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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.	**REISSUED ORDER ON REQUEST TO DEPOSE 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 and this tribunal issued its initial Order on this matter on August 5, 2019. The presiding officer, however, had entirely forgotten an email request of counsel for Purdue to file an additional brief by the end of the business day on August 6, 2019. Such additional brief will be treated as an approved surreply. When reminded of the approved additional briefing, the tribunal afforded Purdue an extension in which to file its surreply until noon on the 7th of August.

In its surreply, and in its earlier briefing, Purdue sought oral argument on the matter. In light of the well briefed arguments of the parties, oral argument will not provide any additional benefit in ruling on the request to take the depositions. U.A.C. R151-4-304(1) makes oral argument permissive and no oral argument will be heard.

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 discover would be appropriate. This rule identifies three circumstances in which discovery could be limited. Except as noted below, and addressed in the Order, only one of these circumstances is modestly 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. The Division has already noticed only a single separate day for the three former CEOs. This is a reasonable limitation as to these deponents. In light of the impact that a single day of deposition testimony would have on the sitting CEO, a similar limitation and an hour limitation is appropriate with regard to Dr. Craig Landau.

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 dollar 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 suggests on more than one occasion in its briefing that the Division's statements about its needs to pursue discovery in different fields of inquiry is changing and undermines its need to depose the CEOs. However, the Sackler Respondents' attacks on subject matter jurisdiction over the Sacklers has made the depositions of the CEOs more prominent than may have been previously apparent to the Division. Reliance on prior discussions regarding the anticipated scope of discovery should not limit the discovery process as the case develops and progresses.

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 in its July 25th Letter 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.

Purdue's willingness to now address the May 2019 order in the *Stucki* case (Purdue August 7 Letter, pp. 2-3) does not change the analysis here. It is not merely the fact that the plaintiff corporation had decided to call its CEO as a witness and could not have its "cake and eat it, too" that caused the *Stucki* court to deny the plaintiff's motion for a protective order.[2] What was controlling in the analysis in the May 2019 *Stucki* order was that the plaintiff "cannot

[2] It may be noted here that Purdue states at page 3 of its August 7th Letter that it "does not plan to call any of the CEOs at trial." Plans may change. If Purdue, the Sacklers and the Division agree that they will not call any of the CEOs or use their testimony at any hearing or in any motion, the Division may decide that it will not take their depositions. It is not known whether any of the parties could make the determination at this stage of the proceedings to not use the CEOs' testimony, but it could be explored by the parties among themselves.

simultaneously seek to shield [the CEO] from a deposition because he has no unique knowledge, while holding him in reserves as a rebuttal witness based on his knowledge." *Stucki*, 2019 WL 2088537 at *7. It was because he had relevant knowledge that his deposition was required, a matter that the corporate plaintiff had earlier denied.

Purdue (Purdue August 7 Letter, p.3) states that the "Division has not shown that the CEOs have unique, relevant personal knowledge of information on topics relevant to this Utah matter." On this point, Purdue quotes a statement made in the hearing on the Motion to Dismiss to the effect that Purdue "didn't have, for the most part, any kind of special marketing that was specific to Utah." Whether one accepts the view of the Division regarding this litigation or not, it is an inescapable conclusion that knowledge about Purdue's nationwide marketing IS knowledge about Utah marketing. Knowledge about misrepresentations of opioid risks on a national scale IS knowledge about misrepresentations of opioid risks in Utah. Although the tribunal can understand that Purdue views this case entirely differently from the Division, the Division is not precluded from pursuing discovery related to its theory of the case. Purdue may not choose which topics or lines of inquiry the Division may pursue.[3]

The subject depositions need not be limited to the Division "asking only questions about the CEOs' interactions with the Individual Respondents relating to Utah" as suggested in Purdue's conclusion on page 5 of its August 7th letter. The Division may inquire about any matters that are related to the subject of its citation and to the defenses raised by the Respondents. as the CEOs might have relevant knowledge about many or most of the Division's claims and the Respondents' defenses. U.A.C. R151-4-502 provides that parties "may obtain discovery

[3] "[A] party should not be limited by its opponent's theory of the case in determining what is discoverable." *In re Cooper Tire & Rubber Co.*, 568 F.3d 1180, 1192; 2009 U.S. App. LEXIS 12473. *Cooper* is a Tenth Circuit Court case on appeal from a Utah Federal District court decision in a case originally named *Petersen v. DaimlerChrysler Corp.*, 2007 U.S. Dist. LEXIS 60981; 2007 WL 2391151.

regarding a matter that is not privileged; is relevant to the subject matter involved in the proceeding; and relates to a claim or defense of the party seeking discovery; or of another party; that is set forth in a pleading; and that is brought pursuant to a statement of fact, information, or belief."[4]

The business practices of Purdue, including alleged misrepresentations about opioid risks, may well have been directed from the very highest levels of management of the company. The Division asserts that it certainly was within the purview of the two allegedly influential directors, Richard Sackler and Kathe Sackler. The normal business interaction between board members, and particularly influential board members, and the chief executive officer of a company leads to unique, and relevant personal knowledge. To deny this almost certainty is to deny the common business experience of the corporate world.

