

**STATE OF NEW YORK  
DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

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In the Matter of the Alleged Violations of Article 11, Title 5 of  
the New York State Environmental Conservation Law (ECL)

- by -

**MATTHEW CAFFREY,**

Respondent.

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**ORDER**

DEC Case No.  
R2-20170804-298

This administrative enforcement proceeding concerns allegations by staff of the New York State Department of Environmental Conservation (Department or DEC) that respondent Matthew Caffrey (respondent) committed two violations of ECL 11-0535-a (2) by offering two ivory articles for sale without a permit or license at a flea market in New York City.

Staff commenced this proceeding by serving respondent, by certified mail, with a motion for order without hearing in lieu of complaint with supporting papers, dated December 2, 2022 (motion). In the motion, staff requests, among other things, an order finding respondent liable for two violations of ECL 11-0535-a (2), imposing a civil penalty of \$9,000, directing respondent to cease and desist from the unpermitted sale, offer for sale, purchase, trade, barter or distribution of any ivory article or rhinoceros horn in the future and reserving the Department's right to take additional action for violations not specifically alleged in the motion (see motion at 4-5 ["Now, Therefore" Clause, I-VIII]). Respondent, proceeding pro se, submitted a response and exhibits in opposition to staff's motion.

The matter was assigned to Administrative Law Judge (ALJ) Michael S. Caruso. ALJ Caruso prepared the attached summary report (Summary Report), which I adopt as my decision in this matter, subject to my comments below.

**Liability**

ECL 11-0535-a provides that "no person shall sell, offer for sale, purchase, trade, barter or distribute an ivory article or rhinoceros horn" without a permit or license (ECL 11-0535-a [2]; see ECL 11-0535-a [3][standards for a permit or license]). An "[i]vory article" is "any item containing worked or raw ivory from any species of elephant or mammoth" (ECL 11-0535-a [1][b]). Here, staff alleges that respondent:

- (1) violated ECL 11-0535-a (2) by offering for sale an ivory umbrella handle without a permit or license to do so;<sup>1</sup> and
- (2) violated ECL 11-0535-a (2) by offering for sale an ivory religious statue without a permit or license to do so (motion ¶¶ 8-16).

“A motion for order without hearing will be granted if, upon all the papers and proof filed, the cause of action or defense is established sufficiently to warrant granting summary judgment under the CPLR in favor of any party” (title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York [6 NYCRR] 622.12 [d]). Based on the motion and papers submitted with and in support of the motion, I concur with the ALJ that Department staff’s proof presents a prima facie showing that respondent committed the two alleged violations of ECL 11-0535-a (2). As set forth in the ALJ’s summary report, Department staff’s proof demonstrates that respondent displayed two ivory items – an ivory-handled umbrella and an ivory religious statue -- for sale in plain view on a table in his booth at an open-air flea market, located at 25-27 West 25th Street, New York, New York, and quoted a price for the items (\$150 each) to an undercover Environmental Conservation Officer (ECO) (see Summary Report at 3-4 [Findings of Fact No. 6-8, 14]). Staff’s evidence also demonstrates that respondent did not have a permit or license to sell the ivory items (see id. at 4 [Finding of Fact No. 12]) and that an expert examined the items and confirmed that they were made of elephant ivory (see id. at 4 [Finding of Fact No. 14]).

I also concur with the ALJ that respondent failed to raise a material issue of fact in opposition to the motion requiring a hearing on either of staff’s two causes of action. Initially, I note that a response to staff’s motion for order without hearing “must include supporting affidavits and other available documentary evidence” (6 NYCRR 622.12 [c]). Here, respondent’s opposition to the motion is in the form of a written statement which was not made under oath, and therefore cannot be considered the affidavit required by 6 NYCRR 622.12 (c) (see 6 NYCRR 622. 2 [b]). As such, respondent’s opposition to the motion is facially deficient.

