IN THE IOWA DISTRICT COURT IN AND FOR POLK COUNTY

STATE OF IOWA ex rel. THOMAS J. MILLER, ATTORNEY GENERAL OF IOWA, 99AG25112, Plaintiff, v. **NEW WOMYN, INC., and DAN KAISER,** Defendants.	**NO. CE 39318** **FINDINGS, CONCLUSIONS AND ORDER**

This matter came on for trial on November 19, 2001. The Attorney General was represented by Assistant Attorney General Ray Johnson. Defendants New Womyn, Inc. and Daniel Kaiser were represented by their attorney, Jay Hamilton. Daniel Kaiser failed to appear for trial. No other representative of New Womyn, Inc. appeared for trial. Having considered the testimony, exhibits and arguments of counsel, the Court now makes the following Findings, Conclusions and Order.

PRELIMINARY MATTERS

Prior to trial, the Attorney General filed a Motion for Default and/or to Exclude Evidence. Defendants filed a Motion to Dismiss, arguing that the Court lacked subject matter jurisdiction. The Court denied the Defendants' Motion to Dismiss and deferred ruling on the Attorney General's Motion for Default. The Court now rules on the Attorney General's Motion.

Re: Motion for Default

The Attorney General moved for default of Defendant New Womyn, Inc. pursuant to I.R.Civ.P. 134(b)(2) and 230 for Defendant New Womyn, Inc.'s failure to comply with court

orders, including the Court's March 8, 2001, Order requiring a response to the civil investigative demand served by the Attorney General. It is also contended that Defendants New Womyn, Inc. and Dan Kaiser failed to fully comply with the Court's October 26, 2001, Order requiring a full response to the Attorney General's Request for Production and Interrogatories, which would have required production of information related to customers. A full response to the demand would have required production of the names of consumers who purchased Defendants' breast enlargement device, along with the amount paid for the device. Defendants have admitted that they have the customer records requested. Ex. 12, pp. 100-103. Investigator Barbara Blake testified that the Attorney General's investigation has been prejudiced in several ways by Defendants' refusal to produce their customer list, including the inability to interview consumers to determine their experiences with the breast enlargement device and their experiences with New Womyn, Inc. The failure to produce the customer list has also made it impossible to determine the identity of those owed restitution and the amounts they are owed.

The Court finds that New Womyn, Inc. has refused to comply with the Court's March 8, 2001, Order. The Court also finds that New Woman, Inc. and Dan Kaiser have failed to fully comply with the Court's October 26, 2001, Order. That failure has substantially prejudiced the Attorney General's case, particularly in regard to the relief sought. The Court further finds that New Woman, Inc. should be, and is, defaulted pursuant to I.R.Civ.P. 134(b)(2) and 230 for its refusal to comply with the Court's March 8, 2001, Order. Default is also appropriate for its failure to fully comply with the Court's October 26, 2001, Order.

Defendant Dan Kaiser failed to appear at the time and date set for trial. The Court finds that Defendant Kaiser should be, and is, defaulted pursuant to I.R.Civ.P. 230(c) for failure to

appear at trial. Defendant Kaiser is also defaulted for his failure to fully comply with the Court's October 26, 2001, Order.

While the Court would enter the above ruling regarding default regardless, the Court does note that counsel for Defendants New Woman, Inc. and Dan Kaiser indicated to the Court that his clients authorized and instructed him to stipulate to the default.

Re: Motion to Exclude Evidence

The Attorney General also requested exclusion of evidence as a sanction for numerous alleged failures on the part of the Defendants to comply with the Court's orders, including the Court's Scheduling Order of January 17, 2001. Defendants made no attempt at trial to introduce any evidence or to call any witnesses. There was no offer of proof made as to what any witness would testify to or as to any exhibit or other evidence that Defendants would introduce. The Court did not exclude any evidence offered by the Defendants. Because no evidence was offered or rejected, and because there was no offer of proof by the Defendants on any evidence, the Court has nothing to rule on in terms of evidence to exclude. The Attorney General's Motion to Exclude Evidence is now moot.

