**IN THE UNITED STATES COURT OF FEDERAL CLAIMS**

**CHEYENNE & ARAPAHO TRIBES,**

**Plaintiff**,

**vs.**

**UNITED STATES OF AMERICA**

**Defendant.**

**Case No. 20-143-L**

Judge Loren A. Smith

**MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS OF UNITED STATES OF AMERICA**

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**IN THE UNITED STATES COURT OF FEDERAL CLAIMS**

**CHEYENNE & ARAPAHO TRIBES,**

**Plaintiff,** **Case No.: 20-143 L**

**vs.** Judge Loren A. Smith

**UNITED STATES OF AMERICA**

**Defendant.**

_____/

**Memorandum in Opposition to Motion to Dismiss of United States of America**

The Plaintiff, Cheyenne & Arapaho Tribes, respectfully submits this Memorandum in Opposition to the Motion to Dismiss of the United States of America and would show as follows:

## INTRODUCTION

This cause arises from the devastating impacts of the opioid epidemic on the Plaintiff, Cheyenne & Arapaho Tribes, and its members, and is premised on the promise that the Defendant, The United States of America, made by treaty to make the Tribes whole when harmed by the conduct of "bad men among the whites." The United States pledged its sacred honor to the Tribes when committing to these treaty promises. It is that pledge on which the Plaintiff now makes claim.

The opioid epidemic has created tremendous hardships for and has caused tremendous damage to the Plaintiff. The Defendant now moves to dismiss the claims of the Tribes in an effort to avoid its treaty obligations and in violation of the sacred honor

which it pledged to the Tribes. ECF 7. It is the "distinctive obligation of trust" which exists between the Defendant and Indian Tribes which the Plaintiff now seeks to enforce. *Seminole Nation v. United States, 316 U.S. 286, 296 (1942).* The United States "must be held to the most exacting fiduciary standards in its relationship with the Indian beneficiaries." *Shoshone Indian Tribe of the Wind River Reservation v. United States*, 364 F.3d 1339, 1348 (Fed. Cir.2004). The position of the Defendant that the Tribes cannot seek redress under the Treaties at issue for the harm caused by the opioid bad men cannot be reconciled with the distinct obligations of trust and the exacting fiduciary standards imposed on the Defendant. The Plaintiff respectfully contends that the Defendant's Motion to Dismiss should be denied.

## FACTUAL AND LEGAL BACKGROUND

### I. The "Bad Man" Cause of Action.

Indian treaties are not to be compared with private contracts. They are organic documents between sovereign entities. The interpretation of treaties is not bound by rules of contract construction but instead requires courts to "look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties" to determine the true meaning of the treaty. See *Choctaw Nation of Indians v. United States, et al., 318* U.S. 423, 431-32 (1943). The applicable canons of construction instruct courts to resolve all ambiguities in the Indians' favor and generally to construe Indian treaties liberally. See *Carpenter v. Shaw*, 280 U.S. 363, 50 S. Ct. 121 (1930).

With respect to the interpretation of language used in treaties, the Supreme Court in *Carpenter* held as follows:

> Such provisions are to be liberally construed. Doubtful expressions are to be resolved in favor of the [tribes and tribal members who rely upon the U.S. for] protection and good faith. Hence, the language used in treaties with the Indians should never be construed to their prejudice. If words be made use of, which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense. And they must be construed not according to their technical meaning but in the sense in which they would naturally be understood by the Indians. At p. 367.

The words of the Bad Man clause at issue in this litigation are plain and clear and, Article I, ¶ 2, of the treaty with the Cheyenne and Arapaho, 1867 provide as follows:

> If bad men among the whites, or among other people subject to the authority of the United States, shall commit ***any wrong*** upon the person or property of the Indians, the ***United States will***, upon proof made to the agent and forwarded to the Commissioner of Indian Affair at Washington City***, proceed at once*** to cause the offender to be arrested and punished according to the laws of the United States***, and also reimburse the injured person for the loss sustained.*** (emphasis added)

The Bad Man clause at issue in this litigation must be understood in its unique context. The Defendant promised the Tribes peace and protection from white (including other people subject to the authority of the United States) depredations in return for amity, land and relocation to reservations. Against a backdrop of aggressions on the Indians by the whites, on July 20, 1867, the United States put forth the Great Peace Commission, which sought Treaties with the Cheyenne and Arapaho to "remove all just causes of complaint on [the Indians'], and at the same time establish security for person

and property…such as will most likely ensure…peace and safety for the whites." An Act to Establish Peace with Certain Hostile Indian Tribes, ch. 32, 15 Stat. 17 § 1 (1867). Shortly thereafter, the Treaty with the Cheyenne and Arapaho, 1867, was executed with the Bad Man clauses prominently in Article 1 of that Treaty. The Bad Man clauses made the federal government responsible for wrongs committed by white men within the Indian's territory. See *Janice v. United States*, 32 Ct. Cl. 407, 410 (1987). The responsibility of the federal government was one of indemnity, indemnifying the Tribes and its members for wrongs imposed by Bad Men. *Elk v. United States*, 87 Fed. Ct. CL. 70, 81-82 (2009) (the term "reimburse" in Bad Man clauses means indemnity and requires the United States to make whole the claimant).

**II. Other Pending Litigation.**

The Defendant devotes four pages of its memorandum to describing other pending litigation brought by the Plaintiff and other Indian Tribes against drug manufacturers, distributors, pharmacies and individuals. See Doc. 7-1, pp. 13-16; and Doc. 7-2 (attachments). Although the point of this recitation is not clear, it appears to suggest that the Plaintiff is obligated to exhaust other potential claims before bringing a claim pursuant to the Bad Man clause of its Treaty with the Defendant. There is no language in the Treaty to support that conclusion nor is there any in applicable law. The Treaty does not require the Tribe or its members to first bring claims against the Bad Men nor does it preclude a claim against the Defendant because claims are pending against the Bad Men. The Treaty obligations of the Defendant are independent and are a part of the organic document defining the relationship between two sovereigns.

## JURISDICTION

This Court has jurisdiction over this cause pursuant to 28 U.S.C. § 1481(a)(1). This is a civil action against the United States founded upon the Treaties that benefit the Cheyenne and Arapaho Tribes dated October 28, 1867, and May 10, 1868, which were both ratified by Acts of Congress. This cause involves a claim against the United States brought by the sovereign Plaintiff pursuant to the Constitution of the United States and Acts of Congress. It is properly before this Court. See *Richard v. United States*, 677 F.3d 1141, 1144 (Fed. Cir. 2012); and *United States v. Mitchell*, 463 U.S. 206, 212-16 (1983) (discussing the history and purpose of the Tucker Act). See also Doc. 1 at ¶ 8.

## STANDARD OF REVIEW

### I. Standard of Review pursuant to Court of Federal Claims Rule 12(b)(6)

When considering a motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6), the Court should accept as true the complaint's undisputed factual allegations and construe them in a light most favorable to the Plaintiff. All reasonable inferences should be indulged in favor of the non-moving party. See *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) and *Sommers Oil Co. v. United States*, 241 F.3d 1375, 1378 (Fed. Cir. 2001). The claim of the Plaintiff must be "plausible on its face." A claim is facially plausible when the Plaintiff pleads factual content that allows the Court to draw the reasonable inference that the Defendant is liable for the misconduct alleged.

*Ashcroft* at 678.

### II. Standard of Review pursuant to Court of Federal Claims Rule 12(b)(1)

In considering a motion to dismiss for lack of subject matter jurisdiction, the Court should accept as true all undisputed facts in the pleadings and draw all reasonable inferences in favor of the Plaintiff. *Trusted Integration, Inc., v. United States*, 659 F.3d 1159, 1163 (Fed. Circ. 2011). While the Court may inquire into jurisdictional facts necessary to determine the Court's jurisdiction, the pleadings and inferences properly drawn from those pleadings are sufficient to establish subject matter jurisdiction as a threshold matter.

## ARGUMENT

### I. The Plaintiff is the party to the Treaties at issue and is a proper Plaintiff.

#### A. The indemnity required by the Treaties inures to the benefit of the Tribe and, as thirty-party beneficiaries, its Tribal members.

The Defendant contends that the Bad Man clause created an individual right but not a tribal one. Doc. 7-1, p. 6. This position represents a marked about-face from the position that the Defendant took in *Hebah v. United States* where the Defendant maintained that the Bad Man provision gave no rights to the individual Indians but was, instead, solely for the benefit of the Tribe itself. 428 F.2d 696, 789 (Ct. Cl. 1970). Having previously argued that the Bad Man clause allows only Tribes to file claims, the Defendant is hardly in a position now to argue that the provision is unambiguous and that the Tribe is not the intended beneficiary of the Treaty. Doc. 7-1, pp. 19-20. There can be no question but that the Plaintiff was the party to the Treaty at issue. Nevertheless, assuming, for the sake of argument, that there is ambiguity in terms of the beneficiary of

the Defendant's indemnity, ambiguity must be resolved in favor of the Indians. *Fishing Vessel*, 443 U.S. at 676; and *Oregon Department of Fish and Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 774 (1985). If for no other reason, the argument of the Defendant must fail by its own inconsistent positions.

The flaws in the Defendant's argument extend beyond simply its inconsistent positions. A close look at *Hebah* makes clear that the Defendant is wrong in considering the Tribes to be third-parties to the Tribes' own treaty. Doc. 7-1, p. 21. In *Hebah*, the United States sought to dismiss a Bad Man claim by an individual tribe member on the grounds that only tribes may pursue such claims. The *Hebah* court disagreed, however, and viewed the Plaintiff tribal members as third-party beneficiaries, allowing their case to proceed on its merits. The Defendant now abandons its prior view that tribes are entitled to bring such claims and extends its erroneous analysis to a false dichotomy that would preclude the Tribe, as a sovereign nation, from exercising treaty rights in a treaty to which it is a party and in which it clearly has rights to be protected.

The *Hebah* court was not presented with the issue of whether a Tribe's Bad Man claims were the only cognizable claims under the bad man provision of the Treaty. Instead, the question decided by the Court was whether the individuals could seek indemnity in their own right. The Court concluded that the individuals could, as third-party beneficiaries to the Treaty. The Court made no suggestion, much less any finding, that Tribes were precluded from bringing claims.

