COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
C.A. No. 1884-cv-01808 (BLS2)

COMMONWEALTH OF MASSACHUSETTS,

v.

PURDUE PHARMA L.P., PURDUE PHARMA INC., RICHARD SACKLER, THERESA SACKLER, KATHE SACKLER, JONATHAN SACKLER, MORTIMER D.A. SACKLER, BEVERLY SACKLER, DAVID SACKLER, ILENE SACKLER LEFCOURT, PETER BOER, PAULO COSTA, CECIL PICKETT, RALPH SNYDERMAN, JUDITH LEWENT, CRAIG LANDAU, JOHN STEWART, MARK TIMNEY, and RUSSELL J. GASDIA

THE COMMONWEALTH'S MEMORANDUM OF LAW IN OPPOSITION TO THE DIRECTOR DEFENDANTS' MOTION TO DISMISS THE FIRST AMENDED COMPLAINT PURSUANT TO MASSACHUSETTS RULE OF CIVIL PROCEDURE 12(b)(2)

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PRELIMINARY STATEMENT

The Commonwealth's First Amended Complaint ("Complaint" or "FAC") alleges that the Directors of Purdue Pharma Inc. intentionally directed thousands of deceptive acts in Massachusetts, causing thousands of people in Massachusetts to suffer, overdose, or die. Those Directors now seek to evade responsibility for their misconduct.

Purdue's Chief Executive Officers submitted a similar motion about personal jurisdiction, which the Commonwealth opposed. The Court should deny the Directors' motion for the same reason as the CEOs': because the Complaint alleges that the Directors committed misconduct purposefully directed at Massachusetts and the Commonwealth's claims arise from that misconduct. Indeed, as Purdue CEO Craig Landau wrote in a confidential business plan: the Directors were the "de facto CEO." FAC ¶ 817. Both the CEOs and the de facto CEOs are subject to jurisdiction in this case.

STANDARD OF PROOF

Because the Directors seek dismissal under Rule 12(b)(2), the Court should assess their motion under the prima facie standard. Application of the prima facie standard is the "most typical method of resolving a motion to dismiss for lack of personal jurisdiction." *Cepeda v. Kass*, 62 Mass. App. Ct. 732, 737-38 (2004). The Court "take[s] specific facts affirmatively alleged by the plaintiff as true (whether or not disputed) and construe[s] them in the light most congenial to the plaintiff's jurisdictional claim." *Id*. at 738 (citation omitted). Here, the Directors have agreed that "facts derived from the FAC [Complaint] are assumed to be true for the purposes of this motion only." Dir. 12(b)(2) Mem. at 1 n.1.

Under the prima facie standard, the Court may also consider evidence submitted by the plaintiff in the form of an affidavit. *See Kleinerman v. Morse*, 26 Mass. App. Ct. 819, 821 nn.4-

5 (1989). Accordingly, as is permitted, the Commonwealth responds to certain of the Directors' factual assertions with evidence accompanying the affidavit of Assistant Attorney General Sydenham Alexander ("SA Aff."). At the motion to dismiss stage, the Court need not reach conclusions about the facts. *See Cepeda*, 62 Mass. App. at 737-38. Until the case reaches the fact-finding stage, "a prima facie showing suffices, notwithstanding any controverting presentation by the moving party, to defeat the motion." *Id.* at 738 (citation omitted).[1]

THE COMMONWEALTH'S ALLEGATIONS

I. The Directors Targeted Massachusetts With A Years-Long, Company-Wide Scheme Involving Thousands Of Unfair And Deceptive Acts In Massachusetts

As set forth in the Complaint, the Directors targeted Massachusetts with a pervasive scheme of illegal deceit. Their scheme involved thousands of unlawful acts in Massachusetts, hundreds of millions of dollars of revenue from Massachusetts, and devastating injuries to Massachusetts families.

A. The Directors Sent Sales Reps To Visit Doctors In Massachusetts Thousands Of Times

The Directors controlled the deceptive marketing at the core of Purdue's business in Massachusetts: sending sales representatives to Massachusetts to mislead Massachusetts doctors

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[1] In a footnote, the Directors suggest that, by denying their misconduct in their brief or in an affidavit, they can deprive the Court of jurisdiction because "disputed jurisdictional allegations 'are entitled to no presumptive weight.'" Dir. 12(b)(2) Mem. at 1 n.1 (citing *Hiles v. Episcopal Diocese of Mass.*, 437 Mass. 505, 516 (2002)). That is incorrect. *Hiles* addressed First Amendment limits to subject matter jurisdiction under Rule 12(b)(1) in a case involving church discipline of a priest, and it stated the standard that applies when the Court is "resolving the factual disputes." 437 Mass. at 516. When this litigation reaches the stage of resolving factual disputes, no party's contentions will be entitled to presumptive weight. But the Directors' motion to dismiss does not present appropriate circumstances to engage in preponderance-of-the-evidence fact-finding. *See Foster-Miller, Inc. v. Babcock & Wilcox Can.*, 46 F.3d 138, 145-46 (1st Cir. 1995) ("the preponderance standard necessitates a full-blown evidentiary hearing … pretrial evidentiary hearings are relatively cumbersome creatures, and … can squander judicial resources" and may be especially inappropriate where "the facts pertinent to jurisdiction and the facts pertinent to the merits are identical, or nearly so").

and pharmacists about Purdue's opioids. FAC ¶¶ 196, 209, 221, 500-02. In 2007, the Directors voted to address Purdue's past deceptive marketing in Massachusetts by entering into a Consent Judgment in this Court. FAC ¶ 193. Months later, in February 2008, the Directors expanded the sales force by 100 reps, knowing and intending that they were directing more sales visits in Massachusetts. FAC ¶ 222-23. In November 2008, the Directors decided to expand the sales force again. FAC ¶¶ 250, 259, 525. In 2010, the Directors expanded the force by another 125 reps. FAC ¶¶ 314, 540. In 2015, the Directors did it again. FAC ¶¶ 460, 588. Every time the Directors decided to send out more sales reps, they knew and intended that more reps would promote opioids in Massachusetts. FAC ¶¶ 223, 315, 460-62, 540. The Directors even had a map showing the reps would cover Massachusetts. FAC ¶ 492.

The Directors' control over sales reps in Massachusetts extended far beyond hiring. The Directors focused intensely on the conduct of sales reps in the field. The Directors required each rep to visit seven prescribers each day and the sales force to visit prescribers thousands of times. FAC ¶¶ 299-300. The Directors got advice from McKinsey & Company about raising each sales rep's annual quota from 1,400 to 1,700 sales visits (FAC ¶ 407) and then arranged a confidential, face-to-face discussion of sales tactics with the McKinsey consultants. SA Aff. Ex. 9. By 2018, the Directors decided reps should visit prescribers over a million times a year. FAC ¶¶ 489, 591.

In January 2011, Director Richard Sackler met with sales reps for several days and discussed how they would promote Purdue's newest opioid. FAC ¶ 328. Then he followed up to demand a discussion with sales management and the Board. FAC ¶¶ 328-31, 648. The Directors met with the Sales VP Russell Gasdia in April and kept pressuring staff about sales tactics in May. FAC ¶¶ 340-44. By June, Richard Sackler demanded to be sent into the field with sales reps in person. FAC ¶¶ 354-55. When he returned from the field, he argued to the Sales VP that

a legally-required warning about Purdue opioids was not needed. FAC ¶ 356. Within days, Directors Kathe and Jonathan Sackler jumped into the conversation with their own sales ideas. FAC ¶ 358.

When sales visits fell behind schedule, Directors Mortimer and Richard Sackler berated the staff. FAC ¶ 368; SA Aff. Ex. 6. When opioid prescriptions did not grow quickly enough, management made sure sales reps in Massachusetts knew that disappointing the Directors could mean losing jobs:

> Just today, Dr. Richard sent another email, 'This is bad,' referring to current Butrans trends. I am quite sure that Dr. Richard would not be sympathetic to the plight of the Boston District … I am much closer to dismissing the entire district than agreeing that they deserve a pass for poor market conditions.

FAC ¶ 198. The Directors also set and graded the "Scorecard" that determined staff compensation; the biggest factor was opioid sales. FAC ¶¶ 458, 503.

The Directors managed Purdue's sales effort on an almost-daily basis. The Sacklers' micromanagement was so intrusive that staff begged for relief. FAC ¶ 197. The Sales VP wrote to the CEO: "Anything you can do to reduce the direct contact of Richard into the organization is appreciated." FAC ¶ 197. The Sacklers expected that even the non-family Directors would work on Purdue business as many as 89 days per year. SA Aff. Ex. 21.

B. The Directors Directed Deceptive Tactics To Get More Patients On Opioids In Massachusetts

The Directors directed sales reps to use tactics that were intentionally deceptive, including in Massachusetts. From the top of the company, Director Richard Sackler peddled the self-serving falsehood that only "criminals" and "junkies" become addicted to opioids. FAC ¶¶ 183, 241, 493. He wrote that addiction happens because irresponsible people "want" to become addicted and "get themselves addicted over and over again." SA Aff. Ex. 20 (Sackler: "Why should they be entitled to our sympathies?"). Blaming addiction on untrustworthy patients

became of one Purdue's key tactics for getting doctors to prescribe opioids without worrying about addiction. FAC ¶ 45. Purdue's "KEY MESSAGES THAT WORK" included this dangerous lie: "It's not addiction, it's abuse. It's about personal responsibility." FAC ¶ 241. When staff raised concerns about addiction, Sackler re-directed them to focus on sales. FAC ¶ 174. Managers praised reps for pushing the deceptive claims in Massachusetts. FAC ¶ 47 (praising Massachusetts rep for focusing doctor on whether patients are trustworthy). A rep summarized: "We were directed to lie." FAC ¶ 179. Meanwhile, in private, the Directors' business plans stated that opioids and addiction are "naturally linked," and the Directors plotted ways to profit off the addiction by selling addiction treatment medication and Narcan. FAC ¶¶ 445-50, 473.

The Directors encouraged staff to target vulnerable patients without disclosing the heightened risks. When Directors asked: "Can we explore promotion pertaining to specific populations (e.g., the elderly)," staff responded within days by reporting that a key initiative was for sales reps to encourage doctors to prescribe opioids to elderly patients on Medicare. SA Aff. Ex. 12; FAC ¶¶ 418, 575, 685, 687. Staff reviewed that initiative with the Directors again three months later. FAC ¶¶ 579. In Massachusetts, during those three months, sales reps reported to Purdue that they pushed opioids for "elderly" or "Medicare" patients more than 300 times. FAC ¶ 687. At least 23 Massachusetts patients aged 65 and older who were prescribed Purdue opioids later died of opioid-related overdoses. FAC ¶ 687. Likewise, the Directors encouraged staff to target patients with osteoarthritis and discussed how sales reps could target arthritis patients without disclosing Purdue's failed trial. FAC ¶ 309. Reps encouraged Massachusetts patients who were not on opioids to take them "first line" as "the first thing they would take to treat pain" — including for arthritis. FAC ¶¶ 61, 63-66, 309, 342.

