FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2016CP4002859

South Carolina Department Of Consumer Affairs
PLAINTIFF(S)

Cash Central Of South Carolina LLC
DEFENDANT(S)

Submitted by:	Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT**. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT**. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

RECEIVED
DEC 29 2017
SC Court of Appeals

ORDER INFORMATION

This order ☒ ends ☐ does not end the case. Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		$
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge Edward **Judge Code** 2164 **Date** 9/28/17

For Clerk of Court Office Use Only

This judgment was entered on the 28 day of Sept, 20 17 and a copy mailed first class or placed in the appropriate attorney's box on this 29 day of Sept, 20 17 to attorneys of record or to parties (when appearing pro se) as follows:

Kelly Hunter Rainsford | James Y. Becker | Mary M Caskey

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter

Clerk of Court Jeanette W. McBride

SCRCP Form 4C (10/2011)

SCANNED

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

Case No. 2016-CP-40-02859

South Carolina Department of Consumer Affairs,

Plaintiff,

vs.

Cash Central of South Carolina, LLC,

Defendant.

FINAL ORDER AND JUDGMENT

In this action, Plaintiff South Carolina Department of Consumer Affairs (the "Department") alleges that Defendant Cash Central of South Carolina, LLC ("Cash Central") failed to comply with S.C. Code Ann. §§ 37-3-201 and 37-3-305, which collectively require a lender seeking to charge a finance charge in excess of eighteen (18%) percent (1) to file with the Department and (2) to post a maximum loan rate schedule in a conspicuous place in its place of business. A trial in this matter was held before this Court on September 6 and 7, 2017. The Department appeared through its attorneys Kelly H. Rainsford and James C. Copeland, and Cash Central appeared through its attorneys James Y. Becker and Mary M. Caskey. As explained below, the Court grants final judgment in favor of Cash Central.

INTRODUCTION

Cash Central was duly licensed by the South Carolina State Board of Financial Institutions ("Board") on October 2, 2013, to operate as a supervised consumer lender in South Carolina and to

do business in South Carolina as www.cashcentral.com.[1] Cash Central has no physical loan offices in South Carolina and operates entirely online.

The Department alleges that Cash Central failed to comply with S.C. Code Ann. §§ 37-3-201 and 37-3-305 by failing to file with the Department a Department-prescribed form identifying Cash Central's maximum loan rates for each category of loan on three occasions between 2013 and 2015, and by failing to post a Maximum Rate Schedule *issued by the Department* in a conspicuous place on its website. S.C. Code Ann. § 37-3-305(3) also requires a lender to include with its posted Maximum Rate Schedule a 127-word disclosure statement.

Cash Central does not dispute that it failed to file the required form with the Department between October 24, 2013, when it first began making loans in South Carolina, and April 10, 2015, when the Department first issued a Maximum Rate Schedule for Cash Central (the "Relevant Time Period"). However, Cash Central presented compelling and essentially uncontradicted evidence that it posted on its website a "South Carolina Fee Schedule" page, which was easily accessible to all of its loan customers, and which included a rate chart with "a series of rates for different dollar amounts and maturities of loans" and the statutorily required 127-word disclosure language. In all meaningful respects, Cash Central's "posting" was equivalent to or superior than the Maximum Rate Schedule issued by the Department for achieving the statutory purpose of promoting consumers' informed use of credit. Additionally, all of Cash Central's loan customers during the Relevant Time Period initiated their loan transaction process online through an interactive and customizable loan calculator that displayed the actual annual percentage rate ("APR") for their particular loan.

Cash Central also presented unrebutted evidence from Rebecca Fox, the Regional Counsel for Cash Central, and Bridgette C. Roman, General Counsel of Community Choice, the corporate

[1] Unlike in other states, supervised lenders such as Cash Central are regulated by two different state agencies.

parent of Cash Central, of the significant efforts taken by Cash Central to comply with South Carolina law. Ms. Fox testified that she created a compliance policy and procedure for Cash Central to operate in South Carolina, which included filing and posting the Maximum Rate Schedule. She also testified that she had copies of the forms ready to file once the licensing process with the Board was complete. Ms. Roman testified concerning the procedures in place for the renewal of the filing with the Department, and offered an explanation for how the first failure to file the maximum rate schedule with the Department ultimately led to the second and third failure to file.

