

No. D-1-GU-07-002600

IN THE MATTER OF STATE OF TEXAS

IN THE DISTRICT COURT OF

and

SMALL'S SEED COMPANY, L.L.C.
Respondent

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TRAVIS COUNTY TEXAS

345 JUDICIAL DISTRICT

DEC 18 2007
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ASSURANCE OF VOLUNTARY COMPLIANCE

COME NOW, THE STATE OF TEXAS, acting by and through Attorney General Greg Abbott, and Respondent, Small's Seed Company, LLC ("Respondent"), and respectfully submit for the Court's approval and filing in accordance with, TEX. BUS. & COM. CODE ANN. § 17.58 (Vernon Supp. 2007), this Assurance of Voluntary Compliance.

STIPULATIONS

The parties, through their respective attorneys, make the following stipulations:

1. The Office of the Attorney General ("OAG") has investigated certain potential claims and causes of action under the Texas Deceptive Trade Practices - Consumer Protection Act, TEX. BUS. & COM. CODE ANN. §§ 17.41 *et seq.* (Vernon 1987 and Supp. 2007) ("DTPA") and alleges that Respondent may have:
 - a. made false, deceptive, or misleading representations regarding the information Respondent collects at its Web site, Santa.com, from children under the age thirteen;
 - b. failed to clearly and conspicuously disclose all material information regarding its information collection practices; and

- c. violated the Children's Online Privacy Protection Act of 1998 ("COPPA"), 15 U.S.C. §§ 6501-6506, which constitutes an unfair or deceptive act or practice affecting commerce pursuant to Section 5(a)(1) of the FTC Act, and is therefore actionable under the DTPA.
2. The OAG notified Respondent regarding the concerns it had about Respondent's Web site on Thursday, November 29, 2007.
3. Respondent denies the allegations set forth in paragraph 1 above and denies that it has violated any law. Specifically, Respondent contends that any prior collection by Respondent of a child's personal information was limited to that child's first name (and last name on an optional basis), online contact information in the form of an e-mail address, and date of birth, and was conducted for (1) the purpose of protecting the safety of the child participant, was not used to re-contact the child for any purpose, and was not disclosed on the Web site or otherwise made available to any third party, (2) the purpose of responding to a specific request or communication from a child and was not disclosed on the Web site or otherwise made available to any third party, or (3) the purpose of protecting the security or integrity of Respondent's Web site and was not disclosed on the Web site or otherwise made available to any third party. For example, Respondent contends that a participant's name was collected for the sole purpose of confirming that this individual was the only person with access to the Web site under this participant's name. Similarly, a participant's date of birth was collected for the sole purpose of determining that participant's age. Moreover, Respondent hereby declares that as soon as it was notified about the concerns of the OAG, it took immediate steps to clarify its

business practices, thereby eliminating any concerns relating to paragraph 1 above. As such, Respondent further declares that it is already in compliance with the terms set forth in this Assurance, and that no alteration to its Web site practices is required in order to be in compliance with this Assurance.

4. The parties agree and stipulate that this Assurance is being filed for the sole purpose of addressing the OAG's claims, without engaging in protracted and expensive litigation, that this Assurance will not be used for any other purposes, except as necessary to enforce the terms of the Assurance, and that this Assurance does not constitute an admission by Respondent of any violation of the DTPA or otherwise;
5. The OAG and Respondent agree to and do not contest the entry of the Assurance by this Court;
6. The signatory hereto is counsel for Respondent; she is authorized to sign this Assurance on behalf of Respondent; and, she has read the Assurance and agrees to entry of same on behalf of Respondent;
7. The OAG has jurisdiction in this matter under section 17.47 of the DTPA.
8. The venue of this cause is proper in Travis County; and
9. Except for the parties expressly named in this Assurance, this Assurance in no way affects any individual's right of action under the DTPA.

DEFINITIONS

It is further stipulated that for purposes of this Assurance, the following definitions will apply:

10. "Respondent" means Small's Seed Company, LLC, and includes its officers, agents, servants, employees, successors and assigns as well as any other persons acting on its behalf who receive actual notice of this Assurance by personal service or otherwise.
11. "Clear and conspicuous" means that the required disclosure is in such size, color, contrast, location, duration, and audibility that it is readily noticeable, readable, and understandable. A statement may not contradict or be inconsistent with any other information with which it is presented. If a statement modifies, explains, or clarifies other information with which it is presented, it must be presented in close proximity to the information it modifies, in a manner that is readily noticeable, readable, and understandable, and it must not be obscured in any manner.
12. "Child" or "Children" means an individual or individuals under the age of 13.
13. "Effective Date" means the day it is approved by the District Court of competent jurisdiction to which it is submitted.
14. "Personal Information" means individually identifiable information about an individual collected online, including:
 - a. A first and last name;
 - b. A home or other physical address including street name and name of a city or town;
 - c. An e-mail address or other online contact information, including but not limited to an instant messaging user identifier, or a screen name that reveals an individual's e-mail address;
 - d. A telephone number;