Even if this deficiency were overlooked, respondent’s submission is nevertheless insufficient, as respondent has provided only general, conclusory denials of the facts set forth in the affidavits and exhibits submitted by staff (see Summary Report at 5-6). I adopt the ALJ’s thorough and considered analysis of the assertions and arguments made by respondent in his submission. I emphasize that, inasmuch as respondent takes issue with the ECOs’ search of his booth -- which was performed after the ECOs returned to the booth to find that respondent had removed the ivory articles from the table (see Summary Report at 3 [Finding of Fact No. 10]) – his arguments are without merit. The search was expressly authorized by ECL 71-0907(4)(b) because, at the time of the search, the ECOs had reason to believe that respondent had violated ECL 11-0535-a (2) (see id. at 6; see also ECL 71-0907[4][b]).

In addition, contrary to respondent’s contention, the fact that respondent was acquitted in New York County Court of criminal charges arising from the incident (see Affirmation of Jonathan Agosta, Esq., in Support of Motion, dated December 2, 2022, Exhibit A; Memorandum of Law by Jonathan

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<sup>1</sup> Respondent Caffrey refers to the “umbrella” as a “parasol” (Response of Matthew Caffrey, undated [received by the Office of Hearings and Mediation Services on May 19, 2023], at 1. A review of the record indicates that, notwithstanding how the item is referenced, the item is an ivory article clearly subject to the requirements of ECL article 11).

Agosta, Esq., in Support of Motion, dated December 2, 2022, at 4 [Memorandum of Law]), does not preclude a finding of liability and the assessment of civil penalties in this administrative enforcement proceeding. It is well settled that an acquittal of criminal charges is not proof of innocence in a subsequent civil proceeding, as here, which involves a lower standard than proof beyond a reasonable doubt (see Reed v State of New York, 78 NY2d 1, 7-8 [1991]; Matter of Robert Liere, Decision and Order of the Commissioner, April 17, 2006, at 3 [“the . . . dismissal of the prior criminal proceeding against respondent does not bar this subsequent civil administrative enforcement proceeding, in which the lower ‘preponderance of evidence’ standard is applied”]; see also 6 NYCRR 622.11 [c] [“the party bearing the burden of proof must sustain that burden by a preponderance of the evidence”]).

Based upon the foregoing, I grant Department staff’s motion for order without hearing and find respondent liable on the two causes of action alleged therein.

### **Penalty**

Pursuant to ECL 71-0919, any person who violates any provision of the Fish and Wildlife Law, including ECL 11-0535-a (2), is liable for the penalties set forth in ECL 71-0925 (see ECL 71-0919 [1][c]). ECL 71-0925 (16) provides:

“If the violation was an act prohibited by section 11-0535-a of this chapter, [the penalty shall be] not more than three thousand dollars or not more than two times the value of the article involved, whichever is greater. If the violation is a second or subsequent violation of such section 11-0535-a, [the penalty shall be] not more than six thousand dollars or not more than three times the value of the article involved, whichever is greater.”

Here, staff seeks a penalty of three thousand dollars (\$3,000) for the first cause of action and six thousand dollars (\$6,000) for the second cause of action, as a subsequent or second violation, for a total penalty of nine thousand dollars (\$9,000). In support of its penalty request, Department staff considered DEE-1: Civil Penalty Policy (June 20, 1990), respondent’s refusal to settle, respondent’s intentional conduct and attempted concealment of evidence and the seriousness of the violations (see Memorandum of Law at 8-9). The ALJ recommends that I impose the requested penalty, which is the statutory maximum.

Based on the record before me, I find the recommended penalty of nine thousand dollars (\$9,000) to be authorized and appropriate. The imposition of the statutory maximum penalty is appropriate in this matter in light of respondent’s intentional violation of the law, his concealment of the ivory items and his lack of cooperation once confronted by uniformed officers. The imposition of the statutory maximum is also justified by the seriousness of the violations, which perpetuate grave harm to endangered and threatened animals, as well as the need for significant penalties to deter and punish those individuals who knowingly participate in the illegal ivory and/or rhinoceros horn trade in New York State. As the ALJ observed (see Summary Report at 7-8), ECL 11-0535-a was promulgated to strengthen the deterrent impact of the statutory framework, and the penalties imposed for violations of ECL 11-0535-a must reflect that goal. For these reasons, I find that imposition of the statutory maximum penalty under the circumstances presented here is warranted.

