NCLC would like to thank Nicholas Mattison, an attorney with the New Mexico law firm Feferman & Warren, and Charles Delbaum, an attorney with the National Consumer Law Center for contributing this pleading.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

[redacted],
on behalf of herself and all others similarly situated,

Plaintiff,

v. 1:14-cv-00759-JB-SCY

COMMUNITY FINANCIAL SERVICE CENTERS, LLC,
d/b/a SPEEDY LOAN,

Defendant.

BRIEF IN SUPPORT OF
PLAINTIFF'S OPPOSED MOTION FOR CLASS CERTIFICATION

I. Nature and Status of the Case

Plaintiff [redacted] filed this class action against Defendant Community Financial Service Centers, LLC, d/b/a Speedy Loan ("Speedy") for violations of the federal Truth in Lending Act, 15 U.S.C. §§ 1601 *et seq.* ("TILA"), the federal Electronic Fund Transfer Act, 15 U.S.C. §§ 1693 *et seq.* ("EFTA"), the New Mexico Unfair Practices Act N.M.S.A 1978 §§ 57-12-1 *et seq.* ("UPA") and for equitable and other remedies relating to violations of the New Mexico Small Loan Act, N.M.S.A. 1978 § 58-15-1 *et seq.*

Speedy is a loan company with twelve stores in New Mexico. In all of its loans during the time period relevant to this action, Speedy conditioned the extension of credit on repayment by means of preauthorized electronic fund transfer. Under New Mexico law, such loans are defined as "payday loans," and are subject to thorough regulation. N.M.S.A. 1978 § 58-15-2. Speedy comprehensively and uniformly violated New Mexico law in all of its payday loans, in violation of the UPA. N.M.S.A. 1978 § 57-12-2. Conditioning the extension of credit on

preauthorized electronic fund transfer is also strictly prohibited by the EFTA, 15 U.S.C. § 1693(b). In addition, all of Speedy's loans made inaccurate or inadequate disclosures of the terms of the loan, in violation of the TILA and the UPA. For instance, Speedy failed to sufficiently disclose the schedule of payments, and many of its loans deceptively disclosed a Total of Payments and Finance Charge that were significantly lower than the true amounts.

Ms. █████ requests that the Court (a) certify one class and four subclasses representing persons affected by this unlawful conduct, and (b) appoint Plaintiff's attorneys as the attorneys for the class.

In making a determination on class certification, a court "should avoid focusing on the merits underlying the class claim." *Adamson v. Bowen*, 855 F.2d 668, 676 (10th Cir. 1988). The Court's task at the Rule 23 stage is "not to adjudicate the case; rather, it is to select the method best suited to adjudication of the controversy fairly and efficiently." *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1191 (2013) (internal brackets and quotation marks omitted). Inquiry into the merits at class certification is only necessary in order to determine whether resolution of each legal or factual question "can be achieved through generalized proof." *In re U.S. Foodservice Inc. Pricing Litig.*, 729 F.3d 108, 118 (2d Cir. 2013) (citing *Amgen*, 133 S. Ct. at 1196). Plaintiffs provide exhibits in connection with this Motion for Class Certification, not to prove the merits of the case, but to establish the common questions of law or fact that link the members of the class. Likewise, the discussion of the "Nature of the Class Claims" immediately below is intended to show that commonality and predominance are met here. Plaintiff does not now seek a ruling on the merits of these claims.

II. Nature of the Class Claims

A. Definition of the Class

Ms. [redacted] seeks certification of one class and four subclasses. The class consists of all natural persons who, beginning four years prior to the filing of the Complaint, entered into a loan with Speedy. The subclasses are as follows:

1. The "Payday Loan Subclass" consists of all members of the class who entered into a loan with Speedy beginning four years prior to the filing of this action,[1] and EITHER (a) Speedy conditioned the loan upon repayment by means of preauthorized debit authorization OR (b) Speedy accepted preauthorized debit authorization and either the loan was to be repaid in fewer than four payments, or the term of the loan was less than 120 days. The members of the Payday Loan Subclass assert a right to relief under the UPA and other legal theories for Speedy's illegal payday loans.

