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BEFORE THE DIVISION OF CONSUMER PROTECTION OF THE UTAH DEPARTMENT OF COMMERCE

IN THE MATTER OF: **PURDUE PHARMA L.P.**, a Delaware limited partnership; **PURDUE PHARMA INC.**, a New York Corporation; **THE PURDUE FREDERICK COMPANY**, a Delaware corporation; **RICHARD SACKLER, M.D.**, individually and as an owner, officer, director, member, principal, manager, and/or key employee of the above named entities; and **KATHE SACKLER, M.D.**, individually and as an owner, officer, director, member, principal, manager, and/or key employee of the above named entities; **Respondents.**	**DIVISION'S SUPPLEMENTAL MEMORANDUM IN OPPOSITION TO RESPONDENTS' MOTIONS TO DISMISS THE DIVISION'S CITATION AND NOTICE OF AGENCY ACTION** **DCP Legal File No. CP-2019-005** **DCP Case No. 107102**

At the May 21, 2019 oral argument on Respondents' Motions to Dismiss the Division's Citation and Notice of Agency Action ("Motions"), the Administrative Law Judge invited the Parties to submit supplemental authority regarding four decisions. Each is addressed in turn below:

A. *State of North Dakota v. Purdue Pharma, L.P., et al.*, Case No. 08-2018-CV-01300 (May 10, 2019).

State of North Dakota v. Purdue Pharma, L.P., et al., case No. 08-2018-CV-01300 (May 10, 2019) ("N.D. Slip Op."), converted a motion to dismiss and granted summary judgment to Purdue on the ground that the Attorney General's claims were preempted and failed to adequately allege causation. *See* N.D. Slip. Op. at 3-4. Here, by contrast, the Tribunal is addressing motions to dismiss, and the Division is not making a failure to warn claim or seeking changes to Purdue's labels. It alleges that Purdue's misrepresentations and omissions are inconsistent with the drugs' label, violates its "duty not to deceive," *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 529 (1992), and often are made through channels that the FDA does not review, evading scrutiny, *see* Citation ¶ 103.

The *North Dakota* decision is an outlier, and contrary to the uniform weight of authority in actions by other state attorneys general against Purdue and other manufacturers or distributors of prescription opioids. In reaching its outlying conclusion, it relied heavily on a letter from the FDA responding to a Citizen Petition from Physicians for Responsible Opioid Prescribing ("PROP"). The FDA granted that petition in part; and the portion denied did not concern *warnings*, but *use* of the drugs—specifically, whether to categorically limit the daily dose or duration of prescriptions. *See In re Opioid Litigation*, No. 400000/2017, 2018 WL 3115102, *8-9 (N.Y. Sup. Ct. June 18, 2018) (explaining that unlike in the *Cerveny* case, on which Purdue relied, "the plaintiffs' allegations here are not based upon the same theories and scientific evidence presented in the PROP petition," but rather concern "the defendants' business practices," in deceptively minimizing the risks of the drugs, and the petition's denial was not "clear evidence," even pre- *Merck Sharp & Dohme Corp.*

v. Albrecht, No. 17-290, 2019 WL 2166393 (U.S. May 20, 2019)). The *North* Dakota decision also relied on a version of the labeling and on another document, a "REMS" that Purdue did not attempt to submit here. *See* N.D. Slip Op. at 12. That a risk is covered by a warning label or REMS, however, does not mean that Purdue can make deceptive statements that go beyond and contradict the label.[1] Otherwise, the label would become a shield, permitting a drug company to misrepresent a product in its marketing, so long as it told the truth in its label. Further, the materials cited simply do not contradict the Division's claims. The Citation is replete with examples of the FDA and/or CDC contradicting or rejecting Purdue's claims, further demonstrating that the *North Dakota* court was wrong to believe the FDA would have condoned Purdue's deceptive practices. *See* Citation ¶¶ 53, 64, 71, 72, 75, 91.[2]

Merck has already rendered the North Dakota decision obsolete, as the *North Dakota* court applied its own interpretation of *Wyeth*, not *Merck*'s, and Purdue did not, and cannot, show that it fully informed the FDA of the justification for, or requested permission to change its label or give increased warnings.[3] And, the Citation also includes allegations that were not addressed in the *North Dakota* decision at all. *See id.* ¶ 62 (minimizing risks of opioids, exaggerating the risks of competing products such as NSAIDs, and ¶¶ 79, 91 (false functional improvement claims).

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[1] The court erroneously assumed that if a REMS mentioned "screening tools and questionnaires" as measures "to help mitigate opioid abuse," then Purdue could make any sort of deceptive claims about the extent to which such measures in fact impact addiction and abuse. *See id.* at 12.

[2] To cite just one example, concerning 12-hour relief, the FDA Response to a 2008 Citizen Petition by the State of Connecticut supports, and is cited in, the Division's Citation. *See* Citation ¶ 75. That OxyContin has a 12 rather than 8 hour dosing (which the Citation does not seek to change), does not in any way authorize Purdue to falsely claim that the drug in fact lasts 12 hours and patients simply need a higher dose (particularly when it knew from the number of patients needing "rescue medication" in between OxyContin doses that it did not). *Id.* ¶¶ 76-79. For example, that "[p]reoccupation with achieving adequate pain relief can be appropriate behavior in a patient with poor pain control" does not permit Purdue to attribute "*signs of addiction*" to pseudoaddiction. Citation ¶ 51 (emphasis added).

[3] Purdue's posture here also provides sufficient basis to infer that it did not. In addition, although Purdue's Exhibit G is not properly before the Tribunal, it further demonstrates that Purdue failed to provide such information; the documents notes that organizations such as the American Academy of Pain Medicine and American Pain Society, whom the Citation alleges served as front groups for Purdue, *see* Citation ¶¶ 50-56, opposed the petition.

Finally, the *North Dakota* court considered itself compelled to address causation because it construed the State's claims as claims for damages. *See* N.D. Slip Op. at 17.[4] Here, the Citation plainly seeks injunctive relief and civil penalties, which the *North Dakota* court did not address. And, the *North Dakota* decision is contrary not only to the uniform weight of authority, but to pertinent precedent, including, for example, *F.T.C. v. Freecom Commc'ns, Inc.*, 401 F.3d 1192, 1203 (10th Cir. 2005) and the cases cited below and in the Division's Opposition.

B. *Merck Sharp & Dohme Corp. v. Albrecht*, No. 17-290, slip op. (U.S. May 20, 2019).

Like *Wyeth v. Levine,* 555 U.S. 555 (2009), which it reaffirms, *Merck Sharp & Dohme Corp. v. Albrecht*, No. 17-290, 2019 WL 2166393 (U.S. May 20, 2019), is fatal to Purdue's preemption argument. As discussed below, the decision also illustrates why Purdue's reliance on a single outlying summary-judgment decision against a wave of contrary authority is unavailing. In *Merck*, the plaintiffs suffered bone fractures after taking the drug Fosamax and brought state law failure to warn claims alleging that Merck should have warned them about the risk of such fractures associated with this drug. *Id.* at *5.[5] The Court reiterated the standard for "impossibility" preemption set forth in *Wyeth*, explaining that "'*absent clear evidence that the FDA would not have approved a change*' to the label, we will not conclude that it was impossible . . . to comply

[4] In doing so, the *North Dakota* court relies on *Ashley County v. Pfizer, Inc.*, 552 F.3d 659 (8th Cir. 2009), a readily distinguishable case (on which Purdue also relied, unsuccessfully, in other actions). *Ashley County*, which involved the legal sales of over-the-counter medicines used to make methamphetamine, did not allege that Pfizer had engaged in any wrongful conduct and, as a result, the court held that the defendants could not be responsible for "merely creat[ing] a condition that makes the eventual harm possible." *Id.* at 668. Here, the Division alleges that Respondents engaged in deceptive and unconscionable marketing in violation of the CSPA. The *North Dakota* court also appears to have ignored that the "touchstone" of the proximate cause inquiry is foreseeability. *See, e.g., State of West Virginia ex rel. Morrisey, et al. v. Cardinal Health, Inc.*, No. 12-C-140 ¶ 3 (Cir. Ct. Boone Cty. W.VA. Apr. 17, 2015); *State of West Virginia ex rel. Morrisey, et al. v. AmerisourceBergen Drug Corp.*, No. 12-C-141 ¶ 3 (Cir. Ct. Boone Cty. W.VA. Dec. 12, 2014) (same); *Harris v. Utah Transit Auth.*, 671 P.2d 217, 219 (Utah 1983).

[5] In *Wyeth*, the plaintiff sued the manufacturer of the Phenergan, alleging failure to adequately warn that "[d]irectly injecting the drug . . . into a patient's vein creates a significant risk of catastrophic consequences," and seeking damages for personal injuries. 555 U.S. at 558.

with both federal and state requirements.'" *Id.* (emphasis added and internal quotation marks omitted).[6] *Merck* "h[e]ld that 'clear evidence' is evidence that shows the court that the drug manufacturer fully informed the FDA of the justifications for the warning required by state law and that the FDA, in turn, informed the drug manufacturer that the FDA would not approve a change to the drug's label to include that warning." *Id.* at *2. Emphasizing that the "possibility of impossibility [is] not enough," and that the burden of proof is on the defendant, it explained:

> The underlying question for this type of impossibility pre-emption defense is whether federal law (including appropriate FDA actions) prohibited the drug manufacturer from adding any and all warnings to the drug label that would satisfy state law. And, of course, *in order* ***to succeed with that defense the manufacturer must show*** that the answer to this question is yes. . . . In a case like *Wyeth*, ***showing that federal law prohibited the drug manufacturer from adding a warning that would satisfy state law requires the drug manufacturer to show that it fully informed the FDA of the justifications for the warning required by state law and that the FDA, in turn, informed the drug manufacturer that the FDA would not approve changing the drug's label to include that warning.***

Id. at *7 & *12 (emphasis added). As such, even denial of a requested change, without more, is not clear evidence the FDA would not permit additional warnings.[7]

Here, Purdue argues that because the FDA has not categorically withdrawn approval for the use of opioids to treat chronic pain, it would be "impossible" for Purdue to comply with a state law duty to stop deceptively marketing the drugs. *See* Purdue MTD at 25. As explained in the Division's Opposition, plainly, that is not the case. And *Merck* demonstrates why, even if the Tribunal, over the Division's objection, considered the selective evidence outside the Citation that Purdue seeks to introduce, and even if the Division's claims were erroneously construed as alleging

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[6] It also held that the court decides whether the manufacturer has satisfied this burden. *Id.* at * 9. However, *Merck*, which arose out of a summary judgment decision, *id.* at *5, did not change the standard of review on a motion to dismiss.

[7] In fact, in *Wyeth* there was no clear evidence that the FDA would have rejected a label change to address the risks at issue in the litigation even though it had earlier rejected, in part, a warning that the manufacturer proposed. *Id.* at *7 (internal quotation marks omitted).

failure to warn, rather than affirmative deception, Purdue's arguments would still fail. Purdue has not shown, and cannot show, that if fully disclosed all pertinent information to the FDA.[8]

C. *Tub City, LLC v. Utah Div. of Consumer Protection & the Utah Dep't of Commerce*, No. 170902052 (3d Jud. Dist. Ct., Utah).

In *Tub City, LLC v. Utah Div. of Consumer Protection & the Utah Dep't of Commerce*, No. 170902052 (3d Jud. Dist. Ct., Utah), Deborah Lambert appealed whether she could be held personally liable when she was not a contracting party to the transactions and she was not personally responsible for the company's obligations under the contracts. Upon review, the Department found that Ms. Lambert was personally liable as a supplier under the act. Ex. A, Findings of Fact, Conclusions of Law, and Order on Review at 8-9. "[N]o allegations of piercing the corporate veil [we]re necessary in the Citation as no legal authority ha[d] been presented to establish that the corporate shield doctrine is applicable to protect a person who has violated the UCSPA." *Id.* at 9. The respondent's "activities in her role as officer, director, agent, and/or owner of [the companies] were sufficient to support a conclusion that she engaged in or enforced consumer transactions." *Id.* On further review, the district court also found that Ms. Lambert was a supplier and personally liable for her actions. Ex. B, Judgment.

Like Ms. Lambert, the Sacklers are "liable, not for the conduct of [Purdue], but for [their] own conduct. [Their] liability is primary, not derivative," and the corporate shield doctrine does not apply to protect them from liability for their conduct. Ex. C, Trial Mem. at 9.[9] The Sacklers

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[8] *Merck* also reaffirms that, contrary to Purdue's characterization, it is the *drug-maker*, not the FDA, that "bears primary responsibility for drug labeling." *Wyeth*, 555 U.S. at 570. The U.S. Supreme Court reiterated that "through many amendments to the [Food, Drug, and Cosmetic Act ("FDCA") and to Food and Drug Administration ("FDA")] regulations, it has remained a central premise of federal drug regulation that *the manufacturer* bears responsibility for the content of its label at all times." *Id.* at * 7 (quoting *Wyeth,* 555 U.S. at 570–571) (emphasis added).

[9] There was never an opinion issued by the district court in the *Tub City* case. The Division filed a Trial Memorandum, and the Judgment was entered in favor of the Division finding Ms. Lambert personally liable. It can be understood from this sequence of events that the arguments of the Trial Memorandum were persuasive.

are suppliers, liable for deceptive acts, because they are each a "person who regularly solicits, engages in, or enforces consumer transactions, *whether or not he deals directly with the consumer.*" Utah Code § 13-11-3(6) (emph. added). The respondent in *Tub City* did have direct interaction with consumers, but under the express provisions of the statute, such direct involvement is unnecessary. *State, ex rel. Wilkinson v. B & H Auto*, 701 F. Supp. 201 (D. Utah 1988). The Sacklers, as the Citation alleges, were engaged in deceptive acts designed to solicit, promote, and increase the rate of consumer transactions for Purdue's opioid products. Indeed, these acts had no purpose beyond promoting additional opioid sales. Citation at ¶¶ 8, 68, 125-161.

If, as the Division has alleged, the acts of the Sacklers amount to violations of the CSPA, the fact that these actions were taken in their roles as corporate officers and board members is irrelevant to their individual liability. "A defendant, attempting to hide behind the corporate entity, 'would not exculpate himself by proving he was acting as an agent of a corporation; he would only additionally inculpate his corporate principal." Trial Mem. at 10 (quoting *Armed Forces Ins. Exchange v. Harrison*, 2003 UT 14, ¶20, 70 P.3d 35). In *Tub City*, the Division pointed the court to the interpretation of consumer protection statutes in other states where corporate officers, employees, or directors may be held individually liable for consumer protection violations. For example, under Ohio's consumer protection act, "Where officers or shareholders of a company take part in or direct the actions of others that constitute a violation of the CSPA, that person may be held individually liable." Trial Mem. at 11 (quoting *Garber v. STS Concrete Co., L.L.C.*, 991 N.E.2d 1225, 1233 (Ohio App. 2013). The Wisconsin Supreme Court has likewise recognized that, under its consumer protection act, "a corporate employee may be personally liable for acts he or she takes on behalf of the corporate entity that employs him or her, that violate the HIPA." Trial

Mem. at 13 (quoting *Stuart v. Wisflog's Showroom Gallery, Inc.*, 308 Wis.2d 103, ¶41 (2008)).[10] In sum, "[a] corporation ... acts through its controlling officers or members. The CSPA imposes liability on individuals who commit deceptive practices or acts, whether or not they act through a business entity." Trial Mem. at 10. The Sacklers are such individuals, and the Division has properly pleaded claims against them under the CSPA.

D. *In the Matter of Bajio, LLC; Bajio Mountain West, LLC; and Logan C. Hunter*, No. DCP 86673

In *In the Matter of Bajio, LLC; Bajio Mountain West, LLC; and Logan C. Hunter*, No. DCP 86673, the presiding officer found that it could not be determined as a matter of law whether the Division had authority to issue a citation against a dissolved entity under the former version of Utah Code §13-2-6 because the question would depend on "whether the 'division ha[d] reasonable cause to believe'" that the respondent was engaged in violating the statute. Ex. D, Order on Bajio's Second Motion to Dismiss ("Order") at 4-5. The presiding officer had "no or little indication, on [the] motion to dismiss, as to what the reasonable belief of the Division was at that time." *Id.* at 5.

In this case, on the other hand, the Division had reason to believe, and in fact did believe, that the Respondents were continuing to violate the statute, and Respondents offered no competent affidavit evidence to the contrary. As noted in the hearing, the Citation alleges ongoing conduct and ongoing violations of the act. *See* Citation at ¶¶ 16, 40, 95, 106-109, 161. At the motion to dismiss stage, these allegations must be taken as true, and they are also evidence of the Division's reasonable belief that the Respondents' violations are ongoing. Given that the Division's authority to issue a citation under Utah Code §13-2-6 could not be determined as a matter of law even when the respondent company was dissolved, it cannot be determined in this context that the Division

[10] Neither the Wisconsin nor the Ohio statutes have provisions expressly extending liability to corporate officers. *See* Wis. Stat. § 100.01 *et seq.*; Ohio Rev. Code § 1345.01 & Ohio Rev. Code §§ 1345.02(A); 1345.03(A).

did not have authority to issue the Citation under Utah Code §13-2-6 when the Citation includes allegations of ongoing conduct, and the only suggestion otherwise is the Respondents' unsubstantiated claims outside the Citation (which are contradicted by their ready access to Purdue's internal documents).