Department staff's motion is silent regarding when the penalty must be paid, and the ALJ recommends that I direct that the penalty be paid within thirty (30) days of service of the order upon respondent. Upon due consideration, I am directing respondent to pay the civil penalty of nine thousand dollars (\$9,000) within sixty (60) days of respondent's receipt of this order.

Finally, I concur with the ALJ that staff's requests for an order (i) directing respondent to cease and desist from the unpermitted sale, offer for sale, purchase, trade, barter or distribution of any ivory article or rhinoceros horn in the future, and (ii) reserving the Department's right to take additional action for violations not specifically alleged in the motion, are both unnecessary. Those requests are denied.

**NOW, THEREFORE**, having considered this matter and being duly advised, it is **ORDERED** that:

- I. Department staff's motion for order without hearing on staff's first and second causes of action against respondent Matthew Caffrey, pursuant to 6 NYCRR 622.12, is granted.
- II. Based on record evidence, respondent Matthew Caffrey is adjudged to have violated ECL 11-0535-a (2) by offering for sale without a permit or license:
  - A. An ivory handled umbrella (first cause of action); and
  - B. An ivory religious statue (second cause of action).
- III. Respondent Matthew Caffrey is assessed a civil penalty of nine thousand dollars (\$9,000).
- IV. Within sixty (60) days of service of this order on respondent Matthew Caffrey, respondent shall pay the civil penalty of nine thousand dollars (\$9,000) by certified check, cashier's check or money order made payable to the New York State Department of Environmental Conservation in accordance with paragraph V of this order.
- V. Respondent Matthew Caffrey shall submit the penalty payment to:

Jonathan Agosta, Esq.  
Assistant Regional Attorney  
NYSDEC Region 2  
One Hunter's Point Plaza  
47-40 21st Street  
Long Island City, New York 11101.
- VI. Any questions or other correspondence regarding this order shall also be addressed to Jonathan Agosta, Esq., at the address referenced in paragraph V of this order.



**STATE OF NEW YORK  
DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

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In the Matter of the Alleged Violations of Article 11, Title 5 of the New York State Environmental Conservation Law (ECL) and Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR)

- by -

**SUMMARY REPORT**

**MATTHEW CAFFREY,**

DEC Case No.  
R2-20170804-298

Respondent.

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Appearances:

- Thomas S. Berkman, Deputy Commissioner and General Counsel (Jonathan Agosta, Assistant Regional Attorney, of counsel), for staff of the Department of Environmental Conservation
- Matthew Caffrey, pro se, for respondent

Proceedings

By notice of notice of motion for order without hearing dated December 2, 2022, staff of the New York State Department of Environmental Conservation (Department or DEC) commenced this enforcement proceeding against respondent Matthew Caffrey (respondent) for alleged violations of ECL 11-0535-a (2) related to the offer for sale of ivory articles by respondent. Staff served the notice of motion for order without hearing and supporting papers on respondent by certified mail on December 2, 2022. By letter dated January 3, 2023, Chief Administrative Law Judge Michele M. Stefanucci advised the parties that the matter had been assigned to me.

Respondent served and filed an undated answer (Caffrey Answer) in opposition to staff's motion, with two photographs attached, that was received by Department staff on May 18, 2023 and the Office of Hearings and Mediation Services on May 19, 2023 (*see* Appendix A).

Staff's Charges

Department staff's motion for order without hearing consists of the notice of motion; motion for order without hearing, dated December 2, 2022; the affidavit of Jesse Paluch (Paluch

Aff.), sworn to November 21, 2022; the affidavit of Edward Piwko (Piwko Aff.), sworn to December 1, 2022, with five photos attached as Exhibit A; the affirmation of Jonathan Agosta, Esq. (Agosta Aff.), dated December 2, 2022, with three exhibits attached; a memorandum of law dated December 2, 2022 (Memorandum of Law); and an affirmation of service of Jonathan Agosta, Esq. (Agosta Aff. of Service), dated January 3, 2023 (*see* Appendix A). Staff's motion sets forth two causes of action.

