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)(6)

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PRELIMINARY STATEMENT

The Commonwealth alleges that defendants Richard Sackler, Beverly Sackler, David Sackler, Ilene Sackler Lefcourt, Jonathan Sackler, Kathe Sackler, Mortimer Sackler, and Theresa Sackler ("the Sacklers") and defendants Peter Boer, Judith Lewent, Cecil Pickett, Paulo Costa, and Ralph Snyderman ("the Outside Directors" and, together, with the Sacklers, "the Directors"), together with other Purdue executives, misled Massachusetts prescribers, pharmacists, patients, and the public about the serious dangers of opioids. The consequences of their misconduct in Massachusetts are tragic: a still ongoing epidemic of dangerous prescribing, addiction, and death. Because the Commonwealth's claims against the Directors for their role in causing this harm are timely and adequately pled, their motion to dismiss under Mass. R. Civ. P. 12(b)(6) should be denied.[1]

ARGUMENT

The Court should deny the Directors' Rule 12(b)(6) motion because the allegations in the Commonwealth's First Amended Complaint ("Complaint" or "FAC"), taken as true and construed in the Commonwealth's favor, state claims for relief that are plausible on their face. *Iannacchino v. Ford Motor Co.*, 451 Mass. 623, 636 (2008) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007)).

To determine whether a complaint crosses the plausibility threshold, "the reviewing court [must] draw on its experience and common sense." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). Although the plausibility inquiry requires "more than a rote recital of the elements of a cause of

[1] To avoid repetition, the Commonwealth incorporates by reference here the summary of allegations in its Opposition to the Directors' Motion to Dismiss Pursuant to Mass. R. Civ. P. 12(b)(2) (pages 2-11). For purposes of its Opposition to the Directors' 12(b)(6) Motion, the Commonwealth relies exclusively on the allegations in the Complaint, not on the Affidavit of AAG Sydenham Alexander or the documents attached thereto.

action," it "does not demand a high degree of factual specificity." *Garcia-Catalan v. United States*, 734 F.3d 100, 103 (1st Cir. 2013) (citations and quotations omitted). "[A] complaint does not have to evince a one-to-one relationship between any single allegation and a necessary element of the cause of action." *A.G. ex rel. Maddox v. Elsevier, Inc.*, 732 F.3d 77, 82 (1st Cir. 2013) (citations and quotations omitted). "Rather, the plausibility standard should be applied to the claim as a whole." *Id.* "The critical question is whether the claim, viewed holistically, is made plausible by the cumulative effect of the factual allegations contained in the complaint." *Id.* (citations and quotations omitted). And this analysis must proceed "on the assumption that all the allegations in the complaint are true[.]" *Iannacchino*, 451 Mass. at 636 (quoting *Twombly*, 550 U.S. 555).

The Directors' 12(b)(6) memorandum centers largely on documents cited in footnotes in the Complaint, which they argue the Court needs to review—thousands of pages of e-mails, memoranda, spreadsheets, reports, and other materials—in order to resolve their 12(b)(6) motion. *See* Dir. 12(b)(6) Memo. at 1-26; *see also* Affidavit of Robert J. Cordy (attaching 121 Exhibits). The Commonwealth did not file any of these documents with its Complaint, but footnotes to the Complaint identified by Bates number approximately 600 documents that informed the Commonwealth's allegations to facilitate resolution of confidentiality disputes pursuant to the Court's Protective Order.

Although the Commonwealth should prevail whether or not the Court accepts the Directors' invitation to engage in a document-by-document analysis, such an expansive review of extrinsic evidence at this early stage of the litigation is premature, and, at set forth below at 14-16, below, generally disfavored. *See Sahu v. Union Carbide Corp.*, 548 F.3d 59, 68 (2d Cir. 2008) (where documents were referred to or quoted "largely for the purpose of indicating that evidence existed," citations were "best viewed as tending to establish that the complaint's factual

assertions [we]re plausible") (quotation omitted); *see also Commonwealth v. Philip Morris Inc.*, No. 957378J, 1998 WL 1181992, at *2 (Mass. Super. Ct. Mar. 20, 1998) (denying Rule 12(b)(2) motion to dismiss where Commonwealth had access only to limited document discovery from other pending cases and had to "resort to inference to show that these notes and minutes reflect an express directive by [the company] with respect to at least some of the tortious conduct alleged in this case").

Because the Commonwealth's "claim[s], viewed holistically, [are] made plausible by the cumulative effect of the factual allegations contained in the complaint[,]" the Court should deny the Directors' motion. *A.G. ex rel. Maddox*, 732 F.3d at 82 (quotation omitted).

I. The Commonwealth Sufficiently Alleges That The Directors Led A Massive, Deadly Scheme of Unfair and Deceptive Marketing in Massachusetts.

As set forth below, the Commonwealth sufficiently pleads that the Directors personally violated Chapter 93A and contributed to the creation of a public nuisance by knowingly authorizing, controlling, directing and ratifying a massive scheme of unfair and deceptive marketing in Massachusetts. The Commonwealth's allegations are therefore sufficient to state a claim for relief.

A. The Directors Participated In Misconduct By Directing, Controlling, Approving And Ratifying It.

Under Massachusetts law, officers and directors are liable in tort where they personally participated in the tort. *See Nader v. Citron*, 372 Mass. 96, 102-03 (1977) (corporate officer not immune from claim under G.L. c. 93A for the acts he is alleged to have committed personally), *abrogated on other grounds by Iannacchino*, 451 Mass. at 636; *see also Refrigeration Discount Corp. v. Catino*, 330 Mass. 230, 235 (1953) (president, director, and general manager of a corporation could be held personally liable even though he acted for benefit of corporation); *Community Builders, Inc. v. Indian Motocycle Assoc.*, 44 Mass. App. Ct. 537, 560 (1998)

(affirming c. 93A liability against individual limited partners of consultancy based on their "personal participation"); *Standard Register Co. v. Bolton-Emerson, Inc*., 38 Mass. App. Ct. 545, 551 (1995) (affirming c. 93A liability against individual officer-defendants "for orchestrat[ing] the misrepresentation" to plaintiff about the corporation's ability to perform a contract "even though they did not sign the agreement"); *DSM Thermoplastic Elastomers, Inc. v. McKenna*, No. 002018B, 2002 WL 968859, at *4 (Mass. Super. Ct. Feb. 5, 2002) ("[A] a corporate officer is generally held personally liable for a tort committed by the corporation that employs him, if he personally participated in the tort by, for example, directing, controlling, approving or ratifying the act that injured the aggrieved party."). Massachusetts law does not permit defendants to evade liability for conduct in which they participated simply by assuming the "cloak" of the title of officer or director. *See Nader v. Citron*, 372 Mass. at 102-03.

Cases interpreting Section 5(a)(1) the Federal Trade Commission Act, to which this Court may look to determine the scope of actionable conduct under G.L. c. 93A § 2(a), likewise hold corporate officials individually liable for the conduct of the corporation where they participated directly in or controlled the deceptive acts and practices, including by their "active participation in the corporation's affairs as a corporate officer," and "either knew or should have known about the deceptive practices." *FTC v. Direct Mktg. Concepts, Inc*., 569 F. Supp. 2d 285, 310 (D. Mass. 2008), *aff'd*, 624 F.3d 1 (1st Cir. 2010). "[I]t is not necessary to show that the individual personally made the misleading or deceptive representations." 569 F. Supp. 2d at 310.

Thus, in the *Direct Marketing Concepts* case, the Federal Trade Commission prevailed on summary judgment in an enforcement action against several marketing companies and their principals for their production and dissemination of deceptive infomercials marketing herbal dietary supplements. 569 F. Supp. 2d 285, 312. The individual defendants were directors, corporate officers, and owners of the corporate defendants. *Id.* at 292. The court rejected

arguments that an individual should not be liable because he did not participate directly in the production of the infomercials. *Id.* at 310-311. As to one co-owner who was "responsible for overseeing the companies' financial health" and "supervising the sales operation," the court found that his awareness of "the high volume of customer complaints and chargebacks" and his participation in and receipt of "minutes from managerial meetings in which concerns about the need for substantiation for the claims made in the infomercials were raised" sufficiently established "an awareness of a high probability of fraud along with an intentional avoidance of the truth." *Id.* at 311 (quotation omitted).[2]

Here, the Commonwealth states a claim against the Directors based on their participation in and control over a massive deceptive marketing scheme. The Complaint alleges that "[e]ach individual defendant knowingly and intentionally sent sales representatives to promote opioids to prescribers in Massachusetts thousands of times," FAC ¶ 162; that "[e]ach 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; and that they "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.[3] *See also* FAC ¶¶ 196, 499-500.

[2] *See also, e.g.*, *FTC v. Bay Area Bus. Council*, 423 F.3d 627, 636-38 (7th Cir. 2005) (affirming summary judgment against individuals overseeing a telemarketing scheme and rejecting one defendant's argument that the fact that she was a salaried employee insulated her from liability: "[t]o claim ignorance in the face of the consumer complaints and returned checks amounts to, at the least, reckless indifference to the corporations' deceptive practices").

