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BEFORE THE DIVISION OF CONSUMER PROTECTION
OF THE UTAH DEPARTMENT OF COMMERCE

IN THE MATTER OF: **PURDUE PHARMA L.P.**, a Delaware limited partnership; **PURDUE PHARMA INC.**, a New York Corporation; **THE PURDUE FREDERICK COMPANY**, a Delaware corporation; **RICHARD SACKLER, M.D.**, individually and as an owner, officer, director, member, principal, manager, and/or key employee of the above named entities; and **KATHE SACKLER, M.D.**, individually and as an owner, officer, director, member, principal, manager, and/or key employee of the above named entities; **Respondents.**	**DIVISION'S MEMORANDUM IN OPPOSITION TO THE SACKLER RESPONDENTS' MOTION TO DISMISS THE DIVISION'S CITATION AND NOTICE OF AGENCY ACTION** **DCP Legal File No. CP-2019-005** **DCP Case No. 107102**

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The Utah Division of Consumer Protection ("Division") respectfully submits this Memorandum in Opposition to Respondents Dr. Richard Sackler's and Dr. Kathe Sackler's (collectively, "the Sackler Respondents" or the "Sacklers") Motion to Dismiss the Division's Citation and Notice of Agency Action ("Motion"). For the reasons set forth below, the Motion should be denied.

I. PRELIMINARY STATEMENT

As detailed in the Citation, Purdue Pharma L.P., Purdue Pharma Inc., and The Purdue Frederick Company (collectively "Purdue"), with the Sacklers at the helm, for many years have maintained a sophisticated campaign to convince the medical community and the public that opioids were safe: essentially, that high doses of pharmaceutical-grade heroin could treat even run-of-the-mill, chronic pain, without significant risk of addiction. The Sacklers, including through Purdue, knowingly or intentionally engaged in, and continue to engage in and/or have failed to correct, an aggressive marketing campaign to overstate the benefits and misstate and conceal the risks of treating chronic pain with opioids to increase Purdue's profits. ¶¶ 162-74.[1] The campaign entailed spreading misstatements through multiple channels, including in Utah, that portrayed opioids as beneficial in treating chronic pain long-term and as having a low risk of addiction. ¶ 16.

The Sackler Respondents focus the bulk of their Motion on asking that the Presiding Officer assume, contrary to the Citation's allegations, that their nationally directed marketing campaign, which emerged from the highest levels of the company, somehow inexplicably excluded Utah. As explained below, that is not the case. Indeed, the Sacklers approved and directed that sales representatives trained at Purdue's Connecticut headquarters engage in Purdue's

[1] All references to "¶ _" are to paragraphs of the Citation.

deceptive marketing in Utah, and even expanded this force nationally, including in Utah. Meanwhile, two of the four most prominent, nationally known "Key Opinion Leaders" ("KOLS") who helped Respondents to spread their messages across the country operated out of Utah.

Seeking to evade responsibility for this conduct, the Sacklers have submitted cursory declarations attempting to disclaim control over Purdue and its activities in Utah. Their motion also makes a variety of unfounded arguments on the merits, and adopts certain arguments made by Purdue. Each of these arguments contradicts the facts and the law. ***First***, the facts set forth in the Citation alone amply support personal jurisdiction and state a claim against the Sacklers. To the extent that the Sacklers rely on materials outside the Citation and Notice of Agency Action for purposes of their personal jurisdiction arguments, none of these materials overcome, or even undermine, the facts pled in the Citation and Notice of Agency Action. Further, additional documents corroborate and add to the evidence that personal jurisdiction is proper in this case. ***Second***, the Sacklers' remaining arguments largely parrot or incorporate the same failed arguments that Purdue has made in other cases (and attempts again here). The Sacklers' attempt to spin them in their favor fares no better here than it did for Purdue.

II. LEGAL STANDARD

Pleadings in administrative proceedings must contain "(a) a clear and concise statement of the allegations or facts relied upon as the basis for the pleading; and (b) an appropriate request for relief when relief is sought." U.A.C. R151-4-202(2). The standard is simply notice pleading, the equivalent of Utah Rule of Civil Procedure 8(a)'s mandate of a short and plain statement, *cf. Parker v. State of Indiana*, 400 N.E.2d 796, 798 (Ind. Ct. App. 1980), although here the Division's allegations would readily satisfy a heightened Rule 9(b) standard as well. Because the standard of review is both familiar and set forth in the Division's Memorandum in Opposition to Purdue's Motion to Dismiss, which is incorporated by reference in Section IV, the Division will not further

elaborate here. Standards specific to the personal jurisdiction argument are addressed in relation to that argument.[2]

III. THE DIVISION MAY EXERCISE PERSONAL JURISDICTION OVER THE SACKLER RESPONDENTS

Contrary to the Sackler Respondents' arguments, the Division may exercise personal jurisdiction over them. At the motion to dismiss for lack of personal jurisdiction stage, a court must "accept the factual allegations in the complaint as true and consider them, and all reasonable inferences to be drawn from them, in the light most favorable to the nonmoving party." *Fenn v. Mleads Enters., Inc.*, 2006 UT 8, ¶ 2, 137 P.2d 706, 708. "[I]f the trial court proceeds on documentary evidence alone to determine whether personal jurisdiction is proper, 'the plaintiff is only required to make a prima facie showing of personal jurisdiction.'" *Hunsaker v. Am. Healthcare Capital*, 2014 UT App 275, ¶ 9, 340 P.2d 788, 791.

Here the Division alleges that it has specific personal jurisdiction over the Sackler Respondents. When a plaintiff relies on specific personal jurisdiction, it must show that "(1) the Utah long-arm statute extends to defendant's acts or contacts, (2) plaintiff's claim arises out of those acts or contacts, and (3) the exercise of jurisdiction satisfies the defendant's right to due process under the United States Constitution." *Fenn*, 2006 UT 8, ¶ 8, 137 P.2d at 710.

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[2] If materials outside the Citation are "not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." Utah R. Civ. P. 12(b). The Sacklers represented at the April 9, 2019 hearing that they do not ask that the motion be converted to one for summary judgment and do not seek consideration of materials outside the citation for any reason other than personal jurisdiction arguments. Similarly, the Division offers the facts presented in its Opposition only for the purposes of personal jurisdiction, noting, however, that it did not have the same access to Purdue's documents as did the Sacklers.

A. State Law Provides for Jurisdiction over the Sackler Respondents

Contrary to the Sackler Respondents' argument, Mot. 18-19, this Division has jurisdiction over the Sacklers pursuant to both Utah's long-arm statute, § 78-27-22, *et seq.*, and the Utah Consumer Sales Practices Act's (UCSPA) long-arm statute, § 13-2-6(4). *Cf. State in re W.A.*, 2002 UT 127, ¶ 14, 63 P.3d 607, 612 ("[A] court may rely on *any* Utah statute affording it personal jurisdiction, not just Utah's long-arm statute."). The *W.A.* court recognized that "the legislature may provide for the extension of personal jurisdiction over an individual in statutes other than the long-arm statute. . . . [N]o reason exists to limit the legislature's authority to enact extensions of personal jurisdiction in other sections of the code." *Id.* ¶ 15, 63 P.3d at 612.

Utah's long-arm statute provides personal jurisdiction over nonresidents for any claim arising out of or related to:

> (1) the transaction of any business within this state;
>
> (2) contracting to supply services or goods in this state;
>
> (3) the causing of any injury within this state whether tortious or by breach of warranty; [and]
>
> (4) the ownership, use, or possession of any real estate situated in this state.

Utah Code Ann. § 78-27-24. The Citation alleges that the Sackler Respondents engaged in such conduct. Respondent Richard Sackler owns, uses, and possesses real estate in Utah. ¶ 5. He also transacted business from his house. *Id.* The Citation also alleges that the Sackler Respondents knowingly caused the unlawful promotion and sales of Purdue's opioids in Utah, thus transacting business within the State and causing injury in and to the State.[3] *See, e.g.*, ¶ 8 (Sackler Respondents personally directed Purdue to conduct deceptive or unfair acts or practices that took

[3] While the Division alleges that the Sacklers caused harm as part of its argument that the Tribunal has jurisdiction over the Sacklers, it is not required to allege harm with respect to the underlying causes of action alleged in the Citation. *See* Opp'n to Purdue MTD 14-16.

place in Utah); ¶¶ 125, 129 (Sackler Respondents personally directed unlawful conduct in Utah). Therefore, the Sackler Respondents are subject to personal jurisdiction under Utah's long-arm statute.

The UCSPA's long-arm statute provides jurisdiction over a person who has violated, is violating, or has attempted to violate the UCSPA if:

> (i) the violation or attempted violation is committed either wholly or partly within the state;
>
> (ii) conduct committed outside the state constitutes an attempt to commit a violation within the state; or
>
> (iii) transactional resources located within the state are used by the offender to directly or indirectly facilitate a violation or attempted violation.

