STATE OF RHODE ISLAND

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: April 24, 2023)

STATE OF RHODE ISLAND,	:	
	:	
Plaintiff,	:	
	:	
v.	:	**C.A. No. PC-2022-04492**
	:	
	:	
BTTR, LLC, HAM, INC., and MICHAEL BRESETTE	:	
	:	
	:	
Defendants.	:	

DECISION

MCHUGH, J. Before this Court for decision is the State of Rhode Island's (the State) Motion for a Preliminary Injunction. This Court conducted hearings on August 1, 2022, August 16, 2022, August 19, 2022, August 24, 2022, August 26, 2022, September 2, 2022, September 12, 2022, September 19, 2022, October 14, 2022, October 21, 2022, and October 28, 2022, where both the State and the Defendants BTTR, LLC, HAM, INC., and Michael Bresette (collectively Defendants) were given opportunities to present evidence in support of their case. This series of hearings culminated in oral argument, in lieu of further briefing, which took place on February 3, 2023 and February 6, 2023. Jurisdiction is pursuant to G.L. 1956 §§ 6-13.1-1 through 6-13.1-11. The Court now issues its Decision.

I

Background

This case stems from a regulatory enforcement action in the Department of Business Regulation (DBR). On February 22, 2021, DBR issued an order suspending Defendants'

contractor registration after investigating "numerous allegations of dishonest or fraudulent conduct, multiple cases of not obtaining building permits, multiple documented violations of the state building code, [and] two bathrooms left in unusable condition[.]" (State's Ex. 1, DBR Emergency Order, at 25.) In March of 2021, DBR and Defendants agreed to the entry of a Consent Decree reinstating the suspended registration in exchange for both internal and external monitoring, revisions to Defendants' company policies, and the requirement that Defendants provide written contracts from then on that identify the scope of all work for its customers. (State's Ex. 2, Consent Decree.)

Matthew Lambert, the Principal State Building Code Official, was assigned to investigate Defendants in April of 2021. (Hr'g Tr. 96:15-20, Aug. 19, 2022.) Over the span of several hearings, Mr. Lambert testified and was cross-examined about several inspections he conducted in accordance with the Consent Decree on residences where Defendants were either currently or previously engaged in work. *See generally* Lambert Testimony Hr'g Tr. Aug. 16, 2022 and Hr'g Tr. Sept. 19, 2022. He testified that while several of his inspections arose from formal complaints DBR received from Defendants' customers, he also explained that he actively contacted customers who left negative reviews for BTTR on Google. *See* Hr'g Tr. 49:2-25, Aug. 26, 2022 (explaining his investigatory process and distinguishing between "formal complaints and investigatory complaints"). Mr. Lambert admitted that he did not contact customers who left favorable reviews. *See* Hr'g Tr. 6:18-7:24, Sept. 2, 2022; *see also* Defs.' Ex. T (printouts of Google reviews). Mr. Lambert testified that his investigatory procedures also involved surveilling Defendants' trucks. (Hr'g Tr. 97:21-98:2, Aug. 19, 2022.)

The site inspections revealed violations of the Consent Decree as well as ongoing issues, including, but not limited to, subpar workmanship, incomplete projects, and discrepancies between

work billed for and services provided. *See generally* Lambert Testimony Hr'g Tr. Aug. 16, 2022 and Hr'g Tr. Sept. 19, 2022. DBR then withdrew from the Consent Decree because of the new violations revealed through Mr. Lambert's inspections and reinstated the suspension of Defendants' contractor registration on February 18, 2022. (State's Ex. 13, Order Withdrawing from the Consent Decree.) Around this time, Mr. Lambert states that his supervisor, James Cambio, indicated that he wanted to shut Defendants down. (Hr'g Tr. 68:22-69:11, Aug. 19, 2022) (explaining that Mr. Cambio made this statement "around the time of the second emergency order"). DBR reinstated Defendants' emergency suspension on March 11, 2022. *See* State's Ex. 16, Order Re: Emergency Suspension, at 9.

The State then filed a Complaint in Superior Court on July 19, 2022, alleging that Defendants continue to solicit business in Rhode Island in violation of their suspension and asserted Count I, violations of the Rhode Island Deceptive Trade Practices Act (DTPA) G.L. 1956 § 6-13.1-2, and Count II restraint of prohibited acts under the DTPA § 6-13.1-5. (Compl. ¶¶ 61-70.) Per the DTPA, the State requested injunctive relief via a Motion for a Temporary Restraining Order (TRO) and Preliminary Injunction. *See generally* State's Mem. in Supp. of TRO and Prelim. Inj. (State's Mem.). On July 26, 2022, this Court granted the State's request and issued a TRO. *See* Order (Rekas Sloan, J.). On September 21, 2022, this Court amended the TRO and stated that the Amended TRO "shall expire at the conclusion of the hearing on the State's Motion for a Preliminary Injunction unless extended by the Court." *See* Amended TRO (McHugh, J.).

II

Standard of Review

The standard of review in this case has been highly contested, and the Court lacks clear guidance under the law to determine which standard of review to apply when the Attorney General seeks a preliminary injunction under § 6-13.1-5.

