Snell & Wilmer
L.L.P.
LAW OFFICES

15 West South Temple
Suite 1200
Gateway Tower West
Salt Lake City, UT 84101
801.257.1900
801.257.1800 (Fax)
www.swlaw.com

Elisabeth M. McOmber
(801) 257-1880
emcomber@swlaw.com



July 25, 2019

**VIA EMAIL**

Bruce L. Dibb, Presiding Officer
Administrative Law Judge
Heber M. Wells Building, 2nd Floor
160 East 300 South
Salt Lake City, Utah 84114-6701
bdibb@utah.gov

Re: In the matter of: Purdue Pharma L.P., et al.; DCP Case No. 107102

Dear Judge Dibb:

On July 18, 2019, the Division filed a Request for Approval from the Presiding Officer to Depose Parties and Non-Parties ("Request"). In that filing, the Division seeks to depose Purdue Pharma L.P.'s current CEO (Dr. Craig Landau) and three former CEOs (John Stewart, Mark Timney, and Michael Friedman) (together, "the CEOs"). Respondents Purdue Pharma L.P., Purdue Pharma Inc., and the Purdue Frederick Company Inc. (collectively, "Purdue"), through their undersigned counsel, hereby oppose the Division's Request. As set forth below, the requested depositions are prohibited by Utah Department of Commerce Administrative Procedures Act Rule 151-4-506. Purdue also moves, pursuant to Rule 151-4-507(1)(a), for a protective order preventing the same depositions. Purdue requests a hearing on this dispute.

## INTRODUCTION AND BACKGROUND

The Division has repeatedly characterized this proceeding as a "narrow[]" consumer protection case regarding allegedly misleading statements made to Utah physicians in Utah. *See* Transcript of Hrg. on Mot. to Convert at 21:11-17, 63:22-64:2. The Division previously represented that it would rely primarily on "depositions that have already been taken in the MDL and documents that have already been produced into the MDL." *Id.* at 9:18-10:1. Purdue has produced about ***50 million pages*** of documents, including the complete MDL production, all call notes reflecting visits from Purdue sales representatives to Utah healthcare professionals from 2006-2017, numerous board documents, transcripts of depositions of dozens of witnesses (including Dr. Kathe Sackler and Dr. Richard Sackler), Dr. Landau's custodial file, over 330,000 documents from Mr. Stewart, over 49,000 documents from Mr. Timney, over 468,000 documents from Mr. Friedman, and ***10,000 pages*** of Utah-specific documents. Purdue has also agreed to produce additional documents requested by the Division and all Utah call notes going back to 1995, long before the time period relevant to this action.

The Division's private counsel also previously said they would seek depositions from Purdue sales representatives, *see, e.g.*, Initial Disclosures at 22, 24-25, but they have not pursued those requests. Instead, the Division now asks to depose four current and former CEOs—senior executives with no ties to Utah and no unique knowledge of Purdue's sales, marketing, or promotional activities in Utah. The Division bears the burden to establish the depositions it seeks are necessary. R151-4-602(4). The Division's Request must be denied. The Division has not shown, and cannot show, that deposing the CEOs would yield any relevant information not otherwise available from either the massive amount of produced documents or from less senior employees. For the same reasons, a protective order barring such depositions is warranted.

## ARGUMENT

As an initial matter, it is beyond this tribunal's power to authorize service of subpoenas on Messrs. Stewart, Timney, and Friedman because they are out-of-state third parties. Under principles of comity, a forum state cannot compel the deposition of a non-party unless the deponent is subject to the jurisdiction of the forum state, such as by residence or by in-state service. *See Colorado Mills, LLC v. SunOpta Grains & Foods Inc.*, 269 P.3d 731, 734 & n.4 (Colo. 2012) (collecting cases). Otherwise, the subpoena must be pursued under the laws of the witness's home state. *See id.* at 734 & n.5. Utah follows this rule. *See* Utah R. Civ. P. 45(e)(3)(C) (allowing non-resident to challenge subpoena unless the non-resident was served in Utah); *Rahofy v. Steadman*, 2012 UT 70, ¶¶ 21-23 (holding that discovery of out-of-state nonparties must be conducted "according to the rules of that state"); *cf.* R151-4-513(4) ("A subpoena shall be served in accordance with the requirements of the jurisdiction in which service is made."). Because the former CEOs are not parties to this litigation and cannot be served in Utah, the Division can only seek their depositions under the laws of their home states.

