PART A

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

STATE OF OKLAHOMA } S.S.
CLEVELAND COUNTY }
FILED In The
Office of the Court Clerk

MAY 02 2019

In the office of the
Court Clerk MARILYN WILLIAMS

Case No. CJ-2017-816
Honorable Thad Balkman

William C. Hetherington
Special Discovery Master

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

REDACTED VERSION

THIS DOCUMENT WAS FILED IN ITS ENTIRETY UNDER SEAL ON APRIL 23, 2019

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MOTION

Pursuant to 12 O.S. § 2056 and Rule 13 of the Rules for the District Courts of Oklahoma, Defendants Watson Laboratories, Inc. ("Watson Labs"), Actavis LLC ("Actavis LL"), and Actavis Pharma, Inc. ("Actavis Pharma") (collectively the "Actavis Defendants"), and Teva Pharmaceuticals USA, Inc. ("Teva USA") and Cephalon, Inc. ("Cephalon") (collectively the

"Teva Defendants") move for Summary Judgment in their favor and against the Plaintiff State of Oklahoma (the "State") with respect to the State's single remaining claim for public nuisance. The State's public nuisance claim rests on a novel and unprecedented theory of false and misleading promotion in Oklahoma. The State cannot rewrite Oklahoma public nuisance law to bring such a claim and, even if it could, the State certainly cannot satisfy the elements of its claim. Because no material issues of fact remain, the Teva and Actavis Defendants are entitled to judgment in their favor as a matter of law. The specific relief requested, and the evidentiary materials supporting the claim for relief, are set forth below.

BRIEF IN SUPPORT

INTRODUCTION AND BACKGROUND

Of the State's six original claims, one remains: a single sweeping claim of public nuisance against two families of pharmaceutical companies for which the State seeks more than $17 billion.[1] The State's legal and factual bases for its public nuisance claim are fundamentally flawed and reflect the State's clear intention to exceed the limits of its authority and the law.

First, the State's claim exceeds the limits of public nuisance law. What the State calls a "public nuisance" claim is at its root a products liability claim. The State alleges that the Defendants misrepresented and omitted the associated risks and hazards of opioid use, thereby causing harm to individual Oklahomans. This is a quintessential products liability claim. In contrast, public nuisance claims relate to interference with ***real property***. Oklahoma courts have

[1] On December 6, 2017, the Court dismissed the State's Oklahoma Consumer Protection Act claims. Following the close of discovery—during which over two hundred depositions were taken and millions of pages of discovery produced—the State dismissed without prejudice its other claims and has decided to proceed on this one claim. On April 4, 2019, the State of Oklahoma voluntarily withdrew all claims against the remaining Defendants except for its claim of public nuisance and request for abatement. (*see* Ex. A, Declaration of N. Merkley; Ex. 1, April 4, 2019 Notice of Voluntary Dismissal of Claims.)

never held that false marketing can form the basis of a public nuisance claim. The State cannot disguise what is, at essence, numerous individual product liability claims as a public nuisance claim merely so that it may seek to extract billions of dollars from pharmaceutical manufacturers.

Second, the State attempts to skirt the statutory requirements of nuisance under Oklahoma law by wrongly equating correlation with causation. "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." 50 O.S. § 1. The nuisance at issue here is the alleged false marketing—not any downstream effects. But between this supposedly false marketing by the Teva and Actavis Defendants and the opioid crisis lies a series of independent actions by many different independent actors, including the decision-making of doctors, patients, pharmacists, criminal actors, and the State itself. As a result, the alleged injury for which the State seeks abatement is simply too "remote" as a matter of law to have been proximately caused by any alleged false marketing by the Teva and Actavis Defendants.

Even if this causal chain were not too attenuated (and it is), the State has no evidence to show that the Teva or Actavis Defendants caused the opioid epidemic in Oklahoma. Despite nearly two dozen experts, the State has done no survey, study, or regression analysis of Oklahoma prescribers to show why they prescribed opioid medicines in Oklahoma, including what, if anything, they relied upon in making those decisions. (Ex. 2, J. Gibson Dep., Mar. 13, 2019, 520:7–23.) In fact, the State concedes it cannot identify a single prescriber or patient in Oklahoma who received any purportedly false marketing by the Teva or Actavis Defendants; a single medically inappropriate prescription written by an Oklahoma prescriber in reliance on such marketing; or any harm caused to any patient from such a prescription. Indeed, Oklahoma doctors have made clear that they did not receive or rely upon any false marketing by the Teva or Actavis

Defendants. After years of litigation, the State simply has no evidence that any false marketing by the Teva and Actavis Defendants caused any Oklahoma prescriber to deviate from her independent medical judgment and write a harmful opioid prescription. Summary judgment is appropriate.

Third, the State cannot hold the Teva and Actavis Defendants liable where it has not shown any evidence of an "unlawful act" in Oklahoma—the very essence of their sole remaining public nuisance claim. The Actavis Defendants sell generic medicines and do not promote them. While Cephalon and Teva USA promoted two unique short-acting opioids (Actiq and Fentora), those medicines have always come with strict FDA-mandated warnings alerting prescribers and patients to their indications and risks. Critically, the State seems to contend that the "unlawful act" is the false marketing of opioids (without identifying which Oklahoma statute has been violated), yet does not identify a single false statement or omission attributable to Cephalon, Teva USA, or any Actavis Defendant made to ***any Oklahoma prescriber or patient***. And, as a matter of basic constitutional due process principles, the State cannot try to bootstrap its flawed claim with marketing statements that occurred outside of Oklahoma. The public nuisance claim fails for this reason, too.

Fourth, even if the State could show an unlawful act in Oklahoma as to the Teva and Actavis Defendants (and it cannot), it still cannot prove that such conduct impacted an entire community. The Oklahoma legislature distinguishes between private and public nuisances. Classification of the nuisance depends on who is or was affected by the nuisance (here, allegedly false marketing) and when. A public nuisance "affects at the same time an entire community or neighborhood, or any considerable number of persons." 50 O.S. § 8. The State cannot show that the nuisance alleged (false marketing by the Teva or Actavis Defendants) caused harm to an entire community of Oklahoma residents, let alone at the same time. Indeed, the State cannot even

identify one Oklahoma patient who was written an improper Actiq, Fentora, or other opioid prescription because of some false marketing by the Teva and Actavis Defendants—much less an "entire community." At best, the State attempts to allege a collection of private nuisances, which, as a matter of law, does not satisfy the Oklahoma public nuisance statute.

Fifth, the State seeks to impose billions of dollars of damages on the Teva and Actavis Defendants by arguing that they are jointly and severally liable with other Defendants for the costs of any abatement plan. The State contends that Defendants are jointly and severally liable because the alleged "injury" is indivisible. But the State ignores that there is not just one single "injury," much less a single injury caused by multiple indivisible factors. In addition, the State confuses its inability to satisfy causation with indivisibility. The State has chosen not to do anything, including looking at its own data, to tie any harm incurred by any specific Oklahoma patient to any specific prescription written because of the marketing of Teva or the Actavis Defendants. The State, for instance, could have surveyed Oklahoma doctors and patients. It could have evaluated its own internal prescription and overdose data to conduct such an analysis. But these failures do not render any harm indivisible. Joint and several liability is not appropriate merely because the State and its experts have made no effort to apportion fault between the Defendants, much less among the many other factors that actually caused the opioid crisis in Oklahoma.

Sixth, the State seeks an inappropriate remedy. The purpose of abatement is to stop a nuisance from happening. Here, the alleged nuisance is false marketing. A literal and logical interpretation of nuisance and abatement law would lead one to believe that the State's Abatement Plan would attempt to restrict marketing and sale of opioid medicines. It does not. Far from it, the State seeks billions of dollars for projects aimed at purportedly limiting the downstream effects of drug abuse and addiction.

In summary, despite its repeated rhetoric otherwise, the State cannot prove any element of its public nuisance claim against the Teva and Actavis Defendants by any standard of proof—let alone by clear and convincing evidence. As a result, the Court must grant summary judgment in favor of the Teva and Actavis Defendants, consistent with Oklahoma law, the United States Constitution, and the intent of the Oklahoma legislature.

STATEMENT OF MATERIAL FACTS NOT IN DISPUTE

The Teva and Actavis Defendants

Teva USA

1. Prior to 2011, Teva USA did not manufacture or sell any branded opioid medicines. (Ex. 3, J. Hassler Decl., ¶ 3.)

2. Teva USA has never promoted the safety, efficacy, or therapeutic value of its generic medicines, including its generic opioids. (Ex. 4, C. Baeder Dep., Jan. 23, 2019, 21:10–13; 23:2–8; 32:14–33:2; 38:24–39:1, 298:24–299:10, 334:3–19; Ex. 3, J. Hassler Decl., ¶ 2; Ex. 5, J. Hassler Dep., Feb. 20, 2019, 46:1–47:21; 62:25–63:22; 271:4–16; 271:21–272:9; 273: 12–20; Ex. 6, Dec. 5, 2017 Hearing Tr., 62:24–63:22; Ex. 7, Sept. 27, 2018 Hearing Tr., 58:12–59:5, Ex. 8, Oct. 3, 2018 Hearing Tr. 34:1–10; Ex. 9, L. Webster Dep., Feb. 18, 2019, 278:20–279:15; Ex. 10, S. Fishman Dep., Feb. 26, 2019, 319:24–320:10; Ex. 11, L. Robin Dep., Jan. 24, 2019, 343:19–25 & Ex. 4 to L. Robin Dep. at 10–14.)

3. The State has not identified any specific marketing that Teva USA made to any doctor in Oklahoma, much less any false marketing, that influenced an Oklahoma prescriber into writing a medically inappropriate prescription. (Ex. 78, M. Rosenblatt Expert Disclosure, 4; Ex. 2, J. Gibson Dep., Mar. 12, 2019, 507:24–508:9.)

Actavis LLC

4. Actavis LLC sells and has only sold generic opioids. (Ex. 3, J. Hassler Decl., ¶ 5.)

5. Actavis LLC has never promoted the safety, efficacy, or therapeutic value of its generic medicines, including its generic opioids. (Ex. 3, J. Hassler Decl., ¶ 6; Ex. 5, J. Hassler Dep., Feb. 20, 2019, 64:14–65:17; 272:23–273:20; Ex. 6, Dec. 5, 2017 Hearing Tr., 62:24–63:22; Ex. 7, Sept. 27, 2018 Hearing Tr., 58:12–59:5; Ex. 8, Oct. 3, 2018 Hearing Tr. 34:1–10; Ex. 9, L. Webster Dep., Feb. 18, 2019, 278:20–283:7; Ex. 12, R. Portenoy Dep., Jan. 24, 2019, 458:16–462:10; Ex. 10, S. Fishman Dep., Feb. 26, 2019, 319:24–322:21; Ex. 11, L. Robin Dep., Jan. 24, 2019, 343:19–345:1 and Ex. 4 to L. Robin Dep. at 10–14; Ex. 13, K. Mount Dep., Dec. 19, 2018, 140:2–9; 148:5–9; 150:10–11.)

6. The State has not identified any specific marketing that Actavis LLC made to any doctor in Oklahoma, much less any false marketing, that influenced an Oklahoma prescriber into writing a medically inappropriate prescription. (Ex. 78, M. Rosenblatt Expert Disclosure, 4; Ex. 2, J. Gibson Dep., Mar. 12, 2019, 507:24–508:9.)

Actavis Pharma

7. Actavis Pharma sells and has only sold generic opioids. (Ex. 3, J. Hassler Decl., ¶ 7.)

8. Actavis Pharma has never promoted the safety, efficacy, or therapeutic value of its generic medicines, including its generic opioids. (Ex. 3, J. Hassler Decl., ¶ 8; Ex. 5, J. Hassler Dep., Feb. 20, 2019, 64:14–65:17; 272:23–273:20; Ex. 6, Dec. 5, 2017 Hearing Tr., 62:24–63:22; Ex. 7, Sept. 27, 2018 Hearing Tr., 58:12–59:5, Ex. 8, Oct. 3, 2018 Hearing Tr. 34:1–10; Ex. 9, L. Webster Dep., Feb. 18, 2019, 278:20–283:7; Ex. 12, R. Portenoy Dep., Jan. 24, 2019, 458:16–462:10; Ex. 10, S. Fishman Dep., Feb. 26, 2019, 319:24–322:21; Ex. 11, L. Robin Dep., Jan. 24,

2019, 343:19–345:1 and Ex. 4 to L. Robin Dep. at 10–14; Ex. 13, K. Mount Dep., Dec. 19, 2018, 140:2–9; 148:5–9; 150:10–11.)

9. The State has not identified any specific marketing that Actavis Pharma made to any doctor in Oklahoma, much less any false marketing, that influenced an Oklahoma prescriber into writing a medically inappropriate prescription. (Ex. 78, M. Rosenblatt Expert Disclosure, 4; Ex. 2, J. Gibson Dep., Mar. 12, 2019, 507:24–508:9.)

Watson Labs

10. Watson Labs sells and has only sold generic opioids. (Ex. 3, J. Hassler Decl., ¶ 9.)

11. Watson Labs has never promoted the safety, efficacy, or therapeutic value of its generic medicines, including its generic opioids. (Ex. 3, J. Hassler Decl., ¶ 10; Ex. 5 J. Hassler Dep., Feb. 20, 2019, 272:23–273:20; Ex. 6, Dec. 5, 2017 Hearing Tr., 62:24–63:22; Ex. 7, Sept. 27, 2018 Hearing Tr., 58:12–59:5, Ex. 8, Oct. 3, 2018 Hearing Tr. 34:1–10; Ex. 9, L. Webster Dep., Feb. 18, 2019, 278:20–283:7; Ex. 12, R. Portenoy Dep., Jan. 24, 2019, 458:16–462:10; Ex. 10, S. Fishman Dep., Feb. 26, 2019, 319:24–322:21; Ex. 11, L. Robin Dep., Jan. 24, 2019, 343:19–345:1 and Ex. 4 to L. Robin Dep. at 10–14; Ex. 13, K. Mount Dep., Dec. 19, 2018, 140:2–9; 148:5–9; 150:10–11.)

12. The State has not identified any specific marketing that Watson Labs made to any doctor in Oklahoma, much less any false marketing, that influenced an Oklahoma prescriber into writing a medically inappropriate prescription. (Ex. 78, M. Rosenblatt Expert Disclosure, 4; Ex. 2, J. Gibson Dep., Mar. 12, 2019, 507:24–508:9.)

Cephalon Inc.

13. Cephalon has only ever manufactured, sold, and marketed two Schedule II opioid medicines—Actiq and Fentora. (Ex. 14, Pet. ¶ 18.)

14. Actiq is a unique short-acting opioid medicine indicated for the "management of breakthrough cancer pain in patients with malignancies who are already receiving and who are tolerant to opioid therapy for their underlying persistent cancer pain." (Ex. 15, Actiq Label.)

15. The label for Actiq comes with numerous warnings of risks involved, including a black-box warning that fully discloses its risks, including the risks of abuse, addiction, overdose, and death. (Ex. 15, Actiq Label.)

16. Cephalon acquired Actiq from a separate company in 2000. (*See* Ex. 16, J. Hassler Dep., Jan. 29, 2019, at 125:7–9.) Cephalon did not start to market Actiq until 2001 and ceased promotion of Actiq in 2006. (*See* Ex. 17, J. Hassler Dep. Aug. 29, 2018, at 28:24–29:1.)

17. Fentora is also a short-acting opioid medicine indicated for the "management of breakthrough pain in patients with cancer who are already receiving and who are tolerant to opioid therapy for their underlying persistent cancer pain." (Ex. 18, Fentora Label.)

18. The label for Fentora comes with numerous warnings of risks involved, including a black-box warning that fully discloses its risks, including the risks of abuse, addiction, overdose, and death. (Ex. 18, Fentora Label.)

