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August 1, 2019

Bruce L. Dibb
Heber M. Wells Building, 2nd Floor
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Salt Lake City, Utah 84114-6701

Re: Purdue's Motion for Protective Order -- DCP Case No. 107102

Dear Judge Dibb,

The Utah Division of Consumer Protection ("Division"), by and through undersigned counsel, opposes Purdue Respondents' letter motion filed on July 25, 2019, seeking to prevent the depositions of Dr. Landau, and Messrs. Steward, Timney and Friedman.

Procedural History

1. On July 18, 2019, the Division filed a Request to serve deposition notices on Richard Sackler, Kathe Sackler, and Purdue's Chief Executive Officer ("CEO") Dr. Landau, and to serve subpoenas upon former Purdue CEOs Stewart, Timney and Friedman. (Hereinafter the Division refers collectively to Dr. Landau, and Messrs. Stewart, Timney and Friedman as the "CEOs")
2. On July 19, 2019, the Administrative Law Judge executed the subpoenas, yet held that the Purdue Respondents could file a Motion for a Protective Order. The Judge set the schedule for that motion to be due on July 25, 2019, with a Division response filed by August 1, 2019.
3. On July 25, 2019, the Purdue Respondents filed a letter motion seeking a protective order to prevent the depositions of the CEOs. They argued (1) this tribunal lacks the power to authorize service of subpoenas on the CEOs, all of whom reside out-of-state; and (2) the Division's Requests are directed to "apex witnesses" who do not have any unique knowledge not otherwise available in Purdue's documents or through depositions of other witnesses. The Purdue Respondents characterized the Division's Request as "a transparent attempt to get discovery for use in other proceedings."

Argument

The Division should be permitted to depose the current and former chief executives of Purdue to elicit testimony needed to carry its burden of proving the facts alleged in the Citation. The Division seeks the depositions in a good faith discovery effort to elicit facts about the Sackler Respondents' liability, which is why the Division sought the discovery only after this Tribunal denied the Sackler Respondents' motion to dismiss. The Division needs the depositions of the CEOs because they alone are percipient witnesses to the roles, involvement, control, and other acts and omissions of the Sackler Respondents.

A. This Tribunal Has the Power To Issue Subpoenas Directed to Out-of-State Non-Parties.

Purdue does not represent former CEOs Stewart, Timney and Friedman, none of whom has sought protection from this Tribunal. Nonetheless, Purdue claims it speaks for them, and argues that "it is beyond this tribunal's power to authorize service of the subpoenas on Messrs. Stewart, Timney and Friedman because they are out-of-state third parties." This position (that no out-of-state witnesses may be required to give testimony before this Tribunal) contradicts R151-4-513(4), which provides that a person who does not reside in Utah may be required to sit for deposition provided that he or she is served the subpoena in accord with the requirements of the jurisdiction in which service is made. The case law cited by Purdue, *Colorado Mills, LLC v. Sunopta Grains and Foods Inc.*, 269 P.3d 731 (Co. 2012)(*en banc*) supports the proposition that out-of-state parties may be subpoenaed, and merely explains "[w]hatever the case, the bottom line is that enforcement of civil subpoenas against out-of-state nonparties is left to the state in which the discovery is to take place."

Here, two of non-parties (Timney and Friedman) reside in Connecticut, which adopted the Uniform Interstate Deposition and Discovery Act and permits the service of out-of-state subpoenas. *See* CONN. GEN. STAT. §§ 52-148e(f), 52-155; CONN. R. SUPER. CT. CIV. § 13-28(g). The other out-of-state non-party (Stewart) resides in Florida, which follows the Uniform Foreign Depositions Act and permits service of out-of-state subpoenas. *See* FLA. STAT. ANN. § 92.251; FLA. R. CIV. PROC. 1.410(g). Counsel for deponents who were able to be identified and contacted expressed preference for delaying discussions on accepting service and scheduling convenient dates/locations until after the Tribunal's ruling on Purdue's motion for a protective order. In the event that counsel for Timney, Friedman and Stewart refuse to accept service on behalf of their clients, the Division will serve the executed subpoenas in accord with the relevant state laws.

