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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 1884CV01808

COMMONWEALTH OF MASSACHUSETTS

vs.

PURDUE PHARMA L.P. & others[1]

MEMORANDUM OF DECISION AND ORDER ON THE DEFENDANT RUSSELL GASDIA'S MOTION TO DISMISS

The Commonwealth brought this action against Purdue Pharma L.P. and Purdue Pharma Inc. (collectively, Purdue) seeking redress for harms that it claims were caused by Purdue's deceptive marketing and sale of its opioid products in Massachusetts. The First Amended Complaint (the Complaint) also names as defendants seventeen other individuals; among them is defendant Russell Gasdia, who was Purdue's Vice President of Sales and Marketing beginning in 2007. Gasdia now moves to dismiss the claims against him pursuant to Mass. R. Civ. P. 12(b)(6). In support, he contends that the Attorney General has no legal grounds for pursuing the claims against him because there is no evidence that he has engaged in misconduct after his retirement from Purdue in December 2014. In the alternative, Gasdia argues that the claims are time-barred. For the following reasons, this Court concludes that the Motion to Dismiss must be **DENIED**.

BACKGROUND

For purposes of this Motion, this Court assumes as true all the allegations in the Complaint. Those allegations have already been summarized in this Court's Memorandum of

[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.

Decision dated September 16, 2019, denying Purdue's Motion to Dismiss (the September 16 Decision). As to those allegations specific to Gasdia, he is described in the Complaint as one of four key executives who oversaw or promoted the activities alleged to be unfair and deceptive. Complaint, ¶596. In his position as Vice President of Sales and Marketing, he was defendant Richard Sackler's "voice in the field." Complaint, ¶ 706. He was involved in the "fundamentals of getting more patients on opioids at higher doses for longer periods" and of targeting the most prolific opioid prescribers. Complaint, ¶700. He worked to expand the number of sales representatives promoting opioids and drove them to visit prescribers more frequently. Complaint, ¶¶702-706. He engaged in these efforts even though he knew that higher doses of Purdue opioids put patients in danger. Complaint, ¶ 712. He also knew and intended that sales representatives would not warn doctors that higher doses put patients at risk. Complaint, ¶¶712-713, 719.

The Complaint gives some specifics as to Gasdia's involvement. In 2011, as the Sacklers looked for ways to increase sales, Gasdia reported to Richard Sackler that Purdue was instructing its sale representatives to focus on converting "opioid naïve patients" (those who had never been on opioids or who were on low doses of Vicodin or Percocet) to Purdue opioids, even though he knew that plan posed an increased risk to those patients. Complaint, ¶¶ 348-349. In 2013, he strategized with other staff on ways to market Purdue opioids directly to insurance companies and managed care formularies in an effort to convince them to cover opioids, using data that the FDA had never approved. Complaint, ¶566. Gasdia wrote scripts used to train Purdue sales representatives, including, for example, a plan to use fake patient profiles to encourage doctors to prescribe Butrans to patients not on opioids. Complaint, ¶ 707. He tracked his staff's adherence to sales targets, and placed sales representatives on "performance enhancement plans" if they

were not generating enough opioid prescriptions. Complaint, ¶350. Gasdia had a "special interest" in Massachusetts where he had started his career. Complaint, ¶742. He oversaw Purdue's negotiations with Massachusetts insurers and tracked Massachusetts regulations to ensure a growing market of opioids here. Complaint, ¶750.

In short, Gasdia (according to the Complaint) "worked at the heart of Purdue's deceptive sales campaign," carrying out the orders of Richard Sacker and other Sackler defendants to promote higher doses of opioids for longer periods of time. Complaint, ¶¶698, 747. Between 2007 and 2014, Purdue paid Gasdia millions of dollars for his efforts. Complaint, ¶ 752.

