DISTRICT COURT, SUMMIT, COLORADO 501 North Park Avenue Breckenridge, CO 80424	DATE FILED: April 6, 2016 1:38 PM CASE NUMBER: 2016CV30045
STATE OF COLORADO, ex rel. CYNTHIA H. COFFMAN, ATTORNEY GENERAL, Plaintiff, v. 123MOUNTAIN.COM, INC., 123MOUNTAIN@LAKEWOOD, LLC, 123MOUNTAIN@FRISCO, LLC, INTERNATIONAL ROCKY TRADE, INC., d/b/a "123MOUNTAIN;" AND SUMMIT PEAK, INC., SUMMIT WEARHOUSE, INC., SKI ANGEL US, INC., and OLIVER GOUMAS a/k/a OLIVIER GOUMAS and ANNA SOFIA GOUMAS, individually, Defendants.	▲ **COURT USE ONLY** ▲
	Case No.: 2016CV030045 Div.: T

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOR PRELIMINARY INJUNCTION

Pursuant to the Court's Order on April 1, 2016, Plaintiff, the State of Colorado, upon relation of Cynthia H. Coffman, Attorney General for the State of Colorado (the "Plaintiff" or the "State") by and through the undersigned counsel, respectfully submits its Proposed Findings of Fact and Conclusions of Law, in advance of the April 6, 2016 Preliminary Injunction hearing as follows:

PROCEDURAL BACKGROUND

1. On March 25, 2016, the State filed a Complaint against Defendants for violations of the Colorado Consumer Protection Act, C.R.S. § 6-1-101 *et seq.* ("CCPA"). On March 28, 2016, the State filed an *Ex Parte* Motion for Temporary Restraining Order, Preliminary Injunction, and Asset Freeze ("Motion"). The Court

granted the Motion on March 29, 2016 and set the matter for a Preliminary Injunction Hearing on April 6, 2016.

FINDINGS OF FACT

2. The State has supported its request for a Preliminary Injunction by establishing the following:

The Defendants operate an outdoor recreational sporting goods website, 123Mountain.com. The website features an extensive array of high end merchandise from name-brand manufacturers. The Defendants currently have no special arrangements with these manufacturers to distribute their merchandise.

The evidence during the hearing showed that the Defendants knowingly and deceptively advertise products on their website as "available" when they are aware that they do not actually have these items in their inventory

After consumers initiate a purchase of these items, using their credit cards, the Defendants contact the consumer to request that they make a direct electronic payment or wire transfer. The Defendants request this direct form of payment so that consumers cannot request a chargeback from their credit card company. After receiving the direct payment, Defendants inform the consumer that they may have to wait up until two years to receive the item that they purchased.

In addition to the unreasonable wait times, Defendants often ship items that are substantially different from what the consumer ordered. When consumers attempt to exchange the item, the Defendants impose onerous refund and exchange policies with the intent to make obtaining a refund or exchange futile or impossible.

The evidence established that Defendants have continued operating in this manner despite numerous consumer complaints and legal actions by affected manufacturers.

CONCLUSIONS OF LAW

I. The CCPA expressly provides for Preliminary Injunctions.

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

> Wherever 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 though the use or employment of any deceptive trade practice.

2. Additionally, the State may seek a preliminary injunction order pursuant to C.R.C.P. 65.

3. The Colorado Supreme Court has repeatedly held 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 (Colo. 1979); see also *May Dep't Stores Co. v. State ex rel. Woodard*, 863 P.2d 967, 972 (Colo. 1993) and *Showpiece Homes Corp. v. Assurance Co. of Am.*, 38 P.3d 47, 51 (Colo. 2001).

4. Both a temporary restraining order and a preliminary injunction are designed to preserve the status quo or protect a party's rights pending the final determination of a matter. See *City of Golden v. Simpson*, 83 P.3d 87, 96 (Colo. 2004). A temporary restraining order is meant to prevent "immediate and irreparable harm." *Id.* (quoting *Mile High Kennel Club v. Colo. Greyhound Breeders Ass'n*, 559 P.2d 1120, 1121 (Colo. App. 1977)).

5. A preliminary injunction is meant to prevent irreparable harm before a decision on the merits of the case. *Id.* Granting preliminary injunctive relief is within the sound discretion of the trial court, and its ruling will not be disturbed on appeal unless manifestly unreasonable, arbitrary, or unfair. *Bd. of County Comm'rs v. Fixed Base Operators*, 939 P.2d 464, 467 (Colo. App. 1997).

