DEPARTMENT OF COMMERCE
Heber M. Wells Building, 2ND Floor
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SALT LAKE CITY, UTAH 84114

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 INC.,** 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.**	**ORDER ON MOTION TO DISMISS OF THE PURDUE RESPONDENTS** **DCP Legal File No. CP-2019-005** DCP Case No. 107102

On April 9, 2019, Purdue Pharma, L.P., Purdue Pharma, Inc. and Purdue Frederick Company filed a Motion to Dismiss the Notice of Agency Action and the Citation (the "Motion") filed by the Division of Consumer Protection (the "Division"). On the same date, Richard Sackler and Kathe Sackler filed a separate Motion to Dismiss the Notice of Agency Action and the Citation filed by the Division.

For convenience, all five respondents will sometimes be referred to collectively herein as the "Respondents." Purdue Pharma, L.P., Purdue Pharma, Inc. and Purdue Frederick Company will sometimes be referred to collectively herein as "Purdue," or the "Purdue Respondents." Richard Sackler and Kathe Sackler will sometimes be referred to collectively herein as the "Sackler Respondents."

This Order addresses the Motion of the Purdue Respondents. A separate Order will issue with regard to the motion to dismiss of the Sackler Respondents.

PROCEDURAL SETTING

1. Some, or all, of the Respondents are engaged in multiple legal actions related to the issues raised in the Citation and Notice of Agency Action (the "Citation") of the Division. Respondents assert that "the Division's claims are similar to other actions filed in courts across the country" (Opposition to Renewed Motion to Convert Informal Proceeding, p.2).
2. Included among these other actions is a civil action filed in calendar year 2017 in the Federal District Court of Ohio, Northern District, as Case No. 1:17-CV-2804 (MDL No. 2804) (the "MDL"). This tribunal may take judicial notice[1] of the pleadings in the MDL.
3. The State of Utah filed on May 31, 2018 a civil action against the Purdue Respondents in the Seventh Judicial District Court, Carbon County, Utah Case No. 180700055 (the "Utah State Action"). This case was dismissed without prejudice on January 30, 2019 (Motion, Exhibit #1).
4. The Citation in this matter was filed on the same date, January 30, 2019, and the Notice of Agency Action was filed on March 8, 2019.
5. On April 9, 2019, Purdue filed a Motion to Dismiss the Notice of Agency Action and the Citation (the "Motion") filed by the Division.
6. The Division filed its Memorandum in Opposition to the Purdue Respondents' Motion to Dismiss (the "Opposition") on April 23, 2019. Purdue filed its Reply in Support of Motion to Dismiss on May 3, 2019 (the "Purdue Reply"), and its Supplemental Brief in

[1] The presiding officer here "may take judicial notice of public records" *BMBT, LLC v. Miller*, 322 P.3d 1172; 2014 Utah App. LEXIS 62.

Support of Motion to Dismiss (the " Purdue Supplemental Brief") on May 30, 2019. The Division filed on May 28, 2019 a Supplemental Memorandum in Opposition to Respondents' Motion to Dismiss (the "Division's Supplemental Memorandum").

LEGAL STANDARD

"When determining whether a trial court properly granted a rule 12(b)(6) motion to dismiss, we accept the factual allegations in the complaint as true and consider them and all reasonable inferences to be drawn from them in a light most favorable to the plaintiff." *St. Benedict's Dev. Co. v. St. Benedict's Hospital*, 811 P.2d 194, 196; 1991 Utah LEXIS 36. Because U.A.C. R151-4-302 directly incorporates the Utah Rules of Civil Procedure (the "URCP") with regard to motions to dismiss, decisions of the Utah Courts of Appeal interpreting the URCP are controlling law in this administrative proceeding.

The Motion before this tribunal at present is one to dismiss the Division's Citation. 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.[2]

ANALYSIS

I. This administrative tribunal is required to address at this juncture in the proceedings the constitutional challenges raised by the Respondents.

In their motions to dismiss, the Respondents make a number of arguments that challenge the constitutionality of either the claims of the Division's Citation or the procedures employed in the statutes or rules applicable to the Division. Careful consideration must be given to the extent to which constitutional law issues are to be addressed in administrative proceedings. The Utah

[2] 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; 1999 U.S. App. LEXIS 3159.

Supreme Court in the case of *Nebeker v. State Tax Commission*, 34 P.3d 180; 2001 Utah LEXIS 145, stated that the Tax Commission "could not determine questions of legality or constitutionality of legislative enactments, citing *State Tax Commission v. Wright*, 596 P.2d 634, 636; 1979 Utah LEXIS 850, and *Johnson v. Utah State Retirement Office*, 621 P.2d 1234; 1980 Utah LEXIS 1070. The Court observed in *Nebeker* that: "[a]s we noted in *Johnson* . . . "administrative agencies do not generally determine the constitutionality of their organic legislation. . ."

Nevertheless, there is no case authority that would preclude an agency or presiding officer from ruling on procedural issues, such as whether the constitutional requirements to satisfy procedural due process are met. It appears, however, that in the area of determining the constitutionality of an agency's organic legislation or the constitutional issues of substantive due process, an agency may not make a constitutional determination.

This conclusion raises the question of how an administrative tribunal addresses a direct constitutional challenge in an administrative proceeding. The Utah Supreme Court answers this question in the case of *Johnson v. Utah State Retirement Office*, 621 P.2d 1234, 1237; 1980 Utah LEXIS 1970. In *Johnson*, the Court stated:

> Plaintiffs' assertion of a constitutional issue does not alter the necessity for compliance with the requirement of first adjudicating their claim before the [administrative agency]. Administrative agencies do not generally determine the constitutionality of their organic legislation, *Public Utilities Comm'n of California v. United States,* 355 U.S. 534, 2 L. Ed. 2d 470, 78 S. Ct. 446 (1958); 3 Davis *Administrative Law Treatise* § 20.04 (1958). But the mere introduction of a constitutional issue does not obviate the need for exhaustion of administrative remedies. As stated in *Public Utilities,* 355 U.S. at 539-40, 78 S. Ct. *at* 450, "if . . . an administrative proceeding might leave no remnant of the constitutional question, the administrative remedy plainly should be pursued."
>
> The instant case involves issues other than the constitutional claim, and pursuit of plaintiffs' administrative remedies might obviate the need of addressing that issue. If not, judicial attention to the constitutional issue, as well as other issues, will be better framed by the structure of a factual context. See *W.E.B. DuBois Clubs of*

America v. Clark, 389 U.S. 309, 19 L. Ed. 2d 546, 88 S. Ct. 450 (1967); *A Quaker Action Group v. Morton,* 148 U.S. App. D.C. 346, 460 F.2d 854 (D.C. Cir. 1971).

A similar holding is found in the more recent Utah Supreme Court case of *Nebeker v. State Tax Commission*, 34 P.3d 180, 186; 2001 Utah LEXIS 145. The *Nebeker* court stated that, although constitutional issues cannot be decided in the administrative proceeding, several important objectives are met by the constitutional issues being raised in such proceeding. The *Nebeker* court said:

> . . . Judicial attention to the constitutional issue, as well as other issues, will be better framed by the structure of a factual context" developed before the agency. *Johnson,* 621 P.2d at 1237. Lastly, to hold otherwise would give a petitioner a way to revive claims he had originally lost due to his own lack of diligence in failing to exhaust his administrative remedies. Therefore, parties must raise constitutional claims in the first instance before the agency.

When addressed in this manner in the administrative proceeding and upon agency review, the direct constitutional question is then determined on appeal from the order on agency review in the Utah Court of Appeals. The parties are well advised to preserve their constitutional law issues by raising them in the administrative proceeding.

II. Due Process

Respondents contend that their due process rights are being impinged for a litany of reasons primarily related to the prosecution of the Division's UCSPA claims in an administrative proceeding.

