

STATE OF NEBRASKA
Department of Banking & Finance

IN THE MATTER OF:)	
)	FINDINGS OF FACT
Red D Cash Lincoln, Inc.,)	CONCLUSIONS OF LAW
2601 North 11 th Street,)	AND
Lincoln, Lancaster County, Nebraska)	CONSENT ORDER

THIS MATTER comes before the Nebraska Department of Banking and Finance (“DEPARTMENT”), by and through its Director, pursuant to its authority under the Delayed Deposit Services Licensing Act, Neb. Rev. Stat. §§ 45-901 to 45-929 (Reissue 2004; Cum. Supp. 2010) (“the Act”). Pursuant to Neb. Rev. Stat. § 45-921 (Reissue 2004), the DEPARTMENT has investigated the actions and examined the books, accounts, and records of Red D Cash Lincoln, Inc., 2601 North 11th Street, Lincoln, Lancaster County, Nebraska (“RED D CASH”). As a result of such investigation and examination, and being duly advised and informed in the matter, the Director and RED D CASH enter into the following Findings of Fact, Conclusions of Law, and Consent Order.

FINDINGS OF FACT

1. RED D CASH currently holds a provisional delayed deposit services business license under the Act. The DEPARTMENT issued RED D CASH its provisional license effective May 1, 2010, pending resolution of this matter. License #1807 was originally granted October 1, 1994, and has been renewed annually on May 1st since that time pursuant to Neb. Rev. Stat. § 45-910 (Cum. Supp. 2010).
2. References in this Consent Order to customers of RED D CASH will be by way of initials, in order to protect the privacy of such customers. RED D CASH knows or

should know the identity of these customers. If RED D CASH is unable to ascertain the identity of these customers, the DEPARTMENT will provide a list of these customers upon receipt of a written request.

3. On May 19, 2009, the DEPARTMENT received a consumer complaint regarding RED D CASH's collection practices. Customer MW claimed that she entered into a delayed deposit contract with RED D CASH, and, when she was unable to pay for the delayed deposit service at the agreed upon time, RED D CASH turned her check over to Diversion Services, Inc. ("Diversion Services") for collection. MW asserted that this method of collection included a request for the Lancaster County Attorney to pursue criminal charges for passing a bad check.

4. According to Diversion Services' "Overview of Programs and Services" as contained in its 2007 Annual Report, Diversion Services is a Nebraska corporation that contracts with Lancaster County and the City of Lincoln to manage the Adult Pre-Trial Diversion Program for the Lancaster County Attorney and the Lincoln City Attorney. The diversion program permits eligible adult offenders to seek dismissal of criminal charges or avoidance of charges altogether by agreeing to complete specified conditions.

5. As part of Diversion Services' contract with Lancaster County, it coordinates the County Attorney Bad Check Restitution Division. According to its "Overview of Programs and Services":

Diversion Services processes . . . bad checks each month that businesses and individuals turn over to the County Attorney for prosecution and restitution. Diversion Services receives \$7.00 of the \$10 per check statutory fee paid by holders of bad checks who request prosecution.

6. The services provided by Diversion Services as part of its bad check restitution program include collecting and depositing statutory fees with the Lancaster County

Treasurer, processing bad checks, sending restitution letters to check writers, collecting and depositing restitution payments, and issuing restitution checks to holders of bad checks.

7. On June 26, 2009, the DEPARTMENT commenced an investigation and examination of RED D CASH (“initial examination”) pursuant to Neb. Rev. Stat. § 45-921 (Reissue 2004). This initial examination included an on-site visitation of, and the service of a subpoena for production of documents from, RED D CASH’s Lincoln, Lancaster County, Nebraska location.

8. As part of its initial examination, the DEPARTMENT directed RED D CASH to produce:

Copies of any and all agreements with Diversion Services, Inc. regarding the collection, attempted collection, or threat of collection of delayed deposit customer non-sufficient funds checks or checks not otherwise paid. If no documents exist regarding an agreement with Diversion Services, Inc., describe in a written narrative any undertaking or agreement with that office regarding the collection of non-sufficient funds checks or checks not otherwise paid.

9. On June 26, 2009, RED D CASH delivered a written narrative (“first narrative”) to the DEPARTMENT in response to the DEPARTMENT’s initial examination.