The evidence submitted by Cash Central in support of its affirmative defenses was uncontradicted by the Department. Instead, the Department's two witnesses testified that only perfect compliance with the statutes at issue and the Department's requirements would suffice. Former Assistant Commissioner of the Board Jim Copeland testified that when the Board completes an examination of a supervised online lender, the Board looks for a copy of the certified version of the Maximum Rate Schedule issued by the Department to be posted on the lender's website. Department Administrator Carri Gruber Lybarker similarly testified that the Department requires that a lender file their maximum rates with the Department and that any posting must include the exact information that would have been included in the Maximum Rate Schedule actually issued by the Department, such that if a lender failed to file the lender could never reasonably expect to comply with the related posting requirement. However, S.C. Code Ann. §§ 37-3-201 and 37-3-305 do not require perfect compliance. Three affirmative defenses asserted by Cash Central – the bona fide error defense, substantial compliance defense, and the excusable neglect defense – either excuse or limit liability where a lender's actions failed to perfectly comply with statutory requirements. The overwhelming weight of the evidence presented at trial demonstrates that Cash

Central intended in good faith to comply with the filing requirements and the failure to do so was unquestionably the result of human error qualifying as a bona fide error or excusable neglect, or both, under the relevant statutory provisions. Further, the evidence demonstrates that Cash Central did in fact comply or substantially comply with the relevant posting requirements, because the purpose of the Code sections at issue – to promote the informed use of credit and to further the consumer's understanding of the terms of their consumer credit transaction – was fulfilled by Cash Central's actions.

The Court concludes that Cash Central is entitled to judgment on each of the three affirmative defenses asserted in its Second Amended Answer. As required by S.C. Code Ann. § 37-3-201(6) the Court orders a penalty of $5,000 per instance, for a total penalty of $15,000, for Cash Central's failure to file the maximum rate schedule in 2013, 2014, and 2015.

FINDINGS OF FACT

1. Cash Central is a web-based lender, which provides short-term and medium-term credit products ranging from $750 to $5,000. It is a wholly owned subsidiary of Direct Financial Solutions LLC, which is a wholly owned subsidiary of Community Choice Financial Inc. ("Community Choice"). Direct Financial Solutions provides operational support services to Cash Central pursuant to a management agreement.

2. Prior to and during the Relevant Time Period, when a subsidiary of Community Choice began operations in a new state, it was the procedure of the company to have a member of the legal department create a detailed compliance outline of the statutory and regulatory requirements for the Community Choice subsidiary to do business in that state. The compliance outline was then used as a policy and procedure manual for the group of Cash Central employees tasked with ensuring compliance with all state requirements.

3. Cash Central began preparing to do business in South Carolina in early 2013. Rebecca Fox, the Regional Counsel for Community Choice at the time, researched South Carolina's statutes, regulations, and licensing requirements for Cash Central's intended lending operations. In accordance with the policy and procedure in place at the time, she prepared a detailed compliance outline of the requirements for supervised lenders in South Carolina, and her outline specifically referenced the filing and posting requirements for the Maximum Rate Schedule. The compliance outline was available to any person working on the commencement of operations in South Carolina, from marketing to collection to licensing.

4. Ms. Fox also prepared drafts of the two forms prescribed by the Department for lenders to file, and worked with Amy Jennings, the Director of Compliance at the time, to ensure the forms were filed. Ms. Fox's and Ms. Jennings' files contain fully completed drafts of the Department's Maximum Rate Schedule filing form and Consumer Credit Grantor Notification form, which were prepared on or about February 4, 2013. Although the documents were never actually sent to the Department, Ms. Fox testified that she intended for the forms be filed with the Department, but that in February 2013 she did not have a final loan and interest rate chart or list to attach to the filing form, as the loan products and interest rates were still under review. She also testified that she planned to wait until Cash Central had obtained a supervised lender's license from the Board, before filing the forms with the Department. She further testified that once she completed drafts of the Maximum Rate Schedule filing form and Consumer Credit Grantor Notification form, her attention and focus turned to the application process for a supervised lending license with the Board.

5. Between February 2013, and September 2013, Ms. Fox and Ms. Jennings worked on obtaining all the information required to complete the application with the Board. In July 2013, Ms.

Jennings submitted an application for Cash Central of South Carolina, LLC. The Board informed Ms. Jennings that a separate application for www.cashcentral.com would be required, and in September 2013, Cash Central submitted a second application to the Board for a license for the website only. Both applications were essentially identical, and both included a rate chart with a series of Cash Central's interest rates for different dollar amounts and maturities of loans. The Board approved Cash Central's Applications for Supervised Licenses on October 2, 2013, and issued license number 8-208 to Cash Central of South Carolina, and license number 8-209 to www.cashcentral.com. Interest rate schedules similar to the one that Ms. Fox intended to be filed with the Department have been on file with the Board since Cash Central began doing business in South Carolina.

