damage;
- (e) any such injury or damage was caused by or the result of either any wrongful act on the part of Money Mart or any alleged conspiracy involving Dollar Financial, but rather it was caused by and was the result of the Class Member’s personal choices and voluntary acts;
- (f) it has any liability arising from personal choices made by, and voluntary acts of, a Class Member; and
- (g) such Class Member has failed to take appropriate steps to mitigate any such damage, including in particular taking steps to repay Loans in cash on or before the Due Date.

50. Specifically, if any Class Member has in fact paid a cheque cashing fee to Money Mart or to any Franchisee of Money Mart in connection with the repayment by cheque of a Loan, Money Mart denies that such payment was caused by or the result of either any wrongful act on the part of Money Mart or any alleged conspiracy involving Money Mart.

Rather it was caused by and was the result of the Class Member's personal choice to incur the fee, rather than repay the Loan on or before the Loan's due date (as the agreement in respect of the Loan (the "Loan Agreement") specifically provides), and Money Mart has no liability arising from personal choices made by, and voluntary acts of, an Class Member.

There Has Been No Unjust Enrichment and No Tracing Order is Possible

51. In further answer to the whole of the Statement of Claim and in particular paragraphs 8, 76, 77 and 78, Money Mart pleads the facts set out in the paragraphs below.

52. Money Mart denies any unjust enrichment, as alleged, and specifically denies that any Class Member has at any material time paid any sum to Money Mart to which Money Mart was not lawfully entitled. Further, if any Class Member has suffered a deprivation as alleged, Money Mart specifically denies that it at any material time it has been enriched unjustly and at such Class Member's expense.

53. Money Mart denies that it has received the "Total Interest" as alleged or any part thereof, and specifically denies that the Class Members have either paid Money Mart the alleged "Total Interest," or suffered a deprivation in the amount of the "Total Interest." In particular, Class Members, such as the Plaintiff M. Smith, who have defaulted on and failed to repay Loans have suffered no deprivation in relation to such unpaid Loans. Money Mart has received nothing and can have no liability to Class Members for any amount in respect of any such unpaid Loans.

54. Further:

- (a) Money Mart denies receiving any amount from any Class Member in respect of any Loan transaction between such Class Member and any Franchisee, and Money Mart specifically denies that at any material time it has been enriched at the expense of such Class Member in respect of any such Loan transaction;
- (b) alternatively, if any Class Member has been deprived as alleged in respect of a Loan transaction with a Franchisee, Money Mart denies receiving any benefit from any alleged deprivation or at any Class Member's expense in relation to such Loan transaction. Further, a Class Member who took a Loan or Loans only from a Franchisee has no claim against Money Mart in respect of any such Loan;
- (c) if at any material time a Franchisee collected interest from a Class Member in breach of s. 347 of the *Criminal Code*, which is not admitted but denied, any such amount or amounts were combined with other amounts lawfully collected or earned or borrowed by the Franchisee before the Franchisee remitted any amount to Money Mart, and Money Mart has no liability with respect to such amounts received from Franchisees.

55. In any event, neither the Plaintiffs nor any Class Members are entitled to the amounts claimed on the basis of unjust enrichment because of the delay in bringing this action during which time Money Mart and the Franchisees have changed their position by using any monies received from the Plaintiffs or Class Members in the ordinary course of their respective businesses with the result that those amounts are no longer available.

56. In further answer to paragraphs 72 - 75 and 79 of the Statement of Claim, if as a result of the alleged conspiracy the Class Members have paid Money Mart the amounts alleged to be “Interest at a Criminal Rate” and alleged to be damages, none of which is admitted and all of which is denied:

- (a) the facts alleged do not establish any link to property over which a trust can be claimed by any Class Member, and in particular do not establish any link to property in the hands of Money Mart;
- (b) alternatively, no specific property belonging to a Class Member has been identified, and as the facts alleged do not identify any specific property which a Class Member can claim is trust property, the paragraphs fail to plead a reasonable claim against Money Mart;
- (c) no Class Member has or can have any direct interest in any specific property that could be the subject of a trust or a tracing order, and no such direct interest is alleged by any Class Member;
- (d) a monetary award is sufficient compensation for any loss or damage any Class Member claims to have suffered.

