

Attorney No. 99000

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

PEOPLE OF THE STATE OF ILLINOIS,

PLAINTIFF,

vs.

CRUSH, LLC, A UTAH LIMITED LIABILITY COMPANY;
and TMP NEVADA, INC., A NEVADA CORPORATION,

DEFENDANTS.

09C1129100

COMPLAINT FOR INJUNCTIVE AND OTHER RELIEF

NOW COMES the Plaintiff, the People of the State of Illinois, by Lisa Madigan, Attorney General of Illinois, who brings this action complaining of the Defendants, Crush, LLC, a Utah Limited Liability Company; and TMP Nevada, Inc., a Nevada Corporation, (hereinafter "Defendants") and states as follows:

I.

JURISDICTION

1. This action is brought for and on the behalf of the PEOPLE OF THE STATE OF ILLINOIS, by Lisa Madigan, Attorney General of Illinois, pursuant to the provisions of the Consumer Fraud and Deceptive Business Practices Act, (hereafter, "Consumer Fraud Act"), 815 ILCS 505/1 *et seq.*, the Uniform Deceptive Trade Practices Act, 815 ILCS 510/2 *et seq.* and her common law authority as Attorney General of Illinois.

2. Venue for this action properly lies in Cook County, Illinois, pursuant to sections 2-101 and 2-102(a) of the Illinois Code of Civil Procedure 735 ILCS 5/2-101, 5/2-102(a) in that

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CHANCERY DIV.

the corporate defendants, Crush, LLC and TMP Nevada, Inc. are foreign corporations conducting business in Illinois without being registered to do so and are therefore considered non-residents, 735 ILCS 2-102 and as such, an action against these non-resident defendants may be commenced in any county, 735 ILCS 2-101.

II.

THE PARTIES

3. Plaintiff, THE PEOPLE OF THE STATE OF ILLINOIS, by Lisa Madigan, Attorney General of Illinois, is charged, *inter alia*, with enforcement of the Consumer Fraud and Deceptive Business Practices Act (815 ILCS 505/1 et seq.).

4. Defendant, Crush, LLC, is a Utah Corporation that was incorporated on November 5, 2008, and has done business from 11778 Election Road, Suite 140, Draper, Utah, 84020.

5. Defendant, Crush, LLC also utilizes a fulfillment house in Florida, at an address of 4650 SW 51st, Suite 771, Davie, Florida, 33314.

6. Defendant, TMP Nevada, Inc., is a Nevada Corporation with the address, 3838 Raymert Drive, Suite 3, Las Vegas, NV 89121, and is the manager of Crush, LLC.

7. For purposes of this Complaint, any references to the acts and practices of Defendants shall mean that such acts and practices are by and through the acts of said corporations' officers, owners, directors, employees, or other agents.

8. To adhere to the fiction of separate corporate existence between the corporate defendants Crush, LLC and TMP Nevada, Inc., would serve to sanction fraud and promote injustice.

III.

COMMERCE

9. Subsection 1(f) of the Consumer Fraud and Deceptive Business Practices Act (815 ILCS 505/1(f) et seq.) defines “trade” or “commerce” as follows:

The terms ‘trade’ and ‘commerce’ mean the advertising, offering for sale, sale, or distribution of any services and any property, tangible or intangible, real, personal, or mixed, and any other article, commodity, or thing of value wherever situated, and shall include any trade or commerce directly or indirectly affecting the people of this State.

IV.

DEFENDANTS’ COURSE OF CONDUCT

10. Defendants were at all times relevant hereto, engaged in the trade or commerce in the state of Illinois by advertising, offering for sale, and selling dietary supplements through various Internet website such as Myspace and Facebook. Consumers clicking on such sites are linked to Defendants’ sites, including www.extremeacaiberry.com and www.nubodi.com .

11. Defendants used misleading and/or false celebrity endorsements as a centerpiece of their online advertisements, such as “Discover Oprah’s top rated diet that celebrities use to get thin.”(Plaintiff’s exhibit 1).

12. Defendants used pictures of celebrities such as Oprah Winfrey and Dr. Mehmet Oz touting significant weight loss and implying a connection to defendants’ products.

13. Defendants offered a “risk free trial offer” for a dietary supplement product sold free of charge to a consumer who would pay only a shipping and handling fee for the delivery of the product.

14. Defendants failed to adequately disclose all material terms and conditions that apply when a consumer purchased one of its products under a “risk free trial offer,” by burying

terms and conditions at the very bottom of the webpage in small print or via a web page link existing independently from the purchasing page.

15. Defendants automatically enrolled the consumers who accepted the Defendants' "free trial offer" in an ongoing purchase program whereby it would charge consumers for additional dietary supplement products unless the consumers contacted the Defendants to cancel the home delivery plan within 14 days from the date the consumers placed the "free trial offer".