II. The Court finds that the facts of this case meet the *Rathke* factors and a preliminary injunction should be entered.

6. The court may grant a preliminary injunction where:

   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 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).

7. The facts of this case meet the *Rathke* factors for preliminary injunctive relief.

8. First, there is a reasonable probability that the State will prove its claims against Defendants. *Rathke*, 648 P.2d at 653. The State has presented evidence that consumers are routinely misled by Defendants' online advertising of products as "available." The State has introduced evidence which shows that Defendants mislead consumers to believe that Defendants possess, or have access to, high-end, hard-to-find items sporting goods items, when in fact Defendants do not have those items and, in all likelihood, cannot provide the item to consumers at all. Then, Defendants refuse to refund consumers when the consumer learns of Defendants' deceit, or refuses to refund consumers who receive inferior and unwanted goods.

9. The evidence presented by the State at the Preliminary Injunction hearing showed that Defendants' website is a ruse intended to get consumers to pay Defendants for items Defendants do not have, and then to charge the consumer for "cancellation" or for whatever inferior goods Defendants choose to send instead.

10. The evidence showed that Defendants are aware that consumers frequently choose to cancel their orders once Defendants disclose the delay (sometimes up to two years), and that Defendants knowingly choose to hide the delay from consumers until after Defendants have collected payment.

11. The evidence presented at the hearing established a reasonable likelihood that the State will establish that Defendants have violated the CCPA.

12. The State introduced evidence that Defendants have violated five provisions of the CCPA: C.R.S. § 6-1-105(1)(c), (g), (u), (n), and (r).

13. Concerning C.R.S. § 6-1-105(1)(c), the State introduced evidence that Defendants make false representations as to their affiliation, connection, or association with companies with which Defendants do not maintain relationships. Defendants claim on their website to provide goods from over 130 brands, when in

fact Defendants lack relationships with these brands, and with some, have been outright prohibited from selling.

14. With respect to C.R.S. § 6-1-105(1)(g), the State introduced evidence that Defendants represent to consumers that goods are of a particular standard, quality, or grade or of a particular style or model, but that Defendants frequently ship consumers products that are different or inferior to those ordered by the consumer. With regards to this claim, the State introduced evidence which showed that consumers who purchase a specific product from the 123.com website, often receive a substantially different item. The Defendants approach to the return of such items, making return difficult and futile, shows an absence of mistake and intentional deception.

15. As for C.R.S. § 6-1-105(1)(u), the State introduced evidence that Defendants fail to disclose the real shipping time, a material fact, at the time of their sales. Defendants know the real shipping time of their "available" goods is weeks, months, or years, but do not notify the consumer of this material fact until after they have extracted payment from the consumer. The evidence showed that the Defendants know from frequent post-sale cancellations that this fact is material, and thus hide the shipping delay in order to induce consumers into buying from Defendants. Any argument that these shipping times are reasonable is contradicted by common knowledge of rational consumer behavior, and clearly contradicted by consumer testimony that they were advised of the extensive wait only after they had made payment.

16. Concerning C.R.S. § 6-1-105(1)(n), the State introduced evidence that Defendants engage in "bait and switch" advertising by advertising the goods on their website and then failing to make deliveries on those goods within a reasonable time or failing to make refunds on those items. During the hearing, the State presented consumer testimony which showed that consumers ordered items that were clearly advertised as for sale, on a website that appears similar to professional legitimate retailers. In addition to clear display, the word "available" appears in a drop-down menu next to the item. Defendants' website states that available items usually ship within nine (9) days. Consumer testimony established that consumers were informed, only after purchasing, that they would have to wait up until two years to receive the item. The Court finds that delivery times of months and years are not reasonable, particularly where items were advertised as available. Consumer testimony also established that Defendants had created an onerous system for returns, clearly designed to defeat consumer efforts to obtain the item they had purchased.

17. With respect to C.R.S. § 6-1-105(1)(r), the State introduced evidence that Defendants advertise a 100% satisfaction guarantee on their goods without clearly and conspicuously disclosing material conditions on that guarantee. Consumer

testimony established that defendants' "guarantee" is not a guarantee at all. Defendants seem to try everything they can to avoid honoring their guarantee by citing inadequately disclosed "terms and conditions," and, if that does not work, by ignoring the consumer altogether.

