

MPT-1 — Sample Answer 1

Foss & Associates LLP
3200 Lakefront Dr., Suite 700
Franklin City, Franklin 33012

MEMORANDUM

To: Zoe Foss

From: Examinee

Date: February 21, 2023

Re: Jasmine Hill Matter

I was asked to draft a memorandum analyzing whether Jasmine Hill has one or more claims against Reliant Boating ("**Reliant**") under the Franklin Deceptive Trade Practices Act ("**DTPA**") and what specific relief Ms. Hill would be entitled to if she were to succeed in a DTPA action.

1. Ms. Hill's has a viable claim against Reliant under the DTPA

Gordon v. Valley Auto Repair, Inc. (Fr. Ct. App. 2009) outlines the elements of a DTPA claim:

- (1) P is a consumer;
- (2) D engaged in one or more of the false, misleading or deceptive acts enumerated in §204;
- (3) the act(s) constituted a producing cause of the P'd damage and
- (4) P relied on D's conduct to his or her detriment (citing *Diaz v. Ellis*, Fr. Sup. Ct. 1998).

i. Consumer

DTPA §203 defines a consumer as "an individual...who seeks or acquires any good or services." Ms. Hill was interested in purchasing a boat, after she and her family enjoyed their summer vacation renting boats on the lake. She decided to buy a used boat from Reliant as it is one of only a few boat stores in town. Therefore Ms. Hill is a consumer under the DTPA.

ii. False, Misleading or Deceptive Acts

DTPA §204 states that false misleading or other deceptive acts or practices in the conduct of any trade or conduct are unlawful; they include:

"(d) representing that goods or services i. have characteristics or uses they do not have or ii. are of a particular standard, qualify or grade if they are of another" [and]...

(g) failing to disclose information concerning goods or services that was known at the time of the transaction if such failure was intended to induce the consumer to enter into a transaction into which the consumer would not have entered had the information been disclosed."

According to Ms. Hill, Mr. Stevens (the owner of Reliant) encouraged her to buy the Envoy, the cheaper pontoon-style boat, after she came down to Reliant's store. He indicated in correspondence to Ms. Hill that the Envoy "is a real gem and would be a perfect fit for [Ms. Hill] because it has plenty of room for you and your family!" Ms. Hill also stated that he told her at the store that the boat was in great condition. The Bill of Sale from Reliant also indicated that "Seller has no knowledge of any defects in and to the Boat." The "real gem" comment may be considered mere puffery under *Gordon*.

Mere puffery is "exaggerated sales speak for promotional purposes and is not actionable under the DTPA" (*Gordon, Diaz*). Mere puffery factors include (1) the specificity of the alleged misrepresentation; (2) the comparative knowledge of the consumer and the seller; and (3) whether the representation relates to a past or current condition as opposed to a future event. "Real gem" doesn't say anything particular about the boat (like "new" or "four years old" etc.). But "great condition" may be considered a statement that "compares one product to another" (i.e. good, great, etc.). Further, because Ms. Hill only has been interested in boating and has only rented a boat a few times, it could be argued that Mr. Stevens (as a boat seller) has far greater knowledge and experience about the state of boats than Ms. Hill. He also recommended this specific boat to Ms. Hill. Mr. Steven's statements also speak to the current condition of the boat, not what it may do or be in the future.

Mr. Stevens should have also known that the boat had a cracked engine, which would be a violation of §204(g). Because the boat was in his possession, Mr. Stevens should have checked out the condition of the engine (a principal part of the boat) prior to making the representation that the boat had no defects. He had the requisite knowledge, experience and opportunity to know whether the engine was cracked. Reliant could argue that Mr. Stevens turned the engine on and it sounded fine, so he had no reason to know that there was a defect in the boat. But as the mechanic told Ms. Hill that it is not uncommon for a motor with a cracked engine block to run for a few minutes under test conditions. Plus the mechanic discovered epoxy glue in the cracks on the engine block which had been recently applied; this told the mechanic that the engine block was damaged when Ms. Hill purchased it from Mr. Stevens.

iii. Act was Producing Cause of P's Damage

Ms. Hill bought the Envoy on Mr. Steven's encouragement and had to repair the same. Mr. Stevens could argue that Ms. Hill should have had notice (even with limited knowledge of boats) that there may be some defects in a used boat. He even showed her another boat which was newer and bigger (2019 21-foot Wellington Mariner). But Ms. Hill indicated that she was looking for a good-quality used boat, which Mr. Stevens knew.

iv. Reliance

Because of Mr. Stevens encouragement and his representations, Ms. Hill can argue that she relied these assurances caused her to buy the boat which led to its repair of \$3000.

2. Damages

i. Economic Damages

Because of the reasons outlined above, Ms. Stevens can argue for economic damages, because Mr. Stevens' misconduct was the producing cause (based on §205 DTPA). she can recover \$3000, which was the cost of the repair to the boat. Because Ms. Stevens provided no other circumstances of loss, it is unclear whether consequential damages (like the lost net profits resulting from the interruption of *Gordon's* business) could be pleaded.

ii. Exemplary Damages.

Where D knowingly made false representations about its repairs, then the DTPA imposes treble damages. "Knowingly" includes "actual awareness of the falsity deception or unfairness of the act or practice giving rise to the consumer's claim. In *Abrams*, the defendant college represented in its catalogue (which the plaintiff relied on) that it would provide "qualified teachers, modern equipment and a low student-teacher ratio. However, the Franklin Court of Appeal ruled that the college knew that it had one qualified teacher in a room with 42 students, all taking different course with only two 10-key adding machines. The Court of Appeal agreed with the trial court in awarding treble damages because the DTPA provides that "it should be liberally construed so as to promote the purpose of protecting consumers against false, misleading or deceptive businesses practices."

In Ms. Hill's case, it could be argued that Mr. Stevens made false representations knowingly by stating that the boat had no defects in the Bill of Sale and that it was in great condition, but it had a cracked engine, with recently glue application. Since the boat was presumably in Mr. Steven's possession and the mechanic indicated that the glue had been applied recently, the Court could construe those facts to mean that Mr. Stevens knew that the engine was in disrepair and he made the false representations to induce Ms. Hill into a sale. On the other hand, Mr. Hill can argue that he didn't know that the engine was in disrepair and that he started the engine in front of Ms. Hill. However Ms. Hill can also bring the boat mechanic as a witness to state that it is not uncommon for a motor with a cracked engine block to run for a few minutes under test conditions and then fail to work when taken on the water.

All in all, Ms. Hill's evidence may support a finding of treble damages, which makes her potential damages about \$9000.

