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KING COUNTY
SUPERIOR COURT

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STATE OF WASHINGTON
KING COUNTY SUPERIOR COURT

STATE OF WASHINGTON
Plaintiff,

v.

HIGH FALLS MEDIA, LLC, a New York limited liability company; **ROC TELECOMMUNICATIONS, LLC**, a New York limited liability company; **MARK LIBUTTI**, Member of High Falls Media, LLC, and Roc Telecommunications, LLC, individually and as part of his marital community; **BRIAN EINHAUS**, Member of High Falls Media, LLC, and Roc Telecommunications, LLC, individually and as part of his marital community; **THOMAS M. TORTORA**, Member of High Falls Media, LLC, and Roc Telecommunications, LLC, individually and as part of his marital community,

Defendants.

NO.
06-2-37298-1 SEA
CONSENT DECREE

[CLERKS ACTION
REQUIRED]

I. JUDGMENT SUMMARY

- 1.1. Judgment Creditor: State of Washington
- 1.2. Judgment Debtors: High Falls Media, LLC, Roc Telecommunications, LLC, Mark Libutti, Brian Einhaus Thomas M. Tortora
- 1.3. Principal Judgment Amount:
 - a. Civil Penalties: \$300,000.00 (with \$275,000.00 suspended compliance with this Consent Decree)

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1 b. Restitution: See Section IV.

2 c. Costs and Attorneys' Fees: \$ 30,000.00

3 1.4. Total Judgment: \$330,000.00 (with \$275,000.00 suspended
4 upon full compliance with this
 Consent Decree)

5 1.5. Attorney for Judgment Creditor: Katherine M. Tassi, Assistant Attorney
6 General

7 1.6. Attorney for Judgment Debtors: Sean Moynihan, Esq.

8 Plaintiff, State of Washington, having commenced this action on
9 November 29 2006, pursuant to the Unfair Business Practices--Consumer Protection Act
10 ("Consumer Protection Act"), Chapter 19.86 RCW; and the Computer Spyware Act, Chapter
11 19.270 RCW;

12 Defendants, High Falls Media, LLC, Roc Telecommunications, LLC,
13 Thomas M. Tortora, Mark Libutti, and Brian Einhaus, (together, "Defendants") having been
14 served with a Summons and Complaint previously filed in this matter or having waived service;
15 and

16 Plaintiff appearing by and through its attorneys, Rob McKenna, Attorney General; and
17 Katherine M. Tassi, Assistant Attorney General; and Defendants appearing by and through their
18 attorney, Sean Moynihan, Esq.; and

19 Plaintiff and Defendants having agreed on a basis for the settlement of the matters alleged
20 in the Complaint, and to the entry of this Consent Decree against Defendants without the need for
21 trial or adjudication of any issue of law or fact; and

22 Plaintiff and Defendants having agreed that this Consent Decree does not constitute
23 evidence or an admission regarding the existence or non-existence of any issue, fact, or violation
24 of any law alleged by Plaintiff; and

25 Defendants recognize and state that this Consent Decree is entered into voluntarily and
26 that no promises or threats have been made by the Attorney General's Office or any member,

1 officer, agent or representative thereof to induce them to enter into this Consent Decree, except as
2 provided herein; and

3 Defendants waive any right they may have to appeal from this Consent Decree; and

4 Defendants further agree that they will not oppose the entry of this Consent Decree on the
5 grounds the Consent Decree fails to comply with Rule 65(d) of the Rules of Civil Procedure, and
6 hereby waives any objections based thereon; and

7 Defendants further agree that this Court shall retain jurisdiction of this action for the
8 purpose of implementing and enforcing the terms and conditions of the Consent Decree and for all
9 other purposes; and

10 The Court finding no just reason for delay;

11 NOW, THEREFORE, it is hereby ORDERED, ADJUDGED, AND DECREED as
12 follows:

13 **II. GENERAL**

14 2.1. Jurisdiction. This Court has jurisdiction of the subject matter of this action and of
15 the parties. Plaintiff's Complaint in this matter states claims upon which relief may be granted
16 under the provisions of the Consumer Protection Act, Chapter 19.86 RCW, and the Computer
17 Spyware Act, Chapter 19.270 RCW.

