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

IN THE MATTER OF: **PURDUE PHARMA L.P.; PURDUE PHARMA INC.; THE PURDUE FREDERICK COMPANY INC.; RICHARD SACKLER, M.D.; and KATHE SACKLER, M.D.,** **Respondents.**	**PURDUE'S MOTION TO EXCLUDE EXPERT TESTIMONY BY GIL A. MILLER** **DCP Legal File No. CP-2019-005** **DCP Case No. 107102** **Oral Argument Requested**

Pursuant to Utah Admin. Code R151-4-301 and R151-4-504(c), Respondents Purdue Pharma L.P., Purdue Pharma Inc., and The Purdue Frederick Company Inc. (collectively, "Purdue"), through counsel, submit this *Motion to Exclude Expert Testimony by Gil A. Miller*, and request oral argument on the same.

SUMMARY

The deadline for the Parties to exchange expert disclosures was July 12, 2019. On that date, the Division filed what purported to be the "Expert Report of Gil A. Miller" ("Miller Report" or "Report") relating to the number of "potential violations" of the UCSPA committed by Purdue. Yet, the Miller Report did not "contain[] a complete statement of all opinions the expert will offer at the hearing and the basis and reasons for them," as ***required*** by the Division's rules. UTAH ADMIN. CODE R151-4-504(1)(a). Instead, Miller indicated that he would prepare expert opinions ***later***, if he received certain data and information. The rules are clear and leave no room for discretion: "[i]f either party fails to file its disclosure within the time frames in R151-4-504(1), the presiding officer . . . ***shall*** exclude the expert testimony from the proceeding." *Id.* R151-4-501(1)(c) (emphasis added). The Division is not permitted to buy itself additional time by filing what is, at most, a placeholder report, and say that it lacks the necessary documents. It was the Division's own choice to initiate this expedited proceeding, in which expert discovery would necessarily have to occur simultaneously with fact discovery. The Division has repeatedly represented to this Tribunal that it can meet its discovery burdens on this highly expedited timeline. The failure to do so is a problem of its own making. If the Division needed more time, it should have continued to litigate this matter in a court of law. Moreover, it is ***Purdue***, not the Division, that has been substantially prejudiced by the lack of discovery. To date, the Division has not produced a single document in response to Purdue's discovery requests. In contrast, the Division has had access to millions of documents from Purdue through the MDL since ***January***. Because Miller failed to disclose any expert opinions, he must be excluded from testifying.

BACKGROUND

This matter ***must*** conclude by November 4, 2019. To comply with this expedited deadline, this Administrative Law Judge Dibbs ordered the parties simultaneously to serve expert disclosures under the governing rules no later than July 12, 2019. At the April 17, 2019 hearing on the Division's motion to convert to a formal proceeding, the Division represented to Judge Dibb: "We do feel comfortable, your Honor, that we'll be able to present our case in the time that's allotted in the administrative proceeding. . . . [W]e feel like we can finish all we need to do within that time period." (Hr'g T. at 9:2–8.) The Division's counsel further argued that "the rules, in my reading, are clear that in a formal proceeding, both sides exchange expert reports, [and] that experts can only testify as to matters that are in their reports." (*Id.* at 20:1–9.) The Division also represented that "this is not an overly complicated matter for an expert to testify about" and that "certainly [the Division] do[es]n't need an army of experts." (*Id.* at 62:13–22.) In his Order on Purdue's Motion to Dismiss, Acting Director Parker emphasized that the Division would be required to provide complete and thorough expert reports by the deadline set in the scheduling order, or face exclusion of its experts. (Mot. to Dismiss Or. at 11 (recognizing the automatic exclusion of R151-4-504(1)(a)(ii) is a "clear direction" that provides "a significant incentive for the written report to be robust and informative").)

