

IN THE COURT OF COMMON PLEAS
BELMONT COUNTY, OHIO

FILED

COUNTY PLEAS COURT

BELMONT CO., OHIO

Case No. 13 CV 0263

2015 MAR 2 PM 12:40

JUDGE FRANK A. FREGIATO

CRISTINA M. GATE
CLERK OF COURT

STATE OF OHIO, *ex rel.*
MICHAEL DEWINE,
ATTORNEY GENERAL OF OHIO,

Plaintiff/Relator,

-vs-

FRED'S PARTY CENTERS, INC, *et al.*

Defendants/Respondents.

AGREED CONSENT JUDGMENT
ENTRY AND ORDER BETWEEN
PLAINTIFF AND DEFENDANTS
FREDERICK R. FRYMAN AND
FRED'S PARTY CENTERS, INC.

PREAMBLE

This matter came to be heard upon the filing of a Complaint by Plaintiff, State of Ohio, acting through Ohio Attorney General Michael DeWine ("Plaintiff"), alleging that Defendants Fred's Party Centers, Inc., doing business as Martin's Ferry Party Center and Bridgeport Party Center, and Defendants Frederick P. Fryman, Joyce Fryman, The Real Property at 819 S. Zane Highway, Martins Ferry, Ohio 43935 (Parcel ID No. 24-03789.000), and The Real Property at 895 National Road, Bridgeport, Ohio 43912 (Parcel ID No. 23-00276.000),¹ violated Ohio's Consumer Protection and Public Nuisance laws.

Specifically, Plaintiff's Complaint alleges that Defendants Fred's Party Centers, Inc., doing business as Martin's Ferry Party Center and Bridgeport Party Center, and Frederick P. Fryman, violated the Ohio Consumer Sales Practices Act ("CSPA"), R.C. 1345.01 et seq., and the Substantive Rules enacted thereunder, and that all named Defendants in Plaintiff's Complaint violated Ohio's public nuisance laws, R.C. 3767.01 et seq.

¹ As Plaintiff's claims regarding violations of Ohio's Public Nuisance Laws have already been addressed, this Agreed Consent Judgment only addresses the remaining pending violations of the Consumer Sales Practice Act, R.C. 1345.01 et seq., as applied to Defendants Fred's Party Centers, doing business as Martins Ferry Party Center and Bridgeport Party Center, and Frederick P. Fryman, Individually and as Owner of Fred's Party Centers.

Plaintiff has reached an agreement with Defendants Frederick Fryman and Fred's Party Centers, Inc., doing business as Martin's Ferry Party Center and Bridgeport Party Center ("Defendants"), and this Agreed Consent Judgment Entry and Order ("Consent Judgment") is intended to resolve all of the pending CSPA claims alleged against Defendants in the Complaint. By signing this entry, Defendants submit to the personal jurisdiction of this Court and consent to the entry of this Consent Judgment pursuant to R.C. 1345.07(F).

Defendants hereby consent to the Court's findings of facts and conclusions of law, to the imposition of this Consent Judgment and to the rights of Plaintiff to enforce this Consent Judgment. Pursuant to R.C. 1345.10, this Consent Judgment is not admissible as *prima facie* evidence of the facts on which it is based for any subsequent proceedings brought by any party under R.C. 1345.09.

FINDINGS OF FACT

1. Defendant Fred's Party Centers, Inc. ("Fred's Party Centers") is an Ohio corporation with its principal place of business located at 895 National Road, Bridgeport, Ohio 43912.
2. Defendant Fred's Party Centers does business as Martins Ferry Party Center, a registered fictitious business name with the Ohio Secretary of State's Office, which has its principal place of business located at 819 S. Zane Highway, Martins Ferry, Ohio 43935.
3. Defendant Fred's Party Centers also does business as Bridgeport Party Center, which has its principal place of business located at 895 National Road, Bridgeport, Ohio 43912. Bridgeport Party Center is not registered as a fictitious business name with the Ohio Secretary of State's Office.