RULING ON THE MERITS

The Attorney General's Petition is in two divisions. Division I alleged Defendant New Woman, Inc. refused to respond to a civil investigative demand served by the Attorney General. That issue was resolved against the Defendant in the Court's March 8, 2001, Order. Defendant New Womyn, Inc. has refused to comply with that Order. Despite the Defendants' stipulation to the Attorney General's default at trial, the Court received evidence on Count II of the Attorney General's Petition. The Court is mindful that in equity matters, all evidence offered must

ordinarily be received in order to preserve it for the record, so that the appellate court, if it finds error in its de novo review, can then decide the case on the record without a remand. Leo v. Leo, 213 N.W.2d 495, 497-98 (Iowa 1973); Sille v. Shaffer, 297 N.W.2d 379, 380-81 (Iowa 1980).

1. Findings of Fact

The Court finds that all facts set forth herein have been established by a preponderance of clear, satisfactory and convincing evidence. New Woman, Inc. was an Iowa corporation located in Bettendorf. Ex. 1, 5 and 12, pp. 25-26. New Woman, Inc. and Daniel Kaiser have sold a "breast enlargement" device called "Stimulations VII" in and from Iowa. See generally Ex. 1, 5 and 12. New Womyn, Inc. was incorporated on August 25, 1997. Ex. 12, p. 16. New Womyn, Inc. had been selling Stimulations VII for about three years prior to the time Defendant Kaiser did a September 20, 1999, KGGO interview. Ex. 5, p. 8. Kaiser was the president of New Womyn, Inc. He directed, formulated and controlled corporate policy, including advertising policy. Ex. 12, pp. 18, 21, 23 - 24, 30. Kaiser was the only employee of New Womyn, Inc. Ex. 12, p. 24.

Stimulations VII consists of a "biosphere" attached to a suction device. Ex. 1-3, 12 and 14. The biospheres are to be placed over the breasts. Id. Prolonged suction over a period of weeks and months purportedly causes permanent growth of tissue and enlargement of the breasts. Ex. 1-3. Defendant Kaiser testified he designed and tested Stimulations VII from September of 1996 to September of 1997. Ex. 12, p. 33. Testing was limited to tests on Kaiser's wife, himself and later on two other individuals. Ex. 12 pp. 33 - 34. When asked during his deposition about the research design used, Kaiser replied, "what is that?" Ex. 12, pp. 34 - 35. Nobody with medical or scientific training assisted Kaiser with a research design. Ex. 12, p. 36.

Defendant Kaiser is not qualified by education, training or experience to determine whether the claims made by New Womyn, Inc. for Stimulations VII are substantiated. When asked in his deposition about his highest level of education, Kaiser replied, "student." Ex. 12, pp. 6 - 7. Kaiser has an "equivalency" certificate in hydraulic engineering from a community college. Ex. 12, p. 7. Kaiser claims three years of cryogenic science experience with an industrial gas company. Ex. 12, pp. 7, 43. He claims three to four years of "pre-med" at Scott Community College, which apparently was pre-chiropractic education. Ex. 12 pp. 7, 39. Despite stating during an interview on KGGO that he had a bachelor's degree, Kaiser is not a college graduate. Compare Ex. 5, p.5 with Ex. 12 pp. 6 - 7. When asked about his qualifications to design Stimulations VII, Kaiser replied, "I breathe, I live." Ex. 12, p. 9. Asked if there was anything else that qualified him to design Stimulations VII, Kaiser indicated that there wasn't. Ex. 12, pp. 8 - 9. When asked what qualified him to determine whether Stimulations VII worked as represented, Kaiser replied, "my eyes" and "common sense." Ex. 12, p. 9. Asked if there was anything else, Kaiser replied, "nothing else I can remember at this point." Ex. 12, p. 9. When asked what qualified him to evaluate side effects and medical conditions related to use of Stimulations VII, Kaiser responded, "common sense" and that there was nothing else that he was aware of. Ex. 12, pp. 9 - 11. At some point, Kaiser became aware that some individuals using Stimulations VII were experiencing numbness in their arms, but he didn't know the medical significance of that. Ex. 12, pp. 12 - 13. He didn't know what caused the numbness or whether it was a serious condition. Ex. 12, pp. 12 - 13. Kaiser was the sole employee of New Womyn, Inc. He was doing the deposition as the designee of New Womyn, Inc. Ex. 12, pp. 4 - 6.

