COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.	SUPERIOR COURT C.A. No. 1884-cv-01808 (BLS2)
COMMONWEALTH OF MASSACHUSETTS, vs. PURDUE PHARMA, L.P., *et al.*	Oral Argument Requested

REPLY IN SUPPORT OF DEFENDANT RUSSELL J. GASDIA'S MOTION TO DISMISS

May 31, 2019

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LEAVE TO FILE EXCESS PAGES GRANTED May 22, 2019

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The Commonwealth is not above the law. It ignores plain statutory language and mischaracterizes controlling caselaw, repeating its sensational allegations and ignoring the rules. Gasdia is not trying to "walk away regardless of his misconduct," as the Commonwealth claims. Comm.'s Mem. at 1. Gasdia did not engage in misconduct, and the Commonwealth's allegations against him are false. What he concedes, only, is that this a motion to dismiss, and—as the Commonwealth knows—the Court is legally obligated to accept the Commonwealth's allegations as true and decide whether those allegations state a claim. As to Gasdia, they do not. This Court should dismiss the claims against Gasdia with prejudice.

ARGUMENT

1. The Commonwealth struggles to defend its improper exercise of authority under Chapter 93A, ignoring key parts of the statute and the law that Gasdia cited

The Commonwealth: (1) does not even address Gasdia's key argument concerning Chapter 93A, and (2) mischaracterizes the facts and holding of *Lowell Gas Co. v. Attorney Gen.*, 377 Mass. 37 (1979). The Commonwealth's weak objections only highlight that it erred in suing Gasdia in this case.

A. Chapter 93A limits the Commonwealth to suing a person who "is using or is about to use" an unlawful practice—a limitation that the Commonwealth fails to address

It is hard to fathom how the Commonwealth could respond to Gasdia's motion without addressing the opening language of Section 4 of Chapter 93A, which specifically identifies when the Commonwealth may sue someone. But: silence. The Commonwealth may sue "[w]henever the attorney general has reason to believe that any person *is using or is about to use* any method, act, or practice declared by section two to be unlawful, and that proceedings would be in the public interest...." G.L. c. 93A § 4 (emphasis added). That is the central premise of Gasdia's motion, yet the Commonwealth has nothing to say about what that language means or how—

when Gasdia has been retired for over four years and has nothing to do with selling or marketing opioids—it has the authority under Section 4 to sue him.

Nor does the Commonwealth address Gasdia's arguments that:

- The "is using or is about to use" language is clear and unambiguous. Gasdia Mem. at 4.
- Controlling Massachusetts caselaw forbids courts from interpreting a statute in a way that would render the statute's language superfluous. *Id.* at 5.
- At least 12 other states have consumer-protection statutes that—unlike the Massachusetts statute—explicitly permit attorneys general to sue whenever they have reason to believe that a person "is using, *has used*, or is about to use" an unlawful practice. *Id.*
- This Court does not have discretion to interpret Chapter 93A inconsistent with its ordinary meaning. *Id.* at 6.
- The Complaint does not and could not allege that Gasdia "is using or is about to use any method, act, or practice declared by section two to be unlawful." G.L. c. 93A § 4. *Id.* at 4.

Presumably, the Commonwealth does not address these issues because it has no good answer to Gasdia's arguments. Perhaps the Commonwealth did not pause to consider its authority when it chose to add Gasdia to its lawsuit; but now, being called to account for that action, it cannot and does not adequately defend its decision.

B. Neither the Supreme Judicial Court nor any other controlling authority has sanctioned the type of case that the Commonwealth seeks to bring against Gasdia

The Commonwealth does not dispute Gasdia's claim that there is not a single case in which the Commonwealth sued a former employee in anything remotely like the circumstances here. Gasdia Mem. at 7. At most, the Commonwealth says that there have been "numerous" cases involving Chapter 93A violations that were "not ongoing." Comm.'s Mem. at 10 & n.4. But not one of those cases addresses the issue that Gasdia raises here, so one cannot tell from the opinions whether the Attorney General pled or had reason to believe that the defendants were still using or about to use the deceptive practices at issue. Certainly, none of the cases involved

an effort by the Attorney General to sue a long-retired employee for alleged misconduct on behalf of his employer years earlier.

