IN THE DISTRICT COURT OF CLEVELAND COUNTY
STATE OF OKLAHOMA

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

Plaintiff,

vs.

(1) PURDUE PHARMA L.P.;
(2) PURDUE PHARMA, INC.;
(3) THE PURDUE FREDERICK COMPANY,
(4) TEVA PHARMACEUTICALS USA, INC.;
(5) CEPHALON, INC.;
(6) JOHNSON & JOHNSON;
(7) JANSSEN PHARMACEUTICALS, INC,
(8) ORTHO-MCNEIL-JANSSEN PHARMACEUTICALS, INC., n/k/a JANSSEN PHARMACEUTICALS;
(9) JANSSEN PHARMACEUTICA, INC., n/k/a JANSSEN PHARMACEUTICALS, INC.;
(10) ALLERGAN, PLC, f/k/a ACTAVIS PLC, f/k/a ACTAVIS, INC., f/k/a WATSON PHARMACEUTICALS, INC.;
(11) WATSON LABORATORIES, INC.;
(12) ACTAVIS LLC; and
(13) ACTAVIS PHARMA, INC., f/k/a WATSON PHARMA, INC.,

Defendants.

For Judge Balkman's Consideration

Case No. CJ-2017-816
Honorable Thad Balkman

William C. Hetherington
Special Discovery Master

STATE OF OKLAHOMA } S.S.
CLEVELAND COUNTY }

FILED

APR 16 2019

In the office of the
Court Clerk MARILYN WILLIAMS

MOTION OF DEFENDANTS WATSON LABORATORIES, INC., ACTAVIS LLC, ACTAVIS PHARMA, INC., CEPHALON, INC., AND TEVA PHARMACEUTICALS USA, INC. FOR JUDICIAL NOTICE PURSUANT TO 12 O.S. § 2201

MOTION

At the April 11, 2019 Hearing on the Generic Manufacturers'[1] Motion for Partial Summary Judgment, the State argued that Oklahoma's public nuisance law does not require an unlawful act or omission. This is contrary to Oklahoma law and, frankly, common sense. Oklahoma law defines a "Nuisance":

[1] Watson Laboratories, Inc., Actavis Pharma, Inc., Actavis LLC, and Teva Pharmaceuticals USA, Inc. (pre-2011).

> "A nuisance consists of ***unlawfully*** doing an act, or omitting to perform a duty, which act or omission . . . [causes the harms specified in §1]."

50 O.S. § 1 (emphasis added). This Court should interpret that provision according to the plain language passed by the Legislature: that a public nuisance can be found ***only*** where a defendant acted or omitted to perform a duty "unlawfully." The State's request that this Court ignore the word "unlawfully" —based on counsel's interpretation of a century-old North Dakota case and an inapposite case from California—should be soundly rejected.

Accordingly, pursuant to 12 O.S. § 2201, Defendants Watson Laboratories, Inc., Actavis LLC, and Actavis Pharma, Inc. (collectively the "Actavis Generic Defendants"), and Cephalon, Inc. and Teva Pharmaceuticals USA, Inc. (collectively the "Teva Defendants"), move this Court to take judicial notice of 50 O.S. § 1 and its requirement that the State must prove, among other things, an unlawful act by each Defendant to succeed on its public nuisance claim.

BRIEF IN SUPPORT

INTRODUCTION AND BACKGROUND

> The statutory command of 12 O.S. 1991 § 2201 obligates this Court to take judicial notice of the common law, constitutions and public statutes. This is not merely a rule of practice which may be relaxed when the public interest demands. The mandatory[]duty to take judicial notice of public statutes may extend to **any stage of a proceeding.** . . . . Matters of health care are of special public importance and subject to this Court's review as matters of *publici juris.*

Petition of Univ. Hosps. Auth., 1997 OK 162, ¶ 3, 953 P.2d 314, 324 (Kauger, C.J. concurring) (footnotes omitted) (emphasis original); *see also Keota Mills & Elevator v. Gamble*, 2010 OK 12, ¶ 9, 243 P.3d 1156, 1158 b ("we cannot ignore applicable, controlling law" (citing 12 O.S. § 2201)).

