COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
C.A. No. 1884-cv-01808 (BLS2)

COMMONWEALTH OF MASSACHUSETTS,

v.

PURDUE PHARMA L.P., PURDUE PHARMA INC., RICHARD SACKLER, THERESA SACKLER, KATHE SACKLER, JONATHAN SACKLER, MORTIMER D.A. SACKLER, BEVERLY SACKLER, DAVID SACKLER, ILENE SACKLER LEFCOURT, PETER BOER, PAULO COSTA, CECIL PICKETT, RALPH SNYDERMAN, JUDITH LEWENT, CRAIG LANDAU, JOHN STEWART, MARK TIMNEY, and RUSSELL J. GASDIA

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

LEAVE TO FILE EXCESS PAGES GRANTED MAY 9, 2019

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PRELIMINARY STATEMENT

The Commonwealth alleges that John Stewart, Mark Timney, and Craig Landau intentionally directed thousands of deceptive acts in Massachusetts, causing thousands of people in Massachusetts to suffer, overdose, or die. These Purdue chief executive officers now seek to evade responsibility for their misconduct. Their motion to dismiss should be denied for the reasons set forth below.

STANDARD OF PROOF

Stewart, Timney, and Landau seek dismissal for lack of personal jurisdiction under Massachusetts Rule of Civil Procedure 12(b)(2).[1] "The most typical method of resolving a motion to dismiss for lack of personal jurisdiction" is application of the prima facie standard. *Cepeda v. Kass*, 62 Mass. App. Ct. 732, 737-38 (2004). The Court "take[s] specific facts affirmatively alleged by the plaintiff as true (whether or not disputed) and construe[s] them in the light most congenial to the plaintiff's jurisdictional claim." *Id*. at 738. The CEOs have agreed that, "[f]or the purposes of this motion, the Officers assume, without conceding, the truth of the factual allegations in the Complaint." CEO Mem. at 3 n.3. The Court may also consider evidence submitted by the plaintiff in the form of an affidavit. *See Kleinerman v. Morse*, 26 Mass. App. Ct. 819, 821 nn.4-5 (1989). In this case, the Commonwealth responds to certain of the CEOs' factual assertions with evidence accompanying the affidavit of Assistant Attorney General Jenny Wojewoda ("JW Decl.").

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[1] In a later filing, the CEOs joined in an argument by Defendant Russell Gasdia challenging the Commonwealth's standing to bring this suit; and Defendant Stewart also makes a statute of limitations argument that resembles an argument raised by Gasdia. To reduce duplication, the Commonwealth addresses those issues in opposition to Gasdia's motion, served on all defendants on the same day as this brief. *See infra* at 37.

THE COMMONWEALTH'S ALLEGATIONS

I. Stewart, Timney, and Landau Directed A Pervasive, Company-Wide Scheme Involving Thousands of Deceptive Acts in Massachusetts

The allegations against Stewart, Timney, and Landau concern a sweeping campaign of misconduct in Massachusetts. As set forth in the First Amended Complaint ("Complaint" or "FAC"), the individual defendants, including these three CEOs, directed a pervasive, company-wide scheme of illegal deceit. The allegations against Stewart, Timney, and Landau are set forth in paragraphs 15-153 of the Complaint discussing Purdue's scheme, paragraphs 160-169 summarizing their responsibility for the deception, and separate sections (paragraphs 597-697; 754-789; and 790-830) devoted to each CEO.[2]

Throughout the years when Stewart, Timney, and Landau committed their misconduct, almost all of Purdue's business was selling addictive opioids. FAC ¶ 20. In 2007, Purdue employed 301 sales representatives to push opioids door-to-door, compared to 34 people in drug discovery. FAC ¶ 207. By 2015, Purdue had more than 700 reps. FAC ¶ 208. Purdue's executives and directors required each rep to visit 7 prescribers each day and the sales force to visit prescribers hundreds of thousands of times. FAC ¶¶ 299-300. Together with the other defendants, Stewart, Timney, and Landau controlled the number of reps, the number of visits, and the doctors they targeted. FAC ¶¶ 222, 314, 427, 436, 452, 460-61, 466-67, 489, 492, 494.

Purdue's executives and directors ordered those sales reps to use tactics that were intentionally deceptive. First, Purdue directed reps to deceive doctors about the risk of addiction. Purdue asserted that trustworthy patients who follow doctors' directions will not get addicted,

[2] The CEOs' attempt to replace the Complaint with a 3-page Appendix of "Jurisdictional Allegations" is incorrect. On a motion to dismiss, the Court considers the full set of the plaintiff's allegations and "construe[s] them in the light most congenial to the plaintiff's jurisdictional claim." *Cepeda*, 62 Mass. App. Ct. at 738.

and that addiction is not caused by drugs. FAC ¶¶ 39, 41, 42, 43, 44. Managers praised reps for pushing those deceptive claims. FAC ¶ 47. A rep summarized: "We were directed to lie." FAC ¶ 179. From the top of the company, Purdue's executives and directors peddled the self-serving falsehood that only "criminals" and "junkies" become addicted to opioids. FAC ¶¶ 183, 241, 493. Stewart, Timney, and Landau each oversaw and participated in deception about the risk of addiction. FAC ¶¶ 600, 607, 608, 613, 636, 654, 659, 660, 668, 677, 757, 778, 786, 806, 821, 826.

Second, Purdue's executives and directors ordered staff to target vulnerable patients without disclosing the heightened risks. Purdue followed a "geriatric strategy" to collect Medicare money from elderly patients (FAC ¶¶ 51, 687); deceptively promoted opioids as the "gold standard" for veterans (FAC ¶ 55); and encouraged patients who were not on opioids to take them "first line" as "the first thing they would take to treat pain" — even for common problems like arthritis (FAC ¶¶ 61, 65, 309, 342). Stewart oversaw and contributed to deceptive promotion for vulnerable patients. FAC ¶¶ 631, 685.

Third, Purdue's executives and directors ordered staff to promote the highest doses of opioids without disclosing the increased risks. Purdue designed sales campaigns to increase high dose prescribing (FAC ¶¶ 69-70); ordered sales reps to push higher doses (FAC ¶¶ 71, 711); studied how sales tactics increased the highest dose prescriptions (FAC ¶¶ 226, 711); and did not tell even its own sales reps that high doses put patients at risk (FAC ¶¶ 73-74). Purdue promoted the deceptive concept of "pseudoaddiction" to get doctors to respond to addiction by increasing the dose. FAC ¶¶ 77-83. When Walgreens cooperated with the DEA to reduce illegal prescriptions of the highest doses, Purdue executives hired McKinsey & Company ("McKinsey") to find ways to get the high-dose prescriptions back. FAC ¶ 410. Stewart, Timney, and Landau

each oversaw and contributed to deception about the risks of higher doses. FAC ¶¶ 599, 618, 643, 651, 652, 661, 662, 668, 680, 754, 808, 824, 827.

Fourth, Purdue's executives and directors ordered staff to use deception to keep patients on opioids longer without disclosing the increased risks. Purdue directed staff to "extend average treatment duration," without telling doctors or patients that longer prescriptions cause more addiction and death. FAC ¶ 89. Purdue conducted studies to determine that higher doses kept patients on opioids longer; then kept those results secret from doctors and patients and pushed the higher doses to increase profits. FAC ¶¶ 91, 377-78. Purdue made deceptive claims that physical dependence on opioids was normal instead of dangerous. FAC ¶ 92. And Purdue deployed an opioid savings card scheme that Purdue's leaders knew — but did not disclose — would keep patients on opioids longer and expose them to greater risk of death. FAC ¶¶ 93-94. Stewart, Timney, and Landau each oversaw deception about the risks of using opioids longer and the savings card scheme. FAC ¶¶ 599, 666, 668, 677, 683, 754, 791, 810, 813, 814.

Fifth, Purdue's executives and directors ordered staff to target the most prolific prescribers of opioids, even when sales reps feared that the doctors were writing inappropriate prescriptions and patients were being harmed. In Massachusetts, Purdue hired the most prolific OxyContin prescriber as Purdue's top-paid spokesperson, even as he lost his medical license for ignoring the risk of addiction and prescribing narcotics after patients overdosed. FAC ¶¶ 117-122, 720-24. Similarly, Purdue directed sales reps to keep visiting Massachusetts doctors Conrad Benoit, Yoon Choi, Fernando Jayma, Ellen Malsky, and Fathalla Mashali after warnings of egregious prescribing, because their prescriptions were profitable. FAC ¶¶ 128-153. In the case of Mashali alone, 17 Massachusetts patients filled prescriptions for Purdue opioids and died of opioid-related overdoses. FAC ¶ 153. Purdue's Board of Directors had a secret list of

hundreds of prescribers suspected of illegal prescribing (code-named *Region Zero*), and how much money Purdue was making from each of them. FAC ¶¶ 310-313. Purdue's official corporate prize for sales reps was so sensitive to prolific prescribers that a rep won year after year "largely on the prescriptions of 3-4 doctors." FAC ¶ 730. Stewart and Timney each oversaw and contributed to the targeting of the most prolific prescribers. FAC ¶¶ 642, 648, 649, 664, 666, 681, 682, 694, 759, 767.

Stewart, Timney, and Landau implemented these deceptive tactics in Massachusetts on a massive scale, with massive effect. They sent sales reps to visit Massachusetts prescribers and pharmacists more than 150,000 times. FAC ¶ 32. A list of the exact date, location, sales rep, and "target" of each sales visit is attached to the Complaint as Exhibit 1. Reps visited Purdue's top 100 targets in Massachusetts an average of more than 200 times each, at a cost to Purdue of more than $40,000 each. FAC ¶ 76. The CEOs knew and intended that their campaign in Massachusetts would repay that investment many times over. Compared to Massachusetts doctors and nurses who prescribed Purdue opioids without lobbying from sales reps, Purdue's top targets wrote far more profitable and dangerous prescriptions — they prescribed Purdue opioids to more patients, at higher doses, for longer periods, and were at least ten times more likely to prescribe Purdue opioids to patients who overdosed and died. FAC ¶ 116. The Attorney General's investigation has already identified 671 Massachusetts patients who filled prescriptions for Purdue opioids and died of opioid-related overdoses. FAC ¶ 22.

