

**THE QUEEN'S BENCH
Winnipeg Centre**

BETWEEN:

JENNY BRIONES (née BEJARANO)

Plaintiff,

-and-

NATIONAL MONEY MART COMPANY and DOLLAR FINANCIAL GROUP INC.

Defendants.

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

**FILLMORE RILEY LLP
1700 - 360 Main Street
Winnipeg, MB R3C 3Z3**

**Telephone: (204) 957-8330
Facsimile: (204) 954-0330**

**CURRAN P. McNICOL
File No. 422945-1/CPM**

**McCARTHY TÉTRAULT LLP
Box 48, Suite 5300
Toronto Dominion Bank Tower
Toronto, ON M5K 1E6**

**Telephone: (416) 601-7719
Facsimile: (416) 868-0673**

JOHN P. BROWN

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

1. The Defendant National Money Mart Company ("Money Mart") admits the allegations contained in paragraph 3 of the statement of claim (the "Statement of Claim").
2. The Defendant denies the allegations contained in paragraphs 4 to 56 of the Statement of Claim and the relief claimed in paragraph 1 therein.
3. The Defendant has no knowledge of the allegations in paragraph 2 of the Statement of Claim, and therefor deny them.
4. Except where admitted herein, Money Mart specifically denies each and every allegation of fact in the Statement of Claim and puts the Plaintiff to the strict proof thereof.
5. In answer to the whole of the Statement of Claim, Money Mart denies that it has any liability either to the Plaintiff, or to any proposed class member.

Money Mart's Business

6. In further answer to the whole of the Statement of Claim, and specifically paragraphs 2 to 18 Money Mart pleads the facts set out in the paragraphs below.

7. 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 ("**Fast Cash Advances**").

8. 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

9. 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.

10. 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.

11. 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 Fast Cash Advances

12. In 1996, Money Mart began offering Fast Cash Advances. During the material time the Money Mart Fast Cash Advance operated as set out below.

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

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

14. A customer could always repay a Fast Cash Advance in cash on or before the due date. In those instances the customer was only required to pay the Fast Cash Advance principal plus interest pro-rated to the date of payment. The customer's post-dated cheque was returned to the customer. Since the cheque cashing service was not being used where the customer repaid a Fast Cash Advance on or before the due date, the customer paid none of the cheque cashing fees associated with that service.

15. A borrower could also elect to repay the Fast Cash Advance by using Money Mart's cheque cashing service. If a customer did not repay a Fast Cash Advance in cash on or before the due date, the customer had 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 included an amount in respect of Money Mart's fees for cashing a first party cheque, was then cashed by Money Mart.

16. The cheque cashing fee which was charged in those circumstances was not part of the cost of the Fast Cash Advance. It was charged for the separate cheque cashing service. It was a fee the customer chose to incur for the benefit and convenience of not having to return to the Money Mart outlet to repay the Fast Cash Advance.

The Fast Cash Advance Agreements are Valid and Enforceable

17. At all material times, Money Mart has offered the various financial services described above to individuals including the proposed class members.

18. Each Fast Cash Advance transaction, including each and every Fast Cash Advance transaction involving a proposed class member, was made pursuant to the terms of a Fast Cash Advance Agreement, as modified, either orally or in writing, from time to time.

19. Each proposed class member, of his or her own accord and without any compulsion by Money Mart, entered into Fast Cash Advance Agreements and received the proceeds of Fast Cash Advances from Money Mart. Each proposed class member used the proceeds from the Fast Cash Advances for his or her own personal benefit, in whatever manner he or she saw fit.

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

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

22. Each and every Fast Cash Advance Agreement, including in particular each Fast Cash Advance Agreement to which a proposed class member was a party, expressly provided the borrower with the right to repay the Fast Cash Advance on or before the Due Date. In those circumstances, the customer paid the principal amount of the Fast Cash Advance plus interest calculated at the rate set out in the Fast Cash Advance Agreement and pro-rated to the date of payment.

23. Where the customer repaid a Fast Cash Advance on or before the Due Date, the customer's post-dated cheque was returned to the customer, and the customer paid none of the fees associated with use of Money Mart's cheque cashing services.