19. Cephalon obtained approval from the Food & Drug Administration to market and sell Fentora in September 2006. (*See* Ex. 17, J. Hassler Dep., Aug. 29, 2018, at 29:1–2; Sept. 25, 2006, Fentora New Drug Application Approval Letter, attached as Exhibit 1-G.) Cephalon no longer promotes Fentora. (Ex. 17, J. Hassler Dep., Aug. 29, 2018, 60:21–61:1.)

20. Since the beginning of 2012, prescribers of Actiq and Fentora were required to comply with the stringent requirements of the TIRF REMS Program—tailored to the narrow class of immediate release opioids that includes Actiq and Fentora—***before*** writing a prescription for these medicines. This includes, among other things, passing a knowledge assessment about the risks

and approved uses of Actiq and Fentora, reviewing the FDA-approved medication guides for Actiq and Fentora with the patient, and signing an agreement that the prescriber understands and has counseled her patient about the risks and approved uses of Actiq and Fentora. (Ex. 20, TIRF REMS Access Program, Initial Approval December 2011, Most Recent Modification August 2017, p. 2–6.)

The Petition

21. The State has dismissed all claims and requests for relief except for a public nuisance claim for abatement. (Ex. 1, State's Notice of Voluntary Dismissal, Apr. 4, 2019.)

22. The State alleges that Defendants[2] "falsely represented and/or omitted the risks of addiction and falsely touted the benefits of [its] opioids." (Ex. 14, Pet. ¶ 53.)

23. The State contends that Defendants' misrepresentations and omissions created an opioid epidemic in Oklahoma and that these acts or omissions constitute "unlawful acts and/or omissions of duties, that annoy, injure, or endanger the comfort, repose, health, and/or safety of others" in violation of 50 Okla. St. § 2 (Ex. 14, Pet. ¶ 118–19.)

24. The State "seeks to abate the public nuisance Defendants created and all necessary relief to abate such public nuisance." (*Id.*, ¶ 120.)

The State Cannot Satisfy The Elements of a Public Nuisance

25. Opioid medicines help patients suffering from pain and can be beneficial when used as prescribed. (Ex. 21, J. Beaman Dep., Mar. 26, 2019, 208:2–18; *id.* 209:17–210:7; *id.* 210:23–211:12; Ex. 22, A. Fugh-Berman Dep., Mar. 6, 2019, 177:14–20); *id.* 404:2–13; Ex. 23, M. Pohl

[2] The State named the following companies as Defendants in the Petition: Purdue Pharma L.P., Purdue Pharma, Inc., the Purdue Frederick Company, Teva USA, Cephalon, Johnson & Johnson, Janssen Pharmaceuticals, Inc., Ortho-McNeil Janssen Pharmaceuticals, Inc., Janssen Pharmaceuticals, Inc., Allergan, PLC, Watson Laboratories, Inc., Actavis LLC, and Actavis Pharma, Inc., f/k/a Watson Pharma, Inc. The State never served Allergan PLC.

Dep., Mar. 8, 2019, 132:22–133:5; *id.* 224:25–225:10; *id.* 256:16–20; Ex. 24; A. Van Zee Dep., Feb. 26, 2019, 52:6–22; *id.* 111:20–112:2.)

26. The FDA approved each of the opioid medicines manufactured by the Teva and Actavis Defendants. (Ex. 15, Actiq Label, OKAG-00111950-68; Ex. 18, Fentora Label.)

27. Each opioid medicine comes with a label that warns of the risks of those medicines. (Ex. 51, S. Martin Dep., Mar. 6, 2019, 66:12–17.)

28. The Teva and Actavis Defendants sell their opioid medicines to distributors. (Ex. 17, J. Hassler Dep., Aug. 29, 2018, 90:5–19.)

29. The Teva and Actavis Defendants did not falsely misrepresent the risks of opioids. (Ex. 10, S. Fishman Dep., Feb. 26, 2019, 323:14–17; *Id.* 327:2–7; Ex. 9, L. Webster Dep., Feb. 18, 2019, 283:19–23; *Id.* 285:12–18.)

30. All branded marketing materials are submitted to the FDA prior to their use. (Ex. 25, J. Hassler Dep., Jan. 30, 2019, 27:18–28:8; *id.* 38:15–39:7; Ex. 5, J. Hassler Dep., Feb. 20, 2019, 9:25–10:7.)

31. All Actiq–related marketing materials were approved by the FDA. (Ex. 25, J. Hassler Dep., Jan. 30, 2019, 27:18–28:8; *Id.* 38:15–39:7; Ex. 5, J. Hassler Dep., Feb. 20, 2019, 9:25–10:7.)

32. Distributors sell the Teva and Actavis Defendants' opioid medicines to pharmacies. (Ex. 17, J. Hassler Dep., Aug. 29, 2018, 90:5–90:19.)

33. Oklahoma prescribers make informed decisions regarding the appropriate treatment for individual patients based on their own independent medical judgment. (Ex. 26, J. Halford Dep., Feb. 22, 2019, 85:19–87:4; *Id.* 172:8–25; Ex. 27, S. Crawford; Feb. 13, 2019 Dep., 107:23–109:6; Ex. 9, L. Webster Dep., Feb. 18, 2019, 121:1–122:11; *id.* 506:1–25; Ex. 28, D. Clauw Dep., Mar. 26, 2019, 97:13–22; *id.* 305:11–19; Ex. 29, E. Krebs, Mar. 19, 2019, 178:10–18; *id.* 41:17–42:5;

Ex. 30, M. Rosenblatt Dep., Mar. 28, 2019, 178:13–179:4; *id.* 190:9–14; Ex. 10, S. Fishman Dep., Feb. 26, 2019, 301:7–25; Ex. 12, R. Portenoy Dep., Jan. 24, 2019, 295:11–24; 299:19–25.)

34. The Oklahoma medical community has long been aware of the risks associated with opioid use, long before the introduction of OxyContin into the market in 1996. (Ex. 10, S. Fishman Dep., Feb. 26, 2019, 313:8–314:3; *id.* 308:23–309:1; Ex. 12, R. Portenoy Dep., Jan. 24, 2019, 474:14–20; Ex. 31, D. Courtwright Dep., Mar. 22, 2019, 66:7–15; *id.* 86:1–11; *id.* 89:3–10; *id.* 89:20–90:4; Ex. 26, J. Halford Dep., Feb. 22, 2019, 26:10–27:4; Ex. 32, G. Schick Dep., Mar. 1, 2019, 14:1–24; Ex. 27, S. Crawford Dep., Feb. 13, 2019, 38:7–23.)

35. Oklahoma prescribers exercise their own independent medical judgment when prescribing patients opioid medicines. (Ex. 10, S. Fishman Dep., Feb. 26, 2019, 304:12–305:21; Ex. 9, L. Webster Dep., Feb. 18, 2019, 291:5–19; Ex. 28, D. Clauw Dep., Mar. 26, 2019, 305:11–305:19; Ex. 29, E. Krebs Dep., Mar. 19, 2019, 41:17–42:5; Ex. 32, G. Schick Dep., Mar. 1, 2019, 53:11–25; Ex. 27, S. Crawford Dep., Feb. 13, 2019, 28:13–24.)

36. Oklahoma prescribers are influenced by many factors other than marketing when making their prescribing decisions. (Ex. 26, J. Halford Dep., Feb. 22, 2019, 97:18–98:8; *id.* 248:7–248:19; Ex. 32, G. Schick Dep., Mar. 1, 2019, 36:7–37:10; *id.* 47:15–48:1; *id.* 53:11–25; Ex. 27, S. Crawford Dep., Feb. 13, 2019, 218:9–11.)

37. Reimbursement policies by managed care organizations, like insurance companies, influence prescribing decisions. (Ex. 26, J. Halford Dep., Feb. 22, 2019, 58:14–20.)

38. Some Oklahoma prescribers did not receive any marketing by the Teva or Actavis Defendants. (Ex. 26, J. Halford Dep., Feb. 22, 2019, 85:14–23; Ex. 32, G. Schick Dep., Mar. 1, 2019, 55:5–10; Ex. 33, L. Ollar–Shoemake Dep., Mar. 13, 2019, 49:9–18; Ex. 27, S. Crawford Dep., Feb. 13, 2019, 253: 20–24; *id.* 255:8–12; *id.* 257:6–13.)

39. Oklahoma prescribers were not misled by any marketing done by the Teva or Actavis Defendants. (Ex. 26, 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, G. Schick Dep., Mar. 1, 2019, 53:7–25; *id.* 84:19–23; Ex. 33, L. Ollar-Shoemake, Mar. 13, 2019, 48:9–18; Ex. 27, S. Crawford Dep., Feb. 13, 2019, 178:17–23; *id.* 264:9–23; Ex. 12, R. Portenoy Dep., Jan. 24, 2019, 498:13–24; Ex. 10, S. Fishman Dep., Feb. 26, 2019, 302:17–25; *id.* 304:3–10.)

40. Oklahoma pharmacies fill opioid prescriptions. (Ex. 34, B. Beasley Dep., Feb. 11, 2019, 85:16–18.)

41. There is no evidence that any Oklahoma pharmacist dispensed a medically unnecessary prescription for Actiq or Fentora in the State of Oklahoma. (Ex. 35, B. Beasley Dep., Feb. 12, 2019, 230:3–231:10; *id.* 256:18–257:1.)

42. There is no evidence that any Oklahoma pharmacist dispensed a medically unnecessary prescription for a generic opioid medicine manufactured by the Teva and Actavis Defendants. (Ex. 35, B. Beasley Dep., Feb. 12, 2019, 230:3–231:10; *id.* 256:18–257:1.)

43. Pharmacists make independent decisions whether or not to substitute generic medicines for branded medicines. (Ex. 5, J. Hassler Dep., Feb. 20, 2019, 46:6–47:6.)

44. The State estimates that it reimbursed for 2700 prescriptions of Actiq and Fentora during the Relevant Time Period. (Ex. 36, J. Beaman Dep., Mar. 14, 2019, 98:13–101:5.) The State only reimbursed for prescriptions it determined were medically necessary. (Ex. 35, B. Beasley Dep., Feb. 12, 2019, 72:19–24; *id.* 76:24–77:5.)

45. The State has not identified any Actiq or Fentora prescription that was medically unnecessary in Oklahoma. (Ex. 21, J. Beaman Dep., Mar. 26, 2019, 225:15–226:12.)

46. The criminal acts of third parties contribute to Oklahomans' addiction and abuse of opioid medicines. The State has prosecuted and convicted numerous Oklahoma prescribers for writing illegal prescriptions of opioids in exchange for money, drugs, or sex. (Ex. 37, Complaint and Order in *State v.* [redacted], *M.D.*; Ex. 38, Criminal Information in *State v.* [redacted]; Ex. 39, Third Amended Information in *State v.* [redacted]; Ex. 40, Amended Information in *State v.* [redacted]; Ex. 41, Press Release: "Attorney General Hunter Charges Doctors with Five Counts of Second Degree Murder;" Ex. 42, Complaint in *State v.* [redacted], *M.D.*; Ex. 43, Order Granting Motion for Default Judgment and Revocation of License in *State v.* [redacted]; Ex. 44, Final Order of Revocation in *State v.* [redacted], *M.D.*; Ex. 45, Voluntary Submittal to Jurisdiction in *State v.* [redacted]; Ex. 46, Order Accepting Voluntary Submittal to Jurisdiction in *State v.* [redacted].)

47. The State has also prosecuted illegal pill mills and pharmacies for breaking the law. (Ex. 47, M. Woodward Dep., Feb. 12, 2019, 50:22–51:8; *id.* 51:13–21; *id.* 247:17–23; *id.* 260:8–15; Ex. 48, M. Stewart Dep., Jan. 22, 2019, 126:22–127:8; *id.* 219:17–219:24.)

48. The Oklahoma Bureau of Narcotics did not prosecute pharmaceutical manufacturers for any wrongdoing—it has only prosecuted pill mills and pharmacies for causing opioid–related problems. (Ex. 47, M. Woodward Dep., Feb. 12, 2019, 262:22–263:3.)

The State Offers No Evidence Of Causation

49. The State offers no causation analysis linking marketing of opioid medicines by the Teva or Actavis Defendants to any opioid prescriptions written by Oklahoma prescribers. (Ex. 2, J. Gibson Dep., Mar. 12, 2019, 507:24–508:15; Ex. 21, J. Beaman Dep., Mar. 26, 2019, 129:13–19; *id* 135:19–136:8.)

50. The State offers no causation analysis linking any false marketing of opioid medicines by the Teva or Actavis Defendants to any opioid prescriptions written by Oklahoma prescribers. (Ex. 2, J. Gibson Dep., Mar. 12, 2019, 507:24–508:15; Ex. 21, J. Beaman Dep., Mar. 26, 2019, 129:13–19; *id.* 135:19–136:8.)

51. The State did not conduct a survey of Oklahoma prescribers to determine who, if anyone, was influenced by any false marketing into writing an opioid prescription. (Ex. 2, J. Gibson Dep., Mar. 12, 2019, 499:19–25; Ex. 21, J. Beaman Dep., Mar. 26, 2019, 203:6–15; *id.* 128:19–129:4; *id.* 203:6–15; Ex. 49, A. Kolodny Dep., Mar. 8, 2019, 511:13–18.)

52. The State has not done any regression or statistical analysis as to causation. (Ex. 50, J. Gibson Dep., Mar. 11, 2019, 293:6–13; *id.* 305:7–12; *id.* 306:7–11; Ex. 2, J. Gibson Dep., Mar. 12, 2019, 489:15–25; *id.* 491:8–12; *id.* 507:24–508:9; *id.* 520:7–23.)

53. The State's abatement and damages experts do not link any opioid–related harm or expenses to any false marketing by the Teva or Actavis Defendants. (Ex. 50, J. Gibson Dep., Mar. 11, 2019, 305:7–12; Ex. 2, J. Gibson Dep., Mar. 12, 2019, 505:15–25; *id.* 507:24–508:15.)

54. The State identifies no marketing—branded or unbranded—attributable to the Teva or Actavis Defendants that influenced any Oklahoma prescriber into writing an inappropriate opioid prescription. (Ex. 50, J. Gibson Dep., Mar. 11, 2019, 46:14–20; *id.* 64:10–21; Ex. 2, J. Gibson Dep., March 12, 2019, 490:20–25; *id.* 491:8–12; *id.* 508: 6–15; Ex. 21, J. Beaman Dep., Mar. 26, 2019, 129:13–19; *id.* 135:19–136:8; Ex. 22, A. Fugh-Berman Dep., Mar. 6, 2019, 118:5–119:1; Ex. 49, A. Kolodny Dep., Mar. 8, 2019, 381:9–382:12; *id.* 393:24–394:5; *id.* 395:22–396:1).

55. The State has not identified and cannot identify a single medically inappropriate prescription of Actiq or Fentora. (Ex. 21, J. Beaman Dep., Mar. 26, 2019, 221:22–222:2.)

56. The State has not identified and cannot identify a single Actiq or Fentora prescription that led to addiction or overdose in Oklahoma. (Ex. 51, S. Martin Dep., Mar. 6, 2019, 145:3–11; Ex. 21, J. Beaman Dep., Mar. 26, 2019, 112:10–113:8.)

The State Offers No Evidence Of Concerted Activity

57. The opinions of key opinion leaders identified by the State in its Petition were developed independently and were not influenced by the Teva or Actavis Defendants. (Ex. 12, R. Portenoy Dep., Jan. 24, 2019, 475:20–476:25; *id.* at 331:6–25; *id.* at 464:10–465:1; 467:25–468:6; *id.* 398:17–400:13; Ex. 9, L. Webster Dep., Feb. 18, 2019, 299:15–300:10; *id.* 375:7–17; *id.* 223:4–7; Ex. 10, S. Fishman Dep., Feb. 26, 2019, 293:8–294:2; *id.* 80:10–82:6; Ex. 52, TEVA_OK_01287333.)

