**REDACTED REPLY BRIEF IN SUPPORT OF MOTION**

Paul T. Moxley (2342)
Hal L. Reiser (4346)
Patrick E. Johnson (10771)
COHNE KINGHORN, P.C.
111 E. Broadway Eleventh Floor
Salt Lake City, UT 84111
(801) 363-4300
pmoxley@ck.law
hreiser@ck.law
pjohnson@ck.law

*Attorneys for Respondent Kathe Sackler*

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

| | |
|---|---|
| **IN THE MATTER OF**:<br><br>**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;<br><br>**Respondents.** | **RESPONDENT KATHE SACKLER'S REPLY IN SUPPORT OF MOTION TO DISMISS THE DIVISION'S NOTICE OF AGENCY ACTION AND CITATION**<br><br>**DCP Legal File No. CP-2019-005**<br><br>**DCP Case No. 107102** |

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Page**

**CASES**

**STATUTES**



**OTHER AUTHORITIES**

The Opposition only serves to underscore the Citation's fatal deficiencies, which require dismissal of the claims against Kathe Sackler.

**No personal jurisdiction:** Recognizing that the Citation shows absolutely no connection between Kathe Sackler and Utah, the Opposition seeks to rewrite the Citation after the fact by adding many new allegations which supposedly support the exercise of personal jurisdiction. But these new allegations fare no better than the ones raised in the Citation—Kathe Sackler has never been to Utah and has not participated in Purdue's alleged prescription opioid marketing activities in Utah or specifically aimed any action at Utah. A defendant who has never stepped foot in the State and has no contacts with the State (suit-related or otherwise) cannot be subject to jurisdiction here.

**No subject matter jurisdiction:** The Tribunal lacks subject matter jurisdiction because the Division's claims against Kathe Sackler do not satisfy two of the UCSPA's elements: she is not a "supplier" and she did not engage in any "consumer transaction" in Utah. The Division has not and cannot cite a case holding that a former director or officer of a company with *nationwide* operations—who never herself engaged in Utah-specific business activities—meets these two elements.

**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 fails to satisfy this requirement, merely repeating conclusory allegations about her role on Purdue's board and information she supposedly received. The few allegations of affirmative conduct raised by the Opposition are stale (often decades old) and unrelated to Purdue's alleged prescription marketing activities in Utah. For example, the Opposition claims that Kathe Sackler [redacted] in 2000, omitting that the

referenced document actually referred to plans for ***Korea***. That the Division can only muster a handful of irrelevant allegations serves to highlight its inability to properly plead a UCSPA violation against Kathe Sackler

## ARGUMENT[1]

### I. The Tribunal Lacks Personal Jurisdiction Over Kathe Sackler

The Opposition concedes that it must show both (i) a statutory basis to exercise personal jurisdiction and (ii) that the exercise of jurisdiction would not violate due process. (Opp. at 3). The Division has made no such showing for Kathe Sackler.

#### 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). The UCSPA limits the exercise of jurisdiction by the 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). The Division cannot satisfy any of these provisions.

---

[1] The declarations and documents submitted with the Motion are properly considered on a motion to dismiss without requiring conversion to a summary judgment motion. The declarations are submitted only in connection with the motion to dismiss for personal jurisdiction, and Utah courts have repeatedly held declarations are properly considered on such motions. *See, e.g.*, *Starways, Inc. v. Curry*, 1999 UT 50, ¶ 3, 980 P.2d 204, 206. The exhibits to the Motion are properly considered on a motion to dismiss under Rules 12(b)(2) and 12(b)(6) 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 the complaint is not considered to be a 'matter outside the pleading.' [I]f the rule were otherwise, a plaintiff with a deficient claim could survive a motion to dismiss simply by not attaching a dispositive document upon which the plaintiff relied."). Additionally, the Tribunal may take judicial notice of government documents and consider them on a motion to dismiss. *See BMBT, LLC v. Miller*, 2014 UT App 64 ¶ 6; 322 P.3d 1172, 1174.

