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IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT
IN HILLSBOROUGH COUNTY, FLORIDA
CIVIL ACTION

OFFICE OF THE ATTORNEY GENERAL
STATE OF FLORIDA
DEPARTMENT OF LEGAL AFFAIRS,

Plaintiff, CASE NO. 22-CA-009958

v.

MV REALTY PBC, LLC, a Florida limited liability company, AMANDA J. ZACHMAN f/k/a AMANDA ZUCKERMAN, an individual, ANTONY MITCHELL, an individual, DAVID MANCHESTER, an individual,

Defendants.
_____/

MOTION FOR TEMPORARY INJUNCTION

Plaintiff, Office of the Attorney General, State of Florida, Department of Legal Affairs ("Plaintiff" or "the Attorney General"), moves for the issuance of an order granting a temporary injunction pursuant to the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA") Sections 501.207(1)(b) and (3), Florida Statutes, against MV Realty PBC, LLC ("MV Realty"), Amanda Zachman, Anthony Mitchell, and David Manchester. The Attorney General seeks a temporary injunction that includes the following relief pursuant to the recently enacted Section 475.279(2), Fla. Stat:

(1) A mandatory injunction to require Defendants to record Notices of Termination for all Memoranda of Homeowner Benefit Agreements or OptListing Agreements ("Memoranda") and Lis Pendens, or implement other measures that serve to terminate all Memoranda, Lis Pendens, or similar instruments recorded pursuant to Home Owner Benefit Agreements ("HBAs") or OptListing Agreements;

(2) A prohibitory injunction to forbid Defendants from filing further Memoranda or Lis Pendens in the public records of the State of Florida; and

(3) A prohibitory injunction forbidding Defendants from attempting to collect Early Termination Fees from their HBAs from the proceeds of real estate sales.

In addition to the above relief requested pursuant to the Statute, the Attorney General is also seeking:

(4) An asset freeze to preserve at least $671,000.00 linked to fees unjustly paid by consumers, and financial discovery to identify and preserve further assets for consumer restitution or other equitable monetary relief.

INTRODUCTION

Defendants MV Realty and its masterminds Amanda Zachman, Anthony Mitchell, and David Manchester, (collectively, "Defendants") have engaged in a

deceptive, unfair and unconscionable scheme to swindle homeowners in Florida and 32 other states out of their home equity. The Florida Legislature recently passed a law to put a stop to this practice, but Defendants refuse to take action necessary to clear the public records of the confusing documents that appear to cloud residential title. Through this Motion for Temporary Injunction, the Attorney General is asking for limited relief pursuant to recently enacted Section 475.279 of the Florida Statutes which requires Defendants to file Notices of Termination of each of their unenforceable Memoranda and legally null Lis Pendens. This relief is necessary to provide notice to the public that MV Realty's documents are not enforceable liens against residential real property. The Attorney General is further requesting that, pursuant to the statute, Defendants be enjoined from filing any new Memoranda or Lis Pendens, as well as be prohibited from collecting Early Termination Fees from the proceeds flowing from the sale of real property for which MV Realty has provided no real estate brokerage services. Finally, the Attorney General is requesting a limited asset freeze for funds identified as Early Termination Fees paid by consumers.

Multiple state attorneys general (including Massachusetts, Pennsylvania, Ohio, North Carolina, and New Jersey) have sued MV Realty over their deceptive sales pitch and unconscionable and unfair business practices. At least one other state, Massachusetts, has already obtained preliminary injunctive relief enjoining MV

Realty from collecting undisclosed fees and obtaining or recording liens on consumers' homes.[1] In addition, state legislatures around the United States, including Florida, have taken action and enacted a variety of laws to stop MV Realty's practices.

Since the Office of the Attorney General filed the Complaint in this matter, Florida enacted a new law that prohibits the filing of liens such as those filed by MV Realty in the public records of the State of Florida. The Florida Legislature unanimously passed Senate Bill 770 on April 20, 2023, and the Governor signed it into law on May 25, 2023.[2] The Bill Analysis and Fiscal Impact Statement prepared in conjunction with the legislation specifically mentions MV Realty and its practice of recording forty-year liens to collect 3 percent of the value of the subject property.[3] The legislation created Section 475.279, Florida Statutes, which became effective on July 1, 2023.[4] Significantly, Section 475.279 prohibits courts in the State of Florida from enforcing MV Realty's Memoranda of Homeowner Benefit Agreement (or any Lis Pendens they may file) after the effective date of the statute, which is July 1, 2023. Specifically, Section 475.279(2) states:

> **A court may not enforce a residential loan alternative agreement by a lien** or constructive trust in the residential real property **or upon**

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[1] Commonwealth of Massachusetts v. MV Realty PBC, LLC et al., Case No. 2284CV02823-BLS2, Dkt. 22 (Superior Court, Suffolk County, MA)
[2] https://www.flsenate.gov/Session/Bill/2023/770 (Last Accessed August 15, 2023).
[3] https://www.flsenate.gov/Session/Bill/2023/770/ByCategory/?Tab=Analyses (Last Accessed August 15, 2023).
[4] Fla. Stat. Ann. § 475.279(2) (West).

the proceeds of the disposition of the residential real property. [emphasis supplied].