57. In answer to paragraphs 72 - 79 of the Statement of Claim, if Franchisees have paid amounts to Money Mart as alleged (which is not admitted but denied):

- (a) Money Mart denies that it has received from Franchisees any amounts except those that Money Mart was lawfully entitled to receive;

- (b) Money Mart denies that it has received from Franchisees any amounts or property in or to which any Class Member has or can have any interest or claim;
 - (c) to the extent that Money Mart has been paid any amounts by a Franchisee, all such payments have been made lawfully, and pursuant to lawful agreements between the Franchisee and Money Mart;
 - (d) the Plaintiffs, M. Smith and Oriet, and all other Class Members who had no Loan transactions with Franchisees have no claim with respect to any amounts paid by a Franchisee to Money Mart.
58. With reference to paragraphs 72-79 of the Statement of Claim Money Mart says that:
- (a) any funds Money Mart has received from a Franchisee are not segregated based on their original source and are not identified as coming from any particular source or line of business;
 - (b) all amounts received by Money Mart from its customers in respect of Loan transactions, including all amounts received by Money Mart from its Franchisees, are deposited by Money Mart into a general corporate account (the "Corporate Account");
 - (c) the Corporate Account also receives funds, unrelated to Loans and unrelated to payments from Franchisees, from Money Mart's other lines of business and from its line of credit, and all funds are commingled in the Account;

- (d) Money Mart pays its own financial obligations from the Corporate Account, and the balance in the account fluctuates significantly, including from a positive balance to a negative balance, daily;
- (e) since August, 1997, the Corporate Account has been overdrawn from time to time, most recently on February 15, 2007, and, as a result, any funds (whether in respect of cheque cashing fees, from Franchisees or otherwise) which may have been received by Money Mart from any Class Member or any Franchisee prior to February 15, 2007 are no longer in the possession of Money Mart;

59. Money Mart says that since August 1997 the balance in the Corporate Account has fluctuated and in the event that it is found that the Class Members are entitled to recover any amount on the basis of unjust enrichment (which is not admitted but specifically denied) any such recovery cannot exceed the lowest intermediate balance in the Corporate Account. Similarly, to the extent that Class Members are seeking to recover amounts from Money Mart in respect of fees received by Money Mart from Franchisees, Money Mart says that such recovery cannot exceed in respect of amounts received from any given Franchisee the lowest intermediate balance in the relevant Franchisee's account.

60. If Money Mart has paid or accrued any amounts to Dollar Financial, such payments or accruals have been made lawfully, pursuant to lawful agreements, and Money Mart has no liability to any Class Member in respect of any such amounts.

61. The allegations in paragraphs 72-75 and 79 of the Statement of Claim fail to state any reasonable claim either for a constructive trust or for an equitable tracing order.

Money Mart Has Rights of Set Off Against Class Members

62. Further in answer to allegations in paragraphs 46, 78 and 81 of the Statement of Claim, and in the alternative, Money Mart pleads the facts in the paragraphs below.

63. If certain provisions of a Loan Agreement relating to the payment of interest and fees are unenforceable against a Class Member because of the provisions of s. 347 of the *Criminal Code* (which facts are not admitted but specifically denied), the remaining terms of the Loan Agreement, and specifically those relating to the customer's (including each Class Member's) obligation to pay the Loan principal and interest, continue to be valid and enforceable against each Class Member. Money Mart is entitled to enforce them in relation to each and every Loan Agreement with each Class Member, and in particular against each and every Class Member who has defaulted on a Loan, since (among other things):

- (a) the purpose and policy of s. 347 of the *Criminal Code* is not subverted by such enforcement;
- (b) the customer would be given an unjustified windfall if the customer was not required to repay the Loan principal and interest;
- (c) the customer would be unjustly enriched in circumstances where the reasonable expectation of the parties to the Loan Agreement is that the Loan principal and interest will be paid by the customer to Money Mart on or before the Due Date.

64. Accordingly, if Money Mart has any liability to any Class Member in relation to the alleged payment and collection of interest contrary to s. 347 of the *Criminal Code* in relation to a Loan transaction, which liability is not admitted but denied, and if such Class Member

has either defaulted on any Loan or Loans and failed to repay to Money Mart the Loan principal and interest as required by the terms of the Loan Agreement, or defaulted on and failed to repay Money Mart any other amounts owed to Money Mart in consideration of other services provided to such Class Member by Money Mart:

- (a) Money Mart is entitled and will seek to set off against such Class Member's claim so much of the unpaid Loan principal, interest and/or all other amounts owing to Money Mart by such Class Member as is sufficient to extinguish such Class Member's claim against Money Mart; and
- (b) Money Mart is entitled to judgment for any balance owing by such Class Member.

65. Further, in answer in particular to paragraphs 82 and 83 of the Statement of Claim:

- (a) Money Mart specifically denies that its business records can be used to determine whether any aggregate amount has in fact been paid by all Class Members either to Money Mart or the Franchisees;
- (b) as the paragraphs fail to plead material facts but purport to describe methods of proof, they are embarrassing, frivolous and vexatious.