The Opposition concedes Kathe Sackler did not use "transactional resources" in Utah. (Opp. at 5). Instead, the Division claims § 13-2-6(4)(a)'s first two subparts are satisfied by Citation ¶¶ 8, 125, 129, or 147. These paragraphs, however, do not specify affirmative acts by Kathe Sackler. To the extent the allegations even mention her, they relate to Purdue's alleged conduct. (*See* ¶ 8 (alleging general "directives *at Purdue*" regarding promotional activities in Utah); ¶ 125 (alleging unspecified actions by a director, officer, or owner of Purdue); ¶ 129 (same); ¶ 147 (no Kathe Sackler reference)). The Division's conclusory assertion that Kathe Sackler's alleged "decisions and directives at Purdue" (¶ 8) are enough to establish personal jurisdiction over her is unsupported by Utah law; indeed, the Division fails to cite a single case attributing a company's jurisdictional contacts to a director or officer.

The Opposition next invokes Utah's long-arm statute (Opp. at 4), but the Citation does not plead personal jurisdiction based on this provision. The Division cannot do so now because the statute applies only to "the courts of this state" and administrative agencies are not "courts of the state." *Frito-Lay v. Utah Labor Commission*, 2009 UT 71, ¶¶ 17-18, 222 P.3d 55, 59.

Absent a statutory basis to exercise jurisdiction, the claims against Kathe Sackler must be dismissed. Utah law prevents the Tribunal from excusing the Division's failure to satisfy these requirements and "go straight to the due process analysis," as the Division improperly suggests (Opp. at 5). *See Venuti v. Cont'l Motors Inc.*, 2018 UT App 4, ¶ 10, 414 P.3d 943, 948.

### B. The Exercise of Jurisdiction over Kathe Sackler Would Violate Due Process

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

The Opposition's unfounded arguments about specific jurisdiction are encapsulated by its claim that Kathe Sackler's Motion argued that the "nationally directed marketing campaign, which emerged from the highest levels of the company, somehow inexplicably excluded Utah."

(Opp. at 1). But Kathe Sackler made no such argument. She instead relied on well-settled case law that jurisdiction over a director who serves a corporation with nationwide activities must be based on that director's specific suit-related acts in or specifically aimed at Utah. *MFS Series Tr. III ex rel. MFS Mun. High Income Fund v. Grainger*, 2004 UT 61, ¶¶ 21, 24, 96 P.3d 927, 933-34; Mot. at 23-25 & n.13). Utah law is clear that conduct by Purdue is not enough.

The Opposition claims Citation ¶¶ 8 and 25 show that Kathe Sackler "personally directed" acts and conduct towards Utah, but neither paragraph supports jurisdiction. (Opp. at 30). Paragraph 25 contains no such allegation and ¶ 8 makes only 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 a legal conclusion, exactly like those rejected in *MFS*. (Mot. at 24-25 & n.13). The Division's argument that *MFS* is inapplicable because the directors in that case submitted affidavits specifically denying "allegations of personal dealings" regarding the alleged misconduct is specious because a movant has no obligation to contest jurisdictionally irrelevant, conclusory allegations.[2] The Division cannot foist onto Kathe Sackler its own burden to identify "adequate evidence" to establish personal jurisdiction. *Fenn v. Mleads Enterprises, Inc.*, 2006 UT 8, ¶ 8, 137 P.3d 706, 710.

Tellingly, the Opposition identifies no case subjecting a director or officer to jurisdiction based on alleged control of a company doing business in a state. Lacking relevant authority, the Division instead relies on cases about substantive liability under not the UCSPA, but the Federal Trade Commission Act. (Opp. at 31-32). But this argument "improper[ly]" attempts to conflate

---

[2] 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.*, CA No. 4:15-CV-00627, 2017 WL 2730739, at *5 (S.D. Tex. June 26, 2017).

"the concept of liability with that of jurisdiction." *MFS*, 2004 UT 61, ¶¶ 21, 24. The Division's argument that Kathe Sackler is subject to jurisdiction because she supposedly had "the ability to control" Purdue (Opp. at 31-32) is equally flawed. *Ontel Products, Inc. v. Project Strategies Corp.* rejected this very argument:

> It is not enough that [the 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). Even accepting the Citation's allegations, Kathe Sackler was just one of many directors on Purdue's board and for a period of time held a Senior Vice President title; none of these allegations demonstrate that she had the power to control Purdue. Notably, Kathe Sackler has never held an officer title during the decade-long limitations period[3] and she plainly had far less authority than the corporate President in *Ontel*.

