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**Memorandum**

**To:** Zoe Foss

**From:** Examinee

**Date:** February 21, 2023

**Re:** Jamine Hill matter

**Deceptive Trade Practices Claim**

The four elements of a DTPA claim are (1) the plaintiff is a consumer; (2) the defendant engaged in one or more of the false, misleading or deceptive acts in §204; (3) the acts constituted a producing cause of the plaintiff's damage; and (4) the plaintiff relied on the defendant's conduct to his or her own detriment. *Gordon(2009)*

**I. Consumer**

A consumer is defined in §203 as an individual seeking any good or service. In our case, Ms. Hill is clearly a consumer because she was an individual seeking to acquire a boat. §203

**II. False, misleading, or deceptive acts**

Are the statements made by Mr. Stevens in person and via email constitute a false, misleading, or deceptive act or are they "mere puffing"? There are three factors that determine whether a representation is "mere puffing": (1) the specificity of the alleged misrepresentation; (2) the comparative knowledge of the consumer and the seller; (3) whether the representation relates to a past or current condition. *Gordon (2019)*

1) In *Salas v. Crawford*, the court found the descriptions of luxurious and rugged to be mere opinion. Therefore, the statement by Mr. Stevens that the boat was a "gem" would be considered mere puffery. However, the more specific statements that the boat was "in great condition" and "runs like new" are likely to satisfy the first test.

2) Representations made by a provider with greater knowledge and experience than the consumer are more likely to be actionable. *Gordon(2019)* In our case, it is clear Mr. Stevens had much more knowledge and experience about boats than Ms. Hill. He is the owner of a boat store while Ms. Hill has never owned a boat and only operated one a few times.

3) Statements about current conditions are more likely actionable. *Gordon (2019)* The statements by Mr. Stevens of the boat being in "great condition" and running like new are clearly about the current condition of the boat.

**III. Producing Cause**

A producing cause is a substantial factor that brings about injury, without which the injury would not have occurred. *Diaz* Here, Mr. Stevens' representations of the quality of the boat were clearly a substantial factor in Ms. Hill making the purchase. Ms. Hill expressed her concerns about the age and quality of the boat only to have Mr. Stevens assuage those concerns with his representations of the boat's quality.

#### **IV. Detriment**

It is obvious Ms. Hill suffered a loss due to her reliance on Mr. Stevens' conduct. Because of his conduct she suffered economic damages by having to pay for repairs to the boat.

#### **Damages**

##### **I. Economic Damages**

A plaintiff may recover "economic damages" where the defendant's misconduct was a producing cause. Fr. Bus. Code §205 Economic damages includes the total loss sustained which includes related and reasonably related necessary expenses. *Gordon (2019)* In *Gordon*, the court recognizes that Section 203(f) includes repair or replacement. Therefore, Ms. Hill will be able to recover the \$3000 cost to replace the broken engine.

##### **II. Treble Damages**

To justify an award of treble damages, the plaintiff must prove the defendant's actions were taken "knowingly". *Abrams(2012)* Knowledge may be inferred where objective manifestations indicate that a person acted with actual awareness. *Gordon(2019)* In our case, we have evidence that Mr. Stevens knew he was making false statements. The mechanic found epoxy glue residue in the cracks of the engine. He also stated he could tell the glue was recently applied. It is also telling the Mr. Stevens only allowed the boat to run for a short period of time out of the water. The mechanic stated the engine could run with a cracked engine for a few minutes, but would seize up after running for an extended period of time in the water. Therefore, Ms. Hill will likely be able to recover treble damages.

##### **III. Mental Anguish**

An award for damages for mental anguish implies a relatively high degree of pain and distress beyond mere worry or anxiety. The court in *Abrams* found that the disappointment and despair experienced by the plaintiff were enough to award damages for mental anguish. In our case, Ms. Hill has stated her disappointment, feeling infuriated, and feeling of being "had". Although it is a high bar, Ms. Hill may be able to recover for mental anguish.

##### **IV. Attorney's Fees**

The recovery of attorney's fees is mandatory for a prevailing DTPA plaintiff. Therefore, Ms. Hill will be able to recover court costs and attorney's fees.

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**MEMORANDUM**

**To:** Zoe Foss

**From:** Examinee

**Date:** February 21, 2023

**Re:** Re: Jasmine Hill matter

**Introduction**

I have been asked to draft a memorandum analyzing whether our client, Ms. Jasmine Hill, has one or more claims against Reliant under the Franklin Deceptive Trade Practices Act (DTPA)(Fr. Bus. Code §§ 200 *et seq.*), as well as discuss what specific relief Ms. Hill would be entitled to if she were to succeed in a DTPA action. After analyzing the facts and applicable legal authorities, I believe Ms. Hill may have successful claims under § 204(d)(ii) of the DTPA for misrepresentations by Reliant about the standard, quality, or grade of the boat; and under § 204(g) for Reliant's failure to disclose information regarding the boat that was known at the time of the transaction. If Ms. Hill were to succeed in these claims, she would be entitled to both economic damages and treble damages.