Mental Anguish

Mental anguish award of damages implies" a relatively high degree of pain and distress beyond mere worry or anxiety, and includes pain resulting from grief, severe disappointment, indignation, wounded pride..." Although Ms. Hill was "disappointed" about her family's weekend getaway being ruined, her disappointment may not rise to the level of "mental anguish" under the DTPA. In *Abrams*, the plaintiff was disappointed that the defendant college did not meet its represented level of acumen for awarding business degrees. She spent about \$5000 for the deposit and was severely disappointed with the College's academic program, indignant at its poor instruction, wounded pride at being "had" and had such severe despair that she dropped out of CBC. A college education may be considered a necessity for advancement; a boat for pleasure may not.

MPT-1 — Sample Answer 2

To: Zoe Foss

From: Applicant

Date: February 21, 2023

Re: Jasmine Hill Matter

You have asked me to determine if Ms. Hill has claims against reliance under the Franklin Deceptive Trade Practices Act (DTPA). Ms. Hill will have claims against Reliance and will have remedies available to her as explained and discussed below.

Whether Ms. Hill has one or more claims against Reliant under the Franklin Deceptive Trade Practices Act (DTPA).

Generally, the DTPA prohibits "false, misleading, or deceptive, acts or practices in the conduct of any trade or commerce." FR. Bus. Code. 204. Section 204 of the DTPA contains a list of prohibited acts. The relevant prohibited acts include: "representing that goods or services...are of a particular standard, quality, or grade if they are of another." Id. at 204d. The other relevant prohibited act includes: " Failing to disclose information concerning goods or services that was known (emphasis added) at the time of the transaction...to induce the consumer into the transaction... [and] the consumer would not have entered had the information been disclosed;" Id. According to Gordon v. Valley Auto Repair Inc., "[t]he elements of a DTPA claim are (1) the plaintiff is a consumer; (2) the defendant engaged in one or more of the false, misleading, or deceptive acts enumerated in [section] 204; (3) the act(s) [caused plaintiff's damages]; and (4) the plaintiff relied on defendant's conduct to...her detriment." Gordon v. Valley Auto Repair Inc., Franklin Court of Appeals (2009) quoting Diaz v. Ellis (Fr. sup. Ct. 1998). The plaintiff has the burden of proof. Id.

Consumer

Under the DTPA act, a consumer is an individual who seeks any good or service. Here, Ms. Hill is a consumer of a boat because she sought a used boat, a good, from Reliant.

Reliant Engaging in Deception

Generally, the DTPA prohibits "false, misleading, or deceptive, acts or practices in the conduct of any trade or commerce." FR. Bus. Code. 204. Section 204 of the DTPA contains a list of prohibited acts. The relevant prohibited acts include: representing that goods have characteristics or uses they do not have or "representing that goods or services...are of a particular standard, quality, or grade if they are of another." Id. at 204d. In Gordon v. Valley Auto Repair Inc., Franklin Court of Appeals (2009)- Plaintiff purchased a used pickup truck in Franklin for hauling goods and plaintiff noticed the truck used too much oil. After two repair attempts, at

Valley repair shop, repairs totaling \$4000 (\$2000 each attempt at repair), the car still leaked oil. Plaintiff took the car to another mechanic and cost was \$2000. Gordon. In Gordon, the plaintiff alleged that the repair company violated the DTPA by "representing that services were performed." Gordon. The repair company told the plaintiff, after unsuccessfully repairing the oil leak the second time that "We've got it fixed now," but there was still a leak after the repair. Gordon. Similarly, here, when Ms. Hill, went to purchase the boat, Mr. Greg Stevens, Reliant store owner, told Ms. Hill that the boat was "in great condition." (Transcript). He also told Ms. Hill in an email that the boat was in "excellent condition and runs just like new." (Email August 10, 2022). Here, Reliant made a representation that the boat was in excellent condition and running like new, noting the quality and standard of boat Ms. Hill was to receive but did not.

The other relevant prohibited act of the DTPA includes: " Failing to disclose information concerning goods or services that was known (emphasis added) at the time of the transaction. Id. Here, Ms. Hill got an example of the boat running at the time of purchase and stated that when she tried to take the boat out on a ride, 15 minutes after being on the water the motor died. Ms. Hill had to get the boat motor replaced because there was a crack in the engine block and it could not be repaired. (Transcript). When speaking to the mechanic Ms. Hill was told, although the boat ran for a few minutes, that is not uncommon for a cracked engine block. The bill of sale that Ms. Hill received also represented that the seller (Reliant) "has no knowledge of any defects in and to the boat." (Boat Bill of Sale).The mechanic also told Ms. Hill that he found epoxy glue in the cracks of the engine block that was recently applied and confirmed that the engine was damaged when she purchased it. From the above stated facts, it can be reasonably inferred, as allowed by the DTPA, that Reliant new of the cracked engine, due to the recent appliance of the glue and misrepresented that the boat could run when testing, although it was common for the boat to run for a few minutes even with a cracked engine. Reliant, on the bill of sale, stated they did not know of any defects, but the recent application of glue can be reasonably inferred that Reliant knew of the defect and failed to disclose it.

Caused Ms. Hill Damages

Economic damages- Ms. Hill has shown, with receipt, that she replaced the motor engine of the boat for \$3000.

Ms. Hill relied on Reliant's conduct to her detriment

In Abrams v. Chesapeake Business College, Plaintiff relied on the misrepresentation in the catalogue were false and misleading and the plaintiff relied on the representation by continuing to pay tuition and not cancel her agreement. Similarly, Ms. Hill would not have purchase the boat if it were not for Mr. Stevens encouragement and if she had know it would need a new motor. (Transcript). The replacement cost set Ms. Hill back financially. (Transcript). Due to the statements Mr. Stevens made to Ms. Hill, she would not have been set back financially in having to purchase a replacement motor, had it not been for Mr. Stevens representations.

Thus, meeting all of the elements of a DTPA claim, Ms. Hill will have a claim under DTPA against Reliant after a showing that she was given false misrepresentations when she purchased the boat.

Claims defendant may make as a defense

Reliant may try and claim that say the boat was in "excellent condition" was puffing. Puffing is defined as mere opinions that are exaggerated for promotional purposes. Gordon. However, if representations are made by a service provider with more knowledge and experience than the consumer and the statements are about past or current conditions, these allegations are more actionable. Gordon. Here, Mr. Stevens is the store owner and more likely than not is a knowledgeable and experienced seller of boats, more than Ms. Hill. This defense will likely not succeed.

Relief Ms. Hill would be entitled to if she succeeds in a DTPA action.

