

OCCC CASE NO. L19-00201

IN THE MATTER OF:	§	BEFORE THE
	§	
MASTER FILE NUMBER: 1400050029	§	OFFICE OF CONSUMER
	§	
1AND2 AUTOMOTIVE, LLC	§	CREDIT COMMISSIONER
11311 REEDER ROAD BLDG. A	§	
DALLAS, TEXAS 75229	§	STATE OF TEXAS

**ORDER TO OPERATE LAWFULLY AND FAIRLY  
AND TO MAKE RESTITUTION**

The Office of the Consumer Credit Commissioner (“OCCC”) issues this Order to Operate Lawfully and Fairly and to Make Restitution against 1and2 Automotive, LLC (“1and2”), based on violations of law described below.<sup>1</sup>

**Background**

1and2 holds a motor vehicle sales finance license with the OCCC under Chapter 348 of the Texas Finance Code. 1and2 is licensed under master file number 1400050029 to do business at two locations. Under license number 150502 (issued on August 1, 2014) 1and2 does business at 11311 Reeder Road, Bldg. A, in Dallas, Texas. Under license number 157796 (issued on April 26, 2017) 1and2 does business at 10501 Harry Hines Blvd., in Dallas Texas. Its compliance officer is Dow Douglas, and its owner and contact is David Kost.

Since September 2014, the OCCC has received over 39 complaints against 1and2. Many of these complaints state that 1and2 obtains money from a potential customer, but refuses to return it unless the customer purchases a vehicle. These issues also appear in news articles by the Dallas Morning News,<sup>2</sup> consumer websites,<sup>3</sup> complaints filed with the Texas Department of Motor Vehicles, and complaints filed with the Texas Office of the Attorney General.

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<sup>1</sup> Tex. Fin. Code § 14.208.

<sup>2</sup> See, e.g., <https://www.dallasnews.com/news/watchdog/2017/11/09/woman-gets-car-repossessed-drives-three-weeks>.

<sup>3</sup> <https://www.dealerrater.com/dealer/1and2-Automotive-review-14202/>.

## **Duty to Operate Lawfully and Fairly**

The OCCC issued a license to 1and2 after finding that its license application warranted the belief that 1and2 would command the confidence of the public, and would operate lawfully and fairly.<sup>4</sup> The OCCC may revoke 1and2's license if it finds that a fact or condition exists that, if it had been known at the time of the license application, would have justified the denial of the application.<sup>5</sup>

The conduct described in this Order shows that 1and2 does not command the confidence of the public, and 1and2 does not operate lawfully and fairly. Failure to comply with this Order or Texas law may result in additional sanctions, including license revocation.

## **Unlawfully Refusing to Return Down Payment**

1and2 has a duty to provide a buyer with a copy of the retail installment contract to which the parties agreed.<sup>6</sup> If 1and2 does not provide the buyer with the agreed upon retail installment contract, and the buyer has not received delivery of the vehicle, the buyer may rescind the contract and receive a refund of all payments made under or in contemplation of the contract.<sup>7</sup> The buyer also has the right to receive the return of any vehicle traded in to the seller under or in contemplation of the contract.<sup>8</sup> Therefore, 1and2 may not claim that money received from the buyer in connection with a retail installment transaction is non-refundable before the signed contract and the vehicle is delivered to the buyer.

In one complaint,<sup>9</sup> the consumer gave 1and2 a down payment of \$3,000.00 without signing a retail installment contract. After reviewing the sales price, financing terms, and cost of insurance, the consumer changed his mind and requested the return of his \$3,000.00 down payment. 1and2 marked the receipt for the down payment as "non-refundable" and the salesperson for 1and2 refused to return the down payment. After the consumer filed a complaint with

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<sup>4</sup> Tex. Fin. Code § 348.504(a)(1).

<sup>5</sup> Tex. Fin. Code § 348.508.

<sup>6</sup> Tex. Fin. Code § 348.110.

<sup>7</sup> Tex. Fin. Code § 348.111.

