

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

**IN THE MATTER OF THE ACCUSATION AGAINST:
VIET XUAN HA and NEW WEST FURNITURE & MATTRESS
Respondents**

AGENCY NO: IH22-019-MAT

DEFAULT ADMINISTRATIVE DECISION FOR IMPOSITION OF PENALTIES

(Public Resources Code Sections 42985-42994 and Title 14 California Code of Regulations Sections 18959-18964)

INTRODUCTION AND PROCEDURAL HISTORY

1. The Department of Resources Recycling and Recovery (Department) served VIET XUAN HA, an individual, and NEW WEST FURNITURE & MATTRESS, an unincorporated sole proprietorship, partnership, or association (Respondents), an accusation in the above-captioned matter on November 29, 2022, alleging that Respondents committed multiple violations of the Used Mattress Recycling and Recovery Act (Public Resources Code (PRC) section 42985 et seq.) (the Accusation). Pursuant to the Act and its implementing regulations (Title 14 of the California Code of Regulations (14 CCR) section 18959 et seq.), the Accusation asserts that Respondents should be penalized \$34,700 for such violations.

2. Included with the Accusation was a form for requesting a hearing (Request for Hearing) to refute the Department's allegations. Respondents were provided more than 15 days from the date of service to file a Request for Hearing.

3. Because Respondents did not file a Request for Hearing or otherwise communicate to the Department that they wish to challenge the allegations against them, the Department issues this Default Administrative Decision for Imposition of Penalties (Decision) pursuant to the Act, 14 CCR section 18971, and Government Code section 11520.

STATUTORY AND REGULATORY FRAMEWORK

4. The Act created the framework for an "extended producer responsibility" program for the end-of-life handling of mattresses in California. (PRC section 42985.) The Act aims to reduce illegal dumping, increase recycling, and substantially reduce public agency costs for the end-of-life management of used mattresses, (PRC section 42985(a)(1)), while also ensuring that Consumers have convenient, no-cost

options available for collection or drop-off of used mattresses. (PRC sections 42985(b), 42987.1(l), 42987.1(n), 42992.) The Act authorizes the Department to certify a mattress recycling organization (MRO) to develop, finance, and implement a convenient and cost-effective program to recover and recycle used mattresses in the state. (PRC sections 42985(a)(1), 42987(a)(1).)

5. The Act defines “Retailer” as “a person who sells mattresses in the state or offers to a consumer a mattress in the state through any means, including, but not limited to, by remote offering, including sales outlets or catalogs, electronically through the Internet, by telephone, or through the mail.” (PRC section 42986(q).)

6. The Act requires all retailers subject to the Act to do the following:

a) register with the MRO (PRC section 42987(b)(1));

b) not sell, offer for sale, or distribute a mattress in the state unless the retailer is in compliance with the Act and the manufacturer of the mattress is identified on the list of compliant manufacturers maintained on the Department’s website (PRC sections 42987(c), 42993(a), 42993(d));

c) add a recycling charge to the purchase price of each mattress and remit the charge to the MRO (PRC section 42989.1(a), (b));

d) when adding the mattress recycling charge to the purchase price of each mattress, clearly display the charge as a separate line item on the invoice, receipt, or equivalent document (PRC section 42989.1(a));

e) offer consumers the option to have a used mattress picked up, at no additional cost, when their new mattress is delivered (PRC section 42992(a));

f) upon request by the Department, and as necessary for the Department to determine whether the retailer is in compliance with the Act, provide the Department with access to the retailer’s facilities and operations, provide relevant records, and maintain such records for at least three years (PRC section 42993.3(a), (b)); and

g) monitor the Department’s website to determine if the manufacturers or renovators of the mattresses the retailer sells are in compliance with the Act (PRC section 42993(c)).

7. There is only one certified MRO: Mattress Recycling Council, Inc. (MRC), which administers the only mattress recycling program under the Act.

8. Pursuant to PRC section 42993.1 and 14 CCR sections 18970 and 18971, the Department may impose an administrative civil penalty for violations of the Act. The Department has authority to impose an administrative civil penalty of up to five hundred dollars (\$500) per day for each violation, but, if the violation is intentional, knowing, or reckless, the Department may impose an administrative civil penalty of up to five thousand dollars (\$5,000) per day for each violation.

9. Pursuant to 14 CCR section 18970, to determine an appropriate penalty, the Department considers the totality of the circumstances, including the factors identified in section 18970: (a) the nature, circumstances, extent, and gravity of violations; (b) the number and severity of violations; (c) evidence that the violation was intentional, knowing, or negligent; (d) the size of Respondents' business; (e) history of violations of the same or similar nature; (f) the willfulness of Respondents' misconduct; (g) whether Respondents took good faith measures to comply and the period of time over which these measures were taken; (h) evidence of any financial gain resulting from the violations; (i) the economic effect of the penalty on Respondents; (j) the deterrent effect that the imposition of the penalty would have on both Respondents and the regulated community; and (k) any other factor that justice may require.

