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**STATE OF WASHINGTON
KING COUNTY SUPERIOR COURT**

STATE OF WASHINGTON

Plaintiff,

v.

ASCENTIVE, LLC, a Delaware Limited
Liability Company,

Defendant.

NO. 10-2-45133-1 SEA

CONSENT DECREE

[CLERKS ACTION
REQUIRED]

I. JUDGMENT SUMMARY

- 1.1 Judgment Creditor: State of Washington
- 1.2 Judgment Debtors: Ascentive, LLC
- 1.3 Principal Judgment Amount:
 - a. Civil Penalties: \$20,000.00 (\$150,000 additional suspended conditioned on compliance with the terms of the Consent Decree)
 - b. Restitution: See Section IV (estimated at \$71,000)
 - c. Costs and Attorneys' Fees: \$58,000.00
- 1.4 Total Judgment: \$ 78,000.00 plus restitution
- 1.5 Attorney for Judgment Creditor: Jason E. Bernstein, Assistant Attorney General
- 1.6 Attorney for Judgment Debtors: Derek A. Newman, Attorney for Debtor

1 Plaintiff, State of Washington, having commenced this action on _____, 2010,
2 pursuant to the Consumer Protection Act, 19.86 RCW; the Computer Spyware Act, RCW 19.270;
3 and the Commercial Electronic Mail Act, 19.190 RCW;

4 Defendant Ascentive, LLC, (“Defendant”), having been served with a Summons and
5 Complaint previously filed in this matter or having consented to service; and

6 Plaintiff appearing by and through its attorneys, Robert M. McKenna, Attorney General;
7 and Jason E. Bernstein, Assistant Attorney General; and Defendant appearing by and through
8 their attorney, Derek A. Newman; and

9 Plaintiff and Defendant having agreed on a basis for the settlement of the matters alleged
10 in the Complaint and to the entry of this Consent Decree against Defendant without the need for
11 trial or adjudication of any issue of law or fact; and

12 Plaintiff and Defendant having agreed that this Consent Decree does not constitute
13 evidence or an admission regarding the existence or non-existence of any issue, fact, or violation
14 of any law alleged by Plaintiff; and

15 Defendant recognizes and states that this Consent Decree is entered into voluntarily and
16 that no promises or threats have been made by the Attorney General’s Office or any member,
17 officer, agent or representative thereof to induce them to enter into this Consent Decree, except as
18 provided herein; and

19 Defendant waives any right they may have to appeal from this Consent Decree; and

20 Defendant further agrees that they will not oppose the entry of this Consent Decree on the
21 grounds the Consent Decree fails to comply with Rule 65(d) of the Rules of Civil Procedure and
22 hereby waives any objections based thereon; and

23 Defendant further agrees that this Court shall retain jurisdiction of this action for the
24 purpose of implementing and enforcing the terms and conditions of the Consent Decree and for all
25 other purposes; and
26

1 The Court finding no just reason for delay;
2 NOW, THEREFORE, it is hereby ORDERED, ADJUDGED, AND DECREED as
3 follows:

4 **II. GENERAL**

5 2.1 Jurisdiction. This Court has jurisdiction of the subject matter of this action and
6 of the parties. Plaintiff's Complaint in this matter states claims upon which relief may be
7 granted under the provisions of the Consumer Protection Act, 19.86 RCW, the Computer
8 Spyware Act, RCW 19.270, and the Commercial Electronic Mail Act, 19.190 RCW.

9 2.2 Defendant. For purposes of this Consent Decree, the term "Defendant" where
10 not otherwise specified shall mean Ascentive, LLC.

11 2.3 Definitions. For purposes of the injunctive provisions below, the following
12 definitions apply:

- 13 a. "Clear and conspicuous" or "clearly and conspicuously," when referring
14 to a statement, disclosure, or any other information, mean that such
15 statement, disclosure or other information by whatever medium
16 communicated is readily understandable and presented in such size,
17 color, contrast, location, and audibility compared to other information
18 with which it is presented that is readily apparent to the person to whom
19 it is disclosed. If such statement, disclosure or other information is
20 necessary as a modification, explanation or clarification to other
21 information with which it is presented, it must be presented in close
22 proximity to the information it modifies in a manner which is readily
23 noticeable and understandable. Further, a disclosure of information is
24 not clear and conspicuous if, among other things, it is obscured by the
25 background against which it appears or there are other distracting
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1 elements. Statements of limitation must be set out in close conjunction
2 with the benefits described or with appropriate captions of such
3 prominence that statements of limitation are not minimized, rendered
4 obscure, presented in an ambiguous fashion, or intermingled with the
5 context of the statement so as to be confusing or misleading. Nothing
6 contrary to, inconsistent with, or in mitigation of any disclosure shall be
7 permitted.

