

ELLIOT BLOCK SBN 116999
TY D. MOORE SBN 262374
Attorneys for Complainant
DEPARTMENT OF RESOURCES RECYCLING & RECOVERY
1001 I Street, 24th Floor
P. O. Box 4025
Sacramento, CA 95812-4025
Telephone: (916) 341- 6756
Facsimile: (916) 319-7238

STATE OF CALIFORNIA
DEPARTMENT OF RESOURCES RECYCLING AND RECOVERY

In the matter of:	)	ACCUSATION
	)	
CARPET AMERICA RECOVERY	)	PUBLIC RESOURCES CODE
	)	§ 42970, ET SEQ.
EFFORT ("CARE")	)	
	)	
RESPONDENT	)	AGENCY NO: 2018-001-CARPET
	)	

California Department of Resources Recycling and Recovery ("Department") is filing this Accusation to seek penalties from Carpet America Recovery Effort ("CARE") in the amount of \$1,830,000.00. CARE, a stewardship organization acting on behalf of its members, is in violation of Public Resources Code ("PRC") § 42975¹ and subject to penalties set forth in Title 14, California Code of Regulations ("CCR") § 18945.1, for failing to meet the recycling goals set forth in its Carpet Stewardship Plan in 2016.

Pursuant to the California Product Stewardship for Carpets law, PRC § 42970 et seq. ("Carpet Law") and the CCR§ 18940 et seq. ("Carpet Regulations") the State of California, the Department,

¹ In 2017, AB 1158 (Stats. 2017, Chap. 794) was enacted, effective January 1, 2018, which revised some of the statutes cited herein. As this Accusation is for the year 2016, all statutory references are to the version of the law in place at that time. A copy of the original legislation with the applicable statutory language is attached and incorporated herein in Exhibit 1.

1 hereby makes and files this Accusation by and through the undersigned Ty Moore, exclusively in his
2 official capacity as an attorney for the Department.

3 JURISDICTION

- 4 1. The Carpet Law established the first mandatory carpet stewardship program in the
5 country, charging manufacturers selling carpet in California with the responsibility of
6 reducing carpet waste through planned management of their postconsumer product. Unlike a
7 traditional regulatory program in which the State mandates specifically how to comply with
8 the law, a stewardship law sets or describes a process to set broad goals and then requires the
9 regulated industry to develop a Plan to meet those goals. The State's role is then to monitor
10 implementation of that Plan and hold the industry responsible for meeting the goals. In this
11 case, the law requires manufacturers or their designated carpet stewardship organization to
12 submit a Plan for approval to the Department (PRC §§ 42972 & 42973) and, once approved,
13 implement that Plan and submit annual reports to verify that the objectives of the Plan are
14 met. (PRC §§ 42975 & 42976)
- 15 2. Additionally, the Department is authorized to impose civil penalties on those
16 manufacturers or stewardship organizations who violate any provision of the Product
17 Stewardship for Carpets law (PRC §§ 42974 & 42978). The Carpet Regulations adopted by
18 the Department were in furtherance of the Carpet Law (CCR § 18940 et seq.).
- 19 3. CARE was, at all times mentioned herein, a stewardship organization. CARE represents
20 all of the manufacturers selling carpet in California; as of October 2016, CARE represented
21 approximately 75 manufacturers. National carpet sales in 2017 were \$8.37B; carpet sales in
22 California are typically considered to be about 10-12% of this domestic market. (Darius
23 Helm, *Annual Report 2018*, Floor Focus Magazine, May 2018, at 30.))
- 24 4. This accusation is subject to the formal hearing procedures of the California
25 Administrative Procedure Act (Government Code (GC) § 11500 et seq.); (PRC § 42978(a);
26 (CCR § 18945).
- 27
28