The only case that the Commonwealth discusses at all on this point is *Lowell Gas Co. v. Attorney Gen.*, 377 Mass. 37 (1979), a case that Gasdia thoroughly addressed in his motion. Gasdia Mem. at 7-8. But the Commonwealth mischaracterizes *Lowell*'s facts and holding. The Commonwealth presents *Lowell* as reaching a "conclusion," which the Commonwealth characterizes as "long-settled," that the Attorney General has authority to bring an enforcement action for past misconduct. Comm.'s Mem. at 4-5. That is not what *Lowell* held, and there have been no progeny emanating from *Lowell* that could fairly justify the Commonwealth's "long-settled" label.

In *Lowell*, the Court found that the Commonwealth's complaints could "reasonably be read to imply that [the alleged unfair] practices were continuing." *Lowell*, 377 Mass. at 47. *Lowell* dealt with a case against companies that were still in business and that were still engaged in the practices that the Attorney General sought to enjoin. *Id.* As Gasdia pointed out in his opening brief, the Supreme Judicial Court did allude to suits against parties "who have engaged in, but recently suspended, practices violative of c. 93A," *id.*, but: (1) that was *dicta*, in light of the fact that the activity in *Lowell* was alleged to be continuing, and (2) even if that language applied here, the Commonwealth does not and cannot allege that Gasdia "recently suspended" the alleged unfair practices. The clear import of that language is that the Attorney General's authority reaches conduct that recently ended but is about to resume, consistent with Section 4's language. That does not apply to Gasdia, who retired years ago.

Lowell does not hold that the Attorney General may sue an individual for past alleged misconduct. Nothing in the case's facts or the Court's analysis supports that proposition.

C. Other provisions within Chapter 93A do not conflict with or undermine Section 4's clear limitation that the Commonwealth may sue a person only when his purported misconduct is ongoing or imminent

The Commonwealth also ignores Gasdia's argument about other Chapter 93A provisions—namely, Sections 6, 9, and 11—that show that the legislature knew how to, and did, distinguish between ongoing and imminent misconduct, on one hand, and past conduct, on the other hand. Gasdia Mem. at 6-7. Instead, the Commonwealth attempts to portray Sections 4, 5, and 6, and the overall "remedial purpose" of Chapter 93A, as contemplating the pursuit of past misconduct. Comm.'s Mem. at 5-9. This effort fails, for two reasons.

First, and fundamentally, although the Commonwealth seeks to parse other parts of Section 93A, it never addresses the key part of Section 4, which says that the Commonwealth may only bring an action when the Attorney General "has reason to believe that any person is using or is about to use" an unlawful practice. G.L. c. 93A § 4. It does no good to point to other parts of Chapter 93A, which do *not* address when the Commonwealth may bring an action, if the Commonwealth cannot even clear the initial hurdle.

Second, the other provisions that the Commonwealth invokes are wholly consistent with a statutory scheme that limits the Commonwealth to pursuing claims for ongoing or imminent misconduct:

- The portion of Section 4 that allows a court to enter an order "as may be necessary to restore any person who has suffered any ascertainable loss by reason of the use or employment" of an unfair practice, Comm.'s Mem. at 5, is a reasonable companion to a statute that allows the Commonwealth to sue to stop ongoing or imminent misconduct. The Commonwealth's warning—that "[u]nder the defendants' argument, the Attorney General would lack standing to recover restitution and civil penalties...against anyone for past misconduct," *id.* at 6—rings hollow. The Commonwealth can pursue restitution and civil penalties against someone who is engaging or is about to engage in wrongdoing, is caught, is sued, and is found liable.

- Section 6 authorizes the Attorney General to conduct an investigation "whenever he believes a person has engaged in or is engaging in any method, act or practice declared to

be unlawful by this chapter...." G.L. c. 93A § 6(1); Comm.'s Mem. at 6-7. The Commonwealth is incorrect when it cautions that "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." Comm.'s Mem. at 6. Investigating past activity is an obvious way for the Commonwealth to identify persons who are "using or about to use" unfair trade practices, which could prompt a Section 4 lawsuit. This provision is consistent with Section 4's limitations on the Commonwealth's authority to sue.

