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Attorneys for the Utah Division of Consumer Protection

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.**	**DIVISION'S PARTIAL OPPOSITION TO PURDUE RESPONDENTS' REQUST FOR LEAVE TO ISSUE NOTICE OF ORAL AND VIDEO DEPOSITION OF THE STATE OF UTAH AND FOR EXPEDITED CONSIDERATION** **DCP Legal File No. CP-2019-005** **DCP Case No. 107102**

The Utah Division of Consumer Protection ("Division") respectfully opposes, in part, Respondents Purdue Pharma L.P., Purdue Pharma, Inc., and the Purdue Frederick Company ("Purdue")'s Request for Leave to Issue Notice of Oral and Video Deposition of the State of Utah

and for Expedited Consideration ("Request"). The Division does not oppose, in concept, the noticing of a deposition, and its own May 21, 2019 Interview/Deposition Report advised that it may seek, consistent with U.A.C. R.151-4-603(4), to depose 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. Purdue's proposed notice of deposition, however, is overbroad. And, as explained below, Purdue's Request effectively concedes that the discovery it seeks is unmoored from, and irrelevant to, the issues presented in this case. Purdue has made no secret of its displeasure regarding this proceeding, and ignores that its conduct, not the Division's, is at issue. But that does not change the law, and Purdue is not entitled to conduct discovery not authorized by the rules, and any deposition topics should be relevant to the claims and defenses in this matter.

The Division does not object to noticing Topics 3-6, 9, and 30 subject to appropriate objections and the limits described herein, but does object to Topics 1-2, 7-8, 12-14, and 28, in full. In addition, Topics 10-11, 15-27, and 29, are both unduly burdensome and seek information more easily obtained through document requests, including information Purdue has already sought through such requests. Additionally, the notice ultimately issued should be for a mutually agreeable time that accommodates the likelihood of multiple designated witnesses who cannot all be deposed on the same day.

I. Legal Standard

Under R.151-4-502, the scope of discovery is limited to relevant, non-privileged matters related to a claim or defense set forth in a pleading. Specifically:

> Parties may obtain discovery regarding a matter that: (a) is not privileged; (b) is relevant to the subject matter involved in the proceeding; and (c) relates to a claim or defense:(i)(A) of the party seeking discovery; or (B) of another party; (ii) that is set forth in a pleading; and (iii) that is brought pursuant to a statement of fact,

information, or belief.

R151-4-502(1). Even if a discovery request would fit within that scope, the Presiding Officer has an obligation to limit the "frequency and extent of discovery," even without a motion by a party, 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.

R151-4-506. In addition, "[u]pon motion by a party or by the person from whom discovery is sought the presiding officer may make an order that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including, for example, ordering "that the discovery not be had," "that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery," or "that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters." R151-4-507.

With respect to depositions, additional precautions apply. "A party may not be granted leave to take a deposition unless the party, upon motion, demonstrates to the satisfaction of the presiding officer that the person has knowledge of facts relevant to the claims or defenses of a party in the proceeding," among other limitations. R151-4-602(2). "In deciding whether to grant the motion, the presiding officer shall consider the probative value the testimony is likely to have in the proceeding." R151-4-602(3). "The moving party has the burden of demonstrating the need for a deposition." R151-4-602(4).

II. Purdue's Notice Includes Irrelevant Topics Outside the Scope of Discovery.

A. Purdue Admits It Is Not Targeting the Issues on which Liability and Civil Penalties Will Be Decided.

In its Request, Purdue does not even attempt to link any of the topics on which Purdue seeks to notice deposition testimony to any element of the Division's claims under the Utah Consumer Sales Practices Act ("UCSPA"). Likewise, it fails to identify any affirmative defense to which the discovery sought would be relevant. This alone shows that Purdue has failed to carry its burden of showing a need for a deposition on these topics.

Purdue admits that the reasons it seeks the discovery at issue are *not* tied to the elements of a claim for civil penalties or injunctive relief. The basis of its Request is its argument that documents it has reviewed show that (despite its claims that document discovery is in its infancy and it expects many more documents) "depositions are necessary to determine the State of Utah ("State")'s knowledge of and actions relating to prescription opioid medications and the causes and effects of Utah's opioid abuse crisis." Request at 3 ¶ 2. Purdue also casts aspersions concerning the level of funding for Utah's Controlled Substances Database and legislative efforts concerning opioid prescribing guidelines. *Id.* Such inquiries, on their face, are far afield from any element of liability on or defense to the Division's CSPA claims.

