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Hennepin County, MN

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.

Case No.: 27-cv-15-18990

Case Type: Civil Other

Statutory Violation

The Honorable Daniel H. Mabley, presiding

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

INTRODUCTION

Plaintiff Jason Dobosenski, in his individual and representative capacities, and Payday America, Inc. ("Defendant" or "Payday") have agreed to settle this Action. Plaintiff, on behalf of himself and the certified class, submits this memorandum in support of his unopposed Motion for Preliminary Approval of Class Action Settlement. Plaintiff requests that the Court enter an order granting preliminary approval of this settlement as fair and reasonable to the class, set a date certain for the final Fairness Hearing, order that settlement notice be sent to all class members and order compliance with the terms of the Settlement Agreement (the "Settlement").[1]

FACTUAL AND LEGAL BACKGROUND

Defendant is a Minnesota corporation that engages in the business of selling consumer short-term loans. (Answer ¶ 3.) It is licensed with the Minnesota Commissioner of Commerce to conduct business as an industrial loan and thrift company. (*Id*. at ¶ 4.) Payday America operates fourteen branch locations in Minnesota where consumers can obtain such loans.

[1] The Settlement Agreement, and exhibits thereto, is attached as Exhibit 1 to the Affidavit of Marisa Katz in Support of Plaintiff's Motion for Preliminary Approval of Class Action Settlement ("Katz Aff.").

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The loans sold by Defendant are "consumer short term loans" as defined under Minn. Stat. § 47.601, subd. 1(d) (Answer ¶ 3) and this Court has determined that the loans are closed-end for purposes of determining maximum rates and charges under Minn. Stat. § 47.59.[2] In particular, Minn. Stat. § 47.59, subd. 3, authorizes finance charges for both open-end and closed-end loans. For closed-end loans, though, Minn. Stat. § 47.59, subd. 6(d), authorizes a financial institution to impose only a "onetime loan administrative fee *not exceeding $25* in connection with closed-end credit…[,]" in addition to the maximum allowed finance charge. (Emphasis added). For open-end loans, a lender may charge more.

For each loan sold to Plaintiff and the class, Defendant charged the maximum allowed finance charge under Minn. Stat. § 47.59, subd. 3.[3] Alongside the maximum-allowed finance charge, each loan sold to Plaintiff and the class imposed a "Cash Advance Charge" of either $25 (for loans up to $350) or $30 (for loans ranging from $351-$1000), as well as an "Annual Fee Applicable to Advances," depending on the amount of cash advanced for each loan (ranging from $2-$50). Therefore, as determined by this Court, Defendant imposed interest charges on each loan to Plaintiff and the class in excess of those allowed under Minn. Stat. § 47.59, subd. 6, since the fees assessed exceeded $25. This Court found the payday loans at issue are closed-end and held, as a matter of law, that Defendant impermissibly charged fees in excess of the maximum allowable rate for closed-end loans. Order, dated Feb. 5, 2018, at 8.

Under Minn. Stat. § 47.601, subd. 2(c), a consumer short-term lender must also furnish a copy of a written contract to the borrower of the APR charged and must disclose it in bold, 24-

[2] Throughout this litigation, Defendant has disputed its payday loans are closed-end, forming the basis of its motion to dismiss, as well as its motion for summary judgment. In its order denying Defendant's motion for summary judgment, however, the Court found the subject loans are, as a matter of law, closed-end credit. Order, Feb. 5, 2018 at 8.

[3] Plaintiff did not challenge Defendant's calculation of the finance charge resulting from the application of the monthly periodic rate, but rather the additional fees that are charged and then added to the calculated finance charge.

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point type. Plaintiff challenged Defendant's failure to include the APR in bold, 24-point type on either its form Periodic Statements or its form Credit Agreements. Rather, Plaintiff argued it had listed a bold, 24-point type "example" APR on the Credit Agreements that was not based on an actual or estimated APR for each payday loan, in violation of Minn. Stat. § 47.601, subd. 2(c)(4). The Court agreed, and granted Plaintiff and the class summary judgment on this count. Order, dated Feb. 5, 2018 at 9-11.

Under Minn. Stat. § 47.601, sub. 3, a consumer short-term lender attempting to collect on an indebtedness in connection with a consumer short-term loan must not engage in prohibited debt collection practices referenced in Minn. Stat. § 332.37. A violation of the federal FDCPA is defined under Minn. Stat. § 332.37(12) as a prohibited debt collection practice. When Mr. Dobosenski and the debt-collection subclass defaulted on one or more of their payday loans, Plaintiff argued Defendant engaged in false, deceptive and misleading representations in connection with the collection of those debts. Those false representations included the amount or legal status of the debt (*see* Minn. Stat. § 47.601, subd. 3; Minn. Stat. § 332.37(12)); that Plaintiff and the class owed money to Defendant on loans that were void (*see* Minn. Stat. § 332.37); and Defendant threatened to take action that cannot be legally taken or that is not intended to be taken (*see* Minn. Stat. § 47.601, subd. 3; Minn. Stat. § 332.37(12)). The Court agreed and granted Plaintiff summary judgment on this count. Order, dated Feb. 5, 2018 at 11.

