

CONSUMER PROTECTION
DIVISION, OFFICE OF THE
ATTORNEY GENERAL, STATE OF
MARYLAND

Proponent,

vs.

ATCL-MD, INC.,
T/A AROUND THE CLOCK
LOCKSMITH, *et al.*

Respondents.

* IN THE
* CONSUMER PROTECTION
* DIVISION OF THE
* OFFICE OF THE
* ATTORNEY GENERAL
* Case No.: 10-013-184207
* OAH No. OAG-CPD-101-10-12108
* OAH No. OAG-CPD-04-10-12113

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**RESPONDENTS’ EXCEPTIONS TO JUDGE KIMBERLY FARRELL’S
PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Respondents ATCL-MD, Inc. t/a Around the Clock Locksmith (“ATCL”) and Joseph Horton¹ hereby submit these exceptions, pursuant to COMAR 02.01.02.21, to Administrative Law Judge Kimberly Farrell’s (“ALJ”) Proposed Findings of Fact and Conclusions of Law.

Procedural Background

Proponent, the Consumer Protection Division of the Office of the Attorney General (the “Proponent” or the “Division”), commenced this action on April 6, 2010 by filing a Statement of Charges seeking to enjoin Respondents from engaging in alleged unfair or deceptive trade practices, as defined in §§ 13-301(1), 13-301(2), 13-301(3) and 13-303 of the Maryland Consumer Protection Act, in the course of offering and selling locksmith services, and to obtain relief for consumers allegedly victimized by Respondents’ alleged unfair or deceptive trade practices.

¹ Throughout the document references to “Respondent” or “Respondents”, whether singular or plural, are intended to be references to Respondents ATCL and Joseph Horton.

In its Statement of Charges, the Division alleged that Respondents engaged in unfair or deceptive trade practices by: (1) making false and misleading statements to consumers that have the capacity, tendency or effect of deceiving or misleading consumers; (2) representing that they have licenses, accreditation by the Better Business Bureau (“BBB”) and other connections and affiliations which they do not have; (3) failing to state material facts, namely the fees to be charged to consumers for Respondents’ services, the omission of which deceives or tends to deceive consumers; and (4) charging consumers “exorbitant” undisclosed fees for goods and services and then pressuring them to approve the fees.

Simultaneously with its filing of its Statement of Charges, the Proponent petitioned for Entry of an *Ex Parte* Cease and Desist Order (the “*Ex Parte* Order”) alleging that Respondents are likely to continue to violate the Maryland Consumer Protection Act thereby causing additional harm to consumers. On April 6, 2010, the Division entered an *Ex Parte* Cease and Desist Order ordering, *inter alia*, Respondents to immediately cease and desist from engaging in any unfair or deceptive trade practices in violation of the Maryland Consumer Protection Act. Pursuant to the *Ex Parte* Order and Md. Code Ann., Com. Law, § 13-403(d), Respondents requested a hearing on the issues raised in the *Ex Parte* Order only.

Over objection by Respondents, a contested trial was held with respect to both the issues raised in the *Ex Parte* Order and the issues raised in the Statement of Charges on May 7, 2010, May 21, 2010, May 26, 2010, June 1, 2010, June 3, 2010, and June 9, 2010 at the Office of Administrative Hearings (“OAH”) in Hunt Valley, Maryland.

After the conclusion of the contested trial, both parties submitted proposed findings of facts and conclusions of law along with post-trial briefing of the issues raised in the Statement of Charges and *Ex Parte* Order.

On October 19, 2010, after evaluation of the evidence presented, the ALJ submitted proposed findings of fact and conclusions of law (“Proposed Findings and Conclusions”) with respect to the issues raised in the Proponent’s Statement of Charges and *Ex Parte* Order.