10. In its first narrative, RED D CASH responded:

There is no agreement between Diversion Services, Inc. and Red D Cash Lincoln, Inc. Red D Cash Lincoln has in the past filled out a form provided to it by the Diversion Services, Inc. when forwarding an unpaid item for collection to Diversion Services. With each check that has been submitted for such collection services, a form is also submitted

11. The DEPARTMENT’s initial examination produced documents for one hundred forty-five (145) RED D CASH accounts. At the time the DEPARTMENT obtained the documents, RED D CASH was apparently attempting in-house collections on forty-seven (47) accounts (“in-house collection accounts”). RED D CASH had

resorted to other means of collection for the remaining ninety-eight (98) accounts (“Subject Accounts”).

12. The documents obtained by the DEPARTMENT from RED D CASH’s in-house collection accounts consist, for the most part, of a copy of the customer’s delayed deposit service agreement (“the Agreement”) and a copy of the customer’s check. Documents from the Subject Accounts generally consist of a copy of the Agreement, an initial form letter sent to customers with delinquent accounts, and a completed form entitled, “LANCASTER COUNTY ATTORNEY’S OFFICE REQUEST FOR CRIMINAL PROSECUTION FOR BAD CHECKS” (“the Form”).

13. The Agreement provides, in part:

I (the customer) have requested [RED D CASH] to make a cash advance to me in exchange for my personal check, which will be held until a designated date for deposit, or which I may pick up by paying the face amount of my check in cash.

...

You (RED D CASH) retain the right to deposit my check and collect the amount I owe you, including a collection action in any state court in Lancaster County, Nebraska

...

The maximum penalty charged if the check is returned as not negotiable, or NSF, is Fifteen Dollars (\$15).

14. The Form contains questions numbered 1 through 15. Each question then contains space for the person completing the Form to respond appropriately. Question 10 on the Form inquires, “Did person [*sic*] ask that any of these checks be held or post-dated?” Following the question is space to answer either “Yes” or “No” and additional space to expand upon a “Yes” answer.

15. The Forms obtained by the DEPARTMENT for RED D CASH customers appear to have been completed and signed by Barbara Olsen, RED D CASH's Secretary/Treasurer. Directly above the signature line of the Form, it states:

The undersigned has read this form and agrees to the conditions set forth thereon: and further, states that he or she has filled out this complaint; that the above statements are true; and that he or she will testify in Court under oath to these statements.

16. RED D CASH answered "No" to Question 10 on ninety-four (94) of the ninety-eight (98) Forms obtained during the DEPARTMENT's initial examination. Question 10 was not visible on the remaining four (4) Forms, as copies of the checks referred for collection had been photocopied over the question.

17. Upon receipt of the Form and the customer's check from RED D CASH, Diversion Services apparently mails the customer a standard form letter. The letter states:

Diversion Services has received bad check(s) written or passed by you in Lancaster county [*sic*] which may be in violation of Nebraska Bad Check Statutes. A statement which shows the check(s) that have been turned over to this office and the status of your file with this office is enclosed.

The total due as of today for your checks and statutory fees is [amount].

PAYMENT MUST BE IN CASH OR MONEY ORDER PAYABLE TO THE DIVERSION SERVICES.

Mail payment or pay in person at DIVERSION SERVICES, 4435 O Street, Suite 96, Lincoln, NE 68510, telephone 483-4444. Office hours are from 8:00 to 4:30 Monday – Friday. Do not send cash through the mail. **PERSONAL CHECKS WILL NOT BE ACCEPTED FOR PAYMENT.** Please note that all bad checks must stay in our files and cannot be returned to you.

Do not contact the business or person where you passed your check(s) as they cannot accept payment once the check(s) have been submitted to this office.

Failure to pay all checks and fees in full within 10 days will result in your having to attend a six hour money management class and pay a \$40.00 class fee. Partial payment does not keep you from having to take the class.

18. The Agreement clearly informs customers that RED D CASH may pursue a civil collection action for delinquent accounts, but, by referring accounts to Diversion Services for collection, RED D CASH's customers may have been given the impression that additional penalties could be imposed pursuant to Nebraska's bad check statutes and through the involvement of the Lancaster County Attorney.

