

ASSURANCE OF DISCONTINUANCE

IN THE MATTER OF COLE EVANS, KISS INDUSTRIES, LLC, LTD
INDUSTRIES LLC and MBCE HOLDINGS LLC

This Assurance of Discontinuance (“Assurance”) is entered into between the State of Colorado, *ex rel.* Philip J. Weiser, Attorney General for the State of Colorado (“the State”), and Respondents Cole Evans (“Evans”), Kiss Industries, LLC (“Kiss Industries”); LTD INDUSTRIES, LLC (“LTD INDUSTRIES”); and MBCE Holdings, LLC (“MBCE Holdings”) (collectively “Respondents”). The State and the Respondents are collectively referred to as “the Parties.” This Assurance is entered into pursuant to the Attorney General’s powers under C.R.S. § 6-1-110(2) and constitutes a settlement between the Parties regarding the following allegations.

I. PARTIES

1. Philip J. Weiser is the duly elected Attorney General for the State of Colorado and has express jurisdiction to investigate and prosecute violations of the Colorado Consumer Protection Act (“CCPA”), Colo Rev. Stat. Sections 6-1-101 through 6-1-1214.

2. Evans is an owner and principal of the Respondent companies. Evans currently resides at 3222 East 1st Avenue, #329, Denver, Colorado 80206.

3. Kiss Industries is a Colorado Limited Liability Company with a principal office street address of 3222 East 1st Avenue, #329, Denver, Colorado 80206.

4. LTD INDUSTRIES is a Colorado Limited Liability Company with a principal office street address of 3222 East 1st Avenue, #329, Denver, Colorado 80206.

5. MBCE Holdings is a Colorado Limited Liability Company with a principal office street address of 12650 E. 33rd, 3104, Aurora, Colorado 80011.

II. DEFINITIONS

6. The term “Effective Date” means the first date upon which both of the following events have occurred: (a) the Parties’ full execution and delivery of this Assurance, and (b) Respondents’ delivery of the payment described in Section V below.

7. The term “hand sanitizer” means hand sanitizer, hand cleanser, or any similar product that purports to kill viruses or germs on contact.

8. Unless otherwise specified, all definitions found in C.R.S. § 6-1-102 are incorporated herein by this reference, and any term defined in those sections shall have the same meaning when used in this Assurance.

III. THE STATE’S ALLEGATIONS & RESPONDENTS’ POSITION

A. The State’s Allegations

9. Respondents sell alcohol-based hand sanitizer.
10. Respondents are new to the hand sanitizer business and began marketing and distributing hand sanitizer in or around March 2020.
11. Respondents have marketed and distributed hand sanitizer under the “Handzfree” label, among other labels. Respondents’ websites contained false and misleading misrepresentations. This Kiss Industries website represented:
 - *“KISS Industries owns and operates two large manufacturing facilities, one in Denver, CO and another in San Antonio, TX.”*
 - Neither Evans nor any of his companies own or operate any manufacturing facilities.
 - *“KISS is the trusted contract manufacturing partner for hundreds of household brands around the United States and distributes products in over 19 countries worldwide.”*
 - None of Evans’ companies is a “manufacturing partner” for any brand. Respondents do not have partnerships with “hundreds of household brands.”
12. The Handzfree website represented:
 - *“Our facilities along with our partner manufacturing plants are regularly audited by accredited 3rd party agencies as well as our own internal auditing program in order to maintain the highest standard of quality control and assurance.”*
 - Respondents’ facility, a portion of a warehouse they use for packaging products such as CBD-coated gummy bears and breath mints, is not regularly audited by accredited 3rd party agencies or by any internal auditing program.

