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NOTICE

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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 1884CV01808

COMMONWEALTH OF MASSACHUSETTS

vs.

PURDUE PHARMA L.P. & others¹

MEMORANDUM OF DECISION AND ORDER ON THE DEFENDANT DIRECTORS' RULE 12(b)(6) MOTION TO DISMISS

The Commonwealth commenced this action against Purdue Pharma L.P. and Purdue Pharma Inc. (Purdue) seeking redress for the harms Purdue allegedly caused when it deceptively marketed and sold its opioid products in Massachusetts. The First Amended Complaint (Complaint), asserts claims under G. L. c. 93A and for public nuisance, and in addition to Purdue, names as defendants current and former Purdue directors, three CEOs, and a vice president of sales. This Court has already issued decisions on: 1) Purdue's Mass. R. Civ. P. 12(b)(6) Motion to Dismiss, dated September 16, 2019 (Purdue Decision); 2) the directors' and Executives' Mass. R. Civ. P. 12(b)(2) Motions to Dismiss, dated October 8, 2019 (Personal Jurisdiction Decision), and 3) Russell Gasdia's Rule 12(b)(6) Motion to Dismiss, dated October 8, 2019 (the Gasdia Decision). This Memorandum addresses the directors' Rule 12(b)(6) Motion to Dismiss (paper #85), which largely repeats the same arguments raised by these other motions.

¹ 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.

Accordingly, for the reasons stated in the prior decisions as supplemented herein, this Court concludes that the Motion must be **DENIED**.²

The relevant background concerning the allegations against the directors and Purdue more generally is set forth in the Purdue Decision and the Personal Jurisdiction Decision, which this Court incorporates here by reference. To summarize, the Commonwealth alleges that members of the Sackler family, including Richard, Beverly, Ilene, Jonathan, Kathe, Mortimer, Theresa, and David Sackler, as well as outside directors Peter Boer, Paulo Costa, Cecil Pickett, Ralph Snyderman, and Judith Lewent, each personally participated in creating, directing, or approving deceptive and unfair marketing messages and materials sent into Massachusetts. It is this unfair and deceptive marketing of Purdue's addictive opioid products—and OxyContin in particular-- that the Commonwealth alleges was a substantial cause of the opioid crisis.

The standard that this Court applies to the instant Motion is well established. The plaintiff must allege, through more than “labels and conclusions[,] . . . [f]actual allegations plausibly suggesting (not merely consistent with) an entitlement to relief.” Iannacchino v. Ford Motor Co., 451 Mass. 623, 636 (2008) (citations omitted). This Court accepts these factual allegations as true and draws all reasonable inferences in the plaintiff's favor. Sisson v. Lhowe, 460 Mass. 705, 707 (2011). Review is confined to the four corners of the complaint, with consideration of other materials appropriate only where the complaint attaches them or where judicial notice is appropriate. Schaer v. Brandeis Univ., 432 Mass. 474, 477 (2000). Consequently, this Court does not determine the sufficiency of the allegations by examining

² Defendant John Stewart, a former Purdue CEO, also has moved to dismiss under Rule 12(b)(6). That request was in the second paragraph of a motion brought by the three officer defendants (including Stewart) pursuant to 12(b)(2) ((Paper No. 76). Stewart's 12(b)(6) Motion raises essentially the same arguments made by defendant Russell Gasdia in his own motion to dismiss. For reasons set forth in this Court's Memorandum of Decision dated October 8, 2019 denying Gasdia's motion, Stewart's motion brought pursuant to Rule 12(b)(6) must also be **DENIED**.

documents cited in the Complaint itself or by reviewing additional documents offered by the defendants. Such a document by document analysis would be premature. See Sahu v. Union Carbide Corp., 548 F.3d 59, 68 (2d Cir. 2008).

In their Motion, the directors raise several arguments in favor of dismissal. They challenge the sufficiency of the allegations with regard to whether they show that: 1) the directors personally participated in the alleged misrepresentations; 2) their conduct can be causally connected to the injury that the Commonwealth alleges; and 3) the directors can be held liable for public nuisance. The defendant directors also argue that the claims are time-barred under the relevant statutes of limitations, and that many of the allegations relate to conduct dating back decades, bearing no relevance to these defendants' liability. Finally, the outside directors, in a supplemental memorandum, contend that, precisely because of their "outside" status, they cannot be held liable for any wrongdoing by the company. In rejecting these arguments, this Court offers the following by way of brief explanation.

1. Personal Participation

Both the 93A claim and the public nuisance claim are torts. As explained in this Court's Personal Jurisdiction Decision, a corporate director may be held personally liable for torts committed by the corporation if the director personally participated in the tort. Such participation exists where the director controls, directs, approves or ratifies the act that injured the aggrieved party. See LaClair v. Silberline Mfg. Co., 379 Mass. 21, 29 (1979); Townsend, Inc. v. Beaupre, 47 Mass. App. Ct. 747, 751 (1999); Catullo v. Metzner, 834 F.2d 1075, 1082 (1st Cir. 1987); Escude Cruz v. Ortho Pharmaceutical Corp., 619 F.2d 902, 907 (1st Cir. 1980). See also In re Fresenius Granuflo/Naturalyte Dialysate Prod. Liab. Litig., 76 F. Supp. 3d 321, 336 (D. Mass. 2015) ("Knowing consent to or approval of unlawful acts' is what gives rise to

[individual director and officer] liability”), quoting PMC, Inc. V. Kadisha, 93 Cal. Rptr. 2d 663, 671 (2000) (reversing summary judgment in favor of director defendants). Here, the directors argue that the allegations of the Complaint rely on information that was simply passed on to them by Purdue staff, and that this passive receipt of information cannot establish direction or control over any tortious misrepresentations. They further argue the Complaint is deficient because it largely treats the directors as a group without any specificity as to what each director did. These arguments lose sight of the relevant standard that this Court applies to a motion brought pursuant to Rule 12(b)(6).