FACTUAL FINDINGS

10. The Department adopts the allegations of the Accusation, as reproduced below, as its factual findings in this matter. By not filing a Request for Hearing, Respondents waived their right to challenge these allegations through the informal hearing procedures outlined in the Administrative Procedure Act (Gov. Code section 11445.10 et seq.).

11. Respondents are, and at all times mentioned herein, were, the owners and operators of a business known as "New West Furniture & Mattress."

12. Since at least as early as May 2008, Respondents have operated a mattress retail store under the name "New West Furniture & Mattress," located at 2398 Stevens Creek Boulevard, San Jose, CA 95128 (the Store).

13. On July 14, 2021, Department inspectors visited the Store to conduct an inspection. During the visit, the inspectors contacted a Store representative, who allowed the inspectors to take photographs in and around the Store but refused to permit any inspection of Respondents' records. The inspectors informed the representatives that refusing to allow the Department to inspect Respondents' records was a

violation of the Act.

14. Before leaving the store, the inspectors provided the representative an informational pamphlet, "California's Used Mattress Recovery and Recycling Program Enforcement Overview" (Mattress Program Enforcement Brochure), regarding the Act, its requirements, and the Department's role in enforcing it.

15. On July 21, 2021, the Department sent Respondents a Notice of Violation (First Notice of Violation). The First Notice of Violation was delivered to the Store on July 22, 2021, and was also sent to Respondents' email address. Included with each copy of the notice was an inspection report identifying eight requirements of the Act that Respondents appeared to be violating.

16. The First Notice of Violation explained that Respondents were in violation of the Act, that penalties would continue to accrue until Respondents corrected the violations, and that the violations of the Act were subject to penalties of up to \$5,000 per day.

17. The First Notice of Violation explained that Respondents were required to provide to the Department various records necessary for the Department to monitor Respondents' compliance with the Act. In particular, the notice identified the following records (Required Compliance Records) and instructed Respondents to provide them by August 20, 2021 (within 30 days of the date of the notice):

- a) documentation showing that Respondents had registered with MRC;
- h) copies of three sales receipts showing recent sales of mattresses;
- i) documentation that Respondents had recently remitted recycle charges to MRC;
- j) a complete list of manufacturers and renovators that supply the mattresses that Respondents offer for sale;
- k) documentation or a statement demonstrating whether Respondents offer customers the option of having a used mattress picked up upon delivery of a purchased mattress; and
- l) documentation or a statement indicating whether Respondents comply with the requirement that they monitor the Department's website to verify that the manufacturers and renovators of mattresses that they offer for sale are registered with MRC, as required by the Act.

18. The First Notice of Violation also included optional questionnaires for Respondents to fill out to demonstrate whether they were complying with the used mattress takeback and website monitoring

requirements (the Optional Questionnaires).

19. The First Notice of Violation also included a copy of the Mattress Program Enforcement Brochure.

20. Respondents did not respond to the First Notice of Violation or provide any of the Required Compliance Records.

21. On September 2, 2021, the Department sent Respondents a Notice of Violation (Second Notice of Violation). The Second Notice of Violation was delivered to the Store on September 3, 2021, and was also sent to Respondents' email address. Included with each copy of the notice was an inspection report identifying eight requirements of the Act that Respondents appeared to be violating.

22. The Second Notice of Violation expanded the records that Respondents were required to provide to demonstrate compliance with the Act (the Expanded Compliance Records). The Expanded Compliance Records encompassed the Required Compliance Records but, rather than requiring just three receipts, required Respondents to provide copies of all receipts for mattress sales between July 14, 2021, and September 1, 2021.

23. The Second Notice of Violation explained that Respondents were in violation of the Act, that penalties would continue to accrue until Respondents corrected the violations, and that the violations of the Act were subject to penalties of up to \$5,000 per day.

24. The Second Notice of Violation set a response deadline of October 4, 2021 (29 days from the date of the notice).

25. Respondents did not respond to the Second Notice of Violation or provide any of the Expanded Compliance Records.

26. On October 6, 2021, Department inspectors again visited the Store to conduct an inspection. During the visit, the Inspectors met with Respondent Xuan Ha, who identified himself as the business owner.

27. The inspectors provided Respondent Xuan Ha with hard copies of the First Notice of Violation and Second Notice of Violation, including the corresponding inspection reports, and Respondent Xuan Ha confirmed that he had previously received them.

