COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.		SUPERIOR COURT
COMMONWEALTH OF MASSACHUSETTS, Plaintiff, v. PURDUE PHARMA L.P, et al, Defendants.	:	Civil Action No. 18-1808-BLS2 LEAVE TO FILE EXCESS PAGES GRANTED ON FEBRUARY 27, 2019

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS CRAIG LANDAU, JOHN STEWART AND MARK TIMNEY'S MOTION TO DISMISS THE FIRST AMENDED COMPLAINT

Dated: March 1, 2019
Boston, Massachusetts

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PRELIMINARY STATEMENT

With its 913 paragraphs and 274 pages, the Commonwealth's First Amended Complaint (the "Complaint") against Purdue Pharma L.P., Purdue Pharma Inc. (collectively "Purdue") and a number of Purdue's current and former directors and officers is undoubtedly long. But that length does not make up for the fact that the Complaint's allegations against the moving Defendants here – three current and former Purdue Chief Executive Officers, John Stewart, Mark Timney, and Craig Landau (the "Officers") – are wholly insufficient to sustain jurisdiction over them in this action.

As CEOs of a company that does business in each of the fifty states, it is not surprising that the Officers directed or oversaw Purdue's operations on a national scale. It does not follow, however, that the Officers are subject to personal jurisdiction in each state in which Purdue does business. Under both the Massachusetts long-arm statute and constitutional due process considerations, more is required to establish jurisdiction over the Officers in Massachusetts: in particular, the Commonwealth must show that each Officer personally and directly participated in conduct purposefully directed towards Massachusetts and that its claims arise from that conduct.

The Commonwealth has attempted, and failed, to make that showing. The vast majority of the Commonwealth's allegations boil down to the unremarkable proposition that, as CEOs, the Officers each oversaw Purdue's national operations and were aware that Purdue sold products in Massachusetts. But, as confirmed in the Officers' sworn declarations, none of them were personally involved in Purdue's sales and marketing activities in Massachusetts, and Massachusetts was of no particular focus for any of them. For each Officer, the Commonwealth also asserts less than ten allegations (specifically addressed in the Appendix hereto) that attempt to tie them to Massachusetts. As detailed in the Officers' sworn declarations, many of these

allegations are just plain wrong. Among other things, the meeting Mr. Stewart attended at Massachusetts General Hospital ("MGH") did not relate to the marketing or promotion of opioids, Mr. Timney did not direct the creation of a call center to target prescribers in Massachusetts and, contrary to the allegations in the Complaint, Dr. Landau did not attend any conferences in Massachusetts. Equally importantly, the Commonwealth mischaracterizes many of the documents it cites in the Complaint to give the false impression that the Officers were actively involved in alleged misconduct in or directed towards Massachusetts. These and other examples lay bare the Commonwealth's attempts to create ties between the Officers and Massachusetts where none actually exist.

The Complaint falls far short of demonstrating that the requirements of either the Massachusetts long-arm statute or the Due Process Clause of the U.S. Constitution have been met. To the contrary, if the Officers' incidental contacts with Massachusetts – which were unavoidable in their role as CEO of a national corporation – are sufficient to create jurisdiction here, any officer of a corporation with nationwide activities would be subject to jurisdiction in each of the 50 states. On the facts of this case, the Officers are not subject to personal jurisdiction in Massachusetts; the opioid crisis in Massachusetts, while certainly real and severe, does not justify overlooking this reality. The Officers should be dismissed from this action with prejudice for lack of personal jurisdiction, pursuant to Mass. R. Civ. P. 12(b)(2).

Even if the Commonwealth could meet its burden of proving that this Court has personal jurisdiction over the Officers – which it cannot – the Commonwealth's claims against Mr. Stewart, who left Purdue in 2013, are barred by the applicable statutes of limitations.[1] For

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[1] Defendant Stewart moves on this additional ground solely for purposes of efficiency and, in doing so, does not concede that the Court has personal jurisdiction over him or waive his personal jurisdiction defense. See Mass. R. Civ. P. 12(b) ("No defense or objection is waived by *(cont'd)*

this independent reason, Mr. Stewart should be dismissed from this action pursuant to Mass. R. Civ. P. 12(b)(6).[2]

FACTUAL BACKGROUND[3]

A. The Officers' Exceedingly Minimal Contacts With Massachusetts

In their respective tenures as CEO, each of the Officers served as the lead executive of Purdue, a company that does business in each of the fifty states. In that role, the Officers did, indeed, "oversee," "direct," and "manage" Purdue's nationwide activities. Contrary to the allegations in the Complaint, however, the Officers were not personally involved in Purdue activities that were purposefully directed towards Massachusetts, as required to establish jurisdiction over them here. As set forth in their declarations, none of the Officers is a resident of Massachusetts, none has any other significant contacts with Massachusetts, and none personally directed or participated in Purdue's sales and marketing of opioid medications in Massachusetts. (Stewart Decl. ¶¶ 3, 8, 10, 11; Timney Decl. ¶¶ 3, 11, 12, 13; Landau Decl. ¶¶ 3, 10, 14, 15, 16.) More specifically, none of the Officers:

(cont'd from previous page)
being joined with one or more other defenses or objections in a responsive pleading or motion."); Ross v. Ross, 371 Mass. 439, 443 n.2 (1976) (the inclusion of a 12(b)(6) argument in a motion to dismiss "did not constitute a waiver of the assertion that the court lacked jurisdiction").

[2] The Officers also join in the motion to dismiss filed by Purdue (which does not contest that they are subject to jurisdiction in Massachusetts), to the extent applicable to the Commonwealth's claims against the Officers.

