STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF RAMSEY

SECOND JUDICIAL DISTRICT

State of Minnesota by its Attorney General,
Lori Swanson,

File No. 62-CV-11-7168

Plaintiff,

vs.

FINDINGS OF FACT, CONCLUSIONS OF LAW, ORDER OF JUDGMENT AND JUDGMENT

Integrity Advance, LLC,

Defendant.

This matter came on for hearing on the 29th day of April 2013 pursuant to the parties' cross motions for summary judgment. Daniel C. Bryden, Esq., Assistant Attorney General, represented the Plaintiff; Nathaniel Zylstra, Esq., Briol & Associates, PLLC, and Claudia Callaway, Esq., Katten Muchin Rosen, LLP, appearing *Pro Hac Vice*, represented Defendant Integrity Advance, LLC. Based upon the arguments of counsel, as well as the files, records, and other proceedings in this action, the Court makes the following:

ORDER

1. The Plaintiff's motion for summary judgment is granted as follows:

A. Integrity Advance, LLC, d/b/a www.iadvancecash.com, and its owners, principals, agents, servants, employees, successors, assigns and any persons acting in concert or participation with them ("Defendant"), is permanently enjoined from extending or collecting any interest or fees on any loans to borrowers who provide a Minnesota home address or otherwise indicate that they are residents of the State of Minnesota. This injunction shall remain in full force and effect unless and until Defendant:

1) registers with the Minnesota Department of Commerce;

2) receives a license to lend in Minnesota from that Department; and

3) complies fully with M. S. §§ 47.60 and 47.601 regarding any loans made to Minnesotans.

B. Integrity Advance, LLC shall pay to the State $705,308 as restitution for the illegal interest charges and fees it has collected from Minnesota borrowers. The State shall distribute this payment in an equitable manner as restitution to Integrity Advance's Minnesota borrowers. The remainder, if any, shall be deposited into the State general fund, including any restitution for a borrower where the State cannot find the borrower after reasonable efforts to do so.

C. In addition to restitution, Integrity Advance, LLC shall pay seven million dollars ($7,000,000) to the State as combined statutory damages under M.S. § 47.601, subd. 6, and civil penalties under M.S. § 8.31, subd. 3(b).

D. The State shall be awarded its reasonable costs and attorneys' fees regarding its investigation into and litigation about Defendant's practices. Within fourteen days of receipt of this Order, the State shall file documentation of its costs, disbursements and reasonable attorneys' fees. Integrity Advance, LLC shall file any objection to the State's documentation within ten days of the State's filing. After such filings, the Court shall determine the amount of costs and attorneys' fees to be awarded the State.

2. Integrity Advance, LLC's motion for summary judgment is denied and its counterclaims are dismissed with prejudice.

3. The attached Memorandum is made a part hereof and incorporated by reference.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated this 31st day of May 2013

By the Court:

Margaret M. Marrinan
Judge of District Court

MEMORANDUM

Findings of Fact

1. Defendant Integrity Advance, LLC is organized as a limited liability company under Delaware law and operates as an online payday lender through its website

https://www.iadvancecash.com.[1] .[2] It has never had a license to operate as a payday lender in Minnesota, or as any other type of lender, from the Minnesota Department of Commerce.[3]

2. The Minnesota Attorney General's Office received complaints in early 2010 indicating that Defendant was making payday loans to Minnesotans[4]. By letter dated April 23, 2010, the State notified Defendant about these complaints and demanded that Defendant "indicate the total number of payday loans you have extended in Minnesota." [5] By letter dated April 28, 2010, Defendant denied that it made payday loans to Minnesota residents,[6] claiming that its website does not allow an applicant who indicates s/he is a Minnesota resident to complete an application.[7]

3. In response, the State advised Defendant that it had received specific complaints from Minnesotans to whom Defendant made loans.[8] The State provided an e-mail received by a Minnesotan from Defendant captioned "[i]nformation regarding your account with Integrity Advance," which set forth payment options for the Minnesotan on her payday loan.[9] Defendant wrote the State, once more denying that it made payday loans to applicants whose applications indicated they resided in Minnesota, stating that the e-mail in question must relate to someone who used to live in another state, or who indicated they resided in a state other than Minnesota on their loan application.[10]

4. Contrary to these initial representations, Defendant now concedes that it extended 1,269 payday loans to borrowers who indicated they were Minnesotans on their loan applications. These borrowers indicated that they lived in, worked in, and banked in Minnesota on their loan applications, and provided telephone numbers with Minnesota area codes for their home and work.[11]

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[1] Affidavit of Daniel C. Bryden, Exhibit A.