18 2.2. Defendants. For purposes of this Consent Decree the term "Defendants" where
19 not otherwise specified shall mean High Falls Media, LLC, Roc Telecommunications, LLC,
20 Thomas M. Tortora, Mark Libutti, and Brian Einhaus.

21 2.3. Definitions. For purposes of the injunctive provisions below, the following
22 definitions apply:

23 (i) "Clearly and Conspicuously" means in a typeface that is of such size,
24 contrast (shade), and location that it is readily noticeable, readable and understandable.

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III. INJUNCTIONS

3.1. Application of Injunctions. The injunctive provisions of this Consent Decree shall apply to Defendants, and Defendants' successors, assigns, officers, agents, servants, employees, representatives, and all other persons or entities in active concert or participation with Defendants.

3.2. Notice. Defendants shall immediately inform all successors, assigns, transferees, officers, agents, servants, employees, representatives, attorneys and all other persons or entities in active concert or participation with Defendants or with the corporations named as Defendants in the Complaint of the terms and conditions of this Consent Decree.

3.3. Injunctions. Defendants and all successors, assigns, transferees, officers, agents, servants, employees, representatives, attorneys and all other persons or entities in active concert or participation with Defendants are hereby permanently enjoined and restrained from directly or indirectly engaging in the following acts or practices:

a) Misrepresenting, directly or by implication, in the context of any advertising, marketing, or sale of, or offer for, services or products, the cost of any service or product by using the word "free" without also including the actual cost of the product or service Clearly and Conspicuously, and in close proximity to the word "free," and in close proximity to the advertisement or offer.

b) Misrepresenting, directly or by implication, in the context of any advertising, marketing, or sale of, or offer for, services or products, the value of a product or service by misrepresenting the features or contents of the service or product, including, but not limited to, representing that the product or service is "unlimited", or provides an "unlimited" amount or number of anything, when, in fact, there are limits to the product or service.

c) In the context of any advertising, marketing, or sale of, or offer for, services or products, failing to honor any express or implied guarantees

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- regarding the service or product.
- d) In the context of any advertising, marketing, or sale of, or offer for, services or products, collecting personal information from consumers, including, but not limited to, name, address, email address, telephone number, or credit card number, without disclosing, prior to collecting the information, the cost of the service or product Clearly and Conspicuously, and in close proximity to the offer for the product or service.
 - e) In the context of conducting any business, failing to respond to consumer inquiries, complaints, or other issues consistent with any representations made by you regarding customer service available to support your business.
 - f) Failing to provide customer service and/or technical support via a Web site and/or telephone number for the hours advertised or stated by you.
 - g) Failing to Clearly and Conspicuously display next to any advertisement or offer for sale of your products or services any time restrictions on the use of the product or service, including, by way of example and not limitation, that a product or service will only be available for 24 hours.
 - h) Creating a false sense of urgency, exclusivity, or need for available products or services in the context of any advertising of services or products.
 - i) Misrepresenting, directly or by implication, the objectivity or authorship of any review or other assessment of your products or services written by you.
 - j) Advertising or marketing any product or service that violates any provision of this Consent Decree.
 - k) Violating any provisions of the Unfair-Business Practices - Consumer Protection Act, RCW 19.86.
 - l) Violating any provisions of the Computer Spyware Act, RCW 19.270.

1 3.4 Application of Injunctions to Prior Businesses. The injunctive provisions 3.3(e)
2 and 3.3(f) shall apply to Defendants' businesses operating on the Web sites
3 www.247downloads.com, www.freedownloadclub.com, www.downloadsforever.com,
4 www.mp3sunlimited.com, and www.freepcscan.com for three months following the date of
5 the last sale of the product. At the end of the three-month period, Defendants shall be
6 considered to have fulfilled their customer service/technical support obligations to existing
7 customers.