The existence of "at least four levels of management between Dr. Landau and Purdue's sales representatives in Utah" (Purdue August 7th Letter, p.4, and Landau declaration at ¶9) is of small moment, if the activities were directed from the company's highest levels of management, including its alleged influential directors, who (in any typical corporate setting) would have interacted with the chief executive officers of the company.

Purdue's argument (Purdue August 7th Letter, p.3) that the CEO depositions should not be taken because of the "millions of documents Purdue has produced" in this proceeding does not mitigate the unique and relevant knowledge of the CEOs. Documents can only provide part of the narrative in this proceeding. This is particularly true if the Respondents intended to keep secret the control of the Sackers and/or the misrepresentations about the risks of opioids.

[4] Persuasive authority is also found in Rule 26(b)(1) of the Utah Rules of Civil Procedure. "Parties may discover any matter, not privileged, which is relevant to the claim or defense of any party if the discovery satisfies the standards of proportionality set forth below [in Rule 26(b)(2)]." The standards of proportionality are essentially the same as set forth in R151-4-506 which is quoted *in toto* above.

The assertion that the marketing by sales representatives ceased eight months into Mr. Landau's tenure as chief executive officer of Purdue (Purdue August 7th Letter, p.4, and Landau declaration at ¶¶ 1 and 9) is not a reason to deny his deposition, but is actually an admission that such activities occurred during his period of leadership. That these activities ceased after eight month on the job might even imply that he has unique and relevant information as to why management decided to terminate such practices or the problems, if any, which were engendered by such practices. The Division is entitled to inquire as to such matters.

Contrary to Purdue's assertion that this proceeding concerns statements made between 2009 and 2019 (Purdue August 7th Letter, p.4), it has yet to be determined when the statute of limitations period begins to run in this case (see the July 15, 2019 Order on Motion to Dismiss of the Sackler Respondents, pp. 36-40). Even assuming a clean January 31, 2009[5] start date to the running of the statute of limitations, information known to Mr. Friedman, other Purdue senior management (of which Mr. Friedman might well have knowledge) and the Sackler Respondents during Mr. Friedman's term of service from 2003-2007 is relevant to damages or the causation of damages incurred in the 2009 to 2019 period. Further, knowledge about Utah suit-related contacts of Richard Sackler and Kathe Sackler is relevant to establish both personal and subject matter jurisdiction, even though such activities or management control existed or had its beginnings prior to the statute of limitations period. Such matters might well be within the unique and relevant personal knowledge of Mr. Friedman from his 2003-2007 tenure.

In the first paragraph under the heading "Argument" at page 2 of Purdue's July 25th 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

[5] The Division's Citation was filed on January 30, 2019 and U.C.A. § 13-2-6(6)(a) provides a clear ten year statute of limitations period.

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.

Section IV of Purdue's August 7th Letter at p.5, states that the parties agree that local state court rules apply to the depositions. It is not clear as to what the parties may have agreed on this subject. R151-4-513 states that service of the subpoena must comply with local requirements. Further, R151-4-513 (3)(c) makes clear that a subpoena issued under these administrative rules may require a person who does not reside in this state to appear at a deposition. The principle of comity fully applies to the taking of depositions. The only other limitation provided by the rule (other than the method of service of the subpoena) is the location of the deposition. In this regard, the rule directs that a person may be deposed in the county in Utah where the person is served with the subpoena "or at any reasonable location as the presiding officer may order." The county of residence of the deponent is a reasonable location for the depositions of each of the CEOs.

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 depositions being served according to some other procedure.

3. Unless another location is otherwise mutually agreed to by the deponent and each of the parties, the depositions shall take place in the county where the deponent resides.
4. The Division may take the deposition of Dr. Craig Landau.
5. Each individual deposition, including the unscheduled deposition of Dr. Craig Landau, shall be limited to no more than seven hours of questioning by the Division and each separate deposition shall only be taken on a single day.
6. Except for the limitation set forth in the preceding paragraph, Purdue's motion for a protective order is denied.

DATED August 12th, 2019.

UTAH DEPARTMENT OF COMMERCE

Bruce L. Dibb, Presiding Officer

CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of August, 2019, I served the foregoing on the parties of record in this proceeding by delivering a copy by electronic means to:

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