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

IN THE MATTER OF: **PURDUE PHARMA L.P.; PURDUE PHARMA INC.; THE PURDUE FREDERICK COMPANY INC.; RICHARD SACKLER, M.D.**; and **KATHE SACKLER, M.D.,** **Respondents.**	**PURDUE'S OPPOSITION TO THE DIVISION'S MOTION TO BIFURCATE** **DCP Legal File No. CP-2019-005** **DCP Case No. 107102** **Oral Argument Requested**

Respondents Purdue Pharma L.P., Purdue Pharma Inc., and The Purdue Frederick Company Inc. (collectively, "Purdue"), through counsel, submit this *Opposition to the Division's Motion to Bifurcate*, and request oral argument.

SUMMARY

The Division's motion to bifurcate this Administrative Proceeding into a "Findings" phase and a "Sanctions" phase is an attempt to circumvent the Executive Director's Order granting the Presiding Officer's request for an extension. Recognizing that the October 2019 trial date was utterly infeasible, the Presiding Officer sought an extension of four months which the Executive Director granted for good cause. Consistent with that extension, the Tribunal ordered a schedule with a hearing starting in February 2020. Now, the Division seeks to undo both the Executive Director's and the Tribunal's orders through a proposed "bifurcation" that would effectively reinstate the same schedule that the Presiding Officer found to be infeasible. Like almost everything the Division has done in this action, its request to bifurcate the Administrative Proceeding appears to be unprecedented. The administrative rules do not provide for bifurcated discovery. Even if they did, bifurcation is unnecessary, inefficient, and unfairly prejudicial to Purdue.

The Division's proposal would create two separate proceedings, and would end-run the continuance granted just two weeks ago by the Executive Director. Given the current status of discovery, the Division's proposal to close the first "phase" of fact discovery by August 30, 2019—just ***eighteen days*** away, and just ***two*** days more than the Parties had for discovery under the original Scheduling Order—is impossible. The Division ***still has not identified all the specific representations made in Utah for which it seeks to hold Purdue liable***. Moreover, there is ongoing conferral and motions practice regarding numerous, significant discovery disputes on both sides.

Purdue argued these points at length in its request for a continuance, which the Executive Director granted, but the Division will not relent in its effort to limit discovery and rush through

this case. Even setting aside Purdue's due process concerns, the Presiding Officer specifically found that this proceeding involves "a complex set of allegations over a significant time period," which "necessitates significant discovery by the parties." As a result, allowing the Parties more time was "prudent," so the Executive Director granted a four-month extension of the hearing date. (July 22, 2019 Order on Req. for Ext.).

Bifurcation does not benefit the public and actively harms the Parties. In short, the Division offers no good cause to bifurcate these proceedings. The request should be denied.

RELEVANT FACTS

The Division seeks expansive discovery from Purdue. (*See* July 17, 2019 Req. Ext., attached as **Exhibit A**.) Purdue likewise requires significant discovery from the Division and state agencies. While the Division has access to extensive discovery from the MDL, the discovery Purdue seeks from the Division or state agencies has not been produced or requested before, and it is not otherwise available to Purdue. This includes significant discovery on whether Purdue violated the UCSPA, separate and apart from any alleged sanctions. For example, Purdue needs discovery on the specific representations for which the Division seeks to hold Purdue liable. Purdue also has requested discovery about the State's own knowledge of and approach to opioid prescribing risks, benefits, guidelines, and limits, which may relate to whether any challenged statements are in fact violations of the UCSPA, or whether the State's own policy decisions, rather than Purdue's actions in Utah, played a role in the opioid abuse epidemic. This same evidence may also bear on the Division's improper attempt to greatly expand the 10-year limitation on UCSPA enforcement actions.

The Parties continue to meet and confer regarding their discovery requests and responses. The Division recently produced some documents, and Purdue is reviewing them to determine the

sufficiency of the production and to identify potential witnesses. But the Division has objected to several categories of requests, and although Purdue will continue negotiating in good faith, motion practice is likely. In addition, the Individual Respondents served discovery on July 23, 2019, and the Division's responses are due August 12, 2019. Even assuming the Parties can reach an agreement on these discovery issues without the need for motion practice, responding to discovery will require significant time and resources on the part of Purdue (and presumably the Division).

