

OCCC CASE NO. L19-00158

<p>IN THE MATTER OF:</p> <p>MASTER FILE NUMBER: 14681</p> <p>BASIN SUBARU, LLC 3917 W. WALL STREET MIDLAND, TEXAS 79703</p>	<p>§ BEFORE THE</p> <p>§</p> <p>§ OFFICE OF CONSUMER</p> <p>§</p> <p>§ CREDIT COMMISSIONER</p> <p>§</p> <p>§ STATE OF TEXAS</p>
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**ORDER TO CEASE AND DESIST, TO TAKE AFFIRMATIVE ACTION,
AND TO MAKE RESTITUTION**

The Office of Consumer Credit Commissioner (“OCCC”) issues this Order to Cease and Desist , to Take Affirmative Action, and to Make Restitution against Basin Subaru, LLC (“Basin Subaru”).¹

Background Facts and Law

Basin Subaru is a motor vehicle dealer, licensed to engage in retail installment transactions by the OCCC under master file number of 14681.² Basin Subaru is also licensed by the Texas Department of Motor Vehicles to act as a dealer under general distinguishing number P109761. Basin Subaru operates at four licensed locations, including 3917 West Wall Street, Midland, Texas 79703, under license number 49025. Basin Subaru’s compliance officer is Stefanie Lillard.

The OCCC issued a license to Basin Subaru after finding that its financial responsibility, experience, character, and general fitness were sufficient to command the confidence of the public, and warrant the belief that it would be operated lawfully and fairly.³ The OCCC is charged with accepting and investigating consumer complaints against its licensees.⁴

¹ Tex. Fin. Code §§ 14.208, 14.251(b).

² Tex. Fin. Code § 348.501 (requiring a person who acts as a holder of a retail installment contract to be licensed by the OCCC).

³ Tex. Fin. Code § 348.504; *see also* Tex. Fin. Code § 348.508(3) (authorizing revocation of a license if a fact or condition exists that, if it had existed or had been known to exist at the time of the application for a license, clearly would have justified the denial of the application).

⁴ Tex. Fin. Code § 14.062; Tex. Fin. Code § 14.202.

On October 14, 2017, Carey and Roger Muniz purchased a motor vehicle from Basin Subaru.⁵ They gave Basin Subaru a \$10,000.00 down payment and financed the \$35,752.73 balance by entering into a retail installment contract. A retail installment contract is an agreement to pay all or part of the cash price of a motor vehicle in one or more deferred installments.⁶

On March 1, 2018, the OCCC received a complaint from Mr. Muniz regarding this transaction, and conducted an investigation. The OCCC identified the violations of law described below. However, Basin Subaru denied any wrongdoing, and refused to return any of the \$10,000 down payment to Mr. and Ms. Muniz.

Contract Unlawfully Conditioned on Subsequent Assignment

A retail installment contract may not be conditioned on the subsequent assignment of that contract.⁷ The retail installment contract signed by Mr. and Ms. Muniz identifies Exeter Finance Corp as the intended assignee. The title application for the vehicle purchased by Mr. and Ms. Muniz identifies Exeter Finance Corp as the first lienholder.

Basin Subaru attempted to assign the contract, but Exeter rejected it. After Exeter rejected the assignment, Basin Subaru sought to unwind and set aside the contract. Specifically, Basin Subaru:

- instructed Mr. and Ms. Muniz to immediately pay Basin Subaru the \$35,752.73 amount financed under the contract;
- instructed Mr. and Ms. Muniz to return the vehicle; and
- repossessed the vehicle.

Therefore, Basin Subaru conditioned the retail installment contract on its successful assignment to Exeter in violation of Section 348.1015 of the Texas Finance Code.

⁵ Carey and Roger Muniz have consented to the disclosure of basic information about their purchase in this Order. They purchased the vehicle at the dealership located at 3917 West Wall Street, Midland, Texas 79703.

⁶ Tex. Fin. Code § 348.001(6) (defining retail installment contract); Tex. Fin. Code § 348.001(7) (defining retail installment transaction).

⁷ Tex. Fin. Code § 348.1015 (stating that “a retail installment contract may not be conditioned on the subsequent assignment of the contract to a holder”).

