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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 IN SUPPORT OF DIVISION'S 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 Reply in Support of its Motion for Restrictive Order Under Utah Code Ann. § 63G-2-207. The Opposition filed by Purdue Pharma L.P., Purdue Pharma Inc., The Purdue Frederick

Company (collectively, "Purdue"), despite its length (which would be excessive if Purdue were permitted to incorporate by reference, and argue, a separate administrative appeal it has pending), offers nothing to dispute the Division's showing that relief is warranted here. Not only does Purdue fail to distinguish the consistent precedents set forth in the Division's Motion, it also fails to justify the timing or content of its Government Records Access Management Act ("GRAMA") request. Meanwhile, Purdue's opposition muddies the waters as to whether Purdue intended to be even nominally making a GRAMA request, or propounding premature discovery. None of Purdue's various red herrings detract from the propriety of the relief sought here.

I. The Same Authority Purdue Cites Refutes its Arguments.

Unable to counter the Division's showing of entitlement to relief, Purdue devotes the bulk of its memorandum to setting up a straw man and working to knock it down. Specifically, Purdue attempts to recast the Division's Motion as seeking to "establish[] a per se rule that civil litigants cannot access public records," Purdue Opp. at 7, and "to restrict Purdue's access to public records on the sole basis that it is a litigant to the present proceeding," Purdue Opp. at 9. That, of course, is not the case. And, the Administrative Law Judge need not consider those issues. The Division has not sought any categorical rule, nor does it request a restrictive order based on Purdue's *status*. It seeks relief based on Purdue's *conduct*. Purdue seeks to create a needless burden on the Division which would distract from other responsibilities and roles filled by records officers, as the primary Records Officer for the Division attested in a declaration. Further, as discussed below, Purdue timed its GRAMA request in a manner than can only be explained as a means of diverting resources from opposition to Purdue's motion to dismiss.

As Purdue concedes, the same cases cited in the Division's motion recognize that even if "[t]he fact that litigation was pending between" parties at the time of a public records request does

not, "in itself relieve" an agency of an obligation to comply with a records request, there is a point where a litigant can abuse that process, and courts are not powerless to put a stop to those tactics. *See United States v. U.S. Dist. Court, Cent. Dist. of Cal., Los Angeles, Cal.*, 717 F.2d 478, 479–82 (9th Cir. 1983); *United States v. Murdock,* 548 F.2d 599, 602 (5th Cir.1977); *DeLia v. Kiernan*, 119 N.J. Super. 581, 585, 293 A.2d 197, 199 (App. Div. 1972). Purdue simply ignores the inherent power "to prevent abuse and to protect the public officials involved." *MAG Entm't, LLC v. Div. of Alcoholic Beverage Control*, 375 N.J. Super. 534, 546, 868 A.2d 1067, 1073-74 (App. Div. 2005). It also neglects to mention that one of the same cases it cites cautions that "Vermont's Public Records Act is not meant to allow an end-run around discovery rules or determinations." *Shlansky v. City of Burlington*, 2010 VT 90, ¶ 8, 188 Vt. 470, 476, 13 A.3d 1075, 1079 (2010). Tellingly, Purdue fails to cite a single case saying that a judge's hands are tied in this scenario.

In fact, quite the opposite, Purdue adds to the authority uniformly supporting the Division's Motion. First, Purdue's cursory reference to *Salt Lake City Corp. v. Salt Lake City Mayor's Records Appeals Bd.*, No. 05-02 ¶ 5 (State Records Comm. Jan. 19, 2005), only undermines its position. There, the State Records Committee explained that although "the right to access public government records is not lost, and may not be impaired, when a citizen files a lawsuit against the government entity that maintains those records, *GRAMA recognizes, however, that a court may impose limitations on access to records during the course of litigation*." *Id.* (internal quotation marks omitted) (emphasis added).[1] It expressly acknowledged that, "where a court order is in place regarding the specific documents requested, the terms of that court order shall govern disclosure." *Id.* (internal quotation marks and alteration omitted) (citing Utah Code Ann. 63-2-202(7) and -207). There, the requesting party had two lawsuits pending against Salt Lake City.

