

BEFORE THE
DEPARTMENT OF CORPORATIONS
STATE OF CALIFORNIA

In the Matter of the Citations and the Desist
And Refrain Order Issued by the Special
Administrator of the California Deferred Deposit
Transaction Law Against:

CHECKS CASHED FOR LESS, INC.,
A California Corporation,

Salam M. Mahmood, President,

Respondent.

Agency File Nos. 100-0186 and
100-0188

OAH No.: L2008010638

DECISION

The attached Proposed Decision of the Administrative Law Judge of the Office of Administrative Hearings, dated July 22, 2008, is hereby adopted by the Department of Corporations as its Decision in the above-entitled matter with the following technical and minor changes pursuant to Government Code Section 11517(c)(2)(C).

This Decision shall become effective on October 31, 2008.

IT IS SO ORDERED this 28th day of October 2008.

CALIFORNIA CORPORATIONS COMMISSIONER

Preston DuFauchard
Preston DuFauchard

BEFORE THE
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STATE OF CALIFORNIA

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Deposit Transaction Law Against:

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OAH No. 2008010638

PROPOSED DECISION

James Ahler, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter on June 30, 2008, in San Diego, California.

Afsaneh Eghbaldari, Corporations Counsel, represented complainant Steven C. Thompson, Special Administrator, California Deferred Deposit Transaction Law, Department of Corporations, State of California.

Al Van Slyke, Attorney at Law, represented respondent Checks Cashed for Less, Inc., a California corporation, and its President and Chief Executive Officer, Salam M. Mahmood.

On June 30, 2008, the matter was submitted.

FACTUAL FINDINGS

The Regulation of Cash Advances and Payday Loans

1. Notice is taken of the following matters. A deferred deposit transaction is a financial arrangement whereby an individual, partnership, corporation or other entity (the

lender) agrees to defer the deposit of a customer's personal check for a specified period of time in return for which the lender immediately provides the customer with cash. This type of transaction is usually known as a "cash advance" or a "payday loan."

Payday lending is legal and is regulated in 37 states. In Georgia and 12 other states, payday lending is either illegal or is not feasible due to state usury laws.¹

Critics of these kinds of loans claim lenders exploit financial hardship for profit, characterizing the lenders as "predatory" and asserting that the lenders target the young and the poor, particularly those who live near military bases or in low-income communities. These detractors assert many borrowers do not understand that high interest rates may trap the borrowers in a debt-cycle in which the borrowers have to renew a loan and pay associated fees on a recurring basis until they can finally save enough to pay off the principal and get out of debt. Payday loan critics note that payday lending unfairly disadvantages the poor, compared to the middle class, which pays far less in interest for cash advances obtained through credit cards.

Supporters of cash advances and payday loans argue that many of those who seek these loans have exhausted or ruined other credit alternatives. The high rate of return is earned through the taking of great risk. Proponents of these loans claim that cash advances provide needed funds to many who have no access to funds from other regulated sources. A staff report released by the Federal Reserve Bank of New York concluded that payday loans should not be categorized as "predatory" because they may improve household welfare. Payday lenders observe that a commercial bank's overdraft fees are often more costly to a bank's customers than the interest and other fees charged by a payday lender.

Due to the extremely short-term nature of payday loans, and the substantial interest charges and other fees that may be related to such loans, in states where cash advances and payday loans are authorized by law, disclosure of the terms and conditions of the loans, as well as warnings and notices about other matters, is a critical part of the regulatory scheme.

The California Deferred Deposit Transaction Law (CDDTL)

2. The California Deferred Deposit Transaction Law (CDDTL) is set forth in Division 10 of the California Financial Code,² commencing with section 23000. Regulations

¹ In the United States, payday lending is primarily regulated at the state level. However, the United States Congress passed a law in October 2006 that became effective on Oct. 1, 2007, which capped lending to military personnel at a 36 percent annual percentage rate (APR). The Department of Defense had labeled payday lending practices "predatory" and military officers cited concern that payday lending ruined the finances of low-paid enlisted men and women, jeopardized their security clearances, and even interfered with deployment schedules to Iraq. Industry-wide statistics showed that fewer than five percent of military enlisted personnel were payday-loan borrowers.

² All statutory references are to the Financial Code, unless otherwise indicated.

under the CDDTL are set forth in California Code of Regulations, title 10, commencing with section 2020.

