STATE OF NEW HAMPSHIRE

In re the Matter of: **State of New Hampshire Banking Department,** **Petitioner,** **and** **Frank Coffey (a/k/a Frank Coffey, Inc, and d/b/a Frank Coffey Auto & Truck Sales [a/k/a frankcoffeyauto.com]),** **Respondent**	**Case No.: 09-206** **Adjudicative Hearing Decision**

I. INTRODUCTION

This case involves retail installment sales of motor vehicles by the above named Respondent, a formerly licensed sales finance company/retail seller. As set out below, I conclude that the Department presented a *prima facie* case and that Respondent violated RSA 361-A: 2. The Respondent's motions to dismiss are DENIED. The Cease and Desist order is made PERMANENT. Administrative fines of $500 for each of 76 violations are AWARDED for a total of $38,000. The fines are STAYED pending the filing of a motion for rehearing.

I also discuss the Respondent's failure to provide records and the issue of restitution but conclude that the former is not a violation of any statute, rule or order when a non-licensee is involved and that I do not have sufficient evidence to impose the latter. I did not give any weight to these issues in determining the administrative fine.

II. PROCEDURAL BACKGROUND

The Department issued to Respondent a Notice of Order to Show Cause and Cease and Desist ("1st Notice") on September 30, 2011 seeking administrative fines and reimbursement. The 1st Notice contained an Order signed by the Commissioner that Respondent cease and desist from violating RSA 361-A. The authority for this part of the Order is contained in RSA 361-A:3-a,I. The Commissioner may issue such an order based on "reasonable cause" that any person is violating the chapter. The 1st Notice also contained a show cause Order. The authority for this part of the Order is contained in RSA 361-A:3,I which provides for an order requiring any person under the Commissioner's jurisdiction to show cause why penalties shall not be imposed for violations of RSA 361-A. Based on the facts alleged in the 1st Notice, the Commissioner found reasonable cause to issue the cease and desist order; that the facts alleged, if true, show Respondent violated RSA 361-A; and, that the Order is necessary and appropriate to the public interest.

The Department's alleged violations against the Respondent in the 1st Notice were as follows:

a. Respondent Coffey:

Violation #1: Unlicensed Sales Finance Company activity (RSA 361-A:2,I) – 455 Counts.

The Department's alleged violations against Respondent also included:

a. An order to show cause why reimbursement to Consumers 1 through 455 as described in the 1st Notice should not be made. The Department sought administrative penalties of up to $2500 for each violation.

Thus, the 1st Notice described the Respondent's right to request a hearing where **he shall show cause why he shall not be fined and ordered to pay restitution**. (emphasis added) The purpose of the hearing is to enter an order disposing of the matter as the facts require. RSA 361-A:3 and RSA 361-A:3-a.

RSA Chapter 541-A and RSA Chapter 361-A require the Department to schedule a hearing on such matter within ten (10) calendar days of a written request for hearing unless otherwise waived by the Respondent. Respondent filed a timely request for hearing on November 1, 2011, and waived his right to a ten (10) day hearing.

The Commissioner issued a second notice ("2nd Notice") on December 1, 2011. The 2nd Notice is procedural and required the Respondent to appear on Thursday, January 5, 2012 at 10:00 am, at the New Hampshire Banking Department located at 53 Regional Drive, Suite 200, Concord, New Hampshire 03301, for the purpose of participating in an adjudicative proceeding, "**at which time the Respondent will have the opportunity to demonstrate why the relief sought in the 1st notice should not become permanent."** (emphasis added)

Pursuant to RSA 541-A:31,III(b), the legal authorities described in the 2nd Notice were: **RSA 541-A:30,III**, RSA 361-A:3,I and I-a, RSA 361-A:3-a,I and II and RSA 361-A:11, VII and VIII. (emphasis added)

The facts as alleged in the 1st Notice were incorporated by reference.

The 2nd Notice commenced an adjudicative proceeding pursuant to RSA 541-A:31 and the JUS 800 Rules "**for the purpose of permitting the Respondent to show compliance with the stated violations**." (emphasis added)

A witness list and proposed exhibits were pre-marked, for identification only, and filed by the Department and provided to Respondent by Wednesday, December 28, 2011. Respondent filed Exhibit A untimely on January 4, 2012.

Paragraph 14 of the 2nd Notice provides that the **Department has the burden of setting forth a *prima facie* case, then the Respondent shall have the burden of showing compliance with applicable law by a preponderance of the evidence**. (emphasis added)

Respondent appeared *pro se*.

Maryam Torben Desfosses, Esquire, New Hampshire Banking Department was designated as Hearings Examiner in this matter with authority to represent the public interest within the scope of the Department's authority.

I was delegated as Presiding Officer to preside over this matter pursuant to RSA 383:7-a; see also RSA 541-A:1,XV.

The entirety of all verbal proceedings was recorded verbatim by the Department upon my initiative.

No request for a certified court reporter was submitted in writing to me.

A Prehearing Conference was conducted on January 5, 2012 before the hearing commenced. Respondent elected to accept an opportunity to file additional material within 10 days of the hearing. Both parties agreed to waive the 20 day requirement for issuing an order and agreed to additional extensions. For this, I am grateful. There have been personal and professional challenges that have unavoidably extended the time necessary to issue this order.

At the beginning of the hearing, the Department made a motion to reduce Counts listed above from 455 to 76. The specific 76 counts are identified in exhibit 13. The Motion was GRANTED without objection. In an opening

statement, I described the obligations of the parties as follows: **Pursuant to the notice of hearing, the burden of going forward on the issues is on the Department, i.e. the Department shall have the burden of setting forth a *prima facie* case and then the Respondent shall have the opportunity to show compliance with applicable law.** (emphasis added)

Respondent made an opening statement. To a large extent it contained legal argument. He also stated that there were facts that he would not contest and that there were facts about which he would testify. An opening statement is not evidence. I will determine the facts based on testimony and exhibits.

