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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**

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The Opposition[1] serves only to confirm that the Division's claims against Richard Sackler should be dismissed.

I. The Tribunal Lacks Personal Jurisdiction Over Richard Sackler

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 Richard Sackler personally made or participated in. This is not for want of evidence at its disposal. The Division has all the millions of pages of documents that Purdue produced in *In re: National Prescription Opiate Litigation*, No. 1:17-MD-2804-DAP (N.D. Ohio) (the "**MDL**"), including from Purdue's custodial file for Richard Sackler, consisting of documents to, from or copying him. In addition, the Division's counsel deposed Richard Sackler in the MDL and, in connection with that, received a 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.

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.

A. There Is No Statutory Basis for Personal Jurisdiction Over Richard Sackler

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

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[1] All terms and short forms defined or used in the Individual Respondents' Motion to Dismiss the Division's Notice of Agency Action and Citation ("**Motion**" or "**Mot.**"), including short form case citations, are again used here. "**Opposition**" or "**Opp.**" refers to the Division's April 25, 2019 brief in opposition. All "¶" references are to the Citation. Emphasis is added to, and internal quotations, brackets, ellipses, and citations are omitted from, quoted material in this brief, unless otherwise indicated. Richard Sackler incorporates and joins each of the arguments set forth in Purdue's and Kathe Sackler's Replies.

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). The Opposition tacitly concedes that jurisdiction is not premised on subpart (iii), the use of "transactional resources" in Utah by Richard Sackler. (Opp. at 5). The Division relies instead on subparts (i) and (ii), which it contends are satisfied by ¶¶8, 125, 129, or 147. (Opp. at 5). But those paragraphs do not plead any claim-related conduct, much less a violation, by Richard Sackler "wholly or partly within" Utah, nor any misconduct by Dr. Sackler outside of Utah that constituted an attempted violation within the State. They allege only conduct at Purdue, which is in Connecticut (¶¶1-3).[2] The Division's argument that Purdue's conduct is attributable to Richard Sackler is meritless. No provision in the UCSPA authorizes such attribution.

The Division invokes Utah's long-arm statute, UTAH CODE ANN. § 78B-3-205 (Opp. at 4), but that statute confers jurisdiction only on "the courts of this state," not administrative agencies.[3] As *Frito-Lay v. Utah Labor Commission* held, administrative agencies are not "courts of the state." 2009 UT 71, ¶¶17-18.[4] The long-arm statute is inapplicable by its terms.

In the absence of any statutory basis to exercise jurisdiction, the Division's claims against Richard Sackler must be dismissed. 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 ("If the relevant state statute does not permit jurisdiction, then the inquiry is ended.").

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[2] *See* ¶8 (unspecified "directives *at Purdue*" that conclusorily caused "unlawful promotion" in Utah); ¶125 (unspecified actions "taken as members of the...Board" or as "officers and owners" of Purdue, headquartered in Connecticut, *see* ¶¶1-3); ¶129 (same); ¶147 (no reference to Utah).

[3] *State ex rel. W.A. v. State*'s statement that "a court may rely on *any* Utah statute affording it personal jurisdiction," 2002 UT 127, ¶14 (Opp. at 4), is no help. This Tribunal is not a court.

[4] *See also Muddy Boys, Inc. v. Dep't of Commerce*, 2019 UT App 33, ¶¶22-27 (administrative tribunals not "courts" under UTAH CODE ANN. § 58-55-503).

B. The Exercise of Jurisdiction Over Richard Sackler Would Violate Due Process

The Division does not dispute that Richard Sackler is not subject to general jurisdiction, but it maintains that he is subject to specific jurisdiction. (Opp. at 5-7). But the Division is unable to show its claims arise out of any claim–related conduct he took in or aimed at Utah.