[3] *See* Pl.'s Opp'n. to Dir. 12(b)(2) Mot. at 4-5, "The Directors Directed Deceptive Tactics To Get More Patients on Opioids in Massachusetts"; *see also* FAC ¶¶ 159-169, 209, 215, 224, 325, 364, 452, 501-02).

The Complaint alleges the Directors directed staff to target prolific opioid prescribers in Massachusetts, including "core" prescribers identified as most susceptible to sales reps' lobbying.[4] It alleges the Directors directed staff to promote higher doses of Purdue opioids in Massachusetts, including through the deceptive *Individualize the Dose* campaign.[5] It alleges the Directors oversaw deceptive tactics to keep Massachusetts patients on opioids longer, including by studying and implementing a savings card program designed to keep patients on Purdue opioids for longer periods of times.[6] It also alleges they directed sales reps to describe Purdue opioids in "less threatening" ways to doctors, FAC ¶ 356, and to encourage doctors to convert to Purdue opioids "patients who had never been on opioids or patients taking 'low dose Vicodin, Percocet, or tramadol' – all patients for whom Purdue's opioids posed an increase in risk." FAC ¶ 348. It further alleges they voted to implement incentive compensation policies that placed outsized emphasis on opioid prescription volume rather than compliance, including in Massachusetts. FAC ¶¶ 215, 225, 226, 253, 395, 430, 458, 503.

The Complaint alleges the Directors directed and oversaw these unfair and deceptive sales tactics, even though they knew that addiction, misuse, diversion, and improper prescribing of Purdue opioids was a significant problem, including in Massachusetts. *See, e.g.*, FAC ¶¶ 202, 211-12, 217, 235, 245, 518, 610 (Directors informed of hundreds of Reports of Concern about abuse and diversion of Purdue opioids and hundreds of tips to Purdue's compliance hotline that were not reported to authorities); FAC ¶¶ 310-13; 338, 510, 642 (Directors informed of secret,

[4] *See id*. at 8, "The Directors Directed Staff To Target Prolific Prescribers in Massachusetts"; *see also* FAC ¶¶ 341, 350, 354, 479.

[5] *See id.* at 6, "The Directors Directed Staff To Promote Higher Doses In Massachusetts"; *see also* FAC ¶¶ 393, 434, 558, 562, 579.

[6] *See id.* at 7-8, "The Directors Oversaw Deceptive Tactics To Keep Massachusetts Patients On Opioids Longer"; *see also* FAC ¶¶ 92-94, 219, 234, 363, 384, 552.

Purdue list of prescribers suspected of diversion and abuse (*Region Zero*), along with the exact number of prescriptions and dollars of revenue each provided to Purdue and their geographical relationship to overdoses and pharmacy robberies); FAC ¶ 319 (Directors informed that Massachusetts data showed far higher rates of "doctor-shopping" for OxyContin prescriptions than for any other opioid); FAC ¶ 337 (Directors informed that Purdue was receiving a rising volume of hotline calls and other compliance matters); FAC ¶ 339 (Directors informed that "if *Region Zero* doctors stopped prescribing opioids, Purdue would lose almost 10% of its sales.").

In addition, the Complaint contains numerous factual allegations that reflect the Directors' active participation in and control over the Purdue's opioid sales and marketing; these allegations support CEO Craig Landau's characterization of the Directors acting as Purdue's "'de facto' CEO," FAC ¶ 485, and refute the 12(b)(6) motion's self-serving characterization of their role as passive rubber-stamps. *See, e.g.*, FAC ¶ 197 (Richard Sackler's demands on sales staff were so intrusive that former Sales VP Russell Gasdia wrote to then-CEO Stewart: "Anything you can do to reduce the direct contact of Richard into the organization is appreciated."); FAC ¶ 234 (Kathe Sackler demanding that staff identify "pressures" affecting OxyContin sales and provide "quantification of their negative impact."); FAC ¶ 237 (Richard Sackler's memo to Kathe, Ilene, David, Jonathan, and Mortimer Sackler warning that Purdue's business posed a "dangerous concentration of risk" and advising installing a CEO who would be loyal to the family); FAC ¶ 261 (Richard Sackler convening a meeting of Board members and staff about "revers[ing] the decline in OxyContin tablets market"); FAC ¶¶ 229, 265 (Mortimer Sackler demanding staff justify negative sales predictions); FAC ¶¶ 266, 304, 331, 381 (Richard Sackler demanding OxyContin and Butrans sales and marketing reports and plans); FAC ¶ 306-10 (Directors demanding sales information and suggesting marketing tactics); FAC ¶ 331 (Richard Sackler conveying disappointment over sales despite report that weekly prescriptions were

double Purdue's forecast, asking for a Board discussion of the barriers sales reps were encountering during promotion, inquiring about the performance of a specific sales rep); FAC ¶¶ 341-45 (staff responding to requests from Richard, Jonathan, Kathe, Mortimer, and Theresa Sackler for reports on Butrans sales tactics); FAC ¶ 353 (Richard Sackler criticizing Purdue's managers for allowing sales reps to target "non-high potential prescribers"); FAC ¶ 354 (Richard Sackler demanding to shadow Purdue two sales reps each day for a week); FAC ¶ 358 (Mortimer, Kathe, and Jonathan Sackler posing questions to staff about how to capture or convert more patients to Purdue opioids); FAC ¶ 366 (Jonathan Sackler pressing for weekly sales updates); FAC ¶ 368 (Mortimer Sackler suggesting that winter sales declines could be avoided by rescheduling the national sales meeting so as not to "extend[] the period of time since the doctor last saw our rep"); FAC ¶ 380 (Richard Sackler pushing staff to commit to "breaking 10K/wk Rx's this month"); FAC ¶ 392 (Richard Sackler questioning staff about the drop in opioid prescriptions at the holidays); FAC ¶ 414 (Mortimer Sackler pressing staff for more information on dosing and "the breakdown of OxyContin market share by strength"); FAC ¶ 484 (Theresa Sackler inquiring about Purdue's efforts to undermine a report discouraging doctors from using OxyContin).

The fact that Purdue completed a Corporate Integrity Agreement ("CIA") after the 2007 Judgment does not, as Directors imply, provide a basis to dismiss the Commonwealth's claims. Dir. 12(b)(6) Memo. at 8-10. *See, e.g., U.S. ex rel. Robinson-Hill v. Nurses' Registry & Home Health Corp.*, No. 08-145, 2013 WL 1187000, at *2 (E.D. Ky. Mar. 20, 2013) (granting motion to strike alleged defense that CIA relating to past misconduct barred claims for misconduct during CIA compliance period); *see also FTC v. Amy Travel Servs.*, 875 F.2d 564, 574–75 (7th Cir. 1989) (rejecting argument by defendants including a director that they should be insulated from liability because the deceptive telemarketing scripts had "the blessing of an attorney,"

because defendants' level of participation and awareness of customer complaints "support[ed] a finding that these individuals had knowledge of the practices at issue," and "[o]btaining the advice of counsel did not change the fact that the business was engaged in deceptive practices"). The CIA required the Directors to ensure that Purdue did not deceive doctors and patients again. FAC ¶ 192. The Commonwealth's allegations, taken as true, show they failed to do that. The fact that Purdue completed the CIA and made compliance reports to the Directors does not change the Commonwealth's allegations, stated in the Complaint, that the Directors led a massive, unfair and deceptive marketing campaign in Massachusetts.

B. The Fact That Directors Frequently Committed Their Misconduct As A Group Does Not Absolve Them From Liability.

Considered "as a whole," the "cumulative effect of the factual allegations contained in the complaint" is to create a plausible claim that the Directors are liable for their participation in unfair and deceptive practices and the creation of a public nuisance. *Ocasio-Hernandez v. Fortuño-Burset*, 640 F.3d 1, 14 (1st Cir. 2011). The Directors' effort to chip away at this cumulative effect fails. Notwithstanding the acknowledgement by Purdue's CEO that "the Directors were the 'de facto CEO,'" FAC ¶ 817, the Directors urge the Court to ignore the factual allegations of their acts on the basis of their preferred characterizations of their misconduct as "ordinary activities" of a board like "routine board votes" "on staffing or budget proposals" or "simply… assent[ing] to various management proposals." Dir. 12(b)(6) Mem. at 2, 28-31. These contentions defy both black-letter principles of tort law and the applicable pleading standard.

First, the assertion that the Directors acted together does not insulate them from liability for votes authorizing and directing misconduct. Common sense commands this result, as the First Circuit recognized more than a century ago:

> To enable one of such [corporate] agents—a director, for example—to escape liability by setting up that the order which he had joined in giving was neither his several nor his joint order, but was the command only of a fictitious person or entity of which he was a component part, would permit, in effect, what we have held to be unlawful,—that a man should justify the commission of a tort by showing that he committed it, not in his personal capacity, but in some other.

