

**BEFORE THE DIVISION OF CONSUMER PROTECTION
OF THE DEPARTMENT OF COMMERCE
OF THE STATE OF UTAH**

In the matter of:

OZN WEB LLC an Arizona limited liability company, doing business as **VAPERXS.COM**; and

CHRIS ARMSTRONG, as an officer, director, manager, agent and/or owner of the above-named entity; and

DARIN TOONE, as an officer, director, manager, agent and/or owner of the above-named entity;

Respondents.

SETTLEMENT AGREEMENT

DCP Legal Case No. 82657
DCP Case 81588

The Utah Division of Consumer Protection ("Division") and OZN Web LLC doing business as VAPERXS.COM and its owners Chris Armstrong and Darin Toone ("Respondents") enter into the following Settlement Agreement ("Agreement").

1. Respondent's Identity. Respondent OZN Web LLC is an Arizona limited liability company established in April of 2013 and with a corporate address of 1421 E Hoover Ave in Phoenix Arizona. OZN Web LLC also does business as Vaper XS. OZN Web, LLC operates a website, vaperxs.com, which lists its address as 4525 S 2300 E Suite #100 in Salt Lake City Utah 84117. Chris Armstrong is listed as a member and manager of the LLC and is listed as the registrant owner of the business's website vaperxs.com, created on October 2, 2013. Darin Toone is also listed as a managing member of the business. Respondents sell electronic cigarettes (also known as e-cigarettes), that utilize a heating element to vaporize a liquid solution containing a mixture of nicotine and flavorings. Respondents offer its product for sale through an auto ship subscription on its website vaperxs.com.
2. Jurisdiction. Respondents admit to the jurisdiction of the Division over the parties and over the subject matter of this action.
3. Agency Action. On May 9, 2014, the Utah Division of Consumer Protection issued an Administrative Citation against the Respondents for violations to the *Utah Consumer*

Sales Practices Act, UTAH CODE §13-11-1 *et seq.* including violations to §13-11-4(2)(a), Utah Administrative Rule R152-11-4(B), Utah Administrative Rule R152-11-2(A), §13-11-4(2)(j), Utah Administrative Rule R152-11-2(A), §13-11-4(2)(e), §13-11-4(2)(l), and §13-11-4(2)(w). The eight violations described carry a maximum potential civil penalty of \$45,000. Respondents admit to these violations and in an effort to resolve this case, agree to voluntarily comply with the *Utah Consumer Sales Practices Act* and take measures to prevent future violations.

4. **Waiver.** Respondents specifically waive any right to an adjudicative proceeding, including administrative review, if applicable. Respondents and the Division hereby express their intent that this matter be resolved expeditiously through settlement as contemplated in UTAH CODE § 63G-4-102(4).
5. **Obligations of the Division.** The Division assesses a fine of \$45,000 and agrees to accept \$10,000 of the potential administrative fine described in Paragraph 3 as payment from the Respondent. The Division agrees to stay payment of the remaining balance of \$35,000 for a period of 18 months from the date the parties sign this agreement. Upon compliance with all terms set forth in this Agreement, the Division shall terminate its administrative investigation. If the Respondents violate any term(s) of the Agreement, the Division may reopen its investigation, take any enforcement action which is authorized by law and warranted by its investigative conclusions, and may seek to enforce full payment of the suspended portion of the fine. Upon Respondents' full compliance with the terms of this agreement, the Division will cancel the stayed portion of the fine.
6. **Obligations of Respondent.** Respondents, whether acting directly or through any officer, agent, or employee, shall perform in accordance with the following obligations agreed upon between the Division and Respondents:
 - a) Respondents agree to pay \$10,000 via certified funds to the "State of Utah Division of Consumer Protection". Payment is due in minimum monthly installments of \$1,000 due on or before the 23rd of each month, with the first installment due no later than July 23, 2014 and every 30 days thereafter over the next 6 month time frame. The total \$10,000 amount must be paid in full by 5:00 pm Mountain Standard Time: **Tuesday, December 23, 2014.**
 - b) Respondents agree to remove all unsubstantiated advertising claims concerning its product including but not limited to the claim that e-cigarettes, "*can be smoked anywhere*" and the phrase, "*smoke anywhere*", and that its

product is a "*healthy alternative*" to traditional cigarette smoking until such time when its claims can be substantiated with supporting evidence.

