SUPREME COURT- STATE OF NEW YORK
DUTCHESS COUNTY

Present: Hon. THOMAS R. DAVIS, J.S.C.

SUPREME COURT: DUTCHESS COUNTY

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In the Matter of the Application of LETITIA JAMES, Attorney General of the State of New York,

Petitioner,

-against-

ROBERT SCORES, individually and as sole member Of BOBBY'S TOWING AND RECOVERY, LLC, BOBBY'S TOWING AND RECOVERY, LLC, and ROBERT SCORES d/b/a BOBBY'S TOWING AND RECOVERY,

Respondents.

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DECISION AND ORDER
(Motion Seq. #2 and #4)

Index No.: 2021-54005

This is a special proceeding brought pursuant to Executive Law §63(12) and GBL §349 to permanently enjoin the respondents from engaging in repeated deceptive, fraudulent and illegal business practices in connection with their towing business. By notice of petition and petition (motion sequence #2), petitioner seeks summary disposition of the proceeding. By order to show cause signed on December 8, 2022 (motion sequence #4), petitioner seeks a preliminary injunction pending determination of the proceeding.

Based on this Court's findings and rulings herein granting the permanent injunctive relief requested in the petition, the request for a preliminary injunction has been rendered moot. The following papers were read and considered in determining the petition and motion:

Petition (Motion Sequence #2)

Petitioner's petition and supporting papers identified as NYSCEF document numbers 30 through 66;

Respondents' answering papers identified as NYSCEF document numbers 115 though 170;

Petitioner's reply papers identified as NYSCEF document numbers 176 through 183; and

Respondents' sur-reply papers identified as NYSCEF document number 187.

Motion Sequence #4:

Petitioner's petition and supporting papers identified as NYSCEF document numbers 90 through 105;

Respondents' answering and opposition papers identified as NYSCEF document numbers 115 though 170;

Petitioner's reply papers identified as NYSCEF document numbers 176 through 183; and

Respondents' sur-reply papers identified as NYSCEF document number 187.

RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

The following facts drawn from the petition (NYSCEF Doc. No. 31) are admitted by the respondents (NYSCEF Doc. No. 117):

Respondent, Robert Scores has been operating a tow truck company since at least May 25, 2004, when, utilizing the name "Bobby's Auto Repair & Collision, Inc.," he filed articles of incorporation with the New York Department of State. The agent for service of process of this entity was "Bobby's Auto Repair & Collision, Inc." located at 248 Smith Street, Poughkeepsie, New York 12601, the location where Bobby's Towing & Recovery, LLC is currently located.

On October 28, 2009, Bobby's Auto Repair & Collision, Inc. was dissolved by proclamation or annulment of authority by the New York State Department of Taxation and Finance.

On January 6, 2009, Robert Scores filed a Certificate of Doing Business Under Assumed Name with the Dutchess County Clerk, assuming the name "Bobby's Auto Repair." This certificate was amended on October 14, 2021, to reflect the name change to "Bobby's Towing and Recovery." On February 28, 2019, Robert Scores created "Bobby's Towing & Recovery, LLC" by filing articles of organization with the DOS. According to the DOS website, Robert Scores is the agent of service for this limited liability corporation.

Robert Scores also operates a towing company using the d/b/a "Bobby's Collision," as evidenced by signs posted at various locations in the City and Town of Poughkeepsie, including

at the Canterbury Garden Apartments, Manchester Garden Apartments, 140 Union Street and 29 Jefferson Street.

Respondent Scores has at all times been actively involved in the day-to-day direction and management of Bobby's Auto Repair and Collision, Inc., Bobby's Towing and Recovery, LLC and Bobby's Collision, and has personally participated in and has personal knowledge of all the acts alleged in the petition.

According to the petition, but not admitted by the respondents, beginning in 2013, the Office of the Attorney General Poughkeepsie Regional Office began receiving consumer complaints about respondents' deceptive business practices, including, among others: patrolling for illegally parked vehicles; towing vehicles when the owner was present and willing to move the vehicle; falsifying tow tickets as to the justification, cost and time of the tow; towing vehicles that were legally parked and shifting the burden of proving the justification for the tow onto the vehicle owners; not making the vehicles available for redemption and charging excessive storage fees; refusing to take credit cards; engaging in disrespectful, and at times racist behavior, physical assault and aggression; repeatedly violating multiple provisions of the City of Poughkeepsie Towing Ordinance (Poughkeepsie City Code Chapter 13, Article XX, Section 13-311).

The Attorney General's Office investigated many of the complaints and determined that respondents' conduct constituted a persistent pattern of deceptive and illegal business practices.