Utah Code Ann. § 13-2-6(4)(a). The Division has alleged that the Sackler Respondents themselves (not just through the companies they own and control) committed violations of the UCSPA "either wholly or partly within the state" and that their conduct outside the state was the cause of violations within the state. *See, e.g.*, ¶¶ 8, 125, 129, 147. Thus, the Sackler Respondents are subject to personal jurisdiction under the UCSPA as well.

Most Utah courts assume application of the long-arm statute and go straight to the due process analysis. *See Pohl, Inc. of Am. v. Webelhuth*, 2008 UT 89, ¶ 19, 201 P.3d 944, 951. "That approach makes sense. . . . [T]he long-arm statute 'should be applied so as to assert jurisdiction over nonresident defendants to the fullest extent permitted by the due process clause of the Fourteenth Amendment to the United States Constitution.'" *Hunsaker*, 2014 UT App 275, ¶ 13, 340 P.3d at 792 (quoting Utah Code Ann. § 78B-3-201(3)).

B. The Division Has Alleged a Prima Facie Case of Specific Personal Jurisdiction over the Sackler Respondents

"[A] Utah state court may assert specific personal jurisdiction over a foreign defendant only if (1) the defendant has minimum contacts with Utah and (2) the assertion of jurisdiction

would not offend the traditional notions of fair play and substantial justice." *Fenn*, 2006 UT 8, ¶ 10, 137 P.3d at 711. A court may exercise specific personal jurisdiction "only on claims arising out of defendant's forum-state activity." *MFS Series Tr. III v. Grainger*, 2004 UT 61, ¶ 10, 96 P.3d 927, 931 (quoting *Neways, Inc. v McCausland*, 950 P.2d 420, 423 (Utah 1997)).

A defendant may establish minimum contacts by "purposefully avail[ing] itself of the benefits of conducting business in Utah." *Hunsaker*, 2014 UT App 275, ¶ 16, 340 P.3d at 792. "Courts often determine purposeful availment by considering whether the defendant 'deliberately' created 'some relationship with the forum state that would serve to make that state's potential exercise of jurisdiction foreseeable.'" *Fenn*, 2006 UT 8, ¶ 13, 137 P.3d at 712 (quoting *First Mortg. Corp. v. State St. Bank & Tr. Co.*, 173 F. Supp. 2d 1167, 1173-74 (D. Utah 2001); citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475-76 (1985)). "That is, 'the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.'" *Hunsaker*, 2014 UT App 275, ¶ 16, 340 P.3d at 792 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)). Importantly, purposeful availment does not require physical presence in the forum. *See id.* ¶ 17, 340 P.3d at 793. Minimum contacts must be examined on a case-by-case basis and the "standard is not susceptible of mechanical application, and instead, involves an ad hoc analysis of the facts." *Fenn*, 2006 UT 8, ¶ 12, 137 P.3d at 711. "In judging minimum contacts, a court properly focuses on 'the relationship among the defendant, the forum, and the litigation.'" *ClearOne, Inc. v. Revolabs, Inc.*, 2016 UT 16, ¶ 8, 369 P.3d 1269, 1273 (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)).

One minimum contacts test, known as the "effects" test, was introduced by the Supreme Court in *Calder v. Jones*, 465 U.S. 783 (1984), and refined in *Walden v. Fiore*, 571 U.S. 277 (2014). *See ClearOne*, 2016 UT 16, ¶¶ 9-23, 369 P.3d at 1273-78. There are three prongs of the

"effects" test: "the defendant must have (1) committed an intentional act, which was (2) expressly aimed at the forum state, and (3) caused harm, the brunt of which is suffered and which the defendant knows is likely to be suffered in the forum state." *Id.* ¶ 11, 369 P.3d at 1274 (quoting *Bancroft & Masters, Inc. v. Augusta Nat'l Inc.*, 223 F.3d 1082, 1087 (9th Cir. 2000)).

The minimum contacts analysis "looks to the defendant's contacts with the forum State itself, not the defendant's contacts with persons who reside there." *Walden*, 571 U.S. at 285. Also, "a defendant's contacts with the forum State may be intertwined with his transactions or interactions with the plaintiff or other parties[, b]ut a defendant's relationship with a plaintiff or third party, standing alone, is an insufficient basis for jurisdiction." *Id.* at 286. Under the "effects" test, a "forum State's exercise of jurisdiction over an out-of-state intentional tortfeasor must be based on intentional conduct by the defendant that creates the necessary contacts with the forum." *Id.* Examples in which the Supreme Court has upheld jurisdiction under the "effects" test include "over defendants who have purposefully 'reach[ed] out beyond' their State and into another by, for example, entering a contractual relationship that 'envisioned continuing and wide-reaching contacts' in the forum State, or by circulating magazines to 'deliberately exploi[t]' a market in the forum State." *Id.* at 285 (alterations in original) (citation omitted). Application of the "effects" test makes clear that the alleged acts and conduct of the Sackler Respondents subjects them to specific personal jurisdiction. *Silver v. Brown*, 382 F. App'x 723 (10th Cir. 2010), is instructive. There, the Tenth Circuit found specific jurisdiction existed when a defendant "purposefully directed his blog at New Mexico, and that [the plaintiff]'s alleged injuries arise out of [the defendant]'s New Mexico-related activities." *Id.* at 728. In so ruling, the Tenth Circuit specifically noted that, like here, "it is clear that this is not a case of untargeted negligence that just happened to cause damage in New Mexico." *Id.* at 730.

C. The Citation Adequately Alleges That the Claims Arise Out of the Sackler Respondents' Acts in or Contacts with Utah, not Purdue's

Although the Division has not had the opportunity to propound Utah-specific discovery concerning the Sackler Respondents, the allegations in the Citation clearly implicate their conduct's effects in Utah. At various times over the years, Respondent Richard Sackler conducted some of his business from Utah, and was willing to use his Utah residence to house Purdue speakers at Utah conferences. ¶ 5. He served as head of Purdue's Marketing Department and of its Research and Development Department, before serving as President of Purdue from 1999-2003, where he oversaw the early marketing of OxyContin. *Id.* From 2003 to approximately 2014, he served as Co-Chairman of the Purdue Board. *Id.* Richard Sackler was a Board Member of Purdue until July of 2018, when a wave of litigation was filed against Purdue. *Id.*

Kathe Sackler is the daughter of Mortimer Sackler, one of the three original founders of Purdue, and she has served as a member of the board of directors of Purdue since the 1990s. ¶ 6. Upon information and belief, she held the position of Senior Vice President from at least 2004-2014. ¶ 151.

Richard and Kathe Sackler personally directed Purdue to conduct the deceptive or unfair acts or practices alleged that took place in Utah. ¶ 8. Through their decisions and directives at Purdue, they knowingly caused the unlawful promotion and sales of Purdue's opioids in Utah. *Id.* Business activities that the Sackler Respondents directed include Purdue's employment of a substantial number of sales representatives nationwide, including in Utah, to visit doctors in their local offices for the purpose of delivering deceptive marketing messages and encouraging such doctors to write prescriptions for Purdue's opioid products. *Id.* They determined the methods by which prescribers were targeted by Purdue's sales representatives, how often the doctors were visited, and what messages and strategies were used with them. *Id.* Among other things, the

Sackler Respondents directed Purdue's sales representatives, including those in Utah, to promote the use of opioids at high doses and for long periods of time, which was unfair and misleading, and which increased Purdue's revenue, but magnified the risk to the State of Utah and its residents. *Id.* The Respondents intentionally engaged, and continue to engage, in an aggressive marketing campaign to overstate the benefits and misstate and conceal the risks of treating chronic pain with opioids in order to increase their profits. ¶ 16.

Respondents pushed patients to stay on Purdue's opioids through the use of savings cards, or Purdue's Rx loyalty program. ¶ 68. In March 2008, Respondent Richard Sackler told a group of Purdue officials and other Sacklers that he was "eager to find ways to build our Rx loyalty to OxyContin tablets" before discussing several detailed points, all designed to get patients to fill their OxyContin prescriptions and to seek refills, but not disclosing the increased risk of addiction with longer use. *Id.* Staff reported to the Sackler Respondents that Purdue had conducted a sensitivity analysis on the opioid savings cards to maximize their impact and, as a result, had increased the dollar value and set the program period to be *15 months* long (and thus geared for substantial pain). *Id.* Research has demonstrated that nearly 60% of patients who used opioids for 90 days continued to use opioids five years later. *Id.* Purdue's marketing records reveal that Purdue sales representatives distributed these savings cards to Utah prescribers and encouraged Utah prescribers and their staff to distribute them to Utah consumers. *Id.* Respondents knew that their continuing efforts to employ deceptive and unfair marketing, despite Purdue being previously sanctioned by government agencies for such actions, would contribute to the opioid epidemic in Utah, and would create access to opioids by at-risk and unauthorized users, which, in turn, would perpetuate the cycle of abuse, addiction, demand, and illegal transactions. ¶ 117.

