STATE OF OKLAHOMA } S.S.
CLEVELAND COUNTY
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**IN THE DISTRICT COURT OF CLEVELAND COUNTY
STATE OF OKLAHOMA**

STATE OF OKLAHOMA, ex rel., MIKE HUNTER, ATTORNEY GENERAL OF OKLAHOMA, Plaintiff,	§	Case No. CJ-2017-816 The Honorable Thad Balkman
vs.	§	
(1) PURDUE PHARMA L.P.; (2) PURDUE PHARMA, INC.; (3) THE PURDUE FREDERICK COMPANY; (4) TEVA PHARMACEUTICALS USA, INC.; (5) CEPHALON, INC.; (6) JOHNSON & JOHNSON; (7) JANSSEN PHARMACEUTICALS, INC.; (8) ORTHO-McNEIL-JANSSEN PHARMACEUTICALS, INC., n/k/a JANSSEN PHARMACEUTICALS, INC.; (9) JANSSEN PHARMACEUTICA, INC., n/k/a JANSSEN PHARMACEUTICALS, INC.; (10) ALLERGAN, PLC, f/k/a ACTAVIS PLC, f/k/a ACTAVIS, INC., f/k/a WATSON PHARMACEUTICALS, INC.; (11) WATSON LABORATORIES, INC.; (12) ACTAVIS LLC; and (13) ACTAVIS PHARMA, INC., f/k/a WATSON PHARMA, INC., Defendants.	§	William C. Hetherington Special Discovery Master *To be heard by the Honorable Thad Balkman, District Judge* CONFIDENTIAL FILED UNDER SEAL PURSUANT TO PROTECTIVE ORDER DATED APRIL 16, 2018

THE STATE'S RESPONSE IN OPPOSITION TO DEFENDANTS WATSON LABORATORIES, INC., ACTAVIS LLC, ACTAVIS PHARMA, INC. AND TEVA PHARMACEUTICALS USA, INC.'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND BRIEF IN SUPPORT

COMES NOW the State of Oklahoma (hereinafter "the State"), by and through counsel, and hereby submits this response in opposition to Defendants Watson Laboratories, Inc., Actavis LLC, Actavis Pharma, Inc., and Teva Pharmaceuticals USA, Inc.'s (collectively "Defendants") Motion for Partial Summary Judgment:

INTRODUCTION

Defendants' motion reflects an abject misunderstanding (whether intentional or not) of Oklahoma public nuisance law. A "nuisance consists of unlawfully doing an act ... which ... injures or endangers the comfort, repose, health, or safety of others ...." *See* Okla. Stat. tit. 50, § 1. A public nuisance is one "which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon the individuals may be unequal." *Id.* § 2.

Here, Defendants' conduct created a public nuisance—the opioid crisis—for which they share joint responsibility. Oklahoma's opioid crisis is an indivisible injury and the purpose of joint and several liability is to "ensure that a plaintiff will be fully compensated for indivisible injuries caused by multiple tortfeasors." *Evanston Ins. Co. v. Aminokit Labs., Inc.*, No. 15-cv-02665-RM-NYW, 2019 WL 479204, at *6 (D. Colo. Feb. 7, 2019). The State has asserted ***one*** action stemming from ***one*** nuisance and seeks ***one*** set of damages/abatement, for which there is joint and several liability amongst the Defendants. *See also McDermott, Inc. v. AmClyde*, 511 U.S. 202, 221 (1994) (purpose of joint and several liability is to ensure that where the ability to recover from one defendant is impaired, "other defendants, rather than an innocent plaintiff [are] responsible for the shortfall."); *Restatement (Third) of Torts: Apportionment of Liability* § 10 (2000); *Restatement (Second) of Torts* § 875 (1979). Once proven, ***all defendants*** become responsible for damages jointly and severally. *See id.*; 8 Okla. Prac., *Product Liability Law* § 3.10 (2017 ed.) ("If the state was a plaintiff in a cause of action against multiple defendants and established liability against those defendants, the state could employ the doctrine of joint and several liability and recover 100% of the damages suffered by the state against a defendant who was, for example, only 10% or 1% at fault.").