58. Although Cephalon provided funding to third-party organizations, Cephalon had policies in place to prevent any influence by Cephalon over the content of third-party publications. (Ex. 53, US Policy-205-Independent Medical Education Grants, Effective August 2013, TEVA_OK_01498888; Ex. 54, Independent Medical Education Grants Policy, Effective January 26, 2009, TEVA_OK_01324842; Ex. 55, C–126 Cephalon Policy on Company Giving, Effective July 2008; Ex. 56, Cephalon Policy on Third–Party Grant Requests, Effective January 2008, TEVA_OK_00510687; Ex. 57, Marketing Policy on Grants, Effective June 2007, TEVA_OK_00510579; Ex. 58, Company Giving, Effective July 2008, TEVA_OK_01324445; Ex. 59, Cephalon Policy on Third-Party Grant Requests, TEVA_OK_00510687.)

59. Third–party organizations operated independently and were not influenced by anything the Teva or Actavis Defendants said or did. (Ex. 60, C. Reisner Dep., Dec. 11, 2018, 165:20–166:5; Ex. 61, [redacted]; Ex. 62, [redacted]; Ex. 13, K. Mount Dep., Dec. 19, 2018, 138:20–140:9; Ex. 63, A. Gilson Dep.,

Dec. 20, 2019, 413:19–414:23; Ex. 64, P. Saigh Dep., Jan. 8, 2019, 298:25–302:4; Ex. 11, L. Robin Dep., Jan. 24, 2019, 41:12–41:18; *id.* 42:12–42:16; *id.* 75:6–75:12; *id.* 340:21–341:8.)

60. The content of Continuing Medical Education programs was not influenced by the Teva or Actavis Defendants. (Ex. 12, R. Portenoy Dep., Jan. 24, 2019, 331:6–25; *id.* 467:25–468:6 *id.* 479:10–480:15; Ex. 9, L. Webster Dep., Feb. 18, 2019, 297:24–298:17; 87:25–88:12; *d.* 89:13–91:17; *id.* 96:11–19; *id.* 165:20–166:5; Ex. 11, L. Robin Dep., Jan. 24, 2019, 41:12–18; Ex. 64, P. Saigh Dep., Jan. 8, 2019, 287:2–288:4.)

61. The State and its experts concede that they did not identify and then analyze the impact of Defendants' marketing in Oklahoma in particular. (Ex. 22, A. Fugh-Berman Dep., Mar. 6, 2019, 119:21–120:3; *id.* 136:19–137:4.)

62. The State's experts testified they cannot point to what caused any Oklahoma doctor to inappropriately prescribe a medicine. (Ex. 49, A. Kolodny Dep., Mar. 8, 2019, 381:9–382:12; Ex. 65, R. Stone Dep., Mar. 15, 2019, 134:23–135:2; *id.* 136:11–141:4.)

63. Instead of proving its claim as to each Defendant, the State contends that it can prove its case "in the aggregate." (Ex. 2, J. Gibson Dep., Mar. 12, 2019, 502:17–503:2; Ex. 66, A. Kolodny Dep., Mar. 7, 2019, 109:16–23; Ex. 67, Aug. 30, 2018 Hearing Tr., 58:2–5; Ex. 68, Nov. 29, 2018 Hearing Tr., 50:20–51:2.)

64. The Teva and Actavis Defendants did not conspire or act in concert with any other Defendant, entity, or individual. (Ex. 25, J. Hassler Dep., Jan. 30, 2019, 259:17–260:16; *id.* 261:10–262:5; Ex. 69, J. Hassler Dep., Jan. 31, 2019, 341:13–342:2; *id.* 345:7–21; *Id.* 348:5–21; Ex. 70, J. Hassler Dep., Feb. 27, 2019, 192:18–23; *id.* 197:14–25.) Many of the State's experts cannot even identify who Cephalon, Teva USA, or the Actavis Defendants are. (Ex. 2, J. Gibson Dep., Mar. 12, 2019, 486:16–488:13; *id.* 490:4–23; Ex. 23, M. Pohl Dep., Mar. 8, 2019, 89:2–

90:5; Ex. 65, R. Stone Dep., Mar. 15, 2019, 154:19–155:2; Ex. 51, S. Martin Dep., Mar. 6, 2019, 48:6–20.)

65. Many of the State's experts also cannot identify any opioid medications manufactured by Cephalon, Teva USA, or the Actavis Defendants. (Ex. 2, J. Gibson Dep., Mar. 12, 2019, 488:14–25; id. 490:13–17; Ex. 65, R. Stone Dep., Mar. 15, 2019 156:3–5; *id.* 157:21–25; Ex. 66, A. Kolodny Mar. 7, 2019, 23:23–24:25; Ex. 49, A. Kolodny Dep., Mar. 8, 2019, 303:11–25; Ex. 71, J. Duncan Dep., 279:14–280:2; Ex. 22, A. Fugh-Berman Dep., Mar. 6, 2019, 14:7–15:1; Ex. 72, C. Ruhm Dep., Mar. 28, 2019, 108:10–14; Ex. 36, J. Beaman Dep., Mar. 14, 2019, 52:8–55:24.)

ARGUMENT AND AUTHORITY

I. APPLICABLE LAW

"Summary judgment is proper when the record before the Court presents no genuine issue of material fact and one party is entitled to judgment as a matter of law." *Taylor v. Pate*, 1993 OK CIV APP 79, 859 P.2d 1124, 1127 (citing *Buckner v. General Motors Corp.,* 760 P.2d 803 (Okl. 1988)). "All material facts set forth in the statement of the movant which are supported by admissible evidence shall be deemed admitted for the purpose of summary judgment unless specifically controverted by the adverse party and supported by admissible evidence." *Attocknie v. Carpenter Mfg., Inc.*, 1995 OK CIV APP 54, ¶ 2, 901 P.2d 221, 223 (citing Rule 13(b), Rules for District Courts of Oklahoma). When a motion for summary judgment sets forth evidence showing no substantial controversy as to the material facts, the burden of proof shifts to the non-moving party to present evidence showing the existence of material factual disputes justifying a trial on the issues. *See Butler By & Through Butler v. Oklahoma City Pub. Sch. Sys.*, 1994 OK CIV APP 22, ¶ 2, 871 P.2d 444, 445.

Under Oklahoma law,[3] "[a] nuisance consists in unlawfully doing an act, or omitting to perform a duty, which act or omission . . . [a]nnoys, injures or endangers the comfort, repose, health, or safety of others . . . ." 50 O.S. § 1. Thus, the unlawful act or omission must ***cause*** the annoyance, injury, or endangerment. *See Moore v. Texaco*, 244 F.3d 1229, 1231 (10th Cir. 2001) (applying Oklahoma law and holding that plaintiff landowner could not prevail on its claim for public nuisance against Texaco because the plaintiff "failed to show that Texaco caused pollution or damage to the property"). 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." 50 O.S. § 2. "A public nuisance may be abated by any public body or officer authorized thereto by law." *Id.* § 11.

The State must prove its public nuisance claim by ***clear and convincing*** evidence. *Burlington N. & Santa Fe Ry. Co. v. Grant*, 505 F.3d 1013, 1022–23 (10th Cir. 2007) (discussing abatement and establishing that the burden of proof under Oklahoma law for injunctive relief is clear and convincing evidence). The State has not and cannot satisfy its burden for many independent reasons.

II. 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 THE LAW OF PUBLIC NUISANCE IN OKLAHOMA.

The law of nuisance in Oklahoma has been historically and fundamentally concerned with the misuse of, or interference with, land and real property. *See, e.g., Laubenstein v. Bode Tower, L.L.C.*, 392 P.3d 706, 709 (Okla. 2016) ("We have said that a nuisance arises from an unreasonable,

[3] There is no dispute that Oklahoma law applies here. The State's reliance upon a North Dakota court's interpretation of North Dakota's public nuisance statute has no bearing on this Oklahoma court interpreting Oklahoma's public nuisance statute. (Ex. 73, Apr. 11 Hearing Tr., 12:3–13:2; *id.* 14:21–16:9.)

unwarranted, or unlawful use *of property*." (emphasis added)). And no case in Oklahoma embraces the State's view that public nuisance encompasses harm caused by the allegedly false marketing and sale of FDA-approved products.

A survey of public nuisance cases in Oklahoma makes clear that public nuisance law in Oklahoma is generally limited to addressing interference with the use and enjoyment of real property. For example, many Oklahoma public nuisance decisions concern the pollution of land or water. *See, e.g., N.C. Corff P'ship, Ltd. v. OXY USA, Inc.*, 929 P.2d 288, 293–96 (Okla. Civ. App. 1996) (groundwater pollution from oil and gas wells); *Meinders v. Johnson*, 134 P.3d 858, 860, 867–68 (Okla. Civ. App. 2005) (sub-surface pollution from mineral exploration). Others concern the misuse of private property for other sorts of obnoxious, dangerous, or immoral purposes. *See, e.g., State ex rel. Fallis v. Mike Kelly Constr. Co.*, 638 P.2d 455, 456 (Okla. 1981) (operation of "open saloon"); *Boudinot v. State ex rel. Cannon*, 340 P.2d 268, 269 (Okla. 1959) ("noise and odor arising" from defendant's "keeping a large number of cats on her residential property"). And others concern the misuse of public lands and roads. *See, e.g., State ex rel. Burk v. Oklahoma City*, 522 P.2d 612, 615 (Okla. 1973) (construction of building on public street).

The State's claim has nothing to do with the misuse of or interference with property. Instead, the State alleges that it has suffered a variety of different harms, including derivative expenses (*e.g.*, healthcare costs, social services, criminal justice), arising from injuries to consumers of FDA-approved medicines sold and marketing by the Defendants in this case. *See* Ex. 14, Pet. ¶ 119. In simple terms, the State's claim sounds entirely in products liability, not public nuisance. Nuisance

and product liability are separate and distinct bodies of law, and courts across the nation have held that they must remain that way.[4]

Consistent with this legal principle, other courts presiding over nearly identical public nuisance claims have dismissed those claims because "[t]here is a clear national trend to limit public nuisance to land use" rather than products-based claims. *State ex rel. Jennings v. Purdue Pharma L.P.*, No. CVN18C01223MMJCCLD, 2019 WL 446382, at *12 (Del. Super. Ct. Feb. 4, 2019). Indeed, state and federal courts across the country—in cases involving a wide array of products— have agreed that public nuisance liability should not be imposed as a substitute for products liability. *See, e.g.*, *Camden Cty. Bd. of Chosen Freeholders v. Beretta, U.S.A. Corp.*, 273 F.3d 536, 540 (3d Cir. 2001) (firearms) ("[T]he courts have enforced the boundary between the well-developed body of product liability law and public nuisance law."); *Ashley Cty. v. Pfizer, Inc.*, 552 F.3d 659, 671–72 (8th Cir. 2009) (cold medicine) (same); *City of Perry v. Procter & Gamble Co.*, 188 F. Supp. 3d 276, 291 (S.D.N.Y. 2016) (flushable wipes) ("The parties do not cite, and the Court is not aware of, any cases applying Iowa law that recognize a nuisance claim arising out of the sale or use of a product as opposed to the use of property."); *Detroit Bd. of Educ. v. Celotex Corp.*, 493 N.W.2d 513, 521 (Mich. Ct. App. 1992) (asbestos) ("The law of nuisance is fraught with conditional rules and exceptions that turn on the facts of individual cases, and the cases almost universally concern the use or condition of property, not products.").

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[4] In 2008, the Rhode Island Supreme Court refused to hold lead paint manufacturers liable under a public nuisance theory. "The law of public nuisance," the court recognized, "never before has been applied to products, however harmful." *State v. Lead Indus., Ass'n, Inc.*, 951 A.2d 428, 456 (R.I. 2008). Whereas "[p]ublic nuisance focuses on the abatement of annoying or bothersome activities[,] [p]roducts liability law, on the other hand, has its own well-defined structure, which is designed specifically to hold manufacturers liable for harmful products that the manufacturers have caused to enter the stream of commerce." *Id.* The court continued: "Undoubtedly, public nuisance and products liability are two distinct causes of action, each with rational boundaries that are not intended to overlap. *Id.*; *see also id.* at 457.

The drafters of the Third Restatement of Torts have noted and approved this trend of denying products liability claims cloaked as public nuisance claims, observing that "the common law of public nuisance is an inapt vehicle for addressing the conduct at issue" in cases of dangerous products. Restatement (Third) of Torts: Liability for Economic Harm § 8 TD No. 2 cmt. g (2014). Commentators have likewise criticized efforts to wield public nuisance liability as a club against product manufacturers. *See, e.g.*, Victor E. Schwartz & Phil Goldberg, *The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort*, 45 Washburn L.J. 541, 543 (2006) ("The current effort to expand public nuisance theory to provide sanctions against manufacturers of lawful products is disconcerting because it would fundamentally change the entire character of public nuisance doctrine, as well as undermine products liability law.").

There are good reasons for not letting public nuisance expand in this way: Allowing a products-based claim to proceed under a nuisance theory would eviscerate "the strict requirements that surround a products liability action." *Lead Indus.*, 951 A.2d at 456. For example, permitting a public nuisance theory for products-based claims could lead to theories—like the State's here—that the standards for causation should be relaxed or that a plaintiff need not have to identify a particular product that gave rise to a particular injury. *City of St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d 110, 116 (Mo. 2007); *Lead Indus.*, 951 A.2d at 457. Thus, recognizing such an action could "permit nuisance liability to be imposed on an endless list of manufacturers, distributors, and retailers of manufactured products." *See City of Chicago,* 821 N.E.2d at 1116. "[N]uisance law 'would become a monster that would devour in one gulp the entire law of tort.'" *Camden Cty.*, 273 F.3d at 540 (quoting *Tioga Pub. Sch. Dist. No. 15 v. U.S. Gypsum Co.*, 984 F.2d 915, 921 (8th Cir. 1993)). Because the Oklahoma Supreme Court has never recognized the type of nuisance claim brought here (nor has any other Oklahoma court) and doing so would improperly expand

the scope and purpose of nuisance law, summary judgment is appropriate.

III. THE STATE CANNOT PROVE CAUSATION.

A. The Claim Fails As A Matter Of Law Because The Causal Chain Is Too Attenuated.

In order for the State to prevail on its public nuisance claim, it must prove by clear and convincing evidence that the Teva and Actavis Defendants' supposedly false statements about opioids caused medical professionals to write medically inappropriate opioid prescriptions, which, in turn, caused various harm to an entire community that the State must now abate. (Ex. 14, Pet. ¶¶ 116–120.) But as a matter of law, the Teva and Actavis Defendants' conduct is simply too attenuated from those downstream harms to be held responsible. Thus, even if the Court were to accept the State's novel theory of Oklahoma's public nuisance law—which it should not—there is no legal basis for finding that the Teva and Actavis Defendants *proximately caused* the public nuisance.

At every turn, there are independent actors that break the chain of causation against the Teva and Actavis Defendants. At a minimum, for each opioid-related harm that the State seeks to abate, the chain of causation would include at least the following links[5]:

- ***Link One***: Actavis and Teva Defendants manufacture the opioids;
- ***Link Two***: The FDA approves the sale of the medicines and their labeling;
- ***Link Three***: The DEA sets quota limits to ensure that there is no "oversupply" of opioid medicines in the market;
- ***Link Four***: An Oklahoma prescriber receives marketing material for branded opioid medicines attributable to the Actavis and Teva Defendants and that marketing material is false or misleading in violation of an Oklahoma law;

[5] This causal chain is not exhaustive and merely provides the Court with some of the elements and various actors involved in the manufacture, sale, prescription, distribution, and diversion of opioid medicines.

