

Cause No. **352 238801 09**

STATE OF TEXAS,
Plaintiff

IN THE DISTRICT COURT

v.

AUSTIN HILTON d/b/a
FX SUPPLEMENTS .COM and d/b/a
ACAIBERRYMAXX.COM; and
HILTON HG, LTD.

Defendant

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____ JUDICIAL DISTRICT

TARRANT COUNTY, TEXAS

PLAINTIFF'S ORIGINAL PETITION
FOR CIVIL PENALTIES AND FOR INJUNCTIVE RELIEF

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, the State of Texas, Plaintiff, acting by and through Attorney General Greg Abbott, and files this Plaintiff's Original Petition for Civil Penalties and for Injunctive Relief complaining of and against AUSTIN HILTON d/b/a FX SUPPLEMENTS.COM and d/b/a ACAIBERRYMAXX.COM; and HILTON HG, LTD.

I. PARTY PLAINTIFF

1. This suit is brought by the ATTORNEY GENERAL through the Consumer Protection Division in the name of the STATE OF TEXAS and in the public interest under the authority granted to him by Section 17.47 of the Deceptive Trade Practices-Consumer Protection Act ("TDTPA"). The TDTPA permits the Attorney General's office to bring an action to restrain, by temporary restraining order, temporary injunction, or permanent injunction, the use of any method, act or practice declared to be unlawful by Section 17.46 of the TDTPA.

FILED
TARRANT COUNTY
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THOMAS A. WILDER
DISTRICT CLERK

II. PARTY DEFENDANTS

- 2.1 Defendant AUSTIN HILTON is an individual residing in Texas and may be served with citation and process at his home at 5006 Deerwood Park Drive #D Arlington, TX 76017-3743 or at his place of business 916 113th Street Ste. B, Arlington, TX 76011 or wherever he may be found. Defendant AUSTIN HILTON d/b/a/ FX SUPPLEMENTS.COM and ACAIBERRYMAXX.COM as an individual doing business in and residing in Texas may also be served with citation and process at his home at 5006 Deerwood Park Drive #D Arlington, TX 76017-3743 or at his place of business 916 113th Street Ste. B, Arlington, TX 76011.
- 2.2 Defendant HILTON HG, LTD. is a domestic limited partnership organized and existing under the laws of the State of Texas that engages in business in the State of Texas. The registered agent for HILTON HG, LTD. is Charles Hilton, deceased. Each general partner and the registered agent of a limited partnership are agents of the limited partnership on whom process may be served. Tex. Revised Limited Partnership Act. §1.08(a). Charles Hilton is deceased and consequently cannot be served with process. The general partner of HILTON HG, LTD, is HILTON HG MANAGEMENT L.L.C. The registered agent for HILTON HG MANAGEMENT L.L.C. is Charles Hilton, deceased. Whenever a limited liability company fails to maintain a registered agent, the Secretary of State shall be an agent of such limited liability company. Tex. Limited Liability Company Act Art. 2.08(B). Consequently, Defendant HILTON HG, LTD. which may be served with process by serving its General Partner HILTON HG MANAGEMENT L.L.C. by serving the Secretary of State

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for the State of Texas, 1019 Brazos Street, Austin, Texas 78701, as its agent for service of process because HILTON HG MANAGEMENT L.L.C. failed to appoint or does not maintain a registered agent in Texas. Tex. Bus. Org. Code § 5.251(A). The most recent address of HILTON HG MANAGEMENT L.L.C. on file with the Secretary of State is 913 113th Street Ste. B, Arlington, TX 76011.

III. AUTHORITY

3. This action is brought by the Attorney General through his Consumer Protection Division under the authority granted by section 17.47 of the Texas Deceptive Practices-Consumer Protection Act (TDTPA).

