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STATE OF NORTH DAKOTA
OFFICE OF ATTORNEY GENERAL

STATE OF NORTH DAKOTA EX REL.
WAYNE STENEHJEM,
ATTORNEY GENERAL,

Petitioner,

-vs-

DAN MILLER and WILMA MILLER,
Individually, and doing business as
DOUBLE DIAMOND CONSTRUCTION
and **DOUBLE DIAMOND BUILDINGS**

Respondents.

**CEASE AND DESIST ORDER,
NOTICE OF CIVIL PENALTY
AND NOTICE OF RIGHT
TO REQUEST A HEARING**

CPAT # 120143.004

.....
To the individual and entity identified below (hereinafter "Respondents"):

Dan Miller doing business as
Double Diamond Construction and
Double Diamond Buildings
547 S. 7th St. #287
Bismarck, ND 58504-5859
and
5221 Elk Ridge Rd
Lincoln, NE 68516-5333

701-651-7497
402-681-8923
303-515-0178
720-633-1716
dan@doublediamondconstruction.com

Wilma Miller doing business as
Double Diamond Construction and
Double Diamond Buildings

547 S. 7th St. #287
Bismarck, ND 58504-5859
and
5221 Elk Ridge Rd
Lincoln, NE 68516-5333
701-651-7497

(including all of those entities' officers, directors, owners, agents, servants, employees and representatives as well as all other persons in active concert or participation with them, extending to all "doing business as" names, formal corporate names, fictitious names of any kind or any variations of the same)

BACKGROUND

1. The Attorney General of North Dakota has a reasonable basis to believe Respondents have engaged in and are engaging in acts or practices declared unlawful by N.D.C.C. ch. 51-15, commonly referred to as the "Consumer Fraud Law;" N.D.C.C. ch. 43-07, commonly referred to as the "Contractors Law;" and N.D.C.C. ch. 51-04, commonly referred to as the "Transient Merchants Law." It is necessary and appropriate in the public interest and for the protection of consumers to restrain the Respondents' unlawful acts or practices.

2. Respondents Dan Miller and Willma Miller, doing business as Double Diamond Construction and Double Diamond Buildings, have engaged in advertising and soliciting the sale of merchandise, including contracting services to erect steel buildings. Respondents solicited and accepted payments from North Dakota consumers when Respondents did not have a contractor's license as required by N.D.C.C. ch. 43-07. Additionally, Respondents did not have a transient merchant license as required by N.D.C.C. ch. 51-04. Respondents have not registered the trade names of Double Diamond Construction or Double Diamond Buildings with the Secretary of State's Office as required by N.D.C.C. ch. 47-25.

3. Respondents have engaged in deceptive acts or practices during solicitations to North Dakota consumers. Respondents have made untrue, deceptive and misleading representations, or have engaged in deceptive acts or practices, with the intent that others rely thereon, including, but not necessarily limited to the following:

- 1) Respondents expressly, impliedly, or by omission of a material fact, made misrepresentations to North Dakota consumers regarding when Respondents would begin, complete, or work on the projects paid for by Respondents' customers;
- 2) Respondents expressly, impliedly, or by omission of a material fact, made misrepresentations to North Dakota consumers including but not limited to, false representations regarding when their materials would be delivered;
- 3) Respondents solicited and accepted pre-payment for materials and services without performing the services or failing to deliver the materials as promised to consumers;
- 4) Respondents expressly, impliedly, or by omission of a material fact, misrepresented to consumers that they were legally authorized to conduct contracting services in North Dakota when, in fact, Respondents did not have a contractor's license as required by N.D.C.C. ch. 43-07; and
- 5) Respondents expressly, impliedly, or by omission of a material fact, misrepresented to consumers that they were legally authorized to conduct business in North Dakota when, in fact, Respondents failed to be licensed as a transient merchant pursuant to N.D.C.C. ch. 51-04.

4. On May 9, 2012, the Attorney General's Office contacted Dan Miller regarding a bid that Respondents submitted to a North Dakota business. Dan Miller identified Wilma Miller as his mother and the owner of Double Diamond Construction. Mr. Miller stated that Respondents' bid was not accepted and they had not performed any contracting work in North Dakota or accepted any advance payments. Mr. Miller

stated that Respondents would apply for a contractor's license before they submitted any other bids, accepted any payments, or began any work in North Dakota. On May 16, 2012, The Attorney General's Office sent a letter to Wilma Miller, doing business as Double Diamond Construction, notifying her that she would need to have a contractor's license before submitting any other bids or performing any contracting work in North Dakota.

