BEFORE THE ADMINISTRATOR OF CONSUMER CREDIT
STATE OF OKLAHOMA

STATE OF OKLAHOMA, ex rel, DEPARTMENT OF CONSUMER CREDIT Petitioner v. XTREME FITNESS CENTER, LLC d/b/a XTREME FITNESS AND NUTRITION, Respondent	)	Case No. 13-0006-DIS

FILED
MAY 23 2013
STATE OF OKLAHOMA
DEPARTMENT OF
CONSUMER CREDIT

FINAL AGENCY ORDER

This matter was heard on the 25th day of March, 2013, at 1:29 p. m. before Bryan Neal, Assistant Attorney General and Independent Hearing Examiner appointed by the Administrator of Consumer Credit ("Administrator") at the Office of the Oklahoma Department of Consumer Credit, 3613 N.W. 56th Street, Suite 240, Oklahoma City, Oklahoma 73112. The State of Oklahoma, ex rel. Oklahoma Department of Consumer Credit (the "Department" or the "Petitioner"), was represented by the Department's General Counsel Roy John Martin and the Respondent XTreme Fitness Center, LLC, doing business as XTreme Fitness and Nutrition (the "Respondent" or "Respondent XTreme"), did not appear in person or by legal counsel, after such Respondent having been mailed a copy of the Notice of Hearing filed by the Department herein on February 22, 2013, in Case No. 13-0006-DIS, pursuant to the requirements of Article II of the Oklahoma Administrative Procedures Act (the "APA"), 75 O.S. §§ 308a-323, by first class U.S. Mail certified with return receipt requested to the Respondent at its address at 100 Woodbriar, Noble, Oklahoma 73068 and was delivered to the Respondent by a representative of the U.S. Postal Service on February 26, 2013, as evidenced by the USPS Track & Confirm sheet

70103090000136216634 on February 26, 2013.

Neither party to these proceedings requested that a court reporter record this matter, relying instead on the Department's electronic record.

The Department's General Counsel presented two (2) witnesses in support of the case against the Respondent: Karen Banks, Senior Department Examiner, and Lindsie Lundy, Department Administrative Programs Officer, Licensing Division.

Upon being duly sworn, Ms. Banks testified that as a Senior Department Examiner she examines unregistered and unlicensed health spas including unlicensed activities, that she investigated the Respondent's Noble location on 100 Woodbriar in Noble, Oklahoma, and that she stopped by for a routine inspection of the Respondent's business premises on October 22, 2012, which facility was open for business upon her visit during normal working hours around lunch time. As part of her investigation of the Respondent's business, Ms. Banks testified that she examined the Respondent's Facebook Page on October 22, 2012, which indicated the presence, among others, of the following features: weight training and cardio equipment, treadmills, elipticals (trainers), weight machines and free weights, aerobic/zumba classes, boxing, 24 hour access for monthly rates of $30.00 per person, $50.00 per couple and $100.00 for boxing (including full access to the weights and cardio equipment) and which multipage Facebook page Ms. Banks identified as Exhibit 1 consisting of thirteen (13) pages. There being no objection, Exhibit 1 was admitted into evidence.

The next exhibit identified by Ms. Banks was a photograph that she took with her phone camera of the building exterior and signage, to which exhibit there was no objection and which exhibit was admitted into evidence as Exhibit 2 without objection. Another exhibit marked as Exhibit 3 was identified by Ms. Banks as a photograph of the interior of the Respondent's

facility depicting weight equipment and bars for free weights, that she took with her phone camera and which was admitted into evidence as Exhibit 3 without objection.

Continuing, Ms. Banks testified that when she visited the Respondent's business premises on October 22, 2012, accompanied by a female employee named Jamy Fryar, she entered into and observed a huge room of workout equipment consisting of treadmills, elipticals, with one patron using the workout equipment and a small room for boxing. While in the Respondent's facility, the Respondent's employee Jamy Fryar provided Ms. Banks with a one page XTreme Fitness & Nutrition Membership Agreement form in blank, which form Ms. Banks identified as Exhibit 4 and which form contained handwritten comments which Ms. Banks stated were in Jamy Fryar's handwriting that included a phone number, prices for the use of the facility such as "12 months 30 + tax w/32.55" and "Month to month $40.00 + tax w/$43.40". There being no objection, Exhibit 4 was admitted into evidence. Ms. Banks testified that various provisions in the Membership Agreement form violate the Oklahoma Health Spa Act, 59 O.S., §2000 et seq., including but not limited to, the consumer's right to cancel within 3 business days of agreement execution was violated by the form requiring 30 days' notice prior to cancellation (59 O.S.,§ 2004 (1)), there is no stated consumer right to cancel if the Respondent's business relocates or if it goes out of business (59 O.S.,§2004(2)), and there is no stated consumer right to cancel if the buyer dies or is physically unable to use the Respondent's facilities (59 O.S.,§ 2004(3)).

According to Ms. Banks, she investigated the Respondent's Facebook page again on Friday March 22, 2013, a copy of which Facebook page she identified as Exhibit 5 consisting of ten pages, which Facebook page evidences the fact that the Respondent remains open for business as recently March 22, 2013. There being no objection, Exhibit 5 was admitted into

evidence.

