

BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS  
STATE OF GEORGIA



OCT 8 2015

*Kevin Westray*  
Kevin Westray, Legal Assistant

**AUCTION VENTURES LLC, d/b/a/  
DEALERS CHOICE AUTO AUCTION;  
DCAA OF MARIETTA, LLC, d/b/a/  
DEALERS CHOICE AUTO AUCTION;  
and RANDY PARKER, individually and  
in his capacity as principal of AUCTION  
VENTURES, LLC, and DCAA OF  
MARIETTA, LLC,**

**Petitioners,**

v.

**JOHN D. SOURS, ADMINISTRATOR,  
FAIR BUSINESS PRACTICES ACT,  
GOVERNOR'S OFFICE OF  
CONSUMER PROTECTION,**

**Respondent.**

**Docket No.:**  
**OSAH-OCP-OCP-FBPA-1558819-60-**  
**Walker**  
**Agency Reference No.: 350821**

**INITIAL DECISION**

**I. SUMMARY OF PROCEEDINGS**

Petitioners appeal the decision by John D. Sours, Administrator of the Fair Business Practices Act, Governor's Office of Consumer Protection ("OCP" or "Respondent"), to assess a civil penalty of \$66,000 for violations of the Fair Business Practices Act ("FBPA"). The evidentiary hearing took place on August 5, 2015, and the record in this matter closed on September 10, 2015. Respondent was represented by Heather Ryfa, Esq. Mr. Parker appeared both on his own behalf and as the representative of Auction Ventures, LLC and DCAA of Marietta, LLC.<sup>1</sup>

<sup>1</sup> Auction Ventures, LLC, and DCAA of Marietta, LLC, are corporate entities that ordinarily would be required to retain an attorney in a legal proceeding. See Eckles d/b/a Atlanta Technology Group v. Atlanta Technology Group, Inc., 267 Ga. 801, 805 (1997). However, the Administrative Rules of Procedure provide that "[i]n the

After careful consideration of the evidence and the arguments of the parties, the Respondent's decision to assess a civil penalty against the Petitioners is **AFFIRMED**; however, the amount of the penalty is reduced from \$66,000 to \$4,000.

## II. FINDINGS OF FACT

### A. Overview

#### 1.

Petitioners Auction Ventures, LLC, ("Auction Ventures") and DCAA of Marietta, LLC, ("DCAA") are now-defunct limited liability corporations that maintained their principal places of business in Georgia. Auction Ventures operated at 2425 N. Expressway, located in Griffin, Georgia, from March 2012 through March 2014. DCAA operated at 810 Cobb Parkway South, located in Marietta, Georgia, from March 2013 through November 2013. (Transcript of Hearing at pages 79-80 (hereinafter "T-")). The entities sold automobiles at auction using the name Dealer's Choice Auto Auction (hereinafter "Dealer's Choice"). (T-79).

#### 2.

Petitioner Randy Parker was the sole owner of both limited liability corporations. (T-79-80). In this capacity, Mr. Parker hired and fired employees, was the signatory on the corporations' bank accounts, and reviewed financial reports and bank statements. (T-85). Managers at each location reported directly to Mr. Parker. (T-86-87).

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Administrative Law Judge's discretion, an owner, majority shareholder, director, officer, registered agent, member, manager or partner of a corporation, limited liability company, or partnership may be allowed to represent the entity in a proceeding before an Administrative Law Judge." Ga. Comp. R. & Regs. 616-1-2-.34. Here, because Mr. Parker was the sole owner of the now-defunct corporations, he was permitted to represent the corporations without counsel.

3.

Petitioners auctioned vehicles owned by third parties, generally car dealers, to the public. (T-59, 62). After a buyer purchased a vehicle at auction, Dealer's Choice would pay the dealer who owned the vehicle. (T-59, 62, 80). If a potential buyer offered the winning bid, Petitioners required them not only to pay for or finance the vehicle, but also to provide the funds for the title ad valorem tax ("TAVT") fees due to the county office.<sup>2</sup> (T-62). Dealer's Choice then provided a "drive out tag" for the vehicle which was good for thirty days. (T-59).