This proceeding was originally commenced via order to show cause and petition for an order compelling compliance with a subpoena duces tecum issued by the Attorney General pursuant to Executive Law § 63(12). Thereafter, respondents provided many (though allegedly not all) documents responsive to the subpoena. Subsequently, and based on the documents provided, the petitioner brought the instant petition seeking, among other things, to permanently enjoin the respondents from engaging in deceptive and illegal practices in connection with their towing company and to provide restitution to individuals victimized by respondents' unlawful practices.

The respondents answered and, in sum and substance, denied that they engaged in any fraudulent, deceptive or illegal business practices.

During the pendency of this proceeding, an order to show cause for a preliminary injunction was brought by the petitioner, which was signed on December 8, 2022 (Hon. D'Alessio, J.S.C.).

SUMMARY NATURE OF THIS PROCEEDING

"In a special proceeding, where no triable issues of fact are raised, the court must make a summary determination on the pleadings and papers submitted as if a motion for summary judgment were before it." *Friends World College v. Nicklin*, 249 A.D.2d 393 [2d Dep't, 1998]. (CPLR 409(b).)

As will be discussed below, the petitioner's papers establish that she has met her prima facie burden and is entitled to summary relief. In opposition, the respondents have failed to raise any genuine, material issue of fact.

STANDING

Initially, respondents re-assert their argument that the petitioner has no standing to enforce provisions of the City of Poughkeepsie code which regulate towing operations. This argument is the same one raised by respondents in their motion to dismiss the petition, which motion was denied. (NYSCEF Doc. Nos. 86 and 87.)

While respondents assert that this particular issue was not decided in the previous order of this court, it certainly appears that it was, given that it was the main argument proffered by the respondents in its motion to dismiss and given the content of the previous order (e.g., "In the case at bar, the Attorney General, as Petitioner herein, is entitled to proceed with its claims premised upon Executive Law $ 63(12) for the alleged repeated or persistent fraud and for the alleged repeated or persistent illegality."). Notably, that order was not appealed, nor was a motion for reargument made.

Nonetheless, as both parties have argued the merits of this issue again on the papers presently before this court, it is reiterated that the respondents' argument as to the petitioner's lack of standing to seek injunctive, monetary and related relief based on respondents' repeated violations of the City of Poughkeepsie Code is baseless. Pursuant to Executive Law §63(12):

> Whenever any person shall engage in repeated fraudulent or illegal acts or otherwise demonstrate persistent fraud or illegality in the carrying on, conducting or transaction of business, the attorney general may apply, in the name of the people of the state of New York, to the supreme court of the state of New York, on notice of five days, for an order enjoining the continuance of such business activity or of any fraudulent or illegal acts, directing restitution and damages and, in an appropriate case, cancelling any certificate filed under and by virtue of the provisions of section four hundred forty of the former penal law or section one

> hundred thirty of the general business law, and the court may award the relief applied for or so much thereof as it may deem proper. The word "fraud" or "fraudulent" as used herein shall include any device, scheme or artifice to defraud and any deception, misrepresentation, concealment, suppression, false pretense, false promise or unconscionable contractual provisions. The term "persistent fraud" or "illegality" as used herein shall include continuance or carrying on of ***any*** *fraudulent or illegal act or conduct*. The term "repeated" as used herein shall include repetition of any separate and distinct fraudulent or illegal act, or conduct which affects more than one person. Notwithstanding any law to the contrary, all monies recovered or obtained under this subdivision by a state agency or state official or employee acting in their official capacity shall be subject to subdivision eleven of section four of the state finance law.
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> In connection with any such application, the attorney general is authorized to take proof and make a determination of the relevant facts and to issue subpoenas in accordance with the civil practice law and rules. Such authorization shall not abate or terminate by reason of any action or proceeding brought by the attorney general under this section. [Emphasis added.]

Respondents' argument that only violations of state or federal law fit within the parameters of this provision of the Executive Law is contradicted by the plain language of the statute (i.e., "any….illegal act or conduct"). Moreover, contrary to respondents' argument, courts have found that the repeated violation of local laws or ordinances may form the basis for a proceeding by the State Attorney General to enjoin (and otherwise rectify) such violations. (*See*, e.g., *People v. Ivybrooke Equity Enterprises, LLC*, 175 A.D.3d 1000 [4th Dep't 2019]; P*eople v. Sec. Elite Grp. Inc.*, 2019 N.Y. Slip Op. 33068(U), 2019 WL 5191214.)