[2] The Bryden Affidavit filed by the State in support of its motion for summary judgment is cited herein as the "Bryden Aff.", the Supplemental Bryden Affidavit is cited as "Bryden Suppl. Aff.", and the Second Supplemental Bryden Affidavit is cited as "Bryden Sec. Suppl. Aff." The Bryden Affidavit filed by the State in opposition to Defendant's motion for summary judgment is cited herein as the "Bryden Aff. in Opp. to Summ. Judg.".

[3] Bryden Aff., Ex. B.

[4] Bryden Aff., Ex. C

[5] Bryden Aff., Ex. D

[6] Bryden Aff., Ex. E.

[7] *Id.*

[8] Bryden Aff., Ex. F.

[9] *Id.*

[10] Bryden Aff., Ex G.

[11] Bryden Aff., ¶¶ 9, 10, & Exs. H & I; Bryden Suppl. Aff., Exs. O - CC.

5. In many instances, Defendant called the loan applicants at their homes in Minnesota shortly after each borrower completed the online application.[12]

6. Defendant also routinely called the applicants at their places of employment as part of the loan underwriting process, or called the applicant's employer directly to confirm employment, also at Minnesota telephone numbers.[13]

7. In some cases, Defendant called the applicant's financial institution in Minnesota to confirm that the applicant's paychecks were automatically deposited into their checking accounts.[14] In those cases where Defendant did not call borrowers directly, it sent e-mails stating that applications were approved; these were received in Minnesota by the borrowers.[15]

8. In addition to phoning Minnesotans at home and at work as part of the underwriting process, Defendant routinely called and emailed Minnesotans to service its payday loans, to collect on delinquent accounts, and for a variety of other reasons.[16]

9. Defendant's business records reflect that it directed approximately 27,944 such contacts into Minnesota for the purpose of doing business with Minnesotans,[17] routinely sent e-mails soliciting additional payday loans to Minnesota borrowers who paid off their loans,[18], and in some instances also called borrowers to solicit additional payday loans after they had paid off their loans.[19] One Minnesotan testified that she still receives calls soliciting new loans from Defendant. Defendant has not rebutted this testimony. [20]

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[12] *See* Bryden Sec. Suppl. Aff., Ex. A at ¶ 2; Bryden Aff., Ex. K (e.g., lines 197, 230, 255, 258, 338); Olson Aff., ¶¶ 2-3; Stanek Aff., ¶ 2; Welch Aff., ¶ 2; Wozniak Aff., ¶ 3.

[13] . *See* Bryden Aff., Exs. A, H, I & K (e.g., lines 304, 324, 1282, 1430, 1849, & 2018); Bryden Sec. Suppl. Aff., Ex. A at ¶ 2; Cooper Aff., ¶ 3; Dahlheimer Aff., ¶ 2; Olson Aff., ¶ 3; Smallidge Aff., ¶ 3; Speckman Aff., ¶ 2.

[14] Smallidge Aff., ¶ 3; Sylvis Aff., ¶ 5.

[15] *See* Bryden Aff., Ex. A (FAQs on Defendant's website state that "[w]e will contact you be [sic] either email or phone within one hour about the status of your loan…" after applying); Bryden Sec. Suppl. Aff., Ex. A at Exs. A through L; Bazy Aff., ¶ 3; Gunderson Aff., ¶ 3; Olson Aff., ¶ 3, Ex. A at 9.

[16] *See, e.g.*, Bryden Sec. Suppl. Aff., Ex. A at Exs. A; Bryden Aff., Ex. K (customer service records); Cooper Aff., ¶ 3; Dahlheimer Aff., ¶¶ 2, 6, 8; Olson Aff., ¶ 3; Stanek Aff., ¶ 3; Sylvis Aff., ¶ 5; Welch Aff., ¶ 3.

[17] Bryden Aff., Ex. K.
[18] Bryden Sec. Suppl. Aff., Ex. A at Ex. L
[19] Bryden Aff., Ex. K (e.g., lines 1349 & 1946).
[20] Bazey Aff., ¶ 6.

10. Defendant deposited its payday loans directly into the borrowers' Minnesota bank accounts through electronic transfers, known as ACH transfers.[21] In addition to these deposits into Minnesota bank accounts, Defendant engaged in more than 20,000 transactions withdrawing interest and principal from them. [22]

11. Defendant's website captured the Internet Protocol Address ("IP Address") of each computer used to complete a loan application and which provided a Minnesota home address on the application.[23] It hired an unidentified third party which claims that at least some of the IP Addresses were associated with a computer outside Minnesota. Not only has Defendant failed to identify this entity or its qualifications, but it has also failed to specify the methodology used to analyze the IP Address information. By contrast, the State used an online IP Address lookup tool to research these IP Addresses and its analysis of them generally indicates that these borrowers overwhelmingly used Minnesota computers to complete their applications.