The Sackler Respondents each personally directed the deceptive, unconscionable, and otherwise unlawful conduct alleged in the Citation and NOAA. ¶ 125. Their actions were taken as members of the Purdue Board of Directors as well as individually as Purdue executive officers and owners of, as the company describes it, "the global Sackler pharmaceutical enterprise." *Id.* The Sackler Respondents seek to distance themselves from the consumer transactions because their most recent actions have been made as members of Purdue's Board of Directors. But, as members of the Board of Directors, the Sacklers "approv[ed] and disapprov[ed] nearly all important (and many less important) decisions." *Id.* Quarterly reports distributed to the board members and minutes of meetings demonstrate that the board members, including both of the Sackler Respondents, were informed of and approved all major activities. *Id.*

As members of the Board, the Sackler Respondents monitored and discussed the exact number of sales representatives; the exact number of visits they made to urge doctors to prescribe Purdue opioids; and the method to target the most profitable prescribers." ¶ 127; *see also* ¶ 8. The Board oversaw Purdue's strategy to push patients to higher doses of opioids and to steer patients away from safer alternatives. ¶ 127. In addition, the Board oversaw the tactics that sales representatives used at sales visits, and discipline for actions that Purdue prohibited, such as sales representatives putting their communications with doctors in writing in the form of emails. *Id.* The Board also oversaw Purdue's compliance obligations, including implementation of Purdue's "Region 0" program for identifying suspicious prescribers and pharmacies − a program that included about 17 prescribers in Utah. *Id.* In addition, the Board approved regular distributions of Purdue's profits to the Sackler family and its trusts, adding up to billions of dollars over the last two decades. ¶ 128. Richard and Kathe Sackler exercised a level of involvement and control,

particularly in the unlawful conduct described in the Citation, that, based on evidence available to the Division, surpassed even that of other Sackler Board member-owners. ¶ 129.

The Sackler Respondents were extremely involved in the decisions about how, when, and where to promote sales of its opioid medications. In fact, "[s]oon after OxyContin's launch, Respondent Richard Sackler reflected on his personal devotion to building OxyContin's market: "You won't believe how committed I am to make OxyContin a huge success. It is almost that I dedicated my life to it." ¶ 130. Like Richard Sackler, Kathe Sackler's goal was to ensure the broadest possible market for OxyContin. ¶ 152. She was involved not only in the development of Purdue's marketing messages, but also pressed, early on, for a "field force expansion plan" to increase detailing visits to prescribers to reach "sales projections and earnings targets." ¶ 154. The Sackler Respondents "personally oversaw, directed, made and approved many of the key decisions regarding Purdue's opioids" and are "legally responsible for their outcomes in Utah." ¶¶ 8, 131, 152-54.

Internal company documents and a prior deposition of Richard Sackler make clear that he was driven by a desire to dramatically increase the sales of, and profits from, Purdue's opioids for the Sackler Respondents' families, and was willing to deceive prescribers, regulators, and patients to do so. ¶ 131. In a deposition for prior litigation, Richard Sackler himself described in detail his participation in key decisions at Purdue regarding opioid product development and marketing, demonstrating that he participated directly in many of Purdue's major strategy decisions, and had authority to control them all. ¶ 133.

In this prior deposition testimony, Respondent Richard Sackler admitted that Purdue did *no* studies of the potential abuse liability of OxyContin before placing the drug on the market, even though the company was aware of a history of oxycodone abuse in the United States (oxycodone

is the active pharmaceutical ingredient in OxyContin) and, despite this knowledge, Sacker neither directed that the company conduct studies nor that the company disclose that it lacked evidence that OxyContin could be taken without the risk of addiction. ¶ 136. Richard Sackler also directed that Purdue intentionally promote OxyContin as a "weaker" opioid, without the stigma associated with other opioids, despite knowing the fact that OxyContin is twice as potent (and dangerous) as Purdue's morphine product, MS Contin. ¶ 138. In May 1997, an internal email from Michael Friedman, Purdue's Executive Vice President and Chief Operating Officer, revealed that Richard Sackler and Purdue were aware that doctors believed, incorrectly, that oxycodone was less powerful than morphine, principally because morphine was used for end-of-life pain and oxycodone was more often associated with less serious pain syndromes. *Id.* Mr. Friedman warned that "it would be extremely dangerous at this early stage in the life of the product to tamper with this 'personality' to make physicians think the drug is stronger or equal to morphine." *Id.* In other words, it would hurt profits to tell the truth. *Id.* Respondent Richard Sackler replied, "I agree with you. Is there general agreement, or are there some holdouts?" *Id.*[4]

The Sackler Respondents fostered the belief among physicians that OxyContin was weaker than morphine. ¶ 139. In a June 1997 email, Respondent Richard Sackler directed: "The only time that the rel[ative] potency comes up or should come up is when a physician feels that the

[4] The Sackler Respondents make much of what they contend to be the limitations period, ignoring the discovery rule discussed below. More importantly, they ignore that the limitations period for a claim on the merits does not dictate the nature and scope of the personal jurisdiction inquiry. *See, e.g., Vladoff v. Chaplin*, 2005 WL 1651172, at *2 (N.D. Ill. July 1, 2005) (Ex. 1) (discussing *Brown v. Grimm*, 624 F.2d 58 (7th Cir. 1980), a case in which "the district court dismissed [a complaint] for lack of personal jurisdiction, though the limitations period had run"). Were it to be otherwise, defendants could engage in "abusive litigation tactics," namely to "wait until expiration of the limitations period before contesting personal jurisdiction." *Schwilm v. Holbrook*, 661 F.2d 12, 16 (3d Cir. 1981). The evidence here is relevant to issues such as the nature of the Sacklers' activities and their knowledge and/or intent.

patient should be moved to morphine." ¶ 141. In other words, Purdue sales representatives were not to discuss the greater potency of OxyContin unless the doctor was thinking (incorrectly) that a switch to morphine (away from OxyContin) would increase potency. *Id.*

Richard Sackler also was directly involved in promoting the dangerously false idea that there was no maximum dose of OxyContin, even though at higher doses patients face a greater risk of addiction, overdose, and death. ¶ 147. In a 1997 email, he noted, "[I]n the US, we tell the oncologist that Oxy is the greatest drug because you should use it early, and because of no ceiling effect, you can titrate it up." *Id.*

In May 2001, the Sackler Respondents received a copy of a letter from the FDA to Purdue with meeting minutes from the meeting between the FDA and Purdue that took place on April 23, 2001. ¶ 155. According to the FDA's minutes, Purdue recognized that OxyContin had become a problem. *Id.* Specifically, the minutes stated that the number of OxyContin prescriptions increased tenfold from 1996 to 2000. The FDA also noted that during this time period, there was a shift in doctors who prescribed OxyContin from oncologists to family practitioners. The FDA described a "general perception" that OxyContin is weaker than morphine. The FDA suggested that Purdue "investigat[e] the sales representatives in the areas most affected by OxyContin abuse," and educate doctors in those areas on proper prescribing. The FDA also suggested that Purdue create a surveillance program and an educational campaign regarding addiction and abuse and that Purdue consider central distribution of OxyContin. While Purdue pressed for a risk management program that covered all long-acting opioids, the FDA made clear that OxyContin was the "bad actor." Later that month, the Sackler Respondents received a Regulatory Agency Contact Report that discussed a call with the FDA about OxyContin. *Id.* The purpose of the FDA's call was to discuss a recent draft press release written by Purdue to respond to a query from

the Roanoke Times about OxyContin abuse and diversion. *Id*. According to Purdue's report, the FDA stated that "the issues discussed at the April 23 meeting were much more serious than what was written in the press release." *Id*.

Purdue often delivered its misstatements through "key opinion leaders," doctors in the field of pain management who were heavily funded by Purdue. ¶ 94. Purdue frequently used opinion leaders to deliver its message because it knew that doctors often place great confidence in seemingly independent peers. *Id*. At least two of Purdue's key opinion leaders live and work in Utah − Dr. Webster and Dr. Perry Fine, who served on the board of the American Pain Foundation. *Id.* Dr. Webster, who works in Salt Lake City, received Purdue funding to develop and teach an online program titled *Managing Patient's Opioid Use: Balancing the Need and Risk*. ¶ 95. This presentation deceptively instructed that screening tools, patient agreements, and urine tests prevented "overuse of prescriptions" and "overdose deaths." *Id.* Upon information and belief, it has been available online for approximately six years and it has been viewed by additional Utah prescribers since it was first broadcast in September 2011. ¶ 95.

