IN THE DISTRICT COURT OF CLEVELAND COUNTY
STATE OF OKLAHOMA

STATE OF OKLAHOMA, ex rel., MIKE HUNTER, ATTORNEY GENERAL OF OKLAHOMA,	STATE OF OKLAHOMA } S.S. CLEVELAND COUNTY }	Case No. CJ-2017-816
Plaintiff,	FILED	Honorable Thad Balkman
v.	DEC 13 2018	Special Discovery Master
PURDUE PHARMA L.P., et al.,	In the office of the Court Clerk MARILYN WILLIAMS	William C. Hetherington, Jr.
Defendants.		

PURDUE'S REPLY IN SUPPORT OF MOTION TO QUASH AND MOTION FOR PROTECTIVE ORDER FOR DEPOSITION NOTICE OF PURDUE VIA JONATHAN SACKLER AND MORTIMER D.A. SACKLER

The State's Response only confirms that the notices seeking to depose Jonathan and Mortimer D.A. Sackler as corporate representatives of Purdue Pharma Inc., Purdue Pharma L.P., and The Purdue Frederick Co (the "Notices") are improper and should be quashed. The Notices suffer from multiple fundamental deficiencies:

First, the Notices served on Purdue Pharma L.P. and The Purdue Frederick Co. are invalid because, as the State now concedes, Jonathan and Mortimer D.A. Sackler do not hold positions at those two entities. Response Br. at 4. Further, Jonathan Sackler resigned as director of Purdue Pharma Inc. on December 8, 2018, as part of a long-planned transition. *See* Opening Br. at 4 n.2. He cannot be a corporate representative of Purdue Pharma Inc. The Notice to Purdue Pharma Inc. through Jonathan Sackler is therefore also invalid and must be quashed in its entirety. *See* Section A, below.

Second, the State fails to identify a shred of unique, relevant, or first-hand information that Jonathan and Mortimer D.A. Sackler bring to bear on the issues in this case. To date, the State has had access to over 40 million pages of documents and has deposed multiple Purdue fact

witnesses and corporate representatives. The parties anticipate an additional 80 hours of deposition testimony on more than 40 designated topics. The State fails to identify any issue on which testimony from Jonathan or Mortimer D.A. Sackler would not be entirely cumulative.

In its Response, the State relies on erroneous arguments that do not provide any basis to deny Purdue's Motion:

Dated, Second-Hand Information Establishes No Unique Knowledge. The State attempts to show that Jonathan and Mortimer D.A. Sackler are "actively involved" in decision-making at Purdue by relying on four documents attached to Purdue's response. Notwithstanding that the State had access to 40 million pages of Purdue documents, none of the documents selected by the State establish that Jonathan or Mortimer D.A. Sackler have unique knowledge. To the contrary, these documents — each of which is more than a decade old — confirm that Jonathan and Mortimer D.A. Sackler's knowledge is entirely derivative, based on what they have been told by management. *See* Section B below.

Family Status Does Not Justify A Corporate Representative Deposition. The State also resorts to the improper suggestion that Jonathan and Mortimer D.A. Sackler's heredity — they are the "sons of the co-founder of Purdue," who have "grown up with Purdue" "in their family" (Response Br. at 2, 5) — is a basis for hailing them into an out-of-state deposition. It is not. The key question for whether an executive's deposition is warranted "is whether the record evidence demonstrates that [the executive] has unique personal knowledge of the controversy." *See Oklahoma ex rel. Edmondson v. Tyson Foods, Inc.*, No. 05-CV-329-GKF-PJC, 2009 WL 10694083, at *4 (N.D. Okla. Apr. 24, 2009) (internal quotation marks omitted). Here, the State's references to Jonathan and Mortimer D.A. Sackler's family status and its inflammatory allegations, such as the claim that they have "been actively involved in the decision-making

process of this multi-billion dollar company—a company which has reaped staggering profits from the addiction and death of thousands of Oklahomans" (Response Br. at 2) demonstrate that the State's actual objective is harassment of Jonathan and Mortimer D.A. Sackler simply because of their family name.

