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July 29, 2019

The Honorable Janet L. Sanders
Suffolk County Superior Court
Suffolk County Courthouse, 10th Floor
3 Pemberton Square
Boston, MA 02108

Re: *Commonwealth v. Purdue Pharma L.P., et al. (Civ. No. 1884-01808-BLS2)*

Dear Judge Sanders:

In advance of the hearing set for August 2, the Commonwealth respectfully writes to identify two recent decisions addressing issues in our case and two mistakes in our brief.

The two recent decisions are enclosed:

- On July 15, the Utah Department of Commerce denied a motion to dismiss an action brought by the Attorney General of Utah against Richard Sackler and Kathe Sackler. At pages 18-32, the Order analyzes and rejects the same arguments regarding due process that the Sackler defendants make in our case.

- On June 20, the Utah Department of Commerce denied a motion to dismiss an action brought by the Attorney General of Utah against Purdue Pharma. At pages 26-28, the Order explains that a Consumer Protection Act with the present tense language "is violating" can be enforced against past misconduct, rejecting an argument that several defendants make in our case.

The two errors in the Commonwealth's brief are in the Memorandum in Opposition to Defendant Russell Gasdia's Motion to Dismiss filed on May 31, 2019 (File Ref Nbr. 72).

- On page 11, footnote 4 incorrectly states that *Commonwealth v. AmCan Enterprises, Inc* was filed in 1997. It was filed in 1993 and, accordingly, it is not an example of a suit brought after the misconduct ended. The decision addresses the termination of misconduct at 47 Mass. App. Ct. at 1221 & n.6.

- On page 22, at the start of the first full sentence, the Commonwealth mistakenly omitted the words "None of."

Respectfully submitted,

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Enclosures:

Order On Motion To Dismiss Of The Sackler Respondents, *In the Matter of Purdue Pharma*, DCP Legal File No. CP-2019-005, DCP Case No. 107102 (Utah Dep't of Comm. July 15, 2019)

Order On Motion To Dismiss Of The Purdue Respondents, *In the Matter of Purdue Pharma*, DCP Legal File No. CP-2019-005, DCP Case No. 107102 (Utah Dep't of Comm. June 20, 2019)

CC (by email, with enclosures):

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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 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.

[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.

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[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

[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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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 SACKLER RESPONDENTS** **DCP Legal File No. CP-2019-005** DCP Case No. 107102

On April 9, 2019, Richard Sackler and Kathe Sackler filed a Motion to Dismiss the Notice of Agency Action and the Citation filed by the Division of Consumer Protection (the "Division"). On the same date, Purdue Pharma, L.P., Purdue Pharma, Inc. and Purdue Frederick Company filed a separate Motion to Dismiss the Notice of Agency Action and the Citation filed by the Division. Richard Sackler and Kathe Sackler rely on their own motion to dismiss and also on the separate arguments from the Purdue Respondents' motion to dismiss.

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

FACTUAL SETTING AND ALLEGATIONS OF THE CITATION

For the purposes of this motion to dismiss (the "Motion"), the following assertions or allegations of the parties are deemed to be correct.

1. The Respondents, Richard Sackler and Kathe Sackler, are engaged in multiple legal actions related to the issues raised in the Division's Notice of Agency Action (the "NOAA"). Respondents assert that "the Division's claims are similar to other actions filed in courts across the country." Respondents' 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"). At the argument on the Motion to Convert Informal hearing in the present proceeding, counsel for the Sackler Respondents acknowledged that the Sacklers had been named in at least one of the MDL cases.

i. Facts Pertaining to Respondent Kathe Sackler and Respondent Richard Sackler:

3. The Division brought its action against only two of the members of the board of directors. The Division asserts that Richard Sackler and Kathe Sackler were not merely board members but were executive officers of the Purdue companies. Citation, ¶¶ 5; 6; 129; 125-60.
4. The Purdue Board of Directors, when Kathe Sackler and Richard Sackler were members, chose to expand the sales force with no exception made for Utah. Div. Opp'n to Sackler Resp'ts Mot. to Dismiss, 22 (citing PKY18312603 at -2620 (Ex. 28)); *see also* Citation, ¶ 127. Purdue has given $200,000 in gifts and other payments to prescribers during the five-year period between 2013-2017 and Purdue employed 186 sales representatives in Utah to visit prescribers in their medical offices for direct marketing, visiting 5,000 Utah

prescribers. Div. Opp'n to Sackler Resp'ts Mot. to Dismiss, 35-6 (citing Citation, ¶ 26).

5. Neither Richard Sackler nor Kathe Sackler are domiciled in Utah. Kathe Sackler resides in and is domiciled in Connecticut. Kathe Sackler has declared that she has never been to Utah. Decl. Kathe Sackler, ¶ 2. Richard Sackler is domiciled in Florida but does own a vacation home in Alta, Utah. Decl. Richard Sackler, ¶ 2. Richard Sackler has declared that he has not maintained an office in Utah, Decl. Richard Sackler, ¶ 2. Whether characterized as an "office" or not, the Division asserts that Richard Sackler has conducted business from his Alta home, has invited business communication to be directed to his Alta home and has offered his Alta home as a place for business conferences (*see infra,* ¶¶ 13 through 19).

6. Richard Sackler and Kathe Sackler each personally directed the unfair, deceptive and otherwise unlawful conduct as members of the Purdue Board of Directors as well as Purdue executive officers and owners of the "global Sackler pharmaceutical enterprise." Citation, ¶¶ 125; 129. The Board of Directors is hands-on and is the de-facto CEO. *Id.* at ¶ 126. The Board reports controlled company communications, monitoring sales representatives, promotion messages, strategies, drug saving cards, and territories. *Id.* at ¶ 127. The "Region 0" program for identifying prescribers and pharmacies included 17 prescribers in Utah and was controlled by the Board. *Id.*

7. Richard Sackler and Kathe Sackler concealed their conduct through many actions: Respondents controlling misleading promotions pushed by sales representatives nationwide, including Utah (Citation, ¶ 8); the Respondents disseminating misstatements through media and physician guidelines (*id.* at ¶¶ 16; 113); the Respondents' controlling fraudulent marketing mischaracterizations of the risks and benefits of its products (*id.* at

¶¶ 32; 164; 168; 174); the respondents sponsoring training sessions where opioid addiction was represented as rare (*id.* at ¶ 63); and aiding in the misleading promotion of 12-hour dosing "as providing 12 continuous hours of pain relief with each dose" (*id.* at ¶ 73).

8. At the Sackler Respondents' direction, Purdue has continued to promote, directly and indirectly, deceptive marketing messages that misrepresent, and fail to include material facts about, the dangers of opioid usage in Utah, despite knowing that these marketing messages are false, in order to increase their sales, revenues, and compensation. *Id.* at ¶ 161.
9. Richard Sackler and Kathe Sackler directed Purdue's employment of opioid sales representatives in Utah, their methods, and tactics used during sales visits. Div. Opp'n to Sackler Resp'ts Mot. to Dismiss, 30; (Citation,¶¶ 127; 133; 141-5; 152; 154).
10. Richard Sackler and Kathe Sackler knowingly and intentionally engaged in aggressive marketing to overstate the benefits and misstate and conceal the risks of treating chronic pain with opioids, which included marketing to Utah (Citation, ¶¶ 162-74).
11. Purdue's marketing records reveal that Purdue sales representatives distributed savings cards to Utah prescribers and encouraged Utah prescribers and their staff to distribute them to Utah consumers. *Id.*, at 10 (citing Citation, ¶ 127). The Division alleges that Richard Sackler and Kathe Sackler knew that continuing efforts to employ deceptive marketing would contribute to the opioid epidemic in Utah. *Id.* (citing Citation, ¶ 117).
12. At least two of the key opinion leaders -- Dr. Webster and Dr. Perry Fine -- live and work in Utah. *Id.* at 31 (citing Citation, 94-5). Dr. Webster is alleged to have received Purdue funding to develop and teach an online program titled *Managing Patient's Opioid Use:*

Balancing the Need and Risk, which deceptively instructed screening tests for overdoses. *Id.* at 14; 31 (citing Citation, ¶¶ 17; 94-5).

ii. Facts Pertaining Particularly to Respondent Richard Sackler:

13. Although there may be some dispute as to specific time periods when Richard Sackler served on Purdue boards or the offices that he held, it is acknowledged that Richard Sackler "served on the Board of Directors of (i) Purdue Pharma Inc. ("PPI") throughout the [period of January 1, 1996] until July 24, 2018 and (ii) The Purdue Frederick Company ("PFC") throughout the [period of January 1, 1996] until March 7, 2005. Decl. Richard Sackler, ¶ 3. Richard Sacker served as Co-Chairman of PPI from March 4, 2003 until May 11, 2007. He also served as Co-Chairman of Purdue Pharma L.P. ("PPLP"), which has no directors, from March 4, 2003 until May 11, 2007. Richard Sackler also asserts that other "than holding the title of President of PPLP and PPI from December 1, 1999 until March 4, 2003, and Senior Vice President of PFC throughout the [period of January 1, 1996] through March 7, 2005" he was not an employee or officer of PPLP, PPI or PFC. Decl. Richard Sackler, ¶ 3.