Nat'l Cash Register Co. v. Leland, 94 F. 502, 509-11 (1st Cir. 1899) (corporate director may be held liable in tort by virtue of a board vote directing corporate agents to engage in the manufacture and sale of an infringing article; under Massachusetts law, corporate directors are individually liable for directing corporation's acts of unfair competition whether they do so "by vote or otherwise.");[7] *Tilman v. Wheaton-Haven Rec. Ass'n,* 517 F. 2d 1141, 1144 (4th Cir. 1975) ("[A] director who actually votes for the commission of a tort is personally liable, even though the wrongful act is performed in the name of the corporation."); *Aeroglide Corp. v. Zeh*, 301 F. 2d 420, 422-23 (2d Cir. 1962) (affirming judgment against directors who "personally participated" in the tort of conversion by voting to authorize execution of a mortgage); *Am. Airlines v. Christensen*, 967 F.2d 410, 417 (10th Cir. 1992) ("Specific direction or sanction of, or active participation or cooperation in, a positively wrongful act of commission or omission which operates to the injury or prejudice of the complaining party will subject an officer…of a corporation to liability for the tort of the corporation." (quotation omitted)).

[7] This has been the standard for directors' liability for decades. The Outside Directors' dire warnings that, if they are held liable, no one would serve as a director, *see* Supplemental Mem. in Supp. of Outside Directors' Mot. to Dismiss at 1-3, ring hollow. Further, the Outside Directors' reliance, in their Supplemental Memorandum, on cases applying the business judgment rule is misplaced. *Id.* (citing *Pinchuck v. State St. Corp*., No. 09-2930 BLS2, 2011 WL 477315 (Mass. Super. Ct. Jan. 19, 2011) and *Harhen v. Brown*, 431 Mass. 838 (2000)). Generally applied in the context of shareholder derivative suits, the business judgment rule does not insulate directors from liability for business decisions involving unlawful conduct, as alleged here. *Harhen*, 431 Mass. at 845 n.7 (2000) (citing *Miller v. Am. Tel. & Tel. Co*., 507 F.2d 759, 762 (3d Cir. 1974); *see also Gray v. Barnett (In re Dehon, Inc*.), 334 B.R. 55, 65-66 (Bankr. D. Mass. 2005) ("challenges to business decisions involving illegal actions do not implicate the business judgment rule").

Nor, of course, do the Rules of Civil Procedure or case law require the Commonwealth to mechanically re-state the facts in the complaint separately as to each Director where, as here, the Commonwealth alleges they acted together in many instances, *see, e.g,* FAC ¶¶ 500-03, voting in lockstep to authorize and direct Purdue's misconduct. *See, e.g., Zond, Inc. v. Fujitsu Semiconductor Ltd.*, 990 F. Supp. 2d 50, 53-54 (D. Mass. 2014) (denying motion to dismiss because it was not "entirely implausible or impossible for the grouped defendants to have acted as alleged" (quotation omitted)).[8]

Second, the Commonwealth's claims are not subject to dismissal on the basis of the Directors' preferred inferences from the Commonwealth's detailed allegations: most notably, their repeated insistence that—in the Directors' view—the allegations relate only "to information the Board received from Purdue's management." Dir. 12(b)(6) Memo. at 11; *see also, e.g., id.* at 7 (describing Directors as "passively receiving" information). To the contrary, the Directors' receipt of information detailing unfair and deceptive conduct supports the Complaint's allegations regarding the Directors' own participation and liability: it formed the context in which they continued to control, authorize, ratify and direct the misconduct in Massachusetts. *See, e.g,* FAC ¶¶ 291-94, 402, 407-12, 414-16, 444, 520, 555-56, 567-73, 584-85 (Directors demanding and receiving information on opioid sales and marketing, strategies to increase the

[8] *See also, e.g., Cota v. U.S. Bank Nat'l Ass'n*, No. 2:15-CV-486-GZS, 2016 WL 922784, at *6 (D. Me. Mar. 10, 2016) (plural references to "Defendants" in complaint did not warrant dismissal, where defendants could "argue at a later stage in the litigation that Plaintiffs cannot make the required evidentiary showing as to the elements of one or more of these claims"); *Nasdaq, Inc. v. IEX Group, Inc.*, No. CV 18-3014-BRM-DEA, 2019 WL 102408, at *14 (D.N.J. Jan. 4, 2019) (denying motion to dismiss where "the consistency of the subject of the pleading…, despite its group format, means that it can be reasonably inferred that each and every allegation is made against each individual defendant," and, "[i]f discovery establishes only one defendant committed the infringing acts, the other defendant can seek summary judgment on that ground"); *Thomas v. Luzerne County Corr. Facility*, 310 F. Supp. 2d 718, 721–22 (M.D. Pa. 2004) (rejecting defendants' argument that group pleading was improper).

duration, dosage, and overall volume of opioid prescriptions, and Purdue's response to threats to increased sales, including increased regulatory and law enforcement scrutiny), FAC ¶¶ 310-13 (Directors informed of prescribers suspected of abuse and diversion), FAC ¶ 520 (Directors informed of surveillance data indicating a "wide geographic dispersion" of OxyContin abuse and diversion driven by product availability and "prescribing practices"); FAC ¶¶ 36, 94, 111, 204, 218, 263, 385, 767 (Directors tracking the marketing tactics used to reinforce the deception). In support of their contentions that they cannot be liable as members of a board, the Directors rely on cases where plaintiffs, unlike the Commonwealth here, failed to allege *any* specific act of participation in misconduct by the defendants.[9] And many of the cases were not decided under the standard of review applicable here.[10] On a motion to dismiss, plaintiffs' entitlement to all

[9] *See Rhone v. Energy North, Inc.*, 790 F. Supp. 353, 362 (D. Mass 1991) (dismissing Chapter 93A § 11 claim against individual officers where "Complaint does not allege any specific facts to support its allegations that [defendants] engaged in the specified types of unfair and deceptive trade practices"); *Rick v. Profit Mgmt. Assoc.*, 241 F. Supp. 3d 215, 225 (D. Mass. 2017) (dismissing Chapter 93A claim against individual officers where "the allegations in the complaint refer only to" corporate defendant); *Saveall v. Adams*, 36 Mass. App. Ct. 349, 353-54 (1994) (dismissing claims against individual officers where the only allegations against them relevant to the Chapter 93A claim were that they "controlled the company, were the sole stockholders, and were…president and treasurer of the company"); *Lyon v. Morphew*, 424 Mass. 828, 833 (1997) (dismissing negligence claim against individual officer where sole allegation that she "had a general supervisory role with regard to the engineering department" was "not enough to support a finding that she personally participated in acts causing harm to the plaintiff"); *Escude Cruz v. Ortho Pharm. Corp.*, 619 F.2d 902, 908 (1st Cir. 1980) (dismissing negligence claim against individual officers and directors against whom plaintiff failed to allege any specific participation other than their general supervisory powers); *Culley v. Cato*, No. 064079, 2007 WL 867043, at *4-5 (Mass. Super. Ct. Mar. 5, 2007) (dismissing claims against individual directors where "not a single factual averment involves more than a conclusory allegation that these individuals should also be held liable for conduct supposedly engaged in by others."); *Claiborne v. Town of Cohasset*, No. 02-P-1465, 2004 WL 57436, at *2 (Mass. Super. Ct. Jan. 13, 2004) (upholding dismissal of negligence, trespass, and nuisance claims against individual officer where, at summary judgment, plaintiff had not produced "evidence of acts relevant to the claims against the corporation that were performed personally by [him].").

[10] For example, *Lyon*, 2004 WL 57436, and *Claiborne*, 2004 WL 57436, were appeals from summary judgment decisions. *Rick v. Profit Mgmt. Assoc.*, applied the heightened pleading standard of Federal Rule of Civil Procedure 9(b). 241 F. Supp. 3d 215, 224-25 (D. Mass. 2017);

inferences in their favor extends to the issue of individual directors' participation, and a motion to dismiss must be denied where "the individual defendants are alleged to be primary participants in the [misconduct], much as a puppeteer pulls a puppet's strings," while "kn[owing] the alleged conduct would cause harm to [the state's] residents." *Ott v. Mort. Investors Corp. of Ohio*, 65 F. Supp. 3d 1046, 1061 (D. Or. 2014) (denying 12(b)(6) motion by directors and officers where, although plaintiffs did not allege that they "ever placed or participated in a telemarketing call," they were alleged to be "responsible for designing and implementing" the allegedly unlawful telemarketing scheme targeting veterans); *see also Grewal v. Insys Therapeutics, Inc.*, No. C-1-18, 2018 WL 7624871, at *4 (N.J. Super. Ct. Dec. 19, 2018) (denying 12(b)(6) motion by CEO of opioid manufacturer where the state alleged that he personally directed and supervised the alleged misconduct set forth in the complaint); *FTC v. LeanSpa, LLC*, 920 F. Supp. 2d 270, 273, 279 (D. Conn. 2013) (denying 12(b)(6) motion by officer because allegation that he participated in hiring and monitoring of affiliate marketers that implemented deceptive sales tactics plausibly supported the claim that he participated in and was involved in the defendants' misconduct).