[3] For purposes of this motion, the Officers assume, without conceding, the truth of the factual allegations in the Complaint. Conclusory statements in the Complaint, however, are "not entitled to the assumption of truth." Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009); see also Iannacchino v. Ford Motor Co., 451 Mass. 623, 635-36 (2008). On a motion to dismiss for lack of personal jurisdiction, the court may consider the parties' affidavits or declarations and their attached exhibits. See, e.g., Droukas v. Divers Training Acad., Inc., 375 Mass. 149, 150-51 (1978). The Officers submit herewith the declarations of John Stewart, Mark Timney, and Craig Landau in support of their Motion To Dismiss The Amended Complaint (hereinafter the "Stewart Decl.," the "Timney Decl.," and the "Landau Decl.," respectively).

- Resided in Massachusetts (Stewart Decl. ¶ 3; Timney Decl. ¶ 3; Landau Decl. ¶ 3);

- Served as an owner, officer, or employee of any business located or headquartered in the Commonwealth of Massachusetts (Stewart Decl. ¶ 7; Timney Decl. ¶ 7; Landau Decl. ¶ 7);

- Owned or leased any real estate located in Massachusetts (Stewart Decl. ¶ 4; Timney Decl. ¶ 4; Landau Decl. ¶ 4);

- Had any bank or brokerage accounts located in Massachusetts (Stewart Decl. ¶ 5; Timney Decl. ¶ 5; Landau Decl. ¶ 5);

- Was involved in the day-to-day marketing or promotion of prescription opioid medications as CEO of Purdue (Stewart Decl. ¶ ¶ 10, 11; Timney Decl. ¶¶ 12, 13; Landau Decl. ¶¶ 15, 16);

- Was personally involved in the management or direct oversight of Purdue sales representatives in Massachusetts (Stewart Decl. ¶ 10; Timney Decl. ¶ 13; Landau Decl. ¶ 15);

- Themselves promoted Purdue's opioid medications to any doctors in Massachusetts or personally made any payments to any doctors in Massachusetts (Stewart Decl. ¶ 11; Timney Decl. ¶ 13; Landau Decl. ¶ 16);

- Personally directed any Purdue employees to visit particular doctors in Massachusetts, to make payments to any particular doctors in Massachusetts, or to engage in particular promotional activities in Massachusetts (Stewart Decl. ¶ 11; Timney Decl. ¶ 13; Landau Decl. ¶ 16); or

- Lobbied or attempted to influence Massachusetts legislation concerning opioids (Stewart Decl. ¶ 17; Timney Decl. ¶ 14; Landau Decl. ¶ 21).

John Stewart

John Stewart served as CEO of Purdue from June 2007 to December 2013. (Stewart Decl. ¶ 1.) Mr. Stewart was not employed by Purdue at any time during the period covered by applicable statutes of limitations. He is a resident of Florida (Id. ¶ 3), and has never lived in Massachusetts. (Id. ¶ 3.) Mr. Stewart made only two brief visits to Massachusetts in his role as CEO of Purdue, and neither visit related to the marketing or promotion of opioid medications. (Id. ¶ 12.)

Mark Timney

Mark Timney served as CEO of Purdue from January 2014 to June 2017. (Timney Decl. ¶ 1.) He is a resident of Connecticut (Id. ¶ 3), and has never lived in Massachusetts. (Id. ¶ 3.) Mr. Timney never visited Massachusetts while serving as CEO of Purdue. (Id. ¶ 9.)

Craig Landau

Dr. Craig Landau has served as CEO of Purdue since June 2017 and previously served as Purdue's Chief Medical Officer and Head of Clinical Development. (Landau Decl. ¶ 1.) He is a resident of Connecticut (Id. ¶ 3), and has never lived in Massachusetts. (Id. ¶ 3.) In February 2018, before this case was filed, Dr. Landau directed that Purdue cease deploying sales personnel to promote its opioid medications. (Id. ¶ 13.) Dr. Landau has not visited Massachusetts as CEO of Purdue nor in the instances alleged in the Complaint. (Id. ¶¶ 10, 11, 12.)

B. The Commonwealth's Conclusory And Factually Inaccurate Allegations

The Complaint asserts claims for unfair and deceptive trade practices, in violation of M.G.L. ch. 93A, and public nuisance against Purdue Pharma L.P., Purdue Pharma Inc., thirteen current and former directors of Purdue Pharma Inc., a former Purdue vice president of sales and marketing, and the three Officers. With respect to the Officers, the Complaint is replete with conclusory allegations that the Officers "oversaw," "directed," or "managed" Purdue's alleged activities in or directed towards Massachusetts, "knew and intended" for Purdue sales representatives to engage in alleged misconduct in Massachusetts, and that certain events –

with no causal nexus whatsoever to the Officers – occurred while each served as CEO (or, in Dr. Landau's case, before he became CEO).[4]