24. By the terms of the Fast Cash Advance Agreement, the customer, including in particular each and every proposed class member, also had the option, should the customer have chosen to do so, to repay the amount owing in respect of a Fast Cash Advance 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 was not returned dishonoured, the customer paid the fees associated with the use of the first party cheque cashing service. Any such fees were paid voluntarily by the customer, and each and every proposed 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 Fast Cash Advance using the cheque cashing service.

25. In circumstances where Money Mart deposited a customer's first party cheque and the cheque was returned dishonoured:

- (a) the Fast Cash Advance principal and interest were not repaid on the Due Date, and no first party cheque cashing fee was paid by the customer or collected by Money Mart;
- (b) Money Mart would give the customer time to pay and satisfy the customer's debt to Money Mart, which time was as long as a year or more, depending on the circumstances of the customer.

26. In the period material to this action:

- (a) More than half the persons who are alleged to be proposed class members defaulted on one or more of their Fast Cash Advances, and many remain in default;
- (b) no first party cheque cashing fee was either paid by, or collected by Money Mart from, any proposed class member with a Fast Cash Fast Cash Advance or Advances in default.

27. In further answer to the whole of the Statement of Claim, and specifically paragraphs 23-28, Money Mart specifically denies that:

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

28. If it is found that the Fast Cash Advance Agreements are void or unenforceable due to illegality (which is not admitted but specifically denied) neither the Plaintiff nor the proposed

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.

There Has Been No Unjust Enrichment

29. In further answer to the whole of the Statement of Claim and in particular paragraphs 33-38, Money Mart pleads the facts set out in the paragraphs below.

30. Money Mart denies any unjust enrichment, as alleged, and specifically denies that any proposed class member has at any material time paid any sum to Money Mart to which Money Mart was not lawfully entitled. Further, if any proposed 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 proposed class member's expense. In any event, each proposed class member has received the benefit of the Fast Cash Advance service and the cheque cashing service and Money Mart incurred costs in providing these services to the proposed class members. Accordingly, if Money Mart has been enriched, which is not admitted but expressly denied, it has not been enriched to the extent it incurred these costs in providing the benefit of these services to the proposed class members.

31. In particular in response to paragraphs 33-35, Money Mart denies that it has received interest as alleged or any part thereof and specifically denies that the proposed class members have either paid Money Mart the alleged interest, or suffered a deprivation in the amount of the interest. In particular, proposed class members who have defaulted on and failed to repay Fast Cash Advances have suffered no deprivation in relation to such unpaid Fast Cash Advances. Money Mart has received nothing and can have no liability to proposed class members for any amount in respect of any such unpaid Fast Cash Advances.

32. In any event, neither the Plaintiff nor any proposed 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 has changed its position by using any monies received from the Plaintiff or proposed class members in the ordinary course of their respective businesses with the result that those amounts are no longer available.

33. In further answer to the Statement of Claim, if as a result of the alleged conspiracy the proposed 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) all amounts received by Money Mart from its customers in respect of Fast Cash Advance transactions are deposited by Money Mart into a general corporate account (the "Corporate Account");
- (b) the Corporate Account also receives funds, unrelated to Fast Cash Advances and unrelated to payments from Money Mart's other lines of business and from its line of credit, and all funds are commingled in the Account;
- (c) 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;
- (d) since August, 1997, the Corporate Account has been overdrawn from time to time and, as a result, any funds (whether in respect of cheque cashing fees or otherwise) which may have been received by Money Mart from any Class Member prior to it being overdrawn are no longer in the possession of Money Mart.

34. 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 proposed 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.

35. 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 proposed class member in respect of any such amounts.

No Harsh or Unconscionable Transactions

36. In further answer to the whole of the Statement of Claim and in particular to paragraphs 39-48, Money Mart pleads the facts set out in the paragraphs below.

37. Money Mart specifically denies that Fast Cash Advance transactions between Money Mart and the Plaintiff, or between Money Mart and any proposed class member, fall within the provisions of *The Unconscionable Transactions Relief Act*, C.C.S.M, c. U-20 (the "UTRA") or *The Consumer Protection Act*, C.C.S.M, c. C-200, as alleged.