Money Mart Has No Liability to the Plaintiffs

66. In answer to the whole of the Statement of Claim, Money Mart denies that it has any liability either to the Plaintiff M. Smith, or to the Plaintiff Oriet, or to any person or persons on whose behalf the Plaintiffs bring this action, described collectively in the Statement of Claim as the "Class" or "Class Members."

67. In further answer to the whole of the Statement of Claim, and in particular paragraphs 20-53, Money Mart pleads the facts in the paragraphs below.

68. With reference to paragraph 20 of the Statement of Claim, Money Mart admits that the plaintiff Margaret Smith (“M. Smith”) took out her first Loan from Money Mart on April 2, 2003 and that the Loan amount was \$330.00. Money Mart specifically denies all other allegations in paragraph 20.

69. The Plaintiff, M. Smith, of her own accord and absent any compulsion by Money Mart, entered into seven Loan Agreements and received the proceeds of seven Loans over the period from February, 2003 to August, 2003. M. Smith used the proceeds from the Loans for her own personal benefit, in whatever manner she saw fit.

70. The Plaintiff, M. Smith, knowing that she had the contractual right pursuant to the terms of her Loan Agreements to repay her loans on or before the Due Date, repaid six of her Loans (the “Six Loans”) using Money Mart’s cheque cashing services and paid the fees associated with the use of such services. On each occasion, the payment of such fees was caused by and was the result of M. Smith’s personal choice to incur the fee, rather than repay the Loan in cash on the Due Date, and Money Mart has no liability arising from personal choices made by, and voluntary acts of, M. Smith.

71. Money Mart specifically denies that:

- (a) there was any breach of s. 347(1) of the *Criminal Code* in relation to any of the Six Loans:

- (b) M. Smith paid to Money Mart, or that Money Mart received from M. Smith, any sum in breach of s. 347 of the *Criminal Code*;
- (c) M. Smith has suffered any injury or damage in relation to any Loan transaction;
- (d) the payment by M. Smith of a cheque cashing fee was caused by or the result of either any wrongful act on the part of Money Mart or any alleged conspiracy involving Money Mart;
- (e) it was unjustly enriched in any manner as a result of its transactions with M. Smith.

72. In relation to the seventh Loan, taken August 4, 2003, M. Smith has failed and refused to repay to Money Mart the principal amount of \$330.00 (the "Principal"), or any part of it, and has failed and refused to pay Money Mart the interest (the "Interest") due to Money Mart in accordance with the terms of the Loan Agreement.

73. In any event, M. Smith obtained multiple Loans and did so with full knowledge of the alleged illegality of the Loans. Therefore, she is *in pari delicto*, and so is not entitled to any relief in respect of her Loans.

74. If Money Mart has any liability to M. Smith in relation to alleged payment and collection of interest contrary to s. 347 of the *Criminal Code* arising out of any of the Six Loans, which such liability is not admitted but denied, Money Mart is entitled and will seek to set off against M. Smith's claim so much of the Principal and Interest as is sufficient to extinguish M. Smith's claim against Money Mart, and Money Mart is entitled to judgment

against M. Smith for the balance due and owing to Money Mart by her in respect of her seventh Loan.

75. With reference to paragraph 50 of the Statement of Claim, Money Mart admits that it entered into fifty agreements from time to time with the Plaintiff Ronald Oriet ("Oriet") in relation to Loans, that the form of agreement changed from time to time over the period from November, 2000 to January, 2004, and that the form of agreement signed by Oriet on February 20, 2001 was in relation to a loan for \$100.00 and contained the terms reproduced in paragraph 50. Money Mart specifically denies all other allegations in paragraph 50.

76. Oriet, of his own accord and absent any compulsion from Money Mart, entered into these Loan Agreements, and received the proceeds from more than fifty Loans over the period from November, 2000 to January, 2004. Oriet used the proceeds from the Loans for his own personal benefit, in whatever manner he saw fit.

77. Oriet, knowing that he had the contractual right pursuant to the terms of his Loan Agreements to repay his Loans on or before the Due Date, and in particular knowing at the time he took out his last Loan that this action had been commenced alleging Money Mart charged and collected interest at a criminal rate, repaid all of his Loans using Money Mart's cheque cashing services and paid the fees associated with the use of such services. On each occasion, the payment of such fees was caused by and was the result of Oriet's personal choice to incur the fee, rather than repay the Loan on the Due Date. Money Mart has no liability arising from personal choices made by, and voluntary acts of, Oriet.