Alternatively, the Court should quash the Notices pending the depositions of all of Purdue's fact witnesses and corporate representatives, who will offer testimony regarding 40 topics designated by the State. At that time, the State will have an opportunity to establish whether there are any areas that have not been addressed by testimony from these corporate representatives and upon which Jonathan and Mortimer D.A. Sackler have unique knowledge.

GOOD CAUSE EXISTS TO QUASH THE NOTICES

A. The State Concedes That Jonathan and Mortimer D.A. Sackler Cannot Testify For Entities Where They Hold No Position — Including Purdue Pharma Inc. for Jonathan Sackler

The State concedes that Jonathan and Mortimer D.A. Sackler are not properly subject to Notices on behalf of Purdue Pharma L.P. or The Purdue Frederick Co., where they hold no positions. Response Br. at 4. *See Cleveland v. Palmby*, 75 F.R.D. 654, 656 (W.D. Okla. 1977) (denying motion to compel noticed deposition of individual who is not "a party to the instant action or an officer, director, or managing agent of a party"); *PettyJohn v. Goodyear Tire & Rubber Co.*, No. 91-2681, 1992 WL 168085, at *1 (E.D. Pa. July 9, 1992) (denying motion to compel noticed depositions because "a corporation may not be examined through its former officers, directors, or managing agents . . . ."). For the same reason, the State does not and cannot dispute that the deposition of Jonathan Sackler, as a representative of Purdue Pharma Inc., should not proceed after his previously planned resignation from that entity's board. Jonathan Sackler's resignation is part of a transition planned months before the Notice was served, *see* Opening Br. at 4 n.2, and which was effected on December 8, 2018.

Jonathan Sackler's status as a director of Purdue Pharma Inc. at the time the Notice was served does not alter the analysis. Under 12 O.S. § 3232(A)(2), the deposition of "a party or of anyone who at the time of the taking the deposition was an officer, director or managing agent" may be used at trial or in other proceedings "for any purpose permitted by the Oklahoma Evidence Code." Interpreting the analogous federal provision, "most courts have ruled that a person being deposed on behalf of a corporation must be an employee of the requisite seniority *at the time the deposition is taken*," 7 *Moore's Federal Practice* § 30.03 (Matthew Bender 3d Ed.) (emphasis in original), which Jonathan Sackler is not. *See also In re Honda Am. Motor Co. Dealership Relations Litig.*, 168 F.R.D. 535, 541 (D. Md. 1996) ("The test for determining whether one is a managing agent must be made at the time of the deposition."). Moreover, where, as here, former director Jonathan Sackler's planned resignation was in process long before the Notice was issued and not effected for the "purpose of avoiding depositions," *Everlight Elecs. Co., v. Nichia Corp.*, No. 12-cv-11758, 2013 WL 12182954, at *2 (E.D. Mich. Aug. 29, 2013), there are no grounds to require Purdue Pharma Inc. to produce him for a deposition. *See In re Honda*, 168 F.R.D. at 542 (granting motion to quash former employee's noticed deposition; "While his interests may still be closely identified with the defendant," without evidence that his status changed "to avoid disclosure" or that he "maintains any control," the plaintiff "cannot compel" his testimony).

B. The Notices Should Be Quashed Because Jonathan and Mortimer D.A. Sackler Do Not Have Any Relevant Unique, Personal Knowledge

The State does not and cannot dispute that depositions of corporate representatives are improper and should be quashed where they are duplicative of prior and scheduled depositions. *See Thomas v. Int'l Bus. Machs.*, 48 F.3d 478, 483 (10th Cir. 1995) (protective order warranted when plaintiff did not "demonstrate that the information she seeks to obtain from [executive]

could not be gathered from other [corporate] personnel"); *In re Yasmin & Yaz*, No. 3:09-md-02100-DRH-PMF, 2011 WL 3759699, at *6 (S.D. Ill. Aug. 18, 2011) (quashing notices where "plaintiffs have already deposed (and are scheduled to depose) numerous senior-level employees intimately familiar with" the subjects at issue). That is the case here.

