

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

FEDERAL TRADE COMMISSION and)
STATE OF MAINE,)

XXL IMPRESSIONS LLC, a limited liability) INJUNCTION AND OTHER
company, also d/b/a BETTER HEALTH) EQUITABLE RELIEF AS TO
NUTRITIONALS,) DEFENDANTS XXL IMPRESSIONS
)

Plaintiffs, the Federal Trade Commission (“FTC” or “Commission”) and the State of Maine, as represented in this matter by the Office of the Attorney General of Maine (“Maine AG”) (“Plaintiffs”), filed a Complaint for Permanent Injunction and Other Equitable Relief against Defendants pursuant to Section 13(b) of the Federal Trade Commission Act (“FTC Act”), 15 U.S.C. § 53(b), pursuant to Section 4(a) of the Telemarketing and Consumer Fraud and Abuse Prevention Act (“Telemarketing Act”), 15 U.S.C. § 6103(a),

1. “Clear(ly) and conspicuous(ly)” means that a required disclosure is difficult to miss (*i.e.*, easily noticeable) and easily understandable by ordinary consumers, including in all of the following ways:

- A. In any communication that is solely visual or solely audible, the disclosure must be made through the same means through which the communication is presented. In any communication made through both visual and audible means, such as a television advertisement, the disclosure must be presented simultaneously in both the visual and audible portions of the communication even if the representation requiring the disclosure is made in only one means;
- B. A visual disclosure, by its size, contrast, location, the length of time it appears, and other characteristics, must stand out from any accompanying text or other visual elements so that it is easily noticed, read, and understood;
- C. An audible disclosure, including by telephone or streaming video, must be delivered in a volume, speed, and cadence sufficient for ordinary consumers to easily hear and understand it;
- D. In any communication using an interactive electronic medium, such as the Internet or software, the disclosure must be unavoidable;
- E. The disclosure must use diction and syntax understandable to ordinary consumers and must appear in each language in which the representation that requires the disclosure appears;

- F. The disclosure must comply with these requirements in each medium through which it is received, including all electronic devices and face-to-face communications;
- G. The disclosure must not be contradicted or mitigated by, or inconsistent with, anything else in the communication; and

by humans to supplement the diet by increasing the total dietary intake, or

a concentrate, metabolite, constituent, extract, or supplement. Total dietary intake (TDI) is the sum of all nutrients consumed from all sources, including food, beverages, and supplements. TDI is expressed as a percentage of the Dietary Reference Intake (DRI) for each nutrient. The DRI is a set of values that represent the range of intake levels that are estimated to meet the nutrient requirements of most healthy people. The DRI is divided into two categories: the Recommended Dietary Allowance (RDA) and the Adequate Intake (AI). The RDA is the average daily intake level that is sufficient to meet the nutrient requirements of nearly all (97-98%) healthy individuals. The AI is the level of intake estimated to be adequate for a nutrient when there is insufficient scientific information available to establish an RDA. The DRI is also used to assess the risk of nutrient deficiency and excess. The DRI is a useful tool for assessing the nutrient status of individuals and populations. The DRI is also used to set the nutrient goals for food and supplement labeling. The DRI is a key component of the Dietary Guidelines for Americans (DGA). The DGA are a set of recommendations that provide a framework for developing a healthy diet. The DGA are based on the DRI and other scientific information. The DGA are updated every five years. The most recent DGA were published in 2015. The DGA are a key component of the National Academies of Sciences, Engineering, and Medicine's (NASEM) report on the DGA. The NASEM report is a landmark report that provides a comprehensive review of the scientific evidence on the DGA. The NASEM report is a key resource for policymakers, health care providers, and the public. The NASEM report is available at <https://www.nationalacademies.org/~/media/Files/Reports/2016/Dietary-Guidelines-for-Americans-2016.pdf>.

12. **“Material Relationship”** means any relationship that materially affects the weight or credibility of any Endorsement and that would not reasonably be expected by consumers.