**2. The Effects Test Cannot Support Personal Jurisdiction**

Nor does the Division's argument that unspecified conduct by Kathe Sackler had supposed "effects in Utah" salvage its claims. (Opp. at 8-14). The "effects test" is inapplicable here, as recognized by the Utah Supreme Court in *ClearOne v. Revolabs, Inc.* 2016 UT 16, ¶¶ 21-26, 369 P.3d 1269, 1277-79 (noting the U.S. Supreme Court's decision in *Walden v. Fiore*, 571 U.S. 277 (2014), narrowed the 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

---

[3] Contrary to the Opposition's 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.

by the plaintiff in Utah, the "conduct had little to do with Utah." *Id.* ¶ 33. Here, Kathe Sackler is not subject to jurisdiction because she had nothing to do with Utah.

The "effects test" cannot apply because the Division has not carried its burden of showing that Kathe Sackler "(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.

**Intentional Act**. The Citation and Opposition fail to support the conclusory allegation that Kathe Sackler engaged in "intentionally" "deceptive acts" (¶ 166; *see also* ¶¶ 167-70, 172). While the Division argues that it "is not required to allege" any allegedly deceptive act by Kathe Sackler (Opp. at 33), no case cited in the Opposition holds that a plaintiff can show a director or officer engaged in an "intentional act" based on the company's conduct. The Division's exclusive reliance on alleged acts of Purdue cannot establish jurisdiction as to Kathe Sackler.

**Express Aiming.** Nor do the Citation and Opposition factually plead that Kathe Sackler expressly aimed to do anything in Utah. To meet the "express aiming" requirement, 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).[4] This requirement is derived from *Calder v. Jones*, 4645 U.S. 783, 788-90 (1984) (cited in Opp. at 6), which held 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—were subject to jurisdiction in California because California was the "focal point" of their conduct. The facts in *Calder* do not

[4] The Seventh Circuit has noted that the effects test should be called the "express aiming" test because mere effects in the forum are not enough; a plaintiff must show that the defendant expressly aimed his or her conduct at the forum. *Mobile Anesthesiologists Chicago, LLC v. Anesthesia Assocs. of Houston Metroplex, P.A.*, 623 F.3d 440, 445 n.1 (7th Cir. 2010).

remotely resemble the allegations against Kathe Sackler, which are based solely on Purdue's alleged *nationwide* conduct. There are no allegations of conduct by Kathe Sackler targeted at Utah. (Mot. at 26 & n.13).[5] The Division incorrectly claims these cases are distinguishable because Citation ¶¶ 8, 127, and 94-95 show that Kathe Sackler directed actions focused on Utah, but that is not true:

- ¶ 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."[6]
- ¶ 127 alleges that Kathe Sackler, as a member of the Board, "oversaw the tactics that sales representatives used at sales visits." It specifies no conduct focused on Utah.
- The Division's assertion that ¶¶ 94-95 of the Citation alleges Kathe Sackler "arranged funding for two KOLs . . . to promote Purdue opioids in Utah and around the country" (Opp. at 31) is false. The referenced paragraphs (¶¶ 94-95) contain no mention of Kathe Sackler at all—they talk only about Purdue.

Further, the Opposition's recitation of the Citation's allegations (at 8-14) are addressed in the Motion (at 7-16, 24-26), and the Opposition does not demonstrate their jurisdictional relevance.[7]

---

[5] *See, e.g.*, *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); *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).

[6] The conclusory allegation that a defendant "directed" or "oversaw" conduct will not support personal jurisdiction. *See, e.g.*, *Gerstle v. Nat'l Credit Adjusters, LLC*, 76 F. Supp.3d 503, 510 (S.D.N.Y. 2015); *Karabu Corp v. Gitner*, 16 F. Supp. 2d 319, 324-25 (S.D.N.Y. 1998).