Because the Commonwealth alleges facts giving rise to a plausible claim against the Directors, the Court should deny the Directors' motion to dismiss.

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cf. United States Funding, Inc. v. Bank of Boston Corp., 28 Mass. App. Ct. 404, 407 (1990) ("concept of unfair or deceptive acts or practices made actionable by G. L. c. 93A goes far beyond the scope of the common law action for fraud and deceit, and does not necessarily require similar pleading specificity.") (quotations and citation omitted). The cited language in *Saveall v. Adams* was applying veil-piercing analysis. 36 Mass. App. Ct. 349; *cf. Townsends, Inc. v. Beaupre*, 47 Mass. App. Ct. 747, 751-52 (1999) (Corporate veil need not be pierced for a corporate officer if he personally participated in the tort by, for example, directing, controlling, approving, or ratifying the unlawful act.). The language cited from *New World Technologies, Inc. v. Microsmart* refers specifically to the standard for establishing personal jurisdiction under the Massachusetts long-arm statute. No. CA943008, 1995 WL 808647, *2 (Mass. Super. Ct. Apr. 12, 1995). Similarly, *Escude* considered participation allegations in the context of personal jurisdiction under the Puerto Rico long arm statute. 619 F.2d at 908.

II. The Court Need Not Look Beyond The Complaint's Allegations To Deny The Directors' Motion to Dismiss.

The Directors' attempts to rebut the Commonwealth's claims using the documents identified in the Complaint's footnotes demonstrate why undertaking a document-by-document review now—at the 12(b)(6) stage and before the Commonwealth has had an opportunity to conduct full discovery as to the Directors—would be premature. Whereas all inferences should be drawn in a plaintiff's favor on a Rule 12(b)(6) motion, the Directors do the opposite, minimizing the documents' import and challenging the reasonable inferences drawn therefrom.

For example, the Commonwealth alleges that, at a July 2010 Board meeting in Bermuda, staff reported that they suspected two Massachusetts doctors of improper prescribing. FAC ¶¶ 310-313. These doctors—who later lost their licenses for improper opioid prescribing—had four patients to whom they prescribed Purdue opioids who later overdosed and died. FAC ¶ 313. Remarkably, the Directors suggest that because these doctors' names appear on a list of 700 such doctors—doctors whose prescribing Purdue tracked and reported to the Directors down to the pill and dollar but did not report to authorities—the Court should give the allegations no weight. Dir. 12(b)(6) Memo. at 8. As discussed above, at pp. 1-3, this is not the appropriate standard at the 12(b)(6) stage.[11]

[11] The Directors' brief is replete with examples of this. For example, the Directors claim that the Commonwealth's allegation, at paragraph 208, that "the Sacklers ordered Purdue to hire hundreds of sales reps to carry out their deceptive sales campaign," is "false" because the documents cited in the footnote to that paragraph do not "show that the Board ordered…anything." Dir. 12(b)(6) Mem. at 11. This argument ignores multiple supporting allegations, including an image of an actual Board resolution "to begin expanding the sales force." FAC ¶¶ 222, 259, 314, 460. The Directors also accuse the Commonwealth of making "[f]alse allegations that Richard Sackler has 'blamed and stigmatized people who become addicted to opioids.'" Dir. 12(b)(6) Mem. at 21. But his horrifying email quoted in paragraph 183 of the Complaint ("we have to hammer on the abusers in every way possible") is but one example of the evidence the Commonwealth will present. Opioid addicts are "criminals," Richard insisted to a different friend, "[w]hy should they be entitled to our sympathies?" "I'll tell you something that will totally revise your belief that addicts don't want to be addicted. It is

For this very reason, subject to narrow exceptions discussed directly below but not present here, the law generally disfavors examination of extrinsic evidence at the motion to dismiss stage unless the motion is converted into one for summary judgment. *See Ironshore Specialty Ins. Co. v. United States*, 871 F.3d 131, 135 (1st Cir. 2017) ("Ordinarily, any consideration of documents not attached to the complaint, or not expressly incorporated therein, is forbidden, unless the proceeding is properly converted into one for summary judgment under Rule 56." (quotation and alterations omitted)); Mass. R. Civ. P. 12(b) ("If . . . matters outside the pleading are presented to *and not excluded by the court*, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56") (emphasis added); *see Goldman v. Belden*, 754 F. 2d 1059, 1066 (2d Cir. 1985) (holding it was improper for lower court to rely on documents quoted in complaint but not attached to or incorporated by reference on a Rule 12(b)(6) motion).

The documents identified in the Complaint's footnotes do not fall into the narrow exceptions to the rule disfavoring examination of extrinsic evidence before summary judgment. They are not public records or documents otherwise subject to judicial notice. *See Freeman v. Town of Hudson*, 714 F.3d 29, 36-37 (2013) (rejecting expansive notion of "public records" extending beyond documents subject to judicial notice). And they are not the type of written instruments or operative documents integral to the cause of action, such as a contract, offering document, or allegedly libelous writing. *See, e.g.*, *Fudge v. Penthouse Int'l, Ltd.*, 840 F.2d 1012, 1015 (1st Cir. 1988) (allegedly libelous magazine story "absolutely central" to plaintiffs' claims,

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factually untrue. They get themselves addicted over and over again." Pl.'s Opp'n to Dir. 12(b)(2) Mot., SA Aff. Ex. 20. The Court should not adjudicate these facts on a motion to dismiss.

and plaintiffs "unquestionably would have had to offer a copy . . . to prove their case").[12] Nor are the documents deemed incorporated by reference into the Complaint by virtue of their identification. *See id.* ("not every document referred to in a complaint may be considered incorporated by reference"); *Goldman v. Belden*, 754 F.2d 1059, 1066 (2d Cir. 1985) ("[L]imited quotation does not constitute incorporation by reference."). Rather, the documents illustrate the Commonwealth's allegations. *See Sahu*, 548 F.3d at 68 (documents were not "extrinsic evidence incorporated into the complaint" where they "seem[ed] to have been used by the plaintiffs largely for the purpose of indicating that evidence existed to support the complaint's assertions"). For the foregoing reasons, review of the documents at this stage of the litigation would be premature and improper.

III. The Commonwealth Has Sufficiently Pled Causation.

The Court should allow the Commonwealth's claims against the Directors to proceed, because, for the reasons articulated in more detail in the Commonwealth's Opposition to Purdue's Motion to Dismiss,[13] the Complaint sufficiently pleads that the actions of the

[12] *See also, e.g.*, *Galiastro v. Mortgage Elec. Reg. Sys., Inc.*, 467 Mass. 160, 173 (2014) (considering mortgage and note in action challenging foreclosure); *Olsen v. Seifert*, No. 976456, 1998 WL 1181710, at *7 (Mass. Super. Ct. Aug. 28, 1998) (considering stock restriction agreement integral to implied covenant of good faith and fair dealing claim); *Lowenstern v. Residential Credit Sols.*, No. 11-11760, 2013 WL 697108, at *3-4 (D. Mass. Feb. 25, 2013) (considering public documents relating to the specific consumer mortgage transaction at issue); *Goodman v. President & Trustees of Bowdoin College*, 135 F. Supp. 2d 40, 46-47 (D. Me. 2001) (considering student handbook and signed pledge "central to" plaintiff's claim, but not disciplinary proceeding transcript and letters not "integrated into or central to" claims despite quotations in complaint).

[13] The Commonwealth incorporates by reference its causation arguments in its Opposition to Purdue's Motion to Dismiss, including that it need not show causation to obtain injunctive relief or recover penalties and costs under G.L. c. 93A and that the causation defense is premature. *See* Pl.'s Opp'n. to Purdue Mot. to Dismiss at 20-22.

defendants, including the Directors, were both a cause-in-fact and proximate cause of the harms in this case.

A. The Directors Were A Cause In Fact Of The Alleged Harms.

The Commonwealth pleads a clear causal nexus between the Directors' unfair and deceptive conduct and the harms it alleges. *See Casavant v. Norwegian Cruise Line, Ltd.*, 460 Mass. 500, 503 (2011) (Chapter 93A plaintiffs must show a "causal connection" between the alleged violation and the relief sought but need not prove "reliance on a misrepresentation"); *see also Winer v. E. Airlines*, 330 Mass. 337, 339–40 (1953) (reversing demurrer where declaration alleged a causal relationship between defendant's negligence and plaintiff's injury).

