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

**SUPPLEMENTAL MEMORANDUM IN SUPPORT OF FORMER DIRECTORS' MOTION TO DISMISS**

In addition to the grounds for dismissal set out in the Individual Directors' Motions to Dismiss, defendants Beverly Sackler, Paulo Costa, Ralph Snyderman, and Judith Lewent (collectively "Former Directors") — each of whom ceased to serve as a member of the PPI Board before the Commonwealth filed this action on June 12, 2018 (*see* FAC ¶¶ 491, 499) — contend that the Commonwealth's FAC[1] as directed at them personally must be dismissed because the Attorney General does not have the authority to sue former directors no longer engaged in or likely to engage in the conduct alleged in her complaint, under G.L. c. 93A § 4. The plain language of G.L. c. 93A § 4 makes clear that the Attorney General may pursue an action against a person only when that person "is using or is about to use" unlawful methods,

[1] The defined terms and citation conventions used in the Individual Defendants' accompanying Personal Jurisdiction Memorandum and 12(b)(6) Memorandum are used in this brief.

acts or practices, in violation of the statute. The little case law that exists on the issue also supports dismissal of the case against the Former Directors. In addition, the Attorney General cannot bring a claim against the Former Directors to abate or enjoin an alleged current public nuisance.

## ARGUMENT

1. The Attorney General cannot sue Former Directors under G.L. c. 93A § 4.

The Massachusetts Consumer Protection Law, G.L. c. 93A ("Chapter 93A") authorizes the Attorney General and consumers to bring legal actions against persons[2] using unfair or deceptive conduct in trade or commerce. The Attorney General's authority (as distinguished from that of a consumer alleging harm under the statute) is set forth and limited by § 4.

The plain language of § 4 unambiguously requires the Attorney General to have reason to believe that the defendant's alleged violations are current or imminent. That section states:

> Whenever the attorney general has reason to believe that any person **is using or is about to use** any method, act, or practice declared by section two to be unlawful, and that proceedings would be in the public interest, he may bring an action in the name of the commonwealth against such person to restrain by temporary restraining order or preliminary or permanent injunction the use of such method, act or practice.

G.L. c. 93A § 4 (emphasis added).

There is nothing ambiguous about this statutory language. Only when a "person" is engaging or about to engage in an unfair or unlawful practice does the Attorney General have standing to bring suit. The Former Directors are doing neither.

Words suggesting past conduct, such as "has used," are absent from § 4. Given their absence, the phrase "is using or is about to use" must be strictly applied; otherwise the statute

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[2] "Persons" is defined as natural persons, corporations, trusts, partnerships, incorporated or unincorporated associations, and any other legal entity. G.L. c. 93A § 1.

would be meaningless. *See Phillips v. Equity Residential Mgmt., L.L.C.*, 478 Mass. 251, 258 (2017) (court must not interpret a statute in a way that renders any portion of it meaningless); *Commonwealth v. Muckle*, 478 Mass. 1001, 1023-24 (2017) (finding improper a statutory interpretation that would render statutory language superfluous).

It is apparent that the legislature made a conscious decision to not include "has used" language in § 4. Consumer protection statutes in other states include language that allows the Attorneys General in those jurisdictions to bring such legal actions based on past conduct. *See e.g.,* Ga. Code § 10-1-397 (Georgia) (authorizing Attorney General to bring action "[w]henever it may appear . . . that any person is using, has used, or is about to use" unlawful acts under the statute); I.C. § 48-606 (Idaho)(authorizing action "[w]henever the [A]ttorney [G]eneral has reason to believe that any person is using, has used, or is about to use" unlawful acts under the statute); 815 ILCS 505/7(a) (Illinois)(authorizing action "[w]henever the Attorney General . . . has reason to believe that any person is using, has used, or is about to use" unlawful acts under the statue).[3] Importantly, the language in other sections of Chapter 93A confirms that the

