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August 7, 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:

As the Division has repeatedly represented, this is a case limited to Purdue's marketing in Utah. The Division advanced the same theory at the April 17, 2019 hearing on its motion to convert. Transcript of Hrg. on Mot. to Convert at 21:11-17, 63:22-64:2. The Division's Initial Disclosures named thirty Utah-specific sales representatives and key opinion leaders as individuals likely to have relevant information. It did not name any of the CEOs (or any other Purdue employees without Utah-specific information) as potential witnesses. Initial Disclosures at 24-25. And in its May 21, 2019 Interview Deposition Report the Division stated that it was "focused on potential witnesses who have relevant knowledge that is specific to the state of Utah." Report at 2. Again, no current or former CEOs or other Purdue employees were identified. To the contrary, the Division asserted that it "had no plans to conduct such interviews or depositions at this time." *Id.* Rather, the Division indicated it "may also identify the person most knowledgeable about Purdue's marketing, sales, or compliance in Utah related to Purdue's Opioids, and the Sackler Respondents' knowledge, involvement, or oversight thereof." *Id.*

Less than three weeks ago the Division abruptly changed course and sought leave to depose the current CEO and three former CEOs under the theory that they had "first-hand knowledge ***of Purdue's operations, including Purdue's misconduct in Utah***." Request at 2 (emphasis added). Purdue responded that the CEOs have no such unique personal knowledge relevant to the case, and the current CEO, Dr. Landau, submitted a declaration to that effect. In response to Purdue's objection and Motion for Protective Order, the Division now has changed course yet again and claims it wants these CEO depositions for the limited purpose of getting "unique" information about the "roles, involvement, control, and other acts and omissions of the Sackler Respondents." Division's Aug. 1 Response ("Response") at 1. Even with this new theory, these depositions are improper.

The Division has not met its "burden of demonstrating the need for a deposition." R151-4-602(4). Neither the original Request nor the Division's Response shows the CEOs have relevant knowledge that could not be more easily obtained from the millions of documents Purdue has produced or depositions of other witnesses. To the contrary, the Division concedes there is "available documentary and testamentary [sic] evidence" that bears on these issues (and, according to the Division, should be considered more credible than sworn declarations from the same witnesses the Division seeks to depose). Response at 3 n.1.

Purdue respectfully submits this reply and asks the Presiding Officer to reconsider its order of August 5, 2019 (the "8/5/19 Order"), deny the Division's motion pursuant to Rule 151-4-506, and issue a protective order pursuant to Rule 151-4-507(1)(a). In the alternative, Purdue asks the Presiding Officer to limit the scope and manner of the CEO depositions. Purdue also requests a hearing on these important issues.

I. THE PRESIDING OFFICER SHOULD NOT ALLOW DEPOSITIONS OF CURRENT AND FORMER CEOS WHO LACK UNIQUE PERSONAL KNOWLEDGE RELEVANT TO THE CASE.

The Division has not met its burden to show that the CEO depositions are necessary. Rule151-4- 602(4). The rules prohibit discovery that is "duplicative," "obtainable from some other source" that would be less onerous, or "unduly burdensome." Rule 151-4-506. Dozens of federal cases cited by the Parties have recognized that depositions of CEOs typically fail to meet those criteria. And even if the "apex doctrine" has not been directly referenced by name in the Tenth Circuit or by Utah state courts, its key principles—that discovery should be reasonable, not duplicative, and conducted in the least burdensome manner—do apply here through both the administrative rules and the Utah Rules of Civil Procedure. *See id.*; Utah R. Civ. P. 26(b)(2). Accordingly, the federal consensus applying these principles to find that CEO depositions are often duplicative of less onerous discovery tools or unduly burdensome is powerful persuasive evidence as to how the Presiding Officer should interpret parallel language in the administrative rules.