16. Defendants failed to provide consumers adequate time to cancel to the home delivery plan by not delivering the free trial product within a reasonable time, giving the consumers limited or no time in which to try the dietary supplement. Indeed, in some cases consumers were afforded no time at all to cancel future delivery of the products, as consumers received the trial offer product later than the 14 day trial period set forth in the hidden terms and conditions.

17. Defendants failed to provide adequate means for the consumers to communicate with the Defendants when the consumers called to cancel the hidden multiple orders by repeatedly ignoring the consumers' cancellations.

18. Defendants failed to clearly and conspicuously disclose to consumers that they were enrolling in a multiple order program if they failed to cancel their order within 14 days of placing said order.

19. Defendants continued to deliver the dietary supplement products to consumers and charged consumers' credit or debit card for each additionally delivered product, without consumers' knowledge or consent, despite consumers' repeated attempts to cancel any further delivery and to obtain refunds.

20. Defendants have offered a free trial offer for a dietary supplement product free of

charge to a consumer who paid a shipping and handling fee for the delivery of the product and failed to deliver the product in a timely manner despite the consumer's repeated inquiries.

21. Because of Defendant's delays in shipping the trial offers, consumers were not able to try the product by the date they were supposed to cancel their orders in a timely manner.

22. In response to refund requests, Defendants repeatedly ignored consumers and failed to make refunds.

23. To date, 22 complaints against Defendants have been filed with various law enforcement agencies by Illinois consumers. The consumers have been billed by Defendants various amounts ranging from \$29.95 a month to \$89.95 a month.

24. Consumers in most cases received no resolution from the Defendants despite their repeated efforts to communicate with the Defendants. Plaintiff reserves the right to prove that additional consumers have been injured as a result of said unlawful practices.

Consumer Illustrations

25. To date, the Plaintiff has received 22 complaints against the Defendants as of the time this complaint is filed and intends to seek restitution for these complainants, as well as for all additional consumer complainants the Plaintiff discovers

26. More specifically, but not by way of limitation, the following allegations are pled as illustrations of unlawful business practices of the Defendants and are not meant to be exhaustive. The Attorney General brings this lawsuit because it is in the public interest to restrain unfair or deceptive acts or practices taking place against consumers in Illinois. The unlawful activities of Defendants are ongoing and Plaintiff reserves the right to present other consumers as witnesses to demonstrate Defendant's unfair or deceptive practices.

Julie Cronin

27. On or about November 1, 2008, Julie Cronin of Mt. Prospect, Illinois saw an advertisement for an Acai berry dietary supplement product on Defendants' website, www.extremeacaiberry.com.

28. The Defendants' website offered a 14 day free trial offer for their acai berry product, Acai Berry 500 for free for a shipping and handling fee of \$3.95.

29. On or about November 5, 2008, Ms. Cronin agreed to pay the one-time shipping and handling fee of \$3.95 for the delivery of the free product, and paid \$3.95 by providing her credit card information through the website.

30. On or about November 15, 2008, prior to ever receiving the "trial offer" in the mail, Ms. Cronin was billed on her credit card for an \$87.00 charge from Defendant Crush, LLC.

31. Upon receiving this charge, Cronin immediately tried to cancel her order..

32. Despite attempting to cancel her order in a timely fashion, Cronin was unable to do so.

33. Ms. Cronin was told that her name was not in "the database" in order for her charge to be cancelled. She was then referred to subsequent Customer Service Numbers that were "no longer in service" or otherwise disconnected.

34. Despite her repeated attempts to resolve her complaint with the Defendants, Ms. Cronin was unable to have the charges removed from her credit card by Defendants.

35. Ultimately, Ms. Cronin had to have her credit card company cancel her credit card and provide her with a new card to avoid further charges by Defendants.

Mark Howerter

36. On or about September 1, 2008, Mark Howerter of Monmouth, Illinois saw an Internet advertisement for the Defendants' dietary supplement product on the extremeacaiberry.com website.

37. Through the website, the Defendants offered a free "trial size" bottle of the product for free for a shipping and handling fee of \$3.95.

38. Mr Howerter ordered the product with his credit card for a total charge of \$3.95.

39. Within a few days, Howerter received his credit card bill and noticed a charge of \$89.31 billed to him by the Defendants.

40. For the next several weeks, Howerter made several phone calls to the toll free number provided by the defendants, but each time he was unable to get the charge removed from his credit card.

41. Additionally Howerter was billed for an additional product he did not order.

42. Despite calling the Defendants several times, Howerter was directed by Defendant to the "terms and conditions" page which appeared in smaller print at the very bottom of the webpage that required consumers to cancel their order within 14 days to avoid being enrolled in the Defendant's "program".