D. The Sackler Respondents' Declarations Offer Nothing to Contradict the Allegations of Their Decades-Long Misconduct

If anything, the Sackler Respondents' cursory Declarations, submitted with their Motions, support the Division's personal jurisdiction allegations. Both Richard and Kathe Sackler acknowledge in those Declarations that they held high-level management positions at Purdue for an extended period of time. Both Declarations are consistent with allegations (and documents) that the Sacklers quietly resigned from their formal management positions amid a criminal investigation of their company, but maintained control through other means, including having the

Board function as the *de facto* CEO of the company.[5] Both also admit to long-term positions on the Board of Directors. Kathe Sackler states that she was a member of the Board of the Purdue Frederick Company and/or Purdue Pharma, Inc. from an undisclosed time until September 27, 2008. *See* K.S. Decl. ¶ 3. Richard Sackler states that he was a member of same from an undisclosed time until September 27, 2018. *See* R.S. Decl. ¶ 3.

The Declarations are as notable for what they do not say as what they do say. The Sackler Respondents' attorneys devote much of the unsworn "Statement of Facts" to attempting to explain away the facts alleged in the Citation or spin them in a manner similar to the recent appearance of one of their attorneys on *Good Morning America* and other efforts by all Respondents to portray themselves in a positive light. If the Citation truly had erred, these declarations were the Sacklers' chance to set the record straight. Yet, they seem carefully crafted to say almost nothing. The declarations disclaim only holding a position as an "employee or officer" outside the time periods and titles identified in the declarations. The only specific fact with which they take issue is service as a director of one of the three Purdue entities – not because someone else had that leadership role, but because that entity has no directors.[6] The declarations do not dispute that the Sacklers,

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[5] *See* ¶¶ 126, 129. *See also* Decl. of Kathe A. Sackler ("K.S. Decl.") ¶ 3; Decl. of Richard A. Sackler ("R.S. Decl.") ¶ 3.

[6] The Sacklers do not dispute that "Richard Sackler is the listed inventor on a number of patents assigned to Purdue, including a patent for" an additional treatment product, ¶ 5, but take issue with the allegation that he ultimately "received" the patent, *see* ¶ 150; Decl. of Christopher J. Stanley at Ex. 1. That the patent was ultimately received by Rhodes Pharmaceuticals L.P. ("Rhodes"), rather than transferred to one of the Purdue entities, is of no moment. First, the ultimate recipient of the patent in no way detracts from the showing of knowledge and active participation. Second, Rhodes also is part of the Sacklers' global pharmaceutical enterprise, and a former senior manager at Purdue described Rhodes Pharmaceuticals, L.P. as "set up as a 'landing pad' for the Sackler family in 2007, to prepare for the possibility that they would need to start afresh following the crisis then engulfing OxyContin." *See* David Crow, *How Purdue's 'One-Two' Punch Fueled the Market for Opioids*, Fin. Times (Sept. 9, 2018), https://www.ft.com/content/8e64ec9c-b133-11e8-8d14-6f049d06439c. Further, reporting by the

whatever their title, approved and directed the conduct at issue in the Citation. They do not disclaim that this conduct was directed toward Utah, and that deceptive and unconscionable practices occurred in this state. *See generally* R.S. Decl.; K.S. Decl.. They do not dispute the Sacklers' possession of the detailed information concerning the company's operations as alleged in the complaint. *See id.* They do not dispute that the Board of Directors acted as a *de facto* CEO. They do not dispute that they could and did control Purdue. In short, the declarations *do not* claim that the Sacklers have never been involved in Purdue's marketing decisions, in staffing and compensation decisions, in plans to promote Purdue's products, or other activities alleged in the Citation, and do not disclaim any of the statements or actions attributed to them.

Richard Sackler states that he did not maintain an office at his home in Utah. *See* R.S. Decl. ¶ 2. He does not, however, dispute or disclaim that he did work from that residence. He also does not dispute that he "conducted a substantial amount of unspecified business from Utah, and was willing to use his Utah residence to house Purdue speakers at Utah conferences." ¶ 5.

In their Motion, the Sackler Respondents claim that Kathe Sackler was critical of and did not support "Project Tango." *See* Mot. 13-14. The Division is not aware of documents reflecting such criticism, and regardless of whether the project went forward, the documents on which the Citation relies demonstrate both her knowledge of the problem of addiction and abuse (contrary to Purdue's marketing statements) and her involvement in Purdue's business development. It is telling, however, that Kathe Sackler's declaration is in no way critical of the project. In fact, neither declaration, nor anything in the Sackler Respondents' Motion, is critical of anything that Purdue or any Sackler family member ever did at all. In fact, Purdue's Board, while the Sackler

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Financial Times revealed that a 2017 manual showed that Rhodes and Purdue used the same employee handbook, and employees reported that "little distinction is made internally between the two companies." *See id.*

Respondents were members, voted to approve a criminal guilty plea by their company, including an Agreed Statement Of Facts admitting, in 2007, that, for more than six years, supervisors and employees *intentionally* deceived doctors about OxyContin: "Beginning on or about December 12, 1995, and continuing until on or about June 30, 2000, Purdue supervisors and employees, with the intent to defraud or mislead, marketed and promoted OxyContin as less addictive, less subject to abuse and diversion, and less likely to cause tolerance and withdrawal than other pain medications."[7]

E. Additional Documents Further Bolster the Showing of Personal Jurisdiction and Discovery Would Likely Reveal Even More

Additional documents further corroborate the allegations as to both of the Sacklers. [redacted][8] [redacted][9] [redacted]

[7] 2007-05-09 Agreed Statement of Facts ¶ 20 (Ex. 2), *available at* https://www.documentcloud.org/documents/279028-purdue-guilty-plea.

[8] PPLPC012000368569 (Ex. 3).

[9] PPLPC039000000157 (Ex. 4).

[redacted][10] [redacted]

[redacted][11]

Contrary to the unsupported suggestion in the Sackler Respondents' Motion, the available evidence shows that Richard and Kathe Sackler were both involved in Purdue's marketing. To ensure marketing consistency nationwide, Purdue, among other things, provided multi-week trainings for sales representatives at its headquarters in Connecticut, followed by field training in the target area with more seasoned representatives.[12] One representative recalled being seated at a table with Richard Sackler "[a]t a celebratory dinner following the training, and described himself as 'blown away,' thinking: 'This is the dude that made it happen. He has a company that his family owns. I want to *be* him one day.'"[13] [redacted]

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10 PDD9316716146 (Ex. 5).

11 PPLPC062000001559 (Ex. 6).

12 Decl. of Sean Thatcher, *Montana v. Purdue Pharma L.P.*, No. ADV-2017-949 (Mont. 1st Jud. Dist. Ct., Lewis & Clark Cty.).

13 Patrick Radden Keefe, *The Family that Built an Empire of Pain*, New Yorker (Oct. 30, 2017), https://www.newyorker.com/magazine/2017/10/30/the-family-that-built-an-empire-of-pain (Ex. 7).

[redacted][14]

Esquire describes this passion as leading to "an appetite for micromanagement," including sending a middle of the night "sales bulletin," directing sales representatives to call his secretary with a "secret password."[15] A former employee recalled an "abrupt" shift as "Richard started taking a more prominent role in the company during the early 1980s. *Id.*

[redacted][16] [redacted]

[redacted][17]

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14 PPLP004030117 (Ex. 8).

15 Christopher Glazek, *The Secretive Family Making Billions From The Opioid Crisis*, Esquire (Oct. 16, 2017), http://www.esquire.com/news-politics/a12775932/sackler-family-oxycontin/.

16 PDD1701029146 (Ex. 9).

17 PDD150191375 (Ex. 10).

[redacted][18] [redacted]

[redacted][19]

Richard Sackler kept a particularly close eye on Purdue's sales numbers. In March 2008, for example, he directed staff to provide him with thousands of pieces of data about sales trends.[20] Staff delivered the data early Sunday morning and Richard responded with detailed instructions for new data that he wanted that same day.[21] Although an employee sent him the additional data only a few hours later, Richard Sackler responded by calling him at home, insisting that the sales forecast was too low, and threatening that he would have the Board reject it.[22] On Monday morning, staff emailed among themselves to prepare for meeting with Richard, highlighting issues with the results that Richard was looking for.[23]

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18 PDD9316706668 (Ex. 11).

19 PDD9316704259 (Ex. 12).

20 PPLPC012000174478 (Ex. 13).

21 PPLPC012000174477 (Ex. 14).

22 PPLPC012000174202 (Ex. 15).

23 PPLPC012000174476 (Ex. 16).

[redacted][24]

[redacted]

[redacted][25]

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[redacted][27]

[redacted]

[redacted][28]

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[redacted][29]

[redacted]

[24] PPLPC012000234970-971 (Ex. 17); *see also* 2009-08-10 email from John Stewart, PPLPC012000234801 (Ex. 18) ("Richard has asked me about this at least 5 times over the past few weeks").