4.

When dealers brought their vehicles to be auctioned, "either they would have a title, or they [would] have thirty days to produce the title." (T-62). After receiving the title, Dealer's Choice would process the title and send in necessary payments to the county so that the buyer could obtain a valid license tag. (T-62, 81).

## **B. Auction Ventures**

5.

As a result of financial difficulties, DCAA, located in Marietta, closed in November 2013. (T-79).<sup>3</sup> Auction Ventures, located in Griffin, continued to hold auctions and collect

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<sup>2</sup> O.C.G.A. § 48-5C-1 provides for a "TAVT." The application for title and TAVT payment must be submitted to the county in which the purchaser registers the vehicle and must be paid at the time application for title and registration are made. A dealer may accept the application for title and TAVT payment and then deliver the title application and TAVT payment to the county tag agent. See also O.C.G.A. § 48-5B-1(b)(1)(C).

<sup>3</sup> While DCAA is listed in the Civil Penalty Order, OCP did not specify any FBPA violations that occurred at this location during the hearing.

payments from buyers, but struggled to remain financially viable. (T-63). According to Mr. Parker, the business was failing due to employee theft and outstanding unpaid debts. (T-95, 98).<sup>4</sup>

6.

Although Auction Ventures continued to collect payment from buyers for vehicles purchased at auction, instead of paying the dealers, Auction Ventures used the funds to “cover[] expenses [and] theft.” (T-63-64, 95). As Mr. Parker admitted at the hearing, he failed to manage his finances appropriately; stating “[i]t was “Peter paying Paul.” (T-95). As a result, dealers would not transfer title until they had received payment from Auction Ventures. (T-64). Even if Auction Ventures was able to obtain title from a dealer, often it did not have funds to pay all of the fees due to the county tag office. (T-64). In May 2014 Auction Ventures went out of business, leaving a number of customers who had bought cars at auction without title to their vehicle. (T-56-58, 67-68). Following the business’s closure, some buyers were able to obtain titles because Mr. Parker continued to make sporadic payments both to dealers and to county tag offices. (T-70).

### **C. Investigation**

7.

After receiving numerous complaints, “OCP”<sup>5</sup> initiated an investigation of Petitioners. (T-13-15).<sup>6</sup>

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<sup>4</sup> Mr. Parker maintained at the hearing that “I had 50 some odd cars stolen . . . I had to pay for those cars;” however, he did not file an insurance claim or a police report regarding the alleged stolen vehicles. (T-95).

<sup>5</sup> Effective July 1, 2015, OCP is known as the Consumer Protection Unit of the Offices of Attorney General. (T-5); see O.C.G.A. § 10-1-395.

<sup>6</sup> Although he did not recall the specific charge, Mr. Parker testified that there is a pending criminal case in this matter. (T-89). Georgia law provides that a dealer that accepts an application for title and state and TAVT fees and converts such fees to his or her own use shall be guilty of theft by conversion. See O.C.G.A. § 48-5C-1.

8.

Amanda Randles works for OCP as an investigator. (T-13). She reviewed consumer complaints made to OCP regarding Auction Ventures. (T-17; Exhibit R-2). Ms. Randles also obtained and reviewed complaints that consumers made to the Better Business Bureau. (T-18; Exhibit R-3).

9.

Based on the information that she reviewed, Ms. Randles prepared a chart documenting each complaint. (Exhibit R-9). The complaints generally fell into three categories: (1) twenty-three consumers were unable to obtain title to vehicles purchased, (2) ten consumers failed to receive a valid emissions certificate as required by law, and (3) seven consumers complained about the quality of the vehicles purchased. (T-35-36; Exhibit R-9).<sup>7</sup>

10.

GRATIS is the State's database that maintains title and tag information. Ms. Randles testified that she checked the GRATIS database and that none of the consumers who had filed complaints regarding title had obtained title within thirty days of the vehicle's purchase date. (T-30-34, 73-78; Exhibits R-8, R-11).

11.