If a violation of the DTPA is committed "knowingly, the plaintiff is entitled to receive three times...her actual economic damages...as well as damages for mental anguish." Gordon v. Valley Auto Repair Inc., Franklin Court of Appeals (2009). Knowingly is defined as "actual awareness, at the time of the act...of the falsity, deception, or unfairness and actual awareness can be inferred objectively to show a person acted with actual awareness. FR. Bus Code. 203. Section 203(f) of the code provides for economic damages to include repair and replacement cost. FR. Bus. Code. 203(f). Here, Ms. Hill would be entitled to the \$3000 replacement cost. Mental anguish- Ms. Hill noted that she was infuriated when the motor engine died on her weekend getaway and that she has been put through a hassel. In order to recieve damages for mental anguish the plaintiff must prove that the defendant acted knowingly. As proved above, Ms. Hill will likely succeed in getting damages for mental anguish as well.

If Ms. Hill prevails, she will also be entitled to mandatory court cost and reasonable attorneys fees. Fr. Bus. Code. 205c.

MPT-1 — Sample Answer 3

MEMORANDUM

To: Zoe Foss

From: Examinee

Date: February 21, 2023

Re: Jasmine Hill matter

Issue: This memorandum will analyze whether Ms. Hill has one or more claims against Greg Stevens d/b/a Reliant Boating ("Reliant") under the Franklin Deceptive Trade Practice Act, Fr. Bus. Code, §§ 200 *et seq.* ("DTPA"), to include a discussion of what specific relief Ms. Hill will be entitled to if she were to succeed in a DTPA action. As discussed, this memorandum will not include a separate statement of facts or address any other potential claims Ms. Hill will have against Reliant, including any claims based on breach of express or implied warranties.

Statement of Facts: [Omitted]

Legal Authorities:

i. The DTPA

The DTPA is to be liberally construed to promote its underlying purpose, which is to protect consumers against false, misleading, and deceptive business practices. § 202. *See also Abrams v. Chesapeake* (Fr. Ct. App. 2012).

In relevant part, the DTPA makes certain false, misleading, or deceptive acts or practices in the conduct of any trade or commerce unlawful, to include but not limited to representing that goods or services have characteristics or uses that they do not have or are of a particular standard, quality, or grade if they are of another. § 204 (d)(i)-(ii). Further, the DTPA makes it unlawful to fail to disclose information concerning goods that was known at the time of the transaction if such failure was intended to induce the consumer to enter into a transaction into which the consumer would not have entered had the information been disclosed. § 204(g).

"Goods" includes tangible items purchased or leased for use. § 203(a). A "consumer" is an "individual . . . who seeks or acquires any goods or services . . ." § 203(d). "Knowingly" means actual awareness, at the time of the act or practice complained of, of the falsity, deception, or unfairness of the act or practice giving rise to the consumer's claim. Actual awareness may be inferred where objective manifestations indicate that a person acted with actual awareness. § 203(k). A "trade" and "commerce" is defined as the "sale ... of any good or service . . ." § 203(e).

The DTPA creates a private cause of action for a "consumer" against any "person" who engages in any one or more of the false, misleading, or deceptive acts or practices enumerated in § 204, if such act or practice is a "producing cause" of the consumer's damages and the consumer relied upon such act or practice to the consumer's detriment. § 205(a). A "person," includes "an individual, partnership, corporation, association, or other group, however organized." § 203(c).

In a suit under the DTPA, a consumer who prevails may obtain: (1) the amount of economic damages found by the trier of fact; or (2) if the trier of fact finds that the conduct of the defendant was committed knowingly: (i) exemplary damages of three times (treble) the amount of economic damages, and (ii) damages for mental anguish. § 205(b)(1)-(2). In addition, each consumer who prevails shall be awarded court costs and reasonable and necessary attorney's fees.

"Economic damages" are defined under the DTPA as "compensatory damages for actual pecuniary loss, including costs of repair and replacement. The term does not include exemplary damages or damages for physical pain and mental anguish." § 203(f).

ii. Applicable case law

In *Gordon v. Valley Auto Repair, Inc.*, (Fr. Ct. App. 2009), the court considered claims against an auto-repair shop under the DTPA arising from repairs to the plaintiff's truck. The defendant was not a seller, but a mechanic who failed to perform adequate repairs on multiple occasions resulting in the plaintiff having to secure additional alternative repairs and spending additional money on those repairs.

As part of its analysis the court noted that under the DTPA actionable representations may be "oral or written." *Id.* (citing *Diaz v. Ellis*, (Fr. Sup. Ct. 1998). In relevant part, the court set forth the required "elements" for a claim under the DTPA: (1) the plaintiff is a consumer; (2) the defendant engaged in one or more of the false, misleading, or deceptive acts enumerated in § 204; (3) the acts constituted a "producing cause" of the plaintiff's damages; and (4) the plaintiff relied on the defendant's conduct to his or her detriment. *Id.* The plaintiff consumer has the burden of proof as to each element. *Diaz*.

A "producing cause" is a substantial factor that brings about the injury, without which the injury would not have occurred. *Diaz*. The court in *Gordon* held that the plaintiff was a "consumer" because she asked the defendant to perform repairs on her truck. In relevant part the court also addressed whether the defendant violated the DTPA by making representations about the standard, quality or grade of service. The court distinguished between mere "puffing" and sales speak that are not actionable. These "puffing" statements are vague or indefinite, or mere opinions. *Id.* (citing *Diaz*). Statements by a seller or provider with more knowledge than a consumer are also more likely to be actionable. *Id.* And statements about past or current conditions are more likely to be actionable than about the future. *Id.* The court set forth several examples where statements were not actionable, which include scenarios where there was "no

guarantee" of condition. Other cases held that describing a car as "luxurious" or "rugged" were mere opinion or puffery. *Id.* (citing *Salas v. Carworld.*). On the other hand, were representations are expressed in terms of "guaranteed" or quality would be "great" they may be actionable. *d.* (citing *Chapman v. Acme Constr.*).

The court also clarified that "economic damages" under DTPA include "total loss sustained by the consumer as a result of the deceptive trade practice" which includes related and reasonably necessary expenses. *Id.* Further, knowing requires the person know that what he is doing is false, deceptive or unfair. *Id.* (citing *Diaz*). The court in *Gordon* held that even where a mechanic represented it completed repaired and had not that did not constitute "knowing" under DTPA because there was no evidence that they knew what they were doing was deceptive or misleading. Finally, an award of attorney's fees is mandatory under the DTPA to a prevailing plaintiff. *Id.*

Next, in *Abrams v. Chesapeake Business College*, (Fr. Ct. App. 2012), the court affirmed an award under the DTPA including exemplary damages. The case focused on statements in a college's catalogue to a student prior to enrollment including qualifications of teachers. These included specific representations about their "thorough" training and modern "state of the art equipment" and "no more than 10 students per room." These representations were proven false in fact. The court held this violated DTPA by making misrepresentations as to characteristics standard and quality and failure to disclose information. In relevant part, the court was careful to distinguish situations where the buyer has actual notice of information, and under those circumstances a seller cannot be liable for failure to disclose. *Id.* (citing *Ling v. Thompson*, Fr. Ct. App 2008). The court held the school knew of the representations and their falsity, and were not innocently withheld. The court also affirmed the award of mental anguish on the basis there was sufficient evidence the school "knowingly" made those representations or omissions. But "mental anguish" implies high degree of pain and distress beyond mere worry or anxiety, includes grief, severe disappointment, indignation and wounded pride." *Id.* The plaintiff's testimony that she suffered "severe disappointment" in the instruction received was sufficient.