C. <u>The Directors Directed Staff To Promote Higher Doses In Massachusetts</u>

The Directors directed staff to promote the highest doses of opioids without disclosing the increased risks. FAC ¶¶ 163-64, 196. Director Richard Sackler ordered Purdue management to "measure our performance by Rx's by strength, giving higher measures to higher strengths," copying Jonathan and Mortimer Sackler on the instruction. FAC ¶ 226. Purdue designed sales campaigns to increase high dose prescribing (FAC ¶¶ 69-70); ordered sales reps to push higher doses (FAC ¶¶ 71, 711); studied how sales tactics increased the highest dose prescriptions (FAC ¶¶ 226, 711); and did not tell even its own sales reps that high doses put patients at risk (FAC ¶¶ 73-74). Richard Sackler demanded details about industry precautions that might interfere with the high dose scheme: how many patients had insurance that would let them take unlimited quantities of Purdue opioids; how many patients were limited to 60 tablets per month; and how many patients had any limit on the number of tablets or doses they could receive. FAC ¶ 240.

In 2013, the Directors met with Sales VP Gasdia about using sales visits and the "Individualize The Dose" campaign to promote higher doses. FAC ¶¶ 399, 558. Later that year, when Walgreens cooperated with the DEA to reduce illegal prescriptions of the highest doses, the Directors arranged a face-to-face meeting with McKinsey about how to get the high-dose prescriptions back. FAC ¶¶ 410, 567-76; SA Aff. Ex. 9.

The Directors knew higher doses put patients at higher risk. As far back as the 1990s, Jonathan and Kathe Sackler knew that patients frequently suffer harm when "high doses of an opioid are used for long periods of time." FAC ¶ 226. Purdue internal documents admitted it was "very likely" that patients face "dose-related overdose risk," but Purdue claimed in public that "dose was not a risk factor for opioid overdose." FAC ¶ 74.

The Directors knew and intended that their high dose scheme targeted Massachusetts — staff told the Directors that Purdue was making $23,964,122 per year in Massachusetts from

doses that the U.S. Centers for Disease Control warned were dangerously high. FAC ¶ 471.

D. <u>The Directors Oversaw Deceptive Tactics To Keep Massachusetts Patients On Opioids Longer</u>

The Directors studied unlawful tactics to keep patients on opioids longer and ordered staff to use them. FAC ¶ 196. Pushing higher doses was one way to keep patients on opioids longer, because Purdue secretly determined that there was "a direct relationship between OxyContin LoT [length of therapy] and dose." FAC ¶¶ 90-91. When Richard Sackler demanded increasing sales, CEO John Stewart encouraged Sales VP Gasdia to tell Richard that patients on lower doses seemed to stop taking opioids sooner, and much of the profit that Purdue had lost had been from doctors backing off the highest dose of OxyContin. FAC ¶ 377. Days later, staff told Richard they were starting quantitative research to determine why patients stay on opioids so they could find ways to sell more opioids at higher doses for longer. FAC ¶ 378.

To accomplish that goal, the Directors pushed an opioid savings card scheme. By 2008, Richard Sackler was asking staff about savings cards, learning how often patients stayed on opioids for five prescriptions or more. FAC ¶¶ 243-44; SA Aff. Ex. 10. In 2011, he directed staff to study a savings card program for a widely-used cholesterol medication (not an addictive narcotic) to learn how Purdue could use it for opioids. FAC ¶ 363. In 2013, the Directors got updates on using direct mail, email, and sales visits to push savings cards, and how savings cards generated high returns by keeping patients on opioids longer. FAC ¶¶ 397, 423. The Directors reviewed confidential studies measuring how their marketing kept more patients on opioids longer than 90 days, and even a year. FAC ¶¶ 384, 558. In Massachusetts, patients who stayed on prescription opioids longer than 90 days were thirty times more likely to die of an overdose; Massachusetts patients who stayed on prescription opioids for a year were fifty-one times more likely to overdose and die. FAC ¶¶ 86, 94.

The Directors knew and intended that the savings card scheme targeted Massachusetts because staff reported to the Directors specifically about savings card promotions "targeted towards HCPs practicing in Massachusetts." FAC ¶ 405.

E. <u>The Directors Directed Staff To Target Prolific Prescribers In Massachusetts</u>

The Directors ordered staff to target the most prolific prescribers of opioids, even when sales reps feared that the doctors were writing inappropriate prescriptions and harming patients. The Directors insisted that sales reps repeatedly visit the most prolific prescribers. FAC ¶ 196. In 2010, the Directors asked for detailed reports about doctors suspected of misconduct and how much money Purdue made from them. FAC ¶¶ 196, 310-13, 535-39. In 2011, when reps failed to meet their benchmarks on targeting prolific prescribers, Richard Sackler responded: "How can our managers have allowed this to happen?" FAC ¶ 353. In 2013, when McKinsey analyzed how Purdue could generate an extra $100 million in opioid prescriptions by targeting top prescribers, the Directors immediately arranged to meet with the consultants about it, face to face. FAC ¶¶ 409, 567-76; SA Aff. Ex. 9. The plan presented at the meeting made clear that the control over targeting came from the Directors — it said: "Mandate field compliance with targets and align the incentive program to match OxyContin prioritization" and "set monthly progress reviews with CEO and Board." SA Aff. Ex. 9.

Following the Directors' lead, Sales VP Russell Gasdia hired the most prolific OxyContin prescriber in Massachusetts as Purdue's top-paid spokesperson in the Commonwealth, even as he lost his medical license for ignoring the risk of addiction. FAC ¶¶ 117-22, 720-24. Purdue management directed sales reps to keep visiting Massachusetts doctors Conrad Benoit, Yoon Choi, Fernando Jayma, Ellen Malsky, and Fathalla Mashali despite warnings of their egregious prescribing, because their prescriptions were profitable. FAC ¶¶ 128-53. In the case of Mashali alone, seventeen Massachusetts patients who filled prescriptions

for Purdue opioids died of opioid-related overdoses. FAC ¶ 153.

F. The Directors Reinstated *The Massachusetts General Hospital Purdue Pharma Pain Program* To Increase Opioid Sales In Massachusetts

The Directors took special interest in promoting Purdue opioids in Massachusetts through the *Massachusetts General Hospital Purdue Pharma Pain Program*. FAC ¶¶ 199, 273-78; SA Aff. Exs. 13-14. The Directors made the decision to pay millions of dollars to sponsor the program in Massachusetts, and they sent CEO John Stewart to Boston to network with doctors who could prescribe opioids in Massachusetts. FAC ¶ 278; SA Aff. Exs. 13-14. The Directors knew and intended that their sponsorship of the *Massachusetts General Hospital Purdue Pharma Pain Program* would contribute to their deceptive promotion of opioids in Massachusetts. FAC ¶ 278.

Evidence from Purdue's own consultants confirms that the Directors drove the MGH program as a platform to increase sales. In 2014, McKinsey consultants analyzing how to sell more opioids in Massachusetts identified MGH as a prime target. They wrote that "Dr. Sackler (owner) is a major donor to MGH," and that a key physician at MGH was "forever in Purdue's debt." A next step for selling more opioids at MGH was: "Reach out to Dr. Sackler." JW Decl. Ex. 23 at PPLPC012000489543 (with CEO Opp.).

Moreover, the Directors were advised that there was a great deal of "legislative activity/debate in Massachusetts around the issues of whether OxyContin tablets should remain available to persons in the Commonwealth," and that funding the *Massachusetts General Hospital Purdue Pharma Pain Program* was a way to get support for Purdue's positions. FAC ¶ 277 (quoting from Board memo); SA Aff. Ex. 13. The Directors understood that the money they voted to send to MGH would help prevent public health measures to restrict opioids in Massachusetts. *See* FAC ¶ 277. And the Directors' interest in the Massachusetts opioid market

continued. Within months of sending John Stewart to MGH, the Directors received a map emphasizing the connection between Purdue's dangerous *Region Zero* prescribers and oxycodone poisonings in the Northeast, including in Massachusetts. FAC ¶ 338. In 2013, Richard Sackler alerted staff that the Massachusetts legislature was considering a bill to limit the length of prescriptions for the most addictive drugs. FAC ¶ 417. The safeguard could help doctors prevent and treat addiction by ensuring more frequent visits for patients. FAC ¶ 417. Staff promised Richard Sackler that they would discuss with him a strategy for opposing the proposed Massachusetts law. FAC ¶ 417. The Directors kept getting reports about Massachusetts legislation in February 2014 (FAC ¶¶ 435, 581); May 2014 (FAC ¶ 439); November 2014 (FAC ¶ 454); November 2015 (FAC ¶ 464); and June 2016 (FAC ¶ 479).

G. The Directors Caused Massive Foreseeable Harm In Massachusetts

The consequences of the Directors' conduct in Massachusetts were foreseeable, massive, and deadly. The Directors sent sales reps to visit Massachusetts prescribers and pharmacists more than 150,000 times, at a cost of about $30 million. FAC ¶¶ 162, 196 (sending reps); 32-33 (numbers and cost); 299-302 (more detail). The Directors knew and intended that the reps would unfairly and deceptively promote opioid sales that are risky for patients by: (a) falsely blaming the dangers of opioids on patients instead of the addictive drugs; (b) pushing opioids for elderly patients, without disclosing the higher risks; (c) pushing opioids for patients who had never taken them before, without disclosing the higher risks; (d) pushing opioids as substitutes for safer medications, with improper comparative claims; (e) falsely assuring doctors and patients that reformulated OxyContin was safe; (f) pushing doctors and patients to use higher doses of opioids, without disclosing the higher risks; (g) pushing doctors and patients to use opioids for longer periods of time, without disclosing the higher risks; and (h) pushing opioid prescriptions by doctors that Purdue knew were writing dangerous prescriptions. FAC ¶¶ 163-64.

The Directors knew and intended that effects of that deceptive conduct would repay the investment many times over. The Directors knew that sales visits were expected to increase prescriptions of Purdue opioids by hundreds of millions of dollars. FAC ¶¶ 291, 402, 461. McKinsey even singled-out a Massachusetts physician as the "True physician example" of how powerfully sales reps increased prescriptions of OxyContin. FAC ¶ 413. The Directors knew that sending sales reps to visit prescribers would increase prescriptions of the highest doses. FAC ¶¶ 399, 414-15, 558. The Directors knew that the savings cards handed out by sales reps kept patients on opioids longer. FAC ¶¶ 384, 393, 415, 551, 575. The Directors knew that targeting prolific prescribers would get more patients on opioids, at higher doses, for longer periods of time. FAC ¶¶ 404, 409, 528, 564, 567. The Directors knew that all these tactics they directed at Massachusetts would be harmful to Massachusetts patients, but profitable for Purdue. FAC ¶¶ 162-68.

H. The Directors Collected Millions Of Dollars From Massachusetts

The Directors broke the law in order to collect billions of dollars, including many millions from Massachusetts. FAC ¶ 200. Since 2007, they paid themselves and their family more than $4 billion, including $120 million from Massachusetts opioid sales. FAC ¶¶ 866-68.

The decade-long, company-wide deceit at Purdue was not an accident of low-level employees gone rogue. Purdue's Directors did not stumble into a billion-dollar windfall from someone else's scheme. They controlled the deception in Massachusetts. FAC ¶¶ 161-67. They paid themselves millions of dollars from Massachusetts. FAC ¶¶ 239, 866-68. Because of their actions, they are subject to jurisdiction in Massachusetts court.

