

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

PEOPLE OF THE STATE OF NEW YORK,
by LETITIA JAMES,
Attorney General of the State of New York,

Petitioner,

-against-

FRANK BORGESE
and
BORGESE HOLDINGS, INC. d/b/a IMPACT
MEDICAL & SURGICAL SOLUTIONS,

Respondents.

Index No. 451367/2020

Hon. Andrew Borrok

CONSENT AND STIPULATION

WHEREAS, Petitioner the People of the State of New York (“Petitioner”), by its attorney, Letitia James, Attorney General of the State of New York (the “NYAG”), filed this action on June 10, 2020 in the Supreme Court of the State of New York, New York County, alleging that Respondents Frank Borgese and Borgese Holdings, Inc. d/b/a IMPACT Medical & Surgical Solutions (together, the “Respondents”) engaged in fraudulent and deceptive conduct in violation of New York Executive Law § 63(12) in connection with their solicitation of sales of personal protective equipment (“PPE”), including N95 and KN95 respirator masks;

WHEREAS, Respondents have not yet answered the Verified Petition, but admit that (i) they sent the emails alleged to have been sent by Respondents in the Verified Petition, (ii) neither Respondent is or was an authorized 3M distributor, (iii) neither Respondent possessed the 3M-branded N95 respirator masks or KN95 respirator masks they advertised for sale, and (iv) Respondents could not meet the delivery times they provided for N95 or KN95 respirator masks;

WHEREAS, Petitioner and Respondents (together, “the Parties”) have entered into the attached Consent Order and Judgment (“Consent Order”), which is incorporated by reference into this Consent and Stipulation (“Stipulation”); and

WHEREAS, the Parties consent to have the Court issue the Consent Order and Judgment;

NOW, THEREFORE, in consideration of the mutual promises set forth below between the parties, and based on good and other valuable consideration, the reciprocal receipt of which is acknowledged, it is stipulated and agreed as follows:

1. Respondents acknowledge receipt of a copy of the Consent Order.
2. Petitioner and the Respondents consent to the entry of the attached Consent Order without further notice. The NYAG will serve Respondents’ counsel with notice of entry of the Consent Order promptly after its entry, if and when it may be entered.
3. Respondents enter into this Stipulation consenting to the entry of the attached Consent Order to resolve this proceeding brought against them by the NYAG.
4. Respondents enter into this Stipulation of their own free and voluntary act, after consulting with their counsel, with full knowledge and understanding of this proceeding and the obligations imposed upon them by the Consent Order.
5. The NYAG has agreed to the terms of the Consent Order based on, among other things, the representations made to the NYAG by Respondents and their counsel. To the extent that any material representations are later found to be inaccurate or misleading, the Consent Order is voidable by the NYAG in her sole discretion.
6. Nothing in this Stipulation or the corresponding Consent Order shall be construed to deprive any person of any private right or cause of action.

7. The NYAG and Respondents represent and warrant, through the signatures below, that the terms and conditions of this Stipulation and the Consent Order are duly approved and their execution duly authorized.


8. This Stipulation may be executed in counterparts, each of which shall be deemed to be an original, but all of which, taken together shall constitute one and the same agreement.

[signature page follows]

THE PEOPLE OF THE STATE OF NEW YORK

Dated: July 27, 2020

LETITIA JAMES
ATTORNEY GENERAL OF THE STATE OF NEW YORK

By: 

Steven J. Glassman, Esq.
Bryan P. Kessler, Esq.
David E. Farber, Esq.

Office of the New York Attorney General
28 Liberty Street, 21st Floor
New York, New York 10005

Attorneys for Petitioner

RESPONDENTS

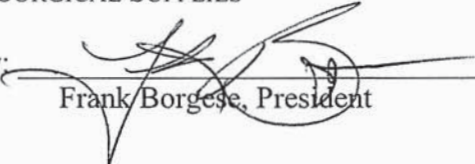
Dated: July 27, 2020



FRANK BORGESE

Dated: July 27, 2020


BORGESE HOLDINGS, INC. D/B/A IMPACT MEDICAL
& SURGICAL SUPPLIES

By: 

Frank Borgese, President

Dated: July 27, 2020

DUKE HOLZMAN PHOTIADIS & GRESENS LLP

By: 

Patricia Gillen, Esq.