**RESPONDENTS’ EXCEPTIONS TO THE PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW**

I. Exception --- Representations That Respondent Could Not Give an Estimate

Respondent takes exception to the ALJ’s factual finding that Respondent represented to consumers that he could not give an estimate of charges. Specifically, Respondent excepts to factual findings 223, 258, 270, 286, 420 and those contained on pages 70-71 under the subheading titled “Representations that the Respondent Could Not Give an Estimate” of the Proposed Findings and Conclusions. Accordingly, Respondent excepts to the ALJ’s conclusion of law number 4 that Respondent violated § 13-301(1) of the Maryland Consumer Protection Act by representing to consumers that he could not give an estimate of his charges.

The basis of Respondent’s exception to the ALJ’s factual findings is that the ALJ erroneously disregarded the signed estimate of Mr. Couzantino and the signed estimates of all post-April 8, 2010 consumers serviced by Respondent and evidence that such estimates were provided by Respondent prior to the commencement of work. *See* Respondents Exhibit 48A, B, and C. Additionally, the ALJ accorded undue weight to the testimony of Elizabeth Mi-Jin Shin, Ann McGovern, Dennis Collins, Jr., Robert Lennox, and Charles E. Couzantino on this issue, and completely disregarded Respondent’s testimony that estimates were always provided to consumers.

Moreover, there is no legal authority supporting the ALJ’s conclusion of law that merchants have a duty to provide estimates to consumers prior to the commencement of work. The ALJ’s misinterpretation of the Court of Special Appeals decision in *State v. Cottman*

Transmission Systems, Inc., 86 Md. App. 714 (1991) led to the erroneous conclusion of law that Respondents were required to provide estimates to consumers prior to the commencement of work. *See* Respondents' discussion of the *Cottman* case in § VII of this memorandum.

II. Exception --- Respondent's Providing Deliberately Low Estimates

Respondent takes exception to the ALJ's factual finding that Respondent provided deliberately low estimates to consumers. Specifically, Respondent excepts to factual findings 88-9, 93, 122, 156, 208-10, 332, 435, 472, 495, 503 and those contained on pages 71-72 under the subheading titled "Providing a Deliberately Low Estimate" of the Proposed Findings and Conclusions. Respondent also excepts to the ALJ's conclusion of law number 4 that Respondent violated § 13-301(1) of the Maryland Consumer Protection Act by providing deliberately low estimates to consumers.

The basis of Respondent's exception to the ALJ's factual findings is that the ALJ accorded undue weight to the testimony of Hae Young Park, David G. Fritz, Robert Kestell, Regina Wright, Allison Busby, Michelle Roles, Amy Russell, Salem Reimer, Jennifer Wainberg, and William Sitko. Additionally, the ALJ failed to properly accord due weight to Respondent's testimony that prior to performing locksmith services, he always provided the consumer with the total cost that would be charged for locksmith services and the individual components that make up that total cost, including the service fee (and whether that fee reflects after hours/weekend/snow fees), supplies fees, hardware expenses, and the fee for the particular service to be rendered, such as a door unlocking fee. The ALJ also failed to properly accord due weight to the signed estimates of Salem Reiner, Jennifer Wainberg, William Sitko, and post-April 8, 2010 consumers serviced by Respondent evidencing that consumers were provided with accurate estimates prior to Respondent's performance of locksmith services. *See* Respondent's Exhibit 48A, B, and C.

The ALJ's conclusion of law on this point is also erroneous. The record is replete with sales receipts and credit card receipts signed by consumers. The fees charged by ATCL were clearly disclosed to all consumers both orally and in writing prior to their signed authorizations. By authorizing Respondents to provide the services and by signing their credit card slips and sales receipts, these consumers voluntarily and willingly agreed to pay the charges. Consumers' failure to read the sales receipts or credit slips before signing them does not equate to them being misled or deceived; and the experience of these consumers with respect to past locksmiths should not provide the basis upon which this Court finds that consumers were misled or that fees were not disclosed to consumers. *See Meeks v. Dashiell*, 166 Md. App. 415, 430 (2006) ("a party to a contract is bound by his signature even if he neglects to read the contract"). Thus, the conclusion of law that consumers were misled by low estimates is without merit.