- c) Respondents' future advertisements shall be clear, factual, supportable, and shall not include any false or misleading statements with respect to its product, its benefits or uses, the retail value of the price.
- d) Respondents agree to refrain from using the term "*Free*" in any of its sales or promotions, when the use of that word is in violation of Utah Admin Code § R152-11-4.
- e) Respondents agree to clearly and conspicuously disclose the price of its products, the price of the shipping and handling, and its terms and conditions concerning its auto-ship program. Such terms must be in plain and direct view to a purchaser prior to the purchaser entering his or her billing and shipment information. Such disclosures must also be made after the transaction in any correspondence or order confirmation sent to the consumer following a purchase.
- f) Respondents' disclosures shall be in compliance with Utah Administrative Rule R152-11-12 and the federal regulations concerning negative options under 16 C.F.R. 425.1. Respondents agree to clearly and conspicuously disclose:
 - (i) How the consumer must notify the Respondent, if he or she does not wish to purchase the product or continue to purchase the product from the Respondent;
 - (ii) Any obligation of the consumer to purchase a minimum quantity of merchandise from the Respondent;
 - (iii) The right of the consumer to cancel his or her renewing of any order at any time;
 - (iv) Whether billing charges will include an amount for shipping and handling;
 - (v) A disclosure indicating that the consumer will be provided with at least ten (10) days in which to mail any form, contained in or accompanying an announcement identifying the selection, to the Respondent;
 - (vi) A disclosure that Respondents will credit the return of any selections sent to a consumer, and guarantee to the Postal Service

or the consumer postage to return such selections to Respondents when the announcement and form are not received by Respondents in time to afford him at least ten (10) days in which to mail his form to the Respondents; and

(vii) The frequency with which the announcements and forms will be sent to the consumer and the maximum number of announcements and forms which will be sent to him during a 12-month period.

g) Respondents agree to comply with all of the regulations of the *Utah Consumer Sales Practices Act and Rules* in all future consumer transactions applicable to its business operations in the state of Utah.

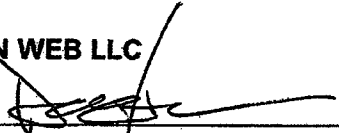
h) Respondents agree to provide a cancellation and refund within 30 days for any consumer who purchased products from Respondents at any time when Respondents did not provide the disclosures required under this Agreement.

7. **Actions by Other Parties.** This agreement is between the Division and the Respondents and does not affect the civil claims of other parties. In addition, this agreement does not affect any enforcement action that might be brought by any local, state, or federal enforcement authority, including any enforcement action that might be brought by a criminal prosecutor
8. **Voluntary Nature of Agreement.** Respondents agree to the provisions of this Agreement freely and voluntarily, without any undue influence of the Division. This document and any documents incorporated herein by reference constitute the entire agreement between the parties. This document supersedes and cancels any and all prior negotiations, representations, understandings or agreements between the parties. There are no verbal agreements that modify, interpret, construe, or affect this Agreement.
9. **Facsimile Signatures.** A fully executed facsimile or emailed copy and/or photocopy of this Settlement Agreement are as legally enforceable and binding as the original.
10. **Counterparts.** This Agreement may be executed in one or more counterparts, each of which shall be deemed an original, but all of which together will constitute one and the same instrument.
11. **Legal Representation.** Respondents acknowledge that they have been informed of the right to be represented by legal counsel and that by signature to this document the Respondents have either sought the advice of an attorney, or has voluntarily chosen not to do so.
12. **Classification.** Respondents acknowledge that this document, once executed, will be

classified as a public document under the Utah Government Records Access Management Act, UTAH CODE § 63G-2.

13. Breach of Agreement. If Respondents fail to comply with any of the terms of this Agreement, including any cease and desist order issued pursuant to this stipulated agreement the Division may take any enforcement action authorized by law, including but not limited to issuing a Notice of Agency Action and scheduling an administrative hearing to determine whether a breach of this Agreement occurred. If the presiding officer finds that a breach occurred, the Division may immediately enter an Order and demand payment of \$35,000 from Respondents, in addition to any other civil penalties arising from violations of the statutes listed in UTAH CODE § 13-2-1.

