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**
	§	**Judge Thad Balkman**
(1) PURDUE PHARMA L.P.;	§	
(2) PURDUE PHARMA, INC.;	§	
(3) THE PURDUE FREDERICK COMPANY;	§	
(4) TEVA PHARMACEUTICALS USA, INC.;	§	**William C. Hetherington**
(5) CEPHALON, INC.;	§	**Special Discovery Master**
(6) JOHNSON & JOHNSON;	§	
(7) JANSSEN PHARMACEUTICALS, INC.;	§	
(8) ORTHO-McNEIL-JANSSEN PHARMACEUTICALS, INC., n/k/a JANSSEN PHARMACEUTICALS, INC.;	§	
(9) JANSSEN PHARMACEUTICA, INC., n/k/a JANSSEN PHARMACEUTICALS, INC.;	§	
(10) ALLERGAN, PLC, f/k/a ACTAVIS PLC, f/k/a ACTAVIS, INC., f/k/a WATSON PHARMACEUTICALS, INC.;	§	
(11) WATSON LABORATORIES, INC.;	§	
(12) ACTAVIS LLC; and	§	
(13) ACTAVIS PHARMA, INC., f/k/a WATSON PHARMA, INC.,	§	
Defendants.	§	

NOTICE OF FILING OF THE STATE'S PROPOSED (1) FINAL JUDGMENT & (2) FINDINGS OF FACT AND CONCLUSIONS OF LAW

PART 5

price-comparison charts, visual aids, and coupon programs. S-1246 at 2. And when Defendants delivered those messages—whether it was styled as promotion, education, or advocacy—the goal was to build the brand. *See, e.g.*, S-2359 at 3. This is naturally commercial speech. It is not science. It is marketing. And marketing—as Defendants' expert witness Dr. De la Garza put it—has "nothing to do with science." Trial Tr. (7/9/19 p.m.,) at 130:14-131:2; *see also id.* at 126:10-11 (in discussing an FDA warning letter regarding misleading statements in one of Defendants' promotional pieces known as a "file card," Dr. Garza stated: "I don't know what a file card is. This is not science.").

95. Even where the marketing involved Defendants' representations of scientific studies or the work of third parties, I do not find liability arises from the studies themselves, but from Defendants' misleading use of the studies. *See Eastman Chem. Co. v. PlastiPure, Inc.*, 775 F. 3d 230, 236-37 (5th Cir. 2014) (First Amendment does not bar Lanham Act claim based on commercial use of scientific study, where the commercial statements were made "without the necessary context presented by a full scientific study, such as a description of the data, the experimental methodology, the potential conflicts of interest, and the differences between raw data and conclusions drawn by the researcher"); *see also id.* (citing similar cases).

96. I also find unconvincing Defendants' argument that their statements are not a basis for liability under the commercial speech doctrine because they are not "inherently misleading."[107] This argument suggests that misleading or deceptive marketing statements

[107] *See* Defs.' Renewed Mot. for Judgment at 5.

are immune under the First Amendment so long as there is evidence that the statement would not have been misleading if given under different context or in light of a different study than those actually cited. Defendants are wrong here too. [108]

97. The Supreme Court's commercial speech doctrine provides the following tiered analysis:

> [W]hen the particular content or method of the advertising suggests that it is inherently misleading or when experience has proved that in fact such advertising is subject to abuse, the States may impose appropriate restrictions. Misleading advertising may be prohibited entirely. But the States may not place an absolute prohibition on certain types of potentially misleading information, *e.g.*, a listing of areas of practice, if the information also may be presented in a way that is not deceptive. . . . Even when a communication is not misleading, the State retains some authority to regulate. But the State must assert a substantial interest and the interference with speech must be in proportion to the interest served.

In re R. M. J., 455 U.S. 191, 203 (1982).

---

[108] Defendants also submit that the First Amendment requires the State to establish their speech was misleading by clear and convincing evidence. Defs.' Renewed Mot. for Judgment at 5 (citing *Bose Corp. v. Consumers Union*, 466 U.S. 485, 511 & n.30 (1984). The case Defendants cite does not support that conclusion.

The *Bose* case requires clear and convincing evidence of "actual malice" under the *New York Times* defamation analysis. Determining the existence of "actual malice," however, is not the same as determining whether something is false or misleading. The latter requires an examination of the statement itself—asking whether the statement is truthful and accurate; whereas the former ("actual malice") requires examination of the what the speaker knew—i.e., whether the speaker "realized that his statement was false" or recklessly disregarded its veracity. *Id.* at n.30. Indeed, the part of the *Bose* decision Defendants cite explains "there is a significant difference between proof of actual malice and mere proof of falsity." *Id.* at 511.

Accordingly, I find no support for Defendants' assertion that the misleading nature of their marketing statements must be shown under the clear-and-convincing standard. To the contrary, I find support for the notion that it need only be found by a preponderance. *See Cent. Hudson*, 447 U.S. at 563 ("The government may ban forms of communication ***more likely to deceive*** the public than to inform it . . . ."). Nevertheless, I find that even under the clear-and-convincing standard, the State has sufficiently shown that Defendants statements were misleading.