Upon being duly sworn, Ms. Lundy testified that as the Department Administrative Programs Officer that she reviews applications, registrations, licenses and renewals thereof, including those of health spas, that she was familiar with the licensing information, records and file of the Respondent, that the Respondent has never been licensed as a health spa at 100 Woodbriar, Noble, Oklahoma, that the Respondent has no health spa license application then pending as of the day of the hearing and that the Respondent was not then currently licensed as of March 25, 2013.

After reviewing the administrative record of this individual proceeding, reviewing the arguments, testimony and evidence presented at the March 25, 2013 hearing and reviewing the proposed order filed by Independent Hearing Examiner, Bryan Neal, the Administrator of Consumer Credit issues the following findings, conclusions and orders:

JURISDICTION AND AUTHORITY

1. The Administrator is charged with the administration and enforcement of the Oklahoma Health Spa Act, 59 O.S. §§ 2000 et seq.

2. No health spa shall offer or advertise health spa services without first being registered with the Administrator. 59 O.S. § 2002(A).

3. The Administrator may, after notice and hearing, decline to renew a registration, or suspend or revoke any registration issued pursuant to the Oklahoma Health Spa Act or any rules promulgated by the Administrator, or in lieu of or in addition to such denial, suspension or revocation, order the refund of any unlawful charges, or enter a cease and desist order. 59 O.S. § 2009(E).

4. Any entity or individual offering to engage or engaged as a health spa without a

registration in the State of Oklahoma shall be subject to a civil penalty not to exceed Five Thousand Dollars ($5,000.00). 59 O.S. § 2009(F).

5. The proceedings herein were conducted in accordance with the provisions of Article II of the Administrative Procedures Act, 75 O.S. §§ 308a-323.

FINDINGS OF FACT

The Administrator of Consumer Credit finds that the following facts were proven by clear and convincing evidence:

1. The Respondent is an Oklahoma domestic limited liability company transacting business at 100 Woodbriar, Noble, OK 73068 and does business as Xtreme Fitness & Nutrition.

2. The Respondent maintains a Facebook website at www.facebook.com/XFNnoble.

3. The Respondent's Facebook website at www.facebook.com/XFNnoble includes, but is not limited to, photographs of the Respondent's business facility at 100 Woodbriar, Noble, OK 73068, weight lifting room/exercise room and weight lifting equipment.

4. On October 22, 2012, the Respondent's Facebook website at www.facebook.com/XFNnoble, includes but is not limited to, the following information:

"XFN is more than just the most elite and state of the art gym in the state; it is a one-stop-shop for all your fitness and nutrition needs! Stop by today and let our staff of personal trainers and nutrition specialist sign you up today!"

"XFN Features: State of the Art Weight Training & Cardio Equipment, Boxing/MMA/BJJ, Professional Grade Tanning, Aerobic/Zumba Classes, Daycare, Full Service Smoothie Bar & Extreme Nutrition Store, 24 hour access and Personal Training."

"Low monthly rates: $30 per person, $50 per couple, Family Membership Available! Boxing/MMA/BJJ: $100 (This includes full access to the weights and cardio equipment)."

5. As of October 22, 2012, the Respondent was not registered as a health spa in the State of Oklahoma. Subsequently, as of March 22, 2013, the Respondent was still not registered as a health spa in the State of Oklahoma.

CONCLUSIONS OF LAW

The Administrator of Consumer Credit concludes that based on the evidence and testimony in this individual proceeding that:

1. The Respondent has violated 59 O.S. § 2002(A) by offering or advertising health spa services without first being registered as a health spa with the Administrator.

2. The Respondent has violated 59 O.S. § 2009(F) by offering to engage or engaging as a health spa without a health spa registration.

ORDER

Based upon the findings of fact and conclusions of law in this individual proceeding and based upon the recommendation of the Independent Hearing Examiner, the Administrator of Consumer Credit issues the following orders:

1. The Respondent, having been found to be a "Health Spa" as that word is defined in 59 O.S. § 2001, that was offering or advertising health spa services on October 22, 2012, and continuing thereafter at least until March 22, 2013, without first obtaining a health spa registration from the Administrator as required under 59 O.S. § 2002 (A) to act in such capacity, shall pay a Five Thousand Dollar ($5,000.00) civil penalty, as authorized in 59 O.S. § 2009(F), and that Respondent shall pay the costs of the Hearing Examiner incurred in this matter as authorized in 59 O.S. § 2009(D) in the amount of $445.75.

2. The Respondent, having been found to be a "Health Spa" as that word is defined in 59 O.S. § 2001, that was offering or advertising health spa services on October 22, 2012, without

first obtaining a health spa registration from the Administrator as required under 59 O.S. § 2002 (A) and continuing to do so through and including March 22, 2013, is issued a permanent Cease and Desist Order to immediately cease and desist from offering or advertising health spa services as a "Health Spa" as that word is defined in 59 O.S. § 2001, and to permanently continue to so cease and desist until such time, if ever, as the Respondent pays all fines, fees and penalties owed to the Department and obtains a registration from the Administrator as required under 59 O.S. § 2002 to act in such capacity as a "Health Spa".

3. The $5,000.00 civil penalty and $445.75 in hearing costs shall be paid by check or money order, shall indicate that payment is for Case Number 12-0006-DIS and shall be submitted to the attention of Roy John Martin, General Counsel, Oklahoma Department of Consumer Credit, 3613 N.W. 56th Street, Suite 240, Oklahoma City, Oklahoma 73112, within thirty (30) days from the date of receipt of this order.

So ordered this 23rd day of May 2013.

Scott Lesher
Administrator of Consumer Credit
State of Oklahoma