- e. A Social Security number;
- f. A persistent identifier, such as a customer number held in a cookie or a processor serial number, where such identifier is associated with individually identifiable information; or a combination of a last name or photograph of the individual with other information such that the combination permits physical or online contacting; or
- g. Information concerning the child or the parents of that child that Respondent collects online from the child and combines with an identifier described in this definition.

RELIEF

15. For purposes of settlement, Respondent declares that it is in compliance with and voluntarily assures the Office of Attorney General that Respondent will continue to comply with the following provisions:
- A. Respondent will not misrepresent, directly or indirectly, its information practices, including but not limited to:
 - 1. The types of information Respondent collects;
 - 2. From whom Respondent collects information (e.g. children); and
 - 3. How Respondent uses or discloses the information;
 - B. Respondent shall maintain a link on the home page of its Web site, and on each page of its Web site where personal information is or may be collected from children, a notice that informs visitors to Respondent's Web site of Respondent's information practices with regard to children. The link will

be clear and prominent so that it stands out and is noticeable to the Web site's visitors through use, for example, of a larger font size in a different color on a contrasting background;

- C. The notice required by the preceding subparagraph B must be clearly and understandably written, be complete, and must contain no unrelated, confusing, or contradictory materials. A complete notice includes:
1. Respondent's name, address, telephone number, and e-mail address;
 2. The types of personal information collected from children and whether the personal information is collected directly or passively (e.g. via cookies);
 3. How such personal information is or may be used by Respondent, including but not limited to fulfillment of a requested transaction, record keeping, marketing back to the child, or making it publicly available through a chat room or by other means;
 4. Whether personal information is disclosed to third parties, and if so, the types of business in which such third parties are engaged, and the general purposes for which such information is used; whether those third parties have agreed to maintain the confidentiality, security, and integrity of the personal information they obtain from Respondent; and that the parent has the option to consent to the collection and use of their child's personal information without consenting to the disclosure of that information to third parties;

5. That Respondent is prohibited from conditioning a child's participation in an activity on the child's disclosing more personal information than is reasonably necessary to participate in such activity; and
 6. The fact that a parent can review and have deleted the child's personal information, and can refuse to permit further collection or use of the child's information, along with details regarding the procedures for doing so;
- D. Except as otherwise specified in subparagraph F below, Respondent will obtain verifiable parental consent prior to any collection, use, and/or disclosure of personal information from children. Respondent will make reasonable efforts to obtain verifiable parental consent, taking into consideration available technology. Respondent's method to obtain verifiable parental consent must be reasonably calculated, in light of available technology, to ensure that the person providing consent is the child's parent. In evaluating the reasonableness of the method used to obtain verifiable consent, the parties are guided by the regulations promulgated by the Federal Trade Commission pursuant to 15 U.S.C. 6501 *et seq.*;
- E. Prior to obtaining a parent's verifiable consent as required by the preceding subparagraph, Respondent will provide the parent a notice of Respondent's information practices with regard to children. The notice will state (i) that Respondent wishes to collect personal information from the child, (ii) that

the parent's consent is required for the collection, use, and/or disclosure of such information, and (iii) all of the information required to be in the notice described in subparagraph B above;

F. Respondent may collect an email address from a child prior to obtaining a parent's verifiable consent in the following circumstances and under the following conditions:

1. Respondent may collect the email address of a parent to be used for the sole purpose of obtaining parental consent or providing notice under subparagraphs C and D above; provided, if Respondent has not obtained parental consent after a reasonable time from the date of the information collection, Respondent will delete such information from its records;
2. Respondent may collect an email address from a child for the sole purpose of responding directly, on a one-time basis, to a specific request from the child; provided, Respondent will not use such information to re-contact the child or for any other purpose and will immediately delete the information from its records;
3. Respondent may collect an email address from a child for the sole purpose of responding to a specific request from the child on a more frequent than one-time basis; provided, Respondent will not use such information for any other purpose and Respondent will make reasonable efforts, taking into consideration available technology, to ensure that a parent receives notice and has the opportunity to request that