14. Richard Sackler oversaw the launch of OxyContin and had worked for Purdue for 43-years in various capacities including Chairman of the Board of Directors and head of marketing. Citation at ¶¶ 132; 144. Richard Sackler was a micromanager and heavily involved in marketing plans, perceptions, approaches, sales forecasts, and listings of top ranking sales representatives ("Toppers"). *Id.* at ¶¶ 133; 143-4; Div. Opp'n to Sackler Resp'ts Mot. to Dismiss, 17 n. 8 (citing PPLPC039000000157). Richard Sackler is also alleged to have directly promoted the false idea that there was no maximum dose of OxyContin, even though there were risks of addiction, overdose, and death at higher

doses. *Id.* at ¶ 147.

15. Richard Sackler was willing to use his Alta home to house speakers at Utah conferences and conducted an unspecified amount of Purdue related work there. Div. Opp'n to Sackler Resp'ts Mot. to Dismiss, 8; 16; 17 (quoting Citation, ¶ 5).

16. He also arranged to conduct Purdue related business at his Alta vacation home in January 2002. *Id.* at 27 n. 49 (citing PPLP045000006550).

17. He conducted business from Alta in January 2008 (*id.* at 22 n. 31 (citing PPLPC042000016733) and in January of 2010 (*id.* n. 31 (citing PDD9316100460). Writing from the Alta home, Richard Sackler gives direction that "[t]here are other dimensions that might be tried including political influence. We need a rapid assessment of the likely situations that are pertaining here so that we can choose the appropriate strategy. Just hammering along the route we've taken might be right or might be very wrong." Div. Opp'n to Sackler Resp'ts Mot. to Dismiss, 22 n. 31 (citing PDD9316100462).

18. As late as December 2016, Richard Sackler arranged to conduct Purdue related business at his Alta home leaving express instructions to contact him there. Div. Notice of Two Supp. Exs., Ex. B (citing PPLPC035000260437).

19. Documents also indicate that Richard Sackler had detailed information on pharmacies in Utah, specifically visiting Jolley's Pharmacy in January of 2002. Div. Opp'n to Sackler Resp'ts Mot. to Dismiss, 27 n. 52 (citing PPLPC012000023080); *see also,* Citation, ¶¶ 8, 127. Such information indicates that he reported a Utah in-store investigation and meeting with the owner of the Jolley compounding pharmacy. *Id.* He also confirmed his knowledge of Jolley Pharmacy and its owner in November of 2006. *Id.* at 27 n. 53 (citing

PPLPC019000112417).

iii. Facts Pertaining Particularly to Respondent Kathe Sackler:

20. Although there may be some dispute as to specific time periods when Kathe Sackler served on Purdue boards or the offices that she held, it is acknowledged that Kathe Sackler "served on the Board of Directors of (i) Purdue Pharma Inc. ("PPI") throughout the [period of January 1, 1996] until September 27, 2018; and (ii) The Purdue Frederick Company ("PFC") throughout the [period of January 1, 1996] until March 7, 2005. Decl. Kathe Sackler, ¶ 3. Kathe Sackler also asserts that other "than holding the title of Senior President of PPLP and PPI from December 1, 1999 until May 31, 2007, and Vice President of PFC from March 7, 2005 through March 7, 2005, she was not an employee or officer of PPLP, PPI or PFC. Decl. Kathe Sackler, ¶ 3.

21. The Division asserts that Kathe Sackler was a board member since the 1990s and was a Senior Vice President and her goal was to ensure the broadest possible market for OxyContin.[1] Citation, ¶¶ 151-2.

22. Kathe Sackler was involved in marketing messages as the Product Pipeline and Strategy memorandum she received (*id.* at ¶ 153) shows she was aware of the literature physicians would receive and take as true.

23. Kathe Sackler was involved with formulating marketing messages with the "field force expansion plan" to increase sales representatives detailing visits to prescribers to reach sales projections and earnings targets. *Id.* at ¶¶ 154-6.

24. In September 2014, Kathe Sackler was involved with Project Tango, which was a plan for Purdue to expand into the business of selling drugs to treat opioid addiction to

[1] For purposes of the Motion, the more specific allegations of the Kathe Sackler Declaration are accepted as the facts in this proceeding.

become "an end-to-end pain provider." *Id.* at ¶¶ 157-8. Even though Project Tango was not adopted (*id.* at ¶160), the Division alleges that Kathe Sackler had routine involvement with marketing messages and allocating sales representatives (Div. Opp'n to Sackler Resp'ts Mot. to Dismiss, 35-6 (citing Citation, ¶ 26)) pertaining to Utah.

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 Rule of Civil Procedure ("URCP") with regard to motions to dismiss, decisions of the Utah appellate courts interpreting the URCP are controlling law in this administrative proceeding.

It is to be noted that many pages of the Sackler Motion and of the Division's opposition memorandum set forth the factual perspective of the parties with regard to the Citation. Multiple factual assertions and factual attacks on the Citation's allegations or in support of the Citation are made in the memoranda. Except for specific categories of factual allegations or documents relating to the personal jurisdiction issue (as addressed below in section III of this Order), the remaining factual allegations are inappropriate to a motion to dismiss. While helpful to provide context, or at least the context as viewed by the respective parties, they cannot form the basis for granting or denying a motion to dismiss as a matter of law.

ANALYSIS

I. The Unsolicited Surreplies of the parties to this Motion shall be disregarded.

The Division filed a surreply on the Motion to Dismiss of the Sackler Respondents by means of a letter dated May 24, 2019, which was not solicited by the administrative law judge. The Sackler Respondents objected to the filing of the Division's surreply and filed their own unsolicited surreply by means of a letter dated May 29, 2019.

The Motion will be determined on the basis of the properly filed memoranda and the additional research of the Tribunal. The surreplies of the parties will be disregarded.

II. The Order on the Purdue Motion to Dismiss resolves the motions the Sackler Respondents based upon the Purdue motion.

The Sackler Respondents refer both generally and specifically to arguments made in the Purdue Motion to Dismiss. Specific reference is made at Motion pp. 31-32 to Purdue's UCSPA's safe harbor provisions (Purdue Motion at § II.A.); Purdue's UCSPA Section 13-2-6(3) argument about enforcing only those violations currently engaged in by respondents (Purdue Motion at § II.c); and Purdue's argument that the Division's unconscionability claims can only be brought in a state district court and not in an administrative tribunal (Purdue Motion at § 11.D). The rulings on these issues are contained in the Order on the Purdue Motion to Dismiss and are not addressed here extensively, or at all.

III. Although the Motion is a motion to dismiss, this Tribunal may look behind the allegations of the Citation at properly filed affidavits and supplemental documents relative to the issue of personal jurisdiction.

On the issue of jurisdiction, affidavits and documentary evidence can be examined at the motion to dismiss stage of the proceeding. The Division must make only a prima facie showing of personal jurisdiction. Any disputes in the documentary evidence are resolved in favor of the Division. *See Venuti v. Cont'l Motors, Inc.*, 414 P.3d 943, 948; 2018 Utah App. LEXIS 2.

> To subject a nonresident defendant to a court's judgment, the court must have personal jurisdiction. *Gardner v. SPX Corp.*, 2012 UT App 45, ¶ 12, 272 P.3d 175. Where the court bases its decision on documentary evidence alone, "the plaintiff must simply make a prima facie showing of personal jurisdiction." *Go Invest Wisely LLC v. Barnes*, 2016 UT App 184, ¶ 9, 382 P.3d 623 (citation and internal quotation marks omitted). "The plaintiff's factual allegations are accepted as true unless specifically controverted by the defendant's affidavits or by depositions, but any disputes in the documentary evidence are resolved in the plaintiff's favor. *Id.* (citation and internal quotation marks omitted).

At oral argument on the Motion, the parties agreed that this Tribunal should rely upon the guidance of the case of *Starways, Inc. v. Curry*, 980 P.2d 204, 206; 1999 Utah LEXIS 86.Mot to Dismiss Oral Arg. Tr., May 21, 2019, 151-2. *Starways* and the case of *Anderson v. Am. Soc'y of Plastic & Reconstructive Surgeons,* 807 P.2d 825, 827; 1990 Utah LEXIS 94, establish that the Tribunal may rely upon documentary evidence alone, including affidavits, permit discovery, or hold an evidentiary hearing. *Id.* at 827. The parties agreed that discovery and an evidentiary hearing on jurisdiction would not be employed in this matter, and this Tribunal will rely upon the Citation, the affidavits of the Sackler Respondents and on other documentary evidence properly before it.

IV. This Tribunal has Personal Jurisdiction over the Individual Respondents

The assertion of personal jurisdiction over a nonresident defendant or respondent depends on the existence of two things: a statutory basis to assert jurisdiction over the person and no constitutional bar to doing so. (*See, In re W.A.,* 63 P.3d 607, 611; 2002 Utah LEXIS 214) There is a statutory basis for asserting jurisdiction over the Sackler Respondents and, based on the allegations as they now exist, no constitutional bar to that assertion.