Staff alleges the following:

1. Respondent violated ECL 11-0535-a (2) by displaying and offering to sell an umbrella with an ivory handle, without a permit, at his table at a flea market on December 4, 2016; and
2. Respondent violated ECL 11-0535-a (2) by displaying and offering to sell an ivory religious statue, without a permit, at his table at a flea market on December 4, 2016.

Based on these allegations, Department staff seeks an order: finding respondent in violation of ECL 11-0535-a (2) on both causes of action; assessing a civil penalty of \$9,000; directing respondent to cease and desist from the unpermitted sale, offer for sale, purchase, trade, barter or distribution of any ivory article or rhinoceros horn in the future; reserving the Department's right to take additional action for violations not specifically alleged in the motion; and ordering such other and further relief as may be just and appropriate under the circumstances.

#### Respondent's Position

In opposition to Department staff's motion, respondent denies that he displayed or offered the ivory articles for sale, and claims he was confronted by the officers and threatened with arrest if he did not allow them to enter and search his booth. Respondent claims that neither of the ivory articles had any markings of price or description and, therefore, the ivory articles were not for sale. Respondent takes issue with how the ivory articles were originally described when seized by Department staff. Respondent also claims there is no chain of custody and that he feels his rights have been violated. (Caffrey Answer.)

#### **FINDINGS OF FACT**

1. Respondent Matthew Caffrey maintains an address at 314 Beach Road, Staten Island, New York. (*See* Caffrey Answer, envelope return address; *see also* Agosta Aff., Exhibit C.)
2. On December 4, 2016, respondent operated a booth with tables exhibiting items for sale at an open-air flea market located at 25-27 West 25th Street, New York, New York. (*See* Paluch Aff. ¶¶ 4-5; Piwko Aff. ¶¶ 4-5; Caffrey Answer, Figures 1 and 2.)
3. Jesse Paluch is an employee of the Department and is a Chief Environmental Conservation Officer (CECO or Captain). At the time of the investigation in this matter, Captain Paluch was an investigator, and as part of his duties he conducted undercover

and plainclothes investigations to discover and prosecute environmental crimes. Captain Paluch also assists the Department's Office of General Counsel in enforcement actions. From September 2014 to April 2018, CECO Paluch worked in the Department's Region 2 office. (*See* Paluch Aff. ¶¶ 1, 3; Piwko Aff. ¶ 4, fn 1.)

4. Edward Piwko is an investigator in the Region 9 office of the Department. As part of Investigator Piwko's duties he conducts undercover and plainclothes investigations to discover and prosecute environmental crimes, and also assists the Department's Office of General Counsel in enforcement actions. From October 2013 to November 2017, Investigator Piwko worked in the Department's Region 2 office. (*See* Piwko Aff. ¶¶ 1, 3.)
5. On December 4, 2016, Captain Paluch and Investigator Piwko were performing an undercover operation in the Flatiron District of Manhattan, New York. (*See* Paluch Aff. ¶ 4, Piwko Aff. ¶ 4.)
6. Captain Paluch and Investigator Piwko crossed the street to an open-air flea market located at 25-27 West 25th Street, New York, New York and observed the sale of ivory by multiple vendors. (*Id.*)
7. Captain Paluch and Investigator Piwko observed two items on display in plain view on a table at a booth belonging to respondent Matthew Caffrey – an umbrella handle and a small religious statue<sup>1</sup> – that the Captain and Investigator identified as ivory. (*See* Paluch Aff. ¶ 5, Piwko Aff. ¶ 5.)
8. Captain Paluch requested a price for the ivory articles from respondent, and respondent said that each item would cost \$150. The exchange between Captain Paluch and respondent was visually witnessed and heard by Investigator Piwko from a separate booth. (*See* Paluch Aff. ¶ 6, Piwko Aff. ¶ 6.)
9. Because the Captain and Investigator were in plain clothes and engaged in a separate undercover operation close to the flea market they called on-duty Environmental Conservation Officers (ECOs) to issue citations for the unlawful sales they had witnessed. (*See* Paluch Aff. ¶ 7, Piwko Aff. ¶ 7.)
10. When the uniformed ECOs arrived, the ivory articles were no longer on display at respondent's table. Captain Paluch then asked respondent for the ivory articles, and respondent refused to comply. The Captain and uniformed ECOs searched respondent's table and booth area and were eventually able to seize the two ivory articles. (*See* Paluch Aff. ¶ 8, Piwko Aff. ¶ 8, Exhibit A.)
11. Investigator Piwko brought the two ivory articles, along with respondent's ID, to ECO Adam Johnson who was in his vehicle issuing tickets to other vendors. (*See* Paluch Aff. ¶ 9, Piwko Aff. ¶ 9.)

