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THE STATE OF TEXAS,

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IN THE DISTRICT COURT

Plaintiff

v.

POTTER COUNTY, TEXAS

MANUEL SANDOVAL d/b/a
MANNY’S PLACE

Defendant

_____ JUDICIAL DISTRICT

**PLAINTIFF’S ORIGINAL PETITION AND
APPLICATION FOR TEMPORARY RESTRAINING
ORDER AND INJUNCTION**

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, **THE STATE OF TEXAS**, hereinafter called Plaintiff, acting by and through Attorney General of Texas GREG ABBOTT, complaining of and against **MANUEL SANDOVAL d/b/a MANNY’S PLACE**, hereinafter called Defendant, and for cause of action would respectfully show the following:

I. DISCOVERY CONTROL PLAN

1.1 The discovery in this case is intended to be conducted under Level 2 pursuant to TEX. R. CIV.P. 190.2(b)(3).

II. NATURE OF THIS SUIT

2.1 The Attorney General, acting within the scope of his official duties under the authority granted to him under the Constitution and the laws of the State of Texas, brings this lawsuit in the name of the State of Texas through his Consumer Protection & Public Health Division against

Defendants for violations of the Texas Deceptive Trade Practices - Consumer Protection Act, TEX. BUS. & COM. CODE ANN. §17.41, *et seq.* (Vernon's 1987 and Supp. 2004) (hereinafter "DTPA").

2.2 The Attorney General, acting within the scope of his official duties under the authority granted to him under the Constitution and the laws of the State of Texas, brings this lawsuit in the name of the State of Texas through the Texas Food, Drug and Cosmetic Act, TEX. HEALTH & SAFETY CODE ANN. § 431.001, *et seq.* (hereinafter "TFDCA") upon the grounds that the Commissioner of Health of the State of Texas and his authorized agents find that the Defendant has violated and is currently violating provisions of § 431.021 of the TFDCA. The TFDCA provides for injunctive relief and a civil penalty for each violation of the TFDCA. TEX. HEALTH & SAFETY CODE ANN. § 431.0585.

2.3 The Attorney General, acting within the scope of his official duties under the authority granted to him under the Constitution and the laws of the State of Texas, brings this lawsuit in the name of the State of Texas for violation of the Contact Lense Prescription Act, TEX. OCC. CODE ANN. § 353.001, *et seq.* (hereinafter "CLPA"). Sections 353.204 and 353.206 of the CLPA grant authority to the Attorney General to enforce the Act by seeking an injunction as well as civil penalties for violations of the CLPA.

III. DEFENDANT

3.1 Defendant, **MANUEL SANDOVAL** is an individual who does business as **MANNY'S PLACE** with his principal place of business located in Amarillo, Texas. Defendant may be served with process at his home at 1401 Tennant Street, Apartment A, Amarillo, Texas 79104 or his place of business at 812 E. Amarillo Boulevard, Amarillo, Texas 79104.

IV. JURISDICTION

4.1 This Court has jurisdiction over this action pursuant to §17.47(b) of the DTPA.

V. VENUE

5.1 Venue of this suit lies in Potter County, Texas for the following reasons:

- a. Under §17.47(b) of the DTPA, Defendant has done business in the county of suit; and
- b. Under TEX. CIV. PRAC. & REM CODE ANN. §15.002(A)(1)(Vernon Supp. 2006), all or a substantial part of the events or omissions giving rise to the claim occurred in the county of suit; and
- c. Under §431.047(c) of the TFDCA, a substantial part of the events or omissions giving rise to the claim occurred in the county of suit; and
- d. Under § 353.204 of the CLPA a substantial part of the events or omissions giving rise to the claim occurred in the county of suit.

VI. PUBLIC INTEREST

6.1 Plaintiff, STATE OF TEXAS, has reason to believe that Defendant is engaging in, has engaged in, or are about to engage in the unlawful acts or practices set forth below. That Defendant has, by means of these unlawful acts and practices, cause damage to and acquired money or property from persons and that Defendant adversely affects the lawful conduct of trade and commerce, thereby directly or indirectly affecting the people of 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.

VII. TRADE AND COMMERCE

7.1 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.

VIII. ACTS OF AGENTS

8.1 Whenever in this Petition it is alleged that Defendant did any act, it is meant that Defendant performed or participated in the act, or that the officers, agents or employees of Defendant performed or participated in the act on behalf of and under the authority of Defendant.

IX. NATURE OF DEFENDANT’S OPERATION

9.1 Defendant, **MANUEL SANDOVAL**, owns and operates a retail business that purports to sell contact lenses to the public without a license.

