**IN THE DISTRICT COURT OF CLEVELAND COUNTY**
**STATE OF OKLAHOMA**

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| STATE OF OKLAHOMA, ex rel., MIKE HUNTER, ATTORNEY GENERAL OF OKLAHOMA, | § | |
| Plaintiff, | § | |
| | § | **Case No. CJ-2017-816** |
| vs. | § | **THE HONORABLE THAD BALKMAN** |
| (1) PURDUE PHARMA L.P.; | § | |
| (2) PURDUE PHARMA, INC.; | § | **WILLIAM C. HETHERINGTON** |
| (3) THE PURDUE FREDERICK COMPANY; | § | **SPECIAL DISCOVERY MASTER** |
| (4) TEVA PHARMACEUTICALS USA, INC.; | § | |
| (5) CEPHALON, INC.; | § | |
| (6) JOHNSON & JOHNSON; | § | |
| (7) JANSSEN PHARMACEUTICALS, INC.; | § | **TO BE HEARD BY THE HONORABLE** |
| (8) ORTHO-McNEIL-JANSSEN PHARMACEUTICALS, INC., n/k/a JANSSEN PHARMACEUTICALS, INC.; | § | **THAD BALKMAN, DISTRICT JUDGE** |
| (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.; | § | STATE OF OKLAHOMA<br>CLEVELAND COUNTY<br>**FILED** |
| (11) WATSON LABORATORIES, INC.; | § | |
| (12) ACTAVIS LLC; and | § | **MAY 03 2019** |
| (13) ACTAVIS PHARMA, INC., f/k/a WATSON PHARMA, INC., | § | |
| Defendants. | § | In the office of the<br>Court Clerk MARILYN WILLIAMS |

**THE STATE'S RESPONSE IN OPPOSITION TO TEVA DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND BRIEF IN SUPPORT**

The Teva Defendants' latest Motion for Summary Judgment fails for many of the same reasons their prior Partial Motion for Summary Judgment failed—it depends entirely on disputed fact questions for which the Court would have to weigh substantial evidence. Defendants ignore the Court's prior summary judgment ruling and reassert the same arguments for certain Teva Defendants that the Court already rejected. They waste the Court's time with arguments as

ridiculous as stating that it is "undisputed" that: they "did not falsely misrepresent the risks of opioids" and "Oklahoma prescribers were not misled by any marketing done" by the Teva Defendants. These are obvious fact questions. They also claim the State has no evidence of a public nuisance despite ample sworn testimony by Defendants of all nuisance elements except causation—videos of which the Court has already seen. They further argue, on one hand, that nuisance requires an "unlawful act" and that "unlawful" means illegal under a statute. However, on the other hand, they argue that their admitted criminal conduct would not be an "unlawful act." This is pure gamesmanship. But, the most offensive and baseless argument in Teva's Motion is where they argue there is no evidence that the public nuisance at issue in this case, the opioid crisis, has "impacted the entire Oklahoma community." This is an audacious statement in the midst of the worst man-made public health crisis in history from which Oklahomans across the State suffer every single day. Statements like this are a large part of how this crisis began, with Defendants telling everyone that there was no problem with opioids and the small problems that existed were limited to drug abusers in isolated areas. It should not be allowed to continue.

As set forth in more detail below, Teva's Motion for Summary Judgment is littered with questions of fact and misstatements of the law. The Motion should be denied.

First, the Teva Defendants' Motion for Summary Judgment—for the second time—reveals a fundamental misunderstanding of nuisance law. The State's action against these defendants does not work a sea change in the area of nuisance law; to the contrary, the present case perfectly meets the elements of Oklahoma's nuisance laws.

Second, there is substantial evidence in the record that Defendants' actions were the direct, natural and proximate cause of the opioid crisis. Multiple witnesses have testified in this case that Defendants' conduct is a cause of the rise in opioid prescriptions and abuse. The Court

does not weigh such evidence at the summary judgment stage, and at the very least, genuine issues of material fact exist which preclude summary judgment on this issue.

Third, exactly which opioids Defendants manufactured—whether brand name or generic—is immaterial. All defendants have engaged in unbranded marketing about opioids generally, either directly or indirectly through KOLs, the media, and front groups. The Court previously denied Defendants' Motion for Partial Summary Judgment on this same argument and Defendants should be estopped from relitigating it.

Fourth, joint and several liability is applicable. At every level, the Teva Defendants participated 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. These Defendants created the market for their opioids—both brand name and generic—and then happily supplied an ever-increasing "demand" for their drugs—demand that was built on addiction and dependence. For joint and several liability to attach, all the State must establish is that a defendant is a cause—not the cause—of the indivisible nuisance. Defendants jointly participated in marketing efforts and endeavors to "educate" prescribers and the public, claiming their drugs were harmless cure-alls. It was Defendants' joint conduct that created the opioid epidemic, and they should bear joint responsibility. Moreover, due process is not implicated for holding Defendants responsible for the crisis they created.

Fifth, it is incredulous that Defendants contest that their actions affected a great number of people. The opioid crisis claims the lives of hundreds of Oklahomans every year. Since 2009, more Oklahomans have died from opioids than from car accidents. The opioid crisis has been declared a National Public Health Emergency by the President and a public health emergency in

Oklahoma by the Governor. For Defendants to state otherwise reflects either ignorance, a lack of sympathy, or, at worst, a bad-faith litigation position.

Lastly, abatement is an appropriate remedy to curtail the conduct at issue here. Oklahoma statutes permit the remedy of abatement to address threats to the public's health and safety. Abatement is a flexible remedy designed to address the particular facts of the case. Thus, the payment of money does not alter the nature of abatement. The Court has already addressed much of this argument in response to J&J's request for a jury trial.

**RESPONSE TO STATEMENT OF UNDISPUTED MATERIAL FACTS**

1. The State denies this statement is material. 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 (both for their branded products and opioids generally as a class of drug), 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 manufacturing, selling, or 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.

2. Denied. Defendants already raised this issue in their prior Motion for Partial Summary Judgment, and the Court found fact questions existed. Defendants engaged in a widespread marketing campaign and made false representations to healthcare providers and/or omitted material facts regarding the risks, efficacy, safety, and therapeutic value of opioids. *See e.g.*, Ex. 2, TEVA_OK_07226349; Ex. 3, TEVA__OK_00116243; Ex. 4, TEVA_OK_00116236; Ex. 5, TEVA_OK_00026786; Ex. 6, Acquired_Actavis_00263733; Ex. 7 , TEVA_OK_00048420; *see also* Ex. 8, Depo. of Andrew Kolodny Mar. 7-8, 2019; Ex. 9, Exhibits to Kolodny Depo., Mar. 7-8, 2019; Ex. 10; *see generally* Ex. 31, Depo of Susan Larijani, Jan. 15, 2019.

3. Denied. *See* Response to ¶ 2. This case has never been about identifying individual prescriptions or individual patients tied to one specific misrepresentation made to one specific doctor. Oklahoma's opioid crisis is an indivisible injury. Reliance is not an element. Defendants each contributed, and are jointly and severally liable for, the public nuisance they created in the State of Oklahoma. *See infra*; Exs. 11 - 19; *see also* Okla. Stat. tit. 23, § 15.[1]

[1] Defendants also incorrectly continue to rely heavily on the terms "medically inappropriate" and "medically unnecessary" prescriptions throughout their Motion apparently based on the State's previously asserted claims for violation of the False Claims Act.

4. The State denies this statement is material. *See* Response to ¶ 1.

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

6. Denied. *See* Response to ¶ 3.

7. The State denies this statement is material. *See* Response to ¶ 1.

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

9. Denied. *See* Response to ¶ 3.

10. The State denies this statement is material. *See* Response to ¶ 1.

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

12. Denied. *See* Response to ¶ 3.

13. The State denies this statement is material. *See* Response to ¶ 1.

14. The State denies this statement is material. Nevertheless, Cephalon pled guilty to misbranding Actiq (a fentanyl lollipop for cancer patients) and improperly marketing it for the use of noncancer pain. *See* Ex. 20, Cephalon Guilty Plea. Further, as early as 2002, Cephalon was fully aware of the increase of the use of Actiq for noncancer pain. Ex. 21, TEVA_OK_00094243.

15. The State denies this statement is material. *See* Response to ¶ 14. Additionally, in a FAQ brochure designed for patients, Defendants stated patients "will not get addicted to Actiq," and called opioid addiction a common misconception. Ex. 22, TEVA_OK_07226345.

16. The State denies this statement is material. *See* Response to ¶ 14.

17. The State denies this statement is material. Nevertheless, Teva targeted primary care and family physicians to increase prescriptions of Fentora even though Fentora was only supposed to be used in patients with severe cancer pain. Ex. 23, TEVA_OK_00100238.

18. The State denies this statement is material. The label for Fentora does not state anything regarding the rate of addiction. However, in the "Transmittal of Advertisements and Promotional Labeling" for Fentora, Defendants stated addiction did not often occur when taken under the supervision of a doctor. Ex. 24, TEVA_OK_00010858.

19. The State denies this statement is material. Further, Defendants cessation of promotion of Fentora in the present day does not abate the public nuisance created by the extensive and misleading promotion done in previous years. *See* Ex. 23, TEVA_OK_00100238; Ex. 24, TEVA_OK_00010858; Ex. 25, TEVA_OK_00050167. Just because Defendants stopped poisoning the well does not mean the well is no longer poisoned.