Furthermore, deposing the CEOs is unwarranted and impermissible in this proceeding. The administrative rules provide that the party seeking a deposition bears "the burden of demonstrating the need for [the] deposition." R151-4- 602(4). The Division comes nowhere near meeting its burden to show that it is entitled to depose the CEOs. Indeed, the Rules affirmatively foreclose the Division's Request. Under Rule 151-4-506, the presiding officer "***shall***" limit discovery, even *sua sponte*, where:

> (1) the discovery sought is unreasonably cumulative, duplicative, or is obtainable from some other source that is (a) more convenient; (b) less burdensome; or (c) less expensive;
> (2) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or
> (3) the discovery is unduly burdensome or expensive, taking into account: (a) the needs of the case; (b) the amount in controversy; (c) limitations on the parties' resources; and (d) the importance of the issues at stake in the litigation.

The Division's Request fails all three prongs of this test. First, the Division fails to show that the discovery it seeks is not "obtainable from some other source." R151-4-506(1). Specifically, it has not shown that deposing the CEOs would yield any relevant information beyond (1) what is found in the mountain of documents it has already requested and received or (2) what it could obtain by deposing other witnesses. Under the well-established "apex doctrine," senior executives can be deposed only if they possess unique personal knowledge unobtainable elsewhere. *See, e.g.*, *United Auto Ins. v. Stucki & Rencher, LLC*, No. 15-cv-834, 2018 WL 1054361, at *1 (D. Utah Feb. 23, 2018) (denying motion to compel deposition of CEO). Second, in light of the documents that have already been produced by Purdue, the Division "has had ample

opportunity by discovery in the action to obtain the information sought." R151-4-506(2). Third, especially given the availability of the requested information from other sources, the Division's Request is "unduly burdensome." R151-4-506(3). The CEOs did not have unique responsibilities related specifically to Utah; for example, they were not Utah representatives or managers. They simply have no connection to Utah or to the Division's claims.

In addition, a party may request a protective order to prevent "annoyance, embarrassment, oppression, or undue burden or expense." R151-4-507(1)(a). For the same reasons that the proposed depositions would be unnecessary and unduly burdensome under Rule 151-4-506, they would also be annoying, oppressive, and unduly burdensome under Rule 151-4-507. The Division's Request is nothing more than a transparent attempt to get discovery for use in other proceedings. Therefore, the Division's Request must be denied, and a protective order should be issued preventing the Division from deposing the CEOs.

## I. THE DIVISION'S ACCESS TO MILLIONS OF DOCUMENTS PURDUE HAS ALREADY PRODUCED RENDERS THE PROPOSED DEPOSITIONS UNNECESSARY AND UNDULY BURDENSOME.

The Division's own statements in this proceeding show why the proposed depositions are barred under Rule 151-4-506. According to the Division, the only issues in this "narrow[]" case, *see* Transcript of Hrg. on Mot. to Convert at 21:11-17, are (1) what marketing statements were made in Utah and (2) whether those statements were false. *Id.* at 63:22-64:2. Consistent with this position, the Division stated at the hearing on its Motion to Convert that "we don't anticipate needing a huge amount of discovery, because the only claim is for those violations of the Consumer Sales Practices Act." *Id.* at 9:18-10:1. Indeed, the Division said that it would rely primarily on "depositions that have already been taken in the MDL and documents that have already been produced into the MDL," *id.*, especially call notes and nationwide "marketing materials." *Id.* at 61:7-62:5.

