

NORTH CAROLINA
NEW HANOVER COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
04-CVS-_____

ADRIANA MCQUILLAN, and
WALTER JAMES FAUST, on behalf
of themselves and all other persons similarly
situated,

Plaintiffs,

v.

CHECK 'N GO OF NORTH CAROLINA,
INC., CNG FINANCIAL CORPORATION,
JARED A. DAVIS and A. DAVID DAVIS,

Defendants.

AOC-CV-752

COMPLAINT

(Jury Trial Requested)

Plaintiffs, on behalf of themselves and all others similarly situated, allege as follows:

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SUMMARY OF CLAIMS

1. Defendants have violated North Carolina law in connection with “payday lending” conducted at numerous North Carolina retail places of business under the name “Check ‘N Go.” Payday lending involves a practice whereby the borrower writes a personal check drawn on his bank account for the amount borrowed, typically between \$200 - \$500, plus a fee, and presents this check to the payday lender. The fee translates into a triple digit annual interest rate. The borrower is given funds in the amount borrowed. The lender agrees to defer presentment of the check until the customer's next payday (or date of next regular income payment), typically 14 – 30 days later. When the loan is due, the borrower may redeem the check for cash, allow the check to clear through the bank, or pay another fee to extend the loan until the next payday.

2. CNG Financial Corporation (“CNG”), Check ‘N Go of North Carolina, Inc. (“Check ‘N Go-NC”), Jared Davis and A. David Davis, have violated North Carolina law in connection with their payday lending operations, including the following specific statutes:

(a) The North Carolina Consumer Finance Act, G.S. 53-166(a) and (b) which requires persons engaged “in the business of lending” to be licensed, prohibits loans of certain types, and applies to “any person who seeks to avoid [its requirements] by any device, subterfuge or pretense whatsoever.”

(b) The North Carolina Check Cashing Statute, G.S. 53-276 through 283, which requires persons engaged in the business of “cashing” checks for a consideration to be licensed, prohibits check cashers from making loans, and limit fees that can be charged.

(c) The North Carolina Unfair Trade Practice Statute, G.S. 75-1.1, which prohibits unfair trade practices. Plaintiffs’ G.S. 75-1.1 claims are based on multiple legal grounds:

- The use of a signed check in connection with lending operations;
- Engaging in payday lending operations after the North Carolina General Assembly allowed the law that authorized same to expire on August 31, 2001;
- Soliciting its payday loan customers to write checks when it has reason to believe that the payday loan customer does not have sufficient funds on deposit with the bank to cover the check; and
- The violation of other consumer protection statutes, identified in this complaint, which also constitute violations of the unfair practices prohibition of G.S. 75-1.1.

(d) G.S. 24-1.1, which prohibits loans of money at interest rates in excess of specified legal limits. Plaintiffs allege that defendants have attempted to circumvent

North Carolina usury law, and, in the alternative, that Check ‘N Go and Check ‘N Go-NC are the actual *bona fide* lender in transactions that are designed to appear as loans made by non-North Carolina state-chartered banks.

(e) In the alternative, the North Carolina Loan Broker Statute, G.S. 66-106 *et seq.*, which requires persons engaged in business as “loan brokers” to provide certain disclosures, procure a bond, and file advertising with the Secretary of State.

Plaintiffs have further alleged multiple grounds of liability on the part of defendants CNG, Jared A. Davis and A. David Davis, including a claim for fraudulent transfers in violation of G.S. 39-23.4 and 39-23.5.

3. Plaintiffs seek a declaratory judgment that Check ‘N Go’s business as conducted in North Carolina is unlawful under North Carolina law, an injunction barring continuing violations of North Carolina law and an award of money damages.

4. Plaintiffs seek to maintain this case as a class action pursuant to Rule 23 of the North Carolina Rules of Civil Procedure on behalf of all persons who have obtained a “payday loan” at any North Carolina Check ‘N Go location at any time after August 31, 2001, in any transaction except for those that purported to involve a national bank as lender.

5. As stated in paragraphs 111-114 below, plaintiffs do not assert any claims under federal law; do not seek a recovery by any plaintiff (including any attorney fees, but exclusive of interest and costs as those terms are used in 28 U.S.C. § 1332) in excess of \$75,000; do not assert claims against any bank; and do not assert claims in connection with transactions in which a national bank is identified as the purported lender on the payday loans made at Check ‘N Go locations.

PARTIES

Plaintiffs

6. Plaintiff Adriana McQuillan is a resident of New Hanover County, North Carolina.
7. Plaintiff Walter James Faust is a resident of Rowan County, North Carolina.

The Check ‘N Go Companies

8. Defendant CNG is an Ohio corporation with its principal place of business in Mason, Ohio, that is controlled by defendants Jared A. Davis and A. David Davis. CNG owns, operates and directs the activities of over 900 Check ‘N Go stores throughout 27 states, including 62 Check ‘N Go stores in North Carolina.

9. Defendant Check ‘N Go-NC is an Ohio corporation created by CNG and wholly owned by CNG. Until March 8, 2004, Check ‘N Go-NC was a North Carolina corporation. Check ‘N Go-NC participates in the operation of retail payday lending establishments throughout North Carolina, including two in New Hanover County, using the name “Check ‘N Go.”

10. All major executive or policy decisions concerning the operation of the Check ‘N Go business, such as whether to enter a major market or close stores within a major market, are made by CNG and its principal owners, Jared A. Davis and A. David Davis. CNG was responsible for monitoring and ensuring that Check ‘N Go business operations were properly licensed and conducted in accordance with applicable state laws, and CNG participated in the licensure of Check ‘N Go-NC in North Carolina.

