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THE STATE OF TEXAS
Plaintiffs

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IN THE DISTRICT COURT

v.

BEXAR COUNTY, TEXAS

YANETT SALINAS, and
HECTOR SALINAS GOMEZ,
d/b/a MAIN OPTICAL
Defendants

_____ JUDICIAL DISTRICT

PLAINTIFF'S ORIGINAL PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW THE STATE OF TEXAS, by and through Attorney General of Texas Greg Abbott, complaining of YANETT SALINAS, and HECTOR SALINAS GOMEZ d/b/a MAIN OPTICAL, Defendants, and for cause of action respectfully show:

AUTHORITY

1.1. This action is governed under Discovery Control Plan level II pursuant to TRCP Rule 190.3 and is brought by Attorney General Greg Abbott, pursuant to the Contact Lens Prescription Act, TEX. OCC. CODE §353.001(West 2006) *et seq.* (hereafter the “CLPA”). The Attorney General may bring an action for civil penalties and to enjoin a violation of the CLPA pursuant to CLPA §§353.204, 353.206 because Defendants have violated the CLPA and the violation creates an immediate threat to the health and safety of the public.

1.2. This action is also brought by Attorney General Greg Abbott, pursuant to the Texas Food, Drug, and Cosmetic Act, TEX. HEALTH & SAFETY CODE §§431.047, 431.0585, and 431.060 (hereafter the “TFDCA”) because Defendants have violated the TFDCA and the violation creates an immediate threat to the health and safety of the public.

1.3. This action is brought by Attorney General Gregg Abbott through his Consumer Protection Division in the name of the State of Texas and in the public interest under the authority granted him by §17.47 of the Texas Deceptive Trade Practices-Consumer Protection ACT, TEX. BUS. COMM. CODE ANN. §17.41 *et seq.* (hereafter the "DTPA") upon the ground that Defendants have engaged in false, deceptive and misleading acts and practices in the course of trade and commerce as defined in, and declared unlawful by, §§17.46(a) and (b) of the DTPA.

1.4. DR. EDUARDO J. SANCHEZ, Texas Commissioner of the Department of State Health Services (hereafter "DSHS") has referred this matter to the Office of Attorney General and has requested injunctive relief and civil penalties against these Defendants.

DEFENDANTS

2.1. Defendant YANETT SALINAS is an individual doing business in Texas as alleged specifically below and may be served with process at her place of business at 111 East Laurel St. No. 108, San Antonio, Texas, 78212.

2.2. Defendant HECTOR SALINAS GOMEZ is an individual doing business in Texas as alleged specifically below and may be served with process at his place of business at 111 East Laurel St. No. 108, San Antonio, Texas, 78212.

2.3. Defendants YANETT SALINAS and HECTOR SALINAS GOMEZ own this business and do business under the assumed name of MAIN OPTICAL.

VENUE

3. Venue of this suit lies in BEXAR County, Texas for the following reasons:

A) Under TEX. CIV. PRAC. & REM. CODE §15.001, venue is proper because all or part of the causes of action alleged herein accrued in BEXAR County, Texas.

B) Under the DTPA §17.47(b), venue is proper because Defendants have done business in BEXAR County, Texas as follows: Defendants have engaged in the sale of contact lenses without prescriptions in Bexar County in violation of the CLPA and TFDCA.

C) Under TEX. HEALTH & SAFETY CODE §431.047(c) venue is proper in Bexar County because the violation is alleged to have occurred in that county.

PUBLIC INTEREST

4. Because Plaintiff STATE OF TEXAS has reason to believe that Defendants have engaged in, and will continue to engage in, the unlawful practices set forth below, Plaintiff, STATE OF TEXAS, has reason to believe Defendants have caused and will cause immediate, irreparable injury, loss and damage to the State of Texas, and will also cause adverse effects to legitimate business enterprises which lawfully conduct trade and commerce in this State. Therefore, the Consumer Protection Division of the office of the Attorney General of the State of Texas believes and is of the opinion that these proceedings are in the public interest.

TRADE AND COMMERCE

5. Defendants have, at all times described below, engaged in conduct which constitutes "trade" and "commerce" as those terms are defined by §17.45(6) of the DTPA.

ACTS OF AGENTS

6. Whenever in this Petition it is alleged that Defendants did any act, it is meant that:

A) Defendants performed or participated in the act, or

B) Defendants' officers, agents, or employees performed or participated in the act

on behalf of and under the authority of the Defendants.

