COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION NO.
1884-cv-01808 (BLS2)

COMMONWEALTH OF MASSACHUSETTS,

Plaintiff,

v.

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

Defendants

MEMORANDUM OF LAW IN OPPOSITION TO PURDUE'S MOTION TO DISMISS THE FIRST AMENDED COMPLAINT

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PRELIMINARY STATEMENT

This case concerns allegations that the defendants, including Purdue Pharma L.P. and Purdue Pharma Inc. (collectively "Purdue"), waged a campaign of deceptive marketing in violation of Massachusetts law. The Commonwealth alleges that Purdue misled prescribers, pharmacists, patients, and the public about the serious dangers of Purdue's opioid drugs, which include addiction, overdose, and death. Purdue cannot identify any meritorious grounds to dismiss the Commonwealth's Complaint, which is adequately pled, timely, and, as at least ten courts have concluded, not preempted by federal law. Accordingly, Purdue's motion should be denied.

THE COMMONWEALTH'S ALLEGATIONS

The Complaint does not attack the Food and Drug Administration ("FDA") label or approved indications of Purdue's drugs, nor does it call for restrictions on their use. Rather, the Complaint reveals, in detail, the unfair and deceptive marketing that Purdue employed to oversell its addictive drugs in Massachusetts.

Purdue deceived Massachusetts prescribers, pharmacists, and patients to get more people to use opioids and, once they were using, to use them at higher and more dangerous doses and for longer and more dangerous periods of time. First Amended Complaint ("FAC") ¶ 2. Purdue promoted falsehoods to dissuade people from safer alternatives. *Id.* Even after Purdue knew an epidemic of opioid addiction was killing Massachusetts residents, it saw the danger of its drugs primarily as an obstacle to sales, and it resorted to deception to overcome that obstacle. *Id.* While Massachusetts residents continued to become addicted and die, Purdue's deception provided the company's owners with many millions of dollars. *Id.*

Purdue's motion largely ignores the allegations of the Complaint and mischaracterizes the Commonwealth's claims. The Commonwealth has clearly alleged many specific ways that Purdue contributed to the harms of opioid addiction by deceiving prescribers, pharmacists, and patients about the risks of its drugs.

Purdue's misrepresentations obscured the risk of addiction at the heart of the epidemic. For example, Purdue told prescribers and patients that addiction was "not caused by drugs," that addiction was "rare," and that it affected only a "small minority" of patients who were already "susceptible individual[s]." FAC ¶¶ 38-39, 43-44. Purdue deceptively exploited harmful stereotypes about drug addiction, dismissing patients who became addicted as "not … reliable or trustworthy," and suggested that prescribers could screen out potential addicts by prescribing opioids to patients who were "trustworthy." FAC ¶¶ 38-39, 42-47. Meanwhile, Purdue acknowledged in its confidential internal documents that opioid addiction "can happen to anyone." FAC ¶ 447.

Purdue provided Massachusetts patients with false testimonials encouraging them to "overcome … concerns about addiction," and falsely claimed that opioids were not addictive if "properly prescribed." FAC ¶¶ 40-41. Purdue also promoted the dangerous, scientifically baseless myth of "pseudoaddiction," telling prescribers that symptoms of addiction were signs that patients needed *higher* doses of opioids. FAC ¶¶ 77-83.

Purdue also falsely overstated the relative safety of its time-release opioids (also referred to as "extended release" or "ER" opioids), which the Centers for Disease Control and Prevention has found pose a higher risk of overdose. FAC ¶ 104. Purdue's statements included misleading comparative claims about other pain medications including acetaminophen, non-steroidal anti-inflammatory drugs (like ibuprofen), lower dose opioids, and immediate release opioids. FAC

¶¶ 100-05. Purdue convinced physicians that reformulated OxyContin, which merely made the pills more difficult to tamper with, was a less addictive, "safer alternative." FAC ¶¶ 100-05, 107-10. Purdue targeted vulnerable opioid-naive patients, and misleadingly downplayed the heightened risk to this population by calling OxyContin a "first line" opioid. FAC ¶¶ 58-61. Purdue overstated the benefits of its opioids by falsely representing that opioids were "especially likely" to benefit elderly patients, that opioids were an effective treatment for osteoarthritis, that opioids "improve [patients'] quality of life," and (in the case of the *Exit Wounds* book that Purdue sponsored and distributed) that opioids were the "unsurpassed … gold standard of pain medications." FAC ¶¶ 53, 55, 65, 101, 106.

Purdue designed and implemented deceptive marketing to prolong the length of time patients stayed on opioids, including pressuring doctors to raise patients' doses. Purdue engaged in this campaign without disclosing: (1) its secret goal of prolonging patients' opioid treatment, (2) the relationship between higher doses and longer treatment, or (3) the heightened risks posed by both higher doses and longer treatment. FAC ¶¶ 67-92. Purdue made false statements about the risks of higher doses and dismissed opioid tolerance and dependence as "normal consequences" of long-term opioid use that were "not the same as addiction." FAC ¶¶ 74, 92.

Purdue used its sales representatives to distribute opioid savings cards, knowing that they would cause patients to stay on opioids longer. FAC ¶¶ 72, 90, 93, 384. In some instances, Purdue distributed savings cards in Massachusetts while they were illegal under state law, urging prescribers to send their patients to use the cards in nearby states. FAC ¶ 119. Purdue succeeded in using misleading sales tactics to prolong the length of time patients took opioids, increasing those patients' risks of overdose. FAC ¶¶ 73, 86, 97. Massachusetts patients who were prescribed opioids for more than one year were 51 times more likely to overdose and die. FAC

¶ 18.

From May 2007 to 2018, Purdue sales reps visited Massachusetts prescribers and pharmacists more than 150,000 times; and at least 2,000 of those prescribers received money, meals, or other gifts from Purdue. FAC ¶¶ 32-33. Purdue distributed thousands of marketing materials in the Commonwealth. FAC ¶ 111. Purdue focused its marketing campaign on face-to-face sales visits because research showed that sales visits drove prescriptions. FAC ¶ 72. To increase sales, Purdue increased its sales force, targeting more Massachusetts communities with each increase. FAC ¶¶ 224, 315, 462.

Those sales visits caused Massachusetts prescribers to write more and more dangerous prescriptions. FAC ¶¶ 114-116. "Those extra prescriptions," the Complaint alleges, "led Massachusetts patients to become addicted, overdose, and die. Just as taking opioids increases risks to a patient, meeting with Purdue sales reps increases the risk that a doctor will write dangerous prescriptions. Some of Purdue's top targets in Massachusetts lost their medical licenses because of their dangerous prescribing. Some went to prison. Most of Purdue's 100 top targets in Massachusetts prescribed Purdue opioids to patients who overdosed and died." FAC ¶ 115. Since 2009, at least 671 people who filled prescriptions for Purdue opioids in Massachusetts died of opioid-related overdoses. FAC ¶ 22. Purdue's top targets for sales visits in Massachusetts were ten times more likely to prescribe opioids to patients who fatally overdosed. FAC ¶ 116.

Purdue's door-to-door marketing meant that it had specific knowledge about the doctors who prescribed its drugs, knowledge that it exploited to sell even more drugs. FAC ¶ 313. Purdue tracked prescribers it suspected of misconduct, a group that staff referred to as *Region Zero*. FAC ¶¶ 310-13. Purdue did not disclose the information it gathered on *Region Zero* to

patients, insurers, or law enforcement — even when an employee wrote that sharing the information was "the right and ethical thing to do." FAC ¶¶ 539, 736. Purdue estimated that *Region Zero* accounted for almost 10% of its opioid sales. FAC ¶ 339.

