

**STATE OF OHIO  
OFFICE OF THE ATTORNEY GENERAL  
CONSUMER PROTECTION SECTION**

JUL 25 2013

DOCKET NO. 434212

12 CONSUMER PROTECTION SECTION  
PUBLIC INSPECTION FILE

This Assurance of Voluntary Compliance ("Assurance") is entered into this 25<sup>th</sup> day of July, 2013 by the Attorney General of the State of Ohio ("Attorney General") and The Kirby Company, a division of The Scott Fetzer Company ("Kirby").

For purposes of this Assurance, “Kirby” means Kirby, doing business under its own name, under The Kirby Company, or under any other business names, its agents, representatives, employees, instructors, successors and assigns.

**WHEREAS**, the Attorney General, having reasonable cause to believe that Kirby has engaged in acts and practices which violate R.C. 1345.01 et seq. (“Consumer Sales Practices Act”) and O.A.C. 109:4-3 et seq. (“Substantive Rules”) has conducted an investigation pursuant to the authority granted him by R.C. 1345.06; and,

**WHEREAS**, the Attorney General may, pursuant to R.C. 1345.06(F), enter into and accept an Assurance; and,

**WHEREAS**, this Assurance is an assurance in writing by Kirby of its intent to conduct its business in a manner designed to comply with the Consumer Sales Practices Act and the Substantive Rules; and,

**WHEREAS**, Kirby expressly denies any violation of the Consumer Sales Practices Act and the Substantive Rules as well as any federal, state or local law; and

**WHEREAS**, Kirby desires to comply with all aspects of the Consumer Sales Practices Act and Substantive Rules and Kirby hereby voluntarily enters into this Assurance with the Attorney General.

**NOW THEREFORE**, in consideration of the mutual promises and conditions set forth herein, the parties hereto **AGREE** as follows:

1. The "Effective Date" shall mean the date indicated on the first page of this Assurance.
2. By accepting this written Assurance, the Attorney General agrees to terminate the current investigation of Kirby's business practices and actions occurring on or before the Effective Date of this Assurance.
3. By giving this written Assurance, Kirby agrees to comply with all the terms of this Assurance and to conduct its business in compliance with all applicable Ohio laws, including without limitation, the Consumer Sales Practices Act, R.C. 1345.01 et seq. and Substantive Rules, O.A.C. 109:4-3-01 et seq.

#### **DEFINITIONS**

1. **Advertising (including "Advertise" or "Advertisement")** is any message created or authorized by Kirby that is disseminated to the public in Ohio, to any segment thereof, or to any individual in Ohio, that directly or indirectly promotes or is likely to promote Kirby home cleaning systems or products, whether conveyed visually, orally, or in writing:

(a) Made during any in-person appearance, including but not limited to, in-home demonstrations or any other in-person contact with the public, segment of the public, or individual;

(b) Made in any point-of-sale literature or information, including but not limited to, product containers, price tags, instruction manuals, sales contracts or financing contracts;

(c) Made in an Internet website, newspaper, magazine, periodical, leaflet, flyer, billboard, sign, catalog, brochure, circular, manual, report, poster, picture, illustration, drawing, invoice, estimate, contract, form, application, business card, letterhead, facsimile material, direct mail literature, email, telephone book, or any other written graphic, pictorial illustration, or printed material;

(d) Made on any inside or outside sign or display, window display, bumper or window sticker, decal, label, or bulletin board; and

(e) Made on any recording, radio, television, video, computer, public address system, by telephonic transmission, telefacsimile, Internet or telecopier transmission, or during any other transmission.

(f) To the extent not covered by 3.1(a) through 3.1(e) above, Advertising also includes any representation which falls within the purview O.A.C. 109:4-3-01(C)(5).

2. **Clear and Conspicuous (or “Clearly and Conspicuously”)** means that a statement, representation, claim, or term is readily noticeable and reasonably understandable by the person(s) to whom it is directed. The following shall be considered in determining whether a statement, representation, claim, or term is Clear and Conspicuous:

(a) Whether it is presented in a coherent and meaningful sequence with respect to other statements, representations, claims, or terms being conveyed;

(b) Whether it is in close proximity to the statement, representation, claim or term it clarifies, modifies, explains, or to which it otherwise relates;

(c) Whether it is contradictory to any statement, representation, claim or term it purports to clarify, modify, or explain, or is otherwise contradictory or confusing in relation to any other statement, representation, claim or term being conveyed;

(d) Whether it is conveyed by means of an abbreviation and, if so, whether the abbreviation is commonly understood by the public, or approved by federal or state law;

(e) Whether it is legible;

(f) Whether it is of sufficient prominence in terms of print, size and contrast, as compared with accompanying statements, representations, claims or terms, so as to be readily noticeable and reasonably understandable by the person(s) to whom it is directed.