The factual allegations relating to the individual directors have already been described in this Court’s Personal Jurisdiction Decision at pages 5-7 and 11-13.³ In summary, the Complaint alleges that the directors repeatedly approved policies and tactics intended to aggressively promote opioid sales even though they knew that these policies and tactics were contributing to an epidemic of addiction, overdose and death. As to the Sacklers in particular, the Complaint alleges that they controlled the company, played an active role in developing and implementing the policies that are alleged to be unlawful, and profited handsomely from their unlawful behavior. More than a hundred pages of the Complaint is devoted to describing the Sackler family’s involvement. Thirty pages concern decisions made by the outside directors. Certainly, this is not a case, as the directors argue, where the Complaint is too conclusory to satisfy the Rule 12(b) (6) standard. Contrast, e.g., Rhone v. Energy N., Inc., 790 F. Supp. 353, 362 (D. Mass. 1991).

³ Although this Court looked to supplemental exhibits in reaching its Personal Jurisdiction Decision which it declines to do for purposes of this Motion, the Complaint, by itself more than sufficiently alleges the directors’ knowing approval of various misleading and deceptive marketing initiatives and strategies. See, e.g., ¶¶ 243-250, 254, 262-263, 371, 384-385, 390, 464-467, 501-513, 532-533, 547-548, 556-559.

That the Complaint does not single out any one of the non-Sackler directors individually and specifically describe the conduct of that director in particular, that does not change this Court's conclusion as to the sufficiency of the allegations: according to the Complaint, they did not act independently but rather voted as a block in lockstep with the Sacklers to approve and implement the policies and practices alleged to be were unlawful. At the time of these votes, the outside directors (according to the Complaint) had information about the impact of these policies and how they contributed to the abuse and diversion of OxyContin in particular. Nevertheless, they continued to give their approval to practices intended to ensure that doctors prescribed more opioids at greater frequency and at higher and more expensive doses. These allegations are sufficient to satisfy the requirements under Rule 12(b)(6) that each of the directors personally participated in wrongdoing.

2. Causation

The directors argue that any connection between their alleged conduct and the resulting harm is too attenuated to impose liability. They cite many intervening causes of opioid overdoses, including the illegal drug trade, decisions by prescribing doctors and the irresponsible dispensation of the drugs by pharmacies. These are similar to causation arguments that Purdue made in support of its Rule 12(b) (6) Motion; this Court, for the same reasons set forth in the Purdue Decision, finds them unpersuasive as to the directors. At the very least, causation is a fact-based inquiry best resolved on a developed factual record. Moreover, because opioids such as OxyContin are highly addictive drugs, a fact finder could plausibly conclude that the defendants knew that misleading and deceptive efforts to increase the prescription of these drugs at higher doses and over longer periods would foreseeably lead to increased addiction and its attendant consequences.

3. Public Nuisance

The directors' argument that the Complaint fails to plead the elements of a public nuisance claim likewise mirrors Purdue's argument that the public nuisance claim should be dismissed against it. In particular, the directors argue that public nuisance claim may only be based on the wrongful use of property, and is not available for a claim involving a lawful consumer product. This Court rejected those arguments in its Purdue Decision, and incorporates the same reasoning here. See Purdue Decision at 9-10.

4. Statutes of Limitations

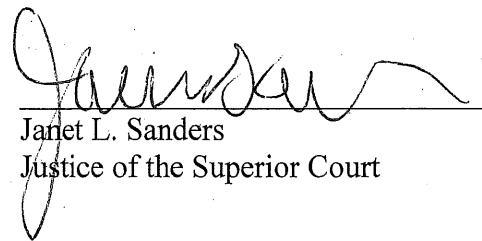
Like the other defendants, the directors cite the relevant statutes of limitations in arguing that the claims must be dismissed. The argument that these claims are time-barred was raised by Purdue in its own Motion to Dismiss and rejected by this Court. See Purdue Decision, p. 13. A statute of limitations begins to run when a cause of action accrues. A cause of action accrues when the plaintiff discovers or with reasonable diligence should have discovered that he suffered harm and that it was the defendant who caused that harm. Harrington v. Costello, 467 Mass. 720, 727 (2014). Given the fact intensive nature of that inquiry, this issue must in most instances be decided by the trier of fact. See Riley v. Presnell, 409 Mass. 239 (1991); see also Stark v. Advanced Magnetics, Inc., 50 Mass.App.Ct. 226 (2000) (reversing lower court's allowance of summary judgment motion on statute of limitations grounds). It cannot be resolved on a motion brought under Rule 12(b)(6).

5. Outside Directors

The outside directors argue that this Court must presume that, given their status as outside, disinterested directors, they acted independently and in good faith. The cases they cite,

however, concern the independence of directors and the application of the business judgment rule in relation to a derivative action. See, e.g., Harhen v. Brown, 431 Mass. 838, 842 (2000); Pinchuck v. State Street Corp., 2011 WL 477315 at *13 (Mass. Super. 2011). Those standards do not apply here. It is true that the Complaint contains no allegation that the outside directors (unlike the Sacklers) stood to profit directly from the marketing and sale of Purdue opioids. However, given the allegations of their personal participation (described above), the absence of a financial motive is not enough to absolve them of wrongdoing.

Dated: November 4, 2019



Janet L. Sanders
Justice of the Superior Court