STATE OF SOUTH CAROLINA	)	BEFORE THE ADMINISTRATOR
	)	SOUTH CAROLINA DEPARTMENT
COUNTY OF RICHLAND	)	OF CONSUMER AFFAIRS
THE SOUTH CAROLINA DEPARTMENT OF CONSUMER AFFAIRS,	)	DOCKET NO. 0426
PETITIONER.	)	
VS.	)	**ORDER**
2001, INC., D/B/A GOLD'S GYM, A/K/A SMARTFITNESS, A/K/A WORLD GYM, AND FRANK A. (TONY) OPPERMAN, INDIVIDUALLY,	)	
RESPONDENT.	)	

STATEMENT OF THE CASE

This matter came before me on a Notice of Hearing dated September 17, 2004. The Affidivit of Service indicates the Notice was addressed to Tony Opperman at World Gym at 3715 East North Street Greenville, SC. 29615. The Notice of Hearing requires the Respondents to show cause why a cease and desist order should not be issued to require them to refrain offering physical fitness services as defined in *S.C. Code Ann*. § 44-79-20 *et seq.* It further indicated the violations alleged were the Respondents' failure to file for renewal for its Certificate of Authority for the filing year 2004: the failure top submit membership agreements complying with the Physical Fitness Services Act; the failure to submit or maintain a bond or other evidence of financial responsibility; and the Respondents' continuing to offer physical fitness services after Respondents had notice they were or are operating in violation of the Physical Fitness Services Act pursuant to *S.C. Code Ann*. § 44-79-80 (7).

A hearing was held before me on October 27, 2004. The Staff was represented by Helen Fennell. None of the Respondents made any appearance. Ken Middlebrooks, Investigator for the Department of Consumer Affairs, was a witness for the Department.

The relevant history of this matter, however, predates the Notice of Hearing referred to above. Exhibit 13 lists prior Orders regarding physical fitness facilities in which Respondent Frank A. (Tony) Opperman was either the owner, president or the officer signing as a controlling person in the Order. Exhibit 14 is a true copy of a Order of the Circuit Court for the for the City of Richmond in the matter of *Virginia v. Hard Bodies of Virginia Beach, Inc*., *d/b/a Gold's Gym*, Chancery No. HA-62 (1) in which the Respondent in that proceeding was fined $84,250.00 plus $16,850.00 in investigation costs for the violation of a prior Assurance of Voluntary Compliance regarding violations of Virginia's laws regarding physical fitness services. Tony Opperman was the President of the Company and representative who signed the Assurance of Discontinuance on or about January 17, 1990.

Finally, an additional factor complicating this matter is a Chapter 13 Bankruptcy case filed on or about October 6, 2004 for Respondent Opperman (Exhibit 2).

FINDINGS OF FACT

1.) Respondents were served with the Notice of Hearing on or about September 19, 2004 by certified and regular U.S. Mail (Exhibit 1). It does not appear that the return receipt was forwarded to the Department, nor does it appear that the Notice sent by regular mail was returned to the return address. Counsel indicated on the record that she contacted Mr. Opperman shortly prior to the hearing to determine if he planned to attend, and that he was aware of the hearing but did not plan to attend.

2.) Respondent Opperman filed notice of a Chapter 13 Bankruptcy Case, Case No. 004-11959-jw, on or about October 6, 2004 (Exhibit 2).

3.) The Department's chief witness was Investigator Ken Middlebrooks. His testimony is the essence of this case, and I find his entire testimony credible. It is summarized below in brief.

On August 16, 2004 Mr. Middlebrooks went to the Upstate to do an initial or first time review of a physical fitness facility It Fits, Inc. on Pelham Road in Greenville, South Carolina. When he got there, the facility was closed, with lights off, and with a sign on it indicating "Temporarily closed due to staffing." He determined that there were other locations of the company, so he went to the location on Fairview Road. It was likewise closed with a similar sign. He went to the location on Batesville Road, found it open and found a Ms. Ann Johns there. She informed him that Frank A. "Tony" Opperman had purchased It Fits in June 2004. She indicated there had been hardships with payroll and payroll checks had bounced. She herself had been working for the company for free in an effort to help keep the services available for members. Mr. Middlebrooks pointed out that the Department had no record of any change in ownership of the physical fitness facility being reported to it, nor was there any filing of a Certificate of Authority under the new ownership.

