COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT

COMMONWEALTH OF MASSACHUSETTS, Plaintiff, 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, Defendants.	)	CIVIL ACTION NO. 1884-CV-01808(B)

REPLY MEMORANDUM OF LAW IN SUPPORT OF THE INDIVIDUAL DIRECTORS' MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

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PRELIMINARY STATEMENT[1]

The Commonwealth's Opposition does not and cannot cure the FAC's fundamental defect: while the Opposition recognizes that "[u]nder Massachusetts law, officers and directors are liable in tort where they personally participated in the tort," Opp. at 3, the FAC does not plead facts to put a single Individual Director on notice as to how he or she is alleged to have personally engaged in tortious conduct related to the sale of prescription opioids. Rather than state facts to support the conclusory allegation that the Individual Directors "participat[ed] in and control[led] . . . a massive deceptive marketing scheme," Opp. at 5, the Opposition instead regurgitates allegations about (i) information the Board received from Purdue's management – without stating what, if anything, any Individual Director did in response to that information – and (ii) agreement by the Board to management's proposals on matters of routine corporate governance. Neither the Opposition nor the FAC pleads any facts to connect any alleged action of any Individual Director to the alleged marketing messages at issue in the Commonwealth's suit. And when confronted with the fact that the FAC relies on misrepresentations of numerous documents, the Commonwealth's chief legal officer refuses to correct these errors and instead asserts that the Court should just accept its demonstrable mischaracterizations at face value. For these reasons and as set forth below, the FAC's allegations against the Individual Directors should therefore be dismissed.

[1] All definitions, abbreviations, and citation conventions used in the Memorandum of Law in Support of the Individual Directors' Motion to Dismiss the First Amended Complaint ("**Mot.**") are used again here.

ARGUMENT

I. The Opposition's Argument that the Court Should Blindly Accept the FAC's Mischaracterizations of Cited Documents Is Contrary to Massachusetts Law, Common Sense, and Basic Fairness

The Commonwealth chose to cite—and, as the Individual Directors' Motion explains, mischaracterize—more than 580 documents in the FAC. Indeed, the majority of the FAC's key allegations against the Individual Directors are unsupported by the documents on which they rely.[2] Unable to rebut the overwhelming evidence that the Commonwealth misrepresented numerous documents before the Court and the public, the Commonwealth now retreats to arguing that the Court should not assess the documents for itself and instead should accept its characterizations of them at face value. That argument not only defies common sense, it is incorrect as a matter of law and fundamentally unfair to the Individual Directors.

It is well-settled that a document cited in a complaint is deemed incorporated and can and should be considered on a motion to dismiss.[3] This rule is sensible: where a plaintiff chooses to bolster its allegations by citing documents without attaching them to the complaint, those documents nonetheless become part of the pleadings and the Court analyzes them when considering whether the plaintiff has stated a claim. If a claim rests on mischaracterizations of cited documents, it fails on the pleadings. The Commonwealth's desire to avoid this review speaks to the accuracy of its allegations.

If the Court considers the plain text of the documents cited in the FAC—and not the

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[2] *See, e.g.*, Mot. at 8 (illustrating FAC's mischaracterizations of information received by board); Mot. at 11–13 (illustrating FAC's mischaracterization of various documents).

[3] *See Marram v. Kobrick Offshore Fund, Ltd.*, 442 Mass. 43, 45 n.4 (2004) (documents not attached to the complaint can be considered where plaintiff had notice of these documents and relied on them in framing the complaint). As even the cases cited by the Opposition recognize, even "where a document is not incorporated by reference, the court may nevertheless consider it where the complaint relies heavily upon its terms and effects." *Sahu v. Union Carbide Corp.*, 548 F.3d 59, 68 (2d Cir. 2008).

Commonwealth's distortions of them—it becomes all the more clear that none of the Individual Directors participated in any alleged misconduct in the Commonwealth. The FAC therefore fails to state a claim against each of the Individual Directors.

II. The Opposition Confirms that the FAC Fails to Properly Allege Personal Participation by Each Individual Director

The Commonwealth advances various arguments regarding how it supposedly satisfied the essential pleading requirement of "personal participation," but none cure the FAC's failure to give fair notice to each Individual Director as to how he or she is alleged to have personally violated the law.

