Utah Division of Consumer Protection
160 East 300 South, Second Floor
PO Box 146704
Salt Lake City, UT 84114-6704
PH. (801) 530-6601/FAX (801) 530-6001

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

IN THE MATTER OF: **HEATH ENTERPRISE INC.,** a Nevada corporation doing business as **FREEWAY TIRE;** **HEATH ENTERPRISES UTAH, INC,** an unregistered Nevada corporation registered as a foreign corporation in Utah doing business as **FREEWAY TIRE**; and **MICHAEL DANIEL HEATH,** individually and as an officer, director, member, principal, manager, and/or agent of the above-named entity; **Respondents.**	FILE COPY **ADMINISTRATIVE CITATION** **DCP Legal File No. 86712** **DCP Case No. 86046, 85715**

PURSUANT TO THE AUTHORITY granted by Utah Code § 13-2-6, which empowers the Division of Consumer Protection (Division) to issue a citation upon reasonable cause to believe a person has violated any statute listed in Utah Code § 13-2-1, it appears, upon information and belief, that you are in violation of the *Utah Consumer Sales Practices Act,* Utah Code § 13-11-1 *et seq.* In particular, the Division alleges:

RESPONDENTS

1. Respondent Heath Enterprise Inc. (HEI) is a registered domestic Nevada corporation doing business as Freeway Tire (FT) in New Harmony, Utah. HEI has a principal address listed on the Nevada business entity filing of 1177 Northfield Road #81, Cedar City, Utah 84721. The registered agent address for the HEI filing is 439 Railroad Street, Elko, Nevada 89801. HEI's original entity registration in Nevada occurred on or around May 19, 2000.

2. Respondent Heath Enterprises Utah, Inc (HEUI) is an unregistered foreign corporation in Nevada that is registered with the Utah Division of Corporations and Commercial Code and also doing business as FT. HEUI has a principal address listed on the Utah business entity filing of 1177 Northfield Road #81, Cedar City, Utah 84721. The registered agent address for the HEUI filing is 881 Baxter Drive, Suite 100, South Jordan, Utah 84095. HEUI's original business entity registration in Utah occurred on or around April 4, 2016.

3. Respondent Michael Daniel Heath (Heath) is the President and Director of HEI and the President of HEUI. Heath owns and operates a gas station and adjacent vehicle repair shop located at 3802 E. Hwy 144, New Harmony, Utah 84757. Heath uses the name "Freeway Tire" as the business name for the vehicle repair shop. FT is not formally registered as a d/b/a with the Utah Division of Corporations and Commercial Code.

4. At all times relevant to this action, Respondents regularly engaged in consumer transactions with the public by soliciting and conducting repairs and services at their location in New Harmony, Utah under the name "Freeway Tire."

[redacted] COMPLAINT

5. On or around January 10, 2016, Curt [redacted] (CA), resident of Hendersen, Nevada, was driving his truck while towing a 2015 Heartland Landmark "365" Newport 5th wheel trailer (Landmark) from his secondary residence in Panguitch, Utah, to his Nevada residence. CA purchased the Landmark in new condition in May 2015.

6. While traveling southbound on Interstate 15 near New Harmony, Utah, CA noticed a vehicle pull up beside him, the driver looked at the tires of the Landmark, and then waived CA over to the side of the road. CA pulled over and a man wearing a mechanic uniform approached CA. The man told CA that he noticed the right rear tire on the Landmark was wobbling badly and that it looked like it is about to fall off. The man pointed to the shackles of the suspension and told CA that the shackles were loose. CA questioned whether the shackles were loose. The man restated that the wheel was wobbling badly and his shop was three miles north up Interstate 15. CA was alarmed by the man's assessment and agreed to drive the Landmark to the shop recommended by this man. CA was concerned because the Landmark was almost new and only had 2,000 miles on it.

7. Upon arriving at FT, a second man who identified himself as "Joe" inspected the Landmark. Joe indicated that the shackles were fine, but the shocks were defective. Joe confirmed to CA that the defective shocks were the cause of the wobbling wheel. CA never saw the defective shock Joe represented was the issue. CA asked how much new shocks would cost. Joe informed CA he would need four shocks at $365 per pair. CA informed Joe that the Landmark was almost new. Joe replied that the manufacturer puts inexpensive shocks on trailers and he sees them break all the time.

8. Joe took CA to a back room of the shop and pulled out a box with about twelve separate boxes of shocks inside. All the boxes were the same. Joe told CA that these were the best shocks for the Landmark and they were special order. CA explained to Joe that they appeared to be cheap shocks worth only about $40 or $50. Joe assured CA that they were not cheap shocks and were special order. Joe stated that if FT needs regular shocks they call NAPA Auto Parts, but these shocks were special order.

9. Even though CA felt uneasy about the transaction, he had a long drive ahead and did not want to injure anyone else or himself. CA agreed to the replacement of all four shocks on the Landmark for a total of $1,018.10.

10. On the invoice for the repairs, Joe wrote "Heavy-Duty Shocks." Joe also told CA that the original shocks were not heavy enough to support the weight.

11. Upon arriving in Arizona, CA went to the local NAPA Auto Parts store with the part number (#94015) of the shocks that FT installed. NAPA confirmed the part number belonged to their NAPA Response shocks and that the retail price of the shock was $29.79 per shock. CA then called the NAPA Auto Parts store in Cedar City, Utah, and confirmed the price of the same shock in Cedar City was $31.56. CA asked the NAPA Auto Parts store employee about the quality of this specific shock. CA was told this shock is the cheapest they sell.

12. On March 16, 2016, a Division investigator contacted Heartland (HL), the manufacturer of the Landmark. HL confirmed the OEM (original equipment manufacturer) shocks on this specific Landmark are not weight bearing, but rather just absorb movement from the springs and shackles to dampen vibration and make the ride more comfortable. HL stated these shocks are optional equipment and do not have to be on the Landmark for the trailer

to function properly and safely. HL further indicated it would be very rare for this type of shock to go bad so soon after purchase. HL stated that even if one of these shocks failed, only the failed shock would need replacement, rather than all four. Finally, HL confirmed the OEM shocks are not considered heavy-duty shocks and cost approximately $20 retail.