As a result, the MV Realty Homeowner Benefit Agreements that act as a lien on consumers home titles and divert the proceeds of residential real estate transactions are legally null documents because they are not enforceable by any court.

In addition to being unenforceable, Defendants' Memoranda and Lis Pendens clutter the public record, slow down closings, deprive consumers of access to their home equity, and trick or confuse consumers into believing they must satisfy MV Realty's lien from the proceeds of their real estate sale -- contrary to the language of the new statute.

Despite a demand from Plaintiff that Defendants remove or terminate its Lis Pendens and Memoranda on July 1, 2023,[5] MV Realty has refused to terminate the Memoranda and persists in seeking money from the proceeds of real estate sales at the closing table. Defendants have recorded thousands of Memoranda and continue to use these documents as liens despite the Florida Legislature's unambiguous pronouncement that courts cannot enforce such encumbrances.

The remedies sought herein, including injunctive relief and an asset freeze, are necessary to prevent ongoing harm to homeowners and to ensure that a

[5] The Attorney General's letter is attached hereto as Exhibit A.

meaningful recovery is available should the Attorney General ultimately succeed in obtaining a judgment for consumer restitution. Since July 1, 2023, homeowners report that MV Realty continues to encumber residential titles despite the Florida Legislature's action. This Court should require Defendants to unbind thousands of Floridian's titles so that homeowners can regain access to the value in their homes and prohibit Defendants from filing additional encumbrances. This Court should further prohibit Defendants from attempting to collect Early Termination Fees from the proceeds of real estate sales. Additionally, the Court should sequester or freeze MV Realty's assets in an amount sufficient to allow for the return of Early Termination Fees previously collected from consumers and allow the Attorney General to take financial discovery to identify and preserve assets for consumer restitution.

STANDARD OF REVIEW

Mandatory injunctions compel an affirmative action by the party enjoined.[6] This Court has the authority to grant temporary mandatory injunctions during the pendency of this action.[7] A party seeking a temporary injunction must normally show (a) a likelihood of irreparable harm, (b) the unavailability of an adequate remedy at law, (c) that the injunction is in the public interest, and (d) a clear legal

[6] *Grant v. GHG014, LLC*, 65 So. 3d 1066, 1067 (Fla.4th DCA 2010).
[7] *Martin v. Pinellas Cnty.*, 444 So. 2d 439, 441 (Fla. 2d DCA 1983).

right to the relief requested or substantial likelihood of success on the merits.[8] Three of these elements, irreparable harm, lack of an adequate remedy at law, and public interest, are presumed because sections 501.207(1)(b) and (3) of FDUTPA expressly authorize the enforcing authority[9] to seek injunctive relief.[10]

FDUTPA at section 501.207(1)(b), Florida Statutes, in relevant part, reads: "The enforcing authority may bring . . . An action to enjoin any person who has violated, is violating, or is otherwise likely to violate, this part." Section 501.207(3), Florida Statutes, in relevant part, reads:

> "Upon motion of the enforcing authority . . . the court may make appropriate orders, including, but not limited to . . . sequestration or freezing of assets, to reimburse consumers or governmental entities found to have been damaged; . . . to strike or limit the application of clauses of contracts to avoid an unconscionable result; . . . to impose reasonable restrictions upon the future activities of any defendant to impede her or him from engaging in or establishing the same type of endeavor; . . . or to grant legal, equitable, or other appropriate relief."

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[8] *Naegele Outdoor Advertising Co. v. City of Jacksonville*, 659 So. 2d 1046, 1047 (Fla. 1995); *Millennium Communications & Fulfillment, Inc. v. Office of the Attorney Gen.*, 761 So.2d 1256, 1260 (Fla. 3d DCA 2000).