78. Money Mart specifically denies that:

- (a) there was any breach of s. 347(1) of the *Criminal Code* in relation to any of Oriet's Loans;
- (b) Oriet paid to Money Mart, or that Money Mart received from Oriet, any sum in breach of s. 347 of the *Criminal Code*;
- (c) Oriet suffered any injury or damage in relation to any Loan transaction;
- (d) the payment by Oriet of a cheque cashing fee was caused by or the result of either any wrongful act on the part of Money Mart or any alleged conspiracy involving Money Mart;
- (e) it was unjustly enriched in any manner as a result of its transactions with Oriet.

79. In any event, Oriet obtained multiple Loans and did so with full knowledge of the alleged illegality of the Loans. Therefore, he is *in pari delicto*, and so is not entitled to any relief in respect of his Loans.

There is No Entitlement to Any Relief

80. For all the reasons expressed above, Money Mart specifically denies the allegations in paragraphs 86 and 87 of the Statement of Claim, and specifically denies that any Class Member has any entitlement to punitive damages.

81. In further answer to the whole of the Statement of Claim, and alternatively, if Money Mart engaged in any wrongful conduct as alleged (which is not admitted but denied) and has any liability to any Class Member as a result (which is also not admitted but denied):

- (a) the claims of any Class Members who died on or before August 19, 2001 are statute-barred, and Money Mart pleads and relies on the *Limitations Act, 2002*, S.O. 2002, c. 24, Sch. B and the *Trustee Act*, R.S.O. 1990, c. T.23;
- (b) any Class Member who is or was bankrupt, or who, in respect of the claims made in this action, has settled with Money Mart, has no status or standing to pursue any further claim against Money Mart.

82. If the plaintiffs or Class Members have sustained the damages alleged in the Statement of Claim, which is expressly denied:

- (a) any alleged damages were caused solely and exclusively by their own acts and omissions and not by Money Mart;
- (b) the plaintiffs or class members have failed or refused to take any, or any reasonable steps to mitigate such damages; and
- (c) such damages are excessive and too remote to be recoverable.

83. In further answer to the whole of the Statement of Claim, if Money Mart has any liability to any Class Member on any basis alleged, which such liability is not admitted but denied, Money Mart denies that Class Members have any entitlement to injunctive relief since damages are an adequate remedy and no Class Member has or will suffer irreparable harm. Further or alternatively, the Class Members have no status or standing to seek an injunction.

84. Money Mart therefore asks that this action be dismissed as against it with costs on a substantial indemnity basis.

COUNTERCLAIM

85. Money Mart claims:
- (a) an accounting of what is due to Money Mart from each and every Class Member who has, at any material time, defaulted on a Loan or failed to pay Money Mart any other amount properly due to Money Mart, whether in respect of a Loan or any other service provided by Money Mart to the Class Member, pursuant to the Class Member's agreements with Money Mart (the "Defaulters");
 - (b) judgment for all amounts owing to Money Mart by each Defaulter, or alternatively judgment for the balance due and owing to Money Mart by any Defaulter, after the taking of accounts;
 - (c) prejudgment and post judgment interest on the said amounts pursuant to the *Courts of Justice Act*;
 - (d) costs and disbursements of this action on a substantial indemnity basis, plus G.S.T.; and,
 - (e) such further and other relief as counsel may advise and this Honourable Court may permit.
86. Money Mart repeats and relies on the allegations in its Statement of Defence.
87. Over the material period, fifty percent or more of the Class Members, including the Plaintiff M. Smith, have failed to pay Money Mart amounts due and owing to Money Mart, and that the Defaulters agreed to pay, pursuant to the Defaulters' agreements (including Loan

Agreements) with Money Mart in respect of services provided by Money Mart to the Defaulters.

88. Money Mart has incurred costs and expenses as a result of the defaults of the Defaulters, including costs and expenses in connection with collection or other proceedings taken against the Defaulters to collect amounts properly due and owing to Money Mart.

89. It was a term, either express or implied, of the agreements between Money Mart and each of the Defaulters that all such costs and expenses would be paid by the Defaulter to Money Mart, in addition to the principal amount of the debt and lawful interest due to Money Mart.

90. Money Mart asks that these Counterclaims be heard at the same time as the main action herein.

February 19, 2007

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BETWEEN :

SMITH et al

- and -

NATIONAL MONEY MART
COMPANY et al

Court File No. 03-CV-1275

**ONTARIO
SUPERIOR COURT OF JUSTICE**

Proceeding Commenced at Toronto

**Statement of Defence and Counterclaim of
National Money Mart Company**

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