13. On March 16, 2016, a Division investigator contacted the manufacturer technical support line for NAPA shocks. NAPA stated that the NAPA Response shock at issue was a light-duty shock. When asked if this particular shock could be considered heavy-duty, the NAPA employee stated that they could not be considered heavy-duty.

14. On March 17, 2016, a Division investigator contacted Respondent Heath to discuss this transaction. Heath informed the Division that the OEM shocks on the Landmark are hydraulic shocks, which are lower quality than gas shocks. The NAPA Response shocks are gas shocks. For this reason, Heath indicated that he considers the NAPA Response shocks to be heavy-duty shocks. On March 17, 2016, a Division investigator contacted HL and confirmed that the OEM shocks on the Landmark are gas shocks and not hydraulic.

[redacted] COMPLAINT

15. On or around October 16, 2015, DeVon [redacted] (DA), resident of Las Vegas, Nevada, stopped by Respondents' place of business in New Harmony, Utah, to purchase ice for his cooler before driving home to Las Vegas. DA was driving his recreational vehicle (RV) at the time. DA had been visiting his daughter and son-in-law in New Harmony, Utah.

16. While stopped at Respondents' place of business, an agent or employee of Respondents approached DA and told him the front tire of DA's RV had cracks and was going to blow out. DA stated the employee was loud and adamant about the safety concern regarding a potential blow out of the tire. DA explained to the employee that he had purchased the RV from the previous owner a year ago. At that time, the previous owner had just replaced the tires. DA also mentioned the RV only had a total of 17,000 miles on it. DA claims he could not see the cracks the employee stated were on the front tires, but DA was too nervous not to replace them based on the assessment of Respondent's employee.

17. DA asked the employee how much two new tires would cost. The employee gave DA a verbal quote that the cost was $260 per tire. DA agreed to the replacement of the tires. DA states he was not provided any written estimate or quote of the repairs at that time. DA had his son-in-law pick him up at Respondents' place of business while the repairs were being completed.

18. Upon returning to pick up the RV, DA was asked to sign an invoice with the total price of $1,121.54. DA states he didn't initially look closely at the final price on the invoice, as he had believed he already knew the approximate price of the tires from the verbal quote. DA was later surprised when he looked closer at the invoice and noted the price was much higher than he was verbally quoted. DA states he did not agree to the higher prices charged by Respondents for the repairs.

COUNT 1

19. Respondents, through their agent or employee, represented that the suspension and/or shackles on CA's Landmark were in dangerous or unsafe condition and the wheel might fall off with continued use. After inspection, FT only alleged one shock was defective.

The manufacturer of the Landmark has confirmed the presence or absence of the shocks do not affect the safety of the trailer. Respondents represented the goods being inspected or diagnosed are in dangerous condition or that continued use of the parts would be harmful to the consumer when such is not the fact.

20. The above actions are in violation of the *Utah Consumer Sales Practices Act Rules,* Utah Admin. Code R152-11-5(A)(9):

> A. It shall be a deceptive act or practice in connection with a consumer transaction involving repairs, inspections, or other similar services for a supplier to:
>
> . . . .
>
> (9) Represent that the goods being inspected or diagnosed are in a dangerous condition or that the consumer's continued use of them may be harmful to him when such is not the fact;

21. **The above actions are alleged as one violation of the above-referenced statute, with a maximum potential fine of $2,500.00 per violation.**

COUNT 2-5

22. Respondents represented all four shocks on the Landmark required replacement. However, CA was only told one shock was defective, but he needed to replace all four shocks. Respondents represented that the defective shock was the cause of the wobbling wheel. This representation could not be true based on the purpose of the shock described by the manufacturer of the Landmark. Further, the shocks on the Landmark are not necessary to be on the trailer and are optional equipment. The manufacturer of the Landmark indicated that even if one shock became defective, no other shocks would require replacement. Respondents represented that repairs, inspections, or other services were necessary when such was not the fact.

23. The above actions are in violation of the *Utah Consumer Sales Practices Act Rules,* Utah Admin. Code R152-11-5(A)(6):

> A. It shall be a deceptive act or practice in connection with a consumer transaction involving repairs, inspections, or other similar services for a supplier to:
> . . . .
> (6) Represent that repairs, inspections, or other services are necessary when such is not the fact;

24. **The above actions are alleged as four violations of the above-referenced statute, with a maximum potential fine of $2,500.00 per violation.**

COUNT 6-9

25. Respondents represented to CA and the Division that the shocks Respondents installed were heavy-duty shocks. The Division has determined from both the manufacturer of the Landmark and the manufacturer of the installed shocks that they are light-duty shocks. Respondents represented to CA that the existing shocks were not sufficient to handle the weight of the trailer. Respondents represented a particular standard, grade, and/or quality of each shock, when such was not the fact. Respondents represented that the performance and benefit of the installed shocks were better than the OEM shocks, when such was not the fact.

26. The above actions are in violation of the *Utah Consumer Sales Practices Act,* Utah Code § 13-11-4(2)(b) or (a):

> (2) Without limiting the scope of Subsection (1), a supplier commits a deceptive act or practice if the supplier knowingly or intentionally:
> . . . .
> (b) indicates that the subject of a consumer transaction is of a particular standard, quality, grade, style, or model, if it is not;
>
> Or in the alternative:

(a) indicates that the subject of a consumer transaction has sponsorship, approval, performance characteristics, accessories, uses, or benefits, if it has not;

27. **The above actions are alleged as four violations of the above-referenced statute, with a maximum potential fine of $2,500.00 per violation.**

COUNT 10

28. Respondents represented to the Division during the investigation of CA's transaction that the original shocks on the Landmark were hydraulic shocks and were inferior to gas shocks. In fact, the original shocks on the Landmark were gas shocks and were not inferior to the NAPA Response shocks. Respondents committed a deceptive act or practice by representing to the Division that in connection with the consumer transaction with CA that the original shocks on the Landmark were of a different standard, grade, quality, style, or model than was the fact.