Paragraphs 13 and 14 in the 1st notice are duplicates. The Department made a Motion to Strike paragraph 13 and the Motion was GRANTED without objection.

Exhibits 1-13 were admitted into evidence. Exhibit A was also admitted.

Following the close of the hearing, The Respondent filed Proposed Findings of Fact and Rulings of Law on January 17, 2012.

III. FACTS

The Department called Kathleen Sheehan, a Bank Examiner with the Consumer Credit Division with 4 years of experience. Exhibits 1-13 were introduced and admitted through her. Then the Department rested. The Respondent raised three motions to dismiss which I took under advisement. The Respondent testified on his own behalf. Based on the testimony and exhibits admitted at the hearing, I find the following facts were established by a preponderance of the evidence.

At all times relevant to this matter, and beginning at least in 1999, Respondent sold motor vehicles from a lot in Milford, New Hampshire. At all

relevant times, he acted as a direct owner, a principal and a control person.

Respondent was licensed as a retail seller from 1999 until April 30, 2000 when this license expired. Exhibit 4. Respondent was licensed as a sales finance company from January 8, 2002 until his license expired on December 31, 2006. Exhibit 4. While licensed, Respondent sold vehicles subject to a retail installment contract. He pursued claims against retail buyers who failed to make payments. He had great difficulty in enforcing the retail installment contracts. He decided not to renew his license because of the lack of success in enforcing the contracts.

The Respondent was not licensed after December 31, 2006. The transactions that are the subject of this matter occurred after December 31, 2006.

On or about September 18, 2009, the Department became aware of an advertisement by Respondent in Auto Solutions. The Week 38 publication (from September 18, 2009 to September 25, 2009) had an advertisement (full page) for Frank Coffey with the statement "FINANCING AVAILABLE" prominently displayed. Exhibit 6. (emphasis in original)

On October 16, 2009, the website of frankcoffeyauto.com advertised "BUY HERE PAY HERE." Exhibit 3. (emphasis in original)

On October 16, 2009, the Department sent a letter to Respondent via U.S. Certified Mail, Return Receipt requested, which Respondent received on October 20, 2009. Exhibit 7. The letter questioned whether Respondent was operating as a sales finance company or retail seller and needed a license under RSA 361-A, Retail Installment Sales of Motor Vehicles. The Department requested a response within 30 days. The Respondent never responded to this letter. When asked at the hearing why he did not respond, after a long pause and several false starts, he could offer no answer to the question.

On October 20, 2009, the Department received documentation from the New Hampshire Department of Safety, Division of Motor Vehicle, Bureau of Title and Anti-Theft, which indicated that Respondent was listed as an active title lienholder on 455 titles, 76 of which were held during January, 2007 through August 25, 2009. Exhibit 8.

With no response from Respondent, the Department sent additional correspondence on February 8, 2010 via U.S. Certified Mail, Return Receipt requested, which he received on February 10, 2010. Exhibit 9. This letter referenced Exhibit 7 and requested a response to that letter. The Respondent did not respond.

As of April 8, 2010, the frankcoffeyauto.com website still advertised "BUY HERE PAY HERE." Exhibit 10.

The phrase "BUY HERE PAY HERE" is a term of art in the industry. It means that a retail buyer with poor credit who cannot use traditional financing can purchase a motor vehicle from the Respondent and make one or more deferred payments over time. This interpretation is buttressed by the 76 liens that the Respondent held on motor vehicles he sold. Exhibit 13 contains 76 applications for a certificate of title. Each application is signed by the Respondent. The Respondent listed himself as a lienholder on each application. The retail buyer signed each application certifying that the Respondent was the only lienholder. Holding a lien on a title is a financing agreement for the motor vehicle. It is analogous to a lender providing a loan or an extension of credit. The existence of the 76 liens plus the ads leads to the conclusion that Respondent was financing the sale of motor vehicles. The Respondent suggested that the words "FINANCING AVAILABLE" may signify that he was merely providing a

brochure to a bank. Bank Examiner Sheehan correctly pointed out that, if that were the case, the bank would hold the lien. While, as explained below, I give no weight to the Respondent's failure to provide the requested records, I can consider his failure to respond to the Department's initial inquiries. The Department's letters contained in Exhibits 7 and 9 are particularly neutral in terms of the business model used by Respondent. The Respondent was previously licensed and perfectly capable of responding to the Department. His failure to do so is significant and is one more piece of evidence that supports the conclusion that Respondent was financing the sale of motor vehicles.

Based on the Auto Solutions ad and the continuation of the website, the Department concluded that Respondent was required to be licensed under RSA 361-A as a sales finance company and/or retail seller of motor vehicles. On May 31, 2011, the Department sent a letter via facsimile to Respondent, indicating he must respond in 10 days and apply to the Department for licensure and submit a consumer list with supporting documentation for transactions from January 1, 2007 to the date of the letter. Exhibit 11. The same letter was also sent via U.S. Certified Mail, Return Receipt requested. Exhibit 12. I find that the respondent received either or both of these documents by June 10, 2011.