- 8 b. “Deceptively misrepresents” or “deceptively misrepresenting” means
9 that the misrepresentation has the capacity to deceive a substantial
10 number of consumers. This term does not imply or create any
11 requirement that the deceptive conduct be intentional.

12 III. INJUNCTIONS

13 3.1 Application of Injunctions. The injunctive provisions of this Consent Decree
14 shall apply to Defendant and Defendant’s successors, assigns, officers, agents, servants,
15 employees, representatives, and all other persons or entities in active concert or participation
16 with Defendant.

17 3.2 Notice. Defendant shall immediately inform all successors, assigns, transferees,
18 officers, agents, servants, employees, representatives, attorneys and all other persons or entities
19 in active concert or participation with Defendant or with the corporations named as Defendant
20 in the Complaint of the terms and conditions of this Consent Decree.

21 3.3 Injunctions. Defendant and all successors, assigns, transferees, officers, agents,
22 servants, employees, representatives, attorneys and all other persons or entities in active
23 concert or participation with Defendant are hereby permanently enjoined and restrained from
24 directly or indirectly engaging in the following acts or practices:
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- a. Deceptively misrepresenting, the need for any product or service in the context of any advertising or marketing of services or products, by using any language, symbols, or other visual or verbal messages that deceptively misrepresent to the consumer that the consumer’s computer is at a risk that necessitates purchasing the product or service by displaying an unreasonable number of repeated pop-ups that the user cannot disable that warn or remind the consumer of problems detected on the computer by a free scan. A subsequent pop-up that presents new or modified information is not “repeated”. It is not unreasonable for a software application to display a single pop-up upon the occurrence of any of (i) product installation; (ii) computer or application startup; (iii) user request; or (iv) the passage of at least five (5) days following the software’s display of a pop-up not caused by (i)-(iii). When determining whether certain software has caused an unreasonable number of multiple advertisements to appear, pop-ups generated by other installed software shall not be considered. “Pop-up” shall mean any on-screen notification, whether it appears on the desktop itself or from the notification area,
- b. Installing on a consumer’s computer by means of a free scan, a free “trial version,” or any other form of software download, software that causes an unreasonable number of multiple advertisements, dialogue boxes, or any form of pop-up or pop-under to appear on the consumer’s computer after the user first attempts to close out of the advertisement, scan interface, or any other form of advertising generated by the software that cannot be easily disabled with an option located prominently within the software’s options or settings screen. It is not

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unreasonable for a software application to display a single pop-up upon the occurrence of any of (i) product installation; (ii) computer or application startup; (iii) user request; or (iv) the passage of at least five (5) days following the software’s display of a pop-up not caused by (i)-(iii). When determining whether certain software has caused an unreasonable number of multiple advertisements to appear, pop-ups generated by other installed software shall not be considered. “Pop-up” shall mean any on-screen notification, whether it appears on the desktop itself or from the notification area,

- c. Failing to disclose clearly and conspicuously each executable software application, whether stand-alone or bundled with other software, that will be installed and appear in the user’s Windows Start menu, other than uninstallation or similar related software applications, when a consumer installs any of Defendant’s software products.
- d. Failing to obtain a consumer’s explicit, positive assent to the installation of any of Defendant’s software prior to the installation. For purposes of this injunction, “explicit, positive assent” may be presumed by a consumer’s choice to install a program after all disclosures have been displayed in compliance with Paragraph 3.3(c) of this Consent Decree and the consumer has chosen to click an “Install” or “Continue” button rather than to cancel the installation.
- e. Failing to obtain a consumer’s explicit, positive assent to purchase a product or service prior to billing for the product or service. Subscription renewals may be billed automatically if they are clearly and conspicuously disclosed at the time of the original order. For purposes