29. The above actions are in violation of the *Utah Consumer Sales Practices Act*, Utah Code § 13-11-4(2)(b):

> (2) Without limiting the scope of Subsection (1), a supplier commits a deceptive act or practice if the supplier knowingly or intentionally:
> . . . .
> (b) indicates that the subject of a consumer transaction is of a particular standard, quality, grade, style, or model, if it is not;

30. **The above actions are alleged as one violation of the above-referenced statute, with a maximum potential fine of $2,500.00 per violation.**

COUNT 11

31. Respondents represented the shocks being shown and sold to CA were special order and not standard shocks from a company such as NAPA Auto Parts. In fact, the shocks were not special order shocks and were standard shocks available and in stock at numerous

NAPA Auto Parts locations. Respondents have misrepresented the shocks were available for a reason that does not exist, specifically that they were special order and not regularly available. Respondents made this representation to CA to give the consumer the impression of a higher standard, grade, quality, or style than was the fact.

32. The above actions are in violation of the *Utah Consumer Sales Practices Act*, Utah Code § 13-11-4(2)(d) or (b):

> (2) Without limiting the scope of Subsection (1), a supplier commits a deceptive act or practice if the supplier knowingly or intentionally:
> . . . .
> (d) indicates that the subject of a consumer transaction is available to the consumer for a reason that does not exist . . . .
>
> Or in the alternative:
>
> (b) indicates that the subject of a consumer transaction is of a particular standard, quality, grade, style, or model, if it is not;

33. **The above actions are alleged as one violation of the above-referenced statute, with a maximum potential fine of $2,500.00 per violation.**

COUNT 12

34. Respondents failed to obtain DA's express authorization in a stored and recorded format for the repairs and services performed on his RV, the cost thereof, or the reasonably expected completion date. DA was given a verbal quote and did not see or sign an invoice until after the repairs were completed.

35. The above actions are in violation of the *Utah Consumer Sales Practices Act Rules,* Utah Admin. Code R152-11-5(A)(1):

> A. It shall be a deceptive act or practice in connection with a consumer transaction involving repairs, inspections, or other similar services for a supplier to:

(1) Fail to obtain the consumer's express authorization for repairs, inspections, or other services. The authorization shall be obtained only after the supplier has clearly explained to the consumer the anticipated repairs, inspection or other services to be performed, the estimated charges for those repairs, inspections or other services, and the reasonably expected completion date of such repairs, inspection or other services to be performed, including any charge for re-assembly of any parts disassembled in regards to the providing of such estimate. For repairs, inspections or other services that exceed a value of $50, a transcript or copy of the consumer's express authorization shall be provided to the consumer on or before the time that the consumer receives the initial billing or invoice for supplier's performance. This rule is in addition to the requirements of any other statute or rule;

36. **The above actions are alleged as one violation of the above-referenced statute, with a maximum potential fine of $2,500.00 per violation.**

COUNT 13

37. Respondents intentionally understated or misstated materially the estimated cost of the repairs and services provided to DA. DA was quoted a price of $260 per tire, but was not told the repairs and services also included equalizer bags and labor charges. DA also notes that the tires themselves were not the quoted price of $260 per tire, but rather he was charged $398.98 per tire.

38. The above actions are in violation of the *Utah Consumer Sales Practices Act Rules,* Utah Admin. Code R152-11-5(A)(10):

> A. It shall be a deceptive act or practice in connection with a consumer transaction involving repairs, inspections, or other similar services for a supplier to:
> . . . .
> (10) Intentionally understate or misstate materially the estimated cost of repairs, inspections, or other services;

39. **The above actions are alleged as one violation of the above-referenced statute, with a maximum potential fine of $2,500.00 per violation.**

Total Alleged Counts: **13**
Total Potential Fine: **$32,500.00**

THIS CITATION ISSUED this 27TH day of June, 2016.

Glen Minson – Investigator
UTAH DIVISION OF CONSUMER PROTECTION

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that the undersigned duly mailed, properly addressed and postage paid, a true and exact copy of the above and foregoing Administrative Citation to the parties listed below:

By regular mail to:

HEATH ENTERPRISE INC
1177 NORTHFIELD ROAD #81
CEDAR CITY UT 84721

HEATH ENTERPRISES UTAH, INC
881 BAXTER DRIVE SUITE 100
SOUTH JORDAN UT 84095

HEATH ENTERPRISES UTAH, INC
1177 NORTHFIELD ROAD #81
CEDAR CITY UT 84721

MICHAEL DANIEL HEATH
1177 NORTHFIELD ROAD #81
CEDAR CITY UT 84721

JENSEN LAW OFFICE
JAMES JENSEN
PO BOX 726
CEDAR CITY UT 84720

Dated this 27TH day of June, 2016.