8 IV. RESTITUTION

9 4.1. Pursuant to RCW 19.86.080, Defendants shall pay consumer restitution as
10 follows. Within 14 days of entry of this Decree, Defendants shall send all Washington
11 consumers who purchased Spyware Slayer, and all Washington consumers who purchased the
12 music download software sold via the following Web sites, www.247downloads.com,
13 www.freedownloadclub.com, www.downloadsforever.com, and www.mp3sunlimited.com, an
14 email whose subject line reads: "Washington Attorney General, High Falls Media, LLC, and
15 Roc Telecommunications, LLC Solicit Refund Requests for Spyware Slayer Program and
16 Music Download Services." The "From" line shall read: "High Falls Media, LLC and Roc
17 Telecommunications, LLC Refund Program." This email shall be sent to all prior Washington
18 purchasers of Defendants' Spyware Slayer program and music download software, and shall
19 read as follows, with no other text included:

20 Dear Washington Customer:

21 Pursuant to a court-approved settlement of a lawsuit instituted by the State of
22 Washington, you are entitled to a refund for the purchase of [fill in product
23 name][for music download software, may add "if you were not satisfied with
24 the product"]. Our records indicate that you purchased this product during the
25 last two years. To take advantage of this refund program, you must respond to
26 this email within 30 days. By clicking on the reply button, your response will
be received and we will send you a check for a full refund by _____, 2006. If
your mailing address has changed, please indicate the new address where the
check should be mailed.

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2 If you would like more information about the refund program or the State of
Washington's case, please visit its website at <http://www.atg.gov/consumer/>.

3 4.2. Within 60 days of the entry of this Decree, Defendants shall mail refund checks
4 to all Washington consumers who have responded to the email described in Paragraph 4.1 in
5 the amount of their original purchase. Defendants shall not be obligated to send checks to
6 consumers who do not respond to the email, or in instances where the email originally sent to
7 the consumer is returned as undeliverable.

8 4.3. Within 75 days of the entry of this Decree, Defendants shall make a report to
9 Plaintiff identifying the names, amounts, addresses, email addresses and dates of refunds made
10 to the consumers who were sent checks pursuant to Paragraph 4.2. In the report, Defendants
11 shall also identify by name, address and amount owed any consumers who Defendants were
12 unable to contact because the email originally sent to them was returned as undeliverable.

13 V. CIVIL PENALTIES

14 5.1. Pursuant to RCW 19.86.140, Plaintiff shall have and recover, and Defendants shall
15 be liable for and shall pay, civil penalties of \$300,000.00. However, \$275,000.00 of the penalties
16 are suspended conditioned upon Defendants' full compliance with the terms of this Consent
17 Decree. If, after a period of two years following entry of this Decree, Defendants have fully
18 complied with all of its terms, the fine provision under this Section V will be considered
19 performed and the suspended portion of the penalties shall be extinguished as fully paid.

20 5.2. Should Defendant companies High Falls Media or Roc Telecommunications fail
21 to fully and timely comply with all terms of this Consent Decree, they shall be deemed in default
22 of this Consent Decree. Should any individual Defendant fail to fully and timely comply with all
23 terms of this Consent Decree, he alone shall be deemed in default of this Consent Decree. Each
24 individual Defendant will be individually liable for the full amount of suspended penalties for
25 future violations proven against him.
26

1 5.3. In a successful action to impose civil penalties, interest will accrue on the
2 unsuspended amount, beginning on the date the civil penalties are unsuspended, at a rate of: 12%
3 or 4 percentage points above the equivalent coupon yield (as published by the Federal Reserve) of
4 the average bill rate for 26 week Treasury bills as determined at the first bill market auction
5 conducted during the calendar month immediately preceding the revocation of the Civil Penalty
6 suspension, whichever is higher.

7 5.4. Payment owing under this provision shall be in the form of a valid check paid to
8 the order of the "Attorney General—State of Washington" and shall be due and owing
9 according to the following schedule:

- 10 On or before January 1, 2007, \$5,000
- 11 On or before March 1, 2007, \$5,000
- 12 On or before May 1, 2007, \$5,000
- 13 On or before July 1, 2007, \$5,000
- 14 On or before September 1, 2007, \$5,000

15 Payment shall be sent to the Office of the Attorney General, Attention: Cynthia Lockridge,
16 Administrative Office Manager, 800 Fifth Avenue, Suite 2000, Seattle, Washington,
17 98104-3188.

18 **VI. ATTORNEY COSTS AND FEES**

19 6.1. Pursuant to RCW 19.86.080, Plaintiff shall recover and Defendants shall pay the
20 costs and reasonable attorneys' fees incurred by the Plaintiff in pursuing this matter in the amount
21 of \$30,000.00, payable within forty-five (45) days of entry of this Consent Decree.

