

State of New Hampshire Banking Department

In re the Matter of:)		
)		
State of New Hampshire Banking Department)	Case No.:	14-173
(Petitioner))		
)		
And)	Order on the Merits	
)		
Ed Walter's NHCars.net, LLC and Edward J.)		
Walter as Manager/Member of Edward J.)		
Walter's NHCars.net, LLC)		
(Respondents))		

Order

I. Introduction

Respondent Ed Walter's NHCars.net, LLC ("Ed Walter's NHCars.net" or "Respondent") was registered as a New Hampshire Limited Liability Corporation (LLC) on December 31, 2007, effective on January 1, 2008. Department's Exhibits 2 - 3 (All Exhibits hereafter "Ex. _"). Respondent Edward J. Walter ("Walter" or "Respondent") has been the sole managing member of Ed Walter's NHCars.net, LLC since its creation on December 31, 2007. Ex. 2 - 3. Ed Walters NHCars.net, LLC and Edward J. Walters are collectively the "Respondents". Ex. 2 - 3. The Respondents are engaged in the business of "Auto Sales" and/or "Auto Sales and Service" at 1118 Hooksett Road, Hooksett, New Hampshire 03106. Ex. 2 - 3. Ed Walter's NHCars.net, LLC is not licensed as either a retailer seller or as a sales finance company with the New Hampshire Banking Department. Ex. 1.

The State of New Hampshire Banking Department ("Department" or "Petitioner") issued an Order to Cease and Desist ("the Order") pursuant to its authority under RSA 361-A:3-a, I to the Respondents on February 29, 2016, ordering that they "cease and desist engaging in the business of a sales finance company and retail seller without a license". The order resulted from an investigation conducted by the Department's Consumer Credit Division, which commenced on or about October 6, 2015. The Order alleged that the Respondents, Ed Walter's NHCars.net, LLC and Edward J. Walter engaged in unlicensed sales finance company and retail seller activity, that the Respondents' failure to obtain a statutorily required license was knowing or negligent, and that Edward J. Walter, individually and as owner of Ed Walter's NHCars.net , LLC knowingly or negligently materially aided the unlicensed activity.

On August 10, 2017 the Petitioner moved to narrow the focus of the Cease and Desist Order by dismissing or amending certain allegations. Motion to Dismiss Specific Allegations. The Presiding Officer granted the Motion to Dismiss Specific Allegations. Proposed Order of August 17, 2017. The issues on appeal include:

1. Whether Respondents have engaged and continue to engage in the business of a sales finance company without a license, in violation of RSA 361-A:2, I;

2. Whether Respondents' failure to obtain such license has been knowing or negligent, in violation of RSA 361-A:11, VII;
3. Whether Edward J. Walter, individually and as owner of Ed Walter's NHCars.net, LLC has knowingly or negligently materially aided in the acts constituting engaging in business without a license;
4. Whether Respondents shall pay an administrative fine of \$456,427.13 for knowingly or negligently violating RSA 361-A:2, I.

The Hearing was held on Tuesday, September 26, 2017, starting at 9:36 a.m. with the Petitioner and Respondent participating. An audio recording of the hearing was made.

II. Facts

A. The Investigation

During the hearing on September 26, 2017, Banking Department Investigator Kimothy Griffin testified that the Petitioner's interest in the Respondent's activities was spurred after reading a newspaper article. Mr. Griffin began researching the Respondents and their actions. Mr. Griffin testified to the evidence from his investigation that included documents from the Office of the New Hampshire Secretary of State, Corporate Division, filed by the Respondents declaring their business purpose as car sales. Mr. Griffin's research also indicated that the Respondents recorded numerous liens with the State Department of Motor Vehicles, Title Bureau, against vehicles they sold to consumers. Based on this research the Petitioner became concerned that the Respondent was conducting retail seller or sales finance activity (or both), without a license. NH RSA 361-A:2, I requires any person involved in retail seller or sales finance activity in this state to apply for and receive a license from the New Hampshire Banking Department. Mr. Griffin was authorized by the Consumer Credit Division of the New Hampshire Banking Department to visit the Respondents' place of business in person to identify and examine any files and records to determine if unlicensed retail seller or sales finance activity had been conducted.