In *Bajio*, the presiding officer also found that the Division had authority pursuant to Utah Code §13-11-17(4)(a) to issue the citation for "a cease and desist order and ... an administrative fine of up to $2,500 for each violation of this chapter." Order at 2-4. This authority does not depend on whether the Respondent is currently violating the statute because cease and desist orders also address "future and potential actions." *Id.* at 3. No obstacle prevents the Respondents from continuing their wrongful conduct in the future *even if*, as Respondents claim, the prior conduct ended in February 2019. Utah Code §13-11-17(4)(a) also provides the Division with the authority to issue the Citation against the Respondents.

Finally, *Bajio* shows Respondents are wrong to argue that an amendment to Utah Code §13-2-6 is a substantive change. They could never have had a vested right to be free from a citation for past acts because Utah Code §13-11-17(4)(a) already provided the Division authority to issue one. The Division had this authority both before and after the Respondents claim to have stopped marketing opioids. Per *Bajio*, Respondents gained no substantive right to be free of administrative citation. The change in the language of Utah Code §13-2-6 is procedural then and applies in this case. In sum, the Citation cannot be dismissed because (1) the Division had reasonable cause to believe, and alleged, the Respondents were continuing to violate the act; (2) the Division had authority alternatively under Utah Code §13-11-17(4)(a) to issue a cease and desist order and administrative fines; and (3) the current version of Utah Code §13-2-6, which expressly applies to cases involving solely past violations, is a procedural change in the law that applies in this case.

DATED this 28th day of May, 2019.

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Dated this 28th day of May, 2019.

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EXHIBIT

A

BEFORE THE DEPARTMENT OF COMMERCE
OF THE STATE OF UTAH

IN THE MATTER OF THE REQUEST FOR AGENCY REVIEW OF **Tub City, LLC, aka Tub City Spas, LLC; Spa Co-Op of Utah, LLC; Deborah Ann Lambert aka Deborah Devoe,** PETITIONERS	**FINDINGS OF FACT, CONCLUSIONS OF LAW and ORDER ON REVIEW** DCP Case No. 84704

INTRODUCTION

This matter came before the Department of Commerce ("Department") upon a request for agency review by Petitioners Tub City, LLC, aka Tub City Spas, LLC; Spa Co-Op of Utah, LLC; Deborah Ann Lambert aka Deborah Devoe (hereafter "Lambert"),[1] challenging the Order of Adjudication of the Division of Consumer Protection ("Division") issued on January 19, 2016, which concluded that Petitioners violated the Utah Consumer Sales Practices Act ("UCSPA").

STATUTES OR RULES PERMITTING OR REQUIRING REVIEW

Agency review of the Division's decision is conducted pursuant to Utah Code Annotated, Section 63G-4-301, and Utah Administrative Code, R151-4-901 *et seq.*

[1] The Division record indicates other spellings of Devoe, including De Vos, DeVos, DeVo.

ISSUES REVIEWED

1. Whether Petitioners failed to establish that under the applicable law, Ms. Lambert could not be found personally liable and jointly and severally liable for UCSPA violations.

2. Whether the fine assessed against Petitioners should be modified to an amount that is proportional to the gravity of Petitioners' offense.

FINDINGS OF FACT

1. On May 13, 2015, the Division issued an administrative citation against Petitioners for violations of the UCSPA.

2. Tub City and Spa Co-op of Utah are expired or delinquent limited liability companies. Ms. Lambert was the manager, owner and/or registered agent for Tub City and Spa Co-op. The Citation named Ms. Lambert individually and as an officer, director, manager, agency and/or owner of the Tub City and Spa Co-op.

3. The Division issued amended citations on June 26, 2015, August 19, 2015 and December 14, 2015.

4. The Third Amended Citation alleged that that Tub City (a) misrepresented the standard, quality, grade, style or model of hot tubs and accessories that were sold; (b) failed to ship or furnish the goods or services in a timely manner; (c) disclaimed the existence of a warranty or failed to honor warranties; (d) failed to provide refunds to consumers, and (e) violated the Division's New or Used Rule.

5. Pursuant to Tub City's request, a hearing was held before the Division Hearing Officer in January 2016.

6. On January 19, 2016, the Division Director adopted the Hearing Officer's Findings of Fact, Conclusions of Law and Recommended Order, concluding that Petitioners violated the UCSPA, issuing a cease and desist order, and assessing administrative fines as follows: $50,000.00 jointly and severally against Tub City and Ms. Lambert for 20 violations, and $5,000.00 jointly and severally against Spa Co-op and Ms. Lambert for two violations.

7. On February 18, 2016, Petitioners filed a request for agency review. Petitioners subsequently filed the hearing transcript; they filed their Memorandum in Support of Agency Review ("Petitioners' Memorandum") on November 7, 2016.

8. The Division filed its memorandum in Opposition to Agency Review on December 7, 2016.

9. Petitioners did not file a reply memorandum. However, on January 5, 2016, Petitioners' counsel sent an electronic mail to the administrative law judge assigned to this agency review matter and to the Division's counsel as follows:

> The question of Deborah DeVos's liability was thoroughly argued before the original judge. My recollection was that the entire second day of the hearing was devoted to the issue, and the intelligible portions of the transcript bear that out. A look at the transcript shows that these items were argued on pages 254-255, and again starting at page 261 where the second day of the hearing starts. Hernandez v. Baker specifically was emailed to Judge Soderberg and to the division before the hearing on January 8. The email where that occurred is attached.
>
> If there are still questions about whether issues were preserved, Tub City and Ms. DeVos would ask for an opportunity to brief the preservation question. Other than that, Tub City is prepared to submit on the filings.

Electronic mail dated January 5, 2017.

10. As discussed in detail below, Petitioners have failed to properly challenge the Division's findings of fact, which are therefore adopted as conclusive and

incorporated herein. For ease of reference, the Hearing Officer's findings of fact included findings that Ms. Lambert was personally involved with the sale of hot tubs to the individual consumers named in the Citation.

11. A brief review of the record indicates that the consumers identified in the Citation paid a total of $6,650.00 to Spa Co-op and a total of $23,913.11 to Tub City. The resulting situation for each consumer appears to be as follows:

Consumer	Entity	Cost	Result
Farnsworth	Spa Co-Op	2,800	Tub returned to Petitioners for repair
Sringham	Spa Co-Op	3,850	Crack in fiberglass never repaired
TOTAL Spa Co-op		**$6,650.00**	
Stock	Tub City	3,000	Missing stairs, pillows, cover lift, and correct cover.
Owens	Tub City	2,650	Tub not functioning - Petitioners did not make repairs
Lehman	Tub City	1,800	Tub not functioning - Petitioners did not make repairs – missing pillows, color changing light and cover
Moyer	Tub City	3,200	Some repairs made by Petitioner but tub still not functioning
Torgerson	Tub City	3,000	Some repairs made by Petitioner but tub still not functioning
Hargraves	Tub City	1,000	Tub not functioning - Petitioners did not make repairs
Hair	Tub City	1,750	Missing correct tub cover
Anderson	Tub City	1,675	Tub not functioning - Petitioners did not make repairs – missing correct tub cover
Larsen	Tub City	2,000	Tub not functioning - Petitioners did not make repairs – missing correct cover, pillows
Reed	Tub City	1,725	Tub never completed or delivered to Reed
Swaner	Tub City	2,113.11	Tub not functioning - Petitioners did not make repairs
TOTAL Tub City		**$23,913.11**	

CONCLUSIONS OF LAW

1. The standards for agency review within the Department of Commerce correspond to those established by the Utah Administrative Procedures Act ("UAPA"), Utah Code Annotated Section 63G-4-403(4) and Utah Admin. Code R151-4-905.

2. The Executive Director may grant relief if she determines that the Division's action is "based upon a determination of fact, made or implied by the agency, that is not supported by substantial evidence when viewed in light of the whole record." Utah Code Ann. §63G-4-403(4)(g). A party challenging the Division's findings of fact must marshal all of the evidence supporting the findings and show that despite the supporting facts the findings are not supported by substantial evidence when considering the conflicting or contradictory evidence. *Uintah County v. Department of Workforce Servs.*, 2014 UT App 44, ¶ 5, 320 P.3d 1103; Utah Admin. Code R151-4-902(3).

3. The Executive Director applies the correction-of-error standard when reviewing the Division's interpretation of general questions of law, granting no deference to the Division's decisions. *Associated Gen. Contrs. v. Bd. of Oil, Gas & Mining*, 2001 UT 112, ¶ 18, 38 P.3d 291. However, agency decisions that apply the law to facts are entitled to discretion and are only subject to review to assure that they fall within the limits of reasonableness and rationality. *Allen v. Dep't of Workforce Servs.*, 2005 UT App 186, ¶ 6, 112 P.3d 1238 (citations omitted).

A. Applicable Law

4. Utah Code Ann. §13-2-5(3) gives the Division Director, "authority to take administrative and judicial action against persons in violation of the division rules and the laws administered and enforced by it, including the issuance of cease and desist orders."

The UCSPA contains a list of prohibited deceptive acts or practices under Utah Code Ann. §13-11-4, and authorizes the Division to adopt "substantive rules that prohibit with specificity acts or practices that violate Section 13-11-4 and appropriate procedural rules." Subsection 13-11-8(2). The Division is required to construe the UCSPA liberally to promote certain policies including the protection of consumers from suppliers who commit deceptive and unconscionable sales practices. Subsection 13-11-2(2).

5. Under the UCSPA, a supplier is defined as "a seller, lessor, assignor, offeror, broker, or other person who regularly solicits, engages in, or enforces consumer transactions, whether or not he deals directly with the consumer." Subsection 13-11-3(6), emphasis added. A supplier commits a deceptive act or practice if the supplier knowingly or intentionally "indicates that the subject of a consumer transaction has sponsorship, approval, performance characteristics, accessories, uses, or benefits, if it has not,"[2] or "indicates that the subject of a consumer transaction is of a particular standard quality, grade, style or model, if it is not."[3] A supplier engages in a deceptive act or practice if he knowingly or intentionally:

> (1) after receipt of payment for goods or services, fails to ship the goods or furnish the services within the time advertised or otherwise represented or if no specific time is advertised or represented, fails to ship the goods or furnish the services within 30 days, unless within the applicable time period the supplier provides the buyer with the option to:
> (i) cancel the sales agreement and receive a refund of all previous payments to the supplier if the refund is mailed or delivered to the buyer within 10 business days after the day on which the seller receives written notification from the buyer of the buyer's intent to cancel the sales agreement and receive the refund, or
> (ii) extend the shipping date to a specific date proposed by the supplier.

Subsection 13-11-4(2)(l). In addition, a supplier engages in a deceptive act or practice if

[2] Utah Code Ann. §13-11-4(2)(a).
[3] Subsection 13-11-4(2)(b).

he knowingly or intentionally:

> (j)(i) indicates that a consumer transaction involves or does not involve a warranty, a disclaimer of warranties, particular warranty terms, or other right, remedies, or obligations, if the representation is false; or
> (ii) fails to honor a warranty or a particular warranty term.

Subsection 13-11-4(2)(j).

6. Moreover, Division rules make the following conduct a deceptive act or practice:

> Except as provided in Section 7c and d of this rule, it shall be a deceptive act or practice in connection with a consumer transaction for a supplier to represent, directly or indirectly, that an item of consumer commodity, or that any part of an item of consumer commodity, is new or unused when such is not the fact, or to misrepresent the extent of previous use thereof, or to fail to make clear and conspicuous disclosures, prior to time of offer, to the consumer or prospective consumer that an item of consumer commodity has been used.

Utah Admin. Code R152-11-7.

B. Division's Findings of Fact Accepted as Conclusive

7. Petitioners fail to establish that Division findings are not supported by substantial evidence. The Division's Citation alleged 29 counts of UCSPA and Division Rule violations; the Division requested $72,500.00 in administrative fines. The Hearing Officer upheld all but five counts and recommended an administrative fine totaling $55,000.00, which was adopted by the Division Director. It was held that Ms. Lambert was a supplier under the UCSPA and was therefore jointly and severally liable for the fines assessed against Spa Co-op and Tub City.

8. Petitioners have not identified any specific findings of fact that they wish to challenge. They also fail to cite the Division record and thus fail to marshal the evidence in support of the Division's findings of fact as required by Subsection R151-4-

902(3). Petitioners challenge the conclusion that Ms. Lambert is personally liable for violations of the UCSPA, maintaining that she acted only on behalf of Spa Co-op and Tub City, which entities were the contracting parties and the sellers. Petitioners' Memorandum, pp. 5-6. Petitioners further argue that the administrative fines assessed are excessive and constitute a violation of the Eighth Amendment. *Id.*, pp. 1-5. Because Petitioners have not identified any findings they challenge and have not met the marshaling requirement, and because the Presiding Officer is entitled to judge the credibility of all witnesses, weigh the testimony of witnesses, and draw reasonable inferences from their testimony,[4] the Division's findings of fact are adopted and incorporated herein.

C. Personal Liability

9. Petitioners have failed to establish that Ms. Lambert cannot be held jointly and severally liable for UCSPA violations. Although Petitioners have not cited to the Division record to indicate where they raised the issue of Ms. Lambert's liability, a review of the record indicates that the issue was raised to the Presiding Officer and the Presiding Officer ruled on Ms. Lambert's personal liability. Therefore, the issue was preserved for agency review.

10. Petitioners rely on provisions in the Utah Revised Limited Liability Company Act (Section 48-2c-601) and the Utah Revised Uniform Limited Liability Company Act (Section 48-3a-304) which deal with the liability of organizers, members, managers and employees, but as noted by the Division, Petitioners overlook the UCSPA

[4] *State v. Waldron*, 2002 UT App 175, para. 16, 51 P.3d 21.

provisions under which Ms. Lambert is a supplier, a person[5] who regularly solicited, engaged in or enforced consumer transactions such as the sale of hot tubs. Subsection 13-11-3(6). The record indicates that Ms. Lambert was personally involved with each consumer transaction identified in the Citation. The Division Citation properly named Ms. Lambert both individually and as officer, director, manager, agent and/or owner of Spa Co-Op and Tub City. Contrary to Petitioners' position, no allegations of piercing the corporate veil are necessary in the Citation as no legal authority has been presented to establish that the corporate shield doctrine is applicable to protect a person who has violated the UCSPA. The Presiding Officer correctly interpreted the language of the UCSPA to conclude that the UCSPA specifically applies to the allegations in this case. *Associated Gen. Contrs.* ¶18.

11. The Division is required to construe the UCSPA to promote certain policies, including protecting consumers from suppliers who commit deceptive and unconscionable sales practices. Subsection 13-11-2(2). Under Subsection 13-11-3(6), Ms. Lambert's activities in her role as officer, director, agent, and/or owner of Spa Co-op and Tub City were sufficient to support a conclusion that she engaged in or enforced consumer transactions. Moreover, the evidence indicates that the consumers dealt directly with Ms. Lambert in purchasing hot tubs and in requesting delivery, repairs, missing accessories, refunds, etc. Therefore, the Presiding Officer reasonably concluded that Ms. Lambert was personally liable.

[5] A "person" includes an "individual, corporation, government . . . or any other legal entity." Subsection 13-11-3(5).

D. Fine Amount is Excessive in Relation to the Gravity of the Offense

12. Petitioners argue that the assessed fines were unconstitutionally excessive and do not bear a reasonable relationship to the gravity of the offense. The Eighth Amendment states "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted. U.S. Constitution, Amendment VIII. In *United States v. Bajakajian,* 524 U.S. 321, 334 (1998), the Supreme Court held that the amount of a forfeiture must bear some relationship to the gravity of the offense. The Utah Court of Appeals has also stated that a fine violates the Eighth Amendment if it is "grossly disproportional to the gravity of a defendant's offense." *Brent Brown Dealerships v. Tax Comm'n, Motor Vehicle Enforcement Div.*, 2006 UT App. 261, 139 P.3d 296, ¶16. A fine assessed should be compared to the maximum that could have been levied; the extent of the unlawful activity and amount of illegal gain should be considered in relation to the penalty and the harm caused. *Id.,* at ¶ 20.

13. Although the Division has the power to assess fines up to $2,500.00 for each UCSPA violation under Subsection 13-11-17(4)(b), it is not sufficient to simply consider the maximum fine that can be assessed for UCSPA violations. Rather, under *Brown* and *Bajakajian*, it is also important to consider the extent of the unlawful activity, the amount of illegal gain, and the harm caused.

14. The maximum fine that the Division could assess for two violations involving Spa Co-op is $5,000.00; the maximum that could be assessed as to violations involving Tub City is $50,000.00. As noted in the Findings of Fact section above, many of the consumers identified in the Citation did not receive a hot tub, returned their hot tub to Petitioners for repairs, or have the hot tub in their possession but never received the

repairs needed to make their hot tub functional. As to Spa Co-op, a consumer paid $2,800.00 for a tub he never received, and another had a tub that cost $3,850.00 with cracked fiberglass that was never repaired. As to Tub City, the consumers who testified that their hot tub is not functional paid a total of $19,163.11 for their hot tubs.[6] Two remaining consumers, who paid a total of $4,750.00 for their hot tubs, testified that they did not receive accessories such as pillows, cover lifts, and the correct hot tub cover. All consumers testified and provided documentation of numerous, repeated calls, emails and visits to Petitioners' place of business in attempts to get their hot tubs serviced and to receive the bargained-for accessories. Such trouble and inconvenience suffered by the consumers while they attempted to obtain repairs and missing products is also considered as part of their loss.

