

IN THE DISTRICT COURT OF SEDGWICK COUNTY, KANSAS

STATE OF KANSAS, *ex rel.*,
STEVE SIX, Attorney General,

Plaintiff,

v.

TIM HENRY LLC d/b/a
American Builders and
TIM HENRY, an individual

Defendants.

Case No. 09 CV 1196

(Pursuant to K.S.A. Chapter 60)

COPY

FILED
2010 JUL 12 P 3:27
DISTRICT
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JOURNAL ENTRY OF CONSENT JUDGMENT

NOW on this ____ day of _____, 2010, Plaintiff's Journal Entry of Consent Judgment comes before the Court pursuant to K.S.A. 50-632(b). The Plaintiff, state of Kansas, *ex rel.* Steve Six, Attorney General, appears by and through Meghan E. Barnds, Assistant Attorney General.

WHEREUPON the parties advise the Court that they have stipulated and agreed to the following:

PARTIES, JURISDICTION AND VENUE

1. Steve Six is the Attorney General of the state of Kansas.
2. The Attorney General's authority to bring this action is derived from the statutory and common law of the State of Kansas, specifically the Kansas Consumer Protection Act, ("KCPA") K.S.A. 50-623 *et seq.*
3. Defendant Tim Henry LLC d/b/a American Builders was formerly registered with the Kansas Secretary of State as a domestic, limited liability company.

4. Defendant Tim Henry LLC was owned and operated by the individual Tim Henry (“Defendant Henry”).

5. Defendant Henry held himself out to Kansas consumers as the owner and operator of Defendant Tim Henry LLC.

6. All references to Defendants herein include acts individually, in concert, or by or through employees, agents, representatives, affiliates, assignees and successors.

7. Defendants stipulate and admit that the Court has subject matter jurisdiction over this case and *in personam* jurisdiction over the parties.

8. Defendants stipulate and admit that venue is proper in this Court.

9. Defendants are suppliers within the definition of K.S.A. 50-624(j).

10. Defendants are engaged in consumer transactions in Kansas within the definition of K.S.A. 50-624(c).

DEFINITIONS

As used herein, the following terms shall mean:

11. “Consumer,” “Client,” or “Customer” shall mean any individual, husband and wife, sole proprietor, or family partnership who seeks or acquires property or services for personal, family, household, business or agricultural purposes, as defined in K.S.A 50-624.

12. “Defendants” shall mean Tim Henry LLC and Tim Henry, the individual, along with their employees, directors, officers, owners, members, managers, agents, assigns, and all other persons or entities acting in concert with them or on their behalf, including their predecessors, subsidiaries, affiliates, and successors, and any other entity formed by an agent, employee, attorney, relative or spouse of Tim Henry, for the benefit of Tim Henry.

13. “Advertise,” “Advertisement,” or “Advertising,” shall mean any written, oral, graphic, or electronic statement, illustration, or depiction that is designed to create interest in the purchasing of, impart information about the attributes of, publicize the availability of, or affect the sale or use of the Defendants’ services, whether the statement appears in a brochure, newspaper, magazine, leaflet, mailer, letter, catalogue, poster, billboard, electronic mail, website, homepage, film, radio, television, or any other medium.

14. “Clear and Conspicuous” or “Clearly and Conspicuously,” shall refer to a statement that, regardless of the medium in which it is made, is readily understandable and presented in such size, color, contrast, duration, location, and audibility, as compared to the other information with which it is presented, that it is readily apparent to the person to whom it is disclosed. A clear and conspicuous 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 present in close proximity to the information it modifies and in a manner that is readily apparent and understandable.

15. “Represent” means to state or imply, directly or indirectly, through claims, statements, questions, conduct, graphics, symbols, lettering, formats, devices, language, documents, messages, or any other manner or means by which meaning might be conveyed. This definition applies to other forms of the word “represent,” including without limitation “representation,” “misrepresent,” and “misrepresentation.”

16. “Advance payment” shall mean any payment made by a consumer to Defendants prior to the completion of all services as contracted for by the consumer.

17. “Trust account” shall mean a bank account maintained by Defendants in the State of Kansas, with a federal or state chartered or licensed financial institution and insured by an

agency of the federal or state government, for the keeping of advance payments from consumers. No funds belonging to Defendants shall be deposited therein with the exception of funds reasonably sufficient to pay bank charges.

18. "Informed consent" shall mean consent obtained from the consumer after full disclosure of all relevant information.