OZN WEB LLC

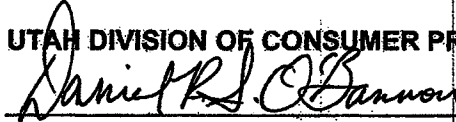


DARRIN TOONE

Printed Name

Dated this 20 day of JUNE, 2014

UTAH DIVISION OF CONSUMER PROTECTION



DANIEL R.S. O'BANNON, DIRECTOR

Dated this 23 date of June, 2014

**BEFORE THE DIVISION OF CONSUMER PROTECTION
OF THE DEPARTMENT OF COMMERCE
OF THE STATE OF UTAH**

In the matter of:

OZN WEB LLC an Arizona limited liability company, doing business as **VAPER XS.COM**; and

CHRIS ARMSTRONG, individually and as an officer, director, manager, agent and/or owner of the above-named entity; and

DARIN TOONE, individually and as an officer, director, manager, agent and/or owner of the above-named entity;

Respondents.

DCP Legal Case No. 82657
DCP Case 81588

ADMINISTRATIVE CITATION

PURSUANT TO THE AUTHORITY granted by UTAH CODE §13-2-6(3), which empowers the Division of Consumer Protection to issue a citation upon any person reasonably believed to be engaged in the violation of any statute listed in UTAH CODE §13-2-1, it appears, upon information and belief, that you are in violation of the *Consumer Sales Practices Act*, UTAH CODE § 13-11-1 *et seq.* In particular, the Division of Consumer Protection alleges:

- 1- OZN Web LLC is an Arizona limited liability company established in April of 2013 and lists its corporate address as 1421 E Hoover Ave in Phoenix Arizona. OZN Web LLC also does business as Vaper XS. OZN Web, LLC operates a website, vaperxs.com, which lists its address as 4525 S 2300 E Suite #100 in Salt Lake City Utah 84117. Chris Armstrong is listed as a member and manager of the LLC and is listed as the registrant owner of the business's website vaperxs.com, created on October 2, 2013. Darin Toone is also listed as a managing member of the business. The above named entities and individuals will be referred to hereinafter as "Respondents."

- 2- Respondents sell electronic cigarettes consisting of a battery powered device that utilizes "*E-juice*" and "*Clearomizers*" to create an inhalable vapor. These electronic cigarettes also known as "e-cigs" are marketed as a smokeless tobacco alternative to cigarettes that Respondents sell solely online through its promotional offerings and auto-shipment plan. As of April 15, 2014 Respondents' website appears to have ceased offering its promotion.
- 3- Respondents' website vaperxs.com advertised that its product can be, "*smoked anywhere*" and listed examples of: "*Airplanes & Airports, Restaurants & Clubs, Hotels & Cruise Ships, and Work & Offices.*" Under the *Utah indoor Clean Air Act*, UTAH CODE §26-38-1 E-cigarettes are subject to the same smoking area restrictions as traditional cigarettes and may not be smoked in the places Respondents have advertised to encompass "anywhere". Respondents' website vaperxs.com also stated its product is a "*healthy alternative*" to traditional cigarette smoking, but does not include any supporting documentation, nor cite references from medical providers or the Food and Drug Administration substantiating this claim.
- 4- Respondents' website also advertised it was offering a promotional, "*New Starter Kit! You Just Pay \$4.95 Shipping & Handling,*" and "*Risk Free Start Kit... Claim your trial... hurry this offer won't last.*" If a consumer attempts to exit the Respondents website without entering their information to participate in the trial, the site will advertise, "*LIMITED OFFER! \$1.99 SHIPPING*" and "*CLICK HERE to try it RISK FREE and 60% off S&H!*" At no time in its initial landing page or pop-up promotion page, is the full retail price of the product disclosed or the additional terms and conditions of the Risk Free Trial stated within close proximity to these advertisements.
- 5- When a consumer agrees to try the Respondents' "*Risk Free Trial*" they are directed to enter their billing and shipping information. Consumers are then directed to a payment page in which the shipping and handling price is then advertised as "*\$1.95*", instead of \$4.95 or \$1.99 as previously represented, and includes a statement that reads, "*Retail: ~~\$99.95~~*". The payment page also advises consumers that, "*The charge will appear on your card as VAPERXS...*" No additional statements, references or disclosures are made to the consumer

regarding the Respondents' terms, conditions or obligations of the trial or the starter kit.

