

DEPARTMENT OF COMMERCE
Heber M. Wells Building, 2ND Floor
160 EAST 300 SOUTH
SALT LAKE CITY, UTAH 84114

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 MOTION TO SET ASIDE
ORDER TO CONVERT INFORMAL
HEARING,**

**NOTICE OF PREHEARING
CONFERENCE, and**

**ORDER TO FILE RESPONSIVE
PLEADINGS**

Case No. **CP-2019-005**

DCP Case No. 107102

On January 30, 2019, the Division of Consumer Protection (the "Division") filed both a Citation and a Motion to Convert Informal Hearing (the "Motion to Convert") in the referenced matter. As of the tenth day following the filing of the Motion to Convert, no opposition to the Motion to Convert had been filed. An order was entered in this matter on February 12, 2019, converting the proceedings into formal adjudicative proceedings. On February 12, 2019, counsel for Purdue Pharma, L.P., Purdue Pharma, Inc. and The Purdue Frederick Company (the "Entity Respondents") filed a Motion to Set Aside Order on Motion to Convert (the "Motion to Set Aside"). On February 15, 2019, counsel for the remaining Respondents, Richard Sackler, M.D. and Kathe Sackler, M.D. (the "Individual Respondents") filed in this matter an Objection to

Administrative Citation and Request For Review. The Division filed no opposition to the Motion to Set Aside before the deadline to respond on February 22, 2019.

FACTUAL BACKGROUND

In addition to the foregoing factual recitation, the following facts are accepted for purposes of this Order on the Motion to Set Aside:

- a. The Motion to Convert was mailed by U.S. mail on January 30, 2019, to each of the Respondents to street addresses for the Respondents and by email on January 30, 2019, to four attorneys at the law firm of Dechert, LLP and to Elisabeth McOmber at the law firm of Snell & Wilmer (see Certificate of Service of the Motion to Convert).
- b. Prior to the entry of the February 12, 2019 Order converting this matter to a formal proceeding, counsel for the Division had communicated by phone and by email with Elisabeth McOmber of Snell & Wilmer (which firm has now filed pleadings in this matter on behalf of the Entity Respondents), and with Patrick Johnson of Cohn Kinghorn, (which firm has now filed a pleading in this case on behalf of the Individual Respondents)(see p. 2 of the Motion to Set Aside and emails attached as Exhibits “A” and “B” to the Motion to Set Aside).
- c. In these communications, counsel for the Division had discussed with counsel for all defendants an extension of time, apparently of unspecified duration, with regard to a response to the Motion to Convert. An email from Elisabeth McOmber to Robert Wing states “this email confirms that we have an extension on deadlines in this case, including Monday’s deadline for responding to the Motion to Convert . . .” (see Exhibit “A” to the Motion to Set Aside).

- d. An email from Elisabeth McOmer to Patrick Johnson of Cohn Kinghorn, with a copy to Robert Wing, refers to communications about “an extension of time to respond to the motion to convert, pending resolution of our discussion regarding the procedural status of the administrative citation and applicable deadlines” (see Exhibit “B” to the Motion to Set Aside).
- e. On February 15, 2019, the Entity Respondents, through counsel, filed a request for review in this matter.
- f. On February 15, 2019, the Individual Respondents, through counsel, filed a request for review in this matter.

LEGAL ANALYSIS

Counsel for the Entity Respondents makes at least three separate arguments in support of the Motion to Set Aside. The first is that Respondents’ counsel had agreed with counsel for the Division to an extension in the time to file an opposition to the Motion to Convert. A second argument is that a Motion to Convert is premature, if filed before a notice of agency action has been filed by the Division. A third argument is that the Respondents had an additional three days to file their opposition to the Motion to Convert, because the Motion to Convert was mailed to the parties by regular mail (see U.A.C. R151-4-107(3)(a)(1)).

Although the duration of the extension for responses to the Motion to Convert is not clarified in any of the motion papers, an extension beyond Monday, February 11th (as mentioned in the Exhibit “A” email) was clearly contemplated. Any extension beyond Monday, February 11th, would make premature the entry of the February 12, 2019 Order on Motion to Convert on

the morning of February 12th. On such basis alone, the February 12, 2019 Order on Motion to Convert should be set aside.¹

Because the February 12, 2019 Order on Motion to Convert is to be set aside by reason of the discussions of counsel for the parties of an extension to file a response to the Motion to Convert, it is unnecessary to address the merits of setting the Motion to Convert aside on the basis of the argument that a motion to convert to a formal proceeding cannot be made until a notice of agency action has been filed in the administrative proceeding. No ruling is made on this second argument.

Similarly, the determination to set aside the Order on Motion to Convert on the basis of Respondents' first argument makes it unnecessary to address the merits of the Respondents' third argument based on U.A.C. R151-4-107(3)(a)(1).