During the course of her investigation Ms. Randles attempted to contact consumers, via telephone and email, who had filed complaints indicating they could not obtain title to vehicles

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<sup>7</sup> The Civil Penalty Order did not impose penalties for complaints regarding vehicle quality. (Exhibits R-9, R-10).

purchased from Auction Ventures; however, she did not receive any response from the majority of the consumers who had filed complaints. (T-38, 42; Exhibit R-9).<sup>8</sup>

12.

At the hearing, Mr. Parker disputed OCP's contention that all of the twenty-three customers named by Respondent failed to receive title to vehicles they had purchased from Auction Ventures, maintaining he had resolved most of the cases. (T-91). The chart prepared by Ms. Randles documents that many complaints had been settled through mediation or that Mr. Parker demonstrated that he had resolved the issue. (Exhibit R-9).<sup>9</sup>

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<sup>8</sup> Exhibit R-9 listed complaints regarding title as follows: 1. Sabrina Adams filed a complaint with the Better Business Bureau regarding title; Exhibit R-9 states that the investigator "[l]eft msg v/m; sent email." 2. Carlos Black filed a complaint with the Better Business Bureau regarding title; Exhibit R-9 states the investigator "[l]eft msg with [consumer representative] and sent email, no response to date." 3. Darrius Cooper filed a complaint with OCP; Exhibit R-9 states the investigator "[l]eft msg/v/m." 4. Christina Defoe filed a complaint with OCP; Exhibit R-9 states that Mr. Parker forwarded evidence indicating the case was resolved and that the complainant's "[p]hone not in svc; sent email." 5. Traci Lynn Douglas filed a complaint with the Better Business Bureau regarding title; Exhibit R-9 states the investigator "[l]eft msg w/someone; sent email. No response." 6. Ana Flores filed a complaint with the Better Business Bureau regarding title; Exhibit R-9 states that "Parker responded via email indicating that receipts would be sent. Nothing further." 7. Sylvia Foggie filed a complaint with OCP regarding title; Exhibit R-9 indicates that "Bus. provided docs showing now resolved. Cons. confirmed on 10/7/14." 8. Crystal Hardnett filed a complaint with the Better Business Bureau regarding title; Exhibit R-9 indicates that there was "[n]o answer; sent email. No response." 9. Billy Hayes filed a complaint with the Better Business Bureau regarding title; Exhibit R-9 indicates that "Parker says resolved, \$ refunded." 10. Audrey Hodge filed a complete with OCP; Exhibit R-9 indicates "[p]hone not is svc; sent letter. Parker says docs sent to Pike Co. No response from cons. (Sent letter, no email or tx#)." 11. Shimon Hunt filed a complaint with OCP regarding title; Exhibit R-9 indicates "Cons. states tag ofc. made provision allowing her to obtain tag." 12. Janette Johnson filed a complaint regarding title; Exhibit R-9 states that the case was resolved in mediation. 13. Michelle McCommons filed a complaint with the Better Business Bureau regarding title; Exhibit R-9 states "[s]ent email to cons. req. docs. No cons response to date." 14. Shaquil McCrae filed a complaint with OCP regarding the inability to obtain a tag due to a lien on the vehicle; Exhibit R-9 indicates "[n]o docs w/orig complaint. Sent email, left msg. Parker says UTL cons." 15. Angelia Smith filed a complaint with the Better Business Bureau regarding title; Exhibit R-9 indicates that "[c]ons. has not rec'd title for either vehicle. Cons. req email to send docs to. Sent email 9/22. No response." 16. Joseph Smith filed a complaint with the Better Business Bureau regarding title; Exhibit R-9 indicates the investigator "[s]ent email, no tx#." 17. Mike Stewart filed a complaint with the Better Business Bureau regarding title; Exhibit R-9 indicates the case was "[r]esolved. Cons. rec'd title and tag." 18. David Stout filed a complaint regarding title; Exhibit R-9 indicates that "[c]ons. states complaint resolved. Not interested in OCP assistance." 19. Bridgett Thomas II filed a complaint with the Better Business Bureau regarding title; Exhibit R-9 indicates "[n]o docs w/orig complaint. Sent email, left msg. Parker says docs corrected and sent to Fulton Co." 20. Jonathan Vasuez filed a complaint with OCP regarding title; Exhibit R-9 states "[c]ons. rec'd title Summer 2014." 21. Robyn Walker filed a complaint with OCP regarding her title; Exhibit R-9 indicates "Med Resolved."

