



GARY R. HERBERT
Governor

SPENCER J. COX
Lieutenant Governor

State of Utah Department of Commerce

FRANCINE A. GIANI
Executive Director

THOMAS A. BRADY
Deputy Director

DANIEL O'BANNON
Director, Division of Consumer Protection

December 30, 2016

FRAN SILVERMAN
TRUTHINADVERTISING.ORG
203.421.6211
FSILVERMAN@TRUTHINADVERTISING.ORG

Subject: Media Inquiry Re: O2PUR

Dear Ms. Silverman.

The Utah Division of Consumer Protection has received your request of December 22, 2016 for any additional documents filed in the O2Pur case since the Administrative Citation was issued in September.

Your request has been considered under the Utah Government Records Access and Management Act ("GRAMA"), Utah Code § 63G-2-101 *et seq.*, as amended.

Your request has been granted. Please find included with this letter records responsive to your request.

Sincerely,

A handwritten signature in black ink, appearing to read "David J. Pierson".

DAVID J. PIERSON
Records Officer
Utah Division of Consumer Protection

RECEIVED

OCT 21 2016

DIVISION OF
CONSUMER PROTECTION

Roger J. McConkie (5513)
PRINCE, YEATES & GELDZAHLER
15 West South Temple, Suite 1700
Salt Lake City, Utah 84101
Telephone. (801) 524-1000
Facsimile (801) 524-1098
Email rjm@princeyeates.com

Attorneys for Alpha Vending LLC, Scott Barth

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

IN THE MATTER OF

VAPEX LLC, a Utah limited liability
company, doing business as
ALPHAFILL, TRYVAPEX.COM and
VAPEXSTORE.COM,

ALPHA VENDING LLC, a Utah limited
liability company,

SCOTT BARTH, individually and as an
officer, director, manager, agent, and/or
owner of the above-named entity, and

MARIO ZAMORA, individually and as
an officer, director, manager, agent, and/or
owner of the above-named entity, and

KOURTNEY SALAVATORI,
individually and as an officer, director,
manager, agent, and/or owner of the
above-named entity,

Respondents.

**RESPONSE TO NOTICE OF
AGENCY ACTION**

(Hearing Requested)

DCP Legal Case No. 83243
DCP Case Nos. 82403 and 86039

Respondent Scott Barth ("Barth" or "Respondent"), individually, responds to the Division of Consumer Protection's ("Division") Notice of Agency Action, by joining in the Division's request for a hearing regarding the matters identified in the Division's Notice of Agency Action and by specifically responding to the Division's numbered allegations by denying, admitting, and alleging as follows:

(FIRST AFFIRMATIVE DEFENSE)

The Division fails to state a claim against Barth upon which relief can be granted

(SECOND AFFIRMATIVE DEFENSE)

Barth hereby responds to the specific numbered allegations of the Notice of Agency Action by admitting, denying and alleging as follows

1 Respondent admits that on or about July 30, 2014, the Division issued an Administrative Citation against the Respondents named therein and that the Division alleged violations which the Division claimed carried maximum fines of \$822,500.00 Respondent denies the remainder of the allegations of paragraph one and affirmatively asserts that the Division did not adequately allege sufficient facts to support a claim of individual liability against this Respondent

2 The Settlement Agreement referred to in paragraph 2 speaks for itself Respondent denies any allegations in paragraph 2 which are inconsistent with the plain language of the Settlement Agreement Respondent denies that he is a party to the

Settlement Agreement and therefore denies the allegations of paragraph 2 as they relate to him individually.

3 Respondent admits that the Division claims that this action (Notice of Agency Action) is directed at Barth only Barth admits that the July 30, 2014 Administrative Citation identified Barth in the heading as being named “individually and as an officer, director, manager, agent, and/or owner of the above-named entity [Vapex LLC and Alpha Vending LLC]” Respondent affirmatively asserts that the Division did not allege facts sufficient to state a claim against Respondent in his individual capacity in the July 30, 2014 Administrative Citation Respondent denies that he “owns and operates” Alpha International Marketing LLC (“AIM”). Barth admits that he owns 2% of AIM and is employed as manager Admit that AIM does business as VictorEJuice and operates under the name O2PUR Respondent admits that Barth is the sole individual listed as the domain registrant, administrative, technical, and billing contact for the websites identified in paragraph 3 Respondent denies the remainder of the allegations of paragraph 3 that have not been expressly admitted herein

4 Deny that O2PUR is marketed as a smokeless tobacco alternative Admit the remainder of the allegations in paragraph 4

5 Admit that AIM entered into an agreement with Marketing Architects, Inc (“MAI”) The agreement speaks for itself. Deny the remainder of the allegations of

paragraph 5. Respondent affirmatively alleges that he personally did not enter into an agreement with MAI

6 Deny that MAI produced broadcast orders for Barth Admit that the language cited in paragraph 6 reflects a broadcast order produced by MAI, which language speaks for itself Respondents deny the remainder of the allegations in paragraph 6

7 Admit that 16 broadcast orders promoted a free e-cigarette Starter Kit and that approximately 675 O2PUR specific radio advertisements ran from December 1, 2014 to February 28, 2016 in the Grand Rapids, Michigan area and that the advertisements also ran in New York, Connecticut and Florida and that O2PUR also advertised through a television commercial up through August 8, 2016 and deny the remainder of the allegations of paragraph 7 Respondent affirmatively asserts that the picture identified in paragraph 7 is only a snapshot of a TV commercial and that the Division's allegations in this paragraph failed to include the price disclaimer that is part of the same commercial

8 Admit that the language in paragraph 8 reflects language in the O2PUR commercial as it aired up through August 8, 2016, which language speaks for itself. Deny the remainder of the allegations of paragraph 8

9. Respondent admits that through January 26, 2015, O2PUR product was sold online through the websites identified in paragraph 9 Respondent denies O2PUR

product was advertised online. Respondent admits that the photo/screenshot in paragraph 9 appears to be taken from its website, which photo/screenshot speaks for itself

10. Respondent admits that photo/screenshot set forth in paragraph 10 appears to have come from an O2PUR website, which photo/screenshot speaks for itself
Respondent further admits that such a screenshot would have accurately depicted what was on the O2PUR websites until January 25, 2015 Respondent affirmatively asserts that such information was not on the O2PUR websites after January 25, 2015 Respondent denies any other allegations in paragraph 10

11. Respondent admits that the “terms and conditions” set forth in paragraph 11 appear to have come from an O2PUR website, which website speaks for itself
Respondent further admits that such websites contained that language until January 26, 2015 Respondent affirmatively asserts that such information was not on the O2PUR websites after January 25, 2015 Respondent denies any other allegations in paragraph 11.

12 Respondent admits the allegations pertaining to the testimonial, which testimonial speaks for itself.

13 Respondent admits the allegations pertaining to the testimonial, which testimonial speaks for itself.

14 The agreement cited in paragraph 14 speaks for itself Respondent denies any assertion that Respondent has breached the provision of the Agreement cited therein and denies any other allegation in paragraph 14

15 Respondent admits that the radio advertisement identified in paragraph 15 amended the “wherever and whenever” phrase in February of 2016 in consultation and cooperation with the Division The allegation that the advertisement was false, deceptive and substantially inaccurate is a legal conclusion which does not require Respondent to admit or deny and, therefore, Respondent denies the same. Respondent denies all of the remaining allegations of paragraph 15.