15. Petitioners maintain that they had employees or independent contractors who mispresented that they provided repairs to the consumers when they in fact had not done so, but ultimately, Petitioners are responsible for the work of their employees and independent contractors. Petitioners also claim that they made little profit from their sales of hot tubs to the consumers and that it would be impossible for Petitioners to pay the assessed fines. However, Petitioners have failed to marshal the evidence in the record to establish the amounts of any profits to Petitioners or any firm amounts by which administrative fines against them could be reduced for such things as any third-party sale of a hot tub by a consumer. Without such evidence, therefore, it is reasonable to assume that the Spa Co-op consumers suffered a loss of approximately $3,500 for a hot tub that was no longer in the consumer's possession and another hot tub with a crack in the fiberglass. It is reasonable to assume that the Tub City consumers suffered a loss of

[6] Several of these consumers also testified that they did not receive certain accessories.

approximately $20,000.00 for hot tubs that are not functional, those missing proper accessories, and the consumers' lost time and inconvenience in dealing with these problems. An additional penalty of $500.00 is assessed for the Spa Co-op transactions and $2,000.00 for the Tub City transactions as a deterrent. Therefore, the total fine assessed against Spa Co-op is $4,000; the total fine assessed against Tub City is $22,000.00. As Ms. Lambert is a supplier, she is jointly and severally liable for the total fines assessed against Spa Co-op and Tub City.

E. Summary

16. In sum, Petitioners have failed to establish that Ms. Lambert could not be held personally liable under the UCSPA. The Division's decision that Petitioners violated the UCSPA is therefore affirmed. However, the administrative fines assessed against Petitioners are modified.[7]

[7] The Division's request that the matter be dismissed on the grounds that Petitioners' brief fails to meet the rules governing briefs on agency review (Opposition to Agency Review, pp. 4-5) is denied. A motion to dismiss may not be brought on an argument that the pleading or memorandum is insufficient. Subsection R151-4-302(2)(b)(i).

ORDER ON REVIEW

For the foregoing reasons, the Division of Consumer Protection's Order of Adjudication is affirmed, but the fines assessed are modified as stated herein.

NOTICE OF RIGHT TO APPEAL

Judicial Review of this Order may be obtained by filing a Petition for Review with the District Court within 30 days after the issuance of this Order. Any Petition for Review must comply with the requirements of Sections 63G-4-401 and 63G-4-402, Utah Code Annotated. In the alternative, but not required in order to exhaust administrative remedies, reconsideration may be requested pursuant to *Bourgeous v. Department of Commerce, et al.*, 981 P.2d 414 (Utah App. 1999) within 20 days after the date of this Order pursuant to Section 63G-4-302.

Dated this 27th day of February, 2017.

Francine A. Giani, Executive Director
Utah Department of Commerce

CERTIFICATE OF MAILING

I certify that on the 27th day of February, 2017, the undersigned mailed a true and correct copy of the foregoing Findings of Fact, Conclusions of Law and Order on Review by certified and first class mail to:

MATTHEW G KOYLE ESQ
2661 WASHINGTON BLVD STE 103
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and caused a copy to be electronically mailed to:

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Julie Price
Administrative Assistant

EXHIBIT

B

The Order of the Court is stated below:
Dated: June 28, 2018 03:41:03 PM
/s/ WILLIAM K KENDALL
District Court Judge

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THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

TUB CITY, LLC, SPA CO-OP of UTAH, LLC, and DEBORAH ANN LAMBERT, Petitioners. vs. UTAH DIVISION OF CONSUMER PROTECTION, and THE UTAH DEPARTMENT OF COMMERCE, Respondents.	JUDGMENT Civil No. 170902052 Judge William K. Kendall

This matter came before the Court on a petition for judicial review filed by Tub City, LLC, Spa Co-Op of Utah, LLC, and Deborah Ann Lambert, seeking judicial review of an informal administrative proceeding before the before the Division of Consumer Protection ("Division") of the Utah Department of Commerce ("Department"). On June 11, 2018, the Court

affirmed the result of the administrative proceeding as to the amounts of administrative fines imposed, and as to personal liability for Ms. Lambert. The Court hereby enters Judgment as follows:

ORDER

The Department's Order on Review, including the Division's Order as incorporated, is affirmed as to Tub City, LLC, Spa Co-op of Utah, LLC, and Deborah Ann Lambert.

Deborah Ann Lambert shall cease and desist from all acts or practices in violation of the Utah Consumer Sales Practices Act ("CSPA").

Tub City, LLC, and Deborah Ann Lambert shall pay to the Division an administrative fine of $22,000 for violations of the CSPA, which fine is imposed jointly and severally.

Spa Co-op of Utah, LLC, and Deborah Ann Lambert shall pay to the Division an administrative fine of $4,000 for violations of the CSPA, which fine is imposed jointly and severally.

SEAN REYES
ATTORNEY GENERAL

/s/ Kevin McLean
Kevin McLean
Assistant Attorney General

/s/ Matthew G. Koyle
matthew@koylelaw.com
Attorney for Petitioners
Signed by Kevin McLean with permission of Matthew G. Koyle

****Executed and entered by the Court as indicated by the date and seal at the top of the first page****

----------**END OF ORDER**----------

CERTIFICATE OF MAILING

I certify that on the 27th day of June 2018 I filed the foregoing with the court's electronic filing system, resulting in electronic service to:

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EXHIBIT

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THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

TUB CITY, LLC, SPA CO-OP of UTAH, LLC, and DEBORAH ANN LAMBERT, Petitioners, vs. UTAH DIVISION OF CONSUMER PROTECTION, and THE UTAH DEPARTMENT OF COMMERCE, Respondents.	**TRIAL MEMORANDUM** Civil Case No: 170902052 AA Judge: William K Kendall

The Division of Consumer Protection ("Division") cited Tub City, LLC., Spa Co-op of Utah, LLC (jointly "Tub City"), and Deborah Ann Lambert ("Ms. Lambert") for violating the

Utah Consumer Sales Practices Act in connection with Tub City's spa business.[1] At the conclusion of the administrative process, the Department of Commerce ("the Department") fined Tub City and Ms. Lambert $26,000, jointly and severally. Tub City and Ms. Lambert petitioned for review in this Court. The Division and the Department moved in limine for an order limiting the scope of the trial, which was granted on April 2, 2018. Review by trial de novo in this case is limited to two legal issues: is Ms. Lambert personally liable, and, is the fine constitutional?

In the administrative proceeding, an administrative law judge ("the ALJ") issued Findings of Fact and Conclusions of Law, which were adopted by the Division and the Department. The Findings of Fact from that decision are referred to here as the "2016 Findings," attached as Exhibit A. Neither Tub City nor Ms. Lambert preserved any objection to the 2016 Findings, and those Findings are conclusively established for purposes of this proceeding. *Friends of Great Salt Lake v. Utah Department of Natural Resources*, 2017 UT 15, 392 P.3d 291. The 2016 Findings constitute the predicate facts for this Court's consideration of the two remaining issues.

1. Ms. Lambert is personally liable under the plain language of the CSPA.

The Utah Consumer Sales Practices Act ("CSPA"), Utah Code § 13-11-1, *et seq.*, imposes liability on suppliers who engage in deceptive acts or practices. Ms. Lambert was a supplier as defined by the CSPA and is therefore personally liable for the fines imposed. She is also personally liable because she was personally involved in the violations at issue.

[1] "Tub City" herein refers to Tub City and Spa Co-Op, unless context dictates otherwise. At the time of the citation and administrative hearing, Ms. Lambert was known as Deborah Devoe. For purposes of consistency, she is referred to in this memorandum as Ms. Lambert.

Section 13-11-4 sets out the type of conduct that is considered deceptive in a consumer transaction. Among other things, a supplier commits a deceptive act or practice if the supplier knowingly or intentionally indicates that the subject of a consumer transaction has characteristics it does not have, or indicates that the subject of a consumer transaction is of a particular standard, quality, grade, style, or model, if it is not. Utah Code §13-11-4(2)(a)-(b). A supplier commits a deceptive act or practice if, after receipt of payment for goods or services, the supplier fails to furnish the goods or services within a specified time. Utah Code § 13-11-4(2)(l). A supplier commits a deceptive act or practice if it does not honor a warranty it has contracted to provide. Utah Code § 13-11-4(2)(j). It is deceptive for a supplier to provide used products when it has indicated that the products were new. Utah Code § 13-11-4(2)(e); Utah Admin. Code R152-11-7(A). A supplier commits a deceptive act or practice if the supplier fails to provide a refund after a valid request for a refund has been made. Utah Admin. Code R152-11-10(C).

The ALJ found that Tub City and Ms. Lambert violated each of these sections of the CSPA and the rules promulgated under it. The fines arise from those violations.

Ms. Lambert is personally liable because she was a supplier. The CSPA imposes liability on "suppliers" and defines a "supplier" to mean "a seller, lessor, assignor, offeror, broker, or other person who regularly solicits, engages in, or enforces consumer transactions, whether or not he deals directly with the consumer." Utah Code §§ 13-11-3(6), 13-11-4(1)-(2). Ms. Lambert regularly solicited, engaged in, or enforced consumer transactions. Though not a requirement, she also dealt directly with each of the consumers, which supports the ALJ's 2016 Findings. Her conduct is set out in the Findings of Fact and Conclusions of Law, which are attached as Exhibit

A and incorporated by reference. The ALJ found that Ms. Lambert was personally involved in each of the consumer transactions out of which a fine arose.

1.1. Ms Lambert personally participated in each transaction at issue.

1.1.1. Tye Farnsworth

Mr. Farnsworth bought a hot tub from Tub City, and the transaction included a warranty. 2016 Findings 2 and 5. The hot tub did not heat properly, Mr. Farnsworth contacted Tub City and Ms. Lambert to request service and repairs, but the hot tub was never repaired. 2016 Findings 3. Tub City and Ms. Lambert failed to honor the warranty issued to Mr. Farnsworth. 2016 Findings 4. Mr. Farnsworth bargained with Tub City and Ms. Lambert for a hot tub that had a used exterior, but all-new parts inside the tub, but did not receive a hot tub with new parts. 2016 Findings 5. "I find that Deborah [Lambert] was personally involved in the sale of the hot tub. Mr. Farnsworth testified that he bought the hot tub from Ms. [Lambert] and that he communicated with her regarding the warranty and repairs." 2016 Findings 7.

1.1.2. Jill Stringham

Ms. Stringham bought a hot tub from Tub City and Ms. Lambert. 2016 Findings 8. The parties bargained that a crack in the hot tub's fiberglass would be repaired and a new filter cover provided. Ms. Lambert personally promised that the crack would be repaired and the new filter cover be provided. Ms. Stringham provided text messages showing that she communicated with Ms. Lambert about the crack in the fiberglass, with Ms. Lambert promising to have someone come repair it. 2016 Findings 9. Ms. Lambert was personally involved in the sale of Ms. Stringham's hot tub, as well as the failure to fix the fiberglass and provide the filter cover. 2016 Findings 10.

1.1.3. Wendy Stock

Ms. Stock bought a hot tub from Tub City. Ms. Lambert told Ms. Stock she would receive a new gray cover, a cover lift, stairs, and pillows. 2016 Findings 11. Tub City did not provide those items. Text messages show communication between Ms. Stock and Ms. Lambert about these missing items. 2016 Findings 12. Ms. Stock made a valid request for a refund. 2016 Findings 13. Ms. Lambert was personally involved in the sale of the hot tub, and in the failure to provide Ms. Stock with the items that she ordered. 2016 Findings 14.

1.1.4. Terri Owens

Ms. Owens purchased a hot tub from Tub City and Ms. Lambert. 2016 Findings 15. The contract for the hot tub included a warranty. 2016 Findings 16. Tub City and Ms. Lambert failed to honor the warranty. The hot tub stopped working shortly after it was delivered, and Ms. Owens immediately contacted Ms. Lambert to repair it. The hot tub was repaired but broke again right away. As evidenced by text messages, Ms. Owens requested that Tub City and Ms. Lambert repair the hot tub, but the tub was not repaired. 2016 Findings 19. Ms. Lambert was personally involved in the sale of the hot tub, and in the failure to honor the warranty. 2016 Findings 20.

1.1.5. Keri Lehman

Ms. Lehman bought a hot tub from Tub City and Ms. Lambert. 2016 Findings 21. Ms. Lehman and Ms. Lambert agreed that a pillow and color-changing light would be provided, as well as a new cover. 2016 Findings 22. When the hot tub arrived, it had a used cover, and Ms. Lambert stated the new cover was on order and would be provided as soon as possible. These communications are found in text messages, introduced at the administrative proceeding. 2016

Findings 23. The hot tub was not functioning properly, and Ms. Lehman made repeated requests for repairs and service. The hot tub was not repaired. 2016 Findings 24. Ms. Lehman was told that her hot tub had a used shell, but new parts. 2016 Findings 25. It did not contain new parts. 2016 Findings 26. Ms. Lambert was personally involved in the sale of the hot tub, and in the failures to repair it and deliver the promised items. 2016 Findings 28.

1.1.6. Blake Moyer

Mr. Moyer bought a hot tub from Tub City and Ms. Lambert. It was covered by a one-year warranty. 2016 Findings 29. It stopped working shortly after delivery but was never successfully repaired. Tub City and Ms. Lambert stopped responding to Mr. Moyer's communications. 2016 Findings 30. Ultimately, Mr. Moyer repaired the hot tub himself, by hiring an electrician. 2016 Findings 32. Ms. Lambert testified that this voided the warranty, but the ALJ found Mr. Moyer's testimony and timeline more persuasive: Mr. Moyer ultimately repaired the hot tub only after Tub City stopped responding to his complaints. 2016 Findings 33. Ms. Lambert was personally involved in the sale of Mr. Moyer's hot tub and in failing to perform the repairs. 2016 Findings 34.

1.1.7. Rick Torgerson

Mr. Torgerson bought a hot tub from Tub City and Ms. Lambert, and the purchase included a one-year warranty. 2016 Findings 35. It did not function properly. The first and second time Mr. Torgerson requested repairs, Tub City performed them. But, the third time Mr. Torgerson contacted Tub City and Ms. Lambert to request service because of leaks, the repairs were never made. 2016 Findings 37. Ms. Lambert was personally involved with the sale of the hot tub and the failure to repair it. 2016 Findings 38.

1.1.8. Scott Hargraves

Mr. Hargraves purchased a hot tub from Tub City and Ms. Lambert. 2016 Findings 39. The hot tub was covered by a one-year warranty. Tub City and Ms. Lambert agreed that Mr. Hargraves would receive a new cover as part of the purchase. 2016 Findings 40. The hot tub did not work as promised, and Mr. Hargraves contacted Tub City and Ms. Lambert to request repairs. Repairs were never performed. 2016 Findings 41. The cover which was delivered was used, and in poor condition. Ms. Lambert was present when the hot tub was delivered and told Mr. Hargraves that the cover was at another store, and he would get it the next day. Cassie, a Tub City employee, later told Mr. Hargraves the cover was never ordered. 2016 Findings 42. Mr. Hargraves requested a refund for the hot tub and cover but did not receive it. 2016 Findings 43. Ms. Lambert was personally involved in the sale of the hot tub, the failure to deliver the new cover, and the failure to repair the hot tub. 2016 Findings 44.

1.1.9. Traci Hair

Ms. Hair purchased a hot tub from Tub City and Ms. Lambert. 2016 Findings 45. Ms. Lambert agreed to provide a gray cover and a cover lift. 2016 Findings 46. When the hot tub was delivered it had a brown cover and no cover lift. 2016 Findings 47. Ms. Lambert was personally involved in the sale of the hot tub and the failure to provide Ms. Hair with the items ordered and paid for. 2016 Findings 49.

1.1.10. Jeremy Anderson

Mr. Anderson bought a hot tub from Tub City and Ms. Lambert. It had a one-year warranty. 2016 Findings 50. Ms. Lambert agreed to provide a new cover. 2016 Findings 51. The cover delivered was too large. Ms. Lambert testified that, while the cover was the wrong size,

she believed Mr. Anderson was being too picky, as the cover was functional. 2016 Findings 52. Mr. Anderson requested services for leaks. Some leaks were repaired, but the leaks kept occurring. Tub City and Ms. Lambert stopped responding to Mr. Anderson's repair requests. 2016 Findings 53.

1.1.11. Glenn Todd Larsen

Mr. Larsen purchased a hot tub from Tub City and Ms. Lambert and the hot tub had a one-year warranty. 2016 Findings 54. Mr. Larsen was supposed to receive pillows and a new cover. 2016 Findings 55. He did not receive the pillows or a new cover. 2016 Findings 56. Instead, he received a used cover in poor condition. Ms. Lambert told him the used cover was temporary and that he would receive his pillows and new cover within ten days, but he never received them. 2016 Findings 57. Some of the parts Mr. Larsen received were used. 2016 Findings 59. Mr. Larsen texted Ms. Lambert several times to get the hot tub repaired, but repairs were not made. Months of text messages were submitted to the ALJ. Ms. Lambert failed to schedule the repairs. 2016 Findings 60. Ms. Lambert was personally involved in the sale of the hot tub, the failure to provide Mr. Larsen with promised equipment and the failure to repair the hot tub while it was under warranty. 2016 Findings 61.

1.1.12. Nancy Reed

Ms. Reed paid a deposit for a hot tub, but the hot tub was not completed and Ms. Reed requested a refund of her deposit. She never received a refund. 2016 Findings 62-63. Ms. Lambert testified that she had agreed with Ms. Reed to refund the money as soon as the hot tub was sold to someone else. 2016 Findings 64. Ms. Lambert was personally involved with the deposit put down by Ms. Reed, and the failure to return the deposit. 2016 Findings 66.

1.1.13. Paul Swaner

Ms. Swaner contracted with Tub City to refurbish his existing hot tub. The contract included a one-year warranty. 2016 Findings 67. When completed, it did not function properly, and Mr. Swaner contacted Ms. Lambert to request repairs. The repairs were not provided. 2016 Findings 68 – 70. Ms. Lambert was personally involved in the transaction to refurbish Mr. Swaner's hot tub and the failure to provide service and repairs. 2016 Findings 71.