NOTICE BEFORE SUIT

7. The Consumer Protection Division informed Defendants in general of the alleged unlawful conduct described below, at least seven days before filing suit, as may be required by §17.47(a) of the DTPA.

NATURE OF DEFENDANTS' OPERATIONS

8.1. Defendants own and operate a retail business at 111 East Laurel St. No. 108, San Antonio, Texas, 78212, known as MAIN OPTICAL, from which they sell and dispense contact lenses and eyeglasses. MAIN OPTICAL had been issued a valid contact lens dispenser permit number CP00660 by the DSHS Contact Lens Dispenser Permit Program. The business practices of MAIN OPTICAL are directed by Defendant YANETT SALINAS and her son Defendant HECTOR SALINAS GOMEZ; the business is managed by her other son, Carlos Gomez.

8.2. Permit CP00660 was renewed on July 18, 2006 and will expire July 31, 2008. The original permit was issued on June 13, 2005. Persons who are issued Contact Lens Dispenser Permits by DSHS are required to comply with the Federal Fairness to Contact Lens Consumers Act, 15 U.S.C. §7601 (West 2006) *et seq.* A violation of that act is also an unfair and deceptive act and practice in violation of the Federal Trade Commission Act, 15 U.S.C. §57A. Such violations in Texas are to be prosecuted as violations of the Texas DTPA; see TEX. BUS. COMM. CODE §17.46(c)(1) referring to 15 U.S.C. §45(a)(1).

8.3. Consumers walk in to Defendants' store and request to purchase contact lenses and eyeglasses. In many if not most circumstances, they do not have a prescription for the lenses or glasses or cannot provide an existing prescription to Defendants, who nonetheless sell them the requested contact lenses or eyeglasses.

8.4. Pursuant to TEX. OCC. CODE §353.101(a)(1)(West 2006) and 15 U.S.C. §7603 (West 2006), the sale of contact lenses without a valid prescription is prohibited. There is legally no such thing as a “non-prescription” contact lens; even non-corrective contact lenses intended solely to change the appearance of the eye require a prescription for their sale.

8.5 Furthermore, a contact lens which is advertised, represented, labeled, promoted, packaged, or sold as a “non-prescription” or “cosmetic” contact lens and which has not been federally approved for sale without a prescription is an “adulterated” and “misbranded” class three medical device pursuant to TEX. HEALTH & SAFETY CODE §§431.111(f)(1)(B), 431.112(e)(1), 431.112(o)(1), 431.112(a)(1), and 431.182(a).

8.6. Defendants maintain, operate, and use various instruments to determine or measure the powers of vision of the human eye and eyeglasses and contact lenses to correct or remedy a defect or abnormal condition of vision or cosmetically change the eye color. However, because the optometrist who was previously employed to engage in these activities for Defendants is now deceased, unlicensed employees of Defendants are now carrying out these activities. Accordingly, Defendants are engaged in the unlicensed practice of optometry as defined in the Texas Optometry Act, TEX. OCC. CODE §351.002(6) (West 2006)(hereafter the “TOA”).

SPECIFIC FACTUAL ALLEGATIONS

9.1. On August 3, 2006, DSHS investigator Jack McDaniel from the DSHS Professional Licensing and Certification Unit, went to the Main Optical location at 111 Laurel St. in San Antonio No. 108, to investigate a complaint that Defendants were selling contact lenses without prescriptions. Without identifying himself as a DSHS investigator, he purchased for \$20.00 what was described as “non-prescription” contact lenses from an employee of Main Optical. The employee never asked for or required a prescription for the sale of these contact lenses.

9.2. Additionally, this investigator suspected that Main Optical was also selling eyeglasses without prescriptions because he observed an operational Auto-Refractor device which was turned on and functioning. This diagnostic device is used to perform eye exams in order to write prescriptions for eyeglasses and contact lenses. No one at Main Optical is an optometrist or other medical professional licensed to write prescriptions for eyeglasses or contact lenses. Investigator McDaniel's report, without its attachments which will be provided to Defendants, is Attachment A, incorporated herein.

9.3. On August 17, 2006, Investigator Ronald J. Waters from the DSHS Food and Drug Inspection Unit, was sent to the Main Optical location on Laurel Street to determine if the firm was: (1) distributing contact lenses at wholesale, (2) maintaining records of receipt for contact lenses, and (3) documenting prescriptions for all distribution to end users. He noted that Manager Carlos Gomez denied knowing anything about any previous sales at wholesale to a retailer at a flea market in September of 2005, but indicated that in any event, Main Optical was not now selling at wholesale.