As to each of the Officers, the Complaint also includes less than ten allegations that purportedly tie them directly to Massachusetts. As set forth in the accompanying Appendix, however, the majority of these allegations are factually inaccurate, and none are legally sufficient to permit the exercise of jurisdiction over the Officers here. Further, the Commonwealth takes liberties with the documents on which its allegations rely, in some instances stretching beyond reason the propositions those documents purportedly support. For example, the Commonwealth alleges that "staff gave Stewart and the Board a map correlating dangerous prescribers in Massachusetts with reports of oxycodone poisoning, burglaries, and robberies." (Compl. ¶ 646.) But the map referenced and cited in that allegation covers the entire Northeast quarter of the United States, including as far west as Indiana and as far south as Virginia. Despite the Commonwealth's attempts to portray this document as Massachusetts-specific, the document simply does not support the assertion that Mr. Stewart had specific knowledge of Massachusetts, let alone that he personally engaged in activities aimed squarely at Massachusetts. The Commonwealth also alleges that Mr. Timney "sent" a Purdue staff member to attend a meeting on the opioid crisis at Tufts. (Id. ¶ 781.) But Mr. Timney was merely copied on the email communication the Commonwealth cites to support that allegation, and the document otherwise gives no indication that Mr. Timney "sent" anyone to the relevant meeting. As to Dr. Landau, he is alleged to have "informed a staff member that he was working with Massachusetts opioid maker Collegium Pharmaceuticals on a strategy to position extended-release and long-acting opioids as safer than immediate release opioids." (Id. ¶ 799.) But the document the

[4] (Compl. ¶¶ 597, 600, 631, 683, 697, 754, 778, 789, 791, 803, 830, 820, 842-50, 852-63.)

Commonwealth cites in support of that allegation is an email communication between Dr. Landau and an FDA employee regarding Purdue's efforts to lead the development of a class-wide risk mitigation strategy for extended-release opioids. (Landau Decl. ¶ 18.) In other words, the document has nothing to do with positioning of extended-release opioids in relation to immediate-release opioids, let alone doing so along with Collegium, which is a direct competitor of Purdue's. (Id.) These examples demonstrate that the Commonwealth's allegations with respect to jurisdiction (and otherwise) cannot be taken at face value.[5]

ARGUMENT

I. THIS COURT LACKS PERSONAL JURISDICTION OVER THE OFFICERS

It is the Commonwealth's burden to establish sufficient facts to support the existence of personal jurisdiction as to each defendant. See Droukas, 375 Mass. at 151. To do so, it must show that jurisdiction is both (i) authorized by the Massachusetts long-arm statute, M.G.L. ch. 223A, § 3, and (ii) consistent with the due process requirements of the U.S. Constitution. See Stanton v. AM Gen. Corp., 50 Mass. App. Ct. 116, 117 (2000). "Because the long-arm statute imposes specific constraints on the exercise of personal jurisdiction that are not coextensive with the parameters of due process, and in order to avoid unnecessary consideration

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[5] In addition to mischaracterizing documents, the Complaint also attempts to draw connections between the Officers and Massachusetts that are wholly inadequate to ground jurisdiction. For example, the Complaint alleges that Mr. Timney "attended the national sales meeting with hundreds of Purdue sales reps, including those from Massachusetts." (Compl. ¶ 775.) Even if true, attending a meeting (which is not alleged to have occurred in Massachusetts) at which individuals associated with Massachusetts also happen to be present cannot constitute a contact with Massachusetts for jurisdictional purposes. The Complaint also alleges that Dr. Landau "flagg[ed]" certain publications, including a publication from Massachusetts General Hospital. (Id. ¶ 809.) Again, even if true, this alleged conduct does not establish any nexus between Dr. Landau and Massachusetts. These allegations are reflective of the extreme lengths the Commonwealth has gone to in an attempt to establish jurisdiction over the Officers.

of constitutional questions, a determination under the long-arm statute is to precede consideration of the constitutional question." SCVNGR, Inc. v. Punchh, Inc., 478 Mass. 324, 325 (2017).

A. Jurisdiction Is Not Authorized Under The Massachusetts Long-Arm Statute

The Commonwealth alleges that personal jurisdiction over the Officers is warranted under sections (a), (c), and (d) of the Massachusetts long-arm statute. (Compl. ¶¶ 842, 852, 862.) The Complaint's allegations are insufficient to support the exercise of personal jurisdiction over the Officers under any of those sections, as discussed below.

1. None Of The Officers Has Transacted Any Business In Massachusetts

Section 3(a) of the long-arm statute authorizes personal jurisdiction over any person "arising from the person's . . . transacting any business in this commonwealth." M.G.L. ch. 223A, § 3(a). Under section 3(a), "the facts must satisfy two requirements – the defendant must have transacted business in Massachusetts, and the plaintiff's claim must have arisen from the transaction of business by the defendant." Exxon Mobil Corp. v. Attorney Gen., 479 Mass. 312, 317 (2018) (internal quotation marks omitted) (emphasis added). Isolated transactions, or those "void of any purposeful intent on the part of the defendant to avail itself of the privilege of conducting activities in the forum State," do not constitute transactions of business under section 3(a). Intech, Inc. v. Triple "C" Marine Salvage, Inc., 444 Mass. 122, 127 (2005) (concluding that advertising and telephoning the plaintiff in Massachusetts were insufficient); Droukas, 375 Mass. at 154 (holding that placing an advertisement, receiving a telephone call, exchanging correspondence with, and shipping merchandise to the plaintiff in Massachusetts were insufficient). Conduct must be "aimed squarely at Massachusetts targets" to be considered a transaction of business under section 3(a). High Country Investor, Inc. v. McAdams, Inc., 221 F.

Supp. 2d 99, 102 (D. Mass. 2002) (dismissing nonresident defendant for lack of personal jurisdiction) (internal citation omitted). Mere knowledge that some act might take place in the Commonwealth is insufficient to establish jurisdiction under section 3(a). See Fletcher Fixed Income Alpha Fund, Ltd. v. Grant Thornton LLP, 89 Mass. App. Ct. 718, 723 (2016) ("knowledge that [another party] would send" reports that defendant prepared "to Massachusetts does not constitute a contact with Massachusetts sufficient to support jurisdiction" under section 3(a)).