20. The State denies this statement is material. Like Defendants' reliance on their label, the presence of a REMS program does not shield them from any and all liability, as Defendants are the ones the drafted the REMS material, which they watered down to preserve sales. Defendants worked with the Pain Care Forum to create the "Industry Working Group," which was specifically designed to fight and water down REMS. *See* Exhibit 77, PPLP004317984. Moreover, despite REMS, Defendants continued misrepresenting the risks and benefits of opioids through other channels. *See* Response to ¶¶2-3, 29, 39.

21. Admitted; the Petition speaks for itself.

22. Admitted; the Petition speaks for itself.

23. Admitted; the Petition speaks for itself.

24. Admitted; the Petition speaks for itself.

25. The State denies this statement is material as phrased. Opioids are essential medicines for certain patients in certain circumstances and can help such patients when prescribed

properly and used properly. However, Defendants assertion that opioids are beneficial for any or all patients in pain is misleading and a common lie Defendants told through marketing. *See* Response to ¶¶2-3, 29, 39. This includes misrepresentations concerning the differences between addiction and dependency, the fake concept of pseudoaddiction, or flatly stating addiction rate was low or rare. Ex. 26, TEVA_OK_01289565.

26. The State denies this statement is material. Further, Defendants marketed off label and even pled guilty to such conduct. *See* Ex. 20, Cephalon Guilty Plea. And, Defendants marketed contrary to their own FDA-approved labels and omitted information in their marketing materials. *See* Response to ¶¶2-3, 29, 39.

27. The State denies this statement is material. *See* Response to ¶¶2-3, 29, 39. Further, Teva kept a list of off-label prescribers, and several members that appeared as off-label prescribers such as Dr. Portenoy, Dr. Sorenson, and Dr. Bhakta, also participated in Teva's speaker's bureau or acted as a Key Opinion leader for the Defendants. Ex. 27, TEVA_OK_06842245.

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

29. Denied. Defendants repeatedly misrepresented the risks of opioids and suggesting this is undisputed is ludicrous. *See* Response ¶¶2-3, 39. For example, Defendants employed a manager who stated he was okay with representatives telling customers little white lies, sending emails dictating what should be said in medical education programs, fraudulently expensing gift cards to health care providers, and repeatedly making off-label claims. Ex. 28, TEVA_OK_04848111. Dr. Kolodny further described examples of Defendants' improper marketing as follows:

    a. "So, I can give you examples of a decep --from examples that come from a multifaceted deceptive campaign that influenced prescribing in the state of

Oklahoma, that misinformed doctors about the risks and the benefits of opioids, examples that would lead a prescriber to underestimate how dangerous and addictive opioids are and overestimate their ability to help people with pain[.]" Ex. __ at 84:06-13, Depo. of Andrew Kolodny, Mar. 7, 2019.

b. "These are completely false and misleading statements. Encouraging, not just patients but people concerned about patients to not be worried that a highly addictive drug is in fact addictive or to be worried about the physiological dependence that sets in on the drug that makes it very difficult for people toc ome off, even if they don't clearly get addicted." *Id.* at 97:09-17 (describing Cephalon sales training document).

c. "This also describes the concept of pseudoaddiction which we talked about earlier, pseudoaddiction not being a real medical conept, but really a fabricated concept to encourage aggressive prescribing to patients who could be suffering from the life-threatening disease of opioid addiction." *Id.* at 101:03-08 (describing Cephalon materials).

d. "So, this is a frequently asked questions from patients...a frequently asked question by patients prescribed Actiq is listed as, 'Will I get addicted to this medicine?' The answer from your client to people who are being prescribed a potent opioid, an immediate-release, short-acting fentanyl product, a highly addictive product, the answer that your client wanted to be given to patients when they asked, 'Will I get addicted to this medicine,' was, 'You will not get addicted to Actiq.'" *Id.* at 102:06-19 (describing Cephalon FAQs).

30. The State denies this statement is material. *See* Response to ¶¶26-27.

31. The State denies this statement as written. The FDA does not regulate unbranded marketing materials and materials being submitted to the FDA is not synonymous with materials being "approved by the FDA."

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

33. Denied. *See* Response to ¶¶2-3, 29, 39. Defendants sought to influence Oklahoma prescribers' medical judgment. *Id.* To do so, Defendants utilized speaker's programs, CME's, KOL's, the media, and both branded and unbranded marketing riddled with misrepresentations. *See, e.g.*, Ex. 29 (*Responsible Opioid Prescribing*, Depo. of John Hassler, Feb. 20, 2019 Ex. 8); Ex. 30 (Depo. of John Hassler, Jan. 23, 2019 Ex. 10).

34. Denied. *See* Response to ¶¶2-3, 29, 39. Defendants sought to influence the Oklahoma medical community's understanding of the risks associated with opioid use. *Id.* Further, 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 opioids use (*see, e.g.*, Ex. 3, TEVA_OK_00116243; Ex. 4, TEVA_OK_00116236, Ex. 5, TEVA_OK_00026786 (excerpt); Ex. 8. Depo. of Andrew Kolodny March 7, 2019 at Ex. 11; Ex. 8 Depo of Andrew Kolodny Mar. 7, 2019 at Ex. 12; Ex. 8, depo of Andrew Kolodny Mar. 7, 2019 at Ex. 20; Ex. 32, TEVA_OK_00107392 at 53 (describing use of CMEs for marketing).

35. Denied. *See* Response to ¶¶ 33, 34.

36. Admitted. Defendants infiltrated those aspects too. For example, Defendants hosted CME's, hosted dinners and training seminars, and misstated studies in medical journals. Further, Defendants falsely marketed their opioids through the use of KOLs —doctors who act as consultants or advisors and through whom Defendants tout their misrepresentations regarding the risk of addiction and benefits of opioids. *See, e.g.*, Ex. 33, TEVA_OK_00039689 (excerpt); Ex. 34, TEVA_OK_03063698. The number one, most highly regarded KOL used by all Defendants—Dr. Russell Portenoy—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. 35, Depo. of Russell Portenoy, at 261:16-271:18. 527:08-536:13, Ex. 2.

37. The State denies this statement is material. Nevertheless, Defendants also influenced reimbursement policies and limitations on coverage. For instance, when Oklahoma was considering limiting prior authorization of Actiq to cancer pain, Defendants contacted

multiple doctors who then called the Drug Utilization Review Board to express their concerns, ultimately resulting in no prior authorization requirement. Ex. 36, TEVA_OK_06692815. Additionally, Defendants blocked an effort in Oklahoma to impose a new prior authorization on Actiq. Ex. 37, TEVA_OK_00598841.

38. Denied. *See* Response to ¶¶ 33, 34, 36. The Defendants conspired to engage in an industry wide marketing scheme which included branded and unbranded marketing to influence prescribers and increase the number of prescriptions written for opioids. It was impossible for a prescriber to know real-time what had been influenced by the Defendants.

39. Denied. *See* Response to ¶¶2-3, 29, 33, 34; *see also* Ex. 8 at 116:02-08 ("We know that prescribing practices were changed by a multifaceted campaign that your client participated in, and we know that Oklahoma is, unfortunately, a state with among the most aggressive prescribing in the country, a state that has disproportionately suffered harm from your client's actions."), Depo. of Andrew Kolodny, Mar. 7, 2019; Ex. 38, Excerpts from Cephalon Call Logs (Exs. 11 - 19), ("I hammered him as hard as I ever have anyone by asking how he can forget A[ctiq] with me in the office every week. He had no good answer other than to say he would pick it up."); ("He said that he is not using but has no reason at all for doing so except that he is a creature of habit. I told him my job was to changes those habits and if that was the only reason, he had better get ready to see a lot of me."); ("Wanted to know if I was going to do a happy hour at In The Raw any Thursday coming up. Told him not this week but next. He loves that place. Asked if he had done any writing to justify his invitation and he said two that he could think of."); ("putt the hammer down on stopping playing and starting writing...getting

more chances to influence habits here"); Ex. 39 124:22-125:19, Depo. of John Hassler Dec. 13, 2018 (confirming Oklahoma sales reps are trained with the same materials as national team, including materials related to pseudoaddiction).

40. The State denies this statement is material.

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

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

43. The State denies this statement is material. Defendants targeted pharmacists in similar methods as doctors were targeted. Ex. 40, TEVA_OK_00041816; *see also* Ex. 1, Depo. of John Hassler, Feb. 20, 2019 at 271:10-16.

44. Denied. It is physically impossible for the State to determine whether all prescriptions are medically necessary instantaneously prior to filling the prescriptions. Ex. 41, Depo. of Frank Lawler, Feb. 20, 2019 at 226:13-227:6; Ex. 42, Depo. of Burl Beasley at 241:21-06.

45. The State denies this statement is material. *See* Response to ¶ 41.

46. The State denies this statement is material. *See* Response to ¶¶ 2-3, 33, 34, 36. Oklahoma's opioid crisis is an indivisible injury. Defendants each contributed, and are jointly and severally liable for, the public nuisance they created in the State of Oklahoma. *See supra*; *see also* Okla. Stat. tit. 23, § 15. Further, Defendants targeted doctors that they considered to be high decile targets and would later be prosecuted by the State for writing prescription for opioids. *See* Ex. 43, TEVA_OK_01222473.

47. The State denies this statement is material. *See* Response to ¶ 46.

48. The State denies this statement is material. *See* Response to ¶ 46; *see also* Ex. 44 at 178:25-179:11, Depo. of Mark Stewart.

49. Denied. *See* Response to ¶¶2-3, 29, 39. Moreover, Defendants perform this analysis themselves. For example, Defendants compensated their sales force on a lucrative bonus system based on results (i.e. prescriptions from their target doctors). *See, e.g.*, Ex. 45 at 28:24-29:13, 32:14-33:06, 48:24-49:08, Depo. of John Hassler, Feb. 21, 2019 (Oklahoma sales force was effective in selling opioid products).

