

**STATE OF FLORIDA
DEPARTMENT OF LEGAL AFFAIRS
OFFICE OF THE ATTORNEY GENERAL**

IN THE MATTER OF:

**DIRECT E, INC., a Florida corporation,
d/b/a DIRECT E-CIG, and
WESLEY CHRISTENSEN, as President
of DIRECT E, INC.,**


Case No. L11-3-1010

Respondents.

ASSURANCE OF VOLUNTARY COMPLIANCE

Pursuant to the provisions of Chapter 501, Part II, Florida Statutes, the Florida Deceptive and Unfair Trade Practices Act, the STATE OF FLORIDA, DEPARTMENT OF LEGAL AFFAIRS, OFFICE OF THE ATTORNEY GENERAL (hereinafter referred to as “the OAG”) caused an investigation to be made into the Advertising and business practices of DIRECT E, Inc., d/b/a Direct E-Cig, and Wesley Christensen, as President of DIRECT E, INC. (hereinafter both “Christensen,” and “DIRECT E, INC.,” shall be referred to collectively as “Respondents”).

IT APPEARS THAT Respondents are prepared to enter into this Assurance of Voluntary Compliance (hereinafter referred to as “AVC”) without any admission that Respondents have violated the law, and the undersigned Director of Economic Crimes and Assistant Attorney General, being in agreement, does in this matter accept this AVC in termination of this


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investigation, pursuant to § 501.207(6), Florida Statutes, and by virtue of the authority vested in the OAG by said statute. The OAG and Respondents hereby agree to the following:

I. STIPULATED FACTS

1.1 Respondent DIRECT E, Inc., is a Florida corporation with its principal office in Bonita Springs, Florida.

1.2 Respondent Wesley Christensen is President of DIRECT E, INC.

1.3 The websites found at www.DirectECig.com, www.SmokelessDirect.com and www.DeluxeVapor.com are represented to be operated through Respondent DIRECT E, INC., d/b/a Direct E-Cig.

1.4 Respondents engage in the sale and distribution of electronic smoking Products to consumers worldwide.

1.5 Respondents advertise their Products and services through its websites and its related web pages.

1.6 The Product sold is a battery-operated device that provides the inhaler with doses of nicotine by delivering a vaporized chemical solution through an electronic cigarette.

1.7. Electronic cigarettes produce a vapor rather than smoke, which is inhaled.

1.8 Complaints alleged that this program was marketed using a “Free Trial” offer that does not Clearly and Conspicuously disclose the details relating to the cancellation procedure and that the trial period began on the order date, not the date the consumer received the Product. Complaints further alleged that consumers who failed to cancel within the specified time were then Charged the full price for the Product.

1.9 The OAG conducted an investigation of Respondents’ “negative option” advertisements and their related collections process.

1.10 During the pendency of this investigation, Respondents have refunded \$684,165.00 (Six Hundred Eighty-Four Thousand One Hundred Sixty-Five Dollars) to consumers, with \$55,200.00 (Fifty-Five Thousand Two Hundred Dollars) refunded to Floridians.

1.11 Respondents deny having violated the law of Florida or any other jurisdiction.

1.12 This AVC is based upon the stipulated facts set forth in Paragraphs 1.1 through 1.11 above. The OAG shall not be estopped from taking further action in this matter should the facts described herein be shown to be incorrect in any material way, or the AVC not be complied with in full.

II. DEFINITIONS

2.1 “Advertising” (including “advertisement” and “advertise”) means any message disseminated to Florida consumers (as defined herein) which promotes or is likely to promote directly or indirectly any good, merchandise, Product or service. The term “advertising” includes, but is not limited to, messages conveyed orally, visually or in writing:

A. in a newspaper, magazine, periodical, leaflet, flyer, catalog, brochure, circular, on or in packaging; in telefacsimile material, in any direct mail literature, including but not limited to inserts, notices, and forms;

B. on any recording, radio, television, video, computer, by a telephonic transmission, telex, facsimile or telecopier transmission, Internet, mobile or other electronic transmission, or during any other transmission.

2.2 “Billing Information” means any data that enables any person to access a consumer’s account, including but not limited to a credit card, checking, savings, share or similar account, utility or telephone bill, mobile application or device, or debit card.