[9] The Attorney General is an enforcing authority under FDUTPA. Pursuant to 501.203(2), Florida Statutes: "Enforcing authority" means . . . the Department of Legal Affairs if the violation occurs in or affects more than one judicial circuit. . ." Defendants' have recorded Memoranda and notices of lis pendens in multiple judicial circuits. Exhibit B, Declaration of Patricia Rossie ("Rossie") at ¶ 14.

[10] *Millennium*, 761 So.2d at 1260 (Fla. 3d DCA 2000); *Harvey v. Wittenberg*, 384 So. 2d 940, 941 (Fla. 3d DCA 1980) ("[A] provision granting jurisdiction to the circuit courts to issue injunctions . . . is the equivalent of a legislative declaration that a violation of the statutory mandate constitutes an irreparable public injury.") (Citing *Times Publishing Co. v. Williams*, 222 So. 2d 470 (Fla. 2d DCA 1969)).

Thus, to prevail on this Motion, the Attorney General need only demonstrate a clear legal right to the relief requested or substantial likelihood of success on the merits.[11]

ARGUMENT

The Attorney General has a clear legal right to the relief requested because Defendants' HBAs cannot be enforced through liens or on the proceeds of home sales under Section 475.279, Florida Statutes. Also, Defendants' Early Termination Fees are unfair and were obtained through deception. FDUTPA authorizes the injunction and asset freeze requested.

I. Defendants' HBAs are Unenforceable Through Liens or on the Proceeds of Home Sales

Section 475.279(2), of the Florida Statutes provides that a "court may not enforce a residential loan alternative agreement by a lien." Section 479.279(2) also provides that residential loan alternative agreements cannot be enforced "upon the proceeds of the disposition of the residential real property".

HBAs are residential loan alternative agreements within the scope of Section 475.279, Florida Statutes. The law defines a residential loan alternative agreement as:

> a signed writing or a signed and written legal instrument or contract between a person and a seller or an owner of residential real property

[11] *Millennium*, 761 So. 2d at 1260; *E-Racer Tech, LLC v. Office of Attorney Gen. Dep't of Legal Affairs*, 198 So. 3d 1107, 1110 (Fla. 4th DCA 2016).

> which: 1. Grants an exclusive right to a person to act as a broker for the disposition of the property; 2. Has an effective duration, inclusive of renewals, of more than 2 years; and 3. Requires the person to pay monetary compensation to the seller or owner.[12]

Defendants' HBAs and MV Realty's prior OptListing Agreements are written contracts signed by homeowners.[13] The HBA purportedly grants MV Realty or its designee an "exclusive right to act as listing agent (as a transaction broker) for any sale" of the homeowner's property and requires the homeowner to enter a subsequent listing agreement with MV Realty should the homeowner seek to sell the property at any time within 40 years.[14] OptListing Agreements state "Owner will list the Property for sale with [MV Realty], which listing will provide for a minimum commission to [MV Realty] of 3% and a maximum commission to [MV Realty] of 6% of the total sales price."[15] The HBA has a term of up to forty years[16] and OptListing Agreements have a term of three years that perpetually renew.[17] Finally, the HBA requires that MV Realty make a one-time, upfront payment of a "Promotion Fee" to the homeowner,[18] and OptListing Agreements refer to "consideration" paid to

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[12] Section 475.279(b), Florida Statutes.
[13] Rossie at Composite Exhibit 5; Defendants' Motion to Dismiss Complaint and Supporting Memorandum of Points and Authorities, Dkt. 16, at Composite Exhibit A and Exhibit B.
[14] *Id.* at ¶ 1.a.
[15] Rossie at Composite Ex. 5, p. 211, ¶3. (OptListing Agreement exemplar from Marlon Williams & Retinella Gayle).
[16] Rossie at Composite Ex. 5, all HBA exemplars at ¶ 2; Dkt. 16 at Composite Ex. A ¶ 2 and Ex. B ¶ 2.
[17] Rossie at Ex. 5, p. 212, ¶ D. (OptListing Agreement exemplar from Marlon Williams & Retinella Gayle).
[18] Rossie at Composite Ex. 5, all HBA exemplars at ¶ 1a; Dkt. 16 at Composite Exhibit A at ¶ 1a and Exhibit B at ¶ 1.a.

homeowners.[19] Thus, Defendants' HBAs and OptListing Agreements satisfy each element of a residential loan alternative agreement under Section 475.279, Florida Statutes.