<sup>9</sup> Better Business Bureau records confirm that it had resolved complaints from Sabrina Adams, Michelle McCommons, Shanita Moore, and Sherico Taylor. (Exhibit R-3).

13.

Two individuals who had filed complaints regarding title testified at the hearing. In March 2014 Hope McKiver-Dawkins purchased a vehicle from Auction Ventures for approximately \$3000.00. (T-44-45, 48). After paying for the car, she received a temporary tag from Auction Ventures. (T-44). When she went to her county office, she discovered that Auction Ventures had not sent in the necessary materials so that she could obtain a license tag. (T-44-46).

14.

Ms. McKiver-Dawkins then returned to Auction Ventures and received a second temporary tag. (T-45). She learned that Auction Ventures had not paid the seller for the vehicle and title had not been transferred. Ultimately, the seller repossessed the vehicle from Ms. McKiver-Dawkins because Auction Ventures never paid him for the car. (T-45-49). Auction Ventures did not refund Ms. Dawkins the \$3,000.00 she had paid for the car. (T-48).

15.

Alytia Simpson testified that she and her husband purchased a Mazda from Petitioner in November 2012 for \$2,200. (T-50). She received a bill of sale. (T-50). She called her county tag office to see if Auction Ventures had sent anything to them, but the county tag office had not received any paperwork. (T-51).

16.

Ms. Simpson contacted Auction Ventures and asked why it had not sent paperwork to the county office but “[w]e kept getting the run-around.” She was never able to obtain title to the vehicle, as a result the vehicle was impounded when the temporary tag expired. (T-51-52). Ms. Simpson never recovered the vehicle nor did she receive reimbursement from Petitioners.

17.

Ten complaints concerned the failure to provide a certificate of emission inspection. Mr. Parker admitted at the hearing that Auction Ventures had auctioned vehicles that did not have certificates, but maintained that it had only sold those cars to buyers who did not reside in counties requiring that a vehicle have a certificate of emissions inspection. (T-80-82). In order to prove that Auction Ventures was required to provide a certificate of emissions, OCP suggested that the undersigned should take judicial notice of the consumers' addresses as listed in the chart prepared by Ms. Randles. (T-85).<sup>10</sup>

18.

The undersigned does not find the addresses listed in the chart to be sufficiently reliable evidence such that the undersigned would be able to take judicial notice and determine whether or not the consumer lived in a county that required a certificate of emissions. Ms. Randles did not process the initial complaints and did not testify she had confirmed that the address listed in the chart was the consumer's address at the time that he or she had purchased a vehicle. None of the affected consumers testified at the hearing<sup>11</sup> to verify that the address listed was accurate at the time the vehicle was purchased; moreover, it appears all of the cases were resolved or that the consumer did not respond to OCP's inquiries.<sup>12</sup>

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<sup>10</sup> Exhibit R-5 references the failure to submit a certificate of emissions but it appears that the document refers to a vehicle purchased by Cora Delia Bailey, who did not file a complaint regarding a certificate of emissions. See Exhibits R-5, R-9.

<sup>11</sup> Exhibit R-9 also indicates that the vehicle purchased by Ms. Simpson was sold without a certificate of emissions but no testimony was offered regarding this issue.

<sup>12</sup> Exhibit R-9 lists complaints regarding vehicles sold without emissions as follows: 1. Gina Clay filed a complaint with OCP regarding the emissions certificate; Exhibit R-9 indicates that complaint was resolved via mediation. 2. Michelle McCommons filed a complaint with the Better Business Bureau regarding the emissions certificate; Exhibit R-9 indicates "[s]ent email to cons. req. docs. No cons response to date." 3. Shanita Moore filed a complaint with the Better Business Bureau regarding the emissions certificate; Exhibit R-9 indicates the case was resolved. 4. Candace Morgan filed a complaint with the Better Business Bureau regarding the emissions certificate; Exhibit R-9 indicates the case was resolved. 5. Yaphet Roper filed a complaint with the Better Business Bureau



19.