The CDDTL became operative on December 31, 2004, when responsibility for licensing and regulating of persons engaged in the business of deferred deposit transactions (payday loans) was transferred from a permit process managed by the California Department of Justice to a licensing operation conducted by the Department of Corporations (the department). In the bill establishing the CDDTL, the legislative findings and intent was stated as follows:

“(a) It is the intent of the Legislature in enacting this legislation to provide greater regulatory oversight of the deferred deposit transaction industry. It is the further intent of the Legislature to guarantee that consumers have the disclosures necessary to make informed decisions regarding deferred deposit transactions and to gather the information necessary to inform future legislative activity. Future legislative activity may include, but is not limited to, changes in the fees charged to consumers, specifications regarding the length of time for deferred deposit transactions, maximum amount provided to consumers and the implementation of an installment product in lieu of a deferred deposit transaction.

(b) In enacting this legislation it is the intent of the Legislature that all persons . . . who are engaged in the business of deferred deposit transactions including, but not limited to, brokers and agents of financial institutions, are subject to all provisions of this division.” (Statutes 2002, chapter 777.)

The Application Process

3. An applicant for a license to engage in the deferred deposit transaction industry must complete and file an application with the department. The eight page application requests identifying and other basic information. An applicant must also complete and file several exhibits, which include an applicant’s authorization to provide financial statements,³ copies of surety bonds, authorizations for the disclosure of the applicant’s financial records, a copy of the certificate of filing and proof of publication of any fictitious business name statement, a certificate of good standing from the department for corporate applicants, and a declaration attesting to the applicant’s familiarity with the CDDTL.⁴ The applicant must sign the application under penalty of perjury.

³ Section 23007 provides as follows:

“The applicant shall file with the application financial statements prepared in accordance with generally accepted accounting principles and acceptable to the commissioner that indicates a net worth of at least twenty-five thousand dollars (\$25,000). A licensee, regardless of the number of licensed locations, shall maintain a net worth of at least twenty-five thousand dollars (\$25,000) at all times.”

⁴ Exhibit K, the declaration regarding the applicant’s familiarity with the CDDTL laws and rules, requires that an applicant certify that he has read the CDDTL rules and regulations, is familiar with their content, and agrees

4. Exhibit F to the application sets forth what is required of an applicant who intends to conduct business under a fictitious business name. Exhibit F instructs an applicant to "provide a copy of the Certificate of Filing and Proof of Publication, both of which bear the County Clerk's filing stamp. Refer to Section 17000 of the Business and Professions Code for the requirements of filing this statement (Financial Code Section 23023)."⁵

An application must be submitted for each location where the applicant intends to engage in the business. A licensee with one or more licensed locations may file a short form license application for secondary branches.

Upon the filing of an application and the payment of required fees, the commissioner investigates the applicant and, if the commissioner determines that the applicant has met all statutory requirements and no grounds for denial exist,⁶ the commissioner issues and delivers a license to the applicant.

The Regulation of Direct Deposit Transactions and Licensees

5. Under the CDDTL, a licensee may defer the deposit of a customer's personal check for up to 31 days. The face amount of the check cannot exceed \$300. Each deferred deposit transaction must be evidenced by a written agreement prescribed by the CDDTL and signed by the customer and the licensee or authorized representative. Before entering into a deferred deposit transaction, licensees must distribute to customers a notice that includes at least the following: (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 \$15; (3) that the customer cannot be prosecuted in a criminal action for a returned check or be threatened with prosecution; (4) the department's toll-free telephone number for

to be bound by them. In signing Exhibit K, an applicant also agrees, among other matters, to submit to periodic examinations as required by the department, to maintain records for two years, to maintain advertising for 90 days, and to file amendments with the department as required. Exhibit L, the declaration pursuant to section 23037, subdivision (i), requires the applicant to agree to follow all federal and state laws and regulations related to a deferred deposit transaction.

⁵ Business and Professions Code section 17000 does *not* set forth the requirements for filing the statement as represented in the application; rather, those requirements are set forth in Business and Professions Code section 17900 et seq. More specifically, Business and Professions Code section 17917 requires a registrant to cause a statement in a prescribed form to be published in a newspaper of general circulation in the county where the fictitious business name statement application was filed. An affidavit establishing proof of publication of that statement must be filed with the county clerk's office 30 days after the completion of the publication.

⁶ Under section 23011, grounds for denial include: (1) Any false statement of material fact made in the application; (2) the participation of any principal in any act involving dishonesty, fraud, or deceit, or the conviction of any principal of any crime if the crime involving dishonesty, fraud, or deceit, provided the act or crime is substantially related to the qualifications, functions, or duties of a person engaged in business in accordance with this division; and (3) the violation by any principal of any provision of the CDDTL or rules thereunder or the violation of any similar regulatory scheme of the State of California or a foreign jurisdiction.

customers with complaints or concerns; (5) that the licensee may not accept any collateral in conjunction with a deferred deposit transaction; and (6) that the check is being negotiated as part of a deferred deposit transaction. (§ 23035.)