50. Denied. *See* Response to ¶¶2-3, 29, 39, 49; *see also* Ex. 46, TEVA_OK_00044404, Ex. 32, TEVA_OK_00107392, Ex. 47 , TEVA_OK_03187758.

51. The State denies this statement is material. *See* Response to ¶¶2-3, 29, 39, 49, 50. Further, Defendants' widespread influence convinced Oklahoma physicians to more aggressively treat chronic non-cancer pain by prescribing more opioids. Ex. 41, Depo. of Frank Lawler, Feb. 20, 2019 at 69:3-24.

52. Denied. *See* Response to ¶¶2-3, 29, 39, 49, 50

53. Denied. *See* Response to ¶ 3. The State has multiple experts that identify the causes of the opioid crisis. *See, e.g.*, Ex. 8 at 84:06-13, 116:02-08 Depo. of Andrew Kolodny, Mar. 7, 2019; Ex. 48 at 333:15-341:14.

54. The State denies this statement is material. *See* Response to ¶ 3; Exs. 11 - 19.

55. The State denies this statement is material. *See* Response to ¶3, 45.

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

57. Denied. *See* Response to ¶¶2-3, 29, 39. Defendants falsely marketed their opioids through the use of KOLs—doctors who act as consultants or advisors and through whom Defendants tout their misrepresentations regarding the risk of addiction and benefits of opioids. *See, e.g.*, Ex. 33 TEVA_OK_00039689 (excerpt); Ex. 34, TEVA_OK_03063698. Dr. Portenoy—the number one, most highly regarded KOL used

by all Defendant—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. 35, Depo. of Russell Portenoy, at 261:16-271:18. 527:08-536:13, Ex. 2. Further, Cephalon recognized that the number one influence on doctor's change in prescription habits was their peers and noted that a "small number of KOLs influence hundreds of prescribers". Ex. 33, TEVA_OK_03063698.

58. The State denies this statement is material. *See also* Ex. 8, Depo. of Andrew Kolodny Mar. 7-8, 2019; Exs. 9, Exhibits to Kolodny Depo., Mar. 7-8, 2019; Ex. 10; Ex. 47, TEVA_OK_03187758 at 40.

59. Denied. Defendants were active collaborators in the Pain Care Forum (*see, e.g.*, Ex. ___, Depo of John Hassler Mar. 6, 2019, Exs. 4-5, 7) 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. 49, 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. 50, APF2056; *See also* Ex. 8, Depo. of Andrew Kolodny Mar. 7-8, 2019; Exs. 9, Exhibits to Kolodny Depo., Mar. 7-8, 2019.

60. Denied. Continuing Medical Education Programs were planned by Defendants' marketing department and hosted and paid for by Defendants. *See* Ex. 8, Depo. of

Andrew Kolodny, Mar. 7, 2019 at 123:24-124:1, 125:23-126:8; Ex. 47, TEVA_OK_03187758 at 40.

61. Denied. *See* Response to ¶¶2-3, 29, 39, 49. The State provides multiple experts on marketing that opine on marketing in Oklahoma as well.

62. Denied. *See* Response to ¶¶2-3, 29, 39, 49.

63. Denied as written; while the State does not have to prove a specific misrepresentation about a specific drug caused a specific doctor to write a specific prescription for that same drug to a patient who was then harmed (as Defendants contend), the State can and will show that each Defendant participated in the conspiracy to promote and oversupply opioids in Oklahoma and now Oklahoma is in an opioid crisis. *See* Response to ¶¶2-3, 29, 39, 49.

64. Denied. *See* Response to ¶ 59. Defendants also utilized other KOLs and Front Groups to advance their agenda. *See also* Ex. 8, Depo. of Andrew Kolodny Mar. 7-8, 2019; Ex. 9, Exhibits to Kolodny Depo., Mar. 7-8, 2019. Further, Teva has a distribution agreement with Purdue whereby Purdue granted Teva rights to sell generic Oxycontin. Ex. 51, Depo. of John Hassler, Nov. 7, 2018 at 82:4-21; Ex. 52 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. 53, Depo. of Christine Baeder at 140:22-143:07; Ex. 54 PDD8901724434 at 25; Ex. 55 PDD8901765166 at PDD8901765192; Ex. 56, POK003478620. Watson also had an agreement with Purdue to sell generic MS Contin prior to Teva acquiring them. *See* Ex. 57, Depo. of John Hassler, Jan. 30, 2019; Ex. 58, 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. 59, Depo. of Eric Wayman at 344:20-345:25; Ex. 60, Wayman Depo. at Ex. 25; Ex. 54, PDD8901724434 at 25. And, a number of Teva sales representatives worked with local Janssen representatives to do join programs or gain access to offices. Ex. 10, TEVA_OK_00094174. Teva shared many of the same speakers in common with Janssen and many Janssen speakers included Actiq in their presentations. *Id.*

65. The State denies this statement is material. Certain experts ability to enumerate by memory each of the Teva Defendants' opioids (and they make dozens) is not material to summary judgment.

## STATEMENT OF ADDITIONAL FACTS WHICH PRECLUDE SUMMARY JUDGMENT[2]

1. It is undisputed that Teva USA merged with Cephalon in October 2011. *See* Ex. 61, 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). Cephalon manufactured and sold branded opioids prior to 2011. *See* Ex. 1, Depo. of John Hassler, Feb. 20, 2019 at 272:10-12. Pursuant to the merger, Teva acquired the opioids that Cephalon manufactured. *See* Ex. 52, Depo. of John Hassler, Jan. 25, 2019 at 15:5-8. Teva

[2] In responding to Defendant's 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.

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, Hassler Depo., Feb. 20, 2019 at 272:10-17.

2. 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, any and all of 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.

3. Defendants engaged in unbranded marketing for opioids generally—a tactic that benefitted 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. The record also reflects that Actavis, Inc. created and distributed print ads for its generic opioid oxymorphone. *See* Ex. 6, 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.

4. Defendants acknowledge their marketing strategies for branded medications result in more prescriptions of those medications and Defendants' profits for sales of such medications. *See, e.g.*, Ex. 62, Depo. of Phil Cramer, Dec. 19, 2018 at 469:16-470:13; Ex. 63 Depo. of Phil Cramer Dec. 19, 2018, Ex. 41; Ex. 64 Depo. of John Hassler Feb. 21,

2019 at 43:17-49:08; Ex. 65, Depo. of Kimberly Deem-Eshleman, Dec. 18, 2018 at 32:21-34:04. Defendants further acknowledge that unbranded marketing can increase prescriptions of opioids generally. *See, e.g.*, Ex. 65 at 48:08-49:18, Depo. of Kimberly Deem-Eshleman, March 5, 2019.

5. Teva is the largest manufacturer of generic opioids in the world. Ex. 66, Depo. of John Hassler, Aug. 29, 2018 at 161:23-162:4; Ex. 51, Depo. of John Hassler, Nov. 7, 2018 at 69:14-18.

6. 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 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). "Summary judgments are *disfavored* and should only be granted when it is clear there are *no disputed* material fact issues." *Fargo v. Hays-Kuehn*, 2015 OK 56, ¶ 12, 352 P.3d 1223, 1227 (emphasis added). 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. Oklahoma Law Does Not Limit Nuisance to Property Claims

Defendants first incorrectly state that Oklahoma nuisance law is limited to real property disputes. Motion at 19. This is incorrect. In making this argument, Defendants wholly ignore the Oklahoma statutory definition of a public nuisance. *See id.* at 19-22. Oklahoma broadly defines nuisance as follows:

> A nuisance consists in unlawfully doing an act, or omitting to perform a duty, which act or omission either:
>
> > **First.** Annoys, injures or endangers the comfort, repose, health, or safety of others; or

> **Second.** Offends decency; or
>
> **Third.** Unlawfully interferes with, obstructs or tends to obstruct, or renders dangerous for passage, any lake or navigable river, stream, canal or basin, or any public park, square, street or highway; or
>
> **Fourth.** In any way renders other persons insecure in life, or in the use of property, provided, this section shall not apply to preexisting agricultural activities.

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. The plain language of Oklahoma's nuisance statute shows that its main purpose is to remedy wrongs that threaten the safety, health, and welfare of the populace, regardless of whether they involve real property or not. Indeed, if nuisances were limited to real property, then all four of the above prongs (which are separated by "or") would expressly mention property like the "Third" prong. But, the "Third" prong is the only one that does. Defendants cannot ignore or render superfluous the other prongs, especially the "First": any act or omission that "[a]nnoys, injures or endangers the comfort, repose, health, or safety of others[.]". According to its very language, the statute *must* be broader than Defendants contend.

Defendants' contention that a public nuisance must be associated with real property is contrary to clearly established Oklahoma law. Oklahoma has never imposed a requirement that there be some form of an injury to land or property. *See, e.g., Jones v. State*, 132 P. 319 (Okla. 1912) ("A public nuisance is a crime against the order and economy of the state, and consists in unlawfully doing any act or omitting to perform any duty required by the public good, which act or omission either (1) annoys or injures the comfort, repose, health or safety of any considerable number of persons; or (2) offends public decency; or ... in any way renders life or the use of

property uncomfortable.").[3] Comment h to Section 821B of the *Restatement (Second) of Torts* states that "unlike a private nuisance, ***a public nuisance does not necessarily involve interference with use and enjoyment of land.***" *Restatement (Second) of Torts* § 821B, cmt. h. (emphasis added).