After completing the investigation, OCP issued a Notice of Contemplated Legal Action (“NCLA”) on December 4, 2014, indicating that it was contemplating taking or initiating legal action pursuant to O.C.G.A. § 10-1-397(b) because it had reason to believe that Petitioners had engaged in unfair and deceptive business practices. (Exhibit R-7). A meeting regarding the NCLA took place during January 2015. (T-26; Exhibit R-7). During the meeting OCP offered Petitioners the option of entering into an Assurance of Voluntary Compliance, but the parties were unable to reach an agreement regarding the case. (T-26-27).

20.

OCP then issued a Civil Penalty Order, assessing a civil penalty of \$66,000.00 against the Petitioners.<sup>13</sup> Regardless of whether OCP had had any contact with a complainant, all of the thirty-three complaints regarding title or emissions were relied upon in assessing the civil penalty because “[t]he consumer filed a complaint and Mr. Parker didn’t provide any information that would show he had satisfied the tag and title” and “Mr. Parker didn’t have records he should have as a business owner . . . .” (T-41, 77).<sup>14</sup>

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regarding the emissions certificate; Exhibit R-9 states “[I]eft msg on v/m; sent email.” 6. Angelia Smith filed a complaint with the Better Business Bureau regarding the emissions certificate; Exhibit R-9 “[c]ons. has not rec’d title for either vehicle. Cons. Req email to send docs to. Sent email 9/22. No response.” 7. Mike Stewart filed a complaint with the Better Business Bureau regarding the emissions certificate; Exhibit R-9 indicates the complaint was resolved. 8. Sheikinah Napper filed a complaint with OCP regarding the emissions certificate; Exhibit R-9 states “[s]poke w/cons. New add. Sending letter and email req. docs. Cons. still has vehicle, not title /tag.” 9. Sherico Taylor filed a complaint with the Better Business Bureau regarding the emissions certificate; Exhibit R-9 indicates that the case was resolved.

<sup>13</sup> Although Petitioners in this matter, the Civil Penalty Order was directed to Mr. Parker, Auction Ventures and DCAA as Respondents. (Exhibit R-10).

<sup>14</sup> OCP served Mr. Parker with an investigative demand requesting documentation regarding the consumer complaints; to date Mr. Parker has not produced most of the requested documentation. (T-21-23; Exhibit R-4). In order to continue to assist customers who had not received title to their vehicle, one employee took business records with her after Auction Ventures closed its doors; however, most records, including computer records, remained at the building. (T-56-58, 67-68). Eventually, Mr. Parker sold the computers and office equipment. (T-68, 90). Although Mr. Parker maintained he had “backed up” information relating to vehicle purchases on hard drives, the hard drives disappeared. (T-90).

The Civil Penalty Order identified two general types of unfair and deceptive acts or practices, but did not specify the nature or number of violations relied upon in assessing \$66,000.00 penalty. It provided in relevant part:

- A. [Petitioners] failed to obtain valid emissions certificates for used vehicles prior to selling the vehicles to consumers and, as a result, violated O.C.G.A. § 12-9-54. By selling vehicles to consumers in violation of the aforementioned emissions certificate requirement, the [Petitioners'] practice violates O.C.G.A. § 10-1-393(a), the general prohibition of unfair or deceptive acts or practices; O.C.G.A. § 10-1-393(b)(5), which prohibits representing that goods or services have approval that they do not have; and O.C.G.A. § 10-1-393(b)(9), which prohibits advertising goods with the intent not to provide them as advertised.
  