- *“Our manufacturing facilities along with partner plants are ISO 9000 certified, ISO 9001 certified, cGMP certified, CFR211 & CFR111 FDA registered.”*
 - Respondents partner with two facilities to manufacture hand sanitizer – one that normally makes liquid products, such as windshield washer fluid, and another that makes liquid and gel-based CBD products;
 - Neither facility has previously manufactured hand sanitizer or any other FDA-regulated Over the Counter (“OTC”) product;
 - Neither facility is ISO 9000 or 9001 certified or cGMP certified for hand sanitizer;
 - Neither facility is CFR 211 or CFR 111 FDA registered.

13. Evans falsely represented to potential purchasers that he owned a hand-sanitizer manufacturing facility.

14. Evans falsely represented to potential purchasers that his hand sanitizer would be manufactured at Oralabs, a Colorado company that is FDA approved and UL certified to manufacture hand sanitizer. Oralabs did not manufacture hand sanitizer that was sold by Respondents.

15. Respondents failed to disclose material facts in their advertisements and other communications with potential purchasers, including about the nature of Respondents’ business, their present ability to fulfill orders, and their regulatory status.

16. The above-described representations and omissions violate the CCPA, including C.R.S. § 6-1-105(1)(kkk).

B. Respondents' Positions

17. Respondents provide the following response:

18. Respondents, as distributors, believed they had a legitimate basis for identifying as a manufacturer, to avoid a broker usurping their manufacturing relationship.

19. With respect to the Handzfree website, Evans provided his credentials for the website to a third party, who directed web traffic from Evans' Handzfree website to another website that contained the inaccurate information. Evans had no involvement in or knowledge of the inaccurate information contained on the website.

20. With respect to Oralabs, until March 19, 2020, Evans believed he had an agreement with Oralabs to manufacture hand sanitizer and was therefore justified in so representing to potential customers.

IV. LEGAL AUTHORITY

21. C.R.S. § 6-1-110(2) authorizes the Attorney General to accept a voluntary payment from Respondents of the costs of the State's investigation and any action or proceeding by the Attorney General and any amount necessary to restore to any person any money or property that may have been acquired by Respondents by means of any deceptive trade practice. The Attorney General may also recover unjust enrichment under C.R.S. § 6-1-110(1) and penalties under C.R.S. § 6-1-112.

V. CONSIDERATION

22. The Attorney General and Respondents enter this Assurance as a compromise and settlement of the Attorney General's allegations herein and to avoid further expense of protracted litigation.

23. Respondents shall pay to the Attorney General \$62,500 on or before September 17, 2020. Payment shall be in the form of a certified check, cashier's check, or money order made payable to the "Colorado Department of Law," shall reference "In The Matter Of Cole Evans, Kiss Industries, LLC, LTD INDUSTRIES LLC, and MBCE Holdings LLC" and shall be delivered to:

Mica Moore, Program Assistant
Consumer Protection Section
Colorado Department of Law
1300 Broadway, 7th Floor
Denver, Colorado 80203

All payments under this paragraph 23 are to be held, along with any interest thereon, in trust by the Attorney General to be used in the Attorney General's sole discretion for reimbursement of the State's actual costs and attorneys' fees, the payment of restitution, if any, and for future consumer fraud or antitrust enforcement, consumer education, or public welfare purposes.

VI. RELEASE

24. The State acknowledges by its execution hereof that this Assurance constitutes a complete settlement and release of all claims under the CCPA on

behalf of the State against Respondents and their directors, officers, principals, and employees with respect to all claims, causes of action, damages, fines, costs, and penalties which were asserted or could have been asserted under the CCPA for the conduct described in this Assurance, that arose prior to the Effective Date and relating to or based upon the acts or practices which are the subject of this Assurance. The State agrees that, except as provided in this Assurance, it shall not proceed with or institute any civil action or proceeding under the CCPA against Respondents, their directors, officers, principals or employees, for any conduct or practice prior to the Effective Date which relates to the subject matter of this Assurance.

25. Nothing herein precludes the State from enforcing the provisions of this Assurance, or from pursuing any law enforcement action under the CCPA with respect to the acts or practices of Respondents not covered by this Assurance or any acts or practices of Respondents conducted after the Effective Date.

