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. AUSTIN HOME VENTURES, LLC, a Colorado limited liability company dba CAPITAL ASSET RECOVERY dba CAPITAL REALTY; BRYAN JENSEN, individually and ETHAN EATON aka ETHAN GRAHAM, individually; BILLY FUSTON, individually; and BAILEY PEREZ, individually, Defendants.	▲ **COURT USE ONLY** ▲
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PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION	

Plaintiff, the State of Colorado, upon relation of Cynthia H. Coffman, Attorney General for the State of Colorado (hereinafter the "State"), by and through undersigned counsel, moves this Court for a preliminary injunction pursuant to C.R.S. § 6-1-110(1) (2015) and C.R.C.P. 65 (2015) to enjoin Defendants from engaging in deceptive trade practices in violation of the Colorado Consumer Protection Act, C.R.S. §§ 6-1-101 *et seq*. (2015) ("CCPA"), and the Colorado Foreclosure Protection Act, C.R.S. §§ 6-1-1101 *et seq*. (2015) ("CFPA"). As grounds for the foregoing, the State states as follows:

CERTIFICATE OF COMPLIANCE WITH C.R.C.P. RULE 121 § 1-15(8)

Pursuant to C.R.C.P. Rule 121 § 1-15(8), the undersigned counsel certify that they have conferred with counsel for Defendants Austin Home Ventures, LLC dba Capital Asset Recovery dba Capital Realty, Bryan Jensen, and Billy Fuston about the relief requested in this motion. These three Defendants oppose this motion.[1]

Defendants Ethan Graham aka Ethan Eaton and Bailey Perez are not represented by counsel at this time. Although opposing counsel have stated their belief that Eaton and Perez may decide to retain them, s*ee* Defs. Austin Home Ventures, LLC's and Bryan Jensen's Mot. to Extend Resp. Deadline ¶ 3 (Oct. 22, 2015), they have not entered appearances on behalf of or notified counsel for the State that they represent either of these Defendants. Opposing counsel has agreed to notify counsel for the State if and when any other Defendant retains them.

INTRODUCTION

1. The State filed a Complaint on September 17, 2015, and a First Amended Complaint on October 8, 2015, against Defendants Austin Home Ventures, LLC dba Capital Asset Recovery dba Capital Realty ("Austin Home Ventures"), Bryan Jensen, Ethan Graham aka Ethan Eaton ("Eaton"), Billy Fuston, and Bailey Perez (collectively, "Defendants"). The State's First Amended Complaint, which it incorporates by reference herein, alleges that Defendants violated and continue to violate the CCPA and the CFPA.

2. Defendants prey on homeowners whose properties received an overbid at a foreclosure sale, meaning that the property sold for more than the total amount owed to the lender. Defendants preempt the public trustee notification process by contacting these homeowners soon after the sale and claiming they will use their professional "expertise" to assist homeowners in recovering overbid funds.

[1] Although Dan Calisher and Chandler Kelley of Foster Graham Milstein & Calisher LLP have not formally entered an appearance on behalf of Billy Fuston, they have confirmed to counsel for the State that Ms. Fuston has retained them to represent her in this matter.

Defendants possess no specialized expertise and homeowners can easily obtain these overbid funds on their own through the public trustees at no cost. Defendants do minimal, if any, work for these consumers and then charge the consumer deceptive and unconscionable costs.

3. Defendants Austin Home Ventures, Jensen, and Eaton also deceive consumers by representing that they provide services for distressed homeowners, such as assisting homeowners to sell their homes in short sale transactions. Instead of helping these homeowners, Austin Home Ventures, Jensen, and Eaton secretly rent out the homes to third parties and keep the lease payments as profits for themselves. In at least one instance, these Defendants obtained title to a property for nominal consideration.

THE STATE'S INVESTIGATION

A. Investigation into Defendants' Overbid Fund Recovery Services

4. The State opened an investigation into Defendants and their businesses in response to a complaint from the Weld County Public Trustee, Susie Velasquez, on February 18, 2015. Ms. Velasquez had received an email from Jensen, on behalf of Capital Asset Recovery[2], requesting that she release a homeowner's overbid funds to him. The homeowner had signed a broad power of attorney appointing Defendants Fuston and Jensen as agents. Ms. Velasquez was concerned that Defendants may have taken advantage of the homeowner, as she knew that homeowners could easily obtain overbid funds without any assistance. Ms. Velasquez forwarded Jensen's email and attached documents to State Investigator Jamie Sells, and the State initiated an investigation. *See* Ex. 1, Aff. of Investigator Jamie Sells ¶ 4.

5. The State contacted other Colorado public trustees to inquire whether they had received similar requests from Jensen or any representative of Capital Asset Recovery. The State requested that any public trustee who had encountered Jensen or Capital Asset Recovery provide relevant information and documents. *Id.* ¶¶ 7–12. The State also met with numerous public trustees to learn about the overbid process in Colorado and their dealings with Defendants. *Id.* ¶¶ 14–16. The State obtained affidavits from public trustees of Adams, Arapahoe, Denver, El Paso, Larimer, Pueblo, and Weld counties, which are attached hereto as Exhibits 2–8.

[2] The State will refer to Austin Home Ventures as "Capital Asset Recovery" in connection with Defendants' overbid recovery business.

6. Upon receiving this information, the State's investigators identified and interviewed homeowners who had dealt with Defendants. Ex. 1 ¶ 17. The State's investigation revealed a pattern and practice of conduct in which representatives of Capital Asset Recovery deceived homeowners into using Defendants' overbid fund recovery services at unconscionable costs, as described more fully below. The State has attached affidavits from five consumers as Exhibits 9–13.

B. Investigation into Defendants' Equity Purchasing and Related Activities

7. During the course of its investigation into Capital Asset Recovery, the State became aware that Defendants Austin Home Ventures, Jensen, and Eaton also offer services to assist distressed homeowners. These Defendants carry on this arm of the business using the names Austin Home Ventures and Capital Realty, which is a trade name of Austin Home Ventures. Ex. 1 ¶¶ 20–21.

8. According to Capital Realty's website, Austin Home Ventures and Capital Realty assist struggling homeowners by buying properties for cash or as a short sale, taking over mortgage payments, and/or turning homeowners' properties into investments that generate cash over time. *Id.* ¶ 21 & *see id.* at Ex. C, Capital Realty Website at 1, "Providing Hope & Solutions for Homeowners."

9. The State identified and interviewed consumers who had enlisted the services of Capital Realty and has attached the affidavits of two such consumers as Exhibits 14 and 15. Through these interviews, the State learned that Austin Home Ventures, Jensen, and Eaton identify homes that appear to be abandoned, contact the property owners, and offer to sell their properties. *See* Ex. 1 ¶¶ 22–24. Neither Jensen nor Eaton is a licensed real estate broker in Colorado. Ex. 16, Resp. to Subpoena, at 9–10 ("None of the identified individuals [Jensen, Eaton, Fuston, or Perez] has a professional license.").

10. Rather than assisting homeowners, Austin Home Ventures, Jensen, and Eaton rent these properties to third parties, acting as both leasing agents and property managers. Without the knowledge or permission of the homeowners, at least some of whom are members of the military and stationed out-of-state, Defendants sign lease agreements with third parties and collect rental deposits and payments, keeping the rental income for themselves. Defendants do not make mortgage payments on the properties, do not disclose to the homeowners that they are renting the properties, and do not provide any portion of the lease payments to the homeowners. *See* Ex. 1 ¶ 22; Ex. 14, Aff. of K.A. ¶¶ 15–16; Ex. 15, Aff. of P.I. ¶¶ 13–15.

11. In at least one instance, under the guise of assisting the homeowner to sell his home, Austin Home Ventures, Jensen, and Eaton obtained a general warranty deed in favor of Austin Home Ventures for nominal consideration. *See* Ex. 14 ¶¶ 8, 17.

DEFENDANTS' DECEPTIVE TRADE PRACTICES IN CONNECTION WITH THEIR OVERBID FUND RECOVERY SERVICES

A. The Overbid Process in Colorado

12. In Colorado, public trustees are responsible for overseeing the foreclosure process. Among other things, public trustees handle releases of deeds of trust and foreclosures of deeds of trust. *See* Ex. 2, Aff. of Thomas S. Mowle ¶ 5; Ex. 3, Aff. of Susie Velasquez ¶ 5; Ex. 4, Aff. of Saul Trujillo ¶ 4; Ex. 5, Aff. of Susan A. Orecchio ¶ 3; Ex. 6, Aff. of Deborah Morgan ¶ 4; Ex. 7, Aff. of Cynthia D. Mares ¶ 5; Ex. 8, Aff. of Debra Johnson ¶ 4.

