BEFORE THE DEPARTMENT OF JUSTICE
OF THE STATE OF DELAWARE

In the Matter of:	)	
MICHAEL D. WHARTON an individual, d/b/a EMMANUEL'S WOOD, INC., d/b/a AMISH MILL, INC.,	)	**Case No. 13-07-06**
Respondents.	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. INTRODUCTION

The final hearing on this administrative action brought under 6 *Del. C.* § 2523, in which the Delaware Department of Justice's Consumer Protection Unit ("CPU") alleges twenty-three violations of the Consumer Fraud Act, 6 *Del. C.* § 2511 *et seq.*, was held on January 8, 2014, at the Delaware Department of Justice's Wilmington office.[1] Deputy Attorney General Stephen G. McDonald appeared on behalf of CPU. Michael D. Wharton, doing business as The Amish Mill, Inc., doing business as Emmanuel's Wood, Inc., appeared on his own behalf.[2]

Previously on September 4, 2013, a hearing ("the Cease and Desist Hearing") was held on the Summary Cease and Desist Order which the CPU had issued against Mr. Wharton pursuant to 29 *Del. C.* § 2525(c). At the conclusion of the hearing, I issued an order making permanent the Summary Cease and Desist Order through the pendency of this case's final

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[1] Per 6 *Del. Reg.* 103-22.1, § 2523 administrative hearings should generally be heard 40 to 60 days after the filing of the administrative complaint. The complaint in this case was filed on August 30, 2013. The instant hearing was originally scheduled for October 30, 2013, but was rescheduled at Mr. Wharton's request to allow more time for him to prepare his case. CPU did not oppose Mr. Wharton's continuance request.

[2] The CPU brought action against Mr. Wharton as an individual, and his entities, Amish Mill, Inc., and Emmanuel's Wood, Inc. When I refer to Mr. Wharton, I refer to all respondents.

hearing pursuant to 6 *Del. C.* § 2523 ("Final Hearing").[3] I also on September 13, 2013, issued pursuant to 6 *Del. Reg.* 103-22 my Findings of Fact and Conclusions of Law.[4]

As an initial matter, the CPU reported that since the Cease and Desist Hearing, Mr. Wharton had delivered items or issued refunds to various named victims in the complaint.[5] The CPU also indicated, as it had at the Cease and Desist Hearing, that it was not proceeding on Counts 16 and 17 of the complaint. (Tr. at 275.)

Citing Mr. Wharton's failure to respond to the administrative complaint as required by 6 *Del. Reg.* 103-15.1 after being noticed twice, the CPU moved for a default order under 6 *Del. Reg.* 103-15.6. (Tr. at 248-254.) CPU also requested that Mr. Wharton not be permitted to introduce witnesses, other than those CPU witnesses he had requested be present, or any documentary evidence because Mr. Wharton failed to provide CPU with a list of the witnesses and documentary evidence he intended to present in accordance with 6 *Del. Reg.* 103-19.3.[6] (Tr.

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[3] The issues in the Cease and Desist Hearing and Final Hearing are very similar, and extensive testimony and documentary evidence was received in the Cease and Desist Hearing. Because of this, the Final Hearing's transcript and exhibits are numbered in continuation from the Cease and Desist Hearing. Thus, the Cease and Desist Hearing's transcript runs from pages 1 to 239, and the Final Hearing's transcript runs from pages 240 to 448. Citation to transcripts will appear as "Tr. at..."

[4] A copy of these was introduced as State's Ex. 24.

[5] Fran Greenglass, who had ordered a chair in April 2012, received it in December 2013. Ashley Dills, who ordered a toy box in January 2013, received it in December 2013. Geralyn Flora, who ordered a table and two barstools in late December 2012, received the table in October or November of 2013 (at the time of the hearing the barstools were still outstanding, but by a CPU letter dated February 21, 2014, which was cc'd to Mr. Wharton, I am informed that these have been recently delivered). Kelly Kammerzelt received a refund of her $300 deposit in late December 2013 or early January 2014 on the laundry cabinets she ordered in November 2012. On the date of the Final Hearing, Mr. Wharton brought a $78 check representing Bruce and Karen Ritterson's deposit on a rocking moose which they ordered on February 23, 2013. These deliveries and refunds were outlined on the record. (Tr. at 273-275.)