Defendants overstate the Court's holding in *Laubenstein*. Motion at 19. The nuisance at issue in *Laubenstein* arguably dealt with real property, but the Court did not hold that nuisance ***required*** interference with real property. *See Laubenstein v. Bode Tower, LLC*, 392 P.3d 706, 709 (Okla. 2016). In fact, in reviewing the facts, the Court stated that the Plaintiff "offered nothing to establish the cellular tower created an environment so inhospitable as to cause 'substantial injury to ***comfort, health,*** or property.'" *Id. Laubenstein* shows that a nuisance *may* be based on use or enjoyment of property, but it does not foreclose that it may also be based on the many other interests specifically protected under the statute.

The California statute on nuisance is nearly identical to Oklahoma's and provides insight. For example, in *ConAgra*, the court found sufficient evidence that a public nuisance existed based on Defendants' "affirmative promotion of lead paint for interior use, not their mere manufacture and distribution of lead paint or their failure to warn of its hazards." 17 Cal.App.5th at 84. Likewise, in *County of Santa Clara v. Atlantic Richfield Co.*, 137 Cal.App.4th 292, 40 Cal.Rptr.3d 313 (2006), the court rejected the argument raised here. There, as in *ConAgra*, the court found the defendants could be held liable for public nuisance by means of their actions in "[e]ngaging in a massive campaign to promote the use of Lead on the interiors and exteriors of private residences and public and private buildings and for use on furniture and toys; failing to

[3] In fact, Oklahoma statutes vest the State with authority to "abate any nuisance affecting injuriously the health of the public or any community." Okla. Stat. tit. 63, § 1-106.

warn the public about the dangers of lead; selling, promoting and distributing lead; trying to discredit evidence linking lead poisoning to lead; trying to stop regulation and restrictions on lead; and trying to increase the market for lead." 137 Cal. App. 4th 292, 304, 40 Cal. Rptr. 3d 313, 324. The defendants there, as here, argued "no public nuisance cause of action may be pleaded against a manufacturer of a product that creates a health hazard because such hazards are remediable solely through products liability [and] this cause of action could never succeed because plaintiffs could not obtain the only remedy they sought—abatement." *Id.* In response, the court held:

> *Anything* which is injurious to health ... or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property ... is a nuisance. 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 individuals may be unequal. The remedies against a public nuisance are: 1. Indictment or information; 2. A civil action; or, 3. Abatement. A civil action may be brought in the name of the people of the State of California to abate a public nuisance.... Here, Santa Clara, SF, and Oakland alleged that defendants assisted in the creation of this nuisance by *concealing the dangers of lead, mounting a campaign against regulation of lead, and promoting lead paint for interior use even though defendants had known for nearly a century that such a use of lead paint was hazardous to human beings*. Defendants "[e]ngag[ed] in a massive campaign to promote the use of Lead on the interiors and exteriors of private residences and public and private buildings and for use on furniture and toys." Had defendants not done so, lead paint would not have been incorporated into the interiors of such a large number of buildings and would not have created the enormous public health hazard that now exists. Santa Clara, SF, and Oakland have adequately alleged that defendants are liable for the abatement of this public nuisance.

*County of Santa Clara v. Atl. Richfield Co.*, 137 Cal. App. 4th 292, 306, 40 Cal. Rptr. 3d 313, 325 (2006) (emphasis added, internal citations omitted); *see also City of Cincinnati v. Beretta U.S.A. Corp.*, 768 N.E.2d 1136, 1142 (Ohio 2002). As in *ConAgra*, the Court should not narrow the State's public nuisance statute from what it plainly says.

To further support their view, Defendants once again attempt to paint the State's claims as products-liability claims. Motion at 20-21. This is as wrong now as it was at the motion to dismiss hearing almost two years ago. Products liability rests on the assertion that the defendant's product was defectively manufactured or designed. *Braswell v. Cincinnati, Inc.*, 731 F.3d 1081, 1085 (10th Cir. 2013). Here, the State alleges Defendants participated 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, for which the remedy of abatement is appropriate. *See* Response to ¶ 2 Statement of Undisputed Facts. In no way does this resemble a products liability case. *See Santa Clara, supra.* The State's claim is ideally suited to be brought as a public nuisance action. The nature of the conduct complained of, and the nature/scope of the harm suffered, fall squarely within the statutory provisions relating to nuisance. Defendants' Motion for Summary Judgment should be denied on this ground.

## II. Defendants Caused the Opioid Crisis

Defendants next argue that the State cannot prove Defendants caused the public nuisance. Motion at 23. To win on this point, Defendants must establish there is no genuine issue of fact as to whether they caused the public nuisance. They cannot do this. One need look no further than Defendants' own documents and testimony about the influence of their marketing efforts to demonstrate there are ample fact questions on causation. *See* Ex. 2, TEVA_OK_07226349; Ex. 3, TEVA__OK_00116243; Ex. 4, TEVA_OK_00116236; Ex. 5 , TEVA_OK_00026786; Ex. 6, Acquired_Actavis_00263733; *see also* Ex. 8, Depo. of Andrew Kolodny Mar. 7-8, 2019; Exs. 9, Exhibits to Kolodny Depo., Mar. 7-8, 2019; *see also* 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....").

To start, Defendants incorrectly assert the State must prove they caused the nuisance by clear and convincing evidence. However, Defendants are incorrect. *Patterson v. Roxana Petroleum Co.*, 1925 OK 224, ¶¶ 12-13, 109 Okla. 89, 91-92, 234 P. 713, 716; *McPherson v. First Presbyterian Church*, 1926 OK 214, 120 Okla. 40, 45, 248 P. 561, 566. Clear and convincing only applies if one is seeking to prevent a threatened nuisance before conduct or an injury occurs. *McPherson*, 1926 OK 214, 120 Okla. 40, 45, 248 P. 561, 566 ("In sum, to enjoin a threatened nuisance, it must appear that the injury would be irreparable in damages, and the evidence must be clear and convincing, not of a possibility or apprehension, but of a reasonable probability, that the injury will be done.").

But the Teva Defendants seek to force the State to prove a different case from the one it brought. The State is not pressing a fraud claim; nor is it pressing a products liability claim; nor is it pressing a claim for damages. The State is pressing a public nuisance claim, and the only remedy it seeks is abatement. Accordingly, despite the Teva Defendants' overtures, there is no reliance element for the State to prove. Nor is there any element that requires the State to prove that any one prescription was unnecessary, inappropriate, or harmful. *See* Response to ¶ 3 Statement of Undisputed Facts. There are only three elements under the public nuisance statutes: (1) that the Teva Defendants unlawfully did an act or omitted to perform a duty; (2) that said act or omission (a) annoys, injures or endangers the comfort, repose, health or safety of others, (b) offends decency, or (c) in any way renders other persons insecure in life, or in the use of

property; and (3) that such nuisance affects, at the same time, an entire community or neighborhood, or any considerable number of persons.[4] 50 O.S. §§ 1, 2.

The State has ample evidence that the Teva Defendants—by, among other things, falsely and deceptively promoting the use of opioids for the treatment of chronic, non-malignant pain[5]—unlawfully acted and omitted to perform a duty,[6] that such acts and omissions injured and endangered the health and safety of others and rendered them insecure in life,[7] and that such effects were felt by a considerable number of persons across the State of Oklahoma.[8] The causal chain in this case is simple: the Teva Defendants falsely and deceptively promoted opioids for the treatment of chronic, non-malignant pain[9] → doctors overprescribed opioids for chronic, non-malignant pain treatment, flooding the state with highly addictive and deadly narcotics[10] → the exponential increase in the prescription and supply of highly addictive, deadly opioids led to

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[4] The State disputes that the "direct and proximate" standard of causation the Teva Defendants cite applies in nuisance actions seeking only abatement; the cases Defendants cite indicate that such a standard applies where a plaintiff seeks to recover damages as a result of a nuisance. *See, e.g., Atchison*, 1928 OK 256, ¶ 8; *see City of Sayre v. Rice*, 1928 OK 499, ¶¶7-9; *see also West*, 1931 OK 693, ¶ 15 ("While evil intent, or negligence importing a greater or less degree of moral blame, may and ordinarily does accompany the commission of a nuisance, it cannot be said that either is an essential element of the offence. . . . In other words, there may be cases where the party in the exercise of his legal rights is bound to afford absolute to all not themselves in fault, *from any evil consequence arising from his acts*." (emphasis added)). Nonetheless, because the State can demonstrate the requisite causal nexus under any standard, the State will assume for purposes of this motion that it must prove Defendants' acts/omissions were a direct and proximate cause of the dangers to health and safety posed by the opioid crisis.

[5] *See* Ex. 20, Cephalon Guilty Plea; Ex. 21, TEVA_OK_00094243 (Cephalon was fully aware of the increase of the use of Actiq for noncancer pain); Ex. 23, TEVA_OK_00100238 (Teva targeted primary care and family physicians to increase prescriptions of Fentora even though Fentora was only supposed to be used in patients with severe cancer pain).

[6] *See, e.g.*, Exhibit 35, Portenoy Depo., at 268:24 – 271:18 ("Again, I've come to conclude that their conduct in marketing without context and without education about risk produced an increase of inappropriate and unsafe prescribing that contributed to the public health problem.")

[7] Exhibit 35, Portenoy Depo., at 268:24 – 271:18; Exhibit 66, Hassler Depo. at 128:18;130:6.