VII. ASSURANCES OF RESPONDENTS

Respondents, their directors, officers, principals, agents, servants, and employees, and those persons in active concert or participation with them who receive actual notice of the Assurance by personal service or otherwise, agree as follows:

26. Respondents shall ensure that the hand sanitizer they sell, distribute, package, and/or market is prepared, manufactured, packaged, labeled, and

transported in compliance with all federal regulations and guidance, including but not limited to the FDA's *Temporary Policy for Preparation of Certain Alcohol-Based Hand Sanitizer Products During the Public Health Emergency (COVID-19) Guidance for Industry* ("Temporary Policy") in its current form and as it may be updated. This expressly includes, but is not limited to:

- a. Compliance with the *Temporary Policy*'s formula requirements, including but not limited to the finished-product formulation specifications for ethanol (80%, volume/volume (v,v) as of the August 7, 2020 updated version of the *Temporary Policy*);
 - b. Compliance with all Appendices and Attachments to the *Temporary Policy*; and
 - c. Compliance with all documents and recommendations that are incorporated into the *Temporary Policy*, including but not limited to the World Health Organization's *Guide to Local Production: WHO-recommended Handrub Formulations* ("WHO-recommended Handrub Formulations Guide"), as referenced at page six of the August 7, 2020 updated version of the *Temporary Policy*).
27. In order to comply with paragraph 26 above, Respondents shall:
- a. Require all companies or persons Respondents contract with or otherwise do business with in connection with the manufacturing, mixing, blending, packaging, labeling of hand sanitizer to agree in

writing to comply with all guidance and requirements set forth in the *Temporary Policy*, and the *WHO-recommended Handrub Formulations Guide*.

- b. Require their contract manufacturers, mixers, and blenders to retain all batch testing samples and related records for a period of twelve months.
- c. Collect all batch testing results and related records from their contract manufacturers, mixers, and blenders, and retain such results and records for a period of twelve months.

28. Respondents shall make no false or misleading representations about the nature of their business; their affiliation, connection or partnership with another company or person; their present ability to deliver; or the certifications, registrations, approval, manufacturing practices, auditing, or oversight of any of Respondents' facilities or operations.

29. Respondents shall make no false or misleading representations about the qualifications, certifications, registrations, approval, manufacturing practices, auditing, or oversight of any company or person Respondents contract with or otherwise do business with in connection with the manufacturing, mixing, blending, supplying, packaging, labeling, transporting, or distribution of hand sanitizer.

30. Respondents shall clearly and conspicuously disclose, in all advertisements and invoices (or similar order-confirmation documents), the detailed

status of Respondents' compliance with (or non-compliance with) FDA requirements and guidance.

31. In order to ensure compliance with this Assurance, Respondents shall provide a copy of this Assurance to all of Respondents' directors, officers, agents, servants, and employees who participate in the advertising, promotion, marketing, or sale of Respondents' hand sanitizer product.

32. If Respondents know or should know of any other person or entity who participates in the advertising, promotion, marketing, or sale of Respondents' hand sanitizer product, Respondent Evans shall use reasonable efforts to ensure that such person or entity makes no false or misleading representations relating to Respondents' hand sanitizer product. Such reasonable efforts shall include:

- a. informing the person or entity, in writing, of the nature of Respondents' business and the regulatory status of Respondents and their manufacturers;
- b. requiring the person or entity to agree, in writing, not to make any false or misleading representations in connection with Respondents' hand sanitizer product, and
- c. pre-approving any written advertising or marketing materials used by the person or entity.