Analysis:

i. Application of the DTPA to the transaction

(a) Whether Ms. Hill qualifies as a "consumer" purchasing a "good" from a "person" engaged in "trade" or "commerce" under the DTPA

Here, as set forth in *Diaz*, the first element of DTPA requires the plaintiff to be a "consumer." Therefore, the first issue to address is whether Ms. Hill qualifies as a "consumer" protected under the DTPA. As part of this analysis, we should also determine whether her transaction falls within the scope of the DTPA for the sale or lease of goods as set forth by the DTPA. Ms. Hill most likely qualifies as a "consumer" because she is an "individual" who sought or acquired goods. *See also Gordon*. The boat constitutes a "good" because it is a "tangible item" that was purchased from Reliant.

We must also examine whether Reliant constitutes a "person" engaged in "trade" or "commerce" against whom Ms. Hill may bring a cause of action under the DTPA. Reliant is effectively a sole proprietorship because the Bill of Sale lists the seller as "Greg Stevens d/b/a Reliant Boating" which indicates Mr. Stevens individually operates as the business "Reliant," which is his sole proprietorship. Mr. Stevens, d/b/a Reliant, would qualify as a "person" for purposes of DTPA liability because he is an "individual" or "other group" however organized. § 203(c). Further, Reliant was engaged in "trade" or "commerce" because they were selling a good. § 203(e).

(b) Whether Reliant committed one or more "unlawful" acts under the DTPA through representations or omissions

The second element of a DTPA claim is whether the defendant engaged in one or more of the false, misleading, or deceptive acts set forth in § 204. *Diaz*. Thus, the next issue to address is whether Reliant committed one or more expressly defined "unlawful" acts under the DTPA. To be sure, Reliant's representations include both oral and written statements. *Gordon*.

Here, Reliant most likely committed one or more "unlawful" acts expressly defined under the DTPA to include making "representations" *that goods have characteristics that they do not or of particular grade or quality* because Reliant expressly represented to Ms. Hill: (a) in its email prior to sale that the Envoy was in "excellent condition and runs just like new"; (b) his verbal statements to Ms. Hill prior to sale that the boat was "a real gem and that it was in great condition"; and (c) the representation in the Bill of Sale that the Seller "has no knowledge of any defects in and to the Boat." The boat was in fact not in "excellent condition" and did not "run just like new" because the engine was cracked, glued back together, and would not operate for more than 15 minutes on the water. The first two representations most likely qualify under this "unlawful" act provision of the DTPA. The third is an omission which will be discussed below.

Reliant may argue these statements or representations were "mere puffery." Reliant will argue that like *Gordon* the representations of "excellent condition" is vague and indefinite (*Diaz*) or that "great condition" is not specific enough to rise to the level of puffery. However, while these statements may be somewhat vague, "runs like new" is likely specific enough to make a reasonable consumer believe an engine would not fail upon first use. Unlike *Gordon*, here there were not generalized statements and there were no representations that qualified Reliant's representations, as the mechanic did in *Gordon* ("might have some problems that would take longer"), instead Reliant made affirmative representations that were unqualified as to the quality of the boat.

Further, under *Diaz* the superior knowledge of the seller in this instance compared to Ms. Hill who has never purchased a boat before likely weigh in favor of an actionable representation. *Diaz*. Further, these representations relate to a current condition of the quality of the boat, not future conditions, and are also more likely actionable for that reason as well. *Diaz*. Ms. Hill would argue these representations are definite enough to fall in line with other cases or "guarantees" like *Chapman*. Further, Ms. Hill should argue these facts are more in

line with *Abrams* based on the specific nature of the representations compared to the falsity in fact of those representations. Like the school catalogue, saying a boat is "like new" or "excellent condition" is directly contrary to a boat with a cracked engine that cannot run on water.

In addition, Reliant also *failed to disclose* information concerning the boat that was, or should be inferred to be known by objective manifestations of knowledge, including the fact that the engine was cracked and would not run on the water when operating. Ms. Hill would have to prove both that the cracked engine was known to Reliant and that Reliant intended to induce Ms. Hill to purchase the boat, and that Ms. Hill would not have entered the transaction had the information been disclosed. This issue may be more difficult to prove given the Seller disclaimed knowledge of any defects in the Bill of Sale. However, given the mechanic who repaired the engine noted the engine was recently glued together, and that he understood it was not "uncommon" for a motor to run for a few minutes under test conditions but fail on the water, the facts indicate that the engine was recently glued and Reliant knew or can be inferred to know that the engine was cracked and not in working order when he sold it to Ms. Hill. Further, the repeated representations to Ms. Hill of the quality of the boat are strong evidence that Reliant intended to induce Ms. Hill to purchase the boat based on these representations. It is also evident from Ms. Hill's statement in her interview that she would not have purchased the boat had she known about the cracked engine.

Ms. Hill should argue these facts are closely analogous to *Abrams* where there were specific representations to quality that were in fact false as demonstrated by the buyer's later acquired knowledge. Like *Abrams*, the buyer here did not know about these defects when she purchased the goods (or service in *Abrams*), and the seller was in a better or superior position to know of the falsity of those representations or omissions.

Therefore, Ms. Hill likely has a strong claim against Reliant that it both made unlawful representations and made unlawful omissions by failing to disclose information that it knew to induce her to purchase the boat under the DTPA.

(c) Whether Reliant's acts constitute a producing cause of the plaintiff's damages.

The third element of a DTPA claim is whether the defendant's act constitute a producing cause of the plaintiff's damages. *Diaz*. A "producing cause" is a substantial factor that brings about the injury, without which the injury would not have occurred. *Diaz*.

Here, the evidence establishes that Ms. Hill would not have purchased the boat absent or "but for," Reliant's representations that it was like new or in excellent condition. Therefore, Reliant's acts most likely were a substantial factor that caused Ms. Hill to buy the boat and also were the producing cause of her expenses in repairing the boat after it was purchased. Ms. Hill stated in her interview that absent those representations and had she knew about the cracked engine she would not have made this purchase.