This memorandum will only focus on Ms. Hill's potential DTPA claims.

**Discussion**

The DTPA prohibits "[f]alse, misleading, or deceptive acts or practices in the conduct of any trade or commerce." § 204. In order to assert a DTPA claim, the following elements must be met: (i) the plaintiff is a consumer; (ii) the defendant engaged in one or more of the false, misleading, or deceptive acts enumerated in § 204; (iii) the act(s) constituted a producing cause of the plaintiff's damage; and (iv) the plaintiff relied on the defendant's conduct to his or her detriment. *Gordon v. Valley Auto Repair, Inc.*, (Fr. Ct. App. 2009) (citing *Diaz v. Ellis* (Fr. Sup. Ct. 1998); Fr. Bus. Code § 205(a)). Actionable representations may be oral or written. *Diaz*. The plaintiff consumer has the burden of proof to each element. *Id.* Ms. Hill is a consumer since she purchased a used boat from a retailer, Reliant. The following sections will discuss the enumerated acts in § 204 that apply to Ms. Hill's case, as well as the specific relief she may be entitled to.

Representations About Standard, Quality, or Grade of Goods--§204(d)(ii).

Ms. Hill potentially has a claim against Reliant under § 204(d)(ii) for false, misleading, or deceptive acts representing that goods or services "are of a particular standard, quality, or grade if they are of another." According to Ms. Hill and the emails she provided between herself and Mr. Greg Stevens, the owner of Reliant, Mr. Stevens represented the used boat as one that was "in excellent condition," "without defect," and would "run like new." These statements were arguably a misrepresentation about the quality of the boat since, not long after Ms. Hill purchased it, the boat's engine failed and had to be replaced. However, Mr. Stevens may argue that the representations he made to Ms. Hill were "mere puffing."

In *Gordon*, the Court found that the statements made to plaintiff about the repairs done to his car by the repair shop employee's were merely puffing because they were "too general and indefinite" and thus not actionable under the DTPA. The Court described the three factors that determine whether a representation is "mere puffing,": (i) the specificity of the alleged misrepresentation; (ii) the comparative knowledge of the consumer and the seller or service provider; and (iii) whether the representation relates to a past or current condition as opposed to a future event or condition. *Diaz*. Here, Mr. Stevens made several representations to Ms. Hill about the boat. First, he encourage Ms. Hill to purchase the Envoy over the Mariner. He referred to the Envoy as a "real gem" that was a "perfect fit" for her and her family, and stated that the boat was in "excellent condition" and "runs like new." Mr. Stevens turned the engine on for Ms. Hill to show that the Boat was running fine. The bill of sale also stated that Mr. Stevens had "no knowledge of any defects in and to the Boat." Calling the boat a real gem, a "perfect fit," and encouraging Ms. Hill to buy the Envoy over the Mariner may fall into the category of "mere puffing" since they are vague, compare one product to another and claim superiority, and were a mere opinion of what boat Ms. Hill would like best. *Gordon*. These statements are similar to the dealership's description of the vehicle in *Salas v. Carworld* (Fr. Ct. App. 2003) as "luxurious" and "rugged" which were found to be mere opinion or puffery.

However, the statements that the boat was in "excellent condition" and "runs like new" are not vague or indefinite. These statements were made in response to Ms. Hill's concern about the boats age and needing repairs. Mr. Stevens is the owner of a used boat shop, thus he has greater knowledge as to the condition of the boats than Ms. Hill, a first time boat buyer with limited experience in operating a boat. This is especially relevant for the fact that Mr. Stevens ran the engine for a short period of time in front of Ms. Hill to show it was working, since Ms. Hill was not aware that some engine problems are undetectable without testing for a longer period on the water. Statements about past or current conditions are more like to be actionable than statements about the future. *Gordon*. These statements are about the current condition of the boat, even though Ms. Hill was concerned about future repairs. Thus, these statements are actionable.

#### Failure to Disclose--§ 204(g).

Ms. Hill also has a potential claim against Reliant for failing to disclose information concerning the boat under § 204(g). To assert this claim under the DTPA, the plaintiff must show that (1) the defendant failed to disclose information about goods or services (2) known by the defendant at the time of the transaction and (3) intended to induce the consumer to enter into a transaction (4) into which the consumer would not have entered had the information been disclosed. *Abrams v. Chesapeake Business College* (Fr. Ct. App. 2012); § 204(g).