13. **“Negative Option Feature”** means, in an offer or agreement to sell or provide any good, program, or service, a provision under which the consumer’s silence or failure to make an affirmative action to reject goods or services, or to cancel the agreement, is interpreted by the seller or provider as acceptance of the offer.

14. **“Person”** means a natural person, an organization, or other legal entity, including a corporation, partnership, sole proprietorship, limited liability company, association, cooperative, or any other group or combination acting as an entity.

15. **“Preauthorized Electronic Fund Transfer”** as defined by the Electronic Fund Transfer Act, 15 U.S.C. § 1693a(10), means an electronic fund transfer authorized in advance to recur at substantially regular intervals.

I.

TWENTY YEAR BAN ON DIRECT RESPONSE 460.7H43(T)-5 Tm ar interva

and Prohibited Representations Regarding Tests, Studies, or Ingredients, nothing in this Section shall prohibit Defendants from Brokering the Manufacture of Covered Products, provided that Defendants or Defendants' family members have no direct or indirect ownership or financial interest in the companies that are advertising, marketing, promoting, selling or distributing the Covered Products, and provided that Defendants only receive payment for their brokerage services from the product manufacturer and do not receive any payment or royalties from companies that advertise, market, promote, sell, or distribute the Covered Products.

“Direct Response Marketing” means any type of marketing, including through television, radio, the Internet, or mail, where a prospective customer is urged to respond directly to the seller to purchase a product.

“Brokering the Manufacture” means assisting a seller or prospective seller in finding a manufacturer to make products to specifications required by the seller or prospective seller.

II.

PROHIBITED REPRESENTATIONS: PAIN RELIEF , CARTIL AGE REBUILDING , COGNITIVE DECLINE, MEMORY IMPROVEMENT, AND DISEASE CLAIMS

IT IS HEREBY ORDERED that Defendants, Defendants' officers, agents, and employees, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any Covered Product, are hereby permanently restrained and enjoined from making, or assisting others in making, expressly or by implication, including through the use of a product name, endorsement, depiction, or illustration, any representation that, in humans, such Covered Product:

- A. Reduces joint pain, inflammation, or stiffness, including in as little as two hours;

- B. Provides relief from back pain;
- C. Reduces the need for medication;
- D. Helps rebuild damaged joints or cartilage;
- E. Reverses, mitigates, or prevents cognitive or mental decline;
- F. Improves memory;
- G. Restores lost memory capacity; or
- H. Cures, mitigates, or treats any disease;

unless the representation is non-misleading and, at the time of making such representation, they possess and rely upon competent and reliable scientific evidence substantiating that the representation is true. For purposes of this Section, competent and reliable scientific evidence

III.

PROHIBITED REPRESENTATIONS: OTHER HEALTH -RELATED CLAIMS

IT IS FURTHER ORDERED that Defendants, Defendants' officers, agents, and employees, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any Covered Product, are permanently restrained and enjoined from making, or assisting others in making, expressly or by implication, including through the use of a product name, endorsement, depiction, or illustration, any representation about the health benefits, safety, performance, or efficacy of any Covered Product, other than a representation covered under the Section of this Order entitled Prohibited Representations: Pain Relief, Cartilage Rebuilding, Cognitive Decline, Memory Improvement, and Disease Claims, unless the representation is non-misleading, and, at the time of making such representation, they possess and rely upon competent and reliable scientific evidence that is sufficient in quality and quantity based on sta

such human clinical testing to substantiate that the representation is true. In addition, when such tests or studies are human clinical tests or studies, all underlying or supporting data and documents generally accepted by experts in the field as relevant to an assessment of such testing as set forth in the Section entitled Preservation of Records Relating to Competent and Reliable Human Clinical Tests or Studies must be available for inspection and production to Plaintiffs. Persons covered by this Section have the burden of proving that a product satisfies the definition of Essentially Equivalent Product.

IV.