A

Section 6-13.1-5

Section 6-13.1-5 of the DTPA does not provide a standard of review for the Court to apply in an action for injunctive relief brought by the Attorney General. Section 6-13.1-5. Rather, § 6-13.1-5 is jurisdictional in the sense that the Attorney General *may not* bring a court action *unless* he or she "has reason to believe that any person is using, has used, or is about to use any method, act, or practice declared to be unlawful by § 6-13.1-2, and that proceedings would be in the public interest[.]" *Id.* In other words, for the Attorney General's power to bring a court action, and in turn, for this Court's power to hear such a case, the Attorney General must have "reason to believe" someone is or is about to commit a DTPA violation. *Id.*

While § 6-13.1-5 also provides that "[t]he superior courts are authorized to issue temporary or permanent injunctions to restrain and prevent violations of this chapter and the injunctions shall be issued without bond[,]" the DTPA is silent on the appropriate standard of review courts should apply in issuing injunctions under the DTPA. *Id.*; *see generally* §§ 6-13.1-1 through 6-13.1-11.

B

Rule 65

Typically, in reviewing a request for a preliminary injunction under Rule 65 of the Superior Court Rules of Civil Procedure, the Superior Court applies a four-factor test and "determine[s]

whether the moving party (1) has a reasonable likelihood of success on the merits, (2) will suffer irreparable harm without the requested injunctive relief, (3) has the balance of the equities, including the possible hardships to each party and to the public interest, tip in its favor, and (4) has shown that the issuance of a preliminary injunction will preserve the status quo." *Iggy's Doughboys, Inc. v. Giroux*, 729 A.2d 701, 705 (R.I. 1999). Further, "the decision to grant a preliminary injunction [under Rule 65] rests within the sound discretion of the hearing justice" and will not be overturned "if the party requesting the preliminary injunction at least has made out a prima facie case." *Id.* (citing *The Fund for Community Progress v. United Way of Southeastern New England*, 695 A.2d 517, 521 (R.I. 1997) and *DiLibero v. Swenson*, 593 A.2d 42, 44 (R.I. 1991)). The moving party is not required to establish a "certainty of success." *DiDonato v. Kennedy*, 822 A.2d 179, 181 (R.I. 2003) (quoting *Fund for Community Progress*, 695 A.2d at 521).

C

The FTC Act

The State asserts that the Court should use the two-factor test applied by the Federal Trade Commission (FTC) when issuing injunctions under the FTC Act rather than the four-factor test under Rule 65. (State's Mem. 10-12.) However, § 6-13.1-3 of the DTPA suggests otherwise, by providing that "[i]t is the intent of the legislature that in construing §§ 6-13.1-1 and 6-13.1-2 due consideration and great weight shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to § 5(a) of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1), as from time to time amended." Section 6-13.1-3. By specifically including §§ 6-13.1-1 and 6-13.1-2, it should be inferred that the General Assembly intended to exclude § 6-13.1-5 and the rest of the DTPA from being interpreted in accordance with how federal courts and the FTC interpret the FTC Act. *Id.* This is in accordance with the maxim of statutory construction,

"*inclusio unius est exclusio alterius*," or the expression of one thing is the exclusion of the other. *See Rison v. Air Filter Systems, Inc*., 707 A.2d 675, 682 (R.I. 1998) (relying on this maxim in interpreting the state workers' compensation statute). Therefore, the Court is unpersuaded by federal caselaw interpreting § 5(a) of the FTC Act.

D

Comparable State Law and the District of Rhode Island

Continuing to press the point, the State also encourages the Court to look to other states, including Massachusetts and Connecticut, which have similar consumer protection statutes to the DTPA. *Compare* § 6-13.1-5, *with* Mass. Gen. Laws ch. 93A, § 11, *and* Conn. Gen. Stat. § 42-110a. The State argues that other states presume irreparable harm by specifically authorizing injunctive relief under their respective statutory schemes. (State's Mem. 11-12.)

In this Court's review of Massachusetts and Connecticut caselaw interpreting their respective unfair and deceptive trade practices acts, these state courts dispose of the irreparable harm requirement, and instead hold that their legislatures presumed irreparable harm by authorizing their attorney generals to seek injunctions for violations of the statute. *See, e.g.*, *Commonwealth v. Mass. CRINC*, 466 N.E.2d 792, 798-99 (Mass. 1984) ("The Attorney General is not required to demonstrate irreparable harm . . . the judge who decides whether an injunction should issue needs to consider specifically whether there is a likelihood of statutory violations and how such statutory violations affect the public interest."); *Commonwealth v. Wellesley Toyota Co*., 470 N.E.2d 142, 145 (Mass. App. Ct. 1984) ("[W]hen the Attorney General acts in the public interest to enjoin violations of statutory provisions, demonstration of immediate irreparable harm is not a prerequisite."); *Department of Transportation v. Pacitti*, 682 A.2d 136, 139 (Conn. App. Ct. 1996) ("Irreparable harm need not be shown in a statutory injunction case . . . enactment of the

statute by implication assures that no adequate alternative remedy exists and that the injury was irreparable[.]").