19. The DEPARTMENT noted at least forty-four (44) instances in its initial examination where the Form indicated that RED D CASH provided two written notices when customers failed to pay for its delayed deposit services at the agreed upon time. However, only customer AW's records contain another notice letter in addition to the initial form letter referenced above in Finding of Fact #12.

20. On May 17, 2010, RED D CASH provided the DEPARTMENT additional documentation with respect to what may have been provided its customers through a second notice. RED D CASH explained that many of the second notices were the result of the initial notice being returned by the United States Postal Service. In many cases, the second notice was a second attempt to provide the customer with initial notice that RED D CASH's delayed deposit service had not been paid at the agreed upon time. In other instances, a second letter was mailed to the customer. RED D CASH represents that the second letter generally stated, "Your next payment on your NSF check was due on [date]. We feel we have been very patient in this matter. You need to contact this office by [date] in order to keep this from going any further. Again call by [date] to make arrangements to resume payments. . . ."

21. The second written notice contained in the records for customer AW states, in relevant part: “We feel we have been very patient in this matter. You need to contact this office by [date] in order to keep this from being turned over to the County Attorney. Again, call by [date] to make arrangements to resume payments. . . .” The records for the remaining forty-three (43) customers did not contain a second letter or any other documentation to explain what may have been sent to each customer.

22. The DEPARTMENT’s initial examination revealed four (4) instances where RED D CASH failed to properly maintain records for customers AC, RP, MP, and KR. The corresponding Forms indicate that RED D CASH provided the initial notice referred to above in Finding of Fact #12 to these customers. However, the letters were not included in customer records.

23. On April 2, 2010, RED D CASH delivered a written narrative (“second narrative”) to the DEPARTMENT in response to the DEPARTMENT’s annual examination conducted on January 28, 2010, pursuant to Neb. Rev. Stat. § 45-920 (Cum. Supp. 2010).

24. RED D CASH disputed the DEPARTMENT’s assertion that it had referred checks to the Lancaster County Attorney for prosecution and attempted to draw a distinction between turning the checks over to Diversion Services for collection. In its second narrative, RED D CASH stated, in part:

We have not submitted any check for prosecution to the Lancaster County Attorney’s Office. Diversion Services is a private entity that contracts with Lancaster County and/or the Lancaster County Attorney’s Office for a variety of services. One of the services that they provide is the collection of bad checks for businesses in the Lincoln, Lancaster County area. They prepared and provided to us the form entitled “Lancaster County Attorney’s Office Request for Criminal Prosecution for Bad Checks”. We have used that form in referring our bad checks to Diversion

Services for collection. We do not request Diversion Services to submit these bad checks to the County Attorney's Office for prosecution. In fact, both Diversion Services and we understand that will not be done.

Indeed, when we started utilizing their services a number of years ago, we specifically had a discussion with them as to whether or not they could collect bad checks where there was no anticipation of, or plan for, referring those bad checks to the County Attorney's Office for prosecution. We were advised . . . that they could attempt to collect our bad checks for us but would of course not submit them to the County Attorney's Office for prosecution. The County Attorney's Office had determined prior to that time that they would not be prosecuting bad checks issued to delayed deposit companies. We have not submitted any customer's [*sic*] for prosecution to the Lancaster County Attorney's Office since your last visit on June 26, 2009 nor have we submitted any for prosecution during the entire calendar year of 2009. Our only submission has been to Diversion Services for their assistance in attempting to collect these bad checks from our customers.

25. On May 13, 2010, RED D CASH provided the DEPARTMENT with affidavits completed by a former office manager and a current office manager of Diversion Services that provide support for RED D CASH's representations regarding its use of the Form.

26. The former office manager, who oversaw the collection of bad checks, stated, in pertinent part:

...

3. Since the late 1990's, we have been collecting bad checks written to Red D Cash Lincoln, Inc. of Lincoln, Nebraska.
4. Our ordinary processes in dealing with merchants were to have them fill out a form and submit the bad checks along with that form to us
5. At or about the time we commenced collecting checks for Red D Cash Lincoln, your Affiant had a conversation with Gordon and Barbara Olsen, of Red D Cash Lincoln, Inc. on the proper method to fill out our form.