On August 18, 2004, Mr. Middlebrooks went to Golds Gym a/k/a World Gym, at 3715 E. North Street, Greenville. The sign on the facility was "World Gym." The name was not registered on Mr. Middlebrook's printout of Greenville physical fitness locations he had taken from the Department, but there was a registration under the trade name Gold's Gym under 2001, Inc.. He spoke there to Mary Hooper, an employee. She indicated that it also had been

purchased by Mr. Frank Opperman on August 13, 2004 and had been converted from Golds Gym to Smartfitness. She said she had not heard from Mr. Opperman in about a week. She was advised that there was likewise no filing with the Department of Consumer Affairs for the new company, so that it was not allowed to sell memberships. She referred him to a Daniel Orosco, identified as a marketing director hired by Mr. Opperman, who was also told that the company was not to sell memberships prior to filing with the Department.

The following day, August 19, 2004, Mr. Middlebrooks together with Deputy Chief Investigator Barbara Morris went to Greenville with the purpose of delivering two letters, Exhibits 3 and 4, to Mr. Opperman, indicating respectively that the 2001 Inc.'s letter of credit was scheduled to expire on September 29, 2004, and indicating that there was apparently no Department of Consumer Affairs record that Frank Opperman co-owned 2001, Inc. d/b/a Golds Gym that time. Exhibit 4 also stated that it appeared that Mr. Opperman was operating Smartfitness Corp. out of the same location without a license, and that a license was required before operating or selling long term memberships. Mr. Middlebrooks and Ms. Morris were unable to deliver the letters to Mr. Opperman at the business at 3715 East North Street, Greenville, so they went to Mr. Opperman's home at 109 Cherrywood Trail, Greer. After being unable to find Mr. Opperman at his home, they placed the letters in the mail in Greenville addressed as indicated. While in Greenville, they called Ms. Johns to see if the It Fits member contracts could be made available to them. She indicated they could but for the fact that the computers had been moved that week.

On September 15, 2004, Mr. Middlebrooks went to Summit Bank to deliver the September 14, 2004 letter of Helen Fennell to Summit and accompanying documents to

negotiate 2001, Inc.'s letter of credit before it expired [Exhibit 5]. It resulted in the bank issuing check number 0202426 in the amount of $25,000.00 to the Department of Consumer Affairs [*Id.*].

On September 23, 2004 Mr. Middelbrooks, accompanied by Investigator Charles Heyward, went to the World Gym location [at 3715 East North Street, Greenville] to deliver Ms. Fennell's letter of September 23, 2004 and accompanying subpoena for all membership lists, membership contracts, and payment histories [Exhibits 6 and 7, respectively]. The employee there said Mr. Opperman would be there in thirty minutes. Mr. Opperman later called on a cell phone and told Mr. Middlebrooks initially that the sought member contracts and other documents were not there, but in the same conversation said that the records were in a back room locked up, and that Jeff Neal, the person at the counter that day, was new and would not be able to assist them. When Mr. Opperman did not ultimately show up, the investigators served the subpoena on Mr. Neal. On that same date, he observed signs on the wall advertising to the effect, "bring a friend, get three months added on a two year membership." They went by the Pelham Road location of It Fits and a sign indicated "Temporarily Closed, For Information On Opening, Contact Tony Opperman" and gave a number.

On September 30, 2004, Jeff Neal called and confirmed to Mr. Middlebrooks that he had given the subpoena to Tony Opperman.

On October 18, 2004, Mr. Middlebrooks went to the East North Street location of World Gym and spoke with Bob Fergeson, the employee in charge at the location at the time. He got boxes of contracts from Mr. Fergeson and brought them back to the Department. On his return he received a call from an employee, Stephanie Gibson, who wanted to know who to contact

with the State regarding not being paid. The sign regarding the three months added to the two year membership was still on the wall on that date.

