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Consumer Protection Section

April 21, 2020

Via Email

To: Happy River, LLC
d/b/a Functional Medical Center of Fort Collins
c/o Benjamin Galyardt
110 W. Harvard St.
Fort Collins, CO 80525
doctor@fmcenters.com

Cease and Desist Notice

This letter is intended to serve as **NOTICE** that the Colorado Attorney General's Office has cause to believe that Happy River, LLC, d/b/a Functional Medical Center of Fort Collins ("Functional Medical Center") and its owner Benjamin Galyardt have engaged in, or are currently engaging in, unfair or deceptive trade practices as defined in § 6-1-105 of the Colorado Consumer Protection Act, §§ 6-1-101 through -1214, C.R.S. ("CCPA").

Specifically, § 6-1-105(1) prohibits, among other things:

- knowingly or recklessly making a false representation as to the source, sponsorship, approval, or certification of goods, services, or property;
- knowingly or recklessly making a false representation as to affiliation, connection, or association with or certification by another;
- knowingly or recklessly making a false representation as to the characteristics, ingredients, uses, benefits, alterations, or quantities of goods or services;
- making a false or misleading statement of fact concerning the price of goods or services;

- failing to disclose material information concerning goods or services in connection with the advertisement or sale of such goods or services; and,
- knowingly or recklessly engaging in any unfair, unconscionable, deceptive, deliberately misleading, false, or fraudulent act or practice.

From the Colorado Attorney General's Office's investigation, it appears that Galyardt and Functional Medical Center have engaged in or are currently engaging in the prohibited conduct described above in connection with the advertisement and sale of purported antibody tests for COVID-19 by, among other things:

- falsely or misleadingly claiming that the antibody tests have been approved by the FDA;
- falsely or misleadingly stating that the results of the antibody tests are conclusive;
- falsely or misleadingly stating that a positive test for SARS-CoV-2 antibodies indicates immunity to COVID-19;
- making false statements concerning the cost to Functional Medical Center of the antibody tests and/or the profit or loss realized by Functional Medical Center of providing such tests;
- failing to make disclosures regarding the limitations of antibody tests for SARS-CoV-2 that are required by the FDA, including that the test has not been reviewed by the FDA, that negative results do not rule out SARS-CoV-2 infection, that results from antibody testing should not be used as the sole basis to diagnose or exclude SARS-CoV-2 infection or to inform infection status, and that positive results may be due to past or present infection with non-SARS-CoV-2 coronavirus strains, such as coronavirus KHU1, NL63, OC43, or 229E, and/or opining without a sufficient basis that consumers should ignore the FDA's required disclosures.

I have attached a copy of the relevant provision of the CCPA for your review.

Violators of the CCPA are subject to penalties of up to \$20,000 per violation or up to \$50,000 per violation if the consumer victim is sixty (60) years of age or older. *See* § 6-1-112, C.R.S. Costs and attorney fees shall be awarded to the attorney general in all actions where the attorney general successfully enforces the CCPA. § 6-1-113(4), C.R.S.

This Notice constitutes a demand by the Colorado Attorney General's Office that Galyardt and Functional Medical Center immediately **CEASE AND DESIST** any and all violations of the CCPA, including but not limited to (1) claiming that any antibody test offered by Galyardt or Functional Medical Center is approved by the FDA if such is not the case; (2) making false, misleading, or unsubstantiated

representations in connection with the sale or offer for sale of any test that purports to detect the presence or absence of COVID-19 or of SARS-CoV-2 antibodies, including any representations that contradict guidance and requirements announced by the FDA; 3) marketing, advertising, or otherwise offering for sale any test that purportedly detects the presence or absence of COVID-19 or SARS-CoV-2 antibodies without clearly and conspicuously disclosing all information required by the FDA on any such advertisement, marketing material, or offer for sale; (4) making false, misleading, or unsubstantiated claims regarding the disclosures required by the FDA for any test that purports to detect the presence or absence of COVID-19 or SARS-CoV-2 antibodies; and (5) making false or misleading statements concerning the cost to Functional Medical Center of any antibody test, Functional Medical Center's overhead, and/or the profit or loss realized by Functional Medical Center for administering any such test.

Please acknowledge receipt of this Notice and your agreement to cease the above-described activities by signing below and returning the signed original document to this office by **April 28, 2020**.