6. With respect to question 10, I instructed the Olsens to mark the question "no".
7. At all times I understood that the delayed deposit services check business accepted checks from customers and delivered to customers at the time of the acceptance of the check, cash.
8. I also understood that the check was not post-dated, but was in fact dated on the date it was written and by agreement was to be presented on a later date specified in that agreement.
9. By the time the checks were submitted to Diversion Services, the presentation date had past [sic] and the check had been returned, either account closed or insufficient funds.
10. The Olsens understood, as did I for Diversion Services, that the checks would not be presented to the County Attorney's Office for prosecution.
11. This was a private arrangement where Diversion Services, as a private corporation, was attempting to collect a bad check for a commercial customer in Lincoln, Nebraska.
12. At no time was your Affiant or anyone else in Diversion Services ever deceived as to the nature of the transaction in which Red D Cash Lincoln, Inc. checks were submitted for collection by Diversion Services. . . .
27. Diversion Services' current office manager stated, in pertinent part:

.....
3. I have always understood Red D Cash Lincoln, Inc. to be a delayed deposit services corporation.
4. It accepted from customers, checks for cash and later deposit.
5. It has submitted those checks which come back from the bank either insufficient funds or account closed to Diversion Services for collection.
6. Only collection services are provided by Diversion Services to Red D Cash Lincoln, Inc.

7. For more than ten years, none of their checks have been presented for prosecution to the County Attorney's Office. The Lancaster County Attorney does not prosecute delayed deposit checks.
8. I understood the nature of the transaction at Red D Cash Lincoln, Inc. and knew that Red D Cash Lincoln, Inc. was answering question 10 as they had been instructed. . . .

28. RED D CASH maintains that its first narrative was in no way meant to conceal any particular facts or circumstances or mislead the DEPARTMENT in any way, and its expanded answers were meant to be part of its continued efforts to provide the DEPARTMENT relevant information.

29. RED D CASH also provided the DEPARTMENT a list of the names of sixty-one (61) customers whose checks had been turned over to Diversion Services for collection since the DEPARTMENT's visit on June 26, 2009, and the Form associated with each of those customers ("subsequent accounts").

30. RED D CASH's in-house collection efforts apparently failed on fourteen of the forty-seven in-house collection accounts the DEPARTMENT obtained during its June 26, 2009 investigation. Checks for customers JB, RB, WB, EB, SB, MH, DM, CN, VN, AR, TR, DR, OR, and SU were subsequently referred to Diversion Services for collection and included in the subsequent accounts.

31. Question 10 was visible on fifty-six (56) of the sixty-one (61) additional Forms RED D CASH provided the DEPARTMENT. RED D CASH answered "No" to Question 10 on all fifty-six (56) of the Forms on which the question was visible.

32. RED D CASH also submitted the Form for four (4) additional accounts on which a stop payment order had been filed. Records from the subsequent accounts clearly indicate that customers WB, MH, MH, and TR placed stop payment orders on their checks.

33. RED D CASH has demonstrated an established and continual practice of referring checks to Diversion Services for collection and maintains that Diversion Services provides check collection services. However, RED D CASH completed the Form when referring checks to Diversion Services for collection, and the Form is clearly meant to act as the first step towards pursuing criminal prosecution by the Lancaster County Attorney for writing bad checks. In addition, RED D CASH has made references in communications to its customers that could reasonably lead them to believe that RED D CASH was pursuing criminal prosecution by the Lancaster County Attorney, and despite the fact that Diversion Services did not present RED D CASH checks to the Lancaster County Attorney, as stated in Findings of Fact #28 and #29, customers of RED D CASH could reasonably have inferred that collection efforts by Diversion Services would result in additional penalties imposed through criminal prosecution, if the customer did not comply with restitution demands. In fact, customer MW made such an inference and stated as much in the complaint she filed with the DEPARTMENT, as noted above in Finding of Fact #3.

34. The DEPARTMENT has reviewed the responses submitted by RED D CASH and the documents gathered in its investigation and has taken all information into consideration in determining the appropriate actions to be taken in this matter.