[8] *See infra* Section IV; ; Ex. 67 Deposition of Claire Nguyen, March 22, 2019, 132:16-24; Ex. 68 Injury Prevention Services Fact Sheet.

[9] *See* Ex. 2, TEVA_OK_07226349; Ex. 3, TEVA__OK_00116243; Ex. 4, TEVA_OK_00116236

[10] Ex. 41, Depo. of Frank Lawler, Feb. 20, 2019 at 69:3-24.

an exponential increase in addiction, overdose and death. Ex. 68, Fatal Unintentional Poisoning Surveillance System Update at 14. As explained below, Defendants fail to show that no genuine issue of material fact exists as to whether the Teva Defendants caused the public nuisance.

**A. The Teva Defendant's promotional campaign was a cause of the public health crisis.**

Contrary to the Motion, the State is not required to show the sort of individualized proof the Teva Defendants demand. *See* Response to ¶ 3 Statement of Undisputed Facts. Even assuming the cases cited articulated the law in Oklahoma for cases seeking damages as a result of unnecessary or fraudulent prescriptions, this case is no longer about that. The State is no longer pressing claims to recoup the overpayments made as a result of unnecessary and fraudulent prescriptions. *See* Response to ¶ 21 Statement of Undisputed Facts. Accordingly, the State need not engage in the exercise of showing which prescriptions were false under the False Claims Act; nor need the Court be concerned about calculating the specific costs of those unnecessary prescriptions. *See* Response to ¶¶ 3, 21 Statement of Undisputed Facts. Instead, the State need only show that the Teva Defendant's promotion caused an increase in prescribing and that such increase, "endangers the comfort, repose, health or safety"[11] of a "considerable number of persons." 50 O.S. §§ 1-2.

Moreover, in nuisance actions seeking abatement, the Oklahoma Supreme Court recognized long ago that generalized proof is sufficient. In *Balch v. State ex rel. Grigsby*, the defendant complained that the State used general evidence to show that defendants' business "was a house of ill fame or one to which persons resorted for the purpose of prostitution." 1917 OK 142, ¶6. And there, in affirming the decision to allow such evidence, the Court stated: "There is no longer any question in this state as to the admissibility of such testimony in cases of

[11] Or any of the other harms listed in 50 O.S. § 1.

the character of the one at bar." *Id.* The Court also quoted an Oklahoma Court of Criminal Appeals decision, stating: "In a prosecution for keeping a bawdy-house . . . The state is not required to show specific acts of lewdness or prostitution." *Id.* (quoting *Jones v. State*, 10 Okla. Crim. 79). The same is true here. The State should not be forced to show specific instances of one doctor relying on one statement to write one prescription. *See* Response to ¶ 3 Statement of Undisputed Facts. The State should only be required to show that Defendants' misleading marketing and influence campaign caused prescriptions to increase generally.

And the State can do just that. As explained above, the State will show that prior to Defendants' decision to aggressively and deceptively promote opioids for the treatment of chronic, non-malignant pain, prescribing rates were consistently low, as were the incidence of addiction, overdose and death. Ex. 69, Piercefield, *Increase in Unintentional Medication Overdose Deaths Oklahoma 1994-2006.* Then, the State will show that, following Defendants choice to aggressively and deceptively promote opioids for the treatment of chronic, non-malignant pain, the prescription of opioids increased exponentially as did the incidence of addiction, overdose and death. *Id.*; *see also* Ex. 68, Fatal Unintentional Poisoning Surveillance System Update at 14. All that changed was how Defendants promoted their drugs. *Id.*; *see also* Ex. 69, Piercefield. In Oklahoma, the fact finder is "entitled to draw any reasonable inferences from the circumstances shown." The President's Commission on the opioid crisis has already declared that the very same "unsubstantiated claims" and "aggressive promotion" at issue here were contributing causes of the current opioid crisis. Exhibit 70, The President's Commission on Combating Drug Addiction and the Opioid Crisis at 20 (Nov. 1, 2017). This Court is certainly entitled, based on the evidence, herein, to conclude the same.

Further, in Oklahoma, proximate cause is a question of fact.[12] Thus, the only time it can serve as a basis for summary judgment is "when there is *no evidence* from which a jury could reasonably find a causal nexus between the act and the injury."[13] Additionally, Defendants rely heavily on class action authority for its arguments regarding the individualized inquiry required for claims based on false marketing to medical professionals. *See* Motion at 25. As the State has repeatedly made clear, this is not a class action. The State has also demonstrated that such evidence exists[14] and that others—the President's Commission on the opioid crisis—have already found such a causal nexus from similar evidence. The State has shown the increase in prescribing was not only a natural consequence but was indeed the *intended* consequence of Defendants' misleading promotion. Ex. 8 at 116:02-08, Depo. of Andrew Kolodny, Mar. 7, 2019. As explained at length at the hearing on Friday, April 26, on Defendants' effort to exclude the testimony of Dr. McAllister, the State also has evidence to show that the public health crisis resulting from the influx of opioids in Oklahoma was a foreseeable consequence of dramatically increasing the supply of opioids in society.[15]

Accordingly, the Teva Defendant's argument here is not that the State lacks evidence of a causal nexus, but that there are "too many" steps in the State's causal chain. Motion at 23. Essentially, they argue that others—doctors, criminal drug traffickers, and the State itself—are at fault, and that their conduct supersedes anything the Defendants did to cause the crisis. The

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[12] *Jackson v. Jones*, 1995 OK 131, ¶8, 907 P.2d 1067, 1072-73; *see also Herwig v. City of Guthrie*, 1938 OK 25, ¶ 13, 78 P.2d 793, 796.
[13] *See Jackson*, 1995 OK 131, ¶8.
[14] Ex. 26, TEVA_OK_01289565; Ex. 28, TEVA_OK_04848111; Ex. 8 at 84:06-13, Depo. of Andrew Kolodny, Mar. 7, 2019.
[15] Exhibit 71, Courtwright Depo., at 155:23-156:19; Exhibit 72, McAllister Discl. ("[T]he historical record consistently indicates that when human beings gain liberal access to opioum products, an addiction epidemic is highly likely to ensue."); Exhibit 73, McAllister Depo., at 52:18 – 53:12.

State has evidence to show (a) that the Teva Defendants intentionally convinced doctors to prescribe more opioids—including Oklahoma pill-mill operators—thereby defeating any learned intermediary defense;[16] (b) that the illicit drug problem does not exist here like it does in other places;[17] and (c) that while the opioid crisis was raging, Teva was signing contracts with Purdue so they could sell even more opioids. *See, e.g.*, Ex. 53, Depo. of Christine Baeder at 140:22-143:07; Ex. 54 PDD8901724434 at 25; Ex. 55 PDD8901765166 at PDD8901765192; Ex. 56, POK003478620. Further, Defendants did not join any of these ghost defendants in this case. Nor have they developed or produced any evidence regarding any of their ghost contributions. So, the question is: Who will the Court believe?

While the State knows how the Court should answer that question, it also recognizes that summary judgment is not the proper stage at which to do so. Defendants are welcome to put on evidence of what they think are other causes at trial. But, until then, proximate cause is no basis on which to decide this case.

## III. Defendants Unlawfully Acted and Omitted to Perform Duties

Defendants next argue that the State has no evidence of an "unlawful act" under Oklahoma law. Motion at 32. They even go so far as to say that the crimes related to the marketing of Actiq for which they pled guilty in 2008 were not "unlawful acts" under the statute. Motion at 34-35. Of course, the nuisance statute does not require criminal conduct, but Cephalon's crimes were undoubtedly unlawful acts. Defendants continue to grasp at straws, misstate the law of nuisance and the evidence in this case.[18] In evaluating nuisance claims, the focus is upon the *condition created* and not the exercise of care or skill by the defendant. *Knoff v.*

[16] Ex. 43, TEVA_OK_01222473.
[17] Exhibit 67, Nguyen Depo., March 22, 2019, at 129:10 – 130:1.
[18] Defendants raised a nearly identical argument in their Motion for Judicial Notice dated April 16, 2019. The State hereby incorporates its response to that motion by reference.

*American Crystal Sugar Co.*, 380 N.W.2d 313, 317 (N.D. 1986) (superseded by statute on other grounds) (note: Oklahoma nuisance law is based on North Dakota law).[19] Hence, a party pleading nuisance need not prove negligence or other culpable standard of care, much less criminal conduct. Indeed, the Oklahoma Supreme Court has held, "[w]hile evil intent, or negligence importing a greater or less degree of moral blame may and ordinarily does accompany the commission of a nuisance, ***it cannot be said that either is an essential element of the offence***." *Oklahoma City v. West*, 7 P.2d 888, 893 (Okla. 1931) (emphasis added) (declining to ascertain *why* sewage was not sufficiently purified in constituting a nuisance); *see also Thompson v. Andover Oil Co.*, 691 P.2d 77, 83 (Okla. Civ. App. 1984) (nuisance "***liability does not depend upon the negligence of a defendant and may exist although there was no negligence. Negligence is not an essential element of a cause of action for nuisance and need not be proved.***") (emphasis added); *compare Hummel v. State*, 99 P.2d 913, 917 (Okla. Crim. App. 1940) (noting nuisance does not require "malicious or actual criminal intent") (citing Okla. Stat. tit. 50, §§ 1, 2).

