

Date: 6/10/22

By: DM

**BEFORE THE DEPARTMENT OF RESOURCES RECYCLING AND RECOVERY
STATE OF CALIFORNIA**

IN THE MATTER OF THE ACCUSATION AGAINST:

**HONG J. LEE, aka DAVID LEE, an individual dba 101 DESIGN FURNITURE AND
MATTRESS; 101 DESIGN FURNITURE AND MATTRESS**

Respondent

File No.: IH21-011-MAT

DECISION AND ORDER

I. INTRODUCTION

The Department of Resources Recycling and Recovery (CalRecycle or Department) served its Accusation on Hong J. Lee and 101 Design Furniture and Mattress (Respondent) on September 14, 2021.

Respondent objected to the Accusation and timely filed its Request for Hearing on August 23, 2021, and a hearing was conducted on January 6, 2022, in Sacramento, California via video-conferencing. On those dates, all evidence and testimony in this matter was received into the record and the record was closed.

Daniel Zlatnik, Attorney, CalRecycle, appeared on behalf of the Department. David Lee appeared on behalf of Respondent.

Douglas C. Jensen, Attorney IV, CalRecycle, presided over the hearing under a delegation of authority from CalRecycle Director, Rachel Machi Wagoner.

II. ISSUE

Whether Respondent's objection to the administrative civil penalties imposed on Respondent through the Accusation will be sustained or overruled.

III. EVIDENTIARY MATTERS

Witnesses

The Department presented testimony from Jonathan Schmidt (Schmidt), an environmental scientist for the Department. Schmidt conducts inspections of mattress retailers for the Department's Extended Producer Responsibility Compliance (EPRC) unit. He conducted an inspection of 101 Design Furniture and Mattress on January 29, 2020.

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The Department presented testimony from Steve Rogers (Rogers), an environmental scientist with the Department's EPRC unit. Rogers regularly conducts inspections of mattress retailers. He attempted to investigate 101 Design Furniture and Mattress on September 9, 2020, but was denied access by Respondent.

The Department presented testimony from Kirby Garrett (Garrett), a supervisor for the Department's EPRC unit. Garrett reviews inspectors' work and monitors ongoing investigations. He testified regarding the Department's communications with Respondent.

David Lee (Lee) presented testimony on behalf of Respondent.

Department Exhibits 1 through 12 were admitted into the record without objection.

IV. FINDINGS OF FACT

101 Design Furniture and Mattress is located at 101 North Western Avenue in Los Angeles, California (Site). The Site is used for retail mattress sales, and it is owned and operated by Lee.

Schmidt inspected the Site on January 29, 2020, where he observed mattresses displayed for sale. Lee was present at the inspection and admitted to Schmidt that Respondent was not registered with the Mattress Retail Council, Inc. (MRC), had never made any remittance payments, and did not add the recycling charge to sale prices of new mattresses. Schmidt provided an informational brochure to Lee regarding retailer responsibilities in connection with mattress sales. Later, Schmidt learned that mattresses he observed on display during his inspection were made by a non-compliant manufacturer.

On February 5, 2020, the Department issued a notice of violation to Respondent requiring Respondent to take corrective action and provide information to the Department within 30 days. Specifically, the Department directed Respondent to provide documentation of registration with the MRC, recent customer receipts displaying the recycling charge as a separate line item, documentation of a recycling charge remittance to the MRC, a complete list of manufacturers of mattresses available for sale at Site, and a statement that Respondent's website is monitored to ensure only compliant manufacturers' mattresses are offered for sale. The notice indicated that "[f]ailure to correct and/or submitting false or misleading information may result in violation(s) subject to penalties of up to \$5,000 per day pursuant to PRC section 42993.1(a)." Respondent did not provide any documents within the 30 days.

Respondent registered with MRC on January 31, 2020, and was approved on February 14, 2020.

On March 11, 2020, the Department issued to Respondent a second notice of violation, noting that Respondent had not complied with the corrective action requirements from

the first notice. It further indicated that failure to respond to the notice by April 10, 2020, would result in penalties of up to \$5,000 per day. Tracking information for the second notice indicates that the document was signed for by "L.Lee". Respondent did not respond to the second notice.

On March 17, 2020, the Department received a voicemail from Lee requesting that a representative from the Department call him back. The Department responded to the voicemail with an email reiterating that Respondent was required to provide documentation as indicated in the first and second notices of violation and restating the necessary corrective actions.

On July 30, 2020, the Department issued a third notice to Respondent. It reiterated the corrective action items and documentation requirements from the first and second notices and identified a due date of August 14, 2020. It emphasized that no further opportunities to avoid penalties would be provided.

On September 9, 2020, the Department attempted to inspect the Site, but was denied access by Respondent. While the Department was unable to conduct a complete inspection, it did observe that mattresses continued to be displayed for sale.