DISCUSSION

The Complaint asserts two causes of action against Gasdia: violations of G. L. c. 93A (Count I) and public nuisance (Count II). As to the c. 93A claim, Gasdia argues that G. L. c. 93A, § 4 makes clear that the Attorney General's authority can be wielded only where there is reason to believe that the defendant "is using or is about to use" an unfair and deceptive business practice. As the Complaint acknowledges, Gasdia stepped down from his positon as Purdue's Vice President of Sales and Marketing in June 2014, and left Purdue entirely in December of that year. Gasdia notes that there is nothing in the Complaint to suggest that he has had any association with the company since then, or that he has any intention of returning. Because he is not currently engaging in the acts on which the Complaint is based, Gasdia argues that the Attorney General has no standing to assert a c. 93A violation against him. Gasdia makes a similar argument as to the public nuisance claim: he contends that the Attorney General's remedy is limited to injunctive relief and that, with no allegations of ongoing misconduct on his part, there is nothing to enjoin. In the alternative, Gasdia argues that both Counts must be dismissed because the Commonwealth knew or had reason to know of Gasdia's misconduct well

before 2014, and that the statute of limitations for prosecuting him has run. This Court concludes that none of these arguments supports dismissal.

1. Chapter 93A Violation

Section 4 of Chapter 93A states:

> Whenever 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, he may bring an action in the name of the commonwealth against such person to restrain by temporary restraining order or preliminary or permanent injunction the use of such method, act or practice. . . .

(italics added). Gasdia has seized on the phrase "is using or is about to use" and argues that it prevents the Attorney General from pursuing a c. 93A claim against any individual or entity who has ceased engaging in the suspect conduct. This argument, however, reads § 4 too narrowly and without regard to other sections of c. 93A, which clearly give the Attorney General the power to investigate and prosecute those who are no longer engaged in the alleged misconduct. See DiFiore v. American Airlines, Inc., 454 Mass. 486, 491 (2009) ("Where possible, [the court] construe[s] the various provisions of a statute in harmony with one another, recognizing that the Legislature did not intend internal contradiction"). Perhaps most important, this argument also has been rejected by the Supreme Judicial Court in Lowell Gas Co. v. Attorney General, 377 Mass. 37 (1979) (Lowell Gas).

The phrase in Section 4 on which Gasdia relies is used in conjunction with the Attorney General's power to obtain injunctive relief. Section 4, however, goes on to describe other remedies that the Attorney General can seek, all with reference to past conduct. The court may issue any order or judgment "as may be necessary to restore any person who *has suffered* any ascertainable loss" because of the unfair or deceptive act or practice. G. L. c. 93A, §4 (italics added). If the court concludes that the defendant "*has employed*" any such practice and the

defendant knew or should have known that the conduct was unfair or deceptive, the court may order a civil penalty of up to $5,000 for each violation. Id. (italics added). In authorizing restitution and civil penalties in addition to injunctive relief, § 4 by its own terms contemplates that the statute is not limited to those situations where the alleged misconduct is ongoing. See id.

Section 4 also must be read together with other provisions of c. 93A. DiFiore, 454 Mass. at 491. Section 6 authorizes the Attorney General to issue civil investigative demands where she believes that any person "*has engaged in* or is engaging in" an unfair or deceptive practice. G. L. c. 93A, §6 (italics added.) 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 in court. G. L. c. 93A, §5 (italics added). Chapter 93A claims also have a four-year statute of limitations. G. L. c. 260, §5A (expressly applying to c. 93A action brought by the Attorney General). If the Attorney General could prosecute only ongoing conduct, there would be no need for a time limit.

More generally, this Court takes into account the legislature's intent in enacting c. 93A, which has been described as a "statute of broad impact." Exxon Mobil Corp. v. Attorney General, 479 Mass. 312, 315 (2018), quoting Slaney v. Westwood Auto, Inc., 366 Mass. 688, 693-694 (1975). Section 4 in particular was intended "to provide an efficient, inexpensive, prompt and broad solution" to the Attorney General in the event that she discovers unfair or deceptive practices that have caused widespread harm. Commonwealth v. DeCotis, 366 Mass. 234, 245 (1974); see also Auto Flat Car Crushers, Inc. v. Hanover Ins. Co., 469 Mass. 813, 824-825 (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]). Construing the statute as a whole and keeping in mind this legislative purpose, this Court does not construe § 4 as a prohibition against the prosecution of unfair and deceptive business practices that have ceased. Such a construction would frustrate the remedial purposes of c. 93A by broadly exempting from liability anyone who stopped the wrongdoing before the Attorney General filed a claim, no matter how grave the damages inflicted.