LITIGATION HISTORY

On October 2, 2015, Plaintiff Randy Merle Holte[4] commenced legal action against Payday asserting class claims under the Minnesota Consumer Short-Term Loan Law, Minn. Stat. §§ 47.59, 47.601. As discussed above, this action concerned payday loan products sold to

[4] As the record reflects, Mr. Holte filed for Chapter 7 Bankruptcy while the parties were briefing their cross motions for summary judgment in August 2017. Shortly after counsel learned of Mr. Holte's bankruptcy status, Jason Dobosenski, a class member, was substituted in as the named plaintiff and class representative.

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consumers in which the fees comprising part of the finance charge for each loan exceed the maximum allowed rates permitted for closed-end credit under the consumer short-term loan law. Plaintiff also challenged the disclosure of the annual percentage rate (APR) in loan documents for its failure to be in at least bold, 24-point type in violation of Minn. Stat. § 47.601, and challenged Payday's debt collection efforts against members of the class with one or more loans that were in default.

Defendant filed a motion to dismiss under Minn. R. Civ. P. 12.02(e) on October 22, 2015. After full briefing and oral argument, the Court issued an order and accompanying memorandum opinion denying Defendant's motion to dismiss all three counts contained in the Class Action Complaint.[5] Order, dated May 16, 2016. The parties thereafter engaged in discovery, exchanging multiple interrogatories, requests for production of documents, requests for admissions, reviewed documents, conferred and negotiated regarding discovery disputes, and conducted depositions. Katz Aff. at ¶5. In Fall 2016, the parties agreed to temporarily stay the litigation in an attempt to settle this Action; however, a mediation on November 29, 2016, was unsuccessful. *Id*. at ¶6.

The parties resumed litigation, with Plaintiff moving for class certification on March 10, 2017. Full briefing and oral argument followed. On April 26, 2017, the Court granted Plaintiff's motion and certified the following class made up of 33,449 members:

> All persons residing in Minnesota who, from October 2, 2013 to December 31, 2016:
>
> (a) Entered into one or more consumer short-term loans with Payday America, Inc. wherein each loan contained a principal amount, or an advance on a credit limit, of $1000 or less and required a minimum payment within 60 days of loan origination or credit advance of more than 25 percent of the principal balance or credit advance; and (b) at the time of origination for each loan transaction, was assessed a finance charge consisting of the following components: "Finance

[5] Although the order denying Defendant's motion to dismiss predates the First Amended Complaint, the latter merely reflects the substitution of class representatives; the causes of action in the amended complaint were unchanged.

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> Charge resulting from application of Monthly Periodic Rate," "Cash Advance Charge," and "Annual Fee Applicable to Advances;" and (c) received a standard form "Periodic Statement with Cash Advance Feature" at the time of each loan origination or cash advance that stated the annual percentage rate (APR) for each loan in less than 24-point type.
>
> Within the above Class, the following debt-collection subclass is defined as:
> All those persons identified in (a) - (c) of this definition and who were sent letters by Payday America, Inc. informing the class member of loan default and/or who were served with process in one or more collection lawsuits in a Conciliation Court in Minnesota.

Order, dated Apr. 26, 2017. At the end of July, the Court granted Plaintiff's unopposed motion for approval of class notice (Order, dated July 31, 2017) and Class Counsel hired Angeion Group as class administrator to send out a notice informing members of the pending litigation, which occurred on August 11, 2017. Katz Aff. at ¶7. The deadline for class members to opt-out of the class litigation was October 10, 2017. *Id*. at ¶7. At the conclusion of this deadline, a total of 17 class members elected to exclude themselves from this Action. *Id*. at ¶7.

The parties filed cross-motions for summary judgment on July 26, 2017, with each party seeking summary judgment on all three counts of the class action complaint. On February 5, 2018, the Court denied Defendant's motion for summary judgment in its entirety and partially granted Plaintiff's motion for summary judgment on all three counts. Order, dated Feb 5, 2018. Although the Court found in favor of Plaintiff and the class with respect to liability on all three counts, it entered "partial" summary judgment in their favor, withholding final judgment pending resolution of four (out of an original six) remaining affirmative defenses previously raised by Defendant.

Shortly after the Court issued its order and accompanying memorandum opinion regarding summary judgment, the parties agreed to re-visit settlement negotiations with a new mediator. Katz Aff. at ¶ 9. On May 14, 2018, the parties participated in good faith, arm's-length negotiations in an attempt to resolve this action with the assistance of experienced mediator and

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retired U.S. Magistrate Judge, Arthur J. Boylan. *Id*. at ¶ 11. Following nearly 12 consecutive hours of mediation, the parties agreed to settle the action on the terms set forth in the Settlement Agreement for the purpose of avoiding the burden, expense, risk, and uncertainty of continuing these proceedings. *See* Exhibit 1 to Katz Aff. (Sett. Agr., Recitals).

SETTLEMENT NEGOTIATIONS

Not long after this Action began, the parties engaged in early, informal discussions to determine the scope of the putative class and potential damages. Katz Aff. at ¶ 6. In addition, Defendant had produced some of its financial statements and tax returns for purposes of a potential settlement so that Plaintiff could get a sense of the company's net worth. *Id*. at ¶ 6. After initial settlement discussions between counsel, the parties agreed to mediate with the assistance of a mediator. The mediation on November 29, 2016 failed. At that early stage of the litigation there was much disagreement as to the scope of the class, whether a class could be certified and the state of Defendant's financial condition; resultantly, any further discussion of settlement ended and the parties continued into full litigation mode. *Id*. at ¶ 6.

