

NO. _____

THE STATE OF TEXAS	§	IN THE DISTRICT COURT
Plaintiffs	§	
v.	§	
	§	BEXAR COUNTY, TEXAS
FLORENCIO LANDIN, JR.,	§	
d/b/a NEW LOOK COSMETICS	§	
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 FLORENCIO LANDIN, JR. d/b/a NEW LOOK COSMETICS, Defendant, 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 Defendant has violated the CLPA.

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 Defendant has violated the TFDCA and the violation created 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 Defendant has 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 this Defendant.

DEFENDANT

2.1. Defendant FLORENCIO LANDIN, JR. is an individual previously doing business in Texas as alleged specifically below and may be served with process at his home at 4407 Shakerton Rd., San Antonio, Texas 78238.

2.2. Defendant FLORENCIO LANDIN, JR. did business under the assumed name of NEW LOOK COSMETICS.

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 Defendant has done business in BEXAR County, Texas as follows: Defendant 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 Defendant has engaged in, and will continue to engage in, the unlawful practices set forth below, Plaintiff, STATE OF TEXAS, has reason to believe Defendant has 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. Defendant has, 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 Defendant did any act, it is meant that:

- A) Defendant performed or participated in the act, or
- B) Defendant's officers, agents, or employees performed or participated in the act on behalf of and under the authority of the Defendant.

NOTICE BEFORE SUIT

7. The Consumer Protection Division informed Defendant 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 DEFENDANT'S OPERATIONS

8.1. Defendant operated a retail business from flea market booths C-01 and P-01 which he rented from the Highway 90 Flea Market Place, 7171 U.S. Highway 90 West, P.O. Box 461406, San Antonio, Texas, 78246. This retail business was known as NEW LOOK COSMETICS, from which he sold and dispensed contact lenses. NEW LOOK COSMETICS did not have issued to it a valid contact lens dispenser permit pursuant to the CLPA.

8.2. Consumers would walk up to Defendant's flea market booths and request to purchase contact lenses. In many if not most circumstances, they did not have a prescription for the lenses or could not provide an existing prescription to Defendant who nonetheless sold them the requested contact lenses.

8.3. Pursuant to the Texas Contact Lens Prescription Act, TEX. OCC. CODE §353.101(a)(1)(West 2006) and the Federal Fairness to Contact Lens Consumers Act, 15 U.S.C. §7603 (West 2006) *et seq.*, the sale of contact lenses without a valid prescription is prohibited. 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 may 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). There is legally no such thing as a "non-prescription"

contact lens; even eye-color “cosmetic” non-corrective contact lenses require a prescription for their sale.

8.4. 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), 431.112(a)(1), and 431.182(a).

SPECIFIC FACTUAL ALLEGATIONS

9. From September 2, 2005 through October 20, 2005, DSHS investigators Jack McDaniel, Ron Waters, and Kristen Weniger conducted an investigation of the NEW LOOK COSMETICS booths at the flea market in San Antonio to investigate a complaint that Defendant was selling contact lenses without prescriptions. These investigators conducted several interviews including one with Defendant Landin in which he admitted selling contact lenses without a prescription. OAG alleges that Defendant sold contact lenses without prescriptions from February 1, 2003 at a Corpus Christi flea market through September 30, 2005 at the San Antonio flea market. Investigator McDaniel’s report without its attachments which will be provided to Defendant is Attachment A; Investigator Waters and Weniger’s report without its attachments which will be provided to Defendant is Attachment B; both reports are incorporated herein.

TEXAS CONTACT LENS PRESCRIPTION ACT VIOLATIONS

10. Defendant has violated the Texas Contact Lens Prescription Act as follows:

A) by selling contact lenses as alleged more specifically in paragraph 9 above, Defendant sold and dispensed contact lenses to consumers 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 Defendant as alleged more specifically in paragraph 9 above, Defendant 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);

TEXAS FOOD, DRUG, AND COSMETIC ACT VIOLATIONS

11. Defendant has 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 paragraph 9 above, Defendant has 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 paragraph 9 above, Defendant has 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 paragraph 9 above, Defendant has 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 paragraph 9 above, Defendant has introduced adulterated medical devices into trade and commerce, in violation of TEX. HEALTH & SAFETY CODE §431.021(a) and 431.111(f)(1)(B);

FALSE, MISLEADING OR DECEPTIVE ACTS

12. Defendant has 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 paragraph 9 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 paragraph 9 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 paragraph 9 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 contact lenses to consumers without a prescription and at a flea market as alleged more specifically in paragraph 9 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 and TEX. BUS. COMM. CODE §35.55. (West 2006)

INJURY TO CONSUMERS

13. Defendant has, 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

14. Because Defendant has engaged in the unlawful acts and practices described above, Defendant has violated and will continue to violate the law as alleged in this Petition. Unless restrained by this Honorable Court, Defendant 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.

15. WHEREFORE, Plaintiff prays that Defendant be cited according to law to appear and answer herein; that after due notice and hearing a TEMPORARY INJUNCTION be

issued; and upon final hearing a PERMANENT INJUNCTION be issued, restraining and enjoining Defendant, their officers, agents, servants, employees and attorneys and any other person in active concert or participation with Defendant from engaging in the following acts or practices:

A) selling, giving away, delivering or dispensing contact lenses to a person without a valid Contact Lens Dispenser's Permit;

B) 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;

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

D) 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";

E) 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;

F) selling contact lenses individually, i.e. selling only one from a packaged pair of contact lenses when such lenses are packaged and federally approved for sale only in pairs;

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

H) 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.*;

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

J) 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;

K) Repackaging eye glasses and contact lenses from original packaging to any new packaging;

L) Altering in any way the original packaging for eye glasses and contact lenses;

M) 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);

N) 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);

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

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

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

A) apply for and obtain a duly issued contact lens dispenser permit from DSHS before engaging in the sale and dispensing of contact lenses;

B) 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 both the primary and secondary containers and any other number needed to specifically identify a specific contact lens to a specific consumer;

C) maintain and retain electronic or paper records of invoices and shipping documents, including copies thereof, showing the purchase of contact lenses by Defendant from his distributors and the lot numbers for both the primary and secondary 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

D) immediately surrender to DSHS any contact lens dispenser permit which may be issued to him in the future should Defendant 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.

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

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

B) Order Defendant 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 Defendant 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 Defendant 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 Defendant to pay prejudgment and post judgment interest on all awards of attorney fees and civil penalties, as may be allowed by TEX. FIN. CODE §304.003;

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

Respectfully submitted,

GREG ABBOTT
Attorney General of Texas

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First Assistant Attorney General

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STATE OF TEXAS

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COUNTY OF BEXAR

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BEFORE ME, the undersigned authority on this day personally appeared THOMAS BRINCK, who after being by me duly sworn, upon his oath deposed and said that the affiant is Drug and Medical Device Group Manager for the Texas Department of State Health Services DSHS and as such is authorized to make this affidavit, that the affiant carefully read the allegations in paragraph 9 of the foregoing pleading, and that as required by §17.47(a) of the Consumer Protection Act, the affiant has reason to believe that each and all of said allegations are true and correct.

THOMAS BRINCK

SUBSCRIBED AND SWORN TO before me on the ____ day of _____, 2006.

Notary Public in and for the
State of Texas