Purdue's decade-long, company-wide deceit was not an accident of low-level employees gone rogue. The deception was directed from the top. Purdue's executives and directors made the decisions to break Massachusetts law. FAC ¶ 161. Those leaders collected a large share of the profits from the deception in Massachusetts. FAC ¶¶ 160, 911-913. And those leaders can

be held accountable in Massachusetts, including Stewart, Timney, and Landau.

II. Stewart Directed Thousands of Deceptive Acts in Massachusetts

Stewart was Purdue's CEO from 2007 through 2013. FAC ¶ 597. He got the job because the Sacklers believed he would be loyal to their family. FAC ¶ 237. As set forth in paragraphs 160-169 of the Complaint, for seven years, Stewart controlled the misconduct described above. FAC ¶¶ 160-69.

Immediately after Purdue's 2007 criminal conviction for deceiving doctors and patients, Stewart began expanding Purdue's sales force. FAC ¶ 603, 612, 617. Stewart advocated for expanding the sales force again and again, putting more reps visiting more doctors in Massachusetts. FAC ¶ 224, 315, 598, 603, 612, 617, 627, 645, 648, 650. Stewart pushed for the reps to target dangerous high prescribers, like Massachusetts doctors Jacobs and Mashali, even as he knew that prolific prescribers correlated with high rates of overdose and death. FAC ¶¶ 620, 642, 646, 648, 666, 681, 682.

Stewart directed what sales reps should say and how many visits they should make, and enforced the disciplining of reps whose doctors did not prescribe enough of Purdue's drugs. FAC ¶¶ 624, 626, 649, 660, 670, 671, 675, 684, 689. Stewart told director Richard Sackler that reps promoted OxyContin as reducing pain faster, having less variability in blood levels, and working for more pain conditions than other products. FAC ¶ 622. That promotion was deceptive, and Stewart knew it. FAC ¶ 622. Stewart directed that reps should promote Purdue opioids for "moderate persistent pain" even though the FDA had removed moderate pain from the drugs' indications. FAC ¶ 684. Stewart drafted sales scripts to deceive doctors into believing reformulated OxyContin was safer, and reps used the scripts in Massachusetts at least 100 times. FAC ¶¶ 670, 671. Stewart hand-edited a presentation to the Board proposing that Purdue respond to a drop in high-dose prescriptions by making more deceptive sales calls,

pushing its deceptive *Individualize The Dose* campaign, and promoting deceptive savings cards to get patients back on higher doses for longer periods of time. FAC ¶ 672; JW Decl. Ex. 7.

Stewart tracked legislation in Massachusetts to ensure that opioid prescriptions continued to grow. FAC ¶¶ 274, 277, 601, 630, 641, 647, 665. And Stewart came to Massachusetts to meet with prescribers and promote the *Massachusetts General Hospital Purdue Pharma Pain Program*, which Purdue established to expand the market for its opioids here. FAC ¶ 278.

III. Timney Directed Thousands of Deceptive Acts in Massachusetts

Timney was Purdue's CEO from 2014 to 2017. FAC ¶¶ 754, 787. For three and a half years, he controlled the misconduct described above. FAC ¶¶ 160-169. When a sales and marketing executive resigned, Timney announced: "I will assume responsibility for our Sales, Marketing, New Product Planning and OTC [over-the-counter] functions." FAC ¶ 785.

Timney controlled Purdue's deceptive sales force in Massachusetts. FAC ¶¶ 754. In consultation with McKinsey, Timney created a scheme to deliver deceptive messages to doctors at Massachusetts hospitals that limited in-person sales visits. FAC ¶¶ 755, 763, 767. Timney told defendant Russell Gasdia that he was watching closely the development of Purdue's new call center, including telemarketing reps instructed to make the same sales pitches as reps in the field. JW Decl. Ex. 13. Timney knew and intended that the call center would target the highest prescribers of Purdue's opioids, including those in the "high value geography" of Massachusetts, with a predicted "upside" of $4 million for OxyContin and $1 million for Butrans over the 6-month pilot period during his tenure as CEO. *See id.*, FAC ¶ 767.

Timney knew and intended that his conduct would drive misrepresentations about Purdue's opioids throughout Massachusetts, even as he tracked and understood the escalating epidemic of addiction. FAC ¶ 758. Timney kept a careful eye on the regulatory scene in Massachusetts, as well as public perception, to ensure that alarms about the dangers of opioids

would not cut into Purdue's profits from this state. FAC ¶¶ 765, 768, 774, 779.

IV. Landau Directed Thousands of Deceptive Acts in Massachusetts

Landau joined Purdue in 1999 and was Chief Medical Officer from 2007 to 2013. FAC ¶ 790. In 2009, Landau worked with McKinsey to develop marketing to "counter the emotional messages from mothers with teenagers that overdosed on OxyContin" by deceptively promoting Purdue's high-dose extended-release opioids. FAC ¶ 800. In 2011, he helped to create the deceptive marketing campaign *In The Face Of Pain*, which promoted pain treatment by urging patients to "overcome" their "concerns about addiction." FAC ¶¶ 40, 804. Testimonials on the website that were presented as personal stories were in fact by Purdue consultants, whom Purdue had paid tens of thousands of dollars to promote its drugs. FAC ¶ 40. Massachusetts residents accessed the site more than 11,700 times. FAC ¶ 111.

In 2017, Landau became Purdue's CEO. FAC ¶ 790. To convince the Sacklers to make him CEO, he wrote a business plan entitled "SACKLER PHARMA ENTERPRISE," in which he proposed "an opioid consolidation strategy." FAC ¶¶ 817-19. Landau proposed that Purdue take advantage of public concern about opioids to become an even more dominant opioid seller "as other companies abandon the space." FAC ¶ 819.

Landau immediately began working to make that dream come true. With Landau as CEO, Purdue sales reps visited Massachusetts prescribers more than 3,000 times. FAC Ex. 1. Like Richard Sackler, Landau went into the field on "field rides" to supervise reps face-to-face. FAC ¶¶ 354-56 (Sackler); JW Decl. Ex. 16 (Landau). Like Stewart and Timney, Landau tracked legislation in Massachusetts to ensure continued access to this important market. FAC ¶ 805.

As the injuries from the defendants' misconduct grew, Landau stepped in to do damage control for Purdue and the Sacklers. He wrote to the President of Tufts University, and asserted, falsely, that Purdue was encouraging physicians to prescribe fewer opioids. FAC ¶ 824. At the

same time, he directed Purdue sales reps to keep pushing Massachusetts doctors to prescribe more opioids. FAC ¶¶ 800, 805, 806, 810, 824.

Finally, in 2018, Landau asserts that he directed sales reps to stop visiting doctors to promote opioids. *See* Landau Decl. ¶ 13. He claims credit for issuing that "direction." *Id.* The Commonwealth seeks to hold him accountable for the deceptive marketing he led in the months and years before that surrender. *See, e.g.*, FAC ¶¶ 160-69.

ARGUMENT

On the first page of their brief, Stewart, Timney, and Landau write that, to establish jurisdiction, "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." CEO Mem. at 1. Their motion to dismiss should be denied because the Complaint indeed alleges that Stewart, Timney, and Landau personally and directly participated in conduct purposefully directed towards Massachusetts and the Commonwealth's claims in this suit arise from their pervasive, deceptive, and deadly misconduct.

I. Stewart, Timney, And Landau Are Subject To Specific Jurisdiction In Massachusetts For The Commonwealth's Claims Regarding Their Illegal Deception Here

The CEOs are subject to jurisdiction in this Court because jurisdiction is authorized by three sections of the Massachusetts Long-Arm Statute and is proper under the Due Process Clause. *See SCVNGR, Inc. v. Punchh, Inc.*, 478 Mass. 324, 325 (2017).

A. Stewart, Timney, and Landau Are Subject To Jurisdiction Under The Long-Arm Statute, G.L. c. 223A, § 3

Each CEO is subject to jurisdiction under the Long-Arm Statute: Massachusetts General Laws Chapter 223A Section 3. That Section provides jurisdiction over out-of-state defendants for claims arising from their contacts with Massachusetts.

1. Section 3(c)

First, each CEO is subject to jurisdiction because he directed deceptive marketing into Massachusetts and caused tortious injury here. Section 3(c) of the Long-Arm Statute authorizes jurisdiction "over a person, who acts directly or by an agent, as to a cause of action in law or equity arising from the person's … causing tortious injury by an act or omission in this Commonwealth." G.L. c. 223A, § 3(c).

a. The CEOs Acted In Massachusetts By Sending False Statements Here

Stewart, Timney, and Landau acted in Massachusetts when they sent deceptive marketing into Massachusetts, knowing and intending that doctors would rely on it to put more patients on dangerous opioids, at higher doses, for longer periods of time. FAC ¶¶ 160-167. The relevant rule about the scope of Section 3(c) was announced in *Murphy v. Erwin-Wasey*:

> Where a defendant knowingly sends into a state a false statement, intending that it should there be relied upon to the injury of a resident of that state, he has, for jurisdictional purposes, acted within that state.

460 F.2d 661, 664 (1st Cir. 1972) (holding jurisdiction was proper under Section 3(c)). Borrowing a phrase from Judge Friendly, *Murphy* explained that intentionally sending a false statement into a state is a way of acting in that state, as surely as a "gunman firing across a state line." *Id.* at 664.