Procedural due process is required in all administrative proceedings. The purpose of due process is to prevent fundamental unfairness. *State v. Parker*, 872 P.2d 1041, 1048; 1994 Utah App. LEXIS 36. At a minimum, due process requires timely and adequate notice, and an opportunity to be heard in a meaningful way. *Salt Lake City Corp. v. Jordan River Restoration Network*, 299 P.3d 990, 1006; 2012 Utah LEXIS 201.

As raised by the Respondents, this is "an opportunity to be heard" due process case. There is no question that each of the Respondents has been given notice of this proceeding consonant with due process requirements.

Most, if not all, of the due process issues raised regarding the issue of having an opportunity to be heard in the matter can be characterized as concerns that should be monitored in this proceeding to assure proper safeguards. The Respondents provide no case authority, either state or federal, that would warrant dismissal of the Division's claims on due process grounds.

A. Purdue is afforded due process notwithstanding the complexity and/or magnitude of the case.

Purdue asserts that the due process analysis in this case is affected by the complexity and magnitude of the case brought against it. The Division counters with arguments including the observation that the present administrative proceeding includes only UCSPA claims and is a streamlined version of its prior Utah State Action. Neither party has cited a case that holds that an administrative action may not be prosecuted or that complex cases may be prosecuted only in state or federal district courts.

As noted in *City Club, Inc. v. Dep't of Alcoholic Bev. Control*, 327 P.3d 32, 36; 2014 Utah App. LEXIS 110, and in *Mathews v. Eldridge*, 424 U.S. 319, 335; 96 S. Ct. 893, 47 L. Ed. 2d 18; 1976 U.S. LEXIS 141, resolution of the constitutional sufficiency of administrative procedures requires consideration of three factors: "[f]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."

The specific fact situations of these two cases are not particularly helpful in this analysis or to the Purdue argument. In *City Club*, the Utah Court of Appeals held that it would not disturb the agency's order on the grounds that City Club had failed to adequately brief its due process claim. In *Mathews*, the Supreme Court concluded that an evidentiary hearing was not required prior to the termination of disability benefits and that the administrative procedures applicable in the case fully comported with due process. In the present matter, an evidentiary hearing of 15 days has been calendared. The parties are afforded discovery, as further addressed below, and dates have been set for expert and rebuttal expert reports. These safeguards are sufficient to eliminate the risk of an erroneous deprivation of the property interest of Purdue. The Division's interest in pursuing its UCSPA claims is substantial, including doing so with the efficient procedures of an administrative proceeding.

It is recognized that a "property" interest of Purdue within the meaning of the due process clause is put at jeopardy here. However, the existing administrative procedures discussed in part below, and the existing administrative procedures provided in the statutes and rules applicable to this proceeding, provide all the process that is constitutionally due before a party can be deprived of that interest. In all events, dismissal of the administrative proceeding is not warranted on due process grounds.

At page 11 of its Motion, Purdue asserts that the legislative history of the UCSPA "supports the conclusion that neither the Utah Legislature nor the Department of Commerce intended administrative proceedings as the forum for claims of this magnitude." This portion of its argument is oddly predicated on the observation that the first $75,000 of administrative fines are to be deposited in a Consumer Protection Education and Training Fund.[3]

[3] U.C.A. Section 13-11-17(4)(b).

The fairly minor amount of this education and training fund does not instruct us as to the inapplicability of the UCSPA in an administrative proceeding for claims of the magnitude asserted here, as the balance of all fines above the $75,000 are to be paid into the general fund of the state.[4] Presumably, it is out of the general fund that the state would apply any collected fines to address the adverse health and financial impacts of the alleged damage resulting from opioid medication sold to Utah consumers in alleged violation of the UCSPA. The existence of the education and training fund is no limitation on the size of case that may be brought under the UCSPA. Rather, it is a modest provision allowing the dedication of some funds to go toward preventing violations of the UCSPA, not merely redressing the violations after they occur.

B. Purdue is afforded due process notwithstanding the applicable rules related to the period of fact discovery in this proceeding.

Central to Purdue's due process concerns is the amount of time it is afforded to pursue its discovery in this administrative proceeding. To highlight its argument, Purdue refers to Rule 26(c)(5) of the Utah Rules of Civil Procedure that designates three tiers of district court litigation and corresponding discovery limits. The tiers of litigation are differentiated by the amount of damages claimed by the plaintiff. The highest tier is tier 3, and litigants have 210 days to complete fact discovery in such cases, subject to further order of the district court. In this regard, the district court may authorize "extraordinary discovery" if deemed appropriate and if a request for the extraordinary discovery is made before the expiration of the "standard discovery" period.

On April 23, 2019, a Scheduling Order was entered in this proceeding setting August 28, 2019 as the discovery cutoff date. U.A.C. R151-4-508(1) provides that the parties "are encouraged to initiate appropriate discovery procedures in advance of the prehearing conference so that

[4] U.C.A. Section 13-2-8.

discovery disputes can be addressed in the conference to the extent possible." The discovery period then runs from the date of the filing of the notice of agency action.

Although the original Citation in this matter was filed on January 30, 2019, the Division did not file its notice of agency action until March 8, 2019. There are 173 days from the date of the notice of agency action until the discovery cutoff date in this proceeding.[5] The 173 day discovery period in this matter is not that much different from the 210 days in a standard discovery period in a state court action. In any event, the 37-day difference in these two periods is not constitutionally malignant.

Further, and more to the point, U.A.C. R151-4-109(2)(b)(ii) permits extension of the discovery period, if the presiding officer finds that injustice would otherwise result. In addition, the Executive Director of the Department of Commerce, when requested by the presiding officer, may also extend the discovery period under the provisions of U.A.C. R151-4-109(2)(c). These discovery extension opportunities are not unlike the provisions of Rule 26(5)(c) URCP regarding the extension of the standard discovery period in state civil actions. They also help render Purdue's due process argument without merit.

Purdue references the scheduling discretion of a district court judge as referred to in the case of *A.K. & R. Whipple Plumbing & Heating v. Aspen Constr.*, 977 P.2d 518, 527; 1999 Utah App. LEXIS 31. Similar discretion is permitted in this administrative proceeding.

It is further to be noted that this administrative proceeding is not being prosecuted in a vacuum. More than eleven other actions have been brought against Purdue in other jurisdictions. The MDL was filed in 2017 and the Purdue Respondents have been parties in the bellwether case

[5] It is acknowledged that the Motion of the Respondents was filed before the prehearing conference and Respondents' reference to a 120 day period in its argument was employed before the prehearing conference. Through the cooperation of the parties and the discretion of the administrative law judge additional discovery time has been afforded to the parties through August 28, 2019.

in the MDL for over a year and a half, with similar fact and expert witness issues. In addition, the Utah State Action was filed on May 31, 2018, more than one year ago. The Utah State Action addressed similar fact and expert witness issues.[6] The case docket in the State Court Action indicates that two notices of depositions were filed by the Purdue Respondents in that case on July 31, 2018 (see docket attached as Exhibit "A" to the Division's Renewed Motion to Convert Informal Proceeding). Although the docket of the State Court Action does not reflect much activity in the case, by rule, discovery was open in that case for several months, before the case was voluntarily dismissed by the Division on January 30, 2019.

Although the Sackler Respondents were not named in the Utah State Action brought by the Division in May 2018, the Sackler Respondents and the Purdue Respondents indicated at the prehearing conference in this proceeding that they have entered into a joint defense agreement with each other whereby they are sharing discovery and witness information from this and other Purdue litigation. Further the Sackler Respondents were named in a non-bellwether case in the MDL and have known of many of the principal issues of such dispute for more than a year.

The existence of these other actions is relevant to the due process arguments, but it does not control the decision here. Thus, while this tribunal opines that the existence of these other cases mitigates Purdue's due process complaints, the tribunal does not depend on the existence of these cases for its resolution of the due process question. Even were this action the first and only action against Purdue, the process afforded is sufficient to satisfy the due process concerns Purdue raises.

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[6] The Respondents assert at p. 5 of their memorandum in opposition to the Division's Renewed Motion to Convert Informal Proceeding that the Citation in the present matter "repeat[ed] verbatim almost all the allegations asserted in the [Utah State Action], including violations of the UCSPA."