2.3 “Charge” means any amount charged or debited to a consumer’s credit or debit card, checking, savings, or other financial account, or collected from a consumer by any other method.

2.4 “Clear and Conspicuous” or “Clearly and Conspicuously” means in that a statement, Representation, claim, disclosure or term being conveyed is presented in a way that is readily noticeable and easily understandable.

The disclosures must be presented prior to requesting the consumer’s Billing Information and prior to the consumer incurring or agreeing to incur any financial obligation, in understandable language syntax, and with nothing contrary to, inconsistent with, or in mitigation of the disclosures used in any communication with the consumer. For purposes herein, a pre-checked box or preselected option requiring action to deselect or opt out is deemed inconsistent with any such disclosure.

The following, without limitation, shall be considered in determining whether a statement, claim, term or Representation is Clear and Conspicuous:

A. whether it is of sufficient prominence in terms of font, size, placement, color, contrast, duration of appearance, sound and speed, as compared to other information with which it is presented so that it is readily noticeable and reasonably understandable;

B. whether it is presented in a coherent and meaningful sequence with respect to other terms, Representations, claims or statements being conveyed;

C. whether it is in close proximity to the statement, Representation, claim or term it clarifies, modifies, explains or to which it otherwise relates;

D. whether it contradicts any other information with which it is presented;

E. whether, if in association with a Negative Option Plan as defined herein, the Offer Terms, as defined herein, of the Negative Option Plan are presented together in a distinct location;

F. whether, if it is oral, it is at an understandable pace and in the same tone and volume as the sales offer;

G. whether it appears for a duration sufficient to allow listeners or viewers to have a reasonable opportunity to notice, read or otherwise understand;

H. whether the language and terms used are commonly understood by the consumer acting reasonably in the context in which they are used; and

I. whether it is accompanied by distracting sounds, graphic or text that compete for the attention of the consumer.

2.5 “Clearly and Prominently” means that a disclosure is made Clearly and Conspicuously and is the most prominent of all offer terms (as such term is defined herein), in a Negative Option Plan offer; provided, however, that to the extent multiple offer terms are required to be disclosed Clearly and Prominently, disclosure of all such offer terms with equal prominence shall be sufficient to satisfy the requirements of this definition.

2.6 “Express Informed Consent” means an affirmative act that is Clear and unambiguous evidence of a person’s acceptance of the offer terms following disclosure of the terms of the offer in the manner set forth in this Judgment. In order to be unambiguous, the act of consent must Clearly apply to the offer terms for the Negative Option Plan so that consumers will fully understand that they are accepting enrollment in a Negative Option Plan and the offer terms, and not some other offer or other terms of the offer.

2.7 “Negative Option Plan” means a contractual plan or an arrangement to sell or provide goods or services under which the customer’s silence or failure to take an affirmative action to reject the goods or services or to cancel the agreement is interpreted by the seller as an acceptance of the offer. Negative Option Plans as used herein include, but are not limited to “trial conversion offers,” as used herein means to offer to provide a trial period of Products or services to consumers where, as a result of accepting the trial period, consumers are required to contact any Respondents before the expiration of the trial period to avoid receiving additional Products or services or incurring a financial obligation.

2.8 “Preauthorized Electronic Fund Transfer,” as defined by the Electronic Fund Transfer Act, 15 U.S.C. § 1693a(9), means an electronic fund transfer authorized in advance to recur at substantially regular intervals.

2.9 “Product” means Products, goods, and services, and includes online memberships.

2.10 “Represent” means to state or imply, directly or indirectly, in substance or effect, and whether by affirmative statements, implications, or omissions in whatever form (whether oral or written, specifically including electronic, internet and e-commerce). This definition applies to other forms of the word “Represent,” including without limitation “Representation.”