- Section 5 authorizes the Attorney General to "accept an assurance of discontinuance" from a person "alleged to be engaged or to have been engaged in" an unfair practice. G.L. c. 93A § 5. The Commonwealth argues that this "could hardly be clearer" in showing that the Attorney General can prosecute past conduct. Comm.'s Mem. at 7. But here, too, the Commonwealth ignores Section 4's critical language. Under Section 4, the Commonwealth may sue when it has reason to believe that a person "is using *or is about to use*" an unfair trade practice. G.L. c. 93A § 4 (emphasis added). If a person was previously engaged in misconduct, and is not engaged in misconduct now but is *about to* engage in misconduct again, then the Commonwealth could accept an assurance of discontinuance, pursuant to Section 5. That is, the Commonwealth clearly *can* pursue someone who has engaged in misconduct in the past, but only if it has reason to believe that person is about to engage in misconduct again.

- The same problem applies to the Commonwealth's statute-of-limitations argument. Comm.'s Mem. at 7-8. The Commonwealth argues that a four-year statute of limitations for Chapter 93A claims makes no sense if the Attorney General cannot sue for past conduct. *Id.* It does make sense, though, if one reads the entire statute, including the "*or is about to use*" language. G.L. c. 93A § 4. If the Commonwealth pled, for example, that Gasdia engaged in misconduct before, left the company, but was about to engage in misconduct again, then the Commonwealth could sue, but would be subject to the four-year limitations period in pursuing a claim. If—as is the case here—the Commonwealth has no basis to accuse Gasdia of ongoing or imminent misconduct, then it cannot bring a claim at all.

None of these provisions justifies ignoring Section 4's clear and unambiguous limitation on when the Attorney General can sue.

The Commonwealth also invokes Chapter 93A's "manifest remedial purposes," arguing that it cannot accomplish its aims unless it can pursue past conduct. Comm.'s Mem. at 8-9. Gasdia agrees that Chapter 93A is a broad statute, which gives the Commonwealth many powers. But that power is not unlimited. If the Commonwealth believes that Section 93A is insufficient, as written, to accomplish its objectives, then it can lobby the legislature to change the statute, in

the way that other states have done. But that does not mean that the Commonwealth has unfettered ability to sue whomever it wants. Indeed, even the case that the Commonwealth cites for the proposition that Chapter 93A vests it with "broad investigatory powers," Comm.'s Mem. at 6, 8, says in the very next sentence, "Still, the statute imposes certain limitations on the scope of the Attorney General's investigative authority that we must consider." *Exxon Mobil Corp. v. Attorney Gen.*, 479 Mass. 312, 325 (2018), *cert. denied sub nom. Exxon Mobil Corp. v. Healey*, 139 S. Ct. 794 (2019).

The only other case that the Commonwealth cites on this issue is a 15-year-old opinion, issued by a divided panel of the Commonwealth Court of Pennsylvania, *Commonwealth v. Percudani*, 844 A.2d 35 (Pa. Cmwlth. 2004). Comm.'s Mem. at 8-9. But the Commonwealth fails to inform the Court of subsequent case law that calls *Percudani* into question. Almost three months ago, a Pennsylvania district court found that there was "substantial ground for difference of opinion" about whether *Percudani* was correctly decided and whether Pennsylvania's Attorney General can pursue an action based entirely on past conduct. *See Pennsylvania v. Navient Corp.*, 2019 WL 1052014, *1, 6-7 (M.D. Pa. March 5, 2019). The court noted that the Third Circuit—the same court that decided the *Shire ViroPharma* case, discussed below—is "the proper forum for a predictive analysis of how the Pennsylvania Supreme Court" would determine whether the "is using or is about to use" language in the Pennsylvania statute permits the Attorney General to pursue a case based solely on past conduct. *Id.* at *7. The appeal is currently pending.

D. The Commonwealth groundlessly dismisses the Third Circuit's *Shire ViroPharma* decision, which directly addresses this controversy

Just a few months ago, a federal Court of Appeals addressed a controversy strikingly similar to this one, in *Federal Trade Comm'n v. Shire ViroPharma, Inc.*, 917 F.3d 147 (3rd Cir.

2019). Without addressing the case's substance, the Commonwealth seeks to dismiss it, arguing that it is "inapposite" because it addressed a violation of Section 13 of the FTC Act, rather than Section 5 of the FTC Act. Comm.'s Mem. at 9-10.

