COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT

COMMONWEALTH OF MASSACHUSETTS,	:	
Plaintiff,	:	Civil Action No. 18-1808-BLS2
v.	:	LEAVE TO FILE EXCESS PAGES GRANTED ON MAY 17, 2019
PURDUE PHARMA L.P, et al,	:	
Defendants.	:	

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

Dated: May 31, 2019
Boston, Massachusetts

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PRELIMINARY STATEMENT[1]

In their motion to dismiss and supporting fact declarations, Defendants Craig Landau, John Stewart and Mark Timney (the "Officers") demonstrated that the Commonwealth's First Amended Complaint ("Complaint") failed to establish that jurisdiction is appropriate under either the Massachusetts long-arm statute or the due process requirements of the U.S. Constitution. In response, the Commonwealth submitted an opposition (the "Opposition") that is long on inflammatory rhetoric, but short on relevant case law or sufficiently detailed facts. On both law and facts, the Opposition fails to overcome the arguments raised in the Officers' motion and the facts asserted in their declarations; in short, the Opposition does not satisfy the Commonwealth's burden of demonstrating that jurisdiction is proper.

On the law, the Opposition cites many cases, but none in which the chief executive officer of a nationwide company was subjected to jurisdiction in a particular state (i) by virtue of the company's activities that inevitably touch upon all states, and (ii) without regard to whether the officer personally and directly participated in the allegedly wrongful conduct in the state. The Commonwealth's application of this inapposite law is equally misguided; the Commonwealth conflates the alleged corporate conduct of Purdue with that of the three individual Officers, and improperly equates their personal compensation with "substantial revenue" of the sort that is required under the long-arm statute. Those arguments (and others) find no support in the law. The Court should decline the Commonwealth's invitation to create new law that would defy the requirements of the Massachusetts long-arm statute and constitutional due process.

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[1] The Officers have partially joined in Defendant Russell Gasdia's Motion to Dismiss, including in the relevant portions of Gasdia's reply papers in further support of his motion.

With respect to the facts, as part of its submission, the Commonwealth appended a number of documents that it contends respond to the Officers' fact declarations and support its allegations that the Officers are subject to jurisdiction in Massachusetts. The cited documents do no such thing. The documents (i) do not reflect the Officers' personal involvement in Purdue's sales and marketing activities in Massachusetts; (ii) at best, reflect only general awareness of Purdue's sales and marketing activities on a nationwide scale; and/or (iii) relate to one-off or tangential contacts with Massachusetts that do not relate to Purdue's sales and marketing activities, and thus cannot plausibly have given rise to the Commonwealth's claims.[2] None of the documents demonstrate, as the Commonwealth must, that any of the Officers personally and directly participated in conduct that was purposefully directed towards Massachusetts and that the Commonwealth's claims arise from such conduct, or that exercising jurisdiction here would comport with constitutional due process requirements. As the allegations against the Officers do not meet any of these requirements, the Complaint should be dismissed with prejudice as to the Officers pursuant to Mass. R. Civ. P. 12(b)(2).

As an independent matter, the Commonwealth essentially acknowledges that its case against Mr. Stewart (who has not been a Purdue executive since 2013) is barred by the statute of limitations, but improperly attempts to avoid dismissal by invoking the discovery rule. This effort falls short as well. The Commonwealth long ago discovered or should have discovered Mr. Stewart's alleged conduct by virtue of information that has been publicly-available (by the Commonwealth's own admission) since at least 2007. For this additional reason, the Complaint should be dismissed with respect to Mr. Stewart.

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[2] The accompanying Appendices address each of the documents that the Commonwealth submitted with its Opposition and show why each fails to demonstrate that jurisdiction over the Officers is proper.

ARGUMENT

I. THE COMMONWEALTH HAS NOT SHOWN THAT JURISDICTION OVER THE OFFICERS IS AUTHORIZED UNDER THE MASSACHUSETTS LONG-ARM STATUTE

A. *Cepeda* Does Not Permit The Commonwealth To Meet Its Burden Of Establishing Jurisdiction Over The Officers By Relying On Conclusory Allegations, Farfetched Inferences, And Refuted Factual Assertions

The Commonwealth cites Cepeda v. Kass, 62 Mass. App. Ct. 732 (2004), for the proposition that, on the Officers' motion, the Court should "take specific facts affirmatively alleged by the plaintiff as true (whether or not disputed) and construe them in the light most congenial to the plaintiff's jurisdictional claim." Id. at 738 (internal citation omitted). However, the Commonwealth omits the immediately preceding passage in Cepeda, which makes clear that "[t]he prima facie showing of personal jurisdiction must be based on evidence of specific facts set forth in the record." Id. at 737 (emphasis added, internal citation omitted); see also Boston Pads, LLC v. Black Dog Grp., No. 2014-3397H, 2015 WL 1880434, at *1 (Mass. Super. Ct. 2015) ("The facts asserted by the plaintiff can be taken as true as long as they are properly supported by evidence.") (internal quotation marks omitted).

Far from establishing facts supporting the exercise of jurisdiction over the Officers, the Commonwealth proffers only (i) conclusory allegations that the Officers "controlled" and "directed" Purdue's' conduct, including in Massachusetts, (ii) farfetched inferences of connections between the Officers and Massachusetts where none exist, and (iii) allegations that are rebutted by the Officers' detailed, sworn fact declarations. The Court may plainly disregard the first two categories of allegations. See Arthur v. Doe, No. SUCV201300995E, 2014 WL 4364850, at *4 (Mass. Super. Ct. July 31, 2014) (noting that on a motion to dismiss on jurisdictional grounds, courts should not "credit conclusory allegations or draw farfetched inferences"). As to the third category, the Commonwealth spends little time

addressing the Officers' detailed factual declarations and fails to refute the facts therein. Accordingly, in resolving the Officers' motion, the Court may consider the uncontroverted facts offered in their declarations. See Fern v. Immergut, 55 Mass. App. Ct. 577, 579-80 (2002) (noting that in resolving whether a plaintiff has met its jurisdictional burden, all uncontroverted facts before the court may be considered); Cardno Chemrisk, LLC v. Foytlin, No. 2014-3932 BLS1, 2015 WL 9275648, at *3 (Mass. Super. Ct. Oct. 26, 2015) ("Uncontroverted facts provided by defendant [in support of Rule 12(b)(2) motion] may be taken into account.").

