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IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT
LORAIN COUNTY, OHIO

OHIO NEIGHBORHOOD FINANCE, INC. D/B/A CASHLAND Appellant vs. RODNEY SCOTT Appellee	CASE NO. 11CA010030 APPEAL FROM THE ELYRIA MUNICIPAL COURT, CASE NO. 09 CVF01488

MERIT BRIEF OF AMICI CURIAE THE LEGAL AID SOCIETY OF CLEVELAND, THE LEGAL AID SOCIETY OF COLUMBUS, COMMUNITY LEGAL AID SERVICES, INC., SOUTHEASTERN OHIO LEGAL SERVICES, THE LEGAL AID SOCIETY OF SOUTHWEST OHIO, LLC, ADVOCATES FOR BASIC LEGAL EQUALITY, INC., LEGAL AID OF WESTERN OHIO, INC., THE OHIO POVERTY LAW CENTER, THE COALITION ON HOMELESSNESS AND HOUSING IN OHIO, THE CENTER FOR RESPONSIBLE LENDING, AND THE NATIONAL CONSUMER LAW CENTER IN SUPPORT OF APPELLEE RODNEY SCOTT

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STATEMENT OF THE ISSUES PRESENTED

The issues presented are as follows: 1) whether Ohio's Short-Term Loan Act applies to Cashland's short-term, single payment loans; 2) whether Cashland made a loan to Rodney Scott in violation of the Short-Term Loan Act; and 3) whether Cashland's loan to Rodney Scott also violated the Ohio Mortgage Loan Act.

STATEMENT OF THE CASE

Ohio Neighborhood Finance, Inc. d/b/a Cashland (hereinafter "Cashland") brought this action against Rodney Scott in the Elyria Municipal Court in Lorain County, seeking to recover on a loan contract. Rodney Scott did not answer or otherwise plead. After an evidentiary hearing in the Elyria Municipal Court, Magistrate Richard Schwartz issued Findings of Fact and Conclusions of Law ("Decision" or "Magistrate's Decision"), which found that Scott's Loan was not governed by the Ohio Mortgage Loan Act, but by the Short-Term Loan Act, and recommended that Cashland be granted a judgment of $465 plus 8% interest from the date of loan origination. Cashland filed objections to the Magistrate's Decision, arguing that it was entitled to additional fees and interest. Judge Lisa Locke Graves issued an Opinion affirming the Magistrate's Decision ("Opinion"), and Cashland filed the instant appeal.

Cashland's appeal was initially dismissed for lack of a final appealable order, but reinstated after a clarifying order from the Municipal Court. Cashland filed its Brief of Appellant (hereinafter "Cashland Brief") on March 12, 2012, and Richard F. Keck filed a Brief of *Amicus Curiae* (hereinafter "Keck Brief") in support of Cashland on March 13, 2012. The undersigned *Amici*—Ohio's legal services programs, the Coalition on Homelessness and Housing in Ohio, the Center for Responsible Lending, and the

National Consumer Law Center—file this brief in support of Appellee Rodney Scott, in which the *Amici* urge this Court to affirm the decision of the Elyria Municipal Court.

STATEMENT OF THE FACTS

The Appellant, Cashland, is in the business of making what are commonly known as payday loans: short-term, unsecured, single payment loans. Payday loans were previously governed by Ohio's Check-Cashing Lender Law, commonly known as the Payday Loan Act, pursuant to the former R.C. §§ 1315.35-1315.44. However, in 2008, the Ohio legislature repealed the Payday Loan Act and simultaneously enacted Sub. H.B. 545, commonly known as the Short-Term Loan Act ("STLA"), R.C. §§ 1321.35-1321.48, a substitute usury law intended to regulate the making of short-term loans. Ohio Legislative Service Commission, *Final Analysis of 2008 Sub. H.B. 545* (Sept. 1, 2008), http://www.lsc.state.oh.us/analyses127/08-hb545-127.pdf (accessed March 26, 2012). The law was "bipartisan legislation" intended as a "major step toward protecting Ohio consumers who are already struggling with debt by strictly regulating payday lenders and lowering the maximum interest rate for short-term loans." Ohio Governor's Message, June 2, 2008 (App. at A-1). The intent of the STLA was to regulate all short-term loans made in the state of Ohio, including unsecured, single payment, "payday" loans of the type offered by Cashland.

The Short-Term Loan Act places significantly stricter limitations on payday lending than did its statutory precursor. Among other changes, the Short-Term Loan Act reduces the permissible annual percentage rate ("APR") on payday loans from the approximately 391% that was allowed under the Payday Loan Act to a significantly lower 28%. The Short-Term Loan Act also sets a minimum loan term of 31 days, forbids short-term lenders from indebting a borrower in an amount greater than 25% of the borrower's gross monthly income, prohibits the issuance of short-term loans that merely pay off existing short-term loans, and contains other requirements designed to minimize financial detriment to borrowers. R.C. §§ 1321.35, 1321.39-1321.41; Ohio Legislative Service Commission, *Final Analysis of 2008 Sub. H.B. 545* (Sept. 1, 2008), http://www.lsc.state.oh.us/analyses127/08-hb545-127.pdf (accessed March 26, 2012).

Payday lenders' response to the June 2008 passage of the Short-Term Loan Act was aggressive. The payday loan industry spent millions of dollars attempting to overturn the new law by organizing a voter referendum, known as Ballot Issue 5, for Ohio's November 2008 election. Cash America, the parent company of appellant Cashland, spent $4.2 million on this effort, according to its filings with the Securities and Exchange Commission (public records of which this Court may take judicial notice).[1] Cash America, 2009 Form 10-K Annual Report (Feb. 26, 2010), at 60, http://ir.10kwizard.com/filing.php?ipage=6791540&DSEQ=1&SEQ=&SQDESC=SECTION_BODY&exp=&source=1570&fg=24&yr=2010 (accessed March 26, 2012).

Ballot Issue 5 asked voters to decide whether the Short-Term Loan Act should replace "the old provisions of the law regulating check cashing lenders, sometimes known as 'payday lenders.'" Ohio Secretary of State, *Ohio Issues Report: State Ballot*

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[1] This Court can take judicial notice of a fact as long as the fact is not "subject to reasonable dispute" and is either "generally known within the territorial jurisdiction" of the court or "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Evid.R. 201. This Court can take judicial notice of the following: public records (*McKenzie v. Davies,* 2d Dist. No. 22932, 2009-Ohio-1960, ¶ 24); facts that receive widespread media attention (*Ohio St. Assn. of United Assn. of Journeymen v. Johnson Controls, Inc.*, 123 Ohio App.3d 190, 196, 703 N.E.2d 86 (8th Dist.1997)); and publicly available documents including press releases and documents filed with the Securities and Exchange Commission (*Chamberlain v. Reddy Ice Holdings, Inc.*, 757 F.Supp.2d 683, 698-99 (E.D.Mich.2010)).

Information for the November 4, 2008 General Election, at 17, http://www.sos.state.oh.us /sos/upload/publications/election/Issues_08.pdf (accessed March 26, 2012).[2] Ohio voters overwhelmingly decided to approve the Short-Term Loan Act, with 63.6% of voters casting a "YES" vote in favor of the Short-Term Loan Act. Ohio Secretary of State, *Amendment and Legislation: Proposed Constitutional Amendments, Initiated Legislation, and Laws Challenged by Referendum, Submitted to the Electors* (updated 12/19/11), at 24-25, http://www.sos.state.oh.us/sos/upload/elections/historical /issuehist.pdf (accessed March 26, 2012).

Immediately following this defeat at the polls, on November 5, 2008, Cash America issued a press release announcing that the company would have to close several locations because "the [Short-Term Loan Act] calls for an annual rate cap of 28 percent, which isn't economically feasible for store front providers of small short-term loans to customers." *Cash America: Election Results Force Cash America to Make Tough Decisions* (Nov. 5, 2008), at 1, http://www.cashamerica.com/Files/NewsReleases/ 2008/PROhio%20Defeat1108.pdf (accessed March 26, 2012). Cash America also stated

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[2] The ballot described the differences in loan amounts, loan terms, and APRs permitted under each regulatory scheme, and gave voters the following choice:

> A "YES" vote means you approve of Section 3 of H.B. 545, and want to limit the interest rate for short term loans to 28% APR and change short term lending laws. A "NO" vote means you disapprove of Section 3 of H.B. 545 and want to permit check cashing lenders to continue to be able to offer short term loans as currently permitted.

Id.

that "we will soon launch an alternative short-term loan product under the Ohio Mortgage Loan Act in our Ohio lending locations." *Id.* at 2.[3]

Cash America similarly announced its plan to offer short-term loans under the Ohio Mortgage Loan Act (hereinafter "OMLA"), R.C. §§ 1321.51-1321.60—rather than under the Short-Term Loan Act—in certain filings with the Securities and Exchange Commission. In a 2008 filing prior to the November 2008 election, Cash America notified investors that it planned to "offer alternative products and services *under other provisions in Ohio law* . . . in the event the referendum . . . is unsuccessful." Cash America, 2008 Form 10-Q Fourth Quarter Quarterly Report (Oct. 31, 2008), at 10, *h*ttp://ir.10kwizard.com/filing.php?ipage=5949444&DSEQ=1&SEQ=&SQDESC=SECTION_BODY&exp=&source=1570&fg=23&yr=2008 (accessed March 26, 2012) (emphasis added).

Indeed, after the Short-Term Loan Act became the regulatory scheme for all payday-style loans, Cashland did not stop making such loans, nor did it obtain an STLA license and modify its products to comply with the STLA. Instead, Cashland registered under the OMLA, a statute that was never intended to regulate payday lenders.[4] Under

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[3] This Court can take judicial notice of the content of this press release pursuant to Evid.R. 201. *E.g. Chamberlain v. Reddy Ice Holdings, Inc.*, 757 F.Supp.2d 683, 698-99 (E.D.Mich.2010). See footnote 1, *supra*.

[4] The Elyria Municipal Court Magistrate's Decision provides a detailed history of the Ohio Mortgage Loan Act, explaining that it was originally enacted to regulate lenders of non-first lien home mortgages and was later expanded to govern first mortgage loans and certain unsecured loans. Decision at 11-12. As the Magistrate's Decision explains, even though the OMLA has become more inclusive over the years, the legislative intent has always been to govern long-term installment loans, not short-term, single payment loans of the type at issue here. *Id.* Indeed, trying to fit the short-term, single payment, payday loan model into the framework of the OMLA is akin to pushing a square peg into a round hole. As the Magistrate points out, "Cashland surely cannot be arguing that the MLA

the guise of the OMLA, Cashland continued to make the same type of loans it had previously made as a licensed payday lender: single payment, short-term, unsecured loans due back in less than 31 days, with annual percentage rates well above the 28% limit imposed by the STLA.[5] Notwithstanding the fact that Ohio's legislature and voters had rendered these loans illegal, Cashland failed to change the terms of its loans to comply with the STLA and instead took deliberate actions to evade the STLA's requirements.