As the State is aware, *see* Response Br. at 4-5, Purdue fact witnesses and corporate representatives have already been deposed. The witnesses who have been deposed include:

- Lisa Miller: Ms. Miller is currently the Head of Corporate Social Responsibility. Ms. Miller has worked at Purdue since 2001, and has worked as a medical-science liaison, and in the areas of medical affairs, market access, and compliance. Ms. Miller was designated to testify as a corporate representative regarding (i) a letter published by Purdue in the New York Times in 2017 and (ii) all actions and efforts that Purdue has taken, are underway, or are anticipated to take place in the future about the opioid crisis. Although not within the scope of the deposition, the State asked Ms. Miller numerous questions about Purdue's marketing of prescription opioids.

- Keith Darragh: Mr. Darragh is Purdue's controller. Mr. Darragah was designated to testify as a corporate representative regarding topics including "Purdue's past and present ownership structure, Purdue's finances, and the distribution of revenue and/or profits to Purdue owners."

- Nine former and current Purdue employees who were sales or business personnel. These individuals were asked extensive questions about Purdue's promotion of prescription opioids and their interactions with healthcare providers.

Additionally the State will be taking depositions of corporate representatives on over 40 additional topics. For example, in December, Purdue will be offering witnesses to testify on 20 topics, including:

- Purdue's involvement with, and contributions to, KOLs regarding opioids and/or pain treatment;
- Purdue's use of branded and unbranded marketing for opioids nationally and in Oklahoma, including the scope, strategy, purpose and goals with respect to such marketing;
- All drugs for the treatment of opioid overdose manufactured, owned, contemplated, developed, and/or in development by Purdue including the nature of each such opioid overdose drug, its intended use, the stage of development of each (e.g. released to market, in development, abandoned), and profits earned by Purdue from the sale of any such drug in Oklahoma.

In January, Purdue will be offering witnesses to testify on another 18 topics, including:

- Research conducted, funded directed and/or influenced by Purdue related to opioid risks and/or efficacy;
- Purdue's research conducted, funded, directed and/or influenced related to pseudoaddiction;
- Purdue's role, influence, or support for any campaign or movement to declare pain as the "Fifth Vital Sign";
- Purdue's use of continuing medical education regarding opioids nationally and in Oklahoma, including the scope, strategy, purpose and goals with respect to such continuing medical education;
- Purdue's use and/or establishment of any opioid abuse and diversion program it established and implemented to identify healthcare professionals' and/or pharmacies' potential abuse or diversion of opioid;
- Policies, practices, and procedures regarding complaints Purdue received related to addiction or abuse of its opioids in Oklahoma;
- Total compensation paid to employees and contractors who detailed and/or promoted to any heath care practitioners and /or pharmacies in Oklahoma;
- Purdue's use of public relations firms and communication with journalists regarding opioids and/or pain management marketing;
- Purdue's efforts or activities in Oklahoma concerning opioids related to, among other things, lobbying efforts and campaign contributions.

The State's conclusory responses illustrate that it has no substantive grounds that justify enforcement of the Notices. The State contends that it is permitted to seek depositions simply because "[t]he Oklahoma Discovery Code allows the party seeking discovery to decide the methods it wants to use to obtain information." Response Br. at 5. The State cites no authority for the remarkable assertion that there are no constraints on what discovery a plaintiff may take. To the contrary, courts regularly quash improper notices, particularly if issued for purposes of harassment. *See, e.g.*, *Stubbs v. Stanford*, No. CJ-2003-9510, 2004 WL 5314496 (Okla. Dist. Oct. 15, 2004); *HE&M, Inc. v. Sec. Bank*, No. CJ201102467, 2015 WL 1606009 (Okla. Dist. Mar. 26, 2015); *Rackley v. BNSF Ry. Co.*, No. CJ-2009-743, 2013 WL 8118565 (Okla. Dist. Apr. 09, 2013); *see generally Newell v. Nash*, 1994 OK CIV APP 143, 889 P.2d 345, 348 ("The trial court has the right to place limits . . . on discovery."). Similarly, the State's claim that "it is

