IN THE DISTRICT COURT OF CLEVELAND COUNTY
STATE OF OKLAHOMA

STATE OF OKLAHOMA, ex rel.,
MIKE HUNTER,
ATTORNEY GENERAL OF OKLAHOMA,

Plaintiff,

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;
(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.

For Judge Balkman's Consideration

Case No. CJ-2017-816
Honorable Thad Balkman

William C. Hetherington
Special Discovery Master

STATE OF OKLAHOMA }
CLEVELAND COUNTY } S.S.

FILED

MAY 09 2019

in the office of the
Court Clerk MARILYN WILLIAMS

DEFENDANTS TEVA PHARMACEUTICALS USA, INC., CEPHALON, INC., WATSON LABORATORIES, INC., ACTAVIS LLC, AND ACTAVIS PHARMA, INC., f/k/a WATSON PHARMA, INC.'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

REDACTED VERSION

I. INTRODUCTION

The State does not dispute that its lone statutory public nuisance claim is predicated upon false marketing. Yet nowhere in its Opposition does the State of Oklahoma (the "State") identify: ***a single false statement*** that a Teva or Actavis Defendant made to anyone in Oklahoma; ***a single opioid prescription*** written because of a false statement or omission by a Teva or Actavis Defendant; or ***a single Oklahoma resident*** that did not receive effective pain relief or was harmed by an opioid manufactured by a Teva or Actavis Defendant when taken as directed. As a result, summary judgment is appropriate as to the Teva and Actavis Defendants on the lone remaining public nuisance claim.

In fact, the State acknowledges that it cannot identify "specific instances of one doctor relying on one statement to write one prescription." (Opp'n, 27.) Nor can the State identify "any one prescription [caused by the Teva and Actavis Defendants' marketing that] was unnecessary, inappropriate, or harmful." (Opp'n, 24.) The State offers no statistical proof of causation, no survey of Oklahoma prescribers, and no survey of Oklahoma patients to even attempt to link any statement attributable to any Teva or Actavis Defendant to any Oklahoma doctor, patient, or improper opioid prescription—much less all of the illicit opioid problems in Oklahoma for which the State seeks billions of dollars. And the State certainly has not shown that any supposedly false marketing by the Teva and Actavis Defendants has misled so many doctors in Oklahoma into writing false prescriptions that an "entire community" has been impacted by that marketing—a prerequisite for bringing its ***public*** nuisance claim. Okla. Stat. tit. 50, § 2.

In fact, the State simply cannot make this showing as to the Teva and Actavis Defendants, who are uniquely situated. Critically, the State does not dispute that the Actavis Defendants sold and did not promote generic medicines to physicians. And the Teva Defendants only promoted

two short-acting opioids (Actiq and Fentora) with very narrow indications that are subject to the unique knowledge and certification requirements in the TIRF-REMS Program before a prescription can even be written. (Mot. at 29–30; TIRF REMS Program, attached as Ex. 20 to Mot.) There is no testimony or evidence that any Oklahoma doctor or patient was unaware of such risks (as Oklahoma law requires)—much less was somehow misled by the Teva or Actavis Defendants. (*See* Mot. at 29–31, 33.) As a result, the State simply has no evidence to prove the essential elements of its public nuisance claim—an unlawful act, causation, or harm to an entire community.

Notwithstanding these clear failures, the State asks the Court to award billions of dollars in "abatement costs" based solely upon a generalized theory that marketing (without identifying whose false marketing by which companies of which medicines impacted which prescribers, if any, in Oklahoma) "caused [opioid] prescriptions to increase generally." (Opp'n, 27). This is legally insufficient to prove causation under Oklahoma law and Supreme Court jurisprudence, and is contrary to common sense. Given the many independent entities that influence whether and how an opioid gets prescribed, distributed, dispensed, and used, the State simply cannot hold the Teva and Actavis Defendants responsible for the opioid crisis in Oklahoma merely by citing statistical evidence that opioid prescriptions generally increased after 1996 (before the Teva Defendants even started promoting their medicines). The State must attribute community-wide harm to specific false marketing by the Teva and Actavis Defendants. It cannot do so—and has not bothered to do so.[1]

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[1] Indeed, the State's primary piece of evidence—a report from the President's Commission on Combating Drug Addiction and the Opioid Crisis President's Commission—is a report that indicates that the Teva and Actavis Defendants are ***not*** responsible for the opioid abuse crisis. The State's proffered evidence shows that the opioid abuse crisis was the result of multiple different factors—and, although it specifically references other opioid manufacturers, it makes

At bottom, the State's view is that municipal governments in Oklahoma (and California, apparently) can bring claims for public nuisance arising from the abuse of prescription opioid medicines and illicit drugs in Oklahoma. But such product-based claims here would impermissibly work a seismic shift in public nuisance law, which has been limited to unlawful acts that impact real property in some way. No such Oklahoma court has ever recognized a products-based public nuisance theory. Certainly, no such Oklahoma court has ever done so without any evidence of an unlawful act, causation, or harm to an entire community—elements which the State asks this Court to effectively ignore. It would be reversible err to permit the State's claims against the Actavis and Teva Defendants to go to trial. Accordingly, summary judgment is appropriate.