The Defendant also ignores the broad, general rule that the United States, as the guardian of the Indians has never entered into Treaties with the individual Indians so as

to embrace the personal rights of individual Indians. *Black Feather v. United States*, 190 U.S. 368, 377 (1903). *Hebah* recognized this principle before finding that the individuals might be third-party beneficiaries to the Treaty rights and granting those individual standing. See *Hebah* at 1338. Indeed, nothing in *Hebah* precludes claims by the very Tribe that obtained, and is party to, the applicable Treaty right. See also *Tsosie v. United States* 825 F.2d 393, 398-99 (describing wrongs by Bad Men against a Treaty Tribe ***giving the Tribe or a wronged member the right to reimbursement from the Federal Treasury***). (emphasis added)

Treaty language creating rights on the part of "the Indians" commonly creates rights on behalf of both the Tribe as sovereign and the individuals as Tribal members. See *United States v. Sioux Nation of Indians*, 448 U.S. 371, 374 (1980) (Tribe has standing to pursue money damage for taking of land set apart for the absolute and undisturbed use and occupation of the Indians); and *Pueblo of Isleta v. Universal Constructors, Inc*., 570 F.2d 300, 302-303 (10th Cir. 1978) (close relationship between the Tribe and its members, together with the difficulties which individual Indians encounter in seeking to assert rights in Courts outweigh fine legal distinctions that would prohibit a Tribe's claim).

It is telling that the Defendant's brief contains no mention of the canons of construction applicable to the interpretation of treaties with Native American Tribes. Courts universally consider those canons of construction in ruling on Bad Men claims noting that Indian Treaties "are to be construed, so far as possible, in the sense in which the Indians understood them." See *Choctaw Nation of Indians v. United States*, 318 U.S.

423, 432 (1943) and *Richard v. United States*, 677 F.3d 1141, 1149 (Fed.Cir. 2012). See also *United States v. Winans*, 198 U.S. 371, 380-81 (1905); *Washington v. Washington State Commercial Passenger Fishing Vessels Association*, 443 U.S. 658, 676 (1979); and *Tulee v. Washington*, 315 U.S. 681, 684-85 (1942). The Tribes and its members are inseparable.

The history and context of treaty negotiations between the United States and the Cheyenne and Arapaho Tribes reflect the shared understanding that the Tribes have the right to bring Bad Man claims. The Bad Man clauses in both the 1867 Treaty and the 1868 Fort Laramie Treaty were negotiated against the backdrop of previous Treaties, including the Treaty with the Cheyenne and Arapaho of October 14, 1865, made and concluded at the camp on the Little Arkansas River. 14 Stat. 703. Article I of that Treaty provides as follows:

> It is agreed by the parties to this Treaty that hereafter perpetual peace shall be maintained between the people and Government of the United State and the Indians parties hereto, and the Indians parties hereto, shall forever remain at peace with each other, and with all other Indians who sustain friendly relations with the Government of the United States. For the purpose of enforcing the provisions of this article it is agreed that hostile acts of depredations are committed by the people of the United States, or by Indians on friendly terms with the United States, against the ***Tribe or Tribes, or the individual members of the Tribe or Tribes, who are parties to this Treaty***, such hostile acts or depredations shall not be redressed by a resort to arms, but the party or parties aggrieved shall submit their complaints through their agent to the President of the United States, and thereupon an impartial arbitration shall be had, and under his direction, and the award thus made shall be binding on all parties interested, and the government of the United States will in good faith enforce the same. (emphasis added)

The 1867 Treaty and the 1868 Fort Laramie Treaty, both containing Bad Man clauses, were plainly intended to carry forward the peacemaking efforts embodied within former Treaties, including the Treaty of 1865 quoted above, and were intended to inure to the benefit of both Tribes and their members. See *Cheyenne and Arapaho Tribes of Oklahoma v. Oklahoma*, 618 F.2d 665, 666 (10th Cir. 1980) (1867 Treaty did not abrogate the 1865 Treaty).

In light of both the historical context of the Treaties at issue and the law requiring Treaties to be construed as Indians understood them, resolving ambiguity in favor of the Indians, the Defendant cannot credibly contend that the Tribes lack standing to bring a Bad Man claim.

### B. The Tribe has standing to bring a *parens patriae* claim

The Defendant contends that the Tribes lack standing to bring a *parens patriae* claim on behalf of its Tribal members. The argument which it advocates, however, is flawed in that it seeks to interpose federalism conundrums into the analysis and further ignores the fact that the plaintiff is a sovereign.

The common law has long recognized the doctrine of *parents patriae* – the prerogative of a sovereign to bring suit "for the prevention of injury to those who cannot protect themselves." *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 600 (1983). *Parens patriae* standing permits a sovereign to protect the rights of its citizens by seeking to vindicate a sovereign or quasi sovereign interest. *Id.* A quasi sovereign interest exists when the interest (1) involves "the health and well-being – both physical

and economic – of its residents in general," and (2) the sovereign "articulates an interest apart from the interests of particular private parties" that affects "a sufficiently substantial segment of its population." *Id.* At 607. The claim at issue affects the entire Tribe and has an even greater effect on a substantial segment of the Tribe.

The Tribes' complaint is explicit in alleging that the crisis brought by the opioid Bad Men has had profound and pervasive effects on the health and wellbeing, both physical and economic, of both the Tribe itself and its individual Tribal members. The complaint also sets forth that a substantial portion of its population has been affected. Doc. 1 at ¶¶ 1, 4, 37, 50, 59, 60, 61, 62, 66, 91 and 92. At this procedural stage, the Court must take these allegations as true. The deleterious effects of the opioid crisis are widely acknowledged and cannot be seriously debated. The allegations of the complaint make clear that both the Tribe and a substantial number of its members have been, and continue to be affected.

The Defendant is wrong in suggesting that the application of the *parens patriae* doctrine is somehow novel. The argument of the Defendant is built around cases which implicate the *Mellon* Rule which is rooted in notions of federalism that define the relationship between states and the federal government. See Doc. 7-1 at 22. In more contemporary cases, the *Mellon* Rule is frequently intertwined with issues related to the scope of the federal government's waiver of sovereign immunity under the Administrative Procedures Act. See, e.g., *Government of Manitoba v. Bernhardt*, 923 F.3d 173, 179-80 (D.C. Cir. 2019). There are no federalism considerations or APA issues presented by the case at bar.

The Treaties at issue are Treaties between sovereigns. It is important to clearly understand the import of *Commonwealth of Massachusetts v. Mellon*, 262 U.S. 447 (1923). The Defendant cites *Mellon* for the proposition that the Plaintiff cannot assert a *parens patriae* claim against the United States. The Court in *Mellon* determined, however, that a state cannot, as *parens patriae*, "institute judicial proceedings to protect citizens of the United States from the operation of the statutes thereof." *Id.* at 485. It is a duty of the United States, not the duty of the state, to enforce the rights of citizens of the United States with respect to their relationship with the federal government. *Id. at 485. See also Quechan Indian Tribe v. United States*, 535 F. Supp. 2d 1073 (S.D. Cal. 2008). The case at bar does not present any issue related to a federal statute. The obligation at issue is embodied in a treaty between a sovereign Indian Tribe and the United States government.

Courts have recognized exceptions to the *Mellon* holding and have permitted Indian Tribes to sue as *parens patriae,* without comment. See *Sisseton-Wahpeton Sioux Tribe of Lake Traverse Indian Reservations, North Dakota and South Dakota v. United States*, 90 F3d 351 (9th Cir. 1996). In the present case the Plaintiff brings its claim for damages to the health and welfare of the Tribe and Tribal members. It acts in the exercise of its authority as a sovereign government to protect itself and the health, safety, and welfare of ***all*** Tribe members, as well as the non-Tribal member inhabitants of its Indian lands so as to stop the growing opioid epidemic within the Tribe. See Doc. 1 at ¶¶ 5-7.

The Plaintiff has standing to bring this claim both for the Tribe in its proprietary capacity and as *parens patriae* for its members. Any other result would be contrary to existing law and would be manifestly unjust.

## II. The claims of the Tribe satisfy all of the elements of a Bad Man Claim.

The Defendant's contention that the Plaintiff has not properly pled the elements of a Bad Man claim is without merit. Each of the necessary elements of the Plaintiff's claim has been properly pled.

### A. The complaint alleges conduct on and around the reservation.

The Defendant contends that the Tribes' complaint does not allege any "on-reservation conduct." Doc. 7-1 at page 26. That statement is simply incorrect. The following allegations are contained in the Plaintiff's complaint (Doc. 1):

> 14. TPL, PPI, PFC, roads and their DEA registrants subsidiaries and affiliates (collectively, "Purdue companies") are engaged in the manufacture, promotion, distribution, and sale of opioids nationally and ***onto Plaintiffs Tribes' reservation lands…***
>
> 51. The Actavis Opioid Bad Men have engaged in the manufacture, promotion, distribution, and sale of the branded and generic prescription opioid drugs sold ***throughout the country, including into the Tribes territory in Western Oklahoma that includes Beckham, Blain, Canadian, Custer, Dewey, Ellis, Kingfisher, Roger Mills, and Wachita counties***.
>
> 91. The opioid Bad Men, in reckless disregard for the consequences, increased prescription drug marketing and sales, and ***flooded the Tribe and Tribal communities with prescription opioids***. These facts and others as alleged in this complaint have only recently come to light, despite the opioid Bad Men's effort to conceal the truth.

> 94. While prescription opioid use has decreased slightly in the U.S. in the past two years, deaths have continued to rise. The great wrongful conduct of the opioid Bad Men remains unabated and is not likely to be abated except via civil litigation. ***This wrongful conduct is rampant within the Tribe, and harms Tribal members and the Tribes' reservation lands***. (emphasis added)

In addition to the allegations noted above, the complaint makes numerous allegations of conduct directed to and against the Plaintiff and its Tribal members. See Doc. 1 at ¶¶ 7, 37, 50, 59, 60, 61, 62, 70, 71, 72, 79, 81 and 82. These allegations make clear the proposition that the wrongs of the Bad Men have been perpetrated both on Indian Tribal lands and in a manner specially designed to impact and damage Tribal members. The Defendant concedes that the Treaties at issue contemplate that the United States government "will be responsible for what white men do within the Indian territory" or "off-reservation wrongs resulting directly therefrom" and that such conduct gives rise to a Bad Man claim. Doc. 7-1 at page 24. It is that wrong, both on Tribal lands and directed to Tribal members, which is the subject of this complaint.