On December 5, 2008, Cashland issued a short-term, single payment, payday-style loan to Rodney Scott (hereinafter "Loan"). Pursuant to the Loan agreement, Scott received \$500.00 from Cashland and was required to pay back \$545.16 to Cashland fourteen days later, on December 19, 2008. The transaction included \$45.16 in finance charges, consisting of a \$30.00 fee for "loan origination" and a \$10.00 "credit investigation" fee, as well as 25% interest. The Loan contained only one scheduled

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was intended or can be conceivably interpreted to allow its lenders to write loans secured by home mortgages to be repayable in full in a matter of days by lump sum." *Id.* at 1.

[5] There are small differences in the fees and procedures between Cashland's current short-term, single payment loans and those offered prior to November 2008. April 1, 2010 Hearing Transcript, 41:12-43:23, Ex. 1 to Appendix of Plaintiff's Motion to Set Aside Magistrate's Decision. However, the loans Cashland currently offers epitomize the type of loans that the Short-Term Loan Act was designed to regulate, in that they are short-term, single payment, unsecured loans that are typically due less than 31 days after loan origination. *Id.* A study by Policy Matters Ohio, published almost a year after the STLA was approved by Ohio voters, found that "[d]espite having one of the best-crafted payday lending laws in the nation, Ohioans are still paying triple-digit interest rates on payday loans." David Rothstein, "New Law, Same Old Loans: Payday Lenders Sidestep Ohio Law," *Policy Matters Ohio* (Sept. 2009), at Executive Summary, http://www.policymattersohio.org/new-law-same-old-loans-payday-lenders-sidestep-ohio-law (accessed March 29, 2012). The study's "findings indicate that payday loans are similar to, if not worse than, before the legislative changes from 2008, because lenders are not operating under the new law. Stores are still selling high-cost, short-term, two-week loans." *Id.* at 6.

payment of \$545.16, due back in fourteen days, on December 19, 2008. Based on these terms, the APR for the Loan was 235.48%. The Loan agreement further provided an authorization to Cashland to electronically debit the funds from Scott's bank account. The agreement also provided for a late fee of the greater of \$15.00 or 5% of the total scheduled payment, as well as a \$20.00 "check collection" fee. *See generally* Customer Agreement, Ex. 2 to Appendix of Plaintiff's Motion to Set Aside Magistrate's Decision (hereinafter "Customer Agreement").

Scott did not repay the Loan in full before the scheduled due date, though he subsequently made a \$35.00 payment on the account. Affidavit of Tara Mapes, Ex. 6 to Appendix of Plaintiff's Motion to Set Aside Magistrate's Decision. On May 28, 2009, Cashland filed a lawsuit seeking judgment against Scott in the sum of \$570.16 plus 25% interest.

ARGUMENT AND LAW

I. Introduction

Cashland continues to make the same type of payday loans that it made prior to the enactment of Short-Term Loan Act, notwithstanding the fact that the Ohio legislature and voters have decided that these loans are no longer legal in Ohio. Cashland has purposefully circumvented the STLA, which is designed to protect borrowers from usurious loans that often lead to a devastating cycle of debt.[6] Cashland claims that its

[6] This cycle of debt has been documented in various publicly available studies of which this Court may take judicial notice. These studies have found that—contrary to the marketing claims made by the payday loan industry—the vast majority of new payday loans are *not* taken out to cover one-time financial emergencies. Rather, the payday loan business model encourages "repeat" or "chronic" borrowing, where borrowers obtain new payday loans in back-to-back transactions to pay off existing payday loans and thereby get trapped in a long-term cycle of debt. David Rothstein and Jeffrey D.

OMLA license allows it to continue to make the very payday loans that the Ohio legislature and people of this state specifically rejected. Both Magistrate Schwartz and Judge Locke Graves properly rejected this argument. This Court should do the same.

First, the Ohio General Assembly designed and enacted the STLA to cover all short-term, unsecured, single payment loans in the state of Ohio. Pursuant to this legislative mandate, the STLA—not the OMLA—applies to Scott's Loan. This Court should construe the STLA in a manner that gives meaning and effect to its licensing requirements, restrictions on loan terms and charges, and other provisions.

Second, the Court should find that Cashland has violated the STLA both in its failure to obtain STLA licensing and in the terms of the Loan itself. In addition, Cashland has violated the STLA by actively engaging in device or subterfuge to evade the requirements of the Act. Cashland's disregard for the law of our state should not be permitted.

Third, this Court should avoid a decision that would nullify the will of the legislature and voters regarding the STLA. The Ohio legislature made a public policy

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Dillman, "Trapped in Debt: The Growth of Payday Lending in Ohio," *Policy Matters Ohio* (Feb. 2007), http://www.policymattersohio.org/trapped-in-debt-the-growth-of-payday-lending-in-ohio (accessed March 29, 2012). The result of this debt trap is that "the typical borrower ends up paying back $793 for a $325 loan." Uriah King, Leslie Parrish and Ozlem Tanik, "Financial Quicksand: Payday lending sinks borrowers in debt with $4.2 billion in predatory fees every year," *Center for Responsible Lending* (Nov. 30, 2006), at 7, http://www.responsiblelending.org/payday-lending/research-analysis/financial-quicksand-payday-lending-sinks-borrowers-in-debt-with-4-2-billion-in-predatory-fees-every-year.html (accessed March 29, 2012). Furthermore, "[t]his 'churning' of existing borrowers' loans every two weeks accounts for three-fourths of all payday loan volume . . . In contrast, loans to non-repeat borrowers account for just two percent of loan volume." Leslie Parrish and Uriah King, "Phantom Demand: Short-term due date generates repeat need for payday loans, accounting for 76% of total volume," *Center for Responsible Lending* (July 9, 2009), at 3, http://www.responsiblelending.org/payday-lending/research-analysis/phantom-demand-final.pdf (accessed March 29, 2012).

determination to repeal Ohio's former Payday Loan Act and replace it with the STLA, and when the payday loan industry organized a ballot referendum on the issue, Ohio voters overwhelmingly upheld the more stringent regulatory scheme enacted by their elected officials. The STLA must be construed to give it the meaning and effect intended by the legislature.

Fourth, the Ohio Division of Financial Institutions (hereinafter "Division")—the administrative agency responsible for carrying out such legislative enactments—was required to implement the STLA by compelling Cashland to obtain an STLA license and ensuring that Cashland's short-term loans comply with STLA limitations. However, the Division has failed to mandate STLA licensing and instead has permitted Cashland to evade the STLA by making illegal short-term loans under the guise of OMLA licensing. The fact that the Division appears to have abdicated its enforcement responsibility does not negate the existence, validity, or applicability of the STLA.

Finally, even if the Court were to find that the OMLA applies to Cashland's payday lending business, Scott's Loan also violates the terms of the OMLA.

II. The Short-Term Loan Act (STLA) Applies to Scott's Loan and the Terms of the Loan Violate the STLA

The Elyria Municipal Court correctly held that the Short-Term Loan Act applies to the loan Cashland made to Rodney Scott and that the terms of the Loan violate the Act.

A. The Short-Term Loan Act Applies to the Loan

As the Elyria Municipal Court recognized, Scott's Loan is precisely the type of payday-style loan that the Short-Term Loan Act was designed to regulate. The Loan was for a short-term, required a single payment, involved an electronic debit from Scott's bank account, provided for a check collection fee, and included $45.16 in finance charges even though the amount Scott borrowed was only $500.00. Certain features of Scott's Loan are precisely those features that the General Assembly chose to limit when it repealed the Payday Loan Act and replaced it with the Short-Term Loan Act. For example, Scott's Loan had a term of only fourteen days, a duration that was typical of loans issued under the prior Payday Loan Act, but which the General Assembly chose to prohibit when it enacted the Short-Term Loan Act and established a new minimum duration of 31 days. R.C. § 1321.39(B). Similarly, Scott's Loan carried an APR of 235.48%, a rate that was permissible under the Payday Loan Act but that the General Assembly prohibited when it capped APRs at 28% under the STLA. R.C. § 1321.40(A). In short, Scott's Loan is the very type of loan that the General Assembly intended to regulate when it repealed the Payday Loan Act and enacted the Short-Term Loan Act in its place.

Cashland has argued that because it was not licensed under the Short-Term Loan Act, the STLA does not apply to any of its loans. Cashland Brief at 16-17. However, as discussed in more detail *infra*, the STLA covers not only licensed businesses, but also those "required to be licensed." R.C. § 1321.47(A). Therefore, despite Cashland's failure to obtain the proper licensing under the Short-Term Loan Act, the Short-Term Loan Act nevertheless applies to Scott's Loan.

B. This Court Must Construe the Short-Term Loan Act in a Manner that Gives Meaning and Effect to Every Provision in the Statute

The STLA prohibits Cashland from engaging "in the business of making short-term loans to a borrower in Ohio . . . without first having obtained a license" under the Act. R.C. § 1321.36(A). In addition, the STLA covers not only licensed businesses, but also those "required to be licensed." R.C. § 1321.47(A). "Short-term loan" is defined as "a loan made pursuant to sections 1321.35 to 1321.48 of the Revised Code." R.C. § 1321.35(A).

Cashland is asking this Court to construe the Short-Term Loan Act in a manner that renders these statutory provisions meaningless. Cashland argues that because it claims to have made the Loan pursuant to the OMLA, the Loan is not a "short-term loan" under the definition provided in section 1321.35(A), and therefore the STLA does not apply. Further, Cashland argues that only those lenders *already licensed* under the STLA are prohibited from making short-terms loans *without* a STLA license. Cashland Brief at 16-17. Cashland uses this circular reading of the statute to justify its position that, if a lender would prefer not to burden itself with STLA licensing, it can simply choose another regulatory scheme that yields higher profit margins. The Elyria Municipal Court properly rejected this circular reasoning. *See* Decision at 9, fn. 9; Opinion at 2-3. Judge Locke Graves pointed out that "short-term loan," "cannot sensibly be restricted to the definition at § 1321.35(A) as 'a loan made pursuant to sections 1321.35 to 1321.48.' This would impose licensing only on the already licensed, an absurd tautology." Opinion at 2-3. This Court should likewise reject Cashland's interpretation of the Short-Term Loan Act.