ARGUMENT

The Court should deny the Directors' motion for the same reason as the CEOs': because the Complaint alleges that the Directors committed misconduct purposefully directed towards Massachusetts, and the Commonwealth's claims arise from that misconduct.

I. The Directors Are Subject To Specific Jurisdiction In Massachusetts For The Commonwealth's Claims Regarding Their Illegal Deception Here

The Directors are subject to jurisdiction under three separate and independent provisions of the Massachusetts Long-Arm Statute, and jurisdiction is proper under the Due Process Clause. *See SCVNGR, Inc. v. Punchh, Inc.*, 478 Mass. 324, 325 (2017).

A. The Directors Are Subject To Jurisdiction Under The Long-Arm Statute

Each Director is subject to jurisdiction under three independent provisions of the Long-Arm Statute: Massachusetts General Laws Chapter 223A Sections 3(c), 3(d), and 3(a).

1. Section 3(c)

First, each Director is subject to jurisdiction because he or she caused tortious injury in Massachusetts by directing deceptive marketing here. Section 3(c) of the Long-Arm Statute provides that "[a] court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action in law or equity arising from the person's … causing tortious injury by an act or omission in this Commonwealth." G.L. c. 223A, § 3(c).

a. The Directors Acted In Massachusetts By Sending False Statements Here

The Directors acted in Massachusetts when they sent deceptive marketing into Massachusetts, knowing and intending that doctors would rely on it to put more patients on dangerous opioids, at higher doses, for longer periods of time. FAC ¶¶ 160-167. *Murphy v. Erwin-Wasey* provides the relevant rule about the scope of Section 3(c):

> Where a defendant knowingly sends into a state a false statement, intending that it should there be relied upon to the injury of a resident of that state, he has, for jurisdictional purposes, acted within that state.

460 F.2d 661, 664 (1st Cir. 1972) (holding jurisdiction in Massachusetts was proper under Section 3(c)). *Murphy* explained that intentionally sending a false statement into a state is a way of acting in that state, as surely as a "gunman firing across a state line." *Id.* at 664.

The Massachusetts Appeals Court considered *Murphy* and adopted it. *See Burtner v. Burnham*, 13 Mass. App. Ct. 158, 163-64 (1982) (out-of-state defendant who sent misleading real estate listing to Massachusetts was subject to Section 3(c) because "where a defendant knowingly sends into a state a false statement, intending that it should there be relied upon to the injury of a resident of that state, he has, for jurisdictional purposes, acted within that state" (quoting *Murphy*, 460 F.2d at 664)).

Section 3(c) applies regardless of the method used to send the deceptive message. *Ealing Corp. v. Harrods Ltd.*, 790 F.2d 978, 982 (1st Cir. 1986) explained:

> [A] fraudulent misrepresentation made in the state, whether made by a personal representative of a defendant within the state or made by the defendant via mail or other communication networks, constitutes an act which confers jurisdiction under 223A, § 3(c).

Section 3(c) applies to every "means of communication." *JMTR Enters., L.L.C. v. Duchin*, 42 F. Supp. 2d 87, 97 (D. Mass. 1999) ("A fraudulent misrepresentation made in the state by a foreign defendant or her agent via mail, telephone, or other means of communication constitutes an act that confers jurisdiction under section 3(c).").

A defendant is subject to jurisdiction for "sending a personal messenger into that state bearing a fraudulent misrepresentation" just the same as for "employing the United States Postal Service as its messenger." *Murphy*, 460 F.2d at 664. The Purdue Directors did not need the Postal Service. Because they controlled their own privately held drug company, they could hire

hundreds of workers to carry out their wishes. FAC ¶ 170. The Directors sent sales representatives to deceive Massachusetts doctors tens of thousands of times. FAC ¶¶ 162-65. The Directors voted to send more sales reps again and again. FAC ¶¶ 222-23, 259, 314-15, 460-62. The Directors pushed the reps to keep patients on opioids longer, promote higher doses, and target the most prolific prescribers — all for the purpose of bringing in money the Directors paid to themselves. FAC ¶¶ 162-168, 170, 200.

To reinforce the deceptive messages delivered by sales reps, the Directors reinstated the *Massachusetts General Hospital Purdue Pharma Pain Program*, directed millions of dollars to MGH, and sent CEO John Stewart to network with doctors who could prescribe opioids in Massachusetts. FAC ¶¶ 273-78; SA Aff. Exs. 13-14. Meanwhile, the Directors tracked dozens of marketing tactics to amplify the deception: misleading pamphlets sent to Massachusetts doctors by mail (FAC ¶¶ 111, 204); emails customized for Massachusetts doctors (FAC ¶ 94); video advertisements streamed to Massachusetts doctors individually chosen for the OxyContin Physicians Television Network (FAC ¶¶ 263, 385); telemarketing calls to Massachusetts doctors from a call center (FAC ¶ 767); and presentations at Massachusetts hospitals and universities (FAC ¶¶ 167, 218, 246, 252, 284-85, 323). The Complaint alleges, with ample detail, that the Directors knowingly and intentionally directed their deceptive marketing to Massachusetts.

That the Directors are high-ranking corporate officials is no defense to Section 3(c). In *DSM Thermoplastic Elastomers, Inc. v. McKenna*, Section 3(c) provided jurisdiction when officers of an out-of-state company sent deceptive statements to Massachusetts. No. 002018B, 2002 WL 968859, at *3 (Mass. Super. Ct. Feb. 5, 2002). Allegations that the executives made misrepresentations and directed correspondence to Massachusetts were sufficient to show "direct personal involvement by the corporate officer in some action which caused the tortious injury."

Id.

i. The Directors' Conduct Was Purposeful And Voluntary

There are two limits to the *Murphy* rule, neither of which applies here. First, *Murphy* may not apply when an out-of-state defendant sends a false statement to Massachusetts only in response to communication initiated by the plaintiff. Without more, merely responding to an inquiry from Massachusetts is "insufficiently purposeful and voluntary" to support jurisdiction. *Nat'l Fin. Corp. v. SJD Ins. Agency, Inc.*, No. 063695, 2007 WL 738722, at *4 (Mass. Super. Ct. Feb. 12, 2007). The Directors here are at the other extreme of "purposeful and voluntary" action and therefore are subject to jurisdiction. They exercised ultimate authority over the marketing campaign: they ordered the marketing campaign for their own financial benefit (FAC ¶¶ 200, 303, 347-48, 461); they made the decisions to expand it (FAC ¶¶ 222-23, 259, 314-15, 460-62); finally, in 2018, they made the decision to bring the sales visits to an end (FAC ¶ 494).

ii. The Directors' Conduct Was Intentional

Second, Section 3(c) may not apply when a plaintiff alleges that the defendant's conduct was an unintentional mistake. *See* CEO Opp. at 13-14; Dir. 12(b)(2) Mem. at 29.

Here, the Commonwealth alleges intentional deception. "Each individual defendant knowingly and intentionally sent sales representatives to promote opioids to prescribers in Massachusetts thousands of times." FAC ¶ 162. "Each individual defendant knew and intended that the sales reps in Massachusetts would unfairly and deceptively promote opioids sales," including eight specific categories of deception. FAC ¶ 163. "Each individual defendant knew and intended that prescribers, pharmacists, and patients in Massachusetts would rely on Purdue's deceptive sales campaign to prescribe, dispense, and take Purdue opioids." FAC ¶ 165. "Each individual defendant knowingly and intentionally took money from Purdue's deceptive business in Massachusetts." FAC ¶ 168. "Each individual defendant knowingly and intentionally sought

to conceal his or her misconduct." FAC ¶ 169. "Holding the defendants accountable is important because of the people they hurt in Massachusetts and because of the defendants' selfish, deliberate choice to break the law." FAC ¶ 831.

The Commonwealth's allegations of intent are stronger than in other cases where courts have found jurisdiction under Section 3(c). The Directors here did more than in *Murphy*, where the defendant "caused a check to be delivered to [plaintiff] in Massachusetts which, he claims, by implication fraudulently misrepresented the amount due." 460 F.2d at 663. So too with *Ealing*, where the defendant falsely said it had an "intention to negotiate," when it did not really intend to negotiate. 790 F.2d at 979. And with *JMTR Enterprises*, where the defendant said she would not demand a deposit, but she actually intended to demand one. 42 F. Supp. 2d at 97. And with *Burtner*, where the defendant overstated the acreage in a real estate listing. 13 Mass. App. Ct. at 159. And the allegations of intent are stronger than in *DSM Thermoplastic*, where the defendant sent four letters exaggerating the performance of a gadget for changing filters on an assembly line. 2002 WL 968859, at *1.

The allegations of intent in this case are stronger than in any of those Section 3(c) cases because the Complaint alleges that the Directors led a years-long campaign of organized deception involving thousands of acts in Massachusetts (*see supra* at 2-11); they optimized their deception using secret research into Massachusetts doctors and patients (FAC ¶¶ 91, 93, 102, 384, 390, 413, 556); they pushed false claims in public while admitting the opposite in private (FAC ¶¶ 74, 445-50, 473); and they disregarded the warnings of the 2007 Judgment of this Massachusetts Court (FAC ¶¶ 188-95). Worst of all, the Directors committed their misconduct even though they knew they were responsible for the causes of the opioid epidemic: too many prescriptions, at too high a dose, for too long, for conditions that do not require them, by doctors

who should not write them. *See* FAC ¶¶ 248, 513, 831-34.[2]

iii. **Murphy, Ealing, JMTR, DSM,** ***And*** **Burtner** ***Are Good Law***

The Directors' brief does not mention *Murphy*, *Ealing*, *JMTR Enterprises*, *DSM Thermoplastic*, or *Burtner*. But the CEOs contend that this body of law is wrong, and they encourage the Court to disregard it. CEO Reply at 8-10. That would be a mistake with respect to any of the individual defendants, including the Directors.

On page 9 of their Reply, the CEOs assert that *Murphy* "is not binding precedent on this Court," and then identify two decisions differing from *Murphy* in other jurisdictions: *Margoles v. Johns*, 483 F.3d 1212 (D.C. Cir. 1973), and *Weller v. Cromwell Oil Co.*, 504 F.2d 927 (6th Cir. 1974). Yet in *Burtner*, the Appeals Court addressed *Murphy*, *Margoles*, and *Weller* — and decided to follow *Murphy*. 13 Mass. App. Ct. at 163-64. *Burtner* is binding precedent.[3]

The CEOs also ask the Court to disregard *Murphy* on the basis of *Roberts v. Legendary Marine Sales*, 447 Mass. 860 (2006). CEO Reply at 9-10. But *Roberts* addressed a different question not at issue here. Section 3(c) requires: "[1] tortious injury [2] by an act or omission in this Commonwealth." G.L. c. 223A, § 3(c). *Murphy* answers a question about the second element: whether an act occurs in the Commonwealth. *See* CEO Reply at 9 ("The court in *Murphy* held that a fraudulent misrepresentation intentionally directed into Massachusetts was

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[2] The Commonwealth's opposition to the CEOs addresses the Directors' incorrect claim that the public nuisance count "sounds in negligence." Dir. 12(b)(2) Mem. at 30. The Complaint alleges intentional misconduct. CEO Opp. at 16 n.4.