- The Commonwealth's argument that it is not required to "mechanically re-state" each of its allegations against each Individual Director, Opp. at 11, is based on the invented premise that the Commonwealth adequately alleged how even one individual participated in misconduct, as if the only issue were repetition. In reality, the FAC does not plead facts showing how a single Individual Director participated in Purdue's alleged marketing activities. The law is clear that the Commonwealth must allege the Individual Directors' personal participation, and an allegation against one Director is insufficient to state a claim against another. *See Rhone v. Energy N., Inc.*, 790 F. Supp. 353, 362 (D. Mass. 1991).

- The Commonwealth contends that the Individual Directors argued that they are insulated from liability because of their board service and quotes a case holding that "a director who **actually votes** for the commission of a tort is personally liable." Opp. at 10. But the FAC does not plead that any Individual Director "actually vote[d]" on anything improper. And more fundamentally, the Opposition fails to explain how the Board assenting to a management plan to hire employees or increase budgets could be tortious.

- The Commonwealth asserts that it can show personal participation by alleging that the Individual Directors "direct[ed], control[led], approv[ed] or ratif[ied]" Purdue's allegedly tortious acts, Opp. at 13 n. 10, but nowhere in the 274-page FAC nor the 33-page Opposition does it identify a single vote by Purdue's board to direct or approve a single one of Purdue's challenged statements about prescription opioids in the Commonwealth.

- The Commonwealth cites various cases arising under the Federal Trade Commission Act, but in each of those cases, there was a detailed discussion of how each defendant was deeply involved in both management of the company's day-to-day activities and the specific deceptive conduct.[4] For example, in *F.T.C. v. Amy Travel Servs., Inc.*, 875 F.2d 564 (7th Cir. 1989), the court held that the individual defendants personally participated

[4] *See* Opp. at 4–5, 8–9.

in tortious conduct because they both participated in the management of the company that was engaged in misconduct and were the authors of the deceptive sales scripts at issue. Such cases bear no resemblance to the allegations against the Individual Directors in the FAC, as (i) none were involved in Purdue's management during the Relevant Period; and (ii) there are few, if any, allegations of affirmative conduct for each Individual Director, and none involve marketing activities in or aimed at Massachusetts. *See* Mot. 28-31. These authorities provide no basis to excuse the Commonwealth's failure to allege each Individual Director's "direct personal involvement in some specified decision or action causally related to plaintiff's injury," as Massachusetts law requires. *Rhone*, 790 F. Supp. 353, 362 (D. Mass. 1991).

The Commonwealth has failed to allege facts to show the participation of any Individual Director, and therefore the FAC should be dismissed.[5]

III. The Opposition Confirms the FAC Has Failed to Allege Facts Supporting Proximate Cause

The Opposition makes the conclusory claim that the FAC has "plead[ed] a clear causal nexus between the Directors' unfair and deceptive conduct and the harm it alleges," Opp. at 17, but it then proceeds to describe only alleged conduct by Purdue and gives no basis to attribute the alleged conduct to specific acts by any Individual Director. The Commonwealth does not respond to reasons set forth, Mot. at 32-33, why there can be no plausible causal connection between the Individual Directors' alleged conduct and harm allegedly suffered in Massachusetts, including:

- There is no conceivable link between the FAC's few allegations of input by certain Individual Directors—such as asking questions posed about a sales proposal connected to a budget forecast (¶ 265) or participating in a discussion about a potential business venture that never happened (¶ 451)—and opioid-related harm suffered in the Commonwealth.

[5] *In re Opioid Litigation*, Index No. 400000/2017 (N.Y. Sup. Ct. Suffolk Cnty. June 21, 2019) (attached to the Affidavit of Annabel Rodriguez as **"Reply Ex. 1"**)—which recently held that a similar complaint adequately stated claims against certain of the Individual Directors under New York law (Ex. 1 at 10)—is inapplicable here. As discussed in the Motion, under Massachusetts law, the Commonwealth's conclusory allegations about the Individual Directors and Purdue's Board are insufficient because they do not specify how each individual is alleged to have violated the law. *See, e.g.*, *Rhone*, 790 F. Supp. at 362.