Mr. Griffin and Consumer Credit Division Examiner Nicole Jeanson visited the Respondents business at 1118 Hooksett Road, Hooksett, NH 03106 on October 21, 2015, and were denied access to business records by Edward J. Walter. They provided Mr. Walter with a subpoena requiring him to produce the records on or before November 4, 2015. Ex. 21. Mr. Walter and the Petitioner's investigators met again on November 4, 2015, at which time Mr. Walter partially complied with the subpoena, but did not provide all of the requested documents. Department investigators returned to Ed Walter's NHCars.net, LLC at 1118 Hooksett Road, Hooksett, NH a third time on February 9, 2016. Again Mr. Walter provided additional documents but did not make all of the information requested by subpoena available to the Petitioner.

A fourth on-site visit to Ed Walter's NHCars.net by the Department occurred on October 18, 2016. This time Investigator Griffin was accompanied by Consumer Credit Division Examiner David Levesque. Mr. Levesque's work focuses on issues relative to money transmitting. The specific purpose of this visit was to investigate functional aspects of the Respondents' web site that appeared to facilitate the transfer of money from consumers to the Respondents.

B. Business Model

During the Banking Department's visits to the Respondents' Hooksett location following presentation of the subpoena, Mr. Griffin and Ms. Jeanson made copies of files that the Petitioner alleges are evidence that the Respondents conducted unlicensed retail seller or sales finance activity during sales of motor vehicles to consumers between March of 2010 and October, 2015. Most of the files contain at least two documents: A Dealer Recap sheet and a Purchase and Sales Agreement between the consumer and Ed Walter's NHCars.net.

The Dealer Recap sheets identify, among other things, the consumer, the vehicle being purchased, the sale price of the vehicle agreed to between the Respondent and the consumer, various fees and commissions that will be collected from the consumer and a Profit Analysis.

The Purchase and Sales Agreement notes that the vehicle sales transaction is between the Respondents and the particular consumer listed, reflects the values listed on the corresponding Dealer Recap sheet, and the dollar value and frequency of regular payments that must be made by the consumer to the Respondents until the agreement is fulfilled under penalty of repossession for failure on the part of the consumer to perform as agreed.

C. Respondent Edward J. Walter

As evidenced by official records on file with the New Hampshire Secretary of State, Respondent Edward J. Walter has been the sole Manager and Member of Ed Walter's NHCars.net, LLC during the entire existence of the corporation. Those records state that the primary business purpose of the company is "auto sales."

D. License Required

The retail sale of motor vehicles in New Hampshire is governed by Chapter 361-A and requires any retail seller as defined by RSA 361-A:1, XII, or sales finance company as defined by RSA 361-A:1, XIII, to be licensed by the New Hampshire Banking Department (RSA 361-A:2 Licensing of Sales Finance Companies and Retail Sellers Required).

E. Allegations of unlicensed retail seller activity dismissed

The Petitioner's original Order to Cease and Desist presented to Ed Walter's NHCars.net, LLC and to Edward J. Walter on February 29, 2016, alleged that the Respondents "...have engaged and continue to engage in the business of a sales finance company or (emphasis added) a retail seller in New Hampshire without a license." On August 10, 2017 the Petitioner submitted a Motion to Dismiss Specific Allegations. Among other things, that motion sought to dismiss all allegations that the Respondents had conducted unlicensed retail seller activity. The Motion was granted on August 17, 2017. Order on Petitioner's Motion to Dismiss Specific Allegations. Therefore our review will focus only on the allegations of unlicensed sales finance activity and will not consider whether or not the Respondents also conducted unlicensed retail seller activity.

III. Analysis

A. No payment histories

In the Subpoena Duces Tecum served on the Respondents by Investigator Griffin on October 21, 2015, item 7 of Exhibit A demands that the Respondents provide “[c]opies of any and all receipts, transaction histories, warranties, extended service contracts, sales agreements, title applications, odometer disclosures, and temporary registration forms related to the files or documents identified in items #1-6 above.” Ex. 21.

Investigator Griffin and Examiner Jeanson testified that, repeated attempts notwithstanding, the Petitioner never received all of the documents it requested from the Respondent. Specifically, they mentioned several times that they did not receive requested information on receipts and transaction histories. In his cross-examination of both of the Petitioner’s witnesses Counselor Chisholm effectively confirmed that his client, the Respondent, had not complied with the properly served subpoena by providing the Department with any documents evidencing receipt of payments of any sort for the consumer transactions in question.

