DISTRICT COURT, ARAPAHOE COUNTY, COLORADO 7325 S. Potomac St. #100 Centennial, CO 80112 DATE FILED: September 23, 2020 11:34 AM CASE NUMBER: 2020CV31853 STATE OF COLORADO, ex rel. PHILIP J. WEISER, ATTORNEY GENERAL Plaintiff, v. FIT TURF, INC., a Michigan Corporation; and PAUL K. WAGNER, Defendants.	▲ COURT USE ONLY ▲
PHILIP J. WEISER, Attorney General JAY B. SIMONSON, 24077* First Assistant Attorney General JONATHAN A. HELFGOTT, 50354* Assistant Attorney General 1300 Broadway, 10th Floor Denver, CO 80203 Telephone: (720) 508-6000 FAX: (720) 508-6040 *Counsel of Record	Case No. Div.:
FINAL CONSENT JUDGMENT	

This matter is before the Court on the parties' Stipulation for Entry of a Final Consent Judgment. The Court has reviewed the Stipulation, the Complaint and is otherwise advised in the grounds therefore. The Court concludes that good cause has been shown for entering this Final Consent Judgment (hereinafter "Consent Judgment").

Accordingly, it is ORDERED that:

GENERAL PROVISIONS

1. Scope of Final Consent Judgment. The injunctive provisions of this Consent Judgment are entered pursuant to the Colorado Consumer Protection Act, §§ 6-1-101, *et seq.*, C.R.S. (2019) ("CCPA"). This Consent Judgment shall apply to Defendants Fit Turf, Inc. ("Fit Turf") and Paul K.

Wagner (collectively, "DEFENDANTS") and any person under the direction or control of any Defendant, including but not limited to any principals, officers, directors, agents, employees, representatives, successors, affiliates, subsidiaries, contractors, and assigns who have received actual notice of this Court's Order.

2. Release of Claims. The State of Colorado, ex. rel. Philip J. Weiser, Attorney General (hereinafter the "STATE"), acknowledges by its execution hereof that this Consent Judgment constitutes a complete settlement and release of all claims under the CCPA on behalf of the STATE against DEFENDANTS, their owners, employees and former employees, with respect to all claims, causes of action, damages, fines, costs, and penalties which were asserted or could have been asserted under the CCPA in the Complaint, which arose prior to this date and relating to or based upon the acts or practices that are the subject of the Complaint filed in this action. The STATE agrees that it shall not proceed with or institute any civil action or proceeding based upon the CCPA against DEFENDANTS, other than the instant action, including but not limited to an action or proceeding seeking restitution, injunctive relief, fines, penalties, attorneys' fees, or costs, for any communication disseminated prior to this date which relates to the subject matter of the Complaint filed in this action or for any conduct or practice prior to the date of entry of this Final Consent Judgment that relates to the subject matter of the Complaint filed in this action.

3. No Admission of Liability. DEFENDANTS contest that they have violated the CCPA, any other laws, and expressly deny any wrongdoing on their parts. DEFENDANTS are entering into this Consent Judgment for the purpose of compromising and resolving disputed claims and to avoid the expense of further litigation. DEFENDANTS' execution of this Consent Judgment is not and shall not be considered an admission by the DEFENDANTS of any of the allegations or claims set forth in the Complaint.

4. Preservation of Law Enforcement Action. Nothing herein precludes the STATE from enforcing the provisions of this Consent Judgment, from pursuing any non-CCPA law enforcement action, or from pursuing any law enforcement action under the CCPA with respect to the acts or practices of DEFENDANTS conducted within the State of Colorado but not covered by this lawsuit and Consent Judgment or any acts or practices of DEFENDANTS conducted within the State of Colorado after the entry of this Consent Judgment.

5. Compliance with and Application of State Law. Nothing herein relieves DEFENDANTS of their duty to comply with applicable laws of the State of Colorado nor constitutes authorization by the STATE for

DEFENDANTS to engage in acts and practices prohibited by such laws. This Consent Judgment shall be governed by the laws of the State of Colorado.

6. Non-Approval of Conduct. Nothing herein constitutes approval by the STATE of DEFENDANTS' past or future business practices. DEFENDANTS shall not make any representation contrary to this paragraph.

7. Preservation of Private Claims and Relation to Private Settlements. Unless otherwise noted, nothing herein shall be construed as a waiver of any private rights, causes of action, or remedies of any person against DEFENDANTS with respect to the acts and practices covered by this Consent Judgment.

