BEFORE THE
DEPARTMENT OF CORPORATIONS
STATE OF CALIFORNIA

In the Matter of the Citations and Desist and Refrain Order Issued To: TIGS Enterprises, LLC doing business as CASH PLUS, CASH PLUS, INC., CASH PLUS OFFICE No. 96, and as PAYDAY ADVANCE, Respondent.	File number: 100-1786 OAH No.: 2009050040

DECISION

The attached Proposed Decision of the Administrative Law Judge of the Office of Administrative Hearings, dated August 12, 2009, is hereby adopted by the Department of Corporations as its Decision in the above-entitled matter with technical and minor changes on the attached Errata Sheet pursuant to Government Code Section 11517(c)(2)(C).

This Decision shall become effective on November 19, 2009.

IT IS SO ORDERED this 18th day of November 2009.

CALIFORNIA CORPORATIONS COMMISSIONER

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Preston DuFauchard

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PROPOSED DECISION

The hearing in the above-captioned matter was held on June 25, 2009, at Los Angeles, California, by Joseph D. Montoya, Administrative Law Judge (ALJ), Office of Administrative Hearings. Complainant was represented by Lindsay B. Herrick, Corporations Counsel. Respondent appeared through its attorney, Gregory B. Salvato.

Evidence was received and the record held open so that the parties could file written closing arguments. Complainant's Post Hearing Brief was timely received, and is identified for the record as Exhibit 11, along with a separate document providing corrections to citations in the Post Hearing Brief. Respondent's request to extend its time to file a closing brief to July 13, 2009, was granted. However, no written closing brief was received.

Complainant, in the Post Hearing Brief, sought admission of a copy of an examination questionnaire as Exhibit 10. There being no objection, the document will be received.

The case was submitted for decision on July 13, 2009. The ALJ hereby makes his factual findings, legal conclusions, and orders, as follows:

INTRODUCTION AND STATEMENT OF THE CASE

The main facts of the case are not disputed. Respondent is licensed to conduct deferred deposit transactions, popularly known as "payday loans." In February 2009, after an examination of Respondent's business and its books and records, the Commissioner issued an order issuing citations and desist and refrain order, which listed violations of the statutes governing Respondent's business. The main violations centered around Respondent's practice of granting borrowers an extension of time to pay back a loan, typically for a fee of $15.00, which is contrary to governing law. Respondent had, on 49

occasions over approximately four years, entered into such extension agreements, receiving $870 in consideration of the loan extensions that it was not entitled to charge.

Respondent was ordered to cease such violations, and was cited for its violations and ordered to pay administrative penalties totaling $19,000 based on the citations. Respondent was also ordered to disgorge charges and fees it had received in such transactions, in the sum of $2,880. Finally, Respondent was ordered to return to its customers the principal amount provided in 49 transactions, totaling $11,645. In all, under the Cease and Desist Order, Respondent's misconduct would cost it an amount in excess of $33,000.

Respondent provided evidence in mitigation, and of rehabilitation, and asserted that the penalties, under all the circumstances, were excessive.

FACTUAL FINDINGS

1. On December 31, 2004, the Commissioner of the California Department of Corporations (Department) issued a deferred deposit transactions originator license to Respondent, TIGS Enterprises LLC. That license, file no. 100-1786, was issued pursuant to the California Deferred Deposit Transaction Law (CDDTL), Financial Code section 23000, et. seq.[1]

2. Respondent is a limited liability company doing business as Cash Plus, Cash Plus Office No. 96, and as Payday Advance.[2] The licensed business allows Respondent to engage in deferred deposit transactions, commonly known as "payday loans" or "payday advances." Such is a written transaction where one person gives funds to another person upon receipt of a personal check, and it is agreed that the personal check shall not be deposited until a later date. Respondent's business is located in La Habra, California.

3. Respondent's managing member is Tom Irikawa, who is responsible for the day-to-day operation of the firm. The other member of the firm is Mr. Salvato, attorney for Respondent in this proceeding.

4. On May 21, 2008, the Department performed a regulatory examination of Respondent. The examination revealed violations of the CDDTL, that being 49 transactions where Respondent charged additional fees to customers for extensions of payment plans (extension transactions).

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[1] All further statutory references are to the Financial Code unless otherwise noted.

