STATE OF NORTH CAROLINA WAKE COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 23 CVS 6408
STATE OF NORTH CAROLINA, ex rel. JOSHUA H. STEIN, Attorney General, Plaintiff, v. MV REALTY PBC, LLC; MV REALTY OF NORTH CAROLINA, LLC; MV BROKERAGE OF NORTH CAROLINA, LLC; AMANDA ZACHMAN; ANTONY MITCHELL; DAVID MANCHESTER; and DARRYL COOK, Defendants.	**ORDER AND OPINION ON PLAINTIFF'S AMENDED MOTION FOR PRELIMINARY INJUNCTION**

THIS MATTER is before the Court on Plaintiff's Amended Motion for Preliminary Injunction ("PI Motion," ECF No. 31).

THE COURT, having considered the PI Motion, the briefs, affidavits, declarations, exhibits, arguments of counsel, and all other appropriate matters of record, **CONCLUDES**, in its discretion, that the PI Motion should be **GRANTED** for the reasons set forth below.

Attorney General Joshua H. Stein, by Special Deputy Attorney General and Policy Litigation Counsel Brian D. Rabinovitz and Special Deputy Attorney General Keith T. Clayton, for Plaintiff.

Holland & Knight, LLP, by Thomas R. Woodrow, Dalton B. Miller, and James C. King and Young Moore and Henderson, P.A., by Walter E. Brock, Jr., and David Duke, for Defendants.

FINDINGS OF FACT

1. The Court makes the following findings of fact, which are made solely for the purpose of resolving the present PI Motion and are not binding in any subsequent proceedings in this action. *See Lohrmann v. Iredell Mem'l Hosp., Inc.*, 174 N.C. App. 63, 75 (2005) ("It is well settled that findings of fact made during a preliminary injunction proceeding are not binding upon a court at trial on the merits."); *disc. rev. denied*, 360 N.C. 364 (2006).

2. The Plaintiff in this action is the State of North Carolina, *ex rel.* Joshua H. Stein, Attorney General (the "State"), pursuant to N.C.G.S. §§ 75-14 and 75-105(a). (Compl. ¶ 1, ECF No. 2.)

3. The various MV Realty entities who are named as Defendants in this case hold themselves out as a real estate brokerage firm and have marketed a Homeowner Benefit Agreement ("HBA") program to North Carolina homeowners since August 2020. (Mitchell Decl. ¶¶ 3–6, 9, ECF No. 38.2.)

4. Defendant MV Realty PBC, LLC is a Florida limited liability company and sole corporate member of Defendant MV Realty of North Carolina, LLC, a licensed North Carolina real estate brokerage firm that is organized as a limited liability company. (Pl's. Br. Supp. Mot. Prelim. Inj., Ex. 21, ECF No. 32.21; MV Realty Operating Agreement, at 13, ECF No. 32.33; Compl. ¶¶ 2–3.)

5. The individual Defendants are current and former owners, officers, and employees of the various MV Realty entities. Defendant Amanda Zachman founded MV Realty PBC in 2014 and serves as its managing director and officer. (Compl. ¶ 8;

Pl's. Am. Br. Supp. Mot. Prelim. Inj., Ex. 21, ECF No. 32.31.) Zachman also serves as an officer of MV Realty of North Carolina. (MV Realty Operating Agreement, at 4.) Defendant Antony Mitchell is the Chief Executive Officer of MV Realty PBC and an officer of MV Realty of North Carolina. (Mitchell Decl. ¶ 1; MV Realty Operating Agreement, at 4.) Defendant David Manchester is the Chief Operating Officer of MV Realty PBC. (Pl's. Am. Br. Supp. Mot. Prelim. Inj., Ex. 17, at 3, 5, 7–8, ECF No. 32.17.) Zachman, Mitchell, and Manchester are also members of MV Realty of North Carolina. (Pl's. Br. Supp. Mot. Prelim. Inj., Ex. 11, ECF No. 32.11; MV Realty Operating Agreement, at 4.) Defendant Darryl Cook is a licensed real estate broker and former employee of MV Realty of North Carolina, who—until March 2023—served as both its Broker-in-Charge and Broker-of-Record. (Compl. ¶ 16; MV Realty Operating Agreement, at 4.)[1]

6. Although certain aspects of MV Realty's program have been modified during the time period in which it has been doing business in North Carolina, the core terms have remained unchanged. MV Realty represents to homeowners that it is "offer[ing] a homeowner an immediate cash payment between $300 to $5,000, depending on the value of the homeowners' property. In exchange, homeowners agree that, if they choose to sell their home during the duration of the program, they will (1) enter into a separate listing agreement; and (2) allow MV [Realty] to be their listing agent." (Mitchell Decl. ¶ 6.)

[1] Throughout this opinion, the Defendants are referred to collectively as "MV Realty."

7. MV Realty operates websites and social media accounts where it advertises the HBA program to homeowners and requests that homeowners provide their contact information and consent to be contacted by an MV Realty agent about the program. (Compl. ¶¶ 56, 62; Michell Decl. ¶ 30.) MV Realty also contracts with online lead generators to direct homeowners to its website in order to maximize the number of homeowners who sign up for the program. (Compl. ¶ 92; Mitchell Decl. ¶ 31; Pl's. Reply Br. Supp. Mot. Prelim. Inj., Ex. 7, ECF No. 39.7.)

8. After a homeowner provides consent and contact information on the website, an agent of MV Realty contacts the homeowner and offers an incentive payment to the homeowner if they sign up for the program. (Mitchell Decl. ¶¶ 6, 30–32, 35–36.) If a homeowner responds that they will accept the payment, MV Realty sends a notary to their home shortly afterwards along with a copy of the HBA, which is the written contract between the homeowner and MV Realty. (Compl. ¶ 40; Mitchell Decl. ¶ 37.) Absent a specific request from the homeowner, the first time a homeowner is afforded the opportunity to review the terms of the HBA is the day the notary arrives at their home for them to sign it. (Mitchell Decl. ¶ 38.) MV Realty agents are not present at the time the HBA is signed by a participating homeowner. (Mitchell Decl. ¶ 41.)

9. By virtue of the HBA, MV Realty is granted an exclusive right to serve as the homeowner's listing agent in the event the homeowner decides to sell their home or if title to the home is otherwise transferred. (Sample HBA, at 1–2, ECF No. 38.3.) The duration of each HBA is forty years. (Sample HBA, at 2.) If a

participating homeowner decides to sell their home during the HBA's term, the commission due to MV Realty upon sale is the greater of 6% of the sale price or the estimated fair market value of the home at the time the HBA is entered into if there is no other cooperating broker. (Sample HBA, at 2.) If another broker participates in the sale, the commission due to MV Realty is the greater of 3% of the sale price or 3% of the home's estimated value at the time the HBA was executed. (Sample HBA, at 2.) The HBA's terms provide that the agreement remains binding on a homeowner's heirs upon the homeowner's death during the forty-year term. (*See* Sample HBA, at 2.)

10. If a participating homeowner breaches the HBA by, for example, using a different listing agent to sell their home, the HBA provides that MV Realty is entitled to receive an Early Termination Fee ("ETF") in the amount of 3% of the fair market value of the home either at the time the HBA was executed or at the time the HBA is breached—whichever is greater. (Sample HBA, at 2.) The HBA further states that the obligations of program participants "constitute covenants running with the land and . . . shall bind future successors in interest to title to the Property" and that, in the event the HBA is breached, "any amounts owed . . . to [MV Realty] . . . shall be secured by a security interest and lien in and against the Property as security for the amounts owed" under the agreement. (Sample HBA, at 3.)

11. MV Realty provides public notice of a homeowner's participation in the HBA program by recording a document designated as a Memorandum of MVR Homeowner Benefit Agreement ("Memorandum") with the Register of Deeds in the

county where the home is located. (Mitchell Decl. ¶ 27.) The Memorandum consists of only one page (plus signature pages for the homeowner and an MV Realty representative) and does not recite the terms of the HBA or attach the HBA as an exhibit. (Mem. HBA, at 11–13, ECF No. 38.3.) Instead, the Memorandum simply contains a brief description of the homeowner's participation in the program and states that the obligations of the homeowner are "covenants running with the land and bind future successors-in-interest to title to the Property." (Mem. HBA, at 11, ECF No. 38.3.)

12. The HBA includes three exhibits: a " 'Working with Real Estate Agents' brochure, a 'Payment Authorization Agreement' form," and the above-mentioned Memorandum. (Revis Aff. ¶ 4, ECF No. 39.1.) Although the HBA references a sample listing agreement, no such listing agreement is actually attached to the HBA. Instead, the HBA provides a link to a website where MV Realty's standard listing agreement can be downloaded. (Sample HBA, at 1; Revis Aff. ¶ 4.)

13. Since MV Realty began operating in North Carolina, approximately 2,100 North Carolina homeowners have participated in the program. (Compl. ¶ 4; Pls.' Br. Supp. Mot. Prelim. Inj., at 4, ECF No. 33.)

14. MV Realty's general practice when it suspects an HBA program participant may be in breach of an HBA is to send the homeowner a letter "remind[ing] the homeowner of their obligations under the HBA and the payments they may be liable for in the event of breach." (Mitchell Decl. ¶ 53.) MV Realty has sent 67 such letters to homeowners in North Carolina. (Mitchell Decl. ¶ 54.)

15. On a number of occasions, MV Realty has sought to enforce HBAs by filing lawsuits for breach of contract against North Carolina homeowners who were alleged to have breached their respective HBAs. (Compl., Ex. 19; Compl., Ex. 20; Pls.' Reply Br. Supp. Mot. Prelim. Inj., Ex. 9, ECF No. 39.9; Pls.' Reply Br. Supp. Mot. Prelim. Inj., Ex. 10, ECF No. 39.10.)

