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STATE OF CALIFORNIA
DEPARTMENT OF RESOURCES RECYCLING AND RECOVERY

In the matter of:

**CARPET AMERICA RECOVERY
EFFORT ("CARE")**

RESPONDENT

ACCUSATION

**PUBLIC RESOURCES CODE
§ 42970, ET SEQ.**

AGENCY NO: 2017-001-CARPET

Pursuant to the California Product Stewardship for Carpets law, Public Resource Code ("PRC") § 42970 et seq. ("Carpet Law") and the California Code of Regulations ("CCR"), Chapter 11 of Division 5 of Title 14, § 18940 et seq. ("Carpet Regulations") the State of California, Department of Resources Recycling and Recovery ("CalRecycle" or Department"), hereby makes and files this Accusation by and through the undersigned Ty Moore, exclusively in his official capacity as an attorney for the Department.

JURISDICTION

1. Assembly Bill 2398 (Chapter 681, Statutes of 2010) established the first mandatory carpet stewardship program in the country, charging manufacturers selling carpet in California with the responsibility of reducing carpet waste through planned management of their postconsumer product. Unlike a traditional regulatory program in which the State mandates specifically how to comply with the law, a stewardship program sets broad goals and then requires the regulated industry to develop a plan to meet those goals. The State's

1 role is then to monitor implementation of that plan and hold the industry to meeting the
2 goals. In this case, the law requires manufacturers or their designated carpet stewardship
3 organization to submit a plan for approval to CalRecycle (California Public Resources Code
4 (PRC) §§ 42972 & 42973 (West 2016)) and, once approved, submit annual reports to verify
5 that the objectives of the plan are met. (PRC §§ 42975 & 42976.)

- 6 2. Additionally, the Department is authorized to impose civil penalties on those
7 manufacturers or stewardship organizations who violate any provision of the Product
8 Stewardship for Carpet law (Cal. Pub. Res. Code §§ 42974 & 42978). The Carpet
9 Regulations adopted by the Department were in furtherance of the Carpet Law (Cal. Code
10 Regs. tit. 14 (14 CCR), § 18940 et seq.).
- 11 3. Carpet America Recovery Effort (“CARE”) was, at all times mentioned herein, a
12 stewardship organization. CARE represents all of the manufacturers authorized to sell carpet
13 in California; as of October 2016, CARE represented approximately 75 manufacturers.
14 According to the Carpet and Rug Institute, which has a close partnership with CARE, the
15 domestic carpet market is a 9.4 billion dollar enterprise. ([http://www.carpet-rug.org/carpet-](http://www.carpet-rug.org/carpet-statistics.html)
16 [statistics.html](http://www.carpet-rug.org/carpet-statistics.html).)
- 17 4. This accusation is subject to the formal hearing procedures of the California
18 Administrative Procedure Act (Cal. Gov. Code § 11500 et seq.); (PRC § 42978(a); (14 CCR
19 § 18945).

20 21 **STATUTORY AND REGULATORY AUTHORITY**

- 22 5. A “carpet stewardship organization” is defined as, “an organization appointed by one or more
23 manufacturers to act as an agent on behalf of the manufacturers to design, submit, and
24 administer a carpet stewardship plan.” (PRC § 42971(e)(1)(a)) CARE was designated by
25 statute as the sole stewardship organization in California until April 1, 2015, and is currently
26 still the only stewardship organization in California. (PRC § 42971(b) & (e)).
- 27 6. That Plan is required to set out the programs that the stewardship organization determined
28 were necessary to achieve “continuous meaningful improvement in the rates of recycling and
diversion of postconsumer carpet subject to its stewardship plan and in meeting the other

1 goas included in the organization's plan" and it also set out a recycling rate that it would
2 achieve within five years. (PRC 42972 & 42973).

