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BEFORE THE DEPARTMENT OF BUSINESS OVERSIGHT
OF THE STATE OF CALIFORNIA

12 In the Matter of:) CFL License Nos.: 603F577, 603J202
13)
14 THE COMMISSIONER OF BUSINESS)
15 OVERSIGHT,)
16 Complainant,)
17) SETTLEMENT AGREEMENT
18 v.)
19)
20 ASPEN HOLDINGS, LLC doing business as)
21 FUND CAPITAL AMERICA,)
22)
23)
24)
25 Respondent.)

21 This Settlement Agreement (Settlement Agreement) is entered between the Commissioner of
22 Business Oversight (Commissioner) and Aspen Holdings, LLC doing business as Fund Capital
23 America (Aspen) (hereinafter collectively referred to as “the Parties”).
24

25 **I.**
26 **Recitals.**

26 A. Aspen is and was at all relevant times herein a California limited liability company
27 doing business as Fund Capital America.
28

1 B. Aspen holds licenses from the Department of Business Oversight (Department) to
2 conduct business as a finance lender under the California Financing Law (CFL) (Fin. Code, § 22000
3 et seq.)¹at two locations: 503 North Alta Drive, Beverly Hills, California 90210 (License No.
4 603J202) and 714 West Olympic Boulevard, Suite 614, Los Angeles, California 90015 (License No.
5 603F577).

6 C. Aspen offers cash advances pursuant to contracts (“Litigation Advance Contracts) to
7 California litigants with potential or pending legal claims (“Litigants”).

8 D. These Litigation Advance Contracts are secured by the potential proceeds from the
9 resolution of the Litigant's potential or pending legal claims.

10 E. The Litigation Advance Contracts also provide that if, upon resolution of the Litigant's
11 potential or pending legal claims, the net proceeds from such resolution are insufficient to pay Aspen
12 the amount set forth in the Litigation Advance Contract, then the Litigant shall owe Aspen no money
13 in excess of the net proceeds.

14 F. On August 26, 2015, the Department commenced a routine examination of Aspen
15 under the CFL.

16 G. During the course of the examination, the Department concluded that the Litigation
17 Advance Contracts constituted loans under the CFL and therefore determined that Aspen had violated
18 certain provisions of the CFL with respect to its Litigation Advance Contracts. Aspen disputed the
19 Department’s conclusions.

20 H. It is the intention and desire of the Parties to resolve the Department’s examination
21 findings without the necessity of an administrative action, hearing, and/or other litigation through
22 this Settlement Agreement.

23 I. The Commissioner finds that this Settlement Agreement is appropriate, in the public
24 interest, and consistent with the purposes fairly intended by the policies and provisions of the CFL.
25

26 _____
27 ¹ Effective October 4, 2017, the name of the “California Finance Lenders Law” changed to the “California Financing
28 Law.” (Assem. Bill No. 1284 (2017-2018 Reg. Sess.) § 4.) For purposes of this document, a reference to the California
Financing Law means the California Finance Lenders Law before October 4, 2017 and the California Financing Law on
and after that date. (Cal. Fin. Code, § 22000.)

1 provisions of this Settlement Agreement be deemed permission to engage in any act or practice
2 prohibited by such statute, regulation or rule, to the extent such statute, regulation or rule is
3 applicable to and governs any particular conduct.

4 6. Nothing herein shall be interpreted as the Department expressly or impliedly
5 granting Aspen permission to continue to offer Litigation Advance Contracts in California as
6 described above, or as relieving Aspen of any future legal liabilities that may arise from further
7 engaging in such conduct.

8 7. Nothing herein, nor the existence of this Settlement Agreement, shall be used by
9 either party hereto or any third party as evidence for or against the proposition that litigation
10 advance agreements are subject to the CFL in any legal or administrative proceeding, whether or
11 not the Department is a party to the proceeding. Furthermore, nothing contained in this Settlement
12 Agreement, as opposed to any underlying facts, events or occurrences, shall be used as evidence in
13 any legal proceeding between the Parties, except to enforce or interpret the provisions of this
14 Settlement Agreement.