This is a streamlined proceeding in which the Division is not asserting claims raised in other actions against Purdue, such as nuisance, negligence, unjust enrichment, and fraud, nor is it one in which remedies such as compensatory damages, abatement of a public nuisance, restitution, and disgorgement are sought. Rather, in this proceeding, the Division asserts only UCSPA violations. As remedies, it also seeks only injunctive relief and civil penalties. Under the UCSPA, a deceptive act or practice by a supplier," such as Purdue, "in connection with a consumer transaction violates this chapter whether it occurs before, during, or after the transaction." Utah Code Ann. § 13-11-4. Whether Purdue engaged in deceptive acts or practices, and thereby violated

the statute, is what is at issue with respect to liability. Concerning the calculation of civil penalties, the statute also prescribes specific factors, (discussed further below).

As such, there will be no need for the Tribunal to consider, in this proceeding, questions of causation and damages. In this context, it is also well established that the division need not show proof of reliance. *See F.T.C. v. Freecom Commc'ns, Inc.*, 401 F.3d 1192, 1203 (10th Cir. 2005) (explaining, in the context of the FTC Act, that "[n]either proof of consumer reliance nor consumer injury is necessary to establish a § 5 violation" and that "[o]therwise, the law would preclude the FTC from taking preemptive action against those responsible for deceptive acts or practices, contrary to § 5's prophylactic purpose").[1]

Unlike in a private action, where, for example, a consumer seeks restitution for a purchase made *as a result of* the respondent's misleading advertising, the Division's responsibility is to police the marketplace and protect consumers and competitors from deceptive or unconscionable conduct. This is true, even where, unlike here, restitution is sought. *See F.T.C. v. Commerce Planet, Inc.*, 878 F. Supp. 2d 1048, 1088 (C.D. Cal. 2012) ("Under section 13(b) of the FTC Act, proof of injury by every individual consumer is not required to justify a restitutionary award"), *aff'd in part, vacated in part, remanded,* 815 F.3d 593 (9th Cir. 2016), and *aff'd in part,* 642 F. App'x 680 (9th Cir. 2016); *see also Gugliuzza v. F.T.C.*, 137 S. Ct. 624, 196 L. Ed. 2d 515 (2017), *cert. denied sub nom. F.T.C. v. Commerce Planet, Inc.*, 815 F.3d 593, 603–05 (9th Cir. 2016).

Tellingly, even where, unlike here, claims for relief such as restitution or ascertainable loss have been brought, Purdue does not cite any case, or any authority, for the expansive and irrelevant

[1] Although this case concerned the Federal Trade Commission, the UCSPA expressly seeks to "to make state regulation of consumer sales practices not inconsistent with the policies of the Federal Trade Commission Act relating to consumer protection." Utah Code Ann. § 13-11-2(4).

discovery it seeks.[2] The Division recognizes that if Purdue is found to have engaged in the violations of the CSPA alleged, the factors considered in assessing civil penalties include "the harm to other persons resulting either directly or indirectly from the violation.". Utah Code Ann. § 13-11-17(6)(b). Although the statue calls for consideration of the harm from *the violations*, it does *not* in any way suggest that the Tribunal could consider the argument that other bad actors also caused harm as an exculpatory factor excusing Purdue for doing so, nor does it contain any provision for argument that penalties should be lessened because someone should have stopped the party who violated the USCPA from violating the statute and thereby causing harm. *See* Utah Code Ann. § 13-11-17. For the reasons set forth more fully below, Purdue's proposed Topics 1, 7-8, 10, 12-14, and 28 are irrelevant to this action, and the Division should not be obligated to designate a witness to address them. Purdue's proposed Topics 3, 5-6, 9, 15-19, 21-22, 24-27, and 30 are overbroad, but if limited, may potentially encompass a subset of relevant discovery.

B. Purdue's Conduct Will be the Basis for Any Civil Penalties Imposed, Not that of Other Parties.

Many of the "Matters of Inquiry," ("Topics"), Purdue lists are irrelevant attempts to cast blame on others for the opioid epidemic, or to argue that the State of Utah should have stopped, or found more resources to stop, Purdue and/or others from engaging in misconduct. As explained above, Purdue's arguments about whether the Division should have mitigated the harm Purdue caused, or whether private parties other than Purdue also engaged in misconduct, are legally

[2] The only action it references is a case against Purdue by the State of South Carolina, which included both common laws claims and claims for ascertainable loss to certain state agencies. Purdue asserts, without providing a copy of the notices, that it has "noticed" Rule 30(b)(6) depositions in that action. *See* Request at 2 ¶ 1. It does not, however, contend that it actually took the depositions or that there has been no dispute over the scope of its notice there. It also omits that, despite the more numerous causes of action at issue in the South Carolina case, there the Rule 30(b)(6) notice initially served included 13 topics of inquiry, not 30 (and subsequent notices issued to additional state agencies largely overlapped with this request).