13. Public trustees conduct foreclosure auction sales on a periodic basis, typically once a week. *See* Ex. 2 ¶ 6; Ex. 3 ¶ 6; Ex. 4 ¶ 6; Ex. 5 ¶ 4; Ex. 6 ¶ 5; Ex. 7 ¶ 6; Ex. 8 ¶ 4.

14. If a property goes to a foreclosure auction sale and is sold for more than the total amount owed to the lender, the property owner may be entitled to overbid funds. Overbid funds may be reduced by amounts due to junior lienors. *See* Ex. 2 ¶¶ 6, 8; Ex. 3 ¶¶ 6, 8; Ex, 4 ¶¶ 6–7; Ex. 5 ¶ 4; Ex. 6 ¶¶ 5, 7; Ex. 7 ¶¶ 6, 8; Ex. 8 ¶¶ 4–5.

15. If overbid funds remain after all redemption periods expire, the public trustees must attempt to notify the owner whose property was sold at a foreclosure sale pursuant to C.R.S. § 38-38-111(2.5)(b). If the amount of the overbid is equal to or greater than $25, the public trustee "shall make reasonable efforts to identify the owner's current address." C.R.S. § 38-38-111(2.5)(b). The public trustees must mail the owner a notice regarding the remaining overbid funds no later than 30 days after the expiration of all redemption periods. *Id.*

16. Many public trustees also attempt to notify owners of overbid funds the day of or a couple days after the foreclosure sale and undertake significant efforts to locate these owners, including but not limited to, accessing social media websites, searching Lexis/Nexis, conducting internet searches, reviewing voter registration records, and coordinating with local law enforcement. Ex. 2 ¶ 7; Ex. 3 ¶ 7; Ex. 4 ¶ 8; Ex. 5 ¶ 5; Ex. 6 ¶¶ 6, 8; Ex. 7 ¶¶ 7, 9; Ex. 8 ¶¶ 6–7.

17. If an overbid exceeding $500 has not been claimed within 60 calendar days from the expiration of all redemption periods, the public trustees shall, within 90 calendar days from the expiration of all redemption periods, publish a notice for four weeks in a newspaper of general circulation. C.R.S. § 38-38-111(3)(b).

18. The public trustees hold any unclaimed overbid funds from sales occurring on or after September 1, 2012, in escrow for a period of five years from the date of the foreclosure sale. C.R.S. § 38-38-111(3)(a). Any unclaimed overbid funds exceeding $25 that are not claimed within five years of the sale are presumed to be unclaimed property pursuant to the Unclaimed Property Act, C.R.S. §§ 38-13-101, *et seq.*, and must be transferred in accordance with that Act. C.R.S. § 38-38-111(3)(a).

19. In order to obtain overbid funds, a homeowner or other person entitled to collect the funds simply needs to go to the public trustee's office with appropriate identification and complete the required paperwork, such as signing a receipt or document verifying that he or she is entitled to receive the funds. Although each public trustee's office has its own policies and procedures for claiming overbid funds, the processes are similar and straightforward. *See* Ex. 2 ¶ 11; Ex. 3 ¶ 11; Ex. 4 ¶ 10; Ex. 5 ¶ 7; Ex. 6 ¶ 10; Ex. 7 ¶ 10; Ex. 8 ¶ 9.

20. Regardless of the county, the owner is never required to pay any fee to the public trustee or a third party in order to obtain overbid funds. There are no professional skills and abilities needed to recover overbid funds. *See* Ex. 2 ¶¶ 11, 13; Ex. 3 ¶¶ 11, 13 & Ex. A; Ex. 4 ¶¶ 10–11 & Ex. A; Ex. 5 ¶¶ 7, 9; Ex. 6 ¶¶ 10, 12 & Ex. A; Ex. 8 ¶¶ 9, 14; *see also* Ex. 7 ¶ 10 & Ex. A.

B. Defendants Preempt the Public Trustee Process and Deceive Consumers to Obtain a Percentage of the Consumer's Overbid Funds.

21. Defendants interfere with the public trustee process by contacting owners whose properties have received an overbid on the day of, or a few days after, the foreclosure sale in order to convince the owners to use their services. *See* Ex. 2 ¶¶ 15–18; Ex. 3 ¶¶ 15–19, 22–25; Ex. 4 ¶¶ 14–15; Ex. 5 ¶¶ 12–13, 17–18; Ex. 6 ¶¶ 14–17; Ex. 7 ¶¶ 16, 21, 24–25, 27; Ex. 8 ¶¶ 21–24; Ex. 9, Aff. of Mark Shank. ¶ 3; Ex. 10, Aff. of Sherise Peterson. ¶¶ 2, 5; Ex. 11, Aff. of Nickelas Gallup.¶ 5; Ex. 12, Aff. of Christine Hill ¶¶ 2–3. In cases where the property owner is deceased, Defendants contact the owner's current and/or former family members. *See* Ex. 8, ¶¶ 26–30; Ex. 13, Aff. of Ray Cash, Sr. ¶¶ 3–4.

22. Defendants tell the owners that they are entitled to money because their homes received an overbid at the foreclosure sale. *See* Ex. 9 ¶ 3; Ex. 10 ¶ 5; Ex. 11 ¶ 5; Ex. 12 ¶ 4; Ex. 13 ¶ 4.

23. Defendants represent that obtaining these overbid funds can be problematic, that the government keeps the money, and that homeowners get ripped off. *See* Ex. 10 ¶ 6. Defendants make similar statements on their Capital Asset Recovery website:

> There is a conflict of interest in many jurisdictions in which the agency holding your money will eventually keep it. They make little or minimal effort in notifying you. . . . [T]hey wait until the statute of limitation has expired and consider your claim and money to be abandoned and forfeited. Then your money become their money or legally property the government or the agency responsible for holding your money [sic].

Ex. 1 at Ex. A, Capital Asset Recovery Website at 5, "Frequently Asked Questions."

24. Defendants portray themselves as having the expertise necessary to recover overbid funds on homeowners' behalf:

> Q: Why should I use your company?
>
> A: We specialize in locating and processing unclaimed funds. We have this process streamlined. The first step to claiming the money is finding it. Most claims are difficult to find as they cannot be found via the internet and it is recommended to hire an experienced representative to process the claim on your behalf.
>
> The agency holding your money may have stringent requirements that must be performed before accepting your claim. These agencies are often times difficult to communicate and correspond with and have incentive to delay or even find cause to not relinquish your money. They stand to keep your money if you do not play by their rules and meet their deadlines. Therefore, it is wise to have Capital Asset Recovery on your side fighting to get your money for you.

Id. at 6.

25. These representations are misleading and deceptive, because the public trustees have no interest in keeping overbid funds and engage in statutorily-required and significant voluntary efforts to notify the homeowner that he or she is due overbid funds. *See supra* ¶¶ 15–16.

26. These representations are further misleading and deceptive because consumers can easily obtain overbid funds on their own and for free, which Defendants do not explain and in fact purposefully preempt. *See supra* ¶¶ 19–20; *see also* Ex. 9 ¶ 20; Ex. 10 ¶ 12; Ex. 11 ¶ 7, 16; Ex. 12 ¶ 8; Ex. 13 ¶¶ 21–22.

27. In many instances, Defendants do not inform the homeowner of the full amount of overbid or disclose that this amount may be reduced by amounts redeemed by junior lienors. Rather, Defendants tell the owners that they are entitled to an amount equivalent to roughly half of the overbid funds—omitting the fact that owners are also entitled to the other half. *See* Ex. 9 ¶¶ 6, 9–10; Ex. 10 ¶¶ 6, 8; Ex. 11 ¶¶ 5, 8, 16.

28. Defendants rely on these misrepresentations and omissions to secure homeowners' agreement to use Defendants' overbid fund recovery services before the public trustees have an opportunity to notify the homeowner. *See* Ex. 9 ¶ 20; Ex. 10 ¶¶ 12–13; Ex. 11 ¶ 16; Ex. 12 ¶ 12; Ex. 13 ¶¶ 21–22.

29. Throughout this process, Defendants represent themselves to be and act as "foreclosure consultants," which are subject to the CFPA. C.R.S. § 6-1-1103(4)(a)(IX) defines a "foreclosure consultant" as

> a person who does not, directly or through an associate, take or acquire any interest in or title to a homeowner's property and who, in the course of such person's business, vocation, or occupation, makes a solicitation, representation, or offer to a home owner to perform, in exchange for compensation from the home owner or from the proceeds of any loan or advance of funds, a service that the person represents will . . . (IX) Assist the home owner in obtaining from the beneficiary, mortgagee, or grantee of the lien in foreclosure, or from counsel for such beneficiary, mortgagee, or grantee, the remaining or excess proceeds from the foreclosure sale of the residence in foreclosure.

