

**IN THE SECOND CIRCUIT COURT FOR DAVIDSON COUNTY, TENNESSEE**  
**AT NASHVILLE**

STATE OF TENNESSEE,  
ex rel. Robert E. Cooper, Jr.,  
Attorney General and Reporter,

Plaintiffs,

HRC MEDICAL CENTERS, INC., et al.

Defendants.

FILED  
2017 JUL 17 AM 10:49  
RICHARD A. BELL  
Case No. 12C4047

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**ORDER**

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This cause came for hearing on June 28, 2017 on the State's Motion for Partial Summary Judgment Against Defendants HRC Medical Centers, Inc., Don Hale, Dan Hale and Dixie Hale; the Defendants' Motion for Summary Judgment; Defendants' Motion for Complaint Amendment to Include Affirmative Defense; and Defendants' Motion to Extend Deadline. After review of the motions, memoranda, responses and attachments thereto and arguments of counsel, this Court GRANTS the State's Motion for Partial Summary Judgment, DENIES Defendants' Motion for Summary Judgment, DENIES Defendants' Motion for Complaint Amendment and GRANTS Defendants' Motion to Extend Deadline.

Procedural History

The State filed a complaint for temporary and permanent injunction, judicial corporate dissolution and other relief against defendants on October 8, 2012.<sup>1</sup> The State alleges violations of the Tennessee Consumer Protection Act ("TCPA"). The alleged violations include making false and misleading statements in the commercial marketplace, material

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<sup>1</sup> The State later amended its Complaint.

omissions about the safety, efficacy, benefits, side effects and risks of “bio-identical” hormone replacement therapy (“BHRT”), and purported claims about the superiority of BHRT over traditional commercial hormone replacement therapy.

Defendant Dan Hale moved for dismissal claiming the action is subject to, and the State failed to follow, the procedural requirements of the health care liability statute. The Court, however, found the gravamen of the State’s complaint lies in the alleged deceptive business practices under the TCPA, not in medical malpractice. Thus, the Court determined the action was not subject to the requirements set forth in the health care liability statute and it denied Mr. Hale’s motion to dismiss.

The State moved for partial summary judgment and Defendants HRC, Don Hale, Bonnie Hale, Dan Hale and Dixie Hale filed a competing motion for summary judgment. On August 31, 2015, Judge McClendon entered a Memorandum Opinion granting partial summary judgment to the State. She found HRC had deceptively advertised its bio-identical hormone replacement therapy: (1) was completely safe, (2) had no side effects, (3) could make a user’s hormones identical to those he or she had when she was in her twenties and thirties, and (4) was compounded by an FDA-approved pharmacy. Judge McClendon also granted summary judgment on the claim HRC omitted material connections of individuals who appeared in advertisement. Additionally, she granted summary judgment on the personal liability of Don Hale and Dan Hale regarding these deceptive advertising claims and omitted material connections.

On February 23, 2017, this Court entered an Order, based upon conclusively established facts, granting summary judgment against Defendant Dixie Hale finding her

“individually liable under the TCPA for the deceptive corporate acts of HRC as set forth in the Court’s August 31, 2015 order, specifically for misrepresenting that its BHRT was completely or absolutely safe, had no or minimal side effects, restored a user’s hormones to the levels of one’s prime, used a compounding pharmacy that had been approved by the FDA, and for omitting the material connections of consumers to HRC or its principals in BHRT testimonials.”

**State’s Motion for Partial Summary Judgment Against Defendants HRC  
Medical Centers, Inc., Don Hale, Dan Hale and Dixie Hale**

Based upon the above-referenced Orders, the State now moves for partial summary judgment against HRC, Don Hale, Dan Hale and Dixie Hale seeking a joint and several consumer redress award of \$18,141,750.<sup>2</sup> The State further seeks a permanent injunction barring said defendants from engaging in conduct the Court has previously found unlawful.

The State claims the undisputed facts—derived from Defendants’ admissions, HRC’s records, HRC employees, self-authenticating business records from third party media outlets and numerous corroborating witnesses—demonstrate presumptive reliance, specifically: (1) the deceptive misrepresentations and omissions were widely disseminated, (2) consumers purchased BHRT, and (3) the State’s redress figure is a reasonable approximation of consumer losses.

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<sup>2</sup> The figure is calculated as follows: \$2,250 (figure below median price of BHRT) multiplied by 8,463 (lowest number of BHRT consumers asserted by HRC) less \$900,000 in refunds. (Undisputed Facts 4, 78-85, 89).

The State cites federal case law indicating FTC claims require no showing of injury or subjective reliance by each consumer. For example, in *McGregor v. Chierico*, the Eleventh Circuit Court of Appeals stated

Liability under the FTC Act is predicated upon certain misrepresentations or misleading statements, coupled with action taken in reliance upon those statements. Proof of individual reliance by each purchasing customer is not a prerequisite to the provision of equitable relief needed to redress fraud. “A presumption of individual reliance arises once the [FTC] has proved that the defendant made material misrepresentations, that they were widely disseminated, and that consumers purchased the defendant’s product.”

206 F.3d 1378, 1388 (11<sup>th</sup> Cir. 2000) (quoting *FTC v. Figgie Int’l, Inc.*, 994 F.2d 595, 605-06 (9<sup>th</sup> Cir. 1993)); *see also F.T.C. v. Freecom Commc’ns, Inc.*, 401 F.3d 1192, 1205 (10<sup>th</sup> Cir. 2005) (“Neither proof of consumer reliance nor consumer injury is necessary to establish a[n FTC Act] § 5 violation.”).

### **Defendants’ Motion for Summary Judgment**

Defendants have filed a competing motion for summary judgment claiming four fundamental procedural and evidentiary points defeat the State’s claims.<sup>3</sup>

First, relying primarily upon *Tucker v. Sierra Builders, et al.*, 180 S.W.3d 109 (Tenn. Ct. App. 2005), Defendants claim the State has failed to demonstrate a causal connection between the alleged factual misrepresentations and any substantial harm. Citing *Tucker*, they claim “a practice found to be deceptive (i.e. technically sufficient with expert support) still may not be a basis for a finding of liability (or damages) unless there is also a contemporaneous finding by the Court that the practice is “unfair.” (Def. MSJ p.6). They further claim the *Tucker* opinion “make[s] it clear that a deceptive act is not ‘unfair’

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<sup>3</sup> Defendants respond to the State’s Motion for Partial Summary Judgment through incorporation by reference of the opposing Defendants’ Motion for Summary Judgment Dismissal.



unless the act or practice causes or is likely to cause ‘substantial injury’ to consumers which is not reasonably avoidable by the consumers themselves and not outweighed by countervailing benefits to consumers or to competitors.” (Def. MSJ p.6).

Second, Defendants contend the State is required to submit admissible expert proof of non-trivial injury to demonstrate a substantial injury from a deceptive act. They maintain the State has not done so and, therefore, cannot establish a *prima facie* element of their cause of action. Specifically, according to Defendants, neither Dr. Liu nor Dr. Finkelstein “set forth any affirmative statement anywhere in the Rule 26 disclosures that their opinions are ‘based upon reasonable medical certainty[.]’” (Def. MSJ p.10). Similarly, Defendants claim the State also may not survive summary dismissal on the basis of the opinions of Dr. Ted Louis Anderson because, among other things, his allegedly untrustworthy opinions have changed drastically over time.