Indeed, it is the "repeated" fraud or illegal act of a business practice which forms the basis for the State Attorney General to commence a proceeding to enjoin such activity. (*See*, e.g., *State v. Grecco*, 21 A.D.3d 470, 478 [2d Dep't 2005].) Whether the underling violation is of a state or local statute or ordinance is irrelevant. The repeated fraud or illegality is what invokes the Attorney General's involvement under the Executive Law. The City of Poughkeepsie Code's lack of appointing the State Attorney General as an entity that can enforce those provisions of the Code is also irrelevant. The State Attorney General's authority in this regard already exists by virtue of the Executive Law.

Respondents' citation, again, to Attorney General Opinion 71 of 1978 is unavailing. Not only are the facts which precipitated the request for that opinion entirely different (local authority asking the Attorney General to collect fines that had already been imposed as the result of a local enforcement proceeding), the Attorney General did not offer any insight or opinion into Executive

Law §63(12). His letter opinion considered the general authority of the Attorney General's office under Executive Law §63(1), not its authority to enjoin repeated illegal and fraudulent acts. In any event, it is not binding on this Court.

The petitioner has standing to enjoin the repeated fraudulent and illegal acts it alleges in this proceeding, including respondents' acts that are illegal as being violations of the City of Poughkeepsie Code.

THE REPEATED AND PERSISTENT FRAUD AND ILLEGALITY AT ISSUE

Petitioner alleges several types of repeated fraud and illegality carried on by the respondents over a number of years.

Fraudulent Acts

Petitioner's allegations of respondents' fraudulent conduct pertain to their having entered into predatory towing services contracts with two apartment complexes in the Town of Poughkeepsie (Manchester Gardens and Canterbury Gardens), which it asserts is violative of Executive Law §63(12), and having falsified tow tickets to misstate the justification for the tow, which it asserts is violative of Executive Law §63(12) and General Business Law ("GBL") §349. It is asserted that the respondents repeatedly misstated the justification for tows by indicating that the car required a jump start, rather than being illegally parked, in order to come within exceptions in the City of Poughkeepsie Code which would allow the otherwise illegal tows to occur.

Illegal Acts

Petitioner alleges that the respondents habitually violate provisions of City of Poughkeepsie Code Chapter 13, Article XX, §13-311 by charging more than the permitted $85 towing fee, charging prohibited storage, administration and other fees, and failing to wait the requisite twenty-minute grace period provided in the ordinance before towing a vehicle, among other violations.

Additionally, petitioner asserts that respondents repeatedly engaged in illegal conduct by towing cars that are not "parked" within the meaning of Vehicle and Traffic ("VTL") section 129, and by failing to provide adequate notice regarding towing under GBL §399-v.

Petitioner's evidence

In support of their petition and their motion for a preliminary injunction, petitioner submitted sixteen affidavits from people whose vehicles were towed by the respondents during the period between January 2019 and December 2021. (NYSCEF Doc. Nos. 34 through 49.) Each affiant described the circumstances of their tow and provided a copy of the tow ticket given to them by respondents upon paying cash (the only form of payment accepted by respondents) to retrieve their vehicle. In addition to the numerous affidavits regarding specific tows, petitioner provided a spreadsheet that it compiled summarizing the information revealed from dozens of other tow tickets which respondents provided in response to petitioner's subpoenas.[1] (NYSCEF Doc. No. 63.)

In addition to the aforesaid spreadsheet, petitioner provided copies of 88 tow tickets for tows that respondents undertook in the City of Poughkeepsie spanning January 2017 to February 2021, which reflected the respondents having charged tow fees far in excess of those allowed under the City Code. (NYSCEF Doc. No. 180.)

Petitioner also provided copies of five tow tickets between 2019 and 2021 which reflected that respondents charged storage fees in excess of those allowed under the City Code. (NYSCEF Doc. No. 181.)

Petitioner also provided several photographs depicting the signage posted at the two apartment complexes in the Town of Poughkeepsie, people's vehicles being towed despite their presence while their vehicles were being hooked up to the tow truck, the respondents' tow truck sitting on the side of the road allegedly waiting and watching for people to park and leave their vehicles, even if only temporarily.

Petitioner also provided copies of several criminal complaints made by various people against the respondents for such things as illegally overcharging them for tows, physically assaulting and/or harassing them when they were in the process of retrieving their vehicles and wrongfully towing their vehicles. Also offered were copies of two bench warrants issued by the

[1] With regard to the spreadsheet, petitioner relies on NYSCEF Doc. No. 63, and not the later-submitted spreadsheet found at NYSCEF Doc. No. 102 based on the fact that the City of Poughkeepsie Code at issue went into effect earlier than originally believed by petitioner. NYSCEF Doc. No. 63 encompasses tows from 2019 through 2021, whereas NYSCEF Doc. No. 102 had redacted tows that occurred earlier than March 2020. Further, petitioner asserts that there are likely a significantly larger number of tow tickets reflecting illegal charges than those summarized on NYSCEF Doc. No. 63, and that its ability to demonstrate the accurate number of tows that were illegally charged was limited to what the respondents provided in response to subpoenas. Petitioner asserts that those responses were not complete.