At the April 11, 2019 hearing, the State misrepresented the requirements of a statutory claim for public nuisance under Oklahoma law. Contrary to the State's representation, the public nuisance statute in Oklahoma clearly and expressly requires an "unlawful" act or omission.[2] This Court should take judicial notice of the same, pursuant to the mandate of 12 O.S. § 2201, to avoid a needless and inefficient dispute for purposes of resolving forthcoming summary judgment motions and at trial.[3] Failure to take judicial notice constitutes reversible error. *Morgan v. State ex rel. Dep't of Pub. Safety*, 1993 OK CIV APP 8, 882 P.2d 574, 575 (reversing and remanding to trial court for failure to take requested judicial notice of law).

ARGUMENT AND AUTHORITY

NUISANCE REQUIRES AN UNLAWFUL ACT OR OMISSION

As defined by statute, "[a] nuisance consists in ***unlawfully*** doing an act, or omitting to perform a duty . . . ." 50 O.S. § 1 (emphasis added). The Oklahoma Legislature's inclusion of the word "unlawful" was not surplusage: "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 (citing 50 O.S. § 1) (emphasis added) (holding that smoking inside private condominium residence was not a violation of any law and therefore did not constitute a public or private nuisance). *Compare Abraham v. Trail Lanes, Inc.*, 2014 OK CIV APP 107, ¶ 13, 352 P.3d

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[2] *Twin Hills Golf & Country Club, Inc. v. Town of Forest Park*, 2005 OK 71, ¶ 6, 123 P.3d 5, 6–7 ("Where the language of a statute is plain and unambiguous, legislative intent and the meaning of the statute will be gleaned from the face of the statute without resort to judicial rules of statutory construction."); *United Design Corp. v. Oklahoma Tax Comm'n*, 1997 OK 43, ¶ 27, 942 P.2d 725, 730, *as corrected* (June 19, 1997).

[3] Taking judicial notice means only that we may dispense with proof of some norm of state and federal law—common, constitutional, or statutory law—of which the court may be advised sans proof. The terms of 12 O.S.1991 § 2201(A) require us to take "judicial notice" of law that is invoked in the adversary process. The terms of § 2201(A) are:

"Judicial notice shall be taken by the court of the common law, constitutions and public statutes in force in every state, territory and jurisdiction of the United States."

Lewis v. Sac & Fox Tribe of Oklahoma Hous. Auth., 1994 OK 20, 896 P.2d 503, 512 n.60. Moreover, "[j]udicial notice may be taken at any stage of the proceeding." 12 O.S. § 2203(C).

1256, 1262 (affirming summary judgment on nuisance claim against owner of bowling alley where murder occurred because the plaintiff failed to show the owner "acted unlawfully") *and Insurance Company of North America v. Sheinbein,* 1971 OK 110, ¶ 6, 488 P.2d 1273, (holding a grass fire which escaped onto a neighbor's land was not a nuisance under 50 O.S. § 1, because it was not "unlawful" as losing control of the grass fire did not violate the relevant statute) *with Tosco Corp. v. Koch Indus., Inc.*, 216 F.3d 886, 895 (10th Cir. 2000) (finding polluting groundwater to be requisite "unlawful act" because "[t]he pollution of any Oklahoma waters, including groundwater, has been prohibited by state statute since the early 1900s") *and State ex rel. Field v. Hess*, 1975 OK 123, 540 P.3d 1165, 1169 (finding requisite "unlawful act" where materials sold by adult bookstore were obscene in violation of Oklahoma obscenity statute).

