



THE CITY OF NEW YORK  
DEPARTMENT OF CONSUMER AND WORKER PROTECTION

NYC DEPARTMENT OF CONSUMER  
AND WORKER PROTECTION,

*Petitioner,*

*-against-*

PRESTIGE MOTOR SALES, INC.,

*Respondent.*

OATH Index No. 2585/19

**Final Agency Decision**

On June 21, 2023, Administrative Law Judge Noel R. Garcia of the Office of Administrative Trials and Hearings (“OATH”) issued a Report and Recommendation (the “R&R”) in the above-captioned matter. OATH recommended that Respondent be directed to pay \$781,000 in civil penalties to the Department of Consumer and Worker Protection (“Department”) and \$24,472.19 in restitution to consumers Regina Aliuthmar, Patrick Fontana, Alexander Obianwu, Robert Rosado, and Sandy Saintelia, for violations of the New York City Consumer Protection Law and various laws and rules governing secondhand automobile dealers. On August 10, 2023, the Department received written arguments from Petitioner.

The Department now issues this Final Agency Decision pursuant to section 2203(h)(l) of the New York City Charter and section 6-02 of title 6 of the Rules of the City of New York. Following review of the record, the Department adopts OATH’s R&R subject to the modifications explained below.

**DISCUSSION**

OATH’s R&R recommended that violations of the Consumer Protection Law, New York City Administrative Code (“NYC Code”) section 20-700 *et seq.* (“CPL”) be sustained, but recommended dismissal of additional violations of the CPL alleged by Petitioner. The Department modifies OATH’s R&R to sustain 575 additional CPL violations. The Department also modifies the amounts of total civil penalties and restitution in the R&R.

Specifically, in count 1, Petitioner alleged that from at least November 9, 2017, Respondent violated the CPL 575 times by falsely representing in online advertisements that its automobiles were certified pre-owned (“CPO”). Petitioner also requested that OATH draw a negative inference that Respondent did not participate in a CPO program based on Respondent’s failure to produce documents regarding its CPO program or the CPO status of its automobiles. In



the R&R, OATH recommended that the 575 violations be dismissed, holding that, while it is likely that at least some advertised automobiles were not CPO, on this record, it cannot be determined which advertisements were false. OATH Dec. at 4 (June 21, 2023). OATH also declined to draw a negative inference from Respondent’s failure to produce documents. OATH’s recommendations are in error.

### I. The CPO Advertisements Violated the CPL.

The R&R misinterprets the evidentiary record. First, the R&R references the affidavit of Gehad Elsayed, Respondent’s office manager, only to the extent it provided testimony that “not all” automobiles were CPO. OATH Dec. at 4. In so doing, the R&R failed to consider the affidavit in full. Beyond that important point, the Elsayed affidavit states that Respondent lacked the capacity to perform detailed inspections or recondition automobiles, as required of any CPO program. Critically, it also states that Respondent would only certify the automobiles as CPO if a consumer requested it, meaning each automobile was not CPO unless a consumer initiated a request.

The R&R also failed to properly consider the individual deceptive website listings entered in evidence. Each listing displays a badge on the corner of an automobile’s picture that reads “CPO vehicles,” indicating that specific automobile was already CPO. But the listings omit any information about whether the automobile was CPO at the time of listing or only upon request. They also deceive consumers to believe that each individual vehicle was CPO-eligible, which might not be the case. Accordingly, those CPO badges, in light of the other evidence in the record, violated the CPL. *See* NYC Code § 20-701(a).

In total, the evidence establishes that Respondent’s automobiles were not CPO, at least when advertised, despite the claims of Respondent’s online advertisements. Thus, these advertisements were deceptive and violated the CPL.

### II. OATH Should Have Drawn a Negative Inference

A negative inference may be drawn when a party withholds evidence that would be relevant to the case. *Love v. N.Y. Hous. Auth.*, 251 A.D.2d 553, 554 (2d Dep’t 1998). As part of OATH’s dismissal of these violations, the ALJ refused to draw a negative inference based on Respondent’s failure to respond to discovery requests for documents relating to any CPO programs or automobiles. OATH Dec. at 4. In doing so, the R&R relied on *Police Dep’t v. Pichardo*, OATH Index No. 913/23 (Nov. 15, 2022), concerning the release of a vehicle seized as the alleged instrumentality of a crime. There, the NYPD failed to show any evidence that a lawful procedure was followed during the search of the vehicle and the only evidence produced was contradictory. *Id* at 5. A negative inference cannot supply an essential fact or be used to make up a deficiency in a party’s argument. *Id*.

Here, as discussed above, Petitioner established that Respondent falsely advertised its vehicles as CPO through testimony and website listings. A negative inference was proper here

and would not, as the ALJ found, be used to supply a deficiency in Petitioner’s case or be used as proof of an essential fact. *See* OATH Dec. at 4.

Accordingly, Respondent is liable for 575 additional violations of the CPL, for a total of \$201,250 in additional civil penalties.

III. OATH Miscalculated The Total Civil Penalties and Restitution

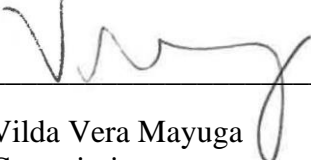
The R&R recommended total civil penalties of \$781,000 and restitution of \$24,472.19. OATH Dec. at 2. The Department modifies both amounts.

Respondent is liable for \$981,900 in total civil penalties. This includes \$201,250 in additional civil penalties for the 575 CPL violations discussed above. This also includes \$1,750 in civil penalties for five violations in count one related to the misrepresentation of dealer fees. OATH Dec. at 11. While the R&R found five violations for \$1,750 in civil penalties, it erroneously recommended civil penalties of \$2,100 and used the erroneous \$2,100 amount to calculate \$781,000 in total civil penalties. *See* OATH Dec. at 20, para. 12. The \$2,100 in penalties is lowered to the correct amount of \$1,750.

Respondent is liable for \$24,772.19 in restitution. This is the total of the five individual amounts of restitution—\$900.00 for Regina Aliuthmar, \$500.00 for Patrick Fontana, \$9,240.83 for Alexander Obianwu, \$4,174.98 for Robert Rosado, and \$9,956.38 for Sandy Saintelia—that OATH recommended. OATH Dec. at 21. The Report and Recommendation erroneously provided the total amount of restitution as \$24,472.19. *See* OATH Dec. at 2.

**CONCLUSION**

OATH’s Report and Recommendation is adopted subject to the modifications explained above. Respondent is ordered to pay \$981,900 in civil penalties and \$24,772.19 in restitution.

  
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Vilda Vera Mayuga  
Commissioner  
Department of Consumer and Worker Protection

Date: 10/06/2023