City of Poughkeepsie to the respondent, Robert Scores, in 2018 for failing to appear for tickets issued against him in connection with criminal complaints for violating the City's Code pertaining to towing restrictions.

Petitioner also provided maps of the two apartment complexes in the Town of Poughkeepsie with markings to indicate the location(s) of signage pertaining to towing required under GBL §399-v.

Respondents' Answer and Proof

Respondents answered the petition and opposed the motion for a preliminary injunction. They offered two affidavits from Mr. Scores, copies of many of the same tow tickets provided by the petitioner, unsworn letters from some of respondents' clients, photographs of signage within the two apartment complexes in the Town of Poughkeepsie, copies of two different versions of the City of Poughkeepsie Code pertaining to towing provisions (one labeled "prior", the other "existing"), a copy of the City of Poughkeepsie Police's impound fees for towed vehicles, and a video of one towing occurrence.

DISCUSSION

Illegal Acts

The petitioner's evidence as to respondents' repeated, in fact habitual, violations of City of Poughkeepsie Code Chapter 13, Article XX ("the City Tow Code") is overwhelming.

The relevant City Tow Code provisions have been in effect since at least March 2017, and likely much earlier. This is based on the version of the City Tow Code attached to respondents' papers as Exhibit B-1. On the first page of that Exhibit, the date March 24, 2017 is indicated, and every page of that Exhibit bears the date "3/24/2017" on the bottom right corner. In the Section of the Code applicable here--§13-311—there is indication that the most recent legislation passed was on December 20, 2010 ("12-20-2010, §§1, 2, 5".) The petitioner's allegations as to respondents' illegal charges and conduct all pertain to tows that occurred after 2017 when the relevant provisions were certainly in effect.

As relevant to the claims made by petitioner herein, the 2017 version of the City Tow Code, section 13-311 of the City Tow Code reads:

(f) Except for tows authorized by the Police Department, **it shall be unlawful for a towing company operator to tow a vehicle if the owner or operator of the vehicle appears at the scene prior to the vehicle being connected to any apparatus of the tow truck, requests the towing company operator not to tow the vehicle and is willing and able to correct the condition warranting the tow. The towing company operator shall be entitled to a hook-up fee not to exceed $25 if the vehicle is connected to any apparatus for towing, provided that the tow truck has not exited the premises and entered onto the public street**. [Emphasis added.] The tow truck operator shall not be permitted to charge any fee to the vehicle owner or operator unless the owner or operator is the one who requested the towing services. Each tow operator shall carry a legible copy of this section and shall show it to a vehicle owner or other person in control of the vehicle who arrives at the scene prior to the towing of a vehicle

(j) Every tow operator shall maintain a written schedule of all rates and charges for towing and storage and shall make such schedule available to any person requesting the same. **The maximum charge for towing of vehicles shall be $60, plus a hook-up fee of $25, plus any and all applicable taxes. The maximum charge for the storage of towed motor vehicles shall be $50 per day, or each part thereof, to commence after the vehicle has been impounded on the premises for a period of 24 hours. No additional charges, including clerical, administrative or service fees, may be charged by the licensee.** [Emphasis added.]

(l) An owner of private property, his or her agent as designated in the contract with the tow operator or **a tow operator contracting with such owner shall allow a waiting period of not less than 20 minutes between the arrival of a tow vehicle at the location from which a vehicle is to be towed and the physical actual connection of any apparatus to the vehicle to be towed for the purpose of commencing the towing. If the owner or other person in control of the vehicle arrives at the scene during this twenty-minute waiting period, such owner or person in control of the vehicle shall be allowed to drive the vehicle from the location without interference or charge.** [Emphasis added.]

These applicable versions of the City Tow Code were slightly modified and, according to Exhibit B-2 attached to respondents' papers, currently read as follows:

(f) Except for tows authorized by the Police Department**, it shall be unlawful for a towing company operator to tow a vehicle if the owner or operator of the vehicle appears at the scene prior to the vehicle being connected to any apparatus of the tow truck, requests the towing company operator not to tow the vehicle and is willing and able to correct the condition warranting the tow. The towing company operator shall be entitled to a hook-up fee not to exceed $25 if the vehicle is connected to any apparatus for towing** [emphasis added]**,** provided that the tow truck has not exited the premises and entered onto the public street. The tow truck operator shall not be permitted to charge any fee to the vehicle owner or operator unless the owner or operator is the one who requested the towing

services. Each tow operator shall carry a legible copy of this section and shall show it to a vehicle owner or other person in control of the vehicle who arrives at the scene prior to the towing of a vehicle.

