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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.**	**REPLY TO OPPOSITION TO DIVISION'S MOTION TO BIFURCATE PROCEEDING** **DCP Legal File No. CP-2019-005** **DCP Case No. 107102**

The Tribunal has the authority to bifurcate this proceeding into a findings (*i.e.* liability) phase and a sanctions phase if it finds "good cause" for such bifurcation. The Division's motion explained bifurcating the hearing into a findings phase and a sanctions phase serves the public

interest in speedy resolution, increases efficiency, resolves discovery issues, conserves resources, adds clarity to case presentation and increases the possibility of settlement. Respondents oppose bifurcation and argue (1) the Tribunal lacks authority to bifurcate discovery; (2) there is no presumption in favor of bifurcation; (3) Respondents are prejudiced by bifurcation because they need further discovery to understand which of their misrepresentations are at issue; and (4) bifurcation will not increase efficiency because liability and sanctions are intertwined. None of these arguments persuades.

First, Respondents are wrong as a matter of law in claiming this Tribunal's authority to bifurcate does not extend to discovery. The Department of Commerce Administrative Procedures Act Rule ("Rule") 151-4-704 expressly provides for bifurcation: "[t]he presiding officer may, for good cause, order a hearing bifurcated into a findings phase and a sanctions phase." R151-4-704. Yet Respondents ask this Tribunal to find that although it has the power to bifurcate, it nonetheless lacks the power to issue discovery schedules implementing its bifurcation order, That makes no sense, and is contradicted by the Tribunal's authority under R151-4-105(1), which states that the rules are intended to secure the "just, speedy, and economical determination of all issues presented in adjudicative proceedings before the department." *See also* R151-4-503(1) (Tribunal has power to issue prehearing orders), R151-4-507(1) (Tribunal has power to issue protective orders governing discovery); and R151-4-508 (Tribunal has authority to determine timing, completion and sequence of discovery within statutory time parameters).

Second, Respondents are wrong on the law when they argue any presumption weighs in favor of a single trial. *See* Respondents' Opposition at 5. As explained by the Division in its moving papers, the prosecuting party enjoys a strong presumption that it should be permitted to

control the manner in which it presents it case, including whether it is bifurcated or not. That is the teaching of *Sensitron, Inc., v. Wallace*, 504 F. Supp.2d 1180, 1186 (D. Utah 2007) and *Patten v. Lederle Labs*., 676 F. Supp. 233, 238 (D. Utah 1987). Further, the decisional law on bifurcation has not been rebutted by Respondents and supports the Division's motion seeking to bifurcate. *See, e.g.*, *Clayton v. Ford Motor Co.*, 2009 UT App 154, ¶¶ 34-35, 214 P.3d 865, 874 (2009); *Wood v. Wood*, 2004 UT App 343 (2004); *Parker v. Parker*, 2000 UT App 30, 996 P.2d 565 (2000); *U.S. ex rel. Bahrani v. ConAgra, Inc.*, 624 F.3d 1275, 1283–84 (10th Cir. 2010); *Angelo v. Armstrong World Indus., Inc.*, 11 F.3d 957, 964 (10th Cir. 1993); *T.J. Smith & Nephew Ltd. v. Deseret Med.*, 85-C-0615W, 1985 WL 73295, at *1–4 (D. Utah Nov. 19, 1985).

Third, Respondents claim prejudice but that claim cannot withstand scrutiny because it rests on a faulty premise. Namely, Respondents claim they lack notice regarding which misrepresentations are at issue in this proceeding. *See* Respondents' Opposition at 6. But the Division's citation, as well as its Initial and Supplemental Disclosures, identify the misrepresentations at issue. The Presiding Officer held that the Division plead its claim of deception with sufficient Rule 9(b) particularity so as to place Respondents on notice. *See* June 20, 2019, Order On Motion To Dismiss of the Purdue Respondents.

Nor can Respondents claim that the parties have not had enough discovery to develop a robust record regarding these misrepresentations. To the contrary, the evidentiary record is robust. Indeed, the Presiding Officer noted the volume of evidence available outside the confines of this proceeding: "[i]t is further to be noted that this administrative proceeding is not being prosecuted in a vacuum. More than eleven other actions have been brought against Purdue in other jurisdictions. The MDL was filed in 2017 and the Purdue Respondents have been parties in the bellwether case in the MDL for over a year and a half." *Id.* at 9-10. The Division

and Respondents all have access to the evidentiary record regarding Respondents' misrepresentations. The Division, not Respondents, is the party who has been seeking Utah-specific information about the misrepresentations from Respondents' files. The bulk of the evidence regarding these misrepresentations has always been in the files of the Respondents who made the misrepresentations, not in the files of the Division. That discovery effort remains ongoing, and the Division will seek assistance from the Tribunal as needed. By contrast, the Respondents' discovery has been focused on evidence relating to harms and causation. As briefed to this Tribunal in the context of the Respondents' Rule 30(b)(6) notice, much of this discovery seeks irrelevant information. In sum, Respondents will not be prejudiced by bifurcation except in the sense that any party who has engaged in wrongdoing is prejudiced by an adjudication of liability.

Fourth, Respondents argue against bifurcation by claiming that the Division has conceded it must prove causation, and therefore liability and sanctions cannot be adjudicated separately because the Division cannot prevail without proving that each misrepresentation caused a physician to write a prescription. Respondents again err as a matter of fact and law. As a factual matter, the Division has never conceded it must prove causation as contemplated by Respondents. As a legal matter, it is clear that the Division need not prove causation. *See F.T.C. v. Freecom Commc'ns, Inc.*, 401 F.3d 1192, 1203 (10th Cir. 2005). 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 polices the marketplace and protects consumers and competitors from deceptive or unconscionable conduct. *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).

The Division bears the burden of proving Respondents made misrepresentations, and asks that it be permitted to make that evidentiary showing of liability in 2019, either on the original or slightly modified schedule.[1] Such a bifurcated approach best conserves resources and facilitates settlement. Notably, Respondents did not try to rebut the reality that a bifurcated hearing on the original schedule greatly increases the possibility of a prompt settlement, which would benefit the public interest and avoid a scenario in which at least one Respondent (Purdue) enters into bankruptcy prior to adjudication of liability. Respondents do not need any more discovery on their own misconduct: they know what they did across the nation, and they know what they did in Utah. The Division respectfully urges the Tribunal to bifurcate this proceeding for "good cause."

DATED this 14th day of August, 2019.

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[1] For all the reasons set forth in it is moving papers, the Division seeks bifurcation even if the liability hearing is scheduled for later than the initial October 15 date.

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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 14th day of August, 2019.

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