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<sup>1</sup> Respondent states the ivory handled item is a parasol, not an umbrella, and that the religious statue is an "ivory Mary statue." (*See* Caffrey Answer.)



12. Captain Paluch and Investigator Piwko contacted the Department's Special Licenses Unit in Albany and verified that respondent did not have a permit to sell ivory. (*See* Paluch Aff. ¶ 10, Piwko Aff. ¶ 10.)
13. Respondent was issued a summons for illegal commercialization of ivory, holding more than one NYS license, and the possession/sale of threatened or endangered species or parts. (*See* Agosta Aff. Exhibits A, B; Caffrey Answer.)
14. Investigator Piwko brought the ivory articles seized from respondent to Dr. George Amato, an expert at identifying ivory at the American Museum of Natural History, who confirmed the umbrella handle and religious statue were elephant ivory. (*See* Piwko Aff. ¶ 12.)
15. As shown by the affirmation of service of Jonathan Agosta, Esq., respondent was served with the notice of motion for order without hearing and accompanying papers by certified mail on December 2, 2022. (*See* Agosta Aff. of Service.)
16. By undated correspondence received by Department staff on May 18, 2023 and the Office of Hearings and Mediation Services on May 19, 2023, respondent Caffrey submitted a response to the motion for order without hearing. (*See* Caffrey Answer.)

## DISCUSSION

Section 622.12 of 6 NYCRR provides for an order without hearing when upon all the papers and proof filed, the cause of action or defense is established sufficiently to warrant granting summary judgment under the CPLR in favor of any party. "Summary judgment is appropriate when no genuine, triable issue of material fact exists between the parties and the movant is entitled to judgment as a matter of law." (*Matter of Frank Perotta*, Partial Summary Order of the Commissioner, January 10, 1996, at 1, *adopting* ALJ Summary Report.)

CPLR 3212(b) provides that a motion for summary judgment shall be granted, "if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." Once the moving party has put forward a prima facie case, the burden shifts to the non-movant to produce sufficient evidence to establish a triable issue. (*See Matter of Locaparra*, Final Decision and Order of the Commissioner, June 16, 2003, at 4.)

A respondent opposing staff's motion for an order without hearing must also lay bare their proof. The New York State Court of Appeals has "repeatedly held that one opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient." (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see Drug Guild Distribs. v 3-9 Drugs*, 277 AD2d 197, 198 [2d Dept 2000], *lv denied* 96 NY2d 710 [2001] [conclusory denial

of transactions by company president insufficient to counter facts established by plaintiff's documentary evidence[.]. A shadowy semblance of an issue, or bald conclusory assertions, even if believable, are not enough to raise a triable issue of fact. (*See Metropolitan Bank of Syracuse v Hall*, 52 AD2d 1084 [4th Dept 1976].)

General denials are insufficient to raise an issue of fact on a summary judgment motion. (*See Matter of Gruen v Deyo*, 218 AD2d 865, 866 [3rd Dept 1995]; *Bronowski v Magnus Enters.*, 61 AD2d 879, 880 [4th Dept 1978].) In order to defeat a motion for summary judgment, a party must disclose in evidentiary form the evidence on which it relies.

In this instance, Department staff must establish its causes of action sufficiently to warrant directing judgment in its favor as a matter of law and do so by tendering evidentiary proof in admissible form. It is Department staff's initial burden to make a prima facie showing of entitlement to summary judgment for each element of the violations alleged by staff. Pursuant to 6 NYCRR § 622.12(a), staff has supported its motion for an order without hearing with affidavits from two undercover police officers that describe the violations of ECL 11-0535-a (2) and an affirmation of counsel providing further documentary evidence in support of the noted violations.