B. The CEOs Are Able To Testify about Facts Proving the Sackler Respondents Are Subject to Jurisdiction and Liable for the Utah Misrepresentations.

The Division needs to depose the CEOs because they have unique knowledge about the Sackler Respondents that cannot be obtained through a review of documents or depositions of other, less-informed, witnesses. Such discovery falls well within the scope of discovery permitted under this Tribunal's rules, as it is indisputably relevant to facts alleged in the Citation. Purdue's invocation of the "apex doctrine" cannot suffice as grounds to bar the discovery, as that doctrine does not apply here, and even if it did, does not bar depositions of high-level executives with relevant knowledge.

1. The CEOs Have Unique Knowledge about the Sackler Respondents.

Purdue's entire argument against the Division taking the CEO depositions rests on the false premise that the only dispute in this matter is whether marketing statements made by Purdue in Utah were false. *See* Purdue Letter Motion at 3-5. Purdue appends the declaration of only one of the CEOs (Landau), which declares that he is not involved in the day-to-day sales, marketing, or promotion of Purdue's opioid medications in Utah or any other state. But there is another dispute that the Tribunal must resolve: are the Sackler Respondents subject to jurisdiction and liable for the false marketing statements made in Utah?

As made clear in the Citation, the Division alleges the Sackler Respondents: (1) each personally directed the unfair, deceptive and otherwise unlawful conduct as members of the Purdue Board of Directors as well as Purdue executive officers and owners of the global Sackler

pharmaceutical enterprise, Citation ¶¶ 125, 129; (2) knowingly directed Purdue to promote with deceptive marketing messages to increase sales, revenues, and compensation, Citation ¶¶ 161; (3) knowingly and intentionally engaged in aggressive marketing, Citation ¶¶ 162-74; (4) directed Purdue's employment of sales representatives in Utah, Citation ¶¶ 127, 133, 141-5, 152, 154; and (5) "exercise[ed] a level of information and control. . . that surpassed even that of other Sackler Board member-owners. . ." and took "many actions personally to carry out the unfair, deceptive and otherwise unlawful activity that led to Utah's opioid epidemic" Citation ¶ 129; *see also* Citation ¶¶ 133-149 regarding Richard Sackler.

This Tribunal held that "the Division will have the burden of proof at the administrative hearing to establish that the Sackler Respondents were responsible for practices that constitutes violation of the UCSAP." *See* July 15, 2019 Order on Motion To Dismiss the Sackler Respondents at 16. This Tribunal also held "the Division's claim is a fact intensive claim." *See* June 20, 2019, Order on Motion To Dismiss the Purdue Respondents. To bear its burden, the Division reasonably seeks to depose the very limited number of persons with first-hand, knowledge about the acts, omissions and statements of the Sackler Respondents: namely, the current and former CEOs. These four persons are uniquely positioned and necessarily observed and are knowledgeable about the extent to which the Sackler Respondents participated in the decision-making that led to the Purdue's deceptive marketing in Utah.

Utah Admin. Code R151-4-602 permits the Division to use depositions as one of the discovery tools necessary to elicit case-dispositive information. Purdue argues that documents and depositions of other witnesses suffice to provide all the information needed by the Division. This is false. The Sackler Respondents disputed, and continue to dispute, the Division's characterization of events based on available documents and testimony. Unless the Sackler Respondents are willing to stipulate to jurisdiction and liability, the Division should be permitted to obtain additional relevant testimony from the four individuals who attended Board meetings and interacted directly with the Sackler Respondents. As a practical matter, only a small fraction of the CEOs' interactions with the Sackler Respondents would have been memorialized in documents. Documents will not capture the conduct of Board meetings (and Purdue does not even memorialize who voted or spoke at Board meetings) and in-person and telephone communications outside of Board meetings. The Sackler Respondents maintained offices at Purdue, creating numerous opportunities for informal interactions with the CEOs. The CEOs, it is fair to assume, would have been the point of contact for the Sacklers' briefings, questions, decisions, and instructions, as well as for other Purdue personnel conveying (or complaining of, in the case of Richard Sackler) their interactions with the Sackler Respondents.[1]

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[1] None of the CEOs submitted a declaration stating they lack any knowledge of the Sackler Respondents' acts, omissions and statements. But even if they done so, the Division should be permitted to depose the CEOs as such declarations would lack any credibility in light of the available documentary and testamentary evidence.