Moreover, the Defendant's reliance on *Herrera v. United States*, 39 Fed. CL. 419, 420 (2019) and *Pablo v. United States*, 98 Fed. CL. 376 (2011) is misplaced. The holdings in both *Herrera* and *Pablo* hinged on specific language in the Navajo Treaty at issue in those cases. That language provided as follows:

> …if any Navajo Indian… shall leave the reservation herein described … they shall forfeit all the rights, privileges, and annuities… conferred by the terms of this Treaty."

That language does not appear in the 1867 Treaty at issue in this case. There is no legal

or other basis to graft that language into the Treaty of the Cheyenne and Arapaho Tribes.

Furthermore, the Defendant's discussion of disestablishment (Doc. 7-1 at 26 FN 7) is a red-herring. The Defendant concedes that there are at least 10,000 acres of reservation trust land held for the benefit of the Cheyenne and Arapaho Tribes. The case on which the Defendant relies makes clear that termination was never accomplished as to the Cheyenne and Arapaho Tribes, regardless of the fact that certain portions of their reservation were opened for homestead entries under surplus land acts that preceded the Indian Reorganization Act. See *Cheyenne and Arapaho Tribes of Oklahoma v. Oklahoma*, 618 F2d 665 (10th Cir 1980). Importantly, the Court further held that the Cheyenne and Arapaho Tribes, and its members, retain Treaty right hunting and fishing rights even though those rights are not expressed in all Treaties, "because the rules of construction…. applied in Indian cases are controlling." *Id.* at 669. Since implied Treaty hunting and fishing rights endured across a wide swath of former Tribal territory, the geographic scope of the Tribes expressed Treaty right to bring Bad Man claims must be understood as similarly expansive. It is clear that both allotted lands and federal trust land within the Cheyenne and Arapaho reservation retain Indian Country status. See also *McGirt v. Oklahoma*, 591 U.S. ___ (2020).

Ultimately, any questions of geographic scope are ancillary to the issues raised in the Defendant's Motion to Dismiss. As noted above, the allegations of the complaint allege wrongful conduct on reservation land and similar conduct directed to the Tribes and Tribal members. Because that wrongful conduct is both plausible and sufficient, the Plaintiff respectfully contends that Defendant's motion to dismiss should be denied.

**B. The conduct of the opioid Bad Men is wrongful conduct.**

The Defendant makes the extraordinary argument that the facts alleged in the complaint do not constitute a wrong within the scope of the Bad Man clause of the Treaty. Doc. 7-1 at page 27. The conduct at issue, however, is criminal conduct, clearly sufficient as a basis for this complaint and patently within the scope of the Bad Man clause of the Treaties.

In 2007 Purdue settled criminal and civil charges against it for misbranding OxyContin and agreed to pay the United States Government $635 million. Doc. 1 at ¶ 17. Undeterred by one of the largest settlements with a drug company in history, Purdue's misconduct continued. The Purdue board, while the Sackler family members sat on that board, voted to approve a criminal guilty plea by their company and agreed to a Statement of Facts which included the fact that the supervisors and employees of the company intentionally deceived doctors about OxyContin beginning on or about December 12, 1995 and continuing until June 30, 2000, all with the intent to defraud or mislead those to whom OxyContin was marketed as being less addictive. The board, while the Sackler family members were directors, also voted to agree to a Corporate Integrity Agreement with the United States. Purdue pled guilty to a crime. The Sackler family members, the stockholders of this closely held corporation and members of its board, agreed to that plea and agreed to the Corporate Integrity Agreement. Doc. 1 at ¶ 31.

The list goes on. Attached as Exhibits "A" and "B" are the Plea Agreement and the Opinion and Order of Chief United States District Judge James P. Jones accepting the

guilty plea of Purdue to a felony, along with the pleas of individuals to misdemeanor charges related to their conduct as corporate officers. These Bad Men are admitted criminals and their conduct was criminal conduct.

The allegations of the Plaintiff's complaint center around the criminal fraud and deception of the Bad Men, both corporately and individually, and the damage which that fraud and deception has caused across our country, including to the Plaintiff and its Tribal members. The wrongful nature of this conduct cannot be seriously debated. To be clear, the conduct is both wrongful and criminal and was committed by Bad Men who were both corporate entities and individuals all as described in Plaintiff's complaint. Doc. 1 at ¶ 10.

**3. The exhaustion of remedies argument is without merit.**

While the Defendant may be accustomed to the protections of the doctrine requiring exhaustion of administrative remedies as a prerequisite to suit under the Administrative Procedures Act, that body of law does not govern the case at bar. None of the cases relied upon by the Defendant involved Treaty rights claims nor did any of them present questions of interpretation governed by the Indian canons of construction. Courts construe treaties with Indian Tribes "as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection." *Jones v. United States*, 846 F.3d 1343, 1358 (Fed. Cir. 2017). In this case counsel for the Plaintiff wrote to Ms. Sweeney, Assistant Secretary – Indian Affairs, U.S. Department of the Interior on November 5, 2019. See exhibit US-8. Receiving no response to that

letter, counsel again wrote to Ms. Sweeney on December 20, 2019. See exhibit "C" attached. Again, there was no response.

On February 10, 2020, this complaint was filed. Doc. 1. Finally, on March 16, 2020, having been served with the complaint, Ms. Sweeney acknowledged receipt of Plaintiff's November 5, 2019 letter raising substantially the same issues as are raised in Defendant's Motion to Dismiss. Counsel for the Plaintiff responded on April 22, 2020, inviting a discussion genuinely aimed at a resolution of what Ms. Sweeney acknowledged is the "opioid epidemic's devastating effect in Indian country." See Exhibit US-9. Ms. Sweeney further responded on May 21, 2020 reiterating her original position. It is quite evident that, while she agrees that the effect on Indian country has been devastating, legal issues which require resolution by this Court remain and further discussion with the Assistant Secretary would be futile absent direction from this Court. The Defendant's Motion to Dismiss followed the Assistant Secretary's letter of May 21, 2020.

Where the Defendant refers specifically to Bad Man cases in the course of its exhaustion argument, the effect is to disguise what would otherwise emerge as a relatively simply rule under the Treaty language at issue. A "claim" is "the only prerequisite to suit required by the Treaty." *Hebah v. United States*, *428 F.2d 1334, 1340 (Ct. CL. 1970).* The claim requirement is "minimal." *Flying Horse v. United States* 696 F.App'x 495, 496-497 (Fed. Cir. 2017) citing *Jones v. United States*, 122 Fed. CL. 490, 515 (2015), vacated and remanded on other grounds, 846 F.3d 1343 (Fed. Cir. 2017).

A close look at the 1867 Bad Man Treaty language demonstrates that the "minimal" standard applies to the case at bar. In its brief, the Defendant presented only

compressed excerpts of the 1867 Bad Man clause. See Doc. 7-1 at p. 11. Those compressed excerpts are as follows:

> If Bad Men among the whites, or among other people subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent and forwarded to the Commissioner of Indian Affair at Washington City, proceed at once to cause the offender to be arrested and punished according to the laws of the United States, and also reimburse the injured person for the loss sustained.
>
> ***
>
> But no such damages shall be adjusted and paid until thoroughly examined and passed upon by the [Assistant Secretary for Indian Affairs] and the Secretary of Interior;…

The Defendant represents that this language is the operative language of the Treaty applicable to "Bad Men among the whites" committing wrong "upon the person or property of the Indians." That is not the case, however. The complete language of paragraphs 3 and 4 of the Treaty is as follows:

> If Bad Men among the whites, or among other people subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent and forwarded to the Commissioner of Indian Affair at Washington City, proceed at once to cause the offender to be arrested and punished according to the laws of the United States, and also reimburse the injured person for the loss sustained.
>
> **If bad men among the Indians shall commit a wrong or depredation upon the person or property of any one, white, black, or Indian, subject to the authority of the United States and at peace therewith, the tribes herein named solemnly agree that they will, on proof made to their agent, and notice by him, deliver up the wrongdoer to the United States, to be tried and punished according to its laws; and in case they willfully**

> **refuse so to do, the person injured shall be reimbursed for his loss from the annuities or other moneys due or to become due to them under this or other treaties made with the United States. And the President, on advising with the Commissioner of Indian Affairs, shall prescribe such rules and regulations for ascertaining damages, under the provisions of this article, as in his judgment may be proper.** But no such damages shall be adjusted and paid until thoroughly examined and passed upon by the Commissioner of Indian Affairs and the Secretary of the Interior, and no one sustaining loss, while violating, or because of his violating, the provisions of this treaty or the laws of the United States, shall be re-imbursed therefor.(emphasis added)

The Court will note that the bolded language above, omitted by the Defendant, is the preface to the language requiring examination by Indian Affairs and relates not to the acts of white men against the Indians (as the Defendant would suggest) but instead relates to acts committed by Bad Men among the Indians against the person or property of others. The language applicable to claims by Indians requires that the United States "proceed at once" to reimburse the injured person for the loss sustained.

Furthermore, even if the language suggested by the Defendant is applicable, no such rules or regulations for ascertaining damages under the provisions of this article appear to have been promulgated by the Executive Branch of the United States government.

A claim giving notice is the only prerequisite to suit required by the Treaty. The United States, through the Assistant Secretary for Indian Affairs, received notice and ignored it until suit was filed. Given the legal positions taken by the Assistant Secretary

in her correspondence, it is evident that it would be futile to continue to deal with the Assistant Secretary until those legal issues are resolved by this Court.

Finally, applying the rules of construction applicable to Indian Treaties, the suggestion that some undefined exhaustion of remedies is applicable to this Treaty strains credulity. The United States has notice of this claim and has ignored it.

## CONCLUSION

The Plaintiff has standing to bring this complaint for both itself and its Tribal members. The opioid crisis affects the very fiber of the Tribes' existence and every member of the Tribe in some way. To suggest that this criminal conduct is not the kind of wrong covered by the Treaty is beyond comprehension. To allow the Defendant to stonewall this claim with undefined administrative practice would be manifestly unjust and contrary to the law. The Plaintiff respectfully requests that the Motion to Dismiss be denied and that the United States Government be required to honor its treaty with the Plaintiff.