28. Respondent Xuan Ha admitted that Respondents were not registered with MRC and were not

remitting any recycling charges to MRC.

29. When asked by the inspectors whether the Respondents offer customers the option to have used mattresses picked up upon delivery of a new one, Respondent Xuan Ha explained that Respondents provide mattress delivery but would not know what to do with a used mattress if they were to pick one up from a customer.

30. During the inspection, the inspectors requested access to receipts for sales of mattresses at the Store. Respondent Xuan Ha did not provide any of the requested records, claiming that such records were not maintained on-site.

31. The Department inspectors instructed Respondent Xuan Ha that Respondents were in violation of the Act, which required Respondents to provide to the Department the records requested in the Second Notice of Violation.

32. On November 5, 2021, the Department sent Respondents another notice regarding their violations of the Act (Notice of Continued Violation). The Notice of Continued Violation was delivered to the Store on November 9, 2021.

33. The Notice of Continued Violation explained that Respondents remained in violation of multiple requirements of the Act and were subject to ongoing penalties of up to \$5,000 per day.

34. The Notice of Continued Violation demanded that Respondents provide the Department records demonstrating that they had corrected the violations by November 12, 2021, and explained that penalties would continue to accrue until Respondents provided such proof.

35. Respondents did not respond to the Notice of Continued Violation or provide any compliance- related documents, such as the Expanded Compliance Records.

LEGAL CONCLUSIONS

36. Respondents are a retailer subject to the Act's requirements because they sell and offer for sale mattresses in California.

37. Respondents intentionally, knowingly, or recklessly violated the Act as set forth in the Accusation and below.

38. In consideration of the totality of the circumstances, including the regulatory factors listed in 14 CCR section 18970, a penalty of \$34,700 is appropriate, as further detailed below.

COUNT I

RESPONDENTS FAILED TO PROVIDE THE DEPARTMENT WITH RELEVANT RECORDS, IN VIOLATION OF PRC SECTION 42993.3(a)(2).

39. During the inspection on July 14, 2021, and in the First Notice of Violation (dated July 21, 2021), Second Notice of Violation (dated September 2, 2021), and Notice of Continued Violation (dated November 5, 2021), the Department demanded that Respondents provide various documents necessary for the Department to assess Respondents' compliance with the Act. In each instance, Respondents failed to provide any records.

40. Respondents' failure to provide records upon request violated PRC section 42993.3(a)(2). This violation persisted throughout all times relevant herein, including through the date of the Accusation.

41. In light of the factors listed in 14 CCR section 18970, a penalty of \$14,850 for Respondents' continuous violation of PRC section 42993.3 is appropriate. Although this violation began on July 14, 2021, and persisted at least through the date of the Accusation (more than 450 days), the Department penalizes Respondents based on their continuous violation of the Act for at least 66 days, with a per-day penalty amount of \$225. The minimum basis of 66 days equals the sum of the periods during which the Department's written notices demanded that Respondents provide records so the Department could assess their compliance with the Act:

| Notice | Date of Notice | Response Due Date | Duration (Days) |
|--------------------------------------|-------------------|-------------------|-----------------|
| <i>First Notice of Violation</i> | July 21, 2021 | August 20, 2021 | 30 |
| <i>Second Notice of Violation</i> | September 2, 2021 | October 4, 2021 | 29 |
| <i>Notice of Continued Violation</i> | November 5, 2021 | November 12, 2021 | 7 |
| | | Total | 66 |

COUNT II

RESPONDENTS FAILED TO REGISTER WITH MRC AS A RETAILER, IN VIOLATION OF PRC SECTION 42987(b)(1)

42. Despite offering mattresses for sale since at least as early as July 2021, Respondents have never registered with MRC as a retailer, in violation of PRC section 42987(b)(1). This violation has persisted throughout all times relevant herein, including through the date of the Accusation.

43. In light of the factors listed in 14 CCR section 18970, a penalty of \$14,850 for Respondents' continuous violation of PRC section 42987(b)(1) is appropriate. Although this violation began no later than July 14, 2021, and persisted at least through the date of the Accusation (more than 450 days), the Department penalizes Respondents based on their continuous violation of the Act for at least 66 days, with a per-day penalty of \$225. The minimum basis of 66 days equals the sum of the periods during which the Department's written notices demanded that Respondents provide records demonstrating that they had corrected this continuous violation of the Act (see table above).

COUNT III

RESPONDENTS FAILED TO COLLECT AND REMIT RECYCLING CHARGES, IN VIOLATION OF PRC SECTION 42989.1

44. Respondents have not added the recycling charge to the price of new mattresses and shown the charge as a line item on receipts for any mattress sales since at least as early as July 14, 2021, and each such sale has constituted a violation of PRC section 42989.1(a).