6. Once the Board issued the licenses, Ms. Fox believed that Cash Central had complied with all of the requirements to do business in South Carolina. She has been practicing law for over 12 years, and almost all of her experience was in the consumer financial services business. She has participated in obtaining licenses in over 20 states for various consumer lenders, and in her experience it was unusual for two regulatory agencies to be involved in the oversight of supervised lenders. She also testified that in her experience, it would have been unusual for a state to issue a license to do business, if all required filings had not yet been made. Consequently, she believed that once the license was issued by the Board, Cash Central had complied with all state law requirements to begin making loans. At the time, she was not aware and did not recall that the initial filing of the Maximum Rate Schedule had not been made. The same rate charts that would have been included with the Department's Maximum Rate Schedule form had already been filed with the Board with Cash Central's application to become a supervised lender. But for a postage stamp and a check, the Maximum Rate Schedule would have been timely filed with the Department.

7. After Cash Central received its licenses, Ms. Fox worked with Dan Vinton, the Online Marketing Manager, and Lisa Vittorini, the Senior Vice President of Compliance, to review and approve all maximum rate and other required disclosures that would appear to South Carolina customers on Cash Central's website, www.cashcentral.com. Shortly after reviewing a screen shot of a "test environment" of what a consumer would see when viewing the website, Ms. Fox specifically discussed the South Carolina requirement of posting a Maximum Rate Schedule with Mr. Vinton to ensure that the online disclosures were compliant with South Carolina law. Ms. Fox exchanged a series of emails with Mr. Vinton with notes referring to the South Carolina statutory requirements for minimum font size and the 127-word disclosure. She also reviewed updates to the webpages designed to comply with the requirements. By November 5, 2013, Ms. Fox believed that the website was fully compliant with the posting requirement in S.C. Code Ann. § 37-3-305.

8. Todd Jensen, the Chief Executive Officer of Direct Financial Solutions, testified at length about Cash Central's website. His testimony and the evidence submitted demonstrates that on or shortly after Cash Central began making loans to South Carolina residents on October 24, 2013, all of its customers had direct and easy access to a South Carolina specific web page titled "South Carolina Fee Schedule" with a rate chart containing "a series of rates for different dollar amounts and maturities" of loans, which was the same as or very similar to the ones filed with the Board. Most importantly, these website pages at all times also included an interactive, customizable loan calculator for selection and disclosure of all significant financial terms, including the interest rate stated as an annual percentage rate ("APR"), for any loan offered by Cash Central.

9. Mr. Jensen testified about the content of the Cash Central website "home" page, www.cashcentral.com, and South Carolina state-specific website page as of numerous particular dates during the Relevant Time Period. Some examples of the webpages were recovered by Cash

Central itself, while others were recovered from Way Back Machine, www.waybackmachine.com, and one was a printout produced by the Board from its 2015 examination of Cash Central. The Department did not dispute the accuracy of the historical website evidence presented by Cash Central.

10. The South Carolina specific page was easily accessible to consumers from the home page, and many other pages in the website, through the same or very similar tabs or hyperlinks, with at most only one or two mouse clicks. The webpages providing access to the South Carolina specific page include, for example, the pages for the three step loan application process, the pages for the five step loan transaction process, and the pages describing specific loan products and other aspects of Cash Central.

11. The rate chart on the "South Carolina Fee Schedule" page includes the same or substantially similar APR rates that would have been filed by Cash Central with the Department pursuant to S.C. Code Ann. § 37-3-305 in late 2013, and were in fact filed with the Board throughout the entire Relevant Time Period.

12. The "South Carolina Fee Schedule" page also contains the exact 127-word statement required by S.C. Code Ann. § 37-3-305(3).

13. Cash Central's website also includes an interactive, customizable loan calculator which allows a customer to input various loan terms for a loan best suited to their needs, including the loan amount and payment schedule to receive a calculated APR for their specific loan for which they would like to apply. Any customer interested in a loan would be automatically presented with a loan cost disclosure and calculated APR specific to the loan for which the customer was interested.

14. Further, once a customer was approved to borrow and began the five step process to complete their transaction, the loan calculator automatically appears in step one of the process. The calculator required the customer to select the Loan Amount, Payment Due Date, Payment Frequency, and Term (Loan Duration) to begin the loan transaction process. Once the customer selected these terms, the loan calculator would automatically compute and display the payment amount, total interest charge, and the APR for the specific loan. If a customer was not satisfied with the loan terms or the APR, the customer could reset the calculator and repeat the process until he or she was satisfied with the terms.