[7] *Silver v. Brown*, 382 F. App'x 723 (10th Cir. 2010) (Opp. at 7) similarly does not support the exercise of jurisdiction. This pre-*Walden* case 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," regarding "actions [that] occurred in New Mexico," meaning the subjects of the blog "w[ere] located in New Mexico" and would feel the consequences of his actions there. *Id.* at 729-30. Even if this case survives *Walden*, it is inapplicable because whereas the conduct in that case was entirely directed at New Mexico, Kathe Sackler is not alleged to have done anything specifically targeting Utah.

**The Brunt of the Harm.** 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. Nor could it, because the Division acknowledges its claims concern a "nationally directed marketing campaign" and conduct that was "national in scope." (Opp. at 1, 35).

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

The Division's assertion that the documents it submitted with its Opposition "[b]olster the [s]howing of [p]ersonal [j]urisdiction" (Opp. at 17-28) is simply false—none of the additional documents is relevant to jurisdiction. Utah is mentioned only three times in the Division's 12 pages of new alleged facts. 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 referenced board minutes (Opp. Ex. 28 at -2620-21) never mention Utah. And the remaining two references to Utah do not involve Kathe Sackler. (*See* Opp. at 17, 27).

The other "evidence" discussed in the Opposition is equally irrelevant.[8] Most of the jurisdictional allegations regarding Kathe Sackler are long outdated 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

[8] As another 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).

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 release 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).

- 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:

- 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) a 2013 committee to [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, and have always been included in 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 irrelevant allegations regarding Purdue's Board. These allegations show that the Board received information and assented to certain actions regarding Purdue's nationwide operations. (Opp. at 8-9). As the Opposition concedes, Kathe Sackler was just one member of a board which included many other directors. (*See* Opp. at 10). She thus

could not set board policy alone. Neither the Citation nor the Opposition show how she voted on any issue, much less allege that she voted to authorize specific unlawful conduct in Utah.

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

Jurisdictional discovery is inappropriate because the Division has not made the required *prima facie* showing of jurisdiction or identified what facts jurisdictional discovery can reasonably be expected to show. *See ClearOne*, 2016 UT 16, ¶ 41. The Division cannot make such a showing because Kathe Sackler does not have suit-related contacts in Utah. In these circumstances, jurisdictional discovery would be an impermissible fishing expedition. *See McNeill v. Geostar*, No. 2:06-CV-911TS, 2007 WL 1577671, at *3 (D. Utah May 29, 2007).[9]

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

The Opposition confirms that the Tribunal lacks subject matter jurisdiction because Kathe Sackler is not a "supplier" under the UCSPA, and prescription opioids are not "consumer transactions" within the meaning of the statute. As the ALJ 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. The Opposition 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" (Opp. at 34) are inapplicable because they do not address the issue here, *i.e.*, whether a director

[9] The Division invokes *Health Grades, Inc. v. Decatur Memorial Hospital*, 190 F. App'x 586 (10th Cir. 2006) (Opp. at 28), but *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. *Sizova v. National Institute of Standards & Technology*, 282 F.3d 1320 (10th Cir. 2002) is similarly inapplicable because it is about jurisdictional discovery in challenges to subject matter jurisdiction.

or officer is a "supplier" when there are no specific allegations that she is soliciting, engaging in, or enforcing consumer transactions in Utah. *Sexton v. Poulsen & Skousen P.C.*, 2:17-CV-01008-JNP-BCW, 2019 WL 1258737 (D. Utah Mar. 19, 2019) is irrelevant because the court's "expansive definition" encompasses only entities that "enforce[] consumer transactions," *e.g.*, "constables, attorneys, and law firms that regularly collect debts." *Id.* at *9. *State, ex. rel. Wilkinson v. B & H Auto*, 701 F. Supp. 201 (D. Utah 1988), is similarly inapplicable because it holds that a party that sells a consumer good to another entity can be a "supplier."

The Opposition also makes the unfounded argument that Kathe Sackler is a "supplier" because she "indirectly solicited and engaged in the sales of opioids in Utah," arguing that Purdue's Board acted as the "de facto CEO of the company," and that Kathe Sackler was a director of the Board and once held an officer title long ago. (Opp. at 34-35). But these conclusory allegations cannot remedy the Opposition's failure to identify a single instance of Kathe Sackler engaging in an act that falls within the definition of a "supplier."