Chapter 93A, Section 2(b), enacted in 1967, states, "It is the intent of the legislature that in construing paragraph (a) of this section in actions brought under sections four, nine and eleven, the courts will be guided by the interpretations given by the Federal Trade Commission and the Federal Courts to section 5(a)(1) of the Federal Trade Commission Act..., *as from time to time amended*" (emphasis added). The Commonwealth—failing to cite the "as from time to time amended" language in Section 2(b)—dismisses *Shire ViroPharma* because it dealt with Section 13 of the FTC Act, which was "a different, later-added section." Comm.'s Mem. at 9. As Section 2(b) makes clear, however, the Massachusetts legislature was not trying to freeze the FTC Act in time. It wanted Massachusetts to continue to refer to FTC Act case law, even as the FTC Act was amended, to flesh out the Massachusetts Unfair and Deceptive Acts and Practices statute. *See Slaney v. Westwood Auto, Inc.*, 366 Mass. 688, 694 & n.8 (1975) (finding that Massachusetts "wholly incorporated" the FTC Act); *Commonwealth v. Fall River Motor Sales, Inc.*, 409 Mass. 302, 311, (1991) ("Federal court decisions interpreting and applying the Federal Trade Commission Act are to be looked to for guidance in interpreting the provisions of G.L. c. 93A.).

Moreover, the statutory-interpretation principles that the Third Circuit employs in *Shire ViroPharma* are identical to the Massachusetts statutory-interpretation principles that Gasdia addressed in his motion. Nowhere does the Commonwealth explain why those clear principles do not apply here.

2. The Commonwealth fails to reckon with Massachusetts law limiting the Attorney General's power to bring public-nuisance actions

Here, too, the Commonwealth breezes past the caselaw Gasdia cites that limits its ability to bring a common-law public-nuisance claim. The Commonwealth does not even mention *Attorney Gen. v. Pitcher*, 183 Mass. 513 (1903), *Attorney Gen. v. Trustees of Boston Elevated Ry. Co.*, 319 Mass. 642 (1946), *Attorney Gen. v. Jamaica Pond Aqueduct Corp.*, 133 Mass. 361 (1882), or *Attorney Gen. v. Revere Copper Co.*, 152 Mass. 444 (1890)—cases at the heart of Gasdia's motion, Gasdia Mem. at 10-11—let alone explain to this Court why Gasdia's interpretation of these cases might be incorrect. Instead, the Commonwealth tells the Court that "[b]abies are born addicted to opioids," and cites decisions applying other states' laws, Comm.'s Mem. at 12-17, apparently as an effort to distract the Court from the actual law in Massachusetts.

As to *Attorney Gen. v. Metro. R.R. Co.*, 125 Mass. 515 (1878) and *Attorney Gen. v. Tudor Ice Co.*, 104 Mass. 239 (1870), the Commonwealth seeks to dismiss them as a "limit in the law of corporations," citing only a corporate-law treatise and ignoring the cases themselves. Comm.'s Mem. at 17. Reading the *actual cases* makes clear that the limit the Commonwealth suggests does not exist. Both cases were against corporations, to be sure, but the Courts' analysis of the Commonwealth's ability bring public-nuisance claims had nothing to do with the defendants' corporate status. In *Metro R.R. Co.*, the Court stated, "The jurisdiction of a court of equity to abate an existing, or prevent a threatened nuisance, upon information filed by the attorney general, is limited to those public nuisances which affect or endanger the public safety or convenience, and require immediate judicial interposition." 125 Mass. at 516. And in *Tudor*

Ice Co., the Court repeated this principle and declined to expand the Attorney General's power to bring common-law public-nuisance actions,[1] stating:

> The only cases in which informations in equity in the name of the attorney general have been sustained by this court are of two classes. The one is of public nuisances, which affect or endanger the public safety or convenience, and require immediate judicial interposition, like obstructions of highways or navigable waters....The other is of trusts for charitable purposes, where the beneficiaries are so numerous and indefinite that the breach of trust cannot be effectively redressed except by suit in behalf of the public....If there are any other cases to which this form of remedy is appropriate, that of a private trading corporation whose proceedings are not shown to have injured or endangered any public or private rights, and are objected to solely upon the ground that they are not authorized by its act of incorporation and are therefore against public policy, is not one of them.

104 Mass. at 244. These cases are old, to be sure; but they remain controlling case law, limiting the circumstances under which the Commonwealth can pursue a common-law public-nuisance claim, that the Commonwealth fails adequately to address.