[6] In an effort to avoid duplicative testimony, Mr. Wharton was told by me at the Cease and Desist Hearing's conclusion to contact CPU if he wished any of CPU's witnesses to return for additional questioning by him. (Tr. at 228-229.) Mr. Wharton subsequently informed CPU he wished for three CPU witnesses to return: Glenn Orem, Dennis Anuszewski, and Janice Robinson. These witnesses were present for the Final Hearing and were cross examined by Mr. Wharton.

at 248-249; 268.) Ultimately, I allowed Mr. Wharton to proceed with his witnesses and documentary evidence.[7] (Tr. at 271-272; 283.)

II. FINDINGS OF FACT

I incorporate by reference my September 13, 2013, Findings of Fact and Conclusions of Law following the Cease and Desist hearing, including the testimony and exhibits I summarized therein.[8] I turn now to the evidence presented at the Final Hearing.[9]

Dennis Anuszewski's Testimony

Mr. Wharton called Dennis Anuszewski, who had previously testified during the Cease and Desist Hearing.[10] During direct examination, Mr. Wharton introduced a letter through the witness as Exhibit D-4 which appeared to be from the craftsman building Mr. Anuszewski's ordered items. (Tr. at 282-284.) In D-4, the craftsman apologized for the delays in certain customers' orders, including Mr. Anuszewski's and another alleged victim in this action, Fran Greenglass's, and said he would do his best to complete the items by October 20, 2013.

Mr. Anuszewski acknowledged during Mr. Wharton's questioning that he was not given a delivery date for his July 2012 order. (Tr. at 286.) On questioning by the CPU, however, Mr. Anuszewski reiterated his testimony from the Cease and Desist Hearing that he had been told he would receive his order in six to eight weeks. (Tr. at 288-289.)

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[7] While allowing Mr. Wharton to present evidence and witnesses about which he did not previously inform the CPU, I noted that should the CPU feel prejudiced at any time by this decision that I would allow a continuance for the CPU to respond to anything that developed during the Final Hearing. (Tr. at 272.) The CPU ultimately did not request such a continuance. (Tr. at 447.)

[8] *See* State's Ex. 24.

[9] I note that the CPU rested on the Cease and Desist Hearing's evidence, the transcript of which was introduced as State's Ex. 23. (Tr. at 276.)

[10] I am informed by the CPU in a letter cc'd to Mr. Wharton that since the Final Hearing on January 8, 2014, Mr. Anuszewski has received the two bar stools he ordered from the Amish Mill on July 28, 2012, on which he had paid a deposit of $321.

Glenn Orem's Testimony

Mr. Wharton next called Glenn Orem, who had previously testified. Mr. Orem testified that while his wife signed the purchase order he was with her when they ordered the furniture (Tr. at 298-299, 314.)

During questioning by the CPU, Mr. Orem testified that he and his wife had been together when ordering the furniture. (Tr. at 314.) Mr. Orem reiterated his prior testimony that in March 2013 he and his wife ordered deck furniture from The Amish Mill store for an event they were hosting in mid-May, and that Mr. Wharton said they would get their items in four to six weeks. (Tr. at 300.) The items were not delivered. Mr. Orem mentioned again the various fees Mr. Wharton said in a voicemail were being imposed on his bill, including penalties for negative internet reviews of The Amish Mill. (State's Ex. 5; Tr. at 300-301.) Mr. Orem also testified that he had sued Mr. Wharton and received a default judgment in Justice of the Peace Court 13. (Tr. at 301.) The September 10, 2013, default judgment against Mr. Wharton for $1,497, representing the deposit for the deck furniture, as well as $35 court costs and 5.75% post-judgment interest, was entered as State's Exhibit 28. (Tr. at 301-302.)

Janice Robinson's Testimony

Mr. Wharton next called Janice Robinson, who had previously testified. Ms. Robinson testified that on May 4, 2013 she ordered a rocking chair as she did not want to take the floor model (Tr. at 316-317 and 326); that she did not know when she ordered the chair that the term "TBD" on the delivery date line of the State's Exhibit 18 meant "To Be Determined" as Mr. Wharton had told her that she would receive the chair within three weeks (Tr. 3260); that she checked on her order June 1 and June 15 and again on June 29, 2013 when she came to the store to check at which time Mr. Wharton yelled and screamed at her, kept bumping her and told her

to get out of the store and that when she tried to leave, the doors were locked, that the police were called but no arrests were made (Tr. at 323, 324, 326- 327); that she is 64 years of age and about 5 feet 5 inches while Mr. Wharton is much bigger than she is, he being over 6 feet tall (Tr. 325); that she had not been told her chair had come in and was ready to be picked up until the prior hearing when Mr. Wharton said he had texted her that it was ready (Tr. 317 and 327); that Ms. Robinson was not aware of the text as she does not text nor know how to text (Tr. 331-332 and 328); that she would not send anyone to pick up the rocking chair now and finally that she has not received a refund of her deposit (Tr. at 328).