The Individual Defendants

11. Jared A. David and A. David Davis are residents of the Mason, Ohio, area, and are citizens and residents of Ohio. They own two-thirds of the stock of CNG, and control and direct the Check ‘N Go enterprise. The remainder of the stock of CNG is owned by two other members of their family: their father (Allen) and their sister (Laura).

FACTS COMMON TO ALL COUNTS

12. Unless the context clearly denotes otherwise, as used hereinafter, “Check ‘N Go” refers to CNG and Check ‘N Go-NC, singularly and collectively, as well as to all operations conducted by any of the defendants under the “Check ‘N Go” name.

13. Check ‘N Go is one of the largest payday lenders, both in North Carolina (over 60 offices or “stores”) and nationally (over 900 offices in 29 states).

14. The Check ‘N Go offices located in North Carolina are, and at all times since August 31, 2001 have been, engaged in “payday lending.”

15. Under Check ‘N Go’s form of payday lending as practiced in North Carolina and elsewhere, a customer in need of a loan writes a personal check at one of defendants’ outlets for a stated amount of \$500 or less, and obtains a promise that the check will not be presented until a date a short time in the future, typically 14-30 days. The customer is given funds in the amount of the check, less a finance charge. In a typical transaction involving a loan in the amount of \$400, for example, the customer writes a check in the amount of \$472 and obtains funds in the amount of \$400. The fee for this loan is \$72. The customer’s check is held for two weeks until the next payday. At the end of that two-week period, when the loan becomes due, the customer can pay \$472 to get the check back, let the check clear the bank, or pay \$72 to extend the loan for two more weeks. Because the payday lender is agreeing to delay the deposit of the check (or

“defer” the “presentment” of the check) such transactions are sometimes referred to as “delayed deposit” or “deferred presentment” lending.

North Carolina’s 1997 Authorization of Payday Lending

16. Prior to 1997, delayed deposit payday lending was illegal in North Carolina. A 1992 North Carolina Attorney General’s opinion concluded that payday lending violated the North Carolina Consumer Finance Act (G.S. 53-164 *et seq.*) and the North Carolina criminal law (G.S. 14-107(b)). This opinion, 60 N.C.A.G. 86 (1992), was reflected as an annotation to G.S. 53-166 in the published North Carolina General Statutes (West Publishing Company/Lexis).

17. On August 7, 1997, the North Carolina General Assembly adopted and enacted into law Chapter 391 of the 1997 Session Laws, authorizing and regulating the payday “Check-Cashing Businesses.” Former G.S. 53-281 was one of the statutes enacted by Chapter 391, and provided as follows:

“§ 53-281. Postdated or delayed deposit checks.

A licensee may defer the deposit of a personal check cashed for a customer for up to 31 days pursuant to the provisions of this section.

The face amount of any postdated or delayed deposit check cashed pursuant to this section shall not exceed three hundred dollars (\$300.00).

Each postdated or delayed deposit check cashed by a licensee shall be documented by a written agreement that has been signed by the customer and the licensee. The written agreement shall contain a statement of the total amount of any fees charged, expressed both as a dollar amount and as an effective annual percentage rate (APR). The written agreement shall authorize the licensee to defer deposit of the personal check until a specific date not later than 31 days from the date the check is cashed.

A licensee shall not directly or indirectly charge any fee or other consideration for cashing a postdated or delayed deposit check in excess of fifteen percent (15%) of the face amount of the check.

No check cashed under the provisions of this section shall be repaid by the proceeds of another check cashed by the same licensee or any affiliate of the licensee. A licensee shall not, for any consideration, renew or otherwise extend any postdated or delayed check or withhold such check from deposit for any period beyond the time set forth in the written agreement with the customer.”

18. Former G.S. 53-281 became effective on October 1, 1997. The law was enacted on an experimental basis to determine how payday companies offered their services and how it affected customers. Chapter 391 of the 2001 Session Laws provided that section 53-281 was subject to an expiration or “sunset” date of July 31, 2001.

Check ‘N Go Begins North Carolina Operations

19. Following the enactment of Chapter 391 of the 1997 Session Laws, in or about September 1997, defendants caused Check ‘N Go-NC to be licensed by the North Carolina Commissioner of Banks as a check-cashing business, and caused offices using the “Check ‘N Go” name to engage in payday lending operations in North Carolina.

20. Over the next three years, Check ‘N Go expanded its North Carolina operations. During the year 2000, Check ‘N Go was North Carolina’s second largest payday lender, with 54 offices and \$12.9 million of annual revenues.

North Carolina Eliminates Authorization For Payday Lending

21. Under the 1997 Session Law enacting it, G.S. 53-281 was to expire on July 31, 2001. On July 31, 2001, the General Assembly enacted, and Governor Easley approved, a one month extension of the expiration date or “sunset” of G.S. 53-281.

22. On July 31, 2001, the North Carolina Commissioner of Banks released an “Urgent Memo” addressed to “[a]ll check-cashing business licensees who are engaged in ‘payday

lending.” On information and belief, this memorandum was sent to, and received by, Check ‘N Go. This memorandum advised the licensees that the sunset of G.S. 53-281 had been extended by one month. This memorandum also advised licensees that they should monitor developments in the General Assembly and should “prepare to cease all payday loans after August 31, 2001, if the law is not re-enacted.”

23. On August 30, 2001, the North Carolina Commissioner of Banks released a second “Urgent Memo” to “[a]ll check-cashing business licensees now engaged in ‘payday lending.’” On information and belief, this memorandum was sent to, and received by, Check ‘N Go. This memorandum stated in part:

N.C.G.S. § 53-281 will expire on Friday, August 31, 2001, and there is no lawful basis for ‘payday lending’ without such a law, including ‘payday lending’ transactions effected by ‘agents’ or ‘facilitators’ of out-of-state lending institutions. . . .