Glen Minson – Investigator
UTAH DIVISION OF CONSUMER PROTECTION

IMPORTANT NOTICE - READ CAREFULLY

This citation may be contested by filing a request for review, in writing, within ten (10) days of receipt of this citation. Following receipt of a request for review, an informal hearing will be scheduled before the State of Utah, Department of Commerce, Division of Consumer Protection pursuant to Utah Code § 63G-4-203, Procedures for Informal Adjudicative Proceedings. The purpose for such a hearing is a review of the citation for factual and legal sufficiency and other questions to be determined by the presiding officer. A citation which is not contested becomes the final order of the Division and is not subject to further agency review. In addition to any fines which might be levied, a cease and desist order may be entered against you. An intentional violation of a final cease and desist order is a third degree felony pursuant to Utah Code § 13-2-6(2). To request a review of the citation, mail your written request to:

Daniel R. S. O'Bannon – Director
Utah Division of Consumer Protection
PO Box 146704
Salt Lake City, UT 84114-6704

Please be advised that all inquiries, correspondence, or other contacts concerning this citation, with the exception of any written request for review as set out above, should be directed to the below-named Division employee, designated by the Director of the Division of Consumer Protection pursuant to Utah Code § 13-2-6(3):

Glen Minson – Investigator
Utah Division of Consumer Protection
PO Box 146704
Salt Lake City, UT 84114-6704
Telephone: (801) 530-6601

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

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

IN THE MATTER OF: **HEATH ENTERPRISE, INC.,** a Nevada corporation doing business as **FREEWAY TIRE,** **HEATH ENTERPRISES UTAH, INC,** an unregistered Nevada corporation registered as a foreign corporation in Utah doing business as **FREEWAY TIRE,** and **MICHAEL DANIEL HEATH,** individually, Respondents.	**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDED ORDER** CASE Nos.: **CP 86046 and 85715**

BY THE PRESIDING OFFICER:

On June 27, 2016, the Utah Division of Consumer Protection ("Division") brought allegations against Heath Enterprise, Inc., doing business as Freeway Tire, Heath Enterprises Utah, Inc., doing business as Freeway Tire, and Michael Daniel Heath (collectively the "Respondents") through an administrative citation (the "Citation"). This matter was heard by the presiding officer on September 20, 2016. The presiding officer has considered and weighed the evidence according to the substantial evidence standard of proof, has reviewed the written

memoranda submitted subsequent to the hearing and the authorities mentioned therein, and now enters the following findings of fact, conclusions of law, and recommended order.

FINDINGS OF FACT

1. This hearing was constrained by the amount of hearsay testimony and other testimony that was presented at the hearing which was not subject to cross examination.
2. Michael David Heath is the manager and principal owner of Heath Enterprise, Inc., a Nevada corporation and of Heath Enterprises Utah, Inc. registered as a foreign corporation in the state of Utah. The two corporations are doing business in New Harmony, Utah as Freeway Tire.
3. Mr. Heath trained his employees in their practices of conducting business at Freeway Tires. These practices included "merchandising the island," a practice of pointing out to vehicle owners any defects in their vehicles (e.g. pointing out bad tires), in order to solicit the vehicle owner's repair or replacement business. The practice of "merchandising the island" was something that Mr. Heath has done all of his business career, and he learned this merchandizing technique from his father before him.
4. In the case of Freeway Tires, these trained practices also included making representations about the standard of quality of products sold and the special order nature of the products.
5. On or about January 10, 2016, a 62 year old consumer (hereafter referred to as "[redacted]") was traveling southbound on Interstate 15 near New Harmony, Utah. He was driving a truck while towing a 2015 Heartland Landmark 365 Newport 5th wheel trailer. Both the truck and the trailer carried Nevada license plates. [redacted] had purchased the trailer new in May of 2015.

6. [redacted] noticed a vehicle drive up to the side of his truck and the driver of the vehicle indicated that something was amiss with his trailer and that he should pull over. The driver of the other vehicle was named Lee. He was an employee of the Respondent, Freeway Tire.
7. Lee told [redacted] that his right rear tire on the trailer was wobbling badly and that the shackles of the suspension were loose. Lee stated that the repair shop where he worked, Freeway Tire, was only three miles away. [redacted] was concerned by Lee's assessment and surprised, as the trailer was almost new and had only traveled about 2,000 miles since it was purchased.
8. [redacted] turned around and went back north to Freeway Tire to address the alleged problem. At Freeway Tire, another employee by the name of Joe told [redacted] that the shackles were fine but that the shock absorbers on the trailer were defective. Joe stated that the trailer was in a dangerous condition with the existing installed shock absorbers, particularly if [redacted] were to travel as far as Parker, Arizona, [redacted]'s stated destination. Joe stated that, although one shock absorber was clearly defective, it was prudent and safer to replace all four shock absorbers.
9. Joe represented to [redacted] that he happened to have in his shop heavy duty shock absorbers that were special order. The shock absorbers were marked at $365 a pair. Joe agreed to sell four shocks to [redacted] for $738 ($184.50 for each shock absorber). With labor charges, tax and a hazardous waste charge for the removed shock absorbers, the total invoice for the transaction was $1,018.10.
10. Chad Street, the 32 year employee and Service Manager of Motor Sportsland in Salt Lake City, testified that the shock absorbers on the Landmark trailer were not weight bearing, were "not at all" required for safety and that shock absorbers were of limited use in his industry. Most fifth wheel trailers that Motor Sportsland sells and services do not have any shock

absorbers at all. Mr. Street testified that the manufacturer would advise to only replace one shock, not all four.

11. The shock absorbers sold to [redacted] were NAPA parts, no. 94015. They are sold regularly by NAPA auto parts stores for $29.79 per shock.

12. The individual Respondent, Mr. Heath, testified that he knew that the shock absorbers sold to [redacted] did not bear a marking of being "heavy duty" and that none of the related documentation for the product said that they were heavy duty. Yet he said that it was the custom of his business and of his employees to call them heavy duty, and that he and his employees were merely continuing that practice. Respondents and their trained employees, therefore, knowingly made representations about the standard and quality of the shock absorbers that they knew were not true.

13. Respondents and their employees represented that the shock absorbers were "special order," when in fact they knew that they were regularly in stock at local NAPA auto shops, including the one closest by in Cedar City. Brian Houser, the manager of the Tinks NAPA store said that three of his five stores had the #94015 shock absorber regularly in stock, these included the Cedar City store and his Beaver and Panguitch stores. The Respondents and their employees knowingly made representations about the shock absorbers being "special order" when they knew those representations were not true.