For good cause appearing, it is:

HEREBY ORDERED that:

1. The February 12, 2019 Order converting this proceeding to a formal adjudicative proceeding is set aside. A renewed motion to convert this proceeding to a formal adjudicative proceeding may be filed, if desired by any of the parties, after a notice of agency action has been filed in this matter pursuant to U.C.A. Section 63G-4-201.
2. In light of the filing of a request for review by each of the Respondents, the Division is directed to file, within ten days of the date of this Order, a notice of agency action to

¹ It should be noted here that the presiding officer cannot read the minds of counsel for the parties. If an extension is discussed between counsel, but not communicated to the presiding officer, it is not possible for the presiding officer to know that he should consider refraining from ruling on a matter. For future reference in this proceeding, counsel should note also that the presiding officer may not accept their private agreements regarding extensions or other matters that may affect the timing of the administrative proceeding. Further, the parties should note that the tribunal will frequently rule on matters when briefing appears to be completed or waived by a party by failing to file a memorandum. A party may also wish to notify the presiding officer in advance if the party does not intend to file a response to a particular motion or pleading. Owing to the tight time lines in administrative proceedings in the state of Utah, rulings will issue when appropriate. If an extension is desired, kindly seek the extension by notifying the presiding officer in writing prior to the expiration of the time to file a responsive pleading.

initiate its adjudicative proceeding in accordance with Title 63G, Chapter 4, Administrative Procedures Act. The copies of the notice of agency action served upon Chris Parker (the Acting Director for the Utah Division of Consumer Protection), upon the undersigned presiding officer, and upon counsel for each of the Respondents are not to be redacted. The copy to be filed as the public document may be redacted, if filed with a motion and supporting documentation asserting a basis for the document to be redacted, and asserting the basis for such redacted information to be protected or maintained as confidential. The Acting Director or the presiding officer will file an order on the motion to redact the public copy of the document, when such motion is properly before this tribunal.

3. For the purposes of the notice of agency action, the Division shall include a notice of a prehearing conference in such document, as required by U.A.C. R151-4-510. The prehearing conference in this matter is to be held at **9:30 a.m. Mountain Time on Tuesday, April 23, 2019** in Room 250 of the Heber M. Wells Building. Parties may participate in the prehearing conference by telephonic conference call, should they provide the presiding officer with their telephone number prior to the date of the prehearing conference.
4. The purpose of the prehearing conference is to enter a scheduling order pursuant to U.A.C. R151-4-114, 503 and/or 510, as applicable, to set a date for pre-hearing motions, to set a hearing date to adjudicate the matter alleged in the notice of agency action and to address such other matters as may be appropriate.

5. Pursuant to U.A.C. R151-4-205(2)(b) or (3), as applicable, each of the Respondents shall file a responsive pleading consistent with the provisions of U.C.A. §63G-4-204, within 30 days of the date of the mailing of the notice of agency action to the Respondents.
6. Pursuant to U.A.C. R151-4-508, the parties are encouraged to initiate appropriate discovery procedures in advance of the prehearing conference, to the extent permitted by rule, so that discovery disputes can be addressed at the prehearing conference, to the extent possible.
7. Failure of a party to file a timely responsive pleading or to participate in the prehearing conference may result in the entry of a default against such party.
8. For the purposes of this adjudicative proceeding, a copy of all pleadings in this matter are to be served upon Chris Parker, Acting Director of the Division of Consumer Protection, as well as to all other persons or parties as may be required by rule.

DATED February 26th, 2019.

UTAH DEPARTMENT OF COMMERCE



Bruce L. Dibb, Presiding Officer
Heber M. Wells Building, 2ND Floor
160 East 300 South
Salt Lake City, UT 84114
bdibb@utah.gov
Telephone: (801) 530-6706

CERTIFICATE OF SERVICE

I hereby certify that I have the 16th day of February, 2019, served this ORDER ON MOTION TO SET ASIDE ORDER TO CONVERT INFORMAL HEARING, NOTICE OF PREHEARING CONFERENCE and ORDER TO FILE RESPONSIVE PLEADINGS on the parties of record in this proceeding set forth below by email to:

Chris Parker
Acting Director
Utah Division of Consumer Protection
chrisparker@utah.gov

Purdue Pharma, L.P.
Purdue Pharma, Inc., and
The Purdue Frederick Company, through counsel
Elisabeth McOmber
Katherine R. Nichols
SNELL & WILMER
emcomber@swlaw.com
knichols@swlaw.com

Richard Sackler, M.D. and
Kathe Sackler, M.D., through counsel
Patrick E. Johnson
Paul T. Moxley
COHNE KINGHORN
pjohnson@ck.law.com
pmoxely@ck.law.com

and to the Division, through

Robert G. Wing, AAG
Kevin McLean, AAG
rwing@agutah.gov
kmclean@agutah.gov

/s/ Bruce L. Dibb
Bruce L. Dibb