B. The Opposition Fails To Show That Any Officer *Personally* Transacted Business In Massachusetts

The Officers' motion and supporting declarations demonstrate that they are not subject to jurisdiction under section 3(a) of the long-arm statute because none of them were personally involved in the sale or marketing of Purdue's opioid medications in Massachusetts. In response, the Commonwealth advances two flawed arguments: (i) it conflates Purdue's alleged conduct with that of the Officers; and (ii) through an erroneous interpretation of applicable law, it makes the incorrect argument that the Officers' purported "control" over Purdue's sales and marketing activities can serve as a basis for jurisdiction under section 3(a). The Court should reject both of these arguments.

1. Alleged Conduct By Purdue (The Company) Does Not Confer Jurisdiction Over Its Individual Officers

In an attempt to demonstrate that the exercise of personal jurisdiction over the individual Officers is appropriate under section 3(a), the Opposition (reflecting the allegations in the Complaint) repeatedly refers to Purdue's alleged conduct. The Opposition states, for example, that "Purdue tracked exactly which doctors were targeted, how often they were visited, and what drugs they prescribed," and that "Purdue selected specific target doctors in nine

Massachusetts communities" "[f]or direct television advertising." (Opp'n at 25 (emphasis added).)[3] These allegations concern Purdue, not the three Officers. Yet it is well-established that individual defendants' contacts with the forum state "are not to be judged according to their employer's activities there," and "[e]ach defendant's contacts with the forum State must be assessed individually." Calder v. Jones, 465 U.S. 783, 790 (1984). Even where the Opposition adds the conclusory assertion that the Officers "directed" Purdue's activities, the cited allegations relate to Purdue's activities and do not contain any facts demonstrating actual direction by the Officers. (See, e.g., Opp'n at 26 (citing Compl. ¶¶ 21, 32, 111, 385, 767).) Jurisdiction over Purdue, of course, is insufficient to confer jurisdiction over the Officers, and the Commonwealth cites no case holding that it is. See Morris v. UNUM Life Ins. Co. of Am., 66 Mass. App. Ct. 716, 720 (2006) (noting that "jurisdiction over a corporation does not automatically secure jurisdiction over its officers or employees") (internal citation omitted).

While the Commonwealth relies on a number of cases to support its argument in favor of exercising jurisdiction under section 3(a), none of its cited cases help it here. Many of the cases the Commonwealth cites[4] involve disputes regarding the exercise of jurisdiction over corporations, not individual corporate officers, and thus are inapt.[5] And in both Johnson

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[3] Within the first five pages of its Opposition, the Commonwealth references more than ten instances of alleged conduct by Purdue, not the individual Officers. (See Opp'n at 2-3 (noting, for example, that "Purdue employed 301 sales representatives to push opioids"; "Purdue directed reps to deceive doctors about the risk of addiction"; and "Purdue followed a 'geriatric strategy' to collect Medicare money from elderly patients") (emphasis added).)

[4] These include Exxon Mobil Corp. v. Attorney General, 479 Mass. 312 (2018); Gunner v. Elmwood Dodge, Inc., 24 Mass. App. Ct. 96 (1987); Good Hope Industries, Inc. v. Ryder Scott Co., 378 Mass. 1 (1979); Tatro v. Manor Care, Inc., 416 Mass. 763 (1994); and Balloon Bouquets, Inc. v. Balloon Telegram Delivery, Inc., 18 Mass. App. Ct. 935 (1984).

[5] The Commonwealth also cites Gunner to argue that the Officers engaged in conduct "aimed squarely" at Massachusetts, but that case is easily distinguishable. There, the defendant – *(cont'd)*

Creative Arts, Inc. v. Wool Masters, Inc., 573 F. Supp. 1106 (D. Mass. 1983) and Gary Scott Int'l, Inc. v. Baroudi, 981 F. Supp. 714 (D. Mass. 1997), the allegations of direct and personal involvement of individual officer defendants in the alleged misconduct were substantially different from the Commonwealth's allegations against the Officers here.[6] **Indeed, the Commonwealth does not cite a single case where a court has exercised long-arm jurisdiction over a non-resident officer of a corporation that does business in all 50 states.**[7] This is not surprising; if the Commonwealth were correct that the Officers' incidental awareness

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a Rhode Island-based corporation, not an individual – took out advertisements for its products in numerous Massachusetts towns, which were found to constitute marketing aimed squarely at Massachusetts sufficient to constitute transacting business in Massachusetts and give rise to jurisdiction under section 3(a). 24 Mass. App. Ct. at 99-101. The fact that a corporation that undertakes repeated, targeted solicitations within Massachusetts may be subject to jurisdiction has no bearing on whether jurisdiction exists over individuals who have undertaken no such actions.

[6] For example, the Johnson Creative Arts court found it had jurisdiction over an individual defendant where he "composed and mailed" a letter that was directly related to the plaintiff's claim and "even accepted telephone orders from Massachusetts retailers." 573 F. Supp. at 1111. The Baroudi court reached the same conclusion where the individual defendant personally advertised his product to Massachusetts residents through his website. 981 F. Supp. at 716. The Opposition correctly notes that, with respect to Johnson Creative Arts, the Officers' motion focused on the individual defendant over whom the court found it did not have jurisdiction, rather than the individual defendant over whom the court did exercise jurisdiction. (Opp'n at 28.) That is because the Commonwealth's conclusory allegations of misconduct are far more similar to allegations against the former Johnson Creative Arts defendant than the latter defendant, as to whom concrete allegations of personal involvement in Massachusetts-directed misconduct were made.