Once the Court certified the class, the parties confirmed there were 33,449 Minnesota borrowers who had taken out loans from Defendant during the class period. Katz Aff. at ¶ 7. In addition, it was estimated by Defendant that approximately 13,000 loans taken out during the class period went into default and upon which Payday had engaged in debt collection efforts. *Id*. at ¶ 12. It was this portion of the class that makes up the debt-collection subclass that was certified by the Court.

In preparation for the May 14 mediation, Class Counsel reviewed and analyzed the class data and determined that the amount of overcharge payments made by the class totaled

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$3,611,023.[6] Katz Aff. ¶ 13. The amount paid in overcharges depended on how many loans were taken out by each individual class member during the class period, as well as the principal amount of each loan. These overcharge amounts paid per class member ranged widely from $2 (*e.g.*, for one loan taken out by one class member) to $630 (*e.g.*, for 178 loans taken out by one class member) during the class period. *Id*. at ¶ 13. Given this wide range, the average overcharge payment made by class members was $108. *Id*. at ¶ 13. A significant portion of the class, 12,190 class members (36.3% of the class), paid $20 or less in overcharges during the over three-year class period. *Id*. at ¶ 13.

These overcharge payments are exclusive of additional damages incurred by the debt collection subclass in connection with collection judgments rendered against class members with loans in default. These include filing fees, attorneys' fees, and fees associated with wage garnishment. Defendant's records indicate there are approximately 1,750 members of the debt collection subclass with balances still due and owing. The total dollar amount of judgments that Defendant obtained for loans made during the Class Period where the judgment remains unsatisfied is approximately $850,000. Declaration of Keith Kaestner ("Kaestner Decl.") at ¶ 5. Defendant estimates that if it were to collect all of the outstanding balances that it has agreed to reduce to $0, that amount would total approximately $850,000. *Id*. Furthermore, the additional statutory damages available under all of Plaintiffs' causes of action that a court could award bring the total potential damages recoverable in this case to several dozen million dollars, given the large number of class members and the number of counts in the complaint.

[6] The amount overpaid for each payday loan is the "cash advance charge" plus the "annual fee applicable to advances" less $25, since, for closed-end transactions, short-term lenders are limited to charging a "onetime loan administrative fee *not exceeding $25* in connection with closed-end credit." Minn. Stat. § 47.59, subd 6(d) (emphasis added).

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During the May 14 mediation, the parties devoted considerable time in their negotiations to addressing the viability of monetary compensation to the nearly 34,000 member class in the context of Defendant's financial condition, as well as the significant costs associated with administering cash compensation to each class member. Katz Aff. at ¶ 14. Class Counsel analyzed, in detail, Defendant's financial information, including available assets and outstanding debt and other liabilities, as well as the class damages data, both before and during the mediation. Class Counsel, along with Judge Boylan, discussed and considered the cost-benefit analysis in this scenario, weighing the costs of administration to enable cash awards for class members against the actual amounts class members would be getting. *Id*. at ¶ 14.

The mediation was highly contested, with counsel for each side advancing their respective arguments zealously on behalf of their clients while demonstrating their willingness to continue to litigate rather than accept a settlement not in the best interests of their clients. Boylan Decl. at ¶ 10. The negotiations were hard fought throughout, and the settlement process was conducted at arm's length and, while conducted in a highly professional manner, was quite adversarial. *Id*.

It became clear during the course of the mediation that Defendant's financial condition and current debt structure made it unfeasible to pay sufficient money into a settlement fund to pay for the costs of administering a cash payment, a cash payment to class members that would be more than a few dollars, the class's statutory attorney fees, and the costs of litigation. Katz Aff. at ¶ 15. Without sufficient cash to pay into a settlement fund, the overwhelming majority of class members would, at most, receive an award in the range of a fraction of one dollar to a few dollars each after paying administration costs, fees, and litigation costs.

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After running through multiple models for possible distribution and the amounts of cash that would be needed, it became apparent that the costs of administration to issue a majority of cash awards for objectively insubstantial amounts outweighed the relatively minor economic benefit of giving *some* amount of cash to class members. Katz Aff. at ¶ 15. In the end, the most reasonable solution with the most long-term economic benefit for the Class was to permanently stop Payday's business practice of selling the loan product at issue in this litigation as open-end credit and assessing those overcharges. *Id*. at ¶ 16. In particular, given that the payday loan customer base comprises consumers who, in large numbers, return to Payday for additional loans, the permanent ending of Defendant's practice that resulted in overcharge payments was a fair and reasonable result in light of the very limited funds at its disposal. *Id*. at ¶ 16. Indeed, Payday estimates it could have reasonably expected to collect approximately $7 million to $9 million in cash advance fees and annual charges above the loan administrative fees commensurate with closed-end credit. As a result of the Settlement, Payday will not charge this additional $7 million to $9 million on the loan product that is the subject of the lawsuit because it has agreed to no longer market and sell this loan product as open-end credit. Keastner Decl. at ¶ 4. This is a major economic benefit to the class and beyond.

