THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Robert E. Hood, Circuit Court Judge



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Case No. 2016-CP-40-02859

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South Carolina Department of Consumer Affairs ..... Appellant,

v.

Cash Central of South Carolina LLC ..... Respondent

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# FINAL BRIEF OF RESPONDENT

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## STATEMENT OF ISSUE ON APPEAL

1. DID THE TRIAL COURT CORRECTLY FIND THAT CASH CENTRAL OF SOUTH CAROLINA LLC ("CASH CENTRAL") HAD ESTABLISHED A DEFENSE TO FAILURE TO POST AND FILE A MAXIMUM RATE SCHEDULE PURSUANT TO S.C. CODE ANN. § § 37-3-305 WHERE THE EVIDENCE SHOWED THE FAILURE WAS INADVERTENT AND IN SPITE OF CASH CENTRAL'S EFFORTS TO COMPLY WITH SOUTH CAROLINA LAW, AND THE EVIDENCE FURTHER SHOWED THAT CASH CENTRAL PROVIDED SUBSTANTIALLY THE SAME INFORMATION ON ITS WEBSITE?

## FACTS[1]

Cash Central is a web-based lender, which provides short-term and medium-term loans ranging from $750 to $5,000. (R. at 9 ¶ 1; 629; 647). It is a wholly owned subsidiary of Direct Financial Solutions LLC, which is a wholly owned subsidiary of Community Choice Financial Inc. ("Community Choice"). (R. at 9 ¶ 1; 394:20-24). Cash Central, like all members of the Community Choice family of companies, focuses on meeting customers' immediate, temporary financial needs, while helping them build good credit for the future. (R. at 439:9-442:13).

Cash Central began preparing to do business in South Carolina in early 2013. (R. at 287:23-25). In doing so, Cash Central utilized a task force of five to seven individuals familiar with Cash Central's products to complete the steps necessary to do business in South Carolina.[2] (R. at 278:19-279:11). Early in this process, Rebecca Fox, the Regional Counsel for Community Choice, prepared a detailed compliance outline based on South Carolina law. (R. at 10 ¶ 3; 279:15-282:5; 552-557). The compliance outline was part of Cash Central's well-established procedure for doing business in a new state, and included information covering topics such as licensing, marketing, default procedures, and collections. (R. at 291:20-293:10; 359:3-22; 364:12-19).

To complete the outline, Fox researched South Carolina's statutes, regulations, and licensing requirements for Cash Central's intended lending operations, and saved copies of the relevant statutes, blank forms, and guides to her computer from the South Carolina Department of Consumer Affairs ("Department") website. (R. at 9-10 ¶¶ 3-4; 288:8-291:5; 549-551). Her

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[1] The Facts are largely drawn from the trial court's order and the Findings of Fact contained in numbered paragraphs on pages 4-14. (R. at 9-19).

[2] Rebecca Fox testified that the task force that was engaged in commencing operations in South Carolina was the same task force that she had worked with throughout her time at Cash Central, and they had a well-established procedure for commencing operations. (R. at 278:14-279:21; 284:6-285:13). That process began with her compliance outline.

compliance outline, which others on the task force used as a roadmap for operations in South Carolina, included the requirements for supervised lenders in South Carolina, and specifically referenced the filing and posting requirements with the Department for the maximum rates to be charged as set forth in the South Carolina Consumer Protection Code ("Code").[3] (R. at 10 ¶ 3; 284:6-285:13; 293:1-294:14; 552-557).

In February 2013, Fox prepared drafts of the Department's Maximum Rate Schedule and Consumer Credit Grantor Notification forms, and worked with Amy Jennings, then Director of Compliance, to ensure the forms were complete and ready for filing. (R. at 295:15-297:20; 558-559). The documents were not submitted to the Department at that time because the rates that needed to be included had not yet been established. (R. at 297:21-299:15).

In the meantime, Fox and Jennings were also working on an Application for a Supervised License with the South Carolina Board of Financial Institutions (the "Board"), and there was some overlap between the documents prepared for the Board and those to be filed with the Department. (R. at 299:16-300:18; 570-628). In September and October of 2013, the license application was sent to the Board which included the same loan rate charts that Cash Central intended to file with the Department. (R. at 10-11; 302:22-304:13; 619-627). Given the similar filings and the fact that over five months had passed since they originally prepared the form, Fox and Jennings failed to

[3] Fox and the rest of the task force attended bi-weekly meetings where they discussed the progress in completing the necessary steps to commence operations. (R. at 282:6-283:8). Due to an oversight, Fox's outline did not clarify that South Carolina has two regulatory agencies (the Department and the Board of Financial Institutions (the "Board") with filing requirements for supervised lenders. (R. at 294:15-22). Bridgette Roman, General Counsel, Executive Vice President, and Secretary for the Community Choice family of companies, testified that Fox's unintentional failure to specify that two different regulators received different filings was a contributing factor to Cash Central's f7ailure to timely file and renew the Maximum Rate Schedule with the Department. (R. at 350:17-352:9).

file the Maximum Rate Schedule with the Department when they submitted the license, even though they intended to do so.[4] (R. at 11 ¶ 6; 319:16-320:2).

Ultimately, the Board approved Cash Central's Application for a Supervised License on October 2, 2013.[5] (R. at 217:18-22; 304:18-19). Fox took the receipt of the license as a "green light" for Cash Central to do business in South Carolina because her experience was that a requirement for additional filings after a license was issued was unusual. (R. at 305:15-306:1). Believing that Cash Central had completed all of its required filings to begin operating in South Carolina, (including filing the Maximum Rate Schedule), 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 be disclosed to South Carolina customers on Cash Central's website, www.cashcentral.com. (R. at 12 ¶ 7; 310:1-316:9; 641-647). Fox specifically discussed the South Carolina requirement of posting a Maximum Rate Schedule with Vinton to ensure that the online disclosures were compliant and appropriately visible to would-be borrowers. (*Id*). Fox obtained various versions of the webpage with notes referring to minimum font size, certain disclosures, and a screen shot of a "test environment" showing what a consumer would see when viewing the website. (R. at 12 ¶ 7; 306:15-307:13; 309:17-23; 640). She also reviewed the website and confirmed that it included all of the elements set forth in her compliance outline—a description of the type of loans made, the loan amount, the range of loan amounts offered, and the maximum rate that would be charged to a customer for a given loan. (R. at 317:2-13).