IV. VENUE

- 4.1 Venue of this action lies in Tarrant County on the basis of section 15.002(a)(1) and (3) of the Texas Civil Practice and Remedies Code because all or a substantial part of the events or omissions giving rise to this cause of action occurred in Tarrant county.
- 4.2 Venue of this action also lies in Tarrant County pursuant to section 17.47(b) of the TDTPA because transactions and events giving rise to this action occurred in Tarrant County and/or because Defendants have done or are doing business in Tarrant County.

V. PUBLIC INTEREST

5. By reason of the institution and operation of the unlawful practices set forth herein, Defendants have and will cause immediate and irreparable injury, loss and damage to the STATE OF TEXAS and its citizens, and will also cause adverse effects to legitimate business enterprise which conducts its trade and commerce in a lawful manner in this State.

Therefore, the Attorney General of the State of Texas believes and is of the opinion that these proceedings are in the public interest.

VI. ACTS OF AGENTS

6. Whenever in this petition it is alleged that Defendants did any act or thing, it is meant that Defendants performed or participated in such act or thing and that such act was performed by the officers, agents, or employees of Defendants, and in each instance, the officers, agents, or employees of Defendants that were then authorized to and did in fact act on behalf of Defendants or otherwise acted under the guidance and direction of the Defendants.

VII. TRADE AND COMMERCE

7. Defendants are engaged in "trade" and "commerce" as defined by section 17.45(6) of the TDTPA as that Defendants are engaged in the sale of dietary supplements.

VIII. NOTICE BEFORE SUIT

8. Plaintiff provided notice to Defendants regarding this action of the alleged unlawful conduct of which complaint is now made, pursuant to Section 17.47(a) of the TDTPA on February 6, 2009.

IX. SPECIFIC FACTUAL ALLEGATIONS

- 9.1 In November 2008, Austin Hilton advertised Acai Berry Maxx on his website fxsupplements.com. and acaiberrymaxx.com. Advertisements for Acai Berry Maxx at fxsupplements.com were placed on banners on Internet sites. Consumers clicked on the banner and were taken to the fxsupplement.com and acaiberrymaxx.com web sites.
- 9.2 Consumers were then given four minutes to order a "free trial" of Acai Berry Maxx.

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According to the website, “acai berries antioxidant powers reduce the risk of heart disease, Alzheimer’s disease, cancer, and premature aging.” In addition, the website advertised that Acai Maxx flushes 10, 20, 30 pounds of waste and toxins from the body. Consumers were given four minutes to place their orders in order to receive a free trial of Acai Berry Maxx.

9.3 Consumers who ordered Acai Berry Maxx were charged a Shipping and Handling fee of \$5.95. Consumers provided a credit card or debit card number to implement the transaction. Consumers could click on a page titled “Privacy Policy” and/or a page titled “Terms and Conditions.” When the consumers clicked on the Terms and Conditions tab, the consumer viewed a three-page-single -spaced document. On the first page of the Terms and Conditions, consumers were informed that they would receive a free 15-day-supply bottle of Acai Berry Maxx which retails for \$64.98. By accepting the Acai Berry Maxx, consumers would be enrolled in a Renewable Program. Consumers were told they could cancel the membership within 14 days from the date that they placed the trial order and they would receive no future shipments. Moreover, 14 days after the initial product was ordered they would be shipped a full month’s supply (two-15-day bottles for the price of \$79.96). Each 30 days, the consumer’s credit card would be charged \$79.96 plus a \$5.95 shipping and handling fee.

9.4. It was not until three quarters of the way down page two of the terms and conditions, that the Negative Option Clause was discussed. In this clause, consumers could read that consumers would be liable for monthly charges of \$79.96 per month plus shipping and handling if they failed to notify the supplier not to supply the goods. On the second page of

the Terms and Conditions page, consumers were notified they could cancel their order by emailing cancel@acaiberrymaxx.com. Finally, on the third page of the terms and conditions, consumers were told that the product was not intended to diagnose, treat, cure or prevent any disease.