15 8. Notwithstanding Paragraph 1 or any other provision of this Settlement Agreement,
16 nothing herein shall be interpreted to preclude the Department from exercising any of its
17 investigatory powers to seek additional information concerning Aspen's Litigation Advance
18 Contracts relating to Aspen contracts executed after the Effective Date of this Settlement
19 Agreement, as defined by Paragraph 21.

20 9. Aspen agrees that it shall not represent or imply that its Litigation Advance Contracts
21 have been approved, in whole or in part, by the Commissioner or the Department. This Paragraph
22 does not apply to arguments or defenses Aspen makes in the context of any legal or administrative
23 proceeding concerning whether the CFL applies to Aspen's Litigation Advance Contracts.

24 10. Aspen further agrees that with respect to every Litigation Advance Contract executed
25 after the Effective Date of this Settlement Agreement, as such date is defined in Paragraph 21, the
26 Litigation Advance Contract shall disclose predominately in the contract the following:

- 27 i. The total funded amount provided to the Litigant under the contract;
- 28 ii. An itemization of charges;

- 1 iii. The annual percentage rate of return, calculated using the same methodology
- 2 that would be used if the transaction were for a closed-end credit transaction
- 3 under 12 Code of Federal Regulations part 1026.22 and assuming that the
- 4 underlying litigation is successfully resolved and funds are available to fully
- 5 satisfy the Litigation Advance Contract;
- 6 iv. The total amount due from the Litigant, including charges, in six-month or less
- 7 intervals from the date the contract is executed, for the first three years from the
- 8 date of execution assuming that the underlying litigation is successfully resolved
- 9 and funds are available to fully satisfy the Litigation Advance Contract;
- 10 v. A right of rescission, allowing the Litigant to cancel the Litigation Advance
- 11 Contract without penalty or further obligation if, within five business days
- 12 following the execution of the Litigation Advance Contract or the Litigant's
- 13 receipt of any portion of the funded amount, the Litigant gives notice of the
- 14 rescission to the Aspen and returns any funds provided to the Litigant by the
- 15 Aspen;
- 16 vi. A statement that there are no fees or charges to be paid by the Litigant other
- 17 than what is disclosed in the Litigation Advance Contract;
- 18 vii. In the event the Litigant seeks more than one litigation funding contract, a
- 19 disclosure providing the cumulative amount due from the Litigant for each prior
- 20 Litigation Advance Contract shall be referenced or repeated in each subsequent
- 21 Litigation Advance Contract, including charges under all prior Litigation
- 22 Advance Contracts;
- 23 viii. A statement that Aspen has no right to make any decisions regarding the
- 24 conduct of the Litigant's legal claim or any settlement or resolution thereof and
- 25 that the right to make such decisions remains solely with the Litigant and his or
- 26 her attorney; and,
- 27 ix. A statement that, if there is no recovery of any money from the Litigant's legal
- 28 claim, the Litigant shall owe nothing to Aspen and that, if the net proceeds of

1 the Litigant's legal claim are insufficient to fully repay the Litigant's obligations
2 to Aspen, then the Litigant shall owe Aspen no money in excess of the net
3 proceeds received from the Litigant's legal claim.

4 11. Aspen further agrees that it shall not do the following in connection with any
5 Litigation Advance Contract:

- 6 i. Pay or offer to pay commissions, referral fees, or any other form of consideration
7 to any attorney, law firm, health care provider, health care facility, or an
8 employee of a law firm, health care provider, or health care facility for referring
9 a Litigant to Aspen;
- 10 ii. Accept any commissions, referral fees, or any other form of consideration from
11 any attorney, law firm, health care provider, health care facility, or an employee
12 of a law firm, health care provider, or health care facility;
- 13 iii. Advertise false or misleading information regarding its products or services.
14 This includes any representation or advertisement stating that Aspen's Litigation
15 Advance Contracts have no fees or no interest charges;
- 16 iv. Receive any right to, nor make, any decisions with respect to the conduct of the
17 Litigant's legal claim or any settlement or resolution. The right to make such
18 decisions shall remain solely with the Litigant and his or her attorney;
- 19 v. Knowingly pay or offer to pay for court costs, filing fees, or attorney's fees either
20 during or after the resolution of the Litigant's legal claim as part of the Litigant's
21 Litigation Advance Contracts;
- 22 vi. Refer a Litigant to a specific attorney, law firm, health care provider, or health
23 care facility;
- 24 vii. Fail to promptly provide copies of the Litigation Advance Contract documents to
25 the Litigant or to the Litigant's attorney;
- 26 viii. As part of the Litigation Advance Contract, obtain a waiver of any remedy the
27 Litigant might otherwise have against Aspen. This section (viii) does not prohibit
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1 Aspen from including a mandatory Arbitration provision in its Litigation
2 Advance Contracts should it so chose;

