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CONSUMER PROTECTION AND ANTITRUST DIVISION
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STATE OF NORTH DAKOTA
OFFICE OF ATTORNEY GENERAL

STATE OF NORTH DAKOTA EX REL.
WAYNE STENEHJEM,
ATTORNEY GENERAL,

Petitioner,

-vs-

**XM BRANDS, INC., a Florida Profit
Corporation; and
KENNETH JACOBI, Individually**

Respondents.

**CEASE AND DESIST ORDER,
NOTICE OF CIVIL PENALTY
AND NOTICE OF RIGHT
TO REQUEST A HEARING**

CPAT 100122.003

To each of the individuals and entities identified below (hereinafter collectively "Respondents"):

XM BRANDS INC.
3609 NORTH 29TH AVE
HOLLYWOOD FL 33020-1003

3389 SHERIDAN STREET 217
HOLLYWOOD FL 33021-3606

5375 NW 159TH STREET SUITE 5490
MIAMI FLORIDA 33014

AND

KENNETH JACOBI
3389 SHERIDAN STREET 217
HOLLYWOOD FL 33021-3606

3609 NORTH 29TH AVE
HOLLYWOOD FL 33020-1003

Dbas

Dazzilinsmile
Lean Body Burn
Lean Max Cleanse
Ever White
Everwhite Kit
Super Smile Bright
Everwhite Brite
Acai XM
Everbright Whites
My Everbrite Smile
XM Health and Beauty
XM-Labs
Syndex Industries
Everbrite Smile
XMBrands
Colo Pure Cleanse
Nutrigenic Life, LLC
My Super Star Smile
Super Star Smile

(including all of those entities' officers, directors, owners, agents, servants, employees and representatives as well as all other persons in active concert or participation with them, extending to all "doing business as" names, formal corporate names, fictitious names of any kind or any variations of the same)

BACKGROUND

1. The Attorney General of North Dakota has a reasonable basis to believe Respondents have engaged in and are engaging in acts or practices declared unlawful by N.D.C.C. ch. 51-15, commonly referred to as the "Consumer Fraud Law." It is necessary and appropriate in the public interest and for the protection of consumers to restrain the Respondents' unlawful acts or practices.

2. Respondents have been the subject of North Dakota consumer complaints alleging unauthorized charges, misrepresentations, or deceptive advertisement or practices. N.D.C.C. ch. 51-15 prohibits a person from engaging in any deceptive act or practice, fraud, false pretense, false promise, or misrepresentation, with the intent that others rely thereon in connection with the sale or advertisement of any merchandise.

3. XM Brands, Inc. is a Florida Profit Corporation located in Miami, Florida. XM Brands, Inc. has used multiple business addresses, including 3609 North 29th Avenue, Hollywood, Florida 33020-1003 and 3389 Sheridan Street 217, Hollywood, Florida 33021-3606. XM Brands, Inc. has reported its address to the Florida Secretary of State as 5753 NW 158 Street, Miami, Florida 33014, however it is believed that this address is incorrect, since mail to this address is returned as undeliverable, and it is believed that the correct address should be 5375 NW 159th Street, Suite 5490, Miami, Florida 33014.

4. Kenneth Jacobi is the sole principal of XM Brands, Inc. and identifies himself as Director. Kenneth Jacobi is believed to be involved in several other businesses enterprises.

5. Respondents are in the business of advertising, soliciting and selling products, including teeth whitening products, acai berry products, colon cleanse products, anti-aging products and other alleged health and diet products, to consumers nationwide, including in the State of North Dakota. Respondents primarily solicit customers through internet advertising through multiple websites.

6. Respondents are and have been operating under many different names or product names, which names are believed to include the following; Dazzilinsmile, Lean Body Burn, Lean Max Cleanse, Ever White, Everwhite Kit, Super Smile Bright,

Everwhite Brite, Acai XM, Everbright Whites, My Everbrite Smile, XM Health and Beauty, XM-Labs, Syndex Industries, Everbrite Smile, XMBrands, Colo Pure Cleanse, Nutrigenic Life, LLC, My Super Star Smile, and Super Star Smile.

7. Respondents websites are believed to include www.dazzlingwhitesystem.com, www.myeverbritesmile.com, and www.vividwhitesmiles.com.

8. The Better Business Bureau of Southeast Florida and the Carribean (“BBB”) reports 1143 complaints against XM Brands, Inc. in the last year. The BBB has XM Brands, Inc. associated with numerous other websites, including www.acaixm.com, www.supersmilebright.com, www.xmorders.com, www.everbritewhites.com, www.myeverywhitekit.com, www.myultrabritewhites.com, and www.acaiinreview.com.