Other courts—including the District of Rhode Island—also forego a balancing of the equities under these circumstances and hold that a violation of a consumer protection statute presumes a harm to the public interest. *U.S. v. Kasz Enterprises, Inc.*, 855 F. Supp. 534, 543 (D.R.I. 1994) ("It is settled that where a statute designed to protect the public authorizes an injunction, considerations applicable to private actions such as irreparable injury and a balancing of the equities are not relevant."); *New Hampshire Department of Environmental Services v. Mottolo*, 917 A.2d 1277, 1282-83 (N.H. 2007) (citing to *Kasz* and holding the same); *Office of Attorney General v. Bilotti*, 267 So. 3d 1, 3 (Fla. Dist. Ct. App. 2019) (holding that the Florida Attorney General's "sole burden in establishing its right to a temporary injunction under the [Florida Deceptive and Unfair Trade Practices Act], is to establish that it has a clear legal right to a temporary injunction by demonstrating a substantial likelihood of success on the merits"); *State ex rel. Office of Attorney General, Bureau of Consumer Protection v. NOS Communications, Inc.*, 84 P.3d 1052, 1054 (Nev. 2004) ("By considering whether the BCP [(the Bureau of Consumer Protection)] had an adequate legal remedy, the district court erred because equitable considerations, such as irreparable harm and an inadequate legal remedy, are presumed in a statutory enforcement action. Thus, the only issue before the district court was whether the BCP presented admissible evidence establishing a reasonable likelihood that the Company was engaging in deceptive trade practices.").

While the Court assigns some persuasive value to these cases, the Court nonetheless finds it prudent to apply all four factors typically applied under Rule 65, and leaves the issue of the appropriate standard of review to apply in suits brought by the Attorney General under the DTPA

to our Supreme Court. *Grady v. Narragansett Electric Co*., 962 A.2d 34, 41 n.4 (R.I. 2009) (referring to the "usual policy of not opining with respect to issues about which [a court] need not opine"). This determination prejudices neither party because the conclusion reached by the Court is the same regardless of how many factors are applied.

III

Analysis

A

Reasonable Likelihood of Success on the Merits

The first step of the preliminary injunction analysis is to consider whether the State has shown a reasonable likelihood of success on the merits. *Fund for Community Progress*, 695 A.2d at 521. "[I]f the moving party fails to establish a likelihood of success on the merits, the Court's analysis ends there." *Crocker v. Pielch*, No. Civ. A. PC 2000-1771, 2002 WL 1035424 at *2 (R.I. Super. May 9, 2002) (citing *Fund for Community Progress*, 695 A.2d at 521 and *Paramount Office Supply Company, Inc. v. D.A. McIsaac, Inc.*, 524 A.2d 1099, 1102 (R.I. 1987)). Likelihood of success on the merits is the "sine qua non" of the four-part preliminary injunction inquiry. *New Comm Wireless Services, Inc. v. SprintCom, Inc.*, 287 F.3d 1, 9 (1st Cir. 2002) (Selya, J.).

To make out its prima facie case, the State must show that Defendants violated the DTPA, which provides that "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are declared unlawful." Section 6-13.1-2. As our Supreme Court has stated, "in enacting the DTPA, the Legislature intended to declare unlawful a broad variety of activities that are unfair or deceptive[.]" *Park v. Ford Motor Co.*, 844 A.2d 687, 692 (R.I. 2004). This is apparent from the list of definitions for "[u]nfair methods of competition and

unfair or deceptive acts or practices" that the General Assembly included in § 6-13.1-1, including the following, which may be of particular relevance to the present case:

> "(iii) Causing likelihood of confusion or of misunderstanding as to affiliation, connection, or association with, or certification by, another;
>
> ". . .
>
> "(v) Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation, or connection that he or she does not have;
>
> ". . .
>
> "(xii) Engaging in any other conduct that similarly creates a likelihood of confusion or of misunderstanding;
>
> "(xiii) Engaging in any act or practice that is unfair or deceptive to the consumer;
>
> "(xiv) Using any other methods, acts, or practices that mislead or deceive members of the public in a material respect[.]" Section 6-13.1-1(6)(iii), (v), and (xii)-(xiv).

Accordingly, the State can satisfy its burden of establishing a prima facie case by demonstrating that Defendants' conduct meets any one of these definitions. *Id.* Throughout its analysis, the Court is keeping in mind that the DTPA "should be liberally construed." *Long v. Dell, Inc.*, 984 A.2d 1074, 1081 (R.I. 2009) (*Long I*).

1

Causing Likelihood of Confusion or of Misunderstanding as to Certification by DBR

The State attempted to show a violation of the DTPA by offering evidence and testimony in support of its contention that Defendants "caus[ed] a likelihood of confusion or of misunderstanding as to . . . certification by [DBR.]" (State's Mem. 12-13.) Namely, the State offered credible evidence showing that Defendants performed repairs (1) while their contractor's

license was suspended or they were otherwise barred from soliciting new business, (2) performed work without the required permits or licenses, and (3) violated an Order from this Court preventing Defendants from collecting money from consumers or their insurers.

i

Working with a Suspended Contractor's Registration

Defendants' registration was summarily suspended on February 22, 2021, pursuant to the Emergency Order following the DBR Investigation. *See* State's Ex. 1, Emergency Order at 1. While this suspension was temporarily lifted by the Consent Decree entered into on March 24, 2021, DBR withdrew from the Consent Decree on February 18, 2022 because of new violations, reinstated the initial Emergency Order, and ordered that the Defendants not solicit any new customers. *See* State's Ex. 2, Consent Decree; State's Ex. 13, Order Withdrawing from Consent Decree.

