DISTRICT COURT, DENVER COUNTY, COLORADO Court Address: 1437 Bannock Street, Rm 256, Denver, CO, 80202	DATE FILED: August 13, 2017 9:47 AM CASE NUMBER: 2017CV31452
Plaintiff(s) ST OF COLO et al. v. **Defendant(s)** MILE HIGH HEATING AND COOLING LLC et al.	⚠ **COURT USE ONLY** ⚠
	Case Number: 2017CV31452 Division: 414 Courtroom:

Order: ORDER ON STATES MOTION FOR TEMPORARY RESTRAINING ORDER

The motion/proposed order attached hereto: GRANTED.

Issue Date: 8/13/2017

ROBERT LEWIS MCGAHEY JR.
District Court Judge

DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock Street Denver, CO 80202	
STATE OF COLORADO, ex rel. CYNTHIA H. COFFMAN, ATTORNEY GENERAL Plaintiff, v. MILE HIGH HEATING & COOLING, LLC; MILE HIGH HEATING AND COOLING, LLC; PIKES PEAK HEATING AND COOLING, LLC; KEVIN DYKMAN, an individual; and KASEY DYKMAN, an individual. Defendants.	▲ COURT USE ONLY ▲
	Case No. 2017CV31452 Div.: 414

(PROPOSED) ORDER ON STATE'S MOTION FOR TEMPORARY RESTRAINING ORDER

The Court, having heard the evidence presented at the Temporary Restraining Order hearing on August 4, 2017,

FINDS and CONCLUDES that a Temporary Restraining Order should be entered against Defendants Mile High Heating & Cooling, LLC, Pikes Peak Heating & Cooling, LLC and Kevin Dykman, individually, for the following reasons:

1. The Court has jurisdiction in the matter presented herein by virtue of Colo. Rev. Stat. § 6-1-110(1) (2016) and Colo. R. Civ. P. 65.

2. The Court is also expressly authorized to issue a Temporary Restraining Order to enjoin ongoing violations of the Colorado Consumer Protection Act ("CCPA") by Colo. Rev. Stat. § 6-1-110(1):

> Whenever the attorney general or a district attorney has cause to believe that a person has engaged in or is engaging in any deceptive trade practice listed in section 6-1-105 . . ., the attorney general . . . may apply for and obtain, in an action in the appropriate district court of this state, a temporary restraining order or injunction, or both, pursuant to the Colorado rules of civil procedure, prohibiting such person from continuing such practices, or engaging therein, or doing any act in furtherance thereof. The court may make such orders or judgment as may be necessary to prevent the use of employment by such person of any such deceptive trade practice or which may be necessary to completely compensate or restore to the original position of any person injured by means of any such practice or to prevent any unjust enrichment by any person through then use or employment of any deceptive trade practice.
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> Colo. Rev. Stat. § 6-1-110(1).

3. This matter came before the Court at a temporary restraining order hearing where the State presented evidence, which the Court found credible, including the sworn testimony from its investigator. Having considered the evidence, the Court finds and concludes that a Temporary Restraining Order against Defendants is necessary.

4. The Court may grant a temporary restraining order or preliminary injunction when:

a) there is a reasonable probability of success on the merits;
b) there is a danger of real, immediate and irreparable injury which may be prevented by injunctive relief;
c) there is no plain, speedy and adequate remedy at law;
d) the granting of the preliminary injunction will not disserve the public interest;
e) the balance of the equities favors entering an injunction; and
f) the injunction will preserve the status quo pending a trial on the merits.

Rathke v. MacFarlane, 648 P.2d 648, 653-54 (Colo. 1982); see also *Gitlitz v. Bellock*, 171 P.3d 1274, 1278 (Colo. App. 2007).

5. Based on the evidence presented by the State at the hearing, the Court finds there is a reasonable probability that the State will prove its claims against Defendants at trial. *Rathke v. MacFarlane*, 648 P.2d 648, 653-54 (Colo. 1982); see also *Gitlitz v. Bellock*, 171 P.3d 1274, 1278 (Colo. App. 2007).