Kaiser and New Womyn, Inc. have advertised and disseminated the following claims for Stimulations VII:

(a) That Stimulations VII will permanently grow breast tissue;
(b) That Stimulations VII will cause breast enlargement two, three or even four cup sizes;
(c) That Stimulations VII has been scientifically proven safe and effective for breast enlargement;
(d) That Stimulations VII will regrow breasts that have been removed via mastectomy;
(e) That Stimulations VII is not a "medical device" subject to FDA regulation.

Ex. 1 and 5. As explained more fully below, the Court finds that Defendants had no reasonable basis for the claims set forth in (a) through (d) above. The Court finds that the claim set forth in (e) above was false. Defendants have advertised and offered a "money back guarantee," an "unheard of money back guarantee" and an "18 month money back guarantee." Ex. 1 and 12, pp. 128, 129. The Court finds that these representations were deceptive. The Court also finds all of the representations set forth in (a) through (e) to be material, as were the representations related to the money-back guarantee. The representations were likely to affect a consumer's conduct or decision with regard to the product or service.

Despite Defendants' representations on their web site that Stimulations VII was not a medical device subject to FDA regulation, the FDA took a different view. On September 30, 1999, Defendants received a letter from the FDA indicating that Stimulations VII was indeed an unapproved medical device. Ex. 19. The letter further indicated that while the FDA had exercised its "enforcement discretion" not to require full compliance with the federal act, that discretion did not apply to the types of claims Defendants were making for their breast enlargement device. The letter indicated that medical claims could not be made and that labeling for the device could not make claims that were not supported through device testing and usage. The letter further stated that the letter was not intended to be an all-inclusive list of violations.

Additional findings of fact will be discussed in relation to the Court's conclusions of law.

2. Conclusions of Law

A. Consumer Fraud Violations

The Attorney General has alleged in Count II that Defendants have made the representations set forth above and that the representations were false, deceptive or misleading, and that Defendants had no reasonable basis for their advertising claims at the time they were made.

Iowa Code § 714.16(2)(a) provides:

> The act, use of employment by a person of an unfair practice, deception, fraud, false pretense, false promise, or misrepresentation, or the concealment, suppression, or omission of a material fact with intent that others rely upon the concealment, suppression, or omission, in connection with the lease, sale or advertisement of any merchandise or the solicitation of contributions for charitable purposes, whether or not a person has in fact been misled, deceived, or damaged, is an unlawful practice.
>
> It is deceptive advertising within the meaning of this section for a person to represent in connection with the lease, sale, or advertisement of any merchandise that the advertised merchandise has certain performance characteristics, accessories, uses or benefits or that certain services are performed on behalf of clients or customers of that person if, at the time of the representation, no reasonable basis for the claim existed. The burden is on the person making the representation to demonstrate that a reasonable basis for the claim existed.

(Emphasis added.)

Iowa Code § 714.16(7) provides in pertinent part that:

> Except in an action for concealment, suppression or omission of a material fact with intent that others rely upon it, it is not necessary in an action for reimbursement or an injunction to allege or prove reliance, damages, intent to deceive, or that the person who engaged in an unlawful act had knowledge of the falsity of the claim or ignorance of the truth. A claim for reimbursement may be proved by any competent evidence, including evidence that would be appropriate in a class action.

Iowa Code § 714.16(1)(f) defines "deception" as:

> An act or practice which has the tendency or capacity to mislead a substantial number of consumers as to a material fact or facts.