- 6- Respondents' "Terms and Conditions" found in greyed out printed link on the bottom of the main website page states:

[2.1] Your Vaper XS order features a 12 day delayed billing period allowing you to **fully evaluate the Vaper XS 30 day starter Kit**. You will be billed 12 days from your initial order. The Vaper XS 30 day Starter Kit includes 1 battery, USB charger, 3 clearomizers... and 4 bottles of e-juice... You will be billed \$99.95 for the starter Kit if you do not call and cancel before your 12 day delayed billing period expired. **You must agree to return your starter kit before the next billing cycle, if you do not, you will be charged the full \$99.95 amount.** Also to qualify for the promotional trail you agree to be enrolled into our convenient auto ship program.

Every 30 days from the date of your initial order you'll be shipped the Vaper XS Replacement Pack and billed \$99.95. The Replacement Pack includes 2 clearomizers and 4 bottles of e-juice so that you never run out. You also understand that you can cancel at any time... without further obligation by calling (888)959-7602 Monday-Friday the hours of 9am-6pm MST. Your transaction will appear on your credit card statement as TRYVaperXS.com. **Your Starter Kit or Replacement Pack will be shipped within 1-2 business days after each payment**

[2.2]...**Customers are receiving a special promotion** delaying the first bill of \$99.95 for 12 days after their first shipment is sent allowing them to evaluate the product, you will be billed \$99.95 18 days later and receive your first Replacement Pack. Customers will continue to receive replacement shipments at the cost of \$99.95 every 30 days after their initial order for a period not to exceed 6 months, unless cancelled....

[3.1]...Products must be returned to **Vaper XS, 4525 S 2300 E #100 Salt Lake City UT 84117**, in their original unopened package within 30 days of shipment.

[3.2]...There is a **\$17.50 per unit restocking fee** for all returned shipments....

- [REDACTED] COMPLAINT -

- 7- On or about October 23, 2013 the consumer, Shawna [REDACTED] of [REDACTED] New York entered into a consumer transaction with the Respondents online at vaperxs.com to receive a "Starter Kit" for the \$4.95 cost of shipping and handling.

The consumer alleges that after entering information in to place the order the consumer was given another introductory offer and was only charged \$1.95 for the shipping and handling. The consumer provided her credit card information and proceeded with the transaction. The consumer alleges no other terms, conditions, or obligations appeared.

- 8- Seventeen days after signing up for the trial, on or about November 9, 2013, the consumer received an e-mail from the Respondents (help@vaperxs.com) advising Ms. [REDACTED] that her order had shipped. The e-mail also advised that the company has a "100% Satisfaction Guarantee," and then represented its website to be TRYVaperXS.com. No disclosure was made regarding the Respondents' terms or conditions of the free trial, auto ship program or 30 day evaluation period as stipulated in the Respondents "Terms and Conditions". On the same day as receiving this shipment confirmation the consumer's credit card was billed \$99.95 by the Respondent.
- 9- On or about November 11, 2013 the consumer received the initially ordered trial product. Approximately 12 days after receiving the product, on or about November 23, 2013, the consumer received an e-mail from Respondents to confirm that the product was shipped and requesting the consumer to contact the Respondents if the product was not received. Five days later (17 days after receiving the product) on or about November 28, 2013 the consumer received another e-mail from the Respondents advising her that the product was to ship again. No advisory, disclosure or reference was made to the consumer in the correspondence regarding the Respondents' auto-ship program or cancellation policy nor was there notice that the consumer would be charged again.
- 10- On or about December 1, 2013 the consumer was billed by the Respondents in the amount of \$99.95. Two days later on or about December 3, 2013 the consumer received an e-mail from the Respondents advising Ms. [REDACTED] that her order had shipped. On December 4, 2013 the consumer received the shipment. Eight days later on December 12, 2013 the consumer received an e-mail from the Respondents to confirm that the consumer had received the product. At no time was an advisory, disclosure or reference made to the

consumer about the Respondents' auto-shipping program or that the consumer's cancellation request was received or accepted.