[1] *Available at* http://www.archives.state.ut.us/src/srcappeal-2005-02.html

See id. ¶ 3. In one of the two suits, the requesting party had also moved, as part of the litigation, to lift the stay of discovery and allow discovery of the same materials sought through the GRAMA request. *See id.* ¶ 4. That motion had been denied. *See id.* (citing Order Denying Plaintiff's Motion to Stay, Case No. 2:04-CV-627TS (D. Utah, Dec. 17, 2004)). The State Records Committee reasoned that as a result, "the posture of at least one of the court cases referenced above is that Mr. Ostler has been ordered by the Court to respond to Defendants' Motion to Dismiss before any discovery may take place." *Id.* The Court interpreted that order "to prohibit the release of the records sought by [the requestor under GRAMA] at th[at] time." *Id.* ¶ 5 (citing Fed. R. Civ. P. 26(d)).

Here, too discovery was not permitted at the time Purdue made its GRAMA request seeking materials for use in this litigation. When Purdue made its request, this proceeding was still an informal one, in which discovery was unavailable. *See* U.A.R.151-4-501(2).[2] In effect, the governing rules placed Purdue in the same position as the litigant subject to the stay order and the federal rule cited in *Salt Lake City Corp.* In both instances, the requesting party was seeking to obtain from an opposing party, for use in litigation, materials it was expressly barred from seeking in discovery. *Salt Lake City Corp.*, however, makes clear that the Administrative Law Judge has the authority to restrict not only discovery, but the use of GRAMA as an end run around discovery limitations.

This is particularly true now that this action has been converted to a formal proceeding and Purdue's opposition has recast, at least somewhat, its GRAMA request as a discovery request. Purdue argues that even if it made, or were to make, a GRAMA request seeking private, controlled,

[2] Purdue understood this and opposed conversion to a formal proceeding that would have allowed discovery to take place.

or protected records protected under GRAMA, it would not face the same obstacles as would other members of the public in obtaining those materials. *See* Purdue Opp. at 8. According to Purdue, "even if Purdue were to request such protected records, they would be accounted for by the protective order in this proceeding." *Id.* Thus, Purdue itself takes the position that its GRAMA requests are effectively discovery requests as the Protective Order extends only to discovery in this litigation.

Purdue's arguments as to the purported limits on this tribunal's authority rely perhaps most heavily on an Iowa case that did not concern a public records request at all. Purdue cites *Mitchell v .City of Cedar Rapids*, No .18-0124, 2019 WL 1496945 (Iowa Apr. 5, 2019) both for its argument regarding the Protective Order in this case and more broadly concerning whether a restrictive order should enter. There, the court explained that the plaintiffs "sought [certain] police investigative reports *under the discovery rules as litigants* suing Officer Jones and his employer, the City of Cedar Rapids," *not* through a public records request. *Mitchell v. City of Cedar Rapids*, No. 18-0124, 2019 WL 1496945, at *5 (Iowa Apr. 5, 2019) (internal quotation marks omitted) (emphasis added). Purdue cites *Mitchell* for the proposition that Iowa's public records law was not "intended to limit the *discovery rights* of litigants in cases involving governmental entities." *See* Purdue Opp. at 7 (quoting *Mitchell*, 2019 WL 1496945, at *5) (emphasis added). Here, Purdue had no discovery rights at the relevant time. Those rights, of course, are not being limited.

Further, nothing in the case-law Purdue cites calls into question the authority to enter a restrictive order, in the discovery or the public-records context. To the extent Purdue's memorandum can now be read as abandoning the pretense of making anything other than an impermissible discovery request, grounds for protection are even more clear. The presiding

officer, *sua sponte* or on motion, may limit discovery under U.A.R151-4-506 to avoid undue burden from unreasonable and irrelevant discovery.

II. GRAMA's Plain Language Contradicts Purdue's Characterization.

Purdue selectively quotes Utah Code Ann. § 63G-2-207(2)(c) for the proposition that ongoing litigation "does not limit the right to obtain[] . . . records through the procedures set forth in [GRAMA]." This partial quotation ignores the preface to this provision, which states that this is true only "[u]nless a court or administrative law judge imposes limitations in a restrictive order." *Id.* Thus, the same statutory provision on which Purdue relies for the authority to make its GRAMA request expressly contemplates restrictive orders limiting its ability to do so and provides the Division with the right to request such an order.