Defendants' HBAs "authorize a person to place a lien on or otherwise encumber" residential real property.[20] The HBA states:

> Should Property Owner default under this Agreement, any amounts owed by Property Owner to Company as a result of such default **shall be secured by a security interest and lien** in and against the Property as security for the amounts owed by Property Owner to Company.[21]

While the OptListing Agreement states:

> [MV Realty] shall be entitled, in its sole discretion, to record an Affidavit and Notice of Interest in Real Estate, among the public records of the county in which the Property is located. Such Notice shall serve to advise third parties of Owner's obligations under this Agreement and shall create a lien upon the Property until released, satisfied or terminated pursuant to the terms of this Agreement.[22]

Defendants' HBAs and OptListing Agreements purport to authorize liens against homeowners' properties and satisfy each element of a residential loan alternative agreement under Section 475.279, Florida Statutes. Therefore, judicial enforcement of liens imposed under the HBA and OptListing Agreement

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[19] Rossie at Ex. 5, p. 211. (OptListing Agreement exemplar from Marlon Williams & Retinella Gayle)
[20] Section 475.279(2), Florida Statutes.
[21] Rossie at Ex. 5, 2019 and 2020 HBA exemplars at ¶ 4(a), 2021-2023 HBA exemplars at ¶ 5a; Dkt. 16 at Exhibit A & B, ¶ 5.a., (emphasis added).
[22] Rossie at Ex. 5, p. 212, ¶ C. (OptListing Agreement exemplar from Marlon Williams & Retinella Gayle)

contravenes Florida law. As Defendants' Memoranda are either unenforceable liens themselves, or are notices of unenforceable liens, they are nullities which should be terminated before they cause even more Florida consumers to payoff these liens with the proceeds from home sales. Yet, Defendants continue to rely upon their Memoranda that encumber homes as though Defendants had an enforceable interest in the property.[23] Defendants even affirmatively file lawsuits and Lis Pendens against homeowners who list their properties without involving MV Realty, but then fail to pursue the suit and instead record a Lis Pendens to recover an Early Termination fee at the closing table.[24] A Lis Pendens is defined as "the jurisdiction, power, or control which courts acquire over property involved in a pending suit."[25] It is axiomatic that if a court has no power to enforce a purported interest in a property, a notice of Lis Pendens is improper.[26] Filing Lis Pendens improperly to divert proceeds from consumers' home sales causes material harm.[27]

Moreover, any interest Defendants may claim in consumers' homes is unenforceable because Defendants are expressly prohibited from enforcing their HBAs against the proceeds of the disposition of residential real properties pursuant

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[23] Rossie at ¶ 29.
[24] Rossie at ¶ 30; Rossie at Composite Ex. 4, Vol. 2 at p. 5, Declaration of Tom Skinner at ¶ 13.
[25] *Med. Facilities Dev., Inc. v. Little Arch Creek Properties, Inc.*, 675 So. 2d 915, 917 (Fla. 1996).
[26] *Tetrault v. Calkins*, 79 So. 3d 213, 215–16 (Discharging Lis Pendens "because the Calkins have no interest in Tetrault's parcel GH which would serve as the basis for a lis pendens.")
[27] *Id.* (Lis Pendens "is a harsh and oppressive remedy" that causes "material harm not remediable on appeal.")

to section 475.279(2), Florida Statutes. Section 475.279 of the Florida Statutes prohibits MV Realty from collecting on the residential loan alternative agreements from the proceeds of the disposition of residential real property, but without action from this Court, title agents, real estate professionals, and purchasers still see these liens as a cloud on title, and homeowners' real estate closings are being stalled.

II. Defendants Should be Required to Clear Up the Public Record and Should be Enjoined from Filing New Memoranda and Notices of Lis Pendens

Defendants have recorded thousands of Memoranda pursuant to their HBAs.[28] As an initial matter, these Memoranda should never have been recorded because the HBA is not a sufficiently definite contract and is incapable of creating a valid lien through contractual agreement. Essential terms of the agreement between MV Realty and consumers remain blank, such as the home's sales price, the terms of the listing agreement, and the identity of the listing agent. "A binding and enforceable contract requires mutual assent to certain and definite contractual terms. Without a meeting of the minds on all essential terms, no enforceable contract arises."[29] Where essential terms of a contract remain open and subject to future negotiation, there can be no enforceable contract.[30] Thus, MV Realty lacks the authority to record its Memoranda in the first instance as they are only authorized by agreements that are

[28] Rossie at ¶ 30.
[29] *Matter of T & B General Contracting, Inc.*, 833 F.2d 1455, 1459 (11th Cir.1987).
[30] *Suggs, Jr. v. Defranco's, Inc.*, 626 So.2d 1100, 1101 (Fla. 1st DCA 1993); *Univ. Creek Associates, II, Ltd. v. Boston Am. Fin. Group, Inc.*, 100 F. Supp. 2d 1337, 1340 (S.D. Fla. 1998).

void and unenforceable. As such, Defendants should be required to file Notices of Termination for their Memoranda in the public records.