16. When MV Realty brings such lawsuits, it files a notice of *lis pendens* against the homeowner's property. (Compl., Ex. 21; Compl. Ex. 22; Pls.' Reply Br. Supp. Mot. Prelim. Inj., Ex. 9; Pls.' Reply Br. Supp. Mot. Prelim. Inj., Ex. 10.) In those lawsuits, MV Realty typically requests that the *lis pendens* remain pending throughout the duration of the lawsuit. (Compl., Ex. 19; Compl., Ex. 20; Pls.' Reply Br. Supp. Mot. Prelim. Inj., Ex. 9; Pls.' Reply Br. Supp. Mot. Prelim. Inj., Ex.10.)

17. On several occasions when MV Realty believed a homeowner had breached an HBA, MV Realty sent letters "to the buyer[s] of the properties threatening to file suit against the buyer[s] to foreclose its 'lien.' " (Compl. ¶ 162; Compl., Ex. 23.) "These threatened legal actions against subsequent purchasers of real property assert that the [HBA] creates an obligation to pay MV Realty's [ETF] that is . . . binding on successors in interest to title to the property." (Compl. ¶ 162; Compl., Ex. 23.)

18. On 30 March 2023, the State initiated the present action, asserting the following claims for relief against MV Realty: (1) unfair or deceptive trade practices ("UDTP") pursuant to N.C.G.S. § 75-1.1, *et seq.*; (2) unlawful telephone solicitation practices under N.C.G.S. § 75-100, *et seq.*; (3) unfair debt collection practices pursuant

to N.C.G.S. § 75-50, *et seq.*; and (4) usurious lending practices under N.C.G.S. § 24-1, *et seq*. (Compl. ¶¶ 173–199.)

19. The parties have represented to the Court that since November of 2022, MV Realty has not entered into any new HBAs in North Carolina. After the present lawsuit was filed, MV Realty agreed that it would not execute any new HBAs until the Court ruled on the State's request for immediate injunctive relief.

20. This case was designated as a complex business case and assigned to the undersigned on 18 April 2023. (ECF No. 7.)

21. On 5 May 2023, the State filed the present PI Motion. (ECF No. 31.)

22. Both in its Complaint and in support of its PI Motion, the State contends that many of the North Carolina homeowners who entered into HBAs were misled by MV Realty representatives about key aspects of the program and that material terms of the program were not properly disclosed to them. The State further asserts that numerous homeowners were not given adequate time to read the HBA before signing and, after execution of the document, were not given a signed copy of the HBA in a timely fashion. Finally, the State argues that key terms contained in the HBA are unlawful in North Carolina.

23. As attachments to its Complaint, the State submitted various exhibits, including the following: (1) three examples of HBAs utilized by MV Realty in North Carolina and a "Termination of an HBA"[2] filed with a North Carolina Register of

[2] The "Termination of an HBA" is a document recorded with the Register of Deeds that provides notice of a release of MV Realty's interest in a home, stating that a Memorandum has been "terminated and [is] of no further force or effect and the property described therein

Deeds; (2) various internal MV Realty correspondence discussing the HBA program; (3) email and text message communications between MV Realty agents and HBA program participants; (4) nine consumer affidavits by homeowners who claim they were misled about material terms of the program or were not afforded an advance opportunity to learn the terms of the program before their execution of an HBA; (5) promotional documentation for prospective HBA program participants; (6) a listing agreement with a homeowner; (7) a checklist containing instructions by MV Realty for notaries who notarize signings of HBAs in North Carolina; (8) demand letters from MV Realty to program participants suspected of being in breach of an HBA (including attached draft complaints, recorded Memoranda, and executed payment authorization forms as exhibits); (9) two notices of *lis pendens* recorded on the property of allegedly breaching HBA program participants; and (10) a demand letter to a purchaser of a program participant's home attaching a draft complaint purporting to seek recovery of the associated ETF along with attorneys' fees, interest, and costs. (Compl., Exs. 1–23, ECF No. 2.)

24. The State submitted additional evidence in connection with the PI Motion, which included the following: (1) five additional affidavits from HBA program participants who claim to have been misled about material terms of the program or allegedly were not afforded an opportunity to learn the terms of the program before the day they signed an HBA; (2) internal MV Realty email correspondence along with correspondence between MV Realty and third-party lenders containing references to

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is released from the effect, restriction and encumbrance" of the relevant HBA. (Compl., Ex. 2.)

the creation of a "lien" or "cloud" on a program participant's title resulting from the HBA; (3) two title insurance policies reflecting the fact that the Memorandum signed by program participants served as an encumbrance upon their homes; (4) email correspondence regarding refinancing requests by homeowners in which the request resulted in the homeowner being required to pay an ETF; (5) four demand letters from MV Realty asserting that MV Realty was entitled to attorneys' fees and costs upon a participant's alleged breach of an HBA (despite the fact that recovery of attorneys' fees and costs are not expressly authorized under the HBAs); (6) bank records regarding MV Realty receipts in North Carolina; (7) two affidavits by Mitchell (the CEO of MV Realty PBC and President of MV Realty of North Carolina) that were filed in defense of a consumer protection action brought by the Massachusetts Attorney General; (8) an affidavit by the Guilford County Register of Deeds, in which he stated that he has instructed his staff to refuse to record MV Realty's Memorandum based on his concern that it qualifies as a false lien; and (9) a demand letter from MV Realty to a participating homeowner that was sent after the State filed suit against MV Realty and while the PI Motion remained pending. (Br. Supp. Mot. Prelim. Inj., Exs. 1–32, ECF Nos. 32.1–32.32.)

25. The State also submitted additional evidence in connection with its filing of a reply brief in support of its PI Motion, which included (1) the affidavit of a North Carolina Department of Justice investigator (attaching exhibits received by the State pursuant to a Civil Investigative Demand served upon MV Realty); (2) a "pitch deck" to potential investors in MV Realty describing the HBA program; (3) two

title insurance company bulletins discussing the effects of the HBA program; (4) two additional consumer affidavits from homeowners expressing their dissatisfaction with MV Realty's program; and (5) three Better Business Bureau complaints made by HBA program participants in North Carolina. (Pls.' Reply Br. Supp. Mot. Prelim. Inj., Exs. 1–10, ECF Nos. 38.2–38.12.)

26. As noted above, the State has submitted a total of sixteen affidavits from homeowners expressing their dissatisfaction with the program based on, among other things, misrepresentations allegedly made to them by MV Realty agents. Pertinent allegations contained in those affidavits are summarized below:

a. Vernice Smith was told by an MV Realty agent that the program mandated that she agree to use MV Realty as her realtor when she decided to sell her home or else pay a fee of 1.5% of the sale price. She was also led to believe that the duration of the contract was only thirty years. (Smith Aff. ¶¶ 6–7, Compl., Ex. 12.) Ms. Smith was not given the opportunity to review the terms of the HBA until a notary brought it to her home for her to sign it. (Smith Aff. ¶¶ 9, 12.) An MV Realty agent was not present for the signing. Although there was an agent available on the phone during the signing, the agent did not provide any details about the HBA or answer any questions about it. (Smith Aff. ¶ 9.) After Ms. Smith signed the contract, she was not provided with a copy. (Smith Aff. ¶ 12.) The entire process took ten to fifteen minutes. (Smith Aff. ¶ 11.) The notary then paid Ms. Smith by a check from MV Realty. (Smith Aff. ¶¶ 13–14.) Ms. Smith was not informed that MV Realty could file a lien on her home after she signed the contract; had she been informed of the possibility of such a lien she would not have signed it. (Smith Aff. ¶ 15.) Ms. Smith later learned that the contract term was actually forty years, but she was never informed that the contract would be binding on her heirs if she died before the forty-year term had expired. (Smith Aff. ¶¶ 7, 16.) Ms. Smith was not correctly informed of the actual amount of the ETF and was instead told that the ETF would equal 1.5% of the sale price of her home. (Smith Aff. ¶ 17.)

b. Bennie Davis was offered $1,144 by an MV Realty agent via text message if he agreed to use MV Realty as a listing agent if he ever decided to sell his home. After he responded, a notary came to his home

the very same day. (Davis Aff. ¶ 5, 8, Compl., Ex. 9.) Mr. Davis was told the term of the agreement was six months. (Davis Aff. ¶ 13.) While Mr. Davis was emailed an electronic copy of the HBA shortly before the notary arrived, the listing agreement referenced by the HBA was not included. (Davis Aff. ¶ 8.) Just before the notary arrived, Mr. Davis was informed that the amount he would receive for signing the HBA had been reduced, but not by how much. (Davis Aff. ¶ 11.) After the notary arrived, Mr. Davis learned that he would only receive $936 for entering into the HBA. (Davis Aff. ¶ 11.) Mr. Davis asked the notary several questions about the program but the notary informed Mr. Davis she could not answer his questions as she was not an agent of MV Realty. (Davis Aff. ¶ 10.) The signing process took approximately thirty minutes. (Davis Aff. ¶ 9.) Mr. Davis was not informed the contract term was forty years; he would not have entered into the HBA if he had been given this information. (Davis Aff. ¶ 13.) Before Mr. Davis signed the agreement, he was informed that there was an ETF of $1,800 if he cancelled the agreement. Mr. Davis was not informed that the ETF was, in actuality, the greater of 3% of the value of the home at the time the HBA was entered into or the value at the time of breach. (Davis Aff. ¶ 14.)

c. Cynthia Jones received an email from MV Realty about the availability of grant money of up to $360. (Jones Aff. ¶ 3, Compl., Ex. 10.) Ms. Jones called MV Realty to discuss the grant money and was told she would receive it if she agreed to use MV Realty as a listing agent in the event she decided to sell her home. (Jones Aff. ¶ 6.) A notary came to Ms. Jones' home, where she signed the HBA. (Jones Aff. ¶¶ 8, 10–12.) The signing process took approximately twenty minutes. (Jones Aff. ¶ 11.) Ms. Jones was provided with some papers by the notary after signing the contract but not a copy of the contract itself. (Jones Aff. ¶ 10.) She was paid approximately $320 after she signed the HBA. (Jones Aff. ¶ 12.) Ms. Jones was not informed that the term of the agreement was forty years, that the contract would be binding on her heirs if she died before the forty-year term expired, or that that there was an ETF of 3%. (Jones Aff. ¶¶ 14–16.) After she entered into the HBA, Ms. Jones received a letter from the Guilford County Register of Deeds notifying her that there was a lien on her home. (Jones Aff. ¶ 18.)