On August 18, 2011, the Department spoke with Respondent and pursuant to that conversation, on August 19, 2011, the Department sent Respondent copies of the 76 applications for certificate of title containing the liens held by him from January 1, 2007 to August 18, 2011. Exhibit 13. The Respondent received this letter on August 24, 2011. *Id.*

In the same correspondence, the Department informed Respondent that he needed to provide a full payment history, how much Respondent purchased the

vehicles for and sold them for and how much the Consumers paid. Exhibit 13. The Department also requested copies of retail installment contracts, purchase and sales agreements and the contracts from the auctions and/or trade-ins if Respondent did not charge interest on these motor vehicle loans. Respondent received this correspondence on August 24, 2011.

Respondent failed to provide any of the requested documentation. The Department did not subpoena any of these documents. *See*, RSA 361-A:5,I; *See also* Jus 803.01(b)(4)(Power of presiding officer to issue subpoena)and Jus 811 (Good faith obligation to produce documents/Motion to Compel).

The Respondent retained several documents for each of the 76 transactions. These documents included, at least: a bill of sale for the Respondent's purchase of the motor vehicle, a bill of sale for the Respondent's sale of the motor vehicle, a title application and a receipt book. The Respondent testified that he kept records for three (3) years. Therefore, as of June 10, 2011, the Respondent had records, at least, for the portion of the 76 transactions that occurred on or after June, 2008. The Respondent never produced records that were requested by the Department. The Respondent testified that he shredded the records.

On September 23, 2011, the Department spoke with Respondent, who confirmed receipt of the August 19, 2011 correspondence and indicated his position is that "[they] have not engaged in sales finance company activity since 2006."

At the hearing, the Respondent testified that on 76 occasions, he sold a motor vehicle to a person who was able to pay a portion of the price but was unable to pay the full agreed-upon price ("Full Price"). These persons, listed in Exhibit 13, made a compelling argument that they should receive the car although

unable to pay the Full Price immediately. Respondent asked each of them to agree to give him a lien on the vehicle as a reminder to pay the remainder of the Full Price. Each of the 76 signed the application for a certificate of title identifying the Respondent as the only lienholder. The Respondent also signed each application. The vast majority of the 76 eventually paid the Full Price and received the title. A few failed to pay the Full Price and received the title anyway. All liens have been released. No consumer has made a complaint regarding Respondent.

Respondent did not collect any finance charge, interest or any other payment beyond the Full Price of the vehicle. Common sense and the balance of the evidence convinces me that the prices listed in the Auto Solutions ad for vehicles for sale by Respondent are accurate and are at or above the Full Price. The circumstantial evidence produced by the Department establishes that the Respondent was seeking to make a profit on his transactions. Put another way, the ad did not contain a price at or below the price that Respondent paid for each of these vehicles. Instead, it contained the price above what he paid that he wanted to receive for the vehicles. In the same vein, the Full Price of each of the 76 vehicles was greater than the price paid by the Respondent. In other words, when the Respondent collected the Full Price, which he did for most of the 76 vehicles, he made a profit. The Respondent is running a used motor vehicle dealership; he is not running a charitable nonprofit corporation. *See,* RSA 292 (requirements for charitable nonprofit corporation)

The Respondent wrote to the Department on October 31, 2011, acknowledging receipt of the 1st notice. He changed the old website of frankcoffeyauto.com to eliminate the reference to BUY HERE PAY HERE. He

had forgotten that the website contained this information. He agreed not to list or in any way advertise as a lender of money for any reason whatsoever or to lend money or extend credit. He stated that he had not listed nor will he list himself as a lienholder on a motor vehicle title. Essentially, he agreed to abide by the cease and desist order.

In testimony, Respondent explained that a salesman for Auto Solutions gathered price information about and took pictures of vehicles on his lot and then the ad was run containing the words "FINANCING AVAILABLE" without his knowledge or consent. As previously described, the information in the ad about the vehicles was accurate. For this finding, I do not rely on Exhibit A which was filed untimely and is unsigned. Having found the facts, I now turn to the legal analysis.

IV. DISCUSSION

The following discussion will illustrate the complexity of the issues presented in this case. I have been a trial lawyer in New Hampshire for nearly thirty (30) years. I understand completely that, as a presiding officer, I have two enormous advantages over the parties. First, I have the power of 20/20 hindsight. Second, I have the luxury of time. The parties must make decisions, and adopt strategies without knowing where the case will lead. Frequently, the parties' attention is necessarily diverted to other matters reducing the time available to devote to a particular case. I again thank the parties for allowing me the time to sort through the controlling statutes. I commend the parties for the time and effort that was put into this case.

A. Burden of Persuasion

In the Procedural Background section of this Order, I have highlighted

several provisions from the Notices as well as my opening statement at the hearing. The appropriate process was followed at the hearing in this case. I write to explain my analysis of the process for future cases. I will begin with the burden of persuasion.

The starting point of this discussion is the reference to RSA 541-A:30 in the 2nd Notice. This statute applies to agency actions against licensees. A license is a privilege. When an agency has discovered relevant facts or conduct of a licensee that support revocation, suspension, etc. of a license, it may not do so without notice to the licensee. RSA 541-A:30,II.[1] It must also give the licensee an opportunity, through an adjudicative proceeding, **to show compliance with all lawful requirements for the retention of the license.** (emphasis added).*Id.* With this language, the legislature has placed the burden of persuasion on the licensee. At the adjudicative proceeding, the agency may rest on the facts and conduct provided in the notice. The licensee must shoulder the burden of persuasion to establish compliance with all lawful requirements.

I have reviewed RSA 361-A, RSA 541-A, and JUS 800 and I have found nothing that places the burden of persuasion on a non-licensee such as the Respondent at this juncture in this case. The closest example I have found is RSA 361-A:11,VIII which may come into play if the administrative fine in that section applies. This paragraph contains a provision that a person may avoid liability if the person sustains the burden of proof that such person did not know, and in the exercise of reasonable care could not have known, of the existence of facts by reason of which the liability is alleged to exist. (emphasis added) Where

[1] RSA 541-A:30, III provides for immediate suspension prior to notice.

the Respondent is the sole actor, as is the case here, this provision has no application.