invalid. Not only do the Division's claims not require it to show misconduct by any party other than Purdue, Purdue does not, and cannot, assert their actions or inactions as an affirmative defense. Nor could any such defense exist. It is well established under the public duty doctrine that alleged omissions or alleged failures to adequately discharge a public duty are not a basis for liability. *See, e.g.*, *Faucheaux v. Provo City*, 2015 UT App 3, ¶¶ 15-16, 343 P.3d 288, 292–93 (explaining that a governmental actor cannot be liable for alleged failure to adequately discharge a public duty in taking "positive steps to benefit others or to protect them from harm," and "under the public-duty doctrine 'a governmental entity is not liable for injury to a citizen where liability is alleged on the ground that the governmental entity owes a duty to the public in general," citing the examples of "police or fire protection"). Purdue's attempts to blame third parties are similarly unavailing and have no bearing on Purdue's own violations of the CSPA. *Compare, e.g.*, *Cmty. House, Inc. v. City of Boise, Idaho*, 623 F.3d 945, 962 (9th Cir. 2010) (explaining that the legislature must "weigh important social demands inherent in the" policy at issue, and that "[l]egislators involved in such balancing are generally entitled to absolute legislative immunity") (citing *Kuzinich v. Santa Clara County,* 689 F.2d 1345, 1350 (9th Cir.1982)).

Further, as explained above the statute calls for consideration of the harm from *the violations*, it does *not* in any way suggest that the Tribunal could consider whether other parties could or should have thwarted Purdue's deceptive marketing scheme, nor does it make an argument that third parties also engaged in misconduct an exculpatory factor. *See* Utah Code Ann. § 13-11-17. It does, by contrast, expressly allow consideration of efforts by *Purdue* to mitigate the harm it caused. *See* Utah Code Ann. § 13-11-17(d) & (e) (including among the relevant factors "*efforts by the supplier* to prevent occurrences of the violation" and "efforts *by the supplier* to mitigate the harm caused by the violation") (emphasis added). The legislature could have, but did

not include mitigation efforts of other parties in the express, limited factors that may be considered in addressing the amount of civil penalties, and its decision not to do so it entirely consistent with the purpose of a proceeding seeking such penalties. It also comports with the longstanding "*expressio unius* canon," of construction, under which the expression of that limitation is an implied rejection of others." Nevares v. M.L.S., 2015 UT 34, ¶ 31, 345 P.3d 719, 725–26.

In addition to being irrelevant, to the extent Purdue's proposed deposition topics concern legislative functions or decisions (including, for example, Topics 1, 13, and 28). The Division does not represent the legislature in this proceeding and such discovery is outside the Division's possession, custody, or control.. Further, Topic 12, which concerns actions in cooperation with the National Association of Attorneys General ("NAAG") appears to seek privileged information that would intrude upon the common interest privilege.

Many of Purdue's proposed deposition topics, however, are evidently designed directly and only to address these irrelevant contentions:

- Topic 1 is directed towards the "Utah State Legislature's budgeting decisions" and is not in any way tied to UCSPA claims or defenses.
- Topic 3 is directed towards Utah's Prescription Pain Medication Program ("PPMP"), including, *inter alia*, its actions, budget, and any actions it considered but did not take, and is not in any way tied to UCSPA claims or defenses.
- Topics 5 and 6 concern the States "consideration, endorsement . . . and/or rejection" of Guidelines referenced in these Topics.
- Topic 7 is directed towards the "Utah Attorney General's 'Opioid Task Force'" including any budgetary constraints and is not in any way tied to UCSPA claims or defenses
- Topic 8 is directed towards "Utah's prescription medication 'Take Back Program,'" including seven different subtopics and is not in any way tied to UCSPA claims or defenses.

- Topic 9 is directed towards the "Utah Violence & Injury Prevention Program ('VIPP"), including five different subtopics and is not in any way tied to UCSPA claims or defenses.

- Topic 10 concerns public service announcements or education campaigns by the State of Utah, including five different subtopics relating to matters such as the budgeting and data analysis and is not in any way tied to UCSPA claims or defenses.

- Topic 11 concerns investigations by Utah into prescribers relating to any prescription pain medication, and includes seven subtopics and is not in any way tied to UCSPA claims or defenses or Purdue's professed commitment to reporting and not supporting such misconduct, but rather apparently aimed at assessing generally the State's enforcement activities and prosecutorial decisions.