Each patient who became addicted to Purdue's opioids was also at risk from other drugs with similar addictive chemistry, including heroin and fentanyl. FAC ¶¶ 20, 88. Purdue knew that "pain treatment and addiction are naturally linked," so it developed a plan — code-named "Project Tango" — to become an "end-to-end pain provider" by selling drugs for addiction treatment. FAC ¶¶ 445-446. In reviewing Project Tango, Purdue charted the rise in opioid addiction in monetary terms, and diagrammed the profitable path a patient would take from pain treatment, to addiction, to addiction treatment and, often, back to addiction again. FAC ¶¶ 446, 450. Later, Purdue considered acquiring the overdose-reversal drug Narcan, which Purdue identified as a "complementary" product to its opioids. FAC ¶ 473.

The Complaint reveals Purdue's responsibility for a crisis that was caused by, as Purdue CEO Craig Landau admitted: "Too many Rxs being written, Too high a dose, For too long, For conditions that often don't require them, By doctors who lack the requisite training in how to use them appropriately." FAC ¶ 832. Purdue's marketing was designed to increase every one of those dangers.

All this misconduct came despite Purdue's promises in a 2007 Consent Judgment in this Court, by which Purdue certified that it would cease deceptive marketing. FAC ¶¶ 193-95, 203, 860. In 2015, the Commonwealth began an investigation into concerns that Purdue was again engaged in misconduct. In August 2016, Purdue and the Commonwealth agreed to toll any applicable statute of limitations period. FAC ¶ 839. The Commonwealth commenced suit in June 2018.

ARGUMENT

I. THE COMMONWEALTH'S CLAIMS ARE NOT BARRED BY FEDERAL OR STATE LAW.

The Court should reject Purdue's arguments that the Commonwealth's claims are precluded because its unfair and deceptive practices are "consistent with" or "comport with" the product labeling for Purdue's opioids. *See* Purdue's Memorandum of Law in Support of Its Motion to Dismiss The Complaint ("Purdue Mem.") at 19-20. Purdue's arguments mischaracterize both the Commonwealth's allegations and the law.[1] As summarized above, the Complaint alleges in detail how Purdue engaged in unfair and deceptive practices in connection with its marketing of opioids in Massachusetts over many years. Contrary to Purdue's assertions, the Commonwealth does not allege that the product label is misleading, nor does the Commonwealth "second guess" the approval of Purdue's drugs by the FDA. Purdue Mem. at 20. The Commonwealth's allegations thus are not preempted by the Federal Food, Drug, and Cosmetic Act ("FDCA") or any other federal law, nor do they concern conduct that falls within the exemption for "permitted practices" under G.L. c. 93A, § 3. The Commonwealth also is not estopped from asserting these claims because of the 2007 Consent Judgment.

A. The Commonwealth's Claims Are Not Preempted by Federal Law.

Courts across the country have rejected arguments that federal law preempts States' claims against Purdue's unlawful marketing. *See* Appendix, Exs. 1-10. As Purdue makes the same arguments in case after case, no court has accepted Purdue's preemption argument against any State's claims. At least ten courts have rejected Purdue's preemption theory:

[1] The Commonwealth does not address here Purdue's challenges to the veracity of the Complaint because the Court will take the Commonwealth's allegations as true, "as well as such inferences as may be drawn therefrom in the plaintiff's favor," for the purposes of 12(b)(6) review. *Marram v. Kobrick Offshore Fund, Ltd.*, 442 Mass. 43, 45 (2004) (citation omitted).

- *State of Arkansas v. Purdue Pharma L.P.*, No. 60CV-18-2018 (Ark. Cir. Ct. Apr. 5, 2019) ("[T]he claim asserted by the Plaintiff with any regard to FDA labeling is one of fraud. Fraud falls squarely within the realm of historic police powers of the state … Defendants' contention that the claims are preempted by the FDCA, is DENIED.") (citations and formatting omitted);

- *State of Vermont v. Purdue Pharma L.P.*, No. 757-9-18 (Ver. Super. Ct. Mar. 19, 2019) ("The fact that the federal government imposes restrictions on drug advertising does not necessarily mean that the states may not regulate deceptive acts by drug manufacturers and distributors. At least at this stage of the proceedings, the court is not persuaded that federal preemption applies here.");

- *State of Tennessee v. Purdue Pharma L.P.*, No. 1-173-18 (Tenn. Cir. Ct. Feb. 22, 2019) ("Purdue's argument with respect to preemption is based upon its erroneous assertion that the Complaint seeks to hold it liable for actions that were approved or required by the FDA and the FDCA. In reality, the Complaint seeks to hold Purdue liable for alleged misleading and deceptive practices in violation of Tennessee's Consumer Protection Act and actions that constitute Tennessee's common law tort of public nuisance. Thus, the Court concludes that the State's claims do not conflict with FDA and FDCA requirements, and preemption does not apply.");

- *State of Delaware v. Purdue Pharma L.P.*, No. N18C-01-223 MMJ CCLD, 2019 WL 446382, at *4 (Del. Super. Ct. Feb. 4, 2019) ("The State's allegations of labeling inconsistent with FDA approvals ('pseudoaddiction,' softening and minimization) are sufficient to survive dismissal on the grounds of federal preemption.");

- *State of Minnesota v. Purdue Pharma L.P.*, No. 27-CV-18-10788 (Minn. Dist. Ct. Jan. 4, 2019) ("The State has alleged Purdue … engaged in conduct both governed, at least in part, by the FDCA and conduct outside of the purview of the FDCA. While Purdue correctly states that state law is preempted when it "stands as an obstacle," viewing the evidence in the light most favorable to the plaintiff no such obstacle between federal and state law is established here to satisfy a motion to dismiss. The State's claims are not preempted by federal law.");

- *Grewal, Attorney General of New Jersey v. Purdue Pharma L.P.*, No. ESX-C-245-17, 2018 WL 4829660, at *16 (N.J. Super. Ct. Oct. 2, 2018) ("[T]he Court finds that the State's allegations do not conflict with federal law. The State does not claim that the FDA-approved labeling was inadequate. Nor does the State seek to change the labeling. The State alleges that Purdue's marketing was inconsistent with or not covered by FDA approvals … If the State is successful on the merits, Purdue would not be forced to violate federal law. Thus, it would be possible for Purdue to comply with both New Jersey

and federal laws. Therefore, the Court rejects Purdue's preemption argument.");

- *State of New Hampshire v. Purdue Pharma Inc.*, No. 217-2017-CV-00402, 2018 WL 4566129, at *14 (N.H. Super. Ct. Sep. 18, 2018) ("[H]aving thoroughly reviewed the complaint and its many allegations, and considered the parties' voluminous filings relevant to Purdue's motion and their accompanying exhibits, the Court concludes Purdue has not shown that the State's allegations wholly reflect conduct consistent with FDA approved labeling. Accordingly, because Purdue's conflict preemption theory presupposes its alleged marketing efforts were consistent with its drugs' labeling, Purdue's motion is DENIED to the extent it raises preemption.");

- *State of Ohio v. Purdue Pharma L.P.*, No. 17 CI 261, 2018 WL 4080052, at *3 (Ohio C.P. Aug. 22, 2018) ("[I]t is evident in the Plaintiff's complaint that its claims are based upon misrepresentations made by the Defendants concerning the use and safety of opioids which go far beyond the labeling …The claims set forth in Plaintiff's complaint are not barred by the FDA's approval of labeling or the doctrine of preemption.");

- *State of Alaska v. Purdue Pharma L.P.*, No. 3AN-17-09966CI, 2018 WL 4468439, at *6 n.65 (Alaska Super. Ct. July 12, 2018) ("Though presented as grounds for failure to state a claim, Purdue's remaining arguments, specifically, Purdue's objections on the grounds of federal preemption, as well as objections to the State's method of proving injury, are premature. Purdue may properly renew their arguments in further motion practice."); and

- *State of Oklahoma v. Purdue Pharma L.P.*, No. CJ-2017-816, 2017 WL 10152334, at *1 (Okl. Dist. Ct. Dec. 6, 2017) ("[T]he State's Petition sufficiently states its claims and those claims should not be dismissed based on preemption.").