Defendants claim that these Memoranda act as a "notice of a lien right,"[31] but, as detailed above, courts are prohibited from enforcing liens premised on Defendants' HBAs. Therefore, the Memoranda, at best, are notices of unenforceable liens and serve no legitimate purpose for Defendants or consumers. Similarly, Defendants routinely file suits against consumers they deem to have breached their HBA to record a Lis Pendens on consumers' properties.[32] In either case, documents that Defendants recorded in the public property records are invalid and serve no purpose other than circumventing section 475.279, Florida Statutes.

Sadly, despite the presence of the new statute, Section 475.279, title companies are still refusing to conduct consumers' real estate closings unless the Memoranda are satisfied, released or terminated.[33] Homeowners attempting to sell properties on which MV Realty has recorded an unenforceable lien or memorandum still must either pay MV Realty to close or sue MV Realty in arbitration to have each individual Memorandum released.[34] A consumer's only option other than paying MV Realty 3% of the proceeds from the sale of their home is to engage an individual

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[31] Dkt. 16 at p. 12.
[32] Rossie at ¶¶ 29-30.
[33] Exhibit C, Declaration of Shannon Wilson at ¶ 5; Exhibit D, Declaration of Richard Barbara at ¶ 6.
[34] Exhibit D at ¶ 6.

arbitration to restrain Defendants' illegal trade practices, which is prohibitively expensive for most consumers and runs counter to the concept of judicial economy.

Effectively, MV Realty employs liens as an extrajudicial remedy that allows it to enforce residential loan alternative agreements on the proceeds of the disposition of residential real property in violation of Section 475.279(2). Under Section 475.279(7), violations of 475.279(2) constitute an unfair or deceptive trade practice within the meaning of FDUTPA.[35] Therefore, the Attorney General has a likelihood of success on the merits of its FDUTPA claim and is entitled to a preliminary injunction requiring MV Realty to terminate its existing Memoranda and Lis Pendens, prohibiting it from filing such instruments in the future, and prohibiting Defendants from attempting to collect Early Termination Fees from the proceeds of real estate sales.

Additionally, the Attorney General has a likelihood of success on the merits of its FDUTPA claims because Defendants deceived consumers about their Memoranda. Consumer complaints received by the Attorney General demonstrate that consumers were unaware that a Memorandum would be recorded as a lien or encumbrance against their property or that the Memoranda would inhibit a

[35] "Notwithstanding s. 501.212, a violation of this section is deemed an unfair or deceptive trade practice within the meaning of part II of chapter 501, and a person who violates this section is subject to the penalties and remedies provided therein" Fla. Stat. § 475.279(7).

consumer's ability to refinance their home or otherwise access their home equity.[36] Numerous consumer declarations alleging that Defendants omit these material details in their sales pitch corroborate the consumer complaints.[37] The omission of a material fact that is likely to detrimentally mislead a consumer acting reasonably in the circumstances is a deceptive act under FDUTPA.[38] Consumer's complaints and declarations are unequivocal that Defendants consistently omitted any mention of recording liens against consumers' properties that would prevent them from accessing their home equity without paying MV Realty. This is a material omission, and the Attorney General has a substantial likelihood of success on the merits of its FDUTPA claim such that a temporary injunction requiring the termination of Defendants' Memoranda is appropriate.

III. Consumer Payments of Termination Fees Should Be Frozen and Preserved for Restitution

FDUTPA authorizes the Court to "make appropriate orders, including, . . . sequestration or freezing of assets."[39] Evidence collected by the Attorney General at

[36] Rossie at ¶ 16.
[37] Declaration of Kathleen Altaro ("Altaro") at ¶2; Declaration of Jennifer Bec-Rodriguez ("Bec-Rodriguez") at ¶6; Declaration of James Calvert ("Calvert") at ¶3; Declaration of Kimberly Holly ("Holly") at ¶3; Declaration of Paula Powers ("Powers") at ¶6; Declaration of Pamela Sokol ("Sokol") at ¶4; Declaration of Keren and Miguel Vega ("Vega") at ¶5; Declaration of Vivian Lopez ("Lopez") at ¶4.
[38] *White v. Grant Mason Holdings, Inc.*, 741 F. App'x 631, 636–37 (11th Cir. 2018) ("A deceptive act can include any omission that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer's detriment.") (internal quotation omitted).
[39] Section 501.207(3), Florida Statutes.

this early stage of this case shows a substantial likelihood of success on the merits, and, therefore, this Court should ensure sufficient funds are sequestered or frozen to pay consumer restitution. Analysis of MV Realty's bank records shows that, at a minimum, the company took at least $671,000 in wire transfers from consumers which referenced a payoff of a lien or termination of an HBA.[40] Furthermore, this amount is underinclusive, as it is based off of financial records from only one of MV Realty's banks and covering only the limited time period from January 2019 through January 2022.[41] Although this preliminary estimate of ill-gotten consumer funds is sufficient at this stage of the case,[42] this Court should allow the Attorney General to take full financial discovery and identify additional consumer funds to sequester or freeze.