[7] The Commonwealth cites Baroudi and Johnson Creative Arts for the proposition that an officer of a company doing business nationwide may be subject to personal jurisdiction in any state in which the corporation does business. (See Opp'n at 36, 37.) But in Baroudi the officer and the business were one and the same, and he personally advertised his products through his website, and in Johnson Creative Arts, the defendant was an officer of a small company who similarly was personally involved in the sales activity at issue in that case. The reasoning in those cases cannot be extended to the situation here, where the Officers are, or were, CEOs of a large-scale, nationwide enterprise and were not directly or personally involved in any alleged misconduct that was purposefully directed towards Massachusetts.

of corporate activities in Massachusetts, inevitable in their role as CEO of a national corporation, is sufficient to subject them to jurisdiction here, then any officer of a corporation with nationwide activities would be subject to jurisdiction in each of the 50 states. Much more is required: namely, that the Officers personally transacted business in Massachusetts. The Commonwealth has failed to plead sufficient facts supporting that conclusion.

In arguing that the Officers are subject to jurisdiction under section 3(a), the Opposition specifically cites Mr. Stewart's one-time visit to Massachusetts in connection with the Massachusetts General Hopsital ("MGH") Pain Program.[8] As detailed in Mr. Stewart's unrebutted declaration and below, however, the MGH Pain Program focused on pain management generally, not the sale or marketing of Purdue's opioid medications. As such, even if that single visit could be considered a transaction of business in Massachusetts – and it should not be – it is insufficient to support jurisdiction because the Commonwealth's claims do not arise from that visit, as required to satisfy section 3(a). See Nat'l Med. Care, Inc. v. Home Med. of Am., Inc., No. 001225, 2002 WL 31187683 (Mass. Super. Ct. Aug. 9, 2002).

2. "Control" Over Purdue's Sales And Marketing Practices As An Officer Does Not Provide A Basis For Jurisdiction Under Section 3(a)

The Opposition further asserts that the Officers personally transacted business in Massachusetts because they purportedly "controlled" Purdue's marketing policies and practices in Massachusetts. (Opp'n at 27.) But the referenced portions of the Complaint only either allege, in conclusory fashion, that each individual defendant "knew and intended" that certain sales and

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[8] The Opposition makes no attempt to argue that other purportedly Massachusetts-directed activities alleged in the Complaint, such as Mr. Timney's discussion of Massachusetts legislation or Dr. Landau's letter to the president of Tufts University, constitute transactions of business or that the Commonwealth's claims arise from those alleged activities.

marketing activities would occur in Massachusetts (Compl. ¶¶ 161-67), or allege that Mr. Stewart (and no other Officer) was involved in Purdue sales policies that were not directed specifically toward Massachusetts (id. ¶¶ 608, 624, 636, 672). Those allegations fall far short of demonstrating that any of the Officers controlled any relevant conduct in or to Massachusetts.

The Commonwealth cites Exxon for the proposition that where a defendant has the right to control conduct in Massachusetts, it may be subject to personal jurisdiction there under section 3(a). But the Commonwealth takes the Exxon court's discussion of "control" completely out of context, and thus gets its wrong. Exxon did not address personal jurisdiction over an individual officer. Further, the Massachusetts SJC's ruling that Exxon transacted business in Massachusetts was anchored in the fact that Exxon itself directly entered into a contract with a Massachusetts entity which governed the operation of more than 300 franchisees located throughout the state. 479 Mass. at 318. When discussing "control," the court was addressing the entirely separate question of whether a Civil Investigative Demand issued by the Attorney General concerning advertising by the franchisees "arose from" Exxon's contractual relationships with the franchisees. Id. at 318-19. Exxon, which involves the extent and consequences of a contractual relationship, simply does not stand for the proposition that an individual CEO can be found to have "transacted business" in Massachusetts based solely upon a conclusory allegation that he "controlled" a company's nationwide activities.

C. The *Murphy* Decision (On Which The Commonwealth Primarily Relies) Applies An Overbroad Standard That Has Not Been Accepted By The Supreme Judicial Court And Has Been Criticized By Other Federal District Courts

The Opposition relies heavily on the First Circuit's 1972 decision in Murphy v. Erwin-Wasey, Inc., 460 F.2d 661 (1st Cir. 1972), to attempt to show that the exercise of jurisdiction over the Officers here would be proper under section 3(c). That reliance is

misplaced. Murphy is not binding precedent on this Court, and indeed, has not been accepted by the SJC.

The plain text of section 3(c) provides for jurisdiction over a defendant based only upon "an act or omission in this commonwealth." M.G.L. c. 223A, § 3(c) (emphasis added). The court in Murphy held that a fraudulent misrepresentation intentionally directed into Massachusetts was the substantive equivalent of an act "in" the state under section 3(c). See Murphy, 460 F.2d at 664. But courts in other Circuits have criticized Murphy for applying section 3(c) too broadly. For example, when analyzing the scope of an analogous statute, the D.C. Circuit noted that "[t]he statute is in plain, easy to understand language – it speaks not of 'tortious act' but of 'act,' and its structure shows an intent that when an act is outside the forum state other significant contacts are necessary before jurisdiction can be exercised." Margoles v. Johns, 483 F.2d 1212, 1219 (D.C. Cir. 1973); see also Weller v. Cromwell Oil Co., 504 F.2d 927, 930-31 (6th Cir. 1974) (noting disagreement between Murphy and Margoles, and following Margoles); Ticketmaster-N.Y., Inc. v. Alioto, 26 F.3d 201, 205 n.5 (1st Cir. 1994) (citing cases criticizing Murphy).[9]