Here, Mr. Steven's failed to disclose that the engine block of the boat purchased by Ms. Hill was cracked and needed to be replaced. The report from the boat repair service provides evidence that the engine block was broken when Ms. Hill purchased the boat. However, it is not clear whether or not Mr. Stevens knew the engine was cracked. The bill of sale for the purchase stated that the seller had "no knowledge of any defects in and to the Boat." However, the report from the repair shop shows that epoxy glue was found on the engine crack, which indicates that the engine block had been previously damaged and someone attempted to repair it. It is not clear from the facts we have at the moment whether or not Reliant was the one who repaired the engine crack with

epoxy glue or if it was done by the previous owner before they sold it to Reliant. Still, as a used boat shop, Reliant likely conducts inspections before purchasing a used boat to sell in their shop. Thus, it is possible Reliant did have knowledge of the engine block crack at the time they sold it to Ms. Hill.

Ms. Hill stated herself that she would not have purchased the boat if she had known about the engine issues. Ms. Hill is a first time boat buyer who has limited experience operating a boat, so she relied on Mr. Stevens opinions as a used boat shop owner in getting recommendations on the type of boat that would be suited for her and the condition of the boat. Ms. Hill asked Mr. Stevens about the condition of the boat because she was concerned about its age and whether it needed future repairs. Thus, Ms. Hill would not have purchased the boat if she had been informed of the engine issues.

## Damages

In order to assert a claim under DTPA, the plaintiff must show the deceptive act of the defendant was a producing cause of the damages the plaintiff incurred. A plaintiff may recover "economic damages" where the defendant's misconduct was a producing cause. *Gordon*; § 205. In *Abrams*, the court found that the false and misleading representations in the college's catalogue were a producing cause because the plaintiff relied on the representations in deciding not to cancel the agreement and instead pay additional tuition. Here, Mr. Stevens encouraged Ms. Hill to buy the Envoy over the Mariner, turned the motor on for a few seconds to show it was running properly, and responded to Ms. Hill's concerns about the boat's age by claiming it was in excellent condition. As explained above, the repair of the boat's engine and the report provided are proof that these statements were false. Like in *Abrams*, Ms. Hill relied on these representations in deciding to purchase the Envoy from Reliant over another boat. Thus, the representations made by Reliant were a producing cause of Ms. Hill's damages from repairing the boat, and she will be entitled to economic damages.

Economic damages include "the total loss sustained by the consumer as a result of the deceptive trade practice," and includes related and reasonably necessary expenses. *Diaz*. In *Gordon*, the trial court awarded the plaintiff economic damages that included the repair costs he incurred and lost net profits. Thus, Ms. Hill will be entitled to the cost of replacing the boat's engine, as well as any other expenses related to its repair.

Ms. Hill may also be entitled to treble damages and damages for mental anguish if she can prove that the defendant's actions were taken "knowingly." § 205(b)(2). The DTPA defines knowingly as "actual awareness" of the falsity, deception, or unfairness of the act or practice giving rise to the consumer's claim; and knowledge may be inferred where objective manifestations indicate that a person acted with actual awareness. *Gordon*. If, as explained earlier, Ms. Hill can prove that Reliant knew about the engine damages and concealed it from her to induce her into making the purchase, then Ms. Hill will be entitled to exemplary damages three times the amount of her economic damages (treble damages). She may also be entitled in that case to damages for mental anguish. Damages for mental anguish "implies a relatively high degree of pain and distress beyond mere worry or anxiety," and includes pain resulting from "grief, severe disappointment, indignation, wounded pride," etc. *Oliver v. Elite Systems*. In *Abrams*, the court awarded damages for mental anguish because the plaintiff felt severe disappointment with the academic program, wounded pride for being tricked, and such severe despair that she dropped out of college. Here, the mental anguish suffered by Ms. Hill may not be enough to award damages. Unlike the severe emotional distress caused by being duped into enrolling and paying for college, Ms. Hill's distress was mainly over not being able to use the boat on a weekend trip as planned. Thus she will likely not be awarded damages for mental anguish.

## **Conclusion**

Ms. Hill may have successful claims under § 204(d)(ii) of the DTPA for misrepresentations by Reliant about the standard, quality, or grade of the boat; and under § 204(g) for Reliant's failure to disclose information regarding the boat that was known at the time of the transaction. However, to succeed on the failure to disclose claim, we must acquire more facts as to whether Reliant was aware of the engine issues. If Ms. Hill were to succeed in these claims, she will be entitled to both economic damages for the cost of repairs, attorney's and court fees, and treble damages.

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