II. RESPONSE TO STATE'S STATEMENT OF ADDITIONAL FACTS WHICH PRECLUDE SUMMARY JUDGMENT[2]

1. Disputed in part. Teva USA acquired Cephalon in 2011, the Teva and Actavis Defendants dispute the State's characterization of the corporate relationship between Teva USA and Cephalon. They are separate corporate entities. Cephalon did not manufacture or market generic opioid medicines.

2. Disputed. The State raises a purely legal argument. The State cannot attribute Cephalon's conduct to a separate and distinct corporate entity. *Gilbert v. Sec. Fin. Corp. of Oklahoma,* 2006 OK 58, ¶ 22, 152 P.3d 165, 175 ("Corporations are distinct legal entities, and generally one corporation will not be held responsible for the acts of another."); *Gulf Oil Corp. v. State*, 1961

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no such reference to the Teva or Actavis Defendants, their medicines, or their marketing practices, much less any in Oklahoma.

[2] In its Opposition, the State denied or disputed the materiality of nearly every fact asserted by the Teva and Actavis Defendants in their Motion. (*See* Opp'n, 4–16.) The State, in opposing these factual assertions, mischaracterizes the testimony of others, improperly relies upon the testimony of other Defendants, and incorrectly raises legal arguments in response. (*Id.*) The Teva and Actavis Defendants disagree with each and every such characterization and maintain that they are indeed both material and undisputed facts.

OK 71, 360 P.2d 933, 936 (same). Further, the entities are not jointly and severally liable.

3. Disputed.

4. Disputed in part. The State cannot attribute statements of the Janssen Defendants' corporate representatives to the Teva and Actavis Defendants. This is yet another attempt to deceive the Court and blur the lines between not only corporate entities but entirely different Defendants who manufacture or sell different opioid medicines, introduced them to the market at different times, and market those medicines (if at all) by different means.

5. Undisputed.

6. Disputed in part and not a material fact. It is true that the Teva and Actavis Defendants presented a single corporate representative to testify on behalf of each separate entity at depositions. But it is not a "fact" that the choice to do so "indicates that the Teva Defendants all operate as a group, not independent subsidiaries." (Opp'n, 18.) The State cannot assert this wholly unsubstantiated theory as a "fact," let alone suggest that it is a material fact that precludes summary judgment. Nor does the State cite any case law for this proposition.

III. ARGUMENT

1. The Court Should Grant Summary Judgment Because The State's Theory of Liability Is Not Grounded In The Law And Would Result In An Unprecedented Expansion of Public Nuisance In Oklahoma.

The State argues that the Oklahoma public nuisance statute broadly defines public nuisance to cover, in essence, any act that harms anyone in Oklahoma. (Opp'n, 20.) But the statute and Oklahoma case law do not support such an unprincipled reading. The Oklahoma public nuisance statute has limits. This Court must understand how Oklahoma appellate courts have understood and applied those limits. The State dodges the required analysis and relies on inapplicable case law in support of its unprecedented theory of liability under Oklahoma law.

a. The Third Restatement Expressly Rejects The State's Understanding Of Public Nuisance Liability.

The State cites to the Second Restatement of Torts in support of the proposition that "public nuisance does not necessarily involve interference with use and enjoyment of land." (Opp'n, 21.) But the Second Restatement does not even address the issue most pertinent to this Court: whether public nuisance doctrine can apply to product-based claims. That is not surprising because the Second Restatement predates the rise of efforts by the State's lawyers to bring its products-based public nuisance claim. The current version of the Restatement, however, does address the possibility of products-based public nuisance claims and expressly disapproves of extending public nuisance law to encompass such claims:

> [P]roblems caused by dangerous products might once have seemed to be matters for the law of public nuisance because the term "public nuisance" has sometimes been defined in broad language that appears to encompass anything injurious to public health and safety. *The traditional office of the tort, however, has been narrower than those formulations suggest, and contemporary case law has made clear that its reach remains more modest.*[3]

The Third Restatement is persuasive because, unlike the Second Restatement upon which the State so heavily relies, the Third Restatement speaks to the precise question at issue—and makes clear that the State's public nuisance claim is not viable. *Cf. City of Philadelphia v. Beretta U.S.A., Corp.*, 126 F. Supp. 2d 882, 909 (E.D. Pa. 2000), *aff'd*, 277 F.3d 415 (3d Cir. 2002) (declining "to 'follow' the expansive reach of public nuisance law ascribed to it by Professors Prosser and

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[3] Restatement (Third) of Torts: Liability for Economic Harm § 8 cmt. g (TD No. 2, 2014). This Restatement received final approval and is the official position of American Law Institute. Pauline Tobouldis, *Restatement of the Law Third, Torts: Liability for Economic Harm Approved*, The ALI Advisor (May 21, 2018), http://www.thealiadviser.org/economic-harm-torts/the-american-law-institute-membership-approves-restatement-of-the-law-third-torts-liability-for-economic-harm/.

Keeton" in their treatise because "since the last edition of their treatise in 1985, courts across the nation have begun to refine the types of cases amenable to a nuisance theory").