9.5. Over 350 consumers filed complaints with the Better Business Bureau and the Office of the Attorney General the following complaints:

- A. Consumers were offered a “free trial” but then were charged shipping and handling fees;
- B. Fourteen days was insufficient time to try the product and to cancel further shipments of the product;
- C. Consumers understood they would get 10 or 14 free days to try the product without any obligations;
- D. Consumers did not receive the trial sample of Acai Berry Maxx until after the time allotted to cancel the product and stop continued shipments;
- E. Consumers did not receive the product but were charged for the product;
- F. Consumers were not aware that they had entered into a renewable program where they would receive continued, automatic shipments of products;
- G. Consumers were not aware that when they received their 10 or 14 day trial, they would be charged \$79.95 for the bottle they had already received;
- H. The information regarding the continuity/renewable program was not proximate to the offer and not clear and conspicuous; and

- I. Consumers were unable to contact FX Supplements.com by email or telephone to cancel the shipment of Acai Berry Maxx;
- J. Phones were not answered and FX Supplements.com did not respond to emails asking to cancel shipments; and
- K. Consumers could only stop the charges by cancelling their credit cards.

X. VIOLATIONS OF THE DECEPTIVE TRADE PRACTICES

- 10. Defendants, as set out in Paragraphs 1 through 11, in the course and conduct of trade and commerce, have directly and indirectly engaged in and will continue to engage in false, misleading, deceptive or unconscionable acts and practices declared unlawful by Sections 17.46(a) and (b) of the Texas Deceptive Trade Practices Act, including but not limited to:
 - A. Causing confusion or misunderstanding as to the affiliation, connection, or association with, or certification of supplements by including on the final page of terms and conditions and in fine print on the web site that the supplements were not intended to diagnose, treat, cure or prevent any disease and that the products had not been evaluated by the Food and Drug Administration after advertising in large print that Acai Berries are “Naturally potent in antioxidants, Acai Berries antioxidant powers reduce the risk of Heart Disease, Alzheimer’s Disease, Cancer, Premature Aging” and “Acai Berry is Dr. Perricone’s #1 Recommended Super Food” in violation of Section 17.46(b)(3) of the TDTPA;
 - B. Representing that the supplements offered have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have or in

violation of Section 17.46(b)(5) of the TDTPA;

- C. Advertising supplements with the intent not to sell them as advertised in violation of Section 17.46(b)(9) of the TDTPA;
- D. Representing that an agreement to receive free supplements and/or to purchase supplements has rights, remedies, or obligations which it does not have or involve, or which are prohibited by law in violation of Section 17.46(b)(12) of the TCTPA;
- E. Failing to disclose information concerning goods or services which was known at the time of transaction if 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 Section 17.46(b)(24) of the TCTPA.

XI. LIABILITY OF AUSTIN HILTON, INDIVIDUALLY

11. The Texas Business Corporation Act provides that a holder of shares, an owner of any beneficial interest in shares is under no obligation to the corporation or to the obligees ... unless the obligee demonstrates that the owner, subscriber, or affiliate caused the corporation to be sued for the purpose of perpetrating and did perpetrate an actual fraud on the obligee primarily for the direct personal benefit of the holder, owner, subscriber, or affiliate. Tex. Bus. Corp. Act Art. 2.21(A)(2). Moreover, "Courts will not disregard the corporation fiction and hold individual officers, directors, or stockholders liable on the obligation of a corporation except where it appears the individuals are using the corporate entity as a sham to perpetrate a fraud, to avoid personal liability, avoid the effect of a statute, or in a few other exceptional situations." *Bell Oil & Gas Co. v. Allied Chemical Corp.*, 41 S.W. 2d 336 at 340

(Tex. 1968).

XII. INJURY TO CONSUMERS

12. By means of the foregoing unlawful acts and practices, Defendants have acquired money or other property from identifiable persons to whom such money should be restored, or who in the alternative are entitled to an award of damages.

XIII. DISGORGEMENT

13. All of the 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 and benefits or profits that result from Defendants putting fraudulently converted property to a profitable use. Defendants should be ordered to disgorge all monies fraudulently taken from individuals and businesses 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.