In connection with a direct deposit transaction, a licensee may not: (a) Accept or use the same check for a subsequent transaction, or permit a customer to pay off all or a portion of one deferred deposit transaction with the proceeds of another; (b) accept any collateral for a deferred deposit transaction; (c) make any deferred deposit transaction contingent on the purchase of insurance or any other goods or services; (d) enter into a deferred deposit transaction with a person who lacks the capacity to contract; (e) alter the date or any other information on a check; (f) engage in any unfair, unlawful, or deceptive conduct, or make any misleading statement; (g) accept more than one check for a single deferred deposit transaction; (h) take any check, instrument, or form in which blanks are left to be filled in after execution; or (i) offer, arrange, act as an agent for, or assist a deferred deposit originator in any way in the making of a deferred deposit transaction unless the deferred deposit originator complies with all applicable federal and state laws and regulations. (§ 23037.)

6. In connection with the licensee's business premises, statutes require the posting of the CDDTL license and a complete, detailed, and unambiguous schedule of fees. (§§ 23018 and 23019.)

A licensee must maintain records. (§ 23026.) By regulation, a licensee's books, records and accounts must be maintained at the licensed place of business identified in the long form application, so long as records for each additional location are available within 24 hours of request. Required records include: Those demonstrating minimum net worth necessary to comply with section 23007 (including quarterly unaudited balance sheets); records demonstrating compliance with surety bond requirements; a list of licensed locations by address and license number; an advertising file; bank or other financial institution statements; and any other records identified by written demand of the commissioner.

A licensee must maintain records for each deferred deposit transaction including the written agreement, evidence of the check, written disclosures, records of any extensions of time or payment plans for repayment of an existing deferred deposit transaction, records of time periods for each transaction, records of transaction fees and charges, and records of transaction payments. (Cal. Code Regs., tit. 10, § 2025.) A licensee must maintain its books, accounts, and records in accordance with generally accepted accounting principles and good business practices. (Cal. Code Regs., tit. 10, § 2026.)

On or before March 15 of each year, a licensee must file an annual report with the commissioner (§ 23026) on a form specified by regulation that discloses: (1) The total number of deferred deposit transactions made; (2) the total dollar amount of deferred deposit transactions made; (3) the total number of individual customers who obtained deferred deposit transactions (repeat customers are counted once); (4) the minimum dollar amount of deferred deposit transactions made; (5) the maximum dollar amount of deferred deposit

transactions made; (6) the average dollar amount of deferred deposit transactions made; (7) the average Annual Percentage Rate (APR) agreed to (total annual percentage rate as stated on the agreements of all transactions divided by total number of transactions; (8) the average number of days of deferred deposit transactions; (9) the total number of returned checks from deferred deposit transactions; (10) the total dollar amount of returned checks from deferred deposit transactions; (11) the total number of returned checks from deferred deposit transactions recovered (including partial recoveries); (12) the total dollar amount of returned checks recovered; (13) the total number of checks from deferred deposit transactions charged off (including partial balances charged off); and (14) the total dollar amount of checks from deferred deposit transactions charged off. (Cal. Code Regs., tit. 10, § 2030.)

7. A licensee is prohibited from distributing false, misleading, or deceptive advertising. All advertisements for a deferred deposit transaction must include a statement that the licensee is licensed by the department. No disapproved advertising may be used. (§ 23027.)

Respondent's Background and Application

8. Salam M. Mahmood (Mahmood) has engaged in the check cashing and deferred deposit transaction business for more than 20 years. Mahmood held permits issued by the California Department of Justice until he became licensed by the department.

Mahmood incorporated in July 1987 and conducted his business under the name of Checks Cashed for Less, Inc. Respondent's principal place of business was located at 724 Highland Avenue, Suite B, National City, CA 91950, but he established two other branches, one of which was located at 3166 Midway Drive, Suite 104, San Diego, CA 92110.

On April 4, 2003, Mahmood signed an application for the issuance of a deferred deposit transaction license under penalty of perjury. He filed that application with the department. Mahmood listed an email address of www.checkscashed4less.com. Mahmood provided the department with Exhibit E (a signed authorization for disclosure of financial records), Exhibit K (a signed acknowledgment that he had reviewed the CDDTL), and Exhibit L (a signed agreement that he would comply with applicable federal and state laws).