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[4] Fox testified that she had every intention of filing the Maximum Rate Schedule because "[t]here's nothing to be gained by shortcutting." (R. at 319:1-19). It was simply human error that the filing was not made. (R. at 319:11-14).

[5] Licenses were issued to Cash Central of South Carolina, LLC and www.cashcentral.com.

Fox left Cash Central in December 2014. (R. at 317:14-15). When she left, she did not know that the initial Maximum Rate Schedule had not been filed with the Department. (R. at 318:24-319:10). Cash Central had never failed to make any similarly required filing of its rates in any other state, and was surprised when it learned from the Board that the filing had not been made.[6] (R. at 318:24-319:10; 368:11-369:12; 378:7-10). Cash Central has a strong commitment to compliance, spent significant resources in ensuring compliance, and used a variety of software, procedures, training, and tools to ensure compliance. (R. at 395:18-402:18; 671-672).

Around the time of Fox's departure, Cash Central began restructuring its compliance department and new individuals were placed in charge of licensing and renewals. (R. at 365:2-367:8; 375:15-25). Responsibility for Cash Central's licensing and annual state filings transitioned from Amy Jennings, who had been handling retail licensing for many years, to Jennifer Flowers. (R. at 354:4-16; 374:14-20). In addition, Cash Central implemented the use of License HQ, software that assisted in making applications for and tracking state licenses. (R. at 16 ¶ 22; 351:21-353:23; 374:8-20). However, the utility and success of License HQ relied on the initial license information being documented within the software so that reminders would be triggered. (R. at 353:7-15). The employees responsible for compliance waited until a license was returned from the regulatory body, and then entered the relevant information concerning the renewal into License HQ. (R. at 353:16-23). Cash Central never received a certified copy of the Maximum Rate Schedule from the Department because the initial filing was not made, and as a result, the renewal deadline was not entered into License HQ. (R. at 16-17 ¶ 23; 374:21-375:17). In addition, Fox's

[6] Roman testified that in the time she has been with the company, she was only aware of two instances where a required regulatory filing had not been made—this instance with the Department and one other instance involving a self-reported failure to timely obtain a retail branch license. (R. at 378:7-379:18).

compliance outline did not indicate that filing was required with both the Board and the Department, and so those relying on her outline were unaware of the additional filing requirement for renewals. (R. at 352:4-20; 355:13-24; 384:18-385:1). Thus, the subsequent failures to renew the Maximum Rate Schedule were the direct result of the initial, inadvertent failure to file the Maximum Rate Schedule. (R. at 355:25-356:6; 336:24-337:4; 376:19-378:6). The Department conceded that there was no evidence of any intentional failure to file. (R. at 18 ¶ 27). Despite Cash Central's inadvertent failure to file and renew the Maximum Rate Schedule, the public, including customers and competitors, had direct and easy access to a South Carolina specific web page titled "South Carolina Fee Schedule" with statutorily compliant disclosures and an interactive, customizable loan calculator for selection and disclosure of all significant financial terms for each customer's specific loan.[7] (R. at 648-670). An example of the webpage as it existed in November 2013 is below:

[7] Fox testified that on October 25, 2013 (two days after the first loan had been made by Cash Central), she realized that the rate chart and 127-word disclosure had not been posted to the website. (R. at 310:25-311:10). She immediately began working with the marketing and website team to have the rates and disclosure posted, and it was corrected by November 5, 2013. (R. at 641-647). During this short period, the interactive calculator was present and functioning, so every customer was able to see the maximum rate for any loan in which they were interested. (R. at 315:20-316:5; 334:4-335:15). After the changes to the website, Cash Central believed the website complied with South Carolina law. (R. at 316:6-9; 390:6-19).

**South Carolina Fee Schedule**

Click here if you reside in a different state.

View Signature Fees

**Signature Installment Loan Fees**

South Carolina Signature Installment loans are available in amounts from $750.00 up to $5000.00 based on your qualification. Cash Central Signature Installment loans are paid in regular payments over 6, 12, 18, 24 months based on your selection of terms in either monthly or bi-weekly payments with finance fees calculated daily. Early loan repayment reduces overall finance fees. Late payments accrue additional finance fees and charges.

## Representative Example of Signature Installment Loan Fees:

12 month Signature Installment Loan of $1500.00 Loan Amount would require 12 payments of $319.12. APR: 238.00%*.

To view specific examples of a Signature Installment Loan, select from the drop down menus below. Your results will be shown below once you selected Loan Amount, 1st Payment Date, Payment Schedule, and Loan Duration and click the 'Submit' button.

Loan Amount: | 1st Payment Date: | Payment Schedule: | Loan Duration (Months):

Submit

Available selected terms are based on qualification

| | | APR | Finance Charge | Amount Financed | Total Payments |
|---|---|---|---|---|---|
| Payment In Months | Payment Cycle | The cost of your credit at a yearly rate. | The dollar amount the credit will cost you. | The amount of credit provided to you or on your behalf. | The amount you will have paid after you have made all payments as scheduled. |
| 6 | Monthly | 239.99% | $804.18 | $1,000.00 | $1,804.18 |
| 6 | Bi-Weekly | 239.72% | $768.35 | $1,000.00 | $1,768.35 |
| 12 | Monthly | 239.99% | $1,702.89 | $1,000.00 | $2,702.89 |
| 12 | Bi-Weekly | 239.81% | $1,684.75 | $1,000.00 | $2,684.75 |
| 12 | Monthly | 180.00% | $2,427.42 | $2,000.00 | $4,427.42 |
| 12 | Bi-Weekly | 179.90% | $2,385.85 | $2,000.00 | $4,385.85 |
| 24 | Monthly | 150.00% | $8,755.00 | $4,000.00 | $12,755.00 |
| 24 | Bi-Weekly | 149.95% | $8,735.31 | $4,000.00 | $12,735.31 |

† *The above APR is based on the first payment date 30 days from funding for monthly payments and 15 days for bi-weekly.*

Consumers: All supervised and restricted creditors making consumer loans in South Carolina are required by law to post a schedule showing the maximum rate of LOAN FINANCE CHARGES stated as ANNUAL PERCENTAGE RATES that the creditor intends to charge for various types of consumer credit transactions.

