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SUPERIOR COURT
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BY: E. BRADFORD?
DEPUTY

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9 ARIZONA SUPERIOR COURT

10 COUNTY OF PIMA

11 State of Arizona, ex rel. Thomas C. Horne,
12 Attorney General,

No. C2011 1805

13
14 Plaintiff

ORDER RE: CONSENT JUDGMENT

15 vs.

Assigned to the Honorable Charles V.
Harrington

16 Smoke Freely, LLC, and Professional
Marketing Associates, Inc.,

17 Defendants.
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19 Based on the parties' Joint Motion to Enter Consent Decree and good cause appearing,
20 THE COURT HEREBY FINDS AND ORDERS:

21 The State of Arizona has filed a complaint alleging violations of A.R.S. § 44-1521 *et*
22 *seq.*, the Consumer Fraud Act, against defendant Smoke Freely, LLC ("Defendant").
23 Defendant a) waives its right to trial; b) admits the jurisdiction of this Court over the subject
24 matter and the parties for the purpose of entry of this Consent Decree; and c) acknowledges that
25 the Court retains jurisdiction for the purpose of enforcing this Consent Decree.

26 1. This Order incorporates the parties' Joint Motion to Enter Consent Decree in
27 *State v. Smoke Freely, LLC*.
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1 2. This Consent Decree does not constitute an admission, for any purpose, by
2 Defendant of any fact or of any violation of state law, rule or regulation, nor does this Decree
3 constitute evidence of any liability, fault or wrongdoing. Defendant specifically denies any
4 liability, fault or wrongdoing. This Consent Decree is made without a trial or adjudication of
5 any issues of fact or law or finding of liability.

6 3. Defendant shall not represent or imply that the Attorney General, the State of
7 Arizona or any state agency has approved any of Defendant's actions or has approved any of its
8 past, present or future business practices, and Defendant is enjoined from directly or indirectly
9 representing anything to the contrary.

10 4. Defendant enters into this Consent Decree voluntarily and states that neither the
11 Attorney General's Office nor any member of the Attorney General's Office has made any
12 promises or threats to induce Defendant to enter into this Consent Decree.

13 5. This Consent Decree only governs the conduct of Defendant which occurs in
14 Arizona.

15 6. This Consent Decree applies to Defendant.

16 7. By its execution of this Consent Decree, the State of Arizona releases and
17 forever discharges, to the fullest extent permitted by law, Defendant from all civil claims,
18 causes of actions, damages, restitution, fines, costs, attorneys' fees and penalties that the
19 Arizona Attorney General could have asserted against Defendant under the above-cited
20 consumer protection statutes that the Attorney General has the authority to release resulting
21 from the business practices alleged in the State's Amended Complaint for Injunctive and Other
22 Relief filed on March 30, 2011 up to and including the Effective Date. This release specifically
23 excludes any liability under the State of Arizona's above-cited consumer protection laws which
24 Defendant has or may have to individual consumers of the State of Arizona.

25 8. The terms of this Consent Decree are limited to the acts of Defendant in the
26 State of Arizona.
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1 **C. DEFINITIONS**

2 9. **“Advertise,” “Advertising,” and “Advertisement”** mean the publication,
3 dissemination, solicitation, and circulation of information promoting products and services via
4 presentations, computer networks, television radio or print, or through direct mailing visual and
5 audio displays, or through any other means.

6 10. **“Clear(ly) and Prominent(ly)”** shall mean:

7 A. In textual communications (*e.g.*, printed publications or words displayed on the screen of a
8 computer or mobile device), the required disclosures are of a type, size, and location
9 sufficiently noticeable for the least sophisticated consumer to read and comprehend them, in
10 print that contrasts highly with the background on which they appear;

11 B. In communications disseminated orally or through audible means (*e.g.*, radio or streaming
12 audio), the required disclosures are delivered in a volume and cadence sufficient for the least
13 sophisticated consumer to hear and comprehend them;

14 C. In communications disseminated through video means (*e.g.*, television or streaming video),
15 the required disclosures are in writing in a form consistent with subpart (A) of this definition
16 and shall appear on the screen for a duration sufficient for the least sophisticated consumer to
17 read and comprehend them, and in the same language as the predominant language that is used
18 in the communication; and

19 D. In all instances, the required disclosures: (1) are presented in an understandable language
20 and syntax; and (2) include nothing contrary to, inconsistent with, or in mitigation of any other
21 statements or disclosures provided by respondent.

22 11. **“Defendant”** means Smoke Freely, LLC.

23 12. **“Effective Date”** means the date on which a Judge of the Pima County Superior
24 Court signs this Decree.
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1 13. **“Electronic Smoking Device”** shall mean a nicotine delivery device that
2 simulates smoking a cigar, cigarette, or pipe, whether or not the device can also be used
3 without nicotine.