The Attorney General has met his burden to establish that Defendants made the representations at issue. Defendants have not established any "reasonable basis" for claims that Stimulations VII would permanently grow breast tissue; that Stimulations VII would cause breast enlargement of two, three or even four cup sizes; that Stimulations VII had been scientifically proven safe and effective for breast enlargement; that Stimulations VII would regrow breasts that have been removed via mastectomy;[1] or that Stimulations VII was not a "medical device" subject to FDA regulation. Defendants produced at deposition documents that purport to be substantiation for their advertising claims, but none of the documents identified are substantiation for any of the advertising claims at issue, nor is there any testimony or other evidence from any "expert" witness or any person qualified by education, training, experience or otherwise indicating that any of the documents have any relevance to, or are support for, any of the advertising claims at issue in this case.

Dr. Stephen Barrett, from Allentown, Pennsylvania, testified at trial. An affidavit prepared by Dr. Barrett was received as Exhibit 15. He completed his premedical and medical education at Columbia University. Dr. Barrett has a thorough grounding in the nature of science,

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[1]Defendants have contended that they did not make the claim that Stimulations VII would regrow breasts that have been removed via mastectomy. New Womyn's web site states "Explanation and Mastectomy Victims--Regrow what was taken from you." On a completely different web page, it states, "Mastectomy Sufferers--You have to ask this! If this process grows breasts on M-F transsexuals, it just might work for me!!! Ask your doctor to contact us, we just might be able to help you be whole again." Ex. 1. The Court finds that, taken as a whole, these are express and implied claims that Stimulations VII will, or may be, effective in regrowing breasts removed via mastectomy. The claims are unsubstantiated.

the scientific method and the evaluation of scientific data. He is a member of the peer review panels of the Journal of the American Medical Association (JAMA), the New England Journal of Medicine, and the Annals of Internal Medicine. He is an editorial board member of the Internet's most prestigious web site (Medscape) and its peer-reviewed scientific journal (MedGenMed). Dr. Barrett is an editorial board member of the Scientific Review of Alternative Medicine, also a peer-reviewed journal. Dr. Barrett's Affidavit and Vitae reflect a substantial amount of additional education, training and experience that would qualify him to express the expert opinions cited herein. Those qualifications will not be repeated here, other than to note that Dr. Barrett has extensive experience in evaluating health-related claims to determine whether the claims are substantiated. He is familiar with the level of substantiation experts in the field would require to conclude that there is a reasonable basis for a health claim for a particular product.

In Dr. Barrett's opinion, reliable health information comes primarily through the use of the scientific method. Scientific research requires proper sampling techniques and the highest possible accuracy of measurement or observation. Scientific studies must be objective and not contaminated by the personal beliefs, perceptions, biases, values, wishful thinking or fraudulent conduct of the researcher. Personal experiences and testimonials should be given very little credibility in judging the value of a health-related method. Controlled clinical trials offer the most credible evidence. These trials compare an experimental group of people who receive the treatment being tested and a control group of people who receive a different treatment or no treatment. For example, members of the experimental group may be exposed to a device, while those in a control group are not. Reputable scientists strive to publish their findings in peer-reviewed journals so that scientific knowledge can advance. Properly written reports include enough detail to enable them to be judged and to be reproducible by others.

Many pills, potions, cream and devices have been marketed with claims that they are effective to enlarge the breast. To date, no product marketed for this purpose has been demonstrated to work as advertised. It is a basic principal of science that extraordinary claims require extraordinary evidence to substantiate the claims. For this reason, protocols for scientific testing of an alleged breast-enlargement product should include many safeguards to ensure that any "before and after" differences are due neither to chance nor to other factors such as observer bias, variability of body weight, measurement variations, postural variations, and variability or shifting of body fluid content. The measurement process should be properly standardized, recorded and judged. Standardization would involve determining how breast size can be reliably measured. The measurements must be made in the same way for each person each time. All measurements should be made at the same time of the day. The measuring tape or other instrument must be applied with the same tension each time. The individual's posture should not vary. Since chest circumference changes when people breathe in and out, the measurement should be taken at the same phase of the respiratory cycle. The measurement should be recorded, and the process should be documented with videotapes and/or photographs. The experiment should be long enough to be meaningful. To document a claim that breast enlargement is likely to be permanent, several years of follow-up study would be needed. Observer bias could result in deliberate or unknowing measurement variations. For this reason, the observers should not know whether the people they measure are using the product. Studies and documents related to body tissues other than the breast would not be persuasive for claims that a device causes breast enlargement.