6. The primary claim for relief in this case is that the Defendants fail or refuse to obtain all governmental licenses or permits required to perform the services they offer, in violation of C.R.S. § 6-1-105(1)(z). The Defendants are required by local municipal ordinances to obtain building permits from the corresponding building departments prior to installing furnaces, boiler heaters, hot water heater and air conditioning units ("HVAC equipment") in consumers' homes.

7. The Court found testimony by the State's investigator to be credible evidence that the Defendants failed or refused to obtain the requisite building permits for the majority of HVAC installations in consumers' homes. The State has demonstrated a reasonable probability of success on the merits as to its primary claim for relief.

8. The second claim for relief is that the Defendants fail to disclose material information concerning services which information was known at the time of an advertisement or sale if such failure to disclose such information was intended to induce the consumer to enter into a transaction, in violation of C.R.S. § 6-1-105(1)(u).

9. The State's investigator testified that she contacted consumers who purchased HVAC equipment and installation from the Defendants and that the consumers were not aware that building permits were required. Additionally, while advertising that they provide "expert service," Defendants failed to disclose that their service technicians often lacked the technical background to diagnose HVAC problems and properly install new equipment. The failure to disclose this information was intended to induce consumers to enter into transactions with the Defendants. The State has demonstrated a reasonable probability of success on the merits as to its second claim for relief.

10. The State's third claim for relief is that the Defendants knowingly made false representations as to the characteristics and benefits of their services, in violation of C.R.S. § 6-1-105(1)(e).

11. During the hearing, the State introduced exhibits containing examples of the Defendants' advertising and sales scripts in which the Defendants represented themselves as "certified" and as providing "expert service." The Court found that such representations would lead consumers to believe that the actual work or services are always performed by qualified technicians. The Court found testimony by the State's investigator to be credible evidence that that while the Defendants hired supervisors with sufficient technical backgrounds, the Defendants also hired technicians who were deemed unqualified by their own supervisors. Where unqualified technicians were sent to consumers' homes, it was a misrepresentation to characterize their services as "expert services." The State has demonstrated a reasonable probability of success on the merits as to its third claim for relief.

12. Regarding the second *Rathke* factor, there is a danger of real, immediate and irreparable injury which may be prevented by injunctive relief. *Rathke*, 648 P.2d at 653.

13. The State presented credible evidence that the Defendants' business model, which includes hiring untrained technicians to install HVAC equipment and a refusal to obtain required building permits for the majority of the installations, creates a danger of real, immediate and irreparable injury. The State presented credible evidence of prior inferior installations by the Defendants, where Defendants failed to obtain building permits and as a result, the building departments had not inspected Defendants' work. Allowing the Defendants to continue to engage in the HVAC business creates a risk that a consumer would be exposed to carbon monoxide poisoning or that their home would blow up. The State has met its burden as to the second *Rathke* factor.

14. Additionally, the State is not required to plead or prove immediate or irreparable injury when a statute concerning the public interest is implicated. *Kourlis v. Dist. Court*, 930 P.2d 1329, 1335 (Colo. 1997) ("Special statutory procedures may supersede or control the more general application of a rule of civil procedure."); *see also Baseline Farms Two, LLP v. Hennings*, 26 P.3d 1209, 1212 (Colo. App. 2001); *Lloyd A. Fry Roofing Co. v. State Dep't of Health Air Pollution Variance Bd.*, 553 P.2d 800, 808 (Colo. 1976).

15. Regarding the third *Rathke* factor, absent an injunction, there is no plain, speedy and adequate remedy at law. *Rathke*, 648 P.2d at 653-54. Given the volume of consumers who have had HVAC equipment installed by the Defendants, it would be slower and less efficient for the courts to handle separate tort, breach of contract or CCPA claims, and then administer injunctive relief in each individual case. Additionally, a temporary restraining order is necessary to protect prospective consumers and simply remedying the prior harm would not be adequate.