Basin Subaru claims that it did not condition the contract on assignment, but merely enforced the contract's default provisions under paragraph 3 of the contract. This assertion is false because Basin Subaru:

- failed to give notice of the amount necessary to redeem after repossession as required by paragraph 3(e) of the contract;⁸
- failed to give a ten day notice of any public or private sale as required by paragraph 3(f) of the contract;⁹ and
- failed to pay any amount left after the sale as required by paragraph 3(f) of the contract.¹⁰

Therefore, Basin Subaru did not enforce the contract's default provisions, but conditioned the financing of the purchase under the retail installment contract on its assignment to Exeter.

Violations of Chapter 9 of the Texas Business & Commerce Code

Under Chapter 348, a dealer must comply with state statutes, including the Texas Business & Commerce Code, in its retail installment transactions.¹¹ Chapter 9 of the Business & Commerce Code allows a creditor to dispose of collateral after repossession by using two methods: (1) acceptance in full satisfaction, and (2) disposition through a public or private sale.¹²

The requirements for accepting the collateral in full satisfaction of the debt depend on whether the debtor has paid at least 60% of the cash price of the collateral.¹³ If the debtor has paid less than 60% of the cash price, then the creditor must provide the debtor with a proposal to accept the collateral in full

⁸ October 14, 2017 retail installment contract, paragraph 3(e) ("If we take your vehicle, we will tell you how much you have to pay to get it back").

⁹ October 14, 2017 retail installment contract, paragraph 3(f) ("If you don't pay us to get the vehicle back, we can sell it or take other action allowed by law. If we sell the motor vehicle in a public or private sale, we will send you notice at least 10 days before we sell it.").

¹⁰ October 14, 2017 retail installment contract, paragraph 3(f) ("We can use the money we get from selling it to pay allowed expenses and to reduce the amount you owe. Allowed expenses are expenses we pay as a direct result of taking the vehicle, holding it, preparing it for sale, and selling it. If any money is left, we will pay it to you unless we must pay it to someone else.")

¹¹ Tex. Fin. Code § 348.008(b).

¹² Tex. Bus. & Com. Code §§ 9.610, 9.620.

¹³ Tex. Bus. & Com. Code § 9.620(e).

satisfaction of the debt, and allow the debtor to consent or make a timely objection to the proposal.¹⁴

In this case, the cash price was \$45,449.50 and Mr. and Ms. Muniz made a \$10,000.00 down payment, which is about 22% of the cash price. This is less than 60% of the cash price. Therefore, Chapter 9 required Basin Subaru to provide Mr. and Ms. Muniz with a proposal in order to accept the vehicle in full satisfaction of the debt. Basin Subaru did not provide them with a proposal, and therefore may not accept the vehicle in full satisfaction of the debt.¹⁵

In order to dispose of collateral through a public or private sale, the creditor must provide the debtor with notification of disposition before the sale.¹⁶ A debtor cannot waive the right to receive this notification except by an agreement signed after default.¹⁷ The creditor must conduct the sale in a commercially reasonable manner, and must comply with requirements for calculating the surplus or deficiency after the sale.¹⁸ After applying the proceeds of the sale to reasonable expenses and the satisfaction of obligations, the creditor is required to pay the debtor any surplus.¹⁹

In this case, Basin Subaru repossessed and sold the vehicle, but:

- failed to notify Mr. and Ms. Muniz of the disposition before the sale;²⁰
- failed to obtain from Mr. and Ms. Muniz an agreement signed after the alleged default waiving their right to receive this notification;²¹
- failed to conduct the sale in a commercially reasonable manner;²²
- failed to comply with requirements for calculating the surplus or deficiency after the sale;²³ and
- failed to pay Mr. and Ms. Muniz the surplus after applying the

¹⁴ Tex. Bus. & Com. Code §§ 9.620, 9.621, 9.622.

¹⁵ Tex. Bus. & Com. Code §§ 9.620, 9.621, 9.622.

¹⁶ Tex. Bus. & Com. Code §§ 9.610, 9.611, 9.612, 9.614.

¹⁷ Tex. Bus. & Com. Code §§ 9.611, 9.624(a).

¹⁸ Tex. Bus. & Com. Code §§ 9.610(b), 9.615, 9.616.