The Complaint alleges that the Directors led a campaign to deceive Massachusetts doctors and patients to get more people on dangerous drugs, at higher and more dangerous doses, for longer and more harmful periods of time, all while peddling falsehoods to keep patients away from safer alternatives. FAC ¶¶ 2; 27-29; 160-67; 895-96. It alleges the Directors engineered a campaign to get more patients on Purdue's opioids, *see, e.g.*, FAC ¶¶ 226, 229-34, 240, 304, 307-09, 330-31, 375-77, 380-81, 397, 404, 441, 489, including by overstating drug benefits, and concealing the results of adverse trials. *See* FAC ¶¶ 308-09, 356. And it alleges the Directors voted to send sales reps to visit Massachusetts doctors knowing and intending that they would use tactics that were deceptive and unfair. FAC ¶¶ 162-167, 208-09, 215, 222-24, 250, 314-15, 325, 364, 452, 460, 501-02.

The Complaint alleges that the campaign of deception the Directors led caused an ongoing epidemic of opioid over-prescribing, addiction, overdose, and death, resulting in an unprecedented public health crisis. It "greatly increased the patients' risk of harm from many drugs in the opioid class—including heroin, fentanyl, and generic oxycodone—which share the same addictive chemistry as Purdue opioids" and "led Massachusetts patients to become

addicted, overdose, and die." FAC ¶¶ 88, 115. And "most of Purdue's 100 top targets in Massachusetts prescribed Purdue opioids to patients who overdosed and died." FAC ¶ 116.

Because the Commonwealth has pled a causal relationship between the Directors' conduct and the harms alleged, dismissal would be inappropriate.

B. The Directors Were A Proximate Cause Of The Alleged Harms.

"Under Massachusetts law, proximate cause turns largely on the foreseeability of the harm." *Limone v. United States*, 579 F.3d 79, 100 (1st Cir. 2009) (citing *Copithorne v. Framingham Union Hosp.*, 401 Mass. 860 (1988)); *Gidwani v. Wasserman*, 373 Mass. 162 (1977)). Unless "it can be said, as a matter of law, that the conduct of the defendants was *not* the proximate cause" of the harms, the question is one for a fact-finder. *Stamas v. Fanning*, 345 Mass. 73, 75-76 (1962) (emphasis added) (quotations omitted); *see also Zezuski v. Jenny Mfg. Co.*, 363 Mass. 324, 328–29 (1973) (citing *Leahy v. Standard Oil Co. of N.Y.*, 224 Mass. 352, 364 (1916) ("Ordinarily the question of negligence is one of fact for the jury. Only when no rational view of the evidence warrants a finding that the defendant was negligent may the issue be taken from the jury.").

To plead a public nuisance claim, plaintiffs need not establish causation as to every single act that created or maintained a public nuisance, but rather bear "the burden of proving that the alleged *nuisance*…was the proximate cause of their injuries." *Alholm v. Town of Wareham*, 371 Mass. 621, 626 (1976) (emphasis added); *see also Attorney General v. Baldwin*, 361 Mass. 199, 208 n.3 (1972) ("It is not necessary to show that the person charged committed the particular act that created the nuisance; it is sufficient if he contributed thereto.") (citing *McDonald v. Dundon*, 242 Mass. 229, 232 (1922)).

Here, the harms the Commonwealth alleges were reasonably foreseeable, because the defendants' unfair and deceptive scheme worked exactly as intended: sales reps focused their

efforts on top targets (in Massachusetts, visiting them an average of more than 200 times each), and those top targets prescribed Purdue opioids to more of their patients, at higher and more dangerous doses, for longer periods of time. FAC ¶¶ 38-97; 113-114. Patients who take opioids at higher doses and for longer periods face higher and higher risk of addiction and death. FAC ¶ 18*; see also* FAC ¶ 74 (Purdue claimed that "dose was not a risk factor for opioid overdose," even while it admitted in internal documents that it was "very likely" that patients face "dose-related overdose risk.") Compared to the general population, Massachusetts patients who were prescribed opioids for more than a year were 51 times more likely to die of an opioid-related overdose. *Id*. As Purdue CEO Craig Landau wrote about the opioid crisis, in 2017:

> There are:
> Too many Rxs being written
> Too high a dose
> For too long
> For conditions that often don't require them
> By doctors who lack the requisite training in how to use them appropriately.

FAC ¶ 832; *see also* Pl.'s Opp'n. to Dir. 12(b)(2) Mot. at 10-11 ("The Directors Caused Massive Foreseeable Harm in Massachusetts").

In Massachusetts, since 2009, at least 671 people who filled prescriptions for Purdue opioids overdosed and died. FAC ¶ 22. And for every death, more than a hundred people suffer from prescription opioid dependence or abuse. FAC ¶ 396. Babies are born addicted to opioids. FAC ¶¶ 24-26. People who are addicted to opioids are often unable to work. *Id*. The addiction of parents can force their children into foster care. *Id*. Grandparents are raising their grandchildren. *Id*. And patients who survive addiction need lengthy, difficult, and expensive treatment. *Id*.

These harms were not only reasonably foreseeable, the Directors foresaw them. The Directors knew that targeting high prescribers worked to vastly increase prescriptions. FAC ¶¶

112-153; *see* also FAC ¶¶ 413, 570 (referencing a "true physician example of a Wareham doctor who wrote 167 more OxyContin prescriptions after sales reps visited him"). And they knew that opioids and opioid addiction are "naturally linked." FAC ¶ 445; *see also* FAC ¶ 337 ("Staff also reported to the Sacklers about the risks of OxyContin, including that 83% of patients in substance abuse treatment centers began abusing opioids by swallowing pills, and that it took, on average, 20 months for a patient to get treatment."). They even considered plans to profit from those foreseeable harms by expanding into the business of selling drugs to treat opioid addiction and reverse overdoses. FAC ¶¶ 445-51, 473. In addition, the Directors knew how many opioids Massachusetts prescribers on Purdue's secret *Region Zero* list – a list of doctors Purdue suspected of diversion and abuse but had not reported to the authorities – were prescribing, and they studied the geographic correlation between those prescribers, oxycodone overdoses, and pharmacy theft. FAC ¶¶ 310-13, 338-39, 642.

For the Directors now to contend that they failed to foresee the scourge of opioid addiction, overdose and death strains credibility, where "the effect of [their] wrongful conduct was clear in foresight." *Kaiser Foundation Health Plan, Inc. v. Pfizer, Inc. (In re Neurontin Mktg. & Sales Practices Litig.*), 712 F.3d 21, 39 (1st Cir. 2013) (plaintiff met proximate causation requirement on consumer protection claim arising from drug company's unlawful marketing of prescription drug); *see also R.L. Currie Corp. v. E. Coast Sand & Gravel, Inc*., 93 Mass. App. Ct. 782, 786 (2018) (reversing summary judgment for defendant where damage to the plaintiff's property "was not so attenuated," but rather was "precisely the type of harm that was a foreseeable consequence" of defendant's actions); *City of Boston v. Smith & Wesson Corp.*, No. 1999-02590, 2000 WL 1473568, at *6 (Mass. Super. Ct. July 13, 2000) (denying gun makers' motion to dismiss public nuisance claim because City's allegations were not, as a matter of law, barred by "remoteness").

Finally, the Court should reject the Directors' contention that intervening events (drug dealers selling illegal street drugs and unethical or irresponsible prescribers and pharmacists improperly prescribing and dispensing opioids) broke the chain of causation. Dir. 12(b)(6) Memo. at 33. Intervening acts of third parties will not break the causal chain if those acts were reasonably foreseeable. *See Commonwealth v. Carlson*, 447 Mass. 79, 84 (2006); *see also Lawrence v. Kamco, Inc*., 8 Mass. App. Ct. 854, 858 (1979) (proximate causation extends liability to "the type of general harm which the defendant should have foreseen"); *In re Neurontin Mktg. & Sales Practices Litig*., 712 F.3d 21, 39-40 (1st Cir. 2013) (defendant's contention that some doctors prescribed Neurontin based on factors other than the defendants' off-label marketing did not eliminate proximate cause). The Directors cannot establish, at this stage of the litigation, that any of the intervening factors they have identified have extinguished the element of proximate cause, particularly where, as here, the severe harms caused by the nuisance were reasonably foreseeable, and even foreseen consequences of the illegal scheme they led.

For the foregoing reasons, like other state courts that have considered and rejected these same causation arguments,[14] the Court should reject the Directors' causation argument and allow the Commonwealth's case to proceed.

