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

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.**	**RESPONDENT RICHARD SACKLER, M.D.'S REPLY IN FURTHER SUPPORT OF HIS MOTION TO DISMISS THE DIVISION'S NOTICE OF AGENCY ACTION AND CITATION** **DCP Legal File No. CP-2019-005** **DCP Case No. 107102** **ORAL ARGUMENT REQUESTED** **Redacted Version for Public Filing**

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

PRELIMINARY STATEMENT 1

ARGUMENT 4

I. The Tribunal Lacks Personal Jurisdiction Over Richard Sackler 4

A. There Is No Statutory Basis for Personal Jurisdiction 4

B. The Exercise of Jurisdiction Would Violate Due Process 6

1. Specific Jurisdiction Cannot Be Based on Purdue's Conduct 7

2. The Effects Test Confirms There Is No Specific Jurisdiction Because There is No Allegation that Richard Sackler Specifically Targeted Utah 10

3. The Division Identifies No Connection Between Its Claims and Richard Sackler's Vacation Home 14

C. The Division's Exhibits Are Jurisdictionally Irrelevant 15

D. The Division's Request for Jurisdictional Discovery Should Be Denied 20

II. The Opposition Confirms that the Tribunal May Not Adjudicate the Claims Against Richard Sackler 21

III. The Opposition Confirms that the Citation Fails to State a Claim Against Richard Sackler 23

A. The Documents Attached to the Motion Can Be Considered 24

B. The Corporate Shield Bars the Division's Attempt to Hold Richard Sackler Liable for Purdue's Alleged Conduct 24

C. The Opposition's Failure to Show Personal Participation by Richard Sackler is Fatal to the Division's Claims Against Him 25

D. The Discovery Rule Cannot Salvage the Division's Untimely Allegations 26

E. **The Opposition Confirms that the Citation's Attempt to Plead Causation Fails** 29

CONCLUSION 30

TABLE OF AUTHORITIES

Page(s)

Cases

Ajax Enters., Inc. v. Szymoniak Law Firm, P.A.,
No. Civ. A. No. 05-5903 (NLH), 2008 WL 1733095 (D.N.J. Apr. 10, 2008) 12 n.6

Anderson v. Dean Witter Reynolds, Inc.,
920 P.2d 575 (Utah Ct. App. 1996) 28

Armed Forces Ins. Exch. v. Harrison,
2003 UT 14, 70 P.3d 35 (2003) 25, 26

Beaver Cty. v. Prop. Tax Div.,
2006 UT 6, 128 P.3d 1187 (2006) 28 n.20

Bhd. of Locomotive Eng'rs & Trainmen v. United Transp. Union,
413 F. Supp. 2d 410 (E.D. Pa. 2005) 12 n.6

BHL Boresight, Inc. v. Geo-Steering Sols. Inc.,
No. 4:15-CV-00627, 2017 WL 2730739 (S.D. Tex. June 26, 2017) 8

Binion v. O'Neal,
95 F. Supp. 3d 1055 (E.D. Mich. 2015) 12 n.6

BMBT, LLC v. Miller,
2014 UT App 64, 322 P.3d 1172 (2014) 24

Bristol-Myers Squibb Co. v. Superior Court,
137 S. Ct. 1773 (2017) 6

Calder v. Jones,
465 U.S. 783 (1984) 7, 11

ClearOne, Inc. v. Revolabs, Inc.,
2016 UT 16, 369 P.3d 1269 (2016) ....*passim*

Colosimo v. Roman Catholic Bishop,
2007 UT 25, 156 P.3d 806 (2007) ....27, 28 & n.20

Corwin v. Swanson,
No. CV 10-769 PSG (PJWX), 2010 WL 11598013 (C.D. Cal. Apr. 27, 2010) 12 n.6

Delman v. J Crew Grp., Inc.,
No. CV 16-9219-MWF (ASx), 2017 WL 3048657 (C.D. Cal. May 15, 2017) 16

Doe v. Al Maktoum,
C.A. No. 07-293-KSF, 2008 WL 4965169 (E.D. Ky. Nov. 18, 2008) 16

F.T.C. v. Bay Area Bus. Council, Inc.,
423 F.3d 627 (7th Cir. 2005) 8

F.T.C. v. World Media Brokers,
415 F.3d 758 (7th Cir. 2005) 8-9

Fenn v. Mleads Enters., Inc.,
2006 UT 8, 137 P.3d 706 (2006) 8

Franco v. The Church of Jesus Christ of Latter-Day Saints,
2001 UT 25, 21 P.3d 198 (2001) 23

Frito-Lay v. Utah Labor Comm'n,
2009 UT 71, 222 P.3d 55 (2009) 6

Gerstle v. Nat'l Credit Adjusters, LLC,
76 F. Supp.3d 503 (S.D.N.Y. 2015).............................12 n.8

Health Grades, Inc. v. Decatur Mem. Hosp.,
190 F. App'x 586 (10th Cir. 2006) 21 n.17

Helicopteros Nacionales de Colom., SA v. Hall,
466 U.S. 408 (1984).............................19

Hernandez v. Baker,
2004 UT App 462, 104 P.3d 664 (2004) 25

Hi-Country Estates Homeowners Ass'n v. Bagley & Co.,
901 P.2d 1017 (Utah 1995).............................4

Hydro Eng'g v. Landa, Inc.,
231 F. Supp. 2d 1130 (D. Utah 2002).............................11

In re LIBOR-Based Fin. Instruments Antitrust Litig.,
No. 11 MDL 2262 (NRB), 2019 WL 1331830 (S.D.N.Y. Mar. 25, 2019) 13 n.9

Karabu Corp. v. Gitner,
16 F. Supp. 2d 319 (S.D.N.Y. 1998).............................7, 12 n.7

Keeton v. Hustler Magazine, Inc.,
465 U.S. 770 (1984).............................7

McNeill v. Geostar,
No. 2:06-CV-911TS, 2007 WL 1577671 (D. Utah May 29, 2007)...................... 21 & n.17

MFS Series Tr. III ex rel. MFS Mun. High Income Fund v. Grainger,
2004 UT 61, 96 P.3d 927 (2004) 7, 8, 9

Mobile Anesthesiologists Chi., LLC v. Anesthesia Assocs. of Hous. Metroplex, P.A.,
623 F.3d 440 (7th Cir. 2010) 11 n.5

Mouzon v. Radiancy, Inc.,
85 F. Supp. 3d 361 (D.D.C. 2015)...9

Muddy Boys, Inc. v. Dep't of Commerce,
2019 UT App 33 (2019)...6

Oakwood Vill. LLC v. Albertsons, Inc.,
2004 UT 101, 104 P.3d 1226 (2004) 24

Ontel Prods., Inc. v. Project Strategies Corp.,
899 F. Supp. 1144 (S.D.N.Y. 1995)...9

Pettengill v. Curtis,
584 F. Supp. 2d 348 (D. Mass. 2008)...16 n.11

Puravai, LLC v. Blue Can,
No. 2:18-cv-00255-DB-EJF, 2018 WL 5085711 (D. Utah Oct. 17, 2018) 14

Ramsay v. Ret. Bd.,
2017 UT App 17, 391 P.3d 1069 (2017) 28 n.20

Rolling Thunder, LLC v. Indian Motorcycle Int'l, LLC,
No. 2:07-CV-52 TS, 2007 WL 2327590 (D. Utah Aug. 10, 2007) 15

Salt Lake City Corp. v. Big Ditch Irrigation Co.,
2011 UT 33, 258 P.3d 539 (2011) 25

Sexton v. Poulsen & Skousen P.C.,
No. 2:17-CV-01008-JNP-BCW, 2019 WL 1258737 (D. Utah Mar. 19, 2019).................22

Silver v. Brown,
382 F. App'x 723 (10th Cir. 2010) 13

Sizova v. National Inst. of Standards & Tech.,
282 F.3d 1320 (10th Cir. 2002) 21 n.17

Starways, Inc. v. Curry,
1999 UT 50, 980 P.2d 204 (1999) 4 n.2

State ex rel. W.A. v. State,
2002 UT 127, 63 P.3d 607 (2002) 6 n.4

State ex rel. Wilkinson v. B & H Auto,
701 F. Supp. 201 (D. Utah 1988)....................14 n.10, 22

Stephenson v. Elison,
2017 UT App 149, 405 P.3d 733 (2017) 27

Ten Mile Indus. Park v. W. Plains Serv. Corp.,
810 F.2d 1518 (10th Cir. 1987) 15

Town of Cornish v. Veibell,
No. 2008056-CA, 2009 WL 1160301 (Utah Ct. App. Apr. 30, 2009) 27

