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10 BEFORE THE DEPARTMENT OF CORPORATIONS
11 OF THE STATE OF CALIFORNIA

12 In the Matter of the Request for a Hearing on) OAH No.
13 Citations and Desist and Refrain Order issued by)
the California Corporations Commissioner,) File No.: 100-2458
14)
Complainant,) Statement in Support of Citations and
15) Desist and Refrain Order
16 v.)
17 Michael Cunningham dba Advance Payday)
Respondent.)
18)
19)

20 Complainant, the California Corporations Commissioner, (“Commissioner”) is informed
21 and believes, and based upon such information and belief, alleges and charges Respondent as
22 follows:
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24 **INTRODUCTION**

25 On June 16, 2005 the Commissioner of the California Department of Corporations
26 (“Department”) issued Respondent, Michael Cunningham dba Advance Payday, a deferred
27 deposit transaction originator license (File No. 100-2458) pursuant to the California Deferred
28 Deposit Transaction Law (“CDDTL”). The CDDTL is found in California Financial Code
sections 23000 et seq. (Future section references are to the Financial Code unless indicated

1 otherwise.)

2 The Commissioner is responsible for enforcing all provisions of the CDDTL. Pursuant to
3 section 23050 and 23058 on December 28, 2007, the Commissioner issued Citations and a
4 Desist and Refrain Order to Respondent for violations of the legal standards required of all
5 deferred deposit transaction originators. Respondent timely requested a hearing concerning the
6 Department’s action.

7 **I**

8 **FACTS AND PROCEDUAL BACKGROUND**

9 1. Respondent Michael Cunningham dba Advance Payday is a sole proprietorship. The
10 owner and manager is Michael Cunningham (“Cunningham”). Cunningham filed
11 Respondent’s CDDTL application and is designated as the person in charge of Respondent’s
12 place of business. Cunningham stated he is Respondent’s owner/manager.

13 2. Respondent engaged in CDDTL business in California at 1741 A Grand
14 Avenue, Grover Beach CA 93433 after the Commissioner issued it a license pursuant to section
15 23005, subdivision (a).

16 3. Since at least June of 2005 Respondent engaged in the business of deferred deposit
17 transactions by offering, originating and making deferred deposit transactions as described
18 below.

19 4. A deferred deposit transaction is a written transaction whereby one person gives
20 funds to another person upon receipt of a personal check and it is agreed that the personal
21 check shall not be deposited until a later date. These transactions are sometimes referred to
22 as “payday advances” or “payday loans.”

23 5. Respondent filed with the Department an application (File No. 100-2458) for a
24 license to make deferred deposit transactions on January 12, 2005, which includes a
25 Declaration, designated as “Exhibit K” that Cunningham signed under penalty of perjury for
26 Respondents, which states:

27 **I (we) have obtained and read copies of the California Deferred**
28 **Deposit Transaction Law (Division 10 of the California**
Financial Code) and the Rules (Chapter 3, Title, 10, California
Code of Regulations) and am familiar with their content: and,

I (we) agree to comply with all the provision[s] of the California Deferred Deposit Transaction Law, including any rules or orders of the Commissioner of Corporations.

Respondent’s Declaration to the application also states that “by signing this declaration” “the applicant hereby agrees (or attests) or declares understanding of the following items listed below:”

1. That the applicant will submit to periodic examinations by the Commissioner of Corporations as required by the California Deferred Deposit Transaction Law.
2. That the applicant will keep and maintain all records for 2 years following the last entry on a deferred deposit transaction and will enable an examiner to review the record keeping and reconcile each consumer deferred deposit transaction with documentation maintained in the consumer’s file records.
3. That the applicant understands the examination process involving the reconciliation of records will be facilitated if the applicant maintains, at minimum, a ledger or listing of the following current and undated information for each deferred deposit transaction (as specified in Financial Code section 23035): customer’s name and address, account number, check number, amount provided, fee, amount of check, corresponding annual percentage rate (e.g. 14-day or 30-day) and the deferred due date.
4. That the applicant will maintain a file of all advertising for a period of 90 days from the date of its use, which will be available to the Commissioner of Corporations upon request.
5. That the applicant will file with the Commissioner of Corporations an amendment to this application prior to any material change in the information contained in the application for licensure, including, without limitation, the plan of operation.
6. That the applicant will file with the Commissioner of Corporations any report required by the Commissioner.
7. That the applicant hereby attests that the applicant (including officers, directors and principals) has not engaged in conduct that would be cause of denial of a license.

