REDACTED REPLY BRIEF IN SUPPORT OF MOTION

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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 KATHE SACKLER, M.D.'S REPLY IN SUPPORT OF MOTION TO DISMISS THE DIVISION'S NOTICE OF AGENCY ACTION AND CITATION** **DCP Legal File No. CP-2019-005** **DCP Case No. 107102**

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PRELIMINARY STATEMENT[1]

Recognizing that the Citation does not and cannot show that Kathe Sackler has any connection to Utah whatsoever, the Opposition improperly seeks to rewrite the Citation after the fact through many new allegations which supposedly support the exercise of personal jurisdiction.[2] But these new allegations fare no better than the ones raised in the Citation—Kathe Sackler has never been to Utah and has not personally participated in Purdue's alleged prescription opioid marketing activities in Utah or anywhere else.

The Opposition confirms that the Division improperly bases its jurisdictional and substantive allegations on Purdue's alleged conduct in Utah and on Kathe Sackler's service on Purdue's Board, which supposedly acted, as a group, as "the 'de-facto' CEO" of Purdue. (¶ 126; Opp. at 14-15). But it is black letter law that jurisdictional and substantive claims against a former director or officer cannot be based on the alleged activities of the company on the board of which she served. Kathe Sackler was just one member of a much larger board and therefore had no ability to unilaterally set board policy. The Citation and Opposition are devoid of a single factual allegation to support the claim that Kathe Sackler personally engaged in any functions that remotely resembled those of a CEO, let alone any allegations that she personally participated in any alleged misconduct by Purdue in or directed at Utah. The Citation's allegations against Kathe Sackler therefore fail as a matter of law and her motion to dismiss should be granted.

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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.

[2] Because the Opposition raises separate allegations against each of Respondents Richard Sackler and Kathe Sackler, each individual is submitting his or her own reply brief in support of the Motion.

No Personal Jurisdiction. The Division concedes that Kathe Sackler is not subject to general jurisdiction in Utah and does not dispute that she has never stepped foot in Utah. Although the Opposition attaches dozens of new exhibits, not a single one shows Kathe Sackler personally participating in Purdue's alleged prescription opioid marketing activities anywhere, let alone in Utah or specifically aimed at Utah. She therefore has no suit-related contacts in Utah. Surely a defendant who has never stepped foot in Utah or personally participated in any suit-related conduct in this State cannot be subject to personal jurisdiction here.

The Opposition strains to manufacture a basis for personal jurisdiction by attributing Purdue's nationwide conduct to Kathe Sackler, relying on conclusory, unsubstantiated allegations of control and agency. The Opposition's argument is encapsulated by its mistaken claim that Kathe Sackler is asking the Tribunal to conclude "that their nationally directed marketing campaign, which emerged from the highest levels of the company, somehow inexplicably excluded Utah." (Opp. at 2). She made no such argument. She instead relied on well-settled case law that jurisdiction over a director or corporation with nationwide activities must be based on specific suit-related acts in or specifically aimed at the forum state. (Mot. at 21-27). Were this not the case, directors or officers of companies with nationwide operations could be haled into court in all fifty states—a possibility that both Utah courts and the U.S. Supreme Court have rejected. Therefore, the Tribunal may not exercise personal jurisdiction over Kathe Sackler.

No Subject Matter Jurisdiction. The Opposition confirms it cannot satisfy an essential prerequisite for bringing a claim against Kathe Sackler under the UCSPA—showing that she is a "supplier" and that she engaged in a "consumer transaction" in Utah. The Division has not and cannot cite a single case showing that a former director or officer of a company with *nationwide*

operations—who neither has been to Utah nor engaged in any Utah-specific business activities—is a "supplier" under the UCSPA or engaged in "consumer transactions" in Utah. Moreover, because Purdue manufactures medicines that 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 Kathe Sackler.

Failure to State a Claim. The Opposition does not dispute that to state a claim against Kathe Sackler, it must show that she personally participated in Purdue's alleged misconduct. The Opposition confirms it cannot satisfy this fundamental requirement, repeating conclusory allegations about her role on Purdue's Board and information she supposedly received (mostly in the last millennium). The few allegations of affirmative conduct raised by the Opposition are stale (in many cases decades old) and have nothing to do with Purdue's alleged prescription marketing activities in Utah. As one example, the Opposition claims that in 2000 (nearly two decades ago), she "pressed for a [redacted]." But the Opposition omits that the referenced document on its face refers to a plan for ***Korea***. That the Division can only muster a handful of stale and irrelevant allegations as to Kathe Sackler—with absolutely no connection to Utah—underscores the fatal deficiencies in the Citation.