Respectfully Submitted,

Date: July 16, 2020

CHEYENNE AND ARAPAHO TRIBES,

PLAINTIFF

By Its Attorneys:

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**IN THE UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF VIRGINIA**
**ABINGDON DIVISION**

**UNITED STATES OF AMERICA** )
)
**v.** ) **Case No.** 1:07CR29
)
**THE PURDUE FREDERICK COMPANY, INC.** )

## PLEA AGREEMENT

THE PURDUE FREDERICK COMPANY, INC. ("PURDUE") has entered into a Plea Agreement with the United States of America, by counsel, pursuant to Rule 11(c)(1)(C) of the Federal Rules of Criminal Procedure ("Fed. R. Crim. P."). The terms and conditions of this agreement are as follows:

### 1. CHARGE TO WHICH PURDUE IS PLEADING GUILTY AND WAIVER OF RIGHTS

PURDUE will enter a plea of guilty to Count One of an Information, charging it with the felony of misbranding a drug, with the intent to defraud or mislead, in violation of Title 21, United States Code, Sections 331(a) and 333(a)(2). The maximum statutory penalty is a fine of $500,000.00 or twice the gross gain or loss, pursuant to Title 18, United States Code, Sections 3571(c)(3) and 3571(d), plus a period of probation of up to five years, pursuant to Title 18, United States Code, Section 3561(c)(1). In addition, PURDUE's assets may be subject to forfeiture. PURDUE understands that fees may be imposed to pay for probation and that there will be a $400 special assessment, pursuant to Title 18, United States Code, Section 3013(a)(2)(B). PURDUE's attorney has informed it of the nature of the charge and the elements of the charge that must be proved by the United States beyond a reasonable doubt before PURDUE could be found guilty as charged.

PURDUE hereby waives its right to be proceeded against by indictment and consents to the filing of an Information charging it with a violation of Title 21, United States Code, Sections 331(a) and 333(a)(2).

PURDUE acknowledges that PURDUE has had all of its rights explained to it. PURDUE expressly recognizes that, as a corporation, PURDUE may have the following constitutional rights and, that by voluntarily pleading guilty, PURDUE knowingly waives and gives up these valuable constitutional rights:

The right to plead not guilty and persist in that plea.
The right to a speedy and public jury trial.
The right to assistance of counsel at that trial and in any subsequent appeal.
The right to remain silent at trial.
The right to testify at trial.



**PLAINTIFF**
**EXHIBIT A**

The right to confront and cross-examine witnesses.
The right to present evidence and witnesses.
The right to compulsory process of the court.
The right to compel the attendance of witnesses at trial.
The right to be presumed innocent.
The right to a unanimous guilty verdict.
The right to appeal a guilty verdict.

PURDUE is pleading guilty as described above because PURDUE is in fact guilty and because PURDUE believes it is in its best interest to do so and not because of any threats or promises, other than the terms of the Plea Agreement, described herein, in exchange for its plea of guilty. PURDUE agrees that all of the matters set forth in the Information are true and correct.

PURDUE understands that the plea is being entered in accordance with Fed. R. Crim. P. 11(c)(1)(C).

## 2. SENTENCING PROVISIONS

The parties agree and stipulate that the 2006 United States Sentencing Guidelines ("U.S.S.G.") Manual should be used and the following sentencing guidelines sections apply, exclusively.

The Offense Level is computed as follows:

| | | |
|---|---|---|
| 6 | § 2B1.1(a)(2) | Base offense level (cross reference from §2N2.1(b)(1)). |
| +2 | § 2B1.1(b)(2)(A)(ii) | The offense was committed through mass-marketing. |
| +2 | § 2B1.1(b)(9)(C) | The offense involved sophisticated means. |
| 10 | Total | |
| | | |
| 12 | § 2B1.1(b)(9) | If the resulting offense level is less than level 12, increase to level 12. |

Total Offense Level is 12

The Culpability Score is computed as follows:

| | | |
|---|---|---|
| 5 | § 8C2.5(a) | Start with 5 points. |
| +4 | § 8C2.5(b)(2)(A)(ii) | The organization had 1,000 or more employees. |
| -1 | § 8C2.5(g)(3) | The organization accepted responsibility for its criminal conduct. |

Total Culpability Score is 8.

The Base Fine for an Offense Level of 12 is $40,000.00 (§ 8C2.4(d)).

The Minimum Multiplier for a Culpability Score of 8 is 1.60 (§ 8C2.6).
The Maximum Multiplier for a Culpability Score of 8 is 3.20 (§ 8C2.6).

The Guideline Fine Range is $64,000.00 to $128,000.00 ((1.60 x $40,000.00) to (3.20 x $40,000.00)) (§ 8C2.7).

The United States asserts that an upward departure to a statutory maximum fine of $500,000.00 is appropriate because, pursuant to § 5K2.0(a)(1)(A), there exists an aggravating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines. PURDUE does not oppose the Court ordering the statutory maximum fine of $500,000.00.

The parties agree and stipulate that determining the pecuniary gain or loss would unduly complicate or prolong the sentencing process and, in accordance with U.S.S.G. § 8C2.4(c) and 18 U.S.C. § 3571(d), should not be used for the determination of the fine.

The parties agree that if the Court refuses to accept the Plea Agreement with the agreed-upon sentence, this Plea Agreement will be null and void, and PURDUE will be free to withdraw this guilty plea. In the event the Court refuses to accept the Plea Agreement with the agreed-upon sentence and PURDUE withdraws this guilty plea, nothing in this Plea Agreement shall be deemed a waiver of the provisions of Federal Rule of Evidence ("Fed. R. Evid.") 410 and the United States will move to dismiss the Information without prejudice to the United States' right to indict PURDUE or any other entity or individual on any charge.

The parties have not agreed to any matters concerning the length and terms of probation. Accordingly, the Court may impose whatever length and terms of probation, if any, that it determines is appropriate.

## 3. FINANCIAL OBLIGATIONS

PURDUE agrees and understands that any of the money paid pursuant to this Plea Agreement will be returned if, and only if, the Court refuses to accept the Plea Agreement with the agreed-upon sentence and, as a result, PURDUE withdraws its guilty plea.

For the remaining portions of this "FINANCIAL OBLIGATIONS" section, "PURDUE" means "THE PURDUE FREDERICK COMPANY, INC. or Purdue Pharma L.P.")

### a. Immediate Payments

Prior to the entry of PURDUE's guilty plea, PURDUE will make the following disbursements:

(1) $3,087,277.60 (three million eighty-seven thousand two hundred seventy-seven dollars and sixty cents) to the Federal and State Medicaid programs for improperly calculated Medicaid rebates for the years 1998 and 1999;

(2) $500,000.00 (five hundred thousand dollars) to the Clerk, U.S. District Court, Abingdon, Virginia, as payment of the maximum statutory fine;

(3) $20,000,000.00 (twenty million dollars) will be paid into an account to be held in trust ("Trust Account") solely for the operation of the Virginia Prescription Monitoring Program ("PMP") or its successors. The Trust Account funds should be prudently invested to ensure an adequate return. Money may be drawn from the Trust Account solely for the purpose of funding the PMP (including, but not limited to, operating and maintaining the PMP and providing training and educational programs concerning the use of the PMP.) The maximum amount to be drawn from the account each year shall be the lesser of (a) sufficient funds to fund Virginia's Prescription Monitoring Program or (b) the Yearly Expenditure Cap. The Yearly Expenditure Cap will be $1,000,000.00 (one million dollars) for the first year and will increase by 4% per year. If, prior to December 31, 2057, there is a calendar year during which Virginia does not have a PMP or its rough equivalent, the remaining money in the Trust Account shall be paid to the United States Treasury. The money in the Trust Account may not be used for any purpose other than funding the PMP, prior to December 31, 2057. As of December 31, 2057, if the PMP and its successors no longer exist, the money remaining in the account may be used for any purpose, for the benefit of the Commonwealth of Virginia;

(4) $5,300,000.00 (five million three hundred thousand dollars) to the Virginia Medicaid Fraud Control Unit's Program Income Fund; and

(5) $151,100,000.00 (one hundred fifty-one million one hundred thousand dollars) as directed by the United States Attorney's Office as partial payment of a total forfeiture of $276,100,000.00 (two hundred seventy six million one hundred thousand dollars).

**b. Civil Settlement Payments**

PURDUE will pay a total of $160,000,000.00 (one hundred sixty million dollars) to the United States and the States to settle civil governmental claims, as set forth below:

(1) PURDUE shall pay $100,615,797.25 (one hundred million six hundred fifteen thousand seven hundred ninety-seven dollars and twenty-five cents) to the United States plus interest at the rate of 4.75% per annum ($13,093.84 per day) on $100,615,797.25 from the

date of the plea by The Purdue Frederick Company, Inc. and continuing until and including the day before complete payment is made pursuant to the Civil Settlement Agreement (attached as Attachment D) between the United States and PURDUE; and $59,384,202.75 (fifty-nine million three hundred eighty-four thousand two hundred two dollars and seventy-five cents) to the States as set forth in Section 3(b)(2) below. These payments shall satisfy Purdue's obligation to make restitution under this Plea Agreement;

(2) The $59,384,202.75 paid to the States shall be placed in a dedicated interest bearing account. Each state that elects to participate in this settlement shall, upon execution of the Form State Release (attached as Attachment L) (or an alternative release agreed to by PURDUE and the state), receive its proportionate share as determined by the Medicaid Fraud Control Unit Negotiating Team, plus interest in accordance with the Form State Release, in a timely manner in accordance with the schedule as provided in the Form State Release. Any money remaining in the dedicated interest bearing account after PURDUE has fully paid all of its obligations shall be returned to PURDUE; and

(3) The parties agree and stipulate, pursuant to 18 U.S.C. § 3663(a)(1)(B)(ii), that no other restitution should be ordered.

**c. Subsequent Forfeiture Payments**

On or before the six month anniversary of the entry of its guilty plea, PURDUE will deposit $90,000,000.00 (ninety million dollars) as directed by the United States Attorney's Office as payment toward a total forfeiture of $276,100,000.00 (two hundred seventy six million one hundred thousand dollars).

On or before the twelve month anniversary of the entry of its guilty plea, PURDUE will deposit $35,000,000.00 (thirty-five million dollars) as directed by the United States Attorney's Office as final payment of a total forfeiture of $276,100,000.00 (two hundred seventy six million one hundred thousand dollars).

**d. Compensation and Settlement**

Based on the agreement in principle reached between PURDUE and the United States on October 25, 2006, PURDUE set aside a total of $130,000,000.00 (one hundred thirty million dollars), some or all of which will have been paid by the date of the entry of the guilty plea, for compensation and settlement of private civil liabilities related to OxyContin. Any of the $130,000,000.00 (one hundred thirty million dollars) remaining unpaid two years after the entry of

PURDUE's guilty plea will be paid to the United States Treasury. Two years after the entry of PURDUE's guilty plea or at the time the entire $130,000,000.00 has been appropriately expended (if the moneys have been expended in less than two years), PURDUE's attorney shall provide to the Court and the United States Attorney's Office an accounting of the moneys paid and will certify that all payments have been made to resolve PURDUE's private civil liabilities related to OxyContin.

