DISTRICT COURT, DENVER COUNTY, COLORADO Court Address: 1437 Bannock Street, Rm 256, Denver, CO, 80202	
Plaintiff(s) ST OF COLO et al. v. **Defendant(s)** MILE HIGH HEATING AND COOLING LLC et al.	DATE FILED: October 3, 2017 7:21 PM CASE NUMBER: 2017CV31452 ⚠ **COURT USE ONLY** ⚠ Case Number: 2017CV31452 Division: 414 Courtroom:

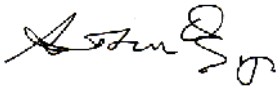
Order: AAMENDED ORDER ON STATE'S MOTION FOR PRELIMINARY INJUNCTION

The motion/proposed order attached hereto: GRANTED WITH AMENDMENTS.

The original Order re: Preliminary Injunction is VACATED and REPLACED with this Amended Order.

The original Order contained a typographical error as to the date of issuance of the Order. This Amended Order is issued nunc pro tunc,09/22/17 at 1:30 p.m., which is the correct date for issuance of the Order.

Issue Date: 10/3/2017



ROBERT LEWIS MCGAHEY JR.
District Court Judge

DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock Street Denver, CO 80202	
STATE OF COLORADO, ex rel. CYNTHIA H. COFFMAN, ATTORNEY GENERAL Plaintiff, v. MILE HIGH HEATING & COOLING, LLC; MILE HIGH HEATING AND COOLING, LLC; PIKES PEAK HEATING AND COOLING, LLC; KEVIN DYKMAN, an individual; and KASEY DYKMAN, an individual. Defendants.	▲ COURT USE ONLY ▲
	Case No. 2017CV031452 Div.: 414

(PROPOSED) ORDER ON STATE'S MOTION FOR PRELIMINARY INJUNCTION

The Court, having heard the evidence presented at a two-day preliminary injunction hearing on September 21 and September 22, 2017,

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

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

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

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

3. This matter came before the Court at a preliminary injunction hearing where the State presented evidence, which the Court found persuasive and credible, including the sworn testimony of fourteen (14) witnesses for the State. Having considered the evidence, the Court finds and concludes that a Preliminary Injunction Order against Defendant Kevin Dykman is necessary. This Preliminary Injunction Order also enters as to Defendants Mile High Heating & Cooling, LLC and Pikes Peak Heating and Cooling, LLC, because they failed to appear at the hearing with an attorney, and because the Court finds that a Preliminary Injunction Order against these companies is necessary.

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

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

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

5. Based on the evidence presented by the State at the preliminary injunction hearing, the Court finds there is a reasonable probability that the State

will prove its claims against Defendants at trial. *Rathke v. MacFarlane*, 648 P.2d 648, 653-54 (Colo. 1982); see also *Gitlitz v. Bellock*, 171 P.3d 1274, 1278 (Colo. App. 2007).

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

7. The Court found testimony by the State's witnesses to be credible and persuasive evidence that the Defendants failed or refused to obtain the requisite building permits for the majority of HVAC installations in consumers' homes. The State presented credible and persuasive evidence that Defendant Kevin Dykman (hereafter, "Mr. Dykman") created, controlled and operated the Defendant companies along with his son Defendant Kasey Dykman.

8. Working from a sampling of the Defendants' documents, the State's investigator presented credible evidence that Defendant Kevin Dykman and his companies had obtained building permits only 7% of the time.

9. Testimony from a Denver Development Services (building department) inspector established that for nineteen (19) HVAC installations in Denver, Mr. Dykman and his companies had not obtained a single permit.

10. Testimony from the Chief Building Official for the City of Sheridan Building Department established that Mr. Dykman's company had not sought a permit for a furnace it installed in the home a 95-year-old Sheridan woman. The Sheridan fire department contacted the building department after responding to an emergency call from the woman that her carbon monoxide alarms were going off. The fire department determined that the carbon monoxide levels in the home were dangerously high and required her to evacuate. The building department's review showed that Mr. Dykman's company had not obtained a building permit, and had installed the furnace without a proper vent system. The improper installation caused the woman's home to fill with dangerous carbon monoxide gas.

11. The testimony of two former operations managers established that Mr. Dykman was aware of building department permit requirement and, as a rule, did not want to pay the cost of obtaining permits and that he had primary control over the company's expenditures.

12. While all of the evidence supported the State's assertion that Mr. Dykman failed or refused to obtain building permits, the best evidence came from

Mr. Dykman himself. When Mr. Dykman invoked his Fifth Amendment privilege in response to the State calling him as a witness, the State introduced his prior sworn testimony from an investigative deposition on September 28, 2016. Mr. Dykman' s prior sworn testimony established that he did not have any employees who were qualified to pull building permits after his second operations manager quit on September 4, 2015. Mr. Dykman's sworn testimony was a clear admission that he had operated his HVAC business for more than a year without pulling building permits.