3. **Competent and Reliable Scientific Evidence** means tests, analyses, research, or studies that have been conducted and evaluated in an objective manner by qualified persons and are generally accepted in the profession to yield accurate and reliable results.

4. **MSRP** means manufacturer's suggested retail price.

5. **Substantiate or Substantiation** means that in support of a claim, Kirby possesses and relies upon competent and reliable scientific evidence that is sufficient in quality and quantity based on standards generally accepted in the relevant scientific fields, when considered in light of the entire body of relevant and reliable scientific evidence.

## **BACKGROUND AND STATEMENT OF FACTS**

6. Kirby has its primary place of business at 1920 W. 114<sup>th</sup> Street, Cleveland, Ohio 44102.

7. Kirby is engaged in the business of manufacturing vacuums and related products and selling them to consumers via a network of authorized Distributors.

8. Distributors enter into a Distributor Agreement that sets forth the terms and conditions of their business relationship with Kirby, including mutual benefits, responsibilities, and obligations.

9. The Distributor Agreement authorizes Distributors to sell Kirby products to consumers through in-home or in-person demonstrations via a sales force made up of individual Dealers.

10. Kirby's Distributor Agreement requires Distributors to sell to consumers only through in-home presentations in a method that complies with the Kirby Marketing System.

11. Kirby provides Distributors with the opportunity to obtain sales training and marketing materials, administration and sponsorship of sales conferences, administration and sponsorship of sales contests, prize offers and other services and benefits.

12. Kirby also provides consumers with customer relations services in regards to matters with Distributors. Consumers may contact Kirby customer relations by mail, email or by calling a toll-free number to complain about individual Distributorships. Kirby customer relations then transmits the Complaints, usually by email or fax, to the Distributors and follows up on each Complaint to document its outcome. On occasion, Kirby has provided a Consumer with a resolution, such as sending a bottle of shampoo or vacuum bags, and has billed the cost of that complaint resolution to the Distributor.

13. Ohio consumers that purchase a Kirby product buy it from a Kirby Distributor and not from Kirby directly. Kirby asserts and its Distributor Agreement states that no agency relationship shall be construed between Kirby Distributors and Kirby, and that the relationship of Kirby and its Distributors is that of vendor and vendee, wherein all obligations to be performed by the Distributor under the Distributor Agreement shall be performed by him/her as an independent contractor.

14. By entering into this Agreement, the Attorney General does not represent, agree, or waive the right to challenge, in any future matter, Kirby's assertion that an agency relationship does not exist between Kirby and its Distributors.

#### **COMPLIANCE PROVISIONS**

15. Kirby shall inform its owners, officers, directors, management level employees and those employees necessary for performing the duties set forth in this Assurance and necessary to implement this Assurance by providing each such person with a copy of this Assurance within five (5) business days after the Effective Date of this Assurance.

16. Kirby shall inform all Ohio Distributors of this Assurance by providing each Distributor with a copy of this Assurance within ten business days of the Effective Date of this Assurance.

17. Unless otherwise stated, the Compliance Provisions shall take effect beginning on the 45th calendar day after the Effective Date of this Assurance.

18. Kirby shall not make any representations, claims, or assertions of fact, health-related or otherwise, whether orally or in writing, which would cause a reasonable consumer to believe such statements are true, unless, at the time such representation, claims or assertions are

made, Kirby possesses or relies upon a reasonable basis in fact and/or Competent and Reliable Scientific Evidence to substantiate that the representations are true.

19. Kirby shall Clearly and Conspicuously represent to Consumers that it has the ability to mediate and attempt to resolve any consumer Complaint regarding a Distributor or Dealer; however, Kirby may continue to represent to consumers that the Distributors and Dealers are independent of Kirby, if such is the case.

20. Kirby shall Clearly and Conspicuously maintain on its main website the existence and terms and conditions of any cancellation policies in effect as of the date of purchase, including but not limited to, the Golden Ager Policy and a specific reference to the three-day right to cancel under 16 C.F.R. § 429.

21. Kirby shall continue to provide cancellation procedures in the Owner's Care Booklet that it provides with every Kirby System, including a specific reference to the three-day right to cancel under 16 C.F.R. § 429 after depletion of Kirby's current stock of booklets.