Section 3(c) applies regardless of the method used to send the deceptive message. The First Circuit explained in *Ealing Corp. v. Harrods Ltd.*, 790 F.2d 978, 982 (1st Cir. 1986):

> [A] fraudulent misrepresentation made in the state, whether made by a personal representative of a defendant within the state or made by the defendant via mail or other communication networks, constitutes an act which confers jurisdiction under 223A, § 3(c).

Section 3(c) applies to every "means of communication."[3] Section 3(c) applies where, as here, the deception is: printed into pamphlets and sent to Massachusetts doctors by mail (FAC ¶¶ 36, 111, 608); emailed to a customized list of doctors selected because they are in Massachusetts (FAC ¶¶ 36, 94); streamed to Massachusetts doctors individually chosen for the OxyContin Physicians Television Network (FAC ¶¶ 36, 385); recited to Massachusetts doctors over the phone from a call center (FAC ¶¶ 36, 763, 767); presented at Massachusetts hospitals and universities (FAC ¶¶ 167, 616, 663); or delivered by sales representatives, face to face (FAC ¶¶ 32, 114, 162-165, 598, 671, 672, 684, 785, 820).

Stewart, Timney, and Landau used all these methods. The deceptive mailings, which Stewart approved, asserted that trustworthy patients would not be addicted and that doctors should respond to signs of addiction by increasing the dose. FAC ¶¶ 606-608. The call center, which Timney oversaw, focused on Massachusetts as one of four "high value geographies." FAC ¶¶ 763, 767. The programs at hospitals and universities include the *Massachusetts General Hospital Purdue Pharma Pain Program*, which Stewart visited in person, and an entire degree program in pain at Tufts, where Landau wrote to the University President. FAC ¶¶ 273-87. And, of course, sales reps made thousands of visits to Massachusetts under the CEOs' orders: 70,000 visits under Stewart as CEO; 35,000 visits under Timney; and at least 3,000 visits under Landau. FAC Ex. 1.

The fact that the CEOs committed their misconduct at work in the employ of Purdue is no

[3] *JMTR Enterprises, L.L.C. v. Duchin*, 42 F. Supp. 2d 87, 97 (D. Mass. 1999) ("A fraudulent misrepresentation made in the state by a foreign defendant or her agent via mail, telephone, or other means of communication constitutes an act that confers jurisdiction under section 3(c)."); *see also Murphy*, 460 F.2d at 664 (a defendant is subject to jurisdiction for "sending a personal messenger into that state bearing a fraudulent misrepresentation" just the same as for "employing the United States Postal Service as its messenger").

defense to personal jurisdiction under Section 3(c). In *DSM Thermoplastic Elastomers, Inc. v. McKenna*, Section 3(c) provided jurisdiction when the president and vice president of sales of an out-of-state company sent deceptive statements to Massachusetts. No. 002018B, 2002 WL 968859 (Mass. Super. Ct. Feb. 5, 2002). Allegations that the executives made misrepresentations and directed correspondence to Massachusetts were sufficient to show "direct personal involvement by the corporate officer in some action which caused the tortious injury." *Id.* at *3. Likewise, in *Zises v. Prudential Insurance*, the court stated: "Personal jurisdiction under section 3(c) will be found where plaintiff's allegations make out a prima facie case for which the individual defendants may be held liable in tort, despite the fact that they acted at all times on behalf of the corporation." No. CA-80-1886-Z, 1981 WL 27044 at *3 (D. Mass. Mar. 10, 1981) (holding executive subject to jurisdiction under Section 3(c)).

i. The CEOs' Conduct Was Purposeful and Voluntary

There are two limits to the *Murphy* rule, neither of which applies here. First, *Murphy* may not apply when an out-of-state defendant sends a false statement to Massachusetts only in response to communication initiated by the plaintiff. Without more, merely responding to an inquiry from Massachusetts is "insufficiently purposeful and voluntary" to support jurisdiction. *Nat'l Finance Corp. v. SJD Ins. Agency, Inc.*, No. 063695, 2007 WL 738722, at *4 (Mass. Super. Ct. Feb. 12, 2007). Stewart, Timney, and Landau are at the other extreme of "purposeful and voluntary" action and therefore are subject to jurisdiction.

Stewart wrote the objectives for the sales and marketing team, from the number of sales visits to the required elements of the sales plan. FAC ¶¶ 624, 632, 649. Stewart urged the Board to expand the sales force and tracked the sales reps in detail. FAC ¶¶ 627-28, 645. Stewart made decisions about what sales reps should say to doctors during their sales visits. FAC ¶¶ 636, 643, 670. Stewart sought Board approval for the *Massachusetts General Hospital Purdue*

Pharma Pain Program and came to Massachusetts to promote it. FAC ¶¶ 623, 641. Stewart directed sales staff to promote higher and more dangerous doses to get "more $ value per script," and he commissioned a study to find that higher doses keep patients on opioids longer. FAC ¶¶ 662, 666, 672. Stewart delivered the news to the Board when Massachusetts allowed opioid savings cards. FAC ¶ 665.

Similarly, Timney oversaw the development of a call center targeting Massachusetts. FAC ¶¶ 763, 767. Timney continued Stewart's policy to increase the number of sales visits to high-volume and "high-value" prescribers. FAC ¶¶ 759-60, 767. Timney directed sales reps to promote OxyContin's abuse-deterrent properties without disclosing their risks. FAC ¶ 773. Timney urged the board to further expand the sales force. FAC ¶ 774. Timney even led the sales and marketing department, rather than replacing the outgoing department head. FAC ¶ 785.

Likewise, Landau promoted the deceptive message that abuse-deterrent properties made Purdue opioids safer and less addictive. FAC ¶¶ 806, 821, 826. Landau directed Purdue's sales reps to promote higher doses and deceive prescribers about their higher risks. FAC ¶¶ 808, 824, 827. Landau helped create the misleading marketing campaign *In the Face of Pain*, which Massachusetts residents accessed more than 11,700 times. FAC ¶¶ 111, 804.

ii. The CEOs' Conduct Was Intentional

Second, Section 3(c) may not apply when a plaintiff alleges that the defendant's conduct was an unintentional mistake. That limit is set forth in two medical malpractice cases, which provide no defense for the Purdue CEOs because the Commonwealth alleges their misconduct was intentional.

Bradley v. Cheleuitte held that Section 3(c) did not reach a doctor accused of giving negligent care in Puerto Rico. 65 F.R.D. 57, 61 (D. Mass. 1974); *see* CEO Mem. at 11. The

alleged misconduct was unintentional: for example, failure to discover a broken bone. 65 F.R.D. at 59. There was no communication to Massachusetts: "The defendant had no further contact with the plaintiff" after she left the hospital in Puerto Rico. *Id.* To test the boundaries of the then-recently-issued *Murphy* decision, the plaintiff argued that Section 3(c) applied because the plaintiff later traveled to Massachusetts. *Id.* at 60. The court rejected that argument and held that the Puerto Rican doctor did not act here. *Id.* at 60.

Other plaintiffs tried to use Section 3(c) for out-of-state medical malpractice in *Lyons v. Duncan*, 81 Mass. App. Ct. 766 (2012); *see* CEO Mem. at 11. Mr. and Mrs. Lyons sued over allegedly negligent surgery in Rhode Island; they also asserted, and then abandoned, a claim that the surgeon sent a "negligent misrepresentation" to Massachusetts when he mailed records of the allegedly negligent operation to a doctor here. 81 Mass. App. Ct. at 768. The court wrote that, even if there were a negligent misrepresentation in those medical records, it would not support jurisdiction, because Section 3(c) "distinguishes between intentional and negligent acts." *Id.* at 770. Because the *Lyons* plaintiffs did not allege that the surgeon intended to do anything wrong, he was not a defendant who "knowingly sends" a false statement into a state. *See Murphy*, 460 F.2d at 664.

Here, the Commonwealth does not allege an unintentional mistake like *Bradley* or *Lyons*. The Commonwealth alleges intentional deception. "Each individual defendant knowingly and intentionally sent sales representatives to promote opioids to prescribers in Massachusetts thousands of times." FAC ¶ 162. "Each individual defendant knew and intended that the sales reps in Massachusetts would unfairly and deceptively promote opioids sales," including eight specific categories of deception. FAC ¶ 163. "Each individual defendant knew and intended that prescribers, pharmacists, and patients in Massachusetts would rely on Purdue's deceptive

sales campaign to prescribe, dispense, and take Purdue opioids." FAC ¶ 165. The Complaint explains the motive for the intentional misconduct: "Each individual defendant knowingly and intentionally took money from Purdue's deceptive business in Massachusetts." FAC ¶ 168. And the Complaint alleges intentional concealment of the intentional misconduct: "Each individual defendant knowingly and intentionally sought to conceal his or her misconduct." FAC ¶ 169. The Complaint explains that the individuals are named in this suit in part because the Commonwealth determined that their misconduct was intentional: "Holding the defendants accountable is important because of the people they hurt in Massachusetts and because of the defendants' selfish, deliberate choice to break the law." FAC ¶ 831.

The Commonwealth's allegations of intent are stronger than in *Murphy*, where the plaintiff alleged the defendant "caused a check to be delivered to him in Massachusetts which, he claims, by implication fraudulently misrepresented the amount due." 460 F.2d at 663 (finding jurisdiction under Section 3(c)). The Commonwealth's allegations of intent are stronger than in *Ealing*, where the plaintiff alleged the defendant falsely said it had an "intention to negotiate," when it did not really intend to negotiate. 790 F.2d at 979 (finding jurisdiction under Section 3(c)). The Commonwealth's allegations of intent are stronger than in *JMTR Enterprises*, where the plaintiff alleged the defendant said she would not demand a deposit, but she actually intended to demand one. 42 F. Supp. 2d at 97 (finding jurisdiction under Section 3(c)). The Commonwealth's allegations of intent are stronger than in *DSM Thermoplastic*, where the plaintiff alleged the defendant sent four letters overstating the performance of a gadget for changing filters on an assembly line. 2002 WL 968859, at *1 (finding jurisdiction under Section 3(c)).