The lack of those payment histories is immaterial to this matter. The exhibits presented by the Petitioner indicate that the Respondents are a sales finance company on the strength of the contracts they signed with numerous New Hampshire consumers who agreed to purchase a vehicle for a “sum substantially equivalent to, or in excess of, the total value of the property” and to have the balance due after down payment “payable by written agreement in more than four installments”. RSA 361-A:1,X; Reg. Z, 12 CFR 226.

There is no requirement that payments on the contracts be made in order for an entity to fit the definition of a sales finance company that must be licensed by the Banking Department prior to commencing business in New Hampshire.

B. Respondent is a sales finance company

RSA 361-A:1, XIII defines a "sales finance company" as “a person engaged, in whole or in part, directly or indirectly, in the business of providing motor vehicle financing in this state to one or more retail buyers,...”.

RSA 361-A:1, IX defines “retail buyer” or “buyer” as “a person who buys a motor vehicle from a retail seller and who executes a retail installment contract either with the retail seller *or with any lender*.” (The emphasis added to this definition points out that the seller of the motor vehicle does not need to be performing as a retail seller to be subject to this statute - an important fact since, in their Motion to Dismiss Specific Allegations, the Petitioner requested that all allegations against the Respondent of retail seller activity be dismissed.)

RSA 361-A:1, X defines “retail installment contract” or “contract” as “an agreement pursuant to which the title to, the property in, or a lien upon the motor vehicle, which is the subject matter of a retail installment transaction, is retained or taken by a sales finance company indirectly from a retail seller or

directly from a retail buyer, as security, in whole or in part, for the retail buyer's obligation. The term includes a promissory note, security agreement, finance agreement, chattel mortgage, conditional sales contract, title loan agreement, rent-to-own agreement, and contract for the bailment or leasing of a motor vehicle, any of which constitutes a 'credit sale' under Federal Reserve Board Regulation Z, Truth-in-Lending, 12 C.F.R. 226, as amended from time to time, and a lease as defined in RSA 361-D (except as limited by RSA 361-A:7-a)."

Federal Reserve Board Regulation Z, Truth-in-Lending, 12 CFR 226.2, (16) defines credit sale as a "sale in which the seller is a creditor". The definition is further refined by the conditions that the consumer agrees to pay as compensation for use a sum substantially equivalent to, or in excess of, the total value of the property...and will become the owner of the property upon compliance with the agreement. (This definition accurately describes the contractual relationships entered into between the Respondent and consumers they sold motor vehicles to.)

None of this requires payments to actually be made to cause an entity to fit the definition of a sales finance company. The Respondents are a sales finance company required to be licensed by the Banking Department prior to commencing business.

C. Evidence of unlicensed sales finance activity

Sales finance transactions, also known as "Buy Here – Pay Here" vehicle purchases, involve an automobile dealership itself extending credit to purchasers of automobiles without the assistance of an outside source of funding (like a bank or credit union) for each transaction. In this case, the credit extended to the consumer is the balance due on the sale price of the vehicle, which will be paid to the sales finance company in equal payments at regular intervals over a set period of time.

Filings made by the Respondent with the New Hampshire Secretary of State establish that the business purpose of the corporation is "AUTO SALES AND SERVICE". Ex. 2.

Petitioner submitted documents copied from the Respondents' files during the Banking Department's several visits in late-2015 and early-2016 to the 1118 Hooksett Rd., Hooksett, NH offices of Ed Walter's NHCars.net, alleging that they are evidence that the Respondents engaged in 178 sales finance transactions between 2010 and 2015. Exs. 14, 15, 16, 17, 18, 19 and 20. Most of these transactions are documented by the Respondent with Dealer Recap Sheets that identified the Respondent as Lienholder and also include:

- Personally identifiable information about the purchasing consumer,
- Identification numbers and other important details of the vehicle to be purchased,
- The agreed-to price of the vehicle,
- The amount to be "financed",
- The financing terms, and
- Other important details of the transaction, such as the amount of down payment, value of any trade-in vehicle, additional charges and fees, the cost of any warranty, etc.

The Dealer Recap sheet is an internal document that is not shared with the consumer and is intended to assist the auto dealer in their efforts to determine the profitability of each transaction.