Mr. Middlebrooks testified contracts brought back to the Department were written on forms for Smartfitness.

4.) Without regard to the merits of the prior Orders and Consent Orders, Frank A. Opperman a/k/a Tony Opperman had notice of the requirements of the South Carolina Physical Fitness Services Act and the Department's expectations regarding it, particularly the requirement to acquire a Certificate of Authority to do business as a physical fitness provider. The following is a summary of the Orders in Exhibit 13:

> a. *SCDCA v. Gingerbread, Inc*. Docket No. 9753- Tony Opperman signed the Consent Order admitting that it had no Certificate of Authority for a location, that its predecessor corporation had violated a previous consent order, that it had accepted post dated checks in violation of Consumer Protection Code Section 378-2-403, and that if substantial additional violations were found, it would relinquish its Certificates for locations doing business as Golds Gym at McAllister Square and East North Street, among others. Executed June 22, 1998.
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> b. *SCDCA v. Club Star Management, Inc., d/b/a Gold's Gym*, Docket No. 9634- Tony Opperman signed the Consent Order admitting that the company had contracted for physical fitness agreements in excess of twenty four months, violating Section 44-79-40, contracted for guaranteed renewal options violating Section 44-79-60, contracted for lifetime memberships violating Section 44-79-40, failed to complete cash price or time price differential terms on contracts in violation of Reg. 28-100 D, and failed to complete Truth in Lending Disclosures in violation of Section 37-2-301. Executed March 26, 1997.
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> c. *SCDCA v. Hardbodies, Inc., d/b/a Gold's Gym*, Docket No. 9221- a Settlement Agreement signed by Frank A. Opperman as Principal of Hardbodies, Inc. agreeing to refund consumers all prepaid monies, cease all collection activities against members of the closed Anderson location of Gold's Gym, and pay a $500.00 fine. Executed July 27, 1992.
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> d. *SCDCA v. Hardbodies, Inc, d/b/a Gold's Gym*, Docket No. 9417- an Order in which the hearing officer found that the company had failed to acquire a Certificate of Authority for that year and failed to submit or maintain a bond or

other evidence of financial responsibility, and required a $500.00 fine. Executed June 17, 1994.

e.) *SCDCA v. Hardbodies, Inc.*, Docket No. 9502- Hearing regarding failure to obtain a Certificate of Authority scheduled and dismissed upon completion of the requirement after the hearing was scheduled. Signed by the Administrator March 28, 1995.

f.) *SCDCA v. Hardbodies, Inc. d/b/a Gold's Gym*, Docket No. 9105- Company represented without counsel by Frank A. Opperman, ordered to refund overcharges to customers who had purchased contracts of purportedly lifetime duration or otherwise in excess of 24 months. Executed March 15, 1991.

g.) *SCDCA v. Hardbodies, Inc. d/b/a Gold's Gym of Greenville*, Docket No. 9019-Report and Recommendation and Administrator's Order adopting it, indicating correspondence had been sent to Frank Opperman as President of the Company, and finding that the Company's location at 3715 East North Street, Greenville, SC, was illegally operating a physical fitness facility without a Certificate of Authority, despite notice of the requirements as much as five months prior to the report and recommendation. Signed by Administrator September 12, 1990.

5.) Exhibit 14 constitutes a true copy of an Order in the matter of *Virginia v. Hard Bodies of Virginia Beach, Inc.*, Chancery No. HA-62(1), in which the Circuit Court for the City of Richmond finding that Respondent had engaged in willful violations of a previous Assurance of Voluntary Compliance, ordered Respondent cease and desist selling or advertising health spa contracts for which any bond was required, ordered that any successor in interest of the capitol stock of the company agree to be bound by the Order, and Ordered the Company to pay fines and investigative costs in the combined amount of $100,100.00. The prior Assurance of Voluntary Compliance had been signed by Tony Opperman, President of Hardbodies of Virginia Beach, Inc d/b/a Gold's Gym.

6.) Frank A. Opperman, Frank Antony Opperman and Tony Opperman are all one and the same person (Exhibit 2, Bankruptcy filing by Respondent Opperman himself).