- Much of the Commonwealth's alleged harm has been caused by the unforeseeable criminal and negligent acts of third-parties (many of which are detailed in the FAC)—including trafficking by drug dealers of illegal street drugs such as fentanyl and heroin (¶ 88), irresponsible dispensation by pharmacies (¶ 412) and overprescribing by certain doctors for personal financial gain (¶¶ 120, 123, 127, 735)—that break the chain of causation. *See, e.g., Kent v. Commonwealth*, 437 Mass. 312, 321 (2002).

- The FAC itself reveals that the vast majority (over 93%) of the victims who tragically died of an opioid overdose never had an OxyContin prescription of any kind. *See* Mot. at 33. *Compare* (¶ 15) *with* (¶ 22).

The Commonwealth admits proximate cause is a required element of a public nuisance claim, Opp. at 18, but the case the Commonwealth cites actually supports the Directors' argument that the FAC's allegations do not support a finding of proximate cause. In *Alholm v. Town of Wareham*, 371 Mass. 621, 625 (1976), the Supreme Judicial Court found a town's maintenance of a burning dump which sent smoke into the roadway was not a proximate cause of an accident where a heavy fog obscured visibility because there was no evidence on which a jury could rationally base a conclusion that the smoke was causally related to the accident. Similarly, there is no basis here to conclude that the Individual Directors' alleged actions were causally related to the alleged harms in the Commonwealth, especially where the FAC itself lays out numerous confounding factors.

The Opposition seeks to demonstrate proximate cause solely by arguing that the Commonwealth's alleged harm was foreseeable. Opp. at 18-21. Yet, even if the FAC had adequately alleged that the harms were foreseeable (it did not), "foreseeability is needed for, but does not end the inquiry as to, proximate causation," especially if there is a highly attenuated relationship between the alleged conduct and harm suffered, as case law relied on by the Commonwealth recognizes.[6] That is precisely the situation here: the FAC has not pled that any Individual Director participated in Purdue's marketing activities in Massachusetts; there are

[6] *In re Neurontin Marketing and Sales Practices Litigation*, 712 F.3d 21, 34 (1st Cir. 2013).

many degrees of separation between the Individual Directors and the harm suffered in Massachusetts; and there are many intervening criminal and negligent actors. *See* Mot. at 32-33.

IV. The Opposition Confirms that the Commonwealth's Nuisance Claim Fails

The Commonwealth's argument that it can state a nuisance claim against the Individual Directors relating to the promotion and sale of FDA-approved prescription drugs finds no basis in Massachusetts law for two reasons.

First, the Opposition ignores that the FAC fails to plead facts supporting the assertion that any Individual Director was involved in the alleged nuisance. *Second*, a nuisance claim cannot be based on the sale of a prescription opioid. While the Commonwealth relies on two trial court decisions to argue that a nuisance claim need not be property-based, both decisions are inapplicable because they involve the *illegal* sale of firearms (including, for example, sales to straw purchasers) and the *illegal* sale of tobacco (violation of G.L. c. 270, § 6, which prohibits the distribution of cigarettes to minors). *City of Boston v. Smith & Wesson Corp.*, No. 1999902590, 2000 WL 1473568 (Mass. Super. Ct. July 13, 2000); *Evans v. Lorillard Tobacco Co.*, 2007 WL 796175 (Mass. Super. Ct. Feb. 7, 2007). In contrast, the Commonwealth's claims against Purdue, and by extension, the Individual Directors, are based on the sale of FDA-approved drugs through legal channels. *See* FAC ¶¶ 112, 155, 163.

The Opposition does not identify a single appellate-level decision in this State which supports its position. Contrary to the Commonwealth's claims, *Jupin v. Kask*, 447 Mass. 141 (2006), supports the Individual Directors' arguments. *Jupin* quotes from the Restatement (Second) Torts § 821B, which includes a lengthy list of examples of common law nuisances, all of which are property based. *Jupin* raises – but rejects – the possibility that storage of unloaded firearms is analogous to the storage of explosives in a city (a traditional, property-based nuisance). The court explained that "[u]nloaded firearms . . . do not inherently interfere with or

threaten the public safety and are not appropriately considered a public nuisance" and any public injury resulted from illegal conduct, "the theft and use of a gun by a third party." *Jupin*, 447 Mass. at 159. *Jupin* thus does not justify the extension of a nuisance claim to the marketing of an FDA-approved medication on a theory completely disassociated from traditional property-based nuisance. The Commonwealth's public nuisance claim must therefore be dismissed.