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

The Division's principal jurisdictional argument is that because Purdue acted in Utah, and because Richard Sackler allegedly had "direct involvement in Purdue's business" (¶8) and was a member of PPI's Board (¶126), he is subject to personal jurisdiction here. This argument has been rejected by *Keeton*, 465 U.S. at 781 n.13, *MFS*, 2004 UT 61, ¶¶21, 24, and other courts, which uniformly 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 argues that, unlike in *MFS*, ¶¶8 and 25 allege that Richard Sackler "personally directed" conduct towards Utah. (Opp. at 30). But ¶25 contains no such allegation, and the cited portion of ¶8 conclusorily alleges 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*, *Karabu*, 16 F. Supp. 2d 319, and 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 denying "allegations of personal dealings" in the alleged misconduct, while Richard Sackler's declaration did not contradict allegations that supposedly "specifically allege[d]" "personal[] direct[ion]" of misconduct. (Opp. at 29-30). Contrary to the Division's argument that Richard Sackler's declaration should have "set the record straight" (Opp. at 15), it is the Division's burden to identify "adequate evidence" to establish personal jurisdiction. *Fenn v. Mleads Enters.*,

2006 UT 8, ¶8. As shown in the Motion (at 7-16), the Division did not meet its burden because it is insufficient to plead alleged Purdue misconduct, and the Division pled no personal participation by Richard Sackler in alleged misconduct in or directed at Utah.

It is telling 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 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 it vaguely asserts are "instructive,"[5] 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). This is an "improper" attempt to conflate "the concept of liability with that of jurisdiction." *MFS*, 2004 UT 61, ¶21.

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 fatally flawed. *See MFS*, 2004 UT 61, ¶¶22-24 (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.*, 899 F. Supp. 1144, 1149 (S.D.N.Y. 1995), 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.

Even if the Division could show that Richard Sackler played a role in nationwide marketing, that

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[5] *See* Opp. at 31-32 (citing *F.T.C. v. Bay Area Bus. Council, Inc.*, 423 F.3d 627 (7th Cir. 2005); *F.T.C. v. World Media Brokers*, 415 F.3d 758 (7th Cir. 2005)).

would not be enough. It would not show that he targeted Utah. *See Mouzon*, 85 F. Supp. 3d at 372 ("Even if [CEO] played a central and dominant part" in marketing campaign and "directly profited" from it, no jurisdiction existed because plaintiffs "ha[d] not alleged that [he] himself targeted" the campaign specifically at the forum).

2. The Effects Test Confirms There Is No Specific Jurisdiction

The Division pins its hope to establish personal jurisdiction on the "effects" test. (Opp. at 5-6). It contends that personal jurisdiction exists because Richard Sackler's conduct purportedly had "effects in Utah." (Opp. at 8-14). The effects test does not help the Division. The test was analyzed at length by *ClearOne*, which recognized that the test had been "narrowed" by the U.S. Supreme Court's decision in *Walden*. 2016 UT 16, ¶¶21, 24-26 (observing that *Walden*, 571 U.S. at 1125, held that "the 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 in Utah, the "conduct had little to do with Utah." *Id.* ¶33.

To establish jurisdiction under the effects test, the Division must show that Richard Sackler "(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." *Id.* ¶25. The Division has not carried this burden.

Intentional Act. The Citation and Opposition do not and cannot specify any intentionally deceptive act that Richard Sackler personally committed. The Division maintains 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")). It attributes these acts to Richard Sackler solely by virtue of his status as a director and officer. (Opp. at 34-35). No case supports this, and *Keeton* rejects it.

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). This requirement is derived from *Calder v. Jones*, 465 U.S. 783, 788-90 (1984) (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 act he targeted at Utah. As demonstrated in the Motion (at 26 & n.14), 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 confirms that nationwide conduct is not targeted at a specific state.[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). They do not:

- Paragraph 8 conclusorily asserts that Richard Sackler's direction of Purdue's nationwide conduct *incidentally* included Utah. ¶8 (alleging he "directed … Purdue's employment of a substantial number of sales representatives nationwide, including in Utah").[7]

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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] As then-District Judge Sotomayor held, the allegation that a defendant "directed" conduct, without supporting factual details, is conclusory and will not support jurisdiction. *Karabu*, 16 F.

- Paragraph 127 alleges that, as a member of the Board, Richard Sackler [redacted] It does not show that he targeted Utah.[8]

- Paragraphs 94-95 do not mention Richard Sackler. The Division's assertion that they allege 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 anywhere in the Citation.