More notably, the SJC has not adopted Murphy's view of the scope of section 3(c). To the contrary, the SJC has made statements indicating that it would reach a different conclusion concerning the scope of section 3(c) than was reached by the First Circuit in Murphy. For example, it noted in Roberts v. Legendary Marine Sales that "[f]ederal court decisions concerning jurisdiction under G.L. c. 223A, § 3(c), have not had the benefit of our determination

[9] The Commonwealth cites several other cases in support of its section 3(c) argument, including Ealing Corp. v. Harrods Ltd., 790 F.2d 978 (1st Cir. 1986), JMTR Enters., L.L.C. v. Duchin, 42 F. Supp. 2d 87 (D. Mass. 1999) and DSM Thermoplastic Elastomers, Inc. v. McKenna, No. 002018B, 2002 WL 968859 (Mass. Super. Ct. Feb. 5, 2002). Those cases, however, each follow Murphy and apply its flawed reasoning without discussion.

of the reach of this provision of the long-arm statute in this context, see [Murphy], and have typically taken a more expansive view than Massachusetts of personal jurisdiction." 447 Mass. 860, 864 n.4 (2006) (internal quotation marks omitted). In light of the SJC's indication in Roberts that it would interpret section 3(c) more narrowly than did the Murphy court, and the cogent criticism of the Murphy decision by federal Circuit courts, this court should interpret section 3(c) according to its plain language and find that it only permits jurisdiction where a defendant is alleged to have committed an act in Massachusetts that caused tortious injury.

D. The Opposition Fails To Establish That The Officers' Compensation Can Satisfy Section 3(d)'s "Derives Substantial Revenue" Requirement

The Commonwealth's Opposition makes the untenable assertion that the Officers' compensation for fulfilling their terms of employment with Purdue can satisfy the requirement under section 3(d) that the Officers have "derived substantial revenue from goods used or consumed in Massachusetts." (Opp'n at 19-20.) This argument is plainly without merit.

The Commonwealth relies on three decisions to attempt to show that the Officers' compensation may satisfy section 3(d)'s "derives substantial revenue" requirement.[10] But none of those cases address the distinction between the Officers' compensation, on the one hand, and the revenue Purdue earns from sales of its products in Massachusetts, on the other. To the contrary, the revenue at issue in each of those cases was traceable back to an entity that made a sale of a product. The Commonwealth's reliance on Heins for the proposition that section 3(d)'s "derives substantial revenue" clause "includes money passed through a chain of entities"

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[10] Merced v. JLG Industries, Inc., 170 F. Supp. 2d 65 (D. Mass. Sept. 28, 2001) (Merced I), Merced v. JLG Industries, Inc., 193 F. Supp. 2d 290 (D. Mass. Dec. 27, 2001) (Merced II), and Heins v. Wilhelm Loh Wetzlar Optical Machinery GmbH & Co., 26 Mass. App. Ct. 14 (1988).

therefore misses the point: the Officers' argument is not that section 3(d) does not apply because revenue has passed through too many layers before it reaches them, but rather that it cannot be established that Purdue's revenue from goods used in Massachusetts reaches them at all. As noted in Hartsel v. Vanguard Group, Inc., which the Officers cited in their motion and which the Commonwealth fails to distinguish,[11] "it would be prohibitively difficult for a court to attempt to trace an employee's salary back to each of its financial and geographic sources based on the customers for which the employee worked." 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).

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[11] The Commonwealth selectively cites Hartsel to suggest that the court in that case did not dismiss out of hand the theory that the Commonwealth advances here. (Opp'n at 21 n.7.) Although the language cited by the Commonwealth notes that the complaint in that case did not allege details about the size, source, or breakdown of the individual defendants' salaries, other language in that decision makes clear that the court would have been extremely skeptical of the theory even if such facts had been alleged. See Hartsel, 2011 WL 2421003, at *12 ("Plaintiffs cite no 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 under analogous Delaware statute).

The Commonwealth also misinterprets John Gallup & Associates, LLC v. Conlow (Conlow), which similarly concluded that a non-resident employee's receipt of salary from a corporation (domiciled in the forum state) did not demonstrate that the employee "derived substantial revenue" from that state. No. 1:12-CV-03779-RWS, 2013 WL 3191005, at *9 (N.D. Ga. June 21, 2013). The Commonwealth contends that the Conlow court reached that conclusion because the defendant "took no action to derive benefit from Georgia," implying the Officers have taken actions to derive a benefit from Massachusetts, and that Conlow is thus inapplicable. (Opp'n at 21). However, nothing in Conlow suggests that the court in that case relied on such a determination to find that the connection between the defendant's salary and her employer's sales in the state was too attenuated to support jurisdiction, or that the question of whether a defendant has taken action to derive a benefit from the forum is even relevant to the analysis. And, in any event, the Commonwealth has failed to allege that the Officers personally took any action to derive a benefit from Massachusetts.

Nor do the Merced decisions help the Commonwealth. The Opposition cites Merced II for the proposition that section 3(d)'s "derives substantial revenue" clause may apply where a defendant has "attempted to cultivate sales relationships." 193 F. Supp. 2d at 293. But the Opposition fails to acknowledge several important aspects of the Merced II court's discussion that distinguish it from this case. The defendant there – an entity, not an individual – was a distributor of parts used by the plaintiff to manufacture machines that were in turn sold to customers in Massachusetts. Id. at 292-93. While the defendant did not directly sell its products to Massachusetts customers, the court indicated that it could potentially be subject to jurisdiction in Massachusetts based on the use by the plaintiff's customers of the machines that incorporated its products, if the defendant had attempted to develop direct sales relationships with customers in Massachusetts, such as through website advertising. Id.; see also Merced I, 170 F. Supp. 2d at 73 (finding that non-resident defendant manufacturer had attempted to cultivate sales relationships in Massachusetts through website advertising and was therefore properly subject to jurisdiction under section 3(d)).