9.4. Investigator Waters did however, observe that the firm: (1) did not maintain a record of prescriptions for contact lenses or eye glasses; (2) did not maintain records that identified the name and address of purchasers of prescription devices; (3) distributed contact lenses that were packaged in boxes that were not labeled for individual sales; and (4) was selling lenses packed in boxes (secondary containers) with lot numbers which were different from the lot numbers on the individual packages within the boxes. Investigator Ron Waters' investigation report, without its attachments which will be provided to Defendants, is Attachment B, incorporated herein.

TEXAS CONTACT LENS PRESCRIPTION ACT VIOLATIONS

10. Defendants have violated the Texas Contact Lens Prescription Act as follows:

A) by selling contact lenses as alleged more specifically in paragraphs 9.1 through 9.4 above, Defendants have sold and dispensed contact lenses to a consumer without receiving a contact lens prescription that has not expired and that conforms to the requirements of CLPA §353.152, in violation of CLPA §353.101(a) and 25 T.A.C. §128.5(a)(1) (West 2006);

B) by advertising and representing that “non-prescription” contact lenses can be purchased by consumers from Defendants as alleged more specifically in paragraphs 9.1 through 9.4 above, Defendants have represented by advertisement, sales representation or otherwise, that contact lenses may be obtained without a prescription, in violation of 15 U.S.C. §7605 (West 2006) and 25 T.A.C. §128.5(a) (West 2006);

C) by failing to maintain records for prescriptions for contact lenses that identify the name and address of purchasers, as alleged more specifically in paragraphs 9.1 through 9.4 above, Defendants failed to maintain a record of all direct communications presented to the seller by the patient or by the prescriber directly, by facsimile or by verified communication, in violation of 15 U.S.C. §7603 (West 2006) and 25 T.A.C. §128.5(a)(2) (West 2006).

TEXAS OPTOMETRY ACT VIOLATIONS

11. Defendants have violated the Texas Optometry Act as follows:

A) by offering to examine the eyes of consumers in order to fit eyeglasses and contact lenses, as alleged more specifically in paragraphs 9.1 through 9.4 above, Defendants are engaged in the unlicensed practice of optometry, in violation of the TOA §351.401.

B) by representing with signs and other posted material that contact lenses or prescription eyeglasses are sold by Defendants without indicating the need for a prescription, as alleged more specifically in paragraphs 9.1 through 9.4 above, Defendants are posting deceptive and misleading advertisements for the sale of prescription eyeglasses and contact lenses which do

not contain language indicating that an eye doctor's prescription is required to purchase prescription eyeglasses and contact lenses, in violation of the TOA §351.403(b).

TEXAS FOOD, DRUG, AND COSMETIC ACT VIOLATIONS

12. Defendants have violated the Texas Food Drug and Cosmetic Act as follows:

A) by representing that a prescription is not required for the purchase of contact lenses as alleged more specifically in paragraphs 9.1 through 9.4 above, Defendants have made false and misleading statements about contact lenses and have misbranded them, in violation of TEX. HEALTH & SAFETY CODE §§431.021(b), 431.112(a)(1), 431.112(e)(1), 431.112(o)(1) and 431.182;

B) by advertising, promoting, and denominating contact lenses as “non-prescription” or “cosmetic” contact lenses as alleged more specifically in paragraphs 9.1 through 9.4 above, Defendants have mislabeled and misbranded a medical device in violation of TEX. HEALTH & SAFETY CODE §§431.021(b), 431.112(a)(1), 431.112(e)(1), 431.112(o)(1) and 431.182;

C) by selling and dispensing contact lenses without a prescription as alleged more specifically in paragraphs 9.1 through 9.4 above, Defendants have introduced misbranded devices into trade and commerce, in violation of TEX. HEALTH & SAFETY CODE §431.021(a);

D) by selling and dispensing contact lenses without federal approval for sale as Class III non-prescription medical devices as alleged more specifically in paragraphs 9.1 through 9.4 above, Defendants have introduced adulterated medical devices into trade and commerce, in violation of TEX. HEALTH & SAFETY CODE §431.021(a) and 431.111(f)(1)(B);

