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IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS  
DIVISION 9

STATE OF KANSAS, *ex rel.* )  
STEVE SIX, ATTORNEY GENERAL, )  
 )  
*Plaintiff,* )

v. )

Case No. 10C1553

BIG O TIRES, LLC, a Nevada Limited )  
Liability Company, )  
 )  
*Defendant.* )

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

JOURNAL ENTRY OF CONSENT JUDGMENT

NOW on this 1 day of <sup>November</sup>~~October~~, 2010, the above-captioned matter comes before this Court for approval of a stipulated Journal Entry of Consent Judgment pursuant to K.S.A. 50-632(b). Plaintiff, State of Kansas, *ex rel.* Steve Six, Attorney General, appears by and through counsel, Emilie Burdette, Assistant Attorney General. Defendant, Big O Tires, LLC, a Nevada Limited Liability Company appears by and through counsel, Trina Le Riche, of Ogletree, Deakins, Nash, Smoak & Stewart, P.C.

THEREUPON the Court, being fully advised in the premises and taking notice of the parties' stipulations, makes the following findings and conclusions:

## **I. PARTIES TO THIS AGREEMENT**

1. Plaintiff, State of Kansas, ex rel. Steve Six is the duly appointed and acting 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, K.S.A. 50-632(b).
3. Defendant, Big O Tires, LLC ("BOT" or "Defendant"), is a Limited Liability Company organized under the laws of Nevada, and it conducts a retail tire business in numerous states, including Kansas, through franchise agreements. Its principal place of business is located at 12650 E. Briarwood Avenue, Suite 2D, Centennial, Colorado 80112.

## **II. JURISDICTION AND VENUE**

4. Defendant admits that, at all times relevant to the allegations set forth herein and, in the ordinary course of business, its authorized agent acted as a "supplier" as defined by K.S.A. 50-624(j), by soliciting, advertising, and/or selling gas redemption programs to Kansas consumers.
5. Defendant admits that, at all times relevant to the allegations set forth herein and, in the ordinary course of business, it engaged in consumer transactions as defined by K.S.A. 50-624(c), either individually or through authorized agents.
6. Defendant further admits and this Court has determined there is personal and subject matter of jurisdiction in this case pursuant K.S.A. 50-623 and K.S.A. 50-638(a).

7. Venue is also proper in the Third Judicial District of Kansas (Shawnee County), pursuant to K.S.A. 50-638(b).

### **III. PURPOSE AND INTENT OF THIS CONSENT JUDGMENT**

8. In the interest of avoiding the costs and uncertainty associated with litigation, Defendant voluntarily enters into this stipulated judgment in full settlement of all claims that could potentially be asserted by Plaintiff arising out of the allegations set forth herein. Further, this Consent Judgment shall not be deemed to be an admission of any violation of the KCPA by Defendant, and Defendant denies all liability as to the claims asserted herein. Consistent with the provisions of K.S.A. 50-632(b), parties agree this Consent Judgment shall constitute a full and final satisfaction of the claims made by Plaintiff in this action.

### **IV. ALLEGATIONS COMMON TO ALL CONSUMERS**

9. Plaintiff alleges that Defendant committed the following acts or practices in violation of the KCPA.
10. At various times during 2007 and 2008, and all periods relevant hereto, Defendant solicited and/or enrolled Kansas consumers in a gas redemption program ("Program") purportedly worth \$500 in gasoline with a purchase of any qualifying set of four (4) Big O tires.<sup>1</sup>
11. The Program may have served as an inducement for consumers to purchase the qualifying sets of BOT tires.

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<sup>1</sup> A redacted spreadsheet of known Kansas consumers is attached hereto as Exhibit "A."

12. At the time of purchasing tires, consumers were given a certificate entitling them to enroll in the Program, which was administered by Quinden Marketing Ltd. (hereinafter "QML"), out of Vancouver British Columbia, Canada. There were numerous terms and conditions applicable to the Program, which serve as the primary basis for the allegations set forth herein.<sup>2</sup>
13. The program, administered through QML, required consumers to initially enroll online through QML's website portal or by mailing the enrollment form to QML.
14. Once enrolled, consumers were required to mail in within 45 days of purchase the following items:
  - a. A photocopy of Proof of Purchase of qualifying set of four Big O tires, showing date of purchase;
  - b. A completed Gasoline Redemption Certificate;
  - c. A self-addressed, stamped # 10 envelope; and,
  - d. A \$6 US Certified Check or Money Order made payable to QML, and refundable as part of the final gas redemption card upon completion of program.<sup>3</sup>
15. Upon completion of these initial steps, consumers were then sent their first \$25 gas card from QML, to be used only for purchases of gas or merchandise from the gas station designated during the enrollment process.
16. The Program, as administered through QML, further required *inter alia* that consumers purchase a minimum of \$25 in gasoline per month from the designated station, and send the receipts for purchases made between the 21<sup>st</sup> day of the prior month to the 20<sup>th</sup> day of the current month.
17. The program, as administered through QML, allowed consumers to obtain only a single \$25 gas card each month for up to 20 months; however, if a particular