The Opposition also confirms that Kathe Sackler did not engage in a "consumer transaction" within the meaning of the UCSPA. The Division offers no factual allegations regarding Kathe Sackler engaging in a "consumer transaction" in Utah (Mot. at 29) and cites only three acts of any kind specifically occurring in Utah, which all relate to **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). The Opposition's boilerplate claim that Kathe Sackler "directed" these acts is insufficient and should be disregarded. (Mot. at 32-33 (collecting cases)).[10]

[10] 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.

## III. The Citation Fails to State a Claim Against Kathe Sackler

### A. The Corporate Shield Doctrine Bars the Citation's Claims

The Division's claims also fail because Kathe Sackler did not make any actionable marketing claims or cause others to make such claims. The Opposition does not meaningfully contest that, under the corporate shield doctrine, Kathe Sackler cannot be 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. (*See* Mot. at 34-35 & 36 n.17). And no matter what theory the Citation invokes, it cannot show that Kathe Sackler violated the law.

### B. The Citation Fails to Plead Personal Participation in Purdue's Alleged Misstatements in Utah

The Citation fails to factually plead that Kathe Sackler 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, precluding claims under the UCSPA. The Opposition does not dispute that "[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; (Mot. at 35-38). The Opposition also does not dispute that Rule 9(c) applies to the UCSPA and any alleged misconduct must be pled with particularity. (Mot. at 33-34).

Unable to show that Kathe Sackler personally participated in Purdue's alleged conduct, the Opposition instead repeats the Citation's rote 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 allegations are insufficient to state a claim against Kathe Sackler. (Mot. at 35-38).

As discussed 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 of or request for information. (Mot. at 12-14).[11] None relate to statements made to healthcare providers about prescription opioids. In arguing that the Citation "pleads detailed allegations against Kathe Sackler," the Opposition asserts, "upon information and belief," that Kathe Sackler once served as Purdue's Senior Vice President.[12] (Opp. at 38; ¶ 151). But a plaintiff cannot state a claim against an officer based on the conduct of the company she served. *See Armed Forces Ins. Exch.*, 2003 UT 14, ¶ 21.

The Opposition reiterates only three specific allegations against Kathe Sackler in support of its argument that it can state a claim against her, but none show she violated the USCPA:

- It claims that Kathe Sackler [redacted] (¶ 154; Opp. at 38). The cited email referenced planned activities 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). 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—does not show that she was involved in Purdue's alleged misstatements to Utah-based healthcare providers about prescription opioids, medications 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," citing a single November 2009 document. (¶ 156; Opp. at 40). But the Opposition ignores that the referenced document shows only that Kathe Sackler **requested** certain information and was provided with documents

---

[11] 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).

[12] The Opposition's claim that Kathe Sackler was a Senior Vice President from 2004 to 2014 is incorrect. She relinquished that title in 2007, before the start of the limitations period, *see infra* § III.C. (K. Sackler Decl. ¶ 3). Regardless, the fact that Kathe Sackler was an officer at Purdue for a particular period of time does not allow the Citation to state a claim against her for the reasons discussed above. (*See* Mot. at 35-38).

related to budgets and projections. Nothing in these documents shows that Kathe Sackler personally participated in Purdue's marketing in Utah. (Mot. at 13).

The Citation therefore fails to state a claim against Kathe Sackler under the UCSPA.[13]

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

The Citation and Opposition rely principally on events that took place in the 1990s and the early 2000s. These allegations should be disregarded as they fall outside of the relevant ten-year limitations period which began on January 30, 2009. (Mot. at 38-39).

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. The Division makes the unfounded argument 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 the statute of limitations. (Opp. at 38). But under the equitable discovery rule, the statute of limitations may be tolled only "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. Fraudulent concealment requires a showing that a defendant took "affirmative steps to conceal" the plaintiff's cause of action. *Id.* ¶ 39. The Citation provides no examples of Kathe Sackler engaging in concealment of any kind; the paragraphs of the Citation cited as evidencing supposed concealment by Kathe Sackler (Opp. at 39) principally relate to **Purdue's** conduct.