- 11-** On or about December 16, 2013 the consumer received another package from Respondents. The following day on December 17, 2013 the consumer received another shipment confirmation e-mail asking the consumer to confirm that she had received the product. The consumer then contacted the company to cancel her subscription and return the unwanted shipments. The consumer obtained a return merchandise authorization (RMA) to return the unwanted product and was advised to mail the products to "Sinless Vapor: 3214 N University Ave #455 Provo Utah 84604". The consumer returned this shipment by paying an out of pocket expense of \$3.48 for shipping and handling at her local USPS location.
- 12-** On December 27, 2013 the consumer was billed again by the Respondents in the amount of \$99.95 despite the December 16, 2013 contact and request to cancel. On December 30, 2013 the consumer received a confirmation e-mail from Respondents advising the consumer that the company received the initial return and would be refunding the consumer a total amount of \$84.95. The consumer contacted the company inquiring how they came to that amount. Respondents told the consumer that there was a \$15.00 restocking fee. At no time was an advisory, disclosure or reference made to the consumer about the Respondents' return policy and a restocking fee.
- 13-** On or about January 5, 2014 a credit of \$84.95 appeared on the consumer's credit card statement. On or about January 15, 2014 Respondents attempted to deliver another package to the consumer. The consumer contacted the company to again cancel and return the unwanted product. The consumer received a confirmation e-mail shortly thereafter advising her a refund was issued for \$99.95 and another e-mail confirming a refund of an additional \$15.00.
- 14-** In total the consumer was charged \$99.95 three times, a total of \$299.85 as part of the Respondents promotional offer and auto-ship program for Vaper XS "Replacement Packs". The consumer was refunded a total refund of \$199.90 for the returns. At no time did the Respondents allot the consumer a "trial" period nor did she receive anything for her initial \$1.95 payment for shipping and handling.
- 15-** The above described actions are in violation of the *Utah Consumer Sales*

Practices Act, and the administrative rules promulgated pursuant to that Act. UTAH CODE § 13-11-17(4)(a) which allows the Division, among other things, to impose an administrative fine of \$2,500.00 for each violation of the chapter.

COUNT I: The above described instance in paragraph 3 is a violation to the *Utah Consumer Sales Practices Act*, UTAH CODE §13-11-4. Deceptive act or practice by supplier.

(2) Without limiting the scope of Subsection (1), a supplier commits a deceptive act or practice if the supplier knowingly or intentionally:

(a) indicates that the subject of a consumer transaction has sponsorship, approval, performance characteristics, accessories, uses, or benefits, if it has not;

Respondents' advertisement that its product can be smoked anywhere is a false, deceptive or substantially inaccurate statement. Respondents have represented that its product can be used in several public places, including airplanes, which is not true.

Additionally, Respondents' advertisement that its product is a healthy alternative to traditional cigarette smoking is also a false, deceptive or substantially invalidated statement. Respondents have represented its product has health benefits it does not.

(2 incidents occurred in violation under this count, a potential fine of \$2,500.00 per violation, for a maximum potential fine of \$5,000.00).

COUNT II: The above described instance in paragraph 4 is a violation to the *Utah Consumer Sales Practices Act*, Administrative Rules R152-11-2. Exclusions and Limitations in Advertisement. R152-11-4. Use of the Word "Free" etc.

B. Disclosure of Conditions. A "free" or similar offer is deceptive unless all the terms, conditions, and obligations upon which receipt and retention of the "free" item are contingent are set forth clearly and conspicuously at the outset of the offer so as to leave no reasonable probability that the terms of the offer might be misunderstood.

Respondents used the word "free" in multiple instances referencing its product trial as without risk, when in fact the Respondents' trial was not free of risk as stated but rather obligated the consumer to additional terms, conditions, and recurring fees.

(1 incident occurred in violation under this count, a potential fine of \$2,500.00 per violation, for a maximum potential fine of \$2,500.00).

COUNT III: The above described instance in paragraphs 4 and 5 are in violation to the *Utah Consumer Sales Practices Act*, Administrative Rules R152-11-2. Exclusions and Limitations in Advertisement.