2. The "EFTA Subclass" consists of all members of the class who entered into a loan with Speedy beginning one year prior to the filing of this case,[2] and whose loan was conditioned upon repayment by means of preauthorized electronic fund transfer. The members of the EFTA Subclass assert a right to relief under the EFTA.

3. The "TILA Subclass" consists of all members of the class who entered into a loan with Speedy beginning one year prior to the filing of this case,[3] in which EITHER

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[1] The statute of limitations under the UPA is four years. N.M.S.A. 1978 § 37-1-4.

[2] The statute of limitations under the EFTA is one year. 15 U.S.C. § 1693m(g).

[3] The statute of limitations under the TILA is one year. 15 U.S.C. § 1640.

(a) the loan paperwork disclosed a "Total of Payments" and "Finance Charge" lower than the true amounts, OR (b) the form contract did not state the dates upon which the first payment or any subsequent payments were due, or whether the payments were due weekly, monthly, or otherwise, or the number of payments. The members of the TILA Subclass assert a right to relief under the TILA.

4. The "Deceptive Disclosure Subclass" consists of all members of the class who entered into a loan with Speedy that disclosed a "Total of Payments" and "Finance Charge" lower than the true amounts.[4] The members of the Deceptive Disclosure Subclass assert a right to relief under the UPA.

B. All of Speedy's Loans to Members of the Payday Loan Subclass Violated New Mexico Law

Since at least four years prior to the filing of this action, Speedy has offered a single loan product, which it refers to as an "installment loan." *See* Exhibit 1 at 49:22-50:7 (deposition of 30(b)(6) designee Kevin Dabney). In order to apply for a loan, Speedy required customers to provide the account number and routing number of an account that could be used for electronic fund transfer. *See* Exhibit 2 (page from Speedy Loan Policy and Procedure Manual directing store employees to "Make sure the customer has an open and active, ach-able[5] checking account"); Exhibit 3 (example of application form requesting account number and routing number); Exhibit 1 at 87:24, 99:23-100:1 (deposition of 30(b)(6) designee Kevin Dabney). Once credit was approved, customers would sign loan paperwork, including a loan contract. Every

[4] As noted *supra*, the statute of limitations under the UPA is four years.

[5] "ACH" refers to the ability of Speedy to withdraw money from the customer's bank account. *See* Exhibit 1 at 93:21-23 (deposition of 30(b)(6) designee Kevin Dabney).

loan contract entered into during the relevant time period stated as follows:

> On or about the day each installment payment becomes due, you authorize us to affect one or more ACH debit entries to your Account at the Bank . . . You acknowledge that the account on which the Check/ACH Authorization is drawn is a legitimate, open, and active account.

See Exhibit 4 (example of form loan contract). In addition to the loan contract, Speedy would also request the customer's signature on a "PPD/ACH Authorization" form, specifying the schedule of automatic debits from the customer's bank account. *See* Exhibit 5 (example of PPD/ACH Authorization, subtitled "Pre-Authorized Electronic Funds Transfer Payments"); Exhibit 1 at 105:20-106:3, 189:20-190:20 (deposition of 30(b)(6) designee Kevin Dabney).

Because Speedy conditioned its loans on repayment by means of preauthorized electronic fund transfer, its loans constitute "payday loans" under New Mexico law. New Mexico's Small Loan Act provides as follows:

> H. "payday loan" means a loan in which the licensee accepts a personal check **or debit authorization** tendered by the consumer and agrees in writing to defer presentment of that check or use of the debit authorization until the consumer's next payday or another date agreed to by the licensee and the consumer and:
>
> (1) includes any advance of money or arrangement or extension of credit whereby the licensee, for a fee, finance charge or other consideration:
>
> (a) accepts a dated personal check or debit authorization from a consumer for the specific purpose of repaying a payday loan;
>
> (b) agrees to hold a dated personal check or debit authorization from a consumer for a period of time prior to negotiating or depositing the personal check or debit authorization; or
>
> (c) pays to the consumer, credits to the consumer's account or pays another person on behalf of the consumer the amount of an instrument actually paid or to be paid pursuant to the New Mexico Small Loan Act of 1955; but
>
> (2) does not include:
>
> . . . (b) installment loans;
>
> E. "installment loan" means a loan that is to be repaid in a minimum of four successive substantially equal payment amounts to pay off a loan in its entirety with a period of no

> less than one hundred twenty days to maturity. **"Installment loan" does not mean a loan in which a licensee requires, as a condition of making the loan, the use of post-dated checks or debit authorizations for repayment of that loan**[.]