18. The State has also met the second *Rathke* factor – that there is a danger of real, immediate, and irreparable injury which may be prevented by injunctive relief.

19. The preliminary injunction is sought by the Colorado Attorney General on behalf of the State of Colorado to enforce state law affecting the public interest.

20. Under Colorado law, the Attorney General is not required to plead or prove immediate or irreparable injury when a statute concerning the public interest is implicated. *See 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) and *Lloyd A. Fry Roofing Co. v. State Dep't of Health Air Pollution Variance Bd.*, 553 P.2d 800, 808 (Colo. 1976).

21. While the Attorney General is not required to prove immediate or irreparable injury, the second *Rathke* factor is met in this case. The CCPA is designed to protect fair competition and safeguard the public from financial loss. *See State ex rel. Dunbar v. Gym of Am.*, 493 P.2d 660, 667 (Colo. 1972).

22. The State has presented evidence that there is a danger of immediate and irreparable injury which may be prevented by injunctive relief. Defendants consistently deceive consumers for their own financial gain, and undermine the reputations of legitimately-operating businesses they purport to "sell." The evidence showed that Defendants grossed at least $1,216,006.49 in approximately a three-year period and indicates that this case involves a significant number of consumer victims.

23. As for the third *Rathke* factor, an injunction is necessary to prevent Defendants from continuing to deceptively sell goods to consumers, as there is no plain, speedy, or adequate remedy at law. A law enforcement action under the CCPA is equitable in nature. *See State ex rel. Salazar v. General Steel*, 129 P.3d 1047, 1050 (Colo. App. 2005). The CCPA is designed to provide "prompt, economical, and readily available remedies against consumer fraud." *W. Food Plan*, 598 P.2d at 1041.

24. The balance of equities and the public interest overwhelmingly support enjoining the Defendants' deceptive conduct. An injunction will serve the public interest by protecting consumers from significant harm.

25. The consumer testimony during the hearing showed that Defendants collect hundreds of dollars per transaction from consumers for expensive merchandise which they do not actually possess, subject consumers to unreasonable delays in receiving merchandise, fail to deliver the ordered merchandise, and then rely on their deceptive refund and return policies to ignore consumer outcry. Without an injunction, the State will be unable to protect the public from Defendants' ongoing alleged illegal activities.

26. In contrast, Defendants will not suffer undue hardship by the entry of an injunction closing down their business because Defendants have no right to continue to engage in unlawful and deceptive trade practices. Nor do Defendants have the right to collect money from consumers as a result of their unlawful and deceptive conduct. While Defendants will undoubtedly be inconvenienced and financially impacted if their businesses are shut down, such hardship is certainly not "undue."

27. The State is not seeking to close down the Defendants' actual stores, only their deceptive online business. The Court finds, however, that Defendants' online businesses must be shut down to protect consumers from further harm.

28. While Defendants may claim to make changes to their business practices, "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).

29. The preliminary injunction will preserve the status quo by forcing Defendants to comply with the law: "the status quo to be maintained is the last lawful and uncontested status, which preceded the pending controversy." *Commonwealth of Penn. v. Snyder*, 977 A.2d 28, 43 (Pa. Cmmw. Ct. 2009). Because of the ongoing consumer harm, there is a need to restore the status quo and prevent Defendants from continuing their unlawful business practices.

30. The Court has broad discretion in how it meets the policy goals of the CCPA, including freezing the Defendants' assets: "In prior cases concerning the CCPA, we have given the Act a liberal construction, relying on the Act's broad purpose and scope." *Hall v. Walter*, 969 P.2d 224, 230 (Colo. 1998), *citing to May Dep't Stores*, 863 P.2d at 973-75 and *Gym of Am.*, 177 P.2d 660 at 667-69 (Colo. 1972).

31. Courts are empowered to enter "any such orders" as the Court deems just and proper to effectuate the purposes of the CCPA. C.R.S. § 6-1-110(1). *See also State*

ex rel. Suthers v. Mandatory Poster Agency, Inc., 260 P.3d 9, 13-14 (Colo. App. 2009). This includes equitable orders which may be necessary to "completely compensate or restore to the original position of any person injured… or to prevent any unjust enrichment." *Id.* The equitable orders are made in light of the legislative mandate to provide "prompt, economical, and readily available remedies against consumer fraud." *W. Food Plan*, 598 P.2d at 1041. Colorado courts routinely order asset freezes when requested by the Attorney General pursuant to the CCPA.