The distributor-purchaser relationship at issue in Merced is distinguishable from the relationship between the Officers and Purdue. Further, the Complaint contains no allegation that the Officers – as opposed to Purdue – ever attempted to directly sell any products to customers in Massachusetts. Even if the Commonwealth could show that the Officers attempted to cultivate sales relationships in Massachusetts (and it cannot), the Commonwealth continues to ignore the distinction between the revenue that Purdue earns through sales of its products, and the compensation that the Officers are paid for satisfying their terms of employment. The revenue at issue in Merced was directly traceable to the defendant's sales of its product that was used by the plaintiff's customers in Massachusetts. That is not at all the situation here, and the

Commonwealth has not cited any case in which a court has exercised jurisdiction over out-of-state officers based solely on compensation earned for providing services to a company that did business in a forum state.

For all of these reasons, the Commonwealth has failed to establish that the Officers "derived substantial revenue" in Massachusetts as required to exercise jurisdiction over them under section 3(d).

II. THE COMMONWEALTH HAS NOT SHOWN THAT JURISDICTION OVER THE OFFICERS IS AUTHORIZED UNDER THE DUE PROCESS CLAUSE

Even if jurisdiction were proper under the Massachusetts long-arm statute (and it is not), jurisdiction over the Officers is not authorized under the Due Process Clause of the U.S. Constitution because (i) the Officers have not established sufficient contacts through the purposeful availment of the privilege of conducting activities in the Commonwealth, (ii) the Commonwealth's claims are not related to the Officers' minimal contacts with the Commonwealth and (iii) the exercise of jurisdiction over the Officers would offend traditional notions of fair play and substantial justice. Although the Commonwealth must demonstrate that all three factors are satisfied, the Opposition fails to do so.

A. The Commonwealth Has Not Satisfied The Purposeful Availment Or Relatedness Due Process Requirements

As demonstrated in their motion (Mem. at 18-19), the Officers had very few contacts with Massachusetts, and none that show that the Officers "purposefully availed" themselves of the privilege of doing business in Massachusetts, as required for the exercise of jurisdiction over the Officers to satisfy constitutional due process considerations. See Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1985) (noting that to satisfy "purposeful

availment" prong of the due process analysis a plaintiff must show that a defendant's "contacts proximately result from actions by the defendant himself that create a substantial connection with the forum State") (internal quotation marks omitted). The vast majority of the Complaint's allegations purportedly tying the Officers to Massachusetts involve conduct (i) that was not purposefully directed towards Massachusetts, (ii) in which the Officers were not personally involved or (iii) that was unrelated to the sale or marketing of Purdue's opioid medications. None of those allegations demonstrate that the Officers purposefully availed themselves of the privilege of doing business in Massachusetts or engaged in Massachusetts-directed conduct that is related to the Commonwealth's claims.

In an attempt to overcome the Complaint's pleading deficiencies on this issue, the Opposition asserts that the Officers "establish[ed] channels for providing regular advice to customers" in Massachusetts (Opp'n at 29), but the examples the Commonwealth cites do not support this assertion. The Commonwealth claims that Mr. Stewart's visit to Massachusetts in connection with Purdue's grant to the MGH Pain Program was an attempt to "establish channels for providing regular advice to customers." As Mr. Stewart has declared, however, the MGH Pain Program focused generally on pain management (this is confirmed by the Commonwealth's Exhibit 22), and Mr. Stewart's visit did not include any promotional discussion of Purdue's opioid medications. (Mem. at 19; App'x at 1; Stewart Decl. ¶ 12(b).) These facts are unrebutted and the Commonwealth's unsupported contrary assertion is exactly the sort of "farfetched inference" that should not be credited.

The Commonwealth also offers Mr. Timney's alleged involvement in setting up call centers, and Dr. Landau's alleged correspondence with Tufts University and involvement in creating a website, as evidence that those Officers attempted to establish channels for

communication with Massachusetts customers. Again, the Commonwealth does not – and cannot – refute the Officers' sworn declarations. Mr. Timney has declared that he did not direct the creation of a call center to target prescribers in Massachusetts (Timney Decl. ¶ 15), and the document the Commonwealth cites relating to the call center contains no mention of Massachusetts, (Affidavit of Jenny Wojewoda ("JW Aff.") Ex. 13). The website Dr. Landau purportedly participated in creating is not even alleged to have been created for the purpose of targeting customers in Massachusetts (Compl. ¶¶ 40, 111, 804), and the letter sent over his signature to the President of Tufts University was plainly not a communication with a customer nor was it intended to establish a channel for such communications (id. ¶ 824).

Finally, the Commonwealth identifies "the campaign of sales visits to Massachusetts doctors, nurses, and pharmacists" as a channel of communication that the Officers established (id. ¶ 11). But, as detailed in their declarations, none of the Officers were personally involved in day-to-day marketing activities or promotion of prescription opioids in Massachusetts (or any other state), in the management or direct oversight of Purdue sales representatives in Massachusetts (or elsewhere), or in the marketing or promotion of Purdue's opioid medications in Massachusetts. (Stewart Decl. ¶¶ 10, 11; Timney Decl. ¶¶ 12, 13; Landau Decl. ¶¶ 15, 16.) The Commonwealth cites no facts or documents contradicting the CEOs' testimony in this regard. The Commonwealth also does not offer any cases suggesting that constitutional due process concerns can be satisfied in a case such as this. Two of the cases the Commonwealth cites, Preferred Mutual Insurance Co. v. Stadler Form Aktiengesellschaft, 308 F. Supp. 3d 463 (D. Mass. 2018), and Mark v. Obear & Sons, Inc., 313 F. Supp. 373 (D. Mass. 1970), involved the exercise of jurisdiction over corporations, not individual corporate officers. These cases do not support the Commonwealth in its attempt to establish jurisdiction over the

Officers here. And in the cases that actually did involve corporate officer defendants,[12] those defendants – unlike the Officers – were alleged to have been directly and personally involved in the forum-directed conduct that gave rise to the plaintiffs' claims. For example, the officer defendants in Luo and Rissman were alleged to have been in direct and continuous contact with the Massachusetts-based plaintiffs over a period of years. Luo, 2014 WL 3048679 at *2; Rissman, 901 F. Supp. 2d at 262-63. No such allegations have been made, or could be made, here. In short, the Commonwealth has failed to establish that the Officers purposefully availed themselves of the privilege of doing business in Massachusetts. As such, the exercise of jurisdiction over them would offend constitutional due process principles.