1.2. Federal law and principles in consumer protection law impose personal liability.

These 2016 Findings show that Ms. Lambert regularly solicited consumer transactions. She personally sold goods and services to consumers, which is the essence of solicitation. She engaged in consumer transactions. She personally spoke with each of the consumers. And, she enforced consumer transactions. She personally was responsible for honoring warranties, arranging for repairs, and processing refunds. By statutory definition, she was a supplier, and when she and Tub City violated the statute, she became personally liable.

Ms. Lambert argued below that Tub City was the contracting party and that she is not personally liable for its obligations. Ms. Lambert is liable, not for the conduct of Tub City, but for her own conduct. Her liability is primary, not derivative.

The Utah State Legislature set out the purposes of the CSPA and guidelines for interpreting it. Utah Code § 13-11-2. It is to be construed liberally to protect consumers from suppliers who commit deceptive and unconscionable sales practices. *Id.* It is to be interpreted consistently with the policies of the Federal Trade Commission Act ("FTCA") relating to consumer protection. *Id.* And it is to "make uniform the law" with respect to consumer protection among those states which enact similar laws. *Id.*

It is well-settled, both under the FTCA and in cases from other states, that an individual who participates in a violation of consumer protection laws is subject to personal liability for those violations. A corporation or limited liability company acts through its controlling officers or members. The CSPA imposes liability on individuals who commit deceptive acts or practices, whether or not they act through a business entity. The fact that persons acting in violation of the law are acting for a corporation may also make the corporation liable under the doctrine of respondeat superior, but "[i]t does not relieve the individuals of their responsibility." *Mead Johnson & Co. v. Baby's Formula Service, Inc.*, 402 F.2d 19, 23 (5th Cir. 1968). Ms. Lambert is liable based on *her* violations of the CSPA, not as a function of Tub City's violations. Personal liability in this case has nothing to do with piercing the corporate veil.

The Utah Supreme Court adopted these principles in *Armed Forces Ins. Exchange v. Harrison*, 2003 UT 14, ¶20, 70 P.3d 35. *Harrison* holds that a corporate officer cannot hide his or her own fraudulent acts behind the corporate veil. To permit an agent of a corporation, in carrying on its business, to inflict wrong and injuries upon others, and then shield himself from liability behind his vicarious character, would often both sanction and encourage the perpetration of flagrant and wanton injuries by agents of insolvent and irresponsible corporations. A defendant, attempting to hide behind the corporate entity, "would not exculpate himself by proving that he was acting as agent of a corporation; he would only additionally inculpate his corporate principal." *Id.*

A corporate officer may be liable under consumer protection statutes if she had direct personal participation in or personally authorized the conduct found to have violated the statute and was not merely tangentially involved. "Individuals who directly (and here, knowingly and

willfully) violate the [Telephone Consumer Protection Act] should not escape liability solely because they are corporate officers." *Texas v. American Blastfax, Inc.*, 164 F.Supp.2d 892, 898 (W.D. Tex. 2001) (parenthetical in original, referring to the mental state expressly required under the relevant statute).

Under the FTCA, relief against an individual is justified if "the individual participated directly in the business entity's deceptive acts or practices *or had the authority to control* such acts or practices." *FTC v. Freecom Communications, Inc.*, 401 F.3d 1192, 1204 (10th Cir. 2005) (emphasis in original). The CSPA should be interpreted consistently with the FTCA. Ms. Lambert participated directly in Tub City's deceptive acts or practices and is liable.

1.3. Other state consumer protection laws consistently impose personal liability.

Many other states have interpreted consumer protection statutes to encompass personal liability using essentially this same test. The Court of Appeals of Ohio, for example, recognized that generally, employees and proprietors of corporations and limited liability companies are not answerable for the debts or responsibilities of the company. In certain contexts, however, individuals can be held to answer for the actions of the company, and violations of the CSPA offer such a context. Ohio's version of the CSPA, like Utah's, and like the FTCA, is designed to prevent deceptive conduct. "Where officers or shareholders of a company take part in or direct the actions of others that constitute a violation of the CSPA, that person may be held individually liable." *Garber v. STS Concrete Co., L.L.C.*, 991 N.E.2d 1225, 1233 (Ohio App. 2013). In Ohio:

> an officer of a corporation is individually liable for each violation of the CSPA in which he personally participates. *Stultz v. Artistic Pools, Inc.*, Summit App. No. C.A. 20189, 2001-Ohio-1420 [2001 WL 1219473], ¶ 4. Liability also exists for actions where "the officer took part in the commission of the act, specifically directed

> the particular act to be done, or participated or cooperated therein." *Grayson v. Cadillac Builders, Inc.* (Sept. 14, 1995), Cuyahoga App. No. 68551, 1995 Ohio App. LEXIS 3954, 1995 WL 546916, citing *State ex rel. Fisher v. Am. Courts, Inc.* (1994), 96 Ohio App.3d 297, 644 N.E.2d 1112. The officer's "liability flows not from his status as * * * an officer * * *, but from his personal actions in violating CSPA." *Inserra v. J.E.M. Bldg. Corp.* (Nov. 22, 2000), Medina App. No. 2973–M, 2000 Ohio App. LEXIS 5447 at *17, 2000 WL 1729480 [*5], citing *Sovel v. Richardson* (Nov. 15, 1995), Summit App. No. 17150, 1995 Ohio App. LEXIS 5076, 1995 WL 678558. This court noted that the CSPA "does not change the existing common law of tort, nor does it change the common law rule with respect to piercing the corporate veil. A corporate officer may not be held liable merely by virtue of his status as a corporate officer. It does, however, create a tort which imposes personal liability upon corporate officers for violations of the act performed by them in their corporate capacities." *Grayson*, 1995 Ohio App. LEXIS 3954 at *9, fn. 1, 1995 WL 546916 [*3, fn. 1]. *Burns v. Spitzer Mgmt.*, 190 Ohio App.3d 365, 2010-Ohio-5369, 941 N.E.2d 1256, ¶ 32 (8th Dist.).

Id., at 1233 – 4. *See also, Joseph General Contracting, Inc. v. Couto*, 317 Conn. 565 (2015) (adopting the test applied by the federal courts when interpreting the FTC Act to the Connecticut Unfair Trade Practices Act).

In Washington, if a corporate officer participates in wrongful conduct, or with knowledge approves the conduct, then the officer, as well as the corporation, is liable for the penalties under the Washington Consumer Protection Act. *Grayson v. Nordic Const. Co., Inc.*, 599 P.2d 1271. In Maryland, officers and agents of a corporation or limited liability company may be held personally liable for Consumer Protection Act violations when they direct, participate in, or cooperate in the prohibited conduct. *MaryCLE, LLC v. First Choice Internet, Inc.*, 166 Md.App. 481, 528 (2006). The Supreme Court of Wisconsin applied personal liability to a corporate employee under another consumer protection statute, the Wisconsin Home Improvement

Practices Act. *Stuart v. Wisflog's Showroom Gallery, Inc.*, 308 Wis.2d 103 (2008). "We hold that a corporate employee may be personally liable for acts he or she takes on behalf of the corporate entity that employs him or her, that violate the HIPA." *Id.*

The CSPA is to be construed to make Utah's law uniform with the laws of other states which enact similar laws. This Court should apply the reasoning of courts from other jurisdictions with respect to personal liability.

The 2016 Findings demonstrate that Ms. Lambert participated directly in Tub City's deceptive acts or practices. The ALJ found that, for each of the consumer transactions at issue in this case, Ms. Lambert was personally involved. She made representations to buyers about the quality of the hot tubs and ancillary products they bought. The hot tubs and other products did not live up to the representations she made. She personally fielded phone calls requesting warranty repairs and told consumers the repairs would be promptly and properly carried out. They were not. She personally promised refunds to unhappy consumers but did not cause the refunds to be made. Her conduct violated the CSPA and she is personally liable.

2. The fines imposed by the Department are appropriate.

The Division imposed administrative fines of $50,000 jointly and severally against Tub City and Ms. Lambert and of $5,000 jointly and severally against Spa Co-op and Ms. Lambert. Tub City and Ms. Lambert challenged the amount of the fines before the Department. The Department carefully considered the amount of the fines and reduced them. It reduced the fine against Spa Co-op to $4,000 and the fine against Tub City to $22,000. It held that Ms. Lambert was jointly and severally liable for both fines. These reduced fines are reasonable and constitutionally appropriate and should be affirmed.

Last year, the Utah Court of Appeals set out the standards for administrative fines in *Phillips v. Dep't of Commerce, Div. of Sec.*, 2017 UT App 84. The Eighth Amendment to the Constitution places upper limits on an administrative agency's power to impose a fine. "The touchstone of the constitutional inquiry under the Excessive Fine Clause is the principle of proportionality. The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish." *Id.* at ¶42 (citing *United States v. Bajakajian*, 524 U.S. 321, 334 (1998)). To determine proportionality, appellate courts "compare the amount of the forfeiture to the gravity of the defendant's offense" while keeping in mind two factors: 1) that judgments about the appropriate punishment for an offense belong in the first instance to the legislature; and 2) any judicial determination regarding the gravity of a particular criminal offense will be inherently imprecise. *Id.*

The Legislature authorized administrative fines of up to $2,500 for each violation of the CSPA. Utah Code § 13-11-17(4). The fines imposed by the Department are less than 50% of the authorized maximum. The facts bearing on the amount of the fines are contained in the Findings of Fact, Conclusions of Law and Order on Review signed by the Executive Director of the Department of Commerce, Francine A. Giani, on February 27, 2017 (the "2017 Findings"). The 2017 Findings are attached as Exhibit B.

The Executive Director engaged in a thorough analysis of the damages incurred by each consumer and the amount of the fines. A table of the thirteen consumers who were harmed by Tub City and Ms. Lambert is included on page 4 of the 2017 Findings. The table shows the cost of each hot tub and the nature of the violation. The cost of each hot tub ranged from $1,000 to $3,850. The total cost for the thirteen consumers exceeded $30,000. The table notes that for all

but one of the hot tubs, the tub was not functioning or was never completed. 2017 Findings, 11. Tub City and Ms. Lambert did not challenge the 2017 Findings. Given the magnitude of the loss and the fact that the products did not function as advertised, a fine of $26,000 is reasonable.

The violations occurred over a long period of time. Mr. Farnsworth purchased his hot tub in August 2012. Ms. Reed purchased her hot tub in April 2015. 2016 Findings 2 and 62. This demonstrates the persistence of the conduct. The conduct included misrepresentations to consumers. Tub City and Ms. Lambert told consumers that their hot tubs contained new parts when they did not. They told consumers they would repair their hot tubs but did not, and in some cases quit responding to repair requests. These were not mere technical violations of the CSPA.

Significant fines should be imposed to deter, not just Ms. Lambert and Tub City, but other suppliers. The CSPA and other consumer protection laws rely principally on self-regulation. Stiff penalties are necessary to encourage compliance.

In reducing the fines from $55,000 to $26,000, the Executive Director expressly considered the extent of the unlawful activity and the amount of illegal gain. See *Brent Brown Dealerships v. Tax Comm'n, Motor Vehicle Enf't Div.*, 2006 UT App 261, ¶ 21 (relevant factors in assessing the propriety of a fine include the harm and the ratio of the fine assessed to the statutory maximum fine). She noted that the consumers provided documentation of numerous, repeated calls, emails and visits to Tub City's place of business in attempts to get their hot tubs serviced and to receive the bargained-for accessories. Such trouble and inconvenience suffered by consumers while they attempted to obtain repairs and missing products was considered as part of their loss.

The Executive Director also noted that Tub City and Ms. Lambert failed to marshal evidence in support of their arguments that their profits were small or that the fine should be reduced for other reasons. After carefully weighing these factors, the Executive Director concluded that it is reasonable to assume that the Spa Co-op consumers suffered a loss of approximately $3,500 for a hot tub that was no longer in the consumer's possession and another hot tub with a crack in the fiberglass. It is reasonable to assume that the Tub City consumers suffered a loss of approximately $20,000 for hot tubs that are not functional, those missing proper accessories, and the consumers' lost time and inconvenience in dealing with these problems. She found it reasonable to impose an additional penalty of $500 for the Spa Co-op transactions and $2,000 for the Tub City transactions as a deterrent.

These fines are proportional to the gravity of the offense and should be upheld.

Respectfully submitted this 1st day of May, 2018.

SEAN REYES
ATTORNEY GENERAL

/s/ Robert G. Wing
Robert G. Wing
Assistant Attorney General

CERTIFICATE OF SERVICE

I, Kevin McLean, certify that on this 1st day of May 2018, I filed the foregoing with the court's electronic filing system, resulting in electronic service to the following, counsel for the petitioners:

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SEAN REYES
ATTORNEY GENERAL

/s/ Kevin McLean
Kevin McLean
Assistant Attorney General

Exhibit: A

DIVISION OF CONSUMER PROTECTION
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DEPARTMENT OF COMMERCE
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SALT LAKE CITY, UTAH 84114-6704
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BEFORE THE DIVISION OF CONSUMER PROTECTION
OF THE DEPARTMENT OF COMMERCE
OF THE STATE OF UTAH

IN THE MATTER OF: TUB CITY, LLC, also known as TUB CITY SPAS, LLC; SPA CO-OP OF UTAH, LLC; and DEBORAH ANN LAMBERT, also known as DEBORAH DEVOE, RESPONDENTS	**PROPOSED ORDER** **CASE NO.** DCP 84704

BY THE PRESIDING OFFICER:

On May 13, 2015, the Utah Division of Consumer Protection (the "Division") issued an Administrative Citation against Tub City, LLC, Spa Co-Op of Utah, LLC, and Deborah Ann Lambert (collectively, the "Respondents"). The exact relationship between Tub City and Spa Co-Op is not entirely clear, although evidence presented showed that they shared a location and owner, and operated the same types of business. A hearing was set, but then continued after the Division issued an Amended Citation on June 26, 2015, a Second Amended Citation on August 19, 2015, and a Third Amended Citation on December 14, 2015. The Division alleges that Respondents misrepresented the model or style of hot tubs or hot tub accessories, failed to deliver items to consumers in a timely manner, failed to deliver a hot tub in a timely manner, failed to honor warranties, delivered used items when new items were bargained for, and refused

to give refunds when valid requests for refunds were made. The Third Amended Citation imposes a $72,500 fine for 29 violations of the Consumer Sales Practices Act.

The matter was heard by the Presiding Officer in an informal hearing on January 7, 2016. Andrea Keith and Glen Minson were present on behalf of the Division, and Matthew Koyle was present on behalf of the Respondents.

The Presiding Officer has reviewed the Parties' evidence and arguments, and for the reasons stated below, finds that the Respondents violated the Consumer Sales Practices Act.

FINDINGS OF FACT

Evidentiary Standard

1. To sustain a citation, the Division must prove its case by substantial evidence. Utah Code Ann. § 13-2-6(3)(d)(ii). "Substantial evidence is that quantum and quality of relevant evidence that is adequate to convince a reasonable mind to support a conclusion . . . consider[ing] all the evidence that both supports and detracts . . . ." *Benjamin v. Utah State Tax Comm'n*, 2011 UT 14, ¶ 21, 250 P.3d 39 (citations omitted).

Tye Farnsworth

2. I find that Mr. Farnsworth purchased a hot tub from Spa Co-Op of Utah on August 18, 2012. There is no dispute between the parties about this, and the transaction was memorialized by a written contract, which contained a one-year warranty. (Ex. 5.)

3. Mr. Farnsworth testified that the hot tub was delivered in September 2015, and had problems with the jets and heat from the beginning. Mr. Farnsworth testified that it would take a week for the tub to heat up to the right temperature. Mr. Farnsworth testified that he contacted Spa Co-Op and Deborah Devoe several times in October and then in March to request service and repairs, but that his hot tub was never repaired.

4. Ms. Devoe testified that Mr. Farnsworth had sold his hot tub to someone else, and so the warrant was void. I find that the sale, if it occurred, occurred after Mr. Farnsworth's requests for repairs and service.

5. I find that Spa Co-Op and Deborah Devoe failed to honor the warranty issued to Mr. Farnsworth.

6. I find that Mr. Farnsworth bargained with Spa Co-Op and Deborah Devoe for a hot tub that had a used exterior, but all-new parts inside the tub, but did not receive a hot tub with new interior parts. Mr. Farnsworth testified that at the time he bought the hot tub, he was told that it would have all new parts, but that when it was delivered, the parts were obviously corroded and non-functioning.

7. I find that Deborah Devoe was personally involved in the sale of the hot tub. Mr. Farnsworth testified that he bought the hot tub from Ms. Devoe, and that he communicated with her regarding the warranty and repairs.

Jill Stringham

8. I find that Jill Stringham bought a hot tub from Spa Co-Op and Deborah Devoe on November 17, 2013. (*See* Contract, Ex. 7.)

9. I find that, as part of the sale, the parties bargained for a crack in the hot tub's fiberglass to be repaired, and for a new filter cover. Ms. Stringham testified that Ms. Devoe promised her that the crack would be replaced before it was delivered, and that a new filter cover would be provided. Ms. Devoe testified that, although fixing the crack was discussed, it was not promised, because such a repair would have been prohibitively expensive. However, Ms. Devoe's testimony is belied by the text messages submitted by Ms. Stringham, that show that Stringham and Devoe communicated about the crack in the fiberglass, with Ms. Devoe promising to have

someone come repair the crack, rather than saying that fixing the crack was never part of the deal. Ms. Stringham also provided pictures of the crack in the fiberglass and the place where the missing filter cover would go. (Ex. 10.)