Purdue does not acknowledge any of these ten rulings in its brief.[2] Indeed, Purdue does not mention "preemption" or provide the legal standard for when a state law claim is preempted by federal law. Instead, Purdue argues that the Commonwealth's claims are not actionable "as a matter of law," suggesting there is some free-standing legal doctrine that bars the Commonwealth's claims. Purdue Mem. at 20-21. Four of the cases Purdue cites are decisions

[2] *See* Purdue Mem. at 33 (citing the Delaware and New Jersey decisions only for discussion of public nuisance).

on federal preemption,[3] and two others consider claims not at all relevant here.[4] Applying the proper standard to the Commonwealth's actual allegations, the Court should deny Purdue's motion because — like the States' claims in Alaska, Arkansas, Delaware, New Hampshire, New Jersey, Minnesota, Ohio, Oklahoma, Tennessee, and Vermont — the Commonwealth's allegations are not preempted by federal law.

In enacting the FDCA, "Congress took care to preserve state law" and, in the 1962 amendments thereto, "added a savings clause, indicating that a provision of state law was only invalidated upon a 'direct and positive' conflict with the FDCA." *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (quoting 21 CFR §202). Congress also added an express preemption clause to the FDCA that applies to medical devices, but not to drugs. *See Id.* at 574-75. That fact, "coupled with [Congress'] certain awareness of the prevalence of state tort litigation, is powerful evidence that Congress did not intend FDA oversight to be the exclusive means of ensuring drug safety and effectiveness." *Id.* (citation omitted).

To succeed on its theory that FDA approvals preempt the Commonwealth's claims, Purdue bears a "demanding" burden. *Wyeth*, 555 U.S. at 573. Purdue must show either that "compliance with both federal and state regulations is a physical impossibility" or that "state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of

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[3] *In re Celexa & Lexapro Mktg. & Sales Practices Litig.*, 779 F.3d 34, 43 (1st Cir. 2015) ("finding plaintiffs' claims preempted by the FDCA"); *Dolin v. GlaxoSmithKline LLC*, 901 F. 3d 803, 805 (7th Cir. 2018) (ruling on "federal preemption"); *Zogenix, Inc. v. Patrick*, No. 14-11689, 2014 WL 1454696, at *1 (D. Mass. Apr. 15, 2014) ("claim is that the emergency order is preempted by federal law"); *Prohias v. Pfizer Inc.*, 490 F. Supp. 2d 1228, 1232 (S.D. Fla. 2007) (considering whether claims are "preempted" or "protected by the safe harbor statutes").

[4] *In re Celexa & Lexapro Mktg. & Sales Practices Litig.*, No. 13–11343–NMG, 2014 WL 866571, at *4 (D. Mass. Mar. 5, 2014) (considering whether "California's safe harbor law" bars claim under California law); *Cytyc Corp. v. Neuromedial Sys., Inc.*, 12 F. Supp. 2d. 296, 301 (S.D.N.Y. 1998) (analyzing claims by business competitors under Lanham Act and New York law).

Congress." *Reckis v. Johnson & Johnson*, 471 Mass. 272, 283 (2015) (citations omitted). Thus, for example, in *Wyeth*, the Court explained that in the pharmaceutical labeling context, "absent clear evidence that the FDA would not have approved a change to [the product's] label, we will not conclude that it was impossible for [the manufacturer] to comply with both federal and state requirements." 555 U.S. at 571; *see also*, *e.g.*, *Reckis*, 471 Mass. at 290 (rejecting preemption defense because "we cannot glean from the FDA's response to the citizen petition, or from any other source in this record, clear evidence that the FDA would not have approved" the plaintiff's proposed warning).

Purdue has not attempted to meet the standards for impossibility or obstacle preemption, and it cannot. There is no impossibility in this case because Purdue could have marketed its product in compliance with the FDCA (and its FDA-approved labeling) without violating Chapter 93A's prohibition against unfair and deceptive conduct. The Commonwealth's claims do not require Purdue to have said or done anything that the FDA precluded. *See Reckis*, 471 Mass. at 282-92. Rather, the Complaint alleges that Purdue's marketing was deceptive in spite of the FDA-approved labels. As the Ninth Circuit has observed, the FDA does not approve product labels "so that manufacturers can mislead consumers and then rely on [information in the approved label] to correct those misinterpretations and provide a shield for liability for the deception." *Reid v. Johnson & Johnson*, 780 F. 3d 952, 958 (9th Cir. 2015). The preemption decisions Purdue cites do not support dismissal in this case, because they involved challenges to drug labels. *See In re Celexa & Lexapro Mktg. & Sales Practices Litig.*, 779 F.3d 34, 38 (1st Cir. 2015) ("[T]he complaint argues that the 'drug label for Lexapro is misleading and inadequate.' In its prayer for relief, plaintiffs request that the court 'permanently enjoin Forest from continuing to sell or market Lexapro with its current drug label.'" (brackets omitted));

Dolin v. GlaxoSmithKline LLC, 901 F. 3d 803, 805 (7th Cir. 2018) (patient died after taking generic medication, and surviving spouse sued the corresponding brand-name drug maker on theory that it caused the death by means of its responsibility for the FDA-approved label: plaintiff contends "the relevant harm was caused by the incomplete label").[5]

Nor are the Commonwealth's claims "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Reckis*, 471 Mass. at 283. The Commonwealth alleges that Purdue deceived prescribers and patients about its drugs. Congress of course does not condone using deceptive marketing to sell drugs, and FDA regulations prohibit drug advertising that is false, misleading, or lacking in fair balance. *See* 21 U.S.C. § 352(n); 21 C.F.R. § 202.1(e); 21 C.F.R. § 314.81(b)(3)(i). The Supreme Court has held that even a state-law failure-to-warn-claim that directly challenged the adequacy of an FDA-approved label did not "frustrate the achievement of congressional objectives." *Wyeth*, 555 U.S. at 581. Thus, none of the Commonwealth's allegations is barred by federal law, and, like the ten other courts to consider Purdue's argument, the Court should deny Purdue's motion to dismiss on this ground.

B. The Commonwealth's Claims Are Not Precluded by Chapter 93A Section 3.

Purdue also fails to meet its burden of showing that the Commonwealth's claims are precluded by the "permitted practice" exemption to 93A liability. *See* G.L. c. 93A § 3 ("Nothing in this chapter shall apply to transactions or actions otherwise permitted under laws as administered by any regulatory board or officer acting under statutory authority of the commonwealth or of the United States."). As a threshold matter, Purdue's argument is premature because, "[i]n essence, the exemption enunciated in § 3 is an affirmative defense that

[5] *Prohias v. Pfizer Inc.*, 490 F. Supp. 2d 1228 (S.D. Fla. 2007) was decided before *Wyeth* and does not use the standard now set by the Supreme Court.

must be asserted in the pleadings and proved at trial." *Fleming v. Nat'l Union Fire Ins. Co.*, 445 Mass. 381, 388 (2005); *see also DiMarzo v. American Mut. Ins. Co.*, 389 Mass. 85, 96–97 (1983) (Section 3 determination is a matter for trial); *Lowell Gas Co. v. Attorney Gen.*, 377 Mass. 37, 52–53 (1979) (same); *Bierig v. Everett Square Plaza Assocs.*, 34 Mass. App. Ct. 354, 367 n. 13 (1993) ("permitted act" exemption was a proper affirmative defense in pleadings). In any case, it is clear Purdue cannot prevail under Section 3.