E) by repackaging and offering for sale contact lenses without maintaining controls necessary to ensure the lot numbers of the primary and secondary packages containing these

contact lenses remain consistent as alleged more specifically in paragraphs 9.1 through 9.4 above, Defendants have adulterated medical devices, in violation of TEX. HEALTH & SAFETY CODE §§ 431.021(b) and 431.111(h);

F) by repackaging and dispensing contact lenses whose primary and secondary package lot numbers are inconsistent as alleged more specifically in paragraphs 9.1 through 9.4 above, Defendants have introduced misbranded devices into trade and commerce, in violation of TEX. HEALTH & SAFETY CODE §431.021(a) and 431.112(a)(1).

FALSE, MISLEADING OR DECEPTIVE ACTS

13.1. Defendants have in the course of trade and commerce engaged in false, misleading and deceptive acts and practices declared unlawful in §§17.46(a) and (b) of the DTPA as follows:

A) representing that contact lenses can be purchased without a prescription as alleged more specifically in paragraphs 9.1 through 9.4 above, thereby causing confusion or misunderstanding as to the source sponsorship, approval, or certification of goods or services, in violation of §17.46(b)(2) of the DTPA;

B) representing that contact lenses can be purchased without a prescription as alleged more specifically in paragraphs 9.1 through 9.4 above, thereby representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits or quantities which they do not have or that a person has a sponsorship, approval, status, affiliation, or connection which he does not have, in violation of §17.46(b)(5) of the DTPA;

C) selling “non-prescription” contact lenses as alleged more specifically in paragraphs 9.1 through 9.4 above, thereby representing that goods or services are of a particular standard, quality or grade, or that goods are of a particular style or model, if they are of another, in violation of §17.46(b)(7) of the DTPA;

D) agreeing to sell prescription eyeglasses and contact lenses to consumers without a prescription as alleged more specifically in paragraphs 9.1 through 9.4 above, thereby representing that an agreement confers or involves rights, remedies or obligations which it does not have or involve or which are prohibited by law, in violation of §17.46(b)(12) of the DTPA.

INJURY TO CONSUMERS

14. Defendants have, by means of these unlawful acts and practices, obtained money or other property from identifiable persons to whom such money or property should be restored or who, in the alternative, are entitled to an award of damages.

PRAYER

15. Because Defendants have engaged in the unlawful acts and practices described above, Defendants have violated and will continue to violate the law as alleged in this Petition. Unless restrained by this Honorable Court, Defendants will continue to violate the laws of the State of Texas and cause immediate, irreparable injury, loss and damage to the State of Texas and to the general public.

16. WHEREFORE, Plaintiff prays that Defendants be cited according to law to appear and answer herein; that before notice and hearing a TEMPORARY RESTRAINING ORDER be issued; that after due notice and hearing a TEMPORARY INJUNCTION be issued; and upon final hearing a PERMANENT INJUNCTION be issued, restraining and enjoining Defendants, their officers, agents, servants, employees and attorneys and any other person in active concert or participation with Defendants from engaging in the following acts or practices:

A) selling, giving away, delivering or dispensing contact lenses to a person without receiving from the person or the person's prescriber, a valid prescription which meets the requirements of 25 TAC §128.5;

B) promoting, representing or advertising, directly or indirectly, that contact lenses can be sold by Defendants without a valid prescription which meets the requirements of 25 TAC §128.5;

C) designating, labeling, denominating, placing or using signs or nomenclature directly on the packages containing the contact lenses or on store windows or walls, or using words or symbols to describe contact lenses, which directly or indirectly identify or describe them as products which can be sold without a prescription, such prohibition including but not limited to the use of words such as “non-prescription”, “no-script cosmetic”, and “non-regulated”;

D) Selling, offering for sale, promoting, advertising, distributing into trade and commerce, or delivering for distribution into trade and commerce, contact lenses without a valid prescription which meets the requirements of 25 TAC §128.5;

E) selling contact lenses labeled as not to be sold individually;

F) selling or distributing contact lenses at wholesale to any other person or business entity for resale without obtaining a duly issued license from DSHS as a device distributor;

G) selling, giving away, delivering or dispensing prescription eyeglasses to a person without receiving from the person or the person’s prescriber, a valid prescription issued pursuant to the requirements of the Texas Optometry Act, TEX. OCC. CODE §351.001, *et seq.*;