6. On January 12, 2004, Respondent completed another Declaration designated as “Exhibit L” to the application, which Cunningham signed under penalty of perjury stating:

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The applicant will comply with all federal and state laws and regulations (including Division 10, commencing with Section 23000, of the Financial Code), if it offers, arranges, acts as an agent for, or assists a deferred deposit originator in the making of a deferred deposit transaction (Financial Code Section 23037(i).)

7. Notwithstanding knowledge regarding the CDDTL requirements, Respondent willfully engaged in CDDTL violations. The Department examiner’s review of Respondent’s business revealed multiple violations of the CDDTL warranting the issuance of Citations and a Desist and Refrain Order. The Commissioner seeks to have his actions upheld.

II
DEFERRED DEPOSIT TRANSACTION LAW

8. As a licensee, Respondent is required to comply with basic legal requirements imposed on all CDDTL licensees concerning notices and advertisements.

9. Section 23027 describes the advertising requirements for CDDTL licensees and subdivision (b) states:

No licensee shall place an advertisement disseminated primarily in this state for a deferred deposit transaction unless the licensee discloses in the printed text of the advertisement, or the oral text in the case of a radio or television advertisement, that the licensee is licensed by the department pursuant to this division.

10. Section 23035 set forth the requirements of the written agreements for deferred deposit transactions and in relevant parts states:

(a) A licensee may defer the deposit of a customer's personal check for up to 31 days, pursuant to the provisions of this section. The face amount of the check shall not exceed three hundred dollars (\$300). Each deferred deposit transaction shall be made pursuant to a written agreement as described in subdivision (e) that has been signed by the customer and by the licensee or an authorized representative of the licensee.

(b) A customer who enters into a deferred deposit transaction and offers a personal check to a licensee pursuant to an agreement shall not be subject to any criminal penalty for the failure to comply with the terms of that agreement

(c) Before entering into a deferred deposit transaction, licensees shall distribute to customers a notice that shall include, but not be limited to, the following:

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- (1) Information about charges for deferred deposit transactions.
- (2) That if the customer's check is returned unpaid, the customer may be charged an additional fee of up to fifteen dollars (\$15).
- (3) That the customer cannot be prosecuted in a criminal action in conjunction with a deferred deposit transaction for a returned check or be threatened with prosecution.
- (4) The department's toll-free telephone number for receiving calls regarding customer complaints and concerns.
- (5) That the licensee may not accept any collateral in conjunction with a deferred deposit transaction.
- (6) That the check is being negotiated as part of a deferred deposit transaction made pursuant to Section 23035 of the Financial Code and is not subject to the provisions of Section 1719 of the Civil Code. No customer may be required to pay treble damages if this check does not clear.
- (d) The following notices shall be clearly and conspicuously posted in the unobstructed view of the public by all licensees in each location of a business providing deferred deposit transactions in letters not less than one-half inch in height:
 - (1) The licensee cannot use the criminal process against a consumer to collect any deferred deposit transaction.
 - (2) The schedule of all charges and fees to be charged on those deferred deposit transactions with an example of all charges and fees that would be charged on at least a one-hundred-dollar (\$100) and a two-hundred-dollar (\$200) deferred deposit transaction, payable in 14 days and 30 days, respectively, giving the corresponding annual percentage rate. The information may be provided in a chart as follows:

Amount Provided	Fee	Amount of Check	14-day APR	30-day APR
\$100	XX	XXX	XXX	XXX
\$200	XX	XXX	XXX	XXX
- (e) An agreement to enter into a deferred deposit transaction shall be in writing and shall be provided by the licensee to the customer. The written agreement shall authorize the licensee to defer deposit of the personal check, shall be signed by the customer, and shall include all of the following:
 - (9) That the customer cannot be prosecuted or threatened with prosecution to collect.

1 (11) That the licensee cannot make a deferred deposit transaction
2 contingent on the purchase of another product or service.