The State cannot point to any Oklahoma case law that supports its interpretation of Oklahoma's public nuisance statute. So it cites a California case about lead paint—*People v. ConAgra Grocery Products Co.*, 17 Cal. App. 5th 51 (2017). *ConAgra* is distinguishable for several reasons. First, California's nuisance statute is different from, and substantially broader than, Oklahoma's.[4] Second, *ConAgra* is factually distinct: the nuisance alleged there was the presence of lead paint in home interiors. Here, the State concedes that there are valid and medically appropriate reasons to prescribe patients opioid medicines. The same cannot be said of lead paint, a substance banned by the United States in 1978 which has no medically beneficial uses and is certainly not an FDA approved medicine. As a result, summary judgment on this purely legal issue is warranted under Oklahoma law.

2. <u>The State Cannot Prove Causation.</u>

A. <u>The State Offers No Evidence Of Causation.</u>

Remarkably, despite its rhetoric and assertions, the State does not identify a single Oklahoma prescriber that says he or she received and was misled by any false or misleading statement attributable to the Teva or Actavis Defendants. The State offers no survey of Oklahoma

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[4] California's nuisance statute provides that

> Anything which is injurious to health, including, but not limited to, the illegal sale of controlled substances, 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, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance.

Cal. Civ. Code § 3479 (West)

prescribers of patients. It provides no regression analysis to try to link any false statements by the Teva or Actavis Defendants to any harmful opioids prescriptions in Oklahoma by controlling for the many independent variables that can lead to the prescribing of opioid medicines and addiction. In fact, the only testimony in this case from Oklahoma prescribers shows that they were ***not misled*** by the Teva or Actavis Defendants.[5] That is undisputed.

At most, the State points to a handful of promotional materials and testimony about promotional efforts (none of which are false or misleading) as evidence of causation. (Opp'n, 23.) That is woefully insufficient. The State collapses the unlawful conduct and causation elements of its claims. It cannot make the leap that certain promotional materials caused the opioid crisis in Oklahoma without showing, at a bare minimum, that Oklahoma prescribers were influenced by those promotional materials into prescribing one of the Teva or Actavis Defendants' medicines and that such prescriptions caused harm to the community. The State concedes that it offers no such evidence.

Remarkably, the State relies heavily on a report from the President's Commission on Combating Drug Addiction and the Opioid Crisis to try to meet its causation burden. (Opp'n, 27 (citing State's Ex. 70 at 20)). But the State's representation to the Court is itself misleading—the statements upon which the State relies from the President's Commission did not declare "that the ***very same*** 'unsubstantiated claims' and 'aggressive promotion' at issue here were contributing causes of the current opioid crisis." (Opp'n, 27 (emphasis added).) The President's Commission said nothing about Oklahoma. It said nothing about any false marketing in Oklahoma. And it

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[5] *See* Ex. 26 to Mot., J. Halford Dep., Feb. 22, 2019, 93:16–22; *Id.* 85:19–87:4; *Id.* 175:1–12; *Id.* 243:8–244:4; *Id.* 78:17–20; Ex. 32 to Mot., G. Schick Dep., Mar. 1, 2019, 53:7–25; *id.* 84:19–23; Ex. 33 to Mot., L. Ollar-Shoemake, Mar. 13, 2019, 48:9–18; Ex. 27 to Mot., S. Crawford Dep., Feb. 13, 2019, 178:17–23; *id.* 264:9–23; Ex. 12 to Mot., R. Portenoy Dep., Jan. 24, 2019, 498:13–24; Ex. 10 to Mot., S. Fishman Dep., Feb. 26, 2019, 302:17–25; *id.* 304:3–10.

referred to specific marketing efforts of ***Purdue***. (State's Ex. 70 at 20, n. 8.) The Commission's Report does not even mention the Actavis or Teva Defendants. At most, the Commission's Report shows that the Teva and Actavis Defendants are ***not responsible*** for the opioid crisis in Oklahoma.

The other "evidence" the State relies upon similarly makes no mention of the Teva or Actavis Defendants, their opioid medicines, or their marketing of those medicines. The State cites *Increase in Unintentional Medication Overdose Deaths Oklahoma 1994–2006* in support of the proposition 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 [*sic*] of addiction, overdose and death." (Opp'n, 27 (citing Ex. 69 to Opp'n.)) But this report, too, makes no mention of the marketing or promotion of opioids. It makes no mention of the Teva or Actavis Defendants. And its authors concluded not only that unintentional medication-related deaths often involve multiple substances (Ex. 69 to Opp'n, 357), but also that "[t]he majority of prescription opioid use is legitimate." (*Id.* at 358.) This State's reliance upon this report is both misplaced and misleading.[6]

The State intends to build on this "evidence" by arguing that as the prescribing of opioids increased, so did the incidence of addiction, overdose and death. (Opp'n, 27.) In support, the State cites an undated PowerPoint presentation titled *Fatal Unintentional Poisoning Surveillance System Update*. (*Id.*) But this presentation simply catalogues the instances of opioid-related deaths in Oklahoma. It does not mention any opioid marketing (much less any by the Teva or Actavis

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[6] There are a host of other reasons why this report does not support the State's argument. The authors state that "[f]actors contributing to emergence of hydrocodone and oxycodone among leading opioids in-deaths per sales are unknown. One reason might be that hydrocodone is more readily available for diversion because it is classified in a less restricted category of controlled substance than methadone or morphine[.]" (Ex. 69 to Opp'n, 361.) The report also notes that methadone was involved in the highest number of deaths. (*Id.* at 357.)