There are likely fact issues, and even expert witness issues, that will be different or new in this administrative proceeding and may not have been addressed in the MDL or other Purdue litigation. However, it should also be noted that this tribunal ordered the Division to provide a list of Utah related alleged misrepresentations with its initial disclosures in this matter. This was done to expedite discovery in this proceeding.

C. Purdue is afforded due process notwithstanding the applicable rules restricting expert discovery to written expert reports in lieu of expert depositions.

Purdue cites no Utah or Federal case authority that holds that due process is denied if the opinions of experts cannot be explored through depositions. As previously stated in the April 19, 2019 Order on Renewed Motion to Convert Informal Hearing in this case, U.A.C. R151-4-504(1)(a) provides for disclosure of expert witnesses in formal proceedings, their opinions, and the basis and reasons for them. This rule states:

> (1)(a) A party shall:
>
> (i) disclose in writing the name, address and telephone number of any person who might be called as an expert witness at the hearing; and
>
> (ii) provide a written report signed by the expert that contains a complete statement of all opinions the expert will offer at the hearing and the basis and reasons for them. Such an expert may not testify in a party's case-in-chief concerning any matter not fairly disclosed in the report. The party offering the expert shall pay the costs for the report.

The clear direction in the rule that "an expert may not testify in a party's case-in-chief concerning any matter not fairly disclosed in the report" is a significant incentive for the written report to be robust and informative.

Recent amendments to R151-4-504, reflected in the language of the rule quoted above and effective in October 2018, essentially copy the language regarding written reports of experts contained in Rule 26(4)(B) of the Utah Rules of Civil Procedure. Therefore, case law

interpreting Rule 26(4)(B) URCP controls or strongly informs any dispute regarding the interpretation of R151-4-504.

U.A.C. R151-4-601(2)(c) precludes a deposition of any expert in an administrative proceeding. By comparison, Rule 26(4)(B) URCP permits either a deposition or a written report, but not both. Written reports of experts, therefore, are a recognized means of discovery of the identity and opinions of expert witnesses in civil actions in the courts of the state of Utah. The use of expert reports to vet the opinions of the experts in this proceeding is not a violation of due process.

D. Purdue is not denied due process by reason of the evidentiary rules that are applicable in this administrative proceeding.

Purdue's concerns about evidentiary matters in this hearing were previously raised in its opposition to the conversion of this case to a formal proceeding. Some of the observations made in the April 19, 2019 Order on Renewed Motion to Convert Informal Proceeding are equally applicable here.

Statutory provisions applicable in administrative proceedings permit evidence that would not be admissible under the Utah Rules of Evidence. Respondents cite specific evidentiary concerns about U.C.A. §63G-4-206(1)(b)(i) and (iii).

U.C.A. §63G-4-206(1)(b)(i) permits a presiding officer in a formal adjudicative proceeding to "exclude evidence that is irrelevant, immaterial, or unduly repetitious." Such rule is not dissimilar to Rules 402 and 403 Utah Rules of Evidence, which provide that "[i]rrelevant evidence is not admissible" and that the "court may exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . wasting time, or needlessly presenting cumulative evidence."

U.C.A. §63G-4-206(1)(b)(iii) permits the introduction of a copy of a document, and is not dissimilar to Rule 1003 Utah Rules of Evidence.

With regard to these and other evidentiary matters mentioned in the briefs of the parties, Utah case law confirms that "administrative proceedings need not possess the formality of judicial proceedings." *Nelson v. Dep't of Employment Security*, 801 P.2d 158; 1990 Utah App. LEXIS 169. The current iterations of the ever-changing Federal or Utah Rules of Evidence are not the *I Ching* for divining whether a due process violation occurs.

Further, decades of Federal administrative proceedings and court decisions related to those proceedings reiterate the statement made by the U.S. Supreme Court that "it has long been settled that the technical rules for the exclusion of evidence applicable in jury trials do not apply to proceedings before federal administrative agencies in the absence of a statutory requirement that such rules are to be observed." *Opp. Cotton Mills v. Adm'r of Wage & Hour Div. of Dep't of Labor*, 312 U.S. 126, 155; 1941 U.S. LEXIS 1223.

The U.S. Tenth Circuit Court echoes this principle by saying that "technical rules for the exclusion of evidence applicable in jury trials do not apply" to administrative proceedings. *Levers v. Berkshire*, 151 F.2d 935, 939; 1945 U.S. App. LEXIS 4543 (10th Cir.). There is nothing in the foregoing authorities or in the authorities cited in Purdue's memoranda that holds that Purdue will not be afforded due process by reason of these evidentiary matters.

Purdue raises the matter of the admissibility of hearsay evidence. Hearsay evidence is admitted in all administrative proceedings on the basis of U.C.A. Subsection 63G-4-206(c). This subsection provides that "the presiding officer may not exclude evidence solely because it is hearsay."

This statutory provision is moderated, however, by (1) U.C.A. Subsection 63G-4-208(3), which provides that a finding of fact that is contested may not be based solely on hearsay evidence unless that evidence is admissible under the Utah Rules of Evidence, and (2) the ruling of the Utah Supreme Court to the same effect in the case of *The Yacht Club v. Utah Liquor Control Commission*, 681 P.2d 1224, 1225; 1984 Utah LEXIS 810, which provides that "[h]earsay evidence is admissible in proceedings before administrative agencies. However, findings of fact cannot be based exclusively on hearsay evidence. They must be supported by a residuum of legal evidence competent in a court of law."

The Respondents provide no case law that establishes that due process is not satisfied or that undue prejudice is occasioned by reason of the admissibility of hearsay evidence in administrative proceedings. To the contrary, the First Circuit Court in *Toribio-Chavez v. Holder*, 611 F.3d 57, 66; 2010 U.S. App. LEXIS 13922, holds that "it is generally accepted . . . that nothing in the due process clause precludes the use of hearsay evidence in administrative proceedings."

E. Purdue is not denied due process by reason of the ten year statute of limitations applicable in this administrative proceeding.

Purdue observes that "the Division's UCSPA claims are subject to a ten-year limitations period in administrative proceedings, Utah Code Ann. §13-2-6(6)(a), compared to only a five-year period in judicial proceeding. *Id.* §13-2-6(6)(b)." Nothing in this dichotomy violates due process rights.

It is important to note that Purdue cites no case, in any jurisdiction, that holds that lengthy statutes of limitations, or limitations of varying length in the same statutory provision, have ever been determined to be unconstitutional or a violation of due process.

Other Utah statutes provide for statutes of limitations of dissimilar length for identical conduct. One example are the limitation periods set forth in U.C.A. §61-1-21.1 of the Utah Uniform Securities Act. Subparagraph (1) of Section 21.1 provides for a five year statute of limitations for a criminal indictment, and subparagraph (2) of the Section provides for a ten-year statute of limitations for an administrative proceeding. There is no reported case that precludes, on due process grounds, this disparity in length or the ten-year limitations period for administrative proceedings, as is also applicable here.[7]

F. Purdue is not denied due process by reason of its inability to have a jury trial

The fact that Purdue had a right to a jury trial in the Utah State Action[8] filed in Carbon County and has no right to a jury trial in this administrative proceeding raises no valid due process concerns.

The cited case of *Int'l Harvester Credit Corp. v. Pioneer Tractor & Implement, Inc.*, 626 P.2d 418; 1981 Utah LEXIS 737, is unavailing here. It states that a jury trial is a guaranteed right in "civil cases." This is an administrative proceeding and is not a civil case.

In tens of thousands of administrative proceedings prosecuted in Utah and before federal agencies over decades there is not a single case that has been presented in this matter that indicates that due process rights are denied by reason of the inability to secure a jury trial.

[7] It is also noted that prior to the 2016 amendment to the Utah Uniform Securities Act, there was no statute of limitations of any duration for administrative proceedings under the Act. No successful challenge on constitutional grounds has been mounted for an open-ended limitations period in these administrative proceedings.
[8] As requested by the Division in the State Court Action.

