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

THE COMMONWEALTH'S MEMORANDUM OF LAW IN OPPOSITION TO:

DEFENDANT RUSSELL GASDIA'S MOTION TO DISMISS;

DEFENDANTS CRAIG LANDAU, JOHN STEWART, AND MARK TIMNEY'S JOINDER IN DEFENDANT RUSSELL GASDIA'S MOTION TO DISMISS;

THE SUPPLEMENTAL MEMORANDUM IN SUPPORT OF FORMER DIRECTORS' MOTION TO DISMISS; AND

JOHN STEWART'S MOTION TO DISMISS ON STATUTE OF LIMITATIONS GROUNDS

LEAVE TO FILE EXCESS PAGES GRANTED May 9, 2019

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Other Authorities

PRELIMINARY STATEMENT

This case concerns allegations that the defendants waged a campaign of unfair and deceptive marketing in violation of Massachusetts law. Executives and directors of Purdue Pharma L.P. and Purdue Pharma Inc. (collectively, "Purdue") directed a massive, years-long scheme to mislead Massachusetts doctors, pharmacists, patients, and the public about the dangers of Purdue's drugs. The consequence of their misconduct is an ongoing epidemic of addiction, overdose, and death.

In his motion to dismiss, Defendant Russell Gasdia concedes that the Court should assume, consistent with the Commonwealth's allegations, that he injured thousands of Massachusetts families; he pocketed millions of dollars; and he intentionally broke the law. Gasdia does not contend that he is outside this jurisdiction or has been sued in the wrong court. Instead, Gasdia presents three brazen legal theories that, he says, let him walk away regardless of his misconduct. Those arguments for impunity are wrong.[1]

THE COMMONWEALTH'S ALLEGATIONS

Gasdia was Purdue's Vice President of Sales and Marketing from 2007 through June 2014 and its Head of Strategic Initiatives from July 2014 until his retirement from Purdue, on December 31, 2014. First Amended Complaint ("FAC" or "Complaint") ¶¶ 698, 751. During his tenure, Gasdia collected millions of dollars, and more than 300 Massachusetts patients died

[1] The Commonwealth submits this Memorandum in Opposition to Defendant Gasdia's Motion to Dismiss ("Gasdia Mem."). It also addresses overlapping arguments by John Stewart, Mark Timney, and Craig Landau in their Joinder in Gasdia's Motion to Dismiss ("CEO Joinder"); by four director defendants in their Supplemental Memorandum in Support of Former Directors' Motion to Dismiss ("Former Dir. Supp."); and by Stewart in support of his Motion to Dismiss ("CEO Mem."). In this brief the Commonwealth uses "defendants" to refer to all of the defendants whose arguments are addressed herein. Gasdia states that he joins arguments advanced by Purdue. Gasdia Mem. at 1, n.1. The Commonwealth addresses those arguments in its separate opposition to Purdue's Motion to Dismiss.

of opioid-related overdoses after filling prescriptions for Purdue opioids. FAC ¶¶ 752-753.

Together with the other executives and directors named in this case, Gasdia led a campaign of deceptive marketing that involved thousands of illegal and dangerous acts across every part of Massachusetts. FAC ¶¶ 698-753. The goal of his deception was to get more Massachusetts patients on Purdue's opioids, at higher doses, for longer periods of time. FAC ¶ 698. To accomplish that, he sent sales representatives to lobby Massachusetts doctors thousands of times. FAC ¶¶ 702-08; FAC Ex. 1.

Gasdia studied how high-dose prescriptions brought Purdue the most money. FAC ¶¶ 709-10. He pushed sales reps to promote the highest doses and directed them to use marketing materials that did not disclose that those doses put patients at higher risk. FAC ¶¶ 711-13.

Gasdia also knew that higher doses keep patients on opioids longer, and he pushed a secret deceptive scheme to make money from that dangerous effect. FAC ¶¶ 717-19. He developed sales tactics to extend the "length of therapy" and directed sales reps to use marketing materials that did not disclose that longer periods on opioids put patients at greater risk. *Id.* One of the tactics for increasing the length of therapy was increasing the dose. FAC ¶ 718.

Gasdia ordered sales reps to target the most prolific opioid prescribers, even when he knew the doctors were being investigated for dangerous prescribing. FAC ¶¶ 720-30. Gasdia signed a contract to pay tens of thousands of dollars to the top prescriber of OxyContin in Massachusetts, even though Gasdia had been warned that the doctor was under investigation. FAC ¶¶ 720-23. Gasdia extended the contract multiple times, making the doctor Purdue's top-paid spokesperson in Massachusetts in the same year that he lost his medical license for dangerous prescribing. FAC ¶¶ 121, 724.

The effects of Gasdia's targeting method were catastrophic for Massachusetts families: the deceptive sales visits caused prescribers to put more patients on Purdue opioids, at higher

doses, for longer periods of time. FAC ¶¶ 112-16, 731-32. Compared to Massachusetts doctors and nurses who prescribed Purdue opioids without seeing sales reps, Purdue's top targets were at least ten times more likely to prescribe Purdue opioids to patients who overdosed and died. FAC ¶ 732.

When people proposed ways to prevent addiction and death, Gasdia fought against them. When United Healthcare tried to reduce illegal diversion of OxyContin by limiting each prescription to 93 pills, Gasdia threatened to cut their "rebate" and got them to back down. FAC ¶ 716. When an employee urged Gasdia to disclose to insurers Purdue's list of hundreds of doctors suspected of illegal and dangerous prescribing because "[a]t a basic level, it just seems like the right and ethical thing to do," Gasdia rejected the suggestion and the list remained secret. FAC ¶ 736.

Gasdia ruthlessly enforced Purdue's tactics for keeping its deception secret and avoiding a paper trail. When staff sent him a report of illegal OxyContin trafficking, he replied: "These should not be on email." FAC ¶ 744. When a manager emailed Gasdia about the arrest of a profitable prolific prescriber in Massachusetts, Gasdia ordered: "Discontinue use of email on this subject." *Id.* And when a sales representative wrote down her sales pitch in an email to a doctor, Gasdia ordered: "Fire her now!" FAC ¶ 745.

The Complaint alleges that Gasdia engaged in unfair and deceptive acts in violation of Chapter 93A § 2, including conduct that misled the public about the severe risks of Purdue opioids. FAC ¶¶ 890-900. The Complaint alleges further that, by his unlawful acts, Gasdia participated in the creation and maintenance of an ongoing public nuisance that interfered with the public's rights to health and safety. FAC ¶¶ 901-10. [2]

[2] The Commonwealth's allegations against each of the other defendants are summarized in the Commonwealth's briefs opposing their motions to dismiss.