H) posting deceptive or misleading advertisements for the sale of eyeglasses and contact lenses which do not contain language indicating that an eye doctor’s prescription is required to purchase prescription eyeglasses and contact lenses;

I) engaging in the unlicensed practice of optometry by examining eyes by any means in order to determine or measure the powers of vision of the human eye, examine or diagnose visual defects, abnormal conditions, or diseases of the human eye or adnexa, or prescribe or fit lenses or prisms to correct or remedy a defect or abnormal condition of vision;

J) Repackaging contact lenses;

K) Altering in any way the original manufacturer's packaging for contact lenses;

L) Selling, offering for sale, promoting, advertising, distributing into trade and commerce, or delivering for distribution into trade and commerce, any misbranded, adulterated, or unapproved class III medical device, including but not limited to contact lenses and prescription eyeglasses, in violation of Texas Food Drug and Cosmetic Act, TEX. HEALTH & SAFETY CODE §431.021(b);

M) misbranding or adulterating any medical device, including but not limited to contact lenses and prescription eyeglasses, in violation of Texas Food Drug and Cosmetic Act, TEX. HEALTH & SAFETY CODE §431.021(a);

N) Representing, directly or by implication, that this court or the Attorney General has approved any good or service sold or offered for sale by Defendants, or have approved any of Defendants' business practices; or

O) Interfering with, preventing, or in any way obstructing DSHS agents from reasonably inspecting, copying, or photographing all business records and business premises of Defendants and all devices found therein, pursuant to TEX. HEALTH & SAFETY CODE §431.042, 431.043, and 431.044.

17. In addition, and by way of mandatory relief, Plaintiff STATE OF TEXAS requests that this Court will order Defendants to:

A) maintain and retain electronic or paper records of prescriptions, including copies thereof, for a minimum of two years from the last date a contact lens is dispensed based on the prescription, said records to conform to the requirements of 25 T.A.C. §128.5 and to indicate the lot numbers for the containers and any other number needed to specifically identify a specific contact lens to a specific consumer;

B) maintain and retain electronic or paper records of invoices and shipping documents, including copies thereof, showing the purchase of contact lenses by Defendants from their distributors or manufacturer's and the lot numbers for the containers in which the contact lenses are packaged, for a minimum of two years from the last date of the invoice or shipping document; and

C) immediately surrender Defendants' contact lens dispenser permit to DSHS should Defendants be found to be in violation of the terms of this injunction by a DSHS investigator and immediately upon receipt of notice by certified mail or in person from a DSHS agent.

18. In addition, Plaintiff STATE OF TEXAS respectfully prays that this Court will:

A) Adjudge against each Defendant civil penalties in favor of Plaintiff STATE OF TEXAS in the amount of \$20,000.00 per violation of the DTPA per Defendant pursuant to TEX. BUS. COMM CODE §17.47(c) and up to \$25,000.00 per day per Defendant for each day of violation of the Texas Food Drug, and Cosmetic Act pursuant to TEX. HEALTH & SAFETY CODE §431.0585;

B) Order Defendants to refund to all persons who purchased contact lenses from Defendants without a prescription and who request a refund of the purchase price plus any sales

tax and postage or handling charges paid on such purchase. Such refund shall also be made to all persons who have paid for but have not received such contact lenses;

C) Order Defendants, jointly and severally, to restore all money or other property taken from identifiable persons by means of unlawful acts or practices, or in the alternative award judgment for damages to compensate for such losses;

D) Order Defendants, jointly and severally, to pay Plaintiff STATE OF TEXAS attorney fees, costs of court, and investigative costs pursuant to the TEX. GOVT. CODE, §402.006(c) and TEX. HEALTH & SAFETY CODE §431.047(d);

E) Order Defendants, jointly and severally, to pay prejudgment and post judgment interest on all awards of restitution, damages or civil penalties, as may be allowed by TEX. FIN. CODE §304.003;

F) Order Defendant, under supervision of agents for Plaintiff, to destroy all contact lenses detained by DSHS agents during the inspections of September 30, 2005 and August 17, 2006; and

G) Grant all other relief to which Plaintiff STATE OF TEXAS may show itself entitled.

Respectfully submitted,

GREG ABBOTT
Attorney General of Texas

KENT C. SULLIVAN
First Assistant Attorney General

EDWARD D. BURBACH
Deputy Attorney General for Litigation

PAUL CARMONA
Assistant Attorney General
Chief, Consumer Protection Division