[3] The *Burtner* complaint included a single count, for violation of 93A. 13 Mass. App. Ct. at 164. The court noted "doubt" about whether a 93A violation was a "tortious injury" within Section 3(c) because it is a statutory claim. *Id.* To avoid any doubt, the court ruled that the complaint should be amended to include an additional count of deceit, a common law tort. *Id.* Here, the Complaint already includes a count of nuisance, a common law tort. Moreover, it is now clear that a 93A violation can constitute a tortious injury. *See* CEO Opp. at 17 & n.5 (citing seven cases decided after *Burtner*).

the substantive equivalent of an act 'in' the state under section 3(c)."). *Roberts* addressed a different question, about the first element — whether damages for breach of contract "constitute 'tortious injury' as contemplated under § 3(c)" — and held that a breach of contract is not a "tortious injury." 447 Mass. at 864. Indeed, *Roberts*' entire analysis of Section 3(c) concerned whether the injury was tortious:

> The injury suffered by the plaintiffs is a monetary injury. Essentially, the plaintiffs contend that, but for the defendant's misrepresentations, they would not have executed the contract to purchase the boat and they would not have incurred expenditures related to its purchase (such as inspections of the boat). The substance of the plaintiffs' complaint is contractual. The damages sought are grounded in breach of contract and do not constitute "tortious injury" as contemplated under § 3(c).

Id.

Here, as discussed below, the injury is not contractual. This is a suit brought by the Attorney General in the public interest to enforce the consumer protection act and public nuisance law and protect Massachusetts residents from injury and death. FAC ¶¶ 4, 22-26. *Murphy*, *Ealing*, *JMTR Enterprises*, *DSM Thermoplastic*, and *Burtner* are apposite authority.

b. The Directors Caused Tortious Injury In Massachusetts

The Directors caused tortious injury in Massachusetts. First, public nuisance is a tort. Second, while a claim under G.L. c. 93A, § 2 ("Chapter 93A") is a statutory action, courts have repeatedly found that Chapter 93A claims satisfy the "tortious injury" requirement of Section 3(c). *See* CEO Opp. at 17 & n.5 (citing seven cases).

The tortious injuries in this case are exemplified by the effect on the Massachusetts prescribers and patients that the Directors targeted. The Complaint alleges that the Directors sent sales reps to Massachusetts to deceive doctors and patients about Purdue's drugs. FAC ¶¶ 162-64. It alleges that each Director "knew and intended that prescribers, pharmacists, and patients in Massachusetts would rely on Purdue's deceptive sales campaign to prescribe, dispense, and

take Purdue opioids." FAC ¶ 165; *see also* FAC ¶¶ 618, 649, 666, 694. And the Complaint alleges that the Directors' deception caused devastating injuries here:

> In Massachusetts, sales reps visited Purdue's 100 top targets an average of more than 200 times each. Those visits cost Purdue more than $40,000 for each doctor …. Purdue paid to lobby those doctors because Purdue knew its reps would convince them to put more patients on opioids, at higher doses, for longer periods … Those extra prescriptions led Massachusetts patients to become addicted, overdose, and die … Purdue's top targets wrote far more dangerous prescriptions …. Purdue's top targets prescribed opioids to more of their patients, at higher doses, and for longer periods of time …. Purdue's top targets were at least ten times more likely to prescribe Purdue opioids to patients who overdosed and died.

FAC ¶¶ 114-116; *see also* FAC ¶¶ 22-26 (at least 671 Purdue patients died of overdoses in Massachusetts); ¶¶ 144-53 (17 Purdue patient deaths from one top prescriber alone).

The Directors' contention that the Commonwealth's Complaint is like *Noonan v. Winston Company* is incorrect. In *Noonan*, the court described the entire set of allegations against the dismissed defendants as follows:

> The Amended Complaint alleges in passing that the [misconduct] was undertaken "on behalf and with the approval of the RJ Reynolds defendants [The Winston Company, RJR France, RJRTC, RJRTI, and WBI]." There are no facts alleged in the Complaint to support this allegation.

902 F. Supp. 298, 306 n.14 (D. Mass. 1995) (citation omitted) *aff'd*, 135 F.3d 85 (1st Cir. 1998). Here, far from including only a single sentence "in passing," the Commonwealth alleges the decisions the Directors made, the orders they issued, the votes they cast, the personal rewards they reaped, and the words they wrote.[4]

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[4] The Directors likewise err in suggesting the Commonwealth's allegations are comparable to those in *Zises v. Prudential Insurance Co.*, No. CA-80-1886-Z, 1981 WL 27044, at *4 (D. Mass. Mar. 10, 1981), an age discrimination case where the court found no jurisdiction over a defendant who was not alleged to have implemented the firing, directed the firing, or "committed any specific act to discharge plaintiff." Here, the Commonwealth alleges the Purdue Directors committed many specific acts to inflict unfair and deceptive business practices and a public nuisance on Massachusetts, including sending sales reps to deliver deceptive marketing; ordering them to push the highest doses by the most prolific prescribers; and reinstating the *Massachusetts General Hospital Purdue Pharma Pain Program*. FAC ¶¶ 160-69; 273-78; 298-302.

2. Section 3(d)

a. The Directors Caused Tortious Injury In Massachusetts And Derived Substantial Revenue From Massachusetts

Even if the Directors' deception were not deemed to have taken place in Massachusetts under the rule of *Murphy*, the directors would still be subject to jurisdiction for their misconduct outside of Massachusetts under Long-Arm Section 3(d). That section provides jurisdiction when [1] a defendant's actions outside Massachusetts cause tortious injury in Massachusetts and [2] the defendant "derives substantial revenue from goods used or consumed or services rendered, in this Commonwealth." G.L. c. 223A, § 3(d). The Directors' misconduct and the money each Director collected from opioid sales in Massachusetts satisfy both of these elements.

First, as just discussed *supra* at 18-19, the Commonwealth alleges that the Directors caused tortious injury in Massachusetts.

Second, the Commonwealth alleges that each Director derived "substantial revenue" from the opioid sales that were the object of their misconduct. Each Director knew and intended that he or she was receiving money from the deception in Massachusetts. FAC ¶ 168. Peter Boer, Judith Lewent, Cecil Pickett, Paulo Costa, and Ralph Snyderman each received at least $16,800 from Massachusetts revenues. FAC ¶ 868. The Sackler Directors paid themselves and their family at least $4.2 *billion*, including $120 million from Massachusetts. FAC ¶ 866.

The significance of that money — as a motivation to break the law — was substantial. FAC ¶ 200. In 2010, staff warned the Directors that doctors were not prescribing Purdue's highest and most profitable dose as much as the company expected, so it might be necessary to cut the Sackler family's quarter-end payout from $320 million to $260 million and distribute it in two parts: one in early December and one closer to the end of the month. FAC ¶ 324. Mortimer Sackler objected: "Why are you BOTH reducing the amount of the distribution and delaying it

and splitting it in two?" FAC ¶ 324. "Just a few weeks ago you agreed to distribute the full 320 [million dollars] in November." *Id.* Richard Sackler wrote about his family: "in the years when the business was producing massive amounts of cash, the shareholders departed from the practice of our industry peers and took the money out of the business." SA Aff. Ex. 19. Director David Sackler called it a "maddening desire for cash." *Id.*

The Directors make no argument that the amount of money they collected is too little to be "substantial" under Section 3(d). *See* Dir. 12(b)(2) Mem. at 32-37; *Keds Corp. v. Renee Int'l Trading*, 888 F.2d 215, 219 (1st Cir. 1989) ($15,000 in sales was enough); *Mark v. Obear & Sons, Inc.*, 313 F. Supp. 373, 376 (D. Mass. 1970) ($5,000 was enough).

Instead, the Directors build their argument on the false premise that Section 3(d) excludes revenue that is "earned by a separate entity" before it is paid out to them. Dir. 12(b)(2) Mem. at 34. The Directors do not mention the controlling precedent holding that Section 3(d)'s "substantial revenue" element <u>is satisfied</u> by money passed through a chain of entities. In *Heins v. Wilhelm Loh Wetzlar Optical Machinery GmbH & Co.*, the defendant German company sold a machine to a Swiss company, which sold it to an Illinois company, which sold it to a Massachusetts company, where it injured a Massachusetts employee. 26 Mass. App. Ct. 14, 17-18 (1988). The Superior Court held that the German defendant did not "derive substantial revenue from goods used in Massachusetts," because the first sale was to a company in Switzerland. *Id.* at 20. The Appeals Court reversed. It held that "literal satisfaction of the explicit statutory requirements" is sufficient. *Id.* The "economic reality" was that the defendant "derive[d] substantial revenue" from Massachusetts, so Section 3(d) applied. *Id.* at 21.

The application of *Heins* is exemplified by this Court's later determination in *Commonwealth v. Philip Morris Inc.*, No. 957378J, 1998 WL 1181992 (Mass. Super. Ct. Mar.

20, 1998). As in this case, the Commonwealth sued out-of-state defendants for deceptively marketing an addictive product (cigarettes) at the heart of a public health disaster. *Id.* at *1. One defendant — B.A.T. Industries p.l.c. — made the same jurisdiction arguments as the Purdue Directors. B.A.T. oversaw a global enterprise that was much bigger than Massachusetts: "with over 500 subsidiaries worldwide." *Id.* B.A.T. did not sell cigarettes in Massachusetts. Instead, "[a]ll of the manufacturing, distributing, marketing, and advertising" was done by other companies. *Id.* From cigarette sales by subsidiaries in Massachusetts, the complaint estimated that B.A.T. received dividends "on the order of $1 billion." *Id.* at *5.

B.A.T. argued that its billion dollars of Massachusetts cigarette money was, as the Purdue Directors put it, earned by a separate entity. This Court rejected that argument:

> This court is bound by *Heins*. The question whether B.A.T. Industries p.l.c. "derives substantial revenue from goods used or consumed" in Massachusetts does not depend on its corporate arrangements. This requirement of the long-arm statute is satisfied if significant revenue from Massachusetts sales makes its way back to B.A.T. Industries p.l.c. The details of the corporate channels through which the funds are transmitted are not of importance. In *Heins*, the record did not even reflect how sales proceeds received by the Illinois distributor were shared with or passed through to the Swiss corporation, nor did it set forth what the arrangement was between the Swiss corporation and the defendant manufacturer. When, how and on what basis the manufacturer got paid were not specified - *i.e.*, the contractual or corporate arrangements by which the manufacturer benefitted from Massachusetts sales was not necessary to the inquiry. If the "economic reality" was that the manufacturer benefitted from sales in Massachusetts, the manufacturer "derived substantial revenue" from Massachusetts.

Id. at *6 (emphasis added). This Court noted that jurisdiction in Massachusetts was important because the complaint alleged that B.A.T. both directed and profited from the misconduct here:

> If, as alleged here, a parent corporation instructs a subsidiary to make misrepresentations about its product, and due to those misrepresentations more product is sold in the forum state and higher dividend returns are received, it is troublesome to conclude that the parent cannot be sued in the forum state simply because the tortiously enhanced revenues are transmitted to it via dividends.

Id. at *6 n.8.