The State has set forth evidence showing that Defendants continued to solicit new work following the February 18, 2022 Consent Decree Withdrawal. Joshua Brother, an Inspector for DBR, testified that BTTR began plumbing work on the Jeblauoi residence in North Smithfield on February 21, 2022. Hr'g Tr. 24:10-13, Oct. 14, 2022; *see* State's Ex. 14, DBR Summary of North Smithfield Inspection. Mr. Brother also inspected a West Warwick residence where BTTR engaged in remediation work following a hit and run accident that damaged the homeowner's detached garage. (Hr'g Tr. 28:18-29:7, Oct. 14, 2022.) BTTR contacted the West Warwick homeowners three days after the accident on February 28, 2022, and subsequently began work on the garage. *Id*. at 39:16-40:1; *see* State's Ex. 15, DBR Summary of West Warwick Inspection. Based on these incidents, on March 11, 2022, DBR Hearing Officer Catherine Warren confirmed that BTTR continued soliciting work after February 18, 2022 in an Order titled, "Order Re:

Emergency Suspension[,]" and authorized "[t]he Department [to] take any steps it deems necessary to ensure the implementation of this emergency suspension of registration." State's Ex. 16, Order Re: Emergency Suspension, at 9.

ii

Performing Unpermitted Work

Matthew Lambert testified that he conducted at least twelve property inspections while investigating BTTR. When discussing each of these inspections, Mr. Lambert stated that no permits were pulled for the work to be completed. *See, e.g.*, Hr'g Tr. 85:13-19, Aug. 16, 2022 (stating no permits were pulled for the Lynch property in Woonsocket even though the work performed required building, electrical, and plumbing permits); *id*. at 92:20-94:15 (explaining no permits were pulled on the Pao residence even though the plumbing, demolition, and insulation work required permits); *id.* at 120:14-121:25, 125:11-22 (explaining that no permits were pulled for the Nightingale residence and opining that "[p]ermits are pulled for life safety issues; to ensure proper work, in case there's, you know, plumbing, electrical work being done; structural issues, if you are getting into any of the actual structure of the building" so that "[t]he municipalities [can] go out and inspect the work for compliance with the building code"); Hr'g Tr. 35:7-36:4, Aug. 19, 2022 (explaining that no permits were pulled for the plumbing work on the bathroom remodel at the Espinol residence in Cranston); *id*. at 36:11-37:6 (detailing that plumbing, electrical, and building permits were not pulled for work on Roland Gazaille's North Smithfield residence)*; id*. at 39:21-40:7 (explaining that no permits were pulled for the plumbing work at Anthony Mucci's Johnston residence); *id*. at 40:21-42:8 (explaining that no permits were pulled for work on a mobile home in Mapleville).

iii

Defendants' Violation of the Court's July 26, 2022 TRO

Finally, on July 26, 2022, this Court issued a TRO, that, among other conditions, prohibited Defendants from "taking any step in furtherance of collection or deposit of any money from consumers or their insurers, including those with contracts with any of the Defendants." (Order, July 26, 2022) (Rekas Sloan, J.).

On August 2, 2022, the State filed a Motion to Adjudge in Contempt based on the Defendants having violated the above condition of the July 26, 2022 TRO. (State's Mot. to Adjudge in Contempt.) The State provided several affidavits in support of its Motion, including an affidavit from Michael Cybularz (Mr. Cybularz), a Senior Manager in the Property Claims Division of Allstate Insurance Company (Allstate). (State's Mem. in Supp. of its Mot. to Adjudge in Contempt (State's Contempt Mem.) Ex. 1, Michael Cybularz Aff. (Cybularz Aff.).) Mr. Cybularz stated that since July 26, 2022, Allstate received at least one inquiry from Gina Graziano (Ms. Graziano) with BTTR regarding payment status in relation to a claim for a Rhode Island policyholder. *Id*. ¶ 4. The State also submitted the affidavit of Justin Albergaria (Mr. Albergaria), a consumer for whom BTTR performed work after a sewer pump caused flooding in the basement of his Johnston home. (State's Suppl. Mem. in Supp. of its Mot. to Adjudge in Contempt (State's Suppl. Contempt Mem.) Ex. 1, Justin Albergaria Aff. (Albergaria Aff.) ¶¶ 1-3.) Mr. Albergaria testified that between July 20 and July 31, 2022, Ms. Graziano contacted him "demanding payment" "at least twice," and on August 1, 2022 he received a call from Ms. Graziano stating that based on her conversation with his insurance adjuster, she believed that Mr. Albergaria received a check from his insurer which he "had to sign [] over to BTTR[.]" *Id*. ¶¶ 6-7. The following

morning, on August 2, 2022, "Ron from BTTR" arrived at Mr. Albergaria's home and asked for the check, which Mr. Albergaria provided. *Id*. ¶ 8.