- B. [Petitioners] failed to facilitate title transfers within the statutorily-defined 30-day period after selling motor vehicles to consumers, which is a violation of O.C.G.A. § 40-3-32. By selling vehicles to consumers in violation of the aforementioned title transfer requirement, the [Petitioners'] practice violates O.C.G.A. § 10-1-393(a), the general prohibition of unfair or deceptive acts or practices.

Petitioners timely appealed the Civil Penalty Order. (Exhibit R-10, OSAH Form 1 and attachments.)

### III. LEGAL ANALYSIS AND CONCLUSIONS OF LAW

#### 1.

The purpose of the Fair Business Practices Act, O.C.G.A. §§ 10-1-390 to 10-1-407, is to “protect consumers and legitimate business enterprises from unfair or deceptive practices in the conduct of any trade or commerce in part or wholly in the state.” O.C.G.A. § 10-1-391(a); Standish v. Hub Motor Co., 149 Ga. App. 365 (1979). The General Assembly intended that “such practices be swiftly stopped.” O.C.G.A. § 10-1-391(a). To that end, the FBPA permits the imposition of a \$2,000 penalty per violation. O.C.G.A. § 10-1-397.

#### 2.

In this case, OCP has assessed a civil penalty of \$66,000. Under O.C.G.A. §§ 10-1-397(b)(1) and 10-1-398, Petitioners may challenge the Civil Penalty Order via an administrative hearing. When a contested case is referred to the Office of State Administrative Hearings, the administrative law judge assigned to the case “has all the powers of the referring agency. . . .” O.C.G.A. § 50-13-41(b); see also O.C.G.A. § 10-1-398(d). The evidentiary hearing is *de novo*, and the administrative law judge “shall make an independent determination on the basis of the competent evidence presented at the hearing.” Ga. Comp. R. & Regs. 616-1-2-.21(a); see also Longleaf Energy Assocs., LLC v. Friends of the Chattahoochee, 298 Ga. App. 753, 768 (2009) (the administrative law judge is required “to consider the applicable facts and law anew, without according deference or presumption of correctness to the [agency]’s decision, and to render an independent decision”). This matter involves the imposition of a civil penalty, thus Respondent bears the burden of proof by a preponderance of the evidence. Ga. Comp. R. & Regs. 616-1-2-.07(1), 616-1-2-.21(4).

**A. Title Violations**

3.

As provided by O.C.G.A. § 10-1-391, the FBPA should be “interpreted and construed consistently with interpretations given by the Federal Trade Commission in the federal courts pursuant to Section 5(a)(1) of the Federal Trade Commission Act,” 15 U.S.C. § 45(a)(1). Under 15 U.S.C. § 45(n), an act or practice is considered unfair or deceptive if “the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.” See FTC v. Peoples Credit First, LLC, 244 Fed. Appx. 942, 944 (11th Cir. 2007) (“To establish that an act or practice is deceptive, the FTC must show that (1) there was a representation or omission, (2) the representation or omission was likely to mislead consumers acting reasonably under the circumstances, and (3) the representation or omission was material”); Raysoni v. Payless Auto Deals, LLC, 296 Ga. 156 (2014) (To demonstrate a claim of consumer fraud under FBPA, a party must show that he or she reasonably relied upon a misrepresentation).

4.

OCP first charges that Petitioners engaged in unfair or deceptive practices by failing to transfer title “within the statutorily-defined 30-day period” specified in O.C.G.A. § 40-3-32. Although not specifically enumerated in the Civil Penalty Order, OCP argues that each of the twenty-three consumer complaints regarding title would constitute an individual violation of the FBPA, regardless of whether consumers later received title to their vehicles.

5.

Given that OCP has the burden of proof, the undersigned does not find the evidence sufficient to support all of the twenty-three violations alleged by OCP. The investigator never had contact with the overwhelming majority of complainants, many of whose cases apparently had been resolved or settled, and the violations were not supported by sufficiently reliable documentation. Notwithstanding the lack of evidence, although in many circumstances the failure to transfer title within thirty days would be an unfair or deceptive act that would cause substantial injury, it would not necessarily be a violation of the FBPA in every case. Although an owner might be required to pay an additional penalty of \$10.00 in addition to ordinary title fee, under O.C.G.A. § 40-3-32(b), “[i]f the documents submitted in support of the title application are rejected, the party submitting the documents shall have 60 days from the date of initial rejection to resubmit the documents required by the commissioner for the issuance of title.”