16 Denied.

17 The agreement cited in paragraph 17 speaks for itself Respondent denies any assertion that Respondent has breached the provision of the Agreement cited therein and denies any other allegation in paragraph 17.

18 Respondent admits that no terms, conditions, or restrictions were stated in the radio advertisements to indicate that consumers would be charged additional fees Respondent denies the remainder of the allegations in paragraph 18 Respondent affirmatively alleges that the radio advertisements directed the potential purchasers to a telephone interactive voice response system “IVR” that expressly sets forth the terms, conditions and restrictions related to the starter kit, including any additional fees Respondent further affirmatively asserts that the IVR system, that is hosted in a state

other than Utah, strictly and automatically excludes and prevents any transactions involving residents of the State of Utah

19 The agreement cited in paragraph 19 speaks for itself Respondent denies any assertion that Respondent has breached the provision of the Agreement cited therein and denies any other allegation in paragraph 19

20. Denied Respondent affirmatively asserts that the radio and television advertising is not "Respondent's" as alleged by the Division but rather O2PUR advertisements Further, to the extent that the allegations in paragraph 20 constitute legal conclusions which do not require the Respondent to admit or deny, Respondent denies the same. Respondent denies all other allegations in paragraph 20 not specifically admitted herein.

21 The agreement cited in paragraph 21 speaks for itself Respondent denies any assertion that Respondent has breached the provision of the Agreement cited therein and denies any other allegation in paragraph 21

22 Denied

23 The agreement cited in paragraph 23 speaks for itself Respondent denies any assertion that Respondent has breached the provision of the Agreement cited therein and denies any other allegation in paragraph 23.

24 Respondent joins in the Division's request for a hearing and denies that Respondent breached the Agreement and that the Division should be able to impose the suspended fines

Respondent asserts the following additional affirmative defenses

(THIRD AFFIRMATIVE DEFENSE)

The Division lacks subject matter jurisdiction over this Respondent. Respondent does not transact any business with consumers residing in the State of Utah. Nor do any of the Respondents in the underlying agency action. The Division was created solely for the purpose of protecting Utah consumer residents. Utah callers or web visitors who try to purchase O2PUR product are prohibited via technical restrictions from engaging in any transactions with Respondent or with any O2PUR related company. All transactions involving any of the Respondents named in the underlying agency action with regard to the offer and sale of e-cigarette products occur through an interactive voice response "IVR" system that is hosted in a state other than Utah. That system strictly and automatically excludes and prevents any transactions involving residents of Utah. More specifically, the IVR system automatically rejects all calls from Utah area codes. If a caller in Utah uses a cell phone with a non-Utah area code, the telephone and internet systems also require a zip code as well and automatically rejects all Utah addresses. Thus, all sales to Utah consumers are prohibited by computer automation. Respondent is unaware of any Utah resident with whom he has conducted business and affirmatively

asserts that no Utah resident has complained to the Division about Respondent nor about any O2PUR related companies nor have such residents been damaged or otherwise injured by respondent or by the Respondents named in the underlying agency action

(FOURTH AFFIRMATIVE DEFENSE)

The Division lacks standing to bring an action against the Respondent Respondent does not transact any business with consumers within the State of Utah Nor did any of the Respondents named in the underlying agency action The Division was created solely for the purpose of protecting Utah consumer residents Utah callers or web visitors who try to purchase O2PUR products are prohibited via technical restrictions from engaging in any transactions with Respondent or with any of the Respondents named in the underlying agency action All transactions involving any of the named Respondents in the underlying agency action with regard to the offer and sale of e-cigarette products occur through an interactive voice response “IVR” system that is hosted in a state other than Utah. That system strictly and automatically excludes and prevents any transactions involving residents of Utah More specifically, the IVR system automatically rejects all calls from Utah area codes If a caller in Utah uses a cell phone with a non-Utah area code, the telephone and internet systems also require a zip code as well and automatically rejects all Utah addresses Thus, all sales to Utah consumers are prohibited by computer automation. Respondent is unaware of any Utah resident consumer with whom he has conducted business or with whom any of the named Respondents in the underlying

agency action have conducted business and affirmatively asserts that no Utah resident has complained to the Division about Respondent or about the Respondents named in the underlying agency action. Respondent is unaware of any Utah resident consumer with whom he has conducted business or with whom the Respondents in the underlying agency action have conducted business that have been injured or otherwise damaged by his actions or by the actions of any of the Respondents named in the underlying agency action and affirmatively assert that no Utah resident has complained to the Division about any of the Respondents in the underlying agency action nor have such residents been damaged or otherwise injured by any of the Respondents in the underlying agency action.

(FIFTH AFFIRMATIVE DEFENSE)

The Division lacks statutory authority to regulate the acts or practices complained of and therefore the Division's actions are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with Utah law; contrary to constitutional right, power, privilege or immunity, in excess of statutory jurisdiction, authority, or limitations, or short of statutory right, or without observance of procedure required by law.

(SIXTH AFFIRMATIVE DEFENSE)

Even if the Division has subject matter jurisdiction over the claims asserted, which it does not, because the Division has not published any rules, regulations or other guidelines clarifying or providing notice, let alone constitutionally adequate notice, of

what activities the Division can regulate that do not involve harm or injury to Utah residents, this enforcement action violates the due process requirements of fair notice guaranteed by the Utah Constitution, the United States Constitution and the Utah Administrative Procedures Act

(SEVENTH AFFIRMATIVE DEFENSE)

The July 30, 2014 Citation and the October 14, 2014 Settlement Agreement are void as a matter of law because the Division lacks subject matter jurisdiction

(EIGHTH AFFIRMATIVE DEFENSE)

Claims by the Division against Respondent based on the agreement are barred for lack of privity Respondent is not a party to the Settlement Agreement which is the subject of the Division's Notice of Agency Action Barth signed the Settlement Agreement solely in his capacity as officer/director of Alpha Vending LLC and not in any individual capacity

(NINTH AFFIRMATIVE DEFENSE)

Respondent affirmatively denies knowingly making any false or unsupported or unsubstantiated statements in advertisements No health claims were made regarding O2PUR product. Testimonials regarding the product are genuine testimonials which Respondent believes to be true and accurate testimonials from real customers Statements in advertising regarding cost savings are likewise testimonials of actual savings to real customers and can be substantiated with supporting evidence

(TENTH AFFIRMATIVE DEFENSE)

The use of the word “free” in the subject advertising materials was at all times accompanied by the appropriate identification of clear and conspicuous conditions or contingencies so as to leave no reasonable probability that the terms of the offer might be misunderstood

(ELEVENTH AFFIRMATIVE DEFENSE)

Neither Respondent nor any of the Respondents named in the underlying agency action are telephone solicitors in the state of Utah and their actions do not fall under the definition of telephone solicitation as defined under Utah Code Ann § 13-26-1, et seq

(TWELFTH AFFIRMATIVE DEFENSE)

Neither Respondent nor any of the named Respondents in the underlying agency action have knowingly or intentionally violated the Utah Consumer Sales Practices Act or its respective rules.

(THIRTEENTH AFFIRMATIVE DEFENSE)

The Division has failed to comply with the Utah Administrative Procedures Act, specifically failing to comply with Utah Code Ann 63G-4-201 et seq.

(FOURTEENTH AFFIRMATIVE DEFENSE)

The actions alleged to have been taken by Respondent, if any, were taken in good faith. Respondent mistakenly aired a commercial which included the term “wherever”

when referring to the use of a smokeless product. Once the mistake was discovered, respondent immediately suspended and discontinued the radio advertising.