2. This Tribunal's Decision Is Governed by Its Own Rules, Not by the Apex Doctrine.

Although Purdue attempts to persuade the Tribunal to rely upon federal jurisprudence in assessing whether the Division is entitled to depose these uniquely-knowledgeable witnesses, the Tribunal should apply its own statutory authority, not federal law. Utah Admin. Code R151-4-502(1) allows a party to obtain discovery regarding any matter that is: (1) not privileged; (2) is relevant to the subject matter involved in the proceeding; and (3) relates to a claim or defense of the party seeking discovery or another party. Utah Admin. Code R151-4-602(3) instructs the presiding officer "to consider the probative value the testimony is likely to have in the proceeding."

On the question of the "probative value" of facts relating to the Sackler Respondents, the Tribunal has already held that: "[d]iscovery in this proceeding may also bolster this prima facie showing of jurisdiction and the Division should be permitted to pursue such discovery in the post-motion to dismiss phase of this proceeding." "Further discovery on matters relating to personal jurisdiction would be warranted in the post-motion to dismiss stage of this proceeding." *See* July 15, 2019 Order on Motion To Dismiss the Sackler Respondents at 29. Here, as set forth above in Section A, the Division cannot obtain the evidence it seeks through the use of any other discovery tool than deposing the four witnesses with unique knowledge about the Sackler Respondents. Purdue does not – and cannot – claim that the four CEOs lack relevant knowledge of these issues.

3. The Apex Doctrine Does Not Apply.

Purdue seeks to persuade this Tribunal to prevent the Division from conducting this essential discovery by relying on the apex doctrine. This argument fails to persuade for several reasons: *First*, the Utah Rules of Civil Procedure, not the Federal Rules of Civil Procedure, are "persuasive authority" for this Tribunal. R151-4-106. Purdue fails to cite to any Utah authority for the apex doctrine. The Division's research failed to locate any Utah decision that incorporates an apex doctrine into analysis under the Utah Rules of Civil Procedure.

Second, even if the Federal Rules applied (which they do not), the Court of Appeals for the Tenth Circuit has not adopted the apex doctrine. Purdue asserts that the Court of Appeals for the Tenth Circuit and the U.S. District Court for the District of Utah "have long held" that apex witnesses should not be deposed, and relies on *United Auto Ins.*, 2018 WL 1054361 at *1 and *Thomas v. Intl. Business Machines ("IBM")*, 48 F.3d 478, 483-84 (10th Cir. 1995). That mischaracterizes the state of the law in the Tenth Circuit. The *United Auto* case cited by Purdue was superseded by a later decision in the same case, *United Auto Ins. v. Stucki & Rencher*, 2019 WL2088537 (May 13, 2019, D. Utah), in which the Court ruled that "without any precedent from the Tenth Circuit Court of Appeals on the apex doctrine, whether the apex doctrine is applicable in the Tenth Circuit appears to be an open question." *Id.* at *7. The Court reversed its earlier ruling and granted the Defendants' motion to either depose Plaintiff's CEO or have Plaintiff agree not to call him at trial. *Id.*

Nor does the *Thomas v. IBM* case support Purdue's effort to block relevant discovery here. There, the Tenth Circuit made no mention of the apex doctrine, but upheld the district court's grant of a protective order when the plaintiff in an employment case noticed the deposition of IBM's CEO Akers with less than the five business days notice required under Local Rule 15(A), and sought to hold the deposition in Oklahoma City as opposed to **CEO** Aker's place of business. On those facts, the Tenth Circuit found the district court acted within its discretion. But that case decidedly

does not adopt the apex doctrine, which is not even mentioned. In short, there is no legal reason why this Tribunal should adopt a doctrine that has not even been adopted by the Tenth Circuit, and then use this doctrine to bar reasonable and necessary discovery.

4.The Apex Doctrine Permits Depositions of the CEOs.