XIV. NECESSITY OF IMMEDIATE HALT TO DECEPTIVE TRADE PRACTICES

14. Plaintiff requests immediate relief by way of a Temporary Injunction to prevent Defendants AUSTIN HILTON d/b/a FX SUPPLEMENTS.COM and d/b/a ACAIBERRYMAXX.COM; and HILTON HG , LTD. from harming additional consumers resulting in the consumers' loss of money.

XV. PRAYER

15. Wherefore, premises considered, Plaintiff prays that after due notice and hearing a TEMPORARY INJUNCTION be issued; and upon final hearing a PERMANENT

INJUNCTION be issued restraining and enjoining AUSTIN HILTON d/b/a FX SUPPLEMENTS.COM and d/b/a ACAIBERRYMAXX.COM; and HILTON HG , LTD. their successors, assigns, officers, agents, servants, employees, and attorneys and any other person in active concert or participation with these Defendants from engaging in the following acts or practices:

A. Prohibited Advertising Practices and the Use of the Term “Free”

- 16.1. Using the word(s) “free,” “free sample,” “free trial,” “no obligation,” or other words of similar import in television, radio, internet or any other advertising of Defendants’ products, without clearly and conspicuously disclosing in close proximity to the word(s), the following:
- (a) That, if true, the consumer must pay any shipping and handling charges (such charges not being excessive in amount); and
 - (b) That, if true, the consumer may be required to enroll in a program with a Negative Option Feature and that such Negative Option Feature may result in additional charges to the consumer.
- 16.2. Using the word(s) “free,” “free sample,” “free trial,” “no obligation,” or other words of similar import in Advertising other than television or radio, without clearly and conspicuously disclosing in close conjunction with the word(s) all terms and conditions associated with the use of the word(s).
- 16.3. Using the word(s) “free,” “free sample,” “free trial,” “no obligations,” or other words of similar import in violation of the Federal Trade Commission’s Guide Concerning the Use

of the Word "Free," 16 CFR Part 251 or any applicable law of the State of Texas.

- 16.4. Using the words "Get your free trial, order in the next ____ minutes", "limited time," "while supplies last," "this week only," or other words of similar import, unless such limitations are actually applied.
- 16.5. Make any representations that are false, deceptive or misleading, or failing to clearly and conspicuously disclose any material fact.

B. Mandatory Disclosures

- 17.1. Plaintiff further prays that Defendants, their employees, agents and servants be thereby restrained and enjoined from failing to disclose, truthfully, and clearly and conspicuously, before obtaining a consumer's express authorization to bill or charge the consumers for any goods or services, all material terms and conditions for the purchase of any such goods or services, including but not limited to:
- 17.2. The quantity of any goods or services that are the subject of the sales offer.
- 17.3. All material restrictions, limitations, or conditions to purchase, receive or use the goods or services that are the subject of the sales offer.
- 17.4. A statement that the trial sample that will be sent to the consumer includes (1) will arrive in a container that contains one entire month's supply, (2) if the consumer does not cancel the order within 14 days of receipt the consumer will be charged for the full month's supply and (3) if the consumer does not cancel the order within 14 days of receipt, the consumer will continue to receive the product and will be charged for the product.
- 17.5. All policies regarding refunds, guarantees, cancellations, exchanges and repurchases,

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including any policy that refunds will not be made, or that cancellations or exchanges will not be accepted.