Barbara Ransom-Kuczmarski's Testimony

Mr. Wharton next called Barbara Ransom-Kuczmarski, a witness who had not previously testified. (Tr. at 336.) Ms. Kuczmarski testified that she ordered a large involved custom cabinet from The Amish Mill, and was very happy with the work (Tr. at 337-341). Her purchase order was introduced as Exhibit D-5. Ms. Kuczmarski testified that when she ordered her item on March 7, 2013 she was not given any delivery date and that it was delivered in mid-October 2013 and she only called Mr. Wharton once to check on her item (Tr. at 339-340 and 345).

Special Investigator Schreiber's Testimony

Mr. Wharton next called Robert Schreiber, a CPU Special Investigator. Mr. Schreiber testified to having facilitated the pickup or delivery of items to several of the alleged victims in the CPU complaint since the Cease and Desist Hearing. (Tr. at 352-353.) These items' delivery, as well as refunds, had been disclosed by the CPU at the commencement of the Final Hearing. (Tr. at 273-275 and 363.) Mr. Schreiber reiterated his earlier testimony at the Cease and Desist Hearing about how, after delivering CPU filings to Mr. Wharton, Mr. Schreiber's partner, Alan

Rachko, had asked Mr. Wharton how long it would take to deliver a rolltop desk and Mr. Wharton responded, without hesitation, six weeks. (Tr. at 368-370.)

Michael Wharton's Testimony

As he had in the Cease and Desist Hearing, Mr. Wharton testified in his own defense. (Tr. at 373.) Mr. Wharton testified that customers are informed that The Amish Mill's suppliers have sometimes up to 300 orders ahead of theirs. (Tr. at 375.) He further stated that the furniture takes time to build because it is custom and not premade, and that customers are explained this. (Tr. at 376-377.) He further indicated that Ms. Robinson was not locked in the store, and that only one of the front entrance's set of double doors was locked. (Tr. at 380.) Mr. Wharton further testified that the locked door has a sign indicating "Use Other Door." (Tr. at 381.) During an objection earlier in the hearing, Mr. Wharton had said that, "[s]he tried to go out a door that is a locked door." (Tr. at 322.)

About the rolltop desk that Mr. Schreiber had testified to and Mr. Wharton's representation that it could be had in six weeks, Mr. Wharton said that "[i]f it's a rolltop desk, those are six weeks. That's not a problem at all. He [the builder] continually makes those." (Tr. at 383.) He also reiterated that there is no date given to customers. (Tr. at 385.)

During cross-examination, Mr. Wharton acknowledged that he had earlier testified about certain 50 or 60-year-old customers "that think they have money, but they want to be controlling and aggressive towards us." (Tr. at 202; 390.) Mr. Wharton was asked about his earlier testimony that violation of "the behavior policy" referenced in his voicemail to Glenn Orem (State's Ex. 5; Tr. at 27-29; 303-305), would result in additional charges and Mr. Wharton said "[i]f we have to go to the Better Business Bureau, if we have to go to court, that fee is on your fee bill," and it was not a written disclosure. (Tr. at 212; 395-396.) Although Mr. Wharton

acknowledged making the statement, he seemed to reverse himself somewhat by saying that "[n]obody was ever charged." (Tr. at 397.) Mr. Wharton acknowledged having recently spoken to the press, and the CPU introduced an article from the January 8, 2014, edition of *The News Journal* which read in relevant part, "Wharton said it is reasonable for customers to expect additional fees if they file complaints that require his company to hire an attorney." (State's Ex. 29; Tr. at 398-399.)