ARGUMENT

I. The Attorney General May Bring Enforcement Actions For Past Violations Of Chapter 93A.

A. In *Lowell Gas*, The Supreme Judicial Court Concluded That The Attorney General Has The Power To Bring Chapter 93A Enforcement Actions For Past Misconduct.

The Supreme Judicial Court ("SJC") has long held that the Attorney General has standing under Chapter 93A, § 4 ("Section 4") to bring an enforcement action for unfair or deceptive conduct that ceased prior to the lawsuit. In *Lowell Gas Co. v. Attorney General*, 377 Mass. 37, 47-48 (1979), the SJC declined to read Section 4 as precluding "suits by the Attorney General against parties who have engaged in, but recently suspended, practices violative of c. 93A." *See also In re Bartel*, 403 B.R. 173, 176 (D. Mass. 2009) (reasoning that the "Attorney General's right to bring such actions [under G.L. 93A, s. 4] ... applies even if a company has ceased its unfair practices"). Specifically, in *Lowell Gas*, the SJC permitted the Attorney General to enforce Chapter 93A against two utilities that claimed to have ceased their alleged misconduct prior to suit, concluding:

> when considered in the context of c. 93A, s 6, and c. 260, s 5A, the broad remedial language of [Section] 4 cannot be read to preclude suits by the Attorney General against parties who have engaged in, but recently suspended, practices violative of c. 93A.

Id.

The defendants would have this Court disregard *Lowell Gas*, contending that the Attorney General lacks standing to bring any Chapter 93A claim against them for past conduct, because they are not "using" or "about to use an unfair or deceptive practice." *See* Gasdia Mem. at 4-6; CEO Joinder at 2-3; Former Dir. Supp. at 2-6. But the defendants do not provide any sufficient basis to upend the SJC's long-settled conclusion. Neither the defendants' resignations

from Purdue nor Purdue's announcement that it would no longer promote opioids to doctors excuses the defendants from liability for their misconduct.

B. The Text, Structure, and Purpose of Chapter 93A Support The SJC's Conclusion in *Lowell Gas*.

Lowell Gas has already correctly rejected the defendants' argument regarding Section 4 as inconsistent with the purpose and function of Chapter 93A. Defendants' argument is at odds with the plain text of Chapter 93A in numerous ways: with the legal remedies in Section 4 itself; the broad investigative authority in Section 6 of Chapter 93A; the authority in Section 5 to accept assurances of discontinuance of Chapter 93A violations "from any person alleged to be engaged or to have been engaged in such method, act or practice" "in lieu" of instituting "an action or proceeding"; and the statute of limitations for 93A actions by the Attorney General, in G.L. c. 260, § 2A. The defendants' arguments are also inconsistent with Chapter 93A's remedial purpose "to provide an efficient, inexpensive, prompt, and broad solution" where she discovers unfair or deceptive practices that cause widespread harm. *Commonwealth v. DeCotis*, 366 Mass. 234, 245 (1974). This case therefore presents no warrant for revisiting *Lowell Gas*'s settled conclusions.

1. The Defendants' Argument Is Inconsistent With Section 4, Which Expressly Authorizes Orders and Judgments Based on Past Conduct.

The defendants' argument is inconsistent with the text of Section 4 itself. In addition to injunctive relief, Section 4 authorizes the court to award the other types of relief — including restitution, civil penalties, and costs of investigation and litigation — that plainly contemplate redress for past violations. Specifically, a court may issue:

> such other orders or 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. If the court

> finds that a person *has employed* any method, act or practice which he knew or should have known to be in violation of said section two, the court may require such person to pay to the commonwealth a civil penalty of not more than five thousand dollars for each such violation and also may require the said person to pay the reasonable costs of investigation and litigation of such violation, including reasonable attorneys' fees.

G.L. c. 93A, § 4 (emphases added).

Under the defendants' argument, the Attorney General would lack standing to recover restitution and civil penalties — remedies expressly authorized by Section 4 — against anyone for past misconduct. Nor would she able to recover costs of investigation of past conduct, even though, as the defendants concede, Section 6 authorizes investigations of past conduct. *See* Gasdia Mem. at 5-6; Former Dir. Supp. at 3-4. Such a construction is contrary to the plain language of Section 4 and in conflict with the obvious purpose of Section 6. *See DiFiore v. Am. Airlines, Inc.*, 454 Mass. 486, 490–91 (2009); *Fordyce v. Town of Hanover*, 457 Mass. 248, 258 (2010) ("We do not read statutory language in isolation.").

2. The Defendants' Argument Is Inconsistent With Section 6, Which Authorizes the Attorney General to Investigate Past Unfair and Deceptive Conduct.

Section 6 authorizes the Attorney General to issue civil investigative demands to investigate unfair or deceptive practices she believes that any person "has engaged in or is engaging in." G.L. c. 93A, § 6 (emphasis added). The "broad investigatory powers" conveyed by Section 6 are "construed liberally in favor of the government." *Exxon Mobil Corp. v. Attorney General*, 479 Mass. 312, 324 (2018) (internal citation omitted). While the defendants argue that the Legislature's use of the "has engaged in" phrase in Section 6 is proof that it intentionally omitted authority to remedy past violations from Section 4, it would be of little use for Chapter 93A to empower the Attorney General to investigate past Chapter 93A violations but deny her the power to prosecute them. The SJC already rightly declined to read such a

contradiction into the statute in *Lowell Gas*. *See DiFiore,* 454 Mass. at 490–91 ("Where possible, we construe the various provisions of a statute in harmony with one another, recognizing that the Legislature did not intend internal contradiction."); *Boston Police Patrolmen's Ass'n, Inc. v. Police Dep't of Boston*, 446 Mass. 46, 50 (2006) ("The words of the statute should be read as a whole to produce an internal consistency. In addition, it is not proper to confine interpretation to the one section to be construed.").

3. The Defendants' Argument Is Inconsistent With The Authority Conferred by Section 5 To Accept An Assurance of Discontinuance For Past Misconduct "In Lieu" Of Commencing A Section 4 Proceeding.

The defendants' argument also contradicts Section 5's authorization to the Attorney General to resolve allegations of past misconduct "in lieu" of filing suit under Section 4. Specifically, Section 5 allows the Attorney General to "accept an assurance of discontinuance of any method, act or practice in violation of this chapter from any person alleged to be engaged or to have been engaged in such method, act or practice" "in lieu" of instituting "an action or proceeding under section four." G.L. c. 93A, § 5 (emphasis added). This provision could hardly be clearer in demonstrating the Legislature's intention that the Attorney General would prosecute past conduct in which the defendants "engaged."