16. As to the fourth and fifth *Rathke* factors, the granting of the preliminary injunction will not disserve the public interest, and the balance of the equities favor the entry of an injunction. An injunction will serve the public interest by protecting consumers from serious potential harm. The interests of the consumers, and the State's interest in protecting those consumers, significantly outweighs the interests of the Defendants.

17. Finally, the injunction will preserve the status quo by forcing Defendants to comply with the law. "The status quo to be maintained is the last actual and lawful uncontested status, which preceded the pending controversy." *Commonwealth of Pennsylvania v. Snyder*, 977 A.2d 28, 43 (Pa. Commw. Ct. 2009). Here, the evidence shows that the Defendants have employed a deceptive business model over the course of several years. The temporary restraining order serves to

restore the proper status quo, the status quo which precedes the Defendants' entry into the HVAC business and subsequent use of deceptive trade practices.

18. Because the State has met its burden under *Rathke*, and in view of the potential for continuing and serious harm to consumers as shown by the State's evidence, the entry of a temporary restraining order is necessary and appropriate.

IT IS HEREBY ORDERED PURSUANT TO C.R.S. § 6-1-110(1) AS FOLLOWS:

A. MILE HIGH HEATING & COOLING, LLC; PIKES PEAK HEATING AND COOLING, LLC; individual defendant KEVIN DYKMAN (collectively "Defendants") and their officers, directors, agents, servants, employees, independent contractors and any other persons in active concert or participation with Defendants who receive actual notice of the Court's Order are enjoined from:

> Engaging in any activity related to the sale or installation of furnaces, boilers, hot water heaters, air conditioning units, or any other type of HVAC equipment. "Engaging in any activity" includes, but is not limited to, working as an employee or manager, for any company or individual who sells or installs furnaces, boilers, hot water heaters, air conditioning units, or any other type of HVAC equipment. "Engaging in any activity" includes, but is not limited to, acting as a general manager, having contact with HVAC consumers, overseeing dispatch, overseeing tech managers, or overseeing telemarketers.

B. Defendant KEVIN DYKMAN is ordered to provide a list of all consumers who have had HVAC equipment installed by any of the Defendants listed in the caption of this order, to the Attorney General, within 30 days of this order. The list shall be used by the Attorney General to contact consumers as appropriate, regarding potentially uninspected HVAC equipment, and as such shall provide as much information as possible to assist the Attorney General's efforts. The list should be produced in the form of an Excel spreadsheet and should contain the consumer's name, address and phone number; the type of installation (furnace, boiler, hot water heater, air conditioning unit, swamp cooler or specified other); the date of installation, and indicate whether or not a building permit was obtained by the Defendants. The consumer list should be produced from business records currently under the control of KEVIN DYKMAN. KEVIN DYKMAN may communicate with his former office manager, and others as needed, in order to complete the consumer list. If the consumer list cannot be produced using existing business records, KEVIN DYKMAN shall provide an explanation in writing to the Attorney General prior to the due date for this provision.

C. KEVIN DYKMAN can receive monetary distributions from Cornerstone Mechanical commensurate with his pre-existing minority share.

ENTERED this _____ day of _____, 2017, at ___:____ (a.m./p.m.) Mountain Standard Time.

In accordance with Rule 65(b) of the Colorado Rules of Civil Procedure, a Temporary Restraining Order expires by its terms within such time after entry not to exceed fourteen calendar days, as the Court fixes, unless within the time so fixed, the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period.

This order has been reviewed and approved as to form by counsel for both the State and the Defendants. At the hearing, the Defendants were informed of their right to contest the Temporary Restraining Order. Because counsel for the Defendants had motioned to withdraw, and Defendants had not secured counsel going forward for the corporate defendants, the parties agreed to appear for a Status Conference on August 24, 2017 at 11:00 A.M. The Defendants consented to an extension of the Temporary Restraining Order until the August 24, 2017 Status Conference and through the timeframe necessary to schedule and carry out a preliminary injunction hearing, if so requested at the Status Conference.

BY THE COURT:

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District Court Judge