4. Defendant Frederick P. Fryman ("Fryman") is a resident of the State of Ohio and Belmont County is the owner of Fred's Party Centers, doing business as Martins Ferry Party Center and Bridgeport Party Center.
5. Defendant Fryman, at all times relevant hereto, operated, dominated, controlled and directed the activities of Fred's Party Centers, doing business as Martins Ferry Party Center and Bridgeport Party Center, causing and/or ratifying the acts and practices of Fred's Party Centers, doing business as Martins Ferry Party Center and Bridgeport Party Center, as described in Plaintiff's Complaint.
6. Defendants were, at all times relevant herein, engaged in the business of soliciting, offering for sale, and selling, *inter alia*, synthetic narcotics/illegal drugs to consumers which were represented as "incense" or "potpourri."
7. Defendants sold the synthetic narcotics/illegal drugs in packets that failed to disclose the full list of ingredients contained in the products and further omitted the illegal ingredients contained in the products.
8. Between February 16, 2013 and March 22, 2013, the Belmont County Drug Task Force conducted undercover investigations into Fred's Party Centers' sale of synthetic narcotics/illegal drugs as legal products. The undercover investigations occurred at both the Bridgeport and Martins Ferry locations in Belmont County.

MARTINS FERRY PARTY CENTER

9. On February 20, 2013, an undercover officer operating under the direction of the Belmont County Drug Task Force, went to Martins Ferry Party Center ("Martins Ferry"), located at 819 S. Zane Highway, Martins Ferry, Ohio 43935, for the purpose of purchasing synthetic narcotics/illegal drugs.

10. The undercover officer drove a vehicle through the Martins Ferry drive-thru and asked the clerk if they sold "Diablo." When the clerk said they did, the undercover officer purchased a packet of "Diablo," as well as a packet of "White Cat Cigars" for a total of \$23.51.
11. The 3-gram packet of "Diablo" was labeled as "Botanical Incense" and had a label on the back noting that it was "sold as incense only" and was "not for human consumption."
12. The "Diablo" packet listed the following Ingredients: "Bay Bean, Siberian Motherwort, Mugwort, Blue Lotus, Lion Tail, Aroma Essence."
13. The "Diablo" packet further claimed the following: "Potpourri does not contain any of the following: JWH-018, JWH-073, HU-210, HU-211, CP-47, 497" and that "It's Legal in 50 States, 100% Legal."
14. Although the "Diablo" packet claimed it was legal and did not contain any illegal and prohibited ingredients, when tested, the vegetation inside the packet of "Diablo" did contain [1-(5-fluoropentyl)indol-3-yl]-(2,2,3,3-tetramethylcyclopropyl)methanone ("XLR11").
15. XLR11 is a Schedule I Controlled Substance. (See R.C. 3719.41(C)(41))

BRIDGEPORT PARTY CENTER

16. On February 16, 2013, Lieutenant Jerry Delman of the Bridgeport Police Department, and a member of the Belmont County Drug Task Force, went to the Bridgeport Party Center ("Bridgeport"), located at 895 National Road, Bridgeport, Ohio 43912, for the purpose of determining if the business sold synthetic narcotics/illegal drugs.
17. Upon entering Bridgeport, Lt. Delman observed ten boxes behind the counter labeled as "Herbal Incense."

18. When Lt. Delman asked the clerk to see one of the herbal incense packages, the clerk handed Lt. Delman a pack of "Diablo" Herbal Incense and stated that the cheaper incense sold for around \$22.00 per pack.
19. When Lt. Delman asked the clerk why the package said "must be 18," the clerk replied, "Because it's a tobacco product."
20. Lt. Delman then inquired if they had any other incense for sale, to which the clerk replied that "You mean the stuff you burn for the aroma?" and pointed to a shelf with stick incense being sold for \$0.25 cents per stick.
21. The stick incense was available to customers to pick up, while the herbal incense, such as the "Diablo," was behind the counter.
22. Lt. Delman left Bridgeport without making any purchases.
23. On March 22, 2013, an undercover officer operating under the direction of the Belmont County Drug Task Force went to Bridgeport, located at 895 National Road, Bridgeport, Ohio 43912, for the purpose of purchasing synthetic narcotics/illegal drugs.
24. Upon entering Bridgeport, the undercover officer spoke to the store clerk about purchasing "fake weed" and purchased one 11-gram packet of "Kush, Pineapple," one 10-gram packet of "Klimax," and a strawberry zig-zag wrap, for a total cost of \$127.06.
25. The 11-gram packet of "Kush, Pineapple" claimed that it contained the following ingredients: "Mullien Leaf, hops, Lemon balm, Indian Leaves, passion flower, and Wild Lettuce" and that it contained "no nicotine or tobacco products."
26. The "Kush, Pineapple" packet contained a warning to "KEEP OUT OF REACH OF CHILDREN" and that it was "NOT INTENDED FOR HUMAN CONSUMPTION."

