

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 and Public Health Division against the Defendants for violations of the Texas Deceptive Trade Practices - Consumer Protection Act, TEX. BUS. & COM. CODE ANN. § 17.41, *et seq.* (hereinafter “DTPA”) and TEX. OCC. CODE ANN. § 702.001, *et seq.* (hereinafter “Health Spa Act”). The DTPA grants authority to the Attorney General to seek injunctive relief and civil penalties for violations of its provisions. TEX. BUS. & COM CODE ANN. § 17.47. The Health Spa Act also grants authority to the Attorney General to seek injunctive relief and civil penalties for violations of its provisions. TEX. OCC. CODE ANN. § 702.552.

III. DEFENDANTS

3.1 Defendant **EXTREME FITNESS & WELLNESS, INC.** is a Texas corporation and may be served with citation by serving its registered agent, as follows:

Shon Zachary Perez, 5905 95th Street, Lubbock, Texas 79424-6706.

3.2 Defendant **SHON ZACHARY PEREZ** is a resident of Lubbock, Lubbock County, Texas and service and citation may be served upon him as follows:

Shon Zachary Perez, 5905 95th Street, Lubbock, Texas 79424-6706.

3.3 Defendant **DESIREE MASTERS PEREZ** is a resident of Lubbock, Lubbock County, Texas and service and citation may be served upon her as follows:

Desiree Masters Perez, 5905 95th Street, Lubbock, Texas 79424-6706.

IV. JURISDICTION

4.1 This Court has jurisdiction over this action pursuant to §17.47(b) of the DTPA and §702.552 of the Health Spa Act.

V. VENUE

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

- a. Under TEX. CIV. PRAC. & REM. CODE ANN. § 15.002(a)(1) (Vernon's 2002), venue is proper because all or a substantial part of the events or omissions giving rise to the claim occurred in the county of suit; and
- b. Under DTPA §17.47(b), venue is proper because the Defendants have done business in the county of suit; and
- c. Under Health Spa Act §702.552 (b)(2), venue is proper because the Defendants reside in the county of suit.

VI. PUBLIC INTEREST

6.1 Plaintiff, **STATE OF TEXAS**, has reason to believe that the Defendants are engaging in, have engaged in, or are about to engage in, the unlawful acts or practices set forth below. That the Defendants have, by means of these unlawful acts and practices, caused damage to or acquired money or property from persons, and that the Defendants adversely affect the lawful conduct of trade and commerce, thereby directly or indirectly affecting the people of this State. Therefore, the Consumer Protection & Public Health 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 the Defendants did any act, it is meant that the Defendants performed or participated in the act, or that the officers, agents or employees of the Defendants performed or participated in the act on behalf of and under the authority of the Defendants.

IX. NOTICE BEFORE SUIT

9.1 The Consumer Protection & Public Health Division contacted the Defendants, by and through their attorney of record, in writing to inform them of the alleged unlawful conduct at least seven (7) days before this suit was filed, as may be required by §17.47(a) of the DTPA.

X. FACTUAL ALLEGATIONS

10.1 Defendants began advertising memberships in a new health spa, Extreme Fitness and Wellness in late 2007, representing “NO MONEY DOWN - NO CONTRACT- \$9.95 A MONTH.” The cost and/or fees were advertised to be valid for only a “limited” period, encouraging consumers to join early before the business was totally operational and before the membership dues and fees were increased. (Exhibit A). The Defendants leased a large space at 5004 Frankford Avenue, Lubbock, Texas 79424-1131 and began to pre-sale memberships to their health spa at their leased location and by the Internet. (Exhibit B).

10.2 In lieu of the exercise equipment that the Defendants represented to members was “on its way” and “would be arriving soon”, they represented that they would be offering exercises classes in kick boxing, yoga, yogilates, cross-fit, cardio-sculpt, BOSU and core strength and would provide “free” child care. Representations were made that once the equipment was delivered and the locker room facilities were completed, the Defendants would host a “Grand Opening.” The Defendants encouraged consumers to purchase memberships early, charging a \$25.00 “fee” and represented to consumers that the “fee” would increase to \$100.00 after the “Grand Opening.” The monthly rate of \$9.95 was represented to be “forever.” (See Supporting Affidavits).

10.3 The Defendants advertised that the health spa to be a “full fitness facility”, “open 24/7” after the Grand Opening with a variety of classes, top of the line equipment, cardio-deck, men’s and women’s only shower/ locker room facilities and a daycare. The Defendants represented to consumers that they could cancel their membership in three (3) days and receive a full refund. Additionally, the Defendants represented that should consumers have a dispute with the business, they could make a claim under the Defendants’ surety bond with the State of Texas. (See Supporting Affidavits).