To sustain a "permitted practice" defense, "a defendant must show more than the mere existence of a related or even overlapping regulatory scheme that covers the transaction. Rather, a defendant must show that such scheme affirmatively permits the practice alleged to be unfair or deceptive." *Aspinall v. Philip Morris, Inc.*, 453 Mass. 431, 434-35 (2009) (citation omitted). Likewise, "[i]nferences cannot be the basis for satisfying the defendants' heavy burden under [Section 3]." *Id*. at 435-36; *see also Commonwealth v. Fremont Inv. & Loan*, 452 Mass. 733, 750 (2008) ("[t]he fact that particular conduct is permitted by statute or by common law principles should be considered, but it is not conclusive on the question of unfairness") (quoting *Schubach v. Household Fin. Corp.*, 375 Mass. 133, 137 (1978)). And even where a specific statement *was* authorized by a federal agency, Section 3 does not shield defendants who combine the approved statement with other statements in an unfair or deceptive manner. *See Aspinall*, 453 Mass. at 437.

O'Hara v. Diageo-Guinness, USA, Inc., cited by Purdue at page 25 of its brief, illustrates how narrow and fact-intensive the "permitted practice" defense must be. Purdue directed the Court to a decision that allowed a Chapter 93A claim about deceptive statements on a beer company's website, but dismissed claims about similar statements printed on labels on bottles and cartons of beer, because the labels were approved by a regulator. *O'Hara*, 306 F. Supp. 3d

441, 466 (D. Mass. 2018). A year later, the same court reconsidered the decision that Purdue cites and reversed it, because evidence showed the regulator approved only the labels on bottles and not the labels on the cartons. *O'Hara v. Diageo-Guinness, USA, Inc.*, No. 15-14139-MLW, --- F. Supp. 3d ----, 2019 WL 1437910, at *1-5 (D. Mass. Mar. 30, 2019).[6]

In this case, Purdue cannot establish on a motion to dismiss that the FDA "affirmatively permits the practice alleged to be unfair or deceptive." *Aspinall*, 453 Mass. at 435. Indeed, Purdue's motion does not identify any of Purdue's false or deceptive acts that were authorized by the FDA. Instead, the motion mischaracterizes the Commonwealth's allegations, arguing that the Complaint seeks to hold Purdue liable for selling OxyContin at a particular dose and for a particular duration of use. Purdue Mem. at 24-25. But this argument ignores the allegations that Purdue engaged in deception. *See supra*, at 2-5.

Purdue relies on a September 10, 2013 letter from the FDA in response to a citizen petition by Physicians for Responsible Opioid Prescribing (the "FDA Letter"). *See* Affidavit of Timothy Blank ("Blank Aff."), Ex. C. But the FDA Letter did not authorize the deception alleged in the Complaint. The citizen petition asked FDA to do three things: (1) remove "moderate [pain]" from the approved indication for opioids, (2) add a "maximum daily dose" for opioids, equivalent to 100 mg of morphine, and (3) limit the use of opioids for non-cancer pain to no more than 90 days of continuous use. *See* PROP Citizen Petition (July 25, 2012), Blank

[6] The other decisions that Purdue cites provide no basis to exempt Purdue's deceptive marketing from Chapter 93A. *See Animal Legal Def. Fund Boston, Inc. v. Provimi Veal Corp.*, 626 F. Supp. 278, 283-84 (D. Mass. 1986) (finding use of antibiotics in animals is a permitted practice and subject to preemption: "Congress' intent to occupy the field of antibiotic use in animals, and to direct the States to leave all regulatory activity in that area to the federal government is clear"); *Prohias*, 490 F. Supp. 2d at 1234-35 (applying permitted practice exemption where plaintiffs *conceded* in their brief that their claims were barred, and denying motion to dismiss claims as to defendant's other marketing).

Aff., Ex. Q at 2. The FDA granted the petition, in part, changing the approved labeling for opioids to remove the indication for moderate pain, but rejected the petition's other two requests. FDA Letter, Blank Aff., Ex. C at 9, 11.

Purdue's permitted practice defense relies on the FDA's rejection of the maximum dose and duration limit proposals, even though the Complaint does not seek to establish limits on opioid dose or treatment duration. Purdue incorrectly asserts that the FDA Letter "declined to add a warning that high doses or long durations of opioid treatment create greater risks to patients." Purdue Mem. at 24. The FDA Letter neither considered, nor declined to add, warnings about the risk of higher doses or longer durations, because the citizen petition did not propose them. FDA Letter, Blank Aff. Ex. C at 12-16 (discussing proposed maximum dose and duration, but not any potential warning).

The FDA's decision not to adopt the proposed labeling restrictions on dose and duration of opioid use does not establish as a matter of law, on a motion to dismiss, that the FDA endorsed Purdue's false and misleading marketing described in the Complaint. The FDA Letter did not, for instance, authorize any of Purdue's false claims about addiction, abuse, or "pseudoaddiction." Rather, the FDA Letter stressed that "[extended release] opioids … have disproportionate safety concerns compared to [immediate release] opioids or non-opioid/opioid combination products," and referenced "data show[ing] that the risk for misuse and abuse is greater for [extended release] opioids." *Id*. at 6-7. The FDA Letter added requirements for future ER opioid drug applicants to conduct studies on the effects of long term opioid use, and "change[d] the boxed warning for [extended release] opioid analgesics to give greater emphasis and prominence to the risks of misuse, abuse, [neonatal opioid withdrawal syndrome], addiction, overdose, and death." *Id*. at 7.

The FDA Letter likewise did not authorize Purdue's deceptive claims about its opioids' supposed "safety," "first line" status, or suitability for opioid-naive patients or the elderly. Nor did it laud OxyContin as the "gold standard" of pain treatment. To the contrary, the FDA Letter changed ER opioid labels to state that the drugs "should be used only when alternative treatments are inadequate because of the serious risks of these drugs." *Id*. at 7 (emphasis in original). The FDA Letter's "changes [were] specifically intended to urge prescribers to weigh carefully whether the benefits of an [extended release] opioid outweigh its serious risks on a patient-by-patient basis," and "to better assess whether the serious risks associated with [extended release] opioids, including the risks of misuse, abuse, addiction, overdose, and death associated with [extended release] formulations, are offset by the benefits [extended release] opioids may provide in managing pain for an individual patient." *Id*. at 8-9.

Purdue's misleading marketing was not authorized by the FDA Letter and was anathema to the FDA's stated goals. The FDA Letter sought to help doctors compare the risks and benefits when deciding whether to prescribe opioid drugs. The Complaint reveals how Purdue corrupted prescribers' judgment, placing a heavy finger of deception on the scale. There can be no finding on a motion to dismiss that the FDA "affirmatively permit[ed]" Purdue's misconduct. *Aspinall*, 453 Mass. at 435.