- 3 7. Subsequent to submission of the Plan, PRC § 42975(a) and 14 CCR 18945.1 require the
4 stewardship organization to implement the Plan and report upon its performance, in an
5 Annual Report which must be submitted to the Department each year by July 1. The
6 reporting period represents twelve consecutive months in the preceding calendar year. (14
7 CCR § 18941(h)).
- 8 8. The Annual Report must provide essential metrics set out in PRC § 42976, including the
9 following:
- 10 a. The amount of carpet sold by square yards and weight, in the state during the
11 reporting period.
 - 12 b. The amount of postconsumer carpet recycled, by weight, during the reporting period.
 - 13 c. The amount of postconsumer carpet recovered but not recycled, by weight, and its
14 ultimate disposition.
- 15 9. CalRecycle is required to review the Annual Report to determine if the stewardship
16 organization has complied with the law by demonstrating "that it achieved continuous
17 meaningful improvement in the rates of recycling and diversion of postconsumer carpet
18 subject to its stewardship plan and in meeting the other goals included in the organization's
19 plan..." (PRC § 42975.)
- 20 10. CalRecycle may impose administrative civil penalties on any person who is in violation of
21 any provision of the Carpet Law, including imposing penalties on a stewardship organization.
22 (PRC § 42978(a) and 14 CCR § 18945 and 18945.1). .
- 23 11. Pursuant to PRC § 42978(a), a civil penalty up to one thousand dollars (\$1,000) per day may
24 be administratively imposed by the Department on any person who is in violation of any
25 provision of this chapter and up to ten thousand dollars (\$10,000) per day if the violation is
26 intentional, knowing, or negligent.
- 27 12. 14 CCR § 18945.1, provides that Failure to demonstrate to the Department continuous
28 meaningful improvement in the rates of recycling and diversion of postconsumer material
subject to a stewardship plan and in meeting the other goals included in an organization's
stewardship plan is a violation of PRC 42975 and is subject to a penalty of up to five
thousand dollars (\$5,000) per day.

1 13. 14 CCR § 18945 requires that the Department consider the totality of the circumstances when
2 determining the appropriate penalty for violations under the Carpet Law. CCR § 18945.2,
3 clarifies this requirement and provides that CalRecycle consider the following when
4 determining the appropriate penalty:

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

18 **GROUND FOR ADMINISTRATIVE ACTION**

- 19 14. On behalf of member carpet manufacturers, CARE submitted its Stewardship Plan ("Plan")
20 on or about March 10, 2011, and it was approved by the Department on or about January 17,
21 2012. The Plan was periodically revised by CARE with CalRecycle's input and approval.
- 22 15. The Plan established CARE's baselines and their goal, to increase the recycling rate 1% per
23 year, from 12% in 2012 to 16% in 2016. The Department used these to determine if CARE
24 was meeting the requirements in statute. (California Carpet Stewardship Plan Revised, ver.
25 3.2.2 (March 10, 2013) (on file with CalRecycle).
- 26 16. In the Plan, recycling is measured by "recycled output", which is a percentage of total
27 discards. CARE's Plan goal was to increase recycled output to 16% by 2016. The baseline
28 recycling rate in 2011 was 7%. (*California Carpet Stewardship Plan, Version 1.4*, Carpet
America Recovery Effort. December 29, 2011, Page 11.)
17. On or about July of each year, CARE submitted a CARE California Carpet Stewardship
Program Annual Report ("Annual Report") documenting their performance during the prior
year. CalRecycle reviewed the data provided by CARE and determined that CARE was
noncompliant in 2013, 2014, and 2015.

COUNT I: IN 2013 CARE FAILED TO DEMONSTRATE TO THE DEPARTMENT THAT IT HAS ACHIEVED CONTINUOUS MEANINGFUL IMPROVEMENT IN THE RATES OF RECYCLING AND DIVERSION IN VIOLATION OF PRC § 42975 AND CCR § 18945.1.