N.M.S.A. 1978 § 58-15-2 (emphasis added). To summarize the relevant parts of this somewhat cumbersome definition for the purposes of this case, a payday loan is any loan in which a preauthorized debit authorization is a *condition* of the loan, OR in which a preauthorized debit authorization is *accepted* and either the loan is repaid in fewer than four payments, or the term of the loan is less than 120 days. Because Speedy conditioned its loans on preauthorized electronic fund transfer, all of its loans were payday loans.

Under the Small Loan Act, if a loan qualifies as a payday loan, it is subject to strict requirements, including the following:

1. A usury limit of $15.50 per $100 plus $.50 per loan. N.M.S.A. 1978 § 58-15-33(A) through (D).
2. Repayment periods not to exceed 35 days. N.M.S.A. 1978 § 58-15-32(B).
3. The right to rescind. N.M.S.A. 1978 § 58-15-32(c).
4. A prohibition on renewal of loans. N.M.S.A. 1978 § 58-15-34(A).
5. The right to enter an unsecured payment plan. N.M.S.A. 1978 § 58-15-35.
6. The use of a commercially reasonable method of verification to verify that the borrower has the ability to repay. N.M.S.A. 1978 § 58-15-32(A) and -37.
7. Required disclosures on the face of the agreement. N.M.S.A. 1978 § 58-15-38.

All of Speedy's payday loans failed to meet the requirements of the Small Loan Act. In many cases, Speedy charged interest rates dramatically above the rate permitted by New Mexico law. *See*, *e.g.*, Exhibit 6 (example of loan charging approximately $44 per $100). Speedy frequently

entered into renewals of its payday loans. *See* Exhibit 7 (discovery response identifying 9101 loan renewals starting four years prior to the filing of this lawsuit). All of Speedy's loans had repayment periods exceeding 35 days. *See* Exhibit 8 (discovery responses stating that "All of Defendant's loans have a stated maturity greater than 35 days). Speedy never offered borrowers the right to enter an unsecured payment plan or included the required disclosures in its agreements. *See* Exhibit 1 at 195:2-196:5 and Exhibits 7 and 8 to deposition (deposition of 30(b)(6) designee Kevin Dabney).

All of the members of the Payday Loan Subclass have the same legal claims against Speedy based on its unlawful payday lending practices. First, Speedy's illegal lending practices violated the UPA. "The UPA is a law that prohibits the economic exploitation of others. The language of the UPA evinces a legislative recognition that, under certain conditions, the market is truly not free, leaving it for courts to determine when the market is not free, and empowering courts to stop and preclude those who prey on the desperation of others from being rewarded with windfall profits." *State ex rel. King v. B&B Inv. Group, Inc.*, 2014-NMSC-024, ¶ 34, 329 P.3d 658, 671. The UPA prohibits "unfair or deceptive trade practices," which are defined as:

> a false or misleading oral or written statement, visual description or other representation of any kind knowingly made in connection with the sale, lease, rental or loan of goods or services or in the extension of credit or in the collection of debts by a person in the regular course of the person's trade or commerce, that may, tends to or does deceive or mislead any person.

N.M.S.A. 1978 § 57-12-2(D). The UPA applies to both misrepresentations and material omissions. *Salmeron v. Highlands Ford Sales, Inc.*, 271 F. Supp. 2d 1314, 1318 (D.N.M. 2003). The UPA provides a non-exhaustive list of unfair or deceptive trade practices, which includes:

> (11) making false or misleading statements of fact concerning the price of goods or services . . .
> (14) using exaggeration, innuendo or ambiguity as to a material fact or failing to state a material fact if doing so deceives or tends to deceive;
> (15) stating that a transaction involves rights, remedies or obligations that it does not involve[.]