22. Kirby agrees to conduct reasonable due diligence to ensure that its Distributors comply with all the applicable terms of this Assurance and with all applicable Ohio laws, including without limitation, the Consumer Sales Practices Act, R.C. 1345.01 et seq., and the Substantive Rules, Ohio Admin. Code, Section 109:4-3-01 et seq. and the Home Solicitation Sales Act, R. C. 1345.21 et seq.

23. Kirby shall clearly communicate to Distributors in writing that failure to adhere to the provisions of their Distributor Agreement, Kirby's required policies and procedures, and state, federal, and local consumer protection laws shall result in appropriate disciplinary action from Kirby, up to and including termination.

24. Kirby shall implement and enforce a program reasonably designed to ensure that Distributors comply with the provisions of their Distributor Agreements that are agreed to by this Assurance and all of Kirby's policies and procedures.

25. As of the Effective Date, Kirby shall require all Distributors to comply with the following:

(a) Disclose and honor the existence and terms and conditions of any cancellation policies in effect as of the date of purchase, including but not limited to, the Golden Ager policy;

(b) Provide all consumers with written notice of the consumer's three-day right to cancel the transaction as provided by R.C. 1345.21 et seq. and 16 C.F.R. § 429 as currently enacted or subsequently amended.

(c) Honor all consumer requests to cancel a purchase in accordance with R.C. 1345.21 et seq. and 16 C.F.R. § 429 as currently enacted or subsequently amended.

(d) Comply with O.A.C. §109:4-3-08 and not sell or offer for sale as new any Kirby Products which have been used, reconditioned, rebuilt or returned by other consumers. Distributor shall not represent any Kirby Product to be new on which the name or serial number has been defaced or altered or from which such name or serial number has been removed. Distributor shall not in any way: (i) change, alter or participate in any change or alteration of any Kirby Product, including without limitation the removal or alteration of the name or serial number; (ii) sell any Kirby Product from which any serial number has been removed, defaced, covered, destroyed or otherwise altered; or (iii) sell any Kirby Product under circumstances which Distributor knows or reasonably should know will involve the removal, defacement, covering, alteration or destruction of any serial



number. The Distributor shall also disclose to Consumers when the unit they are purchasing has been used as a demonstrator unit and answer any questions the Consumer has regarding the Kirby Products' use as a demonstrator unit.

(e) Regardless of whether the potential customer is contacted in person or over the phone, Distributors and their Dealers shall, during the first contact with a potential customer:

- (i) State the name of the person contacting the potential customer and name and address of the Distributor;
- (ii) Not misrepresent that the purpose of the contact is to interest the potential customer in viewing an in-home sales demonstration of a Kirby product and in purchasing one; and
- (iii) Comply with the potential customer's request to terminate the demonstration at any time, even if the demonstration is incomplete and the potential customer simply requests that the Distributor or Dealer end the demonstration. If a potential customer requests the termination of an in-home sales demonstration, the Distributor or Dealer shall promptly gather his or her belongings, repack the products and, as quickly as reasonably possible and depart from the potential customer's home.

26. For purposes of this Assurance, an in-home sales demonstration of Kirby products is deemed to commence upon a Distributor's entry into a potential customer's home for any purpose, including the selling, marketing and demonstrating of any Kirby product or providing any promised complimentary service, including but not limited to, free carpet cleaning, and is deemed to conclude only when the Distributor exits the home without reentry.

27. If Kirby reasonably determines that the Distributor has failed to comply with the terms of this Assurance, Kirby's enforcement action shall include one or more of the following remedies:

- (a) termination;
- (b) imposing monetary fines;
- (c) suspending the right to purchase Kirby products for a period of time;
- (d) advising the Distributor to improve its process and procedures for compliance with any applicable federal, state and/or local laws;
- (e) advising the Distributor to terminate certain Dealers involved in violations of this Assurance;
- (f) advising the Distributor to terminate marketing partners including but not limited to, lead brokers;
- (g) advising the Distributor to retrain employees and/or Dealers regarding compliance with any applicable federal, state and/or local laws;
- (h) making Distributors ineligible for Kirby-sponsored contests, awards and prizes; and/or
- (i) other appropriate and reasonable enforcement action under the circumstances.

In determining what disciplinary action shall be taken, Kirby shall take into consideration the egregiousness of the Distributor's conduct, the number of violations, the Distributor's willingness to cure the problem, and whether Kirby has previously taken enforcement action against the Distributor and to what extent. Kirby shall have the discretion to choose the appropriate remedy.