In this regard, Oklahoma courts have uniformly held the challenged conduct need not be necessarily "unlawful" to constitute a nuisance. *See Briscoe v. Harper Oil Co.*, 702 P.2d 33, 36 (Okla. 1985) ("The fact that a person or corporation has authority to do certain acts does not give the right to do such acts in a way constituting an unnecessary interference with the rights of others. *A license, permit or franchise to do a certain act cannot protect the licensee who abuses the privilege by erecting or maintaining a nuisance*. The reasonableness or necessity of the acts

[19] The Oklahoma legislature incorporated North Dakota's law in adopting its nuisance statutes. *See* Okla. R.L. 1910, § 4250. In Oklahoma, "when a statute has been adopted from another state, the judicial construction of that statute by the highest court of the jurisdiction from which the statute is taken accompanies it, and is treated as incorporated." *Casey v. Casey*, 109 P.3d 345, 350 n. 12 (Okla. 2015) (citing *Sudbury v. Deterding*, 19 P.3d 856, 858 (Okla. 2001)).

complained of are for the jury to decide.") (emphasis added); *Winningham v. Rice*, 282 P.2d 742, 744 (Okla. 1955) ("Defendant's salvage yard business, *though of itself lawful*, was admittedly adjacent to a nice residential district and plaintiffs' evidence, though conflicting with defendant's evidence on the issues in some respects, substantiated their allegations as to the existence of a nuisance causing substantial injury to the health, comfort and property of the adjoining property owners.") (emphasis added); *Crushed Stone Co. v. Moore*, 369 P.2d 811, 816 (Okla. 1962) (where facts showed a lawful business is being conducted in such a manner as to constitute a private and public nuisance, causing substantial injury to comfort, health, or property, court is authorized to enjoin and abate such nuisance); *Dobbs v. City of Durant*, 206 P.2d 180, 182 (Okla. 1949) ("No principal is better settled than that where a business is conducted in such a manner as to interfere with the reasonable and comfortable enjoyment by others of their property or which occasions material injury to the property, a wrong is done to the neighboring owners for which an action will lie *although the business may be a lawful one* and one useful to the public and although the best and most approved methods may be used in the conduct and management of the business.") (emphasis added); *Champlin Refining Co. v. Dugan*, 270 P. 559, 561 (Okla. 1928); *Theatre Estates, Inc. v. Village*, 462 P.2d 651, 653 (Okla. 1969) (defendant's lawful operation of sanitation plant with insufficient capacity and improper operation may constitute nuisance); *Brock v. Roskamp*, 371 P.2d 465, 468 (Okla. 1962); *compare Erickson v. Sorensen*, 877 P.2d 144, 147 (Utah App. 1994) ("It is of no consequence that a business which causes a nuisance is a lawful business.") (quoting *Branch v. Western Petroleum, Inc.*, 657 P.2d 267, 274 (Utah 1982) (further citations omitted)).[20]

[20] *See also* 66 C.J.S. *Nuisances* § 28 ("It is a condition always implied by law that rights granted or regulated by statute shall be exercised by their possessors with due regard to the rights of other persons. *Accordingly, the fact that a person has authority from the legislature or*

Moreover, obtaining FDA and/or DEA approval to sell opioids does not shield Defendants from nuisance liability. Indeed, in 1903, the Oklahoma Supreme Court held that merely holding a license or other approval did not absolve a defendant from the tort of nuisance where the conduct at issue met the statutory requirements:

> Nor will the contention of plaintiffs in error that the territory and county having granted a license to them to sell intoxicating liquors and operate a theatre at the place designated, justifies them in conducting such business in a manner offensive to decency and morals, nor will such a license protect them in permitting and maintaining the nuisance complained of in this case. The license only authorized them to sell intoxicating liquors at the place designated, in a lawful manner, and the license permitting them to operate a theatre at such a place only permitted them to conduct such theatre in a lawful manner and did not permit or authorize them to invite and permit characters such as are described, to congregate and indulge in loud and boisterous language, and the conduct as disclosed by the record in this case. *It is not the sale of intoxicating liquors in a lawful manner which is authorized by their license, nor the conducting of a theatre in a lawful and peaceful manner, that is complained of, but it is the manner of running the business, the permitting of unlawful practices and violations of law, and the obligation to the public, that are complained of; therefore a license or licenses to operate and engage in a business so long as conducted in a lawful manner would not protect them in maintaining a public nuisance, which is in violation of the laws of the territory.*

*Reaves v. Territory*, 74 P. 951, 954 (Okla. Terr. 1903) (emphasis added). Though this was prior to statehood, the same nuisance statute was in place in the Territory of Oklahoma as exists today.

Thus, in terms of what constitutes "unlawful" under the statute, *unlawful* conduct is not tantamount to *illegal* conduct. Section 1 does not define what constitutes "unlawful" conduct; however, Oklahoma courts have used the word "unlawful" in a wide array of civil cases, including tortious interference with contract, conversion, false imprisonment, false arrest, agency, trespass, and others. *See, e.g., Wilspec Technologies, Inc. v. Dunan Holding Group, Ltd.*, 204 P.2d 69, 72-73 (Okla. 2009); *Wade v. Ray*, 168 P. 447, 449 (Okla. 1917); *Kress v.*

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*municipality to do certain acts does not give the right to do such acts in a way constituting an unnecessary interference with the rights of others.*") (emphasis added).

*Bradshaw*, 99 P.2d 508, 511 (Okla. 1940); *Shaw v. City of Okla. City*, 380 P.3d 894, 899 (Okla. Civ. App. 2016); *Tulsa General Drivers, Warehousemen, and Helpers Union, Local No. 523 v. Conley*, 288 P.2d 750, 754 (Okla. 1955); *Hughes v. Harden*, 151 P.2d 425, 426 (Okla. 1944); *Edwards v. Lachman*, 534 P.2d 670, 672 (Okla. 1975). Therefore, as shown here, "[g]iven the statute's ambiguity, the range of definitions of 'unlawful,' the nature of nuisance law, and the purpose of the statute, it must be concluded that 'unlawful' in the statute's context must mean 'wrongful' in a fairly broad sense, rather than illegal in a technical sense." *Erickson v. Sorensen*, 877 P.2d 144, 147 (Utah App. 1994).

Defendants engaged in unlawful acts and omissions that meet the statutory requirement for a public nuisance. *See* Ex. 2, TEVA_OK_07226349; Ex. 3, TEVA__OK_00116243; Ex. 4, TEVA_OK_00116236; Ex. 5, TEVA_OK_00026786; Ex. 6, Acquired_Actavis_00263733; *see also* Ex. 8, Depo. of Andrew Kolodny Mar. 7-8, 2019; Ex. 9, Exhibits to Kolodny Depo., Mar. 7-8, 2019. Their contention that the Commerce Clause prohibits the State from referencing conduct occurring outside of Oklahoma in support of its nuisance claim belies the law and common sense. The State alleges Defendants used their false marketing strategies to deceive Oklahoma doctors and patients regarding the efficacy of their drugs, resulting in the opioid epidemic. *See* Ex. 2, TEVA_OK_07226349; Ex. 3, TEVA__OK_00116243; Ex. 4, TEVA_OK_00116236; Ex. 41, Depo. of Frank Lawler, Feb. 20, 2019 at 69:3-24; Ex. 68, Fatal Unintentional Poisoning Surveillance System Update at 14. The repercussions of Defendants' actions were felt in the State (the opioid crisis),[21] and Defendants should be required to abate it. The Commerce Clause is implicated in those cases where a law is being challenged or a state regulatory body is accused of trying to control conduct beyond its boundaries. *Edgar v. MITE*

[21] Ex. 68, Fatal Unintentional Poisoning Surveillance System Update.

*Corp.*, 457 U.S. 624, 642-43 (1982). However, the Supreme Court expressly limits this rule to states' attempts to exercise "direct" control over interstate commerce through "legislation" and "regulatory regimes." Here, no law is being challenged and there is no regulatory scheme the State is trying to project onto another sovereign. The Commerce Clause argument raised by Defendants is irrelevant here.

Defendants engaged in a widespread marketing campaign—which included Oklahoma—and made false representations to healthcare providers and/or omitted material facts regarding the risks, efficacy, and medical necessity of opioids. *See* Ex. 8, Depo. of Andrew Kolodny, Mar. 7-8, 2019, Ex. 9; *see also supra* ¶39. Defendants falsely marketed their opioids through the use of KOLs through whom Defendants tout their misrepresentations regarding the risk of addiction and benefits of opioids. *See,* Ex. 33 TEVA_OK_00039689 (excerpt); Ex. 34, TEVA_OK_03063698; *See* Ex. 35, Depo. of Russell Portenoy, at 261:16-271:18. 527:08-536:13; Ex. 34, TEVA_OK_03063698. Defendants used these KOLs to promote 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,[22] and Defendants were active collaborators in seemingly unaffiliated organizations that they used to spread their misrepresentations, influence the media, doctors and patients, and ensure that opioids were widely available to be overprescribed.

Moreover, Defendants omitted material information from their marketing materials. Defendants assumed the duty to "educate" doctors about their respective opioids. Under

[22] Ex. 2, TEVA_OK_00116243; Ex. 3, TEVA_OK_00116236, Ex. 5, TEVA_OK_00026786 (excerpt); Ex. 8 Depo. of Andrew Kolodny March 7, 2019 at Ex. 11; Ex. 8 Depo of An

drew Kolodny Mar. 7, 2019 at Ex. 12; Ex. 8, depo of Andrew Kolodny Mar. 7, 2019 at Ex. 20; Ex. 32, TEVA_OK_00107392 at 53 (describing use of CMEs for marketing).