III. COMPLIANCE

3.1 Respondents are on actual notice and shall comply with the following laws:

A. Florida’s Deceptive and Unfair Trade Practices Act, Chapter 501, Part II, Florida Statutes;

B. Florida’s consumer protection laws relating to internet negative option offers, § 559.951, Florida Statutes, effective October 1, 2011;

C. Restore Online Shoppers' Confidence Act, Title 15 USC §8401-8405;

D. Electronic Funds Transfer Act, 15 U.S.C. § 1693e(a), and Section 205.10(b) of Regulation E, 12 C.F.R. § 205.10(b);

E. Federal Trade Commission's Telemarketing Sales Rule, 16 C.F.R. Chap. I, part 310; and

F. Florida Telemarketing Act, Chapter 501, Part IV, Florida Statutes (2010).

3.2 Respondents are permanently restrained, enjoined, and prohibited from engaging in the following acts or practices:

A. Making, or assisting others in making, expressly or by implication, any false or misleading Representation in connection with the marketing, Advertising, promoting, offering for sale, selling or providing any Products in any trade or commerce, including but not limited to internet marketing of Products with a negative option feature or upsells of additional Products offered in conjunction with other Products, that misrepresent, expressly or by implication:

1. the Product being offered;
2. that any such Product is a bonus, free, a gift, or offered without cost;
3. the cost of such Product;
4. that satisfaction with the product is 100% guaranteed or that any other guarantee on the product exists (without Clearly and Conspicuously disclosing in close proximity to the guarantee the terms and conditions of that guarantee);
5. the consequences of completing an online form or submitting an application for additional information, including the nature of the action consumer is taking by clicking "continue," "next," or other words of similar import as a means to purportedly accept one or more offers;

6. the method by which a consumer will be Charged or assessed a fee, Charge, debit, or bill; and

7. any other material term or fact, including any attendant obligations to cancel or take an affirmative action to avoid being assessed a Charge.

B. Offering as a trial purchase or for sale any Product or Representing that such Product is a bonus, a gift, free or without cost or without future obligation, whether for a trial period or any term, without disclosing Clearly and Conspicuously all material terms, conditions, and obligations relating to the receipt, use, and retention of such Product before the consumer provides his or her Billing Information and before the consumer incurs or agrees to incur any immediate or contingent financial obligation.

C. Directly or indirectly using Billing Information to obtain payment from a consumer, unless, prior to obtaining the consumer's billing information the consumer has affirmatively provided Express Informed Consent to the offer after Clear and Conspicuous disclosure of all material terms of the offer, as follows:

1. The consumer is requested to indicate his or her assent to pay and incur a Charge for the Product using a specified billing account.

2. Respondents disclose Clearly and Conspicuously and in close proximity to the request for the consumer's indication of assent the following information:

a. The specific Billing Information to be used;

b. The amounts to be paid and date of any initial payment and timing of subsequent payments;

c. All material restrictions, limitations, or conditions applicable to the purchase, receipt, or use of the Product that is the subject of the offer; and

3. If a Product is offered through a Negative Option Plan

a. Respondents shall Clearly and Conspicuously disclose:

i the costs or any financial obligation associated with the Product, including the dollar amount of the first Charge and when it will be Charged or become due, and the amount and timing of any subsequent or recurring Charge(s);

ii. the length of any trial period and the event that triggers the start of the trial period or any time period before a Charge;

iii. the action that a consumer must take in order to avoid a Charge for a Product, such as canceling a subscription through a simple mechanism; and

iv. an email address or another convenient and easily accessible online method that the consumer can use to cancel subscription to the program and avoid a Charge.

b. Respondents shall obtain consumer's Express Informed Consent to the Negative Option Plan terms and the attendant requirement to cancel within a prescribed time by specific means to avoid being assessed a Charge.

c. The consumer affirmatively indicates assent to pay for the Product using the specified account. In connection with communications made through interactive media such as the Internet, online services, and software, the consumer must indicate such assent by clicking on a button that is specifically labeled to convey such assent, or by taking substantially similar affirmative action authorizing the transaction; any pre-marked or pre-selected options purporting to reference consumer assent or default settings which bypass assent are specifically prohibited and enjoined.

D. Failing to Clearly and Conspicuously disclose a mechanism for declining any offer in a font, color, and size presented as prominent as the mechanism for accepting the offer.

E. Failing to obtain written authorization for Preauthorized Electronic Fund Transfers from a consumer's account before initiating any Preauthorized Electronic Fund Transfer, as required by Section 907(a) of EFTA, 15 U.S.C. § 1693e(a), and Section 205.10(b) of Regulation E, 12 C.F.R. § 205.10(b), as more fully set out in Section 205.10 of the Federal Reserve Board's Official Staff Commentary to Regulation E, 12 C.F.R. § 205, Supp. I;

F. Failing to provide a copy of a valid written authorization to the consumer for Preauthorized Electronic Fund Transfers from a consumer's account, as required by Section 907(a) of EFTA, 15 U.S.C. § 1693e(a), and Section 205.10(b) of Regulation E, 12 C.F.R. § 205.10(b), as more fully set out in Section 205.10 of the Federal Reserve Board's Official Staff Commentary to Regulation E, 12 C.F.R. § 205, Supp. I.