Finally and perhaps most important, this Court's construction of § 4 is in line with the Supreme Judicial Court's interpretation of that section. In Lowell Gas, the Attorney General brought a complaint against two gas companies alleged to have unfairly passed on certain costs to consumers. 477 Mass. at 37. The companies moved to dismiss, asserting among other things that the Attorney General was not authorized to bring the action pursuant to G. L. c. 93A, §4 because the companies had terminated the practices complained of. Id. at 46-47. Although the court noted that the complaint could be construed as targeting practices that were continuing, it went on to reject the companies' argument on broader grounds. Reading § 4 together with § 6, as well as the relevant statute of limitations, G. L. c. 260 §5A, the court concluded that "the broad remedial language of § 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." Lowell Gas, 377 Mass. at 47-48. That is, there was no basis to dismiss the action simply because the companies had ceased their practice of passing on the costs alleged to be unlawful. Although Lowell Gas was decided forty years ago, this Court is aware of no Massachusetts case that questions its reasoning.

In an attempt to avoid the implications of Lowell Gas, Gasdia looks to cases interpreting the Federal Trade Commission (FTC) Act. In particular, he relies on FTC v. Shire ViroPharma,

Inc., 917 F.3d 147 (3rd Cir. 2019). In that case, the court held only that the FTC could not, pursuant to the express language of Section 13(b) of the Act, 15 U.S.C. §53(b), seek injunctive relief against the defendant company for conduct that took place five years before the suit and that related to a drug that the company no longer sold. The court noted, however, that the FTC could have proceeded under Section 5 of the Act, 15 U.S.C. §45(b). In reaching its conclusion regarding G. L. c. 93A, § 4, the court in Lowell Gas relied on those federal cases that interpreted Section 5 of the FTC Act. 377 Mass. at 47. It cites, for example, Goodman v. FTC, 244 F.2d 584, 593 (9th Cir. 1957). Id. Indeed, G. L. c. 93A, § 2(b) directs the courts to look for guidance in FTC and federal court interpretations of Section 5, "as from time to time amended." Gasdia contends that one of those amendments is Section 13 of the FTC Act, which was added to that statute only recently and well after the Lowell Gas decision. This Court is not convinced, however, that the Supreme Judicial Court today interpreting G. L. c. 93A, §4 would reach a different result than it did in Lowell Gas.[2]

2. Public Nuisance

Count II of the Complaint asserts a claim of public nuisance. Although it is based on the common law and not on a statute, Gasdia makes an argument quite similar to that which he asserts with respect to the c. 93A claim — namely, that there is no legal basis to bring this claim because it targets conduct that has ceased. Specifically, Gasdia contends that a public nuisance claim can proceed only if there is an immediate need for injunctive relief; since Gasdia has long

[2] [2] Cases interpreting the FTC Act are in any event not controlling, since the comparison between the provisions that Act and Chapter 93A is not a perfect one. For example, as the court explained in FTC v. Shire ViroPharma, the FTC Act from its inception provides for an administrative process to remedy unfair methods of competition. 917 F.3d at 155. Section 13 was added to allow the FTC to skip this administrative process and go direct to court where there was a need to act quickly to enjoin ongoing illegal conduct. By contrast, Chapter 93A does not have built into it an administrative regime.

since left Purdue, it necessarily follows that Count II fails to state a claim upon which relief may be granted. This Court disagrees.

As to the elements of this claim, Massachusetts follows the Restatement (Second) of Torts § 821B, which defines a public nuisance "as an unreasonable interference with a right common to the general public." See Sullivan v. Chief Justice for Admin. & Mgmt. of Trial Court, 448 Mass. 15, 34 (2006). "In determining whether there has been an unreasonable interference with a public right, a court may consider, inter alia, '[w]hether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience.'" Id., quoting Restatement (Second) of Torts § 821B. This Court already has concluded that the Complaint supports a public nuisance claim against Purdue, see September 16 Decision, pp. 8-10, and reaches the same conclusion as to Gasdia: the Complaint, if true, alleges conduct on his part involving a significant interference with the public health and safety of Massachusetts residents.

Gasdia argues that, even assuming these allegations are true, the public nuisance claim is equitable nature, and the court's jurisdiction is limited to those public nuisances requiring "immediate judicial interposition." In support of this proposition, Gasdia relies on a case handed down 140 years ago, Attorney General v Metro. R.R.Co., 125 Mass. 515 (1878). Quoting that case, Gasdia contends that, because there is no ongoing conduct on his part, there is no need for immediate judicial action and the Attorney General thus has no authority to bring a public nuisance claim. This Court finds this argument puzzling — and ultimately unpersuasive.