V. The Opposition Confirms that the FAC's Allegations are Time Barred

The Commonwealth recognizes that a claim is time barred where "it is undisputed from the face of the complaint that the action was commenced beyond the applicable deadline." Opp. at 28. That is precisely the case here. The Opposition claims that 105 different paragraphs of the FAC show Individual Directors participating in alleged misconduct during the relevant limitations period. But a review of these paragraphs reveals that there are very few, if any, allegations of affirmative conduct by specific Individual Directors, and none involve participation in prescription opioid marketing activities. Instead, the allegations specifically referencing any Individual Director within the limitations period relate only to: (i) potential acquisitions proposed by Purdue that never happened, (ii) Board assent to management's proposed staffing levels and budgets, and (iii) a few requests for information by certain Individual Directors. Mot. at 38. None of this alleged conduct could possibly show any Individual Director participating in Purdue's alleged marketing activities or causing harm to the Commonwealth.

The Opposition also makes two arguments regarding why the statute of limitations is inapplicable—but both arguments are unavailing:

First, the Commonwealth argues that its nuisance claim is timely because the alleged nuisance remains ongoing. The Opposition cites three cases for this proposition, but, in all of those cases, the claimed wrongful <u>conduct</u> was alleged to be ongoing within the limitations

period, as opposed to merely the effects of that earlier conduct. *See Taygeta Corp. v. Varian Assocs.*, 436 Mass. 217, 230-32 (2002) (ongoing contamination of groundwater caused by the continuing presence of hazardous material disposed of by defendant constituted an ongoing nuisance); *Sixty-Eight Devonshire, Inc. v. Shapiro*, 348 Mass. 177, 183-84 (1964) (continuous discharge of water from a defective gutter was recurring event within limitations period); *Asiala v. Fitchburg*, 24 Mass. App. Ct. 13, 14, 19 (1987) (gradual subsidence of land due to defendant's failure to properly construct a retaining wall was an ongoing nuisance). By contrast, the FAC does not specify any alleged misconduct by any Individual Director during the limitations period. *See Taygeta*, 436 Mass. at 231 (nuisance claim not ongoing if based on "the continuation of harm caused by previous but terminated . . . conduct"). Having alleged no participation by the Individual Directors in allegedly deceptive marketing after June 12, 2015, the Commonwealth's nuisance claim is untimely.

Second, the discovery rule cannot save the Commonwealth's untimely claims. Where applicable, the discovery rule starts the limitations period from "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." Opp. at 29. The Opposition does not dispute that it has the burden of pleading facts to demonstrate that its causes of action were inherently unknowable. *See* Mot. at 38-39. Contrary to the Commonwealth's contention, a court can determine on the pleadings that the discovery rule does not apply—and the Opposition cites a case which reached just that conclusion. *See Harrington v. Costello*, 467 Mass. 720, 732–33 (2014) (holding that discovery rule did not apply because plaintiff had knowledge of facts leading to accrual of claim

notwithstanding defendants' alleged efforts to deceive plaintiff).[7] Upon realizing it may have been harmed, Massachusetts faced the same burden as any litigant: to exercise "reasonable diligence" to determine the source of that harm. *Id.* at 725. Here, the discovery rule cannot apply because it is clear from the pleadings that, during the limitations period, the Commonwealth knew or should have known of the harm it allegedly suffered and the role it now contends the Individual Directors played in that harm.