#### Liability

Here, Department staff alleges respondent violated ECL 11-0535-a (2) by offering for sale two ivory articles, the ivory religious statue and the ivory handled umbrella. ECL 11-0535-a (2) provides, "Except as otherwise provided in subdivision three of this section, no person shall sell, offer for sale, purchase, trade, barter or distribute an ivory article or rhinoceros horn." ECL 11-0535-a (3) provides that under certain limited circumstances the Department may issue "licenses or permits for the sale, offering for sale, purchase, trading, bartering or distribution of ivory articles or rhinoceros horns."

Staff has made a prima facie showing that respondent offered the two ivory articles for sale without a license or permit (*see Findings of Fact Nos 7, 8, 12*). In response to staff's motion, respondent does not dispute that he had the ivory articles in his booth, but argues that he did not offer the ivory articles for sale and would not have offered them for sale for \$150 because each item was worth more than that. Respondent's general denial of the facts sworn to by the Captain and Investigator is not enough to overcome staff's prima facie showing. Respondent's answer begins with the events that unfolded after Captain Paluch came back to respondent's booth with uniformed ECOs and discovered the previously displayed ivory articles were removed from respondent's display cases. At that point, Captain Paluch, who was undercover in plain clothes, identified himself as a police officer (*see Finding of Fact No. 10; Agosta Aff., Exhibit A, at 2; Caffrey Answer*). The violation of ECL 11-0535-a (2), however, occurred before that time when Captain Paluch and Investigator Piwko saw the ivory articles on display in respondent's display case, and respondent told Captain Paluch the ivory articles were \$150 each. There is no dispute that the items were or contained ivory. In addition, respondent does not deny that the articles were in his display cases earlier.

Respondent takes issue with the fact that Captain Paluch and the uniformed ECOs searched his booth when it was discovered that he had removed the ivory articles from display. That search and eventual seizure of the ivory articles does not change the fact that Department staff has made a prima facie showing that ECL 11-0535-a (2) was violated when respondent offered the items for sale to Captain Paluch. I also find that the display of ivory articles at a flea market is presumptive evidence of possession with the intent to sell the ivory articles even if the articles do not have prices on them as argued by respondent (*see e.g.* ECL 71-0924 [5]). I conclude that Department staff is entitled to summary judgment on the first and second causes of action for violation of ECL 11-0535-a (2).

As to respondent's issue with the search and seizure of the ivory articles, the articles were in plain view in a public space when they were first witnessed by Captain Paluch and Investigator Piwko. Moreover, warrantless searches by DEC police officers are authorized by ECL 71-0907 (4)(b) "whenever they have cause to believe that any provision of this article or of any law for the protection of fish, shellfish, crustacea, wildlife, game or protected insects has been or is being violated, and to use such force as may be necessary for the purpose of examination and search." Notwithstanding the fact that respondent later removed the ivory articles from plain view, the officers witnessed the violation of ECL 11-0535-a (2) when respondent offered the ivory articles for sale to Captain Paluch. I find the search was authorized by law because the officers had more than adequate cause to believe the law was being violated. Accordingly, I conclude respondent's argument that his rights were violated is unsupported and without merit.

Respondent asserts that there is no chain of custody, but does not offer anything other than that statement. Staff, however, produced an evidence and chain of custody record for the two ivory articles seized from respondent (*see Agosta Aff. Exhibit B*).

Respondent also argues that he was acquitted of all criminal charges by a "New York criminal court judge" (*see Caffrey Answer*). The outcome in that matter has no bearing on this proceeding. Here, the standard of proof is by the preponderance of the evidence. The law and regulations do not require proof beyond a reasonable doubt in this civil proceeding. (*See* 6 NYCRR 622.11[c].) In this matter, Department staff has made a prima facie showing that staff is entitled to summary judgment as a matter of law. Despite general denials or defenses to the contrary, respondent's answer is not sworn to and, therefore, not in admissible form. Furthermore, the photographs submitted by respondent do not further his defense or raise an issue of fact for a hearing. Respondent has also failed to demonstrate an acceptable excuse for his failure to present evidence in admissible form. I conclude respondent has failed to raise a triable issue of fact on staff's first and second causes of action. I have considered respondent's remaining arguments and determine them to be without merit. Accordingly, Department staff's motion is granted on the first and second causes of action.