For these reasons and as set forth below, the Division's claims against Kathe Sackler should be dismissed with prejudice.

ARGUMENT

As set forth below, the Opposition confirms Kathe Sackler's motion to dismiss should be granted because (i) the Tribunal lacks personal jurisdiction over her; (ii) the Tribunal cannot adjudicate this matter because the Division does not meet the statutory elements of a UCSPA

claim; and (iii) the Division has failed to state a claim against her. The affidavits and documents attached to the Motion are properly considered on a motion to dismiss. The affidavits are submitted only in connection with the motion to dismiss for personal jurisdiction, and Utah courts have repeatedly held affidavits are properly considered on such motions. *See e.g.*, *Starways, Inc. v. Curry*, 1999 UT 50, ¶ 3, 980 P.2d 204, 206 (considering affidavits attesting to jurisdictional facts and stating: "allegations asserted in the complaint are considered true only insofar as they are not specifically contradicted by the affidavits").[3] The documents attached and the proposed exhibits to the Motion are properly considered on a motion to dismiss because these documents are expressly referenced, and sometimes quoted, in the Citation. *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 to in the complaint is not considered to be a 'matter outside the pleading.' If 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.").[4]

I. The Tribunal Lacks Personal Jurisdiction Over Kathe Sackler

As the Opposition concedes, to exercise jurisdiction over Kathe Sackler, the Division bears the burden of demonstrating both (i) a statutory basis for the exercise of jurisdiction and (ii) that the exercise of jurisdiction would be consistent with due process. (Opp. at 3). The

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[3] *See also 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.'"); *Roskelley & Co. v. Lerco, Inc.*, 610 P.2d 1307, 1310 (Utah 1980) (in a pretrial determination of jurisdiction, a plaintiff cannot rely on allegations made in the complaint if the defendant has specifically controverted alleged jurisdictional facts by affidavit).

[4] Additionally, the governmental documents attached to the Motion 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.

Opposition confirms that the Division has made no such showing for Kathe Sackler. Nor could it, because:

- Kathe Sackler has indisputably never even been to Utah;
- Not a single allegation in the Citation alleges Kathe Sackler engaged in any act specifically aimed at Utah;
- Not a single allegation in the Opposition alleges Kathe Sackler engaged in any act specifically aimed at Utah;
- Not a single document attached to the Opposition connects Kathe Sackler to Utah.

As the Division has not and cannot satisfy its burdens, the Citation's claims against Kathe Sackler should be dismissed for lack of personal jurisdiction.

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 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), 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 Kathe Sackler, and no other statute empowers the Division and this Tribunal to exercise jurisdiction over her. Accordingly, there is no statutory basis for personal jurisdiction.

The Opposition does not even attempt to base jurisdiction over Kathe Sackler on the use of "transactional resources" in Utah. (Opp. at 5). The Division relies on subparts (i) and (ii) of

§ 13-2-6(4)(a) and claims they are satisfied by ¶¶ 8, 125, 129, or 147 of the Citation. But a review of these paragraphs demonstrates the absence of a statutory basis for jurisdiction. Not one of these paragraphs describes a specific affirmative act allegedly taken by Kathe Sackler. To the extent the allegations even mention Kathe Sackler, they relate to the alleged conduct of **Purdue**, which is headquartered in Connecticut (¶¶ 1-3). (*See* ¶ 8 (alleging jurisdiction based on general "directives *at Purdue*" that supposedly caused unspecified "unlawful promotion and sales" in Utah); ¶ 125 (alleging unspecified actions "taken as [a] members of the [ ] Board of Directors," or as an "officer[] or owner[]," of Purdue entities); ¶ 129 (same); ¶ 147 (no reference to Kathe Sackler whatsoever). Not a single allegation identifies a connection between Kathe Sackler and Utah, let alone any conduct outside of Utah that constituted an attempted violation in the State.

The Division seeks to sidestep its failure to satisfy § 13-2-6(4)(a) by arguing that "decisions and directives at Purdue" (¶ 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 a director or officer who has no connection to Utah.

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 belated attempt to do so is futile. That statute's express language confers jurisdiction only on "the courts of this state," not administrative agencies.[5] 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

[5] The Division's reliance on *State in re W.A.*, 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").