Oklahoma law, "[a]lthough a party has no duty to speak, if he or she undertakes to speak, he or she must tell the truth and not suppress known facts as half-truths calculated to deceive and representations literally true but used to create a false impression are false representations." *Croslin v. Enerlex, Inc.*, 308 P.3d 1041, 1047 (Okla. 2013) (citing *Berry v. Stevens*, 31 P.2d 950 (Okla. 1934)). Defendants had no obligation to either (1) target/call on doctors, (2) "educate" doctors on the nature of their drugs with sales reps, or (3) influence doctors and others. Upon embarking on these tasks, Defendants had a duty to be truthful in their statements. Defendants also had a duty not to omit material information. Defendants engaged in such actions with the full knowledge they were dealing in half-truths and outright lies. Prior to Defendants embarking on these tasks, there was no opioid crisis. Now there is.

This has nothing to do with the Commerce Clause. It is well established that the Commerce Clause "should not be used to immunize out-of-state actors from the legitimate reach of a state's tort and nuisance doctrine," and a "court may protect those within the state from injuries by an out-of-state actor." *City of N.Y. v. Beretta U.S.A. Corp.*, 315 F. Supp. 2d 256, 285-86 (E.D.N.Y. 2004). Even if the Commerce Clause were implicated, which it is not, the health and safety interests of Oklahomans far outweighs any possible burden to commerce alleged here. *See id.* at 286.

In sum, Defendants' conduct caused the opioid crisis in Oklahoma for which they share joint and several liability.[23] Defendants engaged in this conduct in Oklahoma. Defendants

[23] In addition, the First Amendment does not protect false and/or misleading statements. *See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976) ("Untruthful speech, commercial or otherwise, has never been protected for its own sake.") (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) (further citations omitted); *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 638 (1985) ("The States and the Federal Government are free to prevent the dissemination of commercial speech that is false, deceptive, or misleading ....") (citations omitted); *Milavetz, Gallop &*

engaged in national strategies that impacted Oklahoma. And, Defendants practice of using national marketing strategies further confirms the conduct Defendants specific engaged in in Oklahoma. *See* Ex. 2, TEVA_OK_07226349; Ex. 3, TEVA__OK_00116243; Ex. 4, TEVA_OK_00116236; Ex. 5, TEVA_OK_00026786; Ex. 6, Acquired_Actavis_00263733; *see also* Ex. 8, Depo. of Andrew Kolodny Mar. 7-8, 2019; Ex. 9, Exhibits to Kolodny Depo., Mar. 7-8, 2019; Ex. 10; Exs. 11- 19

Defendants fail to show that there is no genuine issue of material fact as to whether Defendants committed unlawful acts.

## IV. Defendants' Conduct Affected The Oklahoma Community

Strangely, Defendants next argue that "there was no impact on the community as a whole, much less all at the same time." Motion at 36. This is flies in the face of what Defendants themselves have admitted in this case. Teva's own corporate representative admitted that the opioid crisis throughout the country affected a large number of people. Ex.66, Deposition of John Hassler, August 29, 2018 127:2-9. It follows that the corporate representative would extrapolate that belief to Oklahoma as well, since he stated he was not aware of any differences in Oklahoma versus the rest of the country after he agreed there was an illicit opioid crisis in the country and was asked whether it extended to Oklahoma. *Id.* at 125:14-18. Similarly, J&J's corporate representative admitted that the crisis affects a large number of people. Ex. 74 at 302:15-305:10, Deposition of Bruce Moskovitz, Aug. 28, 2018.

And there is no doubt Oklahoma's opioid crisis impacts the community as a whole. From 2011-2015, more than 2,100 Oklahomans died from a prescription opioid overdose, Ex. 68,

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*Milavetz, P.A. v. United States*, 559 U.S. 229, 249-50 (2010) (Government has legitimate interest in preventing deception of consumers, thus statutes aimed at prohibiting misleading commercial speech were reasonable).

Injury Prevention Services Fact Sheet; Ex. 75 (Oklahoma Commission on Opioid Abuse Final Report). More Oklahoma adults aged 25-64 die of unintentional prescription opioid overdoses than motor vehicle crashes. *Id.* In 2015, over 326 million opioid pills were dispensed to Oklahoma residents—enough for every adult to have 110 pills. *Id.* Oklahoma has ranked ***first*** for the cumulative distribution in grams per 100,000 people for prescription fentanyl **since 2012.**[24] Department of Justice Drug Enforcement Agency ARCOS Data. The rate of neonatal abstinence syndrome diagnosis in Oklahoma per 100,000 infants increased tenfold from 2002-2015 with more than 1,600 infants diagnosed with neonatal abstinence syndrome during that period. Ex. 67 Deposition of Claire Nguyen, March 22, 2019, 132:16-24. It is nearly impossible to find anyone in the state of Oklahoma that has not been affected in some way by the opioid crisis. There is no question that the community as a whole has been, and is still being, impacted by the mess the Defendants created. Nor can there be any question that the nuisance affects "any considerable number of persons." 50 O.S. §2.

Lastly, Defendants make much hay from the statute's use of the phrase "at the same time," but overstate its significance. For example, in *ConAgra*, cited *supra*, the court affirmed the award of damages for lead paint in homes built prior to 1951. And, as stated, California's nuisance statute contained the "at the same time" terminology. Surely, each home was not built at the exact same time and the harm suffered by the represented plaintiffs did not occur at the exact same time. This is yet another illusory distinction drawn by Defendants to evade culpability for their wrongful acts. Genuine issues of material fact exist which preclude summary judgment on this issue.

## V. The Statute Of Limitations Is Inapplicable To The State's Claims

[24] *See* Department of Justice Drug Enforcement Agency ARCOS Data at https://www.deadiversion.usdoj.gov/arcos/retail_drug_summary/

Defendants next ignore black letter Oklahoma law to argue that the State is subject to a two-year statute of limitations for its nuisance claim. Public policy requires that every reasonable presumption favor government immunity from statutes of limitation. *Oklahoma City Mun. Imp. Auth. v. HTB, Inc.*, 769 P.2d 131, 134 (Okla. 1988). An applicable statute of limitations only runs against the State when a statute expressly says so. Here, no statute expressly states that a statute of limitations runs against the State's nuisance claims.

To the contrary, with respect to public nuisance actions for abatement brought by the State, there simply is no statute of limitations. *See* Okla. Stat. tit. 50, § 7 (***"No lapse of time can legalize a public nuisance amounting to an actual obstruction of public right."***) (emphasis added); *Tosco Corp. v. Koch Indus., Inc.*, 216 F.3d 886, 895 (10th Cir. 2000); *Fischer v. Atlantic Richfield Co.*, 774 F.Supp. 616, 619 (W.D. Okla. 1989) ("[T]he statute of limitations does not run **against** a public nuisance.") (citing Okla. Stat. tit. 50, § 7). Anything that threatens the public health and/or welfare is a nuisance. Okla. Stat. tit. 50, §§ 1, 2.

In a misguided effort to provide support for their statute of limitations argument, Defendants state, "[t]here is no public right to be free of advertising of opioid medicines." Motion at 38. This is an absurd statement that misses the point. Significant public rights are at stake. The public has a right to be free from deceptive and misleading marketing campaigns; the public has a right to be free from harmful over-prescribing; the public has a right to be free from paid shills and "unbiased" industry groups 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. To say the present case for a ***public*** nuisance does not involve public rights belittles the harm suffered by thousands of Oklahoma residents whose health and

safety is at risk due to Defendants' products. This is a *public* nuisance. The statute of limitations is inapplicable.

## VI. Abatement Is An Appropriate Remedy To Curb The Abuse Present Here[25]

Defendants next contend (again) that the State's abatement remedy improperly seeks damages and violates the Free Public Service Rule. Defendants are wrong for several reasons.

First, the J&J Defendants already attempted to argue that the State's abatement remedy was a disguised claim for damages. *See* April 9, 2019 Response to Court Order on Jury-Trial. The Court rejected that argument.

Second, under Oklahoma law, a nuisance consists of both the *action* and the injurious *condition* created. *See* 50 O.S. §1-2. Therefore, a nuisance cannot be truly abated—nullified or eliminated—unless both elements are addressed. This is the only logical understanding of abatement. For example, in the environmental pollution context, no one would seriously argue that once a polluter stops dumping hazardous chemicals into a water source, the State is suddenly powerless to take further action. The water source is still polluted and must be remediated. The company that dumped millions of gallons of toxic waste into a river could render itself immune from the costs of clean-up by simply stopping its unlawful disposal practices before the State brought an action. The same would also be true of any one-time offender—an oil well could explode, causing untold harm to the surrounding environment, but those responsible could avoid responsibility by plugging the well. These are illogical outcomes.

Defendants have tried this argument before, asking for instructions that would immunize them in exchange for promises to cease the unlawful acts at issue; and Oklahoma courts have

[25] At the onset, summary judgment on this issue is improper as it seeks to negate a request for relief. In Oklahoma, summary judgment is appropriate to avoid needless trials. *Winston*, 55 P.3d at 1068. As the court has broad discretion to fashion appropriate relief, disposition of this issue has no effect on the State's viable nuisance claim.

rightfully declined. Rather, as set forth below, Oklahoma courts have defined these nuisances in terms of the condition created and have measured abatement in terms of remedying that condition—*i.e.*, purifying the river. Any other conception of abatement renders it meaningless, both in terms of the remedy it affords (cessation of the act even though the harmful condition remains) and in terms of its ability to be distinguished from a simple injunction.