When engaging in statutory analysis, the Supreme Court of Ohio has stated that "[its] paramount concern is the legislative intent in enacting the statute." *State ex rel. Steele v. Morrissey*, 103 Ohio St.3d 355, 2004-Ohio-4960, 815 N.E.2d 1107, ¶ 21. To determine intent, courts should look to both the language of the statute and the purpose to be accomplished by the enactment of such a law. *See Rice v. CertainTeed Corp.*, 84 Ohio St.3d 417, 419, 704 N.E.2d 1217 (1999). Further, a court should construe a statute "as a whole and [give it] such interpretation as will give effect to every word and clause in it. No part should be treated as superfluous unless that is manifestly required, and the court should avoid that construction which renders a provision meaningless or inoperative." *State ex rel. Myers v. Spencer Twp. Rural School Dist. Bd. of Ed.*, 95 Ohio St. 367, 373, 116 N.E.516 (1917); *see generally* R.C. § 1.47(B) (in enacting a statute, it is presumed that the General Assembly intended the entire statute to be effective).

This is consistent with the doctrine of *in pari materia*, which dictates that when reading related statutes in conjunction, courts must "give such a reasonable construction as to give the proper force and effect to each and all such statutes." *United Tel. Co. of Ohio v. Limbach*, 71 Ohio St.3d 369, 372, 643 N.E.2d 1129 (1994). The "interpretation and application" of statutes "must be viewed in a manner to carry out the legislative intent," and courts "must harmonize and give full application to all such statutes unless they are irreconcilable and in hopeless conflict." *Id.*

Here, the Elyria Municipal Court correctly concluded that section 1321.36(A) of the STLA should not be construed in a manner that renders it meaningless, but instead should be interpreted to mean that the STLA covers all loans of a short duration, even those made by lenders who have failed to obtain STLA licensure. Therefore, under the proper rules of statutory construction, the STLA applies to Scott's Loan.

C. Cashland's Short-Term, Single Payment Loans Violate the Short-Term Loan Act

Cashland's short-term, single payment loans violate numerous provisions of the Short-Term Loan Act. First, Cashland has violated the STLA by failing to secure a license to make short-term loans to consumers. R.C. §§ 1321.35-1321.48. In addition, the duration of Scott's Loan was for less than thirty-one days; there is no warning regarding the high cost of the Loan on the contract; and there is no statement on the contract that informed Scott that complaints regarding the loan could be submitted to the Department of Commerce, Division of Financial Institutions. *See generally* Customer Agreement. These terms violate the STLA at section 1321.38(B); (C)(3); and (C)(4), respectively. In addition, the APR of the Loan—235.48%—greatly exceeds the 28% APR permitted by the STLA. R.C. § 1321.40(A). Therefore, not only is Cashland offering the type of loans intended to be regulated by the STLA, but it is offering those loans in a manner that clearly violates the STLA.

D. Cashland Has Engaged in Device or Subterfuge to Evade the Requirements of the Short-Term Loan Act

The Short-Term Loan Act specifically prohibits short-term lenders from engaging in "any device or subterfuge to evade the requirements of" the Act. R.C. § 1321.41(J). However, since the enactment of the STLA in 2008, and as exemplified by Cashland's loan to Rodney Scott, Cashland has made high-cost, short-term, single payment loans in deliberate circumvention of the STLA.

Cashland has engaged in device and subterfuge to evade the STLA by scheming to obtain licensing under the OMLA after voters upheld the requirements of the STLA and by continuing to issue short-term loans under the guise of the OMLA, in brazen disregard of the STLA. As set forth in the Statement of Facts, *supra*, Cash America's November 5, 2008 press release and its 2008 filing with the Securities and Exchange Commission reveal that Cashland only began offering short-term, single payment loans pursuant to the OMLA in order to avoid the restrictions present in the STLA. By its own admissions, Cashland began making loans under the OMLA specifically to evade the STLA's requirements. Magistrate Schwartz correctly found that "[u]sing an [O]MLA registration as a pretext to make these loans is an evasion of the Short Term Loan law." Decision at 3. This Court should reach the same conclusion.

E. Prior Ohio Appeals Court Cases Do Not Support the Proposition that Short-Term, Single Payment Loans Are Permissible Under the Ohio Mortgage Loan Act

As support for its position that it can provide these short-term, single payment loans pursuant to the OMLA, Cashland erroneously relies on the decisions of several Ohio Appeals Courts in cases where Cashland appealed the amount of post-judgment interest it was awarded. Cashland Brief at 21-22. In each of these cases, Cashland had been awarded a default judgment against *pro se* consumers. In addition, the central issue in the present appeal—namely, whether the STLA or the OMLA regulates Cashland's short-term, single payment loans—was never raised in any of the cited cases. Consequently, these Appeals Court decisions are not relevant to the central issue here and do not provide the support that Cashland seeks.

III. This Court Should Not Nullify the Will of the Legislature or the People or Defer to Interpretations of the Short-Term Loan Act That Are Inconsistent with Stated Public Policy

A. The Ohio General Assembly Has Made a Public Policy Decision that the Short-Term Loan Act Applies to Loans of the Type Cashland Made to Scott, and Ohio Courts Cannot Nullify this Legislative Enactment

The Ohio Supreme Court has repeatedly held that Ohio courts cannot nullify constitutionally valid public policies enacted by the Ohio legislature. "Judicial policy preferences may not be used to override valid legislative enactments, for the General Assembly should be the final arbiter of public policy." *State v. Smorgala,* 50 Ohio St.3d 222, 223, 553 N.E.2d 672 (1990); *see also Painter v. Graley*, 70 Ohio St.3d 377, 385, 639 N.E.2d 51 (1994). "[W]hen the General Assembly enacts laws that are constitutional, the courts may not contravene the legislature's expression of public policy." *Sutton v. Tomco Machining, Inc.*, 129 Ohio St.3d 153, 2011-Ohio-2723, 950 N.E.2d 938, ¶ 8. With respect to payday loans, the Ohio legislature spoke loudly and clearly in 2008, when it replaced the old Payday Loan Act with the Short-Term Loan Act, thereby reducing permissible APRs from 391% to 28% and imposing other more stringent limits on short-term loans of the type at issue here. This valid and unmistakable enactment of public policy by the legislature cannot now be overturned by Ohio courts. Rather, it is the obligation of Ohio courts to uphold and enforce the STLA as the statute that governs all short-term loans in the state of Ohio. For this Court to do otherwise would usurp the role of the legislature and improperly position this Court as the arbiter of public policy in Ohio.

B. This Court Should Not Defer to the Ohio Division of Financial Institution's Apparent Approval of Cashland's Lending Practices Under the OMLA Because Such Practices Conflict with the Public Policy Established by the Legislature

Cashland argues that this Court should be deferential to the decision by the Ohio Division of Financial Institutions to permit Cashland to offer its short-term, single payment loans pursuant to the Ohio Mortgage Loan Act, rather than require that Cashland be licensed pursuant to the Short-Term Loan Act. Cashland Brief at 17-18. However, the legislature, not the Division, is tasked with determining the state's public policy. Further, deference is not appropriate because the Division's alleged interpretation of the Short-Term Loan Act is inconsistent with its statutory purpose.

1) This Court Should Not Give Weight to Mr. Keck's Brief as He is Not Authorized to Speak on Behalf of the Ohio Division of Financial Institutions

The Merit Brief of *Amicus Curiae* Richard F. Keck—filed in support of Cashland—purports to discuss how the Division "develop[ed] an enforcement position" with respect to the Short-Term Loan Act and the Mortgage Loan Act, after the STLA was enacted in 2008. Keck Brief at 3-5. Mr. Keck—a former employee of the Division—apparently attempts to speak on behalf of the Division when he states that the Division made particular "conclusions" or had particular "interpretations" of the STLA and the OMLA. Importantly, however, Mr. Keck is not currently employed by the Division and has no authority to present arguments on its behalf. Mr. Keck does not explain why he was separated from employment with the Division and he fails to disclose the nature of his employment since his departure from the Division. Further, Mr. Keck improperly attempts to introduce new factual information that is not in the record before this Court, and about which this Court cannot take judicial notice. *See generally* Keck Brief. In short, Mr. Keck's assertions cannot be credited as the official position of the Division. Therefore, this Court should not give weight to Mr. Keck's Brief in making its decision in this appeal.

2) This Court Should Not Defer to the Position Attributed to the Ohio Division of Financial Institutions

Cashland and Mr. Keck argue that Ohio courts should give deference to an "administrative interpretation formulated by an agency which has accumulated substantial expertise, and to which the legislature has delegated the responsibility of implementing the legislative command." *State ex rel. McClean v. Industrial Comm. of Ohio*, 25 Ohio St.3d 90, 92, 495 N.E.2d 370 (1986). In his brief, Mr. Keck also cites case law stating that a court should defer to an agency's interpretation of its own rules and regulations where such interpretation is consistent with the statutory law and plain language of the rules. *See e.g., State ex rel. Celebrezze v. Natl. Lime & Stone Co.*, 68 Ohio St.3d 377, 382, 627 N.E.2d 538 (1994). However, Mr. Keck fails to cite to any specific Division rules or regulations interpreting licensing under the Short-Term Loan Act. *See generally* Keck Brief. In fact, the Division did not promulgate any such rules or regulations. As such, there are no applicable administrative rules or regulations to which this Court can defer.

Cashland and Mr. Keck also fail to recognize the important difference between the role of the legislature and the role of an administrative agency—such as the Division—in setting public policy. Namely, the legislature is the body that *establishes* the state's public policy and an agency *merely administers* that policy. *McFee v. Nursing Care Mgmt. of America*, 126 Ohio St.3d 183, 2010-Ohio-2744, 931 N.E.2d 1069, ¶ 25. ("The General Assembly sets public policy, and administrative agencies, . . . 'develop and administer' those policies."); *D.A.B.E., Inc. v. Toledo-Lucas Cty. Bd. of Health*, 96 Ohio St.3d 250, 2002-Ohio-4172, 773 N.E.2d 536, ¶ 41 ("Administrative regulations cannot dictate public policy but rather can only develop and administer policy already established by the General Assembly."). As the Ohio Supreme Court has stated,

> [l]egislative authority is vested with the General Assembly . . . The legislative process and accountability are the cornerstones of the democratic process which justify the General Assembly's role as lawmaker. In contrast, administrative rules do not dictate public policy, but rather expound upon public policy already established by the General Assembly in the Revised Code.

Chambers v. St. Mary's School, 82 Ohio St.3d 563, 566-67, 697 N.E.2d 198 (1998). Therefore, the role of the Division is to put into practice the public policy established by the legislature, not to determine or dictate that policy. Here, the legislature repealed the Payday Loan Act and replaced it with the Short-Term Loan Act, clearly directing that lenders who previously offered short-term, single payment loans under the Payday Loan Act must now offer short-term loans only under the STLA.

