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9

10 BEFORE THE DEPARTMENT OF BUSINESS OVERSIGHT
11 OF THE STATE OF CALIFORNIA

12 In the Matter of) CDDTL License No.: 1004393
) CFLL License No.: 6054610
13 THE COMMISSIONER OF BUSINESS)
OVERSIGHT,)
14) SETTLEMENT AGREEMENT
15 Complainant,)
)
16 v.)
)
17 FLURISH, INC. (DBA LENDUP),)
)
18 Respondent.)
19)

20 This Settlement Agreement (“Agreement”) is entered into between Flurish, Inc. (dba LendUp)
21 hereinafter “Flurish,” and the Commissioner of Business Oversight, (“Commissioner” or
22 “Complainant”), and is made with respect to the following facts:
23

24 **RECITALS**

- 25 A. Flurish is a corporation incorporated on November 29, 2011 in the State of Delaware, with a
26 principal place of business at 225 Bush Street, 11th Floor, San Francisco California 94104.
27 B. Flurish is a deferred deposit originator licensed by the Commissioner since February 8, 2012
28 (License No.1004393), pursuant to the California Deferred Deposit Transaction Law (“CDDTL”)

1 (Financial Code section 23000 et seq.).

2 C. Flurish is also a finance lender licensed by the Commissioner since June 25, 2012 (License
3 No. 6054610), pursuant to the California Finance Lenders Law (“CFLL”) (Financial Code section
4 22000 et seq.).

5 D. The Commissioner has jurisdiction over the licensing and regulation of persons and entities
6 engaged in the business of deferred deposit transactions under the CDDTL and finance lending under
7 the CFLL.

8 E. Sasha Orloff is the President of Flurish and, as such, is authorized to enter into this Agreement
9 on behalf of Flurish.

10 F. Under the CDDTL, the Commissioner conducted a regulatory exam from July 2013 to May
11 2014. The Commissioner issued three regulatory examination letters to Flurish on January 6, 2015,
12 June 1, 2015, and October 1, 2015 finding violations of state law: 1) for passing through a fee
13 charged by a third party vendor for the optional service of instant funding of the loan amount to the
14 consumer (debit, same day and instant funding fees) in violation of Financial Code section 23036,
15 subdivision (f); 2) reducing the amount of a daily discount the customer received for agreeing to pay
16 their loan prior to the due date, when that customer paid later than the agreed date, which operated as
17 a fee to extend the payment due date in violation of Financial Code section 23036, subdivisions (b)
18 and (f); and 3) making deferred deposit transactions contingent on the purchase of a loan made under
19 the CFLL, in violation of Financial Code section 23037, subdivision (c).

20 G. Based on the Commissioner’s findings, Flurish ceased (1) charging the pass-through fees for
21 instant funding; (2) reducing the discount for consumers who repaid their loan amount late; and (3)
22 making CFLL loans contingent on the purchase of CDDTL products.

23 H. Under the CFLL, the Commissioner conducted a regulatory exam from November 2013 to
24 August 2014 for loans starting from the inception of Flurish Inc. in March 2012. The Commissioner
25 issued examination letters to Flurish finding the following violations of state and federal law: 1)
26 passing through a fee charged by a third party vendor for the optional service of instant funding of
27 the loan amount to the consumer (debit, same day and instant funding fees) in violation of Financial
28 Code section 22306; 2) providing inaccurate annual percentage rates by, in some cases, overstating

1 the rate charged on loans and, in other cases, understating the rate charged on loans, in violation of
2 Financial Code section 22346; 3) miscalculating interest charges by, in some cases, overcharging a
3 rate and, in other cases, undercharging a rate, in violation of Financial Code section 22400; 4) failing
4 to correctly precompute interest charges in violation of Financial Code section 22400; and 5) making
5 loans contingent on the purchase of CDDTL products in violation of Financial Code section 22311.

6 I. Based on the Commissioner’s findings, Flurish took corrective actions by identifying
7 customers impacted by the violations and refunding all fees the Commissioner identified as
8 impermissible with respect to CDDTL and CFLL loans. Additionally, Flurish identified impacted
9 customers and refunded all fees paid by customers whose interest rates were identified as
10 miscalculated.

11 It is the intention and desire of the parties to resolve this matter without the necessity of a hearing or
12 other litigation.

13 NOW, THEREFORE, in consideration of these recitals and the terms and conditions set forth
14 below the parties agree as follows:

15 **TERMS AND CONDITIONS**

16 1. Purpose. This Agreement resolves the violations before the Commissioner in a manner that
17 avoids the expense of a hearing and possible further court proceedings, is in the public interest,
18 protects consumers, and is consistent with the purposes, policies, and provisions of the CDDTL and
19 the CFLL.

20 2. Finality of Agreement. Flurish hereby agrees to comply with the Agreement, set forth below,
21 and stipulates that the Agreement is hereby deemed final.