Defendants) or any increase in the incidence of addiction—much less establish any causal relationship between these factors and opioid-related deaths. At most, the presentation attempts to establish an association between unintentional opioid-related overdose death rates and opioid sales in Oklahoma. But again, there is no mention of marketing (or false marketing) or any of the other numerous factors that impact opioid sales or opioid-related deaths. (*Id.*) This presentation also fails to establish any causal connection between the Teva and Actavis Defendants' marketing of their unique opioid medicines and alleged harms.

In short, if the Court were to credit the State's theory of public nuisance law, there would be no causation requirement. All manufacturers of all inherently risky products (from alcohol to fireworks to automobiles) would be subject to public nuisance liability in Oklahoma merely because they marketed their products. As a matter of law, the State cannot prove but-for causation as to the Teva and Actavis Defendants at trial under any standard of proof, let alone under clear and convincing standard,[7] and summary judgment should be granted for this reason and for those set forth in the Motion. (Mot. 15–16; 23–31.)

B. The State Acknowledges That Its Causation Chain Is Broken By Numerous Independent Actions By Numerous Independent Actors That Have Nothing To Do With The Teva Or Actavis Defendants.

Even if the State could prove but-for causation (it has not and cannot), the State cannot prove proximate causation as a matter of law. The State does not dispute that its proposed causal chain contains at least twelve layers of discretionary and fact-intensive decision-making. (Mot., at 23–24; Opp'n, 28–29). Nor does the State dispute the presence of distributors subject to federal

[7] The State argues that clear and convincing standard of evidence is only applicable if one seeks to prevent a threatened nuisance before conduct or injury occurs. (Opp'n, 24.) The Teva and Actavis Defendants disagree and rely upon arguments raised in the Motion as to this point. (Mot. 19.) Regardless, under and standard, that State cannot satisfy its burden on summary judgment or at trial.

regulations, criminal "pill mills," government entities, licensed and rogue physicians, patients who sell or misuse their medications, and other independent actors in the State's proposed causal chain. (*Id.*). The State offers no model to control for these independent actors and actions—that have nothing to do with the Teva or Actavis Defendants—in determining what caused the opioid-related problems in Oklahoma. For this reason alone, the State's causation chain is simply too attenuated and unsupported and, thus, summary judgment is appropriate. (Mot., at 23–28).

The State argues that these many superseding acts do no break the chain of causation because they were "foreseeable." (Opp'n, 28–29). But even if they were foreseeable, the State's claims are nonetheless barred by the remoteness doctrine. *See Woodward v. Kinchen*, 1968 OK 152, 446 P.2d 375, 377–78 ("[L]iability cannot be predicated on a prior and remote cause which merely furnishes the condition for an injury resulting from an intervening, unrelated and efficient cause."); *Lexmark Int'l, Inc. v. Static Control Components*, Inc., 572 U.S. 118, 132 (2014) (common-law proximate causation principles are incorporated into statutes).

Numerous courts have dismissed claims premised on shorter and less-attenuated causal chains as too remote to establish a claim. *See Ironworkers Local Union No. 68 v. AstraZeneca Pharm. LP*, 585 F. Supp. 2d 1339, 1344 (M.D. Fla. 2008), *aff'd on other grounds sub nom. Ironworkers Local Union 68 v. AstraZeneca Pharm., LP*, 634 F.3d 1352 (11th Cir. 2011) (applying rule to dismiss similar claims because whether "Plaintiffs' injuries were caused by Defendants' misconduct would require an inquiry into the specifics of each doctor-patient relationship implicated by the lawsuit"); *see, e.g., Sidney Hillman Health Ctr. of Rochester v. Abbott Labs.*, 873 F.3d 574, 578 (7th Cir. 2017) (rejecting claims against pharmaceutical manufacturers because "there are so many layers, and so many independent decisions, between promotion and payment that the causal chain is too long to satisfy" proximate causation); *United Food & Commercial*

Workers Cent. Pa. & Reg'l Health & Welfare Fund v. Amgen, Inc., 400 F. App'x 255, 257 (9th Cir. 2010) (affirming dismissal where, *inter alia*, no "cognizable theory of proximate causation that link[ed] [manufacturer's] alleged misconduct to Appellant's alleged injury" due to intervening links, including "doctors' decisions to prescribe [the medication]"); *In re Yasmin & Yaz (Drospirenone) Mktg., Sales Practices & Prods. Liab. Litig.*, No. 3:09-CV-20071-DRH, 2010 WL 3119499, at *7–9 (S.D. Ill. 2010) (claims dismissed where court would "have to delve into the specifics of each physician patient relationship to determine what damages were caused by [the] alleged fraudulent conduct, as opposed to what damages were caused by the physician's independent medical judgment").

Contrary to the State's allegation that proximate cause is an issue of fact for the jury, the Oklahoma Supreme Court has made clear that proximate cause "becomes a question law" where, as here, "there is no evidence from which a reasonable person could find a causal nexus" between the defendant's conduct and the alleged injury. *Jones v. Mercy Health Center, Inc.*, 2006 OK 83, ¶ 16, 155 P.3d 9, 14. The State not only fails to plead any wrongdoing by the Teva or Actavis Defendants, but it offers no basis for separating out the many undisputed causal links and criminal acts that were completely independent of any such conduct. As a result, the State's claims would "inevitably require determining causation by conjecture"; such claims would boil down to "junk justice." *City of New Haven v. Purdue Pharma L.P.*, No. X07-HHD-CV-6086134-S, 2019 WL 423990, at *2 (Conn. Super. Ct. Jan. 8, 2019) (dismissing materially similar claims as those raised here). Because the State has failed to provide any evidence of a causal nexus between the Teva and Actavis' Defendants conduct and its alleged injuries, summary judgment should be granted on the issue of proximate causation as a matter of law.