The allegations of bad intent here are stronger than in any of those Section 3(c) cases

because the Complaint alleges that Stewart, Timney, and Landau led a years-long campaign of organized deception involving thousands of acts in Massachusetts (*see supra* at 1-9); they optimized the deception using research into patients and doctors (FAC ¶¶ 91, 93, 102, 384, 413); they pushed false claims in public while admitting the opposite in private (FAC ¶¶ 74, 445-50, 473); and they disregarded the warnings of the 2007 criminal convictions and Judgment (FAC ¶¶ 188-94). Worst of all, the Purdue CEOs committed their misconduct even though they knew they were responsible for the causes of the opioid epidemic: too many opioid prescriptions, at too high a dose, for too long, for conditions that do not require them, by doctors who should not write them. FAC ¶¶ 831-34.[4]

b. The CEOs Caused Tortious Injury In Massachusetts

The CEOs' deception caused tortious injury in Massachusetts. Public nuisance is a tort. *See Sullivan v. Chief Justice for Admin. & Mgmt. of Trial Court*, 448 Mass. 15, 34 (2006) (*quoting* the Restatement (Second) of Torts). While a claim under G.L. c. 93A, § 2 ("Chapter

[4] The CEOs are wrong three times over when they suggest that jurisdiction does not extend to the Commonwealth's claim for public nuisance because "that Count sounds in negligence." CEO Mem. at 11. First, as a matter of law, public nuisance can address intentional misconduct. *See Stop & Shop Cos. v. Fisher*, 387 Mass. 889, 891 n.2 (1983) ("Nuisance liability must be based upon a determination that the interference complained of is intentional and unreasonable or results from conduct which is negligent, reckless, or ultrahazardous."). Second, the Complaint alleges intentional misconduct. The Commonwealth's dozens of allegations of intentional deception are not nullified by the further allegation that "defendants' deceptive conduct was unreasonable in light of the lack of scientific support for their claims and was negligent and reckless with regard to the known risks of Purdue's drugs." FAC ¶¶ 901, 905, 910. On a motion to dismiss, the Court construes the plaintiffs' allegations "in the light most congenial to the plaintiff's jurisdictional claim," *Cepeda*, 62 Mass. App. Ct. at 738 — a standard that does not call for the Court to disregard the allegations of intentional misconduct. Third, once jurisdiction is established for one cause of action, it extends to any "cause of action in law or equity arising from" the same conduct. M.G.L. c. 223A § 3. For example, *DSM Thermoplastic* held Section 3(c) provided jurisdiction for a four-count suit, including fraudulent misrepresentation, negligent misrepresentation, deceit, and Chapter 93A claims, because the company president directed misleading correspondence to Massachusetts. 2002 WL 968859 at *1. *Murphy* itself was "framed as an action for fraud and deceit as well as in contract," and the court relied on Section 3(c) and "tortious injury" to find jurisdiction over the whole case. 460 F.2d at 663.

93A") is a statutory action, courts have repeatedly found that Chapter 93A claims satisfy the "tortious injury" requirement of Section 3(c). *See, e.g.*, *Abbott v. Interactive Computing Devices, Inc*., No. 9601764B, 1998 WL 1182003, at *2 (Mass. Super. Ct. Feb. 27, 1998) (out-of-state president caused tortious injury under Section 3(c) where complaint alleged he sent fraudulent message into Massachusetts in violation of Chapter 93A); *JMTR Enterprises*, 42 F. Supp. 2d at 97 ("fraud and Chapter 93A claims arise from the tortious injury," and out-of-state CEO is subject to jurisdiction under Section 3(c)); *Liu v. DeFelice*, 6 F. Supp. 2d 106, 108 (D. Mass. 1998) (out-of-state defendant caused tortious injury subject to Section 3(c) by violating credit reporting statutes and Chapter 93A).[5]

The tortious injuries in this case are exemplified by the effect on the Massachusetts prescribers and patients that Stewart, Timney, and Landau targeted. The Complaint alleges that each CEO sent sales reps to Massachusetts to deceive doctors and patients about Purdue's drugs. FAC ¶¶ 162-164. It alleges that each CEO "knew and intended that prescribers, pharmacists, and patients in Massachusetts would rely on Purdue's deceptive sales campaign to prescribe, dispense, and take Purdue opioids." FAC ¶ 165; *see also* FAC ¶¶ 618, 624, 649, 666, 672, 684, 694. And the Complaint alleges that the CEOs' deception caused devastating injuries here:

> In Massachusetts, sales reps visited Purdue's 100 top targets an average of more than 200 times each. Those visits cost Purdue more than $40,000 for each doctor … Purdue paid to lobby those doctors because Purdue knew its reps would convince them to put

[5] *See also SCVNGR, Inc. v. eCharge Licensing, LLC*, No. 13–12418–DJC, 2014 WL 4804738, at *3 (D. Mass. Sept. 25, 2014) (letter alleged to violate Chapter 93A constituted tortious injury under Section 3(c)); *Lyle Richards, Int'l. v. Ashworth, Inc*., 132 F.3d 111, 114 (1st Cir. 1997) ("we shall assume, without deciding, that a Chapter 93A violation would constitute a 'tortious injury' under chapter 223A"). *Cf. Klairmont v. Gainsboro Restaurant, Inc.*, 465 Mass. 165, 179 (2013) (Chapter 93A claim "presents a cause of action that is substantively akin to the types of torts" covered by the Massachusetts survival statute); *Travis v. McDonald*, 397 Mass. 230, 231-32 (1986) (for jurisdictional purposes Chapter 93A claims are "in the nature of contract or tort" within the Massachusetts small claims procedure statute).

> more patients on opioids, at higher doses, for longer periods … Those extra prescriptions led Massachusetts patients to become addicted, overdose, and die … Purdue's top targets wrote far more dangerous prescriptions … Purdue's top targets prescribed opioids to more of their patients, at higher doses, and for longer periods of time … Purdue's top targets were at least ten times more likely to prescribe Purdue opioids to patients who overdoses and died.

FAC ¶¶ 114-116; *see also* FAC ¶¶ 22-26 (at least 671 Purdue patients died of overdoses in Massachusetts); ¶¶ 144-53 (17 Purdue patient deaths from one top prescriber alone).[6]

Even though courts compare false statements to the "gunman firing across a state line," *Murphy*, 460 F.2d at 664, the lies in most cases do not kill. Here they did. The injuries that Stewart, Timney, and Landau inflicted on Massachusetts families are sufficient for jurisdiction.

2. Section 3(d)

a. The CEOs Caused Tortious Injury in Massachusetts and Derived Substantial Revenue from Massachusetts

Even if the defendants' deception were not deemed to take place in Massachusetts under the rule of *Murphy*, the CEOs would still be subject to jurisdiction for their misconduct outside of Massachusetts under Long-Arm Section 3(d). That section provides jurisdiction where a defendant's actions outside Massachusetts cause tortious injury in Massachusetts and the defendant "derives substantial revenue from goods used or consumed or services rendered, in this Commonwealth." G.L. c. 223A, § 3(d).

Stewart, Timney, and Landau are subject to jurisdiction here because their misconduct and the hundreds of thousands of dollars each CEO collected from opioid sales in Massachusetts satisfy both the misconduct and revenue elements of Section 3(d). First, as just discussed *supra*

[6] Section 3(c) is not available when the "substance of the plaintiffs' complaint is contractual" and concerns "a monetary injury … grounded in breach of contract." *Roberts v. Legendary Marine Sales*, 447 Mass. 860, 864 (2006). This case is not contractual; it is a suit brought by the Attorney General in the public interest to enforce the consumer protection act and public nuisance law and protect Massachusetts residents from physical injury. FAC ¶¶ 4, 22-26.

at 16-18, the Commonwealth alleges that the CEOs caused tortious injury in Massachusetts.

Second, the Commonwealth alleges that Stewart, Timney, and Landau each derived "substantial revenue" from the opioid sales that were the object of their misconduct. Each defendant knew and intended that he was collecting compensation from the deception in Massachusetts. FAC ¶ 168. Stewart collected more than $700,000 in compensation resulting from opioid sales in Massachusetts. FAC ¶ 911. Timney collected more than $750,000 from opioid sales in Massachusetts. FAC ¶ 912. Landau has collected at least $240,000 from opioid sales in Massachusetts. FAC ¶ 913.

These amounts are "substantial" enough to create jurisdiction in the Commonwealth. Courts have found far smaller amounts sufficient to satisfy the revenue prong for Section 3(d) jurisdiction. *See Keds Corp. v. Renee Int'l Trading*, 888 F.2d 215, 219 (1st Cir. 1989) ($15,000 in sales was enough); *Mark v. Obear & Sons, Inc.*, 313 F. Supp. 373, 376 (D. Mass. 1970) ($5,000 was enough).

The CEOs argue that the connection between the money Purdue collected in Massachusetts and the money it paid its CEOs is too "attenuated" for that money to be "derived" from Massachusetts. CEO Mem. at 16. The case defendants cite, *Merced v. JLG Indus., Inc.*, 193 F. Supp. 2d 290 (D. Mass. Dec. 27, 2001) ("*Merced II*"), shows why the link is sufficient. In *Merced II*, the defendant argued that it could not be subject to 3(d) because it never sold its product in Massachusetts. 193 F. Supp. 2d. at 293. The court said that argument was not enough — because 3(d) is written more broadly and "requires only that the [defendant] derive substantial revenue from the use" in Massachusetts. *Id.* An earlier decision in the same case by the same court added a few more words to explain that courts should not require that a defendant itself sell a product in Massachusetts to satisfy 3(d), because the purpose of the provision is to ensure that

"injured Massachusetts residents have redress against a foreign [defendant]." *Merced v. JLG Indus., Inc*., 170 F. Supp. 2d 65, 72 (D. Mass. Sept. 28, 2001) ("*Merced I*") (finding jurisdiction proper under Section 3(d)). The *Merced II* decision cited by the CEOs goes on to assess whether that defendant either "made direct sales" or "attempted to cultivate sales relationships" in Massachusetts. 193 F. Supp. 2d at 293. The Commonwealth alleges that Stewart, Timney, and Landau "attempted to cultivate sales relationships" in Massachusetts; that is why Stewart came to Massachusetts General Hospital and all three CEOs sent sales reps to visit Massachusetts doctors thousands of times. FAC ¶¶ 162, 624, 672.