*Check-cashing businesses which engage in transactions involving postdated or delayed deposit checks should be prepared to cease all such new agreements after August 31, 2001. Any delayed deposit checks that a licensee is holding as of August 31, 2001 may, of course, be held and then deposited in accordance with the licensee’s lawful contract with its consumers. **However, licensees should make no further payday loans after August 31, 2001, either directly or as agent for another, since they are without legal authority to enter such transactions.***

(Emphasis added.)

24. The payday lending industry lobbied the North Carolina General Assembly extensively seeking action from it that would re-enact G.S. 53-281 or extend its expiration date to some date after August 31, 2001. Check ‘N Go participated in this lobbying effort. However, G.S. 53-281 was not re-enacted nor was its expiration date further extended. No other law authorizing payday lending or “delayed deposit” check cashing was enacted, or has since been enacted, in North Carolina.

Check ‘N Go’s Reaction To Expiration of G.S. 53-281

25. With the expiration of the law authorizing delayed deposit checks and fees for such arrangements, payday lending came to be unlawful under the North Carolina statutes that had formerly prohibited payday lending.

26. At the time of the expiration of G.S. 53-281, Check ‘N Go had to make a decision whether to discontinue payday lending at its 54 stores in operation in North Carolina. All, or substantially all, of Check ‘N Go’s North Carolina revenues were derived from payday lending, so discontinuing payday lending would have been tantamount to closing Check ‘N Go’s North Carolina operations and eliminating the \$12.9 million in annual North Carolina revenue.

27. Check ‘N Go decided to continue operations in North Carolina, by creating an arrangement under which it purported to act as “agent” for a bank. These arrangements are often referred to, and are referred to in this complaint, as “rent-a-charter” arrangements.

28. Unlike the contract forms previously employed in North Carolina and most other states in which Check ‘N Go operated, Check ‘N Go’s new loan contract forms for its North Carolina offices stated that it was acting as the “agent” of a bank. Check ‘N Go contended that because of this new contract form, North Carolina laws prohibiting payday lending operations were inapplicable, and that Check ‘N Go, as a bank’s agent, could disregard such laws.

29. CNG and defendants Jared A. David and A. David Davis were aware of the North Carolina General Assembly’s decision to eliminate the statute authorizing payday lending in North Carolina effective August 31, 2001, and participated in the decision to continue Check ‘N Go’s extensive and profitable North Carolina operations by entering into a “rent-a-charter” arrangement with a bank for the North Carolina Check ‘N Go operations.

30. In 2001, the national trade association of the payday loan industry, the Community Financial Services Association (“CFSA”), was under the leadership of the payday lenders who dominate the North Carolina market. Representatives of the top four payday lending companies, with 278 North Carolina offices in the year 2000 and \$64 million in year 2000 North Carolina revenue, were all on CFSA’s board of directors and constituted a majority of CFSA’s officers, including its past presidents. CFSA encouraged payday lenders to adopt rent-a-charter arrangements in states that had prohibitions or restrictions that the payday lenders wished to avoid.

31. North Carolina’s largest payday lenders, including Advance America, Check ‘N Go, Check Into Cash and First Southern, all implemented rent-a-charter arrangements substantially similar to what was recommended by the CFSA.

32. Notwithstanding the payday industry’s endorsement and implementation of rent-a-charter arrangements, it quickly became clear that both regulatory officials and courts regarded these arrangements as providing no shelter from payday lenders’ duties to comply with state law.

33. Numerous regulatory bodies and courts have considered and rejected the payday industry’s contentions that rent-a-charter arrangements somehow insulate payday lenders from the obligation to comply with state law, such as North Carolina law referred to in this complaint. As stated by the Georgia Attorney General in a recently filed brief: “There is a clear consensus among courts, banking regulators and scholars that non-bank ‘agents’ who participate in [rent-a-charter] arrangements are subject to state usury and consumer protection laws.”

34. In the fall of 2001, the North Carolina Attorney General commenced an investigation of ACE Cash Express’s continued payday lending in North Carolina and its rent-a-charter arrangement with Goleta National Bank. The Attorney General filed suit against ACE in

January of 2002 contending that ACE's payday lending business conducted in North Carolina was unlawful notwithstanding the rent-a-charter relationship. During 2002, after suffering adverse decisions in the courts, ACE agreed to cease its payday lending in North Carolina.

35. Beginning in January 2002, the Office of the Comptroller of the Currency ("OCC") instituted a series of four enforcement actions against national banks and payday lenders involved in rent-a-charter arrangements. A news release issued by OCC on January 31, 2003 stated:

The consent order [against Advance America] marks the fourth such set of enforcement actions the OCC has taken since January 2002, involving national banks that have entered into arrangements with payday lenders. With these actions, no payday lenders are any longer carrying on business through a relationship with a national bank.

"We have been greatly concerned with arrangements in which national banks essentially rent out their charters to third parties who want to evade state and local consumer protection laws," said Comptroller of the Currency John D. Hawke, Jr. "The preemption privileges of national banks derive from the Constitution and are not a commodity that can be transferred for a fee to nonbank lenders."

36. In September of 2002, the Illinois banking regulator and the FDIC issued a consent order barring Check 'N Go from continuing to do business with Brickyard Bank.

37. Notwithstanding the FDIC order, Check 'N Go merely arranged a rent-a-charter relationship with another bank, and again contending it was not subject to North Carolina law prohibiting or restricting its payday loan operations.

**Named Plaintiffs' Transactions At
North Carolina Check 'N Go Offices**

38. Each of the named plaintiffs has obtained payday loans at Check 'N Go retail offices in North Carolina in amounts less than \$500.00. Each of the named plaintiffs has

obtained payday loans at such offices in transactions in which the purported lender was identified on the loan paperwork as a non-North Carolina state-chartered bank.