The Commonwealth relies primarily on the Restatement (Second) of Torts, and its definitions of public nuisance. *Id.* at 11-13. But defining a public nuisance is not the issue that Gasdia raises. The issue he raises is the circumstances under which the Commonwealth can *sue* concerning a public nuisance. As Gasdia explains in his motion, the Commonwealth can bring a public-nuisance action only when there is a statute that authorizes the Attorney General to proceed, or when there is an immediate need for injunctive relief against the defendant. Gasdia Mem. at 10-13. Neither circumstance applies as to Gasdia.

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[1] Indeed, this is the same proposition for which Gasdia cited *Jupin v. Kask*, 447 Mass. 141 (2006) and *Commonwealth v. Stratton Fin. Co.*, 310 Mass. 469 (1941)—that the Supreme Judicial Court has declined to expand the Attorney General's equitable powers. Gasdia Mem. at 11-12. Gasdia did not argue, as the Commonwealth asserts, Comm.'s Mem. at 13 n.6, that this Court should dismiss the public-nuisance claim because it is "too novel"; the Court should dismiss it, as to Gasdia, because (1) the Massachusetts courts have made clear for over 140 years that the Commonwealth's ability to bring a common-law public-nuisance action is limited, and (2) the Commonwealth does not and cannot allege that it has any basis to seek immediate injunctive relief to stop Gasdia from any alleged wrongdoing.

The Commonwealth cites only three Massachusetts public-nuisance cases that it says support its effort to sue Gasdia, but not one of them applies:

- *Attorney General v. Baldwin*, 361 Mass. 199 (1972), Comm.'s Mem. at 12, addresses an action by the Commonwealth pursuant to G.L. Chapter 91, § 23, which authorizes the Attorney General to enjoin or abate unauthorized work in public waters. There, the Commonwealth had explicit statutory authority to bring a public-nuisance claim, which it does not have here.

- *City of Boston v. Smith & Wesson Corp.*, 2000 WL 1473568 (Mass. Super. Ct. July 13, 2000), Comm.'s Mem. at 13, addresses a common-law public-nuisance action that the Commonwealth brought solely against companies presently manufacturing and selling firearms. The case did not include any defendant like Gasdia, an individual who had long since retired and had no present activity to enjoin.

- *Taygeta Corp. v. Varian Assoc., Inc.*, 436 Mass. 217 (2002), Comm.'s Mem. at 14, involved a private-nuisance action for interference with use and enjoyment of property. The Commonwealth offers no basis for this Court to presume that legal principles arising in private-property actions apply to a case like this one, and Gasdia is aware of no such authority.

The Commonwealth's reliance on the *Baldwin* case is particularly problematic, because *Baldwin* is the sole basis for the Commonwealth's argument that this Court can order defendants to pay costs of remediating a public nuisance. Comm.'s Mem. at 18. The Commonwealth brought the public-nuisance action in *Baldwin* based on a Massachusetts statute, G.L. Chapter 91, § 23, which specifically invested the Attorney General with power "to institute proceedings to enjoin or abate such nuisance." All of the language the Commonwealth cites in its brief relates to the Supreme Judicial Court's statutory interpretation of Section 23, which does not apply here. *Baldwin*, 361 Mass. at 207-08. Contrary to the Commonwealth's claim, this Court cannot order Gasdia to pay to abate a public nuisance based on *Baldwin*, because this is not a case arising out of Section 23, and there is no legal authority that would justify such an order.

The Commonwealth's effort to appropriate *In re Acushnet River & New Bedford Harbor Proceedings re Alleged PCB Pollution*, 712 F. Supp. 994, 1003-04 (D. Mass. 1989), in support

of its argument that it can collect public-nuisance costs in a common-law public-nuisance suit, Comm.'s Mem. at 20, is also troubling. The court in *Acushnet River* specifically stated:

> [T]he Commonwealth cites no cases, and the Court's own research has not uncovered any, which suggest that as matter of state substantive law, the equitable remedy provided a governmental entity which seeks to enjoin a public nuisance includes reimbursement of costs incurred in abating the nuisance. The Court can find no Massachusetts case in which an equity court awarded monetary relief other than costs of suit to such an entity which had sued to enjoin a public nuisance.

