STATE OF VERMONT

SUPERIOR COURT
Washington Unit



CIVIL DIVISION
Docket No. Wncv
601-8-12 Wncv

STATE OF VERMONT,
Plaintiff,



v.

41 BROOKLYN ST., LLC,
Defendant.

**ASSURANCE OF DISCONTINUANCE**

NOW COMES the State of Vermont, by and through Vermont Attorney General William H. Sorrell, and hereby accepts from 41 Brooklyn St., LLC ("Defendant") this Assurance of Discontinuance pursuant to 9 V.S.A. § 2459.

**Background**

Defendant is the owner of the following property (hereinafter "the property"):

**41 Brooklyn St., Morrisville.**

The property is a residential rental property constructed before 1978 and is therefore subject to Vermont's lead law, including the requirement of annual essential maintenance practices ("EMPs") that are designed to reduce childhood lead poisoning risks. 18 V.S.A. §§ 1751(19), 1759. Lead-based paint in housing, the focus of the Vermont lead law, is a leading cause of childhood lead poisoning, which can result in adverse health effects, including decreases in IQ. All paint in pre-1978 housing is presumed to be lead-based unless a certified inspector has determined that it is not lead-based. 18 V.S.A. § 1759(a).

EMPs include, but are not limited to, installing window well inserts, visually inspecting properties at least annually for deteriorated paint, restoring surfaces to be free of deteriorated paint within 30 days after such paint has been visually identified or reported to

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GENERAL
109 State Street
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05609

the owner, and posting lead paint hazard information in a prominent place. 18 V.S.A. § 1759(a)(2), (4) and (7). The Vermont lead law requires owners of rental housing to file annual compliance statements attesting to EMP performance with the Vermont Department of Health and with the owner's insurance carrier. 18 V.S.A § 1759(b). A copy of the compliance statement must be given to all tenants and to new tenants prior to entering into a lease agreement. 18 V.S.A. § 1759(b)(3) and (4).

The Vermont Consumer Fraud Act, 9 V.S.A., Chapter 63, prohibits unfair and deceptive acts and practices, including the offering for rent, or the renting of, housing that is non-compliant with the lead law.

A violation of the Vermont lead law may result in a maximum civil penalty of $10,000.00. 18 V.S.A. § 130(b)(6). Each day that a violation continues is a separate violation. 18 V.S.A. § 130(b)(6). Violations of the Consumer Fraud Act are subject to a civil penalty of up to $10,000.00 per violation. 9 V.S.A. §2458(b)(1). Each day that a violation continues is a separate violation.

The property is not currently in compliance with the Vermont lead law. Defendant has informed the State of its intention to complete the EMP work necessary at the property but does not expect that the work will be complete until October 15, 2012.

**Office of the ATTORNEY GENERAL 109 State Street Montpelier, VT 05609**

## INJUNCTIVE RELIEF

Defendant agrees to the following:

1. Defendant shall immediately ensure that access to exterior surfaces and components of the properties with lead hazards and areas directly below the deteriorated surfaces are clearly restricted as described in 18 V.S.A. § 1759(a)(3).
2. Defendant shall give priority to completion of EMPs at any of the properties where a child age 6 or under is residing.
3. Not later than **October 15, 2012** all EMP work, interior and exterior, shall be completed at the property.
4. Upon completion of the EMPs at the property, but no later than October 22, 2012, Defendant will file with the Vermont Department of Health and Defendant's insurance carrier(s), a completed EMP compliance statement for the property, and will give a copy to an adult in each rented unit of the property.
5. Upon completion of EMPs at the property, Defendant shall also provide proof of completion to the Office of the Attorney General at the following address: Robert F. McDougall, Assistant Attorney General, Office of the Attorney General, 109 State Street, Montpelier, Vermont 05609. A copy of the EMP compliance statement for the property shall be sufficient proof of completion.
6. All work performed at the property, whether by Defendant, its employees, or by hired contractors and/or painting companies, shall be performed using safe work practices consistent with 18 V.S.A. § 1760. Contractors and/or painting companies must have all necessary certifications and licenses required to perform the work. It shall be the obligation of Defendant to ensure that any contractors

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and/or painting companies it hires to perform EMP work are aware of the provisions of 18 V.S.A. § 1760, intend to use safe work practices at the property and are properly licensed and certified.

7. If Defendant anticipates not being able to fully comply with the deadlines for EMP compliance solely due to delays relating to contractors and/or painting companies hired to perform the EMP work, Defendant may request an extension of the deadline from the Attorney General's Office. Such request shall be made as soon as the delay is recognized and must include an approximate date by which the work shall be complete.
8. In the event that Defendant wishes by agreement with the Office of the Attorney General to extend any of the dates above for reasons not relating to delays caused by contractors and/or painting companies hired to perform the EMP work, such request must be made by Defendant at least 10 days in advance of the dates specified in this Assurance of Discontinuance.
9. Defendant shall fully and timely comply with the requirements of the Vermont Lead Law, 18 V.S.A., Chapter 38, as long as it maintains any ownership interest in the property or in any other pre-1978 residential housing in which it currently has or later acquires an ownership interest or provides property management services (unless by property management contract the Defendant is explicitly not responsible for EMPs).

**Office of the ATTORNEY GENERAL 109 State Street Montpelier, VT 05609**

## PENALTIES

10. Defendant shall pay civil penalties of five thousand ($5,000.00). Payment shall be due October 31, 2012, and payment made to the "State of Vermont" and shall be sent to: Robert F. McDougall, Assistant Attorney General, Office of the Attorney General, 109 State Street, Montpelier, Vermont 05609.

11. If Defendant complies with the EMP requirements of this Assurance of Discontinuance set forth in paragraphs 1 through 6 above, the penalties provided in paragraph 10 shall be waived by the State of Vermont.

12. The filing of the EMP compliance statements for the properties by October 22, 2012, as described in paragraphs 4 and 7, shall be considered compliance with the requirements of this Assurance of Discontinuance. If, however, it is determined that the filed EMP compliance statements are not accurate, the State may pursue the penalties in paragraph 10 in addition to any other appropriate action under the Vermont lead law.

## OTHER RELIEF

13. This Assurance of Discontinuance is binding on Defendant; however, sale of the property may not occur unless all obligations set forth herein have been completed or this Assurance of Discontinuance is amended in writing to transfer to the buyer or other transferee all remaining obligations.

14. Transfer of ownership of any of the properties shall be consistent with Vermont law, including the provisions of 18 V.S.A. § 1767, specifically relating to the transfer of ownership of target housing.

15. This Assurance of Discontinuance shall not affect marketability of title.

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16. Should Defendant fully transfer or sell its ownership interest in the property after completing all obligations set forth herein, its obligations with respect to that property under this Assurance of Discontinuance are extinguished. However, nothing in this Assurance of Discontinuance in any way affects the obligations of future owners of the property under Vermont law, including under the Vermont lead law.

17. Nothing in this Assurance of Discontinuance in any way affects Defendant's other obligations under state, local, or federal law.

18. Any future failure by Defendant to comply with the Vermont lead law at the property referenced in this Assurance of Discontinuance, or any violation of the terms of this Assurance of Discontinuance, shall be subject to additional penalties of no less than $10,000.00 per violation per day for each day the violation exists.

**Signature**

By signing below, Defendant acknowledges and agrees that the facts contained in the section entitled "Background" are true and voluntarily agrees to and submits to the terms of this Assurance of Discontinuance.

DATED at Morrisville, Vermont this 18th day of Aug., 2012.

Jean Wickart

Jean Wickart, as agent for 41 Brooklyn St., LLC

**Office of the ATTORNEY GENERAL**
**109 State Street**
**Montpelier, VT**
**05609**

**Acceptance**

In lieu of instituting an action or proceeding against Defendant, the Office of the Attorney General, pursuant to 9 V.S.A. § 2459, accepts this Assurance of Discontinuance.

ACCEPTED on behalf of the State of Vermont:

DATED at Montpelier, Vermont this 22nd day of Agust, 2012.

STATE OF VERMONT

WILLIAM H. SORRELL
ATTORNEY GENERAL

By: _____

Robert F. McDougall
Assistant Attorney General
Office of the Attorney General
109 State Street
Montpelier, Vermont 05609
802.828.3186

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GENERAL
109 State Street
Montpelier, VT
05609

STATE OF VERMONT

SUPERIOR COURT
Washington Unit

CIVIL DIVISION
Docket No. 2012 SEP -9 A 11: 59 Wncv

STATE OF VERMONT,
Plaintiff,

v.

BRIAN ARMSTRONG,
Defendant.

**ASSURANCE OF DISCONTINUANCE**

NOW COMES the State of Vermont, by and through Vermont Attorney General William H. Sorrell, and hereby accepts from Brian Armstrong ("Defendant") this Assurance of Discontinuance pursuant to 9 V.S.A. § 2459.

**Background**

Defendant is the owner of the following properties (hereinafter "the properties"):

**168 North Winooski Ave., Burlington; and**
**170-172 North Winooski Ave., Burlington.**

The properties are residential rental properties constructed before 1978 and are therefore subject to Vermont's lead law, including the requirement of annual essential maintenance practices ("EMPs") that are designed to reduce childhood lead poisoning risks. 18 V.S.A. §§ 1751(19), 1759. Lead-based paint in housing, the focus of the Vermont lead law, is a leading cause of childhood lead poisoning, which can result in adverse health effects, including decreases in IQ. All paint in pre-1978 housing is presumed to be lead-based unless a certified inspector has determined that it is not lead-based. 18 V.S.A. § 1759(a).

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EMPs include, but are not limited to, installing window well inserts, visually inspecting properties at least annually for deteriorated paint, restoring surfaces to be free of deteriorated paint within 30 days after such paint has been visually identified or reported to the owner, and posting lead paint hazard information in a prominent place. 18 V.S.A. § 1759(a)(2), (4) and (7). The Vermont lead law requires owners of rental housing to file annual compliance statements attesting to EMP performance with the Vermont Department of Health and with the owner's insurance carrier. 18 V.S.A § 1759(b). A copy of the compliance statement must be given to all tenants and to new tenants prior to entering into a lease agreement. 18 V.S.A. § 1759(b)(3) and (4).

The Vermont Consumer Fraud Act, 9 V.S.A., Chapter 63, prohibits unfair and deceptive acts and practices, including the offering for rent, or the renting of, housing that is non-compliant with the lead law.

A violation of the Vermont lead law may result in a maximum civil penalty of $10,000.00. 18 V.S.A. § 130(b)(6). Each day that a violation continues is a separate violation. 18 V.S.A. § 130(b)(6). Violations of the Consumer Fraud Act are subject to a civil penalty of up to $10,000.00 per violation. 9 V.S.A. §2458(b)(1). Each day that a violation continues is a separate violation.

The properties are not currently in compliance with the Vermont lead law. Defendant has informed the State of his intention to complete the EMP work necessary at the properties but does not expect that the work will be complete until April 30, 2012.

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## INJUNCTIVE RELIEF

Defendant agrees to the following:

1. Defendant shall immediately ensure that access to exterior surfaces and components of the properties with lead hazards and areas directly below the deteriorated surfaces are clearly restricted as described in 18 V.S.A. § 1759(a)(3).
2. Defendant shall give priority to completion of EMPs at any of the properties where a child age 6 or under is residing.
3. Not later than **April 30, 2012** all EMP work, interior and exterior, shall be completed at the properties.
4. Upon completion of the EMPs at the properties, but no later than May 4, 2012, Defendant will file with the Vermont Department of Health and Defendant's insurance carrier(s), a completed EMP compliance statement for the property, and will give a copy to an adult in each rented unit of the property.
5. Upon completion of EMPs at the properties, Defendant shall also provide proof of completion to the Office of the Attorney General at the following address: Robert F. McDougall, Assistant Attorney General, Office of the Attorney General, 109 State Street, Montpelier, Vermont 05609. A copy of the EMP compliance statement for each property shall be sufficient proof of completion.
6. All work performed at the properties, whether by Defendant, his employees, or by hired contractors and/or painting companies, shall be performed using safe work practices consistent with 18 V.S.A. § 1760. Contractors and/or painting companies must have all necessary certifications and licenses required to perform the work. It shall be the obligation of Defendant to ensure that any contractors

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and/or painting companies he hires to perform EMP work are aware of the provisions of 18 V.S.A. § 1760, intend to use safe work practices at the properties and are properly licensed and certified.

7. If Defendant anticipates not being able to fully comply with the deadlines for EMP compliance solely due to delays relating to contractors and/or painting companies hired to perform the EMP work, Defendant may request an extension of the deadline from the Attorney General's Office. Such request shall be made as soon as the delay is recognized and must include an approximate date by which the work shall be complete.
8. In the event that Defendant wishes by agreement with the Office of the Attorney General to extend any of the dates above for reasons not relating to delays caused by contractors and/or painting companies hired to perform the EMP work, such request must be made by Defendant at least 10 days in advance of the dates specified in this Assurance of Discontinuance.
9. Defendant shall fully and timely comply with the requirements of the Vermont Lead Law, 18 V.S.A., Chapter 38, as long as he maintains any ownership interest in the properties or in any other pre-1978 residential housing in which he currently has or later acquires an ownership interest or provides property management services (unless by property management contract the Defendant is explicitly not responsible for EMPs).

Office of the
ATTORNEY
GENERAL
109 State Street
Montpelier, VT
05609

## PENALTIES

10. Defendant shall pay civil penalties of five thousand ($5,000.00). Payment shall be due May 15, 2012, and payment made to the "State of Vermont" and shall be sent to: Robert F. McDougall, Assistant Attorney General, Office of the Attorney General, 109 State Street, Montpelier, Vermont 05609.
11. If Defendant complies with the EMP requirements of this Assurance of Discontinuance set forth in paragraphs 1 through 6 above, the penalties provided in paragraph 10 shall be waived by the State of Vermont.
12. The filing of the EMP compliance statements for the properties by May 4, 2012, as described in paragraphs 4 and 7, shall be considered compliance with the requirements of this Assurance of Discontinuance. If, however, it is determined that the filed EMP compliance statements are not accurate, the State may pursue the penalties in paragraph 10 in addition to any other appropriate action under the Vermont lead law.

## OTHER RELIEF

13. This Assurance of Discontinuance is binding on Defendant, however, sale of any of the properties may not occur unless all obligations set forth herein have been completed or this Assurance of Discontinuance is amended in writing to transfer to the buyer or other transferee all remaining obligations.
14. Transfer of ownership of any of the properties shall be consistent with Vermont law, including the provisions of 18 V.S.A. § 1767, specifically relating to the transfer of ownership of target housing.
15. This Assurance of Discontinuance shall not affect marketability of title.

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GENERAL
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Montpelier, VT
05609

16. Should Defendant fully transfer or sell his ownership interest in any of the properties after completing all obligations set forth herein, his obligations with respect to that particular property under this Assurance of Discontinuance are extinguished. However, nothing in this Assurance of Discontinuance in any way affects the obligations of future owners of any of the properties under Vermont law, including under the Vermont lead law.

17. Nothing in this Assurance of Discontinuance in any way affects Defendant's other obligations under state, local, or federal law.

18. Any future failure by Defendant to comply with the Vermont lead law at any of the properties referenced in this Assurance of Discontinuance, or violations of the terms of this Assurance of Discontinuance, shall be subject to additional penalties of no less than $10,000.00 per violation per day for each day the violation exists.

**Signature**

By signing below, Defendant acknowledges and agrees that the facts contained in the section entitled "Background" are true and voluntarily agrees to and submits to the terms of this Assurance of Discontinuance.

DATED at Colchester, Vermont this 2nd day of February, 2012.

Brian Armstrong

Office of the
ATTORNEY
GENERAL
109 State Street
Montpelier, VT
05609

**Acceptance**

In lieu of instituting an action or proceeding against Defendant, the Office of the Attorney General, pursuant to 9 V.S.A. § 2459, accepts this Assurance of Discontinuance.

ACCEPTED on behalf of the State of Vermont:

DATED at Montpelier, Vermont this 8th day of February, 2012.

STATE OF VERMONT

WILLIAM H. SORRELL
ATTORNEY GENERAL

By: _____

Robert F. McDougall
Assistant Attorney General
Office of the Attorney General
109 State Street
Montpelier, Vermont 05609
802.828.3186

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9 State Street
ontpelier, VT
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**STATE OF VERMONT**

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| SUPERIOR COURT<br>Washington Unit | ) | CIVIL DIVISION<br>Docket No. 149-3-11 wncv |
| STATE OF VERMONT<br>Plaintiff, | ) | |
| vs. | ) | |
| ASTRAZENECA PHARMACEUTICALS LP and ASTRAZENECA LP<br>Defendants. | ) | |

FILED
2011 MAR 15 A 9:00
VT SUPERIOR COURT
WASHINGTON UNIT

**FINAL JUDGMENT AND CONSENT DECREE**

Plaintiff, STATE OF VERMONT, by WILLIAM H. SORRELL, Attorney General of the State of Vermont, has filed a Complaint for a permanent injunction and other relief in this matter pursuant to the Vermont Consumer Fraud Act, 9 V.S.A. §§ 2451 *et seq.*, alleging that AstraZeneca Pharmaceuticals LP and AstraZeneca LP committed violations of the aforementioned Act.

Plaintiff, by its counsel, and AstraZeneca Pharmaceuticals LP and AstraZeneca LP, by their counsel, have agreed to the entry of this Final Judgment and Consent Decree ("Judgment") by the Court without trial or adjudication of any issue of fact or law or finding of wrongdoing or liability of any kind.

**PARTIES**

1. The State of Vermont (hereinafter "the State") is the plaintiff in this case. The Vermont Attorney General is charged with, among other things, the responsibility of enforcing the Vermont Consumer Fraud Act.

2. AstraZeneca Pharmaceuticals LP and AstraZeneca LP (hereinafter "AstraZeneca") are the Defendants in this case. AstraZeneca's Corporate Headquarters is located at, 1800 Concord Pike, Wilmington, DE 19850-5437. As used herein, any reference to "AstraZeneca" shall mean AstraZeneca Pharmaceuticals LP and AstraZeneca LP.

## TRADE AND COMMERCE

AstraZeneca, at all times relevant hereto, engaged in trade and commerce affecting consumers, within the meaning of the Vermont Consumer Fraud Act, in the State of Vermont, including, but not limited to, Washington County.

## PREAMBLE

A. The Attorneys General of thirty-seven[1] states and the District of Columbia (collectively, the "Attorneys General," and the "AGs")[2], conducted an investigation regarding certain AstraZeneca practices concerning Seroquel.

B. The Parties have agreed to resolve the claims raised by the Covered Conduct, as set forth in Section VII, by entering into this Judgment. This Judgment is entered into pursuant to and subject to the State consumer protection laws[3] cited in footnote 3.

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[1] Arizona, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Iowa, Kansas, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Vermont, Washington, West Virginia, and Wisconsin.

[2] Hawaii is being represented on this matter by its Office of Consumer Protection, an agency which is not part of the state Attorney General's Office, but which is statutorily authorized to undertake consumer protection functions, including legal representation of the State of Hawaii. For simplicity, the entire group will be referred to as the "Attorneys General," and such designation, as it includes Hawaii, refers to the Executive Director of the State of Hawaii Office of Consumer Protection."

[3] ARIZONA – *Arizona Consumer Fraud Act*, A.R.S. § 44-1521 *et seq.*; CALIFORNIA – Bus. & Prof Code §§ 17200 *et seq.* and 17500 *et seq.*; COLORADO – *Colorado Consumer Protection Act*, Colo. Rev. Stat. § 6-1-101 *et seq.*; CONNECTICUT – *Connecticut Unfair Trade Practices Act*, Conn. Gen. Stat. §§ 42-110a *et seq.*; DELAWARE – *Delaware Consumer Fraud Act*, Del. CODE ANN. tit. 6, §§ 2511 to 2527; DISTRICT OF COLUMBIA, *District of Columbia Consumer Protection Procedures Act*, D.C. Code §§ 28-3901 *et seq.*; FLORIDA – *Florida Deceptive and Unfair Trade Practices Act, Part II*, Chapter 501, Florida Statutes, 501.201 *et. seq.*; HAWAII – *Uniform Deceptive Trade Practice Act*, Haw. Rev. Stat. Chpt. 481A and Haw. 501.201 *et seq.*; IDAHO – *Consumer Protection Act*, Idaho Code Section 48-601 *et seq.*; ILLINOIS – *Consumer Fraud and Deceptive Business Practices Act*, 815 ILCS 505/2 *et seq.*; IOWA – *Iowa Consumer Fraud Act*, Iowa Code Section 714.16; KANSAS - *Kansas Consumer Protection Act*, K.S.A. 50-623 et seq.; LOUISIANA – *Unfair Trade-Practices and Consumer Protection Law*, LSA-R.S. 51:1401, *et seq.*; MAINE – *Unfair Trade Practices Act*, 5 M.R.S.A. § 207 *et seq.*; MARYLAND - *Maryland Consumer Protection Act*, Md. Code Ann., Com. Law §§ 13-101 *et seq.*; MASSACHUSETTS – Mass. Gen. Laws c. 93A, §§ 2 and 4; MICHIGAN – *Michigan Consumer Protection Act*, MCL § 445.901 *et seq.*; MINNESOTA - Minnesota Deceptive Trade Practices Act, Minn. Stat. §§ 325D.43-48; Minnesota False Advertising Act, Minn. Stat. § 325F.67; Minnesota Consumer Fraud Act, Minn. Stat. §§ 325F.68-70; Minnesota Deceptive Trade Practices Against Senior Citizens or Disabled Persons Act, Minn. Stat. § 325F.71.; MISSOURI – *Missouri Merchandising Practices Act*, Mo. Rev. Stat. §§ 407 et seq.; NEBRASKA – *Uniform Deceptive Trade Practices Act*, NRS §§ 87-301 *et seq.*; NEVADA – Deceptive Trade Practices Act, Nevada Revised

C. AstraZeneca is entering into this Judgment solely for the purpose of settlement and nothing contained herein may be taken as or construed to be an admission or concession of any violation of law or regulation, or of any other matter of fact or law, or of any liability or wrongdoing (including allegations of the Complaint), all of which AstraZeneca expressly denies. AstraZeneca does not admit any violation of law, and does not admit any wrongdoing that was or could have been alleged by any Attorney General before the date of the Judgment. No part of this Judgment, including its statements and commitments, shall constitute evidence of any liability, fault, or wrongdoing by AstraZeneca. This Judgment is made without trial or adjudication of any issue of fact or law or finding of wrongdoing or liability of any kind. It is the intent of the Parties that this Judgment shall not be binding or admissible in any other matter, including, but not limited to, any investigation or litigation, other than in connection with the enforcement of this Judgment. No part of this Judgment shall create a private cause of action or confer any right to any third party for violation of any federal or state statute except that a State may file an action to enforce the terms of this Judgment. To the extent that any provision of this Judgment obligates AstraZeneca to change any policy(ies) or procedure(s) and to the extent not already accomplished, AstraZeneca shall implement the policy(ies) or procedure(s) as soon as reasonably practicable, but no later than 120 days after the Effective Date of this Judgment. Nothing

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Statutes 598.0903 *et seq.*; NEW HAMPSHIRE – *New Hampshire Consumer Protection Act*, RSA 358-A; NEW JERSEY – *New Jersey Consumer Fraud Act*, NJSA 56:8-1 *et seq.*; NEW YORK – General Business Law Art. 22-A, §§ 349-50, and Executive Law § 63(12); NORTH CAROLINA – North Carolina Unfair and Deceptive Trade Practices Act, N.C.G.S. 75-1.1, *et seq.*; NORTH DAKOTA – *Unlawful Sales or Advertising Practices*, N.D. Cent. Code § 51-15-02 *et seq.*; OHIO – *Ohio Consumer Sales Practices Act*, R.C. 1345.01, *et seq.*; OKLAHOMA - Oklahoma Consumer Protection Act 15 O.S. §§ 751 *et seq.*; OREGON -- Oregon Unlawful Trade Practices Act, ORS 646.605 *et seq.*; PENNSYLVANIA – *Pennsylvania Unfair Trade Practices and Consumer Protection Law*, 73 P.S. 201-1 *et seq.*; RHODE ISLAND - Rhode Island Deceptive Trade Practices Act, Rhode Island General Laws § 6-13.1-1, *et seq.*; SOUTH DAKOTA – *South Dakota Deceptive Trade Practices and Consumer Protection*, SDCL ch. 37-24; TENNESSEE – *Tennessee Consumer Protection Act*, Tenn. Code Ann. 47-18-101 *et seq.*; TEXAS – *Texas Deceptive Trade Practices-Consumer Protection Act*, Tex. Bus. And Com. Code 17.47, *et seq.*; VERMONT – *Consumer Fraud Act*, 9 V.S.A. §§ 2451 *et seq.*; WASHINGTON – *Unfair Business Practices/Consumer Protection Act*, RCW §§ 19.86 *et seq.*; WEST VIRGINIA – *West Virginia Consumer Credit and Protection Act*, W. Va. Code § 46A-1101 *et seq.*; WISCONSIN – Wis. Stat. § 100.18 (Fraudulent Representations).

contained herein prevents or prohibits the use of this Judgment for purposes of enforcement by the AGs.

D. This Judgment does not create a waiver or limit AstraZeneca's legal rights, remedies, or defenses in any other action by the Signatory Attorney General, and does not waive or limit AstraZeneca's right to defend itself from, or make argument in, any other matter, claim, or suit, including, but not limited to any investigation or litigation relating to the existence, subject matter, or terms of this Judgment. Nothing in this Judgment shall waive, release, or otherwise affect any claims, defense, or positions AstraZeneca may have in connection with any investigations, claims, or other matters the State is not releasing hereunder.

E. The AGs have reviewed the terms of the Judgment and find that its entry serves the public interest.

**IT IS HEREBY ORDERED that:**

## DEFINITIONS

The following definitions shall be used in construing this Judgment:

1. "AstraZeneca" shall mean "AstraZeneca Pharmaceuticals LP" and "AstraZeneca LP," including all of their subsidiaries, divisions, successors, and assigns doing business in the United States.

2. "AstraZeneca's Legal Department" shall mean personnel of the AstraZeneca Legal Department or its designee providing legal advice to AstraZeneca.

3. "AstraZeneca Marketing" shall mean AstraZeneca commercial personnel assigned to the U.S. Seroquel brand team.

4. "AstraZeneca Medical Education Grants Office" and "MEGO" shall mean the U.S.-based organization within AstraZeneca responsible for oversight of medical education grants and the acceptance, review, and payment of all medical education grant requests.

5. "AstraZeneca Non-SciP" shall mean AstraZeneca personnel other than AstraZeneca Scientifically Trained Personnel or SciP.

6. "AstraZeneca Sales" shall mean the AstraZeneca pharmaceutical sales specialists, or other AstraZeneca personnel, responsible for U.S. Seroquel sales.

7. "AstraZeneca Scientifically Trained Personnel" or "SciP" shall mean AstraZeneca personnel who are highly trained experts with specialized scientific and medical knowledge whose roles involve the provision of specialized medical or scientific information, but excludes anyone performing sales, marketing, ride alongs, or other commercial roles.

8. "Clinically Relevant Information" shall mean information that reasonably prudent clinicians would consider relevant when making prescribing decisions regarding Seroquel.

9. "Consultant" shall mean a non-AstraZeneca Health Care Professional engaged to advise regarding marketing or promotion of Seroquel.

10. "Covered Conduct" shall mean AstraZeneca's Promotional and marketing practices, sampling practices, dissemination of information (including clinical research results), and remuneration to Health Care Professionals, in connection with Seroquel through the Effective Date of the Judgment.

11. "Effective Date" shall mean the date on which a copy of this Judgment, duly executed by AstraZeneca and by the Signatory Attorney General, is approved by, and becomes a Judgment of the Court.

12. "FDA Guidances for Industry" shall mean draft or final documents published by the United States Department of Health and Human Services, Food and Drug Administration ("FDA") that represent the FDA's current thinking on a topic.

13. "Health Care Professional" or "HCP" shall mean any physician or other health care practitioner who is licensed to provide health care services or to prescribe pharmaceutical products in the United States.

14. "Labeling" shall mean all FDA-approved labels, which are a display of written, printed, or graphic matter upon the immediate container of any article, and other written, printed, or graphic matter (a) upon any article or any of its containers or wrappers, or (b) accompanying such article.

15. "Multistate Executive Committee" shall mean the Attorneys General and their staffs representing Arizona, Delaware, District of Columbia, Florida, Illinois, Kansas, Maryland, Massachusetts, North Carolina, Ohio, Pennsylvania, and Vermont.

16. "Multistate Working Group" shall mean the Attorneys General and their staff representing Arizona, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Hawaii, Idaho, Illinois, Iowa, Kansas, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Vermont, Washington, West Virginia, and Wisconsin.

17. "Off-Label" shall mean a use not consistent with the indications section of the Seroquel Labeling approved by the FDA at the time information regarding such use was communicated.

18. "Parties" shall mean AstraZeneca and the Signatory Attorney General.

19. "Professional Information Request Response" or "PIR Response" shall mean a non-promotional, scientific or reference communication to address Unsolicited Requests for medical information from HCPs.

20. "Promotional," "Promoting" or "Promote" shall mean representations made to HCPs, patients, consumers, payers and other customers and other practices intended to increase sales or that attempt to influence prescribing practices of HCPs.

21. "Promotional Slide Deck" shall mean Promotional materials in any medium regarding Seroquel for use in speaker programs in the United States.

22. "Promotional Speaker" shall mean a HCP speaker engaged to Promote Seroquel in the United States.

23. "Reprints Containing Off-Label Information" shall mean articles or reprints from a Scientific or Medical Journal, as defined in 21 C.F.R. 99.3(j), or Reference Publication, as defined in 21 C.F.R. 99.3(i), describing an Off-Label use of Seroquel.

24. "Seroquel" shall mean all FDA-approved drug formulations containing quetiapine fumarate as its principal active ingredient and Promoted by AstraZeneca in the United States, including Seroquel XR.

25. "Signatory Attorney General" shall mean the Attorney General of Vermont, or his authorized designee, who has agreed to this Judgment.

26. "Unsolicited Request" shall mean a request for information regarding Seroquel from a HCP communicated to an agent of AstraZeneca that has not been prompted by AstraZeneca.

## COMPLIANCE PROVISIONS

Except for Sections I.A-C, I.E-G, II.A, II.D.1, IV, and V below, the Compliance Provisions shall apply for six (6) years from the Effective Date of this Judgment.

### I. Promotional Activities

A. AstraZeneca shall not make any written or oral claim that is false, misleading or deceptive regarding Seroquel.

B. AstraZeneca shall not Promote Seroquel for Off-Label uses.

C. In Promotional materials for Seroquel, AstraZeneca shall clearly and conspicuously disclose the risks associated with the product as set forth in the product's black box warning and shall present information about effectiveness and risk in a balanced manner.

D. AstraZeneca shall not present patient profiles/types based on selected symptoms of the FDA-approved indication(s) when Promoting Seroquel, unless:

1. The drug's specific FDA-approved indication(s) is/are stated clearly and conspicuously in the same spread (*i.e.*, on the same page or on a facing page) in any Promotional materials that refer to selected symptoms.

a. With respect to Promotional Slide Decks:

(i) AstraZeneca shall state clearly and conspicuously the FDA-approved indication(s) on the same slide in which selected symptoms are first presented;

(ii) AstraZeneca shall include a short-hand reference to the statement described in Section I.D.1.a.(i) on the same slide as each subsequent reference to selected symptoms (*e.g.*, "Seroquel is not approved for X selected symptom

referenced in this slide. See list of FDA-approved indications at p. Y"); and,

(iii) AstraZeneca shall require any presenter of AstraZeneca's Promotional Slide Decks to present the statement required in Section I.D.1.a.(i), as part of the mandatory slides.

2. Promotional materials have a reference indicating that the full constellation of symptoms and the relevant diagnostic criteria should be consulted and are available in the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV or current version), where applicable.

E. AstraZeneca shall ensure that all Promotional Speakers' Promotional materials for Seroquel comply with AstraZeneca's obligations in the above Sections I.A–D.

F. AstraZeneca's systems and controls shall 1) be designed to ensure that financial incentives do not motivate AstraZeneca Marketing and/or Sales personnel to engage in improper promotion, sales, and marketing of Seroquel; and 2) include mechanisms to exclude from incentive compensation sales that may indicate Off-Label promotion of Seroquel.

G. AstraZeneca's systems and controls shall be designed to prevent AstraZeneca Sales from detailing Seroquel to HCPs who are unlikely to prescribe Seroquel for a use consistent with its FDA-approved label. This shall be effected through systems and controls requiring that AstraZeneca review the call plans for Seroquel and the bases upon, and circumstances under which HCPs belonging to specified medical specialties or types of clinical practice are included in, or excluded from, the call plans. The systems and controls shall require that AstraZeneca modify the call plans as necessary to ensure that AstraZeneca is

Promoting Seroquel in a manner that complies with applicable federal health care program and FDA requirements.

H. AstraZeneca's detailing systems and its controls shall prevent the delivery of samples of Seroquel to HCPs that AstraZeneca has identified as belonging to a specialty group that is unlikely to prescribe Seroquel for a use consistent with its FDA-approved label.

## II. Dissemination and Exchange of Medical Information

A. General Terms

1. The content of AstraZeneca's communications concerning Off-Label uses of Seroquel shall not be false, misleading or deceptive.

B. Professional Information Request Responses

1. AstraZeneca Scientifically Trained Personnel shall have ultimate responsibility for developing and approving the medical content for all PIR Responses regarding Seroquel, including any that may describe Off-Label information. AstraZeneca shall not distribute any such materials unless:

a. Clinically Relevant Information is included in these materials to provide scientific balance;

b. Data in these materials are presented in an unbiased, non-Promotional manner; and

c. These materials are distinguishable from sales aids and other Promotional materials.

2. AstraZeneca Sales and AstraZeneca Marketing personnel shall not develop the medical content of PIR Responses regarding Seroquel.

3. AstraZeneca Sales representatives shall not distribute PIR Responses regarding Seroquel unless specifically authorized to do so pursuant to II.C.6.

4. AstraZeneca shall not knowingly disseminate any PIR Response describing any Off-Label use of Seroquel that makes any false, misleading or deceptive representation regarding Seroquel or any false or misleading or deceptive statement concerning a competing product.

C. Responses to Unsolicited Requests for Off-Label information

1. In responding to an Unsolicited Request for Off-Label information regarding Seroquel, including any request for a specific article related to Off-Label uses, AstraZeneca shall advise the requestor that the request concerns an Off-Label use and inform the requestor of the drug's FDA-approved indication(s), dosage and other relevant Labeling information.

2. If AstraZeneca elects to respond to an Unsolicited Request for Off-Label information from a HCP regarding Seroquel, AstraZeneca Scientifically Trained Personnel shall provide accurate, objective, and scientifically balanced responses. Any such response shall not Promote Seroquel for an Off-Label use.

3. Any written response to an Unsolicited Request for Off-Label information made to AstraZeneca Sales or AstraZeneca Marketing regarding Seroquel shall include:

a. an existing PIR Response prepared in accordance with Section II.B;

b. a PIR Response prepared in response to the request in accordance with Section II.B; or

c. a report containing the results of a reasonable literature search using terms from the request.

4. Only AstraZeneca Scientifically Trained Personnel may respond in writing to an Unsolicited Request for Off-Label information regarding Seroquel unless AstraZeneca Non-SciP are specifically authorized to do so pursuant to II.C.6.

5. AstraZeneca Non-SciP may respond orally to an Unsolicited Request for Off-Label information regarding Seroquel from a HCP only by offering to request on behalf of the HCP that a PIR Response or other information set forth above in II.C.3 be sent to the HCP in follow up or by offering to put the HCP in touch with the Virtual Scientific Exchange Center ("VSEC"). AstraZeneca Non-SciP shall not characterize, describe, identify, name, or offer any opinions about or summarize any Off-Label information.

6. PIR Responses regarding Seroquel may be disseminated only by AstraZeneca Scientifically Trained Personnel to HCPs, and AstraZeneca Non-SciP shall not disseminate these materials to HCPs except in circumstances implicating public health and safety issues. In such circumstances, AstraZeneca Non-SciP may disseminate a PIR Response directly to HCPs, when expressly authorized by the U.S. Compliance Officer, the U.S. General Counsel, and the Vice President of Medical Affairs.

D. Reprints

1. AstraZeneca shall not disseminate information or written materials describing Off-Label or unapproved uses of Seroquel unless such information and materials comply with applicable FDA regulations and FDA Guidance for Industry;

2. Reprints Containing Off-Label Information

a. AstraZeneca Scientifically Trained Personnel shall be responsible for the identification, selection, approval and dissemination of Reprints Containing Off-Label Information regarding Seroquel.

b. Requests to proactively disseminate a Reprint Containing Off-Label Information shall be submitted to the appropriate director of Medical Affairs, who will convene a cross-functional team, including a representative from Clinical, Medical Affairs, AstraZeneca's U.S. Compliance Department, AstraZeneca's Legal Department, and Promotional Regulatory Affairs, to examine the facts and justification for the request to distribute a Reprint Containing Off-Label Information on a case-by-case basis.

c. Reprints Containing Off-Label Information shall:

   (i) be accompanied by the full prescribing information for the product, or a clearly and conspicuously described hyperlink that will provide the reader with such information, and contain a disclosure in a prominent location, which would include the first page or as a cover page where practicable, indicating that the article may discuss Off-Label information; and

   (ii) not be referred to or used in a Promotional manner.

d. Reprints Containing Off-Label Information regarding Seroquel may be disseminated only by AstraZeneca Scientifically Trained

Personnel to HCPs. AstraZeneca Non-SciP shall not disseminate these materials to HCPs.

3. Nothing in this Judgment shall preclude AstraZeneca from disseminating Reprints which have an incidental reference to Off-Label information. If Reprints have an incidental reference to Off-Label information, such reprints shall contain the disclosure required by section II.D.2.c.(i) in a prominent location, as defined above, and such incidental reference to Off-Label information shall not be referred to or used in a Promotional manner as prohibited by Section II.D.2.c.(ii).

**III. Grants**

A. AstraZeneca shall disclose information about medical education grants, including CME grants, regarding Seroquel consistent with the current disclosures of MEGO with a link to the disclosures available through AstraZeneca's website and as required by applicable law.

1. AstraZeneca shall maintain this information on the website, once posted, for at least two years, or longer if applicable law so requires, and shall maintain the information in a readily accessible format for review by the States upon written request for a period of five years.

B. MEGO shall manage all requests to AstraZeneca for funding related to medical education grants regarding Seroquel. Approval decisions shall be made by MEGO alone, and shall be kept separate from the AstraZeneca Sales and AstraZeneca Marketing organizations.

C. AstraZeneca shall not use medical education grants or any other type of grant to Promote Seroquel. This provision includes, but is not limited to, the following prohibitions:

1. AstraZeneca Sales and AstraZeneca Marketing personnel shall not initiate, coordinate or implement grant applications on behalf of any customer or HCP;

2. AstraZeneca Sales and AstraZeneca Marketing personnel shall not be involved in selecting grantees or medical education speakers; and

3. AstraZeneca shall not measure or attempt to track in any way the impact of grants or speaking fees on the participating HCPs' subsequent prescribing habits, practices or patterns.

D. AstraZeneca shall not condition funding of a medical education program grant request relating to Seroquel upon the requestor's selection or rejection of particular speakers.

E. AstraZeneca shall not suggest, control, or attempt to influence selection of the specific topic, title, content, speakers or audience for CMEs relating to Seroquel, consistent with Accreditation Council for Continuing Medical Education Guidelines.

F. AstraZeneca Sales and AstraZeneca Marketing personnel shall not approve grant requests relating to Seroquel, nor attempt to influence the awarding of grants to any customers or HCPs for their prescribing habits, practices or patterns.

G. AstraZeneca shall contractually require the medical education provider to clearly and conspicuously disclose to medical education program attendees AstraZeneca's financial support of the medical education program and any financial relationship with faculty and speakers at such medical education program.

H. After the initial delivery of a medical education program, AstraZeneca shall not knowingly fund the same program, nor shall it provide additional funding for re-distribution of the same program, if the program's speakers are Promoting Seroquel for Off-Label uses in that program.

## IV. Payments to Consultants and Speakers

A. This Section shall be effective for five (5) years from the Effective Date of this Judgment and shall apply to U.S. based Consultants and Promotional Speakers performing Promotional activities for AstraZeneca.

B. Phase I Reporting.

1. AstraZeneca shall continue to post in a prominent position on its website an easily accessible and readily searchable listing of all U.S.-based physicians and Related Entities (as defined below in Section IV.D.5) who or which received Phase I Payments (as defined below in Section IV.D.2) directly or indirectly from AstraZeneca during the first six months of 2010 and the aggregate value of such Phase I Payments.

2. On or before February 28, 2011, AstraZeneca shall also post on its website a listing of updated information about all Phase I Payments provided during the last six months of 2010. On or before May 31, 2011, AstraZeneca shall also post on its website a listing of updated information about all Phase I Payments provided during the first quarter of 2011. On or before June 30, 2011, AstraZeneca shall also post on its website a report of the cumulative value of the Phase I Payments provided to each physician, and/or Related Entity during 2010. The quarterly, six-month, and annual reports shall be easily accessible and readily searchable.

3. Each listing made pursuant to this Section IV. B shall include a complete list of all individual physicians and Related Entities to whom or to which AstraZeneca directly or indirectly made Payments in the preceding six-month period, quarter, or year (as applicable). Each listing shall be arranged alphabetically according to the physicians' last name or the name of the Related Entity. For each physician, the applicable listing shall include the following information: i) physician's full name; ii) name of any Related Entities (if applicable); iii) city and

state that the physician or Related Entity has provided to AstraZeneca for contact purposes; and (iv) the aggregate value of the payment(s) in the preceding quarter, six-month period, or year (as applicable). If payments for multiple physicians have been made to one Related Entity, the aggregate value of all payments to the Related Entity will be the reported amount.

C. Phase II Reporting

1. On or before August 31, 2011, AstraZeneca shall post in a prominent position on its website an easily accessible and readily searchable listing of all U.S.-based physicians and Related Entities who or which received Phase II Payments (as defined below in Section IV.D.3) directly or indirectly from AstraZeneca during the second quarter of 2011 and the aggregate value of such Phase II Payments.

2. After the August 31, 2011 posting, 30 days after the end of each subsequent calendar quarter, AstraZeneca shall post on its website a listing of updated information about all Phase II Payments provided from the first reporting quarter of the year through the close of the most recent quarter of the year. Beginning in 2012, on or before May 1 of each year, AstraZeneca shall also post on its website a report of the cumulative value of the Phase II Payments provided to each physician, and/or Related Entity during each preceding calendar year. The quarterly and annual reports shall be easily accessible and readily searchable.

D. Definitions and Miscellaneous Provisions

1. AstraZeneca shall continue to make each annual listing and the most recent six-month or quarterly listing of Payments available on its website. AstraZeneca shall retain and make available to each Signatory Attorney General, upon request, relevant business records sufficient to demonstrate the purpose of the Payment and (where applicable) the performance of a service by the HCP related to all applicable Payments and to the annual, six-

month, and/or quarterly listings of Payments. Nothing in this Section IV affects the responsibility of AstraZeneca to comply with (or liability for noncompliance with) all applicable state laws as they relate to all applicable Payments made to physicians or Related Entities.[4]

2. For purposes of Section IV.B, the term "Phase I Payments" is defined as all fees paid in connection with U.S.-based physicians serving as Promotional Speakers in the United States or participating in prerequisite speaker training for such Promotional Speaker engagements.

3. For purposes of Section IV.C, the term "Phase II Payments" is defined to include all Phase I Payments and all other "payments or transfers of value" as that term is defined in § 1128G(e)(10) under Section 6002 of the Patient Protection and Affordable Care Act ("PPACA") and any regulations promulgated thereunder. The term Phase II Payments includes, by way of example, the types of payments or transfers of value enumerated in § 1128G(a)(1)(A)(vi) of PPACA. The term includes all payments or transfers of value made to Related Entities on behalf of, at the request of, for the benefit or use of, or under the name of a physician for whom AstraZeneca would otherwise report a Payment if made directly to the physician. The term "Phase II Payments" also includes any payments or transfers of value made, directly by AstraZeneca or by a vendor retained by AstraZeneca to a physician or Related Entity in connection with, or under the auspices of, a co-promotion arrangement.

4. The term "Payments" as used in the definition of Phase I Payments and Phase II Payments does not include transfers of value or other items that are not included or are excluded from the definition of "payment" as set forth in § 1128G(e)(10) under Section 6002 of PPACA and any regulations promulgated thereunder.

[4] This includes, but is not limited to, 18 V.S.A. §§ 4631 *et seq.*

5. For purposes of this Section IV, the term "Related Entity" is defined to be any entity by or in which any physician receiving Payments is employed, has tenure, or has an ownership interest.

E. Once the Federal Physician Payments Sunshine Act becomes effective, AstraZeneca shall comply with the Federal Physician Payments Sunshine Act, Section 6002 of the PPACA, and it is agreed that AstraZeneca's compliance with the Physician Payment Sunshine Provision of PPACA will constitute compliance with Section IV of this Final Judgment and Consent Decree.

## V. Clinical Research Results

A. AstraZeneca shall report clinical research regarding Seroquel in an accurate, objective and balanced manner as follows and as required by applicable law:

1. To the extent permitted by the National Library of Medicine and as required by the FDA Amendments Act of 2007 (Public Law No. 110-85), AstraZeneca shall register clinical trials and submit clinical trial results to the registry and results data bank regarding Seroquel as required by the FDA Amendments Act and any accompanying regulations that may be promulgated pursuant to that Act. With respect to Seroquel, AstraZeneca registers on a publicly accessible NIH website (www.clinicaltrials.gov) the initiation of all AstraZeneca-sponsored clinical studies involving individuals and posts a summary of the results of all AstraZeneca-sponsored clinical studies in patients or volunteers for marketed and investigative products on the above-referenced NIH website and on a company website (www.astrazenecaclinicaltrials.com).

B. When presenting information about a clinical study regarding Seroquel, AstraZeneca shall not do any of the following in a manner that causes the Promotional materials to be false, misleading or deceptive:

1. present favorable information or conclusions from a study that is inadequate in design, scope, or conduct to furnish significant support for such information or conclusions;

2. use the concept of statistical significance to support a claim without providing the appropriate clinical context, or which fails to reveal the range of variations around the quoted average results;

3. use statistical analyses and techniques on a retrospective basis to discover and cite findings not soundly supported by the study, or to suggest scientific validity and rigor for data from studies the design or protocol of which are not amenable to formal statistical evaluations;

4. present the information in a way that implies that the study represents larger or more general experience with the drug than it actually does; or

5. use statistics on numbers of patients, or counts of favorable results or side effects, derived from pooling data, unless such pooling has been done in a statistically rigorous manner, pursuant to a protocol, and that the method of pooling has been disclosed.

## PAYMENT AND RELEASE PROVISIONS

### VI. Terms Relating to Payment

A. No later than 30 days after the Effective Date of this Judgment, AstraZeneca shall pay $68.5 million to be divided and paid by AstraZeneca directly to each Signatory Attorney General of the Multistate Working Group in an amount to be designated by and in the sole discretion of the Multistate Executive Committee. The Parties acknowledge that the payment described herein is not a fine or penalty, or payment in lieu thereof.

### VII. Release

A. By its execution of this Judgment, the State of Vermont releases and forever discharges AstraZeneca, and all of its past and present subsidiaries, divisions, affiliates, co-promoters, controlled joint ventures, predecessors, successors, and assigns and each and all of their current and former officers, directors, shareholders, employees, agents, contractors,and attorneys (collectively, the "Released Parties") of and from the following: all civil claims, causes of action, *parens patriae* claims, damages, restitution, fines, costs, attorneys fees, remedies and/or penalties that the Vermont Attorney General has asserted or could have asserted against the Released Parties under the Vermont Consumer Fraud Act or any amendment thereto, or common law claims concerning unfair, deceptive, or fraudulent trade practices resulting from the Covered Conduct up to and including the Effective Date (collectively, the "Released Claims").