The purpose of this requirement is to assist you in comparing the maximum rates that creditors charge, thereby furthering your understanding of the terms of consumer credit transactions and helping you to avoid the uninformed use of credit.

NOTE: Creditors are prohibited only from granting consumer credit at rates higher than those specified above. A creditor may be willing to grant you credit at rates that are lower than those specified, depending on the amount, terms, collateral and your credit worthiness.

If you have any questions or concerns regarding your Cash Central loan, please feel free to call us at 1-800-460-4356 or contact us via email, chat, fax, or standard mail.

*APR may change based on first payment date selected. Administrative/Origination fee may be included in the calculation of finance charges.

(R. at 654).

The South Carolina specific page was easily accessible to consumers from the www.cashcentral.com "home" page, and many other pages in the website, through the same or very similar tabs or hyperlinks, with just one or two mouse clicks. (R. at 399:21-400:5; 410:10-24; 648-653). The "South Carolina Fee Schedule" page includes loan terms that were on file with the Board and were the same or substantially similar rates that would have been filed by Cash Central with the Department in late 2013. (R. at 217:7-22; 412:9-415:23; 629-637; 654-661). The

"South Carolina Fee Schedule" page also contained the exact 127-word statement required by S.C. Code Ann. § 37-3-305(3). (R. at 654-661). Cash Central presented evidence that its website included all of this information throughout almost the entire period from October 24, 2013, when Cash Central first began making loans in South Carolina, and April 10, 2014, when the Department first issued a maximum rate schedule for Cash Central, as shown in copies of the "South Carolina Fee Schedule" page as it existed in November 2013, April 2014, and on or about October 10, 2014, March 27, 2015, April 26, 2015, and June 16, 2015.[8] (R. at 648-661; 693-694; 344:13-346:6; 404:9-407:5; 693-694).

Further, in addition to providing the statutorily compliant rate chart and 127-word disclosure statement, the website included an interactive, customizable loan cal7culator which allowed a customer to input various loan terms for a loan best suited to their needs, including the loan amount and payment schedule. These variables then produced a custom rate correlating to the terms of the loan the customer sought. (R. at 308:7-309:7; 383-384; 412-415). Any customer interested in a loan would be automatically presented with a loan cost disclosure and calculated rate specific to the loan for which the customer was interested. (R. at 656). This loan calculator could be used by any visitor to the website before entering any personal information or applying for a loan. (R. at 334:4-335:16). Additionally, once a customer was approved to borrow and began the five step process to complete their loan transaction, the loan calculator would automatically appear in step one of the process. (R. at 308:7-309:7; 412-415; 662-670).

[8] As of this date, the name of the website page had changed to "South Carolina Rates and Fees Schedule."

In contrast to the disclosures provided by Cash Central, the Maximum Rate Schedule issued by the Department included the 127-word disclosure and a single line of information about the loans offered:

*South Carolina Department of Consumer Affairs*

# Maximum Rate Schedule

**Registration #: CLL-123409 Date Issued: 12/18/2015 Expiration Date: 01/31/2017**

**CASH CENTRAL OF SOUTH CAROLINA LLC**
**84 E 2400 N**
**NORTH LOGAN, UT 84341-2902**

**CONSUMERS:** All Creditors, including supervised and restricted lenders making consumer loans in South Carolina* are required by law to post a schedule showing the maximum rate of LOAN FINANCE CHARGES stated as an ANNUAL PERCENTAGE that the creditor intends to charge for various types of consumer credit transactions. The purpose of this requirement is to assist you in comparing the maximum rates that creditors charge, thereby furthering your understanding of the terms of consumer credit transactions and helping you to avoid the uninformed use of credit.

**NOTE:** Creditors are prohibited only from granting consumer credit at rates higher than those specified below. A creditor may be willing to grant you credit rate that are lower than those specified, depending on the amount, terms, collateral and your creditworthiness.

** and intending to charge more than 18%*

| CATEGORY | DESCRIPTION | MAXIMUM APR FOR PERSONAL LOANS | |
|---|---|---|---|
| Unsecured | Selected dollar amounts for loans $750.00 - $5,000.00 | 246.9% | FIXED |

(680).

Professor Victor Stango, an expert in the field of consumer behavior and consumer decision making, testified that Cash Central's disclosures and website tools were more comprehensive, specific, and consumer-friendly than the Maximum Rate Schedule issued by the Department and that the Department claimed should have been posted in lieu of Cash Central's disclosures. (R. at 466-472; 704-722). Specifically, "because the disclosures provided by Cash Central are both interactive and customizable, those disclosures provided comprehensive and specific terms of any Cash Central loan about which a consumer wanted to become more informed, for the purposes of

using credit or comparing terms across lenders." (R. at 710 ¶ 17; 466-472). In contrast, he testified that the Maximum Rate Schedule issued by the Department did not provide complete information, did not provide information specific to any consumer, and did not promote the informed use of credit. (R. at 467:21-471:24; 710-711 ¶¶ 18-22).

## STANDARD OF REVIEW

The Department correctly recites that questions of law, such as the construction of a statute, are reviewed *de novo*. *See Boggero v. S. Carolina Dep't of Revenue,* 414 S.C. 277, 280, 777 S.E.2d 842, 843 (Ct. App. 2015); *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008) ("Determining the proper interpretation of a statute is a question of law, and this Court reviews questions of law de novo.").