There also are two pending discovery motions related to depositions. Purdue objected to the Division's request to depose the current and former CEOs, and the Division objected to Purdue's request to issue a 30(b)(6) notice to the Division. Only one fact deposition has been taken in this proceeding.

As the Presiding Officer has already determined, there is significant ongoing discovery that cannot be accomplished under the deadlines imposed by the previous Scheduling Order, including but not limited to the August 28, 2019 fact discovery deadline. Accordingly, on July 23, 2019, the Executive Director continued the hearing by four months, and on July 31, 2019, the Presiding Officer issued an Amended Scheduling Order with a December 12, 2019 discovery deadline. Nonetheless, on August 2, 2019, the Division moved to bifurcate this proceeding into a "Findings Phase," including discovery and a hearing on the violations it alleges—and a "Sanctions Phase," including discovery and a hearing on the sanctions it seeks. The Division does not define exactly what issues will be adjudicated in each "phase," but proposes an August 30, 2019 fact discovery deadline for the "Findings" or "violations" phase, an extended expert discovery deadline, and a condensed period for expert motions, motions *in limine*, and dispositive motions.

ARGUMENT

A. The Administrative Rules Do Not Provide a Mechanism to Bifurcate Discovery.

Administrative Rule 151-4-704, which is the basis of the Division's Motion, provides for bifurcation of the final ***hearing***, not of ***discovery***. UTAH ADMIN. CODE R151-4-704 ("The presiding officer may, for good cause, order ***a hearing*** bifurcated into a findings phase and a sanctions phase." (emphasis added)). Indeed, the Rule is titled "Bifurcation of ***Hearing***." Yet, the Division seeks to bifurcate the whole proceeding, so that there are two discovery phases and two hearings (although it is not clear what discovery and evidence the Division proposes to leave for the second phase). The Rule contemplates no such process. The Division states that it is "aware of other cases in which the Presiding Officer has bifurcated ***hearings***," but cites no authority for bifurcating the entire administrative ***proceeding***. The Division's request to bifurcate this proceeding thus should be denied.

B. Good Cause Does Not Exist for the Division's Request to Bifurcate This Proceeding.

Even if the Rules allowed bifurcation of the entire proceeding, there is no good cause for the request. The Division argues, in conclusory fashion, that bifurcation would increase efficiency, "allow the parties to maintain discovery momentum," further the public interest, "[l]essen the demands placed on the Tribunal," and increase the possibility of a settlement, all without prejudicing the Parties. The Division is wrong on all fronts.

Initially, there is no presumption in favor of bifurcation. In both cases cited by the Division, the Court ***denied*** requests by ***defendants*** to bifurcate the proceedings because there is a presumption that a plaintiff is entitled to a single hearing at which it can present all its proof in whatever order it chooses. In *Sensitron*, the court explained that the presumption arises from "the general principle that ***a single trial tends to lessen the delay, expense and inconvenience to all parties***." *Sensitron, Inc. v. Wallace*, 504 F.Supp.2d 1180, 1186 (D. Utah 2007) (quotation omitted).

Here, the Division is effectively asking for two separate proceedings, where there would otherwise only be one. *Sensitron*'s general principle is true here.

First, the Division is wrong to suggest that Purdue "cannot articulate any credible claim of prejudice." The Division's proposed fact discovery deadline for the liability or "Findings" phase is just ***eighteen days away—two days*** later than the close of discovery in the original Scheduling Order. As Purdue explained at length in its Motion to Continue (and elsewhere), this is an impossibility. Discovery relating to the ***misrepresentations alone***—which will necessarily be part of any liability or "Findings" phase—cannot possibly be completed in the next ***eighteen days***, in no small part because the Division still has not identified the alleged ***public statements in Utah within the past ten years*** that violate the UCSPA. This would cause undeniable prejudice. Many of the same discovery constraints that justified a continuance in the first place would once again be present—and indeed, be more acute—given a remaining fact discovery period of fewer than three weeks under the Division's proposal. And although Purdue's Motion to Dismiss primarily raised Purdue's right to be heard, at this juncture the Division's proposed schedule would violate Purdue's right to notice of the claims against it as well. Purdue recognizes that the Presiding Officer is reticent to find a due process violation, but, at the very least, the Division's proposal is nothing more than an effort to undo the continuance granted by the Executive Director.