d. Barry Hinton was told by an MV Realty agent that he qualified for a payment of about $600 in exchange for agreeing to use MV Realty as his real estate agent if he ever decided to sell his home. (Hinton Aff. ¶ 4, Compl., Ex. 6.) Mr. Hinton was not given an opportunity to review the HBA contract until a notary brought it to his home for him to sign. (Hinton Aff. ¶¶ 6–7.) No MV Realty agent was present at the signing,

which took approximately fifteen minutes. (Hinton Aff. ¶¶ 6, 8.) Mr. Hinton did not receive a copy of the HBA contract after he signed it, but a copy was sent to him later. (Hinton Aff. ¶¶ 7, 10.) Mr. Hinton was not informed that MV Realty would file a lien on his home if he signed the HBA, that the term of the HBA was forty years, or that there was an ETF of 3%. He would not have entered into the HBA if he had been so informed. (Hinton Aff. ¶¶ 11–14.) Mr. Hinton decided to sell his home in 2022 and contacted MV Realty to request brokerage services but despite repeated attempts to contact MV Realty by phone and email, MV Realty did not respond. (Hinton Aff. ¶¶ 16–17.) After at least a month of unsuccessfully trying to contact MV Realty, Mr. Hinton listed his home with a different realty company, whereupon he received a notice from MV Realty that he had breached the HBA and had to pay an ETF of 3%. (Hinton Aff. ¶ 18.) When he sold his home in 2022, Mr. Hinton was forced to pay an ETF of between $4,000 and $6,000. (Hinton Aff. ¶ 19.)

e. Kara Bessinger was informed by email that she qualified for a payment of $530 in exchange for agreeing to use MV Realty if she chose to sell her home. (Bessinger Aff. ¶¶ 4–5, Compl., Ex. 5.) Ms. Bessinger did not receive a copy of the HBA before she met with a notary in the parking lot of a CVS pharmacy to sign it. (Bessinger Aff. ¶¶ 9–10.) Ms. Bessinger signed the HBA inside her car while parked outside the CVS pharmacy. (Bessinger Aff. ¶ 9.) The process took approximately fifteen minutes. During that time, Ms. Bessinger had only four or five minutes to review the HBA. Because it was raining heavily, the notary got in Ms. Bessinger's backseat for the signing process. (Bessinger Aff. ¶ 12.) After Ms. Bessinger signed the contract, she was paid $530. (Bessinger Aff. ¶ 13.) Ms. Bessinger was not provided with a copy of the contract after signing it; instead, a copy was sent to her about two weeks later upon her request. (Bessinger Aff. ¶¶ 14–15.) Ms. Bessigner was not informed that MV Realty would file a lien on her home after she signed the HBA, that the term of the HBA was forty years, or that the contract would be binding on her heirs if she died before the forty-year term concluded. She would not have entered into the HBA if she had been given this information. (Bessinger Aff. ¶¶ 16–18.) Ms. Bessinger decided to sell her home in late 2022, so she attempted to contact MV Realty to request brokerage services. (Bessinger Aff. ¶ 20.) After several attempts, Ms. Bessinger eventually reached an MV Realty agent, but the agents Ms. Bessinger spoke with were unhelpful. (Bessinger Aff. ¶¶ 21–22.) Ms. Bessinger had been contacted by several potential buyers before reaching out to MV Realty, and she presented a buyer's proposed offer to an MV Realty agent. The agent contacted the prospective buyer and told the buyer that MV Realty had a contract to

sell the home for forty years and had a lien on the property. (Bessinger Aff. ¶ 23.) Ms. Bessinger ultimately paid an ETF of $5,887.20 to sell the home to the buyer without the assistance of a real estate broker. (Bessinger Aff. ¶ 24.)

f. Patricia Bandy was told by an MV Realty agent that she qualified for a payment of $890 in exchange for agreeing to use MV Realty as a broker if she decided to sell her home. (Bandy Aff. ¶ 4, Compl., Ex. 4.) Ms. Bandy was not given the opportunity to review the HBA contract until a notary brought it to her home two to three days later. (Bandy Aff. ¶¶ 6–8.) No MV Realty agent was present at the signing. (Bandy Aff. ¶ 7.) The signing process took approximately 20 minutes, and after it concluded, Ms. Bandy was paid $890. (Bandy Aff. ¶¶ 9–10.) Ms. Bandy was not provided with a copy of the HBA after she signed it, so she made copies using her personal copier before the notary left her home. (Bandy Aff. ¶¶ 8, 11.) Ms. Bandy was not informed that MV Realty would file a lien on her home or that the contract would be binding on her heirs if she died before the expiration of the forty-year term. She would not have signed the HBA if she had been given this information. (Bandy Aff. ¶¶ 12–13.) Ms. Bandy decided to sell her home in July 2022 and attempted to contact MV Realty by phone at least three times to request services, but MV Realty did not respond. (Bandy Aff. ¶¶ 15–16.) Eventually, Ms. Bandy was successful in getting in touch with an MV Realty agent, but the agent was unhelpful. Ms. Bandy told the agent she would use a different realty company instead. (Bandy Aff. ¶¶ 17–19.) MV Realty then listed the property for sale without Ms. Bandy's knowledge. (Bandy Aff. ¶¶ 17–19.) When Ms. Bandy learned of the listing, she engaged counsel, who instructed MV Realty to remove the listing and that Ms. Bandy was terminating her relationship with MV Realty. (Bandy Aff. ¶ 20.) MV Realty responded by serving Ms. Bandy with a notice of *lis pendens*. (Bandy Aff. ¶ 21.) By then, the home was under contract, and Ms. Bandy was forced to pay an ETF of $11,714.40 to close the sale. (Bandy Aff. ¶ 23.)

g. Syidah Mateen was told by an MV Realty agent that she qualified for a payment of approximately $795 if she agreed to use MV Realty in the event that she decided to sell her home. (Mateen Aff. ¶ 4, Compl., Ex. 11.) Ms. Mateen did not have an opportunity to review the HBA until a notary brought it to her home several days later. (Mateen Aff. ¶¶ 7–8.) The signing process took place on the street in front of Ms. Mateen's home and took approximately five minutes. Ms. Mateen signed the HBA on the tailgate of the notary's car. Ms. Mateen felt rushed by the notary to complete the signing and did not have time to read the HBA before she signed it. (Mateen Aff. ¶ 9.) Ms. Mateen asked

the notary questions about the HBA program, but the notary told her she could not answer Ms. Mateen's questions. The notary did not suggest that Ms. Mateen contact MV Realty to get answers to her questions. (Mateen Aff. ¶ 10.) After she signed the HBA, Ms. Mateen was paid approximately $795. (Mateen Aff. ¶ 11.) Ms. Mateen was not informed that MV Realty would file a lien on her home, that the term of the HBA was forty years, that the contract would be binding on her heirs if she died before the forty-year term concluded, or that there was an ETF in the amount of 3%. She would not have signed the HBA if she had been given this information. (Mateen Aff. ¶¶ 12–15.)

h. Rodney Benifield specifically asked an MV Realty agent if MV Realty would put a lien on his home before he signed an HBA in late 2021, and the agent said no. (Benifield Aff. ¶¶ 3, ECF No. 39.4.) Mr. Benifield would not have entered into the HBA had he known that a lien could be placed on his home. (Benifield Aff. ¶ 3.) Mr. Benifield was not informed that the term of the HBA was 40 years or that the contract would be binding on his heirs if he died before the forty-year term concluded. Nor was he informed that he would owe an ETF in the amount of 3% if he breached the terms of the HBA. He would not have entered into the HBA if he had been told these facts. (Benifield Aff. ¶¶ 5–7.) In late 2022, Mr. Benifield unsuccessfully attempted on several occasions to reach MV Realty in order to cancel his HBA. (Benifield Aff. ¶ 9.) Mr. Benifield eventually got in touch with an MV Realty agent and requested brokerage services but was dissatisfied with the services he received. (Benifield Aff. ¶¶ 10–11.) After unsuccessfully attempting to sell his home using MV Realty for over six months, Mr. Benifield was told he had sixty days to sell his home or else he would owe a 3% ETF. Mr. Benifield had been told before signing the HBA that if MV Realty was not successful in selling his home within six months, he would be free to use a different realty company. (Benifield Aff. ¶ 14.) Although Mr. Benifield has been contacted by an interested buyer, he has not accepted the buyer's offer because he does not want to pay MV Realty the ETF. (Benifield Aff. ¶ 15.)

i. Yolonda Frasier was offered $1,000 by an MV Realty agent in exchange for agreeing to use MV Realty if she decided to sell her home. (Frasier Aff. ¶ 4, ECF No. 39.5.) Ms. Frasier was told MV Realty "would give public records a notice to not forget about the HBA[.]" (Frasier Aff. ¶ 14.) Ms. Frasier was also informed by the MV Realty agent that the contract term was ten years and that all she would have to do if she wanted to cancel the HBA was to give back the $1,000. (Frasier Aff. ¶¶ 15–16.) Ms. Frasier did not have the opportunity to review the terms of the HBA until a notary brought the contract to her home several days later.