A. Defendants Deceived Consumers Regarding the Early Termination Fee

The Attorney General has received approximately 159 consumer complaints,[43] 17 consumer declarations,[44] and an expert opinion which show that Defendants engaged in unconscionable, unfair, and deceptive practices that caused

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[40] Rossie at ¶ 22.
[41] Id. at ¶ 20.
[42] "In an equitable enforcement action seeking to freeze the defendants' assets, the defendants are liable to the extent of their ill-gotten gains, that being revenue and not net profit." *E-Racer Tech, LLC v. Off. of Att'y Gen. Dep't of Legal Affs.*, 198 So. 3d 1107, 1110 (Fla. 4th DCA 2016) (citing *FTC v. IAB Mkt. Assoc., LP,* 972 F.Supp.2d 1307, 1312 (S.D.Fla.2013)). Furthermore, exactitude is not a requirement – only a reasonable approximation of a defendant's ill-gotten gains. *Id.* (citing *SEC v. Calvo,* 378 F.3d 1211, 1217 (11th Cir.2004)).
[43] Rossie at ¶ 9.
[44] *Id.* at ¶ 11.

consumers to pay the illegal fees the Attorney General seeks to sequester or freeze. Consumers consistently report that Defendants failed to inform them of material information regarding the HBA, including the HBA's forty-year term, the penalty for breaching an HBA, and that the company would file a memorandum encumbering the homeowner's property.[45] These omissions are material because consumers state that they would not have done business with MV Realty if these terms had been clearly disclosed.[46]

Additionally, Defendants actively misled consumers about fees in the HBA. Defendants' marketing materials[47] as well as numerous consumer declarations show that Defendants told consumers that they did not need to repay MV Realty for the upfront payment they receive for signing the HBA – which is deceptive. Defendants' Early Termination Fee is triggered by: "A sale or other transfer of the Property . . . that does not result in the Company being paid the Commission," subject to a limited carveout for transfers to a spouse or heir who agrees within ten days to be bound by

[45] Altaro at ¶2; Bec-Rodriguez at ¶6; Calvert at ¶3; Holly at ¶3; Powers at ¶6; Declaration of Tom Skinner ("Skinner") at ¶5; Sokol at ¶4; Vega at ¶5; Lopez at ¶4.
[46] Altaro at ¶8; Bec-Rodriguez at ¶6; Calvert at ¶5; Holly at ¶3; Powers at ¶6; Skinner at ¶5; Sokol at ¶4; Vega at ¶5; Lopez at ¶4. *F.T.C. v. Direct Mktg. Concepts, Inc.*, 569 F. Supp. 2d 285, 299 (D. Mass. 2008), *aff'd,* 624 F.3d 1 (1st Cir. 2010) ("materiality, is measured by whether a representation is likely to affect the consumer's conduct or decision with regard to a product or service.") (internal quotation omitted).
[47] See e.g., Rossie at ¶25, Ex 6, April 2022 Ad Snapshot at pp. 11-17 ("No obligation to return the payment and you have no obligation to sell").

the HBA.[48] Essentially the only way for a consumer to avoid triggering the Early Termination Fee and repaying MV Realty ten-fold is by staying in the same house for forty years, which only a very small percentage of individuals do.[49] Consumers acting reasonably in the circumstances would be misled by MV Realty's representation that they have no obligation to return the upfront payment they receive, because it is virtually impossible to avoid paying an Early Termination Fee that greatly exceeds the upfront payment.[50]

Consumer complaints about MV Realty's agents deceptively omitting or misrepresenting material aspects of the HBA, such as the Early Termination Fee, are corroborated by MV Realty's training procedures and incentives for its sales staff.[51] Defendants train unlicensed telemarketers, called "Transfer Specialists," not to inform consumers about material aspects of the HBA, and make their continued employment dependent on completing these sales. These practices ensure that

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[48] *See e.g.*, Rossie at Ex. 5; Calvert at Ex. A, p. 2 (Florida HBA); Holley at Ex. A, p. 2 (Georgia HBA).