(j) Every tow operator shall maintain a written schedule of all rates and charges for towing and storage and shall make such schedule available to any person requesting the same. **The maximum charge for towing of vehicles shall be $60, plus a hook-up fee of $25, plus any and all applicable taxes** [emphasis added], except the maximum charge for towing of a vehicle in the following circumstances shall be $125, plus a hook-up fee of $25 plus any and all applicable taxes:

(1) The towing of a vehicle that has been continuously present on private property without the consent of the owner or person in charge of the private property for more than 24 hours; or

(2) The towing of a vehicle that has been parked on private property in a location that blocks a driveway, lane, alley or other place intended to give passage to other portions of the private property or to give passage to or from the public way; or

(3) The towing of a vehicle that has been parked on private property in a location and at a time that interferes with garbage or refuse collection; or

(4) The towing of a vehicle that interferes with snow removal; or

(5) The towing of a vehicle that interferes with paving or construction activities, provided that a twenty-four-hour notice has been given or conspicuously posted; except that the provisions of Section 13-311(c), (e) and (f) shall apply to any such towing. [2]

(k) **The maximum charge for the storage of towed motor vehicles shall be $50 per day, or each part thereof, to commence after the vehicle has been impounded on the premises for a period of 24 hours. No additional charges, including clerical, administrative or service fees, may be charged by the licensee.** [Emphasis added.]

(m) An owner of private property, his or her agent as designated in the contract with the tow operator or a **tow operator contracting with such owner shall allow a waiting period of not less than 20 minutes between the arrival of a tow vehicle at the location from which a vehicle is to be towed and the physical actual connection of any apparatus to the vehicle to be towed for the purpose of commencing the towing. If the owner or other person in control of the vehicle arrives at the scene during this twenty-minute waiting period, such owner or person in control of the vehicle shall be allowed to drive the vehicle from the location without interference or charge**. [Emphasis added.]

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[2] These particular carve-outs for a higher, allowable towing fee in certain instances were, under the previous version of the code, carve-outs which provided that there was no limitation on the towing fee for those instances. In the previous version of the Code, these carve-outs were located at section 13-309.1. As asserted by the petitioner, and borne-out by the evidence, these carve-outs only applied, if at all, to a small number of the tow tickets provided by the respondents such that they could be deemed an anomaly. As discussed herein, the vast majority of the tow tickets reflected illegal charges.

In substance, these cited provisions of the City Tow Code were the same in 2017 as they are now and pertain to the time-period covering the allegations made by the petitioner in this proceeding.

Petitioner provided affidavits from many people not only attesting to the circumstances of their tows in the City of Poughkeepsie, but also to the excessive and illegal amounts of money they were charged by the respondents for the tow. (NYSCEF Doc. Nos. 37, 38, 41, 44, 45, 46, 47, 48.) All of the affiants attached copies of the tow tickets they received from the respondents, and the respondent, Robert Scores, does not dispute the validity of any of those tickets. To the contrary, he largely embraces their content and states that the amounts he charged for each tow were perfectly permissible under the City of Poughkeepsie Code as it existed at the time of each ticket. He is wrong.

As discussed above, the copies of the City Code that he attaches to his affidavit as proof of the legitimacy of the amounts he consistently charged people clearly establish that he overcharged people for virtually every single tow. Both versions of the Code he attaches to his affidavit (Exhibits B-1 and B-2, respectively) reflect that the maximum amount he was allowed to charge for a tow was $85.00, consisting of $25.00 for the hook-up fee, and $60.00 for the tow. He repeatedly and persistently charged people far in excess of that amount. His self-serving statement that he was allowed to charge people an additional fee of $75.00 because he had to "winch" their vehicles is baseless. Under the Code, no additional fees other than those set forth in the Code are allowable, regardless of how they are sought to be categorized.

In addition to the aforesaid affidavits and tickets, the spreadsheet provided by the petitioner summarizing the content of the tow tickets provided in response to subpoenas reflects many more instances of illegal charges. In other words, the patently illegally charges made by the respondents are not anomalies. They constitute the standard operating procedure undertaken by Mr. Scores and his business.

Further, there is no factual dispute that respondents additionally: 1) repeatedly violated the 20-minute grace period provision of the City Tow Code (see NYSCEF Doc. Nos. 41, 43 and 48; affiants' allegations as to violating 20-minute grace period unrefuted by respondent); 2) violated the "drop fee" provision of the Code (see NYSCEF Doc. Nos. 43); and 3) repeatedly violated the maximum storage fees allowable under the code (see NYSCEF Doc. Nos. 36, 37, 42.)