C. The Commonwealth Is Not Estopped From Bringing Its Claims.

The Motion to Dismiss claims that "the Commonwealth is estopped from arguing that marketing statements consistent with FDA-approved materials are misleading," because "[t]he terms of the [2007] Consent Judgment require Purdue's promotions to comply with FDA labeling and indication – and FDA has approved opioids to treat chronic pain." Purdue Mem. at 22. Therefore, Purdue argues, "the Commonwealth cannot now argue that Purdue should have

stopped selling or promoting opioid medications for long term use." *Id.* Purdue's contention distorts the Commonwealth's position and is legally unfounded.

First, the Commonwealth does not contend that marketing statements consistent with FDA-approved materials are misleading, or that Purdue should have stopped selling or promoting opioid medications for long term use. Rather, as summarized above, *see supra* at 1-6, the Complaint alleges conduct that was inconsistent with the FDA's approvals and false and deceptive in violation of Chapter 93A — conduct that, rather than being permitted by the Consent Judgment, contravenes its terms. *See* Consent Judgment, Blank Aff., Ex. A ¶ II.2 ("In the promotion and marketing of OxyContin, Purdue shall not make any written or oral claim that is false, misleading or deceptive."). The Consent Judgment itself provides that, "[e]xcept as expressly provided in this Judgment, nothing in this Judgment shall be construed as: (a) relieving Purdue of its obligation to comply with all state laws, or granting permission to engage in any acts or practices prohibited by such law, regulation or rule" — which, of course, includes Chapter 93A. *Id.* ¶ 47.

Second, Purdue's judicial estoppel defense is meritless. Estoppel in the sense Purdue suggests — the idea that not taking immediate action to redress violations of a judgment would bar future law enforcement — does not exist against the government. *See Fitchburg Gas & Elec. Light Co. v. Dep't of Telecomms. & Energy*, 440 Mass. 625, 636 (2004) (collecting cases on rule that "estoppel is not applied against the government in the exercise of its public duties"). Moreover, unlike the plaintiffs in the two cases Purdue relies upon for this argument, the Commonwealth has been consistent in its position regarding Purdue's unfair and deceptive marketing. *See Otis v. Arbella Mut. Ins. Co.*, 443 Mass. 634, 642 (2005) (plaintiff estopped from asserting in suit against insurer that he was negligent in car crash, following successful tort case

where plaintiff asserted that he was not negligent); *Franco v. Selective Ins. Co.*, 184 F.3d 4, 8-10 (1st Cir. 1999) (plaintiff's suit against insurer not barred by judicial or collateral estoppel, even though he had settled underlying tort suit with employer).

The Court should therefore reject Purdue's attempt to use the 2007 Consent Judgment as a shield from liability for the unlawful post-judgment conduct alleged in the Complaint.

II. THE COMPLAINT STATES A CLAIM FOR PUBLIC NUISANCE FOR SIGNIFICANT INTERFERENCE WITH PUBLIC HEALTH AND SAFETY.

Purdue argues that the Commonwealth's public nuisance count fails to state a claim because it does not relate to real estate. This argument fails because Massachusetts law allows for recovery in public nuisance for conduct which involves a significant interference with public health and public safety,[7] in contrast with private nuisance which is more narrowly limited to interference with property. "A nuisance is public when it interferes with the exercise of a public right by directly encroaching on public property or by causing a common injury." *Sullivan v. Chief Justice for Admin. & Mgmt. of Trial Court*, 448 Mass. 15, 34 (2006).

Massachusetts follows the Restatement (Second) of Torts, § 821B (1979), which defines a public nuisance as "an unreasonable interference with a right common to the general public." "In determining whether there has been an unreasonable interference with a public right, a court may consider, inter alia, '[w]hether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience ….'" *Sullivan*, 448 Mass. at 34 (quoting the Restatement (Second) of Torts, § 821B). A public nuisance is thus "a much broader term and encompasses much conduct other than the type that interferes with the use and enjoyment of private property." W. Page Keeton, et al., Prosser and

[7] Purdue does not argue that the Commonwealth has not sufficiently alleged interference with public health or safety.

Keeton on the Law of Torts, § 90, at 643 (5th ed. 1984); *see also*, *e.g.*, *Leary v. City of Boston*, 20 Mass. App. Ct. 605, 609 (1985).

In *City of Boston v. Smith & Wesson Corp.*, for example, this Court considered whether a public nuisance claim by Boston against gun makers, distributors, sellers, and promoters should be dismissed because the claims did not arise from activities on or related to real estate — the same argument Purdue makes here. *City of Boston v. Smith & Wesson Corp.*, No. 199902590, 2000 WL 1473568 (Mass. Super. Ct. July 13, 2000). The Court denied the motion to dismiss because "a public nuisance is not necessarily one related to property." *Id*. at *14.

As the Complaint alleges, Purdue's deception created and perpetuated a public nuisance that unreasonably interferes with numerous rights common to the general public, including Massachusetts residents' public rights to health, safety, peace, comfort, and convenience. FAC ¶¶ 902-04. In addition to the tragic human cost, the public nuisance has caused hundreds of millions of dollars of economic harm to Massachusetts residents, businesses, and the Commonwealth itself. FAC ¶¶ 905-06.

Three courts, following the Restatement, have denied Purdue's motions to dismiss public nuisance claims brought by States. *See State of New Hampshire*, 2018 WL 4566129, at *14; *State of Ohio*, 2018 WL 4080052, at *4; *State of Alaska*, 2018 WL 4468439, at *4. Those decisions allowed the public nuisance claims to go forward based on the broad nature of the public rights protected by public nuisance — as in Massachusetts, not limited to property rights.

Purdue's reliance on decisions dismissing public nuisance claims in Connecticut and Delaware is misplaced, as those decisions do not inform the scope of public nuisance in Massachusetts. The Connecticut decision was based on an application of Connecticut standing law to claims brought by cities, rather than the state; is not specific to the plaintiff's nuisance

claims; and contains no discussion of the law of nuisance — the word "nuisance" does not appear in the decision at all. *City of New Haven v. Purdue Pharma L.P.*, No. X07HHDCV176086134S, 2019 WL 423990 (Conn. Super. Ct. Jan. 8, 2019). In Delaware, the court dismissed the nuisance claim because Delaware — unlike Massachusetts and unlike the Restatement — does not recognize public nuisance beyond claims to property. *State of Delaware v. Purdue Pharma, L.P.*, 2019 WL 446382, at *12-13; *see also Grewal*, 2018 WL 4829660, at *17. Further demonstrating the distinction between the scope of public nuisance in Massachusetts and Delaware, the Delaware court based its decision on a prior Delaware case that did not allow a public nuisance claim against gun makers on the ground that Delaware public nuisance was limited to claims related to property. In contrast, as discussed above, *City of Boston v. Smith & Wesson Corp.* permitted such a claim to go forward in Massachusetts.

Nor does *Jupin v. Kask*, 447 Mass. 141 (2006), help Purdue's cause. In that case, the court upheld the dismissal of a public nuisance claim against the owner of a gun that was taken by a family member from a locked storage cabinet in the owner's home and used to shoot a police officer. *Id.* at 159-60. Although the Court concluded that an unloaded gun was not a public nuisance, the court recognized that public nuisance law in Massachusetts is broad enough to include interference with public health, public safety, public morals, and public peace — and thus was not limited to claims involving property. *Id*. And, contrary to Purdue's claims, Massachusetts courts have allowed public nuisance claims concerning dangerous products. *See City of Boston*, 2000 WL 1473568, at *14 (denying motion to dismiss public nuisance claim that gun makers facilitated illegal secondary weapons market); *Evans v. Lorillard Tobacco Co.*, No. 04–2840A , 2007 WL 796175, at *19 (Mass. Super. Ct. Feb. 7, 2007) (denying motion to dismiss public nuisance claim concerning the design, manufacture, distribution, and sale of cigarettes).