The Appeals Court has confirmed that 3(d)'s "derived" clause includes money passed through a chain of entities. In *Heins v. Wilhelm Loh Wetzlar Optical Machinery GmbH & Co.*, the defendant West German corporation sold a machine to a Swiss corporation, which sold it to an Illinois corporation, which sold it to a Massachusetts corporation, where it injured a Massachusetts employee. 26 Mass. App. Ct. 14, 17-18 (1988). The West German defendant did not have "any control over the marketing, price or sales of its machines in the United States." *Id.* at 17. The Superior Court held that the West German defendant did not "derive substantial revenue from goods used in Massachusetts," because the initial sale was to a company in Switzerland. *Id.* at 20. The Appeals Court reversed. The Appeals Court held that "literal satisfaction of the explicit statutory requirements" is sufficient to satisfy the long arm statute. *Id.* The relevant "economic reality" was that the defendant "derive[d] substantial revenue" from Massachusetts. *See id.*

The case for jurisdiction over Stewart, Timney, and Landau is even stronger than in *Heins*. The *Heins* defendant, which was several steps removed from the sale of the injury-causing machine, did not have "any control" over marketing or sales of products in North

America; in contrast, the CEOs in this case, together with the other individual defendants, controlled the deception in Massachusetts that is both the basis of the Commonwealth's claims and the source of their revenue. *Id*. at 17; FAC ¶¶ 160-168.[7]

b. Section 3(d) Is A Basis For Specific Jurisdiction

The CEOs incorrectly suggest that this Court cannot use Long-Arm Section 3(d) in the absence of general jurisdiction. While the Appeals Court identified a debate about this issue, *see Fletcher Fixed Income Alpha Fund, Ltd. v. Grant Thornton LLP*, 89 Mass. App. Ct. 718 (2016), the structure and language of Section 3(d), the holdings of the Appeals Court and the First Circuit, and the logic behind the statute all support its use to find specific jurisdiction here.

First, as to the structure and language of the statute, Chapter 223A, Section 2 provides for general jurisdiction — jurisdiction over persons as to whom Massachusetts courts may adjudicate "any cause of action." G.L. c. 223A, § 2 (emphasis added). In contrast, every subsection of Section 3 describes a form of specific jurisdiction. Section 3 restricts jurisdiction to "a cause of action in law or equity arising from" specified conduct. G.L. c. 223A, § 3 (emphasis added). The Supreme Judicial Court noted this aspect of the statutory structure in *Exxon Mobil Corp. v. Attorney General*:

> our inquiry in this case concerns the exercise of specific jurisdiction. This requires an "affiliatio[n] between the forum and the underlying controversy." *See* G. L. c. 223A, § 3 (granting

[7] The cases cited by the defendants from other jurisdictions do not support a different result. In *John Gallup & Assocs. v. Conlow*, No. 1:12-CV_03779-RWS, 2013 WL 3191005, at *10 (N.D. Ga. June 21, 2013), the defendant took no action to derive benefit from Georgia; instead, the alleged basis of jurisdiction, which the court found to be insufficient, was that the defendant's "former employer opened an office in Georgia several months before [she] resigned." In *Hartsel v. Vanguard Grp., Inc.*, No. 5394-VCP, 2011 WL 2421003, at *12 & n.80 (Del. Ch. June 15, 2011), the court wrote: "assuming that a salary could, on its own, satisfy the substantial revenue requirement of § 3104(c)(4), Plaintiffs' Complaint has not alleged sufficient facts to support a reasonable inference that any of the Individual Defendants' salaries were substantial or were derived from fees charged to Nominal Defendants … Indeed, the Complaint fails to allege any details about the size, source, or breakdown of any Individual Defendant's salary."

> jurisdiction over claims "arising from" certain enumerated grounds occurring within Massachusetts)

479 Mass. 312, 315 (2018) (citation omitted). The requirement that a claim relate to specified conduct is the hallmark of specific jurisdiction. *See Ticketmaster-New York, Inc. v. Alioto*, 26 F.3d 201, 207 (1st Cir. 1994) ("relatedness is the divining rod that separates specific jurisdiction cases from general jurisdiction cases").

Second, courts have repeatedly relied on Section 3(d) for specific jurisdiction. The Appeals Court in *Heins* concluded:

> we hold that (1) the literal requirement of the long arm statute that the defendant "derives substantial revenue from goods used ... in this commonwealth," G.L. c. 223A, § 3(d), has been satisfied, and (2) the "minimum contacts" of the defendant with Massachusetts are, when balanced with other factors, sufficient to permit the assertion of specific personal jurisdiction over the defendant under the due process clause.

26 Mass. App. Ct. at 27 (emphasis added). Similarly, the First Circuit in *Keds* held that $15,000 was "substantial revenue" and found "specific jurisdiction" under Section 3(d). 888 F.2d at 219-20. *Obear & Sons* explained that a purpose of Section 3(d) is to provide jurisdiction when general jurisdiction is not available: "It is one of the aims of the long-arm statute to provide an injured consumer with a more effective remedy against the [defendant] who studiously avoids being 'present' in the jurisdiction in which he causes his products to be marketed." 313 F. Supp. at 376 (holding there was jurisdiction under Section 3(d)). In *Darcy v. Hankle*, the Appeals Court found Section 3(d) provided jurisdiction over an out-of-state executive on facts that clearly supported specific, rather than general, jurisdiction. 54 Mass. App. Ct. 846, 849-52 (2002) (New York defendant derived substantial revenue by selling more than $14,000 of lumber to Massachusetts customers). In *Roberts*, 447 Mass. at 864-65, the Supreme Judicial Court held that a defendant was not subject to Section 3(d) based on detailed analysis that would have been

inapplicable if general jurisdiction were required. The SJC did that again in *Caplan v. Donovan*, 450 Mass. 463, 465-67 (2008).[8]

Third, the dicta comprising the "general jurisdiction" side of the debate are not controlling or persuasive. *Connecticut Nat'l Bank v. Hoover Treated Wood Prod., Inc*. expressly limited its holding to Section 3(a), which was enough to establish jurisdiction; in the opening paragraph of the decision, the court emphasized that it was "[c]onfining the analysis to the plaintiff's assertion that its claim arose out of the business transacted by the defendant" — *i.e.*, Section 3(a). 37 Mass. App. Ct. 231, 231 (1994). Only in a footnote that was not necessary to the decision did the Court state that Section 3(d) is "predicated on general jurisdiction." *Id.* at 233 n.6. The decision did not mention or address the precedent holding that specific jurisdiction is available under Section 3(d): *Heins*, *Keds*, or *Obear & Sons*. A later decision that echoed *Connecticut Nat'l Bank* similarly emphasized that the plaintiff claimed jurisdiction only under Section 3(a) and not 3(d). *See Fern v. Immergut*, 55 Mass. App. Ct. 577, 581 (2002) ("Fern claims that personal jurisdiction over Milbank is proper under G.L. c. 223, § 3(a)"); *id.* at 581 n.9 ("there was no claim [that the defendant] derived substantial revenues from services performed in Massachusetts"). *Fern* also characterized Section 3(d) only in a footnote and attributed the characterization only to the footnote in *Connecticut Nat'l Bank*. *See id.* at 581 n. 9. *Fletcher* refers to the debate, but then analyzes Section 3(d) as a basis for specific jurisdiction after all. 89 Mass. App. Ct. at 724-25.[9]

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[8] The Supreme Judicial Court has also cited with approval the conclusion in *Obear & Sons* that $5,000 of Massachusetts sales is enough to subject an out-of-state defendant to jurisdiction under Section 3(d) — an amount that is consistent with specific, but not general, jurisdiction. *See Carlson Corp. v. University of Vermont*, 380 Mass. 102, 107 n.8 (1980).

[9] This Court has issued rulings on both sides of the debate. *Anaqua, Inc. v. Bullard* spotted the problem of the *Connecticut Nat'l Bank* footnote and observed that, if Section 3(d) were (*footnote continued on the next page*)

Fourth, as *Merced I* recognized, *supra* at 20, the function of Section 3(d) is to reach "foreign" defendants who are not "present" in Massachusetts — defendants that are not subject to general jurisdiction here. 170 F. Supp. 2d at 72 ("the purpose of M.G.L. c. 223A, § 3(d) [is to ensure] that injured Massachusetts residents have redress against a foreign [defendant]"); *see also Obear & Sons*, 313 F. Supp. at 376 ("It is one of the aims of the long-arm statute to provide an injured consumer with a more effective remedy against the [defendant] who studiously avoids being 'present'" in Massachusetts) (applying Section 3(d)).

To deny the CEOs' motion, the Court need not define all the theoretical predicates of Section 3(d) or make new law; it is sufficient to find that the section is available as a basis for specific jurisdiction. *See Heins*, 26 Mass. App. Ct. at 27.