27. Finally, the “Kush, Pineapple” packet claimed that it was “Lab Certified” and stated that “This product contains no prohibited chemicals or materials. This product is legal for sale in all 50 states as of September 1, 2011.”
28. The 10-gram packet of “Klimax Potpourri” purported to carry the “Kush” trademark and noted it had a “New Improved Strong Aroma.”
29. The back of the “Klimax Potpourri” packet noted that the ingredients were simply “various herbs.”
30. The “Klimax Potpourri” packet warned that “This Product Is Not To Be Burned or Smoked” and that it was “Not Intended for Human Consumption!”
31. In addition, the “Klimax Potpourri” packet cautioned that one “Must be 18 years or age or older to purchase.”
32. Finally, the “Klimax Potpourri” packet contained the following statement regarding the legality of the product: “This product does not contain 122 and AM2201, AM678, JWH-018, 073, 200, CP-47, 497, C8, cannabicyclohexanol, or HU-210.”
33. Approximately thirty minutes after making the purchases described in Paragraphs 24-32 above, the undercover officer drove through the Bridgeport drive-thru and purchased one 4-gram packet of “OMG, Herbal Potpourri” one 3-gram packet of “botanical incense” labeled as “Diablo,” and a strawberry zig-zag wrap for a total cost of \$48.54.
34. The 3-gram packet of “Diablo” was labeled as “Botanical Incense” and had a label on the back nothing that it was “sold as incense only” and was “not for human consumption.”
35. The “Diablo” packet listed the following Ingredients: “Bay Bean, Siberian Motherwort, Mugwort, Blue Lotus, Lion Tail, Aroma Essence.”

36. The “Diablo” packet further claimed the following: “Potpourri does not contain any of the following: JWH-018, JWH-073, HU-210, HU-211, CP-47, 497” and that “It’s Legal in 50 States, 100% Legal.”
37. Although each of the “Kush, Pineapple” “Klimax, Potpourri,” and “Diablo” packets purchased claimed they were legal and did not contain any illegal or prohibited ingredients, when tested, the vegetation inside each packet did contain XLR11.²
38. “Incense” is defined as “material used to produce a fragrant odor when burned” or “the perfume exhaled from some spices and gums when burned.” (<http://www.merriam-webster.com/dictionary/incense>)
39. “Potpourri” is defined as “a mixture of flowers, herbs, and spices that is usually kept in a jar and used for scent.” (<http://www.merriam-webster.com/dictionary/potpourri>)
40. Unlike typical incense, which is composed of certain biotic materials, and typical potpourri, which is composed of naturally fragrant plant materials, the vegetation misrepresented as “botanical incense” and “potpourri” products and sold by Fryman and Fred’s Party Centers, doing business as Martins Ferry Party Center and Bridgeport Party Center, is coated with illegal and dangerous synthetic compounds that, when consumed, mimic the psychoactive and physiological effects of tetrahydrocannabinol (“THC”), the active ingredient in cannabis, which is also an illegal Schedule I controlled substance. (See R.C. 3719.41(C)(27))(www.dea.gov)
41. Fryman and Fred’s Party Centers, doing business as Martins Ferry Party Center and Bridgeport Party Center, sold products labeled as “incense” and “potpourri” which

² When tested, the “OMG, Herbal Potpourri” packet did not contain any controlled substances.

contained illegal Schedule I controlled substances and for which the ordinary and customary use for such products is to be smoked and consumed as a drug by humans.

42. Fryman and Fred's Party Centers, doing business as Martins Ferry Party Center and Bridgeport Party Center, offered for sale and sold synthetic narcotics/illegal drugs as legal products.