B. Notwithstanding any term of this Judgment, specifically reserved and excluded from the Released Claims as to any entity or person, including Released Parties, are any and all of the following:

1. Any criminal liability that any person or entity, including Released Parties, has or may have to the State of Vermont;

2. Any civil or administrative liability that any person or entity, including Released Parties, has or may have to the State of Vermont not expressly covered by the release in Section VII.A above, including, but not limited to, any and all of the following claims:

a. State or federal antitrust violations;

b. Claims involving "best price," "average wholesale price" or "wholesale acquisition cost;"

c. Medicaid violations, including but not limited to federal Medicaid drug rebate statute violations, Medicaid fraud or abuse, and/or kickback violations related to any state's Medicaid program; and

d. State false claims violations.

3. Actions of state program payors of the State of Vermont arising from the purchase of Seroquel, except for the release of civil penalties under the state consumer protection laws cited in footnote 3.

4. Any claims individual consumers have or may have under the State of Vermont's above cited consumer protection laws against any person or entity, including Released Parties.

## PROVISIONS RELATED TO OTHER LAWS AND DISPUTE RESOLUTION

### VIII. Conflicts with Other Laws

A. This Judgment (or any portion thereof) shall in no way be construed to prohibit AstraZeneca from making representations with respect to Seroquel that are permitted under federal law or in Labeling for the drug under the most current draft or final standard promulgated by the FDA or the most current draft or final FDA Guidances for Industry, or permitted or required under any Investigational New Drug Application, New Drug Application, Supplemental New Drug Application, or Abbreviated New Drug Application approved by FDA, unless facts are or become known to AstraZeneca that such representation, taken in its entirety, is false, misleading or deceptive. Nothing in this paragraph should be interpreted to excuse AstraZeneca from implementing any of the affirmative obligations described in the Compliance Provisions of this Judgment. If, subsequent to the Effective Date of this Judgment, the laws or regulations of the United States are changed so as to expressly authorize conduct that is expressly prohibited by this Judgment, then such conduct shall not constitute a violation of this judgment. Provided however, if AstraZeneca intends to engage in the expressly authorized conduct, AstraZeneca shall notify the Attorneys General (or the Attorney General of the affected state) within 30 business days prior to engaging in the expressly authorized conduct.

B. If, subsequent to the Effective Date of this Judgment, the federal government or any state, or any federal or state agency, enacts or promulgates legislation, regulations, or guidances with respect to matters governed by this Judgment that creates a conflict with any of the Compliance Provisions of the Judgment and AstraZeneca intends to comply with the newly enacted legislation, regulation, or guidance, AstraZeneca shall notify the Attorneys General (or the Attorney General of the affected State) of the same. If the Attorney General agrees, he/she

shall consent to a modification of such provision of the Judgment to the extent necessary to eliminate such conflict. If any Attorney General disagrees and the Parties are not able to resolve the disagreement, AstraZeneca shall seek a modification from an appropriate court of any provision of this Judgment that presents a conflict with any such federal or state law, regulation, or guidance. The disagreement of an Attorney General shall in no way impact AstraZeneca's ability to take action in any state and/or territory not represented by that Attorney General. Changes in federal or state laws, regulations, or guidances with respect to the matters governed by this Judgment shall not be deemed to create a conflict with a provision of this Judgment unless AstraZeneca cannot reasonably comply with both such law, regulation, or guidance and the applicable provision of this Judgment.

## IX. Dispute Resolution

A. For the purposes of resolving disputes with respect to compliance with this Judgment, should any of the Signatory Attorneys General have a reasonable basis to believe that AstraZeneca has engaged in a practice that violates a provision of this Judgment subsequent to the Effective Date of this Judgment, then such Attorney General shall notify AstraZeneca in writing of the specific objection, identify with particularity the provisions of this Judgment that practice appears to violate, and give AstraZeneca thirty (30) days to respond to the notification; provided, however, that a Signatory Attorney General may take any action if the Signatory Attorney General concludes that, because of the specific practice, a threat to the health or safety of the public requires immediate action. Upon receipt of written notice, AstraZeneca shall provide a good-faith written response to the Attorney General notification, containing either a statement explaining why AstraZeneca believes it is in compliance with the Judgment, or a detailed explanation of how the alleged violation occurred and statement explaining how and when AstraZeneca intends to remedy the alleged violation. Nothing in this paragraph shall be interpreted to limit the State's Civil Investigative Demand ("CID") or investigative subpoena authority, to the extent such authority exists under applicable state law, and AstraZeneca reserves all of its rights with respect to a CID or investigative subpoena issued pursuant to such authority.

B. Upon giving AstraZeneca thirty (30) days to respond to the notification described above, the Signatory Attorney General shall also be permitted reasonable access to inspect and copy relevant, non-privileged, non-work product records and documents in the possession, custody or control of AstraZeneca that relate to AstraZeneca's compliance with each provision of this Judgment as to which cause that is legally sufficient in the State has been shown.

C. If the Signatory Attorney General makes or requests copies of any documents during the course of that inspection, the Signatory Attorney General will provide a list of those documents to AstraZeneca. Any and all documents and information (including, but not limited to, electronic information) provided in response to a request by the State shall be protected to the extent provided by the requesting State's Freedom of Information Act or other state law. Such documents or information shall not be disclosed by the State to any other party or entity (pursuant to a FOIA request, subpoena, or otherwise) without first providing notice to AstraZeneca, to the extent allowed by law, so that AstraZeneca may take necessary steps to protect its confidential documents or information prior to disclosure.

D. The State of Vermont may assert any claim that AstraZeneca has violated this Judgment in that State in a separate civil action to enforce compliance with this Judgment, or may seek any other relief afforded by law, but only after providing AstraZeneca an opportunity to respond to the notification described in Paragraph IX.A. above, provided, however, that a Signatory Attorney General may take any action if the Signatory Attorney General concludes that, because of the specific practice, a threat to the health or safety of the public of that State requires immediate action.

## X. Timely Written Requests for Extensions

Nothing will prevent the State from agreeing in writing to provide AstraZeneca with additional time to perform any act or to file any notification required by the Judgment. The Attorney General shall not unreasonably withhold his/her agreement to the request for additional time.

## XI. General Provisions

A. AstraZeneca shall not cause or encourage third parties, nor knowingly permit third parties acting on its behalf, to engage in practices from which AstraZeneca is prohibited by this Judgment.

B. This Judgment represents the full and complete terms of the settlement entered into by the Parties hereto. In any action undertaken by the Parties, neither prior versions of this Judgment, nor prior versions of any of its terms, that were not entered by the Court in this Judgment, may be introduced for any purpose whatsoever.

C. This Court retains jurisdiction of this Judgment and the Parties hereto for the purpose of enforcing and modifying this Judgment and for the purpose of granting such additional relief as may be necessary and appropriate.

D. This Judgment may be executed in counterparts, and a facsimile or .pdf signature shall be deemed to be, and shall have the same force and effect as, an original signature.

E. All Notices under this Judgment shall be provided to John C. Dodds and the U.S. Compliance Officer of AstraZeneca by Overnight Mail at:

John C. Dodds
Morgan, Lewis & Bockius LLP
1701 Market St.
Philadelphia, PA 19103

Marie L. Martino
U.S. Compliance Officer
AstraZeneca
1800 Concord Pike
PO Box 15437
Wilmington, DE 19850-5437

APPROVED:

PLAINTIFF, THE PEOPLE OF THE STATE OF VERMONT

By: _____ Date: 3/10/11
Wendy Morgan, Chief, Public Protection Division

WILLIAM H. SORRELL
Vermont Attorney General

WENDY MORGAN
Chief, Public Protection Division
Vermont Attorney General's Office
Public Protection Division
109 State St.
Montpelier, VT 05609-1001
(802) 828-3171

ASTRAZENECA PHARMACEUTICALS LP and ASTRAZENECA LP

By: _____ Date: _____

Marie L. Martino
U.S. Compliance Officer
AstraZeneca
1800 Concord Pike
PO Box 15437
Wilmington, DE 19850-5437

Approved as to form:

By:_____ Date: _____

John C. Dodds
Morgan, Lewis & Bockius LLP
1701 Market St.
Philadelphia, PA 19103-2921
215.963.4942
215.963.5001-Fax
jdodds@morganlewis.com

Attorney for AstraZeneca Pharmaceuticals LP and AstraZeneca LP

***APPROVED BY THE COURT:***

By: _____ Date: 3/14/11

Superior Court Judge Crawford
Washington Superior Court
65 State Street
Montpelier, VT 06502

STATE OF VERMONT
SUPERIOR COURT
WASHINGTON UNIT

In re BIZZFINDERS.COM, LLC )

CIVIL DIVISION
Docket No. 372-5-12 Wncv

## ASSURANCE OF DISCONTINUANCE

WHEREAS Bizzfinders.com, LLC (hereinafter referred to as "Bizzfinders") is a Nevada limited liability company with offices at 18 North Franklin Blvd., Suite C1, Pleasantville, New Jersey 08232;

WHEREAS Bizzfinders is a provider of website support and other services for businesses, the charges for which are placed on local telephone bills with the assistance of a Florida-based company called ILD Corp.;

WHEREAS between October 2007 and September 2011, Bizzfinders collected net revenues of approximately $77,000 from 231 Vermont businesses for its services that appeared on local telephone bills in Vermont's area code 802;

WHEREAS Bizzfinders charged $39.95 per month for its services;

WHEREAS sellers of goods or services that are to be charged on a consumer's (including a business') local telephone bill are required under 9 V.S.A. § 2466 to send a notice by first-class mail to the party to be charged, containing information specified in the statute;

WHEREAS the Attorney General alleges that Bizzfinders' uniform notice failed to meet all the requirements of 9 V.S.A. § 2466;

WHEREAS the Attorney General also alleges that Bizzfinders violated Vermont Consumer Fraud Rule 109.02, http://www.atg.state.vt.us/assets/files/CF%20109.pdf, by stating that the businesses it solicited by telephone had been "selected" to receive a website free trial, when in fact the caller was simply making contact with prospective customers and all or a substantial number of those being called received the same opportunity;

AND WHEREAS the Attorney General is willing to accept this Assurance of Discontinuance pursuant to 9 V.S.A. § 2459;

THEREFORE, the parties agree as follows:

1. *Injunctive relief.* Bizzfinders shall comply strictly with all provisions of Vermont law, including but not limited to provisions of 9 V.S.A. § 2466 and 9 V.S.A. Chapter 63, relating to the placement of charges on local telephone bills associated with telephone numbers in area code 802.

2. *Customer relief.*

a. No later than July 12, 2012, for each business from which Bizzfinders has received money through a charge on a local telephone bill with a number in area code 802, Bizzfinders shall arrange for an electronic credit record to the business' local telephone company in the amount of all such monies that have not been previously refunded directly to the business. Bizzfinders shall use due diligence to ensure that accurate credits are provided to each customer to whom a credit is due.

b. If a credit record sent under the preceding subparagraph is not accepted or is returned by the local telephone company, Bizzfinders shall, within ten (10) days of learning of the non-acceptance or the return, send to the customer by first-class mail, postage prepaid,

to its last known address a check in the amount of the credit due, accompanied by a letter in substantially the form attached as Exhibit 1 hereto.

c. No later than August 13, 2012, Bizzfinders shall mail to the Vermont Attorney General's Office, 109 State Street, Montpelier, VT 05609, in an electronic Excel format, the names and addresses of the businesses whose telephone numbers were credited, and to which letters and payments were sent, under this Assurance of Discontinuance, along with the date and amount of each credit or payment.

d. No later than August 13, 2012, Bizzfinders shall mail to the Vermont Attorney General's Office, (i) a single check, payable to "Vermont State Treasurer," in the total dollar amount of all refund checks under this paragraph 2 that were returned as undeliverable or that went uncashed, to be treated as unclaimed funds, (ii) a list in electronic Excel format on a compact disk, of the businesses whose checks were returned or were not cashed, and for each business, the last known address and dollar amount due, and (iii) Bizzfinders' federal tax identification number.

3. *Payment to the State.* No later than May 14, 2012, Bizzfinders shall pay to the State of Vermont, in care of the Vermont Attorney General's Office, the sum of ten thousand dollars ($10,000.00) as reimbursement for reasonable attorney's fees and costs.

4. *Binding effect.* This Assurance of Discontinuance shall be binding on Bizzfinders and its successors and assigns.

5. *Release.* The State of Vermont hereby releases and discharges any and all claims that it may have against Bizzfinders, its parents, subsidiaries, affiliates, officers and directors, based on conduct or activities arising under or in connection with 9 V.S.A. Chapter 63 and/or 9 V.S.A. § 2466 prior to the date of this Assurance of Discontinuance.

6. *Admissibility.* This Assurance of Discontinuance is entered into for settlement purposes only and does not constitute an admission by Bizzfinders of any violation of law alleged by the Attorney General. Nothing in this Assurance of Discontinuance may be used or admitted as evidence or as an admission in any other adverse proceeding, action, investigation or inquiry, including but not limited to any governmental, regulatory or self-regulatory authority.

Date: 5/10/12

STATE OF VERMONT

WILLIAM H. SORRELL
ATTORNEY GENERAL

By: Elliot Burg
Assistant Attorney General

Date: April 23, 2012

BIZZFINDERS.COM, LLC

By: _____
Its Authorized Agent

APPROVED AS TO FORM:

Elliot Burg
Assistant Attorney General
Office of Attorney General
109 State Street
Montpelier, Vermont 05609
For the State of Vermont

Andrew B. Lustigman, Esq.
Olshan Grundman Frome Rosenzweig & Wolosky, LLP
Park Avenue Tower
65 East 55th Street
New York, New York 10022
For Bizzfinders.com, LLC

**Exhibit 1 (Letter to Businesses)**

Dear [Name of Business]:

Bizzfinders.com has entered into a settlement with the Vermont Attorney General's Office to resolve claims that we did not properly notify you, in accordance with Vermont law, about charges billed to your local telephone bill for our services.

As part of that settlement, we are enclosing a refund check for all charges relating to Bizzfinders' services that appeared on your local telephone bill.

You have no obligation to do anything in response to this payment.

If you have any questions about the settlement, you may contact the Attorney General's Office at (802) 828-5507.

Sincerely,

Bizzfinders.com, LLC

**SUPERIOR COURT OF VERMONT** **WASHINGTON UNIT**

**Civil Division** **(802) 828-2091**
**Small Claims Division** **(802) 828-5551**

**65 State Street**
**Montpelier, Vermont**
**05602**

| Janet C. Murnane, Esq.
| Vermont Attorney General's Office
| 109 State Street
| Montpelier VT 05609

April 13, 2012

Please be advised that Docket Number 298-4-12 Wncv has been assigned to the case of State of Vermont vs. Capital City Auto Mart, Inc..

STATE OF VERMONT
WASHINGTON COUNTY, S.S.

2012 APR 13 A 10:13

In re:

| | | |
|---|---|---|
| Capital City Auto Mart, Inc.; | ) | |
| L & T Auto, L.L.C.; L & T Auto Group, L.L.C.; | ) | |
| Littleton Auto Mart, Inc.; | ) | Washington Superior Court |
| Littleton Chevrolet Buick Inc.; | ) | Docket No. 298-4-12 Wncv |
| Quality Motors, Inc; Springfield Auto Mart, Inc., | ) | |
| | ) | |
| Respondent | ) | |

ASSURANCE OF DISCONTINUANCE

1. This Assurance of Voluntary Discontinuance ("Assurance") is entered into by Vermont Attorney General William H. Sorrell (referred to herein as the "Attorney General"), acting pursuant to the Vermont Consumer Fraud Act, 9 V.S.A. §§ 2451-2480n; and Capital City Auto Mart, Inc.; L & T Auto, L.L.C; L & T Auto Group, L.L.C.; Littleton Auto Mart, Inc; Littleton Chevrolet Buick Inc.; Quality Motors, Inc.; and Springfield Auto Mart, Inc.; (all referred to herein as Respondent). Upon execution, this Assurance shall be filed in the Washington Superior Court. The date of such filing is referred to herein as the Filing Date.

2. Respondent operates automobile dealerships in Vermont and New Hampshire and markets and sells new and used automobiles to Vermont consumers. As used in this Assurance, Respondent includes its owners, partners, parents, affiliates, subsidiaries, predecessors, and successors.

3. Respondent has agreed to enter into this Assurance, and the Attorney General is willing to accept it, to assure the Attorney General's Office that Respondent will comply with Vermont consumer protection law in the marketing and sales of its new and used automobiles to Vermont consumers.

## FACTS

4. In September 2005, Respondent entered into an Assurance of Discontinuance with the Vermont Attorney General and agreed that it would fully comply with Vermont Consumer Fraud Rule 118 (Automobile Advertising[1]) in all respects.

5. During 2008, in violation of CF Rule 118.02(e)[2], Respondent sold motor vehicles at prices above the advertised price during the effective date of an advertisement. (See attached Exhibit A)

6. During 2008, and in violation of CF Rule 118, Respondent misrepresented the Manufacturer's Suggested Retail Price (MSRP) in one or more advertisements of motor vehicles sold with snowplows by adding to the MSRP those amounts which were paid by Respondent for the snowplows.

## ASSURANCES

7. Respondent will fully comply with Vermont Consumer Fraud Rule 118 in all respects.

8. Respondent will permanently cease selling motor vehicles for more than the advertised price in effect at the time of the sale.

9. For any vehicle sold during the period in which it was advertised, Respondent will enter the current advertised price as the actual "total vehicle price" (as defined in Vermont Consumer Fraud Rule 118.04(d)) on its purchase and sales contracts with consumers.

10. For any vehicle sold during the period in which it was advertised, Respondent may separately reflect an administration or documentation fee on its purchase and sales contracts

---

[1] Automobile Advertising – CF 118 sets forth specific definitions and requirements regarding advertising automobile sales.

[2] 118.02(e) Selling in Accordance with the terms: "A dealer shall not refuse to sell a motor vehicle in accordance with any terms or conditions which the dealer has advertised; . . ."

with consumers, but only if the mathematical calculation is shown whereby the administration or documentation fee is subtracted from the advertised price, and is denominated as the administration or documentation fee. The dollar figure that results from subtracting the administration or document fee from the advertised price shall be reflected as the "initial vehicle price" at Vermont dealerships.

11. For a period of three (3) years after the date this Assurance is executed, Respondent shall maintain and, upon request, make available to the Attorney General for inspection and copying, a print or electronic copy capable of being printed, of all advertising for its dealerships directed to Vermont consumers, or printed or published in a medium likely to reach consumers in Vermont, and such other documents that demonstrate that the representations and offers made in the advertising are in fact true and bona fide.

12. Respondent shall respond diligently and promptly to requests for information and documents that the Attorney General determines would be of assistance to the State in enforcing compliance with this Assurance.

13. Respondent shall deliver a copy of this Assurance to all current and future officers and managers responsible for operations in all dealerships, and to all current and future employees, agents, representatives, and contractors employed in or responsible for business operations in any of the dealerships having any responsibility with respect to the subject matter of this Assurance. Respondent shall deliver a copy of this Assurance to such current individuals and entities no later than ten (10) business days after the Filing Date, and to such future individuals and entities no later than ten (10) days after such individual or entity assumes such position or responsibility.

RELIEF

14. Respondent agrees to pay restitution to the consumers in the amounts stated in the attached Exhibit A within thirty (30) days of the filing of this Assurance.

15. Respondent agrees to pay to the State of Vermont civil penalties of $16,000.00 for the violations discovered by the Attorney General's investigation.

16. In the event the Attorney General must take action to enforce this Assurance and prevails in Court Ordered enforcement, Respondent shall pay all of the State's costs of investigation and enforcement, in addition to any penalties imposed by the Court.

17. Nothing in this Assurance shall be construed as a waiver of any private rights of any person. Nothing in this Assurance shall permit any person or entity, not a signatory hereto, to enforce any provision of this Assurance.

Dated at Montpelier, Vermont, this 11th day of April, 2012, on behalf of:

Plaintiff,

STATE OF VERMONT

WILLIAM H. SORRELL
ATTORNEY GENE

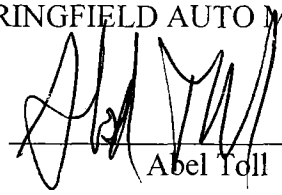
By: Janet C. Murnane
Janet Murnane
Deputy Attorney General

Dated at [illegible], Vermont, this 5th day of April, 2012:

Respondent,

CAPITAL CITY AUTO MART, INC.; L&T AUTO, L.L.C.; L&T AUTO GROUP, L.L.C.; LITTLETON AUTO MART, INC.; LITTLETON CHEVROLET,

BUICK, INC.; QUALITY MOTORS, INC.; AND SPRINGFIELD AUTO MART, INC.

By: 
Abel Toll

STATE OF VERMONT
SUPERIOR COURT
WASHINGTON UNIT

In re CAPITAL ONE BANK (USA), N.A. )

CIVIL DIVISION
Docket No. 756-11-12 Wncv

## ASSURANCE OF DISCONTINUANCE

WHEREAS Capital One Bank (USA), N.A. ("Capital One"), is a national bank with offices at 1680 Capital One Drive, McLean, Virginia 22102;

WHEREAS Capital One is a subsidiary of Capital One Financial Corporation;

WHEREAS Capital One offers credit cards and credit card services to businesses in Vermont;

WHEREAS Capital One markets its credit cards and credit card services to Vermont businesses through direct-mail solicitations, among other methods;

WHEREAS among the solicitations sent to Vermont businesses have been solicitations that allow the business to use an "access check" to borrow up to a certain amount of money—for example, $5,000—at "0% APR [annual percentage rate] for 12 months" (hereinafter "Vermont Access Check Offers");

WHEREAS businesses that choose to accept a Vermont Access Check Offer can, up to the stated dollar amount of the offer and at 0% APR for 12 months, use the check to pay off balances from other credit card accounts or buy merchandise, among other things;

WHEREAS under the terms and conditions of the Vermont Access Check Offers, businesses that used an access check had a continuing balance on their credit card account until the check amount was paid back, even if other new purchases were paid in full by the monthly due date, as a result of which interest or finance charges accrued on new purchases on the account;

Office of the
ATTORNEY
GENERAL
109 State Street
Montpelier, VT
05609

WHEREAS businesses that would have carried a purchase balance regardless of the access check did not pay more in interest on purchases than they would have had they not accepted the Vermont Access Check Offer, but businesses that would have paid off all of their new purchases each month did pay interest on those purchases;

WHEREAS the Attorney General alleges that Capital One's access check solicitations did not disclose the potential for interest charges on new purchases, in violation of the prohibition on unfair and deceptive trade practices in the Vermont Consumer Protection Act, 9 V.S.A. § 2453(a);

WHEREAS Capital One has been using the form of disclosure that appears in the two sentences following "NOTE ► Please read" in Exhibit 1 hereto in some of its access check solicitations, and the Attorney General agrees that this disclosure is accurate, clear, and conspicuous;

WHEREAS Capital One has not admitted any violation of the Vermont Consumer Protection Act;

AND WHEREAS the Attorney General is willing to accept this Assurance of Discontinuance pursuant to 9 V.S.A. § 2459;

THEREFORE, the parties agree as follows:

1. *Disclosure.*

a. Capital One shall use the form of disclosure in Exhibit 1 on Vermont Access Check Offers from November 16, 2012 until November 15, 2013. During that period, for Vermont Access Check Offers sent in other solicitation formats different from Exhibit 1, Capital One shall use the wording contained in the form of disclosure set forth in Exhibit 1

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109 State Street
Montpelier, VT
05609

and place the disclosure on the front of the solicitation, but may make *de minimis* variations in other aspects of the disclosure.

c. For all Vermont Access Check Offers sent from November 16, 2013 through November 15, 2016, Capital One shall clearly and conspicuously disclose on the front of the solicitation how accepting a Vermont Access Check Offer will affect the interest paid on future purchases made with the credit card, if accepting a Vermont Access Check Offer will affect the interest paid on future purchases. For the purpose of this paragraph, a disclosure is clear and conspicuous if it is presented on the front page of a solicitation in such a size, color, contrast, and location, compared to the other information with which it is presented, that it is readily noticeable, readable, and understandable to a reasonable person. A disclosure is not clear and conspicuous if it is contradicted by or inconsistent with other information on the solicitation.

d. Through November 15, 2013, the Vermont Attorney General's Office may by written request directed to Jonathan Campbell at the address below obtain copies sufficient to show the form of any Vermont Access Check Offer solicitations used from November 16, 2012 through the date of the written request.

2. *Consumer relief.*

a. For each Vermont business that paid interest between August 1, 2006 and September 30, 2011, on new purchases while a 0% access check balance was pending that it would not have paid absent that balance, Capital One shall, within thirty (30) business days of signing this Assurance of Discontinuance, credit the business' Capital One account, if any, or send a check to the business' last known address, by first-class mail, postage prepaid. The amount of the credit or check shall be the amount of all such interest charges that have

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not been previously refunded. In either event, Capital One shall send to the business, by first-class mail, postage prepaid, a letter in substantially the form attached as Exhibit 2 hereto, which shall accompany the check if a check is sent. Capital One shall use due diligence to ensure that accurate payment amounts are provided to each business to which a payment is due under this Assurance of Discontinuance.

b. No later than forty-five (45) business days after signing this Assurance of Discontinuance, Capital One shall provide to the Vermont Attorney General's Office the names and addresses of the businesses to which letters and payments were sent or credits provided under this Assurance of Discontinuance, along with the date and amount of each payment.

c. No later than one hundred fifty (150) days after signing this Assurance of Discontinuance, Capital One shall mail to the Vermont Attorney General's Office, 109 State Street, Montpelier, VT 05609, a single check, payable to "Vermont State Treasurer," in the total dollar amount of all checks that were returned as undeliverable or that went uncashed, to be treated as unclaimed funds, along with a list, in Excel format on a compact disk, of the businesses whose checks were returned or were not cashed, and for each such business, the last known address and dollar amount due.

3. *Payment to the State.* Within thirty (30) business days of signing this Assurance of Discontinuance, Capital One shall pay to the State of Vermont, in care of the Vermont Attorney General's Office, the sum of one hundred fifty thousand dollars ($150,000.00) as reimbursement for reasonable investigative costs.

4. *Binding effect.* This Assurance of Discontinuance shall be binding on Capital One, its successors and assigns.

**Office of the ATTORNEY GENERAL 109 State Street Montpelier, VT 05609**

5. *Release.* The State of Vermont hereby releases and discharges any and all claims that it may have against Capital One or its affiliates based on conduct described above that arose prior to the date of this Assurance of Discontinuance. The State of Vermont does not waive any legal rights it may have to enforce the laws of Vermont as to matters not covered by this Assurance of Discontinuance, including time periods not covered by this Assurance of Discontinuance, or to enforce the terms of this Assurance of Discontinuance.

6. *Admissibility.* Nothing in this Assurance of Discontinuance may be used or admitted as evidence or as an admission in any other adverse proceeding or action relating to Capital One, nor shall anything in this document be considered first-party evidence, except by Capital One to enforce the Release.

Date: 10/26/12

STATE OF VERMONT

WILLIAM H. SORRELL
ATTORNEY GENERAL

by: _____
Elliot Burg
Assistant Attorney General

Date: 10/31/12

CAPITAL ONE BANK (USA), N.A.

by: _____
Its Authorized Agent

Office of the
ATTORNEY
GENERAL
109 State Street
Montpelier, VT
05609

APPROVED AS TO FORM:

Elliot Burg
Assistant Attorney General
Office of Attorney General
109 State Street
Montpelier, VT 05609
For the State of Vermont

Jonathan Campbell
Senior Associate General Counsel
Capital One Services, LLC
15000 Capital One Drive
Richmond, VA 23238
For Capital One Bank (USA), N.A.

Office of the
ATTORNEY
GENERAL
109 State Street
Montpelier, VT
05609

EXHIBIT 1

SPARK
BUSINESS from Capital One

For your **existing** account ending in: 1234

This offer good until: **10/31/12**

Lee M. Cardholder
123 Main Street
Atlanta, GA 30306-0123

# 0% APR for 12 months

Your **total** credit limit as of 9/18/12: **$10,000**

Dear Lee M. Cardholder,

The only thing worse than paying too much in interest is letting this offer expire.

**You have until 10/31/12 to start saving with a 0% Annual Percentage Rate (APR) for 12 months.**

After that, your rate will simply go to your purchase rate, which is currently 17.99%. Keep in mind, for each transaction, there's a fee of 3%.

**SAVE!** **Transfer balances—0% for 12 months**
Other credit cards can charge you as much as 14.9%. Stop overpaying—transfer higher-rate balances to your existing Capital One® account and save!

**SAVE!** **Write a check to yourself—0% for 12 months**
There are times when cash is the only answer. With this offer, write a check to yourself, deposit it at your bank, and get cash without those high cash advance rates.

**SAVE!** **Make a purchase—0% for 12 months**
Use one of the attached checks to make that special purchase you've been putting off—even at places that don't accept credit cards.

**NOTE ▷ Please read:**
**If you accept this offer, you will pay interest on all purchases made with your credit card until your entire balance is paid off.**
See Special Notice on the back of this offer.

This offer is good until 10/31/12, so start saving today!

Enjoy 3 convenient ways to save with this offer...

USE THE ENCLOSED CHECKS
by 10/31/2012

GIVE US A CALL
1-800-833-6393

GO ONLINE
capitalone.com/offers

FM233346

**Exhibit 2 (Letter to Businesses)**

Dear [Name of Business]:

Our records show that you took advantage of a "0% for 12 months" access check offer, and that while the access check segment of your balance was pending, you paid interest on new purchases made on your credit card that you would not have paid absent the amount owed on the access check segment of your credit card account. Under a settlement with the Vermont Attorney General's Office, we are enclosing a check to reimburse you for that interest.

If you have any questions about the settlement, you may contact the Attorney General's Office at (802) 828-5507.

Sincerely,

Capital One Bank (USA)

Office of the
ATTORNEY
GENERAL
109 State Street
Montpelier, VT
05609

STATE OF VERMONT

SUPERIOR COURT
Washington Unit

CIVIL DIVISION
Docket No. 296-5-02 Wncv

STATE OF VERMONT,
Plaintiff,

v.

CASELLA WASTE SYSTEMS, INC.,
Defendant.

**REVISED FINAL JUDGMENT BY CONSENT AND ORDER**

WHEREAS, Plaintiff, the State of Vermont, and Defendant, Casella Waste Systems, Inc., by and through their respective attorneys, stipulate and agree to the entry of this Revised Final Judgment.

NOW, THEREFORE, it is hereby ORDERED, ADJUDGED AND DECREED as follows:

I.

JURISDICTION

This Court has jurisdiction of the subject matter of this action and of the Defendant, Casella Waste Systems, Inc. Pursuant to the parties' Stipulation for Entry of Revised Final Judgment by Consent and Order, the Court finds Defendant to have been in violation of the Assurance of Discontinuance filed on May 22, 2002, as set forth in that Stipulation.

II.

DEFINITIONS

As used in this Revised Final Judgment:

(A) "Vermont" means the 14 counties that constitute the state of Vermont.

(B) "Solid waste hauling" means the collection and transportation to a disposal site of trash and garbage (but not construction and demolition debris; medical waste; hazardous waste; organic waste; or special waste, such as contaminated soil, or sludge; or recyclable materials) from residential, commercial and industrial customers. Solid waste hauling includes hand pick-up, containerized pick-up, and roll-off service.

(C) "Defendant" means Casella Waste Systems, Inc., a Delaware corporation with its headquarters in Rutland, Vermont, and its officers, directors, managers, agents, employees, successors, assigns, parents, affiliates, and subsidiaries.

(D) "Small container" means a 2 to 10 cubic yard container.

(E) "Small containerized solid waste hauling service" means providing solid waste hauling service to customers by providing the customer with a small container that is picked up mechanically using a frontload, rearload, or sideload truck, and expressly excludes hand pick-up service, and service using a stationary or self-contained compactor or a compactor attached to or part of a small container.

(F) "Customer" means a small containerized solid waste hauling service customer with a service location or service locations in Vermont.

(G) "Transfer station" means a solid waste management facility located in Vermont where solid waste is collected, aggregated, sorted, stored or processed for the purpose of subsequent transfer to another solid waste management facility for further processing, treatment, transfer or disposal, or for the purpose of subsequent transfer to a landfill located in or outside of Vermont.

(H) "Landfill," except as described in (G) above and in Section V(G), means a land disposal site for the final disposal of solid waste located in Vermont that employs one of a number of methods of disposing of solid waste on land.

(I) "Service location" means each separate address at which Defendant provides small containerized solid waste hauling services; more than one service location may be governed by a single contract.

III.

APPLICABILITY

This Revised Final Judgment applies to Defendant and to its officers, directors, managers, agents, employees, successors, assigns, parents, affiliates, and subsidiaries, and to all other persons in active concert or participation with any of them who shall have received actual notice of this Revised Final Judgment by personal service or otherwise. Nothing contained in this Revised Final Judgment is or has been created for the benefit of any third party, and nothing herein shall be construed to provide any rights to any third party.

IV.

PROHIBITED CONDUCT

Defendant is enjoined and restrained as follows:

(A) Except as set forth in paragraph IV(B) and IV(H), Defendant shall not enter into any contract with a customer for a service location in Vermont that:

(1) Has an initial term longer than two years;

(2) Has any renewal term longer than one year;

(3) Requires that the customer give Defendant notice of termination more than 30 days prior to the end of any initial term or renewal term;

(4) Prohibits the customer from giving notice of intent to cancel by regular mail, facsimile or certified mail;

(5) Is not signed by an individual who holds himself or herself out to be an authorized agent with authority to enter into the contract;

(6) Requires that the customer pay liquidated damages in excess of three times the greater of its prior monthly charge or its average monthly charge over the most recent six months during the first year of the initial term of the customer's contract;

(7) Requires that the customer pay liquidated damages in excess of two times the greater of its prior monthly charge or its average monthly charge over the most recent six months after the customer has been a customer of Defendant for a continuous period in excess of one year;

(8) Requires the customer to give Defendant notice of any offer by or to another solid waste hauling firm or requires the customer to give Defendant a reasonable opportunity to respond to such an offer for any period not covered by the contract (sometimes referred to as a "right to compete" clause);

(9) Does not prominently set forth the contract terms clearly and conspicuously, and is not labeled, in large letters, SERVICE CONTRACT; or

(10) Requires a customer to give Defendant the right or opportunity to provide hauling service for recyclables for a customer unless the customer affirmatively chooses to have Defendant provide such recycling services by so stating on the front of the contract.

(B) Notwithstanding the provisions of paragraph IV(A) of this Revised Final Judgment, Defendant may enter into a contract with a customer for a service location in Vermont with an initial term in excess of two years provided that:

(1) The customer has acknowledged in writing that the Defendant has offered to the customer the form contracts Defendant is required herein to offer generally to customers;

(2) The customer has the right to terminate the contract after two years by giving notice to Defendant 30 days or more prior to the end of the two year period;

(3) The contract otherwise complies with the provisions of paragraph IV(A)(2)-(10); and

(4) The number of service locations subject to contracts permitted under subparagraph (B) in Vermont does not exceed 25% of the total number of service locations for small containerized solid waste hauling service in Vermont in any year, however, for purposes of this paragraph IV(B)(4) only, Defendant shall have a 30 day right to cure any such exceedances.

(C) Upon entry of this Revised Final Judgment, Defendant shall offer to customers with service locations in Vermont only contracts that conform to the requirements of Section IV(A) or IV(B) of this Revised Final Judgment, except as provided by Section IV(H).

(D) Within 30 days of entry of this Revised Final Judgment, Defendant shall notify all customers with service locations in Vermont who currently hold contracts contrary to any provision of Section IV of the following, and shall send a copy of such notification to the Office of the Attorney General, Public Protection Division:

(1) Customers need not provide more than 30 days notice to cancel the contract;

(2) Customers need not give Defendant notice of any offer by or to another solid waste hauling firm or give Defendant a reasonable opportunity to respond to such an offer for any period not covered by the contract;

(3) Customers need not give Defendant the right or opportunity to provide hauling service for recyclables for a customer unless the customer affirmatively chooses to have Defendant provide such recycling services by so stating on the front of the contract.

(E) Upon entry of this Revised Final Judgment, Defendant may not enforce those contract provisions that are inconsistent with this Revised Final Judgment.

(F) Defendant shall honor requests to cancel signed by the customer and transmitted by regular mail, facsimile or certified mail immediately upon receipt of said cancellation. Defendant may seek to obtain from the customer any amounts owed for services rendered prior to Defendant's receipt of such cancellation notice and liquidated damages permitted by this Revised Final Judgment that might apply.

(G) Defendant may not, in the operation of its transfer stations or landfills located in Vermont, impose payment, credit or other terms upon its solid waste hauling competitors that are more onerous than Defendant imposes upon other competitors.

(H) Notwithstanding the provisions of this Revised Final Judgment, Defendant shall not be required to do business with any customer.

V.

PRIOR NOTIFICATION REQUIRED

(A) Defendant shall not, without providing notification to the Antitrust Unit of the Vermont Attorney General's Office, through subsidiaries, partnerships, joint ventures or otherwise, directly or indirectly:

(1) Except as provided in paragraph V(B), acquire any ownership or leasehold interest that has a fair market value of $200,000 or more in any entity that has engaged in solid waste hauling in Vermont within six months of the date of such proposed acquisition; or

(2) Except as provided in paragraph V(B), acquire any stock, share capital, equity or other interest that has a fair market value of $200,000 in any entity that: (a) owns a company that is, or within the six months prior to such proposed acquisition has been, engaged in solid waste hauling in Vermont; or (b) operates any entity that is engaged in solid waste hauling in Vermont; or

(3) Acquire any ownership or leasehold interest in any entity that has engaged in the transfer of solid waste in Vermont within six months of the date of such proposed acquisition; or

(4) Acquire any stock, share capital, equity or other interest in any entity that: (a) owns a company that is, or within the six months prior to such proposed acquisition has been, engaged in the transfer of solid waste in Vermont; or (b) operates any entity that is engaged the transfer of solid waste in Vermont; or

(5) Acquire any ownership or leasehold interest in any entity that has engaged in the final disposal of solid waste from Vermont within six months of the date of such proposed acquisition; or

(6) Acquire any stock, share capital, equity or other interest in any entity that: (a) owns a company that is, or within the six months prior to such proposed acquisition has been, engaged in the final disposal of solid waste from Vermont; or (b) operates any entity that is engaged the final disposal of solid waste from Vermont.

(B) In the event that the Attorney General's prosecution of a court proceeding results in a court finding that Defendant has, within any geographic market within Vermont, a market share of 60% or greater, then the fair market value of an acquisition that triggers a prior

notification to the Attorney General pursuant to paragraphs V(A)(1) and V(A)(2) shall be lowered to $100,000 for the geographic market that is the subject of the court's finding.

(C) Defendant shall provide the notification at least 30 days prior to acquiring any such interest.

(D) If, within the 30 days after receiving such notification, the Antitrust Unit of the Vermont Attorney General makes a written request for additional information or documentation regarding Defendant's proposed acquisition, Defendant shall not consummate the proposed acquisition until 30 days after substantially complying with such request.

(E) Early termination of the waiting periods in this section may be requested and, where appropriate, granted at the discretion of the State of Vermont when all agree in writing to do so.

(F) For purposes of this Revised Final Judgment, "notification" means the provision of notice to the Attorney General on the Notification and Report Form set forth in the Appendix to part 803 of Title 16 of the Code of Federal Regulations as amended, and prepared in accordance with the requirements of that part, except that: (1) Items 4(a) and 5(a), (b) and (c) are not required to be completed by Defendant; and (2) subject to paragraphs V(A)(1) and V(A)(2) it shall not be subject to any limitations based on the value of the acquisition, and shall not require any filing fee.

(G) Defendant agrees that it shall not sell, close, or cease operations of any of its transfer stations in Vermont without providing written notice to the Attorney General at least 45 days prior to such action or receiving written waiver from the Attorney General of this notice requirement. Similarly, Defendant agrees that it shall not sell, close, or cease operations of any of its landfills accepting final disposal of solid waste from Vermont without providing written

notice to the Attorney General at least 45 days prior to such action or receiving written waiver from the Attorney General of this notice requirement. Notice requirements set forth in this paragraph shall not apply to temporary shutdowns for maintenance and other routine needs arising in the ordinary course of business, or in response to any safety concern, fire, accident, equipment failure, utility interruption, or other circumstances beyond Defendant's reasonable control.

(H) Section V shall expire on the fifth anniversary of the date of the entry of this Revised Final Judgment.

VI.

REPORTING

(A) To determine or secure compliance with this Revised Final Judgment, duly authorized representatives of the State of Vermont shall, on reasonable notice given to Defendant at its principal office, subject to any lawful privilege, be permitted:

(1) Access during normal office hours to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other documents and records in the possession, custody, or control of Defendant, which may have counsel present, where the Attorney General has reason to believe Defendant has violated this Revised Final Judgment, and the documents and records to be inspected and copied relate to the alleged violation of this Revised Final Judgment; and

(2) Subject to the reasonable convenience of Defendant and without restraint or interference from it, to interview officers, employees, or agents of Defendant, who may have counsel present, regarding any matters contained in this Revised Final Judgment.

(B) Upon written request of the State of Vermont, on reasonable notice given to Defendant at its principal office, subject to any lawful privilege, Defendant shall submit such written reports, under oath if requested, with respect to any matters contained in this Revised Final Judgment.

(C) No information or documents obtained by the means provided by this Section shall be divulged by the Plaintiff to any person other than a duly authorized representative of the Executive Branch of the State of Vermont, except in the course of legal proceedings to which the State of Vermont is a party, or for the purpose of securing compliance with this Revised Final Judgment, or as otherwise required by law.

(D) If at the time information or documents are furnished by Defendant to Plaintiff, Defendant represents and identifies in writing the material in any such information or document to which a claim of protection may be asserted under Rule 26(c)(7) of the Vermont Rules of Civil Procedure, and Defendant marks each pertinent page of such material "Subject to claim of protection under Rule 26(c)(7) of the Vermont Rules of Civil Procedure," then ten days notice shall be given by Plaintiff to Defendant prior to divulging such material in any legal proceeding (other than a grand jury proceeding) to which Defendant is not a party; except as required by law or court order.

(E) If, prior to the expiration of the Revised Final Judgment, Defendant issues any contract to a customer that contains form language related to Section IV that varies in any way from the language contained in the contract attached as Exhibit 1, a copy of that contract shall be submitted to the Office of the Attorney General, Public Protection Division, within 14 days of the first usage of the new contract.

VII.

FURTHER ELEMENTS OF JUDGMENT

(A) This Revised Final Judgment shall expire on the tenth anniversary of the date of its entry, except Section V which expires as provided in Section V(H), above.

(B) Jurisdiction is retained by this Court over this Revised Final Judgment and the parties hereto for the purpose of enabling any of the parties hereto to apply to this Court at any time for further orders and directions as may be necessary or appropriate to carry out or construe this Revised Final Judgment, to modify or terminate any of its provisions, to enforce compliance, and to punish violations of its provisions.

VIII.

PENALTIES

In the event of a violation of this Revised Final Judgment, the Court may assess civil penalties as permitted by Title 9, Chapter 63 and as otherwise appropriate and permitted by law.

IV.

PUBLIC INTEREST

Entry of this Revised Final Judgment is in the public interest.

X.

COMPLIANCE PROGRAM

(A) Within 60 days of entry of this Revised Final Judgment, Defendant shall implement a compliance program for all of its operations in Vermont, as follows:

(1) Defendant shall create policies and procedures, memorialized in writing and maintained by Defendant's legal department, to assure that all changes to the terms of its customer contracts are approved by Defendant's legal department, and that Defendant is in

compliance with the Revised Final Judgment, including but not limited to all terms set forth in Section IV, as well as all applicable laws and regulations of the State of Vermont.

(2) The compliance policies and procedures shall include training to relevant employees regarding the Revised Final Judgment in the following form:

(i) All terms of the Prohibited Conduct set forth in Section IV shall be incorporated in Defendant's employee orientation program, employee manual and similar materials for relevant employees. Each employee whose job responsibilities relate to the Prohibited Conduct set forth in Section IV shall review the policies and procedures that are relevant to that employee's position when the employee begins working for Defendant, or when new policies and procedures are implemented, and undergo in-person training regarding compliance with the Revised Final Judgment on an annual basis.

(ii) Defendant shall maintain records documenting a log or similar method to track employees' review and training in the relevant policies and procedures. The log shall contain a list of all employees (names and job titles) whose job responsibilities relate to Section IV, and shall indicate when the employee has completed the review and training in the relevant policies and procedures. The log shall be made available to the State as provided in Section VI(A) through VI(D).

So Entered on this 15 day of August, 2011.

Presiding Judge

Casella Waste Management, Inc.
378 East Montpelier Road
Montpelier, VT 05602
(802) 223-7045
Fax (802) 888-5312

# Service Contract

Account Number
Effective Service Start Date
Delivery Date

## CUSTOMER INFORMATION

| BILLING INFORMATION | | SERVICE INFORMATION | |
|---|---|---|---|
| Company Name: | | Company Name: | |
| Address: | | Address: | |
| County: | | County: | |
| Phone Number: | | Phone Number: | |
| Fax Number: | | Fax Number: | |
| Tax I.D. #: | | Email: | |
| Contact Name: | | Contact Name: | |

## NEW SERVICE INFORMATION

| QTY | Container Type (FL, RL, RO) | Container Size | Service Frequency | Material Type | Rental Rate | Haul Rate | Disposal Site Code | Disposal Rate Per Ton | Extra Pickup Fee/ Delivery Fee | Monthly Service Fee |
|---|---|---|---|---|---|---|---|---|---|---|
| | | | | | | | | | | |
| | | | | | | | | | | |
| | | | | | | | | | | |
| | | | | | | | | | | |
| FL / RL Container Delivery Charge | | | | | | | | | $50.00 | |

| | | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| Route Days Recycling | M | T | W | Th | F | Sat | Sun | TOTAL |
| Route Days MSW | M | T | W | Th | F | Sat | Sun | |

## PREVIOUS SERVICE INFORMATION

| QTY | Container Type (FL, RL, RO) | Container Size | Service Frequency | Material Type | Rental Rate | Haul Rate | Disposal Site Code | Disposal Rate Per Ton | Extra Pickup Fee/ Delivery Fee | Monthly Service Fee |
|---|---|---|---|---|---|---|---|---|---|---|
| | | | | | | | | | | |
| | | | | | | | | | | |
| | | | | | | | | | | |

Industry Weight Estimate ____ Lbs/cu.yd Agreed Upon Term ____ Months

**SPECIAL COMMENTS** ____

**I have read and understand the terms and conditions on page 2 of this contract**

Customer Authorized Signature ____
Print Name and Title ____
Date: ____

Casella Waste Management Authorized Signature ____
Print Name and Title ____
Date: ____

Branch Manager Signature: ____ Date: ____

**Note: Faxed Signatures will be treated as originals. Document is ☐ pages**

Form No. 177-53

# VERMONT SERVICE CONTRACT

## TERMS AND CONDITIONS:

**OUR COMMITMENT:**

- To provide the proper equipment necessary to insure you the best quality of service in the industry relative to your recycling and solid waste needs.
- To continue to evaluate your recycling and solid waste service needs and to recommend better service alternatives based on new technology, alternate disposal methodologies, or changes in regulatory requirements.

**YOUR COMMITMENT:**

- Payment of the monthly invoice by the end of the month in which it's received.

**REFERENCES:** All references throughout this document to "us", "we" or "our" shall be deemed herein to be an operation owned by a subsidiary of Casella Waste Systems, Inc. for providing the services described and set forth herein.

**CHANGES IN SERVICES:** Changes in services or fees may be made by verbal or written agreement between us and are considered agreed upon with receipt of payment for new services or fees.

**TERM:** This Service Contract will be effective upon the signature date for the period defined on the front of the Service Contract.

**DISPOSAL:** We will dispose of waste material according to all applicable laws, regulations and ordinances. We will use a disposal facility (landfill, transfer station, etc.) that meets all legal and regulatory requirements and is the most overall cost effective disposal option.

**RESPONSIBILITY OF DISPOSED MATERIAL:**

We are responsible for all non-hazardous and recycling material once collected in our trucks.
You will be responsible for any fines or penalties and additional handling fees if you dispose of any hazardous material in our containers. Hazardous material is defined but not limited to: any substance that is toxic, ignitable, reactive, corrosive, acidic, radioactive, volatile, highly flammable, explosive, biomedical or infectious and that is regulated by any local government, state government or United States government including certain electronic devices categorized as Universal Waste.