Second, damages and liability are closely intertwined in this case because of the role of causation (which the Division now acknowledges it must prove). The UCSPA requires the Division to prove that each representation and omission was made "in connection with a consumer transaction," which in this case requires proof that the alleged misrepresentation or omission caused doctors to write opioid prescriptions. (Purdue's Mot. Dismiss at 33; Purdue's Reply Mot. Dismiss at 21–22.) The Division itself has alleged that the State's claimed damages will be used

"in determining the civil penalties appropriate for Purdue's conduct." (Citation ¶ 29; *accord* Div.'s Resp. Mot. Dismiss (citing UTAH CODE ANN. § 13-11-17(b)); *see also* Purdue's Mot. Dismiss at 33; Purdue's Reply Mot. Dismiss at 15, 21.) And the report prepared by the Division's own expert, Gil. A. Miller, confirms that the issue of liability cannot be disentangled from the issue of penalties: Miller "opines" that he could calculate "the number of occurrences" based on information about Respondents' statements or omissions, and data regarding the number of sales visits, website views, and other statements "accessed by Utah patients, prescribers, and payors." (*See* Miller Expert Rpt. at 4.) Because causation relates to the Division's burden to prove liability ***and*** sanctions, there would be overlapping discovery in both "phases," and no meaningful way to disentangle that discovery.

Third, and relatedly, far from adding "clarity to the case presentation" or "lessen[ing] the demands placed on the Tribunal," bifurcation would increase inefficiencies and unnecessarily complicate this proceeding. The Division fails to explain how its proposed bifurcated discovery process would work in practical terms. For example, the Division does not specify the issues to be adjudicated (and what evidence would be discoverable) during each phase. The Division's proposal thus will lead only to additional discovery disputes requiring the Parties' resources and the Presiding Officer's attention. As the Presiding Officer has acknowledged, this case is complex enough without adding litigation over whether a request can be made, a subpoena issued, or deposition taken in one phase versus another. The Division ignores these critical questions.

The Division also does not acknowledge that its proposal would extend the deadlines for expert disclosures in this "liability phase," but simultaneously shorten the time for expert motions, motions *in limine*, and dispositive motions. Not only are those motions essential to prepare for the

hearing, but the Presiding Officer would have almost no time to consider them beforehand, which would prejudice Purdue.

Fourth, the Division offers no support whatsoever for its "public interest" argument, stating only that "delay" would somehow harm the public. Initially, the un-bifurcated resolution of this case by March 16, 2020—a tight timeframe even after the extension—cannot reasonably be characterized as a "delay." The Division's argument to the contrary effectively ignores the Presiding Officer's decision to seek (and obtain) a continuance because more time was necessary to complete discovery. Nor is it clear what would be "delayed": under any schedule, these proceedings are scheduled to end on March 16, 2020. The Division would not recover damages (if at all) until after the conclusion of both phases. And if the Division's allegations are to be believed, it would not be in the public interest to rush through the liability phase on an inadequate record and risk a loss at the hearing or on judicial review. In any event, because all the allegations in this matter involve past conduct, there are no ongoing violations from which the Division needs to protect the public. Neither the Parties nor the public benefit from rushing to judgment in this case.

CONCLUSION

In sum, the Division's proposed bifurcation is not permitted under Rule 151-4-704 and should be denied on this basis alone. But even if the Rule did permit such a procedure, the proposed bifurcation would be contrary to the public interest, would unnecessarily complicate this proceeding and lead to inefficiencies, and would unfairly prejudice Purdue. The Division's Motion to Bifurcate should be denied.

DATED: August 12, 2019.

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CERTIFICATE OF SERVICE

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