(Frasier Aff. ¶¶ 6–8.) The notary instructed her where to sign the HBA. No MV Realty agent was present or available by telephone to answer questions during the signing. (Frasier Aff. ¶ 9.) The signing process took approximately fifteen minutes. (Frasier Aff. ¶ 7.) After signing the HBA, Ms. Frasier was paid $1,000. (Frasier Aff. ¶ 11.) Ms. Frasier was not provided with a copy of the HBA until approximately two to three months later, when she received an unsigned version. (Frasier Aff. ¶ 12.) Ms. Frasier has attempted to contact MV Realty by phone and email numerous times to cancel the HBA but has never received a response. (Frasier Aff. ¶ 13.) Ms. Frasier would not have entered into the HBA if she had been informed MV Realty would place a lien on her home. (Frasier Aff. ¶ 14.) Ms. Frasier was not informed that the term of the HBA was forty years or that the contract would be binding on her heirs if she died before the forty-year term concluded. Nor was she informed that she could be forced to pay an ETF in the amount of 3%. She would not have entered into the HBA if she had been given this information. (Frasier Aff. ¶¶ 15–16.)

j. Roshawn Walker spoke with an MV Realty agent who offered her $1,200 in exchange for agreeing to use MV Realty if she decided to sell her home. (Walker Aff. ¶ 6, ECF No. 32.5.) The next day, a notary came to Ms. Walker's home with an HBA for her to sign. (Walker Aff. ¶ 8.) The signing took place on Ms. Walker's front porch. The process took approximately twenty minutes. (Walker Aff. ¶ 9.) No agent of MV Realty was either present or made available by phone to answer questions during the signing. (Walker Aff. ¶¶ 10–11.) Ms. Walker was not afforded an opportunity to review the terms of the contract prior to the signing, nor was she provided with a copy of the HBA until five months later. (Walker Aff. ¶¶ 12–13.) Ms. Walker was paid $1,200 after she signed the contract. (Walker Aff. ¶ 14.) Ms. Walker was never informed MV Realty would put a lien on her home, that the HBA would be binding on her heirs if she died before the forty-year term concluded, or that there was a 3% ETF. She would not have entered into the HBA if she had known of these terms. (Walker Aff. ¶¶ 15–17.) Ms. Walker attempted to sell her home using MV Realty not long after signing the HBA. (Walker Aff. ¶ 19.) She was dissatisfied with MV Realty's services and attempted to engage another broker. (Walker Aff. ¶¶ 19–25.) That broker told her he could not represent her because of the HBA. (Walker Aff. ¶ 25.) Ms. Walker contacted an MV Realty agent and informed the agent that she was unaware of the forty-year term, the impact of the HBA on her heirs, and the lien on her property, but the agent told her that there was nothing the agent could do. (Walker Aff. ¶ 27.) The agent told Ms. Walker that she could use another broker, but she would have to pay an ETF if she did so. (Walker Aff. ¶ 28.)

k. Donna Turner was offered $325 by an MV Realty agent in exchange for agreeing to use MV Realty as a broker if she decided to sell her home within the next three years. (Turner Aff. ¶ 5, ECF No. 32.4.) A notary arrived at Ms. Turner's home with an HBA a few days later. (Turner Aff. ¶¶ 6–7.) The notary advised Ms. Turner to direct any questions to MV Realty. (Turner Aff. ¶ 8.) Ms. Turner did not have an opportunity to review the terms of the contract before the day of the signing. (Turner Aff. ¶ 9.) The signing process took ten to fifteen minutes. (Turner Aff. ¶ 8.) Ms. Turner was never informed that MV Realty could have a lien placed on her home, that the HBA would be binding on her heirs if she died before the forty-year term concluded, or that there was an ETF of 3% associated with the HBA. If she had been given this information, she would not have executed the HBA. (Turner Aff. ¶¶ 11–13.) After Ms. Turner signed the HBA, she was paid $325 by check. (Turner Aff. ¶ 15.) Ms. Turner unsuccessfully attempted to cash the check at Walmart because she did not have a bank account but was told that she could not do so because the check appeared to be fraudulent. (Turner Aff. ¶ 15.) Ms. Turner contacted MV Realty and was told to tear up the check and that the check would be reissued. (Turner Aff. ¶¶ 16–17.) Ms. Turner received a second check that, once again, she was unable to cash at Walmart because she was told that "the numbers at the bottom of the check were not matching up." (Turner Aff. ¶ 17.) For this reason, Ms. Turner has received no money in exchange for executing the HBA. (Turner Aff. ¶ 18.)

l. Teresa McCalop was offered between $800 and $900 by an MV Realty agent in exchange for agreeing to use MV Realty if she decided to sell her home. (McCalop Aff. ¶ 9, ECF No. 32.3.) Approximately five days later, a notary came to her home with the HBA for her to sign. (McCalop Aff. ¶ 10.) Ms. McCalop was not afforded an opportunity to review the contract prior to the day of the signing, nor was she provided with a copy of it after she signed it. (McCalop Aff. ¶¶ 15–16.) The notary flipped from one page of the HBA to another and showed Ms. McCalop where to sign. (McCalop Aff. ¶ 15.) The signing process took approximately five to ten minutes. (McCalop Aff. ¶ 13). Ms. McCalop was paid $800 or $900 after she signed the contract; she was unable to recall the exact amount. (McCalop Aff. ¶ 17.) Ms. McCalop attempted to sell her home using MV Realty about one year later. MV Realty referred Ms. McCalop to Sade Washington, a real estate agent, but Ms. McCalop was dissatisfied with the services she received. (McCalop Aff. ¶¶ 18–22.) Ultimately, Ms. McCalop decided to sell her home directly to a buyer for cash. (McCalop Aff. ¶ 22.) MV Realty sent a settlement statement to Ms. McCalop two days before the closing, which reflected a "commission

payment" to MV Realty of $12,003 and an "administrative fee" of $500. The statement also reflected a separate additional payment of $12,003 to Hometown Realty, Ms. Washington's real estate agency. (McCalop Aff. ¶ 24.) Ms. McCalop believed that the HBA required MV Realty to serve as her listing agent if she decided to sell her home and not merely to refer her to a separate realty company. She was dismayed to learn that Sade Washington and her realty company, Hometown Realty, claimed to be entitled to a separate commission in addition to the commission MV Realty stated it was owed. (McCalop Aff. ¶¶ 25–26.) Ms. McCalop was not informed MV Realty could put a lien on her home, that the HBA would be binding on her heirs if she died before the forty-year term concluded, or that there was an ETF of 3% if she breached the HBA. She would not have entered into the HBA if she had been provided with these facts. (McCalop Aff. ¶¶ 27–29.)

m. Sheila Ingram spoke to an MV Realty agent who offered her money in exchange for agreeing to use MV Realty if she decided to sell her home. (Ingram Aff. ¶ 6, ECF No. 32.2.) Ms. Ingram was told she could cancel the HBA at any time. (Ingram Aff. ¶ 7.) Ms. Ingram was not afforded an opportunity to review the terms of the HBA until a notary brought the contract to her friend's home for her to sign it. (Ingram Aff. ¶¶ 8–10.) Ms. Ingram did not receive a copy of the contract until two weeks after she signed it. (Ingram Aff. ¶ 13.) The signing process took approximately five to ten minutes. (Ingram Aff. ¶ 11.) After she signed the contract, Ms. Ingram was paid $1,200. (Ingram Aff. ¶ 12.) Ms. Ingram was not informed that MV Realty could have a lien placed on her home, that the HBA would be binding on her heirs if she died before the forty-year term ended, or that she would have to pay an ETF consisting of 3% of the sale price of her home if she used a different listing agent. Had she been given this information, she would not have entered into the HBA. (Ingram Aff. ¶¶ 14–16.) Ms. Ingram decided to sell her home after signing the HBA but was not satisfied with MV Realty's services, and her home is not currently listed for sale. (Ingram Aff. ¶¶ 18–21.) Ms. Ingram has attempted to refinance her mortgage but her prospective lender could not move forward with her refinancing because MV Realty has not provided the lender with the necessary information. (Ingram Aff. ¶ 22.)

n. Gary Devone was offered an incentive payment by MV Realty in exchange for agreeing to use MV Realty if he decided to sell his home. (Devone Aff. ¶ 6, ECF No. 32.1.) Mr. Devone was not afforded an opportunity to review the HBA prior to a notary bringing it to his home for him to sign it approximately a week after his conversation with the MV Realty agent. (Devone Aff. ¶¶ 7–8, 11.) The signing process took

approximately ten to fifteen minutes. (Devone Aff. ¶ 9.) Mr. Devone was paid $500 after he signed the contract. (Devone Aff. ¶ 12.) Mr. Devone was never told that a lien would exist on his home, that the HBA would be binding on his heirs if he died before the forty-year term concluded, or that he could be liable for an ETF consisting of 3% of the sale price of the home. He would not have signed the HBA if he had received that information. (Devone Aff. ¶¶ 13–14.)

o. Sabrina Abney was offered $455 by an MV Realty agent in exchange for agreeing to use MV Realty if she decided to sell her home. (Abney Aff. ¶ 5, Compl., Ex. 7.) Although Ms. Abney was provided with an advance copy of the HBA before she signed it, she was not given a copy of the listing agreement referenced in the HBA. (Abney Aff. ¶ 7.) A notary brought the HBA to Ms. Abney's place of employment for her to sign several days later. No MV Realty agent was present during the signing. The process took about ten minutes. (Abney Aff. ¶ 9.) Ms. Abney was paid $455 after she signed the HBA. (Abney Aff. ¶ 11.) Although she did not realize it at the time of signing, there were differences between the version of the contract she was sent in advance and the version of the contract that she actually signed. (Abney Aff. ¶ 10.) Ms. Abney was not told that MV Realty would put a lien on her home, that the term of the HBA was forty years, that the contract would be binding on her heirs if she died before the forty-year term ended, or that there was an ETF of 3% as a part of the HBA. She would not have entered into the HBA if she had known of these terms. (Abney Aff. ¶¶ 12–15.)

p. Anthony Bradley was offered $400 by an MV Realty agent in exchange for agreeing to use MV Realty if he decided to sell his home. (Bradley Aff. ¶ 5, Compl., Ex. 8.) Mr. Bradley was not afforded an opportunity to review the terms of the HBA until a notary brought it to his home for him to sign a week or two after his initial conversation with the MV Realty agent. (Bradley Aff. ¶¶ 8–10.) Mr. Bradley felt rushed and pressured during the signing process, which lasted approximately twenty minutes. (Bradley Aff. ¶ 11.) Mr. Bradley was given a check for $400 after signing the HBA. (Bradley Aff. ¶ 12.) Mr. Bradley's bank did not honor this check, and Mr. Bradley was forced to contact MV Realty to request a second check. (Bradley Aff. ¶ 13.) The notary did not provide Mr. Bradley with a copy of the contract after he signed it. (Bradley Aff. ¶ 14.) Mr. Bradley was not told that MV Realty would put a lien on his home, that the HBA term was for forty years, that the contract would be binding on his heirs if he died before the forty-year term concluded, or that he would have to pay a 3% ETF if he sold the home with the assistance of a separate listing agent. He would not have signed the HBA if he had been given this information. (Bradley Aff.