P.3d 55, 59. *See also Muddy Boys, Inc. v. Dep't of Commerce, Div. of Occupational & Prof'l Licensing*, 2019 UT App 33, ¶¶ 22-27 (Utah Mar. 7, 2019) (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 Kathe Sackler.

In the absence of any statutory basis to exercise jurisdiction, the Division's claims against Kathe Sackler fail and there is no need to address constitutional due process issues. The Division's request that this Tribunal excuse the Division's failure to satisfy the statutory requirements and "go straight to the due process analysis" (Opp. at 5) is contrary to Utah 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 over Kathe Sackler Would Violate Due Process

The Division incorrectly maintains that Kathe Sackler is subject to specific jurisdiction. (Opp. at 5-7). Specific jurisdiction requires a showing that the defendant "purposefully 'reach[ed] out beyond' his or her 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 attempt to exercise jurisdiction over Kathe Sackler, an individual who has no contacts with Utah of any kind, is the prototypical example of a situation in which the assertion of jurisdiction would violate a defendant's due process rights.

1. The Division Cannot Predicate Specific Jurisdiction over Kathe Sackler Based on Purdue's Alleged Conduct in Utah

The Division does not dispute that personal jurisdiction over Kathe 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 Kathe Sackler allegedly

had "direct involvement in Purdue's business" (¶ 8), and was a member of Purdue's Board (¶ 126), she 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*, 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 Opposition's attempt to distinguish this case law fails—it points to ¶¶ 8 and 25 of the Citation, which allege that Kathe Sackler "personally directed" acts and conduct 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 Kathe Sackler "because [she] personally directed Purdue to conduct the deceptive or unfair acts or practices alleged herein that took place in Utah." But 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 declaration 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 that Kathe Sackler has any connection to Utah, much less that she played any role in Purdue's alleged marketing activities in the State. In making a jurisdictional motion to dismiss, the movant has no obligation to contest jurisdictionally irrelevant, conclusory allegations. To the contrary, a declaration in support of a motion to dismiss for lack of jurisdiction is properly 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 Kathe 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 do not even mention personal jurisdiction. The Opposition identifies no case holding that a corporate director is subject to personal jurisdiction because she 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 *FTC v. Bay Area Bus. Council, Inc.*, 423 F.3d 627 (7th Cir. 2005) and *FTC v. World Media Brokers*, 415 F.3d 758 (7th Cir. 2005))). The Division claims that these inapposite cases are somehow "instructive" (Opp. at 31), while failing 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 Kathe Sackler is subject to jurisdiction because she 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). To the contrary, even accepting the Citation's allegations as true for purposes of the Motion, Kathe Sackler was just one of many directors and for a period of time held a Senior Vice President title (although there are no specific allegations regarding what activities, if any, she may have carried out as an officer). The Citation thus recognizes that Kathe Sackler never served as president or CEO or otherwise controlled Purdue. Further, as explained in Kathe Sackler's declaration, she has not held an officer title for over a decade and she plainly had far less authority than the corporate President in *Ontel*.[6]

[6] Hypothetically, even if as director Kathe Sackler were to have voted on a nationwide marketing plan—and neither the Citation nor the Opposition allege that she did—that would still be insufficient to establish jurisdiction over her in Utah. *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 Kathe Sackler did not personally participate in any alleged deceptive marketing statements made in or directed at Utah, there is no jurisdiction over her.

2. The Effects Test Confirms There Is No Specific Jurisdiction Because the Citation and Opposition Do Not and Cannot Show that Kathe Sackler Specifically Targeted Utah

Finally, the Division makes a futile attempt to base personal jurisdiction on the so-called "effects" test. (Opp. at 5-6). Notwithstanding that the Division cannot identify any specific connection between Kathe Sackler and Utah, it makes the mistaken claim that she is still subject to jurisdiction in this State because of unspecified conduct that somehow 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 "[t]he proper question is not 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 by the plaintiff in Utah, the "conduct had little to do with Utah." *Id.* ¶ 33. *A fortiori*, Kathe Sackler cannot be subject to personal jurisdiction because her alleged conduct had absolutely nothing to do with Utah.