32. Courts have ordered asset freezes in cases brought under Section 13(b) of the Federal Trade Commission Act, 15 U.S.C. § 53, which, like the CCPA, provides equitable relief against deceptive practices. *See, e.g.*, *F.T.C. v. U.S. Mortg. Funding, Inc.*, 2011 U.S. Dist. LEXIS 31148, at *4 (S.D. Fla. March 01, 2011) (ordering asset freeze against loan modification defendants "thereby preserving the Court's ability to provide effective final relief."); *F.T.C. v. USA Fin., LLC*, 415 Fed. Appx. 970, 976 (11th Cir. 2011) ("Maintaining the asset freeze until the monetary judgment was satisfied was necessary to 'accomplish complete justice.'"): *F.T.C. v. Inc21.com Corp.*, 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); *F.T.C. v. Darling Angel Pin Creations, Inc.*, 2011 U.S. Dist. LEXIS 3981, at *1 (M.D. Fla. Jan. 10, 2011) (recognizing that the district court agreed to freeze assets in conjunction with a temporary restraining order); *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."); *In re Nat'l Credit Mgmt. Grp.*, 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 is appropriate to preserve assets for possible restitution awards); *F.T.C. 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); *id.* ("While it is true that the asset freeze has an effect comparable to that of an attachment, it is not an attachment.").

33. An asset freeze is necessary and warranted to "completely compensate or restore to the original position of any person injured… or to prevent any unjust enrichment." C.R.S. § 6-1-110(1).

34. Absent the safeguard of an asset freeze, the Court finds the States' assertion has been established that the Defendants are likely to transfer or conceal their assets in a manner which will prevent consumers from being compensated or restored to their original positions. The testimony of Investigator Kenneth King regarding the Defendants' failure to respond to the State's investigative subpoenas, and attitude towards the State's investigation, strongly indicates that the Defendants would likely transfer or conceal these assets.

35. There is no evidence that suggests that Defendants maintain an adequate reserve of money to compensate an increasing pool of consumer victims; the contrary, Defendants' refund checks bounce as it is. Further, Defendants have numerous judgments that remain unsatisfied. There is no reason to believe that Defendants will preserve their assets for restitution for consumers at the close of this lawsuit.

36. During the hearing, and in its Motion, the State established that the following bank accounts have been used by Defendants in the course of their business in the past:

a. Alpine Bank
b. Edward Jones & Company, LP
c. JP Morgan Chase & Co.
d. E-Trade Financial Corporation

WHEREFORE, the Court enters a Preliminary Injunction that:

A. Enjoins all Defendants and their officers, directors, agents, servants, employees, independent contractors and any other persons in active concert or participation with Defendants who receive actual notice of this Court's order from:
    a. Advertising or selling or accepting orders or preorders for merchandise via the internet;
    b. Advertising or selling any merchandise or services that Defendants do not currently have in their physical possession;
    c. Advertising or selling merchandise where the consumer is not able to physically inspect the merchandise prior to purchasing; and
    d. Advertising or selling merchandise which requires shipment to consumers.

B. Requires Defendants and their officers, directors, agents, servants, employees, independent contractors, and any other persons in active concert or participation with Defendants who receive actual notice of the Court's order to:
    a. Deactivate all internet sites, internet advertising, and third-party internet advertising, related to Defendants' online sales business, including but not limited to:
        i. 123Mountain.com;
        ii. Summitwearhouse.com;

iii. And any and all online shops operated by Defendants via a third party, including but not limited to ebay.com, etsy.com, facebook.com, and craigslist.com.

C. With regard to the existing Temporary Restraining Order and Asset Freeze in place, the Court orders that Defendants and their officers, directors, agents, servants, employees, independent contractors, and any other persons in active concert or participation with Defendants who receive actual notice of the Court's order are required to continue to comply with the terms of the Temporary Restraining Order and Asset Freeze issued on March 29, 2016, including maintenance of the existing asset freeze, pending outcome at trial in this matter.

April 6, 2016

W Terry Ruckriegle

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Hon. W. Terry Ruckriegle
Senior District Court Judge