As to the second requirement, the Supreme Judicial Court has interpreted the "arising from" language as establishing a "but for" test under which "a claim arises from a defendant's transaction of business in the forum State if the claim was made possible by, or lies in the wake of, the transaction of business in the forum State." Nat'l Med. Care, Inc. v. Home Med. Of Am., Inc., No. 001225, 2002 WL 31187683, at *3 (Mass. Super. Ct. Aug. 9, 2002) (Houston, J.) (dismissing for lack of personal jurisdiction); see also Stanton, 50 Mass. App. Ct. at 119 (affirming dismissal where "the plaintiff's injury cannot be said to have grown out of" the defendant's contacts with Massachusetts).

Jurisdiction over the Officers under section 3(a) may not be premised on Purdue's alleged activities in Massachusetts, or on conclusory allegations regarding their roles as CEOs of Purdue. To the contrary, Massachusetts case law is clear that "jurisdiction over a corporation does not automatically secure jurisdiction over its officers or employees." Morris v. UNUM Life Ins. Co. of Am., 66 Mass. App. Ct. 716, 720 (2006) (internal citation omitted); see also Roy v. Roy, 47 Mass. App. Ct. 921 (1999) (affirming that a defendant's status as officer and director of a Massachusetts corporation did not establish personal jurisdiction). Accordingly, to establish personal jurisdiction over the Officers based upon section 3(a) of the long-arm statute, the

Commonwealth must allege facts sufficient to show that the Officers personally transacted business in Massachusetts. For example, in Johnson Creative Arts, Inc. v. Wool Masters, Inc., the court found that it had jurisdiction over a defendant corporate entity but did not have personal jurisdiction over the entity's secretary (and major shareholder) because the plaintiff failed to show that the secretary had any Massachusetts contacts that would constitute "transacting business" and "[p]laintiff's conclusory allegation that the individual defendants own and control the corporate defendant [wa]s insufficient." 573 F. Supp. 1106, 1111 (D. Mass. 1983), aff'd, 743 F.2d 947 (1st Cir. 1984); see also Grice v. VIM Holdings Grp., LLC, 280 F. Supp. 3d 258, 278-79 (D. Mass. 2017) (noting that "Massachusetts courts have required 'more than mere participation in the corporation's affairs' in order to assert personal jurisdiction," rather, they require sufficient "personal in-forum contacts" between a corporate officer and Massachusetts) (quoting M-R Logistics, LLC v. Riverside Rail, LLC, 537 F. Supp. 2d 269, 280 (D. Mass. 2008)).[6]

Under these standards, the Complaint's allegations against the Officers are entirely insufficient to establish personal jurisdiction under section 3(a). The majority of the Commonwealth's allegations against the Officers simply assert that, as CEOs of Purdue, they were aware of, and ultimately oversaw, the Company's activities in Massachusetts. None of

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[6] The Commonwealth's vague, conclusory allegations that the Officers "oversaw," "directed," or "managed" Purdue's alleged activities in Massachusetts, that they "knew and intended" for Purdue sales representatives to engage in alleged misconduct in Massachusetts, and that certain events with no causal link to them occurred while each served as CEO, see supra at [ ], are thus insufficient because they do not allege personal activity by the Officers. See Johnson Creative Arts, 573 F. Supp. at 1111. Those conclusory allegations also fail to establish jurisdiction over the Officers under sections 3(c) and 3(d). See Zises v. Prudential Ins. Co. of Am., No. CA-80-1886-Z, 1981 WL 27044, at *4 (D. Mass. Mar. 10, 1981) (noting that jurisdiction under sections 3(c) and 3(d) requires specific allegations that defendant personally engaged in tortious conduct).

these allegations establish that any of the Officers personally transacted business in Massachusetts. The handful of specific allegations that attempt to tie each Officer to the Commonwealth fare no better. As detailed in the accompanying Appendix, none of these allegations suggest that the Officers themselves transacted business in the Commonwealth, nor can the Commonwealth's claims be said to have arisen from the handful of alleged contacts identified in the Complaint. As such, the Complaint fails to establish jurisdiction under section 3(a).

2. None Of The Officers Engaged In Any Conduct In Massachusetts Related To The Commonwealth's Claims

Under section 3(c) of the long-arm statute, the Court is authorized to exercise personal jurisdiction over a defendant who "cause[ed] tortious injury by an act or omission in this commonwealth." M.G.L. ch. 223A, § 3(c). Section 3(c) requires pleading tortious harm caused by actions taken in Massachusetts. See Bradley v. Cheleuitte, 65 F.R.D. 57, 59 (D. Mass. 1974) (noting that "[s]ection 3(c) is intended to apply only when the act causing the injury occurs within the Commonwealth" and dismissing defendants for lack of personal jurisdiction). Section 3(c) "distinguishes between intentional and negligent acts." Lyons v. Duncan, 81 Mass. App. Ct. 766, 770 (2012) (finding that "plaintiffs cannot succeed in establishing" section 3(c) jurisdiction over negligent misrepresentation claims); Bradley, 65 F.R.D. at 60 (dismissing medical negligence claim for want of jurisdiction under section 3(c) where the acts, which occurred outside of the state, were "at most negligent"). Accordingly, the Commonwealth may not rely on section 3(c) to establish personal jurisdiction with respect to Count Two of the Complaint – for public nuisance – as that Count sounds in negligence. (See Compl. ¶ 910 (public nuisance claim asserting that the Officers' conduct "was unreasonable in light of the lack of scientific support for

[Purdue's] claims and was negligent and reckless with regard to the known risks of Purdue's drugs") (emphasis added).)