III. Exception --- Respondents "List Prices" for Hardware

Respondent takes exception to the ALJ's factual finding that Respondent's practice of including his own list price for hardware on sales receipts violated §§ 13-303 and 13-301 (1) of the Maryland Consumer Protection Act. Specifically, Respondent excepts to factual findings 24-28 and those contained on pages 71-72 under the subheading "List Prices for Hardware" of the Proposed Findings and Conclusions. Respondent also excepts to the ALJ's conclusion of law number 9 that each time Respondent misrepresented the price of hardware by showing a fictitious "list price" on a consumer's sales receipt violated §§ 13-303 and 13-301(1) of the Maryland Consumer Protection Act.

These factual findings and legal conclusion number 9 are premised on the erroneous factual finding that the "list price" set forth in Respondents documentation represented the manufacturer's suggested retail price. Respondents testified at trial that the "list price" was the price that Respondents would like to charge consumers and not a retail price suggested by a

manufacturer, and Proponent introduced no evidence to rebut Respondents' claim. The ALJ based her finding simply on what she believed a consumer perceived "list price" to mean, without any evidence thereof. The factual findings and legal conclusion number 9 are also premised on the erroneous legal conclusion that Respondents are not entitled to set their own list price for hardware and reflect that price on a consumer's sales receipt. §§ 13-303 and 13-301(1) of the Maryland Consumer Protection Act. The ALJ correctly found that "[t]here are no State, federal or local laws or regulations prescribing or regulating rates for locksmith services in the State of Maryland. A locksmith may charge any fee the market will legitimately bear." However, there is no support for the ALJ's conclusion that Respondent violated the Maryland Consumer Protection Act by setting his own "list price" for hardware. Thus, the ALJ findings of fact and conclusions of law on this point are erroneous and should be overruled.

IV. Exception --- Respondent's Charging Supplies Fees

Respondent takes exception to the ALJ's factual finding that Respondent's practice of billing separately for a "supplies fee" when that figure bore no relation to any supplies actually used in the transaction violated §§ 13-303 and 13-301(1) of the Maryland Consumer Protection Act. Specifically, Respondent excepts to factual findings 20-23 and those contained on pages 72-73 under the subheading "Supplies Fees" of the Proposed Findings and Conclusions. Respondent also excepts to the ALJ's conclusion of law number 8 that each time Respondent charged for a line item "supplies fee" when that figure bore no relation to any supplies actually used in the transaction violated §§ 13-303 and 13-301 (1) of the Maryland Consumer Protection Act.

These factual findings and legal conclusion number 8 are premised on the erroneous legal conclusion that setting forth in detail the amount Respondent charged for the use of his supplies violates §§ 13-303 and 13-301(1) of the Maryland Consumer Protection Act. The ALJ correctly

found that “[t]here are no State, federal or local laws or regulations prescribing or regulating rates for locksmith services in the State of Maryland. A locksmith may charge any fee the market will legitimately bear.” The ALJ’s factual finding that the “locksmith supplies fee” “was totally unrelated to tools, equipment, or other items used in completing any individual call for service” is clearly erroneous. Respondents testified, which was not rebutted, that the “locksmith supplies fee” was intended to cover general overhead, including, without limitation, the costs of purchasing and maintaining equipment such as key blanks, locksmith tools, and key cutting materials. Proponent’s locksmith witnesses testified that they also had these expenses but consolidated general overhead with their other charges so as to present the consumer with a single charge. There is no support for the ALJ’s conclusion that by setting forth separate fees in separate line items rather than consolidating all charges as one general charge or in one line item entry, Respondent violated the Maryland Consumer Protection Act. There is also no support for the ALJ’s finding of fact that the reusability of a particular tool means that Respondents are not entitled to recoup the cost of that tool from consumers. The ALJ’s conclusion of law on this point makes clear that if Respondent charged the same amount for the “locksmith supplies fee” but called it a “service charge,” “maintenance fee,” or even included the locksmith supplies fee in the general charge for services, there would be no violation of the Act. Thus, the ALJ findings of fact and conclusions of law on this point are erroneous and should be overruled.