39. Since August 31, 2001, named plaintiff Adriana McQuillan has obtained several payday loans at a Check ‘N Go store located on Oleander Drive in Wilmington, North Carolina. She was charged a finance charge each time she obtained a loan.

40. To obtain a loan of \$425 dollars, Ms. McQuillan was instructed to write a personal check for \$501.50. It was agreed that his check would be held for 14 days, at which time the check would be deposited or presented for payment. To obtain a loan of \$300, Ms. McQuillan was instructed to write a personal check for \$354.

41. On several occasions, Ms. McQuillan was unable to pay the loan on the scheduled due date and he lacked sufficient funds in his checking account for the check to clear. She “rolled over” her loan by writing another check for the same amount she had borrowed previously, under the same terms.

42. Check ‘N Go treated each rollover as a new loan. Ms. McQuillan was charged an additional finance charge each time she extended her loan.

43. On the occasions on which Ms. McQuillan was instructed by Check ‘N Go to write a personal check in order to obtain a loan, her checking account did not or would not have sufficient funds with which to honor that check during the time period it was to be “held” by Check ‘N Go.

44. Since August 31, 2001, named plaintiff Walter James Faust has obtained several payday loans at a Check ‘N Go store located on Statesville Boulevard in Salisbury, North Carolina. He was charged a finance charge each time he obtained a loan.

45. To obtain a loan of \$250 dollars, Mr. Faust was instructed to write a personal check for \$295. It was agreed that his check would be held for a short length of time (approximately 30 days), at which time the check would be deposited or presented for payment.

46. On several occasions, Mr. Faust found himself unable to pay the loan on the scheduled due date and he lacked sufficient funds in his checking account for the check to clear. He was thus forced to “roll over” his loan by writing another check for the same amount he had borrowed previously, under the same terms.

47. Check ‘N Go treated each rollover as a new loan. Mr. Faust was charged an additional \$45 each time he extended his \$250 loan.

48. On the occasions on which Mr. Faust was instructed by Check ‘N Go to write a personal check in order to obtain a loan, his checking account did not have sufficient funds with which to honor that check.

49. In connection with each of the transactions described herein, plaintiffs procured loans of \$250 to \$425, for terms of 14-30 days, at a charge of 18% of the amount advanced to the borrower, resulting in an annual percentage rate finance charge of over 199% to 469.29%. Plaintiffs each paid not only the amount of the cash advance provided by Check ‘N Go, but also the fees described in the preceding sentence.

CLASS ALLEGATIONS

50. Plaintiffs seek to bring this case as a class action pursuant to Rule 23 of the North Carolina Rules of Civil Procedure. The proposed plaintiff class consists of all persons who have entered into a “payday loan” transaction at North Carolina offices of Check ‘N Go at any time after August 31, 2001, in transactions that did not purport to involve a national bank as lender.

51. Common questions of law and fact predominate over any individual issues that may be presented, because defendants' operations in North Carolina are conducted pursuant to a uniform business method. Common questions include:

- Whether defendants' uniform business methods in the Check 'N Go outlets in North Carolina violate the North Carolina Consumer Finance Act, either because they constitute loans made by defendants or because they violate G.S. 53-166(b)'s prohibition against persons seeking to avoid application of the North Carolina Consumer Finance Act "by any device, subterfuge or pretense whatsoever."
- Whether defendants' uniform business methods in the Check 'N Go establishments in North Carolina constitute "engag[ing] in the business of cashing checks" (within the meaning of "cashing" as defined in the statute) in violation of the North Carolina Check Casher Act, G.S. 53-275 *et seq.*
- Whether defendants' uniform business methods in the Check 'N Go establishments in North Carolina violate G.S. 75-1.1 by reason of:
 - The use of a signed check in connection with lending operations;
 - Engaging in payday lending operations after the North Carolina General Assembly allowed the law that authorized same to expire on August 31, 2001;
 - Soliciting its payday loan customers to write checks when it has reason to believe that the payday loan customer does not have sufficient funds on deposit with the bank to cover the check; and
 - The violations of other consumer protection statutes, identified in this complaint, which also constitute unfair trade practices.
- Whether defendants' uniform business methods in the Check 'N Go operations in North Carolina constitute the business of acting as a "loan broker" in violation of the North Carolina Loan Broker Act, G.S. 66-106 *et seq.*
- Whether defendants' arrangements with non-North Carolina state-chartered lenders effectively exempt defendants from compliance with North Carolina law regulating checks written for insufficient funds, small loan practices and limits, check cashing practices, loan broker requirements and unfair trade practice laws.

52. On information and belief, the proposed plaintiff class is numerous: substantially in excess of 1,000 persons.

53. The named plaintiffs' claims are typical of the claims of the members of the proposed class. Defendants have engaged in standardized conduct toward the proposed class members in connection with defendants' "payday" lending in North Carolina.

54. The named plaintiffs are adequate representatives of the class in that the named plaintiffs do not have antagonistic or conflicting claims with other members of the class; the named plaintiffs have a sufficient interest in the outcome to ensure vigorous advocacy; and counsel for the named plaintiffs have the requisite qualifications and experience to conduct the proposed litigation competently and vigorously.

FIRST CLAIM FOR RELIEF
(Consumer Finance Act, G.S. 53-164 *et seq.*)

55. The allegations of paragraphs 1 through 54, and the other allegations of this complaint, are incorporated herein by reference.

56. G.S. 53-166(a) prohibits persons from being engaged in the "business of lending" loans of less than \$10,000 except pursuant to a license issued by the North Carolina Commissioner of Banks, and except as permitted by G.S. 53-164 *et seq.*

57. Since August 31, 2001 (except for in those transactions in which the payday loan was purportedly made by a national bank as lender), Defendants have been engaged in the "business of lending" within the meaning of G.S. 53-166(a). The transactions that have taken place at Check 'N Go offices in North Carolina since August 31, 2001, and the transactions

between the named plaintiffs and Check ‘N Go offices in North Carolina were loans of less than \$10,000.