Doing something legal, like manufacturing FDA-approved medicines that were later prescribed in Oklahoma, cannot form the basis of a public nuisance claim under Oklahoma law. Indeed, the State recognized that an "unlawful" act or omission was a required element of its statutory public nuisance claim and pled it in its Petition. *See* Pet. ¶ 119 ("Defendants' misrepresentations and omissions regrading opioids constitute ***unlawful acts and/or omissions*** of duties[.]") (emphasis added). The State changed course, however, in response to the Generic Manufacturers' Motion for Partial Summary Judgment and argued at the April 11, 2019 hearing that this Court should ignore the Oklahoma Legislature's inclusion in the public nuisance statute of the word "unlawfully" and, accordingly, that Oklahoma's nuisance law does not require an unlawful act or omission.[4] This is not and cannot be the law of Oklahoma.

[4] To the contrary, a nuisance claim expressly requires "unlawfully doing an act." 50 O.S. § 1. *See also Cities Serv. Oil Co. v. Merritt*, 1958 OK 185, 332 P.2d 677, 684 ("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; or, in any way renders other persons insecure in life or in the use of property." (internal quotation marks omitted)).

First, the State reliance on *Winningham v. Rice*, 1955 OK 108, 282 P.2d 742, 744 for this proposition is misplaced. There the Oklahoma Supreme Court affirmed an injunction preventing the defendant from extending salvage operations into an unzoned portion of its property, and storing vehicles for longer 30 days or greater than 25 in number. In doing so, the Court recognized only that a salvage business was "of itself lawful"—not that operating it in that location, and in that manner, was also lawful. *Id.* And, in affirming the lower court's holding and issuance of the injunction, the Court recognized that operating the salvage yard contrary to the parameters of the injunction was in fact unlawful and thus constituted a nuisance. *Id.* (recognizing injunction "did not prevent defendant from using said area for any ***lawful*** purpose" (emphasis added); "injunction ordinarily should be limited, not to the business, itself, but to the [unlawful] usage that creates the nuisance, leaving the right to carry on the business in a ***proper and lawful manner***" (emphasis added)). Moreover, *Winningham*, the cases it relies on, and subsequent cases following it make clear that public nuisance claims have been limited to interference with the use of real property.[5]

Second, the State's unprecedented interpretation of nuisance law would obliterate all bounds limiting its reach, thereby violating basic principles of due process. The State alleges that it is the "opioid epidemic in Oklahoma that constitutes a public nuisance." Pet. ¶ 118. If, under the State's interpretation, any lawful act or omission contributing to the opioid epidemic leads to nuisance liability, then all manner of individuals would become liable for the alleged nuisance, as the State has defined it. This would include prescribers writing lawful prescriptions, the State's Drug Utilization Review Board, patients taking medicines as directed, and private and public insurers, among all manner of other lawful actors. Such an expansive reading—seeking to hold

[5] *See id.* and cited cases; *see also Brock v. Roskamp*, 1962 OK 86, 371 P.2d 465, 468; *Vranesevich v. Pearl Craft*, 2010 OK CIV APP 92, ¶ 10, 241 P.3d 250, 254 "failure [of duty to comply with restrictive covenants] may constitute a nuisance"); *Fin. & Inv. Co. v. UMA, L.L.C.*, 2009 OK CIV APP 105, ¶ 16, 227 P.3d 1082, 1088 (same).

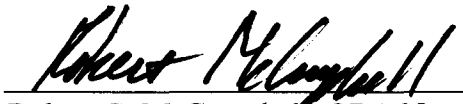
companies (and potentially others) responsible for billions in damages for entirely lawful conduct—would not only violate the clear and express language of the statute, it would transgress constitutional due process principles.

The Court therefore should decline the State's invitation to ignore the clear direction of the Oklahoma Legislature that an unlawful act or omission is a required element that the State must prove to succeed on its public nuisance claim.

CONCLUSION

Pursuant to 12 O.S. § 2201, this Court should take judicial notice of the statutory and common-law element of nuisance law: the requirement of an unlawful act or omission.

Respectfully Submitted,



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I hereby certify that a true and correct copy of the foregoing was emailed this 16th day of April, 2019, to the following:

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