**WEIGHT:** The weight of your waste material is a comprehensive part of the overall cost for service. On the reverse side we have specified a weight per cubic yard that is based on industry averages for similar businesses. We have used this weight as a component in calculating your monthly charge. If, through our weight evaluations, your actual weight doesn't meet this industry estimate we may adjust your monthly charge to reflect the change.

**ADJUSTMENT:** Components of our expenses for providing service include disposal, collection, fuel costs, consumer price index and other costs of doing business. Any increase in these costs may result in a proportionate increase in your monthly rate.

**RESPONSIBILITY FOR EQUIPMENT AND PROPERTY**

**Equipment:**

- We will deliver and install our equipment to the location specified by you on this Contract and/or addendum.
- We will maintain the equipment and repair any damage to the equipment that may occur as a result of normal wear and tear.
- We retain the right to charge you for any repairs as a result of any misuse of the equipment that occurs while our equipment is in your possession.

**Property:**

- Proper roadways, surfaces and pavement need to be provided in order to service your account and therefore, we are not responsible for damage to roadways, surfaces and pavement that are not suitable for access.
- We reserve the right to suspend service if suitable roadways or pavement are not provided.
- Container placement must be in mutually agreed upon designated areas

**Cancellation:** Although there is no early cancellation penalty, as your partner we are committed to resolving any issue that may arise. In the event that you are still not satisfied, we request you give us one month's notice.

**INDEMNITY:**

By signing this Service Contract, we agree to pay all costs, fines and legal fees incurred as the result of our gross negligence, willful misconduct or violation of the law that occurs during the handling of your non-hazardous waste and recycling material. We will also be responsible for all personal injury or property damage claims resulting from our gross negligence or willful misconduct.
By signing this Service Contract, you authorize us to enter your property to provide service, and you are responsible for keeping roadways and pavement suitable for access. You agree to indemnify, hold harmless and defend us against all claims, lawsuits, demands, costs of other liability resulting from or arising out of your gross negligence or willful misconduct while our equipment is in your possession. You will not hold us responsible for damage to our equipment or the improper use of our equipment by you, your employees, guests, or any persons on your premises.

**We are committed to providing you, our customer and partner, with the highest quality of service available in order to build a sustainable, long-term business relationship.**

STATE OF VERMONT

SUPERIOR COURT
Washington Unit

CIVIL DIVISION
Docket No. 296-5-02 Wncv

STATE OF VERMONT,
Plaintiff,

v.

CASELLA WASTE SYSTEMS, INC.,
Defendant.

**STIPULATION FOR ENTRY OF REVISED FINAL JUDGMENT BY CONSENT AND ORDER**

Plaintiff, State of Vermont ("the State"), by and through Vermont Attorney General William H. Sorrell, and Casella Waste Systems, Inc., ("Defendant"),[1] stipulate and agree as follows:

***Violation of Assurance of Discontinuance***

1. Defendant entered into an Assurance of Discontinuance with the State that was filed in this Court on May 22, 2002. *In Re Casella Waste Management Systems, Inc.*, Assurance of Discontinuance, Docket No. 296-5-02 Wncv ("the AOD").
2. One of the State's purposes in obtaining the AOD was to address its concern as to "evergreen" contracts in the waste hauling industry: contracts with provisions that made it difficult for customers to cancel their service with a waste management company, thereby resulting in barriers to entry for competing companies.
3. The AOD resolved allegations that Defendant had, among other things, "entered into written contracts with the vast majority of its existing small container customers . . . [that] make it more difficult and costly for customers to switch to a competitor of Casella." AOD at 2.

[1] "Defendant" means Casella Waste Systems, Inc., a Delaware corporation with its headquarters in Rutland, Vermont, and its officers, directors, managers, agents, employees, successors, assigns, parents, affiliates, and subsidiaries.

4. Among other provisions, the AOD prohibited certain terms in Defendant's small-container customer contracts and provided for stipulated penalties in the amount of $10,000 per violation of the AOD. Specifically, AOD Section VIII(B) stated: "If this Court enters an order finding Casella to be in violation of this Assurance of Discontinuance, then the parties agree that penalties to be assessed by the Court for each act in violation of this Assurance of Discontinuance shall be $10,000. For purposes of this Section VIII, the term 'each act' shall mean: each contract with a Customer into which Casella enters in violation of the provisions of this Assurance, or each separate act with respect to each Customer that Casella takes in violation of the provisions of this Assurance."
5. In 2009 and 2010, Defendant erroneously issued approximately 2,441 contracts to its customers which each contained at least one term that was prohibited by the AOD. The term that the parties agree was in violation of the AOD was as follows:
    a. Section IV(A)(8) of the AOD prohibits any contract term that "requires the Customer to give Respondent [Casella] notice of any offer by or to another solid waste hauling firm or requires the Customer to give Respondent a reasonable opportunity to respond to such an offer for any period not covered by the contract (sometimes referred to as a 'right to compete' clause)."
    b. Bullet 3 under "YOUR COMMITMENT" on the back of each contract described above states: "Grant us the right to match any written competitive offer that is provided to you by the competition."
6. In addition, the State alleges that the contracts described above also violated the 30-day termination provision in AOD Section IV(A)(3):

a. Section IV(A)(3) prohibits any contract term that "requires that the Customer give Respondent [Casella] notice of termination more than thirty (30) days prior to the end of any initial term or renewal term."

b. The back of each contract described above states: "CANCELLATION: As your partner we are committed to resolving any issue that may arise. In the event that you are still not satisfied, you agree to give us four months notice in writing so that we can find a new home for your container."

7. Defendant disagrees with the State's interpretation, submitting that AOD Section IV(A)(3) does not apply to the cancellation language quoted above.

8. In addition, the State alleges that the contracts described above also violated the prohibition on tying hauling of recyclables to hauling of waste in AOD Section IV(A)(10):

a. Section IV(A)(10) prohibits any contract term that "requires a Customer to give Respondent [Casella] the right or opportunity to provide hauling service for recyclables for a Customer unless the Customer affirmatively chooses to have Respondent provide such recycling services by so stating on the front of the contract."

b. Bullet 1 under "YOUR COMMITMENT" on the back of each contract described above states: "You give us the right to collect, dispose of, and process all of your non-hazardous waste and recycling materials generated at your location."

9. Defendant submits that, although none of the contracts described above includes a separate written affirmation on the front of the contract, the front of each of those contracts clearly delineates the categories of material that Defendant is authorized to collect.

10. In addition, the State alleges that several of the contracts described above have a renewal term longer than one year in violation of AOD Section IV(A)(2), which prohibits any contract that "has any renewal term longer than one (1) year."

11. Defendant disagrees with this interpretation, submitting that none of those contracts contained a "renewal term" under AOD Section IV(A)(2).

***Lack of Compliance Program***

12. Defendant acknowledges that factors leading to its violation of the AOD include its lack of written policies to prevent the alteration of such contracts without approval from the legal department, and its failure to train staff as to strict compliance with the AOD. Additionally, Defendant did not act immediately to bring its contracts into full compliance with the AOD.

***Payment of Penalty***

13. Defendant agrees to pay the State the sum of $1 million, as follows:

    a. $400,000 to be paid within 14 days of entry of the Revised Final Judgment;

    b. $200,000 to be paid on or before October 30, 2011;

    c. $200,000 to be paid on or before November 30, 2011;

    d. $200,000 to be paid on or before December 30, 2011.

***Entry of Revised Final Judgment and Release***

14. On May 22, 2002, the State and Defendant filed a Final Judgment by Consent and Order, which was attached as Exhibit E to the AOD ("the Final Judgment"), under seal with this Court in the above-referenced action.

15. The State and Defendant have agreed to a Revised Final Judgment, which has been filed with this Stipulation. The parties ask that the Court hereby enter that Revised Final Judgment.

16. In exchange for the Revised Final Judgment and other relief set forth above, the State agrees to and hereby does release Defendant from any and all claims arising from the facts and circumstances described or alleged in this Stipulation, including any claim that Defendant as of the date of this Stipulation has engaged in conduct in violation of Section IV(A)-(F) and Section V of the AOD. Nothing in the Revised Final Judgment or this Stipulation shall impair or limit the private right of action that any consumer, person, or entity may have against Defendant, nor shall it provide any person or entity with a private right of action against Defendant.
17. The Revised Final Judgment and this Stipulation have been negotiated by and among the State and Defendant in good faith.
18. The State and Defendant waive all rights to contest or appeal the Revised Final Judgment and they shall not challenge in this or any other proceeding the validity of, or the Court's jurisdiction to enter, the Revised Final Judgment, except as is provided by the Revised Final Judgment.
19. The Revised Final Judgment and this Stipulation set forth the complete agreement of the parties and may be altered, amended, or otherwise modified only by the parties' written stipulation to be incorporated in an order issued by the Court, or as is provided by the Revised Final Judgment.
20. The parties agree to this Stipulation in lieu of a complaint and further agree that the Revised Final Judgment may be entered by the Court.
21. Defendant consents to entry of the Revised Final Judgment with full knowledge and understanding of the nature of the proceedings and obligations imposed upon it and waives any formal service requirements of the Revised Final Judgment and this Stipulation.

STATE OF VERMONT, )
Plaintiff, )
)
v. )
)
CASELLA WASTE SYSTEMS, INC., )
Defendant. )

***STIPULATION FOR ENTRY OF REVISED FINAL JUDGMENT BY CONSENT AND ORDER***

DATED at Montpelier, Vermont this 11th day of August, 2011.

WILLIAM H. SORRELL
ATTORNEY GENERAL

By: _____
Sarah E.B. London
Assistant Attorney General
Office of the Attorney General
109 State Street
Montpelier, Vermont 05609
802.828.5479

DATED at Rutland, Vermont this 11th day of August, 2011.

CASELLA WASTE SYSTEMS, INC.

By: _____
John W. Casella
Chief Executive Officer and
Chairman of the Board of Directors

Approved as to form: _____
Ritchie E. Berger
Dinse, Knapp & McAndrew, P.C.
209 Battery Street
PO Box 988
Burlington, VT 05402

*Counsel for Casella Waste Systems, Inc.*

STATE OF VERMONT

SUPERIOR COURT
Washington Unit

CIVIL DIVISION
Docket No. Wncv

STATE OF VERMONT,
Plaintiff,

v.

MARK CHRISTIE,
Defendant.

**ASSURANCE OF DISCONTINUANCE**

NOW COMES the State of Vermont, by and through Vermont Attorney General William H. Sorrell, and hereby accepts from Mark Christie ("Defendant") this Assurance of Discontinuance pursuant to 9 V.S.A. § 2459.

**Background**

Defendant is the owner of the following property (hereinafter "the property"):

**77 Harrison Ave., Rutland – 4 units.**

The property is a residential rental property constructed before 1978 and are therefore subject to Vermont's lead law, including the requirement of annual essential maintenance practices ("EMPs") that are designed to reduce childhood lead poisoning risks. 18 V.S.A. §§ 1751(19), 1759. Lead-based paint in housing, the focus of the Vermont lead law, is a leading cause of childhood lead poisoning, which can result in adverse health effects, including decreases in IQ. All paint in pre-1978 housing is presumed to be lead-based unless a certified inspector has determined that it is not lead-based. 18 V.S.A. § 1759(a).

EMPs include, but are not limited to, installing window well inserts, visually inspecting properties at least annually for deteriorated paint, restoring surfaces to be free of

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GENERAL
109 State Street
Montpelier, VT
05609

deteriorated paint within 30 days after such paint has been visually identified or reported to the owner, and posting lead paint hazard information in a prominent place. 18 V.S.A. § 1759(a)(2), (4) and (7). The Vermont lead law requires owners of rental housing to file annual compliance statements attesting to EMP performance with the Vermont Department of Health and with the owner's insurance carrier. 18 V.S.A § 1759(b). A copy of the compliance statement must be given to all tenants and to new tenants prior to entering into a lease agreement. 18 V.S.A. § 1759(b)(3) and (4).

The Vermont Consumer Fraud Act, 9 V.S.A., Chapter 63, prohibits unfair and deceptive acts and practices, including the offering for rent, or the renting of, housing that is non-compliant with the lead law.

A violation of the Vermont lead law may result in a maximum civil penalty of $10,000.00. 18 V.S.A. § 130(b)(6). Each day that a violation continues is a separate violation. 18 V.S.A. § 130(b)(6). Violations of the Consumer Fraud Act are subject to a civil penalty of up to $10,000.00 per violation. 9 V.S.A. § 2458(b)(1). Each day that a violation continues is a separate violation.

The property is not currently in compliance with the Vermont lead law. Defendant has informed the State of his intention to complete the EMP work necessary at the property but does not expect that the work will be complete until January 20, 2012.

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GENERAL
109 State Street
Montpelier, VT
05609

## INJUNCTIVE RELIEF

Defendant agrees to the following:

1. Defendant shall immediately ensure that access to exterior surfaces and components of the property with lead hazards and areas directly below the deteriorated surfaces are clearly restricted as described in 18 V.S.A. § 1759(a)(3).
2. Defendant shall give priority to completion of EMPs at any of the units at the property where a child age 6 or under is residing.
3. Not later than **January 20, 2012** all EMP work, interior and exterior, shall be completed at the property.
4. Upon completion of the EMPs at the property, but no later than January 25, 2012, Defendant will file with the Vermont Department of Health and Defendant's insurance carrier(s), a completed EMP compliance statement for the property, and will give a copy to an adult in each rented unit of the compliance statement for the property.
5. Upon completion of EMPs at the property, Defendant shall also provide proof of completion to the Office of the Attorney General at the following address: Robert F. McDougall, Assistant Attorney General, Office of the Attorney General, 109 State Street, Montpelier, Vermont 05609. A copy of the EMP compliance statement for the property shall be sufficient proof of completion.
6. All work performed at the property, whether by Defendant, his employees, or by hired contractors and/or painting companies, shall be performed using safe work practices consistent with 18 V.S.A. § 1760. Contractors and/or painting companies must have all necessary certifications and licenses required to perform

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the work. It shall be the obligation of Defendant to ensure that any contractors and/or painting companies they hires to perform EMP work are aware of the provisions of 18 V.S.A. § 1760, intend to use safe work practices at the property and are properly licensed and certified.

7. If Defendant anticipates not being able to fully comply with the deadlines for EMP compliance solely due to delays relating to contractors and/or painting companies hired to perform the EMP work, Defendant may request an extension of the deadline from the Attorney General's Office. Such request shall be made as soon as the delay is recognized and must include an approximate date by which the work shall be complete.

8. In the event that Defendant wishes by agreement with the Office of the Attorney General to extend any of the dates above for reasons not relating to delays caused by contractors and/or painting companies hired to perform the EMP work, such request must be made by Defendant at least 10 days in advance of the dates specified in this Assurance of Discontinuance.

9. Defendant shall fully and timely comply with the requirements of the Vermont Lead Law, 18 V.S.A., Chapter 38, as long as he maintains any ownership interest in the property or in any other pre-1978 residential housing in which he currently has or later acquires an ownership interest or provides property management services (unless by property management contract the Defendant is explicitly not responsible for EMPs).

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GENERAL
109 State Street
Montpelier, VT
05609

## PENALTIES

10. Defendant shall pay civil penalties of five thousand ($5,000.00). Payment shall be due January 30, 2012, and payment made to the "State of Vermont" and shall be sent to: Robert F. McDougall, Assistant Attorney General, Office of the Attorney General, 109 State Street, Montpelier, Vermont 05609.
11. If Defendant complies with the EMP requirements of this Assurance of Discontinuance set forth in paragraphs 1 through 6 above, the penalties provided in paragraph 10 shall be waived by the State of Vermont.
12. The filing of the EMP compliance statements for the property by January 25, 2012, as described in paragraphs 4 and 7, shall be considered compliance with the requirements of this Assurance of Discontinuance. If, however, it is determined that the filed EMP compliance statements are not accurate, the State may pursue the penalties in paragraph 10 in addition to any other appropriate action under the Vermont lead law.

## OTHER RELIEF

13. This Assurance of Discontinuance is binding on Defendant, however, sale of the property may not occur unless all obligations set forth herein have been completed or this Assurance of Discontinuance is amended in writing to transfer to the buyer or other transferee all remaining obligations.
14. Transfer of ownership of the property shall be consistent with Vermont law, including the provisions of 18 V.S.A. § 1767, specifically relating to the transfer of ownership of target housing.
15. This Assurance of Discontinuance shall not affect marketability of title.

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05609

16. Should Defendant fully transfer or sell his ownership interest in the property after completing all obligations set forth herein, his obligations with respect to that particular property under this Assurance of Discontinuance is extinguished. However, nothing in this Assurance of Discontinuance in any way affects the obligations of future owners of any of the property under Vermont law, including under the Vermont lead law.

17. Nothing in this Assurance of Discontinuance in any way affects Defendant's other obligations under state, local, or federal law.

18. Any future failure by Defendant to comply with the Vermont lead law at the property referenced in this Assurance of Discontinuance, or violations of the terms of this Assurance of Discontinuance, shall be subject to additional penalties of no less than $10,000.00 per violation per day for each day the violation exists.

**Signature**

By signing below, Defendant acknowledges and agrees that the facts contained in the section entitled "Background" are true and voluntarily agrees to and submits to the terms of this Assurance of Discontinuance.

DATED at Rutland, Vermont this 15th day of December, 2011.

Mark Christie

Office of the
ATTORNEY
GENERAL
109 State Street
Montpelier, VT
05609

## Acceptance

In lieu of instituting an action or proceeding against Defendant, the Office of the Attorney General, pursuant to 9 V.S.A. § 2459, accepts this Assurance of Discontinuance.

ACCEPTED on behalf of the State of Vermont:

DATED at Montpelier, Vermont this 5th day of January, 2012.

STATE OF VERMONT

WILLIAM H. SORRELL
ATTORNEY GENERAL

By: _____

Robert F. McDougall
Assistant Attorney General
Office of the Attorney General
109 State Street
Montpelier, Vermont 05609
802.828.3186

Office of the
ATTORNEY
GENERAL
109 State Street
Montpelier, VT
05609

Vermont Superior Court
Washington Civil Division

==========

**E N T R Y  R E G A R D I N G  M O T I O N**

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**State of Vermont vs. CSA-Credit Solutions of et al** **484-7-10 Wncv**
[Burg]

Title: **Motion to File Under Seal**, No. 4
Filed on: March 19, 2012
Filed By: Burg, Elliot M., Attorney for:
Plaintiff State of Vermont

Response: NONE



X Granted Compliance by_____

___ Denied

___ Scheduled for hearing on: _____ at _____; Time Allotted _____

___ Other

. . . . . .

. . . . . .

. . . . . .

. . . . . .

. . . . . .

_____ 3/20/12
Judge Date

==========

Date copies sent to: 3-21-12 Clerk's Initials BH
Copies sent to:
Attorney Elliot M. Burg for Plaintiff State of Vermont

STATE OF VERMONT

SUPERIOR COURT
Washington Unit

CIVIL DIVISION
Docket No. 484-7-10 Wncv

STATE OF VERMONT,
Plaintiff

v.

CSA-CREDIT SOLUTIONS OF AMERICA, LLC and DOUG VAN ARSDALE,
Defendants



**ORDER**

BASED UPON the Court's "Decision and Order: Motion for Summary Judgment" entered in this action on March 5, 2012, and the Affidavit of Elliot Burg and related documents submitted in support of reimbursement of fees and costs:

IT IS HEREBY ORDERED AND DECREED:

1. In the event that Defendants CSA-Credit Solutions of America, LLC, and/or Doug Van Arsdale (hereinafter "Defendants" or "the two Defendants") conduct any future debt settlement or similar business in Vermont, they shall (a) first obtain leave from this Court to conduct such a business; (b) not advertise the savings or other results they can achieve unless they first possess reasonable and specific factual substantiation that those results actually represent the typical outcome for their customers, using a calculation based on all debts enrolled, the amounts due at the time of enrollment, and the inclusion of service fees; (c) strictly comply with Vermont's right-to-cancel requirement as set out in 9 V.S.A. § 2454 and Consumer Fraud Rule (CF) 113; and (d) first obtain a state debt adjuster's license and comply with all requirements of the Vermont Debt Adjusters Act.

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GENERAL
109 State Street
Montpelier, VT
05609

2. No later than thirty (30) days after entry of this Order, Defendants shall pay to the 201 Vermont consumers whose names appear on Appendix A hereto, which the State of Vermont has submitted to the Court under seal in light of the personal information involved, the applicable dollar amounts set out in therein. Based on information furnished to the State by Defendants in this litigation, Appendix A lists the 201 Vermont consumers from whom Defendants received fees in connection with actual or promised debt settlement services; the consumers' last-known addresses; and the amounts the consumers paid Defendants, net of any refunds. Defendants shall make such payments by check sent via first-class mail, postage prepaid, to each consumer's last-known address. Within ten (10) business days of making any refund payment under this paragraph, Defendants shall report in writing to the Vermont Attorney General's Office the name of the consumer, the mailing address, and the amount paid. In addition, within one hundred twenty (120) days of the date of mailing, Defendants shall pay to the State of Vermont the amount of the total of all refund checks under this paragraph that are returned as undeliverable or that remain uncashed at the end of ninety (90) days from the date of mailing (which sum shall be treated as unclaimed funds under Vermont state law), and shall at the same time provide to the State of Vermont a list of the consumers whose checks were returned or went uncashed, the consumers' last-known addresses, and each consumer's amount of funds not paid.

3. No later than thirty (30) days after entry of this Order, Defendants shall pay to the State of Vermont civil penalties under 9 V.S.A. § 2458(b) in the amount of two million seventy thousand dollars ($2,070,000.00).

4. No later than thirty (30) days after entry of this Order, Defendants shall pay to the State of Vermont the sum of ninety-one thousand fifty-nine dollars and fifty cents

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($91,059.50) as reimbursement of reasonable fees and costs incurred by the State in connection with this matter.

5. Any payments that Defendants make to the State of Vermont under either paragraph 3 (civil penalties) or paragraph 4 (fees and costs), above, shall be deemed first to have been made under paragraph 4 and, then, once that obligation has been fully satisfied, shall be deemed to have been made under paragraph 3.

6. In addition, on any payment required under paragraph 2, 3, and/or 4 that is not paid within the time period stated in this Order, Defendants shall pay to the consumer(s) and/or to the State of Vermont, as the case may be, post-judgment interest in the amount of twelve percent (12%) per annum.

7. This Court shall retain jurisdiction for purposes of enforcing compliance with the terms of this Order, but the State of Vermont may also seek to enforce those terms in any other appropriate court of law; and in the event that the State brings a successful enforcement action in any court, Defendants shall also reimburse the State the reasonable fees and costs associated with such action.

8. Liability for the payments described in paragraphs 2 through 7 shall be joint and several as between the two Defendants.

9. All payments and reports that Defendants are required to make to the State of Vermont under this Order shall be sent to the State of Vermont in care of the Vermont Attorney General's Office, 109 State Street, Montpelier, Vermont 05609.

Dated: June 21, 2012

Hon. Michael S. Kupersmith
Superior Judge

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109 State Street
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STATE OF VERMONT

SUPERIOR COURT
Washington Unit

CIVIL DIVISION
Docket No. 484-7-10 Wncv

STATE OF VERMONT,
Plaintiff

v.

CSA-CREDIT SOLUTIONS OF AMERICA, LLC and DOUG VAN ARSDALE,
Defendants



**DECISION AND ORDER: MOTION FOR SUMMARY JUDGMENT**

## I. INTRODUCTION

The State of Vermont, by the Office of the Attorney General, filed this lawsuit under the Consumer Fraud Act, 9 V.S.A. chapter 63, in which it alleged four categories of consumer fraud violation by CSA-Credit Solutions of America ("CSA"), a Texas-based "debt settlement" company, and by Doug Van Arsdale, its chief executive. The suit alleges that Defendants (a) used deceptive and unsubstantiated online "results" claims to advertise their services to economically distressed consumers, (b) failed to comply with statutory requirements relating to consumers' right to cancel their contract with CSA, (c) failed to abide by many provisions of the Vermont Debt Adjusters Act, and (d) employed an advance-fee structure that constituted an unfair trade practice. The first three of these causes of action are the subject of a Motion for Summary Judgment filed by the State.

This action was filed on July 2, 2010; Defendants' Answer was filed on July 9, 2010. On September 20, 2011, Defendants' counsel moved for leave to withdraw. On September 29,

the motion was granted and Defendants were directed to have successor counsel file a notice of appearance within 45 days. To date, the Court has received neither notice of appearance by counsel nor a notice of self-representation. On November 18, Plaintiff filed its Motion for Summary Judgment with supporting documents.[1] To date, Defendants have not responded to the motion in any manner.

## II. THE STANDARDS GOVERNING SUMMARY JUDGMENT

The procedure for summary judgment is authorized by Rule 56 of the Vermont Rules of Civil Procedure. That rule provides a method by which a case, or a claim or defense, may be disposed of before trial where no genuine issue as to any material fact exists, or where only a question of law is involved. As stated in Rule 56(c), "[t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that the moving party is entitled to a judgment as a matter of law."

The moving party has the burden of establishing that there exist no issues of material fact, and that the movant is entitled to judgment as a matter of law. *Gore v. Green Mountain Lakes, Inc.*, 140 Vt. 262, 264 (1981). On the other hand, where the issue before the court is solely one of law, and the moving party is entitled to judgment as a matter of law, the granting of summary judgment is appropriate. *Garneau v. Curtis & Bedell, Inc.*, 158 Vt. 363, 366 (1992). Moreover, opposing allegations must have sufficient support in specific facts to create a genuine issue of material fact, *Baldwin v. Upper Valley Services, Inc.*, 162 Vt. 51, 55 (1994); mere denial of the moving party's pleadings is not enough. *Gendreau v. Gorczyk*, 161 Vt. 595, 596 (1993) (mem.). All material facts set forth in the statement

[1] The motion was anticipated by an amended Discovery Stipulation and Order filed by the parties on September 29, 2011.

required to be served by the moving party will be deemed to be admitted unless controverted by the statement required to be served by the opposing party. V.R.C.P. 56(c)(2).

## III. THE MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE TO BE TRIED

As required by V.R.C.P. 56(c)(2), the State annexed to this Motion a Statement of Material Facts as to Which There is No Genuine Issue to Be Tried. ). Since the Defendants have not controverted any of the statements submitted by the Plaintiff, the Court deems them to be admitted. *Gallipo v. City of Rutland*, 2005 VT 83, ¶ 33, 178 Vt. 244. Material facts from the Statement are referred to below as "MF" followed by their corresponding number, as in "MF 13."

## IV. OVERVIEW OF DEFENDANTS' BUSINESS AND INDUSTRY

Defendant CSA-Credit Solutions of America, LLC, is a Delaware limited liability corporation with offices in Dallas, Texas. MF 1. The company is engaged in the business of settling consumer debts with the creditors to whom the debts are owed. MF 2. CSA-Credit Solutions of America, LLC, is the surviving entity of a December 2009 merger with CSA-Credit Solutions of America, Inc. MF 3. The former has stipulated that it is liable for the actions of its "Inc." predecessor.[2] MF 4.

Defendant Doug Van Arsdale is a resident of Texas. MF 5. In December 2003, he founded CSA (Inc.). MF 6. He then served as Chief Executive Officer and Director of the company until November 2006 and Registered Agent until June 2007. MF 7. In December 2007, Mr. Van Arsdale resumed his positions as Chief Executive Officer and Registered Agent of the corporation. MF 8. He was also the sole owner of CSA from December 2003 to

[2] In the remainder of this , CSA-Credit Solutions of America, Inc., and CSA-Credit Solutions of America, LLC, are referred to as "CSA."

November 2006, and from December 2007 until December 2009. MF 9. In December 2009, he founded CSA (LLC), of which he has served as Manager and Governing Person. MF 10.

At all times relevant to this action, CSA held itself out as a "debt settlement" company offering to negotiate reductions in the principal amount of consumers' debts. MF 11. CSA advertised its services through its Internet website, and consumers who wished to respond either called CSA or provided their contact information on the website and received a return call from CSA.[3] MF 12.

Under CSA's Terms of Agreement—also called its Client Service Agreement, MF 14—consumers "enrolled" their debts with CSA in exchange for service fees. MF 15. CSA was responsible for negotiating settlement offers on those debts. MF 16. Consumers were to make contractually-specified monthly payments into a bank account, out of which CSA's fees were electronically drawn by the company. MF 17. Consumers were responsible for depositing additional monies to pay any agreed-upon settlements to their creditors. MF 18.

CSA's service fees were typically calculated as 15 percent of the principal amount of each debt enrolled in its program, MF 19, and paid during the first months of enrollment. MF 20. For example, one Vermont consumer with $42,400 in debts was charged fees of 15 percent of that amount, or $6,360, of which $636 was paid in each of the first four months, and $318 was paid in each of the next 12 months; the consumer was also expected to set aside an additional $332 a month for 12 months to fund debt settlements. MF 21.

At its height, CSA had 1,200 employees, including some 400 sales staff. MF 22. The company's website referred at various times to having enrolled 250,000 consumers, MF 23, with enrolled debts worth a total of more than $1 billion. MF 24.

[3] CSA may also have called some other consumers whose names were provided by "lead generators." MF13.

CSA is a member of an industry described by the FTC as offering debt settlement plans that, "as they are often marketed and implemented, raise[d] several consumer protection concerns." One concern of direct relevance to the instant motion is advertising that made what the FTC termed "false, misleading, or unsubstantiated representations," such as claims that "the provider will or is highly likely to obtain large debt reductions for enrollees, *e.g.*, a 50% reduction of what the consumer owes," and that "the provider will or is highly likely to eliminate the consumer's debt entirely in a specific time frame, *e.g.*, 12 to 36 months." FTC, Telemarketing Sales Rule, Final Rule Amendments, 75 Fed. Reg. 48458, 48463 (Aug. 10, 2010) (hereinafter "*FTC*").

Between January 19, 2004, and October 29, 2008,[4] 207 Vermonters paid CSA over $350,000 in debt settlement fees, net of refunds.[5] MF 26.

## V. STATUTORY FRAMEWORK: THE VERMONT CONSUMER FRAUD ACT—DECEPTION, UNFAIRNESS, AND LACK OF SUBSTANTIATION

### A. Introduction

The legal framework for most of the State's causes of action in this case is provided by the Vermont Consumer Fraud Act.[6] That statute prohibits any unfair or deceptive act or practice in commerce. *See* 9 V.S.A. § 2453(a). In applying the concepts of unfairness and deception, the courts of Vermont are to be "guided" by precedent from the FTC and the federal courts. 9 V.S.A. § 2453(b).

The Consumer Fraud Act is a remedial statute, to be interpreted liberally to effectuate its purpose of protecting consumers. *See, e.g., Carter v. Gugliuzzi*, 168 Vt. 48, 52

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[4] Of the 207 Vermont consumers enrolled with CSA, all but 3 signed up before the start of 2008, and all but 66 before the start of 2007. MF 25.

[5] According to CSA's data, Vermonters paid a total of $371,886.43 and received refunds of $18,051.06, for a net of $353,835.37. MF 27.

(1998) ("The express statutory purpose of the Act is to 'protect the public' against 'unfair or deceptive acts or practices.' ... Its purpose is remedial, and as such we apply the Act liberally to accomplish its purposes."); *Sawyer v. Robson*, 181 Vt. 216, 223 (2006) ("As we emphasized in *Elkins* [*v. Microsoft*, 174 Vt. 328, 331 (2002)], 'The Legislature clearly intended the [Consumer Fraud Act] to have as broad a reach as possible in order to best protect consumers against unfair trade practices.'"); *State v. Custom Pools*, 150 Vt. 533, 536 (1988) ("[T]he Act is clearly remedial in nature. Therefore, we must construe the statute liberally so as to furnish all the remedy and accomplish all the purposes intended."); *accord, State v. Therrien*, 161 Vt. 26, 30-32 (1993), and *Fancher v. Benson*, 154 Vt. 586 (1990).

**B. The Consumer Fraud Act Prohibits Deceptive Trade Practices.**

The Consumer Fraud Act prohibits deceptive acts and practices in commerce. 9 V.S.A. § 2453(a). As noted in *Carter v. Gugliuzzi*, 168 Vt. at 56, deception has three elements:

> (1) there must be a representation, omission, or practice likely to mislead consumers; (2) the consumer must be interpreting the message reasonably under the circumstances; and (3) the misleading effects must be material, that is, likely to affect the consumer's conduct or decision regarding the product. ... Deception is measured by an objective standard, looking to whether the representation or omission had the "capacity or tendency to deceive" a reasonable consumer; actual injury need not be shown. ... To be reasonable, moreover, the consumer's understanding need not be the *only* one possible; "[i]f an ad conveys more than one meaning to reasonable consumers and one of those meanings is false, that ad may be condemned." ... Furthermore, the Act "does not require a showing of intent to mislead, but only an intent to publish the statement challenged." [Citations omitted.]

The third element of deception, materiality, is measured by an objective standard, based on what a reasonable person would regard as important in making a decision. *Carter*, 168 Vt. at 56 (citing *In re Cliffdale Assocs.*, 103 F.T.C. 110, 179 (1984)). The federal courts and the FTC apply a general presumption of materiality: "'Where the seller knew, or should

[6] The other statute relied upon in this lawsuit is the Vermont Debt Adjusters Act.

have known, that an ordinary consumer would need omitted information to evaluate the product or service, or that the claim was false, materiality will be presumed because the manufacturer intended the information or omission to have an effect.'" *Id.* at 56 (quoting *Cliffdale,* 103 F.T.C. at 182). Express claims are automatically deemed to be material. *Id.*

**C. The Consumer Fraud Act Prohibits Unfair Trade Practices.**

In addition to prohibiting deceptive trade acts and practices, the Consumer Fraud Act, 9 V.S.A. § 2453(a), bans unfair acts and practices in commerce. The definition of unfairness is set out in *Christie v. Dalmig*, 136 Vt. 597, 601 (1979) (quoting *F.T.C. v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 n.5 (1972)):

> "(1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise—whether, in other words, it is within at least the penumbra of some common-law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive or unscrupulous; [or] (3) whether it causes substantial injury to consumers..."

While the FTC has stated that substantial injury is the most important of the three alternative formulations of unfairness, it has also noted that violation of public policy as established by statute (among other legal sources) can be used either to support an unfairness claim based on substantial consumer injury or to demonstrate on its own that such injury is present, as long as the public policy is "clear and well-established." Commission Statement of policy on the Scope of the Consumer Unfairness Doctrine, Appendix to *In re International Harvester*, 104 F.T.C. 949, 1984 WL 565290 at *95, *98-99.[7]

**D. Lack of Prior Reasonable Substantiation Is Both Deceptive and Unfair.**

[7] In *Lalande Air & Water Corp. v. Pratt*, 173 Vt. 602 (2002), the Vermont Supreme Court also analyzed unfairness in terms of its oppressive or unscrupulous character under that alternative prong of the *Sperry & Hutchinson* standards, although there it did not find the acts at issue—sending demand letters and filing suit to collect rent beyond that allowed by a ruling whose constitutionality was under legal challenge—to be unfair.

A key requirement of commercial advertising is that the advertiser must possess prior reasonable substantiation for any factual claims that are made. *See* Policy Statement Regarding Advertising Substantiation Program, 49 Fed. Reg. 30999 (Aug. 2, 1984) ("We affirm our commitment to the underlying legal requirement of advertising substantiation—that advertisers and ad agencies have a reasonable basis for advertising claims before they are disseminated.") It has been held to be *both* unfair and deceptive for a person to make factual claims to prospective customers without prior reasonable substantiation.

For example, analyzing the need for substantiation from the standpoint of unfairness, the FTC stated in *In re Pfizer, Inc.*, 81 F.T.C. 23, 1972 WL 127465 at *29,

> [T]he Commission is of the view that it is an unfair practice in violation of the Federal Trade Commission Act to make an affirmative product claim without a reasonable basis for making that claim. Fairness to the consumer, as well as fairness to competitors, dictates this conclusion. Absent a reasonable basis for a vendor's affirmative product claims, a consumer's ability to make an economically rational product choice, and a competitor's ability to compete on the basis of price, quality, service or convenience, are materially impaired and impeded.

At the same time, the FTC has also held a failure to substantiate to be deceptive:

> Advertising that lacks a reasonable basis is also deceptive. ... The deception theory is based on the fact that most ads making objective claims imply, and many expressly state, that an advertiser has certain specific grounds for the claims. If the advertiser does not, the consumer is acting under a false impression. The consumer might have perceived the advertising differently had he or she known the advertiser had no basis for the claim.

*Cliffdale Associates, Inc.*, 103 F.T.C. 110, 1984 WL 565319 at *45 n.5.

Finally, where claims are involved "whose truth or falsity would be difficult or impossible for consumers to evaluate by themselves"—as is true in this case—a "high level of substantiation" is required. *Thompson Medical Co., Inc.*, 104 F.T.C. 648, 1984 WL 565377 at *72.

## VI. DEFENDANTS VIOLATED THE CONSUMER FRAUD ACT BY MAKING DECEPTIVE AND UNSUBSTANTIATED RESULTS CLAIMS.

The first of the State's causes of action is that Defendants violated the Vermont Consumer Fraud Act by repeatedly advertising, deceptively and without substantiation, that they could achieve specified results for consumers in terms of settling debts at amounts substantially below the principal balance due. These claims—which were expressed in terms of percentages (e.g., "Settle Debts For 40%-60% Off Balance") or time (e.g., "Become Debt Free In Less Than 36 Months")—appeared on CSA's website, through which consumers in financial difficulty were lured to contact the company.

### A. CSA Repeatedly Promised Consumers Major Reductions in Their Debts.

CSA solicited potential customers through its Internet website. MF 12. Using that medium, the company advertised its debt settlement services with a succession of prominent, home-page claims about the results that consumers could expect from its services, including:

- "Affordable Monthly Payments Settle Debts For 40%-60% Off Balance" (on CSA's website from December 2004 to December 2006).
- "It [debt settlement] specifically reduces your current outstanding total balances 40-60%" (December 2004 to May 2007).
- "Reduce your debt 60% in seconds!" (March 2005 to February 2006).
- "Reduce your debt 50-75% in seconds!" (August 2004 to December 2004).
- "When you hire us, we negotiate with your creditors to settle your outstanding balance by eliminating 40-60% of your debt" (August 2005 to December 2006).
- "Reduce Total Balances 40-60%" (July 2005 to April 2007).
- "Become Debt Free In Less Than 36 Months" (December 2004 to May 2007).
- "Most of our clients become debt free within 36 months or less" (September 2007 to November 2007).
- "A typical settlement can be accomplished within 36 months or less" (December 2004 to May 2007).

- "We help you become debt free in 12 to 36 months" (June 2007 to October 2007). MF 30.

These claims were made continuously through at least 347 modifications of CSA's website during the years 2004 through 2007, while the company was offering and selling its debt collection services to Vermonters. MF 31.

Moreover, the CSA Enrollment Summary Page (the title was later dropped, but the content remained the same), which was part of the Customer Enrollment Package that CSA mailed to all its customers, MF 32, routinely used a *60%* figure to calculate projected savings. MF 33. An example of a Vermont consumer's Enrollment Summary Page appears below, with a total debt of $42,400 and an "Estimated Settlement Amount (Approx. 40%)" of $16,960—which reflects a 60% savings off the amount due at enrollment. MF 34. In his deposition in a lawsuit similar to this one brought by the New York Attorney General, Defendant Van Arsdale agreed that the reference to an estimated 60% savings on this form "would mean that this consumer can anticipate or would reasonably anticipate that they were going to have a savings off of their debt of 60 percent." *People ex rel. Cuomo v. CSA-Credit Solutions of America, Inc.* (N.Y. Sup. Ct. No. 401225/09) (Deposition of Douglas Van Arsdale, May 25, 2011) (hereinafter "*DVA*") at 237.[8] MF 35.

[8] *See also DVA* at 72 (Q. "CSA was saying to a reasonable consumer you can expect to save 50 percent of your debt [when the CSA website advertised a "50%" savings]?" A. "Sure."), and *DVA* at 222 (to same effect). MF 36.

CONFIDENTIAL Subject to Protective Order in State of Vermont v. CSA-Credit Solutions of America, LLC, Docket No. 484-7-10 Wncv

CSA Credit Solutions of America™

**Enrollment Summary Page** [redacted]

** Please Note: This page must be returned with your Enrollment Package in order for the set up of your file to be completed.

| CSA™ Estimated Settlement Plan Cost | | CSA™ Service Fee Payment Schedule | | Estimated Personal Savings Plan for Payments to Creditors | |
|---|---|---|---|---|---|
| Total Unsecured Debt: | 42400.00 | CSA™ Total Service Fee: | 6360.00 | Estimated Settlement Amount (Approx. 40%): | 16960.00 |
| Estimated Settlement Amount (Approx. 40%): | 16960.00 | CSA Initial Deposit: | 2544.00 | Savings Budget During Initial Deposit Payments: | * Optional * |
| CSA™ Service Fee: | 6360.00 | 4 Initial Deposit Payments of: | 636.00 | Minimum Savings During 12 Remaining Service Fee Payments: | 332.00 |
| Total Debt Elimination Cost: | 23320.00 | Remaining Service Fee Balance: | 3816.00 | Minimum Personal Saving Payments After CSA™ Fee is Paid: | 650.00 |
| Total Debt Savings: | 19080.00 | 12 Monthly Service Fee Payments of: | 318.00 | Total Payments towards Savings After All Payments: | 17634.00 |
| Estimated Monthly Budget Payments: | 650.00 | Total Months to Payoff Service Fee: | 18 | Estimated DEBT FREE Time Frame: | 36 Months |

** NOTE: The estimated saving plan is the minimum suggested for payoff of your enrolled accounts. CSA™ highly recommends that any additional funds, which may become available, be allocated towards your personal savings account. You are encouraged to add as much towards savings as possible, as it is to your advantage to do so. The quicker you save money, the sooner you can get your enrolled debts resolved.

| ACH Debit Service Fee Summary / Personal Savings Summary | | | |
|---|---|---|---|
| Program Start Date: | February 15, 2004 | 4 Initial Deposit Payments of: | 636.00 |
| Remaining Service Fee Start Date: | June 15, 2004 | 12 Monthly Service Fee Payments of: | 318.00 |
| Personal Savings Start Date: | June 15, 2004 | 12 Personal Savings Deposits of: | 332.00 |
| Client Signature: | | | Date: |

** Important: The above debit schedule is the CSA™ recommended payment and personal savings budget. Any date changes of your scheduled ACH Debit, CSA™ service fee payments, require a minimum of five(5) business days notice.

According to the FTC, "phrases such as 'as much as' or 'up to' (e.g., 'up to 60% savings') likely convey to consumers that the product or service will *consistently* produce results in the range of the stated percentage or amount." *FTC*, 48500 n. 578 (emphasis added). Thus, while both CSA's 40% and 60% savings claims must be supported by substantial data, the 40% savings must be *typical*, whereas the 60% savings "only" need be *consistent*. On the other hand, since CSA customarily informed consumers, in its Customer Enrollment Package, that they could expect 60% savings on their debts—and CSA's principal acknowledges that this was a reasonable expectation—that higher standard should have been met, at a minimum, for most enrolled consumers.

CSA's results claims were not qualified or vague. On the contrary, they were unqualified and quantitative, stating precise percentages, ranges of percentages, or time frames to describe the reduction in principal debt amounts—which is to say, the savings—that consumers could anticipate. On their face, as Defendant Van Arsdale has acknowledged, such claims communicated to reasonable consumers that they could personally expect to achieve the stated results, or, put another way, that those outcomes were typical of what CSA customers would achieve.

**B. CSA's Actual Results Were Dramatically Inconsistent with Its Claims.**

The Attorney General's Office sought from CSA through discovery in this case all data that would support the company's advertised results claims. MF 37. In response, two sets of data were produced. One set included a spreadsheet containing a list of 903 debts enrolled by Vermont consumers who paid fees to CSA, the dollar amounts of those debts at the time of enrollment, and the dollar amounts of the settlement offers negotiated by CSA, MF 38 (referred to herein as "the Vermont data"). The other data set consisted of a list of 33,390 debts settled between August 2006 and November 2007, the dollar amounts due at the time of settlement (not at the time of enrollment), and the dollar amounts of the settlements (referred to herein as "the national data"), MF 39, from which the percentage savings for each debt for which there was a settlement offer could be computed. (However, as noted *infra* text 18, CSA did not have a "denominator" to compare these results to, and thus could not say whether its national success rate was 50% or 5% or .5%.)

***Vermont results.*** The focus of the State's analysis of the Vermont data was to answer the following questions, in order to determine the accuracy of CSA's advertising of "40%" savings, "60%" savings, and "debt-free":

1. What percentage of Vermont-enrolled debts were the subject of a settlement offer obtained by CSA that met the advertised percentage of 40%, *including* in the calculation the amount of fees the consumer had to pay to CSA?
2. What percentage of Vermont-enrolled debts were the subject of a settlement offer obtained by CSA that met the advertised percentage of 40%, *excluding* from the calculation the amount of fees the consumer had to pay CSA?
3. What percentage of Vermont-enrolled debts were the subject of a settlement offer obtained by CSA that met the advertised percentage of 60%, *including* in the calculation the amount of fees the consumer had to pay to CSA?
4. What percentage of Vermont-enrolled debts were the subject of a settlement offer obtained by CSA that met the advertised percentage of 60%, *excluding* from the calculation the amount of fees the consumer had to pay to CSA?
5. What percentage of Vermont consumers who signed up with CSA were "debt-free" within three years—that is, had a settlement offer negotiated by CSA for all of their enrolled debts?

In 2010, the FTC, relying on existing precedent, provided detailed guidance on how to calculate these numbers. In its commentary on debt settlement amendments to the federal Telemarketing Sales Rule, the agency complained that debt settlement companies "often use [deficiencies in data] to support their savings claims. All of these deficiencies inflate the savings consumers are likely to obtain." *FTC* at 48499. As a cure, certain principles must be followed:

1. Any savings must be measured against the amount of the debt *at the time of enrollment.*
2. Any savings must take into account the *fees* paid to the debt settlement company.
3. Any savings claims must be based on *all* of the debts enrolled by all of the debt settlement company's customers, not just on debts that were settled.

As the FTC has stated, "savings claims must be calculated based on the amount of debt owed at the time of enrollment, rather than the amount at the time of settlement, in order to account for (a) increases in debt levels from creditor fees or interest charges that

accrue during the period of the program,[9] and (b) fees the consumer pays to the provider. ... [I]n making savings claims, a provider must take into account the experiences of all of its past customers, including those who dropped out or otherwise failed to complete the program. ... In making savings claims, a provider must [also] include all of the debts enrolled by each consumer in the program. The provider may not exclude debts that it has failed to settle—including those associated with consumers who dropped out of the program—from its calculation of the average savings percentage or amount of its consumers' debt reduction." *FTC* at 48500-49501 (footnotes omitted). Moreover, this guidance from the FTC is based not on some new legal theory, but on the agency's decades-old legal test for deception.[10]

These principles make absolute sense from the viewpoint of a consumer who views an online debt settlement advertisement such as, "Reduce your debt 60% in seconds," and who, let us say, has a debt on which the balance as of the time of the viewing is $10,000. Underscoring the importance of calculating savings against the amount of the debt at enrollment (not at settlement), a reasonable consumer should be able to expect a settlement

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[9] The FTC's description of debts increasing from the date of enrollment to the date of settlement accurately describes what happened to most Vermont consumers. Of 394 debts for which CSA's data shows both an enrollment amount and a current balance, 358 debts increased from the time of enrollment; the total net increase was $385,429.72, and the average change in amount was an increase of $978.25. MF 40.