8. Use of Settlement as Defense. DEFENDANTS acknowledge that it is the STATE's customary position that an agreement restraining certain conduct on the part of a defendant does not prevent the STATE from addressing later conduct that could have been prohibited, but was not, in the earlier agreement, unless the earlier agreement expressly limited the STATE's enforcement options in that manner. Therefore, nothing herein shall be interpreted to prevent the STATE from taking enforcement action to address conduct occurring after the entry of this Consent Judgment that the STATE believes to be in violation of the law. The fact that such conduct was not expressly prohibited by the terms of this Consent Judgment shall not be a defense to any such enforcement action.

9. Use of Settlement in Business Activity. Under no circumstances shall this Consent Judgment or the name of the Attorney General or any of the STATE's employees or representatives be used by DEFENDANTS or any of their employees, representatives, or agents as an endorsement of any conduct, past or present, by the DEFENDANTS.

10. No Third Party Beneficiaries Intended. This Consent Judgment is for the benefit of the parties only and does not create or confer rights or remedies upon any other person, including rights as a third-party beneficiary. This Consent Judgment does not create a private right of action on the part of any person or entity, whether to enforce this Consent Judgment or otherwise, other than the parties hereto and their successors in interest.

11. Retention of Jurisdiction. This Court shall retain jurisdiction over this matter for the purpose of enabling any party to this Consent Judgment to apply to the Court at any time for further orders which may be necessary or appropriate for the construction, modification or execution of

this Consent Judgment, and for the enforcement of compliance herewith and the punishment of violations hereof.

12. Contempt. The parties understand and agree that a finding of any violation of any term of provision of this Consent Judgment may give rise to all contempt remedies available to the Court and all remedies provided under § 6-1-112(1)(b), C.R.S. (2019).

13. Execution in Counterparts. This Agreement may be executed simultaneously or in counterparts, each of which shall be deemed to be an original, and may be completed by exchange of counterparts. Signatures received via PDF scanned electronic file shall be deemed to be original signatures.

14. Severability. If any provision(s) of this Consent Judgment is held to be invalid, illegal, unenforceable or in conflict with the law of any jurisdiction, the validity, legality and enforceability of the remaining provisions shall not in any way be affected or impaired thereby.

15. Successors in Interest. The terms and provisions of this Consent Judgment may be enforced by the current Colorado Attorney General and by any of his duly authorized agents or representatives, as well as by any of his successors in interest, and by any of his successors in interest's agents or representatives.

16. Public Record. Pursuant to § 6-1-112(2), C.R.S. (2019), this Consent Judgment shall be a matter of public record.

17. DEFENDANTS shall not be deemed to have violated any of the terms of this Consent Judgment if: (i) DEFENDANTS have implemented reasonable and appropriate policies and procedures to ensure compliance with this Consent Judgment; (ii) the alleged violation is the result of an isolated or inadvertent error related to technical or coding issues, or systems glitches; (iii) DEFENDANTS have reasonable safeguards in place to monitor for, discover and prevent these types of occurrences from happening; and (iv) DEFENDANTS take appropriate steps to investigate and remedy errors or glitches identified by Fit Turf or otherwise brought to their attention. Such remedy shall address any adverse or negative customer impact(s) in a way that is consistent with the terms of this Consent Judgment, including but not limited to providing all credits or refunds that are due to customers as a result of any technical or coding issues, or systems glitches.

DEFINITIONS

18. "Negative Option Feature" means, in an offer or agreement to sell or provide any goods or services, a provision under which the customer's silence or failure to take an affirmative action to reject goods or services or to cancel the agreement is interpreted by the seller as acceptance of the offer.

19. "Automatic Renewal" means the practice of enrolling consumers in additional services beyond the initial service agreed to in a sales offer(s) unless the consumer affirmatively instructs otherwise.

20. "Clear and Conspicuous" means that information is presented in a way that is difficult to miss and that ordinary consumers will easily notice and understand, so that required disclosures are communicated as effectively as the sales message. When disclosures are oral, Clear and Conspicuous means at an understandable speed and pace, and in the same language(s) as the sales offer(s) so that ordinary consumers can easily hear and understand the information. When written, Clear and Conspicuous means information must be printed in a type size that a consumer can readily see and understand that has the same or greater emphasis and degree of contrast with the background as the sales offer and that is not buried on the back or bottom, or in unrelated information that an ordinary consumer would not think important enough to read.

21. "Signature" means an affirmative action by the consumer to written terms and conditions, which may include making a mark in ink, clicking on an electronic icon indicating assent, initiating payment, or other electronic response by the consumer.