The Division can obtain all of the information available concerning any marketing statements made in Utah from the MDL production and the Utah-specific productions Purdue has made. These documents include complete Utah call notes and transcripts of depositions of dozens of current and former Purdue employees. Thus, the Division's Request is "unreasonably cumulative, duplicative, or is obtainable from . . . source[s]" that are more convenient, less burdensome, and less expensive than deposing high-ranking former and current executives. R151-4-506(1). Similarly, these millions of documents afford the Division "ample opportunity" to obtain the information it seeks without the need to depose any of the CEOs. R151-4-506(2). Because the Division has not demonstrated why the information it seeks is unobtainable from the millions of documents Purdue has produced, including documents pertaining to the CEOs themselves, the Division has not met its burden to show that depositions of the CEOs are necessary or appropriate in this proceeding.

## II. THE DIVISION CANNOT DEPOSE SENIOR EXECUTIVES WHO LACK UNIQUE PERSONAL KNOWLEDGE RELEVANT TO THE CASE.

Courts across the country, including the Court of Appeals for the Tenth Circuit and the U.S. District Court for the District of Utah, have long held that senior executives and other so-called "apex" witnesses should not be deposed if they lack "unique personal knowledge" relevant to the case; if the information sought "can be obtained from another witness . . . [or] through an alternative discovery method"; or if "sitting for the deposition is a severe hardship for the executive[s] in light of [their] obligations to [their] company."

*E.g.*, *United Auto. Ins.*, 2018 WL 1054361, at *1 (internal quotation marks omitted) (denying motion to compel deposition of CEO); *see also Thomas v. Int'l Business Machines,* 48 F.3d 478, 483-84 (10th Cir. 1995) (upholding protective order precluding deposition of chairman of the board); *Brown v. Branch Banking & Tr. Co.*, No. 13-cv-81192, 2014 WL 235455, at *2-3 (S.D. Fla. Jan. 22, 2014) (denying motion to compel deposition of bank president, granting protective order, and collecting cases); *Diesel Props. S.r.L. v. Greystone Bus. Credit II LLC*, No. 07-cv-9580, 2008 WL 5099957, at *1-2 (S.D.N.Y. Dec. 3, 2008) (affirming protective order precluding deposition of senior executive); *Cobble v. Value City Furniture*, No. 06-cv-00631, 2008 WL 11358017, at *2 (W.D. Ky. May 19, 2008) (granting motion for protective order precluding deposition of senior executive).

These decisions are based on provisions of the Federal Rules of Civil Procedure that are closely analogous to the administrative rules and prohibit "unreasonably cumulative or duplicative" or unduly burdensome discovery. *Compare* R151-4-506 *with* Fed. R. Civ. P. 26(b)(2)(C). They are also based on the commonsense observation that "deposition notices directed at an official at the highest level or 'apex' of corporate management . . . create[] a tremendous potential for abuse or harassment." *Celerity, Inc. v. Ultra Clean Housing, Inc.*, No. 05-cv-4374, 2007 WL 205067, at *3 (N.D. Cal. Jan. 25, 2007).

The Presiding Officer should follow the lead of numerous other courts and deny the Division's Request given the Division's failure to show that the CEOs possess unique, relevant knowledge. The Division has not shown why the information it seeks cannot be obtained from the documents produced in this matter or from less senior witnesses. Indeed, the Division's Initial Disclosures demonstrate its belief that dozens of less senior employees are likely to have information "supporting [its] claims," including "[a]ll Purdue employees and agents who had business contacts with Utah prescribers, pharmacies, payors, and consumers . . . [or] who promoted, detailed, or advertised Purdue products, or opioids generally, in Utah," Initial Disclosures at 22, and over two dozen named sales representatives. *Id.* at 24-25. The fact that the Division is aware of so many salespeople with supposedly relevant information belies any notion that the current and former CEOs have unique knowledge about Utah marketing activities.[1]

Precluding the deposition of a senior executive is especially appropriate where the individual has provided a declaration certifying that he lacks unique personal knowledge of the issues. *E.g.*, *Thomas*, 48 F.3d at 483; *Alex & Ani, Inc. v. MOA Int'l Corp.*, No. 10-cv-4590, 2011 WL 6413612, at *3 (S.D.N.Y. Dec. 21, 2011) ("Where an executive has submitted an affidavit disclaiming unique personal knowledge, it is often appropriate to defer live depositions of that executive unless and until the examining party can demonstrate otherwise."). In the attached declaration, Dr. Landau states that he does not believe he has any unique or superior personal knowledge relating to the allegations in the Citation. Declaration of Craig Landau dated July 25, 2019 ¶ 11. The same is true for Messrs. Stewart and Timney, who are prepared to submit declarations so attesting if necessary.