- ***Link Five***: Instead of exercising her own independent medical judgment, the Oklahoma prescriber writes a prescription for an opioid medicine to an Oklahoman because of an allegedly false statement made by the Actavis or Teva Defendants and without knowledge or an understanding of the risks of the medication as a learned intermediary, despite prominent and extensive labeling information provided on the medication—and, after 2012, despite the stringent TIRF REMS requirements[6];

- ***Link Six***: Reimbursement policies by managed care organizations, like insurance companies, do not cause the Oklahoma prescriber to write the opioid prescription;

- ***Link Seven***: The patient chooses to fill the medically inappropriate prescription without any knowledge about the risks of the medication;

- ***Link Eight:*** A distributors sells opioids to the pharmacy, without flagging the sale as suspicious;

- ***Link Nine***: The pharmacist first decides whether to substitute a generic medicine for a branded medicine and then dispenses the medically unnecessary opioid prescription, without informing the patient about the risks or deeming the prescription to be medically unnecessary;

- ***Link Ten***: The Oklahoma Health Care Authority does not reimburse for the prescription, thereby deeming the prescription to be medically necessary (and appropriate)--which it did for over 9 million opioid prescriptions after 1996)[7];

- ***Link Eleven***: The patient, or someone who illegally obtained the opioid from the patient, misuses, abuses, and/or becomes addicted to opioids due to the allegedly

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[6] Since the beginning of 2012, Actiq and Fentora have been subject to a special Risk Evaluation and Mitigation Strategy ("REMS") applicable to the class of transmucosal immediate-release fentanyl ("TIRF") prescription medicines. *See* 21 U.S.C. § 355-1 (governing REMS programs); TIRF REMS, Ex. 74, available at http://www.accessdata.fda.gov/drugsatfda_docs/rems/TIRF_SS_2015-12-21_REMS_FULL.pdf. The TIRF REMS Program requires (1) an FDA-approved medication guide to be provided to patients before the medication is dispensed in an outpatient setting; (2) each prescriber of Actiq or Fentora to review educational materials, including the full prescribing information, and to successfully complete a knowledge assessment, ***before being eligible to prescribe*** Actiq or Fentora; and (3) both patient and prescriber must sign a TIRF REMS Access Patient-Prescriber Agreement Form before the patient's first prescription acknowledging that they understand the risks, consequences, and approved uses of TIRF medicines. *Id.* ¶¶ II(A), II(B)(1)(b)(i), II(B)(1)(b)(ii).

[7] If the Oklahoma Health Care Authority *did* reimburse for a particular prescription, then any harm that resulted from that prescription could not have been caused by the Teva or Actavis Defendants because the State only reimbursed for prescriptions it independently deemed "medically necessary." (Ex. 35, B. Beasley Dep., Feb. 12, 2019, 72:19–24; *id.* 76:24–77:5.)

fraudulently-induced prescription, as opposed to other factors or other medically appropriate prescriptions;

- ***Link Twelve***: The patient or someone else who illegally diverted the opioid medicine suffers physical or other harm as a result of the medically unnecessary prescription, as opposed to numerous other factors or circumstances.

These multiple layers of discretionary and fact-intensive decision-making would require an analysis of each prescription, why it was prescribed, why it was dispensed, how it was taken, how it was used, whether it was diverted, and whether it caused any harm. These intervening links render too remote the nexus between any marketing and any downstream harm that forms the basis for the State's public nuisance claim. *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).

Given the many independent links in this chain of causation, courts have repeatedly dismissed similar claims based upon false marketing because the chain of causation is too indirect and too speculative, particularly where the independent decision-making of medical professionals is a link in the chain. *Ironworkers Local Union No. 68 v. AstraZeneca Pharm. LP*, 585 F. Supp. 2d 1339, 1344 (M.D. Fla. 2008) (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.*, 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").

1. Example 1: Independent Decision-Making Of Prescribers.

Take just one example of why the chain of causation is simply too attenuated: the independent decision-making of prescribers. Under Oklahoma law, a physician acts as a "learned intermediary" because he or she exercises independent judgment in deciding whether to issue a prescription. *Tortorelli v. Mercy Health Ctr., Inc.*, 2010 OK CIV APP 105, ¶ 26, 242 P.3d 549, 560 ("[a] major underlying assumption of the learned intermediary doctrine is that a product has properties rendering it dangerous so as to require a doctor's prescription or order for its use"). As a matter of law, that physician must be aware of the risks in the labels of the medicines he or she prescribes, and, as discovery has demonstrated, Oklahoma physicians have long been aware of such risks. Ex. 26, J. Halford Dep., Feb. 22, 2019, 26:10–27:4; Ex. 32, G. Schick Dep., Mar. 1, 2019, 14:1–24; Ex. 27, S. Crawford Dep., Feb. 13, 2019, 38:7–23.) Indeed, other Oklahoma physicians have testified that they never received any marketing from the Teva and Actavis Defendants, and, thus, could not have been misled by anything.[8] And still others made clear that

[8] (Ex. 26, J. Halford Dep., Feb. 22, 2019, 85:14–23; Ex. 32, G. Schick Dep., Mar. 1, 2019, 55:5–55:10; Ex. 33, L. Ollar–Shoemake Dep., Mar. 13, 2019, 49:–49:18; Ex. 27, S. Crawford Dep., Feb. 13, 2019, 253: 20–253:24; *Id.* 255:8–255:12; *Id.* 257:6–257:13.)

even if they received marketing materials, they were not influenced by that marketing—much less any false marketing.[9] As the State's own expert makes clear, this individualized analysis would need to be undertaken for each physician who wrote each opioid prescription that the State believes contributed to the opioid epidemic—something neither the State nor its experts have done. (Ex. 65, R. Stone Dep., Mar. 15, 2019, 134:23–135:2; *id.* 136:11–141:4.)

2. Example 2: Criminal Conduct Of Prescribers, Pill Mills, And Others.

Other examples that defeat the chain of causation abound. The State has prosecuted and convicted numerous Oklahoma prescribers for writing illegal prescriptions of opioids in exchange for money, drugs, or sex.[10] The State also has prosecuted individuals for operating illegal pill mills and illegally selling prescription medicine.[11] As a matter of law, the Actavis and Teva Defendants cannot be held responsible for any harm caused by that independent illegal conduct. *See, e.g., Prince v. B.F. Ascher Co.*, 2004 OK CIV APP 39, ¶ 20, 90 P.3d 1020, 1028 (there is no duty to "anticipate and prevent the intentional or criminal acts of a third party"); *Butler*, 1994 OK CIV

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[9] (Ex. 26, 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, G. Schick Dep., Mar. 1, 2019, 53:7–25; *id.* 84:19–23; Ex. 33, L. Ollar-Shoemake, Mar. 13, 2019, 48:9–18; Ex. 27, S. Crawford Dep., Feb. 13, 2019, 178:17–23; *id.* 264:9–23; Ex. 12, R. Portenoy Dep., Jan. 24, 2019, 498:13–24; Ex. 10, S. Fishman Dep., Feb. 26, 2019, 302:17–25; *id.* 304:3–10.)

[10](Ex. 37, Complaint and Order in *State v.* [redacted], *M.D.*; Ex. 38, Criminal Information in *State v.* [redacted]; Ex. 39, Third Amended Information in *State v.* [redacted]; Ex. 40, Amended Information in *State v.* [redacted]; Ex. 41, Press Release: "Attorney General Hunter Charges Doctors with Five Counts of Second Degree Murder;" Ex. 42, Complaint in *State v.* [redacted], *M.D.*; Ex. 43, Order Granting Motion for Default Judgment and Revocation of License in *State v.* [redacted]; Ex. 44, Final Order of Revocation in *State v.* [redacted], *M.D.*; Ex. 45, Voluntary Submittal to Jurisdiction in *State v.* [redacted]; Ex. 46, Order Accepting Voluntary Submittal to Jurisdiction in *State v.* [redacted].)

[11](Ex. 47, M. Woodward Dep., Feb. 12, 2019, 51:13–21; *id.* 247:17–23; *id.* 260:8–15; Ex. 48, M. Stewart Dep., Jan. 22, 2019, 126:22–127:8; *id.* 219:17–219:24.)

APP 22, 871 P.2d at 446 (proximate cause exists only if conduct causes injury "in a natural and continuous sequence, unbroken by any independent cause").

Put simply, as discovery has confirmed, the chain of causation is simply too attenuated for the Teva Defendants to be held liable. Summary judgment should be granted in favor of the Teva and Actavis Defendants as a matter of law.

B. Even If The Causal Chain Was Not Too Attenuated, The State Offers No Evidence Of Causation As To Any Of the Teva Or Actavis Defendants.

Beyond the legal flaws in the State's theory of the case, the State lacks any evidence to establish but-for causation. Critically, there is no evidence whatsoever that any false statements attributable to the Teva and Actavis Defendants reached any Oklahoma prescriber, which, in turn, caused that prescriber to write an inappropriate opioid prescription that ultimately led to opioid abuse, addiction, or death. And there is certainly no evidence that this occurred to an "entire community." 50 Okla. Stat. § 2.

1. The State Offers No Causation Model Or Survey.

As an initial matter, neither the State nor its experts have provided any type of model to even attempt to show causation. They have not done any survey of Oklahoma providers. They have not interviewed any Oklahoma doctors. They have not done any regression modeling to show whether any Oklahoma provider received and was influenced by any false marketing by the Teva or Actavis Defendants. When asked, the State and its experts repeatedly testified that they could not identify single prescriber who was misled by any marketing done by the Teva or Actavis Defendants.[12] And for good reason: Oklahoma prescribers affirmatively testified that they made

[12](Ex. 2, J. Gibson Dep., Mar. 12, 2019, 499:19–25; Ex. 21, J. Beaman Dep., Mar. 26, 2019, 203:6–15, 128:19–129:4, 203:6–15; Ex. 49, A. Kolodny Dep., Mar. 8, 2019, 511:13–18).

independent medical decisions based on their education, experience, and following an individualized assessment of their patients.[13] Whether an opioid medicine is covered by insurance also directly impacts whether that particular medicine gets prescribed by a doctor. (Ex. 26, J. Halford Dep., Feb. 22, 2019, 58:14–20.) It is also undisputed that the generics medicines sold by the Teva and Actavis Defendants were not marketed. (Ex. 3, J. Hassler Decl., ¶¶ 2, 5, 8, 11.) Because there is no evidence of causation, summary judgment is appropriate.

2. Oklahoma Physicians Could Not Have Been Misled And The State Identifies None That Were.

But there is more. Oklahoma doctors could not have been misled by any marketing attributable to the Teva or Actavis Defendants into writing harmful prescriptions of Actiq, Fentora, or any other opioid medicine. It is undisputed that the labels of opioid medicines accurately disclosed their risks, such that prescribers and patients knew or should have known of the risks associated with opioid use. (Ex. 15, Actiq Label; Ex. 18, Fentora Label). Moreover, since March 2012, prescribers who wished to prescribe Actiq or Fentora (or their generic equivalents) were required to comply with the stringent requirements of a unique FDA-mandated Risk Evaluation and Mitigation Strategy ("REMS")—specifically tailored to the narrow class of transmucosal immediate release fentanyl ("TIRF") opioids that includes Actiq and Fentora—before writing a prescription of these medicines. 21 U.S.C. § 355-1 (governing REMS programs); Ex. 20, TIRF REMS Program. This includes passing a knowledge assessment, reviewing the FDA-approved medication guides for Actiq and Fentora with the patient, and signing an agreement that the prescriber understands and has counseled her patient about the risks and approved uses of Actiq

[13]Ex. 28, D. Clauw Dep., Mar. 26, 2019, 305:11–305:19; Ex. 29, E. Krebs Dep., Mar. 19, 2019, 41:17–42:5; Ex. 32, G. Schick Dep., Mar. 1, 2019, 53:11–25; Ex. 27, S. Crawford Dep., Feb. 13, 2019, 28:13–24.

and Fentora, including the risks of abuse, addiction, and even death. *Id.* Patients also had to sign an agreement with their prescriber about these same issues before receiving a prescription. *Id.* Clearly, no prescriber who had to certify in writing that he or she was aware of the risks of Actiq and Fentora was misled into writing such a prescription.

3. The State Cannot Try To Proceed "In The Aggregate" Without Any Model Or Evidence That Specific Providers Were Misled.

Unable to provide any evidence to support its causation theory, the State contends that it can prove its claim "in the aggregate" by showing that opioid prescriptions generally increased after 1996 when Purdue launched OxyContin. (Ex. 2, J. Gibson Dep., Mar. 12, 2019, 502:17–503:2; Ex. 66, A. Kolodny Dep., Mar. 7, 2019, 109:16–23; Ex. 67, Aug. 30, 2018 Hearing Tr., 58:2–5; Ex. 68, Nov. 29, 2018 Hearing Tr., 50:20–51:2.) Liability cannot be apportioned by market share. *Case v. Fireboard Corp.*, 743 P.2d 1062 (Okla. 1987) (rejecting the "market share theory of liability" because "the public policy favoring recovery on the part of an innocent plaintiff does not justify the abrogation of the rights of a potential defendant to have a causative link proven between that defendant's specific tortious acts and the plaintiff's injuries where there is a lack of circumstances which would insure that there was a significant probability that those acts were related to the injury."). Prescribers write prescriptions for many different reasons (as noted above), and the State concedes it did no survey or other causal analysis of the impact of the Teva and Actavis Defendants' supposedly false marketing on any prescribing decision or any of the opioid-related harms it now seeks to abate. (Ex. 2, J. Gibson Dep., Mar. 12, 2019, 507:24–508:15; Ex. 21, J. Beaman Dep., Mar. 26, 2019, 129:13–19; *id.* 135:19–136:8) Likewise, the State has no evidence that any single Oklahoma prescriber was influenced by any marketing by any Teva or Actavis Defendant into writing a prescription that harmed any patient—much less any false marketing. At best, the State offers an argument about correlation. But this says nothing about

any false marketing, and, of course, correlation does not equal causation. *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 800 (2011); *Arredondo v. Locklear*, 462 F.3d 1292, 1301–02 (10th Cir. 2006) ("correlation and causation are two different things."); *Norris v. Baxter Healthcare Corp.*, 397 F.3d 878, 885 (10th Cir. 2005) ("A correlation does not equal causation.")

Put simply, it is remarkable that—despite dozens of expert reports and hundreds of depositions in a case of this magnitude and importance—the State has offered no viable method of proving causation as to the Teva and Actavis Defendants: no survey of doctors, no regression model, and no testimony from any Oklahoma doctor that he or she was misled into writing any harmful opioid prescription because of a statement attributable to the Actavis or Teva Defendants. Of course, the reason is clear: there is simply no such evidence. The State's theory of aggregate proof is simply wrong—it cannot imbue the Teva and Actavis Defendants with fault because of Purdue's alleged wrongdoings years before the Teva or Actavis Defendants ever marketed or sold their opioid medicines.[14] Thus, summary judgment should be granted in favor of the Teva and Actavis Defendants.

[14]The State has consistently and repeatedly traced all harm caused by the opioid epidemic to the approval, launch, and marketing of OxyContin in 1996. *See, e.g.*, Ex. 67, Aug. 30, 2018 Hearing Transcript, at 57:17–58:1 (Beckworth, B.) ("You can trace it to a very specific point in time, and that is when OxyContin was brought to market and promoted in an aggressive, concentrated, and targeted way to consumers and doctors, practitioners, prescribers, and pharmacists across this country. That's what happened."); Ex. 9, L. Webster Dep., 101:7–12 ("And the documents we've looked at today, in particular the Richard Sackler speech, suggested that OxyContin would be aggressively promoted that a blizzard of prescriptions would follow; correct?); Ex. 6, Dec. 5, 2017, Hearing Tr., 31:21–32:21 (Beckworth, B.) ("It was started in 1996 with Purdue, in their aggressive marketing campaigns, which we're going to talk about today. But I don't think there can be any dispute that the genesis of why we're all here today started with the Sackler family and their company, Purdue. . .").

