

CONSUMER PROTECTION DIVISION
OFFICE OF THE ATTORNEY GENERAL
STATE OF MARYLAND

Proponent,

v.

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

and

JOSEPH M. HORTON

Respondents.

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IN THE

CONSUMER PROTECTION

DIVISION

OFFICE OF THE

ATTORNEY GENERAL

OAH Case Nos. OAG-CPD-04-10-12113
and OAG-CPD-01-10-12108

CPD Case No. 10-013-184207

RULING ON EXCEPTIONS

Both the Proponent and the Respondents filed exceptions to the Proposed Decision submitted by the Administrative Law Judge Kimberly A. Farrell (“the ALJ”). For the reasons set forth below, the Proponent’s exception is granted and the Respondents’ exceptions are denied. Although I primarily am adopting the ALJ’s proposed decision, the final decision will be modified accordingly.

Proponent’s Exception

Proponent excepts to the ALJ’s conclusion that Respondents’ claim on their website of “Satisfaction 100% Guaranteed” does not constitute an unfair or deceptive trade practice in violation of the Consumer Protection Act because it constitutes “mere puffery,” even though the ALJ found the claim to be false. Proposed Decision at 69-70. Contrary to the ALJ’s determination, the Respondents’ claim has the capacity, tendency or effect of deceiving and misleading consumers, especially when viewed in combination with Respondents’ other

deceptive claims designed to give consumers the impression that they will be satisfied with Respondents' services and will be protected if they are not.

Respondents' claim is not "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 (quoting W. Page Keeton, et al., *Prosser and Keeton on the Law of Torts*, § 109 at 757 (5th ed. 1984)), *cert. denied*, 353 Md. 473 (1999). Instead, Respondents' claim is a representation to consumers that, if they are not satisfied with Respondents' services, the Respondents will address their concerns. As the ALJ found, "[c]learly the claim of providing 100% satisfaction is false[.]" Proposed Decision at 70. In fact, the ALJ found that "[o]f approximately fifty-nine complaints filed with the BBB, the consumer was satisfied in one instance by the action taken by the Respondent as a result of the complaint." Proposed Finding of Fact No. 57. The ALJ further stated that "[t]here is a certain irony in the claim of guaranteeing 100% satisfaction when there are over sixty consumer complaints made against Respondents in a relatively short time span." Proposed Decision at 70. The ALJ found that Respondent Horton "falsely maintained in the face of *overwhelming* evidence that he gave every single consumer multiple estimates and that they never protested his outrageous charges until after he performed locksmith services for the quoted prices." *Id.*

The deceptive nature of Respondents' claim of "Satisfaction 100% Guaranteed" is even more pronounced in light of Respondents' other misrepresentations designed to give consumers the impression that Respondents are trustworthy. Those representations included false claims

that Respondents have “Maryland’s largest group of locksmiths,” have a staff with “combined experience of over 32 years,” are licensed, and that their rates are competitive. In considering claims made, the Federal Trade Commission has held that statements or representations should be judged on the overall effect created:

[T]he cardinal factor is the probable effect which the advertiser’s handiwork will have upon the eye and mind of the reader. It is therefore necessary in these cases to consider the advertisement in its entirety and not to engage in disputatious dissection. The entire mosaic should be viewed rather than each tile separately. ‘The buying public does not ordinarily carefully study or weigh each word in an advertisement. The ultimate impression upon the mind of the reader arises from the sum total of not only what is said but also of all that is reasonably implied.’

Federal Trade Commission v. Sterling Drug, Inc., 317 F.2d 669, 674 (2d Cir. 1963), quoting *Aronberg v. Federal Trade Commission*, 132 F.2d 165, 167 (7th Cir. 1942). Especially when viewed in connection with Respondents’ misrepresentations designed to create the false impression that consumers could trust the Respondents, the Agency finds that Respondents’ claim of “Satisfaction 100% Guaranteed” is a deceptive trade practice as defined in § 13-301(1) of the Consumer Protection Act and prohibited by § 13-303 of the Act.

Respondents’ Exceptions

I. Respondents’ Representations That Respondents Could Not Give an Estimate.

Respondents except to the ALJ’s factual finding that Respondents represented to consumers that he could not give an estimate of the charges and proposed conclusion of law that Respondents’ representation constitutes an unfair or deceptive trade practice as defined in § 13-301(1) of the Consumer Protection Act. Respondents contend that the ALJ gave undue weight to

the testimony of five consumers and disregarded Respondent Horton's testimony that estimates were always provided to consumers.