On July 12, 2019, Purdue timely and properly submitted its expert disclosures, despite the fact that the Division had not yet (and ***still*** has not) produced a single document responsive to Purdue's discovery requests. The Division also filed its expert disclosures on July 12, including the Miller Report. The Miller Report consists of just twelve paragraphs, nine of which relate to Miller's background, education, and compensation. The only three paragraphs even mentioning the substance of this proceeding state, in full:

9. I have been retained by the Utah Division of Consumer Protection to calculate, if needed, the number of separate occurrences in which the Utah Consumer Sales Practice Act ("CSPA") may have been violated by the Respondents in this matter using the methodology discussed below.

10. It is my professional opinion that: (1) with instructions on the statements, omissions, or other conduct by Respondents that violated the CSPA; (2) data on the number of sales visits, website views, programs, events, publications, and other conduct carried out in, directed to, or accessed by Utah patients, prescribers, and payors, I could calculate the number of occurrences of Respondents' potential violations of the CSPA in Utah.

11. I have been informed by counsel that Respondents have not yet produced information in discovery that allow the number of occurrences to be calculated. When that information is provided, I would be able to calculate the number of occurrences, if needed.

(Miller Report, ¶¶ 9–11.)

ARGUMENT

The Miller Report does not provide any opinions, basis, or reasons, as required by R151-4-504. Because the deadline for expert reports has passed, the Presiding Officer must exclude any expert testimony by Miller from the hearing.

I. THE MILLER REPORT CONTAINS NO OPINIONS, BASIS, OR REASONS

On July 12, 2019, pursuant to the Scheduling Order and R151-4-504(1)(a), the Parties were required to "provide a written report signed by the expert that contains a complete statement of all opinions the expert will offer at the hearing and the basis and reasons for them." UTAH ADMIN. CODE R151-4-504(1)(a). The Miller Report fails to provide a complete statement of Miller's opinions. In fact, the Miller Report does not contain any opinions at all. An opinion is "[a] person's thought, belief, or inference, esp[ecially] a witness's view about a facts in dispute, as opposed to personal knowledge of the facts themselves." OPINION, BLACK'S LAW DICTIONARY (11th ed. 2019); *see also* EXPERT OPINION, BLACK'S LAW DICTIONARY ("An opinion offered by a witness whose knowledge, skill, experience, training, and education qualify the witness to help a fact-finder understand the evidence or decide a factual dispute.").

The Miller Report does not provide any of Miller's thoughts, beliefs, inferences, or views about anything. At most, the Miller Report suggests that Miller may, at some undetermined point in the future, opine on the number of separate occurrences in which the CSPA "may have been violated by the Respondents." (Miller Report ¶ 9.) This does not constitute "a complete statement of all opinions the expert will offer at the hearing." R151-4-504(1)(a)(ii).

The Division was also required by rule to provide the "the basis and reasons" for Miller's expert opinions within the Miller Report. UTAH ADMIN. CODE R151-4-501(1)(a)(ii). Because the Miller Report failed to disclose opinions, it necessarily also failed to disclose any basis or reasons.

The Miller Report attempts to disclose a "methodology" that Miller would employ ***later***, "with instructions," ***if*** discovery ***eventually*** reveals any facts supporting the Division's baseless claims. (Miller Report ¶¶ 9–10.) Specifically, Miller states that he could calculate the number of occurrences of potential violations of the CSPA, "if needed," with "instructions on the statements, omissions, or other conduct by Respondents that violated the CSPA"[1] and data on events such as sales visits, website views, programs, and others. (Miller Report ¶ 11.) First, a methodology is not an opinion, and cannot, by itself, satisfy the State's disclosure requirements, Second, this is not a methodology; it is simply the identification of inputs and assumptions. Methodology is what an expert would ***do with those inputs***. *See* METHOD, BLACK'S LAW DICTIONARY (11th ed. 2019)

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[1] These are, of course, the misrepresentations the Division has alleged Purdue made. Notably, despite being ordered by Judge Dibbs to identify these representations in ***June***, the Division still has not done so.