Unable to marshal any argument as to why a restrictive order *should* not issue here, Purdue makes a passing attempt to argue that it *could* not issue. Purdue's argument is unfounded. It relies exclusively on a different subsection of the same statute, Utah Code Ann. § 63G-2-207(2)(a), which has no bearing on this inquiry. Purdue argues that because Section 63G-2-207(2)(a) is expressly limited to "judicial or administrative proceedings in which an individual is requesting discovery of records classified private, controlled, or protected under" GRAMA, then the Administrative Law Judge should read Section 63G-2-207(2)(c), which does *not* contain any of the same language, as impliedly limited to discovery requests for "private, controlled, or protected" records under GRAMA. Not surprisingly, Purdue cites no precedent for this novel approach to statutory interpretation. Further, Purdue's theory contradicts the plain language of the statute. Section 63G-2-207(2)(c) is not a subsection of Section 63G-2-207(2)(a), but rather a parallel provision on equal footing, and without such limitation. The text of Section 63G-2-207(2)(c)(i) makes clear that this provision pertains to all "records"; it is not limited to "private, controlled, or

protected" records, as those words appear nowhere in Section 63G-2-207(2)(c)(i). In addition, although Section 63G-2-207(2)(c)(ii) concerns discovery, nothing in Section 63G-2-207(2)(c)(i), the provision at issue here, pertain to discovery requests. Rather, it addresses GRAMA requests. In Section 63G-2-207(1), the same statute makes clear that GRAMA requests and discovery are two different things. *See* Utah Code Ann. § 63G-2-207(1).

In any event, Purdue's attempt to limit Section 63G-2-207(2)(c)(i) to only private, controlled, or protected records would be self-defeating, as that is the same subsection Purdue contends preserves its right to make GRAMA requests. *See* Purdue Opp. at 5. The scope of the restrictive order available under and contemplated by Section 63G-2-207(2)(c)(i) is coextensive with the records a litigant may request under GRAMA. *See* Utah Code Ann. § 63G-2-207(2)(c)(i). Under Purdue's theory, private, controlled, or protected documents under GRAMA would be the *only* documents that "this section does not limit the right to obtain." *Id.* And, the right to obtain public documents, by contrast, *would* be limited. This odd result is both inconsistent with the text and illogical. Moreover, the terms of the statute must be read in context, and it is clear that as a whole Section 63G-2-207 is not limited to addressing certain types of records that might be requested under GRAMA, but rather concerns the use of, and potential restrictions on, discovery or GRAMA "requests" for any type of materials, Utah Code Ann. § 63G-2-207(1). It thus includes all "records" in Utah Code Ann. § 63G-2-207(2)(c)(i).

III. Purdue Offers Nothing to Dispute that Its Improper Request Is Designed for Distraction and Delay.

As a factual matter, Purdue offers nothing to suggest its GRAMA request would serve any purpose other than distraction and delay. First, Purdue's attempt to explain away the timing of its request is unavailing. Purdue offers only two sentences on the issue, stating that it made the GRAMA request "one month after the Division filed its Notice of Agency Action," and claiming

that the timing was the "unavoidable consequence of the expedited nature of this proceeding." Purdue Opp. at 10. In fact, Purdue had been on notice, through the Citation, of this proceeding for months.

Given Purdue's characterization of the reasons for its request (to support a motion to dismiss originally due the same day the request was made), the timing is not even logical. *See* Purdue Opp. at 10. Purdue states that it knew from a public webpage that if it desired to obtain the records of administrative disciplinary actions commenced more than ten years ago, and certain actions commenced more than five years ago, it would need to make a GRAMA request identifying the records it seeks. *See* Purdue Opp. at 4. If Purdue genuinely believed these records included important information for its motion to dismiss, it stands to reason that it would have made its GRAMA request well before filing its motion. Instead, Purdue evidently spent an undisclosed about of time perusing records of hundreds of administrative disciplinary actions online and only on April 8, 2019, the deadline to file its motion to dismiss (which was ultimately extended on April 8, 2019 to the next day), made its short and ambiguous GRAMA request — too late to use the material in its motion, but just in time to coincide with the response period for the Division's opposition memorandum.

Further, Purdue is wrong to claim that the relevance (or lack thereof) of the requested materials has no bearing on the instant dispute. That Purdue cited this proceeding as the sole basis for its GRAMA request, and cannot show any need for or relevance of the materials to this litigation further illustrates the use of GRAMA for distraction and delay. Because Purdue claimed that it desired to use the requested materials in connection with its due process and excessive fines arguments, the Division's Motion referenced the applicable legal standards for resolving Purdue's

challenges on these grounds. Purdue has not, and cannot, explain how it could use the documents it requested to make any argument as to these standards, nor does it dispute their applicability.

IV. Purdue's purported clarification only creates further ambiguity, and further illustrates the need for a restrictive order.