### Penalty

In its motion, Department staff seeks a \$9,000 penalty. For penalties referred to in ECL 71-0919, ECL 71-0925 (16) provides, "[i]f the violation was an act prohibited by section 11-0535-a of this chapter, not more than three thousand dollars or not more than two times the value

of the article involved, whichever is greater. If the violation is a second or subsequent violation of such section 11-0535-a, not more than six thousand dollars or not more than three times the value of the article involved, whichever is greater.” In its Memorandum of Law, Department staff assigns a penalty of \$3,000 for the first cause of action for offering to sell the ivory handled umbrella. For the second cause of action for offering to sell the ivory religious statue, Department staff assigns a penalty of \$6,000 for the second violation of ECL 11-0535-a, for a total of \$9,000. Department staff asserts that respondent’s actions justify the maximum penalty. Staff argues that respondent deliberately brought two ivory articles to an open air flea market, displayed them on his table and offered them for sale. Accordingly, the intentional violation of the law warrants a high penalty. Staff also asserts that respondent’s refusal to settle is another aggravating factor supporting the maximum penalty. In addition, respondent’s attempts to conceal the articles from law enforcement officers is another aggravating factor asserted by staff. Lastly, staff argues that the unlawful sale or offer to sell ivory is a serious violation that warrants a high penalty. (See Memorandum of Law, at 8-9.) Respondent did not provide any factual or legal argument regarding Department staff’s penalty request.

The legislative history of ECL 11-0535-a is instructive:

“The demand for illegal wildlife and wildlife products in the United States, including New York, is driving many species towards extinction. Despite being listed as threatened or endangered since the 1970’s, elephant and rhinoceros populations across Africa and Asia are moving towards extinction. These animals are being slaughtered at an alarming rate to meet the needs of the ivory and horn trade, much of which is unlicensed and illegal. The Wildlife Conservation Society estimates that in Africa alone 96 elephants are slaughtered each day. [ ] In South Africa, the record slaughter of 1,004 rhinos in 2013 is more than twice the number killed in 2011, according to government-released figures.

“The high consumer demand for ivory and horn products in New York is especially troubling. A joint investigation in 2012 by DEC and the U.S. Fish and Wildlife Service resulted in the seizure of over \$2 million worth of elephant ivory from jewelers in New York City. The core problem is the economic opportunity created by the demand for ivory and horn. The existing penalties are not high enough to deter violations. Under the existing statutory framework, a violation of ECL § 11-0535 or § 11-0[536 is only a violation level offense. This is the lowest offense specified under New York law. The penalty for a violation includes a fine structure of between \$0 and \$250 and a maximum of 15 days in jail. In reality, few defendants convicted of a violation ever serve jail time.

“ECL § 71-0924, which sets penalties for illegal commercialization of fish, shellfish, crustaceans, or wildlife, serves as one of the primary tools available to law enforcement against the illegal trade in ivory. This law, however, is out-of-date and no longer provides meaningful deterrence. Currently, those involved in the illegal sale of wildlife parts, such as ivory, can only be charged with a maximum offense of an E felony, the lowest felony under State law. An individual selling \$150,000 worth of illegal ivory can only be charged with the

same level of offense as an individual selling \$15,000, or even just \$1,501 worth of illegal ivory.

“Given the potential profits and volume of ivory and horn sales in New York, the current law is not sufficient to have any detrimental effect on the present market. This bill, by expressly prohibiting the trade of ivory and rhinoceros horns with very limited exceptions and increasing fines and penalties, would help deter the illegal trade in these articles in New York.” (Sponsor’s Memo, Bill Jacket, L 2014, ch 326.)