28. Kirby shall require each divisional supervisor and a corporate representative who has responsibility for the State of Ohio or sales into the State of Ohio as well as any Distributor who made sales in Ohio in the last twelve (12) months and all Ohio Distributors to attend a mandatory meeting within six (6) months of this agreement, in which Kirby will address good business practices, including but not limited to, the following issues:

(a) Complying with Ohio's Consumer Sales Practices Act, R.C. 1345.01 et seq. and its Substantive Rules, O.A.C. 109:4-3-01 et seq., the Ohio Home Solicitation Sales Act, R.C. 1345.21 et seq., the federal Do Not Call Requirements, and all other applicable laws and regulations as determined by Kirby;

(b) Not engaging in "high pressure" sales tactics, including but not limited to, advising Distributors not to conduct an in-home sales demonstration for an unreasonable amount of time, to not make cleaning efficiency or health claims unless those claims are Substantiated, to not misrepresent the availability of a discount, and to not represent that the Distributor or Dealer will win a prize for the sale unless it is true;

(c) Accurately disclosing to a potential customer prior to the customer's purchase of a Kirby system whether the unit was subject to prior demonstrations(s) and/or sales(s);

(d) Clearly and Conspicuously disclosing the material financing terms;

(e) Reviewing the requirement that Distributors provide the written cancellation notice as set forth above;

(f) Reviewing Kirby Policies, Procedures and Recommended Practices, including, but not limited to, compliance with Kirby's Golden Ager Policy;

- (g) Proper record retention procedures, both related to advertising and product sales;
- (h) Providing outstanding customer service and treating consumers honestly and courteously;
- (i) Complying with State and Federal Do Not Call laws; and
- (j) Not stating that a price listed in Advertising or quoted during a sales presentation is discounted from the MSRP unless that fact is true.

At such meeting(s), Kirby shall clearly communicate to Distributors that failure to follow applicable laws, regulations and/or all of Kirby's required Policies and Procedures, shall result in appropriate disciplinary action from Kirby up to and including termination. Kirby shall require each new Distributor to attend a meeting to address each of these issues during the Distributor's first year as an authorized Kirby Distributor.

29. Kirby agrees to utilize the Consumer Complaint Resolution Procedure set forth herein to address all Complaints that Ohio consumers file with the Attorney General against Kirby or Distributors, and agrees to continue to facilitate in good faith the resolution of all Complaints consumers file with Kirby against Kirby or the Distributors. The Attorney General shall send a copy of all Kirby distributor complaints to Kirby.

30. Kirby shall incorporate the following Consumer Complaint Resolution Procedure into its handling of Ohio consumer Complaints:

- (a) The Attorney General will promptly send all consumer inquiries/Complaints pertaining to Kirby or the Distributors ("Complaints") to Kirby, attention Halle Sminchak, Director of Customer & Public Relations & Business Compliance, via email ([hsminchak@kirbywhq.com](mailto:hsminchak@kirbywhq.com)), via fax (216-529-6146), and/or by

mail to Kirby Customer Relations, 1920 West 114<sup>th</sup> Street, Cleveland, OH 44102. From time to time as necessitated by changes in Kirby's internal structure or personnel changes, Kirby shall promptly provide the Attorney General with any new contact information for its representative performing this function;

(b) Kirby shall work with its Distributors to address the Complaints;

(c) Kirby shall verify with each consumer by telephone and/or in writing whether the related Complaint was resolved to the consumer's reasonable satisfaction. Kirby shall copy the Attorney General Complaint Specialist on all Complaint related correspondence. Upon request, Kirby shall send the Attorney General copies of consumer satisfaction surveys returned from such consumers; and

(d) If, despite its reasonable efforts, Kirby is unable to facilitate a resolution between the Distributor and the consumer, Kirby shall send the Attorney General the details of its efforts taken to reach a resolution. The Attorney General and Kirby may further discuss any such unresolved Complaint to determine whether any concern raised in the Complaint is legitimate and/or reasonable, and whether and/or what further action is warranted.

#### **PAYMENT TO THE STATE**

31. Kirby shall pay the amount of \$50,000.00 to the "Office of the Ohio Attorney General Consumer Protection Enforcement Fund" to be used as provided by R.C. 1345.51. Payment shall be made within seven (7) days of the Effective Date of this Assurance.