33. Respondents shall submit compliance reports – sworn under penalty of perjury by Evans – six months, twelve months, and eighteen months after the Effective Date of this Assurance. The compliance reports must:

- a. Identify the primary postal and email address and telephone number, as designated points of contact, which the State may use to communicate with Respondents in connection with this Assurance;
- b. Describe, in detail, the steps Respondents have taken to comply with each paragraph of this Section VII;
- c. Identify the name, street address, and telephone number of all of Respondents’ directors, officers, agents, servants, employees, and all others who participate in the advertising, promotion, marketing, or sale of Respondents’ hand sanitizer product.
- d. Identify the name, street address, and telephone number of each contract manufacturer Respondents use for blending or mixing hand sanitizer;
- e. Include copies of all batch testing results and records that Respondents are required to collect and maintain under paragraph 27 above.

34. Respondents further agree to cooperate with any proceedings or investigations arising out of the State’s monitoring or investigation of compliance with this Assurance. This includes submission of additional compliance reports the State may request, promptly responding to reasonable requests for information

made by the State, and making Evans or any other principals or employees available for interviews and/or Civil Investigative Demand (“CID”) testimony.

35. Respondents shall comply with the CCPA in conducting business in the State of Colorado.

VIII. ENFORCEMENT

36. The obligations set forth in this Assurance are continuing.

37. A violation of any of the terms of this Assurance shall constitute a prima facie violation of the CCPA in accordance with C.R.S. § 6-1-110(2). Upon a violation of any of the terms of this Assurance by Respondents, the Attorney General shall be entitled to file a civil action under the CCPA in any court of competent jurisdiction and to seek an injunction or other appropriate order from such court to enforce the provisions of this Assurance and for appropriate monetary remedies.

38. In addition to any remedies provided under the CCPA, the Attorney General shall be entitled to apply for and seek from a court of competent jurisdiction an order converting this Assurance into a permanent injunction against Respondents as if the parties had fully litigated all issues contained herein, upon a showing by the Attorney General of a material violation by Respondents of this Assurance. In such event, Respondents agree to waive any and all defenses and counterclaims they may have had to such an action, except as to claims or defenses

related to the alleged violation of this Assurance or as to the need for injunctive relief.

39. This Assurance shall not be construed to affect the rights of any private party to pursue remedies pursuant to C.R.S. § 6-1-113, or any other statute or claim in common law.

40. Nothing in this Assurance shall be construed to release claims held by any other governmental authority.

41. Pursuant to C.R.S. § 6-1-110(2), this Assurance shall be a matter of public record, but is not a determination of guilt or liability under the CCPA by any Respondent or an admission of such by any Respondent.

42. This Assurance may be executed in one or more counterparts, each of which shall be deemed an original, but which together shall constitute the Assurance.

43. The person who signs this Assurance in a representative capacity for Respondents warrants that he or she is duly authorized to do so. Respondents acknowledge that they have had a full opportunity to review this Assurance and consult with legal counsel regarding same. Respondents agree and represent that they have read and understand this Assurance, that they accept the legal consequences involved in signing it, and that there are no other representations, agreements or understandings between Respondents and the State that are not stated in writing herein.

IX. MISCELLANEOUS PROVISIONS

44. This Assurance is the final, complete, and exclusive statement of the Parties' agreement on the matters contained herein, and it supersedes, terminates and replaces any and all previous negotiations, agreements, and instruments as may exist between the Parties. Other than any representation expressly stated in this Assurance, the Parties have not made any representations or warranties to each other, and no Party's decision to enter into this Assurance is based upon any statements by any other Party outside of those in this Assurance. No change or modification of this Assurance shall be valid unless in writing and signed by all Parties. If any provision(s) of this Assurance is held to be invalid, illegal, unenforceable or in conflict with the law of any jurisdiction, the validity, legality and enforceability of the remaining provisions shall not in any way be affected or impaired thereby.

45. This Assurance shall neither create nor waive or otherwise affect any private rights or remedies in any third parties nor waive any rights, remedies, or defenses of the Parties in respect to any third parties. Under no circumstances shall this Assurance or the name of the Attorney General or any of the State's employees or representatives be used by Respondents or any person under their direction or control in any way that suggests the State's endorsement of Respondents' past, present, or future conduct.