Third, Defendants again challenge, as plain error, Judge McClendon’s grant of partial summary judgment to the State. Defendants claim Dr. Hale’s discovery responses—ostensibly admitting medically insignificant side effects from any substance—were taken out of context and thus, summary judgment was erroneously granted without *expert* testimony of non-trivial sides effects associated with properly administered and monitored BHRT.

Finally, Defendants contend the State’s failure to mitigate precludes an award of damages and is fatal to the underlying liability claim.<sup>4</sup> They maintain the issues could have been resolved through a standard compliance letter, but instead the State made a “politically-

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<sup>4</sup> Defendants have filed a Motion for Complaint Amendment to Include Affirmative Defense. Specifically, they move the Court to include at trial the defense of failure to mitigate damages.

motivated decision” to “wait in ambush.” They claim many, if not all, of the refunds now sought by the State are for purchases made during the two-year period between the State learning of the allegedly wrongful conduct and its filing suit.

### Law & Analysis

A motion for summary judgment should be granted only “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Tenn. R. Civ. P. 56.04. “The nonmoving party’s evidence must be accepted as true, and any doubts concerning the existence of a genuine issue of material fact shall be resolved in favor of the nonmoving party.” *Martin v. Norfolk So. Ry. Co.*, 271 S.W.3d 76, 84 (Tenn. 2008) (citation omitted).

The following facts are undisputed for summary judgment purposes:

1. Defendant HRC Medical Centers, Inc. (“HRC”) advertised its “bio-identical” hormone replacement therapy (BHRT) known as Amor Vie.
2. Defendant HRC’s practice management model involved heavy advertising of BHRT and its alleged benefits and consultations with non-physician consultants who would take a medical history and explain BHRT including the cost and method of payment.
3. The purpose of advertising HRC’s BHRT was to grow the business.
4. At least 8,463 Tennesseans purchased BHRT from HRC.
5. Elsewhere, Defendant Don Hale has stated that the number of HRC’s active BHR consumers in Tennessee was 13,000.
6. Defendant HRC advertised its BHRT heavily on local television and radio in the Nashville, and to a lesser extent, the Knoxville media market.

7. Defendant HRC advertised its BHRT on WSMV, Nashville's NBC television affiliate.
8. Defendant HRC advertised its BHRT on WKRN, Nashville's ABC television affiliate.
9. Defendant HRC advertised its BHRT on WZTV, Nashville's Fox television affiliate.
10. Defendant HRC advertised its BHRT on radio stations in Tennessee.
11. Defendant HRC advertised its BHRT in Tennessee through sales brochures and posters located in HRC's clinic locations in Tennessee.
12. Defendant HRC also advertised its BHRT on its website, HRCMedical.com and the websites of third parties, such as WSMV, Nashville's NBC affiliate.
13. Drew Hale, son of Don and Dixie Hale, was a marketing manager employed by HRC.
14. HRC hired advertising agencies to assist with advertising. One of the advertising agencies, LakeShore Media, hired Drew Hale who then worked on HRC's advertising from outside the company.
15. HRC spent tens of thousands of dollars per month for advertising BHRT for its centers in Tennessee.
16. In October 2012, HRC budgeted spending \$46,104 for advertising for the Nashville clinic and \$36,583 for advertising for the Knoxville clinic.
17. HRC had an advertising expense of \$43,509 for the Knoxville clinic and \$54,706 for the Nashville clinic for the period November 1 to November 25, 2011.
18. As of August 2012, HRC had spent a total of \$451,061 on BHRT advertising for its Nashville clinic and had an advertising budget for the year of \$470,537.
19. The claim that that [sic] HRC's BHRT was completely or absolutely safe (or through other words conveying the same message) was repeated in sales brochures, television advertisements, social media advertisements, and web postings.<sup>5</sup>
20. In a brochure . . . handed out to consumers at the Knoxville, Nashville, and Memphis offices in Tennessee, HRC stated the following about its BHRT [excerpted below]:

*IS THIS SAFE? Absolutely. They actually have been shown to have very preventive and protective qualities with regard to cancer.*<sup>6</sup>

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<sup>5</sup> Defendants admit the fact, but note the statement fails to reference dissemination timing. (Response pg.2).

<sup>6</sup> The brochure is depicted in Plaintiff's Statement of Undisputed Facts.

21. Copies of the HRC BHRT brochure shown immediately above, which contains the claim that HRC's BHRT was "absolutely" safe, were displayed at HRC clinics in Tennessee for consumers to view and handed to consumers.
22. Boxes containing extra copies of the brochure shown immediately above, which contains the claim that HRC's BHRT was "absolutely" safe, were kept at HRC clinics.
23. In an advertisement for Defendant HRC's BHRT that was accessible to Tennessee consumers at least as of June 11, 2012, Defendant Dan Hale stated, "Bio-identical hormones are completely safe."
24. Defendant Don Hale, on behalf of Defendant HRC, stated the following, in relevant part, in a BHRT advertisement that aired on local Nashville television station WSMV and that was accessible to Tennessee consumers at least as of June 11, 2012:

*No one can find any evidence that having your hormone levels raised back like there were in their [sic] youth can hurt you in any way if it's done with natural hormones as opposed to synthetic hormones.*

25. In an advertisement for Defendant HRC's BHRT that was accessible to Tennessee consumers on HRC's website at least as of June 25, 2012, Defendant Dan Hale stated, "So they-so there are actually no health risks that we've ever been able to determine with the bio-identical hormones."
26. In an advertisement for Defendant HRC's BHRT that was accessible to Tennessee consumers on HRC's website at least as of June 11, 2012, Defendant Dan Hale stated, "Bio-identical hormones are safe. They're not the kind of hormones that are unsafe."
27. Likewise, in an advertisement for Defendant HRC's BHRT that was accessible to Tennessee consumers on HRC's website at least as of June 25, 2012, Defendant Dan Hale, on behalf of Defendant HRC, stated the following in relevant part:

*Go on the Internet and read about bio-identical hormones and you'll see that there's a lot of information out there. All of it is positive. You're not going to see anything that says that the bioidentical hormones causes [sic] anything bad at all. It's just not there. If there's anything bad about something it's going to show up on the Internet as you know. You're not going to find it because bio-identical hormones are the same kind of hormones you had when you were twenty years old.*

29. In a separate HRC BHRT advertisement airing on WSMV that was accessible to Tennessee consumers at least by June 11, 2012, Defendant Dan Hale, on behalf of Defendant HRC, stated:

*Oh my, see the bad thing about hormones is this: It is not good not to replace your hormones. In other words, some people say, "Is this safe?" My it's more than safe. It is not safe not to replace your hormones. . . .*

30. In another advertisement for Defendant HRC Medical's BHRT on WSMV, Defendant Dan Hale and WSMV's Kacy Haggerty engaged in the following dialogue:

KACY HAGGERTY: So is "all natural" a really good option for people?