6.

Through the testimony of Hope McKiver-Dawkins and Alytia Simpson, OCP did present evidence of two violations in this case. Ms. McKiver-Dawkins purchased a vehicle from Auction Ventures. She testified credibly that, despite her payment to Auction Ventures, it never paid the dealer who was the seller of the vehicle and title was not transferred. Ultimately, because Auction Ventures failed to pay the dealer, the vehicle was repossessed. Ms. Alytia Simpson testified that she and her husband purchased a Mazda from Dealer’s Choice. Even after Ms. Simpson contacted Dealer’s Choice on multiple occasions, she was never able to obtain title to the vehicle and it was impounded.

7.

In both cases Auction Ventures had represented to the buyers that title would be transferred and fees paid to the county tag office as required. Auction Ventures's failure to obtain title in these cases constitutes "[u]nfair or deceptive acts or practices in the conduct of consumer transactions" in violation of O.C.G.A. § 10-1-393(a). Mr. Parker admitted that he used buyer's payments to cover business expenses, not to pay dealers for the vehicles, and that he did not transfer necessary funds and documents to county tag offices. Moreover, he did not refund the buyer's payments. Even if Mr. Parker believed that he would be able to make the necessary payments to dealers, "establishment of unfair or deceptive acts or practices, within the meaning of the FBPA, does *not* require proof of an *intentional* conduct . . . ." Regency Nissan v. Taylor, 194 Ga. App. 645, 647 (1990) (emphasis in original).

**B. Certificates of Emissions**

8.

OCP also maintains that Petitioners failed to obtain valid certificates of emission prior to selling the vehicles to ten consumers in violation of O.C.G.A. § 12-9-54. Under O.C.G.A. § 12-9-54:

[n]o person shall sell any motor vehicle which is intended for highway use if such vehicle is at the time of the sale a responsible motor vehicle required to have a certificate of emission inspection under Code Section 12-9-45, unless there appears on such vehicle an unexpired valid certificate of emission inspection issued pursuant to this article.

A certificate of emission is required

in each county or any portion of a county which has been designated by the USEPA in the Code of Federal Regulations as a county or area included within a nonattainment area and which the board designates, through regulation, as a county or area where the excess levels of ozone or carbon monoxide or both are directly related to emissions of hydrocarbons, nitrogen oxides, or carbon monoxide from responsible motor vehicles registered in such county or area.

O.C.G.A. § 12-9-44.

9.

As detailed in the Findings of Fact, OCP did not submit reliable evidence that the consumers who had filed complaints did not have, or were required to have, certificates of emission inspection. Accordingly, OCP did not prove the violations alleged under this portion of the Civil Penalty Order.<sup>15</sup>

### **C. Individual Liability**

10.

To establish individual liability, OCP must demonstrate that (1) the corporation violated the FBPA; (2) Mr. Parker participated directly in the wrongful practice or had the authority to control the corporation; and (3) Mr. Parker had some knowledge of the wrongful acts or practices. See FTC v. Gem Merch. Corp., 87 F.3d 466, 470 (11th Cir. 1996) (citation omitted). Underlying the doctrine of individual liability is the principle that one who enjoys the benefits of the corporation's misdeeds should not be insulated from liability.<sup>16</sup> FTC v. Amy Travel Servs., Inc., 875 F.2d 564, 573 (7th Cir. 1989).

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<sup>15</sup> As noted in the Findings of Fact, Respondent did not elicit testimony from Ms. Simpson that Petitioners had sold her a vehicle without a certificate of emissions when one was required, although Exhibit R-9 indicates she had previously submitted this specific complaint.

<sup>16</sup> Even good faith, which was not shown in this case, will not shield an individual from liability. See FTC v. Direct Benefits Group, 2013 U.S. Dist. LEXIS 100593, at \*60-61 (M.D. Fla. July 18, 2013).