12. Under Minnesota law, payday lenders are required to file with and receive a license to lend from the Minnesota Department of Commerce before lending to Minnesota borrowers. M.S. § 47.60, subd. 3, and M.S. § 47.601, subd. 6(b) (1). Defendant never filed with or received a license from the Minnesota Department of Commerce.[24]

13. Minnesota law caps the interest payday lenders can charge; this varies slightly based on the loan amount. M.S.. § 47.60, subd. 2(a). For example, on a $300 loan, Minnesota law caps the interest and/or fees that can be charged at $23 for the first month. *Id.* After that, interest accrues at 2.75% a month, i.e. $8.25 a month on a $300 loan. M.S. § 47.60, subd. 2(a). A slightly higher rate is permitted on higher loan amounts. *Id.*

14. Defendant charged Minnesota borrowers annual interest rates of up to 1,369%, far in excess of that allowed by M.S. § 47.60, subd. 2(a).[25] For first time borrowers, Defendant charged $30 every two weeks for each $100 borrowed for loans up to $500.[26]

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[21] Bryden Aff., Ex. L; Bryden Aff. in Oppo. to Summ. Judg., ¶ 2 & Ex. A; Borrower Affidavits (all of whom testify that Defendant deposited the loan into a bank account in Minnesota); Bryden Aff., ¶ 10 & Ex. I (Loan Agreements at page 4, requiring the borrower to sign an "ACH Authorization").

[22] Bryden Aff., Ex. L.

[23] Bryden Aff., ¶ 11 & Ex. J.

[24] Bryden Aff., Ex. B.

[25] Bryden Aff., Ex. A.

[26] *Id.*, Ex. I at 3-4.

15. Under Defendant's auto-renewal repayment plan, which it automatically imposed on Minnesota borrowers who did not pay off their loans with their first payments, Defendant electronically debited the borrower's bank account this $30 fee per $100 borrowed every two weeks for eight weeks.[27] In the tenth week, in addition to this interest charge, Defendant took $50 and applied it to the principal balance, continuing to take the accrued interest plus $50 applied to principal every two weeks until the loan was paid off. Often this took many months.[28] While borrowers had the option of paying down the principal sooner, after paying these usurious interest charges, some Minnesota borrowers could not afford to also pay down the principal balance.[29]

16. It is undisputed that not a single one of the payday loans Defendant extended to Minnesotans complied with the caps on fees and interest rates set forth in M.S. §§ 47.60 and 47.601.

17. Minnesota law prohibits repeated "rollovers" or "renewals" of payday loans. It specifically prohibits: 1) extending the term of a payday loan for more than 30 days (M.S. § 47.60, subd. 2(b)); and 2) repayment of one payday loan with the proceeds of another payday loan from the same borrower. M.S. § 47.60, subd. 2(f).

18. It is undisputed that Defendant routinely withdrew only the interest that accrued on its payday loans from the borrower's bank account for the first eight weeks, already a term almost twice that allowed under Minnesota law, leaving the principal balance untouched.[30] Using a $500 loan example, Defendant withdrew only the $150 interest charge every two weeks for eight weeks. *Id.* After these eight weeks, the Defendant would have debited $600 ($150 x 4) from the borrower's bank account, but the principal balance on the loan would still be $500. Defendant does not argue that this practice complies with M.S. § 47.60, subd. 2(b), which limits the term of payday loans to 30 days or less.

19. Defendant continued withdrawing accrued interest every two weeks and would then begin withdrawing $50 and applying it toward the principal balance after the eighth week.[31] After numerous withdrawals, these $50 withdrawals would add up, eventually paying off the principal. For example, on a $500 payday loan, it would take ten $50 withdrawals to pay off the principal--an additional twenty weeks after the initial eight weeks of interest-only withdrawals.

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[27] Bryden Aff., Ex. I at 2
[28] *Id.*
[29] *See* Bazey Aff., ¶ 4; Cooper Aff., ¶ 4; Olson Aff., ¶ 4; Speckman Aff., ¶ 3.

[30] Bryden Aff., Ex. I at 2.
[31] Bryden Aff., Ex. I at 2.

20. This process of repeatedly "renewing" the payday loans had two significant impacts on borrowers:

    1) Rather than being a short-term loan paid off in two weeks, Defendant's payday loans became long-term financial obligations for borrowers who did not or could not afford to pay off the principal balance more quickly; and

    2) Defendant's interest charges quickly snowballed into financially significant obligations, often into amounts many times more than the amount borrowed.

    For example, it was routine for Minnesota borrowers' interest payments to be two or three times the principal balance, such as $1,400 or more in interest on a $500 loan, or over $2,000 in interest on a $700 loan.[32]

    Defendant does not argue that these practices complied with Minnesota law.