58. Since August 31, 2001, none of the defendants has been licensed by the North Carolina Commissioner of Banks.

59. In the course of making payday loans to plaintiffs and members of the class since August 31, 2001, Check ‘N Go repeatedly made loans at interest rates that exceed the rate of interest they would be permitted by law to charge if they were licensed by the North Carolina Commissioner of Banks.

60. In the course of making payday loans to plaintiffs and members of the class since August 31, 2001, Check ‘N Go repeatedly made loans in the same location where it was conducting other business, in violation of G.S. 53-172(a).

61. G.S. 53-166(b) is titled “Evasions” and provides: “The provisions of subsection (a) of this section shall apply to any person who seeks to avoid its application by any device, subterfuge or pretense whatsoever.”

62. Defendants have sought to avoid the application of G.S. 53-166(a) and the North Carolina Consumer Finance Act by entering into arrangements with non-North Carolina, state-chartered banks, whereby Check ‘N Go is identified as an “agent” for the state-chartered financial institution. However, Check ‘N Go has received most of the financial benefit from these lending operations in North Carolina, is itself “engage[d] in the business regulated by this Article” (G.S. 53-168(a)), and is itself “engaged in the business of lending” (G.S. 53-166(a)).

63. As hereinabove alleged in paragraphs 56-60 above, defendants have violated G.S. 53-164 *et seq.* even if defendants are not themselves the actual lenders or makers of the payday loans, because defendants are “engage[d] in the business of lending” and “engage[d] in the

business regulated by this Article” and have sought to “avoid its application by [a] device, subterfuge or pretense.” In the alternative, however, plaintiffs here allege that CNG and/or Check ‘N Go-NC are the *bona fide* lender on the payday loans. In support of this alternative contention, plaintiffs incorporate by reference the allegations of paragraphs 100-101, below.

64. Plaintiffs do not, by this claim or in this complaint, challenge the right of non-North Carolina state-chartered banks to enter into loans with North Carolina residents at such rates as the bank’s home state may permit. Rather, plaintiffs here complain of Check ‘N Go’s actions in arranging such loans and receiving most of the financial benefit of such loans as participation in the “business of lending,” as an “evasion” prohibited by G.S. 53-166(b).

65. The named plaintiffs and the members of the plaintiff class have been damaged by Check ‘N Go’s violations of G.S. 53-164 *et seq.* in that Check ‘N Go has charged fees not permitted because of its lack of licensure and other violations of the North Carolina Consumer Finance Act. Persons in violation of G.S. 53-164 *et seq.* may not retain “any principal or charges whatsoever with respect to such loan.”

66. The named plaintiffs and the members of the plaintiff class are entitled to and request, pursuant to G.S. 1-253, a declaratory judgment that the transactions undertaken at Check ‘N Go outlets in North Carolina since August 31, 2001, with the exception of those transactions that involved a national bank as the purported lender, are in violation of G.S. 53-166(d).

67. The named plaintiffs and the members of the plaintiff class are further entitled to and request a preliminary and permanent injunction, barring Check ‘N Go from continuing to operate in violation of G.S. 53-164 *et seq.*

68. The named plaintiffs and the members of the plaintiff class are, pursuant to G.S. 53-166(d), entitled to recover back from defendants all amounts which defendants have received

in connection with Check ‘N Go transactions in North Carolina since August 31, 2001 (except for those transactions in which the payday loan purports to be made by a national bank as lender), pursuant to G.S. 53-166(d)’s provision that any party in violation of the Act “shall have no right to collect, receive or retain any principal or charges whatsoever with respect to such loan.”

SECOND CLAIM FOR RELIEF
(Check Cashing Statute, G.S. 53-276, 53-283)

69. The allegations of paragraphs 1 through 54, and all other allegations of this complaint, are incorporated herein by reference.

70. Notwithstanding the North Carolina Commissioner of Banks’ refusal to renew Check ‘N Go-NC’s license, defendants have continued to engage in the business of “cashing” checks at Check ‘N Go offices in North Carolina.

71. G.S. 53-276 prohibits any person from engaging in the business of cashing checks for consideration in North Carolina unless that person is licensed under Article 22 of Chapter 53 of the North Carolina General Statutes. G.S. 53-276 further provides that “[n]o person or other entity providing a check-cashing service may avoid the requirements of this Article by providing a check or other currency equivalent instead of currency when cashing payment instruments.”

72. None of defendants holds a license as required by G.S. 53-276.

73. G.S. 53-283(1) prohibits a person required to be licensed under Article 22 of Chapter 53 of the General Statutes from charging fees in excess of those authorized in such Article 22 of Chapter 53.

74. Check ‘N Go’s North Carolina operations charge fees in excess of those authorized in Article 22 of Chapter 53 of the North Carolina General Statutes.

75. G.S. 53-283(2) prohibits a person required to be licensed under Article 22 of Chapter 53 of the General Statutes from “engag[ing] in the business of making loans of money, or extensions of credit, or discounting notes, bills of exchange, items, or other evidences of debt”

76. Defendants have engaged in, and are currently engaging in, the business of making loans of money, of extending credit and of discounting items (customers’ checks) in violation of G.S. 53-283.

77. The named plaintiffs and the members of the plaintiff class have been damaged by defendants’ business practices, in that the named plaintiffs and the members of the plaintiff class have paid fees in connection with Check ‘N Go’s check-cashing transactions and loans (except for those transactions in which the payday loan purports to be made by a national bank as lender) in North Carolina.

78. The named plaintiffs and the members of the plaintiff class are entitled, pursuant to G.S. 1-253, to a declaratory judgment that defendants’ actions as described herein have been and are in violation of G.S. 53-276, 53-283 and 75-1.1.