4. The Defendants' Argument Is Inconsistent With Chapter 93A's Statute Of Limitations.

The Legislature also showed its intention that the Attorney General would prosecute past violations of Chapter 93A by providing a statute of limitations specifically applicable to the Attorney General herself. Chapter 260, § 5A provides that Chapter 93A claims, "whether for damages, penalties or other relief and brought by any person, including the attorney general shall be commenced only within four years next after the cause of action accrues." (emphasis added.) A four-year statute of limitations applicable to the Attorney General makes little sense if the

Attorney General could not bring actions for past conduct. *See DiFiore*, 454 Mass. at 490–91; *Fordyce*, 457 Mass. at 258.

5. The Defendants' Argument Is Inconsistent With Chapter 93A's Remedial Purpose.

In addition to being inconsistent with the text and structure of Chapter 93A, the defendants' arguments are contrary to the statute's manifest remedial purposes. Chapter 93A "is a statute of broad impact" that prohibits "unfair methods of competition" and "unfair or deceptive acts or practices in the conduct of any trade or commerce." *Exxon*, 479 Mass. at 315-16 (quoting *Slaney v. Westwood Auto., Inc.*, 366 Mass. 688, 693-94 (1975)). *See also* G.L. c. 93A § 2(a). The Attorney General's cause of action under Section 4 is intended "to provide an efficient, inexpensive, and broad solution" where she discovers unfair or deceptive practices that cause widespread harm. *DeCotis*, 366 Mass. at 245. *See also Auto Flat Car Crushers, Inc. v. Hanover Ins. Co.*, 469 Mass. 813, 824–25 (2014) ("General Laws c. 93A is a broad remedial statute; the Legislature's manifest purpose in enacting it was to deter misconduct, and to encourage vindicative lawsuits.") (internal citations and quotations omitted).

The exemption that the defendants seek would frustrate the purpose of Chapter 93A by broadly exempting from liability — no matter how grave the damages inflicted on the public — any defendant who ceases wrongdoing before the Attorney General files a claim. The SJC in *Lowell Gas* refused to countenance such a result. Similarly, in *Commonwealth v. Percudani*, where the Pennsylvania Attorney General alleged that a defendant had committed deceptive acts in connection with real estate appraisals, a Pennsylvania court rejected the same argument the defendants make here regarding "using or is about to use" language in Pennsylvania's Unfair Trade Practices and Consumer Protection Law. 844 A.2d 35, 45-46 (Pa. Commw. Ct. 2004). The Pennsylvania defendant argued the Attorney General lacked standing because he had

surrendered his appraiser's license and been barred indefinitely from participating in appraisals. *Id*. The Pennsylvania court disagreed, holding:

> if we adopted [the defendant's] interpretation of Section 4 of the law and limited the Commonwealth's actions to ongoing activities, the purpose of the Law would be frustrated … To allow a party to avoid liability for its actions by merely discontinuing its conduct would render the penalty provisions of the Law meaningless in their application.

Id. at 46. Likewise, here, adopting the defendants' interpretation of Section 4 would frustrate the purposes of Chapter 93A by relieving past bad actors of Attorney General claims for restitution, penalties, costs, and fees.

6. *Lowell Gas* Is Consistent With The FTC Act.

Nor are the defendants here aided by their reference to a case interpreting Section 13 of the Federal Trade Commission Act ("FTC Act"). The SJC in *Lowell Gas* noted that its decision was consistent with Section 5 of the FTC Act, 15 U.S.C. § 45, because "[t]he cases interpreting the Federal Trade Commission Act, whose guidance we are directed to seek, have held that injunctions can be obtained even where the practice is not continuing." *Lowell Gas*, 377 Mass. at 47.[3] Now, the defendants ask the Court to rely on *Federal Trade Commission v. Shire ViroPharma, Inc.*, 917 F. 3d 147, 155-156 (3d Cir. 2019), and other cases interpreting Section 13 of the FTC Act, 15 U.S.C § 53(b), a different, later-added section that authorizes the FTC to file suit to enjoin imminent illegal conduct. *See* Gasdia Mem. at 9-10; Former Dir. Supp. at 5-6. These cases are inapposite, because Section 13 has a purpose distinct from that of Section 5.

[3] G.L. c. 93A § 2(b) provides that courts may look to precedent under Section 5(a)(1) of the FTC Act to determine the scope of actionable conduct under G.L. c. 93A § 2(a), which declares unlawful "unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." Chapter 93A, Section 2(b) does not, as defendants represent, instruct courts to look to "Section 5(a)(1) of the [FTC Act] when interpreting § 4 of the statute." Supp. Former Director Mem. at 5 (emphasis added). And Chapter 93A does not reference Section 13 of the FTC Act at all.

Unlike Section 5 of the FTC Act — "the FTC's traditional [administrative] enforcement tool" for remedying unfair methods of competition — Section 13 was intended to "solve one of the main problems of the FTC's relatively slow-moving administrative regime: the need to move quickly to enjoin ongoing or imminent illegal conduct" when the FTC has reason to believe a wrongdoer "is violating" or "is about to violate" the law. *Shire*, 917 F. 3d at 154, 156. The purpose of Section 13 is "to permit the [FTC] to bring an immediate halt to unfair or deceptive acts or practices ... until agency action is completed," not to "duplicate Section 5, which already prohibits past conduct." *Id.* at 156 (citing S. Rep. No. 93-151, at 30 (1973)).

In *Shire*, the FTC filed a Section 13 action seeking a permanent injunction and restitution against a pharmaceutical manufacturer that had divested the drug at issue years prior. 917 F. 3d at 149. The *Shire* court dismissed the FTC's complaint because the FTC had chosen the wrong one of the two procedures provided under the Act: "If the FTC wants to recover for a past violation — where an entity 'has been' violating the law — it must use Section 5(b)." *Id.* at 159 (citing 15 U.S.C. § 45(b)). Here, by contrast, the Attorney General does not seek an immediate halt to misconduct under a Section 13-like analogue, because Chapter 93A has none. Instead, entirely consistent with *Lowell Gas* and its interpretation of Section 5 of the FTC Act, the Attorney General seeks to redress the grave and ongoing harms of past misconduct.

C. None Of The Amendments To Chapter 93A Since *Lowell Gas* Have Undermined That Decision Or The Attorney General's Authority To Prosecute Past Misconduct.