DR. HALE: It's not even, it's not an option. What I'm saying is that without hormones it's not safe. People sometimes say is this safe? I'm saying to you, it's not safe is like, "Should I wear a safety belt?" Of course. *You know it's not safe not to keep your hormones where they should be.*

31. The claim that HRC's BHRT had no side effects, without qualification, was repeated in television advertisements, Internet videos and social media.
32. The claim that HRC's BHRT was associated with no side effects, without qualification, was contained in an HRC television advertisement entitled "HRCMedical Misty," which aired at least 53 times on Nashville's ABC affiliate from April 1, 2009 to October 2, 2009.
33. In an advertisement for its BHRT on an HRC website that was accessible at least as of June 11, 2012, Defendant HRC stated the following, in relevant part:

*Progesterone has proven bioavailability and no side effects making it the preferred hormone for menopause.*

34. In an advertisement for Defendant HRC's BHRT that was accessible to Tennessee consumers on Facebook at least as of June 11, 2012, Defendant Dan Hale, on behalf of Defendant HRC stated:

I've been practicing medicine for 35 years and so I've practiced the other way. And I feel so much better now because I can prevent these things I can treat the actual problem instead of giving medicine that really has so many side effects . . . Bioidentical hormones are completely safe. *Now, what that means is that the side effects, in men, there are no side effects to testosterone.* Women, it is possible if you get [the] dose a little bit too high or if they're very sensitive to it, *they may get a little bit of a shadow.* All that means is we just cut back on the testosterone a little bit.

35. In an advertisement for Defendant HRC's BHRT on an HRC website that was accessible to Tennessee consumers at least as of June 25, 2012, Defendant Dan Hale stated:

People are wanting to get away from the synthetic hormones made from horse urine, made from pregnant mares. *Those are the things that have a lot of side effects.* They're wanting the natural kind of hormones, the kind of hormones you had when you were 20 years old, so a lot of people are seeking this therapy. I think it's going to continue to grow because, like Oprah, when she had it on her television program. We know that Suzanne

Somers has written 3 books on it. Go on the Internet and read about bio-identical hormones and you'll see that there's a lot of information out there and all of it is positive. *You're not going to see anything where it says the bio-identical hormones causes anything bad at all cause it's just not there. If there's anything bad about something, it'll show up on the Internet as you know. You're not going to find it because bio-identical hormones are the same kind of hormones you had when you were twenty years old.*

36. Elsewhere, Defendant HRC disclosed a few minor side effects, but omitted reference to other side effects. This occurred in sales brochures and Internet advertisements.
37. In a BHRT advertisement that was accessible to Tennessee consumers on an HRC website at least by June 25, 2012, Defendant Dan Hale, on behalf of Defendant HRC, stated:

What I want you to understand is that bio-identical hormones are very safe . . . Our bodies are not made to metabolize horse urine, but they are made to metabolize natural hormones, so there are no health risks that we've ever been able to determine with the bio-identical hormones. *The side effects I mention maybe a little bit of facial hair, maybe a pimple or something like that, maybe spotting if you get the estrogen a little bit too high.* All those things are side effects that can be changed, that can be corrected by lowering the, correcting the dosage and making sure that the dosages are correct. *So the point is that we can correct the hormones naturally then there are absolutely no side effects to it at all.*

38. In a brochure for its BHRT distributed to prospective consumers in Tennessee, Defendant HRC only stated the following about side effects [excerpted below]:<sup>7</sup>

What are the side effects?

A small number of women may have increased breast sensitivity and spotting. The spotting is managed with progesterone capsules each evening. Most of these side effects, if they occur, will resolve after your body adjusts to the hormones.

39. The brochure [referenced in statement 38] which contains the claim was distributed to HRC's prospective BHRT consumers in Tennessee and was available prior to the point of sale.
40. Hundreds of copies of the brochure, [referenced in statement 38] were available at the Nashville HRC office and were on display in the lobby, at the front desk, in the patient rooms, in consultant offices, and in stockrooms.
41. Boxes containing extra copies of the HRC BHRT brochure [referenced in statement 38] were kept at HRC clinic in Tennessee.

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<sup>7</sup> The brochure is depicted in Plaintiff's State of Undisputed Facts.



42. Defendant HRC represented in advertisements that HRC's BHRT restored a consumer's hormones to the levels that the consumer had when she or he was in her or his twenties and thirties or to the levels she or he had in her or his prime.

43. HRC made this claim in sales brochures, television advertisements, promotional posters, on its social media pages, and elsewhere.

44. Defendant HRC stated the following in a BHRT sale brochure as shown below:<sup>8</sup>

Renew! Naturally derived Amor Vie will renew the hormone levels of your prime! Unlike many other hormone treatments, you[r] Amor Vie therapy is personally designed to restore the optimal hormone levels found in your early 20s, not just the levels for a mid-life or senior adult.

45. Copies of the HRC brochure [referenced in Number 44] were displayed at HRC clinics in Tennessee for consumers to view.

46. Boxes containing extra copies of the HRC BHRT pamphlet [referenced in Number 44] were kept at HRC clinics.

47. HRC displayed the Restore! Renew! Rejoice! Pieces . . . within their clinic locations, which includes the claim "Naturally derived Amor Vie will renew the hormone levels of your prime!," "Unlike many other hormone treatments your Amor Vie therapy is personally designed to restore the optimal hormone levels found in your early 20's [sic], not just the levels for a mid-life or senior adult," and "HRC Medical patient sampling indicates that regular treatment provides a sustained hormone level, consistent with that of our prime."

48. In another brochure that was distributed to consumers in Tennessee, Defendant HRC stated, the following:

Men produce mostly testosterone. This hormone is much higher in men than women and those hormones will be replaced to bring levels back to those of a young man.

49. Defendant HRC stated the following in BHRT advertisements accessible by Tennessee:

This is seen as a loss of the love-life we had when we were younger. All of these losses can be re-gained [sic] by returning your testosterone to values we used to have.

50. On February 16, 2012, Defendant HRC stated on its Facebook page for its Knoxville office, the following, in relevant part, about its BHRT:

*At HRC we achieve optimized hormone levels for our patients by restoring those levels back to that of their prime not just the levels for mid-life or senior adults. We are so confident that we can optimize an individual's hormone levels we offer a written guarantee . . . .*

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<sup>8</sup> The brochure is depicted in Plaintiff's Statement of Undisputed Facts.

51. On January 5, 2012, Defendant HRC stated the following, in relevant part, on its Facebook page for its Nashville office:

*Naturally derived Amor Vie will renew the hormone levels of your prime.*

52. Defendant Don Hale, on behalf of Defendant HRC, stated the following, in relevant part, in advertisements about Defendant HRC's BHRT:

No one can find any evidence that *having your hormone levels raised back like they were in your youth* can hurt you in any way if it's done with natural hormones as opposed to synthetic hormones.

53. Defendant HRC stated in advertisements for its BHRT, the following, in relevant part:

*We must first replace and restore [hormones that have] been lost over the years.*

54. Defendant HRC stated the following, in relevant part, in advertisements for its BHRT:

The reduction of the Hormones Estrogen, Progesterone and Testosterone in men can cause a myriad of symptoms affecting our health and the way we feel. HRC's AMOR VIE therapy program is designed to help men & women to . . . RESTORE your Hormones, RENEW your life, and REJOICE in your success. . . . *When hormone levels are normal as they were in one's twenties, usually sleep under normal conditions is not a problem.*

55. Defendant Dan Hale, on behalf of Defendant HRC, stated the following, in relevant part, about Defendant HRC's BHRT:

But the good news is that we do not have to tolerate the ravages of loss of hormones. *These hormones can be replaced by natural hormones that are exactly like the hormones you had when you were 25.* You can live a longer and healthier life. . . . Please let us help at HRC Medical. Dr. Dan.