38. Money Mart specifically denies that:

- (a) the Plaintiff or any proposed class members are "debtors" within the meaning of the *UTRA*;
- (b) the Plaintiff or any proposed class members are "borrowers" or "debtors" within the meaning of *The Consumer Protection Act*;
- (c) it is a "creditor" within the meaning of the *UTRA*;

- (d) it is a "credit grantor" and "money lender", in respect of Fast Cash Advances advanced before 1 April 2007, or a "credit grantor" in respect of Fast Cash Advances advanced on or after 1 April 2007, within the meaning of *The Consumer Protection Act*;
- (e) Fast Cash Advance Agreements are "loan agreements" in respect of Fast Cash Advances advanced before 1 April 2007, or "credit agreements" in respect of Fast Cash Advances advanced on or after 1 April 2007, within the meaning of *The Consumer Protection Act*;
- (f) Fast Cash Advance Agreements were entered into for non-business purposes within the meaning of *The Consumer Protection Act*;
- (g) Fast Cash Advances were "money lent" within the meaning of the *UTRA*;
- (h) cheque cashing fees are included in the "cost of the loan" within the meaning of the *UTRA*;
- (i) cheque cashing fees are included in the "cost of borrowing" in respect of Fast Cash Advances advanced before 1 April 2007, or that the cost of borrowing for each Fast Cash Advance exceeded \$10 within the meaning of *The Consumer Protection Act*;
- (j) the "non-interest charges" in respect of Fast Cash Advances advanced on or after 1 April 2007, within the meaning of *The Consumer Protection Act* constitute part of the value given by the Plaintiff or any proposed class member for the Fast Cash Advances within the meaning of *The Consumer Protection Act*; or that they are included in the "cost of credit" within the meaning of *The Consumer Protection Act*;

- (k) each of the Fast Cash Advances provided by it to the Plaintiff or any proposed class member was advanced upon terms and conditions that required the payment of interest at a criminal rate contrary to s. 347 of the *Criminal Code*;
- (l) the Plaintiff or any proposed class member paid interest at a criminal rate to Money Mart on their Fast Cash Advances;
- (m) the cost of the Fast Cash Advances was harsh or unconscionable within the meaning of the *UTRA*;
- (n) the amounts paid by the Plaintiff or any proposed class member were sums in excess of the amount fairly due for the services they received from Money Mart, within the meaning of the *UTRA*, or that the Plaintiff or any proposed class member is entitled to repayment of those amounts;
- (o) it failed to properly disclose in the Fast Cash Advance Agreements any matter required to be disclosed by *The Consumer Protection Act*;
- (p) the Plaintiff or any proposed class member are entitled to repayment of any cheque cashing fees they paid or to any compensation of whatever kind under *The Consumer Protection Act* or otherwise.

39. Money Mart specifically denies that the terms and conditions upon which it offered to make Fast Cash Advances were either harsh or adverse:

- (a) to the Plaintiff in the circumstances of the Plaintiff; or
- (b) to any proposed class member, in the circumstances of such person.

40. Further or alternatively, Money Mart denies that, at any material time, it engaged in any conduct constituting either an unconscionable act or an unconscionable practice:

- (a) in relation to the Plaintiff in the circumstances of the Plaintiff; or
- (b) in relation to any proposed class member in the circumstances of such person.

41. Further or alternatively, Money Mart specifically denies that, in relation to any Fast Cash Advance:

- (a) either the Plaintiff or any proposed class member was subjected to any pressure by Money Mart to enter into the transaction;
- (b) either the Plaintiff or any proposed class member was in the circumstances unable or incapable of reasonably protecting his or her own interests.

42. Further, in relation to each Fast Cash Advance between Money Mart and the Plaintiff:

- (a) the Plaintiff chose voluntarily to contract with Money Mart on the terms offered by Money Mart, which were acceptable to and accepted by the Plaintiff;
- (b) the Plaintiff chose voluntarily to contract with Money Mart on the terms offered by Money Mart, knowing that there were other alternatives available to the Plaintiff;
- (c) the Plaintiff chose voluntarily to contract on the terms offered by Money Mart because by doing so her could avoid other inconvenience and expense;
- (d) the Plaintiff chose voluntarily to allow Money Mart to deposit her first party cheque, and pay the fees associated with use of the cheque cashing service, because by doing so she could avoid other inconvenience and expense;
- (e) the Plaintiff had the ability and capacity to protect her own interests, and at all material times conducted her dealings with Money Mart in a manner the Plaintiff considered to be in her own interest;

- (f) the Plaintiff did not suffer, or alternatively did not at any time communicate to Money Mart that she suffered, from any physical or mental infirmity, ignorance, illiteracy, age or inability to understand the character, nature and language of the Fast Cash Advances.