At the hearing's conclusion, I reserved judgment. After careful deliberation and review of this case's evidence and transcripts, and based on the facts referenced above and those outlined in my earlier Findings of Fact and Conclusions of Law, I make the following findings of fact:

First, I find that though he represented to these customers that he would construct their items, at the time this representation was made Mr. Wharton knew it was false. It is telling that only after this action is brought do the items get delivered, in at least two cases approximately a year-and-a-half after being ordered. These items were ordered at varying times in 2012 and 2013, yet are only now being delivered all at once. It is reasonable to conclude that the items were not being constructed at all, and that their construction and delivery now is solely in response to this action. In the case of the Rittersons' rocking moose and Kelly Kammerzelt's cabinet, Mr. Wharton issued a refund after the action commenced rather than delivering the items despite having taken their orders 10 and 14 months ago, respectively. And this after having given Ms. Kammerzelt another delivery date in June 2013, which he similarly did not make good on. With so much time and nothing produced, it reinforces the conclusion that Mr. Wharton misrepresented that the items would be constructed in the first.

One would expect a businessman that was having legitimate problems with suppliers to be contrite, offer refunds, or in some way accommodate the customer over an item's extreme lateness. Mr. Wharton's angry interactions with the customers when they inquired about their orders seems more indicative of someone who, viewing some groups of customers negatively and with a sense of entitlement, sought to drive them away and keep their money.

It should also be noted that language about specialty or custom items being non-refundable does not mean that customers are obligated to wait forever to see if Mr. Wharton will have their item constructed. Also, although hearsay is permitted in administrative hearings, I do not find that the letter from the builder, Exhibit D-4, to the extent it is relevant at all, has sufficient evidentiary value to offset the evidence weighing against Mr. Wharton.

Second, I find that Mr. Wharton did represent that these customers' orders would be delivered within a certain timeframe. I find the CPU's witnesses credible. Their testimony that Mr. Wharton gave them a delivery timeframe was bolstered by his comment, without any hesitation, to Mr. Schreiber's partner that a rolltop desk could be delivered in six weeks. Additionally, I do not find credible Mr. Wharton's statements that he informed customers that, for instance, a given chair builder was a year or more behind on orders, or that another builder would have up to 300 orders ahead of theirs. His improbable description of his interaction with Ms. Robinson in which she supposedly could not figure out that one door was locked and the other immediately next to it was unlocked also cuts against his credibility.

While I find Ms. Kuczmarski credible, her situation was not like the customers in the complaint, she expected her unusual custom order would take a long time to build and she did not ask about a likely timeframe or inquire about her order except once in seven months. While

she had a good experience purchasing from The Amish Mill, it does not make me question the credibility or the reasonableness of the CPU witnesses.

Lastly, I find that Mr. Wharton did not disclose that there would be additional fees for such things as making complaints to the Better Business Bureau, placing unflattering internet reviews, and making phone calls to inquire about order status; or that their order could even be canceled without refund for asking about a refund. The CPU witnesses were consistent in having not been informed about such fees. Their testimony is bolstered by the voicemail Mr. Wharton left Mr. Orem saying that his bill was "going up very drastically" because of fees being assessed for phone calls and bad reviews online, as well as the texts Ms. Kammerzelt received from Mr. Wharton assessing call fees. (State's Ex. 8 and 14; Tr. at 304.)

Further, Mr. Wharton acknowledged that fees could be assessed for violation of what he styled the "behavior policy", and he acknowledged that such policy is not written. Moreover, it is clear from the testimony that such policy was not disclosed verbally nor would one expect such a policy to be disclosed as it is difficult to conceive that a reasonable consumer would purchase goods from a business that threatens to add additional charges for complaints to the Better Business Bureau or for phone calls inquiring about their purchases. Such provisions, if disclosed, would reasonably lead the consumer to anticipate problems with their order making them unlikely to enter the transaction. Mr. Wharton has previously claimed that such disclosures were on a disclosure form at his store that he stated he had neglected to bring to the Cease and Desist Hearing. This disclosure form was never introduced in the Final Hearing, either. Only two disclosure forms, Exhibits D-1 and D-2, were ever introduced, and neither includes disclosures of phone call, complaint fees, or similar penalties. (Tr. at 208.) Additionally, I find credible the testimony of Mr. Schreiber that even if Mr. Wharton's exhibits D-1 and D-2,

consisting of standard 8.5" x 11" sheets of paper with small font, were posted in the corner of Mr. Wharton's large furniture store away from the cash registers (Tr. at 157), they were not likely to be seen by customers and any additional disclosures posted in similar fashion would similarly pass unseen.