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[14] For example, courts in Vermont, Tennessee, Minnesota, New Hampshire and New York have rejected causation arguments advanced by Purdue and other opioid industry defendants. Copies of the Vermont, Tennessee, Minnesota and New Hampshire decisions are in the **Appendix to the Commonwealth's Opposition to Purdue's Motion to Dismiss** ("**App**."). *See* App. Ex. 2 (Vermont decision at 6) ("[T]he complaint sufficiently alleges causation…It alleges, for example, that Purdue's misrepresentations resulted in a dramatic increase in prescriptions, that those led to increased addiction, that the majority of opioid deaths in Vermont are causally linked to opioid prescriptions, that Purdue created or was a substantial factor in creating the alleged public nuisance, and that all of this was foreseeable to Purdue."); App. Ex. 3 (Tennessee decision at 8-9) ("Purdue's objection to the Complaint is that the State has failed to adequately causally link the alleged deceptive behavior to any such ascertainable loss. The Court disagrees."); App. Ex. 5 (Minnesota decision at 6-7) ("The State alleges that Purdue engaged in deceptive

III. The Commonwealth Has Stated a Claim For Public Nuisance.

The Commonwealth has stated a claim against the Directors for public nuisance under Massachusetts law, which holds that "all persons who join or participate in the creation or maintenance of a public nuisance are liable jointly and severally for the wrong and injury done thereby." *Baldwin*, 361 Mass. at 208 n.3 (citing *Fuller v. Andrew*, 230 Mass. 139, 146 (1918). Through the conduct described above, the Directors unreasonably interfered with the public's rights to health and safety by directing the unfair and deceptive promotion of opioids for use by more people, at higher and more dangerous doses, for longer periods of time, to foreseeably devastating (and long-lasting) effect. *See* FAC ¶¶ 901-910. The Directors' arguments to the contrary are wrong.

Massachusetts follows the Restatement (Second) of Torts, § 821B (1979), which defines a public nuisance as "an unreasonable interference with a right common to the general public." *Sullivan v. Chief Justice for Admin. & Mgmt. of Trial Court*, 448 Mass. 15, 34 (2006) (citing Restatement (Second) of Torts § 821B (1979) (additional citations omitted). Specifically, public nuisance involves "interference with the interests of the community at large – interests that were recognized as rights of the general public entitled to protection," including interference with public health, safety, morals, peace, or comfort. Restatement (Second) of Torts § 821B cmt. b

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marketing schemes that contributed to a rising tide of widespread opioid prescribing in Minnesota. Further, the State alleges those deceptive practices engaged in by Purdue injured Minnesotans…even though this may not be an easy case for the State to provide causation, at this procedural stage, dismissing the claims would be improper.") (citations and quotations omitted); App. Ex. 7 (New Hampshire decision at *5)("the complaint asserts a *prima facie* causal connection between Purdue's purported wrongdoing and increased opioid prescriptions and abuse."); *see also In re Opioid Litig.*, No. 400000/2017, 2018 WL 3115102, at *21 (N.Y. Sup. Ct. June 18, 2018) ("As to the causation element, the allegations in the complaint are sufficient to infer that the opioid epidemic allegedly spawned in part by the manufacturer defendants' false advertising caused the plaintiffs to suffer extraordinary losses, including the costs related to the care and treatment of residents suffering from prescription opioid addiction[.]").

(1979). Thus, "[i]n determining whether there has been an unreasonable interference with a public right, a court may consider, *inter alia*, "whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience" or "whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right." *Sullivan*, 448 Mass. at 34 (citing Restatement (Second) of Torts § 821B(2)(a), (c) (quotations omitted).

The Commonwealth's public nuisance claim fits squarely within the bounds of the Restatement and Massachusetts law. The Restatement recognizes a public nuisance when a defendant's conduct "affect[s] the health of so many persons as to involve the interests of the public at large." Restatement (Second) of Torts, § 821B, cmt. g (1979). The Restatement is clear that "a public nuisance does not necessarily involve interference with use and enjoyment of land." *Id.* at cmt. h. Indeed, "the threat of communication of smallpox to a single person may be enough to constitute a public nuisance because of the possibility of an epidemic." *Id.* at cmt. g.[15]

In accordance with the Restatement, Massachusetts courts have allowed public nuisance claims in analogous circumstances, outside of the property context. In *City of Boston v. Smith & Wesson Corp.*, for example, the City of Boston sued gun makers, distributors, sellers, and promoters alleging, *inter alia*, that in order to increase profits, they "knowingly, purposefully, intentionally or negligently misled, deceived and confused Boston and its citizens regarding the safety of firearms," including "by claiming falsely and deceptively through advertising that

[15] *See* App. Ex. 2 (Vermont decision at 6) (citing the smallpox example provided in the Restatement and concluding "[i]t cannot seriously be argued that the impacts of opiate addiction in Vermont have not affected the general public. If the State can ultimately prove its allegations as to Purdue's responsibility for the widespread nature of this scourge, it will meet the "public" aspect of such a nuisance claim.")

firearm ownership enhances security and that firearms are safe." 2000 WL 1473568, at *3. The Superior Court denied the gun makers' motion to dismiss Boston's public nuisance claim, concluding its complaint sufficiently alleged the defendants had "intentionally and negligently created and maintained an illegal, secondary firearms market" that "unreasonably interfered with public rights." *Id*., at *14. Likewise, in *Evans v. Lorillard Tobacco Co*., No. 04–2840A, 2007 WL 796175, at *19 (Mass. Super. Ct. Feb. 7, 2007), the Court refused to dismiss a public nuisance claim concerning the design, manufacture, distribution, and sale of cigarettes.

Nonetheless, citing *Jupin v. Kask*, 447 Mass. 141 (2006), the Directors argue that Massachusetts law "requires a nuisance claim to be based on the wrongful use of property." Dir. 12(b)(6) Mem. at 35. In addition to ignoring the Restatement and the above-cited cases, Directors misread *Jupin*. There, the mother of a murdered police officer filed an action against a homeowner, claiming that the homeowner's storage at home of unloaded, legally purchased, and legally owned firearms – including the gun used by the homeowner's partner's son to kill the police officer – was a public nuisance. 447 Mass. at 141. Citing examples of public nuisances provided by the Restatement, the Supreme Judicial Court declined to apply "a public nuisance theory to the ownership, possession or storage" of "a legally acquired firearm in a home," while expressly noting it was not "foreclos[ing] the possibility that some far more egregious conduct with respect to firearms might constitute a public nuisance." 447 Mass. at 158–60, n. 16 (quoting Restatement (Second) Torts § 821B cmt. b (1979)). The Court reasoned:

> Quite evidently, the instant case comes closest to the traditional interference with public safety by way of storing explosives in the midst of a city. However, where explosives stored in the middle of a city create a public nuisance because they might simply go off, causing loss of life outside the property on which they are stored, unloaded firearms do not possess the same capabilities. *Unloaded firearms do not, in and of themselves, discharge. Thus, they do not inherently interfere with or threaten the public safety and are not appropriately considered a public nuisance.*

Id. at 159 (emphasis added) (citations omitted).

Unlike the unloaded gun with which *Jupin* was concerned, Purdue's deception about the risks and benefits of opioids—overseen, controlled and directed by the Directors—*does* "inherently" interfere with and threaten the public health and safety. The prescriptions generated by that deception led Massachusetts patients to become addicted, overdose, and die, and greatly increased patients' risk of harm from many drugs that share the same addictive chemistry as Purdue opioids. FAC ¶¶ 88, 115. Compared to Massachusetts doctors and nurses who prescribed Purdue opioids without seeing reps, Purdue's top targets were at least ten times more likely to prescribe Purdue opioids to patients who overdosed and died. FAC ¶ 116. Far from foreclosing the Commonwealth's claims, *see* Dir. 12(b)(6) Memo. at 35, *Jupin* supports them.

The Directors' efforts to frame the Commonwealth's public nuisance claim as an improper products liability claim based "on the sale of FDA-approved prescription medications," *see* Dir. 12(b)(6) Memo. at 35, n. 44, likewise fails. Citing non-Massachusetts asbestos and lead paint cases "dismissing public nuisance claims based on the sale of a lawful consumer product," Dir. 12(b)(6) Memo at 35-36[16]—and ignoring decisions from multiple courts rejecting identical arguments by opioid manufacturers[17]—the Directors urge dismissal here. But unlike in the lead

[16] The Directors cite *Tioga Pub. Sch. Dist. No. 15 v. U.S. Gypsum Co*., 984 F.2d 915, 920 (8th Cir. 1993) (dismissing statutory public nuisance claim; concluding that an absence of precedent applying nuisance theory to claims that were not related to property infers that the claim is not cognizable); *In re Lead Paint Litig*., 191 N.J. 405 (2007) (dismissing government plaintiffs' claims against manufacturers and distributors of lead-based paint finding they constituted products liability claims); and *State v. Lead Indus., Ass'n*, 951 A.2d 428 (R.I. 2008) (holding that the proper means of commencing a lawsuit against a manufacturer for the sale of an unsafe product is a products liability action). *But see People v. ConAgra Grocery Prod. Co.*, 227 Cal. Rptr. 3d 499, 593-594, 598 (Cal. Ct. App. 2017) (affirming verdict holding lead paint manufacturers liable for the cost of remediating pre-1951 homes based on their affirmative promotion of lead paint use for interior residential use despite having actual knowledge of the product's risk of serious harm), *cert. denied*, 139 S. Ct. 377 (2018).