[2] The Department showed Cash Plus, Inc. as a fictitious name for Respondent. Respondent is a franchise operation; Cash Plus, Inc. is the franchisor, but the franchisor is not a party to this proceeding, only TIGS Enterprises, LLC.

5. On February 19, 2009, Complainant Preston DuFauchard, California Corporations Commissioner, issued his "Order Issuing Citations and to Desist and Refrain from Violations (Fin Code § 23058) and Order Voiding all Transactions and to Disgorge all Charges and Fees (Fin Code § 23060)." (Hereafter D&R Order). Complainant acted through Alan S. Weinger, Lead Corporations Counsel. Thereafter, Respondent requested a hearing on the D&R Order, and this proceeding ensued. All jurisdictional requirements have been met.

6. The 49 instances where Respondent obtained extension charges occurred between December 2004 and May 2008. While there were 49 such extension transactions, only 19 customers were involved. The total fees collected by Respondent for extension transactions was $870.[3] However, other fees and charges had been obtained from these customers, in the total amount of $2,010; these were the usual and lawful charges and interest. Thus, the total fees charged and collected by Respondent in the 49 extension transactions was $2,880.

7. By his D&R Order, Complainant issued citations, which assessed penalties in the amount of $19,000, representing $1,000 for each customer who was charged for an extension transaction. Further, he ordered Respondent to desist and refrain from further violations of section 23036, subdivision (b). Finally, he ordered the transactions voided, and ordered Respondent to "return to its customers, the principal amount provided in 49 deferred transactions totaling $11,645 and to disgorge any and all charges and fees received in conjunction with the . . . transactions, totaling $2,880, which includes $870 in unauthorized fees or charges." (Ex. 1, p. 5.)

8. Mr. Irikawa testified on behalf of Respondent that he had not intended to violate the law when he made the extension transactions, and that since the recent examination Respondent has stopped charging for extensions on the loans it makes. He pointed out that in cases where he would not agree to an extension, the borrower might "bounce" their check, which would lead to a $15 charge, and might have overdraft charges with their own banks. However, in light of the Department's action, he now calls the borrowers, and gives them two or three days to make payment, and if they don't, he negotiates their check.

9. Respondent began business in 2005, and during the first two years the company operated at a loss; the net profit in 2006 was a loss of approximately $33,000, which improved to a loss of approximately $8,000 in 2007. Mr. Irikawa has one assistant, who is paid to work part-time. The Respondent's net income during the first half of 2009 was $3,022, which is on par with 2008. The firm's total equity was approximately $88,000, which exceeds the statutory requirement that such firms have a net worth of at least $25,000. Mr. Irikawa asserts that if the D&R Order is upheld, Respondent could not pay such a large amount and would be forced out of business.

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[3] In some transactions more than $15 was charged; either $30 or $45 being the total amount paid by some borrowers. It is inferred that in these cases there was more than one extension negotiated.

10. There is no evidence of prior disciplinary action against Respondent, and it is inferred from the entire record that Mr. Irikawa cooperated in the examination process. Aside from the charges in the extension transactions, there is no evidence of other harm to consumers.

LEGAL CONCLUSIONS

1. Jurisdiction to proceed in this matter pursuant to sections 23050, 23055, and 23058, was established, based on Factual Findings 1 through 5.

2. Respondent has violated provisions of the CDDTL, and specifically section 23036, subdivision (b), by charging customers for extensions of loans, on 49 occasions, based on Factual Findings 4 and 6.

3. (A) The Commissioner of Corporations is authorized to assess an administrative fine of up to $2,500 per citation, pursuant to section 23058, subdivision (a). However, considering all the circumstances, the amount imposed is excessive.

(B) Here Respondent garnered $870 that it was not entitled to obtain. Complainant would impose a penalty of approximately 22 times the amount that Respondent improperly earned, and will not retain.[4] While the Commissioner is authorized to impose an even higher penalty, such is not warranted in this case given the general purpose of penalty statutes, the amount of the penalties as compared to Respondent's profits and net worth, and other factors.

(C) As a general rule, statutes imposing penalties and forfeitures are to be strictly construed. (See 34 Cal.Jur 3d (2009), Penalties and Forfeitures, § 11.) This is not to say that such statutes are unenforceable, and it is well recognized that civil penalties may be utilized to obtain compliance with laws and regulations. As noted by the Supreme Court some thirty years ago, "Imposition of civil penalties has, increasingly in modern times, become a means by which legislatures implement statutory policy." (*Hale v. Morgan* (1978) 22 Cal.3d 388, 398.)