The Commonwealth alleges that the Purdue Directors led an unlawful scheme to make misrepresentations in Massachusetts to sell more opioids and gain higher returns for themselves, just as *Philip Morris* described. The Complaint alleges that the Directors directed a campaign of deceptive marketing in Massachusetts (FAC ¶¶ 162-67); to "boost" sales of opioids (FAC ¶¶ 248, 350, 393); to pay themselves millions of dollars. FAC ¶ 238 (vote to pay $50 million), ¶ 242 ($250 million), ¶ 247 ($199 million), ¶ 251 ($325 million), ¶ 259 ($162 million), ¶ 265 ($173 million), ¶ 292 ($236 million), ¶ 295 ($141 million), ¶ 320 ($240 million), ¶ 327 ($260 million), ¶ 340 ($189 million), ¶ 357 ($200 million).

When individuals control a company's misconduct and pay themselves the money collected through that misconduct, the money counts as revenue they "derived" under the Long-Arm Statute. For example, in *Gregory v. Preferred Financial Solutions*, the complaint alleged that out-of-state officers and shareholders of an out-of-state company were "the primary participants in creating a scheme to provide debt adjustment services" that violated Georgia law. No. 5:11-cv-422, 2013 WL 5725991, at *5 (M.D. Ga. Oct. 21, 2013). The officers argued that they "never spoke to the Plaintiffs or any other customers in Georgia, they have not personally attempted to settle any customers' debts … and they have not physically transacted business" in Georgia. *Id.* at *4. The court rejected that argument and, applying a long-arm statute with the same language as Section 3(d), held that the individual defendants "derived substantial revenue from Georgia residents." *Id*. at *6. In that case, the "substantial revenue" was derived from the company's receipt of $1.2 million from 751 customers in Georgia (*id.* at *6) — compared to the more than a hundred million dollars that the Purdue Directors derived from the sale of more than 70 million doses of opioids consumed in Massachusetts. FAC ¶¶ 21, 239, 866-68.

Many decisions hold, like *Gregory*, that <u>individuals</u> are subject to jurisdiction based on

"substantial revenue" they acquire through a corporation by directing the corporation's misconduct. *See Related Cos., L.P. v. Ruthling*, No. 17-CV-4175, 2017 WL 6507759, at *5-8 (S.D.N.Y. Dec. 18, 2017) (defendant was company president); *Facit, Inc. v. Kreuger, Inc.*, 732 F. Supp. 1267, 1273 (S.D.N.Y. 1990) (defendants were company president and division manager); *Guttenberg v. Emery*, 41 F. Supp. 3d 61, 68 (D.D.C. 2014) (defendant was comptroller); *Vertrue Inc. v. Meshkin*, 429 F. Supp. 2d 479, 494-95 (D. Conn. 2006) (defendant was director, executive, and shareholder; court did not even require allegation that money was paid out to him, and found it sufficient that the money was within his "access and control").[5]

Contrary to the Directors' contention about a "Hobson's choice," (Dir. 12(b)(2) Mem. at 33), Section 3(d) does not impose an unreasonable choice on anyone. Mr. Hobson does not deserve to be shorthand for unfairness. He rented out horses, imposing the reasonable requirement that a customer who chooses to rent from him must take the horse nearest the stable door (for a practical reason: to spread the wear among his horses).[6] The Legislature likewise has acted reasonably. It enacted the Long-Arm Statute, imposing the requirement that a defendant who chooses to inflict tortious injury in Massachusetts shall be subject to jurisdiction here (for a practical reason: to provide recourse for Massachusetts residents); and the Legislature provided

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[5] *See also Am. Directory Serv. Agency, Inc. v. Beam*, 131 F.R.D. 15, 17 (D.D.C. 1990) (not requiring an allegation of the amount of revenue because court "may safely infer that [individual] derived substantial revenue from [company] sales generated by his efforts in the District"); *Roanoke Cement Co. v. Chesapeake Prods., Inc.*, No. 2:07cv97, 2007 WL 2071731, at *9 (E.D. Va. July 13, 2007) (applying to out-of-state directors the "derives substantial revenue" provision of Virginia long-arm statute: "as its officers and directors, the Court may reasonably infer that defendants benefitted from monies earned by Chesapeake in Virginia"). New York requires that the individual be a shareholder. *See Related Cos.*, 2017 WL 6507759, at *6-7. Even under that rule, each Sackler Director qualifies because they own Purdue. FAC ¶ 170. In Massachusetts, *Heins* makes clear that Section 3(d) should not be limited to money paid to shareholders because "[t]he details of the corporate channels through which the funds are transmitted are not of importance." *Philip Morris*, 1998 WL 1181992, at *6 (discussing *Heins*).

[6] *See The Spectator*, Oct. 10, 1712 (defending Hobson).

defendants with additional protection by limiting jurisdiction to defendants who also satisfy an additional requirement, such as deriving substantial revenue from goods consumed in Massachusetts. The Directors had a fair choice to remain outside the reach of Section 3(d), but they chose to inflict tortious injuries in Massachusetts and to derive substantial revenue from their misconduct in our State.[7]

b. Section 3(d) Is A Basis For Specific Jurisdiction

The Directors incorrectly suggest that the Court cannot use Long-Arm Section 3(d) in the absence of general jurisdiction. *See* Dir. 12(b)(2) Mem. at 36-37. The Commonwealth addressed that argument in its Opposition to the CEOs' motion and demonstrated that the text of the Long-Arm Statute, the holdings of the Appeals Court and the First Circuit, and the logic behind the statute all support its use to find specific jurisdiction. *See* CEO Opp. at 21-24. The Directors do not offer authority or reasoning beyond the CEOs' position, so the Commonwealth

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[7] The Directors cite *Birbara v. Locke*, 99 F.3d 1233, 1237 (1st Cir. 1996), which did not analyze Section 3(d) at all. *Birbara* was a veil-piercing case, in which the plaintiff sought to hold employees liable for a company's breach of contract. When the plaintiff argued that individual liability was justified because the employees drew salaries, the court noted that a salary did not justify veil-piercing, which is a rarely-used departure from the baseline of corporate law. *Id.* at 1239-41. Section 3(d) is not a departure from the law — it is the law. Section 3(d) does not define a standard for veil-piercing, nor is it defined by standards for veil-piercing: *Heins* did not hold that the German defendant was liable for acts of the Swiss, Illinois, or Massachusetts companies; but it was subject to Section 3(d) for the Massachusetts revenue that it derived through them. *See* 26 Mass. App. Ct. at 21.

The Directors also point to *Cambridge-Lee Industries v. Acme Refining Co.*, No. CA-003726, 2005 WL 3047406 (Bos. Mun. Ct. App. Div. Nov. 8, 2005) which held that "revenue from … services rendered in this Commonwealth" was not met by revenue from storage of scrap metal in Chicago. The Complaint in this case alleges that the Directors derived revenue from opioids consumed in Massachusetts. FAC ¶¶ 21, 239, 866-68.

The Directors follow the CEOs in citing *Merced v. JLG Indus., Inc.*, 193 F. Supp. 2d 290 (D. Mass. Dec. 27, 2001), *John Gallup & Assocs. v. Conlow*, No. 1:12-CV_03779-RWS, 2013 WL 3191005 (N.D. Ga. June 21, 2013), and *Hartsel v. Vanguard Group*, No. 5394-VCP, 2011 WL 2421003 (Del. Ch. June 15, 2011), which the Commonwealth addressed at CEO Opp. 19-21.

respectfully refers to its CEO Opposition and incorporates it by reference here.[8]

3. Section 3(a)

The Directors are also subject to jurisdiction under Long-Arm Section 3(a) because the Commonwealth's claims arise from the Directors transacting business here. That section provides jurisdiction over a person who acts directly or by an agent, as to a cause of action arising from the person's transacting business in Massachusetts. *See* G.L. c. 223A, § 3(a). The claims against the Directors arise from their massive, deceptive promotion of opioids across every part of our State. There are three questions to answer in applying Section 3(a), all of which support jurisdiction over the Directors.

a. The Directors Aimed Their Conduct At Massachusetts

First, as occurred here, the business conduct must be "aimed squarely at Massachusetts targets." *Gunner v. Elmwood Dodge, Inc.*, 24 Mass. App. Ct. 96, 99 (1987). Activity "aimed at cultivating a market area in Massachusetts" constitutes the transaction of business under Section 3(a). *Id.* at 97. In *Gunner*, the court found that Section 3(a) applied where a defendant in a

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[8] In *Goodyear Dunlop Tires Operations, S.A. v. Brown*, the Supreme Court observed that a long-arm statute with the same text as 3(d) provided "specific jurisdiction." 564 U.S. 915, 926 n.3 (2011) (D.C. Long-Arm Statute provides "specific jurisdiction over defendant who 'caus[es] tortious injury in the [forum] by an act or omission outside the [forum]' when, in addition, the defendant 'derives substantial revenue from goods used or consumed ... in the [forum]'" (alterations in original)).

Cases finding specific jurisdiction under Section 3(d) include: *Heins*, 26 Mass. App. Ct. at 20; *Darcy v. Hankle*, 54 Mass. App. Ct. 846, 851 (2002); *Keds Corp. v. Renee Int'l Trading*, 888 F.2d 215, 219 (1st Cir. 1989); *Commonwealth v. Philip Morris*, 1998 WL 1181992 (Mass. Super. Ct. Mar. 20, 1988); *Gray v. Michael Stapleton Assocs.*, No. 0500934B, 2007 WL 1630943, at *4 (Mass. Super. Ct. May 7, 2007); *Venture Tape Corp. v. McGills Glass Warehouse*, 292 F. Supp. 2d 230, 232 (D. Mass. 2003); *Merced v. JLG Indus.*, 170 F. Supp. 2d 65, 71-73 (D. Mass 2001); *N. Light Tech., Inc. v. N. Lights Club*, 97 F. Supp. 2d 96, 105-06 (D. Mass. 2000) (jurisdiction over officer and company) *aff'd on other grounds*, 236 F.3d 57 (1st Cir.2001); *Digital Equip. Corp. v. AltaVista Tech., Inc.*, 960 F. Supp. 456, 467 (D. Mass. 1997); *Hasbro, Inc. v. Clue Computing, Inc.*, 994 F. Supp. 34, 44 (D. Mass. 1997); *Mark v. Obear & Sons*, 313 F. Supp. 373, 377 (D. Mass 1970).

neighboring state advertised in newspapers, radio, and television programs directed at Massachusetts and mailed circulars to Massachusetts residents. *Id.* That marketing satisfied Section 3(a) because it was "aimed at" Massachusetts even though the defendant was located in another state and did not perform work, employ workers, or own property in Massachusetts. *Id.*

Here, the marketing that the Directors directed at Massachusetts was "aimed" far more specifically than the car ads in *Gunner*. At the Directors' insistence, Purdue tracked exactly which doctors the sales reps targeted, how often the reps visited, and what drugs the doctors prescribed. FAC ¶¶ 32, 112-16, 298-302, 353, 624. For the *Massachusetts General Hospital Purdue Pharma Pain Program*, the Directors sent John Stewart to Boston to network with doctors who could prescribe opioids in Massachusetts and funded a multi-million-dollar program to contribute to the deceptive promotion of opioids here. FAC ¶¶ 278, 641. For the opioid savings cards, the Directors studied and encouraged a scheme to keep patients on opioids longer (FAC ¶¶ 219, 234, 263, 363, 384), and the Directors were briefed on messages about the cards "targeted towards HCPs practicing in Massachusetts." FAC ¶ 94. The Directors knew how much money Purdue collected from sales of the highest and most dangerous doses in Massachusetts. FAC ¶ 471. The Directors knew how much money Purdue made from doctors in Massachusetts that were suspected of prescribing illegally. FAC ¶¶ 310-13. The Directors knew that a marketing program targeting Boston increased opioid sales by 959%. FAC ¶ 415.

b. The Directors' Conduct Had More Than A Slight Effect In Massachusetts

Second, as here, the business conduct must have more than a slight effect in Massachusetts. *Compare Droukas v. Divers Training Acad., Inc.*, 375 Mass. 149, 154 (1978) (sale of two boat engines had "slight effect on the commerce of the Commonwealth"), *with Good Hope Indus., Inc. v. Ryder Scott Co.*, 378 Mass. 1, 9-10 (1979) (Section 3(a) applied when

defendant made fifty telephone calls to Massachusetts, accepted payments from Massachusetts, and mailed reports to Massachusetts "which it knew would be relied on" by people in Massachusetts making significant decisions).[9] In evaluating each contact, the Court considers whether it is "part of a larger systematic effort on [defendant's] part to obtain business from Massachusetts businesses and residents." *Tatro v. Manor Care, Inc*., 416 Mass. 763, 769 (1994) (finding jurisdiction under Section 3(a)).