3 **III**

4 **DEFERRED DEPOSIT TRANSACTION LAW VIOLATIONS**

5 11. On September 25, 2007, the Commissioner’s examiner visited Respondent’s
6 business after giving the licensee advance notice of the Department’s regulatory
7 examination.

8 12. The Commissioner’s examiner found Respondent in violation of Section 23027(b)
9 in that Respondent failed to include in advertising in the phone book Yellow Pages that
10 Respondent was in fact licensed by the Department and that the Department had issued to
11 Respondent a CDDTL license.

12 13. The Commissioner’s examiner found Respondent violated section 23035(d)(1) in
13 that the notice required to be posted conspicuously did not disclose that the licensee cannot use
14 the criminal process against a consumer to collect any deferred deposit transaction.

15 14. The Commissioner’s examiner additionally found Respondent in violation of
16 Section 23035(d)(2) in that Respondent posted a notice but failed to include examples payable
17 in 14 and 30 days, providing corresponding annual percentage rates.

18 15. Respondent failed to provide in the written notice to be provided each customer
19 entering into a deferred deposit transaction that the customer could not be the subject of a
20 criminal action in conjunction with a deferred deposit transaction for a returned check or be
21 threatened with prosecution. This was in violation of section 23035(c)(3).

22 16. In violation of section 23035(c)(4) Respondent failed to provide in the requisite
23 written notice the toll-free telephone number of the Dept. of Corporations for receiving
24 consumer complaints.

25 17. Respondent failed to distribute to customers a notice stating that their check is being
26 negotiated as part of a deferred deposit transaction pursuant to section 23035 and is not subject
27 to the provisions of 1719 of the Civil Code and that no customer shall be required to pay treble
28 damages if the check does not clear, as required by section 23035(c)(6).

18. Respondent further failed to provide in a written agreement to be executed with each

1 customer entering into a deferred deposit transaction the information that the customer cannot
2 be threatened with criminal prosecution as part of a collection process in violation of section
3 23035(e)(9); and also failed to provide notice that Respondent cannot make a deferred deposit
4 transaction contingent on the purchase of another product or service in violation of section
5 23035(e)(11).

6 19. Respondent was informed about the above-described violations at the time of the
7 Department's regulatory examination on September 25, 2007.

8 20. On December 28, 2007, the Commissioner issued to Respondent "Citations and
9 Desist and Refrain Order" citing it for eight violations of the CDDTL. The Citations are set
10 forth below:

11 **Citation A.** Licensee failed to include in advertising that licensee is licensed by the
12 Department of Corporations pursuant to the California Deferred Deposit Transaction
13 Law in violation of California Financial Code 23027(b).

14 **Citation B.** The notice required to be conspicuously posted in the unobstructed view
15 of the public in letters not less than 1/2 inch in height did not include the disclosure that
16 the licensee cannot use the criminal process against a consumer to collect any deferred
17 depositions transaction in violation of California Financial Code section 23035(d)(1).

18 **Citation C.** The notice required to be conspicuously posted in the unobstructed view
19 of the public in letters not less than 1/2 inch in height contained a schedule of all the fees
20 and charges that would be charged on deferred depositions transactions with an example
21 of the fees and charges that would be charged on at least a \$100 and \$200 deferred
22 deposit transaction, but did not include examples payable in 14 and 30 days, giving the
23 corresponding annual percentage rates in violation of Financial Code section 23035(d)
24 (2).

25 **Citation D.** Licensee failed to include disclosure that the customer cannot be
26 criminally prosecuted in a criminal action in conjunction with a deferred depositions
27 transaction for a returned check or be threatened with criminal prosecution in the notice
28 required to be distributed to the customer prior to entering into deferred depositions
transaction in violation of Financial Code section 23035(c)(3).

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Citation E. Licensee failed to include the Department’s toll free number, which is 1-866-ASK CORP (275-2677), in the notice distributed to the customer prior to entering into the agreement in violation of Financial Code section 23035(c)(4).

Citation F. Licensee failed to include disclosure that the check is being negotiated as part of a deferred deposit transaction pursuant to section 23035 of the Financial Code and is not subject to the provisions of 1719 of the Civil Code and that no customer shall be required to pay treble damages if the check does not clear in the notice distributed to the customer prior to entering into the agreement in violation of Financial Code section 23035(c)(6).