B. Exercising Jurisdiction Over The Officers Would Be Unreasonable Under The Circumstances Of This Case

The Commonwealth asserts that exercising jurisdiction over the Officers here would be reasonable because it would serve "many" interests, including the public interest and its own interests. (Opp'n at 34.) But whether or not those "interests" would be "served" is not the relevant inquiry. The correct question is whether asserting jurisdiction over the Officers would "offend traditional notions of fair play and substantial justice," Exxon, 479 Mass. at 321, and the correct answer is yes.

If this Court were to exercise jurisdiction over the Officers here, the implications would be severe and far-reaching. Finding jurisdiction in these circumstances would mean that

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[12] Those cases include Yankee Group, Inc. v. Yamashita, 678 F. Supp. 20 (D. Mass. 1988); DSM Thermoplastic Elastomers, Johnson Creative Arts, Kleinerman v. Morse, 26 Mass. App. Ct. 819 (1989); Cossart v. United Excel Corp., 804 F.3d 13 (1st Cir. 2015); Calder v. Jones, 465 U.S. 783 (1984); Luo v. Tao Ceramics Corp., No. 13-CV-5280-F, 2014 WL 3048679 (Mass. Super. Ct. Apr. 10, 2014); Rissman Hendricks & Oliverio, LLP v. MIV Therapeutics, Inc., 901 F. Supp. 2d 255 (D. Mass. 2012); and Bulldog Investor General Partnership v. Secretary of the Commonwealth, 457 Mass. 210 (2010).

corporate officers are subject to jurisdiction in all 50 states simply because they oversee nationwide activities and may have been incidentally aware of, or had unavoidable tangential involvement in corporate activity in Massachusetts (or any other state). The Officers have shown that they were not personally involved in any relevant conduct that was purposefully directed towards Massachusetts. As the Officers had no reason to expect that they would be haled into court here, exercising jurisdiction over them would be unreasonable and would not comport with the requirements of due process.[13]

III. THE DOCUMENTS PROFFERED BY THE COMMONWEALTH DO NOT ESTABLISH THAT JURISDICTION OVER THE OFFICERS IS PROPER

In addition to misinterpreting and misapplying the relevant law, the Commonwealth's Opposition appends 25 exhibits, purportedly to rebut the Officers' sworn factual declarations that specifically refute the Complaint's conclusory jurisdictional allegations. (See JW Aff. and accompanying exhibits.) As the Appendices accompanying this brief explain, the Commonwealth's exhibits, individually and in the aggregate, fall far short of showing that any of the Officers had personal involvement in any sales or marketing activity in Massachusetts.[14] The Commonwealth attempts to stretch these documents to say things they

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[13] The Commonwealth contends that the Officers have asserted "only in generic fashion" that defending this suit in Massachusetts would place a significant burden on them. (Opp'n at 33.) For the reasons stated, forcing the Officers to defend this suit in Massachusetts would be patently unfair, unreasonable and burdensome. In any event, where, as here, a defendant has shown that it has only minimal contacts with the forum state and that the plaintiff's claims do not arise from those contacts, the defendant need show "less" in terms of unreasonableness to defeat jurisdiction. Ticketmaster, 26 F.3d at 210.

[14] In some instances the Opposition misstates the Complaint's allegations to suggest that the Officers were engaged in certain affirmative conduct, when the allegations do not so state. For example, the Opposition asserts that "Stewart told director Richard Sackler that reps promoted OxyContin" as having certain benefits compared to other opioid products (Opp'n at 6), but the Complaint alleges only that "following a question from Richard Sackler, staff told Stewart and

(cont'd)

simply do not say – an effort that lays bare just how thin the Commonwealth's claim of personal jurisdiction over each of the Officers actually is. The deficiencies as to each of the Officers are summarized below.

A. The Documents Fail To Show That Dr. Landau Was Engaged In Massachusetts-Directed Conduct That Gave Rise To The Commonwealth's Claims

The Commonwealth offers five documents in support of its claim of jurisdiction over Dr. Landau, none of which demonstrate that he personally and directly engaged in conduct in or directed at Massachusetts.[15] More specifically:

- Two of the documents do not even mention Massachusetts. (JW Aff. Exs. 16, 19.) The first (id. Ex. 16), is an email – on which Dr. Landau is not copied – relating to Purdue staff's efforts to schedule "field rides" for Dr. Landau in various locations outside of Massachusetts; the document does not indicate that those rides ever actually occurred (and the Commonwealth does not point to any other evidence indicating that they did). In the second document (id. Ex. 19), Dr. Landau states that he believes there is a meeting planned with Purdue's General Counsel and Chief Compliance Officer to "discuss opioid promotion," but there is no indication that the planned meeting related in any way to efforts in Massachusetts.

- A third document is a letter sent to the president of Tufts University over Dr. Landau's signature. (Id. Ex. 20 & ¶ 13.) The Commonwealth makes no suggestion that its claims arise in any manner from this one-off, private communication, which does not relate to Purdue's sales and marketing efforts in Massachusetts.

- The Commonwealth offers two documents (JW Aff. Exs. 17, 18) purportedly to undermine Dr. Landau's statements in his declaration that (i) he did not personally negotiate a contract between Purdue and Massachusetts-based Analgesic

(cont'd from previous page)
the Board that Purdue promoted OxyContin" as having those benefits, (Compl. ¶ 622 (emphasis added)). This is just one of many examples of the Commonwealth playing fast and loose with the facts of this case.