V. Exception --- Respondent’s Advice to Consumers That Insurance Would Reimburse for Locksmith Services

Respondent takes exception to the ALJ’s factual findings that Respondent advised consumers that insurance would provide reimbursement for locksmith services. Specifically, Respondent excepts to factual findings 78-82, 97-8, 109, 150, 157-61, 212, 277, 291, 298, 324, 325, 357, 374, 390, and 402. Respondent takes exception to the ALJ’s conclusion of law number

4 that Respondent violated § 13-301 (1) of the Maryland Consumer Protection Act by advising consumers that insurance may provide reimbursement for charges incurred for locksmith services.

The basis of Respondent's exception to the ALJ's factual findings is that the ALJ accorded undue weight to the testimony of David G. Fritz, Christine Kropac, Eric Knebel, Regina Wright, Allison Busby, Dennis Collins, Robert Lennox, Timothy Grube, Ann Purcell, Julia Worcester, Amy Russell, Susan Dewalder, Amy Roberts, Salem Reimer, Jennifer Wainberg, and William Sitko. Additionally, the ALJ failed to properly accord due weight to Respondent's testimony that he does not advise consumers on insurance issues and that, if asked about the matter, he advises consumers to inquire with their insurers.

Even if the ALJ believed that Mr. Horton rendered such advice, the consumers' reliance on this advice was unreasonable because consumers knew or should have known that Mr. Horton would have no basis to know the individual terms of each consumer's insurance policies. Thus, the ALJ's legal conclusion that any advice to consumers regarding reimbursement of locksmith services by insurance companies was a violation of § 13-301(1) of the Maryland Consumer Protection Act is erroneous.

VI. Exception --- Respondent's Representation That It Was Affiliated with Pop-A-Lock

Respondent takes exception to the factual finding that Respondent deceptively represented that it was affiliated with Pop-A-Lock. Specifically, Respondent excepts to factual findings 379, 392, 462 and those contained on pages 75-76 under the subheading titled "Pop-A-Lock Confusion" of the Proposed Findings and Conclusions. Respondent also excepts to the ALJ's conclusion of law number 5 that Respondent violated § 13-301(2) of the Maryland Consumer Protection Act by misrepresenting that it was affiliated with Pop-A-Lock.

The ALJ's findings of fact and conclusions of law were premised primarily on the fact that Google Internet searches for locksmiths produced listings showing that Respondents were linked to Pop-A-Lock, on the fact that consumers who called these listings testified that they believed they were calling Pop-A-Lock, and on the fact that Respondents' vehicle had what the ALJ perceived to be the same color scheme as Pop-A-Lock's vehicles. The bases of Respondent's exception to the ALJ's factual findings and conclusion of law are that no evidence was introduced that Respondents were responsible for any information produced by Google search results or that Respondents color scheme choice was intended to confuse consumers as to the identify or affiliation of Respondents, and that the ALJ accorded undue weight to the testimony of Susan Dewalder and Edgar Wayne Snyder that they called Respondent believing that they were calling Pop-A-Lock. The ALJ failed to properly accord due weight to Respondent's testimony that he never represented to consumers that he was affiliated with Pop-A-Lock and his testimony that he always corrected consumers when they asked if they were speaking with Pop-A-Lock, as well as the clear markings on Respondent's vehicle identifying the business as Around the Clock Locksmith.