14. The representations knowingly made by the Respondents and/or their employees: that all four shocks should be replaced, that they were heavy duty shock absorbers and that they were special order goods, were knowingly untrue.

15. There was considerable conflicting testimony about what was said by Lee and Joe to induce [redacted] to buy new shocks. The one statement that the Respondents admit was made by Lee

(the employee that met [redacted] out on the road and waived him over) was made as [redacted] was about to turn around to go back to Freeway Tire. This statement was: "take it easy going into the shop." This statement alone would give cause for great concern to any consumer, let alone an older out-of-state consumer who had a long trip ahead of him, like [redacted].

16. Several days later, when [redacted] called and confronted Mr. Heath about the above described practices and the exorbitant purchase price for the shock absorbers, the Respondents refunded $500.00 to [redacted]. This concession did not eliminate the violations that took place at the time of the sale.

17. [redacted] was a 78 year-old consumer from Las Vegas, Nevada, whose recreational vehicle bore out-of-state license plates. [redacted] went to Freeway Tire on October 16, 2015 to buy some ice to take on his trip home to Las Vegas.

18. Respondents' employee warned [redacted] that the two front tires on his six-wheeler RV should be replaced. The employee cited cracks in the sides of the tires that were imperceptible to [redacted].

19. A discussion ensued as to whether only two tires were to be replaced or all six tires on the vehicle. [redacted] determined that the front two tires were to be replaced at a verbal estimated cost of $600.00 for the pair of tires.

20. [redacted] went to his son's house, located not far away from Freeway Tire, while the repairs were made.

21. Ultimately, [redacted] paid $797.96 for the pair of tires and paid a total amount of $1,121.54, including add-ons of labor ($117), equalizer bags ($79.96), a hazardous waste charge ($30), unspecified "shop supplies" ($43.16) and taxes ($53.46) (see Exhibit No. 1).

22. [redacted] signed the credit card receipt presented to him after the work was fully completed, before he signed the section of the Service Order with the heading "Estimated Cost of Above Repairs." [redacted], therefore, did not receive a transcript or copy of the express authorization of the estimate, prior to paying for the tires.

23. The estimate on the Service Order for this work equaled, to the penny, the final total amount on the Service Order.

24. The details of the transaction with the second consumer, [redacted], were particularly hampered by the absence of the opportunity to cross examine Robert Boatner, the employee of the Respondents who handled the tire purchase transaction with Mr. [redacted]. Respondents presented an affidavit of Mr. Boatner. The consumer, [redacted], participated as a witness by telephone call and was subject to cross examination. The [redacted] testimony was more credible.

25. Respondents' explanation of the fact that the estimate equaled precisely the total final cost on the invoice was that it was easy for one of their employees to compute the amount in advance of the completion of the estimate. Without Mr. Boatner's testimony, subject to cross examination, explaining the order in time in which the estimate and total amount were entered on the Service Order, this tribunal accepts the testimony of [redacted] as set forth in the previous paragraphs of these findings. Further, math calculations by Mr. Boatner (as described below), belie Respondents' argument.

26. Mr. Boatner intentionally wrote on the extension columns of the Service Order that the total cost of the two tires was $797.96, when immediately to the left of that dollar amount (in the "Labor-Other Parts" section of the Service Order), he wrote that the cost per tire was $225.00. When totally disregarding the add-on costs of the equalizer bags and installation

labor, and focusing solely on the part cost for the tires, the "Labor-Other Parts" section of the Service Order reflected a total cost for the tires alone of $450.00 ($225.00 per tire), but the extension portion of the Service Order showed a total cost for the tires alone of $797.00 ($398.98 per tire). This action by Mr. Boatner constituted an intentional material misstatement of the estimated parts portion of the cost of repairs. Such action by Mr. Boatner constituted a violation of Utah Admin. Code R152-11-5(A)(10).

CONCLUSIONS OF LAW

In addition to the conclusions of law inherent in the foregoing findings, this tribunal makes the following additional conclusions of law:

A. By statutory definition, the Division of Consumer Protection is the "enforcing authority" under the Utah Consumer Sales Practices Act (the "UCSPA").[1] U.C.A. §13-11-8(2) provides that the "enforcing authority shall adopt substantive rules that prohibit with specificity acts or practices that violate Section 13-11-4 . . ."[2] The administrative rules that are the basis of the allegations in Counts 1-5, 12 and 13 of the Citation against the Respondents here are promulgated under authority of this statutory provision.

B. The Utah Court of Appeals case of *Target Trucking and Workers' Compensation Fund v. Labor Commission,* 108 p.3d 128, 129 (2005) provides that "[a]n administrative body's rules must conform to, rather than be inconsistent, with statute. *See Bradshaw v. Wilkinson Water Co., 2004 UT 38, 94 P.3d 242.* The rule must, therefore, yield to the statute." It is, therefore, necessary to determine if any of the rules forming the basis of the claims of the Division are inconsistent with the statute under which the rules were promulgated. Specifically in this

[1] U.C.A. §13-11-3(3).
[2] See the purpose declaration contained in R152-11-1(A).

matter, are Division rules that fail to contain a knowledge or intent requirement inconsistent with the Division's statutory authority?

C. Administrative rules promulgated by an administrative agency cannot enlarge or extend the statute creating those rights.[3]

D. The case of *Duchesne Land, LC et al. v. Division of Consumer Protection,* 257 P.3d 441 (2011), does not provide any clarification on the issue of whether knowledge or intent are required elements of a case under the Division's administrative rules. While it is true that in *Duchesne* the administrative law judge found that the respondents in that case had "knowingly and intentionally failed to make refunds to the three buyers who requested them" (referencing generally Utah Admin Code R151-11-10(C), an administrative rule of the Division), this specific finding by the ALJ (i.e. that such failure was knowing and intentional) was superfluous. A plain reading of Subpart 10(C) of Chapter 11 reveals that the deceptive acts described in 10(C) do not include a requirement of showing knowledge or intent. Further, the matter under consideration by the Utah Court of Appeals in *Duchesne* was whether the Utah Consumer Sales Protection Act "applied to real estate transactions or to construction contracts" *Id.* at 444. The Court made no ruling on, and gave no consideration to, the issue of whether it was mandatory that the violations of the administrative rule were made knowingly or intentionally.