To subject a nonresident defendant to a judgment in Utah, there must be personal jurisdiction. *ClearOne, Inc. v. Revolabs, Inc.,* 369 P.3d 1269, 1272; 2016 Utah LEXIS 37. The analysis here will address Utah and United States Supreme Court decisions over a period of years, applying such cases to the particular facts of this proceeding. We must harmonize these decisions

and give proper consideration to any recent trends in the law. As evidenced below, the Utah Supreme Court has extensively relied upon the latest United States Supreme Court decisions.

For a motion to dismiss for lack of personal jurisdiction, factual allegations in the citation are accepted as true and considered in a light most favorable to the nonmoving party. *Fenn v. MLeads Enters.,* P.3d 706, 709; 2006 Utah LEXIS 8. "The plaintiff's factual allegations are accepted as true unless specifically controverted by the defendant's affidavits or by depositions, but any disputes in the documentary evidence are resolved in the plaintiff's favor." *Go Invest Wisely, LLC v. Barnes,* 382 P.3d 623, 627; 2016 Utah App. LEXIS 194; *Hunsaker v. Am. Healthcare Capital,* 340 P.3d 788, 791; 2014 Utah App. LEXIS 281. In this analysis on jurisdiction, the statements set forth above in the Factual Setting section of this Order have been relied upon.

At oral argument on the Motion, the parties agreed that jurisdiction in this matter could only be based upon a finding of specific personal jurisdiction, as general jurisdiction is not present. General jurisdiction is appropriate only when affiliations with the state are so "continuous and systematic" as to render the nonresident essentially "at home in the forum State." *Daimler AG v. Bauman*, 571 U.S. 117, 137 (2014); 2014 U.S. LEXIS 644; *ClearOne, Inc.,* 369 P.3d at 1282.

Specific personal jurisdiction "gives a court power over a defendant only with respect to claims arising out of the particular activities of the defendant in the forum state." *Arguello v. Industrial Woodworking Mach. Co.,* 838 P.2d 1120, 1122; 1992 Utah LEXIS 68. Consequently, "personal jurisdiction is only proper if we determine that (1) the Utah long-arm statute extends to defendant's acts or contacts, (2) plaintiff's claim arises out of those acts or contacts, and (3) the

exercise of jurisdiction satisfies the defendant's right to due process under the United States Constitution." *Fenn,* 2006 UT 8, ¶ 8, 137 P.3d 706.

In its 2018 pronouncement on the subject, the Utah Supreme Court gives guidance that to determine whether a state court can exercise specific jurisdiction, courts conduct a two-part inquiry: (1) do the plaintiff's claims come within the reach of the state's long-arm statute; and (2) are the defendant's contacts with the state sufficient to satisfy constitutional due process. *Venuti v. Cont'l Motors Inc.*, 414 P.3d 943, 948; 2018 Utah App. LEXIS 2 (quoting *Arguello,* 838 P.2d at 1122). Thus, the first question is whether there exists a statutory basis for asserting personal jurisdiction over the Sacklers.

A. Statutory Basis to Assert Jurisdiction

The Division need not rely here on the general long-arm statute found in U.C.A. Section 78B-3-205, but may rely upon the long-arm provisions of the UCSPA. The Utah Supreme Court has noted that in assessing personal jurisdiction over a nonresident defendant the tribunal may rely upon "any Utah statute affording it personal jurisdiction, not just Utah's long-arm statute". *In re W.A.,* 63 P.3d at 612.

In Utah, a person violating the UCSPA is subject to the personal jurisdiction if:

> (i) the violation or attempted violation is committed wholly or partly within the state;
> (ii) conduct committed outside the state constitutes an attempt to commit a violation within the state; or
> (iii) transactional resources located within the state are used by the offender to directly or indirectly facilitate a violation or attempted violation.

U.C.A. §13-2-6(4)(a).

As alleged in the Citation, the actions of Richard Sackler and Kathe Sackler constituted a violation of the UCSPA within the state of Utah. A sufficient statutory basis exists to confer personal jurisdiction over the Sackler Respondents, if due process requirements are met.

Section 13-11-4(1) of the UCSPA states that a "deceptive act or practice by a supplier in connection with a consumer transaction violates this chapter . . ." A "supplier" is defined in the UCSPA 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." U.C.A. Section 13-11-3(6). Under these provisions, the allegations of the Citation are sufficient to implicate Richard Sackler and Kathe Sackler as suppliers and as persons who participated in deceptive acts in connection with engaging in and enforcing consumer transactions in violation of the UCSPA. This liability is established within the meaning of the statute and in long-standing Department of Commerce precedent.

Application of this principle is not based in any regard on the theory of piercing the corporate veil. The Division does on rely upon such theory and no facts are pleaded that would support such a claim.

Personal liability of the Sackler Respondents under the statutory provisions of the UCSPA finds support in the recent Utah case of *Tub City et al. v. Utah Division of Consumer Protection*, Civ. No. 170902052 (Utah 3d. Jud. Dist. 2018). In *Tub City*, an individual who was an officer of the entity respondent was found personally liable for UCSPA violations without regard to the piercing of the corporate veil or of personal fraudulent representations of the individual respondent.

It is acknowledged that in *Tub City* the individual respondent had direct contact with the Utah consumers, a fact not in evidence here. However, the Utah statute is not as narrow as the particular facts of the *Tub City* case. As noted, the statute specifically provides that a person is a supplier "whether or not he deals directly with the consumer." The fact that the Sackler

Respondents did not directly deal with a Utah purchaser of opioids does not preclude their personal liability under the UCSPA.

Utah is not alone in adopting consumer protections statutes that impose liability on officers or directors of entities engaged in consumer transactions within their respective states. Like Utah, the state of Ohio adopted the Uniform Consumer Protection Act. Ohio Rev. Code Ann. § 1345.01. In *Garber v. STS Concrete Co., LLC*, 991 N.E.2d 1225; 2013 Ohio App. LEXIS 2774, the Court of Appeals of Ohio found liability of both an entity and its owner under two distinct Ohio consumer protection statutes, the Ohio Consumer Sales Practices Act (the "CSPA") and the Ohio Home Solicitation Sales Act. The *Garber* court stated that

> [i]n certain contexts, however, individuals can be held to answer for the actions of the company. Violations of the CSPA offer such a context. Where officers or shareholders of a company take part or direct the actions of others that constitute a violation of the CSPA, that person may be held individually liable.

Garber, 991 N.E.2d at 1233. The Citation in the present proceeding sufficiently alleges that the Sackler Respondents directed the actions of others that constituted a violation of the consumer protection statute.

The State of Maryland applies its consumer protection statutes in a manner such that officers and agents of a corporation or limited liability company may be held personally liable when they direct, participate in, or cooperate in the prohibited conduct. An example of this personal liability by an officer of an entity was found for violations of the Maryland consumer protection statute called the Maryland Commercial Electronic Mail Act (MCEMA). *MaryCLE, LLC v. First Choice Internet, Inc.*, 890 A.2d 818; 2006 Md. App. LEXIS 2, applies this statute and the Maryland Court stated that officers may be individually liable for the "wrongdoing that is based on their decisions." *Id.* at 845. The MCEMA statute employs the term "merchant"

instead of "supplier" in identifying liable parties, but the effect of imposing liability on the officers of an entity is the same.[2] Md. Code Ann., Com. Law § 13-101.

The Supreme Court of the State of Washington has also imposed personal liability on officers of a company on the basis of the State's consumer protection statute. *Grayson v. Nordic Constr. Co.,* 599 P.2d 1271, 1274; 1979 Wash. LEXIS 1424. While denying liability on a piercing of the corporate veil theory, the court stated:

> Although the trial court improperly pierced Nordic's corporate veil on the alter ego theory, we nonetheless find that personal liability was properly imposed on Bergstrom under the rule enunciated in *State v. Ralph Williams' North West Chrysler Plymouth, Inc.*, 87 Wn.2d 298, 553 P.2d 423 (1976). If a corporate officer participates in wrongful conduct or with knowledge approves of the conduct, then the officer, as well as the corporation, is liable for the penalties. *State v. Ralph Williams' North West Chrysler Plymouth, Inc., supra; Johnson v. Harrigan-Peach Land Dev. Co.*, 79 Wn.2d 745, 489 P.2d 923 (1971). In *Ralph Williams*, this court considered a deceptive practice in violation of the Consumer Protection Act to be a type of wrongful conduct which justified imposing personal liability on a participating corporate officer.

Grayson, 599 P.2d at 1271.