In this case, the effect on Massachusetts is immense. The Directors led a "systematic effort" that included 150,000 sales visits (FAC ¶¶ 32, 221-23, 259, 298-302, 314-15, 368, 460-62); 70 million doses of opioids (FAC ¶ 21); more than $500,000,000 in revenue (FAC ¶ 21); and a multi-million dollar *Massachusetts General Hospital Purdue Pharma Pain Program* at a leading hospital in the State (FAC ¶¶ 273-78). Just as the Directors intended, Massachusetts doctors and patients relied on that campaign to make some of the most consequential decisions of their lives: to prescribe and use Purdue opioids, and to keep using them at higher doses and for longer periods of time. FAC ¶¶ 72, 114, 165, 413, 426, 433. McKinsey determined that a Massachusetts doctor wrote 167 more OxyContin prescriptions after Purdue targeted him for frequent sales visits (FAC ¶ 413); that same week, Richard Sackler convened a meeting about sales tactics with the Directors and McKinsey (SA Aff. Ex. 9). Purdue's top targets in Massachusetts prescribed Purdue opioids to more of their patients, at higher doses, for longer periods of time, and were far more likely to prescribe Purdue opioids to patients who subsequently overdosed and died. FAC ¶ 116.

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[9] This principle is why a "single, isolated" contact did not satisfy Section 3(a) in *Morris v. UNUM Life Insurance Co.*, 66 Mass. App. Ct. 716, 722 (2006), and knowledge that a customer would send an audit report to Massachusetts did not satisfy Section 3(a) in *Fletcher Fixed Income Alpha Fund, Ltd. v. Grant Thornton LLP*, 89 Mass. App. Ct. 718, 723-24 (2016).

c. The Directors Controlled The Conduct In Massachusetts

Third, as here, the defendants must control the conduct in Massachusetts. In *Exxon Mobil Corp. v. Attorney General*, 479 Mass. 312, 319-20 (2018), the Supreme Judicial Court explained that an out-of-state defendant is subject to Section 3(a) if he has the "right to control the specific policy or practice resulting in harm to the plaintiff." Exxon was not located in Massachusetts, but the Court found specific jurisdiction under Section 3(a) because the company controlled marketing in the Commonwealth through local franchisees. *Id.* at 314-15, 319-20. The Court rejected Exxon's assertion that it had "no direct contact with any consumers in Massachusetts," and instead held that "[t]hrough its control," Exxon indeed "communicates directly" in Massachusetts. *Id.* at 320. The Court's reasoning defeats the Directors' excuse that they are immune from jurisdiction because they did not travel door-to-door in Massachusetts. Just as the Court found in *Exxon*, the Directors controlled the policies and practices resulting in harm in Massachusetts. Together with the other individual defendants, the Directors decided whether to send deceptive marketing into Massachusetts and what that deceptive marketing would say. FAC ¶¶ 161-67, 196 (summary); ¶¶ 221-23, 259, 298-302, 314-15, 368, 460-62 (more sales visits); ¶¶ 196, 226, 240, 261-62, 296, 347, 390, 399-400, 403 (higher doses); ¶¶ 196, 258-59, 347, 353, 409 (targeting prolific prescribers).

Like Exxon, individuals who control business conduct in Massachusetts are subject to jurisdiction here. *Kleinerman*, 26 Mass. App. Ct. at 824, referred to Sections 3(a), 3(c), and 3(d) and emphasized: "we have no difficulty in deciding" there is jurisdiction over a corporate officer who dispatched "minions" to Massachusetts, who issued "[m]ajor directives," and to whom "major controversies were bucked up." The Commonwealth alleges that the Purdue Directors dispatched sales reps to Massachusetts to visit doctors thousands of times. FAC ¶¶ 221-23, 259, 298-302, 314-15, 368, 460-62. The Directors issued "major directives" controlling business in

Massachusetts, including the decision to reinstate the *Massachusetts General Hospital Purdue Pharma Pain Program.* FAC ¶¶ 273-78. And the Directors decided "major controversies" — when staff suggested redirecting Purdue toward "Appropriate Use," it was the Directors who refused. FAC ¶¶ 488-89.

A director's conduct and control were also central in *Farazi v. Caffey*, No. 030834C, 2007 WL 1630973, at *2 (Mass. Super. Ct. May 2, 2007), where the complaint alleged that an out-of-state director of an out-of-state company deceived the plaintiff into paying $20,000 for a Worcester franchise of "eModel.com." In holding that the director was subject to jurisdiction under Section 3(a), the court noted that his power as a director strengthened the case for jurisdiction. *See id*. at *6 (his "status as director of the corporate defendants . . . is important and lends further credence to [the plaintiff]'s jurisdictional argument").

Similarly, *Johnson Creative Arts v. Wool Masters, Inc.* 573 F. Supp. 1106, 1111-12 (D. Mass. 1983), *aff'd*, 743 F.2d 947 (1st Cir. 1984), held that Section 3(a) provided jurisdiction over a company president and shareholder who never came to Massachusetts but directed deceptive practices from a neighboring state. He composed and mailed a letter to needlepoint shops in Massachusetts, accepted telephone orders from Massachusetts, and "directed the activities of the corporation since its inception." *Id.* Far beyond writing a letter or taking a phone call, the Purdue Directors orchestrated a massive, years-long marketing campaign.[10]

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[10] *See also Commonwealth v. Starion Energy, Inc.*, No. 18-03199-H (Mass. Super Ct. Apr. 29, 2019) (out-of-state executives subject to Section 3(a) where "[t]here is credible evidence that Defendants directed extensive business conduct by Starion in Massachusetts through agents acting on their behalf"); *Am. Microtel, Inc. v. Sec'y of State*, No. CA935874, 4791995 WL 809575, at *10-11 & n.8 (Mass. Super. Ct. Jan. 27, 1995) (jurisdiction in administrative proceeding was provided by different statute, but court confirmed in dicta that, in court proceeding, out-of-state officer/shareholder who controlled the misconduct of out-of-state corporation would be subject to jurisdiction under Section 3(a)).

In contrast, decisions finding a lack of jurisdiction over corporate leaders emphasize the lack of allegations like those present in the Commonwealth's Complaint. *Grice v. VIM Holdings Group, LLC*, 280 F. Supp. 3d 258, 271-74, 278 (D. Mass. 2017) found there was jurisdiction over an individual alleged to have composed a single letter that he could have inferred would be delivered to Massachusetts, and there was not jurisdiction over other individuals because the complaint in *Grice* "did not make any allegations as to whether [they] approved, supported or controlled any of the in-forum activities by the companies."

The Commonwealth's allegations are not like *Pettengill v. Curtis*, 584 F. Supp. 2d 348 (D. Mass. 2008). *Pettengill* was a childhood sexual abuse case in which the victim sued executives of the Boy Scouts of America who were alleged to have had a duty to enact policies to prevent sexual abuse and failed to do so. *Id.* at 354-55. The court held that this omission — a failure to enact policies — did not constitute "transacting business" Massachusetts. *Id.* at 357-59. The Complaint does not accuse the Directors of failing to act. It alleges that they acted. The Directors acted on a massive scale, by directing thousands of acts in Massachusetts, which constitutes transacting business here.[11]

Likewise, the Commonwealth's Complaint bears no resemblance to the one in *Malden Transportation, Inc. v. Uber Technologies, Inc.*, 286 F. Supp. 3d 264 (D. Mass. 2017). The court there found no jurisdiction over Uber director Garrett Camp because the complaint alleged "[n]o specific facts with regard to Camp … beyond the claim that he founded (and is a director of) Uber." 286 F. Supp. 3d at 271. Similarly, that complaint failed to make allegations about individual defendant Travis Kalanick, beyond "a smattering of irrelevant comments … such as

[11] *Chlebda v. H.E. Fortna & Bro., Inc.*, 609 F.2d 1022, 1023 (1st Cir. 1979) is also a case of omission: the Court emphasized that the defendants "engaged in no advertising, marketing or sales activities in Massachusetts" at all.

that he is a fan of Ayn Rand[.]" *Id.* The complaint failed to allege that either defendant "made decisions about Uber's operations in Massachusetts." *Id.* In contrast, the Commonwealth sued Purdue's Directors because they made crucial decisions about Purdue's operations in Massachusetts, including: how many sales reps would visit Massachusetts doctors and how often (FAC ¶¶ 221-23, 299-302, 314-15, 460-62); whether the reps would promote higher and higher doses (FAC ¶¶ 196, 226, 240, 261-62, 296, 347, 390, 399-400, 403); whether the reps would target the most prolific prescribers (FAC ¶¶ 196, 258-59, 347, 353, 409); and whether Purdue would promote opioid prescribing through the *Massachusetts General Hospital Purdue Pharma Pain Program* (FAC ¶¶ 273-78).

The Complaint thus alleges that the Directors transacted business in Massachusetts by directing deceptive marketing here, and the Commonwealth's claims arise from it.

Satisfying one section of the Long-Arm Statute is enough to establish jurisdiction under the statute. The fact that the Complaint fulfills three sections reinforces the conclusion that the Legislature intended for jurisdiction over the Directors to be available. The Legislature provided multiple sections of the statute to make sure that defendants like these who engage in pervasive, deliberate, and dangerous conduct in Massachusetts are subject to jurisdiction here. *See Tatro*, 416 Mass. at 771 ("We doubt that the Legislature intended to foreclose a resident of Massachusetts … from seeking relief in the courts of the Commonwealth when the literal requirements of the long-arm statute have been satisfied.").