IV. NO "UNLAWFUL ACT" SERVES AS THE BASIS FOR THE STATE'S PUBLIC NUISANCE CLAIM.

The State has failed to demonstrate any causal link between the Teva and Actavis Defendants' statements and the public nuisance alleged. But even if the State had done so by clear and convincing evidence, it has put forth ***no*** evidence to show the actual nuisance it alleged—specifically, it has not identified a single unlawful act committed in Oklahoma by the Teva and Actavis Defendants that annoyed, injured, or endangered the health or safety of others.[15]

"For an act or omission to be a nuisance in Oklahoma, it ***must be unlawful***." *Nuncio v. Rock Knoll Townhome Vill., Inc.*, 2016 OK CIV APP 83, ¶ 8, 389 P.3d 370, 374 (emphasis added); *see also Moore v. Texaco, Inc.*, 244 F.3d 1229, 1231 (10th Cir. 2001). And "in the case of a public nuisance [the nuisance] never becomes in itself lawful. It is not unlawful as to the whole public, and lawful as to its constituents, or a part of its constituents. It is absolutely and wholly unlawful." *Revard v. Hunt*, 1911 OK 425, 29 Okla. 835, 119 P. 589, 593; *see also State ex rel. Draper v. Lynch,* 137 P.2d 949, 952 (Okla. 1943) (violation of statute prohibiting lotteries constitutes an "unlawful act" for purposes of bringing a nuisance claim); *James v. State*, 4 Okla. Crim. 587, 112 P. 944 (1911) (violation of gambling statute constitutes an "unlawful act"); *State ex rel. Field v. Hess*, 1975 OK 123 (violation of statute prohibiting selling or trafficking obscene works is an unlawful act such that "[t]he statutory definition of 'nuisance' is satisfied."). The State does not come close to meeting its burden as to the Teva and Actavis Defendants.

A. The State Cannot Identify Any False Marketing Within, Or Directed To, Oklahoma.

[15] Indeed, while the State has not identified any specific Oklahoma law that the Teva and Actavis Defendants allegedly violated, presumably the State bases its public nuisance claim on alleged false marketing in violation of the Oklahoma Consumer Protection Act—a claim the Court already dismissed. This is improper. Regardless, as described above, the State has no evidence that the Teva or Actavis Defendants engaged in any false marketing in Oklahoma or directed to Oklahoma.

The State does not identify any Oklahoma law that the Teva or Actavis Defendants supposedly violated. To the extent the State relies upon a violation of the Oklahoma Consumer Protection Act (a claim that this Court already dismissed), the State does not identify a single instance of false marketing committed by the Teva or Actavis Defendants anywhere, let alone in Oklahoma. The Actavis Defendants and Teva USA did not promote their generic medicines. (Ex. 3, J. Hassler Decl., ¶¶ 2, 6, 8, 10.) And as for Cephalon's branded opioid medicines—Actiq and Fentora are unique short-acting opioids and comprise a miniscule share of the Oklahoma market (*i.e.*, less than .1%). The FDA approved all Actiq-related marketing materials. (Ex. 25, J. Hassler Dep., Jan. 30, 2019, 27:18–28:8; *Id.* 38:15–39:7; Ex. 5, J. Hassler Dep., Feb. 20, 2019, 9:25–10:7.) The State does not identify any false marketing made by Teva USA or Cephalon with a connection to Oklahoma, much less any that physicians relied upon.

To try to avoid this burden, the State has repeatedly cited various marketing materials without any evidence that they reached and influenced Oklahoma prescribers. Counsel for the State even admitted that the State intends to rely upon generalized marketing and other acts that took place outside of Oklahoma to try to support its lone remaining Oklahoma-specific claim. (Ex. 75, Mar. 29, 2018, Hearing Tr., 36:8–10; *id.* 40:23–41:1; 46:11–15; 109:3–8 (Beckworth, B.).) But the State cannot rely upon any alleged false marketing done ***outside Oklahoma*** to sustain its claim of public nuisance ***within Oklahoma*** without violating the Due Process and Commerce Clauses of the United States Constitution. *See, e.g., Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336 (1989) (Commerce Clause "precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State"); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 572–73 (1996) ("Alabama does not have the power, however, to punish BMW for conduct that was lawful where it occurred and that had no

impact on Alabama or its residents."); *Ass'n for Accessible Medicines v. Frosh*, 887 F.3d 664, 672 (4th Cir. 2018) (holding unconstitutional the State of Maryland's attempt to "compel manufacturers and wholesalers to act in accordance with Maryland law outside of Maryland.").[16]

B. The Cephalon Plea Agreement Does Not Constitute A Predicate "Illegal Act" Under The Nuisance Statute.

At most, the State relies upon a plea agreement whereby Cephalon pled guilty to a misdemeanor for off-label promotion of Actiq during an eight-month period in 2001. But it is black-letter law that off-label marketing is not inherently "false or misleading." *United States v. Caronia*, 703 F.3d 149, 165 (2d Cir. 2012); *In re Actimmune Mktg. Litig.*, 614 F. Supp. 2d 1037, 1051 n.6 (N.D. Cal. 2009) ("off-label marketing of an approved drug is itself not inherently fraudulent").[17] The First Amendment also protects "speech promoting the lawful, off-label use of an FDA-approved drug." *Caronia*, 703 F.3d at 169; *see also Sorrell v. IMS Health Inc.*, 564 U.S. 552, 557 (2011) ("[s]peech in aid of pharmaceutical marketing, however, is a form of expression protected by the Free Speech Clause of the First Amendment"). For these very reasons, numerous courts have rejected claims against the Teva Defendants based upon the off-label promotion of opioid medicines. *See Travelers Indem. Co. v. Cephalon, Inc.*, 32 F. Supp. 3d 538, 552 (E.D. Pa. 2014), *aff'd*, 620 F. App'x 82 (3d Cir. 2015); *Ind./Ky./Ohio Reg'l Council of Carpenters Welfare Fund v. Cephalon, Inc.*, No. 13-7167, 2014 WL 2115498, at *5–7 (E.D. Pa. May 21, 2014).

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[16]The Teva and Actavis Defendants are concurrently filing a Motion for Judicial Notice on this constitutional issue and incorporate and rely upon that argument herein.

[17]In addition, "[c]ourts and the FDA have recognized the propriety and potential public value of unapproved or off-label drug use." *United States v. Caronia*, 703 F.3d 149, 153 (2d Cir. 2012); *see also Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 351 n.5 (2001) (off-label prescribing "often is essential to giving patients optimal medical care"); Use of Approved Drugs for Unlabeled Indications, FDA Drug Bulletin, Vol. 12, No. 1, at 4-5 (Apr. 1982) ("accepted medical practice often includes drug use that is not reflected in approved drug labeling") (quoted in *Weaver v. Reagen*, 886 F.2d 194, 198 (8th Cir. 1989)).

Yet the State does not identify any marketing—which is the subject of the Cephalon plea agreement—that took place in Oklahoma. Nor does the State identify any such off-label marketing that misled a single Oklahoma prescriber into writing a harmful opioid prescription. As a result, the misdemeanor plea does not create a genuine issue of material fact to overcome summary judgment on the public nuisance claim. *See generally Cent. Reg'l Employees Ben. Fund v. Cephalon, Inc.*, No. CIV.A. 09-3418 MLC, 2009 WL 3245485, at *4 (D.N.J. Oct. 7, 2009) (dismissing claims against Cephalon and holding reference to misdemeanor plea as insufficient to state a claim).

D. The Teva and Actavis Defendants Cannot Be Held Liable For Statements Made By Third-Parties.

The State also attempts to hold the Teva and Actavis Defendants liable for statements made by third-party organizations and key opinion leaders. But it cannot attribute to Defendants the statements made by others without establishing the existence of an agency relationship between the Defendants and the speaker. *Estate of King v. Wagoner County Bd. of County Com'rs*, 2006 OK CIV APP 118, ¶ 27 ("An agency relationship will not be presumed, and the burden of proving the existence, nature and extent of the relationship ordinarily rests on the party asserting it."). As a matter of law, evidence of funding alone is insufficient. *Murray County v. Homesales, Inc.*, 2014 OK 52, ¶ 15 ("The essential factor in any agency relationship is the principal's right to control the conduct of the agent.") Here, the undisputed facts show that third-party organizations, such as the American Pain Foundation, the Pain and Policy Studies Group, and the American Academy of Pain Management, operated independently and were not influenced by anything the Teva or Actavis Defendants said or did. (Ex. 60, C. Reisner Dep., Dec. 11, 2018, 165:20–166:5; [redacted]; Ex. 13, K. Mount Dep., Dec. 19, 2018, 138:20–140:9; Ex. 63, A. Gilson Dep., Dec. 20, 2019, 413:19–

414:23; Ex. 64, P. Saigh Dep., Jan. 8, 2019, 298:25–302:4; Ex. 11, L. Robin Dep., Jan. 24, 2019, 41:12–41:18; *id.* 42:12–42:16; *id.* 75:6–75:12; *id.* 340:21–341:8.) By the same token, the content of third-party publications and CMEs was created independently from the Teva and Actavis Defendants. (Ex. 12, R. Portenoy Dep., Jan. 24, 2019, 331:6–25; *id.* 467:25–468:6 *id.* 479:10–480:15; Ex. 9, L. Webster Dep., Feb. 18, 2019, 297:24–298:17; 87:25–88:12; *id.* 89:13–91:17; *id.* 96:11–19; *id.* 165:20–166:5; Ex. 11, L. Robin Dep., Jan. 24, 2019, 41:12–18; Ex. 64, P. Saigh Dep., Jan. 8, 2019, 287:2–288:4.) The undisputed evidence shows that key opinion leaders and third-party organizations were independent and not influenced by any act or statement by the Teva or Actavis Defendants. Nor has the State shown that any act or statement made by the Teva or Actavis Defendants to these third-party organizations took place in Oklahoma or was in any way directed at Oklahoma in a way that would allow Oklahoma to regulate it consistent with the Constitution. Nor has the State shown that those third-party statements were received by any prescriber in Oklahoma, or impacted her prescribing decisions.

In short, the State has not identified a single unlawful act made by the Teva and Actavis Defendants in the State of Oklahoma that caused the opioid epidemic. Thus, summary judgment is appropriate.

VI. THERE WAS NO IMPACT ON THE COMMUNITY AS A WHOLE, MUCH LESS ALL AT THE SAME TIME.

Even if the State could show some unlawful conduct, there is no evidence that the alleged nuisance (false marketing) impacted the entire Oklahoma community as a whole. 50 Okla. Stat. § 2 ("A public nuisance is one which affects ***at the same time*** an ***entire community*** . . .") (emphasis added). The State, for instance, cannot show that each Oklahoman received marketing messages from the Teva Defendants, much less false marketing messages. The State cannot show that each Oklahoma received a prescription for an opioid medicine manufactured by the Teva or Actavis

Defendants. And the State certainly cannot show that any allegedly false marketing was the cause of harmful opioid prescriptions for even one Oklahoman—much less "an entire community." *Id.*

The State's legal theory ignores this basic principle of public nuisance law. Oklahoma public nuisance law does not impose liability merely because the State can identify a few marketing statements by a manufacturer it believes were misleading, or merely because the State believes that such marketing may have influenced some Oklahoma prescribers into writing opioid prescriptions. There is no public nuisance ***unless the public as a whole has been harmed by the nuisance***—here, the allegedly false marketing by the Actavis and Teva Defendants. Neither the State nor its experts have attempted to show how many doctors supposedly received any false marketing by the Teva or Actavis Defendants, how many doctors were supposedly deceived into writing opioid prescriptions by such marketing, or how many of those prescriptions supposedly harmed patients. Because there is no evidence that the Actavis and Teva Defendants' false marketing caused harm to "an entire community" of Oklahomans "at the same time," 50 Okla. Stat. § 2, summary judgment is appropriate.

VII. THE STATE'S PUBLIC NUISANCE CLAIM IS BARRED BY THE TWO-YEAR STATUTE OF LIMITATIONS.

The State is subject to 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); *see also* 50 Okla. Stat. § 7 ("[n]o lapse of time can legalize a public nuisance, amounting to an actual obstruction of ***public right.***") (emphasis added). Thus, if there is no interference with a public right, the two-year limitation period applies.

While the Oklahoma Supreme Court has not defined a public right in this context, other courts have recognized that "[a] public right is more than an aggregate of private rights by a large number of injured people. Rather a public right is the right to a public good, such as 'an indivisible resource shared by the public at large, like air, water, or public rights of way.'" *State v. Lead Indus., Ass'n, Inc.*, 951 A.2d 428, 448 (R.I. 2008) (internal citations omitted). Indeed,

> [u]nlike an interference with a public resource, "[t]he manufacture and distribution of products rarely, if ever, causes a violation of a public right as that term has been understood in the law of public nuisance. Products generally are purchased and used by individual consumers, and any harm they cause—even if the use of the product is widespread and the manufacturer's or distributor's conduct is unreasonable—is not an actionable violation of a public right. * * * The sheer number of violations does not transform the harm from individual injury to communal injury.

Id. (quoting Gifford, 71 U. Cin. L. Rev. at 817).

Here, there is no public right implicated. It is implausible for the State to argue, and the Court to find, that any alleged false marketing of prescription opioids to unidentified Oklahoma prescribers is akin to violating a person's right to clean air or unpolluted waterways. There is no public right to be free of advertising of opioid medicines. If the State seeks to regulate the conduct of pharmaceutical manufacturers, it can try to do so through the legislature. It has not done so. No matter how hard the State may try, it cannot turn a series of individualized opioid-related injuries into a public right to be free from commercial activity.

This principle is fatal to the State's claim. Because no public right is implicated, the State was obligated to bring its public nuisance claim within two years after it allegedly was harmed by the nuisance. Indeed, the statute of limitations started to run as soon as the State "kn[e]w[] or, in the exercise of reasonable diligence, should have known of the injury." *Resolution Trust Corp. v. Grant,* 901 P.2d 807, 813 (Okla. 1995). The State has long argued that the opioid epidemic in Oklahoma started in 1996. (Ex. 6, Dec. 5, 2017 Hearing Tr., 31:21–32:21 (Beckworth, B.)). It

further acknowledges that an increase in opioid overdoses in Oklahoma between 1999 and 2012. Pet. ¶ 119. Even the Oklahoma Bureau of Narcotics has long known of opioid-related injuries in Oklahoma. (Ex. 47, M. Woodward Dep., Feb. 12, 2019, 206:16–207:2.) Yet the State waited until June 2017 to bring this lawsuit. Its remaining nuisance claim is therefore time-barred.

VII. THE STATE'S ABATEMENT REMEDY IMPROPERLY SEEKS DAMAGES, IS NOT TAILORED TO THE NUISANCE, AND VIOLATES THE FREE PUBLIC SERVICES RULE.

Abatement is an equitable remedy. *See, e.g., State v. Twin C Convenience Store*, 218 P.3d 529, 532 (Okla. Civ. App. Ct. 2009) (plaintiff sought to "obtain abatement of nuisances by injunction."). The statute makes clear that the target of the abatement must be the "public nuisance." 50 Okla. Stat. § 11 ("A public nuisance may be abated by any public body or officer authorized thereto by law"). Thus, courts can provide "relief against either public or private nuisances by compelling the abatement, or restraining the continuance of the existing nuisance . . . ." *Magnolia Petroleum Co. v. Wright*, 124 Okla. 55, 254 P. 41, 45 (1926) (internal quotations and citations omitted); *see also Simons v. Fahnestock,* 182 Okla. 460 (1938).