3. No "Unlawful Act" Serves As The Basis For the State's Public Nuisance Claim.

The State tries to read out "unlawfully" from Oklahoma's public nuisance statute. It cannot do so. Even the State's Petition acknowledges that the State must show "unlawful" conduct—that "Defendants' misrepresentations and omissions regarding opioids constitute ***unlawful acts*** . . .". (Pet., ¶ 119.) Nor can "unlawfully" be defined as anything other than its plain meaning—a violation of the law. Black's Law Dictionary defines "unlawful" as "not authorized by law, illegal." Black's Law Dictionary (10th ed. 2014).

Binding Oklahoma authority recognizes this principle. In *Nuncio v. Rock Knoll Townhome Vill., Inc.*, the Oklahoma Court of Civil Appeals held that "[f]or an act or omission to be a nuisance in Oklahoma, ***it must be unlawful.***" 2016 OK CIV APP 83, ¶ 8, 389 P.3d 370, 374 (citing Okla. Stat. tit. 50, § 1) (emphasis added). There, the alleged nuisance was smoking inside a residence, which some found annoying and certainly posed a threat to the health and welfare of those residing in the condominium residence. *Id.* But the court held that because it was not a violation of any law to smoke inside a residence, there was no nuisance, public or private. *Id.*

Here, the State concedes that the manufacture and sale of opioid medicines is lawful. (Opp'n, 32.) The promotion of opioid medicines is also lawful. *See Sorrell v. IMS Health Inc.*, 564 U.S. 552, 557-58 (2011). And the State has no evidence that the Teva or Actavis Defendants acted in an unlawful manner in Oklahoma through any supposed false marketing, such that they impacted an entire community. It is not Defendants' position that engaging in a lawful business shields them from liability. The Teva and Actavis Defendants engaged in a lawful business activity in a ***lawful manner*** in Oklahoma, and there is no evidence to the contrary.

Nor does the State offer any support for its argument that the statements of third parties are attributable to the Teva and Actavis Defendants. Throughout its Opposition, the State cites to the testimony of Dr. Russell Portenoy, a key opinion leader, as evidence of Defendants' false

marketing of opioids. (*See, e.g.,* Opp'n, 34.) But Dr. Portenoy concedes that he has no such evidence as to the Teva or Actavis Defendants—much less in Oklahoma. (Ex. 12 to Mot., R. Portenoy Dep., Jan. 24, 2019, 331:6–25; *id.* 398:17–400:13; *id.* 464:10–465:1; *id.* 467:25–468:6 *id.* 475:20–476:25; *id.* 479:10–480:15.). The State also argues that Defendants omitted information from marketing materials in breach of a duty to be truthful, but fails to provide a single example of a "half-truth" or "outright lie." (Opp'n, 35.) Moreover, the State does not show that any of these alleged marketing materials reached any Oklahoma prescriber, misled any Oklahoma prescriber, or caused harm to any Oklahoma patient.

The State next argues that the guilty plea involving off-label conduct from a short time period in 2001 constitutes the "unlawful" act. (Opp'n, 6, 35.) But the State does not identify any off-label statements that took place in Oklahoma. Nor does the State show how any such statements were false or misleading—the very essence of their public nuisance claim, based upon their own Petition. (Pet., ¶ 119.)

When stripped to its essence, the State appears to be saying that any marketing (false or otherwise) can constitute an "unlawful act" within the meaning of the public nuisance statute, so long as such marketing leads to increased sales of potentially addictive or harmful products. It does not matter that the marketing is not false. It does not matter that the risks of the medicines at issue are fully disclosed in FDA-approved labels. It does not even matter that other licensed professionals must first write a prescription of such medicines (and comply with other FDA-approved requirements) before they can be used. The State's theory defies common sense—and basic principles of law. For the reasons set forth in the Motion and in the Teva and Actavis Defendants' Motion for Judicial Notice, the Court must find that the Teva and Actavis Defendants

committed an unlawful act for its public nuisance claim, and the State has no such evidence. (*See* Mot. 32–36; *see also* Mot. for Judicial Notice 3–6.) Summary judgment is appropriate.

4. There Was No Impact On The Community As A Whole, Much Less All At The Same Time.

The State next attempts to argue that the entire Oklahoma community was impacted at the same by time by the acts of different Defendants who marketed different opioid medicines (if at all) by different means and, at times years apart. (Opp'n, 36.) The State alleges the entire community has been impacted as a whole—but however unfortunate the effects of drug abuse are, it cannot be said that, as a legal matter, any marketing ***by the Teva or Actavis Defendants*** had an impact on the "entire community." Okla. Stat. tit. 50, § 1. The State certainly offers no such evidence.