[10] *See FTC* at 48497 n. 549 (citing FTC's 1984 Policy Statement on Deception), and *FTC* at 48499 n. 567 (citing FTC cases challenging percentage savings claims that date back to 2002, including *FTC v. Debt-Set*, No. 1:07-cv-00558-RPM (D. Colo. filed Mar. 19, 2007) (promising to reduce amount owed to 50% to 60% of amount at time of enrollment); *FTC v. Connelly*, No. SA CV 06-701 DOC (RNBx) (C.D. Cal. Am. Compl. filed Nov. 27, 2006) (promising to reduce overall amount owed by up to 40% to 60%); *FTC v. Nat'l Consumer Council, Inc.*, No. SACV04-0474 CJC (JWJX) (C.D. Cal. filed Apr. 23, 2004); *FTC v. Better Budget Fin. Servs., Inc.*, No. 04-12326 (WG4) (D. Mass. filed Nov. 2, 2004) (promising to reduce consumers' debts by up to 50% to 70%); *FTC v. Innovative Sys. Tech., Inc.*, No. CV04-0728 GAF JTLx (C.D. Cal. filed Feb. 3, 2004) (representing it could save consumers up to 70% of debt owed); *FTC v. Jubilee Fin. Servs., Inc.*, No. 02-6468 ABC (Ex) (C.D. Cal. filed Aug. 19, 2002) (promising to reduce debts by up to 60%). Thus, CSA had reason to know that its advertising was deceptive, had it inquired into the matter. Indeed, in another consumer fraud case brought by the State, the Vermont Supreme Court opined that it "must give substantial deference to the FTC's express position" as articulated not prior to the conduct at issue, but in an *amicus curiae* brief filed in support of the State in that very appeal. *See State v. Internat'l Collection Service, Inc.*, 156 Vt. at 545-46.

offer of 60% off the amount of the debt when she signs up, or $4,000—not an offer of 60% off some as-yet-unknown higher amount due (higher because of potential future interest, fees, and penalties). Likewise, if the consumer also has to pay $1,500 in fees, those fees will be real money out of her pocket that reduces her savings and should therefore be taken into account in figuring the actual extent of those savings. Finally, if she were told that the promised 60% reduction in her debt would occur *only if* there is a settlement offer, and that in many cases the company will not be able to obtain such an offer, it is unlikely that she or many other consumers would bother to enroll in the first place.

In response to the State's discovery requests, CSA produced an Excel spreadsheet that contained key information on the debts enrolled by company's Vermont customers, including consumer identification information, the amount of the debt at enrollment ("enrollment amount"), and the amount of settlement offers, MF 42; CSA has stipulated that the spreadsheet is the most accurate data compilation for Vermont.[11] MF 29. By comparing the debt enrollment amounts to the corresponding best (lowest-dollar) settlement amounts, it is possible to determine how many of the Vermont debts were the subject of a settlement offer that met the terms of CSA's savings claims (*i.e.,* a 40% or 60% reduction in the amount to be paid to the creditor), and to determine how many Vermonters became "debt-free" (had settlement offers for all of their debts) at any point in time.

Responding to the five questions set out on page 13, above, here are the *actual* results achieved by CSA for Vermonters, based on comparing (1) the dollar amount due at the time of enrollment of the each of the 903 Vermont debts, with (2) the lowest-dollar settlement offer, if any, negotiated by CSA for each of those debts:

[11] CSA's Vermont data actually omitted some settlement offers that the Attorney General's Office identified from other company documents and added to the spreadsheet, to CSA's benefit. MF 41.

1. Of the 903 Vermont debts, 63—7.0%—were the subject of an offer in an amount at least 40% less than the enrollment amount of the debt, including CSA's estimated fees.[12] MF 44.
2. Of the 903 Vermont debts, 139—15.4%—were the subject of an offer in an amount at least 40% less than the enrollment amount of the debt, excluding fees. MF 45.
3. Of the 903 Vermont debts, 6—0.7%—were the subject of an offer in an amount at least 60% less than the enrollment amount of the debt, including CSA's estimated fees. MF 46.
4. Of the 903 Vermont debts, 44—4.9%—were the subject of an offer in an amount at least 60% less than the enrollment amount of the debt, excluding fees. MF 47.
5. Of the 207 Vermont consumers who signed up with CSA, 31—15.0%—received a settlement offer in any amount for all of their enrolled debts. MF 48.

Restated in tabular form, the first four figures are as follows:

| | **40% Savings** | **60% Savings** |
|---|---|---|
| **Counting CSA Fees** | 7.0% | 0.7% |
| **Not Counting CSA Fees** | 15.4% | 4.9% |

It is obvious that these Vermont results are not remotely consistent with CSA's advertised results claims. Indeed, following the FTC framework (and thus including CSA's fees in the calculation), and focusing on the 60% savings that CSA routinely set out in Vermont consumers' paperwork, only 0.7% of Vermont consumers' debts—*one debt in 200*—were the subject of a settlement offer consistent with CSA's promises. What is more,

[12] CSA's Vermont data does not link consumer fees paid to the specific debts that form the basis for calculating those fees; the data only shows the total of fees paid by each consumer. To calculate success rates *including fees*, the State multiplied the enrollment amount of each debt by CSA's customary 15% fee formula; but the fees associated with debts for which there was *no settlement offer* were ignored. This ended up *understating* the total fees that Vermonters paid (and favoring CSA), but it provided the best estimate possible of how much consumers who received a settlement offer had to pay in order to settle a debt—that is, the settlement amount plus the associated CSA fees. MF 43.

almost two-thirds of Vermont consumers' debts—599 out of 903—were the subject of no settlement offer at all.

While there may be many reasons for these dismal results—including poor performance by CSA, intransigence by creditors, and consumer inability or unwillingness to continue with the CSA program—it was still CSA's legal obligation to have prior reasonable substantiation for its advertising claims, taking into account all of the debts and debtors enrolled. The actual numbers show that even on a *post hac* basis, the Vermont data is completely at odds with what CSA told the public in order to lure consumers to sign up with the company.[13]

***National results.*** The national results data set produced by CSA is insufficient to prove much of anything, for several reasons.

First, that data covers only a brief period of time, encompassing just 12 non-sequential months between August 2006 and October 2007, MF 52, a time period that did not even begin until over two years after the first Vermonters enrolled with CSA. In fact, by August 2006, fully 94 (45.4%) of the total of 207 Vermont customers of CSA had already enrolled with the company, MF 53, so the national data provided by CSA completely misses the time period that is most relevant to almost half of the company's Vermont customers.

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[13] There are two possible explanations for why Defendants might believe they had stronger support for their claims than they did, but both of these involve unfairly inflating consumers' savings, contrary to the FTC principles described in the text. First, CSA calculated savings based on the amount of the debt at the time of *settlement*, rather than at the time of *enrollment*. *See DVA* at 87, MF 49. Even so, CSA itself focused on the amount of the debt at the time of enrollment in its telemarketing script, which stated, "Now, what our company does is called **settlement**. We **dramatically reduce your debt and get you out in 3 years or less!!** Based on $ _____ *(original amount)* what we'll do is **reduce** your debt down to $_____ *(50% of original amount)*." MF 50 (bold and italics in original, underline added for emphasis). Second, Defendant Van Arsdale thought it acceptable to base CSA's claims on only the debts the company *settled*, rather than on all of the debts consumers enrolled. *See DVA* at 200 (CSA's percentage savings claim was based on "just the actual ones [debt settlements] that were accepted"), MF 51.

Second, CSA's claimed national results are completely inconsistent with the FTC principles described above: they include only debts that were settled, not all debts for any period of time; they are based on amounts due at the time of settlement, not at enrollment; and they do not include any of CSA's fees in the calculation of savings.

Third, the only way to evaluate CSA's claimed national results as potential substantiation for its results advertisements is to compare the number of settlements at the advertised level of savings with *all* enrolled debts.[14] However, as noted in the State's Motion of Sanctions Under V.R.C.P. 37(b), filed on November 16, 2011, CSA has never produced that total number of debts—the needed "denominator," as it were—despite repeated discovery requests and a stipulated Order of the Court that it do so. The fact that CSA has not calculated this "denominator" before is a patently clear indication that it did not have prior, or reasonable, factual substantiation for its claims.

Again, actual results were not consistent with promised results, nor can CSA substantiate its claims with data, this time at the national level.

**C. CSA's Results Claims Were Deceptive and Thus Unlawful.**

Based on the above data analysis, it is apparent that the three elements of deception under the Consumer Fraud Act, 9 V.S.A. § 2453(a)—misrepresentation, reasonable interpretation and materiality—were present in CSA's advertised results claims.

With respect to the first of those elements, CSA clearly misrepresented the settlement results it obtained for the vast majority of Vermont and national debts. Success rates (as defined by the advertised claims) in the range of 0.7% to 15.4% (the former taking

[14] By way of example, if the national data showed 900 debts successfully settled (*e.g.*, at a 60% savings or more) out of a total of 1,000 debts available to be settled, that would mean that 90% of the debts (900/1,000) were settled consistent with CSA's ads. However, if 900 debts were successfully settled out of a total of *10,000* debts, the

into account fees paid to CSA) mean that CSA negotiated very few Vermont debts at the promised savings. In light of that track record, Vermonters were surely deceived, given that "[i]t is deceptive to make unqualified performance claims that are only true for some consumers, because consumers are likely to interpret such claims to apply to the typical consumer." *FTC* at 48500 n.575; *accord, FTC v. Five-Star Auto Club, Inc.*, 97 F. Supp. 2d 502, 528-29 (S.D.N.Y. 2000) (it was reasonable for consumers to assume that earnings expressly claimed for multi-level marketing scheme were achieved by typical participant); *National Dynamics Corp. v. FTC*, 492 F.2d 1333, 1335 (2d Cir. 1974), *cert. denied*, 419 U.S. 993 (1974) (advertising may not make "deceptive use of unusual earnings claims realized only by a few"); *Bailey Employment System, Inc. v. Hahn*, 545 F. Supp. 62, 70 (D. Conn. 1982), *aff'd* 723 F.2d 895 (2d Cir.1983) (projected earnings claims held deceptive where they did not "bear a reasonable relationship to the average amounts earned in the past by a majority of existing franchisees"); *Porter & Dietsch, Inc. v. FTC*, 605 F.2d 294, 303 (7th Cir. 1979) (deception found where "[t]he typical and ordinary experiences of consumers do not parallel the experiences reported in [advertised] testimonials"). CSA's advertised results were anything but typical and thus misrepresented the truth of the matter.

As for the second element of deception, in light of the prevailing precedent on the "typicality" that is required of results claims, it was certainly reasonable for consumers to read CSA's percentage-savings and "debt-free" claims to mean that those were the outcomes they could expect—if not in every case, then for most of them. In this regard, it should be recalled that even if some consumers had a different understanding of the advertising, the

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success rate would be only 9% (900/10,000). The difference is crucial: the data could be said to substantiate the advertising only in the first of the two hypotheticals.

claims were still deceptive if they "convey[ed] more than one meaning to reasonable consumers and one of those meanings [was] false." *Carter v. Gugliuzzi*, 168 Vt. at 56.

Finally, as noted *supra* text 7, the third element—materiality—is satisfied if the representations at issue are express, for those are deemed to be material. Indeed, other than price, what could be more material to consumers, in terms of influencing their decision to enroll with CSA or not, than the savings on their debts that they could expect for their money?

In short, CSA's website claims were deceptive within the meaning of the Consumer Fraud Act and thus violated the law.

**D. CSA's Advertising Claims Were Unsubstantiated and Thus Unlawful.**

As discussed ***supra* text 8-9,** failure to possess prior reasonable factual substantiation for advertising claims is considered to be an unfair and deceptive trade practice. As the FTC restated in its debt settlement rule commentary, "It is an unfair and deceptive practice to make an express or implied objective claim without a reasonable basis supporting it." *FTC* at 48500 n. 574.

The FTC has applied this substantiation requirement to debt settlement companies:

> When a debt relief service provider represents that it will save consumers a certain amount or reduce the debts by a certain percentage, it also represents, by implication, that this savings claim is supported by competent and reliable, methodologically sound evidence showing that consumers generally who enroll in the program will obtain the advertised results. ... Generally, savings claims should reflect the experiences of the provider's past customers. ... Similarly, the existence of some satisfied customers does not constitute a reasonable basis.

*FTC* at 48500 (footnotes omitted).

Given the wide gulf between CSA's advertised results and its actual outcomes, the question becomes, is it possible that CSA had some other prior, reasonable substantiation to

support its online results claims? As detailed below, the answer from Defendant Van Arsdale's New York deposition testimony is clearly "no," at least as to CSA's initial year of 2004 in Vermont; and for later years, CSA looked to its own national data, which has already been shown to have failed to support those claims.

Consider the question of whether CSA had any reasonable substantiation in the company's early years, starting with the company's founding in 2003. Obviously at that point, CSA had no track record of its own to rely on. Instead, Van Arsdale testified, he looked at what other debt settlement companies were doing. *DVA* at 32-33, MF 54. Asked if he obtained any information from those companies about the percentage savings that consumers were likely to achieve, he stated that the savings "varied from 50, 60, 70, 80, 90." *Id.* at 33. However, when asked whether he had seen "any data or records substantiating these percentages," he replied, "I saw a couple of settlement letters."[15] *Id.* Those letters, he said, were shown to him by an employee of a debt settlement company called Debt XS. *Id.* at 33-34.

Van Arsdale was then asked whether he had any information beyond those specific letters, and he responded, "Online at the time as well, there were other smaller companies that were posting their letters of what they were achieving for their clients." *Id.* at 34. Pressed as to whether he saw "other data besides these letters that would reflect consumer savings," he said, "I don't think so." *Id.* at 35. After describing a "general discussion" he had with someone at Debt XS, Van Arsdale was then asked if he knew about the savings for "the total percentage of consumers" at that company, and he replied, "I didn't inquire about

[15] Later in his deposition, Van Arsdale inexplicably changed "a couple of" letters to "a few hundred." *DVA* at 98, MF 55. Nonetheless, he also clarified that he did not know how many times the savings reflected in those letters were reached, did not ask anyone about that, and did not ask any company how often consumers dropped out of their program, *id.* at 103—although he did put CSA's dropout rate at 60%, *id.* at 104—thus

that." *Id.* at 36. Finally, Van Arsdale was asked if he had "any other substantiation, independent substantiation for the claims that you advertised on the website back in 2003?" His answer was "No." *Id.* at 40.

It was not until the year 2005 that CSA "started to get more regular reporting [on settlement results] ... and operations started putting those [data] systems in place." *Id.* at 81, MF 56. This reporting "may have started in late '04," but Van Arsdale became more aware of it late in 2005 through reports he received. *Id.* at 81-82.[16]

Defendant Van Arsdale attempts to support his company's results claims are wholly insufficient. For at least the years 2003-04 and into 2005, the only conceivable support for CSA's quantitative results claims were some settlement letters from another company. Such anecdotal information cannot establish that advertised savings percentages represented typical or consistent outcomes for CSA's customers. As for later years, the small percentage of debts for which CSA negotiated savings of 40% or 60% is reflected in its own records, as discussed above..

This lack of substantiation extended to CSA's "debt free" claims, too. Apart from his general statements, lacking in any detail, that the "debt free in 36 months" claim was chosen based on "industry data" and then on what CSA "saw ... as well," Van Arsdale admitted that he had no specific figures. *DVA* at 210, MF 57. Asked "What percentage of CSA consumers became debt free in less than 36 months?" he replied, "I do not know that." *DVA* at 217, MF 58. Asked "Did you have any data to support this claim?" he said, "I knew that clients were settling in three or four months. So I'm assuming there was some data."

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reinforcing the fact that he had nothing but anecdotes on which to base his company's results claims.

[16] Mr. Van Arsdale was asked if he started getting this "more data" in "late '05 and in '06." He answered, "Correct." *Id.* at 87.

*Id.* at 217-18. Nor did he know what percentage of consumers took more than 36 months to settle all of their debts. *Id.* at 218. Again, where the law required there to be prior reasonable substantiation, there was none.

The FTC—and thus Vermont law—patently expect much more in the way of quantitative data to substantiate the kinds of percentage savings claims that CSA used to solicit its customers:

> Although providers [*i.e.*, debt settlement companies] may use samples of their historical data to substantiate savings claims, these samples must be representative of the entire relevant population of past customers. Providers using samples must, among other things, employ *appropriate sampling techniques, proper statistical analysis, and safeguards for reducing bias and random error.* Providers may not cherry-pick specific categories of consumers or exclude others in order to inflate the savings.

*FTC* at 48500 n.577 (emphasis added).

In sum, CSA violated the Consumer Fraud Act by failing to have prior reasonable substantiation of its online results claims.

## VII. DEFENDANTS VIOLATED THE CONSUMER FRAUD ACT'S REQUIREMENTS ON THE RIGHT TO CANCEL TELEPHONIC TRANSACTIONS.

### A. The Consumer Fraud Act Imposes Specific Requirements with Respect to Consumers' Right to Cancel Telephonic Transactions.

Under the Vermont Consumer Fraud Act, "home solicitation sales" are subject to a three-business-day right to cancel, 9 V.S.A. § 2451a(d). A "home solicitation sale" includes a transaction "solicited or consummated wholly or in part by telephone with a consumer at the residence or place of business or employment of the consumer." *Id.*

Under 9 V.S.A. § 2454(a)(1), with limited exceptions not pertinent here, "in addition to any right otherwise to revoke an offer, the consumer or any other person obligated for any

part of the purchase price may cancel a home solicitation sale until midnight of the third *business day* after the day on which the consumer has signed an agreement or offer to purchase relating to such sale, or has otherwise agreed to buy consumer goods or services from the seller." (Emphasis added.) A "business day" is defined as "any calendar day except Saturday, Sunday or any day classified as a holiday under [state law]." 9 V.S.A. § 2451a(e); *accord,* CF 113.01(b). Moreover, "[w]ithin ten [business] days after a home solicitation sale has been cancelled ..., the seller shall tender to the consumer any payments made by the consumer." 9 V.S.A. § 2454(c)(1). This right to cancel is an extremely important protection for consumers, affording them a "cooling off" period during which they can reconsider their decision to enter into a transaction or contract with a business that they have dealt with only at a distance.

Title 9 V.S.A. § 2454, and, for telephonic sales, the Vermont Attorney General's Consumer Fraud Rule (CF) 113, available at http://www.atg.state.vt.us/display.php?smod=131, describe the kinds of disclosures of this right to cancel that must be made by a seller of goods or services. Under 9 V.S.A. § 2454(b) and CF 113.02, in every telephonic home solicitation sale, the seller must furnish to the consumer, prior to debiting a bank account or otherwise initiating payment, a receipt or contract of sale containing both a short and a multi-paragraph disclosure of the right to cancel, the latter containing the terms of that right. In addition, the seller in a telephonic sale must *orally* inform the consumer of his or her right to cancel the transaction prior to the buyer's receipt of those written notices. 9 V.S.A. § 2454(b)(2)(D) and CF 113.02(c).

Failure to comply with CF 113 is an unfair and deceptive act and practice in commerce under the Consumer Fraud Act. 9 V.S.A. § 2454(h) and CF 113.05. One remedy

for this failure is described in 9 V.S.A. § 2454(b)(3): "Until the seller has complied with this subsection, the consumer ... may cancel the home solicitation sale by notifying the seller in any manner and by any means of his intention to cancel. The cancellation period of three business days shall begin to run from the time the seller complies with this subsection." *Accord,* CF 103.02(d) and 103.03. Thus there is no time limit on this important entitlement, affording a strong incentive for businesses to comply strictly with the requirements of the law. Moreover, if a company like CSA has performed any services pursuant to a "home solicitation sale" prior to its cancellation, "the seller shall be entitled to no compensation therefor." 9 V.S.A. § 2454(d)(7).

Thus, among other things, the Consumer Fraud Act and CF 113 require:

1. Oral as well as written disclosure of the right to cancel.
2. An opportunity to cancel within three business days.
3. An opportunity to cancel by mail.
4. Upon cancellation, payment of a full refund to the consumer.
5. Payment of any required refund within ten business days of cancellation.

It should be stressed that all of these requirements associated with the right to cancel are very specific and not open to variation or revision by any business. Indeed, the Vermont Supreme Court does not approve of attempts to read limitations into the Consumer Fraud Act that do not expressly appear on the face of the statute. *See State v. Internat'l Collection Service, Inc.*, 156 Vt. 540 (1991) (rejecting argument that Consumer Fraud Act did not authorize Attorney General to sue business for engaging in unfair or deceptive acts or practices against other businesses, rather than against individual consumers).

**B. CSA's Cancellation Notice Did Not Meet the Statutory Requirements.**

As a threshold matter, all of Defendants' transactions with Vermont consumers involved a telephone conversation between the consumer and a CSA representative to solicit

the consumer's interest in entering into a service contract with the company and to firm up the details of that agreement. MF 59. As such, they were "home solicitation sales" within the meaning of the Consumer Fraud Act and thus required a three-business-day right to cancel as prescribed by the Act and CF 113.

However, in no fewer than five respects CSA failed to comply strictly with its obligations relating to the right to cancel and thus violated the Consumer Fraud Act, 9 V.S.A. §§ 2453(a) and 2454, and CF 113.

First, CSA's telephonic marketing script contained no oral disclosure of any right to cancel. MF 60.

Second, CSA's written notice of the right to cancel, which appeared in its standard Agreement, set out a right to cancel that lasted only until "midnight of the third day after the date of the transaction," MF 61—in other words, three calendar days, not the statutory three *business* days, after that date. The difference had real importance: over a weekend, it meant that a right to cancel that should have lasted for five calendar days (three business days and two weekend days) was two days shorter than it should have been, and over a holiday weekend it was shorter by three days.

Third, CSA compelled consumers both to mail *and* to fax their cancellation request, rather than simply to mail, deliver, *or* telegraph the request. MF 62. That imposed a significant burden on their customers, particularly in rural Vermont, to access a fax machine if they wanted to cancel.

Fourth, CSA's contract with consumers stated that consumers were "**OBLIGATED TO PAY CREDIT SOLUTIONS THAT PORTION OF THE *TOTAL FEES ALREADY EARNED* BY COMPANY IN ACCORDANCE WITH PARAGRAPH 13 OF THIS**

**AGREEMENT.**" MF 63 (capitals and bold in original, italics added). Paragraph 13 of the contract between consumers and CSA in turn described the installment payments to be made by the consumer to Credit Solutions of America, including the service fees due the company. MF 64. The first of these installments was often due as early as the date the consumer signed the Agreement, or, in the absence of a signature, the date of the Agreement itself.[17] MF 65.

That first month's payment could be substantial. For example, Vermont consumer B.M.'s first monthly payment of $538.13 in fees was due, under Paragraph 13 of his contract with CSA, on the same day as the date on the contract and thus was "already earned by the company" and not refundable. MF 67. As a result, the consumer's entitlement to a full refund was substantially compromised.

Fifth, CSA's written right-to-cancel notice provided that the company had 30 days to pay a refund in the event of a cancellation, MF 68, thus substantially lengthening the repayment interval from the statutory 10 business days, to the consumer's detriment.

In short, CSA systemically violated its right-to-cancel-related obligations under Vermont law and is now required to provide a full refund to any consumer who manifests an intention to cancel.

## VIII. DEFENDANTS VIOLATED THE CONSUMER FRAUD ACT BY FAILING TO COMPLY WITH THE VERMONT DEBT ADJUSTERS ACT.

As noted above, one of the alternative tests for determining whether a trade practice is unfair under the Consumer Fraud Act is "'whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by

[17] Of the 207 Vermont consumer files analyzed for this Motion, fully 145 had a first payment due on the same date as the contract was signed (or on the printed contract date, if there was no signature date). MF 66.

statutes, the common law, or otherwise—whether, in other words, it is within at least the penumbra of some common-law, statutory, or other established concept of unfairness.'" *Christie v. Dalmig*, 136 Vt. at 601 (quoting *FTC v. Sperry & Hutchinson Co.*, 405 U.S. at 244 n.5). Here, the State alleges that Defendants failed to comply with the Vermont Debt Adjusters Act, 8 V.S.A. chapter 83, 8 V.S.A. ch. 133,[18] a statute designed in large part to protect consumers, and that Defendants' non-compliance in turn amounted to an unfair trade practice.

**A. CSA Was a "Debt Adjuster" Subject to the Debt Adjusters Act.**

At all times relevant to this lawsuit, CSA's business fell within the following definition of "debt adjustment" in 8 V.S.A. § 4861(2) as that definition existed during the time period relevant to this case[19] and was thus subject to the provisions of the Debt Adjusters Act:

> "Debt adjustment" means making a contract with a debtor whereby the debtor agrees to pay a sum or sums of money periodically and the other party to the contract distributes, supervises, coordinates, *negotiates,* or controls the distribution of such money or evidences thereof among one or more of the debtor's creditors in full or partial payment of obligations of the debtor. For purposes of this chapter, engaging in debt adjustment in this state shall include: (A) soliciting debt adjustment business from within this state, whether by mail, by telephone, by electronic means, or by other means regardless of whether the debtor resides within this state or outside this state; (B) soliciting debt adjustment business with an individual residing in this state, whether by mail, by telephone, by electronic means, or by other means; or (C) entering into, or succeeding to, a debt adjustment contract with an individual residing in this state. [Emphasis added.]

Under CSA's business model, echoing the language of the statute, (1) "the debtor agrees to pay a sum or sums of money periodically," and (2) CSA ("the other party to the

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[18] Former chapter 133 of title 8 V.S.A., consisting of sections 4861-4876, was recodified in 2010 as chapter 83 of the same title, comprising sections 2751-2766. Act 137 (2009 Adj. Sess.), § 3.

[19] The quoted definition was amended in 2010 simply "to clarify existing law," *see* S. 278 as passed by the House and Senate, § 29(c), http://www.leg.state.vt.us/docs/2010/bills/Passed/S-278.pdf; but in any event, the current definition continues to encompass CSA's core activity, which is to "negotiate ... the distribution of money or evidences thereof among one or more of the debtor's creditors in full or partial payment of obligations of the debtor."

contract") "negotiates ... the distribution of such money ... among one or more of the debtor's creditors in full or partial payment of obligations of the debtor."

The first of these elements—the debtor's agreement to make periodic payments—is reflected in the Estimated Personal Savings Plan for Payments to Creditors ("the Plan") set out in the CSA Customer Enrollment Package sent to all customers of the company. MF 69. As noted in the example reprinted *supra* text 29, the Plan includes a chart that contains information on the total dollar amount of the consumer's enrolled debts, the fees due CSA, and total savings. Pertinent to the statutory issue at hand, it also states the amount of "Minimum Personal Saving Payments After Credit Solutions Fee is Paid," to be deposited by the consumer into his or her bank account. These payments, as noted at the bottom of the sheet, are "the minimum[20] suggested for payoff of your enrolled account ... Credit Solutions highly recommends that any additional funds which may become available be allocated towards your personal savings account." MF 70 (emphasis in original). These consumer payments are an essential element of the CSA program, as described by the company: "When the client has the available funds to settle an account, [CSA] contacts the creditor and asks that a settlement be negotiated in the amount that the customer has saved." MF 71; *see also* Client Service Agreement ¶ 12 (consumer agrees to budget a set amount per month for ultimate distribution to creditors). MF 72.

The second element—negotiation of the distribution of such money among one or more of the debtor's creditors in full or partial payment of the debtor's obligations—exactly describes CSA's core service. CSA offers to negotiate with a consumer's creditors to reduce the principal amount of the consumer's debts, thus purportedly achieving the

[20] A later version of the Estimated Personal Savings Plan dropped that title and highlighted the word "minimum" by italicizing and bolding it ("***minimum***").

percentage savings described earlier in this Memorandum. As the company has acknowledged, CSA "provides consumer debt *negotiation* and settlement services. [CSA] customers enroll certain unsecured accounts with [CSA] and [CSA] *negotiates* for settlement offers on those accounts." MF 73 (emphasis added). Once one or more debt settlements have been negotiated by CSA and accepted by the consumer, the agreed-upon funds are thus distributed by the consumer to or among the creditors according to the settlement terms.[21] MF 74.

When interpreting a statute, the courts "first rely upon the plain language of the law as a means of determining legislative intent." *Nichols v. Hofmann,* 2010 Vt. 36, ¶ 7, 188 Vt. 1 (citing *Delta Psi Fraternity v. City of Burlington,* 2008 VT 129, ¶ 7, 185 Vt. 129). "If that plain language resolves the conflict without doing violence to the legislative scheme, there is no need to go further ...." *Id.* (quoting *Lubinsky v. Fair Haven Zoning Bd.,* 148 Vt. 47, 49 (1986)). Moreover, in this case, the licensing agency for debt adjusters, the Vermont Department of Banking, Insurance, Securities and Health Care Administration (BISHCA), has opined that CSA meets the definition of debt adjuster under the law, MF 75, which is significant because "[t]he interpretation of an agency charged with the administration of a statute is entitled to substantial deference, if it is a sensible reading of the statutory language, ... and if it is not inconsistent with the legislative history." *Internat'l Collection Service,* 156 Vt. at 545-46 (quoting *Lawrence County v. Lead-Deadwood School Dist. I,* 469 U.S. 256, 262 (1985)).

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[21] Because CSA has expressly acknowledged that it negotiates with consumers' creditors for the payment of a reduced debt amount, there is no need to resort to rules of construction to try to discern what the term "negotiates" means in the Debt Adjusters Act.

Here, nothing in the Debt Adjusters Act requires CSA itself to handle the consumer's settlement funds. The "distribution" of such funds need not be effected directly by CSA in order for the company to be considered a debt adjuster. It is simply the consumer's agreement to make periodic payments and CSA's negotiation of a reduced principal amount due on the consumer's debt that characterizes a debt adjuster under a plain-language reading of Vermont law; and CSA meets that definition.

**B. CSA Violated At Least Seven Requirements of the Debt Adjusters Act.**

The Debt Adjusters Act goes on to impose a series of pro-consumer obligations on companies subject to the law. These obligations first include having to obtain a license from BISHCA, 8 V.S.A. § 2752, to ensure, among other things, that the company and those who control it have "the financial responsibility, experience, character, and general fitness ... [to] command the confidence of the community and warrant belief that the business will be operated honestly, fairly, and efficiently within the purposes of [the law]." 8 V.S.A. § 2756. However, CSA never obtained a license. MF 76.

Other obligations under the Act designed to protect Vermont consumers include licensees' having to (1) post a bond to secure the company's performance of its obligations as a licensee, 8 V.S.A. § 2755; (2) submit an annual report containing, among other things, the number of new consumer contracts entered into with Vermont consumers, contracts completed, contracts cancelled, and total contracts in force, 8 V.S.A. § 2757a(a)(2)—all factors relevant to the success of the licensee's program; (3) provide consumers with written contracts in a form approved by BISHCA and containing specified disclosures, including the fact that debt adjustment plans are not suitable for all debtors, 8 V.S.A. § 2759(a)-(b); (4) afford a three-business-day right to cancel the contract and provide disclosures of that right,

8 V.S.A. § 2759, identical to those required by the Consumer Fraud Act; and (5) limit their fee for services to a $50.00 initial setup fee plus ten percent of any payment received by the company for distribution to creditors, 8 V.S.A. § 2762. Finally, no one other than a licensee may use the term "debt reduction" in any public advertisement. 8 V.S.A. § 2760b(c).

In fact, CSA failed to comply with any of these requirements. CSA did not post the requisite bond. MF 77. The company did not submit an annual report. MF 78. It did not disclose in its contract that debt adjustment plans are not suitable for all debtors. MF 79. It did not comply strictly with the right-to-cancel requirement for the same five reasons as it failed to comply with the right-to-cancel disclosure requirements of the Consumer Fraud Act, *see supra* text 26-28. MF 80. And it clearly did not limit its fee for services to a $50.00 initial setup fee plus ten percent of any payment received by the company for distribution to creditors. MF 81. Moreover, CSA did use the prohibited term "debt reduction" in many of its public advertisements. MF 82.

It should be noted, finally, that most of the provisions of the Debt Adjusters Act relevant to this case share with the Consumer Fraud Act the objective of protecting Vermonters from financial harm, in this case at the hands of a regulated industry. The limit on fees to be charged is clearly one such provision, as is the requirement of a contractual disclosure that debt adjustment plans are not suitable for all debtors, the requirement of a three-day right to cancel properly disclosed, and, to a lesser but still extant degree, the bonding and annual report provisions and the restriction on the use of the term "debt reduction" in any public advertisement. As such, the statute's goals are remedial, warranting a liberal construction in the application of the law to CSA. *See Carter v. Fred's*

*Plumbing & Heating, Inc.*, 174 Vt. 572, 574 (mem. 2002) ("Remedial statutes are entitled to liberal construction."); *see also* cases cited *supra* text 6.

## IX. DEFENDANT VAN ARSDALE IS PERSONALLY LIABLE FOR CSA'S VIOLATIONS OF LAW.

### A. Vermont Law Supports Personal Liability for Consumer Fraud Violations.

Under Vermont law, a corporate officer may be held derivatively liable for consumer fraud where he or she has directly participated in the unfair or deceptive acts, directly aided the actor, or has a principal/agent relationship with the actor. *See State v. Stedman*, 149 Vt. 594, 598 (Vt. 1988). In *Stedman*, the Supreme Court acknowledged that such derivative liability can also extend to a principal who "has engaged in, is aware of, or has condoned deceptive acts of his agents." *Id.* (citing *Jackson v.* Harkey, 704 P.2d 687, 692 (Wash. App. 1985)).

Federal courts have taken a similar approach to derivative liability. For example, in *FTC v. Amy Travel Service, Inc.,* 875 F.2d 564, 573-74 (7th Cir. 1989), the FTC sued three telemarketing companies and two of their owner-officers for deceptively marketing and selling "vacation certificates." The individual defendants had developed the basic script used by the companies' telemarketers, which the trial court found to be deceptive. As is alleged here, the individual defendants "were certainly aware of the misrepresentations contained in them." 875 F.2d at 574. The court held that since the officers had both the authority to control their companies and some knowledge of the challenged practices, they were personally liable. *See* 875 F.2d at 573. *Accord, Consumer Protection Division v. Morgan*, 874 A.2d 919, 949 (Md. App. 2005) ("We hold that the Consumer Protection Division may hold individuals jointly and severally liable for restitution for the Consumer

Protection Act violations of corporations, when the Division proves that (1) the individual participated directly in or had authority to control the deceptions or misrepresentations, and (2) the individual had knowledge of the practices.")

Authority to control a company, in turn, "can be evidenced by active involvement in business affairs and the making of corporate policy, including assuming the duties of a corporate officer." *Amy Travel*, 875 F.2d at 573. As for the knowledge requirement, that may be satisfied by demonstrating that the individual had "'actual knowledge of material misrepresentations, reckless indifference to the truth or falsity of such misrepresentations, or an awareness of a high probability of fraud along with an intentional avoidance of the truth.'" *Id.* at 574 (citation omitted). However, it need not be shown that the person intended to defraud consumers. *Id.*

This view of officer liability is consistent with decisions in other states holding that officers who have not themselves made deceptive representations may be held liable for unfair or deceptive acts and practices by their corporations where they have either knowingly entered into the deceptive scheme, *see Schmidt Enterprises, Inc. v. State,* 354 N.E.2d 247, 253 (Ind. App. 1976); established the company policy, *see Moy v. Schreiber Deed Security Co.*, 535 A.2d 1168, 1171 (Pa. Super. Ct. 1988), and *State ex rel. Medlock v. Nest Egg Society Today, Inc.*, 348 S.E.2d 381, 385-86 (S.C. App. 1986); or approved of promotional materials that were deceptive, *see Grayson v. Nordic Construction Co., Inc.*, 599 P.2d 1271, 1274 (Wash. 1979).

Finally, in an action alleging involvement in unfair or deceptive practices by corporate owner-officers, the Chittenden Superior Court denied a motion to dismiss filed by the individual defendants based on allegations that they had knowledge or control of the

wrongful conduct at issue. *See State v. Vacation Break U.S.A., Inc., et al.*, No. S353-97 CnC (Chittenden Super. Ct., Mar. 11, 1998) (Opinion and Order at 3) ("corporate officers and directors are liable for tortious acts the corporation commits under their direction or with their participation."). Noting that according to the complaint, the corporate officers "ha[d] known of or controlled" the company's allegedly unfair and deceptive acts, the Court in that case denied the individual defendants' motion to dismiss. *Id.* at 3-4.

**B. Defendant Van Arsdale Is Personally Liable for CSA's Violations of Law.**

Here, as noted *supra* text 4, Defendant Van Arsdale founded CSA and served as its CEO, Director and Registered Agent until November 2006, as well as resuming his positions as CEO and Registered Agent of CSA in December 2007 and founding CSA's successor limited liability corporation. However, his role at CSA went well beyond those titles.

First, Defendant Van Arsdale has acknowledged that he had authority over CSA's website content and was aware of the company's results claims at or shortly after they appeared on the website, MF 83. Indeed, his "research" into the debt settlement industry—such as it was—led to the inclusion of percentage savings claims on the company's website, *DVA* at 32-40, a website that Mr. Van Arsdale himself helped put together, *DVA* at 37, 39. MF 84.

Second, Defendant Van Arsdale was aware of CSA's right to cancel and related notifications from their inception. MF 85. Not only that, but he helped create, approved, and had the authority to change any part of, CSA's enrollment package, *DVA* at 42-43, which package contained the right-to-cancel rules and procedures challenged in this lawsuit. MF 86. Similarly, Mr. Van Arsdale reviewed, approved, and retained the authority to change the telephone scripts used by CSA, *DVA* at 41-42, MF 87, which scripts omitted the oral notice of the right to cancel mandated by Vermont statute.

Third, Defendant Van Arsdale was aware of Vermont's debt adjuster licensing law on or about the time it became effective. MF 88.

Based on the above, Defendant Van Arsdale is personally liable for CSA's conduct with respect to the company's online results claims, its consumer right-to-cancel policies, and its failure to comply with Vermont's debt adjusters statute, because he had the requisite authority and knowledge of that conduct, as well as direct involvement in it (although such involvement is not strictly needed to establish liability).

## X. APPROPRIATE RELIEF

Once the liability of Defendants is established, the issue of appropriate relief must be addressed. The Consumer Fraud Act authorizes the Court to render "any" temporary or permanent relief as may be in the public interest, including consumer restitution, civil penalties of up to $10,000 per violation, injunctive relief and attorney's fees and costs. 9 V.S.A. § 2458(b).

### A. Injunctive Relief

The State has represented that CSA is no longer doing business in Vermont or with Vermont consumers. However, "'[i]t is settled that an action for an injunction does not become moot merely because the conduct complained of has terminated, if there is a possibility of recurrence[.]'" *Id.* (quoting *Allee v. Medrano*, 416 U.S. 802, 810 (1974)). Otherwise "'the defendant is free to return to his old ways.'" *Id.* (quoting *U.S. v. W.T. Grant,* 345 U.S. 629, 632 (1953), and citing *Beneficial Corp. v. FTC,* 542 F.2d 611, 617 (3d Cir. 1976) (court may bar prior deceptive practice if practice could be resumed), and *Fedders Corp. v. FTC*, 529 F.2d 1398, 1403 (2d Cir.1976) (injunctive relief may extend to discontinued deceptive practice where public interest requires)).

As a result, it is appropriate for the Court to order either that Defendants not conduct any future debt settlement or similar business in Vermont, or, in the alternative, that they (1) not advertise the savings or other results it can achieve unless they first possess reasonable and specific factual substantiation that those results represent the typical outcome for their customers, using a calculation based on all debts enrolled, the amounts due at the time of enrollment, and the inclusion of service fees; (2) strictly comply with Vermont's right-to-cancel requirements as set out in 9 V.S.A. § 2454 and CF 113; and (3) first obtain a state debt adjuster's license and comply with all requirements of the Vermont Debt Adjusters Act. The Court will enjoin Defendants from conducting any debt settlement or similar business in Vermont unless and until they obtain leave of the Court.

**B. Consumer Refunds and Other Monetary Relief**

Vermont consumers who enrolled with CSA were both deceived by the company as to the debt-reduction results they could expect to achieve, and denied their statutory right to cancel. Accordingly, Defendants will be required, jointly and severally, to provide prompt and full refunds of all as-yet-unrefunded amounts received from Vermont consumers.

**C. Civil Penalties**

The Consumer Fraud Act, 9 V.S.A. § 2458(b), authorizes the imposition of civil penalties in an amount not to exceed $10,000 per violation. Each online results claim—of which there were at least 347, measured by just website revisions, MF 31—and each one of CSA's 207 Vermont customers represents a separate violation. *See, e.g., People v. Bestline Products, Inc.*, 132 Cal. Rptr. 767, 795 (1976) (one violation per solicitee); *State ex rel. Corbin v. United Energy Corp. of America*, 725 P.2d 752 (Ariz. Ct. App. 1986) (permitting maximum penalty per victim per violation); *see also State v. Menard, Inc.*, 358 N.W.2d 813, 815 (Wis.

Ct. App. 1984), and *May Dept. Stores Co. v. State ex rel. Woodard*, 863 P.2d 967, 975 (Colo. 1993) ("transaction" under consumer fraud statute means one advertisement in one media outlet per day).

Defendants' unfair and deceptive practices were substantial and widespread enough to warrant the imposition of significant civil penalties, both as a sanction for Defendant's conduct and as a deterrent to similar conduct by them and others in the future. The State proposes a civil penalty of $1,000 for each per-consumer violation, for a total of $207,000, to be imposed, jointly and severally, on CSA and Defendant Van Arsdale. However, because of the extent and breadth of Defendants' fraudulent conduct, the Court believes that the maximum penalty of $2.07 million ($10,000 times 207 consumers) is appropriate,

**D. Fees and Costs**

The Consumer Fraud Act, 9 V.S.A. § 2458(b), also provides for "an order requiring reimbursement to the State of Vermont for the reasonable value of its services and its expenses in investigating and prosecuting [this] action." The Court will order CSA and Defendant Arsdale, jointly and severally, to pay the State's reasonable fees and costs in this matter. The State will submit an affidavit to the Court setting out the hours logged by its legal staff and recommended reimbursement rates within 30 days of this Order.

**ORDER**

The State's Motion for Summary Judgment on Counts 1, 2 and 4 is *granted.* The State will file a proposed order, consistent with this decision within ten days.

Dated at Montpelier, Vt., March 5, 2012,

Michael S. Kupersmith
Superior Judge

STATE OF VERMONT
SUPERIOR COURT
WASHINGTON UNIT

In re EBIZZ, LLC )

CIVIL DIVISION
Docket No. 373-5-12 Wnw

## ASSURANCE OF DISCONTINUANCE

WHEREAS Ebizz, LLC (hereinafter referred to as "Ebizz") is a New Jersey limited liability company with offices at 1360 Clifton Avenue, Suite 282, Clifton, New Jersey 07012;

WHEREAS Ebizz is a provider of website support and other services for businesses, the charges for which are placed on local telephone bills with the assistance of a Florida-based company called ILD Corp.;

WHEREAS between March 2007 and September 2011, Ebizz collected net revenues of approximately $78,500 from 296 Vermont businesses for its services that appeared on local telephone bills in Vermont's area code 802;

WHEREAS Ebizz charged $39.95 per month for its services;

WHEREAS sellers of goods or services that are to be charged on a consumer's (including a business') local telephone bill are required under 9 V.S.A. § 2466 to send a notice by first-class mail to the party to be charged, containing information specified in the statute;

WHEREAS the Attorney General alleges that Ebizz's uniform notice failed to meet all the requirements of 9 V.S.A. § 2466;

WHEREAS the Attorney General also alleges that Ebizz violated Vermont Consumer Fraud Rule 109.02, http://www.atg.state.vt.us/assets/files/CF%20109.pdf, by stating that the businesses it solicited by telephone had been "selected" to receive a website free trial, when in fact the caller was simply making contact with prospective customers and all or a substantial number of those being called received the same opportunity;

AND WHEREAS the Attorney General is willing to accept this Assurance of Discontinuance pursuant to 9 V.S.A. § 2459;

THEREFORE, the parties agree as follows:

1. *Injunctive relief.* Ebizz shall comply strictly with all provisions of Vermont law, including but not limited to provisions of 9 V.S.A. § 2466 and 9 V.S.A. Chapter 63, relating to the placement of charges on local telephone bills associated with telephone numbers in area code 802.

2. *Customer relief.*

a. No later than July 12, 2012, for each business from which Ebizz has received money through a charge on a local telephone bill with a number in area code 802, Ebizz shall arrange for an electronic credit record to the business' local telephone company in the amount of all such monies that have not been previously refunded directly to the business. Ebizz shall use due diligence to ensure that accurate credits are provided to each customer to whom a credit is due.

b. If a credit record sent under the preceding subparagraph is not accepted or is returned by the local telephone company, Ebizz shall, within ten (10) days of learning of the non-acceptance or the return, send to the customer by first-class mail, postage prepaid, to its

last known address a check in the amount of the credit due, accompanied by a letter in substantially the form attached as Exhibit 1 hereto.

c. No later than August 13, 2012, Ebizz shall mail to the Vermont Attorney General's Office, 109 State Street, Montpelier, VT 05609, in electronic Excel format, the names and addresses of the businesses whose telephone numbers were credited, and to which letters and payments were sent, under this Assurance of Discontinuance, along with the date and amount of each credit or payment.

d. No later than August 13, 2012, Ebizz shall mail to the Vermont Attorney General's Office, (i) a single check, payable to "Vermont State Treasurer," in the total dollar amount of all refund checks under this paragraph 2 that were returned as undeliverable or that went uncashed, to be treated as unclaimed funds, (ii) a list in electronic Excel format on a compact disk, of the businesses whose checks were returned or were not cashed, and for each business, the last known address and dollar amount due, and (iii) Ebizz's federal tax identification number.

3. *Payment to the State.* No later than May 14, 2012, Ebizz shall pay to the State of Vermont, in care of the Vermont Attorney General's Office, the sum of ten thousand dollars ($10,000.00) as reimbursement for reasonable attorney's fees and costs.

4. *Binding effect.* This Assurance of Discontinuance shall be binding on Ebizz and its successors and assigns.

5. *Release.* The State of Vermont hereby releases and discharges any and all claims that it may have against Ebizz, its parents, subsidiaries, affiliates, officers and directors, based on conduct or activities arising under or in connection with 9 V.S.A. Chapter 63 and/or 9 V.S.A. § 2466 prior to the date of this Assurance of Discontinuance.

6. *Admissibility.* This Assurance of Discontinuance is entered into for settlement purposes only and does not constitute an admission by Ebizz of any violation of law alleged by the Attorney General. Nothing in this Assurance of Discontinuance may be used or admitted as evidence or as an admission in any other adverse proceeding, action, investigation or inquiry, including but not limited to any governmental, regulatory or self-regulatory authority.

Date: 5/10/12

STATE OF VERMONT

WILLIAM H. SORRELL
ATTORNEY GENERAL

By: _____
Elliot Burg
Assistant Attorney General

Date: 4-23-12

EBIZZ, LLC

By: _____
Its Authorized Agent

APPROVED AS TO FORM:

_____
Elliot Burg
Assistant Attorney General
Office of Attorney General
109 State Street
Montpelier, Vermont 05609
For the State of Vermont

_____
Andrew B. Lustigman, Esq.
Olshan Grundman Frome Rosenzweig & Wolosky, LLP
Park Avenue Tower
65 East 55th Street
New York, New York 10022
For Ebizz, LLC

**Exhibit 1 (Letter to Businesses)**

Dear [Name of Business]:

Ebizz has entered into a settlement with the Vermont Attorney General's Office to resolve claims that we did not properly notify you, in accordance with Vermont law, about charges billed to your local telephone bill for our services.

As part of that settlement, we are enclosing a refund check for all charges relating to Ebizz's services that appeared on your local telephone bill.

You have no obligation to do anything in response to this payment.

If you have any questions about the settlement, you may contact the Attorney General's Office at (802) 828-5507.

Sincerely,

Ebizz

STATE OF VERMONT

SUPERIOR COURT
Washington Unit 12 DEC 28 A 11:57

CIVIL DIVISION
Docket No. 475-6-12 Wncv

In re FABRI-KAL CORPORATION )

## ASSURANCE OF DISCONTINUANCE

WHEREAS Fabri-Kal Corporation ("Fabri-Kal") is a Michigan corporation with offices at 600 Plastics Place, Kalamazoo, Michigan 49001;

WHEREAS Fabri-Kal is a supplier to retail businesses of "Greenware" products, including Greenware drinking cups, which are made of the bioplastic polylactic acid or PLA;

WHEREAS Fabri-Kal sold over $2.4 million worth of these products in Vermont between March 2005 and August 2011;

WHEREAS Fabri-Kal consistently advertised and labeled its Greenware products as "100% compostable";

WHEREAS Fabri-Kal acknowledges that due to variability in conditions, home composting of its products is not recommended;

WHEREAS many, but not all, of Fabri-Kal's marketing and product materials contained a "compostability" disclaimer that noted that Greenware products could only be composted in a municipal or commercial facility, such as, "100% compostable in actively managed municipal or commercial composting facilities, where they exist," "100% compostable in municipal and industrial composting facilities," and "100% Compostable [i]n a commercial compost facility";

Office of the
ATTORNEY
GENERAL
109 State Street
Montpelier, VT
05609

WHEREAS most Vermonters, and most of Vermont, are not served by municipal or commercial composting facilities that accept products such as Fabri-Kal's;

WHEREAS the Fabri-Kal disclaimers did not disclose the lack of such facilities in the state;

WHEREAS other Fabri-Kal marketing and product materials contained no disclaimer at all, stating only, for example, "This cup is made from corn, environmentally sustainable, and 100% compostable," or simply, "100% compostable."