E. Violations under other sections of the UCSPA do not require knowledge or intent. For example, U.C.A. §13-11-5 permits the Division to pursue administrative proceedings against

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[3] In footnote 7 of its ruling in the case of *Ferro v. Utah Department of Commerce*, 828 P.2d 507, 512 (1992), the Utah Court of Appeals observed that "[g]iven the established rule that agency regulations may not "abridge, enlarge, extend or modify the statute creating the right or imposing the duty," *IML Freight, Inc. v. Ottosen, 538 P.2d 296, 297 (Utah 1975)*, it is the statute, not the rule, that governs. If an agency regulation is not in harmony with the statute, it is invalid." *Ferro* was a DOPL case and did not address the issue of the requirement of knowingly or intentionally committing deceptive acts under the Utah Consumer Protection Sales Act.

a supplier in a consumer transaction who engages in an "unconscionable act or practice." This statutory provision (contained in the same Chapter 11 of Title 13 as the deceptive acts which are the subject of this present administrative proceeding), does not require a showing that such unconscionable act was made knowingly or intentionally.[4]

F. The analysis here comes down to deceptive acts or practices prohibited by Subsection 4(1) and the narrow enumerated examples of some specific deceptive acts or practices listed in subparagraphs (a) through (w) of Subsection 4(2). The plain language of the 4(2) statutory text provides that the listing of (a) through (w) is provided "[w]ithout limiting the scope of Subsection [4](1)." This statement gives independent significance and force to violations of (and rule making authority under) Subsection 4(1), free of the knowing or intentional standard of Subsection 4(2). The specific listing of deceptive acts in 4(2)(a) through (w) is only intended as a partial list; it is not exclusive. As to this partial list, knowledge or intent is a required element of the violation. This requirement, however, is not applicable to 4(1) deceptive acts or to other violations mentioned in the UCSPA.

G. The Utah Court of Appeals case of *Midland Funding, LLC v. Sotolongo et al., 325 P.3d 871, 2014 Utah App. LEXIS 94 (2014)* can be distinguished. The *Midland* case is not a case brought by the Division, but is a case brought by an individual under a private right of action that may be asserted under the UCSPA. The opinion of the court fails to state whether the plaintiff's claim in that action is based upon 4(1), 4(2) or some other provision of the UCSPA, although the court did refer to 4(1) in its preliminary reference to the UCSPA. No 4(1) versus 4(2) distinction is analyzed or even mentioned in any way in the case.

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[4] This same absence of a knowing or intentional element is found also in the various deceptive acts listed in subparagraphs (A), (B) and (C) of R152-11-10. R152-11-10(C) is the rule referenced in the *Duchesne* case discussed above.

H. *Rawson v. Conover*, 20 P.3d 876, 2001 Utah LEXIS 42 (2001) is expressly a 4(2) case and the Court includes the knowingly or intentionally language at the introduction to its quotation of the subsection 4(2)(b) claim asserted by the plaintiff in that case. Further, the *Rawson* case is inapposite by reason of the fact that the UCSPA had been subsequently amended to substitute "knowingly or intentionally" instead of the former "intent to deceive" standard.[5]

I. The case of the *Division of Consumer Protection v. GAF Corporation, 760 P,2d 310, 1988 Utah LEXIS 75 (1988)* is a 4(2)(b) and 4(2)(j) case. Further, any discussion in the case of the application of an "intentional" standard to the USCPA generally is dicta, as the former version of U.C.A. §13-11-1 *et seq.* (as applied in the case), did not require a showing of intent in any portion of the UCSPA.

J. It is doubtful that a knowingly or intentionally requirement would be applied to a UCSPA case under U.C.A. §13-11-5. Further, it is unclear to this tribunal whether a knowing or intentional requirement would be applied to a R152-11-10 case. Therefore, the outcome of a 4(1) case, directly presented to the Utah Supreme Court, is also in doubt under the current case law in the state of Utah.

K. The better reasoning in the matter would preclude the knowing or intentional standard being applied to claims for deceptive acts or practices under 4(1), claims for unconscionable acts or practices under U.C.A. §13-11-5, or the Utah Admin. Code R152-11-5 claims of the Citation.

L. Based upon the foregoing, and the express statutory language of U.C.A. §13-11-4(2), it is appropriate to apply a knowledge or intent requirement to the deceptive act allegations contained in Counts 6 through 11 of the Citation and not to apply a knowledge or intent

[5] This amendment was made in 1995. The 2001 *Rawson* decision was based on the facts of that case and the statute as it existed prior to the 1995 amendment.

requirement to Counts 1 through 5, 12 and 13 of the Citation. As noted in the findings of fact above and in the conclusions of law below, all of the actions of the Respondents and their employees as alleged in Counts 6 through 11 were performed knowingly and/or intentionally.

M. Having determined that the standard of knowinglyor intentionally is to be applied to certain of the Counts of the Citation, it is important to know how this language is to be applied in a practical sense. Perhaps the most precise analysis of this matter is found in the Federal 10th Circuit Court case of *Heard v. Bonneville Billing and Collections*, 2000 U.S. App. LEXIS 14525; 2000 Colo. J. C.A.R. 4096.[6] Bonneville, a debt collection company, urged the court to apply an interpretation that a consumer must show an intent to deceive to establish a "deceptive act or practice" under U.C.A. §13-11-4(2). The *Heard* court rejected this argument and stated:

> "Bonneville's effort to diminish this evidence by contending it fails to establish an intent to deceive under Utah Code Ann. §13-11-4 is equally unavailing. The Utah legislature amended this section, effective May 1, 1995, and changed 'intent to deceive' to 'knowingly or intentionally.' Thus . . . the court may consider the circumstances 'which the supplier knew or had reason to know' to decide whether an act is deceptive."