(FIFTEENTH AFFIRMATIVE DEFENSE)

The September 2014 Citation did not assert facts to adequately state a claim against Respondent in his individual capacity upon which relief can be granted.

(SIXTEENTH AFFIRMATIVE DEFENSE)

To the extent there are administrative rules, regulations or internal memoranda that are unique to the Division which may impact this matter of which Respondent is not aware and to preserve the right to assert such rules, regulations and memoranda, Respondent asserts the right to modify and or amend this Response.

(SEVENTEENTH AFFIRMATIVE DEFENSE)

Some or all of the Division's claims and allegations are barred by the doctrine of bad faith, waiver, estoppel, laches and/or mistake.

(EIGHTEENTH AFFIRMATIVE DEFENSE)

The Division contract claims against Respondent are barred by the statute of frauds because Respondent did not sign the settlement agreement in his individual capacity.

(NINETEENTH AFFIRMATIVE DEFENSE)

The settlement agreement is vague and ambiguous and lacks sufficient specificity as to be enforced against Respondent individually. There was no meeting of the minds.

(TWENTIETH AFFIRMATIVE DEFENSE)

The Division's actions constitute and create an unconstitutional infringement and/or burden on interstate commerce and the Respondent's right to engage in interstate commerce.

(TWENTY-FIRST AFFIRMATIVE DEFENSE)

The Division's actions constitute an unconstitutional violation of Respondent's First Amendment Rights of free speech

(PRAYER FOR RELIEF)


Respondent respectfully requests that the matter be dismissed as against this Respondent immediately and in its entirety and that the Division take nothing thereby

(HEARING REQUEST)

Respondent respectfully requests a hearing on all matters set forth above

DATED this 21st day of October, 2016

PRINCE, YEATES & GELDZAHLER

By 

Roger J. McConkie
Attorney for Respondent

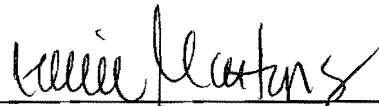
CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of October, 2016 the foregoing **Response to Notice of Agency Action**, was hand delivered and mailed, postage prepaid, to the following.

Adam Watson
Utah Division of Consumer Protection
160 East 300 South, 2nd Floor
P O Box 146704
Salt Lake City, Utah 84114-6704

Liz Blaylock
Utah Division of Consumer Protection
160 East 300 South, 2nd Floor
P O Box 146704
Salt Lake City, Utah 84114-6704

Bruce Dibb, Administrative Law Judge
Utah Division of Consumer Protection
160 East 300 South, 2nd Floor
P O Box 146704
Salt Lake City, Utah 84114-6704



RECEIVED

OCT 21 2016

DIVISION OF
CONSUMER PROTECTION

Roger J McConkie (5513)
PRINCE, YEATES & GELDZAHLER
15 West South Temple, Suite 1700
Salt Lake City, Utah 84101
Telephone (801) 524-1000
Facsimile (801) 524-1098
Email rjm@princeyeates.com

*Attorneys for Alpha International Marketing LLC
and Scott Barth*

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

IN THE MATTER OF

**ALPHA INTERNATIONAL
MARKETING LLC**, a Utah Limited
Liability Company, doing business as
**VICTOREJUICE, SELECTEJUICE
and O2PUR**, and

SCOTT BARTH, individually and as an
officer, director, manager, agent, and/or
owner of the above-named entity, and

Respondents.

**ANSWER TO
ADMINISTRATIVE CITATION**

(Hearing Requested)

**DCP Legal File No. CP-16-11
DCP Case No. 86039**

Respondents Alpha International Marketing LLC, a Utah Limited Liability
Company, doing business as VICTOREJUICE, AND O2PUR, and Scott Barth respond to
the allegations of the Administrative Citation by admitting, denying and alleging as
follows

FIRST AFFIRMATIVE DEFENSE

The Division of Consumer Protection (Division) fails to state a claim against these Respondents upon which relief can be granted

SECOND AFFIRMATIVE DEFENSE

Respondents hereby respond to the specific numbered allegations of the Administrative Citation by admitting denying and alleging as follows

1 Respondents deny that Alpha International Marketing LLC (hereafter “AIM”) does business under the registered name SelectEJuice Respondents admit the remainder of the allegations set forth in paragraph 1

2 Admit

3 Respondents deny that AIM is Barth’s business Respondents affirmatively assert that Barth owns a 2% interest in AIM Respondents admit that AIM is engaged in the business of selling electronic cigarettes and flavored liquid for electronic cigarettes

4. Respondents deny that O2PUR is marketed as a smokeless tobacco alternative to cigarettes Respondents admit the remainder of the allegations contained in paragraph 4

5 Admit that AIM entered into an agreement with Marketing Architects, Inc. (“MAI”) The agreement speaks for itself Deny the remainder of the allegations in paragraph 5 Respondents affirmatively allege that Respondent Barth did not enter into a contract with MAI

6 Deny that MAI produced broadcast orders for Barth Admit that the language cited in paragraph 6 reflects a broadcast order produced by MAI, which language speaks for itself Respondents deny the remainder of the allegations in paragraph 6

7 Admit that the 16 broadcast orders promoted a free e-cigarette Starter Kit and that approximately 675 O2PUR specific radio advertisements ran from December 1, 2014 to February 28, 2016 in the Grand Rapids, Michigan area and that the advertisements also ran in New York, Connecticut, and Florida and that O2PUR also advertised through a television commercial up through August 8, 2016 Respondents deny the remainder of the allegations of paragraph 7 Respondents affirmatively assert that the picture identified in paragraph 7 is only a snapshot of a TV commercial and that the Division's allegations in this paragraph failed to include the price disclaimer that is part of the same commercial

8 Admit that the language in paragraph 8 reflects language in the O2PUR commercial as it aired up through August 8, 2016, which language speaks for itself Respondents deny the remainder of the allegations of paragraph 8

9 Respondents admit that through January 26, 2015 O2PUR product was sold online through the websites identified in paragraph 9. Respondents deny O2PUR product was advertised online. Respondents admit that the photo/screen shot in paragraph 9 appears to be taken from its website, which photo/screenshot speaks for itself

10 Respondents admit that photo/ screen shot set forth in paragraph 10 appears to have come from an O2PUR website, which photo/screenshot speaks for itself
Respondents further admit that such a screen shot would have accurately depicted what was on the O2PUR websites until January 25, 2015 Respondents affirmatively assert that such information was not on the O2PUR websites after January 25, 2015. Respondents deny any other allegations in paragraph 10

11 Respondents admit that “terms and conditions” set forth in paragraph 11 appear to have come from an O2PUR website, which website speaks for itself
Respondents further admit that such websites contained that language until January 26, 2015 Respondents affirmatively assert that such information was not on the O2PUR websites after January 25, 2015 Respondents deny any other allegations in paragraph 11

12 Respondents admit the allegations pertaining to the testimonial, which testimonial speaks for itself

13 Respondents admit the allegations pertaining to the testimonial, which testimonial speaks for itself

14 Respondents admit that O2PUR’s website at one time contained a 100% satisfaction guarantee and that customers received an email reiterating the same
Respondents deny the remainder of the allegations contained in paragraph 14

15 Respondents lack sufficient information to admit or deny the allegations in paragraph 15 and therefore deny the same.

16. Respondents lack sufficient information to admit or deny the allegations in paragraph 16 and therefore deny the same.