This means that, exactly which opioids Defendants mismarketed—branded or generic—is immaterial. All the State must show for joint and several liability to attach is that a defendant is ***a*** cause—not ***the*** cause—of the indivisible nuisance. *See* Okla. Stat. tit. 23, § 15; *Nat'l Union Fire Ins. Co. v. A.A.R. Western Skyways, Inc.*, 1989 OK 157, ¶ 14, 784 P.2d 52, 56 (under Oklahoma law, joint and several liability allows a "plaintiff to recover all of his damages from any tortfeasor regardless of the degree of negligence that party contributed to the plaintiff's damages...."); *Stevens v. Barnhill*, 1954 OK 29, ¶ 11, 266 P.2d 463, 465 ("[W]here the separate and individual acts of several persons combine to produce directly a single injury, each is responsible for the entire result even though the act of one person alone may not be the cause of the injury.") (citations omitted, emphasis added).

In *People v. ConAgra Grocery Prods. Co.*, 17 Cal. App. 5th 51, 227 Cal. Rptr. 3d 499 (2017), the defendants raised a similar defense to that presented here. There, the State of California brought a representative public nuisance action against several paint manufacturers for injuries sustained from the presence of lead paint in California homes. In response to the defendants' argument that their promotions could not have caused the presence of interior lead paint in homes without proof that paint made by each of them was currently present in those homes, the court stated:

> This contention misconstrues the basis for defendants' liability. Defendants are liable for promoting lead paint for interior residential use. **To the extent that this promotion caused lead paint to be used on residential interiors, the identity of the manufacturer of that lead paint is irrelevant. Indeed, the [Lead Industry Association's] promotions did not refer to any manufacturer of lead paint, but were generic. What matters is whether defendants' promotions were a substantial factor in leading to the use of lead paint on residential interiors.** Substantial evidence supports the court's causation finding on that basis.

Id. at 108 (emphasis added). In other words, the distinction of marketing branded versus generic opioids is a red herring. Defendants are responsible for causing the opioid epidemic, regardless of

the type of opioids they sold. The trial court in *ConAgra* ordered the defendants to pay $1 billion to abate the nuisance. *ConAgra*, 17 Cal. App. 5th at 131-32. The California Supreme Court affirmed that order. The United States Supreme Court denied certiorari. *See Sherwin-Williams Co. v. California*, 139 S.Ct. 378 (2018).

Here, the Teva Defendants participated at every level in a deceptive and misleading marketing campaign that understated the risks of addiction and overstated the efficacy of their respective opioids, thereby creating a public nuisance and indivisible injury in the form of the opioid crisis in Oklahoma and resulting harm to the State. These Defendants created the market for their opioids—both branded and generic—and then happily supplied an ever-increasing "demand" for their drugs—demand that was built on addiction and dependence. In short, Defendants produced a devastating cycle of overprescribing and addiction for which they bear joint and several responsibility. Understandably, as often is the case, Defendants are attempting to chip away at the State's claims by drawing illusory, irrelevant distinctions and making sweeping conclusions of law that have no actual bearing on the issues before the Court.

With respect to the precise *conduct* at issue, ***the category of the drugs as generic or branded is irrelevant***. The Teva Defendants' admit there is a direct correlation between Defendants' marketing and provision of generic opioids and Defendants' sales of branded opioids. *See* Ex. 1, Depo. of John Hassler, Feb. 20, 2019 at 271:10-16 ("[T]he generics usually ride in the wake of what a branded company has done to build a market for an innovative product, and then the generics simply announce availability of generic versions of that product…."). It is undisputed Cephalon and Teva engaged in a conspiracy lasting more than a decade with Purdue and Johnson & Johnson through, and as an extension of, "unbiased" groups such as the Pain Care Forum—a cabal of companies and their shills, designed to create the false belief that America is in pain,

opioids are the cure, opioids are more effective and safer than they really are, and any effort to curb their use must be stopped. Further, the Teva Defendants worked directly with Purdue to ensure that generic OxyContin was widely prescribed in Oklahoma. Indeed, Purdue sales reps were bonused for selling Teva's generic OxyContin. This conduct produced the nuisance from which Oklahoma suffers today. Moreover, it is undisputed Cephalon marketed branded opioids prior to its merger with Teva; thus, its conduct is attributable to the Teva Defendants under Oklahoma law. Lastly, there is sufficient evidence in the record that demonstrates Defendants did indeed *market* generic opioids; however, the Teva Defendants would still be at fault for simply "riding the wake" of the opioid crisis and pumping Oklahoma full of their deadly generics. This evidence creates a genuine issue of material fact such that summary judgment should be denied.