43. Further or alternatively, if Money Mart engaged in any conduct constituting either an unconscionable act or an unconscionable practice, which is not admitted but specifically denied, Money Mart specifically denies that either the Plaintiff or any proposed class member suffered any loss or damage because of any such act or practice.

Money Mart's Best Business Practices

44. Money Mart adheres to a set of "best business practices" in offering its Fast Cash Advance 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 was 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.

45. Money Mart and the other members of the Association have agreed to abide by the Association's Code of Conduct. At all material times copy of the Association's Code of Conduct was posted in all Money Mart stores and on the Association's website and included the practices described below regarding its Fast Cash Advances.

- (a) Borrowers had to have a chequing account and employment income.
- (b) Fast Cash Advances were limited to a set percentage of the borrower's net pay.

- (c) Customers were not permitted to extend or “rollover” a Fast Cash Advance i.e. they were not permitted to use the proceeds of another Fast Cash Advance to repay an existing Fast Cash Advance.
- (d) If a customer was dissatisfied in any way with a Fast Cash Advance, including any fees or interest that are to be paid, a customer could simply return the principal amount of the Fast Cash Advance prior to the close of business the following day and the customer was not be charged any interest or fees of any kind.
- (e) Default fees and charges on a Fast Cash Advance in default could not exceed the maximum NSF fees charged by the major banks and there were restrictions on the interest that could be charged on default.
- (f) A Fast Cash Advance could not be made to a customer based on social assistance payments to be received by the customer.
- (g) The cost of the Fast Cash Advance had to be displayed prominently on all Fast Cash Advance documentation.

46. The federal and provincial governments recognize the need for service providers such as Money Mart. Both the federal and provincial governments have passed legislation permitting the payday loan industry to continue to carry on business in a regulated environment, including Money Mart's Fast Cash Advance service.

Dollar Financial and Money Mart Operate Independently of Each Other

47. In further answer to the whole of the Statement of Claim, and in particular paragraphs 4-7, 17-18, 21-32, 34, 35, 37, 38 and 49-53 Money Mart pleads the facts set out below in respect of the relevant time period.

48. The defendant Dollar Financial Group Inc. ("Dollar Financial") was founded in 1979. It was incorporated in the State of New York, U.S.A., and at all material times had its principal place of business in Berwyn, Pennsylvania. DFG International, Inc. ("DFG International"), is a wholly-owned subsidiary of Dollar Financial.

49. In November 1996, the shares of National Money Mart Inc. were purchased by Dollar Financial Canada Ltd. ("DFC"), an Alberta company which was another 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. These shares are no longer owned by Dollar Financial or DFG International, either directly or indirectly.

50. Money Mart had a very strong management team at the time of its acquisition which was left intact to operate the business. At all material times Money Mart had complete autonomy to carry on its business in the same manner as prior to the acquisition.

51. At the time of this acquisition, Money Mart was already offering most of its current products and services including Fast Cash Advances. The Fast Cash Advance 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 Fast Cash Advance.

52. Contrary to the allegations in the whole of the Statement of Claim Dollar Financial did not exercise effective or actual control or management of Money Mart's business. Nor did Money Mart act "in furtherance of a common business enterprise carried on by Money Mart and Dollar Financial for their mutual benefit, in which Money Mart functioned as if it were a part of Dollar Financial."

53. Money Mart was and is a separate corporation and operates autonomously. At all material times, all decisions concerning the day-to-day business of Money Mart, the products offered by Money Mart and how they were offered, were made by Money Mart. The relationship between Dollar Financial and Money Mart was a typical parent/indirect-subsidary relationship.