17 Respondents lack sufficient information to admit or deny the allegations in paragraph 17 and therefore deny the same

18 Respondents lack sufficient information to admit or deny the allegations in paragraph 18 and therefore deny the same

19 Respondents lack sufficient information to admit or deny the allegations of paragraph 19 and therefore deny the same

20 Respondents lack sufficient information to admit or deny the allegations of paragraph 20 and therefore deny the same

21 Respondents lack sufficient information to admit or deny the allegations of paragraph 21 and therefore deny the same

22 Respondents lack sufficient information to admit or deny the allegations of paragraph 22 and therefore deny the same

23 Respondents admit that O2PUR has sent out industry update newsletters to educate the public regarding e-cigarettes which newsletters have included references to American Vaping Association Press Releases Respondents lack sufficient information to admit or deny the remainder to the allegations in paragraph 23 and therefore deny the same

24. Respondents admit that O2PUR has sent out industry update newsletters to educate the public regarding e-cigarettes which newsletters have included references to

American Vaping Association Press Releases Respondents lack sufficient information to admit or deny the remainder to the allegations in paragraph 24 and therefore deny the same

25. Respondents lack sufficient knowledge to form a belief as to the truthfulness of the allegation that the American Vaping Association does not endorse Respondent's product and therefore denies the same Respondents deny the remaining allegations of paragraph 25

26 To the extent that the allegations in paragraph 26 constitute a legal conclusion which does not require Respondents to admit or deny, Respondents deny the same Respondents deny the remainder of the allegations contained in paragraph 26 not expressly admitted herein Further, Respondents affirmatively allege that they have not engaged in any consumer transactions to or with any Utah residents and therefore cannot have violated the Utah Consumer Sales Practices Act

27 Denied

28 Respondents admit that O2PUR advertisements use the word "free" in multiple advertising mediums in reference to its starter kit Respondents deny the remainder of the allegations contained in paragraph 28.

29 To the extent that the allegations in paragraph 29 constitute a legal conclusion which does not require Respondents to admit or deny, Respondents deny the same Respondents deny the remainder of the allegations contained in paragraph 29 not expressly admitted herein Further, Respondents affirmatively allege that they have not

engaged in any consumer transactions to or with any Utah residents and therefore cannot have violated the Utah Consumer Sales Practices Act and/or its related rules

30 Denied

31 Respondents admit that O2PUR's website at one time contained a 100% satisfaction guarantee. Respondent affirmatively alleges that it does provide customers with information regarding thirty-day full refunds for customer dissatisfaction to back up the satisfaction guarantee Respondents deny the remainder of the allegations in paragraph 31

32 To the extent that the allegations in paragraph 32 constitute a legal conclusion which does not require Respondents to admit or deny, Respondents deny the same Respondents deny the remainder of the allegations contained in paragraph 32 not expressly admitted herein. Further, Respondents affirmatively allege that they have not engaged in any consumer transactions to or with any Utah residents and therefore cannot have violated the Utah Consumer Sales Practices Act

33 Denied

34 Respondents admit that the Respondents are not registered with the Division to conduct telephone solicitations Respondents deny that they conducted telephone solicitations To the extent that the allegations in paragraph 34 constitute a legal conclusion which does not require Respondents to admit or deny, Respondents deny the same. Respondents deny the remainder of the allegations contained in paragraph 34 not expressly admitted herein.

35 To the extent the allegations contained in paragraph 35 constitute a legal conclusion which does not require Respondents to admit or deny, Respondents deny the same Respondents deny the remainder of the allegations contained in paragraph 35 not expressly admitted herein Further, Respondents affirmatively allege that they have not engaged in any telephone solicitation generally, and more specifically, have not engaged in any telephone solicitation to or with any Utah residents and therefore cannot have violated Utah's telephone fraud prevention act

36 Denied

37 Denied.

38 To the extent that the allegations in paragraph 38 constitute a legal conclusion which does not require Respondents to admit or deny, Respondents deny the same Respondents deny the remainder of the allegations contained in paragraph 38 not expressly admitted herein Further, Respondents affirmatively allege that they have not engaged in any consumer transactions to or with any Utah residents and therefore cannot have violated the Utah Consumer Sales Practices Act and/or its related rules

39 Denied

40. Respondents admit that O2PUR promoted at least 11 broadcast orders of hundreds of radio advertisements and promoted a television commercial that has run at least 1,000 times. Respondents deny having made any sales offers to Utah residents and therefore deny the allegations of paragraph 40. Respondents admit that O2PUR radio advertisements do not have oral disclosures regarding exclusions, reservations,

limitations, prices, terms or conditions, however Respondents affirmatively allege that all radio advertisements direct listeners to a telephone interactive voice response “IVR” system that expressly sets forth all necessary exclusions, reservations, limitations, prices, terms or conditions Respondents deny the remainder of the allegations contained in paragraph 40

41 To the extent that the allegations in paragraph 41 constitute a legal conclusion which does not require Respondents to admit or deny, Respondents deny the same. Respondents deny the remainder of the allegations contained in paragraph 41 not expressly admitted herein Further, Respondents affirmatively allege that they have not engaged in any consumer transactions to or with any Utah residents and therefore cannot have violated the Utah Consumer Sales Practices Act and/or its related rules

42 Denied

Respondents assert the following additional affirmative defenses

(THIRD AFFIRMATIVE DEFENSE)

The Division lacks subject matter jurisdiction over these Respondents Respondents do not transact any business with consumers within the State of Utah The Division was created solely for the purpose of protecting Utah consumer residents Utah callers or web visitors who try to purchase O2PUR products are prohibited via technical restrictions from engaging in any transactions with Respondents. All transactions involving Respondents with regard to the offer and sale of e-cigarette products occur through an interactive voice response “IVR” system that is hosted in a state other than

Utah That system strictly and automatically excludes and prevents any transactions involving residents of Utah More specifically, the IVR system automatically rejects all calls from Utah area codes If a caller in Utah uses a cell phone with a non-Utah area code, the telephone and internet systems also require a zip code as well and automatically rejects all Utah addresses Thus, all sales to Utah consumers are prohibited by computer automation Respondents are unaware of any Utah resident with whom it has conducted business and affirmatively assert that no Utah resident has complained to the Division about Respondents nor have such residents been damaged or otherwise injured by respondents

(FOURTH AFFIRMATIVE DEFENSE)

The Division lacks standing to bring an action against the Respondents Respondents do not transact any business with consumers within the State of Utah The Division was created solely for the purpose of protecting Utah consumer residents Utah callers or web visitors who try to purchase O2PUR product are prohibited via technical restrictions from engaging in any transactions with Respondents All transactions involving Respondents with regard to the offer and sale of e-cigarette products occur through an interactive voice response “IVR” system that is hosted in a state other than Utah That system strictly and automatically excludes and prevents any transactions involving residents of Utah More specifically, the IVR system automatically rejects all calls from Utah area codes. If a caller in Utah uses a cell phone with a non-Utah area code, the telephone and internet systems require a zip code as well and automatically

rejects all Utah addresses. Thus, all sales to Utah consumers are prohibited by computer automation. Respondents are unaware of any Utah resident with whom it has conducted business and affirmatively assert that no Utah resident has complained to the Division about Respondents. Respondents are unaware of any Utah resident with whom it has conducted business and affirmatively assert that no Utah resident has complained to the Division about Respondents nor have such residents been damaged or otherwise injured by respondents.