An "associate" of a foreclosure consultant means "a partner, subsidiary, affiliate, agent, or any other person working in association with a foreclosure consultant." C.R.S. § 6-1-1103(1).

30. After convincing homeowners that they need Defendants' services, Defendants continue their deceptive and unconscionable practices in obtaining and distributing these funds. *See e.g.*, Ex. 9 at Ex. A, Assignment Agreement at 3, "Notice Required by Colorado Law"; Ex. 11 at Ex. A, Assignment Agreement at 3, "Notice Required by Colorado Law"; Ex. 12 at Ex. A, Assignment Agreement at 3, "Notice Required by Colorado Law"; Ex. 13 at Ex. A, Assignment Agreement at 3, "Notice Required by Colorado Law.

31. First, Defendants represent that they will pay all expenses associated with obtaining the overbid funds when, in fact, Defendants make homeowners pay them. Defendants make this misrepresentation via:

A. An early communication such as a cover letter or email that states: Capital Asset Recovery "*pay[s] for all expenses related to the process* and . . . fight[s] to reduce or eliminate unfair bank fees, liens, attorney's fees and HOA fees." (Emphasis added.) Defendants represent that returning the documents to Capital Asset Recovery will cost the homeowner nothing, and they even include a prepaid FedEx Shipping Return Label. *See* Ex. 9 at Ex. A at 1–2; Ex. 11 at Ex. A at 1–2; Ex. 13 at Ex. A at 1–2.

B. Capital Asset Recovery's website, which states that it "pay[s] for all expenses and fees, including but not limited to, title report fees, courier fees, filing fees, liens and any other costs related to the recovery process." Ex. 1 at Ex. A at 3, 6.

C. An Assignment Agreement that Defendants require homeowners to execute, which states that Capital Asset Recovery "*shall be responsible for any expenses incurred* in connection with its efforts to collect any Unclaimed Funds." (Emphasis added.) Later, however, the Assignment Agreement indicates that Capital Asset Recovery "shall first be reimbursed for any expenses incurred." *See* Ex. 9 at Ex. A, Assignment Agreement ¶ 2; Ex. 11 at Ex. A, Assignment Agreement ¶ 2; Ex. 12 at Ex. A, Assignment Agreement ¶ 2; Ex. 13 at Ex. A, Assignment Agreement ¶ 2.

32. Despite these conflicting representations, Defendants deduct expenses, which typically include mailing and notary fees, from homeowners' overbid funds

before splitting the overbid funds. Indeed, Defendants even charge the owners the fees incurred from using the prepaid FedEx Shipping Return Label. This practice has cost homeowners hundreds of dollars. *See e.g.*, Ex. 9 at Ex. D (deducting $415 in expenses); Ex. 13 at Ex. D (deducting $205 in expenses).

33. Importantly, these expenses would not be incurred by homeowners had Defendants not preempted the public trustee process. There are no fees required to obtain overbid funds, and these expenses are solely the product of Defendants' unnecessary involvement and attempt to siphon off overbid funds for themselves. *See supra* ¶¶ 19–20.

34. Second, Defendants frequently fail to disclose the full amount of the overbid available to homeowners. Instead, Defendants only tell homeowners that they are entitled to an "anticipated net allocated amount," which is typically 50% to 80% of the overbid. Additionally, Defendants intentionally omit the fact that they deduct their fees from the overbid amount prior to calculating the owner's anticipated net allocated amount. *See* Ex. 9 ¶¶ 9, 13 & Ex. A, Assignment Agreement ¶ 2; Ex. 11 ¶¶ 8, 15–16 & Ex. A, Assignment Agreement ¶ 2; *see also* Ex. 1 ¶ 17(e) & (g).

35. Third, Defendants require homeowners to sign an Assignment Agreement that contains numerous misrepresentations and omissions, including:

A. Representing that each party has had at least 24 hours to review prior to execution, when they have not. *See* Ex. 9 at Ex. A, Assignment Agreement ¶ 5(j); Ex. 11 at Ex. A, Assignment Agreement ¶ 5(j); Ex. 12 at Ex. A, Assignment Agreement ¶ 5(j); Ex. 13 at Ex. A, Assignment Agreement ¶ 5(j). Many owners saw the documents for the first time when they executed the documents, which is a violation of C.R.S. § 6-1-1104(1). *See* Ex. 9 ¶ 7; Ex. 10 ¶ 8; Ex. 12 ¶ 6; Ex. 13 ¶ 5.

B. As described in paragraph 33 above, setting forth an "anticipated net allocated amount" that does not reflect the full amount of the overbid to which the owner is entitled. Moreover, in most instances the Agreement is drafted prior to the expiration of the redemption periods, so it is unknown whether junior lienors will redeem and reduce the amount of available overbid funds. *See supra* ¶ 21; *see also* Ex. 3 ¶¶ 22-29.

C. As described in paragraph 30(C) above, representing that Defendants will pay expenses when they do not.

36. Defendants frequently do not provide homeowners with executed copies of this Agreement in violation of the CFPA. *See* C.R.S. § 6-1-1104(7) (requiring foreclosure consultant to provide homeowner a signed, dated, and acknowledged copy of foreclosure consulting contract immediately upon execution); *see also* Ex. 12 ¶¶ 6, 9.

37. Fourth, Defendants require homeowners to execute a "Special Durable Power of Attorney for Financial and Real Estate Transactions" ("Power of Attorney"), which needlessly grants a variety of broad powers to two "agents": one being Jensen and the other being Fuston, Bailey, or Eaton. *See* Ex. 9 at Ex. A, Power of Attorney; Ex. 11 at Ex. A, Power of Attorney; Ex. 12 at Ex. A, Power of Attorney; Ex. 13 at Ex. A, Power of Attorney.

38. This Power of Attorney violates the CCPA, as the CFPA prohibits a foreclosure consultant or associate from "[o]btain[ing] a power of attorney from a homeowner *for any purpose other than to inspect documents as provided by law*" and from engaging in any unconscionable transaction. C.R.S. §§ 6-1-1107(1)(f) (emphasis added) & 6-1-1109(1). Contrary to this command, and among other things, Defendants' Power of Attorney grants them the power to:

A. Execute and deliver legal instruments relating to the property and loan documents, such as affidavits (Ex. 9 at Ex. A, Power of Attorney ¶ 1; Ex. 11 at Ex. A, Power of Attorney ¶ 1; Ex. 12 at Ex. A, Power of Attorney ¶ 1; Ex. 13 at Ex. A, Power of Attorney ¶ 1);

B. Request and accept all loan information from the owner's lender, including payment histories, pay-off amounts, and account balances (*id.* ¶ 2);

C. Make insurance claims on behalf of the owner and receive the owner's net insurance proceeds by check payable to Jensen or other agents (*id.* ¶ 3);

D. Purchase insurance on the property in the name of the owner (*id.* ¶ 4);

E. Receive the proceeds of any check from the owner's lender or the lender's representative made payable to Jensen or the other agents, including but not limited to payments resulting from refunds or reimbursements for overages of tax and insurance escrow amounts, double payments to the lender, and from "sales proceeds of the Property pursuant to any forced sale by Lender" (*id.* ¶ 5);

F. "Endorse to the Agent, any and all payments made payable to [the owner], whether jointly or individually, from the Lender" (*id.* ¶ 6);

G. Retain outside counsel, including executing an attorney/client agreement (*id.* ¶ 8);

H. Temporarily modify the owner's mailing address (*id.* ¶ 12); and

I. Access homeowners' bank accounts to "[i]nitiate and complete outbound wire or automated clearing house transfers from [owner's] bank/financial institution account for the sole purpose of compensating Agent pursuant to the agreed upon percent split in accordance with the related Assignment Agreement" (*id.* ¶ 14).

39. The Power of Attorney further (1) requires homeowners to provide social security numbers, dates of birth, and driver license numbers along with copies of social security cards and driver licenses; (2) states that the owner may not revoke the Power of Attorney; (3) states that it is not impacted by the subsequent disability or incapacity of the owner; and (4) indicates that it will not lapse. *Id.* at 1, ¶¶ 9–10.

40. Fifth, at no point in this process do Defendants describe the overbid fund recovery process or notify homeowners that they can obtain overbid funds for free by working directly with the public trustees. *See* Ex. 9 ¶ 20; Ex. 10 ¶ 12; Ex. 11 ¶ 7, 16; Ex. 12 ¶ 8; Ex. 13 ¶¶ 21–22.

