

1 MARY ANN SMITH
Deputy Commissioner
2 DANIEL P. O'DONNELL
Assistant Chief Counsel
3 JOANNE ROSS (State Bar No. 202338)
Senior Counsel
4 Department of Financial Protection and Innovation
2101 Arena Blvd.
5 Sacramento, California 95834-2036
Telephone: (916) 936-7908
6 Facsimile: (916) 928-7929

7
8 Attorneys for Complainant

9
10 BEFORE THE DEPARTMENT OF FINANCIAL PROTECTION AND INNOVATION
11 OF THE STATE OF CALIFORNIA

12
13 In the Matter of:) CFL FILE NO.: 60DBO-77076
14 THE COMMISSIONER OF FINANCIAL)
PROTECTION AND INNOVATION,) CONSENT ORDER
15)
16 Complainant,)
17 v.)
18 ALLUP FINANCE LLC,)
19 Respondent.)
20)
21)

22 This Consent Order is entered into by and between the Commissioner of Financial Protection
23 and Innovation (Commissioner) and Allup Finance LLC (Consent Order).

24 I.

25 **RECITALS**

26 This Consent Order is made with reference to the following facts:

27 A. Allup Finance LLC (Allup) is a New Jersey limited liability company organized on
28 December 19, 2016, with its principal place of business at 255 Route 17 South, Hackensack, New

1 Jersey 07601. Allup has a pending application with the Department of Financial Protection and
2 Innovation (Department) to become a licensed commercial lender under the California Financing
3 Law (Fin. Code, § 22000, et seq.) (CFL).

4 B. Jay Yoon is the Managing Member of Allup. Jay Yoon is authorized to enter into this
5 Consent Order on behalf of Allup.

6 C. The Department, through the Commissioner, has jurisdiction over the licensing and
7 regulation of persons and entities engaged in the business of lending and brokering in California,
8 pursuant to the CFL.

9 D. In 2018, the Department commenced an investigation of Allup’s compliance with the
10 CFL in regard to Allup’s purported non-loan financing products (Investigation).

11 E. In connection with the Investigation, the Department issued subpoenas pursuant to
12 Government Code section § 11181, subdivision (e) (Subpoenas). Allup produced documents and
13 other information to the Department voluntarily and pursuant to the Subpoenas (Information).

14 F. From the Commissioner’s review of the Information, the Commissioner made the
15 following factual findings:

16 i. Allup has provided financing products to small businesses in California which
17 it claims are Merchant Cash Advances, (MCAs).

18 ii. In Allup’s MCA agreements, merchants obtain funding whereby Allup
19 purchases the business’ future receivables in exchange for the expected equivalent amount of cash up
20 front, plus fees and interest.

21 iii. Under Allup’s standard MCA agreement (Agreement), Allup purchases shares
22 of future revenue “without recourse;” meaning that, if the small business’ revenue craters for reasons
23 outside its control, Allup loses money on the deal and is not able to otherwise recoup the upfront
24 money it provided from the general assets of the small business or the small business’ owners.

25 iv. The law of California generally holds that purchasing a share of a business’
26 outstanding receivables *without* obtaining recourse beyond the receivables purchased, such as to the
27 seller’s general assets, is not lending and is not subject to the state’s general lending law, the CFL.
28 (*See, e.g., West Pico Furniture Co. v. Pac. Fin. Loans (West Pico)* (1970) 2 Cal.3d 594, 601-606.)

1 The law also makes clear one point: *outstanding* (not future) receivable purchase agreements are not
2 loans when the “funding” provider, the purchaser of the receivables, bears the risk of loss and does
3 not gain the ability to collect upon the small business’ (or small business owners’) general assets in
4 the event that the receivables purchased underperform expectations. (*See West Pico*, 2 Cal.3d at 605
5 [analyzing which party to the transaction bore the “risk of nonpayment” in determining whether to
6 affirm trial court judgment that sale of outstanding receivables was actually a loan].)

7 v. In Allup’s Agreements, however, Allup has broad authority to declare
8 “default” on its merchants, and when doing so may use extensive recourse allowed under its
9 Agreement. For example, the Agreement states that when an ACH remittance to the merchant’s
10 account is returned due to insufficient funds or *fails for any reason whatsoever*, the merchant will be
11 charged the maximum non-sufficient funds fee permitted pursuant to applicable law per
12 occurrence. Furthermore, it states that the occurrence of three (3) or more events of insufficient
13 funds shall constitute an event of default under the Agreement. When an event of default occurs,
14 Allup has the right under the Agreement to enter into the merchant’s business and seize *all* assets –
15 without so much as notice to the merchant. The Commissioner notes that if a merchant’s business
16 slows, through no fault of the merchant, the regular monthly payment taken from the merchant’s
17 ACH account under the Agreement may be more than the receivables earned by the merchant over
18 that time period. This may lead to an “insufficient funds” situation that triggers extra fees and
19 potentially “default” under the Agreements. Since Allup is claiming only to buy the receivables and
20 not to be lending with recourse if unpaid, Allup’s Agreement that allows an event of default – and
21 therefore full recourse until the funding amount has been repaid – for “insufficient funds” *for any*
22 *reason whatsoever* does not put the risk of the “purchase” of receivables on Allup’s shoulders, but
23 rather the risk of repayment on the merchant’s shoulders, just like a loan.