N.M.S.A. 1978 § 57-12-2(D). The UPA also prohibits "unconscionable trade practices," which it defines to mean:

> an act or practice in connection with the sale, lease, rental or loan, or in connection with the offering for sale, lease, rental or loan, of any goods or services, including services provided by licensed professionals, or in the extension of credit or in the collection of debts that to a person's detriment:
> (1) takes advantage of the lack of knowledge, ability, experience or capacity of a person to a grossly unfair degree; or
> (2) results in a gross disparity between the value received by a person and the price paid.

N.M.S.A. 1978 § 57-12-2(E). "Substantive unconscionability is found where the contract terms themselves are illegal, contrary to public policy, or grossly unfair." *B & B Inv. Grp., Inc.*, 2014-NMSC-024 at ¶ 32, 329 P.3d at 670. All class members have the same claim: that Speedy's illegal lending practices are both unfair and unconscionable.

Moreover, the payday loans made to Ms. ███ and all other members of the class are void. Loans made in violation of a statute providing criminal penalties are void. *White v. Singleton*, 1975-NMCA-104, ¶ 8, 88 N.M. 262, 539 P.2d 1024. The Small Loan Act provides for such penalties. N.M.S.A. 1978 § 58-15-38. All Class members have a claim to equitable or other relief for Speedy's illegal lending practices.

C. Speedy Uniformly Violated the EFTA

For the same reason that Speedy's loans constituted "payday loans," they also violated the EFTA. The EFTA makes it illegal to "condition the extension of credit to a

consumer on such consumer's repayment by means of preauthorized electronic fund transfers." 15 U.S.C. § 1693k. As set forth *supra*, all of Speedy's loans were made upon such a condition. All of the members of the EFTA Subclass therefore have the same claim against Speedy based on violation of the EFTA.

D. Speedy's Form Loan Contracts Uniformly Failed to Disclose Payment Due Dates as Required by the Truth in Lending Act

The TILA requires the clear, conspicuous, meaningful, and accurate disclosure of a standard set of financial terms for loans. 15 U.S.C. §§ 1632 and 1638. Among those terms are the Finance Charge, Total of Payments, and Payment Schedule. 15 U.S.C. §§ 1632(a) and 1638(a)(3), (5), and (6) and Regulation Z, 12 C.F.R. §§ 1026.17 and 1026.18.

In every loan made by Speedy to members of the TILA subclass, the form contract did not state the dates upon which the first payment or any subsequent payments were due, nor whether they were due weekly, monthly, or otherwise, in violation of the TILA's requirement that the timing of payments be clearly and conspicuously disclosed. *See* Exhibit 9 (example of loan contract stating that "Payments are due on your payday" and stating that the "Number of Payments" is "Monthly"). All TILA Subclass members have this same claim, based on Speedy's uniform practices.

E. Speedy's Inaccurate Disclosures Violated the TILA and the Unfair Practices Act

Many of Speedy's loans under-disclosed the Total of Payments and Finance Charge. *See, e.g.,* Exhibit 10 (4 payments of $154.52 equals 618.08, not $575.39 as disclosed), the disclosed Total of Payments, or the sum of the Amount Financed and

Finance Charge). This under-disclosure made Speedy's loans appear significantly less expensive than they really were. Such misrepresentations violate the TILA and constitute unfair or deceptive practices under the UPA. 15 U.S.C. §§ 1632(a) and 1638(a)(3) and (5); N.M.S.A. 1978 § 57-12-2. The Deceptive Disclosure Subclass includes all persons within the statute of limitations to whom such misrepresentations were made.

III. The Court Should Certify this Case as a Class Action

A. Standard for Class Certification

Class actions are essential to enforce laws protecting consumers. The Supreme Court has noted that "small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617, 117 S.Ct.2231 (1197). Similarly, as the court stated in *Eshaghi v. Hanley Dawson Cadillac Co.*, 214 Ill.App.3d 995, 574 N.E.2d 760, 764, 766 (1st Dist. 1991):

> In a large and impersonal society, class actions are often the last barricade of consumer protection. . . . To consumerists, the consumer class action is an inviting procedural device to cope with frauds causing small damages to large groups. The slight loss to the individual, when aggregated in the coffers of the wrongdoer, results in gains which are both handsome and tempting. The alternatives to the class action -- private suits or governmental actions -- have been so often found wanting in controlling consumer frauds that not even the ardent critics of class actions seriously contend that they are truly effective. The consumer class action, when brought by those who have no other avenue of legal redress, provides restitution to the injured, and deterrence of the wrongdoer.