79. The named plaintiffs and the members of the plaintiff class are further entitled to a preliminary and permanent injunction, barring Check ‘N Go from continuing to operate in violation of G.S. 53-276, 53-283 and 75.1.1.

80. The named plaintiffs and the members of the plaintiff class are entitled to recover from defendants all fees or interest paid in connection with Check ‘N Go transactions in North Carolina since August 31, 2001, except for those transactions which purported to involve a national bank as lender.

THIRD CLAIM FOR RELIEF
(Unfair Trade Practices--G.S. 75-1.1 *et seq.*)

81. The allegations of paragraphs 1 through 80 and 98-111, and all other allegations of this complaint, are incorporated herein by reference.

82. By this claim plaintiffs allege that the Check 'N Go business operations in North Carolina, which were at all times conducted willfully, are contrary to the public policy of North Carolina, are substantially injurious to consumers of North Carolina, and constitute unfair trade practices under G.S. 75-1.1. Check 'N Go's unfair practices include the following:

- (a) Requiring that plaintiffs and members of the plaintiff class provide a personal check as security for, or as the basis for obtaining a payday loan.
- (b) Engaging in payday lending after the law authorizing such transactions expired.
- (c) Soliciting customers to write checks in order to obtain a payday loan, knowing that the customer lacks funds on deposit in the bank with which to honor the check.
- (d) Engaging in violations of each of the specific consumer protection statutes alleged elsewhere in this complaint, the violations of which also constitute unfair trade practices.

83. In making payday loans to its customers, Check 'N Go does not thoroughly evaluate a borrower's ability to repay the loan, but instead hold's the borrower's personal check as security for the loan.

84. Taking the borrower's personal check in connection with the payday loan deprives the customer of any opportunity to present defenses to the loan.

85. By securing a signed check from a borrower to assure repayment of a loan, Check 'N Go places itself in a position to withdraw funds from the borrower's bank account or, if the account does not contain sufficient funds, to cause the borrower to incur "bounced check" or "NSF" fees from the bank and the payday lender, and to cause a deterioration of the borrower's relationship with his bank.

86. By securing a signed check from the borrower to assure repayment of the loan, Check 'N Go also places the borrower in a position in which the borrower's other outstanding checks will be rejected by the borrower's bank for insufficient funds, thereby giving rise to bank "NSF" charges as well as returned check charges from other persons to whom the borrower has written checks, and to cause a deterioration of the borrower's financial relationship with the borrower's other creditors.

87. The loans are structured to make it difficult for consumers to pay in full at the end of the loan period without needing to borrow again before the next payday. Because of the consequences described in the preceding paragraph, payday loan borrowers are reluctant to default on payday loan obligations and, instead, frequently take out other payday loans to redeem the initial payday loan or "roll over" the loan for another 14 or 30 days by paying an additional loan fee.

88. Payday loans are structured in such a way so as to encourage extended borrowing through rollovers and replacement loans. Once a payday loan has been obtained, the cost to renew it or replace it is substantially smaller than the cost to pay it off. A substantial amount of payday loan revenues are derived from so-called "repeat customers."

89. With the sunset of G.S. 53-281, payday lending is no longer authorized under North Carolina law, and this form of business is contrary to North Carolina's public policy.

90. Check ‘N Go’s practice of soliciting its customers to write personal checks when it is understood by the very nature of the transaction that the customer lacks the funds to cover the check being written also constitutes an unfair trade practice under G.S. 75-1.1. G.S. 14-107(b) makes it unlawful for any person to “solicit or to aid and abet any other person, firm or corporation to draw, make, utter or issue and deliver to any person, firm or corporation, any check or draft on any bank or depository for the payment of money or its equivalent, being informed, knowing or having reasonable grounds for believing at the time of the soliciting or the aiding and abetting that the maker or the drawer of the check or draft has not sufficient funds on deposit in, or credit with, the bank or depository with which to pay the check or draft upon presentation.”

91. Because Check ‘N Go engages in the payday loan business for the stated purpose of providing its customers with loans of funds the customers lack, all customers of Check ‘N Go are solicited to write checks at a time when defendants have “reasonable grounds for believing” that the maker of the check does not then have sufficient funds to pay the check.

92. Moreover, as alleged elsewhere in this complaint, defendants have violated other North Carolina statutes, specifically: G.S. 53-164 *et seq.* (the North Carolina Consumer Finance Act); G.S. 53-275 *et seq.* (the North Carolina Check Cashing Business Law); G.S. 24-1 *et seq.* (North Carolina usury law); and/or G.S. 66-106 *et seq.* (the North Carolina loan broker statutes), and such violations constitute also violations of G.S. 75-1.1.

93. Plaintiffs and members of the plaintiff class have been damaged by Check ‘N Go’s violations of the Unfair Trade Practices statute. They were charged fees that were impermissible and are subject to refund.

94. Defendants have willfully caused the Check ‘N Go transactions hereinabove described to take place at Check ‘N Go outlets in North Carolina. Such transactions occur and have occurred in commerce in North Carolina.

95. The named plaintiffs and the members of the plaintiff class are entitled, pursuant to G.S. 1-253, to a declaratory judgment that the acts taken and being taken in North Carolina by Check ‘N Go are in violation of G.S. 75-1.1.

96. The named plaintiffs and the members of the plaintiff class are further entitled to a preliminary and permanent injunction, barring Check ‘N Go from continuing to operate in violation of G.S. 75-1.1.

97. The named plaintiffs and the members of the plaintiff class are entitled to recover from defendants all fees or interest paid in connection with Check ‘N Go transactions in North Carolina since August 31, 2001, except for those transactions which purported to involve a national bank as lender, and are further entitled to treble damages and attorney fees pursuant to G.S. 75-16.1.