As the Division concedes, to establish jurisdiction under the effects test, a plaintiff must show that the defendant "(1) committed an intentional act; (2) expressly aimed at the forum state; (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 Kathe Sackler supposedly 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 Kathe Sackler personally committed. Unable to do so, the Division maintains that it "is not required to allege" any allegedly deceptive act by Kathe Sackler (Opp. at 33), and relies exclusively on alleged acts of Purdue (Opp. at 33, citing ¶ 17 ("Purdue paid ... at least two Utah doctors"), ¶ 26 ("Purdue has given ... Utah prescribers ... gifts")). The Division attempts to attribute these actions to Kathe Sackler solely by virtue of her service as a director until 2018 and the officer title that she held prior to 2007. (Opp. at 34-35; K. Sackler Decl. ¶ 3). But this theory has no support under Utah law: the Opposition fails to cite a single case for the proposition that a plaintiff can show that a defendant director or officer somehow engaged in an "intentional act" on the basis of the *company's* alleged conduct.

Express Aiming. Nor can the Division satisfy the "express aiming" requirement because the Citation and Opposition do not plead that Kathe Sackler expressly aimed to do anything in Utah. 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 v. Landa, Inc.*, 231 F. Supp. 2d 1130, 1135 (D. Utah 2002).[7] 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 as to Kathe Sackler are based on Purdue's alleged *nationwide* conduct, not on any action Kathe Sackler targeted at Utah. As set forth in the

[7] 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 Chicago, LLC v. Anesthesia Assocs. of Houston Metroplex, P.A.*, 623 F.3d 440, 445 n.1 (7th Cir. 2010).

Motion (at 26 & n.13), under *J. McIntyre* and other cases, nationwide 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 hold that nationwide conduct does not satisfy the effects test because it is not targeted at a specific forum.[8]

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

- Paragraph 8 alleges that any direction of Purdue's sales representatives in Utah was only incidental to the Board's alleged oversight of the Company's nationwide conduct: "Business activities that [Kathe Sackler] directed include Purdue's employment of a substantial number of sales representatives nationwide, including in Utah."[9]
- Paragraph 127 alleges that [Kathe Sackler], as member[] of the Board, "oversaw the tactics that sales representatives used at sales visits." It does not specify any conduct by Kathe Sackler targeted at or focused on Utah.[10]
- Finally, the Division's assertion that the Citation alleges Kathe 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 Kathe Sackler at all—they talk only about Purdue.

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[8] *See, e.g., Corwin v. Swanson*, No. CV 10-769 PSG (PJWX), 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.*, No. CIV.A. 05-5903 NLH, 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).

[9] 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).

[10] 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 Kathe 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.[11]

Nor does *Silver v. Brown*, 382 F. App'x 723 (10th Cir. 2010) (Opp. at 7), support the Division's assertion of jurisdiction over Kathe Sackler. *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," and "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.* Even assuming *Silver* survives *Walden*, the facts of *Silver* and the allegations against Kathe Sackler could not be more different: unlike in *Silver* where the defendant had numerous connections to the forum state, here Kathe Sackler has no connections to Utah at all.

The Brunt of the Harm. As to the third step of the effects test—the requirement that the conduct in 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

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[11] 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.*, No. 11 MDL 2262 (NRB), 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.

its claims concern a "nationally directed marketing campaign" and conduct 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.

C. The Exhibits Attached to the Opposition Only Confirm that the Tribunal Lacks Jurisdiction over Kathe Sackler

The Division asserts that the documents it submitted with its Opposition "[b]olster the [s]howing of [p]ersonal [j]urisdiction." (Opp. at 17-28). That assertion is groundless because none of the additional documents show any connection between Kathe Sackler and Utah, much less suit-related contacts that form a basis for specific jurisdiction. Utah is mentioned only three times in the Division's 12-page litany of new alleged facts, and none provide a basis to exercise jurisdiction as to Kathe Sackler. *First*, the Division asserts (Opp. at 22) that a 2008 expansion of Purdue's sales force approved by Purdue's Board "made no exception for Utah." But the Board minutes approving the expansion (Opp. Ex. 28 at -2620-21) make no mention of Utah. And the remaining two references to Utah do not involve Kathe Sackler in any way. *See* Opp. at 17, 27. The Division's other "evidence"—to the extent it is even properly before this Tribunal[12]—is even more irrelevant to the personal jurisdiction analysis. None of it demonstrates that Kathe Sackler has any contacts with Utah, much less contacts sufficient to support the exercise of personal jurisdiction over her in this proceeding.

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[12] For example, the Division contends that Kathe 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 Kathe Sackler's 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").