WHEREAS the Vermont Attorney General alleges that because the compostability of products is important to Vermont consumers' purchasing decisions, and because Fabri-Kal's marketing and product materials did not note the absence of appropriate composting facilities for its products for most Vermonters, Fabri-Kal violated the Vermont Consumer Fraud Act, 9 V.S.A. § 2453(a), by advertising its products as compostable when, for most Vermont consumers, there was no practical way of composting them.

WHEREAS Fabri-Kal does not admit any violation of Vermont law;

WHEREAS the Attorney General is willing to accept this Assurance of Discontinuance pursuant to 9 V.S.A. § 2459; and

THEREFORE the parties agree as follows:

1. Fabri-Kal shall comply strictly with the Vermont Consumer Fraud Act, 9 V.S.A. chapter 63, and all regulations promulgated thereunder.

2. Fabri-Kal shall not offer, sell, or distribute for offer or sale, any product in or into the State of Vermont that is represented, directly or indirectly, to be "compostable" unless:

a. The product packaging bears a clear and conspicuous statement, if true, that the product is not suitable for backyard composting, or words to that effect; and

**Office of the ATTORNEY GENERAL 109 State Street Montpelier, VT 05609**

b. Either (i) there are municipal or commercial facilities reasonably and practically available to a substantial majority of Vermont consumers, which facilities accept the product for composting, or (ii) there is a clear and conspicuous disclosure on the product packaging of the absence of such facilities (such as, "Commercial facilities may not exist in your area.").

*Provided that* (a) with respect to drinking cups bearing the word "compostable" engraved on the bottom surface of the cup, the above required disclosures may appear on a label in the form of a green band or ribbon around the lower exterior of the cup; and (b) the above required disclosures shall apply to those products that are within the control of Fabri-Kal as of July 16, 2012.

For the purpose of this paragraph, "clear and conspicuous" means that a disclosure is proximate to the compostability claim and not significantly smaller or less visible than the claim itself.

3. As *cy pres* relief, within fifteen (15) business days of signing this Assurance of Discontinuance, Fabri-Kal shall pay the sum of twenty thousand dollars ($20,000.00) to the Central Vermont Solid Waste Management District, 137 Barre Street, Montpelier, Vermont 05602, to develop a residential composting pilot project consistent with its proposal dated April 13, 2012, and shall, at the same time, notify the Vermont Attorney General's Office in writing of the payment.

4. Also within fifteen (15) business days of signing this Assurance of Discontinuance, Fabri-Kal shall pay to the State of Vermont, in care of the Vermont Attorney General's Office, the sum of eighty thousand dollars ($80,000.00) in civil penalties and costs.

**Office of the ATTORNEY GENERAL 109 State Street Montpelier, VT 05609**

5. The undersigned represent that they are authorized to enter into this Assurance and to bind their respective parties to its terms.

6. This Assurance of Discontinuance resolves all claims by the State of Vermont relating to the matters described herein.

Date: 6/4/12

STATE OF VERMONT

WILLIAM H. SORRELL
ATTORNEY GENERAL

By: _____
Elliot Burg
Assistant Attorney General

Date: 6/18/12

FABRI-KAL COPORATION

By: _____
Its Authorized Agent

**Office of the ATTORNEY GENERAL**
**109 State Street**
**Montpelier, VT 05609**

APPROVED AS TO FORM:

Elliot Burg
Assistant Attorney General
Vermont Attorney General's Office
109 State Street
Montpelier, VT 05609
For the State of Vermont

J. Thomas MacFarlane, Esq.
Clark Hill PLC
151 S. Old Woodward Ave, Suite 200
Birmingham, MI 48009
For Fabri-Kal Corporation

**Office of the ATTORNEY GENERAL 109 State Street Montpelier, VT 05609**

**STATE OF VERMONT**

2011 JUN 27 P 4:02

ORDER

2011 JUN 23 A 11:55

SUPERIOR COURT
Washington Unit

Docket No. 390-6-11 Wncv





STATE OF VERMONT
Plaintiff

vs.

GLAXOSMITHKLINE LLC and SB PHARMCO PUERTO RICO, INC.,

Defendants.

# FINAL CONSENT JUDGMENT

Plaintiff, STATE OF VERMONT, by WILLIAM H. SORRELL, Attorney General of the State of Vermont, has filed a Complaint for a permanent injunction and other relief in this matter pursuant to the Vermont Consumer Fraud Act, 9 V.S.A. §§ 2451-2466, alleging that Defendants GLAXOSMITHKLINE LLC (hereinafter "GlaxoSmithKline") and SB PHARMCO PUERTO RICO, INC. (hereinafter "SB Pharmco") committed violations of the aforementioned Act.

Plaintiff, by its counsel, and GlaxoSmithKline and SB Pharmco, by their counsel, have agreed to the entry of this Final Consent Judgment ("Consent Judgment") by the Court without trial or adjudication of any issue of fact or law, and without admission of wrongdoing or liability of any kind.

## I. DEFINITIONS

The following definitions shall be used in construing this Consent Judgment:

A. "GlaxoSmithKline LLC" or "GlaxoSmithKline" shall mean GlaxoSmithKline LLC, all of its past and present officers, directors, shareholders, employees, subsidiaries, divisions, predecessors, and successors.

B. "SB Pharmco Puerto Rico, Inc." or "SB Pharmco" shall mean SB Pharmco Puerto Rico, Inc., all of its past and present officers, directors, shareholders, employees, subsidiaries, divisions, and predecessors.

C. "Covered Conduct" shall mean Defendants' production, manufacturing, processing, packing, holding, distribution, and sale of Covered Products manufactured at SB Pharmco's production facility at Cidra, Puerto Rico.

D. "Covered Products" shall mean those products, set forth in Exhibit A.

E. "Effective Date" shall mean the date on which a copy of this Consent Judgment, duly executed by Defendants and by the signatory Attorney General, is approved by, and becomes a Judgment, of the Court.

F. "Multistate Working Group" shall mean the Attorneys General and their staff representing Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, the District of Columbia, Florida, Hawaii[1], Idaho, Illinois, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Missouri, Montana, Nebraska, Nevada, New Jersey, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Vermont, Washington, West Virginia, and Wisconsin.

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[1] Hawaii is being represented on this matter by its Office of Consumer Protection, an agency which is not part of the state Attorney General's Office, but which is statutorily authorized to undertake consumer protection functions, including legal representation of the State of Hawaii. For simplicity, the entire group will be referred to as the "Attorneys General," and such designation, as it includes Hawaii, refers to the Executive Director of the State of Hawaii Office of Consumer Protection.

G. "Multistate Executive Committee" shall mean the Attorneys General and their staff representing Arizona, Florida, Illinois, Maryland, Oregon, Pennsylvania, Tennessee, and Texas.

H. "Defendants" shall mean GlaxoSmithKline LLC and SB Pharmco Puerto Rico, Inc.

I. "Parties" shall mean the Vermont Attorney General and Defendants.

J. "Attorneys General" shall mean the Attorneys General of the Multistate Working Group.

## II. PREAMBLE

A. The Attorneys General conducted an investigation regarding the Covered Conduct. The Parties have agreed to resolve the concerns related to the Covered Conduct under the State Consumer Protection Laws[2], as cited in footnote 2, by entering into this Consent Judgment.

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[2] ALABAMA- Deceptive Trade Practices Act, AL ST 8-19-1, 13A-9-42, 8-19-8; ALASKA -*Alaska Unfair Trade Practices and Consumer Protection Act*, AS 45.50.471 *et seq*;ARIZONA - *Arizona Consumer Fraud Act*, A.R.S. § 44-1521 *et seq.*; ARKANSAS – Deceptive Trade Practices Act, Ark. Code Ann.§4-88-101, *et seq.*;CALIFORNIA - Bus. & Prof Code §§ 17200 *et seq.*and 17500 *et seq.*; COLORADO- *Colorado Consumer Protection Act*, Colo. Rev. Stat. § 6-1-101 *et seq.*; CONNECTICUT - *Connecticut Unfair Trade Practices Act*, Conn. Gen. Stat.§§ 42-110a *et seq.*; DELAWARE - *Delaware Consumer Fraud Act*, Del. CODE ANN. tit. 6, §§ 2511 to 2527; DISTRICT OF COLUMBIA, *District of Columbia Consumer Protection Procedures Act*, D.C. Code §§ 28-3901 *et seq.*; FLORIDA - *Florida Deceptive and Unfair Trade Practices Act, Part II*, Chapter 501, Florida Statutes, 501.201 et. seq.; HAWAII - *Uniform Deceptive Trade Practice Act*, Haw. Rev. Stat. Chpt. 481A and Haw. 501.201 *et seq.*; IDAHO - Consumer Protection Act, Idaho Code Section 48-601 *et seq.*; ILLINOIS - *Consumer Fraud and Deceptive Business Practices Act*, 815 ILCS 505/2 *et seq.*; IOWA - *Iowa Consumer Fraud Act*, Iowa Code Section 714.16; KANSAS - *Kansas Consumer Protection Act*, K.S.A. 50-623 *et seq.*; KENTUCKY- *The Kentucky Consumer Protection Act*, KRS 367.110 et seq.; MAINE - *Unfair Trade Practices Act*, 5 M.R.S.A. § 207 *et seq.*; MARYLAND - *Maryland Consumer Protection Act*, Md. Code Ann., Com. Law §§ 13-101 *et seq.*; MASSACHUSETTS - Mass. Gen. Laws c. 93A, §§ 2 and 4; MICHIGAN - *Michigan Consumer Protection Act*, MCL § 445.901 *et seq.*; MISSOURI - *Missouri Merchandising Practices Act*, Mo. Rev. Stat. §§ 407 *et seq.*; MONTANA– *Montana Unfair Trade Practices and Consumer Protection Act*, Mont. Code Ann. § 30-14-101 *et. seq.*;NEBRASKA - *Uniform Deceptive Trade Practices Act*, NRS §§ 87-301 *et seq.*; NEVADA - *Deceptive Trade Practices Act*, Nevada Revised Statutes 598.0903 *et seq.*; NEW JERSEY - *New Jersey Consumer Fraud Act*, NJSA

B. This Consent Judgment reflects a negotiated agreement entered into by the Parties as their own free and voluntary act, and with full knowledge and understanding of the nature of the proceedings and the obligations and duties imposed by this Consent Judgment. Defendants are entering into this Consent Judgment solely for the purpose of settlement, and nothing contained herein may be taken as or construed to be an admission or concession of any violation of law or regulation, or of any other matter of fact or law, or of any liability or wrongdoing, all of which Defendants expressly deny. Through this Consent Judgment, Defendants do not admit any violation of law, and do not admit any wrongdoing that was or could have been alleged by any of the signatory Attorneys General before the date of the Consent Judgment. No part of this Consent Judgment, including its statements and commitments, shall constitute evidence of any liability, fault, or wrongdoing by Defendants. This Consent Judgment does not constitute an admission by Defendants that the Covered Conduct violated or could violate the State Consumer Protection Laws. It is the intent of the Parties that this Consent Judgment shall not be admissible or binding in any other matter, including, but not limited to, any investigation or litigation, other than in connection with the enforcement of this Consent Judgment. No part of this Consent Judgment shall create a private cause of action or convert any right to any third party for violation of any federal or state statute or law, except that an Attorney General may file an action

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56:8-1 *et seq.*; NORTH CAROLINA - North Carolina Unfair and Deceptive Trade Practices Act, N.C.G.S. 75-1.1, *et seq.*; NORTH DAKOTA - *Unlawful Sales or Advertising Practices*, N.D. Cent. Code § 51-15-02 *et seq.*; OHIO - *Ohio Consumer Sales Practices Act*, R.C. 1345.01, *et seq.*; OREGON - Oregon Unlawful Trade Practices Act, ORS 646.605 *et seq.*; PENNSYLVANIA - Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 P.S. 201-1 *et seq.*; RHODE ISLAND -*Rhode Island Deceptive Trade Practices Act,* Rhode Island General Laws§ 6-13.1-1, *et seq.*;SOUTH DAKOTA - *South Dakota Deceptive Trade Practices and Consumer Protection*, SDCL ch. 37-24; TENNESSEE - Tennessee Consumer Protection Act, Tenn. Code Ann.§ 47-18-101 *et seq.*; TEXAS - *Texas Deceptive Trade Practices-Consumer Protection Act*, TEX. BUS. & COM. CODE § 17.41, *et seq.*; VERMONT - Consumer Fraud Act, 9 V.S.A. §§ 2451 *et seq.*; WASHINGTON - *Unfair Business Practices/Consumer Protection Act*, RCW §§ 19.86 *et seq.*; WEST VIRGINIA - *West Virginia Consumer Credit and Protection Act*, W.Va. Code § 46A-1101 *et seq.*; WISCONSIN - Wis. Stat. § 100.18 (Fraudulent Representations).

to enforce the terms of this Consent Judgment. Nothing contained herein prevents or prohibits the use of this Consent Judgment for purposes of enforcement by the Vermont Attorney General.

C. This Consent Judgment does not create a waiver or limit Defendants' legal rights, remedies, or defenses in any other action by the Vermont Attorney General, and does not waive or limit Defendants' right to defend themselves from, or make arguments in, any other matter, claim, or suit, including, but not limited to, any investigation or litigation relating to the existence, subject matter, or terms of this Consent Judgment. Nothing in this Consent Judgment shall waive, release, or otherwise affect any claims, defenses, or other positions Defendants may assert in connection with any investigations, claims, or other matters the Attorneys General are not releasing hereunder. Notwithstanding the foregoing, the Vermont Attorney General may file an action to enforce the terms of this Consent Judgment.

D. This Consent Judgment does not constitute an approval by the Attorneys General of Defendants' business practices, and Defendants shall make no representation or claim to the contrary.

E. This Consent Judgment sets forth the entire agreement between the Parties hereto and supersedes all prior agreements or understandings, whether written or oral, between the Parties and/or their respective counsel, with respect to the Covered Conduct.

F. This Court retains jurisdiction of this Consent Judgment and the Parties hereto for the purpose of enforcing and modifying this Consent Judgment and for the purpose of granting such additional relief as may be necessary and appropriate.

G. This Consent Judgment may be executed in counterparts, each of which shall be deemed to constitute an original counterpart hereof, and all of which shall together constitute one and the same Consent Judgment. One or more counterparts of this Consent Judgment may be

delivered by facsimile or electronic transmission with the intent that it, or they, shall constitute an original counterpart hereof.

H. This Consent Judgment relates solely to the Covered Conduct.

## III. COMPLIANCE PROVISIONS

A. Defendants shall not, as a result of the manner in which the Covered Products are manufactured, make any written or oral claim for the Covered Products that is false, misleading, or deceptive.

B. Defendants shall not, as a result of the manner in which the Covered Products are manufactured, represent that the Covered Products have sponsorship, approval, characteristics, ingredients, uses, benefits, quantities, or qualities that they do not have.

C. Defendants shall not, as a result of the manner in which the Covered Products are manufactured, cause likelihood of confusion or of misunderstanding as to the Covered Products' source, sponsorship, approval, or certification.

## IV. DISBURSEMENT OF PAYMENTS: PAYMENT TO THE STATES

A. Within 30 days of the Effective Date of this Consent Judgment, Defendants shall pay $40.75 million to be divided and paid by Defendants directly to each Attorney General of the Multistate Working Group in an amount designated by and in the sole discretion of the Multistate Executive Committee.[3] Said payment shall be used by the Attorneys General for attorneys' fees and other costs of investigation and litigation, or to be placed in, or applied to, the consumer protection enforcement fund, consumer education or litigation or local consumer aid or revolving fund, used to defray the costs of the inquiry leading hereto, or for other uses permitted

[3] The State of Vermont's share is $530,937.

by state law, at the sole discretion of each Attorney General. The Parties acknowledge that the payment described herein is not a fine or penalty, or payment in lieu thereof.

## V. REPRESENTATIONS AND WARRANTIES

A. GlaxoSmithKline acknowledges that it is a proper party to this Consent Judgment. GlaxoSmithKline further warrants and represents that the individual signing this Consent Judgment on behalf of GlaxoSmithKline is doing so in his or her official capacity and is fully authorized by GlaxoSmithKline to enter into this Consent Judgment and to legally bind GlaxoSmithKline to all of the terms and conditions of the Consent Judgment.

B. SB Pharmco acknowledges that it is a proper party to this Consent Judgment. SB Pharmco further warrants and represents that the individual signing this Consent Judgment on behalf of SB Pharmco is doing so in his or her official capacity and is fully authorized by SB Pharmco to enter into this Consent Judgment and to legally bind SB Pharmco to all of the terms and conditions of the Consent Judgment.

C. The Attorney General warrants and represents that he is signing this Consent Judgment in his or her official capacity, and that he is fully authorized by his State to enter into this Judgment, including, but not limited to, the authority to grant the release contained in Section VI of this Consent Judgment, and to legally bind his State to all of the terms and conditions of this Consent Judgment.

## VI. RELEASE

A. By execution of this Consent Judgment, the State of Vermont releases and forever discharges Defendants and all of their past and present officers, directors, shareholders, employees, subsidiaries, divisions, parents, predecessors, successors, assigns, and transferees

(collectively, the "Released Parties"), from the following: all civil claims, causes of action, parens patriae claims, damages, restitution, fines, costs, attorneys' fees, remedies and/or penalties that were or could have been asserted against the Released Parties by the Attorney General under the Vermont Consumer Fraud Act, 9 V.S.A. §§ 2451-2466, or any amendments thereto, or by common law claims concerning unfair, deceptive, or fraudulent trade practices resulting from the Covered Conduct, up to and including the Effective Date of this Consent Judgment (collectively, the "Released Claims").

B. Notwithstanding any term of this Consent Judgment, specifically reserved and excluded from the Released Claims as to any entity or person, including Released Parties, are any and all of the following:

1. Any claims related to the marketing or promotion of rosiglitazone that do not relate to the manner in which the product was manufactured at the Cidra, Puerto Rico facility.
2. Any criminal liability that any person or entity, including Released Parties, has or may have to the State of Vermont;
3. Any civil or administrative liability that any person or entity, including Released Parties, has or may have to the State of Vermont, under any statute, regulation, or rule not expressly covered by the release in Section VI.A. including, but not limited to, any and all of the following claims:
    a. State or federal antitrust violations;
    b. Medicaid violations, including, but not limited to, federal Medicaid drug rebate statute violations, Medicaid fraud or abuse, and/or kickback violations related to Vermont's Medicaid program;

c. Claims involving "best price," "average wholesale price," or "wholesale acquisition cost;"

d. State false claims violations; and

e. Claims to enforce the terms and conditions of this Consent Judgment.

4. Actions of state program payors of the State of Vermont arising from the Covered Conduct, except for the release of civil penalties under the state consumer protection laws cited in footnote 2.

5. Any claims individual consumers have or may have under the State of Vermont's consumer protection laws against any person or entity, including Released Parties.

## VII. CONFLICTS

A. If, subsequent to the Effective Date of this Consent Judgment, the federal government or any state, or any federal or state agency, enacts or promulgates legislation or regulations with respect to matters governed by this Consent Judgment that creates a conflict with any provision of the Consent Judgment and Defendants intend to comply with the newly enacted legislation or regulation, Defendants shall notify the Attorneys General (or the Attorney General of the affected State) of the same. If the Attorney General agrees, he shall consent to a modification of such provision of the Consent Judgment to the extent necessary to eliminate such conflict. If the Attorney General disagrees and the Parties are not able to resolve the disagreement, Defendants shall seek a modification from an appropriate court of any provision of this Consent Judgment that presents a conflict with any such federal or state law or regulation. Changes in federal or state laws or regulations, with respect to the matters governed by this

Consent Judgment, shall not be deemed to create a conflict with a provision of this Consent Judgment unless Defendants cannot reasonably comply with both such law or regulation and the applicable provision of this Consent Judgment.

## VIII. DISPUTE RESOLUTION

A. For the purposes of resolving disputes with respect to compliance with this Consent Judgment, should any of the signatory Attorneys General believe that one or both Defendants have violated a provision of this Consent Judgment subsequent to the Effective Date, then such Attorney General shall notify that Defendant or those Defendants in writing of the specific objection, identify with particularity the provisions of this Consent Judgment that the practice appears to violate, and give Defendants 30 days to respond to the notification.

B. Upon receipt of written notice from any of the Attorneys General, each Defendant receiving such notice shall provide a good-faith written response to the Attorney General notification, containing either a statement explaining why that Defendant believes it is in compliance with the Consent Judgment or a detailed explanation of how the alleged violation occurred and statement explaining how and when that Defendant intends to remedy the alleged violation.

C. Except as set forth in Sections VIII.E and F below, the Attorney General may not take any action during the 30 day response period. Nothing shall prevent the Attorney General from agreeing in writing to provide Defendant with additional time beyond the 30 days to respond to the notice.

D. The Attorney General may not take any action during which a modification request is pending before a court pursuant to Section VII.A, except as provided for in Sections VIII.E and F below.

E. Nothing in this Consent Judgment shall be interpreted to limit the State's Civil Investigative Demand ("CID") or investigative subpoena authority.

F. The Attorney General may assert any claim that one or both Defendants have violated this Consent Judgment in a separate civil action to enforce compliance with this Consent Judgment, or may seek any other relief afforded by law, but only after providing Defendant or Defendants an opportunity to respond to the notification as described above; provided, however, that the Attorney General may take any action if the Attorney General believes that, because of the specific practice, a threat to the health or safety of the public requires immediate action.

## IX. COMPLIANCE WITH ALL LAWS

A. Except as expressly provided in this Consent Judgment, nothing in this Consent Judgment shall be construed as:

1. Relieving Defendants of their obligation to comply with all applicable state laws, regulations, or rules, or granting permission to engage in any acts or practices prohibited by any law, regulation, or rule; or
2. Limiting or expanding in any way any right any state represented by the Multistate Working Group may otherwise have to enforce applicable state law or obtain information, documents, or testimony from Defendants pursuant to any applicable state law, regulation, or rule, or any right Defendants may otherwise have to oppose any subpoena, civil investigative demand, motion, or other procedure issued, served, filed, or otherwise employed by the State pursuant to any such state law, regulation, or rule.

## X. GENERAL PROVISIONS

A. Nothing in this Consent Judgment is intended to modify the Settlement Agreement, effective December 15, 2010, between the State of Vermont and GlaxoSmithKline, LLC formerly known as SmithKline Beecham corporation, d/b/a GlaxoSmithKline, and SB Pharmco, Puerto Rico, Inc (collectively "GSK").

B. Nothing will prevent the Attorney General from agreeing in writing to provide Defendants with additional time to perform any act required by the Consent Judgment. The Attorney General shall not unreasonably withhold his consent to the request for additional time.

C. All notices under this Consent Judgment shall be sent by overnight United States mail. The documents shall be sent to the following addresses:

For GlaxoSmithKline LLC and SB Pharmco Puerto Rico, Inc.:

Matthew J. O'Connor
Covington & Burling LLP
1201 Pennsylvania Avenue, NW
Washington, DC 20004-2401

Barry H. Boise
Pepper Hamilton LLP
3000 Two Logan Square
Eighteenth and Arch Streets
Philadelphia, PA 19103

APPROVED:

PLAINTIFF, THE PEOPLE OF THE STATE OF VERMONT

By: _____ Date: 6/23/11
Wendy Morgan, Chief, Public Protections Division

WILLIAM H. SORRELL
Vermont Attorney General

Wendy Morgan
Vermont Attorney General's Office
Public Protection Division
109 State Street
Montpelier, Vermont 05609
802-828-5479
rkriger@atg.state.vt.us

FOR GLAXOSMITHKLINE LLC

By: S. Mark Werner Date: 6.17.11

S. Mark Werner
Senior Vice President
GlaxoSmithKline LLC

FOR SB PHARMCO PUERTO RICO, INC.

By:_____ Date: June 16th 2011

Desmond P. Burke
Trustee
SB Pharmco Puerto Rico, Inc.

FOR DEFENDANTS GLAXOSMITHKLINE LLC AND SB PHARMCO PUERTO RICO, INC.

By: _____ Date: 4/20/11

Geoffrey E. Hobart
Matthew J. O'Connor
Covington & Burling LLP
1201 Pennsylvania Avenue, NW
Washington, DC 20004-2401

FOR DEFENDANTS GLAXOSMITHKLINE LLC AND SB PHARMCO PUERTO RICO, INC.

By: Barry H. Boise Date: 6/15/11

Nina M. Gussack
Barry H. Boise
Pepper Hamilton LLP
3000 Two Logan Square
Eighteenth and Arch Streets
Philadelphia, PA 19103

Approved as to form:

By: John D. Monahan Date: June 14, 2011

John D. Monahan
Dinse, Knapp & McAndrew, P.C.
P.O. Box 988
Burlington, VT 05402-0988

Attorney for GlaxoSmithKline LLC and SB Pharmco Puerto Rico, Inc.

**STATE OF VERMONT**

| | | |
|---|---|---|
| SUPERIOR COURT<br>Washington Unit | ) | Docket No. _____ |
| STATE OF VERMONT<br>Plaintiff | ) | |
| vs. | ) | |
| GLAXOSMITHKLINE LLC and SB PHARMCO PUERTO RICO, INC.,<br>Defendants. | ) | |

**FINAL CONSENT JUDGMENT**

***APPROVED BY THE COURT:***

By: Geoffrey Crawford Date: 6/27/11

Superior Court Judge
Washington Superior Court
65 State Street
Montpelier, VT 05602

*Exhibit A - Product Produced at Cidra, Puerto Rico facility 2001 - 2009*

| **PRODUCT NAME** |
|---|
| Abreva® (Docosanol) Cream 10 % |
| Albenza® (albendazole, USP) |
| Avandamet® (Roglitazone maleate/Metformin HCL) |
| Avandia® (Rosiglitazone Maleate) |
| Bactroban® (Mupirocin) Ointment |
| Bactroban Cream® (Mupirocin Calcium) |
| Tagamet® / Cimetidine USP / Tagamet® HB |
| Compazine® |
| Coreg® (carvedilol) |
| Denavir Cream® (Penciclovir)[1] |
| Dibenzyline®[2] |
| Dyazide® |
| Dyrenium®[2] |
| Ecotrin® Aqueous Film Coated |
| Factive® (gemifloxacin mesylate)[3] |
| Kytril® (Granisetron HCl)[4] |
| Paxil® (Paroxetine HCl)[5] |
| Paxil® Oral Suspension (Paroxetine HCL) |
| Paxil CR® (Paroxetine HCL) |
| Relafen® (Nabumetone) |
| Stelazine® |
| Thorazine® |

[1] Divested as part of GlaxoSmithkline merger but manufactured at Cidra, until transferred to new owner (Novartis).

[2] Divested product: manufactured at Cidra, until transferred to new owner (Wellspring).

[3] Product manufactured under contract agreements with LG Life Sciences LTD (sold to Genesoft in 2002 before approved by the FDA in 2003).

[4] Divested as part of GlaxoSmithkline merger but manufactured at Cidra, until transferred to new owner (Roche).

[5] Generic version of product manufactured at Cidra but distributed by PAR Pharmaceutical.

**UNITED STATES DISTRICT COURT**
**DISTRICT OF VERMONT**

**STATE OF VERMONT**

**Plaintiff**

**v.** **Civil No.** 2:11-cv-16

**HEALTH NET, INC., AND**
**HEALTH NET OF THE NORTHEAST, INC.**

**Defendants**

## CONSENT DECREE, FINAL ORDER AND JUDGMENT

1. The State of Vermont ("Vermont"), by and through Attorney General William H. Sorrell, ("AG") and Health Net, Inc., ("HN") and Health Net of the Northeast, Inc., ("HNNE") agree to settle the AG's claims arising from a missing portable hard drive of HNNE's and stipulate that this Consent Decree, Final Order and Judgment ("Judgment") may be entered by the Court as set forth below.
2. The terms of this Judgment represent a voluntary settlement of disputed allegations of facts and law. The parties have consented to the entry of this Judgment for the purpose of settlement only and agree that it does not constitute an admission of the violation of any law, rule, or regulation. Nothing in this Judgment shall be construed to limit HN and/or HNNE's ability or right to assert any legal, factual, or equitable defenses in any pending or future proceeding of any kind, except with respect to enforcement of this Judgment by the AG.

3. HN and HNNE consent to entry of this Judgment with full knowledge and understanding of the nature of the proceedings and obligations imposed upon them and waive any formal service requirements of the Complaint and Judgment.

4. The Court, having considered the pleadings and proposed Judgment executed by the parties, and with good cause appearing,

HEREBY ORDERS, ADJUDGES AND DECREES that Judgment may be entered in this matter as follows:

**Jurisdiction**

5. Jurisdiction of this Court over HN and HNNE and the subject matter of this Judgment is admitted for purposes of entering into and enforcing this Judgment pursuant to 42 U.S.C. § 1320d-5(d)(1), 28 U.S.C. § 1331, and 28 U.S.C. § 1367. Jurisdiction is retained by this Court for the purpose of enabling the parties to apply to this Court for further orders and directions as may be necessary or appropriate, or for execution of this Judgment, including further relief for any violation of this Judgment.

**Parties**

6. Vermont, by and through the AG, is charged, *inter alia*, with enforcement of the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), Pub. L. No. 104-191, 110 Stat. 1936, as amended by the Health Information Technology for Economic and Clinical Health Act of 2009 ("HITECH Act"), Pub. L. No. 111-5, 123 Stat. 226 (codified in part at 42 U.S.C. § 1320d-5(d)), the Vermont Security

Breach Notice Act, 9 V.S.A. §§ 2430-2435, and the Vermont Consumer Fraud Act, 9 V.S.A §§ 2451-2466.

7. HN is a publicly traded Delaware corporation with its main office located at 21650 Oxnard Street, Woodland Hills, CA 91367.

8. HNNE is a wholly owned subsidiary of HN with its main office located at One Far Mill Crossing, Shelton, CT 06484. At all times relevant to this matter, HNNE, through its subsidiaries, provided health insurance plans, including Medicare Advantage plans, to Vermont residents.

**Recitals**

9. On or about May 14, 2009, HNNE learned that a portable computer hard drive had disappeared from the desk of an IT associate at its Shelton, Connecticut office.

10. Before May 14, 2009, the hard drive had been shipped from HNNE's Shelton, Connecticut office to Rancho Cordova, California, to be copied onto HN's servers in Rancho Cordova. When the planned data migration could not be completed in California, the hard drive with all of its original contents was shipped back to Shelton, Connecticut. The drive was discovered missing after its return to Connecticut.

11. HNNE represents that the hard drive was shipped in a secure lock box during the trips to and from California. The information contained on the hard drive, however, was not encrypted, contrary to company policy, during either the trip to or from California.

12. HNNE did not create a log file of the collection and transfer of the data included on the hard drive.
13. The hard drive contained approximately 27.7 million scanned pages of documents related to the medical, personal, and financial information of approximately 1.5 million members of HN's health plan subsidiaries.
14. Included in the contents of the hard drive was the protected health information ("PHI" as that term is defined under HIPAA, 45 C.F.R. § 160.103), and personal information ("PI" as that term is defined under Vermont law, 9 V.S.A. § 2430(5)) of approximately 525 Vermont residents.
15. Neither HNNE nor HN reported the missing hard drive to the Connecticut police.
16. In order to determine the scope of the information contained on the missing hard drive and identify the members referenced therein, HNNE retained the forensic expert, Kroll, Inc., to conduct an investigation. Kroll's investigation included searching for the hard drive, interviewing relevant employees, duplicating the contents of the hard drive, determining the type and volume of information that was contained on the hard drive and issuing a report on its findings.
17. The data on the missing hard drive was saved in files with proprietary file extensions created by HNNE's document management system. Inside these files were TIF ("Tagged Image File") images that were scanned into the system.
18. HNNE represents that the images on the hard drive could only be viewed with appropriate viewing software.

19. HNNE represents that the data on the missing hard drive was randomly saved and not searchable. HNNE further represents that, because of the format of the data and the fact that data was randomly saved on the drive, HNNE could not readily determine the drive's content when it went missing. After Kroll recreated the missing hard drive, according to HNNE, the only way that it could have reviewed the images contained therein was to manually review page by page all twenty-seven million pages of images, which would have extended the amount of time necessary to identify and notify the members of HN's subsidiaries whose information was on the drive.

20. Accordingly, HNNE retained Navigant Consulting, Inc. ("Navigant"), to develop a computer program to mine the contents of the recreated drive for data necessary to identify and notify the members whose information was contained therein. Navigant's computerized process identified the majority of the documents on the recreated drive and the members of HN's subsidiaries referenced therein, but was not able to identify all such members referenced on the hard drive, necessitating further manual review which HNNE represents has now been completed.

21. HNNE and HN began mailing notice letters to Vermont residents whose PHI and PI was, or was reasonably believed to have been, contained on the hard drive on approximately November 30, 2009, more than six months after the drive was discovered missing.

22. The last notice letter to an affected Vermont resident was sent on approximately July 22, 2010.

23. No law enforcement agency requested that the consumer notice letters be delayed.

24. HNNE represents that it concluded there was a low risk of harm to Vermont residents because the data was randomly saved and not searchable, there were a large number of individuals referenced in the drive of which Vermont residents constituted a small percentage, it took HNNE approximately six (6) months to identify the majority of members referenced on the drive and no identity theft attributable to the loss of the hard drive has ever been brought to HN or HNNE's attention.

25. The November 30, 2009 notification letter to affected Vermont residents stated in part:

> The purpose of this letter is to inform you of a matter involving an unencrypted portable computer disk drive that was discovered missing from a Health Net office. The information on the disk drive is in the form of scanned images rather than raw data and covers the period from 2002 to mid-2009. Because of the nature of the files saved on this portable computer disk drive, we were initially unable to determine what information was on the disk drive. The investigation to make this determination was very lengthy and required a detailed forensic review by computer experts. However, we have now been able to determine that the disk drive contained your personal information such as your name, address, Social Security number and possibly your protected health and financial information.
>
> Fortunately, the files on the missing drive were not saved in a format that can be easily accessible and therefore, we believe the risk of harm to you is low.

26. To date, there is no evidence that any member of any HN subsidiary, including HNNE, has been victimized by fraud or identity theft as a result of the loss of the hard drive.

27. HNNE has provided credit monitoring services, credit restoration services, and up to $1 million dollars in personal internet identity insurance to all individuals referenced on the missing hard drive.

28. Since the date of this incident, HNNE has encrypted or will encrypt all external hard drives and other portable media used to transfer PHI or PI.

29. Since the date of this incident, HNNE has encrypted or will encrypt all desktop computers and hard drives of company laptops.

30. Since the date of this incident, HNNE has implemented or will implement technology that automatically logs all transfers and actual or attempted access of PHI and PI.

31. Since the date of this incident, HNNE has implemented or will implement a combination of hardware and software that resides between the email server and the email client that is designed to identify email or attachments containing PHI or PI and automatically encrypt email containing such identified information before transmission.

32. HNNE represents that it has spent in excess of $7 million dollars to remediate this incident for all affected members.

**Injunctive Provisions**

33. In addition to the remedial measures HNNE has and will undertake as set forth above, HNNE shall:

    a. Retain IBM as a third-party data security auditor to evaluate the extent to which HNNE's information security programs and practices ensure the

security, confidentiality, and integrity of PHI and PI and protect against future security breaches.

b. Provide the AG a written report that describes the auditor's assessment of HNNE's information security programs, describes the auditor's conclusions, identifies any of the auditor's recommended steps to improve HNNE's information security programs and practices, and identifies HNNE's plan for implementing the auditor's recommended steps.

c. Provide the AG an initial report outlined above by January 31, 2011, and a follow-up report by January 31, 2013. Each report shall be submitted to the AG consistent with the Notice provisions set forth below.

**Payment to the State**

34. HN and HNNE shall pay to the State of Vermont $55,000.00 (Fifty-Five Thousand Dollars), which shall be made payable to "The State of Vermont" and shall be provided by wire transfer in accordance with instructions provided by Vermont's counsel no later than five (5) business days after receipt by HN or HNNE of notice of entry of this Judgment.

**Release**

35. In exchange for the consideration set forth herein, the AG agrees to release HN and HNNE, their subsidiaries, affiliated entities and successors, and the officers, directors, members, agents, employees, and shareholders of each from all civil claims and causes of action for violations of the federal and state laws set forth in the Complaint, including any and all claims and causes of action for violations of

the federal and state laws alleged in the Complaint that the AG could have asserted or of which it was or is aware up to and including the effective date of this Judgment.

**Enforcement, Costs, and Liquidated Damages**

36. The terms of this Judgment shall be governed by the laws of the State of Vermont. The parties agree that the exclusive forum for resolving any disputes to enforce the terms of this Judgment shall be the United States District Court for the District of Vermont.

37. The AG shall not bring an action to enforce the terms of this Judgment until it has:

    a. provided notice to HN and/or HNNE that describes the manner in which the relevant entity is claimed to have violated the terms of the Judgment, and

    b. provided HN and/or HNNE a period of thirty (30) days from the date of the notice in which to cure the claimed violation.

38. The AG's obligation to provide notice and the right to cure under this section does not preclude the AG from seeking injunctive relief pursuant to the standards for obtaining such relief in this jurisdiction.

39. If the AG is required to commence a proceeding to enforce any provision of this Judgment, HN and/or HNNE agree to pay all reasonable costs and reasonable attorney's fees incurred in such enforcement in the event and to the extent that the AG prevails in any such enforcement action.

40. If the Court enters an order finding HN and/or HNNE to be in violation of paragraphs 33 and/or 34 of this Judgment, the parties agree that the penalty to be assessed by the Court shall be a minimum of $5,000.00 and a maximum of $10,000.00 for each violation of paragraphs 33 and/or 34.

**Notice**

41. Notices and reports to be provided under this Judgment shall be sent by nationally recognized overnight courier service or certified mail (return receipt requested) to the named party at the address below:

    a. If to HN and/or HNNE:

    Attorney Jeffrey L. Poston
    Crowell & Moring, LLP
    1001 Pennsylvania Ave, NW
    Washington, D.C. 20004-2595

    b. If to the AG:

    Sarah E.B. London
    Assistant Attorney General
    Vermont Attorney General's Office
    109 State Street
    Montpelier, VT 05609-1001

**General Provisions**

42. No waiver, modification, or amendment of the terms of this Judgment shall be valid or binding unless made in writing, signed by the party to be charged, and approved by this Court and then only to the extent set forth in such written waiver, modification, or amendment.

43. Failure by any party to this Judgment to insist upon the strict performance by any other party of any provision of this Judgment shall not be deemed a waiver of any

provisions of this Judgment, and such party, notwithstanding such failure, shall have the right thereafter to insist upon the performance of any and all provisions of this Judgment and the imposition of any applicable penalties for failure to comply.

44. If any clause, provision, or section of this Judgment is held to be illegal, invalid, or unenforceable, such illegality, invalidity, or unenforceability shall not affect any other clause, provision, or section of this Judgment, and this Judgment shall be construed and enforced as if such illegal, invalid, or unenforceable clause, section, or other provision had not been contained herein.
45. Nothing in this Judgment shall be construed as relieving HN and/or HNNE of the obligation to comply with all state and federal laws, regulations, or rules.
46. Nothing in this Judgment shall be construed as limiting the AG's right to obtain documents, records, testimony, or other information pursuant to any law, regulation, rule, or other legal authority.
47. Nothing in this Judgment shall be construed to waive the sovereign immunity of the State of Vermont or any of its officers, agencies, agents, employees, or anyone else authorized to act on behalf of the State.

SO ORDERED, ADJUDGED and DECREED.

Entered this 20 day of Jan, 2011

By the Court:

Presiding Judge

Date: 1/14/11

STATE OF VERMONT
ATTORNEY GENERAL
WILLIAM H. SORRELL

Sarah E.B. London
Assistant Attorney General
109 State Street
Montpelier, VT 05609-1001

Date: 1/11/11

Health Net, Inc.

Linda V. Tiano, President
Regional Health Plans

Date: 1/11/11

Health Net of the Northeast, Inc.

Linda V. Tiano, President

Judgment entered on docket
Date: January 21, 2010

**STATE OF VERMONT**
**SUPERIOR COURT**
**WASHINGTON UNIT**

**In re LOCAL AREA YELLOW PAGES, LLC )** **CIVIL DIVISION**
**Docket No.** 159-11-12 Wncv

## ASSURANCE OF DISCONTINUANCE

WHEREAS Local Area Yellow Pages, LLC, (hereinafter referred to as "LAYP"), is a California corporation with offices at 353 Sacramento Street, Suite 1500, San Francisco, CA;

WHEREAS LAYP is a third-party provider of internet access and a website address service to businesses, the charges for which are placed on local telephone bills with the assistance of a San Antonio-based company called Enhanced Services Billing, Inc. (ESBI);

WHEREAS LAYP solicited Vermont businesses over the telephone to purchase its service;

WHEREAS LAYP's charges to businesses averaged $ 34.95 per month;

WHEREAS during the period 2004 to 2010, LAYP charged over $51,000, net, to 375 businesses for its services that appeared on local telephone bills in Vermont's area code 802;

WHEREAS sellers of goods or services that are to be charged on a consumer's (including a business') local telephone bill are required under 9 V.S.A. § 2466 to mail a notice to the party to be charged, containing information specified in the statute;

WHEREAS while LAYP did provide to Vermont consumers who were to be charged for its services on their local telephone bills a notice of the charge as well as several emails reminding them of the order, the notice did not contain the address or telephone number of the Attorney General's Consumer Assistance Program;

WHEREAS, LAYP maintains that its customer service and liberal refund policy were available to all customers, including those in area code 802;

WHEREAS the Attorney General alleges that as a result, LAYP violated the notification requirement of the Vermont Consumer Protection Act, 9 V.S.A. § 2466;

WHEREAS the script used by LAYP's telemarketers stated at the outset, "We're doing an update on your business listing, so I'll need to confirm that all the contact details we have here is correct.";

WHEREAS in fact, one of the purposes of LAYP's calls was also to solicit the purchase of its service, which was explained later in the company's telemarketing script;

WHEREAS the Attorney General alleges that LAYP's script misrepresented the purpose of the company's sales calls, in violation of the Consumer Fraud Act prohibition on deceptive trade practices, 9 V.S.A. § 2453(a);

WHEREAS the Attorney General also alleges that LAYP violated the right-to-cancel provisions of 9 V.S.A. § 2454 and Vermont Consumer Fraud Rule 113 for telephonic sales by not providing its customers with proper notice of their right to cancel;

WHEREAS, LAYP has not admitted any violation of Vermont law;

AND WHEREAS the Attorney General is willing to accept this Assurance of Discontinuance pursuant to 9 V.S.A. § 2459;

THEREFORE, the parties agree as follows:

1. *Injunctive relief.* LAYP shall comply strictly with all provisions of Vermont law, including but not limited to provisions of the Vermont Consumer Fraud Act, 9 V.S.A. chapter 63, relating to the placement of charges on local telephone bills, the prohibition on deceptive trade practices, and the right to cancel a telephonic transaction.

2. *Consumer relief.*

a. For each business from which LAYP has received money through a charge on a local telephone bill with a number in area code 802 since June 1, 2006, LAYP shall, within ten (10) business days of signing this Assurance of Discontinuance, request through ESBI that an electronic credit record to the business' local telephone company in the amount of all such monies that have not been previously refunded. LAYP shall use due diligence to ensure that accurate credits are provided to each business to whom a credit is due.

b. If a credit record sent under the preceding paragraph is not accepted or is returned by the local telephone company, LAYP shall, within ten (10) days of learning of the non-acceptance or the return, send to the consumer, by first-class mail, postage prepaid, a check in the amount of the credit due to the business' last known address, accompanied by a letter in substantially the form attached as Exhibit 1.

c. No later than 60 (sixty) days after signing this Assurance of Discontinuance, LAYP shall provide to the Vermont Attorney General's Office the names and addresses of the businesses whose telephone numbers were credited, and to which letters and payments were sent, under this Assurance of Discontinuance, along with the date and amount of each credit or payment.

d. No later than ninety (90) days after signing this Assurance of Discontinuance, LAYP shall mail to the Vermont Attorney General's Office, 109 State Street, Montpelier, VT 05609, a single check, payable to "Vermont State Treasurer," in the total dollar amount of all checks that were returned as undeliverable or that went uncashed, to be treated as unclaimed funds, along with a list, in electronic Excel format on a compact disk, of the consumers whose checks were returned or were not cashed (which list shall set out the first



18.

and last names of the consumers in distinct fields or columns), and for each such consumer, the last known address and dollar amount due.

3. *Payment to the State.* Within twenty (20) days of signing this Assurance of Discontinuance, LAYP shall pay to the State of Vermont, in care of the Vermont Attorney General's Office, the sum of ten thousand dollars ($10,000.00) in reimbursement for fees and costs.

4. *Binding effect.* This Assurance of Discontinuance shall be binding on LAYP, its successors and assigns.

5. *Release.* The State of Vermont hereby releases and discharges any and all claims that it may have against LAYP, Baldwin Yung, Chris Wuuhwei Chen, Boaz Yung, Carlington HK Limited, Dicken Yung, and Bruce Baker, for the conduct relating to LAYP described in this Assurance of Discontinuance.

6. *Admissibility/Effect.* Nothing in this Assurance of Discontinuance may be used or admitted as evidence or as an admission in any adverse proceeding or action relating to LAYP nor shall it be construed to limit LAYP's right to assert any legal, factual or equitable defense in any pending or future proceeding, except with respect to enforcement of this Assurance of Discontinuance.

Date: 11/1/12

STATE OF VERMONT

WILLIAM H. SORRELL
ATTORNEY GENERAL

by: _____
Elliot Burg
Assistant Attorney General

Date: 10/29/12

Local Area Yellow Pages, LLC

by: _____
Its Authorized Agent

APPROVED AS TO FORM:

_____
Elliot Burg
Assistant Attorney General
Office of Attorney General
109 State Street
Montpelier, VT 05609
For the State of Vermont

_____
Andrew B. Lustigman, Esq.
Olshan Frome Wolosky LLP
Park Avenue Tower
65 East 55th Street
New York, NY 10022
For Local Area Yellow Pages, LLC

**Exhibit 1 (Letter to Consumers)**

Dear [Name of Consumer]:

Under a settlement with the Vermont Attorney General's Office, we are enclosing a check to reimburse you for charges by our company, Local Area Yellow Pages, LLC, that appeared on your local telephone bill. If you have any questions about the settlement, you may contact the Attorney General's Office at 802-828-5507.

Sincerely,

Local Area Yellow Pages, LLC

STATE OF VERMONT

SUPERIOR COURT
Washington Unit

CIVIL DIVISION
Docket No. Wncv

STATE OF VERMONT,
Plaintiff,

v.

GAETAN MARCHESSAULT and
MARY JANE MARCHESSAULT,
Defendants.

**CONSENT DECREE, FINAL ORDER AND JUDGMENT**

To resolve the allegations in the Complaint filed in the above captioned matter, the parties, the State of Vermont and Defendants Gaetan Marchessault and Mary Jane Marchessault, stipulate and agree to the following:

1. Defendants no longer own the 76-78 Archibald Street property ("the property").
2. Defendants shall fully and timely comply with the requirements of the Vermont lead law, 18 V.S.A., Chapter 38, as long as they maintain any ownership interest in any pre-1978 residential housing in which they have or acquire an ownership interest or provide property management services (unless by property management contract Defendants are explicitly not responsible for EMPs).

**PAYMENT**

3. Defendants shall pay the sum of ten thousand dollars ($10,000.00) in civil penalties to the State of Vermont for the filing of a false Essential Maintenance Practices Compliance Statement for the property in April 2011 and to resolve the other allegations of the Complaint.

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**109 State Street**
**Montpelier, VT 05609**

4. Based on Defendants' demonstrated inability to pay the penalty listed in the preceding paragraph and upon a review of financial information provided to the State by Defendants, the State agrees to accept a reduced penalty of two thousand dollars ($2,000.00) provided that if it is determined that the financial information provided by Defendants is different in any material respect, the Attorney General may seek to impose the full penalty agreed to in paragraph 3.