RESPONSE TO STATEMENT OF UNDISPUTED MATERIAL FACTS

1. Denied. It is undisputed that Cephalon manufactured and sold branded opioids prior to 2011. *See* Ex. 1, Depo. of John Hassler, Feb. 20, 2019 at 272:10-12. It is also undisputed Teva USA merged with Cephalon in October 2011. *See* Ex. 2, Article: *Teva to Acquire Cephalon in $6.8 Billion Transaction* ("Cephalon's ***merger*** with Teva is the result of a rigorous process that included a review of a wide-range of strategic options undertaken by Cephalon's Board of Directors and management team to maximize value and deliver significant returns to shareholders.") (emphasis added).[1] Pursuant to the merger, Teva acquired the opioids that Cephalon manufactured. *See* Ex. 3, Depo. of John Hassler, Jan. 25, 2019 at 15:5-8 (Q. And, along with the acquisition of those companies, Teva acquired the opioid products that those companies manufactured, correct? A. Yes.). Teva has admitted that, after 2011, as part of one company, it and Cephalon continued to use unbranded marketing and branded marketing for its opioids. Ex. 1,

[1]*Available at* www.tevapharm.com/news/teva_to_acquire_cephalon_in_6_8_billion_transaction_05_11.aspx (last visited Mar. 30, 2019).

Hassler Depo., Feb. 20, 2019 at 272:10-17. Under Oklahoma law, when a purchasing corporation is a mere continuation of the selling company, successor liability applies. *Pulis v. United States Elec. Tool Co.*, 1977 OK 36, ¶ 5, 561 P.2d 68, 69. Therefore, under common law principles, Cephalon's conduct and resultant liability regarding its opioids may be attributed to the Teva Defendants. Notwithstanding the application of successor liability, Defendants' conduct contributed to a public nuisance and indivisible injury for which they are jointly and severally liable, regardless of when such conduct occurred.

2. Denied for two reasons. First, this statement is immaterial to the issues of the instant case. For purposes of summary judgment, a fact is "material" if proof of it would establish or refute an essential element of a cause of action or defense. *Winston v. Stewart & Elder, P.C.*, 2002 OK 68, 55 P.3d 1063, 1067 n. 4. As shown herein, Defendants engaged in a nationwide complex marketing and supply scheme to increase their profits by overstating the efficacy of their opioids and downplaying the risks of addiction, resulting in a public nuisance for which they are jointly and severally liable. *See* Plaintiff's Statement of Additional Facts That Preclude Summary Judgment, *infra*. In this regard, Teva's corporate representative, John Hassler, acknowledged there is a direct correlation between Defendants' provision of generic opioids and Defendants' marketing and sale of branded opioids. *See* Ex. 1, Depo. of John Hassler Feb. 20, 2019 at 271:10-16 ("[T]he generics usually ride in the wake of what a branded company has done to build a market for an innovative product, and then the generics simply announce availability of generic versions of that product…."). Therefore, any purported distinction between the promotion of generic opioids versus branded opioids is immaterial for purposes of the State's public nuisance claim. In deciding a motion for summary judgment, the trial court must rule out ***all theories of liability*** fairly comprised within the evidentiary materials before it. *Winston*, 55 P.3d at 1068. Defendants'

statement is a distinction without a difference and is not material to any claim or defense by either party to this action, yet Defendants' seek summary judgment on ***all*** of the State's claims based on this illusory distinction.

Second, even if this contention were relevant, there is a genuine issue as to whether Defendants did in fact market generic opioids. For example, Defendants engaged in unbranded marketing for opioids generally—a tactic that benefitted the profit margins for all of their opioids—branded and generic. *See* Ex. 1, Depo. of John Hassler Feb. 20, 2019 at 274:4—275:19. As another example, the record also reflects that Actavis, Inc. created and distributed print ads for the generic opioid oxymorphone. *See* Ex. 4, Bates Nos. Acquired_Actavis_00263733-263735. The Actavis Defendants also used its Kadian sales force to tell doctors about this generic oxymorphone product when it launched. *See* Ex. 1, Depo of John Hassler Feb. 20, 2019 at 65:08-17. The branded version of this drug, Opana ER, was removed from the market following a request by the FDA. As such, summary judgment would still be improper.