Based on the case law discussed above, including *Diaz*, these facts most likely satisfy the requirement that Reliant's conduct including representations and omissions was a "producing" cause of Ms. Hill's damages.

(d) Whether Ms. Hill relied on the defendant's conduct to her detriment.

The fourth element of a claim under the DTPA is to establish that the plaintiff relied on the defendant's conduct to her detriment. *Diaz*. Here, like *Abrams*, Ms. Hill would not have made the purchase but for or absent Reliant's representations as to quality of the boat and its failure to disclose the cracked engine. Therefore, Ms. Hill relied on Reliant's conduct to her detriment because she (a) purchased the boat; (b) expended time and resources taking it to a Lake for vacation with her family; and (c) had to make repairs to the engine.

Thus, these elements including Ms. Hill's "detriment" would be satisfied based on these three factors and they are all tied to Reliant's initial representations and omissions in the sale.

(e) Potential Remedies

Economic damages

As discussed above, the DTPA allows Ms. Hill to recover economic damages which include actual pecuniary losses under section 203, including costs of repair and replacement. Ms. Hill suffered costs of repair to the engine that would be recoverable, which includes the \$3,000 to repair the engine. Further, case law construed the economic damages under DTPA include "total loss sustained by the consumer as a result of the deceptive trade practice" *Gordon*. This may include loss profits. *Id.* Here, Ms. Hill did not suffer other expenses to repair or replace the boat or lost profits, therefore, her economic damages are likely limited to \$3,000 in repair costs.

Exemplary damages for knowingly violations

Ms. Hill can only recover exemplary damages or mental anguish damages if she proves Reliant's conduct was "knowing." As discussed in *Gordon*, this requires proof that the defendant actually knew the statements were false, deceptive and unfair. The evidence discussed above may satisfy this burden given Reliant likely glued the engine together recently before selling it to Ms. Hill and was in superior position to know about running the engine in testing conditions compared to on the water. The mechanic may be able to provide sufficient evidence to satisfy Reliant knew or can be inferred based on objective evidence of recent "cover up" repairs that they acted "knowingly" when they specifically told Ms. Hill that the boat was in excellent condition *and* when they falsely misrepresented in the Bill of Sale that they had No knowledge of any defects in the Boat.

Therefore, Ms. Hill can likely recover exemplary, or treble, damages in the amount of three times her economic damages, or \$9,000.

Mental anguish

Ms. Hill can only recover "mental anguish" if she shows severe disappointment, not just mere anxiety or stress. Ms. Hill's statement expresses some aspect of severe disappointment based on feeling taken advantage of and had to lose a weekend getaway with her family, but her testimony does not indicate heightened disappointment that is typically required to recover for mental anguish. However, *Abrams* instructs us that if she adds to her testimony additional factors or statements of "severe disappointment," as opposed to just mere "disappointment" she may be able to recover for mental anguish.

At this stage, it appears unlikely that these damages are recoverable based on facts presented to date.

Attorney's fees and costs

As a prevailing party under DTPA, Ms. Hill will be entitled to recover her attorney's fees and court costs. This is a mandatory award. *Abrams*. Therefore, if Ms. Hill prevails under her DTPA claims she will be awarded her attorney's fees and court costs. These fees are limited to "reasonable and necessary" fees.

MPT-2 — Sample Answer 1

AZIZ & SHAPIRO LLP

MEMORANDUM

To: Hamid Aziz

Re: Happy Frocks Inc. Liability for profits

Date: 2/21/23

I. Legal Argument

In a trademark infringement action, the defendant's profits that are attributable to the infringement are recoverable by the plaintiff. An award of profits is justified by three rationales: (1) to deter wrongdoing, (2) to prevent defendant's unjust enrichment, and (3) to compensate the plaintiff for the harm. *Spindrift Automotive Accessories, Inc. v. Holt Enterprises, Ltd.* (2021). To determine whether to award an infringer's profits to the plaintiff, the court applies a balancing test, but the factors are not weighted equally--rather, the court will exercise discretion in assessing each factor's importance and decide if the equities weigh in favor of awarding defendant's profits to the plaintiff. *Id.* The factors to be considered are as follows: (1) the infringer's mental state, (2) the connection between infringer's profits and the infringement, (3) the adequacy of other remedies, (4) equitable defenses, and (5) the public interest. *Id.*

a. The infringer's mental state weighs against profits because at most, Happy Frocks acted with negligence.

The more culpable the defendant's actions, the more likely they are to be subject to an award of profits. The mental states that weigh in favor of awarding profits are: willfulness, recklessness, callous disregard for the plaintiff's rights, willful blindness, and a specific intent to deceive. On the other hand, the mental states that weigh against an award of profits are: mere negligence or an innocent nature to the infringement. Here, Happy Frocks did not willfully, recklessly, or otherwise sell the infringing products. Rather, Happy Frocks actions in selling the infringing products were with mere negligence. Happy Frocks's manufacturer, Quality Clothes, was the one using the infringing buttons and deceived Happy Frocks by asking for enough money to buy B&B's buttons when it really was using cheap copies. In addition, as soon as Happy Frocks became aware of the infringement, it recalled all Quality Clothes's products and terminated business with them. Even though Happy Frocks was supposed to do quality inspections that would have caught the infringement, this can at most be attributed to negligence. Therefore, this factor weighs against profits.

b. The connection between infringer's profits and the infringement weighs against profits because the trademark owner was not harmed, Happy Frocks profits did not flow from the infringement, consumers were unaware, and Happy Frocks actually was harmed.

The connections considered for this factor are whether the trademark owner was harmed by lost or diverted sales, whether the infringer's profits flow from the infringement, whether consumers were confused by the infringement, and whether the benefit to the infringer is certain or not. Here, B&B was not harmed by the infringement because they testified their sales increased. Also, the infringer's profits did not flow from the infringement because they were still sending Quality Clothes the amount it would cost to buy B&B's buttons; only Quality Clothes profited from this. Next, the consumers were likely not confused by the infringement because the expert testimony of Tiffany Chen proves that only 3% of consumers look at logos on buttons and care where they come from. Finally, there is no benefit to the infringer because not only did they not benefit from buying cheaper buttons, but also they had to pull all their items from the stores, and lost a lot of money because of that. Therefore, this factor weighs against profits.

c. The adequacy of other remedies weighs against profits because they fully cover the losses and do not overreach.

