

BEFORE THE
DEPARTMENT OF CORPORATIONS
STATE OF CALIFORNIA

In the Matter of

THE CALIFORNIA CORPORATIONS
COMMISSIONER,

Complainant,

vs.

TC REBATE SERVICES, INC.,
and NABEEL SLAIEH,

Respondents.

OAH No.: L2007040649

DECISION

The attached Proposed Decision of the Administrative Law Judge of the Office of Administrative Hearings, dated September 13, 2007, is hereby adopted by the Department of Corporations as its Decision in the above-entitled matter with the following technical and minor change pursuant to Government Code Section 11517(c)(2)(C).

(1) Page 1, paragraph 5, line 2, after "August 14," strike "2004" and insert "2007."

(2) Page 6, paragraph 6, line 2, strike "financial" and insert "finance."

This Decision shall become effective on OCTOBER 16, 2007

IT IS SO ORDERED this 15TH day of OCTOBER 2007

CALIFORNIA CORPORATIONS COMMISSIONER

Preston DuFauchard

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PROPOSED DECISION

This matter regularly came before Samuel D. Reyes, Administrative Law Judge, Office of Administrative Hearings, in Los Angeles, California, on August 13, 2007, and in Riverside, California, on August 14, 2007.

Judy L. Hartley, Senior Corporations Counsel, and Blaine Noblett, Corporations Counsel, appeared on behalf of complainant Patricia R. Speight, Special Administrator, California Finance Lenders Law, Department of Corporations (Department).

Brian C. Ostler, Sr., Attorney at Law, appeared on behalf of TC Rebate Services, Inc., and Nabeel Slaieh (respondent TC Services and respondent Slaieh, respectively, and respondents, collectively).

Complainant issued a Desist and Refrain Order (Order) on January 3, 2007, concluding that in providing cash rebates respondents have in fact been making loans without having been licensed to act as finance lenders, and directing respondents to cease and desist such activity. Respondents deny that they have acted as finance lenders and argue for rescission of the Order.

Oral and documentary evidence was received at the hearing and the matter was submitted for decision on August 14, 2004.

FACTUAL FINDINGS

1. Complainant is responsible, as delegated by the California Corporations Commissioner, for administration and enforcement of the California Finance Lenders Law (Lenders Law), pursuant to Financial Code¹ section 22000 et seq.

2. Complainant issued the Order on January 3, 2007, in her official capacity. Its proof of service indicates that the Order was personally served on respondents on January 31, 2007.

3. On February 13, 2007, respondents' counsel in this matter wrote a letter to complainant, which was received by the Department on February 16, 2007. In the body of the letter, counsel states: "I am counsel for TC Rebate Services, Inc. I am advised that you issued a desist and refrain order to TC Rebate Services, Inc. which has not been served. [¶] I am authorized to accept service of the desist and refrain order so that we can avoid an inadvertent default from occurring. Therefore, please direct any further correspondence to my attention. [¶] It is my intention to request a hearing on the matter to dispute the factual predicates, factual conclusions and legal conclusions of the desist and refrain order. [¶] Please confirm with me that there has been no service as of this date on the desist and refrain order. If you contend that there has been service, please advise me of any response date."

4. Respondents' letter to complainant was apparently misfiled and not forwarded to complainant's counsel until April 18, 2007. On April 19, 2007, counsel for complainant wrote a responsive letter to counsel for respondents. In pertinent part, the letter stated: the Order had been served on respondent's prior counsel, Stephen B. Mashney (Mashney), who stated he was not authorized to accept service; the Order had been personally served on respondents on January 31, 2007; and, "Notwithstanding that your February 13, 2006 letter did not request a hearing, the Department will schedule a hearing on the Order for your client, TC Rebate Services, Inc., if your client still desires such a hearing. However, the Department considers the Order final as to Mr. Slaieh as the Department has not heard from Mr. Slaieh in any form or fashion and more than two months have passed since service of the Order was made on Mr. Slaieh."

5. The matter was thereafter set for hearing before the Office of Administrative Hearings for May 21, 2007. This hearing was temporarily enjoined by order of the Superior Court of the State of California, County of Riverside. The temporary injunction was subsequently lifted and the hearing was rescheduled.

6. At all times material, respondent TC Services operated a business called "EZ Cash Advance," located at 16738 Lakeshore Drive, Suite E, Lake Elsinore, California (establishment).²

¹ Unless otherwise stated, all further references are to the Financial Code.

7. The Department has not issued a license to respondents, or to either of them, to act as finance lenders.

8. On May 16, 2005, Department Examiner Anghesom Seyoum (Seyoum) conducted an investigation of respondents' business, following complaints of unlicensed deferred deposit transactions (payday loans). On arrival, Seyoum noted signs outside the establishment for "EZ Cash Advance," advertising \$100 to \$1,000 "Cash Rebates" "in minutes." He spoke with Khalil Robbin (Robbin), an accountant performing work for respondents. Robbin admitted that the company had been making pay day loans, but that those would stop May 18, 2005, in favor of "pre-paid phone card rebates."