21. Defendant's repeated renewals of its payday loans coupled with its high interest rates caused significant financial strain for some borrowers.[33] Some found themselves trapped in a downward cycle of debt, needing to borrow from one payday lender to pay off another, all the while falling further and further behind on their other obligations.[34] As one affiant described it, she imagines the process was similar to how people get addicted to drugs, where you need more and more just to keep even.[35] The State submitted 18 borrower affidavits which document how Defendant's loans had this effect in Minnesota. The affidavit testimony is incorporated herein by reference.

22. Minnesota law provides that no payday loan contract may contain "a provision selecting a law other than Minnesota under which the contract is construed or enforced."

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[32] Cooper Aff., ¶¶ 3-4; Gunderson Aff., ¶ 4; Smallidge Aff., ¶ 4; Speckman Aff., ¶ 5; *see generally* Bryden Aff., Ex. H (setting forth many examples of borrowers paying two or three times the principal balance in interest alone).

[33] *See* Cooper Aff., ¶ 4 ("[i]t took a very long time to pay off this loan and it caused a lot of hardship for my family"); Speckman Aff., ¶ 3 ("[t]his was a serious strain on my finances, and I was pulled into a cycle of taking out other payday loans…"); Williams Aff., ¶ 4 ("I had no idea what kind of financial nightmare I was about to enter").

[34] *See* Gunderson Aff., ¶¶ 4-5 ("[i]t felt like I would never be able to get out from under this loan"); Nyhus Aff., ¶ 4 ("[t]hese payday loans… had a disastrous effect on my financial situation"); Heidenreich Aff., ¶ 7 ("I experienced significant financial and personal difficulties because of the payday loans I took out…" and "ultimately declared bankruptcy because of the payday loans…").

[35] Smallidge Aff., ¶ 5.

M.S. § 47.601, subd. 2(1). Defendant's loan contract provides that it "will be governed by the laws of the State of Delaware."[36] Minnesota law provides that no payday loan contract may contain "a provision limiting class actions" against the payday lender for violations of M.S. §§ 47.60 and 47.601. M.S. § 47.601, subd. 2(3). In contravention of this Defendant's loan contracts provide:

> YOU ARE GIVING UP YOUR RIGHT TO SERVE AS A REPRESENTATIVE, AS A PRIVATE ATTORNEY GENERAL, OR IN ANY OTHER REPRESENTATIVE CAPACITY, AND/OR TO PARTICIPATE AS A MEMBER OF A CLASS OF CLAIMANTS, IN ANY LAWSUIT FILED AGAINST US AND/OR RELATED THIRD PARTIES.[37]

23. Minnesota law requires that payday loan agreements contain a Consumer Notice that provides certain information to the borrower about payday loans. M.S. § 47.60, subd. 4(e). Defendant's loan agreements did not contain this notice.[38]

Conclusions of Law

1. Summary judgment is proper when "there is no genuine issue as to any material fact." Minn. R. Civ. P. 56.03. An adverse party cannot defeat summary judgment by "mere averments or denials but must present specific facts showing there is a genuine issue for trial." Minn. R. Civ. P. 56.05.

   Issues of contract interpretation are questions of law. *Travertine Corp. v. Lexington-Silverwood*, 683 N.W.2d 267, 271 (Minn. 2004). In applying these standards, it is important to bear in mind that Minnesota's consumer protection statutes are governed by a preponderance of the evidence standard. *State by Humphrey v. Alpine Air Prods., Inc.*, 500 N.W.2d 788, 790 (Minn. 1993). Minnesota's consumer protection statutes "are remedial in nature," and are "very broadly construed to enhance consumer protection." *State by Humphrey v. Philip Morris, Inc.*, 551 N.W.2d 490, 495-96 (Minn. 1996).

2. Minnesota statutes are presumed constitutional, and a party challenging the constitutionality of a state statute "bears the very heavy burden of demonstrating beyond a reasonable doubt that the statute is unconstitutional." *State v. Merrill,* 450 N.W.2d 318,

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[36] Bryden Aff., Ex. I at 6

[37] Bryden Aff., Ex. I at 6. (caps in original).

[38] Bryden Aff., Ex. I.

321 (Minn. 1990); *State v. Int'l Harvester Co.*, 241 Minn. 63 N.W.2d 547, 552 (Minn. 1954).

3. As demonstrated above, Defendant does not dispute that the terms and conditions of its payday loans do not comply with Minnesota law.