The Supreme Court of the State of Wisconsin has also addressed this issue in the context of a consumer protection statute. In *Stuart v. Weisflog's Showroom Gallery, Inc.*, 746 N.W.2d 762; 2008 Wisc. LEXIS 17, the Wisconsin Court found a corporate officer liable for violations of the Wisconsin Home Improvement Practices Act (HIPA). In confirming this holding, the Court quoted the statute and analyzed its implications by saying:

> The HIPA envisions that a person, such as Weisflog, may be personally liable given its plain language which reads: "'Seller' means a person engaged in the business of making or selling home improvements and includes corporations, partnerships, associations and any other form of business organization or entity, and their officers, representatives, agents and employees." Wis. Admin. Code § ATCP 110(5) (emphasis in original). Furthermore

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[2] In denying the grant of a motion to dismiss on imposing liability on an officer of the entity, the *MaryCLE* court relies upon a Maryland Consumer Protection Act (MCPA) case *B&S Marketing Enters. v. Consumer Protection Div.*, 835 A.2d 215; 2003 Md. App. LEXIS 140; cert denied, 844 A.2d 427 (2004); 2004 Md. LEXIS 140. The *MaryCLE* case states, without any authority arising from the language of the statute, that this personal liability under the MCEMA and the MCPA is found on the basis that violations of these two statutes is "in the nature of a tort." No reliance upon such a characterization is warranted or required with regard to the UCSPA.

> *Wis. Stat. § 100.20(5)* states: "Any person suffering pecuniary loss because of a violation by any other person of any order issued under this section may sue for damages therefore . . . and shall recover twice the amount of such pecuniary loss, together with costs, including a reasonable attorney's fee." (emphasis in original).
>
> 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. Accordingly, such violations may create personal liability for individuals who are alleged to be responsible for prohibited, unfair dealings and practices.

Stuart, 746 N.W.2d at 774.

To be sure, the Division will have the burden of proof at the administrative hearing to establish that the Sackler Respondents were responsible for practices that constituted violations of the UCSPA, but the Citation sufficiently alleges that the Sackler Respondents were the individuals who were the actual decision makers that directed the violative conduct.

U.C.A. Sections 13-11-4(1) and 13-11-3(6) speak to liability only and do not purport to state an additional basis for personal jurisdiction independent from the long-arm provisions of U.C.A. 13-2-6(4)(a). Nothing in the statutory language indicates that the legislature intended to expand the scope of personal jurisdiction by imposing liability on those who, by definition, are suppliers. As between states that do not impose liability on officers of an entity for deceptive acts in the consumer protection arena, and states that do (e.g. Utah, Ohio, Maryland, Washington and Wisconsin as referenced above), it would be remarkable indeed if a state legislature, by the mere stroke of a pen (in adding a provision to its consumer protection laws creating such personal liability) could concomitantly create personal jurisdiction over such individuals, regardless of minimum contacts or the due process requirements of the Fourteenth Amendment.

The Utah Supreme Court in the case of *MFS Series Trust III v. Grainger*, 96 P.3d 927; 2004 Utah LEXIS 128, addresses a provision of the Utah Uniform Securities Act that imposes liability on those who directly control a seller of securities or upon an officer or director of the

seller.[3] The Supreme Court made the distinction between being *liable* for a securities violation and whether there was *personal jurisdiction* over the liable party. The Court said:

> Liability and jurisdiction are independent. Liability depends on the relationship between the plaintiff and the defendants and between the individual defendants; jurisdiction depends only upon each defendant's relationship with the forum." *Sher v. Johnson*, 911 F.2d 1357, 1365 (9th Cir. 1990) (citing *Shaffer v. Heitner*, 433 U.S. 186, 204, 53 L. Ed. 2d 683, 97 S. Ct. 2569 & n.19 (1977)). Section 61-1-22(4) speaks to liability only and does not purport to grant personal jurisdiction. Nothing in the statutory language indicates that the legislature intended to do so. Even if the statute attempted to confer personal jurisdiction, due process would still require an analysis of minimum contacts. Permitting allegations of liability under Utah's securities laws to automatically give rise to personal jurisdiction, without first considering whether each defendant "purposefully availed" himself of the benefits and protections of Utah's laws, would be to ignore the due process requirements of the Fourteenth Amendment.

See International Shoe, 326 U.S. at 316.

At oral argument on the Motion (Mot. to Dismiss Oral Arg. Tr., May 21, 2019, 114-9; 161:15-16), counsel for Richard Sackler referred to the 1984 decision of the United States Supreme Court of *Keeton v. Hustler Magazine, Inc.,* 465 U.S. 770; 1984 U.S. LEXIS 40. The *Keeton* Court stated that the "jurisdiction for a corporate officer or director must be based on that officer or director's conduct specifically aimed at the state and not based on corporate conduct." Further, "[j]urisdiction over an employee does not automatically follow from jurisdiction over the corporation which employs him. Each defendant's contacts with the forum state must be assessed individually." *Id.* at 781 n.13. The Utah Supreme Court in the *MFS* case stated similarly that "[m]ere corporate status can never be the basis for jurisdiction. Each defendant's contacts with the forum state must be assessed individually." *MFS Series Tr. III,* 96 P.3d at 931.

No personal jurisdiction was found over the defendants in the *MFS* case. However, the *MFS* court observes at page 932 that the plaintiffs in the *MFS* case had to "rely solely on

[3] U.C.A. Section 61-1-22(4) imposes liability on "[e]very person who directly or indirectly controls a seller or buyer . . . [and] every partner, officer, or director of such seller or buyer . . . who materially aids in the sale . . ."

defendants' status as officers or directors of the corporation to support personal jurisdiction over them." As discussed in further detail below, that is not the case in the present proceeding. Here the Division alleges, *inter alia*, that at "the Sackler Respondents' direction, Purdue has continued to promote, directly and indirectly, deceptive marketing messages that misrepresent, and fail to include material facts about, the dangers of opioid usage in Utah, despite knowing that these marketing messages are false, in order to increase their sales, revenues, and compensation" Citation, ¶ 161. Having found that Utah law subjects the Sackler Respondents to Utah's jurisdiction for the alleged violations of the UCSPA, we now analyze the Sackler Respondents' Utah contacts relevant to the alleged violations to see if the Constitution forbids Utah's exercise of specific personal jurisdiction over the Sackler Respondents.

B. The assertion of personal jurisdiction by this tribunal does not violate the Sackler Respondents' Constitutional Due Process Rights

For specific personal jurisdiction, the United States Supreme Court has interpreted the Due Process Clause of the Fourteenth Amendment to permit the state personal jurisdiction over a party when the party has "minimum contacts with [the state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Int'l Shoe Co. v. Wash., Office of Unemployment Comp. & Placement*, 326 U.S. 310, 316; 1945 U.S. LEXIS 1447. For minimum contacts, the focus is on "the relationship among the defendant, the forum, and the litigation." *Calder v. Jones,* 465 U.S. 783, 788; 1984 U.S. LEXIS 41.

For purposes of specific jurisdiction, these contacts "must be the basis for the plaintiff's claim." *Arguello*, 838 P.2d at 1123. This analysis focuses the court's attention on "the relationship of the defendant, the forum, and the litigation to each other." *Id.* (citation and internal quotation marks omitted). *Venuti,* 414 P.3d at 948.

The Sackler Respondents minimize their relationship with the State of Utah and have filed brief affidavits to state their position that they do not have minimum contacts with the forum. As instructed by the *Starways* case, the statements in both affidavits are accepted as facts for the purpose of the Motion, as they have not been contested by affidavits of the Division. *Starways*, 980 P.2d at 206. On the other hand, the Citation recites certain specific actions of the Sackler Respondents that the Division asserts show contacts with the forum.

In evaluating the relationship of the Sackler Respondents, the forum and the litigation to each other, the *Starways* case is instructive in assessing minimum contacts and evaluating the parties' alleged facts. Starways was a Nevada corporation with its principal place of business located in Utah. The defendants were doing business as Curry & Chase Marketing and were accused of defamatory communications "both in personal conversations and in nationally broadcast facsimile transmissions." Starways further alleged that the acts giving rise to the causes of action occurred in the State of Utah, as well as many other states simultaneously. Starways brought its action against the California individual defendants, Chase and Curry, in Utah and the Utah Supreme Court determined that there was personal jurisdiction.

In analyzing those actions that gave rise to establishing minimum contacts, the Utah Court stated:

> Both defendants deny that they individually transmitted facsimiles into Utah. The court below, however, properly focused on what Chase and Curry failed to establish in their affidavits. Neither Chase nor Curry stated that they did not *cause* facsimile transmissions to be sent into Utah. Moreover, nowhere in the affidavits can be found a denial of the complaint's allegation that the defendants made defamatory statements "in personal conversations" with persons located in Utah. In the absence of such specific denials, we agree with the district court's conclusion that the defendants failed to contradict Starways' allegations of personal jurisdictional. (emphasis in original) *See Anderson*, 807 P.2d at 827 ("The plaintiff's factual allegations are accepted as true unless specifically controverted.").

Starways, 980 P.2d at 206.

The only thing asserted by the Sackler Respondents in their affidavits here is their place of residence and domicile, and their periods of service as officers and/or directors of some of the Purdue entities. The Sackler Respondents failed to deny that they caused the UCSPA violations in the State of Utah and failed to deny that that they had exercised the control necessary to make Purdue violate the UCSPA. The Sackler Respondents failed to contradict the Division's allegations of personal involvement that might give rise to jurisdiction. Therefore, the unrebutted allegations of the Citation are accepted as the facts in this case for the purpose of the Motion.