Tracey v. Blood,
78 Utah 385, 3 P.2d 263 (1931)....................27

United States v. Swiss Am. Bank, Ltd.,
116 F. Supp. 2d 217 (D. Mass. 2000),
aff'd, 274 F.3d 610 (1st Cir. 2001) 17

Venuti v. Cont'l Motors Inc.,
2018 UT App 4, 414 P.3d 943 (2018) 6

Walden v. Fiore,
571 U.S. 277 (2014)....................6, 10, 13

Weisler v. Cmty. Health Sys., Inc.,
Civ. No. 12-0079 MV/CG, 2012 WL 4498919 (D.N.M. Sept. 27, 2012).................. 16-17

Younique, L.L.C. v. Youssef,
No. 2:15-cv-00783-JNP-DBP, 2016 WL 6998659 (D. Utah Nov. 30, 2016)....................14

Rules & Statutes

FED. R. CIV. P. 9(c)....................25

UTAH CODE ANN. § 13-2-6 ....4, 5, 6 n.4, 26

UTAH CODE ANN. § 58-55-503 6

UTAH CODE ANN. § 78B-3-205....................5

PRELIMINARY STATEMENT[1]

The Division's Opposition serves only to reinforce the fact that the Citation provides no basis to exercise personal jurisdiction over Richard Sackler in Utah. The Opposition is 42 pages long and the accompanying exhibits total over 900 pages, yet the Division cannot pinpoint a single misleading marketing statement in or aimed at Utah that he personally made or participated in. This is not for want of evidence at its disposal. The Division has all of the millions of pages of documents that Purdue produced in *In re: National Prescription Opiate Litigation*, Case No. 1:17-MD-2804-DAP (N.D. Ohio) (the "**MDL**"), including from Purdue's custodial file for Richard Sackler, consisting of documents addressed to, emanating from or copying him. In addition, the Division's counsel deposed Richard Sackler in the MDL and, in connection with that, received production of emails from his personal accounts. The Division still has no evidence to support its empty rhetoric. It has not carried its burden of establishing personal jurisdiction.

Nor has the Division stated a claim against Richard Sackler under the UCSPA. Lacking allegations or evidence that he personally participated in any specific misconduct, the Division relies on the general contention that he was a member of a Board that supposedly acted as "the 'de-facto' CEO" of Purdue. (Opp. at 14-16, 22, 34 (citing ¶126)). This is a spurious point because CEOs of major companies do not personally participate in everything a company does and the Division fails to substantiate its conclusory characterization: All of the allegations and documents before this Tribunal show just the opposite—that the Board acted as a board, receiving reports and

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[1] All terms and short forms defined in the Individual Respondents' Motion to Dismiss the Division's Notice of Agency Action and Citation ("**Motion**" or "**Mot.**") are again used here. "**Opposition**" or "**Opp.**" refers to the Division's April 25, 2019 brief in opposition. Emphasis is added to, and internal quotations, brackets, ellipses, and citations omitted from, quoted material in this brief, unless otherwise indicated.

voting on proposals from the professional managers who ran Purdue, from the CEO down. Moreover, as the Division recognizes, Richard Sackler was just one of many Board members, so he could not unilaterally set Board policy. The Division's position is unsupported by any factual allegations in the Citation, and it is entirely inconsistent with Utah law. The Division's claims against Richard Sackler should be dismissed:

No Personal Jurisdiction. The Division concedes that Richard Sackler is not subject to general jurisdiction, and the Citation and the Opposition identify no suit-related contact between Richard Sackler and Utah, defeating any claim of specific jurisdiction. His use of a vacation home in Utah is irrelevant because it has no connection to the Division's claims.

The evidence in the Division's possession is voluminous. That makes its failure to identify any jurisdictionally-relevant documents all the more revealing. Lacking any relevant factual allegations, the Opposition strains to manufacture a basis for personal jurisdiction by attributing Purdue's nationwide conduct to Richard Sackler because he served on the Board until 2018 and was a Purdue officer until 2007. But jurisdiction over a corporation does not establish jurisdiction over individual officers or directors. Courts, including the U.S. Supreme Court, uniformly reject attempts to predicate jurisdiction over executives based on corporate conduct. Because Richard Sackler did not personally participate in challenged conduct in or specifically aimed at Utah, personal jurisdiction is lacking.

The Division's contention that Richard Sackler is subject to personal jurisdiction on the theory that his conduct had effects in Utah is equally meritless. The argument is encapsulated by the Division's mistaken claim that Richard Sackler is asking the Tribunal to conclude "that their [the Individual Respondents'] nationally directed marketing campaign, which emerged from the highest levels of the company, somehow inexplicably excluded Utah." (Opp. at 1). Putting aside

that this attributes corporate conduct to individuals, the Division's statement of its position defeats its argument. The effects test supports jurisdiction only if the defendant specifically targets the forum and the brunt of the injury caused by the defendant is felt in the forum. The Division's conclusory claim that Richard Sackler "directed" nationwide conduct does not show that he specifically targeted Utah. It shows he did not.

No Subject Matter Jurisdiction. The Opposition confirms that the Division cannot satisfy an essential prerequisite for bringing a claim against Richard Sackler under the UCSPA—showing that he is a "supplier" and engaged in a "consumer transaction" in Utah. The Division has not cited and cannot cite a single case showing that a former director or officer of a company with *nationwide* operations—who did not engage in any Utah-specific business activities—is a "supplier" under the UCSPA or engaged in "consumer transactions" in Utah. Moreover, because Purdue manufactures medicines which the FDA has determined are safe and effective for their intended uses—and are not, as the Opposition claims, "pharmaceutical-grade heroin" (Opp. at 1)—the UCSPA expressly does not apply to any of the claims in the Citation. The Tribunal lacks the authority to adjudicate the claims in the Citation against Richard Sackler.

Failure to State a Claim. The Opposition identifies no authority for holding Richard Sackler liable for the conduct of Purdue. The UCSPA—unlike other Utah statutes—provides no basis for holding directors liable for the conduct of their corporations. And the Opposition confirms that the Division has not shown that Richard Sackler personally participated in Purdue's alleged misconduct. Instead, the Division primarily repeats non-specific allegations about his general role in Purdue's activities and about information that he supposedly received. The few allegations of affirmative conduct raised by the Opposition are stale and do not show his involvement in Purdue's marketing in Utah.

ARGUMENT

I. The Tribunal Lacks Personal Jurisdiction Over Richard Sackler

The Division concedes that it bears the burden of establishing both (i) a statutory basis for exercising jurisdiction over Richard Sackler and (ii) that the exercise of jurisdiction would be consistent with due process. (Opp. at 3). The Opposition confirms that the Division has made no such showing. The facts pled against Richard Sackler amount to nothing more than occasional use of a vacation property that had nothing to do with any allegedly misleading marketing statements. They do not establish any claim-related connection between him and Utah.[2]

A. There Is No Statutory Basis for Personal Jurisdiction

As administrative entities, the Division and this Tribunal "ha[ve] only the rights and powers granted to [them] by statute." *Hi-Country Estates Homeowners Ass'n v. Bagley & Co.*, 901 P.2d 1017, 1021 (Utah 1995). To ensure that administrative agencies' powers "are not overextended, any reasonable doubt of the existence of any power must be resolved against the exercise thereof." *Id.* As the Division acknowledges (Opp. at 5, 8), the UCSPA limits the exercise of jurisdiction by the Division and this Tribunal to persons who violate or attempt to violate the UCSPA (i) "wholly or partly within the state," (ii) through conduct "outside the state [that] constitutes an attempt to commit a violation within the state," or (iii) using "transactional resources" within the State. UTAH CODE ANN. § 13-2-6(4)(a). None of these provisions authorizes the statutory exercise of jurisdiction over Richard Sackler, and no other statute empowers the

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[2] The Division does not contest that the affidavits that have been attached in support of the Individual Respondent's 12(b)(2) Motion are properly considered on a motion to dismiss. *See Starways, Inc. v. Curry*, 1999 UT 50, ¶3, 980 P.2d 204, 206 ("allegations asserted in the complaint are considered true only insofar as they are not specifically contradicted by the affidavits"); *ClearOne, Inc. v. Revolabs, Inc.*, 2016 UT 16, ¶35, 369 P.3d 1269, 1281 ("A court may determine jurisdiction on affidavits alone, permit discovery, or hold an evidentiary hearing.").