¹⁹ Tex. Bus. & Com. Code §§ 9.608(a)(4), 9.615(d)(1).

²⁰ Tex. Bus. & Com. Code §§ 9.610, 9.611, 9.612, 9.614.

²¹ Tex. Bus. & Com. Code §§ 9.611, 9.624(a).

²² Tex. Bus. & Com. Code §§ 9.610(b), 9.615, 9.616; *Wright v. Interfirst Bank Tyler, N.A.*, 746 S.W.2d 874 (Tex. App. – Tyler 1988, no writ) (finding that sale was not conducted in a commercially reasonable manner where creditor failed to give proper notice of the sale).

²³ Tex. Bus. & Com. Code §§ 9.610(b), 9.615, 9.616.

proceeds of the sale to reasonable expenses and the satisfaction of obligations.²⁴

Therefore, Basin Subaru violated Chapter 9 of the Texas Business and Commerce Code in its sale of the vehicle after repossession.

Unlawful Use of Conditional Delivery Agreement and Retail Installment Contract

A conditional delivery agreement gives a motor vehicle dealer time to obtain financing by selling the retail installment contract to another company.²⁵ If the dealer is unable to sell the retail installment contract, then it must return any down payment to the buyer.²⁶

On October 14, 2017, Basin Subaru signed a conditional delivery agreement with Mr. and Ms. Muniz. The agreement acknowledged that Mr. and Ms. Muniz “tendered a down payment to Seller in the amount of \$10,000.00.” The agreement required Basin Subaru to “return any down payment or other consideration received from the Buyer in connection with this Agreement” if the parties do not enter into a retail installment contract to finance the purchase.

On the same day that Basin Subaru signed the conditional delivery agreement, it also signed a retail installment contract with Mr. and Ms. Muniz. A conditional delivery agreement is void on the execution of a retail installment contract.²⁷ Therefore, the conditional delivery agreement was void upon signing.

By executing a retail installment contract and a conditional delivery agreement at the same time, Basin Subaru represented that the two contracts conferred or involved rights, remedies, or obligations which they do not have or

²⁴ Tex. Bus. & Com. Code §§ 9.608(a)(4), 9.615(d)(1).

²⁵ Tex. Fin. Code § 348.013 (regulating conditional delivery agreements, added by Acts 2009, 81st Legislature); Interim Report to the 81st Texas Legislature, House Committee on Financial Institutions (November 2008), pages 59 to 66, available at <https://lrl.texas.gov/scanned/interim/80/F49h.pdf>.

²⁶ Tex. Fin. Code § 348.013(g); Interim Report to the 81st Texas Legislature, House Committee on Financial Institutions (November 2008), page 65 (stating “if the consumer possesses the vehicle, the consumer should have a right of rescission should the financing become unavailable and the ability to retain their trade-in vehicle and down-payment fee”).

²⁷ Tex. Fin. Code § 348.013(c)(2).

involve, or which are prohibited by law.²⁸ Therefore, Basin Subaru engaged in misleading and deceptive acts and practices in violation of Texas law.²⁹

Basin Subaru used the retail installment contract and conditional delivery agreement to obtain a \$10,000 down payment from Mr. and Ms. Muniz. When Basin Subaru was unable to obtain financing from Exeter Finance Corp, it repossessed the vehicle and refused to return the \$10,000 down payment. Therefore, Basin Subaru used the unlawful simultaneous execution of these contracts to obtain and keep the \$10,000 down payment.

Unlawful Retention of \$10,000 Down Payment

Basin Subaru should not be allowed to keep both the \$45,449.50 vehicle and the \$10,000 down payment after:

- unlawfully conditioning the contract on assignment;
- unlawfully executing a conditional delivery agreement and retail installment contract at the same time;
- disregarding its duties under the retail installment contract; and
- violating Chapter 9 of the Business & Commerce Code.

These acts do not command the confidence of the public, or warrant the belief that Basin Subaru operates lawfully and fairly.³⁰ Mr. and Ms. Muniz have been injured by Basin Subaru's violations.³¹ Therefore, Basin Subaru must return the \$10,000 down payment to Mr. and Ms. Muniz.