Citation G. Licensee failed to include disclosure that customer cannot be prosecuted or threatened with prosecution to collect a deferred deposit transaction in the Agreement in violation of California Financial Code section 23035(e)(9).

Citation H. Licensee failed to include disclosure that licensee cannot make a deferred deposition transaction contingent on the purchase of another product or service in the Agreement in violation of California Financial Code section 23035(e)(11).

Pursuant to section 23058, Respondent was ordered to pay to the Commissioner a total penalty of \$13,000. The penalty for each of citation is shown below.

Citation A.	\$2,500
Citation B.	\$1,500
Citation C.	\$1,500
Citation D.	\$1,500
Citation E.	\$1,500
Citation F.	\$1,500
Citation G.	\$1,500
Citation H.	\$1,500

IV
COMMISSISONER’S AUTHORITY TO ISSUE CITATIONS

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Section 23058 gives the Commissioner’s authority to issues citations and states:

(a) If, upon inspection, examination or investigation, based upon a complaint or otherwise, the department has cause to believe that a person is engaged in the business of deferred deposit transactions without a license, or a licensee or person is violating any provision of this division or any rule or order thereunder, the department may issue a citation to that person in writing, describing with particularity the basis of the citation. Each citation may contain an order to desist and refrain and an assessment of an administrative penalty not to exceed two thousand five hundred dollars (\$ 2,500). All penalties collected under this section shall be deposited in the State Corporations Fund.

(b) The sanctions authorized under this section shall be separate from, and in addition to, all other administrative, civil, or criminal remedies.

(c) If within 30 days from the receipt of the citation of the person cited fails to notify the department that the person intends to request a hearing as described in subdivision (d), the citation shall be deemed final.

(d) Any hearing under this section shall be conducted in accordance with Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code, and in all states the commissioner has all the powers granted therein.

(e) After the exhaustion of the review procedures provided for in this section, the department may apply to the appropriate superior court for a judgment in the amount of the administrative penalty and order compelling the cited person to comply with the order of the department. The application, which shall include a certified copy of the final order of the department, shall constitute a sufficient showing to warrant the issuance of the judgment and order.

V

COMMISSISONER’S AUTHORITY TO ISSUE A DESIST AND REFRAIN ORDER

Respondent engaged in the business of deferred deposit transactions that violated the provisions of the CDDTL as set out above. California Financial Code section 23050 provides in pertinent part:

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Whenever, in the opinion of the commissioner, any person is engaged in the business of deferred deposit transactions, as defined in this division, without a license from the commissioner, or any licensee is violating any provision of this division, the commissioner may order that person or licensee to desist and to refrain from engaging in the business or further violating this division.

Pursuant to sections 23050 and 23058, the Commissioner ordered Respondents to desist and refrain from engaging in the business of deferred deposit transactions in the State of California in violation of California Financial Code sections 23027(b), 23035(d) (1), 23035 (d) (2), 23035(c) (3), 23035(c)(4), 23035(c) (6), 23035(e)(9) and 23035 (e)(11) as set out herein. The Commissioner’s Desist and Refrain Order was properly issued and necessary for the protection of consumers and consistent with the purposes, policies and provisions of the CDDTL.

CONCLUSION

Complainant finds by reason of the foregoing that Respondent Michael Cunningham dba Advance Payday violated California Financial Code sections 23027, and 23035. Therefore, the Commissioner is justified in issuing Citations to Respondent pursuant to section 23058 and is also justified in issuing a Desist and Refrain Order to Respondent pursuant to section 23050 and section 23058.

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THEREFORE IT IS PRAYED THAT:

1. Respondent be ordered to immediately pay to the Commissioner an administrative penalty in the total amount of THIRTEEN THOUSAND DOLLARS (\$13,000) for Citations A through H described above; and,
2. The Desist and Refrain Order issued pursuant to Financial Code section 23050 be upheld to prohibit Respondent from violating Financial Code sections 23027 and 23035.

Dated: February 1, 2008
San Francisco, California

Respectfully submitted,

PRESTON DuFAUCHARD
California Corporations Commissioner

By _____

JOHN R. DREWS
Corporations Counsel
Attorney for Complainant