13. The State presented evidence that Mr. Dykman continued avoiding building permits even after his deposition on September 28, 2016. The Court heard the testimony of an Aurora consumer who purchased a furnace with installation from Mr. Dykman's company on January 24, 2017. The witness testified that she felt compelled to contact her local building department after seeing news reports about the temporary restraining order issued against Mr. Dykman on August 4, 2017. The Aurora building department determined that Mr. Dykman's company had not obtained a building permit and then issued a correction notice to the woman for the failure to obtain a building permit and for improper installation.

14. The State has demonstrated a reasonable probability of success on the merits as to its first and primary claim for relief.

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

16. The testimony of six (6) consumer witnesses established that Mr. Dykman's companies either gave consumers incorrect information, informing them they could decline building permits, or did not provide the consumer with any information regarding building permits. The testimony of the former operations managers established that Mr. Dykman was aware of the building department requirements and did not want to pay for the building permits. Mr. Dykman failed to disclose building permit requirements to consumers in order to induce consumers to enter into transactions with his companies on his terms.

17. Additionally, Mr. Dykman and his companies failed to disclose that his service technicians often lacked the technical background to work as service technicians. In his prior sworn testimony, Mr. Dykman admitted that he began his business with inexperienced technicians. The former operations managers testified that Mr. Dykman often hired inexperienced technicians who lacked the requisite skill to perform their jobs safely.

18. The State has demonstrated a reasonable probability of success on the merits as to its second claim for relief.

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

20. During the hearing, the State introduced exhibits containing examples of the Defendants' advertising and sales scripts in which the Defendants represented themselves as "certified" and as providing "expert service." Consumers at minimum were entitled to services from a company that complies with local ordinances and performs its work with the minimum requisite competency. Three correction notices issued by building inspectors, and the observations of third-party repair companies that corrected Defendants' faulty installations, provided clear evidence of the Defendants' lack of competency. It was a misrepresentation by Mr. Dykman to claim to provide HVAC services, let alone "expert" HVAC services, while operating so far below the minimum standards. The State has demonstrated a reasonable probability of success on the merits as to its third claim for relief.

21. Mr. Dykman invoked his Fifth Amendment privilege in response to a series of questions about his business practices and business documents. The Court chooses to draw an adverse inference from his refusal to testify. "[T]he Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them." *Baxter v. Palmigiano*, 425 U.S. 308, 318, 96 S.Ct. 1551, 47 L.Ed.2d 810 (1976); *see Sec. & Exch. Comm'n v. Colello*, 139 F.3d 674, 677 (9th Cir. 1998) ("Parties are free to invoke the Fifth Amendment in civil cases, but the court is equally free to draw adverse inferences from their failure of proof.") (cited with approval in *Steiner v. Minn. Life Ins. Co.*, 85 P.3d 135, 141 (Colo. 2004)). People In Interest of L.K., 2016 COA 112, ¶ 33, cert. granted sub nom. C.K. v. People, No. 16SC638, 2016 WL 6575162 (Colo. Nov. 7, 2016).

22. Kevin Dykman owns and operates an HVAC business, selling and installing furnaces, hot water heaters and air conditioning units in the homes of Colorado consumers. The Court finds it disturbing that Mr. Dykman feels he cannot talk about his business without a risk of incriminating himself. The adverse inference from his refusal to testify is that Mr. Dykman knew his answers would be harmful to his own case and would support the State's case.

23. Even more striking than Mr. Dykman's refusal to testify was the manner in which Mr. Dykman produced documents to the State in response to a civil investigative demand subpoena. The subpoena instructed Mr. Dykman to produce his documents in electronic or digital format. In the Civil Investigative Demand investigative deposition taken by the State, Mr. Dykman testified that he deliberately took a flash drive with all of his business records to a copying service

where he paid several thousand dollars to have the documents printed out. Mr. Dykman sent the documents to the Attorney General's Office in thirteen (13) banker boxes. Mr. Dykman produced these documents to the Attorney General in no particular order. In response to questions about whether someone had deliberately shuffled the documents, Mr. Dykman repeatedly answered, "I don't recall." When asked why he paid to have the documents printed, instead of producing the flash drive, Mr. Dykman answered, "because I'm not helping you do your job." Mr. Dykman went on to state, "You're here to do everything you can to shut me down or bill me or fine me or whatever it is, and I'm not going to make it easy for you." **State's Exhibit 35**, *Sworn Statement of Kevin Dykman*, 79:11-83:17.

24. Similar to spoliation, the Court may draw an adverse inference from the manner in which Mr. Dykman produced his documents.[1] Mr. Dykman admitted under oath that he was trying to deceive the Attorney General's Office by making it harder for them to review his business documents. The adverse inference is that Mr. Dykman produced his documents in this obfuscatory manner because he knew that his business documents contained information that would support a case against him. The Court chooses to include this clear and adverse inference in in its findings.

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

26. The State presented credible evidence that the Defendants' business model, which includes hiring untrained technicians to install HVAC equipment and a refusal to obtain required building permits for the majority of the installations, creates a danger of real, immediate and irreparable injury. Mr. Dykman imposed his business model on an unsuspecting public and the Court takes note of the fact that many of the witnesses who testified were elderly.

