STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

Jason Dobosenski, on behalf of himself and all others similarly situated
Plaintiff,

v.

Payday America Inc.,

Defendant.

ORDER GRANTING PARTIAL SUMMARY JUDGMENT

Court File No. 27-CV-15-18990

The above-entitled matter came duly on November 9, 2017, before the Honorable Judge Daniel H. Mabley, pursuant to Plaintiff's and Defendant's cross motions for summary judgment.

Marisa Katz, Attorney at Law, submitted a written memorandum and appeared in person on behalf of the Plaintiff, Jason Dobosenski, on behalf of himself and all others similarly situated.

Patrick Hoffman, Attorney At Law, submitted written motions and memoranda and appeared in person on behalf of the Defendant, Payday America Inc.

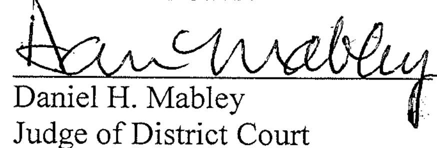
Based upon all the files, records, arguments of counsel, and the Court being fully advised in the premises, the Court makes the following:

ORDER

1. Plaintiff's motion for summary judgment is **PARTIALLY GRANTED**.
2. Defendant's motion for summary judgment is **DENIED**.
3. The attached memorandum is incorporated.

Date: February 5, 2018

BY THE COURT:



Daniel H. Mabley
Judge of District Court

MEMORANDUM

PROCEDURAL POINTS

The first class representative, Randy Holte, filed for Chapter 7 bankruptcy. Both parties have stipulated that Jason Dobosenski would be added and substituted as the class representative. The substantive claims remain unchanged with the substitution. Mr. Dobosenski's motion for summary judgment is partially granted on his behalf and behalf of the class. As summary judgment is partially granted in favor of Mr. Dobosenski and the class, the parties shall meet, confer and propose a plan to the Court to manage and adjudicate any remaining issues related to the litigation, specifically, individual defenses that Payday may have. The joint proposal shall be submitted to the Court within 30 days of this order being issued. The Court will conduct a scheduling conference after its receipt of the parties' submission at a date and time to be determined by the Court. Judgment shall not be entered while issues remain.

FINDINGS

Payday America, Inc., hereinafter Payday, is a Minnesota Corporation licensed as an industrial loan and thrift company. Payday is a consumer short-term lender under Minnesota Statute §47.601 subd. 1(e), and provides consumer short-term loans. In order for any borrower to receive a loan from Payday, they must first come into one of Payday locations and enter into a credit agreement. The borrowers' credit limit is listed on their credit agreements, and is based on their income and other documentation. Once a borrower has determined the amount they want advanced, either the full credit limit or less than that amount, Payday issues the advance and provides a periodic statement. In order to receive another advance, borrowers must either call or come into the location. If a new loan is made, it does not effect when the initial loan is due. The parties disagree as to whether borrowers would be able to receive an additional loan up to or less

than their credit limit, while they had an unpaid balance. This factual dispute is not material to the Court's decision.

The credit agreements, which are written and provided by Payday, refers to itself as a "CONSUMER NOTE, DISCLOSURE AND OPEN-END CREDIT AGREEMENT." According to the agreement, borrowers are required to pay the entire unpaid principal balance of a loan, unpaid finance charges, and any other charges on the due date. Partial payments are not accepted. The due date is defined as date of a borrower's next paycheck or the payment date set for on the periodic statement. The credit agreement uses the terms "open-end credit" and "line of credit." The credit agreement also authorizes Payday to make a withdrawal from borrowers' bank account, along with a separate authorization for drafts on borrowers' account. In bold 24-point font, and example annual percentage rate (APR) is printed on the credit agreement. The periodic statements provide information on the loan amount, finance charge, total balance, the due date, and the actual APR. The actual annual percentage rates listed on the periodic statements were not bolded or in 24-point font. The actual APR is based on the assumption that a borrower will pay the full balance on the due date. The periodic statements are provided whenever a loan is made, including the initial loan that is made on the same day the credit agreement is entered into. It is printed for the borrower and the borrower signs the periodic statement.

On the due date, Payday attempts to make the pre-authorized withdrawal from the borrower's bank account. If a borrower does not have sufficient funds in his or her bank account on the due date, and does not make other arrangements to pay, i.e. entering a location to make the payment, Payday sends a collection letter. The letter requires payment of the entire balance and states that if it is not paid, Payday may initiate legal action. If the collection letter does not generate a response, Payday generally initiates a conciliation court action.