A. It is a deceptive act or practice for a supplier in connection with a consumer transaction, in the sale or offering for sale of a consumer commodity to make any offer in written or printed advertising or promotional literature without stating clearly and conspicuously in close proximity to the words stating the offer of any material exclusions, reservations, limitations, modifications, or conditions. The following are examples of the types of material exclusions, reservations, limitations, modifications, or conditions of offers which must be clearly stated:

(1) An advertisement for any consumer commodity not disclosing the amount of any additional charge for any of the features displayed or listed in the advertisement would be deceptive.

Respondents failed to make clear and conspicuous written disclosures within close proximity to any of its offers stating any material exclusions, reservations, limitations, consistent price modifications, terms or conditions.

Respondents failed to make an advertising statement depicting the full retail value of the e-cig product that would be charged after the 12 day trial and the full cost of the Replacement Packs that were to be charged every 30 days thereafter.

(2 incidents occurred in violation under this count, a potential fine of \$2,500.00 per violation, for a maximum potential fine of \$5,000.00).

COUNT IV: The above described instance in paragraphs 4, 8 are in violation to the *Utah Consumer Sales Practices Act*, UTAH CODE §13-11-4. Deceptive act or practice by supplier.

(2) Without limiting the scope of Subsection (1), a supplier commits a deceptive act or practice if the supplier knowingly or intentionally:

(j) (i) indicates that a consumer transaction involves or does not involve a warranty, a disclaimer of warranties, particular warranty terms, or other rights, remedies, or obligations, if the representation is false;

Respondents' advertisements fail to clearly and conspicuously disclose the obligations of the consumer to cancel the Risk Free Trial, within 12 days to avoid being billed the full retail value.

Respondents' advertisements also failed to clearly and conspicuously disclose such terms, rights, remedies or obligations of the auto-ship program for Replacement Packs that were to occur after the 12 day period.

Respondents advertise a "100% Satisfaction Guarantee" however no terms, conditions, restrictions or polices were stated for this guarantee in any of Respondents representations to consumer, including on Respondents' website or in any of the email correspondence regarding the consumer transaction.

(3 incidents occurred in violation under this count, a potential fine of \$2,500.00 per violation, for a maximum potential fine of \$7,500.00).

COUNT V: The above described instance in paragraph 6 is in violation to the *Utah Consumer Sales Practices Act*, Administrative Rules R152-11-12. Negative Options.

A. A negative option, as defined in 16 C.F.R. 425.1, is a deceptive act or practice only if the negative option violates 16 C.F.R. 425.1.

Respondents' auto-ship program fails to comply with the following 16 C.F.R. 425.1 negative option rules:

(a)(1) Promotional material shall clearly and conspicuously disclose the material terms of the plan, including:

(i) That aspect of the plan under which the subscriber must notify the seller, in the manner provided for by the seller, if he does not wish to purchase the selection;

(iii) The right of a contract-complete subscriber to cancel his membership at any time;

(iv) Whether billing charges will include an amount for postage and handling;

(2) Prior to sending any selection, the seller shall mail to its subscribers, within the time specified by paragraph (a)(3) of this section:

(ii) A form, contained in or accompanying the announcement, clearly and conspicuously disclosing that the subscriber will receive the selection identified in the announcement unless he instructs the seller that he does not want the selection, designating a procedure by which the form may be used for the purpose of enabling the subscriber so to instruct the seller,

- and specifying either the return date or the mailing date.*
- (b)(4) Fail to terminate promptly the membership of a properly identified contract-complete subscriber upon his written request.*
- (5) Ship, without the express consent of the subscriber, substituted merchandise for that ordered by the subscriber.*

Respondents failed to clearly and conspicuously disclose:

- i. how the consumer was to cancel the next shipment, or
- ii. that the consumer could cancel any time in its e-mailed communications with the consumer and on its site.
- iii. whether its price of \$99.95 included shipping and handling and if the initial shipping and handling fee paid to enter the trial was deducted or credit towards the initial purchase price.
- iv. that the consumer would receive a "Replacement Pack" unless cancelled in a stated manner by a specified date prior to sending its products .

Respondents failed to promptly and effectively cancel the consumer's subscription to its auto-ship program after the consumer's written and verbal request.

Respondents failed to obtain the consumer's expressed consent to bill and send its "Replacement Packs".

(6 incidents occurred in violation under this count, a potential fine of \$2,500.00 per violation, for a maximum potential fine of \$15,000.00).