41. Sixth, upon receiving the above-described documents from a homeowner, Defendants contact the public trustee to claim overbid funds on behalf of the homeowner, instructing public trustees to "ONLY contact [them] regarding the recovery of any and all excess proceeds/surplus funds." *See* Ex. 2 at Ex. B; Ex. 3 at Ex. D; Ex. 4 at Ex. B; Ex. 5 at Exs. C–D; Ex. 6 at Ex. C; Ex. 7 at Ex. C; Ex. 8 at Exs. B–C. The only reason for this provision is to attempt to prevent or impede the trustee and homeowner from communicating directly.

42. Defendants' communications with the public trustees track the following pattern:

A. Jensen sends a communication and documents to the public trustee of the county where the owner's property is located via email, facsimile, and/or mail. *See* Ex. 1 ¶ 15; Ex. 2 ¶¶ 14, 16; Ex. 3 ¶¶ 16–17, 23–24; Ex. 4 ¶¶ 15–16; Ex. 5 ¶¶ 13–14; Ex. 6 ¶¶ 15–16; Ex. 7 ¶¶ 14–15, 19–20, 25–26; Ex. 8 ¶¶ 22–23, 28–29.

B. Jensen represents to the public trustee that the owners have granted him the power to act on their behalf in an attempt to claim and recover any and all excess proceeds or surplus/overbid funds resulting from a foreclosure sale. Ex. 2 at Ex. B; Ex. 3 at Ex. D; Ex. 4 at Ex. B; Ex. 5 at Exs. C–D; Ex. 6 at Ex. C; Ex. 7 at Ex. C; Ex. 8 at Exs. B–C.

C. Jensen attaches a copy of the executed Power of Attorney, Notarized Copy of Photo Identification (including copies of social security cards, driver licenses, and other documents), and Notice of Election and Demand. In some instances, Jensen also forwards other documents such as a Collection of Personal Property by Affidavit and an Affidavit of Fact/Affidavit of Demand (Demand Statement). *Id.*

D. Jensen requests that the public trustees only contact him regarding the overbid funds. *Id.*

43. At the conclusion of this process, Defendants typically either:

A. Accompany the homeowner to the public trustee's office to obtain the overbid check, immediately drive the owner to a bank in order to cash the check, and demand cash, on the spot, in an amount equal to that set forth in the Agreement in addition to expenses, s*ee* Ex. 10 ¶¶ 9–10;

B. Obtain the overbid check directly from the homeowner, cash the check themselves (likely using their power of attorney), and cut a check to the owner for their portion, *see* Ex. 12 ¶¶ 9–11; or

C. Obtain the overbid check directly from the public trustee (even where the check is made payable to the homeowner—not Defendants), cash the check (likely by using their power of attorney), deduct their costs and expenses, and forward a percentage of the overbid funds to the owner. *See* Ex. 13 ¶¶ 17–18 & Ex. D; Ex. 11 ¶¶ 13–14 (explaining that he received a check from Austin Home Ventures rather than the public trustee); Ex. 9 ¶¶ 18–19 & Ex. E; Ex. 7 ¶ 23.

44. Other than sending an email to the public trustee and ensuring that owners sign documents necessary to enable Defendants to obtain a significant portion of the overbid, Defendants do not provide any other services to homeowners.

45. And, despite professing "expertise" in obtaining overbid funds, Defendants' interactions with several public trustees demonstrate otherwise.

46. For example, with respect to one property in Denver County, Jensen made claims on behalf of six purported successors of the deceased owner. Despite multiple requests from the Denver County Public Trustee, Jensen refused to provide letters of testamentary intent or letters of administration issued by a probate court to show which of these six persons had been appointed as the personal representative of the estate. Rather than providing the required documents, Jensen indicated that he would require the Denver County Public Trustee to pay attorney fees and costs if she did not honor his requests. *See* Ex. 8 ¶¶ 26–30.

47. In another instance, Jensen harassed and threatened to sue a public trustee, because the public trustee gave the overbid funds directly to the owner instead of giving the funds to Jensen. *See* Ex. 4 ¶ 19.

C. Consumer Examples

48. The following examples illustrate Defendants' deceptive and unlawful practices and the harmful impact of their conduct on Colorado consumers.

49. Consumer Nickelas Gallup lost his home in foreclosure in late 2014. Shortly after his home sold at auction, Defendant Perez contacted him and told him that his home sold for more than he owed, and that he was entitled to excess funds. She represented that she could help him recover these funds, which she said would approximate $20,000 after fees and costs. She did not disclose the actual amount of the overbid, which exceeded $50,000, nor did she tell him that he could obtain his overbid funds on his own and for free through the public trustee. Instead, she "led [him] to believe this was the best way for [him] to get the money." Ex. 11 ¶¶ 4–7. Mr. Gallup indicated to Perez that he had been a victim of a mass shooting and had experienced subsequent medical and financial issues, so he "thought receiving this money was a blessing." *Id.* ¶ 7.

50. Perez represented that her company would pay for all expenses related to the process. *Id.* ¶ 8. She sent Mr. Gallup several documents to sign, including a Power of Attorney and an Assignment Agreement, which estimated his anticipated share to be $23,838.71. Defendants ultimately deposited $21,105.87 into Mr. Gallup's bank account—even less than the amount set forth in the Assignment Agreement. Later, Mr. Gallup learned that he had actually been entitled to $42,306.73 in overbid funds. Defendants had taken *over half* of this amount for their fees and expenses despite doing only nominal work in obtaining the excess funds. *See id.* ¶¶ 8, 14, 16.

51. Consumer Mark Shank lost his home in foreclosure in February 2015. The day of the foreclosure sale, Defendant Fuston called Mr. Shank and told him that his home had sold for more than he owed on the mortgage, that he had money due to him, and that she could help him obtain this money. She sent a notary to his home with documents to sign, including a Power of Attorney and Assignment Agreement. The Assignment Agreement stated that Mr. Shank would be entitled to $3,671.00 following a 50/50 split with Capital Asset Recovery. *See* Ex. 9 ¶¶ 2–4, 7 & Ex. A, Assignment Agreement ¶ 2.

52. Approximately one week after signing the documents, Mr. Shank received a letter from the Arapahoe County Public Trustee stating that he was entitled to $22,000—roughly *six times* the amount Capital Asset Recovery told him he would receive. Because Mr. Shank had already signed paperwork with Capital Asset Recovery, he felt that he had to honor what he had signed. Despite the fact that Defendants misled him, he assumed that the discrepancy was his own fault—that he had "probably had messed up getting [his] money." *Id.* ¶¶ 10, 12.

53. Mr. Shank spoke with Fuston again and told her about the letter he had received from the public trustee, stating that he "better be getting more than the $3600." Fuston told him he would get half of the $22,000. Capital Asset Recovery sent Mr. Shank a check from Austin Home Ventures for $10,792.50—just under half the overbid funds owed to him. In addition to Defendants' fees, Mr. Shank paid $415 in expenses that he would not have incurred but for Defendants' deception. *Id.* ¶¶ 13, 18, & Ex. D.

54. Consumer Ray Cash, Sr. is 85 years old. His son passed away in July 2013, leaving behind a home that subsequently went into foreclosure. Sometime after the foreclosure sale, Perez called Mr. Cash. She told him that she was with a recovery service that helped people recover money owed to them, and that Mr. Cash was entitled to approximately $6,400.00 in overbid funds from the sale of his son's home. Defendant Perez led him to believe that this was a "good deal" and "the best [he] could do," and Mr. Cash thought this was the only way he would receive the overbid funds. Ex. 13 ¶¶ 2–4, 12.

55. Defendants required Mr. Cash to sign a Power of Attorney and an Assignment Agreement, which estimated his recovery to be $3,205.13. *Id.* ¶ 8 & Ex. A, Assignment Agreement ¶ 2. Sometime after Mr. Cash signed these forms, Defendant Jensen came to his home and gave him a copy of a check for $6,410.25 sent to him "c/o Capital Asset Recovery." *Id.* ¶ 13. Jensen told him he would receive half this amount less expenses. *Id.* Mr. Cash ultimately received a check from Austin Home Ventures for only $3,102.63—even less than his estimated

recovery. *Id.* ¶ 18. Austin Home Ventures had deducted $205 in needless notary and FedEx fees, and split the remainder in half. *Id.* at Ex. D. Thus, Austin Home Ventures received $3,102.63 in exchange for its services, which consisted of nothing more than sending an email to the public trustee and requesting that the consumer sign documents that enabled the check to be sent to Capital Asset Recovery. *Id.*

56. Consumer Christine Hill lost her home in foreclosure in July 2014. Soon after, a representative of Capital Asset Recovery reached out to Ms. Hill and left a message asking her to call them. Ms. Hill conducted a Yahoo search to see if the company was legitimate, and, because she did not find any complaints, returned the call and spoke with Defendant Eaton. He told her he was calling with the "great news" that there was an overbid on her home and there was money owed to her and her ex-husband. Ms. Hill asked if there was a fee for the service, and Eaton responded that it would be 20%. Ex. 12 ¶¶ 2–5.