The adequacy factor looks at whether other remedies are sufficient to make the plaintiff whole without an award of profits; if the plaintiff is made whole by other remedies, then awarding profits is not appropriate. Here, since an injunction and money damages are being sought, Happy Frocks terminated its relationship with Quality Clothes, and stopped using infringing buttons, it seems like profits are unnecessary. An injunction will prevent it from happening again and since Happy Frocks did not profit from this, the loss of the button sales to B&B, which would be the actual damages, would be adequate to remedy B&B.

d. Equitable defenses weigh against profits because Happy Frocks can prove that the plaintiff failed to act timely.

If the defendant has a claim of equitable defenses such as laches, plaintiff's failure to timely act, plaintiff's acquiescence, or unclean hands, then this would weigh in against an award of profits. Here, defendant likely has a claim for plaintiff's failure to timely act. While B&B testified that they did immediately send a cease and desist letter, on cross-examination it was discovered that it actually took them 9 months to send the letter. In addition, the letter was vague and required Happy Frocks to investigate on their own to determine which manufacturer was responsible. In combination, this delay on B&B's part weighs against awarding profits.

e. The public interest weighs against profits because there is no public danger from use of the buttons and the infringement already stopped.

If there is a public interest in preserving public safety or deterring other infringements, then the public interest weighs in favor of awarding profits. Here, B&B testified that the copy buttons

were neither dangerous, poisonous, nor pose a choking hazard. Also, Happy Frocks as already stopped infringing and even terminated its relationship with Quality Clothes, which was the manufacturer that was actually responsible for the infringement--thus, risk of future infringements is low. Therefore, there is not a significant public interest in awarding B&B profits in this case.

II. Conclusion

In conclusion, it is unlikely that Happy Frocks will have to pay profit damages to B&B because when each factor is weighed, the result is that none of them weigh in favor of awarding profits. Unlike the defendant's case in *Spindrift*, profits should not be awarded because here, there was no culpable mental state, the connection between the infringement and the profits is weak, other remedies are available and adequate, an equitable defense is available, and the public interest in safety and deterrence low--thus, Happy Frocks should not be responsible for profit damages.

MPT-2 — Sample Answer 2

B&B Inc is Not Entitled to Profit Damages From Happy Frocks, Inc.

I. Caption [Omitted per instructions]

II. Statement of Facts [Omitted per instructions]

III. Legal Argument

Introduction:

This portion of this brief will explain why Happy Frocks ought not to be held liable for profits as a result of trademark infringement. When deciding issues of lost profits Courts typically rely on three rationale, as articulated by the District Court of Franklin in the Spindrift case (2012), when awarding lost profits. (1) Deter wrongdoer from doing it again, (2) prevent defendant's unjust enrichment and (3) to compensate the plaintiff for harms caused by the infringement. Courts also look at the following factors (1) infringer's mental state, (2) the connection between the infringer's profits and the infringement, (3) the adequacy of other remedies, (4) equitable defenses and (5) the public interest. The factors are not equally and the court must apply its discretion when weighing them. The Supreme Court in Romag (2020) stated that "the defendant's mental state is a highly important consideration." Willfulness is a very important factor but not, as the infringers in both Romag and Spindrift argued, a prerequisite for recovering profits.

A. Happy Frock's mental state does not support an award of profit damages as Happy Frock's infringement was not willful as it was done by an overseas manufacturer without Happy Frock's knowledge and Happy Frock ceased the behavior once notified by B&B.

Happy Frocks ought not be liable for profit damages here due to the lack of a willfull or knowing mental state in relation to the infringement. In Spindrift (2021) the Franklin District Court awarded profit damages partially due to the defendant's mental state. The Romag (2020) case suggests that the defendant's mental state is the most important, but not dispositive, factor in determining whether to award profit damages in a trademark action. In Spindrift the defendant knowingly and deliberately sold the infringing parts themselves. The same defendant continued to do so after being told of the infringement, "this conduct by Holt was hardly innocent." This is distinguishable from our present case where Happy Frock's actions are neither knowing nor deliberate. The infringing here was done by a sub manufacturer, not by Happy Frock. The infringement was done by the named defendant directly in Spindrift. Happy Frock did not receive notice of the infringement until the fourth shipment of goods came from the infringing sub manufacturer Quality Clothes. Quality Clothes is an overseas company distinct from Happy Frocks. Upon learning of the infringement Happy Frocks, after a brief investigation to confirm the allegation, instructed Quality Clothes to stop the infringement, terminated the relationship with them, and stopped selling items from that manufacturer. That sufficiently distinguishes us from

the defendant in Spindrift. Happy Frocks did not know the infringement was going on, they stopped it once told about it, and they stopped selling the infringing products. Happy Frocks themselves were damaged by the infringement as Mr. Harris said in his direct examination; "they were still billing us and we were still paying them for the cost of the buttons from B&B." It cannot be said that Happy Frocks acted knowingly or willfully here in terms of selling trademark infringing products thus an award of profit damages would not be proper here.

B&B will try and counter this argument by saying that Happy Frock must have known of the infringement due to the fact they received four shipments of faulty goods. Further, they will argue, Happy Frock inspected each shipment. Finally, they will say, Happy Frock actually ordered an increase in production to meet new demand. We can counter this by stating, as Mr. Harris said, that the issue wasn't discovered until the fourth shipment. Yes this may illustrate negligent quality control methods but that does not establish the sort of willful or knowing mental state that is sufficient to support an award of profits damages. Happy Frock was only negligent, if anything, here and thus profit damages should not be awarded. Profits were awarded in both Romag and Spindrift, however we are told in those cases those defendants knowingly infringed and continued the wrongful acts after receiving notice. Thus our case is distinguishable as Happy Frock did not do the infringing themselves, they instructed their sub-manufacturer to cease the infringement upon learning of it, and at most were negligent in their application of their own quality control methods. This court itself in its February 17th, 2023 post-trial hearing stated that "I realize defendant did not initiate the infringement." Happy Frock did not act with the type of mental state shown in Spindrift justifying an award of profits damages. Given that this is the most important of the five factors articulated here, Happy Frocks ought not be liable for profit damages. B&B may point to the fact that Happy Frock did not do a recall of all products. Happy Frock explained why this would be difficult for them to do. It was simply not practical to initiate a full product recall, and the cessation of their relationship with Quality Clothes in addition to them telling Quality to stop immediately should show their mental state does not arise to knowing or willful.

B. The connection between the infringer's profits and the infringement do not support an award of profits damages as B&B's sales increased during the applicable period, Happy Frock lost money as a result of the infringement and it cannot be said that the trademark owner was harmed by diverted sales or that Happy Frock's profits flowed directly from the infringement.

In Spindrift, the Franklin District court explained this factor as measuring the trademark owner's harm from lost or diverted sales resulting from the infringement and measuring the profits gained by the infringer as a result of the infringement. In that case the defendant charged the public full price while actually using counterfeit infringing products that cost him significantly less. Thus profits from the breach were shown. Our case can be distinguished from these facts such that a similar award of profits damages is not appropriate here.