On April 30, 2014, Jason Dobosenski, who was substituted as class representative, hereinafter plaintiff, applied for and received a $250.00 loan from Payday. His credit limit with Payday was $250.00, as set forth on the credit agreement between plaintiff and Payday. Plaintiff incurred finance charges for the April 30, 2014 loan in the amount of $29.37. The finance charge comprised of $2.07 in monthly period rate, $25.00 in a cash advance charge, and $2.00 in annual fees. Plaintiff was required to pay the entire loan principal and finance charge nine days later. Plaintiff paid this first loan on the due date.

Plaintiff then sought a second loan on May 13, 2014 for his credit limit of $250. He was given the loan, and incurred a total finance charge of $29.30. The finance charge comprised of $2.30 in monthly period rate, $25.00 in a cash advance charge, and $2.00 in annual fees. Plaintiff was required to pay the entire principal amount and finance charge on May 23, 2014. Before the due date, plaintiff learned that he would not be able to pay the full amount, and called Payday. He was informed that he could not make partial payments, and did not pay the total $279.30 due. A notice and demand of payment letter was sent to Plaintiff, which indicated Payday may commence a conciliation court action. Later, Payday initiated a conciliation court action to recover in Blue Earth County, case number 07-CO-14-380. A default judgment was entered, and plaintiff's wages were garnished until the judgment was satisfied.

DISCUSSION

I. Summary Judgment Standard

Summary judgment is appropriate when the moving party demonstrates there is no genuine issue of material fact and is therefore entitled to judgment as a matter of law. Minn. R. Civ. P.

56.03; *State ex rel. Swanson v. Integrity Advance, LLC,* 846 N.W.2d 435, 439 (Minn. Ct. App. 2014). A genuine issue of material fact exists when a fact may reasonably be resolved in favor of either party. *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997). Any issue of fact should be viewed in the light most favorable to the non-moving party. *State ex rel. Swanson*, at 439. To avoid summary judgment, the nonmoving party cannot simply rely on the pleadings, but must present specific facts that demonstrate that there is a genuine issue for trial. *W.J.L. v. Bugge*, 573 N.W.2d 677, 680 (Minn. 1998).

II. Advances made by Payday were closed-end loans

It is undisputed that Payday is a short-term lender under the statute. *See* MINN. STAT. § 47.601 subd.1 (e). As such, each new advance that Payday made under the credit agreements to Plaintiff and the class constituted "a new consumer short-term loan." § 47.601. subd.1 (d). By definition, each advanced made by Payday was a new loan, and thus indicates that the advances should not be considered as part of an open-ended credit plan.

Although Minnesota Statute § 47.601 does not define open-ended credit, Minnesota has adopted the definition set out in the federal Truth in Lending Act (TILA). MINN. STAT. § 334.16 subd. 2. Under the TILA, open-end credit is defined as consumer credit extended by a creditor under a plan in which:

> (i) The creditor reasonably contemplates repeated transactions;
>
> (ii) The creditor may impose a finance charge from time to time on an outstanding unpaid balance; and
>
> (iii) The amount of credit that may be extended to the consumer during the term of the plan (up to any limit set by the creditor) is generally made available to the extent that any outstanding balance is repaid.

12 C.F.R. § 1026.2(a) (20). Closed-end credit is consumer credit other than open-end credit. 12 C.F.R. § 1026.2(a) (10). Under the TILA a loan is either closed-end or open-end credit. *See Id.*, § 1026.2(a) (20).

Courts have also recognized several non-determinative factors in determining whether a particular short-term loan is open-end or closed-end. Revolving credit is an essential characteristic of open-ended credit plans. *State v. Minn. Sch. of Business, Inc.*, 899 N.W.2d 467, 475 (Minn. 2017). Whether credit is generally extended on an ongoing basis is a factor. 12 C.F.R. § 1026.2(a) (20(iii); *see American Accounts & Advisors, Inc. v. Hendrickson*, 460 N.W.2d 83 (Minn. Ct. App. 1990). Another characteristic of a closed-ended credit transaction is if the amount of debt being fixed at the time of the transaction. *See Wise Furniture v. Dehning*, 343 N.W.2d 26 (Minn. 1984). If a balance due may be carried forward has been considered as a factor suggesting an open-end credit plan. *Id.* The terms of a loan, particularly if there is a repayment schedule or a fixed end date when the entirety of the loan is due, have also been considered. *Minn. Sch. of Business*, 899 N.W.2d at 475.

Here most factors utilized by courts indicate that the credit arrangement between Payday and the plaintiff and the class were closed-ended. First, the amount of debt was fixed at the time of each advance. The periodic statements provided the entire balance that was due, which included the calculated finance charge, and when the balance was due. If the balance listed on the periodic statement was not paid by the listed due date, the loan entered default. Although the finance charge would have changed if any borrower did pay earlier than the specified due date, the difference was not provided to the borrowers unless they called a listed number.