On December 31, 2004, the commissioner issued a deferred deposit originator license to Checks Cashed for Less, Inc. to engage in business at the National City headquarters (File No. 100-0186) and to engage in business at Midway Drive branch (File No. 100-0188). A three-page letter from the department accompanied the delivery of those licenses. That letter set forth detailed information regarding a licensee's obligations and responsibilities, although it specifically stated that it did not include all of those obligations and responsibilities. Item 7 in the letter advised that a licensee was required to maintain a net worth of at least \$25,000 at all times. The letter did not mention the method by which a licensee was obligated to meet that requirement. Item 5 of the letter set forth the books and records a licensee was required to keep, but the letter did not mention specifically the licensee's need to maintain quarterly

unaudited balance sheets. Item 10 of the letter noted the requirement that any advertisement must include the statement that the business was licensed by the department.

The August 15, 2006, Audit

9. On August 15, 2006, Rudy Parada (Parada), a department examiner, conducted a one-day examination of respondent's National City operation. By letter dated September 18, 2006, Jennie Pu (Pu), a senior examiner, advised Mahmood of the results of that examination.

Pu advised respondent that the use of the name "Checks Cashed 4 Less" was not authorized and that the only name respondent was authorized to use was "Checks Cashed for Less, Inc." Pu advised respondent of several other alleged violations that are not relevant to this proceeding. Respondent was not advised of any failure to produce a quarterly unaudited balance sheet or any failure to disclose in any advertising that respondent was licensed by the department.

Pu requested that Mahmood respond to her notice and advise the department of the corrective action respondent had taken to ensure compliance with applicable laws.

10. The day after he received Pu's letter, Mahmood went to the San Diego County Clerk's Office and filed an application for a fictitious business name statement to do business under the names "Checks Cashed 4 Le\$\$" and "Advanced Payday Plu\$." After filing the application, respondent published in the *San Diego Metropolitan Uptown Examiner and Daily Business Report*, an adjudicated newspaper of general circulation within the County of San Diego, a fictitious business name statement on August 23, August 30, September 6, and September 13, 2006. Mahmood then filed proof of publication of that notice.

11. By letter dated October 17, 2006, Elizabeth Corrales, respondent's authorized representative, advised Pu of the various corrective measures respondent had taken in response to the department's August 15, 2006, audit. A copy of the proof of publication filed with the San Diego County Clerk's Office was provided to the department. This proof could not have been obtained unless respondent's application for a fictitious business name statement had been filed with the San Diego County Clerk's Office. In addition to the proof of publication, various disclosure forms were also provided to the department. These forms were on the letterhead of "Checks Cashed 4 Le\$\$.

The October 12, 2007, Audit

12. On October 12, 2007, Parada and Arby Aghayans, an examiner trainee, commenced a three-day examination of respondent's Midway Drive operation. Mahmood was present for a portion of that examination. Parada testified that the department had previously notified Mahmood by letter that he was required to produce an unaudited quarterly balance sheet, but a copy of that letter was not produced by the department.

Mahmood recalled that he was asked to provide an "updated" balance sheet. Exactly what was requested was not established.⁷

During the examination, Mahmood provided Parada with a balance sheet dated March 10, 2007, which showed retained earnings of \$420,623. Parada testified that the March 10, 2007, balance sheet was not sufficiently current, and that Mahmood had an obligation to produce a quarterly balance sheet for the quarter ending June 10, 2007.⁸

Mahmood asked for the opportunity to provide a current balance sheet to avoid being in violation, and although he was given that opportunity, the "violation" was not cured and resulted in a civil penalty assessed in the maximum amount of \$2,500. Mahmood belatedly produced the quarterly report.

Parada found instances in which respondent advertised itself as doing business under the fictitious names of "Cash 4 Le\$\$" and "Advanced Payday Plus." He considered these advertisements to be violations because respondent had not submitted to the department a certified copy of its application to use those fictitious business names.

Finally, respondent produced a flyer for Parada that did not mention that respondent was licensed by the department. Respondent maintained a website that did not include the required notice. Parada concluded the flyer and website were in violation of the CDDTL. However, Parada did not cite respondent for failing to post the department's toll-free telephone number for citizen complaints in his Midway branch office or for using an agreement that did not contain the department's toll-free telephone number.

On October 16, 2007, Parada conducted an exit interview in which Parada advised Mahmood that had respondent violated the CDDTL by transacting business in a name not on the license, by not preparing a quarterly balance sheet, and by not including in his website and in an advertisement a statement that respondent was licensed by the department.

13. The October 2007 audit did not reveal that respondent engaged in any unauthorized lending practices, dishonesty, fraud, or other prohibited transactions.

14. Parada testified that he had never conducted an examination of a deferred deposit transaction licensee in which he did not find a violation of the CDDTL.

15. Based on his August 2006 audit experience, Mahmood believed that he would be given an opportunity to correct the areas of noncompliance brought to his attention in the October 16, 2007, exit interview. Without the department making any formal request,

⁷ If weaker and less satisfactory evidence is offered by a party, when it was within that party's ability to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust. (California Jury Instructions, Civil: Book of Approved Jury Instructions, 9th ed., BAJI 2.02.)