Indeed, none of the documents added by the Division dispute that Kathe Sackler has never been to Utah. And none of those documents show any contacts whatsoever between Kathe Sackler and Utah, let alone suit-related contacts that could provide the basis for asserting jurisdiction over her in this State. Most of the jurisdictional allegations regarding Kathe Sackler that were added in the Opposition occurred long before the start of the limitations period and have nothing to do with prescription opioid marketing activities in Utah. For example:

- Documents received by Kathe Sackler such as: (i) a memorandum authored by a Purdue executive 25 years ago and CC'd to 13 individuals (one of whom was Kathe Sackler) (Opp. Ex. 9, discussed on Opp. at 19); (ii) an email written 22 years ago by a Purdue executive that was received by 28 individuals (one of whom was Kathe Sackler) (Opp. Ex. 11, discussed on Opp. at 20); (iii) an email sent by Purdue's general counsel 12 years ago to 26 Purdue directors and executives (one of whom was Kathe Sackler) (Opp. Ex. 42, discussed on Opp. at 26); (iv) an email from a press clipping service regarding articles on drug abuse that was sent to Kathe Sackler (Opp. Ex. 40, discussed on Opp. at 26); (v) a 2008 report to Purdue's Board regarding a tally of the number of "Reports of Concern" that were received by Purdue and the number of investigations that were conducted in response (Opp. at 26); and (vi) a draft memorandum regarding factors to be considered in selecting a CEO (Opp. Exs. 29-30, discussed on Opp. at 22-23).

- Emails that Kathe Sackler wrote 19 and 22 years ago in which she recounted discussions in the 1980s with Richard Sackler about the possibility of developing a controlled oxycodone product. (Opp. Exs. 4-5, discussed on Opp. at 17-18).

- An email that Kathe Sackler wrote 20 years ago about sales predictions and product shipments for two weeks of the calendar year. (Opp. Ex. 12, discussed on Opp. at 20).

- A claim that, as of 2004, there was an office at Purdue's headquarters in Connecticut designated for Kathe Sackler (Opp. at 21), without any specificity regarding what, if anything, she did at that office.

- Minutes from a February 2008 board meeting showing that the Board authorized the hiring of additional personnel for sales-related positions for unspecified purposes. (Ex. 28, discussed on Opp. at 22).

The few specific allegations within the limitations period are similarly irrelevant for jurisdictional purposes, including:

- Documents showing Kathe Sackler was a member of three board-level committees: (i) a compensation committee in 2009; (ii) a committee reviewing and approving Board-specified aspects of the 2009 budget; and (iii) [redacted]

[redacted] (Opp. Exs. 27 & 32, discussed on Opp. at 22-23). The documents cited by the Opposition do not show what actions (if any) were taken by these committees or if the latter two committees even met.

- The Opposition again mentions "Project Tango" and claims this shows Kathe Sackler's "knowledge of the problem of addiction and abuse." (Opp. at 16). On its face, a claim about Kathe Sackler's knowledge about certain risks has nothing to do with prescription opioid marketing activities in Utah. These risks were well-known to the FDA, which has always detailed them on OxyContin's label. (Mot. at 31; *see* Ex. 3). Nor could "Project Tango" have any impact in Utah (or anywhere else) because it indisputably was never implemented.

Finally, the Opposition discusses certain irrelevant allegations in the Citation regarding Purdue's Board. These allegations do not describe any Board activities that relate specifically to Utah. Instead, the allegations simply show that the Board received certain information or voted on certain actions regarding Purdue's nationwide operations. (*See* Opp. at 8-9). Moreover, as the Opposition concedes, Kathe Sackler was just one member of a board which included many other directors. (*See* Opp. at 10). That means she could not set board policy alone. Neither the Citation nor the Opposition specify how Kathe Sackler voted on any occasion, let alone make any allegations that she voted to direct alleged misconduct in Utah or anywhere else.

In sum, the allegations in the Citation and the additional allegations and documents set forth in the Citation do not come close to establishing personal jurisdiction over Kathe Sackler.

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

Jurisdictional discovery is inappropriate in this case because the Division does not have a remotely plausible basis to exercise jurisdiction as to Kathe Sackler. To be entitled to jurisdictional discovery, the Division is required to have made a *prima facie* showing of jurisdiction or identified 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). The Division has utterly failed to make such a showing as to Kathe Sackler, who has never even stepped foot in Utah and has no suit-related contacts (or any contacts at all) in the State.