Further, the Division misstates how this doctrine has been applied in Utah and the Tenth Circuit. Although *Thomas* did not use the express phrase "apex doctrine," it applied the same principles. In affirming the district court's protective order, the Court did not rely solely on procedural defects of the deposition notice. Rather, the Court also noted the significance of the CEO's affidavit that he "lacked personal knowledge" relevant to the case and the plaintiff's failure to depose lower-level executives first. *Thomas v. Int'l Bus. Machines*, 48 F.3d 478, 483 (10th Cir. 1995). Whether they call it an "apex doctrine" or an application of Federal Rule 26, district courts in this Circuit and around the country have read *Thomas* as requiring special consideration when parties seek to depose senior executives. *E.g.*, *Black Card, LLC v. VISA U.S.A., Inc.*, No. 15-cv-027, 2016 WL 7325665, at *2 (D. Wyo. Dec. 12, 2016); *Meeker v. Life Care Centers of Am., Inc.*, No. 14-cv-02101, 2015 WL 5244947, at *2 (D. Colo. Sept. 9, 2015); *Oklahoma ex rel. Edmondson v. Tyson Foods, Inc.*, No. 05-cv-329, 2009 WL 10694083, at *2 (N.D. Okla. Apr. 24, 2009).[1] And ***the Division has pointed to no case anywhere permitting the deposition of a senior executive without demonstrated unique personal knowledge, let alone four.***

Likewise, *United Automobile Insurance Co.* did not "reverse" the earlier ruling granting a protective order against deposing the plaintiff's CEO or reject an "apex" approach, as the Division suggests. Rather, once the plaintiff revealed that it planned to call the CEO as a witness at trial, the court said that it could not "have [its] cake and eat it too" by using him as its own witness but shielding him from deposition by the defendant. *United Auto. Ins. Co. v. Stucki &*

[1] District courts in the Tenth Circuit characterize *Thomas*'s relationship to the apex doctrine in different ways. Some treat *Thomas* as a seminal "apex doctrine" case. *See Meeker*, 2015 WL 5244947, at *2. Others say that while the doctrine "has not officially been adopted in this Circuit," *Thomas* "directly address[es]" the same issue and requires courts to take into account "special factors" inherent in such depositions as part of the Rule 26 analysis. *Black Card*, 2016 WL 7325665, at *2 (quoting *Van Den Eng v. Coleman Co.*, No. 05-mc-109, 2005 WL 3776352, at *2 (D. Kan. Oct. 21, 2005). A few cases treat the apex doctrine as an open question. These cases do not cite *Thomas* at all. *E.g.*, *United Auto. Ins. Co*, 2019 WL 2088537, at *7; *Tierra Blanca Ranch High Country Youth Program v. Gonzales*, 329 F.R.D. 694, 696 (D.N.M. 2019). These variations are semantic. Regardless of what courts call it or how they read *Thomas*, the district courts in the cases cited by, Purdue, the Division, and the Order have applied the conventional apex principles.

Rencher, LLC, No. 15-cv-834, 2019 WL 2088537, at *7 (D. Utah May 13, 2019).[2] The protective order would remain in effect if the plaintiff "agree[d] not to call him at trial." *Id.* Purdue does not plan to call any of the CEOs at trial.

Finally, the Division's citations to cases in other circuits putting the burden on the party opposing depositions of apex witnesses are inapposite. Unlike the Federal Rules of Civil Procedure, the administrative rules require the party seeking ***any*** deposition to demonstrate that it is necessary. R151-4- 602(4). Its citation to the Rule 151-4- 502(I) is similarly misplaced. That rule addresses the proper scope of discovery. It says nothing about the ***means*** available to obtain that information. The Division bears the burden to show that the CEOs have unique personal knowledge relevant to the case that cannot be obtained from the millions of documents Purdue has produced or through other less burdensome and more relevant depositions.

II. THE DIVISION STILL HAS NOT SHOWN THAT THE CEOS HAVE RELEVANT AND UNIQUE PERSONAL INFORMATION.

Purdue recognizes that before its submission of this reply the Presiding Officer was inclined to allow the Division to proceed in its efforts to get the depositions of the CEOs. Purdue respectfully submits that this would be improper and unduly burdensome, particularly as to Dr. Landau as the current CEO. The Division's limitations on the scope of these depositions do not affect the burden analysis.

The Division has not shown that the CEOs have unique, relevant personal knowledge of information on topics relevant to this Utah matter. Tellingly, the Division has not pointed to a single piece of actual evidence from the vast collection of available documents in this proceeding and the MDL supporting its conclusory assertion that these CEOs "are the persons most able" to testify about the Individual Respondents' "knowledge, directions, and participation in Purdue's marketing and compliance efforts." Response at 6. Rather, the Division relies on wholly speculative suppositions about "informal" interactions between the CEOs and Dr. Richard Sackler or Dr. Kathe Sackler (the "Individual Respondents"). And nowhere does the Division connect its naked conjecture about the CEOs' hypothetical knowledge to Utah. Even if the CEOs had some ***unique*** knowledge of the Individual Respondents' involvement with Purdue's general marketing—which they do not—that information would not be relevant to this case, which involves statements made in Utah and any jurisdictionally relevant conduct by the Individual Respondents in Utah. As the Division has expressed: "the marketing practices of Purdue are nationwide. . . . [T]hey sent the same pamphlets, the same marketing materials to doctors everywhere. They didn't have, for the most part, any kind of special marketing that was specific to Utah." Transcript of Hrg. on Mot. to Convert at 61:23-62:5.