¶¶ 15, 17–19.) Mr. Bradley has been informed by the Guilford County Register of Deeds that there is a lien on his property. (Bradley Aff. ¶ 16.)

27. In response to the PI Motion, MV Realty submitted (1) declarations by an officer of MV Realty and one of its attorneys explaining how the HBA program operates; (2) a sample HBA; (3) declarations from a number of HBA program participants in North Carolina stating that they fully understood the MV Realty program and their satisfaction with MV Realty's services; and (4) five recordings of automated telephone calls from MV Realty to new North Carolina participants in the program, confirming that the homeowner (after signing an HBA) understood and agreed to the HBA's terms. (Resp. Opp'n Mot. Prelim. Inj., Exs. A–F, G1–G5, ECF Nos. 38.1–38.12.)

28. The Motion originally came on for hearing on 14 June 2023. On 15 June 2023, the Court ordered supplemental briefing on several issues. (ECF No. 47.) On 26 July 2023, the Court heard additional arguments at a hearing via Webex on the issues addressed in the supplemental briefing. On 31 July 2023, at the request of MV Realty, the Court permitted the parties to submit final supplemental briefs by 21 August 2023. (ECF No. 56.) The Court conducted a Webex hearing on 25 August 2023 with regard to the issues addressed in the parties' final supplemental briefs.

29. The PI Motion is now ripe for decision.

CONCLUSIONS OF LAW

30. A preliminary injunction "is an extraordinary measure taken by a court to preserve the status quo of the parties during litigation." *Ridge Cmty. Invs., Inc. v. Berry*, 293 N.C. 688, 701 (1977).

31. N.C.G.S. § 75-14 states as follows:

> If it shall become necessary to do so, the Attorney General may prosecute civil actions in the name of the State on relation of the Attorney General to obtain a mandatory order, including (but not limited to) permanent or temporary injunctions and temporary restraining orders, to carry out the provisions of [North Carolina's Unfair and Deceptive Trade Practices Act], and the venue shall be in any county as selected by the Attorney General.

N.C.G.S. § 75-14. In addition, N.C.G.S. § 75-105(a) provides, in pertinent part, that "[t]he Attorney General may investigate any complaints received alleging violation of this Article. If the Attorney General finds that there has been a violation of this Article, the Attorney General may bring an action to impose civil penalties and to seek any other appropriate relief pursuant to this Chapter, including equitable relief to restrain the violation." *Id.* § 75-105(a).

32. This Court has previously stated the applicable standard for evaluating motions brought by the Attorney General seeking a preliminary injunction.

> A preliminary injunction is an extraordinary measure that "will not be lightly granted." *Travenol Labs., Inc. v. Turner*, 30 N.C. App. 686, 692, 228 S.E.2d 478 (1976) (citation omitted). To obtain such relief, a plaintiff must generally show "a likelihood of success on the merits of his case and . . . [that] plaintiff is likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the Court, issuance is necessary for the protection of his rights during the course of litigation." *Analog Devices, Inc. v. Michalski*, 157 N.C. App. 462, 466, 579 S.E.2d 449 (2003) (citations omitted). When the Attorney General brings an enforcement action "to vindicate public interest rather than to redress individual grievances," however, a more lenient standard may apply to the requirement of irreparable loss or harm, and the State need not show "actual injury" to obtain an injunction; rather, the State-movant must show that the "act or practice complained of adversely affects the public interest." *State ex rel. Edmisten v. Challenge, Inc.*, 54 N.C. App. 513, 521–22, 284 S.E.2d 333 (1981). In *Challenge, Inc.*, the court explicitly took note of the fact that G.S. § 75-14 provides the Attorney General with the authority to obtain mandatory orders to enforce the

> North Carolina Unfair and Deceptive Trade Practices Act. *Id.*; *see also State ex rel. Ross v. Overcash*, 2008 N.C. App. LEXIS 1669 (Sept. 16, 2008) (affirming an injunction issued in an enforcement action that required the defendant to close a mining operation pending compliance with statutory law, even in the absence of actual or apparent injury).

State ex rel. Cooper v. W. Sky Fin., LLC, 2015 NCBC LEXIS 87, at *44–45 (N.C. Super. Ct. Aug. 27, 2015).

33. The issuance of a preliminary injunction is a decision committed to a trial court's discretion. *State ex rel. Edmisten v. Fayetteville St. Christian Sch.*, 299 N.C. 351, 357 (1980).

34. As noted above, the State's complaint states four substantive causes of action: (1) a UDTP claim; (2) an unlawful telephone solicitation practices claim; (3) a claim for unfair debt collection practices; and (4) a usurious lending practices claim. (Compl. ¶¶ 173–199.)

35. In support of its PI Motion, however, the State focuses primarily on its UDTP claim.

36. The nature of UDTP claims has been summarized by this Court as follows:

> North Carolina law created a private right of action under Chapter 75 as part of its effort to protect consumers from unfair or deceptive trade practices. *See* N.C.G.S. § 5-1.1 (outlawing unfair or deceptive practices in trade); N.G.G.S. § 75-16 (creating a private right of action and authorizing treble damages); *see also Hardy v. Toler*, 24 N.C. App. 625, 630–31, 211 S.E.2d 809, 813 (1975). The protections of N.C.G.S. § 75-1.1 extend, in certain circumstances, to businesses as well. *Dalton v. Camp*, 353 N.C. 647, 656, 548 S.E.2d 704, 710 (2001) (citing *United Labs.*, 322 N.C. at 665, 370 S.E.2d at 389.
>
> "[T]o establish a *prima facie* claim for unfair trade practices, a plaintiff must show: (1) defendant committed an unfair or deceptive act or

> practice, (2) the action in question was in or affecting commerce, and (3) the act proximately caused injury to the plaintiff." *Dalton*, 353 N.C. at 656, 548 S.E.2d at 711 (citing *Spartan Leasing, Inc. v. Pollard*, 101 N.C. App. 450, 460–61, 400 S.E.2d 476, 482 (1991)). "The Act does not . . . define an unfair or deceptive act, 'nor is any precise definition of the term possible.' " *Bernard v. Cent. Carolina Truck Sales, Inc.*, 68 N.C. App. 228, 229–30, 314 S.E.2d 582, 584 (1984) (quoting *Wachovia Bank & Trust Co. v. Smith*, 44 N.C. App. 685, 690, 262 S.E.2d 646, 649 (1980)). A trade practice "is unfair if it is unethical or unscrupulous, and it is deceptive if it has a tendency to deceive." *Sunbelt Rentals, Inc. v. Head & Engquist Equip., L.L.C.*, 174 N.C. App. 49, 59, 620 S.E.2d 222, 230 (2005) (citing *Polo Fashions, Inc. v. Craftex, Inc.*, 816 F.2d 145, 148 (4th Cir. 1987)).

Charah, LLC v. Sequoia Servs., LLC, 2020 NCBC LEXIS 52, at *18 (N.C. Super. Ct. Apr. 17, 2020). Our Supreme Court has reiterated that "a practice is deceptive if it has the capacity . . . to deceive." *Walker v. Fleetwood Homes of N.C., Inc.*, 362 N.C. 63, 72 (2007).

37. "Whether the alleged conduct constitutes an unfair or deceptive act is 'a question of law for the court.' " *Campbell Sales Grp., Inc. v. Niroflex by Jiufeng Furniture, LLC*, 2022 NCBC LEXIS 148, at **33 (N.C. Super. Ct. Dec. 5, 2022) (quoting *Dealers Supply Co. v. Cheil Indus.*, 348 F. Supp. 2d 579, 592 (M.D.N.C. 2004)). "The question of '[w]hether a particular act is unfair or deceptive, depends on the facts surrounding the transaction and the impact on the marketplace.' " *Id.* (quoting *Dealers Supply Co.*, 348 F. Supp. 2d at 591).

38. The parties differ greatly in their respective characterizations of the HBA program. The State portrays the program as a predatory scheme targeting financially vulnerable homeowners who are misled about key aspects of the program, while MV Realty, conversely, contends that the program not only provides valuable

real estate brokerage services but also provides homeowners with an upfront payment that is never required to be refunded. (*See, e.g.*, Mitchell Aff. ¶ 5, ECF No. 32.27.)

39. The Court has thoroughly reviewed all of the materials submitted by the parties and carefully considered the legal arguments of counsel.

40. As described above, the record contains sixteen affidavits by homeowners who testified that they were either misled about material terms of the HBA program or that important aspects of the program were not disclosed to them. These affidavits also demonstrate that participating homeowners were not regularly afforded an opportunity to review the HBA before it was brought to them by a notary and that signed copies of the HBA were not routinely given to the homeowners afterward. The Court finds the testimony contained in those affidavits to be credible and probative on the issues raised by the present Motion.

41. On 17 August 2023—near the end of the parties' briefing in connection with the present PI Motion—the North Carolina General Assembly passed House Bill 422, entitled "An Act to Prohibit Unfair Real Estate Service Agreements for Residential Real Estate," which materially affects MV Realty's ability to lawfully operate in North Carolina going forward. *See* 2023 H.B. 422 § 3.

42. House Bill 422 states that it is "intended to prohibit the use of real estate service agreements that are unfair to an owner of residential real estate or to other persons who may become owners of that real estate in the future" and "prohibits the recording of such residential real estate service agreements so that the public records

will not be clouded by them and provides remedies for owners who are inconvenienced or damaged by the recording of such agreements." *Id.* § 1.

43. House Bill 422 contains the following Definitions section:

> For the purposes of this Article, the following definitions apply:
>
> (1) Person. – A person as defined by G.S. 105-228.90(b)(23).
>
> (2) Real estate service agreement. – A written contract between a service provider and the owner or potential buyer of residential real estate to provide services, current or future, in connection with the maintenance, purchase, or sale of residential real estate.
>
> (3) Residential real estate. – Real property located in this State which is used primarily for personal, family, or household purposes.
>
> (4) Service provider. – A person who provides a service related to residential real estate, including a real estate broker.
>
> (5) Unfair real estate service agreement. – A real estate service agreement that violates G.S. 93A-85.2.