PROHIBITED REPRESENTATIONS REGARDING TESTS, STUDIES, OR INGREDIENTS

IT IS FURTHER ORDERED that Defendants, Defendants' officers, agents, and employees, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any Covered Product are hereby permanently restrained and enjoined from misrepresenting, in any manner, expressly or by implication, including through the use of any product name, endorsement, depiction, or illustration:

- A. That any Covered Product is clinically proven to rebuild joint cartilage, reduce back or joint pain, reduce stiffness, or reduce inflammation;
- B. That any Covered Product is clinically proven to restore or improve memory, or mitigate cognitive decline;
- C. That the performance or benefits of any Covered Product are scientifically proven; or

B. All documents referring or relating to recruitment; randomization; instructions,

For any test conducted, controlled, or sponsored, in whole or in part, by Defendants, Defendants must establish and maintain reasonable procedures to protect the confidentiality, security, and integrity of any personal information collected from or about participants. These procedures shall be documented in writing and shall contain administrative, technical, and physical safeguards appropriate to Corporate Defendants' size and complexity, the nature and scope of Defendants' activities, and the sensitivity of the personal information collected from or about the participants.

VII.

PROHIBITED REPRESENTATIONS

VII I.

PROHIBITED REPRESENTATIONS
RELATED TO ADVERTISING FORMAT

IT IS FURTHER ORDERED that Defendants and their officers, agents, and

- B. The total cost to purchase, receive, or use the good or service, including shipping, handling, processing, and any additional financial obligations that may be incurred as a result of accepting the free product, service, or offer;
- C. The timing or manner of any charge or bill;
- D. Any material restrictions, limitations, or conditions to purchase, receive, or use the good or service; and
- E. Any material aspect of the performance, efficacy, nature, or central characteristics of the good or service.

XI.

1. In close proximity to such claim, the total cost to purchase, receive, or use any good or service that is the subject of the sales offer, including shipping, handling, and processing;
 2. The amount, timing, and manner of payment of all fees, charges, or other amounts that a consumer will be charged or billed, and any additional financial obligations that may be incurred as a result of accepting the free product, service, or offer; and
 3. The terms and conditions of any refund, cancellation, exchange, or purchase policy or policies, including the specific steps and means by which such requests must be submitted, and the telephone number, email address, web address, or street address to which such requests must be directed, including the deadline (by date or frequency) by which the consumer must act, and, if there is a policy of not making refunds, cancellations, exchanges, or repurchases, a statement regarding this policy; and
- B. Failing to Clearly and Conspicuously disclose, or assisting others in failing to Clearly and Conspicuously disclose, before consumers are asked to reveal billing information or consent to any purchase that includes a Negative Option Feature:
1. That the consumer will be charged for the good or service, or that the charges will increase after the trial period ends, and if applicable, that the charges will be on a recurring basis, unless the consumer timely takes steps to prevent or stop such charges;

2. The amount (or range of costs) the consumer will be charged or billed, including shipping, handling, and processing, and, if applicable, the frequency of such charges unless the consumer timely takes steps to prevent or stop them;
3. The deadline (by date or frequency) by which the consumer must act in order to stop the recurring charges;
4. The name of the seller or provider of the good or service;
5. A description of the good or service; and
6. The mechanism to stop any recurring charges.

In addition, for any transaction involving a sale of a good or service to a consumer through a Negative Option Feature, within ten (10) days after the date of the sale, Defendants must send the consumer written confirmation of the transaction, either by email or first class mail, according to the consumer's preference, which is identified as a written confirmation in the email subject line or on the outside of the envelope. Such written confirmation shall include Clear and Conspicuous disclosure of all the information required by this Subsection XI.B(1)-(6) above, and shall specify the procedures by which consumers can cancel or obtain a refund.

XII.