<sup>8</sup> Tex. Fin. Code § 348.111(3).

<sup>9</sup> OCCC Complaint No. 109442.

the OCCC, 1and2 refunded the consumer's down payment. 1and2 violated Texas law by marking the down payment receipt as "non-refundable" and refusing to return the down payment when it had a duty to do so.<sup>10</sup>

In another complaint,<sup>11</sup> the consumer gave 1and2 a down payment of \$2,500.00 before signing a retail installment contract. After reviewing the terms of the financing, the consumer changed her mind and requested the return of her \$2,500.00 down payment. The salesperson for 1and2 refused to return the down payment. After the consumer filed a complaint with the OCCC, 1and2 refunded the consumer's down payment. 1and2 violated Texas law by refusing to return the down payment when it had a duty to do so.<sup>12</sup>

In another complaint,<sup>13</sup> the consumer gave 1and2 a down payment of \$1,000.00 before signing a retail installment contract. After reviewing the terms of the financing, the consumer changed his mind and requested the return of his \$1,000.00 down payment. The salesperson for 1and2 refused to return the down payment. The customer then felt compelled to sign the retail installment contract to avoid losing the down payment. After the consumer filed a complaint with the OCCC, 1and2 refunded the consumer's down payment. 1and2 violated Texas law by refusing to return the down payment when it had a duty to do so.<sup>14</sup>

The OCCC received several similar complaints involving down payments of \$1,500.00,<sup>15</sup> \$500.00,<sup>16</sup> \$3,200.00,<sup>17</sup> \$1,500.00,<sup>18</sup> \$5,000.00,<sup>19</sup> \$3,000.00,<sup>20</sup> \$3,900.00,<sup>21</sup> \$6,090.00,<sup>22</sup> and \$3,000.00.<sup>23</sup>

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<sup>10</sup> Tex. Fin. Code §§ 348.110, 348.111; Tex. Bus. & Com. Code § 17.46 (prohibiting false, misleading, or deceptive acts or practices); Tex. Bus. & Com. Code § 17.46(12) (prohibiting a representation that an agreement confers or involves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law).

<sup>11</sup> OCCC Complaint No. 111932.

<sup>12</sup> Tex. Fin. Code §§ 348.110, 348.111; Tex. Bus. & Com. Code § 17.46.

<sup>13</sup> OCCC Complaint No. 111932.

<sup>14</sup> Tex. Fin. Code §§ 348.110, 348.111; Tex. Bus. & Com. Code § 17.46.

<sup>15</sup> OCCC Complaint No. 18901.

<sup>16</sup> OCCC Complaint No. 18876.

<sup>17</sup> OCCC Complaint No. 15067.

<sup>18</sup> OCCC Complaint No. 15951.

<sup>19</sup> OCCC Complaint No. 110737.

<sup>20</sup> OCCC Complaint No. 109773.

<sup>21</sup> OCCC Complaint No. 109687.

<sup>22</sup> OCCC Complaint No. 111326.

<sup>23</sup> OCCC Complaint No. 17835.

## Unlawful Conditional Delivery Agreement

1and2 executes a “Non-Refundable Deposit Agreement” with potential buyers that it claims serves as a conditional delivery agreement. The OCCC has exclusive jurisdiction to enforce the statute regulating conditional delivery agreements.<sup>24</sup> A conditional delivery agreement is a contract between a prospective buyer and a seller that allows the prospective buyer to use a motor vehicle for up to 15 days.<sup>25</sup> If the prospective buyer purchases the vehicle through a retail installment contract, the conditional delivery agreement is void.<sup>26</sup>

If the prospective buyer does not purchase the vehicle, the seller must return any trade-in motor vehicle and any down payment.<sup>27</sup> The amount to be returned to a prospective buyer is subject to review by the OCCC.<sup>28</sup> The OCCC may order the seller to pay the prospective buyer money owed in connection with a conditional delivery agreement.<sup>29</sup>

1and2’s “Non-Refundable Deposit Agreement” requires the prospective buyer to make a “NON-REFUNDABLE DEPOSIT/DOWN PAYMENT” toward the purchase of a vehicle. If the prospective buyer fails to timely pay 1and2 any balances due toward the purchase of the vehicle, then the down payment is forfeited. Therefore, 1and2’s use of this contract as a conditional delivery agreement violates Section 348.013 of the Finance Code, which requires the seller to return any down payment if the parties do not enter into a retail installment contract.<sup>30</sup>

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<sup>24</sup> Tex. Fin. Code § 348.013(q).