⁸ A quarterly balance sheet for the quarter ending September 10, 2007, was not required, according to Parada, because the raw data necessary to prepare such a balance sheet might still be at the accountant's office.

Mahmood prepared and transmitted to the department a current quarterly balance sheet and he faxed proof of publication of the questioned fictitious business names to the department. Mahmood reviewed all advertising to ensure that the required statement was present.

The Department's Responses

16. Parada forwarded the results of his October 2007 audit to Pu who, in turn, brought the matter of respondent's violations to the attention of complainant Stephen C. Thompson (Thompson), Special Administrator, California Deferred Deposit Transaction Law, Department of Corporations.

On the basis of Thompson's review of the work papers, and possibly as a result of speaking with the examiners (Thompson could not recall if he had done so), Thompson concluded each violation was a "fairly serious violation" and that a citation should be issued for each violation. Thompson concluded that a civil penalty should be assessed for each violation in the maximum amount authorized by law (\$2,500), for a total civil penalty of \$7,500. Thompson concluded that it was necessary to issue a desist and refrain order.

In determining the amount of the civil penalty, Thompson generally considered such factors as whether the violation was a repeat offense, the duration of the violation, the number of transactions, and the financial condition of the respondent. These disciplinary factors were not included in any disciplinary guideline or regulation.

17. With regard to respondent's unauthorized use of the names "Checks Cashed 4 Le\$\$" and "Advanced Payday Loans," Thompson claimed that this was a repeat offense predating the August 2006 audit. Thompson acknowledged that the department's file contained respondent's questioned fictitious business names, and that the department had actual notice that respondent had been using those names since August 2006. Although Thompson claimed that members of the public had the right to know who they were dealing with, and that was the reason for the law, he conceded that there were no complaints from any member of the public and that there was no known harm resulting from respondent's alleged use of the unauthorized names. Thompson acknowledged the department's receipt of the proof of publication of the fictitious business name statements from respondent in October 2006. Thompson testified that in response to respondent's most recent application to obtain authorization to use the fictitious names in question, which was submitted after the citations were filed, Thompson instructed subordinates to refuse to process the application because he feared that doing so might compromise the administrative action and might result in a reduction of the civil penalty; in providing this testimony, Thompson did not mention the potential harm to the public that might arise out of the department's refusal to process the application and the potential of public confusion, even though he claimed that was the basis for imposing the maximum civil penalty. Thompson also acknowledged that if a member of the public called the department and asked who owned "Checks Cashed 4 Le\$\$," the department would likely provide information for "Checks Cashed for Less" since the names sounded identical. Thompson acknowledged that he did not know what was required to

obtain a proof of publication of a fictitious name, but he conceded that respondent had published a fictitious name statement for "Checks Cashed 4 Le\$\$" and "Advanced Payday Loan\$" in San Diego County in September and October 2006.

Neither Thompson nor Parada could provide any explanation for the need to have both a certified application and a certified proof of publication.

18. With regard to respondent's failure to produce a current quarterly balance sheet, Parada testified that he did not require the production of a current balance sheet if the quarter had just ended, and that respondent could have complied with the CDDTL by providing an unaudited balance sheet for the period ending June 10, 2007. Parada testified he rejected respondent's offer to provide a more current balance sheet to cure the violation because Mahmood had been told to provide one in writing previously (see footnote 6). Mahmood made no effort to provide the department with a fictitious balance sheet, and he offered no excuse for his failure to provide one other than his belief that the March 10 balance sheet was an "updated" version. There was no explanation why a maximum civil penalty of \$2,500 for this single first-time offense was assessed other than the unelucidating conclusory statement that it "was a serious violation."

Had the department believed respondent was in financial difficulty, then it could have used the financial disclosure authorizations to obtain respondent's financial records; the fact the department did not do so and the fact that Parada would have accepted a balance sheet that was more than a quarter old established that this was not a serious violation, but was more technical in nature.

19. With regard to respondent's failure to include a statement in its website and flyer that respondent was licensed by the department, it was established that there were 500 such flyers and that they were distributed from the Midway office only. Respondent's failure to include the required language in the flyers was an unintentional oversight, as evidenced by respondent's compliance with the requirement on other occasions. There was no explanation why a maximum civil penalty of \$2,500 was assessed for this single first-time offense other than it "was a serious violation."

The seriousness of this violation was mitigated by the fact that there were notices posted throughout the Midway branch office that respondent was licensed by the department, notices concerning the department's toll-free telephone numbers, and transaction agreements which included the department's toll-free telephone numbers. In light of these matters, there was minimal risk of harm to the public.