Lowell Gas has been a leading case interpreting Chapter 93A for forty years, during which the Attorney General has investigated and prosecuted numerous Chapter 93A violations that were not ongoing.[4] Had the Legislature wished to modify Chapter 93A to alter the SJC's

[4] *See, e.g., Commonwealth v. AmCan Enterprises, Inc.*, 47 Mass. App. Ct. 330, 331–32 (1999) (affirming award to the Commonwealth of 93A damages and penalties for conduct that occurred

conclusion, it could have done so. *See Codon v. Haitsma*, 325 Mass. 371, 373 (1950) (for purposes of statutory construction it must be presumed that "the legislature knew preexisting law and the decisions of [the SJC]"). Instead, over the course of decades and multiple amendments, the Legislature has expanded Section 4's remedial scope by authorizing the Commonwealth to collect "a civil penalty of not more than five thousand dollars" for each violation of Chapter 93A. *See* An Act Providing for Civil Penalties and Attorney Fees in Certain Actions by the Attorney General Relative to Deceptive Practices, 1985 Mass. Acts 468. For the foregoing reasons, the Court should reject the defendants' standing argument.

II. The Commonwealth Has Stated A Claim For Public Nuisance.

A. The Commonwealth Alleges That The Defendants Unreasonably Interfered With A Public Right.

The Commonwealth alleges that the defendants created and contributed to a public nuisance by unreasonably interfering with the health and safety of the public. That cause of action falls squarely within the responsibility of the Attorney General to protect public rights. 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

---

between 1990 and 1994, in case filed in 1997); *Commonwealth v. Equifax*, No. 1784CV03009BLS2, 2018 WL 3013918 (Mass. Super. Ct. April 3, 2018) (denying motion to dismiss where defendant was sued under Chapter 93A for its past failure to report a data breach); *Commonwealth v. Zak*, No. 2011-624-H, 2015 Mass. Super. LEXIS 1894 (Mass. Super. Ct. July 14, 2015) (imposing injunction and assessing penalties, and restitution under Chapter 93A against corporate defendant that had "stopped operating" prior to suit); *Commonwealth v. Desire*, No. 97–1387–BLS2, 2011 WL 5299274 (Mass. Super. Ct. Oct. 20, 2011) (in case filed in 2007, defendant was liable for Chapter 93A violations committed between 2002 and 2004); *Commonwealth v. Source One Assoc., Inc.,* 436 Mass. 118 (2002) (affirming judgment, in case filed in 1998, that defendant was liable for Chapter 93A violations committed between 1995 and 1997).

health, the public safety, the public peace, the public comfort or the public convenience[.]'" *Sullivan v. Chief Justice for Admin. & Mgmt. of Trial Court*, 448 Mass. 15, 34 (2006) (quoting the Restatement (Second) of Torts, § 821B).

In Massachusetts, "all persons who join or participate in the creation or maintenance of a public nuisance are liable jointly and severally for the wrong and injury done thereby." *Attorney General v. Baldwin*, 361 Mass. 199, 208 n.3 (1972) ("It is not necessary to show that the person charged committed the particular act that created the nuisance; it is sufficient if he contributed thereto").[5] The Commonwealth's allegations that the defendants joined or participated in the creation or maintenance of a public nuisance and unreasonably interfered with public health and safety are more than sufficient to state a claim. The Complaint alleges that the defendants were the primary participants in a campaign to deceive Massachusetts doctors and patients to get more people on dangerous drugs, at higher and more dangerous doses, for longer and more harmful periods of time, all the while peddling falsehoods to keep patients away from safer alternatives. FAC ¶¶ 2; 24-29; 901-910. The Complaint further alleges that that campaign of deception caused an ongoing epidemic of opioid over-prescribing, addiction, overdose, and death, resulting in an unprecedented public health crisis. *Id.* The injuries from addiction and overdose are staggering. FAC ¶ 26. Beyond the death toll — including at least 671 Purdue patients in Massachusetts — the defendants' campaign of deception has imposed lasting hardship on the living. FAC ¶¶ 15, 22, 24-26. For every death, more than a hundred people suffer from prescription opioid dependence or abuse. FAC ¶ 396. Babies are born addicted to opioids. FAC

[5] Restatement (Second) of Torts, § 834, which relates to Invasions of Interests in Land Other Than by Trespass, provides helpful guidance. Comment d states "[o]ne is subject to liability for a nuisance caused by an activity, not only when he carries on the activity but also when he participates to a substantial extent in carrying it on." "When there is reasonable doubt" about a person's participation, "the question is for the trier of fact." *Id.*

¶¶ 24-26. People who are addicted to opioids are often unable to work. *Id.* The addiction of parents can force their children into foster care. *Id.* Grandparents are raising their grandchildren. *Id.* And patients who survive addiction need lengthy, difficult, and expensive treatment. *Id.* The Commonwealth has spent at least hundreds of millions of dollars on special treatment, prevention, intervention, and recovery initiatives to address the harms of the opioid epidemic, including by appropriating $134 million in FY 2016, $173 million in FY 2017, $185.3 million in FY 2018, and more than $200 million in FY 2019. FAC ¶ 907.

The Restatement recognizes a public nuisance when a defendant's conduct "affect[s] the health of so many persons as to involve the interests of the public at large," and states, by way of example, that "the threat of communication of smallpox to a single person may be enough to constitute a public nuisance because of the possibility of an epidemic." Restatement (Second) of Torts, § 821B cmt. g. Just as the threat of communication of smallpox to a single person can constitute a public nuisance, so too can a decade-long campaign of deception about the risks of drugs that caused an ongoing epidemic of addiction, overdose, and death.[6]

This Court's decision in *City of Boston v. Smith & Wesson Corp.*, No. 1999-02590, 2000 WL 1473568 (Mass. Super. Ct. July 13, 2000) is instructive. There, the City of Boston sued gun makers, distributors, sellers, and promoters alleging, *inter alia*, that:

> to increase profits, Defendants have knowingly, purposefully, intentionally or negligently misled, deceived and confused Boston and its citizens regarding the safety of firearms. Defendants did this, Plaintiffs allege, by claiming falsely and deceptively through

[6] Gasdia's reliance on *Jupin v. Kask*, 447 Mass. 141 (2006) and *Commonwealth v. Stratton Fin. Co.*, 310 Mass 469 (1941) to suggest that the Commonwealth's nuisance theory is too "novel" to be sustained is misplaced; neither case is remotely analogous to the Commonwealth's. Gasdia Mem. at 11-12. In *Jupin*, a public nuisance action filed by the mother of a murdered police officer, the SJC declined to find "home storage of unloaded, legally purchased, and legally owned firearms" a public nuisance. 447 Mass. at 158-159. In *Stratton*, the SJC declined to use common law public nuisance to enforce a criminal usury law reasoning that doing so would deprive the defendant of a jury trial. 310 Mass. at 473-474.