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of this injunctive provision only, with respect to subscription renewals or automatic billing, in addition to being clearly and conspicuously disclosed, the offer must state the following:

- a. The cost of the product or service,
- b. the frequency of billing for the product or service,
- c. the date and amount of the first payment due,
- d. the fact that the consumer will be charged the amount listed if the consumer does not cancel the product or service prior to the beginning of a new billing period,
- e. and a straightforward method of cancellation that complies in all respects with Paragraph 3.3(h) of this Consent Decree.
- f. Using more than one pre-checked box or other method of adding products or services by default to a consumer’s purchase order prior to or at the point of purchase. If an item is added by default to a consumer’s purchase order, it must be listed clearly and conspicuously on the order summary page with an option to remove the item from the order. The option (whether a button or link) to delete the item added by default must appear in close proximity to the item as it appears on the order summary page. In addition, also in close proximity to the listed item must appear the following hyperlinked text: “What’s This?” Clicking this hyperlink will create a web pop-up explaining what the item does and that the item was not deselected by the consumer on the Optional Upgrade page.

- 1 g. Failing to provide a summary and requiring an order confirmation by the
2 consumer of the items and cost of items included in the consumer's
3 purchase order prior to processing the order.
- 4 h. Requiring consumers to expressly assent more than once to the
5 cancellation of a particular product or service unless to request a
6 clarification of any ambiguity in the cancellation request (*e.g.* whether
7 the consumer intends to cancel the autorenewal or the actual
8 subscription itself)—by a method established and disclosed by
9 Ascentive—unless and until the consumer subsequently renews such
10 product or service.
- 11 i. Deceptively misrepresenting the utility, substance, or effect of any scan
12 of the consumer's computer.
- 13 j. Knowingly authorizing third parties to use misleading subject or "From"
14 lines in commercial electronic mail sent on Ascentive's behalf or using
15 such misleading subject or "From" lines in commercial email sent
16 directly by Ascentive.
- 17 k. Inducing an owner or operator to install a computer software component
18 onto the computer by deceptively misrepresenting, directly or by
19 implication, the extent to which software is necessary for maintenance,
20 update, or repair of a computer or computer software, for security or
21 privacy reasons, or for the proper operation of the computer.

22 IV. RESTITUTION

23 4.1 Pursuant to RCW 19.86.080, Defendant shall pay consumer restitution as
24 follows. Within 30 days of the filing of this Consent Decree, Defendant shall send all
25 Washington consumers who purchased, within the 2 year period preceding the date of entry of
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1 this Decree, any Ascentive product, including but not limited to ActiveSpeed, PC
2 ScanandSweep, PC Speedscan Pro, or Spyware Striker Pro, and paid for both the Back-Up CD
3 and Extended Download Service but who did not utilize the Extended Download Service, an
4 email with the subject line: "Washington Attorney General Settlement with Ascentive, LLC,
5 d/b/a Finallyfast.com." The "From" line shall read: "Ascentive, LLC, d/b/a Finallyfast.com
6 Refund Program." This email shall state:

7 Dear Washington Customer:

8 Pursuant to a settlement between Ascentive, LLC, d/b/a Finallyfast.com,
9 and the State of Washington, you may be entitled to a refund of your purchase
10 price for either a Back-Up CD or Extended Download Service paid for in
11 connection with your purchase of one or more of Ascentive's software products.
12 Our records indicate that you purchased one or more software products from
13 Ascentive during the last two years and purchased both the Back-Up CD and
14 Extended Download Service Product Upgrades and did not use the Extended
15 Download Service. To take advantage of this refund program, you must print
16 this email, have the person who paid for the product sign and date where noted
17 below certifying that person has never used the Back-Up CD or Extended
18 Download Service, and mail this letter back to Ascentive within 30 days of
19 receiving this notice. If your letter is postmarked more than 30 days from your
20 receipt of this notice you will not receive a refund. If your mailing address has
21 changed, please indicate the new address where the check should be mailed.

22 If you would like more information about the refund program, please
23 visit the Washington State Attorney General's website at www.atg.wa.gov.
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Signed: _____
Print Name: _____
Date: _____

By signing above, I certify that I paid for both the Ascentive Back-Up CD and Extended Download Service in connection with the purchase of one or more Ascentive software products and have never used either product.