10.4 The Consumer Protection & Public Health Division has received 180 complaints regarding the misrepresentations of the Defendants. The Defendants sold over 800 memberships based upon several misrepresentations, including but not limited to:

- a. “NO MONEY DOWN” but required a \$25 “enrollment fee”;

- b. "NO CONTRACT" but the consumers were required to sign a "membership agreement";
- c. That state of the art exercise equipment would arrive in by March 1st and when it did not arrive, Defendants claimed that it would arrive by April 1st and that they had no idea why the shipment was delayed from California, when Defendants knew at the time that they had not purchased the equipment and did not have the money to purchase the equipment;
- d. That Defendants had a surety bond in place with the Secretary of State; (Exhibit C).
- e. That Defendants would refund the dues/fees to consumers.

10.5 Defendants collected in excess of \$40,000 in pre-sale membership dues and fees from consumers and failed to open a health spa as advertised. (Exhibit D). Defendants have spent the membership dues/fees for their personal use, such as: *Buffalo Wild Wings; Lin's Restaurant; Taco Villa; Jake's Sports Café; Sonic Drive In; Smoothie King; Wing Stop; Georges; Cracker Barrel; O'Hana Sushi Bar; Arby's; Lujan's; Texas Roadhouse; Hooters; The Gas Light; Docs Liquor Store; Chances R; Adolph's Bar & Grill; Brady's Package; Lakeway Liquor; Blockbuster Video; Main Event; Select A Seat; Movie 16; PetSmart; Veterinary Clinic; Buckle; Men's Warehouse; and Red Raider Outfitters.* Defendants also used membership dues/fees to make payments on their personal automobile loans, boat loan, motorcycle loan, mortgage loan and to purchase a membership to Lake Ridge Country Club. Defendants repeatedly transferred money between their business

accounts and personal accounts, commingling the funds from all of their accounts. (Exhibit E).

10.6 On April 11, 2008, the landlord, Alliance Realty Services, changed the locks on the leased premises for the Defendants' non-payment of rent in excess of \$18,000. (Exhibit F).

XI. HEALTH SPA ACT VIOLATIONS

11.1 Defendants have engaged in conduct, as alleged above, in violation of the Health Spa Act, TEX. OCC. CODE ANN. § 702.001, *et seq.* (West 2007), by:

- a. Failing to obtain a health spa operator's certificate, as required by Health Spa Act §702.101;
- b. Failing to complete an application for a health spa operator's certification of registration with the secretary of state in violation of §702.102;
- c. Failing to post a health spa operator's certificate of registration in a conspicuous place at each registered location, as required by Health Spa Act §702.105;
- d. Failing to submit to the comptroller, a copy of the operator's certificate of registration for application of a sales tax permit as required by Health Spa Act §702.107;
- e. Failing to secure a surety bond or posting security with the Texas Secretary of State, as required by Health Spa Act §702.151; and §702.153;
- f. Failing to comply with §702.301 requirements in their membership contracts;

- g. Failing to comply with the disclosure requirements as set forth in §702.302;
- h. Failing to provide the required language in the membership contracts in violation of §702.304;
- I. Failing to provide the statutory language in the membership contracts in violation of §702.305;
- j. Failing to cancel the membership contracts for a full refund in violation of §702.307;
- k. Selling or offering for sell, a membership in a health spa before the health spa opens without a certificate in violation §702.351;
- l. Failing to deposit prepayments for a membership in an escrow account established with a financial institution insured by the Federal Deposit Insurance Corporation in violation of §702.352;
- m. Failing to refund the escrowed prepayment in violation of §702.355;
- n. Offering a special offer or discount to fewer than all prospective members in violation of §702.402;
- o. Misrepresenting the availability, quality, or extent of the facilities or services of the health spa in violation of §702.402;
- p. Misrepresenting the period during which a special offer or discount will be available in violation of §702.402;
- q. Advertising in print or electronic medium without including in the

advertisement the health spa operator's certificate of registration number in violation of §702.404.