In addition, another complication in the distribution models was that the amount any one individual paid in overcharges had no bearing on the additional damages incurred by members of the debt-collection subclass. For instance, a class member who might have paid $200 in overcharges for multiple loans that were always repaid on time would have had the same damages as a class member who only took out one payday loan but who defaulted and had his wages garnished by Payday. As a result, any *pro rata* distribution calculations based on overcharges would have been further complicated by debt-collection damages incurred by the

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debt-collection subclass, all of whom defaulted on various numbers of loans, in various amounts and with various balances due and owing. This would have invariably increased the costs of administration by a substantial amount, further depleting already limited funds for distribution to the class. To that end, Payday agreed to cease collection efforts on any remaining outstanding balances from loans taken out during the class period and reduce those balances to $0. This translates to a monetary benefit totaling approximately $850,000 to the class. Kaestner Decl. at ¶ 5. Payday further agreed to cause the satisfaction of any unsatisfied judgments remaining on class member loan accounts.

Defendant will also pay all costs of administration of this settlement—which Class Counsel estimate to be in the range of $40,000 to $100,00 given experience with similar size class settlements (Katz Aff. at ¶ 15)—as well as $750,000 into a Settlement Fund for payment of the class's attorney fees, litigation costs, and the Class Representative service award, if this Settlement is approved by the Court. This cash payment will go toward paying the class's attorneys' fees for nearly three years of hard fought litigation in which it prevailed on multiple pre-trial motions on a contingency basis: Defendant's motion to dismiss, Plaintiff's motion for class certification and both parties' cross motions for summary judgment. Also, in Class Counsel's experience, given the large number of class members, there will be much work to be done *after* final approval of settlement: there will be many inquiries about the settlement by class members that will require both attorney and staff time, as well as issues that come up for individual class members. Katz Aff. at ¶17. Given comparable class cases (in terms of the number of class members) that Class Counsel have handled in the past, it is reasonable to estimate that there will be several hundred additional hours expended by Class Counsel and their firm in the year after approval of this settlement. *Id*. at ¶ 17.

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Furthermore, by the end of this litigation, Class Counsel will have expended close to $28,000 in out of pocket litigation costs, which, if this Settlement is approved, will also be paid out of the Settlement Fund. Katz Aff. at ¶ 17. Also to be paid out of the Settlement Fund, pending approval by the Court, is the class representative service award to Mr. Dobosenski in the amount of $7,500 in recognition of his efforts and ongoing commitment to this case during litigation and settlement negotiations.

In sum, after negotiations that were hard-fought on both sides, and with the assistance of a very experienced and well-respected mediator, the parties came to an agreement on a fair, reasonable and equitable way to benefit the class given the challenging circumstances surrounding Payday's financial condition and the class size. Boylan Decl. ¶¶ at 9-10; Katz Aff. at ¶ 20. The parties agreed to a robust settlement comprising valuable injunctive relief that will translate into millions of dollars in savings to the class, payment by Defendant of all settlement administration costs, and a cash component of $750,000 inclusive of the class's attorney fees, litigation costs, and a class representative service award. Sett. Agr. at §§ 5-7.

While deferring to the Court for the ultimate determination of the fairness, reasonableness and adequacy of the Settlement, Judge Boylan offers his view that the proposed Settlement is a reasonable result, obtained at arm's length after a professionally conducted, adversarial negotiating process. Boylan Decl. at ¶ 13. Based on his extensive experience as a mediator in class actions and former judge, as well as the facts and circumstances of the case, Judge Boylan opines that the Settlement "provides for substantial benefits and relief to the Class and is a fair, adequate and reasonable settlement reached through arm's-length negotiations by skilled, well informed counsel... ." *Id.* He adds, "It is my opinion that the Settlement is not only

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within the range of reasonableness and subject to preliminary approval but is fair, adequate, and reasonable and in the best interests of the Class, free from any collusion." *Id.*

TERMS OF THE SETTLEMENT AGREEMENT AND BENEFITS TO CLASS MEMBERS

A. Payday America will end its practice of selling the subject loans as open-end credit.

Under the terms of the Settlement, Payday agrees to no longer market and sell the loan product that is the subject of this lawsuit as open-end credit and further agrees that if it sells the loan product that is the subject of this lawsuit, then it will not assess,c harge, and collect annual charges and cash advance fees in violation of Minn. Stat. § 47.59, as amended. Sett. Agr. at § 6(a).[7] This term of the Settlement is estimated to translate to a monetary benefit of $7 million to $9 million to the class and beyond in the next seven years. Kaestner Decl. at ¶ 4.

B. Payday America will disclose APRs in bold, 24-point type.

As required by Minn. Stat. § 47.601, Payday agrees to disclose the actual annual percentage rate calculated at the time each loan product is taken out by a consumer borrower in at least bold, 24-point font. Sett. Agr. at § 6(b).