Acushnet River, 712 F. Supp. at 1003. The reason that the court remanded the case for further proceedings was *not* because the Commonwealth could recover abatement costs when suing for public nuisance, but was *instead* because the case was an unusual one in which the Commonwealth played a "dual role" as the trustee for real property that had been damaged:

> This distinction between the power of the state to enjoin the public nuisance and the ability of the individually harmed plaintiff to collect damages is particularly relevant here because of the dual role played by the Commonwealth in this litigation. The Commonwealth sues not only as a sovereign seeking to abate a nuisance which interferes with the public rights of its citizens, but also as a trustee over the directly affected natural resources. In the latter role the Commonwealth is not unlike a private litigant suing for special damages. Given this dichotomy, and the apparent limits of the state substantive law, it is not clear to this Court that the claim for recovery of abatement expenses presents purely equitable issues.

Id. at 1004. Here, the Commonwealth is not in the dual role that was so central to the court's remand in *Acushnet*, and it has no basis to seek abatement costs from Gasdia.

3. The Commonwealth failed to exercise reasonable diligence, and its claims against Gasdia are time-barred

The Commonwealth argues that its claims against Gasdia are not time-barred because it only recently discovered them after reviewing documents from the MDL, and because it is usually up to a trier of fact to decide when a claim accrued. Comm.'s Mem. at 20-21. These arguments fail, because it is clear from the Complaint's face and myriad public documents that the Commonwealth did not exercise reasonable diligence in suing Gasdia.

A. The Commonwealth does not credibly defend its diligence, and it therefore cannot rely on the discovery rule

Accessing MDL documents did not change the mix of information that would have caused the Commonwealth, with reasonable diligence, to know it had a claim against Gasdia. The Commonwealth has relied on the MDL documents to add detail, but nothing in the Commonwealth's claims is materially different from the other claims that Gasdia describes in his motion, Gasdia's Mem. at 14-17—which the Commonwealth does not deny.

The Commonwealth's primary argument seems to be that there was not enough information available to it to know that it had claims against Gasdia. It even tries to distinguish its knowledge of claims against Purdue from its knowledge of claims against Gasdia, Comm.'s Mem. at 22, as if Gasdia engaged in some independent conduct that caused harm—which he did not, and which the Complaint does not even allege.

The Commonwealth cites *In re Massachusetts Diet Drug Litig.*, 338 F. Supp. 2d 198 (D. Mass. 2004), in which plaintiffs who took certain diet drugs sued the manufacturer. The manufacturer invoked the statute of limitations, arguing that plaintiffs were on notice of their claims because of extensive publicity that the drugs had been removed from the market, which should have prompted plaintiffs to seek echocardiograms to determine whether they had been injured. *Id.* at 205. The court declined to rule at the motion-to-dismiss stage, finding that fact issues existed concerning where each individual plaintiff lived, what media coverage existed in that location, and whether each plaintiff learned of the need to have an echocardiogram. *Id* at 206-07. The key to the *Diet Drug* decision was that questions existed concerning whether relevant publicity actually reached individual plaintiffs. *Id.*

That is not a relevant concern here. The Commonwealth is not the same as individual plaintiffs who might not have access to news.[2] And there is no question that the Commonwealth *actually* knew of allegations concerning Purdue's sales and marketing of opioids, because the Commonwealth itself entered into a Consent Judgment with Purdue in 2007 that gave it access to internal Purdue documents, served a Civil Investigative Demand on Purdue in March 2015, and sought a statute-of-limitations waiver from Purdue in August 2016. Gasdia's Mem. at 16.

The Commonwealth asserts that this Court should ignore the *Luberda* case—the 2003 South Carolina lawsuit that named Gasdia as a defendant—because it was a "single lawsuit by a private plaintiff in South Carolina concerning claims arising from pre-2007 sales and marketing." Comm's Mem. at 23. But the Commonwealth's effort to minimize that case falls flat. Is the Commonwealth really arguing that it is less sophisticated and able to determine who to sue than a single private plaintiff? That would not be persuasive. And the Commonwealth's characterization of the case as "arising from pre-2007 sales and marketing" is misleading. The *Luberda* case makes essentially the same allegations that the Commonwealth makes in this case, and focuses on *post-2007* conduct, specifically alleging, "Notwithstanding the federal conviction on like prior bad acts Defendant(s) continued to push a fraudulent marketing campaign that promoted OxyContin as less addictive, less subject to abuse and less likely to cause withdrawal, when they in fact knew such information was not true." Ex. F to Gasdia Mem. at ¶ 49. Also, contrary to the case that the Commonwealth cites on this point, *Cohen v. S.A.C. Trading Corp.*,