(FIFTH AFFIRMATIVE DEFENSE)

The Division lacks statutory authority to regulate the acts or practices complained of and therefore the Division's actions are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with Utah law, contrary to constitutional right, power, privilege or immunity, in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; or without observance of procedure required by law.

(SIXTH AFFIRMATIVE DEFENSE)

Even if the Division has subject matter jurisdiction over the claims asserted, which it does not, because the Division has not published any rules, regulations or other guidelines clarifying or providing notice, let alone constitutionally adequate notice, of what activities the Division can regulate that do not involve harm or injury to Utah residents, this enforcement action violates the due process requirements of fair notice guaranteed by the Utah Constitution, the United States Constitution and the Utah Administrative Procedures Act.

(SEVENTH AFFIRMATIVE DEFENSE)

The July 30, 2014 Citation and the October 14, 2014 Settlement Agreement are void as a matter of law because the Division lacks subject matter jurisdiction

(EIGHTH AFFIRMATIVE DEFENSE)

The actions alleged to have been taken by Respondents, if any, were taken in good faith Respondents mistakenly aired a commercial which included the term “wherever” when referring to the use of a smokeless product Once the mistake was discovered, respondents immediately suspended and discontinued the radio advertising

(NINTH AFFIRMATIVE DEFENSE)

Respondents affirmatively deny knowingly making any false or unsupported or unsubstantiated statements in its advertisements No health claims were made regarding its product Testimonials regarding the product are genuine testimonials which Respondents believe to be true and accurate testimonials from real customers Statements in advertising regarding cost savings are likewise testimonials of actual savings to real customers and can be substantiated with supporting evidence

(TENTH AFFIRMATIVE DEFENSE)

The Respondents use of the American Vaping Association press release was sent out in industry newsletters to educate the public regarding e-cigarettes Such use of the press release was not to suggest and did not promote sponsorship, approval or endorsement from the American Vaping Association

(ELEVENTH AFFIRMATIVE DEFENSE)

Respondents use of the word “free” in its advertising materials was at all times accompanied by the appropriate identification of clear and conspicuous conditions or contingencies so as to leave no reasonable probability that the terms of the offer might be misunderstood

(TWELFTH AFFIRMATIVE DEFENSE)

Respondents are not telephone solicitors in the state of Utah and their actions do not fall under the definition of telephone solicitation as defined in Utah Code Ann § 13-26-1, et seq

(THIRTEENTH AFFIRMATIVE DEFENSE)

Respondents have not knowingly or intentionally violated the Utah Consumer Sales Practices Act or its respective rules

(FOURTEENTH AFFIRMATIVE DEFENSE)

The Division has failed to comply with the Utah Administrative Procedures Act, specifically failing to comply with Utah Code Ann § 63G-4-201 et seq

(FIFTEENTH AFFIRMATIVE DEFENSE)

To the extent there are administrative rules, regulations or internal memoranda that are unique to the Division which may impact this matter of which Respondents are not aware and to preserve the right to assert such rules, regulations and memoranda, Respondents assert the right to modify and or amend this Response

(SIXTEENTH AFFIRMATIVE DEFENSE)

Some or all of the Division's claims and allegations are barred by the doctrine of bad faith, waiver, estoppel, laches and/or mistake

(SEVENTEENTH AFFIRMATIVE DEFENSE)

The Division's actions constitute and create an unconstitutional infringement and/or burden on interstate commerce and the Respondents' right to engage in interstate commerce

(EIGHTEENTH AFFIRMATIVE DEFENSE)

The Division's actions constitute an unconstitutional violation of Respondents' First Amendment Rights of free speech

(PRAYER FOR RELIEF)

Respondents respectfully request that the matter be dismissed as against these Respondents immediately and in its entirety and that the Division take nothing thereby

(HEARING REQUEST)

Respondents respectfully request a hearing on all matters set forth above

DATED this 21st day of October, 2016

PRINCE, YEATES & GELDZAHLER

By



Roger J. McConkie
Attorney for Respondents

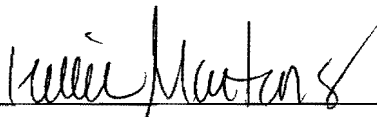
CERTIFICATE OF SERVICE

I hereby certify that on the 21 day of October, 2016 the foregoing **Answer to Administrative Citation**, was hand delivered and mailed, postage prepaid, to the following

Adam Watson
Utah Division of Consumer Protection
160 East 300 South, 2nd Floor
P O Box 146704
Salt Lake City, Utah 84114-6704

Liz Blaylock
Utah Division of Consumer Protection
160 East 300 South, 2nd Floor
P O Box 146704
Salt Lake City, Utah 84114-6704

Bruce Dibb, Administrative Law Judge
Utah Division of Consumer Protection
160 East 300 South, 2nd Floor
P O Box 146704
Salt Lake City, Utah 84114-6704



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

SCOTT BARTH, individually *et al*

RESPONDENTS

**NOTICE OF ADMINISTRATIVE
HEARING**

Case no **83242**

TO ALL PARTIES

This matter will come for hearing at the Division's offices at 160 East 300 South, Room 250, Salt Lake City, Tuesday, December 6, 2016 at 9 00 a m This hearing will be held in conjunction with the hearing for Alpha International Marketing, LLC, O2PUR *et al* , in the Department of Consumer Protection case no CP-16-011

Hearings are informal proceedings, conducted pursuant to the Utah Administrative Procedures Act, Utah Code Title 63G, Chapter 4 For further information, please see the enclosed document INFORMAL HEARINGS BEFORE THE DIVISION OF CONSUMER PROTECTION

DATED October 7, 2016

DEPARTMENT OF COMMERCE



BRUCE L DIBB, PRESIDING OFFICER

*Thurs
Jan 5th*

DIVISION OF CONSUMER PROTECTION
STATE OF UTAH DEPARTMENT OF COMMERCE
160 E 300 S
PO BOX 146704
SALT LAKE CITY UT 84114

**INFORMAL HEARINGS BEFORE THE
DIVISION OF CONSUMER PROTECTION**

You have requested an informal hearing to contest an Administrative Citation issued by the Division of Consumer Protection. As you prepare for the hearing, please keep in mind the following:

- 1 **Notice** The enclosed Notice of Administrative Hearing specifies the time and date of the hearing. On the day of the hearing, the Division receptionist at the address listed above, on the second floor, will give you the room number for the hearing. The name of the Presiding Officer for the hearing is on your Notice. Please address the Presiding Officer by name (e.g., "Mr. Smith" or "Ms. Jones").
- 2 **Open Hearing** The hearing is open to all parties, and is open to the public unless closed by the Presiding Officer. The Division will record the hearing.
- 3 **Access to Information** Discovery is prohibited, but parties may have access to all materials and information the Division intends to present at the hearing. You may contact the investigator whose name appears on your citation to request access to this information.
- 4 **Legal Representation** You may represent yourself or be represented by an attorney. Ordinarily, the Division is not represented by an attorney at the hearing.
- 5 **Issues** The primary issues for the hearing are:
 - Was there a factual and legal basis to issue the Citation?
 - If so, was it fair to issue the Citation?
 - If so, what is the appropriate penalty?
- 6 **Burden of Proof** If you are denying the offense, the Division is responsible to prove its case against you by substantial evidence. If you are admitting the offense, you are responsible to prove that the Citation should be dismissed or the penalty should be reduced.
- 7 **Evidence** All parties may testify, present evidence, and comment on the issues. In presenting evidence, any party may examine witnesses and submit exhibits. At the request of either party, or at his or her own initiative, the Presiding Officer may examine a witness. Any party may ask to present a witness by telephone. The Presiding Officer will exclude any evidence he or she deems irrelevant, repetitious or improper. **If you have documents or other records to support your position, you must provide them. You may give them to the Division ahead of hearing or bring two (2) copies with you to the hearing.**
- 8 **Final Order** Following the hearing, the Presiding Officer will take the matter under advisement and make a recommendation to the Division Director, who will issue a Final Order to uphold, dismiss or modify the Citation. The Final Order will include a notice of any right of administrative or judicial review.