XII. DECEPTIVE TRADE PRACTICES ACT VIOLATIONS

12.1 Defendants, as alleged above, 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. By violating the Health Spa Act, the Defendants are in violation of the DTPA. Section 702.403(a) of the Health Spa Act provides that a person who violates the Health Spa Act commits a false, misleading, or deceptive act or practice within the meaning of the DTPA.
- b. By advertising for sale or selling memberships in a health spa without holding a health spa operator's certificate of registration, the Defendants caused confusion or misunderstanding as to certification by the State of Texas in violation of §17.46(b)(2) and §17.46 (3);
- c. By operating a health spa, the Defendants are representing, by implication, that they have the approval of a health spa registered by the Texas Secretary of State, which they do not, in violation of §17.46(b)(5);
- d. By advertising for sale or selling memberships in a health spa without holding a health spa operator's certificate of registration, the Defendants

represented that the services were of a particular standard, when they were of another in violation of §17.46(b) (7);

- e. Representing to consumers a membership to a health spa with “NO MONEY DOWN” but requiring a “enrollment fee” of \$25, is advertising services with intent not to sell them as advertised in violation of §17.46 (b)(9);
- f. Representing to consumers there is “NO CONTRACT” but requiring consumers to sign a “membership agreement,” constitutes advertising services with the intent not to sell them as advertised in violation of §17.46(b)(9);
- g. Failing to disclose that they had not purchased the exercise equipment and/or had the money/financing to purchase/lease the equipment which was known at the time the consumers purchased memberships, and such failure to disclose such information was intended to induce the consumers into a transaction that they would not have entered had the information been disclosed in violation of §17.46(b)(24);
- h. Representing to consumers that they could cancel their membership and receive refunds and by failing to place the pre-paid membership dues into an escrow account and spending the membership dues and fees on personal items, is advertising services with intent not to sell them as advertised in violation of §17.46(b)(9) and failing to disclose information which was

intended to induce the consumers into a transaction that they would not have entered, had the information been disclosed in violation of §17.46(b)(24);

- I. Representing that Defendants had a surety bond in place as required by the State of Texas, when in fact they did not, is representing that the services have approval, sponsorship, status, affiliation or connection which they did not in violation of §17.46(b)(5);
- j. Representing that membership price of \$9.95 per month was limited to the first 100 people, and continuing to sell memberships at \$9.95 after the first 100 were sold was a false or misleading statement to induced the consumer into a transaction into which the consumer would not have entered had the information been disclosed in violation of §17.46(b)(24);
- k. Representing that the “enrollment fee” of \$25 would go up to \$100 after the Grand Opening, was a false or misleading statement 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)(24);

XIII. INJURY TO CONSUMERS

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

XIV. RESTITUTION

14.1 Plaintiff, **STATE OF TEXAS**, seeks this Court to order the Defendants to restore all money or other property taken from identifiable people by means of unlawful acts or practices, or in the alternative award judgment for damages to compensate for such losses.

XV. EQUITABLE RESCISSION

15.1 All agreements between Defendants and consumers should be subject to the equitable remedy of rescission.

XVI. DISGORGEMENT

16.1 All of Defendants' assets are subject to the equitable remedy of disgorgement, which is the forced relinquishment of all benefits that would be unjust for Defendants to retain, including all ill- gotten gains, benefits or profits. Defendants should be ordered to disgorge all monies secured by deception, together with all of the proceeds, profits, income, interest and accessions thereto. Such disgorgement should be for the benefit of victimized consumers and the State of Texas.

XVII. CONSTRUCTIVE TRUST

17.1 A constructive trust should be placed upon all of Defendants' assets in favor of all consumers victimized by Defendants and in favor of the State of Texas until this Court determines the appropriate amount of restitution and disgorgement.

XVIII. CIVIL PENALTIES

18.1 Plaintiff, **STATE OF TEXAS**, seeks this Court to adjudge against Defendants civil penalties in favor of Plaintiff, **STATE OF TEXAS**, for the Defendants' violations of the Health Spa Act and Deceptive Trade Practices Act.

XIX. COSTS

19.1 Plaintiff, **STATE OF TEXAS**, seeks this Court to order the Defendants to pay reasonable expenses, including court costs, attorney's fees, investigative costs, witness fees, and deposition expenses, incurred in obtaining an injunction or recovering a civil penalty pursuant to TEX. OCC. CODE ANN. § 702.551(b). Plaintiff also seeks this court to order the Defendants to pay pre-judgment and post-judgment interest at the highest lawful rate.