- 17.6. The number of payments that must be made (if more than one), the dates or time periods when the payments will be required or charged, the amount of each payment, and the total cost.
- 17.7. If true, that Billing Information that the seller already possesses, either because the customer previously provided it to the seller, or the seller obtained it from another source, will be used to bill or charge the consumer.
- 17.8. If the offer includes a Negative Option Feature or Membership, all material terms and conditions of the Negative Option Feature or Membership, including but not limited to the fact that the consumer's account will be automatically charged unless the consumer takes affirmative action to avoid the charges, when the charges will be submitted for payment, the specific steps the consumer must take to avoid the charges, when a consumer cancellation request must be received by the Defendants, and a telephone number or address where the consumer's cancellation request should be directed; provided that with respect to the first such automatic shipment or automatic renewal, the telephone disclosures must identify the specific date by which the consumer must take an affirmative action to avoid the charge.
- 17.9. If any of the Defendants obtain a consumer's Billing Information to purchase any goods or services and then solicits the purchase of other goods or services, an affirmative disclosure must be made of all material terms and conditions for the purchase of each additional good or service before obtaining the consumer's express authorization to bill or charge for such

additional good or service.

C. Mandatory Disclosures with Product Shipments

- 18.1. Plaintiff further prays that Defendants, their employees, agents and servants be thereby restrained and enjoined from:
- 18.2. Failing to provide, prior to charging the consumer for any goods or services supplied pursuant to a Negative Option Feature, a written document clearly and conspicuously disclosing all material terms and conditions of the sale including, but not limited to the fact that the consumer is currently enrolled in Defendants' Negative Option Feature, that the consumer's account will be charged for the first and all successive product shipments under the Negative Option Feature unless the consumer cancels his or her enrollment in the Negative Option Feature, the specific steps the consumer must take to cancel enrollment in the Negative Option Feature, including a telephone number, physical address, or email address where a notice to cancel enrollment may be directed and the amount of time the consumer has to submit such notice to the Defendants. The disclosure document required under this Paragraph must be a separate, stand-alone document and not contain any sales or promotional material and shall be conspicuously placed within the shipment so as to be unavoidable. The document shall also provide clear and conspicuous notice that the consumer has the right to a refund, along with instructions on how to exercise such right; provided that Defendants may set terms and conditions for refund policies (such as a reasonable time limit within which consumers may request a refund, or that shipping and handling charges will not be refunded), only if Defendants have clearly and conspicuously

disclosed such terms with the offer.

- 18.3. Failing to provide consumers at least fourteen (14) days after receipt of the introductory or free shipment which enrolls the consumer in a Negative Option Feature, and at least fourteen (14) days after receipt of any succeeding shipment under a Negative Option Feature, within which to cancel the continuity program and to avoid any future charges.

D. Guarantee and Refund Promises

- 19.1. Plaintiff further prays that Defendants, their employees, agents and servants be thereby restrained and enjoined from:
- 19.2. With respect to any good or service offered with a money-back guarantee by Defendants, failing to submit a request to the appropriate credit card processor or mail a check if appropriate, within fourteen (14) business days of Defendants' receipt of a refund request, a full refund of the purchase price of the good or service, including any shipping costs, insurance, handling, or any other fee or charge paid by the consumer; provided, however, that Defendants may set terms and conditions for such money-back guarantee (such as a reasonable time limit within which consumers may request a refund, or that shipping and handling charges will not be refunded), only if Defendants have clearly and conspicuously disclosed such terms and conditions in close proximity to the money-back guarantee offer.
- 19.3. Failing to honor any representations made by Defendants regarding refunds.
- 19.4. Failing to clearly and conspicuously disclose, at the time a consumer makes a new order, modifies his/her order, or requests a refund, all the terms and conditions that may impact any refund policy or money-back guarantee that the Defendants are providing. Such disclosure

shall be made by the Defendants prior to accepting any modified or new order by the consumer.

- 19.5. Failing to honor a request that Defendants receive to cancel enrollment in a Continuity Program, when such a request is consistent with clearly and conspicuously disclosed terms and conditions of the Continuity Program. Provided, however, that if Defendants receive or discover credible evidence that any of their agents, servants, representatives, employees, and all persons or entities in active concert or participation with any of them who receive actual notice of this Order by personal service or otherwise, have made any representation to a consumer during a transaction that is inconsistent with or contradicts any of the disclosures required by this Order, Defendants must offer to the consumer an appropriate refund and cancellation of his or her enrollment in the Continuity Program. If a consumer asserts, directly or through a third party, without any evidence, that a representation inconsistent with or contradicting any of the disclosures required by this Order was made, the Defendants, unless they can produce evidence to the contrary, must offer to the consumer an appropriate refund and cancellation of his or her enrollment in the Continuity Program.