15. The Department's two witnesses did not attempt to rebut the evidence of what was posted on Cash Central's website during the Relevant Time Period. The Department's Administrator, Carri Grube Lybarker, and Jim Copeland, the former Assistant Commissioner of the Board, both admitted that they only reviewed the website for a short time, and that they did not save or print any screenshots or otherwise retain any evidence regarding Cash Central's website in the summer of 2015. Both of the Department's witnesses testified that they were looking for the Maximum Rate Schedule issued by the Department, which is what they would have deemed compliant with the posting requirement. Neither witness could definitively state what would have been compliant, other than the posting of the form issued by the Department after a lender files the Maximum Rate Schedule form prescribed by the Department.[2]

16. The Court concludes that all of the website screenshots about which Mr. Jensen testified were true and accurate depictions of what was on Cash Central's home page and the South Carolina specific page on the dates in question. The architecture and workflow process of Cash Central's website required each customer to complete the loan transaction process utilizing the

[2] Mr. Copeland also testified that the examination report issued to Cash Central in April 2015 included other exceptions and findings, all of which were resolved to the Board's satisfaction. The examination resulted in Cash Central receiving an overall compliance rating of 3 out of 5.

online loan calculator and provided numerous opportunities to view the South Carolina Fee Schedule page.

17. Cash Central also introduced the testimony of Professor Victor Stango, a Ph.D. in behavioral economics, who was qualified as an expert in the field of consumer and firm behavior in household financial settings. Professor Stango testified as to how consumers interpret consumer disclosures. He testified that the disclosures by Cash Central were superior to the Maximum Rate Schedule issued by the Department in that they were more specific, more relevant, and wider in scope. He also testified that the form of the Cash Central disclosures were superior to the form of the Maximum Rate Schedule because the disclosures comported with well-accepted principles of disclosure design as set out in government and other research studies, where the goals of such disclosures are to promote the informed use of credit and facilitate loan term comparisons across lenders.

18. Professor Stango also testified that the 127 word disclosure on the Maximum Rate Schedule issue by the Department requires that a consumer have 17 years of education to understand the meaning of the disclosure. In contrast, the narrative disclosures offered by Cash Central, which he testified included substantially the same information as the 127 word disclosure, were presented in a manner that made the information understandable to a consumer with only an 8th grade education.

19. Professor Stango's testimony as to how the Cash Central disclosure compared to the Maximum Rate Schedule issued by the Department was essentially unrebutted by the Department.

20. Cash Central also presented evidence of the changes it has made to its website at the demand of the Department since this lawsuit was filed. The rate chart with the series of rates for different dollar amounts and maturities of loans and interactive loan calculator that was present on

the website during the Relevant Time Period has been removed and replaced with a PDF of the Maximum Rate Schedule issued by the Department. Professor Stango testified that the changes to the disclosures had a negative impact in terms of promoting consumers' informed use of credit and the ability of consumers to compare loan terms. He testified that he was not aware of any research study on consumer behavior in household financial settings that would support using the Maximum Rate Schedule issued by the Department in place of the Cash Central disclosures.

21. Cash Central does not dispute that it failed to file the Maximum Rate Schedule on three separate occasions between October 2013 and April 2015. However, once Cash Central learned that the Maximum Rate Schedules had not been filed, it promptly filed a Maximum Rate Schedule on or about April 10, 2015, which was accepted and certified by the Department without question. Further, Cash Central submitted renewal filings in 2016 and 2017, stating a maximum rate similar to the maximum rates charged between 2013 and 2015. The renewal filings have been accepted and certified by the Department without question.

22. Cash Central offered convincing and uncontradicted evidence that the initial, unintentional failure of Ms. Fox and Ms. Jennings to file the Maximum Rate Schedule in 2013 led to Cash Central's failure to file the Maximum Rate Schedule in 2014 and 2015. Ms. Roman, the General Counsel, Executive Vice President, and Secretary of Community Choice, testified that in April of 2012 and continuing to the present time, Community Choice's subsidiaries have used LicenseHQ, which is licensing and operational compliance software that tracks license and permit applications as well as their renewals, payments, and other associated requirements.

23. Normally, the first input for the LicenseHQ database is the initial license or permit issued by the licensing or permitting agency in response to Cash Central's initial filing. At the same time, the expiration date of the newly added license is entered, and thereafter, the software then

notifies the appropriate licensing staff member to initiate and manage the renewal process. Since Cash Central missed the initial Maximum Rate Schedule filings with the Department, and did not receive the form issued by the Department in response, there was no documentation and no occasion to input these required filings in the software application. Thus, the initial failure to file was the primary cause of the subsequent failures.

24. Cash Central's assertions concerning the LicenseHQ compliance software were supported by testimony that the Supervised Lenders' license issued by the Board for Cash Central of South Carolina, LLC was entered into License HQ, and was timely renewed. Mr. Copeland testified that the license for www.cashecentral.com was not timely renewed, but that after a reminder was sent to Cash Central in March 2014, the license was renewed without issue. Ms. Roman testified that the reason the license for the website was not timely renewed was again because of a unique requirement in South Carolina—that a separate license for the website be issued separate and apart from Cash Central of South Carolina, LLC, which does not operate any physical locations in the State. Both licenses were timely renewed in 2015, and have been since that date through the use of License HQ.