5. Payment shall be made to the "State of Vermont" and shall be sent to the Attorney General's Office at the following address: Jessica Mishaan, Legal Assistant, Office of the Attorney General, 109 State Street, Montpelier, VT 05609-1001. The payment may be made in four installments as follows: (a) five hundred dollars ($500.00) shall be due upon Defendants' signature of this Consent Decree; (b) five hundred dollars ($500.00) shall be due no later than June 30, 2012; (c) five hundred dollars shall be due no later than December 31, 2012; and (d) five hundred dollars ($500.00) shall be due no later than June 30, 2013.

**OTHER RELIEF**

6. Nothing in this Consent Decree in any way affects the obligations of current or future owners of the property under Vermont law, including under the Vermont lead law.

7. Nothing in this Consent Decree in any way affects Defendants' other obligations under state, local, or federal law.

8. Any future failure by Defendants to comply with the Vermont lead law at any other properties referenced through this Consent Decree shall be subject to additional

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penalties of no less than one thousand dollars ($1,000.00) per violation per day for each day the violation exists.

9. In addition to any other penalties which might be appropriate under Vermont law, any future failure by Defendants to comply with the terms of this Consent Decree, shall be subject to a liquidated civil penalty in the amount of ten thousand dollars ($10,000.00) and additional penalties of no less than one thousand dollars ($1,000.00) per violation of the Consent Decree, per day for each day the violation exists.

**STIPULATION**

Defendants Gaetan Marchessault and Mary Jane Marchessault acknowledge receipt of and voluntarily agree to the terms of this Consent Decree and waive any formal service requirements of the Complaint, Consent Decree, Order and Final Judgment.

DATED at Burlington, Vermont this 6th day of December, 2011.

Gaetan Marchessault
Gaetan Marchessault

DATED at Burlington, Vermont this 6th day of December, 2011.

Mary Jane Marchessault
Mary Jane Marchessault

**Office of the ATTORNEY GENERAL 109 State Street Montpelier, VT 05609**

ACCEPTED on behalf of the State of Vermont:

DATED at Montpelier, Vermont this 12th day of December, 2011.

STATE OF VERMONT

WILLIAM H. SORRELL
ATTORNEY GENERAL

By: _____

Robert F. McDougall
Assistant Attorney General
Office of the Attorney General
109 State Street
Montpelier, Vermont 05609
802.828.3186

**Office of the ATTORNEY GENERAL 109 State Street Montpelier, VT 05609**

**DECREE, ORDER AND FINAL JUDGMENT**

This Consent Decree is accepted and entered as a Decree, Order and Final Judgment of this Court in the matter of: *State of Vermont v. Gaetan Marchessault and Mary Jane Marchessault*, Docket No._____ Wncv.

SO ORDERED.

DATED at Montpelier, Vermont this _____ day of _____, 2011.

_____
Washington Superior Court Judge

**Office of the ATTORNEY GENERAL 109 State Street Montpelier, VT 05609**

STATE OF VERMONT

2011 JUL 11 P 4:06

SUPERIOR COURT
Washington Unit

CIVIL DIVISION
Docket No. 430-7-11 Wncv

proposed

STATE OF VERMONT,
Plaintiff,

v.

MARY FERNANDEZ
Defendant.

FILED
2011 JUL 13 P 2:32

**STIPULATION OF SETTLEMENT AND CONSENT DECREE**

To resolve the allegations in the Complaint filed in the above captioned matter, Plaintiff State of Vermont and Defendant Mary Fernandez (hereinafter "Defendant") stipulate and agree to the following:

1. Defendant shall complete all essential maintenance practices ("EMPs") at the five properties listed in Attachment A of the Complaint ("the properties") as follows:

   a. Any EMP work necessary at the properties will be completed by an individual who is certified by the Vermont Department of Health to perform EMPs.

   b. Priority for completion of EMPs at the properties shall be given to any properties where children are known to reside, particularly if the children are age 6 or younger.

   c. Defendant shall immediately ensure that access to exterior surfaces and components of the properties with lead hazards and areas directly below the deteriorated surfaces are clearly restricted as described in 18 V.S.A. § 1759(a)(3).

   d. Not later than July 28, 2011, Defendant shall complete all **interior** EMPs required by the lead law, including window well inserts, at all of the units of the properties where children age 6 or younger reside, believed to be three units total. Defendant

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shall also provide the Attorney General's Office with a written update as to the progress of interior EMP completion at all of the remaining properties.

e. Not later than August 21, 2011, Defendant shall complete all **interior** EMPs required by the lead law at the remaining units of all properties, including window well inserts unless the windows have been replaced with vinyl windows by this time.

f. Defendant shall provide written confirmation of completion of the interior EMPs to: Robert F. McDougall, Assistant Attorney General, Office of the Attorney General, 109 State Street, Montpelier, Vermont 05609. Written confirmation shall be provided no later than ten days after the dates specified in paragraphs 1(d) and (e).

g. Not later than August 31, 2011, Defendant shall complete all **exterior** EMPs required by the lead law at all of the properties.

h. Not later than September 10, 2011, Defendant will file with the Vermont Department of Health and with Defendants' insurance carrier, and will give a copy to an adult in each rented unit of any of the properties, a completed EMP compliance statement for each of the properties, and will also provide a copy of the completed EMP compliance statement to the Office of the Attorney General at the address provided in paragraph 1(f).

2. Defendant shall not rent, or offer for rent, any unit which becomes vacant in a property that is not EMP compliant until such time as the EMP work is complete and the EMP compliance statement is distributed as described above.

3. Defendant will endeavor in good faith to comply with the terms and conditions of this Consent Decree. In the event that Defendant wishes to extend any of the compliance dates by agreement with the Attorney General's Office, the Attorney General's Office will

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exercise good faith and consider such request, provided that such request is made no later than 10 days in advance of the dates specified in this Consent Decree.

4. Defendant shall fully and timely comply with the requirements of the Vermont lead law, 18 V.S.A., Chapter 38, as long as the Defendant maintains any ownership or property management service interest in the properties and in any other pre-1978 rental housing in which the Defendant acquires an ownership interest.

**PENALTIES**

5. Defendant shall pay two thousand five hundred dollars ($2,500.00) in civil penalties to the State of Vermont. Payment shall be made to the "State of Vermont" and shall be sent to the Attorney General's Office at the address listed in paragraph 1(f). The payment shall be due at the time this document is executed by Defendant.

6. In addition to the payment described in paragraph 5, Defendant shall expend at least five thousand dollars ($5,000.00), including the actual cost of materials and the actual (or if the work is done by employees of Defendant, the reasonable) cost of labor, on any or all of the following lead hazard reduction improvements at any of the properties or in any other pre-1978 rental housing in which Defendant acquires an interest:

a. Replacement of painted windows;

b. Replacement of painted doors;

c. Covering of painted exterior walls with siding; and

d. Replacement or covering of interior or exterior (including porch) floors and stairs with permanent carpeting or other permanent floor covering;

*provided that* the building component in question was installed and first painted before 1978; *and further provided that* Defendant may submit for prior approval

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other potential lead hazard reduction improvements (e.g. soil coverage) to the Attorney General's Office, which shall have complete discretion to determine whether the improvements count toward the required expenditure.

7. Defendant shall provide written documentation of the expenditures to the Attorney General's Office at the address provided in paragraph 1(f) by August 15, 2011.

**OTHER RELIEF**

8. Defendant may not sell any of the properties unless all obligations in paragraphs 1, 5, 6 and 7 have been completed or this Consent Decree is amended in writing to transfer to the buyer or other transferee all remaining obligations.

9. Transfer of ownership of any of the properties shall be consistent with Vermont law, including the provisions of 18 V.S.A. § 1767 specifically relating to the transfer of ownership of pre-1978 rental housing.

10. This Consent Decree shall not affect marketability of title.

11. Nothing in this Consent Decree in any way affects Defendant's other obligations under state, local, or federal law.

12. If Defendant shall, at any time in the future, fail to comply with the terms and conditions of this Consent Decree, then each future failure of Defendant to comply with the terms and conditions of this Consent Decree shall constitute a separate civil action for which the State of Vermont may pursue additional civil penalties beyond the civil penalty outlined herein.

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**STIPULATION**

Defendant Mary Fernandez acknowledges receipt of and voluntarily agrees to the terms of this Consent Decree and waives any formal service requirements of the Complaint, Consent Decree, and Decree, Order and Final Judgment.

DATED at Montpelier, Vermont this 6 day of July, 2011.

Mary Fernandez

Approved as to form:

DATED at Montpelier, Vermont this 7th day of July, 2011.

Michael Popowski, Esq.

ACCEPTED on behalf of the State of Vermont:

DATED at Montpelier, Vermont this 11th day of July, 2011.

STATE OF VERMONT

WILLIAM H. SORRELL
ATTORNEY GENERAL

By: Robert F. McDougall
Assistant Attorney General
Office of the Attorney General
109 State Street
Montpelier, Vermont 05609

Office of the
ATTORNEY
GENERAL
109 State Street
Montpelier, VT
05609

**DECREE, ORDER AND FINAL JUDGMENT**

This Consent Decree is accepted and entered as a Decree, Order and Final Judgment of this Court in the matter of: *State of Vermont v. Mary Fernandez*, Docket No. 430-7-11 Wncv.

SO ORDERED.

DATED at Montpelier, Vermont this 13 day of July, 2011.

Washington Superior Court Judge

Office of the
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109 State Street
Montpelier, VT
05609

**UNITED STATES DISTRICT COURT**
**FOR THE**
**DISTRICT OF VERMONT**

| | |
|---|---|
| MYINFOGUARD, LLC, NATIONWIDE ASSIST, LLC, SOLO COMMUNICATIONS, LLC, TOTAL PROTECTION PLUS, LLC, UNITED COMMUNICATIONS LINK, LLC, VOICEXPRESS, INC, CONTACT MESSAGE SYSTEMS, LLC, NATIONS 1ST, COMMUNICATIONS, LLC, NEW LINK, NETWORK, LLC, NATIONS VOICE PLUS, LLC, BLVD NETWORK, LLC, COAST TO COAST VOICE, LLC, EMERGENCY ROADSIDE VOICEMAIL, LLC, METELINE TECH, INC, ROADSIDE PAL, LLC, SELECTED, SERVICES INC, SELECTED OPTIONS, INC, TRIVOICE INTERNATIONAL, LTD, USA VOICE MAIL, INC, and VOXTRAIL, LTD,<br><br>Plaintiffs,<br><br>v.<br><br>WILLIAM H. SORRELL, in his official capacity as Attorney General of the State of Vermont, PETER SHUMLIN in his official capacity as Governor of the State of Vermont, and ELLIOT M. BURG in his individual capacity,<br><br>Defendants. | Case no. 2:12-cv-074 |
| * * * * * * * | * * * * * * * |
| STATE OF VERMONT,<br><br>Plaintiff,<br><br>v.<br><br>MYINFOGUARD, LLC, NATIONWIDE ASSIST, LLC, SOLO | Case no. 2:12-cv-102 |

COMMUNICATIONS, LLC, TOTAL :
PROTECTION PLUS, LLC, UNITED :
COMMUNICATIONS LINK, LLC, :
VOICEXPRESS, INC, CONTACT :
MESSAGE SYSTEMS, LLC, NATIONS :
1ST, COMMUNICATIONS, LLC, NEW :
LINK, NETWORK, LLC, and NATIONS :
VOICE PLUS, LLC, BETTY STEWART, :
ROBERT POITRAS, DENNIS :
KALLIVOKAS, GEORGE LUTICH, :
NICHOLAS DELCORSO, NEIL :
WILLIAMS, LUIS A. RUELAS, :
CHARLES R. DARST, SCOTT A. :
LUCAS, BRYAN GLAUS, VINCENT :
DELCORSO, JOSEPH MARINUCCI, :
NICHOLAS KALLIVOKAS, DADATA, :
INC., ENHANCED SERVICES BILLING, :
INC., and ILD CORP, :
:
Defendants. :

**OPINION AND ORDER**

These cases concern two provisions of Vermont's since-amended Consumer Protection Act ("CPA"), Vt. Stat. Ann. tit 9 § 2451 *et seq* (West 2012). Section 2453 contains a general prohibition of all "[u]nfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce." Meanwhile, section 2466 (amended as of May 27, 2011) required that companies wishing to charge consumers on their local telephone bills notify them of the charges by first-class mail.

For the last two years, the State of Vermont has been investigating U.S. companies for practices that violate its consumer protection laws and regulations, which include charging consumers for telephone services without consumers'

authorization (a practice known as "cramming"), failing to comply with notification requirements, and other unfair practices. On April 17, 2012, while the parties were engaged in initial settlement discussions, ten of those companies[1] located in Florida and New York (collectively, "the Sellers") filed a suit (No. 12-cv-74 or "case 74") in this Court challenging the constitutionality of section 2466 (the notification provision) on Commerce Clause, equal protection, and First Amendment grounds. Two days later, on the ninteenth, the State of Vermont filed a civil enforcement action in Washington Superior Court against the Sellers, thirteen related individuals, and three other companies for alleged violations of sections 2453 and 2466. On May 14, 2012, the Sellers filed notice that they were removing the state enforcement action to this Court (No. 12-cv-102 or "case 102"). Two days later on the sixteenth, the Sellers filed a First Amended Complaint in case 74 in which they added ten additional corporations as plaintiffs[2] as well as a new

[1] The ten corporations are MyInfoGuard, LLC; Nationwide Assist, LLC; Solo Communications, LLC; Total Protection Plus, LLC; United Communications Link, LLC; VoiceXpress, Inc.; Contact Message Systems, LLC; Nations 1st Communications, LLC; New Link Network, LLC; and Nations Voice Plus, LLC.

[2] The parties in the First Amended Complaint are Blvd Network, LLC; Coast to Coast Voice, LLC; Emergency Roadside Voicemail, LLC; Meteline Tech, Inc.; Roadside Pal, LLC; Selected Services, Inc.; Selected Options, Inc.; TriVoice International, Ltd.; USA Voice Mail, Inc.; and Voxtrail, Ltd. None of these corporations are parties to the State's CPA enforcement action.

claim alleging that Assistant Attorney General ("AAG") Burg, the lead attorney for the State in both cases, had violated the Sellers' constitutional rights in violation of 42 U.S.C. § 1983.

In a separate state action, five of the new plaintiff corporations sought to quash civil administrative subpoenas issued by the Attorney General on the grounds that any continuing investigation should be conducted under the auspices of federal discovery in case 74. On October 19, Superior Court Judge Bent denied this request. *See* case 74 ECF No. 30.

Multiple motions are pending before the Court: (1) AAG Burg's Motion to Dismiss the Sellers' section 1983 claim in case 74, (case 74 ECF No. 16); (2) the State's Motion to Remand case 102 on the grounds that it was improperly removed, (case 102 ECF No. 44); (3) Motions to Dismiss the State's CPA claims in case 102, (case 102 ECF Nos. 58, 59, 80); (4) the Attorney General's Motion to Dismiss case 74 under the abstention doctrine recognized in *Younger v. Harris*, 401 U.S. 37 (1971), (case 74 ECF No. 7); and (5) the Sellers' Motion to Stay proceedings in Washington Superior Court relating to investigative subpoenas sought by the Attorney General (case 74 ECF No. 25 (cross-filed as case 102 ECF No. 101).

For the reasons stated below, the Court **grants** AAG Burg's Motion to Dismiss Count V of the case 74 Complaint; **dismisses**

the remainder of case 74 on *Younger* abstention grounds; and **remands** case 102 to the Washington Superior Court for further proceedings. The Court also **denies as moot** the Motions to Dismiss the CPA claims as well as the Motion to Stay additional state proceedings.

## Discussion

### I. The § 1983 Claim Against AAG Burg

Count V of the First Amended Complaint ("Complaint") in case 74 asserts a § 1983 claim for monetary damages against AAG Burg in his personal capacity. The Sellers allege that AAG Burg violated their constitutional rights by drafting the pre-2011 version of § 2466; enforcing that provision despite being aware that its constitutionality was questionable after the Second Circuit's decision in *IMS Health, Inc. v. Sorell*, 630 F.3d 263 (2d Cir. 2010); testifying before the Vermont Legislature in favor of a replacement for section 2466; and otherwise improperly using his powers to investigate violations of the provision and to pursue civil cases against the Sellers and other corporations. *See* case 74 ECF No. 19 at *3-8. AAG Burg seeks to dismiss this claim because he is protected by absolute immunity for his official actions as an AAG. *See Imbler v. Pachtman*, 424 U.S. 409, 419 n.13 (1976) ("An absolute immunity defeats a suit at the outset, so long as the official's actions

were within the scope of the immunity."); *Shmueli v. City of New York*, 424 F.3d 231, 236 (2d Cir. 2005) (Where the nature of the function being performed by the defendant official is clear from the face of the complaint, "the absolute immunity defense may be resolved as a matter of law on a motion to dismiss the complaint pursuant to Rule 12(b)(6).").

Absolute immunity extends to government officials performing functions "analogous to those of a prosecutor." *Butz v. Economou*, 438 U.S. 478, 515 (1978); *Cornejo v. Bell*, 592 F.3d 121, 127-28 (2d Cir. 2010) ("This Court has previously extended absolute immunity to state and federal officials initiating noncriminal proceedings such as administrative proceedings and civil litigation."). The purpose of such immunity is to protect government attorneys from fear of intimidation or harassment when they are advocating for the state. *See Butz*, 436 U.S. at 512. In determining whether a particular official is entitled to absolute immunity, courts focus on the functions performed by that official. Trial conduct as well as actions taken in preparation or in anticipation of litigation are generally afforded absolute immunity; however, a "prosecutor's administrative duties and those investigatory functions that do not relate to an advocate's preparation for the initiation of a prosecution or for judicial proceedings are not entitled to

absolute immunity." *Buckley v. Fitzsimmons*, 509 U.S. 259, 273 (1993). Absolute immunity is inapplicable in situations where a government attorney acts beyond the scope of his or her authority or in the "'clear absence of all jurisdiction.'" *Doe v. Philips*, 81 F.3d 1204, 1210 (2d Cir. 1996) (quoting *Stump v. Sparkman*, 435 U.S. 349, 357 (1978)).

There is little question that AAG Burg was acting as the functional equivalent of a prosecutor while he was investigating potential violations of the CPA to determine whether to file civil enforcement actions. Issuing civil investigative subpoenas, threatening enforcement actions, engaging in settlement discussions, and filing a state court action are all related to the Attorney General's preparation for litigation. *Accord McCormick v. City of Lawrence, Kan.*, 253 F. Supp. 2d 1172, 1204-05 (D. Kan. 2003); *Brewer v. Hill*, 453 F. Supp. 67, 69 (N.D. Tex. 1978). It is also quite clear that when AAG Burg took these actions, he was acting within the scope of his authority under Vermont law. *See generally* Vt. Stat. Ann. tit. 3 §§ 152, 157 (authorizing the Attorney General to prepare and try civil and criminal matters at common law, as allowed by statute, and also those in which the state is a party); *id.*, § 153 (allowing the appointment of a Deputy Attorney General and Assistant Attorney Generals); Vt. Stat. Ann. tit. 9 §§ 2458-60

(authorizing the Attorney General to investigate and enforce Vermont's consumer protection laws). Nor is this a case in which the AAG acted without authority by, for example, enforcing a provision that was invalidated by a prior court judgment or abrogated by a superseding statute. The AAG does not retroactively lose authority to enforce the notification requirement simply because the Sellers have raised potentially valid constitutional objections.

AAG Burg's legislative activities present a different question because drafting legislation and providing testimony are not analogous to the functions of a prosecutor, even if Vermont law requires the Attorney General and his subordinates to perform these tasks. *See* Vt. Stat. Ann. tit. 3 § 158. Nonetheless, a different form of protection, absolute legislative immunity, attaches to all actions taken "in the sphere of legitimate legislative activity." *Bogan v. Scott-Harris*, 523 U.S. 44, 54 (1998) (quoting *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951)). This immunity shelters from suit non-legislative officials who perform legislative functions, such as drafting or otherwise shaping legislation. *See id.* at 55; *State Employees Bargaining Coal v. Rowland*, 494 F.3d 71, 82 (2d Cir.

2007). For this reason, AAG Burg is also entitled to absolute immunity for his role in drafting section 2466.[3]

Because AAG Burg is entitled to absolute immunity for enforcing the CPA and testifying before legislature, the Court dismisses the Sellers' § 1983 claim against AAG Burg for failure to state a claim upon which relief can be granted. *See* Fed. R. Civ. P. 12(b)(6).

**II. The State's Motion to Remand Case 102**

According to the State, removal of case 102 was improper, and this Court should remand that action to the Washington Superior Court. *See* 28 U.S.C. § 1447(c). An action filed in state court may be removed to federal court "only if the case originally could have been filed in federal court." *Marcus v.*

[3] Whether AAG Burg is entitled to absolute immunity for his 2011 testimony in favor of amending the notification provision is a closer question. While absolute immunity from section 1983 claims attaches to a witness' testimony in judicial proceedings, *see, e.g.*, *Rehberg v. Paulk*, 132 S. Ct. 1497, 1503 (2012) (extending absolute immunity to grand jury testimony), it has never been extended to the legislative context. *See, e.g.*, *United States v. Philip Morris USA, Inc.*, 337 F. Supp. 2d 15, 27 (D.D.C. 2004) ("While the common law provides absolute immunity for witnesses in *judicial* proceedings in order to encourage candor without fear of prosecution, the immunity in *legislative* proceedings extends only to actions for defamation or libel.") (emphasis in original) (unaffected by subsequent amendment, No. CIVA 99-2496 GK, 2004 WL 5370172 (D.D.C. Aug. 10, 2004)). The Court need not resolve this issue, though, because the Sellers do not allege that AAG Burg's testimony about the withholding provision constituted a violation of their constitutional rights; rather, they merely cite his testimony as evidence of the withholding provision's questionable validity.

*AT&T Corp*, 138 F.3d 46, 51 (2d Cir. 1998) (citing 28 U.S.C. § 1441(a)).

The Sellers claim that there are three bases on which this Court may assert original jurisdiction over case 102: ordinary diversity jurisdiction under 28 U.S.C. § 1332(a); the "mass action" provision of the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1332(d)(1); and the "class action" provision of CAFA, 28 U.S.C. § 1332(d)(2)-(10). The State contends that the Sellers fail to show that there is original jurisdiction on any of these grounds. First, the State argues, correctly, that it is not a citizen for the purpose of diversity jurisdiction. *Moor v. County of Alameda*, 411 U.S. 693, 717 (1973) ("There is no question that a State is not a 'citizen' for the purposes of the diversity jurisdiction."). Second, the State notes that both the class action and mass action prongs of CAFA require at least 100 members or parties. *See* 28 U.S.C. § 1331(d)(5)(B), (d)(11)(B)(i). Because the State is the sole plaintiff in the enforcement action, the State argues that the Sellers cannot establish that the numerosity requirements of CAFA are met. The Sellers respond by noting that this Court must look beyond the face of the complaint and determine whether there is jurisdiction based on the citizenship of the "real and substantial parties to the controversy," who in their view are

the affected consumers and their telephone providers. *Navarro Sav. Ass'n v. Lee*, 446 U.S. 458, 460 (1980). The fundamental dispute, then, is whether the State or the group of consumers subjected to cramming is the real party in interest in this case. If those consumers, who number over one thousand, are the real parties in interest, then the Sellers will have little difficulty satisfying the numerosity requirements of CAFA and may also be able to show complete diversity for the purposes of section 1332(a).

With respect to both section 1332(a) and CAFA, federal courts are in general agreement that "a crucial distinction must be made between a plaintiff who sues *solely* in his capacity as an agent, on the one hand, and, on the other, a plaintiff who sues not only as an agent, but also as an individual who has his own stake in the litigation." *Oscar Gruss & Son, Inc. v. Hollander*, 337 F.3d 186, 194 (2d Cir. 2003) (emphasis added). However, there is a circuit split regarding the approach courts should apply when determining whether a State is a real party in interest in a *parens patriae* action. The Fifth Circuit has adopted a "claim-by-claim" analysis, which despite its name actually requires a court to consider whether a party will benefit from each form of relief requested. *See Louisiana ex rel. Caldwell v. Allstate Ins. Co.*, 536 F.3d 418, 430 (5th Cir.

2008). The Fourth, Seventh, and Ninth Circuits, on the other hand, apply a wholesale approach, which requires consideration of the complaint in its entirety. *See AU Optronics Corp. v. South Carolina*, No. 11-254, 11-255, 2012 WL 5265799 at *6 (4th Cir. Oct. 25, 2012); *LG Display Co., Ltd. v. Madigan*, 665 F.3d 768, 773 (7th Cir. 2011); *Nevada v. Bank of Am. Corp.*, 672 F.3d 661, 671 (9th Cir. 2012).[4] This disagreement stems in part from the relatively recent adoption of CAFA, which Congress enacted to expand the scope of class actions that would be litigated in federal court and thereby prevent class-action plaintiffs from forum-shopping. *See generally* Dwight R. Carswell, Comment, *CAFA and* Parens Patriae *Actions*, 78 U. Chi. L. Rev. 345, 349-53 (2011).

This Court adopts the wholesale approach. Although the enactment of CAFA was meant to expand federal court jurisdiction over class actions, it does not follow that "federal courts are required to deviate from the traditional 'whole complaint' analysis when evaluating whether a State is the real party in interest in a *parens patriae* case." *LG Display Co., Ltd.*, 665 F.3d at 776-77 (quoting *In re TFT-LCD (Flat Panel) Antitrust*

[4] The Second Circuit has yet to decide this question, but a district court in Connecticut has joined the Fourth, Seventh, and Ninth Circuits in applying the wholesale approach. *See*; *Connecticut v. Moody's Corp.,* No. 10-CV-546, 2011 WL 63905 at *3-4 (D. Conn. Jan. 5, 2011).

*Litig*, No. C 07-1927, 2011 WL 560593 (N.D. Cal. Feb. 15, 2011)); *see also Ford Motor Co. v. Dep't of Treasury of State of Indiana*, 323 U.S. 459, 464, (1945) ("[T]he nature of a suit as one against the state is to be determined by the essential nature and effect of the proceeding.") overruled on other grounds by *Lapides v. Bd. of Regents of the Univ. Sys. of Ga.*, 535 U.S. 613 (2002). Indeed, the Supreme Court has counseled that restraint is particularly suitable in the removal context in light of its longstanding policy of strictly construing the statutory procedures for removal (*see Syngenta Crop Protection, Inc. v. Henson*, 537 U.S. 28, 32 (2002)), as well as the sovereignty concerns raised by asserting federal jurisdiction over cases brought by states in their own courts. *See Franchise Tax. Bd. V. Constr. Laborers Vacation Trust*, 463 U.S. 1, 21 n.22 (1983) ("[C]onsiderations of comity make us reluctant to snatch cases which a State has brought from the courts of that State, unless some clear rule demands it.").

The State seeks three remedies under the public enforcement provision of the CPA, Vt. Stat. Ann. tit. 9 § 1458: (1) a permanent injunction prohibiting Defendants from engaging in unfair business practices; (2) civil penalties of up to $10,000 for each violation of the act; and (3) full restitution to all Vermont customers who paid money to Defendants through charges

on their local telephone bills. *See* case 102 ECF No. 9 (Consumer Fraud Complaint) at *31. Under the CPA, only the State may seek civil penalties or injunctive relief restraining a particular practice or corporation on a statewide basis. By contrast, the private action provision of the CPA merely authorizes monetary damages, attorney's fees, exemplary damages up to three times the value of the consideration given to the consumer, as well as "appropriate equitable relief."[5] Vt. Stat. Ann. tit. 9 § 2461(b); *see also Gramatan Home Investors Corp. v. Starling*, 470 A.2d 1157, 1161 (Vt. 1983) (explaining that consumers cannot seek a civil penalty under section 2461(b)).

Applying the wholesale approach, the Court finds that the state is a real party in interest in its enforcement action. The fact that the State seeks civil penalties and a statewide injunction against cramming—remedies unavailable to consumers—leaves no doubt that the State has concrete interests in the litigation; put simply, the benefits of those remedies flow to the State as a whole. *Accord Connecticut v. Moody's Corp.,* No. 10-CV-546, 2011 WL 63905 at *3-4 (D. Conn. Jan. 5, 2011);

[5] Consumers entitled to "appropriate equitable relief" might be able to secure an injunction against an offending corporation; however, there does not appear to be a single instance in which an injunction has been granted under the private action component of the CPA. The Vermont Supreme Court has made clear in other contexts that the issuance of an injunction is an extraordinary remedy that is unwarranted where monetary damages will suffice. *See, e.g., Okemo Mountain, Inc. v. Town of Ludlow*, 762 A.2d 1219, 1227 (2000).

*Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Cavicchia*, 311 F. Supp. 149, 155 (S.D.N.Y. 1970) (quoting *Missouri, K. & T. Ry. Co. of Kansas v. Hickman*, 183 U.S. 53, 59 (1901) ("It may be fairly held that the State is such [a] real party [in interest] when the relief sought is that which enures to it alone, and in its favor the judgment or decree, if for the plaintiff, will effectively operate.")). The fact that the State also seeks restitution for Vermont consumers specifically affected by cramming practices does not undermine the State's broader interest in its case. *Accord Hood v. AstraZeneca Pharmas., LP*, 744 F. Supp. 2d 590, 596 (N.D. Miss. 2010) ("The fact that another party may benefit from a favorable resolution of this case does not minimize or negate the State's substantial interest.").

The Sellers argue that the civil penalty and injunction portions of the case 102 Complaint are irrelevant to the determination of whether the State is the real party at interest because under their reading of the CPA, the injunction and civil penalty provisions are facially inapplicable in this case.[6] *See Louisiana ex. rel Caldwell*, 536 F.3d at 424-25 ("'Defendants may pierce the pleadings to show that the . . . claim has been

[6] In making this argument, the Sellers incorporate the portions of ESBI's Motion to Dismiss (case 102 ECF No. 58) that address this issue. *See* Case 102 ECF No. 72 at *7 n.4.

fraudulently pleaded to prevent removal.'") (quoting *Burchett v. Cargill, Inc.*, 38 F.3d 170, 175 (5th Cir. 1995)). The Sellers note that they voluntarily ceased cramming prior to this litigation and that in any event, the recent amendment of the notification provision prohibits most third-party charges to Vermont telephone customers anyway. They then suggest that Vt. Stat. Ann. tit. 9 § 2458 only authorizes the State to seek injunctive relief for prospective violations of the CPA and that the State may not seek civil penalties unless a potential defendant has violated the terms of an *existing* injunction.[7]

In the woods of statutory interpretation, this Court may occasionally be convinced to take a road less traveled, but by advancing a rather tortured construction of the CPA, the Sellers are essentially asking the Court to bushwhack. First, the Sellers rely heavily on a hyper-textual reading of the first clause in section 2458(a), which permits state attorneys to file an action in the name of a state when they have reason to believe that a person "*is using* or *is about to use*" an unlawful practice. *Id*. (emphasis added). But it strains credulity to

[7] Contrary to the Sellers' representations, the Vermont Supreme Court did not demarcate the scope of the Attorney General's authority to take action against past conduct in *State of Vermont v. International Collection Service, Inc.*, 594 A.2d 426 (Vt. 1991); the Court merely determined that the Attorney General could take action in cases where businesses rather than consumers were victimized by unfair or deceptive acts. *Id*. at 432.

think that the Vermont legislature intended these words to allow persons or companies to avoid a lawsuit by simply ceasing unlawful activity. *See State of Vermont v. Custom Pools*, 556 A.2d 72, 74 (Vt. 1988) (explaining that the Court must give "meaning and effect" to the purpose of section 2458—protecting the public from unfair or deceptive acts or practices). Such a rule would provide potential defendants with a comically easy way to avoid suits by the State, and it would also be inconsistent with section 2458(b), which authorizes remedies—including civil penalties and restitution—that are meant to address past, not future harms. Indeed, injunctive relief is often warranted precisely because the circumstances of a particular case strongly suggest that past violations of law are likely to continue, even where a party has voluntarily suspended the activity in question. *See, e.g., Sec. & Exch. Comm'n v. Manor Nursing Centers, Inc.*, 458 F.2d 1082, 1100 (2d Cir. 1972) ("The critical question for a district court in deciding whether to issue a permanent injunction in view of past violations is whether there is a reasonable likelihood that the wrong will be repeated.").

In addition, section 2459 allows the Attorney General to accept an "assurance of discontinuance" of unfair or deceptive practices in any case where the Attorney General had the

authority to institute an action under section 2458, while section 2460 permits the Attorney General to issue civil investigative subpoenas for past violations of the CPA. Both of these provisions would be rendered superfluous if, as the Sellers claim, the Attorney General had no ability to file an action without reasonable belief of an ongoing or prospective violation.

The Sellers also ask this Court to read section 2461, which permits a civil penalty of $10,000 for each violation of an injunction order, as imposing a limitation on section 2458(b), which provides that state attorneys may request other forms of relief in addition to injunctive relief, including "the imposition of a civil penalty of not more than $10,000.00 for each violation." A plain reading of these provisions suggests that they govern separate circumstances: section 2458(b) allows civil penalties and injunctive relief (along with other remedies, such as restitution and reimbursement) when the Court determines there has been a violation of the CPA, while section 2461 allows additional civil penalties when a person has violated an *existing* temporary or permanent injunction previously issued by a court.

At this point, though, the Court need not resolve these statutory questions. The Court simply concludes that the State

is relying on a reasonable interpretation of section 2458, that the State's requests for injunctive relief and civil penalties are not facially inapplicable in this case, and that those forms of relief are therefore relevant to the determination that the State is a real party in interest. The Sellers are of course entitled to raise their arguments again on remand; however, this Court suspects that the Sellers will find themselves entangled in the prickly-ash if they do not blaze an interpretive trail that is more enticing to follow.

Accordingly, the Court finds that it does not have original jurisdiction over case 102 under either the general diversity provision at 28 U.S.C. § 1332(a) or CAFA. Removal was therefore improper, and the Court remands case 102 to the Washington Superior Court. *See* 28 U.S.C. §§ 1441, 1447(c).

**III. The Sellers' Motions to Dismiss the CPA Claims**

The Sellers and the other defendants in case 102 raise a series of motions to dismiss the State's CPA claims against them. In summary, they claim that the section 2466 notification requirement violates the Commerce Clause, that the Attorney General lacks authority to bring an action against them under section 2458, that the Attorney General has failed to state a claim upon which relief may be granted, that portions of the State's claims are barred by the statute of limitations, and

that the State does not have personal jurisdiction over Defendants Luis Reulas and Joseph Marinucci. *See* case 102 ECF Nos. 58, 81. Because the Court is remanding case 102, the Court denies these motions as moot. *See, e.g.*, *Ben & Jerry's Homemade, Inc. v. KLLM, Inc.*, 58 F. Supp. 2d 315, 319 (D. Vt. 1999) (remanding due to improper removal and denying a Rule 12(b)(6) motion to dismiss as moot). The state court will have the opportunity to hear and decide the Sellers' constitutional claims.

## IV. The State's Motion to Dismiss Case 74 on *Younger* Abstention Grounds

The State asks the Court to dismiss case 74 pursuant to the doctrine established by *Younger v. Harris*, 401 U.S. 37 (1971), which precludes federal courts from enjoining ongoing state proceedings.[8] Although *Younger* itself was limited to state criminal trials, the doctrine has since been expanded to encompass state civil and administrative enforcement actions. *See, e.g.*, *Juidice v. Vail*, 430 U.S. 327 (1977) (civil contempt); *Trainor v. Hernandez*, 431 U.S. 434 (1977) (civil fraud); *Moore v. Simms*, 442 U.S. 415 (1979) (state child abuse proceeding); *Ohio Civil Rights Comm'm v. Dayton Christian Schools, Inc.*, 477 U.S. 619 (1986) (state administrative

[8] *Younger* abstention applies with equal force to declaratory judgment actions. *Samuels v. Mackell*, 401 U.S. 66, 69-70, 72-73 (1971).

proceeding). *Younger* abstention is premised on "the basic doctrine of equity jurisprudence that courts of equity should not act . . . when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief." *Younger*, 401 U.S. 43-44. It is also rooted in "basic concerns of federalism which counsel against interference by federal courts, through injunctions or otherwise, with legitimate state functions, particularly with the operation of state courts." *Trainor*, 431 U.S. at 441.

*Younger* abstention does not apply to claims for monetary damages brought under 28 U.S.C. § 1983. *See Rivers v. McLeod*, 252 F.3d 99, 101-02 (2d Cir. 2001) ("[A]pplication of the Younger doctrine is inappropriate where the litigant seeks money damages for an alleged violation of § 1983 . . . ."); *Deakins v. Monaghan*, 484 U.S. 193, 202 (1998) (explaining that a district court may stay but not dismiss monetary claims that are not cognizable in a parallel state proceeding); *cf. Mitchum v. Foster*, 407 U.S. 225, 243 (1972) (holding that section 1983 claims are not barred by the anti-injunction statute). The Sellers cannot rely on this because the Court is dismissing their section 1983 claim against AAG Burg, which includes their sole request for monetary relief.

The Sellers claim that the remainder of case 74 should not be dismissed because the three requirements for *Younger* abstention are not met. "*Younger* abstention is mandatory when: (1) there is a pending state proceeding, (2) that implicates an important state interest, and (3) the state proceeding affords the federal plaintiff an adequate opportunity for judicial review of his or her federal constitutional claims." *Spargo v. New York State Comm'n on Judicial Conduct*, 351 F.3d 65, 75 (2d Cir. 2003).

The first two requirements are easily established. Because the Court is remanding case 102 to state court, there is an ongoing state proceeding: the state's CPA enforcement action against the Sellers. That the State enforcement action (case 102) was filed two days after the federal action (case 74) is of no consequence because *Younger* abstention only requires that the state action be initiated "before any proceedings of substance on the merits have taken place in federal court." *Hicks v. Miranda*, 422 U.S. 332, 349 (1975).

The Sellers' claims also clearly implicate important state interests. As the Second Circuit instructed in *Philip Morris, Inc. v. Blumenthal*, 123 F.3d 102, 105-06 (2d Cir. 1997), this Court must "look to the importance of the generic proceedings to the State" rather than the outcome of this particular case. *Id*.

(quoting *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 365 (1989)). Unlike *Phillip Morris*, the gravamen of the State's interest is not merely a "subrogation action grounded in tort"; in addition to seeking restitution for affected Vermont consumers, the State is acting under its own authority to prevent and eradicate unfair and deceptive business practices, interests the Second Circuit has already acknowledged are at the very least "arguably important." *Philip Morris*, 123 F.3d at 105-06. And as this Court has already explained, the State is seeking civil penalties and injunctive relief, remedies only the State is entitled to seek under the CPA.

The Sellers raise an inventive but no more successful argument with respect to the third and final requirement for *Younger* abstention. They suggest that there is no adequate opportunity for review of their constitutional claims in state court because the state enforcement action must be brought as a compulsory counterclaim to the federal suit, case 74. The Sellers rely principally on the mandatory nature of Rule 13(a), which, with certain exceptions, requires a litigant to "state as a counterclaim any claim that . . . arises out of the transaction or occurrence that is the subject matter of the opposing party's claim; and . . . does not require adding another party over whom the court cannot acquire jurisdiction."

Fed. R. Civ. P. 13(a). The Sellers argue that because the State's enforcement claims arise out of the same set of transactions and occurrences as their constitutional claims, the State's enforcement action "are compulsory counterclaims that must be brought in the 074 case *or not at all*." ECF No. 14 at *13 (emphasis added).

The Sellers misperceive how Rule 13(a) operates, particularly when, as here, the potential counterclaims are filed in an independent action in state court *while the federal action was pending*. Put simply, a federal court has no authority to enjoin a state action even if it concerns claims that should have been filed as compulsory counterclaims. The reason for this is straightforward. The Anti-Injunction Act states that "[a] court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C § 2283; *see also Mitchum*, 407 U.S. at 228-29 (expressly rejecting "the view that the anti-injunction statute merely states a flexible doctrine of comity, and [making] clear that the statute imposes an absolute ban upon the issuance of a federal injunction against a pending state court

proceeding, in the absence of one of the recognized exceptions.").

When, as here, the state action does not threaten this Court's jurisdiction or a judgment, two of the three exceptions are wholly inapplicable. The only remaining way for the Sellers to skirt the Anti-Injunction Act is to argue that Rule 13(a) represents an express exception to the Anti-Injunction Act; however, federal courts have consistently held that it is not. *See, e.g.*, *Seattle Totems Hockey Club, Inc. v. National Hockey League,* 652 F.2d 852, 855 n.5 (9th Cir. 1981) ("[A] federal court is barred by § 2283 from enjoining a party from proceeding in state court on a claim that should have been pleaded as a compulsory counterclaim in a prior federal suit."); *Connecticut Housing Fin. Auth. v. Eno Farms Ltd. P'ship,* No. 07-cv-319, 2007 WL 1670130, at *3 n.2 (D. Conn. June 6, 2007); *Bridgeport Machines, Inc. v. Alamo Iron Works, Inc.*, 76 F. Supp. 2d 209, 212 (D. Conn. 1999); *Bruce v. Martin,* 680 F. Supp. 616, 620 n.3 (S.D.N.Y. 1988).[9] This Court agrees. When there is a conflict,

[9] District courts in other circuits agree. *See, e.g.*, *A.B. ex rel. Kehoe v. Hous. Auth. of S. Bend*, No. 11-cv-163, 2011 WL 2692966 (N.D. Ind. July 8, 2011); *Vick v. Nash Hosp., Inc.,* 756 F. Supp. 2d 690, 693–94 (E.D.N.C. 2010); *Wells Dairy, Inc. v. The Estate of J.P. Richardson*, 89 F. Supp. 2d 1042, 1065 (N.D. Iowa 2000); *Gunderson v. ADM Investor Servs., Inc.*, 976 F. Supp. 818, 825 (N.D. Iowa 1997); *Cont'l White Cap v. Speco, Inc.,* 1987 WL 14617, at *2 (N.D. Il. July 17, 1987); *L. F. Dommerich & Co. v. Bress*, 280 F. Supp. 590, 600 (D.N.J. 1968).

the principle of avoiding interfering with state proceedings trumps the preference, reflected in Rule 13(a), for avoiding potentially duplicative litigation. *See* Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure*, § 1418 (3d ed. 2012) (explaining that in the absence of voluntary abstention by one court, both a state and federal action may proceed toward judgment and that any issues resolved in the first case to be decided will control in the second).

Indeed, there is an even more basic reason to reject the Sellers' Rule 13(a) argument: it is little more than an end run around the Supreme Court's decision in *Hicks v. Miranda*, which held "that where state criminal proceedings are begun against the federal plaintiffs after the federal complaint is filed but before any proceedings of substance on the merits have taken place in the federal court, the principles of *Younger v. Harris* should apply in full force." 422 U.S. at 349. *Hicks*, like *Younger*, applies with equal force to civil proceedings. *See Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 238 (1984). *Younger* abstention does not turn on who wins the race to court, which is precisely the position the Sellers are taking in this litigation. This Court has no authority to enjoin an ongoing State proceeding simply because it concerns claims that arguably should have been filed as compulsory counterclaims under Rule

13(a).[10] For that reason, Rule 13(a) presents no bar to the adequate review of the Sellers' constitutional claims, and the third and final requirement for *Younger* abstention is met.

Finally, the Sellers argue that *Younger* abstention is inappropriate because the State has acted in bad faith. *See Younger*, 401 U.S. at 54. The bad-faith exception is rarely applied and is only appropriate where the state has "no reasonable expectation of obtaining a favorable outcome," *Cullen v. Fliegner*, 18 F.3d 96, 103 (2d Cir. 1994), or where the state proceeding is "motivated by a desire to harass or is conducted in bad faith." *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 611 (1975). The Sellers fall well short of meeting this burden. The Sellers' allegations on this point either repeat their statutory arguments—which this Court finds unpersuasive—or cite what this Court considers to be routine actions taken by the State to enforce the CPA. As the Court explains above, the State relies on a plain reading of the relevant statutory provisions and therefore does not clearly lack a reasonable expectation of obtaining a favorable outcome against the Sellers. To the extent that the Sellers object to the way in which those provisions are being administered, this Court

[10] For this reason, it is in this case immaterial whether or not the state enforcement claims arise out of the same set of transactions and occurrences as the federal constitutional claims.

declines the invitation to equate vigorous enforcement of presumptively valid consumer protection laws with harassment.

Because this Court must abstain under *Younger*, case 74 is dismissed. *See Obeda v. Connecticut Bd. of Registration for Prof'l Engineers & Land Surveyors*, 570 F. Supp. 1007, 1011 (D. Conn. 1983) ("[T]he proper action by the district court when *Younger* abstention applies is dismissal, not a stay.") (citing *Trainor*, 431 U.S. at 440–41). The Sellers may raise their constitutional claims as defenses or counterclaims in case 102 on remand. *See Gibson v. Berryhill*, 411 U.S. 564, 577, 93 S. Ct. 1689, 1697, 36 L. Ed. 2d 488 (1973) ("*Younger v. Harris* contemplates the outright dismissal of the federal suit, and the presentation of all claims, both state and federal, to the state courts.").

**V. The Sellers' Motion to Stay Additional State Proceedings**

A district court may stay state court proceedings to protect its own jurisdiction under the All Writs Act, 28 U.S.C. § 1651; however, because this Court is dismissing case 74 and remanding case 102, it will be left with no jurisdiction to protect. For this reason, the Court denies the Sellers' Motion to Stay additional state proceedings as moot.

## CONCLUSION

For the reasons stated, the Court **dismisses** case 74, **remands** case 102, and **denies** as moot the Motions to Dismiss case 102 and the Sellers' Motion to Stay additional state proceedings.

Dated at Burlington, in the District of Vermont, this 9th day of November, 2012.

/s/William K. Sessions III
William K. Sessions III
U.S. District Court Judge

AO 450 (Rev. 5/85) Judgment in a Civil Case

**United States District Court**
**District of Vermont**

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|---|---|---|
| MyInfoGuard, LLC, Nationwide Assist LLC, Solo Communications, LLC, Total Protection Plus, LLC, United Communications Link, LLC, VoiceXpress, Inc., Contact Message Systems, LLC, Nations 1st Communications, LLC, New Link Network, LLC, Nations Voice Plus, LLC,<br><br>Plaintiffs,<br><br>v.<br><br>William H. Sorrell, *in his official capacity as Attorney General of the State of Vermont*, Peter Shumlin, *in his official capacity as Governor of the State of Vermont*, and Elliot M. Burg, *Assistant Attorney General, in his individual capacity*,<br><br>Defendants. | : | **JUDGMENT IN A CIVIL CASE**<br><br>CASE NUMBER: 2:12-cv-74 |

_____**Jury Verdict.** This action came before the Court for trial by jury. The issues have been Tried and the jury has rendered its verdict.

__X__**Decision by Court.** This action came to trial or hearing before the Court. The issues Have been tried or heard and a decision has been rendered.

**IT IS ORDERED AND ADJUDGED** that pursuant to the Court's Opinion and Order (Document No. 31) filed November 9, 2012, defendant Elliot M. Burg's Motion to Dismiss Count V (Document No. 16) is GRANTED and defendants' Motion to Dismiss on Younger Abstention Grounds (Document No. 7) is GRANTED. This case is hereby DISMISSED.

Date: November 9, 2012

JEFFREY S. EATON
Clerk

/s/ Lisa A. Wright
(By) Deputy Clerk

JUDGMENT ENTERED ON DOCKET
DATE: 11/09/2012

STATE OF VERMONT
SUPERIOR COURT
Washington Unit

In re NCO FINANCIAL SYSTEMS, INC.

CIVIL DIVISION
Docket No. Wncv

**ASSURANCE OF VOLUNTARY COMPLIANCE**

## PREAMBLE

This Assurance of Voluntary Compliance (hereinafter referred to as "Assurance") is entered into between the Attorneys General of the States and Commonwealths of Alaska, Arkansas, Idaho, Illinois, Iowa, Kentucky, Louisiana, Michigan, Nebraska, Nevada, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Rhode Island, South Carolina, Vermont, and Wisconsin (referred to collectively as the "Multi-State Working Group" or the "Participating States"), acting on behalf of their respective states, and pursuant to their respective Consumer protection and/or debt collection statutes[1], and NCO Financial Systems, Inc., a Pennsylvania corporation that engages in business in each of the Participating States.