> advertising that firearm ownership enhances security and that firearms are safe.

Id. at *3. The Court denied the defendants' motion to dismiss the City of Boston's public nuisance claim, concluding its complaint sufficiently alleged the defendants had "intentionally and negligently created and maintained an illegal, secondary firearms market" that "unreasonably interfered with public rights." *Id*. at *14.

Remarkably, the defendants claim that that there is no nuisance for them to abate, because they resigned from Purdue and because Purdue laid off its sales reps in 2018.[7] But where, as here, the nuisance is ongoing, the defendants remain liable for their misconduct. *See Taygeta Corp. v. Varian Assocs., Inc*., 436 Mass. 217, 231–32 (2002) (vacating judgment against the plaintiff in private nuisance action) (citing Restatement (Second) of Torts, § 834 cmt. e (1979)).[8] In *Taygeta*, in 2002, the SJC concluded that "the continuing seepage of pollutants" on the plaintiff's property gave rise to an actionable nuisance claim, even though the defendant had ceased dumping hazardous material on the property and sold it in the 1970s. *Id*. The SJC disagreed with the lower court's conclusion that "the ongoing migration" of pollutants "was not an abatable condition," and vacated its grant of summary judgment to the defendant. *Id*. at 222, 232.

Moreover, since Purdue laid off its sales reps in 2018, courts throughout the country have *denied* motions to dismiss public nuisance claims by Attorneys General addressing the same

---

[7] Gasdia Mem. at 12 ("nothing for Gasdia to remove"); CEO Joinder at 4 (CEOs not "engaged in any conduct that requires abatement"); Former Dir. Supp. at 7 ("no conduct by the Former Directors that the Court could enjoin, 'abate' or remove"). *But see* Dir. 12(b)(6) Mem. at 4 ("the Individual Directors are committed to working to provide meaningful assistance to those impacted by this public health crisis.")

[8] Comment e to Section 834 of the Restatement explains that a person who substantially participated in creating a nuisance condition remains subject to liability "even though he is no longer in a position to abate the condition and to stop the harm." Restatement (Second) of Torts, § 834 cmt. e.

misconduct:

- ***State of Alaska v. Purdue Pharma L.P.***, No. 3AN-17-09966CI, 2018 WL 4468439, at *4 (Alaska Super. Ct. July 12, 2018) (citations omitted): "The State alleges Purdue's conduct, as described in the complaint, has 'been a substantial factor' in creating a public health crisis and state of emergency in Alaska. The State alleges opioid use, overuse, and addiction has injured the State by causing deaths, overwhelming medical resources and emergency rooms, increasing illegal activity and law enforcement activities, increasing costs for medical care of infants born with neonatal abstinence syndrome and requiring foster treatment, and incurring significant expenses in addiction treatment. The court finds the facts as alleged could reasonably be construed as demonstrating a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience and therefore an interference with a right common to the general public. The State has alleged facts sufficient to state a claim for public nuisance."

- ***State of Vermont v. Purdue Pharma L.P.***, No. 757-9-18 Cncv, slip op. at 4-6 (Vt. Super. Ct. Mar. 19, 2019) (citations omitted): "The public nuisance claim alleges that Purdue has created, or was a substantial factor in creating, a public nuisance by harming 'the health, safety, peace, comfort, or convenience of the general community.' For example, the complaint cites a distortion of the medical standard of care for treatment of chronic pain, high rates of opioid abuse and overdoses, the impact of those events upon Vermont families and communities, and increased costs for health care, emergency services and law enforcement across the state. It further alleges that these impacts were foreseeable, and could be abated by steps such as education, honest marketing, and addiction treatment … It cannot seriously be argued that the impacts of opiate addiction in Vermont have not affected the general public. If the State can ultimately prove its allegations as to Purdue's responsibility for the widespread nature of this scourge, it will meet the 'public' aspect of such a nuisance claim." Appendix to the Commonwealth's Opposition to Purdue's Motion to Dismiss, Ex. 2.

- ***State of New Hampshire v. Purdue Pharma LP***, No. 217-2017-CV-00402, 2018 WL 4566129, at *14 (NH Super. Ct. Sept. 18, 2018) (citations omitted): "Regarding the State's public nuisance claim, Purdue contends that such a cause of action must 'arise from the active or passive use of real property, whereas the State challenges only manufacturing and marketing activity' … numerous other jurisdictions that, like the New Hampshire Supreme Court, look to the Restatement (Second) of Torts to guide their analysis of public nuisance claims have expressly concluded that 'an action for public nuisance may lie even though neither the plaintiff nor the defendant acts in the exercise of private property rights.' … Purdue also maintains that the State's claim fails because 'the alleged public nuisance identified in the complaint is not reasonably subject to abatement.' This issue demands little consideration as it is a question of fact whether Purdue can abate the alleged public nuisance for which the State seeks to hold it liable and, drawing all inferences in the State's favor, the complaint adequately alleges that Purdue is in fact capable of doing so."

- ***State of Tennessee v. Purdue Pharma, L.P.***, No. 1-173-18, slip op. at 9 (Tenn. Cir. Ct. Feb. 22, 2019) (citations omitted): "A public nuisance is an act or omission that unreasonably interferes with or obstructs rights common to the public … As has been set forth previously, the Complaint describes with great specificity the actions of Purdue with respect to its marketing of opioid products, including alleged misrepresentations regarding the safety, efficacy, and benefits of its products and an alleged practice of marketing its products to known 'pill mills.' The Court will not rehash the allegations, but the Complaint is replete with specific examples of behavior on the part of Purdue that, if proven, would establish interference with the health, comfort, and safety of the citizens of the State of Tennessee. Furthermore, the Complaint alleges resulting damages, including but not limited to 'increased opioid use, abuse, addiction, and overdose deaths' and '[t]he greater demand for emergency services, law enforcement, addiction treatment, and other social services," which place 'an unreasonable burden on governmental resources including the State and its political subdivisions.'" Appendix to the Commonwealth's Opposition to Purdue's Motion to Dismiss, Ex. 3.

- ***State of Arkansas v. Purdue Pharma, L.P.***, No. 60CV-18-2018, slip op. at 5-6 (Ark. Cir. Ct. Apr. 5, 2019) (citations omitted): "Plaintiff's public nuisance claim alleges that the 'Defendants, individually and in concert with each other, have engaged in improper and unlawful conduct that is injurious to public health and safety and has caused material discomfort and annoyance to the public at large.' Specifically, Plaintiff alleges the 'Defendants' actions were, at the least, a substantial factor in opioids becoming widely available and widely used.' And that 'without Defendants' actions, opioid use would not have become so widespread, and the enormous public health hazard of opioid overuse, abuse, and addiction that now exists would have been averted.' Under Arkansas law, public nuisance is any improper, indecent or unlawful conduct that injures the public … The Restatement also notes as an example of a public nuisance 'conduct [that] involves a significant interference with the public health,' and offers as an example the spread of smallpox, risking an epidemic. Defendants cannot seriously contend that the impacts of opiate addiction in Arkansas have not affected the general public." Appendix to the Commonwealth's Opposition to Purdue's Motion to Dismiss, Ex. 1.