7.) The above Orders raise the issue that companies operated by or through Respondent Opperman are shells only and/or that they are the alter ego of Respondent Opperman. It is unnecessary to so find, however. It is clear that Respondent Opperman personally had notice that companies providing physical fitness services were required to have Certificates of Authority in South Carolina at least as early as 1990, at least thirteen years ago, and that memberships could not be sold in excess of twenty four months at least as early as 1991, and repeatedly thereafter.

8.) The Department of Consumer Affairs files reflect that as of filing year 2000, 2001, Inc. d/b/a Gold's Gym at 3715 East North St., Greenville, was run by Owner/Manager Jack Simmons (Testimony of Middlebrooks; Exhibit 9).

9.) The Department of Consumer Affairs files reflect that as of filing year 2004, Gold's Gym at 3715 East North St., Greenville, was run by Owner/Manager Jack Simmons (Testimony of Middlebrooks; Exhibit 9).

10.) Articles of Incorporation were filed for 2001, Inc. on April 12, 2001 showing the initial registered office of the corporation to be 3715 E. North St, Greenville. Its registered agent was Karl Opperman and an undated or date redacted Department of Revenue annual report of corporations, certified as a true copy on October 25, 2004, indicates that Frank A. Opperman is the President (Exhibit 11).

11.) Articles of Incorporation were filed for Smartfitness Corp. on October 6, 2003 showing the initial registered office of the corporation to be 109 Cherrywood Trail, Greer, SC (the apparent home address of Frank Opperman). Its registered agent was Karl Opperman and an undated or date redacted Department of Revenue annual report of corporations, certified as a true

copy on October 25, 2004, indicates that Frank A. Opperman is the President and registered agent on that document (Exhibit 12).

12.) The Department's counsel stipulated at the hearing that it sought no monetary relief from Respondent Opperman whatsoever (Statement of Attorney Fennell).

CONCLUSIONS OF LAW

1.) Service of the Notice of Hearing on Respondents was timely and proper under the Administrative Procedures Act, *S.C. Code Ann.* §§ 1-23-310 *et seq.,* and in all respects complied with that Act.

2.) The South Carolina Department of Consumer Affairs has jurisdiction over this matter pursuant to the South Carolina Physical Fitness Services Act, *S. C. Code Ann.* §§ 44-79-10 *et seq.* and the Consumer Protection Code, *S.C. Code Ann*. §§ 37-1-101 *et seq.*

3.) Despite personal and repeated notice of the requirements of the Physical Fitness Services Act and the Consumer Protection Code, Respondent Frank A. Opperman operated various physical fitness businesses in the Greenville area: a.) Without notifying the Department that he was operating new entities there or had acquired an interest in them; b.) Without filing for or acquiring a Certificate of Authority for those locations (the It Fits, Inc. locations at Pelham Road, Batesville Road and Fairview Road.; c.) Under a name never registered with the Department (Smartfitness) (Testimony of Middlebrooks; Exhibit 12).

4.) Despite personal and repeated notices that the Physical Fitness Services Act prohibited contracts in excess of twenty four months in violation of *S.C. Code Ann*. § 44-79-40, the company of which Respondent Frank A. Opperman was President, operating at an unlicensed location, under a name unregistered with the Department of Consumer Affairs, advertised and

sold numerous persons memberships in excess of twenty four months. For example, Exhibit 8, Contracts of Mesa (Term 7/28/04 to 8/28/06), Simon (Term 7/30/04 to 12/31/20), Leister (Term 7/2/04 to 10/2/06), Procel (Term 4/21/04 to 7/21/06); Gentry (Term 4/12/04 to 5/25/06), Poulos (Term 7/25/03 to 10/25/05) and Church, (Term 7/2/04 to 10/2/06). Note these are only samples from the boxes of contracts, which may number in the thousands (Testimony of Middlebrooks).

5.) The corporate Respondents with have operated without a Certificate of Authority (Smartfitness) or have allowed their Certificate of Authority lapse (2001, Inc.) (Testimony of Middlebrooks; Exhibits 3, 4, 5, 6 9 and 10).