Here, the temporary[18] "nuisance" is Defendants' allegedly false marketing. It is not, as the State would like the Court to believe, the damages that resulted from any alleged false marketing. Thus, to be a viable form of relief, the abatement remedy must be limited to curtailing the marketing and promotion of opioid medicines in Oklahoma. But the Abatement Plan proposed by the State and its expert, Dr. Ruhm, does no such thing. Instead, [redacted]

[18] By seeking to abate the alleged nuisance, the State necessarily brings a claim for a temporary, as opposed to permanent, public nuisance. On April 11, 2019, the State conceded that it is asserting only a "temporary nuisance." (Ex. 73, Apr. 11, 2019 Hearing Tr., 52–53); *see also Moneypenney v. Dawson*, 2006 OK 53, ¶ 9, 141 P.3d 549, 553 ("As a general proposition, '[w]hen a cause of an injury is abatable either by an expenditure of labor or money, it will not be held permanent.'" *Id.* (quoting *City of Ardmore v. Orr*, 1913 OK 50, 129 P. 867) (alteration in original)).

[redacted]. (Ex. 76, Ruhm Supp. Disclosure, 1.) The State simply ignores that the Teva and Actavis Defendants no longer promote or market any opioid medicines in Oklahoma. (Ex. 17, J. Hassler Dep., Aug. 29, 2018, 60:21–61:1.)

In addition to failing to address the nuisance itself through injunctive relief, the Abatement Plan is flawed for another fundamental reason: it seeks to provide money to the State for numerous expenses that it otherwise provides as a sovereign, such as emergency services and drug courts.[19] This is contrary to public policy and common law. The "free public services doctrine," also known as the municipal cost recovery rule, "provides that, absent specific statutory authorization or damage to government-owned property, a county cannot recover the costs of carrying out public services from a tortfeasor whose conduct caused the need for the services." 32 A.L.R.6th 261 (Originally published in 2008). The rationale being that "state legislatures establish local governments to provide core services for the public and pay for these services by spreading the costs to all citizens through taxation." *Baker v. Smith & Wesson Corp.*, No. CIV.A. 99C-09-283-FS, 2002 WL 31741522, at *5 (Del. Super. Ct. Nov. 27, 2002). The Abatement Plan ignores that legal principle. *See Walker Cty. v. Tri-State Crematory,* 284 Ga. App. 34, 40, 643 S.E.2d 324, 329 (2007) (County that established a crisis center, morgue, and other facilities to recover, move, store, and identify human remains discovered on a crematorium's property was barred by the free public services doctrine).

[19]The Abatement Plan contains numerous other examples of services that the State already provides for which it seeks an award of money. Jessica Hawkins, who testified as an expert on the State's Abatement Plan and stated that many of the proposals are based off of programs already in place. (Ex. 77, J. Hawkins Dep., 90:11–20; 185:20–22; 239:25–240:3.)

In short, the State chose to dismiss its claims for past and future damages, and now seeks only abatement relief. But the State's Abatement Plan is not injunctive (but just a concealed form of damages), is not limited to addressing the alleged public nuisance, and is precluded by the free public services doctrine. Accordingly, summary judgment should be granted to the Teva and Actavis Defendants on this claim.

VIII. JOINT AND SEVERAL LIABILITY DOES NOT APPLY AS A MATTER OF LAW.

Even if the Court finds that the State's public nuisance claim is not flawed as a matter of law and can survive summary judgment (and it should not), there is no legal or factual basis to allow for joint and several liability. In 2009, Oklahoma sought to curb "lawsuit abuse" and did so, in part, by limiting the applicability of joint and several liability.[20] Joint and several liability is now nearly obsolete under Oklahoma law because the legislature deemed it contrary to public policy.

"Oklahoma's several liability statute now apportions liability by degree of fault rather than imposing joint liability." *Loos v. Saint-Gobain Abrasives, Inc.*, No. CIV-15-411-R, 2016 WL 5017335, at *6 (W.D. Okla. Sept. 19, 2016). The statute does make clear, however, that it "shall not apply to actions brought by or on behalf of the state." 23 Okla. Stat. § 15 (West). But the statute does not automatically apply joint and several liable in any action brought by the State—which would improperly ***expand*** the concept of joint and several liability (the very thing the Oklahoma legislature sought to avoid). Instead, common law principles apply, and not a single Oklahoma case brought since the passage of this statute has found joint and several liability.

[20]The statute now precludes apportionment of joint and several liability, stating: "In any civil action based on fault and not arising out of contract, the liability for damages caused by two or more persons shall be several only and a joint tortfeasor shall be liable only for the amount of damages allocated to that tortfeasor." 23 Okla. Stat. § 15.

Under Oklahoma's common law, in order to be jointly and severally liable, the distinct acts of each defendant must "combine to produce directly a single injury." *Union Tex. Petroleum Corp. v. Jackson*, 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*, 180 P.2d 840, 843 (Okla. 1947); *Delaney v. Morris*, 145 P.2d 936, 939 (Okla. 1944); *White v. Taylor*, 728 P.2d 525, 526 (Okla. Ct. App. 1986). Here, there is no single injury. The State alleges a host of different individualized injuries to various consumers 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). Even the Abatement Plan seeks to address a number of different types of social harms and public expenses. And the State makes no effort to show that the different marketing (if any) by different manufacturers of different opioid medicines led to the same injuries.[21] While the State has repeatedly invoked the mantra of "joint and several liability," it lacks any evidence to apply this doctrine.[22]

Oklahoma Supreme Court precedent makes clear that joint and several liability cannot apply here. In *Delaney v. Morris*, the Oklahoma Supreme Court held that the trial court erred by failing to instruct the jury that one defendant, Delaney, "could not be held liable for the injuries inflicted by [his co-defendant] Ark." 145 P.2d at 939. In that case, both defendants caused

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[21] It is implausible to suggest, and undisputed that the State cannot show, that the marketing of short-acting opioid medicines intended for breakthrough cancer pain led to any injuries, let alone combined to produce the same injuries as the marketing of broadly-indicated opioid medicines (such as OxyContin).

[22] It is apparent that the State confuses the concepts of causation and joint and several liability. (Ex. 73,, Apr. 11, 2019 Hearing Tr., 133:17–20 ("Again, we don't have to prove any underlying unlawful conduct. The nuisance itself is unlawful."; *id.* at 78:20–25.) (Beckworth, B.)) Of course, before the Court can even consider the apportionment of liability, it must determine whether, and which, Defendants are liable.

pollution that harmed the plaintiff Morris's property. But their pollution entered Morris's property through different ravines that were separate for a stretch before ultimately intersecting: "the two ravines carrying these polluted streams had no relation to each other until they joined." *Id.* at 938. As a result, there were "two separate and distinct sources of pollution which later, according to plaintiff's evidence, commingled and affected the land at a certain point but which prior thereto had left obvious and ascertainable separate and distinct effects upon other portions of the land." *Id.* The trial court gave jury instructions "wherein the jury was permitted to find a joint judgment against defendants," but the Supreme Court held that there was "no rule of law that would have authorized Morris to recover against Delaney for the pollution cast onto Morris's land by Ark where it was so clearly distinct and separable from that of Delaney." *Id* at 939. In this case, similarly, the State cannot hold the Teva and Actavis Defendants responsible for injuries caused by other Defendants' allegedly improper promotion and sale of their own opioid products.

Likewise, in *Watson v. Batton,* the plaintiff claimed injuries as the result of two automobile accidents that occurred six months apart. *Watson v. Batton*, 958 P.2d 812, 813 (Okla. Civ. App. 1998). The plaintiff sued the two other drivers involved in the two accidents, arguing both were liable for her injuries because of the combined effect of the two accidents, which she argued could not be separated. *Id.* The Court of Civil Appeals rejected the argument, finding that:

> [T]he accidents were separate. Each accident was an individual occurrence. While there may be similarities between the accidents, the same could be said of any automobile accident, even if different plaintiffs and defendants were involved. [The Plaintiff's] contention that she suffered an "indivisible injury" is rejected. She purportedly received injuries from each automobile accident. ***The injuries from the first accident . . . may have been exacerbated by the second accident . . . but remain separate and distinct.***

Id. at 814 (emphasis added) (analyzing injury in the context of misjoinder).

Here, the State seeks to hold the Teva and Actavis Defendants responsible for an array of different types of injuries associated with opioid usage—not a single injury. And, as in *Delaney* and *Watson*, these injuries purportedly stem from entirely separate marketing conduct by entirely separate Defendants (and third parties) at different times and to different audiences. For instance, the State contends that Purdue created the opioid epidemic in 1996 through its marketing of OxyContin. Pet. ¶ 53. But the Teva Defendants did not even start promoting any opioid medicines until many years later. Thus, they cannot be held jointly and severally liable for injuries stemming from Purdue's conduct in the marketing of OxyContin.

Notably, the State has done nothing to try to link any particular category of injury that requires abatement to any marketing conduct by the Teva or Actavis Defendants. Nor has the State offered any basis for apportioning harm among the Defendants, such as by identifying what marketing attributable to what Defendants caused what opioid prescriptions to be written. Indeed, the State has even refused to produce the information that would be necessary to do such an analysis. This failure, of course, does not render any harm "indivisible." It merely means that the State cannot meet its causation burden—and certainly cannot proceed on a joint and several theory.

In short, even if the Court finds that a genuine issue of material fact exists as to liability, that does not mean that joint and several liability applies. It does not.

CONCLUSION

For the foregoing reasons, the Court should grant summary judgment in favor of the Teva and Actavis Defendants, consistent with Oklahoma law and the United States Constitution.

Dated: May 2, 2019

Respectfully submitted,

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I hereby certify that a true and correct copy of the foregoing was emailed this 2nd day of May 2019, to the following:

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S505508

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

DECLARATION OF NICK MERKLEY IN SUPPORT OF DEFENDANT WATSON LABORATORIES, INC., ACTAVIS LLC, ACTAVIS PHARMA, INC., AND TEVA PHARAMCEUTICALS USA, INC.'S MOTION FOR SUMMARY JUDGMENT

I, Nick Merkley, declare as follows:

1. I am an attorney at law admitted to practice pro hac vice in the above-captioned matter. I am a Partner at the law firm of Morgan, Lewis & Bockius LLP and counsel of record for Defendants Watson Laboratories, Inc. ("Watson Labs"), Actavis LLC ("Actavis LLC"), Actavis Pharma, Inc. ("Actavis Pharma"), and Teva Pharmaceuticals USA, Inc. ("Teva USA") in the above-captioned matter.

2. I have personal knowledge of the facts set forth herein and the admissibility of the exhibits attached here, and I could and would competently testify to such facts if called to do so.

3. A true and correct copy of the April 4, 2019 Notice of Voluntary Dismissal of Claims, is attached as **Exhibit 1**.

4. A true and correct copy of pages 485–492, 498–509, 519–522, of the Mar. 12, 2019, Deposition of James Gibson, is attached as **Exhibit 2**.

5. A true and correct copy of the Mar. 15, 2019, Declaration of John Hassler, is attached as **Exhibit 3**.

6. A true and correct copy of pages 20–24, 31–34, 37–40, 297–300, 333–335 of the Jan. 23, 2019, Deposition of Christine Baeder, is attached as **Exhibit 4**.

7. A true and correct copy of pages 8-11, 45-48, 61-66, 270-274, of the Feb. 20, 2019, Deposition of John Hassler, is attached as **Exhibit 5**.

8. A true and correct copy of pages 30–33, 61–64, of the Dec. 5, 2017, Hearing Transcript, is attached as **Exhibit 6**.

9. A true and correct copy of pages 57–60, of the Sept. 27, 2018, Hearing Transcript, is attached as **Exhibit 7**.

10. A true and correct copy of pages 33–35, of the Oct. 3, 2018, Hearing Transcript, is attached as **Exhibit 8**.

11. A true and correct copy of pages 86–92, 95–97, 100–02, 120–23, 164–167, 222–24, 277–86, 290–92, 296-301, 374-376, 505-507, of the Feb. 18, 2019, Deposition of Lynn Webster, is attached as **Exhibit 9**.

12. A true and correct copy of pages 79–83, 292–95, 300–10, 312–15, 318–24, 326–28, of the Feb. 26, 2019, Deposition of Scott Fishman, is attached as **Exhibit 10**.

13. A true and correct copy of pages 40–43, 74–76, 339–46 & Ex. 4, of the Jan. 24, 2019, Deposition of Lisa Robin, is attached as **Exhibit 11**.

14. A true and correct copy of pages 294–96, 298–300, 330–32, 397–401, 457–469, 473–81, 497–99, of the Jan. 24, 2019, Deposition of Russell Portenoy, is attached as **Exhibit 12**.

15. A true and correct copy of pages 137–41, 147–51, of the Dec. 19, 2018, Deposition of Kenneth Mount, is attached as **Exhibit 13**.

16. A true and correct copy of the Original Petition, filed by the State of Oklahoma on July 3, 2017, is attached as **Exhibit 14**.

17. A true and correct copy of OKAG-00111950-68, Actiq Label, is attached as **Exhibit 15**.

18. A true and correct copy of pages 124–26, of the Jan. 29, 2018, Deposition of John Hassler, is attached as **Exhibit 16**.

19. A true and correct copy of pages 27–30, 59–62, 89–91, of the Aug. 29, 2018, Deposition of John Hassler, is attached as **Exhibit 17**.

20. A true and correct copy of OKAG-00111970–85, Fentora Label, is attached as **Exhibit 18**.

21. A true and correct copy TEVA_OK_14089419–23, Sept. 25, 2006, Fentora New Drug Application Approval Letter, is attached as **Exhibit 19**.

22. A true and correct copy of TEVA_OK_14089989–14090004, TIRF REMS Access Program, Initial Approval December 2011, Most Recent Modification August 2017, is attached as **Exhibit 20**.

23. A true and correct copy of pages 111–13, 127–30, 134–37, 202–04, 207–12, 220–27 of the Mar. 26, 2019, Deposition of J. Beaman, is attached as **Exhibit 21**.

24. A true and correct copy of pages 13–16, 117–21, 135–38, 176–78, 403–05 of the Mar. 6, 2019, Deposition of Adriane Fugh-Berman, is attached as **Exhibit 22**.

25. A true and correct copy of pages 88–91, 131–34, 223–26, 255–57 of the Mar. 8, 2019, Deposition of Mel Pohl, is attached as **Exhibit 23**.

26. A true and correct copy of pages 51–53, 110–13 of the Feb. 26, 2019, Deposition of Art Van Zee, is attached as **Exhibit 24**.

27. A true and correct copy of pages 26–29, 37–40, 258–63 of the Jan. 30, 2019, Deposition of John Hassler, is attached as **Exhibit 25**.

28. A true and correct copy of pages 25–28, 77–79, 84–88, 92–94, 96–99, 171–76, 242–45, 247–49 of the Feb. 22, 2019, Deposition of J. Halford, is attached as **Exhibit 26**.

29. A true and correct copy of pages 27–29, 37–39, 106–10, 177–79, 217–19, 252–58, 263–65 of the Feb. 13, 2019, Deposition of Steven Alan Crawford, is attached as **Exhibit 27**.

30. A true and correct copy of pages 96–98, 304–06, of the Mar. 26, 2019, Deposition of Daniel Clauw, is attached as **Exhibit 28**.

31. A true and correct copy of pages 40–43, 177–79, of the Mar. 19, 2019, Deposition of Erin Krebs, is attached as **Exhibit 29**.