This Court conducted a hearing on August 5, 2022, on the State's Motion to Adjudge in Contempt. *See* Docket. Based on the foregoing evidence as well as testimony at the hearing, this Court found that the State demonstrated "by clear and convincing evidence that Defendant BTTR LLC violated that prohibition by seeking to collect money from a consume[r] and that consumer's insurers." (Order, Aug. 23, 2022) (McHugh, J.).

Because Defendants conducted work with a suspended contractor's registration, performed unpermitted work, and violated this Court's TRO, the State has established a prima facie case of a pattern of conduct that "caus[ed] likelihood of confusion or of misunderstanding as to [Defendants'] . . . certification by [DBR]" or as to their legal authority to perform contracting work and collect payment from consumers and insurers. Section 6-13.1-1(6)(iii); *see also* § 6-13.1-1(6)(xii) (stating that "[e]ngaging in any other conduct that similarly creates a likelihood of confusion or of misunderstanding" is an unfair or deceptive trade practice).

2

Engaging in Any Act or Practice That is Unfair or Deceptive to the Consumer

The DTPA contains a "catch-all" definition for activities that do not fall into any of the more specific categories of unfair or deceptive trade practices and provides that "[e]ngaging in any act or practice that is unfair or deceptive to the consumer" is unlawful. Section 6-13.1-1(6)(xiii). Our Supreme Court defined "unfair" and "deceptive" under the DTPA in *Long v. Dell, Inc.*, 93 A.3d 988 (R.I. 2014) (*Long II*).

i

Unfair

Rhode Island courts consider the following factors to determine whether a trade practice is unfair:

> "(1) Whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise—whether, in other words, it is within at least the penumbra of some common-law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; [and] (3) whether it causes substantial injury to consumers (or competitors or other businessmen)." *Long II*, 93 A.3d at 1000 (internal quotation omitted).

Further, a DTPA plaintiff "need not establish every factor, and they may prove unfairness by showing that a trade practice meets one factor to a great degree or two or three factors to a lesser degree." *Id.* at 1001.

Under these factors, the State argues that Defendants' standard practice violates the DTPA "at several junctures[,]" including their door-to-door sales tactics, performing incomplete or improper work, billing customers and insurance companies for work never performed, and inflating costs. *See* State's Mem. at 14.

In support of its argument, the State set forth the following relevant evidence:

1. Mr. Lambert testified that when he went to inspect Lorraine Lynch's home in Woonsocket on August 26, 2021, he "observed that the bathroom was not complete" and that "[t]here was a lot of work that was not done." (Hr'g Tr. 82:14-15, Aug. 16, 2022.) He also stated that "[t]here was a lot of things in the insurance documentation that was billed for that was not done." *Id.* at 82:19-20. He added that Timothy White, an employee of BTTR, completed the plumbing work at Ms. Lynch's home, but also added that Timothy White was unlicensed and that the inspection revealed poor workmanship. *See id.* at 87:1-21;

State's Ex. 5, DBR Inspection Report. Mr. Lambert's testimony reflects the report he prepared following the inspection. *See generally* State's Ex. 5, DBR Inspection Report. Mr. Lambert did acknowledge that after discussion with Dennis Blanchette, the operations manager at BTTR, BTTR returned to the Lynch home on September 28, 2021 and completed some additional work. *See* Defs.' Ex. S, Certificate of Completed Satisfaction.[1]

a. On January 20, 2022, Mr. Lambert issued a "Notice of Intent to Assess Civil Penalty" to Defendants for several violations at the Lynch home, including not performing work that was promised, failing to supply a written contract to Ms. Lynch in violation of the Consent Order, and for invoicing the insurance company for work that was not performed. (State's Ex. 6, Notice of Intent to Assess Civil Penalty.)

2. Mr. Lambert testified that when he inspected the residence of Christopher Pao in West Warwick, Rhode Island, he observed several issues including "a lot of tile and grout issues, chips in the tile, uneven tiles[,]" "almost zero water pressure in the newly-installed bathroom" and that "the tub was not the replacement that it was supposed to be." (Hr'g Tr. 96:14-21, Aug. 16, 2022.) Mr. Lambert completed an investigative report detailing his findings. *See* State's Ex. 7, DBR Inspection Report. Mr. Lambert acknowledges that after

[1] This Court provided the following guidance with respect to the weight given to Defendants' Certificates of Completed Satisfaction signed by consumers:

> "[S]ome of these people who signed these . . . may not have been . . . enamored [with] what happened after, and I'm sure they were aggravated and irritated, but . . . they wanted to end this . . . If you call your plumber and the guy comes and does a terrible job, then he comes back and does it right, you're not going to be completely satisfied because he had to come twice, and you didn't have the use of [your property], so that's the way I'm looking at these documents." (Hr'g Tr. 83:19-84:4, Sept. 12, 2022.)

he contacted BTTR they went back and fixed the issues he identified. (Hr'g Tr. 97:9-22, Aug. 16, 2022; *see* Defs.' Ex. N, Certificate of Completed Satisfaction.)

a. In January of 2022, Mr. Lambert issued a Notice of Intent to Assess Civil Violations stemming from his findings at the Pao residence. *See* State's Ex. 8, Notice of Intent to Assess Civil Penalty.