I note that RSA 541-A:30-a,III(d) and (e) provide the authority for rules addressing (d) Burden of proof, and (e) Standard of proof. Jus 812.02 covers both Standard and Burden of Proof: The party asserting a proposition shall bear the burden of proving the truth of the proposition by a preponderance of the evidence.

I believe a fair reading of the Notices in this matter compels the conclusion that the Department is asserting the proposition that the Respondent violated RSA 361-A. As highlighted above, Paragraph 14 of the 2nd Notice provides, in pertinent part, that the **Department has the burden of setting forth a *prima facie* case….** (emphasis added) This statement is accurate and describes how the hearing was handled: **Pursuant to the notice of hearing, the burden of going forward on the issues is on the Department, i.e. the Department shall have the burden of setting forth a *prima facie* case….**(Opening Statement)

Moreover, the historical process is consistent with the Department bearing the burden of persuasion. Jus Rule Jus 812.03 Order of Proceeding (b) Testimony shall be offered in the following order:(1) The party or parties bearing the burden of proof and such witnesses as the party may call…. Traditionally, the Department has taken the lead in presenting testimony.

Therefore, the Department has the burden of persuasion in this matter, a burden that does not shift.

B. Standard of proof

The standard of proof is clearly set forth in the Jus rules. Jus 812.02, previously quoted, identifies the standard as proof by a preponderance of the evidence.

Jus 802.01(i) defines "Proof by a preponderance of the evidence" as a demonstration by admissible evidence that a fact or legal conclusion is more probable than not to be true.

C. *Prima Facie* Case/Burden of production

A *prima facie* case is a demonstration by admissible evidence that the relevant facts and the legal elements of the violation are more probable than not to be true. The Department must carry the burden of persuasion and the burden of production. The Respondent may, and in this case did, move to dismiss the case when the Department rests, relying on the argument that a *prima facie* case was not proved. Once the Department has established a *prima facie* case, however, the burden of production shifts to the Respondent. …[**T]he Department shall have the burden of setting forth a *prima facie* case and then the Respondent shall have the opportunity to show compliance with applicable law.** (Opening Statement) The Respondent must rebut a central fact or legal element. If the Respondent can do so, the burden of production shifts back to the Department. While this shifting of the burden of production back and forth can theoretically continue indefinitely, as a matter of practice, it does not.

D. The Statutory Requirements

RSA 361-A:3, I (show cause) and RSA 361-A:3-a (cease and desist) contain similar language regarding the basis for an order. An order shall be entered making such disposition of the matter as the facts require. RSA 361-A:3, I(show cause) The cease and desist order shall be vacated or made permanent as the facts require. RSA 361-A:3-a, I. A more global description is set out in RSA 361-A;5, VI. All actions by the Commissioner shall be taken only when the Commissioner finds such action necessary or appropriate to the public interest or

for the protection of consumers and consistent with the purposes fairly intended by the policy and provisions of Title XXXIII-A. RSA 361-A is the only statute in Title XXXIII-A.

E. RSA 361-A

We now come to the heart of the matter. What constitutes a violation of RSA 361-A and did the Respondent violate the statute? The former is a matter of statutory construction. For the latter, I will rely on the facts set out in section II. Because the Respondent made several motions to dismiss at the close of the Department's case, I will make a separate determination whether the Department established a *prima facie* case when it rested and in this determination I will not rely on facts provided during Respondent's testimony.

In interpreting the statutes, I will be guided by a number of well-settled principles of statutory construction. My goal is to apply statutes in light of the legislature's intent in enacting them, and in light of the policy sought to be advanced by the entire statutory scheme. *Soraghan v. Mt. Cranmore Ski Resort,* 152 N.H. 399, 401, 881 A.2d 693 (2005). " When construing the meaning of a statute, [I] will first examine the language found in the statute, and where possible, ascribe the plain and ordinary meanings to words used." *Conrad v. Hazen,* 140 N.H. 249, 251, 665 A.2d 372 (1995) (quotation omitted). " [I] interpret statutes not in isolation, but in the context of the overall statutory scheme." [965 A.2d 1120] *Appeal of City of Portsmouth,* 151 N.H. 170, 174, 855 A.2d 483 (2004). " When interpreting two statutes that deal with a similar subject matter, [I] construe them so that they do not contradict each other, and so that they will lead to reasonable results and effectuate the legislative purpose of the statutes." *Grand China v. United Nat'l Ins. Co.,* 156 N.H. 429, 431, 938 A.2d 905

(2007).

While not dispositive, the title of RSA 361-A is "Retail Installment Sales of Motor Vehicles." RSA 361-A:2 provides that no person shall engage in the business of a sales finance company or retail seller in this state without a license. The Department did not allege that the Respondent engaged in the business of a retail seller. There is no dispute that the Respondent does not have a license and his dealership is located in Milford, New Hampshire.

The elements that the Department must prove are that Respondent:

1. engaged in the business of

2. a sales finance company.

Like the Sirens' song, the Respondent repeatedly insisted that the Department could not prove that he was engaged in a business. I must turn a deaf ear to this argument. The Department proved that the Respondent registered his business with the secretary of state. He was licensed as a retail seller and then as a sales finance company and operated as such for many years. He has continued to sell motor vehicles since his license expired. As of October 16, 2009, he was an active title lienholder for 455 motor vehicles. In his proposed findings of fact, 22, the respondent describes his business as a "motor vehicle dealership." The Respondent is engaged in business. I have found that his business makes a profit. I do not agree, however, that making a profit is an essential requirement of a business. It is certainly a goal but a business that loses money or breaks even does not cease to be a business. Even if the Respondent made no profit on the 76 transactions that form the basis of this matter, he was still engaged in a business. The only issue that remains is whether he was engaged in the business of a sales finance company.