("A mode of organizing, operating, or performing something . . . .").[2] Plainly, the mere identification of categories of data to be reviewed does not provide Purdue notice of the methodology Miller would apply to this hypothetical future data.

Accordingly, the Miller Report plainly does not satisfy the requirements of R151-4-501.

II. BECAUSE THE DIVISION FAILED TO DISCLOSE MILLER'S OPINIONS AND HIS BASIS AND REASONS, MILLER MUST BE EXCLUDED FROM OFFERING ANY EXPERT TESTIMONY

The Division's rules ***require*** that Miller be excluded from presenting expert testimony at the hearing for two reasons.

First, an expert is prohibited from "testify[in]g in a party's case-in-chief concerning any matter not fairly disclosed in the report." R151-4-501(1)(a)(ii). The Utah Court of Appeals has made clear that the identical language in Utah Rule of Civil Procedure 26 "locks in the scope of the expert's testimony." *Arreguin-Leon v. Hadco Constr. LLC*, 2018 UT App 225, ¶ 21, 438 P.3d 25, *cert. granted,* No. 20190121, 2019 WL 2751143 (Utah May 22, 2019). As detailed above, the Miller Report has failed to disclose ***any*** opinions whatsoever. The Division is locked into what it chose to produce, and, based on that production, there is ***literally*** no opinion to which Miller could testify at the hearing. Because the Division has failed fairly to disclose ***any*** expert opinions in the Miller Report, R151-4-501(1)(a)(ii) requires exclusion.

[2] At most, Miller's "methodology" appears to be nothing more than simple multiplication. Performing basic math functions is not a proper subject for expert testimony. *See* Utah R. Evid. 702 (permitting expert testimony only "if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue"); *see also James River Ins. Co. v. Rapid Funding, LLC*, 658 F.3d 1207, 1214 (10th Cir. 2011) ("A mathematical calculation well within the ability of anyone with a grade-school education is, in our opinion, more aptly characterized as a lay opinion . . . ."). If Miller's "methodology" is something other than the multiplication function, that only further demonstrates the deficiencies of the Division's disclosure because Purdue has no notice of it.

Second, and separately, the rules provide that "[i]f either party fails to file its disclosure within the time frames in R151-4-504(1), the presiding officer: (i) ***shall*** exclude the expert testimony from the proceeding." UTAH ADMIN. CODE R151-4-501(1)(c) (emphasis added). The deadline for expert disclosure was July 12, 2019. By that date, the Division was ***required*** to produce "a written report signed by [Miller] that contains a complete statement of all opinions [Miller] will offer at the hearing and the basis and reasons for them." UTAH ADMIN. CODE R151-4-501(1)(a). Because the Miller Report does not contain these necessary elements, Miller's testimony must be excluded.

The rules do not allow the Division to kick the can down the road. The reason for this is clear: given the expedited nature of UCSPA administrative proceedings, the failure timely to produce an expert report necessarily prejudices the opposing party. Here, the Division's failure to provide an adequate expert report substantially prejudices to Purdue. The Division ***still*** has not identified the representations that it believes violated the UCSPA. Nor has it indicated the amount of penalties it seeks or the methodology it intends to use to determine that amount.[3] Consequently, Purdue is forced to defend itself blindfolded and handcuffed, remaining unable to target its discovery—the window for which is rapidly closing—to address and test the Division's theory of the case. Moreover, without actual opinions from the Division's designated expert—and without any other discovery from the Division—Purdue cannot possibly prepare its rebuttal report: how could Purdue's expert rebut the so-called opinion that Miller ***will*** "calculate, if needed, the number of separate occurrences" of UCSPA violations some day in the future? How could Purdue's expert