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[1] The ability to provide the jury with an adverse inference instruction as a sanction for spoliation of evidence derives from the trial court's inherent powers. *See Pena v. District Court,* 681 P.2d 953, 956 (Colo.1984) (stating that trial courts possess "all powers reasonably required to enable a court to perform efficiently its judicial functions, to protect its dignity, independence, and integrity, and to make its lawful actions effective").Aloi v. Union Pac. R.R. Corp., 129 P.3d 999, 1002 (Colo. 2006)

"[W}here a litigant intentionally suppresses or destroys pertinent evidence, an inference arises that such evidence would be unfavorable to his case." *Collins v. Throckmorton,* Del.Supr., 425 A.2d 146, 150 (1980) (citing *Larsen v. Romeo,* Md.Ct.App., 254 Md. 220, 255 A.2d 387 (1969)). This inference is a product of the legal maxim *omnia praesumuntur contra spoliatorem,* "all things are to be presumed against the destroyer." Robert Tucker, *The Flexible Doctrine of Spoliation of Evidence: Cause of Action, Defense, Evidentiary Presumption, and Discovery Sanction,* 27 U. Tol. L.Rev. 67, 77 (1995). Lucas v. Christiana Skating Ctr., Ltd., 722 A.2d 1247, 1248 (Del. Super. Ct. 1998)

27. The testimony of the 95 year-old woman who purchased a furnace with installation from Mr. Dykman's company and then was forced to evacuate her home after it filled with carbon monoxide, established that Mr. Dykman's deceptive trade practices created a danger of real, immediate and irreparable injury; specifically, death. Other testimony supports this conclusion; including the testimony of a former operations manager who testified that a consumer's home filled with natural gas after one of Mr. Dykman's inexperienced technicians performed services. Evidence that building departments have issued correction notices when they have had the rare opportunity to inspect the work of Mr. Dykman's companies further supports this conclusion.

28. Allowing the Defendants to continue to engage in the HVAC business creates a risk that a consumer would be exposed to carbon monoxide poisoning or that their home would blow up. The State has met its burden as to the second *Rathke* factor.

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

30. Regarding the third *Rathke* factor, absent an injunction, there is no plain, speedy and adequate remedy at law. *Rathke*, 648 P.2d at 653-54. Given the volume of consumers who have had HVAC equipment installed by the Defendants, it would be slower and less efficient for the courts to handle separate tort, breach of contract or CCPA claims, and then administer injunctive relief in each individual case. There is no adequate remedy at law either. The public needs protection from Mr. Dykman's deceptive business practices. Where a remedy at law would offer monetary damages, monetary damages cannot stop or address Mr. Dykman's deceptive behavior and business practices.

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

32. Finally, the injunction will preserve the status quo. "The status quo to be maintained is the last actual and lawful uncontested status, which preceded the pending controversy." *Commonwealth of Pennsylvania v. Snyder*, 977 A.2d 28, 43 (Pa. Commw. Ct. 2009). Here, the status quo is the temporary restraining order

issued on August 4, 2017. The terms of the temporary restraining order have protected consumers from Mr. Dykman's and his companies' deceptive trade practices and the Court preserves that status through the issuance of a preliminary injunction.

33. During the hearing, Mr. Dykman invoked his Fifth Amendment privilege and chose not to testify. Mr. Dykman presented no witnesses in his defense. While Mr. Dykman objected to certain evidence, citing a "statute of limitations," nothing barred the Court from reviewing relevant evidence, such as invoices from 2012. "Unless otherwise provided by constitution, statute or rule, all relevant evidence is admissible. CRE 402. 'A trial court has considerable discretion in ruling upon the admissibility of evidence' and 'in determining whether evidence has logical relevance.'" *Smith v. Bd. of Educ.,* 83 P.3d 1157, 1165 (Colo.App.2003).

34. The statute of limitations provision for the Colorado Consumer Protection Act ("CCPA") states: "All actions brought under this article must be commenced within three years after the date on which the false, misleading, or deceptive act or practice occurred or the date on which the last in a series of such acts or practices occurred or within three years after the consumer discovered or in the exercise of reasonable diligence should have discovered the occurrence of the false, misleading, or deceptive act or practice. The period of limitation provided in this section may be extended for a period of one year if the plaintiff proves that failure to timely commence the action was caused by the defendant engaging in conduct calculated to induce the plaintiff to refrain from or postpone the commencement of the action." C.R.S. § 6-1-115.

35. The State's evidence was relevant and not barred by constitution, statute or rule. Further, testimony from the State's investigator established that the investigation began in 2015 and that the State had no prior notice of Defendants' failure or refusal to obtain building permits. The State was well within the statute of limitations for this matter.

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

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

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

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

B. To the extent that it does not violate provision A above, KEVIN DYKMAN can receive monetary distributions from Cornerstone Mechanical commensurate with his pre-existing minority share.

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

This preliminary injunction order shall remain in effect through the five day trial, currently scheduled for February 26, 2018, and until further determinations are made by this Court as to the entry of a permanent injunction.

BY THE COURT:

_____
District Court Judge