X. FACTUAL ALLEGATIONS

10.1 On or about October 28, 2004, the Contact Lens Dispensing Permit Program (CLDPP) sent a Cease and Desist Order, via United States Postal Service on November 1, 2004 to Defendant **MANUEL SANDOVAL dba MANNY’S PLACE** instructing the establishment to Cease and Desist from dispensing contact lenses without a permit. (Exhibit A).

10.2 On or about July 21, 2005, the CLDPP reported to the Texas Department of State Health Services that Defendant **MANUEL SANDOVAL dba MANNY’S PLACE** was continuing to sell contact lenses without a permit. (Exhibit A).

10.3 On August 2, 2005, the Texas Department of State Health & Services contacted the Defendant **MANUEL SANDOVAL dba MANNY’S PLACE** who confirmed that he had received the Cease and Desist Order of October 28, 2004. The Defendant stated that he had quit selling the

contact lenses. He stated that in total he only sold the contact lenses for about four (4) months. (Exhibit B).

10.4 In May 2006, Dr. Amy Nailling, D. O., reported to the Texas Department of State Health and Services that she had treated two patients who had purchased contact lenses from the Defendant **MANUEL SANDOVAL dba MANNY’S PLACE** and that the contact lenses had caused damage to her patients’ vision. She also reported that in March 2006, that she had gone to Defendant’s place of business and told two employees that they should not sell or dispense contact lenses without a license. After March 2006, Dr. Nailling treated two more patients who had reported to her that they had purchased contact lenses from the Defendant. (Exhibit C).

10.5 On September 19, 2006, Barbara Dykes, investigator for the Office of The Attorney General traveled to Amarillo, Texas to conduct an undercover investigation on Manny’s Place located at 812 Amarillo Boulevard E., Amarillo, Texas. Ms. Dykes inquired about purchasing colored contact lenses. The Hispanic male, approximately 40-45 years of age responded that “he did not have any” and “would get more and in any color she wanted”. He also stated that he would have a booth in the Canyon, Texas square for Homecoming on October 17, 2006 and he would try to have them at that time. (Exhibit D).

XI. VIOLATIONS OF THE CONTACT LENS PRESCRIPTION ACT

11.1 Defendant **MANUEL SANDOVAL dba MANNY’S PLACE**, as alleged above, has in the course of trade and commerce violated the Contact Lens Prescription Act, TEX. OCC. CODE ANN. § 353.001, *et seq.* as follows:

- a. Dispensing contact lenses in violation of § 353.051; and
- b. Dispensing contact lenses as a business entity without a contact lense dispensing

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permit in violation of § 353.052; and

- c. Dispensing contact lenses to a consumer in violation of § 353.101.

XII. VIOLATIONS OF THE DECEPTIVE TRADE PRACTICES ACT

12.1 Defendant **MANUEL SANDOVAL dba MANNY'S PLACE**, as alleged above, has in the course of trade and commerce, directly and indirectly engaged in false, misleading, deceptive and unconscionable acts and practices declared unlawful by Texas Deceptive Trade Practices - Consumer Protection Act, TEX. BUS. & COM. CODE ANN. §17.41, *et seq.* (Vernon's 1987 and Supp 2006), including but not limited to:

- a. Failing to disclose that contact lenses are only to be sold upon the order or written prescription of a licensed physician or optometrist in Texas;
- b. Failing to disclose that contact lenses are only to be sold by a business who has a contact lense dispensing permit;
- c. Failing to disclose that it may be injurious to one's health for contact lenses to be used which have not been disinfected or cleaned properly;
- d. Failing to disclose that it may be injurious to one's health to wear contact lenses for an extended period of time;
- e. Falsely advertising to a consumer that contact lenses were available for purchase and that a prescription was not required ; and
- f. Falsely representing to a consumer that contact lenses can legally be dispensed without an order of a licensed physician or an optometrist.

12.2 Moreover, the Consumer Protection Division has reason to believe that the above actions specifically violate § 17.46(a) and the following provisions of § 17.46(b) of the DTPA:

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- a. Causing confusion or misunderstanding as to the source, sponsorship, approval, or certification of goods or services in violation of §17.46(b)(2);
- b. Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits or quantities which they do not have in violation of §17.46(b)(5);
- c. 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);
- d. Failing to disclose information concerning goods or services which was known at the time of the transaction when such failure to disclose such information was intended to induce the consumer into a transaction into which the consumer would not have entered had the information been disclosed in violation of §17.46(b)(23).

XIII. INJURY TO CONSUMERS

13.1 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.

13.2 Because Defendants have engaged in the unlawful acts and practices described above, Defendants have violated 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 damage to the general public.