6.) All operation of 2001, Inc. after September 15, 2004 and all operation of Physical Fitness Service providers by the other corporate Respondents was illegal under the Physical Fitness Services Act, *S. C. Code Ann.* §§ 44-79-80 (Testimony of Middlebrooks; Exhibits 3, 4, 5, 6 9 and 10)

7.) Respondent Frank A. Opperman is clearly the glue that keeps all of these entities together. It appears clear that Respondent Opperman has developed a pattern or practice of violating or ignoring the requirements of physical fitness and consumer protection laws in South Carolina and at least one other jurisdiction.

8.) All corporate Respondents failed to file or renew Certificates of Authority for 2004 as required by *S.C. Code Ann*. § 44-79-80 (4) and (5) (Testimony of Middlebrooks).

9.) Although it is necessarily confusing as to what entity was offering what service, it is clear that at the 3715 East North Street, Greenville location, membership contracts were marketed under the name of Smartfitness which had not been submitted to the Department and did not comply with the contract requirements limiting them to twenty four months or less, in

violation of *S.C. Code Ann*. §§ 44-79-80 (4) (d) and -60 respectively (Testimony of Middlebrooks; Exhibit 8).

10.) All corporate Respondents failed to maintain a bond or other evidence of financial responsibility as required by *S.C. Code Ann.* § 44-79-80 (1) (Testimony of Middlebrooks).

11.) All Respondents continued to offer physical fitness services after notice that they were operating in violation of the Physical Fitness Services Act, either when the Certificate of Authority had lapsed, or had never been applied for, or the contracts offered exceeded twenty four months in duration, and continued to advertise such services, in violation of *S.C. Code Ann*. §§ 44-79-80 (7). In the case of the spa at 3715 East North Street, Greenville, the illegal terms continued to be advertised on a wall sign after Notice of this hearing was received and the contracts themselves were subpoenaed (Testimony of Middlebrooks).

12.) Respondent Opperman's Bankruptcy filing raises the issue of whether a proceeding against him may be at odds with the automatic stay, provided for in Section 362 of the Bankruptcy Code [11 *U.S.C.* § 364]. It reads, in pertinent part:

> (a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302 or 303 of this title . . . operates as a stay, applicable to all entities, of—
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> > (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title. . . .
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> (b) The filing of a petition under section 301, 302 or 303. . . does not operate as a stay. . . .
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> > (4) under paragraph (1), (2) (3), or (6) of subsection (a) of this section, of

> the commencement or continuation of an action or proceeding by a governmental unit. . . to enforce such governmental unit's . . . police and regulatory power, including the enforcement of a judgment other than a money judgement, obtained in an action or proceeding by the governmental unit's . . . police or regulatory power. . . .

13.) There appears to be no implication of any of the corporate Respondents in the Opperman Bankruptcy filing nor any reason why the Bankruptcy Code section cited above would inhibit any cease and desist order designed to prevent them from operating illegally under the Consumer Protection Code, the Physical Fitness Services Act, or other applicable law. Under South Carolina law, the failure to license under statutes intended to provide protection to the public may have the effect of rendering the contract's written by the entity void. *Fairly v. Wappoo Mills,* 44 S.C. 227, 22 S.E. 108 (1894); S.C. Atty. Gen. Ops. No. 1776 (December 22, 1964). The disposition of the letter of credit is not noticed in this matter, and does not appear to be regarded as a part of the bankrupt estate of Respondent Opperman. Such of the customers who have not paid cash may be protected by voiding the contracts.