[1] The Division's assertion that "[n]one of the testimony sought is cumulative or duplicative" because "each witness has significant personal knowledge of critical facts and events," Request at 3, does not satisfy the Division's burden. Nowhere does the Division state the basis for this conclusory, vague, and incorrect statement. And even if the Division had demonstrated that the CEOs had any such "personal knowledge"—which it has not done—it has failed to even assert, much less demonstrate, that the same information is not available from the document productions or from the testimony of other witnesses.

In addition, as Dr. Landau's Declaration states, his critical obligations to the company require his undivided attention, and preparing for and sitting for a deposition in this matter would be extremely burdensome and disruptive. As CEO, Dr. Landau has ultimate oversight of operations comprising more than 690 employees. *Id.* ¶ 12. His responsibilities include the panoply of duties traditionally held by CEOs of complex pharmaceutical organizations, such as managing and motivating personnel, communicating with his management teams across the businesses of the company, developing and implementing short-term and long-term strategies, overseeing an active pipeline of new medicines, supporting the financial and corporate compliance functions, and driving new business development. *Id.* In addition, Dr. Landau is responsible for managing the extraordinary—indeed, unprecedented—issues arising from the thousands of lawsuits filed across the country against Purdue, and he must work closely with counsel and other advisors on an almost daily basis. *Id.* Dr. Landau is required to be available 24 hours a day, seven days a week, and his typical workday ranges from 12 to 16 hours. *Id.* Under the present circumstances, a deposition would impose severe, and needless, burdens on Dr. Landau.

Former high-level executives like Messrs. Stewart, Timney, and Friedman "continue to be protected by the apex doctrine even after leaving office." *K.C.R. v. Cty. of L.A.*, No. 13-cv- 3806, 2014 WL 3434257, at *3 (C.D. Cal. July 11, 2014); *accord Sargent v. Cty of Seattle*, No. 12-cv-1232, 2013 WL 1898213, at *3 n.2 (W.D. Wash. May 7, 2013) (interests protected by apex doctrine "survive[] leaving office"); *Gauthier v. Union Pacific R.R. Co.*, No. 07-cv-12, 2008 WL 2467016, at *4 (E.D.Tex. June 18, 2008) (quashing deposition of former CEO where party seeking discovery had not yet deposed 30(b)(6) witness).

Because the Division has presented no evidence that the CEOs have unique personal knowledge relevant to this action, it has failed to carry its burden under Rule 151-4-602(4), and its Request must be denied.

## III. A PROTECTIVE ORDER IS WARRANTED TO PROTECT THE CEOS FROM ANNOYANCE, OPPRESSION, AND UNDUE BURDEN.

A protective order is also warranted under Rule 151-4-507(1)(a). Courts routinely grant protective orders shielding senior executives from unjustified depositions. *E.g.*, *Thomas*, 48 F.3d at 483-84; *Brown*, 2014 WL 235455; *Diesel Props.*, 2008 WL 5099957, at *1; *Cobble*, 2008 WL 11358017, at *2. Courts also grant such orders to protect former executives under the same analysis. *E.g.*, *Gauthier*, 2008 WL 2467016. Here, for all of the reasons discussed above, depositions of the CEOs would cause "annoyance," "oppression," and "undue burden." R151-4-507(1). Therefore, a protective order is appropriate.

## CONCLUSION

For the reasons set forth above, the Division has failed to meet its burden under Rule 151-4-602 to "demonstrat[e] the need for" deposing the CEOs. Therefore, Purdue respectfully requests that the Presiding Officer deny the Division's Request and, pursuant to Rule 151-4-507(1)(a), enter a protective order preventing the depositions of the CEOs.

Sincerely,

*/s/ Elisabeth M. McOmber*

Cc: all counsel of record