## I. GENERAL PROVISIONS

[1] Alaska, Unfair Trade Practices and Consumer Protection Act, AS 45.50.471 et seq.; Arkansas, Ark. Code Ann. §4-88-101 et seq.; Idaho, Idaho Consumer Protection Act, Idaho Code section 48-601 et seq.; Illinois, Illinois Collection Agency Act, 225 ILCS 425/1 et seq. and the Illinois Consumer Fraud & Deceptive Business Practices Act, 815 ILCS 505/1 et seq.; Iowa, Iowa Consumer Fraud Act: Iowa Code section 714.16 and Iowa Debt Collection Practices Act: Iowa Code sections 537.7101 – 537.7103; Kentucky, Kentucky Consumer Protection Act, KRS 367.110 et seq.; Louisiana, Unfair Trade Practices and Consumer Protection Law, LSA-R.S. 51:1401 et seq.; Michigan, Regulation of Collection Practices Act, MCL 445.251, et seq.; Nebraska, NE Consumer Protection Act, NRS. §§59-1601 *et seq.* and NE Uniform Deceptive Trade Practices Act, NRS. §§87-301 *et seq.*; Nevada, Nevada Deceptive Trade Practices Act, NRS 598.0903 et. seq.; New Mexico, New Mexico Unfair Practices Act, NMSA 1978, Sec. 57-12-1 et seq. (1967); North Carolina, North Carolina Collection Agency Act, N.C. Gen. Stat. § 58-70-1, *et seq.*, and the North Carolina Unfair Practices Act, N.C. Gen. Stat. § 75-1.1, *et seq.*; North Dakota, North Dakota Century Code (N.D.C.C.) § 51-15-01 et seq.; and N.D.C.C. ch. 13-05.; Ohio, Ohio Consumer Sales Practices Act, R.C. 1345.01 et seq.; Oregon, Oregon Unlawful Trade Practices Act, Oregon Revised Statute (ORS) 646.605 to 646.656, including Oregon's Unlawful Collection Practices Act, ORS 646.639.; Rhode Island, R.I. Gen. Laws §6-13.1-1, *et seq.*, commonly referred to as the Rhode Island Deceptive trade Practices Act; R.I. Gen. Laws §19-14.9-1, *et seq.*, commonly referred to as the Rhode Island Fair Debt Collection Act; South Carolina, South Carolina Unfair Trade Practices Act, South Carolina Code Ann. Sections 39-5-10, et seq.; Vermont, Vermont Consumer Fraud Act, 9 V.S.A. s 2451, et seq. and Vermont's Consumer Fraud Rule 104; Wisconsin, Wis. Stats. § 427.104 and Wis. Adm. Code DFI-Bkgch. ch. 74.

Recognizing that the State of Vermont, by and through Attorney General William H. Sorrell, and NCO Financial Systems, Inc. ("NCOF"), by its counsel, have consented to the entry of this Assurance, agree as follows:

1.1 The Court has jurisdiction over the parties and the subject matter of this Assurance.

1.2 Venue is proper over this Assurance and its enforcement because the alleged violations of 9 V.S.A. § 2451, et seq. and Vermont's Consumer Fraud Rule 104, the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692 et seq., and the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681 et seq. occurred in Washington County, Vermont.

1.3 Attorney General William H. Sorrell, has authority under 9 V.S.A. § 2458 to bring consumer protection actions on behalf of the State of Vermont.

1.4 This Assurance shall be governed by the laws of the State of Vermont.

1.5 This Assurance is entered into by NCOF as a free and voluntary act and with full knowledge and understanding of the nature of the proceedings and the obligations and duties imposed by this Assurance.

1.6 Nothing in this Assurance constitutes any agreement by the Parties concerning the characterization of the amounts paid pursuant to this Assurance for purposes of the Internal Revenue Code or any state tax laws, or the resolution of any other matters.

1.7 This Assurance constitutes a complete settlement and release of all claims on behalf of the signatory Attorneys General against NCOF with respect to all civil claims, causes of action, damages, fines, costs or penalties for alleged violations of the States' respective Consumer Protection Acts cited in footnote 1, arising from any acts, policies or practices which were known prior to the Effective Date of this Assurance and which were related to or based

upon NCOF's debt collection practices and were addressed as identified in Paragraphs 6.2a-ff of this Assurance.

1.8 The States and NCOF have agreed to the entry of this Assurance without trial of any issue of fact or law. This Assurance is entered into only for the purpose of resolving the issues raised in this Assurance, and does not bind any other officers or agencies of the respective States to this Assurance. This Assurance shall not be construed to nor does it resolve or preclude any other action, civil, criminal, or administrative.

1.9 Nothing contained herein shall be construed to waive any individual right of action by a Consumer or any action by a local, state, federal, or other governmental entity.

1.10 Nothing in this Assurance shall in any way preclude any investigation or enforcement action against NCOF under any legal authority granted to the State for any activities related to NCOF's business practices, as well as transactions not subject to this action.

1.11 NCOF shall not represent directly or indirectly or in any way whatsoever imply that the Court or any Signatory Attorney General has sanctioned, condoned, or approved any part or aspect of NCOF's business practices, current efforts to reform its practices, or any further practices that NCOF may adopt or consider adopting.

## II. DEFINITIONS

For purposes of this Assurance, the following words or terms shall have the following meaning:

2.1 "Affiliate" means a business entity that is owned by, operated by, controlled by, or under common control with another business entity.

2.2 "Call Center" means any physical location from which NCOF places or receives Consumer credit Debt Collection phone calls.

2.3 "Collection Center" means any physical location from which NCOF sends or receives Consumer credit Debt correspondence.

2.4 "Communication" means the conveying of information regarding a Debt directly or indirectly to any person through any medium, as that term is defined in the FDCPA, 15 U.S.C. § 1692(a)(2).

2.5 "Consumer" means any natural person obligated or allegedly obligated to pay any Debt, as that term is defined in the FDCPA, 15 U.S.C. § 1692(a)(3).

2.6 "Creditor" means any person who offers or extends credit creating a Debt or to whom a Debt is owed, but such term does not include any person to the extent that he receives an assignment or transfer of a Debt in default solely for the purpose of facilitating collection of such Debt for another, as that term is defined in the FDCPA, 15 U.S.C. § 1692(a)(4).

2.7 "Debt" means any obligation or alleged obligation of a Consumer to pay money arising out of a transaction in which the money, property, insurance or services which are the subject of the transaction are primarily for personal, family or household purposes, whether or not such obligation has been reduced to judgment, as that term is defined in the FDCPA, 15 U.S.C. § 1692(a)(5).

2.8 "Debt Collector" means any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any Debts, as defined by 15 U.S.C. § 1692(a)(5), or who regularly collects or attempts to collect, directly or indirectly, Debts owed or due or asserted to be owed or due another, as that term is defined in the FDCPA, 15 U.S.C. §§ 1692(a)(6)(A) – (F), and/or as that term is defined under applicable state law.

2.9 "Debt Collection" means any activity the principal purpose of which is to collect, or attempt to collect, directly or indirectly, Debts owed, or asserted to be owed, or due,

regardless of whether collection of the Debt is governed by the FDCPA, to the extent that any individual state Attorney General has jurisdiction over non-Consumer Debt Collection activities.

2.10 "Effective Date" shall mean the latest date by which all Parties have executed the Assurance or the date on which the Assurance is filed.

2.11 "Furnisher of Credit Information" to "consumer reporting agencies" means a person who furnishes information to consumer reporting agencies relating to Consumers, as those terms are defined or used in the FCRA, 15 U.S.C. §§ 1681-1681(x).

2.12 "Location information" means a Consumer's place of abode and the Consumer's telephone number at such place or at the Consumer's place of employment, as that term is defined in the FDCPA, 15 U.S.C. § 1692(a)(7).

2.13 "Multi-State Executive Committee" shall refer to a committee comprising representatives from the States of Illinois, Louisiana, Nevada, New Mexico, and Ohio.

2.14 "Multi-State Working Group" or "Participating States" shall refer to the States and Commonwealths of Alaska, Arkansas, Idaho, Illinois, Iowa, Kentucky, Louisiana, Michigan, Nebraska, Nevada, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Rhode Island, South Carolina, Vermont, and Wisconsin collectively.

2.15 "NCOF" shall mean NCO Financial Systems, Inc., doing business under its own name, or under any other business names, including its officers, directors, agents, representatives, salespersons, employees, instructors, affiliates, successors, and assigns, and all persons acting in concert or participation with NCOF, directly or indirectly, whether acting individually, or acting on behalf of NCOF or at its direction, through any corporate device, partnership or association through which they may now or hereafter act or conduct business.

a. "NCOF" shall not mean an "Independent Contractor" who is a person or entity who provides services and who, in the provision of such services, is free

from direction and control over the means and manner of providing the services, subject only to the right of NCOF to specify the desired result. Independent contractor status cannot be a subterfuge to avoid employee status, including an apparent agency relationship.

b. "NCOF" shall not mean JP Morgan Chase.

2.16 "Ohio Assurance" shall refer to the Ohio Assurance of Voluntary Compliance entered into between the State of Ohio Office of the Attorney General and NCOF.

2.17 "Parties" to this Assurance shall mean the State of Vermont and NCO Financial Systems, Inc. as defined in Paragraph 2.15 above.

2.18 "Representative" means an employee of NCOF and/or any and all other persons, corporations, partnerships, or other entities that NCOF has the power or right to control and direct in the material details and means of how their work is to be performed.

2.19 "Supplier" means a seller, lessor, assignor, franchisor, or other person engaged in the business of effecting or soliciting Consumer transactions, whether or not the person deals directly with the Consumer, as that term is defined in 9 V.S.A. § 2451a(a).

## III. REPRESENTATIONS AND WARRANTIES

3.1 NCOF warrants and represents that it and its predecessors are engaged in trade and commerce within the Participating States by, among other things, the operation of a Debt Collection business, as a Debt Collector, as that term is defined in the FDCPA, 15 U.S.C. § 1692(a)(6).

3.2 NCOF warrants and represents that it and its predecessors are "Furnishers of Credit Information" to consumer reporting agencies as that term is defined in Section II of this Assurance and in the FCRA, 15 U.S.C. §§ 1681-1681(x).

3.3. NCOF warrants and represents that it and its predecessors are "Suppliers" as that terms is defined in Section II of this Assurance.

3.4 NCOF and the Participating States warrant and represent that they negotiated the terms of this Assurance in good faith.

## IV. BACKGROUND AND STATEMENT OF FACTS

4.1 NCO Group, Inc. is the ultimate corporate parent of NCOF.

4.2 NCOF is a Pennsylvania corporation that engages in business in each of the Participating States, of which its principal place of business is 507 Prudential Road, Horsham, Pennsylvania, 19044.

4.3 NCOF is, and has been at all times relevant to this action, engaged in providing Debt Collection services by regularly collecting, or attempting to collect, Debts that were due or alleged to be due from Consumers.

4.4 NCOF has been assigned Debts for collection from various Creditors or entities for the purpose of attempting to collect those Debts from Consumers.

4.5 NCOF has attempted to collect on alleged Debts through collection letters sent to Consumers from NCOF's collection centers.

4.6 NCOF has attempted to collect on alleged Debts through telephone calls made by NCOF's Debt Collector employees from NCOF's Call Centers.

## V. ALLEGATIONS

The Participating States allege that NCOF has engaged in conduct in violation of 9 V.S.A. § 2451, et seq., and Vermont's Consumer Fraud Rule 104., the FDCPA, 15 U.S.C. § 1692 et seq., and the FCRA, 15 U.S.C. § 1681 et seq., including, but not limited to, the following: (1)

engaging in or using unfair or deceptive Debt Collection acts and/or practices in violation of 9 V.S.A. § 2453 and Vermont's Consumer Fraud Rule 104, and/or in violation of the FDCPA at 15 U.S.C. §§ 1692b(2), 1692b(3), 1692c(a)(1), 1692c(a)(2), 1692c(a)(3), 1692c(c), 1692d, 1692d(2), 1692d(5), 1692d(6), 1692g(a) and 1692g(b); (2) engaging in or using false, deceptive, or misleading representations or means in connection with the collection of Debts in violation of 9 V.S.A. § 2453 and Vermont's Consumer Fraud Rule 104, and/or in violation of the FDCPA at 15 U.S.C. §§ 1692e, 1692e(2)(A)(B), 1692e(4), 1692e(5), and 1692e(10); (3) engaging in or using unfair means to collect or attempt to collect Debts in violation of 9 V.S.A. § 2453 and Vermont's Consumer Fraud Rule 104, and/or in violation of the FDCPA at 15 U.S.C. §§ 1692f, 1692f(1), and 1692f(6); (4) by furnishing credit information to consumer reporting agencies in violation of the FCRA at 15 U.S.C. §§ 1681s-2(a)(1)B), 1681s-2(a)(3), and 1681s-2(b); and (5) otherwise violating 9 V.S.A. § 2453 and Vermont's Consumer Fraud Rule 104, the FDCPA, and/or the FCRA.

NCOF denies these allegations.

## VI. ASSURANCE

6.1 **Compliance with All Laws**. NCOF shall comply with 9 V.S.A. § 2451, et seq. and Vermont's Consumer Fraud Rule 104, the FDCPA, 15 U.S.C. § 1692 et seq., and the FCRA, 15 U.S.C. § 1681 et seq.

6.2 **Compliance with Specific Laws**. Through this Assurance, NCOF shall not:

a. Violate the FDCPA, 15 U.S.C. § 1692 et seq.;

b. Violate the FCRA, 15 U.S.C. § 1681 et seq.;

c. Communicate that Consumers owe Debts when communicating with any person other than the Consumers for the purposes of acquiring location information, in violation of the FDCPA, 15 U.S.C. § 1692b(2);

d. Communicate with persons other than the Consumer more than once, when not requested to do so by such person, and when NCOF does not reasonably believe that the earlier response of such person was erroneous or incomplete and that such person now has correct or complete location information, in violation of the FDCPA, 15 U.S.C. § 1692b(3);

e. Communicate with Consumers in connection with the collection of Debts at times or places NCOF knows or should know to be inconvenient to the Consumers, including during inconvenient hours, in violation of the FDCPA, 15 U.S.C. § 1692c(a)(1);

f. Communicate with Consumers in connection with the collection of Debts, without the prior consent of the Consumers, after knowing that the Consumers were represented by attorneys with respect to the alleged Debts, in violation of the FDCPA, 15 U.S.C. § 1692c(a)(2);

g. Communicate with Consumers in connection with the collection of Debts at the Consumers' places of employment when NCOF knows or should know that the Consumers' employers prohibit the Consumers from receiving such communications, in violation of the FDCPA, 15 U.S.C. § 1692c(a)(3);

h. Communicate with Consumers in connection with the collections of Debts, except as otherwise provided by law, after being notified in writing that the Consumers refuse to pay the Debts or that the Consumers wish NCOF to

cease further communications with the Consumers, in violation of the FDCPA, 15 U.S.C. § 1692c(c);

i. Engage in conduct the natural consequence of which was to harass, oppress, or abuse persons in connection with the collection of a Debt, in violation of the FDCPA, 15 U.S.C. § 1692d;

j. Use obscene or profane language in connection with the collection of Debts, in violation of the FDCPA, 15 U.S.C. § 1692d(2);

k. Place multiple telephone calls within a short period of time to Consumers for purposes of annoying or harassing Consumers at the called numbers, in violation of the FDCPA, 15 U.S.C. § 1692d(5);

l. Attempt to collect alleged Debts by telephone without providing the meaningful disclosure of the caller's identity, in violation of the FDCPA, 15 U.S.C. § 1692d(6);

m. Use false or misleading representations to collect or attempt to collect Debts or to obtain Location Information, in violation of the FDCPA, 15 U.S.C. § 1692e;

n. Falsely represent the character, amount, or legal status of Debts or services rendered or compensation which may be lawfully received by Debt Collectors for the collection of Debts, in violation of the FDCPA, 15 U.S.C. § 1692e(2)(A)(B);

o. Represent or imply to Consumers that nonpayment of Debts will result in the arrest or imprisonment of the Consumers, or the seizure, garnishment, attachment, or sale of any of the Consumers' property or wages when there is

no legal authority or intention to do so, in violation of the FDCPA, 15 U.S.C. § 1692e(4);

p. Threaten to take legal actions when there is no legal authority or intention to do so, in violation of the FDCPA, 15 U.S.C. § 1692e(5);

q. Use any false representation or deceptive means to collect or attempt to collect any Debt or to obtain information concerning a Consumer, in violation of the FDCPA, 15 U.S.C. § 1692e(10);

r. Use unfair or unconscionable means to collect or attempt to collect Debts, in violation of the FDCPA, 15 U.S.C. § 1692f;

s. Collect or attempt to collect amounts (including interest, fees, charges, or expenses incidental to the principal obligation) that were not expressly authorized by the agreements creating the Debts or permitted by law, in violation of the FDCPA, 15 U.S.C. § 1692f(1);

t. Take or threaten to take nonjudicial actions against Consumers' real or personal properties or wages when there is no legal authority or intention to do so, in violation of the FDCPA, 15 U.S.C. § 1692f(6);

u. Fail to provide written notices to Consumers, within five days after initial telephone contact, that contain the following information: the amount of the Debt; the name of the Creditor; a statement that unless the Consumer disputes the validity of the Debt within thirty days NCOF will assume the Debt is valid; the process by which the Consumer may request verification of a Debt; and a statement that upon the Consumer's written request within thirty days, NCOF would provide the name of the original Creditor, if different from the current Creditor, in violation of the FDCPA, 15 U.S.C. § 1692g(a);

v. Fail to cease collection activities upon the receipt of written notifications from Consumers of disputes, or requests for the names of the original Creditors or for verification of the Debts alleged to be owed, until the NCOF mails verifications or the debts to the Consumers, in violation of the FDCPA, 15 U.S.C. § 1692g(b);

w. Attempt to collect on Debts that are not owed by the Consumers contacted by the NCOF;

x. Fail to remove telephone numbers from collection account records and continue to place telephone calls to those numbers after being informed that the person from whom NCOF sought to collect the Debts cannot be reached at the numbers called;

y. Communicate with third parties more than once after the third parties provide NCOF with Location Information or indicate that they do not have the Location Information being sought, unless NCOF has a reasonable belief that the earlier response of such person was erroneous or incomplete and that such person now has correct or complete Location Information, pursuant to FDCPA, 15 U.S.C. § 1692b(3);

z. Except as permitted by law, communicate with or divulge information to third parties, without the prior consent of the Consumers, regarding alleged Debts owed by Consumers in an effort to embarrass or persuade the Consumers to pay the Debts;

aa. Fail to inform Consumers, upon receiving oral requests for verification of Debts, that requests to verify Debts must be made in writing, or failing or

refusing to provide Consumers with the address to where the written requests must be mailed, or both;

bb. Collect or attempt to collect on settled Debts.

cc. Fail to honor or confirm settlement agreements in writing with Consumers and continue to attempt to collect additional amounts or the full amount of the Debts allegedly owed;

dd. Withdraw money from Consumers' bank accounts, on dates or in dollar amounts, not authorized by Consumers;

ee. Collect or attempt to collect on Debts that have been discharged in bankruptcy.

ff. Collect or attempt to collect on Debts when the Consumer has notified NCOF that they are the victim of identity theft, until NCOF takes the appropriate steps under applicable state law to determine that the Consumer is responsible for the specific Debt in question.

6.3 **General Compliance**: Within thirty calendar days of the Effective Date of this Assurance, NCOF shall:

a. Train employees to answer all questions on first contact with the Consumer in a respectful manner;

b. Send written communication within five calendar days of the first telephone contact with a Consumer and include the amount of the Debt, the name and contact information of the Creditor, notice that the Consumer has thirty calendar days to dispute the Debt, how to dispute the Debt, and how to request validation of the Debt;

c. In all collection notices, always itemize the amount owed;

d. Maintain confidentiality of all financial information, including, but not limited to, truncating social security and credit card numbers, in compliance with 9 V.S.A. § 2440, 9 V.S.A. § 2451 et seq., and/or other applicable state, federal and local law regarding maintenance of the confidentiality of all financial information;

e. Attempt collection against any spouses of deceased debtors only if NCOF first validates the Debt, obtains and possesses information supporting a good faith claim that the surviving spouse is legally obligated on the Debt and provides this information to the surviving spouse[2];

f. Maintain collectors' activity logs with detailed information and/or codes for deciphering abbreviations, including, but not limited to:

(1) The exact number called;

(2) The exact name of the debtor trying to be reached;

(3) The duration of the call, noting the time the call began;

(4) Whether a message was left and with whom;

(5) When possible, the exact name of the person with whom the Debt Collector spoke;

(6) A summary of what was said (a) in the first contact message, (b) in any subsequent messages, and (c) in any offers to settle the Debt;

(7) If a settlement was offered, the terms of the settlement, including the total amount to be paid and the payment schedule;

[2] This provision shall be subject to the final rules promulgated by the Federal Trade Commission ("FTC") clarifying how to collect decedents' debts.

(8) The reason for communicating with a third-party in connection with a collection attempt; and

g. In connection with NCOF's business activities in collecting or attempting to collect on Debts, NCOF must, prior to withdrawing funds from Consumers' bank accounts, whether by automatic debit, simulated check or otherwise, obtain the following information from the Consumer:

(1) The name and address of the Consumer;

(2) The account number from which funds will be withdrawn;

(3) The routing number of the account from which funds will be withdrawn;

(4) The check number or numbers (if applicable);

(5) The exact dollar amount of the funds to be withdrawn in each installment (if applicable);

(6) The exact date or dates the funds will be withdrawn;

(7) Express authorization for the funds to be withdrawn from the account.

If funds are to be withdrawn from a Consumer's account in installments, the information in items (1) through (7) above shall additionally be sent to the Consumer in writing at least three but not more than ten calendar days prior to each installment payment being withdrawn from the account in accordance with the FDCPA.

h. Confirm all settlement agreements by mailing written documents to Consumers within seven calendar days of the agreement that include:

(1) Total amount owed;

(2) Itemization of all fees;

(3) Interest;

(4) Principal;

(5) Date Debt incurred;

(6) Approval of Creditor (holder of the account);

(7) Agreement to update status of debt if previously reported by NCOF to a credit reporting agency;

(8) Agreement to provide written confirmation to validate when the settlement amount is paid in full;

i. NCOF will direct its affiliate, NCO Portfolio Management, Inc., and related Debt buying companies to not sell or provide a Debt to any other entity, other than the client from which it was obtained, if an investigation reveals that the Debt cannot be substantiated as complete and accurate or that the Debt has been paid or that the Consumer was victim of identity theft.

j. Cease collecting or attempting to collect Debts when the Consumer has notified NCOF that the Consumer is the victim of identity theft until NCOF takes the appropriate steps under applicable state law to determine that the Consumer is responsible for the specific Debt in question.

6.4 **Reporting**. To the extent that a Debt has been credit reported, as part of the regular NCOF credit reporting update process, NCOF shall notify credit reporting agencies within thirty calendar days of either of the following:

a. Any verbal or written Consumer dispute, including notification by the Consumer that the Consumer is the victim of identity theft and thus not responsible for the Debt; or

b. Receipt of the results of an investigation as to the accuracy or completeness of information previously reported, including that such Debt has been paid.

6.5 **Notice to Consumers**. Within thirty calendar days of and for a period of five years from the Effective Date of this Assurance, NCOF and its owners, officers, directors, agents, employees, salespersons, Representatives, Independent Contractors, Affiliates, and all persons or entities in active concert or participation with NCOF in connection with NCOF's actions as a Debt Collector in the collection of Debts from Consumers shall make the following disclosure clearly and conspicuously on the back of each written collection communication that is sent to a Consumer for the purpose of collecting a Debt:

> Federal and State law prohibit certain methods of debt collection and require that we treat you fairly. For Vermont residents, please view our website at www.ncogroup.com to review your rights under Federal and State law.

6.6 NCOF shall not be considered to be out of compliance with these compliance procedures in the event any Representative or Independent Contractor misrepresents its activities to NCOF or conceals the true nature of its activities, so long as NCOF can show that it has taken the steps noted in Section VII below to ascertain the truth and discipline the Representatives and Independent Contractors engaged in misrepresentations to NCOF.

## VII. COMPLIANCE MONITORING

To the extent they are not already the existing practices, NCOF agrees to adopt and implement the following policies and procedures:

7.1 NCOF shall maintain measures reasonably necessary to ensure that its Representatives, as defined herein, are properly trained and are otherwise performing their duties in compliance with all applicable laws, including, but not limited to, the 9 V.S.A. § 2451, et seq.

and Vermont's Consumer Fraud Rule 104, the FDCPA, 15 U.S.C. § 1692 et seq., and/or the FCRA, 15 U.S.C. § 1681 et seq. NCOF shall further adhere to its policy of disciplining, up to and including the termination of, Representatives that have not complied with the requirements of this Assurance and/or all applicable laws, including, but not limited to the 9 V.S.A. § 2451, et seq. and Vermont's Consumer Fraud Rule 104, the FDCPA, 15 U.S.C. § 1692 et seq., and/or the FCRA, 15 U.S.C. § 1681 et seq. NCOF shall maintain all records referenced in this paragraph and shall, within fourteen days of receiving a request from the Signatory Attorney General, produce a copy of all such records.

7.2 When NCOF hires, retains, and/or enters into an agreement with an Independent Contractor, as defined herein, NCOF shall notify and require, through representations and warranties in their contracts with all Independent Contractors, that each Independent Contractor (1) must comply with the 9 V.S.A. § 2451, et seq. and Vermont's Consumer Fraud Rule 104, the FDCPA, 15 U.S.C. § 1692 et seq., and/or the FCRA, 15 U.S.C. § 1681 et seq., (2) refrain from engaging in the acts and practices described in Section VI, Paragraphs 6.2a-6.2ff, and (3) comply with the practices set forth in Section VI, Paragraphs 6.3a-6.3l. Further, NCOF shall clearly and conspicuously notify such Independent Contractor that any and all of their Debt Collection acts and/or practices must be consistent with NCOF's policies and procedures consistent with the terms of this Assurance. NCOF shall train and sufficiently monitor Independent Contractors in accordance with the provisions stated herein. Should NCOF learn that any Independent Contractor is acting in violation of the law or the requirements of this Assurance, NCOF shall immediately take action to enforce its contractual rights with such Independent Contractor regarding the violations, including as described herein. NCOF shall monitor and enforce its contractual rights, up to and including termination of any Independent Contractor which is in violation of the law, this Assurance, or its contract with NCOF.

7.3 Unless otherwise noted herein, NCOF shall create, to the extent not already existing, and shall adopt and implement written procedures reasonably expected to create continuing compliance and otherwise comply with any and all terms of this Assurance within thirty calendar days after the Effective Date of this Assurance.

7.4 NCOF shall create, to the extent not already existing, and shall maintain written policies and procedures reasonably necessary to ensure Consumer complaints are quickly responded to and that a good faith effort is made to resolve such complaints in a timely manner. Such policies and procedures shall include, but are not limited to:

a. Policies and procedures reasonably necessary to ensure that all Consumer complaints are sufficiently documented, with such documentation containing the following minimum information: (1) the name and account number (or other identifying information) of each Consumer; (2) a summary of the Consumer's complaint and action taken by NCOF to resolve the complaint; (3) the name and other sufficient identifying information of the Representative(s) and/or Independent Contractor(s) involved with such complaint; (4) a summary of any actions taken by NCOF with regard to the handling of the complaint by the Representative(s) and/or Independent Contractor(s), including any disciplinary action taken against the Representative(s) and/or Independent Contractor(s). NCOF shall retain all such records and documentation for a period of three years.

b. Policies and procedures necessary to generally ensure that Consumer complaints to NCOF are answered in a timely manner.

c. Policies and procedures necessary to generally ensure compliance with validation requests by Consumers. Such policies and procedures may include any lawful conduct with regard to electing to close accounts and cease related collection efforts.

7.5 NCOF shall maintain copies of all policies and procedures referenced in Paragraph 7.4 of this Assurance and shall, within fourteen calendar days of receiving a request from the Signatory Attorney General, produce a copy of all such policies and procedures.

7.6 For a period of eighteen months starting November 1, 2011, NCOF shall monitor twenty-five thousand (25,000) randomly selected Debt Collection phone calls placed by NCOF's Representatives during that time period. NCOF personnel will monitor and evaluate calls for the following:

a. Whether NCOF's Representatives making Debt Collection phone calls to Consumers beginning with a statement that includes the words: "This call may be monitored or recorded;"

b. Whether NCOF's Representatives appropriately document the status/disposition associated with the Consumer contacts in the collection system; and

c. Whether any of the following occurs when NCOF's Representatives make Debt Collection phone calls:

(1) Except as permitted by applicable law, disclosure of the existence of a Debt or NCOF's third party Debt Collector status to anyone other than the Consumer;

(2) Misrepresenting NCOF's status as a third party Debt Collector, or NCOF's Representatives identifying themselves as anything but a Debt Collector to a Consumer;

(3) A Consumer is subjected to profanity, rudeness, or inappropriate threats;

(4) The Consumer is contacted at work if the collector knows or has reason to know that the Consumer's employer prohibits the Consumer from receiving such communication at work;

(5) A message is left for the Consumer at another number other than the Consumer's home or business after the Consumer has already been reached;

(6) A Consumer has been improperly threatened with potential legal action or wage garnishment;

(7) All written cease and desist requests were honored; and

(8) Except as required by applicable law, any voice message for a return call is left, beyond anything other than the collector's name, telephone number, and ID code.

7.7 NCOF shall monitor its Representatives and the calls they make, and its Consumer Debt accounts over a period of eighteen months from the date of this Assurance ("Reporting Period") to ensure that NCOF and its Representatives are complying with relevant laws, policies and procedures, including but not limited to those set forth herein.

7.8 NCOF shall issue a report ("Report") to the Participating States every six months during the Reporting Period, which shall begin on November 1, 2011, which shall include the evaluation of NCOF's compliance with this Assurance and the factual basis for said evaluation. In the event the Attorney General receives a third party request for a Report issued by NCOF pursuant to this Assurance, the Attorney General will notify NCOF of the third party request so that NCOF may seek any type of protection afforded under applicable state law, including but not limited to a protective order.

7.9 In the event any Report should show a violation of the law or the requirements of this Assurance, or NCOF should learn any of its Representatives or Independent Contractors are acting in violation of the law or the requirements of this Assurance, NCOF shall immediately take appropriate action relating to its Representatives or Independent Contractors and will enforce its contractual rights with such Independent Contractors regarding the violations, including as described herein. NCOF shall monitor and enforce its contractual rights, up to and including termination of any Representative or Independent Contractor that violates the law, this Assurance, or its contract with NCOF.

7.10 **Retention of Documents**. NCOF shall generate, retain and make readily available to the Participating States for inspection, upon reasonable notice and without the necessity of a subpoena or other legal process, all material records and documents reasonably necessary to document compliance with this Assurance. NCOF shall maintain these records and documents for a minimum of four years after the final Report.

## VIII. CONSUMER RESTITUTION

NCOF shall set aside Fifty Thousand Dollars ($50,000) per each Signatory State to be available for restitution for Consumer redress. For a period of three years from the Effective Date of this Assurance, NCOF shall pay claims for restitution to Vermont, as provided herein, not to exceed a total payment in the amount of Fifty Thousand Dollars ($50,000). During that time period, the State may submit a claim for restitution to NCOF demonstrating a prima facie showing that, as a result of third party Debt Collection efforts undertaken by NCOF, a Consumer of the state: (1) paid a third party Consumer Debt to NCOF that was not owed by the Consumer; (2) overpaid interest on a third party Consumer Debt not supported by the underlying agreement between the debtor and the original holder of the Debt or as otherwise permitted by law; or (3)

paid an amount on a third party Consumer Debt in excess of an amount NCOF agreed to settle the account. NCOF will refund the Consumer an amount equal to the Consumer's overpayment to NCOF within thirty calendar days of receipt of the State's claim for restitution, unless NCOF provides information within that thirty calendar day period that raises a question of fact regarding the validity of the claim. If such evidence is provided by NCOF, the State will have thirty calendar days to evaluate the validity of the claim. The Vermont Attorney General's decision will be final and binding upon the State and NCOF. Nothing in this paragraph limits or restricts the right of a state or of an individual Consumer to seek restitution or pursue any other remedy provided by law, regardless whether the amount set aside under this paragraph has been depleted.

## IX. PAYMENT TO THE STATE

9.1 NCOF shall pay Five Hundred Seventy-Five Thousand Dollars ($575,000.00) to be divided and paid by NCOF directly to the following sixteen Signatory Attorney Generals of the Multistate Working Group in amount to be designated by and in the sole discretion of the Multistate Executive Committee: Alaska, Arkansas, Idaho, Illinois, Iowa, Louisiana, Michigan, Nebraska, Nevada, New Mexico, North Dakota, Ohio, Oregon, Rhode Island, South Carolina, and Wisconsin.

9.2 Upon the Effective Date of the Ohio Assurance, the Multistate Executive Committee will provide NCOF with instructions for the payments to be distributed under this Section. Said payment shall be paid within thirty calendar days of the Effective Date of this Assurance and shall be used by the Signatory Attorney General for such purposes that may include, but are not limited to, attorneys' fees, investigative costs, Consumer education, litigation

funds, local Consumer aid funds, public protection or Consumer protection purposes or other purposes as allowed by state law at the sole discretion of each Signatory Attorney General.

## X. COMPLIANCE PROCESS WITH ASSURANCE

10.1 NCOF shall keep for three years records sufficient to establish its compliance with the terms of this Assurance and shall permit an authorized representative of the Signatory Attorney General within ten calendar days' notice to inspect and/or copy any such records during normal business hours. Such records must be maintained in a secure manner, in compliance with Gramm-Leach-Bliley Act and the laws of the Participating States, to prevent identity theft.

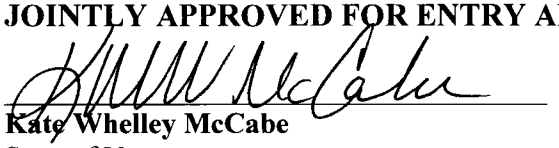
10.2 In the event that any Signatory Attorney General has reason to believe that NCOF has failed to abide by this Assurance, and absent exigent circumstances, the Signatory Attorney General shall give NCOF fifteen calendar days' notice (the "Notice") before filing a motion or other pleading seeking to enforce this Assurance. The Notice shall be in writing and shall set forth those provisions of the Assurance that the Signatory Attorney General believes have been violated. The fifteen calendar day period ("Notice Period") shall provide NCOF an opportunity to respond to the assertions of the Signatory Attorney General and the parties may use the Notice Period to attempt a resolution of the concerns. Within the Notice Period, NCOF shall provide the Signatory Attorney General with a written response containing NCOF's reply to the assertions made in the Notice and the steps that NCOF has taken or will take to resolve the alleged violation(s). The Signatory Attorney General and NCOF agree to attempt to resolve any alleged violation(s) of this Assurance through good faith negotiation prior to the Signatory Attorney General initiating any action for enforcement. This provision does not preclude any Signatory Attorney General from filing an action without complying with this provision if such

Signatory Attorney General believes such immediate action is necessary to protect Consumers from immediate harm.

10.3 In the event that any Signatory Attorney General initiates legal action or incurs any costs to compel NCOF to abide by this Assurance, upon proof of the violation, NCOF shall be liable to the Signatory Attorney General for any such reasonable costs associated with proving that violation, including, but not limited to, a reasonable sum for attorneys' fees.

10.4 Failure of the Signatory Attorney General to timely enforce any term, condition, or requirement of this Assurance shall not provide, nor be construed to provide, NCOF a defense for noncompliance with any term of this Assurance or any other law, rule, or regulation; nor shall it stop or limit the Signatory Attorney General from later enforcing any term of this Assurance or seeking any other remedy available by law, rule, or regulation.

**JOINTLY APPROVED FOR ENTRY AND SUBMITTED BY:**



2/6/12
Date

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State of Vermont
109 State Street
Montpelier, VT 05609
802-828-5621
kwhelleymccabe@atg.state.vt.us
*Counsel for the Vermont Attorney General*

**FOR NCO FINANCIAL SYSTEMS, INC.**

10/14/11
Date

**Joshua Gindin**
Executive Vice President and General Counsel

**APPROVED AS TO FORM:**

10/14/11
Date

**David Israel** (LA Bar No. 7174)
SESSIONS, FISHMAN, NATHAN & ISRAEL, LLC
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Metairie, Louisiana 70002-7227
(504) 846-7900
disrael@sessions-law.biz
*Counsel for NCO Financial Systems, Inc.*

**STATE OF VERMONT**
**SUPERIOR COURT**
**Washington Unit**

**In re NCO FINANCIAL SYSTEMS, INC. )** **CIVIL DIVISION**
**Docket No. Wncv**

## AGREED AMENDMENT TO ASSURANCE OF VOLUNTARY COMPLIANCE

On or about October 14, 2011, the State of Vermont, by and through Attorney General William H. Sorrell, and NCO Financial Systems, Inc. ("NCOF"), by its counsel ("NCOF" or collectively, the "Parties") entered into an Assurance of Voluntary Compliance ("Assurance"). Pursuant to subsequent discussions regarding implementation of certain provisions of the Assurance, the Parties hereby agree to replace the following subsections in their entirety with the language stated below.

6.3 **General Compliance**: As detailed in ¶¶ 7.1 and 7.2 herein, within thirty calendar days of the Effective Date of this Addendum, NCOF shall:

c. In connection with all Debt Collection notices where an oral or written request is made by the Consumer to do so, itemize all amounts owed or provide a "break-out" of the total amount owed as made available by NCOF's client. If NCOF is unable to itemize the amounts owed or cannot obtain that information from NCOF's Debt Collection client, NCOF will consider the account disputed, will close the account, and will cease any and all Debt Collection efforts related to that account;

h. As detailed in ¶¶ 7.1 and 7.2 herein, confirm all settlement agreements by mailing written documents to Consumers within seven calendar days of the settlement agreement that include:

(2) Itemization of all fees as made available by NCOF's Debt Collection client, if requested by the Consumer, either orally or in writing. If NCOF is unable to itemize the fees and amounts owed or cannot obtain that information from NCOF's client, NCOF will consider the account disputed, will close the account, and will cease any and all Debt Collection efforts related to that account. Further, the settlement agreement between NCOF and the Consumer will be considered null and void as it pertains to the now-disputed account and the Consumer will no longer be held to the terms of such agreement;

(3) Itemization of the interest charged on the account as made available by NCOF's Debt Collection client, if requested by the Consumer, either orally or in writing. If NCOF is unable to itemize the interest charged or cannot obtain that information from NCOF's client, NCOF will consider the account disputed, will close the account, and will cease any and all Debt Collection efforts related to that account. Further, the settlement agreement between NCOF and the Consumer will be considered null and void as it pertains to the now-disputed account and the Consumer will no longer be held to the terms of such agreement;

(4) Itemization of the principal balance owed on the account as made available by NCOF's Debt Collection client, if requested by the Consumer, either orally or in writing. If NCOF is unable to itemize the principal balance owed or cannot obtain that information from NCOF's client, NCOF will consider the account disputed, will close the account, and will cease any and all Debt Collection efforts related to that account. Further, the settlement agreement between NCOF and the Consumer will be considered null and void as it pertains to the now-disputed account and the Consumer will no longer be held to the terms of such agreement;

6.5 **Notices to Consumers**. Within one-hundred fifty (150) calendar days of and for a period of five (5) years from the Effective Date of this Addendum, NCOF and its owners, officers, directors, agents, employees, salespersons, Representatives, Independent Contractors, Affiliates, and all persons or entities in active concert or participation with NCOF in connection with NCOF's actions as a Debt Collector in the collection of Debts from Consumers shall:

a. Make the following disclosure clearly and conspicuously on the back or front of each written collection communication issued via automatic print or processing, whether completed in-house at NCOF or by an outside printer vendor, that is sent to a Consumer for the purpose of collecting a Debt:

> Federal and State law prohibit certain methods of debt collection and require that we treat you fairly. State residents should view our website at

www.ncogroup.com to review your rights under Federal and State law.

Provision 6.5(a) excludes from this notice requirement only those written collection communications that are drafted and issued in response to a specific Consumer inquiry or are drafted and issued to address specific Consumer needs and are not otherwise based on any type of pre-printed form or template.

b. Make the following disclosure clearly and conspicuously on NCOF's website, www.ncogroup.com:

> Consumers may request orally or in writing details regarding any debt being collected by NCOF, including an itemization of the principal balance owed, including an itemization of all fees, interest, and any other amount charged to the account.

7.1 NCOF shall maintain measures reasonably necessary to ensure that its Representatives, as defined herein, are properly trained and are otherwise performing their duties in compliance with all applicable laws, including, but not limited to, the Vermont Consumer Fraud Act, 9 V.S.A. § 2451 et seq., and Vermont's Consumer Fraud Rule 104, the FDCPA, 15 U.S.C. § 1692 et seq., and/or the FCRA, 15 U.S.C. § 1681 et seq. Further, NCOF shall train its Representatives that if a Consumer requests, either orally or in writing, an itemization or "break-out" of the total Debt owed and NCOF does not already possess the information requested, the Representatives shall contact NCOF's Debt Collection client to obtain that information and, if available, will provide that information to the Consumer. If NCOF is unable to obtain the information from NCOF's client, NCOF shall instruct its Representatives to consider the account disputed, to close the account, and to cease any and all Debt Collection efforts related to that account. Any settlement agreement previously reached between NCOF and the Consumer pertaining to the referenced account will be considered null and void as it pertains to the now-disputed account and the Consumer will no longer be held to the terms of such agreement.

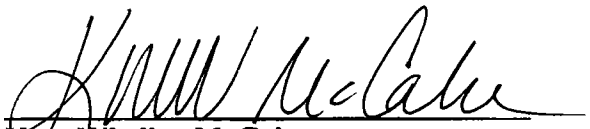
NCOF shall further adhere to its policy of disciplining, up to and including the termination of, Representatives that have not complied with the requirements of this Assurance and/or all applicable laws, including, but not limited to the Vermont Consumer Fraud Act, 9 V.S.A. § 2451 et seq., and Vermont's Consumer Fraud Rule 104, the FDCPA, 15 U.S.C. § 1692 et seq., and/or the FCRA, 15 U.S.C. § 1681 et seq. NCOF shall maintain all records referenced in this paragraph and shall, within fourteen days of receiving a request from the Signatory Attorney General, produce a copy of all such records.

7.2 When NCOF hires, retains, and/or enters into an agreement with an Independent Contractor, as defined herein, NCOF shall notify and require, through representations and warranties in their contracts with all Independent Contractors, that each Independent Contractor (1) must comply with the Vermont Consumer Fraud Act, 9 V.S.A.
§ 2451 et seq., and Vermont's Consumer Fraud Rule 104, the FDCPA, 15 U.S.C. § 1692 et seq., and/or the FCRA, 15 U.S.C. § 1681 et seq., (2) refrain from engaging in the acts and practices described in Section VI, Paragraphs 6.2a-6.2ff, and (3) comply with the practices set forth in Section VI, Paragraphs 6.3a-6.3h. Further, NCOF shall clearly and conspicuously notify such Independent Contractor that any and all of their Debt Collection acts and/or practices must be consistent with NCOF's policies and procedures consistent with the terms of this Assurance. NCOF shall train and sufficiently monitor Independent Contractors in accordance with the provisions stated herein. Further, NCOF shall train its Independent Contractors that if a Consumer requests, either orally or in writing, an itemization or "break-out" of the total Debt owed, and NCOF does not already possess the information requested, the Independent Contractor shall contact NCOF's Debt Collection client to obtain that information and, if available, will provide that information to the Consumer. If NCOF is unable to obtain the

information from NCOF's client, NCOF shall instruct its Independent Contractors to consider the account disputed, to close the account, and to cease any and all Debt Collection efforts related to that account. Any settlement agreement previously reached between NCOF and the Consumer pertaining to the referenced account will be considered null and void as it pertains to the now-disputed account and the Consumer will no longer be held to the terms of such agreement. Should NCOF learn that any Independent Contractor is acting in violation of the law or the requirements of this Assurance, NCOF shall immediately take action to enforce its contractual rights with such Independent Contractor regarding the violations, including as described herein. NCOF shall monitor and enforce its contractual rights, up to and including termination of any Independent Contractor which is in violation of the law, this Assurance, or its contract with NCOF.

This Amendment is not intended to apply to any other provisions or subparagraphs of the October 14, 2011 Assurance not listed above. Any and all other paragraphs and subparagraphs in the Assurance executed on or about October 14, 2011 are still fully valid and enforceable and NCOF shall function in full accordance with that Assurance.

**JOINTLY APPROVED FOR ENTRY AND SUBMITTED BY:**



2/6/12
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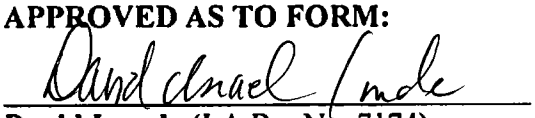
***Counsel for the Vermont Attorney General***

**FOR NCO FINANCIAL SYSTEMS, INC.**

1-24-12
Date

**Joshua Gindin**
Executive Vice President and General Counsel

**APPROVED AS TO FORM:**



1/26/12
Date

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*Counsel for NCO Financial Systems, Inc.*

Office of the
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109 State Street
Montpelier, VT
05609

STATE OF VERMONT
SUPERIOR COURT
WASHINGTON UNIT

2012 FEB 14 P 2:43

**In re ONLINE YELLOW PAGES, LLC )**

**CIVIL DIVISION**
**Docket No.** 114-2-12 Wncv

## ASSURANCE OF DISCONTINUANCE

WHEREAS Online Yellow Pages, LLC (hereinafter referred to as "Online Yellow Pages"), a subsidiary of Intercall Limited, is a Florida corporation with offices at 1820 East Hallandale Beach Blvd., Hallandale Beach, Florida 33309;

WHEREAS Online Yellow Pages is a third-party provider of business advertising listings on its website, the charges for which are placed on local telephone bills with the assistance of a Ponta Vedra Beach, Florida-based company called ILD Telecommunications, Inc.;

WHEREAS Online Yellow Pages' charges to businesses (which are considered consumers under Vermont law and are referred to as such in this Assurance of Discontinuance) for this service are $30 to $50 per month;

WHEREAS beginning in or around 2009, Online Yellow Pages charged a total of over $56,000 to more than 190 Vermont businesses for its services that appeared on local telephone bills in Vermont's area code 802;

WHEREAS sellers of goods or services that are to be charged on a consumer's local telephone bill are required under 9 V.S.A. § 2466 to send a notice by first class mail to the party to be charged containing information specific in the statute;

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GENERAL
109 State Street
Montpelier, VT
05609

WHEREAS Online Yellow Pages did not send to Vermont consumers who were charged for its services on their local telephone bills a notice by U.S. first-class mail, nor did it notify consumers of all the information required by the statute;

WHEREAS the Attorney General alleges that Online Yellow Pages violated the Vermont Consumer Fraud Act, 9 V.S.A. § 2466, by not complying with that provision's notice requirements;

WHEREAS the Attorney General also alleges that Online Yellow Pages violated the right-to-cancel provisions of 9 V.S.A. § 2454 and Vermont Consumer Fraud Rule 113 for telephonic sales by not providing its customers with proper notice of their right to cancel;

WHEREAS the Attorney General further alleges that Online Yellow Pages charged at least some Vermont consumers on their telephone bills without the proper authorization;

AND WHEREAS the Attorney General is willing to accept this Assurance of Discontinuance pursuant to 9 V.S.A. § 2459;

THEREFORE, the parties agree as follows:

1. *Injunctive relief.* Online Yellow Pages shall comply strictly with all provisions of Vermont law, including but not limited to provisions of the Vermont Consumer Fraud Act, 9 V.S.A. chapter 63, relating to the placement of charges on local telephone bills associated with telephone numbers in area code 802.