3. The State denies this statement is material. *See* Response to ¶ 2.

4. The State denies this statement is material. *See* Response to ¶ 2.

5. The State denies this statement is material. *See* Response to ¶ 2.

6. The State denies this statement is material. *See* Response to ¶ 2.

7. The State denies this statement is material. *See* Response to ¶ 2.

8. The State denies this statement is material. *See* Response to ¶ 2.

9. Denied as phrased; the Petition speaks for itself. *See also* Response to ¶ 2.

10. Admitted; the Petition speaks for itself.

STATEMENT OF ADDITIONAL FACTS WHICH PRECLUDE SUMMARY JUDGMENT[2]

1. Defendants engaged in a widespread marketing campaign and made false representations to healthcare providers and/or omitted material facts regarding the risks, efficacy, and medical necessity of opioids. *See* Ex. 5, TEVA_OK_07226349; Ex. 6, TEVA_OK_00116243; Ex. 7, TEVA_OK_00116236; Ex. 8 TEVA_OK_00026786; Ex. 4, Acquired_Actavis_00263733; *see also* Ex. 16, Depo. of Andrew Kolodny Mar. 7-8, 2019; Exs. 17 - 57, Exhibits to Kolodny Depo., Mar. 7-8, 2019.

2. Defendants falsely marketed their opioids through the use of "Key Opinion Leaders"—doctors who act as consultants or advisors and through whom Defendants tout their misrepresentations regarding the risk of addiction and benefits of opioids ("KOLs"). *See, e.g.*, Ex. 9 TEVA_OK_00039689 (excerpt); Ex. 10 TEVA_OK_03063698. The number one, most highly regarded KOL used by all Defendants testified that Teva and Cephalon are at fault for causing the opioid crisis by, among other things, overstating the benefits and understating the risks of opioids. *See* Ex. 58, Depo of Russell Portenoy, at 261:16-271:18, 527:08-536:13, Ex. 2.

3. Defendants promoted the false concept of "pseudoaddiction," which Defendants used to convince prescribers that classic signs of addiction were actually signs of under-treated pain and should be treated with more opioid use (*see, e.g.*, Ex. 6, TEVA_OK_00116243; Ex. 7, TEVA_OK_00116236; Ex. 8, TEVA_OK 00026786 (excerpt); Ex. 27, Depo. of Andrew Kolodny

[2] In responding to Defendants' Motion, the State is only required to present sufficient evidence showing the existence of material factual disputes justifying a trial on the issues. The State is not required to present its entire case in its response. *See Opryland USA Inc. v. Great Am. Music Show, Inc.*, 970 F.2d 847, 850 (Fed. Cir. 1992); *Higgins v. Scherr*, 837 F.2d 155, 157 (4th Cir. 1988). Accordingly, the State does not contend that the evidence presented herein is the *only* evidence of Defendants' liability for nuisance and the other claims raised in the Petition, but rather genuine issues of material fact exist that justify a trial on said claims.

Mar. 7, 2019 at Ex. 11; Ex. 28, Depo of Andrew Kolodny Mar. 7, 2019 at Ex. 12; Ex. 35, depo of Andrew Kolodny Mar. 7, 2019 at Ex. 20).

4. Defendants were active collaborators in the Pain Care Forum (*see, e.g.*, Ex. 59-61, Depo of John Hassler Mar. 6, 2019, Exs. 4-5, 7; Ex. 62, Depo of Kimberly Deem-Eshleman, Ex. 41) and also used seemingly unaffiliated organizations, like The American Pain Foundation (the "APF"), as pain advocates to spread their misrepresentations, influence the media, doctors and patients, and ensure that opioids were widely available to be overprescribed. Although these third parties, the Pain Care forum and entities like APF purported to be independent, they obtained much of their funding from pharmaceutical companies such as Cephalon and Teva. Ex. 11, TEVA_OK_01022263. For example, APF and the Pain Care Forum created materials—funded by Defendants—to spread their misrepresentations further and add perceived legitimacy and impartiality. Ex. 12, APF2056.