The Attorney General also introduced the deposition of Charles Kyper. Mr. Kyper is from Chapel Hill North Carolina. He was employed by the Food and Drug Administration for

more than twenty-eight years. He has extensive experience in FDA review and approval of applications for new medical devices. In addition to other extensive qualifications, he was Director of the pre-market approval staff for medical devices at the FDA. Ex. 20, pp. 28-29. Mr. Kyper and his staff were responsible for the administrative, scientific and regulatory review of new medical device submissions. It was their job to determine whether scientific data submitted was sufficient to submit to scientific review panels. Id. Mr. Kyper was also involved in training of the scientific review panels. Ex. 20, p. 40-41. Safety and efficacy data for a device and claims made for a device had to meet requirements for "valid scientific evidence." Ex. 20, p. 29-30. Mr. Kyper is well qualified by education, training and experience to express the opinions contained herein and in his deposition (Ex. 20). Those extensive qualifications can be found in the record in Exhibits, 17, 18 and 20.

It is Mr. Kyper's opinion that Stimulations VII is a medical device under FDA statutes and regulations, because it is intended to affect the structure of the body. Ex. 20, p. 11. Mr. Kyper indicated that a breast pump similar to Stimulations VII was on public display in the lobby of the FDA in a collection of what the FDA considered to be "quack devices." Ex. 20, p. 16. Mr. Kyper reviewed the substantiation New Womyn, Inc. provided at its deposition (Ex. 13), along with the claims at issue made for Stimulations VII. He concluded that scientists would not recognize the information as adequate to support the claims made for the device. Ex. 20, pp. 41-50. The FDA would require an adequate protocol for clinical studies so that it could be determined whether the results obtained were reproducible. Ex. 20, pp. 31, 32. Studies would have to be performed at two, if not three, independent sites, all following the same protocol. Id. The reason the sites act independently is to reduce the potential for bias and, once again, to show that results are reproducible. Id. Any financial interest of an investigator would

have to be disclosed and would receive higher FDA scrutiny of the results. Ex. 20, pp. 32-33. Detailed records would be required. Id. If individuals are removed or drop out of the study, detailed information would have to be provided as to why that happened. Ex. 20, pp. 33-34. Clinical studies would have to be on the product at issue or at least one that is not materially different. Ex. 20, pp. 34-38. If there is reliance on studies for a similar device, additional studies may even be required to determine whether devices are equivalent. Id.

Defendants have made both "establishment claims" and "non-establishment claims" for Stimulations VII. Establishment claims are statements to the effect that scientific tests establish that a product works as intended. Removatron International Corporation v. Federal Trade Commission, 884 F.2d 1489, 1492, fn. 3 (1st Circ. 1989). An example would be claims made on Defendants' web site to the effect that Stimulations VII has been scientifically proven safe or effective for breast enlargement. Non-establishment claims are statement to the effect that a product works for a particular purpose. Id. Establishment claims require at least the level of substantiation represented. Id.

The level of substantiation required to support claims for a medical device is well-controlled scientific studies. See generally Removatron International Corporation v. Federal Trade Commission. A valid scientific test is one in which persons with skill and expertise in the field conduct the test and evaluate its results in a disinterested manner using testing procedures generally accepted in the profession which best ensure accurate results. Removatron at fn. 5.