4.2 Within 75 days of the entry of this Decree, Defendant shall mail refund checks to all Washington consumers who have responded to the email described in Paragraph 4.1 in the amount of the price paid for both the Back-Up CD and the Extended Download Service. Defendant shall not be obligated to send checks to consumers who do not timely postmark their response to the email; however, Defendant must make good-faith efforts to obtain the correct email address for any consumer whose email is returned as undeliverable or is otherwise not received by the consumer. Defendant shall track whether consumers open the refund email.

4.3 Within 90 days of the entry of this Decree, Defendant shall make a report to Plaintiff identifying the names, amounts, addresses, email addresses and dates of refunds made to the consumers who were sent checks pursuant to Paragraph 4.2. In the report, Defendant shall also identify by name, address and amount owed any consumers who Defendant were unable to contact because the email originally sent to them was returned as undeliverable. For all consumers who did not reply to the refund email, Defendant shall indicate whether the consumer opened the email message.

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V. CIVIL PENALTIES

5.1 Pursuant to RCW 19.86.140, Plaintiff shall have and recover and Defendant shall be liable for and shall pay civil penalties of \$20,000.00. An additional civil penalty of \$150,000 is also imposed upon Defendant, however, this \$150,000 portion shall be suspended upon Defendant's compliance with the terms of this Consent Decree. Defendants shall have six months to comply with the injunctive provisions of this Consent Decree.

5.2 Payment owing under this provision shall be in the form of a valid check paid to the order of the "Attorney General—State of Washington" and shall be due and owing upon entry of this Consent Decree. Payment shall be sent to the Office of the Attorney General, Attention: Cynthia Lockridge, Administrative Office Manager, 800 Fifth Avenue, Suite 2000, Seattle, Washington, 98104-3188.

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VI. ATTORNEY COSTS AND FEES

6.1 Pursuant to RCW 19.86.080, Plaintiff shall recover and Defendant shall pay the costs and reasonable attorneys' fees incurred by the Plaintiff in pursuing this matter in the amount of \$58,000.00, payable upon entry of this Consent Decree.

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

6.3 Payment owing under this provision shall be in the form of a valid check paid to the order of the "Attorney General—State of Washington" and shall be due and owing upon entry of the Consent Decree. Payment shall be sent to the Office of the Attorney General, Attention: Cynthia Lockridge, Administrative Office Manager, 800 Fifth Avenue, Suite 2000, Seattle, Washington, 98104-3188.

1 **VII. ENFORCEMENT**

2 7.1 Beginning 6 months after the entry of this consent decree, violation of any of the
3 injunctions contained in this Consent Decree shall subject the Defendant to a civil penalty of up to
4 \$25,000 per violation pursuant to RCW 19.86.140.

5 7.2 Beginning 6 months after the entry of this consent decree, violation of any of the
6 terms of this Consent Decree shall constitute a violation of the Consumer Protection Act, RCW
7 19.86.020.

8 7.3 This Consent Decree is entered pursuant to RCW 19.86.080. Jurisdiction is
9 retained for the purpose of enabling any party to this Consent Decree with or without the prior
10 consent of the other party to apply to the Court at any time for enforcement of compliance with
11 this Consent Decree, to punish violations thereof, or to modify or clarify this Consent Decree.

12 7.4 Representatives of the Office of the Attorney General shall be permitted to access,
13 inspect and/or copy all business records or documents under control of Defendant in order to
14 monitor compliance with this Consent Decree within 14 days of written request to Defendant,
15 provided that the inspection and copying shall be done in such a way as to avoid disruption of
16 Defendant's business activities. Failure to comply with this section will subject Defendant to a
17 minimum civil penalty of \$2,000.00 per day for each day beyond 14 days after the written request
18 that the Attorney General is prevented by Defendant from accessing all records as provided by
19 this paragraph.

20 7.5 Representatives of the Office of the Attorney General may be permitted to
21 question Defendant or any officer, director, agent, or employee of any corporation affiliated with
22 Defendant in the form of a deposition, pursuant to the provisions and notice requirements of CR
23 30 in order to monitor compliance with this Consent Decree.

24 7.6 Nothing in this Consent Decree shall be construed as to limit or bar any other
25 governmental entity or consumer from pursuing other available remedies against Defendant.
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