Purdue also incorrectly claims the Attorney General is barred from bringing a public nuisance claim to address harms suffered by Massachusetts residents. Purdue Mem. at 32 n.13. To the contrary, the Attorney General is the public officer vested with authority to protect the public interest, and "[a]n information in equity by the Attorney General is the normal remedy for the abatement of a public nuisance." *Sullivan*, 448 Mass. at 34-35 (citing G.L. c. 12 § 3).

The Complaint states a claim for public nuisance because it alleges that Purdue significantly interfered with public health and safety in the marketing and sale of its opioids. Purdue's assertion that the claim impermissibly seeks to hold Purdue solely liable for the entire opioid epidemic is not an argument that the public nuisance count fails to state a claim, but rather raises a damages issue about the extent of the public nuisance for which Purdue may be held responsible. The Commonwealth should be permitted to move forward with proving its claim.

III. THE COMMONWEALTH ADEQUATELY PLEADS CAUSATION.

Purdue's arguments about causation also neglect both the Commonwealth's allegations and the relevant legal standards. The Commonwealth has more than adequately alleged causation where necessary at the motion to dismiss stage. Contrary to the assertions of the Motion to Dismiss, the complexity of the opioid crisis does not absolve Purdue of liability for the harm it directly and foreseeably caused.

A. Purdue's Causation Defense Is Premature.

Purdue's defenses regarding causation are premature, as the "question of causality…is generally a question of fact for the jury." *Zezuski v. Jenny Mfg. Co.*, 363 Mass. 324, 328 (1973). Accordingly, many of the cases Purdue cites regarding causation do not concern pleading

standards at all.[8] As discussed below, the Complaint adequately pleads each element of its claims, including that Purdue's misconduct caused foreseeable events leading directly to the alleged harms. The Commonwealth should therefore be permitted to proceed on its claims.

B. The Commonwealth Need Not Show Causation to Obtain Injunctive Relief or Recover Penalties and Costs Under Chapter 93A.

Even if they had merit, Purdue's causation arguments could not be a complete defense to the Commonwealth's Chapter 93A claims because, to the extent those claims seek penalties, costs, and injunctive relief, "the Attorney General, unlike a private litigant who sues under § 9 or § 11 of c. 93A, is only required to prove that unfair or deceptive acts or practice took place in trade or commerce; she is not required to prove or quantify resulting economic injury." *Commonwealth v. Equifax*, No. 1784CV03009BLS2, 2018 WL 3013918 (Mass. Super. Ct. Apr. 3, 2018) (citing *Commonwealth v. Fall River Motor Sales, Inc.*, 409 Mass. 302, 312 (1991); *Commonwealth v. Chatham Dev. Co.*, 49 Mass. App. Ct. 525, 528–29, rev. denied, 432 Mass. 1107 (2000)). In actions by the Attorney General under Chapter 93A, the Court may impose civil penalties of up to $5,000 per violation and require the defendant pay the costs of investigation and litigation, "if the court finds that a person has employed any method, act or

[8] *See Cottam v. CVS Pharmacy*, 436 Mass. 316 (2002) (holding after trial that duty to warn can be assumed by pharmacy despite learned intermediary); *Garside v. Osco Drug, Inc.*, 976 F.2d 77 (1st Cir. 1992) (reversing summary judgment for defendant for more fact-finding at trial); *Bodie v. Purdue Pharma Co.*, 236 F. App'x 511 (11th Cir. 2007) (allowing summary judgment after causation discovery); *In re Celexa & Lexapro Mktg. & Sales Practices Litig.*, 289 F. Supp. 3d 247 (D. Mass. 2018) (allowing summary judgment after causation discovery), *rev'd*, 915 F.3d 1 (1st Cir. 2019) (finding dispute of fact related to causation); *Ferreira v. Sterling Jewelers Inc.*, 130 F. Supp. 3d 471 (D. Mass 2015) (allowing summary judgment after discovery completed); *Russo v. Baxter Healthcare Corp.*, 140 F. 3d 6 (1st Cir. 1998) (affirming judgment as a matter of law after plaintiff rested); *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258 (1992) (remanding on summary judgment); *MacDonald v. Ortho Pharm. Corp.*, 394 Mass. 131 (1985) (reinstating jury verdict for plaintiff).

practice which he knew or should have known to be in violation of said section two." G.L. c. 93A § 4. Purdue's causation arguments are misplaced with regard to the claims for penalties, costs, and injunctive relief that the Commonwealth may pursue without proving causation.

C. Purdue Was a Cause in Fact and Proximate Cause of the Alleged Harms.

Even where seeking additional relief under Chapter 93A, the Complaint properly pleads the elements of causation under the cause-in-fact and proximate cause standards. Chapter 93A plaintiffs are required to show a "causal connection" between the alleged violation and the damages sought but need not prove "reliance on a misrepresentation." *Casavant v. Norwegian Cruise Line Ltd.*, 460 Mass. 500, 503 (2011). Likewise, proximate causation is an element of a public nuisance claim. *See City of Boston*, 2000 WL 1473568 at *4. The Commonwealth's Complaint properly pleads that Purdue was both a cause-in-fact and proximate cause of the harms in this case.

1. The Commonwealth Pleads That Purdue Was a Cause-in-Fact of Addiction, Overdose, and Death.

The Complaint alleges throughout that Purdue's deceptive campaign injured Massachusetts patients. FAC ¶¶ 15, 18, 21-26, 30, 67, 72, 83, 86, 88-90, 94, 96-97, 100, 115-116, 121-22, 129, 131, 134, 139, 152-53, 384, 447, 450.

Purdue argues that the casual chain is broken by the "learned intermediary rule," under which "a drug manufacturer's duty to warn is generally discharged by providing physicians with an adequate warning about any risks associated with its prescription drug products." *Niedner v. Ortho-McNeil Pharm., Inc.*, 90 Mass. App. Ct. 306, 309 (2016). The learned intermediary doctrine, however, does not bar claims that a drug manufacturer *deceived* physicians, *see id.*, which is exactly what the Commonwealth alleges. FAC ¶¶ 2, 114-116, 165. Notwithstanding the existence of FDA-approved labels, the false and misleading claims that Purdue made to

prescribers represent the antithesis of an "adequate warning."

Nor can Purdue prevail with its argument that the "cause in fact" standard requires the Commonwealth to plead reliance by specific doctors on specific misrepresentations to defeat a motion to dismiss. Purdue Mem. at 26. The cited *City of Chicago* analysis concerned standards for claims under the Chicago False Claims Act, the Illinois Insurance Fraud Statute, and Illinois common law fraud — standards that do not apply to Chapter 93A, which does not require such a showing. *See City of Chicago v. Purdue Pharma L.P.*, No. 14 C 4361, 2015 WL 2208423, at *14 (N.D. Ill. May 8, 2015); *Casavant*, 460 Mass. at 503 (93A liability does not require reliance). Moreover, the Commonwealth alleges that specific prescribers *did* rely on Purdue's deception: Purdue's top 100 targets in Massachusetts wrote more dangerous prescriptions to more 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 ¶¶ 113-116.

In reversing another case Purdue relies on, the First Circuit found the plaintiff could proceed to trial where there was "ample evidence" that the drug company "spent money inducing doctors to prescribe its drugs to pediatric patients and that it would not have done so had the effort not been worth the money." *In re Celexa & Lexapro Mktg. & Sales Practices Litig.*, 915 F.3d 1, 12 (1st Cir. 2019).