10. I find that Ms. Devoe was personally involved in the sale and of Ms. Stringham's hot tub, as well as the failure to fix the fiberglass and provide the filter cover.

Wendy Stock

11. I find that Wendy Stock purchased a hot tub from Tub City, LLC in May, 2014. As part of that transaction, Deborah Devoe, on behalf of Tub City, stated that Ms. Stock would receive a new grey cover, a cover lift, stairs, and pillows. Ms. Stock was unavailable at the time of the hearing, and the evidence was proffered by Andrea Keith from the Division.

12. I find that Ms. Stock was never provided the new cover, stairs, pillows, or cover lift. The text messages show communication between Ms. Stock and Ms. Devoe regarding the missing items (Ex. 16) and the pictures submitted by Ms. Stock show the condition of the cover that she was given to use until the new cover was supposed to arrive. That cover was represented to Ms. Stock as being new, but I find, as shown in the pictures, that the cover was not in a new condition. (Ex. 17.) Ms. Devoe testified that the reason Ms. Stock had not received the items was because she had an aggressive boyfriend who would not allow her employees to come onto the property or deliver the items. Even assuming Ms. Devoe's statements regarding the boyfriend to be true, such circumstances would not relieve Tub City or Ms. Devoe of their obligations to deliver the promised items to Ms. Stock.

13. I find that Ms. Stock made a valid request for refund. This request was memorialized in a complaint sent to the Better Business Bureau on September 24, 2014. (Ex. 12.)

14. I find that Deborah Devoe was personally involved in the sale of the hot tub, and in the failure to provide Ms. Stock with the items that she ordered.

Terri Owens

15. I find that Terri Owens purchased a hot tub from Tub City and Deborah Devoe on June 22, 2014. (Contract, Ex. 18.)

16. As part of the purchase, the hot tub was warrantied for certain problems, enumerated in the "Warranty" section of the sales contract. (*Id.*)

17. I find that, when purchasing the hot tub, Ms. Owens was told by Ms. Devoe that the hot tub she was purchasing consisted of a used shell, but new parts.

18. I find that there is a lack of substantial evidence that Ms. Owens' hot tub had used interior parts. Ms. Owens testified that she personally did not know if the interior parts were used. Ms. Owens provided a handwritten letter from a service tec, that she contacted another hot tub company, which stated that the cover was missing from the mother board, and wires were spliced in an unsafe manner, but did not comment on whether the interior parts were new or used.

19. I find that Tub City and Deborah Devoe failed to honor the warranty on Ms. Owens' hot tub. Ms. Owens' hot tub stopped working shortly after it was delivered. Ms. Owens testified as such, and stated that she immediately contacted Tub City and Deborah Devoe to repair the hot tub. The hot tub was repaired, but then broke again right away. Ms. Owens testified, and submitted text messages (ex. 20), that she repeatedly requested repairs and service for her hot tub, but that it was not repaired. Her requests were made in September 2014 and March 2015. Ms. Devoe submitted text messages from August 2015 that Ms. Devoe texted Ms. Owens and asked if everything was ok with the hot tub, and Ms. Owens replied that it was. (Ex.

21.) However, these messages do not controvert the Division's evidence that starting in September 2014 and through March 2015, Ms. Devoe and Tub City repeatedly failed to honor the warranty.

20. I find that Ms. Devoe was personally involved in the sale of the hot tub, and failure to honor the warranty.

Keri Lehman

21. I find that Keri Lehman purchased a hot tub from Tub City and Deborah Devoe in December 2014, including a one-year warranty. (Contract, Ex. 22.)

22. I find that, as testified to by Ms. Lehman, as part of that transaction, Ms. Lehman and Ms. Devoe agreed that a pillow and color-changing light would be provided, as well as a new cover.

23. When the hot tub arrived, it had a used cover (ex. 23), and Ms. Devoe stated that the new cover was on order and would be provided as soon as possible. Ms. Devoe also told Ms. Lehman that the pillow was on order and would be provided as soon as possible. (Text messages, Ex. 24.)

24. I find that the hot tub had problem functioning properly, and that after a month of requests for repairs and service, Ms. Lehman's hot tub was not working properly and had not been repaired. (*Id.*) Tub City provided text messages, allegedly showing communication between Ms. Devoe and a service tec, stating essentially that the problem with Ms. Lehman's hot tub was that Ms. Lehman had not cleaned the filters, which are not covered under warranty. (Ex. 41.) However, these text messages date from April 2015, and Ms. Lehman testified, and provided text messages, that show communication between her and Ms. Devoe from December 2014 and January 2015 that the hot tub was not functioning, starting soon after the tub was delivered. (Ex.

24.) The text messages submitted by Respondents fail to controvert the Division's evidence regarding problems and failures to repair and honor the warranty in December and January.

25. I find that, as testified to by Ms. Lehman, the hot tub was advertised to her as containing new parts and having a used shell.

26. I find that the hot tub did not contain new parts. Ms. Lehman eventually sold her hot tub to Kris Oberhall, who testified that the control pack installed on Ms. Lehman's hot tub was not compatible with the rest of the hot tub, and that other parts were not compatible with the hot tub.

27. I find that the new cover, pillow, and color-changing light were never delivered to Ms. Lehman, and that a refund was never given. I find that Ms. Lehman and Ms. Devoe agreed to provide Ms. Lehman with a new cover, which was never provided, and that the temporary cover was in a used condition, which had not been agreed to by Ms. Lehman.

28. I find that Ms. Devoe was personally involved in the sale of the hot tub, and in the failures to repair the hot tub and deliver the promised items.

Blake Moyer

29. I find that Mr. Moyer (written as "Moyer" in the Citation) bought a hot tub from Tub City and Ms. Devoe. Mr. Moyer testified that he did not sign a contract, but he understood that used parts would be provided in the hot tub. There was a one-year warranty on Mr. Moyer's hot tub. (Ex. 25.)

30. I find that the hot tub stopped working shortly after delivery, but was never successfully repaired by Tub City. The hot tub was purchased in November 2014, and worked for about six hours after it was delivered. Mr. Moyer contacted Tub City to schedule repairs. Mr. Moyer testified that Mr. Jergins, a Tub City service technician, attempted to repair the hot tub,

but was not successful. Mr. Moyer testified that Tub City and Ms. Devoe stopped responding to his communications and never repaired the problems with his hot tub.

31. The hot tub was delivered with the wrong-sized cover, and Mr. Moyer testified that he was never provided the correct-sized cover.

32. Mr. Moyer testified that he repaired the hot tub himself, after Tub City failed to honor its warranty. Mr. Moyer testified that the motherboard was improperly installed, and that he contracted with an electrician to repair the faulty wiring.

33. Ms. Devoe testified that repairs were not done on Mr. Moyer's hot tub because it was clear that repairs had been done on his tub by people other than Tub City, which voided the warranty. However, I find Mr. Moyer's testimony and timeline more persuasive: that ultimately he performed the repairs after Tub City stopped responding to his complaints.

34. I find that Ms. Devoe was personally involved in the sale of Mr. Moyer's hot tub, and in failing to perform the repairs.

Rick Torgerson

35. I find that Rick Torgerson purchased a hot tub from Tub City and Ms. Devoe in January 2015, and that the purchase included a one-year warranty. (Ex. 35.)

36. I find that Mr. Torgerson made two requests for repairs to his hot tub, that were honored by Tub City and repairs were made.

37. However, the third time Mr. Torgerson contacted Tub City and Ms. Devoe to request service because of leaks, repairs were never made. (Text messages, Ex. 36.)

38. I find that Ms. Devoe was personally involved with the sale of the hot tub, and the failure to repair the tub. (*Id.*)

Scott Hargraves

39. I find that Mr. Hargraves purchased a hot tub from Tub City and Ms. Devoe in March 2015. (Ex. 2.)

40. I find that, as part of that purchase, Mr. Hargraves signed a contract with Tub City (which he did not have a copy of) and received a one-year warranty. Tub City and Ms. Devoe also agreed that Mr. Hargraves would receive a new cover as part of the purchase.

41. I find that Mr. Hargraves hot tub did not work as promised, and that he contacted Tub City and Ms. Devoe to request repairs. (Ex. 3.) On April 7, 2015, Mr. Hargraves contacted Tub City and Ms. Devoe, and reported that the water in the hot tub was dropping rapidly, and requested repairs. However, repairs were never performed.

42. I find that the cover which was delivered was used, and in poor condition. Ms. Devoe was present when the hot tub was delivered, and told Mr. Hargraves that the cover was at another store, and that he would get it the next day. Cassie, a Tub City employee, later told Mr. Hargraves that the cover was never ordered. As of the date of the hearing, Mr. Hargraves has not received the new cover.

43. Mr. Hargraves requested a refund for the hot tub and cover, but was never given a refund, and never received the new cover.

44. I find that Ms. Devoe was personally involved in the sale of the hot tub, and the failure to repair the hot tub and failure to deliver the new cover.

Traci Hair

45. I find that Traci Hair purchased a hot tub from Tub City and Ms. Devoe on February 15, 2015. (Ex. 38.) At the hearing, the Division attempted to call Ms. Hair as a witness by phone, but she did not answer. The Division then proffered evidence that Ms. Hair had related

to Andrea Keith, and submitted documentary evidence. Mr. Koyle, for Respondents, stated that he believed that Ms. Hair's complaints had been resolved, but Ms. Keith testified that she spoke with Ms. Hair the day before the hearing, and Ms. Hair had still not received the correct cover or cover lift.

46. As part of the transaction, Ms. Devoe and Tub City agreed to provide Ms. Hair with a grey cover and a cover lift.

47. When the hot tub was delivered, the cover was brown instead of grey, and no cover lift was delivered.

48. As of the day of the hearing, Ms. Hair had still not received the grey cover or cover lift.

49. I find that Ms. Devoe was personally involved in the sale of the hot tub and the failure to provide Ms. Hair with the items.

Jeremy Anderson

50. I find that on April 10, 2015, Jeremy Anderson purchased a hot tub from Tub City and Ms. Devoe. (Ex. 26.) The contract stated that the hot tub had a one-year warranty. (*Id.*)

51. Mr. Anderson testified that Ms. Devoe agreed to provide a new cover.

52. However, when the hot tub was delivered, the cover was too large. Ms. Devoe testified that the cover was the wrong size, and overhung the hot tub by about an inch on all sides, and believed that Mr. Anderson was being too picky about the size of the cover, since it functioned perfectly even if it was slightly too big.

53. Mr. Anderson testified that he had requested service for leaks and a problem with the blower. He testified that the blower was repaired, and some leaks were repaired, but that leaks kept occurring, and Tub City and Ms. Devoe stopped responding to their requests for

repairs. As of the day of the hearing, the leaks had not been fixed and the correct cover had not been provided to Mr. Anderson.

Glenn Todd Larsen

54. I find that Glenn Todd Larsen purchased a hot tub from Tub City and Deborah Devoe on April 20, 2015. (Ex. 28.) The contract stated that the hot tub had a one-year warranty. (*Id.*)

55. As part of the transaction, Mr. Larsen was supposed to receive pillows, and a new cover. The contract states that the controller will be a "used Balboa controller" (*Id.*).

56. Mr. Larsen never received the pillows, or the new cover.

57. Mr. Larsen received a used cover that was in poor condition. (Ex. 30.) Ms. Devoes told Mr. Larsen that the used cover was temporary, and that he would receive his pillows and new cover within 10 days. But Mr. Larsen did not receive the cover or pillows.

58. Mr. Larsen testified that when he purchased the hot tub, he was shown the inside of the tub, and that all of the parts were new. Then, when the hot tub was delivered to him, and the delivery person opened the tub to ensure it was working properly, Mr. Larsen saw that none of the parts inside the tub were as they were when he purchased it, and were actually not new.

59. I find that Mr. Larsen did not receive the parts he bargained for. It is true that the contract states that Mr. Larsen was to receive a used Balboa controller, but the evidence presented by the Division, that Mr. Larsen was to receive other parts in a new condition, when the parts were actually delivered to him in a used condition, is persuasive, and meets the substantial evidence standard.

60. Mr. Larsen texted Ms. Devoe several times to get the hot tub repaired. The temperature was set at 98 degrees, but was heating to 108 or 109 degrees and shutting off. (Ex.

31.) Repairs were not made to the hot tub. Ms. Devoe testified that she had instructed a service tec to repair Mr. Larsen's hot tub, and that the service tec told her that he had repaired the tub, when he actually had not. However, I find that her testimony is unpersuasive, and that it fails to account for the months of text messages between Ms. Devoe and Mr. Larsen, where Ms. Devoe fails numerous times to schedule a tec to visit Mr. Larsen and repair his hot tub.

61. I find that Ms. Devoe was personally involved in the sale of Mr. Larsen's hot tub, and in the failure to provide him with the new cover, or pillows, or repair the hot tub under the warranty.

Nancy Reed

62. I find that Ms. Reed payed a deposit for a hot tub in April 2015. (Ex. 33.)

63. I find that, as of July 2015, the hot tub had not been completed, and Ms. Reed requested a refund of her deposit. Ms. Reed was told that a refund was processed a few days later, but she never received the refund.

64. Ms. Devoe testified that she had agreed with Ms. Reed to provide her the refund as soon as the hot tub that she had originally contract to purchase, was sold to someone else. Ms. Devoe testified that at the time of the hearing, someone had put down a deposit to purchase the hot tub, but had not completed the transaction yet.

65. As of the hearing, Ms. Reed had not received a refund.

66. I find that Ms. Devoe was personally involved with the deposit put down by Ms. Reed, and the failure to return the deposit.

Paul Swaner

67. I find that Paul Swaner contracted with Tub City to refurbish his existing hot tub. (Ex. 37.) The contract provided a one-year warranty for the work performed. (*Id.*)

68. When the hot tub was completed and delivered to Mr. Swaner, the tub ran continually. Mr. Swaner contacted Ms. Devoe to request repairs for the hot tub, but never received the requested repairs, and was able to figure out himself how to stop the hot tub from running all the time.

69. On or around June 15, 2015, the hot tub quit working altogether. Mr. Swaner sent numerous text messages and called Ms. Devoe several times. She promised that a tec would come to repair the tub, but no one ever came to repair the tub.

70. Ms. Devoe testified that Mr. Swaner refused to allow them to make repairs, and instead only wanted to sell the tub back. However, I find this testimony not persuasive, and find Mr. Swaner's testimony more persuasive, and that his testimony rises to the level of substantial evidence and supports the Division's allegations in the Citation.

71. I find that Ms. Devoe was personally involved in the transaction to refurbish Mr. Swaner's hot tub, and the failure to provide service and repairs for the hot tub.

CONCLUSIONS OF LAW

Jurisdiction

72. The Division of Consumer Protection may issue citations and enforce the Consumer Sales Practices Act (the "CSPA") against any person it believes to have violated the CSPA. Utah Code Ann. § 13-2-6(3). Here, jurisdiction over Respondents is proper because they have engaged in conduct that violates the CSPA.

Counts 1 3

73. I find that Tub City and Ms. Devoe indicated to Traci Hair and Jeremy Anderson that they would receive certain covers for their hot tubs, that Hair and Anderson never received, in violation of Utah Code Ann. § 13-11-4(2)(b).

74. I find that Tub City and Ms. Devoe did not repair a crack in the fiberglass of Jill Stringham's hot tub, as had been agreed, in violation of Utah Code Ann. § 13-11-4(2)(b).

75. I find that Ms. Devoe is individually responsible for these three violations, because she is a "supplier" under the Utah Consumer Sales Practices Act. Utah Code Ann. § 13-11-3(6) because she was a person who regularly solicited, engaged in, or enforced the consumer transactions at issue here.

76. I recommend that Tub City and Ms. Devoe be fined jointly and severally $7,500 for three violations of Utah Code Ann. 13-11-4(2)(b).

Count 4

77. I find that Tub City and Ms. Devoe failed to deliver the hot tub or provide a refund to Nancy Reed. The evidence was not controverted that Ms. Reed made a valid refund request, that Ms. Devoe agreed to refund her deposit, but that she has not yet done so. Accordingly, I find one violation of Utah Code Ann. § 13-11-4(2)(l).

78. As stated above in paragraph 75, I find that Ms. Devoe is a "supplier" under the Consumer Sales Practices Act, and recommend fining her jointly and severally.

79. I recommend that Tub City and Ms. Devoe be fined jointly and severally $2,500 for one violation of Utah Code Ann. § 13-11-4(2)(l).

Counts 5 9

80. I find that Spa Co-Op and Ms. Devoe failed to provide a filter cover for Jill Stringham, and that Tub City and Ms. Devoe failed to provide Wendy Stock with stairs, pillows, and a cover lift, failed to provide Keri Lehman with a pillow or color-changing light, failed to provide Traci Hair with a cover lift, and failed to provide Glenn Todd Larsen with pillows, in violation of Utah Code Ann. § 13-11-4(2)(a) or (l).

81. As stated above in paragraph 75, I find that Ms. Devoe is a "supplier" under the Consumer Sales Practices Act, and recommend fining her jointly and severally.

82. I recommend fining Tub City and Ms. Devoe jointly and severally $10,000 for 4 violations of Utah Code Ann. § 13-11-4(2)(a) and (l), and that Spa Co-Op and Ms. Devoe be fined $2,500 jointly and severally for one violation of Utah Code Ann. § 13-11-4(2)(l).