Division and this Tribunal to exercise jurisdiction over them. Accordingly, there is no statutory basis for personal jurisdiction.

The Opposition tacitly concedes that jurisdiction is not premised on the use of "transactional resources" in Utah by Richard Sackler. (Opp. at 5). The Division relies instead on subparts (i) and (ii) of § 13-2-6(4)(a), resting on the tepid contention that they are satisfied by ¶¶8, 125, 129, or 147 of the Citation. But a review of the paragraphs demonstrates the absence of a statutory basis for jurisdiction: They do not plead any claim-related conduct in Utah by Richard Sackler, much less a violation "wholly or partly within" this State. They allege only conduct at Purdue, which is headquartered in Connecticut. (¶¶1-3.)[3] None of these paragraphs factually alleges any misconduct by Richard Sackler outside this State that constituted an attempted violation within this State.

The Division seeks to sidestep its failure to satisfy § 13-2-6(4)(a) by arguing that "decisions and directives <u>at Purdue</u>" (¶8) suffice. (Opp. at 5). However, no provision in the UCSPA, or any other applicable statute, authorizes the attribution of Purdue's jurisdictional contacts to its out-of-state corporate officers or directors.

In an attempt to evade the UCSPA's constraints on jurisdiction, the Division invokes Utah's long-arm statute, UTAH CODE ANN. § 78B-3-205. (Opp. at 4). The Citation did not plead personal jurisdiction based on § 78B-3-205, and its eleventh hour attempt to do so is futile. That statute's express language confers jurisdiction only on "the <u>courts</u> of this state," not administrative

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[3] *See* ¶8 (alleging jurisdiction based on general "directives *at Purdue*," which is headquartered in Connecticut (¶¶1-3,) that purportedly caused unspecified and conclusory "unlawful promotion and sales" in Utah); ¶125 (alleging unspecified actions "taken as members of the [ ] Board of Directors," or as "officers and owners," of Purdue entities, headquartered in Connecticut, *see* ¶¶1-3); ¶129 (same); ¶147 (no reference to any conduct in or aimed at Utah).

agencies.[4] As the Utah Supreme Court held in *Frito-Lay v. Utah Labor Commission*, administrative agencies are not "courts of the state." 2009 UT 71, ¶¶17-18, 222 P.3d 55, 59. *See also Muddy Boys, Inc. v. Dep't of Commerce*, 2019 UT App 33, ¶¶22-27 (administrative tribunals are not "courts" as the term is used in UTAH CODE ANN. § 58-55-503). The long-arm statute does not apply and cannot support the exercise of jurisdiction over either Individual Respondent in this proceeding.

In the absence of any statutory basis to exercise jurisdiction, the Division's claims against Richard Sackler should be dismissed, and there is no need to address constitutional issues. The Division's request to be excused from its failure to satisfy the statutory requirements and "go straight to the due process analysis" (Opp. at 5) is unsustainable as a matter of law. *See Venuti v. Cont'l Motors Inc.*, 2018 UT App 4, ¶10, 414 P.3d 943, 948 ("If the relevant state statute does not permit jurisdiction, then the inquiry is ended.").

B. The Exercise of Jurisdiction Would Violate Due Process

The Division does not dispute, and thereby concedes, that Richard Sackler is not subject to general jurisdiction, but it maintains that he is subject to specific jurisdiction. (Opp. at 5-7). Specific jurisdiction requires a showing that the defendant "purposefully reached out beyond their State and into another," *Walden v. Fiore*, 571 U.S. 277, 285 (2014), and that the claim "arise[s] out of or relate[s] to the defendant's contacts with the forum." *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1780 (2017). (*See* Mot. at 21). The Division's inability to satisfy these requirements independently compels dismissal.

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[4] The Division's reliance on *State ex rel. W.A. v. State*, 2002 UT 127, ¶14, 63 P.3d 607, 612 (Opp. at 4), for the proposition that "a court may rely on *any* Utah statute affording it personal jurisdiction, not just Utah's long-arm statute," is unavailing because this Tribunal is not a court. *See* UTAH CODE ANN. § 13-2-6(1) (authorizing the Division "to convene administrative hearings").

1. Specific Jurisdiction Cannot Be Based on Purdue's Conduct

The Division does not dispute that personal jurisdiction over Richard Sackler cannot be premised on Purdue's contacts with Utah. (Mot. at 23). That forecloses the Division's principal jurisdictional argument: that because Purdue acted in Utah, and because Richard Sackler allegedly had "direct involvement in Purdue's business" (¶8) and was a member of the Board of PPI (¶126), he is subject to personal jurisdiction here.

The argument that jurisdiction over a corporation establishes jurisdiction over its officers and directors was rejected by the U.S. Supreme Court in *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 n.13 (1984). *See also Calder v. Jones*, 465 U.S. 783, 790 (1984) (corporate employees' "contacts with [forum] are not to be judged according to [the corporation's] activities there"). The argument has also been rejected by the Utah Supreme Court in *MFS Series Tr. III ex rel. MFS Mun. High Income Fund v. Grainger*, 2004 UT 61, ¶¶21, 24, 96 P.3d 927, 933-34, and dozens of other courts, all of which hold that general allegations that an officer or director controlled a company do not suffice to establish personal jurisdiction. (*See* Mot. at 23-25 & n.13 (collecting cases)).

The Division's attempt to distinguish this case law falls flat. It argues that, unlike in *MFS*, the Citation alleges in ¶¶8 and 25 that Richard Sackler "personally directed" acts and conduct directed towards Utah. (Opp. at 30). Paragraph 25 contains no such allegation. The referenced portion of ¶8 is the conclusory allegation that Utah has jurisdiction over him "because [he] personally directed Purdue to conduct the deceptive or unfair acts or practices alleged herein that took place in Utah." That is not a factual allegation: It is a legal conclusion exactly like those rejected in *MFS*, in *Karabu Corp. v. Gitner*, 16 F. Supp. 2d 319 (S.D.N.Y. 1998), and in the other cases collected in the Motion (at 24-25 & n.13).

The Division argues that *MFS* is inapplicable because the directors there submitted affidavits specifically denying "allegations of personal dealings" regarding the alleged misconduct, while the declaration submitted here did not contradict allegations that supposedly "specifically allege[d]" "personal[ ] direct[ion]" of misconduct. (Opp. at 29-30; *see also* Opp. at 14-17 (criticizing the declarations for failing to "set the record straight")). This argument is specious. As discussed above and in the Motion (at 7-16), the Citation does not factually plead Richard Sackler's personal participation in any alleged misconduct, much less any in or directed at Utah. With millions of pages of documents at its disposal, the Division would do so if it could. It cannot. In making a jurisdictional motion to dismiss, the movant has no obligation to contest jurisdictionally irrelevant, conclusory allegations. Contrary to the Division's argument that Richard Sackler's declaration should have "set the record straight," a declaration in support of a motion to dismiss for lack of jurisdiction is to be limited to the issues relevant to personal jurisdiction. *See BHL Boresight, Inc. v. Geo-Steering Sols. Inc.*, 2017 WL 2730739, at *5 (S.D. Tex. June 26, 2017) (disregarding statements in declaration that are not "relevant to the 12(b)(2) analysis"). The Division's attempt to foist onto Richard Sackler its own burden—as the plaintiff—to identify "adequate evidence" to establish personal jurisdiction, *Fenn v. Mleads Enterprises, Inc.*, 2006 UT 8, ¶8, 137 P.3d 706, 710, is unsupported and legally baseless.

Just as telling as the Division's fruitless attempt to distinguish the personal jurisdiction cases in the Motion is the fact that the only cases the Division points to <u>do not even mention personal jurisdiction</u>. The Opposition identifies no case holding that a corporate director is subject to personal jurisdiction because s/he controlled a company that did business in a state. The Opposition instead cites two cases concerning substantive liability under the Federal Trade Commission Act, which is not at issue here. (Opp. at 31-32 (citing *F.T.C. v. Bay Area Bus.*

Council, Inc., 423 F.3d 627 (7th Cir. 2005) and *F.T.C. v. World Media Brokers*, 415 F.3d 758 (7th Cir. 2005))). The Division vaguely claims that these inapposite cases are "instructive" (Opp. at 31), while it fails to distinguish the host of authorities directly addressing when allegations of personal involvement can establish personal jurisdiction over corporate directors discussed in the Motion (at 24-25). Its approach is not only transparently infirm but also an "improper" attempt to conflate "the concept of liability with that of jurisdiction." *MFS*, 2004 UT 61, ¶¶21, 24.