25. The evidence before the Court also demonstrated that if Cash Central had made the initial filing, it would have received renewal reminders from the Department to assist it with complying with the regulatory filing requirements. Since Cash Central made its initial filing with the Department on April 10, 2015, it has received reminders from the Department for renewal filings.

26. Finally, Ms. Roman testified that during the Relevant Time Period, there were staffing changes made as to who would be responsible for renewal filings. Ms. Jennings

transitioned to a different role in early to mid-2014, and Ms. Fox left Community Choice in December 2014. These staffing changes contributed to the initial failure to file.

27. The Department conceded that there was no evidence that any of Cash Central's failures to file were intentional.

28. Based on these facts, the Court concludes that the unintentional error that led to the failure to make the initial filing directly led to the unintentional failure to make renewal filings in 2014 and 2015.

29. Ms. Lybarker testified that the filing of the Maximum Rate Schedule with the Department was important because the Department uses the filings by supervised lenders to create a document titled "Maximum APRS Offered for Consumer Transactions," which is over 600 pages in length, in PDF form, and which the Department posts on its website. This document includes, primarily, the name, office location, and maximum loan rate for each lender that files a Maximum Rate Schedule with the Department. Ms. Lybarker testified that she believed the document was important because it allowed consumers to compare maximum rate schedules among various lenders and that lenders reviewed the maximum rates in order to be more competitive.

30. However, Cash Central's expert witness, Professor Stango, testified that the disclosure form issued by the Department based on the filings by lenders did not effectively promote any of the purposes of the statutes as stated by the General Assembly and the Department. The document is located under a tab on the Department's website titled "Licensee Lookup," rather than the perhaps more appropriate tab "Consumer Information," it is not easily searchable or customizable, and it does not contain defined terms. In contrast, during the Relevant Time Period, Cash Central's website contained an interactive calculator that allowed a customer to obtain information specific to the loan he was seeking. The calculator was in addition to the South

Carolina Fee Schedule posted in order to comply with the requirement that a maximum rate be posted on the website. Professor Stango doubted that the typical consumer would find the document to be easily accessible or useful, and the Department offered no evidence that any consumer had ever used the document.

31. Finally, the Department admitted that they had no evidence of any complaint by any consumer against Cash Central related to Cash Central's failure to file the Maximum Rate Schedule, or concerning the fee schedule and other information posted on Cash Central's website.

CONCLUSIONS OF LAW

1. **Cash Central's failure to file the Maximum Rate Schedule was not intentional and was the result of a bona fide error.**

In this action, the Department seeks pursuant to S.C. Code Ann. § 37-5-202 to recover the "excess" between 18% per annum and the loan interest rate charged for all of Cash Central's customers solely because Cash Central inadvertently failed to file a Maximum Rate Schedule form with the Department prior to April 10, 2015. The Department maintains this position even though a rate chart with a series of rates for different dollar amounts and maturities of loans was filed with the Board and posted on Cash Central's website throughout the Relevant Time Period.

Based on the facts set forth above, the Court concludes that Cash Central met its burden of proof under section 37-5-202(7), which provides a "bona fide error" defense as follows:

> A creditor may not be held liable in an action brought under this section for a violation of this title if the creditor shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid the error.

Cash Central has presented sufficient evidence to meet this standard. There is no evidence that Cash Central's employees ever intended to violate any portion of the South Carolina Consumer Protection Code, or the requirements, regulations, and administrative interpretations established by the Department with regard to supervised lenders and the making of consumer loans in South

Carolina. Instead, Cash Central's evidence demonstrates concrete and specific steps taken to prepare and file the Maximum Rate Schedule, and that reasonably adapted policies and procedures to ensure compliance were in place.

Rebecca Fox maintained a policy and procedure of researching and summarizing all applicable state regulations related to filing, disclosure, and other topics, and her business records show that she was aware of and made efforts to comply with the requirements concerning the Maximum Rate Schedule. Todd Jensen and Bridgette Roman each testified concerning the extensive efforts Cash Central undertakes in order to comply with various state and federal laws, including utilizing LicenseHQ for license and regulatory filings. Ms. Fox's files show she and Amy Jennings completed the required forms in February 2013, and the testimony states that they had every intention of filing the forms once the Board issued licenses to Cash Central. However, after Ms. Fox completed her review of the requirements under South Carolina law and completed a proposed form for the Maximum Rate Schedule, she and Ms. Jennings were consumed with the applications to the Board in order to receive licenses to become a supervised lender, which included copies of the fee schedules prepared by Ms. Fox to be filed with the Maximum Rate Schedule. South Carolina is the only state among the states where the Community Choice entities operate that requires lenders such as Cash Central to obtain licenses and fulfill other filing requirements with two different regulatory agencies. The evidence demonstrates that Ms. Fox and Ms. Jennings simply forgot, due to innocent human error, to file the forms they had prepared back in February 2013, after having successfully obtained the licenses with the Board in September 2013.