54. Dollar Financial's officers and directors did not control Money Mart. Dollar Financial conducted the affairs of its board of directors separately and independently from the affairs of Money Mart. Money Mart's operations were not supervised or conducted by the board of directors of Dollar Financial.

55. Money Mart was separately financed and had separate bank relationships and separate lines of credit from those of Dollar Financial. Dollar Financial did not deposit any of its funds into Money Mart accounts, nor did Money Mart deposit any of its funds into Dollar Financial accounts. Dollar Financial did not pay any of its bills with Money Mart funds, nor did Money Mart pay any of its bills with Dollar Financial funds. Employees of Dollar Financial and employees of Money Mart were paid by their respective employers from each company's own separate bank accounts. Staff meetings were entirely separate and independent of each other.

56. The form and contents of Dollar Financial's annual reports and other regulatory filings were dictated by U.S. law. Its annual reports were 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. Such regulatory filings of Dollar Financial were in keeping with SEC requirements and reflected normal reporting practices followed by similar companies in the United States, as a result of the requirements of U.S. law.

57. With reference to paragraphs 18, 27, 34 and 37 and the whole of the Statement of Claim, Money Mart says that:

- (a) Money Mart and Dollar Financial were 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 was required to pay and Dollar Financial was 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 were also parties to a written management agreement; and
- (d) Money Mart, from time to time, in accordance with its legal obligations and lawfully, paid amounts to Dollar Financial under that agreement.

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

59. If at any material time in any respect Dollar Financial and Money Mart functioned as an integrated business sharing common purposes and objectives, or shared networks or systems as alleged (all of which is not admitted but specifically denied), Money Mart did so lawfully, for

the purposes of promoting its own business interests and without any intention to harm any proposed class member. Money Mart has no liability to any proposed class member in respect of such lawful activities.

No Conspiracy

60. In further answer to the whole of the Statement of Claim and in particular the allegations in paragraphs 23-28 and 49-52, Money Mart pleads the facts set out in the paragraphs below.

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

- (a) it entered into any agreement or arrangement with any person to breach s. 347(1) of the *Criminal Code*;
- (b) it breached s. 347(1) of the *Criminal Code*.;
- (c) it conspired with any person in the manner alleged in paragraphs 49-52 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 proposed class member (and any alleged injury is not admitted but specifically denied).

62. If Money Mart engaged in any of the activities alleged in the Statement of Claim (and in particular in paragraphs 23-28 and 49-52), which is not admitted but specifically denied, Money Mart specifically denies that:

- (a) any proposed class member has suffered any injury or damage as a result;

- (b) a proposed class member's payment of a cheque cashing fee when such proposed class member repaid by cheque a Fast Cash Advance from Money Mart constituted an actionable injury or damage in law.

63. If any proposed 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 with Dollar Financial that was unlawful, and that was directed at the proposed class member or proposed class members in circumstances where either Money Mart or Dollar Financial ought to have known at the material time that injury to the proposed class member was likely;
- (b) any injury to any proposed class member was likely;
- (c) it ought to have known at any material time that any injury was likely;
- (d) it intended that such proposed 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 proposed class member's personal choices and voluntary acts;
- (f) it has any liability arising from personal choices made by, and voluntary acts of, a proposed class member; and
- (g) such proposed class member took appropriate steps to mitigate any such damage, including in particular taking steps to repay Fast Cash Advances in cash on or before the Due Date.

64. Specifically, if any proposed class member has in fact paid a cheque cashing fee to Money Mart in connection with the repayment by cheque of a Fast Cash Advance, 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 proposed class member's personal choice to incur the fee, rather than repay the Fast Cash Advance on or before the Fast Cash Advance's due date (as the Fast Cash Advance Agreement specifically provides), and Money Mart has no liability arising from personal choices made by, and voluntary acts of, proposed class members.