**e. Forfeiture**

To accomplish the forfeiture, which will be paid as set forth above, PURDUE agrees to the filing of a civil forfeiture complaint, pursuant to 18 U.S.C. § 981(a)(1)(A), in the Western District of Virginia and agrees to forfeit $276,100,000.00 in cash in settlement of the forfeiture complaint ("settlement sum"). PURDUE agrees to sign, concurrent with the signing of this Plea Agreement, a settlement agreement acknowledging that the settlement sum represents proceeds of a violation of 18 U.S.C. § 1957 and/or are forfeitable in lieu of certain property that would be otherwise subject to forfeiture pursuant to 19 U.S.C. § 1613(c). PURDUE agrees to forfeit all interest in these funds and to take whatever steps are necessary to pass clear title of this sum to the United States. These steps include but are not limited to making the sum available to the United States, as directed by the United States. PURDUE agrees not to file a claim in any forfeiture proceeding or to contest, in any manner, the forfeiture of said assets. PURDUE understands and agrees that forfeiture of this property is proportionate to the degree and nature of the offense, and does not raise any of the concerns raised in *United States v. Austin*, 113 S.Ct. 2801 (1993). To the extent that such concerns are raised, PURDUE freely and knowingly waives any and all right it may have to raise a defense of "excessive fines" under the Eighth Amendment to this forfeiture. PURDUE further understands and agrees that this forfeiture is separate and distinct from, and is not in the nature of, or in lieu of, any monetary penalty that may be imposed by the court.

**f. Monitoring Costs**

PURDUE agrees to expend not less than $5,012,722.40 (five million twelve thousand seven hundred twenty-two dollars and forty cents) in monitoring costs over the next seventy-two months for the purpose of ensuring that Purdue Pharma L.P. complies with its Corporate Integrity Agreement ("CIA") with the Department of Health and Human Services Office of Inspector General ("OIG") and does not engage in any further criminal activity. On an annual basis, beginning on the first anniversary of PURDUE's guilty plea, PURDUE's attorney shall provide to the United States Attorney's Office an accounting of the moneys paid and will certify that all payments set forth therein have been paid as part of a monitoring program as set forth by the CIA between Purdue Pharma L.P. and the OIG or otherwise to prevent future criminal activity by Purdue Pharma L.P. Any of the $5,012,722.40 (five million twelve thousand seven hundred twenty-two dollars and forty cents) remaining unspent seventy-two months after the entry of PURDUE's guilty plea will be paid to the United States Treasury.

**g. Security**

Prior to pleading guilty, Purdue agrees to provide a lien to the United States against sufficient company assets to secure the $125,000,000.00 in deferred payments.

## 4. MANDATORY ASSESSMENT

PURDUE understands that there is a mandatory assessment of $400.00 per felony count of conviction. PURDUE agrees that it will submit to the U.S. Clerk's Office, a certified check, money order, or attorney's trust check, made payable to the "Clerk, U.S. District Court" in the amount of $400.00 within seven days of entering its plea of guilty.

## 5. ADDITIONAL OBLIGATIONS

Unless the Court rejects this Plea Agreement and, as a result, PURDUE withdraws its plea, PURDUE agrees to: (1) accept responsibility for its conduct; (2) fully comply with all terms of probation, if probation is imposed; (3) not attempt to withdraw its guilty plea; (4) not deny that it committed the crime to which it has pled guilty; and (5) not make or adopt any arguments or objections to the presentence investigation report that are inconsistent with this Plea Agreement (if a presentence report is ordered by the Court); and (6) comply with its obligations under the Civil Settlement Agreement (attached as Attachment D).

PURDUE consents to public disclosure of all resolution documents related to this case.

Neither PURDUE nor any of its associated entities (as set forth in Attachment A), will, through its present or future directors, officers, employees, agents, or attorneys, make any public statements, including statements or positions in litigation in which any United States department or agency is a party, contradicting any statement of fact set forth in the Agreed Statement of Facts (attached as Attachment B). Should the United States Attorney's Office for the Western District of Virginia notify PURDUE of a public statement by any such person that in whole or in part contradicts a statement of fact contained in the Agreed Statement of Facts, PURDUE may avoid noncompliance with its obligations under this Plea Agreement by publicly repudiating such statement within two business days after such notification. Notwithstanding the above, any PURDUE entity may avail itself of any legal or factual arguments available to it in defending litigation brought by a party other than the United States or in any investigation or proceeding brought by a state entity or by the United States Congress. This paragraph is not intended to apply to any statement made by any individual in the course of any actual or contemplated criminal, regulatory, administrative or civil case initiated by any governmental or private party against such individual.

## 6. ADMISSIBILITY OF STATEMENTS

PURDUE understands that any statements made on its behalf (including, but not limited to, this Plea Agreement and its admission of guilt) during or in preparation for any guilty plea hearing, sentencing hearing, or other hearing and any statements made, in any setting, may be used against

it in this or any other related criminal proceeding. PURDUE knowingly waives any right it may have under the Constitution, any statute, rule or other source of law to have such statements, or evidence derived from such statements, suppressed or excluded from being admitted into evidence in this or any other related criminal proceeding. With the exception of the situations set forth above, PURDUE does not waive its right to argue against admissibility under any ground permitted under federal or state rules of evidence in any other proceeding.

If the Court rejects the Plea Agreement, and, as a result, PURDUE withdraws its plea, PURDUE will not be bound by the waivers set forth in this section of the Plea Agreement.

## 7. WAIVER OF RIGHT TO APPEAL AND COLLATERALLY ATTACK THE JUDGMENT AND SENTENCE IMPOSED BY THE COURT

If the Court accepts this Plea Agreement, PURDUE agrees that PURDUE will not appeal the conviction or sentence imposed. PURDUE is knowingly and voluntarily waiving any right to appeal and is voluntarily willing to rely on the Court in sentencing it, pursuant to the terms of Fed. R. Crim. P. 11(c)(1)(C).

PURDUE agrees not to collaterally attack the judgment and/or sentence imposed in this case and waives its right, if any, to collaterally attack, pursuant to Title 28, United States Code, Section 2255, the judgment and any part of the sentence imposed upon it by the Court. PURDUE agrees and understands that if PURDUE, or anyone acting on PURDUE's behalf, files any court document (including but not limited to a notice of appeal) seeking to disturb, in any way, the judgment and/or sentence imposed in its case, the United States will be free to take whatever actions it wishes based on this failure of PURDUE to comply with its obligations under the Plea Agreement.

## 8. REMEDIES FOR FAILURE TO COMPLY WITH ANY PROVISION OF THE PLEA AGREEMENT OR OVERALL RESOLUTION

PURDUE understands that if: (1) PURDUE attempts to withdraw its plea (in the absence of the Court refusing to accept the Plea Agreement) or fails to comply with any provision of this Plea Agreement, at any time; (2) any defendant in this case does not fulfill the defendant's obligations under the defendant's plea agreement prior to the imposition of judgment; (3) PURDUE's conviction is set aside, for any reason; (4) any entity related to any defendant fails to execute all required paperwork or fails to fulfill its obligations to effectuate the resolution of this entire investigation prior to the imposition of judgment; and/or (5) PURDUE fails to comply with its obligations under the Civil Settlement Agreement (attached as Attachment D) the United States may, at its election, pursue any or all of the following remedies: (a) declare this Plea Agreement void; (b) file, by indictment or information, any charges which were filed and/or could have been filed concerning the matters involved in the instant investigation; (c) refuse to abide by any stipulations and/or recommendations contained in this Plea Agreement; (d) not be bound by any obligation of the United States set forth in this Plea Agreement, including, but not limited to, those obligations set forth in the section of this Plea Agreement entitled "COMPLETION OF PROSECUTION;" and (e) take any other action provided for under this Plea Agreement or by statute, regulation or court rule.

The remedies set forth above are cumulative and not mutually exclusive. If the United States pursues any of its permissible remedies as set forth in this Plea Agreement, PURDUE will still be bound by its obligations under this Plea Agreement. PURDUE hereby waives its right under Fed. R. Crim. P. 7 to be proceeded against by indictment and consents to the filing of an information against it concerning any charges filed pursuant to this section of the Plea Agreement. PURDUE hereby waives any statute of limitations argument as to any such charges.

## 9. INFORMATION ACCESS WAIVER

PURDUE and any related entity knowingly and voluntarily agrees to waive all rights, whether asserted directly or by a representative, to request or receive from any department or agency of the United States any records pertaining to the investigation or prosecution of this case, including without limitation any records that may be sought under the Freedom of Information Act, 5 U.S.C. § 552, or the Privacy Act of 1974, 5 U.S.C. § 552a.

## 10. DESTRUCTION OF ITEMS OBTAINED BY LAW ENFORCEMENT

By signing this Plea Agreement, PURDUE and any related entities hereby consent to the destruction of all items obtained by law enforcement agents during the course of the investigation, with the exception of the company's original files. However, PURDUE expressly agrees that, within 30 days of being informed by the United States Attorney's Office that records and/or other items obtained from PURDUE or entities/individuals who were employed by PURDUE or entities/individuals who were agents of PURDUE are available for removal, it will remove, at its cost, all such records and/or other items from the premises designated by the United States Attorney's Office.

## 11. COMPLETION OF PROSECUTION

PURDUE understands that except as provided for in this Plea Agreement and the Non-Prosecution Agreement (attached as Attachment C), so long as PURDUE complies with all of its obligations under the Plea Agreement, and all entities set forth in the Non-Prosecution Agreement comply with their obligations therein, there will be no further criminal prosecution or forfeiture action by the United States for any violations of law, occurring before May 10, 2007, pertaining to OxyContin that was the subject matter of the investigation by the United States Attorney's Office for the Western District of Virginia and the United States Department of Justice Office of Consumer Litigation that led to this agreement, against the following, or any property owned by any of the following: PURDUE, its current and former directors, officers, employees, co-promoters, owners (including trustees and trust beneficiaries of such owners), successors and assigns; any of PURDUE'S related and associated entities (as listed on Attachment A); and such related and associated entities' current and former directors, officers, employees, owners (including trustees and trust beneficiaries of such owners), successors and assigns, and trusts for the benefit of the families of the current and former directors of PURDUE, including the trustees and trust beneficiaries of such trusts.