Defendant's payday loans violated Minnesota law in at least six different ways:

1) Defendant had not filed with or received a license to operate as a payday lender from the Minnesota Department of Commerce;

2) Defendant's interest charges were far in excess of those allowed under Minnesota law;

3) Defendant's payday loans had a term of more than 30 days;

4) Defendant's loan contracts lacked the disclosures required by Minn. Stat.§ 47.60, subd. 4(e);

5) Defendant's loan contracts contained a choice of law clause that violated Minnesota law; and

6) Defendant's loan contract contained a class action ban that violated Minnesota law.

4. Since Defendant extended at least 1,269 of its payday loans to Minnesotans, it committed at least 7,614 (1,269 x 6) separate violations of Minnesota law. As discussed above, Defendant engaged in many thousands of other acts in Minnesota in the course of originating and servicing the payday loans it extended to Minnesotans. The result: in total, Defendant violated Minnesota law many thousands of times.

5. Defendant argues that the application of Minnesota law to the payday loans it gave to Minnesotans violates the Dormant Commerce and Due Process clauses of the United States Constitution. Both its counterclaims and affirmative defenses are based on these theories, the crux of the defense being that it lacks a sufficient "nexus" to Minnesota, (Counterclaim, ¶¶ 37, 38, 48, 49, 57, 58) and its business operations were "wholly outside" Minnesota, (Counterclaim, ¶¶ 38, 39, 47, 49, 50, 55-61). Based upon these theories, Defendant argues that the application of Minnesota law to its loans to Minnesota residents is unconstitutional. (At the outset of this litigation, Defendant brought a motion to dismiss based on the Dormant Commerce Clause, which this Court denied. The Minnesota Court of Appeals denied Defendant's Petition for Discretionary Review of that Order, noting that this Court's decision "does not appear to be questionable or involve an unsettled area of the law." April 17, 2012 Order at 2.)

6. The Commerce Clause of the United States Constitution provides that "[t]he congress shall have the power ... [t]o regulate Commerce with foreign Nations and among the

several states." U.S. Const. art. I, § 8, cl. 3. The United States Supreme Court has held that the Commerce Clause impliedly contains a negative command, the "Dormant" Commerce Clause that forbids states from discriminating against or unduly burdening interstate commerce. *Chapman v. Comm'r of Revenue*, 651 N.W.2d 825, 831 (Minn. 2002) (citing *Quill Corp. v. North Dakota*, 504 U.S. 298, 312 (1992)). The Dormant Commerce Clause prevents a state from regulating commerce that occurs "wholly outside" the state. *See Healy v. Beer Inst.*, 491 U.S. 324, 335 (1989) (describing this type of Dormant Commerce Clause challenge).

7. Defendant argues that Delaware law should apply because the transaction was "consummated" in Delaware. This is factually inaccurate because the loans were consummated when Integrity deposited money into the borrowers' bank accounts in Minnesota. Furthermore, "consummation" is not the relevant legal standard for the Dormant Commerce Clause analysis: the applicable legal standard is whether the commerce occurred "wholly outside" the State of Minnesota. Integrity's commerce in making payday loans to Minnesotans did not occur wholly outside Minnesota. To the contrary, in the process of originating and servicing its 1,269 payday loans to Minnesota residents, and in the process of soliciting business from Minnesotans, Defendant's commerce entered into the State of Minnesota many thousands of times. Defendant's commerce in Minnesota includes:

(1) extending payday loans to borrowers who were in Minnesota, and who indicated on their applications that they lived in Minnesota, worked in Minnesota, and banked in Minnesota;

(2) calling these borrowers at their homes and their work in Minnesota, using telephone numbers with Minnesota area codes, in the course of underwriting, servicing, and collecting on its payday loans;

(3) calling the borrowers' employers in Minnesota to confirm borrowers' employment;

(4) sending e-mails to borrowers who reside in Minnesota, and who received the e-mails in Minnesota;

(5) depositing payday loans into Minnesota bank accounts held by Minnesota residents;

(6) initiating many thousands of ACH transactions withdrawing usurious interest charges from these Minnesota bank accounts; and

(7) soliciting new business from Minnesotans who paid off their loans by sending e-mails and placing phone calls to Minnesotans at their homes and at work.

The effects of Defendant's violations of Minnesota law were also felt in Minnesota, as Minnesotans were trapped into the cycle of payday loan debt by Defendant's usury and

loan renewals - the very effects that the Minnesota Legislature sought to prevent by enacting M.S. §§ 47.60 and 47.601. Given these facts, Defendant has failed to demonstrate that its commerce occurred "wholly outside" Minnesota, or that it lacks sufficient contacts with Minnesota to apply Minnesota law to the payday loans it extended to Minnesota residents.

8. The two statutes violated by Defendant apply only to commerce which occurs in Minnesota.

M.S. § 47.601 applies only to loan transactions in which "the borrower is a Minnesota resident and the borrower completes the transaction, either personally or electronically, while physically located in the State of Minnesota." M.S. § 47.601, subd. 5. The parameters of the statute are clearly confined to conduct occurring in this state.