22 6.2. In any successful action to enforce any part of this Consent Decree, Defendants
23 will pay the Attorney General its attorneys' fees and costs, including reasonable attorneys' fees as
24 provided by RCW 19.86.080.

25 6.3. Payment owing under this provision shall be in the form of a valid check paid to
26 the order of the "Attorney General—State of Washington" and shall be due and owing within

Handwritten signatures:
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1 forty-five (45) days of entry of the Consent Decree. Payment shall be sent to the Office of the
2 Attorney General, Attention: Cynthia Lockridge, Administrative Office Manager,
3 800 Fifth Avenue, Suite 2000, Seattle, Washington, 98104-3188.

4 **VII. ENFORCEMENT**

5 7.1. Violation of any of the injunctions contained in this Consent Decree shall subject
6 the Defendants to a civil penalty of up to \$25,000.00 per violation pursuant to RCW 19.86.140,
7 provided that the suspended civil penalties described in Paragraph 5.1 shall be instated upon the
8 proof of a first violation, and that any subsequent violations shall be subject to additional civil
9 penalties of up to \$25,000.00 per violation.

10 7.2. Violation of any of the terms of this Consent Decree shall constitute a violation of
11 the Consumer Protection Act, RCW 19.86.020.

12 7.3. This Consent Decree is entered pursuant to RCW 19.86.080. Jurisdiction is
13 retained for the purpose of enabling any party to this Consent Decree with or without the prior
14 consent of the other party to apply to the Court at any time for enforcement of compliance with
15 this Consent Decree, to punish violations thereof, or to modify or clarify this Consent Decree.

16 7.4. Representatives of the Office of the Attorney General shall be permitted to access,
17 inspect and/or copy all business records or documents under control of Defendants in order to
18 monitor compliance with this Consent Decree within 14 days of written request to Defendants,
19 provided that the inspection and copying shall be done in such a way as to avoid disruption of
20 Defendants' business activities. Failure to comply with this section will subject Defendants to a
21 minimum civil penalty of \$2,000 per day for each day beyond 14 days after the written request
22 that the Attorney General is prevented by Defendants from accessing all records as provided by
23 this paragraph.

24 7.5. Representatives of the Office of the Attorney General may be permitted to
25 question Defendants, or any officer, director, agent, or employee of any corporation affiliated with
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1 Defendant(s) in the form of a deposition, pursuant to the provisions and notice requirements of
2 CR 30, in order to monitor compliance with this Consent Decree.

3 7.6. Nothing in this Consent Decree shall be construed as to limit or bar any other
4 governmental entity or consumer from pursuing other available remedies against Defendants.

5 7.7. Under no circumstances shall this Consent Decree or the name of the State of
6 Washington, the Office of the Attorney General, Consumer Protection Division, or any of their
7 employees or representatives be used by any Defendants named in the Complaint in connection
8 with any selling, advertising, or promotion of products or services, or as an endorsement or
9 approval of Defendants' acts, practices or conduct of business.

10 VIII. DISMISSAL AND WAIVER OF CLAIMS

11 8.1 Upon entry of this Consent Decree, all claims in this matter not otherwise
12 addressed by this Consent Decree are dismissed. ~~May 23 2006~~

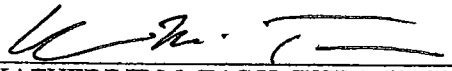
13 DONE IN OPEN COURT this ____ day _____, 2006.

14 Carlos Y. Velatogui


15 JUDGE/COURT COMMISSIONER

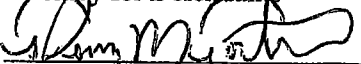
17 Approved for entry and presented by:


18 ROB MCKENNA
19 Attorney General


20 
21 KATHERINE M. TASSI, WSBA #32908
22 Assistant Attorney General
23 Attorneys for Plaintiff
24 State of Washington


Approved for Entry, Notice of
Presentation Waived:

25 
26 SEAN A. MOYNIHAN - Corp counsel
Attorney for Defendants not admitted
in WA


THOMAS M. TORTORA
Defendant


MARK LIBUTTI
Defendant


BRIAN EINHAUS
Defendant


FLOYD E. IVEY, WSBA 6888
Local counsel for Defendants
P.O. Box 6125
Kennewick, WA 99336
(509) 735-3581