[25] Friedman Dep. 94:7-94:23 (Dec. 1996) (Ex. 19).

[26] Friedman Dep. 570:23-571:17 (July 2002) (Ex. 20).

[27] Friedman Dep. 582:10-583:4 (July 2002) (Ex. 21).

[28] Friedman Dep. 583:16-584:22 (July 2002) (Ex. 22).

[29] Friedman Dep. 34:5-35:9 (May 2004) (Ex. 23).

[redacted][30]

[redacted][31] [redacted]

[redacted][32]

[redacted][33] [redacted][34]

The *de facto* CEOs also made sure [redacted]

[30] Friedman Dep. 309:19-311:3 (July 2002) (Ex. 24).

[31] PDD9316100460 at BN-0462 (Ex. 25) ([redacted]), *accord* PPLPC042000016733 (Ex. 26) ([redacted]).

[32] PKY183212603 (Ex. 27).

[33] PKY183212603 at -2620 (Ex. 28).

[34] *Id.*

[redacted][35] [redacted]

[redacted][36]

[redacted]

[redacted][37]

In addition to making key personnel decisions Kathe also made decisions regarding employee compensation. According to an internal document from 2009, Kathe Sackler sat on the compensation committee, which made decisions regarding the amount of bonuses paid, which was linked to increased sales and sales goal attainments (or, in other words, Purdue's marketing success).[38]

[redacted]

[redacted]

[redacted]

[redacted][39]

[redacted]

[redacted]

[redacted]

35 PDD9316304897 (Ex. 29); PDD9316304898 (Ex. 30).

36 *Id.*

37 PPLPC020001106306 (Ex. 31).

38 PPLPC061000049074 (Ex. 32).

39 *See generally* Aug. 2015 Dep. of Richard Sackler.

[redacted][40] [redacted]

[redacted][41] [redacted]

[redacted][42]

[redacted]

[redacted][43] [redacted]

[redacted][44]

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40 PKY180149256 (Ex. 33).

41 PPLPC045000004928 (Ex. 34) (emphasis added).

42 PPLPC045000004928 (Ex. 35).

43 PPLPC012000170948 (Ex. 36).

44 PPLP004030162 (Ex. 37).

[redacted][45] [redacted]

[redacted][46]

[redacted]

[45] PDD1701611080 (Ex. 38).

[46] PPLPC04500005405 (Ex. 39).

[redacted] For example, Purdue's Board, which included the Sackler Respondents, was informed that from second quarter 2007 until second quarter 2008, Purdue received over 3,200 Reports of Concern but only 109 field inquiries (or investigations) were conducted in response. Despite having a steady increase of tips to Purdue's compliance hotline and Reports of Concern, Purdue and the Sackler Respondents failed to report this potential diversion to authorities, or to take other meaningful steps to prevent and address the diversion of its opioids. Internal documents show they also kept tabs on issues of abuse and division through e-mail lists, google alerts, and similar messages.[47] As another example, in 2007 one of Purdue's top attorneys, Howard Udell, sent the Sacklers an email about news stories around the country that showed DEA data that demonstrated large increases of the use of opioids, particularly OxyContin, from 1997 until 2005. According to the communication, he stated, "[m]any of these articles have suggested that this increase is a negative development suggesting overpromotion and increasing abuse and diversion of these products."[48] Instead of stopping or redressing the deceptive marketing, however, the response was a public relations campaign to counter the news reports and publicly promote Purdue as a good corporate citizen. Richard Sackler

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47 *See, e.g.*, PPLPC061000024965 (Ex. 40). The Sackler's Motion cites to selected documents, arguing, again on the merits, that there was no violation found of the Corporate Integrity Agreement ("CIA") with the federal government. [redacted] PPLP004367636 at -7694 (Ex. 35). That violations were either resolved such as the "deficiencies" that "prompted an extensive corrective action plan in 2009," PDD9316101579 (Ex. 41), or not discovered, does not show that they did not occur. Indeed, the Sacklers would have been aware of evidence that deceptive marketing was occurring from the lawsuit filed by the City of Chicago in 2014, which is a matter of public record, later lawsuits, as well as investigations such as that conducted by the New York Attorney General, which resulted in a 2015 settlement with Purdue. *See* Attorney General of the State of New York, *In the Matter of Purdue Pharma L.P.*, Assurance No.: 15-151, Assurance of Discontinuance Under Executive Law Section 63, Subdivision 15.

48 PPLPC012000153272 (Ex. 42).

devoted so much of his time to this effort that he was asked in an email, "Is the oxycontin controversy still consuming all your time?"[49]

When the Attorney General of Connecticut (now Senator), Richard Blumenthal, wrote to Purdue in a letter received July 31, 2001, he directed his letter to Richard Sackler. He would not have done so, of course, if he believed that Richard Sackler lacked the authority or knowledge to respond to his concerns. The letter states among other things, "Dr. Sackler, I have been increasingly dismayed and alarmed about the problems of escalating abuse of OxyContin," and references an earlier statement by Richard Sackler.[50] Despite very specific suggestions from Attorney General Blumenthal about steps that Purdue should take to rein in the inappropriate marketing of OxyContin, Purdue took – and the Sacklers directed – no changes[51].

[redacted][52]

[redacted][53]

Finally, Purdue's documents suggest it was no small matter that the Sacklers received and had ready access to the information they did. In a 2003 affidavit in support of a motion for

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49 PPLC45000006550 at BN-6554 (Ex. 43).

50 PDD1507271042 (Ex. 44).

51 Friedman Dep. 424:24-426:2 (Aug. 2001) (Ex. 45).

52 PPLPC012000023080 (Ex. 46).

53 PPLPC019000112417 (Ex. 47).

protective order by Purdue in other litigation, Mr. Friedman, who attested to familiarity with "the internal practices employed by Purdue to protect its highly confidential documents,"[54] explained that Purdue "spends millions of dollars each year developing and marketing its products," and information regarding these efforts is "vital to the company's survival."[55] He attested that, "[f]or that reason, Purdue jealously guards its highly confidential information."[56] Further describing the procedures, he explained that, [s]ensitive marketing documents are routed to a small number of Purdue employees on limited distribution lists."[57] As this policy reveals, there was a reason the Sacklers received this sensitive information: they were part of a small group intended to act on it, and with a need to know.

"When a defendant moves to dismiss for lack of jurisdiction, either party should be allowed discovery on the factual issues raised by that motion." *Health Grades, Inc. v. Decatur Mem'l Hosp.*, 190 F. App'x 586, 589 (10th Cir. 2006) (quoting *Sizova v. Nat'l Inst. of Standards & Tech.*, 282 F.3d 1320, 1326 (10th Cir. 2002)). Although a court has discretion, "a refusal to grant discovery constitutes an abuse of discretion if the denial results in prejudice to a litigant." *Sizova*, 282 F.3d at 1326. "Prejudice is present where 'pertinent facts bearing on the question of jurisdiction are controverted . . . or where a more satisfactory showing of the facts is necessary.'" *Id.* (alteration in original) (quoting *Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406, 430 n.24 (9th Cir. 1977)). Here, the Division has not had the opportunity to conduct jurisdictional discovery against the Sacklers, or any Utah-specific discovery. Such discovery has been permitted in opioid litigation in which defendants have challenged personal jurisdiction. Order Denying

54 Aff. of Michael Friedman ¶ 10.

55 *Id.* ¶ 13.

56 *Id.*

57 *Id.* ¶ 16.

Mots. to Dismiss 2, *Kentucky, ex rel. Beshear v. Mallinckrodt PLC*, No. 18-CI-00381 (Ky. Cty. Cir. Ct. Jan. 22, 2019) (Ex. 48) (denying motion to dismiss for lack of personal jurisdiction and ordering jurisdictional discovery); Ruling Re: Jurisdictional Disc. on Defs. Allergan, Teva, & Mallinckrodt, *In re Nat'l Prescription Opiate Litig.*, No. 1:17-MD-2804 (DAP) (N.D. Ohio Apr. 3, 2019), Doc. 1512 (Ex. 49). More than adequate basis for personal jurisdiction exists, particularly given that the Sacklers have offered nothing to call jurisdiction into question.

F. The Sackler Respondents' Cases in Support of Dismissal for Lack of Personal Jurisdiction Are Easily Distinguishable

The Sackler Respondents rely heavily on *MFS* for the propositions that "[m]ere corporate status can never be the basis for jurisdiction," that "Defendants must have performed some affirmative action themselves," and that managing and controlling a company is an insufficient basis for specific jurisdiction. *See* Mot. 21, 23-25 (quoting *MFS*, 2004 UT 61, ¶¶ 11 & 15, 96 P.3d at 931, 932). The Sacklers did more than manage and control Purdue; they were personally responsible for many of its marketing activities in Utah.