STATUTORY AND REGULATORY AUTHORITY

5. A “carpet stewardship organization” is defined as, “an organization appointed by one or more manufacturers to act as an agent on behalf of the manufacturers to design, submit, and administer a carpet stewardship plan.” (PRC § 42971(e)(1)(A)) CARE was designated by statute as the sole stewardship organization in California until April 1, 2015, and is currently still the only carpet stewardship organization in California. (PRC § 42971(b) & (e)).
6. “[Manufacturers or Stewardship Organizations submitting Plans must] include goals that, to the extent feasible based on available technology and information, increase the recycling of postconsumer carpet, increase the diversion of postconsumer carpets from landfills, increase the recyclability of carpets, and incentivize the market growth of secondary products made from postconsumer carpet..” (PRC § 42972(a)(2).)
7. Subsequent to submission of the carpet stewardship plan, PRC § 42975(a) and CCR 18944 require the stewardship organization to implement the carpet stewardship plan and report upon its performance, in an Annual Report which must be submitted to the Department each year by July 1. The reporting period represents twelve (12) consecutive months in the preceding calendar year. (CCR § 18941(h)).
8. The Annual Report must provide essential metrics set out in PRC § 42976, including the following:
 - a. The amount of carpet sold by square yards and weight, in the State during the reporting period.
 - b. The amount of postconsumer carpet recycled, by weight, during the reporting period.
 - c. The amount of postconsumer carpet recovered but not recycled, by weight, and its ultimate disposition.
9. The Department is required to review the Annual Report to determine if the stewardship organization has complied with the law by demonstrating “that it achieved continuous meaningful improvement in the rates of recycling and diversion of postconsumer carpet subject to its stewardship plan **and** in meeting the other goals included in the organization’s plan...” (PRC § 42975, emphasis added)
10. The Department may impose administrative civil penalties on any person who is in violation of any provision of the Carpet Law, including imposing penalties on a stewardship organization. (PRC § 42978(a) and CCR § 18945 and 18945.1).

- 1 11. Pursuant to PRC § 42978(a), a civil penalty up to one thousand dollars (\$1,000) per day may
2 be administratively imposed by the Department on any person who is in violation of any
3 provision of this chapter and up to ten thousand dollars (\$10,000) per day if the violation is
4 intentional, knowing, or negligent.
- 5 12. CCR § 18945.1, provides that failure to demonstrate to the Department continuous
6 meaningful improvement in the rates of recycling and diversion of postconsumer material
7 subject to a carpet stewardship plan and in meeting the other goals included in an
8 organization's carpet stewardship plan is a violation of PRC 42975 and is subject to a penalty
9 of up to five thousand dollars (\$5,000) per day.
- 10 13. CR § 18945.2, further provides that the Department consider the following when determining
11 the appropriate penalty:
- 12 (a) The nature, circumstances, extent, and gravity of the violation(s).
 - 13 (b) The number and severity of the violation(s).
 - 14 (c) Evidence that the violation was intentional, knowing or negligent.
 - 15 (d) The size of the violator.
 - 16 (e) History of violation(s) of the same or similar nature.
 - 17 (f) The willfulness of the violator's misconduct.
 - 18 (g) Whether the violator took good faith measures to comply with this chapter and the
19 period of time over which these measures were taken.
 - 20 (h) Evidence of any financial gain resulting from the violation(s).
 - 21 (i) The economic effect of the penalty on the violator.
 - 22 (j) The deterrent effect that the imposition of the penalty would have on both the
23 violator and the regulated community.
 - 24 (k) Any other factor that justice may require.

25 **GROUND'S FOR ADMINISTRATIVE ACTION**

- 26 14. On behalf of its member carpet manufacturers, CARE submitted its carpet stewardship plan
27 on or about March 10, 2011. It was approved by the Department on or about January 17,
28 2012. The carpet stewardship plan was periodically revised by CARE with the Department's
input and approval; the Department reviewed not less than eight (8) CARE carpet
stewardship plans and three (3) CARE Addendums to the carpet stewardship plan Version
3.2.2 prior to 2016. (Carpet Stewardship Plans Internet Page (April 12, 2018),
www.calrecycle.ca.gov/carpet/Plans/default.htm)
15. In its January 21, 2014 Public Meeting and Review of CARE's carpet stewardship plan
version 3.0 (largely unchanged in subsequent versions of CARE's carpet stewardship plan),

1 based upon information about flat or declining recycling rates and the Department's concern
2 about whether CARE's Plan could meet its goals, the Department cautioned CARE regarding
3 implementation, specifically with regards to "incentives, differential fees, or other
4 mechanisms to address the complexities and market dynamics and recycling consequences"
5 as well as raising concerns of various stakeholders, regarding the sufficiency of funding,
6 assessments, and incentives. CARE assured the Department that it knew best how to meet its
7 goals and that it was confident that it would.