- ***State of Minnesota v. Purdue Pharma, L.P.***, No. 27-CV-18-10788, slip op. at 9 (Minn. Dist. Ct. Jan. 4, 2019) (citations omitted): "The State alleges that Purdue created a public nuisance by an 'act or failure to perform a legal duty' has resulted in the 'maint[enance] or [permission of] a condition which unreasonably annoys, injures or endangers the safety, health, morals, comfort, or repose of any considerable number of members of the public.' The State alleges Purdue's marketing deceived health care providers and patients about the dangers associated with opioids and was a 'substantial factor in opioids becoming widely available and widely used in Minnesota.' The State alleges in detail throughout the Complaint that Purdue's marketing "misconduct" impacted opioid overdose deaths, increases in hospitalization, substance abuse treatment rates, money spent by government health care programs as a result of opioids, and criminal justice and societal costs related to opioids." Appendix to the Commonwealth's Opposition to Purdue's Motion to Dismiss, Ex. 5.

- ***State of Ohio v. Purdue Pharma, L.P.***, No. 17 CI 261, 2018 WL 4080052, at *4 (Ohio Com. Pl. Aug. 22, 2018) (citations omitted): "[T]he Ohio Supreme Court adopted a broader definition of public nuisance. The court determined that the restatement of the law of torts (2nd) sets forth a broad definition of public nuisance allowing an action to be maintained 'for injuries caused by a product if the facts establish that the design, manufacturing, marketing, or sale of the product unnecessarily interferes with a right common to the general public.' Under the broad definition of public nuisance and the liberal pleading rules of the state of Ohio, this Court finds that the Plaintiff has adequately pled public nuisance."

If the defendants were correct that there is no nuisance to abate, then all of these decisions from across the country would be wrong.[9]

Finally, the defendants contend that the public nuisance claim should be dismissed because there is no need for "immediate judicial interposition."[10] Gasdia at 10-11; CEO Joinder at 4; Former Dir. Supp. at 6. That argument is incorrect for two reasons. First, under the Massachusetts Rules of Civil Procedure, the relevant question is whether the Commonwealth adequately pled that the defendants committed the tort of public nuisance: "an unreasonable interference with a public right," such as "significant interference with the public health." *Sullivan*, 448 Mass. at 34. This is not a motion about a Temporary Restraining Order; it is a motion to dismiss under 12(b)(6). The Complaint states a claim, so the case should proceed. Second, even assuming there were some freestanding inquiry into the need for this suit,

---

[9] The defendants' argument that their subsequent conduct defeats a nuisance claim finds no support even in the few decisions that have dismissed nuisance claims against Purdue. As far as the Commonwealth is aware, no court has accepted the argument that Purdue or its executives can avoid nuisance liability by firing sales reps or resigning. *See State of Delaware v. Purdue Pharma L.P.*, No. N18C-01-223 MMJ CCLD, 2019 WL 446382, at *10-11 (Del. Super. Ct. February 4, 2019) (ruling based on Delaware distinctions between product-based and property-based nuisance claims); *Grewal, Att'y Gen. of New Jersey v. Purdue Pharma L.P.*, No. ESX-C-245-17, 2018 WL 4829660, at *17 (N.J. Super. Ct. Oct. 2, 2018) (ruling based on a New Jersey statute that the New Jersey Product Liability Act "subsumes the State's public nuisance claim").

[10] The two 1870s decisions on "immediate judicial interposition" describe a limit in the law of corporations concerning when an Attorney General could "restrain a corporation from engaging in transactions that are prohibited or not authorized by its charter." William Fletcher, et al., Fletcher Cyclopedia of the Law of Corporations §§ 3457-58 (Sept. 2018) (discussing *Att'y Gen. v. Tudor Ice Co.*, 104 Mass 239 (1870) and *Att'y Gen. v. Metro. R.R. Co.*, 125 Mass. 515 (1878)).

the interference with public rights alleged in the Complaint amply justifies the Court's involvement.

B. The Court Can Order The Defendants To Pay The Costs Of Abating The Nuisance.

It should be no surprise to the defendants that the Court can order them to pay to abate a public nuisance they substantially participated in creating. The SJC addressed abatement of a public nuisance in an action by the Attorney General in *Baldwin*, 361 Mass. at 208. The defendants in that case created a public nuisance by directing a real estate and investment trust to fill 12 acres of a Massachusetts waterway with debris. *Id.* at 199 n.1, 202. There was no ongoing misconduct because the defendants had lost their license. *Id.* at 207. The SJC ordered the defendants to abate the nuisance by removing 12 acres of fill. *Id.*at 207-08. The decision made clear that this remedy did not depend on whether the individuals were capable of scooping debris out of the creek with their own hands. The Court understood that the means of abatement would be the "expenditure of money" — including explicitly money from the defendants' "personal assets":

> It is clear that a relatively large expenditure of money will probably be required to accomplish the removal of the fill. The record before us indicates that at least twelve acres of land have been filled to considerable depth. We recognize that the two licensees named herein as defendants may not be financially able, either from trust assets or their personal assets, to comply with the court order to remove the fill.

Id. at 208. Indeed, in *Baldwin*, the SJC contemplated that relief could include exhausting the personal assets of the defendants and finding additional liable individuals to contribute payments as well. *See id.*

The need for abatement in the opioid epidemic is no less significant than in *Baldwin*. When Purdue argued to a New Hampshire court that there was nothing to abate, the court found

that defense "demands little consideration." *State of New Hampshire v. Purdue Pharma LP*, 2018 WL 4566129, at *14. The court recognized that "it is a question of fact whether Purdue can abate the alleged public nuisance for which the State seeks to hold it liable." *Id.* Moreover, the Attorney General was entitled to the chance to prove at trial that the nuisance could be abated, including "through health care provider and consumer education on appropriate prescribing, honest marketing of the risks and benefits of long-term opioid use, addiction treatment, disposal of unused opioids, and other means." *Id.* Similarly, in this case, the many ways the defendants can pay to abate the nuisance they created present questions of fact for litigation — not a basis for dismissal. For the Court to conclude at the start of the case, as a matter of law, that defendants liable for creating a public nuisance cannot be ordered to pay for its abatement would be remarkable, unjust, and incorrect.