57. Eaton took Ms. Hill to a bank to sign and notarize documents. About a week later, Ms. Hill learned that the El Paso County Public Trustee had sent a letter to her ex-husband's home addressed to her and her ex-husband advising them of the overbid funds. Before receiving the letter, Ms. Hill did not know that she could obtain overbid funds on her own. However, because she had signed a contract with Capital Asset Recovery, Ms. Hill felt she had to continue working with them. *Id.* ¶¶ 6, 8.

58. Eaton drove Ms. Hill to the El Paso Public Trustee's Office to collect the overbid funds. The Public Trustee gave Ms. Hill a check for $28,410.09, which Ms. Hill immediately handed over to Eaton. Eaton took Ms. Hill to his office, where Jensen cut checks to her and her ex-husband totaling $22,728.07. Thus, Capital Asset Recovery kept $5,682.02 of Ms. Hill's overbid funds for itself by preempting the notification process and performing marginal, unnecessary services. *Id.* ¶¶ 10–12.

59. Consumer Sherise Peterson's home went into foreclosure and was sold at auction in March 2015. Soon after, Ms. Peterson received a phone call from the El Paso County Public Trustee informing her that her home sold for more than she owed and that she may be entitled to $18,000. The Public Trustee told Ms. Peterson that she would need to wait 10 days from the date of the sale to see whether any junior lienors claimed the funds. Ms. Peterson was aware of two liens against her property and did not anticipate receiving any of the excess proceeds. In fact, she thought that the liens were for more than $18,000 and that she would have to pay money in the end. Ex. 10 ¶¶ 2–4.

60. Ms. Peterson then received a call from Defendant Perez of Capital Asset Recovery, who told her that she had overbid funds due to her. Perez told Ms. Peterson that homeowners are frequently not aware of these funds, the government keeps the money, homeowners get "ripped off," and that Capital Asset Recovery could help if she signed a contract and paid a fee. She did not tell Ms. Peterson that the fee was 50% of the overbid funds. *Id.* ¶¶ 5–6.

61. Ms. Peterson agreed to meet Perez at a bank to review and sign the documents. Ms. Peterson was very surprised at the 50% fee, but Perez asserted this was the cost for Capital Asset Recovery's assistance. Ms. Peterson felt desperate and needed the $9,000; she was afraid that she would have to pay money to the Public Trustee without Perez's help. *Id.* ¶ 8.

62. Perez then drove Ms. Peterson to the El Paso County Public Trustee's office, were she picked up a check for $18,344.72. *Id.* ¶ 9. Next, Perez drove Ms. Peterson to cash the check and took roughly $9,000 cash for herself. *Id.* ¶ 10. During this time period, Ms. Peterson's cell phone had been broken and she was unable to make or receive calls. *Id.* ¶ 11. When she had her phone fixed, she had a voicemail from the El Paso County Public Trustee stating that her overbid funds check of $18,000 was ready to be picked up. *Id.* Ms. Peterson did not know that she could have picked up the check herself because Perez had led her to believe that the only way to receive the entire amount was with her help. *Id.* ¶ 12. As explained in Ms. Peterson's affidavit, she felt that Perez did nothing to help her, and instead had "played" her while she was in a vulnerable financial state. *Id.* ¶ 13.

63. As these examples and the accompanying affidavits illustrate, Defendants deceive consumers into believing that their services are necessary to claim overbid funds, when in fact consumers can obtain these funds on their own and for free through a straightforward process with the public trustees. Defendants then deduct an unconscionably high portion of the overbid funds to keep for themselves—often never even informing homeowners that that they are legally entitled to the entire amount.

64. The State has determined that Defendants have contacted at least 26 homeowners who were entitled to receive overbid funds ranging up to $59,061.44. Ex. 1 ¶ 18 & Ex. B. Five of these consumers are considered elderly under the CCPA. C.R.S. § 6-1-102(4.4) (defining "elderly person" as 60 years of age or older).

65. While Defendants did not obtain money from all of these owners, the State has determined that Defendants received at least $101,897.26 from 12 separate homeowners. *Id.* ¶ 19 & Ex. B. It is possible that Defendants obtained more money from additional owners.

66. Finally, Defendants may be continuing to contact homeowners and referring them to third parties. *See* Ex. 16 ¶ 6. Defendants' website is still up and running, and they still possess very broad powers of attorney for several homeowners.

DEFENDANTS' DECEPTIVE TRADE PRACTICES IN CONNECTION WITH THEIR EQUITY PURCHASING AND RELATED SERVICES

67. Defendants have refused to provide the State with information about any of their business activities outside of the overbid recovery business, despite Austin Home Venture's receipt of a lawful subpoena from the State. *Id.* at 2 ("Capital Asset objects generally to the Requests to the extent they seek information and documents unrelated to Capital Asset's overbid fund business."); *see also id.* ¶¶ 1, 7–10, 12, 13, 18. Even though they have refused to cooperate with the State's investigation, the State has determined that Defendants Austin Home Ventures, Jensen, and Eaton have engaged in other deceptive conduct.

A. Defendants Austin Home Ventures, Jensen, and Eaton Make Misrepresentations and Omissions About Their Equity Purchasing and Related Activities to Homeowners.

68. Defendants Austin Home Ventures, Jensen, and Eaton also engage in misleading and deceptive business practices through their equity purchasing and related activities. Similar to the overbid funds recovery business, these Defendants make material omissions and misrepresentations throughout the process and profit substantially while claiming to help distressed homeowners.

69. Austin Home Ventures claims on its Capital Realty website that it provides "hope and solutions for struggling homeowners" and proclaims: "WE ARE HERE TO HELP!" Ex. 1 ¶ 21 & Ex. C at 2. Austin Home Ventures represents that it is interested in buying properties for cash or as a short sale, taking over mortgage payments, and/or turning consumers' properties into investments that generate cash over time. *Id.* at 1.

70. Austin Home Ventures represents that it provides services for distressed homeowners, including those who are facing foreclosure, having trouble selling their homes, behind on their house payments, and/or have an expired realtor listing. *Id.* at 8.

71. Austin Home Ventures advocates three options for struggling homeowners:

A. Buy and Renovate: Capital Realty or its associates will make "a cash offer and close quickly." As neither Jensen nor Eaton is a real estate broker, the consumer is not "responsible for paying any fees [or] commissions," and there will be reduced closing costs.

B. Little or No Equity: Capital Realty offers a solution for homeowners with little or no equity that will save a house from going into foreclosure and generate thousands of dollars to consumers. Capital Realty claims that this program is "unprecedented" and has been called "ingenious" by real estate professionals and business professors. However, Capital Realty does not explain this option on its website, because it is "reluctant to reveal the details . . . as competitors may steal [the] idea."

C. Break-Even Equity: Capital Realty offers to eliminate closing costs and "take over" the homeowner's mortgage payments, even if the homeowner is behind in making the payments. Then, Capital Asset will refinance the property in three to five years to get the property out of the homeowner's name.

Id. at 3–4. Austin Home Ventures advertises that it will "TURN YOUR HOUSE INTO A CASH MAKING MACHINE!!!" *Id.* at 9.

72. Austin Home Ventures claims that it has negotiated with Colorado homeowners' lenders to postpone foreclosure sales making "thousands in the meantime." *Id.* at 12.

73. The State's investigation revealed that Jensen and Eaton first identify homes that appear to be abandoned. Eaton then contacts the property owners to determine whether the owners are interested in their services. Ex. 1 ¶¶ 22–23.

74. At least some of the homeowners contacted by Eaton are active members of the military and had to move out of their homes when they received orders assigning them to serve at a location in another state. *See* Ex. 14 ¶ 3; Ex. 15 ¶ 2. These homeowners still owned their homes and were attempting to sell them when contacted by Defendants. *See* Ex. 14 ¶¶ 3–5; Ex. 14 ¶¶ 2–4.

75. Eaton claims to assist homeowners by selling (including short-selling) their properties. Ex. 14 ¶¶ 6–7; Ex. 15 ¶ 5.

76. Rather than assisting homeowners, Austin Home Ventures, Jensen, and Eaton rent the properties to third parties, acting as both leasing agents and property managers. Without the knowledge or permission of the homeowners, these Defendants sign lease agreements with third parties and collect rental deposits and payments. Ex. 14 ¶¶ 13, 15–16; Ex. 15 ¶¶ 11–14.