3. Section 3(a)

The CEOs are also subject to jurisdiction under Long-Arm Section 3(a) because the Commonwealth's claims arise from the CEOs transacting business here. That section provides jurisdiction over a person who acts directly or by an agent, as to a cause of action arising from the person's transacting business in Massachusetts. *See* G.L. c. 223A, § 3(a). The claims against Stewart, Timney, and Landau arise from their massive, deceptive promotion of opioids across

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(*continued from prior page*) interpreted to require general jurisdiction, it would render the body of decisions on "substantial revenue" to be in error because they fall "far short of the constitutional requirements for general jurisdiction." No. SUCV201401491BLS1, 2014 WL 10542986, at *6 n.5 (Mass. Super. Ct. July 24, 2014). *Gray v. Michael Stapleton Assocs.*, held that Section 3(d) provided jurisdiction over a non-resident defendant on facts that indicate specific jurisdiction. No. 0500934B, 2007 WL 1630943, at *4-5 (Mass. Super. Ct. May 7, 2007). *SCVNGR, Inc. v. Punchh, Inc.*, No. SUCV201600553BLS1, 2018 WL 6492729, at *5 (Mass. Super. Ct. Sept. 17, 2018) and *MerlinOne, Inc. v. Shoom, Inc.*, No. 0402022, 2005 WL 2524362, at *2 (Mass. Super. Ct. July 1, 2005) follow *Connecticut Nat'l Bank*. The federal case cited by defendants, *Pettengill v. Curtis*, 584 F. Supp. 2d 348, 357 (D. Mass. 2008) relies, without analysis, on the footnote in *Connecticut Nat'l Bank*. An earlier federal case, not cited by the CEOs, *Noonan v. Winston Co.*, 135 F.3d 85, 89-90 (1st Cir. 1998) analyzed Section 3(d) only as general jurisdiction and did not consider specific jurisdiction only because "plaintiffs abandoned their specific jurisdiction claim."

every part of our State.

There are three questions to answer in applying Section 3(a), all of which support jurisdiction over the CEOs. First, as occurred here, the business conduct must be "aimed squarely at Massachusetts targets." *Gunner v. Elmwood Dodge, Inc*., 24 Mass. App. Ct. 96, 99-101 (1987). Activity "aimed at cultivating a market area in Massachusetts" constitutes the transaction of business under Section 3(a). *Id.* at 97. In *Gunner*, the court found that Section 3(a) applied where a defendant located in a neighboring state advertised in newspapers, radio, and television programs directed at Massachusetts and mailed circulars to Massachusetts residents. *Id.* That marketing satisfied Section 3(a) because it was "aimed at" Massachusetts even though the defendant was located in another state and did not perform work, employ workers, or own property in Massachusetts. *Id.* Here, the marketing that Stewart, Timney, and Landau directed at Massachusetts was "aimed" far more specifically than the car ads in *Gunner*. For tens of thousands of in-person sales visits to Massachusetts doctors, Purdue tracked exactly which doctors were targeted, how often they were visited, and what drugs they prescribed (FAC ¶¶ 32, 112-16, 624). For the multi-million-dollar *Massachusetts General Hospital Purdue Pharma Pain Program*, CEO Stewart came in person to MGH. (FAC ¶¶ 278, 641). For direct TV advertising, Purdue selected specific target doctors in nine Massachusetts communities (FAC ¶¶ 385, 426). Purdue's directors and CEO were briefed specifically on "emails *targeted towards HCPs practicing in Massachusetts*" to push opioid savings cards. FAC ¶ 94. Consistent with Purdue's targeting, managers knew how much money the company collected from sales of the highest and most dangerous doses in Massachusetts (FAC ¶ 471), and even how much money it was making from the specific doctors in Massachusetts that Purdue suspected were prescribing illegally (FAC ¶¶ 310-13). Staff reported to the Board that a marketing program targeting the

city of Boston increased opioid sales by 959%. FAC ¶ 415.

Second, as here, the business conduct must have more than a slight effect in Massachusetts. While a single advertisement for the sale of two boat engines had "slight effect on the commerce of the Commonwealth" and did not satisfy Section 3(a), *Droukas v. Divers Training Academy, Inc*., 375 Mass. 149, 154 (1978),[10] a defendant's conduct satisfied Section 3(a) where the defendant made fifty telephone calls to Massachusetts, accepted payments from Massachusetts, and mailed reports to Massachusetts "which it knew would be relied on" by people in Massachusetts making significant decisions. *Good Hope Industries, Inc. v. Ryder Scott Co*., 378 Mass. 1, 9-10 (1979). In this case, the effect on Massachusetts is immense. Stewart, Timney, and Landau directed a campaign that involved thousands of mailings (FAC ¶ 111); phone calls (FAC ¶ 767); direct television advertisements (FAC ¶ 385); 150,000 sales visits (FAC ¶ 32); 70 million doses of opioids (FAC ¶ 21); and more than $500,000,000 in sales (FAC ¶ 21). Just as Stewart, Timney, and Landau intended, Massachusetts doctors and patients relied on that campaign to make some of the most consequential decisions of their lives: to prescribe and use Purdue opioids, and to keep using them at higher doses and for longer periods of time. FAC ¶¶ 72, 114, 165, 413, 426, 433. McKinsey determined that one Massachusetts doctor wrote 167 more OxyContin prescriptions after Purdue sales reps visited him. FAC ¶ 413. The Attorney General's investigation found that effect multiplied across the prescribers that Purdue targeted in Massachusetts, so that Purdue's top targets prescribed Purdue opioids to more of their patients, at higher doses, for longer periods of time, and were far more likely to prescribe Purdue opioids to patients who overdosed and died. FAC ¶ 116.

[10] *Droukas* and *Roberts* are members of a trilogy holding that isolated, out-of-state marine sales are not subject to jurisdiction. *See also Intech, Inc. v. Triple "C" Marine Salvage, Inc*., 444 Mass. 122, 127 (2005).

Third, as here, the defendants must control the conduct in Massachusetts. In *Exxon*, 479 Mass. at 319-20, the Supreme Judicial Court explained that an out-of-state defendant is subject to Section 3(a) if he has the "right to control the specific policy or practice resulting in harm to the plaintiff." Exxon was not located for general jurisdiction purposes in Massachusetts, but the Court found specific jurisdiction under Section 3(a) because the company controlled marketing in the Commonwealth through local franchisees. *Id.* at 314-15, 319-20. The Court rejected Exxon's assertion that it had "no direct contact with any consumers in Massachusetts," and instead held that "[t]hrough its control," Exxon indeed "communicates directly" in Massachusetts. *Id.* at 320. That reasoning destroys the CEOs' defense that they are immune from jurisdiction because they did not travel door-to-door in Massachusetts. Just as the Court found in *Exxon*, Stewart, Timney, and Landau controlled the policies and practices resulting in harm in Massachusetts. Together with the other individual defendants, Stewart, Timney, and Landau decided whether to send deceptive marketing into Massachusetts and what that deceptive marketing would say. FAC ¶¶ 161-67; 608, 624, 636, 672. Accordingly, the CEOs are subject to jurisdiction under Section 3(a).

The CEOs cannot rely on their incomplete description of *Johnson Creative Arts v. Wool Masters, Inc.* 573 F. Supp. 1106 (D. Mass. 1983), *aff'd*, 743 F.2d 947 (1st Cir. 1984) to argue that Section 3(a) applies to companies but not executives. *See* CEO Mem. at 10. In *Johnson*, the plaintiff sued an out-of-state company and two individuals for improper marketing in Massachusetts. As the CEOs explain, *Johnson* held that <u>one</u> of the individuals was not subject to Section 3(a) because the plaintiff did not allege that he was involved in the improper marketing. The fact that an individual "is the corporation's secretary and owns a substantial portion of the corporation's stock does not without more establish that he was transacting business in

Massachusetts." 573 F. Supp. at 1111. Likewise, a "conclusory allegation that the individual defendants own and control the corporate defendant" does not establish jurisdiction. *Id*.

The CEOs' brief fails to point out, however, that on the same page of the cited decision, *Johnson* held that Section 3(a) did apply to the other individual defendant — the company president — because he participated in the misconduct. The court noted that the president "composed and mailed" a letter to needlepoint shops in Massachusetts, "accepted telephone orders from Massachusetts," and "directed the activities of the corporation." *Id.* at 1111-12. Based on those allegations, he was subject to jurisdiction under Section 3(a). *Id.* at 1112. Far beyond writing a letter or making a phone call, the CEO defendants in this case orchestrated an immense, years-long deceptive marketing campaign.

Finally, the CEOs are not insulated from Section 3(a) because the deception was their job. Courts repeatedly apply Section 3(a) to corporate officers for their misconduct at work. *See New World Tech., Inc. v. Microsmart, Inc*., No. CA943008, 1995 WL 808647, at *3 (Mass. Super. Ct. Apr. 12, 1995) ("That [the president defendant] transacted business only as an officer of [the corporate defendant], and not in any individual capacity, does not protect him from § 3(a).") (denying president's motion to dismiss); *Yankee Group, Inc. v. Yamashita*, 678 F. Supp. 20, 22 (D. Mass. 1988) ("jurisdiction under [Section 3(a)] may be predicated on activities undertaken in a corporate capacity") (denying motion to dismiss of president/director).