The post-*Walden* decision of the *Venuti* court observes that the United States Supreme Court has suggested two modes of analyzing the question of whether minimum contacts are present: the "arising out of" test and the "stream of commerce" test. Both tests support the exercise of specific jurisdiction in this proceeding.

The *Venuti* Court stated that under "the 'arising out of' test, the defendant's contacts must be sufficiently related to the plaintiff's claim so that it can be said that the claim arises out of these contacts. *Arguello,* 838 P.2d at 1124 . . . "Ultimately, due process is not satisfied by the quantity of the contacts with the state, but 'rather upon the quality and nature' of the minimum contacts and their relationship to the claim asserted." *Id.* at 1123 (emphases omitted) (quoting *International Shoe, 326 U.S. at 319*); *Venuti,* 414 P.3d at 949.

Based upon the facts recited in paragraphs 3 through 12 of that portion of the Factual Setting of this Order under the heading "Facts Pertaining to Respondent Kathe Sackler and

Respondent Richard Sackler" there are sufficient contacts to establish the personal minimum contacts of the Sackler Respondents with the State of Utah.

The *Venuti* court also addresses the "stream of commerce" test of personal jurisdiction. The *Venuti* court states that:

> The "stream of commerce" theory of specific jurisdiction developed in product-liability cases to address the situation where "the seller does not come in direct contact with the forum state but does so through intermediaries such as retailers or distributors." American Law of Prods. Liab. 3d *Stream of commerce theory* § 48.85 (2017). "Typically, in such cases, a nonresident defendant, acting outside the forum, places in the stream of commerce a product that ultimately causes harm inside the forum." *Goodyear Dunlop Tires Operations v. Brown*, 564 U.S. 915, 926, 131 S. Ct. 2846, 180 L. Ed. 2d 796 (2011) (emphasis omitted). Under this theory, if the sale of a product "is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve directly or indirectly, the market for its product in other States," then "it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others." *World-Wide Volkswagen Corp.*, 444 U.S. at 297.

Venuti, 414 P.3d at 950.

The Sackler Respondents are alleged to have directed the regular and anticipated flow of opioids from the manufacturer to distribution in the State of Utah. Here, Purdue, through the Sackler Respondents-directed board, marketed extensively in Utah (Citation, ¶¶ 8), including their use of sales representatives to actively misrepresent the risks, benefits, and addictive qualities of its opioids despite their awareness of contradictory research (*id.* at ¶ 16; 113), and the funding of opinion leaders to push their opioids (*id.* at ¶¶ 94-5) showing that minimum contacts have been met. The Division also alleges that these actions were personally directed in some significant degree by the Sackler Respondents in their board and individual capacities (id. at ¶ 125).

A prima facie case for jurisdiction has been established; the Respondents have sufficient contacts with this state to justify the imposition of personal jurisdiction over them; and the

exercise of personal jurisdiction over the Respondents by the State of Utah accords with the requirements of due process.

Much has been written and said by the parties regarding the affect that the case of *Walden v. Fiore*, 571 U.S. 277, 288; 2014 U.S. LEXIS 1635 has had upon the "effects test" set out in the earlier United States Supreme Court case of *Calder v. Jones,* 465 U.S. 783, 788 (1984); 1984 U.S. LEXIS 41. The Sackler Respondents argue that *Walden* holds that jurisdiction may not be established over the Sacklers if the only alleged contact a Sackler Respondent had with Utah is the effects that his or her contact as a supplier of opioids had on the State of Utah or its citizens. In light of the facts in the present proceeding, in *Calder*, and in *Walden*, the change brought about by *Walden* does not alter the conclusion here regarding jurisdiction over the Sackler Respondents.

In *Calder*, the plaintiff lived and worked in California, and the defendants worked for the National Enquirer in Florida. The National Enquirer sold more copies of its publication in California than in any other state. *Calder*, 465 U.S. at 785. According to the Court, the defendants knew that their magazine article would have its most significant impact in California, hence the Court's conclusion that their conduct was "expressly aimed" at California. *Id.*

For the *Calder* effects-test to apply, the plaintiff must allege facts sufficient to meet a three-prong test: (1) the defendant must have committed an intentional tort; (2) the plaintiff must have felt the brunt of the harm caused by that tort in the forum, such that the forum can be said to be the focal point of the harm suffered by the plaintiff as a result of the tort; and (3) the defendant must have expressly aimed his tortious conduct at the forum, such that the forum can be said to be the focal point of the tortious activity. *Calder*, 465 U.S. at 789.

In application, the Court found that there was a writer of the article (Calder) and an editor of the article (South) that targeted the plaintiff and they knew it would have a potentially devastating impact in California. *Calder*, 465 U.S. at 789-90. The Court found that the editor and writer knew that the brunt of that injury would be felt by the plaintiff in California, which is where the National Enquirer had its largest circulation. *Id.* The Court found that the editor and writer would have expected to "reasonably anticipate being haled into court there" to answer for the truth of the statements made in their article. *Id.* (quoting *World-Wide Volkswagen Corp.*, 444 U.S. at 297). "An individual injured in California need not go to Florida to seek redress from persons who, though remaining in Florida, knowingly caused the injury in California." *Id.* at 790. The editor's and writer's status as employees did not insulate them from jurisdiction as each defendant's contacts with the forum must be assessed individually. *Id.* They were primary participants in an alleged wrongdoing intentionally directed at a California resident, and jurisdiction over them was proper on that basis. *Id.*

The narrowing of the effects test in *Walden* is easily distinguishable from the present case. In *Walden,* a professional gambler had a large amount of cash seized at a Georgia airport by a deputized DEA agent while in transit from Puerto Rico to Las Vegas -- Fiore's domicile. Fiore filed suit in a Nevada federal district court where personal jurisdiction was found over Walden, the DEA agent. *Id.* The Ninth Circuit upheld personal jurisdiction on the theory that the allegedly false probable-cause-affidavit was aimed at Nevada because Walden, the Georgia agent, could foresee that it would affect people who had a "significant connection" to Nevada by denying them the use in Nevada of their money. *Id.* Walden had no connection to Nevada but for Fiore's lawsuit. The narrowing that occurred by reason of *Walden* was that the defendant must have a connection with the forum in a more "meaningful" way than just the plaintiff's suit.

The situation in *Walden* is materially distinct from the kind of connection that was in *Calder*—and the facts alleged in this matter. The writer and editor in *Calder* knew of the effects that were possible in California. Here, based on the allegations, the Sackler Respondents directed conduct specifically at Utah.

Here the three prongs of the effects-test are satisfied. First, both Richard Sackler and Kathe Sackler allegedly committed a violation of the UCSPA in their roles as alleged controlling directors of the Purdue entities. *Calder*, 465 U.S. at 789.

Second, the Division has alleged that Utah has felt the brunt of the harm caused by the Purdue entities' actions directed at Utah, acting at the direction of the Sackler Respondents, such that Utah can be said to be the focal point of the harm suffered by the plaintiff as a result of the wrongs committed. *Calder*, 465 U.S. at 789. Purdue, through the direction of the Sackler Respondents, has targeted the entire country with no express exemptions or attenuated strategies for any jurisdiction. The Division has asserted that the Respondents availed themselves of the benefits of doing business in Utah and this forum is well within the target of Purdue's "focal point." Citation, ¶¶ 1-8.

Third, both Richard Sackler and Kathe Sackler, in their role as directors of the Purdue entities, aimed their misconduct at the State of Utah. *Calder*, 465 U.S. at 789. Purdue did not expressly target their products only to one market or one location, which makes this proceeding distinguishable from *Silver v. Brown,* 382 F. Appx. 723 (10th Cir. 2010); 2010 U.S. App. LEXIS 12090, and other internet cases similar to *Silver*. Purdue had a national marketing campaign, which was based in some part on direct physical sales contacts, that wrought significant effects in multiple jurisdictions. There is no sliding scale of relative harm to compare and contrast the effects from state to state. Purdue targeted its opioid products at the United States and Utah

suffered its share of the brunt of this harm as alleged in the Citation (¶¶ 18-28). The Division seeks redress for the Utah harms it alleges. The Sackler Respondents were responsible for control of the marketing tactics and strategy and sales representatives nationwide. *Id.* at ¶¶ 8; 16; 32; 63; 67; 73; 94-5; 113; 127; 164; 168; 174. The three-prong effects test is met.

Richard Sackler and Kathe Sackler have roles that are similar to the role of the editor in *Calder.* The writer of the article in *Calder* could be likened to that of an agent where the editor was the principal. The editor had the ability to demand edits to the story or just not publish it. The editor ratified and assented to the content of the writer's article with an inclination that there would be an effect in the forum. The Sackler Respondents knew that there would be an effect with their directing of marketing tactics of sales representatives and channeling funds to opinion leaders that would distort the objectivity of consumers and physicians.