ALLEGATIONS

19. Defendants engage in the advertising, solicitation and sale of home construction and repair services throughout the state of Kansas.

20. Defendant Henry has offered the aforementioned services to Kansas consumers, by creating and forfeiting multiple limited liability companies in the state of Kansas, for over twenty (20) years.

21. Plaintiff alleges that Defendants, while offering the aforementioned services for sale in Kansas in 2007, engaged in deceptive and unconscionable acts and practices in violation of the KCPA, specifically, but not limited to, K.S.A. 50-626, which acts and practices include, but are not limited to:

- a. Making willful use of false statements and/or exaggerations to consumers about when home construction and repair services would be completed, in violation of K.S.A. 50-626(b)(2);
- b. Willfully suppressing, concealing, omitting or failing to inform consumers that consumers' initial payments to Defendants, in the form of insurance proceeds or otherwise, would be used to cover Defendants' pre-existing financial obligations, in violation of K.S.A. 50-626(b)(3);
- c. Entering into consumer transactions knowing, or with reason to know, Defendants could not complete the home construction and repair services as contracted for in a timely manner, thereby depriving consumers of a material benefit, in violation of K.S.A. 50-627(b)(3).

22. Defendants agree to this Consent Judgment without trial or adjudication of any issue of fact or law solely for the purposes of settlement.

INJUNCTIVE RELIEF

23. Defendants agree to refrain, and to be permanently enjoined, from engaging in those acts and practices set forth in paragraph twenty one (21) herein and Defendants agree that engaging in any such acts or similar acts, after the date of this Consent Judgment, shall constitute a violation of this Consent Judgment.

24. Defendants agree to refrain, and to be permanently enjoined, from making oral representations that, directly or indirectly, contradict terms or language contained in Defendants' written contracts with consumers.

25. Defendants agree to refrain, and to be permanently enjoined, from misrepresenting, directly or indirectly, in Defendants' advertising, promotional materials, sales presentations, or in any manner the nature of the services to be performed, specifically the ability of Defendants to perform services within a specific timeframe.

26. Defendants agree to refrain, and to be permanently enjoined, from misrepresenting, directly or indirectly, in Defendants' advertising, promotional materials, sales presentations, or in any manner Defendants' qualifications, training or experience.

27. Defendants agree to refrain, and to be permanently enjoined, from accepting advance payments from any consumer unless the aforementioned payments are deposited into a trust account, to be debited only for the purpose of paying subcontractors and purchasing material for use in rendering services to the consumer. Defendants agree to refrain, and to be permanently enjoined, from withdrawing or transferring funds from the aforementioned trust account for services or material rendered by Defendants, until such time as all services have been

provided to the consumer as contracted for and all subcontractors have been paid. *Provided however*, Defendants may withdraw or transfer funds from the trust account for services or material rendered by Defendants at any time with the prior, informed consent of the consumer.

28. Defendants agree to create and maintain records that, in reasonable detail, accurately, fairly, and completely reflect Defendants' incomes, disbursements, transactions, and use of advance payments from consumers.

29. Defendants agree to preserve the aforementioned records for a period of at least five (5) years, and to make such records available to the Office of the Attorney General for periodic inspection.

30. Defendants agree to, prior to accepting advance payment from any consumer, clearly and conspicuously disclose Defendants' refund and cancellation policies to the consumer, in writing.

31. Defendants agree to comply with all Kansas laws, statutes, rules and regulations, relating to consumer transactions in Kansas, specifically the Kansas Consumer Protection Act, K.S.A. 50-623, *et seq.*

32. Defendant Henry agrees to refrain, and to be permanently enjoined, from working for, or performing home construction and repair services on behalf of, any entity not in compliance with all Kansas laws, statutes, rules and regulations, relating to consumer transactions in Kansas, specifically the Kansas Consumer Protection Act, K.S.A. 50-623, *et seq.*

33. Defendants agree to comply with all licensing requirements in any county or municipality in which Defendants operate, including but not limited requirements with regard to license renewal, bonding and insurance.

34. Defendant Henry agrees to refrain, and to be permanently enjoined, from working for, or performing home construction and repair services on behalf of, any entity not in compliance with all licensing requirements in any county or municipality in which Defendant Henry may perform home construction and repair services.