COUNT VI: The above described instance in paragraph 8 is a violation to the *Utah Consumer Sales Practices Act*, UTAH CODE §13-11-4. Deceptive act or practice by supplier.

- (2) Without limiting the scope of Subsection (1), a supplier commits a deceptive act or practice if the supplier knowingly or intentionally:
- (e) indicates that the subject of a consumer transaction has been supplied in accordance with a previous representation, if it has not;

Respondents represented to the consumer that only \$1.95 was charged for shipping and handling to receive a starter kit and try the product, when in fact the consumer did not receive any initial trial period to receive and evaluate the product without risk.

Respondents failed to advise the consumer she would be billed an alternate amount

prior to a receiving repeated shipments.

(1 incident occurred in violation under this count, a potential fine of \$2,500.00 per violation, for a maximum potential fine of \$2,500.00).

COUNT VII: The above described instance in paragraph 8 is also in violation to the *Utah Consumer Sales Practices Act*, UTAH CODE §13-11-4. Deceptive act or practice by supplier.

(l) after receipt of payment for goods or services, fails to ship the goods or furnish the services within the time advertised or otherwise represented or, if no specific time is advertised or represented, fails to ship the goods or furnish the services within 30 days, unless within the applicable time period the supplier provides the buyer with the option to:

- (i) cancel the sales agreement and receive a refund of all previous payments to the supplier if the refund is mailed or delivered to the buyer within 10 business days after the day on which the seller receives written notification from the buyer of the buyer's intent to cancel the sales agreement and receive the refund; or
- (ii) extend the shipping date to a specific date proposed by the supplier;

Respondents received the consumer's payment of \$1.95 on October 23, 2013, but did ship or otherwise deliver the goods within 1 to 2 business days as represented.

Respondent did not ship the consumer the goods until after the consumer's initial "12 day" trial ended. Offer to change date or issue refund

(1 incident occurred in violation under this count, a potential fine of \$2,500.00 per violation, for a maximum potential fine of \$2,500.00).

COUNT VIII: The acts described in paragraphs 8-13 are in violation to the *Utah Consumer Sales Practices Act*, UTAH CODE §13-11-4. Deceptive act or practice by supplier.

(2) Without limiting the scope of Subsection (1), a supplier commits a deceptive act or practice if the supplier knowingly or intentionally:

- (w) misrepresents the geographical origin or location of the supplier's business;

Respondents misrepresented its website and mailing location to the consumer.

Respondents utilized the website TRYVaperxs.com in multiple correspondences and

referenced it in its terms and conditions. The website domain TRYVaperxs.com is not registered to the Respondents and a prior registration history record for the domain does not exist. Additionally, Respondents' mailing and contact address has been represented to consumers as 4525 S 2300 E STE 100 Holladay Utah 84117; however, alternate mailing addresses were utilized in the consumer transaction including the product return address given of "sinless vapor 3214 N University Ave #455 Provo UT 84604," and the January shipment address of "VAPEX 2734 S 3600 W STE #K & #L Salt Lake City Utah 84119." Respondents have represented that their business is located at these addresses, when in fact the businesses at these locations are separate 3rd party fulfillment companies.

(2 incidents occurred in violation under this count, a potential fine of \$2,500.00 per violation, for a maximum potential fine of \$5,000.00).

The above 8 counts carry a total maximum fine of \$45,000.00

THIS CITATION AMENDED THE 9th DAY OF May 2014



Liz Blaylock-INVESTIGATOR
Utah Division of Consumer Protection

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that the undersigned has this day served, via first class and certified mail, postage prepaid, a true and exact copy of the foregoing Citation upon the following:

OZN WEB LLC
1421 E HOOVER AVE
PHOENIX AZ 85006

Certified Article Number

7196 9008 9111 1473 8638

SENDERS RECORD

CHRIS ARMSTRONG
1704 BRUGNING OAK DR
DRAPER UT 84020

Certified Article Number

7196 9008 9111 1473 8645

SENDERS RECORD

DARIN TOONE
1421 E HOOVER AVE
PHOENIX AZ 85006

Certified Article Number

7196 9008 9111 1473 8652

SENDERS RECORD

VAPER XS
4536 S 2300 E STE# 100
HOLLADAY UT 84117

Certified Article Number

7196 9008 9111 1473 8615

SENDERS RECORD

BY: 