Mr. Scores's response to the affidavits submitted by people illegally overcharged and/or illegally towed by him is that people were illegally parked and he towed them—he was just doing his job. This misses the point. Regardless of whether people parked illegally, respondents are not entitled to violate numerous Code provisions in the process of towing them. Mr. Scores makes much of the fact that he expects people to follow the rules, and if only they did, he wouldn't tow them. The irony of his argument is not lost on the Court. He, too, has to follow the rules spelled out in the City of Poughkeepsie Code and he has blatantly, unabashedly and persistently failed to do so.

With respect to respondents' illegal conduct by violating GBL §399-v, petitioner asserts that the signs at Canterbury Garden apartments and Manchester Garden apartments violate this statute because they are not prominently and conspicuously placed throughout each complex, they fail to correctly display the respondent's corporate name and they fail to set forth the name, address and phone number of the parking facility operators. Respondents assert that the signs comply with the statute.

GBL §399-v(2) reads:

> Every parking facility shall display prominently a conspicuous notice stating the name, address and telephone number of the operator of the parking facility together with the name, address and telephone number of any individual or entity authorized to tow from such parking facility any motor vehicle or the name, address and telephone number of any individual or entity authorized to place a device designed to immobilize any motor vehicle in such parking facility. Such notice shall also state that unauthorized vehicles will be towed at the vehicle owner's expense.

The signage posted at the Canterbury Gardens and Manchester Garden apartment complexes do not comply with the requirements of the statute. First, none of the signs contain the name of the owner of the parking facility. Second, they do not state that the vehicles will be towed, "at the vehicle owner's expense." The one sign at Manchester Garden Apartments (NYSCEF Doc. No. 146) reads that vehicles are towed at, "owner or operator's expense." That is not what the statute requires. One of the two signs at Canterbury Garden Apartments (NYSCEF Doc. No. 145) is not legible to the Court and appears obscured by a bush. If it is duplicative of the one at Manchester Gardens, is it equally deficient in this regard.

Third, the signs do not meet the statutory requirement that they be displayed, "prominently and conspicuous[ly]." Petitioner provided maps of each apartment complex at issue; they are both moderately large complexes with multiple buildings and parking lots. It is undisputed that there

is one, relatively small sign regarding towing posted near the entrance to the Manchester Garden complex. There are apparently two such signs located at the Canterbury Apartment complex, both at different entrances to the complex, one of which is partially obscured by a bush. This does not constitute prominent and conspicuous notice. As petitioner notes, correctly in the Court's view, each parking lot within each complex should bear a proper sign such that people are on notice in the very lot in which they park that they do so at risk of being towed if their vehicle does not belong there. Similarly, those whose cars may have been towed should not need to walk around trying to find a sign outside the complex which indicates the location where their vehicle can be retrieved.

Finally, the signs do not indicate that respondents' actual business name is the authorized tow operator. The signs reflect the tow operator as being "Bobby's Collision," but it is uncontradicted that this is not the actual name of respondents' business, which is "Bobby's Towing and Recovery, LLC."[3]

With respect to the respondents' illegal conduct by repeatedly violating VTL §129, it is evident that the respondents regularly towed vehicles which were not "parked" within the meaning of the statute, but were temporarily standing to load or unload merchandise and/or passengers. VTL §129, defining "Park or parking," reads:

> "...the standing of a vehicle, whether occupied or not, otherwise than temporarily for the purpose of and while actually engaged in loading or unloading merchandise or passengers."

Of the five incidents described by the petitioner, four of which are supported by affidavits and supporting documentation and one by police affidavit and incident report, only one (the Blanchard Affidavit, NYSCEF Doc. No. 34) is factually contested by the respondents on the salient point. The others—all of which were offered to demonstrate that the person who was stopped was only there for a few minutes while either dropping something off at an apartment, picking up a child from an apartment or using the bathroom while actively unloading groceries—are only addressed by the respondents on the point that their vehicles were each located in a "no parking" area when they were towed. In other words, respondents do not contest that each of these vehicles was towed after being located in a "no parking" area for only a few minutes, and respondents do

[3] If this were the only deficiency with the signage, it might be considered de minimis, but it is not.

not contest the circumstances of each person's reason for temporarily stopping—to unload merchandise or pick someone up.

Indeed, one affiant, Ms. Nash (NYSCEF Doc. No. 43) attached to her affidavit a letter from the management company of her building in which residents were advised that they should not stop their vehicles in "no parking" areas for more than 15 minutes or else they would be towed. Ms. Nash, who has a Ring camera and was able to specifically identify how long her vehicle was stopped while she was unloading groceries and using her bathroom, was only stopped for six minutes when her car was towed by the respondents. Respondents do not deny this.