(D) In *Hale v. Morgan, supra*, a landlord of a trailer park had unlawfully cut off a tenant's utilities when the tenant refused to pay rent for several months. Under the Code of Civil Procedure, the landlord was subject to a fine of $100 per day, and ultimately, the trial court made an award of $17,300, in a case where the rent had been $65 per month. The Supreme Court held that in the circumstances, this tended to deprive the landlord of due

[4] Complainant argues that Respondent is being penalized $387.75 per citation, an amount well below the $2,500 maximum, dividing the total penalty by 49 transactions. (Post Hearing Brief, p. 5.) However, this is just another way of saying that the penalty is well over 20 times the amount illegally charged by Respondent.

process, as there was no discretion involved in the award, and no accounting of whether the landlord had acted in ignorance of the law, or egregiously, and there was no consideration of the total amount of the award as compared to the value of the rental property; the amount ordered had the potential of a confiscatory result. It was also noted that the statutory scheme did not distinguish between the well-heeled corporate landlord for whom the fine would mean less than the individual landlord, perhaps lacking in sophistication as well as the resources to pay such a fine.

(E) Here, Respondent provided evidence that it had a net income during the past two years of approximately $500 per month, and that it had a net worth of approximately $88,000. It is not a large lender. The penalties in question are more than 20 percent of Respondent's net worth.[5] There is no evidence that Respondent's net worth was considered when the penalties were assessed, as Respondent provided such information at the hearing. In any event, it does not appear that it is necessary to take more than one fifth of Respondent's net worth, or more than three times its recent net yearly income, in order to deter future misconduct.

(F) The penalties appear excessive when Department penalty guidelines are considered. California Code of Regulations (CCR), title 10, section 270.50, provides as follows:

> In determining the amount of any administrative penalty levied or assessed against any person subject to Part 3, Division 1, Title 4 of the Corporations Code for each violation of any statute, rule, or order, the Commissioner may consider a variety of factors including, but not limited to, the following:
>
> (1) The nature and seriousness of the violations including actual or potential harm to the public or consumer.
>
> (2) The number and persistence of violations and the length of time over which they occurred.
>
> (3) The person's history of violations or complaints with the Department, other agencies or regulators.
>
> (4) Whether the person's conduct was negligent, willful, or knowing, and the extent to which it was negligent, willful, or knowing.
>
> (5) The person's financial condition including net worth and revenue.

[5] It should be noted that in civil cases involving punitive damage awards, California courts traditionally have not allowed punitive damages to exceed 10 per cent of a defendant's net worth. (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1166.)

(6) The nature and extent to which the person cooperated with the Department's investigation.

(7) Whether the person aggravated or mitigated any injury or damage caused by the violations.

(8) The nature and extent to which the person has taken corrective action to ensure that violations will not reoccur.

(F) While CCR section 270.50 pertains to violations of the Corporations Code, it provides guidance for a response to the violations of the Finance Code, and for an exercise of discretion. Here, Respondent has taken corrective action and cooperated in the investigation. (Subds. (6) & (8).) As noted above, the Respondent's revenue is not a large amount, and consideration of that and its net worth calls for a lower penalty. (Subd. (5).) The misconduct appears to have been a function of ignorance and neglect, though willful in the legal sense. (Subd. (4).)

(G) To be sure, the violations occurred over a period of time, but the harm was relatively small, and there is some credence to Mr. Irikawa's claim that where an extension prevented a default, the harm to the borrower by the extension transaction might by mitigated by avoidance of other charges to the customer. At bottom, section 270.50 provides support for the proposition that $19,000 in civil penalties is too large an amount in this case.

(H) In this case, an appropriate penalty is $7,500, an amount less than 10 times the amount illegally charged, but sufficient to deter future misconduct. It is less than 10 per cent of the Respondent's net worth, and slightly more than its net income in 2008. Therefore, the D&R Order will be modified to reflect that reduced penalty.