[15] The Commonwealth also offers five additional documents that purportedly show that Purdue had a particular commercial interest in Massachusetts. (JW Aff. Exs. 21-25.) Each of those exhibits is addressed in each of the accompanying Appendices.

Research, and (ii) those contracts were unrelated to the sale or marketing of opioid products, (Landau Decl. ¶ 17). In the cited documents, however, Analgesic Research proposes activities relating to the implementation of a Risk Evaluation and Mitigation Strategy required by FDA – not the sales and marketing of opioids (the subject matter of this lawsuit) – and Dr. Landau explicitly states with regard to contract negotiations that "[t]his is not [my] area of responsibility."[16] (JW Aff. Ex. 17 (emphasis added).) These documents – which date from nine years before Dr. Landau became CEO of Purdue – simply do not reflect that Dr. Landau personally negotiated an arrangement with a Massachusetts company relating to the sales and marketing of Purdue's opioids anywhere, let alone in Massachusetts.

B. The Documents Fail To Show That Mr. Timney Was Engaged In Massachusetts-Directed Conduct That Gave Rise To The Commonwealth's Claims

With respect to Mr. Timney, the Commonwealth offers seven documents, none of which establish that he was personally and directly involved in Purdue's sales and marketing activities in Massachusetts. More specifically:

- Four of the seven documents (JW Aff. Exs. 14, 15, 23 and 25) are not addressed to Mr. Timney and, in any event, at most reflect Purdue's nationwide sales and marketing activities. The Commonwealth suggests that three of these documents (id. Exs. 15, 23 and 25) demonstrate that Mr. Timney was aware of Purdue's nationwide strategy to target integrated delivery networks, including Partners and Steward in Massachusetts, and rebut the statement in his declaration that he did not personally participate in sales or marketing efforts focused on Partners or Steward (id. ¶¶ 10, 14). However, there is no indication that Mr. Timney ever received these documents, or that the "top-to-top" interactions referenced in Exhibit 15 ever occurred. Even if he saw these documents, mere awareness of Purdue's sales and marketing activities – without direct personal involvement – does not give rise to jurisdiction in the Commonwealth.

- A third document (id. Ex. 13) is offered, along with Exhibit 14, to suggest that Mr. Timney was aware that a call center established by Purdue was used for affirmative outreach (id. ¶ 9). Neither of these documents, however, suggest that the call center was specifically directed at Massachusetts.

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[16] These 2008 documents appear unrelated to the 2009 and 2013 arrangements alleged in paragraphs 798 and 812 of the Complaint – to which Dr. Landau's declaration responded – and contain no indication that the arrangement discussed in Exhibits 17 and 18 was ever agreed to.

- The two remaining documents were cited in the Complaint and addressed in Mr. Timney's sworn declaration. Exhibit 11 reflects Mr. Timney's report to the Purdue Board about the passage of legislation in Massachusetts, and Exhibit 12 is a letter to the editor of the Boston Globe submitted over Mr. Timney's signature. As detailed in the Officers' motion and Mr. Timney's declaration, the Commonwealth makes no effort to show that its claims arise from either of these activities and, in any event, neither reflects Mr. Timney's involvement in or direction of Purdue's sales and marketing efforts in Massachusetts. (Timney Decl. ¶¶ 15, 18.)

C. The Documents Fail To Show That Mr. Stewart Was Engaged In Massachusetts-Directed Conduct That Gave Rise To The Commonwealth's Claims

In support of its claim of jurisdiction over Mr. Stewart, the Commonwealth offers eleven documents, none of which is sufficient to establish that jurisdiction over Mr. Stewart is proper. More specifically:

- The Commonwealth offers eight documents purportedly demonstrating that Mr. Stewart "managed the marketing and promotion of opioids in Massachusetts." (JW Aff. ¶ 6 (emphasis added).) None of these documents, however, even includes the word "Massachusetts." (Id. Exs. 1-8.) Indeed, the only Massachusetts "connection" the Commonwealth purports to identify in these exhibits is that Massachusetts was one of the states encompassed in a statement by McKinsey & Co. that nurse practitioners were able to prescribe OxyContin in 41 states (a fact that would not be apparent to a reader of the document). (Id. Ex. 4.) At best, these documents reflect a CEO's general awareness of Purdue's nationwide sales and marketing activities; they do not show that Mr. Stewart was personally and directly involved in the sale and marketing of Purdue's opioid medications in Massachusetts.

- The Commonwealth offers another document, purportedly demonstrating that Mr. Stewart and Purdue were particularly focused on commercial activities in Massachusetts (id. ¶ 14 and Ex. 24), but which in fact reflect Purdue's nationwide sales and marketing activity. The Commonwealth highlights two slides in the document; in one Massachusetts is one of 24 referenced states, in the other two Massachusetts territories are listed along with 28 territories in other states.

- The Commonwealth offers two documents purportedly establishing that Mr. Stewart "managed the decision" to pay a grant to the MGH Pain Program and that "a purpose of the payment was the promotion of Purdue's opioids." (Id. ¶ 7.) These documents (id. Exs. 9-10) reflect only that Purdue approved a grant to the MGH Pain Program in 2003 – four years before Mr. Stewart became CEO of Purdue – and that Mr. Stewart was involved in reinstating that grant. They do not

rebut Mr. Stewart's sworn declaration that his single visit to Massachusetts in connection with the MGH Pain Program was not intended to promote Purdue's opioids. (Stewart Decl. ¶ 12(b).) To the contrary, Mr. Stewart's statement is corroborated by another document cited by the Commonwealth (JW Aff. Ex. 22),[17] which reflects that the purpose of the program was to support developments and education in the area of pain management. In any event, the Commonwealth makes no argument that its claims arise out of Purdue's support of the MGH Pain Program.