3.3 Respondents shall cancel a consumer's participation in a Negative Option Plan at the request of the consumer as soon as reasonably practicable after receipt of the request, provided that the cancellation request is in accordance with Respondents' cancellation policy, which shall have been Clearly and Conspicuously disclosed to the consumer reasonably in advance of the date that the consumer must exercise his or her right to cancel. DIRECT E, INC., shall not knowingly ship Products or deliver services in a Negative Option Plan to a consumer from whom Respondents have received a request to cancel enrollment in the Plan, provided that the cancellation request is in accordance with the Respondents' cancellation policy.

3.4 For purposes of sales following the execution of this AVC, upon request, Respondents shall provide proof that the consumer ordered Respondents' Product or service billed to the consumer or Charged to his or her account. If Respondents are unable to retrieve proof of a consumer's order, DIRECT E, INC., shall, upon the request of the consumer, issue a refund to such consumer. DIRECT E, INC., shall require that all Third Party Advertisers obtain,

retain, and provide to DIRECT E, INC., upon request, proof that a Florida consumer ordered Respondents' Product or service. For Internet sales, Respondents shall use reasonable efforts and shall require its Third Party Advertisers to retain and provide to a Florida consumer or to the OAG upon request, at a minimum, the time, IP address, browser type and click referrer for each transaction relating to Respondents' offers of goods or services.

3.5 Respondents shall give consumers at least fourteen (14) days from the date of shipment of the product to request a refund.

3.6 Within five (5) days of the Execution Date, Respondents shall appoint a liaison (the "Liaison") who will, among other things, communicate directly with the OAG and be responsible for investigating and working in good faith to resolve any issues of compliance with this AVC raised by the OAG.

3.7 Respondents shall make the substantive terms and conditions of this AVC known to all officers, directors, partners, managers, employees, agents, Representatives, licensees, franchisees, independent contractors, successors, and assigns engaged in Respondent' business.

3.8 Respondent shall not effect any change in their form of doing business or organizational identity as a method of avoiding the terms and conditions set forth in the AVC.

IV. STIPULATED PAYMENT

4.1 The parties agree that Respondents will pay to the Office of the Attorney General, the sum of FIFTY THOUSAND DOLLARS (\$50,000.00) as costs and fees to the Department of Legal Affairs' Revolving Trust Fund per the following schedule:

- A) FIFTEEN THOUSAND DOLLARS (\$15,000.00) at the time this AVC is executed;
- B) FIFTEEN THOUSAND DOLLARS (\$15,000.00) on or before December 30, 2011; and

C) TWENTY THOUSAND DOLLARS (\$20,000.00) on or before January 30, 2012.

4.2 Payments will be made by certified funds payable to “The Department of Legal Affairs Revolving Trust Fund” at the time this AVC is executed. Payment shall be delivered to Robert Follis, Assistant Attorney General, 3507 East Frontage Road, Suite 325, Tampa, Florida, 33607. This payment amount shall be deposited in the Department of Legal Affairs' Revolving Trust Fund, in accordance with Florida Statute § 501.2101(1). Time is of the essence in all payments pursuant to this agreement.

V. FUTURE VIOLATIONS

5.1 IT IS HEREBY AGREED by the parties that any subsequent failure to comply with the provisions of this AVC is by statute *prima facie* evidence of a violation of Chapter 501, Part II, Florida Statutes, and may subject Respondents to any and all civil penalties and sanctions authorized by law, including attorney’s fees and costs.

VI. ACCEPTANCE

6.1 IT IS HEREBY AGREED by the parties that this AVC shall become effective upon its acceptance by the Department, who may refuse to accept it as its discretion. The receipt of or deposit by the Department of any monies pursuant to this AVC does not constitute acceptance by said Department, and monies received will be returned if this AVC is not accepted.