It is clear from the legislative history that the fines and penalties provided in ECL 71-0925 (16) were intended to deter the illegal trade in ivory and rhinoceros horn. Given respondent’s lack of cooperation and active concealment of the ivory articles after he had the articles on open display in a public area and offered them for sale to Captain Paluch, I conclude that staff’s requested penalty is supported and appropriate.

Staff also requests that respondent be ordered to cease and desist from the unpermitted sale, offer for sale, purchase, trade, barter or distribution of any ivory article or rhinoceros horn in the future. Staff’s request is unnecessary because respondent is required to comply with the ECL and any applicable regulations. Further language to that effect is not needed (*see Matter of Adonai Realty L.P.*, Order of the Commissioner, February 19, 2016, at 2).

Lastly, Department staff requests that the Commissioner’s order reserve staff’s right to take additional action for violations not specifically alleged in the motion. Such requests by staff to reserve all rights have been made, and rejected, in prior orders (*see e.g. Matter of Galloway*, Order of the Commissioner, January 16, 2015, at 5). Language reserving the Department or the State’s rights for matters that have not been alleged in the motion is unnecessary.

### **CONCLUSIONS OF LAW**

By offering for sale an ivory handled umbrella and ivory religious statue, without a permit or a license to do so, respondent Matthew Caffrey violated ECL 11-0353-a (2).

### **RECOMMENDATIONS**

Based on the foregoing, I recommend that the Commissioner issue an order:

1. Granting Department staff’s motion for order without hearing on staff’s first and second causes of action against respondent Matthew Caffrey;
2. Holding that respondent Matthew Caffrey violated ECL 11-0535-a (2) by offering for sale without a permit:
  - a. An ivory handled umbrella; and
  - b. An ivory religious statue.

3. Assessing a civil penalty against respondent Matthew Caffrey in the amount of nine thousand dollars (\$9,000);
4. Directing respondent Matthew Caffrey to submit the civil penalty of nine thousand dollars (\$9,000), within thirty (30) days of service of the Commissioner's order on respondent, to the following:

Jonathan Agosta, Esq.  
Assistant Regional Attorney  
NYSDEC Region 2  
One Hunter's Point Plaza  
47-40 21st Street  
Long Island City, New York 11101; and

5. Directing such other and further relief as the Commissioner deems appropriate.

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/S/  
Michael S. Caruso  
Administrative Law Judge

Dated: June 22, 2023  
Albany, New York

## APPENDIX A

*Matter of Matthew Caffrey*  
DEC File No. R2-20170804-298  
Motion for Order Without Hearing

### Department Staff's Papers

1. Cover letter dated December 21, 2022, filing the enclosed notice of motion and motion for order without hearing and supporting papers
2. Notice of Motion for Order Without Hearing, dated December 2, 2022
3. Motion for Order Without Hearing, dated December 2, 2022
4. Affirmation of Jonathan Agosta, Esq., dated December 2, 2022, attaching the following exhibits:
  - A. NYS DEC, DEC Dispatch System, Law Enforcement Complaint Summary
  - B. NYS DEC, Office of Public Protection, Evidence and Chain-of-Custody Record
  - C. Notice of Calendar Call, dated April 7, 2022
5. Affidavit of Jesse Paluch, sworn to November 21, 2022
6. Affidavit of Edward Piwko, sworn to December 1, 2022, attaching the following exhibit:
  - A. Photograph of ivory umbrella handle with evidence-seizure tag  
Photograph of ivory umbrella handle  
Photograph of ivory religious statue  
Photograph of ivory religious statue with evidence-seizure tag  
Photograph of ivory umbrella handle and ivory religious statue with evidence-seizure tags
7. Memorandum of Law, dated December 2, 2022
8. Affirmation of Service, dated January 3, 2023

### Respondent's Papers

- A. Undated correspondence from Matthew Caffrey, received May 19, 2023, attached the following exhibits:
  - Fig. 1 Photograph of individual identified by respondent as Mr. Piwko moving a chair out of the way to enter respondent's booth
  - Fig. 2 Unidentified photograph of what appears to be respondent's booth with the ivory religious statue sitting on top of a display case