With respect to Count One, which alleges a violation of M.G.L. ch. 93A, the Complaint premises jurisdiction under section 3(c) on the same allegations discussed above. But, with one exception, the Complaint does not allege that the Officers committed any acts in Massachusetts.[7] See Med. Spectroscopy, Inc. v. Zamir, No. 1584CV03390, 2016 WL 4077289, at *2 (Mass. Super. Ct. June 14, 2016) (Salinger, J.) (finding personal jurisdiction not supported under section 3(c) where the plaintiffs "presented no evidence that their claims arise from or out of alleged misconduct . . . that took place in Massachusetts"). The Complaint alleges that Mr. Stewart met with MGH officials in Massachusetts regarding Purdue's financial support for the MGH pain program. As explained in Mr. Stewart's Declaration, however, the MGH pain program focused on a wide variety of topics relating to pain diagnosis and management, and Mr. Stewart's meeting with MGH officials – which lasted no more than a few hours – did not involve any promotional discussion of Purdue's opioid medications. (Stewart Decl. ¶ 12.) This sole visit cannot plausibly be said to have caused any tortious injury, and thus cannot serve as a basis for this Court's exercise of jurisdiction over Mr. Stewart or any other Defendant.

In support of its assertion of personal jurisdiction under section 3(c), the Commonwealth also offers the wholly conclusory allegation that the Officers "directed" Purdue to violate a consent judgment issued by this Court. (Compl. ¶¶ 859-60.) The Complaint offers no facts whatsoever to support this allegation, which need not be credited. See Harvard Climate Justice Coal. v. President & Fellows of Harvard Coll., No. SUCV201403620H, 2015 WL

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[7] As discussed above and in Dr. Landau's Declaration, although the Commonwealth alleges that Dr. Landau attended two conferences on opioids in Boston, Dr. Landau did not actually attend those conferences. (Landau Decl. ¶¶ 11, 12.)

1519036, at *2 (Mass. Super. Ct. Mar. 17, 2015) (Wilson, J.) (in evaluating motions to dismiss courts must "look beyond the conclusory allegations in the complaint" and "determine if the nonmoving party has pled 'factual allegations plausibly suggesting (not merely consistent with) an entitlement to relief'") (quoting Curtis v. Herb Chambers I-95, Inc., 458 Mass. 674, 676 (2011) and Iannacchino, 451 Mass. at 636). The Officers dispute that Purdue violated the consent judgment, much less that any of them directed Purdue to do so. Even if this conclusory allegation were true, however, it would not give rise to a tortious injury, and therefore would not support personal jurisdiction under section 3(c). See Roberts v. Legendary Marine Sales, 447 Mass. 860, 864 (2006) ("damages . . . grounded in breach of contract . . . do not constitute 'tortious injury' as contemplated under §3(c)").[8] The Commonwealth has failed to establish that jurisdiction is proper under section 3(c).

3. The Officers Have Not Caused Tortious Injury In Massachusetts

To establish jurisdiction under section 3(d) of the long-arm statute, a plaintiff must show (1) that the defendant "cause[d] tortious injury" in Massachusetts, and (2) that the defendant "regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in [Massachusetts]." M.G.L. ch. 223A, § 3(d). As an initial matter, personal jurisdiction jurisprudence distinguishes between two types of jurisdiction: specific and general. See Walden v. Fiore, 571 U.S. 277, 283 n.6 (2014). Although the Complaint purports to assert specific

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[8] Claims regarding an alleged breach of a consent judgment generally sound in contract, not tort. See United States v. FMC Corp., 531 F.3d 813, 819 (9th Cir. 2008) ("Contract principles are generally applicable in our analysis of consent decrees.") (internal quotation marks omitted); Lloyd's Material Supply Co. v. Regal Beloit Corp., No. CV 16-8027 DMG (JPRx), 2017 WL 5172206, at *4 (C.D. Cal. June 27, 2017) (claim for violation of a consent judgment would sound in contract).

jurisdiction under section 3(d), the weight of Massachusetts authority holds that section 3(d) provides only for general jurisdiction. See Fletcher, 89 Mass. App. Ct. at 724 (noting that "the cases tend to support" that view). "For an individual, the paradigm forum for the exercise of general jurisdiction is the individual's domicile." Daimler AG v. Bauman, 571 U.S. 117, 137 (2014). None of the Officers, however, resides in Massachusetts nor have they resided in Massachusetts in the past. (See Compl. ¶ 11; Stewart Decl. ¶ 3; Timney Decl. ¶ 3; Landau Decl. ¶ 3.) As the Commonwealth cannot establish general jurisdiction over the Officers, it cannot rely upon section 3(d) to support personal jurisdiction. See Pettengill v. Curtis, 584 F. Supp. 2d 348, 357 (D. Mass. 2008) (holding that the plaintiff could not rely on section 3(d) where the facts did not support general jurisdiction and dismissing individual defendants for lack of personal jurisdiction).