3. While investigating the residence of Byron Acevedo in Providence, Mr. Lambert learned that when addressing a sewage backup, "instead of removing it from the home, [BTTR] brushed it into a sump pump, which blew out into the backyard." (Hr'g Tr. 107:3-10, Aug. 16, 2022.) Mr. Lambert also mentioned that Mr. and Ms. Acevedo were concerned about the sewage in their backyard because Ms. Acevedo was pregnant, and the couple had pets that used the backyard. *Id.* at 107:15-20. Mr. Lambert further testified that with respect to the Acevedo residence, he could "visibly see" that "[t]here was a lot of work that was said to be done that wasn't complete, including the connecting and disconnecting, moving of the stove, replacing[,] removing and reinstalling the kitchen sink and vanity, as well as capping all the pipes." *Id.* at 107:25-108:7. According to Mr. Lambert, BTTR never returned to the residence to fix the issues. *Id.* at 109:3-7; *but see* Defs.' Ex. V, Certificate of Completed Satisfaction.

4. Mr. Lambert testified that when he inspected the residence of Veronica Nightingale in East Providence, he identified several issues with respect to the water leak and kitchen remodel undertaken by Defendants. *Id*. at 118:2-24. At the time of the inspection, BTTR had been working on the residence for seventeen weeks. *Id.* However, Mr. Lambert noted that minimal work had been done, and work that had been done created safety issues, such as a long strip of plywood that was removed in front of Ms. Nightingale's sink, which created

a tripping hazard. *Id*. at 118:16-21. Furthermore, Mr. Lambert noted that the insurance company had paid BTTR about $25,000 at the time of his inspection, but there were discrepancies between the insurance bill and the actual work that was done. *Id*. at 118:7-10, 119:8-22. For example, the insurance bill stated that the new flooring was complete; however, at the time of Mr. Lambert's inspection, the only work done on the floor was the strip of plywood in front of the sink that was removed. *Id*. at 119:20-22. Mr. Lambert prepared a report following the inspection on Ms. Nightingale's residence identifying proposed violations. *See generally* State's Ex. 11, DBR Inspection Report.

a. On January 20, 2022, Mr. Lambert issued a Notice of Intent to Assess Civil Violations based on his findings at the Nightingale residence for several violations, including dishonest and fraudulent conduct, failing to supply a written contract to Ms. Nightingale in violation of the Consent Order, and for invoicing the insurance company for work that was not performed. *See* State's Ex. 12, Notice of Intent to Assess Civil Penalty.

5. While inspecting the residence of Paul Vanasse in Foster, Mr. Lambert testified that he learned Mr. Vanasse received a final invoice from BTTR which included work that was not completed. (Hr'g Tr. 72:18-20, Aug. 16, 2022.) For example, the invoice included the removal of all items from the garage to mitigate water from a leak due to a bad storm. *Id*. at 70:22-23, 73:6-12. However, at the time of the inspection, there was still standing water under items in the garage. *Id*. at 73:14-16. Mr. Lambert prepared a report detailing his investigative findings on Mr. Vanasse's residence. *See generally* State's Ex. 3, DBR Inspection Report. Mr. Lambert acknowledged that the Vanasse case was eventually resolved after mediation. (Hr'g Tr. 43:12-22, Sept. 12, 2022.)

a. On January 20, 2022, Mr. Lambert issued a Notice of Intent to Assess Civil Violations based on his findings at the Vanasse residence for several violations, including failing to complete a project and improper work. *See* State's Ex. 4, Notice of Intent to Assess Civil Penalty.

This evidence is sufficient to satisfy the State's burden of setting forth a prima facie case that Defendants acted unfairly, or unethically, in its dealings with consumers, and that their practice caused substantial injury by charging for work not completed. Section 6-13.1-1(6)(xiii); *Long II*, 93 A.3d at 1000.

ii

Deceptive

"[T]o prove that a trade practice is deceptive under the DTPA, a plaintiff must set forth three elements: '[1] a representation, omission, or practice, that [2] is likely to mislead consumers acting reasonably under the circumstances, and [3], the representation, omission, or practice is material.'" *Long II*, 93 A.3d at 1003 (quoting *F.T.C. v. Verity International Ltd*., 443 F.3d 48, 63 (2d Cir. 2006)). '"The deception need not be made with intent to deceive; it is enough that the representations or practices were likely to mislead consumers acting reasonably."' *Id.* (quoting *F.T.C.*, 443 F.3d at 63).