In *MFS*, plaintiffs brought a securities law and common law fraud and negligence suit against officers and directors of LES, an environmental service company, alleging plaintiffs relied on LES's incorrect financial statements when they purchased bonds. *See MFS*, 2004 UT 61, ¶¶ 2-5, 96 P.3d at 929-30. "Each defendant submitted affidavits specifically denying allegations of personal dealings regarding the bond issuance" whose facts "are taken as true and the facts recited in the complaint are considered only to the extent that they do not contradict the affidavit." *Id.* ¶ 14, 96 P.3d at 931-32. That left plaintiffs to rely solely on defendants' status as officers or directors to support personal jurisdiction. *See id.* ¶ 14, 96 P.3d at 932.

Unlike this case, the plaintiffs in *MFS* "made no allegations of affirmative actions on the part of defendants. Instead they merely made allegations based on defendants' status as directors

and officers." *Id.* ¶ 15, 96 P.3d at 932. The *MFS* court relied in part on a California case for its conclusion that the defendants, in their roles as directors and officers, did not have sufficient minimum contacts with the forum. *See id.* at ¶ 17, 96 P.3d at 932 ("[E]vidence does not show which individual officers and directors personally directed or actively participated in the alleged tortious conduct, or whether they purposefully directed that conduct toward [the forum state]." (alteration in original)). Here, to the contrary, the Citation specifically alleges the Sackler Respondents "personally directed," ¶¶ 8, 25, in acts and conduct directed toward Utah, and gives examples of what they did, *see, e.g.*, ¶¶ 126-160. Also, here, the Sackler Respondents made no attempt to contradict the allegations in the Citation; instead, in their declarations they simply state what positions they had within Purdue and when they held them, and their domiciles.

The Sackler Respondents' reliance on *Puravai, LLC v. Blue Can*, 2018 WL 5085711 (D. Utah Oct. 17, 2018) (Ex. 50), for their arguments that the Division has not pled causation, Mot. 22, and that nationwide advertising not directed at Utah cannot support jurisdiction, Mot. 26, fails as well. First, the Sackler Respondents' "causation" requirement stems from a federal Tenth Circuit case, not a Utah case. *See Puravai*, 2018 WL 5085711, at *5; *see also State, ex rel. Wilkinson v. B & H Auto,* 701 F. Supp. 201, 205 (D. Utah 1988) ("The Utah Consumer Sales Practices Act is broad enough to impose liability upon suppliers of consumer goods who deceptively transact with other suppliers."). Second, the Division is not alleging that the Sackler Respondents simply advertised their products on the internet without any focus on Utah. Rather, the allegations include that they directed Purdue's employment of opioid sales representatives in Utah, ¶ 8, the methods by which prescribers were targeted, *id.*, oversaw tactics that sales

representatives used during sales visits, ¶ 127, and arranged funding for two KOLs – Dr. Webster and Dr. Perry Fine – to promote Purdue opioids in Utah and around the country, ¶¶ 94-95.[58]

Similarly, the cases the Sackler Respondents cite in support of their argument that federal courts in other states will not exercise jurisdiction based on vaguely worded generalizations that a defendant "oversaw," "authorized," was a "guiding spirit," or was a "micro-manager" of a company are easily distinguishable. Mot. 25 n.13 (citing *Gerstle v. Nat'l Credit Adjusters, LLC*, 76 F. Supp. 3d 503, 510 (S.D.N.Y. 2015); *Fasugbe v. Willms*, 2011 WL 3667440, at *3-4 (E.D. Cal. Aug. 22, 2011) (Ex. 52); *Delman v. J. Crew Grp., Inc.*, 2017 WL 3048657 (C.D. Cal. May 15, 2017) (Ex. 53)). In *Gerstle*, the court noted that, unlike here, "[n]othing in the Complaint indicates that any of these individuals . . . were 'primary actors' in the specific matter at hand." 76 F. Supp. 3d at 510. In *Fasugbe* the court found that plaintiffs' allegations concerning the head of a company – in contrast to the Division's allegations here − were merely "conclusory statements that he was a 'guiding spirit' and 'central figure' and made all final decisions." 2011 WL 3667440, at *3. Finally, the *Delman* case suffered the same fate: the plaintiff's allegations concerning the defendant company's CEO were so pitifully weak that the court would not find specific jurisdiction. "Simply alleging, *without more*, that [the CEO] is very involved with the business . . . is not sufficient to make [the CEO] subject to the Court's personal jurisdiction." 2017 WL 3048657, at *4 (emphasis added). By contrast, *F.T.C. v. Bay Area Business Council, Inc.*, 423 F.3d 627 (7th Cir. 2005), is instructive. There, as here, an individual defendant submitted a declaration "[t]o support her claim . . . that she is not an 'owner or stockholder'" of a corporation

[58] These same allegations render inapposite the Sackler Respondents' other cited cases on this point. *See* Mem. 26 & n.14 (citing *Mouzon v. Radiancy, Inc.*, 85 F. Supp. 3d 361, 372 (D.D.C. 2015); *Federated Rural Elec. Ins. Corp. v. Kootenai Elec. Coop.*, 17 F.3d 1302, 1305 (10th Cir. 1994); *PS Audio, Inc. v. Allen*, 2018 WL 5309834 (D. Colo. Aug. 10, 2018) (Ex. 51)).

and therefore lacked the ability to control the corporation. *Id.* at 637. In upholding the grant of summary judgment in the FTC's favor, the Seventh Circuit affirmed that the defendant's declaration was "evidence that the district court properly disregarded," noting "her assertion is irrelevant." *Id.*; *see also id.* at 632 (upholding district court's ruling "that Porcelli and Harris were individually liable for the corporate defendants' deceptive practices because both had authority to control the corporate defendants and knew about their deceptive practices"); *F.T.C. v. World Media Brokers*, 415 F.3d 758, 764 (10th Cir. 2005) (rejecting argument that defendant "cannot be individually liable because he did not 'directly or indirectly make false or misleading statements to U.S. consumers or participate in practices designed to induce U.S. consumers to purchase shares or interests in foreign lottery tickets.' Yemec's argument misses the mark. Whether he personally made misrepresentations is irrelevant so long as the FTC has shown that he had authority to control the corporations' deceptive practices.").

G. The Sacklers' Arguments that the Conduct They Directed Was Not Wrongful Are Both Unavailing and Unmoored from any Legal Argument in Their Motion

The Sacklers devote much of their background section to attempting to distort or spin statements quoted in the Citation to argue that the statements were not misleading or the conduct not wrongful. They do not, however, raise any legal argument concerning whether the deceptive marketing campaign described in the Citation meets the Utah Consumer Sales Practices Act ("UCSPA")'s criteria for deceptive or unconscionable sales practices. This section thus appears to be a gratuitous attempt to explain away their internal documents now that they have come to light. This, of course, is not a new endeavor. The Sackler family has become famous for both its former secrecy, and more recently, efforts to promote their public image and that of Purdue in the media. These efforts include, for example, an onslaught of full page advertisements by Purdue in major newspapers seeking to promote Purdue as a good corporate citizen and citing a "principle

upon which physician brothers founded the company."[59] In reality the documents concerning, for example, the "blizzard of prescriptions" to be unleashed, ¶ 135, and efforts to "hammer on the abusers," ¶ 149, speak for themselves, and any dispute over their interpretation is a factual dispute over the merits that cannot be resolved on a motion to dismiss. Further, in seeking to claim credit for example for abuse deterrent formulations (which also were deceptively marketed), Respondents hardly distance themselves from the conduct at issue. *See* Mot. at 11.

IV. THE DIVISION MAY ADJUDICATE THE CLAIMS AGAINST THE SACKLER RESPONDENTS

In support of their arguments that "this Tribunal lacks authority to adjudicate the claims in the Citation" against them, the Sackler Respondents first argue that "the Citation does not identify any communications that either Individual Respondent made to consumers (patients) in Utah." Mot. 28. This argument fails because the Division is not required to allege the Individual Respondents made any such communications. The UCSPA specifically provides that a supplier may be liable "whether or not he deals directly with the consumer." Utah Code Ann. § 13-11-3(6).

Contrary to the Sackler Respondents' second argument, Mot. 29, the Sackler Respondents are suppliers under the UCSPA. The UCSPA contemplates liability on the part of those who do not directly engage with consumers if they solicit or engage in consumer transactions. In addition, "[a] deceptive [or unconscionable] act or practice by a supplier in connection with a consumer

[59] Another separate article reports that this advertisement alone cost $277,200 (i.e., more than three times the amount Purdue claimed (wrongly) in its motion to dismiss was contemplated as a potential total civil penalty in a proceeding such as this – an argument the Sackler Respondents purport to incorporate by reference), https://www.itemlive.com/2018/10/08/maker-of-oxycontin-responds-to-lawsuits-with-full-page-ad-outlines-measures-to-combat-crisis/ (Ex. 54).

transaction violates this chapter whether it occurs before, during, or after the transaction." Utah Code Ann. § 13-11-4; *see also* Utah Code Ann. § 13-11-5 (using "unconscionable").