9. Robbin explained how the pre-paid phone card rebates would work. Thus, if a customer wanted a cash advance, for instance, \$200, he/she would receive a telephone card for 200 minutes, and a pre-paid phone card rebate for \$200, in exchange for a one-year contract requiring biweekly payments of \$47. The cash rebate could be redeemed at the time the agreement was signed, but would have to be returned if the customer was unable to meet his/her one-year payment obligation. The same terms were available for other amounts, including \$100, \$300, \$400, and \$500.

10. Seyoum obtained documents evidencing the payday loan and the rebate programs. The pre-paid phone card rebate form, which was very similar to the pay day loan one, authorized respondent TC Services to obtain a credit report, and stated that the customer was liable for all agreed-upon fees. The standard application authorized respondent TC services to debit the customer's bank account for any sums due. Robbin provided a business card that stated: "EZ Cash Advance \$100 - \$1,000" with the address of the establishment.

11. Robbin reported that respondent Slaieh was the owner of respondent TC Services. At Seyoum's request Robbin provided a letter from respondent Slaieh on the letterhead of "TC Rebate Services, Inc.", dated June 3, 2005, that stated: "I hereby authorize Khalil Robbin to act on behalf of TC Rebate Services, Inc. He has full authority to decide and speak for us."³

² The establishment may be closed at this time. In a declaration filed under penalty of perjury by respondent Slaich on August 8, 2007, in the Superior Court of California, County of Riverside, he asserts that the facility has "closed" and that "it no longer operates or conducts business of any kind."

³ Respondent Slaich did not testify at the hearing, asserting his privilege against self-incrimination to each question posed by complainant's counsel. However, the signature on the letter matches that in the August 8, 2007, declaration filed by respondent Slaieh in Riverside County Superior Court, referred to in footnote 2. Therefore, the June 3, 2005, letter is authentic and establishes Robbin's authority to speak for respondents.

12. On May 20, 2005, David A. Pauley (Pauley) obtained a cash advance from respondents, which he believed to be one in a series of payday loans, and documents evidencing his transaction were provided to Seyoum. In exchange for \$300, Pauley signed an agreement to pay the money over a 12-month period. Although Pauley authorized respondent TC Services to debit his account if he did not pay the minimum due every two weeks, he actually repaid the \$300, plus interest, within two weeks. Pauley also received pre-paid phone cards with the \$300, which cards he had not requested and did not need.

13. On January 9, 2006, Department Examiner Michael Cacho (Cacho) went to the establishment to conduct an examination of respondents' business activities. He met with the office manager, Saad Ghandur (Ghandur). Ghandur explained that the primary service provided by EZ Cash Advance was the "Phone Card Rebate Program," whereby in exchange for a cash advance and a 50-minute pre-paid phone card, the customer agreed to pay a minimum biweekly amount over a one-year period. Payments could be made in person or by electronic transfer. Each time a payment was made, a new pre-paid phone card was issued for the amount of the payment due. In the example used by Ghandur, a \$100 advance required biweekly payments of \$29. The interview was abruptly terminated when respondents' prior counsel, Mashney, called the establishment and told Cacho and Ghandur that the Department did not have the authority to conduct the examination.

14. On November 21, 2006, Department Examiner Ing Parravicini (Parravicini) conducted an undercover investigation at the establishment. The establishment advertised cash rebates from "\$100 to \$1,000," as well as phone and fax services. Pretending to be a customer, Parravicini approached the service window and asked for a cash advance. The only person at the establishment, a man who called himself "Sid," but whom she later learned was Ghandur, explained the requirements for obtaining a cash advance. Parravicini would have to complete an application, sign a contract, and complete a transaction form and an authorization for bank withdrawal. She would have to provide a copy of the most recent bank statement and/or pay stub, show her California Driver's License or Identification, show her checkbook, and provide a copy of a utility bill. She would also need to write a check for \$129, which would serve as collateral. If all the application requirements were met, Ghandur informed Parravicini, then she would receive a \$100 cash advance and a \$29 phone card. The \$129 would be due in 14 days, but if Parravicini was unable to repay the entire amount, then a minimum of \$29 would be due, and a new \$29 phone card would be issued. The cycle would repeat until the original amount was repaid, at which time the collateral check would be returned.

15. Ghandur provided a business card, on the back of which he summarized the requirements he had explained to Parravicini. The card did not refer to any individual or firm, except to "E-Z Cash Rebate," in large bold letters. The sums "\$100 - \$1000" were also in large print. Smaller text proclaimed "cash rebate in minutes," and listed the following services: "Cellular Service"; "Pre-paid Phone Cards"; "Rebate Contracts"; and "Copy/Fax Service."

16. Ghandur also informed Parravicini that she could participate in a \$200 cash rebate program, which had a \$47 phone card. The collateral check for this one was \$247.

Parravicini could also receive a payday loan, in which case she would only be eligible for the \$100 cash advance programs.