On September 16, 2020, the Department issued a fourth notice to Respondent, noting the access denial in addition to issues identified in the previous notices. It again indicated that Respondent was in violation and subject to penalties. Tracking information for the fourth notice shows that it was signed for by "Lee".

On December 2, 2020, the Department issued a letter to Respondent offering to resolve Respondent's alleged violations through settlement. The letter indicated that Respondent was subject to a penalty of \$37,575 as of December 2, 2020. It further stated that "if the violations have not been corrected, or if you do not choose to participate in the settlement process by January 4, 2021, the Department, CalRecycle, will refer the violations to our legal counsel and seek the maximum penalty allowed by law." Again, Respondent provided no response.

The Department filed its Accusation on September 14, 2021, seeking penalties totaling \$68,916 in connection with four violations of the Act:

- 1) A \$5,000 penalty for intentionally denying the Department with access to the Site on September 9, 2020, pursuant to PRC section 42993.3(a)(1).
- 2) A \$29,058.00 penalty for an "intentional" or "knowing" failure to provide relevant records pursuant to PRC section 42993.3(a)(2). Specifically, the Department seeks penalties of \$501.00 per day for a 58-day period.

- 3) A \$29,058 penalty- again, 58 days at \$501 per day- for Respondent's failure to add a recycling charge to the price of new mattresses and display the charge as a separate line item on receipts under PRC section 42989.1(a).
- 4) A \$5,800 penalty for 58 days of violation at \$100 per day for offering non-compliant mattresses for sale in violation of PRC section 22987(c).

Respondent objected to the Accusation on the ground "that it is so uncertain, ambiguous, or unintelligible that it fails to identify the transactions on which it is based or otherwise prevents preparation of a defense" and requested a hearing. Hearing was conducted on January 6, 2022.

V. LEGAL ANALYSIS

The Used Mattress Recovery and Recycling Act (PRC section 42985 et seq.) (the Act) was established in order to reduce illegal dumping, increase recycling, and substantially reduce public agency costs for the end-of-life management of used mattresses. The Department provides enforcement oversight of the Act and is authorized to impose administrative civil penalties on mattress retailers for violations.

"The department may impose an administrative civil penalty on any ... retailer that is in violation of this chapter. The amount of the administrative civil penalty shall not exceed five hundred dollars (\$500) per day, but, if the violation is intentional, knowing, or reckless, the department may impose an administrative civil penalty of not more than five thousand dollars (\$5,000) per day." (PRC section 42993.1(a).)

In assessing or reviewing the amount of civil penalty imposed for a violation of this article, the department or the court shall consider the totality of the circumstances, which may include, but is not limited to, the following:

- (a) The nature, circumstances, extent, and gravity of the violation(s).
- (b) The number and severity of the violation(s).
- (c) Evidence that the violation was intentional, knowing, or negligent.
- (d) The size of the violator.
- (e) History of violation(s) of the same or similar nature.
- (f) The willfulness of the violator's misconduct.
- (g) Whether the violator took good faith measures to comply with this chapter and the period of time over which these measures were taken.
- (h) Evidence of any financial gain resulting from the violation(s).
- (i) The economic effect of the penalty on the violator.
- (j) The deterrent effect that the imposition of the penalty would have on both the violator and the regulated community.
- (k) Any other factor that justice may require.

Here, the Department seeks to impose penalties upon Respondent totaling \$68,916 in connection with four violations of the Act.

Absent a statute or other authority fixing a different standard, the burden of proof requires proof by a preponderance of the evidence. (Evidence Code (EC) section 115.) Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting. (EC section 500.) Therefore, the Department meets its burden of proof by establishing by each charge by a preponderance of the evidence.

Count I- Failure to Provide the Department with Access to the Facility

The Department seeks to impose a penalty on Respondent for the September 9, 2020, access denial. It seeks the maximum penalty of \$5,000, contending that the denial "knowing" or "intentional"

Section 42993.3(a)(1) provides that a mattress retailer shall "[u]pon request, provide the department with reasonable and timely access, as determined by the department and as authorized pursuant to Title 13 (commencing with Section 1822.50) of Part 3 of the Code of Civil Procedure, to its facilities and operations, as necessary to determine compliance with this chapter."

Respondent does not dispute that it denied access in violation of section 42993.3(a)(1). However, it argues that the denial was not "knowing" and, therefore, a maximum penalty is not authorized. Specifically, Respondent contends that it did not know that it was obligated under the Act to provide the Department timely access to the Site.

Respondent's claim that it did not know that it must provide timely access is not credible. Following the first inspection- which Respondent permitted- Respondent was repeatedly provided clear information regarding its obligations under the Act, including the requirement to provide site access. Respondent acknowledged receipt of the information and demonstrated its understanding of the information in subsequent interactions with the Department.