32. A true and correct copy of pages 177–80, 189–91, of the Mar. 28, 2019, Deposition of M. Rosenblatt, is attached as **Exhibit 30**.

33. A true and correct copy of pages 65–67, 85–91, of the Mar. 22, 2019, Deposition of David Courtwright, is attached as **Exhibit 31**.

34. A true and correct copy of pages 13–15, 35–38, 46–49, 52–56, 83–85, of the Mar. 1, 2019, Deposition of Gary Schick, is attached as **Exhibit 32**.

35. A true and correct copy of pages 47–50, of the Mar. 13, 2019, Deposition of L. Ollar-Shoemake, is attached as **Exhibit 33**.

36. A true and correct copy of pages 84–86, of the Feb. 11, 2019, Deposition of B. Beasley, is attached as **Exhibit 34**.

37. A true and correct copy of pages 71–73, 75–77, 229–32, 255–58, of the Feb. 12, 2019, Deposition of B. Beasley, is attached as **Exhibit 35**.

38. A true and correct copy of pages 51–56, 97–102, of the Mar. 14, 2019, Deposition of J. Beaman, is attached as **Exhibit 36**.

39. A true and correct copy of the Complaint and Order in *State v.* [redacted], *M.D.*, is attached as **Exhibit 37**.

40. A true and correct copy of the Criminal Information in *State v.* [redacted], is attached as **Exhibit 38**.

41. A true and correct copy of the Third Amended Information in *State v.* [redacted], is attached as **Exhibit 39**.

42. A true and correct copy of the Amended Information in *State v.* [redacted], is attached as **Exhibit 40**.

43. A true and correct copy of the Press Release: "Attorney General Hunter Charges Doctors with Five Counts of Second Degree Murder," is attached as **Exhibit 41**.

44. A true and correct copy of the Complaint in *State v.* [redacted], *M.D.*, is attached as **Exhibit 42**.

45. A true and correct copy of the Order Granting Motion for Default Judgment and Revocation of License in *State v.* [redacted], is attached as **Exhibit 43**.

46. A true and correct copy of the Final Order of Revocation in *State v.* [redacted] *M.D.*, is attached as **Exhibit 44**.

47. A true and correct copy of the Voluntary Submittal to Jurisdiction in *State v.* [redacted], is attached as **Exhibit 45**.

48. A true and correct copy of the Order Accepting Voluntary Submittal to Jurisdiction in *State v.* [redacted], is attached as **Exhibit 46**.

49. A true and correct copy of pages 49–52, 205–08, 246–48, 259–64, of the Feb. 12, 2019, Deposition of M. Woodward, is attached as **Exhibit 47**.

50. A true and correct copy of pages 125–28, 218–20, of the Jan. 22, 2019, Deposition of M. Stewart, is attached as **Exhibit 48**.

51. A true and correct copy of pages 302–304, 380–83, 392–97, 510–12, of the Mar. 8, 2019, Deposition of A. Kolodny, is attached as **Exhibit 49**.

52. A true and correct copy of pages 45–47, 63–65, 292–94, 304–07, of the Mar. 11, 2019, Deposition of James Gibson, is attached as **Exhibit 50**.

53. A true and correct copy of pages 47-49, 65–67, 144-145, of the Mar. 6, 2019, Deposition of Samuel Martin, is attached as **Exhibit 51**.

54. A true and correct copy of TEVA_OK_01287333–45, Teva Unrestricted Educational Grant Agreement, is attached as **Exhibit 52**.

55. A true and correct copy of US Policy-205-Independent Medical Education Grants, Effective August 2013, TEVA_OK_01498888, is attached as **Exhibit 53**.

56. A true and correct copy of Independent Medical Education Grants Policy, Effective January 26, 2009, TEVA_OK_01324842, is attached as **Exhibit 54**.

57. A true and correct copy of C–126 Cephalon Policy on Company Giving, Effective July 2008, TEVA_OK_00509708, is attached as **Exhibit 55**.

58. A true and correct copy of Cephalon Policy on Third–Party Grant Requests, Effective January 2008, TEVA_OK_00510687, is attached as **Exhibit 56**.

59. A true and correct copy of Marketing Policy on Grants, Effective June 2007, TEVA_OK_00510579, is attached as **Exhibit 57**.

60. A true and correct copy of Company Giving, Effective July 2008, TEVA_OK_01324445, is attached as **Exhibit 58**.

61. A true and correct copy of Cephalon Policy on Third-Party Grant Requests, TEVA_OK_00510687, is attached as **Exhibit 59**.

62. A true and correct copy of pages 164–67, of the Dec. 11, 2018, Deposition of Carly Reisner, is attached as **Exhibit 60**.

63. A true and correct copy of the [redacted], is attached as **Exhibit 61**.

64. A true and correct copy of the [redacted], is attached as **Exhibit 62**.

65. A true and correct copy of pages 412–15, of the Dec. 20, 2018, Deposition of Aaron Gilson, is attached as **Exhibit 63**.

66. A true and correct copy of pages 286–89, 297–303, of the Jan. 8, 2019, Deposition of Philip Saigh, is attached as **Exhibit 64**.

67. A true and correct copy of pages 133–42, 153–58, of the Mar. 15, 2019, Deposition of Renzi Stone, is attached as **Exhibit 65**.

68. A true and correct copy of pages 22–25, 108–10, of the Mar. 7, 2019, Deposition of Andrew Kolodny, is attached as **Exhibit 66**.

69. A true and correct copy of pages 57–59, of the Aug. 30, 2018, Hearing Transcript, is attached as **Exhibit 67**.

70. A true and correct copy of pages 49–52, of the Nov. 29, 2019, Hearing Transcript, is attached as **Exhibit 68**.

71. A true and correct copy of pages 340–49, of the Jan. 31, 2019, Deposition of John Hassler, is attached as **Exhibit 69**.

72. A true and correct copy of pages 191–93, 196–98, of the Feb. 27, 2019, Deposition of John Hassler, is attached as **Exhibit 70**.

73. A true and correct copy of pages 278–81, of the Mar. 27, 2019, Deposition of John Duncan, is attached as **Exhibit 71**.

74. A true and correct copy of pages 107–09, of the Mar. 28, 2019, Deposition of Christopher Ruhm, is attached as **Exhibit 72**.

75. A true and correct copy of pages 11–17, 51–54, 77–79, 132–134 of the Apr. 11, 2019, Hearing Transcript, is attached as **Exhibit 73**.

76. A true and correct copy of the TIRF REMS, available at http://www.accessdata.fda.gov/drugsatfda_docs/rems/TIRF_SS_2015-12-21_REMS_FULL.pdf. is attached as **Exhibit 74**.

77. A true and correct copy of pages 35–37, 39–42, 45–47, 108–10, of the Mar. 29, 2018, Hearing Transcript, is attached as **Exhibit 75**.

78. A true and correct copy of the Christopher Ruhm Supplemental Disclosure is attached as **Exhibit 76**.

79. A true and correct copy of pages 89–91, 184–86, 238–41, of the Mar. 6, 2019, Deposition of Jessica Hawkins, is attached as **Exhibit 77**.

80. A true and correct copy of the Melanie Rosenblatt Expert Disclosure is attached as **Exhibit 78**.

[*Signature Page Follows*]

I STATE UNDER PENALTY OF PERJURY UNDER THE LAWS OF OKLAHOMA THAT THE FOREGOING IS TRUE AND CORRECT.

Dated: April 23, 2019.

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EXHIBIT 1

IN THE DISTRICT COURT OF CLEVELAND COUNTY
STATE OF OKLAHOMA

STATE OF OKLAHOMA, ex rel., MIKE HUNTER, ATTORNEY GENERAL OF OKLAHOMA,	§	
Plaintiff,	§	
vs.	§	Case No. CJ-2017-816 The Honorable Thad Balkman
(1) PURDUE PHARMA L.P.; (2) PURDUE PHARMA, INC.; (3) THE PURDUE FREDERICK COMPANY; (4) TEVA PHARMACEUTICALS USA, INC.; (5) CEPHALON, INC.; (6) JOHNSON & JOHNSON; (7) JANSSEN PHARMACEUTICALS, INC.; (8) ORTHO-McNEIL-JANSSEN PHARMACEUTICALS, INC., n/k/a JANSSEN PHARMACEUTICALS, INC.; (9) JANSSEN PHARMACEUTICA, INC., n/k/a JANSSEN PHARMACEUTICALS, INC.; (10) ALLERGAN, PLC, f/k/a ACTAVIS PLC, f/k/a ACTAVIS, INC., f/k/a WATSON PHARMACEUTICALS, INC.; (11) WATSON LABORATORIES, INC.; (12) ACTAVIS LLC; and (13) ACTAVIS PHARMA, INC., f/k/a WATSON PHARMA, INC.,	§	William C. Hetherington Special Discovery Master
Defendants.	§	

NOTICE OF VOLUNTARY DISMISSAL OF CERTAIN CLAIMS WITHOUT PREJUDICE

Pursuant to Okla. Stat. tit. 12, §§ 683 and 684, the State of Oklahoma hereby voluntarily dismisses the following causes of action without prejudice to refiling: (1) violation of the Oklahoma Medicaid False Claims Act, (2) violation of the Oklahoma Medicaid Program Integrity Act, (3) Fraud (Actual and Constructive) and Deceit, (4) Unjust Enrichment, and (5) compensatory damages, including past damages stemming from its public nuisance claim. The State does not

dismiss, and will continue to pursue, its cause of action for public nuisance and remedy of abatement under Okla. Stat. tit. 50, §§ 1–2, 8, 11, as well as any and all further equitable relief deemed just and proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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EXHIBIT 2

IN THE DISTRICT COURT OF CLEVELAND COUNTY
STATE OF OKLAHOMA

STATE OF OKLAHOMA, ex rel.,
MIKE HUNTER, ATTORNEY GENERAL
OF OKLAHOMA,
Plaintiff,
vs. No. CJ-2017-816
PURDUE PHARMA L.P.;
PURDUE PHARMA, INC.;
THE PURDUE FREDERICK
COMPANY;
TEVA PHARMACEUTICALS
USA, INC.;
CEPHALON, INC.;
JOHNSON & JOHNSON;
JANSSEN PHARMACEUTICALS, INC.;
ORTHO-McNEIL-JANSSEN
PHARMACEUTICALS, INC., n/k/a
JANSSEN PHARMACEUTICALS, INC.;
JANSSEN PHARMACEUTICA,
INC., n/k/a JANSSEN
PHARMACEUTICALS, INC.;
ALLERGAN, PLC, f/k/a
ACTAVIS PLC, f/k/a ACTAVIS, INC.,
f/k/a WATSON PHARMACEUTICALS, INC.;
WATSON LABORATORIES, INC.;
ACTAVIS LLC; and
ACTAVIS PHARMA, INC.,
f/k/a WATSON PHARMA, INC.,

Defendants.
_____/

VOLUME II

VIDEOTAPED DEPOSITION OF JAMES GIBSON, PhD
TAKEN ON BEHALF OF THE DEFENDANTS
ON MARCH 12, 2019, BEGINNING AT 8:24 A.M.
IN OKLAHOMA CITY, OKLAHOMA

VIDEOTAPED BY: Greg Brown
REPORTED BY: Lacy Antle, CSR, RPR

Q Okay. And then you have a category of damages called past damages, correct?
A I do.
Q Okay. And as I read your report there are at least $4 billion worth of past damages that you're -- you've calculated, correct?
A I think it's about 4.5, yes.
Q Sure. And then there's also future damages that you've calculated as well, correct?
A In two ways, yes.
Q Fair enough. And for future damages, that's at least another $8 billion worth of damages; is that correct?
A Is that right?
Q I said at least, I'm not holding you to a specific number but...
A I'm looking at page 40 and it is at least.
Q Okay.
A To the state of Oklahoma. The state government of Oklahoma.
Q So the state of Oklahoma. And so it's your testimony that the defendants in this case, for purposes of damages owed, owe the amounts of damages that you -- would owe the amounts of damages that you've calculated and we just talked about, correct?

A Yes.

Q Okay. And at some point you're going to get up at trial and testify that the damages -- the defendants owe those billions of dollars worth of damages, correct?

A If -- I believe that's the case, yes.

Q Okay. Do you know who the defendants are in this case?

A I'm a little bit embarrassed to say I don't know very -- I know the names of them, but I don't know very much about them.

Q Okay. And can you -- can you provide me with the names of the defendants in this case?

A Purdue, Teva, Johnson & Johnson, and I could be wrong, but I think that's it.

Q From your perspective, there are no -- sitting here today you can't identify any other defendants that may be part of this case?

A I cannot.

Q Okay. Have you ever heard of a company named Watson Laboratories?

A I've read about Watson Laboratories in the newspaper and that's it.

Q Okay. Do you know whether they're a defendant in this case?

A I'm sorry, I don't actually.
Q And fair to say you don't know anything about that company, other than what you might have read in the newspaper?
A It is fair to say that I know very little about it.
Q And you're not giving any opinion on that particular company, correct?
A I'm giving no opinion on any particular company.
Q Okay. Fair enough.
And have you ever heard of a company named Actavis, Inc.?
Have you ever heard of a company named Actavis, Inc.?
A I have not.
Q So you don't know one way or the other whether they're a defendant in this case or not a defendant in this case?
A I do not.
Q Have you ever heard of a company named Actavis, LLC?
A I have not.
Q Do you know one way or the other whether they're a defendant in this case or not?

A I do not.
Q It's fair to say you don't know anything about either Actavis, Inc. or Actavis, LLC?
A It is fair to say that.
Q Have you ever heard of a company named Cephalon?
A I don't think so.
Q It's fair to say you don't know whether Cephalon's a defendant in this case or not?
A It's fair to say that.
Q And it's fair to say you're not giving an opinion about Cephalon?
A I think it's fair to say that.
Q It's fair to say that you're not aware of any particular prescription medicines, whether opioids or not opioids that Cephalon may manufacture?
A I'm not aware of that.
Q Have you ever heard of a medicine Fentora?
A I'm pausing because it sounds like other things, but I don't think I have actually.
Q Have you ever heard of the medicine Actiq?
A Could you spell it for me, sir?
Q Sure, A-C-T-I-Q.
A I have not.

Q Fair to say since you don't -- never heard of that you don't know the indications for those particular medicines?

A I do not.

Q Fair -- fair to say you don't know how many, if any, of those medicines Actiq or Fentora were ever prescribed by doctors in the state of Oklahoma?

A I do not.

Q Fair to say that with respect to those medicines, Actiq or Fentora, to the extent any were prescribed by doctors in Oklahoma, you're not aware of why they would have been prescribed?

A I'm not aware.

Q Fair to say that since you're not familiar with the company Cephalon, you're not giving any opinion regarding any marketing that Cephalon may or may not have done in the state of Oklahoma?

A I am not.

Q Fair to say that since you've never heard of the company Cephalon, you're not giving an opinion one way or the other about the effect of any marketing that Cephalon may or may not have done in the state of Oklahoma?

A I'm not offering any opinion on that.

Q And I think you mentioned Teva, is that correct?
A I did.
Q Okay. Do you know what specific Teva entity is named as a defendant in this case?
A I really have no idea.
Q Have you ever heard of the name Teva Pharmaceuticals USA?
A No.
Q Do you know whether Teva Pharmaceuticals USA is a defendant in this case?
A I do not.
Q Fair to say that -- well, do you know any -- are you aware of any -- any medicines, opioid or otherwise, that Teva Pharmaceuticals USA manufacturers?
A I am not.
Q Since you're not aware whether Teva Pharmaceuticals USA -- strike that.
Are you aware of any conduct that Teva Pharmaceuticals USA has engaged in in the state of Oklahoma?
A I am not.
Q And fair to say you've not reviewed any marketing materials associated with Teva

Pharmaceuticals USA?

