DEPARTMENT OF COMMERCE
Heber M. Wells Building, 2ND Floor
160 EAST 300 SOUTH
SALT LAKE CITY, UTAH 84114

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

IN THE MATTER OF: **PURDUE PHARMA, L.P.**, a Delaware limited partnership; **PURDUE PHARMA, INC.,** a New York corporation; **THE PURDUE FREDERICK COMPANY,** a Delaware corporation; **RICHARD SACKLER, M.D.,** individually and as an owner, officer director, member, principal, manager and/or key employee of the above named entities; and **KATHE SACKLER, M.D.,** individually and as an owner, officer, director, member, principal, manager and/or key employee of the above named entities, Respondents.	**ORDER ON OBJECTIONS TO DEPOSITIONS OF DR. CRAIG LANDAU, JOHN STEWART, MARK TIMNEY AND MICHAEL FRIEDMAN** Case No. **CP-2019-005** DCP Case No. 107102

On July 18, 2019, the Division filed a Request for Approval from the Presiding Officer to Depose Parties and Non-Parties (the "Request"). The Request seeks approval of the depositions of Dr. Craig Landau (the current CEO of Purdue), and of John Stewart, Mark Timney and Michael Friedman (former CEOs of Purdue). These four potential deponents are referred to collectively herein as the "CEOs."

In response to such request, the presiding officer issued on July 19, 2019, subpoenas for the deposition of John Stewart on August 19, 2019, Mark Timney on August 20, 2019, and Michael Friedman on August 21, 2019 (the "Subpoenas"). Purdue requested and obtained leave of this

Tribunal to file an objection to the Request by July 25, 2019. This objection was timely filed. The Division filed a timely reply on August 1, 2019.

ANALYSIS

The taking of depositions in administrative proceedings is generally controlled by U.A.C. R151-4-602, which provides in relevant part that a party seeking a deposition must "demonstrate the person has knowledge of facts relevant to the claims or defenses of a party in the proceeding . . ." Further, R151-4-602(3) provides that the "presiding officer shall consider the probative value the testimony is likely to have in the proceeding." Taking these factors into consideration, it is appropriate that the depositions of the CEOs be taken in this matter.

U.A.C. R151-4-506 addresses when limits on the use of discovery would be appropriate. This rule identifies three circumstances in which discovery could be limited. None of these circumstances is applicable here. The rule states:

> The frequency and extent of discovery shall be limited by the presiding officer regardless of whether either party files a motion to limit discovery if:
>
> (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 first two circumstances relate to obtaining discovery in a more convenient or less burdensome way, and whether the party seeking the discovery has had ample opportunity to obtain the information. Purdue's recitation of documents received by the Division's "private

counsel" in other litigation does not satisfy the apparent need to focus on Utah related marketing and the underpinnings of the Division's claim that the Sackler Respondents are "suppliers" under the UCSPA. There has been no demonstration that Utah related issues have been adequately addressed in the existing document and deposition discovery.

Each of the CEOs is uniquely positioned to know very specific and unique facts relative to this administrative proceeding, including not in the least, matters relating to the alleged involvement of the Sackler Respondents in directing and controlling the operations of Purdue *vis-à-vis* the other officers and directors of the company. In fact, based upon the allegations of the citation in this matter, the Division would be ill advised to go to trial in this case without having taken the depositions of the CEOs.

As to the third circumstance addressed in R151-4-506, all of the parties in this matter have commented upon the significant amount in controversy here and the importance of the issues at stake in the litigation. In light of the needs of the case, the allegations of the citation, and the defenses of the respondents (including the personal jurisdiction and subject matter jurisdiction defenses of the Sackler Respondents), the taking of the depositions of the CEOs would likely be a prudent allocation of the parties' recourses in this proceeding.

Purdue ignores the uniqueness of the knowledge and information of the CEOs and attempts to interpose the apex doctrine, where it factually has no application. In addition to the factual deficiencies of Purdue's argument, the apex doctrine has not been applied in Utah state courts or in Utah administrative proceedings. None of the parties have cited a Utah state court case that applies the doctrine.

Even if applicable in Utah or in this administrative proceeding, the apex doctrine would not preclude the depositions of the CEOs in this circumstance as the CEOs have unique knowledge

about essential issues in this case, including the amount of control exerted by the Sackler Respondents over the operations of the Purdue entities. The CEOs' participation in board meetings and in private communications with the Sackler Respondents would give them unique, and possibly essential, knowledge about management and control of Purdue.

At one point Purdue states that the CEOs have no unique knowledge about the marketing of opioids in Utah, but then state that Mr. Landau (and presumably the former CEOs) have knowledge about "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" (emphasis added) Purdue July 25, 2019 letter at p. 5. These same issues are relevant and subject to discovery in this proceeding.

If the apex doctrine can be said to be applicable in this administrative proceeding because of Federal legal precedent, it is less than clear that the apex doctrine even applies within the Tenth Circuit. The cited Tenth Circuit case of *Thomas v. IBM*, 48 F.3d 473; 1995 U.S. App. LEXIS 3314, does not mention the word "apex." It merely grants a protective order against the taking of the deposition of the CEO of IBM under circumstances where only five-days' notice was given of the deposition, the court noted the burden that a hurried deposition would impose on the CEO and the fact that the plaintiff "waited until the eleventh hour" to request the deposition.[1] *Id.* 484. None of these elements are present here.