III. At this stage of the proceedings, there is no indication that the statutory penalties sought by the Division would violate the excessive fines clauses of the United States and Utah Constitutions.

The matter of excessive fines in an administrative law case has been extensively discussed in the matter of *Brent Brown Dealerships v. Tax Comm'n, Motor Vehicle Enforcement Div.*, 139 P.3d 296; 2006 Utah App. LEXIS 275. In *Brent Brown*, a fine of $135,000 had been assessed and was affirmed on appeal. The Court of Appeals recognized the fact that, as an agency proceeding, the judgment of the legislature in authorizing fine amounts was one of two major factors to be considered. The second consideration was that any judicial determination regarding the gravity of a matter will be inherently imprecise. *Id.* at 301.

The *Brent Brown* case also discusses the case of *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S. Ct 1589, 134 L. Ed. 2d 809; 1996 U.S. LEXIS 3390. The *Gore* case is an unfair trade practices case that raises the issue of "fair notice" of the amount of a judgment when based upon a range of statutory penalty amounts from multiple states. Purdue's comments that hundreds of millions of dollars of fines could be imposed here may indicate that it already has fair notice, but no determination on this issue is to be made at this juncture of the proceeding. Further, the *Gore* case provides no authority for granting a motion to dismiss.

Purdue cites the Utah Court of Appeals case of *Phillips v. Department of Commerce,* 397 P.3d 863; 2017 Utah App. LEXIS 84. The *Phillips* court addressed the amount of fines imposed in a case before the Division of Securities, an agency within the Department of Commerce. The *Phillips* court noted that the "Eighth Amendment unquestionably places upper limits on the Commission's power to impose a fine on Phillips or any other violator of the [Uniform Securities] Act." *Id.* at 873. "The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the fine must bear some

relationship to the gravity of the offense that it is intended to punish." *Id.*, (quoting *United States v. Bajakajian,* 524 U.S. 321, 334 (1998).

The constitutional rights discussed in *Bajakajian, Brent Brown, Gore* and *Phillips* do not require the dismissal of this case, but only require that the fine imposed be appropriate within the standards of the cited cases. No constitutional analysis can be applied at this stage of the proceeding because no specific dollar amount has been assessed or is under consideration.

IV. The Division's claims are cognizable.

A. Preemption

At oral argument on the Motion, the parties acknowledged that the preemption issue raised by Respondents (and to be addressed here) is "impossibility conflict preemption." Confining the preemption analysis to this subcategory of conflict preemption, it is necessary to address whether the Supremacy Clause of the U.S. Constitution preempts the Division's UCSPA claims. In this regard, it is important to note that the Federal Drug Administration (the "FDA") has a significant statutory footprint in the area of the regulation of opioids, including the OxyContin branded product of Purdue.

Based upon its principal statutory authority under the Federal Food, Drug, and Cosmetic Act, ch. 675, 52 Stat. 1040, as amended 21 U.S.C. §301 *et seq.* (the "FDCA"), the FDA approves the printed label of OxyContin, including the printed package insert that contains the "Black Box" warnings, the indications, the contraindications, the warnings and precautions, and the adverse reactions for which there is some basis to believe a causal relationship exists between the drug and the occurrence of the adverse event. This approval authority includes more broadly the written material that is sent to the physician who prescribes the drug.[9] Under the FDCA, the FDA

[9] For a general description of what is included in this authority to label see *Merck Sharp & Dohme Corp. v. Albrecht*, 587 U.S. ___, 3 (2019); 2019 U.S. Lexis 3542.

also has regulatory approval authority over public branded advertising ("direct-to-consumer" or "DTC" ads) of the product in question[10] (21 U.S.C.S. §§ 331; 353(c); 21 C.F.R. § 202.1).

A host of preemption cases and arguments are cited by the parties. Initially, the Division relies on eleven Purdue-related cases in various jurisdictions, all of which had determined that preemption did not foreclose the claims made against Purdue by the plaintiffs in those actions.[11] In the days immediately preceding the oral argument of the Motion, Purdue reversed this significant trend of adverse precedent by obtaining a dismissal and a ruling of preemption in the case of *North Dakota v. Purdue Pharma, L.P., et al.*, case No. 08-2018-CV-01300, slip op. (N.D. Dist. May 10, 2019).

The *North Dakota* court held that federal law preempted North Dakota's claims based on issues similar to the Division's allegations: such as the safety and efficacy of opioids for the long-term treatment of chronic pain (Citation ¶¶ 49–68, 83–92), dosing (*Id.* ¶¶ 69–82), pseudoaddiction (*Id.* ¶¶ 51–53, 58–59), and the manageability of addiction risk. *Id.* ¶ 54.

However, *North Dakota* is distinguishable in that the Division does not allege that Purdue mislabeled the drugs or that it should stop selling them; rather, the Division claims that Purdue engaged in unbranded marketing outside of the FDA's penumbra. (*Id.* ¶103). As to federal preemption, Purdue's contention is that *North Dakota* is indistinguishable to the aforementioned

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[10] For example, a TV advertisement that names a product by brand name.

[11] Decisions in jurisdictions denying the application of preemption outright and/or denying application of preemption at the motion to dismiss stage of the case include *South Carolina v. Purdue Pharma, L.P.*, No. 2017-CP40-04872, 4-8 (S.C. Comp. Pl. Apr. 12, 2018); *In re Opioid Litig.*, 2018 WL 3115102, 5-9 (N.Y. Sup. Ct. June 18, 2018); *Washington v. Purdue Pharma, L.P.*, No. 17-2-25505-0 SEA, 3 (Wash. Super. Ct. May 14, 2018); *Ohio v. Purdue Pharma, L.P.*, 2018 WL 4080052, 2-4 (Ohio Ct. Com. Pl. Aug. 22, 2018); *New Hampshire v. Purdue Pharma, Inc*, 2018 WL 4566129, 2-3 (N.H. Super. Ct. Sept. 18, 2018); *Grewal v. Purdue Pharma, L.P.*, 2018 WL 446382, 16 (N.J. Super. Ct. Oct. 2, 2018); *Commonwealth of Kentucky, ex rel. Beshear v. Johnson & Johnson*, No. 18-Ci-00313, 6 (Ky. Cir. Ct. Nov. 20, 2018); *State of Vermont v. Purdue Pharma, L.P.*, No. 757-9-18 Cncv, 4-5 (Vt. Super. Ct. Mar. 19, 2019); *State of Tennessee, ex rel. Slatery v. Purdue Pharma, L.P.*, No. 1-173-18, 2-5 (Tenn. Cir. Ct. Feb. 22, 2019); *In re Natl. Prescription Opiate Litig.*, 1:18-OP-45090, 2018 WL 4895856, 18-20 (N.D. Ohio Oct. 5, 2018).

claims. Purdue asserts that both North Dakota and Utah are identical because "given the FDA does not yet believe the state of the data supports additional warnings or altered labeling when presented with the issues asserted by the State, it would have been impossible for Purdue to comply with what the State alleges was required under North Dakota law while still respecting the FDA's unwillingness to change the labeling and warnings, both on its labels for opioids and in its advertising." *North Dakota,* No. 08-2018-CV-01300, *slip op.* ¶ 40. Purdue argues that, if the Division's assertions were to the FDA labeling and mislabeling, then *Wyeth* and *Bartlett* would apply. *Wyeth v. Levine*, 555 U.S. 555, 571; 129 S. Ct. 1187; 2009 U.S. LEXIS 1774; *Mut. Pharm. Co. v. Bartlett*, 570 U.S. 472, 488–89; 2013 U.S. LEXIS 4702. ("the FDA retains authority to reject labeling changes," a manufacturer cannot be liable under state law where there is "clear evidence that the FDA would not have" permitted the manufacturer to change its labeling or marketing materials to add the warnings that a plaintiff's claims would require.) Notwithstanding this analysis, the *North Dakota* decision does not support the dismissal of claims outside of the FDA approved labeling.