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<sup>2</sup> A copy of the Gas Redemption Program is attached hereto as Exhibit "B."

<sup>3</sup> This requirement renders the Program worth only \$494, rather than the \$500 represented to consumers.

month was missed for any reason (i.e., failure to abide by technical rules, consumers could not use their designated gas station for whatever reason, or consumers made no gas purchases during the month), consumers lost the right/ability to obtain the \$25 gas card for that month. Consumers were not allowed to recoup the loss, resulting in a reduction off of the remaining balance of the redemption Program.

18. Additional terms and conditions included Defendant and QML reserving the right to change the terms and conditions at any time during the Program period, and the administrator, QML, did make various material changes to the Program through their website during participation by Kansas consumers.
19. A review of the document production and consumer complaints indicate that, from at least October of 2008 through July of 2008, Kansas consumers were required by Defendant's administrator of the Program, QML, to use a self-addressed, stamped, self-adhering, #10 size envelope, when submitting gas receipts. Numerous consumers failed to comply with various mid-program policy changes, i.e., "self-adhering" envelopes, and consequently had their receipts rejected. At least one consumer was rejected from the Program entirely for failing to enroll by using a # 10 envelope and subsequently failing to remunerate a \$10.00 service charge for reinstatement in the Program.
20. One of the provisions of the Program required consumers to waive all legal rights and remedies in contract and tort, and further allowed Defendant's administrator, QML, to change program rules at any time without notice to consumers.

## **V. ALLEGED KCPA VIOLATIONS**

21. The foregoing practices are alleged by Plaintiff to be deceptive and/or unconscionable under the KCPA.
22. Specifically, Plaintiff alleges that Defendant's failure to clearly and conspicuously disclose all of the Program's material terms and conditions to consumers at the time they were induced to purchase the qualifying set of Big O tires constitutes deceptive and/or unconscionable acts or practices pursuant to K.S.A. 50-626(b)(1)(A), (D), and (F), (2), and (3); and, K.S.A. 50-627(b)(1) and (5).
23. Plaintiff alleges the denial of consumers' claims/receipts based on a failure to comply with technical, one-sided, and/or continually changing Program terms and conditions constitutes deceptive and/or unconscionable acts or practices pursuant to K.S.A. 50-626(b)(1)(A), (D), and (F); and, K.S.A. 50-627(b)(1) and (5).
24. Plaintiff further alleges the Program's contractual provisions reserving the right to unilaterally change the material terms and conditions of the Program at any time without notice to consumers constitutes deceptive and/or unconscionable acts or practices pursuant to K.S.A. 50-626(b)(1)(A), (D), and (F), (2), and (3); and, K.S.A. 50-627(b)(1), (3), and (5).
25. Finally, Plaintiff alleges the Program's contractual provisions requiring consumers to waive all legal rights and remedies in contract and tort arising out of the transaction, constitutes unconscionable acts or practices pursuant to K.S.A. 50-627(b)(1) and (5).

## V. AGREED REMEDIES

26. Defendant agrees to entry of judgment against it in the amount of \$75,000, and agrees to pay said amount before or contemporaneously with the filing of this Consent Judgment.
27. Pursuant to K.S.A. 50-636(a), Defendant shall pay the stipulated judgment amount of Seventy-Five Thousand Dollars (\$75,000.00) in settlement of this matter, in the form of a cashier's check, directly to the Office of the Kansas Attorney General. Said funds shall be distributed in accordance with the provisions of K.S.A. 50-632.
28. Where applicable, Defendant agrees the Attorney General may provide eligible consumers with an opt-in restitution program.
  - a. The State will set aside up to \$30,000.00 of the monies paid by Defendant for distribution to eligible consumers.
  - b. An eligible consumer shall be defined as a Kansas consumer who can provide proof of purchase of a set of tires from Defendant or Defendant's franchisee that would have qualified the consumer for enrollment in the Program.
  - c. Within 45 days of the date of execution of this agreement, Plaintiff will use diligent and best efforts to locate and contact individuals believed to be eligible consumers. Plaintiff will attempt to locate and mail notice to known eligible consumers and will place a notice on its website for unknown eligible consumers.