Even assuming *arguendo* the apex doctrine should be incorporated into the Tribunal's discovery procedures, the doctrine itself simply requires the Tribunal to look at the particular facts at hand. The intent behind the development of the apex doctrine is to protect busy, high-level executives "whose only connection with the matter is the fact that he is the CEO of the defendant, the top official, where the buck stops on all corporate matters regardless of the level of factual involvement or knowledge." *Minter v. Wells Fargo Bank, N.A.*, 258 F.R.D. 118, 127 (D. Md. 2009). As the jurisprudence makes clear, the party seeking to prevent an apex deposition in its entirety "has a heavy burden of showing that such protection is warranted." *See Engage Healthcare Communications, LLC v. Intellisphere, LLC*, 2017 WL 9481235 (D. N.J. Nov. 1, 2017). As the district court explained in *United States ex rel. Galmines v. Novartis Pharmaceuticals Corporation*, 2015 WL 4973626, *2 (E.D. Pa. August 20, 2015), "[t]he apex doctrine does not represent an exception to the rule that a party seeking to quash a subpoena bears the 'heavy burden' of demonstrating that the subpoena represents an undue burden." As a result, "it is very unusual for a court to prohibit the taking of a deposition altogether and absent extraordinary circumstances, such an order would likely be in error." *Id.* at *2.

For that reason, courts applying the apex doctrine consistently permit depositions of high-level executives to proceed when merited by the facts. For example, the District Court in Utah permitted the deposition of an Asarco former high-level executive to proceed in *Asarco LLC v. Noranda Min., Inc.*, 2015 WL 1924882 (April 28, 2015), reasoning that the need for the discovery outweighed any burden. *See also Moore v. Angie's List, Inc.,* 2015 WL 12835674 (E.D.Pa. Dec. 21, 2015)(CEO may be deposed); *Weber v. Fujifilm Medical Systems,* 2011 WL 677278 (D. Ct. Jan. 24, 2011) (high-level executive depositions are necessary and not merely intended to harass); *Johnson v. Jung*, 242 F.R.D. 481 (N.D. Ill. 2007)(lack of personal involvement and busy travel schedule does not suffice as reasons to prevent deposition of CEO); *Morales v. E.D. Etnyre & Co.,* 229 F.R.D. 661 (D. N.M. 2005)(permitted deposition of CEO); *Pepsi-Cola Bottling Company of Pittsburgh v. Pepsico, Inc.*, 2002 WL 922082 (D. Ks. May 2, 2002) (denied motion for protective order precluding depositions of senior executives); *General Star Indemnity Co., v. Platinum Indemnity Ltd.*, 210 F.R.D. 80 (S.D.N.Y. 2002)(no protective order granted); *In re Bridgestone/Firestone Inc. Tires Products Liability Litigation,* 205 F.R.D. 535 (S.D. Ind. 2002)("Federal courts have permitted the depositions of high level executives when conduct and knowledge at the highest corporate levels of the defendants are relevant in the case."); *Six West Rental Acquisition, Inc. v. Sony Mgt. Corp.*, 203 F.R.D. 98, 102-4 (S.D. N.Y 2001) (allowing deposition of Sony's chairman); *Horsewood v. Kids "R" Us,* 1998 WL 526589, *7 (D. Ks. Aug. 13, 1998) ("The probability that Cudrin can provide relevant evidence to a material issue outweighs the suggested burden of his deposition. That Cudrin is too busy and that a deposition will disrupt his work carries little weight.").

The relevant facts that control the Tribunal's analysis of this discovery dispute are straightforward, and compel the conclusion that the Division should be permitted to depose the

CEOs. The Division alleged the Sackler Respondents are subject to personal jurisdiction in Utah, and are personally liable for the misrepresentations made in Utah. The four CEOs, by virtue of their unique positions vis-à-vis the Sackler Respondents, are the persons most able (and indeed perhaps the only persons able) to testify about the Sackler Respondents' knowledge, directions, and participation in Purdue's marketing and compliance efforts. On these facts, this Tribunal should not grant Purdue a protective order.

Sincerely yours,

/s/ Susan L. Burke
Susan L. Burke