The Division's apparent argument that Richard Sackler should be subject to jurisdiction because, as one of many directors, he supposedly had "the ability to control" Purdue (Opp. at 31-32) is equally flawed. *See MFS*, 2004 UT 61, ¶¶21, 24 (rejecting argument that statute making officers and directors liable for failing to supervise certain corporate conduct that they could control "create[d] personal jurisdiction over" them). *Ontel Products, Inc. v. Project Strategies Corp.*, rejected this very argument, holding:

> It is not enough that [corporate President] likely possessed authority to direct all the activities that gave rise to this suit. If that were the case, the President of every company would be subject to jurisdiction in [a forum] based on activities with which he or she had no personal involvement and over which he or she exercised no decisionmaking [sic] authority.

899 F. Supp. 1144, 1149 (S.D.N.Y. 1995). For the past decade, Richard Sackler was not even an officer of Purdue and had far less authority than the corporate President in *Ontel*.

Even if, as a director, Richard Sackler had voted to approve nationwide marketing statements—and there is no evidence he did—that would not be enough. *See Mouzon v. Radiancy, Inc.*, 85 F. Supp. 3d 361, 372 (D.D.C. 2015) (Mot. at 24) (dismissing claims against CEO: "Even if [he] played a central and dominant part" in the marketing campaign and "directly profited" from it, no jurisdiction existed because plaintiffs "ha[d] not alleged that [he] himself targeted" the marketing campaign specifically at the forum (Washington, D.C.)). Because Richard Sackler did

not personally participate in any alleged deceptive marketing statements made in or directed at Utah, there is no jurisdiction over him.

2. The Effects Test Confirms There Is No Specific Jurisdiction Because There Is No Allegation that Richard Sackler Specifically Targeted Utah

The Division ultimately pins its hope to establish personal jurisdiction argument on what is known as the "effects" test. (Opp. at 5-6). It contends that personal jurisdiction exists—even without any suit-related contacts between Richard Sackler and Utah—because their conduct purportedly had "effects in Utah." (Opp. at 8-14).

But the effects test does nothing to help the Division. This test was analyzed at length by the Utah Supreme Court in *ClearOne v. Revolabs, Inc.*, in which the Court recognized that the test had been "narrowed" by the U.S. Supreme Court's decision in *Walden.* 2016 UT 16, ¶¶21, 24-26 (noting that *Walden*, 571 U.S. at 1125, held that "the proper question is <u>not</u> where the plaintiff experienced a particular injury or effect but whether the defendant's conduct connects him to the forum in a meaningful way"). Applying the *Walden*-narrowed effects test, *ClearOne* dismissed the claims of a Utah company against an out-of-state defendant because, while the effects of the defendant's conducts were felt in Utah, the "conduct had little to do with Utah." *Id.* ¶33. Here, too, the alleged claim-related conduct by Richard Sackler "had little to do with Utah" (*see* Mot. at 6-14), the effects test likewise compels dismissal for lack of personal jurisdiction.

As the Division concedes, to establish jurisdiction under the effects test, a plaintiff must show that the defendant "(1) committed an intentional act, which was (2) expressly aimed at the forum state, and (3) causing harm, the brunt of which is suffered and which the defendant knows is likely to be suffered in the forum state." *ClearOne*, 2016 UT 16, ¶25; Opp. at 7. The Division has not carried this burden.

Intentional Act. Although the Citation includes conclusory allegations that Richard Sackler engaged in "intentionally" "deceptive acts" (¶166; *see also* ¶¶167-70, 172), both the Citation and Opposition are entirely devoid of any factual allegation or evidence that specifies any intentionally deceptive act that he personally committed. Unable to do so, the Division maintains that it "is not required to allege" any deceptive acts by him (Opp. at 33), and relies exclusively on alleged acts of Purdue (Opp. at 35-36, citing ¶17 ("Purdue paid at least two Utah doctors"), ¶26 ("Purdue has given Utah prescribers ... gifts")). These are then attributed to Richard Sackler solely by virtue of his service as a member of the Board until 2018 and as an officer prior to 2007. (Opp. at 34-35; R. Sackler Decl. ¶3). There is no case law supporting this.

Express Aiming. To show that a defendant "expressly aimed" conduct at the forum, a plaintiff must show that the forum was "the focal point of the tort and its harm." *Hydro Eng'g, Inc. v. Landa, Inc.*, 231 F. Supp. 2d 1130, 1135 (D. Utah 2002).[5] This requirement is derived from *Calder*, 465 U.S. at 788-90 (Opp. at 6), which found that a reporter and editor—who had written an article about "the California activities of a California resident," drawn from California sources, and based on phone calls to California—had "intentionally" targeted, and were therefore subject to jurisdiction in, California because California was the "focal point" of their conduct. *Calder* does not support jurisdiction here because the claims in the Citation are based on the alleged involvement of Richard Sackler in Purdue's *nationwide* conduct, not on any action he targeted at Utah. As set forth in the Motion (at 26 & n.14), under *J. McIntyre* and other cases, nationwide

[5] Because the effects test requires a showing not only that the defendant's conduct had an effect in the forum but also that the defendant expressly aimed his or her conduct at the forum, the Seventh Circuit has noted that it might be more accurately called the "express aiming test." *Mobile Anesthesiologists Chi., LLC v. Anesthesia Assocs. of Hous. Metroplex, P.A.*, 623 F.3d 440, 445 n.1 (7th Cir. 2010).

conduct aimed at the U.S. market as a whole is not conduct targeted at a specific state. Case after case applying the effects test holds that nationwide conduct does not satisfy the effects test because it is not targeted at a specific forum.[6]

The Division attempts to distinguish these cases on the ostensible ground that ¶¶8, 127 and 94-95 show that Richard Sackler focused on Utah. (Opp. at 30-31). Not so:

- Paragraph 8 alleges that any direction of Purdue's sales representatives in Utah was incidental to the Individual Respondents' alleged supervision of their nationwide conduct: "Business activities that the [Individual] Respondents directed include Purdue's employment of a substantial number of sales representatives nationwide, including in Utah."[7]
- Paragraph 127 alleges that Richard Sackler, as a member of the Board, [redacted] It does not show any conduct by Richard Sackler targeted at or focused on Utah.[8]
- Finally, the Division's assertion that the Citation alleges that the Richard Sackler "arranged funding for two KOLs—Dr. Webster and Dr. Perry Fine—to promote Purdue opioids in Utah and around the country" (Opp. at 31) is simply false. There is no such allegation in the Citation. The referenced paragraphs (¶¶94-95) contain no mention of Richard Sackler—they talk only about Purdue.

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[6] *See, e.g.*, *Corwin v. Swanson*, 2010 WL 11598013, at *3 (C.D. Cal. Apr. 27, 2010) (nationwide statements not aimed at California); *Bhd. of Locomotive Eng'rs & Trainmen v. United Transp. Union*, 413 F. Supp. 2d 410, 420 (E.D. Pa. 2005) (national conduct not aimed at Pennsylvania); *Ajax Enters., Inc. v. Szymoniak Law Firm, P.A.*, 2008 WL 1733095, at *5 & n.3 (D.N.J. Apr. 10, 2008) (website targeted at "a national audience" did not target New Jersey); *Binion v. O'Neal*, 95 F. Supp. 3d 1055, 1060 (E.D. Mich. 2015) (posts "meant for a national or even international audience" not targeted at Michigan).

[7] The allegation that a defendant "directed" conduct, without supporting factual details, is a conclusory label that will not support personal jurisdiction. *See, e.g.*, *Karabu*, 16 F. Supp. 2d at 324-25 (Sotomayor, D.J.) (conclusory allegation that defendants "directed" personnel to engage in wrongdoing insufficient to support personal jurisdiction).

[8] The allegation that a defendant "oversaw" conduct, without supporting factual details, is a conclusory label that will not support personal jurisdiction. *See Gerstle v. Nat'l Credit Adjusters, LLC*, 76 F. Supp.3d 503, 510 (S.D.N.Y. 2015) (conclusory allegation that defendants "oversaw" policies did not support personal jurisdiction).