56. Defendant Dan Hale, on behalf of Defendant HRC, stated the following, in relevant part, about Defendant HRC's BHRT:

That is why it is crucial to replace these lost hormones. *But the key is to replace them (estradiol, progesterone, and testosterone) with hormones that are an exact duplicate of those we had when we were 25 years old . . . Natural hormones as we had when we were 25 do not have the side effects associated with synthetics.*

57. Defendant Dan Hale, on behalf of Defendant HRC, stated the following, in advertisements for Defendant HRC's BHRT:



DAN HALE: *Bioidentical mean biologically identical to the hormones you had when you were 20 years old.*

NARRATOR: Wouldn't we all want to feel twenty again?

58. Elsewhere, Defendant Dan Hale, on behalf of Defendant HRC, stated the following, in relevant part:

Without hormones, we're just an empty shell of ourselves. I didn't get that quote from me – that was from Suzanne Somers – one of her books. But it's so – she hit the nail on the head because without hormones, we wish we were like we were but we're just not. We're not the same people. *But when we can replace those hormones, we're back like we were when we were 20 – 25 years old* and every day of my work day I have people say thank you for what you've done for me because I have my life back.

59. Defendant Dan Hale, on behalf of Defendant HRC, stated the following, in relevant part, in advertisements for Defendant HRC's BHRT on WSMV:

*But when we can replace those hormones, we're back like we were when we were 20-25 years old . . .*

60. In BHRT advertisements written by Defendant Dan Hale that were given to HRC's potential consumers prior to the point of sale, Defendant Dan Hale stated:

When Bio-Identical Pellets are used this means the hormones are biologically identical to the natural hormones you had when you were in your early 20's [sic], when you were at your peak in health, strength, mental clarity, and sexual prowess.

61. In HRC BHRT advertisements, Defendant Dan Hale, on behalf of Defendant HRC, stated:

Sure, the restoring means that we're restoring the hormones that we had when we were 25 years old. We gradually lose those hormones with time, so that when we restore those we feel better.

62. Defendant Don Hale, on behalf of Defendant HRC, stated the following, in relevant party, in BHRT advertisements aired on local Nashville television station WSMV:

*No one can find any evidence that having your hormone levels raised back like there were in their [sic] youth can hurt you in any way if it's done with natural hormones as opposed to synthetic hormones.*

63. Defendant HRC told consumers that its compounding pharmacy was FDA-approved in advertisements—a claim for which Defendant Dan Hale admitted he was responsible.

64. Defendant HRC stated the following in promotional materials for its BHRT, which were handed out to consumers in Tennessee:

*Our pellets are bio-engineered using all natural ingredients by our FDA approved compounding pharmacy. Our pharmacy is one of only two FDA approved pharmacies of their kind in the United States.*

65. If asked whether HRC's BHRT was FDA-approved, HRC sales representatives were instructed to state "The natural hormone pellets we use meet standards set by FDA."
66. In advertisements for its BHRT, Defendant HRC used consumer testimonials from principals of the company, family members of the principals of the company, employees of the company, or others with connections to Defendant HRC, without disclosing the relationship between the individual and Defendant HRC.<sup>9</sup>
67. In one advertisement for Defendant HRC's BHRT directed towards consumers in Middle Tennessee and accessible at least by June 11, 2012, . . . Defendant Don Hale, one of the founders of Defendant HRC Medical and its President and CEO, gave a consumer testimonial without any disclosure of his ownership interest or other connection to Defendant HRC.<sup>10</sup>
68. In the same advertisement for Defendant HRC's BHRT, . . . Trina Lonning, who was employed by Defendant HRC at the time the advertisement was created, gave a consumer testimonial without any disclosure of her connection to Defendant HRC.<sup>11</sup>
69. Another advertisement for Defendant HRC's BHRT, which was accessible to Tennessee consumers at least by June 25, 2012, . . . aired on WSMV and featured Defendant HRC employee Trina Lonning without any disclosure about her connection to Defendant HRC, featured the following statement:

JENNIFER HERRON: *Trina took things into her own hands and looked on the Internet for answers.* She wanted to be herself again. The person she was 20 years ago. . . . First she had to find out why the synthetic hormones she was taking only helped the hot flashes (emphasis added).

70. Similarly, in a different advertisement for Defendant HRC's BHRT that was accessible to Tennessee consumers at least by June 11, 2012, directed at consumers in Middle Tennessee, and featured on Defendant HRC's Facebook page for its Nashville office, . . . Defendant HRC featured Don Hale, founder of Defendant HRC Medical, Defendant Don Hale's son and Defendant HRC employee, Drew Hale, and Defendant Done Hale's daughter-in-law and Defendant HRC employee, Jennifer Hale, in consumer testimonials about

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<sup>9</sup> Defendants admit the statement, but assert it is immaterial.

<sup>10</sup> A screenshot of the advertisement is included in Plaintiff's Statement of Undisputed Facts.

<sup>11</sup> Screenshots of the advertisements referenced in Numbers 67-71, 74-75 are included in Plaintiff's Statement of Undisputed Facts.

Defendant HRC's BHRT without any disclosure about their respective connections to Defendant HRC or its owners.

71. [In the advertisement referenced in Number 70], Drew Hale and Jennifer Hale spoke while a statement states "Actual Bio-Identical Hormone Replacement Patient" appeared on the screen.
72. Despite the fact that he is related by blood to the principals of the company and was employed with Defendant HRC, in an advertising capacity, Drew Hale stated the following in [the advertisement referenced in Number 70] for Defendant HRC Medical's BHRT:

*I stumbled across the all-natural hormone replacement* and I've been doing it and it's been great.

73. Similarly, Jennifer Hale, despite the fact that she was employed by Defendant HRC, stated the following:

I'm Jennifer. I'm 25 years old. I've been suffering from migraine headaches for as long as I can remember. *Heard about the natural hormone replacement*, so I got tested for it. And not only had it helped me with my migraine headaches, it has helped me with my energy level – I feel wonderful throughout the day. I sleep really well. I'm focused. And now I realize that it's not only for women going through menopause, so I'm very happy that I did it.

74. In the same advertisement for Defendant HRC's BHRT that has been featured on Defendant HRC's Facebook page for its Nashville office, one of the Nashville office's receptionists was depicted . . . without any disclosure about her status as an HRC employee.

75. In another advertisement for Defendant HRC's BHRT that aired in Tennessee . . . Defendant Dixie Hale gave a consumer testimonial, on behalf of Defendant HRC, in which her employment and relationship with the company was not disclosed. In the advertisement, Defendant Dixie Hale stated:

I work long hours and it is very important to me that I can continue longer during the day without getting so tired. People are a lot more tired and stressed out than they used to be. And the hormones can definitely help. I felt it was safer for me and with the result that I got. I felt so much better. I mean it's the perfect fit for me. I have a lot more energy. When I have more energy and I'm feeling better, I'm happier.