5. The Attorney General has since received a complaint alleging that Respondents received a \$5,500 payment on May 4, 2012. Respondents failed to disclose this contract when Mr. Miller was asked, during the May 9th telephone conversation with the Attorney General's Office, whether Respondents had received any payments from any North Dakota consumers. The complaint alleges that Respondents solicited and accepted an advance deposit, and then failed to erect the building or pay the company that delivered the materials. In June 2012, Respondents entered into another contract to erect a steel building, after they were notified that they were required to be licensed before conducting any business in North Dakota. Respondents accepted approximately \$50,000, and then failed to erect the building. Respondents did not pay the subcontractors or the suppliers. Additionally, Respondents have been sued by another consumer who paid approximately \$54,800 between May and September 2012. Respondents failed to finish the project, and failed to pay their subcontractors.

6. The Attorney General has attempted to contact Respondents' numerous times regarding the consumer complaints filed against them. However, Respondents have refused to reply to the Attorney General's telephone messages and letters. It appears that Respondents are no longer in North Dakota, and have a history of traveling

from state to state. Respondents repeatedly change their telephone numbers, in an attempt to hide from consumers. Additionally, the address that Respondents have represented as their principal place in North Dakota is a mail forwarding facility.

7. Respondents have made untrue, deceptive and misleading representations, and/or have made or engaged in deceptive acts or practices, fraud, false pretenses, false promises or misrepresentations with the intent that others rely thereon, in violation of N.D.C.C. ch. 51-15, the Consumer Fraud Law.

8. Respondents have operated as a contractor in the state of North Dakota and have accepted payment for contracting services in excess of \$2,000. Respondents are not licensed as a contractor and it appears that Respondents have engaged in sales activity in North Dakota without obtaining the required contractor's license pursuant to N.D.C.C. ch. 43-07.

9. Respondents are alleged to be a "transient merchants," as defined by N.D.C.C. §51-04-01(2). Respondents have offered and sold to consumers contracting merchandise and services, including, but not limited, merchandise and services to erect steel buildings. Respondents are not licensed as a transient merchant and it appears that Respondents have engaged in sales activity in North Dakota without first obtaining the required transient merchant license pursuant to N.D.C.C. ch. 51-04. Therefore, said sales transactions are invalid.

10. Each of the Respondents is engaged in a combination of two or more persons who have agreed to act together to inflict a wrong or an injury upon another, or who have agreed to act together to commit a lawful act using unlawful means to inflict a wrong or injury upon another, namely violation of N.D.C.C. chs. 51-15, 43-07, and 51-

04. In doing so, Respondents have committed acts in pursuit of an agreement and the agreement has proximately caused damage to North Dakota consumers.

11. Respondents are liable for their own misconduct and/or for directing others to engage in misconduct. See e.g. *Zimprich v. North Dakota Harvestore Sys., Inc.*, 419 N.W.2d 912, 914 (N.D. 1988); *Rickbeil v. Grafton Deaconess Hosp.*, 23 N.W.2d 247, 257 (N.D. 1946)("The general rule with reference to this feature is considered and set out in the great series of volumes of jurisprudence familiar to the courts. In 52 Am. Jur., 440, this rule is stated, 'It is a conceded general rule that all persons or entities are liable for torts committed by them, or by their agents while acting within the scope of their duties.'").

12. Respondents who are natural persons will additionally be subject to personal liability for corporate misconduct. *Hilzendager v. Skwarok*, 335 N.W.2d 768 (N.D. 1983)(quoting *Schriock v. Schriock*, 128 N.W.2d 852, 866 (N.D. 1964)("... but, when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons.' Fletcher, Private Corporations Sec. 41 (1963 rev. vol.)"). The crime/fraud exception to the protections of corporate form has long been recognized in North Dakota, "neither law nor equity will ever recognize the right of a corporate entity to become the receptacle or cover for fraud or wrong based on deception for the purpose of defeating the right of innocent parties." *McFadden v. Jenkins*, 169 N.W. 151, 163 (N.D. 1918). See also *Danks v. Holland*, 246 N.W.2d 86 (N.D. 1976); *Family Center Drug v. North Dakota St. Bd. of Pharm.*, 181 N.W.2d 738, 745 (N.D. 1970).

