Robert G. Wing (4445)
Kevin M. McLean (16101)
Assistant Attorneys General
SEAN D. REYES (7969)
Utah Attorney General
Utah Attorney General's Office
160 East 300 South, 5th Floor
PO Box 140872
Salt Lake City, UT 84114-0872
Ph. (801) 366-0310
rgwing@agutah.gov
kmclean@agutah.gov

Linda Singer
Elizabeth Smith
Lisa Saltzburg
Motley Rice LLC
401 9th St. NW, Suite 1001
Washington, DC 20004
Ph. (202) 386-9627
lsinger@motleyrice.com
esmith@motleyrice.com
lsaltzburg@motleyrice.com

Matt McCarley
Misty Farris
Majed Nachawati
Fears Nachawati, PLLC
5473 Blair Road
Dallas, Texas 75231
Ph. (214) 890-0711
mccarley@fnlawfirm.com
mfarris@fnlawfirm.com
mn@fnlawfirm.com

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.**	**MOTION FOR RESTRICTIVE ORDER UNDER UTAH CODE ANN. § 63g-2-207** **DCP Legal File No. CP-2019-005** **DCP Case No. 107102**

The Utah Division of Consumer Protection ("Division") respectfully submits the following Motion for Restrictive Order Under Utah Code Ann. § 63G-2-207. The Presiding Officer has both statutory and inherent authority to prevent parties from using public records requests under the Government Records Access Management Act ("GRAMA") as a means to

create distraction from or delay in administrative proceedings. Counsel for Pharma L.P., Purdue Pharma Inc., The Purdue Frederick Company (collectively, "Purdue") has done just that, submitting a vague request including, but not limited to, all records of all administrative disciplinary actions of the Division of Consumer Protection and the Division of Consumer Affairs for an unlimited period of time. For the reasons that follow, the Division respectfully requests that the Court exercise that authority here.

I. Both GRAMA and Inherent Authority Provide for Restrictive Orders to Prevent Distraction and Delay.

GRAMA requests and discovery are two different things, and the former was not intended as an end-run around the later. *See* Utah Code Ann. § 63G-2-207(1) ("Subpoenas and other methods of discovery under the state or federal statutes or rules of civil, criminal, administrative, or legislative procedure are not written requests under Section 63G-2-204"). Accordingly, GRAMA's legislative history reflects a proposal to expressly prevent party litigants from requesting records from a governmental entity relating to the subject matter of litigation. *See* H.B.400 submitted by Rep. Marty Stephens in 1992, footnote 11. Chapter 280, Laws of Utah (1992) (proposing the addition of "a new Section 63-2-207" which would provide that "[a] request by a party litigant against the state, a political subdivision, or other governmental entity for records related to the subject matter of the litigation shall not be subject to Sections 63-2-201 through 206 . . . ."). Ultimately, a new Section 63G-2-207 was added, which, among other things, provided that a litigant's right to obtain records is not limited thereunder "[u]nless a court or administrative law judge imposes limitations in a restrictive order[.]" Utah Code Ann. § 63G-2-207(2)(c). Thus, the statute contemplates that administrative law judges may impose restrictive orders where appropriate in the proceedings before them.

In addition, elsewhere, courts have recognized inherent authority to prevent the use of public records requests as a means of delaying or undermining litigation. *See MAG Entm't, LLC v. Div. of Alcoholic Beverage Control*, 375 N.J. Super. 534, 546, 868 A.2d 1067, 1074 (App. Div. 2005) ("inspection [of public records] is subject to reasonable controls, and courts have inherent power to prevent abuse and protect the public officials involved"); *DeLia v. Kiernan*, 119 N.J. Super. 581, 585, 293 A.2d 197, 199 (App. Div. 1972) (same); *compare United States v. U.S. Dist. Court, Cent. Dist. of Cal., Los Angeles, Cal.*, 717 F.2d 478, 479–82 (9th Cir. 1983) (concluding that the court's "intervention is necessary to insure the orderly and efficient operation of the criminal justice system in this circuit, and that "[t]he harm to the Government in allowing FOIA discovery to override Rule 16 would be substantial in this case and in all later criminal cases."); *United States v. Murdock,* 548 F.2d 599, 602 (5th Cir.1977) ("FOIA was not intended as a device to delay ongoing litigation or to enlarge the scope of discovery beyond that already provided by the Federal Rules of Criminal Procedure."). The potential for abuse is readily apparent. By way of example, "a party in litigation with the Government may disrupt the Government counsel's trial preparation by seeking, perhaps on the eve of the trial or hearing, the release under the FOIA of records in the Government's litigation files." Administrative Conference of the United States, The Use of the Freedom of Information Act for Discovery Purposes (Dec. 16, 1983), https://www.acus.gov/recommendation/use-freedom-information-act-discovery-purposes (explaining that "[i]n these cases, the Government counsel must divert attention from trial preparation in order to prevent a FOIA release to an opposing party of sensitive, nondisclosable records").