6.2 Nothing in this AVC shall be construed as a waiver of any private rights of any person or release of any private rights, causes of action, or remedies of any person against the Respondents.

6.3 Within five (5) days of the Execution Date, Respondents shall appoint a liaison who will, among other things, communicate directly with the OAG and be responsible for

investigating and working in good faith to resolve any issues of compliance with this AVC raised by the OAG (the "Liaison").

6.4 For a period of four (4) years following the execution of this AVC, Respondents shall retain documents and other information reasonably sufficient to assess its compliance with this AVC and shall provide reasonable access to such documents and information to the OAG upon request, or provide copies of such materials to the OAG at the OAG's request.

Respondents' failure to retain any particular document shall not constitute a *per se* violation of this AVC.

6.5 Nothing in this AVC shall be construed as a waiver of any private rights of any person or release of any private rights, causes of action, or remedies of any person against the Respondents.

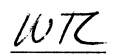
6.6 This AVC may be amended only by a writing executed by all signatories hereto and any provision hereof may be waived only by an instrument in writing executed by the waiving party. The waiver by any party of any breach of this Assurance shall not be deemed to be or construed as a waiver of any other breach, whether prior, subsequent, or contemporaneous, of this Assurance.

IN WITNESS WHEREOF, Respondents have caused this AVC to be executed by an authorized Representative, as a true act and deed, in the County and State listed below, as of the date affixed thereon.

BY MY SIGNATURE I hereby affirm that I am acting in my capacity and within my authority as a corporate officer of Respondents' business, and that by my signature I am binding the entity to the terms and conditions of this AVC.



Wesley Christensen
President of DIRECT E, INC.


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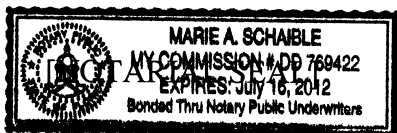
State of Florida,
County of Lee, TO WIT:

THIS DAY PERSONALLY APPEARED BEFORE ME, an officer duly authorized to take acknowledgments in the State of Florida, **Wesley Christensen as President of DIRECT E, INC.**, acknowledged that he executed the foregoing instrument for the purposes therein stated, on this 14th day of December, 2011. Mr. Christensen is (check one) personally known ☒ or produced identification _____; Florida driver license

C623-898-68-181-0.

My commission expires: July 16, 2012.

Sworn to and subscribed before me this 14th day of December, 2011.



Marie A. Schaible
Notary

BY MY SIGNATURE I hereby affirm that I am acting in my capacity and within my authority as the individual named above as a Respondent, and that by my signature I am binding myself to the terms and conditions of this AVC.

[Signature]
Wesley Christensen
As an Individual

State of Florida,
County of Lee, TO WIT:

THIS DAY PERSONALLY APPEARED BEFORE ME, an officer duly authorized to take acknowledgments in the State of Florida, **Wesley Christensen, an individual**, and acknowledged before me that he executed the foregoing instrument for the purposes therein stated, on this 14th day of December, 2011. Mr. Christensen is (check one) personally known ☒ or produced identification _____; Florida driving license # _____.

My commission expires: July 16, 2012.

Sworn to and subscribed before me this 14th day of December, 2011.

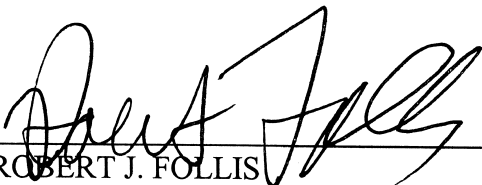
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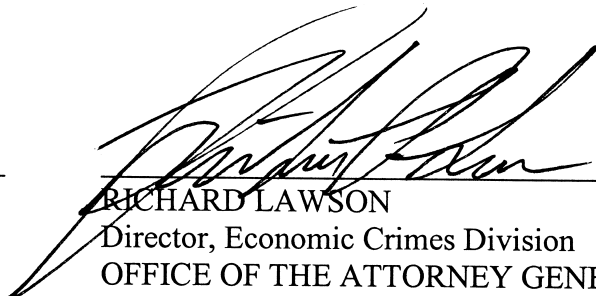
Marie A. Schaible
Notary

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FOR THE OFFICE OF THE ATTORNEY GENERAL:



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Accepted this 28 day of December, 2011.