In another instance, a delivery vehicle was towed by the respondents while the driver had stepped away from the vehicle for just a few minutes to locate the precise apartment to which to deliver merchandise. Respondents do not deny this. (NYSCEF Doc. Nos. 83, 85.)

It is clear that the respondents have repeatedly engaged in towing vehicles that were not "parked" within the meaning of VTL §129 and, as such, repeatedly engaged in illegal conduct.

Fraudulent Acts

With regard to the respondents' fraudulent conduct, there is no dispute that they engaged in repeatedly misrepresenting the reason(s) for a vehicle being towed on the tow tickets they created. (NYSCEF Doc. Nos. 34, 35, 43.) Mr. Scores does not deny that the false reason of "jump start" was repeatedly written on tow tickets from his business where the vehicle was not towed for that reason. His only excuse for that circumstance is that an unidentified former employee of his did it; he didn't. There is no dispute it was repeatedly done, and there is no dispute that Mr. Scores's business (through an employee or otherwise) did it. Such falsifications of business records are clearly fraudulent and constitute a deceptive business practice. Mr. Scores does not dispute this. This conduct occurred with respect to tows that respondents undertook in both the City and the Town of Poughkeepsie. (NYSCEF Doc. Nos. 34, 35, 43)

Whether or not the respondents' act of entering into "predatory" towing services contracts[4] constitutes either a fraudulent or illegal act is not so clear. The petitioner has not made any showing that the contracts between respondents and Manchester Garden and Canterbury Garden

[4] Other than the City of Poughkeepsie Code, which regulates some of the practices and fees of tow operators within the City of Poughkeepsie, the petitioner offers no legal support for the proposition that the "predatory" contracts at issue here are actually violative of any State law, or other local law to which the respondents might be subject. The Court has been unable to locate any such precedent.

apartments are illegal, and it has not articulated how they would constitute a deceptive act or practice under GBL §349. The New York Court of Appeals, "has defined a 'deceptive act or practice' as a representation or omission " 'likely to mislead a reasonable consumer acting reasonably under the circumstances' " (*Karlin v. IVF Am.*, 93 N.Y.2d 282, 294, 690 N.Y.S.2d 495, 712 N.E.2d 662 [quoting *Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank, supra,* at 26, 623 N.Y.S.2d 529, 647 N.E.2d 741])." *Gaidon v. Guardian Life Ins. Co. of America*, 94 N.Y.2d 330 [1999].

Here, the allegation is that tenants are unaware of the terms of the various towing contracts that respondents have with private lot owners and of the carte blanche that the respondents have under such contracts to tow cars within those lots. It is not that the tenants are deceived by the contract.

Similarly, it is not clear that the terms of any of those contracts are "unconscionable" such that they might constitute "fraud" within the meaning of Executive Law §63(12) and be subject to enforcement under that statute. A provision in a contract allowing a single towing company the right to tow cars from a private lot does not, by itself, render the contract unconscionable. While the *conduct* of the respondents here in carrying out its contracts with private lot owners has been repeatedly fraudulent and illegal, there has been no showing that the terms of any particular contract at issue are, in themselves, unconscionable.

Entitlement to Relief Under Executive Law §63(12) , GBL §§349 and 350-D

Based on all of the above, Petitioner has met her prima facie burden of establishing that the respondents have engaged in repeated illegal acts and that the respondents have otherwise demonstrated persistent illegality in the carrying on, conducting or transaction of their towing business, under Executive Law §63(12). The repeated illegal acts have consisted of the following:

- Repeatedly and persistently violating City of Poughkeepsie Code Chapter 13, Article XX ("the City Tow Code") by, 1) repeatedly violating the maximum towing fees set forth in the City Tow Code; 2) repeatedly violating the 20-minute grace period provision of the City Tow Code; 3) repeatedly violating the "drop fee" provision of the Code; and 4) repeatedly violating the maximum storage fees allowable under the code; and
- Repeatedly and persistently violating VTL §399-v(2) by not providing adequate notice/signage, as discussed above; and

- Repeatedly and persistently violating VTL §129 by towing cars that are not illegally parked within the meaning of the statute.

Petitioner has also met her prima facie burden of establishing that this illegal conduct is a violation of GBL §349. Respondents have failed to raise a triable issue of fact in opposition to thereto. Therefore, the petitioner is entitled to injunctive relief, and restitution under both statutory provisions.

Petitioner has also met her prima facie burden of establishing that the respondents have engaged in repeated fraudulent acts and that the respondents have otherwise demonstrated persistent fraud in the carrying on, conducting or transaction of their towing business, under Executive Law §63(12). The repeated fraudulent acts have consisted of falsifying tow tickets to misstate the justification for the tow, as discussed above. Petitioner has also met her prima facie burden of establishing that this conduct is a violation of GBL §349. Respondents have failed to raise a triable issue of fact in opposition to thereto. Therefore, the petitioner is entitled to injunctive relief, and restitution under both statutory provisions.