77. Austin Home Ventures, Jensen, and Eaton act or have acted as leasing agents, property managers, or sellers for at least 14 properties in Colorado. Ex. 1 ¶ 24.

78. C.R.S. § 12-61-102 states that it is "unlawful for any person, firm, partnership, limited liability company, association, or corporation to engage in the business or capacity of real estate broker in this state without first having obtained a license from the real estate commission." *See also* C.R.S. § 6-1-105(1)(z) (providing that it is a violation of the CCPA to refuse or fail to obtain governmental licenses required to perform services).

79. C.R.S. § 12-61-101(2)(a) defines a "real estate broker" to mean

> any person, firm, partnership, limited liability company, association, or corporation who, in consideration of compensation of compensation by fee, commission, salary, or anything of value or with the intention of receiving or collecting such compensation, engages in or offers or attempts to engage in, either directly or indirectly, by a continuing course of conduct or by any single act or transaction, any of the following acts:
>
> (I) Selling, exchanging, buying, renting, or leasing real estate, or interest therein . . .
> (II) Offering to sell, exchange, buy, rent, or lease real estate or interest therein . . .
> . . .
> (IV) Negotiating the purchase, sale, or exchange of real estate, or interest therein . . .
> (V) Listing, offering, attempting, or agreeing to list real estate, or interest therein . . . for sale, exchange, rent, or lease . . . .

80. Neither Jensen nor Eaton is a licensed real estate broker in Colorado. *See* Ex. 16 ¶ 16 ("None of the identified individuals [Jensen, Eaton, Fuston, or Perez] has a professional license.").

B. While Defendants Austin Home Ventures, Jensen, and Eaton Represent That They Will Negotiate Short Sales For, Sell, or Buy Consumers' Distressed Homes, They Secretly Rent the Homes To Third Parties and Collect Rental Payments Without Notifying the Owners.

81. Eaton represented to at least one homeowner, P.I., that he would attempt to negotiate a short sale with the homeowner's lender. The homeowner, who is active duty military, received transfer orders that required him and his family to move out of Colorado. Ex. 15 ¶¶ 2, 5.

82. Eaton presented P.I. with a "Standard Purchase and Sale Agreement for Real Property," listing the buyer as Austin Home Ventures LLC and/or Assigns. *Id.* at Ex. B. The purchase price listed in the agreement was less than half of what the homeowners owed on the property, meaning that it would be a short sale. Jensen signed this document by and for Austin Home Ventures. *Id.* Neither Austin Home Ventures nor Jensen nor Eaton gave P.I. any money. *Id.* ¶ 14.

83. Austin Home Ventures, Jensen, and Eaton never contacted P.I.'s lender to attempt to negotiate a short sale. *Id.* ¶ 15.

84. Instead of working with P.I.'s lender, and unbeknownst to him, Austin Home Ventures, Jensen, and Eaton rented out the property to a third party and collected rental payments. *Id.* ¶¶ 11–14. These Defendants did not forward any lease payments to P.I., did not pay any portion of the mortgage payments, and did not disclose to P.I. that that they were leasing the property until P.I. discovered this information through a third party and confronted Defendants about it. *Id.*

85. Eaton contacted another homeowner, K.A., claiming that he worked for a company that sells houses to investors. K.A. thought that Eaton was a real estate broker. Similar to the representations made on Austin Home Ventures' website, Eaton told K.A. that they could make money by selling the house. Ex. 14 ¶¶ 6–7; *see also* Ex. 1 at Ex. C.

86. K.A., who is also active duty military, had received orders to move out-of-state, had moved, and had been unable to sell his house. Ex. 14 ¶¶ 2–4.

87. The documents that Austin Home Ventures, Jensen, and Eaton sent to K.A. included a General Warranty Deed whereby the homeowner granted the property to Austin Home Ventures for $10. K.A. signed the General Warranty Deed on March 24, 2014, thinking that it was a contract for Eaton to sell his home. *Id.* ¶ 8 & Ex. A.

88. K.A. also apparently signed a "Binding Agreement" with Austin Home Ventures on March 28, 2014, four days after he executed the General Warranty Deed. *Id.* at Ex. B. The Binding Agreement provided that, upon transfer of title through execution of the general warranty deed, Austin Home Ventures agreed to pay K.A. $300. *Id.*

89. This agreement did not contain the provisions required by C.R.S. § 6-1-1112, including but not limited to: a disclosure about whether Austin Home Ventures, Jensen, or Eaton would assume any financial or legal obligations of the homeowner; the terms of any rental agreement or lease; a notice of cancellation required by C.R.S. § 6-1-1114; or the notice required by C.R.S. § 6-1-1112(1)(j).

90. Further, K.A. signed this agreement after—not prior to—the execution of the General Warranty Deed, which conveyed the property to Austin Home Ventures in violation of C.R.S. § 6-1-1111. *See id.* at Exs. A & B.

91. Without the knowledge or permission of K.A., Austin Home Ventures, Jensen, and Eaton rented out this property to a third party and collected lease payments. *Id.* ¶¶ 13, 16. They did not forward any lease payments to K.A. and did not make any payments to K.A.'s mortgage company. *Id.* ¶ 15. K.A. never agreed to allow Defendants to lease his property. *Id.* ¶ 16.

92. Austin Home Ventures, Jensen, or Eaton filed the General Warranty Deed in the El Paso clerk and recorder's office on or about November 5, 2014, thereby transferring title to Austin Home Ventures. *Id.* at Ex. A. Therefore, these Defendants are "equity purchasers" or associates thereof and required to comply with the CFPA. *See* C.R.S. § 6-1-1103(2) (defining "equity purchaser" as "a person, other than a person who acquires a property for the purpose of using such property as his or her personal residence, who acquires title to a residence in foreclosure"); *see also* C.R.S. § 6-1-1103(1) (defining an "associate" as "a partner, subsidiary, affiliate, agent, or any other person working in association with . . . an equity purchaser").

93. Currently, K.A. cannot sell the property, because his name is no longer on the deed, and the house may be occupied by a renter who is likely making rental payments to Austin Home Ventures, Jensen, and Eaton. *Id.* ¶¶ 16–18.

LEGAL ARGUMENT

A. The CCPA Expressly Provides for Preliminary Injunctions.

94. This Court is expressly authorized by C.R.S. § 6-1-110(1) to issue a preliminary injunction to enjoin ongoing violations of the CCPA:

> 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 or part 7 of this article, the attorney general or district attorney 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 judgments as may be necessary to prevent the use or 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 the use or employment of any deceptive trade practice.

C.R.S. § 6-1-110(1). Additionally, the State may seek a preliminary injunction pursuant to C.R.C.P. 65.

95. The Colorado Supreme Court has held repeatedly that the legislative purpose of the CCPA is to provide "prompt, economical, and readily available remedies against consumer fraud." *W. Food Plan, Inc. v. Dist. Court*, 598 P.2d 1038, 1041 (Colo. 1979); *see also Showpiece Homes Corp. v. Assurance Co. of Am.*, 38 P.3d 47, 51 (Colo. 2001) (same); *May Dep't Stores Co. v. State ex rel. Woodard*, 863 P.2d 967, 972 (Colo. 1993) (same).

96. A preliminary injunction is designed to prevent "irreparable harm prior to a decision on the merits of a case." *City of Golden v. Simpson*, 83 P.3d 87, 96 (Colo. 2004) (citing *Combined Commc'ns Corp. v. City and Cty. of Denver*, 186 Colo. 443, 447, 528 P.2d 249, 251 (1974)); *see also Gitlitz v. Bellock*, 171 P.3d 1274, 1278 (Colo. App. 2007) (same). A preliminary injunction is meant to preserve the

status quo or protect a party's rights pending the final determination of a matter. *City of Golden*, 83 P.3d at 96; *Gitlitz*, 171 P.3d at 1278.

97. Granting preliminary injunctive relief is within the sound discretion of the trial court, and its ruling will not be disturbed on appeal unless it is manifestly unreasonable, arbitrary or unfair. *Bd. of Cty. Comm'rs v. Fixed Base Operators*, 939 P.2d 464, 466–67 (Colo. App. 1997).

B. The Rathke Factors

98. The Court may grant a 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,* 171 P.3d at 1278. The State meets all *Rathke* factors in this matter, and they all weigh heavily in favor of granting the requested relief.