Similarly, nothing in the Opposition's lengthy recitation of the Citation's allegations (Opp. at 8-14) identifies any jurisdictionally relevant fact showing that Richard Sackler specifically targeted Utah. (*See* Motion at 7-16, 24-26 (addressing the irrelevance of these allegations)).[9]

The Division's reliance on *Silver v. Brown*, 382 F. App'x 723 (10th Cir. 2010) (Opp. at 7) as its leading authority supposedly showing why the effects test supports jurisdiction here is telling. *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 claim-related conduct here.

The Brunt of the Harm. The third step of the effects test is 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

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Supp. 2d at 324-25.

[8] The allegation that a defendant "oversaw" conduct, without supporting factual details, is a conclusory label that does not support jurisdiction. *See, e.g.*, *Gerstle*, 76 F. Supp. 3d at 510.

[9] Contrary to the Opposition's opaque footnote 4 (Opp. at 12 n.4), stale allegations about conduct long before the limitations period are jurisdictionally irrelevant because the Division's claims do not 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"). Conduct decades ago is jurisdictionally irrelevant.

harm allegedly arising from the alleged "decisions and directives at Purdue" (¶8) was "suffered in" Utah. Nor could it, because the Division's claims concededly concern an alleged "nationally directed marketing campaign" and alleged conduct that was "national in scope." (Opp. at 1, 35).

3. The Division Identifies No Connection between Its Claims and Richard Sackler's 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*, 2018 WL 5085711, at *5 (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 Division show a causal relationship between the vacation home and its claims comes from the U.S. Supreme Court's requirement that the plaintiff's claim "arise out of the defendant's forum-related conduct." *See Younique, L.L.C. v. Youssef*, 2016 WL 6998659, at *4 (D. Utah Nov. 30, 2016). *ClearOne* acknowledged this when it noted that the effects test requires a showing that conduct expressly aimed at the forum state "caused harm" there. 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. "A nexus must exist between a defendant's forum-related contacts and the Plaintiffs' cause of action. This is not satisfied when 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.

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[10] The Division purports to rely on *State ex rel. Wilkinson v. B & H Auto*, 701 F. Supp. 201, 205 (D. Utah 1988) (Opp. at 30), but this case does not even mention personal jurisdiction.

Utah Aug. 10, 2007). The Alta vacation home is not a basis for personal jurisdiction.

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 show that Richard Sackler engaged in conduct in or aimed at Utah giving rise to any of the Division's claims. 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 other two references pertain only to ski trips, which are jurisdictionally irrelevant:

- The Division speculates (Opp. at 17) that Richard Sackler [redacted] does not mention Utah and in all events has nothing to do with marketing practices.
- The Division asserts [redacted] They have no connection to the Division's claims. [11]

The Division's other "evidence" is thus irrelevant to the personal jurisdiction analysis. None of it connects Richard Sackler to any conduct giving rise to any claims in Utah:

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

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[11] The Division also attaches other emails showing that Richard Sackler went skiing in Utah while on vacation. None has any connection to the Division's claims. *See* [redacted]

the early 1980s." (Opp. at 19 & n.15). Neither article mentions any conduct in or aimed at Utah, and micromanagement does not support the assertion of personal jurisdiction. *Delman*, 2017 WL 3048657, at *2-4 (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."[12]

Stale and Irrelevant Documents. Many of the documents cited by the Division date to long before the limitations period and have nothing to do with any alleged conduct targeting Utah.[13] (*See* Mot. at 39). Old documents unrelated to the Division's claims cannot support jurisdiction. *United States v. Swiss Am. Bank, Ltd.*, 116 F. Supp. 2d 217, 223 (D. Mass. 2000) (contacts "at least seven years before the tortious acts are alleged to have occurred" did not support personal jurisdiction as they were unrelated to claim), *aff'd*, 274 F.3d 610 (1st Cir. 2001).

A detailed review of some of the other old documents cited by the Opposition (in addition to those summarized in footnote 13) confirms their irrelevance. For example:

- The Division cites a 1997 email (Opp. Ex. 11) sent to 28 people, including Richard Sackler,

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[12] *Doe v. Al Maktoum*, 2008 WL 4965169, at *5 (E.D. Ky. Nov. 18, 2008); *see also Weisler v. Cmty. Health Sys., Inc.*, 2012 WL 4498919, at *6 (D.N.M. Sept. 27, 2012) (gathering cases rejecting reliance on hearsay articles to show personal jurisdiction).