Whatever shift in the law regarding personal jurisdiction may have occurred by reason of the *Walden* decision, it is important to note that the *Walden* Court analyzed and defended its decision in *Calder*. In doing so, it recited the facts in *Calder* that it relied upon to make its decision. *Walden's* recitation of the *Calder* facts at page 287 of the *Walden* opinion is not dissimilar to the present set of facts where "the jurisdictional inquiry focused on the relationship among the defendant, the forum and the litigation." *Id.* In the present proceeding,

- The Sackler Respondents directed sales representatives to enter into Utah and contact doctors in face-to-face meetings to sell opioids;
- The Sacklers Respondents caused injury in Utah; and
- The brunt of the injury suffered by the state and its consumer/residents was suffered in Utah.

On the basis of the *Calder* facts recited by the *Walden* Court, the Supreme Court again affirmed that, in *Calder*, they "found those forum contacts to be ample." *Id.*

Jurisdiction over the Sackler Respondents is proper in Utah based upon the effects of their extra-territorial conduct in the State of Utah. *Id.* The *Walden* Court did not find minimum contacts with Nevada in part because the defendant in *Walden* "never contacted anyone in, or sent anything or anyone to Nevada." *Id.* at 289. Here the Sackler Respondents are alleged to have directed the activities that resulted in contacts with two opinion leaders in Utah and the implementation of the bonus card program in Utah (Citation, ¶127), and they sent sales representatives to meet with Utah licensed doctors in Utah. *Walden* is entirely different than the present proceeding. Here the deceptive marketing and opioid sales were funneled into Utah, at the direction of the Sackler Respondents.

In *Walden*, the Court found that the argument for jurisdiction was predominantly plaintiff-related and not defendant-related. Jurisdiction was erroneously determined by the federal district court and the Ninth Circuit Court of Appeals in *Walden* on the basis that the plaintiff suffered the injury in Nevada, not that the DEA agent had any activities in or directed any action toward Nevada. All of the DEA agent's actions were taken in Georgia.[4] As stated by the *Walden* court: "[t]he proper question is not where the plaintiff experienced a particular injury or effect but whether the defendant's conduct connects him to the forum in a meaningful way." *Id.* at 290. Here the Sackler-directed marketing and deception was focused at Utah for the claims pleaded in the Citation. This Sackler-directed marketing and deception is what the *Walden* Court called "forum-focused" activity that justified jurisdiction in *Calder*. *Id.* 290.

Utah and its citizens/consumers bore the brunt of the forum-focused, Sackler-directed marketing and deception alleged in the Citation. In the *Calder* case, the Supreme Court

[4] The *Walden* Court concluded its opinion by saying "Petitioner's [i.e. the DEA agent's] relevant conduct occurred entirely in Georgia, and the mere fact that his conduct affected plaintiffs with connections to the forum State does not suffice to authorize jurisdiction." *Id.* at 291.

concluded that Calder (the author of the subject magazine article) and South (the editor of the article) were "primary participants in an alleged wrongdoing intentionally directed at a California resident, and jurisdiction over them was proper on that basis. If the Division cannot prove Richard Sackler and Kathe Sackler were among the principal directors and pseudo-executives of Purdue, controlling the alleged deceptive marketing, as alleged in the Citation, the justification for jurisdiction on the basis set forth here may unravel. At the motion to dismiss stage, however, jurisdiction is sufficiently established.

The Sackler Respondents further rely upon the recent United States Supreme Court decision of *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773; 2017 U.S. LEXIS 3873, to further support their argument that the Supreme Court is continuing in a trend to narrow the reach of personal jurisdiction. The *Bristol-Myers* case does not support dismissal of the present administrative proceeding.

In *Bristol-Myers*, more than 600 plaintiffs filed suit against Bristol-Myers Squib ("BMS"), alleging injuries from one of BMS's drugs called Plavix. This action was filed in California, but most of the plaintiffs were not residents of California and could not allege that they obtained Plavix in California nor that they were injured by Plavix in California or were treated for their injuries in California. *Id.* at 1778. The denial of personal jurisdiction over BMS in a California court by these out-of-state plaintiffs is not instructive to our analysis here.[5] In this proceeding, the Division has sufficiently alleged that Utah consumers obtained opioids in Utah through efforts of the Sackler Respondents, were injured by such opioids in Utah, and were treated for their injuries in Utah.

[5] It should be noted that the *Bristol-Myers* Court did find personal jurisdiction over BMS on behalf of the 86 plaintiffs that were California residents.

The reasonableness of the exercise of jurisdiction is demonstrated by this forum's interest in adjudicating the dispute and the State's interest in obtaining an efficient resolution of the controversy. In comparison to these factors, the burden on the Sackler Respondents is relatively light. The majority opinion in *Bristol-Myers* states that assessing the burden on the defendant "obviously requires a court to consider the practical problems resulting from litigation in the forum, but it also encompasses the more abstract matter of submitting to the coercive power of a State that may have little legitimate interest in the claims in question." *Bristol-Myers Id.* at 1780. In the California state action filed in *Bristol-Myers,* only 86 of the more than 600 plaintiffs were residents of California. By comparison, the interest of the State of Utah in the claims in the present matter is enormous.

The Sacker Respondents also meet the purposeful-availment requirement that is a component of the minimum contacts inquiry. As suppliers under the UCSPA, they are alleged to have taken deliberate steps to serve the forum state market with the product that is the subject of the action and to engage in the deceptive marketing of the product, garnering substantial personal profit. Utah was a targeted market for the Purdue opioids. The allegedly misleading marketing and resulting sales were enforceable under general commercial law in the state. The Sackler Respondents benefited from the protection of Utah's laws for the conduct of business in the state. The fact that other states in the Union were also targeted does not change the forum-directed actions for the State of Utah or Purdue's and the Sackler Respondents purposeful availment of the protection of Utah law.

It is acknowledged that the Sackler Respondents will bear some burden for being haled into court in the Utah forum. However, the Utah Court of Appeals in *Fenn v. MLeads Enters., Inc.,* 103 P.3d 156; 2004 Utah App. Lexis 452, stated that Utah had an interest in "preventing its

residents from receiving noncompliant email" and that this interest, among others, outweighed the burden placed on the out-of-state defendant. *Id.* at 163-164. Similarly, the marketing of opioids in a deceptive manner in the State of Utah would create a substantial interest for the state of Utah to prosecute its claim here and outweighs the burned placed on the out-of-state respondents. In contrast to the scope and level of activity Purdue undertook to market and sell in Utah, which the Division alleges the Sackler Respondents directed and from which they benefitted, the burden of litigating in this state is relatively small.

The Division has established a prima facie case for specific personal jurisdiction at this stage of the proceeding. Discovery in this proceeding may also bolster this prima facie showing of jurisdiction and the Division should be permitted to pursue such discovery in the post-motion to dismiss phase of this proceeding.

Counsel for Richard Sackler argues that there is no need for further discovery on the issue of personal jurisdiction. This argument is principally based upon his observation that the Division had already had access to millions of pages of documents produced from the Respondents in another proceeding, and that the Division had also taken the deposition of both Richard Sackler and Kathe Sackler in the other proceeding. We do not have before us the requests for production of documents that produced the aforementioned millions of pages of documents and we do not have before us the transcripts of the two Sackler depositions. Since these discovery means were employed in another jurisdiction outside of the state of Utah, it would be reasonable to presume, for example, that the depositions contained little or nothing regarding the Utah focus of the actions or contacts of the Respondents. Further discovery on matters relating to personal jurisdiction would be warranted in the post-motion to dismiss stage of this proceeding.

In addition to the foregoing factors that the Sackler Respondents have in common, Richard Sackler has additional forum related contacts. Owning the Alta ski home alone is insufficient to bestow jurisdiction and his use of the ski home could be unrelated to the claims made in this proceeding, but for the suit related activities summarized in paragraphs 13 through 20 of the Factual Setting portion of this Order.

The United States Supreme Court stated in *Bristol-Myers* at page 1781 that:

> In order for a court to exercise specific jurisdiction over a claim, there must be an "affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State." *Goodyear*, 564 U. S., at 919, 131 S. Ct. 2846, 180 L. Ed. 2d 796 (internal quotation marks and brackets in original omitted). When there is no such connection, specific jurisdiction is lacking regardless of the extent of a defendant's unconnected activities in the State. *See id.*, at 931, n. 6, 131 S. Ct. 2846, 180 L. Ed. 2d 796.

Richard Sackler's ski activities from the Alta, Utah home are "unconnected activities" in the State of Utah that do not aid jurisdiction. The other activities described above are examples of an "affiliation between the forum and the underlying controversy." The *Bristol-Myers* opinion speaks in terms of a single "activity" or a single "occurrence" that takes place in the forum state. *Id.* at 1781, quoting *Goodyear*, 564 U. S. at 919. Here we have multiple suit-related contacts and connections between Richard Sackler and Utah, based on the Division's allegations.

The Division alleges that Richard Sackler oversaw the launch of OxyContin and had worked for Purdue for 43-years in various capacities including Chairman of the Board of Directors and head of marketing. Citation at ¶¶ 132; 144. The Division contends that Richard Sackler was a micromanager and heavily involved in marketing plans, perceptions, approaches, sales forecasts, and listings of top ranking sales representatives ("Toppers"). *Id.* at ¶¶ 133; 143. Richard Sackler is also alleged to have directly promoted the false idea that there was no

maximum dose of OxyContin, even though there were risks of addiction, overdose, and death at higher doses. *Id.* at ¶ 147.