C. Payday America will cease all collection activity.

Under the Settlement, Payday agrees to reduce to $0 any balances owed by Settling Class Members that arose from a loan that Payday made to the class during the class period. Sett. Agr. at § 7(a). Payday also agrees to cease any and all collection efforts on such accounts. *Id*. This term of the Settlement is estimated to translate to a monetary benefit of $850,000 to the Class. Kaestner Decl. at ¶ 5.

[7] Payday is not prohibited from developing an open-end loan product in the future that complies with Minn. Stat. §§ 47.59 and 47.601. Sett. Agr. at § 6(c).

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D. Satisfaction of judgments already rendered against class members.

For judgments previously entered in favor of Payday and against class members that arose from a loan Payday made during the Class Period and which remain unsatisfied, Payday agrees to file the necessary documents to indicate the satisfaction of the judgment. Sett. Agr. at § 7(b).

E. The Settlement Fund.

Under the Settlement, Payday agrees to pay a total of $750,000[8] in to an escrow account to be maintained by the Class Administrator ("Settlement Fund") for the purpose of paying: (a) the amount the Court awards Class Counsel as attorneys' fees and litigation expenses; (b) a class representative service award the Court may award the Class Representative for his efforts in prosecuting this Litigation on behalf of the class; and (c) if any amount remains in the Settlement Fund after (a) and (b), to go to the *cy pres* recipients as set forth in amended Minn. R. Civ. P. 23.05(a)(2), which goes into effect on July 1, 2018. Sett. Agr. at § 5(a).

F. Total Value of Settlement Benefits.

The total value of this settlement includes all of the components detailed in the sections above. Specifically, $7 million to $9 million in charges over the next seven years (and more in the years following) that will no longer be charged to Payday customers; $850,000 in judgments against class members that Payday will not collect; approximately $40,000 to $100,000 in class settlement administration costs that Payday will pay; the $8,400 in mediation fees it already paid; and; the $750,000 Settlement Fund to cover the class's attorney fees, litigation costs, and the Class Representative service award (all to be determined by the Court), for *a total settlement*

[8] Defendant also agreed to pay (and has paid) the costs of the May 14, 2018 mediation, which is an additional monetary benefit to the Class that is not included in the amounts spelled out in the Settlement Agreement.

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value of between $8,640,000 and $10,700,000, if only the injunctive relief value is calculated for the next seven years rather than a longer period of time.

G. Settlement Notice and Class Administration.

If this Court preliminarily approves the Settlement as fair, reasonable and adequate, and approves the proposed Settlement Notice, Defendant will provide to the Class Administrator, Angeion Group, an updated list of the names, email address (if any), and last known mailing addresses of the Settling Class Members. Sett. Agr. at ¶ 3(a). The proposed Settlement Notice is attached to the Settlement Agreement as Exhibit B and meets the requirements of Minn. R. Civ. P. 23 to inform the Settling Class Members of the benefits of the settlement and what they need to do if they wish to object. Sett. Agr. at ¶ 4.

Promptly after the entry of the Preliminary Approval Order, if so approved, the Class Administrator shall send the Settlement Notice by email to all those Settling Class Members for whom Payday maintains email addresses and shall send the Settlement Notice by postcard to the mailing address for all those Settling Class Members for whom Payday does not maintain email addresses. Sett. Agr. at ¶ 3(b). For those emailed Settlement Notices that are returned as undeliverable, the Class Administrator shall promptly mail the postcard Settlement Notice to the mailing address contained in Payday's business records. *Id*.

Payday will pay the costs incurred by the Class Administrator associated with the following tasks: (i) emailing and mailing the Settlement Notice to the Settling Class Members, (ii) updating and maintaining the class action website, www.minnesotapaydayclassaction.com, previously set up by Class Counsel, which will contain the full text of the Settlement Notice, the amended Complaint, Answer, and the Settlement Agreement as well as any orders issued by the Court; (iii) providing live operators to give telephone assistance to the Settling Class Members

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who have general questions about the notice, and to refer others to Class Counsel, and (iv) maintaining an escrow account to manage the Settlement Fund. *Id*. at ¶ 3(b 3(c).

H. Objections to Settlement.

Any Settling Class Member may object to the proposed Settlement. Sett. Agr. at ¶ 4(a). The Settling Class Member must mail the objection to the Administrator by the deadline established in the Preliminary Approval Order and Settlement Notice. *Id*. The Parties will ask the Court to establish an Objection Deadline of no later than 45 calendar days following the date on which the Settlement Notice is first e-mailed or mailed by the Administrator. *Id*. To be considered valid, each Objection must be timely filed with the District Court Administrator and served (as judged by the filing deadline and postmark date set forth), and must (i) state the Settling Class Member's full name, address, and telephone number; (ii) the name and case number of this lawsuit; (iii) provide a statement indicating the following, "I object to the settlement in *Dobosenski v. Payday America*" and the detailed reason(s) for his or her objection, along with copies of any documents that the class member wishes to submit in support of his or her position that the settlement is not in the best interests of the class; (iv) a statement about whether he or she intends to appear at the final Fairness Hearing, either in person or through his or her attorney; and (v) the objecting class member's signature. *Id*.