[17] The Commonwealth incorporates by reference relevant excerpts from decisions by state courts quoted in its Opposition to Defendant Gasdia's Motion to Dismiss at pp. 14-16, citing App. Ex. 1 (Arkansas decision at 5-6); App. Ex. 2 (Vermont decision at 4-6); App. Ex. 3 (Tennessee

and asbestos cases on which Directors rely, the Commonwealth's public nuisance claim does not turn turns on allegations that the product itself (here, opioids) caused the nuisance. Rather, like the nuisance claims against gun industry defendants in *City of Boston*, *supra* at 24, and opioid industry defendants, *see* n. 17, it turns on allegations that the defendants' *unlawful marketing* fueled the nuisance.[18] *See* Pl.'s Opp'n. to Dir. 12(b)(2) Mot. at 2-8; *see also* FAC ¶¶ 19, 904-905.

The Report and Recommendation issued in *Muscogee (Creek) Nation, see* n. 17, aptly explains how, although a "nuisance theory concerns a product," like the Commonwealth's, "it does not sound in products liability":

> The FAC alleges that the nuisance arises from the Defendants' misconduct, not from alleged harm caused by the use or misuse of an otherwise legal prescription opioid product. Plaintiff alleges that the nuisance is the result of fraudulent marketing that

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decision at 9); App. Ex. 5 (Minnesota decision at 9); App. Ex. 7 (New Hampshire decision at *14); App. Ex. 8 (Ohio decision at *4); App. Ex. 9 (Alaska decision at *4).

Other courts have also refused to dismiss nuisance claims by state and municipalities against opioid industry defendants. *See, e.g.*, *Muscogee (Creek) Nation v. Purdue Pharma L.P.*, Case No. 1:18-op-45459, Doc. # 1499, Slip op. at 51-60 (Report & Recommendation) (N.D. Oh., Apr. 1, 2019), *adopted, in relevant part*, by Doc. # 1680, Slip op. at 16-20 (Opinion and Order) (N.D. Oh., June 13, 2019), attached to the **Appendix to the Commonwealth's Mem. of Law in Opp'n to the Directors' 12(b)(6) Mot. to Dismiss** ("**Dir. 12(b)(6) Opp'n. App.**") as **Ex. 1** and **Ex. 2**, respectively; *Commonwealth v. Endo Health Sols. Inc.*, No. 17-CI-1147, 2018 WL 3635765, at *6 (Ky. Cir. Ct. July 10, 2018); *In re Opioid Litig.*, No. 400000/2017, 2018 WL 3115102, at *12-15 (N.Y. Sup. Ct. June 18, 2018); and *State of Washington v. Purdue Pharma L.P.*, No. 17-2-25505-0- SEA, Slip op. at 3-4 (King Cty. Super. Ct. May 14, 2018), **Dir. 12(b)(6) Opp'n. App. Ex. 3**.

[18] The Massachusetts District Court noted this same distinction in dismissing a town's public nuisance claim against a manufacturer of polychlorinated biphenyls ("PCBs"): that, unlike in the lead paint and asbestos contexts (to which the court found PCBs analogous), "in *City of Boston* the defendant created and supplied an illegal secondary market in weapons." *Town of Westport v. Monsanto Co.*, No. CIV.A. 14-12041-DJC, 2015 WL 1321466, at *3 (D. Mass. Mar. 24, 2015); *see also Ileto v. Glock Inc.*, 349 F.3d 1191, 1214 (9th Cir. 2003) (allowing public nuisance suit against gun manufacturer alleged to have "purposefully over-saturated the legal gun market in order to take advantage of re-sales to distributors that they know or should know will in turn sell to illegal buyers"); *City of Cincinnati v. Beretta U.S.A. Corp.*, 768 N.E.2d 1136, 1142 (Ohio 2002) (allowing public nuisance claim based on plaintiff's allegation that gun industry defendants "intentionally and recklessly market, distribute and sell handguns that defendants know, or reasonably should know, will be obtained by persons with criminal purpose").

> misstated the safety and efficacy of opioids in order to ensure widespread use and the failure to create and maintain controls against theft, diversion and misuse of prescription opioids from the legal supply chains that lead to an illicit secondary market. *These allegations make clear that the claimed nuisance is the alleged consequence of the Defendants' conduct and not the opioid product itself.*

Muscogee (Creek) Nation, Report & Recommendation at 56-57 (Dir. 12(b)(6) Opp'n. App. Ex. 1). In an Opinion and Order adopting the above-referenced Report and Recommendation, the Court rejected the opioid industry defendants' assertion that the "physical opioid drugs causing the addiction and death are the instrumentality" of the nuisance. *Muscogee (Creek) Nation*, Op. and Order at 19-20 (Dir. 12(b)(6) Opp'n. App. Ex. 2). The Court explained "that the nuisance is the condition of having more opioids free in circulation than are medically necessary (*e.g.*, an illicit, secondary, or 'black' market), and that defendants' conduct in carrying out their business activities is the instrumentality by which the nuisance was created and fueled." *Id*. The same reasoning applies here.

Finally, Directors' reliance on a comment to a tentative draft provision in the Third Restatement of Torts is misplaced. *See* Dir. 12(b)(6) Memo. at 35-36, n. 1 (citing Restatement (Third) of Torts: Liability for Economic Harm § 8, cmt. g (Tentative Draft No. 2, 2014)). As the draft acknowledges, the definition of "public nuisance" for actions by public officials "tends to be considerably broader than the common-law definition recognized by this Section as a basis for a private suit." Restatement (Third) of Torts: Liability for Economic Harm § 8, cmt. a (Tentative Draft No. 2, 2014). Unlike Section §821B of the Restatement (Second) of Torts, the Tentative Draft has not been adopted by the Supreme Judicial Court nor even "considered by the members of The American Law Institute[,] and does not represent the position of the Institute on any of the issues with which it deals," Restatement (Third) of Torts, § 8, n. a.

For the foregoing reasons, the Court should deny the Directors' motion to dismiss the Commonwealth's public nuisance claim.

IV. The Commonwealth's Claims Are Not Barred By Statutes Of Limitations.

A claim is not subject to dismissal on statute of limitations grounds unless "it is undisputed from the face of the complaint that the action was commenced beyond the applicable deadline." *Commonwealth v. Tradition (N. America) Inc.*, 91 Mass. App. Ct. 63, 70 (2017); *see also Donovan v. Phillip Morris USA, Inc.*, 455 Mass. 215, 228 (2000) ("Application of a statute of limitations usually involves a question of fact to be decided by a jury."). Here, dismissal on limitations grounds is not appropriate.

First, the Commonwealth's claims against the Directors are timely, because the Complaint's allegations make clear that, with the exception of defendant Judith Lewent,[19] the Directors participated in the alleged misconduct well into the respective four- and three-year limitations periods for Chapter 93A and public nuisance claims, *see* G.L. c. 260, §§ 2A, 5A; FAC ¶¶ 172-173, 196, 208, 430-497, 498-513, 578-595.

Second, the Commonwealth's nuisance claim is timely because the nuisance remains ongoing. "An action for a continuing nuisance allows a plaintiff whose claim otherwise would be untimely to sue where its rights are invaded from time to time because of repeated or recurring wrongs," resulting in ongoing harms. *Taygeta Corp. v. Varian Assocs.*, 436 Mass. 217, 231 (2002) (holding that continuing nuisance was not barred by the statute of limitations) (citing *Sixty–Eight Devonshire, Inc. v. Shapiro*, 348 Mass. 177, 183–184 (1964) (same)); *see also Asiala v. Fitchburg*, 24 Mass. App. Ct. 13, 16-19 (1987) (same); *In re Opioid Litig.*, 2018 WL 3115102, at *12-13 (N.Y. Sup. Ct. June 18, 2018) (rejecting opioid manufacturers' untimeliness argument, concluding "[t]he rule with respect to nuisance or other continuing wrongs is that the

[19] The Commonwealth's claims against defendant Lewent, who was a Director from March 2009 to December 2013, are timely by virtue of the discovery rule and the continuing nature of the nuisance, as discussed further below.

action accrues anew on each day of the wrong, so that the right to maintain the cause of action continues as long as the nuisance exists.").

Third, the Commonwealth's claims are timely by operation of the discovery rule, which "for the purpose of determining when a cause of action accrues, and thus when the statute of limitations starts to run…prescribes as crucial the date when a plaintiff discovers, or…should reasonably have discovered, that she has been harmed or may have been harmed by the defendant's conduct." *Bowen v. Eli Lilly & Co.*, 408 Mass. 204, 205-06 (1990); *see also Szymanski v. Bos. Mut. Life Ins.*, 56 Mass. App. Ct. 367, 370 (2002) ("Actions in both contract and tort may be tolled until such time as the plaintiff discovers the facts giving rise to the cause of action.").