76. This advertisement alone ran 58 times on just Nashville's ABC affiliate from April 1, 2009 to October 2, 2009.
77. In still another advertisement for Defendant HRC's BHRT in which Don Hale and Dixie Hale were featured and that was accessible to Tennessee consumers at least by June 11, 2012, Defendants Don Hale and Dixie Hale gave testimonials without any disclosure of their ownership interest in or employment with the company

78. As of 2010, HRC used a template contract for BHRT for men at its Tennessee clinics that stated that the price was \$3,450, which men paid.
79. At its clinics in Tennessee, while HRC negotiated its BHRT contract price with some men, the median price paid for male BHRT was at least \$3,000.
80. As of May 5, 2009, HRC used a template contract for BHRT for women at its Tennessee clinics that state that the price was \$2,650, which women paid.
81. As of October 16, 2009, HRC used a template contract for BHRT for women at its Tennessee clinics that stated that the price was \$2,950, which women paid.
82. The \$2,950 price HRC stated in its template contract for BHRT for women at its Tennessee clinics did not decrease after October 16, 2009.
83. At its clinics in Tennessee, while HRC negotiated its BHRT contract price with some women, the median price paid for female BHRT exceeded \$2,250.
84. Not many people signed up for the a la carte price for one pellet implant, which was \$1,100.
85. In those instances where HRC decided to give a refund or to apply the consumer's remaining balance towards other services, it would deduct \$1,100 per pellet implant.
86. According to HRC's sales consultants, only a handful of consumers applied their remaining balance to other services because the amount subtracted for each pellet implant was \$1,100, which did not leave a lot of funds to pay for other services.
87. HRC did not track incoming accounts receivable by consumer in its accounting records and was in the process of transitioning from a cash-basis to an accrual basis accounting system.
89. HRC has claims to provide approximately \$900,000 in refunds to BHRT consumers nationwide.
90. HRC's contracts had a provision asserting that the contracts were non-refundable.
91. From January to May 14, 2012, HRC recorded only four individuals from Tennessee clinics who were paying through monthly auto-drafts who requested refunds, which HRC stated resulted in a loss of only \$3,763.36.
92. Consumer Jane Doe 17 was told by an HRC sales representative during a sales consultation that its BHRT had zero side effects and was completely safe, decided to purchase BHRT for approximately \$3,000, stated that if she knew about the side effects associated with HRC's BHRT before signing up she would not have purchased BHRT, and did not receive a refund from any source.<sup>12</sup>

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<sup>12</sup> Defendants seemingly do not deny Consumer Jane Doe 17 stated such. Instead, they assert the fact is inadmissible "as containing a statement which cannot be support by a layman's observation (i.e., side

93. Consumer Jane Doe 19 was given a brochure for HRC's BHRT that stated among other things "IS THIS SAFE? Absolutely. . .," told by HRC's sales consultant that HRC was "all natural and safe," purchased BHRT for \$2,950, stated that she would not have purchased it had she been told about the possible side effects that could result from BHRT, and received a full refund from HRC.
94. Consumer Jane Doe 2 was told by an HRC sales representative during a sales consultation that HRC's BHRT did not have any harmful side effects, purchased BHRT for \$2,950, requested a refund, but was told she could only receive store credit for other services, which she refused.
95. Consumer Jane Doe 10 saw an HRC advertisement on Tennessee Mornings that said that HRC's BHRT would give one the hormone levels one had when she was young, was told by an HRC sales representative during a sales consultation that HRC's BHRT had "no side effects," purchased BHRT to increase her hormone levels in a safe manner, and requested but never received a refund.
96. Consumer Jane Doe 12 was told by an HRC sales representative that HRC's BHRT had no side effects, purchased BHRT for \$2,950, and would not have taken BHRT if the possible side effects were disclosed.
97. Consumer Jane Doe 43 saw and heard advertisements about HRC that claimed its BHRT was safe and had no side effects and purchased Defendant HRC's BHRT for \$2,300.
98. Consumer Jane Doe 21 was told by an HRC sales representative during a sales consultation that BHRT had no side effects, purchased BHRT for \$2,650, and requested but did not receive a refund from HRC.
99. Consumer Jane Doe 37 was told only about acne as a possible side effect of HRC's BHRT, purchased it for approximately \$3,000, and requested but never received a refund from HRC.
100. Consumer Jane Doe 22 saw and heard HRC's advertisements featuring Dr. Hale stating that HRC's BHRT was safe, was told during her sales consultation that HRC's BHRT had no side effects, paid \$2,950 for the therapy, and requested a refund and was told that HRC does not give refunds.
101. Consumer Jane Doe 25 was told only that acne and facial hair growth were possible side effects of BHRT, purchased BHRT for \$2,650, and requested but did not receive a consumer refund.
102. Consumer Jane Doe 42 was told only that hair growth and menstrual-like bleeding were possible side effects of HRC's BHRT, was not told about any health risks of HRC's BHRT, purchased BHRT for approximately \$3,000, and

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effects associated with HRC's BHRT) in a record in which not a single medical expert . . . has identified a causal relationship between any HRC patient and any harm[.]" (Response pg. 3). Defendants lodge said objection to "inadmissible and irrelevant factual opinion[s]" to Items 92 through 102.

stated she would not have purchased HRC's BHRT if she had been told all of the possible side effects and health risks.<sup>13</sup>

103. The State's Complaint alleges Defendants' "sweeping safety, risk, and side-effect claims for Defendant HRC Medical's BHRT are false, deceptive, and/or not adequately substantiated." (Undisputed Fact 3)
104. The State's Complaint alleges Defendants "failed to clearly and conspicuously disclose or purposefully understated potential serious side effects from their alternative BHRT regimen, including . . . risks of endometrial cancer . . . possible increased risk of breast cancer, as well as other side effects that may significantly impair a consumer's quality of life[.]" (Undisputed Fact 4)
105. The State's Complaint alleges Defendants' "BHRT may increase an individual's hematocrit and hemoglobin levels . . . [which] increase an individuals' risk of developing a blood clot, stroke, or other cardiovascular problems, which is not disclosed by Defendant HRC Medical." (Undisputed Fact 5)
106. The State's Complaint alleges "contraindications mean that the therapy . . . may result in additional increased health risks or increased risk of death, including women who have had breast or endometrial cancer [.]" (Undisputed Fact 6)
107. The State's Complaint alleges deceptive conduct by Defendants in claiming "HRC Medical's BHRT has no cancer risk or protects against or prevents cancer or through words or phrases of similar import, when this is not the case or when this statement was made without adequate support to substantiate such claim at the time made[.]" (Undisputed Fact 7)
108. The State filed the Affidavit of Ted Louis Anderson , M.D. (Undisputed Fact 9)
109. Dr. Anderson's Affidavit includes the following language: "Some women have absolute contraindications to hormone replacement therapy, meaning that the therapy is inappropriate and may result in increased health risks or increased risk of death." (Undisputed Fact 10)
110. Dr. Anderson's Affidavit includes the following language: "I am seeing increasing numbers of patients in my practice who have received hormone replacement therapy at these clinics." (Undisputed Fact 12)
111. Dr. Anderson's Affidavit includes the following language: "I have performed appropriate medical searches of the relevant medical literature." (Undisputed Fact 13)
112. Defense counsel took Dr. Anderson's discovery deposition at the Offices of the State Attorney General beginning on February 26, 2015. (Undisputed Fact 16)
113. In his discovery deposition, Dr. Anderson agreed hormone replacement therapy is "very common." (Undisputed Fact 17)

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<sup>13</sup> Facts 1-102 were submitted by the State in support of its Motion for Summary Judgment. Facts 103-133 (as renumbered) were submitted by Defendant in support of their Motion for Summary Judgment.