24 vi. Allup’s Agreements with merchants in California also allow for an indefinite
25 repayment period. Rather than agreeing to purchase the merchants’ receivables for a certain period
26 of time, and taking the risk of loss if such receivables over that time are not the equivalent to the
27 funding made by Allup to the merchant, Allup again places the risk of repayment on the merchant by
28 leaving the repayment period open until fully repaid (with fees and interest). Again, these terms and

1 Evidence of refunds shall include merchant business and owner name, last known address and/or any
2 other contact information, copies of cleared refund checks, and copies of certified mail receipts for
3 any checks not cleared. Allup shall escheat any unclaimed refunds to the California State
4 Controller's Office within the period provided by Code of Civil Procedure section 1520 of the
5 Unclaimed Property Law (Code of Civ. Proc., section 1500, et seq.).

6 4. Department's Investigative Costs. Allup shall pay a portion of the Department's
7 costs of the Investigation. Such payment by Allup shall total \$20,000.00 (Investigative Costs) to the
8 Commissioner. Payment of the Investigative Costs shall be made no more than twenty (20) business
9 days after the Effective Date, as defined below (Effective Date), and should be made in the form of a
10 cashier's check or Automated Clearing House deposit payable to the "Department of Financial
11 Protection and Innovation" and transmitted to the attention of "Accounting – Litigation" at
12 Department of Financial Protection and Innovation, 2101 Arena Boulevard, Sacramento, California
13 95834-2036. Notice of such payment shall be forwarded to Joanne Ross, Senior Counsel,
14 Department of Financial Protection and Innovation, Enforcement Division, via email:
15 *Joanne.Ross@dfpi.ca.gov.*

16 5. Waiver of Hearing Rights. Allup acknowledges that the Commissioner is ready,
17 willing, and able to proceed with the filing of an enforcement action upon his findings. Allup hereby
18 waives the right to any hearings, and to any reconsideration, appeal, or other right to review which
19 may be afforded pursuant to the CFL, the California Administrative Procedure Act, the California
20 Code of Civil Procedure, or any other provision of law. Allup further expressly waives any
21 requirement for the filing of an Accusation pursuant to Government Code section 11415.60,
22 subdivision (b). By waiving such rights, Allup effectively consents to this Consent Order, and the
23 Desist and Refrain Order contained herein, becoming final.

24 6. Full and Final Settlement. The Parties hereby acknowledge and agree that this
25 Consent Order is intended to constitute a full, final, and complete resolution of this matter, and that
26 no further proceedings or actions will be brought by the Commissioner in connection with this matter
27 under the CFL or any other provision of law, excepting therefrom any proceeding to enforce
28 compliance with the terms of this Consent Order.

1 7. Failure to Comply with Consent Order. Allup agrees that if it fails to comply with the
2 terms of this Consent Order, the Commissioner may, in addition to all other available remedies it may
3 invoke under the CFL, deny the issuing of Allup’s CFL license, or, if issued, summarily suspend
4 Allup’s CFL license until Allup is in compliance. Allup waives any notice and hearing rights to
5 contest such denial or summary suspension which may be afforded under the CFL, the California
6 Administrative Procedure Act, the California Code of Civil Procedure, or any other provision of law
7 in connection therewith.

8 8. Information Willfully Withheld or Misrepresented. This Consent Order may be
9 revoked, and the Commissioner may pursue any and all remedies available under the law against
10 Allup if the Commissioner discovers that Allup knowingly or willfully withheld or misrepresented
11 information used for and relied upon in this Consent Order.

12 9. Future Actions by Commissioner. If Allup fails to comply with any terms of the
13 Consent Order, the Commissioner may institute proceedings for any and all violations otherwise
14 resolved under this Consent Order. The Commissioner reserves the right to bring any future actions
15 against Allup, or any of its partners, owners, officers, shareholders, directors, employees, or
16 successors for any and all unknown violations of the CFL.