C. The Court Can Order The Defendants To Pay Special Damages The Commonwealth Has Already Incurred.

A plaintiff seeking damages for a public nuisance must seek "special damages" — *i.e.*, the plaintiff "must have suffered damage different in kind from that suffered by the general public." Restatement (Second) of Torts, § 821B cmt. i. That standard allows the Commonwealth to recover for the special costs it bears in this case.

In *City of Boston*, this Court concluded that much of the harm alleged by the city — "substantial financial costs for prevention, amelioration and abatement of the ongoing public nuisance caused by Defendants"; "economic injury as a result of increased spending on, among other things, law enforcement, emergency rescue services, increased security at public schools and public buildings, costs for coroner and funeral services for unknown victims, pensions, disability benefits, unemployment benefits, higher prison costs, and youth intervention programs"; and "lower tax revenues and lower property values" — was "of a type that can only

be suffered by these plaintiffs." 2000 WL 1473568, at *5-6. Here too, the Commonwealth's alleged damages, including the millions of dollars it has appropriated for special treatment, prevention, intervention, and recovery initiatives to abate the harms of the opioid epidemic, *see* FAC ¶ 907, are different than those alleged by the general public. *See also In re Acushnet River & New Bedford Harbor Proceedings re Alleged PCB Pollution*, 712 F. Supp. 994 (D. Mass. 1989).

Defendants rely heavily on *In re Acushnet River*, an action by the Commonwealth against alleged harbor polluters, to argue that abatement costs are not an available remedy, *see* Gasdia Mem. at 12-13, but that Court did not so conclude. 712 F. Supp. 994. To the contrary, citing the Commonwealth's dual role "as a sovereign seeking to abate a nuisance which interferes with the public rights of its citizens" and "as a trustee over the directly affected natural resources," the Court concluded that "the Commonwealth is not unlike a private litigant suing for special damages" and sent the Commonwealth's claim for abatement expenses to a jury. *Id.* at 1004. This Court should likewise allow the case to proceed.

III. The Statute Of Limitations Does Not Provide A Basis To Dismiss The Complaint.

A. The Commonwealth's Claims Against Gasdia And Stewart Are Timely Because Of The Discovery Rule.

The Commonwealth's claims against both Gasdia and Stewart are timely,[11] because the Commonwealth brought the claims promptly after discovering them. *See* FAC ¶¶ 835-839. Under the discovery rule, "[a] cause of action accrues when the plaintiff discovers or with reasonable diligence should have discovered that (1) he has suffered harm; (2) his harm was caused by the conduct of another; and (3) the defendant is the person who caused that harm."

[11] The statute of limitations for Chapter 93A claims is four years, and the statute of limitations for public nuisance claims is three years. *See* G.L., c. 260, §§ 2A, 5A.

Harrington v. Costello, 467 Mass. 720, 727 (2014) (emphasis added). A claim does not accrue 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., Inc. v. Reynolds*, 559 U.S. 633, 634-35 (2010). A plaintiff need not demonstrate the defendant concealed the facts to get the benefit of the discovery rule. *See id*.

A claim is not subject to dismissal on statute of limitations grounds unless "it is undisputed from the face of the complaint that the action was commenced beyond the applicable deadline." *Commonwealth v. Tradition (N. America) Inc.*, 91 Mass. App. Ct. 63, 70 (2017). When the Commonwealth's claims accrued against Gasdia and Stewart is a question of fact that 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) (same).

The Commonwealth alleged the defendants concealed their unfair and deceptive conduct, *see* FAC ¶ 836, and that discovering the nature and extent of that misconduct required a costly and complex investigation. *See* FAC ¶ 837. The significance and timing of that investigation are underscored by the Civil Investigative Demands ("CIDs") that the Commonwealth issued to Purdue and its former employees and consultants, beginning in 2015 and continuing until March 2018 — less than three months before the Commonwealth filed its initial complaint. *See* Affidavit of Gillian Feiner ("Feiner Aff.") ¶¶ 1-15. Where, as here, the Commonwealth has alleged facts plausibly suggesting applicability of the discovery rule, the question of whether its claims are time-barred "must await either a motion for summary judgment or trial." *See Tyron v. Massachusetts Bay Transp. Auth.*, No. SUCV201402654, 2016 WL 5874408, at *2 (Mass.

Super. Aug. 17, 2016).

the factors defendants cite — articles critical of Purdue published since 2007; earlier lawsuits against Purdue*;* the Commonwealth's March 2015 CID to Purdue; Purdue's August 3, 2016 agreement to toll the applicable limitations period; or a 2013 lawsuit in South Carolina concerning pre-2007 sales and marketing conduct — changes the analysis.[12] Rather, they serve to underscore the fact-intensive nature of the discovery rule inquiry.

The articles cited in the Commonwealth's initial complaint do not establish, as a matter of law, when the Commonwealth's claims accrued. The initial complaint cited those articles as "warning signs" to the defendants, who knew far more about Purdue's marketing than anyone, and could have and should have stopped its misconduct. Initial Complaint ¶ 161.

Publicity concerning allegations of misconduct by Purdue in other jurisdictions does not establish, as a matter of law, when the Commonwealth's claims against Gasdia and Stewart (which relate to their own misconduct, *see* FAC ¶¶ 10, 29, 159-169, 597-753) accrued. *See Harrington*, 467 Mass. at 727 (The discovery rule tolls the statute of limitations until the plaintiff discovers that "the defendant is the person who caused [the] harm.") (emphasis added). Even where the publicity *has* related to the defendant in question, courts have declined to find claims time-barred at the motion to dismiss stage. *See, e.g., In re Massachusetts Diet Drug Litig.*, 338 F. Supp. 2d 198, 205-209 (D. Mass. 2004) (rejecting arguments that plaintiffs' claims were time-barred because of "extensive publicity surrounding the [defendant's] withdrawal of the diet drugs from the market" and "the subsequent extensive publicity concerning the class action settlement agreement" and concluding it "would require[] a fact-intensive inquiry into the pervasiveness and content of the publicity and the particular circumstances of the relevant plaintiff(s).");

[12] *See* Gasdia Mem. at 14-16, Ex. F ¶¶ 52-58; CEO Mem. at 21.

Cascone v. United States, 370 F.3d 95 (1st Cir. 2004) (reversing dismissal of the plaintiff's claim finding publicity was insufficient to trigger accrual).