N. We must also rely upon the binding precedent for the Department of Commerce as found in the order on agency review in the March 2015 decision in *Monkey Mountain, LLC*, DCP Case No. 82354. In that case, the Executive Director of the Department held that:

> "A person engages in conduct:
> (1) Intentionally, or with intent or willfully with respect to the nature of his conduct, when it is his conscious objective or desire to engage in the conduct or cause the result.
> (2) Knowingly, or with knowledge, with respect to his conduct or to circumstances surrounding his conduct, when he is aware of the nature of his conduct or the existing circumstances. A person acts knowingly, or with knowledge, with respect

[6] *Heard* is a Colorado Federal District Court case appealed to the Tenth Circuit Court interpreting the Utah statute at issue in the present matter.

> to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result."

In summary, the Executive Director held that a person's actions were knowing when done "with awareness" or intentionally, when done "with purpose" to do the acts described in subsections (a) through (w) of Section 4(2). Knowing or intending to deceive the consumer is not an element of the offense.

O. Clarification regarding the "intentionally" or "intent" component of U.C.A. §13-11-4(2) is also found in the definition of "intent" in the Model Utah Jury Instructions (MUJI). The approved instruction on "intent" provides:

> "Intent ordinarily cannot be proved directly because there is no way to read people's minds. However, you may determine intent from the surrounding circumstances and find that [a person] intended the natural and probable consequences of acts done knowingly. You may consider any statement made or act done by [the person] and all other facts and circumstances that may show intent."

P. Therefore, in determining which acts of the Respondents were violative of U.C.A. §13-11-4(2), we must include (beyond any narrow construction of knowledge or intent) those circumstances that the supplier had reason to know, what he was aware of or did with purpose, and any statements made or acts done, including all other facts and circumstances that may show intent. The following additional conclusions of law are based upon these analyses.

Q. A practice of "merchandizing the island" (as described in finding #3 above), is not a *per se* violation of the UCSPA or of the rules promulgated thereunder. However, such approach to business must not include (i) indicating that the subject of a consumer transaction has performance characteristics, if it has not (see U.C.A. §13-11-4(2)(a)), (ii) indicating that the subject of a consumer transaction is of a particular standard, quality or grade, when it is not

(see §13-11-4(2)(b)), (iii) indicating that the subject of a consumer transaction is available to the consumer for a reason that does not exist (see U.C.A. §13-11-4(2)(d)), (iv) representing that repairs or other services were necessary when such was not the fact (Utah Consumer Sales Practices Act Rules, R152-11-5(A)(6)), or (v) violating one of the other prohibitions of the UCSPA.

R. The untrue representation knowingly and intentionally made to [redacted] by the Respondents and their agent that the shock absorbers on the Landmark trailer were defective and that the trailer was in a dangerous condition with the existing four installed shock absorbers was a violation of Utah Consumer Sales Practices Act Rules, U.C.A. R152-11-5(a)(9).

S. The untrue representation knowingly and intentionally made to [redacted] that all four shocks should be replaced was a representation that repairs or other services were necessary when such was not the fact. Such representation was a violation of Utah Consumer Sales Practices Act Rules, R152-11-5(a)(6). Accepting the evidence that one of the pins on one of the shock absorbers was bent, and therefore defective, there was a separate violation of the referenced rule for each of the other three shock absorbers that did not require replacement.

T. The untrue representation knowingly and intentionally made to [redacted] that the four shock absorbers sold to [redacted] where heavy duty was an indication that the goods were of a particular standard, quality or grade, when they were not. These representations constituted four separate violations of Utah Consumer Sales Practices Act, U.C.A. §13-11-4(2)(b).

U. The untrue representation knowingly and intentionally made to [redacted] that the four shock absorbers sold to [redacted] where heavy duty was an indication that the goods had certain performance characteristics and benefits, when they did not, also constituted four separate violations of Utah Consumer Sales Practices Act, U.C.A. §13-11-4(2)(a).

V. The untrue representation knowingly and intentionally made to [redacted] that the shock absorbers were special order was an indication that the subject of a consumer transaction is of a particular standard, quality or grade, but it was not. Such representation, knowingly and intentionally made, constitutes four separate violations of Utah Consumer Sales Practices Act, U.C.A. §13-11-4(2)(b). However, only one violation is alleged in the Citation.

W. The untrue representation knowingly and intentionally made to [redacted] that the shock absorbers were special order was an indication that the subject of a consumer transaction is available to the consumer for a reason that does not exist. Such representation, knowingly and intentionally made, also constituted a violation of Utah Consumer Sales Practices Act, U.C.A. §13-11-4(2)(d).

X. Respondents knowingly failed to obtain express authorization and a clear estimation of the charges for the services before the time that the services were rendered. This failure constituted a knowing violation of Utah Consumer Sales Practices Act Rules, U.C.A. R152-11-5(A)(1).

Y. Even accepting the Respondents' factual assertion that Mr. Boatner was able to easily calculate the "Estimated Cost of Above Repairs" to equal, to the penny, the final total amount on the Service Order, the Respondents are liable for a material misstatement of the repair costs in violation of R152-11-5(A)(10).

Z. Mr. Boatner's intentional action of inserting on the Service Order the sum of $797.96 as the total cost for two tires that are separately itemized on the Service Order as being $225.00 per tire, constitutes an intentional material misstatement of a material component of the $1,121.54 estimated parts portion of the cost of repairs. Such action by Mr. Boatner constituted a violation of Utah Admin. Code R152-11-5(A)(10).

AA. Respondents are jointly and severally liable as suppliers for each of the violations referenced herein.

BB. Utah Code Ann. §13-11-17(4) provides that violations of Chapter 11 of Title 13 may be addressed through the imposition of an administrative fine not to exceed $2,500 per violation of Section 13-11-1 *et seq.* or of the rules promulgated thereunder, and that the Division may issue a cease and desist order.