VII. Exception---Respondent's Claim that Its Rates Are Competitive

Respondent takes exception to the ALJ's conclusion of law that Respondent's claim that its rates are competitive violates §13-301(1) of the Maryland Consumer Protection Act. Specifically, Respondent excepts to factual findings 40, 41, and those contained on page 65 under the subheading titled "Competitive Rates" of the Proposed Findings and Conclusions. Respondent also excepts to the ALJ's conclusion of law number 4

The bases of Respondent's exception to the ALJ's factual findings and conclusion of law are two-fold. First, Respondents provide a unique service in that they are available and respond to service inquiries at any and all times of the day and night. Proponent's witnesses included two

locksmiths and, although they testified that they were available on a 24 hours per day – seven days per week basis, these assertions were rebutted at trial by Proponent’s other witnesses. Specifically, several of Proponent’s witnesses testified that they tried to call other locksmiths, including the two locksmith witnesses, but were unable to reach them and that they used Respondents because of that fact. Accordingly, Respondents’ prices are competitive. Second, Respondents’ claim regarding the competitiveness of their rates was puffery. The Court of Special Appeals has clearly held that such statements amount to “puffing” and “sales talk” which is the “sort of speech that is offered and understood as an expression of the seller’s opinion only, which is to be discounted as such by the buyer, and on which no reasonable [person] would rely.” *McGraw v. Loyola Ford, Inc.*, 124 Md. App. 560, 582 (1999) quoting W. Page Keeton, *et al.*, PROSSER AND KEETON ON THE LAW OF TORTS, § 109 at 757 (5th ed. 1984). Second, the Court of Special Appeals emphasized that an actionable statement is one that is “false or misleading *and* has the capacity, tendency, or effect of deceiving or misleading consumers.” *Id.* at 577 (emphasis in the original) (internal quotation marks and citations omitted). The Division introduced no evidence that any consumer relied upon, or was deceived by, these statements, nor how these statements could have the effect of being misleading.

VIII. Exception --- Respondent’s Failure to Give Estimates

Respondent takes exception to the ALJ’s factual findings that Respondent’s purported failure to give estimates of the cost of his services, even in the absence of a request for an estimate, is a violation of § 13-301(3) of the Maryland Consumer Protection Act. Specifically, Respondent excepts to factual findings 104, 129, 147, 169, 181, 192, 20-204, 220-225, 244, 256, 270, 286, 303, 309, 319, 350 and those contained on pages 77-82 under the subheading “The Failure to Give Complete Estimates” of the Proposed Findings and Conclusions. Respondent also excepts to the ALJ’s conclusion of law number 6 that Respondent violated § 13-301(3) of

the Maryland Consumer Protection Act by failing to give estimates of his charges for locksmith services.

The basis of Respondent's exception to the ALJ's factual findings and conclusion of law is that the ALJ radically expanded the scope of the Maryland Consumer Protection Act by not only finding that merchants know the information that is in the possession of consumers, but also by misinterpreting the Court of Special Appeals' decision in the case of *State v. Cottman Transmission Systems, Inc.*, 86 Md. App. 714 (1991).

The ALJ erroneously gave weight to the past experiences of consumers with other locksmiths and/or statements made to them by third parties with respect to charges imposed by other locksmiths (*e.g.*, a police officer's statement to a consumer) when she found that Respondents used these past experiences and statements to mislead consumers. The ALJ had no basis to find that Respondents knew the details of a consumer's past experiences with other locksmiths or the details of private conversations that the consumer had with a third party. The ALJ's finding effectively assumes that Respondents have telepathic powers and that they can, and had a duty to, use those powers to read the minds of consumers and overhear private conversations when setting their prices. Proponent introduced no evidence that consumers shared their past experiences or private conversations with Respondents, that Respondents otherwise had any reason to know about those experiences or conversations, or that Respondents used the information held by consumers to mislead them about the nature or price of Respondents' services.