- d. Eligible consumers will be required to submit a completed claim form (attached hereto as Exhibit X) and a signed release of claims against Defendant (attached hereto as Exhibit X) to Plaintiff postmarked not later than 90 days after execution of this agreement.
  - e. Within 120 days after execution of this agreement, Plaintiff will issue restitution checks to all eligible consumers meeting the criteria established for claiming participation in this opt-in restitution program.
  - f. Eligible consumers may receive up to \$200.00 per claim up to \$30,000.00 or a pro-rata share of \$30,000.00 if more than 150 claims are made through this opt-in restitution program. All checks will be considered void within 90 days of issuance.
  - g. Any funds not claimed by eligible consumers shall revert back to Plaintiff to be utilized in the costs of administration of this opt-in restitution program.
  - h. Within 320 days of execution of this agreement, Plaintiff agrees to provide Defendant with copies of all claim forms submitted by eligible consumers, copies of all executed release of claims, and a final spreadsheet of the restitution funds distributed to eligible consumers.
29. After payment of this judgment in full, the Attorney General agrees to file with the court a satisfaction of judgment and provide Defendant with a file-stamped copy.
30. Defendant agrees to be permanently enjoined from committing the specific acts or practices set forth herein in any ongoing or future Gas Redemption Programs in



this State. Defendant further agrees its agents, employees, and representatives are also permanently enjoined from committing the specific acts or practices described above in any ongoing or future Gas Redemption Programs within this State.

31. Compliance with this Consent Judgment does not relieve Defendant of any other obligations imposed by 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.
32. The Parties acknowledge and agree this Consent Judgment shall not be construed as an approval or sanction by the Kansas Attorney General of the business practices of Defendant, nor shall Defendant represent the decree as such 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.
33. The Parties acknowledge and agree this Consent Judgment settles all past, present, and future claims, known or unknown, in relation to the allegations and Program set forth herein.
34. Nothing in this Consent Judgment shall be construed to limit the rights of any consumers from pursuing any and all legal remedies they may be entitled to assert individually against Defendant through a private cause of action.
35. Defendant acknowledges and agrees this Court has continuing jurisdiction over this matter pursuant to K.S.A. 50-632(b) and, any breach any of the terms,

conditions, or payments set forth herein shall be treated as a violation of the Court's order and shall be subject to further penalties under the law.

36. This Court shall also retain such jurisdiction 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 relief as may be necessary or appropriate for the modification or compliance of any provisions contained herein. This Court shall also retain jurisdiction if any violation of any term of this Consent Judgment is committed.
37. Defendant further acknowledges and agrees that, pursuant to the United States Bankruptcy code, specifically 11 U.S.C 523(a)(2)(A) and (a)(7), and due to the nature of the conduct underlying this agreement and the violations set forth herein, this judgment shall not be dischargeable in any federal court bankruptcy proceeding commenced after the entry of this judgment.
38. 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.

**IT IS THEREFORE ORDERED, ADJUDGED AND DECREED** that the stipulations and agreements of the parties contained herein are found to be reasonable and are hereby adopted and approved as the findings of fact and conclusions of law of the Court.

**IT IS FURTHER ORDERED, ADJUDGED AND DECREED** that judgment is hereby entered against Defendant Big O Tires, LLC, in favor of Plaintiff in the amount set forth herein.

**IT IS FURTHER ORDERED, ADJUDGED AND DECREED** that this Court shall retain jurisdiction over the parties and subject matter of this action for the purpose of rendering any additional equitable relief, orders, decrees, or judgments as may be requested by the parties or may be deemed appropriate by the Court.

**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**

  
Judge of the District Court

Respectfully submitted and approved by:  
STEVE SIX, Attorney General,

By: 

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*Attorney for the Plaintiff*

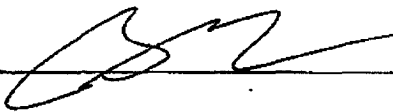
AND

Attorney for Defendant Big O Tires, LLC:

By: Wine R. LeRiche

*Attorney for Defendant, BOT*

AND

By: 

*Authorized Agent or Officer of BOT*