22. "Established Business Relationship" shall mean:

(a) Was formed, prior to the telephone solicitation, through a voluntary, two-way communication between a seller or telephone solicitor and a residential subscriber or wireless telephone service subscriber, with or without consideration, on the basis of an application, purchase, ongoing contractual agreement, or commercial transaction between the parties regarding products or services offered by such seller or telephone solicitor; and

(b) Has not been previously terminated by either party; or

(c) Currently exists or has existed within the immediately preceding eighteen months.

23. "Recently Enrolled Customers" shall mean current customers of DEFENDANTS who enrolled in any of DEFENDANTS' services between September 15, 2017 and the date this Consent Judgment is entered.

PERMANENT INJUNCTION

24. The Court enters a permanent injunction ENJOINING the DEFENDANTS, individually, and any other person under their control or at their direction, including but not limited to any principals, officers, directors, agents, employees, representatives, successors, affiliates, subsidiaries, contractors, and assigns who receive actual notice of this Court's Order, from the following:

a. Selling, offering for sale, or charging any consumer within the State of Colorado for any goods or services that involve a Negative Option Feature, including but not limited to Automatically Renewing services, without

   i. Clearly and Conspicuously disclosing, before a consumer consents to pay for such goods or services, all material terms and conditions of the Negative Option Feature, including, but not limited to, the fact that the consumer's account will be charged unless the consumer takes an affirmative action to avoid the charge(s), the date(s) the charge(s) will be submitted for payment, and the specific steps the consumer must take to avoid the charge(s);

   ii. Obtaining the consumer's express authorization to Automatically Renewing services. The express authorization may be oral or in writing.

      1. If oral, the express authorization must follow a Clear and Conspicuous oral disclosure of all information described in Paragraph 24(a)(i) and DEFENDANTS must make and maintain an audio recording of the entire telemarketing transaction containing such express authorization. for three (3) years from the date of the transaction.

      2. If written, the express authorization must consist of a consumer's Signature located adjacent to or below or in response to a Clear

and Conspicuous written disclosure of all information described in Paragraph 19(a)(i), and DEFENDANTS shall maintain a copy of the entire document containing such written express authorization for three (3) years from the date of the Signature.

b. Increasing the rate charged to any consumer for any goods or services that involve a Negative Option Feature, including but not limited to Automatically Renewing services, without Clearly and Conspicuously disclosing all material terms of the rate change, including, but not limited to, the fact that the consumer will be charged the increased rate(s) unless the consumer takes an affirmative action to avoid the charge(s), and the date(s) the increased rate(s) will go into effect.

c. Conducting business as a commercial telephone seller as defined in § 6-1-302(1), C.R.S. (2019) unless and until DEFENDANT Fit Turf registers with the Attorney General as required by § 6-1-303(1), C.R.S. (2019).

d. Engaging in any telemarketing practices unless or until DEFENDANT Fit Turf is in compliance with the Colorado No-Call List Act, § 6-1-901 *et seq.*, C.R.S. (2019), provided, however, that nothing shall prevent DEFENDANT Fit Turf from telemarketing to any consumer with whom Fit Turf has an Established Business Relationship.

25. Further, DEFENDANTS must affirmatively do the following:

a. On or before February 28, 2021, obtain express authorization from all Recently Enrolled Customers to remain enrolled in any of DEFENDANTS' services that involve a Negative Option Feature, including any Automatically Renewing services. Defendants shall obtain such express authorization before charging any Recently Enrolled Customer for any Automatically Renewing service. The express authorization required under this paragraph shall follow a Clear and Conspicuous disclosure of all information described in Paragraph 24(a)(i) herein and shall be the same or substantially similar to the express authorization described in Paragraph 24(a)(ii) herein.

b. Allow for cancellation of any service in the same method and manner that the consumer agreed to the offer.

c. Within 30 days of the entry of this Consent Judgment, DEFENDANTS shall either:

i. provide the State with documents or other information sufficient to demonstrate DEFENDANTS' compliance with the Colorado No-Call List Act, §§ 6-1-901 *et seq.*, C.R.S. (2019); or

ii. certify in writing and under oath that DEFENDANTS have ceased any and all telemarketing practices.