Even allowing that the violation was not "knowing", a maximum penalty is still authorized. Section 42993.1(a) provides for a maximum penalty where the violation is "knowing" or "intentional". Here, it is undisputed that the September 9 access denial was intentional.

Respondent's September 9 access denial is a serious violation warranting a substantial penalty. Following the January 29 inspection, the Department repeatedly notified Respondent that it was in violation and directed Respondent to demonstrate that it had taken corrective actions. However, Respondent did not cooperate with those efforts; by denying access on September 9, Respondent further undermined the Department's enforcement oversight of the Act. The violation was willful and severe. A maximum penalty of \$5,000 is warranted and the Department's \$5,000 penalty is sustained.

Count II- Failure to Provide the Department with Relevant Records

The Department seeks to impose on Respondent a penalty of \$29,058.00 for an “intentional” or “knowing” failure to provide relevant records pursuant to PRC section 42993.3(a)(2). Specifically, the Department seeks penalties of \$501.00 per day for a 58-day period. The Accusation notes that the Department has authority to “impose penalties for at least 108 days- “the aggregate number of days the Department afforded Respondent to demonstrate compliance with the Act following the various notices” but seeks a reduced number of days based on representations made to Respondent during settlement negotiations.

PRC section 42993.3(a)(2) states that a mattress retailer “shall... [u]pon request, provide the department with relevant records necessary to determine compliance with this chapter.” (PRC section 42993.3(a)(2).)

Here, the Department requested records, including receipts, demonstrating that Respondent had corrected violations identified in the Department’s January 29 inspection. Respondent did not provide the records.

Respondent does not dispute that it failed to provide the records, but rather contends that the failure was not “knowing”. Specifically, Respondent claims that it did not know that it was required to produce the records pursuant to the Act. As discussed above in connection with Count I, Respondent’s claims of ignorance are not credible.

Respondent’s failure to produce relevant records represents a serious violation of the Act. It prevented the Department from assessing whether Respondent had come into compliance and whether new violations had arisen. The violation undermined the Department’s enforcement oversight of the Act and it was knowing and willful. The Department’s penalty of \$29,058 is sustained.

Count III- Respondent Failed to Collect the Recycling Charge and Display Recycling Charge on Receipts, in Violation of PRC Section 42989.1(a)

The Department seeks to impose a penalty of \$29,058- 58 days at \$501 per day- for Respondent’s failure to add a recycling charge to the price of new mattresses and display the charge as a separate line item on receipts as required by PRC section 42989.1(a).

PRC section 42989.1 provides that “each ... retailer ... that sells a mattress to a consumer ... shall add the (recycling) charge to the purchase price of the mattress. The charge shall be clearly visible on the invoice, receipt, or functionally equivalent document by the seller to the consumer as a separate line item.” (PRC section 42989.1(a).)

At the January 29 inspection, Respondent admitted that he had not been adding a recycling charge as a separate line item on receipts. Following the inspection, the Department repeatedly asked Respondent to provide receipts demonstrating that the charge was being collected, but Respondent did not cooperate. On September 9, the Department attempted to access the Site but was denied access; nonetheless, the Department observed that mattresses continued to be displayed for sale.

It is the Department's burden to prove "each fact the existence or nonexistence of which is essential to the claim ... that he is asserting." (EC section 500.) Here, the Department has provided evidence that Respondent was out of compliance from January 29 to September 9, a 223-day period. Respondent's claim that he did not issue receipts during this time is not credible and he has not otherwise refuted the Department's allegation. The Department's penalty of \$29,058 for 58 days of violations of Section 42989.1 is sustained.

Count IV- Respondent Sold, Distributed, or Offered for Sale a Mattress in the State While in Violation of PRC Section 42987(c).

The Department seeks to impose a penalty for selling noncompliant mattresses of \$5,800 for 58 days of violation at \$100 per day for violation of PRC section 42987(c).

Section 42987(c) states that: "A retailer shall not sell, distribute, or offer for sale a mattress in the state unless the retailer is in compliance with this chapter and the manufacturer or renovator of the mattress sold by the retailer is listed in compliance with this chapter."


As discussed above in connection with Count III, the Department has provided evidence that Respondent was out of compliance from January 29 to September 9, a 223-day period. Nonetheless, the Department seeks only 58 days of violation. The Department's penalty of \$5,800 is sustained.

VI. DECISION AND ORDER

Respondent's objection to the Accusation is overruled.

IT IS SO ORDERED.

DATED: 6/10/22


Douglas C. Jensen
Attorney IV
Department of Resources Recycling
and Recovery (CalRecycle)
Hearing Officer