III. CONCLUSIONS OF LAW

Standard of Review

"[T]he burden of proving fraud is by a preponderance of the evidence." *Miller v. Falconetti*, 1993 WL 603298 at *2 (Ridgely, P.J. presiding). The Consumer Fraud Act makes unlawful certain conduct in connection with the sale of merchandise. Section 2513 of Title 6, *Delaware Code*, states:

> The act, use or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation. Or the concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in the connection with the sale, lease or advertisement of any merchandise, whether or not any person has in fact been misled, deceived or damaged thereby, is an unlawful practice.

The conduct alleged in this complaint is cognizable under § 2513 because, "[m]erchandise means any objects, wares, [and] goods", and thus the sale of furniture falls within the statute. 6 *Del. C.* § 2511(2).

In the case of a false statement, the person making such statement must know it is untrue or make it with reckless indifference to the truth. *Ayers v. Quillen*, 2004 WL 1965866 at *5 (Del. Super.).

> The general rule is that a person is chargeable with a false statement if it was made under such circumstances as to raise a presumption of his knowledge of the falseness. This principle applies where a person has a duty to know the truth or where the

> facts are peculiarly within the knowledge of the person making the statement.

Id. at *6 (citing *In re: Brandywine Volkswagen Ltd.*, 306 A.2d 24, 27 (Del. Super. 1973)).

Additionally, 6 *Del. C.* § 2513 "requires that the person making the statement intend others to rely upon the deception, false promise or misrepresentation." *Id.* at *9. The consumer need not prove their actual reliance on the false statement or omission, but only that such statement was made with the intent that someone would rely upon it. *Id.* (*citing S&R Associates, Inc. v. Shell Oil Co.*, 725 A.2d 431, 440 (Del. Super. 1998) ("The Plaintiff need only prove that the Defendant intentionally concealed material facts with the intent that others would rely upon such concealment.").

While a misrepresentation or omission being made with a reckless indifference for the truth is actionable, "there must be an actual or constructive awareness of one's conduct and a realization of its probable consequences." *Quillen* at *8 (internal quotations omitted).

Additionally, in the case of an omission, fraud "may also occur through deliberate concealment of a material fact in the face of a duty to speak." *Murphy v. Berlin Construction*, 1999 WL 41633 at *3 (Del. Super.) (emphasis omitted). A duty to speak can be created by making "a partial disclosure of facts that require the disclosure of additional facts to prevent a misleading impression." *Id.* "The failure to disclose material information is actionable when, under the circumstances, the absence of such information creates a 'condition of falseness.'" *Id.*

The complaint's twenty-three administrative charges follow three broad types: charges alleging that Mr. Wharton made false representations to these customers that he would construct their items ("the Item Construction Counts"); that Mr. Wharton made false representations to these customers when he referenced a timeframe for delivery of their items ("the Delivery Timeframe Counts"); and that Mr. Wharton made material omissions in connection to the sale of

these customers' items when he did not disclose that additional fees would be imposed on customers making phone calls to him, writing criticizing reviews on the internet about his business, contacting the Better Business Bureau, and the like, or that their order would be canceled for asking for a refund ("the Omission Counts"). The fact patterns giving rise to each type of charge are substantially similar, and so I analyze the charges by group.

The Item Construction Counts

Counts One, Three, Seven, Nine, Thirteen, Eighteen, Twenty-One, and Twenty-Four allege that Mr. Wharton employed a false promise or misrepresentation in connection with the sale of merchandise when he represented to the complaint's named customers that he would construct, or have constructed by others, the items the customers ordered.

At a minimum, Mr. Wharton's representations regarding the orders in issue were made with a reckless indifference for the truth. Mr. Wharton testified about his knowledge of the process that goes into making fine furniture as well as his knowledge of the people he employed to complete his orders. Thus it is clear Mr. Wharton knew or should have known that he could not deliver the goods under the terms that he was promising to his customers. He also knew or should have known the probable consequence of the representation—that customers would give him money and be left without their items.

Yet the fact that the conduct occurred again and again through eight groups of customers indicates this was not merely reckless indifference for the truth, but that he knew the representation was untrue. Had the conduct not been willful, Mr. Wharton would have stopped making these representations once he realized after the first few transactions that he was not able to fulfill what he promised. The representation was also made with intent others rely on it because absent the representation that the items would be made, there would have been no

transaction at all. Accordingly, I find Mr. Wharton in violation of the Consumer Fraud Act on Counts One, Three, Seven, Nine, Thirteen, Eighteen, Twenty-One, and Twenty-Four.