Similarly, the requirements of M.S. § 47.60, subd. 3 apply only to a "business entity" that makes "consumer small loans to Minnesota residents." M.S. § 47.60, subd. 3. This includes entities that do "not have a physical location in Minnesota that [make] a consumer small loan electronically via the Internet." M.S. § 47.60, subd. 3. Thus M.S. § 47.60 also only applies to transactions with "Minnesota residents" and not to commerce outside the boundaries of Minnesota. The statutes are not unconstitutional.

9. The Minnesota Court of Appeals rejected a similar Dormant Commerce Clause challenge where the Minnesota statute by its own terms was limited to commerce that occurs in Minnesota.

In *Rio/Bill Blass v. Bredeson Ass'n., Inc.*, 1998 WL 27299, No. C6-97-1386 (Minn. Ct. App., Jan. 27, 1998), a Minnesota corporation sought to confirm an arbitration award against a New York corporation for unpaid commissions under the Minnesota Sales Representative Act ("MSRA"), M.S. § 325E.37. Raising arguments similar to those raised here by Integrity, that defendant argued that the MSRA violated the Dormant Commerce Clause.

In rejecting defendant's constitutional challenge, the court noted that "[i]t is well settled that the Commerce Clause allows states to incidentally regulate aspects of interstate commerce when Congress has chosen not to legislate." *Id.* at *3 (citing *Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. 366, 371 (1976)). The Court of Appeals also noted that the state statute "by its own terms regulates only agreements with sales representatives who are Minnesota residents, have their principal place of business in Minnesota, or whose sales territory includes part or all of the state." *Id.* In this respect, Minn. Stats. §§ 47.60 and 47.601 as applied here are indistinguishable from the statutes at issue in *Rio/Bill Blass*, and the same legal conclusion follows.

10. It is well-established that a state can regulate the terms and conditions of loans given to its residents while they are in the state, even if the lender is outside the state. The Pennsylvania Supreme Court summed up the law as follows:

> If there is anything well established in constitutional law it is that regulation of the rate of interest is a subject within the police power of the State, and this is especially true in the case of loans of comparatively small amounts, since the business of making such loans profoundly affects the social life of the community.

Equitable Credit & Discount Co. v. Geier, 342 Pa. 445, 455, 21 A.2d 53, 59 (Pa. 1941).

Federal courts are in accord that the Dormant Commerce Clause does not prohibit a state from regulating the credit terms extended to its residents, even if the lender is outside the state. *Aldens, Inc. v. Packel*, 524 F.2d 38 (3d Cir. 1975), *cert. denied*, 425 U.S. 943 (1976); *Aldens, Inc. v. LaFollette*, 552 F.2d 745 (7th Cir. 1977); *Aldens, Inc. v. Ryan*, 571 F.2d 1159 (10th Cir. 1978). The Tenth Circuit applied this rule of law to an online payday lender, and held that a state does not violate the Dormant Commerce Clause by applying its lending regulations to payday loans given to its citizens over the Internet. *Quik Payday, Inc. v. Stork*, 549 F.3d 1302 (10th Cir. 2008). More generally, courts have held that the Dormant Commerce Clause does not prevent a state from applying its consumer protection laws to an online transaction between an in-state resident and an out-of-state company. *See, e.g., SPGGC, LLC v. Blumenthal*, 505 F.3d 183 (2d Cir. 2007). Accordingly, the State's effort to regulate the payday loans Defendant extended to Minnesotans is well within its traditional police powers.

11. The strong public policy reflected in M.S. §§ 47.60 and 47.601 reflects the recognition by the legislature of the threat posed by predatory lending to the state's residents. The Minnesota Court, joined by numerous courts around the country, echoes that concern. *See Aros v. Beneficial Arizona, Inc.*, 194 Ariz. 62, 65, 66 (1999) (describing how Arizona's payday lending laws were designed to protect consumers from "unconscionable lending practices" and "abuses and predatory practices"); *Goleta Nat'l Bank v. Lingerfelt*, 211 F.Supp.2d 711, 716 (E.D.N.C. 2002) (federal court applies *Younger* abstention and refuses to intervene in state action against payday lenders because the State "has a vital interest in protecting its citizens from predatory lending, usury, and other forms of deceptive trade practices"); *Johnson v. Cash Store*, 68 P.3d 1099, 1105-06 (Wash. Ct. App. 2003) (describing the "debt treadmill" that traps consumers in a "vicious cycle of indebtedness" and noting that the payday lender "has no regard for the disastrous economic effect of his illegally high rates or of his constant attempt to keep borrowers in debt by encouraging renewals, and by making difficult the payment of the principal of the obligation") (citations omitted); *Austin v. Alabama Check Cashers Ass'n. et al.*, 936 So.2d 1014, 1023 (Ala. 2005) (noting that before Alabama enacted its payday lending laws, "[t]hose whose chief motivation was greed" preyed upon vulnerable Alabama residents and that Alabamans sought "elimination of this evil") (citations omitted); *Cash America Net of Nevada, LLC v. Pennsylvania*, 978 A.2d 1028, 1038 (Pa. Commw. Ct. 2009) (noting that the Pennsylvania Supreme Court views payday lending as "a predatory lending practice" that uses "subterfuge" to "attempt to circumvent fundamental public policy").