II. A Restrictive Order is Warranted in this Action.

A. Purdue Timed A GRAMA Request to Exactly Coincide with Motions Briefing.

That potential has become real here. The Division initially filed an Administration Citation against Respondents, including Purdue on January 30, 2019. Though on notice of the action and the Division's intent to proceed in this forum for approximately two and half months, Purdue took no action under GRAMA for most of that time. On April 8, 2019, the same day its response to the Administrative Citation was due, Purdue submitted a GRAMA request to the Department of Commerce.[1] Purdue's April 9, 2019 Motion to dismiss concedes that it has already perused ten years' worth of public records, which the Division makes publicly available online. *See* Purdue MTD at 10 & n.6. Yet, Purdue seeks these same materials, as well as vaguely identified, but likely voluminous records dating back to the inception of the Division of Consumer Protection and the Division of Consumer Affairs through a GRAMA request. *See* Purdue GRAMA Request, attached as Ex. A. Although Purdue indicates that it made its GRAMA request for the purpose of citing responsive information in its Motion to Dismiss, Purdue, as described above, declined to make the request *before* the anticipated due date for its motion. Instead, it waited such that the 10-day period for the division to respond to its motion is completely subsumed by the 14-day period to respond to the GRAMA request.

B. The Requested Material Is Irrelevant to, Yet Sought Only for, This Proceeding.

Purdue made its GRAMA request ostensibly to gather documents for use in connection with its motion to dismiss. Such materials, however, are neither relevant nor permitted to be considered in this context. It is black-letter law that materials outside the pleadings cannot be considered on a motion to dismiss. *See, e.g., Oakwood Vill. LLC v. Albertsons, Inc.*, 2004 UT 101,

[1] Also on April 8, 2019, Richard Sackler and Kathe Sacker (the "Sackler Respondents") requested permission to make certain filings under seal, and the Presiding Officer granted a one-day extension of time to file Responses and Motions to Dismiss to accommodate this request. All Respondents ultimately filed Responses and Motions to Dismiss on April 9, 2019.

¶ 12, 104 P.3d 1226, 1231. Further, Purdue's motion suggests that only reason it seeks documents concerning other actions against other respondents is to compare the amount of penalties sought or assessed there to those that might be imposed in a second phase of this action if Purdue is found liable. The Division will eschew arguing points that may be raised in response to the motion to dismiss, but notes that information about other misconduct by other respondents is simply a red herring with no bearing on Purdue's due process argument.

C. Purdue's Request Is Outside GRAMA's Bounds in Any Event.

Not only did Purdue time an irrelevant GRAMA request to coincide, precisely, with the Division's response period to a motion to dismiss, it failed to comply with GRAMA in making the request. Public records requests are available for *specific, identified records*, not a broad search for information the requestor desires the agency to compile. The State Records Committee has agreed, for example, that "a records request that yields more than 450K documents is not reasonably specific as required by Utah Code § 63G-2-201(7). Decision and Order, *Empty v. Box Elder County*, Case No. 18-20 ¶ 3. Here, Purdue's request includes "complete records of all administrative disciplinary actions brought by or before the Division of Consumer Protection and/or the Division of Consumer Affairs, without limitation as to date." *See* Exhibit A. This request does not seek any specific information or identify any disciplinary action concerning which records are sought. Rather, it assumes the agency will identify the relevant actions. Even then, it is unclear which records are sought. Does Purdue seek for example, only the disposition of the action? Would the request include transcripts of proceedings? Does Purdue seek any document related at all to any administrative disciplinary actions, including for example, investigators' notes, materials obtained in discovery, and the like? The request for various policies and procedures manuals is similarly vague.

Where, as here a requestor fails to provide a "legally sufficient description of the records" sought, the request fails to comply with Utah Code Ann. 63-2-205(1). Decision and Order, *Schwarz v. University of Utah*, Case no. 05-04 (State Records Committee) (finding a request seeking "all records on me, Barbara Schwartz, and also the often misspelled version of my name, Schwartz," "[a]ny records on Mark C. Rathburn, and also the name Mark de Rothschild," "[a]ny records on Scientology, or Church of Scientology," "[a]ny records on deceased Scientology founder L. Ron Hubbard," "[a]ny records of the former president Dwight David Eisenhower" was not "specific enough that a records manager who is familiar with the agency's records would understand which records are being sought" and that the requestor "ha[d] not described the records she [sought] with sufficient detail").

Utah law is consistent with that of other states recognizing that a public records request "is not intended as a research tool litigants may use to force government officials to identify and siphon useful information." *MAG Entm't, LLC*, 868 A.2d at 1074 (explaining that a state public records law did "not countenance open-ended searches of an agency's files" or encompass "[w]holesale requests for general information to be analyzed, collated and compiled by the responding government entity"). Rather, a "proper request . . . must identify with reasonable clarity those documents that are desired, and a party cannot satisfy this requirement by simply requesting *all* of an agency's documents." *MAG Entm't, LLC*, 868 A.2d at 1074-75 (emphasis in original and internal quotation marks omitted); *Hangartner v. City of Seattle,* 151 *Wash.*2d 439, 90 *P.*3d 26, 28 (2004) (finding request for "all books, records, [and] documents of every kind" related to a specific public transportation project improper under Washington's public records law).