20. Thompson had no information concerning respondent's financial condition. Neither party provided any evidence concerning respondent's financial condition.

Salam Mahmood

21. Mahmood provided a history of his enterprises. He testified he never experienced any licensing or regulatory problems before the October 2006 audit. Mahmood believed he did all that was required following that audit to gain authorization to use the fictitious business names "Checks Cashed 4 Le\$\$" and "Advanced Payday Loan\$." His testimony in that regard was credible, although he was mistaken.

Mahmood admitted he did not produce a current unaudited quarterly balance sheet at the October 2007 audit as specifically required by regulation. He testified that he misunderstood the requirement, believing that he was simply required to provide an "updated" balance sheet; Mahmood testified that he thought the March 2007 balance sheet he provided was adequate for the department's purposes. Upon being advised that a current balance sheet was required, Mahmood agreed to provide one to the department, and he promised a similar violation would not occur again.

Mahmood testified he was unaware that respondent's website and the Midway flyers did not have the required language advising that Checks Cashed for Less was licensed by the department.

22. Mahmood was served with the Citations and Desist and Refrain Order in late December 2007. On December 31, 2007, after the citations and order were served, Pu issued a letter to respondent describing the results of the department's October 2007 audit of the Midway Drive operation. Pu requested that Mahmood provide the department with a written reply within 30 days that described how respondent intended to correct the violations.

23. Mahmood surrendered the license to his Midway branch operation to the department on June 21, 2008.

Jurisdictional Matters

24. On December 28, 2007, complainant signed the Citations and Desist and Refrain Order. This document was served on respondent, together with other required jurisdictional documents. Respondent requested a hearing to contest the citations and issuance of the desist and refrain order.

25. On June 30, 2008, the record in the administrative proceeding was opened. There was no objection to jurisdiction. Opening statements were given. Sworn testimony was received and documentary evidence was produced. Closing arguments were given, the record was closed, and the matter was submitted.

Arguments

26. Complainant argued that the CDDTL exists to protect the public, that each of the violations alleged was established, and that each was a serious violation that exposed the public to a substantial risk of harm. Complainant argued that respondent had agreed to comply with the CDDTL when making application for a license, that respondent actually knew or should have known of the laws he violated, that respondent had been warned once before about using an unauthorized business name, and that respondent's violations were intentional, egregious, and repeated. Complainant argued that each violation required the imposition of a maximum civil penalty of \$2,500 to gain respondent's attention, and that affirming the desist and refrain order was necessary to protect the public.

27. Respondent argued that the disciplinary action involved much ado about nothing. There were no consumer complaints and no public harm was established. Mahmood claimed he attempted in good faith to do all that was required of him to do business under the fictitious business names of "Checks Cashed 4 Le\$\$" and "Advanced Payday Loan\$." Mahmood claimed he misunderstood the examiner's requirement that he provide a current unaudited quarterly balance sheet for the October 2007 audit. Mahmood admitted that he was responsible for distributing a flyer that did not contain required disclosures, but he established this was not a business practice. Respondent requested that any civil penalty be assessed in a minimal amount, and that the desist and refrain order be vacated because affirming it would permanently harm respondent's reputation.

Evaluation

28. The CDDTL's primary purpose is to regulate the deferred deposit transaction industry and to guarantee that consumers receive disclosures necessary to make informed decisions. The CDDTL provides enforcement alternatives designed to require licensees to comply with the CDDTL and to remove from the industry those persons who engage in unlicensed activities and those licensees who engage in activities that pose a risk of harm to the public.

Where the purpose of a licensing statute is not to punish but to serve another legitimate governmental interest, such as protecting the consumers and the public who deal with members of a particular profession or trade, the statute is considered nonpenal. When the Legislature's intent, as here, is to protect the health, safety, and welfare of the public rather than to serve punitive interests, the Legislature additionally intends that the law be interpreted broadly so that particular licensees will not be able easily to evade the statute's protective purposes. (*Hughes v. Board of Architectural Examiners* (1988) 17 Cal.4th 763, 784-788.)

Unlike the statutory scheme which provides for the imposition of civil penalties for engaging in unfair competition under Business and Professions Code section 17200 and for

disseminating false statements under Business and Professions Code section 17500,⁹ unlike the statutory scheme related to the assessment of civil penalties for violating the Forest Practice Act,¹⁰ and unlike the regulatory provisions related to the assessment of a civil penalty for violating the Waste Integrated Management Act,¹¹ the department has no statute or regulation that sets forth the manner in which civil penalties are to be assessed or the factors that are to be considered.