"Rule 23 must be liberally interpreted" and read to "favor maintenance of class actions." *Woe v. Cuomo*, 729 F.2d 96, 107 (2d Cir. 1989); *King v. Kansas City Southern Industries*,

519 F.2d 20, 25-26 (7th Cir. 1975).

The Truth in Lending Act explicitly provides for class actions, and scores of such classes have been certified. 15 U.S.C. § 1640(a). *See, e.g., Chester v. Tancorde Finance, Inc.*, 14-CV-0092 JAP/KK (D.N.M., Jan. 2015); *Maez v. Springs Auto. Group, L.L.C.*, 268 F.R.D. 391 (D. Colo. 2010); *Lymburner v. U.S. Fin. Funds, Inc.*, 263 F.R.D. 534 (N.D. Cal. 2010); *McAnaney v. Astoria Fin. Corp.*, 2006 WL 2689621 at *3 (E.D.N.Y. Sept. 19, 2006); *Abel v. Keybank*, 2004 WL 540699 (N.D.Ohio Mar. 4 2004); *Purdie v. Ace Cash Express, Inc.*, 2003 WL 22976611 (N.D.Tex. Dec. 11, 2003); *see also*, *Ballard v. Equifax Check Services, Inc.*, 186 F.R.D. 589, 600 (E.D. Cal. 1999) (class actions are desirable and to be encouraged to enforce compliance with consumer protection laws).

The Unfair Practices Act explicitly provides for class actions. N.M.S.A. 1978 § 57-12-10(E). The New Mexico Supreme Court held in the context of a putative UPA class action that:

> The opportunity to seek class relief is of particular importance to the enforcement of consumer rights because it provides a mechanism for the spreading of costs. The class action device allows claimants with individually small claims the opportunity for relief that would otherwise be economically infeasible because they may collectively share the otherwise prohibitive costs of bringing and maintaining the claim . . . . The opportunity for class relief and its importance to consumer rights is enshrined in the fundamental policy of New Mexico and evidenced by our statutory scheme.

Fiser v. Dell Computer Corp., 2008-NMSC-046, ¶¶ 12-13, 144 N.M. 464, 468, 188 P.3d 1215, 1219.

To certify a class, the plaintiff must meet all four requirements of Fed. R. Civ. P. 23(a) and one of the three categories of Fed. R. Civ. P. 23(b). *Amchem Products, Inc. v.*

Windsor, 521 U.S. 591 (1997).

B. Plaintiffs Satisfy the Four Requirements of Rule 23(a)

1. The Proposed Class Passes the Numerosity Test

Fed. R. Civ. P. 23(a)(1) requires that a class be "so numerous that joinder of all members is impracticable." *Rex v. Owens*, 585 F. 2d 432, 436 (10th Cir. 1978). In this case, Speedy admits to entering into more than 32,000 loans starting four years prior to the filing of this lawsuit. See Exhibit 7 (discovery response). All of these loans are included in the Payday Loan Subclass. The EFTA and TILA subclasses include more than 6,000 customers. *See* Exhibit 7 (discovery response). The total number of persons in the Deceptive Disclosure Subclass is unknown with precision, but it is high.[6] Plaintiff's counsel reviewed 200 sample loan files produced by Defendant, and of the first 100 in which contracts were produced, 90 under-disclosed the Total of Payments and Finance Charge.[7] *See* Exhibit 11 (Declaration of Nicholas Mattison). If 90% of all contracts made inaccurate disclosures, then the Deceptive Disclosure Subclass will have approximately 29,000 members.

2. The Proposed Class Passes the Commonality Test

Fed. R. Civ. P. 23(a)(2) requires class members' and the named representatives' claims to share a common question of law ***or*** fact. "For a common question of law to exist, the putative class must share a discrete legal question of some kind." *J.B. ex rel*

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[6]Defendant is currently creating a spreadsheet that will allow the precise determination of this number.