Similarly, nothing in the Opposition's lengthy recitation of the Citation's allegations (Opp. at 8-14) identifies any fact showing that Richard Sackler specifically targeted Utah. These allegations are addressed in the Motion (at 7-16, 24-26), and the Opposition does not demonstrate their jurisdictional relevance.[9]

The Division's reliance on *Silver v. Brown*, 382 F. App'x 723 (10th Cir. 2010) (Opp. at 7) as its leading authority as to why the effects test supports jurisdiction here is telling. *Silver* is a pre-*Walden* case, and it bears no resemblance to the allegations in the Citation. *Silver* found jurisdiction over a defendant who was sued for defamation in New Mexico based on a blog he wrote "about a New Mexico resident and a New Mexico company," "which complained about "actions [that] occurred in . . . New Mexico." *Id.* at 729-30. The defendant knew that the individual and company he was complaining about "w[ere] located in New Mexico" and would thus feel the consequences of his actions there. *Id.* at 730. Even assuming *Silver* survives *Walden*, there are no remotely similar allegations that Richard Sackler aimed any claim-related conduct here.

The Brunt of the Harm. As to the third step of the effects test—the requirement that the conduct at question "caus[ed] harm, the brunt of which is suffered . . . in the forum state," *ClearOne*, 2016 UT 16, ¶25—the Division does not even attempt to claim that "the brunt" of the harm allegedly arising from the alleged "decisions and directives at Purdue" (¶8) was "suffered in" Utah. *ClearOne*, 2016 UT 16, ¶25. Moreover, because the Division plainly acknowledges that its claims concern an alleged "nationally directed marketing campaign" and alleged conduct

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[9] Contrary to the Opposition's opaque footnote 4 (Opp. at 12 n.4), stale allegations about conduct long before the limitations period cannot support personal jurisdiction because a plaintiff's claims cannot arise out of them. *See, e.g.*, *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 2019 WL 1331830, at *32 (S.D.N.Y. Mar. 25, 2019) (no jurisdiction based on "transactions that occurred before the relevant time period"). Accordingly, the Citation's allegations about conduct from decades ago are jurisdictionally irrelevant.

that was "national in scope" (Opp. at 1, 35; *see also id.* at 2 ("across the country"); 42 n.63 ("national scheme")), it concededly cannot satisfy this prong of the effects test.

3. The Division Identifies No Connection Between Its Claims and Richard Sackler's Vacation Home

Richard Sackler has a vacation home in Utah. The Division does not dispute that a vacation home that is unrelated to plaintiff's cause of action cannot support personal jurisdiction. (Mot. at 22). Nowhere in the Citation or the Opposition does the Division factually identify any such connection, let alone establish a causal relationship between the vacation home and the Division's claims. *See Puravai, LLC v. Blue Can*, 2018 WL 5085711, at *5 (D. Utah Oct. 18, 2018) (Mot. at 22). The Division contends that it is not obliged to show that its claims arise out of or relate to the vacation home because *Puravai*'s causation analysis does not stem from "a Utah case." Opp. at 30.[10] That is beside the point. The requirement that the plaintiff show a causal relationship between the vacation home and the Division's claims is the Supreme Court-imposed requirement that the plaintiff's claim must "arise out of the defendant's forum-related conduct." *Younique, L.L.C. v. Youssef*, 2016 WL 6998659, at *4 (D. Utah Nov. 30, 2016). The Utah Supreme Court acknowledged this requirement in *ClearOne*, in language quoted in the Opposition (at 7), when it noted that the effects test requires a showing that conduct expressly aimed at the forum state "caused harm" in the forum state. 2016 UT 16, ¶25.

The Division has made no factual showing that the happenstance that Richard Sackler's vacation home is located in Utah, gave rise to any of its claims. But, "[a] nexus must exist between a defendant's forum-related contacts and the Plaintiffs' cause of action. This is not satisfied when

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[10] The Division relies on *State ex rel. Wilkinson v. B & H Auto*, 701 F. Supp. 201, 205 (D. Utah 1988) (Opp. at 30), another case that does not even mention personal jurisdiction, much less undertake a specific jurisdiction analysis.

Plaintiffs would have suffered the same injury even if none of the Defendant's forum contacts had taken place." *Rolling Thunder, LLC v. Indian Motorcycle Int'l, LLC*, 2007 WL 2327590, at *3 (D. Utah Aug. 10, 2007). The Alta vacation home does not permit the exercise of personal jurisdiction over Richard Sackler. *See Ten Mile Indus. Park v. W. Plains Serv. Corp.*, 810 F.2d 1518, 1528 (10th Cir. 1987) (no personal jurisdiction based on ownership of property where the "cause of action . . . did not arise as a result of appellees' ownership of the [] property.").

C. The Division's Exhibits Are Jurisdictionally Irrelevant

The Division asserts that the 900+ pages of documents it submitted with its Opposition "[b]olster the [s]howing of [p]ersonal [j]urisdiction." (Opp. at 17-29). That assertion is groundless because none of the additional documents shows that Richard Sackler engaged in conduct in or aimed at Utah from which the Division's claims arise. These documents are predominantly stale, and they relate to Purdue's nationwide business, not any conduct expressly aimed at Utah.

Utah is mentioned only three times in the Division's 12-page litany of new alleged facts. *First*, the Division asserts (Opp. at 22) that a [REDACTED] The absence of any reference to Utah hardly shows minimum contacts with Utah.

The other two references pertain only to the jurisdictionally irrelevant fact that Richard Sackler visited Utah on skiing trips.

- The Division speculates (Opp. at 17) that Richard Sackler [REDACTED] does not mention Utah and has nothing to do with the marketing practices at issue in the Citation.
- The Division asserts [REDACTED]

They have no connection to the Division's claims.

The Division's other "evidence"—to the extent it is even properly before this Tribunal[11]—is even more irrelevant to the personal jurisdiction analysis. These other documents are drawn from a hodgepodge of stale, hearsay and irrelevant sources. None of them connect Richard Sackler to any conduct giving rise to any claims in Utah:

Published Articles. The Division cites (i) one article for the anodyne proposition that in 1999 Richard Sackler attended a "dinner following [] training" in Connecticut (Opp. at 18; Opp. Ex. 7), and (ii) a second article reporting that he was a micromanager and played a prominent role in Purdue "during the early 1980s." (Opp. at 19 & n.15). Neither article mentions any conduct in or aimed at Utah, and micromanagement (even if it occurred within the past 30 years) does not support the assertion of personal jurisdiction. *See Delman v. J Crew Grp., Inc.*, 2017 WL 3048657, at *2-4 (C.D. Cal. May 15, 2017) (no personal jurisdiction over CEO alleged to have been a "hands-on micro-manager"). "[P]laintiffs must come forward with more than hearsay news stories or website equivalents to establish a *prima facie* case of jurisdiction." *Doe v. Al Maktoum*, 2008 WL 4965169, at *5 (E.D. Ky. Nov. 18, 2008); *see also Weisler v. Cmty. Health Sys., Inc.*, 2012

[11] For example, the Division's contends that Richard Sackler should have known that Purdue was not addressing the abuse and diversion of OxyContin (Opp. 25-26 & n.47) based on (1) unspecified information in a hearsay *Los Angeles Times* story, (2) unidentified documents that supposedly list Purdue's field inquiries in response to Reports of Concern in 2007 and 2008; (3) hearsay allegations in a (still-pending) lawsuit filed by the City of Chicago; and (4) a 2015 Assurance of Discontinuance. This unsubstantiated argument is jurisdictionally irrelevant since an alleged failure to act outside of Utah cannot support jurisdiction in Utah. *See, e.g., Pettengill v. Curtis*, 584 F. Supp. 2d 348, 358-59 (D. Mass. 2008) (dismissing claim for lack of personal jurisdiction based on "tortious failure to act" because "transform[ing] a failure to act that was directed nowhere in particular into a purposeful availment of the laws of one specific state" would "subject [individuals] to personal jurisdiction everywhere").

WL 4498919, at *6 (D.N.M. Sept. 27, 2012) (gathering cases rejecting reliance on hearsay articles to show personal jurisdiction).

Stale and Irrelevant Documents. Many of the new documents cited by the Division are very old—with a vintage many years, and in some instances decades, before the limitations period—and have nothing to do with any alleged conduct by Richard Sackler targeting Utah.[12] (*See* Mot. at 39). It is beyond dispute that stale documents unrelated to the Division's claims cannot support personal jurisdiction. *See United States v. Swiss Am. Bank, Ltd.*, 116 F. Supp. 2d 217, 223 (D. Mass. 2000) (contacts with forum "at least seven years before the tortious acts are alleged to have occurred" did not support personal jurisdiction because they were unrelated to the claim), *aff'd*, 274 F.3d 610 (1st Cir. 2001).