I. Settlement Administration.

Within 30 days of the Effective Date, which is the later of (1) 30 days following the Court's order granting final approval if no appeal is taken of such order, or (2) the Court's entry of a final order and judgment after any appeals are resolved, the Claims Administrator will distribute the money in the Settlement Fund by making the following payments: (1) paying Class Counsel's attorneys' fees and costs, if approved by this Court; (2) paying the class representative

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his service award, if approved; and (3) if any amount remains in the Settlement Fund after (1) and (2), to go to *cy pres* recipients as set forth in amended Minn. R. Civ. P. 23.05(a)(2), which goes into effect on July 1, 2018. Sett. Agr. at § 5(a). Defendant shall pay the costs of Notice and administration of the settlement.

J. Class Representative Service Award.

Subject to the Court's approval, Plaintiff Jason Dobosenski, seeks to receive $7,500 from the Settlement Fund as compensation for his time and effort in participating in this action, settlement negotiations, and otherwise assisting Class Counsel on behalf of the class. Sett. Agr. at § 5(c). The Settlement Notice will inform class members of the service award sought.

This service award is warranted because Mr. Dobosenski played an active role in this litigation: he provided information to counsel, reviewed the pleadings, participated in discovery, prepared for and had his deposition taken, participated in the mediation session, and kept in contact with Class Counsel since he was substituted in as named plaintiff and class representative. Dobosenski Aff. at ¶¶ 9-11. His participation and resolve were critical to the continued litigation and ultimate settlement of this matter. Furthermore, Mr. Dobosenski believes this settlement to be fair, reasonable and in the best interests of the class. *Id*. at ¶ 13.

K. Class Counsel's Fees and Expenses.

Prior to the fairness hearing, Class Counsel will file a motion with the Court seeking an award of class attorneys' fees of $714,500 (for current and future attorney fees) and litigation expenses of $28,000, in a total amount not exceeding $742,500. Sett. Agr. at § 5(b). Payday agrees it will not oppose Class Counsel's motion. *Id*. Class Counsel will be reimbursed and indemnified solely out of the Settlement Fund. *Id*. All costs, fees, and expenses of Class Counsel as determined by the Court will be paid out of the Settlement Fund. Class Counsel in this case is

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Vildan Teske and Marisa Katz and their firm Teske, Katz, Kitzer & Rochel, PLLP. Any portion of attorneys' fees and litigation costs not approved shall remain in the Settlement Fund until distribution as *cy pres* under Minn. R. Civ. P. 23.05(a)(2). The Settlement Notice will inform class members of the attorneys' fees and costs requested.

L. Release of Claims.

As part of the Agreement, Plaintiff and Settling Class Members will fully release and discharge the Payday Released Parties, as defined in the Settlement Agreement, "from any and all settled claims." Sett. Agr. at § 8(a). As a result, Defendant will not be subject to liability or expense of any kind to Settling Class Members with respect to any of the Settled Claims, where the provisions of the Settlement shall be the exclusive remedy of all Settling Class Members against the Defendant. *Id*. at § 8(b). Each Settling Class Member will be forever barred from asserting any of the settled claims against Defendant. *Id*. at § 8(c).

ARGUMENT

I. The Court Should Preliminarily Approve the Settlement.

Rule 23.05(a) of the Minnesota Rules of Civil Procedure provides that class actions may be settled, voluntarily dismissed, or compromised only with the court's approval.[9] The Court has a duty to protect the rights of absent class members as well as the interests of the named plaintiff. *White v. Nat'l Football League*, 822 F. Supp. 1389, 1416 (D. Minn. 1993). The Court's initial task is to make a preliminary evaluation of the fairness of the settlement before directing that notice be given to the settlement class. *Id* at 1399. The class will be notified of the fairness hearing, the goal of which is to determine all information necessary for the court to rule on

[9] "Because of the substantial similarity between Minnesota's rule 23 and Fed. R. Civ. P. 23, 'federal precedent is instructive in interpreting our rule.'" *Whitaker v. 3M Co*., 764 N.W.2d 631, 635 (Minn. App. 2009) (citing *Glen Lewy Trust v. Inv. Advisors, Inc*., 650 N.W.2d 445, 452 (Minn. App. 2002); *see also* Minn. R. Civ. P. 23, 2006 & 1968 advisory comm. comments.).

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whether the proposed settlement is fair, reasonable, and adequate. *Van Horn v. Trickey*, 840 F.2d 604, 606 (8th Cir. 1988) ("In approving a class settlement, the district court must consider whether it is fair, reasonable, and adequate."); *see also State v. St. Joseph's Hosp*., 366 N.W.2d 403, 406 (Minn. Ct. App. 1985) ("The standard in these cases is whether the settlement is fair, adequate, reasonable, and is not the product of collusion between the parties.")

Here, although the case is only at the preliminary approval stage, it is apparent this settlement satisfies the elements of both preliminary and final approval. As will be discussed, the Settlement is a product of arm's length negotiations that resolved disputed claims. The parties are in agreement that the proposed settlement negotiated between them satisfies the standards for judicial approval, and request that the Court grant preliminary approval accordingly.