On the day prior to the oral argument of the Motion, the U.S. Supreme Court issued a new opinion on the application of preemption in the pharmaceutical arena[12] in the case of *Merck Sharp & Dohme Corp. v. Albrecht*, 587 U.S. __ (2019); 2019 U.S. Lexis 3542. Although *Albrecht* is the latest pronouncement on preemption by the U.S. Supreme Court, it is a "failure to warn case" and cannot be dispositive for the present matter on a motion to dismiss. Similarly, the *Wyeth v. Levine*, 555 U.S. 555; 129 S. Ct. 1187; 2009 U.S. LEXIS 1774, decision referred to by the parties here is a failure to warn case.

[12] The medication in question in the *Albrecht* case is Merck's branded Fosamax product used for the treatment of osteoporosis.

The Division's principal UCSPA claims rise or fall on its allegations that Purdue acted in violation of the Utah statute by its deceitful marketing of its opioid product in ways that are not regulated by the FDA. No claim is made by the Division that Purdue and the FDA must change the OxyContin product label. No claim is made that Purdue deceived the FDA (Mot. To Dismiss Oral Arg. Tr., May 21, 2019, 15:16), although Purdue, as with other pharmaceutical manufacturers, is deemed to be in possession of better science-based information than the FDA.[13]

The Division's claim is that Purdue is required to market its product consistent with the product's label and not in a deceitful manner in violation of the UCSPA. This claim is a fact intensive claim. More importantly, if pleaded sufficiently in its Citation, the claim would survive the present motion to dismiss.

In this regard, the Division asserts that, in ways outside of the FDA approved labeling arena, Purdue violated the UCSPA through its deceptive direct marketing (Citation ¶¶ 61-68), false claims of risk (*Id.* ¶¶ 69-72), misleading promotions (*Id.* ¶¶ 73-82), overstatements of quality of life and effects (*Id.* ¶¶ 83-92), and misleading statements and promotions through sponsored opinion leaders, seminars and sales representatives. *Id.* ¶¶ 93-105.

As an example, in the Citation, the Division has alleged that Purdue engaged in marketing beyond its FDA regulated OxyContin label. The Division alleges that the FDA does not regulate unbranded advertising, marketing or scripts by sales representatives, or marketing funneled through third-party industry groups. *Id.* ¶ 103. The Division also made this point in the Motion to Dismiss Oral Argument, noting that marketing was performed through unbranded websites and with the American Pain Foundation. Mot. To Dismiss Oral Arg. Tr., May 21, 2019,

[13] "Manufacturers have superior access to information about their drugs, especially in the postmarketing phase as new risks emerge" *Wyeth v. Levine*, 555 U.S. 555; 129 S. Ct. 337, 578-579; 2008 U.S. LEXIS 665.

101:12-102:4; *see* Citation ¶ 60. Accordingly, the Division alleges that Purdue funded the American Academy of Pain, which endorsed using opioids for chronic pain. *Id.* ¶¶ 50-6. The Division asserts that Purdue disseminated its misstatements through industry groups funded by Purdue, such as the American Pain Foundation, American Academy of Pain Medicine, and American Pain Society. *Id.* ¶¶ 98-99. Purdue is alleged to have conducted more than 40 pain management and speaking training sessions to recruit and train over 5,000 physicians, nurses, and pharmacists to act as speakers on behalf of Purdue. *Id.* ¶ 101. Further, Purdue is alleged to have used direct sales representatives to market unbranded opioids. *Id.* ¶ 102. These activities appear to be outside of the label approval authority of the FDA, where no preemption applies.

As noted above, the Division was asked at oral argument if the Division premised its claims upon deceit being perpetrated by Purdue upon the FDA. This was denied by the Division. In denying the conflict preemption argument of the opioid manufacturers in the MDL, the MDL court stated (at *23) ". . . the state law claims are not premised upon inappropriate labeling or a fraud upon the FDA, but rather fraudulent marketing in the promotion and sale of their opioids." Similar allegations are made here in the Division's Citation, and such allegations survive a motion to dismiss on the grounds of preemption.

The universe of the Division's claims can thus be categorized in at least four subgroups or classes. The primary class is described and discussed above. At oral argument on the Motion, the parties were invited to file a supplemental memorandum addressing four cases that were discussed for the first time during oral argument. In Purdue's Supplemental Memorandum dated May 30, 2019, Purdue identified three additional classes of claims. At page 4 of its Supplemental Memorandum, Purdue urges dismissal of the Division's claims "to the extent they are based on: (1) representations consistent with the FDA's responses to the PROP and

Connecticut petitions; (2) branded marketing materials submitted to the FDA under 21 CFR §314.81; or (3) the contention that Purdue withheld [from] or failed to disclose information [to] the FDA."

Each of these additional classes of claims is difficult to address at the motion to dismiss stage of these proceedings.

The "Connecticut petitions" referenced by Purdue in its Supplemental Brief, whatever they may be *in toto,* are not before us on the Motion.[14] A 2008 letter from the FDA in response to a single Connecticut petition is referenced in the Citation. Citation ¶ 75. However, Purdue refers to "petitions" in the plural. The entire scope of the "petitions" cannot be assessed on this motion to dismiss. As addressed in footnote 14 below, the 2008 FDA letter is also not before us.

The September 10, 2013 letter of the FDA relating to the PROP petition is referenced in the Citation (see footnote 51 at ¶ 66), and the letter itself is before us on the Motion.[15] However, the PROP petition itself is not before us on this motion to dismiss. The full import of the PROP petition and the procedures related thereto would have to be before us and examined in order to strike any of the Division's claims on the basis of the PROP petition. The significance of the PROP petition (and presumably the Connecticut petitions) is that they may form the basis of the "clear evidence" that the *Wyeth* court held was necessary to determine that the FDA would not have changed the product's label, leading to a possible decision of preemption.

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[14] The Utah Supreme Court in *Oakwood Vill. LLC v. Albertsons, Inc.*, 104 P.3d 1226, 1231; 2004 Utah LEXIS 223 states that three conditions must be met for a document that is not attached to a complaint to be considered on a motion to dismiss. These are: (1) the document is referred to in the complaint, (2) the document is central to the plaintiff's claim, and (3) the person offering the document must "submit an indisputably authentic copy to the court." Although a single Connecticut petition and a 2008 FDA response letter are referenced in the Citation, no party has provided an indisputably authentic copy of any of the Connecticut documents.

[15] Documents attached to a complaint are incorporated into the pleadings for purposes of judicial notice and may properly be considered in deciding a motion to dismiss. *Webster v. JP Morgan Chase Bank, NA*, 290 P.3d 930, 937; 2012 Utah App. LEXIS 334. Although not attached to the Citation, the predicate for inclusion is satisfied with regard to the response letter of the FDA to the PROP petition by the fact that the URL for the letter is included in the Division's footnote in the Citation.

The next class of additional claims would be included in the Purdue assertions at page 23 of its Motion that "the FDA's regulatory authority extends to prescription medication promotional activity. Indeed, FDA regulations define 'labeling' expansively to include virtually all communication with medical professions' about a medication." After urging this expansive definition, Purdue makes the factual allegation that in this case "it is undisputed that at all relevant times, Purdue's FDA-approved opioid medications were accompanied by FDA-approved labeling." Neither the Citation nor the Opposition of the Division acknowledges these as undisputed facts. This determination and the determination of which of the claims falls within this class would require the development of evidence that identifies which promotional materials or communications were submitted to the FDA. These matters are not set forth in the Citation and may not be determined on a motion to dismiss.

The final class of claims seems to be based on the claim being abandoned, if any, by counsel for the Division at oral argument. Mot. To Dismiss Oral Arg. Tr., May 21, 2019, 100:19-25. Again, as to the Citation allegations themselves, such abandonment would be outside of anything alleged in the Citation and would not be subject to a motion to dismiss. The specific paragraph numbers in the Citation of the abandoned claims should be identified and not presumed from an offhand comment of counsel in oral argument.