Failure to submit the signed acknowledgement of this Cease and Desist Notice may result in further enforcement action by the Colorado Attorney General's Office. This office will continue to monitor consumer complaints to ensure your compliance with this demand. Violations of the CCPA may result in further legal action, including the filing of a civil lawsuit. Any questions you have relating to this Notice should be directed to Jonathan Helfgott at 720-508-6217 or at jonathan.helfgott@coag.gov.

Sincerely,

FOR THE ATTORNEY GENERAL

s/ Jonathan A. Helfgott

Jonathan A. Helfgott
Assistant Attorney General II
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ACKNOWLEDGEMENT

I, Benjamin Galyardt, acknowledge that I have received and reviewed the above-contained notice and advisement. I hereby certify that Happy River, LLC and I agree to CEASE & DESIST the sale of any goods or services to consumers unless and until Happy River, LLC and I are in full compliance with all requirements of the CCPA. I represent that I have the authority to sign this acknowledgement on behalf of Happy River, LLC.

Signature

Title

Print Name

Date

West's Colorado Revised Statutes Annotated
Title 6. Consumer and Commercial Affairs (Refs & Annos)
Fair Trade and Restraint of Trade
Article 1. Colorado Consumer Protection Act (Refs & Annos)
Part 1. Consumer Protection--General (Refs & Annos)

C.R.S.A. § 6-1-105

§ 6-1-105. Unfair or deceptive trade practices

Effective: January 1, 2020

[Currentness](#)

- (1) A person engages in a deceptive trade practice when, in the course of the person's business, vocation, or occupation, the person:
- (a) Either knowingly or recklessly passes off goods, services, or property as those of another;
 - (b) Either knowingly or recklessly makes a false representation as to the source, sponsorship, approval, or certification of goods, services, or property;
 - (c) Either knowingly or recklessly makes a false representation as to affiliation, connection, or association with or certification by another;
 - (d) Uses deceptive representations or designations of geographic origin in connection with goods or services;
 - (e) Either knowingly or recklessly makes a false representation as to the characteristics, ingredients, uses, benefits, alterations, or quantities of goods, food, services, or property or a false representation as to the sponsorship, approval, status, affiliation, or connection of a person therewith;
 - (f) Represents that goods are original or new if he knows or should know that they are deteriorated, altered, reconditioned, reclaimed, used, or secondhand;
 - (g) Represents that goods, food, services, or property are of a particular standard, quality, or grade, or that goods are of a particular style or model, if he knows or should know that they are of another;
 - (h) Disparages the goods, services, property, or business of another by false or misleading representation of fact;
 - (i) Advertises goods, services, or property with intent not to sell them as advertised;

- (j) Advertises goods or services with intent not to supply reasonably expectable public demand, unless the advertisement discloses a limitation of quantity;
- (k) Advertises under the guise of obtaining sales personnel when in fact the purpose is to first sell a product or service to the sales personnel applicant;
- (l) Makes false or misleading statements of fact concerning the price of goods, services, or property or the reasons for, existence of, or amounts of price reductions;
- (m) Fails to deliver to the customer at the time of an installment sale of goods or services a written order, contract, or receipt setting forth the name and address of the seller, the name and address of the organization which he represents, and all of the terms and conditions of the sale, including a description of the goods or services, stated in readable, clear, and unambiguous language;
- (n) Employs “bait and switch” advertising, which is advertising accompanied by an effort to sell goods, services, or property other than those advertised or on terms other than those advertised and which is also accompanied by one or more of the following practices:
 - (I) Refusal to show the goods or property advertised or to offer the services advertised;
 - (II) Disparagement in any respect of the advertised goods, property, or services or the terms of sale;
 - (III) Requiring tie-in sales or other undisclosed conditions to be met prior to selling the advertised goods, property, or services;
 - (IV) Refusal to take orders for the goods, property, or services advertised for delivery within a reasonable time;
 - (V) Showing or demonstrating defective goods, property, or services which are unusable or impractical for the purposes set forth in the advertisement;
 - (VI) Accepting a deposit for the goods, property, or services and subsequently switching the purchase order to higher-priced goods, property, or services; or
 - (VII) Failure to make deliveries of the goods, property, or services within a reasonable time or to make a refund therefor;
- (o) Either knowingly or recklessly fails to identify flood-damaged or water-damaged goods as to such damages;
- (p) Solicits door-to-door as a seller, unless the seller, within thirty seconds after beginning the conversation, identifies himself or herself, whom he or she represents, and the purpose of the call;

(p.3) to (p.7) Repealed by [Laws 1999, Ch. 188, § 14, eff. May 18, 1999](#).