If Gasdia is arguing that this action is one in equity, he ignores the fact that the court's equitable powers also extend to abatement orders. Count II would appear to seek this kind of relief in asking the court to require the defendants to reimburse the Commonwealth for the

expenses incurred in abating the nuisance. Gasdia nevertheless maintains that, because the underlying conduct that created the nuisance has ceased, there is "no nuisance to abate," and this Count thus fails to state a claim. This position is not supported by the case law, however. For example, in Taygeta Corp. v. Varian Assoc. Inc., the Supreme Judicial Court concluded that the continuing seepage of pollutants on the plaintiff's property gave rise to an actionable nuisance claim even though the dumping of the hazardous material that caused the contamination had stopped many years before. 436 Mass. 217, 231-232 (2002). [3] See also Restatement (Second) of Torts §834 comment e, at 150-151 (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 stop the harm"). In the instant case, the Complaint contains sufficient allegations to show that Gasdia participated in conduct which significantly interfered with the public health and safety. That is enough.

Although this Court need not determine on a motion to dismiss precisely what relief the Commonwealth would be entitled to receive, this Court would note that an abatement order in a public nuisance case could include a requirement that the defendants expend the money necessary to abate the nuisance. That is precisely what the Supreme Judicial Court decided in Attorney General v. Baldwin, 361 Mass. 199, 208 (1972). In that case, the court upheld the lower court's order that the defendants remove debris that they had caused to be dumped into a Massachusetts waterway, even though the cleanup would necessarily require a "large expenditure of money." Id.[4]

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[3] It is true that Taygeta involved a private nuisance. But this Court does not see why the same principles should not also apply to a public nuisance claim this like one.

[4] In support of his position that the Commonwealth cannot seek such reimbursement costs, Gasdia relies on In re Acushnet River & New Bedford Harbor Proceedings re Alleged PCP Pollution, 712 F. Supp. 994, 1004 (D. Mass. 1989). However, the court there ruled only that the Commonwealth's claim for public nuisance abatement expenses presented issues that had to be tried to a jury.

3. Statute of Limitations

The Attorney General filed her initial complaint June 12, 2018; the First Amended Complaint adding Gasdia as a defendant was filed on December 21, 2018. A four-year statute of limitations applies to the c. 93A claim. G. L. c. 260, §5A. A three-year statute of limitations applies to the public nuisance claim. G. L. c. 260, §2A. Gasdia, who stepped down from his sales and marketing position at Purdue in June 2014, argues that both claims are time-barred. This Court concludes that the limitations issue cannot be decided on a Rule 12(b)(6) motion.

Both statutes of limitations are subject to the discovery rule, which states that "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." Harrington v. Costello 467 Mass. 720, 727 (2014). When the cause of action "accrues" for statute of limitations purposes is ordinarily a question of fact that cannot be determined from the pleadings alone. See Riley v. Presnell, 409 Mass. 239, 247 (1991) (reversing summary judgment against plaintiff on statute of limitations grounds). Rarely can the issue be determined on a Rule 12(b)(6) motion. See Commonwealth v. Tradition (North America), Inc., 91 Mass. App. Ct. 63, 70 (2017) (dismissal pursuant to Rule 12(b)(6) based on statute of limitations is appropriate only where "it is undisputed from the face of the complaint that the action was commenced beyond the applicable deadline").

In the instant case, the Complaint alleges that the defendants (including Gasdia) concealed their conduct, and that determining the nature and extent of that conduct required a complex investigation, including civil investigative demands that continued until March 2018. That is enough to prevent dismissal on statute of limitations grounds. Gasdia cites various lawsuits filed against Purdue and others in other jurisdictions as early as 2013 that contain

allegations quite similar to those asserted against Gasdia here: indeed, one lawsuit (filed in South Carolina) actually names Gasdia as a defendant. That only underscores the fact intensive nature of the inquiry, however. See, e.g., In re Massachusetts Diet Drug Litig. 338 F. Supp. 2d. 198, 205-206 (D. Mass. 2004) (that there was extensive publicity regarding diet drugs at issue was not enough to determine that plaintiffs' claims were time-barred as a matter of law). In short, it would be premature for this Court to resolve this question before any discovery has taken place.

CONCLUSION AND ORDER

For these reasons and for other reasons set forth in the Commonwealth's Memorandum in Opposition, Gasdia's Motion to Dismiss is **DENIED.**

Janet L. Sanders
Justice of the Superior Court

Dated: October 8, 2019