Money Mart Has Rights of Set Off Against Proposed Class Members

65. In answer to the whole of the Statement of Claim, if certain provisions of a Fast Cash Advance Agreement relating to the payment of interest and fees are unenforceable against a proposed 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 Fast Cash Advance Agreement, and specifically those relating to the customer's (including each proposed class member's) obligation to pay the Fast Cash Advance principal and interest, continue to be valid and enforceable against each proposed class member. Money Mart is entitled to enforce those rights in relation to each and every Fast Cash Advance Agreement with each proposed class member, and in particular against each and every proposed class member who has defaulted on a Fast Cash Advance, since (among other things):

- (a) the purpose and policy of s. 347 of the *Criminal Code* is not subverted by such enforcement;

- (b) the proposed class member would be given an unjustified windfall if the proposed class member was not required to repay the Fast Cash Advance principal and interest;
- (c) the proposed class member would be unjustly enriched in circumstances where the reasonable expectation of the parties to the Fast Cash Advance Agreement is that the Fast Cash Advance principal and interest would be paid by the proposed class member to Money Mart on or before the Due Date.

66. Accordingly, if Money Mart has any liability to any proposed class member in relation to the alleged payment and collection of interest contrary to s. 347 of the *Criminal Code* in relation to a Fast Cash Advance transaction, which liability is not admitted but denied, and if such proposed class member has either defaulted on any Fast Cash Advance or Advances and failed to repay to Money Mart the Fast Cash Advance principal and interest as required by the terms of the Fast Cash Advance 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 proposed class member by Money Mart:

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

67. In addition, Money Mart has incurred costs and expenses as a result of any defaults by any proposed class members, including costs and expenses in connection with collection or other proceedings taken against such proposed class members to collect amounts properly due and owing to Money Mart.

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

69. Money Mart is entitled to set off so much of these other amounts owing to it that have not been paid by proposed class members as is sufficient to extinguish such proposed class members' claims against Money Mart. Money Mart is entitled to judgment against the said proposed class members for any balance due and owing to it after all such set-offs are applied.

70. The proposed class members' failure to pay such Fast Cash Advance principal, interest and other amounts constitutes a breach of the respective Fast Cash Advance Agreements entered into by them in respect of which Money Mart has suffered damages for which they are liable. Further, and in the alternative, the proposed class members' failure to pay such Fast Cash Advance principal, interest and other amounts results in their unjust enrichment to Money Mart's deprivation without juridical reason. Further, and in the alternative, the proposed class members' receipt and retention of such Fast Cash Advance principal constitutes money had and received for which they are bound to account or for which they are obligated to pay on the basis of *quantum meruit*. Money Mart is entitled to judgment against the said proposed class members for any balance due and owing to it after all such set-offs are applied.

71. Accordingly, Money Mart has rights of set-off and a counterclaim against each and every proposed class member who has, at any material time, defaulted on a Fast Cash Advance or failed to pay Money Mart any other amount properly due to Money Mart, whether in respect of a Fast Cash Advance or any other service provided by Money Mart to the proposed class member, pursuant to the proposed class member's agreements with Money Mart. Until Money Mart's counterclaim and rights of set-off have been determined, liability cannot be established against Money Mart by any proposed class member, and no aggregate assessment of monetary relief can be made pursuant to *The Class Proceedings Act* or otherwise.

Many of the Claims are Statute-Barred

72. Pursuant to Section 2 of *The Limitations Act* C.C.S.M. c. L150 the claims in this action had to be commenced within six years. The proposed class is not limited to customers who obtained Fast Cash Advances within six years of the commencement date of this Action. Those claims that are based on Fast Cash Advances that were entered into more than six years prior to the commencement of this Action are statute-barred.

73. Section 39 of *The Class Proceedings Act* does not apply to relieve the Plaintiff or any proposed class member from this result for the following reasons:

- (a) the action relied on by the Plaintiff, *Blasko v. National Money Mart Company* (the "Blasko" action) was commenced on about 26 April 2004 and the plaintiff has not taken any steps in the action since issuing the statement of claim except for amending her claim more than 8 years later in November 2012;
- (b) reliance on the *Blasko* action to toll any limitation periods would be an abuse of process;

- (c) the claims in the original statement of claim in *Blasko* are different from the claims in the within Action and so cannot be used to toll any limitation periods in any event;
- (d) the amendments made to the statement of claim in the *Blasko* action in November 2012 that purport to allege new and different causes of action from the original statement of claim and are statute-barred;
- (e) there is no basis on which it is reasonable for the Plaintiff or any other proposed class member to assume that they were class members in the *Blasko* action.