5. Defendants acknowledge there is a direct correlation between Defendants' marketing strategies for branded medications and Defendants' profits for sales of such medications. *See, e.g.*, Ex. 63, Depo. of Phil Cramer, Dec. 19, 2018 at 469:16-470:13; Ex. 64, Depo. of Phil Cramer Dec. 19, 2018, Ex. 41; Ex. 65, Depo. of John Hassler Feb. 21, 2019, at 43:17-49:08; Ex. 66, Depo. of Kimberly Deem-Eshleman, Dec. 18, 2018 at 32:21-34:04.

6. Defendants acknowledge there is a direct correlation between sales of branded medication and sales of generic medication. *See* Ex. 1, Depo. of John Hassler, Feb. 20, 2019 at 271:10-16 ("[T]he generics usually ride in the wake of what a branded company has done to build a market for an innovative product, and then the generics simply announce availability of generic versions of that product….").

7. Teva is the largest manufacturer of generic opioids *in the world.* Ex. 13, Depo. of John Hassler, Aug. 29, 2018 at 161:23-162:4; Ex. 14, Depo. of John Hassler, Nov. 7, 2018 at 69:14-18.

8. Teva has a distribution agreement with Purdue whereby Purdue granted Teva rights to sell generic Oxycontin. Ex. 14, Hassler Depo., Nov. 7, 2018 at 82:4-21; Ex. 15, Depo. of John Hassler, Jan. 25, 2019 at 16:7—17:11. And, both Actavis and Watson had similar distribution agreements with Purdue for selling generic OxyContin prior to Teva acquiring them. *See, e.g.*, Ex. 67, Depo. of Christine Baeder at 140:22-143:07; Ex. 68, PDD8901724434 at 25; Ex. 69, PDD8901765166 at PDD8901765192; Ex. 70, POK003478620. Watson also had an agreement with Purdue to sell generic MS Contin prior to Teva acquiring them. *See* Ex. 71, Depo. of John Hassler, Jan. 30, 2019; Ex. 72, Depo. of John Hassler, Jan. 30, 2019 at Ex. 19. Even worse, while Teva claims publicly it did not use sales representatives to market Opioids in Oklahoma, Purdue paid its own sales representatives bonuses for sales of Teva's generics—and, in turn, Purdue earned a royalty payment from Teva for such sales. *See* Ex. 73, Depo. of Eric Wayman at 344:20-345:25; Ex. 74, Wayman Depo. at Ex. 25; Ex. 71, PDD8901724434 at 25.

9. Oklahoma's opioid crisis is an indivisible injury. Defendants each contributed, and are jointly and severally liable for, the public nuisance in the State of Oklahoma. *See supra*; *see also* Okla. Stat. tit. 23, § 15.

10. The Teva Defendants presented a ***single*** corporate representative to testify on behalf of all Teva Defendants on all topics. The Teva Defendants chose to defend the case this way, by putting up one witness for all its affiliated companies. That corporate representative confirmed at every deposition—all fifteen of them—that he was testifying on behalf of all Teva Defendants unless he indicated otherwise for a particular answer (and he rarely did so). No one

forced the Teva Defendants to offer testimony in this way. Their choice to do so only further indicates that the Teva Defendants all operate as a group, not independent subsidiaries.

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate only where the pleadings, discovery, disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. Okla. Stat. tit. 12, § 2056(C). For purposes of summary judgment, a fact is "material" if proof of it would establish or refute an essential element of a cause of action or a defense. *Winston v. Stewart & Elder, P.C.*, 2002 OK 68, ¶ 9, 55 P.3d 1063, 1067 n. 4. "An issue is genuine if there is sufficient evidence on each side so that a rational trier of fact could resolve the issue either way." *Brown v. Perez*, 835 F.3d 1223, 1234 (10th Cir. 2016) (citation omitted). Summary judgment allows for the isolation and identification of non-triable fact issues. *Winston*, 55 P.3d at 1067. The Court's function at the summary judgment stage is not to weigh the evidence and determine the truth of the matter asserted, but to determine whether there is a genuine issue for trial. *See id.* If reasonable minds might reach different conclusions when viewing the evidentiary materials (even those which are undisputed), summary judgment is inappropriate. *See id.* All inferences and conclusions which may be drawn from the underlying facts must be taken in the light most favorable to the party opposing summary judgment. *Winston*, 55 P.3d at 1068. In deciding a motion for summary judgment, the trial court must rule out ***all theories of liability*** fairly comprised within the evidentiary materials before it. *See id.* "Summary process is properly invoked only when it serves to eliminate a useless trial...." *See id.* (citation omitted, emphasis added).