17. Parravicini requested to purchase a phone card without entering into a rebate program. Ghandur denied her request, stating that the phone card is available only with the cash advance.

18. Respondents presented the testimony of a marketing expert, William L. Smith, Jr., (Smith), who is also employed as an attorney by respondents' counsel. Smith had worked for approximately five years as a telemarketing consultant and had been involved in many rebate programs. Smith noted that in his experience, many companies, including America On Line, Star Tech, AT & T, and Best Buy, offered cash as a promotion for underlying services, such as dial-up internet access, roadside assistance, cellular telephone service, or consumer products. The cost for the underlying service, even with the cash rebate, was typically high. In respondents' case, Smith stated, the product being provided is pre-paid phone cards, and failure to pay the agreed-upon sums at the end of one year would require return of the rebate.

19. The services provided by respondents are different from the typical cash rebate described by Smith. Despite the slight variations the program underwent in the approximately 18 months covered by Department visits, the customer still determined the amount of the "rebate" and received the cash up front. The examples cited by Smith all had a tangible, desired underlying product; on the other hand, respondents' pre-paid phone cards, as demonstrated by Pauley's situation, were incidental to the cash transaction. The minimum payments were, in fact, finance charges on the initial amount of the advance or "rebate." A key distinguishing fact that made clear that cash, not pre-paid phone cards, was the service being provided by respondents, is that the pre-paid card cannot be obtained without the cash advance and accompanying one-year payment contract.

LEGAL CONCLUSIONS

1. Under Evidence Code section 500, "a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting." Inasmuch as complainant filed the Order, she has the burden of proving the facts that warranted its issuance. Respondents, on the other hand, have the burden of establishing any affirmative defense, exemption or exception to the licensure requirement.

2. Section 22712 states: "Whenever, in the opinion of the commissioner, any person is engaged in business as a broker or finance lender, 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. If, within 30 days after the order is served, a written request for a hearing is filed and no hearing is held within 30 days thereafter, the order is rescinded."

3. Respondents filed a motion to dismiss the instant matter on grounds that the Order was rescinded by the Department's alleged failure to hold a hearing within 30 days of a written request for such a hearing.

Respondents rely on their attorney's February 13, 2003, letter, set forth in factual finding number 3, as their request for hearing. However, the statements made by counsel in that letter are too ambiguous to constitute a request for hearing pursuant to section 22712, which requires a "written request for a hearing." The statement at issue, "It is my intention to request a hearing," indicates planned action, not a present request. Moreover, in context of the entire letter, the statement indicates future action, conditioned on service of the Order or evidence of such service.

Respondents' reliance on section 23058, subdivision (c), is misplaced, as that provision is inapplicable and distinguishable. The statute provides: "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." Section 23058, subdivision (c), pertains to citations not orders, and is found in the California Deferred Deposit Transaction Law, section 23000 et seq., not in the Lenders Law. A more informal expression of a future intent may thus be more appropriate in a citation scheme that does not involve the expedited formal proceedings associated with the Order.

The motion to dismiss is, therefore, denied.

4. Section 22100 provides: "No person shall engage in the business of a finance lender or broker without obtaining a license from the commissioner."

5. A "finance lender" is defined, in pertinent part, as including "any person who is engaged in the business of making consumer loans or making commercial loans. The business of making consumer loans may include lending money and taking, in the name of the lender, or in any other name, in whole or in part, as security for the loan, any contract or obligation involving the forfeiture of rights in or to personal property, the use and possession of which property is retained by other than a mortgagee or lender, or any lien on, assignment of, or power of attorney relative to wages, salary, earnings, income, or commission." (§ 22009).

6. As set forth in factual finding numbers 8 through 19, respondents have been engaged in the business of a financial lender within the meaning of sections 22009 and 22100. Although there have been slight variations in the "programs" offered by respondents, in each variation consumers received cash, in an amount of their choosing, which they were obligated to repay, along with a fee, as required by a written contract or obligation. Failure to make the agreed-upon payments resulted in forfeiture of the cash advance or "rebate." Respondents prominently advertise the "cash advance" feature of their programs, and Pauley, the only customer to testify at the hearing, clearly understood he was receiving a loan. Moreover, pre-paid cards could not be obtained without the "rebate" or cash advance. Thus, any pre-paid telephone card given to the consumer was incidental to the lending of money.

7. Inasmuch as respondents do not have a license to engage in business as a finance lender, as set forth in factual finding number 7, and since they have not established any exemption from the licensure requirement, a violation of section 22100 has been established, by reason of factual finding numbers 6 through 19, and legal conclusion numbers 1 through 6.

8. Cause exists for issuance of the Order because respondents have engaged in business as a finance lender without a license to so act, by reason of factual finding numbers 1 through 19, and legal conclusion numbers 1 through 7.

ORDER

The Order was properly issued and shall remain in effect.

DATED: 9/3/07

~~SAMUEL D. REYES~~ /
Administrative Law Judge
Office of Administrative Hearings