45. Even if Respondents did collect any recycling charges in compliance with PRC section 42989.1(a), they violated PRC section 42989.1(b) continuously since collecting the charges because they never remitted the charges to MRC.

46. In light of the factors listed in 14 CCR section 18970, a total penalty of \$2,500 for Respondents' violations of PRC section 42989.1 is appropriate. Although Respondents were violating PRC section 42989.1 at least as early as July 14, 2021, and continued to violate it at least through the date of the Accusation, the Department penalizes Respondents \$50 per day for the period of 50 days covered by the Expanded Compliance records. The Second Notice of Violation demanded the Expanded Compliance Records so that the Department could assess Respondents' compliance with PRC section 42989.1 on each

of those days (July 14, 2021, through September 1, 2021).

47. Even if the factual evidence were insufficient to establish violations of PRC section 42989.1, Respondents would have caused such insufficiency by intentionally not providing the Department records relevant to those violations, as described in Count I. A \$2,500 penalty is therefore appropriate either as a penalty for Respondent's intentional violation of section 42989.1 or as an additional penalty for the intentional violation of section 42993.3(a)(2) set forth in Count I.

COUNT IV

RESPONDENTS FAILED TO OFFER FREE PICKUP OF USED MATTRESSES UPON DELIVERY OF NEW MATTRESSES, IN VIOLATION OF PRC SECTION 42992(a)

48. During both inspections (the first on July 14, 2021, and the second on October 5, 2021) and in the First Notice of Violation (dated July 21, 2021) and Second Notice of Violation (dated September 2, 2021), the Department required Respondents to provide documentation or a statement regarding whether they offer free pickup of a used mattresses when delivering a new mattress. Respondents provided no documentation or other response indicating that they offered this mandatory, free service to their customers.

49. Respondents violated PRC section 42992(a) every time they delivered a new mattress from at least as early as July 14, 2021, through at least as late as September 1, 2021, by not offering pickup of a used mattress in connection with delivery.

50. Respondents continue not to offer customers the option to have a used mattress picked up upon delivery of a purchased mattress, thereby violating PRC section 42992(a) with each such delivery.

51. In light of the factors listed in 14 CCR section 18970, a penalty of \$50 per day, for a total penalty of \$2,500, for Respondents' violations of PRC section 42992(a) is appropriate. Although Respondents were violating section 42992(a) at least as early as July 14, 2021, and continued to violate it at least through the date of the Accusation, the Department penalizes Respondents based on their violation of the Act on 50 different days. The minimum basis of 50 days equals the number of days covered by the Expanded Compliance Records. The Second Notice of Violation demanded the Expanded Compliance Records so that the Department could assess Respondents' compliance with PRC section 42992(a) on each of those days (July 14, 2021, through September 1, 2021).

52. Even if the factual evidence were insufficient to establish violations of PRC section 42922(a), Respondent would have caused such insufficiency by intentionally not providing the Department records relevant to those violations, as described in Count I. A \$2,500 penalty is therefore appropriate either as a penalty for Respondents' intentional violation of section 42922(a) or as an additional penalty for the intentional violation of section 42993.3(a)(2) set forth in Count I.

53. Moreover, if Respondents provided no documentation that they offered no-cost mattress pickup because they did not maintain such documentation, a \$2,500 penalty would still be appropriate because lack of such documentation would constitute a violation of PRC section 42992 (subdivisions (a) and (b)), which requires Respondents to maintain records necessary for the Department to determine their compliance with the Act.

ORDER

Good cause appearing, the Department acts in accordance with Government Code section 11520, subdivision (a), and orders as follows:

Respondents VIET XUAN HA and NEW WEST FURNITURE & MATTRESS are hereby ordered to pay an administrative penalty of \$34,700 to the Department within 30 (thirty) days of the date of this Decision.

RESPONDENTS' RIGHT TO FILE WRITTEN MOTION

Pursuant to government code section 11520, subdivision (c), Respondents have the right to serve the Department with a written motion requesting that the decision be vacated and stating the grounds relied on:

Within seven days after service on the respondent of a decision based on the respondent's default, the respondent may serve a written motion requesting that the decision be vacated and stating the grounds relied on. The agency in its discretion may vacate the decision and grant a hearing on a showing of good cause. As used in this subdivision, good cause includes, but is not limited to, any of the following:

- (1) Failure of the person to receive notice served pursuant to Section 11505.
- (2) Mistake, inadvertence, surprise, or excusable neglect. (Gov. Code section 11520(c).)

This Decision shall become effective on the date signed below.

Dated: Jun 22, 2023

MINDY MCINTYRE
Chief Deputy Director
Department of Resources Recycling and
Recovery