A In conjunction with this report I have not.

Q Well, fair to say that you're not giving an opinion with respect to any marketing materials attributable to Teva Pharmaceuticals USA?

A It is fair to say that.

Q Fair to say you're not giving any opinion about the effect of any marketing that Teva Pharmaceuticals USA may or may not have done in the state of Oklahoma?

A It's fair to say.

Q To the extent any Oklahoma prescriber wrote a prescription for any opioid medicines -- medicine from -- strike that.

Do you know whether any Oklahoma prescriber has written a prescription for any opioid medicine manufactured by Teva Pharmaceuticals USA?

A I do not.

Q Do you know -- and because you don't know that -- that answer to that question, is it fair to say you don't to the extent a prescriber did, why the prescriber would have written such a prescription?

A I do not know that.

Q We talked about your medically unnecessary -- the calculations you did for, I'm calling them medically unnecessary prescriptions. I think you talked about -- you described them as your FCA calculations, do you recall that?

A I do.

Q Okay.

A The statutory penalty calculations.

Q Is that -- whatever's easiest for us to reference, but what's on page 50?

A The only thing I'll say is that I believe the title on page 50 is statutory -- no, it's -- on page 43 the title is statutory penalties.

Q Okay.

A And maybe that's a better name, if that's okay with you?

Q That's -- I'm happy to, whatever is -- so we're both talking about the same thing, I'm happy -- happy to do that.

The statutory penalty calculations that you've done are based on Dr. Beaman's review of actual medical records for particular prescriptions, correct?

A The medical records belong to the patients, prescriptions in the medical records of

A That is correct.

Q Okay. So I did some math, and again, I'm not a statistician so I just used a Google calculator, as I understand it, Dr. Beaman, if you take 38,492 and divide it into 9 million, that is approximately .4 percent of all prescriptions submitted to Medicaid over 21 years; does that sound about right to you?

A Two corrections. I'm afraid I think you said 90 million rather than 9 million. Am I wrong about that?

Q Well, this says 9 million, but if I said 90, I meant to say 9 -- I meant to say 9 million.

A Let's assume 9 million.

Q Let's assume 9 million?

A Yes. And the principle there is that the size of the sample is virtually entirely unrelated to the size of the population, so that number is irrelevant to me.

Q And fair enough, and I understand that's your position. I'm just trying to make sure I understand what was done because to be perfectly honest what makes sense to a statistician may not make sense to a lawyer. So I just wanted to make sure I'm clear as to what was done.

A Fair enough.

Q So as I understand it then, out of the nine million opioid prescriptions submitted to Oklahoma Medicaid over a 21-year period, Dr. Beaman would have reviewed .4 percent of those prescriptions?

A Yes.

Q Okay.

A By your -- by your arrhythmic -- I'm accepting your arithmetic.

Q Fair enough. And if it's wrong I'm blaming Google Maps -- or Google calculator, but let's just assume it's correct.

Do you know, with respect to any of those .4 percent of prescriptions, do you know whether Dr. Beaman interviewed any patients?

A I don't know his methodology for making the determination.

Q Did you interview any patients?

A Absolutely not.

Q Okay. Did -- do you know whether Dr. Beaman interviewed any doctors?

A I don't know his methodology.

Q Did you interview any doctors?

A I did not.

Q Okay. And then, as I understand it as well, Dr. Beaman reviewed -- if you take the 38,492 prescriptions out of that universe, he identified 8,059 prescriptions that were medically unnecessary; is that correct?

A I believe that is correct. Yes, 8,059 I think is the right number.

Q And you've identified in the -- on page 50, 1,000 -- 1,061,634 prescriptions that were medically unnecessary?

A That's correct.

Q So again, according to my Google calculator, and we can blame Google if it's wrong, Dr. Beaman then reviewed less than one percent of the approximately one million prescriptions that you contend were medically unnecessary; is that fair?

A I'm stumbling over "you contend." I don't contend anything about medically unnecessary. I accept the judgment of Dr. Beaman.

Q Okay. But you've identified -- in your report you've identified the number of medically unnecessary prescriptions as 1,061,634 correct?

A That's correct.

Q Dr. Beaman has not identified 1,061,634 prescriptions that were medically unnecessary,

correct?

A Correct.

Q And instead, Dr. Beaman identified 8,059 prescriptions that he believes were medically unnecessary?

A I'm with you, and I agree with that.

Q Okay. And so as I understand it, that is less than one percent of the approximately 1,061,634 prescriptions that the State seeks billions of dollars in damages for, correct?

A I'll accept your arithmetic.

Q Okay.

A Yeah.

Q Fair enough. You have also, Dr. Gibson, calculated past damages and future damages, based upon the State's theory in this case, correct?

A That's correct.

Q Okay. And we talked about the numbers earlier, but it's in the billions of dollars as to past damages and future damages, correct?

A It is in the billions of dollars, yes.

Q And they go all the way back to 1996, for some categories at least?

A Well, I'm not 100 percent sure that that's true under the following logic. Many of these time

series, series of data across years, reach a zero point at a year later than 1996, I believe, from memory, that year may be 2008 for NAS. I know for WONDER it's '98 is a number greater than zero, and '97 and '96 is zero, and I think something similar to that is true of OUD.

So while I'm making the estimate all the way back to 1996, I could be shown to be wrong because I can't remember every single one of the series. I believe that the estimates for those two years are going to be pretty close to zero.

Q And so if you -- say take 1998 then?

A Okay.

Q Do you know which manufacturers actually had FDA approved opioids in 1998?

A I do not.

Q Do you know which manufacturers, if any, were actually marketing opioid medicines in 1998?

A I do not.

Q And because you don't know, you don't which defendants, if any, were actually marketing opioid medicines in 1998, correct?

A That's correct. I've always assumed, as I've said several times, that the injury is indivisible and there's joint and several liability.

And those are assumptions that I was asked to make in my analysis.

Q Fair enough. And with respect to those past and future damages, those would include harm that flowed from prescriptions that would meet Dr. Beaman's test for medically necessary prescriptions, correct?

A I don't think Dr. Beaman ever made a judgment that a script was medically necessary.

Q Well, with respect to opioid -- strike that.

Well, then let me ask it this way, with respect to your past and future damages, correct, it includes harm flowing from, in some instances, lawfully prescribed FDA prescriptions, correct?

A That's correct.

Q And would some of those prescriptions fall outside of Dr. Beaman's categorization of what is medically unnecessary?

A I can't make that judgment, I think only Beaman can make that judgment.

Q And has he done that analysis?

A I don't know.

Q You have not done that analysis, correct?

A I have not done that analysis, that is

correct.

Q You've assumed in your past and future damages buckets that -- that harm flowing from -- strike that.

In your past and future damages bucket you've included harm flowing both from prescriptions that would fall within Dr. Beaman's categorization of what is medically unnecessary and prescriptions that would fall outside of that categorization, correct?

A Incorrect.

Q Well, why is that incorrect?

A Because of your inclusion of future. If you limited it -- if you limited that to past, I would say correct.

Q So let me ask the question, limiting that to past damages; is that a fair statement?

A Yes.

Q And with respect to future damages, you have -- you do not distinguish between medically necessary and medically unnecessary prescriptions, correct?

A Well, I think it's important to be a little bit careful here. My future analysis, under the assumption that the nuisance is abatable, are

costs, they're cost of these programs, the Ruhm list, if you will, under the assumption that the nuisance is not abatable, then they are continuation of the damages. So I want to be a little bit careful about the language that we use to describe, first there are two alternatives for future and in my opinion the language is different in the two.

Q Well, with respect to all future damages, right, let's just group them together, that would include damages associated with lawfully prescribed FDA prescriptions, correct?

A I don't think that's a correct statement.

Q Well, we can -- we can -- we can debate that.

So with respect to your damages calculations, do your damages calculations, just stick with past damages, do your damages calculations include damages for prescriptions written for reasons that have nothing to do with marketing?

MR. ANGLOVICH: Object to form.

THE WITNESS: I follow you. As I've indicated, I make no judgment about the origins of the prescription in the damages model, so I think I agree with you.

Q (BY MR. ERCOLE) And it also includes damages from opioid prescriptions that were -- if something is misused by patients, correct?

A Mine do, yes.

Q And it includes damages from opioid prescriptions that were diverted by third parties in some instances, correct?

A I really have no opinion on that because I don't have any evidence to -- for which -- from which I can derive a conclusion.

Q Fair enough.

A Because that's not part of my focus.

Q And I think we've -- we've talked about this -- let me finish asking these questions and then I'm going to go back to one point and then wrap up soon.

Sitting here today, can you identify a single opioid prescription underlying any of your past or future damages that was medically unnecessary for any patient?

A Yes.

Q Okay. Okay. So --

A Maybe I misunderstood the question.

Q Yeah. So we're talking now about past and future damages, correct?

A Okay.

Q We're not talking about statutory penalties, any of that stuff, we're talking about past and future damages, right? With respect to those categories, can you identify a single opioid prescription underlying those damages that was medically unnecessary for any patient?

A I apologize, I misunderstood your question. And I think the answer is that I cannot identify any specific script.

Q And can you identify any opioid prescription underlying your past and future damages that was written because of any marketing by any defendant in this particular case?

A I'd like to have a continuing objection, if I may, to future damages not being distinguished by the two different categories, because my answers are really dramatically different, depending on Path A or Path B for future. If you focus on past I can answer pretty easily, but they're very different alternatives on future.

Q Okay. So why don't we stick -- for right now just stick with past.

With respect to past damages, can you identify any opioid -- any opioid prescription

written because of any marketing by any of the defendants in this case?

A No.

Q With respect to past damages, can you identify any patient who was -- strike that.

With respect to past damages, can you identify any Oklahoma doctor who was misled by any marketing by any defendant in this case?

A No.

Q With respect to any -- with respect to past damages, can you identify any patient who was harmed by taking, as directed, any lawfully prescribed opioid medicine manufactured by any defendant in this case?

A No.

Q With respect to future damages, can you identify any medically unnecessary prescription that underlies any of your categories of future damages?

A Just to be clear, when you say future damages, that only pertains to the analysis under the assumption that the nuisance is not abatable.

Q However you want to categorize future damages, I'm just asking with respect to future damages that you're giving an opinion on, can you identify any medically unnecessary prescription that

underlies those future damages?

A Again, I'm going to insist that the future projections be distinguished between damages and cost. And so I'm afraid that you're try to use damages in a generic way, and I completely reject the proposition that the dollars under the abatable assumption are damages. They're not damages, they're costs. The Ruhm dollars are costs, and I'm afraid that what you're trying to get me to do is put all of that stuff into damages.

Q So I'll ask it -- put aside with Ruhm and them, with respect to your future damages calculations, okay?

A When I hear you say future damages, I'm going to confine my answers to the category under the assumption that the nuisance is not abatable, period.

Q Okay. Whatever you want to call it. With respect to that category, can you identify a single medically unnecessary prescription?

A No.

Q With respect to that category, can you identify a single opioid prescription written by -- written because of any marketing by any defendant in this case?

individual company. Do you follow me? But if you're asking me have I broken out the damages by individual companies, at this point the answer, as you know, is I have not.

Q And in fairness, you've actually not offered any opinion about whether any aspect of your damages calculation should be attributed to any particular defendant?

A Except under the theory of joint and several.

Q And without that theory in play, you have never made any assessment in that regard, is that correct?

A That's correct.

MS. STRONG: Can I have a quick break?

THE VIDEOGRAPHER: We're off the record at 2:42 p.m.

(Break taken from 2:42 p.m. to 2:46 p.m.)

THE VIDEOGRAPHER: We are back on the record at 2:46 p.m.

Q (BY MS. STRONG) I just want to clear up one thing.

Even in the context of a joint and several liability, as you understand it, I believe you already testified, you personally are not offering

any opinions as to the conduct of any particular defendant in this case?

A I believe that's correct.

Q And you've run a regression analysis in connection with this case, correct?

A Lots of them.

Q Did you run a regression analysis to determine why Oklahoma prescribers wrote prescriptions of opioid medicines?

A I have no data for which a regression or any other model could be applied to.

Q Did you run an regression analysis to determine why any Oklahoma prescribers wrote prescriptions of any unnecessary opioid medicines?

A No.

Q Did you run a regression analysis as to why Oklahoma prescribers wrote particular types of opioid medicines?

A Particular types? No.

Q Did you run a regression analysis to determine whether defendants' marketing caused any of the categories of damages you've identified?

A No.

MS. STRONG: Okay. Can we have a moment to break?

MS. FREIWALD: Can I ask one question?

You were asked a bunch of questions about the other defendants' marketing conduct, and I never asked you specifically, but I assume the answer would be the same, you haven't engaged in any analysis of any of Purdue's marketing conduct, correct?

THE WITNESS: That's correct. And, you know, the answer for Purdue is the same as the answer for Janssen on every single one of these.

MS. FREIWALD: Thank you.

THE VIDEOGRAPHER: We're off the record at 2:48 p.m.

(Break taken from 2:48 p.m. to 2:48 p.m.)

THE VIDEOGRAPHER: We are on the record at 2:48 p.m.

MR. ANGLOVICH: Just wanted to make it clear that -- how much time has been used so far?

THE VIDEOGRAPHER: Four hours and 35 minutes. We have 25 minutes left.

MR. ANGLOVICH: So there's 25 minutes left. We've agreed to keep the deposition open for the defendants to ask questions about these co-files that we've produced. We're -- we'll get them to you as soon as we can. Given the late hour it may not

EXHIBIT 3

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

DECLARATION OF JOHN HASSLER

I, John Hassler, declare as follows:

1. I am Senior Vice-President and General Manager of CNS, Sales and Marketing, at Teva Pharmaceuticals USA, Inc. ("Teva USA"). I have held this position since January 2015. I have worked for Teva USA since 2001.

2. I have personal knowledge of the facts set forth herein or have acquired such knowledge from my review of documents and conversations with relevant employees for Teva USA and Watson Laboratories, Inc. ("Watson Labs"), Actavis LLC ("Actavis LL"), and Actavis Pharma, Inc. ("Actavis Pharma"). I could and would competently testify to the facts stated herein if called to do so.

3. Prior to 2011, Teva USA did not manufacture or sell any branded opioid medicines.

4. Teva USA has never promoted the safety, efficacy, or therapeutic value of its generic medicines, including its generic opioids. As a general matter, Teva USA has never used continuing medical education ("CME"), speaker programs, or other third-parties to promote its generic opioids.

5. Actavis LLC sells only generic medicines, including only generic opioids.

6. Actavis LLC has never promoted the safety, efficacy, or therapeutic value of its generic medicines, including its generic opioids. As a general matter, Actavis LLC has never used continuing medical education ("CME"), speaker programs, or other third-parties to promote its generic opioids.

7. Actavis Pharma sells only generic medicines, including only generic opioids.

8. Actavis Pharma has never promoted the safety, efficacy, or therapeutic value of its generic medicines, including its generic opioids. As a general matter, Actavis Pharma has

never used continuing medical education ("CME"). speaker programs, or other third-parties to promote its generic opioids.

9. Watson Labs sells only generic medicines, including only generic opioids.

10. Watson Labs has never promoted the safety, efficacy, or therapeutic value of its generic medicines, including its generic opioids. As a general matter, Watson Labs has never used continuing medical education ("CME"), speaker programs, or other third-parties to promote its generic opioids.

I STATE UNDER PENALTY OF PERJURY UNDER THE LAWS OF OKLAHOMA THAT THE FOREGOING IS TRUE AND CORRECT.

Dated this 15th day of March, 2019.

By: _____
JOHN HASSLER
SVP & GM, Teva CNS
Teva Pharmaceuticals USA, Inc.
111000 Nall Avenue
Overland Park, KS 66211