99. First, there is a reasonable probability that the State will prove its claims against Defendants. *Rathke*, 648 P.2d at 653. Investigator Sells' affidavit, the consumer affidavits, the public trustee affidavits, and the Response to the State's Investigative Subpoena show that Defendants are engaged in a pattern and practice of deceptive conduct in violation of the CCPA and CFPA by, among other things:

A. Making false or misleading statements of fact concerning the price of their services by, among other things: (1) representing that Defendants will pay expenses associated with recovering overbid funds when they charge consumers; and (2) representing that consumers are only owed

a portion (frequently half) of the overbid and omitting the fact that owners are entitled to the other half in violation of C.R.S. § 6-1-105(1)(l);

B. Failing to disclose material information with the intent of inducing consumers into a transaction, including but not limited to: (1) that consumers can easily obtain overbid funds on their own and for free by working directly with public trustees, (2) that Defendants will deduct 20% to 50% of the consumer's overbid for doing a nominal amount of work; (3) that consumers will be required to pay Defendants' expenses, and that consumers would not incur these expenses but for Defendants' involvement; (4) that Defendants have no specialized expertise in recovering overbid funds, which is a straightforward process overseen by public trustees; (5) the total amount of the overbid; or (6) that the overbid amount may be reduced by amounts redeemed by junior lienors, in violation of C.R.S. § 6-1-105(1)(u);

C. Failing to provide homeowners at least 24 hours to review the foreclosure consulting contracts prior to signing as required by C.R.S. § 6-1-1104(1);

D. Failing to disclose the exact nature of the foreclosure consulting services Defendants will provide or the total amount and terms of compensation to be received by the foreclosure consultant or associate as required by C.R.S. § 6-1-1104(3);

E. Failing to date, personally sign, and initial each page of the foreclosure consulting contract as required by C.R.S. § 6-1-1104(4);

F. Failing to provide homeowners with signed, dated, and acknowledged copies of the foreclosure consulting contracts and notices of cancellation immediately upon execution in violation of C.R.S. § 6-1-1104(7);

G. Requiring consumers to sign broad powers of attorney for purposes other than to inspect documents in violation of C.R.S. § 6-1-1107(1)(f);

H. Facilitating or engaging in unconscionable acts in connection with foreclosure consulting in violation of C.R.S. § 6-1-1109(1);

I. Refusing or failing to obtain a real estate broker license despite performing or representing that they would perform services such as

selling, leasing, and managing properties, that require a real estate broker license, in violation of C.R.S. § 6-1-105(1)(z);

J. Knowingly making false representations in the course of their business, occupation, or vocations as to the characteristics, uses or benefits of their services, including but not limited to, that Austin Home Ventures, Jensen, and Eaton will and can assist in short-selling a home or otherwise will assist homeowners in financial distress, in violation of C.R.S. § 6-1-105(1)(e);

K. Failing to disclose material information with the intent of inducing consumers into a transaction, including but not limited to, that Austin Home Ventures, Jensen, and Eaton plant to lease a property to a third-party without the knowledge or permission of the homeowner, will collect rents from the renter without paying the homeowner, and (5) will take title to the property, in violation of C.R.S. § 6-1-105(1)(u);

L. Failing to comply with C.R.S. § 6-1-1111 by entering into an equity purchase contract after executing a document that transferred an interest in the residence in foreclosure;

M. Failing to comply with C.R.S. § 6-1-1112(1), because the equity purchase contracts did not contain the required provisions, including but not limited to, a disclosure about whether Austin Home Ventures, Jensen, or Eaton would assume any financial or legal obligations of the homeowner, the terms of any rental agreement or lease, the notice of cancellation required by C.R.S. § 6-1-1114, or the notice required by C.R.S. § 6-1-1112(1)(j);

N. Failing to comply with C.R.S. § 6-1-1114, because the equity purchase contracts failed to include a notice of cancellation;

O. Engaging in conduct prohibited by C.R.S. § 6-1-1117(1), (2)(a), (2)(c), and (4); and

P. Facilitating or engaging in unconscionable acts in connection with equity purchasing in violation of C.R.S. § 6-1-1119.

100. Second, there is a danger of real and irreparable injury to consumers if no preliminary injunction is entered. *Rathke*, 648 P.2d at 653. The CCPA is designed to protect fair competition and safeguard the public from financial loss. *See State ex rel. Dunbar v. Gym of Am., Inc.*, 493 P.2d 660, 667 (Colo. 1972). The

State has established that Defendants' operation causes significant harm to the public and will continue to do so unless enjoined:

A. In a span of less than a year, Defendants have collected at least $101,897.26 from 12 Colorado consumers from their overbid business.

B. Defendants have attempted to enter into deceptive overbid agreements with numerous other consumers, but were unsuccessful in those attempts.

C. Defendants may be continuing to refer consumers to a California law firm engaged in a similar business rather than directing them to the public trustees from whom consumers could receive objective advice about how to claim their overbid. Although Capital Asset Recovery and Jensen claim that they have, at least temporarily, ceased their overbid business, they have refused to respond to the State's numerous requests for written confirmation about their current business practices. Moreover, there is nothing to prevent Capital Asset Recovery or Jensen from reopening their overbid business, and it is unknown if Eaton, Fuston, or Perez are continuing to use the business model. As the Colorado Supreme Court has held,

> cessation or modification of an unlawful practice does not obviate the need for injunctive relief to prevent future misconduct. . . . According to the United States Supreme Court: "It is the duty of courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment [of the unlawful practice] seems timed to anticipate suit, and there is probability of resumption."

May Dep't Stores, 863 P.2d at 979 n. 24 (internal citations omitted).

D. Defendants remain in possession of several active powers of attorney that allow them broad and unnecessary access to consumers' financial information and accounts as well as consumers' personally identifiable information such as social security and driver's license numbers.

E. Austin Home Ventures, Jensen, and Eaton continue to engage in their equity purchasing business and still hold title to K.A.'s property thereby preventing him from selling the property. Additionally, the State has identified at least 14 properties in Colorado where these

> Defendants appear to be acting in a selling, leasing, and/or property management capacity. Defendants have earned an unknown amount from these schemes, and obtained title to an unknown number of properties. Moreover, Defendants have refused to provide the State with information about any of their businesses other than the overbid recovery business, despite receiving a lawful subpoena from the State. *See supra* ¶ 67.

101. For the same reasons, absent an injunction, there is no plain, speedy and adequate remedy at law. *Rathke*, 648 P.2d at 653–54. There is a need to stop this conduct to prevent additional consumers from being victimized by Defendants' deception. Absent injunctive relief from this Court, Defendants can continue their deception, (a) collecting thousands of dollars in unjust enrichment from consumers who falsely believe that Defendants will assist them in overbid recovery or with their distressed properties; and (b) obtaining title to consumers' homes under false pretenses.

102. The fourth and fifth *Rathke* factors, balance of the equities and the public interest, overwhelmingly favor entering an injunction. An injunction will serve the public interest by protecting Colorado consumers from significant harm, as it will prevent Defendants from deceiving more consumers into believing they will benefit from Defendants' services while hiding the fact that they are being charged exorbitant fees – often in the tens of thousands of dollars – for something that the consumers can do for free by working directly with the public trustees. It will also prevent Defendants from preying on members of the military and others who have vacated their homes and are in financial distress.

103. In contrast, Defendants will suffer no undue hardship from the entry of an injunction because they have no right to engage in unlawful and deceptive trade practices in violation of the CCPA and CFPA. Without an injunction, Defendants will continue their deception, thereby harming consumers, interfering in the public trustee overbid recovery process, and taking advantage of already distressed homeowners.

104. Finally, an injunction would preserve the status quo by forcing Defendants to comply with the law, which meets the final *Rathke* factor. "The status quo is 'the last uncontested status between the parties which preceded the controversy.'" *Predator Int'l, Inc. v. Gamo Outdoor USA, Inc.,* 669 F. Supp. 2d 1235, 1243 (D. Colo. 2009) (quoting *SCFC ILC, Inc. v. Visa USA, Inc.*, 936 F.2d 1096, 1100 n. 8 (10th Cir.1991)). *See also Indep. Inst. v. Buescher,* 718 F. Supp. 2d 1257, 1266 (D. Colo. 2010) ("The status quo is defined as the last uncontested status between the parties which preceded the controversy.") (internal quotation omitted);

Commonwealth of Pennsylvania ex rel. Corbett v. Snyder, 977 A.2d 28, 43 (Pa. Commw. Ct. 2009) ("The status quo to be maintained is the last actual and lawful uncontested status, which preceded the pending controversy."). Because of the ongoing consumer harm, there is a need to restore the status quo, which was the status prior to Defendants' unlawful conduct, and prevent Defendants from continuing their deceptive business practices.