XX. APPLICATION FOR EX PARTE TEMPORARY RESTRAINING ORDER AND ASSET FREEZE

20.1 It is essential that the Court immediately and temporarily restrain Defendants from continuing with the conduct described in this Petition, namely the unlawful operation of a health spa. It is essential that the Court act immediately, prior to notice on Defendants and a hearing on the matter, because Defendants will continue to engage in the unlawful operations of a health spa and thereby cause immediate and irreparable injury, loss, or damage to persons who pay for health spa services which the Defendants are unable to lawfully provide. Defendants will continue to solicit members each day and will continue to

receive membership fees and dues from consumers when they are not licensed to operate a health spa in the State of Texas.

20.2 Plaintiff, **STATE OF TEXAS**, also asks that the assets of Defendants be frozen during the pendency of these legal proceedings to preserve monies for consumer restitution upon final judgment. Defendants have received over \$40,000 in membership dues and fees from their victims based on their unlawful health spa operations. The Defendants failed to place the membership dues/fees in an escrowed account pursuant to the Health Spa Act and have use the money for their personal expenses and commingled the funds in their business and personal accounts as stated above. (Exhibit D). Unless an asset freeze is granted, Defendants' remaining assets may be dissipated, lost, altered, removed or materially injured. The interests of the State of Texas and the public require an Ex Parte Asset Freeze to preserve monies for consumer restitution.

XXI. PRAYER

21.1 WHEREFORE, **THE STATE OF TEXAS** prays that the Defendants be cited according to law to appear and answer herein; that before notice and hearing a TEMPORARY RESTRAINING ORDER AND ASSET FREEZE be issued; that after due notice and hearing a TEMPORARY INJUNCTION be issued; and upon trial of this cause a PERMANENT INJUNCTION be issued, restraining and enjoining the Defendants, its officers, agents, servants, employees and attorneys and any other person in active concert or participation with the Defendants, jointly and severally from:

- a. Failing to obtain a health spa operator's certificate, as required by Health Spa Act §702.101;
- b. Failing to complete an application for a health spa operator's certification of registration with the Secretary of State in violation of §702.102;
- c. Failing to post a health spa operator's certificate of registration in a conspicuous place at each registered location, as required by Health Spa Act §702.105;
- d. Failing to submit to the comptroller, a copy of the operator's certificate of registration for application of a sales tax permit as required by Health Spa Act §702.107;
- e. Failing to secure a surety bond or posting security with the Texas Secretary of State, as required by Health Spa Act §702.151; and §702.153;
- f. Failing to comply with §702.301 requirements in their membership contracts;
- g. Failing to comply with the disclosure requirements as set forth in §702.302;
- h. Failing to provide the required language in the membership contracts in violation of §702.304;
- i. Failing to provide the statutory language in the membership contracts in violation of §702.305;
- j. Failing to cancel the membership contracts for a full refund in violation of §702.307;

- k. Selling or offering for sell, a membership in a health spa before the health spa opens without a certificate in violation §702.351;
- l. Failing to deposit prepayments for a membership in an escrow account established with a financial institution insured by the Federal Deposit Insurance Corporation in violation of §702.352;
- m. Failing to refund the escrowed prepayment in violation of §702.355;
- n. Offering a special offer or discount to fewer than all prospective members in violation of §702.402;
- o. Misrepresenting the availability, quality, or extent of the facilities or services of the health spa in violation of §702.402;
- p. Misrepresenting the period during which a special offer or discount will be available in violation of §702.402;
- q. Advertising in print or electronic medium without including in the advertisement the health spa operator's certificate of registration number in violation of §702.404.
- r. Advertising for sale or selling memberships in a health spa without holding a health spa operator's certificate of registration, which causes confusion or misunderstanding as to certification by the State of Texas in violation of §17.46(b)(2) and §17.46 (3);

- s. Operating a health spa without a registering with the Secretary of State, implying that they have the approval of a health spa registered by the Texas Secretary of State, which they do not, in violation of §17.46(b)(5);
- t. Advertising for sale or selling memberships in a health spa without holding a health spa operator's certificate of registration, representing that the services are of a particular standard, when they were of another in violation of §17.46(b) (7);
- u. Representing to consumers a membership to a health spa with "NO MONEY DOWN" but requiring a "enrollment fee" of \$25, advertising services with intent not to sell them as advertised in violation of §17.46 (b)(9);
- v. Representing to consumers there is "NO CONTRACT" but requiring consumers to sign a "membership agreement," advertising services with the intent not to sell them as advertised in violation of §17.46(b)(9);
- w. Failing to disclose that they had not purchased the exercise equipment and/or had the money/financing to purchase/lease the equipment which was known at the time the consumers purchased memberships, and such failure to disclose such information was intended to induce the consumers into a transaction that they would not have entered had the information been disclosed in violation of §17.46(b)(24);