74. Money Mart pleads and relies upon *The Limitation Act*, CCSM c L150.

The Plaintiff and Proposed Class Members Agreed Not to Bring Claims More Than One Year After They Arose

75. The Plaintiff and each proposed class member who obtained a Fast Cash Advance from and after April 2003 expressly agreed in writing in the Fast Cash Advance Agreements they signed that “any action involving any claim shall be commenced within one (1) year after the date on which this agreement was executed, failing which no such action can or shall be commenced.”

76. All the claims in the within Action relate to Fast Cash Advance Agreements obtained before 18 October 2010. This action was commenced on 1 February 2012, more than a year after the last relevant Fast Cash Advance Agreement was signed and almost six years after the Plaintiff obtained her last Fast Cash Advance in July 2006.

77. Accordingly, the Plaintiff and any such proposed class members are not permitted to bring such claims in this Action.

78. Section 39 of the *CPA* does relieve the Plaintiff or any proposed class members from their "one-year" agreements. Section 39 was never intended to and does not apply to private agreements of this type.

79. In the alternative, in the event it is found that the "one-year" agreements entered into by the Plaintiff and proposed class members come within the meaning of s. 39 of the *CPA*, s. 39 nonetheless does not apply for the reasons set out in respect of the statutory limitation period above.

Money Mart Has No Liability to the Plaintiff

80. In answer to the whole of the Statement of Claim, Money Mart denies that it has any liability either to the Plaintiff or to any proposed class member on whose behalf the Plaintiff brings this Action.

81. In further answer to the whole of the Statement of Claim, and in particular paragraphs 19-22, Money Mart pleads the facts in the paragraphs below.

82. The Plaintiff first became a Money Mart customer in September 2001. According to the Customer Registration Form completed by the Plaintiff, she had steady employment and a bank account with overdraft protection.

83. After becoming a Money Mart customer, the Plaintiff attended at Money Mart stores on more than 100 occasions to use Money Mart's services including its Cheque Cashing services and Fast Cash Advance services.

84. Between September 2001 and July 2006 the Plaintiff obtained 99 Fast Cash Advances from Money Mart. She repaid 17 of these Fast Cash Advances in cash. Since the Plaintiff did

not use the Cheque Cashing service on these occasions to repay her loan she did not pay any cheque cashing fees.

70. The Plaintiff repaid her remaining Fast Cash Advances using Money Mart's Cheque Cashing service. The Plaintiff's last Fast Cash Advance transaction with Money Mart was in July 2006. The Plaintiff borrowed \$757.56. However, the cheque she delivered to Money Mart in repayment of this loan was returned by her bank which refused to honor it. She has made some payments towards the outstanding balance in instalments over time but the Plaintiff currently owes Money Mart a significant portion of the principal plus interest and fees related to her bounced cheque.

85. The Plaintiff entered into the Fast Cash Advance Agreements of her own accord and absent any compulsion by Money Mart. The Plaintiff used the proceeds from the Fast Cash Advances for her own personal benefit, in whatever manner she saw fit.

86. The Plaintiff, knowing that she had the contractual right pursuant to the terms of her Fast Cash Advance Agreements to repay her Fast Cash Advances on or before the Due Date, repaid the majority of her Fast Cash Advances 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 her personal choice to incur the fee, rather than repay the Fast Cash Advance in cash on the Due Date, and Money Mart has no liability arising from personal choices made by, and voluntary acts of, the Plaintiff.

87. Money Mart specifically denies that:

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

- (b) the Plaintiff paid to Money Mart, or that Money Mart received from the Plaintiff, any sum in breach of s. 347 of the *Criminal Code*;
- (c) the Plaintiff has suffered any injury or damage in relation to any Fast Cash Advance transaction;
- (d) the payment by the Plaintiff 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) Money Mart was unjustly enriched in any manner as a result of its transactions with the Plaintiff.

88. In any event, the Plaintiff obtained multiple Fast Cash Advances and did so with full knowledge of the alleged illegality of the Fast Cash Advances. Therefore, she is *in pari delicto*, and so is not entitled to any relief in respect of her Fast Cash Advances.

There is No Entitlement to Any Relief

89. 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 proposed class member as a result (which is also not admitted but denied), any proposed 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.