701 Seneca Street, Suite 750
Buffalo, NY 14210

Attorney for Respondents

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

PEOPLE OF THE STATE OF NEW YORK,
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**CONSENT ORDER AND
JUDGMENT**

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WHEREAS, Respondents have not yet answered the Verified Petition, but admit that (i) they sent the emails alleged to have been sent by Respondents in the Verified Petition, (ii) neither Respondent is or was an authorized 3M distributor, (iii) neither Respondent possessed the 3M-branded N95 respirator masks or KN95 respirator masks they advertised for sale, and (iv) Respondents could not meet the delivery times they provided for N95 or KN95 respirator masks.

WHEREAS, Petitioner and Respondents (together, “the Parties”) have entered into the Consent and Stipulation, dated July 27, 2020, (“Stipulation”), which is incorporated by reference into this Consent Order and Judgment (“Consent Order”);

WHEREAS, the Parties wish to resolve the claims alleged in the Verified Petition in order to avoid prolonged and costly litigation, and in furtherance of the public interest; and

WHEREAS, the Parties consent to have the Court issue the following Order and Judgment;

NOW, THEREFORE, IT IS ADJUGED, ORDERED AND DECREED:

I. JURISDICTION

1. This Court retains jurisdiction of this action to enforce the terms of this Consent Order, or to grant such further relief as the Court deems just and proper.

2. This Consent Order shall extend to the Respondents, their principals, directors, officers, shareholders, employees, assignees, and agents acting in concert or in participation with them.

II. RELIEF

Prohibited Practices

3. Respondents shall not engage in deceptive or fraudulent practices in violation of Executive Law § 63(12), including but not limited to:

- a. falsely claiming to be an authorized distributor of PPE or otherwise falsely claiming the ability to order any PPE or COVID-related testing kits directly from a manufacturer;
- b. falsely claiming to possess any PPE or COVID-related testing kits;

- c. misrepresenting Respondents' historical, current, or future ability to obtain any PPE or COVID-related testing kits
- d. providing delivery estimates or delivery times without a reasonable basis for delivery;
- e. providing incomplete or altered documents to prospective purchasers;
- f. misrepresenting any detail of any PPE or COVID-related testing kit, including the identity of its manufacturer and any certifications or approvals;
- g. providing a fictitious reference to prospective purchasers, and
- h. price gouging in violation of New York General Business Law § 396-r.

4. Respondents shall not sell, attempt to sell, advertise, market, or otherwise solicit the sale of personal protective equipment (i.e., any equipment worn by healthcare workers or patients to minimize or reduce exposure to or transmission of viral or bacterial infectious agents, and which specifically includes, among other things, N95 respirator masks, KN95 respirator masks, surgical masks, face shields, and gowns) or COVID-related testing kits at any time prior to January 1, 2023.

5. Respondents shall not sell, attempt to sell, advertise, market, or otherwise solicit the sale of PPE (including N95 respirator masks, KN95 respirator masks, surgical masks, face shields, and gowns) or COVID-related testing kits on or after January 1, 2023, unless and until each Respondent has first executed and filed with the Attorney General a performance bond in the sum of \$100,000 by a surety or bonding company licensed by, and in good standing with, the New York State Department of Insurance, guaranteeing that each Respondent comply with the injunctive relief in Paragraph 3 herein, the proceeds of the bond to provide a fund for restitution to customers defrauded or damaged by Respondents' conduct.

6. In the event that either Respondent sells, attempts to sell, advertises, markets, or otherwise solicits the sale of PPE (including N95 respirator masks, KN95 respirator masks, surgical masks, face shields, and gowns) or COVID-related testing kits on or after January 1, 2023, Respondents are required to provide quarterly reports to the NYAG stating the number of orders placed by a customer in connection with Respondents' sales activities regarding PPE or COVID-related testing kits, and identifying for each order placed by a customer:

- a. the name of the customer;
- b. the item(s) ordered (specifically including for each item the manufacturer and model number);
- c. the total sales price;
- d. the date of any purchase order and/or any invoice;
- e. the actual delivery date(s) for each item in the order;
- f. the name(s) of every other person or entity involved in making or fulfilling the order; and
- g. any complaint, or request for refund, or refund paid in connection with the order.