ASSET FREEZE AND ESCROW ESTABLISHMENT REQUEST UNDER C.R.S. § 6-1-110(1)

105. Given the broad remedial scope of the CCPA and the conduct of Defendants, an equitable order pursuant to C.R.S. § 6-1-110(1) freezing the Defendants' bank accounts is necessary to preserve effective final relief for consumers. Section 6-1-110(1) authorizes an equitable order that may be necessary to "completely compensate or restore to the original position of any person injured . . . or to prevent any unjust enrichment." *See also Western Food Plan*, 598 P.2d at 1041 (stating that the CCPA is designed "to provide prompt, economical, and readily available remedies against consumer fraud"); *United States v. Oakland Cannabis Buyers' Co-op.*, 532 U.S. 483, 496 (2001) (stating that district courts sitting in equity have discretion to craft a fitting remedy "unless a statute clearly provides otherwise").

106. Courts have ordered asset freezes under Section 13(b) of the Federal Trade Commission Act, 15 U.S.C. §53, which, like the CCPA, provides for equitable relief against deceptive practices. *See, e.g., FTC v. USA Fin., LLC*, 415 F. App'x 970, 976 (11th Cir. 2011) ("Maintaining the asset freeze until the monetary judgment was satisfied was necessary to 'accomplish complete justice.'") (citing *CSC Holdings, Inc. v. Redisi*, 309 F.3d 988, 996 (7th Cir. 2002)); *Levi Strauss & Co. v. Sunrise Int'l Trading Inc.*, 51 F.3d 982, 987 (11th Cir. 1995) ("A request for equitable relief invokes the district court's inherent equitable powers to order preliminary relief, including an asset freeze, in order to assure the availability of permanent relief."); *FTC v. H. N. Singer, Inc.*, 668 F.2d 1107, 1112 (9th Cir. 1982) (stating that an asset freeze by a preliminary injunction is an appropriate provisional remedy to give form to the final equitable relief and "[w]hile it is true that the asset freeze has an effect comparable to that of an attachment, it is not an attachment."); *F.T.C. v. U.S. Mortg. Funding, Inc.*, No. 11-CV-80155-COHN, 2011 WL 810790, at *1, 2011 U.S. Dist. LEXIS 31148, at *4 (S.D. Fla. March 1, 2011) (ordering asset freeze against loan modification defendants "thereby preserving Court's ability to provide effective final relief"); *FTC v. Inc21.com Corp.*, No. C 10-00022 WHA, 2010 WL 1486356, at *1, 2010 U.S. Dist. LEXIS 45663, at *4–5 (N.D. Cal. April 13, 2010) (ordering asset freeze in a preliminary injunction so refunds may be issued if FTC prevails); *In re Nat'l Credit Mgmt. Group*, 21 F. Supp. 2d 424,

462 (D.N.J. 1998) (observing that state and FTC were likely to prevail on merits in a consumer fraud action under state and federal law and thus an asset freeze was appropriate to preserve assets for possible restitution awards).

107. In view of Defendants' fraudulent and deceptive practices, it is necessary and appropriate for the Court to issue an Order to freeze Defendants' bank accounts to the extent they contain the proceeds of Defendants' deceptive conduct. The funds in these accounts were obtained through unlawful conduct, and an asset freeze will maximize the likelihood of recovering funds to compensate victims, prevent Defendants' unjust enrichment, and deter additional unlawful transactions.

108. For the same reasons, it is further appropriate for the Court to order Defendants to establish an escrow account to provide full restitution to affected consumers. Defendants should be required to maintain a balance in that account equal to the amount of funds collected to date from consumers affected by the business practices described herein. This Court should further order Defendants to provide the Court and State with evidence of the establishment of this account and the balance maintained. Finally, this Court should prohibit Defendants from transferring or withdrawing any funds from this account pending a further order of this Court.

RELIEF REQUESTED

WHEREFORE, the State requests that this Court enter a Preliminary Injunction that:

A. Enjoins all Defendants from violating the CCPA and CFPA.

B. Enjoins Defendants Austin Home Ventures, LLC dba Capital Asset Recovery dba Capital Realty, Bryan Jensen, Ethan Eaton aka Ethan Graham, Billy Fuston, and Bailey Perez, and their officers, directors, agents, servants, employees, independent contractors and any other persons in active concert or participation with Defendants from:

    1. Engaging or attempting to engage in any overbid recovery services;

    2. Acting as foreclosure consultants; and

    3. Contacting future or past clients of the overbid recovery business.

C. Enjoins Defendants Austin Home Ventures, LLC dba Capital Asset Recovery dba Capital Realty, Bryan Jensen, and Ethan Eaton aka Ethan Graham, and their officers, directors, agents, servants, employees, independent contractors and any other persons in active concert or participation with Defendants from:

1. Engaging or attempting to engage in any equity purchasing, selling, or short-selling agreements for residential properties;

2. Acting as equity purchasers; and

3. Offering or purporting to offer loss mitigation, loan modification, real estate broker, and similar services to distressed homeowners.

D. Orders that all powers of attorney obtained by Defendants in connection with their overbid fund recovery activities are renounced and terminated.

E. Orders that Defendants cannot take any action purportedly authorized by any power of attorney entered in connection with their overbid fund recovery business.

F. Orders that Defendants must execute all documents necessary to quit-claim, assign, transfer, or convey any interest they obtained through their use or employment of deceptive trade practices back to the owner. C.R.C.P. 65(f) expressly permits this Court to order "an injunction restoring to any person any property from which he may have been ousted or deprived of possession by fraud."

G. Freezes any bank accounts of Defendants into which consumer funds generated from Defendants' deceptive trade practices have been deposited or transferred and enjoins Defendants from:

1. Withdrawing, transferring, or otherwise encumbering any funds from any account, including but not limited to those accounts in Defendants' names, at any financial institution into which Defendants or their officers, directors, agents, servants, employees, independent contractors or any other persons in active concert or participation with Defendants, deposited or transferred money received from consumers as a result of Defendants' deceptive trade practices;

2. Negotiating any checks, money orders, wire transfers, drafts, or other negotiable instruments received by Defendants or their officers,

directors, agents, servants, employees, independent contractors or any other persons in active concert or participation with Defendants as a result of Defendants' deceptive trade practices;

3. Depositing or processing any credit card and debit card receipts obtained by Defendants or their officers, directors, agents, servants, employees, independent contractors or any other persons in active concert or participation with Defendants as a result of Defendants' deceptive trade practices, and using any financial transaction device, such as a bank account number, debit card number, or credit card number, obtained from any consumer; and

4. Spending, transferring, giving away, or in any way disposing of any monies received by Defendants or their officers, directors, agents, servants, employees, independent contractors or any other persons in active concert or participation with Defendants as a result of Defendants' deceptive trade practices.

H. Orders that Defendants (1) establish an escrow account to provide full restitution to affected consumers; (2) maintain a balance in that account equal to the amount of funds collected to date from consumers affected by the business practices described herein; (3) provide the Court and State with evidence of the establishment of this account and the balance maintained; and (4) be prohibited from transferring or withdrawing any funds from this account pending further order of this Court.

I. Orders any additional such relief as this Court deems necessary and appropriate to further the purposes of the Colorado Consumer Protection Act and the Colorado Foreclosure Protection Act.

Dated this 12th day of November, 2015.

CYNTHIA H. COFFMAN
Attorney General

Jennifer Miner Dethmers
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LAUREN M. DICKEY*
Assistant Attorneys General
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*Counsel of Record

CERTIFICATE OF SERVICE

The undersigned certifies that on this 12th day of November, 2015, a true and correct copy of the foregoing **PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION** was filed with the Clerk of Court using the ICCES system and served on the following:

Daniel Calisher
D. Chandler Kelley
Foster Graham Milstein & Calisher, LLP
360 South Garfield, 6th Floor
Denver, Colorado 80209
Attorneys for Defendants, Austin Home Ventures, LLC, Bryan Jensen, and Billy Fuston

Served on the following via first-class United States mail, postage pre-paid:

Ethan Eaton
4617 Chicory Court
Colorado Springs, CO 80917

Served on the following via first-class United States mail, postage pre-paid, pursuant to C.R.C.P. 5(b)(2)(B):

Bailey Perez
4855 Hunters Run
Colorado Springs, CO 80911
(Served without exhibits)

Served on the following via Clerk of Court pursuant to C.R.C.P. 5(b)(2)(C):

Bailey Perez
c/o Clerk of Court
1437 Bannock Street
Denver, CO 80202

/s/ Julia Wiggins
Julia Wiggins