114. In his discovery deposition, Dr. Anderson stated, “I think that we think that it’s<sup>14</sup> probably safer than the media would like the public to believe it is.” (Undisputed Fact 17)
115. In his discovery deposition, Dr. Anderson stated, “Now I want to make it very, very clear that I have [sic] no objection to bio-identical hormones. I use bio-identical hormones. So if Dr. Houston is publishing on the merits of specific chemical forms of hormones, bio-identical hormones as defined by the chemical forms that exist in nature, I have no objection to that. I use them all the time.”<sup>15</sup> (Undisputed Fact 17)
116. In his discovery deposition, Dr. Anderson agreed the FDA has acknowledged it has not fully studied BHRT and has not expressed an opinion regarding it. (Undisputed Fact 17)
117. In his discovery deposition, Dr. Anderson agreed the FDA has never stated BHRT is harmful.<sup>16</sup> (Undisputed Fact 17)
118. In his discovery deposition, Dr. Anderson defined “completely safe” as “something that is not causing any potential for medical harm.” (Undisputed Fact 17)
119. In his discovery deposition, Dr. Anderson stated, “I do think it’s important to obtain informed consent if you’re going to undergo any kind of therapy.”
120. In his discovery deposition, Dr. Anderson stated, “No. In fact, I’m a frequent user of bio-identical hormone replacement therapy, a frequent prescriber of bio-identical hormone replacement therapy. I would say that probably 90% of the patients that I have that are on hormone replacement therapy are taking bio-identical hormone replacement therapy.”<sup>17</sup> (Undisputed Fact 17)
121. In his discovery deposition, Dr. Anderson stated he does not typically require patients provide written consent; he verbally discusses consent, which he documents in the patient’s chart. (Undisputed Fact 17)
122. In his discovery deposition, when questioned regarding his opinion of BHRT clinical in general, Dr. Anderson stated: “I don’t have a personal observation. I do have a general concern if BHRT clinics are using the same kind of cocktail that I’ve seen in my research for this particular case.” (Undisputed Fact 17)
123. In his discovery deposition, Dr. Anderson stated he had not evaluated other clinics. (Undisputed Fact 17)

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<sup>14</sup> The State notes “this proposed undisputed fact does not indicate what ‘it’s,’ in the quoted language, refers to.”

<sup>15</sup> According to the State, “the BHRT that Dr. Anderson prescribed differed substantially from Defendants’ BHRT.”

<sup>16</sup> According to the State, Dr. Anderson further explained the FDA has stated there is, however, insufficient evidence to support enhanced safety and efficacy claims of BHRT over traditional hormone regimens.

<sup>17</sup> The State disagrees “bio-identical hormone replacement therapy” in general equates to Defendants’ BHRT.

124. In his discovery deposition, Dr. Anderson agreed he “th[ough] [Defendants’ clinics] were causing irreparable harm.” (Undisputed Fact 17)
125. When asked to clarify and explain regarding “irreparable harm,” Dr. Anderson, stated, “Based on patients who were receiving hormone replacement therapy in that clinic<sup>18</sup> who came to me with cancer.” (Undisputed Fact 17)
126. In his discovery deposition, Dr. Anderson stated he did not note in his medical charts which clinics patients had visited, including HRC Medical Centers. (Undisputed Fact 17)
127. The following exchange occurred during Dr. Anderson’s discovery deposition:
- Q: As we sit here today, can you give me the name of one human being, male or female, that you know of who you can say on a standard of reasonable medical certainty, more probable than not, that the patient has suffered permanent or indefinite harm as a result of anything done by HRC specifically? Can you give me such a name?
- A: I’m not sure if I can.
128. When questioned regarding safety studies, Dr. Anderson responded, “No, I believe that there have been studies; I just can’t give you one right here.” (Undisputed Fact 17)
129. At no time prior to the filing of the October 8, 2012 Complaint by the State did Don Hale or any of his company representatives receive any type of warning letter, email, memo, or other communication from the Office of the Attorney General which requested or demanded Defendants change anything at all about their advertising or marketing practices. (Undisputed Fact 21)
130. Based upon news reports and rumors, Don Hale and HRC Medical Centers employed an individual (Bill Fletcher) for the express purpose of attempting to “find out if we are in trouble with the Office of the Attorney General, . . . so that we can take any appropriate corrective action which might be required of us.” (Undisputed Fact 22)
131. The Rule 26 Disclosure Statement of James H. Liu, M.D. contains no statement his opinions are “based upon reasonable medical certainty” nor are his opinions expressed in terms of “likelihood, probably or greater than 50% certainty.”<sup>19</sup> (Undisputed Fact 23)
132. The Rule 26 Disclosure Statement of Joel L. Finkelstein, M.D. contains no statement his opinions are “based upon reasonable medical certainty” nor are his opinions expressed in terms of “likelihood, probably or greater than 50% certainty.”<sup>20</sup> (Undisputed Fact 24)

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<sup>18</sup> The parties dispute whether Dr. Anderson could identify “that clinic.”

<sup>19</sup> The State disputed relevancy contending “reasonable medical certainty” refers to causation in healthcare liability and personal injury actions.

<sup>20</sup> The State disputed relevancy contending “reasonable medical certainty” refers to causation in healthcare liability and personal injury actions.



133. When questioned regarding “any reason that HRC could not have modified its advertising if given an opportunity prior to the State’s filing of its lawsuit[,]” the Stated objected claiming “the interrogatory is argumentative and calls for speculation.” (Undisputed Fact 30)

The Tennessee Consumer Protection Act “establishes a private<sup>21</sup> right of action for any person who suffers an ‘ascertainable loss . . . as a result of the use or employment by another person of an unfair or deceptive act or practice[.]’” *Harvey v. Ford Motor Credit Co.*, No. 03A01-9807-CV-00235, 1999 WL 486894, at \*1 (Tenn. Ct. App. July 13, 1999) (quoting Tenn. Code Ann. § 47-18-109(a)(1)). Stated another way,

[i]n order to recover under the TCPA, the plaintiff must prove: (1) that the defendant engaged in an **unfair or deceptive** act or practice declared unlawful by the TCPA *and* (2) **that the defendant’s conduct caused an “ascertainable loss** of money or property, real, personal or mixed, or any other article, commodity, or thing of value wherever situated . . . .”

*Tucker v. Sierra Builders, et al.*, 180 S.W.3d 109, 115 (Tenn. Ct. App. 2005) (citing Tenn. Code Ann. § 47-18-109(a)(1)) (footnote omitted) (emphasis added).

“A **deceptive** act or practice is one that causes or tends to cause a consumer to believe what is false or that misleads or tends to mislead a consumer as to a matter of fact.” *Id.* at 116 (emphasis added). “[T]he essence of deception is misleading consumers by a merchant’s statements, silence, or actions.” *Id.* (citation omitted).