In the 8/5/19 Order, the Presiding Officer noted the Division's "apparent need to focus on Utah related marketing and the underpinnings of the Division's claim that the Sackler Respondents are 'suppliers' under the USPA." 8/5/19 Order at 3. Dr. Landau's sworn declaration makes clear, however, that he does not have any personal knowledge on this topic or any other topic relevant to the issues raised by the Division in seeking his testimony:

- While CEO, Dr. Landau "was not involved in the day-to-day sales, marketing, or promotion of Purdue's opioid medications in Utah, or any other state. Nor was [he] involved in the management or direct oversight of Purdue sales representatives in Utah, or any other state." Landau Decl. ¶ 9;

[2] Furthermore, while the court in *United Automobile Insurance Co.* noted that the applicability of the apex doctrine "appears to be an open question" without a Tenth Circuit Court of Appeals decision explicitly adopting it (notwithstanding the lower courts that have applied it), 2019 WL 2088537, at *7, it did remark that regardless, "many of the factors considered in an apex doctrine analysis" already overlap with a Rule 26(c) analysis, including considerations of burden and knowledge. *Id.*

- Dr. Landau did not personally "direct[] or engage[] in the marketing or promotion of Purdue's opioid medications in Utah," such as by "direct[ing] any other Purdue employee to visit particular doctors in Utah, to make payments to any particular doctors in Utah, or to engage in any particular promotional activities in Utah." *Id.* ¶ 10;
- Dr. Landau has no knowledge or information about conduct by Purdue in (or directed at) Utah, whether directed by the Individual Respondents or anyone else. *See id.* ¶¶ 6, 9, 10; and
- During the time Dr. Landau was CEO and Purdue used sales representatives to promote opioids—which was only between June 2017 and February 2018—there were at least four levels of management between Dr. Landau and Purdue's sales representatives in Utah, as in every other state. *Id.* ¶ 9.

Thus, the only actual evidence provided on this issue demonstrates that Dr. Landau is not uniquely positioned to know specific facts relevant to this administrative proceeding, and the Division has not demonstrated otherwise.

The 8/5/19 Order also appears to assume that additional information about "Utah related issues" is available that has not been "addressed in the existing document and deposition discovery." *See* Order at 3. This is incorrect. As the Division has already represented, Purdue's marketing was generally consistent nationwide and, thus, covered by the MDL production. Transcript of Hrg. on Mot. to Convert at 9:18-10:1, 61:23-62:5. Those documents were not merely received by the Division's private counsel in other litigation; the Division itself requested and received that entire production in this case and has represented that it would rely primarily on that evidence in this case. Transcript of Hrg. on Mot. to Convert at 9:18-10:1. Furthermore, Purdue produced 10,000 pages of Utah-specific documents requested by the Division, including all Utah sales representative call notes going back to 1995.

The 8/5/19 Order also lists general topics about which Dr. Landau (and presumably the other CEOs) would have knowledge, such as "managing and motivating personnel, communicating with . . . 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." Order at 4 (quoting Purdue's July 25, 2019 letter at 5) (emphasis added in the Order). Purdue respectfully submits that these company-wide issues were raised to demonstrate the severe burden that would result if Dr. Landau is forced to abandon his critical duties to the company in order to take time to prepare for and participate in a deposition and are not relevant in this Utah proceeding. In fact, not a single one of these general business operation topics has been identified by the Division as relevant to the depositions they propose to take. And none relate to the issues in the Utah case, which concerns marketing Purdue opioids ***in Utah*** and jurisdiction over the Individual Respondents ***in Utah***.

Further, to the extent these general business operation issues are relevant, they are amply covered by the MDL depositions and documents that Purdue produced to the Division. Those documents, including board notes and depositions of Richard Sackler and Kathe Sackler, address how Purdue went about "managing and motivating personnel, communicating with . . . 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."