The first report required under this paragraph shall be provided to the NYAG three months after the earliest of Respondents' first solicitation, advertisement, attempt to sell, or completed sale of PPE or Covid-related testing kits on or after January 1, 2023. The second and subsequent reports shall be provided at three month intervals thereafter, and this reporting requirement shall conclude after the provision of 8 quarterly reports, but no later than January 1, 2027.

7. Respondents' reports to the NYAG required by Paragraph 6 of the Consent Order shall be sworn to be true and complete under penalty of perjury.

Cooperation and Record-Keeping Requirements

8. Respondents agree that Respondents shall make themselves available, upon reasonable notice, to meet with attorneys or other representatives of the NYAG either in person or by telephone, and that Respondents shall answer questions reasonably related to Respondents' business dealings involving PPE or COVID-related testing kits to the best of their ability. Respondents agree that, if so requested or demanded by the NYAG, and upon reasonable notice, the Respondents shall make themselves available to testify in hearings, depositions, and/or at trial. Respondents also agree to make available to the State, upon reasonable notice, documents or other materials relevant to any investigation or litigation, including all emails sent to or from fborgese@impactmss.com since February 1, 2020 through the date of this order, subject to redaction for attorney/client privileged communications.

9. Until January 1, 2025, if either of Respondents change their address, telephone number, or name under which they do business, Respondents shall notify the NYAG within five days of each such change.

10. Respondents shall retain all records relating to their obligations under this Consent Order, until July 1, 2025. During that time, Respondents shall, upon twenty (20) days' written notice from the NYAG, provide all documentation and information necessary for the NYAG to verify compliance with this Consent Order.

III. ENFORCEMENT OF THIS CONSENT ORDER

11. Prior to seeking judicial relief for a violation of this Consent Order, the NYAG shall provide Respondents with 20-days' advance notice of the violation and an opportunity to cure any breach of the Consent Order, and in the event the breach is not fully cured within 20 days, NYAG may move to enforce or to hold Respondents in contempt of this Consent Order.

12. Respondents shall pay those costs paid by the NYAG to third parties (e.g., translators, court fees, court reporters, etc.) related to any action to enforce this Consent Order.

IV. MISCELLANEOUS

13. Respondents shall provide a copy of this Consent Order to each of their employees or agents involved in selling, attempting to sell, advertising, marketing, or otherwise soliciting the sale of PPE (including N95 respirator masks, KN95 respirator masks, surgical masks, face shields, and gowns) or COVID-related testing kits, with instructions to read it in full.

14. Respondents shall make no representation that NYAG approves of the practices or procedures set forth herein for any other matter.

15. All notifications, reports, and requests required or otherwise made pursuant to this Consent Order shall be addressed as follows:

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| If to Petitioner or the NYAG: | David Farber, Esq. Taxpayer Protection Bureau Office of the New York Attorney General 28 Liberty Street, 21 st Floor New York, NY 10005 David.Farber@ag.ny.gov |
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| If to Respondents: | Frank Borgese 4931 S. Buffalo Street, Unit #36 Orchard Park, NY 14127 fborgese@impactmss.com |
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16. All notifications, reports, and requests required or otherwise made pursuant to this Consent Order shall be sent by United States mail with return receipt requested or overnight delivery service with signature required, unless such communications are sent by email and a reply is written without objection to the electronic means of communication.

17. Any failure of the NYAG to exercise any right under any provision of this Consent Order shall not constitute a waiver of any rights of the NYAG to enforce such provision prospectively.

18. This Consent Order shall be construed in accordance with the laws of New York.

19. Nothing in this Consent Order shall relieve the Respondents of their obligation to comply with all local, State, and federal laws.

20. This Consent Order may not be changed, altered or modified without further order of the Court, except as provided in the Stipulation.

21. This Consent Order becomes effective upon entry by the Court.

Dated: _____, 2020

SO ORDERED

J.S.C.