FOURTH CLAIM FOR RELIEF
(Evading Usury, G.S. 24-1.1)

98. The allegations of paragraphs 1 through 54, and all other allegations of this complaint, are incorporated herein by reference.

99. By this alternative claim, it is contended that defendants have engaged in efforts to circumvent and evade the law of usury in North Carolina, and that the payday loan transactions constitute a loan of funds from defendants. Plaintiffs do not, by their complaint or this claim, challenge the right of out-of-state banks to enter into loans with North Carolina residents at such rates as the bank’s home state may permit. Rather, plaintiffs complain here of

Check ‘N Go’s actions in arranging such loans and receiving most of the financial benefits of such loans as an evasion prohibited by Chapter 24 and cases decided under Chapter 24, and in the further alternative contend that Check ‘N Go was the true and *bona fide* lender in the loan transactions alleged herein.

100. On information and belief, defendants have controlled and conducted the business of making payday loans by Check ‘N Go in North Carolina as described herein. On information and belief, the marketing of the payday loans made by Check ‘N Go in North Carolina has been and is conducted and controlled by defendants. The economic risk of such loans is (and has been) borne by defendants. The collection of such loans is (and has been) conducted by defendants. The corporate defendants have received most of the earnings generated by the deferred check presentment loans.

101. In North Carolina, Check ‘N Go has conducted business under the name Check ‘N Go rather than under the names of out-of-state financial institutions. The Check ‘N Go name has been continuously used rather than being changed to be consistent with the identity of the financial institutions with which defendants have entered into their various arrangements.

102. For loans structured under the “rent-a-charter” arrangements using state-chartered lending institutions, defendants are subject to Chapter 24 of the North Carolina General Statutes, and are not entitled to the usury protections of 12 U.S.C. §1831d, as made applicable in North Carolina by G.S. 24-2.3(b).

103. Since September 1, 2001, for the payday loans it has made in North Carolina (with the exception of those loans made purportedly using a national bank as lender), Check ‘N Go has charged interest at rates in excess of the maximum rate permitted by Chapter 24 of the North Carolina General Statutes.

104. With the exception of those loans purportedly made using a national bank as lender, defendants have entered into, or caused others to enter into, loans of money, with an understanding that the money loaned shall be returned, with payment or an agreement to pay, a greater rate of interest than that allowed by law, and with a corrupt intent to take more than the legal rate for the use of the money loaned.

105. The named plaintiffs and the members of the plaintiff class are entitled to recover from defendants twice the amount of interest paid on all payday loans made by Check ‘N Go using a rent-a-charter agreement with a state-chartered bank, and to a release from any further obligation to make payments to Check ‘N Go on those loans.

FIFTH CLAIM FOR RELIEF
(Loan Brokers, G.S. 66-106 *et seq.*)

106. The allegations of paragraphs 1 through 54, and all other allegations of this complaint, are incorporated herein by reference.

107. In the alternative to the allegations made elsewhere in this complaint, plaintiffs here allege as an alternative claim that, with the exception of those transactions made purportedly using a national bank as lender, Check ‘N Go has operated and operates in North Carolina as a “loan broker” within the meaning of G.S. 66-106.

108. G.S. 66-106 *et seq.* require that all loan brokers doing business in North Carolina provide specified disclosure statements to prospective borrowers, obtain a bond or establish a trust account, and file certain materials with the Secretary of State.

109. Check ‘N Go has not complied with any of the requirements of Article 20 of Chapter 66 of the North Carolina General Statutes.

110. G.S. 66-111(d) provides that “[t]he violation of any provisions of this Article shall constitute an unfair practice under G.S. 75-1.1.”

111. The allegations of paragraphs 94-97 are specifically incorporated here by reference, and plaintiffs are entitled to relief as there alleged.

LIMITATION OF CLAIMS

112. Plaintiffs do not assert in this action any claims under federal law, and specifically and without limitation do not assert any claims under 12 U.S.C. §1831d.

113. Plaintiffs do not assert in this action any claim against any person not named herein, and specifically do not assert any claim against any bank.

114. Plaintiffs do not assert in this action any claim with respect to any loan in which the purported lender, as reflected in the writings signed by the borrower, is a national bank.

115. Plaintiffs do not assert in this action any claim for damages in the aggregate for any named plaintiff or member of the plaintiff class in excess of \$75,000, exclusive of interest and costs within the meaning of those terms as used in 28 U.S.C. § 1332(b). The financial transactions at issue in this case involve payday loans of \$500 or less.

LIABILITY OF CNG, JARED A. DAVIS AND A. DAVID DAVIS

116. Plaintiffs contend CNG and individual defendants Jared A. Davis and A. David Davis share all liability to which Check ‘N Go-NC is subject, and also contend that CNG and the individual defendants are liable for such funds as were originally obtained from North Carolina borrower payments and were ultimately transferred to them or entities under their control (including, without limitation, to companies affiliated with CNG).

Participation In Wrongdoing

117. The allegations of paragraph 1 to 116 and all other allegations of this complaint are incorporated herein by reference.

118. Plaintiffs contend that CNG and individual defendants Jared A. Davis and A. David Davis have joint and several liability with Check 'N Go-NC by reason of their actual participation in the matters complained of herein.

119. As specific acts of actual participation by CNG and individual defendants, plaintiffs allege:

- (a) CNG acted as the management company for the Check 'N Go operations. Jared A. Davis was CNG's president.
- (b) CNG determined the states in which Check 'N Go would conduct operations.
- (c) CNG and the individual defendants were aware of the North Carolina General Assembly's decision to eliminate the statute authorizing payday lending in North Carolina effective August 31, 2001.
- (d) In or about September 2001, CNG and the individual defendants made the decision that Check 'N Go-NC would continue in the payday lending business in North Carolina notwithstanding the expiration of the law that permitted such business and notwithstanding the North Carolina Commissioner of Banks' memoranda.
- (e) CNG and the individual defendants participated in this decision with the other major North Carolina payday lenders, and elected to have the North Carolina Check 'N Go operations follow the rent-a-charter model

recommended by the CFSA, of which CNG was a founding member, and which was followed by the other major North Carolina payday lenders, including Check Into Cash, Advance America and First Southern Cash Advance. Check N' Go's actions in adopting the CFSA proposal were consistent with CNG's membership as a founding member of CFSA and its membership on the CFSA board of directors.