The UCSPA also expressly provides guidance for its construction and purpose, including that: "This act shall be construed liberally to promote the following policies: . . . to protect consumers from suppliers who commit deceptive and unconscionable sales practices; [and] to encourage the development of fair consumer sales practices." Utah Code Ann. §§ 13-11-2(2) & (3). To effectuate these purposes, the UCSPA has chosen an "expansive definition" of supplier. *See Sexton v. Poulsen & Skousen P.C.*, 2019 WL 1258737, at *9-10 (D. Utah Mar. 19, 2019) (Ex. 55) (holding debt collectors qualify as suppliers under UCSPA). "To interpret 'supplier' narrowly to include only those in privity with the consumer would defeat the clear purpose of the Act, and could not have been intended by the Utah legislature." *B & H Auto*, 701 F. Supp. at 204 (holding parties that changed odometers and sold vehicles to resaler were suppliers for purposes of UCSPA).

Here, the Division has alleged that "Respondents are 'suppliers' within the meaning of the UCSPA because, through their direct involvement in Purdue's business, they indirectly solicited and engaged in the sales of opioids in Utah," ¶ 8, and these and all allegations in the Citation must be taken as true at this stage, *see Webster v. JP Morgan Chase Bank, NA*, 2012 UT App 321, ¶ 2, 290 P.3d 930, 931. The Sackler Respondents seek to distance themselves from the consumer transactions because their most recent actions have been made as members of Purdue's Board of Directors, but Purdue's planning documents describe the Board as "the 'de-facto' CEO" of the company. ¶ 126. In addition to being a board member, Richard Sackler has served as "head of marketing, President, and Co-Chairman of the Board." ¶ 132. Kathe Sackler "has been a member

of the board of directors of Purdue since the 1990s," and "she held the position of Senior Vice President from at least 2004 to 2014." ¶ 151.

The Sackler Respondents next argue that "neither Sackler Respondent is alleged to have personally engaged in any relevant transaction in Utah of any kind, much less a 'consumer transaction' within the UCSPA." Mot. 29. To the contrary, the Citation alleges that the Sackler Respondents, through their instrumentality, Purdue, engaged in acts in Utah. *See, e.g.*, ¶¶ 17, 26. In support, the Sackler Respondents argue that "[t]he Division of Consumer Protection has no statutory mandate to adjudicate claims against a pharmaceutical manufacturer whose medicines are approved by the FDA and are dispensed by doctors and pharmacists in the highly-regulated field of pharmaceuticals and controlled substances." *Id.* This argument fails for the reasons described in the Division's opposition to Purdue's motion to dismiss. *See* Opp'n to Purdue MTD 23-27, 29-31.

With respect to their fourth argument, that "the Citation does not plead that the Sackler Respondents themselves engaged in any act '*in connection* with a consumer transaction' in Utah," Mot. 29, the Sackler Respondents are wrong. As a preliminary matter, Respondents' conduct – including the conduct of the Sackler Respondents – was national in scope and therefore impacted Utah. *See, e.g.*, ¶¶ 18, 38, 42, 46, 48, 51, 56, 59-105. Moreover, the Citation ***does*** allege acts that specifically occurred in Utah and that the Sackler Respondents directed these acts. *See, e.g.*, ¶ 17 ("Purdue paid at least two Utah doctors to be 'key opinion leaders.'"); ¶ 26 ("Purdue has given Utah prescribers almost $200,000 in gifts and other payments during the five-year period between 2013-2017. . . . [F]rom 2006-2017, Respondents employed 86 sales representatives in Utah to visit

Utah prescribers in their medical offices and deliver direct marketing messages . . . . During this time period, Respondents' sales representatives visited more than 5,000 Utah prescribers.").[60]

Equally unavailing is the Sackler Respondents' attempt to insulate themselves by claiming that the Division does not allege either did anything "aside from the ordinary functions of any director." Mot. 30. This is patently false. The Sacklers were not simply board members, but "served for many years as executive officers of Purdue, taking many actions personally to carry out the unfair, deceptive and otherwise unlawful activity that led to Utah's opioid epidemic." ¶ 129. The Citation is replete with allegations that describe this conduct in detail. *See* ¶¶ 125-60.[61] Accordingly, far from being "numerous steps away from any consumer action," Mot. 30, the Sackler Respondents were central actors who directly orchestrated Purdue's deceptive scheme.

The Sackler Respondents' fifth argument, that because "Purdue manufactures an FDA-approved medicine, and sells that medicine under an FDA-approved label that explicitly warns of the risk of addiction and misuse, the UCSPA expressly does not apply to any of the claims in the Citation," Mot. 31, fails for the same reasons as described in the Division's memorandum of law in opposition to Purdue's motion to dismiss, *see* Opp'n to Purdue MTD 23-25.

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[60] The Sackler Respondents read too much into *Holmes v. American States Insurance Co.*, 2000 UT App 85, 1 P.3d 552. *See* Mot. 30-31. That case merely stands for the proposition that "[u]nder the facts of this case, it is clear that appellees are not appellant's 'supplier.'" 2000 UT App ¶ 21, 1 P.3d at 557. In fact, the *Holmes* court held that one may be a supplier "whether or not he deals directly with the consumer." *Id.* ¶ 20, 557 (citing Utah Code Ann. § 13-11-3(6)).

[61] The Sackler Respondents' argument that upholding claims against them would allow the Division to "bring duplicative claims against any director of [a] company simply because he or she engaged in ordinary functions that had nothing to do with the alleged misconduct," Mot. 31, is belied by any fair reading of the allegations in this case. The Citation's allegations make clear that the Division is not seeking to hold the Sackler Respondents liable for "ordinary [board] functions that had nothing to do with the alleged misconduct." Indeed, far from attempting to expand liability to boards of directors generally, the Division sued just two of Purdue's directors based on the evidence received at the time of the filing of Citation.

The Sackler Respondents' remaining three arguments – that "the UCSPA does not apply to any of the claims in the Citation" because Purdue "manufacturers and FDA-approved medicine, and sells that medicine under an FDA-approved label"; that "Purdue ceased all prescription opioid marketing activities in February 2018"; and that unconscionable acts or practices are impermissible under the UCSPA, Mot. 31-21 – are all equally unavailing for the reasons described in the Division's opposition to Purdue's motion to dismiss, *see* Opp'n to Purdue MTD 23-25, 27-29.

V. THE CITATION STATES A CLAIM AGAINST THE SACKLER RESPONDENTS

A. The Division's Allegations Are Well-Pleaded

The Sackler Respondents argue that "[t]he Citation fails to identify the alleged violations upon which the Division's claims are premised" because the Division fails to plead with particularity that "(i) the Sackler Respondents personally participated in making any specific acts or practice of deception of healthcare providers in Utah, and (ii) the circumstances warrant a finding of unconscionability." Mot. 34. The Sackler Respondents are wrong.

In addition to the Citation's general allegations, the Citation contains numerous allegations that detail the specific wrongdoing that the Division attributes to Richard and Kathe Sackler. *See* ¶¶ 125-60. By way of example, the Citation alleges that Richard and Kathe Sackler "oversaw Purdue's strategy to push patients to higher doses of opioids and to steer patients away from safer alternatives." ¶ 127.

With respect to Richard Sackler, the Citation alleges that "as head of Purdue's marketing department and then President and Co-Chairman of Purdue's Board . . . Richard Sackler would have been aware of and approved all of Purdue's marketing themes and strategies." ¶ 132. As part of this, "Richard Sackler articulated the marketing strategy that he and Purdue would use to fundamentally change the medical landscape in Purdue's favor." ¶ 137, *see also* ¶ 138 (alleging

that Richard Sackler "directed that Purdue intentionally promote OxyContin as a 'weaker' opioid . . . despite knowing the fact that OxyContin is twice as potent (and dangerous) as Purdue's morphine product, MS Contin."); ¶ 147 (describing how Richard Sackler "was directly involved in promoting the dangerously false idea there was no maximum dose of OxyContin").

The Citation also pleads detailed allegations against Kathe Sackler. Kathe Sackler served as Purdue's Senior Vice President from 2004-14. ¶ 151. In this role, as well as developing Purdue's marketing messages, Kathe Sackler pressed "for a 'field force expansion plan' to increase detailing visits to prescribers to reach 'sales projections and earnings targets.'" ¶ 154; *see also* ¶ 157 (describing Kathe Sackler's role in a business development initiative to make profits from selling opioids and treating resulting opioid addiction).