- Topic 12 is directed to Utah's "involvement" in actions in cooperation with the National Association of Attorneys General ("NAAG") and contains no reference to deceptive advertising by Purdue.

- Topic 13 is directed to a 2016 publication by the "Office of Legislative Research and General Counsel," including "options" not included in the publication and actions or results that followed and is not in any way tied to UCSPA claims or defenses

- Topic 14 concerns the Utah Controlled Substance Database Program ("CSD"), including ten different subtopics and is not in any way tied to UCSPA claims or defenses.

- Topics 15, 16, 18, 21, and 24-27 include various subtopics directed towards the "policies, procedures, operations, and activities" of individual state agencies or departments, or state-run healthcare facilities and appear broad enough to suggest Purdue seeks to inquire, for example, into Medicaid or Workers' Compensation coverage for any prescription reimbursed and is not in any way tied to UCSPA claims or defenses.

- Topic 17 concerns a 2005 Department of Health "Workgroup," actions it did or did not take and a report cited in the discovery request and is not in any way tied to UCSPA claims or defenses

- Topic 19 seeks broadly to inquire about the Division of Disease Control and Prevention, including, for example, any data it collected and is not in any way tied to UCSPA claims or defenses, and appears intended as a fishing expedition when publically available reports and information on the opioid epidemic in Utah would be available to Purdue

- Topic 22 concerns complaints or reports to the Division concerning prescription opioid marketing, the Division's consideration of any such complaints, and "any reporting to or communications with any company" regarding marketing practices.

- Topic 28 seeks to inquire about the "State's funding of addiction or overdose treatment and/or prevention" and is not in any way tied to UCSPA claims or defenses.

- Topic 30 concerns data about and actions by the State in connection with crimes and crime rates in Utah, and their link to prescription opioids and to Purdue.

To the extent that Topics 3, 9, 10, 15-19, 21[3] concern the falsity of Purdue's misrepresentations and their dissemination in Utah, or Purdue's public promises to cooperate with law enforcement and report suspicious prescribers, while privately declining to do so, however, the Division would not object to relevance on these more limited matters. Similarly, the Division would not object to relevance with respect to Topic 22 to the extent Purdue's conduct or falsity of its marketing is at issue, or to Topics 24-27 only insofar as they concern Purdue's attempts to influence these agencies and/or their formularies. With respect to Topic 20, the information sought, to the extent it exists, would be covered by aggregate statistical information available through document requests and public information, and deposition discovery would serve no relevant purpose. Finally, to the extent that these Topic 30 concerns misleading statements by Purdue and the harm caused, the Division is willing to designate a witness to testify regarding Purdue's deceptive marketing or providing aggregate statistical information concerning increases in crime via document discovery.

C. Inquiry into the State's Knowledge of the Opioid Epidemic Is Outside the Scope of Discovery.

[3] Moreover, any information about the State's expenditures to confront harms would be better suited to document requests, and Purdue has already made document requests more directly addressing the harms alleged. It has shown no need for a cumulative request for deposition discovery.

As explained above, Purdue argues that a number of its Topics are directed toward discovery concerning Utah's "knowledge of and actions relating to prescription opioid medications and the causes and effects of Utah's opioid abuse crisis." Request at 3 ¶ 2. Such topics have no bearing on Purdue's UCSPA claims. Because they could conceivably relate to an attempt to bring an affirmative defense on statute of limitations grounds, though significantly overbroad and seeking testimony of legislative actors whom the Division does not represent in this action, the Division out of an abundance of caution, notes a subset of the discovery sought that may pertain to an attempted statute of limitations defense. The Topics at issue are Nos. 2, 4, 20, 22, 23, and 29. Each of these requests ignores, however, that inquiry into knowledge of the opioid epidemic would not address the issue of whether the Division had been apprised of Purdue's roll therein or the misconduct alleged in the Citation and Notice of Agency Action.

The topics directed towards Purdue's proposed "knowledge'" inquiry include:

- Topic 2, concerns investigations and findings by the Office of the Legislative Auditor General
- Topic 4 concerns various matters related to the "2009 Utah Clinical Guidelines on Prescribing Opioids, 2016 updates, and/or 2018 Utah Clinical Guidelines on Prescribing Opioids for Treatment of Pain," including the "legislative focus that precipitated the guidelines" and the State of Utah's "efforts" to assess "the continued medical appropriateness" of those Guidelines.[4]
- Topic 20 concerns "[c]ounty by county differences in prescribing, abuse, addiction and death associated" with both prescription painkillers and illicit opioids.
- Topic 22 concerns complaints, reports, or petitions regarding the prescription opioid marketing activities of any company.
- Topic 23 is directed at the "Attorney General Office's knowledge of [Purdue's] May 2007 Guilty Plea Agreement"

[4] To the extent it seeks discovery into "efforts by the State in assessing the continued medical appropriateness of the Guidelines" for purposes of arguing about causation or harm, Topic 4 is irrelevant.