Id.

44. House Bill 422 creates a new statute—N.C.G.S. § 93A-85.2—providing that real estate service agreements are "unfair, void, and in violation of this Article if the agreement is to be in effect for more than one year and either expressly or implicitly aims to . . . [r]un with the land or bind future owners of residential real estate . . . [or] [c]reate a lien, encumbrance, or other real property security interest." *Id.* The new law further states that service providers are not entitled to a refund for any "consideration paid to the owner . . . in connection with an unfair real estate services agreement." *Id.*

45. House Bill 422 goes on to provide that "[r]ecording an unfair real estate service agreement is prohibited" and that "[i]f an unfair real estate service agreement, or notice or memorandum thereof, has been recorded, it is void." *Id.* Pursuant to House Bill 422, all of the following provisions apply to any such recording that becomes void:

> (1) The recording shall not operate as a lien, encumbrance, or security interest.
>
> (2) No owner or buyer shall be required to record any document voiding the recording.
>
> (3) The recording shall not provide actual or constructive notice to any person interested in the residential real estate that is identified in the unfair real estate service agreement.
>
> (4) The recording violates G.S. 14-118.6(a).

Id.

46. House Bill 422 authorizes a private right of action for violations by providers of such services, including the right to recover damages, costs, and attorneys' fees. *Id.*

47. House Bill 422 also makes any such violations "an unfair or deceptive trade practice under G.S. 75-1.1" and states that an aggrieved party may seek all of the types of relief available under Chapter 75. *Id.* House Bill 422 provides that "recoveries available under Chapter 75 of the General Statues . . . will not be offset by the consideration paid by the service provider to the owner or buyer in connection with [an] unfair services agreement." *Id.* House Bill 422 expressly authorizes the

North Carolina Attorney General to bring enforcement actions for any such violations. *Id.*

48. House Bill 422 was signed by Governor Roy Cooper on 24 August 2023. 2023 S.L. 117 § 3. Pursuant to its terms, the effective date of House Bill 422 is the date on which it became law, and it "applies to unfair real estate service agreements that are executed, modified, extended, or amended on or after that date." *Id.* § 3.

49. It is clear that House Bill 422 applies to MV Realty's HBA program and prohibits MV Realty from entering into new HBAs (in their current form) with North Carolina homeowners going forward. However, MV Realty argues, and the State does not appear to seriously dispute, that House Bill 422 does not control the resolution of certain aspects of the State's PI Motion—namely, the issue of whether, and to what extent, the State is entitled to have the Court preliminarily enjoin MV Realty's continued enforcement of its *existing* HBAs with North Carolina homeowners. Accordingly, the Court must address those issues, and the remainder of this Opinion analyzes the State's right to preliminary injunctive relief under North Carolina law as it existed prior to the General Assembly's enactment of House Bill 422.

50. For the reasons set out in detail below, the Court concludes that even under North Carolina law predating the enactment of House Bill 422, the State has demonstrated an entitlement to preliminary injunctive relief.

51. As an initial matter, the State has not pointed the Court to any legal authority in this State making it unlawful for an entity to purchase an option to serve as a homeowner's exclusive listing agent for a future sale of their home. Moreover,

the State does not challenge the reasonableness of the amount of the commission set out in the HBA to be paid by the homeowner in circumstances where MV Realty fully performs its duties as a listing agent in connection with selling that homeowner's residence.

52. Nevertheless, as discussed below, the Court concludes that the State has shown a likelihood of success as to the merits of its UDTP claim in that certain aspects of the HBA program are either deceptive, possess the capacity to deceive a reasonable homeowner, or are otherwise unenforceable under North Carolina law.

53. The question of whether the ETF is legally enforceable is a key issue in this case as the answer materially affects other aspects of MV Realty's program. MV Realty contends that the ETF is a valid liquidated damages provision, whereas the State claims that it amounts to an unlawful penalty.

54. As discussed above, subject only to highly limited exceptions, MV Realty is entitled to recover from the homeowner the ETF upon any "sale or other transfer [of the home] that does not result in [ ] [MV Realty] being paid [a] [c]omission[,]"—that is, any sale of the home by anyone other than an MV Realty listing agent. (Sample HBA, at 2.) The amount of the ETF is calculated based upon the greater of the value of the home at the time the HBA is signed or its value at the time the HBA is breached.

55. "It is well established that a sum specified in [a] contract as the measure of recovery in the event of a breach will be enforced if the court determines it to be a provision for liquidated damages, but not enforced if it is determined to be a penalty."

KNC Techs., LLC v. Tutton, 2021 NCBC LEXIS 38, at *42 (N.C. Super. Ct. Apr. 8, 2021) (cleaned up).

> A stipulated sum is for liquidated damages only (1) where the damages which the parties reasonably anticipate are difficult to ascertain because of their indefiniteness or uncertainty and (2) where the amount stipulated is either a reasonable estimate of the damages which would probably be caused by a breach or is reasonably proportionate to the damages which have actually been caused by the breach.

Knutton v. Cofield, 273 N.C. 355, 361 (1968) (cleaned up).

56. "Whether the liquidated amount is a reasonable prior estimate of damages is determined by the status of the parties at the time of [the] making [of] the contract." *E. Carolina Internal Med., P.A. v. Faidas*, 149 N.C. App. 940, 946, *aff'd per curiam*, 356 N.C. 607 (2002). "In determining whether a fixed sum, described by the contract as a measure of recovery in the event of breach, is a liquidated damage or perhaps an unenforceable penalty, this Court will consider the nature of the contract, the intention of the parties, and the sophistication of the parties." *Majestic Cinema Holdings, LLC v. High Point Cinema*, 191 N.C. App. 163, 167, *disc. rev. denied*, 362 N.C. 509 (2008) (cleaned up). A court will also look to the language used by the parties to the contract to ascertain their intent. *Knutton*, 273 N.C. at 361. "Whether a liquidated damages amount is a reasonable estimate of the damages that would likely result from a default is a question of fact." *Green Park Inn, Inc. v. Moore*, 149 N.C. App. 531, 540 (2002). "The party seeking to invalidate a liquidated damages clause bears the burden of proving the provision is invalid." *WFC Lynnwood I LLC v. Lee of Raleigh, Inc.*, 259 N.C. App. 925, 929 (2018).

57. Although the parties have spent significant time debating the second prong of the above-referenced test, the Court need not resolve that dispute because the Court finds that the State has shown a likelihood of success on the merits of its argument that the ETF fails to satisfy the first prong. As noted above, in order for a stipulated damages amount to be deemed a valid liquidated damages provision, the damages reasonably anticipated by the parties must be "difficult to ascertain because of their indefiniteness or uncertainty." *Knutton*, 273 N.C. at 361; *see also Ledbetter Bros. Inc. v. N.C. Dep't of Transp.*, 68 N.C. App. 97, 106 (1984). Here, conversely, the calculation of the damages recoverable by MV Realty in the case of a homeowner's breach of an HBA would be simple to calculate—a proposition that MV Realty has failed to persuasively counter.[3] *See Knutton*, 273 N.C. at 361 (in determining whether a stipulated sum is a valid liquidated damages provision or an unlawful penalty, "the courts have been greatly influenced by the fact that in almost all [ ] cases [ ] damages are uncertain and very difficult to estimate.").

58. Furthermore, as noted above, the relative sophistication of the parties is a factor to be considered by a court in determining whether such a contractual provision is valid. Here, this factor also weighs against the enforceability of the ETF provision. The homeowners who participate in the HBA program are consumers who

[3] Although the HBA contains language reciting that the parties agree that the damages from a breach would be difficult to ascertain because of indefiniteness or uncertainty, the Court is not bound by the parties' characterization of the payment in determining the enforceability of the provision. *See, e.g.*, *United Ord. of American Bricklayers & Stone Masons Union v. Thorleif Larsen & Son, Inc.*, 519 F.2d 331, 333 (7th Cir. 1975) ("[U]se of the term 'liquidated damages' . . . is not conclusive[.]") (citations omitted).

are being asked to sign a preprinted form that was drafted by MV Realty, a sophisticated commercial enterprise, under "take it or leave it" circumstances.

59. Finally, although not dispositive on this issue, the Court notes that in earlier versions of the HBA, the ETF was expressly referred to as a "penalty" by MV Realty itself. (*See e.g.*, Compl., Exs. 1, 13, 19, 20.) A prior version of the HBA stated in large, capitalized boldface print, as follows: "**THIS AGREEMENT PROVIDES FOR A PENALTY FOR EARLY TERMINATION AS SET FORTH IN THIS SECTION 3**." (Compl., Ex. 1 (emphasis in original).) Although MV Realty subsequently removed this language from its standard HBA, the substantive terms that MV Realty itself had previously described as a "penalty" did not change in the new version of the HBA. (Sample HBA, at 2.)

60. Thus, the Court concludes that the State has shown a likelihood of success on the merits regarding its argument that the ETF is unenforceable under North Carolina law.

61. The Court finds that the State has also met its burden of showing a likelihood of success on its UDTP claim as to those aspects of the HBA program that create a cloud on the title of participating homeowners with regard to their residences—namely, the recordation of the Memorandum and the filing of a notice of *lis pendens*.

62. In essence, MV Realty is asserting the following interrelated propositions, which are admittedly somewhat circular: (1) the Memorandum "pertains to real property" (and thus is properly subject to recordation by the Register

of Deeds) because the HBA (which is referenced in the Memorandum) contains a covenant that "runs with the land"; (2) the HBA is able to be properly characterized as containing a covenant that "runs with the land" largely because of the inclusion of the ETF provision therein, which gives rise to a security interest in favor of MV Realty; (3) this security interest operates as a lien on the home in the event of a homeowner's breach of the HBA; and (4) because of the existence of this lien, the filing of a notice of *lis pendens* in the event of a breach of the HBA is legally permissible. For the reasons set out below, however, the Court finds that the house of cards upon which MV's arguments rest collapses under scrutiny.