[49] Exhibit E, Declaration of Richard Fryer ("Fryer"), at ¶ 43.

[50] Liability for FDUTPA violations based on deceptive acts or practices accrues from a "representation, omission, or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer's detriment." *PNR, Inc. v. Beacon Prop. Mgmt., Inc.*, 842 So. 2d 773, 777 (Fla. 2003) (citing *Millennium*, 761 So.2d at 1263 (Fla. 3d DCA 2000)); *Rollins, Inc. v. Butland*, 951 So. 2d 860, 883 (Fla. 2d DCA 2006) ("'[A] party asserting a deceptive trade practice claim need not show actual reliance on the representation or omission at issue.' Rather, the party must establish that 'the practice was likely to deceive a consumer acting reasonably in the same circumstances.'") (*quoting Davis v. Powertel, Inc.*, 776 So. 2d 971, 973-74 (Fla. 1st DCA 2000).

[51] Rossie at Composite Ex. 4 (Declaration of Calista Wilson at ¶ 2, Declaration of Dominique Butler at ¶¶ 2, 11); Fryer at ¶ 44, 55.

Transfer Specialists will, at best, only repeat MV Realty's misleading sales pitch and will not provide meaningful information about the Early Termination Fee and other onerous provisions of the HBA.[52]

Similarly, Defendants incentivize their licensed real estate professionals ("licensees") to omit or misrepresent material terms of the HBA. These incentives create significant pressure to omit onerous terms such as the Early Termination Fee to sell more HBAs.[53] Defendants' licensees are also not required to see consumers in person prior to execution of the HBA, which makes it more difficult to explain the material terms of the HBA and more likely that a consumer will misunderstand those terms.[54] In sum, Defendants engaged in a deliberate practice to deceive consumers about material aspects of the HBA.

B. The Early Termination Fee is Unconscionable

The Attorney General also has a likelihood of success on the merits of its claim that Defendants' Early Termination Fee violates FDUTPA because it is unconscionable. The HBA states that the Early Termination Fee is to be imposed as "liquidated damages" should consumers engage someone other than MV Realty to sell their house or if their home is sold or transferred without MV Realty being paid

[52] *Id.*
[53] Fryer at ¶¶ 34-37;54.
[54] *Id.* at ¶ 55.

its commission.[55] Contract clauses of this type are impermissible if they appear "unconscionable in light of the circumstances existing at the time of breach."[56] Defendants' Early Termination Fee is clearly unconscionable at the time of breach because it grants MV Realty a windfall that exceeds the profit Defendants would receive for acting as the seller's broker.

The amount of the Early Termination Fee has varied slightly in different versions of the HBA.[57] However, it is either "three percent (3%) of the fair market value of the Property, as reasonably determined by [MV Realty]"[58] or "three percent (3%) of the greater of (i) [], the Property's current Realtors Valuation Model home value estimate, or (ii) the fair market value of the Property at the time of the Property Owner's breach or Early Termination Event, as reasonably determined by [MV Realty]."[59] Under the HBA, upon brokering the sale of a consumer's home, MV Realty receives a commission equal to six percent (6%) of the sale price and is obligated to pay three percent (3%) of the sale price to the "Cooperating Broker," which is the buyer's broker or brokers.[60] Thus, MV Realty's maximum revenue from an HBA is 3% of the home's sale price, unless the same MV Realty licensee is engaged by both the buyer and the seller such that there is no Cooperating Broker.

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[55] Rossie at Ex. 5 (all HBA exemplars at ¶ 3); Dkt. 16, Ex. A and Ex. B at ¶ 3.
[56] *Hutchison v. Tompkins*, 259 So. 2d 129, 132 (Fla. 1972).
[57] Rossie at Ex. 5.
[58] Rossie at Ex. 5 (2019-2020 HBA exemplars at ¶ 3).
[59] Rossie at Ex. 5 (2021-2023 HBA exemplars at ¶ 3); Dkt. 16, Ex. A and Ex. B at ¶ 3.
[60] Rossie at Ex. 5 (all HBA exemplars at ¶ 1b); Dkt. 16, Ex. A and Ex. B at ¶ 1b.

Thus, the Early Termination Fee is equal to the maximum revenue MV Realty will receive from the HBA in the vast majority of cases. However, MV Realty's appropriate measure of damages for breach of the HBA is not its revenue – it is its lost profits.[61] Calculating profits requires deducting necessary expenses, such as the licensees commission and the cost of marketing the property, from MV Realty's revenue. Therefore, the Early Termination Fee is excessive because it is virtually always more than Defendants would profit from performing under the HBA. Excessive liquidated damages clauses are unconscionable.[62] The funds that MV Realty has wrongfully obtained through the Early Termination Fee should be returned to consumers.