35. The DEPARTMENT could conclude that the actions of RED D CASH warrant the commencement of administrative proceedings to determine whether it should suspend or revoke RED D CASH's license pursuant to Neb. Rev. Stat. § 45-922(1) (Cum. Supp. 2010) and/or impose an administrative fine in an amount up to five thousand dollars (\$5,000.00) per violation, plus investigation costs, pursuant to Neb. Rev. Stat. § 45-925 (Cum. Supp. 2010).

36. The DEPARTMENT incurred a minimum of three thousand five hundred dollars (\$3,500.00) in investigation costs in this matter, including 12.75 hours of examiner time.

CONCLUSIONS OF LAW

1. Neb. Rev. Stat. § 45-908 (Reissue 2004) provides that in order to issue a delayed deposit services business license, the Director must determine that the character and general fitness of the applicant and its officers, directors, and shareholders are such as to warrant a belief that the business will be operated honestly, fairly, efficiently, and in accordance with the Act.

2. Neb. Rev. Stat. § 45-915.01(1) (Cum. Supp. 2010) provides that a licensee shall keep or make available the books and records relating to transactions as are necessary to enable the DEPARTMENT to determine whether the licensee is complying with the Act.

3. Neb. Rev. Stat. § 45-915.01(2) (Cum. Supp. 2010) provides that a licensee shall, at a minimum, include in its books and records copies of all application materials relating to makers, disclosure agreements, checks, payment receipts, and proofs of compliance required by Section 45-919.

4. Neb. Rev. Stat. § 45-917(1) (Cum. Supp. 2010) provides that every licensee shall, at the time any delayed deposit services transaction is made, give to the maker of the check a notice written in plain English disclosing, among other things, any penalty not to exceed fifteen dollars which the licensee will charge if the check is not negotiable on the date agreed upon.

5. Neb. Rev. Stat. § 45-922(1) (Cum. Supp. 2010) provides that the Director may, following notice and a hearing, suspend or revoke any license issued pursuant to the

Act if he finds, among other things, that a licensee has knowingly violated the Act; a fact or condition existing which, if it had existed at the time of the original application for such license, would have warranted the Director to refuse to issue the license; or that a licensee has knowingly subscribed to, made, or caused to be made any false statement in the books and records of the licensee.

6. Neb. Rev. Stat. § 45-925 (Cum. Supp. 2010) provides that if the Director finds, after notice and opportunity for hearing, that any person has violated the Act, the Director may order such person to pay an administrative fine of not more than five thousand dollars for each separate violation and the costs of an investigation.

7. As stated above in Finding of Fact #10, RED D CASH initially informed the DEPARTMENT that there was no agreement between Diversion Services and RED D CASH regarding the collection, attempted collection, or threat of collection of delayed deposit customer non-sufficient funds checks or checks not otherwise paid. However, as stated above in Finding of Fact #24, RED D CASH later disclosed to the DEPARTMENT that an agreement was formed with Diversion Services at the time RED D CASH began utilizing their services. RED D CASH's failure to respond completely at the outset of the DEPARTMENT's investigation constitutes a fact which, if it had existed at the time of the original application for its license, could have warranted the Director to refuse to issue RED D CASH a license pursuant to Neb. Rev. Stat. § 45-908 (Reissue 2004).

8. As stated above in Findings of Fact #18 and #33, RED D CASH customers may have believed, based upon representations made to them either directly or indirectly, that RED D CASH may pursue criminal prosecution by the Lancaster County Attorney pursuant to Nebraska's bad check statutes. As stated above in Finding of Fact #13, such a

penalty was not disclosed to customers at the time they entered into the delayed deposit transaction, in violation of Neb. Rev. Stat. § 45-917(1) (Cum. Supp. 2010).

9. As stated above in Findings of Fact #19, #21, and #22, RED D CASH failed to maintain customer records in forty-seven (47) instances, representing forty-seven (47) separate violations of Neb. Rev. Stat. § 45-915.01(1) (Cum. Supp. 2010).

10. The facts listed in the above Findings of Fact constitute a sufficient basis for the Director to have determined that RED D CASH has violated the Act and that an administrative hearing should be held to determine whether to suspend or revoke its license in accordance with Section 45-922(1) and/or to impose a fine in an amount of not more than five thousand dollars (\$5,000.00) for each separate violation plus costs of investigation in accordance with Section 45-925.