46. Nothing herein relieves Respondents of their duty to comply with all applicable laws, regulations, or rules of the State of Colorado nor constitutes authorization by the State for Respondents to engage in acts and practices prohibited by such laws.

47. Respondents acknowledge that it is the State's customary position that an agreement restraining certain conduct by a party does not prevent the State from addressing later conduct that could have been prohibited, but was not, in the earlier agreement, unless the earlier agreement expressly limited the State's enforcement options in that manner. Therefore, nothing herein shall be interpreted to prevent the State from taking enforcement action to address conduct occurring after the Effective Date that the State believes to be in violation of the law. The fact that such conduct was not expressly prohibited by the terms of this Assurance shall not be a defense to any such enforcement action.

48. The terms and provisions of this Assurance may be enforced by the current Colorado Attorney General, and by any of his duly authorized agents or representatives, as well as by any of his successors in interest, and by any of his successors in interest's agents or representatives. Nothing herein precludes the State from enforcing the provisions of this Assurance pursuant to its terms, or the State from pursuing any law enforcement action under the CCPA with respect to any unrelated acts or practices of Respondents not covered by the State's

investigation and this Assurance or any acts or practices of Respondents conducted after the Effective Date of this Assurance.

X. NOTICE

49. All notices regarding this Assurance shall be sent by certified mail, return receipt requested or reputable overnight delivery service (e.g., FedEx, UPS) and email at the addresses set forth below unless any Party notifies the other Parties in writing of another address to which notices should be provided:

To Respondent Cole Evans:

3222 E. 1st Avenue, #329
Denver, CO 89296

With a copy to:

Timothy R. Beyer
Bryan Cave Leighton Paisner LLP
1700 Lincoln Street, Suite 4100
Denver, CO 80203
Email: tim.beyer@bclplaw.com
Phone: (303) 866-0481

To Respondent Kiss Industries, LLC:

Cole Evans
3222 E. 1st Avenue, #329
Denver, CO 89296

With a copy to:

Timothy R. Beyer
Bryan Cave Leighton Paisner LLP
1700 Lincoln Street, Suite 4100
Denver, CO 80203

Email: tim.beyer@bclplaw.com
Phone: (303) 866-0481

To Respondent LTD INDUSTRIES, LLC:

Cole Evans
3222 E. 1st Avenue, #329
Denver, CO 89296

With a copy to:

Timothy R. Beyer
Bryan Cave Leighton Paisner LLP
1700 Lincoln Street, Suite 4100
Denver, CO 80203
Email: tim.beyer@bclplaw.com
Phone: (303) 866-0481

To Respondent MBCE Holdings, LLC:

Matt Bransfield
4997 E. Iowa Ave.
Denver, CO 80222

With a copy to:

Timothy R. Beyer
Bryan Cave Leighton Paisner LLP
1700 Lincoln Street, Suite 4100
Denver, CO 80203
Email: tim.beyer@bclplaw.com
Phone: (303) 866-0481

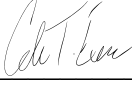
To the Attorney General:

Mark T. Bailey
Senior Assistant Attorney General II
mark.bailey@coag.gov
Jay Simonson
First Assistant Attorney General
jay.simonson@coag.gov

Consumer Fraud Unit
1300 Broadway, 7th Floor
Denver, CO 80203
Fax: 720-508-6040


[Signature[s] appear on the following pages.]

Respondent Cole Evans

By: 
Cole Evans


9/1/
Date

Respondent Kiss Industries, Inc.

By: 
Founder &
Print Name and Title


9/1/
Date

Respondent LTD INDUSTRIES LLC

By: 
Founder &
Print Name and Title

9/1/
Date

Respondent MBCE Holdings LLC

By: 
Founder &
Print Name and Title

9/1/
Date

PHILIP J. WEISER
Attorney General

By: _____
Mark T. Bailey
Senior Assistant Attorney General II

August 30, 2020