22 3. Desist and Refrain Order. In accordance with Financial Code sections 23050 and 22712,
23 Flurish stipulates that it is ordered to desist and refrain from violating the CDDTL and the CFLL
24 including but not limited to: (1) charging fees (debit, same day, and instant funding fees) in violation
25 of Financial Code 23036 (f); (2) charging fees to extend the due dates of deferred deposit transactions
26 in violation of Financial Code sections 23036, subdivisions (b) and (f); (3) making deferred deposit
27 transactions and loans contingent on each other in violation of Financial Code section 23037,
28 subdivision (c); (4) charging fees (debit, same day, and instant funding fees) in violation of Financial

1 Code section 22306; (5) providing inaccurate annual percentage rates on loans in violation of
2 Financial Code section 22346; (6) miscalculating interest rates in violation of Financial Code section
3 22400; (7) failing to correctly precompute interest charges in violation of Financial Code section
4 22400; and (8) making loans and deferred deposit transactions contingent on each other in violation
5 of Financial Code section 22311.

6 4. Waiver of Hearing Rights. Flurish acknowledges that the Commissioner is prepared to
7 proceed to an administrative hearing on the violations identified in this Agreement. Flurish hereby
8 waives the right to any hearing, and to any reconsideration, appeal, injunction, or other right to
9 review which may be afforded pursuant to the CDDTL and the CFLL. Flurish further expressly
10 waives any requirement for the filing of an Accusation that may be afforded by Government Code
11 section 11415.60 (b), the California Administrative Procedure Act, the California Code of Civil
12 Procedure, or any other provision of law. By waiving these rights, Flurish effectively consents to this
13 Agreement becoming final.

14 5. Previously Issued Refunds. After the Commissioner notified Flurish of these violations,
15 Flurish began providing refunds to affected consumers by way of an ACH deposit to their bank
16 account or issuing a credit against the customer's outstanding loan balance (if a customer has not
17 made payment on a loan related to one or more of the identified issues). For those consumers who
18 received refunds prior to the effective date of this Agreement, Flurish shall provide to the
19 Commissioner evidence of prior refund payments within 30 days of the execution of this Agreement
20 of no less than \$1,085,518.00.

21 6. Future Refund Requirements. To date, Flurish has not been able to issue refunds to every
22 consumer's bank account due to closed or inactive accounts. For refunds issued to consumers whose
23 accounts Flurish was unable to previously deposit the refund, Flurish shall comply with the
24 following:

25 a) Within 15 days from the effective date of this Agreement, Flurish shall email a notice to the
26 borrower stating:

27 "The Department of Business Oversight and Flurish have entered into an agreement to
28 resolve violations of California law. Pursuant to that agreement, a refund in the amount of

1 \$xxx.xx is being made for your benefit. In order to receive this refund, you must, within
2 twenty (20) days of the date of this email, either: (a) update your account information so that
3 the refund may be processed to your bank account (you may update your account information
4 by contacting Flurish by phone at (855) 253-6387), or (b) provide a current home address to
5 receive the refund by check.

6 If you have any questions concerning this refund, please contact Flurish, Inc. at (855) 253-
7 6387.”

8 b) Flurish shall complete all refunds to the borrowers who respond to the email provided in
9 paragraph 6 (a) within 60 days of the effective date of this Agreement.

10 c) Flurish shall provide the Department a monthly report in Excel format for each type of
11 charge the Department found to be unauthorized, covering refunds made to customers. The report
12 shall include at minimum the following: the customer’s transaction number (Loan ID#), customer’s
13 user identification number, customer’s name (first and last), last known address, date of transaction
14 (origination date), method of payment (credit to balance if charges not collected, or direct deposit into
15 bank account), amount paid, date of issuance of check (if applicable), check number (if applicable),
16 any funds that Flurish escheats to the State, the date the unclaimed funds escheat to the state, the total
17 dollar amount of payments made to customers, and the total amount of payments per customer. These
18 reports are due to Mary Ann Smith, Deputy Commissioner, 1515 K Street, Suite 200, Sacramento,
19 CA 95814 by close of business 30 days from the effective date of this Agreement and the second
20 report shall be due by close of business 60 days from the effective date of this Agreement.

21 c) Flurish shall be responsible for ensuring that any outstanding refund payment as to
22 which Flurish has not received a response from a customer under Paragraph 6(a) above is escheated
23 to the State of California pursuant to the provisions of the California Unclaimed Property Law (Code
24 of Civil Procedure, section 1500 et seq.).

25 d) Flurish shall maintain evidence for no less than five years that a customer’s balance
26 was reduced in the amount of the refund; that the customer was notified about the balance reduction;
27 and that Flurish escheated to the State any unclaimed amounts.