Notwithstanding the large footprint of the FDA in the opioid market, significant precedent acknowledges that private rights of action and state action are warranted and appropriate in the same drug enforcement arena with the FDA. FDA oversight is not the exclusive means of ensuring drug safety. *Wyeth v. Levine*, 555 U.S. 555; 129 S. Ct. 337, 575; 2009 U.S. LEXIS 1774. In discussing the FDCA, the *Wyeth* court stated that "Congress did not provide a federal remedy for consumers harmed by unsafe or ineffective drugs in the 1938

statute *or in any subsequent amendment*. Evidently, it determined that widely available state rights of action provided appropriate relief for injured consumers. It may also have recognized that state-law remedies further consumer protection by motivating manufacturers to produce safe and effective drugs and to give adequate warnings." *Id.* at 574 (emphasis in italics added). The FDA maintains that state law offers an additional, and important, layer of consumer protection that complements FDA regulation. *Id.* at 579. "State tort suits uncover unknown drug hazards and provide incentives for drug manufacturers to disclose safety risks promptly." *Id.* at 578-579.

At this stage of the proceedings, the Respondents have not met their burden to show that the Division's claims are preempted.

B. The Division's claims are not precluded by the UCSPA Safe Harbor.

The same principles that preclude preemption preclude granting a motion to dismiss based upon the provisions of U.C.A. §13-11-22(1)(a). This statute provides that the UCSPA "does not apply to . . . an act or practice required or specifically permitted by or under federal law. . ." In the present matter, the federal law in question is the FDCA.

In *Miller v. Corinthian College, Inc.*, 769 F. Supp. 2nd 1336; 2011 U.S. Dist. LEXIS 15746, cited by Purdue, the Utah Federal District Court applied the Federal Arbitration Act (the "FAA") provisions to compel enforcement of the written arbitration clause in students' agreements with the college defendant. The court held that the UCSPA language quoted above carved out an exception that could not prohibit the enforcement of the arbitration provisions in the face of a UCSPA class action claim. The *Miller* court concluded that if "the UCSPA did so [i.e. precluded arbitration], it would be preempted by the FAA." *Id.* 1341. Here there is no preemption as to a significant class or portion of the Division's claims and a motion to dismiss on the basis of preemption may not be granted as to the remainder of the Division's claims.

Concomitantly, the FDCA does not require or specifically permit the actions complained of by the Division. As alleged, such actions do not fall within the safe harbor created by U.C.A. §13-11-22(1)(a).

C. The regulatory scheme of the FDCA does not preclude UCSPA claims.

As posited by Purdue, its primary argument about a more specific regulatory scheme governing the conduct alleged by the Division is essentially a rephrasing of its preemption argument. Purdue again pits the UCSPA against the FDCA.

The parties also pit against each other two opinions issued out of the Federal District Court for the District of Utah. Purdue relies upon *Thomas v. Wells Fargo Bank, N.A.*, 2014 U.S. Dist. LEXIS 22078 and the Division relies upon *Naranjo v. Cherrington Firm, LLC*, 286 F. Supp. 3d 1242; 2018 U.S. Dist. LEXIS 10734. The *Thomas* court dismisses Thomas's UCSPA claim because of his federal Fair Credit Reporting Act ("FCRA") claim. The *Naranjo* court denies the dismissal of Naranjo's UCSPA claim notwithstanding his federal Fair Debt Collection Practices Act ("FDCPA") claim.

Thomas dismisses the UCSPA claim on two separate grounds. The *Thomas* court misapplies Utah law on the first basis for its dismissal and the second basis for dismissal is inapplicable to the present proceeding.

For its first reason for dismissing the UCSPA claim, the *Thomas* court relies upon and quotes U.C.A. Section 13-11-22(1)(a), stating that the UCSPA "does not apply to . . . an act or practice required or specifically permitted by or under federal law, or by or under state law." This is the safe harbor language and argument that has been rejected above for the present proceeding. Further, the *Thomas* court misapplies the safe harbor language which states nothing regarding a more specific regulatory provision barring a less specific regulation – the Purdue

argument here.

For its second reason for dismissing the *Thomas* claim, the court quotes the specific FCRA provision that expressly preempts state law. It is an express preemption case - and all parties here and this tribunal agree that ours is an impossibility conflict preemption case.

This tribunal follows the better reasoning of the *Naranjo* case, which is a FDCPA case that, like the FDCA, does not have an express preemption provision.

V. The Citation may not be dismissed on the grounds of the naked assertion that Purdue ceased marketing its opioid medications prior to the filing of the Citation in this matter.

In the first instance, the Motion is denied on the basis of Purdue's assertion that a "continuing" violation is required and that Purdue has not been marketing opioids in Utah for over a year. The factual assertions at pages 29 and 30 of the Motion to the effect that "Purdue discontinued marketing its opioid medications more than a year ago" are outside the Division's agency action pleading, and cannot be the basis for a motion to dismiss. 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 [Division's citation] 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; 1999 U.S. App. LEXIS 3159.

Unnecessary to this ruling, but taking a longer-term view of this issue, it is to be further noted that a reasonable interpretation of a statute is required when assessing the intent of the Legislature. Purdue's argument at this juncture is that the language of the pre-2018 amendment[16] of U.C.A. §13-2-6(3) implied that a person must be continuing its violations for the conduct to

[16] Purdue overstates the significance of the 2018 amendment of the statute to state "has violated or is violating." It is not only plausible, but also likely, that the purpose of the amendment was not to change the Legislature's intentions but to merely put suppliers on clearer notice of its already existing meaning for the enforcement of the UCSPA.

be actionable. This position is asserted on the basis that the Division is to take action against a person who "is violating" a UCSPA chapter.[17] Stated differently by Purdue, the Division cannot pursue UCSPA remedies for "past conduct." Such construction of the former statutory language disregards the intent of the Legislature.

The vast majority (and possibly as much as two thirds or more) of consumer protection claims and fines imposed under the UCSPA are made related to one-time violations, over and done in every case well before a citation is filed by the Division. Purdue's proposed construction of the UCSPA would eviscerate the statute and run counter to any reasonable intention of the Legislature with regard to the interpretation of the provision.

A companion consideration to this analysis is that legislation is to be interpreted to avoid any absurdity. Purdue's faulty construction of the statute would mean that there is an absurd but failsafe mechanism to avoid any liability for fines under the UCSPA, no matter the gravity of the perpetrator's actions or the magnitude of the adverse impact upon Utah consumers. This certain means of defeating a UCSPA claim would be for a person to immediately cease any violative conduct the very moment that an investigator from the Division of Consumer Protection contacts the person about possible violations of the UCSPA. This initial contact is often undertaken by Division investigators to gain background information and to assess whether a consumer complaint has any merit. An individual could conduct a lucrative and harmful deceptive enterprise and then be freed from any financial consequences by merely acting more quickly in terminating his wrongful actions than the Division in filing its claim. The Legislature did not intend such a result.

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[17] A more complete reading of the statutory provision is that the Division may take action under Section 13-2-6(3) if the division "has reasonable cause to believe that any person . . . is violating any chapter listed in Section 13-2-1."

Because the motion to dismiss based on this issue fails for the reason stated in the first paragraph of this section, no in-depth discussion is necessary of principles of statutory construction, including the absurd consequences cannons or the absurdity doctrine.[18]

VI. The Division must bring its U.C.A. §13-11-5 unconscionability claim in a state or federal district court, not in an administrative proceeding.

The Respondents assert that the Division's unconscionability claim under U.C.A. Section 13-11-5 cannot be brought in an administrative proceeding on the basis that this section of the UCSPA states that the "unconscionability of an act or practice is a question of law for the court." The statutory structure of the UCSPA must be examined, therefore, to determine if the use of the word "court" precludes an administrative proceeding as the means of determining unconscionability.

The UCSPA, in its present form, is numbered in sections from 13-11-1 to 13-11-23. However, it does not contain 24 consecutive sections, but includes in the range of Section 13-11-1 to Section 13-11-23 seven repealed sections, including repealed Section 13-11-4.5. Sections have been added to the UCSPA and others deleted over the years, and not always fully harmonized.