Further, as Mr. Keck correctly quotes in his brief, "[a]n agency's interpretation of a statute that governs its action should be given deference *so long as the interpretation is not irrational, unreasonable, or inconsistent with the statutory purpose.*" *Dann v. Ohio Elections Comm.*, 164 Ohio Misc.2d 39, 2011-Ohio-3945, 952 N.E.2d 588, ¶ 16 (C.P.) (*quoting Morning View Care Ctr.-Fulton v. Ohio Dept. of Human Servs.*, 148 Ohio App.3d 518, 2002-Ohio-2878, 774 N.E.2d 300, ¶ 47-48) (emphasis added). Here, the interpretation Mr. Keck attributes to the Division is blatantly inconsistent with the statutory purpose of the STLA, which is to mandate that all short-term loans in Ohio comply with the STLA. The STLA was enacted to replace the Payday Loan Act and govern the entire field of short-term lending in Ohio. The Ohio General Assembly did not exclude any short-term loan products from regulation, but rather made the comprehensive determination that "[n]o person shall engage in the business of making short-term loans to a borrower in Ohio, or, in whole or in part, make, offer, or broker a loan, or assist a borrower in Ohio to obtain such a loan, without first having obtained a license from the superintendent of financial institutions under [the STLA]." R.C. § 1321.36(A); *see also* Ohio Legislative Service Commission, *Final Analysis of 2008 Sub. H.B. 545* (Sept. 1, 2008), at 3, http://www.lsc.state.oh.us/analyses127/08-hb545-127.pdf (accessed March 26, 2012).

Far from being uncertain about the scope of the STLA at the time of its enactment in June 2008, Cashland demonstrated a keen awareness that the STLA would govern all short-term loans and would therefore eliminate Cashland's abusive (but lucrative) payday loan product. Cashland's parent company, Cash America, launched a swift and aggressive campaign to put the STLA on the November 2008 ballot, spending $4.2

million to overturn the law. However, Ohioans voted by a large majority to approve the General Assembly's enactment of the STLA. The statutory purpose of the STLA was obvious to the Ohio General Assembly, voters, and Cashland itself, and that statutory purpose remains clear today: any lender wishing to make short-term loans in Ohio must obtain STLA licensing and comply with STLA requirements.

Mr. Keck, however, alleges that "nothing in the Short Term Loan Act requires any lender to obtain a license or requires any particular type of loan to be made pursuant to the Short Term Loan Act." Keck Brief at 4. He claims that the STLA merely provides "optional rate authority" for lenders who choose to rely on the Act. *Id.* This notion that lenders offering short-term, single payment loans are not required to be licensed pursuant to the STLA and can instead offer these loans under the OMLA—which was never intended to regulate the short-term, single-payment, payday loans at issue here—is an irrational and unreasonable statutory interpretation, which is inconsistent with the purpose of the STLA. Indeed, the interpretation Mr. Keck attributes to the Division directly contradicts the express provisions of the STLA, resulting in the convoluted and illogical readings of the STLA licensing provisions that are found in the Cashland and Keck briefs. Because Mr. Keck's interpretation is inconsistent with the statutory purpose—and because he does not speak for the Division—this Court owes no deference to his view of the Short-Term Loan Act.

3) This Court Should Not Sanction the Apparent Under-Enforcement of the STLA

It appears that the Division has been under-enforcing the STLA by failing to require lenders of short-term loans, such as Cashland, to be licensed pursuant to the STLA and by failing to bring enforcement action against lenders who offer these loans without an STLA license. Under-enforcement by administrative agencies has been recognized as particularly problematic where the individuals who would be protected by enforcement are members of a vulnerable population. As the First District Court of Appeals has stated,

> [u]nderenforcement by an administrative agency may be even more likely where, as in this case, the regulated party is a relatively powerful business entity while the class protected by the regulation tends to consist of low-income persons with scant resources, lack of knowledge about their rights, inexperience in the regulated area, and insufficient understanding of the prohibited practice.

Elder v. Fischer, 129 Ohio App.3d 209, 218, 717 N.E.2d 730 (1st Dist.1998). Deferring to under-enforcement of the STLA would harm consumers throughout Ohio and be tantamount to the unlawful nullification by this Court of the public policy established by the legislature.

Deference to an administrative agency's statutory interpretation and implementation is only appropriate where the agency interpretation, rules, and regulations are rational, reasonable, and consistent with the statutory purpose. *Dann*, 164 Ohio Misc.2d 39, 2011-Ohio-3945, 952 N.E.2d 588, ¶ 16. Here, the interpretation of the STLA attributed to the Division is unquestionably inconsistent with the stated purpose of that Act. In addition, the Division's apparent under-enforcement of the STLA has further jeopardized the financial situation of an already vulnerable population of cash-strapped borrowers. For these reasons, this Court should not defer to the Division's apparent failure to enforce the Short-Term Loan Act, but should instead uphold the public policy established by the legislature and voters and require that Cashland offer its short-term, single payment loans pursuant to the STLA.

IV. Even if the Ohio Mortgage Loan Act Applies, Cashland's Short-Term, Single Payment Loans Violate the OMLA

Even if this Court were to find that the Ohio Mortgage Loan Act applies to Cashland's payday lending business, the loan that Cashland made to Rodney Scott would still be illegal because the Loan terms violate the requirements of the OMLA. The OMLA allows for two different types of loans—"interest-bearing" and "precomputed" loans. A "precomputed loan" is defined as one "in which the debt is a sum comprising the principal amount and the amount of interest computed in advance on the assumption that all scheduled payments will be made when due." R.C. § 1321.51(G). An "interest-bearing loan" is "a loan in which the debt is expressed as the principal amount and interest is computed, charged, and collected on unpaid principal balances outstanding from time to time." R.C. § 1321.51(F). Regardless of whether Scott's Loan is a "precomputed" or "interest-bearing loan," its terms violate the OMLA.

A. Cashland's Loan is a Precomputed Loan That Violates the OMLA

In attempting to evade the requirements of the Short-Term Loan Act, Cashland has tried to characterize its short-term, single payment loans as "interest-bearing" loans permitted under the Ohio Mortgage Loan Act. However, Scott's Loan is clearly a precomputed loan in that the interest on the loan is computed in advance of giving the loan. As Magistrate Schwartz stated in his Decision,

> it is difficult to conceive a loan more clearly within the definition of "precomputed" than the one here. A fourteen-day loan made on the premise that the borrower will have no money until a "payday," resulting in a bank deposit, at which time the bank account will be tapped, and with all of the interest and charges "computed in advance" and included on the very face of the contract "on the assumption that the only scheduled payment will be made when due" cannot be construed as anything else but precomputed, as a matter of law. Calling a precomputed loan like this one by any other name does not render the loan less "precomputed."

Decision at 4. Similarly, Judge Locke Graves found that "the loan to [Scott] better fits the definition of 'precomputed.'" Opinion at 1. Moreover, Cashland has itself referred to loans of this type as precomputed loans in other Appeals Court cases. *See e.g.* Brief of Appellant, Ohio Neighborhood Finance, Inc., *Ohio Neighborhood Finance, Inc. v. Mackendrick*, 2d Dist. No. 10-023978, at 2 ("Appellant made a precomputed loan to Appellee in the amount of $250.00.") (App. at A-8); Brief of Appellant, Ohio Neighborhood Finance, Inc., *Ohio Neighborhood Finance, Inc. v. Christie*, 8th Dist. No. 10-094821, at 1 ("Appellant made a precomputed loan to Appellee in the amount of $890.00.") (App. at A-21). This Court should similarly find that Scott's Loan is a precomputed loan.

Section 1321.57 states that with respect to precomputed loans, "[l]oans shall be repayable in monthly installments . . . ." R.C. § 1321.57(D)(1). The precomputed Loan that Cashland made to Scott includes only one payment. Specifically, the Loan contract includes a "payment schedule" that lists "[o]ne payment in the amount of $545.16 due on 12/19/18 (Payment Date)." Customer Agreement at 1 ("Payment Schedule"). Therefore, as a precomputed loan repayable in a single payment rather than monthly installments, the Loan violates the Ohio Mortgage Loan Act. R.C. §§ 1321.51(G), 1321.57(D)(1).

B. Even if Cashland's Loan is Considered to Be Interest-Bearing, it Similarly Violates the OMLA

Even if this Court determines that the Loan is an interest-bearing loan, the terms of the Loan contract still violate the OMLA. The OMLA defines an "interest-bearing" loan as "a loan in which the debt is expressed as the principal amount and interest is computed, charged, and collected on unpaid principal balances outstanding from *time to time*." R.C. § 1321.51(F) (emphasis added). In section 1321.57, the OMLA allows for the computation of interest in two ways: (1) interest may be computed on "unpaid principal balances outstanding from *time to time*, for the time outstanding;" or (2) "a registrant may charge and collect interest for the *first installment period* . . . and for each *succeeding installment period*." R.C. § 1321.57(C)(1)(a)-(b) (emphasis added). Regardless of how the interest is computed, however, "unpaid interest continues to accumulate to be paid from the proceeds of *subsequent payments*." R.C. § 1321.57(C)(1)(c) (emphasis added). Therefore, just as with precomputed loans, the OMLA contemplates multiple payments for interest-bearing loans. As Magistrate Schwartz stated, "[r]ather than telegraphing a legislative message to approve one payment, short-term loans, the language of the statute describes all loans, both precomputed and interest-bearing, as with multiple payments." Decision at 5.

Again, the payment schedule for Scott's Loan includes only one single payment due date. Customer Agreement at 1 ("Payment Schedule"). The Loan does not include multiple scheduled payments, nor does it include a framework for paying interest "from time to time." Cashland argues that because Scott could have pre-paid his loan at any time prior to the scheduled payment due date, in any number of partial payments, the Loan satisfies the multiple installment requirement of the OMLA. However, the mere fact that a cash-strapped consumer is permitted to pay off his loan early—in the unlikely event that he scrapes some money together before his next payday—is no substitute for regular, scheduled installments that facilitate affordable repayment over time. Cashland's tortured reading of the OMLA lacks merit and should not be endorsed by this Court.