- (f) CNG and the individual defendants were aware of the September 9, 2002 Cease and Desist order issued by FDIC against Brickyard Bank, which ordered Brickyard to stop its rent-a-charter arrangement with CNG.

Liability To Return Funds
(G.S. 53-166(d); G.S. 39-23.4 and -23.5)

120. The allegations of paragraph 1 to 119 and all other allegations of this complaint are incorporated herein by reference.

121. CNG and Jared A. Davis and A. David Davis, and entities under their control, have received funds from Check 'N Go-NC and from the operations of the Check 'N Go offices in North Carolina. CNG and the individual defendants are liable to return all such funds.

122. Such liability arises because CNG and the individual defendants are "other part[ies] in violation" under G.S. 53-166(d), which provides that "any other party in violation shall have no right to collect, receive or retain any principal or charges whatsoever with respect to such loan." The "violation" by CNG and the individual defendants arises from their participation in and implementation of the acts and actions described in this Complaint.

123. Such liability also arises because funds transferred to or through CNG and the individual defendants, and entities under their control, constitute transfers made during a time at

which Check 'N Go-NC was "insolvent" within the meaning of that term as used in G.S. 39-23.2, after taking into consideration the amount of the liability represented by Check 'N Go-NC's duty to make refunds to North Carolina customers. Plaintiffs allege that CNG and the individual defendants, and entities under their control, are receiving, and have received, transfers of funds that constitute "fraudulent transfers" under G.S. 39-23.5(a) in that Check 'N Go-NC did not receive reasonably equivalent value in exchange for such transfers, and such transfers were made at a time when, after giving consideration to Check 'N Go-NC's obligation to refund all fees paid by North Carolina customers, CNG was insolvent. Plaintiffs allege they are creditors of Check 'N Go-NC whose claims arose prior to such transfers.

124. Plaintiffs further allege that such transfers were made with the intent to hinder creditors under G.S. 39-23.4(a), and that the fragmentation of Check 'N Go operations into purportedly separate corporations and the transfers of funds from Check 'N Go-NC done after the North Carolina payday authorization ended but Check 'N Go nonetheless continued to its North Carolina operations, were done with the intent to insulate defendants against the risk of having to refund to North Carolina borrowers the funds that had been unlawfully derived from Check 'N Go's unlawful deferred check presentment payday lending operations.

125. To the extent of transfers to CNG or the individual defendants, or entities under their control, on account of antecedent debt, plaintiffs challenge such transfers as preferences under G.S. 39-23.5(b)

Conspiracy

126. The allegations of paragraph 1 to 125 and all other allegations of this complaint are incorporated herein by reference.

127. CNG and the individual defendants share liability with Check ‘N Go-NC because they entered into a conspiracy to violate North Carolina law by agreeing with others (including defendant Check ‘N Go-NC) to perform acts in violation of North Carolina law as hereinabove alleged.

128. The actions hereinabove alleged were taken in furtherance of such conspiracy, and plaintiffs were injured as a proximate cause thereof, all as alleged herein.

Piercing Corporate Veil

129. The allegations of 1 to 129 are incorporated herein by reference.

130. Check ‘N Go-NC is a mere instrumentality of CNG.

131. CNG decided the states in which Check ‘N Go would do business, and caused approximately 29 purportedly separate organizations (such as Check ‘N Go-NC) to be set up for particular states. Those purportedly separate organizations such as Check ‘N Go-NC have no separate home office, no home office staff, no telephone, no telephone listing, no address, no board meetings, or other indicia of separate existence. Check ‘N Go-NC is an alter ego of CNG.

132. CNG has used Check ‘N Go-NC to perpetrate violations of the statutory law of North Carolina. Plaintiffs have been proximately injured as a consequence thereof. CNG shares liability with Check ‘N Go-NC for the matters alleged herein.

PRAYER FOR RELIEF

WHEREFORE, the plaintiffs, on behalf of themselves and all others similarly situated, pray that this Court grant relief as requested in this complaint, including that the Court:

A. Issue a declaratory judgment, declaring that the Check ‘N Go operations in North Carolina are in violation of North Carolina law;

- B. Issue a preliminary and permanent injunction, barring defendants from offering, making, arranging, or collecting payday loans to North Carolina consumers;
- C. Certify this case as a class action under Rule 23 of the North Carolina Rules of Civil Procedure;
- D. Award the named plaintiffs and the members of the plaintiff class a refund of all amounts (principal, as well as fees and interest) paid by customers on payday loans described herein and obtained through Check ‘N Go offices in North Carolina;
- E. Award the named plaintiffs and the other members of the plaintiff class treble damages pursuant to G.S. 75-1.1 and attorney fees pursuant to G.S. 75-16.1;
- F. Award the named plaintiffs and the other members of the plaintiff class double the amount of fees paid pursuant to the Fourth Claim For Relief;
- G. Award the plaintiffs and the other members of the class pre-judgment and post-judgment interest;
- H. Order the disgorgement and refund of all monies, fees and interest unlawfully charged and that have been transferred to or through defendants or their affiliates; and
- I. Award costs, and such other and further relief as the Court deems just and proper under the circumstances.

PLAINTIFFS DEMAND TRIAL BY JURY

This the _____ day of _____, 2004.

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