A detailed review of some of the other old documents (in addition to those summarized in footnote 12) cited by the Opposition confirms their irrelevance. For example:

- The Division cites a 1997 email (Opp. Ex. 11) sent to 28 people, including Richard Sackler, which stated that [REDACTED] The email was not written by Richard Sackler and has nothing to do with Utah. Although the Division complains that [REDACTED]

[12] *See, e.g.*, [REDACTED]

, that is an alleged omission directed nowhere. The Division identifies no misrepresentation by Purdue or Richard Sackler and does not show that the use of OxyContin "earlier" for non-cancer pain was not within the FDA-approved indications (it was[13]). As the Motion (at 9) explained in response to similar allegations (¶¶139-41), any suggestion that Richard Sackler directed Purdue to deceive doctors in the 1990s about the strength of OxyContin is not only decades old but is also refuted by the 1995 FDA-approved label (Ex. 3 at Table 3), which informed prescribers of the relative strength of morphine and oxycodone.

- The Division implies that Richard Sackler acted improperly by stating in a 1997 email—which has nothing to do with Utah— This innuendo ignores that his statement is fully consistent with OxyContin's FDA-approved label, which states: "Like all full opioid agonists, **<u>there is no ceiling effect to analgesia for oxycodone</u>**."[14] Although the Division believes this is , it is the FDA—not the Division—that determines the substance of an FDA-approved label and its accuracy. *See* Mot. at 31 (Division lacks authority to regulate marketing of FDA-approved medicines).

- The Division cites a 2001 letter from the Connecticut Attorney General to Richard Sackler expressing concern about abuse and diversion of OxyContin (Opp. Ex. 44), ostensibly to show that Purdue never took steps to "rein in the inappropriate marketing of OxyContin." (Opp. at 27; Opp. Ex. 44). However, this 18-year-old letter—which does not mention Utah—"accepts that [Purdue] does not market OxyContin directly to consumers," and also "welcome[s]" Purdue's offer "to provide tamper proof prescription pads to physicians." (Opp. Ex. 44). The Opposition identifies no documents that show that Purdue did not take steps to curb abuse and diversion—because Purdue did. *See, e.g.*, Mot. at 2-3 (discussing (i) Purdue's 2007 guilty plea to early inappropriate marketing and (ii) how, from 2007-12, Purdue operated under a government-required monitor scrutinizing its marketing and compliance with its Corporate Integrity Agreement ("**CIA**")). <u>The Division's own documents confirm</u> that the Board was repeatedly informed by management of efforts by Purdue's Corporate Compliance team (Opp. Ex. 41 at 16-17; Mot. at 2-3) and that Purdue created a tamper-resistant formulation of OxyContin ("**OTR**" or "**OxyContin Tamper Resistant**"). (Opp. Ex. 36).

- The Division cites 2004 testimony that That is not a Utah connection.

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[13] *See* Ex. 3 at 1 (1995 FDA approved label, stating "OxyContin . . . is indicated for the <u>management of moderate to severe pain</u> where use of an opioid analgesic is appropriate for more than a few days"); *id.* at 2 ("During <u>chronic therapy</u>, especially <u>for non-cancer pain syndromes</u>, the continued need for around-the-clock opioid therapy should be reassessed periodically . . .").

[14] Purdue's Motion to Dismiss, Ex. F (2018 label); *see also* Ex. 3 at 1 ("Like all pure opioid agonists, <u>there is no ceiling effect</u> to analgesia, such as is seen with partial agonists or non-opioid analgesics").

More Recent (2007 to 2013) Irrelevant Documents. The more recent documents the Opposition relies on are no more probative. At most, they show appropriate active engagement by a Purdue director in Purdue's sales nationwide and have nothing to do with Utah.[15] Nor does the Division's *ipse dixit* claim that Richard Sackler's 2015 deposition—which is not in the record—show that he participated in unspecified [redacted] (Opp. at 23 & n. 39) or identify any facts from this deposition that are relevant to personal jurisdiction in Utah, and counsel is aware of none. None of these sources shows that Richard Sackler participated in or directed any allegedly deceptive marketing in or specifically targeted at Utah.

Ski Trips. The Division also cites documents showing that Richard Sackler went skiing in Utah during vacations and sometimes exchanged emails with people while on vacation or to plan vacations.[16] These documents, like the others, do not show that he engaged in any conduct in or aimed at Utah that gave rise to any of the Division's claims. Thus, they do not support personal jurisdiction. *See Helicopteros Nacionales de Colombia, SA v. Hall*, 466 U.S. 408, 417-18 (1984) (trips to forum, with no connection to causes of action, do not support jurisdiction); *see*

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[15] *See* [redacted]

[16] [redacted]

also supra at 14-15.

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The Division's shotgun approach to jurisdiction—proffering 900+ pages of documents to obscure the lack of any claim-related connections between Richard Sackler and Utah—is legally unsustainable. If the Division had a basis for jurisdiction, it would be able to identify it clearly and succinctly. The Division's additional documents confirm that the Division does not have a specific factual basis for jurisdiction.

D. The Division's Request for Jurisdictional Discovery Should Be Denied

If there were ever a case in which jurisdictional discovery is inappropriate, it is this case. The Division already has access to over tens of millions of pages of Purdue documents produced in discovery in the MDL. Those documents include Board reports and other materials received by Richard Sackler, Purdue's custodial files for him, and the thousands of emails they sent and received. The Division also has documents produced from Richard Sackler's personal emails in the MDL, and its outside counsel took the 2019 deposition of Richard Sackler in the MDL. Yet, from this huge trove of information, the Division has identified no evidence supporting its jurisdictional theories. Equally important, the Division has not identified what, if any, specific information it expects from jurisdictional discovery that has not already been produced.

The Division argues that it should be granted jurisdictional discovery because (1) it has not conducted any Utah-specific discovery, and (2) other courts permitted jurisdictional discovery of other corporate defendants in other opioid cases. (Opp. at 28-29). To be entitled to jurisdictional discovery, the Division must have made a *prima facie* showing of jurisdiction or identified just what facts jurisdictional discovery can reasonably be expected to show. *See ClearOne*, 2016 UT 16, ¶41 (trial court did not abuse discretion in denying jurisdictional discovery where plaintiff

"failed to show that discovery would lead to facts proving" jurisdiction). No such showing has been made, as the Division has not identified a single suit-related contact between Richard Sackler and Utah. *McNeill v. Geostar*, 2007 WL 1577671, at *3 (D. Utah May 29, 2007) (rejecting request for jurisdictional discovery by a plaintiff arguing that the defendant was subject to jurisdiction because it controlled another company that did business in Utah because plaintiff had not "not made a colorable claim . . . [of] personal jurisdiction" or identified "what discovery [it] seeks or why it would be fruitful to the precise issues before the Court.").[17] The other opioid cases cited by the Division, moreover, concerned companies that manufactured drugs distributed in the forum, not claims against their corporate directors.[18]

II. The Opposition Confirms that the Tribunal May Not Adjudicate the Claims Against Richard Sackler

The Opposition confirms that Richard Sackler is not a "supplier[]" under the UCSPA, and prescription opioids are not "consumer transactions" within the meaning of the statute. The Tribunal therefore lacks subject matter jurisdiction over the UCSPA's claims against him.

As the Tribunal has previously recognized, there is no reported Utah case that supports the Division's contention that a director or officer of a corporate entity can be a "supplier" under the UCSPA. *See* April 19, 2019 Order on Renewed Motion to Convert Informal Hearing at 4 n.2. In

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[17] The Division (Opp. at 28) invokes *Health Grades, Inc. v. Decatur Memorial Hospital*, 190 F. App'x 586 (10th Cir. 2006), in support of its request for jurisdictional discovery. *McNeill* considered *Health Grades* and concluded that it does not support jurisdictional discovery where the plaintiff does not make a colorable claim of personal jurisdiction or identify why jurisdictional discovery would be fruitful. The Opposition (at 28) also cites *Sizova v. National Institute of Standards & Technology*, 282 F.3d 1320 (10th Cir. 2002), but that case is about jurisdictional discovery in challenges to subject matter jurisdiction.

[18] *See* Opp. Ex. 48 and Order, *In re Nat'l Prescription Opiate Litig.*, No. 1:17-MD-2804 (DAP) (N.D. Ohio Apr. 3, 2019) (ECF 1512) (permitting jurisdictional discovery because plaintiff established a *prima facie* case of jurisdiction) (mistakenly cited as Opp. Ex. 49, *see* Opp. 29).

its Opposition, the Division does not cite a single case to the contrary. The statutory definition of "supplier" in the UCSPA is fully inclusive and cannot be expanded by fiat to include a director or officer of a corporate entity that operates nationwide. (*See* Mot. at 35 n.16).