4 14. **“Free Trial Offer”** shall mean any offer of merchandise in which a consumer is
5 not required to pay the purchase price of the merchandise while the consumer uses the
6 merchandise for a specified period of time.

7 **D. GENERAL TERMS**

8 15. Defendant shall comply with the Consumer Fraud Act, A.R.S. § 44-1521, *et*
9 *seq.*, as it is currently written or as is amended in the future.

10 16. Defendant shall comply with all federal and state laws and rules relating to
11 and/or regulating Electronic Smoking Devices as they are currently written or as they are
12 amended or promulgated in the future.

13 17. Defendant shall Clearly and Prominently disclose the terms and conditions
14 associated with any Free Trial Offer, including, but not limited to, the duration of the offer.

15 18. When calculating the date on which a Free Trial Offer ends and consumers’
16 bank and/or credit accounts will be debited, Defendant shall include an additional 5 days for
17 shipping.

18 19. Defendant shall provide consumers with specific information related to when
19 consumers’ bank and/or credit accounts will be debited following a Free Trial Offer.

20 20. Defendant shall not debit a consumer’s bank or credit account before the date
21 disclosed to consumers as part of any Free Trial Offer.

22 21. Defendant shall Clearly and Prominently disclose specific shipping and handling
23 fees associated with a Free Trial Offer.

24 22. Defendant shall Clearly and Prominently disclose their restocking fee policy in
25 accordance with A.R.S. § 44-1377.
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23. Before initiating any proceeding to enforce this Consent Judgment, the Attorney General shall provide at least thirty (30) days written notice to the Defendants to provide them a reasonable opportunity to cure any alleged violation. Whenever possible, the parties shall seek to resolve an alleged violation of this Consent Judgment by discussion. In addition, in determining whether to enforce this Consent Judgment or to seek an order for monetary, civil contempt, or any other relief or sanction, the Attorney General shall give good faith consideration to whether the Defendants have taken corrective action designed to cause the claimed violation to be cured and to prevent future occurrences.

RESTITUTION

24. Defendant shall pay restitution in the amount of \$500.00 by delivering a check, backed by good and sufficient funds, in the amount of \$500.00 to the Attorney General's Office within five (5) business days of the Effective Date.

25. Upon receipt of the restitution check, the Attorney General's Office shall deposit the checks into an interest bearing account to be distributed on a *pro rata* basis, determined by the Attorney General's Office, to the consumers described in paragraphs twenty-six (26) and twenty-seven (27) below.

26. The Attorney General's Office shall distribute restitution to consumers who contact the Attorney General's office no more than sixty (60) days after the Effective Date.

27. In order to receive restitution, consumers must submit a sworn affidavit to the State along with any documentation they possess.

28. Any amount the Attorney General's Office does not distribute to consumers reverts to the Consumer Fraud Revolving Fund as additional attorneys' fees and costs.

29. Should a restitution check be returned to the Attorney General's Office, the Attorney General's Office shall make a diligent effort to locate the consumer(s). If, after 180 days from the date the check is returned, the Attorney General's Office has been unable to locate the consumer, the Attorney General's Office shall cancel that check and the amount

1 represented by the returned restitution check shall revert to the Consumer Fraud Revolving
2 Fund as additional attorneys' fees and costs.

3 30. If a consumer does not cash a restitution check within six (6) months of the date
4 of the check, the Attorney General's Office shall cancel that check and the uncashed check(s)
5 shall revert to the Consumer Fraud Revolving Fund as additional attorneys' fees and costs.

6 **ATTORNEYS' FEES AND COSTS**

7 31. Pursuant to A.R.S. § 44-1534, Defendant shall pay the Attorney General
8 \$10,000.00 in costs and attorneys' fees to be deposited into the Consumer Fraud Revolving
9 Fund in accordance with A.R.S. § 44 -1531.01 and used for the purposes specified therein. The
10 payment of attorneys' fees and costs and other obligations herein, shall not be considered a
11 civil fine or penalty pursuant to A.R.S. § 44-1531.

12 32. Defendant shall pay the costs and attorneys' fees, in checks backed by good and
13 sufficient funds, by delivering a cashier's check to the Attorney General in the amount of
14 \$10,000.00 on the day it delivers the signed Joint Motion to Enter Consent Decree to the
15 Attorney General's Office.

16 **CIVIL PENALTIES**

17 33. Pursuant to A.R.S. § 44-1531, Defendant shall pay the Attorney General Twenty
18 Thousand Dollars (\$20,000.00) in civil penalties to be deposited in the Consumer Fraud
19 Revolving Fund pursuant to A.R.S. § 44-1531.01. Payment of the \$20,000 shall be made in
20 payments of \$2,000. The first payment shall be made on or before November 1, 2012. Future
21 payments of \$2,000 shall be made on the first day of each following month until the \$20,000 is
22 paid in full.

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24 DATED this 31st day of October, 2012.

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27 JUDGE OF THE SUPERIOR COURT
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