2. *Consumer relief.*

a. For each consumer from which Online Yellow Pages has received money through a charge on a local telephone bill with a number in area code 802 on or after May 1, 2005, Online Yellow Pages shall, within thirty (30) business days of signing this Assurance of Discontinuance, send to the consumer, by first-class mail, postage prepaid, a check in the

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GENERAL
109 State Street
Montpelier, VT
05609

amount of all monies that have not been previously refunded to the consumer's last known address, accompanied by a letter in substantially the form attached as Exhibit 1. Online Yellow Pages shall use due diligence to ensure that accurate refunds are provided to each consumer to whom a refund is due under this Assurance of Discontinuance. Online Yellow Pages shall not be obligated to issue refunds to consumers who Online Yellow Pages can demonstrate to the Vermont Attorney General's Office used its services.

c. No later than 60 (sixty) days after signing this Assurance of Discontinuance, Online Yellow Pages shall provide to the Vermont Attorney General's Office the names and addresses of the consumers to whom letters and payments were sent under this Assurance of Discontinuance, along with the date and amount of each payment.

d. No later than ninety (90) days after signing this Assurance of Discontinuance, Online Yellow Pages shall mail to the Vermont Attorney General's Office, 109 State Street, Montpelier, VT 05609, a single check, payable to "Vermont State Treasurer," in the total dollar amount of all checks that were returned as undeliverable or that went uncashed, to be treated as unclaimed funds, along with a list, in Excel format on a compact disk, of the consumers whose checks were returned or were not cashed (which list shall set out the first and last names of the consumers in distinct fields or columns), and for each such consumer, the last known address and dollar amount due.

3. *Binding effect.* This Assurance of Discontinuance shall be binding on Online Yellow Pages, its successors and assigns.

4. *Release.* The State of Vermont hereby releases and discharges any and all claims that it may have against Online Yellow Pages or its affiliates based on conduct or activities

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05609

arising under or in connection with the Vermont Consumer Fraud Act prior to the date of this Assurance of Discontinuance.

5. *Admissibility.* Nothing in this Assurance of Discontinuance may be used or admitted as evidence or as an admission in any other adverse proceeding or action relating to Online Yellow Pages, nor shall anything in this document be considered first-party evidence.

Date: 1/12/12

STATE OF VERMONT

WILLIAM H. SORRELL
ATTORNEY GENERAL

by: _____
Elliot Burg
Assistant Attorney General

Date: 2/6/12

ONLINE YELLOW PAGES, LLC

by: _____
Its Authorized Agent

APPROVED AS TO FORM:

_____
Elliot Burg
Assistant Attorney General
Office of Attorney General
109 State Street
Montpelier, VT 05609
For the State of Vermont

_____
Elizabeth L. Bevington, Esq.
Holland & Knight
315 South Calhoun Street, Suite 600
Tallahassee, FL 32301
For Online Yellow Pages, LLC

Office of the
ATTORNEY
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109 State Street
Montpelier, VT
05609

**Exhibit 1 (Letter to Consumers)**

Dear [Name of Consumer]:

Under a settlement with the Vermont Attorney General's Office, we are enclosing a check to reimburse you for charges by our company, Online Yellow Pages, that appeared on your local telephone bill.

If you have any questions about the settlement, you may contact us at 1 (888) 212-1421 or the Attorney General's Office at (802) 828-5507.

Sincerely,

Online Yellow Pages, LLC

Office of the
ATTORNEY
GENERAL
109 State Street
Montpelier, VT
05609

**STATE OF VERMONT**
**SUPERIOR COURT**
**WASHINGTON UNIT**



**In re PERSONAL VOICE, INC.)**

**CIVIL DIVISION**
**Docket No. 669-10-11 Wncv**



## SUPPLEMENTAL ASSURANCE OF DISCONTINUANCE

WHEREAS Personal Voice, Inc. (hereinafter referred to as "Personal Voice"), a subsidiary of Digitel Network Corporation, is a Florida corporation with offices at 16805 US Highway 19 North, Clearwater, Florida 33764;

WHEREAS Personal Voice is a third-party provider of voice mail services and prepaid credit cards, the charges for which are placed on local telephone bills with the assistance of a San Antonio, Texas-based company called Enhanced Services Billing, Inc. (ESBI);

WHEREAS Personal Voice marketed its services on the Internet and through telemarketing;

WHEREAS Personal Voice's charges to consumers averaged $12.95 per month,

WHEREAS during the period January 2004 to March 2008, Personal Voice charged a total of over $49,900 to 578 consumers for its services that appeared on local telephone bills in Vermont's area code 802;

WHEREAS sellers of goods or services that are to be charged on a consumer's local telephone bill are required under the Vermont Consumer Fraud Act, 9 V.S.A. § 2466, to mail a notice to the party to be charged, containing information specified in the statute;

WHEREAS while Personal Voice did provide to Vermont consumers who were to be charged for its services on their local telephone bills a notice of the charge, the notice did not contain the address or telephone number of the Attorney General's Consumer Assistance Program, nor was the notice sent to consumers by mail;

WHEREAS the Attorney General alleges that as a result, Personal Voice violated the notification requirements of 9 V.S.A. § 2466;

WHEREAS Personal Voice did not provide consumers who were telemarketed with two copies of a "short-form" and detailed "long-form" notice of their right to cancel their transaction, nor, in connection with the prepaid credit card offer, was a full refund offered;

WHEREAS the Attorney General alleges that as a result, Personal Voice violated the requirements of the Consumer Fraud Act, V.S.A. § 2454, and Vermont Consumer Fraud Rule (CF) 113 for telephonic transactions;

WHEREAS Personal Voice has not admitted any violation of Vermont law;

WHEREAS the original Assurance of Discontinuance in this matter was filed with the Court on October 19, 2011;

WHEREAS circumstances warrant supplementation of the original Assurance of Discontinuance;

AND WHEREAS the Attorney General is willing to accept this Supplemental Assurance of Discontinuance pursuant to 9 V.S.A. § 2459;

THEREFORE, the parties agree as follows:

1. *Injunctive relief.* Personal Voice shall comply strictly with all provisions of Vermont law, including but not limited to provisions of 9 V.S.A. § 2466 and 9 V.S.A.

chapter 63 relating to the placement of charges on local telephone bills associated with telephone numbers in area code 802.

2. *Consumer relief.*

a. Personal Voice represents that for each consumer from whom it has received money through a charge on a local telephone bill with a number in area code 802, it began, no later than October 7, 2011, sending refund checks for the amount billed on the local telephone bill minus any refunds already made to each consumer by first-class mail, postage prepaid; that it used due diligence to ensure that accurate refunds were provided to each consumer (which check was valid for at least sixty (60) days from its date of issue), accompanied by a letter in substantially the form attached as Exhibit 1 hereto; and that the payments were made on the following disbursement schedule:

- Twelve thousand dollars ($12,000.00) no later than October 7, 2011;
- An additional twenty-four thousand dollars ($24,000.00) no later than January 1, 2012;
- An additional fourteen thousand dollars ($14,000.00) no later than April 1, 2012.

b. Personal Voice further represents that it has provided to the Vermont Attorney General's Office the names and addresses of the consumers to which letters and payments were sent, under this Assurance of Discontinuance, along with the date and amount of each payment.

c. No later than August 21, 2012, Personal Voice shall mail to the Vermont Attorney General's Office, 109 State Street, Montpelier, VT 05609, a single check, payable to "Vermont State Treasurer," in the total dollar amount of all checks that were returned as undeliverable or that went uncashed, to be treated as unclaimed funds, along with a list, in electronic Excel format on a compact disk, of the consumers whose checks were returned or

were not cashed (which list shall set out the first and last names of the consumers in distinct fields or columns), and for each such consumer, the last known address and dollar amount due.

3. *Civil penalties, fees and costs.* Personal Voice shall pay to the State of Vermont, in care of the Vermont Attorney General's Office, the sum of ten thousand dollars ($10,000.00) as reimbursement for fees and costs, in four monthly installments of two thousand five hundred dollars ($2,500.00) each no later than September 1, October 1, November 1, and December 1, 2012, respectively.

4. In the event that any of the payments required by paragraphs 2(c) and 3 is not made on time, Personal Voice shall, within ten (10) days of the due date for the payment, pay the sum of ten thousand dollars ($10,000.00) in additional liquidated damages, along with all other payments then due.

5. David Giorgione, principal of Personal Voice and Digitel, shall be jointly and severally liable for the payments required by paragraphs 2(c) and 3, and for any liquidated damages that might be imposed by this Court under paragraph 4.

6. *Binding effect.* This Assurance of Discontinuance shall be binding on Personal Voice and its successors and assigns.

7. *Release.* The State of Vermont hereby releases and discharges any and all claims that it may have against Personal Voice, David Giorgione, Digitel Network Corporation, its officers, shareholders or employees, or its affiliates based on conduct or activities arising under or in connection with 9 V.S.A. § 2466 and/or 9 V.S.A. Chapter 63 prior to the date of this Assurance of Discontinuance.

8. *Effect.* Nothing in this Assurance of Discontinuance shall be construed to limit Personal Voice's right to assert any legal, factual or equitable defenses in any pending or future proceeding, except with respect to enforcement of this Assurance of Discontinuance.

Date: 8/27/12

STATE OF VERMONT

WILLIAM H. SORRELL
ATTORNEY GENERAL

by: _____
Elliot Burg
Assistant Attorney General

Date: 8/27/12

PERSONAL VOICE, INC.

by: _____
Its Authorized Agent

APPROVED AS TO FORM:

_____
Elliot Burg
Assistant Attorney General
Office of Attorney General
109 State Street
Montpelier, VT 05609
For the State of Vermont

_____
William E. Raney, Esq.
Copilevitz & Canter, LLC
310 W. 20th Street, Suite 300
Kansas City, MO 64108
For Personal Voice, Inc.

**Exhibit 1 (Letter to Businesses)**

Dear [Name of Consumer]:

Personal Voice, Inc., has entered into a settlement with the Vermont Attorney General's Office to resolve claims that we did not properly notify you, in accordance with Vermont law, about charges billed to your local telephone bill for our services.

As part of that settlement, we are enclosing a refund check for all charges relating to Personal Voice's services that appeared on your local telephone bill.

You have no obligation to do anything in response to this payment.

Sincerely,

Personal Voice, Inc.

STATE OF VERMONT

SUPERIOR COURT
Washington Unit

CIVIL DIVISION
Docket No. Wncv

In re: INERGY PROPANE, LLC,
d/b/a PYROFAX ENERGY.

**ASSURANCE OF DISCONTINUANCE**

**Background**

***Inergy Propane LLC***

1. Inergy Propane, LLC ("Inergy") is a Missouri corporation with offices at 2 Brush Creek Blvd., Suite 200, Kansas City, Missouri 64112, that is wholly owned by the limited partnership Inergy, L.P. Inergy's operations include the retail marketing, sale and distribution of propane to residential, commercial, industrial and agricultural customers, serving approximately 700,000 retail customers from over 350 customer service centers throughout the United States.
2. In December 2004, Inergy purchased Star Gas, a propane company doing business in Vermont under the trade name Ultramar.[1] Since on or about April 10, 2008, when it registered with the Vermont Secretary of State, the branches acquired by Inergy in its purchase of Star Gas now conduct business in Vermont as Pyrofax Energy ("Pyrofax").

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[1] In transactions independent of its purchase of Star Gas, Inergy has acquired the following propane companies that conduct business in Vermont: Stevens Energy, Deerfield Valley Energy, Newton's Energy, and FG White Energy. Inergy is also authorized to conduct business in Vermont as Inergy Sales & Service and Stellar Propane Services.

*Minimum Usage Fee*

3. In the fall of 2010, Pyrofax was providing propane services to approximately 25,674 Vermont consumers.
4. On September 23, 2010 Pyrofax sent a "Disclosure of Charges" to all of its Vermont consumers. *See* Attachment A (Disclosure of Charges).
5. In late 2010, Pyrofax advised at least 3,950 Vermont consumers that the consumer would be charged a "minimum usage fee" at the rate of $2.50 per gallon for the difference, in gallons, between one full tank of fuel (based on storage capacity) and the amount of fuel the consumer purchased during the previous twelve months. *Id.* The minimum usage fee was based on fuel purchased by Vermont consumers for the period of time from December 1, 2009 through November 30, 2010. *Id.* During this time period, some of the above referenced consumers were unaware of the minimum usage requirement prior to the September 23, 2010, notice.
6. Pyrofax mailed the invoice for the minimum usage fee charge to Vermont consumers in two mailing groups with the first consumers being mailed the assessment/invoice the week of December 13, 2010, the second group the week of December 20, 2010.
7. Between December 2010 and February 2011, the Consumer Assistance Program ("CAP") of the Attorney General's Office received more than 60 consumer complaints regarding the minimum usage fee.
8. In response to public concern about the minimum usage fee, Inergy independently credited or refunded the minimum usage fee charges assessed to its consumers by the end of January, 2011.

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***Refund Practices***

9. Since January 1, 2010, 23 Vermont consumers made complaints to the Vermont Attorney General's Office regarding Pyrofax's refund practices after the consumer disconnected or terminated services with Pyrofax. Consumers specifically complained about: (a) Pyrofax's failure to return their security deposit with interest within 14 days of disconnection or termination of service; (b) Pyrofax's untimely reimbursement for unused gas after disconnection or termination; and (c) Pyrofax's failure to remove their gas storage tank in a timely manner.

***Regulatory Framework***

10. Pursuant to 9 V.S.A. § 2461b, the Vermont Attorney General's Office has regulation of and rule making authority to promote business practices which are uniformly fair to sellers and protect consumers concerning propane gas. Vermont Consumer Fraud Rule 111 ("CF 111") for liquefied petroleum "propane" gas was amended in 2009 and became effective on January 1, 2010.

11. CF 111.20(a)(2) prohibits the billing or collection of "any charge that is not clearly and conspicuously set forth in a written contract in existence as of the effective date of [CF 111], or in the absence of such a contract, any charge that has not been disclosed clearly and conspicuously in writing to the consumer at least 60 days prior to the charge...."

12. CF 111.19 requires the disclosure of prices and charges.

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13. CF 111.12(d) requires gas companies to "refund a consumer's security deposit with accrued interest less accrued charges within 14 days of disconnection or termination of service."

14. CF 111.18(b) requires gas companies at time of disconnection or termination to, "reimburse to the consumer, within 20 days of the disconnection or termination, the retail price paid for any gas remaining in the tank, or, if the amount of gas remaining in the tank cannot be determined with certainty, reimburse to the consumer 80 percent of the company's best reasonable estimate of said amount less any amounts due to the consumer...."

15. CF 111.18(a) requires gas companies to remove a storage tank within 20 days for an above ground tank (30 days in the case of an underground tank) or as soon as weather permits.

16. A violation of CF 111 constitutes an unfair and deceptive trade act and practice in commerce under Vermont's Consumer Fraud Act, 9 V.S.A. § 2453(a).

17. Violations of the Consumer Fraud Act are subject to a civil penalty of up to $10,000.00 per violation. 9 V.S.A. § 2458(b)(1). Each day that a violation continues is a separate violation.

***The State's Allegations***

18. The Vermont Attorney General's Office alleges the following violations of the Consumer Fraud Rules:

    (a) that the assessment of the minimum usage fee by Pyrofax in December 2010 without proper notice violated CF 111.19 and CF 111.20(a)(2);

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(b) that Pyrofax's failure to refund security deposits following disconnection or termination of service within the timeframes specified violated CF 111.12(d);

(c) that Pyrofax's failure to reimburse Vermont consumers for unused gas remaining in the tank following disconnection or termination of service within the timeframes specified violated CF 111.18(b); and

(d) that Pyrofax's failure to remove storage tanks within the timeframes specified violated CF 111.18(a).

19. Agreeing to the terms of this Assurance of Discontinuance for the purpose of settlement does not constitute an admission by Pyrofax to a violation of any law, rule, or regulation.

**Assurances and Relief**

The Attorney General and Inergy d/b/a Pyrofax are willing to accept this Assurance of Discontinuance pursuant to 9 V.S.A. § 2459, and the parties agree as follows:

***Injunctive Relief***

20. Inergy shall comply with all applicable federal and Vermont laws and regulations, including but not limited to the Vermont Consumer Fraud Act, 9 V.S.A., ch. 63, and CF 111, as it may, from time to time be amended.

21. Inergy shall cease the assessment or collection of any and all minimum usage fees from Vermont consumers. "Minimum usage fees" ("MUF") shall include any fees relating to the purchase of a minimum number of gallons of propane per year, including fees for propane not actually delivered to a consumer, irrespective of whether the fee is called a "minimum usage fee." Notwithstanding, nothing herein

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shall prohibit the requirement that a consumer purchase a minimum number of gallons as part of a guaranteed price plan.

22. Within 20 days of the date when it disconnects or terminates service to a consumer, or when it is notified by the consumer in writing, in conformity with CF 111.16, that service is disconnected, whichever is earlier, Inergy shall refund to the consumer:

    (a) the amount paid by the consumer for any propane remaining in the storage tank, less any payments due Inergy from the consumer; or

    (b) refund the amount paid by the consumer for 80 percent of Inergy's best reasonable estimate of the quantity of propane remaining in the tank, less any payments due from the consumer, if the quantity of propane remaining in the storage tank cannot be determined with certainty. Inergy shall refund the remainder of the amount due as soon as the quantity of propane left in the tank can be determined with certainty, but no later than 14 days after the removal of the tank or 20 days after the termination or disconnection of service, whichever is later.

23. Inergy shall promptly remove propane storage tanks within 20 days of a consumer's request following disconnection by Inergy or upon receipt from the consumer in writing that the tank has been disconnected. For an underground tank the removal time period will be 30 days. If weather or placement conditions do not allow for tank removal in the stated time period, tank removal will occur as soon as weather and access to the tank allow, whichever is later.

24. Inergy shall refund all consumer security deposits with accrued interest, and less accrued charges, within 14 days of disconnection as defined in CF 111.

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*Refunds to Customers*

25. Inergy has previously refunded or credited the MUF to its consumers. However, to the extent that any remaining customers exist with such a charge, within 30 days of signing this Assurance of Discontinuance, Inergy shall refund to all of its minimum usage fee assessed Vermont customers, all unrefunded fees paid by each customer as a result of the imposition of the "minimum usage fee" by Inergy in 2010-2011.
26. Inergy has previously provided significant discounts to those consumers who purchased propane as a result of the notice of the minimum usage fee. To the extent not previously provided, Inergy shall credit those consumers 20% of the amount the consumer paid for the fuel which they were not otherwise required to purchase as a result of the MUF.
27. Inergy has identified 302 Vermont consumers who, between January 1, 2010 and May 25, 2011: (a) were disconnected from services by Inergy; and (b) did not received refunds for unused propane fuel more than 20 days after the disconnection of services, i.e. did not receive timely refunds.
28. Inergy shall pay liquidated damages in the amount of two hundred fifty dollars ($250.00) to each of the 302 identified Vermont consumers who did not receive a timely refund for unused propane fuel, as described in paragraph 27.
29. Payment of these liquidated damages provided by paragraph 27 shall occur as follows:

    (a) within 30 days of signing this Assurance of Discontinuance, Inergy shall forward to the Office of the Attorney General individual checks for $250.00 made out to each of the 302 identified Vermont consumers. Inergy shall also

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provide the mailing address for each of those consumers, and any insert (e.g. form letter) it would like to be included in the mailing; and

(b) within 10 days of receipt from Inergy, the Office of the Attorney General will mail each of the 302 Vermont consumers the check, along with the insert from Inergy and a letter from the Office of the Attorney General.

30. Inergy agrees to consider in good faith claims presented by any Vermont consumer, not among the 302 identified Vermont consumers referenced in paragraph 28, who disconnected or terminated services with Inergy between January 1, 2010 and May 25, 2011, and who believes that he or she did not receive a timely refund by Inergy for unused propane fuel. In the event such a consumer demonstrates that the refund was untimely, Inergy will negotiate a liquidated damages payment in a manner consistent with the terms of this settlement. Inergy shall provide the Attorney General with a list of any consumers who requested payments under this paragraph, and the outcome of the negotiations, including payment amount, if any.

***Compliance Officer***

31. Within thirty (30) days of signing this Assurance of Discontinuance, Inergy shall hire or designate a "Compliance Officer."

(a) Inergy shall provide that the Compliance Officer has the following authority and is adequately empowered to assume the following duties and responsibilities:

(i) resolve Vermont consumer complaints, requests, and inquiries on a case-by-case basis, including determining whether refunds or

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account credits are appropriate, and whether a particular refund was timely for amounts up to $2,500.00;[2]

(ii) be a direct liaison to the Vermont Attorney General's Office and the Vermont Consumer Assistance Program ("CAP") with respect to any consumer complaints, requests, or inquiries, and any other matters arising from this Assurance of Discontinuance and its implementation;

(iii) monitor the resolution of consumer complaints, requests, and inquiries delivered to Inergy by the Vermont Attorney General's Office or CAP and by any other Vermont consumers; and

(iv) Respond, as appropriate, to any requests or inquiries from the Vermont Attorney General's Office regarding alleged violations of this Assurance of Discontinuance or applicable state and/or federal laws and regulations by Inergy;

(b) Inergy shall provide a designated, direct-dial phone line where the Compliance Officer can be reached by the Attorney General's Office.

(c) Inergy shall provide the Vermont Attorney General's Office with the name, address, telephone number and e-mail address of the person who has been named Compliance Officer within three days of his/her appointment.

32. Inergy shall include contact information for the Compliance Officer on all billing statements and fee disclosures to Vermont consumers. The contact information shall

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[2] For any refund, penalty, or credit that exceeds $2,500, the Compliance Officer may require prior approval from his superiors including the Western New England Division President.

include the designated e-mail address where a consumer can reach the Compliance Officer.

***Payment to the State of Vermont***

33. Within 60 days of signing this Assurance of Discontinuance, Inergy shall pay to the State of Vermont one hundred forty thousand dollars ($140,000.00) in civil penalties and costs. Payment of the one hundred forty thousand dollars ($140,000.00) shall be made to the "State of Vermont" and shall be sent to the Vermont Attorney General's Office at the following address: Robert F. McDougall, Assistant Attorney General, Office of the Attorney General, 109 State Street, Montpelier, Vermont 05609.

34. Within 30 days of signing this Assurance of Discontinuance, Inergy shall pay to the Vermont Low Income Home Energy Assistance Program ("LIHEAP") one hundred thousand dollars ($100,000.00). Payment of the one hundred thousand dollars ($100,000.00) shall be made via the Vermont Department for Children and Families, Economic Services Division, Fuel Assistance Program, 103 South Main Street, Waterbury, Vermont 05671. Notice of the payment shall be provided to the Attorney General at the address listed in paragraph 33.

***Final Resolution***

35. Neither Inergy nor anyone acting on its behalf shall state or infer that the Vermont Attorney General's Office approves any business practices by Inergy.

36. This Assurance of Discontinuance shall be binding on Inergy, all of its affiliate companies doing business in Vermont, its officers, directors, owners, managers, successors and assigns. The undersigned authorized agent of Inergy shall promptly take reasonable steps to ensure that copies of this document are provided to all

**Office of the ATTORNEY GENERAL 109 State Street Montpelier, VT 05609**

officers, directors, owners and managers of the company, and all of its affiliate companies doing business in Vermont.

37. This Assurance of Discontinuance resolves all existing claims the State of Vermont may have against Inergy stemming from the conduct described in this document.

DATED at Montpelier, Vermont this 18th day of January, 2012.

STATE OF VERMONT

WILLIAM H. SORRELL
ATTORNEY GENERAL

By: _____
Robert F. McDougall
Assistant Attorney General
Office of the Attorney General
109 State Street
Montpelier, VT 05609

**Office of the ATTORNEY GENERAL 109 State Street Montpelier, VT 05609**

DATED at ESSEX JUNCTION, VERMONT this 12th day of January, 2012.

INERGY PROPANE, LLC

By: _____
Its Authorized Agent

DAVID J. WELLER DIVISION PRESIDENT
Name and Title of Authorized Agent

APPROVED AS TO FORM:

_____
Robert F. McDougall
Assistant Attorney General
Office of Attorney General
109 State Street
Montpelier, VT 05609
For the State of Vermont

_____
Joshua R. Diamond, Esq.
Diamond & Robinson, P.C.
15 East State Street
P.O. Box 1460
Montpelier, VT 05601-1460
For Inergy Propane, LLC

stevens energy

pyrofax energy
PROPANE & HEATING OIL

deerfield valley energy

newton's energy

1-888-PYROFAX

f.g. white energy

| PROPANE DEALER'S DISCLOSURE OF CHARGES | | |
|---|---|---|
| **CHARGE** | **AMOUNT*** | **VALID UNTIL*** |
| Security Deposit | 1/6 of Estimated Annual Expense | 1 Year |
| Permit/Inspection Charge | $53.00 | Variable |
| Equipment Installation Charge | $80.00 | Variable |
| Service Diagnostic Fee - During Business Hours | $70.00 | Variable |
| Service Diagnostic Fee - Emergency Hours | $105.00 | Variable |
| Leak/Pressure Test - Technician | $75.00 | Variable |
| Leak/Pressure Test - Driver | $50.00 | Variable |
| After-Hours Delivery Charge | $175.00 | Variable |
| Meter Read Fee | $2.00 | Sept. 30, 2011 |
| Equipment Lease Fee / Month (based on tank size) | $2.50- $13.00/mo | Sept. 30, 2011 |
| Special Trip Charge - Business Hours | $100.00 | Variable |
| Minimum Annual Purchase Requirement (tank capacity) | 1 tank/year | Sept. 30, 2011 |
| Late Payment Fee | 1.5%/Month (18% Annual) | Sept. 30, 2011 |
| Equipment Reconnection Charge | $55.00 | Variable |
| Early Service Termination Fee | $100.00 | Sept. 30, 2011 |
| Pump Out/Restocking Charge | $0.30/gallon $50.00 minimum | Variable |
| Equipment Removal Charge - Above Ground Tank | $75/hr | Variable |
| Equipment Removal Charge - Underground Tank * Does not include excavation cost. | $75/hr | Variable |
| Collection Reporting Fee | $25.00 | Sept. 30, 2011 |
| Non-Sufficient Funds Fee | $35.00 | Sept. 30, 2011 |
| Fuel Surcharge | $2.50/delivery | Variable |

Unless otherwise stated in writing above, the amount of all charges for which an amount is listed will remain in effect for 365 days from the date of this Disclosure. You will be required to sign a written agreement and/or complete a credit check that is satisfactory to the Company. This Disclosure is in addition to the terms and conditions of any Agreement between the Company and you. Advice on purchasing LP gas is available on the Vermont Attorney General's website at www.atg.state.vt.us.
*If the word variable appears, it means that the amount of the charge ***may increase or decrease at any time***. If no amount or date is stated, the charge or lack of charge will remain in effect for one year from the date of this Disclosure (or three years for changes relating to termination of service).

**ATTACHMENT A**

STATE OF VERMONT
SUPERIOR COURT
WASHINGTON UNIT 2012 MAR 29 P 1:47

| | |
|---|---|
| In re SMALL BUSINESS TECHNICAL SOLUTIONS, LLC ) | CIVL DIVISION Docket No. 255-3-12 Wncv |

## ASSURANCE OF DISCONTINUANCE

WHEREAS Small Business Technical Solutions, LLC (hereinafter referred to as "SBTS") is an Illinois limited liability company with offices at 929 N. Plum Grove Road, Schaumburg, Illinois 60173;

WHEREAS SBTS is a provider of computer support and other services for small and medium sized businesses, the charges for which are placed on local telephone bills with the assistance of a Florida-based company called ILD Teleservices, Inc.;

WHEREAS Small Business Technical Solutions' charges for the services were $49.95 per month;

WHEREAS beginning in early 2008, SBTS, up until approximately March 2010 when SBTS ceased marketing to Vermont businesses, collected net revenues of approximately $55,000 from 481 Vermont businesses for its services that appeared on local telephone bills in Vermont's area code 802;

WHEREAS sellers of goods or services that are to be charged on a consumer's (including a business') local telephone bill are required under 9 V.S.A. § 2466 to mail a notice to the party to be charged, containing information specified in the statute;

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WHEREAS while SBTS did send to Vermont consumers (including businesses) who were to be charged for its services on their local telephone bills a notice of the charge, that did contain most, but not all, of the information required by the statute and was not sent as a freestanding notice by U.S. first-class mail;

WHEREAS the Attorney General alleges that SBTS' uniform notice failed to meet these requirements of 9 V.S.A. § 2466;

WHEREAS the Attorney General also alleges that SBTS violated the right-to-cancel provisions of 9 V.S.A. § 2454 and Vermont Consumer Fraud Rule 113 for telephonic sales by not providing its customers with proper notice of their right to cancel;

WHEREAS the Attorney General also alleges that SBTS used deceptive telemarketing to solicit Vermont businesses to agree to be charged on their local telephone bills by (a) misrepresenting the purpose of its telemarketing calls at the outset as being to inform the business that it would be receiving utility bill rebates and to confirm the accuracy of its listing for the business, in violation of 9 V.S.A. § 2453(a), and (b) telling businesses that they were "preferred telephone customers," when in fact the caller was simply making contact with prospective customers and all or a substantial number of those being called received the same opportunity, in violation of Vermont Consumer Fraud Rule (CF) 109.02, http://www.atg.state.vt.us/ assets/files/CF%2010.pdf;

WHEREAS the Attorney General further alleges that SBTS charged Vermont businesses on their telephone bills without their authorization;

AND WHEREAS the Attorney General is willing to accept this Assurance of Discontinuance pursuant to 9 V.S.A. § 2459;

THEREFORE, the parties agree as follows:

**Office of the ATTORNEY GENERAL**
**109 State Street**
**Montpelier, VT 05609**

1. *Injunctive relief.* SBTS shall comply strictly with all provisions of Vermont law, including but not limited to provisions of 9 V.S.A. § 2466 and 9 V.S.A. Chapter 63, relating to the placement of charges on local telephone bills associated with telephone numbers in area code 802.

2. *Customer relief.*

a. For each business from which SBTS has received money through a charge on a local telephone bill with a number in area code 802 on or after May 1, 2005, SBTS shall arrange for an electronic credit record to the business' local telephone company in the amount of all such monies that have not been previously refunded directly to the business. SBTS shall begin to issue such credits within twenty (20) business days of signing this Assurance of Discontinuance, and SBTS shall have completed all attempts to issue such credits within sixty (60) days of signing this Assurance of Discontinuance. SBTS shall use due diligence to ensure that accurate credits are provided to each customer to whom a credit is due.

b. If a credit record sent under the preceding paragraph is not accepted or is returned by the local telephone company, SBTS shall, within ten (10) days of learning of the non-acceptance or the return, send to the customer by first-class mail, postage prepaid, a check in the amount of the credit due to the business' last known address to SBTS, accompanied by a letter in substantially the form attached as Exhibit 1 hereto.

c. No later than seventy (70) days after signing this Assurance of Discontinuance, SBTS shall provide, in Excel format, to the Vermont Attorney General's Office the names and addresses of the businesses whose telephone numbers were credited, and to which

**Office of the ATTORNEY GENERAL 109 State Street Montpelier, VT 05609**

letters and payments were sent, under this Assurance of Discontinuance, along with the date and amount of each credit or payment.

3. No later than ninety (90) days after signing this Assurance of Discontinuance, SBTS shall pay to the Vermont Attorney General's Office the total dollar amount of all checks returned as undeliverable or that went uncashed by that date, in a check payable to "Vermont State Treasurer," to be treated as unclaimed funds, along with a list in Excel format of the businesses to whom the monies due were not paid, their last known addresses, and the dollar amount due.

4. *Payment to the State.* Within twenty (20) days of signing this Assurance of Discontinuance, SBTS shall pay to the State of Vermont, in care of the Vermont Attorney General's Office, the sum of ten thousand dollars ($10,000) as reimbursement for reasonable attorney's fees and costs.

5. *Binding effect.* This Assurance of Discontinuance shall be binding on SBTS and its successors and assigns.

6. *Release.* The State of Vermont hereby releases and discharges any and all claims that it may have against SBTS, its parents, subsidiaries, affiliates, officers and directors, based on conduct or activities arising under or in connection with 9 V.S.A. § 2466 and/or 9 V.S.A. Chapter 63 prior to the date of this Assurance of Discontinuance.

7. *Admissibility.* This Assurance of Discontinuance is entered into for settlement purposes only and does not constitute an admission or concession by SBTS of any violation of law alleged by the Attorney General. Nothing in this Assurance of Discontinuance may be used or admitted as evidence or as an admission in any other adverse proceeding, action,

**Office of the ATTORNEY GENERAL 109 State Street Montpelier, VT 05609**

investigation or inquiry, including but not limited to any governmental, regulatory or self-regulatory authority.

Date: 3/29/12

STATE OF VERMONT

WILLIAM H. SORRELL
ATTORNEY GENERAL

By: _____
Elliot Burg
Assistant Attorney General

Date: _____

SMALL BUSINESS TECHNICAL SOLUTIONS, LLC

By: _____
Its Authorized Agent

APPROVED AS TO FORM:

_____
Elliot Burg
Assistant Attorney General
Office of Attorney General
109 State Street
Montpelier, Vermont 05609
For the State of Vermont

_____
Linda A. Goldstein, Esq.
Manatt, Phelps & Phillips, LLP
7 Times Square
New York, New York 10036
For Small Business Technical Solutions, LLC

**Office of the ATTORNEY GENERAL 109 State Street Montpelier, VT 05609**

investigation or inquiry, including but not limited to any governmental, regulatory or self-regulatory authority.

Date: 2/28/12

STATE OF VERMONT

WILLIAM H. SORRELL
ATTORNEY GENERAL

By: Elliot Burg
Assistant Attorney General

Date: _____

SMALL BUSINESS TECHNICAL SOLUTIONS, LLC

By: _____
Its Authorized Agent

APPROVED AS TO FORM:

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Assistant Attorney General
Office of Attorney General
109 State Street
Montpelier, Vermont 05609
For the State of Vermont

Linda A. Goldstein, Esq.
Manatt, Phelps & Phillips, LLP
7 Times Square
New York, New York 10036
For Small Business Technical Solutions, LLC

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Montpelier, VT
05609

investigation or inquiry, including but not limited to any governmental, regulatory or self-regulatory authority.

Date: 2/28/12

STATE OF VERMONT

WILLIAM H. SORRELL
ATTORNEY GENERAL

By: Elliot Burg
Assistant Attorney General

Date: 3/28/12

SMALL BUSINESS TECHNICAL SOLUTIONS, LLC

By: Its Authorized Agent

APPROVED AS TO FORM:

Elliot Burg
Assistant Attorney General
Office of Attorney General
109 State Street
Montpelier, Vermont 05609
For the State of Vermont

Linda A. Goldstein, Esq.
Manatt, Phelps & Phillips, LLP
7 Times Square
New York, New York 10036
For Small Business Technical Solutions, LLC

Office of the
ATTORNEY
GENERAL
109 State Street
Montpelier, VT
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**Exhibit 1 (Letter to Businesses)**

Dear [Name of Business]:

Small Business Technical Solutions (SBTS) has entered into a settlement with the Vermont Attorney General's Office to resolve claims that we did not properly notify you, in accordance with Vermont law, about charges billed to your local telephone bill for our services.

As part of that settlement, we are enclosing a refund check for all charges relating to SBTS' services that appeared on your local telephone bill.

You have no obligation to do anything in response to this payment.

If you have any questions about the settlement, you may contact the Attorney General's Office at (802) 828-5507.

Sincerely,

SBTS

**Office of the ATTORNEY GENERAL 109 State Street Montpelier, VT 05609**

**STATE OF VERMONT**
**SUPERIOR COURT**
**WASHINGTON UNIT** 2012 MAR 12 P 3:37

**In re USDIRECTORY.COM, LLC )**

**CIVIL DIVISION**
**Docket No.** 185-3-12 Wncv

## ASSURANCE OF DISCONTINUANCE

WHEREAS USDirectory.com, LLC (hereinafter referred to as "USDirectory.com"), is a Florida limited liability corporation with offices located at 999 West Yamato Road, Suite 100, Boca Raton, Florida 33431;

WHEREAS USDirectory.com provides Internet advertising and related services to local businesses, some of the charges for which are placed on local telephone bills with the assistance of a Northridge, California-based company called OAN Services, Inc.;

WHEREAS USDirectory.com solicited Vermont businesses over the telephone and through "live check" mailings to purchase its service;

WHEREAS USDirectory.com's charges to businesses were typically in the range of $29.95 to $49.95 per month;

WHEREAS during the period 2004 to 2007, USDirectory.com charged over $150,000 to 511 businesses for its services that appeared on local telephone bills in Vermont's area code 802;

WHEREAS sellers of goods or services that are to be charged on a consumer's (including a business') local telephone bill are required under 9 V.S.A. § 2466 to mail a notice to the party to be charged, containing information specified in the statute;

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WHEREAS the notice sent by USDirectory.com to Vermont businesses did not contain all of the information required by 9 V.S.A. § 2466;

WHEREAS the Attorney General alleges that USDirectory.com violated the Vermont Consumer Fraud Act, 9 V.S.A. § 2466, by not complying with that provision's notice requirements;

WHEREAS the script used by USDirectory.com's telemarketers stated at the outset that the reason for the call was to verify the accuracy of an existing listing;

WHEREAS the purpose of the call was primarily to solicit a purchase of an enhanced listing, a fact that was not mentioned until later in the call;

WHEREAS the Attorney General alleges that the script used by USDirectory.com violated the Consumer Fraud Act's prohibition on deceptive trade practices, 9 V.S.A. § 2453(a), by misrepresenting the purpose of the call at the beginning of each call;

WHEREAS the Attorney General further alleges that USDirectory.com charged some Vermont consumers on their telephone bills without authorization;

WHEREAS such unauthorized billings constitute an unfair trade practice under the Consumer Fraud Act, 9 V.S.A. § 2453(a);

WHEREAS the "live checks" used by USDirectory.com contained only "mouse type" (7-point Times New Roman font in a ½-by-3¼-inch space) disclosures that endorsement of the checks would result in a charge to the endorser's telephone bill;

WHEREAS the Attorney General alleges that the use of such disclosures was a deceptive trade practice under the Consumer Fraud Act, 9 V.S.A. § 2453(a);

**Office of the ATTORNEY GENERAL 109 State Street Montpelier, VT 05609**

WHEREAS the Attorney General further alleges that USDirectory.com violated the right-to-cancel provisions of 9 V.S.A. § 2454 and Vermont Consumer Fraud Rule 113 for telephonic sales by not providing its customers with proper notice of their right to cancel;

WHEREAS USDirectory.com has not admitted any violation of law;

AND WHEREAS the Attorney General is willing to accept this Assurance of Discontinuance pursuant to 9 V.S.A. § 2459;

THEREFORE, the parties agree as follows:

1. *Injunctive relief.* USDirectory.com shall comply strictly with all provisions of Vermont law, including but not limited to provisions of the Vermont Consumer Fraud Act, 9 V.S.A. chapter 63, relating to the placement of charges on local telephone bills, the prohibition on unfair and deceptive trade practices, and the right to cancel a telephonic transaction.

2. *Consumer relief.*

a. For each consumer from which USDirectory.com has received money through a charge on a local telephone bill with a number in area code 802, USDirectory.com shall, within ten (10) business days of signing this Assurance of Discontinuance, send to the consumer, by first-class mail, postage prepaid, a check in the amount of all monies that have not been previously refunded to the consumer's last known address, accompanied by a letter in substantially the same form attached as Exhibit 1. USDirectory.com shall use due diligence to ensure that accurate refunds are provided to each consumer to whom a refund is due under this Assurance of Discontinuance. USDirectory.com shall not be obligated to issue refunds to consumers who USDirectory.com can demonstrate to the Vermont Attorney General's Office used its services.

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b. No later than 60 (sixty) days after signing this Assurance of Discontinuance, USDirectory.com shall provide to the Vermont Attorney General's Office the names and addresses of the consumers to whom letters and payments were sent under this Assurance of Discontinuance, along with the date and amount of each payment.

c. No later than ninety (90) days after signing this Assurance of Discontinuance, USDirectory.com shall mail to the Vermont Attorney General's Office, 109 State Street, Montpelier, VT 05609, a single check, payable to "Vermont State Treasurer," in the total dollar amount of all checks that were returned as undeliverable or that went uncashed, to be treated as unclaimed funds, along with a list, in Excel format on a compact disk, of the consumers whose checks were returned or were not cashed (which list shall set out the first and last names of the consumers in distinct fields or columns), and for each such consumer, the last known address and dollar amount due.

3. *Civil penalties, fees and costs.* Within twenty (20) days of signing this Assurance of Discontinuance, USDirectory.com shall pay to the State of Vermont, in care of the Vermont Attorney General's Office, the sum of ten thousand dollars ($10,000.00) in civil penalties and costs.

4. *Binding effect.* This Assurance of Discontinuance shall be binding on USDirectory.com, its successors and assigns.

5. *Release.* The State of Vermont hereby releases and discharges any and all claims that it may have against USDirectory.com or its affiliates based on conduct or activities arising under or in connection with the Vermont Consumer Fraud Act prior to the date of this Assurance of Discontinuance.

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6. *Admissibility.* Nothing in this Assurance of Discontinuance may be used or admitted as evidence or as an admission in any other adverse proceeding or action related to USDirectory.com, nor shall anything in this document be considered first-party evidence.

Date: 12/14/12

STATE OF VERMONT

WILLIAM H. SORRELL
ATTORNEY GENERAL

by: _____
Elliot Burg
Assistant Attorney General

Date: 2/29/2012

USDirectory.com, Inc.

by: _____
Its Authorized Agent

APPROVED AS TO FORM:

_____
Elliot Burg
Assistant Attorney General
Office of Attorney General
109 State Street
Montpelier, VT 05609
For the State of Vermont

_____
Walter H. Messick, Esq.
Galvan Messick, LLP
1900 Corporate Blvd., Suite 101 West
Boca Raton, FL 33431
For USDirectory.com, Inc.

**Office of the ATTORNEY GENERAL**
**109 State Street**
**Montpelier, VT 05609**

**Exhibit 1 (Letter to Consumers)**

Dear [Name of Business]:

Under a settlement with the Vermont Attorney General's Office, we are enclosing a check to reimburse you for charges by our company, USDirectory.com, that appeared on your local telephone bill.

If you have any questions about the settlement, you may all the Attorney General's Office at (802) 828-5507.

Sincerely,

USDirectory.com

Office of the
ATTORNEY
GENERAL
109 State Street
Montpelier, VT
05609

**STATE OF VERMONT**
**SUPERIOR COURT**
**WASHINGTON UNIT**

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|---|---|---|
| **In re VOICEMAIL DIRECT** | ) | **CIVIL DIVISION** |
| **USA LLC n/k/a INTELICOM** | ) | **Docket No.** 636-9-12 Wncv |
| **MESSAGING LLC** | ) | |

FILED

# ASSURANCE OF DISCONTINUANCE

WHEREAS Voicemail Direct USA LLC, now known as Intelicom Messaging LLC (hereinafter referred to as "Voicemail Direct"), is a Nevada corporation with offices at 701 North Green Valley Parkway, Suite 200, Henderson, NV 89074, and with branch offices at 350 Seventh Avenue, 2nd floor, New York, NY 10001, and 8201 Peters Road, Suite 2400, Plantation, FL 33324;

WHEREAS Voicemail Direct is a third-party provider of a voicemail service, the charges for which are placed on local telephone bills with the assistance of a Ponta Vedra Beach, Florida-based company called ILD Telecommunications, Inc. (ILD);

WHEREAS Voicemail Direct's charges to consumers were $14.95 per month;

WHEREAS starting in 2005, Voicemail Direct charged a net total of over $50,000 to more than 600 Vermonters for its services that appeared on local telephone bills in Vermont's area code 802;

WHEREAS sellers of goods or services that are to be charged on a consumer's local telephone bill are required under 9 V.S.A. § 2466 to mail a notice to the party to be charged, containing information specific in the statute;

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**109 State Street**
**Montpelier, VT 05609**

WHEREAS Voicemail Direct did not send to Vermont consumers who were charged for its services on their local telephone bills a mailing by U.S. first-class mail containing all of the information required by 9 V.S.A. § 2466, although it did send them two emails that contained most, though not all, of the information required by the statute;

WHEREAS most of the consumers who responded to the Attorney General's Office in the course of its investigation of this matter stated that they had no recollection of ever authorizing the placement of charges on their telephone bill for Voicemail Direct's services;

WHEREAS Voicemail Direct maintains that its state-of-the-art customer service and liberal refund policy were available to all customers, including those in area code 802;

WHEREAS the Attorney General alleges that Voicemail Direct violated the Vermont Consumer Fraud Act, 9 V.S.A. § 2466, by not complying with that provision's notice requirements and by failing to obtain billing authorization from its customers;

AND WHEREAS the Attorney General is willing to accept this Assurance of Discontinuance pursuant to 9 V.S.A. § 2459;

THEREFORE, the parties agree as follows:

1. *Injunctive relief.* Voicemail Direct shall comply strictly with all provisions of Vermont law, including but not limited to provisions of the Vermont Consumer Protection Act, 9 V.S.A. chapter 63, relating to the placement of charges on local telephone bills associated with telephone numbers in area code 802.

2. *Consumer relief.*

a. For each consumer from which Voicemail Direct has received money through a charge on a local telephone bill with a number in area code 802 on or after June 7, 2005, Voicemail Direct shall, within ten (10) business days of signing this Assurance of

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05609

Discontinuance, send to the consumer, by first-class mail, postage prepaid, a check in the amount of all monies that have not been previously refunded to the consumer's last known address, accompanied by a letter in substantially the form attached as Exhibit 1. Voicemail Direct shall use due diligence to ensure that accurate refunds are provided to each consumer to whom a refund is due under this Assurance of Discontinuance. Voicemail Direct shall not be obligated to issue refunds to consumers who Voicemail Direct can demonstrate to the Vermont Attorney General's Office used its services.

b. No later than 60 (sixty) days after signing this Assurance of Discontinuance, Voicemail Direct shall provide to the Vermont Attorney General's Office the names and addresses of the consumers to whom letters and payments were sent under this Assurance of Discontinuance, along with the date and amount of each payment.

c. No later than ninety (90) days after signing this Assurance of Discontinuance, Voicemail Direct shall mail to the Vermont Attorney General's Office, 109 State Street, Montpelier, VT 05609, a single check, payable to "Vermont State Treasurer," in the total dollar amount of all checks that were returned as undeliverable or that went uncashed, to be treated as unclaimed funds, along with a list, in Excel format on a compact disk, of the consumers whose checks were returned or were not cashed (which list shall set out the first and last names of the consumers in distinct fields or columns), and for each such consumer, the last known address and dollar amount due.

3. *Payment to the State.* Within twenty (20) days of signing this Assurance of Discontinuance, Voicemail Direct shall pay to the State of Vermont, in care of the Vermont Attorney General's Office, the sum of ten thousand dollars ($10,000) as reimbursement for reasonable attorneys' fees and costs.

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4. *Binding effect.* This Assurance of Discontinuance shall be binding on Voicemail Direct, its successors and assigns.

5. *Release.* The State of Vermont hereby releases and discharges any and all claims that it may have under the Consumer Protection Act against Voicemail Direct, its parent company and affiliates, and any of their officers, directors, members, managers, and employees, and ILD Corp. for the conduct relating to Voicemail Direct described in this Assurance of Discontinuance.

6. *Admissibility.* Nothing in this Assurance of Discontinuance may be used or admitted as evidence or as an admission in any other adverse proceeding or action relating to Voicemail Direct, nor shall anything in this document be considered first-party evidence.

Date: 9/7/12

STATE OF VERMONT

WILLIAM H. SORRELL
ATTORNEY GENERAL

by: _____
Elliot Burg
Assistant Attorney General

Date: 8/29/12

VOICEMAIL DIRECT LLC n/k/a
INTELICOM MESSAGING LLC

by: _____
Its Authorized Agent

Office of the
ATTORNEY
GENERAL
109 State Street
Montpelier, VT
05609

APPROVED AS TO FORM:

Elliot Burg
Assistant Attorney General
Office of Attorney General
109 State Street
Montpelier, VT 05609
For the State of Vermont

Christine Rafin, Esq.
Klein Zelman Rothermel LLP
485 Madison Avenue
New York, NY 10022-5803
For Voicemail Direct LLC
n/k/a Intelicom Messaging LLC

Office of the
ATTORNEY
GENERAL
109 State Street
Montpelier, VT
05609

**Exhibit 1 (Letter to Consumers)**

Dear [Name of Consumer]:

Under a settlement with the Vermont Attorney General's Office, we are enclosing a check to reimburse you for charges by our company, Voicemail Direct, that appeared on your local telephone bill.

If you have any questions about the settlement, you may contact the Attorney General's Office at (802) 828-5507.

Sincerely,

Voicemail Direct USA LLC n/k/a
Intelicom Messaging LLC

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