26. Notwithstanding any provision in Paragraph 25(a), DEFENDANTS will not be held to have violated this Consent Judgment with respect to any Recently Enrolled Customer for whom DEFENDANTS have not obtained express authorization to remain enrolled in any of DEFENDANTS' Automatically Renewing services under the following conditions:

a. DEFENDANTS have made at least three efforts to obtain such Recently Enrolled Customer's express authorization to remain enrolled in Automatically Renewing Services. Such efforts may include phone calls, text messages, and no more than one e-mail message, and may include mechanisms whereby Recently Enrolled Customers may automatically indicate their affirmative consent (*e.g.*, via an automated text messaging system or email reply).

b. Each of DEFENDANTS' efforts to obtain express authorization from such Recently Enrolled Customer includes a Clear and Conspicuous disclosure of all information described in Paragraph 24(a)(i).

c. DEFENDANTS maintain records of each effort to obtain express authorization from such Recently Enrolled Customer to remain enrolled in Automatically Renewing Services for a minimum of three (3) years from the date such effort was made.

d. DEFENDANTS have not automatically charged such Recently Enrolled Customer for work performed (*e.g.*, by charging a credit card or debiting a bank account in such

Recently Enrolled Customer's file), and instead have submitted an invoice to such Recently Enrolled Customer seeking payment.

e. In the event that such Recently Enrolled Customer disputes any amount charged by DEFENDANTS on the grounds that the Recently Enrolled Customer was unaware of any Negative Option Feature or that the Recently Enrolled Customer was enrolled in Automatically Renewing services, DEFENDANTS shall waive the disputed charge.

MONETARY PROVISIONS

27. This Court orders DEFENDANTS, jointly and severally, to pay a total amount of $325,000 in lieu of any fines, penalties, restitution, unjust enrichment, and costs and fees. DEFENDANTS shall make an initial payment of $125,000 within ninety (90) days of entry of this Consent Judgment. The STATE agrees to suspend $200,000 of the payment upon receiving an initial payment of $125,000 unless (a) any DEFENDANT falsified their financial information provided to the STATE, and (b) any DEFENDANT violates any term of this Consent Judgment

28. Failure to make the initial payment of $125,000 will constitute contempt of this Court and, in addition to any contempt remedies the Court deems appropriate, will result in the entire $325,000 (minus any amounts paid) being due and payable immediately by all DEFENDANTS, jointly and severally, without the need for trial, unless DEFENDANTS make the $125,000 payment within seven days of receiving notice from the STATE of nonpayment.

29. If the STATE receives evidence of a violation of any injunctive term of this Consent Judgment, or evidence that any DEFENDANT falsified financial information provided to the STATE, the STATE may file a motion with this Court alleging a violation of this Consent Judgment. If the Court determines that any DEFENDANT violated any injunctive term of this Consent Judgment willfully, knowingly, or under such circumstances that the DEFENDANT should have known of the violation, the entire $325,000 (less any payment previously made by DEFENDANTS) shall be due and payable immediately by that DEFENDANT. This remedy shall be in addition to any other remedy, including all remedies under the CCPA and/or for contempt, which the Court may deem appropriate.

30. All payments under this Consent Judgment are to be held, along with any interest thereon, in trust by the Attorney General to be used in the Attorney General's sole discretion for reimbursement of the State's actual costs and attorneys' fees, the payment of restitution, if any, and for future consumer fraud or antitrust enforcement, consumer education, or public welfare purposes. All payments shall be made payable to the Colorado Department of Law with a reference to "*State v. Fit Turf, Inc., et al.*" and shall be delivered to:

Mica Moore, Program Manager
Consumer Protection Unit
1300 Broadway – 7th Floor
Denver, Colorado 80203

31. DEFENDANTS shall fully cooperate with all further investigations relating to these proceedings, including but not limited to the submission of additional compliance reports the STATE may request and promptly responding to reasonable requests for information made by the STATE.

32. The terms of this Consent Judgment shall expire five (5) years from the date this Consent Judgment is entered by the Court.

REPRESENTATIONS AND WARRANTIES

33. Except as expressly provided in this Consent Judgment, nothing in this Consent Judgment shall be construed as relieving DEFENDANTS of their respective obligations to comply with all state and federal laws, regulations, or rules, or granting permission to engage in any acts or practices prohibited by such laws, regulations or rules.

34. Due to the public interest nature of the STATE's claims in this matter, DEFENDANTS hereby specifically agree and stipulate that the monetary obligation imposed hereunder constitutes a debt for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, is not compensation for actual pecuniary loss, and is specifically non-dischargeable under 11 U.S.C.A. § 523(a)(7).

35. In any action brought by the STATE to enforce this Consent Judgment, DEFENDANTS consent to personal and subject matter jurisdiction in the District Court for Arapahoe County, Colorado.

36. DEFENDANTS acknowledge that they have thoroughly reviewed this Consent Judgment with their attorney(s), that they understand and agree to its terms, and that they agree that it shall be entered as the Order of this Court.

SO ORDERED and SIGNED this September 23, 2020 day of _____, 2020.

By the Court:

_____
Arapahoe County District Court Judge

Dated: _____

Frederick Martinez
District Court Judge