The answer to this question will require a journey through definitions contained in two statutes. During our journey, we must pass safely between Scylla and Charybdis. At times the journey will be circular. At one point, term A will be defined by using term B but the definition of term B will include term A, twice. Nevertheless, with patience and pluck, we will successfully reach the shores of Ithaca. Homer. *The Odyssey*.

Sales finance company is a defined term. In pertinent part, a sales finance company is a person engaged, in whole or in part, directly or indirectly, in the business of providing motor vehicle financing … to one or more retail buyers….RSA 361-A:1,XIII. The Respondent's whole business was selling motor vehicles directly. The issue is reduced to whether he was engaged in the business of providing motor vehicle financing to one or more retail buyers.

Retail buyer is a defined term. A retail buyer is a person who buys a motor vehicle from a retail seller and who executes a retail installment contract … with the retail seller…. RSA 361-A:1, IX. No lender is alleged to be involved in this matter so I have removed that reference from the statute. The definition of retail buyer brings us to the definition of a retail seller which I have parsed for the purpose of clarity.

A retail seller is a person who sells a motor vehicle

a) in this state, or

b) to a retail buyer and,

in regard to either a) or b) under or subject to a retail installment contract. RSA 361-A:1,XII.

The Respondent sold motor vehicles in this state. If the sale involved the execution of a retail installment contract, then the Respondent is a retail seller and

the buyer is a retail buyer. Consequently, the question that remains from the definitions of retail buyer and retail seller is whether the sales were under or subject to a retail installment contract, another defined term. In particular, was the Respondent engaged in the business of providing motor vehicle financing under an executed retail installment contract?

A retail installment contract (Term A) means an agreement pursuant to which …**a lien upon the motor vehicle**, which is the subject matter of a retail installment transaction (Term B), is retained or taken by a sales finance company…directly from a retail buyer, as security, in whole or in part, for the retail buyers obligation. The **term includes a …title loan agreement….** RSA 361-A:1,X. (emphasis added)

The Respondent retained a lien upon the 76 motor vehicles he sold which are the subject of this matter. He took the liens directly as security for the obligation to make the final payment. Was this a retail installment transaction? If so, the Respondent is a retail seller and the buyers are retail buyers.

The retail installment transaction brings us to Circe's Island. A retail installment transaction (Term B) means any consumer credit transaction as defined in RSA 358-K:1,V, evidenced by a retail installment contract (Term A) entered into … between a sales finance company and a retail buyer, wherein the retail buyer buys a motor vehicle subject to a retail installment contract (Term A, again) at a time price payable in one or more deferred installments. RSA 361-A:1,XI

In sum, a retail installment contract exists when there is a retail installment transaction which is evidenced by a retail installment contract.

The Respondent retained the 76 liens in order to remind the buyer to make

the final payment. The final payment is the time price payable in a deferred installment. I will explain below my view of the existence of a retail installment contract and thus a retail installment transaction.

Once restored to human form, our odyssey continues into RSA 358-K:1,V which defines a consumer credit transaction as a consumer credit sale or a consumer loan. I will spare the reader the definition of consumer loan because I determine that it does not apply. RSA 358-K:1,VI (Loan between a creditor and a debtor). A consumer credit sale means a sale of goods … in which the seller is a creditor, the buyer is a consumer, the goods … are purchased primarily for a personal, family or household purpose, and the debt is payable in installments ….RSA 358-K:1, IV.

The purchase of the 76 motor vehicles in this case was primarily for a personal, family or household purpose. The evidence in Exhibit 13 establishes that these were not commercial transactions for a non-personal purpose.

A simple circular definition is mere child's play for us at this point and, therefore, it is no surprise that a consumer is a buyer. RSA 358-K:1, III.

A creditor is a person who regularly extends credit that is subject to an interest or other charge…. The uncontroverted testimony in this case is that the Respondent did not charge interest or other charge. The other relevant uncontroverted testimony is that the Respondent allowed the consumer/buyer to leave with the auto while still owing the final payment. Creditor also means a person who regularly extends credit that is payable, by written agreement, in more than 4 installments. RSA 358-K:1,VIII.

The Respondent retained 76 liens over two years upon motor vehicles which he sold. He regularly extended credit. The liens were retained while the

Respondent advertised “BUY HERE PAY HERE,” and “FINANCING AVAILABLE.” These are terms that establish that the Respondent was financing the sale of the 76 motor vehicles. The Respondent’s unexplained failure to respond to the October, 2009 and February, 2010 letters from the Department is further evidence that this former licensee was aware of the law and he had no answer to explain why his practices did not require a license..

Each of the 76 retail buyers signed the application for a certificate of title identifying the Respondent as the only lienholder. The Respondent also signed each application. The evidence of the transaction also included a bill of sale from the Respondent’s purchase of the auto, a bill of sale for the consumers/buyers purchase, a title file and a receipt. The completed applications for certificate of tile contained in Exhibit 13 together with the bills of sale and receipts plus the evidence of the ads constitute an executed retail installment contract.[2] As day follows night, this conclusion means that each of the 76 transactions was a retail installment transaction; the Respondent was a retail seller; and, the 76 buyers/consumers were retail buyers.