35. Defendants agree to be permanently enjoined from entering into, forming, organizing or reorganizing into any partnership, corporation, sole proprietorship or any other legal structures, for the purpose of avoiding compliance with the terms of this Consent Judgment.

36. Defendants agree to make available and/or disclose the provisions of this Consent Judgment to each officer, director and employee of management level that is involved in Kansas operations of the Defendants within ten (10) days of execution of this Consent Judgment.

CONSUMER RESTITUTION

37. Defendants represent to this Court that Defendants failed to maintain general liability insurance during the relevant time period, and therefore no insurance proceeds or any other means exist to provide restitution to the consumers named in Plaintiff's petition. Defendants agree that the existence of such insurance is a material fact, and that any failure by Defendants to disclose the existence of such insurance, either before or after the date of this Consent Judgment, shall constitute a violation of this Consent Judgment.

OTHER PROVISIONS

38. The provisions of this Consent Judgment will be applicable to Defendants, and every employee, agent or representative of the Defendants.

39. Energy Guard LLC ratifies, agrees, adopts and agrees to abide by the provisions of this Consent Judgment.

40. Jurisdiction is retained by this Court for the purpose of enabling any of the parties to this Consent Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the modification of any of the provisions hereof, for the enforcement of compliance herewith, and for the punishment of violations thereof.

41. If any portion, provision, or part of this Consent Judgment is held to be invalid, unenforceable, or void for any reason whatsoever, that portion shall be severed from the remainder and shall not affect the validity or enforceability of the remaining provisions, portions or parts.

42. Compliance with this Consent Judgment does not relieve the Defendants of any obligation imposed by applicable federal, state, or local law, nor shall the Attorney General be precluded from taking appropriate legal action to enforce civil or criminal statutes under his jurisdiction.

43. The parties understand that this Consent Judgment shall not be construed as an approval of or sanction by the Attorney General of the business practices of the Defendants nor shall the Defendants represent the decree as such an approval. The parties further understand that any failure by the State of Kansas or by the Attorney General to take any action in response to any information submitted pursuant to the Consent Judgment shall not be construed as an approval of or sanction of any representations, acts or practices indicated by such information, nor shall it preclude action thereon at a later date.

44. Each of the Defendants' representatives, signing this Journal Entry of Consent Judgment, warrants that the representative has been duly authorized by the Defendants for whom the representative appears to be acting to enter and execute this Journal Entry of Consent Judgment on behalf of Defendants. Defendants further represent that they have had an

opportunity to consult with and obtain the advice of private legal counsel prior to entering into this Consent Judgment.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the stipulation and agreement of the parties contained herein are adopted and approved as the findings of fact and conclusions of law of the Court and any monies owed hereunder by Defendants immediately become a judgment upon filing.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that pursuant to the Kansas Consumer Protection Act, and the provisions of K.S.A. 50-632(b), the court hereby approves the terms of the Consent Judgment and adopts the same as the Order of the Court.

IT IS SO ORDERED.

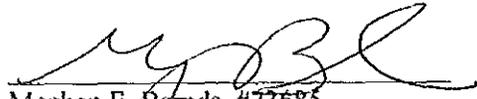
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DISTRICT COURT JUDGE

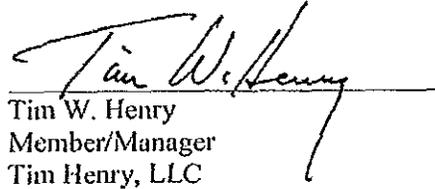
Prepared and approved by:

PLAINTIFF:

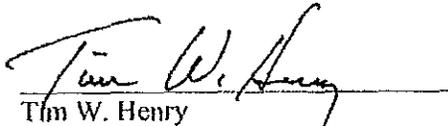


Meghan E. Barnds, #23685
Assistant Attorney General
Office of Kansas Attorney General, Steve Six
120 Southwest 10th Ave., 2nd Floor
Topeka, Kansas 66612
Attorney for Plaintiff

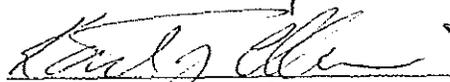
DEFENDANTS:



Tim W. Henry
Member/Manager
Tim Henry, LLC



Tim W. Henry



Kent J. Collins, #14228
Attorney for Defendants

~~Tim W. Henry
Member/Manager
Tim Henry, LLC~~

~~Tim W. Henry~~


Kent J. Collins, #14228
Attorney for Defendants


ATTORNEY
for Energy Guard, LLC