STATE OF NEW MEXICO
COUNTY OF SANTA FE
FIRST JUDICIAL DISTRICT

STATE OF NEW MEXICO, *ex rel.*
GARY K. KING, Attorney General,

Plaintiff,

v. Case No. D0101-CV-2009-01917

FASTBUCKS HOLDING CORPORATION, *et al.*,

Defendants.

DECISION AND FINAL ORDER

THIS MATTER having come before the Court for a non-jury trial on liability and appropriate remedies, and the Court having heard all evidence presented by the parties and reviewed the closing arguments submitted by the parties, finds and determines:

1. This Court has subject matter jurisdiction of the action and personal jurisdiction over the parties, and venue is proper.

2. The Attorney General is the proper party to bring this action. *See* NMSA 1978, § 57-12-8.A (1977).

3. "Unfair or deceptive trade practices and unconscionable trade practices in the conduct of any trade or commerce are unlawful." NMSA 1978, § 57-12-3 (1971).

4. Subpart E of Section 57-12-2, NMSA 1978 (2009), provides:

> "unconscionable trade practice" means an act or practice in connection with the sale, lease, rental or loan, or in connection with the offering for sale, lease, rental or loan, of any goods or services, including services provided by licensed professionals, or in the extension of credit or in the collection of debts that to a person's detriment:
>
> (1) takes advantage of the lack of knowledge, ability, experience or capacity of a person to a grossly unfair degree; or

(2) results in a gross disparity between the value received by a person and the price paid.

5. In 2007, the Legislature enacted statutory reforms to regulate *payday* loans. *See* §§ 58-15-32 - 58-15-39, NMSA 1978 (2007). It appears from the Legislature's 2007 reforms that its concern was with the costs of loans to consumers, rather than what a lending device is named. To be sure, it would be difficult for a legislative body to fathom all the clever permutations of lending devices that might be designed or what names such devices might be given.

6. Although the 2007 reforms address payday loans, the Unfair Trade Practices Act (UPA) addresses the very type of unconscionable lending practices at issue in this matter. The UPA prohibits alternative means of engaging in unconscionable trade practices, and Defendants have engaged in both of those prohibited means in that they have taken advantage of the lack of knowledge, ability, experience or capacity of persons to a grossly unfair degree *and* their extensions of credit have resulted in gross disparities between the value received by persons and the prices paid. *See* § 57-12-2.E(1) & (2).

7. After enactment of the 2007 legislative reforms, Defendants fashioned their loans and business practices so as to circumvent regulation of payday loans. They dramatically increased their use of installment loan products and decreased the use of payday loans. Given the obvious reversal in the usage of the two loan products after the legislation was enacted in 2007, this Court rejects as pretextual Defendants' justification that they promoted installment loan products over payday loans due to customers not having checks.

8. Defendants took advantage of borrowers' lack of knowledge, ability, experience or capacity to a grossly unfair degree by deliberately steering borrowers into loans that subjected them

to higher interest rates and that kept them locked into recurring cycles of debt. Defendants are experts in the loan products they created and demonstrated their superior knowledge of the alternative loan products through their explicit actions to maneuver around the regulation of payday loans, through the measures they took to attempt to maintain and emphasize the availability of "installment loan products," and by diverting borrowers away from regulated, less expensive payday loans.

9. Defendants provide incentives to their representatives for steering borrowers into the more expensive installment loan products and away from less expensive loan products, and for promoting prolonging and recurring inescapable indebtedness to Defendants. For example, Rose Figueroa testified that "[w]e just basically don't let anybody pay off," and that "[w]e tell them how their tax refund is better used at Wal-Mart . . . than at FastBucks, and we basically talk them into making a payment and continuing to be our customer." She was congratulated for her approach and used as an example for how other employees of Defendants could conduct themselves to earn the conspicuous financial rewards that were imparted upon her. This Court rejects Witness Coyazo's explanation for the "[w]e just basically don't let anybody pay off" comment as disingenuous, particularly given that it immediately preceded "[w]e tell them how their tax refund is better used at Wal-Mart." It is clear from the context that Ms. Figueroa was referring to not allowing *the same* borrowers to pay off their loans when they were able to, rather than replacing borrowers who paid off their loans with new borrowers.

10. Examples of how Defendants dissuade borrowers from taking out payday loans and steer them into installment loan products include Defendants using "smooth selling language," training and instructing store managers to portray payday loans in less favorable terms than

installment loan products, and misleading borrowers on the characteristics of payday loans as compared to installment loan products.