With respect to the trial court's factual findings, Cash Central contends this action seeking statutory remedies and alleging the charging of improper interest under the Code is at law.[9] *See Jones v. Barco, Inc.*, 250 S.C. 522, 525, 159 S.E.2d 279, 281 (1968) ("Plaintiffs' action to recover the statutory penalty for usury and to recover damages for the defendants' tortious conduct in conspiring to exact usurious charges from them is an action at law."). This is consistent with the standard applied to appeals relating to other consumer protection statutes. *See Brown v. Dick Smith Nissan, Inc.*, 414 S.C. 101, 105, 777 S.E.2d 208, 210 (2015) ("An action brought under the Dealers

[9] Cash Central acknowledges that there is no case law directly addressing the standard of review under the Code. It makes its argument by analogy to other cases seeking statutory remedies. The Department appears to agree that this is an action at law. (App. Brief at Sections III(C), IV(D)). In the event the Court determines this matter sounds in equity rather than at law, Cash Central would further argue that all the findings of the trial court are supported by the preponderance of the evidence as required under the equitable standard of review. *See Townes Assocs. Ltd. v. City of Greenville*, 266 S.C. 81, 85, 221 S.E.2d 773, 775 (1976). However, this scope of review does not require this Court to disregard the findings of the trial court that saw and heard the witnesses and was in a better position to judge their credibility. *Tiger, Inc. v. Fisher Agro, Inc.*, 301 S.C. 229, 237, 391 S.E.2d 538, 543 (1989).

Act is an action at law."); *Payne v. Holiday Towers, Inc.*, 283 S.C. 210, 215, 321 S.E.2d 179, 182 (Ct. App. 1984) (finding an action under the South Carolina Unfair Trade Practices Act is at law). As such, this Court reviews the trial court's rulings to determine if they are supported by any evidence or governed by an error of law. *Townes Assocs., Ltd. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976).

## ARGUMENT

Cash Central concedes that it did not timely file and post a Maximum Rate Schedule as required by S.C. Code Ann. § 37-3-305. The issue then becomes whether any defenses apply such that Cash Central is not required to refund any interest collected above 18%.

The Department continues to insist that there is no defense for anything other than perfect compliance with the initial filing and posting requirements of the Code. This is contrary to the common law, which embraces the idea of substantial compliance, and the Code itself, which provides defenses for failure to achieve strict compliance if certain facts are proven. The trial court found that Cash Central proved entitlement to relief under three separate and distinct defenses: (1) the "bona fide error" defense found in S.C. Code Ann. § 37-5-202(7); (2) substantial compliance with the Code as recognized in *Davis v. NationsCredit Fin. Servs. Corp.*, 326 S.C. 83, 85-86, 484 S.E.2d 471, 472 (1997); and (3) the "bona fide error or excusable neglect" defense provided in S.C. Code Ann. § 37-3-201(6). To prevail in this appeal, the Department must show that the trial court erred as to all three of these defenses. The application of any one of these defenses bars the relief sought by the Department.

In interpreting the Code, "[t]he cardinal rule of statutory interpretation is to ascertain and effectuate the legislative intent whenever possible." *Mitchell v. City of Greenville*, 411 S.C. 632, 634, 770 S.E.2d 391, 392 (2015). A statutory provision should be given a *reasonable* construction

consistent with the purpose and policy expressed in the statute. *Jackson v. Charleston County Sch. Dist.*, 316 S.C. 177, 181, 447 S.E.2d 859, 861 (1994) (emphasis added).

Section 37-1-102(1) of the Code declares that it shall be liberally construed and applied to promote its underlying purposes and policies. One of the primary purposes of the Code is to "*further consumer understanding of the terms of credit transactions*" and to "protect consumer buyers, lessees, and borrowers against unfair practices by some suppliers of consumer credit, *having due regard for the interests of legitimate and scrupulous creditors*." S.C. Code Ann. § 37-1-102(2)(c), (d) (emphasis added).

The legislative intent of the "posting" requirement in S.C. Code Ann. § 37-3-305 is stated in subsection (3): "The purpose of this requirement is to assist you in comparing the maximum rates that creditors charge, thereby *furthering your understanding of the terms of consumer credit transactions* and helping you to avoid the uninformed use of credit." (Emphasis added). There is no evidence that Cash Central's failure to comply with South Carolina law was intentional or that any consumer or competitor was misled as to the interest rates charged by Cash Central based on the information presented on its website during the period in question.[10] All of the Department's arguments must be considered against this backdrop of uncontroverted facts.

[10] The Department conceded there was no willful or intentional disregard of the statutory requirements or the Department's forms. (R. at 18 ¶¶ 27-28). In addition, neither the Department nor Cash Central ever received any complaint against Cash Central concerning its rates or disclosures. (R. at 272:15-273:4). There was no evidence that any customer was harmed by Cash Central's failure to file the Maximum Rate Schedule or post the exact form issued by the Department instead of its own disclosure.

## I. Cash Central substantially complied with the terms of the Code and provided consumers with more and better information than would have been provided by posting a Maximum Rate Schedule approved by the Department.

The Department focuses its brief on Cash Central's technical failure to file and post the Maximum Rate Schedule issued by the Department while making no reference to the facts, as found by the trial court, that Cash Central provided more and more useful information than would have been provided on its website for any consumer or competitor to see if Cash Central had simply posted the Maximum Rate Schedule issued by the Department. (R. at 19-20). These facts led the trial court to determine that Cash Central substantially complied with the Code's directives and underlying purpose. As found by the trial court,

> 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.

(R. at 13-14). The trial court further found that "the architecture and workflow process of Cash Central's website required each customer to complete the loan transaction process utilizing the online loan calculator and provided numerous opportunities to view the South Carolina Fee Schedule page." (R. at 14-15). Given these facts, the trial court went on to conclude "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." (R. at 24). In order to avoid these facts, the Department takes the position that the trial court erred in considering anything other than the failure to file, including the information actually provided to consumers and competitors on Cash Central's website. (App. Brief at Section IV(D)).