EXPRESS INFORMED CONSENT

2. Understands that the transaction includes a Negative Option Feature; and
3. Understands the specific affirmative steps the consumer must take to

1. For consumers who entered into the agreement to purchase a good or service including a Negative Option Feature over the Internet or through other web-based applications or services, Defendants must provide a mechanism for consumers to stop the recurring charge over the Internet or through such other web-based application or service.
2. For consumers who entered into the agreement to purchase a good or service including a Negative Option Feature through an oral offer and acceptance, Defendants must maintain a telephone number through which the consumer can easily cancel the good or service, seek a refund for past charges, and immediately stop all further charges. Defendants must answer all calls to this telephone number during normal business hours.

XIV.

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CONFIDENCE ACT

IT IS FURTHER ORDERED that Defendants, Defendants' officers, agents, and

actual notice of this Order, whether acting directly or indirectly, in connection with the advertising, marketing, promotion, offering for sale, sale, or distribution of any good or service, are permanently restrained and enjoined, in connection with any person who purchases any good or service subsequent to the date of this Order, and who uses a debit card or other means of electronic fund transfer, from:

- A. Failing to obtain written authorization for Preauthorized Electronic Fund Transfers from a consumer's account before initiating any Preauthorized Electronic Fund Transfer, as required by Section 907(a) of the Electronic Fund Transfer Act, 15 U.S.C. § 1693e(a), and Section 1005.10(b) of Regulation E, 12 C.F.R. § 1005.10(b), as more fully set out in Section 1005.10 of the Consumer Financial Protection Bureau's Official Staff Commentary to Regulation E, 12 C.F.R. § 1005, Supp. I; and
- B. Failing to maintain procedures reasonably adapted to avoid an unintentional failure to obtain written authorization for a Preauthorized Electronic Fund Transfer, as required in Section 1005.10 of the Consumer Financial Protection Bureau's Official Staff Commentary to Regulation E, 12 C.F.R. § 1005, Supp. I.

XVI.

MONETARY JUDGMENT AND PARTIAL SUSPENSION

IT IS FURTHER ORDERED that:

- A. Judgment is hereby entered in favor of Plaintiffs and against Defendants, jointly and severally, in the amount of \$6,574,957, as equitable monetary relief;
- B. Defendants are ordered to pay to the Commission \$131,000, such payment to be made to the Commission no later than April 30, 2017 by electronic funds transfer

in accordance with instructions previously provided by a representative of the Commission.

- C. Upon satisfaction of the order to pay described above in Subsection B, the remainder of the judgment as to XXL Impressions LLC and Jeffrey R. Powlowsky shall be suspended subject to Subsections E and F below;
- D. In the event of default on any obligation to make payments under this Order, including, but not limited to, failure to pay \$131,000 to the Commission pursuant to Subsection B, above, interest shall accrue as computed pursuant to 28 U.S.C. § 1961(a) from the date of default to the date of payments. In the event such default continues for ten (10) calendar days beyond the date any payments are due, the entire judgment amount of \$6,574,957 shall immediately become due and payable. Defendants shall be jointly and severally liable with all remaining defendants named in

3. The email from Defendants' attorney to Plaintiffs dated September 16, 2016, explaining Jeffrey R. Powlowsky's other financial interests; and
 4. Additional financial documents supplied by Defendants' attorney to Plaintiffs on September 19, 21, 23, 27, and 28, 2016;
- F. The suspension of the judgment will be lifted as to any Defendant if, upon motion by either of Plaintiffs, the Court finds that such Defendant failed to disclose any material asset or income, materially misstated the value of any asset, or made any other material misstatement or omission in the financial representations identified in Subsection E, above;
- G. If the suspension of the judgment is lifted, this judgment becomes immediately due as to the defendant or defendants causing the suspension to be lifted in the amount specified in Subsection A, above (which the parties stipulate only for purposes of this Section represents the consumer injury alleged in the Complaint), less any payment previously made pursuant to this Section, plus interest computed from the date of entry of this Order;
- H. All money paid to the Commission pursuant to this Order may be deposited into a fund administered by the Commission or its designee to be used for equitable relief, including consumer redress and any attendant expenses for the administration of any redress fund, or for other equitable relief such as consumer informational remedies. If a representative of the Commission decides that such equitable remedies are wholly or partially impracticable, the remaining money shall be divided with the State of Maine. Any money not used by the FTC for equitable relief