ORDER

Based upon the foregoing information, it appears to the Attorney General that Respondents have engaged in violations of N.D.C.C. chs. 51-15, 43-07, and 51-04; **NOW, THEREFORE, IT IS ORDERED** pursuant to N.D.C.C. § 51-15-07 that Respondents and their agents, servants, employees, contractors, representatives (extending to all "doing business as" names, formal corporate names, aliases, fictitious names of any kind or any variations of the same) as well as all other persons in active concert or participation with them, whether directly or indirectly, immediately **CEASE AND DESIST** from: 1) soliciting, advertising, selling, or providing in North Dakota any contracting services or merchandise, including, but not limited to, erecting steel buildings, and all other services and/or merchandise as defined in N.D.C.C. § 51-15-01(3); 2) soliciting using untrue, deceptive or misleading representations to consumers or engaging in deceptive acts or practices, fraud, false pretenses, false promises or misrepresentations with the intent that consumers rely thereon, in violation of N.D.C.C. § 51-15-02; 3) soliciting or accepting from consumers advance payments or consumer deposits in connection with any sale of merchandise, as defined by N.D.C.C. § 51-15-01(3); 4) providing contracting services in North Dakota in violation of N.D.C.C. ch. 43-07; and 5) engaging in any sales or business activities in North Dakota, including soliciting, advertising or selling goods, services and/or merchandise as defined N.D.C.C. § 51-15-01(3), without a Transient Merchants license as required pursuant to N.D.C.C. ch. 51-04. Respondents also shall immediately **CEASE AND DESIST** from issuing any invoices or bills to North Dakota consumers for the sale of contracting services or merchandise and **CEASE AND DESIST** from taking any payments from North Dakota consumers including, but not limited to, direct debits or withdrawals from

North Dakota consumers' bank accounts, cash, checks, or credit card payments for the sale of contracting services or merchandise or other services and/or merchandise as defined in N.D.C.C. § 51-15-01(3).

YOU ARE NOTIFIED that pursuant to N.D.C.C. § 12.1-09-03 a person is guilty of a criminal offense if he or she intentionally "alters, destroys, mutilates, conceals, or removes a record, document, or thing with intent to impair its verity or availability" in an official proceeding. As such, intentional destruction of any documents related to this matter may result in criminal prosecution.

NOTICE OF CIVIL PENALTIES

YOU ARE FURTHER NOTIFIED that pursuant to N.D.C.C. § 51-15-07 any violation of this Cease and Desist Order is subject to civil penalties not to exceed \$1,000 per violation. Any violation of this Order that also is a violation of N.D.C.C. ch. 51-15 may result in additional civil penalties of not more than \$5,000 per violation. Any violation of this Order that also is a violation of N.D.C.C. ch. 43-07 may result in additional civil penalties of not more than \$5,000 per violation and is a Class A misdemeanor. Any violation of this Order that also is a violation of N.D.C.C. ch. 51-04 may result in additional civil penalties of not more than \$5,000 per violation and is a Class B misdemeanor. Such penalties are separate and in addition to any civil penalties, costs, expenses, investigation fees, and attorney fees pursuant to N.D.C.C. chs. 51-15, 43-07, 51-04 or any other applicable statute. Nothing in this Order is intended to limit or waive any rights and remedies available to the State of North Dakota or consumers.

NOTICE OF RIGHT TO REQUEST HEARING

YOU ARE NOTIFIED that pursuant to N.D.C.C. § 51-15-07 you may request a hearing before the Attorney General if such a request is made in writing WITHIN TEN

(10) DAYS AFTER THE RECEIPT OF THIS ORDER. Respondents have the right to be represented by legal counsel at the hearing.

Dated this 2nd day of April, 2013.

STATE OF NORTH DAKOTA

Wayne Stenehjem

Attorney General

BY: 

Parrell D. Grossman, ID No. 04684

Assistant Attorney General

Director

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