Even if section 3(d) were considered a basis for specific jurisdiction – which it is not – the Complaint fails to satisfy the requirements of section 3(d). As to the first prong of section 3(d), the Complaint does not establish that any of the Officers "cause[d] tortious injury" in Massachusetts. "Where the defendant is a non-resident corporate officer," section 3(d) requires the plaintiff to "make some showing of direct personal involvement by the corporate officer in some action which caused the tortious injury." New World Techs., Inc. v. Microsmart, Inc., No. CA943008, 1995 WL 808647, at *2 (Mass. Super. Ct. Apr. 12, 1995) (Neel, J.) (dismissing corporate officer defendant for lack of personal jurisdiction); see also Zises, 1981 WL 27044 at *4 (noting that "while [defendant] was Chairman of the Board [], plaintiff has failed to allege that [defendant] committed any specific act . . . Jurisdiction over defendant [] therefore cannot be predicated on either section 3(c) or 3(d), since both sections require allegations that defendant committed a tortious act against plaintiff."). As reflected in the

accompanying Appendix and the Officers' Declarations, and as discussed above, the Commonwealth's allegations against the Officers are largely factually inaccurate. In any event, the Commonwealth does not allege the Officers' direct personal involvement in any conduct that could plausibly be said to have caused tortious injury. The Complaint thus fails to satisfy the requirements of the first prong of section 3(d).

The Complaint also fails to satisfy the second prong of the section 3(d) analysis. The Complaint vaguely asserts that "many defendants" "regularly do business or engage in a persistent course of conduct in Massachusetts" (Compl. ¶ 873), but contains no allegations identifying any such business activities or conduct by any of the Officers. To the contrary, the Officers' declarations establish that they have not engaged in such business activities or persistent course of conduct. (See Stewart Decl. ¶¶ 4-12; Timney Decl. ¶¶ 4-13; Landau Decl. ¶¶ 4-17 (describing Officers' minimal contacts with Massachusetts).) As reflected in the Officers' declarations, they have had very few contacts with Massachusetts at all, and even fewer in their capacities as CEOs of Purdue. (Id.) Only Mr. Stewart actually visited Massachusetts while CEO of Purdue, and his three visits to the Commonwealth over a seven-year period (one of which was for a vacation weekend in Chatham) are insufficient to establish the "persistent course of conduct" required to establish jurisdiction under section 3(d). See Kolikof v. Samuelson, 488 F. Supp. 881, 884 (D. Mass. 1980) (finding no personal jurisdiction under section 3(d) over corporate president who occasionally visited Massachusetts even where jurisdiction existed over corporation).

Finally, in a far-fetched attempt to establish jurisdiction under section 3(d), the Complaint alleges that the Officers "derived substantial revenue from goods used or consumed in Massachusetts" (Compl. ¶ 864), because Purdue allegedly earned 2.8% of its revenue from

Massachusetts and makes no effort to segregate Massachusetts revenue from money paid to its directors and officers (id. ¶¶ 865, 869, 871-72 & Ex. 2). This deeply flawed reasoning conflates Purdue's revenue from sales of its products in Massachusetts, on the one hand, with the Officers' compensation for fulfilling the terms of their employment with Purdue on the other. Section 3(d) does not support personal jurisdiction based on the indirect receipt of funds that allegedly bear some connection to Massachusetts. See Merced v. JLG Indus., Inc., 193 F. Supp. 2d 290, 293-94 (D. Mass. 2001) (granting motion to dismiss for lack of personal jurisdiction and noting that while "Massachusetts courts have construed the substantial revenue prong liberally . . . there are still limits on Massachusetts long-arm jurisdiction;" "[i]t is not enough" to argue that a party "benefitted from sales" made by a separate entity in Massachusetts). Not surprisingly, courts considering other long-arm statutes similar to section 3(d) have concluded that even an out-of-state employee's receipt of salary from a corporation domiciled in a forum state does not demonstrate that the employee "derived substantial revenue" from that state. See John Gallup & Assocs., LLC v. Conlow, No. 1:12-CV-03779-RWS, 2013 WL 3191005, at *9 (N.D. Ga. June 21, 2013); Hartsel v. Vanguard Grp., Inc., No. 5394-VCP, 2011 WL 2421003, at *12 (Del. Ch. June 15, 2011), aff'd 38 A.3d 1254 (Del. 2012) (rejecting argument that high-level officers derived substantial revenue from fees charged by their employers in the forum state and noting the lack of "case law or other authority for the proposition that a defendant-employee's receipt of a salary based on services rendered to a company that allegedly derives substantial revenue from its activities in Delaware is [] sufficient . . . to confer personal jurisdiction over that defendant"). This is undoubtedly correct: if the attenuated link the Commonwealth alleges were sufficient, any officer of a corporation with nationwide sales would be subject to jurisdiction in all fifty states.

For all of these reasons, the Commonwealth has failed to satisfy its burden to show that the long-arm statute authorizes the exercise of personal jurisdiction over the Officers.

B. Exercising Jurisdiction Over The Officers Would Offend Principles Of Due Process

Because the Commonwealth has failed to establish that jurisdiction over the Officers is appropriate under the long-arm statute, the Court's inquiry may end here. See Morris, 66 Mass. App. Ct. at 722 (affirming dismissal of nonresident corporate employees and finding it "unnecessary . . . to consider any due process issues" where long-arm statute did not provide a basis for jurisdiction). Nevertheless, even if the Commonwealth could demonstrate that personal jurisdiction over the Officers were authorized by the Massachusetts long-arm statute, this Court may not exercise jurisdiction over the Officers because doing so would not comport with constitutional due process requirements. See REMF Corp. v. Miranda, 60 Mass. App. Ct. 905, 905 (2004) (noting that "[the long-arm statute] cannot authorize jurisdiction which is constitutionally unacceptable, even though the fact pattern asserted in support of jurisdiction apparently satisfies the statute's literal requirements" and affirming dismissal of nonresident defendant). The due process analysis includes three requirements: (1) that the defendant established minimum contacts with the forum state through "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum;" (2) that the claim at issue "arise[s] out of or relate[s] to the defendant's contacts with the forum;" and (3) that the assertion of jurisdiction over the defendant does not "offend traditional notions of fair play and substantial justice." Exxon, 479 Mass. at 321.