“The concept of **unfairness** is even broader than the concept of deceptiveness, and it applies to various abusive business practices that are not necessarily deceptive.” *Id.* (emphasis added). “[A]n act or practice should not be deemed unfair ‘unless the act or practice causes or is likely to cause **substantial injury** to consumers which is not

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<sup>21</sup>Tennessee Code Annotated section 47-18-114 provides “The attorney general and reporter, at the request of the division, may bring an appropriate action or proceeding in any court of competent jurisdiction to this part.”

reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.” *Id.* at 116-17 (quoting 15 U.S.C.A. § 45(n)) (emphasis added). “To be considered ‘substantial,’ consumer injury must be more than trivial or speculative.” *Id.* at 117 (citations omitted). “Substantial injury usually involves monetary injury or unwarranted health and safety risks.” *Id.* (citation omitted).

“The Tennessee Consumer Protection Act does not require reliance.” *Harvey v. Ford Motor Credit Co.*, No. 03A01-9807-CV-00235, 1999 WL 486894, at \*2 (Tenn. Ct. App. July 13, 1999). “Although the Act does not require reliance, plaintiffs are required to show that the defendant’s wrongful conduct proximately cause their injury.” *Id.*; *see also White v. Early*, 211 S.W.3d 723, 743 (Tenn. Ct. App. 2006) (“[I]n order to recover under the [TCPA], the alleged ‘unfair or deceptive act or practice’ must in fact cause the damages of which the plaintiff complain.”); *Milliken v. Crye-Leike Realtors*, No. M1999-00071-COA-R3-CV, 2001 WL 747638, at \*6 (“Without actual ascertainable loss resulting from the unfair or deceptive acts, an action for money damages is precluded.”) *Compare F.T.C. v. Freecom Communications, Inc.*, 401 F.3d 1192, 1205 (10<sup>th</sup> Cir. 2005) (holding, to establish a right to consumer redress, the State is not required “to show a particular purchaser actually relied on *or was injured* by the unlawful misrepresentations.”) (emphasis added). “The phrase ‘as a result of’<sup>22</sup> requires a showing by a plaintiff that the alleged violations caused his or her injury.” *Id.* (citations omitted); *see also In re: Bridgestone/Firestone, Inc.*, No. IP 00-9373-C-B/S, MDL No. 1373, 2001 WL 34136016 (S.D. Indiana Aug. 6, 2001) (“[R]eliance is simply not an element of any

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<sup>22</sup>The TCPA, Tennessee Code Annotated section 47-18-109(a)(1), states:

Any person who suffers an ascertainable loss of money or property, real, personal, or mixed, or any other article, commodity, or thing of value wherever situated, *as a result of* the use or employment by another person of an unfair or deceptive act or practice described in § 47-18-104(b) and declared to be unlawful by this party, may bring an action individually to recover actual damages.”

(emphasis added).

TCPA claim; instead, Plaintiffs need only establish, through the use of extrinsic evidence, that their losses were proximately caused by Defendants['] deceitful conduct, an element the Tennessee courts have held does not constitute subjective reliance.”).<sup>23</sup>

In *Stracener v. Swindle*, the Court of Appeals applied the following three-pronged test for proximate causation to determine whether the plaintiff's damages resulted from the defendant's unfair or deceptive act:

- (1) the tortfeasor's conduct must have been a 'substantial factor' in bringing about the harm being complained of; and
- (2) there is no rule or policy that should relieve the wrongdoer from liability because of the manner in which the negligence has resulted in the harm; and
- (3) the harm giving rise to the action could have reasonably been foreseen or anticipated by a person of ordinary intelligence and prudence.

No. 01A01-9502-CH-00047, 1995 WL 414873, at \*3 (citing *McClenahan v. Cooley*, 806 S.W.2d 767, 775 (Tenn. 1991)).

As noted above, Defendants move for summary judgment on several grounds. First, Defendants, again, challenge Judge McClendon's order granting partial summary judgment.<sup>24</sup> They claim Judge McClendon erred in finding “deceptive” Defendants' conduct—claiming BHRT “was completely safe” and “had no side effects”—without expert proof, according to Defendants, that these “factually incorrect (but innocuous and medically immaterial)” statements “r[ose] to the level of ‘substantial harm’ defined as the governing standard for a [TCPA] claim.”

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<sup>23</sup>In *Bridgestone*, the Court found the defendants' “uniform concealment and suppression of material information [] supplie[d] the objective proximate causal link for Plaintiffs TCPA claim.” 2001 WL 34136016, at \*8 n.9.

<sup>24</sup>Again, in her August 31, 2015 Order, Judge McClendon found HRC had deceptively advertised its bio-identical hormone replacement therapy and omitted material connections; she found Don Hale and Dan Hale personally liable for such conduct. In its February 23, 2017 Order, this Court extended the finding of personal liability to Dixie Hale “for the deceptive corporate acts of HRC as set forth in the Court's August 31, 2015 order[.]”

The Court declines to revisit Judge McClendon’s deception finding; appellate review is not the function of this Court. HRC’s deception is established. Accordingly, substantial injury is not required as “substantial injury” is an element of “unfair” conduct.<sup>25</sup> A plain reading of the TCPA statute belies Defendants’ argument liability can be found only for conduct that is *both* deceptive and unfair. *See* Tenn. Code Ann. (An action may be brought for loss “as a result of the use or employment by another person of an unfair *or* deceptive act or practice[.]”) (emphasis added).

Defendants further claim the State’s failure to mitigate damages precludes a finding of liability and, at a minimum, precludes an award of damages. This argument is without merit. As followed here, Tennessee Code Annotated section 47-18-108(a)(2) expressly permits the State to forego notice where it determines in writing the purposes of the TCPA would be “substantially impaired by delay in instituting legal proceedings[.]” In sum, Defendants’ Motion for Summary Judgment is DENIED.

As stated above, the State moves for summary judgment claiming the undisputed facts raise a presumption of reliance. As outlined above, reliance—subjective or presumed—is not required in a TCPA claim. However, what is required— a deceptive act or practice which proximately caused consumers’ losses—has been shown.

Beyond deception, addressed above, the Court finds the undisputed facts<sup>26</sup> demonstrate causation. For example, Jane Doe 17 stated, during a sales consultation, an HRC

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<sup>25</sup> Likewise, neither expert proof of substantial injury nor a causal link to substantial injury is required.

<sup>26</sup> Defendant “disputes” Facts 92, 93 and 96 only “as containing a statement which cannot be support by a layman’s observation (i.e., side effects associated with HRC’s BHRT) in a record in which not a single

representative indicated HRC's BHRT had zero side effects and was completely safe. She purchased BHRT for approximately \$3,000, but would not have done so had she known about the side effects associated with HRC's BHRT. (Undisputed Fact 92). Jane Doe 12 was similarly told by an HRC representative HRC's BHRT had no side effects. She purchased BHRT for \$2,950, but would not have done so had the possible side effects been disclosed. (Undisputed Fact 96). Likewise, Jane Doe 19 stated she was given an HRC sales brochure which characterized BHRT as "absolutely" safe. She purchased BHRT for \$2,950, but would not have purchased the product had she known about the possible side effects. (Undisputed Fact 93). Despite Defendants' protestations to the contrary, the State is not required to show causation between physical side effects and HRC's BHRT; it is required to show, and has shown, HRC's deception was a substantial factor in causing consumers to purchase products which did not perform as promised. Accordingly, the State's Motion for Partial Summary Judgment is GRANTED. A consumer redress award of \$18,141,750 is lodged jointly and severally against Defendants HRC, Don Hale, Dan Hale and Dixie Hale and a permanent injunction is issued, pursuant to Tennessee Code Annotated section 47-18-108 barring these Defendants from engaging in conduct the Court has found unlawful.