It is, however, the role of the ALJ, who has observed the witnesses and their demeanor, to make determinations as to credibility of the witnesses. *Anderson v. Dep't of Public Safety and Correctional Services*, 330 Md. 187, 212-13 (1993). Having observed Respondent Horton's demeanor in this case, the ALJ concluded that "[t]he Respondent's testimony was relentlessly perjurious." Proposed Decision at 90. The ALJ further stated that:

He was evasive. He was argumentative. At times it seemed he could not stop himself from quibbling meaningless semantics. At times he claimed to have excellent recall of the details of particular transactions but would later state he could not remember precisely the same matters. He vamped for time by saying he did not understand questions and asking to have them repeated. He stated at various points that every single consumer was lying, confused, or mistaken. He falsely maintained in the face of *overwhelming* evidence that he gave every single consumer multiple accurate estimates and that they never protested his outrageous charges until after he performed locksmith services for the quoted prices.

Proposed Decision at 91. Respondents have failed to provide any support, let alone "strong reasons" as to why the Agency should not defer to the ALJ's determination that the testimony of multiple consumers was credible while the testimony of Respondent Horton was not, as would be required to overturn the ALJ's credibility findings. *Dep't of Health and Mental Hygiene v. Shrieves*, 100 Md. App. 283, 302-03 (1994).

Respondents further misconstrue the ALJ's finding regarding Respondents' duty to give estimates to consumers. The ALJ did not hold that "merchants have a duty to provide estimates to consumers prior to the commencement of work." Instead, the ALJ found that, because Respondents' prices significantly exceeded typical prices in the industry, the estimated cost of

the service was material information that Respondents were required to disclose to consumers under § 13-301(3) of the Consumer Protection Act. Proposed Decision at 82. The ALJ also found that, when asked to give estimates, Respondents misrepresented to consumers that they were unable to do so. Proposed Decision at 71. There is substantial evidence in the record to support both of the ALJ's conclusions and Respondents' exception is denied.

II. Finding that Respondents Provided Deliberately Low Estimates.

Respondents except to the ALJ's findings of fact and conclusion of law that Respondents engaged in unfair or deceptive practices by providing consumers with deliberately low estimates. First, as discussed above, Respondents' contentions regarding the ALJ's determinations as to the credibility of witnesses is without foundation. Second, the Respondents' contention that their misrepresentations regarding what the service would cost were somehow cured because consumers signed the credit and debit card slips are without merit. There is substantial evidence to support the ALJ's findings that Respondents had reason to know at they time they gave estimates to consumers that those estimates did not reflect the amount that Respondents would charge consumers. There is also substantial evidence to support the ALJ's findings that Respondents refused to return consumers' credit and debit cards unless and until the consumers signed the authorizations. Accordingly, Respondents' second exception is denied.

III. Finding that Respondents' "List Prices" for Hardware were Deceptive.

Respondents except to the ALJ's finding that they violated the Consumer Protection Act by "misrepresent[ing] the price of hardware by showing a fictitious 'list price' on a consumer's sales receipt." Respondents, however, misconstrue the ALJ's conclusion. Contrary to

Respondents' contention, the ALJ did not find that the list price set forth in Respondents' documentation represented the manufacturer's suggested retail price. Rather, the ALJ found that, because Respondents' charges for hardware bore no relation to Respondents' actual costs for the parts and, instead, merely constituted whatever price Respondents thought they could obtain, that Respondents engaged in unfair or deceptive practices when they represented to consumers that they were offering discounts to consumers on those parts. Proposed Decision at 72. There is substantial evidence in the record to support the ALJ's findings and Respondents' exception is denied.

IV. Finding That Respondents' Supplies Fees Charges were Deceptive.

Respondents except to the ALJ's finding that the itemized supplies fees charged by Respondents were deceptive because they bore no relation to the price of any supplies used by Respondents. The evidence that the percentage charged by Respondents as a supplies fee varied widely from consumer-to-consumer and the testimony of other locksmiths as to supply costs and depreciation provide substantial evidence to support the ALJ's findings. Accordingly, the Respondents' exception is denied.

V. Finding That Respondents Advised Consumers That Insurance Would Reimburse Them for Locksmith Services.

Respondents except to the ALJ's findings that Respondents falsely advised consumers that insurance would reimburse them for the cost of the locksmith services. Respondents again except to the ALJ giving greater weight to the testimony of consumers than to Respondent Horton's testimony. As discussed above, it is the role of the ALJ to judge the credibility of the

witnesses whose demeanor she was able to observe. Further, Respondents' contention that the misrepresentation does not violate the Consumer Protection Act because "consumers' reliance on this advice was unreasonable" is without merit. Even if there was evidence to support Respondents' contention, which there is not, Respondents' representations are deceptive "whether or not any consumer in fact has been misled, deceived, or damaged as a result of that practice." CPA § 13-302. Rather, Respondents' representations need only "have the capacity, tendency or effect of deceiving or misleading consumers." CPA § 13-301(1). Accordingly, Respondents' exception is denied.