The transaction documents in most of the copied files also include Purchase and Sales Agreements between the Respondent and their consumer. And, while the Dealer Recap Sheets consistently state that balance due to the seller is “financed at 0.00% for a term of 0 Monthly payments” (emphasis added), the Purchase and Sales Agreements contradict the implication that a retail installment contract is not involved by clearly stating that the customer agrees to pay the outstanding balance by consistently making payments to the Respondent at an agreed to rate of frequency (such as weekly, bi-weekly or monthly) until the balance due is paid in full. Of the two documents laying out the terms of the transaction, only this Purchase and Sales Agreement is agreed to and signed by the consumer and the Respondents. Therefore, the Purchase and Sales agreements signed by consumers and the Respondents are the documents evidencing a retail installment contract as defined by RSA 361-A:1, X and a retail installment transaction as defined by RSA 361-A:1, XI.

In addition, the Petitioner submitted several exhibits as evidence of the Respondents’ performance as a sales finance company, including:

- A print out of a consumer complaint made to the Better Business Bureau regarding a “buy here pay here” motor vehicle loan with Ed Walter’s NHCars.net, LLC. Ex. 5.
- A print out of a positive review of NHCars.net on www.dealerrater.com in which the consumer describes their experience using the company’s “pay here” system for acquisition of a truck with “reasonable payment options”. Ex. 6.
- A print out from the NHCars.net web site including a credit application, Ex. 7.

D. License required

RSA 361-A:2 requires anyone conducting sales finance business or activities in New Hampshire to apply for and receive a license to do so from the Bank Commissioner. The Petitioner provided evidence, a print-out from the Banking Department licensing database, showing that the Respondents do not have a license to conduct sales finance activity. Ex. 1.

361-A:2 Licensing of Sales Finance Companies and Retail Sellers Required. –

I. No person shall engage in the business of a sales finance company or retail seller in this state without a license therefor as provided in this chapter. Persons subject to this chapter shall be responsible for the supervision of their employees, agents, and branch offices. No state or federally chartered bank, savings bank, trust company, credit union, cooperative bank, or industrial bank shall be required to obtain such a license but shall comply with the provisions of RSA 361-A:7-12, unless otherwise exempted in this chapter.

The Petitioner alleges that the Respondent committed 178 individual unlicensed sales finance transactions between 2010 and 2015 and submitted confidential Exhibits 14, 15, 16, 17, 18, 19 and 20 as evidence of those alleged violations. The Petitioner and its witnesses stated that the documents confirm those unlicensed transactions.

The Respondent did not challenge any of the exhibits submitted by the Petitioner or the testimony that they are evidence of sales finance activity.

E. Negligent unlicensed sales finance activity

On July 11, 2016, Ed Walter's NHCars.net, LLC submitted an application and \$50 application fee to the New Hampshire Banking Department to become a licensed Retail Seller. A query of the Department's Licensee database conducted on March 2, 2017 listed the license status as "Withdrawn W/O License", with the additional comment "3/2/2017 – withdrawn for failure to complete application." Ex. 1.

The submission of an application and payment of the application fee by the Respondents to the New Hampshire Banking Department indicates that the Respondent became aware at some point that a license from the Department was required to conduct sales finance activity and that their business model included sales finance activity that required licensing.

It is noted that the license application was submitted to the Department by the Respondents in July of 2016, more than eight months after the Petitioner's first on-site visit to Ed Walter's NHCars.net, LLC to investigate and discuss allegations of unlicensed sales finance activity, and that the files collected by the Petitioner and submitted as Exhibits 14, 15, 16, 17, 18, 19 and 20 cover allegations of illegal activity on the part of the Respondent from calendar years 2010 through 2015. However it is also noted that, during closing arguments, Respondent pointed out that the Petitioner did not present any evidence that the Respondent continued to conduct Sales Finance activity after being informed of the licensing requirement.

It is possible that the Respondent was unaware of the licensing requirements of RSA 361-A. It is also possible that the Respondent has redesigned their business model after becoming aware of these state laws to avoid performing in any manner that would require them to be licensed by the Banking Department. For instance, the Respondents could abstain from any activities relative to vehicle financing by selling only to consumers who personally arrange their own financing without any assistance from the unlicensed dealership or through cash sales.

None of the exhibits or testimony presented by the Petitioner indicates that the Respondent continued to conduct illegal sales finance activity after it was notified by the Banking Department that a license was required. Therefore, absent evidence to the contrary, we find that the Respondents have violated RSA 361-A negligently.