18. The allegations set forth in paragraphs 1 through 17 are incorporated by reference as if fully set forth here.
19. CalRecycle evaluated the 2013 Annual Report on or about September 14, 2014; the Director of CalRecycle, during its monthly public meeting, announced her determination that CARE was noncompliant because it was “not making sufficient continuous and meaningful improvement toward the goals in the approved Plan, particularly with respect to the last seven quarters that show no gains in the recycling rate.” (*2013 CARE Annual Report Request for Approval* by CalRecycle to Director Carol Mortensen re. the 2013 Annual Report (Sept. 14, 2014) (on file with CalRecycle).)
20. The recycling rate listed in the 2013 Annual Report was 12.2%, which did not demonstrate meaningful improvement over the 12% recycling rate reached mid-way through the prior reporting period. (*2013 Annual Report*, § 6.10.2, page 20 (July 1, 2014) (on file with CARE.)) This is a violation of PRC § 42975 and CCR § 18945.1.
21. While CalRecycle found CARE to be in violation of the statute, the Department provided CARE with recommendations on adjustments that it believed would result in meaningful improvement and deferred commencing enforcement action at that time, to allow CARE time to amend their Plan and bring their performance under their Plan back into compliance during the following reporting period.

COUNT II: IN 2014 CARE FAILED TO DEMONSTRATE TO THE DEPARTMENT THAT IT HAS ACHIEVED CONTINUOUS MEANINGFUL IMPROVEMENT IN THE RATES OF RECYCLING IN VIOLATION OF PRC § 42975 AND CCR § 18945.1.

22. The allegations set forth in paragraphs 1 through 21 are incorporated by reference as if fully set forth here.
23. CalRecycle evaluated the 2014 Annual Report on or about September 15, 2015. During its monthly public meeting, CalRecycle considered CARE’s performance during the 2014 calendar year and found that it had again failed to demonstrate continuous and meaningful

1 improvement in the recycling rates for postconsumer carpet. (2014 CARE Annual Report
2 Request for Approval by CalRecycle to Director Scott Smithline re. the 2014 Annual Report
3 (Sept. 15, 2015) (on file with CalRecycle).)

- 4 a. CARE had begun implementation of [the Program] in 2011; CARE had 3 years prior
5 to the start of the measuring period to develop its Plan infrastructure.
6 b. The recycled output rate decreased from 12.2% to 12.1% in 2014 (and the last quarter
7 of 2014 indicating a downward trend in the rate to 11%). (2014 Annual Report, §
8 5.5.2, page 42. (July 1, 2015) (on file with CARE.) This is a violation of PRC §
9 42975 and CCR § 18945.1.

10 24. Finding that CARE had failed to meet program requirements and Plan goals, CalRecycle's
11 Director, again provided CARE with recommendations on adjustments that it believed would
12 result in meaningful improvement and decided to defer enforcement action at that time, to
13 allow CARE time to amend their Plan and bring their performance under their Plan back into
14 compliance during the following period.

15 **COUNT III: IN 2015 CARE FAILED TO DEMONSTRATE TO THE DEPARTMENT THAT IT**
16 **HAS ACHIEVED CONTINUOUS MEANINGFUL IMPROVEMENT IN THE RATES OF**
17 **RECYCLING AND DIVERSION IN VIOLATION OF PRC § 42975 AND CCR § 18945.1.**
18

19 25. The allegations set forth in paragraphs 1 through 26 are incorporated by reference as if fully
20 set forth here.

21 26. On or about January 5, 2015, the Director of CalRecycle, Carol Mortensen approved the first
22 of three Addendums, proposed by CARE, to amend the CARE Plan. In her letter, the
23 Director urgently recommended that CARE immediately take action to ensure that their Plan
24 produced continuous and meaningful improvement to the recycling rates and urged CARE
25 towards their self-imposed goal of 16% by 2016; various recommendations from the
26 Department were included. (Letter from Carol Mortensen to Bob Peoples, Executive
27 Director of CARE (Jan. 5, 2015) (on file with CalRecycle).)