There is a potential conflict between RSA 361-A:1, XI, the definition of a retail installment transaction as payable “in one or more deferred installments” and the definition of creditor in RSA 358-K which requires “more than 4 installments.” The conflict is easily resolved. RSA 358-K, as used in this matter, is a general statute. RSA 361-A is a more recently enacted, specific statute. It is a well settled rule of statutory construction "that in the case of conflicting

[2] It is worth pointing out that the 76 executed retail installment contracts violated RSA 361-A:7. This, however, is not part of the allegations and I give it no weight.

statutory provisions, the specific statute controls over the general statute." Appeal of Plantier, 126 N.H. 500, 510; 494 A.2d 270 (1985). Therefore, the transactions by the Respondent that involved only one deferred installment fall within the statutory definition**.**

I also conclude that the Respondent provided motor vehicle financing under a retail installment contract in the sale of the 76 motor vehicles for which he retained the lien. I reach this conclusion based only on the evidence presented by the Department:

The Respondent was registered with the secretary of state. The Respondent previously held a retail sellers license and then a sales finance company license that had expired. The Respondent continued to sell motor vehicles after his license expired. He was an active title lienholder on 455 motor vehicles. The Respondent retained 76 liens over two years upon motor vehicles which he sold. The liens were retained while the Respondent advertised “BUY HERE PAY HERE,” and “FINANCING AVAILABLE.” These are terms that establish that the Respondent was financing the sale of the 76 motor vehicles. Thus, he regularly extended credit. Each of the 76 retail buyers signed the application for a certificate of title identifying the Respondent as the only lienholder. The Respondent signed each application. The Respondent’s unexplained failure to respond to the October, 2009 and February, 2010 letters from the Department is further evidence that this former licensee was aware of the law and he had no answer to explain why his practices did not require a license.

Therefore, the Department proved a *prima facie* case. The Respondent’s Motions to Dismiss are DENIED.

The Respondent’s testimony carries him further away from safe harbor.

To choose two examples, he admits that he retained the liens to remind the retail buyers of their obligation to pay him the remainder of the Full Price of the motor vehicles. He retained records of the 76 transactions for three years and then shredded them after the Department requested them. Both of these facts support the order sought by the Department.

I conclude, therefore, as the facts require, as necessary and appropriate to the public interest, and for the protection of consumers, that the Respondent violated RSA 361-A:2 by engaging in the business of a sales finance company without a license. The cease and desist order is hereby made PERMANENT. The Show Cause Order is hereby GRANTED.

F. Failure to Produce Records

The Respondent's failure to provide the requested documentation is troubling. While there was previous correspondence, I find that the first formal request for records is contained in the May 31, 2011 letter. Exhibits 11 and 12. This letter was faxed to Respondent on May 31, 2011 and sent by certified mail on June 1, 2011. The Respondent signed for the letter but the green card is not dated. I find that it is more probable than not that the Respondent received either the fax or certified copy of the letter or both by June 10, 2011.

On August 18, 2011, the Department spoke with Respondent and pursuant to that conversation, on August 19, 2011, the Department sent Respondent copies of the 76 applications for certificate of title containing the liens held by him from January 1, 2007 to August 19, 2011. Exhibit 13. The Respondent received this letter on August 24, 2011. *Id.*

In the same correspondence, the Department informed Respondent that he needed to provide a full payment history, how much Respondent purchased the

vehicles for and sold them for and how much the Consumers paid. *Id*. The Department also requested copies of retail installment contracts, purchase and sales agreements and the contracts from the auctions and/or trade-ins if Respondent did not charge interest on these motor vehicle loans. *Id*. Respondent received this correspondence on August 24, 2011. *Id*.

Respondent failed to provide any of the requested documentation. The Department did not subpoena any of these documents. *See*, RSA 361-A:5, I. *See also* Jus 803.01(b)(4)(Power of presiding officer to issue subpoena)and Jus 811 (Good faith obligation to produce documents/Motion to Compel)

The Respondent retained several documents for each of the 76 transactions. These documents included, at least: a bill of sale for the purchase of the motor vehicle, a bill of sale for the sale of the motor vehicle, a title application and a receipt book. The Respondent testified that he kept records for three (3) years. Therefore, as of June 10, 2011, the Respondent had records for the portion of the 76 transactions from, at least, June, 2008. The Respondent never produced records that were requested by the Department. The Respondent testified that he shredded the records.

Once again, the distinction between a licensee and a non-licensee becomes relevant. RSA 361-A:9-a, I requires a licensee to keep and use business records as required by the Commissioner through the rulemaking process. These records are to be preserved for as long as the Commissioner requires. *Id*. This statute places no requirement on a non-licensee.

RSA 361-A:6-a presents a different avenue but one that is closed in this case. A close reading of the statute confines its power to examinations. There was no examination in this case. RSA 361-A:6-a is entitled Examinations. In

section I, the Commissioner is authorized to examine the business affairs of any person, whether licensed or not, to determine compliance with RSA 361-A. *See also* RSA 361-A:6-a, III. The Department has subpoena power to compel production of all relevant records. *Id.* at I; *See Also* RSA 361-A:5, I (Commissioner has subpoena power with the ability to seek an order from the superior court for non-compliance.) Under section II, The Department may examine the records of any person at any time, with or without notice. Entities are subject to periodic, special, regular or other examination. The section then sets out specific time limits and penalties for the production of records by licensees or persons that maintain their files and business documents in another state. The Respondent is in this state and is not a licensee. A thorough examination may be conducted under section III. The expense of an examination may be paid by a licensee or person. Section IV. The result of this activity is a report of examination. Section IV-a. Entities must, among other things, facilitate the examination. Section V. There is a detailed process for handling a report of examination. *Id.* at (a)-(c). I conclude that an examination was not conducted in this case.

