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**VIA EMAIL**

Bruce L. Dibb, Administrative Law Judge
Heber M. Wells Building, 2nd Floor
160 East 300 South
Salt Lake City, UT 84114
bdibb@utah.gov

Re: **The Matter of Purdue Pharma L.P. et al., DCP Case No. 107102**

Dear Judge Dibb:

At oral argument, the Sackler Respondents heavily relied on a point first made in their Replies to argue that the Division cannot exercise personal jurisdiction under the "effects" test, claiming that a line of Supreme Court and Utah Supreme Court cases effectively eliminated personal jurisdiction for national marketing efforts. The Division, circumspectly, writes to clarify the record.

The Sackler Responders rely heavily on *Calder v. Jones*, 465 U.S. 783 (1984), a case they did not cite or acknowledge at all in their Motion, and *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 310 (2011). *See* Mem. 25-26; Reply 10-14. In *Nicastro*, the "plurality would have permitted the exercise of jurisdiction 'only where the defendant can be said to have targeted the forum"' where the defendant sent its goods, rather than its agents, into a jurisdiction. *Plixer Int'l, Inc. v. Scrutinizer GmbH*, 906 F.3d 1, 9 (1st Cir. 2018); *Nicastro*, 564 U.S. at 882 (noting that the manufacturer did not advertise or send employees to New Jersey or otherwise seek to serve the New Jersey market, into which less than a handful of its products eventually made their way). Justice Breyer concurred in the result in *Nicastro*, but declined to adopt the plurality's "targeting" rule, such that it is not even the controlling precedent. *See Greene v. Karpeles*, 2019 WL 1125796, at *6 (N.D. Ill. Mar. 12, 2019) (explaining that "[a]lthough th[e] inquiry asks whether the defendant 'targeted' the forum State, it is not necessary for [the defendant] to have singled out [that State] for his business activities"; rather, he could "purposefully direct his activities toward the forum state "just as he had toward all the other states") (citation and alteration omitted) As the First Circuit noted, "this rule did not command a majority on the Court and so is not binding here." *Plixer*, 906 F.3d at 9; *see also Greene*, 2019 WL 1125796, at *6 (citing *Plixer* and recognizing the First Circuit joined "the Fifth, D.C., and Federal Circuits in deeming Justice Breyer's concurrence in *J. McIntyre* to be the controlling opinion under *Marks v. United States*, 430 U.S. 188, 193 (1977)").[1]

[1] In oral argument, the Sackler Respondents quoted extensively from an opinion written by then Judge Sotomayor concerning inapposite circumstances of "randomly su[ing] any out-of-state corporate employee" who might "turn[] out not be involved in the relevant misconduct" but identify other targets, *Karabu Corp. v.*

Thus, the Sackler Respondents are simply wrong to urge that case law commands that because they targeted a market that extends into, but also beyond, Utah's borders, they are not subject to Utah's jurisdiction. *Greene*, 2019 WL 1125796, at *6 & *7 (noting that to hold otherwise would "lead to the absurd result that a defendant conducting business in a handful of States, or even 49 States, is amenable to suit in each of those States, but that a defendant with substantial business nationwide is amenable to suit only in his home State(s)"); *see also Keim v. ADF MidAtlantic, LLC*, 199 F. Supp. 3d 1362, 1370 (S.D. Fla. 2016) (upholding jurisdiction under the effects test over defendant who promoted brand not limited to any specific geographic region).

Finally, the Sackler Respondents emphasized at the hearing an argument also offered for the first time in their Replies, that the Division must show that the "brunt" of the harm to all persons injured by their misconduct was suffered in Utah. That is not the law. Respondents rely primarily on *ClearOne, Inc. v. Revolabs, Inc.*, 2016 UT 16, 369 P.3d 1269, a case that simply applied the Supreme Court's decision in *Walden v. Fiore*, 571 U.S. 277 (2014), and in which the defendant submitted an affidavit stating that it "does not direct any advertising into Utah." *Id.* at 1271. The only reference to the "brunt" of the injury in *Walden* occurs in the context of describing the reasons personal jurisdiction in California was proper in *Calder*. *Id.* at 287 (explaining that in *Calder*, "the 'brunt' of that injury was suffered *by the plaintiff* in that State" (emphasis added)). As these cases make clear, the focus of the jurisdictional inquiry is the nexus between the *jurisdiction* and the action, the concept expressed in *Walden's* "brunt" of the injury language. Here, Purdue is not contesting jurisdiction, and there is no question that the marketing at issue targeted Utah.

Respectfully submitted,

*/s/ Linda Singer*

Linda Singer

cc: All counsel of record

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*Gitner*, 16 F. Supp. 2d 319 (S.D.N.Y. 1998), but failed to acknowledge a Tenth Circuit precedent directly on point, written by then Judge Gorsuch, which held that "actions that 'are performed for the very purpose of having their consequences felt in the forum state' are more than sufficient to support a finding of purposeful direction under *Calder*." *See Dudnikov v. Chalk & Vermillion Fine Arts, Inc.*, 514 F.3d 1063, 1078 (10th Cir. 2008) (Gorsuch, J.) (quoting *Finley v. River N. Records, Inc.*, 148 F.3d 913, 916 (8th Cir. 1998) (holding jurisdiction proper when an out-of-state defendant sent fraudulent material into the forum state with the purpose of inducing reliance, and such reliance was the harmful effect for which plaintiff sought redress)).