You should not rely on this letter alone for instructions regarding informal hearings. The hearing is governed by law (Utah Administrative Procedures Act, see Utah Code Annotated § 63G-4 et seq., (2008), Utah Division of Consumer Protection, see Utah Code Ann. § 13-2 et seq.), and rule (Department of Commerce Administrative Procedures Act Rules, see Utah Admin. Code R151-4). You may access these laws and rules at your local library or by visiting <http://le.utah.gov> and/or <http://www.rules.utah.gov> and searching for the above named statutes or rules.

You may contact the Presiding Officer with any technical or procedural questions, but the Presiding Officer may not discuss the merits of the case with you.

Revision Date: May 7, 2013

CERTIFICATE OF SERVICE

I hereby certify that I have this day served this NOTICE OF ADMINISTRATIVE HEARING on the parties of record in this proceeding set forth below by delivering a copy by email to

the Respondents

Russell D Harris
Christopher Infanger
Mel S Martin, P C
russelldharris@lawyer.com
[Chris R Infanger@gmail.com](mailto:ChrisRInfanger@gmail.com)

the Division of Consumer Protection

Adam Watson, Chief Investigator
awatson@utah.gov

Dated this 7th day of October, 2016

/s/ Bruce L Dobb
Bruce L Dobb



Bruce Dobb <bdobb@utah gov>

Notices in related Barth cases

1 message

Bruce Dobb <bdobb@utah gov>

Fri, Oct 7, 2016 at 4 29 PM

To russelldhams@lawyer com, Chrs R Infanger@gmail com, Adam Watson <awatson@utah gov>

Gentlemen

Attached are two Notices for administrative hearing I have set the two Barth related matters for hearing at the same time

Bruce Dobb, ALJ

2 attachments **Signed Notice O2PUR pdf**
137K **Signed Notice Barth pdf**
128K

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

**ALPHA INTERNATIONAL MARKETING
LLC**, a Utah limited liability company doing
business as **VITOREJUICE**,
SELECTEJUICE and **O2PUR**, and

SCOTT BARTH, individually and as an
officer, director, manager, agent and/or owner
of the above named entity,

RESPONDENTS

**NOTICE OF ADMINISTRATIVE
HEARING**

Case no **CP-16-11**

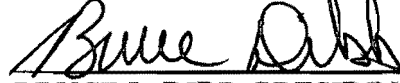
TO ALL PARTIES

This matter will come for hearing at the Division's offices at 160 East 300 South, Room 250, Salt Lake City, Tuesday, December 6, 2016 at 9 00 a m This hearing will be held in conjunction with the hearing for Scott Barth in the Department of Consumer Protection case no 8324

Hearings are informal proceedings, conducted pursuant to the Utah Administrative Procedures Act, Utah Code Title 63G, Chapter 4 For further information, please see the enclosed document INFORMAL HEARINGS BEFORE THE DIVISION OF CONSUMER PROTECTION

DATED October 7, 2016.

DEPARTMENT OF COMMERCE

A handwritten signature in black ink, appearing to read "Bruce Dibb", written over a horizontal line.

BRUCE L. DIBB, PRESIDING OFFICER

DIVISION OF CONSUMER PROTECTION
STATE OF UTAH DEPARTMENT OF COMMERCE
160 E 300 S
PO BOX 146704
SALT LAKE CITY UT 84114

**INFORMAL HEARINGS BEFORE THE
DIVISION OF CONSUMER PROTECTION**

You have requested an informal hearing to contest an Administrative Citation issued by the Division of Consumer Protection. As you prepare for the hearing, please keep in mind the following:

- 1 **Notice** The enclosed Notice of Administrative Hearing specifies the time and date of the hearing. On the day of the hearing, the Division receptionist at the address listed above, on the second floor, will give you the room number for the hearing. The name of the Presiding Officer for the hearing is on your Notice. Please address the Presiding Officer by name (e.g., "Mr. Smith" or "Ms. Jones").
- 2 **Open Hearing** The hearing is open to all parties, and is open to the public unless closed by the Presiding Officer. The Division will record the hearing.
- 3 **Access to Information** Discovery is prohibited, but parties may have access to all materials and information the Division intends to present at the hearing. You may contact the investigator whose name appears on your citation to request access to this information.
- 4 **Legal Representation** You may represent yourself or be represented by an attorney. Ordinarily, the Division is not represented by an attorney at the hearing.
- 5 **Issues** The primary issues for the hearing are:
 - Was there a factual and legal basis to issue the Citation?
 - If so, was it fair to issue the Citation?
 - If so, what is the appropriate penalty?
- 6 **Burden of Proof** If you are denying the offense, the Division is responsible to prove its case against you by substantial evidence. If you are admitting the offense, you are responsible to prove that the Citation should be dismissed or the penalty should be reduced.
- 7 **Evidence** All parties may testify, present evidence, and comment on the issues. In presenting evidence, any party may examine witnesses and submit exhibits. At the request of either party, or at his or her own initiative, the Presiding Officer may examine a witness. Any party may ask to present a witness by telephone. The Presiding Officer will exclude any evidence he or she deems irrelevant, repetitious or improper. **If you have documents or other records to support your position, you must provide them. You may give them to the Division ahead of hearing or bring two (2) copies with you to the hearing.**
- 8 **Final Order** Following the hearing, the Presiding Officer will take the matter under advisement and make a recommendation to the Division Director, who will issue a Final Order to uphold, dismiss or modify the Citation. The Final Order will include a notice of any right of administrative or judicial review.

You should not rely on this letter alone for instructions regarding informal hearings. The hearing is governed by law (Utah Administrative Procedures Act, see Utah Code Annotated § 63G-4 et seq., (2008), Utah Division of Consumer Protection, see Utah Code Ann. § 13-2 et seq.), and rule (Department of Commerce Administrative Procedures Act Rules, see Utah Admin. Code R151-4). You may access these laws and rules at your local library or by visiting <http://le.utah.gov> and/or <http://www.rules.utah.gov> and searching for the above named statutes or rules.

You may contact the Presiding Officer with any technical or procedural questions, but the Presiding Officer may not discuss the merits of the case with you.

Revision Date May 7, 2013

CERTIFICATE OF SERVICE

I hereby certify that I have this day served this NOTICE OF ADMINISTRATIVE HEARING on the parties of record in this proceeding set forth below by delivering a copy by email to

the Respondents

Russell D Harris
Christopher Infanger
Mel S Martin, P C
russelldharris@lawyer.com
[Chris R Infanger@gmail.com](mailto:ChrisRInfanger@gmail.com)

the Division of Consumer Protection

Adam Watson, Investigator
awatson@utah.gov

Dated this 7th day of October, 2016

/s/ Bruce L Dobb
Bruce L Dobb



Bruce Dobb <bdobb@utah.gov>

Notices in related Barth cases

1 message

Bruce Dobb <bdobb@utah.gov>

Fr, Oct 7, 2016 at 4 29 PM

To: russelldhams@lawyer.com, Chris R Infanger@gmail.com, Adam Watson <awatson@utah.gov>

Gentlemen

Attached are two Notices for administrative hearing. I have set the two Barth related matters for hearing at the same time.