90. If the Plaintiff or proposed 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 Plaintiff or proposed 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.

91. Money Mart respectfully requests that this Honourable Court grant judgment:

- (a) dismissing this Action against it, and in particular the claims of the Representative Plaintiff and all proposed class members, and;
- (b) in addition, or in the alternative,
 - (i) ordering an accounting of what is due to it from the Plaintiff and all other proposed class members who have defaulted on a Fast Cash Advance or failed to pay Money Mart any other amount properly due to Money Mart, whether in respect of a Fast Cash Advance or any other service provided by Money Mart to the proposed class member, pursuant to the proposed class member's agreements with Money Mart together with prejudgment and post judgment interest on the said amounts;
 - (ii) setting off such amounts as are owed to Money Mart by such proposed class members against any amounts awarded to such proposed class members herein; and,
 - (iii) pursuant to the counterclaim hereto, ordering such proposed class members to pay Money Mart all amounts owing to it after the above set-offs are applied;
- (c) awarding costs on such basis as this Honourable Court deems appropriate in the exercise of its discretion, including G.S.T.; and

- (d) granting such other relief as this Honourable Court deems just in the circumstances.

COUNTERCLAIM

92. The Defendant (plaintiff by counterclaim), claims against the Plaintiff and proposed class members (defendants by counterclaim) as follows:

- (a) an accounting of what is due to Money Mart from each and every proposed class member (including the Plaintiff) who has defaulted on a Fast Cash Advance or failed to pay Money Mart any other amount properly due to Money Mart, whether in respect of a Fast Cash Advance or any other service provided by Money Mart to the proposed class member, pursuant to the proposed 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;
- (d) costs; and
- (e) such further and other relief as counsel may advise and this Honourable Court may permit.

93. Money Mart repeats and relies on the allegations in its Statement of Defence.

94. Money Mart uses the same defined terms in this Counterclaim as are used in its Statement of Defence.

95. The Defaulters failed to pay Money Mart amounts due and owing to Money Mart which the Defaulters agreed to pay, pursuant to the Defaulters' agreements (including their Fast Cash

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

96. Money Mart has rights of set-off and a counterclaim against the Defaulters whether in respect of a Fast Cash Advance or any other service provided by Money Mart to them, pursuant to their agreements with Money Mart.

97. 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.

98. 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.

99. Money Mart is entitled to set off so much of the Fast Cash Advance principal, interest and/or all other amounts owing to it that have not been paid by the Defaulters as is sufficient to extinguish such Defaulters' claims against Money Mart. Money Mart is entitled to judgment against the Defaulters for any balance due and owing to it after all such set-offs are applied.

The Defaulters' failure to pay such Fast Cash Advance principal, interest and other amounts constitutes a breach of the respective Fast Cash Advance Agreements entered into by them in respect of which Money Mart has suffered damages for which the Defaulters are liable. Further, and in the alternative, the Defaulters' failure to pay such Fast Cash Advance principal, interest and other amounts results in their unjust enrichment to Money Mart's deprivation without juridical reason. Further, and in the alternative, the Defaulters' receipt and retention of such

Fast Cash Advance principal constitutes money had and received for which the Defaulters are bound to account or for which they are obligated to pay on the basis of *quantum meruit*. Money Mart is entitled to judgment against the Defaulters for any balance due and owing to it after all such set-offs are applied.

100. Money Mart therefore claims from the Defaulters all such amounts that are owing by the Defaulters to Money Mart as above described.

101. Until Money Mart's rights of set-off and counterclaim have been determined, liability cannot be established against it by any proposed class member, and no aggregate assessment of monetary relief can be made.

May 1, 2017

McCARTHY TÉTRAULT LLP
Box 48, Suite 5300
Toronto Dominion Bank Tower
Toronto, ON M5K 1E6

JOHN P. BROWN
LSUC #22635H
Telephone: (416) 601-7719

Solicitor for the Defendant National Money Mart
Company.

TO: BENNETT MOUNTEER LLP
1400 – 128 west Pender Street
Vancouver, BC R3L 0C6

PAUL R. BENNETT
Telephone: (604) 639-3680
Solicitors for the Plaintiff