- 8 16. The carpet stewardship plan established CARE's baselines and includes its Plan's goal,
9 increasing the recycling rate to 16% in 2016. The Department used CARE's carpet
10 stewardship plan (*California Carpet Stewardship Plan Revised, Version 3.2.2* (March 10,
11 2014) to determine if CARE was meeting the requirements in statute.
- 12 17. In the carpet stewardship plan, recycling is measured by "recycled output," which is a
13 percentage of total discards. CARE's carpet stewardship plan goal was to increase recycled
14 output to 16% by 2016. The baseline recycling rate in 2011 was 7%. (*California Carpet*
15 *Stewardship Plan, Version 1.4*, Carpet America Recovery Effort. December 29, 2011, page
16 11).
- 17 18. On or about July of each year, CARE submitted a CARE California Carpet Stewardship
18 Program Annual Report ("Annual Report") documenting its performance during the prior
19 year. The Department reviewed the data provided by CARE and determined that CARE was
20 noncompliant in 2013, 2014, and 2015 for failure to demonstrate continuous and meaningful
21 improvement in its recycling rates; based on its respective Annual Reports, in 2013 CARE
22 achieved a recycling rate of 12.2%, in 2014 CARE achieved a recycling rate of 12.1%, and in
23 2015 CARE achieved a recycling rate of 10%. Prior to this Accusation, the Department filed
24 an Accusation seeking penalties for non-compliance for these three years. A Proposed
25 Decision was issued by the Office of Administrative Hearings, which was modified and
26 adopted as the Agency's Final Decision on April 25, 2018 for penalties in the amount of
27 \$821,250.
- 28 19. On June 30, 2017, CARE submitted an Annual Report documenting its performance in 2016.
In that annual report, the recycling rate "increased slightly in 2016, from 10% in 2015 to

11%.” (2016 Annual Report, § 5.8, page 39 (June 30, 2017).) This recycling rate was significantly below the 16% recycling rate goal in CARE’s Plan and, as previously noted, is lower than the 12.2% and 12.1% recycling rates reported by CARE for 2013 and 2014.

20. The Department concluded their evaluation of the 2016 Annual Report on or about September 21, 2017; the Department Director, during the September monthly public meeting, announced his determination that CARE was noncompliant because “The Annual Report shows that the key measures of recycled output, along with diversion, are lower than the goals outlined in the approved Plan...” (2016 CARE Annual Report Request for Approval by the Department to Director Scott Smithline re. the 2016 Annual Report (Sept. 21, 2017)).

21. The recycling rate listed in the 2016 Annual Report was 11%, which did not demonstrate meaningful improvement over the 10.1% recycling rate achieved in 2015 (2016 Annual Report, § 5.8, page 39 (June 30, 2017)).

22. CARE failed to meet the 16% recycling goal set forth in CARE’s carpet stewardship plan. (California Carpet Stewardship Plan Revised, Version 3.2.2 (March 10, 2014). This is a violation of PRC § 42975 and CCR § 18945.1.

PENALTIES

23. The allegations set forth in paragraphs 1 through 22 are incorporated by reference as if fully set forth here.

24. CARE failed to meet its recycling rate goal in 2016 in violation of § 42975 and CCR § 18945.1.

a. The violation is classified as a Level 2 violation for which the amount of the base penalty may be up to \$5,000 per day. (CCR § 18945.1 (2016)).

b. The Department has considered and considered the following relevant factors, for which it had information, in determining the amount of the penalty it is seeking (CCR, § 18945.2):

i. The nature, circumstances, extent, and gravity of the violation(s).

1. CARE’s non-compliance is significant for reasons noted below in ii, iv, and vi.

ii. The number and severity of the violation(s).

1. The violation described herein includes 366 days of non-compliance and when combined with previous non-compliance, means that CARE has been out of compliance for the past 4 years.
- iii. Evidence that the violation was intentional, knowing or negligent.
 1. See vi. Below.
- iv. The size of the violator.
 1. The violator(s) in this case are CARE, the carpet stewardship organization acting on behalf of its members, and its members, the approximately 75 carpet manufacturers. They collectively constitute the entire carpet industry lawfully selling carpet in the State of California. 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.
- v. History of violation(s) of the same or similar nature.
 1. As noted, CARE has previously been found in violation for failure to demonstrate continuous and meaningful improvement, based on low recycling rates, for 2013, 2014 and 2015.
- vi. The willfulness of the violator's misconduct.
 1. It is well established principle of law that "negligence" is the failure to use reasonable care to prevent harm to oneself or to others. A person can be negligent by acting or failing to act. A person is negligent if he or she does something that a reasonably careful person would not do in the same situation or fails to do something that a reasonably careful person would do in the same situation. (California Civil Jury Instructions §401 (2017))
 2. The Department admonished CARE for underperforming in 2013, 2014 and 2015 and found them in violation each year prior to the 2016 measurement period. In 2016, again CARE failed to meet their performance goals for the fourth consecutive year.
 3. CARE was not obligated to serve as a stewardship organization and its members were not forced to sell in California. By selling, they assumed certain responsibilities in the State and had duties to the State and purchasers of carpet. CARE, via their carpet stewardship plan, indicated to California citizens and assessment payers that they would meet a specific goal as described in their carpet stewardship plan. Despite failure to meet its goals three years in a row, CARE continued to insist that it would meet its 16% goal for 2016, and resisted making changes that the Department believed were necessary for the program's success. This program, as set forth in PRC § 42972, requires participants to set their own procedures and goals and amend them as necessary. (The statute does not authorize the Department to force changes to an approved Plan.) Failing to meet the recycling and diversion goals hurts taxpayers and carpet purchasers because the State and consumers then become responsible of assuming the burdens and costs associated with managing this material which should have been assumed by the manufacturers and managed through the approved carpet stewardship plan (in this case through the seller's agent CARE).
 4. The Department asserts that CARE's continuing failure to perform over time, in 2016 (and before), indicate a failure to take reasonable measures