F. Penalties

The Petitioner has proven that the Respondents conducted unlicensed sales finance activity. The Cease and Desist Order, as amended by the Petitioner's Motion to Dismiss Specific Allegations, which was approved by the Presiding Officer on August 17, 2017, alleges 178 separate violations.

361-A:11 Penalties. –

I. Any person who shall violate any provisions of this chapter, or engage in the business of a sales finance company in this state without a license therefor as provided herein, shall be guilty of a misdemeanor if a natural person, or guilty of a felony if any other person.

361-A:11 Penalties. –

VI. Any person who negligently violates any rule or order of the commissioner may, upon notice and opportunity for hearing, except where another penalty is expressly provided, be subject to suspension, revocation, or denial of any registration or license, including the forfeiture of any application fee, or imposition of an administrative fine not to exceed \$1,500 for each violation in lieu of or in addition to such suspension or revocation as may be applicable under this title for violation of the provision to which a rule or order relates. Each of the acts specified shall constitute a separate violation.

361-A:11 Penalties. –

VIII. Every person who directly or indirectly controls a person liable under this section, every partner, principal executive officer or director of such person, every person occupying a similar status or performing a similar function, every employee of such person who materially aids in the act constituting the violation, and every licensee or person acting as a common law agent who materially aids in the acts constituting the violation, either knowingly or negligently, may, upon notice and opportunity for hearing, and in addition to any other penalty provided for by law, be subject to such suspension, revocation, or denial of any registration or license, including the forfeiture of any application fee, or an administrative fine not to exceed \$2,500, or both. Each of the acts specified shall constitute a separate violation, and such administrative action or fine may be imposed in addition to any criminal or civil penalties imposed. No person shall be liable under this paragraph who shall sustain 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.

As outlined earlier, the violations of RSA 361-A are evidenced by the existence of signed Purchase and Sales Agreements between the Respondents and consumers for the purchase of specific motor vehicles. Whether payments were actually made by the consumer or liens filed by the Respondent are not relevant events to the fact that RSA 361-A:2 required Ed Walter's NHCars.net, LLC and Edward J. Walter to be licensed by the Banking Department *prior* to commencing sales finance activity. A payment history would only confirm that the consumer held up their end of the contract and a lien would only indicate that the Respondent took steps to assure that they would be able to recover the collateral if the consumer failed to make the agreed-

to payments. Neither is necessary to confirm the illegal proffering and signing of retail installment contracts by the Respondent as an unlicensed sales finance company.

Therefore, to calculate a reasonable fine to assess against the Respondents, we reviewed each of the 178 transaction files included in confidential Exhibits 14, 15, 16, 17, 18, 19 and 20 to determine how many of them include a *signed* Purchase and Sales Agreement between the Respondent and a consumer that anticipated more than four installment payments. Twenty of the files did not include a signed Purchase and Sales agreement and have been disallowed as evidence of unlicensed sales finance activity, leaving 158 violations of RSA 361-A by the Respondents.

Respondent Ed Walter's NHCars.net, LLC negligently conducted 158 unlicensed sales finance transactions from calendar year 2010 through calendar year 2015. The maximum fine allowed by RSA 361-A:11, VI is \$1,500 per violation or, in this case, \$237,000. The primary purpose of RSA 361-A is to provide consumer protection. The Petitioner did not submit evidence of consumer complaints or harm to consumers resulting from the actions of Ed Walter's NHCars.net, LLC, nor did the Petitioner argue that the Respondent continued to conduct unlicensed sales finance activity once they were made aware of the licensing requirements of RSA 361-A. With these as mitigating factors, we find that the Respondent, Ed Walter's NHCars.net shall pay a fine of \$100 for each of 158 violations or \$15,800.

IV. Conclusions and Findings

No dispute exists as to whether the Respondents failed to comply with the licensing requirements of RSA 361-A.

Based on the foregoing, I issue the following Order:

1. Respondent Ed Walter's NHCars.net, LLC negligently committed 158 acts of unlicensed sales finance activity between 2010 and 2015 and shall pay an administrative fine of \$15,800.
2. Payment of these amounts shall be by check made payable to Treasurer, State of New Hampshire.
3. **The payment of the fine is STAYED.** The appeal process begins with a Motion for Rehearing within 30 days of this 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 further order.

So Ordered:

Date:

10/26/17



Gerald H. Little