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[3] *See also* K.R.S. 367.190 (Kentucky) (authorizing Attorney General to bring action whenever the Attorney General "has reason to believe that any person is using, has used, or is about to use" unlawful acts under the statute); LSA-R.S. 51:1407 (Louisiana) (authorizing Attorney General to bring action whenever the Attorney General "has reason to believe that any person is using, has used, or is about to use" unlawful acts under the statute); Miss. Code § 75-24-9 (Mississippi) (authorizing action whenever the Attorney General "has reason to believe that any person is using, has used, or is about to use" unlawful acts under the statute); MCA 32-11-402 (Montana) (authorizing action against a person "[i]f in the opinion of the department a person is using, has used, or is about to use any method, act, or practice" unlawful under the statute); N.M.S.A. 1978 § 57-12-8 (New Mexico) (authorizing action "[w]henever the [A]ttorney [G]eneral has reasonable belief that any person is using, has used or is about to use" practices unlawful under the statute); Gen. Laws 1956, § 6-13.1-5 (Rhode Island) (authorizing action "[w]henever the [A]ttorney [G]eneral has reason to believe that any person is using, has used, or is about to use" unlawful acts under the statute); S.C. Code § 39-5-50(a) (South Carolina) (authorizing action "[w]henever the Attorney General has reasonable cause to believe that any person is using, has used or is about to use" unlawful acts under the statute); SDCL § 37-24-23 (South Dakota)

legislature knew to distinguish between ongoing or imminent conduct and past conduct. *See* G.L. c. 93A § 6 (authorizing investigation "whenever [the AG] believes a person ***has engaged in or is engaging in*** any method, act or practice declared to be unlawful by this chapter....") (emphasis added); G.L. c. 93A § 9 (authorizing private civil action by a citizen "who ***has been injured*** by another person's use or employment" of a method declared unlawful by the statute) (emphasis added); G.L. c. 93A § 11 (authorizing suit by a person engaged in business "who suffers any loss of money or property...as a result of" a business person's unlawful practice). *See also Essex Reg'l Ret. Bd. v. Swallow*, 481 Mass. 241, 252 (2019) (where legislature has carefully employed a term in one place and excluded it another, it should not be implied where excluded); *Commonwealth v. Wimer*, 480 Mass. 1, 5 (2018) (it is instructive to compare language at issue to language found elsewhere in same statute).

Not surprisingly there is very little Massachusetts case law on the proper application of the plain and clear language in § 4, undoubtedly because actions against persons such as the Former Directors here have not been brought. The only Massachusetts appellate case that comes close to the topic is *Lowell Gas Co. v. Attorney General*, 377 Mass. 37 (1979). In that case, the Attorney General alleged that two gas companies inflated their prices and overcharged their clients. *Id.* at 38-41. The company defendants argued that the Attorney General lacked standing to sue under § 4 because, although they were still in business, they had stopped the alleged unfair and deceptive conduct. *Id.* The Court held that the Attorney General had standing to sue because the Attorney General's complaint implied that the defendants' unfair methods were continuing. *Id.* But even if the practices had ceased, the Court, in *dicta*, explained that

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(authorizing action "[i]f the attorney general has reason to believe that any person is using, has used, or is about to use" unlawful acts under the statute).

injunctions could be issued because "the broad remedial language of section 4 cannot be read to preclude suits by the [Attorney General] against parties who have engaged in, but recently suspended, practices violative of c. 93A" *id.* at 47-48, particularly in circumstances where the defendants remained in business, and presumably could resume the unlawful activities. *Id.* Here, the Former Directors left Purdue before the lawsuit was filed and the Attorney General has not alleged, nor could she, that these Former Directors have plans to resume activities that the Attorney General complains the company engaged in while they were directors.[4]

In addition, § 2 of Chapter 93A provides that "the courts will be guided by the interpretations given by the Federal Trade Commission [("FTC")] and the Federal Courts to section 5(a)(1) of the Federal Trade Commission Act" when interpreting § 4 of the statute. 15 U.S.C. 45(a)(1). In language strikingly similar to that in § 4, the Federal Trade Commission Act authorizes the FTC to sue when it "has reason to believe" that a person "is violating, or is about to violate" the law. 15 U.S.C. § 13(b). In *Fed. Trade Comm'n v. Shire ViroPharma, Inc.*, 917 F.3d 147 (3rd Cir. 2019), Shire ViroPharma challenged the FTC's right to sue after the FTC brought an action against it based on prior conduct in connection with a drug it no longer owned. *Id.* at 149. The Court affirmed the dismissal of the FTC's complaint explaining that the plain language of "Section 13(b) [did] not permit the FTC to bring a claim based on long-past conduct