Nothing in this Plea Agreement affects the administrative, civil, criminal, or other tax liability of any entity or individual and this Plea Agreement does not bind the Internal Revenue Service of the Department of Treasury, the Tax Division of the United States Department of Justice, or any other government agency with respect to the resolution of any tax issue.

PURDUE understands that nothing in this Plea Agreement precludes any private party from pursuing any civil remedy against PURDUE, and PURDUE agrees that it will not raise this Plea Agreement or its guilty plea as a defense to any such civil action.

## 12. LIMITATION OF AGREEMENT

This Plea Agreement is limited to the United States of America and does not bind any state or local authorities.

## 13. EFFECTIVE REPRESENTATION

PURDUE has discussed the terms of the foregoing Plea Agreement and all matters pertaining to the charges against it with its attorney and is fully satisfied with its attorney and its attorney's advice. At this time, PURDUE has no dissatisfaction or complaint with its attorney's representation. PURDUE agrees to make known to the Court no later than at the time of sentencing any dissatisfaction or complaint PURDUE may have with its attorney's representation.

## 14. EFFECT OF PURDUE'S SIGNATURE

PURDUE understands that its Authorized Corporate Officer's signature on this Plea Agreement constitutes a binding offer by it to enter into this Plea Agreement. PURDUE understands that the United States has not accepted PURDUE's offer until the authorized representative of the United States has signed the Plea Agreement.

## 15. GENERAL UNDERSTANDINGS

The parties jointly submit that this Plea Agreement and the Agreed Statement of Facts provide sufficient information concerning PURDUE and the crimes charged in this case to enable the meaningful exercise of sentencing authority by the Court under 18 U.S.C. § 3553. The parties agree to request that the Court impose sentence at the date of the arraignment and plea pursuant to the provisions of Fed. Rule Crim. P. 32(c)(1)(A)(ii) and U.S.S.G. § 6A1.1(a)(2), if the Court determines that a presentence report is not necessary.

If the Court orders a presentence report, PURDUE understands that a thorough presentence investigation will be conducted and sentencing recommendations independent of the United States Attorney's Office will be made by the presentence preparer.

PURDUE understands that the prosecution will be free to allocute or describe the nature of this offense and the evidence in this case.

PURDUE understands that the United States retains the right, notwithstanding any provision in this Plea Agreement, to inform the Probation Office and the Court of all relevant facts, to address

the Court with respect to the nature and seriousness of the offense(s), to respond to any questions raised by the Court, to correct any inaccuracies or inadequacies in the presentence report, if a report is prepared, and to respond to any statements made to the Court by or on behalf of the defendant.

PURDUE willingly stipulates that there is a sufficient factual basis for the Court to accept the plea.

PURDUE understands that this Plea Agreement does not apply to any crimes or charges not addressed in this Plea Agreement.

PURDUE has not been coerced, threatened, or promised anything other than the terms of this Plea Agreement, described above, in exchange for its plea of guilty. PURDUE understands that its attorney will be free to argue any mitigating factors on its behalf; to the extent they are not inconsistent with the terms of this Plea Agreement. PURDUE understands that PURDUE will have an opportunity to have a representative address the Court prior to sentence being imposed.

This writing and the Agreed Statement of Facts (attached as Attachment B), Non-Prosecution Agreement (attached as Attachment C), Civil Settlement Agreement (attached as Attachment D), Corporate Integrity Agreement (attached as Attachment E), Stipulation for Compromise Settlement (attached as Attachment G), and Agreed Order of Forfeiture (attached as Attachment H) are the complete and only agreements between the United States and PURDUE, Purdue Pharma L.P. and its related and associated entities concerning resolution of this matter. Also attached to this agreement are the Virginia Release (attached as Attachment L) and the Form State Release (attached as Attachment M). In addition, PURDUE has no objection to the filing of the Information (Attachment F), Verified Complaint for Forfeiture *In Rem* (attached as Attachment I), and the Notice of Compliance (attached as Attachment J) and the Court's entry of a Warrant of Arrest *In Rem* (attached as Attachment K). The agreements and documents listed in this paragraph set forth the entire understanding between the parties and constitutes the complete agreement between the United States Attorney for the Western District of Virginia and PURDUE, Purdue Pharma L.P. and its related and associated entities and no other additional terms or agreements shall be entered except and unless those other terms or agreements are in writing and signed by the parties. These agreements supersede all prior understandings, promises, agreements, or conditions, if any, between the United States and PURDUE, Purdue Pharma L.P. and its related and associated entities.

PURDUE has consulted with its attorney and fully understands its rights with respect to the offenses charged in the charging document(s). Further, PURDUE has consulted with its attorney and fully understands its rights. PURDUE has read this Plea Agreement and carefully reviewed every part of it with its attorney. PURDUE understands this Plea Agreement and PURDUE voluntarily agrees to it. Being aware of all of the possible consequences of its plea, PURDUE has independently decided to enter this plea of its own free will and is affirming that agreement on this date by the signature of its Authorized Corporate Officer below.

The Authorized Corporate Officer, by her signature below, hereby certifies to the following:

(1) She has read the entire Plea Agreement and documents referenced herein and discussed them with PURDUE's owners;

(2) PURDUE understands all the terms of the Plea Agreement and those terms correctly reflect the results of plea negotiations;

(3) PURDUE is fully satisfied with PURDUE's attorneys' representation during all phases of this case;

(4) PURDUE is freely and voluntarily pleading guilty in this case;.
(5) PURDUE is pleading guilty as set forth in this Plea Agreement because it is guilty of the crimes to which it is entering its plea; and
(6) PURDUE understands that it is waiving its right to appeal the judgment and conviction in this case.

PURDUE acknowledges its acceptance of this Plea Agreement by the signature of its counsel and Authorized Corporate Officer. A copy of a certification by PURDUE's Board of Directors authorizing the Authorized Corporate Officer to execute this Plea Agreement and all other documents to resolve this matter on behalf of PURDUE is attached.

Date: May 7, 2007

Robin E. Abrams, Esquire
Vice-President and Director of
The Purdue Frederick Company, Inc. and
Vice-President and Associate General Counsel
of Purdue Pharma L.P.
Authorized Corporate Officer for
The Purdue Frederick Company, Inc.

I have discussed with and fully explained to the Board of Directors of PURDUE the facts and circumstances of the case; all rights with respect to the offense charged in the Information; possible defenses to the offense charged in the Information; all rights with respect to the Sentencing Guidelines; and all of the consequences of entering into this Plea Agreement and entering a guilty plea. I have reviewed the entire Plea Agreement and documents referenced herein with my client, through its Authorized Corporate Officer. In my judgment, PURDUE understands the terms and conditions of the Plea Agreement, and I believe PURDUE's decision to enter into the Plea Agreement is knowing and voluntary. PURDUE's execution of and entry into the Plea Agreement is done with my consent.

Date: May 8, 2007

Howard M. Shapiro, Esquire
Counsel for The Purdue Frederick Company, Inc.

Date: May 9, 2007

John L. Brownlee
United States Attorney
Western District of Virginia

Rick A. Mountcastle, Assistant United States Attorney
Randy Ramseyer, Assistant United States Attorney
Sharon Burnham, Assistant United States Attorney
Barbara T. Wells, Trial Attorney, U.S. Dept. Of Justice
Elizabeth Stein, Trial Attorney, U.S. Dept. Of Justice

**THE PURDUE FREDERICK COMPANY INC.**

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**Vice President's Certificate**

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The undersigned, Robin E. Abrams, the Vice President of The Purdue Frederick Company Inc., a New York corporation (the "Corporation"), DOES HEREBY CERTIFY that attached hereto as Schedule 1 is a true, correct and complete copy of the resolutions approved by the Written Consent of the Sole Director of the Corporation dated May 4, 2007 authorizing the Corporation to execute and deliver on behalf of the Corporation that certain Plea Agreement between the United States of America and the Corporation, together with other documents listed therein with respect to settling that certain investigation by the United States Attorney's Office for the Western District of Virginia, which resolutions have not been amended or rescinded as of the date hereof.

IN WITNESS WHEREOF, the undersigned has executed this Certificate this May 4, 2007.

Robin E. Abrams
Vice President

**SCHEDULE 1**

RESOLVED, that the Agreed Statement of Facts between the United States of America and the Corporation (the "Agreed Statement of Facts") in the form presented to the Director of the Corporation be and the same hereby is approved; and further

RESOLVED, that the Settlement Agreement among the United States of America, acting through the Civil Division of the Department of Justice and the United States Attorney's Office for the Western District of Virginia, the Office of the Inspector General of the United States Department of Health and Human Services, the United States Office of Personnel Management, the United States Department of Defense TRICARE Management Activity, the United States Department of Labor Office of Workers' Compensation Programs, the Corporation and Purdue Pharma L.P., a Delaware limited partnership (the "Civil Settlement Agreement"), in the form presented to the Director of the Corporation be and the same hereby is approved; and further

RESOLVED, that the Plea Agreement between the United States of America and the Corporation (the "Plea Agreement") in the form presented to the Director of the Corporation be and the same hereby is approved; and further

RESOLVED, that the Stipulation for Compromise Settlement between the United States of America and the Corporation (the "Stipulation for Compromise Settlement") in the form presented to the Director of the Corporation be and the same hereby is approved; and further

RESOLVED, that the Agreed Order of Forfeiture between the United States of America and the Corporation (the "Agreed Order of Forfeiture"; the Agreed Statement of Facts, the Civil Settlement Agreement, the Plea Agreement, the Stipulation for Compromise Settlement, and the Agreed Order of Forfeiture are hereinafter collectively referred to as the "Settlement Documents"), in the form presented to the Director of the Corporation be and the same hereby is approved; and further

RESOLVED, that Robin E. Abrams as the Vice President of the Corporation, be and she hereby is authorized and directed to execute and deliver in the name and on behalf of the Corporation the Settlement Documents, each in the form or substantially in the form presented to the Director of the Corporation, with such changes, additions and modifications thereto as she shall approve, such approval to be conclusively evidenced by her execution and delivery thereof; and further

RESOLVED, that Robin E. Abrams as the Vice President of the Corporation, be and she hereby is authorized and directed to make, execute and deliver, or cause to be made, executed and delivered, all such agreements, documents, instruments and other papers, and to do or cause to be done on behalf of the Corporation all such acts, as she may deem necessary or appropriate to carry out the purposes and intent of the foregoing resolutions, including, but not limited to, appearing on behalf of the Corporation in the United States District Court for the Western district of Virginia, Abingdon Division, in order to make any statement or statements on behalf of the Corporation she deems appropriate in connection with the judgment to be pronounced against the Corporation in accordance with the Settlement Documents.