The State has set forth evidence from former BTTR employee Ryan Ward in support of its case that Defendants engage in deceptive practices in their dealings with customers. Namely, Mr. Ward testified to the following:

1. Mr. Ward testified that, as a general practice, he was instructed by Mr. Bresette and BTTR to "remove certain things immediately at the initial loss in order to increase the size of the loss." (Hr'g Tr. 34:10-20, Sept. 19, 2022.) Mr. Ward testified that BTTR did this because

of the "line of sight [rule,]" which he explained means "if you remove a single item, all of those matching items . . . have to be replaced by the insurance company." *Id.* at 38:9-14.

a. Mr. Ward gave specific examples of this occurring. For instance, he testified that while working on a project at Mrs. Moreau's house in Cumberland, Mr. Bresette had "overwritten [his] initial scope of work of what [he] had determined needed to be done and decided on a much larger scope of work." *Id.* at 43:11-16. This included "label[ing] specific cabinets as custom which they were not" and "remov[ing] everything in the unit basically from two to four feet down, everything was to be removed, flooring, baseboard, trim, cabinetry, backsplash." *Id.* at 43:19-23. This was to address water damage, and although Mr. Ward initially recommended attempting to dry out the affected areas, which was by his knowledge standard practice in the industry, he "was [instead] instructed by Mr. Bresette that on all losses, no attempt would be made to dry the structures out." *Id.* at 44:1-22. "Demo was [the] first option." *Id.* at 44:17.

    i. At a later point in the project, Mr. Ward testified that "Mr. Bresette purchased cabinets that were different than what Mrs. Moreau thought she was getting[,]" and that these cabinets were in fact less expensive than the cabinets Mrs. Moreau initially picked out. *Id.* at 52:22-53:16. Mr. Ward further stated that Mrs. Moreau complained about this, but that BTTR offered a resolution which was unacceptable to the customer. *Id.* at 53:17-25.

2. While working on Mr. Ankomah's house in Pawtucket, Mr. Ward stated that he did not give the customer a copy of the actual estimate. (Hr'g Tr. 48:15-22, Oct. 21, 2022.) He

explained that he was "directed by Mr. Bresette to never give a copy of the actual estimate to a customer[,]" and that instead their practice was to give "what was called a customer total sheet which had the value of the claim but no individual line items." *Id.* at 48:19-22.

a. Mr. Ward also testified that BTTR installed laminate floors instead of tile floors in Mr. Ankomah's bathroom, even though tile floors were included in the original estimate to the insurer. *Id.* at 49:8-11. While Mr. Ankomah agreed to this change, the laminate floors cost less than the tile floors, and Mr. Ward testified that to the best of his knowledge, the difference between the cost of the two floor types was not returned to the customer. *Id.* at 49:19-51:7.

3. Mr. Ward also testified that at Ms. Barker's house in Johnston, Ms. Barker "was charged to remove and replace the laminate floor throughout the finished basement" but that the work was never completed. *Id.* at 69:17-70:1. Instead, Mr. Bresette made an agreement with the customer to install carpet in two upstairs bedrooms as an "even exchange" for foregoing the laminate floor work in the basement. *Id.* at 70:3-8. However, Mr. Ward testified that the cost of carpeting the two bedrooms was only $250 per room, while the cost of removing and replacing the laminate floors in the basement was $5000. *Id.* at 70:15-24. Mr. Ward added Ms. Barker was not made aware of the price difference and that BTTR billed the insurance company for the laminate floors instead of the less expensive carpeting of the bedrooms. *Id.* at 70:23-24, 73:1-17.

3

Mr. Bresette's Personal Liability

In addition to the foregoing evidence, the State has set forth evidence showing that Mr. Bresette was personally involved and drove much of BTTR's decision making. As Mr. Ward

described, he "never did anything on [his] own" when working at BTTR. (Hr'g Tr. 34:12-20, Sept. 19, 2022.) Mr. Ward stated, "[e]verything went through Mike, Mr. Bresette. [I] didn't determine what [I] w[as] doing unless the loss was very simple, [I] never determined that on [my] own. Everything went through Mr. Bresette. [I] had to call him, explain to him what was going on, and then he would direct [me] to remove certain things immediately at the initial loss in order to increase the size of the loss." *Id.* Mr. Ward stated that he "was instructed by Mr. Bresette that on all losses, no attempt would be made to dry the structures out. Demo was [the] first option." *Id.* at 44:15-17. Describing the incident at the Moreau residence, Mr. Ward stated that Mr. Bresette was "physically on site and did the walk-through with" him, and then instructed Mr. Ward to remove everything below four feet, despite the fact that Mr. Ward initially recommended attempting to dry the area out. *Id.* at 44:18-46:25. Mr. Ward stated that he followed this order because "[t]here was no disagreeing with Mr. Bresette, ever." *Id.* at 46:22-25. Finally, Mr. Ward also testified that Mr. Bresette personally handled estimates and checks from the insurance company, and that there were several instances where, to the best of his knowledge, Mr. Bresette did not return extra insurance proceeds to a customer who was entitled to a refund. *Id.* at 50:20-79:18.

In sum, all of this evidence is sufficient to satisfy the State's burden of making a prima facie case that Mr. Bresette, BTTR, and HAM maintained a practice that is likely to deceive or mislead consumers acting reasonably under the circumstances, and that the practice is material. Section 6-13.1-1(6)(xiii); *Long II*, 93 A.3d at 1003.