11.

OCP has proven, by a preponderance of the evidence, that Mr. Parker should be held liable for the above-listed violations in his individual capacity. Regarding the first requirement, the Respondent proved that Auction Ventures d/b/a Dealer's Choice committed violations of the FBPA. Second, the evidence demonstrated that Mr. Parker possessed the authority to control the corporation. Mr. Parker was the sole owner of Auction Ventures, hired and fired employees, was the signatory on the corporation's bank accounts, and reviewed financial reports and bank statements. Managers reported directly to Mr. Parker.

12.

The knowledge requirement is fulfilled if an individual had actual knowledge of the unfair or deceptive practices, was recklessly indifferent to such practices, or was aware of a high probability of the unfair practices yet intentionally avoided the truth. FTC. v. Nat'l Urological Group, Inc., 645 F. Supp. 2d 1167, 1207 (N.D. Ga. 2008) (determining that corporate officers were individually liable for the corporation's misleading ads because, as the creators of the ads, the individuals knew of, or at least were recklessly indifferent to, the misrepresentations therein). In this case, Mr. Parker was the sole owner of the corporations and admitted using buyer's funds to pay his operating expenses. Given that he orchestrated Dealer's Choice's unfair and deceptive practices he is individually liable for the violations of the FBPA.



**D. Civil Penalty**

13.

The administrator of the OCP is authorized by statute to “issue an order against a person who willfully violates [the FBPA], imposing a civil penalty of up to a maximum of \$2,000.00 per violation . . . .” O.C.G.A. § 10-1-397(b)(1)(B). In this case OCP issued a \$66,000 civil penalty based on the thirty-three complaints logged regarding title or emissions certification. As a preliminary matter, OCP may not assess a fine in the amount of \$66,000 because it failed to present sufficient evidence of all of the violations alleged. However, it did submit proof of two FBPA violations.

14.

In assessing the appropriate amount of civil penalties, courts have considered the following factors: (1) financial ability to pay, (2) the willfulness of the violation, or the degree of good faith or bad faith, (3) the degree of harm caused to the public, and (4) the benefits received by the violators. *See, e.g., United States v. Mac's Muffler Shop, Inc.*, 1986 U.S. Dist. LEXIS 18108, at \*22-24 (N.D. Ga. Nov. 4, 1986) (reducing a fine from \$2,500 per violation to \$1,500 for violations of the Clean Air Act); *United States v. Papercraft Corp.*, 426 F. Supp. 916, 918 (W.D. Pa. 1977) (reducing fine to \$200 per day); *FTC v. Consol. Foods Corp.*, 396 F. Supp. 1353, 1356-57 (S.D.N.Y. 1975) (reducing a fine to from \$470,000 to \$25,000 because the company did not benefit, but in fact deteriorated, from its noncompliance); *United States v. Beatrice Foods Co.*, 351 F. Supp. 969, 970-72 (D. Minn. 1972), *aff'd*, 493 F.2d 1259 (8th Cir. 1974).

15.

Although Mr. Parker claims to be in dire financial straits, the undersigned does not find his testimony credible in this regard. His calculated actions caused grievous harm to individuals who had paid in good faith for a vehicle they would not be able to use. The undersigned also finds it troubling that, although he was well aware he had outstanding obligations to his consumers, he failed to carefully maintain records after the businesses closed.<sup>17</sup> Last, by appropriating money from the buyers, Mr. Parker benefitted in that he was able to keep his business afloat. Considering all of the circumstances, Mr. Parker should pay the maximum penalty of \$2000.00 for each violation proven.

#### IV . DECISION

In accordance with the foregoing Findings of Fact and Conclusions of Law, the OCP's decision to issue a civil penalty is **AFFIRMED**; however the civil penalty is reduced to \$4,000.00.

**SO ORDERED, this** 8 **day of October 2015.**

  
\_\_\_\_\_  
**Ronit Walker**  
**Administrative Law Judge**

<sup>17</sup> See Ga. Comp. R. & Regs. 681-9-.02(1)(f).