63. The Court will first address the parties' arguments concerning MV Realty's ability to file a notice of *lis pendens* upon its determination that a participating homeowner has breached the HBA.

64. As noted above, when MV Realty sues a homeowner for breach of the HBA and seeks to recover the ETF, it files a notice of *lis pendens* with the Clerk of Superior Court in the county where the home is located. (Compl., Ex. 21; Compl., Ex. 22; Pls.' Reply Br. Supp. Mot. Prelim. Inj., Ex. 9; Pls.' Reply Br. Supp. Mot. Prelim. Inj., Ex. 10.) This notice states that it is being filed in connection with a lawsuit for "breach of contract" and that the homeowner's obligation to use MV Realty as their exclusive listing agent "as described in the [HBA]" is an "obligation [that] runs with the Property[.]" (Compl. Ex. 21.)

65. N.C.G.S. § 1-116 governs the filing of a *lis pendens* in North Carolina and sets out an exclusive list of circumstances in which a *lis pendens* is proper. Defendants rely on subparts (a)(1) and (2) of the statute, which read as follows:

> (a) Any person desiring the benefit of constructive notice of pending litigation must file a separate, independent notice thereof, which notice shall be cross-indexed in accordance with G.S. 1-117, in all of the following cases:
>
> (1) Actions affecting title to real property.
>
> (2) Actions to foreclose any mortgage or deed of trust or to enforce any lien on real property.

N.C.G.S. § 1-116(a)(1)–(2).

66. With regard to subpart (a)(1), this provision is clearly inapplicable given that the limited nature of the contractual arrangement created by the HBA cannot reasonably be said to affect title to the property. Such a conclusion is consistent with applicable case law from North Carolina's appellate courts. *See*, *e.g.*, *Parker v. White*, 235 N.C. 680, 688 (1952) ("[I]t is clear from a reading of the complaint, and the amendments thereto, that this is an action to recover monetary damages. . . . Hence, the action is not one affecting the title to real property within the purview of G.S. § 1-116."); *Horney v. Price*, 189 N.C. 820, 825 (1925) ("The rule of *lis pendens* . . . does not apply to an action merely seeking to recover a money judgment, nor to any other action which does not directly affect property."); *Doby v. Lowder*, 72 N.C. App. 22, 29 (1984) ("The nature of plaintiffs' action . . . must be determined by reference to the facts alleged in the body of the complaint. This is an action for a money judgment. It does not seek to set aside a transfer of realty. In such a case the filing of a notice of

lis pendens is not authorized.") (cleaned up); *Lord v. Jeffreys*, 22 N.C. App. 13, 14 (1974) ("This complaint asks for commissions for the sale and purchase of [ ] properties . . . and for damages for breach of contract. . . . [T]he language of the statute is too clear to permit any construction other than that for plaintiff to have the right to file a notice of *lis pendens* in this action, it must be an action affecting the title to land.").

67. MV Realty's reliance on subpart (a)(2) of N.C.G.S. § 1-116 hinges on the validity of its argument that the HBA does, in fact, create a legally enforceable lien on the home.

68. MV Realty contends that the HBA contains a contingent (or "springing") lien that comes into existence upon the breach of an HBA by a participating homeowner.[4]

69. Such a security interest is created, MV Realty asserts, based on Section 5(a) of the HBA, which states as follows:

> Property Owner's obligations hereunder shall constitute covenants running with the land and, until this Agreement is terminated pursuant to Section 5(c), shall bind future successors in interest to title to the Property. 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.

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[4] Notably, this contention is at odds with the State's evidence suggesting that MV Realty's agents have on a number of occasions assured homeowners that the program will *not* result in a lien being placed on their home. (*See, e.g.*, Benifield Aff. ¶ 3, ECF No. 39.4 ("I specifically asked the MV Realty agent with whom I was speaking whether MV Realty would be placing a lien on my home. The MV Realty agent told me that MV Realty would not be filing a lien on my home.").)

(Sample HBA, at 3 (emphasis added).)

70. MV Realty concedes that the existence of such a security interest is premised upon the enforceability of the ETF.[5] However, for the reasons stated above, the Court has ruled that the ETF is likely an unenforceable penalty rather than an enforceable liquidated damages provision.

71. Accordingly, the Court concludes that the State has shown a likelihood of success as to its argument that the HBA creates no valid security interest in the property sufficient to trigger subpart (a)(2) of N.C.G.S. § 1-116.[6] *See*, *e.g.*, *Cutter v. Cutter Realty Co.*, 265 N.C. 664, 668 (1965) ("The *lis pendens* statute does not apply, for example, to an action the purpose of which is to secure a personal judgment for the payment of money even though such a judgment, if obtained and properly docketed, is a lien upon land of the defendant described in the complaint."); *Zinn v. Walker*, 87 N.C. App. 325, 337 (1987), *disc. rev. denied*, 321 N.C. 747 (1988) (holding

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[5] At the 26 July 2023 supplemental hearing on the PI Motion, the following colloquy occurred between the Court and counsel for MV Realty:

> THE COURT: Is the lien tied to the existence of the ETF?
>
> [DEFENDANTS' COUNSEL]: *Yes*, because the lien – *I think it has to be,* Your Honor, because the lien only arises upon default. There are a number of events of default, and those include retaining another broker to list the property. That's a breach of the agreement. That's a default. And so in that instance, now the owner becomes liable – unless it changes its mind, which would be great – but the owner becomes liable for the liquidated damages because it's in clear default of the contract.

(26 July 2023 Tr., at pp. 64–65) (emphasis added).

[6] In its second supplemental brief, MV Realty suggests—for the first time—that the HBA may create an *equitable* lien. However, under North Carolina law equitable liens exist only "where there are factors invoking equity[.]" *Falcone v. Juda*, 71 N.C. App. 790, 793 (1984) (cleaned up). No such equitable factors favoring MV Realty exist in the present case.

that "if neither a foreclosure nor attachment order are involved, a *lis pendens* may be filed only where a legitimate interest in real property may lie"); *Pegram v. Tomrich Corp.*, 4 N.C. App. 413, 415 (1969) ("An action to secure a personal judgment for payment of money is not an action 'affecting title to real property' within the meaning of G.S. § 1-116(a)(1), even though such a judgment, if obtained and properly docketed, is a lien upon land of the defendant.").

72. Furthermore, even assuming *arguendo* that a lien does, in fact, come into existence upon a homeowner's breach of the HBA, the Court believes that the State has shown a likelihood of success on its claim that MV Realty's program possesses a capacity to deceive in that the HBA does not sufficiently put a reasonable homeowner on notice as to the specific nature of such a lien.

73. As noted above, Section 5(a) of the HBA states as follows:

> Property Owner's obligations hereunder shall constitute covenants running with the land and, until this Agreement is terminated pursuant to Section 5(c), shall bind future successors in interest to title to the Property. *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.

(Sample HBA, at 3 (emphasis added).)

74. However, Section 5(c) contains the following language:

> In the event Property Owner wishes to refinance an existing mortgage on the Property or grant a new mortgage on the Property, Company will consider in good faith any request from Property Owner to facilitate such refinancing or new mortgage by subordinating *the lien of this Agreement* to the refinanced or new mortgage. In the event that Property Owner sells the Property in compliance with this Agreement (whether through the efforts of Company or pursuant to Section 4), or in

> the event Property Owner ceases to own the Property due to foreclosure, condemnation or arms-length deed in lieu of foreclosure to an unrelated third party, Company will, upon written request, deliver to the closing agent for the sale of the Property or the purchaser of the Property a Notice of Termination of the Memorandum, in recordable form.

(Sample HBA, at 3 (emphasis added).)

75. As the State notes, these two sections of the HBA are not consistent. Section 5(a) implies that a lien does not come into existence unless and until the homeowner breaches the HBA. Conversely, Section 5(c) suggests that a lien exists from the inception of the signed HBA and does not contain any language indicating that this subpart is applicable *only* in case of a breach by the homeowner. It is not clear to the Court how a reasonable homeowner would be able to comprehend the interplay between these two provisions.

76. The lack of clarity with regard to the scope and effect of the alleged lien was further demonstrated at the hearings on the PI Motion in which counsel for MV Realty was unable to provide a definitive answer to the Court's repeated questioning as to whether such a lien could ever confer upon MV Realty the right to foreclose on the homeowner's property in the event of a breach. Assuming a right of foreclosure is contemplated by the lien allegedly created by the HBA, such a possibility is nowhere communicated to the homeowner. Moreover, it need hardly be said that if MV Realty's own attorneys are unable to determine whether such a right of foreclosure exists, no reasonable homeowner can be deemed to be on notice of this possibility at the time they sign the HBA.

77. The Court likewise has serious concerns about MV Realty's ability to lawfully record the Memorandum with the Register of Deeds following a homeowner's execution of the HBA.

78. As noted above, the Memorandum is a one-page document that MV Realty records with the Register of Deeds after a homeowner executes an HBA. (*See, e.g.*, Compl., Exs. 1, 13, 19, 20.) It refers to a "certain MVR Homeowner Benefit Agreement," includes a legal description of the homeowner's property, and states that the HBA term begins as of an "Effective Date" (which is not actually listed in the Memorandum), and "expires on the earlier of: (i) the date the Property is sold in accordance with the Agreement, and (ii) the date that is forty (40) years after the Commencement Date (the 'Term'), unless otherwise terminated in accordance with its terms." (Compl. Ex. 1.) The Memorandum also states—in bold, underlined text—that "**the obligations of Property Owner under the [HBA] constitute covenants running with the land and shall bind future successors-in-interest to title to the Property**." (Compl. Ex. 1 (emphasis in original).)

79. MV Realty argues that the recordation of the Memorandum with the local Register of Deeds is permissible pursuant to the broad language of N.C.G.S. § 161-14, which sets out the duties of a Register of Deeds in North Carolina regarding the registration of instruments. N.C.G.S. § 161-14(a) provides that "[a]fter the register of deeds has determined that all statutory and locally adopted prerequisites for recording have been met, the register of deeds shall immediately register all written instruments presented to him for registration." N.C.G.S. § 161-14(a).