RECOMMENDED ORDER

Respondent is ordered to cease and desist from any act in violation of the *Consumer Sales Practices Act*, Utah Code Annot. Title 13, Chapter 11 and the *Consumer Sales Practices Act Rules* referenced below.

On the basis of the findings of fact and conclusions of law outlined herein, the presiding officer further recommends that Respondents be assessed and ordered to pay an administrative fine in the amount of $27,500.00, as follows:

- $2,500 for a single violation of *Utah Consumer Sales Practices Act Rules*, U.C.A. R152-11-5(A)(9) as to [redacted];
- $2,500 for a single violation of both *Utah Consumer Sales Practices Act*, U.C.A. §13-11-4(2)(b) and (d) as to [redacted], which were pled in the alternative;
- $7,500 for three violations of *Utah Consumer Sales Practices Act Rules*, R152-11-5(A)(6) as to [redacted];
- $10,000 for four violations of both *Utah Consumer Sales Practices Act*, U.C.A. §13-11-4(2)(a) and *Utah Consumer Sales Practices Act*, U.C.A. §13-11-4(2)(b) as to [redacted], which violations were pled in the alternative;

- $2,500 for a single violation of *Utah Consumer Sales Practices Act Rules* R152-11-5(A)(1) as to [redacted];
- $2,500 for a single violation of *Utah Consumer Sales Practices Rules* R152-11-5(A)(10) as to [redacted]

DATED this 3rd day of March, 2017.

DEPARTMENT OF COMMERCE

Bruce L. Dibb, PRESIDING OFFICER

DIVISION OF CONSUMER PROTECTION
DANIEL R.S. O'BANNON, DIRECTOR
DEPARTMENT OF COMMERCE
P.O. BOX 146704
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BEFORE THE DIVISION OF CONSUMER PROTECTION
OF THE DEPARTMENT OF COMMERCE
OF THE STATE OF UTAH

IN THE MATTER OF: **HEATH ENTERPRISE, INC.,** a Nevada corporation doing business as **FREEWAY TIRE,** **HEATH ENTERPRISES UTAH, INC,** an unregistered Nevada corporation registered as a foreign corporation in Utah doing business as **FREEWAY TIRE,** and **MICHAEL DANIEL HEATH,** individually, Respondents.	**ORDER OF ADJUDICATION** CASE No.s: **CP 86046** and **85715**

BY THE DIRECTOR:

Daniel R.S. O'Bannon, Director of the Division of Consumer Protection, has reviewed the presiding officer's March 3, 2017, findings of fact, conclusions of law and recommended order, and hereby adopts the recommendation except as provided below.

ORDER

Respondents are ordered to cease and desist from any act in violation of the *Consumer Sales Practices Act*, Utah Code Annot. Title 13, Chapter 11 and the *Consumer Sales Practices Act Rules* referenced below.

Respondents are assessed and ordered to jointly and severally pay an administrative fine in the amount of $27,500.00, as follows:

- $2,500 for a single violation of *Utah Consumer Sales Practices Act Rules*, U.C.A. R152-11-5(A)(9) as to [redacted];
- $2,500 for a single violation of both *Utah Consumer Sales Practices Act*, U.C.A. §13-11-4(2)(b) and (d) as to [redacted], which were pled in the alternative;
- $7,500 for three violations of *Utah Consumer Sales Practices Act Rules*, R152-11-5(A)(6) as to [redacted];
- $10,000 for four violations of both *Utah Consumer Sales Practices Act*, U.C.A. §13-11-4(2)(a) and *Utah Consumer Sales Practices Act*, U.C.A. §13-11-4(2)(b) as to [redacted], which violations were pled in the alternative;
- $2,500 for a single violation of *Utah Consumer Sales Practices Act Rules* R152-11-5(A)(1) as to [redacted];
- $2,500 for a single violation of *Utah Consumer Sales Practices Rules* R152-11-5(A)(10) as to [redacted].

Of the $27,500 administrative fine, $12,500 is suspended as follows:

- $5,000 of the $7,500 imposed for three violations of *Utah Consumer Sales Practices Act Rules*, R152-11-5(A)(6) as to [redacted];
- $7,500 of the $10,000 imposed for four violations of both *Utah Consumer Sales Practices Act*, U.C.A. §13-11-4(2)(a) and *Utah Consumer Sales Practices Act*, U.C.A. §13-11-4(2)(b) as to [redacted], which violations were pled in the alternative.

The suspension of the $12,500 is conditioned upon Respondents' compliance with the *Utah Consumers Sales Practices Act* and *Rules*. Should the Division issue an order within the next three years finding any of the Respondents violated the *Utah Consumers Sales Practices Act* or the *Utah Consumer Sales Practices Act Rules*, the Respondents are jointly and severally ordered to pay the suspended $12,500 in addition to any other amounts ordered.

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

This order shall be effective on the signature date below.

This fine may be filed and entered with the appropriate court as a civil judgment.

DATED this 3 day of March, 2017.

UTAH DEPARTMENT OF COMMERCE

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

NOTICE OF RIGHT TO ADMINISTRATIVE REVIEW

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

CERTIFICATE OF SERVICE

I certify that on the 7th day of March, 2017, I served the foregoing ORDER OF ADJUDICATION and a copy of the FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDED ORDER on the parties in this proceeding by first class mail, postage prepaid, to:

Heath Enterprise, Inc. a Nevada corporation
dba Freeway Tire
Heath Enterprises Utah
dba Freeway Tire, and
Michael Daniel Heath

c/o James W. Jensen
Jensen Law Office
250 S. Main
Cedar City, Utah 84720

and by email to:

Division of Consumer Protection
Glen Minson, Investigator
gminson@utah.gov

Jeffrey Buckner, AAG
jbuckner@utah.gov