L.A. Bushmeyer

44. On or about November 28, 2008, L.A. Bushmeyer of Hull, Illinois saw a banner advertisement featuring Oprah Winfrey for an Acai berry dietary supplement on the internet.

45. After clicking the banner, Bushmeyer was led to www.extremeacaciberry.com, a website affiliated with Defendants.

45. The Defendants' website offered a 14 day free trial supply for their acai berry product for free for a shipping and handling fee of \$1.00.

46. Within one week of placing her order, Ms. Bushmeyer received a charge of \$89.00 on credit card bill.

47. On that very same day, Defendants billed Bushmeyer an amount of \$89.00 in addition to the \$1.00 that she agreed upon.

48. Upon calling Defendants to dispute the unauthorized charge, Bushmeyer was informed that she could not cancel her order.

49. Ultimately, Ms. Bushmeyer was able to have her credit card company cancel her charge and block any further charges by Defendants.

V.

APPLICABLE STATUTES

50. Section 2 of the Consumer Fraud Act provides, in pertinent part:

Unfair methods of competition and unfair or deceptive acts or practices, including but not limited to the use or employment of any deception, fraud, false pretense, false promise, misrepresentation or the concealment, suppression or omission of any material fact, with intent that others rely upon the concealment, suppression or omission of such material fact, or the use or employment of any practice described in Section 2 of the "Uniform Deceptive Trade Practices Act," approved August 5, 1965, in the conduct of any trade or commerce are hereby declared unlawful whether any person has in fact been misled, deceived or damaged thereby

815 ILCS 505/2.

VI.

VIOLATIONS

51. The Defendants engaged in a course of trade or commerce which constitutes unfair and deceptive acts or practices declared unlawful under Section 2 of the Consumer Fraud and Deceptive Business Practices Act (815 ILCS 505/2) by:

A. Representing, directly or by implication, that a product sample being offered as a “free trial offer”, or words of similar import, without disclosing all of the material terms and conditions that a consumer must satisfy in order to receive the sample, particularly the fact that consumers must cancel before the end of the free trail period because they will be otherwise billed on their credit or debit card;

B. Representing, directly or by implication, that a product sample being offered as a “free trial offer”, when in many cases consumers are billed for additional products before the free trial has ended and therefore consumers are unable to cancel future product shipments in time to avoid future charges;

C. Implying endorsements of their products by celebrities when in fact no such relationship existed. (Plaintiff’s exhibit 2).

D. Failing to disclose all material terms and conditions to the consumers who placed the “free trial offer” by hiding the terms and conditions in a place not reasonably detectable by the consumers;

E. Failing to disclose the material fact that payment information provided by consumers for shipping and handling charges will be used by defendants to charge consumers for automatic product shipments in the future.

F. Collecting money from consumers who placed the “free trial offer” and never delivering the goods to the consumers despite receiving the shipping and handling fee from the

consumers;

G. Failing to deliver the "free trial" goods in advance of charging for additional

orders;

H. Failing to make refunds upon the request of consumers when goods or products were never delivered or never ordered;

I. Failing to make refunds upon the request of consumers when goods or products not previously agreed by the consumers were delivered;

J. Failing to answer phone calls or emails from consumers wishing to cancel their order; and

K. Failing to provide such consumers a reasonable time to respond and cancel any orders after a free trial

L. Failing to provide such consumers a reasonable notice of the continuity or re-billing agreement.

VII.

REMEDIES

52. Section 7 of the Consumer Fraud Act provides in relevant part:

Whenever the Attorney General ... has reason to believe that any person is using, has used, or is about to use any method, act or practice declared by this Act to be unlawful, and that proceedings would be in the public interest, he or she may bring an action in the name of the People of the State against such person to restrain by preliminary or permanent injunction the use of such method, act or practice. The Court, in its discretion, may exercise all powers necessary, including but not limited to: injunction; revocation; forfeiture or suspension of any license, charter, franchise, certificate or other evidence of authority of any person to do business in this State; appointment of receiver; dissolution of domestic corporations or association suspension or termination of the right of foreign corporations or associations to do business in this State; and restitution.

In addition to the remedies provided herein, the Attorney General ... may request and the Court may impose a civil penalty in a sum not to exceed \$50,000 against any person found by the Court to have engaged in any method, act or practice declared unlawful under this Act. In the event the court finds the method, act or practice to have been entered into with the intent to defraud, the court has the authority to impose a civil penalty in a sum not to exceed \$50,000 per violation.