B. Jurisdiction Over Stewart, Timney And Landau Is Consistent With Due Process

The Due Process Clause allows jurisdiction over Stewart, Timney, and Landau because: (a) each purposefully directed deceptive marketing at Massachusetts; (b) the Commonwealth's claims arise from that deception; and (c) exercising jurisdiction over these defendants advances the values of fair play and substantial justice. *See Bulldog Inv. Gen. P'ship v. Sec'y of the*

Commonwealth, 457 Mass. 210, 217 (2010).[11]

1. Stewart, Timney, and Landau Purposefully Directed Deceptive Marketing at Massachusetts

The first part of the due process test is satisfied because Stewart, Timney, and Landau purposefully directed deceptive marketing at Massachusetts. The U.S. Supreme Court identified "advertising in the forum State" and "establishing channels for providing regular advice to customers in the forum State" as acts that exemplify purposeful availment. *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 112 (1987). Stewart's travel to Massachusetts to support the *Massachusetts General Hospital Purdue Pharma Pain Program* was precisely an act to "establish channels for providing regular advice to customers" in Massachusetts. FAC ¶¶ 273-278, 641. So was Timney's work to set up call center to target the Partners and Steward hospital systems in Massachusetts with thousands of calls. FAC ¶¶ 763, 767. So too was Landau's deceptive letter to encourage continued support for Purdue opioids at Tufts University (FAC ¶¶ 279-287, 824); and his work creating the deceptive website, *In The Face Of Pain*, viewed in Massachusetts more than 11,700 times (FAC ¶¶ 40, 111, 804). The most damaging and pervasive "channel for providing regular advice" to Massachusetts targets was the campaign of sales rep visits to Massachusetts doctors, nurses, and pharmacists — which Stewart, Timney, Landau, and the other individual defendants named in this litigation controlled. They controlled whether the marketing happened and whether it was deceptive. FAC ¶¶ 161-69.

The Supreme Court has also made clear that the CEOs are subject to jurisdiction for misconduct they commit at work. In *Calder v. Jones*, a California plaintiff sued an out-of-state magazine company and two of its employees. 465 U.S. 783, 785-86 (1984). The individual

[11] The CEOs' criticism that paragraph 874 of the Complaint "does not make a meaningful attempt" to complete the due process analysis is inapt. CEO Mem. at 17. The whole Complaint alleges facts, and this brief explains their legal significance.

defendants included the editor and president of the company who "oversees just about every function" and edited the disputed article but made no relevant trips to California. *Id.* at 786. Like Purdue's CEOs, the president argued that he should not be held accountable:

> Petitioners argue that they are not responsible for the circulation of the article in California. A reporter and an editor, they claim, have no direct economic stake in their employer's sales in a distant State. Nor are ordinary employees able to control their employer's marketing activity … Petitioners liken themselves to a welder employed in Florida who works on a boiler which subsequently explodes in California. Cases which hold that jurisdiction will be proper over the manufacturer should not be applied to the welder who has no control over and derives no direct benefit from his employer's sales in that distant State.

465 U.S. at 789 (citations omitted). The Supreme Court held that defendants' "status as employees does not somehow insulate them from jurisdiction." *Id.* at 790. The Court wrote:

> "Petitioners' analogy does not wash. Whatever the status of their hypothetical welder, petitioners are not charged with mere untargeted negligence. Rather, their intentional, and allegedly tortious, actions were expressly aimed at California."

465 U.S. at 789. Much more so here. While *Calder* found personal jurisdiction as a result of a single article accusing the plaintiff of drinking too much, the CEOs in this case led a years-long premeditated campaign of deception that took place nearly every day and involved selling tens of millions of doses of addictive drugs in Massachusetts. FAC ¶¶ 21, 32, 33; FAC Ex. 1 (listing 150,000 sales visits).

The Supreme Judicial Court has likewise made clear that far more modest actions than those here are sufficient to constitute purposeful availment for due process. *Bulldog*, 457 Mass. at 217, held that an investment partnership and its individual employees purposefully availed themselves of the privilege of conducting business in Massachusetts when they "operated a Web site accessible in Massachusetts and sent a solicitation [letter] that is prohibited by Massachusetts law to a Massachusetts resident." The court explained that businesses and executives who seek

the benefits of commerce in Massachusetts should be subject to jurisdiction here:

> By soliciting purchases of their [product], the plaintiffs sought to derive commercial benefit from their interaction with [a Massachusetts resident]. Therefore, it would be unfair "to escape having to account in [Massachusetts] for consequences that arise proximately from such activities."

457 Mass. at 218 (*quoting Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473-74 (1985)). Stewart, Timney, and Landau meet that standard, just like the executives found subject to Massachusetts jurisdiction in *Kleinerman*, 26 Mass. App. Ct. at 824-25; *Yankee Group*, 678 F. Supp. at 23; *Johnson Creative Arts*, 574 F. Supp. at 1111-12; *DSM Thermoplastic*, 2002 WL 968859 at *3; and *New World Techs.*, 1995 WL 808647 at *4.

The cases cited by the CEOs do not show otherwise. The CEOs cite *Morris v. UNUM Life Ins. Co.*, concerning purposeful availment (CEO Mem. at 19), but that case did not address due process at all. 66 Mass. App. Ct. 716, 722 (2006) ("unnecessary for us to consider any due process issues"). *Preferred Mut. Ins. Co. v. Stadler Form Atkiengesellschaft*, (CEO Mem. at 18-19), states that putting a product into the stream of commerce is not sufficient to indicate purposeful availment, but creating "a marketing plan" is. 308 F. Supp. 3d 463, 468-70 (D. Mass. 2018); *see also Obear & Sons*, 313 F. Supp. at 376 ("Obear specifically intended that its machines, including the machine here involved, be marketed in Massachusetts and to that end entered into a standing arrangement" with people in Massachusetts). The Commonwealth sued the individual defendants in this case, including the three CEOs, precisely because they created the deceptive marketing plan. FAC ¶¶ 161-69.

Tellingly, the CEOs cite *Kleinerman*, (CEO Mem. at 18), for only <u>half</u> of the decision, holding that two "lesser officers" of an out-of-state company were not subject to jurisdiction because they had not "participated in activities having a relevant and significant effect in Massachusetts." 26 Mass. App. Ct. at 825. The CEOs do not address the other half of the

decision, holding that the individual defendant most analogous to Stewart, Timney, and Landau — the company president — *was* subject to jurisdiction. Kleinerman's complaint alleged that the company president "dispatched … minions to Massachusetts" to implement a deceptive scheme; "major policy decisions" and "major directives" flowed from the president; and, like Stewart, the president made "inspectional visits" in Massachusetts. *Id.* at 821-24. As a result, the Appeals Court found that the president *was* subject to jurisdiction here. *Id.* at 824.

2. The Commonwealth's Claims Relate To The Deception That Stewart, Timney, and Landau Directed

The second requirement of due process is satisfied because the claims asserted in this case relate to the defendants' contacts with Massachusetts. That test is satisfied here for the same reason as in *Exxon*: because Stewart, Timney, and Landau "control the specific policy or practice resulting in harm to the plaintiff." 479 Mass. at 319. As shown in the Complaint, the Commonwealth's claims relate to the decisions by the individual defendants (including specifically Stewart, Timney, and Landau) to conduct a deceptive marketing campaign. FAC ¶¶ 161-169.

This Court found that a defendant corporate president and CEO did not meet the relatedness requirement in *Garcia v. Right At Home, Inc.*, No. SUCV20150808BLS2, 2016 WL 3144372 (Mass. Super. Ct. Jan. 19, 2016). In that case, a putative class of home healthcare aides alleged that a Massachusetts home healthcare franchisee ("KELLC") failed to pay required wages, and that the CEO and president of the national franchisor ("RAH") were subject to Massachusetts jurisdiction because they "controlled and/or managed RAH" and "RAH is closely integrated with KELLC." *Id.* at *2. The Court found those allegations to be insufficient and noted that the relatedness test requires more than that the claims "arose out of the general relationship between the parties." *Id.* (*quoting Fern*, 55 Mass. App. Ct. at 584). The Court

further observed that the individuals submitted affidavits showing they had little or no contact with Massachusetts and the "[p]laintiffs offer no evidence to the contrary." *Id.*

Garcia illustrates allegations that fall far short of the direct personal conduct of the Purdue CEOs. In this case, the Commonwealth has not made the bare allegation that Purdue acted in Massachusetts and the CEOs managed Purdue. Instead, the Commonwealth has alleged in detail, supported by evidence, that Stewart, Timney, and Landau controlled the deceptive marketing that is the subject of the Commonwealth's claims. FAC ¶¶ 161-169.

3. Exercising Jurisdiction Over the People Who Directed the Deception Advances the Values of Fair Play and Substantial Justice

Finally, the exercise of jurisdiction over Stewart, Timney, and Landau advances the values of "fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). Fairness and justice oblige the Court to compare any special burden borne by the defendants against the many interests that are served by exercising jurisdiction in Massachusetts. The CEOs' motion papers in effect acknowledge that litigating here would not impose special burdens: their brief asserts only in generic fashion that defending this suit in Massachusetts would "place a significant burden" on them. CEO Mem. at 20. The 21 pages of declarations by Stewart, Timney, and Landau contain no declaration of fact that any of them would face any burden at all.

The court addressed a similar defendant in *Rissman Hendricks & Oliverio, LLP v. MIV Therapeutics Inc.*, 901 F. Supp. 2d 255 (D. Mass. 2012). There plaintiff filed suit in Massachusetts against a French company and its former CEO. The CEO asserted in an affidavit that litigating in Massachusetts would place "significant financial and logistical burdens on him," because he had moved to the Cayman Islands. *Id.* at 266. The court found that the CEO faced no special burden and allowed jurisdiction. *Id.* at 266-67.

Many interests are served by exercising jurisdiction here — including interests of the Commonwealth, the Attorney General, and the public. "A State generally has a 'manifest interest' in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors." *Burger King*, 471 U.S. at 473. "As Massachusetts's chief law enforcement officer, the Attorney General has a manifest interest in enforcing G.L. c. 93A." *Exxon*, 479 Mass. at 323-24. And, as the Appeals Court noted when addressing the issue of impoundment of pleadings in this case: "it is difficult to imagine a dispute in which the public has a greater interest…." *Commonwealth v. Purdue Pharma LP*, 2019-J-0050 (Mass. App. Ct. Jan. 31, 2019) (single Justice).

C. The Defendants' Other Legal Arguments Against Jurisdiction Are Wrong

Defendants make two more general arguments against jurisdiction. Each is incorrect.