Requests have therefore been denied, for example, when "the commission would have to go through every employee's file and compile the information." *Gannett Co. v. James*, 86 A.D.2d 744, 745, 447 N.Y.S.2d 781, 783 (1982); *accord Brown v. King Cty.*, 100 F. App'x 655, 656 (9th Cir. 2004) (concluding that a request stating: "[i]f any other files or documents regarding Lisa Brown are maintained, indicate the existence of these documents, the locations of the documents and the custodian of the documents in your response" "was not for a particular public record" and "did not describe a document in a manner that would assist the person searching for the record" but rather impermissibly "asked for information about possible documents"); *Bader v. Bove*, 273 A.D.2d 466, 467, 710 N.Y.S.2d 379, 379 (2000) (notwithstanding obligation to "'reasonably describe' the documents requested" petitioners made requests that would have required "the one full-time employee of the Village Clerk's office would have to manually search through every document filed with the Village going back over 45 years"); *Capitol Info. Ass'n v. Ann Arbor Police*, 138 Mich. App. 655, 656–59, 360 N.W.2d 262, 263–64 (1984) ("Plaintiff's request here was absurdly overbroad. Compliance would require defendants to search their files for correspondence with a wide spectrum of federal agencies dealing with any of more than 100,000 persons during an extensive period of time. The Legislature clearly intended M.C.L. § 15.233(1); M.S.A. § 4.1801(3)(1) to relieve public bodies from the intolerable administrative burdens which would result if such wholesale requests had to be fulfilled. Plaintiff had to request specific identifiable records; it failed to do so here.").

Here, the Division's Records Officer estimates that Purdue's GRAMA request sweeps in potentially tens of thousands of pages of documents. *See* Pierson Decl. ¶ 15 (attached as Ex. A). The lack of specificity regarding the scope of the request prevents the Division from making a detailed estimate of the time needed to pull, redact, and provide the records sought. *See id.* ¶ 16

(attached as Ex. A). It is clear, however, that it would take months of the Records Officer's time if he were to process the request alone. *See id.* ¶ 14. Each of the certified officers at the Division with the training to handle GRAMA requests, of which there are only two, have other job responsibilities that would be delayed if their time were consumed by responding to GRAMA requests. *See id.*

Purdue in effect is seeking to conduct discovery through the GRAMA process, without the limitations, most notably relevance, in the discovery rules, and while also ignoring GRAMA's strictures, which are not designed for, and do not lend themselves too, vague and ambiguous demands such as Purdue's. Further, in addition to this overarching and fundamental flaw, Purdue's request, though ambiguous, appears to seek a variety of materials that are protected from disclosure under Utah law. An agency may also decline to "fulfill a person's records request if the request unreasonably duplicates prior records requests from that person." Utah Code Ann. § 63G-2-201(8)(iv). Here, although it did not make a prior GRAMA request, Purdue's request ask the agency to reproduce to it records of 450 actions Purdue concedes it already has and has reviewed. *See* Purdue MTD at 10. Purdue will have ample opportunity to seek relevant discovery under the supervision of this tribunal and governing rules of procedure. Otherwise, the Department and its divisions may face a long stream of GRAMA requests intended to divert the State's resources, become reason to delay the case (until GRAMA requests are satisfied or separately litigated), and unilaterally develop materials not permitted as discovery as the action proceeds).

WHEREFORE, the Division respectfully requests that the Presiding Officer grant its Motion for Restrictive Order Under Utah Code Ann. § 63G-2-207.

DATED this 25th day of April, 2019.

SEAN D. REYES
UTAH ATTORNEY GENERAL

By: /s/ *Kevin M. McLean*
Kevin M. McLean (16101)
Robert G. Wing (4445)
Assistant Attorneys General

Linda Singer
Elizabeth Smith
Lisa Saltzburg
Motley Rice LLC
401 9th St. NW, Suite 1001
Washington, DC 20004
Ph. (202) 386-9627
lsinger@motleyrice.com
esmith@motleyrice.com
lsaltzburg@motleyrice.com

Matt McCarley
Misty Farris
Majed Nachawati
Fears Nachawati, PLLC
5473 Blair Road
Dallas, Texas 75231
Ph. (214) 890-0711
mccarley@fnlawfirm.com
mfarris@fnlawfirm.com
mn@fnlawfirm.com

Counsel for the Division

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:

By electronic mail:

Elizabeth McOmber, Esq.
emcomber@swlaw.com

Mark Cheffo, Esq.
Mark.Cheffo@dechert.com

Will Sachse, Esq.
Will.Sachse@dechert.com

Sara Roitman, Esq.
Sara.Roitman@dechert.com

Paul LaFata, Esq.
Paul.LaFata@dechert.com

Patrick Johnson
pjohnson@ck.law

Paul Moxley
pmoxley@ck.law

Dated this 25th day of April, 2019.

____