<sup>25</sup> Tex. Fin. Code § 348.013(a), (e).

<sup>26</sup> Tex. Fin. Code § 348.013(c)(2).

<sup>27</sup> Tex. Fin. Code § 348.013(g).

<sup>28</sup> Tex. Fin. Code § 348.013(k).

<sup>29</sup> Tex. Fin. Code § 348.013(k).

<sup>30</sup> Tex. Fin. Code § 348.013(g); Tex. Fin. Code § 348.013(d) (stating that a conditional delivery agreement may only confer rights consistent with Section 348.013); Tex. Bus. & Com. Code § 17.46 (prohibiting false, misleading, or deceptive acts or practices); Tex. Bus. & Com. Code § 17.46(12) (prohibiting a representation that an agreement confers or involves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law).

## **Unlawful Waiver of Rights**

1and2's "Non-Refundable Deposit Agreement" states that "Buyer understands and agrees never to dispute misrepresentation of said vehicle." False, misleading, or deceptive acts or practices in the sale of a motor vehicle are unlawful.<sup>31</sup> The prospective buyer's waiver of the misrepresentations in 1and2's agreement is contrary to public policy, unenforceable, and void.<sup>32</sup> 1and2 is not operating lawfully or fairly when it unlawfully asks prospective buyers to waive their legal rights.

## **Unlawfully Conditioning Contract on Subsequent Assignment**

The OCCC received a complaint that the customer signed a retail installment contract and took possession of the vehicle.<sup>33</sup> 1and2 was unable to sell and assign the contract to another licensee. 1and2 then demanded that the customer return the vehicle and unilaterally rescinded the contract because it was unable to sell and assign the contract. By doing so, 1and2 violated the Finance Code by conditioning the contract on the subsequent assignment to another licensee.<sup>34</sup>

## **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.<sup>35</sup> The Commissioner may also order such a person to make restitution to a person injured by the violation.<sup>36</sup>

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<sup>31</sup> Tex. Bus. & Com. Code § 17.46.

<sup>32</sup> Tex. Bus. & Com. Code § 17.42.

<sup>33</sup> OCCC Complaint No. 15191.

<sup>34</sup> Tex. Fin. Code § 348.1015; Tex. Bus. & Com. Code § 17.46 (prohibiting false, misleading, or deceptive acts or practices); Tex. Bus. & Com. Code § 17.46(12) (prohibiting a representation that an agreement confers or involves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law).

<sup>35</sup> Tex. Fin. Code § 14.208(a).

<sup>36</sup> Tex. Fin. Code § 14.251(b).

## Order

IT IS ORDERED that 1and2 Automotive, Inc.:

1. Deliver to each buyer a copy of the retail installment contract accepted by 1and2 Automotive, Inc. as required by Section 348.110 of the Texas Finance Code;
2. Cease and desist from using a non-refundable deposit agreement as a conditional delivery agreement as described by Section 348.013 of the Texas Finance Code;
3. Cease and desist from using a non-refundable deposit agreement before the buyer receives a copy of the retail installment contract and delivery of the vehicle as required by Section 348.111 of the Texas Finance Code;
4. Cease and desist from using any agreement in which the buyer agrees to waive its legal rights regarding 1and2 Automotive, Inc.'s misrepresentations;
5. Otherwise cease and desist from violating the requirements of Chapter 348 of the Texas Finance Code;
6. No later than July 24, 2019, refund any payment made under, or in contemplation of, a retail installment contract to a buyer that has not received delivery of a vehicle and has not been provided with a copy of the contract as required by Section 348.111 of the Texas Finance Code;
7. No later than July 24, 2019, return any down payment or other consideration received from a prospective buyer in connection with a conditional delivery agreement if the parties do not subsequently enter into a retail installment contract as required by 348.013 of the Texas Finance Code;
8. No later than July 24, 2019, return any down payment or other consideration to any prospective buyer that 1and2 received in connection with a conditional delivery agreement if the prospective buyer did not purchase that vehicle;
9. No later than July 24, 2019, deliver to the prospective buyer a sum of money equal to the agreed value of the trade-in motor vehicle tendered to 1and2 in connection with a conditional delivery agreement if the prospective buyer did not purchase that vehicle; and
10. No later than July 24, 2019, submit a spreadsheet in Microsoft Excel format that contains the following columns:

- a. The name, address, and telephone number of each person who received a refund or other payment under this order,
- b. The date of the refund or other payment, and
- c. The check number or other identifying form of the refund or other payment.

### **Violation of Order**

If you violate this Order, the OCCC may impose an administrative penalty of up to \$1,000 per day,<sup>37</sup> and may also revoke your license.<sup>38</sup>

### **Right to Request Hearing**

1and2 has the right to request a hearing regarding this Order.<sup>39</sup> 1and2's request must be made in writing and sent to the OCCC not later than 30 days after 1and2 receives this Order. 1and2 must send its request to:

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

If 1and2 requests a hearing, a hearing on this matter will be set and conducted in accordance with Chapter 2001 of the Texas Government Code.<sup>40</sup> If 1and2 fails to request a hearing by this deadline, this Order is considered final and enforceable.<sup>41</sup>

All communications with the OCCC concerning this matter must be through Michael Rigby, General Counsel, who may be contacted 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.

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<sup>37</sup> Tex. Fin. Code § 14.208(c).

<sup>38</sup> Tex. Fin. Code § 348.508.

<sup>39</sup> Tex. Fin. Code § 14.208(b).

<sup>40</sup> Tex. Fin. Code § 14.208(b).

<sup>41</sup> Tex. Fin. Code § 14.208(c).

Signed this 17<sup>th</sup> day of June, 2019.

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

### CERTIFICATE OF SERVICE

I certify that on June 17, 2019, a true and correct copy of this Order to Operate Lawfully and Fairly and to Make Restitution has been sent to 1and2 Automotive, LLC by the following methods:

1and2 Automotive, LLC  
Attn: Dow Douglas  
Compliance Officer and Statutory Agent  
11311 Reeder Road Bldg. A  
Dallas, Texas 75229

- hand-delivery
- facsimile
- electronic mail
- regular mail
- certified mail, return receipt requested  
#91 7199 9991 7037 5165 2886

1and2 Automotive, LLC  
Attn: David A. Kost, Member  
11311 Reeder Road Bldg. A  
Dallas, Texas 75229

- hand-delivery
- facsimile
- electronic mail
- regular mail
- certified mail, return receipt requested  
#91 7199 9991 7037 5165 2893

Susan White  
Attorney for 1and2 Automotive, LLC  
Shackelford, Bowen McKinley &  
Norton, LLP  
111 Congress Ave Ste. 1070  
Austin, TX 78701  
[swhite@shackelfordlaw.net](mailto:swhite@shackelfordlaw.net)

- hand-delivery
- facsimile
- electronic mail
- regular mail
- certified mail, return receipt requested  
#91 7199 9991 7037 5165 2909

/s/ Michael Rigby  
Michael Rigby  
General Counsel  
Office of Consumer Credit Commissioner  
State Bar No. 50511925  
2601 North Lamar Blvd.  
Austin, Texas 78705  
(512) 936-7623  
(512) 936-7610 (fax)  
[michael.rigby@occc.texas.gov](mailto:michael.rigby@occc.texas.gov)