C. Cashland Attempts to Contract for a Higher Interest Rate than is Permissible under the OMLA

Under the terms of the Loan contract, Scott promised to pay "$500 (the Principal Amount of this loan) plus interest at a rate of 25% per annum . . . ." Customer Agreement at 1 (Promise to Pay). However, the OMLA only permits a lender to charge an interest rate of 21%.[7] R.C. § 1321.57(A). Cashland relies on section 1321.571 as its basis for charging 25% interest because that section states that, "[a]s an alternative to the interest permitted in division (A) of section 1321.57 . . . a registrant may contract for and receive interest at any rate or rates agreed upon or consented to by the parties . . . but not exceeding an annual percentage rate of twenty-five per cent." R.C. § 1321.571. However, Section 1321.57(A) states that "*[n]otwithstanding any other provisions of the Revised Code*, a registrant may contract for and receive interest . . . at a rate or rates *not exceeding twenty-one per cent* . . . ." R.C. § 1321.57(A) (emphasis added). The language and legislative history of section 1321.57(A) repeal by implication the "alternative" 25% interest rate option in section 1321.571.[8] Therefore, this Court should find that loans

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[7] It is important to note that an interest rate of either 21% or 25% under the OMLA is likely to violate the 28% annual percentage rate cap imposed by the Short-Term Loan Act, when that 21% or 25% interest rate is combined with the extremely short repayment term and the fees that Cashland asserts it can charge under the OMLA. An annual percentage rate ("APR") measures the total cost of a loan, including both interest and fees, and takes into account the length of the repayment period. Therefore, a loan that has an interest rate of 21% or 25% may nevertheless have an APR greater than 28%. For example, the loan that Cashland made to Scott had a stated interest rate of 25%, but the APR for Scott's loan was actually 235.48%, due to the costly interest and fees relative to the loan size and the 14-day repayment term. Customer Agreement at 1.

[8] In addressing the apparent inconsistency between these two provisions, Judge Locke Graves explained that,

> After the meaning of "annual percentage rate" in the mortgage loan law was changed to become nearly identical with "interest rate," §1321.571 no longer was an "alternative" to §1321.57(A), but its implicit repeal. The

made pursuant to the OMLA must have an interest rate no greater than 21% and that the 25% interest rate in Scott's Loan violates the OMLA.

D. Cashland Violates the OMLA by Seeking to Collect a Late Charge of Five Percent of the Total Loan Amount

Finally, Scott's Loan violates the OMLA by purporting to charge a "late charge" not permitted under the provisions of the statute. The Loan contract states that "[i]f you fail to pay the Total of Payments within 10 days after the Payment Date, you will be charged a late charge equal to the greater of 5% of the *total payments* or $15.00." Customer Agreement at 1 ("Late Charge") (emphasis added). The OMLA, however, states that "[i]f the loan contract so provides, a registrant may collect a default charge on *any installment* not paid in full within ten days after its due date . . . [and that] the default charge shall not exceed the greater of five per cent of the *scheduled installment* or fifteen dollars." R.C. § 1321.57(L) (emphasis added). Because Scott's Loan is a single payment loan without any scheduled installments, Cashland has no authority to seek a late charge pursuant to section 1321.57(L).

In addition, Cashland's attempt to collect a late fee on the *total of payments*—in other words, the total loan amount—violates the OMLA default charge provision, which only permits the charge to be based on the amount of a single scheduled installment, not

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> later reenactments of the 21% cap on interest at §1321.57(A), each with a "notwithstanding" clause, resurrected §1321.57(A) and repealed by implication the then patently inconsistent §1321.571 . . . The courts that cite §1321.571 to authorize 25% as an "interest rate" do not consider the mandatory preemptive effect of "notwithstanding" clauses, the legislative history of these sections, and the important difference between "interest rate" and "annual percentage rate" under the law and behind the enactment of §1321.571.

Opinion at 3; *see also* Decision at 12-13 (*quoting Ohio Neighborhood Finance Inc. v. Hill* (Franklin Mun. 7/30/10), No. 2010 CVF010114).

the total amount of the loan. R.C. § 1321.57(L). Moreover, allowing late fees based on the total of payments could have undesirable ramifications for other types of lending governed by the OMLA. Magistrate Schwartz pointed out that "[c]onstruing the statute to allow this [default] charge in this context would likely encourage more MLA registrants to require more borrowers to sign one payment, short term loans—especially much larger loans—at the prospect of receiving an extra five percent upon breach." Decision at 14. Consequently, under the OMLA, Cashland cannot lawfully collect a default charge of "the greater of 5% of the total payments or $15.00." Allowing Cashland to do so would violate the statute and would be unwise from a public policy perspective.

CONCLUSION

This Court cannot allow the payday loan industry to continue evading the law of the state of Ohio. The enactment of the STLA reflects the Ohio legislature's public policy decision to limit payday loans, a legislative decision that should not be overturned by the judiciary. Further, Ohio voters' approval of the STLA should be recognized and affirmed.

This Court should uphold the STLA and construe the statute in a manner that gives meaning and effect to every clause, especially to the provisions requiring all lenders of short-term loans to obtain STLA licensing and comply with STLA limitations. The Court should not defer to the convoluted interpretation by Cashland and a former employee of the Ohio Division of Financial Institutions, which directly contradicts the statutory purpose. In addition, this Court should not sanction under-enforcement of the

STLA because such under-enforcement exposes vulnerable Ohioans, whose financial straits compel them to borrow short-term loans, to further financial harm.

This Court should find that the Short-Term Loan Act applies to the loan Cashland made to Rodney Scott and that Cashland violated the STLA by failing to obtain proper licensing, making a loan with illegal terms, and engaging in device or subterfuge to evade STLA requirements. Further, even if the Court determines that the Ohio Mortgage Loan Act applies to the Loan, the Court should hold that Cashland's Loan violated OMLA requirements as well.

For all of the reasons set forth in this Brief, the undersigned *Amici* request that the Court affirm the decision of the Elyria Municipal Court.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Brief was served by regular mail upon Drew H. Campbell and Anthony M. Sharett, Bricker & Eckler LLP, 100 S. Third Street, Columbus, Ohio 43215, counsel for Appellant Ohio Neighborhood Finance, Inc.; Darrell Dreher and Elizabeth Anstaett, Dreher Tomkies Scheiderer LLP, 2750 Huntington Center, 41 South High Street, Columbus, Ohio 43215, counsel for Amicus Richard Keck; and Appellee Rodney Scott, 250 13th Street, Elyria, Ohio 44035, on April 2, 2012.

Katherine B. Hollingsworth (0087579)

APPENDIX

OH Gov. Mess., 6/2/2008

Ohio Governor's Message, June 2, 2008

June 2, 2008
Governor of Ohio
2008

6.2.08 - Governor Signs House Bill 545

Columbus, Ohio - Governor Ted Strickland today signed House Bill 545, which establishes stricter regulations for short-term lending practices (payday lending) in Ohio.

"The bipartisan legislation signed today takes a major step toward protecting Ohio consumers who are already struggling with debt by strictly regulating payday lenders and lowering the maximum interest rate for short-term loans," Strickland said.

Sponsored by State Representative Chris Widener, HB 545 caps the interest rate for payday loans at 28 percent, reduced from the current annual interest rate of 391 percent.

The bill also sets a $500 borrowing limit for consumers and restricts borrowers to four loans per year. Additionally, the legislation extends loan terms to 31 days from 14 days.

Strickland today also signed several additional bills recently passed by the Ohio legislature:

Senate Bill 150

State Senator Tom Roberts sponsored SB 150, which allows individuals to use a military identification card as proof of the purchaser's age when buying alcohol. The legislation also revises other state liquor laws.

House Bill 405

State Representative Kevin Bacon sponsored HB 405, which eliminates the requirement that each county board of mental retardation and developmental disabilities maintain a service substitution list and long-term service planning registry. The bill also revises the law governing county boards' waiting lists.

House Bill 331

State Representative Mark Wagoner (now State Senator) sponsored HB 331, which revises the licensure and regulation of maternity homes and obstetric and newborn care facilities.

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IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT

Ohio Neighborhood Finance, Inc.,	:	
Plaintiff-Appellant,	:	Case No. CA 023978
-vs-	:	(REGULAR CALENDAR)
Phillip Mackendrick,	:	On Appeal from the Dayton Municipal Court Case No. 09CVF005221
Defendant-Appellee.	:	

BRIEF OF APPELLANT, OHIO NEIGHBORHOOD FINANCE, INC.

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INTRODUCTION

This appeal arises out of a judgment on a debt collection action. It is undisputed that the loan contract between the parties contained in an agreement under which Appellee would pay a rate of interest of 25%. Despite this express agreement in the contract, the trial court denied Appellant's default judgment motion against Appellee for the amount owed on the loan, because it opined that the correct post judgment interest rate to be applied to the judgment is 21% per annum and not 25% per annum. But the trial court's application of doctrine found in Ohio Consumer Law Handbook to apply post-judgment interest to Appellant's default judgment motion is contrary to well-settled Ohio law. Hence, the judgment below should be reversed to grant Appellant's default judgment motion and apply the contract rate of 25% interest per annum on the balance of the loan.

APPELLANT'S ASSIGNMENT OF ERROR

ASSIGNMENT OF ERROR NO. 1

> THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DENYING APPELLANT'S DEFAULT JUDGMENT MOTION OPINING THAT 21% PER ANNUM IS THE APPLICABLE INTEREST RATE ON THE DEBT AND NOT THE CONTRACTED RATE OF 25% ON POST JUDGMENT INTEREST.

Issue presented for review.

A. Whether a trial court can reduce the rate of interest on a debt owed to a debtor pursuant to a default judgment motion when the requirements of R.C. 1321.571 permit a registrant under the Ohio Mortgage Loan Act to contract for and receive interest at any rate agreed upon, not exceeding 25%.

I. STATEMENT OF THE CASE

This appeal stems from a loan that Appellant Ohio Neighborhood Finance, Inc. (Appellant") made to Appellee Phillip Mackendrick ("Appellee"). Appellant is registered with the Ohio Department of Commerce as a registrant under the Ohio Mortgage Loan Act. The loan was entered into on March 18, 2009 with an agreed upon interest rate of 25% per annum on the principal amount outstanding on the loan from the date of the agreement between Appellant and Appellee until the loan is paid in full.

After Appellee failed to discharge his liability under the loan after demand for payment by Appellant, on August 12, 2009, Appellant filed a Complaint in the Dayton Municipal Court, Montgomery County, Ohio seeking a judgment in the sum of $314.13, plus interest at the rate of 25% per annum from the date of default. Because, Appellee failed to answer or otherwise plead, Appellant filed its default judgment motion with the Court seeking the remaining amount due to Appellant under the loan.[1]

In its Judgment Entry issued March 17, 2010, the trial court found that it could not grant Appellant the requested amount prayed for in its default judgment motion. Citing from an Ohio Consumer Law Handbook, the lower court ostensibly reasoned that because Appellant charged additional fees to the Appellee relating to the loan, including without limitation, loan origination charges, in total, these fees would push the annual percentage rate beyond 25%. Thus, the court denied Appellant's default judgment motion on March 23, 2010.

Appellant appealed to this Court on April 1, 2010.

II. STATEMENT OF FACTS

The facts in this case are straightforward. Appellant is registered as a lender with the Ohio Department of Commerce, Division of Financial Institutions under the Ohio Mortgage

[1] Appellee made some payments under the loan but failed to discharge the entire amount owed to Appellant.