II. The Settlement is Fair, Reasonable and Adequate.

The voluntary resolution of litigation is looked upon with favor by the courts. *Holden v. Burlington N., Inc.*, 665 F. Supp. 1398, 1405 (D. Minn. 1987). This is particularly so with class action litigation. *White*, 822 F. Supp. at 1416 (D. Minn. 1993). "Strong public policy favors [settlement] agreements, and courts should approach them with a presumption in their favor." *Petrovic v. Amoco Oil Co*., 200 F.3d 1140, 1148 (8th Cir. 1999) (citing *Little Rock Sch. Dist. v. Pulaski Cnty. Special Sch. Dist. No. 1*, 921 F.2d 1371, 1388 (8th Cir. 1990)). By supporting the settlement of complex class action litigation, the judiciary can minimize litigation expenses on both sides, reduce the strain on scarce judicial resources and avoid the risk of trial to both parties. *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig*., 55 F.3d 768, 784 (3d Cir. 1995) (citing cases: Newberg on Class Actions §11.41 (4th Ed. 2002)).

In determining whether to approve a settlement, the Court considers various factors, including: "1. [t]he settlement is reached through arm's length bargaining; 2. investigation and

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discovery are sufficient to allow counsel and the court to act intelligently; 3. counsel is experienced in similar litigation; and 4. the percentage of objectors is small." *Kurvers v. National Computer Systems, Inc.*, 2003 WL 25437178 (Minn. Dist. Ct. 2003). There is a "presumption of fairness" if these four basic factors are present. *Id.*

Courts also consider a number of additional factors in assessing the ultimate "fairness" of a class action settlement, including, "(1) the reasonableness of the settlement in light of all attendant risks of litigation; (2) the expense, likely duration and complexity of litigation; (3) the opinions of the representatives of class members, class counsel and class representatives and (4) the extent of discovery completed and the stage of the proceedings." *Welsch v. Gardebring*, 667 F. Supp. 1284, 1290 (D. Minn. 1987); *Grunin v. Int'l House of Pancakes*, 513 F.2d 114, 124 (8th Cir. 1975). When the proposed settlement in this case is measured against these standards, it is apparent that it is both reasonable and in the best interests of the class and should be preliminarily approved.

A. Class Counsel and the Class Representative Believe that the Proposed Settlement is Fair and Reasonable.

In considering approval of a settlement, the Court must consider the views of Class Counsel and of the Class Representative. Class Counsel are experienced in this type of litigation, having litigated and settled numerous class actions and complex cases. *See* Katz Aff., filed Mar. 10, 2017 in support of Pl's mot. for class cert., at ¶¶ 8-11; Teske Aff., filed Mar. 10, 2017 in support of Pl's mot. for class cert., at ¶¶ 2-11. Here, Class Counsel are of the opinion that this is a fair and reasonable settlement given the circumstances present in this case. Katz Aff. at ¶ 22. The opinion of experienced counsel should be given significant weight, and the Court is entitled to rely on these evaluations. *Welsch*, 667 F. Supp. at 1295; *St. Joseph's Hosp*., 366 N.W.2d at 406 ("The trial court, absent a finding of fraud or collusion, should be hesitant to substitute its

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own judgment for that of counsel.") Moreover, Magistrate Judge Boylan, who presided as mediator for the May 14 mediation, also believes this settlement is adequate, fair, reasonable and in the best interests of the class. Boylan Decl. at ¶ 13; *see also In re Target Corp. Customer Data Sec. Breach Litig*., 2015 U.S. Dist. LEXIS 155137 at *14 (D. Minn. Nov. 17, 2015) (court noting the mediator's "helpful and factual descriptions of the settlement process" in order granting final approval of class settlement) (Exh. 2 to Katz Aff.)

As explained in detail above, Class Counsel spent a great deal of time devising a settlement that is fair and in the best interests of the class against the backdrop of Defendant's financial condition and the large number of class members. In the end, the best possible result was to ensure that Payday stopped its business practice of selling the loan products at issue in this litigation as open-end credit and assessing those charges to consumers. Additionally, the payday loan customer base comprises largely low-income, cash-strapped consumers, many of whom return to Defendant for additional loans, further bolstering the importance of permanent injunctive relief regarding Defendant's practice, which will result in a total of $7 million to $9 million in overall savings for class members and consumers in the next seven years (Kaestner Decl. at ¶ 4), and additional settlement benefits that bring the total value of this settlement to between $8.6 and $10.7 million.

Indeed, Courts have previously recognized the monetary value of such settlements, even if class members do not receive cash awards directly. *See, e.g., In re Xcel Energy, Inc., Sec., Derivative & "ERISA" Litig.*, 364 F. Supp. 2d 980, 1003 (D. Minn. 2005) ("Despite the relief in this case being nonmonetary, plaintiff's counsel negotiated what can be coined 'therapeutic relief' for the class. The benefits conferred go to the very nature of the corporate governance that plaintiff challenged as deficient."); *First State Orthopaedics v. Concentra, Inc.*, 534 F. Supp. 2d

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500, 522 (E.D. Pa. 2007) ("While the nonmonetary relief mandates increased scrutiny of the settlement, the court is persuaded that the settlement cures many of the objectionable practices complained of by the plaintiffs and provides real benefits to the class despite the absence of any monetary payment."); *Zimmerman v. Bell*, 800 F.2d 386, 391 (4th Cir. 1986) (quoting *Maher v. Zapata Corporation*, 714 F.2d 436, 466 (5th Cir.1983) ("Influencing the future conduct of management may serve the interests of the corporation as fully as a recovery for past misconduct, and a settlement may be accepted 'even though no direct monetary benefits are paid by the defendants to the corporation.'"); *Pinto v. Spectrum Chems. & Lab. Prods.*, 985 A.2d 1239, 1250-51 (N.J. 2010) ("equitable relief in many cases will have a substantial public benefit as well as financial value to the client").