The Delivery Timeframe Counts

Counts Two, Four, Eight, Ten, Fourteen, Nineteen, Twenty-Two, and Twenty-Five all allege that Mr. Wharton employed a false promise or misrepresentation in connection with the sale of merchandise when he represented that these customers' furniture orders would be completed within a certain amount of time, for instance six weeks.

Again, and at a minimum, Mr. Wharton's representations as to the timeframe of delivery were made with a reckless indifference for the truth. Mr. Wharton alone would have been privy to the vagaries of his suppliers, and would have known that he would not be able to deliver the items in the timeframe he represented (if constructed at all). Additionally, Mr. Wharton knew the probable result of his representation: that the customer would make the order and not receive the item in the time promised.

Yet this goes beyond mere reckless indifference to the truth because he continued to do it again and again. Mr. Wharton was on notice that he would not be able to deliver in the timeframes he was promising because of earlier failures to make the promised deliveries. He continued to make the representations anyway. While once or twice may be plausibly denied as an unforeseen problem with a supplier, one would expect a businessman to stop making such timeframe representations if he were acting in good faith since he would be on notice that he could not deliver within the window promised. Eight times, on the other hand, betrays the willfulness of the conduct.

The fact that the invoices note some variation of "TBD" ("To Be Determined") does not act as a safe harbor for Mr. Wharton. Many of the complaining customers did not even realize

what "TBD" meant, some testifying that they thought it was someone's initials. Even for those that did understand what "TBD" meant, the fact remains that Mr. Wharton represented the delivery timeframe verbally, and he cannot use the invoice's notation as a shield.[11] Accordingly, I find Mr. Wharton in violation of the Consumer Fraud Act on Counts Two, Four, Eight, Ten, Fourteen, Nineteen, Twenty-Two, and Twenty-Five.

The Omission Counts

Counts Five, Six, Eleven, Twelve, Fifteen, Twenty and Twenty-Three allege that Mr. Wharton omitted material facts by failing to disclose that certain actions by the customer, such as making phone calls to Mr. Wharton or asking for a refund, would result in additional charges or even the cancellation of their order without refund. Omissions are only actionable if there is a duty, including where the disclosure of certain facts requires the disclosure of additional facts to prevent a misleading impression.

The amount customers were liable for (less any deposit they paid) was disclosed on customer invoices. This created a duty to disclose that Mr. Wharton could impose additional fees because absent such disclosure, a customer was left with the misleading impression that their bill could not go up. Mr. Wharton alone was in a position to know what fees he would impose on customers. Additionally, that Mr. Wharton imposed "surprise" charges repeatedly indicates that these omissions were willful. Accordingly, I find that Mr. Wharton violated the Consumer Fraud Act in Counts Five, Six, Eleven, Twelve, Fifteen, Twenty and Twenty-Three.

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[11] Though there is no essence of time provision on any of the invoices, "[w]hen time is not of the essence in a contract, a party still commits a material breach when it fails to perform within a reasonable time." *Hifn, Inc. v. Intel Corps.*, 2007 WL 2801393 at FN96 (Del. Ch. 2007). Besides having no essence of time provision, the customers, with perhaps the exception of Mr. Orem who of all the CPU witnesses had the most date-specific requirement, were content with giving Mr. Wharton additional time, often months, beyond the verbal timeframe he represented to them. Thus, there was no essence of time requirement, and Mr. Wharton absent his verbal representation needed only provide their items within a reasonable amount of time. At this point, even without the verbal representations, Mr. Wharton would have failed the agreements' terms as to reasonableness of delivery time given how long ago many of these customers ordered their items.

Penalties

Where, as here, willful violations of the Consumer Fraud Act are found, 29 *Del. C.* § 2524(b) allows for the imposition of up to $5,000 per violation; the imposition of a cease and desist order; an order of restitution; or other relief appropriate to prevent violators from being unjustly enriched.

Firstly, I make the August 30, 2013, Summary Cease and Desist Order permanent for a period of five years from the date of its initial issuance. Therefore, it will be in place against Mr. Wharton until August 30, 2018, and I incorporate it herein by reference.

Second, as to restitution, the total amount of restitution that would have been owing when this case began was $3,335.[12] As noted above, Mr. Wharton has either made delivery or paid refunds to several victims, and so as to them no restitution is owing. Additionally, Glenn Orem has already obtained an order of restitution in his civil judgment against Mr. Wharton. Restitution is therefore only owed at this point to Janice Robinson in the amount of $125. However, in the event that Mr. Wharton does not pay his civil judgment to Mr. Orem, then restitution in the amount of $1,497 is also owed to Mr. Orem.