The Department has argued that even if Cash Central inadvertently failed to make the initial filing in 2013, Cash Central's failure to file the Maximum Rate Schedule in 2014 and 2015 could not have been a bona fide error. The Department argues in circular fashion that if compliance

procedures are reasonably adapted to avoid the error, then there would never be a compliance failure. If the Department's view was accepted by the Court, then there would never be any instance in which the statutorily created defense would apply, and it would thus be rendered meaningless.

Moreover, Cash Central has offered credible, reliable, and ample evidence and testimony as to why the second and third failures to file occurred, and it all stems from the original mistake that led to the failure to file the initial Maximum Rate Schedule. First, the procedure Cash Central had in place to ensure timely renewals were made was based on the initial filing being properly made. If Ms. Fox and Ms. Jennings had not inadvertently failed to file the initial Maximum Rate Schedule, the Department would have issued a maximum rate schedule to Cash Central, the renewal period would have been entered into LicenseHQ, and the renewals for 2014 and 2015 would have been timely made. In fact, when the Maximum Rate Schedule was filed in April 2015, and when the form was issued by the Department, it was entered into LicenseHQ and subsequent timely renewals were made. Ms. Roman also testified that there were staffing changes, which the Department acknowledged was often an excuse they accepted for a lender's failure to file.

Second, if the initial Maximum Rate Schedule had been filed, the Department itself would have issued reminders to Cash Central to file renewals, and it is unlikely any further error would have occurred.

Third, the overwhelming evidence is that all of the information on the Maximum Rate Schedule issued by the Department was in fact posted by Cash Central. If Cash Central had filed the initial Maximum Rate Schedule in 2013 and received a form issued by the Department, the only information that a consumer would have had would have been the following:

Category	Description	Maximum A.P.R. For Fixed Rate Personal Loans	Notes
Secured Personal Loans Non-Real Estate	$750.00-$5,000.00	246.90%	

The evidence set forth by Cash Central, which is not disputed by any evidence from the Department, is that during the Relevant Time Period, every customer of Cash Central would have seen a rate chart similar to the rate chart ultimately filed with and certified by the Department in April 2015, and would also have had access to an interactive loan rate calcultor which would have given the customer specific information about the terms of the actual loan sought by the customer. As explained in detail by Professor Stango, whose testimony was not disputed by the Department, Cash Central's website disclosures provided substantially more and better information than would have been provided if Cash Central had simply posted the Maximum Rate Schedule issued by the Department on its website. Additionally, the disclosures and information provided by Cash Central were more specific and more helpful to consumers than the information contained on the Maximum Rate Schedule.

Based on the foregoing, the Court concludes that Cash Central's failure to file the Maximum Rate Schedules during the Relevant Time Period was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid the error.

2. **Cash Central substantially complied with S.C. Code Ann. §§ 37-3-201 and 37-3-305.**

In interpreting statutory requirements and applying them to specific cases, South Carolina courts have adopted the doctrine of substantial compliance to excuse liability for non-compliance with technical requirements of a statute that are not central to accomplishing the primary legislative intent. Although the term itself has not been specifically defined, our courts recognize that "substantial compliance is met if the purpose of the statute is achieved." *Responsible Economic*

Development v. Florence Consol. Mun. Planning Com'n., No. 2005-UP-584, 2005 WL 7084861 (S.C. Ct. App. Nov. 16, 2005) (emphasis added) (citing numerous cases finding an entity substantially complied with notice provisions of a statute).

In *Davis v. NationsCredit Fin. Servs. Corp.*, the South Carolina Supreme Court addressed the issue of whether a lender substantially complied with S.C. Code Ann. § 37-10-102 (commonly known as the attorney preference statute). 326 S.C. 83, 85–86, 484 S.E.2d 471, 472 (1997). Recognizing that the purpose of the attorney preference statute was to protect borrowers by requiring disclosure, contemporaneously with their loan application, of their rights to legal counsel of their choice, the Supreme Court held that NationsCredit substantially complied with the statute by using a separate piece of paper to make the disclosure, rather than following the statute's express language requiring the disclosure on the "first page" of the loan application. *Id.* at 85–86, 484 S.E.2d at 472. Substantial compliance was achieved where the form of the disclosure was clear and meaningful and provided contemporaneously with the credit application, even though on a separate page. *Id.*; *accord* King *v. American General Finance, Inc.*, 386 S.C. 82, 89, 687 S.E.2d 321, 324 (2009)). The Court concluded that to find otherwise "would elevate form over substance." *Id.*