1 to ensure success and constitute an unreasonably insufficient response in
2 light of their own past performance. PRC § 42972(e) indicates that
3 entities with an approved carpet stewardship plan may make changes to
4 ensure the effectiveness of their carpet stewardship plan, and later notify
the Department regarding the changes and the reasons why those changes
were necessary.

5 vii. Whether the violator took good faith measures to comply with the law and the
6 period of time over which these measures were taken.

7 1. The Department acknowledges that CARE implemented the activities
8 broadly described in their carpet stewardship plan. As noted above,
9 CARE made changes to their carpet stewardship plan, submitting eight
10 (8) different versions for the Department's review, as well as three (3)
11 Addendum, which included changes to subsidy payouts and increases
12 to drop-off locations. "The Department asked CARE to provide more
13 information on incentives. As noted earlier, incentives are at the heart
14 of CARE's approach to implementing AB2398." (Kathy Frevert at the
15 Department's January 2014 Monthly Meeting, Recording at 1:47:15
16 (January 21, 2014)). The Department consistently questioned whether
17 CARE's charges and payouts would be sufficient to meet its goals.
18 CARE consistently refused to provide the data needed (e.g. aggregate
19 cost of recycling, cost of transportation, etc.) to allow the Department
20 to determine whether or not those measures were sufficient and asked
21 the Department to trust that CARE knew its industry best. Therefore,
22 the Department cannot find that CARE took good faith efforts to
23 comply.

24 viii. Evidence of any financial gain resulting from the violation(s).

25 By failing to increase the assessment on carpet and use those funds for
26 increasing recycling, CARE's manufacturer member's did not
27 contribute sufficient funding to meet the statute's requirements.

28 1. The economic effect of the penalty on the violator is nominal. In
2016, as reported by CARE in the 2016 Annual Report total carpet
sales were 94.1 million sq. yds. in California alone. A maximum
penalty of \$5,000/day, approximately \$1.8M, would result in a cost of
1.94 cents for each square yard of carpet sold in California in 2016.
Any penalty will be shared across a multi-billion dollar industry; the
economic effect of the penalty will be spread across all CARE
members.

ix. The deterrent effect that the imposition of the penalty would have on both the
violin and the regulated community.

1. Based on the calculations indicated immediately above, even a
maximum economic penalty based on intentional violations would
likely have a nominal effect on CARE and its members. The
Department hopes, however, that a strong monetary penalty might
send a message to stakeholders and prospective customers that
CARE's members need to do more to meet their statutory obligations
to California consumers.

x. Any other factor that justice may require.

1. None that the Department is aware of.

1
2 c. Based on the above factors, the Department seeks a penalty for 2016 of \$5,000/day,
3 for 366 days, for a total of \$1,830,000.00.

4 25. The Department requests that the administrative decision in the matter expressly prohibit
5 CARE from using Carpet Program assessment funds to pay the above penalties. The Carpet
6 Law specifies that the assessment provide sufficient funding to carry out the carpet
7 stewardship plan, specifically the law states "the carpet stewardship organization may expend
8 the assessment only to carry out the Plan." (PRC§ 42972(c)(1)). It also establishes that the
9 assessment should be tax exempt and shown on receipts and invoices with an accompanying
10 description of the assessment. (PRC § 42972.5). Permitting the use of the carpet assessment
11 to pay the penalty is a misuse of the assessment because allowing CARE to use these funds
12 to pay the penalty, does nothing to carry out the approved carpet stewardship plan.

13
14
15
16 Dated: August 13, 2018.



TY D. MOORE
Attorney, Legal Division
Department of Resources Recycling and
Recovery ()