In sum, contrary to their protestations, the Citation "provide[s] the Sackler Respondents with 'fair notice' of the claim against them." Mot. 34.

B. The Division's Allegations Are Not Time-barred

The Sackler Respondents are incorrect that the allegations against them are time barred for two reasons: the Division has alleged violations by the Sackler Respondents within the last 10 years; more importantly, the Sackler Respondents concealed their wrongdoing and the harm of Purdue's products so that equitable tolling applies to violations before January 2009. "Under the fraudulent concealment doctrine, Utah courts toll the running of the limitations period if 'a plaintiff does not become aware of the cause of action because of the defendant's concealment or misleading conduct.'" *Colosimo v. Roman Catholic Bishop of Salt Lake City*, 2007 UT 25, ¶ 38, 156 P.3d 806, 816 (quoting *Russell Packard Dev., Inc. v. Carson*, 2005 UT 14, ¶ 25, 108 P.3d 741,

747).[62] "'[W]hen a plaintiff alleges that a defendant took affirmative steps to conceal the plaintiff's cause of action,' . . . [and] a plaintiff has made a prima facie showing of fraudulent concealment, the 'plaintiff will be charged with constructive notice of the facts forming the basis of a cause of action only at that point at which a plaintiff, reasonably on notice to inquire into a defendant's wrongdoing, would have, with due diligence, discovered the facts forming the basis for the cause of action despite the defendant's efforts to conceal it.'" *Colosimo*, 2007 UT 25, ¶ 39, 156 P.3d at 816 (quoting *Russell Packard Dev.*, 2005 UT 14, ¶ 38, 108 P.3d 750). "The question of when a plaintiff reasonably would have discovered the facts underlying a cause of action in light of a defendant's affirmative concealment is a 'highly fact-dependent legal question[]' that is 'necessarily a matter left to . . . finders of fact.'" *Russell Packard Dev.*, 2005 UT 14, ¶ 39, 108 P.3d at 750 (first alteration in original). Given that the Division has pled concealment by the Sackler Respondents, the motion to dismiss must be denied.

The Division has alleged repeatedly that the Respondents concealed their conduct and the harm of their products or engaged in misleading conduct. *See* ¶¶ 8, 16, 32, 46, 48, 63, 67, 73, 113, 164, 168, 174. The Respondents' scheme worked specifically because it was concealed. The fact that it continued long enough for the Division to issue the Citation during the limitations period of some of the Sackler Respondents' lengthy wrongdoing does not prevent the Division from pursuing penalties for their violations outside the 10-year limitations period. The Utah Supreme Court has said a plaintiff can invoke the discovery rule even if the plaintiff knew or should have known about the cause of action prior to the running of the limitations period because "[s]uch an

[62] The statute of limitations also may be tolled "where the case presents exceptional circumstances and the application of the general rule would be irrational or unjust, regardless of any showing that the defendant has prevented the discovery of the cause of action." *Russell Packard Dev.*, 2005 UT 14, ¶ 25, 108 P.3d at 747.

overly strict interpretation would run counter to the touchstone of reasonableness upon which the concealment version of the discovery rule is based." *Russell Packard Dev.*, 2005 UT 14, ¶ 27, 108 P.3d at 747.

In *In re National Prescription Opiate Litigation*, the magistrate judge found the Respondents' alleged concealment "sufficient to raise a plausible inference that the applicable limitation periods are subject to tolling." *In re Nat'l Prescription Opiate Litig.*, 2018 WL 4895856, at *26 (N.D. Ohio, Oct 5, 2018) (Ex. 56), *R & R adopted in part, rejected in part*, 2018 WL 6628898 (N.D. Ohio Dec. 19, 2018) (Ex. 57). Reviewing the magistrate's recommendation, the district court denied the motion to dismiss because the allegations were "insufficient to *conclusively establish* that any of Plaintiffs' claims are time-barred by the statute of limitations." *In re Nat'l Prescription Opiate Litig.*, 2018 WL 6628898, at *2.

In any event, the Division has also alleged numerous acts, including acts by the Sackler Respondents, since January 2009. For example, in alleging that "Richard and Kathe Sackler consistently pressed for more information about Purdue's marketing strategies and implementation and were more deeply involved in their direction," the Division cited an example from November 2009. ¶ 156. The Division has alleged that "[i]n 2011, Richard Sackler even arranged to accompany several Purdue sales representatives into the field to visit prescribers" and in 2012 made "nearly daily demands for information and involvement in decision-making." ¶ 143. And Kathe Sackler's 2014 involvement in Project Tango provides evidence of her awareness "of the link between pain treatment and opioid addiction treatment." ¶¶ 157-58.

Moreover, the Division has made numerous allegations that the Sackler Respondents were directly involved in actions of the Purdue Respondents. For example, the Division alleges that "the Sackler Respondents directed Purdue's sales representatives, including those in Utah, to

promote the use of opioids at high doses and for long periods of time, which was unfair and misleading, and which increased Purdue's revenue, but magnified the risk to the State of Utah and its residents." ¶ 8; *see also* ¶¶ 125-27. The Division also alleges that, "[a]t the Sackler Respondents' direction, Purdue has continued to promote, directly and indirectly, deceptive marketing messages that misrepresent, and fail to include material facts about, the dangers of opioid usage in Utah, despite knowing that these marketing messages are false, in order to increase their sales, revenue, and compensation." ¶ 161. For this reason, actions taken by Purdue after January 2009 can be attributed to the Sackler Respondents who directed those actions.

Finally, even if the Division were not entitled to penalties based on the Sackler Respondents' conduct before January 2009 (and it is), that conduct would be relevant to the Sacklers' knowledge and state of mind and to personal jurisdiction. The UCSPA requires that the Division establish, or at this point allege, the Respondents' knowledge and state of mind. Utah Code Ann. § 13-11-4 requires that the Respondents' actions be "knowing[] or intentional[]," and Utah Code Ann. § 13-11-5 requires consideration of the "circumstances which the supplier knew or had reason to know." Thus, any of Sackler Respondents' actions from before, during, or after January 2009 would be relevant under the UCSPA.

C. The Division Alleges that the Sackler Respondents Caused Harm

The Sackler Respondents' argument that "the Division cannot establish causation" may be dealt with summarily. Mot. 39. The Division is not required to plead causation under the UCSPA. *See* Opp'n to Purdue MTD 14-15, 31-32. Notwithstanding, even if the Division were required to plead causation (and it is not), the Sackler Respondents' argument that "the Citation does not identify any instance in which either Sackler Respondent made an improper promotional statement about prescription opioids in Utah or told others at Purdue to do so" is without merit. Mot. 39. The Citation is replete with allegations that demonstrate that the Sackler Respondents directed the

dissemination of deceptive materials. *See, e.g.*, ¶ 133 ("[C]ompany emails show that Richard Sackler . . . directs marketing messages."); ¶ 138 ("[Richard Sackler] directed that Purdue intentionally promote OxyContin as a 'weaker' opioid . . . despite knowing the fact that OxyContin is twice as potent (and dangerous) as Purdue's morphine product, MS Contin."); ¶ 139 (alleging Richard and Kathe Sackler failed to direct Purdue "to cease cultivating this fraudulent misperception").[63]

Turning to proximate cause, the Sackler Respondents attempt to escape liability by blaming "many contributors" (except themselves) that "result from intervening third party acts, some of which are criminal or at the very least negligent." Mot. 39. This argument fails for the same reasons described in the Division's memorandum of law in opposition to Purdue's motion to dismiss. *See* Opp'n to Purdue MTD 14-15, 33-35.[64]

VI. THE CITATION SHOULD NOT BE DISMISSED FOR THE "ADDITIONAL REASONS" SET FORTH IN PURDUE'S MOTION TO DISMISS

The arguments that the Sacklers incorporate by reference from Purdue's Motion to Dismiss the Citation and Notice of Agency Action fail for the same reasons set forth in the Division's Memorandum in Opposition to that motion, filed April 23, 2019. Because the Sacklers merely adopt Purdue's statements as their own, no further argument is necessary.

VII. CONCLUSION

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

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[63] Equally unavailing is the Sackler Respondents' contention that "the Citation's limited allegations regarding affirmative conduct by the Sackler Respondents do not even attempt to explain how either one could have caused harm in Utah." Mot. 39. As described above, the Citation alleges that the Sackler Respondents engaged in a national scheme that caused harms in Utah, and how the Sackler Respondents directed wrongdoing specifically alleged to have taken place in Utah.

[64] Likewise, as described in the Division's opposition to Purdue's motion to dismiss, the Division is not required to allege harm. *See* Opp'n to Purdue MTD 14-15, 31-21.

DATED this 25th day of April, 2019.

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