Bruce Dobb, ALJ

2 attachments



Signed Notice O2PUR.pdf

137K



Signed Notice Barth.pdf

128K



Bruce Dibb <bdibb@utah.gov>

Fwd: Legal Case No.'s 86039 and 83243

3 messages

Adam Watson <awatson@utah.gov>
To: Bruce Dibb <bdibb@utah.gov>

Fri, Sep 30, 2016 at 2:09 PM

Mr. Dibb,

Please see the request below for a hearing involving O2PUR and Mr. Scott Barth. There is also a notice of agency action involving Mr. Barth that was filed at the same time as the O2PUR citation. The Division requests both hearings to be consolidated into one hearing.

Thank you,

Adam Watson - Chief Investigator

State of Utah, Department of Commerce, **Division of Consumer Protection**
160 East 300 South, Second Floor
PO Box 146704
Salt Lake City, UT 84114-6704

Telephone 801 530 6601 | **Fax** 801 530 6001**website** www.dcp.utah.gov

The information contained in this electronic mail message is confidential information intended only for the use of the individual or entity named above and may be privileged. If the reader of this message is not the intended recipient or the employee or agent responsible to deliver it to the intended recipient, you are hereby notified that any dissemination, distribution, or copying of this communication is strictly prohibited. If you have received this communication in error, please immediately notify us by telephone (801) 530-6601 or by replying to this message. Also, please delete the original message. By reading this email you hereby agree to waive all liability of the sender into perpetuity throughout the universe. Thank you.

----- Forwarded message -----

From **Mel Martin** <lawoffice5282@gmail.com>

Date: Fri, Sep 30, 2016 at 12:26 PM

Subject: Legal Case No.'s 86039 and 83243

To: awatson@utah.gov

Cc: Russ Hams <russelldhams@lawyer.com>, "Chris R Infanger@gmail.com" <Chris R Infanger@gmail.com>

Dear Mr. Watson,

On behalf of Russell D. Hams and Christopher Infanger of Mel S. Martin, P.C., I request a hearing in Case no. 86039.

I look forward to your return email with a time for a phone conference Monday morning.

Thank you!

Best Regards,

Karen Stolworthy
Mel S. Martin, P.C.

Bruce Dibb <bdibb@utah.gov>
To: Adam Watson <awatson@utah.gov>

Tue, Oct 4, 2016 at 8:57 AM

I do not have a copy of the Citation in either the O2PUR or the Barth matters. Would you send them to me?

10/4/2016

State of Utah Mail - Fwd Legal Case No's 86039 and 83243

Is November 7th too early of a date for a joint hearing on these matters?

*
Bruce Dobb

[Quoted text hidden]

Adam Watson <awatson@utah.gov>
To: Bruce Dobb <bdobb@utah.gov>

Tue, Oct 4, 2016 at 1:38 PM

I will put copies in your box

I think 11/7/16 may be too soon. I spoke with their attorney who was thinking a couple months out

[Quoted text hidden]

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

SCOTT BARTH, individually and
ALPHA VENDING, LLC, a Utah limited
liability company,

RESPONDENTS

**AMENDED NOTICE OF
ADMINISTRATIVE HEARING**

Case no **83242**

IN THE MATTER OF

**ALPHA INTERNATIONAL MARKETING
LLC**, a Utah limited liability company doing
business as **VITOREJUICE**,
SELECTEJUICE and **O2PUR**, and

SCOTT BARTH, individually and as an
officer, director, manager, agent and/or owner
of the above named entity,

RESPONDENTS

**AMENDED NOTICE OF
ADMINISTRATIVE HEARING**

Case no. **CP-16-011**

TO ALL PARTIES

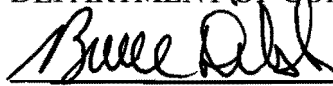
At the request of the parties to continue the prior hearing date of these matters, these two matters will come for hearing at the Division's offices at 160 East 300 South, Room 250, Salt Lake City, Thursday, January 5, 2017 at 9 00 a m

Hearings are informal proceedings, conducted pursuant to the Utah Administrative Procedures Act, Utah Code Title 63G, Chapter 4 For further information, please see the

enclosed document INFORMAL HEARINGS BEFORE THE DIVISION OF CONSUMER
PROTECTION

DATED November 22, 2016

DEPARTMENT OF COMMERCE

A handwritten signature in black ink, appearing to read "Bruce L. Dibb", is written over a horizontal line.

BRUCE L. DIBB, PRESIDING OFFICER

DIVISION OF CONSUMER PROTECTION
STATE OF UTAH DEPARTMENT OF COMMERCE
160 E 300 S
PO BOX 146704
SALT LAKE CITY UT 84114

**INFORMAL HEARINGS BEFORE THE
DIVISION OF CONSUMER PROTECTION**

You have requested an informal hearing to contest an Administrative Citation issued by the Division of Consumer Protection. As you prepare for the hearing, please keep in mind the following:

- 1 **Notice** The enclosed Notice of Administrative Hearing specifies the time and date of the hearing. On the day of the hearing, the Division receptionist at the address listed above, on the second floor, will give you the room number for the hearing. The name of the Presiding Officer for the hearing is on your Notice. Please address the Presiding Officer by name (e.g., "Mr. Smith" or "Ms. Jones").
- 2 **Open Hearing** The hearing is open to all parties, and is open to the public unless closed by the Presiding Officer. The Division will record the hearing.
- 3 **Access to Information** Discovery is prohibited, but parties may have access to all materials and information the Division intends to present at the hearing. You may contact the investigator whose name appears on your citation to request access to this information.
- 4 **Legal Representation** You may represent yourself or be represented by an attorney. Ordinarily, the Division is not represented by an attorney at the hearing.
- 5 **Issues** The primary issues for the hearing are:
 - Was there a factual and legal basis to issue the Citation?
 - If so, was it fair to issue the Citation?
 - If so, what is the appropriate penalty?
- 6 **Burden of Proof** If you are denying the offense, the Division is responsible to prove its case against you by substantial evidence. If you are admitting the offense, you are responsible to prove that the Citation should be dismissed or the penalty should be reduced.
- 7 **Evidence** All parties may testify, present evidence, and comment on the issues. In presenting evidence, any party may examine witnesses and submit exhibits. At the request of either party, or at his or her own initiative, the Presiding Officer may examine a witness. Any party may ask to present a witness by telephone. The Presiding Officer will exclude any evidence he or she deems irrelevant, repetitious or improper. **If you have documents or other records to support your position, you must provide them. You may give them to the Division ahead of hearing or bring two (2) copies with you to the hearing.**
- 8 **Final Order** Following the hearing, the Presiding Officer will take the matter under advisement and make a recommendation to the Division Director, who will issue a Final Order to uphold, dismiss or modify the Citation. The Final Order will include a notice of any right of administrative or judicial review.

You should not rely on this letter alone for instructions regarding informal hearings. The hearing is governed by law (Utah Administrative Procedures Act, see Utah Code Annotated § 63G-4 et seq., (2008), Utah Division of Consumer Protection, see Utah Code Ann. § 13-2 et seq.), and rule (Department of Commerce Administrative Procedures Act Rules, see Utah Admin. Code R151-4). You may access these laws and rules at your local library or by visiting <http://le.utah.gov> and/or <http://www.rules.utah.gov> and searching for the above named statutes or rules.