[13] *See, e.g.*, [redacted]

Opp. Ex. 44 (receipt of letter from Connecticut Attorney General; no mention of Utah).

stating that [redacted] The email has nothing to do with Utah. The Division complains that [redacted], but 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 for non-cancer pain was not within the FDA-approved indications (it was[14]). As the Motion (at 9) explained in response to similar allegations (¶¶139-41), any suggestion that Richard Sackler directed Purdue to deceive doctors about the relative strength of OxyContin is not only decades old, but is also refuted by the 1995 FDA-approved label (Ex. 3 at Table 3).

- The Division implies that Richard Sackler acted improperly by stating in a 1997 email—which has nothing to do with Utah—[redacted] This innuendo ignores that his statement is fully consistent with OxyContin's FDA-approved label, which states: "Like all full opioid agonists, there is no ceiling effect to analgesia for oxycodone."[15] Although the Division calls this [redacted], it is the FDA—not the Division—that determines the substance of an FDA-approved label and its accuracy.

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

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 director in Purdue's sales nationwide and have nothing to do with Utah.[16] None shows that Richard Sackler participated in or directed marketing in or specifically targeted at Utah.

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[14] *See* Ex. 3 at 1 (1995 FDA approved label, stating "OxyContin . . . is indicated for the management of moderate to severe pain ..."); *id.* at 2 (addressing "chronic therapy, especially for non-cancer pain syndromes ....").

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

[16] *See* [redacted]

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. Despite the huge trove of information available to it, the Division has no evidence supporting its jurisdictional theories and has not identified what information it expects from discovery.

To be entitled to jurisdictional discovery, the Division must make a *prima facie* showing of jurisdiction or identify precisely what facts jurisdictional discovery can reasonably be expected to show. *See ClearOne*, 2016 UT 16, ¶41 (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 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]

II. No Subject Matter Jurisdiction Over the UCSPA Claims Against Richard Sackler

As addressed in the Motion (at 28-32), no authority supports the Division's attempt to hold Richard Sackler a "supplier" under the UCSPA solely because he was the director of a company

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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). *McNeill* concluded that *Health Grades* does not support discovery where, as here, a plaintiff fails to adequately plead personal jurisdiction or identify why jurisdictional discovery would be fruitful. *Sizova v. National Institute of Standards & Technology*, 282 F.3d 1320 (10th Cir. 2002) (Opp. at 28) also does not help the Division because *Sizova* is about jurisdictional discovery on subject matter jurisdiction. The opioid cases cited by the Division (Opp. at 29) also are inapposite because they concerned companies that manufactured drugs distributed in the forum, not their directors. *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).

that is alleged to be a supplier. Neither of the Division's cases (Opp. at 34) extends the definition of "suppliers" to the officers or directors of alleged suppliers. The Court in *Sexton v. Poulsen & Skousen P.C.*, 2019 WL 1258737 (D. Utah Mar. 19, 2019) (cited in Opp. at 34) held only that the definition of "supplier" is "expansive" because the term includes many types of parties that "enforce[] consumer transactions," in addition to actual suppliers. *Id.* at *9. *State ex. rel. Wilkinson v. B & H Auto*, 701 F. Supp. 201, 204 (D. Utah 1988), simply held that an entity that sells a consumer good to another entity can be a "supplier." The Tribunal therefore lacks subject matter jurisdiction over the UCSPA claims against Richard Sackler.

III. The Citation Fails to State a Claim Against Richard Sackler[18]

The Corporate Shield. The Opposition has no response to Richard Sackler's argument that the Division cannot assert a claim against him because he did not make any statements that are actionable under the UCSPA. (Mot. at 34-35). Utah law does not permit liability against a director for their company's conduct unless an exception to the corporate shield defense applies. The Division has identified none. 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). Thus, the corporate shield defense bars the UCSPA claim against Richard Sackler. *See Hernandez*, 2004 UT App 462, ¶¶7-8; *Salt Lake City*, 2011 UT 33, ¶27.