Treasury as disgorgement. Defendants have no right to challenge any actions the Commission or its representatives may take pursuant to this Subsection;

- I. All money paid to the State of Maine pursuant to this Order shall be deposited into the Attorney General's other special revenue account and used for consumer education, consumer protection, antitrust enforcement, or for any lawful purpose at the sole discretion of the Attorney General;
- J. Defendants relinquish dominion and all legal and equitable right, title, and interest in all assets transferred pursuant to this Order and may not seek the return of any assets;
- K. The facts alleged in the Complaint will be taken as true, without further proof, in any subsequent civil litigation by or on behalf of either of Plaintiffs, including in a proceeding to enforce their rights to any payment or monetary judgment pursuant to this Order, such as a nondischargeability complaint in any bankruptcy case;
- L. The facts alleged in the Complaint establish all elements necessary to sustain an action by either of Plaintiffs pursuant to Section 523(a)(2)(A) of the Bankruptcy Code, 11 U.S.C. § 523(a)(2)(A), and this Order will have collateral estoppel effect for such purposes; and
- M. Defendants acknowledge that their Taxpayer Identification Numbers (Social Security Numbers or Employer Identification Numbers), which Defendants must submit to Plaintiffs, may be used for collecting and reporting on any delinquent amount arising out of this Order, in accordance with 31 U.S.C. § 7701.

XVII.

COOPERATION WITH FTC AND MAINE

IT IS FURTHER ORDERED that Defendants must fully cooperate with representatives of the Commission, the Maine AG, and any of their representatives in this case and in any investigation related to or associated with the transactions or the occurrences that are the subject of the Complaint. Defendants must provide truthful and complete information, evidence, and testimony. Individual Defendant must appear and Corporate Defendant must cause its partners, officers, employees, representatives, or agents to appear for interviews, discovery, hearings, trials, and any other proceedings that a representative of the Commission or the Maine AG may

address, telephone number, email address, Social Security number, other identifying information, or any data that enables access to a customer's account (including a credit card, bank account, or other financial account), that any Defendant obtained prior to entry of this Order in connection with the labeling, advertising, marketing, distribution, or sale of any formulation of

majority owner or controls directly or indirectly, and Corporate Defendant, must deliver a copy of this Order to:

1. All principals, officers, directors, LLP and LLC partners, managers, and members;
2. All employees, agents, and representatives who participate in the manufacturing, labeling, advertising, marketing, distribution, or sale of any Covered Product or service; and
3. Any business entity resulting from any change in structure as set forth in the Section titled Compliance Reporting.

Delivery must occur within 7 days of entry of this Order for current personnel. For all others, delivery must occur before they assume their responsibilities.

- C. From each individual or entity to which a Defendant delivered a copy of this Order, that Defendant must obtain, within 30 days, a signed and dated

Plaintiffs' representatives may use to communicate with Defendant;

(b) identify all of that Defendant's businesses by all of their names, telephone numbers, and physical, postal, email, and Internet addresses;

(c) describe the activities of each business, including the goods and services offered, the means of advertising, marketing, and sales, and the involvement of any other Defendants (which Individual Defendants must describe if they know or should know due to their

contact; (b) the structure of Corporate Defendant or any entity that Defendants have any ownership interest in or control directly or indirectly that may affect compliance obligations arising under this Order, including: creation, merger, sale, or dissolution of the entity or any subsidiary, parent, or affiliate that engages in any acts or practices subject to this Order.