80. In *Fleming v. Mann*, 23 N.C. App. 418 (1974), our Court of Appeals stated that "it is not the function of the Register of Deeds to inquire into the substance or the legal efficacy of the documents presented to him for recording. If they are properly acknowledged and probated and if the appropriate fee is tendered, it is his duty promptly to record and index them." *Id.* at 422. The Court of Appeals further held that "any instruments pertaining to real property are included among the documents allowed by law to be registered." *Id.* at 421 (cleaned up).

81. Nevertheless, there are limits to what may properly be recorded under N.C.G.S. § 161-14(a). For example, N.C.G.S. § 14-118.6 makes it unlawful

> for any person to present for filing or recording in a public record or a private record generally available to the public a false lien or encumbrance against the real or personal property of an owner or beneficial interest holder, knowing or having reason to know that the lien or encumbrance is false or contains a materially false, fictitious, or fraudulent statement or representation.

N.C.G.S. § 14-118.6(a).

82. Moreover, subpart (d) of the statute states that "the presentation of an instrument for recording or filing with a register of deeds or clerk of superior court that purports to be a lien or encumbrance that is determined to be materially false, fictitious, or fraudulent shall constitute a violation of G.S. 75-1.1." *Id.* § 14-118.6(d).

83. Although MV Realty disputes the applicability of N.C.G.S. § 14-118.6 to its recordation of the Memorandum, it does not go so far as to argue that a document purporting to reference a covenant running with the land can lawfully be recorded if the reference to such a covenant is clearly false.

84. The State challenges the validity of the statement in both the HBA and the Memorandum that the obligation of a participating homeowner to use MV Realty as their listing agent creates a covenant "running with the land" that binds successors-in-interest. This statement is false, the State argues, because the HBA is, in actuality, a contract for personal services that does not meet the legal requirements applicable to covenants that run with the land. As such, the State contends that the HBA is merely a *personal* covenant rather than a *real* covenant.

85. Our Court of Appeals has stated the following:

> Covenants that run with the land are real as distinguished from personal covenants that do not run with the land. Three essential requirements must concur to create a real covenant: (1) the intent of the parties as can be determined from the instruments of record; (2) the covenant must be so closely connected with the real property that it touches and concerns the land; and, (3) there must be privity of estate between the parties to the covenant.

Cunningham v. City of Greensboro, 212 N.C. App. 86, 97 (2011) (cleaned up).

86. Our Supreme Court has held that "[w]here the burdens and benefits created by the covenant are of such a nature that they may exist independently from the parties' ownership interests in land, the covenant does not touch and concern the land and will not run with the land." *Runyon v. Paley*, 331 N.C. 293, 300 (1992) (cleaned up). "To touch and concern the land, the object of the covenant must be annexed to, inherent in, or connected with, land or other real property, or related to the land granted or demised." *Raintree Corp. v. Rowe*, 38 N.C. App. 664, 670 (1978) (cleaned up); *see also id.* at 669 ("The provision that the covenant is to run with the

land is not binding unless the covenants possess the characteristics of a real covenant.").

87. Although the "touch and concern" element does not require "that the covenant have a physical effect on the land[,]" it does require that the restriction "affect the legal rights of the covenanting parties as landowners." *Runyon*, 331 N.C. at 300.

88. As a general proposition, a covenant "to pay money [does] not touch and concern the land." *Raintree*, 38 N.C. App. at 670.

89. The Court observes that our General Assembly has stated that "[t]he public policy of this State favors the marketability of real property and the transferability of interests in real property free from . . . unreasonable restraints on alienation[ ] and covenants . . . that do not touch and concern the property." N.C.G.S. § 39A-1(a).

90. MV Realty appears to be contending that the "touch and concern" element is satisfied here based on its accompanying argument that the HBA creates a security interest (or lien) on the homeowner's property. Indeed, as the following statement from MV Realty's briefing on this Motion makes clear, the existence of a valid lien pursuant to the HBA serves as a key basis for MV Realty's contention that the HBA contains covenants that run with the land:

> "To touch and concern the land[,] the object of the covenant must be annexed to, inherent in, or connected with, the land." . . . In Section 5, the homeowner grants a lien over (and interest in) the property in the event of a breach. That lien right is clearly connected with the land—and indeed enforceable against a subsequent purchaser who had notice

> (including constructive notice as a matter of law) of the agreement and lien. Accordingly, the statement in the Memorandum is not false.

Defs.' Final Suppl. Br., at 6, ECF No. 57. *See also* Defs.' Suppl. Br., at 6, ECF No. 51 ("The conveyance of a contingent lien and security interest in real property undoubtedly 'concerns' or 'has to do with' real property, especially upon the vesting of such lien rights and security interest.").

91. However, in this Opinion, the Court has explained why the State has demonstrated a likelihood of success on its argument that no legally enforceable lien is created by the HBA. Thus, based on the present record, the Court is unpersuaded that the HBA contains covenants that "touch and concern" the land. Instead, it appears more likely that the HBA—when properly construed—merely authorizes a breach of contract suit for damages.

92. Therefore, because MV Realty's asserted basis for filing the Memorandum appears to be legally invalid, the State has shown a likelihood of success on its argument that the filing of the Memorandum is likewise unlawful.

93. The Court is also concerned that the HBA does not fully explain to the homeowner the ramifications of the recordation of the Memorandum—that is, the fact that the recorded Memorandum serves as a cloud on the homeowner's title in the eyes of lenders. This concern was in no way alleviated by the response of MV Realty's counsel to the Court's questions on this issue at the 26 July hearing. During a colloquy with MV Realty's attorney, the Court asked counsel to identify the specific facts that the recording of the Memoranda was intended to give notice of to third parties. MV Realty's counsel replied: "[w]hat we're notifying the world of is the HBA;

that it exists, and that there is a need to understand whether the owner has complied with the requirements of it." (26 July 2023 Tr., at p. 37.) When questioned further about whether a reasonable homeowner could actually be expected to understand the ramifications of entering into an HBA or of breaching it, counsel's response was as follows:

> I expect the homeowner to be responsible to understand it. Whether the homeowner can on his or her own would completely depend on that homeowner's experience, what industry he or she works in. You know, we'd have to figure out – *if there's such a thing as an average homeowner, I don't know that they would necessarily understand*. But they know to ask. They know who they can ask.

(26 July 2023 Tr., at p. 66 (emphasis added).)

94. All of the concerns expressed above suffice to show a reasonable likelihood of success on the merits of the State's UDTP claim. In addition, the Court believes that certain other aspects of MV Realty's HBA program (or the way in which the program is actually carried out) potentially give rise to UDTP liability as well. For example, the most current version of the HBA appears to provide a three-day right of rescission to homeowners following their execution of the HBA. However, the State has offered evidence that, at least in some instances, participating homeowners were not given a signed copy of the agreement post-execution, which would obviously undercut the effectiveness of a cancellation period.

95. In addition, as mentioned previously, the HBA does not contain as an attachment a copy of the listing agreement to be executed by the homeowner upon their decision to sell their home—instead simply citing to a URL link that apparently contains this information online. The State has also offered evidence that the listing

agreement used by MV Realty provides for a $500 administrative fee to be paid by the homeowner to MV Realty upon a completed sale (in addition to the payment of the commission), and the existence of the $500 fee is nowhere mentioned in the HBA.

96. In sum, the State has shown a likelihood of success on its claim that—through its operation of the HBA program—MV Realty has engaged in a pattern of acts that both have the capacity to deceive, and actually have deceived, homeowners in North Carolina.

97. The Court has also carefully considered the State's arguments regarding its entitlement to a preliminary injunction based on its claims alleging unlawful telephone solicitation practices, unfair debt collection practice, and usurious lending practices. The Court concludes that based on the record that presently exists, the State has failed to show a likelihood of success on the merits as to these claims.

98. As noted above, in suits by the Attorney General brought under N.C.G.S. § 75-14 seeking a preliminary injunction, the State is not required to show irreparable harm but rather simply that the defendant's conduct adversely affects the public interest. That standard is easily met here. Defendants have entered into contracts with approximately 2,100 homeowners across North Carolina, and each of those contracts contain all, or virtually all, of the same terms that the Court has discussed herein in connection with the Court's determination that the State has shown a likelihood of success on the merits on its UDTP claim.

99. As noted earlier in this Opinion, the enactment of House Bill 422 precludes MV Realty – going forward – from entering into new contracts with North

Carolina homeowners containing the same terms set out in its existing HBAs. With regard to the status of those existing HBAs, the Court is not unmindful of the effects that a preliminary injunction in favor of the State will potentially have on Defendants' ability to enforce certain provisions of those contracts during the pendency of this lawsuit.

100. The Court finds, however, that any harm suffered by MV Realty from a preliminary injunction is outweighed by the likelihood of continued harm to North Carolina homeowners absent the entry of a preliminary injunction.

101. Therefore, in its discretion, the Court concludes that, on balance, the equities clearly favor issuance of a preliminary injunction in favor of the State.

102. For the reasons set out above, the Court, in the exercise of its discretion, **GRANTS** the State's PI Motion.

103. However, before actually issuing an order setting out the specific terms of the injunctive relief to which the State is entitled, the Court deems it appropriate to allow the parties an opportunity to each submit (1) a proposed preliminary injunction order that takes into account both the Court's rulings contained herein as well as the provisions of House Bill 422; and (2) a concise brief explaining the rationale underlying the inclusion of the terms contained in its proposed order. Each party shall file its proposed preliminary injunction order and accompanying brief **on or before 8 September 2023**. The parties' briefs shall be **no more than 2,000 words** and shall comply in all respects with the North Carolina Business Court

Rules.[7] The Court will determine at that time whether a hearing is necessary with regard to the parties' submissions.

CONCLUSION

104. For the reasons set out above, the Court **CONCLUDES**, in its discretion, that the Motion for Preliminary Injunction is **GRANTED.**

SO ORDERED, this the 30th day of August, 2023.

/s/ Mark A. Davis
Mark A. Davis
Special Superior Court Judge
for Complex Business Cases

[7] The briefs shall *not* be accompanied by any additional affidavits, declarations, or other exhibits.