The Division alleges that Richard Sackler was willing to use his Alta home to house speakers at Utah conferences and conducted an unspecified amount of work there. Div. Opp'n to Sackler Resp'ts Mot. to Dismiss, 8; 16; 17 (Citation, ¶ 5).

The Division asserts that Richard Sackler arranged to conduct Purdue related business at his Alta vacation home in January 2002. *Id.* at 27 n. 49 (citing PPLP045000006550). He conducted business from Alta in January 2008 (id. at 22 nt. 31 (citing PPLPC042000016733) and in January of 2010 (*id.* n. 31 (citing PDD9316100460). Writing from the Alta home, Richard Sackler gives direction on Purdue business that "[t]here are other dimensions that might be tried including political influence." He continues by saying in his Alta, Utah generated email that "[w]e need a rapid assessment of the likely situations that are pertaining here so that we can choose the appropriate strategy. Just hammering along the route we've taken might be right or might be very wrong." Div. Opp'n to Sackler Resp'ts Mot. to Dismiss, 22 n. 31 (citing PDD9316100462).

As late as December 2016, Richard Sackler arranged to conduct Purdue related business at his Alta home leaving express instructions to contact him there. Div. Notice of Two Supp. Exs., Ex. B (citing PPLPC035000260437).

The Division alleges that documents also indicate that Richard Sackler had detailed information on pharmacies in Utah, specifically making a personal investigatory visit to Jolley's Pharmacy (a compounding pharmacy) in January of 2002. Div. Opp'n to Sackler Resp'ts Mot. to Dismiss, 27 n. 52 (citing PPLPC012000023080); *see also* Citation, ¶¶ 8, 127. Such information indicates that he reported his Utah in-store investigation and meeting with the owner of the

Jolley compounding pharmacy. *Id.* He also confirmed his knowledge of Jolley Pharmacy and its owner in November of 2006. *Id.* at 27 n. 53 (citing PPLPC019000112417).

Richard Sackler's written 2016 message (Div. Notice of Two Supp. Exs., Ex. B (citing PPLPC035000260437)) demonstrates that his use of the ski home was not only for recreational purposes, but was also to conduct the business of marketing opioids. A 2002 document invites Purdue employees to contact him at the Alta home to conduct the opioid sales business of Purdue. Div. Opp'n to Sackler Resp'ts Mot. to Dismiss, 27 nt. 49 (citing PPLP045000006550).]

By the use of Richard Sackler's Alta home in the manners described, Richard Sackler purposefully availed himself of the privilege of conducting opioid promotion or sales activities in the State of Utah; the Division's claims in part arise out of or are related to his forum conduct;[6] and the exercise of jurisdiction is reasonable under the circumstances.

It is to be noted that, in establishing jurisdiction over the Sackler Respondents, no reliance can be placed on Kathe Sackler's involvement with the Korean marketing project (other than to demonstrate Kathe Sackler's involvement in Purdue business), and we give it no weight.

V. Except for the claim for unconscionable acts and practices, this tribunal can adjudicate the claims against the Sackler Respondents.

Section II of the Sackler Motion addresses a number of issues asserting that this tribunal cannot adjudicate the claims against the individual respondents in the action. These matters will be addressed in turn. A number of these matters have been previously addressed in the June 20, 2019, Order On Motion to Dismiss of the Purdue Respondents (the "Purdue Order") and will be incorporated by reference without further elaboration here.

[6] A claim relates to a respondent's forum conduct if it has a "connect[ion] with that conduct." *International Shoe*, 326 U.S., at 319. In order for a state court to exercise specific jurisdiction, the suit must aris[e] out of or relat[e] to the defendant's contacts with the forum." *Bristol-Myers Id.* at 1780. (internal quotation marks omitted). *See also Daimler AG v. Bauman,* 571 U.S. 117; 2014 U.S. LEXIS 644.

The Division has authority under U.C.A. Section 13-11-4(1) and (2) to take action against suppliers engaged in deceptive acts or practices in connection with a consumer transaction. This tribunal has subject matter jurisdiction over the claims made in the Citation against the Sackler Respondents.

First, there is no statutory requirement that the Sackler Respondents communicate directly with consumers. U.C.A. Section 13-11-3(6) provides that a supplier includes a person "whether or not he deals directly with the consumer."

Second, as discussed in greater detail in Section V.B. at page 12 above of this Order, the Sackler Respondents are suppliers within the meaning of the statute, and clearly cannot be dismissed on this basis at the motion to dismiss stage of these proceeding. Whether defined as suppliers or merchants under the respective statutes in Utah, Ohio, Maryland, Washington or Wisconsin, ample authority exists to hold officers and directors liable under the UCSPA or similar consumer protection statutes.

Third, sales of medications are consumer transactions in the state of Utah. See the Purdue Order at pages 31 through 33.

Fourth, there is no statutory overreach under the UCSPA, as previously addressed in the second point above in this section and in Section V.B. of this Order at page 12.

Fifth, as discussed at pages 24 through 26 of the Purdue Order, the provisions of U.C.A. Section 13-11-22(1) 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" does not prohibit the action filed by the Division here.

Sixth, the assertion that Purdue ceased marketing activities in February 2018, is a factual assertion that cannot form the basis of granting a motion to dismiss. See the Purdue Order at

page 26 and the forward-looking discussion at pages 26 through 28.

Seventh, the unconscionable acts and practices claims of the Division are dismissed from this proceeding for the reasons stated at pages 28 through 30 of the Purdue Order.

VI. Except as otherwise noted in this Order, the Citation states a claim against the Sackler Respondents.

i. Under Utah case law and the Utah Rules of Civil Procedure, a short plain statement alleging facts supported by factual allegations is required.

Under Utah case law, a demurrer is only proper when the allegations pleaded are unsupported by facts and are mere stated conclusions. *Franco v. Church of Jesus Christ of Latter-Day St.s,* 21 P.3d 198, 206; 2001 Utah LEXIS 43. Rule 12(b)(6) concerns the sufficiency of the pleadings and not the underlying merits of a particular case where the issue is whether the petitioner has alleged enough in the complaint to state a cause of action. This preliminary question is asked and answered before the court conducts any hearings on the case. *Am. W. Bank Members, L.C. v. State*, 342 P.3d 224, 230-1; 2014 Utah LEXIS 182 (quoting *Alvarez v. Galetka*, 933 P.2d 987, 989; 1997 Utah LEXIS 22). Under Rule 8 of the Utah Rules of Civil Procedure, an original claim must contain a short and plain: (1) statement of the claim showing that the party is entitled to relief; and (2) demand for judgment for specified relief. A 12(b)(6) motion to dismiss should be granted only if, assuming the truth of the allegations in the complaint and drawing all reasonable inferences therefrom in the light most favorable to the plaintiff, it is clear that the plaintiff is not entitled to relief. *Rusk v. Univ. of Utah Healthcare Risk Mgmt.,* 391 P.3d 325, 327; 2016 Utah App. LEXIS 254 (quoting *Hudgens v. Prosper, Inc.,* 243 P.3d 1275; 2010 Utah LEXIS 204).

Further, under Rule 12 of the Utah Rules of Civil Procedure, a motion to dismiss is proper only where it clearly appears that the plaintiff would not be entitled to relief under the facts alleged or under any set of facts they could prove to support their claim. *Bennett v. Jones,*

Waldo, Holbrook & McDonough, 70 P.3d 17, 25; 2003 Utah LEXIS 17 (quoting *Clark v. Deloitte & Touche LLP,* 34 P.3d 209; 2001 Utah LEXIS 171). "A dismissal is a severe measure and should be granted by the trial court only if it is clear that a party is not entitled to relief under any state of facts which could be proved in support of its claim." *Am. W. Bank Members, L.C.*, 342 P.3d at 230 (quoting *Colman v. Utah State Land Bd.,* 795 P.2d 622, 624; 1990 Utah LEXIS 28).

ii. The Division's pleaded allegations in the Citation are beyond mere conclusions and supported by facts.

The Division's 174-paragraph Citation thoroughly cites the Utah State Code with allegations that are factually supported and are beyond conclusory statements. There is a significant amount of footnoted material with citations to websites and Bates numbers for extraneous documents. Second, the Division has prayers for relief for three-counts of violations to the UCSPA at the end of the Citation (¶¶ 162-174).

The Division has not made mere conclusory statements and a demurrer action under Rule 12(b)(6) is a very severe measure and unwarranted here. The Division has adequately supported its pleadings with factual allegations, which must be taken as true on a motion to dismiss. *Am. W. Bank Members, L.C.*, 342 P.3d at 230 (quoting *Osguthorpe v. Wolf Mountain Resorts, L.C.,* 232 P.3d 999; 2010 Utah LEXIS 60). Assuming all the facts in the Citation as true, there is no reason to dismiss. Thus, the request for a Rule 12(b)(6) motion for dismissing the Citation for want of stating a claim where relief can be given is denied.

iii. The allegations of the Citation are pleaded with sufficient particularity.