Purdue is evidently aware that it was obligated to meet certain threshold conditions to obtain records under GRAMA, including a requirement to identify the records it seeks with reasonable specificity. *See* Purdue Opp. at 4. Under GRAMA, a governmental entity is only required to provide a record if the person making the request "identifies the record with reasonable specificity." Utah Code Ann. § 63G-2-201(7). Purdue elects not to dispute that it failed to meet this requirement here. Instead, it offers a cursory paragraph stating that it will contest that issue through an appeal of the denial of its GRAMA request. *See* Purdue Opp. at 11. At the same time, however, Purdue attaches, and purports to incorporate by reference, its appeal brief. *See id.* The Division cannot respond to that brief, which is seven single-spaced pages, in the space allowed for a reply to Purdue's opposition to its motion. It should not be expected to do so, and the Administrative Law Judge should disregard the exhibit, which is in effect a means of "self-help" to avoid page limits and confuse issues.[3]

The Division briefly notes that it addressed Purdue's clear failure to stay within GRAMA's bounds in its motion, and Purdue does not even attempt to distinguish the relevant authorities beyond noting that tens of thousands of documents or pages would be still less than the 450,000 at

[3] "[C]ase after case in varying contexts have disapproved stratagems to avoid page limitations." *Miller UK Ltd. v. Caterpillar, Inc.*, 292 F.R.D. 590, 591-93 (N.D. Ill. 2013). One of the "frequently employed devices to skirt a limit" in this regard "is adoption by reference to other filings or documents." *Id.; see also, e.g., Kernan v. C.I.R.*, 108 T.C.M (CCH) 503 (T.C. 2014) (explaining that "[a]mong the most blatant methods is to put material into an appendix and to not count that appendix as falling within the page limits" and describing "incorporat[ing] another document by reference" as another tactic); *THI of New Mexico at Valle Norte, LLC v. Harvey*, 527 F. App'x 665, 671-72 (10th Cir. 2013).

issue in one of the multiple decisions the Division cited. *See* Purdue Ex. C at 6. To the extent Purdue argues that the Division, though under no obligation to do so, should have met and conferred with Purdue to discern the records requested despite Purdue's failure to follow the statutory requirements, Purdue's own exhibits further demonstrate that the Division properly eschewed further distraction. Although Purdue at least narrowed the temporal scope of part of its request to a ten-year period, in attempting to explain away the problems with its request, Purdue itself appears confused and is internally inconsistent in what it is requesting.

On the one hand, Purdue claims to seek voluminous documents that include "but are not limited to" various examples of documents related to actions commenced too many years ago to be available online, and "for the actions currently available on the Divisions' website, any and all documents that are not available via the website." *Id.* As explained above, Purdue includes in its memorandum a section arguing that "Purdue's Request was improperly denied," while at the same time disclaiming any intent to litigate that issue here and declining to make any substantive argument. *See* Purdue Opp. at 11. Elsewhere in its brief, it attempts to argue that because the request was denied as lacking reasonable specificity, that means that the Division is not contending that it would improperly encompass documents protected from disclosure. In fact, as the Division explained in its motion, Purdue's request is too ambiguous to discern the scope of materials requested, but appears intended to sweep in materials that are not public records under GRAMA. Although Purdue attempts to make an issue out of the grounds for the denial, which is not at issue here,[4] it does concede that for purposes of this motion, the Division explained that Purdue's

[4] The Division will address Purdue's arguments regarding the denial, including Purdue's meritless contention that bias played a role, in the separate appeal of that denial.

GRAMA request "appears to seek a variety of materials that are protected from disclosure under Utah law"). *See* Ex. C. to Purdue Opp. at 7.

At the same time, however, Purdue claims that it meant its request for "records of all administrative disciplinary actions" to be construed as seeking the "record of administrative disciplinary action" as defined in Utah Code Ann. § 63G-4-106, which is titled "Access to information on state-controlled websites." *See* Purdue Ex. C at 4 & 6. The definition Purdue claims it intended to apply is used only in connection with, and includes only, public records already posted on the internet. Thus, the few statutory provisions in which this term appears concern "remov[al of] the record of administrative disciplinary action from public access on the state-controlled website." Utah Code Ann. § 63G-4-107; Utah Code Ann. § 63G-4-108. If that was in fact the intended scope of Purdue's request, than Purdue already has access to all of the requested materials, which by definition are available online without a GRAMA request.

For the reasons set forth in its Motion and above, the Division respectfully requests that the Presiding Officer grant its Motion for Restrictive Order Under Utah Code Ann. § 63G-2-207.

DATED this 10th day of May 2019.

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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 10th day of May, 2019.

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