The Department has argued that *NationsCredit v. Davis* should not apply because the substantial compliance defense does not apply to the failure to meet a regulatory filing requirement, such as filing the Maximum Rate Schedule. However, there is no logic to this argument, and it has been rejected by other courts. In *Williamson, Inc. v. Calibre Homes, Inc.*, the Washington Court of Appeals held that a corporate entity engaged in real estate brokerage services which failed to comply with certain statutory filing requirements to become a licensed real estate broker or salesperson had nevertheless substantially complied with the statute and was entitled to recover commissions. 106 Was. App. 558, 570, 23 P.3d 1118, 1125. The two persons who were "the sole

shareholders and the only officers, directors, and employees" of the corporation were properly licensed real estate salespersons throughout the relevant time period. *Id.* at 560, 23 P.3d at 1120. The corporation which brought the action to recover the commissions "never attempted to obtain a real estate broker or salesperson license." *Id.* In concluding that the corporation had substantially complied with the licensing requirements, the court emphasized that if the corporation had actually filed the application, it would have been accepted by the agency and the corporation would have become licensed, because the only requirement it failed to fulfill was actually filing the application for the license. *Id.* at 565, 23 P.3d at 1122. The court further noted that the licensing statute's purpose to "protect the general public from negligent, unscrupulous, or dishonest real estate operators" was fulfilled, and therefore the corporation had substantially complied with the licensing requirements by the regulatory agency. *Id* at 565-66, 23 P.3d at 1122-23. The doctrine has been similarly applied in other cases.

Here, the Department argues that a failure to comply with a technical requirement – filing the Maximum Rate Schedule with the Department – warrants recasting all of the loans made by Cash Central during the Relevant Time Period to an interest rate of 18% per annum. However, every single consumer who received loans during the Relevant Time Period received more and better loan rate information than would have been provided on the Maximum Rate Schedule issued by the Department. Customers visiting Cash Central's website not only received access to a statutorily-compliant rate chart, but also to the 127-word disclosure statement required by S.C. Code Ann. § 37-3-305(3). Cash Central's customers also automatically received more useful information concerning the cost of credit – cost and disclosure information that was specific to the actual loan for which the customer applied. Cash Central's website automatically calculated the customer's monthly payment and the overall cost of the credit based on the actual amount of the

customer's desired loan, which allowed them the opportunity to compare Cash Central's products with other lenders and to understand all the terms of the loan. Moreover, Cash Central was a supervised lender, licensed by the Board, during the entire Relevant Time Period.

In *Davis*, the South Carolina Supreme Court also quoted approvingly from an earlier decision interpreting requirements of the federal Truth in Lending Act stating: "this court will strongly construe [the Act's] provisions against borrowers who were not misled by a lender's disclosure but merely seek a penalty for finding a technical problem with the loan form which could not have conceivably influenced his choice of credit." *Davis v. NationsCredit Fin. Servs. Corp.*, 326 S.C. 83, 87, 484 S.E.2d 471, 473 (1997) (citing *General Motors Acceptance Corporation v. McMinn*, 285 S.C. 67, 328 S.E.2d 472 (1985)).

There is no evidence that Cash Central's failure to file the Maximum Rate Schedule form with the Department affected any consumer's choice of credit in any way. The undisputed evidence is that Cash Central's website disclosures better promote the purposes of Section 37-3-305 than the Maximum Rate Schedule issued by the Department. There is no logical or legal reason that the substantial compliance defense should not apply equally to a failure to either file or post information. Thus, the Court finds that Cash Central substantially complied with S.C. Code Ann. §§ 37-3-201 and 37-3-305.

3. **The liability for Cash Central's failure to file the Maximum Rate Schedule during the Relevant Time Period is limited pursuant to S.C. Code Ann. § 37-3-201(6).**

Alternatively, any monetary liability for Cash Central's failure to file the Maximum Rate Schedule is strictly limited by the provisions of S.C. Code § 37-3-201(6), which provides, in pertinent part, as follows:

[I]f a lender can demonstrate with competent evidence that

> [a] any failure to post rates properly filed under Section 37-3-305 *or failure to properly file these rates under Section 37-3-305* was a result of a bona fide error or excusable neglect,
>
> [b] the rates were properly posted or properly filed when the error or neglect was discovered or brought to the lender's attention, and
>
> [c] that no other failure to post or file rates has been brought to the lender's attention by the Department of Consumer Affairs or by consumers within the previous forty-eight month period,
>
> then the maximum rate of loan finance charges assessable by the lender is the rate *previously properly filed* with the Department of Consumer Affairs,
>
> provided, however, the lender that has failed or neglected to post rates or to file rates is subject to a civil penalty of up to $5,000.00 payable to the Department of Consumer Affairs.