To try to conceal the lack of any evidence to satisfy this critical element, the State tries to argue that the downstream effects of alleged false marketing are themselves the nuisance. This is wrong. "A nuisance consists in unlawfully doing an act, or omitting to perform a duty, which act or omission either . . . annoys, injures or endangers the comfort, repose, health, or safety of others." Okla. Stat. tit. 50, § 1. The nuisance at issue here is the alleged false marketing—not any downstream effects. What the State deems an "illusory distinction" is a ***legal*** distinction, one that the Court cannot ignore. (Opp'n, 37.) The State offers no evidence that any false marketing by the Teva and Actavis Defendants caused ***a single harmful opioid prescription*** to be written—much less so many harmful opioid prescriptions that the public as a whole has been harmed.

Further, the State has made no attempt to dispute that the different Defendants marketed and sold different opioid medicines at different times. The State ignores that the alleged nuisance may affect the community as a whole "at the same time." Okla. Stat. tit. 50, § 2. Because the supposedly improper marketing did not take place at the same time and, to the extent it had any

impact, did not impact the community at the same time, the public nuisance claim fails on this element, too.

5. The State's Public Nuisance Claim Is Barred By The Two-Year Statute Of Limitations.

Appealing to emotion and rhetoric and without citing any case law, the State appears to argue that it is not subject to the statute of limitations. (*See* Opp'n, 38). This is not the law. Under Oklahoma law, the State is not exempt from the statute of limitations unless (1) it is acting in its capacity as sovereign and (2) a public right is implicated. *Oklahoma City Mun. Imp. Auth. v. HTB, Inc.*, 1988 OK 149, 769 P.2d 131, 137. Similarly, under Oklahoma law, a two-year statute of limitations applies to nuisance claims unless an "actual obstruction of a public right" is alleged. *Cole v. Asarco Inc.*, No. 03-CV-327-GKF-PJC, 2010 WL 711195, at *5 (N.D. Okla. Feb. 24, 2010)

Indeed, the State ignores the cornerstone of a public nuisance claim: a public right. The State takes the position that the "public rights" at issue here are the "public's health and safety." (Opp'n, 4.) In suggesting that the Restatement supports the view that public health is a "public right" protected by public nuisance law, the State fundamentally misreads the Restatement. Specifically, while some significant interferences with public health might implicate a public right, not all do. *See, e.g., State v. Lead Indus., Ass'n, Inc.*, 951 A.2d 428, 436, 448 (R.I. 2008) ("lead poisoning constitutes a public health crisis," but does not involve public rights); *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1114 (2004) (concluding there is no public right to be "free from unreasonable jeopardy to health, welfare, and safety, and from unreasonable threats of danger to person and property" caused by illegal conduct of others). The State twists the facts and similarly contorts the law. There is no public right to be free from allegedly deceptive marketing materials or the widespread distribution of a lawful prescription medication—even if the health of

individual members of the public might be implicated—and so, the State's public nuisance claim fails at the very outset. The Restatement makes this point clear.

Section 821B defines a public nuisance as an "unreasonable interference with a right common to the general public," and offers several "[c]ircumstances that may sustain a holding that an interference with a public right is unreasonable:"

> (a) [w]hether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or (b) whether the conduct is proscribed by a statute . . . or (c) whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.

Restatement (Second) of Torts § 821B (1979). The Restatement thus regards public health, not as a standalone public right (as the State would have the Court believe), but as part of a circumstance that might render the interference with a public right unreasonable—the same way the interference might be unreasonable under subsection (b) if proscribed by statute, or subsection (c) if it creates a knowing and continuing significant impact on a public right.[8] The Restatement offers no support to the notion that public health is itself a public right, however—even if some interferences with public health might indeed interfere with a health-related public right. *See Lead Indus., Ass'n, Inc.*, 951 A.2d at 453 ("The state's allegation that defendants have interfered with the 'health, safety, peace, comfort or convenience of the residents of the [s]tate' standing alone does not constitute an allegation of interference with a public right."); *see also* Restatement (Second) of Torts § 821B (1979) (a public right is "collective in nature and not like the individual right that

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[8] For example, if a factory pollutes a community water source, the factory might be interfering with a public right to access this indivisible public resource, but a public nuisance would exist only if this interference is unreasonable. If the pollution involves a significant interference with public health, that might sustain a finding of unreasonableness, in the same way the interference is per se unreasonable if proscribed by statute.

everyone has not to be assaulted or defamed or defrauded or negligently injured"). The State's contrary reading is a distortion of an already overstretched Restatement.

Urging adherence to established legal principles does not belittle the harms suffered by those individuals who have suffered from opioid abuse. The Court is entrusted with the duty and authority to construe Oklahoma's laws and should not be swayed by the State's grandstanding. The two-year statute of limitations clearly applies because the State has not and cannot prove that a public right is implicated.[9] (Mot. 37–39.) Given that the State chose not to bring this lawsuit within two years of having been harmed by the alleged public nuisance (which, according to the State, occurred in 1996, more than twenty years ago), summary judgment is inappropriate.

6. The State's Abatement Remedy Improperly Seeks Damages, Is Not Tailored To The Nuisance, And Violates The Free Public Services Rule.