While the UCSPA has been a serviceable tool for protecting the consumers of the state of Utah, it is not a hallmark of cohesiveness. As an example, on two consecutive pages of the unannotated printed volume of the code one finds the section that is the subject of this analysis, Section 13-11-5 on unconscionability, that refers to "courts," the immediately following section, Section 13-11-6, that refers to "district courts," and Section 13-11-17 that refers to "a court of competent jurisdiction." This creates somewhat of a hodgepodge of legal language and analysis.

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[18] These last two principles are discussed in some detail in the Utah Supreme Court cases of *Cox v. Laycock*, 345 P.3d 689; 2015 Utah LEXIS 53, and *Utley v. Mill Man Steel, Inc.*, 357 P.3d 992; 2015 Utah LEXIS 222 (see the concurring opinion).

This situation is to be expected by the normal forward progression of a consumer protection statute adopted in 1973 and amended multiple times over forty-six years. Fortunately, a sound and admirable consistency of interpretation and implementation has prevailed over this same period of time.

In 2008, the currently serving Executive Director of the Department of Commerce adopted an Agency Review ruling on appeal of a consumer protection case in *Daniel Thomas and Thomas Snow Removal,* DCP No. 60452 (March 25, 2008). In *Thomas,* the Executive Director ruled that the Division's Section 13-11-5 claim cannot be pursued in the administrative action, affirming the ruling of the administrative law judge that disregarded the U.C.A. Section 13-11-5 claim of the Division on the basis that the citation's unconscionability claim under the UCSPA could be addressed solely in a state court action. *Id.* at 4.

This Department of Commerce precedent has not changed since the 2008 *Thomas* decision. The soundness of the Executive Director's interpretation of the word "court" has been affirmed recently in the Utah Court of Appeals decision of *Muddy Boys, Inc. v. Department of Commerce*, 2019 UT App 33; 2019 Utah App. LEXIS 34. *Muddy Boys* was not a UCSPA case, but involved the interpretation of the word "court" in the Utah Construction Trades Licensing Act, U.C.A. Section 58-55-1 *et seq.* (the "UCTLA"), also a Department of Commerce statute. The respondent, Muddy Boys, contended that the definition of the word "court" was "broad enough to encompass both judicial courts and administrative tribunals." *Muddy Boys,* 219 UT App. 33 at *P17.

On agency review, the Executive Director again held that proceedings in a "court" did not contemplate an administrative proceeding. The Utah Court of Appeals agreed with this holding and stated that, within the context of the UCTLA, "we conclude that the legislature did

not intend the term "court" to include administrative agencies. Accordingly, we decline to disturb the Department's conclusion . . ." *Id.* at *P29. Although the context of the UCTLA is somewhat clearer than in the UCSPA, the same conclusion follows here.

Garrard v. Gateway Fin. Servs., Inc., 207 P.3d 1227; 2009 Utah LEXIS 62, cited by the Division, is a Utah Unfair Practices Act case and does not address the UCSPA or its enforcement.

While the Division is correct in noting that Section 13-11-2(2) of the UCSPA provides that the UCSPA is to be construed liberally "to protect consumers from suppliers who commit deceptive and unconscionable sales practices" (Mot. To Dismiss Oral Arg. Tr., May 21, 2019, 116:13-250), such statutory provision does not state in which forum such actions may be taken by the Division to secure such protections. Enforcement actions by the Division against unconscionable acts under Section 13-11-5 are to be taken in a state or federal district court and not in an administrative proceeding.

VII. The Division's Citation for deceptive actions can include claims based upon omissions.

Deception includes omissions of material facts. Just as fraud is to be defined in the broadest fashion to require the application of Rule 9(b) of the Utah Rules of Civil Procedure to the deception allegations of the Citation (see discussion below in Section XI of this Order on pleading deception with particularity), a broad definition of both fraud and deception includes the concept of omissions.

This principle is acknowledged in the Utah case of *Coroles v. Sabey*, 79 P.3d 974; 2003 Utah App. LEXIS 101. In *Coroles* the Utah Court of Appeals addressed the Rule 9(b) issue of pleading with particularity and observed that the "Rule 9(b) requirement should not be understood as limited to allegations of common-law fraud. . . . It reaches to all circumstances

where the pleader alleges the kind of misrepresentations, *omissions*, or other deceptions covered by the term 'fraud' in its broadest dimension" (emphasis added). *Id.* at 984. Breaking down this statement, the Court of Appeals states that two of the subsets of the universe of deceptions are "misrepresentations" and "omissions."

In addition, it is to be noted that Purdue exclusively focuses its argument about dismissing any claims or allegations about "omissions" on the Section 13-11-4(2) language incorporating the verb "indicates." The Citation is not based exclusively on subsection 4(2) allegations. Count I of the Citation includes allegations based upon the entirety of the UCSPA by referencing Section 13-11-1 *et seq.* In addition, Count I references Section 13-11-4(1) specifically. The interplay between Subsection 4(1) and 4(2) is significant. Subsection 4(2) is a specific list of *per se* categories[19] of UCSPA violations. The Subsection 4(2) list is not exclusive or exhaustive. Subsection 4(1) is the more broad reference to deceptive acts or practices. This conclusion is evident in reading Subsection 4(1) and 4(2) together. The introductory parenthetical to Subsection 4(2) is "[w]ithout limiting the scope of Subsection (1) . . ." Hence, Subsection 4(1) must be read to prohibit deceptive acts or practices in a broader sense.

Subsection 4(1) permits a full consideration of all alleged deceptive consumer practices, including allegations that assert that the deceptive consumer practices of Purdue included omissions as part of the deception.

VIII. The sale of Purdue opioids in the state of Utah are consumer transactions subject to the UCSPA.

U.C.A. §13-11-3(2) provides that a "consumer transaction" is "a sale . . . to a person for . . . primarily personal, family, or household purposes." Purdue asserts that courts have determined

[19] *Reid v. LVNF Funding, LLC*, 2016 U.S. Dist. LEXIS 2733, 2016 SL 247571 (D. Utah 2016) (the UCSPA "provides categories of conduct considered *per se* deceptive, such as charging a consumer for a transaction to which he did not agree").

that selling prescription medications is not for "primarily personal, family, or household purposes." Purdue cites Georgia, California and District of Columbia cases in support of this proposition.

Utah law provides that the first rule of statutory interpretation is to look to the plain language of the statute. *Stephens v. Bonneville Travel*, 935 P.2d 518, 520; 1997 Utah LEXIS 29; see also *K & T, Inc. v. Koroulis*, 888 P.2d 623, 627; 1994 Utah LEXIS 97. Based solely on the quoted language of the statute, it appears that little could be more "primarily personal" than ingestion of a medication in the form of a pill. That the string of transactions leading to the consumer's obtaining the prescription medication is a sale for "primarily personal...purposes" is plain.

Purdue's principal argument on this point is that the Purdue opioids "are not directly available to the general public, but require a physician's prescription." This argument disregards the implications of U.C.A. §13-11-3(6) which defines a supplier subject to the UCSPA as a seller who solicits consumer transactions, "whether or not he deals directly with the consumer." The intervening act of the prescribing of the medication by a physician does not change the nature of the consumer transaction between Purdue and the Utah consumer. This principle is reinforced by the Utah case of *Wilkinson v. B & H Auto*, 701 F. Supp. 201, 1988 U.S. Dist. LEXIS 14688 (defendants, who were alleged to have tampered with vehicle odometers with the intent to defraud purchasers, were not insulated from liability under the UCSPA for deceptive acts merely because they sold the vehicles involved to independent dealers for resale, rather than directly to consumers).

The statutory meaning of "consumer transaction" is also expanded by U.C.A. §13-11-3(2)(b), which provides that a consumer transaction includes an "offer" or a "solicitation" with respect to a transfer or disposition described in Subsection (2)(a). It is unquestioned that the

allegations of the Citation comprise sufficient assertions that the Purdue Respondents were engaged in the offer and solicitation of opioid sales in the state of Utah.