Counts 10–18

83. I find that Tub City and Ms. Devoe failed to honor the warranties it contracted for with Terri Owens, Keri Lehman, Blake Moyer, Rick Torgerson, Scott Hargraves, Jeremy Anderson, Glenn Todd Larsen, and Paul Swaner. Utah Code Ann. § 13-11-4(2)(j). I find that Spa Co-Op and Ms. Devoe failed to honor the warranty it contracted for with Tye Farnsworth. Utah Code Ann. § 13-11-4(j).

84. As stated above in paragraph 75, I find that Ms. Devoe is a "supplier" under the Consumer Sales Practices Act, and recommend fining her jointly and severally.

85. I recommend that Tub City and Ms. Devoe be fined jointly and severally $20,000 for 8 violations of Utah Code Ann. § 13-11-4(j), and that Spa Co-Op and Ms. Devoe be fined jointly and severally $2,500 for one violation.

Counts 19-24

86. I find that Spa Co-Op and Ms. Devoe provided Mr. Farnsworth with used parts on his hot tub, instead of new parts, in violation of Utah Code Ann. § 13-11-4(2)(l) and Utah Administrative Code r.152-11-7(A).

87. I find that Tub City and Ms. Devoe provided used parts to Keri Lehman and Glenn Todd Larsen, when new parts were agreed to, in violation of Utah Code Ann. § 13-11-4(2)(l) and Utah Administrative Code r.152-11-7(A).

88. I find that the Division did not present substantial evidence to support a finding that Terri Owens received used parts when new parts were contracted for.

89. I find that Tub City and Ms. Devoe agreed to provide new hot tub covers to Wendy Stock, Keri Lehman, and Scott Hargraves, but failed to do so and provided used covers instead. Utah Code Ann. § 13-11-4(2)(l) and Utah Administrative Code r.152-11-7(A).

90. As stated above in paragraph 75, I find that Ms. Devoe is a "supplier" under the Consumer Sales Practices Act, and recommend fining her jointly and severally.

91. I recommend fining Spa Co-Op and Ms. Devoe jointly and severally $2,500 for one violation of Utah Code Ann. § 13-11-4(2)(l) and Utah Administrative Code r.152-11-7(A).

92. I recommend that Tub City and Ms. Devoe be fined jointly and severally $10,000 for four violations of Utah Code Ann. § 13-11-4(2)(l) and Utah Administrative Code r.152-11-7(A).

Counts 25–28

93. I find that the evidence does not support finding violations under Counts 25–28. The Division has argued that Respondents should be fined here because they provided used hot tub covers to four consumers, and then refused to provide refunds. However, the evidence shows that the complainants did not make specific refunds for the covers only, and instead were making general requests for refunds of the entire transaction. Additionally, the used covers were not surreptitiously sold to consumers under the guise that they were new covers. The evidence shows that the covers were provided by Respondents as "temporary" covers to use until the new covers arrived.

Count 29

94. I find that Tub City and Ms. Devoe failed to provide Nancy Reed with a refund, after a valid request for refund was made, in violation of Utah Administrative Code rule 152-11-10(C).

95. As stated above in paragraph 75. I find that Ms. Devoe is a "supplier" under the Consumer Sales Practices Act, and recommend fining her jointly and severally.

96. However, because I have recommended that Respondents be fined already for failing to provide Ms. Reed a refund (Count 4 above), I recommend that Tub City and Ms. Devoe not be fined for one violation of Utah Administrative Code rule 152-11-10(C).

RECOMMENDED ORDER

On the basis of the Findings of Fact and Conclusions of Law above, the Presiding Officer recommends to the Director of the Division that Respondents be ordered to cease and desist from any act in violation of the Consumer Sales Practices Act, Utah Code Title 13, Chapter 11.

The Presiding Officer further recommends that Respondents be assessed and ordered to pay administrative fines as follows: $50,000 jointly and severally against Tub City, LLC and Deborah Devoe, and $5,000 jointly and severally against Spa Co-Op and Deborah Devoe.

Dated January 15, 2016.

DEPARTMENT OF COMMERCE

GREG SODERBERG, PRESIDING OFFICER

DIVISION OF CONSUMER PROTECTION
DANIEL O'BANNON, DIRECTOR
DEPARTMENT OF COMMERCE
P.O. BOX 146704
160 EAST 300 SOUTH
SALT LAKE CITY, UTAH 84114-6704
Telephone: (801) 530-6601

BEFORE THE DIVISION OF CONSUMER PROTECTION
OF THE DEPARTMENT OF COMMERCE
OF THE STATE OF UTAH

IN THE MATTER OF:	**ORDER OF ADJUDICATION**
TUB CITY, LLC, also known as TUB CITY SPAS, LLC; SPA CO-OP OF UTAH, LLC; and DEBORAH ANN LAMBERT, also known as DEBORAH DEVOE,	CASE NO. DCP 84704
RESPONDENTS	

BY THE DIRECTOR:

Daniel R.S. O'Bannon, Director of the Division of Consumer Protection, has reviewed the Presiding Officer's Findings of Fact, Conclusions of Law, and Recommended Order and hereby adopts the recommendation in its entirety.

ORDER

Respondents are ordered to cease and desist from any act in violation of the Consumer Sales Practices Act. Respondents are assessed and ordered to pay administrative fines as follows: $50,000 jointly and severally against Tub City, LLC and Deborah Devoe, for 20 violations of the Utah Consumer Sales Practices Act, and $5,000 jointly and severally against Spa Co-Op and Deborah Devoe for 2 violations of the Utah Consumer Sales Practices Act. This fine may be filed and entered with the appropriate court as a civil judgment.

Pursuant to Utah Code Ann. § 13-2-6(2), a person who has notice of this final cease and desist order and intentionally violates any provision contained herein is guilty of a third degree felony. This order shall be effective on the signature date below.

DATED January 19, 2016.

UTAH DEPARTMENT OF COMMERCE

Daniel R.S. O'Bannon
Director, Division of Consumer Protection

NOTICE OF RIGHT TO ADMINISTRATIVE REVIEW

Agency review of this order may be obtained by filing a request for agency review with the Executive Director of the Department of Commerce, 160 East 300 South, Box 146701, Salt Lake City, Utah 84114-6701, within thirty (30) days after the date of this order. The agency action in this case was an informal proceeding. The laws and rules governing agency review of this proceeding are found in Section 63G-4-101 et seq. of the Utah Code, and Rule 151-4 of the Utah Administrative Code.

CERTIFICATE OF SERVICE

I certify that on January 19, 2016, I served the foregoing ORDER on the parties in this proceeding by electronic mail to:

TUB CITY LLC ET AL.
C/O MATTHEW G KOYLE
Matthew@koylelaw.com

and by hand delivery to:

Division of Consumer Protection
Attn.: Andrea Keith, Investigator
Heber M. Wells Building, 2nd Floor
Salt Lake City, UT

Exhibit: B

BEFORE THE DEPARTMENT OF COMMERCE
OF THE STATE OF UTAH

IN THE MATTER OF THE REQUEST FOR AGENCY REVIEW OF **Tub City, LLC, aka Tub City Spas, LLC; Spa Co-Op of Utah, LLC; Deborah Ann Lambert aka Deborah Devoe,** PETITIONERS	**FINDINGS OF FACT, CONCLUSIONS OF LAW and ORDER ON REVIEW** DCP Case No. 84704

INTRODUCTION

This matter came before the Department of Commerce ("Department") upon a request for agency review by Petitioners Tub City, LLC, aka Tub City Spas, LLC; Spa Co-Op of Utah, LLC; Deborah Ann Lambert aka Deborah Devoe (hereafter "Lambert"),[1] challenging the Order of Adjudication of the Division of Consumer Protection ("Division") issued on January 19, 2016, which concluded that Petitioners violated the Utah Consumer Sales Practices Act ("UCSPA").

STATUTES OR RULES PERMITTING OR REQUIRING REVIEW

Agency review of the Division's decision is conducted pursuant to Utah Code Annotated, Section 63G-4-301, and Utah Administrative Code, R151-4-901 *et seq.*

[1] The Division record indicates other spellings of Devoe, including De Vos, DeVos, DeVo.

ISSUES REVIEWED

1. Whether Petitioners failed to establish that under the applicable law, Ms. Lambert could not be found personally liable and jointly and severally liable for UCSPA violations.

2. Whether the fine assessed against Petitioners should be modified to an amount that is proportional to the gravity of Petitioners' offense.

FINDINGS OF FACT

1. On May 13, 2015, the Division issued an administrative citation against Petitioners for violations of the UCSPA.

2. Tub City and Spa Co-op of Utah are expired or delinquent limited liability companies. Ms. Lambert was the manager, owner and/or registered agent for Tub City and Spa Co-op. The Citation named Ms. Lambert individually and as an officer, director, manager, agency and/or owner of the Tub City and Spa Co-op.

3. The Division issued amended citations on June 26, 2015, August 19, 2015 and December 14, 2015.

4. The Third Amended Citation alleged that that Tub City (a) misrepresented the standard, quality, grade, style or model of hot tubs and accessories that were sold; (b) failed to ship or furnish the goods or services in a timely manner; (c) disclaimed the existence of a warranty or failed to honor warranties; (d) failed to provide refunds to consumers, and (e) violated the Division's New or Used Rule.

5. Pursuant to Tub City's request, a hearing was held before the Division Hearing Officer in January 2016.

6. On January 19, 2016, the Division Director adopted the Hearing Officer's Findings of Fact, Conclusions of Law and Recommended Order, concluding that Petitioners violated the UCSPA, issuing a cease and desist order, and assessing administrative fines as follows: $50,000.00 jointly and severally against Tub City and Ms. Lambert for 20 violations, and $5,000.00 jointly and severally against Spa Co-op and Ms. Lambert for two violations.

7. On February 18, 2016, Petitioners filed a request for agency review. Petitioners subsequently filed the hearing transcript; they filed their Memorandum in Support of Agency Review ("Petitioners' Memorandum") on November 7, 2016.

8. The Division filed its memorandum in Opposition to Agency Review on December 7, 2016.

9. Petitioners did not file a reply memorandum. However, on January 5, 2016, Petitioners' counsel sent an electronic mail to the administrative law judge assigned to this agency review matter and to the Division's counsel as follows:

> The question of Deborah DeVos's liability was thoroughly argued before the original judge. My recollection was that the entire second day of the hearing was devoted to the issue, and the intelligible portions of the transcript bear that out. A look at the transcript shows that these items were argued on pages 254-255, and again starting at page 261 where the second day of the hearing starts. Hernandez v. Baker specifically was emailed to Judge Soderberg and to the division before the hearing on January 8. The email where that occurred is attached.
>
> If there are still questions about whether issues were preserved, Tub City and Ms. DeVos would ask for an opportunity to brief the preservation question. Other than that, Tub City is prepared to submit on the filings.

Electronic mail dated January 5, 2017.

10. As discussed in detail below, Petitioners have failed to properly challenge the Division's findings of fact, which are therefore adopted as conclusive and

incorporated herein. For ease of reference, the Hearing Officer's findings of fact included findings that Ms. Lambert was personally involved with the sale of hot tubs to the individual consumers named in the Citation.

11. A brief review of the record indicates that the consumers identified in the Citation paid a total of $6,650.00 to Spa Co-op and a total of $23,913.11 to Tub City. The resulting situation for each consumer appears to be as follows:

Consumer	Entity	Cost	Result
Farnsworth	Spa Co-Op	2,800	Tub returned to Petitioners for repair
Sringham	Spa Co-Op	3,850	Crack in fiberglass never repaired
TOTAL Spa Co-op		**$6,650.00**	
Stock	Tub City	3,000	Missing stairs, pillows, cover lift, and correct cover.
Owens	Tub City	2,650	Tub not functioning - Petitioners did not make repairs
Lehman	Tub City	1,800	Tub not functioning - Petitioners did not make repairs -- missing pillows, color changing light and cover
Moyer	Tub City	3,200	Some repairs made by Petitioner but tub still not functioning
Torgerson	Tub City	3,000	Some repairs made by Petitioner but tub still not functioning
Hargraves	Tub City	1,000	Tub not functioning - Petitioners did not make repairs
Hair	Tub City	1,750	Missing correct tub cover
Anderson	Tub City	1,675	Tub not functioning - Petitioners did not make repairs -- missing correct tub cover
Larsen	Tub City	2,000	Tub not functioning - Petitioners did not make repairs – missing correct cover, pillows
Reed	Tub City	1,725	Tub never completed or delivered to Reed
Swaner	Tub City	2,113.11	Tub not functioning - Petitioners did not make repairs
TOTAL Tub City		**$23,913.11**	

CONCLUSIONS OF LAW

1. The standards for agency review within the Department of Commerce correspond to those established by the Utah Administrative Procedures Act ("UAPA"), Utah Code Annotated Section 63G-4-403(4) and Utah Admin. Code R151-4-905.

2. The Executive Director may grant relief if she determines that the Division's action is "based upon a determination of fact, made or implied by the agency, that is not supported by substantial evidence when viewed in light of the whole record." Utah Code Ann. §63G-4-403(4)(g). A party challenging the Division's findings of fact must marshal all of the evidence supporting the findings and show that despite the supporting facts the findings are not supported by substantial evidence when considering the conflicting or contradictory evidence. *Uintah County v. Department of Workforce Servs.*, 2014 UT App 44, ¶ 5, 320 P.3d 1103; Utah Admin. Code R151-4-902(3).

3. The Executive Director applies the correction-of-error standard when reviewing the Division's interpretation of general questions of law, granting no deference to the Division's decisions. *Associated Gen. Contrs. v. Bd. of Oil, Gas & Mining*, 2001 UT 112, ¶ 18, 38 P.3d 291. However, agency decisions that apply the law to facts are entitled to discretion and are only subject to review to assure that they fall within the limits of reasonableness and rationality. *Allen v. Dep't of Workforce Servs.*, 2005 UT App 186, ¶ 6, 112 P.3d 1238 (citations omitted).

A. Applicable Law

4. Utah Code Ann. §13-2-5(3) gives the Division Director, "authority to take administrative and judicial action against persons in violation of the division rules and the laws administered and enforced by it, including the issuance of cease and desist orders."

The UCSPA contains a list of prohibited deceptive acts or practices under Utah Code Ann. §13-11-4, and authorizes the Division to adopt "substantive rules that prohibit with specificity acts or practices that violate Section 13-11-4 and appropriate procedural rules." Subsection 13-11-8(2). The Division is required to construe the UCSPA liberally to promote certain policies including the protection of consumers from suppliers who commit deceptive and unconscionable sales practices. Subsection 13-11-2(2).

5. Under the UCSPA, a supplier is defined as "a seller, lessor, assignor, offeror, broker, or other person who regularly solicits, engages in, or enforces consumer transactions, whether or not he deals directly with the consumer." Subsection 13-11-3(6), emphasis added. A supplier commits a deceptive act or practice if the supplier knowingly or intentionally "indicates that the subject of a consumer transaction has sponsorship, approval, performance characteristics, accessories, uses, or benefits, if it has not,"[2] or "indicates that the subject of a consumer transaction is of a particular standard quality, grade, style or model, if it is not."[3] A supplier engages in a deceptive act or practice if he knowingly or intentionally:

> (1) after receipt of payment for goods or services, fails to ship the goods or furnish the services within the time advertised or otherwise represented or if no specific time is advertised or represented, fails to ship the goods or furnish the services within 30 days, unless within the applicable time period the supplier provides the buyer with the option to:
> (i) cancel the sales agreement and receive a refund of all previous payments to the supplier if the refund is mailed or delivered to the buyer within 10 business days after the day on which the seller receives written notification from the buyer of the buyer's intent to cancel the sales agreement and receive the refund, or
> (ii) extend the shipping date to a specific date proposed by the supplier,

Subsection 13-11-4(2)(l). In addition, a supplier engages in a deceptive act or practice if

[2] Utah Code Ann. §13-11-4(2)(a).
[3] Subsection 13-11-4(2)(b).

he knowingly or intentionally:

> (j)(i) indicates that a consumer transaction involves or does not involve a warranty, a disclaimer of warranties, particular warranty terms, or other right, remedies, or obligations, if the representation is false; or
> (ii) fails to honor a warranty or a particular warranty term.

Subsection 13-11-4(2)(j).

6. Moreover, Division rules make the following conduct a deceptive act or practice:

> Except as provided in Section 7c and d of this rule, it shall be a deceptive act or practice in connection with a consumer transaction for a supplier to represent, directly or indirectly, that an item of consumer commodity, or that any part of an item of consumer commodity, is new or unused when such is not the fact, or to misrepresent the extent of previous use thereof, or to fail to make clear and conspicuous disclosures, prior to time of offer, to the consumer or prospective consumer that an item of consumer commodity has been used.

Utah Admin. Code R152-11-7.

B. Division's Findings of Fact Accepted as Conclusive

7. Petitioners fail to establish that Division findings are not supported by substantial evidence. The Division's Citation alleged 29 counts of UCSPA and Division Rule violations; the Division requested $72,500.00 in administrative fines. The Hearing Officer upheld all but five counts and recommended an administrative fine totaling $55,000.00, which was adopted by the Division Director. It was held that Ms. Lambert was a supplier under the UCSPA and was therefore jointly and severally liable for the fines assessed against Spa Co-op and Tub City.

8. Petitioners have not identified any specific findings of fact that they wish to challenge. They also fail to cite the Division record and thus fail to marshal the evidence in support of the Division's findings of fact as required by Subsection R151-4-

902(3). Petitioners challenge the conclusion that Ms. Lambert is personally liable for violations of the UCSPA, maintaining that she acted only on behalf of Spa Co-op and Tub City, which entities were the contracting parties and the sellers. Petitioners' Memorandum, pp. 5-6. Petitioners further argue that the administrative fines assessed are excessive and constitute a violation of the Eighth Amendment. *Id.*, pp. 1-5. Because Petitioners have not identified any findings they challenge and have not met the marshaling requirement, and because the Presiding Officer is entitled to judge the credibility of all witnesses, weigh the testimony of witnesses, and draw reasonable inferences from their testimony,[4] the Division's findings of fact are adopted and incorporated herein.