Mr. Garcia, of B&B, could not say for certain whether consumers purchase items due to the B&B logo being on the button. Happy Frock's expert witness testified that only 3% of consumers noticed the buttons and thought that the B&B logo made that item more desirable.

This was a survey of actual Happy Frocks customers. A different survey of consumers of children's clothes generally found that 6% of customers said that the presence of a brand name on buttons was one of many factors that went into their decision to buy something. Less than 1% said it was the reason for buying something. Thus, at worst 6% of the people buying Happy Frock's products were tricked or induced to purchase the product as a result of the infringement. This is not a substantial enough connection to justify an award of profit damages here.

B&B will attempt to counter this by arguing that the \$450,000 made by Happy Frock as a result of selling the infringing products shows an adequate connection between profit and infringement such that profits should be awarded. Happy Frock actually accelerate their processing of shipments from Quality due to demand. This argument should fail as they will not be able to show that the sales were a result of the infringement. Happy Frock's own evidence, articulated above, shows that 97% of consumers do not notice the logo on the button of their products. Thus it seems impossible to say that the profits enjoyed by Happy Frock were actually due to the infringement. People simply do not care what buttons are on a product. Further, Happy Frock actually lost money as a result of the infringement. They were still being billed for the full price of B&B buttons by Quality Clothing. They have also lost their on hand inventory and thus will not be able to profit from that. This factor thus does not support an award of profits damages and such a claim for that relief should be denied.

C. Injunctive relief and an award of economic damages is sufficient to compensate B&B and ensure that no further infringement takes place, thus Happy Frocks should not be held liable for profit damages as deterrence and making the plaintiff whole are achieved through other remedies.

In Spindrift, the court said there are three remedies for trademark infringement; (1) actual damages, (2) injunctive relief, and (3) the portion of the defendant's profits attributable to the infringement. In Spindrift, the plaintiff failed to illustrate the necessary evidence to support an award of the defendant's profits. An injunction was sufficient.

Similarly, B&B can, and likely will, get actual damages here as well as an injunction blocking future infringement. Given that B&B will be unable to show real harm to their reputation due to lack of evidence, injunctive relief and actual damages are sufficient awards here. The injunction will ensure the infringement does not continue. Happy Frock has already voluntarily ceased selling the products. Only 6% at most of consumers consider the button when making a purchasing decision thus there is not significant harm to the B&B brand that they can quantify or point to. Actual damages will be sufficient to compensate B&B for the actual economic damages suffered as a result of the infringement and injunctive relief will ensure it does not continue. B&B will counter this by saying their brand has been harmed and the behavior could continue later. They do not have evidence to support either of those claims thus this factor does not support an award of the defendant's profits in addition to actual damages and injunctive relief.

D. B&B should not be awarded profit damages as Happy Frock has the equitable defense of laches available as B&B waited nine months to bring this action after knowing of the infringement.

In Spindrift, the court noted that Spindrift brought suit immediately upon learning of the infringement and thus no equitable defenses were available to the defendant. This is distinguishable from our case as B&B waited nine months to bring this action after learning of the facts giving rise to it. Thus, the equitable defense of laches is available to Happy Frocks and no award should be made based on Happy Frock's profits. B&B also failed to immediately move for an injunction blocking the infringement as the plaintiff in Spindrift did. B&B did send a cease and desist letter immediately and they will raise this in rebuttal to our argument here. Laches concerns when a plaintiff actually brings an action. The cease and desist letter is not enough action to overcome the fact that they waited nine months to bring suit and seek an injunction. Equity thus does not support an award of the defendant's profits here as the plaintiff, B&B, inappropriately waited nine months to bring this action. There is nothing in the record justifying such a delay. Equity does not support a plaintiff waiting to bring an action in order to maximize recovery. The existence of laches here as a viable defense means this factor does not support an award of the defendant's profits in addition to actual damages and injunctive relief.

E. The public interest here is not served by an award of profit damages as the infringing buttons do not pose any additional harm to the public at large.

In Spindrift, the court articulated this factor as "is there a public interest in making an award of profits, such as preserving public safety or deterring other infringements" They found that this factor did not support an award of the defendant's profits due to the existence of an injunction and lack of evidence showing that the parts caused danger to the public. Similarly, we can show both of those things here and thus the public interest is not served by an award of the Defendant's profits.

Happy Frocks has voluntarily stopped the infringing practices here and there is no evidence of any intent to resume that behavior. In addition, if the court were to issue permanent injunctive relief here that would further block the behavior from starting again. Either of these things, or both, illustrate that the public interest wouldn't really be served by an award of defendant's profits. Happy Frock isn't planning on doing this again, they didn't knowingly do it to begin with and an injunction is perfectly adequate to ensure that it does not happen again. Further, trial testimony shows that the infringing product is not a danger to the public. B&B's CEO admitted during direct examination that the infringing buttons are not toxic and do not present any greater choking hazard as genuine B&B buttons. Thus they are not a danger to the public, and the public interest would not be served by an award of the defendant's profits here.

Conclusion

Weighing these factors as the court in Spindrift did, we can see that none of the five factors truly support an award of the defendant's profits. Further the first factor is the most important

one according to the Supreme Court's decision in Romag and we have sufficiently argued and illustrated above that Happy Frock did not infringe willingly or knowingly here. Given the lack of support for an award of defendant's profits as a result of analyzing the five factors articulated in Spindrift, this court ought not make an award of Happy Frock's profits to B&B as a result of trademark infringement. Happy frock did not act knowingly. There is little to no evidence of harm to the B&B logo as a result of the infringement, nor is there evidence that Happy Frock's profits resulted from the infringement. Injunctive relief and actual damages are sufficient to fully compensate B&B. Happy Frock has laches as an available equitable remedy, and the public interest would not be served by an award of Happy Frock's profits. For all of these reasons, this court should not award B&B Happy Frock's profits as additional damages.

MPT-2 — Sample Answer 3

I. Caption

II. Statement of Facts

III. Legal Argument

There are three remedies for trademark infringement: (1) the actual damages suffered by the plaintiff; (2) injunctive relief, barring future infringements; and (3) that portion of the defendant's profits that are attributable to the infringement. In this matter, a portion of the defendant's profits are not appropriate because the Happy Frocks did not have a harmful mental state, there was no connection between the infringer's profits and the infringement, there are other adequate remedies, Happy Frocks has equitable defenses and there is no harm to the public interest at this time.