28 27. CalRecycle evaluated the 2015 Annual Report on or about September 21, 2016 and found
that CARE had again failed to comply with the statutory requirements to demonstrate

1 continuous and meaningful improvement in postconsumer carpet recycling and diversion
2 rates. (2015 CARE Annual Report Request for Approval from CalRecycle staff to Director
3 Scott Smithline re. the 2015 Annual Report (Sept. 21, 2016) (on file with CalRecycle.)
4 The recycled output rate decreased from 12.1% to 10% for 2015. (2015 Annual Report, §
5 5.15, page 62. (July 1, 2016) (on file with CARE.) This is a violation of PRC § 42975 and
6 CCR § 18945.1.

7 8 PENALTIES

9 28. After three consecutive years of lack of improvement and a decrease, in the recycling rate,
10 CalRecycle's Director authorized his staff to file this Accusation seeking penalties for the
11 Counts outlined above. (Scott Smithline, Remarks at the CalRecycle Monthly Meeting
12 (September 21, 2016) (on file with CalRecycle).

13 29. Count I: For failing to demonstrate to the Department that it has achieved continuous and
14 meaningful improvement in 2013 in violation of § 42975 and CCR § 18945.1.

- 15 a. The violation is classified as a Level 2 violation for which the amount of the base
16 penalty may be up to \$5,000 per day. (14 CCR § 18945.1 (2016).)
- 17 b. CalRecycle has considered the totality of the circumstances (14 CCR, § 18945.2) and
18 considered the following relevant factors for determining a penalty:
- 19 i. CARE is acting on behalf of all carpet manufacturers who were legally selling
20 carpet in California, therefore the size of the violator, in terms of market
21 share, gross carpet sales, and ability to affect changes to positively or
22 negatively impact the program, could not be any larger. (Id. § 18945.2(d), (i)-
23 (j).)
- 24 ii. Any penalty will be shared across a multi-billion dollar industry; the
25 economic effect of the penalty will be spread across all carpet manufacturers
26 in the state, so it must be significant to have any deterrent effect. (Id. §
27 18945.2(i)-(j).)
- 28 iii. 2013 was the first year that CARE was found to be noncompliant. (Id. §
18945.2(b), (e).)

- 1 c. Based on the above factors, CalRecycle seeks a penalty for 2013 of \$500/day for 365
2 days during the year, for a total of \$182,500.

3 30. Count II: For failing to demonstrate to the Department that it has achieved continuous and
4 meaningful improvement in 2014 in violation of § 42975 and CCR § 18945.1

- 5 a. The violation is classified as a Level 2 violation for which the amount of the base
6 penalty may be up to \$5,000 per day. (14 CCR, § 18945.1).
7 b. CalRecycle has considered the totality of the circumstances (Cal. Code Regs. tit. 14, §
8 18945 et seq. (2016)) and considered the following relevant factors for determining a
9 penalty:
10 i. CalRecycle has determined these violations were at least negligent and may
11 have been knowing and intentional.

- 12 1. In early 2014, CARE initiated its national Voluntary Product
13 Stewardship (VPS) Program. “[T]he purpose of this Program is to
14 promote and support voluntary market-driven solutions for the
15 diversion of Post-Consumer Carpet and **oppose efforts to enact**
16 **Extended Producer Responsibility or EPR legislation or**
17 **regulations.”** (*CARE VPS Program Annual U.S. Qualified Sorter*
18 *Agreement*, Version 1.0 (Dec. 12, 2014) (on file with CalRecycle).
19 The VPS Qualified Sorter Agreement **demands that program**
20 **participants abstain from supporting EPR legislation or**
21 **regulations for at least eighteen (18) months after receipt of a**
22 **recycling subsidy payment from CARE and specifically obligates**
23 **repayment of any funds should they subsequently decide to**
24 **support EPR.** The CARE Board of Directors, also responsible for
25 approving CARE’s California Stewardship Plan, Annual Reports,
26 assessments, subsidy payments, and other operational details
27 concerning the California EPR program directs the VPS Program
28 seeking to stifle EPR legislation nationwide. (*Id.*)

1 2. Despite earlier recommendations from CalRecycle, CARE was
2 negligent in failing to adjust incentives and assessments quickly in
3 response to market fluctuations. This resulted in subsidies being
4 insufficient to move the postconsumer materials back into the market.