Finally, the Class Representative is of the opinion that the proposed Settlement is in the best interests of the class. Dobosenski Aff. at ¶¶ 13-14. Mr. Dobosenski was involved in settlement discussions, participated in the mediation with Judge Boylan, has discussed the merits of the Settlement with Class Counsel in detail, and has approved the settlement. *Id.* This factor, too, favors preliminary approval.

B. The Complexity and Expense of Future Litigation Support Preliminary Approval of the Proposed Settlement.

This factor takes into account the probable costs, in both time and money, of continued litigation through trial and appeals. Settling Class Members will receive substantial equitable benefits under the Settlement, including no longer being charged annual charges and cash advance fees in violation of Minn. Stat. § 47.59 if it continues to use the loan product at issue in this litigation, relief from any previous outstanding loan balances for loans taken out during the class period, and satisfaction of prior judgments against them for loans taken out during the class period without the risk of protracted, continued and uncertain litigation. Additional and lengthy

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litigation, including appellate litigation, would be necessary to bring this dispute to a conclusion. Indeed, Defendant has vigorously disputed the claims in this case, arguing, among other things, that its loan products are open-end credit and the charges associated with open end credit are, therefore, lawful.

"The very purpose of compromise is to avoid the delay and expense of . . . a trial." *DeBoer v. Mellon Mortg. Co.*, 64 F.3d 1171, 1178 (8th Cir. 1995). Rather than assuming the risk of future, and possibly uncertain litigation, Settling Cass Members will be able to take advantage of the benefits provided through this settlement. Thus, the agreed settlement relief could exceed what Plaintiffs might have obtained after an award of judgment at trial, which, given Defendant's financial condition, could have resulted in it going out of business where class members would be left with nothing. This factor weighs heavily in favor of final approval of the settlement. Furthermore, the benefits of this settlement will be available to class members immediately rather than after several years of additional litigation.

C. The Proposed Settlement is a Product of Arm's Length Negotiations.

In reviewing the merits of any proposed settlement, the Court must determine whether the settlement is the product of arm's length negotiations, or of fraud or collusion. To make this evaluation, the Court must look to the conduct of the negotiations that led to the proposed settlement. *Holden*, 665 F. Supp. at 1424 (D. Minn. 1987). The history of this case indicates that this factor weighs strongly in favor of approving the settlement. This action was commenced after months of investigation and due diligence by Class Counsel and was vigorously prosecuted and defended by both sides for nearly three years. Katz Aff. at ¶ 18; Boylan Decl. at ¶¶ 7, 10. Every pre-trial motion, dispositive and non-dispositive, was hotly contested, fully researched, briefed and argued before the Court. The parties engaged in full discovery, including document

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productions, a number of discussions about discovery disputes, and depositions. Katz Aff. at ¶ 5. Over the course of this case, two mediations were scheduled: the first one in November 2016, which was unsuccessful and the one on May 14, which resulted in this Settlement. *Id*. at ¶ 11; Boylan Decl. at 4. There can be no question this Settlement is the product of arm's length negotiations. Boylan Decl. at ¶ 13 ("I can attest that the proposed settlement is a reasonable result, obtained at arm's length after a professionally conducted, adversarial negotiating process…").

D. The Proposed Settlement Notice Satisfies the Requirements of Minnesota Rule of Civil Procedure 23.

Rule 23.03(b)(2) requires the Court direct to class members "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." To meet this standard, class notice need only be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Grunin*, 513 F.2d at 120.

The proposed Settlement Notice (attached to the Settlement as Exhibit B) meets the requirements of Minn. R. Civ. P. 23. It provides the class definition and information regarding the nature of the claims in the case, the settlement benefits, how to get more information regarding the settlement and the underlying case, how and by when one can object to the settlement, contact information for Class Counsel, the amount Class Counsel will be petitioning the Court for attorneys' fees and costs, and the amount Class Counsel will be petitioning the Court for a class representative service award. Sett. Agr., Exh. B. The Notice will be sent to those class members who did not opt-out of this litigation, by email to those class members for whom Payday maintains email addresses, and by postcard mailed to those class members for whom Payday does not maintain email address but does have a mailing address. Sett. Agr. at §

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3(b).The method and manner of notifying the class members, as well as the content of the proposed Settlement Notice, meet the requirements of Rule 23.

CONCLUSION

This Settlement meets all the requirements for this Court to grant preliminary approval. The parties engaged in arm's length negotiations. These negotiations were conducted in a fair and meaningful manner, and the proposed settlement gives the class significant benefits. This settlement is fair, reasonable and adequate at law. Plaintiff, therefore, respectfully requests this Court grant preliminary approval, and order that Settlement Notice be sent to Settlement Class Members, and that the parties perform as provided for in the Settlement Agreement.

Respectfully submitted,

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