B. <u>Jurisdiction Over The Directors Is Consistent With Due Process</u>

The Due Process Clause allows jurisdiction over the Directors because: (a) each purposefully directed deceptive marketing at Massachusetts; (b) the Commonwealth's claims relate to that deception; and (c) exercising jurisdiction over these defendants advances the values

of fair play and substantial justice. *See Bulldog Inv. Gen. P'ship v. Sec'y of the Commonwealth*, 457 Mass. 210, 217-18 (2010).

1. The Complaint Alleges That The Directors Purposefully Directed Deceptive Marketing At Massachusetts

The Commonwealth satisfies the first element of due process for the same reason set forth in the briefing about Purdue's CEOs: because the Complaint alleges that the Directors purposefully directed deceptive marketing at Massachusetts. *See* CEO Opp. at 29-31. "[E]stablishing channels for providing regular advice to customers in the forum State" exemplifies purposeful availment. *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 112 (1987). Individuals who "control their employer's marketing activity" purposefully enter a jurisdiction when "their intentional, and allegedly tortious, actions were expressly aimed at" the State. *Calder v. Jones*, 465 U.S. 783, 789 (1984). The Supreme Judicial Court held in *Bulldog*:

> By soliciting purchases of their [product], the plaintiffs sought to derive commercial benefit from their interaction with [a Massachusetts resident]. Therefore, it would be unfair "to escape having to account in [Massachusetts] for consequences that arise proximately from such activities."

457 Mass. at 218 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473-74 (1985) (affirming jurisdiction over corporate entity and four individuals).

The Commonwealth's earlier brief showed how this law applies to Purdue's CEOs.[12] The same logic applies to Purdue's Directors. Because the Commonwealth alleges that the Directors established channels of deceptive marketing in Massachusetts (*Asahi*), intentionally targeted Massachusetts with tortious misconduct (*Calder*), and solicited purchases of millions of

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[12] *See Kleinerman*, 26 Mass. App. Ct. at 824-25; *Yankee Grp., Inc. v. Yamashita*, 678 F. Supp. 20, 23 (D. Mass. 1988); *Johnson*, 574 F. Supp. at 1111-12; *DSM Thermoplastic*, 2002 WL 968859 at *3; *New World Tech., Inc. v. Microsmart, Inc*, No. CA943008, 1995 WL 808647, at *4 (Mass. Super. Ct. Apr. 12, 1995). Because the Directors controlled the misconduct, those cases aptly support jurisdiction over the Directors too. As Craig Landau wrote, the Directors were the "de facto CEO." FAC ¶ 817.

dollars of opioids in Massachusetts (*Bulldog*), the Directors meet the test for purposeful availment.

Massachusetts decisions support exercising jurisdiction over the Directors. For example, in *Massachusetts Mutual Life Insurance Co. v. Residential Funding Co.*, 843 F Supp. 2d 191, 197 (D. Mass. 2012), the plaintiff sued out-of-state directors of out-of-state financial companies (including JP Morgan, Credit Suisse, and Goldman Sachs) for misrepresentations about billions of dollars' worth of mortgage-backed securities that crashed during the financial crisis. The complaint alleged that some of the directors had signed securities registration statements, and some had not. *Mass. Mutual* Compl., 2011 WL 830866, ¶¶ 15-28. The court held that all of the directors "purposefully availed themselves of the privilege of conducting business in Massachusetts" because the complaint alleged that they "exercised control over the Corporate Defendants and directed the Corporate Defendants to sell securities in Massachusetts." *Id.* at 210-11. Purposeful availment was a "difficult question" there, however, because the complaint relied on that single allegation. *Id.* at 210. In contrast, the Commonwealth's Complaint details over many years and from many angles how the Purdue Directors directed thousands of unlawful acts in Massachusetts: thousands more sales visits; more vulnerable patients; higher doses; longer prescriptions; targeting dangerous prescribers; and the *Massachusetts General Hospital Purdue Pharma Pain Program* — all after the 2007 Judgment of this Court. *See supra* at 2-11. And the Commonwealth illustrates the allegations with dozens of communications and actions addressing Massachusetts.[13]

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[13] The allegations of purposeful availment here are also stronger than in *Mass. Mutual* because the Commonwealth alleges that members of a single family dominated the board of a privately-held company (FAC ¶ 170), micromanaged operations as the "de facto CEO" (FAC ¶¶ 196-98, 817), and paid themselves billions of dollars from the misconduct (FAC ¶ 238) — a degree of purposeful availment not alleged against the directors of the nation's biggest banks.

Similarly, in *Harbourvest International Private Equity Partners II v. Axent Technologies, Inc.*, No. 99-2188, 2000 WL 1466096, at *1 (Mass. Super. Ct. Aug. 31, 2000), the complaint alleged that out-of-state directors of an out-of-state company violated Massachusetts law when they approved a "stock swap" transaction a few days before their stock dropped 70%. This Court held that the directors' conduct "reviewing, supervising, authorizing, directing, and/or controlling" the transaction was sufficient to establish purposeful availment and jurisdiction. *Id.* at *5. The Court emphasized that the directors sought to benefit from Massachusetts business so significantly – a $50 million transaction – that jurisdiction "cannot be unreasonable." *Id.* at *6. Compared to that single deal, the Purdue Directors sought to benefit from many thousands of transactions, worth far more money, and with far greater consequences for Massachusetts.

Courts in other jurisdictions have ruled consistently with the Massachusetts decisions, repeatedly finding jurisdiction over directors who direct misconduct into their states:

- In *Ott v. Mortgage Investors Corp.*, 65 F. Supp. 3d 1046, 1052 (D. Or. 2014), the complaint alleged that out-of-state directors of an out-of-state company oversaw a scheme of illegal telemarketing, analogous to the scheme of unlawful opioid marketing in this case. The defendants argued that "mere oversight" was not enough for purposeful availment. *Id.* at 1057. It was "a large operation with many employees, and plaintiffs do not allege that any of the individual defendants ever placed or participated in a telemarking call." *Id.* at 1061. The court rejected that defense because the complaint alleged that the defendants controlled the illegal scheme — "as a puppeteer pulls a puppet's strings." *Id.* It did not matter whether the directors dialed the phone calls themselves. *Ott* also rejected the Directors' defense that they are exempt from jurisdiction because they targeted every state: the court found jurisdiction even if the directors "formulated, directed, implemented, and ratified a telemarketing scheme aimed at all 50 states." *Id.* at 1057.

- In *State ex re. Miller v. Grodzinsky*, 571 N.W.2d 1, 2 (Iowa 1997), the Attorney General of Iowa sued to enforce the state's consumer protection law against out-of-state directors of out-of-state corporations that mailed deceptive "Magic Money Maker" sweepstakes forms into Iowa. There was no indication that the directors went to Iowa or licked the stamps for the mailings, but the Iowa Supreme Court held they were subject to jurisdiction because the complaint alleged that they "manage, control, and direct all business policies, activities, operations, financial transactions, and acts of [the companies] directly and/or indirectly through agents and employees hired by them and acting at their direction," and they designed the deception. *Id.* at 6.

- In *Retail Services Software, Inc. v. Lashlee*, 854 F.2d 18, 19-20 (2nd Cir. 1988), the complaint alleged that out-of-state directors of an out-of-state company deceived the plaintiff into paying $187,000 for worthless retail software store franchises. The Second Circuit held that directors purposefully sought to benefit from the jurisdiction because they, "through [their company], reached into New York to obtain the benefits of selling seven franchises to be operated in the state." *Id.* at 23. The court noted that the directors were also shareholders of the closely-held corporation, which made the case for jurisdiction "even more persuasive" because the directors had a "direct economic stake" in the franchise sales. *Id.* at 24. The "direct economic stake" of the Sackler Directors in the Purdue opioids sold in Massachusetts exceeds those defendants a thousand times over. FAC ¶¶ 200, 866.

- In *Openwave Systems, Inc. v. Fuld*, No. C-08-5683, 2009 WL 1622164, at *1 (N.D. Cal. June 6, 2009), the complaint alleged that out-of-state directors of an out-of-state company (Lehman Brothers) deceived the plaintiff about debt with variable interest rates. The directors submitted affidavits "denying having communicated with" the plaintiff and even "denying knowledge of what representations were made to [the plaintiff]." *Id.* at *11. The court held the directors were subject to jurisdiction because the complaint alleged that they "knowingly participated in a plan to cause the Lehman representatives to make the misrepresentations" that harmed the plaintiff in the suit. *Id.* at *11, 14.

- In *Christie v. National Institute for Newman Studies*, 258 F. Supp. 3d 494, 497-98 (D.N.J. 2017), the complaint alleged that the out-of-state directors of an out-of-state non-profit corporation "approved and oversaw" hacking into the plaintiff's computer in violation of New Jersey law. The directors argued that there was no jurisdiction because "they did not physically enter New Jersey" and the complaint did not allege "a single concrete action" that the directors took during the hacking. *Id.* at 503, 510. The court rejected those arguments and found jurisdiction because the complaint alleged that the directors "approved and oversaw the intrusion of Plaintiff's personal and private email communications by [the corporation]." *Id.* at 510.

- And when the Attorney General of New Jersey sued an out-of-state director of an out-of-state opioid company, John Kapoor, <u>for unlawful marketing of prescription opioids</u>, Kapoor argued lack of personal jurisdiction. *See N.J., ex rel. Grewal v. Insys Therapeutics, Inc.*, No. C-1-18, 2018 WL 7624871, at *4 (N.J. Super. Ct. Dec. 19, 2018). The Attorney General's complaint alleged that "the Defendants directed its sales force to push and encourage healthcare providers to write [opioid] prescriptions for more patients, and at higher doses." *Id.* at *1. The court denied the motion to dismiss because "[t]he State alleges that Kapoor personally directed and supervised the alleged misconduct set forth in the complaint." *Id.* at *4.[14]

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[14] *See also Reynolds Corp. v. Nat'l Operator Servs., Inc.*, 73 F. Supp. 2d 299, 304 (W.D.N.Y. 1999) (finding jurisdiction over out-of-state directors of out-of-state company); *Duke v. Young*, 496 So. 2d 37, 40 (Ala. 1986) (same); *EEI Holding Corp. v. Bragg*, 947 F. Supp. 2d 913, 917 (C.D. Ill. 2013) (same).

The cases cited by the Directors do not contradict any of these decisions supporting jurisdiction. In *J. McIntyre Machinery, Ltd. v. Nicastro*, the Supreme Court emphasized that jurisdiction is available in cases of "intentional tort" because "the defendant might well fall within the State's authority by reason of his attempt to obstruct its laws." 564 U.S. 873, 880 (2011) (plurality opinion). Likewise, *Walden v. Fiore* discussed *Calder* and reaffirmed that intentionally sending false statements into a state is a tort that occurs in the target state and supports jurisdiction there. 571 U.S. 277, 288 (2014) (discussing libel). The Court found a lack of jurisdiction in *Walden* only because the complaint alleged that the defendant never "sent anything or anyone to" the forum state — the opposite of the allegations here. *Id*. at 289. *Walden* reiterated *Calder*'s holding that executives who control misconduct cannot escape jurisdiction by arguing that they did not deliver the false statements themselves:

> The defendants in *Calder* argued that no contacts they had with California were sufficiently purposeful because their employer was responsible for circulation of the article. We rejected that argument. Even though the defendants did not circulate the article themselves, they "expressly aimed" "their intentional, and allegedly tortious, actions" at California because they knew the National Enquirer "ha[d] its largest circulation" in California, and that the article would "have a potentially devastating impact" there.