Defendants have no well-controlled scientific studies whatsoever for Stimulations VII. Defendants' testing of Stimulations VII on Defendant Kaiser, his wife and on a limited number of others is inadequate to make advertising claims related to the safety and efficacy of Stimulations VII. The "testing" falls far short of that required for any of the claims, but

especially that establishment claim that Stimulations VII had been "scientifically proven" safe and effective for breast enlargement.

Defendants have argued in these proceedings that it is the Attorney General's burden to "prove" the "amount of substantiation experts in the field would agree is reasonable." Defendants rely on State of Iowa v. Hydro Mag, Ltd., 436 N.W.2d 617 (Iowa 1989) to support this argument. The Iowa Supreme Court in Hydro Mag was interpreting the 1983 Iowa Consumer Fraud Act. Hydro Mag at 618. The Act was substantially amended by the legislature in 1987, and many, if not most, of the provisions at issue in this case were added after Hydro Mag was decided. See Chapter 164 of Acts and Joint Resolutions, 1987 Regular Session of the Seventy-Second General Assembly. Most notably, the portion of Iowa Code § 714.16(2)(a) that places the burden of proof on the Defendants to substantiate their advertising was added. Hydro Mag was decided under a statute that did not contain the following language:

> It is deceptive advertising within the meaning of this section for a person to represent in connection with the lease, sale, or advertisement of any merchandise that the advertised merchandise has certain performance characteristics, accessories, uses, or benefits or that certain services are performed on behalf of clients or customers of that person if, at the time of the representation, no reasonable basis for the claim existed. The burden is on the person making the representation to demonstrate that a reasonable basis for the claim existed.

(Emphasis added.)

Defendants had the burden to prove that they had a "reasonable basis" for their advertising at the time the advertising claims were made. That includes proof of the level of substantiation required to support their claims. It is for the Court, after reviewing and considering the evidence, including evidence as to the amount of substantiation experts would view as adequate for the type of claim involved, to determine whether Defendants have met their

burden. The burden to substantiate their advertising at all times remains with the Defendants. In any event, the Attorney General has proven that well-designed, well-controlled, peer-reviewed, clinical studies would be required before any advertising claims could be made that Stimulations VII would cause the growth of breast tissue or breast enlargement. The Attorney General has established that Defendants did not possess or rely on such studies at the time the representations at issue were made. While it is not necessary to decide the issue at this time because the testing done was clearly inadequate, the Court would also note that even the inadequate testing was done on several individuals with a financial interest in sale of the product, making the testing somewhat suspect. The financial interest increases the need for detailed records of the methods and results of the testing, which, in this case, have not been introduced or documented.

The Court also concludes that the representations regarding Defendants' money-back guarantee were deceptive. The Attorney General introduced testimony and an affidavit from Investigator Barbara Blake. Investigator Blake has been an investigator in the Consumer Protection Division of the Attorney General's Office for more than twelve years. She has testified as an expert witness on consumer matters on many occasions. She has extensive training and experience in working in consumer protection matters related to false, deceptive and misleading advertising. Investigator Blake has interviewed hundreds of consumers related to deceptive advertising matters. She has interviewed numerous employees of companies and defendants engaged in various methods of deceiving the public. She works on matters related to deceptive advertising and consumer perception of advertising on a daily basis and has done so for more than twelve years. Investigator Blake is well qualified by experience and training to express opinions as to how consumers would perceive advertising representations. See e.g. State v. Khalsa, 542 N.W.2d 263, 267-268 (Iowa App. 1995) (Consumer Protection investigator from

the Iowa Attorney General's Office qualified to give expert opinion as to whether advertising contained implied claims that were deceptive and as to how consumers perceived those advertising claims). Investigator Blake has concluded that the Defendants' money-back guarantee is deceptive and misleading for many reasons. Material terms of the Defendants' money-back guarantee are not clearly and conspicuously disclosed. The 18-month money-back guarantee is effective after 18 months of use, while an "18 month money back guarantee" is commonly understood by consumers as a full refund if the consumer is dissatisfied with the product during the first 18 months. The terms and conditions of the money-back guarantee are so onerous as to make the money-back guarantee illusory or worthless. For example, a consumer must be measured by a physician, keep a daily log of use and make repeated visits back to the physician for measurement, all at the consumer's expense. Records must be kept on forms provided by New Womyn, Inc. The measurements and log must continue for 18 months. Even then, the decision to make the refund is discretionary with Defendants. The Court finds Investigator Blake's testimony on this issue to be credible. The Court reaches the same conclusions from its own independent review of the money-back guarantee and the terms and conditions associated with the guarantee.