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 elements of a statute that are not central to accomplishing the primary legislative intent. *See Davis v. NationsCredit Fin. Servs. Corp.*, 326 S.C. 83, 85–86, 484 S.E.2d 471, 472 (1997). The Department takes issue with the trial court's citation of *Responsible Economic Development v. Florence Consol. Mun. Planning Com'n.*, No. 2005-UP-584, 2005 WL 7084861 (S.C. Ct. App. Nov. 16, 2005) (citing numerous cases finding an entity substantially complied with notice provisions of a statute). However, that authority is not different in kind from other published South Carolina appellate authority. *Compare Responsible Economic Development* ("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." (emphasis added)), *with Brown v. Baby Girl Harper*,

410 S.C. 446, 453, 766 S.E.2d 375, 379 (2014) ("Substantial compliance has been defined as "compliance in respect to the essential matters necessary to assure every reasonable objective of the statute."). Thus, the mere citation to an unpublished opinion does not amount to an error of law. The fundamental principle is the same across all of these cases—did the party take steps such that the objectives of the statute were met even in the absence of technical perfection?

For purposes of this appeal, the most helpful discussion of the doctrine of substantial compliance is that in *Davis*. There, the South Carolina Supreme Court addressed the issue of whether a lender substantially complied with S.C. Code Ann. § 37-10-102 (the "attorney preference statute"). *Davis*, 326 S.C. at 85–86, 484 S.E.2d at 472. Recognizing that the purpose of the attorney preference statute was to protect borrowers by requiring disclosure of their rights to legal counsel of their choice contemporaneously with their loan application, 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 *Davis* court further 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*, 326 S.C. at 87, 484 S.E.2d at 473 (citing *General Motors Acceptance Corporation v. McMinn*, 285 S.C. 67, 328 S.E.2d 472 (1985)).

Given this guidance and the facts above, the trial court properly determined that Cash Central substantially complied with S.C. Code Ann. §§ 37-3-201 and 37-3-305 because the public was provided more information than was required by the Code and provided by the Department's form. Every consumer and any competitor of Cash Central could, throughout the entire period in question, access information concerning the type of loans made by Cash Central, the amount of the loans offered, the cost of credit, and the maximum interest rate. (R. at 648-670). The information that was available was more comprehensive and better promoted the informed used of credit than if Cash Central had simply posted the Maximum Rate Schedule issued by the Department. (R. at 712-715).

The Department has argued that *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. The Department's argument that this defense is unavailable has been rejected throughout this case because South Carolina courts have never placed any such limitation on the substantial compliance defense. Instead, the well-established defense is rooted in the principle that form should not be elevated over substance if the purpose expressed in the statute at issue is achieved. *Davis*, 326 S.C. at 86, 484 S.E.2d at 472 (citing *Jackson v. Charleston County Sch. Dist.*, 316 S.C. 177, 447 S.E.2d 859 (1994)). South Carolina courts have never limited the scope of the substantial compliance doctrine to hold that it does not apply to a failure to meet a regulatory filing requirement. In fact, other courts have reached the opposite conclusion. *See, e.g., Williamson, Inc. v. Calibre Homes, Inc.*, 106 Wash. App. 558, 570, 23 P.3d 1118, 1125 (Wash. Ct. App. 2001) (finding that a corporation had substantially complied with licensing requirement when

the only failure was the failing to actually file an application for a license). In rebuttal, the Department relies on *W&N Construction Co., Inc. v. Williams*, 322 S.C. 448, 472 S.E.2d 622 (1996), in which the South Carolina Supreme Court held that an unlicensed contractor could not recover on a contract. However, the issue of substantial compliance was not raised in that case, and it presents no facts to determine what efforts, if any, that contractor had made to comply with the requirement to obtain a license.

The Department's arguments are inconsistent with South Carolina law relating to substantial compliance and with the trial court's factual findings relating to Cash Central's website and the information that was provided to the public there. Based on the applicable law and standard of review, the trial court's ruling that Cash Central substantially complied with the Code's requirements should be affirmed.[11]

## II. The bona fide error defense in S.C. Code Ann. § 37-5-202(7) is available to a lender for failing to file a Maximum Rate Schedule approved by the Department.

### A. The Statute.

The Department argues that the affirmative defense provided in S.C. Code Ann. § 37-5-202(7) is not available to a supervised lender for failing to file or post the Maximum Rate Schedule as required under S.C. Code Ann. § 37-3-305. However, this argument is directly contrary to § 37-5-202, which provides that a consumer has a private cause of action for damages and penalties if a creditor fails to file or post a Maximum Rate Schedule and provides a defense for failure to

[11] The Department argues that even if Cash Central proved its defenses, it should still be required to refund excess charges. (App. Brief at I). However, the defenses of substantial compliance or that a bona fide error occurred pursuant to § 37-5-202(7) are complete defenses and excuse liability altogether. To construe the defenses otherwise would leave them meaningless as there would be no purpose for lenders to assert the defenses and prevail only to have a court order refunds of any amounts charged at an interest rate over 18%.

comply with that requirement under certain circumstances. Specifically, § 37-5-202(1) provides in relevant part:

> (1) If a creditor has violated any provisions of this title applying to . . . [the] ***schedule of maximum loan finance charges to be filed and posted*** (Sections 37-2-305 and 37-3-305), . . . the consumer has a cause of action to recover actual damages and also a right in an action other than a class action, to recover from the person violating this title a penalty in an amount determined by the court not less than one hundred dollars nor more than one thousand dollars.

(Emphasis added). Subsection 7 of § 37-5-202 provides a defense for creditors charged with a violation of subsection 1, and states:

> 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.