[7]These documents are available upon request. Plaintiff does not attach them as an exhibit because of the volume of documents, and because it appears that this point is undisputed.

Hart v. Valdez, 186 F.3d 1280, 1289 (10th Cir. 1999). "Common nuclei of fact are typically manifest where . . . the defendants have engaged in standardized conduct towards members of the proposed class by mailing to them allegedly illegal form letters or documents." *Keele v. Wexler*, 149 F. 3d 589, 594 (7th Cir. 1998) (citations omitted).

Rule 23(a)(2) does not require all questions of law or fact to be common; even a single common question will suffice. *Wal Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2556 (2011). "'The commonality and typicality requirements of Rule 23(a) tend to merge. Both serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence.'" *Id.* at 2551 n.5 (quoting *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 157 58, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982)); *see, e.g.*, *Sykes v. Mel S. Harris and Associates LLC*, 780 F.3d 70 (2d Cir. 2015) (whether affidavits of merit in support of default judgments were false was susceptible of proof on a class-wide basis).

And while Rule 23 requires a showing of common questions, it does *not* require a showing "that those questions will be answered, on the merits, in favor of the class." *Amgen,* 133 S. Ct. at 1191. *Answering* common questions is reserved for the merits stage. *Id.*

Where a question of law involves "standardized conduct of the defendants toward members of the proposed class, a common nucleus of operative facts is typically presented, and the commonality requirement . . . is usually met." *Franklin v. City of*

Chicago, 102 F.R.D. 944, 949 (N.D.Ill. 1984); *Patrykus v. Gomilla*, 121 F.R.D. 357, 361 (N.D.Ill. 1988). Numerous TILA class actions alleging errors in standard form disclosures have been found to meet the commonality test. *See* Section III(A), *supra*.

In this case, the following common questions are presented:

1. Whether Speedy's loans are payday loans under the Small Loan Act;
2. Whether Speedy's loans complied with the Small Loan Act's requirements for payday loans;
3. Whether Speedy's loans violated the UPA with regard to their violation of the Small Loan Act;
4. Whether Speedy's loans are void or it would otherwise be inequitable for Speedy to retain or collect unlawful interest;
5. Whether Speedy conditioned loans on ACH withdrawals in violation of the EFTA.
6. Whether Speedy under-disclosed the Finance Charge and Total of Payments, in violation of the TILA and the UPA;
7. Whether Speedy failed to list the payment schedule fully and accurately, in violation of the TILA.

Commonality is met here because all of these questions have the capacity to "generate common *answers* apt to drive the resolution of the litigation." *In re Urethane Antitrust Litigation,* 768 F.3d 147, 157-58 5 (10th Cir. 2014) (citing *Dukes v. Walmart, supra*).

3. The Class Representative Meets the Typicality Test

Fed. R. Civ. P. 23 requires that the claims of the named representative be typical

of the claims of the class. "Typicality exists even when there may be varying fact situations among individual members of the class and this is all right so long as the claims of the plaintiffs and the other class members are based on the same legal or remedial theory." *Penn v. San Juan Hospital,* 528 F.2d 1181, 1189 (10th Cir. 1975); *De La Fuente v. Stokely-Van Camp, Inc.*, 713 F.2d 225, 232 (7th Cir. 1983). The typicality requirement ensures "that the class representatives are sufficiently similar to the rest of the class in terms of their legal claims, factual circumstances, and stake in the litigation so that certifying those individuals to represent the class will be fair to the rest of the proposed class." *In re Schering Plough Corp. ERISA Litig.*, 589 F.3d 585 (3d Cir. 2009).

In the present case, the claims of Ms. ████ and members of the class all arise from identical loan agreements and from the same course of conduct by Defendant. Ms. ████'s claims are identical to those of the class members. Speedy's loans to Ms. ████, like its loans to all class members, were payday loans that violated New Mexico law and the EFTA. The inaccurate form contracts used in Speedy's loans to Ms. ████ were identical to the form contracts that it used in its loans to all of the other class members. The legal theories raised by Ms. ████ are the same as those raised on behalf of the class. There are no claims or defenses unique to Ms. ████.