28 7. Administrative Penalty and Costs. Flurish agrees to pay (a) remediation of \$2,400,000.00,

1 inclusive of refunds made for the expedited funding fee and administrative costs, and (b) an
2 administrative penalty of \$100,000.00, all due and payable within thirty (30) calendar days of the
3 effective date of this Agreement. Flurish shall submit a check made payable to the Department of
4 Business Oversight in the amount of \$1,065,462.00, and submit it to Mary Ann Smith, Deputy
5 Commissioner, Department of Business Oversight, Enforcement Division, 1515 K Street, Suite 200,
6 Sacramento, CA 95814.

7 8. Full and Final Settlement. The parties hereby acknowledge and agree that this Agreement is
8 intended to constitute a full, final, and complete resolution of the matter and that no further
9 proceedings or actions will be brought by the Commissioner in connection with these matters either
10 under the CDDTL and the CFLL, or any other provision of law, unless the proceeding or action is
11 based upon discovery of new and further violations of the CDDTL and the CFLL which do not form
12 the basis for this Agreement or which were knowingly concealed from the Commissioner by Flurish.

13 9. Suspension of License for Failure to Comply. Flurish agrees that if it fails to comply with any
14 of the terms of this Agreement, Flurish may be immediately suspended from engaging in lending
15 under its CFLL and CDDTL licenses until the terms are met. Flurish hereby waives any notice and
16 hearing rights to contest the immediate suspension.

17 10. Binding. This Agreement is binding on all heirs, assigns, and/or successors in interest.

18 11. Commissioner's Duties. The parties further acknowledge and agree that nothing contained in
19 this Agreement shall operate to limit the Commissioner's ability to assist any other agency (city,
20 county, state or federal) with any prosecution of an administrative, civil or criminal action brought by
21 any such agency against Flurish.

22 12. Third Party Actions. It is the intent and understanding between the parties that this
23 Agreement does not create any private rights or remedies against Flurish or create any liability for
24 Flurish or limit defenses of Flurish for any person or entity not a party to this Agreement.

25 13. Independent Legal Advice. Each party represents, warrants, and agrees that it has received
26 independent advice from its attorney(s) or representatives with respect to the advisability of executing
27 this Agreement.

28 14. Counterparts. The parties agree that this Agreement may be executed in one or more separate

1 counterparts, each of which when so executed, shall be deemed an original. A fax signature shall be
2 deemed the same as an original signature. Such counterparts shall together constitute and be one and
3 the same instrument.

4 15. Waiver, Modification, and Qualified Integration. The waiver of any provision of this
5 Agreement shall not operate to waive any other provision set forth herein. No waiver, amendment, or
6 modification of this Agreement shall be valid or binding to any extent unless it is in writing and
7 signed by all of the parties affected by it.

8 16. Headings and Governing Law. The headings to the paragraphs of this Agreement are inserted
9 for convenience only and will not be deemed a part hereof or affect the construction or interpretation
10 of the provisions hereof. This Agreement shall be construed and enforced in accordance with and
11 governed by California law.

12 17. Full Integration. Each party represents, warrants, and agrees that in executing this Agreement
13 it has relied solely on the statements set forth herein and the advice of its own counsel. Each party
14 further represents, warrants, and agrees that in executing this Agreement it has placed no reliance on
15 any statement, representation, or promise of any other party, or any other person or entity not
16 expressly set forth herein, or upon the failure of any party or any other person or entity to make any
17 statement, representation or disclosure of anything whatsoever. The parties have included this clause:
18 (1) to preclude any claim that any party was in any way fraudulently induced to execute this
19 Agreement; and (2) to preclude the introduction of parol evidence to vary, interpret, supplement, or
20 contradict the terms of this Agreement.

21 18. Presumption from Drafting. Since the parties had the opportunity to draft, review and edit the
22 language of this Agreement, no presumption for or against any party arising out of drafting all or any
23 part of this Agreement will be applied in any action relating to, connected to, or involving this
24 Agreement. Accordingly, the parties waive the benefit of Civil Code section 1654 and any successor
25 or amended statute, providing that in cases of uncertainty, language of a contract should be
26 interpreted most strongly against the party who caused the uncertainty to exist.

27 19. Voluntary Agreement. Flurish enters into this Agreement voluntarily and without coercion
28 and acknowledges that no promises, threats or assurances have been made by the Commissioner or

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any officer, or agent thereof, about this Agreement.

20. Effective Date. This Agreement shall not become effective and final until signed by all parties.

21. Public Record. Respondent acknowledges that this Agreement is a public record.

22. Authority to Execute. Each signator hereto covenants that he/she possesses all necessary capacity and authority to sign and enter into this Agreement.

Dated: September 27, 2016

JAN LYNN OWEN
Commissioner of Business Oversight

By _____
MARY ANN SMITH
Deputy Commissioner
Enforcement Division

Dated: September 23, 2016

FLURISH, INC. (dba LendUP)

By _____
SASHA ORLOFF
President

APPROVED AS TO FORM AND CONTENT:

Dated: September 23, 2016

By _____
ANGELA L. JEFFERS, General Counsel