Loan Act, R.C. 1321.51 *et seq.* In that capacity as a registered lender, on March 18, 2009, Appellant made a precomputed loan to Appellee in the amount of $250.00. The terms of this loan are outlined in the Customer Agreement that Appellee executed a copy of which is attached to the Complaint (Exhibit A). Under these specifically articulated terms, Appellee agreed to pay a loan origination charge of $15.00 and a credit investigation fee of $10.00. (Ex. A., p. 1.). Coupled with interest, Appellee was obligated to pay Appellant $279.13 due on April 9, 2009. (Ex. A., p. 3.). Under the "PROMISE TO PAY" section of the Customer Agreement, Appellee was advised of the following provision in pertinent part:

> You promise to pay us $250.00 (the Principal Amount on this loan) plus interest at a rate of 25% per annum on the principal outstanding for the time outstanding from the date of this Customer Agreement until paid in full. Interest shall be computed daily upon the principal balance outstanding by using the simple interest method, assuming a 365-day year.

(Ex. A., p. 3).

Appellee was also provided with a Federal Truth-In-Lending Disclosure, which among other things, discloses the annual percentage rate and total amount of payments due and owing to Appellant.

When the April 9, 2009 due date arrived, Appellee's bank account had insufficient funds to cover the repayment amount for the loan. Further, once Appellant demanded payment from Appellee pursuant to the Customer Agreement, Appellee failed to make all of the payments due and owing under the loan.

On August 12, 2009, Appellant filed its Complaint in the Dayton Municipal Court seeking judgment against Appellee in the sum of $314.13 together with interest at the agreed upon rate of 25% per annum from the date of default, plus court costs and reasonable attorneys' fees permitted by statute and contract. Because Appellee failed to respond or otherwise plead to

Appellant's Complaint, on March 18, 2010, Appellant filed its motion for default judgment and tendered a corresponding proposed judgment entry seeking a judgment in the amount of $232.43 plus the 25% interest, court costs, and reasonable attorneys' fees.

On March 23, 2010, the court journalized the Judgment Entry denying Appellant's default judgment motion. Citing from an Ohio Consumer Law Handbook, the court denied Appellant's motion because it determined that when the loan origination fee, the credit investigation fee, and the interest rate are totaled together, the annual percentage rate exceeds 25% per annum. A copy of the Judgment Entry is attached hereto as Exhibit B.

Appellant appealed the court's decision to this Court. For the reasons that follow, this Court should sustain Appellant's sole assignment of error, reverse the trial court's decision, grant Appellant's default judgment motion, and award Appellant the interest rate of 25% per annum on the outstanding balance due and owing pursuant to the written contract Appellee executed that contained a legal rate of interest.

III. LAW AND ARGUMENT IN SUPPORT OF ASSIGNMENT OF ERROR

The trial court denied Appellant's default judgment motion. (Ex. B., p. 1). Citing from a Ohio Consumer Law Handbook, the court reasoned that while the prevailing law permits companies situated like Appellant to receive post judgment interest at 25% per annum, it held that Appellant is not entitled to this interest rate because it charged other fees to Appellee for the loan, thus, exceeding 25% interest.

In this case, the proper standard for review is *de novo*. "In applying the *de novo* standard, we review the trial court's decision independently and without deference to the trial court's determination." *Tejeda v. Toledo Heart Surgeons, Inc.* (2009), Sixth App. No. L-07-1242, 2009-Ohio-3495, at ¶51 (citing *White v. DePuy, Inc.* (1998), 129 Ohio App.3d 472, 478). Moreover, Ohio Supreme Court jurisprudence holds that the standard of review for contract interpretation is also *de novo*. *Taylor Bldg. Corp. of Am. v. Benfield*, (2008) 117 Ohio St.3d 352, 360.

The issue in this appeal is the determination of the appropriate rate of interest to be applied to the default judgment requested by Appellant based on the Appellee's failure to make payments on a loan made under the Ohio Mortgage Loan Act.

A. <u>Assignment of Error</u>: **The Trial Court Committed Reversible Error In Denying Appellant's Default Judgment Motion Seeking Post Judgment Interest At The Rate Of 25% Per Annum.**

1. **For loans made under the OMLA, R.C. 1321.571 permits OMLA registrants and debtors to contract to an interest rate not to exceed an annual percentage rate of 25%, irrespective of other fees associated with the loan.**

Simply put, Appellant's request in its default judgment motion seeking the principal and interest at 25% owned to it due to Appellee's default us lawful under Ohio law. Appellant is a registrant under the Ohio Mortgage Loan Act ("OMLA"). Ohio Revised Code §§ 1321.51 *et seq*. Thus, Appellant's loan to Appellee was made pursuant to the OMLA. Indeed, under the "GOVERNING LAW" provision on page two of the Customer Agreement, it specifically states that the Customer Agreement is governed by the "Mortgage Loan Act, Ohio Revised Code Sections 1321.51 to 1321.60…" (Ex. A., p. 2).

Additionally, under the OMLA, only registrants like Appellant can make loans subject to the OMLA. More specifically, no person (other than an exempt entity) may engage in the business of making secondary (subordinate lien) real estate mortgage loans in Ohio without first obtaining a certificate of registration from the Ohio Division of Financial Institutions. R.C. 1321.52(A), 1321.53(D). Further, the OMLA permits registrants like Appellant to make unsecured loans, loans secured by mortgage on a borrower's real estate which is a first lien, loans secured by other than real estate and loans secured by any combination of mortgages and security interests. R.C. 1321.52(C).

The OMLA contains unambiguous language regarding the interest rate authority granted to registrants for loans made under the OMLA. R.C. 1321.57(A) is the general interest rate and charges provision for OMLA registrants and provides:

> (A) Notwithstanding any other provisions of the Revised Code, a registrant may contract for and receive interest, calculated according to the actuarial method, at a rate or rates not exceeding twenty-one per cent per year on the unpaid principal balances of the loan. Loans may be interest-bearing or precomputed.

R.C. 1321.57(A). Critically, R.C. 1321.571, the "Alternative interest rate upon agreement or consent" statute states:

> "As an alternative to the interest permitted in division (A) of section 1321.57 and in division (B) of section 1321.58 of the Revised Code, a registrant may contract for and receive interest at any rate or rates agreed upon or consented to by the parties to the loan contract or open-end loan agreement, but not exceeding an annual percentage rate of twenty-five percent."

R.C. 1321.571.[2]

Additionally, Appellant may charge specific fees under the OMLA, including a loan origination fee, a credit investigation fee, a default charge, a return check fee, **<u>and</u> accruing interest at 25% per annum.** R.C. 1321.51(H)(1) provides:

> In addition to the interest and charges provided by this section, no further or other amount, whether in the form of broker fees, placement fees, or any other fees whatsoever, shall be charged or received by the registrant, except costs and disbursements in connection with any suit to collect a loan or lawful activity to realize on a security interest or mortgage after default, including reasonable attorney fees incurred by the registrant as a result of the suit or activity and to which the registrant becomes entitled by law, and except the following additional charges which may be including the principal amount of the loan or collected at any time after the loan is made:

[2] By way of legislative history, R.C. 1321.571 was originally enacted in 1982 with a sunset provision. (ed. Note). The Ohio legislature extended the sunset in 1984, 1987, and 1991 and in 1994 the legislature repealed the sunset, making the alternative interest rate authority in R.C. 1321.571 permanent. *Id.* (history); 1994 Ohio H.B. 695, § 3.

(c) Fees for credit investigations not exceeding ten dollars. (Emphasis added).

R.C. 1321.57(H)(1)(c).

Likewise, in addition to a credit investigation fee under the OMLA statutes, Appellant is permitted to charge loan origination fees for unsecured loans. R.C. 1321.57(J)(1)(b) states:

> (J)(1) In addition to points authorized under division (G) of this section, a registrant may charge and receive the following:
>
> (b) With respect to loans that are not secured by goods or real estate: if the principal amount of the loan is five hundred dollars or less, loan origination charges not exceeding fifteen dollars.

R.C. 1321.57(J)(1)(b) (Emphasis added). And, these charges may be paid by the borrower at the time of the loan or may be included in the principal amount of the loan.

Moreover, the OMLA authorizes Appellant to charge a return fee for $20.00 upon default and a default charge of 5% of the amount due or $15.00, whichever is greater. See R.C. 1321.57(K) ($20.00 return check fee); R.C. 1321.57(L) (Default charge not to exceed the greater of 5% or fifteen dollars).

Critically, the Ohio annual percentage rate (which is altogether different from the federal APR) is defined in R.C. 1321.51(K) as "the ratio of interest on the loan to unpaid principal balances on the loan." "Interest" means all charges payable directly or indirectly by a borrower to a registrant as a condition to a loan or an application for a loan, however, dominated. But this does not include default charges, deferment charges, insurance charges or premiums, court costs, loan origination charges, check collection charges, credit line charges, points, prepayment penalties, or other fees and charges specifically authorized by law. R.C. 1321.57(E) (Emphasis added).

In other words, for Ohio annual percentage rate calculations, the fees and charges that are not interest are never included in the Ohio annual percentage rate calculation. Under Ohio law, OMLA registrants like Appellant can charge interest at 25%, plus, the authorized fees permitted by statute articulated above and not violate the 25% Ohio annual percentage rate cap. Since Ohio law specifically excludes the additional charges for the interest rate calculation, Appellant can charge and request interest at a rate of 25% per annum on the unpaid principal balance.

Thus, for loans made by a registrant to a consumer pursuant to a note or customer agreement, the OMLA permits any interest rate agreed upon not exceeding an annual percentage rate of 25%, plus all fees permissible under Ohio law. Hence, the trial court committed reversible error when it denied Appellant's default judgment motion based upon doctrine found in the Ohio Consumer Law Handbook.

2. The Contract Between Appellant And Appellee Complies With The OMLA And All Terms Are Unambiguous.

The contract terms between Appellant and Appellee are unambiguous and were properly disclosed to Appellant at the time of the loan.

It is axiomatic under Ohio law that when the language is unambiguous, the terms of the contract must simply be applied "without resorting to methods of construction and interpretation." *Buckeye Check Cashing, Inc. v. Madison* (2008), Cuyahoga App. No. 90861, 2008-Ohio-5124, at ¶12 (holding that a creditor operating under the Check Cashing Act was permitted to contract for and receive interest, a loan origination fee, and a returned check fee provided that the terms are included in the written loan agreement); *Alexander v. Buckeye Pipe Line Co.* (1978), 53 Ohio St.2d 241 (holding that "if a contract is clear and unambiguous, then its interpretation is a matter of law and there is no issue of fact to be determined").

Critically, numerous cases interpreting R.C. 1343.03 have held that when a written contract contains a legal rate of interest, then that agreed upon rate should be applied to the judgment. See *American General Finance v. Bauer* (May 4, 2001), Delaware App No.