4. Ms. ████ and her Counsel Will Provide the Class Adequate Representation

Fed. R. Civ. P. 23(a)(4) requires that the named representative provide fair and adequate protection for the interests of the class. *J.B. ex rel Hart*, 186 F.3d at 1287. This

requirement involves two factors: "(1) the class representative must not have interests antagonistic to those of the class, and (2) the attorney representing the class must be qualified, experienced, and generally able to conduct the proposed litigation." *Lopez v. City of Santa Fe*, 206 F.R.D. 285, 289-290 (D.N.M. 2002), *citing*, *Retired Chicago Police Association v. City of Chicago*, 7 F.3d 584, 598 (7th Cir. 1993).

Ms. ██ understands and has fulfilled her responsibilities as class representative. She has conferred with her attorneys on multiple occasions, both over the phone and in person. She receives status reports. She has reviewed pleadings from the case. She has responded to written discovery. *See* Exhibit 11 (Declaration of Nicholas Mattison).

Ms. ██ is represented by Nicholas Mattison and Richard Feferman of Feferman & Warren, and by Charles Delbaum of the National Consumer Law Center. Ms. ██'s attorneys have extensive experience litigating TILA and UPA cases and in bringing class actions, including class actions under TILA and the UPA, in both this court and state courts. Mr. Feferman's firm has brought at least 28 consumer class actions, and he has been involved in nearly all of them. *See* Exhibit 12 (Declaration of Richard Feferman). Recently, Mr. Feferman and Mr. Delbaum were appointed class counsel in another TILA case, *Chester v. Tancorde Finance, Inc.*, 14-CV-92 JAP/KK (Doc. 33, 1/12/15), where this Court stated, "Mr. Feferman has been a mainstay in successful consumer class actions in this District, and the Court is confident he will adequately represent the class and vigorously prosecute this case to its conclusion." Attorney Charles Delbaum and the National Consumer Law Center also represent Ms. ██. Mr. Delbaum is a litigator with 43 years of experience, including being co-counsel in a dozen successful consumer class

actions in the past nine years, with another dozen currently pending. He is co-author of the National Consumer Law Center's *Consumer Class Actions* manual. *See* Exhibit 13 (Declaration of Charles Delbaum).

Ms. [redacted]'s interests in this litigation are coincident with the interests of the classes. Ms. [redacted] and the class members seek damages and equitable relief as the result of Defendant's unlawful practices. Ms. [redacted] does not seek any different separate individual relief. Given the identical nature of the claims between Ms. [redacted] and the class members, there is no potential for conflicting interests in this action.

C. Plaintiff Also Meets the Requirements of Rule 23(b)(3)

1. Common Questions of Law or Fact Predominate

For class certification under Fed. R. Civ. P. 23(b)(3), "questions of law or fact common to each class member's claim must predominate over individual questions." *Aguirre v. Bustos*, 89 F.R.D 645, 649 (D. N.M. 1981). In determining whether there is predominance, courts ask whether there is a "material variation" in the defendant's posture towards the different class members. *Esplin v. Hirschi*, 402 F.2d 94, 99 (10th Cir. 1968). "Predominance is a test readily met in certain cases alleging consumer or securities fraud . . . ." *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 625 (1997) (citations omitted). The predominance inquiry "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Id.* at 623. If the liability issues are common to the class, common questions will generally predominate. *See, e.g.*, *In re Nassau Cnty. Strip Search Cases*, 461 F.3d 219, 227 (2d. Cir. 2006); *Daffin v. Ford Motor Co.*, 458 F.3d 549, 552-53 (6th Cir. 2006).

The authorities hold that cases dealing with the legality of standardized documents or conduct are generally appropriate for resolution by class action because the document or conduct is the focal point of the analysis. *In re U.S. Foodservice Inc. Pricing Litig.*, 729 F.3d 108 (2d Cir. 2013) *cert. denied sub nom. US Foods, Inc. v. Catholic Healthcare West*, 134 S. Ct. 1938, 188 L. Ed. 2d 960 (2014) (Predominance will be found in the absence of material differences in contract language); *Haroco v. American Nat'l Bk. & Tr. Co.*, 121 F.R.D. 664, 669 (N.D.Ill. 1988) (improper computation of interest); *Kleiner v. First Nat'l Bank of Atlanta*, 97 F.R.D. 683 (N.D.Ga. 1983) (same); *Heastie v. Community Bank of Greater Peoria*, 125 F.R.D. 669 (N.D.Ill. 1989) (execution of home improvement financing documents in sequence that evaded consumers' rescission rights).