A single lawsuit by a private plaintiff in South Carolina concerning claims arising from pre-2007 sales and marketing does not establish, as a matter of law, when the Commonwealth's claims accrued, particularly where there was "no indication that the suit received any publicity, or that it resulted in published or broadly disseminated opinions." *Cohen v. S.A.C. Trading Corp.*, 711 F.3d 353, 363 (2d Cir. 2013) (internal quotations omitted) (reinstating claims previously determined to be time-barred).

And neither the Commonwealth's March 2015 issuance of a CID to Purdue nor its August 2016 entry into a tolling agreement with Purdue establishes, as a matter of law, when the Commonwealth's claims accrued. *See Harrington*, 467 Mass. at 727; *see also Anawan Ins. Agency, Inc. v. Div. of Ins.*, 459 Mass. 592, 598-600 (2011) (holding that discovery rule operated to toll statute of limitations for claims by the Commonwealth's Division of Insurance until well after commencement of its investigation). All these events show is that the Commonwealth was diligently investigating whether potential claims existed. As Gasdia seems to acknowledge, *see* Gasdia Mem. at 14, the Commonwealth did not even gain access to many of the documents referenced in the allegations against him in the First Amended Complaint until after its June 2018 filing of the original complaint, when it began to receive documents Purdue produced in the multidistrict litigation *In re National Prescription Opiate Litigation*, Case No. 17-MD-2804 (N.D. Oh.), including Gasdia's custodial file. *See* Feiner Aff. ¶¶ 16-18.

Because the date when the Commonwealth's claims against Gasdia and Stewart accrued is a question of fact that cannot be determined from the pleadings alone, dismissal on statute of limitations grounds at this stage would be premature and inappropriate.

B. The Commonwealth's 93A Claim Against Gasdia Is Timely Without Regard To The Discovery Rule.

The Commonwealth filed its initial complaint in this matter on June 12, 2018 and its First Amended Complaint, adding Gasdia, on December 21, 2018. Gasdia retired from Purdue on December 31, 2014, less than four years before either filing. FAC ¶ 751. Accordingly, the Commonwealth's Chapter 93A claim against Gasdia is timely without regard to the discovery rule.

Even if the Court were to credit Gasdia's unsupported assertion that his "last involvement with sales and marketing at Purdue was in June 2014,"[13] the Commonwealth's claim would be timely, because it relates back to the original June 12, 2018 complaint filing. *See* Mass. R. Civ. P. 15(c) ("[w]henever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment (including an amendment changing a party) relates back to the original pleading."); *see also Ramirez v. Graham*, 64 Mass. App. Ct. 573, 577 (2005) (it is "expected ordinarily that the amendment would 'relate back' to the original pleading.") "Massachusetts practice is more liberal than other jurisdictions in allowing amendments adding or substituting defendants after expiration of a period of limitations." *Nat'l Lumber Co. v. LeFrancois Const. Corp.*, 430 Mass. 663, 671 (2000) (defendants were properly added by amendment at a time when original claims would have been time-barred); *Wadsworth v. Bos. Gas Co.*, 352 Mass. 86 (1967) (finding no error in allowing the motions to add Boston Gas as a defendant when original actions against Boston Gas would have been barred by the statute of limitations). As multiple

[13] The Complaint alleges that from July 2014 until his retirement, Gasdia continued to participate in Purdue's deception as its Head of Strategic Initiatives, including planning a call center from which Purdue staff could telephone Massachusetts prescribers to promote opioids using the same deceptive pitches that reps used face to face. FAC ¶ 751.

Massachusetts courts have observed, the expiration of the statute of limitations is "a reason for allowing the addition … of a new defendant, rather than a reason for not allowing the amendment." *Srebnick v. Lo-Law Transit Mngmnt, Inc.*, 29 Mass. App. Ct. 45, 50 (1990), quoting *Bengar v. Clark Equip. Co.*, 401 Mass. 554, 556 (1988). For the foregoing reasons, the Commonwealth's Chapter 93A claim against Gasdia is timely, even without operation of the discovery rule, and should not be dismissed.

CONCLUSION

For the reasons stated above, the Court should deny Defendant Russell Gasdia's Motion to Dismiss the First Amended Complaint; Defendants Craig Landau, John Stewart, and Mark Timney's Joinder in Defendant Russell Gasdia's Motion to Dismiss; and the Supplemental Memorandum in Support of Former Directors' Motion to Dismiss; as well as the statute of limitations defense raised by Defendant John Stewart in the Motion of Defendants Craig Landau, John Stewart, and Mark Timney to Dismiss the First Amended Complaint.

Dated: May 10, 2019

Respectfully submitted,

COMMONWEALTH OF MASSACHUSETTS
By its Attorney,
MAURA HEALEY
ATTORNEY GENERAL

Sydenham B. Alexander III, BBO # 671182
Gillian Feiner, BBO # 664152
Eric M. Gold, BBO # 660393
Jeffrey Walker, BBO # 673328
Jenny Wojewoda, BBO # 674722

Assistant Attorneys General
Health Care & Fair Competition Bureau
Office of the Attorney General
One Ashburton Place
Boston, Massachusetts 02108
617-727-2200
gillian.feiner@mass.gov

CERTIFICATE OF SERVICE

I, Gillian Feiner, Assistant Attorney General, hereby certify that I have this day, May 10, 2019, served the foregoing document upon all parties by email and first class mail to:

Counsel for Defendants Purdue Pharma L.P. and Purdue Pharma Inc.
Timothy C. Blank, BBO # 548670
Sarah Magen
Debra O'Gorman
Jon Olsen
DECHERT LLP
One International Place, 40th Floor
100 Oliver Street
Boston, MA 02110-2605
timothy.blank@dechert.com
sarah.magen@dechert.com
debra.o'gorman@dechert.com
jon.olsen@dechert.com

Counsel for Defendants 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 and Judith Lewent
Robert J. Cordy
Matthew L. Knowles
Annabel Rodriguez
MCDERMOTT WILL & EMERY LLP
28 State Street, Suite 3400
Boston, MA 02109
(617) 535-4033
rcordy@mwe.com
mknowles@mwe.com
anrodriguez@mwe.com

Counsel for Defendants Craig Landau, John Stewart, and Mark Timney
James R. Carroll, BBO # 554426
Maya P. Florence, BBO # 661628
SKADDEN, ARPS, SLATE MEAGHER & FLOM LLP
500 Boylston Street
Boston, Massachusetts 02116
james.carroll@skadden.com
maya.florence@skadden.com

Counsel for Defendant Russell J. Gasdia
Juliet A. Davison, BBO # 562289
DAVISON LAW, LLC
280 Summer St., 5th Floor
Boston, MA 02210
juliet@davisonlawllc.com
porter@spplawyers.com

Gillian Feiner, AAG