Pursuant to Executive Law §63(12) and GBL §§349, the petitioner is entitled to injunctive relief and to obtain restitution for the illegal and/or fraudulent acts at issue. (See, also, e.g., *State v. Maiorano*, 189 A.D.2d 766 [2d Dep't 1993]; *State by Abrams v. Ford Motor Co.*, 74 N.Y.2d 495 [1989].) Pursuant to GBL §350-d, petitioner is entitled to seek civil penalties up to $5000 for each violation of Article 22-A of the GBL. Petitioner has listed 17 forms of relief that it seeks in its petition, which include injunctive relief, restitution, civil penalties and other, more particularized relief.

Given the respondents' extensive history of illegal and fraudulent conduct as described at length herein, much of the relief requested by the petitioner is warranted.

Based on the foregoing, it is hereby

ORDERED that the petition (motion sequence #2) is granted to the extent further ordered herein; and it is further

ORDERED that the respondents are permanently enjoined from violating New York State Executive Law §63(12), New York State General Business Law Article 22-A, and Poughkeepsie

City Code Chapter 13, §13-311 (the City's Tow Ordinance, as currently numbered and as it may be renumbered at any time hereafter); and it is further

ORDERED that the respondents are permanently enjoined from engaging in the fraudulent, deceptive and/or illegal practices which were the subject of this proceeding; and it is further

ORDERED, that the respondents shall make full monetary restitution to all aggrieved consumers known and unknown, and that to effectuate this directive, the petitioner shall, by no later than July 10, 2023, submit a proposed order, on notice to respondents, in which the amounts, manner and method of distributing restitution to each known, and to the unknown, aggrieved consumers shall be set forth, including any provision for disgorgement of profits; and it is further

ORDERED that by no later than July 10, 2023, the respondents shall pay a civil penalty to the petitioner in the amount of $20,000 pursuant to GBL §350-d, representing the four instances of fraudulent tow tickets misrepresenting the reason for the tow, as demonstrated via affidavits and documentary evidence in this proceeding (NYSCEF Doc. Nos. 34, 35, 43); and it is further

ORDERED that the respondents shall, by no later than July 10, 2023, fully comply with GBL §399-v with respect to each property at which they are contracted or otherwise permitted to tow vehicles including, but not limited to, Manchester Garden and Canterbury Garden apartments, which shall include but not be limited to, erecting conspicuous signs in each parking lot or area from which respondents tow vehicles which signs provide all of the information required under GBL §399-v; and it is further

ORDERED that the respondents shall prominently and publicly display their towing and storage rates at their facility/place of business in areas accessible by and visible to consumers; and it is further

ORDERED that the respondents are immediately and permanently enjoined from engaging in, or being affiliated in any manner with, the towing operation business, either as a driver, proprietor or any other capacity, within the State of New York until $100,000 cash, or a $100,000 performance bond is filed with the New York State Attorney General by a surety or bonding company licensed by and in good standing with the New York State Department of Insurance, guaranteeing that the respondents comply with all injunctive relief directed herein, the proceeds of which cash or bond will be to provide a fund for restitution to consumers defrauded or damaged by respondents' fraudulent or illegal past or future conduct if the respondents do not make

restitution as provided for herein and in accordance with a further order to be issued by the Court; and it is further

ORDERED that **counsel for the parties shall appear for oral argument on June 14, 2023 at 2:00 p.m.** for the purpose of discussing possible additional parameters of the performance bond or cash imposed herein (including, but not limited to, the time for such bond to remain in place or cash to be held), and for the purpose of discussing any additional conditions and/or parameters that should be imposed as part of the permanent injunctive relief granted herein (which may include, but not be limited to, requiring the respondents to keep a log book regarding all tows they undertake, requiring the respondents to take photographs of each vehicle and its location prior to all tows they undertake, and all other such type of relief requested in the petition); and it is further

ORDERED that the petitioner's motion for a preliminary injunction (motion sequence #4) is denied as moot; and it is further

ORDERED that the respondents shall, by no later than July 10, 2023, pay costs to the petitioner in the amount of $2,000.00 pursuant to CPLR §8303(a)(6).

Dated: May 30, 2023
Poughkeepsie, NY

ENTER:

Hon. Thomas R. Davis, J.S.C.

Pursuant to CPLR Section 5513, an appeal as of right must be taken within thirty days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry, except that when the appellant has served a copy of the judgment or order and written notice of its entry, the appeal must be taken within thirty days thereof.