(q) Contrives, prepares, sets up, operates, publicizes by means of advertisements, or promotes any pyramid promotional scheme;

(r) Advertises or otherwise represents that goods or services are guaranteed without clearly and conspicuously disclosing the nature and extent of the guarantee, any material conditions or limitations in the guarantee which are imposed by the guarantor, the manner in which the guarantor will perform, and the identity of such guarantor. Any representation that goods or services are “guaranteed for life” or have a “lifetime guarantee” shall contain, in addition to the other requirements of this paragraph (r), a conspicuous disclosure of the meaning of “life” or “lifetime” as used in such representation (whether that of the purchaser, the goods or services, or otherwise). Guarantees shall not be used which under normal conditions could not be practically fulfilled or which are for such a period of time or are otherwise of such a nature as to have the capacity and tendency of misleading purchasers or prospective purchasers into believing that the goods or services so guaranteed have a greater degree of serviceability, durability, or performance capability in actual use than is true in fact. The provisions of this paragraph (r) apply not only to guarantees but also to warranties, to disclaimer of warranties, to purported guarantees and warranties, and to any promise or representation in the nature of a guarantee or warranty; however, such provisions do not apply to any reference to a guarantee in a slogan or advertisement so long as there is no guarantee or warranty of specific merchandise or other property.

(s) and (t) Repealed by [Laws 1999, Ch. 188, § 14, eff. May 18, 1999](#).

(u) Fails to disclose material information concerning goods, services, or property which information was known at the time of an advertisement or sale if such failure to disclose such information was intended to induce the consumer to enter into a transaction;

(v) Disburses funds in connection with a real estate transaction in violation of [section 38-35-125\(2\), C.R.S.](#);

(w) Repealed by [Laws 1999, Ch. 188, § 14, eff. May 18, 1999](#).

(x) Violates [sections 6-1-203 to 6-1-206](#) or part 7 of this article 1;

(y) Fails, in connection with any solicitation, oral or written, to clearly and prominently disclose immediately adjacent to or after the description of any item or prize to be received by any person the actual retail value of each item or prize to be awarded. For the purposes of this paragraph (y), the actual retail value is the price at which substantial sales of the item were made in the person's trade area or in the trade area in which the item or prize is to be received within the last ninety days or, if no substantial sales were made, the actual cost of the item or prize to the person on whose behalf any contest or promotion is conducted; except that, whenever the actual cost of the item to the provider is less than fifteen dollars per item, a disclosure that “actual cost to the provider is less than fifteen dollars” may be made in lieu of disclosure of actual cost. The provisions of this paragraph (y) shall not apply to a promotion which is soliciting the sale of a newspaper, magazine, or periodical of general circulation, or to a promotion soliciting the sale of books, records, audio tapes, compact discs, or videos when the promoter allows the purchaser to review the merchandise without obligation for at least seven days and provides a full refund within thirty days after the receipt of the returned merchandise or when a membership club operation is in conformity with rules and regulations of the federal trade commission contained in 16 CFR 425.

- (z) Refuses or fails to obtain all governmental licenses or permits required to perform the services or to sell the goods, food, services, or property as agreed to or contracted for with a consumer;
- (aa) Fails, in connection with the issuing, making, providing, selling, or offering to sell of a motor vehicle service contract, to comply with the provisions of article 11 of title 42, C.R.S.;
- (bb) Repealed by [Laws 1999, Ch. 188, § 14, eff. May 18, 1999](#).
- (cc) Engages in any commercial telephone solicitation which constitutes an unlawful telemarketing practice as defined in [section 6-1-304](#);
- (dd) Repealed by [Laws 1999, Ch. 188, § 14, eff. May 18, 1999](#).
- (ee) Intentionally violates any provision of article 10 of title 5, C.R.S.;
- (ee.5) to (ff) Repealed by [Laws 1999, Ch. 188, § 14, eff. May 18, 1999](#).
- (gg) Fails to disclose or misrepresents to another person, a secured creditor, or an assignee by whom such person is retained to repossess personal property whether such person is bonded in accordance with [section 4-9-629, C.R.S.](#), or fails to file such bond with the attorney general;
- (hh) Violates any provision of article 16 of this title;
- (ii) Repealed by [Laws 1999, Ch. 188, § 14, eff. May 18, 1999](#).
- (jj) Represents to any person that such person has won or is eligible to win any award, prize, or thing of value as the result of a contest, promotion, sweepstakes, or drawing, or that such person will receive or is eligible to receive free goods, services, or property, unless, at the time of the representation, the person has the present ability to supply such award, prize, or thing of value;
- (kk) Violates any provision of article 6 of this title;
- (ll) Either knowingly or recklessly makes a false representation as to the results of a radon test or the need for radon mitigation;
- (mm) Violates [section 35-27-113\(3\)\(e\), \(3\)\(f\), or \(3\)\(i\), C.R.S.](#);
- (nn) Repealed by [Laws 2000, Ch. 2, § 1, eff. July 1, 2001](#).
- (oo) Fails to comply with the provisions of [section 35-80-108\(1\)\(a\), \(1\)\(b\), or \(2\)\(f\), C.R.S.](#);