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF VIRGINIA**
**ABINGDON DIVISION**

| | | |
|---|---|---|
| **UNITED STATES OF AMERICA** | ) | |
| | ) | |
| | ) | Case No. 1:07CR00029 |
| v. | ) | |
| | ) | **OPINION AND ORDER** |
| **THE PURDUE FREDERICK COMPANY, INC., ET AL.,** | ) | |
| | ) | By: James P. Jones |
| | ) | Chief United States District Judge |
| Defendants. | ) | |
| | ) | |

*John L. Brownlee, United States Attorney, Rick A. Mountcastle and Randy Ramseyer, Assistant United States Attorneys, Roanoke, Virginia, for United States; Howard M. Shapiro and Kimberly A. Parker, Wilmer Cutler Pickering Hale and Dorr LLP, Washington, D.C., for The Purdue Frederick Company, Inc.*; *Mark F. Pomerantz, Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York, N.Y,, for Michael Freidman; Mary Jo White, Debevoise & Plimpton LLP, New York, N.Y., for Howard R. Udell; and Andrew Good, Good & Cormier, Boston, Massachusetts, for Paul D. Goldenheim.*

The issue before the court is whether or not to accept the plea agreements in this case.[1]

The Purdue Frederick Company, Inc. ("Purdue") has pleaded guilty to misbranding OxyContin, a prescription opiod pain medication, with the intent to defraud or mislead, a felony under the federal Food, Drug, and Cosmetic Act. 21 U.S.C.A. §§ 331(a), 333(a)(2) (West 1999). The individual defendants, Michael

[1] This Opinion elaborates on the court's oral opinion.

**PLAINTIFF EXHIBIT B**

Friedman, Howard R. Udell, and Paul D. Goldenheim, have pleaded guilty to the misdemeanor charge of misbranding, solely as responsible corporate officers.[2] 21 U.S.C.A. § 333(a)(1) (West 1999); *see United States v. Park*, 421 U.S. 658, 676 (1975). The individual defendants are not charged with personal knowledge of the misbranding or with any personal intent to defraud.

The Information in this case charges, among other things, that

> [b]eginning on or about December 12, 1995, and continuing until on or about June 30, 2001, certain PURDUE supervisors and employees, with the intent to defraud or mislead, marketed and promoted OxyContin as less addictive, less subject to abuse and diversion, and less likely to cause tolerance and withdrawal than other pain medications as follows:
>
> a. Trained PURDUE sales representatives and told some health care providers that it was more difficult to extract the oxycodone from an OxyContin tablet for the purpose of intravenous abuse, although PURDUE's own study showed that a drug abuser could extract approximately 68% of the oxycodone from a single 10mg OxyContin tablet by crushing the tablet, stirring it in water, and drawing the solution through cotton into a syringe;
>
> b. Told PURDUE sales representatives they could tell health care providers that OxyContin potentially creates less chance for addiction than immediate-release opioids;
>
> c. Sponsored training that taught PURDUE sales supervisors that OxyContin had fewer "peak and trough" blood level

[2] Friedman is the former president and CEO of Purdue, Udell is the executive vice president and chief legal officer, and Goldenheim is the former chief scientific officer.

effects than immediate-release opioids resulting in less euphoria and less potential for abuse than short-acting opioids;

d. Told certain health care providers that patients could stop therapy abruptly without experiencing withdrawal symptoms and that patients who took OxyContin would not develop tolerance to the drug; and

e. Told certain health care providers that OxyContin did not cause a "buzz" or euphoria, caused less euphoria, had less addiction potential, had less abuse potential, was less likely to be diverted than immediate-release opioids, and could be used to "weed out" addicts and drug seekers.

(Information ¶ 19.) Purdue has agreed that these facts are true, and the individual defendants, while they do not agree that they had knowledge of these things, have agreed that the court may accept these facts in support of their guilty pleas. (Agreed Statement of Facts ¶ 46.)

The plea agreements have been submitted pursuant to Federal Rule of Criminal Procedure 11(c)(1)(C), which allows the parties to agree to a specific sentence to be imposed. The court is not bound by the plea agreements, and may reject them. If a plea agreement is rejected, that defendant must be given an opportunity to withdraw the guilty plea. Fed. R. Crim. P. 11(c)(5)(B). The government has agreed in this case that if the court rejects any of the plea agreements, the government will dismiss the Information filed in the case, without prejudice to the government's right to later

indict the defendants or any other entity or individual on any charge. (Plea Agreements ¶ 2.) Accordingly, if the court rejects any of the plea agreements, the present case may end, and it will be up to the government to decide whether to re-prosecute the defendants, or any of them.

In addition to a lengthy hearing on the present issue, the parties were required to submit extensive written material, including financial information, for the court's consideration.

The Supreme Court has held that defendants have "no absolute right to have a guilty plea accepted." *Santobello v. New York*, 404 U.S. 257, 262 (1971). The Court stated, "A court may reject a plea in exercise of sound judicial discretion." *Id.* "[I]t is not only permitted but expected that the court will take an active role in evaluating the agreement." *United States v. Kraus*, 137 F.3d 447, 452 (7th Cir. 1998). But as the Sixth Circuit stated, "By leaving the decision whether to accept or reject a plea to the exercise of sound judicial discretion, the Supreme Court did not intend to allow district courts to reject pleas on an arbitrary basis." *United States v. Moore*, 916 F.2d 1131, 1136 (6th Cir. 1990) (internal quotations and citation omitted).

While the court's decision must not be arbitrary, "Rule 11 does not limit the reasons for which the district court may reject a proposed plea agreement." *United States v. Skidmore*, 998 F. 2d. 372, 376 (6th Cir. 1993). "The authority to exercise

judicial discretion implies the responsibility to consider all relevant factors and rationally construct a decision." *Moore*, 916 F.2d at 1136. Rule 11 explicitly states that a court cannot accept a plea if it is not supported by the factual record or if the court believes that that the plea is not voluntary. Fed. R. Crim. P. 11(b)(2),(3). But Rule 11 also allows a district judge to reject a plea agreement if it is too lenient or too harsh. *Skidmore*, 998 F.2d at 376.

In determining the proper criminal sentence, the court must consider certain factors set forth by statute. I must consider "the nature and circumstances of the offense and the history and characteristics of the defendant," as well as

> the need for the sentence imposed—(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

18 U.S.C.A. § 3553(a) (West 2000 & Supp. 2004). The court's obligation is to impose "a sentence sufficient, but not greater than necessary, to comply with" these purposes. *Id.*

Under the law, Purdue is subject to a penalty of five years probation and a fine of up to $500,000. In its plea agreement, Purdue has agreed to substantial additional

monetary sanctions totaling $600 million, reported to be one of the largest in the history of the pharmaceutical industry. The amount includes the following:

1. $100,615,797.25 payable to federal government health care agencies under a Civil Settlement Agreement;

2. $59,384,202.75 in escrow for those states that elect to settle their claims against Purdue. These civil settlements to the federal and state government total $160 million, of which the federal government is receiving sixty percent;

4. $3,471,220.68 to Medicaid programs for improperly calculated rebates;

5. $500,000 fine to the United States;

6. $20 million in trust to the Commonwealth of Virginia for operating the Virginia Prescription Monitoring Program;

7. $5.3 million to the Virginia Medicaid Fraud Control Unit's Program Income Fund;

8. $276.1 million forfeiture to the United States;

9. $130 million to settle private civil claims related to OxyContin; and

10. $4,628,779.32 to be expended by Purdue for monitoring costs in connection with a Corporate Integrity Agreement with the U.S. Department of Health and Human Services.

The individual defendants are subject to a punishment of twelve months imprisonment and a fine of up to $100,000. In their plea agreements, they have agreed to pay a total of $34.5 million to the Virginia Medicaid Fraud Unit's Program

Income Fund.[3] In return, the government has agreed to sentences for them without any imprisonment.

There have been several reasons suggested why the court should reject the plea agreements.

Lack of Restitution. The plea agreements preclude restitution other than as set forth in the agreements and a number of alleged victims object to this provision, contending that the amounts allocated to private parties are insufficient, compared to the recovery by governmental victims. BlueCross BlueShield of Tennessee has filed a Request for Notice, an Opportunity to be Heard at Sentencing, and an Order of Restitution. Other third-party health care payors have joined in this motion. In addition, an individual who considers herself a victim because of her addiction to OxyContin has objected to the plea agreements and has filed a formal Motion to Assert Victim's Rights, in which she complains about restitution, as well as other matters.

These parties have received notice of this present proceedings and the court has allow them an opportunity to speak.[4]

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[3] Defendant Friedman has agreed to pay $19 million, whereas defendants Udell and Goldenheim have agreed to pay $8 million and $7.5 million, respectively.

[4] It is argued that the Crime Victims Rights Act, 18 U.S.C.A. § 3771(a)(2) (West Supp. 2007), has not been complied with in this case because general notice to potential

The government and the defendants, in agreeing to preclude other restitution, rely on the Victim and Witness Protection Act of 1982 ("VWPA"), which states in relevant part as follows:

> To the extent that the court determines that the complication and prolongation of the sentencing process resulting from the fashioning of an order of restitution under this section outweighs the need to provide restitution to any victims, the court may decline to make such an order.

18 U.S.C.A. § 3663 (a)(1)(B)(ii) (West 2000 & Supp. 2007).[5]

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victims has been insufficent. In fact, there has been extensive national publicity about the case, *see, e.g.,* Barry Meier, *Narcotic Maker Guilty of Deceit Over Marketing*, N.Y. Times, May 11, 2007, at A1, with widespread comment by victims rights blogs and Web sites. Notice of the sentencing and of the right of victims to attend and speak was published on the court's Web site, and all of the pleadings and other documents filed in the case have been available for viewing without charge on that site. The court received numerous letters and e-mails from interested members of the public concening the scheduled sentencing. Any person known to be a possible victim was given individual notice of the hearing and of the right to speak, and over twenty people accepted this opportunity. The main courtroom was full, and a second courtroom equipped with an audio and video feed was used for the overflow. I find that notice to potential victims was adequate.