3 ix. Provide legal advice to the Litigant regarding the Litigation Advance Contract or
4 the Litigant's underlying legal claim; and,

5 x. Report a Litigant to a credit reporting agency if the net proceeds of the
6 Litigant's legal claim are insufficient to fully repay the Litigant's obligations
7 to Aspen.

8 12. This Settlement Agreement is binding on all heirs, assigns, and/or successors in
9 interest of the Parties.

10 13. The Parties hereby acknowledge and agree that this Settlement Agreement is
11 intended to constitute a full, final and complete resolution of all the findings identified by the
12 Department in the examination commenced on August 25, 2015.

13 14. The Parties further acknowledge and agree that nothing contained in this Settlement
14 Agreement shall operate to limit the Commissioner's ability to assist any other agency (city, county,
15 state or federal) with any investigation or prosecution brought by any such agency against Aspen or
16 any other person based upon any of Aspen's activities.

17 15. Each of the Parties represents, warrants, and agrees that it has received independent
18 advice from its attorney(s) and/or representatives with respect to the advisability of executing this
19 Settlement Agreement.

20 16. The Parties agree that this Settlement Agreement may be executed in one or more
21 separate counterparts, each of which when so executed, shall be deemed an original. Such
22 counterparts shall together constitute and be one and the same instrument.

23 17. The waiver of any provision of this Settlement Agreement shall not operate to waive
24 any other provision set forth herein. No waiver, amendment, or modification of this Settlement
25 Agreement shall be valid or binding to any extent unless it is in writing and signed by all the parties
26 affected by it.

27 18. Each of the Parties represents, warrants, and agrees that in executing this Settlement
28 Agreement it has relied solely on the statements set forth herein and the advice of its own counsel.

1 Each of the Parties further represents, warrants, and agrees that in executing this Settlement
2 Agreement it has placed no reliance on any statement, representation, or promise of any other party,
3 or any other person or entity not expressly set forth herein, or upon the failure of any party or any
4 other person or entity to make any statement, representation or disclosure of anything whatsoever.
5 The Parties have included this clause: (1) to preclude any claim that any party was in any way
6 fraudulently induced to execute this Settlement Agreement; and (2) to preclude the introduction of
7 parol evidence to vary, interpret, supplement, or contradict the terms of this Settlement Agreement.

8 19. In that the Parties have had the opportunity to draft, review and edit the language of
9 this Settlement Agreement, no presumption for or against any party arising out of drafting all or any
10 part of this Settlement Agreement will be applied in any action relating to, connected to, or
11 involving this Settlement Agreement. Accordingly, the Parties waive the benefit of Civil Code
12 section 1654 and any successor or amended statute, providing that in cases of uncertainty, language
13 of a contract should be interpreted most strongly against the party who caused the uncertainty to
14 exist.

15 20. Aspen enters into this Settlement Agreement voluntarily.

16 21. This Settlement Agreement shall become effective on the date (“Effective Date”)
17 when it is signed by all Parties and delivered by the Commissioner’s agent by email to Aspen’s
18 counsel at wsteckbauer@swesq.com.

19 22. The Parties acknowledge that this Settlement Agreement is a public record.

20 23. Each signatory hereto covenants that he/she possesses all necessary capacity and
21 authority to sign and enter into this Settlement Agreement.

22 Dated: January 31, 2018

23 JAN LYNN OWEN
24 Commissioner of Business Oversight

25
26 BY: _____
27 Mary Ann Smith
28 Deputy Commissioner

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Dated: January 24, 2018

Aspen Holdings LLC

BY: _____
John Emrani
Managing Member