2. The Commonwealth Pleads That Purdue Was a Proximate Cause of Addiction, Overdose, and Death.

Purdue's argument that intervening events break the chain of proximate causation between Purdue's misconduct and the alleged harms ignores, again, both the Complaint's allegations and the proper legal standards. The Commonwealth has adequately pled proximate causation for both its Chapter 93A and public nuisance claims.

Where events intervene between a defendant's conduct and an eventual harm, proximate causation extends liability so far as those intervening events were *foreseeable* to the defendant. *Lawrence v. Kamco, Inc.*, 8 Mass. App. Ct. 854, 858 (1979) (proximate causation extends liability to "the type of general harm which the defendant should have foreseen"). To establish proximate causation, "it is not necessary . . . that the *particular* series of events which ended in the injury to the plaintiff were the probable consequences of the defendant's acts"; rather, "it is enough to prove that the probable consequence of [the defendant's] acts was that harm of the *same general character* as that which came to the plaintiff would come to persons who stood in the same general relation to the defendant as the plaintiff." *West v. Molders Foundry Co.*, 342 Mass. 8, 12-13 (1961) (emphasis added).

Purdue cannot establish on a motion to dismiss that the chain of proximate causation between its deceptive conduct and the alleged harm is broken because some victims who became addicted to its opioids obtained drugs illegally, abused drugs, or overdosed on drugs not made by Purdue. Those events were *foreseeable* when Purdue decided to break the law. Purdue knew its drugs carried grave risk of addiction, knew that higher doses and longer treatment increased patients' risk, knew that addicted patients were at risk of harm from other similar drugs, and knew that its own opioids were being diverted to an illegal secondary market. FAC ¶¶ 72, 90, 93, 310-13, 384. Purdue even sought to capitalize on this knowledge that "pain treatment and addiction are naturally linked" when it internally considered selling addiction treatment and overdose-reversal drugs. FAC ¶¶ 445, 450, 475.

Knowing the risks, Purdue identified doctors it suspected of improper prescribing but failed to report them to law enforcement. FAC ¶¶ 310-13, 736. Several of Purdue's top targets in Massachusetts lost their licenses or went to prison, and the majority prescribed Purdue opioids

to patients who overdosed and died. FAC ¶ 115. At least 671 people who filled prescriptions for Purdue opioids in Massachusetts died of opioid-related overdoses. FAC ¶ 22. These consequences were tragically foreseeable at the time Purdue engaged in its deception.

3. The Commonwealth Is Not Required to Prove Reliance on a Misrepresentation.

The Motion to Dismiss ignores the Commonwealth's allegations that Purdue's misrepresentations induced specific doctors to prescribe more of its opioids, including several who lost their medical licenses after being targeted by Purdue. FAC ¶¶ 113-116. Even if the Commonwealth's investigation had not uncovered those facts, however, Purdue's argument that the Commonwealth was required to allege reliance by specific doctors on specific misrepresentations is legally wrong. The Commonwealth's Chapter 93A claims do not require it to plead or prove reliance. *See Casavant*, 460 Mass. at 503 ("The plaintiffs need not show proof of actual reliance on a misrepresentation in order to recover damages under G.L. c. 93A, but rather must show a causal connection between the deception and the loss and that the loss was foreseeable as a result of the deception." (brackets and quotations omitted)).

Purdue's reliance argument rests on cases analyzing proximate cause under Racketeer Influenced and Corrupt Organizations statutes. These RICO cases follow the Supreme Court's analysis in *Holmes v. Securities Investor Protection Corp.*, which addressed the problem of "apportioning damages among [numerous] plaintiffs removed at different levels of injury from the violative acts." *Holmes*, 503 U.S. 258, 268 (1992); *see In re Yasmin & Yaz (Drospirenone) Mktg, Sales, Practices & Prods. Liability Litig.*, No. 3:09–md–02100–DRH–PMF, 2010 WL 3119499, at *5 (S.D. Il. Aug. 5, 2010) (causation under RICO); *Ironworkers Local Union No. 68 v. AstraZeneca Pharm., LP*, 585 F. Supp. 2d 1339, 1343-45 (M.D. Fla. 2008) (causation under RICO); *United Food & Commercial Workers Cent. PA & Reg'l Health & Welfare Fund v.*

Amgen, Inc., 400 F. App'x. 255, 257 (9th Cir. 2010) (applying *Holmes* to RICO claims).[9]

The Commonwealth is not suing under RICO, and Purdue has not cited any authority for the proposition that a Massachusetts court deciding Chapter 93A pleading issues should follow RICO. Indeed, in *City of New Haven*, the one non-RICO case cited for this point, the court stated that its causation analysis would not apply to an enforcement action brought by the state in the public interest. *City of New Haven*, 2019 WL 423990, at *5 ("Enforcement claims … don't require the same causation analysis as ordinary individual lawsuits for compensatory damages. Unfair trade practices claims are a good example.").

IV. THE COMMONWEALTH SEEKS APPROPRIATE RELIEF.

Contrary to Purdue's argument (Purdue Mem. at 34), there is no basis for the Court to rule that the Commonwealth seeks relief to which it is not entitled. Chapter 93A Section 4 authorizes the Attorney General to seek "judgments as may be necessary to restore to any person who has suffered any ascertainable loss by reason of the use or employment of such unlawful method, act or practice any moneys or property, real or personal, which may have been acquired by means of such method, act, or practice." G.L. c. 93A § 4. The statute supports the Commonwealth's claims for disgorgement and restitution.

The Supreme Judicial Court has made clear that the Attorney General has broad responsibility to secure relief under Section 4 of Chapter 93A:

> "[R]elief under G.L. c. 93A is not intended to be limited in a proceeding under s 4 to those persons who are listed in the Attorney General's bill. The very purpose of the Attorney General's involvement is to provide an efficient, inexpensive, prompt and broad solution to the alleged wrong. Relief in favor of

[9] Similarly, the decision Purdue cites regarding Bank of America does not provide the appropriate standard because it concerns "the contours of proximate cause under the [Fair Housing Act]," which excludes foreseeability analysis. *Bank of Am. Corp. v. City of Miami*, 137 S. Ct. 1296, 1305-06 (2017); *see* Purdue Mem. at 28.

> all wronged persons would be the result in a class action brought by a consumer under G.L. c. 93A, s 9, and we see no logical reason for a distinction in an action brought by the Attorney General under s 4."

Commonwealth v. DeCotis, 366 Mass. 234, 245-46 (1974).[10] Likewise, it is proper for Purdue to pay for the abatement of the nuisance, including the crucial abatement efforts undertaken by the Commonwealth.

Purdue's contentions about the scope of relief for its misconduct are not proper for a motion under Massachusetts Rule of Civil Procedure 12(b)(6), because they do not (and cannot) identify a "failure to state a claim upon which relief can be granted." Mass. R. Civ. P. 12(b). In Section V of its brief, Purdue concedes that relief *can* be granted both for violations of Chapter 93A and for public nuisance. *See* Purdue Mem. at 34 (acknowledging that abatement can be granted as a remedy for public nuisance and penalties can be granted as relief for violations of Chapter 93A).