32. Payment owing under this provision shall be in the form of a certified check or money order paid to the "Ohio Attorney General's Office," and mailed to:

**Patricia Anderson  
Administrative Secretary  
Consumer Protection Section**

30 E. Broad Street, 14<sup>th</sup> Floor  
Columbus, Ohio 43215

**GENERAL PROVISIONS**

33. This Assurance shall be governed by the laws of the State of Ohio.

34. This Assurance sets forth the entire agreement between the Attorney General and Kirby and supersedes all prior agreements or understandings, whether written or oral, between the Parties and/or their respective counsel with respect to the subject matter hereof. This Assurance may be amended by written agreement between the Parties, subject to any further requirements under state law.

35. The Parties acknowledge that no other promises, representations or agreements of any nature have been made or entered into by the Parties. The Parties further acknowledge that this Assurance constitutes a single and entire agreement that is not severable or divisible, except that if any provision herein is found to be legally insufficient or unenforceable, the remaining provisions shall continue in full force and effect.

36. In the event that the Attorney General has reason to believe that Kirby has failed to abide by this Assurance, and absent exigent circumstances, the Attorney General shall give Kirby fifteen (15) days' notice before filing a motion or other pleading seeking to enforce this Assurance. The Notice shall be in writing and shall set forth those provisions of the Assurance that the Attorney General believes have been violated.

37. This Assurance is a public record and shall be maintained in the Public Inspection File.

### **PENALTIES FOR FAILURE TO COMPLY**

38. The Attorney General may assert any claim that Kirby has violated this Assurance in a separate civil action to enforce this Assurance, or to seek any other relief afforded by law, as provided by statute.

39. This Assurance shall in no way exempt Kirby from any other obligations imposed by law, and nothing contained herein shall relieve Kirby of any legal responsibility for any acts or practices engaged in by Kirby other than those acts specifically resolved by this Assurance.

40. Pursuant to R.C. 1345.06(F), nothing in this Assurance shall in any way preclude any investigative or enforcement action against Kirby under any legal authority granted to the Attorney General:

(a) With respect to the types of transactions or occurrences which are the subject of this enforcement action, that occur after the Effective Date; or

(b) With respect to transactions or occurrences which are not the subject of this action.

41. By execution of this Assurance, following a full and complete payment by Kirby and compliant implementation with all of the terms of this Assurance, the Attorney General releases and forever discharges Kirby and its affiliates, and their respective directors, officers, employees, agents, representatives, successors, predecessors, and assigns ("Released Parties"), from the following: all civil claims, causes of action, damages, restitution, fines, costs, and penalties that the Attorney General could have asserted against the Released Parties under the Consumer Sales Practices Act and the Substantive Rules based on Kirby's conduct prior to the date of this Assurance, whether known or unknown, foreseen or unforeseen, as described in the Compliance sections of this Assurance, (including Kirby's due diligence related to the conduct of

Distributors set forth in paragraph twenty-five (25) of this Assurance, truthfulness and substantiation of its advertising claims, enforcing its Golden Ager Policy and applicable state and federal cancellation laws (collectively, the "Released Claims"). Released Claims do not include claims for violation of this Assurance or claims pursuant to any other statute or regulation (including, without limitation, antitrust laws, environmental laws, tax laws, credit repair/service organization laws, buying club laws, and criminal statutes and codes), nor do they include actions or proceedings brought pursuant to Ohio consumer protection laws or statutes alleging violations that are not addressed by the terms of this Assurance.

**WHEREFORE**, the Parties hereto affix their signatures in recognition and acceptance of the terms contained herein on this 25<sup>th</sup> day of July, 2013.



**SIGNATURES**

**ACCEPTED BY:**

**FOR THE OHIO ATTORNEY GENERAL,  
MICHAEL DEWINE**

  
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Jeff Loeser (0082144)  
Associate Assistant Attorney General  
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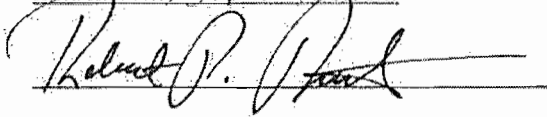
Date

7/25/2013

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Date

7/22/13

**SIGNATURES**

**ACCEPTED BY:**

**FOR THE OHIO ATTORNEY GENERAL,  
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\_\_\_\_\_  
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\_\_\_\_\_  
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**COUNSEL FOR KIRBY COMPANY**

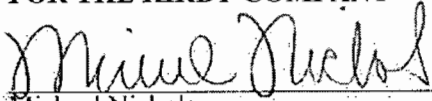
  
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7-19-13  
\_\_\_\_\_  
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\_\_\_\_\_  
Date

**FOR THE KIRBY COMPANY**

A handwritten signature in dark ink, appearing to read "Michael Nichols", written over a horizontal line.

Michael Nichols  
President, Business Operations

7-19-13

Date