2. Additionally, Individual Defendant must report any change in:
 - (a) names, including aliases or fictitious names, or residence addresses; or
 - (b) titles or roles in any business activity, including any business for which such Defendant performs services whether as employees or otherwise and any entity in which such Defendant has any ownership interest, and identify the name, physical address, and any Internet address of the business or entity.
- C. For a period of 10 years, each Defendant must submit to the Commission and the Maine AG notice of the filing of any bankruptcy petition, insolvency proceeding, or similar proceeding by or against such Defendant within 14 days of its filing.
- D. Any submission to the Commission or the Maine AG required by this Order to be sworn under penalty of perjury must be true and accurate and comply with 28 U.S.C. § 1746, such as by concluding: “I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on: _____” and supplying the date, signatory’s full name, title (if applicable), and signature.

- E. Unless otherwise directed by a Commission representative in writing, all submissions to the Commission pursuant to this Order must be emailed to DEBrief@ftc.gov or sent by overnight courier (not the U.S. Postal Service) to: Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580. The subject line must begin: *FTC v. XXL Impressions et al.*, and the number X_____.
- F. Unless otherwise directed by a Maine AG representative in writing, all submissions to the Maine AG pursuant to this Order must be sent by overnight courier (not the U.S. Postal Service) to: Office of the Attorney General of Maine, Consumer Protection Division, 111 Sewall Street, 6th Floor, Augusta, ME 04330. The subject line must begin: *Order in re State of Maine v. XXL Impressions et al.*, and must identify the Court and docket number of this Order as ordered by the Court.

XXI.

RECORDKEEPING

IT IS FURTHER ORDERED that in connection with the sale of any Covered Product, Defendant must create certain records for 10 years after entry of the Order, and retain each such record for 5 years. Specifically, Corporate Defendant and Individual Defendant for any business that such Defendant, individually or collectively with any other Defendants, is a majority owner or controls directly or indirectly, must create and retain the following records:

- A. Accounting records showing the revenues from all goods or services sold, all costs incurred in generating those revenues, and the resulting net profit or loss;

- B. Personnel records showing, for each person providing services, whether as an employee or otherwise, that person's: name; address; telephone numbers; job title or position; dates of service; and (if applicable) the reason for termination;
- C. Complaints and full or partial refund requests, whether received directly or indirectly, such as through a third party, and any response;
- D. All records necessary to demonstrate full compliance with each provision of this Order, including all submissions to the Commission and the Maine AG; and
- E. A copy of each unique advertisement or other marketing material.

XXII.

COMPLIANCE MONITORING

Defendant who has agreed to such an interview. The person interviewed may have counsel present.

- C. Plaintiffs may use all other lawful means, including posing, through their representatives, as consumers, suppliers, or other individuals or entities, to Defendants or any individual or entity affiliated with Defendants, without the necessity of identification or prior notice. Nothing in this Order limits the Commission's lawful use of compulsory process, pursuant to Sections 9 and 20 of the FTC Act, 15 U.S.C. §§ 49, 57b-1. Nothing in this Order limits the Maine AG's lawful use of compulsory process, pursuant to section 211 of the Maine UTPA, ME. REV. STAT. tit. 5, § 211. Defendants hereby consent to the disclosure by the Maine AG to any law enforcement agency and any representative of the State of Maine of any material or information produced by Defendants pursuant to section 211 of the Maine UTPA, whether produced before or after the date of this Order.
- D. Upon written request from a representative of the Commission or the State of Maine, any consumer reporting agency must furnish consumer reports concerning individual Defendant, pursuant to Section 604(1) of the Fair Credit Reporting Act, 15 U.S.C. §1681b(a)(1).

XXIII .

RETENTION OF JURISDICTION

IT IS FURTHER ORDERED that this Court shall retain jurisdiction of this matter for purposes of construction, modification, and enforcement of this Order.

IT IS SO ORDERED this 10th day of March, 2017.

/s/ Nancy Torresen
United States Chief District Judge

IT IS SO STIPULATED this 15 day of February, 2017.

DAVID C. SHONKA
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