You may contact the Presiding Officer with any technical or procedural questions, but the Presiding Officer may not discuss the merits of the case with you.

Revision Date: May 7, 2013

CERTIFICATE OF SERVICE

I hereby certify that I have this day served this NOTICE OF ADMINISTRATIVE HEARING on the parties of record in this proceeding set forth below by delivering a copy by email to

the Respondents

Roger J McConkie
Prince Yeates
rjm@princeyeates.com

the Division of Consumer Protection

Liz Blaylock
lblaylock@utah.gov

Adam Watson, Chief Investigator
awatson@utah.gov

Dated this 22nd day of October, 2016

/s/ Bruce L Dobb
Bruce L Dobb



Bruce Dobb <bdobb@utah.gov>

Amended Notice of Hearing

1 message

Bruce Dobb <bdobb@utah.gov>

Tue, Nov 22, 2016 at 4 43 PM

To rjm@princeyeates.com, Elizabeth Blaylock <lblaylock@utah.gov>, Adam Watson <awatson@utah.gov>

To All

Attached is the Amended Notice of Hearing in the Barth - O2PUR companion cases

Bruce L. Dobb, ALJ

Signed Amended Notice.pdf
142K

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

*See attached email
on any further extension.*

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

IN THE MATTER OF

SCOTT BARTH, individually and
ALPHA VENDING, LLC, a Utah limited
liability company,

RESPONDENTS

**SECOND AMENDED NOTICE OF
ADMINISTRATIVE HEARING**

Case no **83242**

IN THE MATTER OF

**ALPHA INTERNATIONAL MARKETING
LLC**, a Utah limited liability company doing
business as **VITOREJUICE**,
SELECTEJUICE and **O2PUR**, and

SCOTT BARTH, individually and as an
officer, director, manager, agent and/or owner
of the above named entity,

RESPONDENTS

**SECOND AMENDED NOTICE OF
ADMINISTRATIVE HEARING**

Case no **CP-16-011**

TO ALL PARTIES

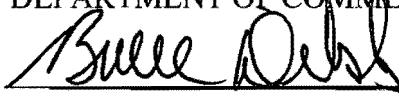
At the request of the parties to continue the prior hearing date of these matters, these two matters will come for hearing at the Division's offices at 160 East 300 South, Room 250, Salt Lake City, Tuesday, January 31, 2017 at 9 00 a m

Hearings are informal proceedings, conducted pursuant to the Utah Administrative Procedures Act, Utah Code Title 63G, Chapter 4 For further information, please see the

enclosed document INFORMAL HEARINGS BEFORE THE DIVISION OF CONSUMER
PROTECTION

DATED December 29, 2016

DEPARTMENT OF COMMERCE

A handwritten signature in black ink, appearing to read "Bruce L. Dibb", is written over a horizontal line.

BRUCE L. DIBB, PRESIDING OFFICER

DIVISION OF CONSUMER PROTECTION
STATE OF UTAH DEPARTMENT OF COMMERCE
160 E 300 S
PO BOX 146704
SALT LAKE CITY UT 84114

**INFORMAL HEARINGS BEFORE THE
DIVISION OF CONSUMER PROTECTION**

You have requested an informal hearing to contest an Administrative Citation issued by the Division of Consumer Protection. As you prepare for the hearing, please keep in mind the following:

- 1 **Notice** The enclosed Notice of Administrative Hearing specifies the time and date of the hearing. On the day of the hearing, the Division receptionist at the address listed above, on the second floor, will give you the room number for the hearing. The name of the Presiding Officer for the hearing is on your Notice. Please address the Presiding Officer by name (e.g., "Mr. Smith" or "Ms. Jones").
- 2 **Open Hearing** The hearing is open to all parties, and is open to the public unless closed by the Presiding Officer. The Division will record the hearing.
- 3 **Access to Information** Discovery is prohibited, but parties may have access to all materials and information the Division intends to present at the hearing. You may contact the investigator whose name appears on your citation to request access to this information.
- 4 **Legal Representation** You may represent yourself or be represented by an attorney. Ordinarily, the Division is not represented by an attorney at the hearing.
- 5 **Issues** The primary issues for the hearing are:
 - Was there a factual and legal basis to issue the Citation?
 - If so, was it fair to issue the Citation?
 - If so, what is the appropriate penalty?
- 6 **Burden of Proof** If you are denying the offense, the Division is responsible to prove its case against you by substantial evidence. If you are admitting the offense, you are responsible to prove that the Citation should be dismissed or the penalty should be reduced.
- 7 **Evidence** All parties may testify, present evidence, and comment on the issues. In presenting evidence, any party may examine witnesses and submit exhibits. At the request of either party, or at his or her own initiative, the Presiding Officer may examine a witness. Any party may ask to present a witness by telephone. The Presiding Officer will exclude any evidence he or she deems irrelevant, repetitious or improper. **If you have documents or other records to support your position, you must provide them. You may give them to the Division ahead of hearing or bring two (2) copies with you to the hearing.**
- 8 **Final Order** Following the hearing, the Presiding Officer will take the matter under advisement and make a recommendation to the Division Director, who will issue a Final Order to uphold, dismiss or modify the Citation. The Final Order will include a notice of any right of administrative or judicial review.

You should not rely on this letter alone for instructions regarding informal hearings. The hearing is governed by law Utah Administrative Procedures Act, see Utah Code Annotated § 63G-4 et seq., (2008), Utah Division of Consumer Protection, see Utah Code Ann. § 13-2 et seq., and rule (Department of Commerce Administrative Procedures Act Rules, see Utah Admin. Code R151-4). You may access these laws and rules at your local library or by visiting <http://le.utah.gov> and/or <http://www.rules.utah.gov> and searching for the above named statutes or rules.

You may contact the Presiding Officer with any technical or procedural questions, but the Presiding Officer may not discuss the merits of the case with you.

Revision Date May 7, 2013

CERTIFICATE OF SERVICE

I hereby certify that I have this day served this SECOND AMENDED NOTICE OF ADMINISTRATIVE HEARING on the parties of record in this proceeding set forth below by delivering a copy by email to

the Respondents

Roger J McConkie
Prince Yeates
rjm@princeyeates.com

the Division of Consumer Protection

Liz Blaylock
lblaylock@utah.gov

Adam Watson, Chief Investigator
awatson@utah.gov

Dated this 29th day of December, 2016

/s/ Bruce L Dobb
Bruce L Dobb



Bruce Dibb <bdibb@utah.gov>

Second Amended Hearing Notice - Barth, O2PUR et al.

2 messages

Bruce Dibb <bdibb@utah.gov>

Thu, Dec 29, 2016 at 9 36 AM

To rjm@pnnceyeates.com, Elizabeth Blaylock <lblaylock@utah.gov>, Adam Watson <awatson@utah.gov>, Julie Price <julieprice@utah.gov>

To All

Attached is the Amended Notice moving the hearing date to January 31st in the referenced matters

Would you kindly note that this is a second extension and that I am unlikely to grant a further extension except for the narrow circumstances mentioned in R151-4-109(2)(b)

Bruce L. Dibb, ALJ

**Signed 2nd Amended Notice of Hearing.pdf**

148K

Adam Watson <awatson@utah.gov>

Thu, Dec 29, 2016 at 9 36 AM

To bdibb@utah.gov

I will be out of the office until January 3, 2016. Please call the main office number, 801-530-6601, for immediate assistance. Thank you.