IX. The Division has sufficiently alleged causation in its Citation.

Utah case law gives the standard definition of proximate cause as "that cause which, in natural and continuous sequence, (unbroken by an efficient intervening cause), produces the injury and without which the result would not have occurred. It is the efficient cause--the one that necessarily sets in operation the factors that accomplish the injury." *Mitchell v. Pearson Enters.*, 697 P.2d 240, 245-46; 1985 Utah LEXIS 772.

In the Citation, the Division has sufficiently alleged the harm in Utah from opioid prescriptions. Citation ¶¶ 26-27. The Division has also alleged that Purdue is the proximate cause through its direct marketing (*Id.* ¶¶ 61-68), false claims of risk (*Id.* ¶¶ 69-72), particular misleading promotions (*Id.* ¶¶ 73-82), overstatements of quality of life and effects (*Id.* ¶¶ 83-92), and misleading statements (*Id.* ¶¶ 93-105) that led to the harms resultant in Utah medical care, law enforcement, public safety measures, rehabilitation services, state welfare expenditures, and Medicaid costs, all alleged by the Division in the Citation. *Id.* ¶ 27.

Further, at this point in the proceedings, proximate cause is a question of fact not appropriate for dispositive resolution in a motion to dismiss. For this reason, the Respondents' assertion that the Division has not alleged proximate cause is determined affirmatively in favor of the Division.

The Respondents further argue that the Division has pleaded facts that are too attenuated and remote to establish proximate cause. In this regard, the Respondents contend that the causal chain is broken by (1) the independent medical judgment of medical professionals who prescribed the opioid products, and (2) third-party criminal acts. Motion p. 34-36 and Purdue

Reply p. 21-23. It cannot be determined at this early stage of the proceedings, absent any discovery, that the injuries to Utah consumers, as asserted by the Division, are so remote as to bar any potential recovery, or which portion of the alleged injuries, if any, are attributable to intervening criminal acts. At this juncture, it is sufficiently alleged that Utah consumers have been injured by the opioid epidemic fostered by Purdue.

X. Sufficient allegations are stated to impose liability for the statements of third parties.

Purdue argues that the Division has not pleaded any basis to hold it liable for the statements of third parties. Motion p. 37. The Division alleges that Purdue funded or sponsored third-party materials, but Purdue contends that only a principal may be liable for the conduct of its agents. *Id.* (citing *Zeese v. Estate of Siegel,* 534 P.2d 85, 88; 1975 Utah LEXIS 673). Purdue contends that the essential feature of an agency relationship is control. *Id.* (citing *Sutton v. Miles,* 333 P.3d 1279; 2014 Utah App. LEXIS 202).

However, the Division asserts that an agency relationship is a question of fact and is inappropriate for resolution on a motion to dismiss. Opposition p. 35 (citing *Tel. Tower, LLC v. Century Mortg., LLC,* 376 P.3d 333, 341; 2016 Utah App. LEXIS 103). Purdue does not cite compelling authority to show that financial support does not establish necessary control. Motion p. 37. Further, "a principal's manifestation of assent to an agency relationship may be informal, implicit, and nonspecific." Restatement (Third) of Agency § 1.01 cmt. d (2006).

The motion to dismiss standard applies, which assumes that the Division's allegations are true and gives the Division reasonable inference of fact. *Lowe v. Sorenson Research Co.,* 779 P.2d 668, 669; 1989 Utah LEXIS 84. The Division alleges that Purdue paid industry groups to produce education materials and guidelines for the use of opioids for chronic pain, overstated benefits, and understated their risks. Opposition p. 35-6: Citation ¶¶ 49-60. The Division

contends that Purdue's recurrent funding of third party articles, editorial input, and collaboration with industry groups pushing messages that Purdue adopted as their own shows an agency relationship. *Id.* ¶¶ 49-60. At this point in the proceedings, the Division has adequately pleaded that Purdue had control of third party publications and events.

XI. The Division is required to plead its UCSPA claims of deception with the particularity of Rule 9(b) URCP and has done so.

Purdue argues for dismissal of any claims based upon U.C.A. §13-2-4 because the Division does not adequately plead with particularity such claims. Purdue asserts that the Division alleged "deceptive and fraudulent" claims that must meet this standard under Rule 9(b) Utah Rules of Civil Procedure. Purdue Reply p. 25-26. The Division asserts that the Administrative Code does "not have a corollary to URCP 9(c), and so fraud need not be plead with particularity. Opposition p. 4. The Division relies upon the notice pleading standards of U.A.C. R151-4-202(2). In all events, the Division asserts that sufficient particularity is provided in the Citation.

Whether Rule 9(b) URCP applies to UCSPA claims has not been decided by the Utah Supreme Court or by a Utah Court of Appeals. How these courts would rule on the question is not known. Reliance on U.A.C. R151-4-106 also provides an uncertain basis for the determination. This rule states that the "Utah Rules of Civil Procedure and related case law are *persuasive* authority in this rule (R151-4), but may not, except as otherwise provided by Title 63G, Chapter 4 . . . or by this rule, be considered *controlling authority* (emphasis added). Neither Title 63G or R151-4 states that Rule 9(b) URCP is controlling authority.

Until a Utah appeals court makes a clear determination on this point, this tribunal feels constrained to follow the lead of the Federal District Court for the Utah District, which addressed this issue specifically in *Jackson v. Philip Morris Inc.*, 46 F. Supp. 2d 1217, 1222; 1998 U.S. Dist. LEXIS 21924. The Federal District Court in *Jackson* held that "allegations of deceptive

practices under the UCSPA fall within this category of 'fraud' and are thus governed by Rule 9(b)." In making this determination, the *Jackson* court relied upon the discussion of the Utah Supreme Court on determining the breadth of the word "fraud" in the case of *Williams v. State Farm Ins. Co.*, 656 P.2d 966, 972; 1982 Utah LEXIS 1042. In *Williams,* the Utah Supreme Court held that "fraud" is a term of uncertain meaning, which must be "fleshed out by elaboration and by consideration of the context in which [it is] used." *Williams*, 656 P.2d at 972. In *Jackson,* it was found to be apparent that allegations of misrepresentation and deception in UCSPA claims are within the Rule 9(b) categorization of fraud and therefore subject to the requirement of pleading with particularity. *Jackson,* 46 F. Supp. 2d at 1222.

The matter remains whether the Division pleaded in particularity to comply with Rule 9(b).

The Division alleges that Purdue helped to change the perception of opioid risk and benefit and promoted its use to the medical community through marketing materials, medical literature, articles, symposia, and direct approach to physicians. The Division alleges Purdue knowingly misrepresented the efficacy, safety, and risk of its products,[20] through marketing and direct promotion to doctors,[21] for the purpose of increasing sales.[22] The Division alleges Purdue intended physicians to rely on their misrepresentations,[23] and that physicians did rely, causing prescriptions for medically unnecessary opioids to be paid for by Utah.[24] The Citation alleges that there is a connection between Purdue's deceptive marketing of its opioid products and injuries in Utah

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[20] Citation ¶¶ 12-26.
[21] *Id.* at ¶¶ 30-32; 83-92; 93-105.
[22] *Id.* at ¶ 121.
[23] *Id.* at ¶¶ 56; 66-8.
[24] *Id.* at ¶¶ 28-9; 124.

Absent clear authority to the contrary from a Utah appeals court, the *Jackson* case is to be followed here. Thus, it is necessary that the Citation allege the specificity required by Rule 9(b) URCP. The Division has alleged the elements of Rule 9(b) with sufficient specificity.

ORDER

In accordance with the foregoing analysis, Purdue's motions are denied in part and granted in part. Any claims for unconscionable actions under U.C.A. Section 13-11-5 are dismissed from this adversary proceeding. All other motions to dismiss specifically discussed above are denied. As to any contentions by Purdue not specifically addressed above, this tribunal finds that they lack merit or that they state defenses more appropriately considered on a motion for summary judgment or at the administrative hearing of this adversary proceeding.

Dated this 20th day of June, 2019.

Chris Parker, Presiding Officer and
Acting Director

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of June, 2019, I served the foregoing on the parties of record in this proceeding by delivering a copy by electronic means to:

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