9. Respondents are marketing, soliciting and selling merchandise to North Dakota consumers through the use of trial offers, often advertised as “free trials” or “risk-free trials.” This marketing method is often referred to as “negative option” marketing. Respondents advertise to consumers the opportunity to try a product for free through a free trial that only requires the consumer to pay a small amount for shipping. Often the free trial of the product is advertised through the use of pop-up ads promoting the products which the consumer sees while searching the internet. Respondents solicit and make sales to consumers through interactive websites, and the websites allow the consumer to purchase products and sign up for trials online.

10. Respondents’ “free trial” or “negative option” marketing offers the consumer the opportunity to try Respondents product, “free” or “risk free” through their “exclusive trial.” However, the consumer is signing up for more than a trial. By accepting the trial, the consumer is, often unknowingly and unintentionally, enrolled in a

membership or program, with automatic shipment of products, for which Respondents bills the consumer the full price of the product each month until the consumer cancels. To avoid any additional charges the consumer must contact the Respondents and cancel within the trial period. Respondents automatically bill the consumer on the credit card the consumer provided for the original small shipping fee for the trial.

11. Respondents advertise “Get your exclusive trial – just pay shipping and handling.” The specific terms and conditions of the offer, which includes the enrollment in the auto-ship program is only displayed on the very bottom of the page in small font. Because of the way the trial is advertised, many consumers do not realize that by agreeing to accept a sample or trial, they are agreeing to future charges and shipments. The ‘terms & conditions’ included with the offers are not clearly disclosed. Consumers believe that they have only agreed to the free sample or trial and if they want more of the product they will contact the company to make additional purchases. Consumers are not aware that their credit cards will be used for future charges until the charges appear on their credit card.

12. The Attorney General alleges Respondents business practices are deceptive and misleading, and their practices have, in fact, deceived numerous consumers and caused the consumers financial loss. Respondents’ free trial offer is misrepresenting the true nature of the agreement the consumer is entering into.

13. If consumers refuse the packages they are not given refunds because the company requires a Return Merchandise Authorization (RMA) number to return product, even the “trial”.

14. Some of Respondents trials also require consumer to return unused product if the consumer does not want to continue beyond the trial. Instead of sending

the consumer the exact amount of product included in the trial, the Respondents send the consumer an entire bottle of product, only one-half of which is included in the trial. Should the consumer choose not to continue past the trial, the consumer is expected and required to return the unused one-half bottle of the product, which is not considered included in the trial. If the product is not returned, the consumer is charged for the product. In order to return the product, the company requires a Return Merchandise Authorization (RMA) number to return product. If the consumer is changes for the first shipment, the consumer doesn't qualify for a refund until the product is returned, and to return it they need a RMA number.

15. Some consumers have complained that they never received any of the trial products from Respondents. Others have complained that the trial products have not arrived until after the trial period, or the time for cancellation, has expired, thus eliminating the purpose of the trial.

16. Consumer complaints against Respondents have also included allegations that Respondents have shipped and charged for products the consumer never ordered.

17. The Attorney General also has concerns about the safety and efficacy of the products sold by Respondents, and whether representations made about the products are false or misleading. Complaints have been made that the products do not work as promised, and there have been allegations made that the products have made people sick.

18. When the consumer cancels after receiving additional products, the consumer is expected and required by Respondents to return any products shipped. When the consumer wants to return the product to Respondents and get a refund of the charges made to the account for the product, Respondents first require the consumer to

obtain a RMA number, and have further demanded or charged the consumer 45% of the price of the product as a “restocking fee,” limiting the refund to 65% of the amount charged.

19. Respondents also have not been forthcoming with resolving consumer complaints, and have not been cooperative in providing consumers with refunds.

20. After receiving consumer complaints against Respondents, the Attorney General commenced an investigation into Respondents’ business practices. On May 6, 2010, the Attorney General issued a Civil Investigative Demand to Respondents XM Brands, Inc. and its owed Kenneth Jacobi, pursuant to the Attorney General’s authority under N.D.C.C. § 51-15-04. Respondents have refused to provide responses and produce documents as requested in the Civil Investigative Demand.

21. Each of the Respondents is engaged in a combination of two or more persons who have agreed to act together to inflict a wrong or an injury upon another, or who have agreed to act together to commit a lawful act using unlawful means to inflict a wrong or injury upon another, namely violation of North Dakota's Consumer Fraud Law. In doing so, Respondents have committed acts in pursuit of the agreement and the agreement has proximately caused damage to North Dakota consumers.