11. Under the Act's statutory framework, the Director has the legal and equitable authority to fashion significant remedies.

12. It is in the best interest of RED D CASH, and it is in the best interest of the public, for RED D CASH and the DEPARTMENT to resolve the issues included herein.

CONSENT ORDER

The DEPARTMENT and RED D CASH agree as follows:

Stipulations: In connection with this Consent Order, RED D CASH and the Director stipulate to the following:

1. The DEPARTMENT has jurisdiction as to all matters herein.
2. This Consent Order shall resolve all matters raised by the DEPARTMENT's investigation into RED D CASH's collection practices. Should future circumstances

warrant, the facts from this matter may be considered in a future administrative action by the DEPARTMENT.

3. This Consent Order shall be in lieu of all other proceedings available to the DEPARTMENT, except as specifically referenced in this Consent Order.

RED D CASH further represents as follows:

1. RED D CASH is aware of its right to a hearing on these matters at which it may be represented by counsel, present evidence, and cross-examine witnesses. The right to such a hearing, and any related appeal, is irrevocably waived.

2. RED D CASH is acting free from any duress or coercion of any kind or nature.

3. This Consent Order is executed to avoid further proceedings and constitutes an admission of violations of the Act solely for the purpose of this Consent Order and for no other purpose.

IT IS THEREFORE ORDERED as follows:

1. RED D CASH shall immediately discontinue any and all collection efforts attempted through Diversion Services or any other collection agency when such collection efforts carry the threat or the implied threat of criminal prosecution or involvement by any county attorney's office. RED D CASH's collection efforts, whether performed by RED D CASH or a third party, shall clearly and accurately reflect that the collection is civil in nature.

2. Within ten (10) days after the effective date of this Consent Order, RED D CASH shall pay a fine of two thousand five hundred dollars (\$2,500.00) for failing to submit a complete response to the DEPARTMENT at the outset of the DEPARTMENT's

investigation of the matters included herein in violation of Neb. Rev. Stat. § 45-908 (Reissue 2004).

3. Within ten (10) days after the effective date of this Consent Order, RED D CASH shall pay a fine of one hundred dollars (\$100.00) for each of the forty-seven (47) instances where RED D CASH failed to maintain customer records in violation of Neb. Rev. Stat. § 45-915.01(1) and (2) (Cum. Supp. 2010).

4. Within thirty (30) days after the effective date of this Consent Order, RED D CASH shall provide customer MW a full refund, including the amount of her delayed deposit check and any and all fees and penalties collected from her in conjunction with any checks referred to Diversion Services for collection, by providing the DEPARTMENT a money order in the exact amount of such refund. The DEPARTMENT will provide a receipt of such funds to RED D CASH and then deliver the refund to MW.

5. Within ten (10) days after the effective date of this Consent Order, RED D CASH shall pay the DEPARTMENT's investigation costs in the amount of three thousand five hundred dollars (\$3,500.00).

6. The total amount of the fine, seven thousand two hundred dollars (\$7,200.00) plus the total amount of investigation costs, three thousand five hundred dollars (\$3,500.00), shall be payable in one check or money order in the amount of ten thousand seven hundred dollars (\$10,700.00) to the DEPARTMENT.

7. Within six (6) business days of compliance with all provisions included herein, the DEPARTMENT shall issue a non-provisional delayed deposit services business license to RED D CASH for the current licensing period.

8. In the event RED D CASH fails to comply with any of the provisions of this Consent Order, the DEPARTMENT may commence such action regarding RED D CASH as it deems necessary and appropriate in the public interest.

9. If, at any time, the DEPARTMENT determines RED D CASH has committed any other violations of the Act, the DEPARTMENT may take any action available to it under the Act.

10. The effective date of this Consent Order will be the date of the Director's signature.

DATED this 24 day of November, 2010.

RED D CASH LINCOLN, INC.

By: Gordon Olsen
Gordon Olsen, President & CEO

2601 N. 11th Street
Lincoln, Nebraska

DATED this 1st day of December, 2010.

**STATE OF NEBRASKA
DEPARTMENT OF BANKING AND FINANCE**

By: John Munn
John Munn, Director

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