5 *(2014 CARE Annual Report Request for Approval.)*

6 ii. The violation was preceded by the same violation in 2013. 14 CCR §
7 18945.2(b), (c), (e)-(g).).

8 iii. CARE is acting on behalf of all carpet manufacturers who were legally selling
9 carpet in California, therefore the size of the violator, in terms of market
10 share, gross carpet sales, and ability to affect changes to positively or
11 negatively impact the program, could not be any larger. (Id. § 18945.2(d), (i)-
12 (j).)

13 iv. Any penalty will be shared across a multi-billion dollar industry; the
14 economic effect of the penalty will be spread across all carpet manufacturers
15 in the state, so it must be significant to have any deterrent effect. (Id. §
16 18945.2(i)-(j).)

17 c. Based on the above factors, CalRecycle seeks a penalty for 2014 of \$4000/day for
18 365 days during the year, for a total of \$1,460,000.

19 31. Count III: For failing to demonstrate to the Department that it has achieved continuous and
20 meaningful improvement in 2015 in violation of PRC § 42975 and CCR § 18945.1.

21 d. The violation is classified as a Level 2 for which the amount of the base penalty may
22 be up to \$5,000 per day. (14 CCR § 18945.1).


23 e. CalRecycle has considered the totality of the circumstances (Cal. Code Regs. tit. 14, §
24 18945 et seq. (2016)) and considered the following relevant factors for determining a
25 penalty:

26 v. CalRecycle has determined that these violations were at least negligent and
27 may have been knowing and intentional.

1. As previously discussed, CARE was simultaneously administering this EPR program while promoting the VPS Program which is dedicated to limiting the advancement of EPR programs nationwide.
 2. Staff concluded that CARE's failure to provide reasonable access to carpet drop-off sites in all counties, in the 5th year of program operation, was negligent. Additionally, staff determined that CARE was underserving large population centers (e.g. Los Angeles and San Diego Counties). CARE's failure to provide these services, were unreasonable and contributed to recycling shortfalls. (*2015 CARE Annual Report Request for Approval.*)
 3. CARE's slow response to market changes was unreasonable and contributed to its inability to adequately fund infrastructure and drive markets for increased recycled output. (*Id.*)
 - vi. The violation was preceded by the same violations in 2013 and 2014. (14 CCR, § 18945.2(b), (c) (e)-(g).)
 - vii. CARE is acting on behalf of virtually all carpet manufacturers who were legally selling carpet in California, therefore the size of the violator, in terms of market share, gross carpet sales, and ability to affect changes to positively or negatively impact the program, could not be any larger. (*Id.* § 18945.2(d), (i)-(j).)
 - viii. Any penalty will be shared across a multi-billion dollar industry; the economic effect of the penalty will be spread across all carpet manufacturers in the state, so it must be significant to have any deterrent effect. (*Id.* § 18945.2(i), (j).)
 - f. Based on the above factors, CalRecycle seeks a penalty for 2015 of \$4500/day for 365 days during the year, for a total of \$1,642,500.
32. CalRecycle requests that the administrative decision in the matter expressly prohibit CARE from using Carpet Program assessment funds to pay the above penalties. The Carpet Law specifies that the assessment should be used only to implement the Plan, for approved

1 program activities and expenses. (PRC§ 42972(c)(1). It also establishes that the assessment
2 should be tax exempt and shown on receipts and invoices with an accompanying description
3 of the assessment. (PRC § 42972.5.) Permitting the use of the carpet assessment to pay
4 penalty is a misuse of the assessment because allowing CARE to use these funds to pay the
5 penalty, does nothing to promote any activity approved in the Plan.
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9 Dated: March 10, 2017.



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12 Department of Resources Recycling and
13 Recovery (CalRecycle)
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