The cases cited by the Division in support of its claim that Richard Sackler is a "supplier" are readily distinguishable because they address the types of corporate entities that meet the definition of a "supplier" and do not address the issue here, *i.e.*, whether a director or officer of a company with nationwide operations is a "supplier" when there are no specific allegations that he or she is soliciting, engaging in, or enforcing consumer transactions. The Division cites *Sexton* for the principle that the definition of "supplier" under the UCSPA is "expansive." (Opp. at 34 (citing *Sexton v. Poulsen & Skousen P.C.*, 2019 WL 1258737, at *9 (D. Utah Mar. 19, 2019)). However, the court in *Sexton* makes clear that the term "supplier" is "expansive" because it includes many types of parties that "enforce[] consumer transactions," *e.g.*, "constables, attorneys, and law firms that regularly collect debts uncured from consumer transactions are suppliers because they enforce those transactions," as opposed to only including those who "supply a good or service to a consumer." *Id.* The second case relied on by the Division, *State ex. rel. Wilkinson v. B & H Auto*, 701 F. Supp. 201, 204 (D. Utah 1988), is similarly irrelevant because it simply holds that an entity that sells a consumer good to another entity can be a "supplier." The Division has identified no case supporting its unprecedented argument that directors or officers of alleged suppliers are themselves "suppliers" under circumstances similar to those alleged here.

The Opposition also makes the unfounded argument that Richard Sackler should be considered a "supplier[]" under the UCSPA because he "indirectly solicited and engaged in the sales of opioids in Utah." (Opp. at 34). In support, the Opposition advances the conclusory claims that Purdue's Board acted as the "de facto CEO of the company," and that he held certain titles at

Purdue. (Opp. at 34-35). But unsubstantiated allegations based solely on corporate titles and the role of the Board as a whole cannot make up for the Opposition's failure to identify a single example of him engaging in any act within the statutory definition of a "supplier."

The Opposition also confirms that the Tribunal lacks subject matter jurisdiction because Richard Sackler did not engage in a "consumer transaction" within the meaning of the UCSPA. The Opposition does not dispute that the Citation does not plead that Richard Sackler engaged in any act in connection with a consumer transaction in Utah. (Mot. at 29). The Opposition only cites three instances of acts specifically occurring in Utah, and they all relate to alleged conduct by Purdue: Purdue's alleged payments to two Utah doctors; Purdue's alleged gifts and payments to Utah prescribers; and Purdue's alleged employment of sales representatives to Utah providers. (Opp. at 35; ¶¶17, 26). Although the Opposition claims that Richard Sackler somehow "directed" these acts, those boilerplate allegations should be disregarded because neither the Citation nor the Opposition specifies any facts showing that he authorized or was otherwise personally involved with these alleged activities. *See, e.g.*, *Franco v. The Church of Jesus Christ of Latter-Day Saints*, 2001 UT 25, ¶26, 21 P.3d 198, 206 (noting the sufficiency of a complaint "must be determined by the facts pleaded rather than the conclusions stated"); Mot. at 33 (collecting similar cases).[19]

III. The Opposition Confirms that the Citation Fails to State a Claim Against Richard Sackler

The Opposition does not and cannot remedy the Citation's fatal defect: it does not and cannot plead that Richard Sackler personally participated in Purdue's alleged prescription opioid marketing activities in Utah. The Citation therefore fails as a matter of law to state a claim.

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[19] Richard Sackler incorporates and joins in each of the arguments set forth in Purdue's Motion to Dismiss and Reply, including the reasons that claims related to the sale of prescription opioids fall outside the purview of the UCSPA.

A. The Documents Attached to the Motion Can Be Considered

The Opposition's assertion (Opp. at 3 n.2) that the Individual Respondents represented at the April 9, 2019 hearing that the documents attached to their Motion (and the proposed exhibits to the Motion) cannot be considered on their motion to dismiss for failure to state a claim is false. Documents that were expressly referenced or quoted in the Citation are before this Tribunal on the 12(b)(6) motion to dismiss. *Oakwood Vill. LLC v. Albertsons, Inc.*, 2004 UT 101, ¶13, 104 P.3d 1226, 1231 ("[A] document that is referred to in the complaint, even though not formally incorporated by reference or attached in the complaint is not considered to be a 'matter outside the pleading.' . . . [I]f the rule were otherwise, a plaintiff with a deficient claim could survive a motion to dismiss simply by not attaching a dispositive document upon which the plaintiff relied."). Additionally, the governmental documents attached to the Motion and Purdue's motion to dismiss can be considered because the Tribunal "may take judicial notice of public records and may thus consider them on a motion to dismiss." *See BMBT, LLC v. Miller*, 2014 UT App 64, ¶6, 322 P.3d 1172, 1174.

B. The Corporate Shield Bars the Division's Attempt to Hold Richard Sackler Liable for Purdue's Alleged Conduct

The Opposition has no response to Richard Sackler's argument that the Division has no claim against him because he did not make any statements, directly or indirectly, that are actionable under the UCSPA. Utah law does not permit liability against him based on the alleged conduct of Purdue. (Mot. at 34-35). As explained in the Motion, the UCSPA—unlike other Utah statutes—does not make corporate officers or directors personally liable for violations committed by their company. (*See* Mot. at 34-35 & 36 n.17). The Division identifies no case law or authority that would support imposing such liability. Thus, the corporate shield defense bars the UCSPA claim

against him. *See Hernandez v. Baker*, 2004 UT App 462, ¶¶7-8, 104 P.3d 664, 667; *Salt Lake City Corp. v. Big Ditch Irrigation Co.*, 2011 UT 33, ¶27, 258 P.3d 539, 545-46.

C. The Opposition's Failure to Show Personal Participation by Richard Sackler is Fatal to the Division's Claims Against Him

The Citation also fails to state a claim against Richard Sackler because it does not allege facts showing that he personally participated in making, or instructed others to make, misleading statements about any prescription opioids sold by Purdue in Utah or to otherwise violate Utah law. Assuming for the sake of argument that corporate directors can be held liable for a company's violation of the UCSPA, the Opposition does not dispute that their conduct is to be analyzed under the standard set forth in *Armed Forces Insurance Exchange v. Harrison*: "an officer or director of a corporation is not personally liable for torts of the corporation or of its other officers and agents merely by virtue of holding corporate office, but can only incur **personal liability by participating in the wrongful activity**" that is the subject of the claim. 2003 UT 14, ¶19, 70 P.3d 35, 41 (Mot. at 35-38). The Division also does not dispute that Rule 9(c) applies to UCSPA claims, meaning that it must plead any alleged UCSPA violations with particularity. (Mot. at 33-34).

The Opposition confirms that the Citation cannot satisfy the personal participation requirement for Richard Sackler with particularity or otherwise. Unable to show that Richard Sackler personally participated in making statements to a Utah-based healthcare provider or engaged in other Utah-specific promotional activities, the Opposition instead repeats the Citation's boilerplate assertions that he "oversaw" and "approved" certain of Purdue's activities and "personally directed" Purdue's alleged wrongdoing. (Opp. at 8-10). These unsubstantiated allegations are insufficient to state a claim against Richard Sackler for a UCPSA violation.

The handful of allegations that the Opposition relies on concerning Richard Sackler (at 37-40) do not plead his involvement with any marketing statements—let alone any misleading statements—in the last decade or in Utah:

- The Division invokes the "information and belief" assertion that "Richard Sackler would have been aware of and approved all of Purdue's marketing themes and strategies" based on his positions as the head of Purdue's marketing department and his subsequent positions as President and Co-Chairman of Purdue's Board. (¶132.) But the Citation alleges (¶5) that Richard Sackler's work as head of marketing was *before 1999*, **more than 10 years before the limitations period**. (*See also* ¶137 [REDACTED] .) As to the Division's allegations based on Richard's alleged 1999-2003 service as President and 2003-2007 service as Co-Chairman (¶5; R. Sackler Decl. ¶3), it is black-letter law that general oversight of the business activities of a corporation "does not alone establish facts supporting a claim that [the officer or director] is personally liable for fraud." *Armed Forces*, 2003 UT 14, ¶21. The Division must plead facts more than titles.

- The Division invokes the allegation that around 1997 Richard Sackler directed [REDACTED] (¶138). But the Division offers no response to the Motion's (at 9) observation that the FDA-approved label disclosed the relationship between OxyContin and morphine. Tellingly, the Division's long description of the type of misrepresentations that its claims against Purdue are based on (¶¶33-105) does **not** include any allegations that Purdue misrepresented the strength of OxyContin.