Oklahoma defines an abatable nuisance as one that may be "abated by the expenditure of money or labor." *Oklahoma City v. West*, 7 P.2d 888, 890 (Okla. 1931). Implicit within the concept of abatement in Oklahoma is the notion that a responsible defendant may be required to expend funds. This, of course, vitiates Defendants' argument that abatement stops with cessation of the unlawful conduct (i.e., injunctive relief). If that were the case, then an abatable nuisance would simply be defined as one that can be abated by prohibitory injunction. The Court's power to abate a nuisance is broader than issuing injunctive relief and includes the power to compel defendants to pay the costs of abatement. And, when the court orders the payment of such costs, the case does not transform into an action "improperly seeking damages" as Defendants contend.

For example, in *Town of Jennings v. Pappenfuss*, 263 P. 456 (Okla. 1928), the plaintiff brought her action "for an injunction to enjoin the plaintiff in error, defendant below, from maintaining a nuisance and *to compel it to abate the same*." *Id.* (emphasis added). "She alleged that the overflow from a septic tank of the town sewer located upon her farm constituted a nuisance; that the town permitted the overflow upon her land and that the odor and stench was of such extent that it was practically impossible to live upon her farm; . . . [and] that said condition was detrimental to plaintiff and endangered her comfort, health, and repose." *Id.* The court, in turn, found that defendant had been maintaining a nuisance "by permitting the overflow from the septic tank to flow into a ditch and over and upon the land of the plaintiff." *Id.* And the court, as

a remedy, ordered "[1] a permanent injunction be granted the plaintiff against the defendant enjoining it from maintaining a nuisance of the overflow from the septic tank over the lands of the plaintiff, and [2] that defendant proceed at once to abate the nuisance and pay the cost." *Id.* (emphasis added). On appeal, the Oklahoma Supreme Court not only affirmed the judgment, but declared the whole matter—including the order to pay the costs of abatement—"to be an action in equity." *Id.*

The State's requested relief of an abatement fund is on solid ground. The exact issue of an abatement fund was recently addressed in *ConAgra*, *supra*. There, several California cities brought an action against lead paint manufacturers for abatement of a public nuisance created by interior residential lead paint in the ten (10) jurisdictions represented by plaintiff. *Id.* at 79. Plaintiff submitted an abatement plan with cleanup costs associated with removing lead paint from the interior of the homes at issue. The Court, sitting in equity, ordered Defendants to pay **$1.15 billion** into a specifically designated abatement fund. *Id.* On appeal, Defendants, like here, argued that they were entitled to a jury because Plaintiff's abatement plan was "nothing more than a thinly-disguised damages award." *Id.* at 132. The appellate court disagreed, holding:

> [T]he distinction between an abatement order and a damages award is stark. An abatement order is an equitable remedy, while damages are a legal remedy. An equitable remedy's sole purpose is to eliminate the hazard that is causing the prospective harm to the plaintiff. An equitable remedy provides no compensation to the plaintiff for prior harm. Damages, on the other hand, are directed at compensating the plaintiff for prior accrued harm that has resulted from the defendant's wrongful conduct. The distinction between these two types of remedies frequently arises in nuisance actions.

*Id.* The Tenth Circuit has also recognized this distinction under Oklahoma law, holding that the creation of an "escrow fund for the abatement of the nuisance . . . is an equitable remedy, rather

than a legal award of damages." *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 938-39 (10th Cir. 2001).

Defendants also argue that the abatement plan is not tailored to the nuisance of "false marketing." But the State has disclosed multiple experts that have spent copious amounts of time developing the abatement plan to narrowly tailor it to address the problem Defendants created. And while Defendants may choose to define the nuisance however they desire, as discussed *supra*, it differs from the definition the State presents and therefore leaves a sufficient question of fact that precludes summary judgment. The State's abatement plan is well within its statutory authority, does not seek damages, and is tailored to abating the nuisance at hand.

In addition, Defendants argue the abatement plan violates the "Free Public Service Rule" (also called the municipal cost recovery rule) in that the State, allegedly, seeks to provide money to the State for numerous expenses it otherwise provides as a sovereign and the State cannot recover for costs of carrying out public services. But Defendants only cite two out-of-state cases (Delaware and Georgia) to support this proposition. Why? ***Because the free public services doctrine or municipal cost recovery rule has never been adopted in Oklahoma***. But even if the municipal cost recovery rule had been adopted, the leading case on the doctrine barring recovery of the cost of municipal services is *Flagstaff v. Atchison, Topeka & Santa Fe Ry. Co.*, 719 F.2d 322, 323 (9th Cir. 1983). In that case the Ninth Circuit, speaking through Justice (then Judge) Kennedy, found an exception to the general rule against recovery of municipal costs where the acts of a private party create a public nuisance which the government seeks to abate. *Id.* Thus, *Flagstaff* supports the proposition that municipal cost recovery may be appropriate in public nuisance abatement actions brought by a governmental plaintiff.

Other courts have also concluded that recovery is allowed where the acts of a private party create a **public nuisance** which the government seeks to abate. *Flagstaff*, 719 F.2d at 324 *citing Town of East Troy v. Soo Line Railroad Co.*, 653 F.2d 1123 (7th Cir.1980) (recovery for expense in cleaning up ground water pollution), *cert. denied,* 450 U.S. 922 (1981); *City of Evansville v. Kentucky Liquid Recycling, Inc.*, 604 F.2d 1008 (7th Cir. 1979) (recovery allowed for costs of clean-up of toxic wastes discharged into drinking water supplies), *cert. denied,* 444 U.S. 1025 (1980); *United States v. Illinois Terminal Railroad Co.*, 501 F.Supp. 18 (E.D. Mo. 1980) (recovery allowed for removal of abandoned bridge piers).

Likewise, the Third Circuit has also stated that plaintiffs asserting claims for municipal services due to unusual accidents should be allowed to prove their damages associated with lost production by municipal workers. *See Com. of Pa. v. General Public Utilities Corp.*, 710 F.2d 117, 122-23 (3d Cir. 1983), *aff'g in part, vacating in part sub nom. In Re TMI Litigation Governmental Entities Claims*, 544 F.Supp. 853, 855 (M.D. Pa. 1982) (summary judgment not appropriate where there is disputed factual question whether "nuclear incidents" present a unique type of hazard). The Third Circuit thus has counseled that a municipality *may*, under the appropriate circumstances, sue for the cost of public services spent in connection with nuisance abatement. *Id.*

Needless to say, the municipal cost recovery rule is not applicable in Oklahoma nor to this case. Even if the rule was recognized in Oklahoma, this case would clearly fall under the recognized exception where a private party created a nuisance that the government is seeking to abate. The import of this precedent could not be clearer: (1) a nuisance is more than the acts at issue and includes the condition created; (2) thus, abatement does not stop once the "acts" have ceased (and they have not); (3) the expenditure of funds is by definition a recognized part of the

abatement remedy; (4) the abatement is tailored to the nuisance at issue; and (5) the free public services doctrine is inapplicable in Oklahoma. Summary judgment on this issue should be denied.

**VII. Joint and Several Liability Is Appropriate**

Defendants final attempt to avoid liability is to argue that joint and several liability does not apply. Motion at 42. As an initial matter, Defendants' Motion is dead on arrival in this regard since the limitation on joint and several liability they raise is not applicable to actions brought by the State. *See* Okla. Stat. tit. 23, § 15(B)("This section shall not apply to actions brought by or on behalf of the state."). Under Oklahoma law, "where 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." *Stevens v. Barnhill*, 266 P.2d 463, 465 (Okla. 1954) (citations omitted, emphasis added).

There is ample evidence that Defendants' conduct contributed to the opioid crisis and joint and several liability is appropriate. There is one public nuisance in this case; there is one indivisible injury. *See, e.g.* Ex. 79, Depo. of Jason Beaman Mar. 14, 2019 at 106:17-107:08; Ex. 8 , Depo. of Andrew Kolodny Mar. 7, 2019 at 64:06-68:05, 108:21-110:05. Defendants chose to both collectively and independently to increase the prescribing of their own opioids and opioids generally. *See* Ex. 2, TEVA_OK_07226349; Ex. 3, TEVA__OK_00116243; Ex. 4, TEVA_OK_00116236; Ex. 5, TEVA_OK_00026786; Ex. 6, Acquired_Actavis_00263733; *see also* Ex. 8, Depo. of Andrew Kolodny Mar. 7-8, 2019; Ex. 9, Exhibits to Kolodny Depo., Mar. 7-8, 2019; Ex. 10; Exs. 11 – 19. They did this knowing full well the addictive nature of these drugs and the historic problems they have created. *See, e.g.* Ex. 76, Depo. of John Hassler Feb. 28, 2019 at 111:04-09. Defendants—jointly motivated by greed and profit—falsely marketed their

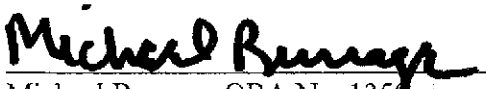
opioids through the use of KOLs through whom Defendants tout their misrepresentations regarding the risk of addiction and benefits of opioids. *See* Response to Statement of Undisputed Facts ¶ 36. Defendants were active collaborators in seemingly unaffiliated organizations that they used to spread their misrepresentations, influence the media, doctors and patients, and ensure that opioids were widely available to be overprescribed. *See* Response to Statement of Undisputed Facts ¶ 59. Defendants acted collectively through the Pain Care Forum. The result of such conduct was a single indivisible injury in Oklahoma.

Joint and several liability is supported by both the facts and law. Accordingly, Defendants' Motion for Summary Judgment should be denied on this ground as well.

## CONCLUSION

For the reasons set forth above, the State respectfully requests the Court deny Defendants' Motion for Summary Judgment in its entirety, and for such further relief the Court deems proper.

Respectfully submitted,



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