The case at bar is especially appropriate for class action treatment, because there are no individual questions relating to liability. All of Speedy's loans were unlawful payday loans, and all of its loan contracts violated the TILA, the EFTA, and the UPA. There are no individual inquiries necessary to resolve this case or which pose the kind of problems that are barriers to class certification. The legal issues concerning the violations of the TILA, the EFTA, and New Mexico law predominate over any other possible issues.

2. The Class Action Mechanism Is the Superior Method for Resolving the Claims of the Class

For class certification to be appropriate under Fed. R. Civ. P. 23(b)(3), the class action mechanism must be the "superior method for resolving [the] controversy." *Aguirre*, 89 F.R.D at 649. "Much as the predominance test, the superiority requirement is founded on the notions of judicial economy." *Nicodemus v. Union Pacific Corp.*, 204

F.R.D 479, 493 (D. Wyo. 2001), *citing*, *Newberg on Class Actions* § 4.32.

Rule 23(b)(3) lists factors "pertinent" to the finding that a class action is superior to other available methods for the fair and efficient adjudication of the controversy, which include:

> (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of the class action.

Here, the amounts of the claims are relatively small. It is unlikely that the class members have much interest in individually controlling the prosecution of the action; no other individual actions have been filed. It would be very desirable to concentrate the litigation in this forum. Moreover, most class members would likely not even know their rights had been violated and would not be able to afford to retain competent counsel to pursue their rights.

Further, there is no impediment to managing the common issues, all of which arise from Defendants' standard, uniform loan agreements and lending practices. "In addition to the consideration of manageability, the Court should take into account factors such as conserving time, effort and expense and providing a forum for small claimants." *Id.* In deciding the best available method, courts should consider the "inability of the poor or uninformed to enforce their rights, and the improbability that large numbers of class members would possess the initiative to litigate individually." *Haynes v. Logan Furniture Mart, Inc.*, 503 F.2d 1161, 1165 (7th Cir. 1974); *accord, In re Whirlpool Corp.*

Front-Loaning Washer Products Liab. Litig., 722 F.3d 838, 861 (6th Cir. 2013) (finding that "class members are not likely to file individual actions--the cost of litigation would dwarf any potential recovery" (citing *Amgen*, 133 S. Ct. at 1202, 185 L. Ed. 2d 308 (2013)); *Wolin v. Jaguar Land Rover N. Am., L.L.C.,* 617 F.3d 1168, 1176 (9th Cir. 2010) (finding individual adjudication of claims under Michigan CPA and Florida DUTPA inferior when no other actions had been filed and "the amount of damages suffered by each class member is not large"); *Seijas v. Republic of Argentina*, 606 F.3d 53, 58 (2d Cir. 2010) (noting that "district court correctly determined that proceeding individually would be prohibitive for class members with small claims"). In a class action arising under another chapter of the Consumer Credit Protection Act, the Utah federal district court stated:

> The individual plaintiffs are unlikely ever to sue because, at the level of rational economic calculation, the potential costs associated with individual lawsuits greatly exceed the potential rewards. Therefore, a class action suit is by far the most sensible means of aggregating these small individual claims in one proceeding.

Ditty v. Check Rite, Ltd., 182 F.R.D. 639, 645 (D. Utah 1998).

In this case, no better method is available for the adjudication of the class members' claims than the class action mechanism.

IV. Conclusion

The proposed class meets the requirements of Rules 23(a) as well as Rule 23(b)(3). Ms. [REDACTED] requests that the Court certify this case as a class action and appoint her attorneys as class counsel.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I further hereby certify that on November 27, 2015, 2015, I filed the foregoing pleading electronically through the CM/ECF File System, which caused all parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

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/s/ Nicholas Mattison
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