Purdue refers to the February 2018 protective order granted in the Utah Federal District Court case of *United Automobile Insurance v. Stucki & Rencher, LLC*, 2:15-CV-834 RJS, 2018

[1] The plaintiff "waited until after the expiration of the original discovery deadline" to give notice to the IBM CEO of the deposition. *Id.* 483.

WL 1054361 (D. Utah Feb 23, 2018), but fails to note that the Court observed that the defendant had not "yet" shown that the CEO deponent had "unique personal knowledge of the matter." The February 2018 *Stucki* court refers to the apex doctrine in its discussion. However, Purdue failed to also note that when the taking of the deposition of the CEO was again addressed in May of 2019, the *Stucki* court granted an order compelling the deposition. The May 2019 order in the case noted 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." *United Automobile Insurance v. Stucki & Rencher, LLC*, 2:15-CV-834 RJS, 2019 WL 2088537 at *7 (D. Utah May 13, 2019).

As recently as January 2019, another Federal District Court within the Tenth Circuit (the Federal District Court of New Mexico) has stated that the "apex doctrine has not been addressed by the Tenth Circuit" (interior quotations omitted). *Tierra Blanca Ranch High Country Youth Program v. Gonzales*, 329 F.R.D. 694, 696; 2019 U.S. Dist. LEXIS 3300.

Federal court application of the apex doctrine is not controlling in this administrative proceeding, in the Federal or State District Courts of the State of Utah, or in the Tenth Circuit, of which Utah is a part.

In the first paragraph under the heading "Argument" at page 2 of the Purdue letter objecting to the depositions, Purdue states that the Division must follow local state law, citing U.A.C. R151-4-513(4) ("A subpoena shall be served in accordance with the requirements of the jurisdiction in which service is made"). The Division cites the state statutes or rules of civil procedure in the two states where the out-of-state non-parties reside and says it can comply with such service requirements.

ORDER

IT IS HEREBY ORDERED that:

1. The John Stewart, Mark Timney and Michael Friedman depositions may proceed on the dates designated in the issued Subpoenas (or otherwise on dates mutually agreed to by the parties);
2. The Division is directed to comply with the R151-4-513(4) service requirements, unless the Division and the deponents otherwise mutually agree to the subpoenas being served according to some other procedure;
3. The Division may take the deposition of Dr. Craig Landau; and
4. Purdue's motion for a protective order is denied.

DATED August 9th, 2019.

UTAH DEPARTMENT OF COMMERCE

Bruce L. Dibb, Presiding Officer

CERTIFICATE OF SERVICE

I hereby certify that on the 5TH day of August, 2019, I served the foregoing on the parties of record in this proceeding by delivering a copy by electronic means to:

Chris Parker
Acting Director/Presiding Officer
Division of Consumer Protection
chrisparker@utah.gov

Purdue Pharma, L.P.
Purdue Pharma, Inc., and
The Purdue Frederick Company,
(the "Purdue Respondents"),
through counsel
Elisabeth McOmber
Katherine R. Nichols
SNELL & WILMER
emcomber@swlaw.com
knichols@swlaw.com

Purdue Respondents, through counsel
Will Sachse
Sara Roitman
Erik Snapp
DECHERT LLP
will.sachse@dechert.com
sara.roitman@dechert.com
erik.snapp@dechert.com

Richard Sackler, and
Kathe Sackler, through counsel
Patrick E. Johnson
Paul T. Moxley
Timothy J. Bywater
COHNE KINGHORN
pjohnson@ck.law
pmoxley@ck.law
tbywater@ck.law

Richard Sackler, through counsel
Douglas J. Pepe, Gregory P. Joseph
Christopher J. Stanley, Mara Leventhal
Roman Asudulayev
JOSEPH HAGE AARONSON LLC
dpepe@jha.com, gjoseph@jha.com
cstanley@jha.com, mleventhal@jha.com
rasudulayev@jha.com

Kathe Sackler, through counsel
Maura Monaghan, Susan Gittes
Jacob Stahl
DEBEVOISE & PLIMPTON LLP
mkmonaghan@debevoise.com
srgittes@debevoise.com
jwstahl@debevoise.com

Robert G. Wing, AAG
Kevin McLean, AAG
rwing@agutah.gov
kmclean@agutah.gov
Counsel for the Division

Linda Singer, Elizabeth Smith
Lisa Saltzburg, David Ackerman, Susan Burke
MOTLEY RICE LLC
lsinger@motleyrice.com
esmith@motleyrice.com
lsaltzburg@motleyrice.com
dackerman@motleyrice.com
sburke@motleyrice.com
Counsel for the Division

N. Majed Nachawati, Matthew R. McCarley
Misty Farris, Jonathan Novak, Ann Saucer
FEARS NACHAWATI, PLLC
mn@fnlawfirm.com, mccarley@fnlawfirm.com
mfarris@fnlawfirm.com
jnovak@fnlawfirm.com
asaucer@fnlawfirm.com
Counsel for the Division

Glenn R. Bronson
RICHARDS BRANDT MILLER NELSON
Glemm-Bronson@rbmn.com
Counsel for the Division

/s/ Nathaniel Gallegos