ARGUMENT AND AUTHORITIES

I. DEFENDANTS MISREPRESENT THE STATE'S CLAIMS

As noted above, Defendants' motion reveals a deep misunderstanding of Oklahoma's law on public nuisance and joint and several liability. Defendants attempt to gain deep traction on their contention that they—allegedly—do not market generic opioids. But this contention, even if true (which it is not), does not absolve Defendants of *liability* for the public nuisance at issue—— the opioid crisis—for which they share joint and several culpability. A "nuisance consists of unlawfully doing an act ... which ... injures or endangers the comfort, repose, health, or safety of others ...." Okla. Stat. tit. 50, § 1. A public nuisance is one "which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon the individuals may be unequal." *Id.* § 2. In various filings before this Court, including this response, the State has shown Defendants collectively carried on a decades-long campaign of deception and greed regarding their respective opioids. The Teva Defendants admit that the success of branded opioids is inextricably tied to the marketing of generic opioids. *See, e.g.*, Ex. 1, Depo. of John Hassler, Feb. 20, 2019 at 271:10-16 ("[T]he generics usually ride in the wake of what a branded company has done to build a market for an innovative product, and then the generics simply announce availability of generic versions of that product...."). For this conduct, the State has suffered an indivisible injury. It bears repeating that all the State must show for joint and several liability to attach is that one of the defendants is ***a*** cause—not ***the*** cause—of the nuisance. Okla. Stat. tit. 23, § 15; *Nat'l Union Fire Ins. Co. v. A.A.R. Western Skyways, Inc.*, 1989 OK 157, ¶ 14, 784 P.2d 52, 56; *Stevens v. Barnhill*, 1954 OK 29, ¶ 11, 266 P.2d 463, 465. Thus, Defendants' argument that they do not bear responsibility for the

opioid crisis based on an arbitrary carve-out of generic opioids is really not a defense at all given their joint and several liability with one another.

No one reasonably disputes a fundamental tenet of business is that marketing increases profits. No one reasonably disputes that generic products are successful based on the success of their branded counterparts. Teva admits there is a direct correlation between sales of branded medication and sales of generic medication. Teva is the largest manufacturer of generic opioids in the world; it has a distribution agreement with Purdue whereby Purdue granted Teva rights to sell generic Oxycontin. *See* Statement of Additional Facts That Preclude Summary Judgment, ¶ 8. Actavis and Watson both previously had such agreements with Purdue prior to being acquired by Teva. *See id.* And Purdue paid its own sales representatives bonuses based on their selling Teva generics. *See* Ex. 73, Wayman Depo. at 344:20-345:25; Ex. 74, Wayman Depo. at Ex. 25. If that is not concerted conduct, it is hard to know what is. This relationship is symbiotic and any marketing tactics employed with respect to OxyContin necessarily or by implication promote generic OxyContin. Stated another way, *both* companies profited off *any* marketing, branded or otherwise. Summary judgment should be denied on this basis alone.

Nonetheless, genuine issues of material fact do exist with respect to whether Defendants actually marketed generic opioids. For example, Defendants engaged in unbranded marketing for opioids generally—a tactic that benefitted the profit margins for *all* of their opioids—branded and generic. *See* Statement of Additional Facts, *supra*. Thus, to say that Defendants do not "promote" generic opioids grossly misstates reality. Moreover, the record reflects that Actavis, Inc. created and distributed print ads for the generic opioid oxymorphone, some of which were deceptive (*see, e.g.*, Ex. 16, Depo. of Andrew Kolodny, Mar. 8, 2019 at 317:03-321:20), and made product

announcements through their sales force. *See* Statement of Additional Facts ¶1. Accordingly, summary judgment would still be improper on this separate, independent ground.