Under the discovery rule, "[a] cause of action accrues when the plaintiff discovers or with reasonable diligence should have discovered that (1) he has suffered harm; (2) his harm was caused by the conduct of another; and (3) *the defendant* is the person who caused that harm." *Harrington v. Costello*, 467 Mass. 720, 727 (2014) (emphasis added); *see also Cambridge Plating Co., Inc. v. Napco, Inc.*, 991 F.2d 21, 25 (1st Cir. 1993) (under Massachusetts discovery rule "the [plaintiff's] delayed knowledge may be either the fact of the injury…or the cause of the harm"). Unlike the equitable doctrine of fraudulent concealment codified by G.L. c. 260 § 12, the discovery rule does not require the plaintiff to allege an affirmative act of concealment. *See Puritan Medical Ctr., Inc. v. Cashman*, 413 Mass. 167, 175 (1992); *Chace v. Curran*, No. 200402290, 2005 WL 1812464, at * 8 (Mass. Super. Ct. June 7, 2005). Accordingly, the Directors' reliance on caselaw applying the fraudulent concealment statute is misplaced. *See Stark v. Advanced Magnetics, Inc.*, 50 Mass. App. Ct. 226, 232 (2000)[20] (plaintiff alleged

[20] In *Stark*, the Appeals Court reversed the Superior Court's dismissal of the 93A claim, because "there [wa]s a disputed issue of fact whether the plaintiff knew or should have known that he

fraudulent concealment under G.L. c. 260 § 12); *White v. Peabody Constr. Co.*, 386 Mass. 121, 133 (1982) (same); *Abdallah v. Bain Capital LLC,* 880 F. Supp. 2d 190, 198 (D. Mass. 2012) (same); *Burbridge v. Bd. of Assessors of Lexington*, 11 Mass. App. Ct. 546, 549 (1981) (same).

When the Commonwealth's claims accrued is a question of fact that cannot be determined from the pleadings alone. *See Riley v. Presnell*, 409 Mass. 239, 239 (1991) ("when a plaintiff knew or should have known of his cause of action is one fact which in most instances will be decided by the trier of fact"); *see also Szymanski*, 56 Mass. App. Ct. at 380, 383 (reversing summary judgment for defendant; "there was a jury question as to when the plaintiff should have been alerted by the information available that his policy's accumulated value was unlikely to reach a self-sustaining level after nine years."). Determining when the plaintiff should have "reasonably discovered" a cause of action is a question of fact, and "the steps taken by a plaintiff to discover her cause of action play a role in the decision whether to apply the discovery rule." *Cambridge Plating*, 991 F. 2d at 27. "Fairness dictates that the discovery rule not be deemed inapplicable simply because reasonable actions other than those taken by the plaintiff *could* have uncovered the injury or cause of harm." *Id.* at 26-27 (emphasis in original) ("if reasonable inquiry failed to disclose the problem, it cannot be said that the problem 'should reasonably have been uncovered'").

Here, the Commonwealth alleges that discovering the nature and extent of the Directors' misconduct—the bulk of which took place behind closed doors and out of the public's eye—required a costly and complex investigation. FAC ¶¶ 836-837. Because the Commonwealth

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may been injured by the defendants' conduct before" the relevant date. 50 Mass. App. Ct. at 235-36.

alleges facts plausibly suggesting the application of the discovery rule, any dispute about when the Commonwealth's claims accrued should be resolved through factual findings after discovery. *See Riley*, 409 Mass. at 247-48; *see also Tyron v. Massachusetts Bay Transp. Auth.*, No. SUCV201402654, 2016 WL 5874408, at *2 (Mass. Super. Ct. Aug. 17, 2016) (question whether plaintiff's claims were time-barred "must await either a motion for summary judgment or trial").[21]

Further, although a plaintiff need not demonstrate that a defendant concealed relevant facts to get the benefit of the discovery rule, *see Szymanski*, 56 Mass. App. Ct. at 370-371,[22] allegations that the Directors obscured the nature and extent of their involvement and control over Purdue also bear on the accrual date. *See Harrington*, 467 Mass. at 727 (The discovery rule tolls the statute of limitations until the plaintiff discovers that "*the defendant* is the person who caused [the] harm.") (emphasis added). In particular, the Complaint alleges the Directors have been concealing their control over Purdue and its sales strategy—to push opioids with the false promise that they create an enhanced "lifestyle"—for over a decade. FAC ¶ 177. The Directors adopted a public relations strategy focused on "deflect[ing] attention away from the company owners." FAC ¶¶ 180, 187. They abandoned public-facing management positions in the wake of state and federal investigations into Purdue's marketing and promotion of OxyContin, in the

[21] *See also Commonwealth v. Endo Health Solutions Inc.*, 2018 WL 3635765, at *3 (Franklin Cir. Ct. July 10, 2018) ("knowing of the harm a product may create does not equate to knowing of specific alleged misrepresentations made about the properties of Defendants' products nor the improper, unnecessarily induced prescriptions of Defendants' drugs").

[22] In *Szymanski*, the Appeals Court explained that the discovery rule "which operates to toll a limitations period until a prospective plaintiff learns or should have learned that he has been injured, may arise in three circumstances: where a misrepresentation concerns a fact that was 'inherently unknowable' to the injured party, where a wrongdoer breached some duty of disclosure, *or* where a wrongdoer concealed the existence of a cause of action through some affirmative act done with the intent to deceive." 56 Mass. App. Ct. at 370–71 (emphasis added).

early 2000s (Richard Sackler left his position as President of Purdue and Jonathan, Kathe, and Mortimer Sackler resigned from their positions as Vice Presidents) and installed a CEO selected for his loyalty to the Sackler family. FAC ¶¶ 179, 187, 237. They voted that three Purdue executives—but no member of the Sackler family — should plead guilty as individuals in connection with Purdue Frederick's 2007 criminal conviction for felony misbranding OxyContin. FAC ¶ 188. As part of the injunctive relief in the 2007 Judgment, Purdue certified to the Commonwealth that it would refrain from deceptive marketing and would not promote OxyContin through "any oral or written claim that is false, misleading, or deceptive." FAC ¶¶ 193-194. In 2013, the defendants sought assurances from staff that journalists covering the opioid epidemic were not focused on the Sacklers. FAC ¶ 429 (Jonathan Sackler). And in late 2016, they responded to press inquiries about their involvement in Purdue evasively, with half-truths routed through their foreign press offices: "Sackler family members hold no management positions."[23] Against this backdrop, determining whether the Commonwealth acted reasonably in discovering the Directors' involvement in the harms alleged presents questions of fact.

Finally, the Court should reject the Directors' paradoxical argument that the 2007 Judgment provides them a shield against the discovery rule's application in this case. Dir. 12(b)(6) Memo. at 39-40. The Court should also reject the related argument that the discovery

[23] FAC ¶¶ 480-481 ("In November [2016], staff prepared statements to the press denying the Sacklers' involvement in Purdue. Their draft claimed: 'Sackler family members hold no leadership roles in the companies owned by the family trust.' That was a lie. Sackler family members held the controlling majority of seats on the Board and, in fact, controlled the company. A staff member reviewing the draft knew what was up and commented with apparent sarcasm: 'Love the … statement.' Staff eventually told the press: 'Sackler family members hold no management positions.' Some employees worried about the deception. When journalists asked follow-up questions about the Sacklers, communications staff deliberated about whether to repeat the 'no management positions' claim. They double-checked that Purdue's top lawyers had ordered the statement. Then they arranged for one of the Sacklers' foreign companies to issue it, so U.S. employees would not be blamed: 'The statement will come out of Singapore.'")

rule does not apply because the Commonwealth had the means to investigate the defendants earlier, through issuance of CIDs or written demands pursuant to the 2007 Consent Judgment against Purdue. *Id.* The Directors cite no case for the proposition that state enforcement authorities with investigative authority should face a higher burden than other litigants under the discovery rule, nor do they provide support for their assertion that the discovery rule "cannot apply" against recidivist defendants who were subject to a prior injunction. *Cf. Anawan Ins. Agency, Inc. v. Div. of Ins.*, 459 Mass. 592 (2011) (affirming superior court judgment applying discovery rule to enforcement action by Commonwealth's Division of Insurance, despite lengthy investigation). Creating such a standard would be contrary to the public interest.

CONCLUSION

For the reasons stated above, the Commonwealth respectfully submits that the Directors' 12(b)(6) motion should be denied.

Dated: June 19, 2019

Respectfully submitted,

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By its Attorney,
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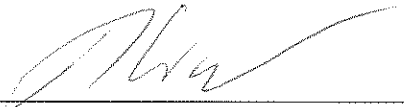

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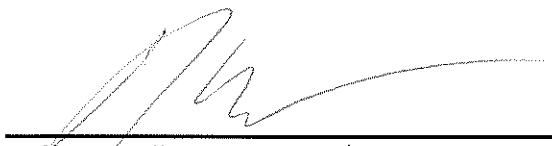

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