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[2] This was also the issue in another case that the Commonwealth relies on, *Cascone v. United States*, 370 F.3d 95 (1st Cir. 2004), Comm.'s Mem. at 23. In *Cascone*, although defendant argued that publicity about an unusually high number of heart-attack deaths at a particular VA hospital should have put plaintiffs on notice that the hospital might have wrongfully caused their family member's death, plaintiffs had not actually seen any of the news coverage, which only appeared in newspapers accessed by less than 1% of households where plaintiffs lived. *Id.* at 99.

711 F.3d 353 (2d Cir. 2013), Comm.'s Mem. at 23, the *Luberda* case *did* result in broadly disseminated opinions, which are available through a quick Westlaw search. *See, e.g., Luberda v. Purdue Frederick Corp.*, 2014 WL 1315558 (D.S.C. March 24, 2014); *Luberda v. Purdue Frederick Corp.*, 2014 WL 5020237 (D.S.C. Oct. 7, 2014); *see also In re OxyContin Antitrust Litig.*, 994 F. Supp. 2d 367, 415 (S.D.N.Y. 2014) (published opinion identifying Gasdia as Purdue's Vice President for Sales and Marketing).

This case fits well within the caution that the Supreme Judicial Court articulated in *Harrington v. Costello*, 467 Mass. 720, 730 (2014):

> If accrual were not to occur until a plaintiff, who knows (or reasonably should know) that an identified defendant has acted in a way that caused the plaintiff harm, gathers sufficient facts to overcome a legal defense or claim that appears to prevent the claim against that defendant from being legally actionable or viable, accrual arguably could be delayed for years, rendering alleged tortfeasors "perpetual defendants-in-waiting."

Gasdia left the sales-and-marketing role at Purdue almost five years ago and has long-since retired from the company. The Commonwealth's effort to pull him into this case—many years after the Commonwealth knew or had reason to know that it had claims and that Gasdia was someone it could sue—is inappropriate.

B. Without the discovery rule, the Commonwealth's claims are time-barred

The Commonwealth concedes, through its silence, that without the discovery rule, its public-nuisance claim against Gasdia is time-barred and should be dismissed.

As to its Chapter 93A claim, the Commonwealth's assertion that it does not need to rely on the discovery rule to sue Gasdia, Comm.'s Mem. at 24-25, is wrong. Gasdia was completely out of the sales-and-marketing function at Purdue by no later than June 2014, and the Complaint does not allege otherwise. The Complaint's fleeting reference to Gasdia's "planning a call center" does not help the Commonwealth, because: (a) the Complaint makes clear that the call-

center activity occurred in September 2014, which is too late, and (b) the Commonwealth's wholly conclusory statement in paragraph 751 that Gasdia "continued to participate in Purdue's misconduct" is insufficient, where the Commonwealth offers zero information about Gasdia's alleged improper activities within the statute-of-limitations period. *See Laurano v. Superintendent of Schools of Saugus*, 459 Mass. 1008, 1008 (2011) (on 12(b)(6) motion, court looks beyond conclusory allegations and focuses on whether factual allegations plausibly allege entitlement to relief); *Iannacchino v. Ford Motor Co.*, 451 Mass. 623, 632-33 (2008) (when plaintiff uses terms that are conclusory and subjective, like "defective," such bare assertions do not suffice to state a claim). Thus, even if the Commonwealth can rely on its June 12, 2018 complaint filing as the operative date, that was still too late to sue Gasdia under Chapter 93A.

CONCLUSION

For these reasons, Defendant Russell J. Gasdia respectfully requests that Counts One and Two against him be dismissed with prejudice.

Respectfully submitted,

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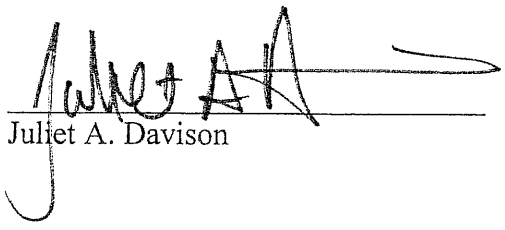

Juliet A. Davison

Dated: May 31, 2019