As set forth in the Complaint, the Department commenced this action pursuant to S.C. Code Ann. § 37-6-113, which allows it to recover excess charges for consumers who have a right to recover under the Code. (R. at 39 ¶¶ 6-7). In this derivative capacity, the Department sought the recovery of excess fees pursuant to S.C. Code Ann. § 37-5-202(1). (*Id*). Under § 37-6-113(A), "[a]fter demand, the administrator may bring a civil action against a creditor . . . subject to this title to recover actual damages sustained and excess charges paid by . . . consumers who have a right to recover explicitly granted by this title." This subsection concludes with the following statement: "[a] defense available to a respondent in a civil action brought by a consumer under this title is available to him in a civil action brought [by the Department] pursuant to this subsection." S.C. Code Ann. § 37-6-113(A). Therefore, Cash Central can assert any defense in this action that it would be able to assert in an action by an individual customer, including the bona fide error defense of S.C. Code Ann. § 37-5-202(7). The trial court, based on its review of the

evidence in this case, found that Cash Central had proven it was entitled to this defense. (R. at 19-22).

The Department argues that in *Bell Finance Company v. South Carolina Department of Consumer Affairs*, 297 S.C. 111, 374 S.E.2d 918 (Ct. App. 1988), this Court rejected the ability of a lender to use the bona fide error defense set forth in S.C. Code Ann. § 37-5-202(7). However, the Department's reliance on *Bell* is misleading and demonstrably incorrect. The *Bell* case does not mention, discuss, or make any conclusions concerning the bona fide error defense under § 37-5-202(7). Instead, the only issue decided in *Bell* was whether or not the plaintiff was a supervised lender subject to the requirement that a Maximum Rate Schedule be filed and posted. The *Bell* case does not hold that the bona fide error defense under § 37-5-202(7) does not apply to the lender's conduct, or that the Department's interpretation of § 37-5-202(7) has been approved, nor has it been cited by any other case for either conclusion. In fact, Cash Central is not aware of any case that has ever held that a lender failing to file a Maximum Rate Schedule may not avail itself of the defense created by § 37-5-202(7).

The Department further argues that S.C. Code Ann. § 37-5-202(7) is not available to lenders for failing to file a Maximum Rate Schedule because another statute, S.C. Code Ann. § 37-3-201(6), provides a defense for failing to file the Maximum Rate Schedule. However, the Department misconstrues the nature and impact of each of the two applicable statutes. Section 37-5-202(7) provides that a creditor must show a bona fide error in conjunction with procedures reasonably adapted to avoid the error that occurred. If a creditor makes such a showing, the creditor is completely excused from liability.

In contrast, S.C. Code Ann. § 37-3-201(6) provides:

[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). Each of these sections provides a defense to lenders under certain circumstances; however, the two defenses are not mutually exclusive nor are they contradictory as argued by the Department.

Where a lender has failed to file the Maximum Rate Schedule, § 37-3-201(6) requires the lender to demonstrate that it complied with the requirement for posting a Maximum Rate Schedule and that the failure to file was due to excusable neglect or bona fide error. There is no element requiring the lender to show policies or procedures in place to avoid the error, and instead, § 37-3-201(6) requires that the lender not have failed to file or post within the prior forty-eight months. Most significantly, perhaps, if a lender meets the requirements of § 37-3-201(6), its liability is not completely excused—instead, it owes a civil penalty of up to $5,000. If the lender meets the more stringent requirements of § 37-5-202(7), its liability is completely excused.

**B. The Department's interpretation is inconsistent with the Statutes.**

The Department continues to argue that the defense set forth in § 37-5-202(7) is not available based on its July 30, 1986 Administrative Interpretation No. 3.305-8601 ("Administrative Interpretation"). (App. Br. At Section III(A)). However, the trial court correctly rejected this argument because the administrative interpretation contradicts the plain language of

§ 37-5-202. Section 37-5-202(1) provides a private cause of action to a consumer "[i]f a creditor has violated ***any provisions of this title*** applying to . . . [the] ***schedule of maximum loan charges to be filed and posted*** (Sections 37-2-305 and 37-3-305)." (Emphasis added.)

Section 37-5-202(7) provides that:

> 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.

(emphasis added). Thus, the General Assembly obviously intended for this section to provide a defense for violations of the filing and posting requirements. The Department's interpretation denies a creditor an affirmative defense which is expressly provided by the same statutory section that provides the consumer (and the Department) the cause of action against the creditor.[12]

In addition, the Administrative Interpretation improperly prejudges the lender's actual conduct using conclusory statements and circular logic, stating "[t]he maintenance of such procedures would almost certainly result in the proper filing under Section 37-3-305." If "maintenance of such procedures" would always result in compliance, why would the General Assembly include the defense? The construct advanced by the Department is not permissible as "the appellate court must presume the legislature intended to accomplish something with an enacted statute and did not intend for a section or provision to be purposeless or futile." *S.C. Coastal Conservation League v. S.C. Dep't of Health & Envtl. Control*, 380 S.C. 349, 369, 669 S.E.2d 899, 909 (Ct. App. 2008), *rev'd on other grounds by,* 390 S.C. 418, 702 S.E.2d 246 (2010).

[12] As discussed above, the Department's claims pursuant to § 37-6-113(A) are derivative claims based solely on the consumer's right of action provided in §§ 37-5-202(1), (2), and (3) and therefore the defense set forth in § 37-5-202(7) also applies.

Cash Central offered ample, credible, and convincing evidence that it maintained and followed procedures to ascertain and comply with statutory filing requirements in the states in which it operated, including South Carolina. Cash Central prepared a Maximum Rate Schedule for filing with the Department, had every intention of making the initial filing, and had a procedure in place to ensure renewal filings. The overwhelming and uncontradicted evidence before the trial court was that the single, initial failure to file led to the other errors by Cash Central, and that none of the errors that occurred were the result of an absence of procedures in place.