C. Personal Liability

9. Petitioners have failed to establish that Ms. Lambert cannot be held jointly and severally liable for UCSPA violations. Although Petitioners have not cited to the Division record to indicate where they raised the issue of Ms. Lambert's liability, a review of the record indicates that the issue was raised to the Presiding Officer and the Presiding Officer ruled on Ms. Lambert's personal liability. Therefore, the issue was preserved for agency review.

10. Petitioners rely on provisions in the Utah Revised Limited Liability Company Act (Section 48-2c-601) and the Utah Revised Uniform Limited Liability Company Act (Section 48-3a-304) which deal with the liability of organizers, members, managers and employees, but as noted by the Division, Petitioners overlook the UCSPA

[4] *State v. Waldron*, 2002 UT App 175, para. 16, 51 P.3d 21.

provisions under which Ms. Lambert is a supplier, a person[5] who regularly solicited, engaged in or enforced consumer transactions such as the sale of hot tubs. Subsection 13-11-3(6). The record indicates that Ms. Lambert was personally involved with each consumer transaction identified in the Citation. The Division Citation properly named Ms. Lambert both individually and as officer, director, manager, agent and/or owner of Spa Co-Op and Tub City. Contrary to Petitioners' position, no allegations of piercing the corporate veil are necessary in the Citation as no legal authority has been presented to establish that the corporate shield doctrine is applicable to protect a person who has violated the UCSPA. The Presiding Officer correctly interpreted the language of the UCSPA to conclude that the UCSPA specifically applies to the allegations in this case. *Associated Gen. Contrs.* ¶18.

11. The Division is required to construe the UCSPA to promote certain policies, including protecting consumers from suppliers who commit deceptive and unconscionable sales practices. Subsection 13-11-2(2). Under Subsection 13-11-3(6), Ms. Lambert's activities in her role as officer, director, agent, and/or owner of Spa Co-op and Tub City were sufficient to support a conclusion that she engaged in or enforced consumer transactions. Moreover, the evidence indicates that the consumers dealt directly with Ms. Lambert in purchasing hot tubs and in requesting delivery, repairs, missing accessories, refunds, etc. Therefore, the Presiding Officer reasonably concluded that Ms. Lambert was personally liable.

[5] A "person" includes an "individual, corporation, government . . . or any other legal entity." Subsection 13-11-3(5).

D. Fine Amount is Excessive in Relation to the Gravity of the Offense

12. Petitioners argue that the assessed fines were unconstitutionally excessive and do not bear a reasonable relationship to the gravity of the offense. The Eighth Amendment states "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted. U.S. Constitution, Amendment VIII. In *United States v. Bajakajian*, 524 U.S. 321, 334 (1998), the Supreme Court held that the amount of a forfeiture must bear some relationship to the gravity of the offense. The Utah Court of Appeals has also stated that a fine violates the Eighth Amendment if it is "grossly disproportional to the gravity of a defendant's offense." *Brent Brown Dealerships v. Tax Comm'n, Motor Vehicle Enforcement Div.*, 2006 UT App. 261, 139 P.3d 296, ¶16. A fine assessed should be compared to the maximum that could have been levied; the extent of the unlawful activity and amount of illegal gain should be considered in relation to the penalty and the harm caused. *Id.*, at ¶ 20.

13. Although the Division has the power to assess fines up to $2,500.00 for each UCSPA violation under Subsection 13-11-17(4)(b), it is not sufficient to simply consider the maximum fine that can be assessed for UCSPA violations. Rather, under *Brown* and *Bajakajian*, it is also important to consider the extent of the unlawful activity, the amount of illegal gain, and the harm caused.

14. The maximum fine that the Division could assess for two violations involving Spa Co-op is $5,000.00; the maximum that could be assessed as to violations involving Tub City is $50,000.00. As noted in the Findings of Fact section above, many of the consumers identified in the Citation did not receive a hot tub, returned their hot tub to Petitioners for repairs, or have the hot tub in their possession but never received the

repairs needed to make their hot tub functional. As to Spa Co-op, a consumer paid $2,800.00 for a tub he never received, and another had a tub that cost $3,850.00 with cracked fiberglass that was never repaired. As to Tub City, the consumers who testified that their hot tub is not functional paid a total of $19,163.11 for their hot tubs.[6] Two remaining consumers, who paid a total of $4,750.00 for their hot tubs, testified that they did not receive accessories such as pillows, cover lifts, and the correct hot tub cover. All consumers testified and provided documentation of numerous, repeated calls, emails and visits to Petitioners' place of business in attempts to get their hot tubs serviced and to receive the bargained-for accessories. Such trouble and inconvenience suffered by the consumers while they attempted to obtain repairs and missing products is also considered as part of their loss.

15. Petitioners maintain that they had employees or independent contractors who mispresented that they provided repairs to the consumers when they in fact had not done so, but ultimately, Petitioners are responsible for the work of their employees and independent contractors. Petitioners also claim that they made little profit from their sales of hot tubs to the consumers and that it would be impossible for Petitioners to pay the assessed fines. However, Petitioners have failed to marshal the evidence in the record to establish the amounts of any profits to Petitioners or any firm amounts by which administrative fines against them could be reduced for such things as any third-party sale of a hot tub by a consumer. Without such evidence, therefore, it is reasonable to assume that the Spa Co-op consumers suffered a loss of approximately $3,500 for a hot tub that was no longer in the consumer's possession and another hot tub with a crack in the fiberglass. It is reasonable to assume that the Tub City consumers suffered a loss of

[6] Several of these consumers also testified that they did not receive certain accessories.

approximately $20,000.00 for hot tubs that are not functional, those missing proper accessories, and the consumers' lost time and inconvenience in dealing with these problems. An additional penalty of $500.00 is assessed for the Spa Co-op transactions and $2,000.00 for the Tub City transactions as a deterrent. Therefore, the total fine assessed against Spa Co-op is $4,000; the total fine assessed against Tub City is $22,000.00. As Ms. Lambert is a supplier, she is jointly and severally liable for the total fines assessed against Spa Co-op and Tub City.

E. Summary

16. In sum, Petitioners have failed to establish that Ms. Lambert could not be held personally liable under the UCSPA. The Division's decision that Petitioners violated the UCSPA is therefore affirmed. However, the administrative fines assessed against Petitioners are modified.[7]

[7] The Division's request that the matter be dismissed on the grounds that Petitioners' brief fails to meet the rules governing briefs on agency review (Opposition to Agency Review, pp. 4-5) is denied. A motion to dismiss may not be brought on an argument that the pleading or memorandum is insufficient. Subsection R151-4-302(2)(b)(i).

ORDER ON REVIEW

For the foregoing reasons, the Division of Consumer Protection's Order of Adjudication is affirmed, but the fines assessed are modified as stated herein.

NOTICE OF RIGHT TO APPEAL

Judicial Review of this Order may be obtained by filing a Petition for Review with the District Court within 30 days after the issuance of this Order. Any Petition for Review must comply with the requirements of Sections 63G-4-401 and 63G-4-402, Utah Code Annotated. In the alternative, but not required in order to exhaust administrative remedies, reconsideration may be requested pursuant to *Bourgeous v. Department of Commerce, et al.*, 981 P.2d 414 (Utah App. 1999) within 20 days after the date of this Order pursuant to Section 63G-4-302.

Dated this 27th day of February, 2017.

Francine A. Giani, Executive Director
Utah Department of Commerce

CERTIFICATE OF MAILING

I certify that on the 27th day of February, 2017, the undersigned mailed a true and correct copy of the foregoing Findings of Fact, Conclusions of Law and Order on Review by certified and first class mail to:

MATTHEW G KOYLE ESQ
2661 WASHINGTON BLVD STE 103
OGDEN UT 84401

and caused a copy to be electronically mailed to:

Daniel O'Bannon, Director (dobannon@utah.gov)
Division of Consumer Protection
160 East 300 South 2nd Floor
Salt Lake City, UT 84111

Jeff Buckner, Assistant Attorney General (jbuckner@utah.gov)
Office of the Attorney General
160 East 300 South
Salt Lake City, UT 84111

Julie Price
Administrative Assistant

EXHIBIT

D

DIVISION OF CONSUMER PROTECTION
DEPARTMENT OF COMMERCE
P.O. BOX 146704
160 EAST 300 SOUTH
SALT LAKE CITY, UTAH 84114-6704

BEFORE THE DIVISION OF CONSUMER PROTECTION
OF THE DEPARTMENT OF COMMERCE
OF THE STATE OF UTAH

IN THE MATTER OF: **BAJIO, LLC,** a Delaware limited liability company doing business as BAJIO MEXICAN GRILL; **BAJIO MOUNTAIN WEST, LLC,** a Utah limited liability company doing business as BAJIO MEXICAN GRILL; and **LOGAN C. HUNTER,** individually, RESPONDENTS.	**ORDER ON BAJIO'S SECOND MOTION TO DISMISS** Case no.: **DCP 86673**

Bajio, LLC, a purportedly dissolved Delaware limited liability company, has filed a Motion to Dismiss the administrative proceeding brought by the Division of Consumer Protection (the "Division"), based upon an argument of an absence of statutory authority to bring the Amended Citation (the "Citation") under U.C.A. §13-2-6(3). For purposes of this Order, the moving Respondent shall be referred to as Bajio or the "Respondent."

The important question posed by Bajio in this, its second Motion to Dismiss, is whether there is statutory authority for the Division to bring its Citation against a purportedly dissolved limited liability company based upon alleged violations that took place approximately eight years ago.

I. The Division has authority to bring its Citation under U.C.A. §13-11-17(4)(a)

The Division is not confined to stating authority for its Citation only in the first paragraph of its pleading. If valid authority and grounds exist for its claims are set forth in the separate Counts of the Citation, the Citation should not be dismissed.

The facts of the Citation are based upon the alleged dealings of a franchisor with its franchisee. Violations of the consumer protection statutes and rules with regard to franchises is found in part in R152-11-11. Count 1 and 2 of the Citation are premised upon R152-11-11(B)(10) and Count 3 is premised upon R152-11-11(B)(1) and (3)[1]. These rules are promulgated under the authority granted by the Utah Legislature[2] under the Utah Consumer Sales Practices Act (the "UCSPA"). Subsection 17(4)(a)[3] of the UCSPA grants substantial authority to the Division and provides:

> "in addition to other penalties and remedies set out under this chapter, and in addition to its other enforcement powers under Title 13, Chapter 2, Division of Consumer Protection, the division director may issue a cease and desist order and impose an administrative fine of up to $2,500 for each violation of this chapter (emphasis added).

This statute expressly states that the director of the Division has enforcement authority in addition to that of U.C.A. §13-2-6(3), relied upon by Bajio in its motion.

Further, the first section of R152-11 states that:

> "The purposes and policies of these rules are to (1) define with reasonable specificity acts and practices which violate Section 4 of the Utah Consumer Sales Practices Act . . ."

---

[1] The numbers of the rules referenced in the Citation are improperly designated or typed as R15-22-11 in the Citation. However, the full text of the rules is included *verbatim* in the Citation and gives the Respondent adequate notice of the basis for the Citation.

[2] R152-11-1(a) provides that the substantive rules of R152-11 "are adopted by the Director of the Division of Consumer Protection pursuant to Section 188 of the Laws of Utah, 1973 (Utah Consumer Sales Practices Act, Utah Code Annotated Section 13-11-1 *et seq* , as amended "

[3] Again, the Division's citation to this statute in its Opposition Memorandum is improperly designated or typed as Utah Code §13-11-4. However, the full text of the relevant portion of the statute is included *verbatim* in its Opposition Memorandum and gives the Respondent adequate notice of the statutory basis for its argument Further, Bajio apprehended this reality and cites the proper statutory reference in its Reply Memorandum at p 4

The Count 1 and 2 allegations based upon R152-11-11(B)(10) and the Count 3 allegations based upon R152-11-11(B)(1) and (3) are precisely those kinds of "specific acts and practices" relating to franchises that are violative of Section 4 of the UCSPA and are not limited to the statutory authority of U.C.A. §13-2-6(3).

Bajio makes no argument in its Reply memorandum against the authority of the Division to bring a Citation based upon the claims of Counts 1 through 3 under R152-11-11(B)(1), (3) and/or (10).

Bajio's sole argument with regard to U.C.A. §13-11-17(4)(a), is based upon its position that such statute "encompasses current or ongoing behavior – [stating]: the division director may issue a cease and desist order and impose an administrative fine of up to $2,500 for each violation of this chapter. The use of the conjunction "and" makes clear that the foregoing language is geared towards current and ongoing violations as a "cease and desist order" is only applicable to current and ongoing actions" (Reply Memorandum p. 4).

However, cease and desist orders also are geared towards future and potential actions. The granting of a cease and desist order lawfully precludes future violations. Although it may seem unlikely or even very doubtful that Bajio would ever return to its activities of granting franchises in the State of Utah, it is a not without the realm of possibility. It could renew its status as a limited liability company and conduct business in Utah or elsewhere. The assertions of Bajio that it will never do so do not eliminate the possibility. The Division has a legitimate right to foreclose such possibility entirely by issuing a cease and desist order.[4] If the other factual elements are present to establish the asserted violations, the Division is authorized by statute to pursue and obtain both the cease and desist order, and a fine. The conjunctive

[4] Division cease and desist orders customarily include a notice that violating a cease and desist order constitutes a third degree felony under U.C.A. §13-2-6(2). Such a serious consequence renders an even greater impetus to future compliance by a franchisor, or a former franchisor.

language of the authorizing statute by the use of the word "and" is not dispositive of the question of the Division's authority to pursue the claims under R152-11-11(B)(1), (3) and/or (10).

No other argument is offered to counter the Division's authority to bring its Citation under U.C.A. §13-11-17(4)(a), and its claims under R152-11-11(B)(1), (3) and/or (10).

In addition to the analysis and conclusion below in Section II of this order, the Citation will not be dismissed on the basis of a lack of authority to pursue the present claims, notwithstanding the apparent fact that Bajio is not currently pursuing franchise operations in the State of Utah.

II. On the basis of the present record in this matter, the Division's authority to bring its Citation under U.C.A. §13-2-6(3) cannot be determined as a matter of law.

Bajio's motion is based upon the assertion that the Division has no authority under U.C.A. §13-2-6(3) to bring the Citation in this matter because Bajio is presented as a dissolved entity[5] and "is" not "engaged" in any violation at the time that the decision was made to file the Citation. Quoting text from a Utah case discussed below, Bajio asserts that the question here turns on a fine distinction of what the meaning of the word "is" is.

Because U.C.A. §13-2-6(3) is a distinct and possible second grounds for the authority of the Division to bring the Citation, this possibility will be analyzed in this Section of this Order.

It is important to note that the plain language of the mandate of U.C.A. §13-2-6(3) for the Division to take enforcement action is not whether Bajio "is" in existence and "engaged" in violative action at the time that the decision is made that enforcement action is to be promptly

[5] At the time of the hearing of Bajio's first Motion to Dismiss (based on statute of limitations arguments), this tribunal stated that it would accept, for purposes of that argument, that Bajio was dissolved. A proffer was made that the entity was dissolved, supported by means of a document purportedly from a Delaware state agency. The document was not examined by the presiding officer, was not moved to be accepted as an exhibit and was not accepted as an exhibit. No testimony or evidence was adduced at the hearing on the motion regarding possible legal successors to Bajio It was the view of the tribunal that the statute of limitations arguments did not hinge on the current existence of the entity Now that the present existence, in fact, of Bajio has become a possible turning point in the U.C.A. §13-2-6(3) argument, proper proof of the existence, dissolution and possible successors in interest becomes more relevant, and possibly necessary It is not to be assumed for purposes of this Motion.

taken, but whether the "division has **reasonable cause to believe"** (emphasis added), that Bajio was then engaged in violating the statute. We have no or little indication, on this motion to dismiss, as to what the reasonable belief of the Division was at that time.

At the administrative hearing in this matter, it might be simple to determine that the Division knew of the expired status of Bajio, that Bajio could not be presently engaged in violative actions, and that it was without authority to act under U.C.A. §13-2-6(3). In an informal proceeding, as this is, it is difficult to elucidate these facts owing to the lack of discovery procedures.

What the statute does not plainly tell us is what should be done if the Division reasonably believed (at the time that the decision was made to file the Citation), that Bajio was then currently violating the statute, but subsequently learns that Bajio was dissolved and without successors, and was not engaging in violative activities at the time that the Citation was filed. In such case, should the Division dismiss its U.C.A. §13-2-6(3) claims or should it then continue with its Citation, pursing claims regarding possible violations of the past? Because of its U.C.A. §13-11-17(4)(a) independent authority to impose cease and desist orders and to assess fines, this question may be of small moment in this matter.

If, on the other hand, the Division had reason to know that Bajio did not presently exist, had no legal successors in violative activity in the State of Utah, and did not exist at the time that the decision was made to file the Citation, the Bajio argument appears valid. In such case, the U.C.A. §13-2-6(3) claims should be dismissed, when these facts are brought forth in the administrative proceeding.