Finally, depositions of Drs. Friedman and Landau are especially irrelevant and unduly burdensome. This proceeding concerns statements made between 2009 and 2019 (and the Citation does not explicitly reference statements after February 2018, when Purdue discontinued the use of sales representatives to promote its opioid medications to prescribers). Dr. Friedman was CEO from 2003-07 and thus left the company before the relevant period. Dr. Landau has only been CEO since June 2017, and detailing by sales representatives ceased eight months into his tenure. Landau Decl. ¶¶ 1, 9. Before that, beginning in September 2013, Dr. Landau was with Purdue Canada, which is not

involved in this proceeding. *Id.* ¶ 7. Thus, the CEOs, and especially Drs. Friedman and Landau, have no unique knowledge of Purdue's Utah marketing activities during the relevant time period, or of the Individual Respondents' involvement with Utah marketing. In particular, a deposition imposes an undue burden on Dr. Landau as current CEO, given his other significant and ongoing duties, *id.* ¶ 12, which far outweighs any probative value of testimony in light of Dr. Landau's limited tenure as CEO.

III. IN THE ALTERNATIVE, THE PRESIDING OFFICER SHOULD LIMIT ANY DEPOSITIONS TO PREVENT DUPLICATIVE AND UNDULY BURDENSOME DISCOVERY.

The Presiding Officer should limit the scope and manner of discovery to prevent "annoyance, embarrassment, oppression, or undue burden or expense" to a party or witness. R151-4-507(1)(c), (d). The risk of undue burden to Dr. Landau is especially high given his immense responsibilities as a sitting CEO and his limited knowledge of the relevant timeframe, as explained above. At a minimum, the Division should be required to depose Messrs. Stewart and Tinney first and then demonstrate that it requires further non-duplicative information available only from Dr. Landau or Dr. Friedman.

Purdue also has grave concern that the Division will try to go far beyond the subject-matter limitations the Division proffered as the sole reason for these depositions—determining what the CEOs may have known regarding the Individual Respondents' alleged "decision-making that led to [sic] Purdue's deceptive marketing in Utah." Response at 3. Given that the Division claims to want these depositions for such limited purposes, Purdue respectfully suggests the Presiding Officer consider other, less burdensome discovery methods or strict deposition limitations. *See* R151-4-507(1)(c). For instance, the CEOs could be deposed by written question on the limited topics proposed by the Division, which would confirm they have no relevant knowledge. Similarly, the Division should be ordered to limit its questioning to the Individual Respondents' involvement in Purdue's marketing in Utah while the witness was serving as CEO. *See* R151-4-507(1)(d).

IV. SUBPOENAS OF FOREIGN CEOS ARE SUBJECT TO REVIEW IN THE CEOS' HOME STATES.

The parties apparently agree that the enforcement of any subpoena that may be issued by the Presiding Officer "is left to the state in which the discovery is to take place." Response at 2 (quoting *Colorado Mills, LLC v. Sunopta Grains and Foods Inc.*, 269 P.3d 731 (Co. 2012) (*en banc*)). The Connecticut and Florida statutes the Division cites state the same requirement. Conn. Gen. Stat. Ann. § 52-148e(f)(1) ("The Superior Court shall have jurisdiction to quash or modify, or to enforce compliance with, a [foreign] subpoena issued for the taking of a deposition . . . "); Fla. Stat. Ann. § 92.251(3)(a) ("To request issuance of a subpoena under this section, a party from a foreign jurisdiction must submit a foreign subpoena to a clerk of court in the county in this state in which discovery is sought."). Thus, whatever subpoenas the Division may be granted will be subject to review and enforcement solely by those jurisdictions. Accordingly, it is correct that the Presiding Officer cannot unilaterally hale Purdue's former CEOs to Utah or compel their depositions.

CONCLUSION

The Division should not be permitted to take depositions of the current CEO and three former CEOs. In the alternative, the Presiding Officer should limit the Division to asking only questions about the CEOs' interactions with the Individual Respondents relating to Utah during their tenures as CEO and limit the method of discovery to avoid undue burden and annoyance. In addition, given the limited knowledge that either Dr. Landau or Dr. Friedman could possess, the Division should be required to depose the other CEOs first and then demonstrate why Dr. Landau or Dr. Friedman have unique personal knowledge that is not duplicative of the other testimony. This is an issue of great importance to Purdue and the CEOs, and Purdue again respectfully requests oral argument.

Snell & Wilmer
L.L.P.

Sincerely,

/s/ Elisabeth M. McOmber
Elisabeth M. McOmber

Cc: all counsel of record

4833-5687-1071