DEPARTMENT OF COMMERCE
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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.	**ORDER ON DIVISION'S MOTION TO BIFURCATE PROCEEDINGS PURSUANT TO R151-4-704** Case No. **CP-2019-005** DCP Case No. 107102

On August 2, 2019, the Division of Consumer Protection (the "Division") filed a motion to bifurcate these administrative proceedings pursuant to U.A.C. R151-4-704 (the "Motion"). On August 12, 2019, Purdue filed an opposition to the Motion and the Division filed its Reply on August 14, 2019.

ANALYSIS

Administrative proceedings may be bifurcated into a findings phase and a sanctions phase pursuant to the provisions of R151-4-704. The relevant rule states simply that the "presiding officer may, for good cause, order a hearing bifurcated into a findings phase and a sanctions

phase." By employing the word "may" in the rule, it is clear that such action is at the discretion of the presiding officer. Further, good cause must be shown for such a bifurcation.

There is no reported Utah case authority interpreting or applying R151-4-704.

Contrary to the characterization of the Division, the parties did not carefully negotiate the April 23, 2019 Scheduling Order dates (Motion p. 6). The respondents' cooperation in trying to fit within the 240 day requirement of R151-4-109(2)(a) was accomplished with the respondents figuratively kicking and screaming, and objecting multiple times on the record, that their due process rights were being violated. The current hearing schedule, beginning in late February, fairly addresses these concerns. Any order issued now setting a November hearing date with the rebuttal expert designation dates and the motion dates of the April 23, 2019 Scheduling Order poses new due process issues that are unnecessary and will embroil the parties in time-consuming and needless motions.

Bifurcation would unnecessarily complicate discovery in these proceedings in multiple ways. By not bifurcating the proceedings, it would at least eliminate the possible need of taking the deposition of some individuals twice, once for liability and once for damages. More critical is that bifurcating the hearing upon the schedule that the Division proposes would mean that discovery on liability would close fourteen days from the date of this Order – which is clearly an impossibility.

Further, with regard to discovery and disclosures, it is to be noted that under Rule 26(a)(1)(C) of the Utah Rules of Civil Procedure, a party is to provide in initial disclosures "a computation of any damages claimed and a copy of all discoverable documents or evidentiary material on which such computation is based, including materials about the nature and extent of injuries suffered." While Rule 26 is not controlling here, the Division's unexplained failure or

reluctance to address the basis for the computation of its claimed damages is clearly not "good cause" for bifurcation so that damages can be addressed in a subsequent sanctions hearing.[1]

It is a correct observation that bifurcation has been employed frequently by this tribunal. However, this has been done in cases before the Division of Occupational and Professional Licensing or before the Division of Securities where a respondent desires not to have his prior negative enforcement history introduced during the findings phase of a case to avoid tainting the outcome in the findings phase. The evidence of the prior negative enforcement history is then presented for the first time in a sanctions phase as aggravating circumstances that would impact the severity of the sanctions to be imposed. This would be an example of good cause which would justify the exercise of discretion in possibly granting a bifurcation. No need to isolate a negative enforcement history is evident in the present proceeding. Further, it is the Division seeking bifurcation here, and not one of the Respondents.

The Division's request to have the proceeding bifurcated runs counter to the general principle that a single trial tends to lessen the delay, expense and inconvenience to all parties. The Division cites federal case law and the U.S. District Court case from the Central Division of Utah known as *Sensitron, Inc. v. Wallace*, 504 F.Supp.2d 1180; 2007 U.S. Dist. LEXIS 32516. The Division cites *Sensitron* for the proposition that "the presumption is that the plaintiff, in a typical case, should be allowed to present her case in the order she chooses." In *Sensitron,* however, it was the plaintiff who was objecting to bifurcation, and the defendant who was seeking bifurcation.

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[1] It is noted that more than six months have elapsed since the filing of the citation in this matter, and that the Division's administrative action is a continuation of the UCSPA claims originally asserted in a state civil action filed in the district court in Carbon County more than fourteen months ago. The Division's theory of damages should be past the infancy stage at this juncture. It is acknowledged that the tribunal only receives certificates of service of the parties' initial disclosures and responses to discovery. As a consequence, it is possible that the Division has begun to make meaningful disclosure about its theory of damages and the underlying facts upon which its damage claims are based. The point here, however, is that the Division has not presented in this proceeding, or in its Motion, an issue regarding damages that is a sufficient cause or a good cause to bifurcate the administrative hearing.

Following the language quoted by the Division, the *Sensitron* court concludes its thought by saying:

> The burden is on the defendant [in *Sensitron*, the moving party] to convince the court that a separate trial is proper in light of the general principle that a single trial tends to lessen the delay, expense and inconvenience to all parties. *Id.* 1186.

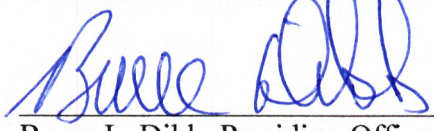
In *Sensitron*, the Court denied bifurcation and quoted the general rule above from another federal case from the District of Utah, in which bifurcation was also denied.[2]

ORDER

IT IS HEREBY ORDERED that the Division's Motion to bifurcate these proceedings pursuant to U.C.A. R151-4-704 is denied.

DATED August 16th, 2019.

UTAH DEPARTMENT OF COMMERCE



Bruce L. Dibb, Presiding Officer

[2] *Patten v. Lederle Labs.*, 676 F.Supp. 233, 238; 1987 U.S. Dist. LEXIS 12089.

CERTIFICATE OF SERVICE

I hereby certify that on the 16th 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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