Second, borrowers were not allowed to carry forward unpaid balances, which indicates that the advances were not a part of an open-end credit plan. Even assuming that Payday would

have allowed borrowers to take a second advance, up to the borrower's credit limit, despite owing an unpaid balance, the second advance would not carry forward the unpaid balance. The earlier loan would be unaffected by the second advance, and the second advance would have its own due date. The earlier loan has its own due date, and a fixed number of payments that borrowers must make—one payment for the total balance. The separation of financing charges, total amount due, and due date indicate that earlier unpaid balances would not be carried forward, and thus indicate that each loan was an individual close-end loan.

The terms of the loan indicate that the arrangement was a series of close-end loans, as opposed to one open-end credit plan. There was a fixed end date for when the entirety of the loan was to be paid. This was indicated on the periodic statement, and Payday was authorized to withdraw the amount due from borrowers' bank accounts on the due date. If there were not sufficient funds available when the withdrawal is made, and the borrowers did not make other arrangements to pay, i.e. coming into the location to make a payment, the loan would be in default. Although other terms in the credit agreement and periodic statement utilize the terms, "line of credit," and "open-end credit" they are not conclusive.

The amount of debt was also fixed. This is demonstrated by the total amount terms on the periodic statements. Although it is true that the finance charge would change if a borrower managed to pay off the loan before the due date, the nature of the loans do not support such a practice. The depositions of Plaintiff and the prior class representative indicate that each borrower sought a loan from Payday in dire financial need. Indeed, Payday's practice of setting the due date for when a borrower would be receiving a payment, and defining due date as when a borrower would receive payment both show that payments were only expected to be paid on the due date, as indicated on the periodic statement.

Looking specifically at the definition of open-end credit under the TILA, the additional advances were not generally available under the credit agreement. Even assuming that Payday reasonably contemplated repeated transactions with its borrowers, and that Payday could impose a finance charge, the undisputed facts do not indicate that the credit was generally available. *See* 12 C.F.R. § 1026.2(a) (20). It is true that a borrower could have repeatedly received loans up to their credit limit, pay off the balance, and received another loan. This indicates that the credit is self-replenishing. *See* official interpretation to 12 C.F.R. § 1026.2(a) (20) at ¶5. However, each time a borrower wished to receive another advance, the borrower had to either call or return to a Payday location to receive it. This requirement of additional contact with Payday renders the credit not generally available, but instead placed an extra burden to receive additional credit. The addition steps are more akin to "separately apply[ing] for those additional advances." *Id.*

Based on the statutory definition of a consumer short-term loan, definition of open-end credit under the TILA, and factors considered by courts, the Court concludes that the advances provided by Payday to its lenders were close-end loans not open-end credit. Having made that determination, each claim shall be analyzed.

III. Claim I: Payday has charged finance charges in excess of maximum rates

Payday charged Plaintiff in his first loan a cash advance charge of $25.00 and an annual fee of $2.00, for a total administrative fee of $27.00. This finance charge was in excess of $25.00 in violation of Minnesota Statute § 47.59 subdivision 6(d). It is undisputed that all members of the class were billed similar finance charges. Indeed Payday acknowledges that it did so because it considered its loans to be open-ended – a position that the court has rejected above.

IV. Claim II: Payday failed to provide the actual APR in the statutorily required typeface

As a preliminary matter Minnesota Statute § 47.601 creates a private right of action. "A statute does not give rise to a civil cause of action unless the language of the statue is explicit or it can be determined by clear implication." *Becker v. Mayo Found,* 737 N.W.2d 200, 207 (Minn. 2007). The boldface headnotes before sections and subdivisions are mere catchwords and not a part of the statute. MINN. STAT. §645.49. The headnote for Subdivision 6 of Minnesota Statute § 47.601 reads "**Penalties for violation; private right of action.**" (Emphasis in original). Although, "private right of action," is not part of the body of the statute, "an individual or entity who violates subdivision 2 or 3 is liable to the borrower," is a part of the statute. The language of the statute explicitly creates a private cause of action. Since the language of the statute is explicit and plain, there is no need for any cannons of interpretation or review of legislative history. *KSTP-TV v. Ramsey County*, 806 N.W.2d 785, 788 (Minn. 2011) ("But if the statute is unambiguous on its face, we look no further than the plain language to determine the statute's meaning.").