B. Individual Liability

The Court finds that Defendant Daniel Kaiser is individually liable for his and New Womyn's violations of the Iowa Consumer Fraud Act. The Iowa Consumer Fraud Act applies to "persons." Iowa Code § 714.16(1)(j) and (2)(a). It is not necessary to pierce the corporate veil to find individual liability for violations of Iowa Code § 714.16. State ex. rel. Miller v. Santa Rosa Sales, 475 N.W.2d 210, 220 (Iowa 1991). Both a corporation and its "controlling persons" are

liable for violations of a deceptive trade practices statute. State ex. rel. McLeod v. C&L Corporation, Inc., 313 S.E.2d 334, (S.C. App. 1984). A controlling person is one who formulates, controls and directs corporate policy, or one who is deeply involved with the business. Id. Defendant Kaiser is personally liable because he participated in the acts at issue. He is also individually liable because he formulated, directed, controlled and was deeply involved in the violations.

C. Customer List

Defendants are also jointly and severally liable for restitution to out-of-state consumers who purchased from the Defendants while they were an Iowa business. Defendants advertised and sold these breast enlargement devices to out-of-state consumers from Iowa. Iowa Code § 714.16(2)(a) prohibits certain deceptive trade practices. Iowa Code § 714.16(2)(a) prohibits certain deceptive trade practices. Iowa Code § 714.16(7) provides for restitution to victims. There is no requirement that the victim live in Iowa so long as the violations took place in or from Iowa (emphasis added by the Court). The Iowa Consumer Fraud Act provides for restitution orders by the Court to restore money or property to any "person" where the money has been acquired by a defendant in violation of the Act. There is no language in the Act to limit injunctive relief or restitution only to Iowa consumers where the prohibited acts are those of an Iowa business. See Vacco v. Lipsitz, 663 N.Y.S.2d 468, 474 (1997) (consumer fraud act protects all consumers regardless of residency, a result that is "hardly novel" given the number of state consumer protection statutes interpreted to be applicable to out-of-state consumers). See also Millenium Communications v. Office of the Attorney General, Department of Legal Affairs, State of Florida, 761 So. 2d 1256, 1261-1262 (Fl. 3rd Dis. 2000) (In absence of any language in

consumer protection statute limiting scope to in-state consumers, statute would be construed to apply to out-of-state consumers victimized by in-state company). Despite the language cited by Defendants, Iowa's Consumer Fraud Act does not contain any language that could even remotely be construed to limiting its scope to in-state consumers. Persons located in Iowa who deceive out-of-state consumers are liable for restitution to those consumers. Since there is no limiting language, there is no reason to believe the legislature intended to allow Iowans to cheat out-of-state residents without having to comply with the Consumer Fraud Act.

Defendants' proposed interpretation of the consumer fraud act would make Iowa a safe haven for con artists who simply set up shop in Iowa but only sell to out-of-state consumers through national advertising. See People v. Camera Warehouse, Inc. 496 N.Y.S. 2nd 659 (1985) (A state is damaged if its citizens are permitted to engage in fraudulent practices even where parties damaged are non-residents.)