Nonetheless, 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—not individual—defendants in other opioid cases.[13] (Opp. 28-29). But Utah law does not permit such a fishing expedition where no *prima facie* showing has been made. *See McNeill v. Geostar*, No. 2:06-CV-911TS, 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 due its control of 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.").[14] Despite referencing scores of new facts and exhibits in the Opposition, the Division still could not muster a single Utah-specific allegation as to Kathe Sackler. The Tribunal should not reward the Division's decision to bring an action against Kathe Sackler based on such slim allegations by permitting jurisdictional discovery in contravention of Utah law.

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[13] *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) (Doc. 1512) (permitting jurisdictional discovery because plaintiff established a *prima facie* case of jurisdiction) (mistakenly cited as Opp. Ex. 49, *see* Opp. 29).

[14] The Division invokes *Health Grades, Inc. v. Decatur Memorial Hospital*, 190 F. App'x 586 (10th Cir. 2006), in support of its request for jurisdictional discovery. (Opp. at 28). *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.

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

The Opposition confirms that Kathe 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 to adjudicate an UCSPA claim against Kathe Sackler. As the Tribunal previously recognized, there is no reported Utah case supporting 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 its Opposition, the Division does not cite a single case to the contrary. The definition of "supplier" found in the UCSPA is fully inclusive and should not be expanded to include a director or officer of a corporate entity. (*See* Mot. at 35 n.16).

The cases cited by the Division in support of its claim that Kathe 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 she is soliciting, engaging in, or enforcing consumer transactions, let alone doing any of those things in Utah. 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.*, 2:17-CV-01008-JNP-BCW, 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 a party 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 Kathe Sackler should be considered a "supplier" under the UCSPA because she "indirectly solicited and engaged in the sales of opioids in Utah." (Opp. at 34). In support, the Opposition advances the conclusory claim that Purdue's Board acted as the "de facto CEO of the company," and Kathe Sackler was a director of the Board and held an officer title for a certain period. (Opp. at 34-35). But unsubstantiated allegations based solely on a corporate title and the alleged role of the Board as a whole—of which Kathe Sachler was only one member, who therefore could not make board policy—cannot make up for the Opposition's failure to identify a single example of Kathe Sackler engaging in any act that would place her within the statutory definition of a "supplier" in Utah. That is particularly true because, as the Citation makes clear, Kathe Sackler was never the CEO nor did she hold any comparable position of decision-making responsibility at Purdue.

The Opposition also confirms that the Tribunal lacks subject matter jurisdiction because Kathe Sackler did not engage in a "consumer transaction" within the meaning of the UCSPA. Critically, the Opposition does not rebut the Motion's assertion that the Citation fails to plead that Kathe 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**, not Kathe Sackler: 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 in Utah. (Opp. at 35; ¶¶ 17, 26). Although the Opposition

makes the conclusory claim that Kathe Sackler somehow "directed" these acts, such boilerplate allegations should be disregarded because neither the Citation nor the Opposition identifies any specific facts showing that Kathe Sackler authorized or otherwise had any personal involvement with these alleged activities (or, for that matter, any connection with Utah at all). *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)).[15]

III. The Opposition Confirms That the Citation Fails to State a Claim Against Kathe Sackler

The Opposition does not and cannot remedy the Citation's other fatal defect: its failure to plead that Kathe 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.

A. The Opposition Does Not Show That Kathe Sackler Made Any Communications Giving Rise to a Claim Against Her, and UCSPA Liability Cannot Be Premised Solely on the Conduct of Purdue

The Opposition provides no answer to the Motion's argument that the Division's claims fail because Kathe Sackler did not make any marketing claims or cause others to make such claims, directly or indirectly, that are actionable under the UCSPA. Utah law does not permit liability against Kathe Sackler based on the alleged conduct of Purdue. As explained in the Motion, Kathe Sackler, as a former officer and director, cannot be personally held liable for the alleged violations committed by the company because the Division's claims under the UCSPA are statutory, not tort, causes of action. The Division does not dispute that the UCSPA provides no exception to the general rule that officers and directors are not liable for the conduct of their

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[15] Kathe 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.

companies. (*See* Mot. at 34-35 & 36 n.17). Thus, the corporate shield defense bars the UCSPA claim against Kathe Sackler. *See Hernandez v. Baker*, 2004 UT App 462, ¶¶ 7-8, 104 P.3d 664, 667; *Salt Lake City Corp. v. Big Ditch Irr. Co.*, 2011 UT 33, ¶ 27, 258 P.3d 539, 545.