In making its argument about the present tense requirement of a U.C.A. §13-2-6(3) claim, Bajio sites the Utah Court of Appeals[6] decision of *Prows v. Labor Commission, et al.*, 333 P.3d 1261, 2014 Utah App. LEXIS 196 (2014). Prows was a brick mason for over 25 years when he suffered a serious injury that left him without work for a period of three years. He sought a determination before the Utah Labor Commission that he had a permanent total disability. After he filed his claim, but prior to the administrative hearing on his claim, Prows returned to gainful employment (not as a brick mason). In denying his claim for permanent total disability, the Labor Commission held that he had to meet the four requirements of the statute. The first of these was a showing that "(i) the employee is not gainfully employed." This Prows could not do, as he was employed at the very time when he was required to show that he met this condition.

The Division's hypothetical of a peace officer citing a moving vehicle while in the very act of violating the lawful speed limit is inapposite here and has no merit.

The conclusion drawn in this Section of the Order may not satisfactorily address the Division's stated concern that it should be able to pursue U.C.A. §13-2-6(3) remedies against a respondent who deceived consumers and simply walks away with his ill-gotten gains, but immediately ceases business before the Division may react and bring a Citation (Opposition Memorandum p. 2). Perhaps, the Division is left to address this concern only through its other enforcement powers, such as those under U.C.A. §13-11-17. Alternately, the Division may wish to pursue legislative expansion of its U.C.A. §13-2-6(3) enforcement powers. As stated in *Prows* "[o]ur task is to interpret the words used by the legislature, not to correct or revise them." *Id* at p. 1264.

[6] Bajio refers to this case as a Utah Supreme Court decision. However, the Utah Supreme Court denied the petition for certiorari in the case (see *Prows v LBR Commn*, 341 P 3d 253, 2014 Utah Lexis 230). The language quoted in the Bajio memorandum is text taken from the Court of Appeals' decision.

III. Respondent's Motion is not presented as a motion for summary judgment

The Motion to Dismiss of Bajio is also not granted because it should have been brought as a summary judgment supported by affidavits or references in the record that show that there is undisputed evidence showing the absence of a necessary element of the claim, or of the Division's authority.

The Motion before this tribunal at present is one to dismiss the Citation of the Division. A dismissal is to be granted only when the allegations of the Citation itself fail to state a claim upon which relief may be granted or other good cause exists. See R151-4-301(c) and (d). The focus must be on the allegations of the Citation.[7] If other facts are to be considered, the proper procedure is to make a motion for summary judgment and supplement such motion with affidavits and portions of the record on disputed or undisputed facts bearing specifically on the grounds for the motion.

In the second paragraph at page 3 of its Motion, Bajio recites a litany of assertions about when it ceased operating in the state of Utah, offering franchises, and about the cessation of business by the franchisees with whom it conducted business. These statements are wholly unsupported in the record and there are no affidavits or admissions cited to this tribunal. Further, there are no affidavits, or even assertions in the Motion, about what the Division had "reasonable cause to believe" regarding each of these assertions at the time that the decision was made by the Division to file its Citation. To address this matter in its present procedural format as a motion to dismiss, we must look solely within the confines of the language of the Citation itself to determine if, at the time of the filing of the Citation, the Division had "reasonable cause to believe that [Bajio] is engaged" in violating the consumer protection statutes or rules. Our

[7] A tribunal's function on a motion to dismiss "is not to weigh potential evidence that the parties might present at trial, but to assess whether the plaintiff's complaint alone is legally sufficient to state a claim for which relief may be granted." *Sutton v Utah State Sch for the Deaf & Blind, 173 F 3d 1226, 1236 (10th Cir 1999)*

analysis must depart from the point of what the Division had "reasonable cause to believe," from the language in the Citation.

The only statement about the existence of Bajio in the Citation is in the first numbered paragraph. The first sentence of this paragraph states; Bajio, LLC was a Delaware limited liability company established in August 2005 with a principal place of business of 2711 Centerville Road Suite 400 Willington (sic) Delaware 19808."

Here some uncertainty may exist. The operative words in the Citation are "was" and "established." Nothing is clearly said about whether the entity still existed, when or if it ceased to exist, what franchise business it was then pursuing or what the status of these matters may have been at the time that the Division made its decision to pursue the Citation or at the time of the filing of the Citation.

It is somewhat probative (but certainly not conclusive), that the Certificate of Service incorporated in the Citation reflects that the Division attempted to complete service of the Citation by mailing to the Centerville Road address in Delaware, possibly indicating that the Division had reason to believe that the entity still existed and could be reached at that address.

All of this is academic speculation, however, as the hearing in this matter should be helpful in determining what the Division had "reasonable cause to believe" at the time that the Citation was filed. After proper factual development of its case at the administrative hearing in this matter, it may be appropriate for Bajio to request dismissal of any U.C.A. §13-2-6(3) claims against Bajio. This, however, would not override the U.C.A. §13-11-17(4)(a) claims addressed above in SectionI of this Order. Such claims would survive any evidentiary presentation regarding what the Division had a reasonable cause to believe about the then current existence or violative activities of Bajio, or of its successors in interest.

ORDER

The Motion to Dismiss of Bajio is denied. The Division has ample authority under U.C.A. §13-11-17(4)(a), and its promulgated and cited rules of R152-11-11(B)(1), (3) and/or (10), to bring its Citation against Bajio. On the present status of the record in this matter, it further cannot be determined as a matter of law that the Division does not also have authority to bring its Citation under U.C.A. §13-2-6(3). If relevant or meaningful, the question of the U.C.A. §13-2-6(3) authority of the Division to bring claims can be sorted out at the administrative hearing in this matter, based on evidence adduced at that time.

DATED January 12th 2017,

DEPARTMENT OF COMMERCE

BRUCE L. DIBB, PRESIDING OFFICER

CERTIFICATE OF SERVICE

I hereby certify that I have this day served this ORDER ON BAJIO'S SECOND MOTION TO DISMISS on the parties of record in this proceeding set forth below by delivering a copy by email to:

Bajio Mountain West, LLC
and Logan C. Hunter

Richard A. Roberts
robertsr@provolawyers.com

Bajio, LLC

Greggory J. Savage
gsavage@rqn.com

Gregory S. Roberts
groberts@rqn.com

Division of Consumer Protection

Liz Blaylock, Investigator
lblaylock@utah.gov

Jacob Hart, Investigator
jhart@utah.gov

Dated this 12th day of January, 2017.

/s/ Bruce L. Dibb
Bruce L. Dibb

Bruce Dibb <bdibb@utah.gov>

Orders on Bajio's Second and Third Motions to Dismiss

1 message

Bruce Dibb <bdibb@utah.gov> Thu, Jan 12, 2017 at 1.50 PM
To Richard Roberts <robertsr@provolawyers.com>, "Greggory J. Savage" <gsavage@rqn.com>, Gregory Roberts <groberts@rqn.com>, Elizabeth Blaylock <lblaylock@utah.gov>, Jennifer Korb <jkorb@utah.gov>, Jacob Hart <jfhart@utah.gov>

Counsel

Attached are rulings on the referenced motions. I will disseminate the ruling on the BMW/Logan Motion in the near future.

Bruce L. Dibb, ALJ

2 attachments

Signed Order on Bajios 2nd Motion to Dismiss.pdf
508K

Signed Order on Bajios 3rd Motion to Dismiss.pdf
474K

DIVISION OF CONSUMER PROTECTION
DEPARTMENT OF COMMERCE
P.O. BOX 146704
160 EAST 300 SOUTH
SALT LAKE CITY, UTAH 84114-6704

BEFORE THE DIVISION OF CONSUMER PROTECTION
OF THE DEPARTMENT OF COMMERCE
OF THE STATE OF UTAH

IN THE MATTER OF: **BAJIO, LLC,** a Delaware limited liability company doing business as BAJIO MEXICAN GRILL; **BAJIO MOUNTAIN WEST, LLC,** a Utah limited liability company doing business as BAJIO MEXICAN GRILL; and **LOGAN C. HUNTER,** individually, RESPONDENTS.	**ORDER ON BAJIO'S SECOND MOTION TO DISMISS** Case no.: **DCP 86673**

Bajio, LLC, a purportedly dissolved Delaware limited liability company, has filed a Motion to Dismiss the administrative proceeding brought by the Division of Consumer Protection (the "Division"), based upon an argument of an absence of statutory authority to bring the Amended Citation (the "Citation") under U.C.A. §13-2-6(3). For purposes of this Order, the moving Respondent shall be referred to as Bajio or the "Respondent."

The important question posed by Bajio in this, its second Motion to Dismiss, is whether there is statutory authority for the Division to bring its Citation against a purportedly dissolved limited liability company based upon alleged violations that took place approximately eight years ago.

I. The Division has authority to bring its Citation under U.C.A. §13-11-17(4)(a)

The Division is not confined to stating authority for its Citation only in the first paragraph of its pleading. If valid authority and grounds exist for its claims are set forth in the separate Counts of the Citation, the Citation should not be dismissed.

The facts of the Citation are based upon the alleged dealings of a franchisor with its franchisee. Violations of the consumer protection statutes and rules with regard to franchises is found in part in R152-11-11. Count 1 and 2 of the Citation are premised upon R152-11-11(B)(10) and Count 3 is premised upon R152-11-11(B)(1) and (3)[1]. These rules are promulgated under the authority granted by the Utah Legislature[2] under the Utah Consumer Sales Practices Act (the "UCSPA"). Subsection 17(4)(a)[3] of the UCSPA grants substantial authority to the Division and provides:

> "in addition to other penalties and remedies set out under this chapter, and in addition to its other enforcement powers under Title 13, Chapter 2, Division of Consumer Protection, the division director may issue a cease and desist order and impose an administrative fine of up to $2,500 for each violation of this chapter (emphasis added).

This statute expressly states that the director of the Division has enforcement authority in addition to that of U.C.A. §13-2-6(3), relied upon by Bajio in its motion.

Further, the first section of R152-11 states that:

> "The purposes and policies of these rules are to (1) define with reasonable specificity acts and practices which violate Section 4 of the Utah Consumer Sales Practices Act . . ."

---

[1] The numbers of the rules referenced in the Citation are improperly designated or typed as R15-22-11 in the Citation. However, the full text of the rules is included *verbatim* in the Citation and gives the Respondent adequate notice of the basis for the Citation.

[2] R152-11-1(a) provides that the substantive rules of R152-11 "are adopted by the Director of the Division of Consumer Protection pursuant to Section 188 of the Laws of Utah, 1973 (Utah Consumer Sales Practices Act, Utah Code Annotated Section 13-11-1 *et seq.*, as amended."

[3] Again, the Division's citation to this statute in its Opposition Memorandum is improperly designated or typed as Utah Code §13-11-4 However, the full text of the relevant portion of the statute is included *verbatim* in its Opposition Memorandum and gives the Respondent adequate notice of the statutory basis for its argument. Further, Bajio apprehended this reality and cites the proper statutory reference in its Reply Memorandum at p 4

The Count 1 and 2 allegations based upon R152-11-11(B)(10) and the Count 3 allegations based upon R152-11-11(B)(1) and (3) are precisely those kinds of "specific acts and practices" relating to franchises that are violative of Section 4 of the UCSPA and are not limited to the statutory authority of U.C.A. §13-2-6(3).

Bajio makes no argument in its Reply memorandum against the authority of the Division to bring a Citation based upon the claims of Counts 1 through 3 under R152-11-11(B)(1), (3) and/or (10).

Bajio's sole argument with regard to U.C.A. §13-11-17(4)(a), is based upon its position that such statute "encompasses current or ongoing behavior – [stating]: the division director may issue a cease and desist order and impose an administrative fine of up to $2,500 for each violation of this chapter. The use of the conjunction "and" makes clear that the foregoing language is geared towards current and ongoing violations as a "cease and desist order" is only applicable to current and ongoing actions" (Reply Memorandum p. 4).

However, cease and desist orders also are geared towards future and potential actions. The granting of a cease and desist order lawfully precludes future violations. Although it may seem unlikely or even very doubtful that Bajio would ever return to its activities of granting franchises in the State of Utah, it is a not without the realm of possibility. It could renew its status as a limited liability company and conduct business in Utah or elsewhere. The assertions of Bajio that it will never do so do not eliminate the possibility. The Division has a legitimate right to foreclose such possibility entirely by issuing a cease and desist order.[4] If the other factual elements are present to establish the asserted violations, the Division is authorized by statute to pursue and obtain both the cease and desist order, and a fine. The conjunctive

[4] Division cease and desist orders customarily include a notice that violating a cease and desist order constitutes a third degree felony under U.C.A. §13-2-6(2). Such a serious consequence renders an even greater impetus to future compliance by a franchisor, or a former franchisor.

language of the authorizing statute by the use of the word "and" is not dispositive of the question of the Division's authority to pursue the claims under R152-11-11(B)(1), (3) and/or (10).

No other argument is offered to counter the Division's authority to bring its Citation under U.C.A. §13-11-17(4)(a), and its claims under R152-11-11(B)(1), (3) and/or (10).

In addition to the analysis and conclusion below in Section II of this order, the Citation will not be dismissed on the basis of a lack of authority to pursue the present claims, notwithstanding the apparent fact that Bajio is not currently pursuing franchise operations in the State of Utah.

II. On the basis of the present record in this matter, the Division's authority to bring its Citation under U.C.A. §13-2-6(3) cannot be determined as a matter of law.

Bajio's motion is based upon the assertion that the Division has no authority under U.C.A. §13-2-6(3) to bring the Citation in this matter because Bajio is presented as a dissolved entity[5] and "is" not "engaged" in any violation at the time that the decision was made to file the Citation. Quoting text from a Utah case discussed below, Bajio asserts that the question here turns on a fine distinction of what the meaning of the word "is" is.

Because U.C.A. §13-2-6(3) is a distinct and possible second grounds for the authority of the Division to bring the Citation, this possibility will be analyzed in this Section of this Order.

It is important to note that the plain language of the mandate of U.C.A. §13-2-6(3) for the Division to take enforcement action is not whether Bajio "is" in existence and "engaged" in violative action at the time that the decision is made that enforcement action is to be promptly

[5] At the time of the hearing of Bajio's first Motion to Dismiss (based on statute of limitations arguments), this tribunal stated that it would accept, for purposes of that argument, that Bajio was dissolved A proffer was made that the entity was dissolved, supported by means of a document purportedly from a Delaware state agency. The document was not examined by the presiding officer, was not moved to be accepted as an exhibit and was not accepted as an exhibit. No testimony or evidence was adduced at the hearing on the motion regarding possible legal successors to Bajio. It was the view of the tribunal that the statute of limitations arguments did not hinge on the current existence of the entity. Now that the present existence, in fact, of Bajio has become a possible turning point in the U.C.A §13-2-6(3) argument, proper proof of the existence, dissolution and possible successors in interest becomes more relevant, and possibly necessary. It is not to be assumed for purposes of this Motion.

taken, but whether the "division has **reasonable cause to believe"** (emphasis added), that Bajio was then engaged in violating the statute. We have no or little indication, on this motion to dismiss, as to what the reasonable belief of the Division was at that time.

At the administrative hearing in this matter, it might be simple to determine that the Division knew of the expired status of Bajio, that Bajio could not be presently engaged in violative actions, and that it was without authority to act under U.C.A. §13-2-6(3). In an informal proceeding, as this is, it is difficult to elucidate these facts owing to the lack of discovery procedures.

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III. Respondent's Motion is not presented as a motion for summary judgment

The Motion to Dismiss of Bajio is also not granted because it should have been brought as a summary judgment supported by affidavits or references in the record that show that there is undisputed evidence showing the absence of a necessary element of the claim, or of the Division's authority.

The Motion before this tribunal at present is one to dismiss the Citation of the Division. A dismissal is to be granted only when the allegations of the Citation itself fail to state a claim upon which relief may be granted or other good cause exists. See R151-4-301(c) and (d). The focus must be on the allegations of the Citation.[7] If other facts are to be considered, the proper procedure is to make a motion for summary judgment and supplement such motion with affidavits and portions of the record on disputed or undisputed facts bearing specifically on the grounds for the motion.

In the second paragraph at page 3 of its Motion, Bajio recites a litany of assertions about when it ceased operating in the state of Utah, offering franchises, and about the cessation of business by the franchisees with whom it conducted business. These statements are wholly unsupported in the record and there are no affidavits or admissions cited to this tribunal. Further, there are no affidavits, or even assertions in the Motion, about what the Division had "reasonable cause to believe" regarding each of these assertions at the time that the decision was made by the Division to file its Citation. To address this matter in its present procedural format as a motion to dismiss, we must look solely within the confines of the language of the Citation itself to determine if, at the time of the filing of the Citation, the Division had "reasonable cause to believe that [Bajio] is engaged" in violating the consumer protection statutes or rules. Our

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Here some uncertainty may exist. The operative words in the Citation are "was" and "established." Nothing is clearly said about whether the entity still existed, when or if it ceased to exist, what franchise business it was then pursuing or what the status of these matters may have been at the time that the Division made its decision to pursue the Citation or at the time of the filing of the Citation.

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ORDER

The Motion to Dismiss of Bajio is denied. The Division has ample authority under U.C.A. §13-11-17(4)(a), and its promulgated and cited rules of R152-11-11(B)(1), (3) and/or (10), to bring its Citation against Bajio. On the present status of the record in this matter, it further cannot be determined as a matter of law that the Division does not also have authority to bring its Citation under U.C.A. §13-2-6(3). If relevant or meaningful, the question of the U.C.A. §13-2-6(3) authority of the Division to bring claims can be sorted out at the administrative hearing in this matter, based on evidence adduced at that time.

DATED January 12th 2017,

DEPARTMENT OF COMMERCE

BRUCE L. DIBB, PRESIDING OFFICER

CERTIFICATE OF SERVICE

I hereby certify that I have this day served this ORDER ON BAJIO'S SECOND MOTION TO DISMISS on the parties of record in this proceeding set forth below by delivering a copy by email to:

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