Numerous courts have concluded that an Attorney General may obtain restitution for out-of-state consumers when an in-state company engages in deceptive trade practices. See Brown v. Market Development , Inc., 322 N.E. 2d 367 (Ohio Com. Pl 1974) (Ohio deceptive trade practices statute provides civil remedies in consumer transactions irrespective of the location of the consumer): Kugler v. Haitian Tours Inc., 283 A 2d 706 (N.J. Super. App. Div. 1972) (New Jersey deceptive trade practices statute applied to unfair and deceptive trade practices perpetrated by a New Jersey business against out-of-state consumers; Clothesrigger, Inc. v. GTE Corp., 236 Cal. Rptr. 605 (Cal. App. Ct 1987) (California consumer protection statute protects out-of-state consumer from wrongful conduct in California): State ex rel. Corbin v. Pickrell, 667 P. 2d 1304 (Ariz. 1983) (Arizona consumer fraud statute applies to conduct by local businesses against out-of-state consumers); In re Del Felice, 77 B.R.. 376, 380 C Bankr. D. Conn. 1987) (New York

attorney general could bring action on behalf of consumers from other states against in-state perpetrator.)

Ordering restitution for any consumers is complicated by the fact that Defendants have refused to obey this Court's orders and produce the list. Defendants will have ten (10) days from the date of entry of this Order to produce the customer list. If it is not produced, the Court will impose appropriate sanctions.

ORDER

IT IS THEREFORE ORDERED that:

1. Defendants New Womyn, Inc., Daniel Kaiser and their partners, officers, employees, agents, successors and all other persons, corporations and other entities acting in concert or participating with said Defendants are permanently enjoined pursuant to Iowa Code § 714.16(7) from making any representation, directly or by implication, that Stimulations VII or any other novelty, product or device

a. will permanently grow breast tissue;

b. will cause breast enlargement;

c. has been scientifically proven safe and effective for breast enlargement;

d. will regrow breasts that have been removed via mastectomy; or

e. is not a "medical device" subject to FDA regulation, (if it is to be used for breast enlargement).

2. Within ten (10) days of entry of this Order, Defendants New Womyn, Inc., and Daniel Kaiser shall provide to the Attorney General the name, last known address, phone number, date and amount of purchase, product purchased and the date and amount of any refund, if any, for all individuals who purchased Stimulations VII from New Womyn, Inc. The required list is not

limited to Iowans and restitution will not be so limited. All individuals who purchased from New Womyn, Inc., while it or its web server were located in Iowa are to be disclosed and are to receive refunds. The Court will then enter a supplemental order and judgment against the Defendants, jointly and severally, for the amount of restitution owed. If Defendants do not fully and completely comply with that provision in a timely manner, the Attorney General shall take steps necessary to have a Rule to Show Cause personally served on the Defendants pursuant to Iowa Code § 665.7. If Defendants do not comply, they risk punishment for contempt pursuant to Iowa Code §§ 665.4 and 665.5 for refusal to obey court orders, which may be punished as contempt pursuant to Iowa Code § 665.2(3).

3. Defendants New Womyn, Inc. and Daniel Kaiser, jointly and severally, shall pay the State's attorneys' fees and investigation costs pursuant to Iowa Code § 714.16(11). The Attorney General shall submit a fee application within fifteen days of entry of this Order.

4. Defendant New Womyn, Inc. shall pay a civil penalty pursuant to Iowa Code § 714.16(7). The amount of the penalty will be determined after the issue of restitution is resolved.

5. Defendant Daniel Kaiser shall pay a civil penalty pursuant to Iowa Code § 714.16(7). The amount of the penalty will be determined after the issue of restitution is resolved. Defendants should note that, in addition to a finding of contempt, the Court may enter a civil penalty in an estimated amount for full disgorgement of funds collected from Stimulations VII customers if the customer list is not produced. That Attorney General contends that that amount may well exceed one million dollars, and the Court may allow the Attorney General to produce the best available evidence, given the circumstances, for the Court to make that estimate.

6. Defendants New Womyn, Inc., and Daniel Kaiser shall pay all court costs incurred in this action.

7. The Court shall retain jurisdiction for purposes of enforcement.

DATED this 7th day of January, 2002.

Glenn E. Pille, Judge
Fifth Judicial District of Iowa

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