**XIV. APPLICATION FOR EX PARTE
TEMPORARY RESTRAINING ORDER**

14.1 It is essential that the Court immediately and temporarily restrain Defendant **MANUEL SANDOVAL dba MANNY’S PLACE** from continuing with the conduct described in this Petition, namely, the unauthorized dispensing of contact lenses. It is essential that the Court act immediately, prior to notice on Defendant and a hearing on the matter, because Defendant will continue to engage in the unauthorized dispensing of contact lenses and thereby cause immediate and irreparable injury, loss, or damage to persons who receive their contact lenses. Specifically, Defendants will continue to solicit customers each day and will continue to sell contact lenses without a license subjecting consumers to physical injury and/or loss of vision.

XV. PRAYER

15.1 WHEREFORE, Plaintiff prays that Defendant **MANUEL SANDOVAL dba MANNY’S PLACE** 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 Defendant, his officers, agents, servants, employees and attorneys and any other person in active concert or participation with Defendant from engaging, directly or indirectly, in the following acts or practices:

- a. Selling contact lenses without a license;
- b. Failing to disclose that contact lenses are only to be sold upon the order or written prescription of a licensed physician or optometrist in Texas;
- c. Failing to disclose that it may be injurious to one’s health for contact lenses to be used

which have not been disinfected or cleaned properly;

- d. Falsely advertising to a consumer that contact lenses were available for purchase and that a prescription was not required ;
- e. Falsely representing to a consumer that contact lenses can legally be dispensed without an order of a licensed physician or an optometrist;
- f. Causing confusion or misunderstanding as to the source, sponsorship, approval, or certification of the contact lenses;
- g. Representing that the contact lenses have sponsorship, approval, characteristics, ingredients, uses, benefits or quantities which they do not have;
- h. Representing that the contact lenses are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another;
- i. Failing to disclose information concerning the contact lenses which was known at the time of the sale, when such failure to disclose such information was intended to induce the consumer into a transaction into which the consumer would not have entered had the information been disclosed;
- j. Concealing, withholding, destroying, mutilating, altering, falsifying, or removing from the jurisdiction of this Court any books, records, documents, invoices, receipts, or other written materials relating to the business of Defendants currently or hereafter in Defendants' possession, custody or control except in response to further orders or subpoenas in this cause.

15.2 WHEREFORE, Plaintiff further prays that Defendant **MANUEL SANDOVAL dba MANNY'S PLACE** be cited according to law to appear and answer herein; that before notice and

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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 Defendant, his officers, agents, servants, employees and attorneys and any other person in active concert or participation with Defendant from engaging, directly or indirectly, in the following acts as listed in paragraph 15.1 above.

15.3 Plaintiff, STATE OF TEXAS, further prays that this Court grant leave to conduct telephone, oral, written, and other depositions of witnesses prior to any scheduled Temporary Injunction Hearing and prior to Defendant's answer date, with reasonable shortened notice to Defendant and his attorney, if known.

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

- a. Adjudge against Defendants civil penalties in favor of Plaintiff, STATE OF TEXAS, in the amount of \$20,000 per violation of the DTPA;
- b. Order Defendants 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;
- c. Adjudge against Defendants reasonable attorney's fees and court costs pursuant to TEX. GOV'T CODE ANN. § 402.006 (Vernon 1998);
- d. Adjudge against Defendants prejudgment and postjudgment interest at the highest lawful rate;
- e. Adjudge that all fines, penalties or forfeitures payable to and for the benefit of the State are not dischargeable under bankruptcy pursuant to 11 U.S.C. §523(a)(7).

16.5 Further, Plaintiff, STATE OF TEXAS, respectfully prays for all other relief to which Plaintiff

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STATE OF TEXAS, may be justly entitled.

DATED this _____ day of November 2006.

Respectfully submitted,

GREG ABBOTT
Attorney General of Texas

KENT C. SULLIVAN
First Assistant Attorney General

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VERIFICATION

STATE OF TEXAS §
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COUNTY OF LUBBOCK §

BEFORE ME, the undersigned authority, on this day personally appeared affiant Barbara T. Dykes, who proved to me through current Texas Driver License to be the person whose name is subscribed to this Verification and who acknowledged to me that she executed the same, and after she was duly sworn, upon her oath, she deposed and said that the affiant is an investigator for the Office of Attorney General, and is authorized to make this affidavit, that the affiant has carefully read the factual allegations in the foregoing PLAINTIFF’ S ORIGINAL PETITION AND APPLICATION FOR TEMPORARY RESTRAINING ORDER AND INJUNCTION, and has reason to believe that each and all said factual allegations are true and correct; and affiant signs this Verification, pursuant to Rule 682 of the TEXAS RULES OF CIVIL PROCEDURE.

BARBARA T. DYKES
INVESTIGATOR

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

NOTARY PUBLIC IN AND
FOR THE STATE OF TEXAS