II. TEVA IS RESPONSIBLE FOR CEPHALON'S CONDUCT

Teva also attempts to avoid liability for its role in this crisis by arguing it did not manufacture or sell branded opioids prior to 2011. This is false for two reasons. First, it is undisputed Defendant Cephalon, Inc. manufactured and sold branded opioid medicines prior to 2011. *See* Response to Statement of Material Facts, ¶ 1. It is also undisputed Teva merged with Cephalon in October 2011, and under Oklahoma law, when the purchasing corporation is a mere continuation of the selling company, it becomes responsible for the liabilities of the selling company. *Pulis v. United States Elec. Tool Co.*, 1977 OK 36, ¶ 5, 561 P.2d 68, 69. More specifically tailored to the facts of the instant case, successors-in-interest can be liable for the maintenance of a public nuisance created by a predecessor company. *Meinders v. Johnson*, 2006 OK CIV APP 35, ¶ 41, 134 P.3d 858, 870. And, any prior settlement with Cephalon expressly did not include the State's nuisance claim. *See generally* Pl.'s Response to Defendant Cephalon, Inc.'s Motion for Partial Summary Judgment and Brief in Support. Specifically, the settlement did not cover: (1) the State's nuisance claims with respect to any medications marketed and sold by Cephalon during any period of time, (2) any claims related to sales of opioids other than Actiq during any period of time, (3) any claims related to sales of Actiq outside the Agreement's specified time period, (4) Cephalon's conduct in engaging in a conspiracy or common course of action with the other Defendants in false promoting opioids, (5) any of Cephalon's tortious conduct that occurred outside the Agreement's specified time period, and (6) Cephalon's marketing and sale of Fentora. *See id.* at 4. Further, the Settlement expressly carved out any claims related to any other statutory basis or damages or conduct:

> Notwithstanding any terms of this Agreement, the State specifically does not release any person or entity from any of the following claims or liabilities... (c) any civil liability that Cephalon has or may have under any state statute, regulation, or rule not covered by this release; (d) any liability to the State (or agencies thereof) for any conduct other than the Covered Conduct. .. (h) any claims for personal injury or property damage or for other consequential damages arising from the Covered Conduct....

See id. at 3.

Second, the principles set forth above regarding nuisance law and joint tortfeasor liability apply equally here. Defendants created a public nuisance for which they bear joint and several liability. Both Cephalon and Teva (as well as the other Defendants) each played pivotal roles in the creation of this public health crisis. Whether that conduct occurred before or after 2011 is irrelevant. Indeed, Teva's conduct is arguably more derisive in that it merged with Cephalon during the height of the opioid crisis while touting the success of Cephalon's branded business and, in the words of Teva's CEO, their "profitable" future together. *See* Ex. 2 ("We are embarking today on a new and exciting future for Teva's branded business, and we are delighted that we will be working together with the Cephalon team," said Shlomo Yanai, President and Chief Executive Officer of Teva. "This is transforming for Teva's branded business, as it will help us to deliver on our strategic goal of creating a diversified, multi-faceted company. We have been following Cephalon for a long time and are very happy with the opportunity to join forces. Our significantly broader portfolio will permit marketing and sales synergies and ***enhance profitability***. We look forward to welcoming our colleagues at Cephalon to the Teva family.") (emphasis added). Cephalon was a day-one member of the Pain Care Forum and served on its Executive Committee along with Purdue and the American Pain Foundation for more than a decade. *See* Statement of Additional Facts, ¶ 4. To place temporal parameters on Teva's contribution to this crisis injects

elements not required to establish a public nuisance under Oklahoma law, and Defendants' Motion for Partial Summary Judgment should be denied on this illusory issue.

III. THE STATE DOES NOT ALLEGE A FAILURE TO WARN

Defendants' contention that any failure to warn claim is preempted by federal law warrants no response, as the State has not made such an allegation. Summary judgment on this claim should be denied as well.

CONCLUSION

WHEREFORE, for the reasons stated herein, Plaintiff respectfully requests that the Court deny Defendants' Motion for Partial Summary Judgment and award the State such further relief deemed equitable and just.

Respectfully submitted,

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