11. Defendants encourage borrowers of installment loan products to "pay off" one loan with a new loan, which would be expressly prohibited if the borrower had taken out payday loans rather than installment loan products. *See* § 58-15-34.A & E. By promoting installment loan products in lieu of payday loans, Defendants also avoid the provisions of Section 58-15-35, which require lenders of payday loans to "offer the consumer the opportunity to enter into an unsecured payment plan for any unpaid administrative fees and principal balance of the payday loan," allow consumers of payday loans to enter into payment plans for any unpaid administrative fees and the principal balances of payday loans, and give consumers of payday loans the opportunity to retire their delinquent debt obligations over a minimum 130-day repayment period without incurring interest–all benefits to borrowers that Defendants avoid by promoting installment loan products.

12. Testimony shows that borrowers did not understand the differences between payday loans and installment loan products and that those differences were not explained to them.

13. Defendants' exploitation of the disparity in knowledge and insights into the various loan products that they possess as compared to their customers is exemplified in their efforts to promote installment loan products and thereby engage in practices that would be prohibited when a loan is fashioned as a payday loan and by their efforts to subject their consumers to loan terms that are more detrimental to consumers than those of payday loans. Their actions take advantage of their customers lack of knowledge of the intricacies of the loan options to a grossly unfair degree.

14. Defendants' installment loan products carry Annual Percentage Rates (APRs) of 520 to 650 percent. The high APRs and prolonged repayment terms result in detrimentally expensive

loan products. Defendants' loan practices have resulted in some borrowers paying back more than twice the amount they borrowed. One borrower repaid $889.26 more in interest on his installment loan product than he would have for a payday loan. Another borrower incurred a repayment obligation of $4,680.48 for a $934 installment loan product. Another borrower incurred a repayment obligation of $2,303.71 for an $800 installment loan product. The evidence illustrates a pattern of Defendants manufacturing exorbitantly expensive repayment obligations through their use of the installment loan products. The evidence shows a gross disparity between the value received and the prices paid for installment loan products.

15. Given borrowers' financial conditions, it was knowable *ab initio* that they would be unable to repay their loans without accruing exorbitant interest.

16. Defendants' essentially acknowledge through their own admissions that they take advantage of borrowers' desperate financial conditions and argue that the "value" of their loan products is increased due to that desperation.

17. This Court rejects Defendants' asserted conceptualization of "value," which would essentially encourage their exploitation of borrowers' desperate conditions that are intrinsic to their argument without considering the disparity in knowledge of the available loan products. Interestingly, the same argument that "value" increases based on a borrower's desperate financial circumstances could have been made to define the "value" of payday loans, yet the Legislature placed limitations on those loans.

18. Given that Defendants have engaged in unconscionable lending by taking advantage of the lack of knowledge, ability, experience or capacity of persons to a grossly unfair degree *and* extending credit that has resulted in gross disparities between the value received by persons and the

prices paid, this Court finds that Defendants shall pay restitution. *See* § 57-12-2.E(1) & (2). However, while the Court agrees that the proper measure of restitution for consumers victimized by practices that violate the UPA is the amount of consumer loss, the Court rejects the Attorney General's position on the amount of consumer loss. The Attorney General asserts that the amount of restitution should be "the total sum of monies FastBucks collected in excess of principal from the ILPs, minus any deficiencies incurred on individual loans with borrowers who took out multiple ILPs from FastBucks." The Attorney General's position would place no time value of money on the loans. This Court finds that the amount of consumer loss is best represented by the difference in the amounts the borrowers paid under the installment loan products and the amounts they would have paid had they taken out payday loans, minus any deficiencies incurred on individual loans. This formulation takes into account equitable considerations, including the public policy considerations made clear by the Legislature in its 2007 reforms.

19. This Court further finds that Defendants shall be permanently enjoined from originating installment loan products that provide terms that do not accord with those statutory consumer protections to which payday loans are subject.

20. Except to the extent they accord with the statutorily required terms of payday loans, Defendants' installment loan products and loan agreements by any other name that share the same or similar terms as their installment loan products are prohibited by Section 57-12-2.E and are unenforceable as a matter of New Mexico law.

21. The Court denies the request for civil penalties.

22. The Court denies Defendants' claim of equitable estoppel because they have failed to satisfy the elements thereof.

IT IS ORDERED that Defendants shall pay restitution for the differences in the amounts the borrowers paid under the installment loan products and the amounts they would have paid had they taken out payday loans, minus any deficiencies incurred on individual loans.

IT IS FURTHER ORDERED that Defendants shall be, and hereby are, permanently enjoined from originating installment loan products that provide terms that do not accord with those statutory consumer protections to which payday loans are subject.

IT IS DECLARED that, except to the extent they accord with the statutorily required terms of payday loans, Defendants' installment loan products and loan agreements by any other name that share the same or similar terms as their installment loan products are prohibited by Section 57-12-2.E and are unenforceable as a matter of New Mexico law.

Michael E Vigil

MICHAEL E. VIGIL
DISTRICT COURT JUDGE

Notice on date of filing to:

KAREN MYERS, JOHN THOMPSON, WILLIAM KELLER
DONALD F. KOCHERSBERGER III