The fact that courts have long recognized the strong public policy behind state payday lending regulations supports the application of Minnesota law to the payday loans Defendant extended to Minnesotans.

12. Defendant argues that the application of Minnesota law to the payday loans it extended to Minnesotans would subject it to an unmanageable patchwork of state laws that it could not simultaneously comply with. But Defendant had only to comply with M.S. §§ 47.60 and 47.601 *if it chose to lend to Minnesota residents*. The Tenth Circuit rejected Defendant's argument when another online payday lender raised it:

> Moreover, Quik Payday has not explained how it would be burdensome to it simply to inquire of the customer in which state he is located while communicating with Quik Payday.

Quik Payday, 549 F.3d at 1308-09.

The Second Circuit rejected a similar argument in *SPPGC*:

> That SPPGC may not be able to sell its gift cards on exactly the same terms to consumers in all states does not, in itself, demonstrate a regulatory conflict sufficient to establish that Connecticut's law is unconstitutional. Consumer protection matters are typically left to the control of the states precisely so that different states *can* apply different regulatory standards based on what is locally appropriate.

SPGGC, 505 F.3d at 196 (emphasis in original). The reasoning of the Tenth and Second circuits applies here and defeats Defendant's argument.

13. Defendant also asserts a counterclaim based on the Due Process Clause of the United State Constitution, and claims that the State is exceeding its "regulatory jurisdiction" by seeking to apply Minnesota law to the loans Defendant extended to Minnesotans. It does not appear that any Minnesota court has recognized a Due Process Clause restriction on "regulatory jurisdiction" that is separate and distinct from the familiar Due Process Clause minimum contacts requirement for personal jurisdiction.

To the extent courts in other jurisdictions have recognized such a theory, it appears that challenges to regulatory jurisdiction are essentially the same as challenges to personal jurisdiction. For example, in *Gerling Global Reinsurance Corp. of Amer. v. Gallagher*, 267 F.3d 1228 (11th Cir. 2001), the court recognized a substantive Due Process limit to the "constitutionally permissible regulatory authority of the Florida legislature." *Id.* at 1234-35. But the test for determining whether such a Due Process Clause limitation was exceeded is essentially the same as the Due Process Clause personal jurisdiction analysis. As the court explained:

> A state's legislative jurisdiction is circumscribed by the Due Process Clause: There must be at least some minimal contact between a State and

> the regulated subject before it can, consistently with the requirements of due process, exercise legislative jurisdiction. The inquiry into whether sufficient legislative jurisdiction exists is similar to that explored in determining sufficient minimum contacts for the purposes of assessing whether a court can exercise personal jurisdiction consistent with due process, or whether a court can apply a state's own law under choice-of-law analysis consistent with due process.

Id. at 1235 (*quoting American Charities for Reasonable Fundraising Regulation, Inc. v. Pinellas County*, 221 F.3d 1211, 1216 (11th Cir. 2000)).

14. This Defendant had many thousands of contacts with Minnesota. The mere fact that a company does not have a physical presence in the State, but instead conducts its business by telephone and e-mail, is not significant for the Due Process analysis. *Marquette Nat'l Bank v. Norris*, 270 N.W.2d 290, 295 (Minn. 1978). Moreover, the thousands of contacts Defendant engaged in with Minnesota relate directly to its payday lending, which is precisely the subject matter the State seeks to regulate. Accordingly, it does not violate the Due Process Clause to apply Minnesota law to the payday loans Defendant extended to Minnesotans.

15. The Attorney General's power to obtain injunctions under § 8.31 is broad. *State by Hatch v. Cross Country Bank*, 703 N.W.2d 562, 571-72 (Minn. Ct. App. 2005). *See Cross Country Bank*, 703 N.W.2d at 571-72. The State is also entitled to injunctive relief under Minn. Stat. § 47.601, subd. 6(b)(1).