00CAG08023 (for loans under the OMLA when the contract provides the rate of interest when money becomes due, that rate should be applied); *Dutro Used Cars, Inc. v. Gooden* (2009), Muskingum App. No. CT08-0048, 2009-Ohio-2913, at ¶9 (citing *American General Finance* and holding that its reversible error when a trial court fails to apply contractually agreed upon interest to a judgment and instead applies the statutory rate; *Dutro Used Cars, Inc. v. Gooden* (2009), Muskingum App. No. CT08-0049, 2009-Ohio-2914, at ¶10 (same); *Dutro Used Cars, Inc. v. Gooden* (2009), Muskingum App. No. CT08-0050, 2009-Ohio-2908, at ¶9 (same).

In fact, the Ninth Appellate District explains that permitting OMLA registrants to charge interest in excess of the statutory rate is no fluke. The court in *Leacock v. Household Realty Corp.* (June 3, 2002), Lorain App. No. 91CA005141, at *3 reasoned:

> "The Act [OMLA] regulates second mortgage loans and requires that a lender obtain a certificate by registering with the division of consumer finance, which investigates a lender's financial responsibility and general fitness to operate honestly and fairly. *R.C. 1321.53*. In return, the state permits certified lenders to charge interest in excess of the statutory ceiling, up to a maximum of twenty-five percent per year. *R.C. 1321.571*. The Act is one of several regulatory schemes designed to protect consumers from deceptive or unscrupulous practices...."

Significantly, Appellant recently appealed this same issue in the Fifth District Court of Appeals in case captioned, *Ohio Neighborhood Finance, Inc. v. Allen* (Dec. 10, 2009), Fifth App. Dist. Case No. CT2009-0040, 2009 Ohio App. LEXIS 5540. In *Allen*, exactly like the case at bar, the trial court sua sponte reduced the interest rate on the debt owed to Ohio Neighborhood Finance to a rate below 25%. Ohio Neighborhood Finance, Inc. appealed claiming that the contract rate of 25% should be enforced. Citing *Dutro Used Cars, Inc.* referenced herein, the Court succinctly reversed the trial court's decision and entered judgment in favor of Ohio Neighborhood Finance, Inc. for the amount requested (which included loan origination and credit investigation fees), plus interest at a rate of 25%. A copy of the Judgment Entry is attached hereto as Exhibit C.

Here, Appellant is a registrant under the OMLA and, as stated in the Customer Agreement, the subject loan was made pursuant to the OMLA. Under the term in the Customer Agreement titled "PROMISE TO PAY," Appellee agreed to pay the principal amount of the loan, plus interest at a rate of 25% per annum. (Ex. A., p. 1). This term is unambiguous and is not susceptible to more than one interpretation. Appellant filed suit against Appellee to collect on nothing more that what it was owed. But instead of interpreting and tracking the plain language in the Customer Agreement and following Ohio law, the trial court ostensibly decided *sua sponte* to apply a reduced rate of interest to the judgment in this matter citing from a handbook. Federal law APR guidelines are inapplicable and do not control in this matter, because the aforementioned statutory provision of the Ohio Revised Code allow Appellant to collect 25% interest, plus allowable fees associated with the loan. The 25% interest rate agreed upon by Appellant and Appellee should be applied to the judgment. And when the trial court failed to do so, it committed reversible error.

Finally, from a policy perspective registrants are permitted to charge interest on debts owed at 25% interest, irrespective of other allowable fees, in exchange for the regulatory hurdles a registrant must navigate prior to becoming licensed under the OMLA. Accordingly, the trial court erred when it denied Appellant's default judgment motion opining that a reduced interest rate on the judgment to 21% is proper.

IV. CONCLUSION

For all the reasons stated above, Appellant Ohio Neighborhood Finance, Inc., respectfully requests that this Court reverse the judgment of the Dayton Municipal Court and grant

Appellant's default judgment motion and enforce the agreed upon and lawful contract rate of 25% interest per annum on the remaining balance of the loan.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Brief of Appellant was served upon the following, by regular United States mail, postage prepaid, this 4th day of May, 2010:

Phillip Mackendrick
2813 Edgemoor Lane
Moraine, Ohio 45439

Anthony M. Sharett (0076607)

EIGHTH DISTRICT COURT OF APPEALS
CUYAHOGA COUNTY, OHIO

Ohio Neighborhood Finance, Inc.
d/b/a Cashland,

Plaintiff/Appellant,

v.

Phellip Christie,

Defendant/Appellee.

Case No. CA-10-094821

Appeal from Parma Municipal Court
Case No. 09 CVF 03473

BRIEF OF APPELLANT OHIO NEIGHBORHOOD FINANCE, INC.

FILED
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CUYAHOGA COUNTY, OHIO

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Date of Hearing: 09/22/2010 Case #: 94821
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Transcript #: ___ Exhibits: ___
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INTRODUCTION

This appeal arises out of a judgment on a debt collection action. It is undisputed that the loan contract between the parties contained in an agreement under which Appellee would pay a rate of interest of 25%. Despite this express agreement in the contract, the Court granted judgment against Appellee for the amount owed on the loan, plus costs, but *sua sponte* reduced the rate of interest to 4% per annum. And, because the Court offered no reasoning warranting such a reduction, and because the reduction is contrary to Ohio law, the judgment below should be modified to enforce the contract rate of 25%.

APPELLANT'S ASSIGNMENT OF ERROR

ASSIGNMENT OF ERROR NO. 1

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN REDUCING TO 4% PER ANNUM, THE INTEREST RATE ON THE DEBT IN THE DEFAULT JUDGMENT GRANTED IN FAVOR OF APPELLANT OHIO NEIGHBORHOOD FINANCE, INC.

Issue presented for review.

A. Whether a trial court can reduce the rate of interest on a debt owed to a creditor pursuant to a default judgment when the requirements of R.C. 1321.571 permit a registrant under the Ohio Mortgage Loan Act to contract for and receive interest at any rate agreed upon, not exceeding 25%.

I. STATEMENT OF THE CASE

This appeal stems from a loan that Appellant Ohio Neighborhood Finance. Inc. made to Appellee Phellip Christie. Appellant is registered with the Ohio Department of Commerce as a registrant under the Ohio Mortgage Loan Act. The loan was entered into on May 15, 2009 with an agreed upon interest rate of 25% per annum on the principal amount outstanding on the loan from the date of the agreement between Appellant and Appellee until the loan was paid in full.

After Appellee failed to discharge his liability under the loan after demand for payment by Appellant, on August 21, 2009, Appellant filed a Complaint in the Parma Municipal Court, Cuyahoga County, Ohio seeking a judgment in the sum of $1,009.56, plus interest at the rate of 25% per annum from the date of default. Appellee made no payments under the loan, thus not satisfying the outstanding balance.

In its Judgment Entry issued February 8, 2010, the lower court found that Appellee, although duly served with the summons and Complaint, failed to timely respond or otherwise appear. Thus, the court granted judgment against Appellee for the sum of $1,009.56, plus costs, but reduced the rate of interest to 4% per annum.

Appellant appealed to this Court on March 12, 2010.

II. STATEMENT OF FACTS[1]

The facts in this case are straightforward. Appellant is registered as a lender with the Ohio Department of Commerce, Division of Financial Institutions under the Ohio Mortgage Loan Act, R.C. 1321.51 *et seq.* In that capacity as a registered lender, on May 15, 2009, Appellant made a precomputed loan to Appellee in the amount of $890.00. The terms of this loan are outlined in the Customer Agreement that Appellee executed a copy of which is an

[1] Due to the nature of the proceedings at the trial court, and given that Appellant obtained its Judgment Entry via its default judgment motion, there is no transcript of proceedings from the trial court proceeding.

exhibit to the Complaint. which is attached hereto as Exhibit A. Under these specifically articulated terms. Appellee agreed to pay a loan origination charge of $100.00. and a credit investigation fee of $10.00. (Ex. A., p. 3.). Coupled with interest, Appellee was obligated to pay Appellant $1,009.56 due on May 29, 2009 (principal amount of loan being $1,000.00). (Ex. A., p. 3. and see Motion for Default Judgment and Affidavit in Support). Under the "PROMISE TO PAY" section of the Customer Agreement, Appellee was advised of the following provision in pertinent part:

> You promise to pay us $1,000.00 (the Principal Amount on this loan) plus interest at a rate of 25% per annum on the principal outstanding for the time outstanding from the date of this Customer Agreement until paid in full. Interest shall be computed daily upon the principal balance outstanding by using the simple interest method, assuming a 365-day year.

(Ex. A., p. 3).

Appellee was also provided with a Federal Truth-In-Lending Disclosure, which among other things, discloses the annual percentage rate and total amount of payments due and owing to Appellant.

When the May 29, 2009 due date arrived, Appellee's bank account had insufficient funds to cover the repayment amount for the loan. Further, once Appellant demanded payment from Appellee pursuant to the Customer Agreement, Appellee failed to make any of the payments due and owing under the loan.

On August 21, 2009, Appellant filed its Complaint in the Parma Municipal Court seeking judgment against Appellee in the sum of $1,009.56 together with interest at the agreed upon rate of 25% per annum from the date of default, plus court costs and reasonable attorneys' fees permitted by statute and contract. Because Appellee failed to respond or otherwise plead to Appellant's Complaint, on February 5, 2010, Appellant filed its motion for default judgment and tendered a corresponding proposed judgment entry seeking a judgment in the amount of $1.009.56 plus the 25% interest, court costs.[2]

On February 8, 2010, the court journalized the Judgment Entry and awarded Appellant the sum of $1,009.56, plus court costs. But instead of awarding Appellant the agreed upon interest rate of 25% per annum on the judgment amount, the court *sua sponte* reduced the rate of interest to 4% per annum on the unpaid principal amount from the date of default. A copy of the Judgment Entry is attached hereto as Exhibit B. The court did not state a basis for its reduction in the interest rate from 25% per annum to 4%. Notably, as of the date of the Judgment Entry, the statutory interest rate on judgments was 4% according to the Administrative Journal Entry determined by the Ohio Department of Taxation, attached hereto as Exhibit C.

Appellant appealed the court's decision to this Court. For the reasons that follow, this Court should modify the trial court's decision and award Appellant the interest rate of 25% per annum on the outstanding balance due and owing pursuant to the written contract Appellee executed that contained a legal rate of interest.