E. Maintaining Accessibility to Telephone Personnel

20. Plaintiff further prays that Defendants, their employees, agents and servants be thereby restrained and enjoined from failing to ensure consumer accessibility to personnel manning any telephone number that Defendants provide for canceling any order for Products, goods or services, for requesting refunds, or for effectuating any money-back guarantee. For purposes of this Paragraph, "consumer accessibility" shall mean that, under normal operating

conditions, at least ninety percent (90%) of all calls placed during each consecutive three (3) month period to such telephone numbers shall be connected to Defendants' personnel no later than nine (9) minutes after the call is answered. In addition, for purposes of this Paragraph, "calls placed" shall exclude any call placed by a consumer if a consumer voluntarily disconnects within twenty (20) seconds. Further, Defendants shall ensure that all telephone calls placed to such numbers are answered within four (4) rings and that if live personnel are not immediately available to conduct business with the consumer when the phone is answered, Defendants must deliver over the telephone a Clear and Conspicuous recording that live personnel should be available to assist the consumer within nine (9) minutes.

F. Responding to Consumer Complaints

21. Plaintiff further prays that Defendants, their employees, agents and servants be thereby restrained and enjoined from failing to investigate and promptly resolve any consumer complaint or request for refund received by Defendants and to notify the consumer of the resolution of the complaint or request and the reason therefore.

G. Wholesalers, Distributors, and Resellers

- 22.1. Plaintiff further prays that Defendants, their employees, agents and servants be thereby restrained and enjoined from:
- 22.2. Including in any contract with any wholesaler, distributor, or known reseller of Defendants' Products terms and conditions that conflict with the requirements of the terms of any Temporary Injunction or Final Judgment and Permanent Injunction.

- 22.3. Failing to provide all wholesalers, distributors, and known reseller of Defendants' Products with a copy of any Temporary Injunction, as may be issued by this Court, within ten (10) business days of the entry of any such Temporary Injunction. For any wholesalers, distributors, and known resellers that initiates distribution of Defendants' Products ten (10) or more business days after the entry of this Agreed Final Judgment and Permanent Injunction, and that has not previously received a copy of any Temporary Injunction, Defendants shall immediately transmit a copy to the wholesaler or known reseller.
- 22.4. Providing to, or approving the use of, marketing materials or information, labeling, product packaging or package inserts, or products, to wholesalers, distributors, and known resellers of Defendants' products that do not comply with the requirements of any Temporary Injunction or Final Judgment and Permanent Injunction.

H. Civil Penalties

- 23.1. Plaintiff further prays that upon final hearing, this Court grant a judgment against Defendants jointly and severally for payment of civil penalties of \$20,000.00 per violation of the TDTPA to the State of Texas. *See Texas Deceptive Trade Practices Act § 17.47(c)(1).*
- 23.2. Plaintiff further prays that upon final hearing this Court grant a judgment against Defendants jointly and severally for payment of civil penalties of \$250,000.00 per violation of the TDTPA if the consumer was 65 years of age or older. *See Texas Deceptive Trade Practices Act § 17.47(c)(2).*

I. Additional Provisions

24. Plaintiff further prays that, upon final hearing, this Court order Defendants to jointly and severally 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. *See* Texas Deceptive Trade Practices Act § 17.47(d).
25. Plaintiff further prays that, upon final hearing, this Court order each and every Defendant to disgorge all monies taken from consumers through deceptive practices, including gains and benefits or profits resulting from violations of the TDTPA.
26. Plaintiff further prays for costs of Court, reasonable attorneys' fees as provided in Texas Government Code Ann. Section 402.006(c), that any and all relief be denied Defendants and for such other and further relief to which Plaintiff may be justly entitled.

Respectfully submitted,

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