Because, the plain language of the statute is contrary to the agency's interpretation, the Court properly rejected the Department's interpretation. *Brown v. Bi-Lo, Inc.*, 354 S.C. 436, 440, 581 S.E.2d 836, 838 (2003) (internal citation omitted); *see also State v. Sweat*, 379 S.C. 367, 384, 665 S.E.2d 645, 655 (Ct. App. 2008) (finding that the court was "free to read the statute based on the plain language without deference to the State's position"); *Richland Cty. School Dist. Two v. S. C. Dep't. of Educ.*, 335 S.C. 491, 517 S.E.2d 444 (Ct. App. 1999) (rejecting an administrative interpretation of a statute based on the plain meaning of the statute).

### C. Cash Central offered convincing and unrebutted evidence of procedures reasonably adapted to avoid the error.

Lastly, the Department contends that Cash Central did not prove this defense. In doing so, the Department does not argue that there is not evidence to support the trial court's ruling, but rather that the trial court got it wrong.

Once again, the Department asks the Court to demand perfection of Cash Central when the General Assembly has recognized in creating the defense that companies are run by humans and as a result, errors occur.[13] It is undisputed that the compliance outline created by Fox contained

[13] Regulatory agencies are also managed by humans and mistakes occur there too. The Department acknowledged that when it issued the Maximum Rate Schedule to Cash Central in April 2015, it stated that Cash Central offered secured loans, even though Cash Central had submitted a filing

comprehensive information about the requirement to file and post a Maximum Rate Schedule; however, the outline failed to clarify that filings were required with both the Board and the Department. Fox was aware and had every intention of following the outline to file the Department's Form and had prepared a draft for filing once Cash Central received its supervised licenses; however, Cash Central failed to make the filing after many months passed before the licenses were issued. In addition to the procedures in place for the initial filing, Cash Central implemented the use of License HQ to facilitate timely renewals, but it failed to preform perfectly due to unique requirements in South Carolina that involve filings with two regulatory agencies and licenses for two different entities. As established in the Facts, the initial inadvertent failure led to the subsequent inadvertent failures. Further, Roman testified that personnel changes and changes in the duties assigned to various personnel contributed to Cash Central's failure to file in 2014 and 2015. All of the testimony by Cash Central led to the trial court's well-supported conclusion that Fox's failure to ensure that the first maximum rate schedule was timely filed led to Cash Central's failure to subsequently file the form.

Both Fox and Roman testified that in hindsight, the compliance outline could have included more information to ensure that this error did not occur, but deficiencies in a procedure do not invalidate the bona fide error defense.[14] The General Assembly does not require that a lender have

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stating that it only made unsecured loans. (R. at 242:18-249:7; 674-675; 678-679). In December 2015, the Department issued a second incorrect Maximum Rate Schedule that failed to describe the type of loan even though the form submitted by Cash Central was correct. (R. at 268-272; 680). In explaining these errors, the Department's Administrator admitted that human errors are bound to occur.

[14] The Department also argues that Cash Central's error was an error of law, but that conclusion is not supported by the evidence. Fox testified that she knew that the Maximum Rate Schedule had to be filed with the Department at the time that she created the outline and prepared forms for filing. (R. at 8; 10-11). However, by the time that Cash Central was prepared to begin doing business in South Carolina, Fox did not realize that the forms had not already been filed. (R. at

***perfectly*** adapted procedures in order to be excused from liability for failing to post or file a Maximum Rate Schedule, and instead requires that the procedures be "reasonably adapted."[15] The Department argues that because the policies did not lead to perfect compliance, they failed. As is the case with many of the Department's other arguments, if the Court accepts the Department's argument, the statutory affirmative defenses that are intended to excuse less than perfect compliance are rendered meaningless. The trial court's finding that Cash Central established a defense under this statute is supported by the evidence and must be affirmed.

## III. The trial court correctly found that S.C. Code § 37-3-201(6) also provided a defense for this inadvertent failure to file and post.

Alternatively, any monetary liability for Cash Central's failure to file the Department's Maximum Rate Schedule form is strictly limited by the provisions of S.C. Code § 37-3-201(6) and the remedy there provided. As quoted above, this section limits monetary liability "to a civil penalty of up to $5,000" for an inadvertent failure to either file or post rates, provided that all three conditions in the subsection are satisfied, as they are here. The three requirements are: (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 . . . within the previous forty-eight month period." The Department contends that this defense does not apply to an initial failure to file or post.

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11). She did not make an error of law; she believed that the filings, which she had already prepared, had been made by Amy Jennings. (R. at 11).

[15] This standard is identical to the requirement in bona fide error defenses for several federal consumer statutes such as the Federal Debt Collection Practices Act. *See, e.g., Kort v. Diversified Collection Services, Inc.*, 394 F.3d 530, 537 (7th Cir. 2005) (complying with the FDCPA does not necessitate that "debt collectors . . . take every conceivable precaution to avoid errors; rather, it only requires reasonable precautions").

The trial court correctly applied this defense in this case. First, the failure to properly file the rate schedule with the Department, as demonstrated in the previous section, was a good faith error, and it also qualifies as excusable neglect. *Black's Law Dictionary* defines "excusable neglect" as "[a] failure—which the law will excuse—to take some proper step at the proper time . . . not because of the party's own carelessness, inattention, or willful disregard of the court's process, but because of some unexpected or unavoidable hindrance or accident . . . ." NEGLECT, *Black's Law Dictionary* (10th ed. 2014). As stated by the trial court in its "Findings of Fact" and conceded by the Department, there was no willful or intentional disregard of the statutory requirements or the Department's forms. (R. at 18 ¶¶ 27-28). The evidence clearly demonstrates that Cash Central had every intention to file its Maximum Rate Schedule and had prepared the form for filing with the Department. The failure to file the prepared form was simply an unintentional oversight.