22. Respondents are liable for their own misconduct and/or for directing others to engage in misconduct. See *e.g. Zimprich v. North Dakota Harvestore Sys., Inc.*, 419 N.W.2d 912, 914 (N.D. 1988); *Rickbeil v. Grafton Deaconess Hosp.*, 23 N.W.2d 247, 257 (N.D. 1946)(“The general rule with reference to this feature is considered and set out in the great series of volumes of jurisprudence familiar to the courts. In 52 Am. Jur. 440, this rule is stated, 'It is a conceded general rule that all

persons or entities are liable for torts committed by them, or by their agents while acting within the scope of their duties."").

23. Respondents who are natural persons will additionally be subject to personal liability for corporate misconduct. *Hilzendager v. Skwarok*, 335 N.W.2d 768 (N.D. 1983)(quoting *Schriock v. Schriock*, 128 N.W.2d 852, 866 (N.D. 1964)("... but, when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons.' Fletcher, Private Corporations Sec. 41 (1963 rev. vol.)."). The crime/fraud exception to the protections of corporate form has long been recognized in North Dakota, "neither law nor equity will ever recognize the right of a corporate entity to become the receptacle or cover for fraud or wrong based on deception for the purpose of defeating the right of innocent parties." *McFadden v. Jenkins*, 169 N.W. 151, 163 (N.D. 1918). See also *Danks v. Holland*, 246 N.W.2d 86 (N.D. 1976); *Family Center Drug v. North Dakota St. Bd. of Pharm.*, 181 N.W.2d 738, 745 (N.D. 1970).

ORDER

NOW, THEREFORE, IT IS ORDERED pursuant to N.D.C.C. § 51-15-07 that Respondents, individually, and where applicable their officers, directors, owners, agents, servants, employees, contractors, representatives (extending to all "doing business as" names, formal corporate names, aliases, fictitious names of any kind or any variations of the same) as well as all other persons in active concert or participation with them, whether directly or indirectly, immediately **CEASE AND DESIST** from:

- 1) advertising, soliciting or selling merchandise to North Dakota consumers;
- 2) advertising, soliciting, or selling to North Dakota consumers merchandise advertised as a "free trial," "exclusive trial" or "free sample;"
- 3) charging any North Dakota consumers

credit or debit card for merchandise the consumer has not expressly and knowingly ordered or expressly and knowingly authorized payment for; and 4) engaging in any deceptive act or practice, fraud, false pretense, false promise, or misrepresentation, with the intent that others rely thereon in connection with the sale or advertisement of any merchandise, in violation of N.D.C.C. ch. 51-15. Respondents also shall immediately **CEASE AND DESIST** from taking, collecting, charging, billing or accepting any payment from any North Dakota consumers, including, but not limited to, cash, check, direct credit, debits or withdrawals from North Dakota consumers' credit cards, debit cards or bank accounts for any past or future sale of merchandise or other services related to the sale of merchandise.

YOU ARE NOTIFIED that pursuant to N.D.C.C. § 12.1-09-03 a person is guilty of a criminal offense if he or she intentionally "alters, destroys, mutilates, conceals, or removes a record, document, or thing with intent to impair its verity or availability" in an official proceeding. As such, intentional destruction of any documents related to this matter may result in criminal prosecution.

NOTICE OF CIVIL PENALTIES

YOU ARE FURTHER NOTIFIED that pursuant to N.D.C.C. § 51-15-07 any violation of this Cease and Desist Order is subject to civil penalties not to exceed \$1,000 per violation. Any violation of this Order that also is a violation of N.D.C.C. ch. 51-15 may result in additional civil penalties of not more than \$5,000 per violation. Nothing in this Order is intended to limit or waive any rights and remedies available to the State of North Dakota or consumers.

NOTICE OF RIGHT TO REQUEST HEARING

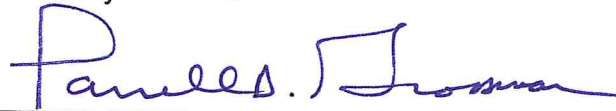
YOU ARE NOTIFIED that pursuant to N.D.C.C. § 51-15-07 you may request a hearing before the Attorney General if such a request is made in writing WITHIN TEN (10) DAYS AFTER THE RECEIPT OF THIS ORDER. Respondents have the right to be represented by legal counsel at the hearing.

Dated this 13th day of August, 2010.

STATE OF NORTH DAKOTA

Wayne Stenehjem
Attorney General

BY:



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