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[3] Significantly, the Division has also failed to produce ***any*** expert on causation or the harms alleged in its Citation. The Division itself conceded that the harms alleged caused by Purdue's conduct are necessary to evaluate the amount of any penalty in this case. Without an expert, it is not clear how the Division could possibly attempt to prove within the deadline that Purdue's conduct caused any harm whatsoever, let alone the extent of that harm.

challenge Miller's "professional opinion" that he ***will*** consider "instructions on the statements, omissions or other conduct by Respondents that violated the UCSPA" as well as data from various sources? How could Purdue's expert rebut Miller's "opinion" without any information about ***how*** Miller will consider those instructions and data? In short, there is nothing for Purdue to rebut. And if the Division is permitted to just submit a report by whatever deadline it pleases, Purdue will have no time to rebut that report before the hearing, let alone conduct other necessary follow-up discovery.

Given the Division's clearly deficient expert disclosure, Miller's testimony must be excluded.

III. THE DIVISION'S DEFICIENT EXPERT DISCLOSURE IS NOT EXCUSED BY THE EXPEDITED DISCOVERY TIMELINE

In his report, Miller states that he has been "informed by counsel that Respondents have not yet produced information in discovery that allow the number of occurrences to be calculated," and "[w]hen that information is provided, [he] would be able to calculate the number of occurrences, if needed." (Miller Report ¶ 11.) This is nothing more than a concession that the Miller Report is deficient and a naked attempt unilaterally to extend the already impossibly-tight deadlines.

The Division cannot blame Purdue for the Division's own deficient disclosure. Such fault rests squarely with the Division. Purdue has strenuously argued from the beginning of this administrative proceeding that the tremendous amount of work that needs to be done to litigate these issues fully and fairly cannot be done under the breakneck deadlines imposed by the Division's rules. The Division has categorically disagreed. Indeed, it was the Division that chose this forum, precisely ***because*** of its expedited pace. Yet, Purdue predicted that this exact situation would arise: the Division has simply "close[d] its eyes to the mountain of discovery needed fairly

to adjudicate these claims and vaguely assert[ed] that, ***somehow***, the Parties and the ALJ will be able to get this done within the deadline." (Purdue's Reply Mot. Dismiss at 9.) And having made its bed, the Division must now lie in it.

Purdue was forced to provide its expert reports ***without the Division having produced one single responsive document***. That alone has substantially prejudiced Purdue's ability to mount an effective defense. The Division, on the other hand, has had access to millions of Purdue's documents and scores of depositions through the MDL and its private counsel. In other words, ***Purdue***—not the Division—has been and remains at a distinct discovery disadvantage. Apparently ***none*** of the materials available to the Division, however, were provided to Miller for his analysis. (*See* Miller Report ¶ 11.) For example, Miller made no attempt to tabulate potential violations from the ***eleven years*** of call notes that have been available to the Division since ***before it issued the Citation in January***; no attempt to tabulate violations based on the Division's initial and supplemental disclosures identifying approximately 150 purportedly false statements (none of which were related to Utah within the statutory limitations period); and no attempt to tabulate violations based on documents identified by the Division's other experts. The only logical conclusion is that the Division has been wholly unable to identify ***any*** actionable conduct; if it had, the Division was required to identify and analyze that conduct and disclose that analysis in an expert report by July 12. Because it failed to do so, the rules mandate Miller's testimony be excluded.

CONCLUSION

The Division, of course, faces a tremendous burden: it must provide sufficient evidence, including expert testimony, to sustain its massive case in an incredibly short timeframe. But the Division chose that burden. Purdue has repeatedly said that it cannot be done, while the Division

has staunchly insisted that it can. The Division cannot now seek to avoid the consequences of its own tactical decisions by punting its expert disclosures to another day and blaming its deficient disclosures on Purdue. Because the Division has failed timely to comply with the rules governing expert disclosures, Gil A. Miller's testimony must be excluded from the hearing.

DATED: July 18, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on July 18, 2019, I caused a copy of the foregoing to be served by electronic mail upon the following:

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