Court have repeatedly held that, so long as a complaint states a claim upon which relief can be granted, a defendant's arguments about the scope of relief are not properly decided on a motion to dismiss. *See, e.g.*, *AG Spectrum Co. v. Elder*, 181 F. Supp. 3d 615, 617 (D. Iowa 2016) ("While a Rule 12(b)(6) motion lies if a plaintiff has not stated a claim upon which <u>any</u> relief can be granted, under the facts of this case, a Rule 12(b)(6) motion is not the appropriate vehicle for the dismissal of one of [plaintiff]'s prayers for relief, which is not itself a part of the plaintiff's claim." (emphasis in original) (collecting cases from four circuits)); *In re General*

[10] *See also Kelley v. CVS Pharmacy, Inc.*, No. CIV.A. 98-0897-BLS2, 2007 WL 2781163, at *12 (Mass. Super. Ct. Aug. 24, 2007) ("This Court finds that the disgorgement of profit derived from an unfair and deceptive act or practice is a permissible damage remedy under G.L. c. 93A, § 9"); *Tyler v. Michaels Stores, Inc.*, 464 Mass. 492, 504 n.20 (2013) (identifying circumstances where disgorgement of defendant's profits is appropriate means of calculating damages under Chapter 93A § 9).

Motors Corp., 383 F. Supp. 2d 1340, 1344 (D. Okla. 2005) (in suit under Massachusetts Chapter 93A, refusing to limit relief on a 12(b)(6) motion because "the prayer for relief is not part of the claim").

Purdue's challenge to the Prayer For Relief is especially misplaced because Massachusetts Rule of Civil Procedure 54(c) assures that "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings." Mass. R. Civ. P. 54(c).[11] How much Purdue pays for its misconduct should be decided through a full public reckoning of the evidence of Purdue's deception and the injuries Purdue caused in Massachusetts — not on a motion to dismiss.

V. THE COMMONWEALTH'S CLAIMS ARE NOT BARRED BY STATUTES OF LIMITATIONS.

The Complaint seeks to hold Purdue liable for unlawful conduct after the 2007 Consent Judgment. The Motion to Dismiss acknowledges that much of the conduct at issue is well within the limitations period. Purdue Mem. at 35. Considering the parties' tolling agreement from August 3, 2016 until May 18, 2018, FAC ¶ 839, and the four-year statute of limitations for G.L. c. 93A, the allegations related to conduct on or after August 2012 are undoubtedly timely. Purdue does not cite a single case dismissing a complaint (even in part) where, as here, some of the conduct at issue was certainly within the limitations period and there was, as here, a dispute as to the applicability of the discovery rule with regard to earlier conduct. The Court should decline Purdue's invitation to do so in this case.

[11] *See also Long v. Wickett*, 50 Mass. App. Ct. 380, 392, (2000) ("[W]hen a party asserts only one legal right, even if seeking multiple remedies, there is only a single claim for relief for rule 54(b) purposes.")

The Court should also reject Purdue's motion to dismiss the Complaint, in part, on statute of limitations grounds, because the statute of limitations defenses are inappropriate grounds for dismissal at the pleading stage. A statute of limitations generally does not begin to run until the plaintiff knows or should have known of the cause of action, a rule necessary to prevent "the unfairness of a rule that holds that the statute of limitations has run even before a plaintiff knew or reasonably should have known that she may have been harmed by the conduct of another." *Bowen v. Eli Lilly & Co.*, 408 Mass. 204, 205 (1990). The determination is generally a matter of fact, and in most cases cannot be determined from the pleadings alone. *See Riley v. Presnell*, 409 Mass. 239, 239 (1991) ("when a plaintiff knew or should have known of his cause of action is one fact which in most instances will be decided by the trier of fact"); *Szymanski v. Boston Mut. Life Ins. Co.*, 56 Mass. App. Ct. 367, 370 (2002) ("In most instances, the question when a plaintiff knew or should have known of its cause of action is one of fact that will be decided by the trier of fact"); *City of New Bedford v. Monsanto Co.*, No. BRCV2010-01053, 2013 WL 11109970, at *2 (Mass. Super. Ct. May 21, 2013) ("because the court cannot determine from the facts alleged in the amended complaint when the city discovered or reasonably should have discovered the contamination, dismissal under the applicable statutes of limitations is precluded").[12]

It follows that a claim should not be dismissed on statute of limitations grounds pursuant to Rule 12(b)(6) unless "it is undisputed from the face of the complaint that the action was

[12] *See also Tyron v. Mass. Bay Transp. Auth.*, No. SUCV201402654, 2016 WL 5874408, at *2 (Mass. Super. Ct. Aug. 17, 2016) ("At the motion to dismiss stage, the plaintiff need only allege facts plausibly suggesting applicability of the discovery rule … The question of whether the plaintiff's claim is barred by the statute of limitations must await either a motion for summary judgment or trial."); *Nicolopoulos v. Town of Saugus*, No. 082350C, 2009 WL 3416313, at *1 (Mass. Super. Ct. Sept. 14, 2009).

commenced beyond the applicable deadline." *Commonwealth v. Tradition (N. America) Inc.*, 91 Mass. App. Ct. 63, 70 (2017); *see also Friedman v. Jablonski*, 371 Mass. 482, 487-88 (1976) (denying motion to dismiss on statute of limitations grounds where, "[t]he complaint does not show that, as matter of law, the plaintiffs reasonably could have known the true facts about the well by the time of the sale of the premises.").

Nothing in the Complaint proves that the statute of limitations bars any claim as a matter of law. The articles cited in the Commonwealth's initial complaint do not establish when the Commonwealth's cause of action accrued, nor when it should have filed its claim. The initial complaint cited those articles as "warning signs" *to Purdue*, which knew far more about its marketing than anyone, and could have and should have stopped its misconduct. Initial Complaint ¶ 161. As relevant to the limitations period, the Complaint alleges that the facts of Purdue's misconduct were not known to the public or the Commonwealth, but were hidden from both in internal company documents. FAC ¶¶ 837, 838; Initial Complaint ¶ 203 ("Any statutes of limitation otherwise applicable to any claims asserted herein against all Defendants have been tolled by the discovery rule.").

Purdue misconstrues the discovery rule, arguing that the statute of limitations began to run when an article critical of Purdue was published in the media. Purdue Mem. at 36. Even if the Attorney General saw an article that disclosed facts material to her allegations, the Supreme Court has explained that the limitations period under the discovery rule does not commence upon mere "inquiry notice," or "the point where the facts would lead a reasonably diligent plaintiff to investigate further," but rather when "the plaintiff thereafter discovers or a reasonably diligent plaintiff would have discovered" the facts underlying the cause of action. *Merck & Co. v. Reynolds*, 559 U.S. 633, 634-35 (2010). Here, the reasonableness test turns on many factors,

including when the Attorney General had reasonable notice that Purdue was violating Chapter 93A or causing a public nuisance, when such notice was sufficient to merit opening an investigation, and when that investigation should have uncovered the conduct alleged in the Complaint.

Purdue argues perversely that publicity surrounding Purdue's 2007 criminal conviction, and the Consent Judgment in which the company swore it would end its deceptive marketing, served as notice to the Commonwealth that Purdue's deception continued. *See* Purdue Mem. at 35-36. But the discovery rule does not place a higher burden on enforcement against recidivists.

The Commonwealth investigated diligently to uncover the facts alleged in its Complaint. Indeed, the Commonwealth revealed facts about Purdue's illegal deceit that no other plaintiff or law enforcement agency had ever made public — as was highlighted by Purdue's strenuous efforts to keep the Complaint secret. Any dispute about when the Commonwealth's claims accrued should be resolved through factual findings after discovery. *See Riley*, 409 Mass. at 239.

CONCLUSION

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

Dated: April 16, 2019

Respectfully submitted,
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