(pp) Violates article 9 of title 42, C.R.S.;

(qq) Repealed by [Laws 1999, Ch. 188, § 14, eff. May 18, 1999](#).

(rr) Violates the provisions of part 8 of this article;

(ss) Violates any provision of part 33 of article 32 of title 24, C.R.S., that applies to the installation of manufactured homes;

(tt) Violates any provision of part 9 of this article;

(uu) Violates [section 38-40-105, C.R.S.](#);

(vv) Violates [section 24-21-523\(1\)\(f\)](#) or [\(1\)\(i\)](#) or [24-21-525\(3\), \(4\), or \(5\)](#);

(ww) Violates any provision of [section 6-1-702](#);

(xx) Violates any provision of part 11 of this article;

(yy) Repealed by [Laws 2015, Ch. 259, § 7, eff. Aug. 5, 2015](#).

(zz) Violates any provision of [section 6-1-717](#);

(aaa) Violates any provision of [section 12-10-710](#);

(bbb) Violates any provision of [section 12-10-713](#);

(ccc) Violates the provisions of [section 6-1-722](#);

(ddd) Violates [section 6-1-724](#);

(eee) Violates [section 6-1-701](#);

(fff) Violates [section 6-1-723](#);

(ggg) Violates [section 6-1-725](#);

(hhh) Either knowingly or recklessly represents that hemp, hemp oil, or any derivative of a hemp plant constitutes retail marijuana or medical marijuana unless it fully satisfies the definition of such products pursuant to [section 44-10-103\(34\)](#) or (57);

(iii) Either knowingly or recklessly enters into, or attempts to enforce, an agreement regarding the recovery of an overbid on foreclosed property if the agreement concerns the recovery of funds in the possession of:

(I) A public trustee prior to transfer of the funds to the state treasurer under [section 38-38-111](#); or

<Text of (1)(iii)(II) effective until July 1, 2020>

(II) The state treasurer and does not meet the requirements for such an agreement as specified in [section 38-13-128.5](#);

<Text of (1)(iii)(II) effective July 1, 2020>

(II) The state treasurer and does not meet the requirements for such an agreement as specified in [section 38-13-1304](#);

(jjj) Violates [section 6-1-726](#).

(kkk) Either knowingly or recklessly engages in any unfair, unconscionable, deceptive, deliberately misleading, false, or fraudulent act or practice.

(lll) Violates article 20 of title 5.

(mmm) Violates section 24-34-114.

(2) Evidence that a person has engaged in a deceptive trade practice shall be prima facie evidence of intent to injure competitors and to destroy or substantially lessen competition.

(3) The deceptive trade practices listed in this section are in addition to and do not limit the types of unfair trade practices actionable at common law or under other statutes of this state.

(4) For purposes of this section, “recklessly” means a reckless disregard for the truth or falsity of a statement or advertisement.