- x. Representing to consumers that they could cancel their membership and receive refunds and by failing to place the pre-paid membership dues into an escrow account and spending the membership dues and fees on personal items, advertising services with intent not to sell them as advertised in violation of §17.46(b)(9) and failing to disclose information which was intended to induce the consumers into a transaction that they would not have entered, had the information been disclosed in violation of §17.46(b)(24);
- y. Representing that Defendants had a surety bond in place as required by the State of Texas, when in fact they did not, representing that the services have approval, sponsorship, status, affiliation or connection which they did not in violation of §17.46(b)(5);
- z. Representing that the membership price of \$9.95 per month, was limited to the first 100 people, and continuing to sell memberships at \$9.95 after the first 100 were sold, a false or misleading statement to induced the consumer into a transaction into which the consumer would not have entered had the information been disclosed in violation of §17.46(b)(24);
- aa. Representing that the “enrollment fee” of \$25 would go up to \$100 after the Grand Opening, a false or misleading statement to induced the consumer into a transaction into which the consumer would not have entered had the information been disclosed in violation of §17.46(b)(24);

- bb. Concealing, withholding, destroying, mutilating, altering, falsifying, or removing from the jurisdiction of this Court any books, records, documents, invoices, receipts, or other written material relating to the Defendants currently or hereafter in Defendants' possession, custody or control except in response to further orders or subpoenas in this cause.

21.2 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 Defendants' answer date, with reasonable shortened notice to Defendants and their attorney, if known.

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

- a. Adjudge against the Defendants, jointly and severally, civil penalties in favor of Plaintiff, **STATE OF TEXAS**, in an amount of up to \$1,000.00 per violation of the Health Spa Act not to exceed a total of \$25,000.00, pursuant to TEX. OCC. CODE ANN. § 702.553(a) (b); and
- b. Adjudge against the Defendants, jointly and severally, civil penalties in favor of Plaintiff, **STATE OF TEXAS**, in the amount of up to \$20,000.00 per violation of the Deceptive Trade Practices Act, pursuant to §17.47(c)(1) of the DTPA; and
- c. Adjudge against the Defendants, jointly and severally, civil penalties in favor of Plaintiff, **STATE OF TEXAS**, in the amount of \$250,000.00 for

- violations of the Deceptive Trade Practices Act if the consumer was 65 years of age or older, pursuant to §17.47(c)(2) of the DTPA; and
- d. Order the Defendants jointly and severally, to restore all money or other property taken from identifiable people by means of unlawful acts or practices, or in the alternative award judgment for damages to compensate for such losses; and
 - e. Order disgorgement of all monies taken by Defendants as a result of their unlawful health spa practices; and
 - f. Place an equitable lien on all of Defendants' asset and rescind all membership and/or fee agreements entered into by and between Defendants and their customers; and
 - g. Freeze all assets known and unknown of Defendants to insure restitution for consumers; and
 - h. 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); and
 - I. Adjudge against the Defendants jointly and severally, reasonable expenses, including court costs, attorney's fees, investigative costs, witness fees, and deposition expenses, incurred in obtaining an injunction or recovering a civil penalty pursuant to TEX. OCC. CODE ANN. § 702.551(b); and

j. Adjudge against the Defendants jointly and severally, pre-judgment and post-judgment interest at the highest lawful rate.

21.4 Further, Plaintiff, **STATE OF TEXAS**, respectfully prays that this Court will order the Defendants to return to the State of Texas all records, whether electronic or hard copy, which Defendants have collected in the regular course of business or by other means, which contain personal identifying information and sensitive personal information of consumers, as identified in TEX. BUS & COM. CODE ANN. §35.48 and §48.001, *et seq.*

21.5 Further, Plaintiff, **STATE OF TEXAS**, respectfully prays for all other relief to which the Plaintiff may be justly entitled.

DATED this 25th day of August, 2008.

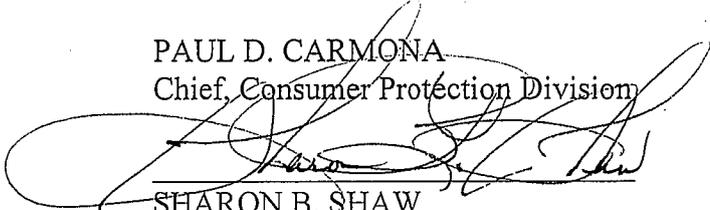
Respectfully submitted,

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