4. (A) The "disgorgement" order cannot be upheld. Section 23060, subdivision (a), provides that where there have been fees charged that are not allowed under the law, the deferred deposit transaction "shall be void, and no person shall have any right to collect or receive the principal amount provided in the deferred deposit transaction, any charges, or fees in connection with the transaction." However, that appears to say no more than the common law rule that a party to an illegal contract, which is void, can not enforce the transaction. That is not a change from the general rule that the law will leave the parties to an illegal contract where it finds them, although in some situations, a party who is not in equal wrong in the transaction may obtain some relief. And, the statute, which should be strictly construed, should not be read as saying that the Department and the Commissioner have the authority to order a remedy that the courts may not be able to provide.

(B) As stated by Mr. Witkin, "normally, relief given to one who is not in equal wrong is limited to rescission and restitution; he or she will not be permitted to *enforce* the contract." (1 Witkin, Summary of Cal. Law (10th ed. (2005), Contracts, § 440.) Under that generally rule, if the consumers in question had brought suit, being not in equal wrong in

the void transaction, they could have recovered the extension fees, but would have been required to return the amount lent them if they wished to recover the fee; they could not keep the money they borrowed. On the other hand, if they had not repaid the loan, and Respondent had brought suit on the borrower's check, the void nature of the transaction would provide a defense for the consumer. Put another way, as to the amount of money actually loaned to consumers in the extension transactions, section 23060, subdivision (a) provides a shield, but not a sword. The transaction, having been executed, could not be undone by the consumers to the extent that they would receive the loan amount, and the Department should not be deemed to have the power to do that for them.

(C) Furthermore, the order as initially issued would unjustly enrich the 19 borrowers in these transactions. They would not only be able to obtain "free" loans, they would essentially receive gifts equal to the amount they actually borrowed; they would be unjustly enriched, and Respondent would be further penalized by that amount.[6]

(D) In these circumstances, the appropriate remedy is for Respondent to refund to the consumers the fees earned, which would place the parties in the same position that they were in at the start of the transaction; effectively, there would be rescission and restitution. Therefore, that part of the D& R Order requiring repayment of $2,880 to the 19 consumers will be upheld, but payment of the loan amounts will not.

ORDER

The appeal from the D&R Order issued to Respondent TIGS Enterprises, LLC, is sustained in part, and overruled in part, and the D&R Order is hereby modified and amended, as follows:

1. Respondent TIGS Enterprises, LLC, is hereby ordered to desist and refrain from violating Financial Code section 23036, subdivision (b), when it engages in the business of deferred deposit transactions in the State of California.

2. Respondent TIGS Enterprises, LLC, is ordered to pay administrative penalties to the California Department of Corporations in the amount of $7,500. Said penalties are to be paid within 30 days of the effective date of this decision. Failure to comply with this order may expose Respondent to court proceedings pursuant to Financial Code section 23058, subdivision (e), and any other remedies that the Department may have.

3. Respondent TIGS Enterprises, LLC, shall make payments totaling $2,880, to those customers listed in the D&R Order, for the fees and charges in made in connection with the

[6] To go beyond ordering the restitution of the fees paid has the potential to running the undersigned afoul of the constitutional prohibition against an administrative agency exercising judicial powers. (See *McHugh v. Santa Monica Rent Control Bd*. (1989) 49 Cal.3d 318.)

49 extension transactions. Said payments shall be tendered within 30 days of the effective date of this order. In any case where Respondent cannot locate the consumers, it shall provide the Department with proof of its efforts to locate them, within 30 days of the effective date of this order.

August 12, 2009

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Joseph D. Montoya
Administrative Law Judge
Office of Administrative Hearings

ERRATA SHEET

(Corrections to Proposed Decision –TIGS Enterprises dba Cash Plus, et al.)

The following minor and technical amendments are hereby made to the Proposed Decision dated August 12, 2009, pursuant to Government Code section 11517(c)(2)(C):

1) On page 5 of the proposed decision, in the second line of paragraph (F) of Legal Conclusions, “section 270.50” is changed to “section 250.70”.

2) On page 6 of the proposed decision, paragraph (F) of Legal Conclusions is changed to paragraph (G).

3) On page 6 of the proposed decision, paragraph (G) of Legal Conclusions is changed to paragraph (H).

4) On page 6 of the proposed decision, paragraph (H) of Legal Conclusions is changed to paragraph (I).

5) On page 6 of the proposed decision, in the first line of paragraph (F) of Legal Conclusions, “section 270.50” is changed to “section 250.70”.

6) On page 6 of the proposed decision, in the forth line of paragraph (G) of Legal Conclusions, “section 270.50” is changed to “section 250.70”.