CONCLUSIONS OF LAW

1. The Court has jurisdiction over the subject matter, issues, and parties to this Consent Judgment pursuant to R.C. 1345.04.
2. The Court has venue to hear this case pursuant to Ohio Civ. R. 3(B)(1)-(3) in that Belmont County is the county in which Defendants reside, have their principal place of business and some of the transactions complained of herein, and out of which this action arose, occurred in Belmont County.
3. The CSPA, R.C. 1345.01 et seq., governs the business practices of the Defendants.
4. The Ohio Attorney General is the proper party to commence these proceedings under the authority of R.C. 1345.07 and by virtue of his statutory and common law authority to protect the interests of the citizens of the State of Ohio.
5. Defendants are "suppliers," as defined in R.C. 1345.01(C), as Defendants were, at all times relevant herein, engaged in the business of effecting consumer transactions by soliciting, offering for sale, and selling synthetic narcotics/illegal drugs to individuals in Belmont County in the State of Ohio for purposes that were primarily personal, family, or household within the meaning specified in R.C. 1345.01(A) and (D).
6. Defendants have committed unfair, deceptive, and unconscionable acts or practices in violation of the CSPA, R.C. 1345.02(A) and R.C. 1345.03(A), by offering for sale and

selling synthetic narcotics/illegal drugs as legal products.

7. Defendants have committed unfair and deceptive acts or practices in violation of the CSPA, R.C. 1345.02(A), by failing to clearly and conspicuously disclose that its products contained Schedule I controlled substances and were thus illegal.
8. Defendants have committed unfair and deceptive acts or practices in violation of the CSPA, R.C. 1345.02(A), and the Exclusions and Limitations in Advertising Rule, Ohio Admin. Code 109:4-3-02(A)(1), by failing to clearly and conspicuously disclose certain material exclusions related to its “incense” and “potpourri” products. Specifically, while Defendants’ “incense” and “potpourri” products contained statements that they did not contain any prohibited ingredients or that they only contained certain ingredients, Defendants failed to disclose that their products contained other Schedule I controlled substances and were thus illegal.

ORDER

For purposes of affecting this Consent Judgment Entry and Order, it is therefore ORDERED, ADJUDGED, AND DECREED that:

1. Plaintiff’s request for a Declaratory Judgment is GRANTED; and it is therefore DECLARED that the acts and practices set forth in the Findings of Fact and enumerated in the Conclusions of Law set forth above in Paragraphs (6) through (8) violate the CSPA, R.C. 1345.01 et seq., and the Substantive Rules enacted thereunder, in the manner set forth therein.
2. Defendants, their officers, partners, agents, representatives, salespersons, employees, independent contractors, successors, assigns, and all persons acting on behalf of Defendants, directly or indirectly, through any corporate device or private device,

partnership or association in connection with any consumer transaction, including any person or entity which purchases any interest in the business and continues to operate the business, are hereby PERMANENTLY ENJOINED from violating the CSPA, R.C. 1345.01 et seq.

3. Defendants, their officers, partners, agents, representatives, salespersons, employees, independent contractors, successors, assigns, and all persons acting on behalf of Defendants, directly or indirectly, through any corporate device or private device, partnership or association in connection with any consumer transaction, including any person or entity which purchases any interest in the business and continues to operate the business, are hereby PERMANENTLY ENJOINED from engaging in the acts and practices enumerated in the Conclusions of Law set forth above in Paragraphs (6) through (8).
4. IT IS FURTHER ORDERED that Defendants are PERMANENTLY ENJOINED from soliciting and engaging in the business of effecting consumer transactions by soliciting, offering for sale, and/or selling incense products, potpourri products, or synthetic narcotics/illegal drugs in the State of Ohio as suppliers, as defined in R.C. 1345.01(C).
5. IT IS FURTHER ORDERED Defendants shall, for a period of two (2) years commencing on the filing date of this Consent Judgment, post a sign on each door of the business premises located at 819 S. Zane Highway, Martins Ferry, Ohio 43935 and 895 National Road, Bridgeport, Ohio 43912 that states that Defendants do not sell synthetic narcotics/illegal drugs. The sign shall contain bold print in at least 28 point font that specifically states:

“INCENSE,” “POTPOURRI,” AND ANY OTHER NOVELTY PRODUCTS WHICH MAY CONTAIN SCHEDULE I CONTROLLED SUBSTANCES OR OTHER SYNTHETIC NARCOTICS/ILLEGAL DRUGS WILL NOT BE SOLD AND MAY NOT BE PURCHASED ON THESE PREMISES.