Lastly, I turn to administrative penalties for 23 violations of 6 *Del. C.* § 2513. "The amount of punitive damages should be reasonably proportionate to the actual damages, but no particular ratio can be fixed in the abstract. Instead, the relative size of the awards depends upon the facts of the particular case." *Stephenson v. Capano Development, Inc.*, 462 A.2d 1069, 1077 (Del. 1983) (internal citations omitted). "Among the factors properly considered in determining the amount of a civil penalty is the financial gain realized from an alleged violation and the defendant's ability to pay." *State v. Wellington Homes, Inc.*, 2001 WL 238125 (Del. Super.)

[12] The deposit amounts each customer paid were testified to at length in the Cease and Desist Hearing: Dennis Anuszewski, $321; Kelly Kammerzelt, $300; Bruce and Karen Ritterson, $70; Geralyn Flora, $759.50; Ashley Dills, $162.50; Glenn Orem, $1,497; Fran Greenglass, $100; and Janice Robinson, $125.

(*citing United States v. Reader's Digest Association, Inc.*, 494 F.Supp. 770, 772 (1980), *aff'd* 662 F.2d 955, 967 (3rd Cir. 1981). Additional considerations are good or bad faith of the defendant, injury to the public, the necessity of vindicating the authority of the responsible regulatory agency.[13] *Reader's Digest*, 494 F.Supp. at 772.

Although there is no set ratio for assessing civil or administrative penalties, *State v. Gardiner*, 2000 WL 973304 (Del. Super.), is instructive. In *Gardiner*, the Court found that the respondent had realized a $500 profit per fraudulent warranty, and assessed a $7,500 civil penalty per violation—in other words, multiplying the profit realized by a factor of 15. *Id.* at *11.

In weighing these factors, firstly, I find that the financial gain realized from the violations totaled approximately $3,335.[14]

Next, assessing Mr. Wharton's ability to pay, at one point Mr. Wharton indicated that he had $700,000 worth of product in The Amish Mill store, and that he owns it but "I don't have it all paid for." (Tr. at 223.) Additionally, he testified that bad publicity resulting from media interest in this case "has almost ruined the Amish business in this State," which would suggest that his business may be struggling now. (Tr. at 398.) It seems fair to say that Mr. Wharton has some ability to pay.

Third, considering good or bad faith, I have found Mr. Wharton's conduct willful. Because the fact patterns at issue in this case are substantially similar and serial in nature, the bad faith is manifest.

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[13] In *Reader's Digest*, the relevant regulatory agency was the Federal Trade Commission. In this action, it is the CPU.

[14] Because it does not appear the items were constructed prior to this action for reasons outlined above, I use the total of the deposits as profit. Though in the months since the September 4, 2013, Cease and Desist Hearing Mr. Wharton has made several deliveries and refunds to customers, that is relevant only in assessing restitution, not for calculating the profit he would have realized but for this action being brought.

Fourth, I find significant injury to the public because of the ongoing, repeated nature of the violations across multiple victims.

Lastly, the conduct at issue in this case warrants vindicating the CPU's authority. This is because there must be some significant sanction lest Mr. Wharton's serial bad conduct continue.

Taking the above-factors together, I conclude that a substantial administrative penalty is appropriate. In aggregate, Wharton had realized $3,335 in profit by his conduct. Using *Gardiner*'s ratio as guidance, I assess total administrative penalties at $23,000, or $1,000 per violation. This is significantly less than the $5,000 maximum penalty available under the statute per violation, but proportionate under the case law while still being a significant penalty.

IV. CONCLUSION AND ORDER

For the foregoing reasons, I find twenty-three violations of Delaware's Consumer Fraud Act, and order that: the Summary Cease and Desist Order be made permanent until August 30, 2018; that Mr. Wharton pay restitution to Janice Robinson in the amount of $125 and $1,497 to Glenn Orem if Mr. Wharton does not pay his civil judgment to Mr. Orem; and that administrative penalties of $23,000 be imposed against Mr. Wharton.

Any party who is aggrieved by this final administrative order may appeal it to Superior Court within 30 days after the date of issuance. 29 *Del. C.* § 2523(e).

Leonard S. Togman, Esq.
HEARING OFFICER

Date: February 24, 2014