Respondent make no further use of the information. The notice will include the same information required in the notice required by subparagraph C above, and will also state (i) that Respondent has already collected the child's e-mail address in order to respond to the child's request for information and that the requested information will require more than one contact with the child, (ii) that the parent may refuse to permit further contact with the child and require the deletion of the information, and how the parent can do so, and (iii) that if the parent fails to respond to the notice, Respondent may use the information for the purpose(s) stated in the notice. The notice will be provided immediately after Respondent's initial response to the child and before making any additional response to the child;

4. Respondent may collect a child's name and online contact information to the extent reasonably necessary to protect the safety of a child participant on Respondent's Web site; provided, Respondent will use the information for the sole purpose of protecting the child's safety, will not use the information to re-contact the child or for any other purpose, and will not disclose the information on the Web site. Further, Respondent will make reasonable efforts, taking into consideration available technology, to ensure that a parent receives notice and has the opportunity to request that Respondent make no further use of the information. The notice will include the same information required in

the notice required by subparagraph C above, and will also state (i) that Respondent has collected the child's name and e-mail address in order to protect the safety of the child participating on the Web site, (ii) that the parent may refuse to permit the use of the information and require the deletion of the information, and how the parent can do so, and (iii) that if the parent fails to respond to the notice, Respondent may use the information for the purpose stated in the notice ; and

5. Respondent may collect a child's name and email address to the extent reasonably necessary: (i) To protect the security or integrity of its Web site; (ii) To take precautions against liability; (iii) To respond to judicial process; or (iv) To the extent permitted under other provisions of law, to provide information to law enforcement agencies or for an investigation on a matter related to public safety, provided, Respondent will not use the information for any other purpose;

G. Upon the request of a parent whose child has provided personal information to Respondent, Respondent will provide to that parent the following:

1. A description of the specific types or categories of personal information collected from children by Respondent, such as name, address, telephone number, e-mail address, hobbies, and extracurricular activities;

2. The opportunity at any time to refuse to permit Respondent's further use or future online collection of personal information from that child, and to direct Respondent to delete the child's personal information; and
3. Notwithstanding any other provision of law, a means of reviewing any personal information collected from the child.

The means employed by Respondent to carry out the requirements of this subparagraph will ensure that the requestor is a parent of that child, taking into account available technology, and not be unduly burdensome to the parent;

- H. Respondent will not condition a child's participation in a game, the offering of a prize, or another activity on the child's disclosing more personal information than is reasonably necessary to participate in such activity; and
- I. Respondent will maintain reasonable procedures to protect the confidentiality, security, and integrity of personal information collected from children.

16. Respondent further voluntarily assures the OAG that, for any child from whom Respondent has previously collected personal information not in the manner set forth in this Assurance, Respondent will delete all such information within thirty (30) days unless, upon receiving notice from Respondent, the child's parent provides verifiable consent prior to that date. The notice and verifiable consent obtained pursuant to this paragraph will meet the foregoing procedures required by this Assurance for obtaining a parent's verifiable consent prior to the collection of a child's information.

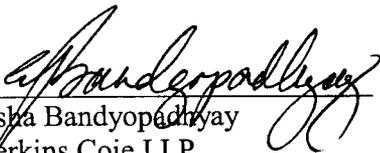
GENERAL PROVISIONS

17. Respondent shall not represent, directly or by implication, that this Court or the Attorney General, has approved any of Respondent's business practices.
18. This Assurance shall be governed by § 17.58 of the DTPA and shall remain in effect until rescinded by agreement of the parties or voided by a Court of competent jurisdiction.
19. This Assurance shall be binding upon Respondent and its successors and assigns. If Respondent merges with any other business entity or if Respondent sells, assigns, or otherwise transfers substantially all of its assets to any other business entity, Respondent shall provide reasonable prior notice of this Assurance to the surviving corporation or the purchaser, assignee, or transferee and its binding effect upon the surviving corporation, purchaser, assignee, or transferee.
20. It is further understood that, pursuant to § 17.58 of the DTPA, unless this Assurance is rescinded by agreement of the parties or voided by a Court for good cause, subsequent failure to comply with the terms of this Assurance is *prima facie* evidence of a violation of the DTPA.
21. This Assurance shall be deemed in effect from the day it is approved by the District Court of competent jurisdiction to which it is submitted. To the extent that the provisions of this Assurance conflict with any Texas, local or federal law which now exists, or is later enacted or amended, such law and not this Assurance shall apply where such conflict exists. For the purposes of this Assurance, a conflict exists if conduct prohibited by this Assurance is required by such Texas, local, or federal law or a person or agency acting under color of Texas, local or federal law, or if conduct required by this Assurance

is prohibited by such Texas, local, federal law or a person or agency acting under color of Texas, local or federal law.

22. All relief not provided herein is hereby expressly excluded.

AGREED this 11th day of December, 2007.


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