III. LAW AND ARGUMENT IN SUPPORT OF ASSIGNMENT OF ERROR

The trial court granted Appellant a default judgment on the unpaid loan. (Ex. B., p. 1). But the lower court improperly reduced the contracted rate of interest from 25% to 4%. Since the trial court awarded Appellant damages coupled with the interest rate of 4% presumably pursuant to the statutory rate under Ohio law, these damages were awarded as a matter of law. Thus, the proper standard for review is *de novo*. "In applying the *de novo* standard, we review the trial court's decision independently and without deference to the trial court's determination." *Tejeda v. Toledo Heart Surgeons, Inc.* (2009), Sixth App. No. L-07-1242, 2009-Ohio-3495, at

[2] Appellant's Judgment Entry that it tendered to the trial court did not include a request for attorneys' fees as Appellant determined that it was not entitled to attorneys' fees via the contract with Appellee.

¶51 (citing *White v. DePuy, Inc.* (1998), 129 Ohio App.3d 472, 478). Moreover, Ohio Supreme Court jurisprudence holds that the standard of review for contract interpretation is also *de novo*. *Taylor Bldg. Corp. of Am. v. Benfield*, (2008) 117 Ohio St.3d 352, 360.

The issue in this appeal is the determination of the appropriate rate of interest to be applied to the default judgment based on the Appellee's failure to make payments on a loan made under the Ohio Mortgage Loan Act.

A. **<u>Assignment of Error</u>: The Trial Court Committed Reversible Error In Reducing To 4% Per Annum, The Interest Rate On The Debt In The Default Judgment Granted In Favor Of Appellant Ohio Neighborhood Finance, Inc.**

1. **For loans made under the OMLA, R.C. 1321.571 permits OMLA registrants and debtors to contract to an interest rate not to exceed an annual percentage rate of 25%.**

Appellant is a registrant under the Ohio Mortgage Loan Act ("OMLA"). Ohio Revised Code §§ 1321.51 *et seq*. Thus, Appellant's loan to Appellee was made pursuant to the OMLA. Indeed, under the "GOVERNING LAW" provision on page two of the Customer Agreement, it specifically states that the Customer Agreement is governed by the "Mortgage Loan Act, Ohio Revised Code Sections 1321.51 to 1321.60..." (Ex. A., p. 4).

Additionally, under the OMLA, only registrants like Appellant can make loans subject to the OMLA. More specifically, no person (other than an exempt entity) may engage in the business of making secondary (subordinate lien) real estate mortgage loans in Ohio without first obtaining a certificate of registration from the Ohio Division of Financial Institutions. R.C. 1321.52(A), 1321.53(D). Further, the OMLA permits registrants like Appellant to make unsecured loans, loans secured by mortgage on a borrower's real estate which is a first lien, loans secured by other than real estate and loans secured by any combination of mortgages and security interests. R.C. 1321.52(C).

The OMLA contains unambiguous language regarding the interest rate authority granted to registrants for loans made under the OMLA. R.C. 1321.57(A) is the general interest rate and charges provision for OMLA registrants and provides:

> (A) Notwithstanding any other provisions of the Revised Code, a registrant may contract for and receive interest, calculated according to the actuarial method, at a rate or rates not exceeding twenty-one per cent per year on the unpaid principal balances of the loan. Loans may be interest-bearing or precomputed.

R.C. 1321.57(A). Critically, R.C. 1321.571, the "Alternative interest rate upon agreement or consent" statute states:

> "As an alternative to the interest permitted in division (A) of section 1321.57 and in division (B) of section 1321.58 of the Revised Code, a registrant may contract for and receive interest at any rate or rates agreed upon or consented to by the parties to the loan contract or open-end loan agreement, but not exceeding an annual percentage rate of twenty-five percent."

R.C. 1321.571.[3] Thus, for loans made by a registrant to a consumer pursuant to a note or customer agreement, the OMLA permits any interest rate agreed upon not exceeding an annual percentage rate of 25%. R.C. 1321.571 is the controlling statute in this case.

2. The trial court erred to the extent that it relied upon R.C. 1343.03 to reduce the interest rate in the judgment because R.C. 1343.03 is inapplicable.

In its Judgment Entry, the trial court did not opine as to why it *sua sponte* reduced the interest rate on the debt from the lawful contract rate of 25% to 4%. But assuming arguendo that the Court reduced the rate to 4% because that was the statutory rate when the Judgment Entry was journalized, the trial court erred as a matter of law.

R.C. 1343.03 states, in pertinent part:

> "(A) In cases other than those provided for in sections 1341.01 and 1343.02 of the Revised Code, when money becomes due and payable upon any bond, bill, note,

[3] By way of legislative history, R.C. 1321.571 was originally enacted in 1982 with a sunset provision. (ed. Note). The Ohio legislature extended the sunset in 1984, 1987, and 1991 and in 1994 the legislature repealed the sunset, making the alternative interest rate authority in R.C. 1321.571 permanent. *Id.* (history); 1994 Ohio H.B. 695, § 3.

> or other instrument of writing, upon any book account, upon any settlement between parties, upon all verbal contracts entered into, and upon all judgments, decrees. and orders of any judicial tribunal for the payment of money arising out of tortious conduct or a contract or other transaction, the creditor is entitled interest at the rate per annum determined pursuant to section 5703.47 of the Revised Code, unless a written contract provides a different rate of interest in relation to the money that becomes due and payable, in which case the creditor is entitled to interest at the rate provided in the contract. Notification of the interest rate per annum shall be provided pursuant to sections 319.19, 1901.313, 1907.202, 2303.25, and 5703.47 of the Revised Code."

R.C. 1343.03(A). (Emphasis added). R.C. 5703.47 requires the Ohio Tax Commissioner to set the statutory interest rate. According to the Ohio Department of Taxation's Administrative Journal Entry, the Tax Commissioner set the interest rate for calendar year 2010 at 4%. See Exhibit C.

Yet, Fifth Appellate District interpreting R.C. 1343.03 has held that when a written contract contains a legal rate of interest, then that agreed upon rate should be applied to the judgment. See *American General Finance v. Bauer* (May 4, 2001), Delaware App No. 00CAG08023 (for loans under the OMLA when the contract provides the rate of interest when money becomes due, that rate should be applied); *Dutro Used Cars, Inc. v. Gooden* (2009), Muskingum App. No. CT08-0048, 2009-Ohio-2913, at ¶9 (citing *American General Finance* and holding that its reversible error when a trial court fails to apply contractually agreed upon interest to a judgment and instead applies the statutory rate; *Dutro Used Cars, Inc. v. Gooden* (2009), Muskingum App. No. CT08-0049, 2009-Ohio-2914, at ¶10 (same); *Dutro Used Cars, Inc. v. Gooden* (2009), Muskingum App. No. CT08-0050, 2009-Ohio-2908, at ¶9 (same).

In fact, the Ninth Appellate District explains that permitting OMLA registrants to charge interest in excess of the statutory rate is no fluke. The court in *Leacock v. Household Realty Corp.* (June 3, 1992), Ninth App. No. 91CA005141, 1992 Ohio App. LEXIS 2918 at *3 reasoned:

> "The Act [OMLA] regulates second mortgage loans and requires that a lender obtain a certificate by registering with the division of consumer finance, which investigates a lender's financial responsibility and general fitness to operate honestly and fairly. *R.C. 1321.53.* In return, the state permits certified lenders to charge interest in excess of the statutory ceiling, up to a maximum of twenty-five percent per year. *R.C. 1321.571.* The Act is one of several regulatory schemes designed to protect consumers from deceptive or unscrupulous practices...."

Significantly, Appellant recently appealed this same issue in the Fifth District Court of Appeals in case captioned, *Ohio Neighborhood Finance, Inc. v. Allen* (Dec. 10, 2009), Fifth App. Dist. Case No. CT2009-0040, 2009 Ohio App. LEXIS 5540. In *Allen*, exactly like the case at bar, the trial court sua sponte reduced the interest rate on the debt owed to Ohio Neighborhood Finance to a rate below 25%. Ohio Neighborhood Finance, Inc. appealed claiming that the contract rate of 25% should be enforced. Citing *Dutro Used Cars, Inc.* referenced herein, the Court succinctly reversed the trial court's decision and entered judgment in favor of Ohio Neighborhood Finance, Inc. for the amount requested (which included loan origination and credit investigation fees), plus interest at a rate of 25%. A copy of the Judgment Entry is attached hereto as Exhibit D.

Thus, not only are registrants permitted to charge interest on debts owed in excess of the statutory rate, but permitting this activity to registrants is in exchange for the regulatory hurdles a registrant must navigate prior to becoming licensed under the OMLA. Accordingly, assuming that the trial court relied upon R.C. 1343.03 when it reduced the interest rate on the judgment from 25% to 4%, it committed reversible error.

3. The trial court committed reversible error when it reduced the rate of interest allowed by R.C. 1321.571.

The unambiguous provisions of R.C. 1321.571 permit any rate of interest agreed upon by a creditor and debtor, not to exceed an annual percentage rate of 25%. On the loan in question, Appellant and Appellee agreed by contract via the Customer Agreement (Ex. A.) to a rate of interest of 25%. Significantly, there is no provision of the OMLA that permits the reduction of a lawful annual percentage rate of interest by a trial court.

It is axiomatic under Ohio law that when the language is unambiguous, the terms of the contract must simply be applied "without resorting to methods of construction and interpretation." *Buckeye Check Cashing, Inc. v. Madison* (2008), Cuyahoga App. No. 90861, 2008-Ohio-5124, at ¶12 (holding that a creditor operating under the Check Cashing Act was permitted to contract for and receive interest, a loan origination fee, and a returned check fee provided that the terms are included in the written loan agreement); *Alexander v. Buckeye Pipe Line Co.* (1978), 53 Ohio St.2d 241 (holding that "if a contract is clear and unambiguous, then its interpretation is a matter of law and there is no issue of fact to be determined").

Here, Appellant is a registrant under the OMLA and, as stated in the Customer Agreement, the subject loan was made pursuant to the OMLA. Under the term in the Customer Agreement titled "PROMISE TO PAY," Appellee agreed to pay the principal amount of the loan, plus interest at a rate of 25% per annum. (Ex. A., p. 1). This term is unambiguous and is not susceptible to more than one interpretation. Appellant filed suit against Appellee to collect on nothing more that what it was owed. But instead of interpreting and tracking the plain language in the Customer Agreement, the trial court ostensibly decided *sua sponte* to apply the statutory rate of interest to the judgment in this matter. R.C 1343.03 is inapplicable and does not control in this matter, because the written contract in this case provided for different terms. The 25% interest rate agreed upon by Appellant and Appellee should be applied to the judgment. And, when the trial court failed to do so, it committed reversible error.

IV. CONCLUSION

For all the reasons stated above. Appellant Ohio Neighborhood Finance. Inc.. respectfully requests that this Court modify the judgment of the Parma Municipal Court and enforce the agreed upon and lawful contract rate of 25%.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the Brief of Appellant, Ohio Neighborhood Finance, Inc. was served, via Regular U.S. Mail, postage prepaid, this 13th day of May 2010, upon the following:

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