- The Division also relies on the allegation that around 1997 or 2001, [REDACTED] (¶147.) But, it offers no response to the Motion's (at 9) observation that the language the Division attributes to Richard Sackler is consistent with the FDA approved-label for OxyContin. As noted above, while the Division labels the statement that OxyContin has "no ceiling effect" "dangerously false," it appears in OxyContin's FDA-approved label, which is reviewed by the FDA—not the Division—for accuracy. *See supra* at 18 & n.14.

- The Division alleges that he requested information (¶¶156, 143) and [REDACTED] (¶143). But none of these allegations show that he was involved with any misrepresentations, let alone any in Utah.

D. The Discovery Rule Cannot Salvage the Division's Untimely Allegations

The Division's claims under the UCSPA in this administrative action are governed by a ten-year statute of limitations. UTAH CODE ANN. § 13-2-6(6)(a). As such, the allegations against Richard Sackler are untimely insofar as they are based on alleged conduct that occurred on or

before January 30, 2009, ten years prior to the filing of this action, and should therefore be dismissed. (Mot. at 38-39). The Citation relies principally on events that took place in the 1990s and the early 2000s, all of which should be disregarded as untimely.

Under Utah law, the burden is on the plaintiff—here, the Division—to show that the limitations period should be tolled. *Stephenson v. Elison*, 2017 UT App 149, ¶33, 405 P.3d 733, 740 (citing *Tracey v. Blood*, 78 Utah 385, 3 P.2d 263, 266 (1931) ("Apparently all courts are agreed . . . that the burden [is] upon the plaintiff to plead and prove facts sufficient to toll the statute of limitations[.]")). Recognizing that the majority of the factual allegations against Richard Sackler are time-barred, the Division attempts to argue that equitable tolling should apply because the Individual Respondents supposedly "concealed their wrongdoing and the harm of Purdue's products" and should be estopped from asserting statute of limitations. (Opp. at 38). But the Division cannot salvage its untimely claims because it cannot identify a single instance of Richard Sackler engaging in fraudulent concealment.

Under the equitable discovery rule, the statute of limitations may only be tolled "when either exceptional circumstances or the defendant's fraudulent concealment prevents the plaintiff from timely filing suit." *Colosimo v. Roman Catholic Bishop*, 2007 UT 25, ¶15, 156 P.3d 806, 811. To establish fraudulent concealment, as the Opposition seeks to do here, a plaintiff must allege that a defendant took "affirmative steps to conceal" the plaintiff's cause of action. *Id.* at ¶39. The paragraphs of the Citation cited in the Opposition as evidencing fraudulent concealment (Opp. at 39; ¶¶8, 16, 32, 46, 48, 63, 67, 73, 113, 164, 168, 174) principally relate to alleged conduct by Purdue, not Richard Sackler. Not a single one of these cited paragraphs—nor any other paragraph in the Citation—describes any affirmative act of concealment by him. *See Town of Cornish v. Veibell*, 2009 WL 1160301, at *2 (Utah Ct. App. Apr. 30, 2009) (holding "equitable

discovery rule cannot be invoked to toll the statute of limitations" because [plaintiff] failed to show that [defendant] took affirmative steps to conceal [plaintiff's] causes of action," and therefore "failed to make a prima facie showing of fraudulent concealment").[20]

The Division also cannot invoke equitable tolling because it fails to plead that it investigated his alleged conduct but that its efforts were rendered futile by alleged concealment, as required for the doctrine to apply. *See Colosimo*, 2007 UT 25, ¶40 ("[B]efore a plaintiff may rely on the fraudulent concealment doctrine, he must have actually made an attempt to investigate his claim and . . . such an attempt must have been rendered futile as a result of the defendant's fraudulent or misleading conduct."); *id.* at ¶37 ("[P]laintiff must diligently investigate his claim to prevail under a theory of fraudulent concealment."); *Anderson v. Dean Witter Reynolds, Inc.*, 920 P.2d 575, 580 (Utah Ct. App. 1996) ("Plaintiff had a duty to inquire, which should have prompted an investigation in timely fashion. She did not investigate the facts at all, let alone with the requisite degree of reasonable diligence. Therefore, the discovery rule does not serve to validate her otherwise untimely lawsuit."). Any suggestion that the Attorney General had until recently no basis for investigating claims about Purdue's marketing from decades ago is irreconcilable with the Citation's admission (¶114) that in 2007 Purdue entered a guilty plea and publicly settled related claims. (*See also* Mot. at 2-3 (addressing the monitoring put in place after the settlement to prevent a repeat of inappropriate marketing)). The Division has made no effort to show that, at

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[20] *See also Beaver Cty. v. Prop. Tax Div.*, 2006 UT 6, ¶32, 128 P.3d 1187, 1194 ("We have counseled that courts should be cautious in tolling a statute of limitations; liberal tolling could potentially cause greater hardships than it would ultimately relieve. The doctrine of equitable tolling should not be used simply to rescue litigants who have inexcusably and unreasonably slept on their rights."); *Ramsay v. Ret. Bd.*, 2017 UT App 17, ¶15, 391 P.3d 1069, 1074 (rejecting fraudulent concealment theory because defendant "did nothing to prevent" plaintiffs from discovering their claim; "In no case is mere silence or failure to disclose sufficient in itself to constitute fraudulent concealment." (quoting *Colosimo*, 2007 UT 25, ¶44)).

any time after 2007 (or before), it diligently investigated the claims alleged against Richard Sackler within the limitations period—under which claims expire after a decade—but was unable to discover certain alleged facts because of his supposed fraudulent conduct.[21]

For all of these reasons, the Citation's allegations that took place before January 2009 fail as a matter of law. As discussed in the Motion (at 39-41), the few timely allegations do not come remotely close to stating a claim against him.

E. The Opposition Confirms that the Citation's Attempt to Plead Causation Fails

The Opposition's claim that "[t]he Division is not required to plead causation under the UCSPA" (Opp. at 41) is belied by the Citation's conclusory alleged that Richard Sackler's conduct "caused significant harm to the State and the agencies." (¶¶28-29). These allegations fail a matter of law because the Division cannot establish any plausible causal link between Utah's alleged harm and any alleged conduct by Purdue, let alone by Richard Sackler. (*See* Mot. at 39-41).

The Opposition offers no meaningful response to the Motion's point that the Citation fails to identify a single instance in which Richard Sackler participated in making any of the allegedly improper promotional statements that supposedly caused harm in Utah. The Opposition instead retreats to the mantra that "the Citation is replete with allegations that demonstrate that the [Individual Respondents] directed the dissemination of deceptive materials," but the Opposition does not and cannot cite to a single instance of Richard Sackler actually instructing anyone to make a misleading statement in Utah or anywhere else. (Opp. at 42).

The limited conduct ascribed to Richard in the three cited paragraphs (Opp. at 42) provide no support for the Division's causation argument. The allegation that unspecified

21 The Opposition mentions the "exceptional circumstances" doctrine in a footnote (Opp. at 39, n.62), but fails to specify what they are or how they justify equitable tolling.

[REDACTED] at an unspecified time (¶ 133) is conclusory, does not show his involvement with any misrepresentation, and does not plead facts showing that his conduct caused any harm. The Division's reliance on the other allegations—[REDACTED]—serves only to emphasize just how baseless its claims against him are, despite the Division's counsel's access to a huge trove of information before filing the Citation. As addressed above (at 26):

- The Citation does not allege that Purdue or anyone else made any misleading statements about the strength of OxyContin in Utah (*see* ¶¶33-105) so these allegations are irrelevant to the Division's claims;
- The allegations are from 1997, twenty-two years ago; and
- The Division has no response to the Motion's point (at 9) that there could be no deception because the FDA-approved label always disclosed the relative potency of oxycodone and morphine.

The Opposition similarly cannot excuse the Citation's inability to show proximate cause. The Opposition does not deny that that there are many degrees of separation between any alleged actions by Richard Sackler and the harm resulting from opioid abuse and addiction. Indeed that harm results in significant part from intervening criminal and negligent acts—many of which are detailed in the Citation—that break the chain of causation. The Citation's causation allegations fail as a matter of law.

CONCLUSION

For the foregoing reasons, the Division's claims against Richard Sackler should be dismissed.

DATED this 6th day of May, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on this the 6th day of May, 2019, I served the above-captioned document on the parties of record in this proceeding set forth below by delivering a copy thereof by hand-delivery, U.S. Mail, electronic means and/or as more specifically designated below, to:

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