- Topic 29 broadly concerns information about neonatal abstinence syndrome ("NAS"), including the State of Utah's knowledge of individual children who have suffered from NAS

Topic 2 is directed to the Office of Legislative Auditor General, which the Division does not represent in this proceeding and seeks discovery outside the Division's custody and control. Topics 5 and 6 are overbroad, but the Division does not object to designating a witness to the extent that they seek to address the falsity of Purdue's marketing and the Division's lack of knowledge of Purdue's misconduct. Topic 20 is simply not relevant to whether and to what extent the Division learned of the violations at issue in this action. To the extent Topic 22 concerns Purdue's marking activities, the Division would not dispute its relevance, but has already responded to a document request on the same topic.

Topic 23 seeks to discover privileged communications that, if they exist, would be subject to both the joint prosecution privilege and the attorney-client privilege. Purdue is not entitled to inquire into any communication among attorneys about potential legal claims, which appears to be the purpose of Purdue's proposed discovery. With respect to Topic 29, the Division does not object to making aggregate statistical information and public reports available, but objects to inquiry related to individual children diagnosed with NAS, which would be both needlessly burdensome and an intrusion on these children's privacy.

III. Purdue's Notice Includes Deposition Topics Duplicative of and More Suited to Document Requests.

Many of Purdue's proposed Matters of Inquiry are focused on reports, documents, or data compilations, better suited to document requests, not deposition discovery. And, Purdue has already propounded documents requests on many of the same matters, including matters the Division has already advised Purdue are irrelevant (and which are therefore not further discussed in this section). On their face, Topics 10-11, 15-27, and 29 seek various data and information and

are more suited to document discovery. As an example, Topic 19 seems geared towards seeking out documents and data from the Division of Disease Control and Prevention, including, for example, any data it collected. Topic 11, as another, example seeks to depose a designated witness concerning various matters such as communications by the State to members of the public and others related to disciplinary actions. Purdue has already served multiple document requests related to many of the same issues. To the extent they pertain to the falsity of Purdue's statements, Purdue has not shown any reason why such document requests would be insufficient to provide relevant discovery. *Compare, e.g.*, Purdue's First Set of Request for Production to the Division ("Purdue RFPs") No. 58 *with* Topic 11. Similarly, Purdue has already propounded document discovery concerning "any discussion, review, or analysis by a formulary committee (or other equivalent committees or groups) concerning coverage of Opioids" and "any discussion, review, or analysis of the State's Preferred Drug List and/or requiring prior authorization for any Opioid medication" and has not explained why it needs deposition testimony on the same. *Compare* Purdue RFPs Nos. 14 & 15 *with* Topics 24-28. Purdue also has not explained why, for example, it would need deposition testimony concerning educational efforts or media outreach by the Division when it has already served two separate RFPs on this topic. See Purdue RFPs 49 & 54.

Although Purdue's document discovery requests are overbroad, the Division, out of abundance of caution, has been diligently responding to document requests with the potential to bear on Purdue's liability or civil penalty factors. This discovery is more than sufficient. *See Braun v. Medtronic Sofamor Danek, Inc.*, 2:10-CV-1283, 2013 WL 1566692, at *4 (D. Utah Apr. 12, 2013) (agreeing that a Rule 30(b)(6) deposition topic would be an excessive burden where a party "could readily obtain the same information through alternate forms of discovery").

In conclusion, while the Division is prepared, for efficiency sake, to designate a witness or witnesses to testify at a deposition, Purdue's proposed Matters of Inquiry are vastly overbroad and largely irrelevant (as well as duplicative of document requests). The Division respectfully requests that the proposed Notice be narrowed consistent with the objections set forth above. The Division also requests that any notice issue for a mutually agreeable date, rather than eleven days from now, particularly given that a witness prepared to testify for the Division, unlike a fact witness, likely will have to be prepared to testify more broadly to the State's knowledge. In addition, the Tribunal has before it a motion to bifurcate the hearing, and if that motion is granted, it may also be expedient to stage the deposition so that topics which pertain only to assessment of civil penalties (and which comprise the bulk of the matters of inquiry Purdue proposes), are considered after topics pertaining to Purdue's liability.

DATED this 8th day of August, 2019.

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CERTIFICATE OF SERVICE

I certify that I have served or will serve the foregoing document on the parties of record in this proceeding set forth below:

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Dated this 8th day of August, 2019.

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