#### **Defendants' Motion for Complaint Amendment to Include Affirmative Defense**

Defendants move to amend their complaint to include the affirmative defense of failure to mitigate damages. They note their amended answer reserved the right to assert additional affirmative defenses and claim the defense became apparent after the State submitted its expert accountant's interrogatory responses, which "provided greater detail of the evidence intended for submission by the State in support of its claim that damages

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medical expert . . . has identified a causal relationship between any HRC patient and any harm[.]" (Response pg. 3).

have accrued as a result of the Defendants' conduct[.]” Alternatively, citing Tennessee Code Annotated section 47-18-108(a)(2), they maintain mitigation is an element of the State's case, disposing of the need to formally plead such as an affirmative defense.

The State objects first claiming amendment is futile. The State contends the mitigation doctrine applies when a party is injured in tort or contract and, thus, is inapplicable here. It further contends the doctrine does not apply to consumer redress or governmental enforcement actions or where detrimental to public policy. Pursuant to Tennessee Code Annotated section 47-18-108(a)(2),<sup>27</sup> the State maintains it lawfully withheld advance notice of suit as the Director of the Division of Consumer Affairs certified in writing the purposes of the TCPA would be substantially impaired by delay. Additionally, the State contends Defendants have admitted facts undermining the mitigation defense indicating they would not, in fact, have changed their advertising claims upon notice.

Beyond futility, the State claims the amendment is unduly delayed as it was filed over four and one-half years after the State's original complaint which expressly stated the State had not provided Defendants with 10 days' notice of the State's intention to initiate legal proceedings and over two years after the Defendants' most-recent answers. As purported evidence of bad faith, the State contends its expert accountant's interrogatory responses—cited by Defendants as necessitating the amendment—relate only to claims under the Uniform Fraudulent Transfer Act and not to the TCPA claims. Finally, the State contends Defendants should not be allowed to amend their complaint to add the

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<sup>27</sup> The TCPA, Tennessee Code Annotated section 47-18-108(a)(2), states:

Unless the division determines in writing that the purposes of this part will be substantially impaired by delay in instituting legal proceedings, it shall, at least ten (10) days before instituting legal proceedings are provided for in this section, give notice to the person against whom proceedings are contemplated and give such person an opportunity to present such reasons why such proceedings should not be instituted.



affirmative defense of failure to mitigate damages because they have failed to cure deficiencies with prior amendments; Dan Hale has previously filed three answers and Don and Dixie Hale have filed two answers .

“Mitigation of damages is an affirmative defense.” *Aqua-Chem, Inc. v. D & H Machine Service, Inc.*, No. E2015-01818-COA-R3-CV, 2016 WL 7068566, at \*5 (Tenn. Ct. App. May 26, 2016) (citing *Maness v. Collins*, No. W2008-00941-COA-R3-CV, 2010 WL 4629614, at \*11 (Tenn. Ct. App. Nov. 17, 2010); *Allied Waste N. Am., Inc. v. Lewis, King, Krieg & Waldrop, P.C.*, 93 F.Supp. 3d 835, 863 (M.D. Tenn. 2015)). “As a general rule, a party waives an affirmative defense if it does not include the defense in an answer or responsive pleading.” *Pratcher v. Methodist Healthcare Memphis Hospitals*, 407 S.W.3d 727, 735 (Tenn. 2013) (citations omitted). “This rule, however, is not rigid and inflexible because trial judges have wide latitude to allow a defendant to amend its answer before trial.” *Id.* (citing *Biscan v. Brown*, 160 S.W.3d 462, 471 (Tenn. 2005)). The Court must consider several facts in determining whether to allow amendment: “whether the amendment would cause undue delay; whether the opposing party has sufficient notice; whether the party seeking the amendment is acting in bad faith; whether the deficiencies have not been cured in previous amendments; whether the amendment would be futile; and whether the amendment would cause undue prejudice.” *Small ex rel. Russell v. Shelby County Schools*, No. W2007-00045-COA-R3-CV, 2008 WL 360925, at \*16 (Tenn. Ct. App. Feb. 12, 2008) (citing *Newcomb v. Kohler Co.*, 222 S.W.3d 368, 384 (Tenn. Ct. App. 2006)). “[T]he primary factor to be considered by the trial court . . . is whether the plaintiff will be unduly prejudiced by the defendant’s delay in raising the affirmative defense.” *Id.* (quoting *Reed v. Alamo Rent-A-Car, Inc.*, 4 S.W.3d 677, 691 (Tenn. Ct. App. 1999)).

The defense of mitigation of damages does not apply when the government undertakes to protect the public through equitable remedies dependent upon the gain received by the defendant rather than by the loss suffered by the plaintiff. *See Federal Trade Comm'n v. Stratford Career Institute*, N. 16-CV-371, 2016 WL 3769187, at \*4 (N.D. Ohio 2016) (footnotes omitted). Here, the State seeks equitable remedies dependent upon gain—specifically, an injunction, consumer refunds and disgorgement of ill-gotten monies. *See generally, id.* Accordingly, mitigation is inapplicable and Defendants' purported defense fails as a matter of law. Moreover, as explained above, Tennessee Code Annotated section 47-18-108(a)(2) expressly permits the State to forego notice—which, according to Defendants, would have spurred mitigation—where it determines in writing the purposes of the TCPA would be “substantially impaired by delay in instituting legal proceedings[.]” Finding futility of amendment along with other grounds—including undue delay, failure to cure and undue prejudice—the Court DENIES Defendants' Motion to Amend.

#### **Defendants' Motion to Extend Deadline**

Defendants move to extend the deadline for completing expert depositions from July 15, 2017 to July 18, 2017, due to scheduling challenges for the experts and all parties' counsel. Finding no objection, the motion is GRANTED.

#### **CONCLUSION**

For the aforementioned reasons, this Court GRANTS the State's Motion for Partial Summary Judgment, DENIES Defendants' Motion for Summary Judgment, DENIES



Defendants' Motion for Complaint Amendment and GRANTS Defendants' Motion to Extend Deadline.

Pursuant to Tennessee Rule of Appellate Procedure 9, the parties may move for interlocutory appeal within thirty days from entry of this Order.

Enter this the 13 day of July, 2017.

  
DON R. ASH, JUDGE

CERTIFICATE OF SERVICE

I hereby certify the foregoing has been served upon the following by U.S. Mail on this the 17<sup>th</sup> day of July, 2017:

Wm. Kennerly Burger  
12 Public Square North  
Murfreesboro, TN 37130

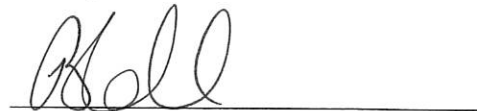
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