The Division also fails to satisfy the prerequisite of pleading 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, ¶¶ 37,40. Any suggestion that the

---

[13] The Opposition seeks to undermine Kathe Sackler's arguments by claiming her declaration did not "set the record straight." (Opp. at 15-16). Her declaration, however, was appropriately focused on jurisdictional issues because a declaration can be considered only on a Rule 12(b)(2) motion, not a Rule 12(b)(6) motion.

Division had until recently no basis for investigating claims about Purdue's marketing from decades ago is irreconcilable with the Citation's admission (¶ 114) that in 2007, Purdue entered a guilty plea and publicly settled related claims. The Division has made no effort to show that it diligently investigated the claims alleged against Kathe Sackler within the limitations period—but was stymied by an act of concealment by Kathe Sackler. The Division therefore has no basis to invoke equitable tolling and all pre-January 2009 allegations are time barred.

### D. The Citation's Attempt to Plead Causation Fails

The Opposition cannot substantiate the Citation's allegation that Kathe Sackler's actions "caused significant harm to the State and the agencies." (¶¶ 28-29). The Opposition and Citation do not identify a single instance where Kathe Sackler made a statement that caused Utah to suffer harm. (*See* Mot. at 39-41). The Opposition instead claims "the Citation is replete with allegations that [Kathe Sackler] directed the dissemination of deceptive materials" (Opp. at 41-42), but the four referenced paragraphs of the Citation do not describe 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 has no plausible connection to harm in Utah. There are also indisputably (i) many degrees of separation between Kathe Sackler and the harm resulting from opioid abuse and addiction in Utah and (ii) intervening criminal and negligent acts that break the chain of causation. (Mot. at 40-41).

## CONCLUSION

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

DATED this 7th day of May, 2019.

COHNE KINGHORN, P.C.

By: /s/ Patrick E. Johnson

Paul T. Moxley
Hal L. Reiser
Patrick E. Johnson
111 E. Broadway Eleventh Floor
Salt Lake City, UT 84111
Tel: (801) 363-4300
pmoxley@ck.law
hreiser@ck.law
pjohnson@ck.law
*Attorneys for Respondent Kathe Sackler*

## 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:

By hand-delivery:

Utah Department of Commerce
Bruce Dibb, Administrative Law Judge
160 East 300 South, 2ndFloor
PO Box 146701
Salt Lake City, UT 84114-6701

Utah Division of Consumer Protection
160 East 300 South, 2ndFloor
PO Box 146704
Salt Lake City, UT 84114-6704

By electronic mail:

Bruce Dibb
bdibb@utah.gov

Robert G. Wing
rwing@agutah.gov

Kevin McLean
kmclean@agutah.gov

Linda Singer
lsinger@motleyrice.com

Elizabeth Smith
esmith@motleyrice.com

Lisa Saltzburg
lsaltzburg@motleyrice.com

Katherine Nichols
knichols@swlaw.com

Annika Jones
aljones@swlaw.com

David Ackerman
dackerman@motleyrice.com

Matthew McCarley
mccarley@fnlawfirm.com

Majed Nachawati
mn@fnlawfirm.com

Jonathan Novak
jnovak@fnlawfirm.com

Ann Saucer
asaucer@fnlawfirm.com

Misty Farris
mfarris@fnlawfirm.com

Glenn Bronson
grb@princeyeates.com

Elisabeth McOmber
emcomber@swlaw.com

Will Sachse
Will.Sachse@dechert.com

Paul T. Moxley
pmoxley@ck.law

Patrick E. Johnson
pjohnson@ck.law

Tim Bywater
tbywater@ck.law

Gregory Joseph
gjoseph@jha.com

Mara Leventhal
mleventhal@jha.com

Doug Pepe
dpepe@jha.com

Christopher Stanley
cstanley@jha.com

Ben Albert
balbert@jha.com

Roman Asudulayev
rasudulayev@jha.com

Maura Monaghan
mkmonaghan@debevoise.com

Susan Reagan Gittes
srgittes@debevoise.com

Jacob Stahl
jwstahl@debevoise.com

*/s/ Patrick E. Johnson*