17 10. Assisting Other Agencies. Nothing in this Consent Order limits the Commissioner’s
18 ability to assist a government agency (whether city, county, state, or federal) with any administrative,
19 civil or criminal prosecutions brought by that agency against Allup or any other person based upon
20 any of the activities alleged in this matter or otherwise.

21 11. Headings. The headings to the paragraphs of this Consent Order are inserted for
22 convenience only and will not be deemed a part hereof or affect the construction or interpretation of
23 the provisions hereof.

24 12. Binding. This Consent Order is binding on all heirs, assigns, and/or successors in
25 interest.

26 13. Reliance. Each of the Parties represents, warrants, and agrees that in executing this
27 Consent Order it has relied solely on the statements set forth herein and the advice of its own counsel.
28 Each of the Parties further represents, warrants, and agrees that in executing this Consent Order it has

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

7 14. Waiver, Amendments, and Modifications. No waiver, amendment, or modification of
8 this Consent Order will be valid or binding unless it is in writing and signed by each of the Parties.
9 The waiver of any provision of this Consent Order will not be deemed a waiver of any other
10 provision. No waiver by either Party of any breach of, or of compliance with, any condition or
11 provision of this Consent Order by the other Party will be considered a waiver of any other condition
12 or provision or of the same condition or provision at another time.

13 15. Full Integration. This Consent Order is the final written expression and the complete
14 and exclusive statement of all the agreements, conditions, promises, representations, and covenants
15 between the Parties with respect to the subject matter hereof, and supersedes all prior or
16 contemporaneous agreements, negotiations, representations, understandings, and discussions between
17 and among the Parties, their respective representatives, and any other person or entity, with respect to
18 the subject matter covered hereby.

19 16. Governing Law. This Consent Order will be governed by and construed in accordance
20 with California law. Each of the Parties hereto consents to the jurisdiction of such court, and hereby
21 irrevocably waives, to the fullest extent permitted by law, the defense of an inconvenient forum to the
22 maintenance of such action or proceeding in such court.

23 17. Counterparts. This Consent Order may be executed in one or more separate
24 counterparts, each of which when so executed, shall be deemed an original. Such counterparts shall
25 together constitute a single document.

26 18. Effect Upon Future Proceedings. If Allup applies for any license, permit or
27 qualification under the Commissioner's current or future jurisdiction, or is the subject of any future
28 action by the Commissioner to enforce this Consent Order, then the subject matter hereof shall be

1 admitted for the purpose of such application(s) or proceeding(s).

2 19. Third Parties. This Consent Order does not create or give rise to any private rights or
3 remedies against Allup, or any of its past, present, and future predecessors, successors, parents,
4 subsidiaries, affiliates, and related entities, and each of their respective partners, employees, agents,
5 attorneys, officers, directors, shareholders, members, partners, joint venturers, representatives and
6 assigns (Allup Parties), create any liability on the part of Allup or the Allup Parties, or limit the
7 defenses of Allup or the Allup Parties for any person or entity not a party to this Consent Order.

8 20. Voluntary Agreement. Allup enters into this Consent Order voluntarily and without
9 coercion and acknowledges that no promises, threats or assurances have been made by the
10 Commissioner or any officer, or agent thereof, about this Consent Order. The Parties each represent
11 and acknowledge that he, she or it is executing this Consent Order completely voluntarily and
12 without any duress or undue influence of any kind from any source.

13 21. Notice. Any notice required under this Consent Order shall be provided to each party
14 at the following addresses.

15 i. To Allup:
16 Jay Yoon
17 Managing Member
18 Allup Financial LLC
19 255 Route 17 South
20 Hackensack, NJ 07601

21 ii. To the Commissioner:
22 Joanne Ross
23 Senior Counsel, Enforcement Division
24 Department of Financial Protection and Innovation
25 2101 Arena Boulevard, Sacramento, California 95834-2036
26 *Joanne.Ross@dfpi.ca.gov*

27 22. Signatures. A fax or electronic mail signature shall be deemed the same as an original
28 signature.

29 23. Public Record. Allup hereby acknowledges that this Consent Order is and will be a
30 matter of public record.

31 24. Effective Date. This Consent Order shall become final and effective when signed by
32 all Parties and sent by the Commissioner's agent via e-mail to legal@allupfinance.com.

1 25. Authority to Sign. Each signatory hereto covenants that he or she possesses all
2 necessary capacity and authority to sign and enter into this Consent Order and undertake the
3 obligations set forth herein.

4
5 Dated: November 12, 2020

MANUEL ALVAREZ
Commissioner of Financial Protection and Innovation

6
7 By _____
8 Mary Ann Smith
9 Deputy Commissioner

10 Dated: November 10, 2020

ALLUP FINANCIAL LLC

11
12 By _____
13 Jay Yoon
14 Managing Member