An "example" APR was provided on the credit agreements between Payday and borrowers, but an example is not sufficient under Minnesota Statute § 47.601 subdivision 2(c) (4). The subdivision requires "in bold, 24-point type, the annual percentage rate as computed under United States Code, chapter 15 section 1606." MINN. STAT. § 47.601 subd 2(c) (4). That section of the United States Code then states that APR shall be determined in accordance with regulations of the Bureau of Consumer Financial Protection. 15 U.S.C. § 1606; § 1602. Regulation Z controls the calculation of APR for close-end credit and provides for various methods of calculation. *See* 12 C.F.R. § 1026.22. Regulation Z also provides for the required disclosures for closed-end credit, principal of which is the disclosure of the APR. 12 C.F.R. § 1026.18. Payday argues in footnote 8 of their memorandum in opposition of plaintiff's motion for summary judgment and in the

memorandum generally that it was not possible to calculate the actual APR. Regulation Z appears to permit an estimated APR. Specifically it provides,

> If any information necessary for an accurate disclosure is unknown to the creditor, the creditor shall make the disclosure based on the best information reasonably available at the time the disclosure is provided to the consumer, and shall state clearly that the disclosure is an estimate. 12 C.F.R. § 1026.17(c) (2) (i).

Based on the regulation above, Payday was still in violation of the federal regulation and Minnesota requirements. Inferring based on the undisputed facts that Payday was not able to provide an actual APR because Payday could not know when the loan would be paid off, Payday was still obligated to provide an estimate based on the best information reasonably available. *Id.* The best information available was a known to Payday included the due date listed on the periodic statement and information of when the borrowers' next paychecks would enter their bank accounts. That due date was used to calculate what is labeled as "ACTUAL ANNUAL PERCENTAGE RATE," on the periodic statements. The actual APR from the periodic statement represented Payday's attempt to provide a permissive estimate under Regulation Z. This estimated APR fails to meet the bold 24-point typeface disclosure requirement. MINN. STAT. § 47.601 subd 2(c) (4). The estimated APR also fails Regulation Z for not clearly stating the disclosure was an estimate. 12 C.F.R. § 1026.17(c) (2) (i). The example APR provided in the credit agreement does not meet Regulation Z's requirement that it be based on the best information available to Payday, since it was not based on when a borrower would be paid next. 12 C.F.R. § 1026.17(c) (2) (i).

Minnesota's typeface requirements are not in consistent with the requirements of the TILA. Regulation Z provides that inconsistent disclosure requirements are preempted. 12 C.F.R. § 1026.28(a) (1). "A State law is inconsistent if it requires a creditor to make

disclosures or take actions that contradict the requirements of the Federal law." *Id.* Minnesota's typeface requirement is merely a requirement in form, and does not contradict any disclosure provisions in Regulation Z.

Payday also argues that since it was not possible to precisely calculate the APR applicable to its loans, primarily because they were open-ended and thus not capable of precise calculation. However, given the court's ruling that the loans involved were in fact closed-ended, this argument fails.

V. Claim III: Payday engaged in prohibited collection practices

As discussed above, the Minnesota Statute § 47.601 does create a private right of action. Although Payday argues that the statute does not apply to them, as they are not debt collectors, Payday is a consumer short-term lender that engages collection or attempts to collect on an indebtedness in connection to their consumer short-term loan. *See* § 47.601 subd. 3. Subdivision 3 of § 47.601 refers to the prohibited debt collection practices in § 332.37. Minnesota Statute § 332.37 applies to collection agencies and collectors. As plaintiff's and the class' claim is brought under § 47.601 subd. 3, and not § 332.37 directly, Payday is prohibited as a consumer short-term lender from engaging in any of the practices listed in § 332.37 not as a debt collector but as a consumer short-term lender. The specific violation here, false representation of character, amount or legal status of debt, and threat to take any action that cannot legally be taken, is incorporated into § 332.37(12) with reference to Title 15 United States Code § 1692e, the Fair Debt Collection Practices Act of 1977.

VI. Payday is not entitled to summary judgment under theory of voluntary payment

Payday argues that the voluntary doctrine applies to bar any recovery for amounts that plaintiff and class voluntarily paid. The doctrine provides, "one who makes a payment voluntarily cannot recover it back on the ground that he was under no legal obligation to make it." *Thomas Pebbles & Co. v. Sherman*, 181 N.W. 715 (Minn. 1921); *Hanson v. Tele-Communications*, 2000 WL 1376533 (Minn. Ct. App. Sept. 26, 2000). The doctrine of voluntary payment does not apply here. There is no dispute that the plaintiff and all members of the class were contractually obligated to repay their loans along with appropriate finance charges. Thus any payments they made were not voluntary but rather because they were under a legal obligation to do so. *Thomas Pebbles & Co.*, 181 N.W. 715. The doctrine of voluntary payment does not apply, and Payday is not entitled to summary judgment on the theory.

CONCLUSION

Based on upon the entire record, findings, and reasons discussed above, Plaintiff and the classes' motion for summary judgment is partially granted. Payday's motion for summary judgment is denied. Judgment shall not be entered while issues remain – the application of the remaining defenses to individual members of the class. Both parties shall confer to address the remaining issues related to litigation.

D.H.M.