The factors Thompson relied on were certainly reasonable, but the manner in which those factors were applied was unreasonable. The sole violation, though repeated, was inadvertent and posed no real risk of harm to the public. No violation implicated any specific transaction, and no public harm was established. The failure to produce a current balance statement was a one-time event of minor consequence, and the failure to include in an advertisement written notice that respondent was licensed by the department was not part of any fraudulent or misleading scheme, and was mitigated by other notices providing such information at respondent's place of business.

These were not serious violations. They were not willful, repeated, or egregious. Mahmood attempted to gain authorization from the department to use the fictitious business names "Checks Cashed 4 Le\$\$" and "Advanced Payday Loan\$." Neither the department nor anyone else was confused or misled by respondent's 'use of these fictitious business names. There was no complaint from any member of the public concerning respondent's business

⁹ These statutory schemes authorize a maximum civil penalty of \$2,500 for each violation, and the determination of the penalties is governed by sections 17206, subdivision (b) and 17536, subdivision (b).

With regard to the assessment of a civil penalty, these statutes contain identical language:

"The court shall impose a civil penalty for each violation of this chapter. In assessing the amount of the civil penalty, the court shall consider any one or more of the relevant circumstances presented by any of the parties to the case, including, but not limited to, the following: the nature and seriousness of the misconduct, the number of violations, the persistence of the misconduct, the length of time over which the misconduct occurred, the willfulness of the defendant's misconduct, and the defendant's assets, liabilities, and net worth."

¹⁰ Public Resources Code section 4601.2 provides in part:

"(b) In determining the amount of any administrative civil penalty, the department shall consider all relevant circumstances, including, but not limited to, the extent of harm caused by the violation, the nature, persistence, circumstances, extent and gravity of the violation, the length of time over which the violation occurred, whether any substantial damage caused by the violation is susceptible to corrective action, whether the violation was willful or caused by negligence, and, with respect to the violator, the ability of the violator to pay any fines or penalties, the effect on ability to continue in business, the corrective action, if any, taken by the violator, whether the violator has any prior history of violations, the degree of culpability, economic savings, if any, resulting from the violation, and such other matters as justice may require."

¹¹ Title 14, California Code of Regulations, section 18429 sets forth a comprehensive penalty schedule for administrative complaints.

practices. No actual harm resulted from these violations. Two audits did not reveal that respondent had engaged in any predatory lending practices or that respondent failed to disclose the terms and conditions of any payday loan. Respondent substantially complied with the CDDTL.

Much of the evidence presented at the administrative hearing in this matter likely was not available to complainant when the civil penalty was being assessed. Complainant did not consider this evidence in assessing the maximum penalty. Evidence of respondent's good behavior, good practices, and lack of dereliction, as well as other evidence relevant to the issue of penalty, was properly admitted at this hearing on the penalty issue and requires that the amount of the civil penalties be reduced.

The violations established in this matter do not justify the assessment of a civil penalty in excess of \$250 per violation. Imposing civil penalties in those amounts will gain respondent's attention. Any civil penalty assessed in a total amount in excess of \$750 would be unduly penal.

LEGAL CONCLUSIONS

Relevant Statutory and Regulatory Authority

1. Financial Code section 23007 provides:

"The applicant shall file with the application financial statements prepared in accordance with generally accepted accounting principles and acceptable to the commissioner that indicates a net worth of at least twenty-five thousand dollars (\$25,000). A licensee, regardless of the number of licensed locations, shall maintain a net worth of at least twenty-five thousand dollars (\$25,000) at all times."

2. While section 23007 does not contain a specific requirement concerning the manner in which the licensee must establish that he maintains a current net worth of at least \$25,000, that requirement is set forth in California Code of Regulations, title 10, section 2025, subdivision (b), which provides in relevant part:

"(b) A licensee shall maintain the following books, records and accounts at the licensed place of business provided in its long form application, provided that records maintained at each additional location are available at the licensed location within 24 hours of request: records demonstrating minimum net worth requirements in compliance with Section 23007 of the Financial Code including quarterly unaudited balance sheets"

3. Section 23023 provides:

"No licensee shall transact the business licensed or make any transaction provided for by this division under any other name or at any other place of business than that named in the license except pursuant to a currently effective written order of the commissioner authorizing the other name or other place of business."

4. Section 23027, subdivision (b) provides:

"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."

Enforcement

5. The commissioner has the authority to investigate and examine the operations of licensees and to charge costs for such examinations (§ 23046), to take custody of a licensee's books, records and accounts (§ 23047), to compel the attendance of witnesses and the production of documents at hearings (§ 23048), to enjoin violations of the CDDTL and to impose civil penalties (§ 23051), to suspend or revoke a license (§ 23052), and to issue citations (§ 2358).