6. IT IS FURTHER ORDERED that Defendants shall cooperate with the Ohio Attorney General or his representative by providing the Ohio Attorney General, upon his request and upon reasonable twenty-four (24) hour notice, copies of any and all records in the possession and/or control of Defendants which are necessary to establish compliance with the law, this Consent Judgment, and any court order granted herein, or to permit the Ohio Attorney General or his representative to inspect and/or copy any and all such records that are in the possession and/or control of Defendants.
7. IT IS FURTHER ORDERED that as part of the consideration for the termination of the Attorney General’s investigation and litigation of Defendants’ business practices under the CSPA, R.C. 1345.01 et seq., Defendants are assessed, jointly and severally, and shall pay Twenty-Five Thousand Dollars (\$25,000.00) to the Office of the Ohio Attorney General’s General Holding Account (R004). Said payment shall be used by the Attorney General for such purposes that may include, but are not limited to, education about the use and danger of synthetic narcotics/illegal drugs, and the investigation and enforcement for violations in relation to synthetic drug production, distribution, and possession. Said payment is due and payable upon execution of this Consent Judgment and shall be made by delivering a certified check or money order, payable to the “Ohio Attorney General’s Office,” to:

**Finance Assistance
Consumer Protection Section
30 East Broad Street, 14th Floor
Columbus, Ohio 43215**

8. The Attorney General may assert any claim that Defendants have violated this Consent Judgment in a separate civil action to enforce this Consent Judgment or to seek any other relief afforded by law. In any such action or proceeding, relevant evidence of conduct that occurred before the filing date of this Consent Judgment shall be admissible on any material issue, including alleged willfulness, intent, knowledge, contempt or breach, to the extent permitted by law. By this paragraph, Defendants do not waive any evidentiary objection or any other objection it may have as permitted by law to the admissibility of any such evidence.
9. IT IS FURTHER ORDERED that any violation of the terms of this Consent Judgment shall constitute contempt. Service of any action for contempt shall be complete upon mailing a certified copy of such action to undersigned counsel for Defendants.
10. In the event the Ohio Attorney General must initiate legal action or incur any costs to compel Defendants to abide by this Consent Judgment, upon order of the Court, Defendants shall be liable to the Ohio Attorney General for any and all penalties imposed by the Court for contempt and, in addition to the payment to the State awarded herein, any such costs and reasonable attorneys' fees expended to proceed with such a motion for contempt that the Court may impose.
11. Failure of the Attorney General to timely enforce any term, condition, or requirement of this Consent Judgment shall not provide, nor be construed to provide, Defendants a defense for noncompliance with any term of this Consent Judgment or any other law,

rule, or regulation; nor shall it stop or limit the Attorney General from later enforcing any term of this Consent Judgment or seeking any other remedy available by law, rule, or regulation.

12. Nothing in this Consent Judgment shall in any way preclude any investigation or enforcement action against Defendants under any legal authority granted to the State for transactions not subject to this action.

13. IT IS FURTHER ORDERED that Defendants shall not represent directly or indirectly or in any way whatsoever that the Court or the Ohio Attorney General has sanctioned, condoned, or approved any part or aspect of Defendants' business operation.

14. IT IS FURTHER ORDERED that Defendants shall pay all court costs associated with this matter.

15. This Court shall retain jurisdiction to enforce compliance with this Consent Judgment.

IT IS SO ORDERED.

Frank A. Fregiato

DATE

HON. JUDGE FREGIATO

**JOINTLY APPROVED FOR ENTRY AND SUBMITTED BY:
FOR THE OHIO ATTORNEY GENERAL, MICHAEL DEWINE**



MELISSA G. WRIGHT (0077843)

2-10-15

Date

Assistant Section Chief
Consumer Protection Section
CHARISSA PAYER (0064452)
Principal Assistant Attorney General
Health & Human Services Section
30 East Broad Street, 14th Floor
Columbus, Ohio 43215-3428
(614) 466-8169; (866) 528-7423 (facsimile)
melissa.wright@ohioattorneygeneral.gov
charissa.payer@ohioattorneygeneral.gov
Counsel for Plaintiff, State of Ohio

**FOR DEFENDANTS FREDERICK A. FRYMAN AND FRED'S PARTY CENTERS,
INC., DOING BUSINESS AS MARTINS FERRY PARTY CENTER AND BRIDGEPORT
PARTY CENTER**



DENNIS W. MCNAMARA (0005114)

2-10-15

Date

88 East Broad Street, Suite 1350
Columbus, Ohio 43215
(614) 464-2770; (614) 464-0043 (facsimile)
mcnamara@rr.ohio.com

*Counsel for Defendants Frederick Fryman and Fred's Party Centers, Inc., doing business as
Martins Ferry Party Center and Bridgeport Party Center*