simply not possible" for it to obtain the information it needs "in just a couple depositions" does not identify what information it supposedly needs or why the testimony of Jonathan and Mortimer D.A. Sackler is non-duplicative where the State has already taken almost two dozen depositions and has many scheduled more witnesses, including 80 hours of testimony from corporate representatives.

At its core, the State's argument is that it should be permitted to depose Jonathan and Mortimer D.A. Sackler because they "grew up with Purdue," the company is "in their blood," and they "*very likely* know things about the company that no one else does." Response Br. at 5. But speculative claims that these individuals *might* possess non-duplicative knowledge because "[t]heir fathers founded Purdue," *id.*, does not suffice to compel their depositions. *See In re Yasmin & Yaz*, 2011 WL 3759699, at *6 (plaintiffs not permitted to depose executives when they "only provided general, conclusory statements about the witnesses' alleged knowledge," including that "ultimate decisions and visions were surely promulgated by [the] witnesses"); *Oklahoma ex rel. Edmondson v. Tyson Foods, Inc.*, 2009 WL 10694083, at *4 (granting protective order when plaintiff "believe[d]" an executive had unique knowledge but offered no basis for its belief beyond the executive's signature on a corporate policy statement). Further, the State's inflammatory characterization of Jonathan and Mortimer D.A. Sackler as "individuals who have profited wildly for years while getting Oklahomans addicted to opioids" demonstrates that the State's principal objective is to harass these individuals because of their family name.

The State had the opportunity to select from 40 million pages of documents to support their claim that Jonathan and Mortimer D.A. Sackler have "independent knowledge about the company." Response Br. at 5. The State's Response, however, attaches four documents, each of which is more than a decade old. These documents include:

- [redacted]
- [redacted]
- [redacted]

These documents confirm that Jonathan and Mortimer D.A. Sackler, like most corporate directors, received information concerning corporate activities from others responsible for the day-to-day operations of the company. These documents do not show Jonathan or Mortimer D.A. Sackler undertaking any activities relating to the development, manufacture, marketing, or sale of prescription opioids. Nor do these documents establish that either Jonathan or Mortimer D.A. Sackler possesses any unique or non-derivative Purdue Pharma Inc. information, much less any first-hand knowledge which other management witnesses cannot provide. These are precisely the circumstances under which deposition of corporate directors should be quashed. *See In re Yasmin & Yaz*, 2011 WL 3759699, at *6 (denying motion to compel when documents did not indicate that "either executive was included as a first line scientist, investigator, marketer, or regulator lobbyist" and showed only that they were kept "in the loop").

The State's attempt to justify deposing Jonathan and Mortimer D.A. Sackler by attributing, without substantiation, "Purdue's overall management decisions relating to the production and marketing of opioids" to Jonathan and Mortimer D.A. Sackler, Response Br. at 6, is likewise unavailing. The State's case focuses on how opioid manufacturers allegedly

marketed their products to doctors and patients. To the extent that the State seeks information regarding "management decisions," the appropriate witnesses are managers, not directors.