Generally, an award of profits is justified by three rationales: (1) to deter a wrongdoer from doing so again, (2) to prevent the defendant's unjust enrichment, and (3) to compensate the plaintiff for harms caused by the infringement. Spendthrift Automotive Accessories. In determining whether to award profits to the Plaintiff the court must further weigh the infringer's mental state, the connection between the infringer's profits and the infringement, the adequacy of other remedies, equitable defenses and the public interest. *Id.* These factors are not assigned equal weight, as the district court's discretion lies in assessing the relative importance of these factors in a particular factual situation and determining whether, on the whole, the equities weigh in favor of granting profits.

1. Profits should not be awarded to the Plaintiff as Happy Frocks did not have a harmful mental state, as they were defrauded by their manufacturer and did not intend to infringe on the trademark.

A defendant's state of mind has a bearing on what relief a plaintiff should receive. An innocent trademark violator often stands in very different shoes than an intentional one. Some courts have held that a plaintiff can win a profits remedy only on the showing that the defendant willfully infringed on the trademark. However, the court in Romag found that although willfulness is a highly important consideration in awarding profits under the Lanham Act (provides the remedies for trademark infringement) it is not an absolute precondition. The court held that willfulness is not "an inflexible precondition to recover" of a defendant's profits under the Act but rather "a defendant's mental state is a highly important consideration in determining whether an award of profits is appropriate."

The Defendant's mental state should be considered in light of the harm to the trademark owner and to consumers. In addition to willfulness, factors such as recklessness, callous disregard for the plaintiff's rights, willful blindness, and a specific intent to deceive should be

taken into account. However, mere negligence of an innocent nature to the infringement, would be contrary to the award of profits.

Here, although Happy Frocks did not immediately respond to the cease and desist letter this was not due to ill intentions but rather they had to investigate the allegations contained in the letter as the letter did not indicate which manufacturer was using the incorrect buttons. It took Happy Frocks several weeks to get correct samples from all the overseas manufacturers. As soon as they found out it was Quality Clothes who was manufacturing with the wrong buttons Happy Frocks immediately stopped their production. Not only did Happy Frocks stop production they terminated their relationship with Quality Clothes and stopped selling their inventory of clothing that Quality Clothes had manufactured. Aside from this, Happy Frocks was truly unaware of the use of the wrong buttons as Quality Clothes was supposed to buy the buttons directly from Plaintiff and then invoice Happy Frocks. However, although Quality Clothes was using the wrong buttons they were still invoicing Happy Frocks. Happy Frocks was still paying the invoices and this caused them a severe financial loss.

Further, Happy Frocks had procedures in place to ensure the quality of the clothes produced by their manufacturers. They received 4 shipments from Quality Clothes in the time period the wrong buttons were used. Happy Frocks however, did not notice the use of the wrong buttons until the last shipment came in. Although demand was high for the product during the time of the shipment and employees were told to work quickly, there is no evidence that Happy Frocks worked in a manner that cut corners or harm the consumers. There was no negligent action much less intentional action on the part of Happy Frocks.

Therefore, Happy Frocks did not have bad intentions and did not intend to infringe the trademark.

2. Happy Frocks does not owe profits to the Plaintiff as there was not a connection between their profits and the infringement because a majority of the customers did not notice the difference in the buttons and the profits of the trademark holder was not hindered as their profits increased.

The court must also weigh whether there was a connection between the infringer's profits and the infringement. To do so the court must consider whether the trademark owner was harmed by lost or diverted sales due to the infringement. These losses and sales must be beyond those sales lost by the infringement itself, which would be accounted for by actual damages. Further, the court must analyze whether the infringer's profits flow directly from or were caused by infringement. If they were, then an award of profits is justified. The court must also consider whether the customers were confused by the infringement, in thinking that the trademark owner authorized the infringing acts. Lastly, the court will decipher with what certainty the infringer benefited from the infringement.

Here, the Plaintiff's overall sales were unaffected with sales actually increasing. The only loss suffered was from the sale of the buttons to the offending manufacturer of Happy Frocks,

Quality Clothes. Further, although customers may see the B&B logo on the buttons used on the clothing produced, Plaintiff provided no evidence that customers can tell a difference between their buttons and the ones used. Further, Happy Frocks profits do not flow directly from the infringed product as they are buttons and a mere addition to the complete product. Additionally, customers were not confused by the infringement. A survey of 839 customers of Happy Frocks clothes manufactured by Quality Clothes indicated that the use of B&b'S logo on the buttons played a minimal role in the clothing purchase with 3% of the respondents saying that they noticed the logo and thought it added to the desirability of the clothes. Further, another survey of 997 customers of children's clothes indicated that only 6% stated that whether there was a brand name printed on the buttons of clothes was a reason, for purchasing one item of clothing instead of another and less than 1% said that the appearance of a brand name on a button was the only reason for purchasing a particular item of clothing over another.

3. Plaintiff should not be awarded profits as there are other available remedies such as an injunction.

The court must also consider whether the trademark owner would be made whole by other available remedies. Here, the plaintiff would be.

Here, Plaintiff has the opportunity to be granted an injunction which would stop the use of hthe wrong buttons which has already been ceased by Happy Frocks.

4. The Plaintiff should not be granted profits as they waited 9 months before filing their action even though they were aware of their claim and they came with unclean hands by trying to get Happy Frocks to settle on their terms.

The court must further consider whether the defendant has a claim of equitable defenses such as laches or failure to timely act on the part of the plaintiff, acquienseces by the plaintiff in the infringement, or unclean hands.

Here, although Plaintiff sent a letter to their lawyer requesting she write a cease and desist letter to happy Frocks within a week or two, plaintiff waited to file their complaint in this action, seeking an immediate injunction until nine months later, which was a week before the so-called "Black-Friday" sales. This sale is the largest one in retail goods like clothing. As such, the defendant likely has a defense of laches. This would also constitute unclean hands by the plaintiff as they waited to file when they knew that Happy Frocks would suffer the most damage from and injunction, bolstering plaintiff's case. This tactic was also used to try and get happy Frocks to settle the case on their terms.

5. Profits should not be awarded because there is no concern for the public interest due to the infringement sense many consumers do not buy the product due to buttons and there was no increased danger in using the wrong buttons.

Lastly, the court must consider whether a public interest is served by making an award of profits, such as preserving public safety or deterring other infringements. Here, the facts are dissimilar from an infringing medication containing an ingredient that would cause harm to the consumer. The buttons used by Happy Frocks are not poisonous and do not cause concern that children are more likely to swallow them. Further, as in *Spendthrift Automotives*, here an injunction was granted and therefore there is unlikely a concern for a danger to the public.

Conclusion

Weighing the above factors, the Plaintiff should not be awarded profits from Happy Frocks as the factors clearly weigh in favor of Happy Frocks.