The Opposition cannot dispute that the Commonwealth had a wealth of information about Purdue's alleged marketing activities that form the basis for the Commonwealth's allegations against the Individual Defendants. The Opposition does not dispute that the original complaint cited publicly-available articles from before the limitations period regarding many of the same alleged marketing practices that the Commonwealth contends form the basis of the FAC.[8] The Opposition also does not dispute that, under the 2007 Consent Judgment, the Commonwealth had extraordinary access to information about Purdue's sales and marketing practices. To the extent the Commonwealth had concerns about Purdue's activities as a result of these articles or the costs the Commonwealth was incurring due to opioid-related harm during the limitations

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[7] Other cases have similarly granted motions to dismiss claims that were time barred, notwithstanding that the plaintiff invoked the discovery rule. *See, e.g.*, *Proal v. JP Morgan Chase & Co.*, 202 F. Supp. 3d 209, 215 (D. Mass. 2016) ("[d]espite Plaintiff's contentions, it is undisputed that she was aware of the event that caused her harm . . . when it occurred," and the fact that documents related to her claim were publicly recorded "put[] her on inquiry notice of potential wrongdoing") (applying Massachusetts law), *aff'd sub nom. Proal v. J.P. Morgan Chase Bank, N.A.*, 701 F. App'x 12 (1st Cir. 2017); *Abdallah v. Bain Capital LLC*, 880 F. Supp. 2d 190, 197 (D. Mass. 2012) (plaintiff was not entitled to application of discovery rule because her injuries were "evident at the time that they occurred," and because she had previously pursued a legal claim against defendants, which was evidence that she knew of her injury and that defendants were a likely cause at the time the injury occurred) (applying Massachusetts law).

[8] The original complaint quotes news articles that appeared in the *American Journal of Public Health* in 2009, *Time* magazine in 2010, *Fortune* in 2011, and the *Los Angeles Times* in 2013, as well as other publicly-available materials from 2011, 2012, and 2014. Compl. ¶¶ 162 – 169.

period, it could easily have begun investigating. And the identity of Purdue's directors, *i.e.*, the Individual Directors, was never a secret: it was readily obtainable from the website of the Connecticut Secretary of State. Reply Ex. 2 (Nov. 15, 2013 filing). The Opposition similarly fails to identify any acts of concealment by the Individual Directors that could justify invocation of the discovery rule. *See* Mot. at 40. None of the allegations identified by the Opposition show an intent to conceal alleged misconduct from the Commonwealth:

- The Opposition references the decision by certain Individual Directors in the early 2000s —before the Relevant Period—to resign their management positions. Opp. at 32. But a decision to resign a position could not possibly be deemed an act of concealment of alleged conduct that took place years later. Regardless, Purdue's public records clearly disclosed the relationship between the Individual Directors and Purdue.

- The Opposition reiterates the FAC's allegation that the Individual Directors "voted that three executives – but no member of the Sackler family – should plead guilty" in connection with Purdue's plea. Opp. at 32; *see* FAC ¶ 188. This allegation is facially implausible, as a board of directors cannot decide that an employee should plead guilty to a crime and the referenced document does not show Purdue's board making such a decision. Reply Ex. 3.

- The Opposition, citing ¶ 429 of the FAC, alleges that "the defendants sought assurances from staff that journalists covering the opioid epidemic were not focused on the Sacklers." Opp. at 32. In reality, the cited email from one Individual Director stated that there was "no apparent focus [in press articles] on the makers of IR oxycodone." Ex. 99. As the FAC recognizes, Purdue does not manufacture immediate release oxycodone. Regardless, a comment that the media was not focused on the manufacturer of one product does not show concealment by anyone.

- Finally, the Opposition cites to a statement issued in 2016 that "Sackler family members hold no management positions." Opp. at 32. That statement is indisputably true and cannot plausibly be considered an act of concealment.

Thus, the Commonwealth has not identified any concealing acts taken by any, much less all, of the Individual Directors that could prevent dismissal of the Commonwealth's time-barred claims.

CONCLUSION

For the foregoing reasons, the Individual Directors' motion to dismiss should be granted.

Respectfully submitted,

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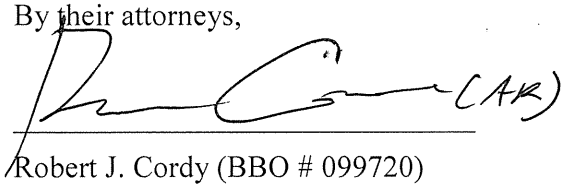

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