Liz Blaylock

IMPORTANT NOTICE - READ CAREFULLY

This citation may be contested by filing a request for a hearing, in writing, within ten (10) days from receipt of this citation. Such hearing shall be conducted as an informal hearing pursuant to UTAH CODE § 63G-4-203, the Utah Administrative Procedures Act. A citation which is not contested becomes the final order of the Division and is not subject to further agency review. In addition to any fines which might be levied, a cease and desist order shall be entered against you. An intentional violation of a final cease and desist order is a third degree felony pursuant to UTAH CODE §13-2-6(2). If you desire a hearing on this citation you may mail your request to:

**Daniel R.S. O'Bannon – Director
Utah Division of Consumer Protection
PO Box 146704
Salt Lake City, UT 84114-6704**

Please be advised that all inquiries, correspondence, or other contacts concerning this citation, with the exception of any written request for hearing as set out above, should be directed to the below-named Division employee, designated by the Director of the Division of Consumer Protection pursuant to UTAH CODE §13-2-6(3):

**Liz Blaylock – Investigator
Utah Division of Consumer Protection
PO Box 146704
Salt Lake City, UT 84114-6704
Telephone: (801) 530-6397
E-mail: egaleria@utah.gov**

DIVISION OF CONSUMER PROTECTION
STATE OF UTAH DEPARTMENT OF COMMERCE
160 E 300 S
PO BOX 146704
SALT LAKE CITY UT 84114

**INFORMAL HEARINGS BEFORE THE
DIVISION OF CONSUMER PROTECTION**

You may request an informal hearing to contest an Administrative Citation issued by the Division of Consumer Protection within ten (10) business days from the date of the Citation. Your request should be in writing, include the case number from your Citation, and be directed to the Director of the Utah Division of Consumer Protection at the address listed above. As you prepare for the hearing, please keep in mind the following:

1. **Notice.** You will receive a Notice of Administrative Hearing specifying a time and date of the hearing. On the day of the hearing, the Division receptionist at the address listed above, on the second floor, will give you the room number for the hearing. The name of the Presiding Officer for the hearing is on your Notice. Please address the Presiding Officer by name (e.g., "Mr. Smith" or "Ms. Jones").

2. **Open Hearing.** The hearing is open to all parties, and is open to the public unless closed by the Presiding Officer. The Division will record the hearing.

3. **Access to Information.** Discovery is prohibited, but parties may have access to all materials and information the Division intends to present at the hearing. You may contact the investigator whose name appears on your citation to request access to this information.

4. **Legal Representation.** You may represent yourself or be represented by an attorney. Ordinarily, the Division is not represented by an attorney at the hearing.

5. **Issues.** The primary issues for the hearing are:

- Was there a factual and legal basis to issue the Citation?
- If so, was it fair to issue the Citation?
- If so, what is the appropriate penalty?

6. **Burden of Proof.** If you are denying the offense, the Division is responsible to prove its case against you by a preponderance of the evidence. If you are admitting the offense, you are responsible to prove that the Citation should be dismissed or the penalty should be reduced.

7. **Evidence.** All parties may testify, present evidence, and comment on the issues. In presenting evidence, any party may examine witnesses and submit exhibits. At the request of either party, or at his or her own initiative, the Presiding Officer may examine a witness. Any party may ask to present a witness by telephone. The Presiding Officer will exclude any evidence he or she deems irrelevant, repetitious or improper.

8. **Final Order.** Following the hearing, the Presiding Officer will take the matter under advisement and make a recommendation to the Division Director, who will issue a Final Order to uphold, dismiss or modify the Citation. The Final Order will include a notice of any right of administrative or judicial review.

You should not rely on this letter alone for instructions regarding informal hearings. The hearing is governed by law (Utah Administrative Procedures Act, see Utah Code § 63G-4 *et al.*; Utah Division of Consumer Protection, see Utah Code § 13-2 *et al.* and rule Department of Commerce Administrative Procedures Act Rules, see Utah Admin. Code R151-4. You may access these laws and rules at your local library or at the following Internet sites: le.utah.gov and rules.utah.gov

You may contact the Presiding Officer with any technical or procedural questions, but the Presiding Officer may not discuss the merits of the case with you.

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