Tellingly, the Commonwealth does not make a meaningful attempt to show that the first and second prongs of the due process analysis are met. (Compl. ¶ 874.) Nor would any attempt succeed. As to the first requirement, as discussed above and in the accompanying

Appendix, and as affirmed in the Officers' declarations, the Officers had exceedingly minimal contacts with Massachusetts. None of these were of the type that would suggest "purposeful availment of the privilege of conducting activities in the forum state, thereby invoking the benefits and protection of that state's laws and making the defendant's involuntary presence before the state's courts foreseeable." United Elec., Radio & Mach. Workers of Am. v. 163 Pleasant St. Corp., 960 F.2d 1080, 1089 (1st Cir. 1992) (reversing denial of motion to dismiss for lack of personal jurisdiction). "Purposeful availment cannot be premised on the unilateral activity of another party or third person," rather a defendant's contacts with the forum state must be voluntary and "must proximately result from actions by the defendant himself." Preferred Mut. Ins. Co. v. Stadler Form Atkiengesellschaft, 308 F. Supp. 3d 463, 468 (D. Mass. 2018) (dismissing defendant for lack of personal jurisdiction) (internal quotation marks omitted); see also Kleinerman v. Morse, 26 Mass. App. Ct. 819, 825 (1989) (dismissing nonresident corporate officer defendants who had limited direct involvement in alleged conduct underlying the plaintiffs' claims).

As discussed above and in the Appendix, the vast majority of the allegations purportedly tying the Officers to Massachusetts involve their oversight and awareness of Purdue's activities at a national level. These allegations involve conduct that either was not purposefully directed towards Massachusetts or in which the Officers were not personally involved (or some combination of the two). The remaining alleged "contacts" are equally insufficient. Mr. Stewart took isolated trips to Massachusetts, including two in his role as CEO (but none to sell or promote Purdue's opioid medications). (Stewart Decl. ¶ 12.) The Officers are each alleged to have sent a Purdue staff member to Massachusetts on one occasion to attend a conference (Compl. ¶¶ 663, 781, 794), but the Officers do not recall doing so. (Stewart Decl. ¶

13; Timney Decl. ¶ 17; Landau Decl. ¶ 12.) And Dr. Landau is alleged to have worked with Massachusetts-based Analgesic Research, but that work was limited (and in any event was unrelated to the sale or promotion of Purdue's opioid medications). (Landau Decl. ¶ 17.) These contacts are not sufficient to meet the constitutional requirements for jurisdiction. See Garcia v. Right at Home, Inc., No. SUCV20150808BLS2, 2016 WL 3144372, at *2 (Mass. Super. Ct. Jan. 19, 2016) (Sanders, J.) (finding minimum contacts did not exist where individual out-of-state defendants "had little or no personal contact with Massachusetts" even though they were alleged to "control[] and/or manage[]" defendant corporate entities, "over which t[he] Court concededly ha[d] personal jurisdiction"); Preferred Mut., 308 F. Supp. 3d at 469 (speculation that a defendant "targeted" Massachusetts, without "further facts or details," was insufficient to establish minimum contacts); Morris, 66 Mass. App. Ct. at 720 (reviewing Massachusetts-produced records and sending three letters to Massachusetts were insufficient contacts for jurisdictional purposes).

The Complaint also fails to satisfy the due process "relatedness" requirement, pursuant to which the plaintiff must "show a demonstrable nexus between its claims and the defendant's forum-based activities, such that the litigation itself is founded directly on those activities." Mukarker v. City of Philadelphia, 178 F. Supp. 3d 8, 11 (D. Mass. 2016) (dismissing defendant for lack of personal jurisdiction) (internal citation omitted). As discussed above and in the Appendix, none of the Commonwealth's claims "arise out of or relate" to any of the Officers' contacts with Massachusetts. Exxon, 479 Mass. at 312. None of those contacts – including Mr. Stewart's trip to Massachusetts for a meeting regarding the MGH pain program and Dr. Landau's work with Analgesic Research – were related to the sale or marketing of opioid medications, which is the sole basis for the Commonwealth's alleged claims.

"If the plaintiff fails to satisfy the first two prongs" of the constitutional due process inquiry – as is the case here – "the Court need not reach the issue of reasonableness." Mukarker, 178 F. Supp. 3d at 11; see also Ticketmaster N.Y., Inc. v. Alioto, 26 F.3d 201, 210 (1st Cir. 1994) (noting that the third prong of the due process inquiry "evokes a sliding scale: the weaker the plaintiff's showing on the first two prongs (relatedness and purposeful availment), the less a defendant need show in terms of unreasonableness to defeat jurisdiction," and affirming dismissal of nonresident defendant). Nevertheless, it is clear that, contrary to the Complaint's assertions, exercising jurisdiction over the Officers would offend traditional notions of fair play and substantial justice. Finding jurisdiction here would suggest that corporate officers are subject to jurisdiction in all fifty states simply because they oversee nationwide activities and may have incidentally been aware of, or had unavoidable tangential involvement in, activities in Massachusetts (as in any number of other states). The Officers did not personally engage in conduct purposefully directed towards the Commonwealth of Massachusetts, had no reason to expect that they would be subject to jurisdiction in Massachusetts, and being forced to defend this action in Massachusetts would place a significant burden on the Officers. Accordingly, any attempt to exercise jurisdiction over the Officers would violate constitutional due process.