Under section 23051, subdivision (d), "the remedies provided by this section and by other sections of this division are not exclusive, and may be sought and employed in any combination to enforce the provisions of this division."

6. Section 23058 provides in part:

"(a) If, upon inspection, examination or investigation, based upon a complaint or otherwise, the department has cause to believe that . . . a licensee . . . is violating any provision of this division or any rule or order thereunder, the department may issue a 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."

Assessing the Civil Penalty

7. Civil penalties may have a punitive or deterrent aspect, but their primary purpose is to secure obedience to statutes and regulations imposed to assure important public policy objectives. It is not uncommon that civil penalties require no proof of actual harm. A penalty statute pre-supposes that its violation produces damage beyond that which is compensable. (*City and County of San Francisco v. Sainez* (2000) 77 Cal.App.4th 1302, 1315.)

8. Statutes imposing civil penalties do not require the State to present evidence of a defendant's financial circumstances. The statutes also do not require a defendant to present evidence of financial condition. If neither party presents any evidence relating to financial condition or some other enumerated factor, the court is still required to impose civil penalties based upon other relevant evidence before the court. (*People v. First Federal Credit Corp.* (2002) 104 Cal.App.4th 721, 729.)

9. The burden of proving that actual damages are less than the liquidated maximum provided in a penalty statute lies with a defendant, and in the absence of evidence in mitigation, a court is free to assess the full amount. (*People ex rel. State Air Resources Board v. Wilmshurst* (1999) 68 Cal.App.4th 1332, 1351-1352.)

10. Evidence of a licensee's good behavior, good practices, and lack of dereliction, as well as other evidence relevant to the issue of penalty, is properly admitted at the administrative hearing on the issue of penalty, and this is true even though a long period of time may have transpired between the findings of violations and the hearing on the penalty. (*Toyota of Visalia v. New Motor Vehicle Bd.* (1987) 188 Cal.App.3d 872, 878.)

Cause Exists to Affirm the Citation, to Modify the Amount of Civil Penalties Imposed, and to Affirm the Desist and Refrain Order

11. The preponderance of the evidence established good cause to affirm each violation alleged in the Citations and Desist and Refrain Order dated December 28, 2007.

Respondent violated section 23007 and California Code of Regulations, title 10, section 2025, subdivision (b), by failing to maintain and produce current financial records, including an unaudited quarterly balance sheet, showing that respondent's net worth exceeded \$24,999 (Citation A). Respondent violated section 23023 by using fictitious business names that had not been specifically authorized by the commissioner (Citation B). Respondent violated section 23027, subdivision (b) by failing to include in its website and by failing to include in a flyer that the department licensed respondent's deferred deposit transaction operations (Citation C).

Cause exists to modify the amounts of the civil penalties that were imposed. Respondent established that it made good faith efforts to obtain authorization to use the fictitious business names "Checks Cashed 4 Le\$\$" and "Advanced Payday Loan\$. There was no confusion on the part of the department or the public regarding respondent's use of those fictitious business names and the violation was technical in nature (Citation A). Respondent established that it misunderstood its obligation to produce a current unaudited quarterly balance sheet. In mitigation, respondent established that the violation was not willful, but was the result of an honest mistake, and that as soon as respondent was notified of the violation an effort was made to cure it (Citation B). Respondent established that it unwittingly failed to include required language in its website and in a flyer that was distributed from respondent's Midway branch office, and that this was not a deceptive business practice; indeed, respondent posted signs advising the public of the department's toll-free telephone number and provided customers with that number in documents related to each transaction subject to the CDDTL. The imposition of a civil penalty of \$250 for each violation will gain respondent's attention and is adequate to serve the public interest.

Cause exists to affirm the cease and desist order. Respondent failed to establish how the affirmation of that order will result in any actual prejudice to respondent or its operation.

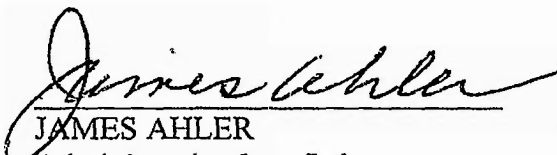
This conclusion is based on all Factual Findings and on all Legal Conclusions.

ORDER

The Desist and Refrain Order signed on December 28, 2007, directed to respondent Checks Cashed for Less and to Salam M. Mahmood, President, is affirmed.

The violations alleged in the Citations A, B, and C, are affirmed; provided however, that the amount of the civil penalty for each violation is modified and is reduced to \$250 per violation, for a total civil penalty of \$750.

DATED: 7/22/08


JAMES AHLER
Administrative Law Judge
Office of Administrative Hearings