Moreover, Cash Central 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. In fact, Cash Central's disclosures exceeded the statutory requirement for posting the single annual percentage rate for its highest rate loan (as shown on the Maximum Rate Schedule actually issued by the Department), and included the optional "series of rates for different dollar amounts and maturities" of loans. (R. at 712-715). Most importantly, Cash Central's unique online loan calculator permitted every customer to learn prior to completing their loan application, the *exact rate for the actual loan for which they were applying*. For all practical purposes, Cash Central's actual method of "posting" was superior to the Maximum Rate Schedule actually issued by the Department in terms of advancing the legislative purpose of promoting informed consumer credit transactions. (*See* R. 706 ¶ 6; 712-717).

The Department never considered whether Cash Central's disclosures complied with the statute. No one from the Department could state exactly what was on Cash Central's website when it was reviewed, and Carolyn Grube-Lybarker, the Department's Administrator, admitted that all she could recall was that the Maximum Rate Schedule form issued by the Department was not on the website. (R. at 250:23-252:22). Despite her cursory examination, the Department claimed that in examining a posting by a supervised lender, the Department considers whether a posting other than the actual form issued by the Department on a "case by case basis." (R. at 255:20-257:20). In looking only for the actual Maximum Rate Schedule issued by the Department, the Department contradicted its own interpretation and procedure.

Second, after Cash Central was notified by the Board on April 3, 2015, of its previous failure to file, Cash Central filed its Maximum Rate Schedule with the Department for both licenses on April 10, 2015, just seven days later. (R. at 369:13-370:15; 673-677). Thus, the rates were promptly filed and posted once Cash Central became aware of the problem.[16]

Third, no other failure to file rates has been brought to the Cash Central's attention by the Department or by consumers within the previous forty-eight month period. (R. at 27). Thus, Cash Central meets all three of the "conditions" required to establish a defense under § 37-3-201(6).

Subsection six 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

[16] Substantially the same rates that were filed in 2015 had been filed in 2013 with the Board, demonstrating there was never any intention by Cash Central to hide the rates it charged.

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 a conclusion is absurd, and requires ignoring the legislative intent behind this provision. "[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).

If 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.

Literal application of the "previously properly filed" language would also yield differing results for essentially identical conduct. A lender that initially filed its maximum rate, but then failed to re-file for 18 months (or even more), would be excused for its failure to file, assuming all other conditions of subsection six were satisfied. However, a lender like Cash Central in this case, whose 18 month-failure to file occurred at the onset of its business in South Carolina, would not be excused. The statutory language should be interpreted to avoid such a result, especially since there is no other indication in the legislative scheme that the Legislature intended to limit liability

for a failure of a *subsequent* maximum rate filing, under the stated conditions, but not an *initial* maximum rate filing.

Finally, "'[w]ords 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.

The actual interest rates that Cash Central charged are otherwise perfectly legal, and the primary purpose of the statutory scheme—to provide disclosure of the actual loan interest rate to the consumers contemporaneously with their loan transaction—was indisputably achieved. The clear legislative intent behind subsection six is to protect lenders like Cash Central from significant monetary liability due to an inadvertent failure to file the Maximum Rate Schedule with the Department. As directed by the *Fulghum* decision, this Court should find 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 Ann. § 37-1-102(2)(d) (emphasis added), construe subsection six in accordance with the legislative intent to limit liability for Cash Central's failure to file the rate schedule with the Department.

The statutory section nowhere states that it applies in only one instance and not the other. Fairly applying the rules of statutory interpretation with "due regard for the interests of legitimate and scrupulous creditors" compels the conclusion that the defense can apply in either situation, provided the lender meets all elements of the defense. Here, the Court correctly found that Cash Central presented convincing and uncontradicted evidence that its failure to file the Department's Form in 2013 led to the failure to file the form in 2014 and 2015. (R. at 16-17). The Court correctly concluded that "the initial failure to file was the primary cause of the subsequent failures," and the Court concluded that the initial failure to file was caused by excusable neglect. (R. at 21; 26-27). These excusable failures, combined with the trial court's finding that Cash Central substantially, if not literally, complied with the ***statutory*** posting requirements, led the Court to conclude that the defense available under § 37-2-201(6) was available to Cash Central for the entire period in question.

The trial court also correctly rejected the Department's argument that the § 37-2-201(6) defense requires *both* a penalty and refunds of excess charges. (R. at 28-29). This defense states quite plainly "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." S.C. Code Ann. § 37-3-201(6). This section says nothing about refunds of excess charges, and the purpose behind it is to limit the otherwise applicable liability for refunds of excess charges to a civil penalty of up to $5,000 per incident, for a failure to either file or post rates. The defense is not designed to impose *additional* liability for compliance failures.

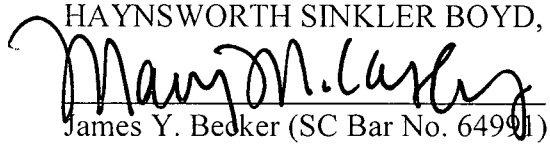
For these reasons, the trial court correctly concluded that § 37-3-201(6) limits liability for Cash Central's failure to file the Department's Form, and the liability is restricted to the penalty ordered by the Court.

## CONCLUSION

The trial court included detailed findings of fact showing that Cash Central's failure to file and post a maximum rate schedule was unintentional and occurred despite Cash Central's extensive efforts to comply with South Carolina law. The trial court further found that Cash Central provided the required information and significant additional information, such that Cash Central substantially complied with the Code. Based on these factual findings, the trial court found that Cash Central had established three defenses to the Department's claims. This Court must affirm if it agrees as to *any* one of the three defenses. As set forth above, the common law and the Code do not require perfect compliance and this Court should affirm the trial court's ultimate ruling that Cash Central was not required to refund any excess charges.

Respectfully submitted,

HAYNSWORTH SINKLER BOYD, P.A.



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Robert E. Hood, Circuit Court Judge

Case No. 2016-CP-40-02859

South Carolina Department of Consumer Affairs ..... Appellant,

v.

Cash Central of South Carolina LLC ..... Respondent

**CERTIFICATE OF COUNSEL**

The undersigned herby certifies that the Final Brief of Respondents complies with Rule 211(b).

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