There is also a different road which does apply to this case but does not lead to a violation. RSA 361-A:5, VII authorizes the Commissioner to investigate conduct. *See also* RSA 361-A:5, VIII (Regulatory functions authorized by the chapter include performing investigations.) RSA 361-A:6, VI contains a separate provision for the recovery of the cost of an investigation.

RSA 361-A:11 provides for penalties. A violation of the law, a rule or an order is a violation of the chapter. RSA 361-A:11-a

RSA 361-A:11, Sections I and II are criminal, beyond my jurisdiction, and

would require a much different standard of proof.

Section III authorizes restitution which I shall discuss below. Section IV authorizes a penalty against any person who holds or is a party to a retail installment contract that is not in compliance with the chapter. I will also discuss this below.

Sections V and VI are confined to a person who violates any rule or order. I cannot find a rule or an order that was violated in regard to the production of documents. Sections VII and VIII authorize imposition of a penalty for a violation of the chapter. I will discuss this in a different context below but I cannot identify a provision of the chapter that the Respondent violated in failing to produce the requested documents.

There was no subpoena issued in this matter. The Department's action was described as an investigation. Exhibits 11 and 12 (an initial investigation). There was no order to produce the records. At one time, there was a rule, Ban 2412.01, which required a person subject to RSA 361-A to make records available during an investigation but the rule was enacted in 2002 and was expired at all times relevant to this matter.

I am forced to conclude that the Respondent was not subject to an examination and that there is no statute, rule or order that provides a penalty for a non-licensee failing to produce records as a result of a letter request during an investigation.

As I stated at the beginning of this section, I am troubled by the Respondent's behavior in regard to the documents. I believe the Department has enough tools to prevent this situation from recurring. But in this case, it appears that the Respondent has gotten away with bad behavior.

As I discussed at the hearing, I have considered whether I can draw an adverse inference from the destruction of relevant evidence on the basis of the doctrine of spoliation. The doctrine is recognized in New Hampshire. *Murray v. Developmental Services of Sullivan County, Inc.* 149 N.H. 264,271, 818 A.2d 302, 309 (2003). I have already determined that Respondent violated the Chapter. An analysis of whether the doctrine of spoliation applies is not necessary in this case but it may be applicable in a future case.

While I will give no weight to the Respondent's failure to provide records, I have used his failure to respond to exhibits 7 and 9 as evidence that he knew he was operating in violation of RSA 361-A.

G. Restitution

The Respondent violated RSA 361-A. Exhibit 13 contains the identity of 76 consumers who were the victims of Respondent. RSA 361-A:11, III provides a formula for calculating restitution. The statute also prohibits the collection of any finance charge, delinquency, or collection charge. The Respondent testified that he did not collect any of these charges and there was no evidence to the contrary.

Under the formula, I must know the wholesale market value or the trade-in value of the vehicle, and the amount above these values charged to the consumers. I have none of these figures. It may be that one or more of the vehicles identified in Exhibit 13 are advertised in Exhibit 6 but without a VIN, I cannot make a determination that the advertised car more probably than not is the vehicle identified in the title application. Even if I could divine the advertised price, I cannot know whether the consumer was charged a lower price or what value the Respondent paid for the vehicle. I am faced with the conclusion that I

am unable to order restitution on the record before me.

H. Administrative Fines

RSA 361-A:11, IV provides for imposition of a penalty, upon notice and opportunity for hearing, on any person (other than a consumer) who holds or is a party to, in any manner, a retail installment contract that is not in compliance with this chapter. The Respondent is just such a person. The mandate of RSA 361-A:5,VI is that actions be taken only upon a finding that the action is necessary or appropriate to the public interest or for the protection of consumers.

Retail installment sales of motor vehicles are a heavily regulated business in New Hampshire. The Respondent spent many years as a licensee but was not satisfied with the results when he tried to enforce retail installment contracts against consumers. He was fully aware of the requirement to be licensed. He chose to flaunt the statute and to embark on a business contrary to the statute and devoid of the protection of consumers provided by RSA 361-A.

I determine that the Respondent knowingly violated the Chapter. RSA 361-A:11,VII provides for the same fine whether the violation was knowing or negligent. The administrative fine may not exceed $2,500 with each specified act constituting a separate violation. There are 76 violations. If I were to levy a fine based only on Respondent's knowing violation of the Chapter, it would be $2,500 per violation. I believe, however, there is at least one other factor that should be considered once it is necessary to determine the amount of an administrative fine. That factor is the extent of the Respondent's business.

I have information in Exhibit 6 that sheds some light on this factor. The exhibit contains 36 vehicles. All but two are advertised at prices at or below $5,000. The ad states accurately "many vehicles under $3,000." One of these is

at $699. The outliers are at $8,000 and $8,950. This may be a small sample but I believe it is representative given the circumstances of its genesis, a salesman trying to create the best possible ad in order to seek new business.

Having considered all the admissible evidence and the relevant legal conclusions, I set the administrative fine at $500 per violation, a total of $38,000. Payment of this amount shall be by check made payable to Treasurer, State of New Hampshire.

The payment of the fine is STAYED. As set out below, the appeal process begins with the filing of a Motion for Rehearing within 30 days of the order. If no motion is filed, the stay shall be automatically lifted and payment shall be due on the 31st day. The filing of a motion for rehearing will continue the stay of the payment until I issue a decision on rehearing.

V. RULINGS ON PROPOSED FINDINGS OF FACTS AND RULINGS OF LAW

I make the following findings of fact and rulings of law in response to the Respondent's Proposed Findings of Fact and Rulings of Law:

Findings of Fact

1-Granted

2-Granted to the extent that Respondent is an individual and does business in New Hampshire. The Respondent is also incorporated.