The State does not dispute that the public nuisance statute makes clear that the only available remedy in Oklahoma is abatement. (Opp'n, 39.); *see also* Okla. Stat. tit. 50 §§ 8, 11; *Magnolia Petroleum Co. v. Wright*, 1926 OK 196, 254 P. 41; *Simons v. Fahnestock*, 1938 OK 264, 78 P.2d 388. Nor does it dispute that the Teva and Actavis Defendants no longer promote or market any opioid medicines in Oklahoma. *Id.* Instead, the State attempts to disguise its improper claim for damages by arguing that they are simply "funds . . . required to [be] expend[ed]" to abate the public nuisance. (Opp'n at 40.) However, the State misses the point that it is the actual *false marketing* and *promotion of opioids* that underlies its public nuisance claim. (Mot. 39–40.) Thus, abatement of the alleged public nuisance in Oklahoma would consist of ceasing all marketing and promotion of opioids. Because the Teva and Actavis Defendants have already done so, there is no

[9] Further, the State's self-serving statement that a public right must be implicated because the State alleges a public nuisance is no more than *ipse dixit* and, as with its other arguments that are untethered from the law—particularly Oklahoma law, it carries no weight. (Opp'n, 38.)

longer any activity that would require abatement. (*See* Ex. 3 to Mot., J. Hassler Dep., Aug. 29, 2018, 60:21–61:1.) Here, the State chose to drop its claims for damages. Because its remaining public nuisance claim does not permit damages (even those refashioned as abatement "funds"), it cannot rewrite a statute to give it a remedy it abandoned.

The State also argues incorrectly that the free public services doctrine does not bar its claim because Oklahoma has not adopted this rule. (Opp'n, 42–44.) But that is wrong because the doctrine applies absent clear statutory or judicial recognition of a government entity's right to recover the costs of providing public services as it represents the "general common-law rule." *D.C. v. Air Fla., Inc.*, 750 F.2d 1077, 1079-80 (D.C. Cir. 1984) (applying the rule and noting that "this issue apparently has never been decided by District of Columbia courts"); *City of Flagstaff v. Atchison, Topeka & Santa Fe Ry. Co.*, 719 F.2d 322, 323 (9th Cir. 1983) (similar); *see also* W. Page Keeton et al., *Prosser and Keeton on Law of Torts* § 2, at 7 (5th ed. 1984) (noting that common law barred such suits due to the plaintiff's "political or governmental capacity"). Indeed, other federal courts have applied the rule to bar recovery precisely when "it's not clear" that state law authorizes such recovery. *See, e.g.*, *City of Miami v. Bank of Am. Corp.*, 800 F.3d 1262, 1288–89 (11th Cir. 2015), *vacated and remanded sub nom. Bank of Am. Corp. v. City of Miami, Fla.*, 137 S. Ct. 1296 (2017).

The State also relies upon the Ninth Circuit's ruling in *City of Flagstaff*, 719 F.2d 322. In *Flagstaff*, the issue before the Court was "whether a municipality which commits police, fire, and other relief measures to a major emergency may recover the costs of those services from the tortfeasor who caused the accident." *Id.* at 323. The answer: no. The Ninth Circuit affirmed the district court's grant of summary judgment holding that "the action brought by the municipality is not recognized by Arizona law and that specific authorization for the recovery sought must come

from a legislative authority, not the courts." *Id.* The State cites this case not for its holding but for dicta regarding the possibility that municipalities *may* recover under certain narrow circumstances. But the court noted that in those cases where recovery *may* be permitted, the "cases fall into distinct, well-defined categories unrelated to the normal provision of police, fire, and emergency services[.]" *Id.*

The kind of "exception" addressed by the Ninth Circuit's dicta in *Flagstaff* is inapplicable here. Many courts have recognized that such an exception would "swallow[] the rule, since many expenditures for public services could be re-characterized by skillful litigants as expenses incurred in abating a public nuisance." *Cty. of Erie, New York v. Colgan Air, Inc.*, 711 F.3d 147, 152–53 (2d Cir. 2013).[10] Further, even if an exception applied, many costs—such as the costs of police and emergency responses to specific incidents—are not nuisance-abatement costs which would even qualify for the exception. *See id.* at 152–54; *City of Chicago*, 821 N.E.2d at 1147 (concluding that that because "the damages [plaintiffs] seek do not represent the cost of abatement, the exception in *City of Flagstaff* . . . does not apply"). Here, [redacted], the State seeks costs undeniably associated with "police, fire, and emergency services"—for which the municipal cost recovery rule applies without exception. (*See, e.g.*, [redacted]

Thus, unless the Oklahoma legislature has clearly authorized the recovery sought in this litigation—which it has not—the free public services doctrine is a viable defense.

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[10] *See also Walker Cty. v. Tri-State Crematory*, 643 S.E.2d 324, 328 (Ga. Ct. App. 2007); *City of Chicago*, 821 N.E.2d at 1146–47; *City of Philadelphia*, 126 F. Supp. 2d at 894–95; *Baker v. Smith & Wesson Corp.*, No. Civ.A. 99C-09-283-FS, 2002 WL 31741522, at *6 (Del. Super. Ct. Nov. 27, 2002); *Bd. of Sup'rs of Fairfax Cty., VA v. U.S. Home Corp.*, No. 85225, 1989 WL 646518, at *2 (Va. Cir. Ct. Aug. 14, 1989).