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[4] The same reasoning also requires the dismissal of the FAC against defendants Ilene Lefcourt Sackler, David Sackler, Jonathan Sackler, Kathe Sackler, Mortimer Sackler, Richard Sackler and Theresa Sackler, who resigned from the Board more recently, but before the filing of the FAC. "[T]he question whether a plaintiff has standing is evaluated as of the time the *operative* complaint is filed." *Hunter v. Branch Banking & Tr. Co.*, No. 3:12-CV-2437-D, 2013 WL 4052411, at *3 n.4 (N.D. Tex. Aug. 12, 2013) (emphasis in original) (no standing where plaintiff lacked standing at the time of the amended complaint, even though plaintiff had standing at the time of its initial complaint); *Mink v. Suthers*, 482 F.3d 1244, 1255 (10th Cir. 2007) (same). Because they were also former directors at the time the FAC was filed and there is likewise no allegation that they intend to resume their positions, they are also entitled to dismissal.

without some evidence that the defendant 'is' committing or 'is about to' commit another violation." *Id.* at 157. *See Fed. Trade Comm'n v. Hornbeam Special Situations, LLC*, 2018 WL 6254580 (N.D. Ga. Oct. 15, 2018) (plain language of Section 13(b) requires FTC to plead facts to support its reason to believe that each defendant is violating or is about to violate the law); *Fed. Trade Comm'n v. Nat'l Urological Group, Inc.*, 2005 WL 8155166 (N.D. Ga. June 24, 2005) (finding that § 13(b) cannot be used to remedy past violations because statute is limited to situations where a person is "violating or is about to violate" a law).

In *Shire*, the FTC tried and failed to persuade the court that the company's incentives and opportunities to resume misconduct were close enough to support a finding that the company was "about to violate" the law. *Shire*, 917 F.3d at 160. Here, there are no such allegations regarding the former Directors, nor could there be.

Because the Attorney General lacks authority to sue the Former Directors under § 4 of Chapter 93A, the case against them should be dismissed.

2. The Attorney General cannot sue Former Directors for public nuisance.

In Count II of the FAC, the Attorney General alleges that each defendant created and maintained a public nuisance (¶ 904) and that she is "empowered to bring a *parens patriae* action on behalf of the Commonwealth for abatement of a public nuisance." (¶ 903). It is established law in Massachusetts that in order for the Attorney General to bring a public nuisance claim to abate or remove a public nuisance, there must be an immediate required need for injunctive relief or other related court order. *See Attorney Gen. v. Metro. R.R. Co.*, 125 Mass. 515, 516 (1878) ("The jurisdiction of a court of equity to abate an existing, or prevent a threatened nuisance, upon information filed by the attorney general, is limited to those public nuisances which affect or endanger the public safety or convenience, and require immediate judicial interposition."); *see*

*also Attorney Gen. v. Baldwin*, 361 Mass. 199, 207-08 (1972) (with respect to nuisances, "abate" means removal).

Accordingly, in addition to the grounds for dismissal set forth in the Individual Director's 12(b)(6) Memorandum, Count II should be dismissed against the Former Directors because there is no immediate need for injunctive relief with respect to them. The Former Directors all left Purdue before the Attorney General filed the action. There is no conduct by the Former Directors that the Court could enjoin, "abate" or remove in this case, nor is there a public nuisance.

Because the Attorney General failed to allege any proper basis for her claims of public nuisance against the former Directors, those claims should be dismissed.

## CONCLUSION

For these reasons, the Former Directors respectfully requests that the case against them be dismissed with prejudice.

Dated: April 1, 2019

Respectfully submitted,

DEFENDANTS BEVERLY SACKLER, PAULO COSTA, RALPH SNYDERMAN, AND JUDITH LEWENT

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