B

Irreparable Harm

"The moving party seeking a preliminary injunction must demonstrate that it stands to suffer some irreparable harm that is presently threatened or imminent and for which no adequate legal remedy exists to restore that plaintiff to its rightful position." *Fund for Community Progress*, 695 A.2d at 521; *but see Town of North Kingstown v. International Association of Firefighters, Local 1651, AFL-CIO*, 65 A.3d 480, 482 (R.I. 2013) (holding that where a strong showing is made on likelihood of success on the merits, the moving party "need not make as strong a showing of irreparable harm").

The State has shown that continued harm to Rhode Island consumers is "presently threatened" if Defendants are able to continue engaging in contracting work. Defendants have shown an unwillingness to abide by orders from both DBR and this Court, as evidenced by the February 28, 2022 Consent Decree Withdrawal by DBR, the March 11, 2022 DBR Order Reinstating the Emergency Suspension, and the August 2022 Order by this Court holding BTTR in contempt for collecting monies in violation of the July 26, 2022 TRO. *See* State's Ex. 13, Order Withdrawing from the Consent Decree; State's Ex. 16, Order Re: Emergency Suspension; Order (on Defendants' Motion to Allow Collection and Deposits of Monies Owed from Consumers) (McHugh, J.). At this point, further Court action is necessary to prevent future harm to Rhode Island consumers.

C

Balancing of the Equities

"Having found a likelihood of success [on the merits] and an immediate irreparable injury, the trial justice should next consider the equities of the case by examining the hardship to the

moving party if the injunction is denied, the hardship to the opposing party if the injunction is granted and the public interest in denying or granting the requested relief." *Fund for Community Progress*, 695 A.2d at 521.

Here, the State requests a preliminary injunction pursuant to its ability to do so in the public interest under the DTPA. *See* §§ 6-13.1-2 and 6-13.1-5. While the State has not established that Defendant "prey[ed] on unsuspecting, often elderly Rhode Islanders," as alleged in its Complaint, the State has put forth sufficient evidence to demonstrate that the harm to the public, if the preliminary injunction is denied, outweighs the Defendants' interest in continuing to operate its business. *Compare* Compl. ¶ 17 *with* Hr'g Tr. 60:2-14, Sept. 12, 2022 (discussing that the ages of only two consumers were actually known by DBR). In considering the aforementioned examples of deception and unfair practices, including unfinished work, deceptive billing, and broadening the scope of work, the State has demonstrated that a balancing of the equities weighs in favor of the public interest of preventing Defendants from continuing to conduct their business and causing harm to Rhode Island consumers. *See e.g., infra* A.2; *Fund for Community Progress*, 695 A.2d at 521.

D

Status Quo

"In considering the equities, the hearing justice should bear in mind that 'the office of a preliminary injunction is not ordinarily to achieve a final and formal determination of the rights of the parties or of the merits of the controversy, but is merely to hold matters approximately in status quo, and in the meantime to prevent the doing of any acts whereby the rights in question may be irreparably injured or endangered.'" *Fund for Community Progress*, 695 A.2d at 521 (quoting *Coolbeth v. Berberian*, 112 R.I. 558, 564, 313 A.2d 656, 659 (1974)).

A preliminary injunction is necessary to maintain the status quo, which as of moment under the Amended TRO entered on September 21, 2022 and the Order on Defendants' Motion to Allow Collection and Deposits of Monies Owed from Consumers entered on October 31, 2022, is that Defendants are barred from engaging in contracting work in Rhode Island and are limited to collecting monies owed pursuant to the 90/10 List. *See* Amended Temporary Restraining Order (McHugh, J.); Order (on Defendants' Motion to Allow Collection and Deposits of Monies Owed from Consumers) (McHugh, J.). Issuing this Preliminary Injunction will keep these conditions in place until further order of the Court.

IV

Conclusion

In conclusion, the evidence set forth by the State is sufficient to establish a prima facie case of DTPA violations by Defendants. Notably, the State only needed to establish a prima facie case under *one* definition of "[u]nfair methods of competition and unfair or deceptive acts or practices[,]" and the evidence highlighted by the Court satisfies at least *three*. Sections 6-13.1-1 and 6-13.1-2; *see also Porcaro v. O'Rourke*, No. 08-ADMS-10007, 2008 WL 4456752, at *3 (Mass. App. Div. Sept. 25, 2008) (holding that the failure to obtain a building permit combined with installing undersized windows was sufficient evidence of an unfair and deceptive trade practices act violation under Massachusetts law); *Commonwealth v. Burns*, 663 A.2d 308, 310-11 (Pa. Commw. Ct. 1995) (holding that a contractor violated Pennsylvania's Unfair Trade Practices and Consumer Protection Law by coercing customers to make additional payments, failing to complete work, and otherwise performing work that was subpar). Therefore, the State has shown a reasonable likelihood of success on the merits, and after considering the other three factors of irreparable harm, the balancing of the equities, and the status quo, this Court is convinced that a

preliminary injunction is appropriate. It should also be mentioned that Defendants did not call witnesses of their own or otherwise put on a case.

For all these reasons, the State's Motion for a Preliminary Injunction is **GRANTED**, and the Amended TRO issued on September 21, 2022 is **EXTENDED** and **AMENDED** by the Preliminary Injunction Order accompanying this Decision until further order by this Court.