II. THE COMMONWEALTH'S CLAIMS AGAINST MR. STEWART ARE BARRED BY THE APPLICABLE STATUTES OF LIMITATIONS

Even if the Court were to find that it has personal jurisdiction over the Officers (and it should not), the Commonwealth's claims against Mr. Stewart would still fail as a matter of law because the Commonwealth's claims against him are time-barred.

The Commonwealth's public nuisance claim is governed by a three-year statute of limitations; the Chapter 93A claim is governed by a four-year statute of limitations. See M.G.L. ch. 260, §§ 2A, 5A. The Complaint fails to allege that the conduct on which the

Commonwealth's claims against Mr. Stewart are based occurred within the past four years. Indeed, as the Complaint concedes, Mr. Stewart served as CEO only until the end of 2013 (Compl. ¶¶ 597, 695), more than four years before this action was filed. The Commonwealth's claims against him are, therefore, clearly time-barred.

The Commonwealth attempts to avoid this fatal flaw by arguing that the statutes of limitations are tolled as to all Defendants under the discovery rule and because the Defendants allegedly concealed their deception from the public and the Commonwealth. (Compl. ¶¶ 835-39.) Each of these assertions fails. As to the discovery rule, "[i]ts essence is that an applicable statute of limitations will not commence to run against the plaintiff until the plaintiff knows, or reasonably should have known, that he has been harmed and that such harm may be a product of someone's negligence." Hanley v. Citizens Bank of Mass., 60 Mass. App. Ct. 1117 (2004); see also Jaycox v. Edwards, 90 Mass. App. Ct. 1115 (2016) (discovery rule applies "where a misrepresentation concerns a fact that was 'inherently unknowable' to the injured party"). The discovery rule is inapplicable in this case. As the Commonwealth acknowledged in its original complaint, the facts underlying the Commonwealth's claims are and have been public knowledge in "[e]very year since" 2007. (Dkt. No. 1, ¶¶ 161-73.)[9] The Officers' roles as CEOs of Purdue likewise have been matters of public record. The Commonwealth cannot credibly claim that it did not know it had allegedly been harmed or that the facts upon which its claims against the Officers are based were "inherently unknowable."

Nor can the Commonwealth rely upon the separate, but related, fraudulent

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[9] The Court may consider the Commonwealth's original complaint because it is a part of the record in this action and because the court may properly take judicial notice of it. See Lalchandani v. Roddy, 86 Mass. App. Ct. 819, 824 (2015) (noting that it was appropriate for the lower court to take judicial notice of documents "which were docketed pleadings and part of the record").

concealment doctrine to avoid the limitations periods. It is well-settled that, under the Massachusetts fraudulent concealment statute, M.G.L. ch. 260, § 12, the limitations period may not be tolled "unless the defendant(s) concealed the existence of a cause of action through some affirmative act done with intent to deceive." White v. Peabody Const. Co., 386 Mass. 121, 133 (1982) (internal quotation marks omitted), see also Khan v. The Dime Sav. Bank of N.Y., No. 931345E, 1993 WL 818711, at *2 (Mass. Super. Ct. Nov. 15, 1993) (finding no tolling under fraudulent concealment doctrine where no allegations of affirmative act done with intent to deceive, and dismissing claim as time-barred).[10] The Complaint does not allege that Mr. Stewart took any affirmative act to conceal any claim with intent to deceive. To the extent that the Complaint purports to allege that Mr. Stewart failed to disclose an allegedly deceptive scheme, those allegations are wholly conclusory, and in any event are insufficient to establish fraudulent concealment. See Connelly v. Bartlett, 286 Mass. 311, 317-18 (1934) ("[t]he silence of a defendant, his failure to disclose his deceit to the plaintiff, under our decisions, is not ordinarily [a] fraudulent concealment"). As a result, the doctrine has no application in this case. The Commonwealth cannot avoid the applicable statutes of limitations under either the discovery rule or based on a conclusory claim of alleged fraudulent concealment; accordingly, its claims against Mr. Stewart must be dismissed as time-barred.

CONCLUSION

The opioid crisis in the Commonwealth is unquestionably real and severe. But the crisis is not remedied by eschewing the standards for personal jurisdiction under both Massachusetts law and the Due Process Clause of the U.S. Constitution. As set forth above and

[10] A different standard may apply in cases where the defendant has a fiduciary relationship to the plaintiff. See Khan, 1993 WL 818711, at *2. However, no such relationship is alleged here and none exists.

in the accompanying Appendix, the Officers did not personally engage in conduct purposefully directed at Massachusetts, nor can the Commonwealth show that its claims arise from the Officers' conduct. The Officers therefore are not subject to personal jurisdiction in Massachusetts under either the Massachusetts long-arm statute or constitutional due process considerations. The Commonwealth's claims against Mr. Stewart are also independently barred by the applicable statutes of limitations. For these reasons, the Commonwealth's claims against Mr. Stewart, Mr. Timney, and Dr. Landau should be dismissed with prejudice.

Dated: March 1, 2019
Boston, Massachusetts

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Maya P. Florence, hereby certify that on March 1, 2019, pursuant to an agreement among the parties, a true copy of the foregoing Memorandum Of Law In Support Of Defendants Craig Landau, John Stewart And Mark Timney's Motion To Dismiss The First Amended Complaint was served by email upon the following counsel of record:

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