[5] The plea agreements cite to this provision of the VWPA. The Mandatory Victims Restitution Act of 1986 ("MVRA") has nearly identical language:

> This section shall not apply in the case of an offense described in paragraph (1)(A)(ii) if the court finds, from facts on the record, that—
>
> (A) the number of identifiable victims is so large as to make restitution impracticable; or
>
> (B) determining complex issues of fact related to the cause or amount of the victim's losses would

In order to award an alleged victim restitution under either the VWPA or the MVRA, the court would have to determine whether that person was "directly and proximately" harmed by the misbranding offense that was the subject of the plea agreements. The Fourth Circuit has held that to be considered "directly and proximately harmed" under either the VWPA or the MVRA, a person must show that the harm resulted from "conduct underlying an element of the offense of conviction." *United States v. Blake*, 81 F.3d 498, 506 (4th Cir. 1996) (construing the phrase "directly and proximately harmed" under the VWPA); *see also United States v. Davenport*, 445 F.3d 366, 374 (4th Cir. 2006) (citing to *Blake* but interpreting the phrase "directly and proximately harmed" as used in the MVRA).

Purdue argues that third-party payors cannot show that they were directly and proximately harmed by Purdue's misbranding, unless they can prove the following:

1. That a Purdue sales representative misstated to a specific prescribing physician that OxyContin was less addictive, less subject to abuse and diversion, or less likely to cause tolerance or withdrawal than other pain medications;

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> complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process.

18 U.S.C.A. § 3663A (c)(3) (West 2000 & Supp. 2007). The Crime Victims Rights Act confirms the general right of victims to "full and timely restitution as provided in law." 18 U.S.C.A. § 3771(a)(6) (West Supp. 2007).

2. That specific prescribing physician relied upon that misstatement by that Purdue sales representative and, in reliance on that misstatement, prescribed OxyContin rather than an alternative pain medication (e.g. Percocet) for one of the private third-party payor's insured individuals;

3. That the physician prescribed OxyContin for the insured because of the misstatement and not because of the other attributes of OxyContin (e.g., twelve-hour dosing or the absence of acetaminophen, which risks liver toxicity);

4. That the private third-party payor paid for that prescription of OxyContin; and

5. That the private third-party payor paid more for the OxyContin prescription than the particular alternative pain medication that the prescribing physician would have prescribed if he or she had not relied on the misstatement and prescribed OxyContin.

(Purdue's Resp. July 9, 2007, at 9-10.)

Purdue further argues that the chain of causation between the harm alleged and the misbranding offense could have been broken by any intervening act on behalf of the insured patient or the prescribing health care professional. For example, if patients obtained OxyContin improperly by deceiving their physicians or by altering an otherwise proper prescription, the third-party payors would not be entitled to restitution for those prescriptions since the misbranding did not directly and proximately caused any financial loss to the third-party payor. Or if a physician negligently prescribed OxyContin, the third-party payor that paid for that prescription

is also not entitled to restitution because the misbranding once again did not directly and proximately cause the third-party payor's financial loss.

Even if third-party payors can show that they were directly harmed by Purdue's misbranding, Purdue claims that each payor would have to present to this court the facts of every instance of overpayment in order for the Court to determine the proper amount of restitution for each third-party payor.

As to any individuals injured by the use of OxyContin, the difficulties of establishing causation are demonstrated by the numerous civil suits that have been filed by such persons against Purdue, including two before this court, *McCauley v. Purdue Pharma*, *L.P.*, 331 F. Supp. 2d 449 (W.D. Va. 2004), and *Ewing v. Purdue Pharma, L.P.*, No. 2:02CV00150, 2004 WL 1856002 (W.D. Va. Aug. 19, 2004). Courts have consistently found that despite extensive discovery, plaintiffs were unable to show that Purdue's misbranding proximately caused their injuries. *See, e.g., Bodie v. Purdue Pharma Co.*, No. 05-13834, 2007 WL 1577964, at *3 (11th Cir. June 1, 2007) (affirming the district court's conclusion that the plaintiff's claims failed because he could not show that he was proximately harmed by Purdue's allegedly inadequate warnings); *Koenig v. Purdue Pharma Co.*, 435 F. Supp. 2d 551, 556 (N.D. Tex. 2006) ("Because plaintiffs have failed to show that an adequate warning would have changed [the physician]'s decision to prescribe OxyContin, and

because [the physician] testified that he would not have changed his decision, the Court finds that Plaintiffs have failed to raise a genuine fact issue."); *Timmons v. Purdue Pharma Co.*, No. 8:04-CV-1479-T-26MAP, 2006 WL 263602, at *4 (M.D. Fla. Feb. 2, 2006) ("Even if OxyContin were considered unreasonably dangerous, which it has not been deemed so, Plaintiff has failed to show any evidence of causation."); *McCauley*, 331 F. Supp. 2d at 465 (granting Purdue's motion for summary judgment and stating "[t]he plaintiffs' burden is greater than merely showing a temporal link between their use of OxyContin and any injuries they sustained. Instead, it is evidence of the causal link between OxyContin and their injuries that the plaintiffs lack."); *Foister v. Purdue Pharma, L.P.*, No. 01-268-JBC, 2001 U.S. Dist. LEXIS 23765, at *27 (E.D. Ky. Dec. 27, 2001) (denying the plaintiffs' motion for injunctive relief and noting that the "plaintiffs have failed to produce any evidence showing that the defendant's marketing, promotional, or distribution practices have ever caused even one table of OxyContin to be inappropriately prescribed or diverted.").

It is argued that restitution might be handled in this case as with a civil class action claim, but class certification has been generally denied in OxyContin claims because of the variety of causation issues. *See, e.g., Hurtado v. Purdue Pharma Co.*, No. 12648/03, 2005 WL 192351, at *1(N.Y. Sup. Ct. Jan. 24, 2005) (denying class

certification "because of the different reasons and methods by which the drug was prescribed and used.").

It is true that the governmental health care providers have been allotted a portion of Purdue's payment in settlement of their civil claims for the misbranding of OxyContin ($160 million) that is greater than the portion to be used by Purdue to settle private claims ($130 million). However, Purdue's liability for private claims is not capped by the plea agreements. Purdue agrees to pay at least $130 million to settle private claims, but no maximum limit is imposed. I do not find that the plea agreements are inherently unfair in this regard.

Accordingly, in spite of the arguments by putative victims, I agree that the restitution process would unduly complicate and prolong the sentencing process. In order to prove causation, litigation over many months, if not years, would be required before final judgment in this case could be entered. Such delay would be contrary to the basic principles of our criminal justice system.

I would have preferred that the plea agreements had allocated some amount of the money for the education of those at risk from the improper use of prescription drugs, and the treatment of those who have succumbed to such use. Prescription drug abuse is rampant in all areas of our country, particularly among young people,

causing untold misery and harm. The White House drug policy office estimates that such abuse rose seventeen percent from 2001 to 2005. That office reports that currently there are more new abusers of prescription drugs than new users of any illicit drugs. As recently reported, "Young people mistakenly believe prescription drugs are safer than street drugs . . . but accidental prescription drug deaths are rising and students who abuse pills are more likely to drive fast, binge-drink and engage in other dangerous behaviors." Carla K. Johnson, *Arrest Puts Spotlight on Prescription Drug Abuse*, The Roanoke Times, July 6, 2007, at 4A. It has been estimated that there are more than 6.4 million prescription drug abusers in the United States.

On the other hand, I am forbidden by law to participate in plea discussions, Fed. R. Crim. P. 11(c)(1), and I will not reject these agreements simply because they do not contain provisions that I would have preferred. The government has represented that it did not demand inclusion of a treatment provision in the plea agreements because national drug policy has been placed by Congress in the Substance Abuse and Mental Health Service Administration, an agency of the U.S. Department of Health and Human Services. The government prosecutors were reluctant to direct treatment funds in a manner beyond their expertise and possibly contrary to national policy. I will not second-guess their decision in this regard.

Political Interference. It has been suggested that Purdue may have received a favorable deal from the government solely because of politics.

I completely reject this claim. I have had long experience with the United States Attorney for this district, and I am convinced that neither he nor the career prosecutors who handled this case would have permitted any political interference. In fact, I am sure that they would have refused to accept a plea agreement that they did not sincerely feel was in the best interests of justice.

Lack of Incarceration. The plea agreements provide for no incarceration for the individual defendants. The government points out that a sentence of incarceration under the federal sentencing guidelines would be unusual based on the facts of the case. The government is also convinced that the nature of the convictions of the individual defendants— based on strict liability for misbranding—will send a strong deterrent message to the pharmaceutical industry. The defendants point to their lack of prior criminal record, their strong commitment to civic and charitable endeavors, as well as their other positive personal attributes. On the other hand, the potential damage by the misbranding disclosed in this case was substantial and I do not minimize the danger to the public from this crime. The defendants voluntarily accepted responsibility over this business enterprise, for which they were generously rewarded. However, while the question is a close one, I find that in the absence of

government proof of knowledge by the individual defendants of the wrongdoing, prison sentences are not appropriate.

Summary. In summary, I find that the plea agreements are supported by the facts and the law and impose adequate punishment on the defendants and I accept them. Moreover, for the reasons stated, I will deny the third party motions. (Dtk. Nos. 35, 42, 43, 44, 48, 49 and 65.)

It is so **ORDERED**.

ENTER: July 23, 2007

/S/ JAMES P. JONES
Chief United States District Judge

J. NIXON DANIEL, III
*MANAGING PARTNER*

DIRECT DIAL
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E. DIXIE BEGGS
1908 – 2001

BERT H. LANE
1917 - 1981

December 20, 2019

Tara Katuk MacLean Sweeney
Assistant Secretary – Indian Affairs
U.S. Department of the Interior
1849 C Street, NW
MS-4660-MIB
Washington, DC 20240

Re: Cheyenne & Arapaho Tribes

Dear Assistant Secretary Sweeney:

On November 5, 2019, I wrote to you regarding the claims of my clients, the Cheyenne & Arapaho Tribes, brought pursuant to Article I of the Treaty of October 28, 1867, 15 Stat. 593. That letter presented the claim of the Tribes pursuant to the terms of the Treaty.

To date, I have had no response to my letter. Absent an affirmative response to resolve this claim, suit will be filed on January 3, 2020.

Very truly yours,

J. Nixon Daniel, III
For the Firm

JNDIII:cmh

cc: Regional Director James Schock
Scott McCorkle
Darryl Lacounte
Lael Echo-Hawk
Antonio Church
T. Roe Frazer, II
Kelly Rudd



**PLAINTIFF EXHIBIT C**