The *Cottman* case is the only authority cited in support of this conclusion of law and is readily distinguishable from the present case. In *Cottman*, the State alleged that a chain of automotive transmission servicers violated Maryland's CPA by withholding certain diagnostic

and price information from consumers. *Id.* In *Cottman*, the Division established at trial that in order to determine whether transmission repairs were necessary, Cottman first performed an “external” inspection of the car at no cost. *Id.* at 720. Although in 99% of the cases this “external” inspection was sufficient to reveal whether a transmission repair was necessary, Cottman failed to disclose this fact, and the cost of the ultimate repair, to the consumer until it had also convinced the consumer to pay an additional \$200 for an unnecessary “internal” inspection that had already been performed by virtue of the external inspection. *Id.* at 724. Only upon completion of this “internal” inspection did Cottman provide the estimated cost of repairs. *Id.* The Court found that “[f]ailure to mention the possible total price . . . *under the circumstances of this case, is a deceptive trade practice.*” *Id.* at 727. Thus, in *Cottman*, the Court of Special Appeals deliberately limited the scope of its holding to that unique set of facts. The ALJ expanded *Cottman* to apply to every merchant’s transaction with a consumer by holding that Respondents had a duty to provide and estimate and that a failure to do so was deceptive.

The facts in *Cottman* bear no resemblance to the case at hand, and the holding of that case is inapplicable hereto. Unlike the defendants in *Cottman*, there is no suggestion that Respondents’ services were unnecessary or that they performed services above and beyond what the circumstances called for. By contrast, the *Cottman* defendants were performing an unnecessary “internal” inspection and were misrepresenting their ability to provide an estimate until that inspection was completed. Indeed, in this case, the opposite is true – all consumers acknowledged the benefits of ATCL’s services and a number of consumers testified that they called other locksmiths prior to ATCL and either were unable to reach them or were told the locksmith was unable to provide timely service. The *Cottman* court essentially held that a

merchant misleads a consumer when it attempts to charge a consumer for a service already covered by another service for which the consumer has already paid without disclosing that fact. The context in which the *Cottman* decision was made cannot be overlooked or minimized. There is certainly no reasonable way to extrapolate from *Cottman* the expansive reading of the Maryland Consumer Protection Act set forth by the ALJ in her Proposed Findings and Conclusions, that every merchant has a duty to provide an estimate to consumers prior to performing services regardless of the nature of those services, the necessity of those services, or the manner in which they are to be performed.

IX. Exception --- Unaddressed Provisions of the Cease and Desist Order

The ALJ failed to address in the Proposed Findings and Conclusions certain provisions of the *Ex Parte* Cease and Desist Order that impose onerous obligations on Respondent as follows:

- A. Respondents shall maintain all licenses, bonding, and insurance required by the Maryland Locksmith Act, including general liability insurance in the amount of at least \$300,000.
- B. Respondents shall include on each invoice, sales receipt or work order for services:
 - 1. the quoted cost of the service provided to the consumer prior to agreeing to provide the service;
 - 2. the total actual costs of the service;
 - 3. the address where the services were provided;
 - 4. the type of lock being serviced;
 - 5. the vehicle identification number, if applicable; and
 - 6. the manufacturer's list prices of locks, bolts and other supplies and parts.

- C. Respondents shall include on the front side of any invoice, sales receipt or work order for services they provide consumers in connection with the offer or sale of locksmith services the following statement:

“If you have any questions or complaints concerning locksmith services, you may get in touch with the Maryland Attorney General’s Consumer Protection Division at (888) 743-0023 or by writing to: Consumer Protection Division, 200 St. Paul Place, 16th Floor, Baltimore, Maryland 21202.”

The above provisions impose requirements on Respondent that are not imposed on any other locksmith in the state of Maryland. The identified requirements negatively impact Respondent’s ability to conduct his business and are fundamentally unfair. The ALJ failed to address the foregoing issues and thus failed to find that the foregoing provisions of the *Ex Parte* Cease and Desist Order were properly issued by the Agency.

WHEREFORE, Respondents submit the aforementioned exceptions to be considered and incorporated into the Final Order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of November, 2010, a copy of Respondents' Exceptions to Judge Kimberly Farrell's Proposed Findings of Fact and Conclusions of Law were mailed to:

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