B. The Citation Fails to Plead Any Specific Allegations of Personal Participation By Kathe Sackler in Making Any Misleading Statement

The Citation also fails to state a claim against Kathe Sackler because it does not allege facts to plead she either personally participated in making, or instructed others to make, misleading statements about any prescription opioids sold by Purdue in Utah or to otherwise violate the law. Indeed, neither the Citation nor the Opposition contains a single factual allegation against Kathe Sackler that relates to Utah at all. The Opposition does not and cannot dispute that under Utah law, "[a]n 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. *Armed Forces Ins. Exch. v. Harrison*, 2003 UT 14, ¶ 19, 70 P.3d 35, 41 (citing 3A William Meade Fletcher, FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPS. § 1137, at 209 (rev. ed. 2002)). (Mot. at 35-38). The Opposition also does not dispute that Rule 9(c) applies to claims alleged under the UCSPA, meaning that it must plead any alleged misconduct with particularity. (Mot. at 33-34).

The Opposition confirms that the Citation cannot satisfy the personal participation requirement with particularity or otherwise as to Kathe Sackler. Unable to show that she 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 Kathe Sackler, as a member of the Board, "oversaw" and "approved" certain of Purdue's activities and "personally directed" Purdue's wrongdoing. (Opp. at 8-10).

But such unsubstantiated and conclusory allegations are insufficient to state a claim against Kathe Sackler under the UCSPA.

As discussed in detail in the Motion, there are only five specific allegations regarding Kathe Sackler in the Citation—only two of which are within the limitations period—and they all concern either the receipt or request of information. (Mot. at 12-14).[16] None of the allegations support the notion that Kathe Sackler personally participated in making any alleged misstatement regarding Purdue's marketing of prescription opioids. Moreover, the two allegations of conduct by Kathe Sackler within the limitations period do not relate to misleading statements made to healthcare providers about prescription opioids. (Mot. at 13-14).

In arguing that the Citation "pleads detailed allegations against Kathe Sackler," the Opposition asserts "upon information and belief" that Kathe Sackler served as Purdue's Senior Vice President for a period of time.[17] (¶ 151). But Utah law is clear that a plaintiff cannot state a claim against an officer on the basis that she held that title at the time that the company engaged in alleged misconduct. *See Armed Forces Ins. Exch.*, 2003 UT 14, ¶ 21 (corporate directors "whose duties generally included overseeing the business activities of the corporation does not alone establish facts supporting a claim that she is personally liable for fraud").

The Opposition reiterates only three specific allegations against Kathe Sackler in support

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[16] As the Opposition itself recognizes, the added jurisdictional allegations cannot be considered as part of the Division's opposition to Kathe Sackler's motion to dismiss for failure to state a claim. (Opp. at 3 n.2).

[17] The Opposition claims that Kathe Sackler was a Senior Vice President from 2004 to 2014. As explained in the declaration of Kathe Sackler, she stopped holding the title of Senior Vice President in 2007 (plainly outside the statute of limitations, *see supra* § III.C.). K. Sackler Decl ¶ 3. Regardless, the fact that Kathe Sackler had an officer title at a company for a particular period of time does not allow the Citation to state a claim against her because, as discussed above, a plaintiff cannot state a claim against a director or officer unless it can show that she personally participated in wrongdoing—and the Citation has not and cannot make such a showing.

of its argument that it can state a claim against her, but none of these allegations remotely show that she violated the UCSPA:

- It claims that Kathe Sackler "pressed for a '[redacted]'" (¶ 154; Opp. at 38). That plan, however, related to planned activities in 2000 in Korea. (Mot. at 13).

- It claims that Kathe Sackler was involved "in a business development initiative to make profits from selling opioids and treating resulting opioid addiction," by which it is referring to so-called "Project Tango." (¶ 157; Opp. at 38). The Opposition fails to explain how Kathe Sackler's alleged involvement in considering a transaction regarding a product already on the market for *treating* opioid addiction—that Purdue did not actually acquire—could possibly show her personal involvement in Purdue's alleged misstatements to Utah-based healthcare providers about prescription opioids that are approved by the FDA to treat pain. (Mot. at 13-14).