The matter of the satisfactory pleading with particularity under Rule 9(c) of the Utah Rules of Civil Procedure is addressed at pages 35 through 37 in the Purdue Order. No grounds exist for dismissing the Citation on such basis.

Although the Respondents assert that that the Citation does not "establish" that Richard Sackler or Kathe Sackler participated in Purdue's alleged prescription opioid marketing activities, it is not necessary that these facts be established at this juncture. The Division need not prove its case at the motion to dismiss stage of the proceeding *St. Benedict's Dev. Co.,* 811 P.2d at 196.

Notwithstanding the assertions of the Respondents, the Division does allege, and will yet have to prove, that the Sackler Respondents "personally directed Purdue to conduct the deceptive or unfair acts or practices alleged herein that took place in Utah" (Citation ¶ 8, quoted in Motion p. 7). In doing so, the Division alleges that the Sackler Respondents "exercise[ed] a level of involvement and control . . . that surpassed even that of other Sackler Board member-owners . . ." and took "many actions personally to carry out the unfair, deceptive and otherwise unlawful activity that led to Utah's opioid epidemic" (Citation ¶ 129, quoted in Motion p. 8). Additional allegations of the personal involvement of Richard Sackler are found in the Citation ¶¶ 133-149.

VII. The claims against the Sackler Respondents are not time barred.

The UCSPA provides for a ten-year statute of limitations for administrative actions. U.C.A. § 13-2-6(6)(a). Deceptive actions and practices taking place within this ten-year period are clearly the proper subject of the Citation. Substantial harm to the State and to Utah consumers is alleged in the Citation in this time period. Consideration must also be given to when the ten-year statute of limitations is deemed to commence running.

A. Utah precedent allows for equitable tolling where there is frustration of inquiry notice.

As a general rule, under Utah law, a statute of limitations begins to run "upon the happening of the last event necessary to complete the cause of action." *Myers v. McDonald,* 635 P.2d 84, 86; 1981 Utah LEXIS 859. Once a statute has begun to run, a plaintiff must file his or

her claim before the limitations period expires or the claim will be barred and ignorance of the existence of a cause of action will neither prevent the running of the statute of limitations nor excuse a plaintiff's failure to file a claim within the relevant statutory period. *Id.* However, there are two settings where there may be tolling under the "discovery rule." *Id.*; *Russell Packard Dev. v. Carson*, 108 P.3d 741, 746; 2005 Utah LEXIS 24.

The first setting for tolling is the "internal discovery rule," also referred to as the "statutory discovery rule." *Russell Packard Dev.,* 108 P.3d at 746. Plainly, this is a statute recognizing latent detection relating to when the plaintiff either discovered or should have discovered his or her cause of action, thereby triggering the running of the statute of limitations. *Berenda v. Langford*, 914 P.2d 45, 55; 1996 Utah LEXIS 37. Once the plaintiff has actual or constructive knowledge of the relevant facts of the cause of action, the statutory limitations period begins and the plaintiff who desires to file a claim must do so within the time specified in the statute or face the time bar. *Id.*

The second setting in which the discovery rule may toll a statute of limitations is the "equitable discovery rule," which has its own two settings to which it applies. *Russell Packard Dev.,* 108 P.3d at 747. The first is where a plaintiff does not become aware of the cause of action because of the defendant's concealment or misleading conduct." *Walker Drug Co. v. La Sal Oil Co.,* 902 P.2d 1229, 1231; 1995 Utah LEXIS 52. The second is "where the case presents exceptional circumstances and the application of the general rule would be irrational or unjust, regardless of any showing that the defendant has prevented the discovery of the cause of action." *Id.* The concealment version of the discovery rule requires an evaluation of the reasonableness of a plaintiff's conduct in light of the defendant's fraudulent or misleading conduct. *Warren v. Provo City Corp.*, 838 P.2d 1125, 1129; 1992 Utah LEXIS 70. The rule is that of "a claim of

equitable estoppel, whereby a defendant who causes a delay in the bringing of a cause of action is estopped from relying on the statute of limitations as a defense to the action." *Id.*

The *Colosimo* decision further refined the fraudulent concealment version of the discovery rule found in *Russell Packard,* recognizing a futility component to the fraudulent concealment doctrine in only two narrow circumstances. *Colosimo v. Roman Catholic Bishop,* 156 P.3d 806, 818; 2007 Utah LEXIS 58. The first is where a plaintiff has made inquiry and then has been misled by the defendants. *Id.* The second is where the plaintiff's lack of inquiry may be excused where the defendant has affirmatively concealed facts necessary to put the plaintiff on inquiry notice. *Id.*

Significantly, "the question of when a plaintiff reasonably would have discovered the facts underlying a cause of action in light of a defendant's affirmative concealment is a highly fact-dependent legal question that is necessarily a matter left to trial courts and finders of fact." *Berenda,* 914 P.2d at 53; *Spears v. Warr,* 44 P.3d 742, 753; 2002 Utah LEXIS 35; *Russell Packard Dev.,* 108 P.3d at 750; *Colosimo,* 156 P.3d at 817. Congruently, in the *City of Everett v. Purdue Pharma* action, the Federal District Court held that it was premature for the court to dismiss Everett's claims based on Purdue's affirmative defenses, because the discovery rule presented a dispositive basis for denying Everett's motion to dismiss relating to the statute of limitations. *City of Everett v. Purdue Pharma Ltd. P'ship,* No. C17-209RSM, 2017 U.S. Dist. LEXIS 156653, at *25 (W.D. Wash. Sep. 25, 2017).

B. The Division has made a *prima facie* showing to satisfy equitable tolling at this point in the proceeding.

In application, there is a ten-year statute of limitations for administrative actions on UCSPA claims under § 13-2-6(6)(a) of the UCSPA. There is no Utah discovery rule statute applying an internal discovery rule. Thus, the argument that the Division brings for tolling is

under either one of the equitable discovery rule scenarios.

Under the equitable discovery rule, the Division may be allowed to toll the statute of limitations. *Russell Packard Dev.,* 108 P.3d at 747. The first scenario applies if the Division did not become aware of the cause of action because of the defendant's concealment or misleading conduct. *Walker Drug Co.,* 902 P.2d at 1231. The second scenario (where the case presents exceptional circumstances and the application of the general rule would be irrational or unjust) is not pleaded by the Division so it is inapposite.

Here, the Division alleges that the Sackler Respondents concealed their misleading conduct to frustrate inquiry notice within the ten-year period. Div. Opp'n to Sackler Resp'ts Mot. to Dismiss, 38. The Division claims that the Respondents concealed their conduct through many actions: by misleading promotions pushed by sales representatives (Citation, ¶ 8); disseminating misstatements through media and physician guidelines (*id.* at ¶¶ 16; 113); controlling fraudulently marketed mischaracterizations of the risks and benefits of its products (*id.* at ¶¶ 32; 164; 168; 174); and sponsoring training sessions where opioid addiction was represented as rare (*id.* at ¶ 63). The Division also provides evidence of a published journal article showing a correlated finding of the introduction of OxyContin and misleading dissemination of claims that opioid addiction is rare (*id.* at ¶ 67); and aiding in the misleading promotion of 12-hour dosing (*id.* at ¶ 73). Collectively, this information is an adequate prima facie showing for a plaintiff to allege that a defendant has taken affirmative steps to conceal the plaintiff's cause of action. *Berenda,* 914 P.2d at 50.

The Division's lack of inquiry may be excused where the Respondents have affirmatively concealed facts necessary to put the plaintiff on inquiry notice. *Colosimo,* 156 P.3d at 819. The Division has made an initial showing that its inquiry was frustrated by the Respondents and this

seems to be above mere speculation. The Division has alleged violation by the Sackler Respondents within the last ten-years as well as the Respondents' concealment of wrongdoing and harm of Purdue's products prior to 2009 to justify equitable tolling. *See* Div. Opp'n to Sackler Resp'ts Mot. to Dismiss, 38.

Moving forward, the question of when the Division reasonably would have discovered the facts underlying the cause of action given the Respondents' alleged affirmative concealment is a highly fact-dependent legal question that is a matter left to the finders of fact. *Berenda,* 914 P.2d at 53; *Spears,* 44 P.3d at 753; *Russell Packard Dev.,* 108 P.3d at 750; *Colosimo,* 156 P.3d at 817. It is premature to dismiss the Division's claims relating to the statute of limitations at this point in the proceeding.

VII. The issue of causation has been sufficiently addressed in the Citation.

The principles regarding causation are set forth beginning at page 33 of the Purdue Order and are applicable to the Sackler Respondents in this matter. No basis exists for granting a motion to dismiss on such grounds at this stage of the proceeding.

ORDER

In accordance with the foregoing analysis, the motions of the Sackler Respondents 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 the Sackler Respondents 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 administrative proceeding.

Dated this 15th day of July, 2019.

Chris Parker, Presiding Officer and
Acting Director

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of July, 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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