Credits

Amended by Laws 1975, S.B.69, § 1, eff. July 1, 1975; Laws 1984, H.B.1271, § 2, eff. July 1, 1984; Laws 1984, H.B.1385, § 2, eff. July 1, 1984; Laws 1985, H.B.1159, § 2, eff. June 1, 1985; Laws 1987, H.B.1300, §§ 3, 4, eff. July 1, 1987; Laws 1988, H.B.1236, § 2, eff. July 1, 1988; Laws 1988, H.B.1263, § 2, eff. July 1, 1988; [Laws 1989, H.B.1195, § 2, eff. Jan. 1, 1990](#); [Laws 1989, H.B.1305, §§ 1, 4, eff. June 7, 1989](#); [Laws 1990, H.B.90-1090, § 2, eff. July 1, 1990](#); [Laws 1990, H.B.90-1243, § 2, eff. April 20, 1990](#); [Laws 1991, H.B.91-1253, § 1, eff. May 16, 1991](#); [Laws 1991, H.B.91-1264, § 1, eff. June 8, 1991](#);

Laws 1992, H.B.92-1314, § 2, eff. June 1, 1992; Laws 1992, S.B.92-17, § 2, eff. April 29, 1992; Laws 1993, H.B.93-1144, § 2, eff. July 1, 1993; Laws 1993, S.B.93-17, § 3, eff. July 1, 1993; Laws 1993, S.B.93-165, § 1, eff. July 1, 1993; Laws 1994, H.B.94-1102, § 1, eff. July 1, 1994; Laws 1994, S.B.94-1, § 14, eff. Jan. 1, 1995; Laws 1994, S.B.94-23, § 10, eff. July 1, 1994; Laws 1994, S.B.94-36, § 1, eff. April 20, 1994; Laws 1996, H.B.96-1137, § 1, eff. July 1, 1996; Laws 1996, H.B.96-1260, § 1, eff. July 1, 1996; Laws 1997, H.B.97-1105, § 13, eff. May 21, 1997; Laws 1997, H.B.97-1284, § 1, eff. July 1, 1997; Laws 1997, S.B.97-24, § 1, eff. July 1, 1997; Laws 1998, Ch. 213, § 2, eff. Aug. 5, 1998; Laws 1999, Ch. 188, §§ 3, 14, eff. May 18, 1999; Laws 2000, Ch. 2, § 1, eff. July 1, 2001; Laws 2000, Ch. 203, § 2, eff. Aug. 2, 2000; Laws 2000, Ch. 259, § 3, eff. July 1, 2001; Laws 2001, Ch. 321, § 37, eff. July 1, 2001; Laws 2001, Ch. 324, § 2, eff. Aug. 8, 2001; Laws 2002, Ch. 323, § 3, eff. June 7, 2002; Laws 2003, Ch. 29, § 3, eff. March 5, 2003; Laws 2004, Ch. 55, § 2, eff. March 23, 2004; Laws 2004, Ch. 130, § 2, eff. Aug. 4, 2004; Laws 2006, Ch. 291, § 2, eff. May 30, 2006; Laws 2007, Ch. 210, § 1, eff. July 1, 2007; Laws 2007, Ch. 386, § 10, eff. June 1, 2007; Laws 2007, Ch. 387, § 5, eff. June 1, 2007; Laws 2010, Ch. 180, § 2, eff. Aug. 11, 2010; Laws 2013, Ch. 271, § 2, eff. May 24, 2013; Laws 2013, Ch. 399, § 2, eff. June 5, 2013; Laws 2014, Ch. 358, § 2, eff. Aug. 6, 2014; Laws 2015, Ch. 199, § 7, eff. May 18, 2015; Laws 2015, Ch. 259, § 7, eff. Aug. 5, 2015; Laws 2016, Ch. 97, § 2, eff. Aug. 10, 2016; Laws 2016, Ch. 117, § 1, eff. Aug. 10, 2016; Laws 2016, Ch. 246, § 2, eff. July 1, 2016; Laws 2017, Ch. 207, § 4, eff. July 1, 2018; Laws 2018, Ch. 36, § 1, eff. Aug. 8, 2018; Laws 2018, Ch. 55, § 4, eff. Oct. 1, 2018; Laws 2019, Ch. 110, § 2, eff. July 1, 2020; Laws 2019, Ch. 136, § 8, eff. Oct. 1, 2019; Laws 2019, Ch. 157, § 3, eff. Aug. 2, 2019; Laws 2019, Ch. 171, § 1, eff. Jan. 1, 2020; Laws 2019, Ch. 268, § 2, eff. May 23, 2019; Laws 2019, Ch. 315, § 8, eff. Jan. 1, 2020.

C. R. S. A. § 6-1-105, CO ST § 6-1-105

Current through legislation effective April 1, 2020 of the 2020 Regular Session. Some statute sections may be more current. See credits for details.