Both the Defendants' material omissions and misrepresentations regarding the Early Termination Fee, as well as the fact that it is unconscionable, establish that the Attorney General has a likelihood of success on the merits. Therefore, the Court

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[61] *HCA Health Servs. of Fla., Inc. v. CyberKnife Ctr. of Treasure Coast, LLC*, 204 So. 3d 469, 472 (Fla. 4th DCA 2016) (quoting *Del Monte Fresh Produce Co. v. Net Results, Inc.*, 77 So.3d 667, 673 (Fla. 3d DCA 2011)).

[62] *Secrist v. Nat'l Serv. Indus., Inc.*, 395 So. 2d 1280, 1283 (Fla. 2nd DCA 1981) (affirming trial court's refusal to assess excessive liquidated damages attributed to overhead costs that were not incurred); *RKR Motors, Inc. v. Associated Unif. Rental & Linen Supply, Inc.*, 995 So. 2d 588, 595 (Fla. 3d DCA 2008) (liquidated damages that exceeded lost profits were unconscionable); *Perez v. Aerospace Acad., Inc.*, 546 So. 2d 1139, 1141 (Fla. 3d DCA 1989) (liquidated damages clause operates as penalty or unconscionably to the extent it fails to credit readily ascertainable savings realized by non-breaching party); *Coleman v. B.R. Chamberlain & Sons, Inc.*, 766 So. 2d 427, 429 (Fla. 5th DCA 2000) (Florida courts will not enforce a penalty which is disproportionate to the damages and is agreed upon in order to enforce performance of a contract and held *in terrorem* over the promisor to deter him from breaking his promise.)

should sequester or freeze assets sufficient to ensure that consumer funds paid as Early Termination Fees can be returned.

IV. Conclusion

WHEREFORE, the Attorney General respectfully requests the Court enter an Order: (1) granting a mandatory injunction requiring Defendants file Notices of Termination or implement other measures that serve to terminate all Memoranda, Lis Pendens, or similar instruments recorded pursuant to HBAs or OptListing Agreements, such that it is clear in the public record that these instruments are not current or valid liens against real property; (2) granting a prohibitory injunction forbidding Defendants from recording additional such instruments; and (3) granting a prohibitory injunction forbidding Defendants from collecting Early Termination Fees from the proceeds of real estate sales; (4) a sequestering or freeze of at least $671,000.00 linked to Early Termination Fees; (4) allowing the Attorney General to take financial discovery to identify and preserve additional assets linked to Early Termination Fees for consumer restitution or other equitable monetary relief; and, (5) allowing such additional or further relief as the Court deems necessary or appropriate.

CONFERRAL STATEMENT

Undersigned counsel certifies that she has conferred via letter dated May 26, 2023. Defendants have never responded in writing to the letter, but undersigned

counsel has further conferred via telephone calls on June 30, 2023, and a follow up email on June 30, 2023. Undersigned counsel also conferred with counsel for Defendants via voicemails to each of Defendants' multiple counsel on August 28, 2023, and a follow up email and then a phone call with Defendants' counsel. Defendants have not agreed to the relief requested, but Plaintiff will continue to confer with Defendants all the way up until the time of the hearing as to whether any issues can be narrowed.

Dated: August 28, 2023.

Respectfully Submitted,

ASHLEY MOODY
ATTORNEY GENERAL

/s/ Ellen K. Lyons

Ellen K. Lyons, FBN 57819
Special Counsel, Asst. Attorney General
Email: Ellen.Lyons@myfloridalegal.com
Patrick C. Crotty, FBN 122814
Senior Assistant Attorney General
Email: Patrick.Crotty@myfloridalegal.com
Miles W. Vaughn, FBN 1032235
Assistant Attorney General
Email: Miles.Vaughn@myfloridalegal.com

Office of the Attorney General,
State of Florida
Department of Legal Affairs
Consumer Protection Division
3507 E. Frontage Road, Suite 325
Tampa, Florida 33607
Telephone (813) 287-7950
Facsimile (813) 281-5515

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 28, 2023, a true and correct copy of the foregoing Motion was filed through the Florida Courts E-Filing Portal, which has simultaneously effected service to all counsel of record.

/s/ Ellen K. Lyons
Ellen K. Lyons, FBN 57819
Special Counsel, Asst. Attorney General