- It claims that Kathe Sackler "consistently pressed for more information about Purdue's marketing strategies and implementation and [was] more deeply involved in their direction," citing a November 2009 document. (¶ 156; Opp. at 40). But the Opposition ignores that, as explained in the Motion, the referenced document shows only that at a budget presentation, Kathe Sackler requested certain information, and in response was provided with documents related to budgets and projections. (Mot. at 13).

The allegations set forth in the Citation and the Opposition against Kathe Sackler therefore fail to state a claim against her under the UCSPA.[18]

C. 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 Kathe 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

[18] The Opposition seeks to undermine Kathe Sackler's arguments by claiming that the declaration submitted by her in support of her personal jurisdiction arguments in the Motion to dismiss do not "set the record straight" by including facts to refute allegations about her alleged involvement in Purdue's marketing activities. (Opp. at 15-16). The declaration does not attempt to reach the substance of the Division's faulty claims because it is appropriately focused on personal jurisdiction, as declarations cannot be considered on a motion to dismiss for failure to state a claim.

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 they fall outside of the relevant limitations period. As discussed above and in the Motion (at 39), there are only two allegations against Kathe Sackler within the limitations period, and these assertions are insufficient to support a claim against her under the UCSPA.

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 virtually all of the factual allegations against Kathe Sackler are time-barred, the Division attempts to argue that equitable tolling should apply because Kathe Sackler supposedly "concealed [her] 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 against Kathe Sackler because it cannot identify a single instance of her 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 of Salt Lake City*, 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.* ¶ 39. The paragraphs of the Citation cited in the Opposition as evidencing Kathe Sackler's alleged 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 Kathe Sackler. Not a single one of

these cited paragraphs—nor any other paragraph in the Citation—describes any affirmative act of concealment by Kathe Sackler. *See Town of Cornish v. Veibell*, 2009 UT App 117, No. 20080516-CA, 2009 WL 1160301, at *2 (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"); *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)).[19]

The Division also cannot invoke equitable tolling because it fails to plead that it investigated Kathe Sackler's alleged conduct but 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.* ¶ 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 Division had

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[19] *See also Beaver County 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.").

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 monitoring put in place after the settlement to prevent a repeat of inappropriate marketing)). The Division has made no effort to show that, at any time after 2007 (or before), it diligently investigated the claims alleged against Kathe Sackler within the limitations period—under which claims expire after a decade—but was unable to discover certain alleged facts because of supposed fraudulent conduct by Kathe Sackler. [20]

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 Kathe Sackler.

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

Notwithstanding the Opposition's claim that "[t]he Division is not required to plead causation under the UCSPA" (Opp. at 41), the Citation alleged that Kathe Sackler's actions "caused significant harm to the State and the agencies." (¶¶ 28-29). These allegations should be dismissed as a matter of law because the Division cannot establish any plausible causal link between Utah's alleged harm and any actions by Kathe Sackler. (*See* Mot. at 39-41).

The Opposition offers no meaningful response to the point that the Citation fails to identify a single instance in which Kathe Sackler participated in making any of the allegedly improper promotional statements that supposedly caused the State to suffer harm. The Opposition instead retreats to the mantra that "the Citation is replete with allegations that [Kathe Sackler] directed the dissemination of deceptive materials," but the Opposition does not and

[20] 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.

cannot cite to a single instance of Kathe Sackler instructing anyone to make a misleading statement in Utah or anywhere else. Indeed, the four paragraphs of the Citation cited in support of this mistaken claim (Opp. at 40) do not describe any affirmative conduct by Kathe Sackler.

The Opposition similarly cannot excuse the Citation's inability to show proximate cause. The Opposition cannot deny, for example, that Kathe Sackler's request for certain information at a 2009 budget meeting or her receipt of information about a proposed transaction could not and did not cause harm in Utah. The Opposition similarly cannot deny there are many degrees of separation between the alleged acts of Kathe Sackler (of which none are specifically alleged) and the harm resulting from opioid abuse and addiction in Utah. Moreover, this alleged harm derives in significant part from intervening criminal and negligent acts—many of which are detailed in the Citation—that break the chain of causation. (Mot. at 40-41). The Citation's causation allegations should therefore fail as a matter of law.

CONCLUSION

For the foregoing reasons, the Division's claims against Kathe Sackler should be dismissed with prejudice.

DATED this 6th day of May, 2019.

COHNE KINGHORN, P.C.

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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:

By hand-delivery and first class mail, postage prepaid:

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