No Personal Participation. Even if directors could be held liable for a company's

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[18] The Opposition wrongly asserts (Opp. at 3 n.2) that the Individual Respondents said at the April 9, 2019 hearing that the documents attached to their Motion (and the proposed exhibits to the Motion) cannot be considered. Documents that were expressly referenced or quoted in the Citation are before this Tribunal on the 12(b)(6) motion to dismiss. *Oakwood*, 2004 UT 101, ¶13 ("[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.'"). Also, the governmental documents attached to the Motion and Purdue's motion to dismiss can be considered. *See BMBT, LLC v. Miller*, 2014 UT App 64, ¶6.

violation of the UCSPA, the Opposition cannot ignore the standard set forth in *Armed Forces*: "an officer or director of a corporation … can only incur personal liability by participating in the wrongful activity." 2003 UT 14, ¶19 (Mot. at 35-38). The handful of allegations that the Opposition relies on concerning Richard Sackler (at 37-42) do not plead his involvement with any marketing statements[19]—let alone any misleading statements—in the last decade or in Utah, and do not support a claim against Richard Sackler for a UCPSA violation:

- The Division alleges on "information and belief" that "Richard Sackler would have been aware of and approved all of Purdue's marketing themes and strategies" because he was the head of Purdue's marketing department and later was President and Co-Chairman of the Board. (¶132). But Richard Sackler's work as head of marketing was before 1999 (¶5), more than 10 years before the limitations period. (*See also* ¶137 [redacted].) The Division's allegations about Richard Sackler's service as President (1999-2003) and Co-Chairman (2003-2007) (¶5; R. Sackler Decl. ¶3) plead only his titles. It is black-letter law that general oversight of the business activities of a corporation cannot support a claim on its own. *Armed Forces*, 2003 UT 14, ¶21.

- The Division alleges that around 1997, ten years before the limitations period, Richard Sackler directed [redacted] (¶138). The Division's description of Purdue's alleged misrepresentations (¶¶33-105) does not include anything about OxyContin's strength. It also ignores that the FDA-approved label disclosed the relative strength of OxyContin and morphine. (Mot. at 9).

- The Division alleges that around 1997 or 2001, years before the limitations period, [redacted] (¶147) But the Division has no response to the fact that the quoted language cannot be deceptive because it precisely matches OxyContin's FDA-approved label (Mot. at 9). While the Division calls the notion that OxyContin has "no ceiling effect" false, the FDA-approved label trumps the Division's views. *See supra* at 11 & n.15.

- The Division alleges that he sought information (¶¶156, 143) and [redacted] (¶143), but that does not allege a part in any misrepresentation, let alone one in Utah.

Discovery Rule Irrelevant. The discovery rule does not save the Division's untimely

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19 Repetition of 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) are insufficient as a matter of law. *See also* supra nn.7-8.

claims. Purdue's 2007 guilty plea and $600 million public settlement of related claims (¶144) belie any suggestion that the Attorney General had until recently no basis for investigating claims about Purdue's marketing from decades ago.[20] The Division cannot show that it diligently investigated its claims against Richard Sackler within the limitations period but was hampered by his conduct.

The Division Has Not Pled Causation. The Opposition's assertion that it has pled causation because "the Citation is replete with allegations that demonstrate that the [Individual Respondents] directed the dissemination of deceptive materials" (Opp. at 41-42), is false. The Division cites three paragraphs about Richard Sackler: One alleges that unspecified [redacted] at an unspecified time (¶ 133) without showing any conduct or how it caused any harm. The other two allegations—[redacted]—are emblematic of how weak the Division's claims are. The allegations are more than twenty-two years old. The Citation does not allege that Purdue misrepresented the strength of OxyContin in Utah (*see* ¶¶33-105). And any suggestion that Purdue supposedly caused harm by failing to disclose the strength of OxyContin is belied by the fact that its potency was disclosed in the FDA-approved label. Ex. 3 at Table 3. The Division has not pled causation.

CONCLUSION

For these reasons, and for the reasons set forth in the Motion, the Division's claims against Richard Sackler should be dismissed.

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20 *See also* Mot. at 2-3 (addressing monitoring mandated by the settlement).

DATED this 7th day of May, 2019.

COHNE KINGHORN, P.C.

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CERTIFICATE OF SERVICE

I hereby certify that on this the 7th 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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