815 ILCS 505/7.

VIII.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, PEOPLE OF THE STATE OF ILLINOIS, prays for the following relief:

A. A finding that Defendants have engaged in unfair or deceptive acts or practices in the conduct of trade or commerce in violation of the Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/2;

B. An order preliminarily and permanently enjoining Defendants from advertising and offering any healthcare or diet supplements for sale on the Internet;

C. An order preliminarily and permanently enjoining Defendants from advertising and offering any product for sale on the Internet that uses a phony blog (known also as "flogs") or customized "news article" designed or written by defendant or an agent of defendant, including affiliate marketers and affiliate networks;

D. An order preliminarily and permanently enjoining Defendants from using the names or images of any celebrity or well known person in connection with the advertisement of any product manufactured, marketed, sold or shipped by Defendants;

E. An order preliminarily and permanently enjoining Defendants by any other name or through any other corporation, partnership or business entity in which Defendants have any interest, from engaging in the trade or commerce of advertisement or sales of dietary supplement;

F. An order preliminarily and permanently enjoining Defendants from using the words “free” “or free trial” or “no obligation” or words of similar import without clearly and conspicuously disclosing shipping and handling charges and whether the consumer may be enrolled in a repeating order program.

G. An order preliminarily and permanently enjoining Defendants from enrolling consumers in any repeating order program;

H. An order requiring Defendants to pay restitution to all consumers who have suffered injury as a result of Defendant’s unlawful acts and practices;

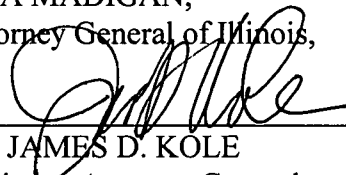
I. An order requiring Defendants to pay a civil penalty of Fifty Thousand Dollars (\$50,000.00), and an additional penalty of Fifty Thousand Dollars (\$50,000.00) per violation of the Consumer Fraud and Deceptive Business Practices Act for such violations the Court finds that defendant committed with intent to defraud;

J. An order requiring Defendants to pay an additional civil penalty of Fifty Thousand Dollars (\$50,000.00), per violation of the Consumer Fraud and Deceptive Business Practices Act found by the Court to have been committed against a person 65 years or older as provided by Section 7(c) of the Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 7(c);

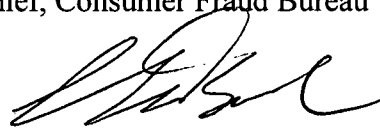
K. An order requiring Defendants to pay all costs for the prosecution and investigation of this action, as provided by Section 10 of the Consumer Fraud Act, 815 ILCS 505/1 *et seq.*; and

L. An order granting any further relief that this Court deems just and necessary.

PEOPLE OF THE STATE OF ILLINOIS,
LISA MADIGAN,
Attorney General of Illinois,



By: JAMES D. KOLE
Assistant Attorney General
Chief, Consumer Fraud Bureau



ADAM SOKOL
Assistant Attorney General

LISA MADIGAN
Attorney General

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Report
Oprah's Top Diet



Discover Oprah's top-rated diet that celebrities use to get thin. I'm no celebrity, but it worked for me.

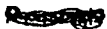


EXHIBIT
1

Attorney No. 99000

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

PEOPLE OF THE STATE OF ILLINOIS,)
)
Plaintiff,)
)
vs.)
)
Crush, LLC , a Utah Limited Liability Company;)
and TMP Nevada, Inc. , a Nevada corporation,)
)
Defendants.)
)

Affidavit of OW Licensing Company, LLC

I, Doug Pattison do hereby swear under oath that if called as a witness in the above captioned matter, I would competently testify as follows:

1. I currently am employed as VP and Treasurer for OW Licensing Company, LLC.
2. OW Licensing Company, LLC is a Delaware Limited Liability Company with its principal place of business in Chicago, Illinois..
3. OW Licensing Company, LLC is the holder of rights of publicity and related rights to Ms. Oprah Winfrey.
4. Ms. Oprah Winfrey is an individual residing in the State of Illinois.
5. She is the host of the nationally syndicated "The Oprah Winfrey Show".
6. Ms. Oprah Winfrey has never endorsed any acai berry supplement or acai related product by name.



7. Ms. Oprah Winfrey has never approved or agreed to have her image or name used in conjunction with the sale and marketing of any acai berry related product.

FURTHER AFFIANT SAYETH NOT

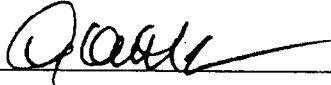


VP and Treasurer for OW Licensing Company, LLC

August 18, 2009

Date

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth are true and correct, except as to such matters stated therein stated to be on information and belief and to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.



VP and Treasurer for OW Licensing Company, LLC

August 18, 2009

Date

FURTHER AFFIANT SAYETH NOT




Dr. Mehmet C. Oz, MD

8/18/09

Date

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth are true and correct, except as to such matters stated therein stated to be on information and belief and to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.



Dr. Mehmet C. Oz., MD

8/18/09

Date