VI. Finding that Respondents Misrepresented that They were Affiliated With Pop-A-Lock.

Respondents except to the ALJ's conclusion that Respondents misrepresented that they were affiliated with Pop-A-Lock based upon false Google listings that included the Respondents' contact information, the colors on the Respondents' truck that resembled the Pop-A-Lock colors, and consumer testimony. There is substantial evidence in the record to support the ALJ's conclusions, including consumer testimony as to the manner in which Respondent Horton answered business calls and Respondent Horton's use of a Myspace account with the name "popalockjoe." Despite the absence of evidence that Horton intentionally placed the listings on Google, a violation of § 13-301(2) of the Consumer Protection Act does not require a finding of scienter or that the violator "have knowledge of the falsity or intent to deceive." *Golt v. Phillips*, 308 Md. 1, 10-11 (1986). "For consumer protection purposes, the meaning of any statement or representation is determined not only by what is explicitly stated but also by what is reasonably

implied.” *Id.*, at 9-10, citing *Spiegel, Inc. v. Federal Trade Comm’n*, 411 F.2d 481, 483 (7th Cir. 1969); *Aronberg v. Federal Trade Comm’n*, 132 F.2d 165, 167 (7th Cir. 1942); and *In the Matter of Seekonk Freezer Meats, Inc.*, 82 F.T.C. 1025, 1054 (1973). There was substantial evidence in the record to support the ALJ’s conclusion that Respondents violated § 13-301(2) of the CPA and Respondents’ exception is denied.

VII. Finding That Respondents Misrepresented Their Rates were “Competitive.”

Respondents except to the ALJ’s conclusion that they misrepresented that their rates were competitive because Respondents’ rates should be compared with locksmiths that offer service 24 hours per day, seven days per week and, even if Respondents’ rates were not competitive, the claim was only puffing. Contrary to Respondents’ contentions, the ALJ found that Respondents’ rates were much higher than those of other locksmiths who offered 24/7 service, especially in light of the additional fees that Respondents added, such as materials and supplies fees. Additionally, Respondents’ contentions were not mere puffery. Instead, it was clear that Respondents’ prices were material to consumers and Respondents’ misrepresentations that their prices were competitive constitutes more than just a statement of opinion. Further, as discussed above, it is not necessary that consumers actually be deceived by Respondents’ misrepresentations. Rather, it is only important that Respondents’ misrepresentations have the *capacity, tendency or effect* of deceiving or misleading consumers. Accordingly, Respondents’ exception is denied.

VIII. Respondents' Failure to Give Estimates.

Respondents except to the ALJ's finding that Respondents engaged in unfair or deceptive practices as defined in § 13-301(3) of the CPA by failing to provide estimates to consumers where Respondents' fees "are unusual in the industry and exorbitant by any comparison to the next highest priced competitor." Proposed Decision at 78. Section 13-301(3) requires a person to disclose a material fact if the failure to disclose that material fact deceives or tends to deceive consumers. Contrary to Respondents' contention, the ALJ's finding does not require that Respondents be able to read a consumer's mind. Rather, the Consumer Protection Act requires Respondents to disclose information "if a significant number of unsophisticated consumers would attach importance to the information in determining a choice of action." *Golt*, 308 Md. At 10, citing *Charles of the Ritz Distributors Corp. v. Federal Trade Comm'n*, 143 F. 2d 676, 679-80 (2d Cir. 1944); *Gulf Oil Corp. v. Federal Trade Comm'n*, 150 F.2d 106, 109 (5th Cir. 1945). The testimony of consumers in this case provides substantial evidence to support the ALJ's finding that "Respondent knows full well that the consumer will be shocked at the difference between what they are expecting to pay and what he will actually charge them." Proposed Decision at 79.

Further, contrary to the Respondents' contentions, the Agency agrees with the ALJ and the Proponent that *State v. Cottman Transmission Systems, Inc.*, 86 Md. App. 714, 725-26, *cert. denied*, 324 Md. 121 (1991), supports the proposition that price is a fact that is material to consumers in making a purchasing decision. The Court of Appeals confirmed that price is material to consumers in *Luskin's, Inc. v. Consumer Protection Division*, 353 Md. 335, 365-66

(1999), especially where the price is one that, like here, would be unexpected by consumers.

Accordingly, Respondents' exception is denied.

IX. Unaddressed Provisions of the Cease and Desist Order.

Respondents except to the ALJ's failure to address provisions of the *Ex Parte* Cease and Desist Order in this matter they consider to be onerous. However, the delegation to the Office of Administrative Hearings is limited to "issuing proposed findings of fact and proposed conclusions of law, but not to recommend proposed relief." COMAR 02.01.02.04(B). The authority to determine what relief is appropriate is the province of the Agency, and a Final Order is being issued together with this Ruling on Exceptions.

CONSUMER PROTECTION DIVISION
OFFICE OF THE ATTORNEY GENERAL

Dated: May 9, 2011

By:



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