Under its *parens patriae* authority the state is empowered to seek restitution for violations of law. *See State, ex. rel Humphrey v. Alpine Air Prods.*, 490 N.W.2d 888, 896, n.4 (Minn. Ct. App. 1992); *State by Humphrey v. Ri-Mel, Inc.*, 417 N.W. 2d 102, 112 (Minn. Ct. App. 1987), *pet. for rev. denied*, (1988) (affirming $491,000 restitution award).

In addition, M.S. §§ 47.601, subd. 6(1) & (2) provide that a lender that violates the laws discussed above "is liable to the borrower for all money collected or received in connection with the loan" as well as "actual, incidental, and consequential damages." Under M.S. §§ 47.601, subd. 7, the Attorney General is empowered to seek these remedies. *See also* M.S. § 8.31, subd. 3a.

16. Restitution is an equitable remedy. *See, e.g., Alpine Air Prods., Inc.*, 490 N.W.2d at 896. An appropriate measure of restitution here is for Defendant to refund each borrower the total illegal interest collected by Defendant, minus any unpaid principal. For example, if a borrower received a $300 loan, paid $636 in interest, but then made no further payments, the amount of restitution would be $336, i.e. the total interest paid minus unpaid principal. The amount of restitution that each borrower would receive under this formula can be calculated using Defendant's business records. *See* Bryden Aff., ¶ 15 & Ex. N. In total, Defendant is liable for $705,308 in restitution under this formula. *Id.*

17. M.S. § 47.601, subd. 6, provides that any individual or entity that violates the substantive prohibitions on payday loans is liable for "statutory damages of up to $1,000 per violation." In other words, once a violation of the statute is found, there is no further analysis to determine whether a statutory penalty ought to be imposed. Instead, the Defendant "is liable" for statutory damages and the only question is the amount of the damages award. The Defendant is also liable for civil penalties of up to $25,000 *per violation* under Minn. Stat. § 8.31, subd. 3. *See* M.S. § 645.24 (2012) ("When a penalty or forfeiture is provided for the violation of a law, such penalty or forfeiture shall be construed to be for ***each*** such violation") (emphasis added) See also *Alpine Air Prods.*, 490 N.W.2d at 896 (holding that "[t]he State is entitled to civil penalties up to $25,000 for each violation" of law under M.S. § 8.31).

18. Defendant violated Minnesota law many thousands of times. Were the Court to assess statutory damages and civil penalties to the fullest extent allowed under the above statutes, the statutory damages and civil penalties could run into the hundreds of millions of dollars. Specifically, given the minimum number of transactions here (1269), the Court could assess:

a) $1000 per transaction ($1,269,000) under M.S. 47.601, subd. 6; and
b) $25000 per violation ($31,725,000).

The result would be a penalty of $32,994,000.

The proper measure for determining that penalty was addressed by the Minnesota Court of Appeals in *Alpine Air Prods., Inc.*, 490 N.W. 2d at 896-97 (citing *United States v. Reader's Digest Ass'n.*, 662 F.2d 955, 967 (3d Cir.1981), *cert. denied*, 102 S. Ct. 1253 (1982)). That court identified four factors to be considered in assessing the proper civil penalty: (1) the good or bad faith of the defendant; (2) the injury to the public; (3) the defendant's ability to pay; and (4) the desire to eliminate the benefits derived by the violation.

Application of the *Alpine Air* factors to this case favors a significant award of statutory damages and civil penalties:

First, the Defendant did not act in "good faith." Rather, it misrepresented to the State its lending in Minnesota during the State's investigation. And it did so more than once.

Second, the sheer number of illegal loans Defendant chose to extend to Minnesotans demonstrates both bad faith as well as widespread injury to the public.

Third, Defendant's violation of the law targeted some of the State's most financially vulnerable citizens. These citizens were the least able to afford interest rates of 1,368%, and every time Defendant withdrew its usurious interest charges from these borrowers' bank accounts, it was an injury to the public. The super-sized rate of interest reflects predatory lending of a breath-taking magnitude.

Fourth, addressing the legislature's intent to eliminate the benefits derived from the violations (i.e., the profits Defendant earned through its illegal practices), Defendant should not be allowed to keep its ill-gotten gains from its deliberate and illegal activity in this State. Based on these factors, a seven million dollar ($7,000,000) combined statutory damages and civil penalty award is both measured as well as appropriate.[39]

19. Pursuant to M.S. § 47.601, subd. 6(b)(1), Defendant is liable for the State's costs, disbursements, and reasonable attorney fees. Defendant is also liable for these expenses under M.S. § 8.31, subd. 3a.

Based upon the above, and as set forth in the above Order, the Court grants Plaintiff's motion for summary judgment, denies Defendant's motion for summary judgment, and dismisses Defendant's counterclaims with prejudice.

Dated: 31 May 2013

MMM

5.31.13

[39] This is a mere 21% of the potential damages that would be allowed by statute.