²⁸ Tex. Bus. & Com. Code § 17.46(b)(12) (defining "false, misleading, or deceptive acts or practices" to include "representing that an agreement confers or involves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law")

²⁹ Tex. Bus. & Com. Code § 17.46(a) (stating that false, misleading, or deceptive acts or practices in the conduct of any trade or commerce are unlawful).

³⁰ Tex. Fin. Code § 348.504 (authorizing the Commissioner to approve a Chapter 348 license application if she finds the financial responsibility, experience, character, and general fitness of the applicant command the confidence of the public, and warrant the belief that the business will be operated lawfully and fairly); Tex. Fin. Code § 348.508(3) (authorizing revocation of a license if a fact or condition exists that, if it had existed or had been known to exist at the time of the application for a license, clearly would have justified the denial of the application).

³¹ Tex. Fin. Code § 14.251(b).

Authority

If the Commissioner has reasonable cause to believe that a person is violating Chapter 348 of the Texas Finance Code, the Commissioner may issue an order to cease and desist from the violation, an order to take affirmative action, or both to enforce compliance.³² Additionally, the Commissioner may order a person who violates Chapter 348 or a rule adopted under Chapter 348 to make restitution to an identifiable person injured by the violation.³³

The Commissioner has reasonable cause to believe that Basin Subaru is violating Chapter 348 of the Texas Finance Code and Title 7, Chapter 84 of the Texas Administrative Code.

Order

IT IS THEREFORE ORDERED that Basin Subaru, LLC:

1. cease and desist from conditioning any motor vehicle retail installment contract on the subsequent assignment to a holder;
2. cease and desist from violating the terms of a retail installment contract;
3. cease and desist from violating Chapter 9 of the Texas Business & Commerce Code;
4. cease and desist from executing a conditional delivery agreement and a retail installment contract at the same time;
5. no later than December 24, 2018, refund to Roger Muniz and Carey Muniz their \$10,000 down payment tendered in connection with the October 14, 2017 retail installment contract;
6. no later than January 3, 2019, submit proof to the OCCC of Basin Subaru's refund of the down payment; and

³² Tex. Fin. Code § 14.208(a).

³³ Tex. Fin. Code § 14.251(b).

7. maintain complete and accurate records of all refunds.³⁴

Violation of Order

You may be assessed an administrative penalty of up to \$1,000 for each day of violation of this Order.³⁵

Right to Request Hearing

You have the right to request a hearing regarding this Order.³⁶ Your request must be made in writing and sent to the OCCC not later than 30 days after you receive this Order. You must send your request to:

Michael Rigby
General Counsel
Office of Consumer Credit Commissioner
2601 N. Lamar Blvd.
Austin, Texas 78705

If you request a hearing, a hearing on this matter will be set and conducted in accordance with Chapter 2001 of the Texas Government Code.³⁷ If you fail to request a hearing by this deadline, this Order is considered final and enforceable.³⁸

All communications with the OCCC concerning this matter must be through Michael Rigby, General Counsel. You may contact him by mail at 2601 N. Lamar Blvd., Austin, Texas 78705, by telephone at (512) 936-7623, or by email to michael.rigby@occc.texas.gov.

³⁴ See 7 Tex. Admin. Code § 84.704.

³⁵ Tex. Fin. Code § 14.208(c).

³⁶ Tex. Fin. Code § 14.208(b).

³⁷ Tex. Fin. Code § 14.208(b).

³⁸ Tex. Fin. Code § 14.208(c).

Signed this 11th day of December, 2018.

/s/ Leslie L. Pettijohn
Leslie L. Pettijohn
Consumer Credit Commissioner
State of Texas

CERTIFICATE OF SERVICE

I certify that on December 11, 2018, a true and correct copy of this Order to Cease and Desist, to Take Affirmative Action, and to Make Restitution has been sent to Basin Subaru, LLC by regular mail and certified mail, return receipt requested, at:

CMRRR: 91 7199 9991 7037 5230 8393

Basin Subaru, LLC
Attn: Stefanie Lillard, Compliance Officer
3917 W. Wall Street
Midland, Texas 79703

CMRRR: 91 7199 9991 7037 5230 8386

Basin Subaru, LLC
Attn: Pete Martinez, Statutory Agent
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