3-Granted in part, the Respondent did not have the burden of persuasion.

4-Granted

5-Granted

6-Granted

7-Granted Respondent was a lienholder on 76 titles.

8-Granted

9-Granted regarding the witness' testimony; the remainder is Denied: the witness also produced a number of exhibits and other evidence.

10-Granted regarding the witness' testimony; the remainder is Denied: the witness also produced a number of exhibits and other evidence.

11-Granted

12-Granted I note that the Respondent had no explanation as to why he never responded to this letter.

13-Granted that the ad in Exhibit 6 was a mistake based solely on the Respondent's testimony. Exhibit A is given no weight. Denied to the extent that the Respondent removed the ad. The ad remained in the week 38 publication.

14-Granted with the addition that Respondent also received a letter dated October 16, 2009 questioning whether he was operating as a sales finance company/retail seller. Respondent did not respond by November 19, 2009.

15-Granted to the extent that the next letter from the Department was received in June, 2011, 16 months after the previous contact. I specifically Deny the proposed finding that Respondent was actually unaware until that time of the significance of the liens. Even if I were to give credence to this finding, which I do not, his ignorance of the law was no excuse and was the direct result of his failure to respond to earlier letters. The remainder, therefore is Denied.

16-Granted to the extent that the reference was eventually removed but it was on the website at least from before October 16, 2009 until after April 8, 2010.

17-Granted

18-Granted The Respondent failed to respond in writing to all letters from the Department. His only written response followed service of the 1st Notice.

19-Granted to the extent that the phone call took place. The remainder is Denied. The Respondent did engage in the business of a sales finance company at all relevant times.

20-Granted

21-Granted

22-Granted

23-Granted as a matter of fact to the extent that Respondent testified that he does not recollect violating the statute. I find this testimony to be incredible. He did violate the statute and he knew it at all relevant times. He testified that there is no record of the 76 violations. This proposed finding is Denied. The Department produced records of the transactions. The Respondent testified that he had no records, I neither grant nor deny this testimony but I give it no weight. He did have records, if they no longer exist; it is because he shredded them.

24-Granted to the extent that the Respondent testified that liens were placed with the permission of the retail buyer. This testimony is given little weight. I conclude that the Respondent would not allow the sale unless the buyer agreed to the placement of the lien. The remainder is Denied. The buyers were under a contractual obligation to make the deferred payment.

25-Granted

26-Granted in regard to charging interest. The remainder is Denied. The Respondent intended and did make a profit and did derive income from the payment of the Full Price.

27-Granted to the extent that Respondent retained ownership of the 76 vehicles. The remainder is Denied.

28-Granted but the testimony was that this scenario rarely happened.

Rulings of Law

1. Granted
2. Granted
3. Granted except for the reference to injunctive relief.
4. Granted
5. Denied. The statutory reference is to the definition of a "legitimate business" and the purpose of the definition used in that particular statute is to narrow access to motor vehicle records. RSA 361-A is designed to protect consumers and the definition is intended to be more expansive. The Attorney General's position in the *Devere* brief is not binding. Neither of these citations sheds any light on the statute at issue.
6. Granted with the understanding that one definition from Indiana, which is not binding, includes the purpose of profit, not actually making profit. This citation sheds no light on the statute at issue.
7. Granted with the understanding that a Superior Court order is not binding and the activity at issue in this case is the sale of motor vehicles. This activity does contain a profit motive.
8. Granted but not on point. The statute at issue was enacted at least in part to protect consumers. It would be illogical for the legislature to strip away that protection based on whether the seller was making or intending to make a profit.
9. Denied. Profit is not required under the statute and the circumstantial evidence supports the conclusion that the Respondent made a profit.
10. Denied see finding of fact 26
11. Denied see finding of fact 26

12. Denied see finding of fact 26 The Respondent failed to rebut the Department's *prima facie* case
13. Denied see Order
14. Denied see Order. The executed applications for certificates of title, the liens, the shredded bills of sale and receipts, the failure to respond to the Department's early letters, and the ads constitute a preponderance of evidence that the Respondent was engaged in the execution of retail installment contracts without a license.
15. Denied. While much of the discussion is accurate, the statute does not limit the term retail installment contract. It provides a number of examples which are "included". The Respondent placed the liens on the titles in order to remind the retail buyers to pay the last installment on their contract.
16. Denied See Order. Reasonable cause is the wrong standard for this hearing.
17. Denied See Order
18. Denied. The Respondent did not have a burden of proof. He failed to carry the burden of production. The cease and desist order is made Permanent.

VI. CONCLUSION

I conclude, therefore, as the facts require, as necessary and appropriate to the public interest, and for the protection of consumers, that the Respondent violated RSA 361-A:2 by engaging in the business of a sales finance company without a license. The cease and desist order is hereby made PERMANENT. The Show Cause Order is hereby GRANTED.

Having considered all the admissible evidence and the relevant legal conclusions, I set the administrative fine at $500 per violation, a total of $38,000. Payment of this amount shall be by check made payable to Treasurer, State of New Hampshire.

The payment of the fine is STAYED. As set out below, the appeal process begins with the filing of a Motion for Rehearing within 30 days of the order. If no motion is filed, the stay shall be automatically lifted and payment shall be due on the 31st day. The filing of a motion for rehearing will continue the stay of the payment until I issue a decision on rehearing.

VII. APPEAL

The process for appeal is governed under RSA 541:3, RSA 541:4 and Administrative Rule Jus 813.04.

SO ORDERED.

SIGNED,

Dated: 6/4/12

/s/
STEPHEN J. JUDGE, ESQ.
PRESIDING OFFICER