7. Joint And Several Liability Does Not Apply As A Matter Of Law.

The State argues that joint and several liability applies to all actions brought by the State. (Opp'n, 44.) This is simply not true. While the Oklahoma several liability statute did not repeal common law joint and several liability principles as to the State, Okla. Stat. tit. 23, § 15, it also did not hold that all actions by the State are subject to joint and several liability. (Mot. 41–42.) Under Oklahoma's common law principles, in order to be jointly and severally liable the distinct acts of each defendant must "combine to produce directly a single injury." *Union Texas Petroleum Corp. v. Jackson*, 1995 OK CIV APP 63, 909 P.2d 131, 149 (Okla. Ct. App. 1995). If the State's injury is not "single" but divisible, joint and several liability is not appropriate. *See, e.g., Atl. Ref. Co. v. Pack*, 1947 OK 127, 180 P.2d 840, 843; *Delaney v. Morris*, 1944 OK 51, 145 P.2d 936, 939; *White v. Taylor*, 1986 OK CIV APP 29, 728 P.2d 525, 526. The State's suggestion that whenever the State is a plaintiff it can ignore the elements of joint and several liability is legally wrong—and contravenes the Oklahoma legislature's intent in passing the several liability statute. (Mot. 41–44.)

Conceding that it must prove a single, indivisible, injury for joint and several liability to attach, the State attempts to create an indivisible injury where none exists. (Opp'n, 3, 44–45.) The State argues that a single, indivisible injury exists because "Defendants jointly participated" in the alleged false marketing and "Defendants' joint conduct" created the opioid abuse crisis. (*Id.* 3.) But the State has failed to put forth ***any*** evidence of joint conduct between the Teva/Actavis Defendants and any other Defendant—indeed, despite the millions of documents produced in this case, the State unsurprisingly fails to point to any evidence in support of its baseless allegations of joint conduct. (Opp'n, 3, 44–45.) And even if it did, the Oklahoma Supreme Court has made clear that allegations of joint conduct alone are insufficient to establish indivisible injury or joint and

several liability. *See Selby v. Lindstrom*, 1916 OK 714, 158 P. 1127, 1128 ("The creation of a joint liability in tort does ***not*** depend upon proof that the same act of wrongdoing was participated in by both tort-feasors and that they were in concert and had a common intent or were engaged in a joint undertaking . . .") (emphasis added). An injury is single where there is only one injury, and it is indivisible where it is "incapable of apportionment." *Johnson v. Ford Motor Co.*, 2002 OK 24, ¶ 14, 45 P.3d 86, 91.

Here, the State alleges a host of different individualized injuries to various residents and to the State itself. *See* Pet. ¶ 119 (*e.g.*, increase in non-medical use of painkillers, increase in number of heroin deaths, increase in healthcare, criminal justice, and lost work productivity expenses). And while the State has made no effort to try to apportion responsibility among Defendants for those alleged injuries, that does not make them indivisible. In fact, based upon its flawed assertion that it need not provide "individualized proof" (Opp'n, 26), the State repeatedly has refused to produce data and other documents that would allow for any type of causation analysis, much less apportionment.[11] Because the State's injuries are neither singular nor indivisible, they are insufficient to establish joint and several liability under Oklahoma law. *See, e.g.*, *Atl. Ref. Co.*, 180 P.2d at 843; *Delaney*, 145 P.2d at 939; *White*, 728 P.2d at 526.

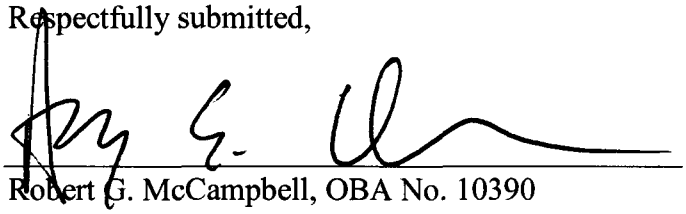
IV. CONCLUSION

[11] Indeed, the State has objected and refused to produce evidence that would allow for apportionment of responsibility for the State's alleged injuries, such as information about doctors who wrote the opioid prescriptions the State says were harmful, information about the patients who received the allegedly harmful prescriptions, and even opioid-related investigator reports by State employees. *See* Opp'n, 26 (arguing that "the State is not required to show the sort of individualized proof that the Teva Defendants demand.") To the extent the State seeks to argue that its alleged injuries are indivisible because it has failed to produce evidence in this case that would allow for apportionment, no court in Oklahoma or elsewhere has held that a party may create an indivisible injury by withholding or failing to collect evidence that would allow for apportionment. This Court should not be the first.

For the reasons set forth herein and in the Teva and Actavis Defendants' Motion, summary judgment should be granted in their favor in its entirety.

Dated May 9, 2019

Respectfully submitted,



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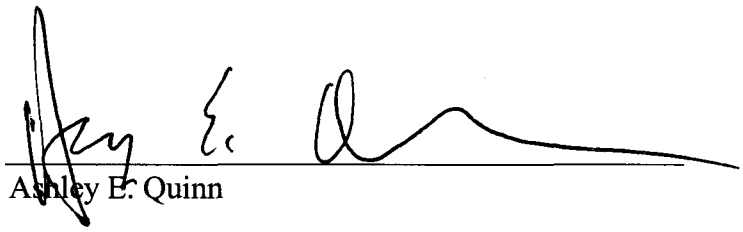

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