1. CEOs Are Subject To Jurisdiction

Defendants say they were too high in the corporation to be subject to jurisdiction. The CEOs assert that they never "themselves promoted Purdue's opioid medications to any doctors in Massachusetts." CEO Mem. at 4. They emphasize: "there were four layers of management between me and Purdue's Massachusetts sales representatives." Stewart Decl. ¶ 10; *see also* Timney Decl. ¶ 12 ("at least three levels"); Landau Decl. ¶ 15 ("at least four levels"). The CEOs contend that, because their role was to make decisions about Purdue's misconduct, as opposed to carrying out those decisions, they should not be subject to jurisdiction.

That defense is eviscerated by both the Commonwealth's allegations and the law. First, the allegations in this case are directed at Purdue's leaders. The Complaint alleges that it was the CEOs, the Directors, and the Vice President of Sales — the individual defendants in this suit — who decided to deceive doctors and patients about Purdue's drugs. FAC ¶¶ 161-69.

Second, the law favors exercising jurisdiction over corporate leaders accused of

misconduct. "[P]recedent supports subjecting corporate officers to jurisdiction under the long-arm statute at least where they are 'primary participants' in corporate action." *Cossart v. United Excel Corp.*, 804 F.3d 13, 19 (1st Cir. 2015) (holding president of out-of-state company subject to jurisdiction under Section 3(a)). "Massachusetts has an interest in protecting its residents from tortious conduct on the part of non-resident corporate officers." *Yankee Group*, 678 F. Supp. at 23 (holding president of out-of-state company subject to jurisdiction under Section 3(a)).

In *Johnson Creative Arts*, the court emphasized: "In his capacity as president, vice-president and treasurer, Keyes has directed the activities of the corporation since its inception." 573 F. Supp. at 1112. The court did not conclude that the individual's position as president of the company made him *less* susceptible to jurisdiction; instead, his control of the company as president supported the holding that he *was* subject to jurisdiction here. *Id*. (holding president of out-of-state company subject to jurisdiction under Section 3(a)).

In *Luo v. Tao Ceramics Corp*., the court explained: "jurisdiction over a corporate officer acting in the scope of his/her employment is proper when the conduct giving rise to the litigation is entrepreneurial or managerial in nature." No. 13-CV-5280-F, 2014 WL 3048679, at *1 (Mass. Super. Ct. Apr. 10, 2014). The court found that the role of a CEO was "both managerial and entrepreneurial." *Id.* The CEO defendant "oversaw [an employee's] work in Massachusetts in her capacity as Chief Executive Officer, the highest managerial position within a corporation. Accordingly, the inquiry into whether [the defendant's] contacts with Massachusetts supports the exercise of personal jurisdiction in this case must include her conduct as Chief Executive Officer." *Id.* The court held the CEO was subject to jurisdiction. *Id.* at *4.[12]

[12] In addition to *Cossart, Yankee Group,* (*footnote continued on the next page*)

In this case, the Commonwealth did not sue the scores of line-level workers that Purdue's executives and directors used to carry out their scheme — people who might be like the hypothetical welder in *Calder*. *See* 465 U.S. at 789. Instead, the Commonwealth named the people who controlled the deception and collected the most of the ill-gotten gains.

2. Nationwide Deception Is Not A Defense

Defendants' second argument is they should be excused from jurisdiction because their deception was so widespread. The CEOs emphasize that they "oversee nationwide activities" and "oversaw Purdue's operations on a national scale." CEO Mem. at 1, 20. Leading nationwide deception is no defense to jurisdiction in Massachusetts. Each CEO knowingly and deliberately directed deceptive marketing here. FAC ¶¶ 161-69.

The CEOs' "nationwide" misconduct defense was rejected in *Gary Scott Int'l, Inc. v. Baroudi*, in which a man in California sold twelve cigar humidors to Massachusetts buyers:

> Rather than limiting his business to his home state or region, defendant chose to market and sell his humidors nationwide. In choosing to do so, defendant accepted both the benefits and the risks of nationwide business. One of the risks inherent in defendant's decision to pursue nationwide sales was the possibility that he could be haled into a Court in a foreign state where his humidors were marketed and sold.

981 F. Supp. 714, 717 (D. Mass. 1997) (finding jurisdiction over individual defendant under Section 3(a) and due process).

Likewise, the company president in *Johnson Creative Arts* was subject to Massachusetts jurisdiction for running a nationwide scheme: his unfair solicitation letter about colored yarn was

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(*continued from prior page*) *Johnson Creative Arts*, and *Luo*, out-of-state CEOs, presidents, and executives were subject to jurisdiction in *Calder*, 465 U.S. at 785; *Kleinerman*, 26 Mass. App. Ct. at 825; *Rissman*, 901 F. Supp. 2d at 255; *JMTR Enterprises*, 42 F. Supp. 2d at 90, 98; *Zises*, 1981 WL 27044 at *3; *DSM Thermoplastic*, 2002 WL 968859 at *3; *Abbott*, 1998 WL 1182003 at *2; and *New World Tech.*, 1995 WL 808647 at *4.

distributed to needlepoint shops "throughout the country." 573 F. Supp. at 1109, 1111.

Similarly, when a plaintiff sued an out-of-state motel in *Tatro v. Manor Care, Inc.*, the Supreme Judicial Court held: "It is not unreasonable to require a [defendant] that deliberately draws its customers (and hence its income) from many, if not all, of the States, including Massachusetts, and that has the resources of a large business, including a legal department, to defend itself in Massachusetts." 416 Mass. 763, 773 (1994).[13]

The CEOs imply that Massachusetts is small compared to their ambitions, suggesting that only their top priority states could have jurisdiction. Landau asserts: "Massachusetts has not been a state of particular focus for me." Landau Decl. ¶ 13. Stewart says: "Massachusetts was of no particular commercial focus for me." Stewart Decl. ¶ 8. Timney declares: "I did not consider Massachusetts to be a 'high value geography.'" Timney Decl. ¶ 16. These CEOs valued Massachusetts enough to send sales reps to visit the Commonwealth 150,000 times. FAC ¶¶ 32-33. They valued Massachusetts enough to sell 70 million doses of opioids for more than $500 million, causing hundreds of Massachusetts families to see their loved ones fill prescriptions for Purdue opioids, overdose, and die. FAC ¶¶ 21-24. The fact that the CEOs also inflicted grievous harms in other places does not excuse them from answering for their wrongdoing here.

D. <u>The Defendants' Factual Assertions Are Disputed And Wrong</u>

The CEOs also seek to dismiss the case based on 21 pages of factual assertions in declarations attached to their brief. At this stage, it is sufficient for the Court to observe that many of the CEOs' assertions are disputed by the allegations of the Complaint and by documents

[13] *See also Balloon Bouquets, Inc. v. Balloon Telegram Delivery, Inc.*, 18 Mass. App. Ct. 935, 936 (1984) (finding jurisdiction under Section 3(a) over defendant that operates nationally, is never physically present in Massachusetts, but "has a significant effect" on people here).

uncovered in the Commonwealth's investigation, attached to the affidavit of Jenny Wojewoda. Under the prima facie standard, the Court "take[s] specific facts affirmatively alleged by the plaintiff as true (whether or not disputed) and construe[s] them in the light most congenial to the plaintiff's jurisdictional claim." *Cepeda*, 62 Mass. App. Ct. at 737-38; *see also Tatro*, 416 Mass. at 765 (examining disputed jurisdictional facts "in the light most favorable to the plaintiff" and reversing dismissal); *Kleinerman*, 26 Mass. App. Ct. at 820-21, n.4 (accepting facts alleged in complaint and plaintiff's affidavit).

The CEOs' assertions, all made "to the best of my recollection," (Stewart Decl. ¶ 2; Timney Decl. ¶ 2; Landau Decl. ¶ 2), are often incorrect. For example, Stewart asserts that the purpose of paying millions of dollars to the *Massachusetts General Hospital Purdue Pharma Pain Program* was not to increase prescriptions of opioids in Massachusetts (Stewart Decl. ¶ 12(b)); but documents show that growing the market for Purdue opioids in Massachusetts was a key goal of the payments to MGH. JW Decl. Exs. 9, 22-23. Timney states that he did not direct the creation of Purdue's call center and that the call center was not designed to make telephone calls to doctors (Timney Decl. ¶ 15); but documents show Timney was closely involved in plans to call doctors tens of thousands of times and a key call center "objective" was to "increase scripts for Butrans and OxyContin." JW Decl. Exs. 13-14. Landau asserts that he "was not involved in the day-to-day marketing activities or promotion of prescription opioids" and was not "involved in the management or direct oversight of Purdue sales representatives" (Landau Decl. ¶ 15); but documents show he went on "field rides" to supervise sales reps face-to-face. JW Decl. Ex. 16. In the face of disputes between the defendants' self-serving recollections and the Commonwealth's allegations, the Court should allow the suit to proceed. *See Cepeda*, 62 Mass. App. at 740 (reversing dismissal); *Tatro*, 416 Mass. at 765 (reversing

dismissal); *Kleinerman*, 26 Mass. App. Ct. at 824-25 (reversing dismissal as to company president).

II. The CEOs' Arguments Regarding Standing and Statutes of Limitations Are Wrong

The CEOs' arguments about standing and statutes of limitations resemble arguments raised by defendant Russell Gasdia. To reduce duplication, the Commonwealth addresses those issues in opposition to Gasdia's motion and incorporates that opposition here.

CONCLUSION

For the reasons stated above, the motion to dismiss should be denied.

Dated: May 10, 2019

Respectfully submitted,
COMMONWEALTH OF MASSACHUSETTS

By its Attorney,
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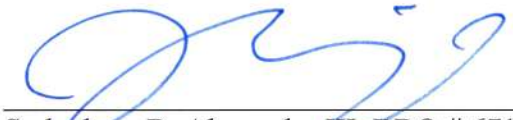

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