(Emphasis and paragraph breaks added.) Subsection 6 is intended to limit monetary liability for an inadvertent failure to either file or post rates, provided that all three conditions in the subsection are satisfied. The Court finds that Cash Central has proved its conduct met all three conditions.

First, as explained above, the failure to properly file the rate schedule with the Department was a good faith error and qualifies as excusable neglect. There was certainly no willful disregard of the statutory requirements or the Department's forms. The evidence clearly demonstrates that Cash Central had every intention to file the Maximum Rate Schedule prescribed by the Department and had even prepared the form for filing with the Department. The failure to actually file throughout the Relevant Time Period was simply an unintentional human oversight. Further, Cash Central indisputably complied with the prime statutory requirement to "post" or disclose rates to its customers from the moment it began offering loans to South Carolina residents. Cash Central's disclosures actually exceeded the statutory requirement for posting the single annual percentage rate for its highest rate loan, and provided every customer an online loan calculator to determine the exact APR for actual loan for which they were applying. Cash Central's disclosures were also easier to understand and more accessible for less educated consumers.

Second, after Cash Central was notified by the Board on April 3, 2015, of its previous failure to file, Cash Central promptly filed its Maximum Rate Schedule with the Department for both licenses on April 10, 2015, just seven days later.

Third, no other failure to file rates has been brought to Cash Central's attention by the Department or by consumers within the previous forty-eight month period. Cash Central thus meets all three "conditions" of section 37-3-201(6) to limit its liability.

Subsection 6 also states that if a lender demonstrates with competent evidence that it satisfied all three conditions in the statute "then the maximum rate of loan finance charges assessable by the lender is the rate *previously properly filed* with the Department of Consumer Affairs." (Emphasis added.) In this instance, because Cash Central had just begun to do business in South Carolina, and failed to file its *initial* Maximum Rate Schedule prior to April 10, 2015, there is no "previously properly filed" rate.

The Department argues that since Cash Central does not have a previously properly filed rate, subsection six does not apply. However, such an interpretation impermissibly prevents application of this section of the statute to an initial failure to file, and requires ignoring the legislative intent behind this subsection of the statute, which is to limit liability for an inadvertent failure to either file or post rate information. "[I]f the literal text of an act is inconsistent with legislative meaning or intent, or leads to an absurd result, a statute is construed to agree with the legislative intention." 2A *Sutherland Statutory Construction* § 46:7 (7th ed.) (internal citations omitted). Our Supreme Court has unequivocally held that a court must reject a statute's literal wording when adopting such a meaning would lead to absurd results. *Fulghum v. Bleakley*, 177 S.C. 286, 181 S.E. 30, 32 (1935) (internal citations omitted).

Since in this instance there is no "previously properly filed" rate, then literal application of the statutory language compels the logical conclusion that the maximum rate of loan finance charge Cash Central could have assessed was 0.00%. Such a result is plainly absurd, and would mean that all of the interest charged by Cash Central was subject to refund, even though the statutory scheme allows a lender to charge any interest rate and does not even require a lender to file a Maximum Rate Schedule for interest rates of 18% or less. The Court rejects the Department's proposed interpretation and finds that this section may be applied to an initial failure to file. "Words in a statute must be construed in context . . . [t]hus, the court may not, in order to give effect to particular words, virtually destroy the meaning of the entire context; that is, give the particular words a significance [that] would be clearly repugnant to the statute, looked at as a whole, and destructive of its obvious intent.'" *State v. Douglas*, 411 S.C. 307, 331, 768 S.E.2d 232, 245 (Ct. App. 2014) (internal citations omitted).

Here, the unmistakable legislative intent of the subsection is clear when interpreted in its full context: if a lender meets the three conditions set forth in the statutory language, then liability for a failure to *either* post *or* file is limited to a civil penalty of up to $5,000.00. Because the failure to post rates will always be excused if the rates were properly filed, the legislature's intent could not possibly have been to excuse a failure to file only if the lender missed the *subsequent* rather than the *initial* rate filings. As directed by the *Fulghum* decision, this Court finds that literally applying the "previously properly filed" language leads to an absurd result, and "*having due regard for the interests of legitimate and scrupulous creditors*," S.C. Code § 37-1-102(2) (d) (emphasis added), construes subsection 6 to limit liability for Cash Central's failure to file the rate schedule with the Department.

Because the Court finds that Cash Central meets the requirements of section 37-3-201(6), Cash Central is ordered to pay a civil penalty for $5,000 per failure to file.

CONCLUSION

Based on the foregoing, the Court grants judgment in favor of Cash Central on each of the three affirmative defenses pleaded and proved at trial, and orders Cash Central to pay a civil penalty of $15,000 to the Department

AND IT IS SO ORDERED.

The Honorable Robert E. Hood
Fifth Judicial Circuit

Columbia, South Carolina

9/28, 2017