Walden, 571 U.S. at 288 n.7.[15]

Bristol-Myers Squibb Co. v. Superior Court of California addressed claims of misleading advertising against a drug maker, and it shows why this Court does have jurisdiction. 137 S. Ct. 1773, 1778 (2017). A key fact about *Bristol-Myers*, which the Directors do not mention, is that

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[15] Other cases cited by the Directors concern general jurisdiction. *See BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549, 1558 (2017); *Daimler AG v. Bauman*, 571 U.S. 117, 120-22 (2014); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919-20 (2011).

Keeton v. Hustler Magazine, Inc., recited a standard that is met in this case: "we today reject the suggestion that employees who act in their official capacity are somehow shielded from suit in their individual capacity. But jurisdiction over an employee does not automatically follow from jurisdiction over the corporation which employs him …. Each defendant's contacts with the forum State must be assessed individually." 465 U.S. 770, 781 n.13 (1984).

the California court had jurisdiction over claims by California residents. *Id.* at 1779. Those claims are analogous to the Commonwealth's claims here. The Court's analysis of claims by nonresidents emphasized the factors that distinguish nonresident plaintiffs from the Commonwealth: jurisdiction was lacking because "the nonresidents were not prescribed Plavix in California, did not purchase Plavix in California, did not ingest Plavix in California, and were not injured by Plavix in California." *Id.* at 1781. In contrast, in this case, the Commonwealth seeks jurisdiction in Massachusetts based on allegations that the Directors sent sales reps to Massachusetts to deceive doctors in Massachusetts to prescribe opioids to patients in Massachusetts who overdosed and died in Massachusetts. FAC ¶¶ 21-23, 31-37, 112-16, 162-67. As the Supreme Judicial Court has recognized, *Bristol-Myers* encouraged plaintiffs to sue the drug maker in the jurisdiction where they were harmed, as the Commonwealth is doing here. *See Exxon*, 479 Mass. at 321 n.8 ("Unlike in *Bristol–Myers*, the Attorney General's investigation is brought on behalf of Massachusetts residents, for potential violations occurring within Massachusetts.").[16]

[16] Several cases cited by the Directors do not merit extended analysis by the Court. *Confederate Motors, Inc. v. Terny*, 831 F. Supp. 2d 405, 409 (D. Mass. 2011) was a contract dispute with no conduct in Massachusetts and a forum-selection clause that listed Massachusetts by mistake. *M-R Logistics v. Riverside Rail*, 537 F. Supp. 2d 269, 280-81 (D. Mass. 2008) was a breach of contract suit where the contract established the individuals were not parties to the agreement. *Saeed v. Omex Systems, Inc.*, No. 16-CV-11715-ADB, 2017 WL 4225037, at *5 (D. Mass. Sept. 22, 2017) was a breach of contract case where the court relied on the fact that the contract was not drafted, signed, or performed in Massachusetts. *Harlow v. Children's Hospital*, 432 F.3d 50, 53-54, 68-69 (1st Cir. 2005) held that Maine lacked jurisdiction over medical malpractice committed in another state. *Wang v. Schroeter*, C.A. No. 11-10009-RWZ, 2011 WL 6148579, at *5 (D. Mass. Dec. 9, 2011) denied jurisdiction because the complaint alleged "no facts regarding conduct by an individual defendant." *Copia Communications, LLC v. AM Resorts, L.P.*, 812 F.3d 1, 6 (1st Cir. 2016) denied jurisdiction over a Jamaican resort in a suit about services performed in Jamaica. *Preferred Mutual Insurance. Co. v. Stadler Form AG*, 308 F. Supp. 3d 463, 467 (D. Mass 2018) concerned a defendant who never sold or marketed anything in Massachusetts or sent a representative here.

The First Circuit has explained that "[t]he purposeful availment prong represents a rough quid pro quo: when a defendant deliberately targets its behavior toward the society or economy of a particular forum, the forum should have the power to subject the defendant to judgment regarding that behavior." *C.W. Downer & Co. v. Bioriginal Food & Sci. Corp.*, 771 F.3d 59, 66 (1st Cir. 2014) (citation omitted). The Commonwealth alleges that the Directors deliberately targeted Massachusetts with a massive, deceptive marketing campaign for a dangerous drug and extracted more than a hundred million dollars for themselves, while hundreds of Massachusetts patients died. Answering for their behavior in Massachusetts court is only the start of what Purdue's Directors owe the people of Massachusetts — but it is an appropriate start.

2. The Commonwealth's Claims Relate To The Deception That The Directors Directed

The second requirement of due process is satisfied because the Commonwealth's claims relate to the Directors' contacts with Massachusetts. The Complaint alleges that the Directors "control the specific policy or practice resulting in harm to the plaintiff." *Exxon*, 479 Mass. at 319 (Attorney General's investigation addressed a matter "arising from" Exxon transacting business in Massachusetts); *see supra* at 2-11 (summarizing FAC allegations of Directors' control); 29 (same). When the complaint alleges that directors controlled the specific conduct at issue in a suit, the relatedness test is satisfied. *See Mass. Mutual*, 843 F Supp. 2d at 210; *Ott*, 65 F. Supp. 3d at 1057-58.[17]

[17] The authority that the Directors cite on relatedness does not show any lack of relatedness in this case. *Openrisk, LLC v. Roston*, No. 15-P-1282, 2016 WL 5596005, at *5, 6 (Mass. App. Ct. Sept. 29, 2016) (Rule 1:28 summary disposition) shows contacts insufficiently related to a claim: acts in which defendants were not involved; a meeting that led to no consequences; a purchase that was not made. In contrast, the Commonwealth alleges that the Directors ordered a deceptive marketing campaign that caused hundreds of deaths and millions of dollars of sales. *Galletly v. Coventry Healthcare, Inc.*, 956 F. Supp. 2d 310, 312-14 (D. Mass. 2013) shows the basic rule by

3. Exercising Jurisdiction Over The People Who Directed The Deception Advances the Values Of Fair Play And Substantial Justice

The exercise of jurisdiction over the Directors also advances the values of "fair play and substantial justice." *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). The Directors do not make any argument about this aspect of due process. *See* Dir. 12(b)(2) Mem. at 37-42. Upon determining that the Commonwealth's allegations satisfy the Long-Arm Statute, that the Complaint alleges the Directors purposefully directed deceptive marketing at Massachusetts, and that the Commonwealth's claims relate to that alleged deception, the Court should conclude that subjecting these defendants to jurisdiction is just and fair.

C. The Directors' Factual Assertions Are Disputed And Wrong

Finally, the Directors seek to dismiss the case based on factual assertions set forth in declarations and in their brief. At this stage, it is sufficient for the Court to observe that many of the Directors' assertions are disputed by the allegations of the Complaint and by evidence uncovered in the Commonwealth's investigation. *See* SA Aff. Exs. 1-24. Under the prima facie standard, the Court "take[s] specific facts affirmatively alleged by the plaintiff as true (whether or not disputed) and construe[s] them in the light most congenial to the plaintiff's jurisdictional claim." *Cepeda*, 62 Mass. App. Ct. at 737-38.

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exercising jurisdiction over an individual whose Massachusetts contacts related to the claim improper firing and not exercising jurisdiction over an individual whose contacts were not related to the claim. *Interface Group-Massachusetts, LLC v. Rosen*, 256 F. Supp. 2d 103, 107-08 (D. Mass. 2003) applied that same rule by finding that contacts unrelated to the claim did not support jurisdiction. The court also concluded that an act committed outside of Massachusetts (allegedly causing a company to breach a lease in Massachusetts) was not aimed at Massachusetts and was linked to Massachusetts only by its effect. *Id.* at 108. The Commonwealth alleges that the Directors caused deadly effects in Massachusetts by acts they intentionally directed here. *E.g.*, FAC ¶¶ 222 (sales visits); ¶¶ 273-78 (MGH).

The Directors' concluding argument about national newspaper advertising misses the allegations in this case. The Directors' alleged acts (*e.g.*, directing thousands of door-to-door sales visits in Massachusetts and a multi-million-dollar program at MGH) were more targeted, extensive, and dangerous for Massachusetts residents than a national advertisement.

This Court encountered similar factual disputes at the motion to dismiss stage when the Commonwealth sued the cigarette companies in *Philip Morris*. The Court observed that, as here:

> To date, the Commonwealth has had access to documentary discovery from [the defendant] in similar cases pending in other states. It has not had depositions of the people involved to flesh out the various notes and meeting minutes it has seen, but must resort to inference to show that those notes and minutes reflect an express directive by [the defendant] with respect to at least some of the tortious conduct alleged in this case.

1998 WL 1181992, at *2. The Court denied the motion to dismiss and held that the Commonwealth met the burden for a prima facie case:

> While the Commonwealth's argument is based on snippets from B.A.T. Industries p.l.c., TSRT and Chairman's Advisory Conferences documents (some of which are ambiguous as to whether B.A.T. Industries p.l.c. was "directing" that something be done or merely being kept informed of its subsidiaries' activities), the context supports the Commonwealth's interpretation.

Id. at *3.

The Commonwealth's jurisdictional allegations are far stronger in the present case. Unlike the British holding company at issue in *Philip Morris*, the Purdue Directors determined how many sales reps pushed their drug door-to-door in Massachusetts (FAC ¶¶ 162, 196, 221-23, 299-302, 314-15, 460-62); how many doctors they visited (FAC ¶¶ 299-300); which doctors they targeted (FAC ¶¶ 196, 258-59, 347, 353, 409); and what doses of the drugs they recommended (FAC ¶¶ 196, 226, 240, 261-62, 296, 347, 399-400, 403). Unlike B.A.T., the Purdue Directors made the decision to reinstate a multi-million-dollar *Massachusetts General Hospital Purdue Pharma Pain Program*. FAC ¶ 273-78. Unlike B.A.T., seven of the Purdue Directors (Richard, Beverly, Jonathan, Kathe, Ilene, and Mortimer) committed their misconduct after they voted to enter into a Consent Judgment in this Court. FAC ¶¶ 193-95. The Commonwealth's allegations are enough to allow the litigation to proceed.

If — contrary to the "most typical method" identified by *Cepeda* — the Court finds it

appropriate to resolve factual disputes at the motion to dismiss stage, the Commonwealth requests the opportunity to seek documents and interrogatory responses from each defendant, depose each defendant, and present evidence and testimony at an evidentiary hearing. At the time of the First Amended Complaint, the Commonwealth did not have any Director's custodial file. SA Aff. ¶¶ 8-9, Ex. 22. Despite their role at the epicenter of the opioid epidemic, Directors Jonathan Sackler, Mortimer Sackler, David Sackler, Theresa Sackler, Beverly Sackler, Ilene Sackler Lefcourt, Peter Boer, Paulo Costa, Judith Lewent, Cecil Pickett, and Ralph Snyderman (to the best of the Commonwealth's knowledge) have never been deposed about what they did at Purdue.

CONCLUSION

For the reasons stated above, the Directors' motion should be denied.

Dated: June 19, 2019

Respectfully submitted,
COMMONWEALTH OF MASSACHUSETTS

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