IV. THE DISCOVERY RULE DOES NOT TOLL THE STATUTE OF LIMITATIONS APPLICABLE TO THE COMMONWEALTH'S CLAIMS AGAINST MR. STEWART

As an independent matter, the Commonwealth's claims against Mr. Stewart are barred because the Commonwealth does not allege that Mr. Stewart – who stepped down as CEO of Purdue in 2013 – engaged in any conduct within the applicable limitations periods.[18] The Commonwealth does not dispute this, but instead claims that it "has alleged facts plausibly suggesting applicability of the discovery rule," specifically that "discovering the nature and extent of [the defendants'] misconduct required a costly and complex investigation," and that, therefore, the "the question of whether its claims are time-barred must await either a motion for summary judgment or trial." (Opp'n at 21 (citations omitted).)

The Commonwealth's reasoning is flawed because it ignores the relevant inquiry under the discovery rule: for a claim to accrue, the plaintiff need not have knowledge of the full extent of his injury or the defendant's alleged misconduct. See Riley v. Presnell, 409 Mass. 239, 243 (1991) ("One need not apprehend the full extent or nature of an injury in order for a cause of

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[17] This document, along with the Commonwealth's Exhibit 21, are purportedly offered to rebut the statements made by all three Officers in their declarations that they did not consider Massachusetts to be a state of particular focus. Both documents predate any of the Officers' tenures as CEO and there is no suggestion that any of the Officers have seen either of the documents.

[18] The Commonwealth's public nuisance claim is governed by a three-year statute of limitations and its Chapter 93A claim is governed by a four-year statute of limitations.

action to accrue."); see also In re Mass. Diet Drug Litigation, 338 F. Supp. 2d 198, 203 (D. Mass. 2004) ("Diet Drug") (same). Moreover, when a claim accrues does not depend upon when the plaintiff decides to investigate the potential claim. Rather, a claim accrues, and the statute of limitations commences, when the plaintiff discovers or reasonably should have discovered that he has suffered harm and that the defendant is the cause of his harm. See Harrington v. Costello, 467 Mass. 720, 727 (2014).

In its original complaint, the Commonwealth acknowledged that the facts underlying the Commonwealth's claims are and have been public knowledge in "[e]very year since 2007." (Dkt. No. 1 ¶¶ 161-73.) Now, in its Opposition, the Commonwealth argues that any publicity concerning the defendants' misconduct only served as "'warning signs' to the defendants" of the alleged misconduct. (Opp'n at 22 (emphasis omitted).) That argument should be rejected. The Commonwealth cannot credibly argue that only the defendants should have been on notice of information published by nationally-distributed publications such as Time, the America Journal of Public Health, and Fortune, and federal entities including the White House, the Center for Disease Control and the United States Senate. (Dkt. No. 1 ¶¶ 163-65.)

The Commonwealth cites two cases in which courts found that publicity did not render claims time-barred at the motion to dismiss stage because of questions regarding whether the plaintiff was, in fact, on notice based on the publicity. In Diet Drug, the court found that it could not determine whether "wide-spread publicity surrounding the withdrawal of" diet drugs from the market put a class of 195 plaintiffs on notice of their potential claims because that determination would "necessarily depend on the circumstances pertaining to each plaintiff, such as where he lived and what media coverage there was in that location." 338 F. Supp. 2d at 204, 207. In Cascone v. United States, the court found that publicity regarding the murders of four

patients by a nurse at a Veterans Affairs Medical Center did not put the estate of one of her victims on notice of its possible claims because (i) the relevant publicity was not in fact available to all of the plaintiffs, and (ii) none of the publicity referenced the circumstances surrounding the death of the plaintiffs' next-of-kin. 370 F.3d 95, 102-108 (1st Cir. 2004). These decisions are inapposite. Unlike the 195 plaintiffs in Diet Drug, the Commonwealth is just one entity. No fact intensive inquiry is required to impute widespread public information to the Commonwealth, especially when the Commonwealth itself has alleged specific public activities within Massachusetts. (See Dkt. No. 1 ¶ 162 ("In 2008 . . . the Massachusetts State Legislature created an OxyContin and Heroin Commission because of concerns about Purdue's dangerous drugs.").) And, unlike the publicity at issue in Cascone, the Commonwealth has alleged continuous public information regarding Purdue's opioid sales and marketing activities – the exact conduct at issue in the Complaint – since at least 2007.

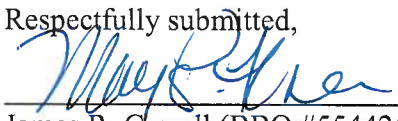
Finally, the Commonwealth's assertion that "[p]ublicity concerning allegations of misconduct by Purdue" does not establish when the Commonwealth's claims against Mr. Stewart accrued (Opp'n at 22) rings hollow. The Commonwealth's Complaint extensively relies upon conclusory allegations that Mr. Stewart "controlled" and "directed" Purdue's activities. It strains credulity to believe that the Commonwealth could not have discovered this minimal level of alleged involvement in Purdue's activities before the applicable statutes of limitations expired. As a result, the Commonwealth's claims against Mr. Stewart should be dismissed as time-barred.

CONCLUSION

For all of the foregoing reasons, and for those set forth in the Officers' previously-filed papers, the Officers' Motion to Dismiss should be granted in its entirety and the Complaint should be dismissed as to them.

Dated: May 31, 2019
Boston, Massachusetts

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Maya P. Florence, hereby certify that on May 31, 2019, pursuant to an agreement among the parties, a true copy of the foregoing Reply Memorandum Of Law In Further 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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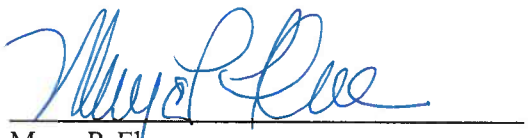

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