The State has never alleged, and has no evidence, that Jonathan or Mortimer D.A. Sackler personally participated in the challenged marketing activities (because they did not). The State has not made a sufficient showing under the authorities on which it relies, which support the proposition that executive depositions should proceed where there was evidence that the executive was ***personally*** involved in, or had unique knowledge of, claim-related conduct. *See Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig.*, 205 F.R.D. 535, 536 (S.D. Ind. 2002) (plaintiffs presented evidence that "Mr. Ford has referred to his personal knowledge of and involvement in certain relevant matters, including the Firestone tire recall, Explorer safety issues, and Ford's response to the tire and Explorer issues"); *Six W. Retail Acquisition v. Sony Theatre Mgmt.*, 203 F.R.D. 98, 102-05 (S.D.N.Y. 2001) (evidence showed that CEO had "unique knowledge on several issues" and "was substantially involved" in managing theaters and planning a merger at issue in the case); *Gaither v. Hous. Auth. of the City of New Haven*, No. 3:07CV0667(WWE), 2008 WL 2782728, at *1 (D. Conn. July 7, 2008) (executive "interacted personally" with the household of plaintiff who brought housing discrimination claims and was involved in decisions regarding housing accommodation requests). Indeed, in *Burns v. Bank of America*, No. 03-civ-1685(RMB)(JCF), 2007 WL 1589437 (S.D.N.Y. June 4, 2007), the court quashed the deposition of the defendant's general counsel, explaining that "[u]nlike the plaintiff in *Six West*, the plaintiffs in this case have not support[ed] [their] allegations with evidence sufficient for this Court to infer that [the proposed deponent] has some unique knowledge on a number of relevant issues." *Id.* at *5.

The Notices are not calculated to seek discovery that the State lacks or will not obtain from other sources. Instead, the Notices are calculated to harass corporate representatives without unique knowledge about duplicative information and should thus be quashed. *See, e.g., Ameritox, Ltd. v. Millennium Labs., Inc.*, No. 12-cv-7493, 2012 WL 6568226, at *3 (N.D. Ill. Dec. 14, 2012) (granting motion to quash cumulative requests).

* * *

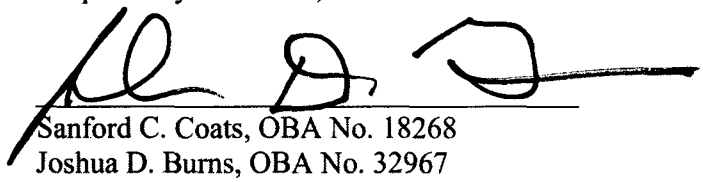
In the alternative, the Court should defer the noticed depositions until after other corporate depositions have been completed. At that time, the State will have the opportunity to establish whether there are issues (if any) for which deposition testimony has not been provided as to which Jonathan or Mortimer D.A. Sackler have unique, non-duplicative knowledge, questioning can be limited to any such subjects, *see Bridgestone*, 205 F.R.D. at 537 (noting that deposing executive after other depositions enabled the parties to "identify more readily the appropriate areas of questioning"), and held at the corporation's principal place of business. *See Crest Infiniti, II, LP v. Swinton*, 2007 OK 77, 174 P.3d 996, 1003 n.16 ("Depositions of corporate officials are ordinarily taken at the corporation's principal place of business unless justice requires otherwise." (citation and internal quotation marks omitted)).

CONCLUSION

For the foregoing reasons, Purdue respectfully requests that this Court grant its Motion to Quash and Motion for Protective Order. Specifically, Purdue requests that the Court quash the Notices and enter a protective order preventing the State from taking the depositions of Jonathan Sackler and Mortimer D.A. Sackler as corporate representatives of Purdue.

Date: December 13, 2018

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of December 2018, I caused a true and correct copy of the following:

PURDUE'S REPLY IN SUPPORT OF MOTION TO QUASH AND MOTION FOR PROTECTIVE ORDER FOR DEPOSITION NOTICE OF PURDUE VIA JONATHAN SACKLER AND MORTIMER D.A. SACKLER

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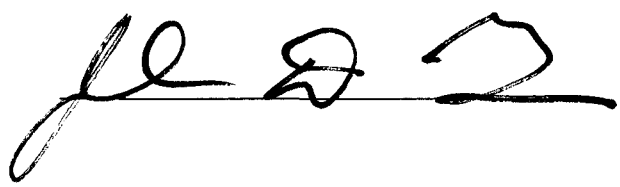

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