14.) As for Respondent Opperman himself, it appears that henceforth he should not be permitted to participate in the physical fitness services industry in South Carolina, or anywhere else for that matter. The question remains whether the automatic stay prevents a cease and desist order from applying to him. It appears it does not. Cases uphold the enforcement of an automatic stay against state action designed to raise revenue only. Likewise, the stay has been held to inhibit the government's attempts to revoke licenses to the extent the license right is considered the property of the estate, and the action is regarded as in effect an attempt to enforce a money judgment. *In re: Draughon Training Inst*., 119 B.R. 921 (1990); *In re: Penn Terra Ltd.*, 24 B.R. 427 (1982). Nevertheless, as noted in *Javens and Javens v. City of Hazel Park and*

Royal Oak, 107 F. 3d 359 (6th Cir 1997) concerning the legislative history of the stay:

> [W]here a governmental unit is suing a debtor to prevent or stop violation of fraud, evironmental protection, consumer protection, safety, or similar police or regulatory laws, or attempting to fix damages for violation of such a law, the action or proceeding is not stayed under the automatic stay.
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> S. Rep. No. 95-989, at 52 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5838

Here, the Department has stipulated it seeks no monetary relief from Respondent Opperman. Where it is found that the motivation of the governmental entity is solely to stop the debtor from operating a business in violation of local police power or regulatory law, the governmental activity comes under the exception. *Cournoyer v. Town of Lincoln*, 790 F. 2d 971 (1st Cir. 1986) *aff'g* 53 B.R. 478 (D.R.I. 1985). *See also*, *NLRB v. Cooper Painting, Inc.*, 804 F. 2d 934 (1986) (company unilaterally terminated collective bargaining agreement, and agency petition filed alleging unfair labor practices, against alter ego partnership, within Section 364 (b) (4) exception); *Eddleman v. Dept. of Labor*, 923 F. 2d 782 (10th Cir. 1991) (362 (b) (4) exception upheld, even though it involved the payment of wages because the claim was to prevent unfair competition and not pecuniary); *USA v. Silver Seafood, Inc.*, 2003 U.S. Lexis 16416 (D.Ala. 2003) (for essential injunction under the Food and Drug Act); *Mateer v. State of Illinois*, 205 B.R.915 (Ill. 1997) (State environmental enforcement exempt).

It is noteworthy here that the licenses, or lack of a license, is not in the name of Respondent Opperman, but in the corporate name of 2001, Inc. (not a party to the bankruptcy) or otherwise non-existent in the case of Smartfitness (and the remaining unlicensed entities), likewise not parties to the bankruptcy. Thus, the Physical Fitness Certificate of Authority does not appear to be an asset of the bankrupt estate as considered in *In re: Draughon, supra*. *See also, Brennan v. Poritz,* 198 B. R. 445 (N.J. 1996) (abuse of discretion to extend automatic stay

to non-debtors).

The Department's only goal is to prevent the consumer harm of sales of physical fitness memberships without licenses or otherwise in violation of law. The Department does not assert non-payment of licensing fees or fines as a reason to withhold a license to any entity. It has specifically waived any claims of money. To the contrary, the impetus of this matter was the utter failure of Respondent Opperman's businesses to make themselves known to and subject to the regulatory authority of the Department, or in the case of 2001, Inc., to advise of the change in ownership and timely renew the license with attendant financial responsibility assurances to protect the public. The problem was that Respondent Opperman used his business entities to do business "under the radar" and undetected by the Department. He likewise continued his practice of writing contracts in violation of Section 44-79-40 (1) by exceeding twenty four months, having promised not to do so in the past. The precise evils the South Carolina's regulation sought to combat have come to pass: contracts with extended terms are sold, the businesses are closed and services unavailable, and employees of unregulated business are unpaid and unemployed.

WHEREFORE IT IS ORDERED that all Respondents, including Respondent Frank A. Opperman individually, CEASE AND DESIST from offering physical fitness services in South Carolina as that term is defined in *S.C. Code Ann.* § 44-79-20 (1), directly or indirectly, or by and through agents, employees, representatives or designees, including but not limited to sales of memberships or contracts in cash or credit contracts for such services,

IT IS FURTHER ORDERED that a copy of this Order be forwarded to the Bankruptcy Court and to Respondent Opperman's counsel in addition to the other Respondents;

IT IS FURTHER ORDERED and intended that should any portion of this Order be deemed unconstitutional or invalid for any reason whatever, the remainder of it shall be fully given effect without the unconstitutional or invalid term or part;

AND IT IS SO ORDERED.

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Philip S. Porter
Designated Hearing Officer

Columbia, S.C.

November , 2004