98. Upon consideration of the State's evidence that Defendants made unsubstantiated claims, misrepresented scientific literature, and otherwise disseminated incomplete and deceptive commercial statements as described in the Findings of Fact, the court concludes that Defendants' speech was misleading, "inherently misleading," and "in fact . . . subject to abuse." *In re RMJ*, 455 U.S. at 206-207.

99. As explained above, Defendants knew their messages were misleading. They were told by their own experts that marketing opioids on their abuse potential was dangerous and that Purdue had already shown that such a message was prone to mislead. S-0035. They were told that the data they cited did not support their claims before they made them, and then again by the FDA after they had already started spreading that misleading message. *Id.* They knew the studies they were citing were incomplete, unsound, or fraught with misrepresentations. S-2511. But they sent their sales reps to deliver those messages anyway. And it worked; the call notes and the sales trends demonstrate that Oklahoma physicians were influenced by the misleading messages Defendants were delivering. S-2357 at 11-12; *see* FOF § F.4. The fact that Defendants could have cited other data or delivered their message in a different way that *may* not have been misleading is immaterial. The messages they *did* deliver were misleading, and imposing liability for such statements is consistent with the First Amendment.

100. But, even if some of the statements complained of were not "inherently misleading" or shown to be subject to abuse, but rather were only "potentially misleading," imposing tort liability for these statements is appropriate under the *Central Hudson* scrutiny analysis.

101. First, the State has a "substantial interest" in protecting consumers from dangerous and addictive prescription drugs. *See Rubin v. Coors Brewing Co.*, 514 U.S. 476, 485 (1995) (The government has a significant interest in protecting the health, safety, and welfare of its citizens by preventing brewers from competing on the basis of alcohol strength, which could lead to greater alcoholism and its attendant social costs"); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 564 (2001) (State's interest in preventing underage tobacco use is "substantial, and even compelling"). There is also "no question" that the state has a substantial interest in "ensuring the accuracy of commercial information in the marketplace." *Edenfield v. Fane*, 507 U.S. 761, 769 (1993).

102. Imposing tort liability for marketing about dangerous prescription opioids that has the effect of creating a public nuisance "directly advances" that interest and with a "fit" that is "reasonable" and "in proportion to the interest served." *Board of Trustees of State University of New York v. Fox*, 492 U.S. 469, 480 (1989) (test requires "a fit that is not necessarily perfect, but reasonable"). A generally applicable nuisance law that imposes liability when a defendant's speech regarding dangerous and addictive drugs creates a nuisance directly advances the State's interest in accurate commercial information about dangerous and addictive drugs. *See Spirit Airlines, Inc. v. U.S. Dep't of Transp.*, 687 F.3d 403, 415 (D.C. Cir. 2012). I find unpersuasive Defendants' argument that liability for misleading use of scientific information will "chill" discourse rather than encouraging greater discourse by incentivizing full and complete disclosure of the basis for marketing claims. *Cf. id.* (disclosure requirement "imposes no burden on speech other than requiring airlines to disclose the total price consumers will have to pay. This the First Amendment

plainly permits"). The fit is reasonable and proportionate because it imposes liability for speech that has actually been found to have created a public nuisance, and the abatement remedy is specifically calculated to fixing the nuisance Defendants created.

103. Accordingly, I conclude that (a) the speech at issue here is commercial in nature; (b) that it was inherently misleading and subject to abuse, as described in the Findings of Fact; (c) that it is therefore not protected speech under the First Amendment; (d) in the alternative, liability directly advances the substantial government interests in a reasonable and proportionate way; and, therefore, (e) that the State's claim seeking to impose tort liability for those statements is consistent with the United States Constitution.

(2). Association

104. Defendants also argue that imposing lability on them for the statements of third parties violates Defendants' association rights under the First Amendment. This argument is misplaced.

105. The State does not seek to hold Defendants liable based on their mere association with KOL's, advocacy groups, and the Pain Care Forum. Rather, the State has sought to impose liability on these Defendants based on their misleading use of these entities' statements for commercial aims. *See Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 67-68 (1983) ("We have made clear that advertising which links a product to a current public debate is not thereby entitled to the constitutional protection afforded noncommercial speech. . . . Advertisers should not be permitted to immunize false or misleading product information from government regulation simply by including references to public issues."); *California v. ConAgra Grocery Products Co.*, 17 Cal. App.

5th 51, 92-93 (2017) (holding lead manufacturers' "participation in trade-association-sponsored lead paint promotional advertising were not entitled to any First Amendment protections").

106. I do not rely on the statements of these entities to hold Defendants vicariously liable for them; rather I base my findings of liability on how Defendants used those statements in their marketing efforts. *See* FOF § F. Accordingly, because I do not find Defendants liable based on their mere association, membership, or funding of these third-parties, I find no violation of their rights to associate.

(3). Lobbying

107. Finally, Defendants also argue that imposing lability on them for their lobbying efforts violates their right to petition under the First Amendment. Like their argument regarding associational rights, I also find this argument misplaced. The State is not seeking to hold Defendants liable merely because they lobbied for more favorable laws or sought to influence governmental agencies and regulatory boards. Defendants' "lobbying" efforts are relevant in response to Defendants' efforts to suggest the State's alleged inaction caused the opioid crisis. Evidence that Defendants came to Oklahoma with "SWAT teams" designed to prevent the State from taking action is certainly relevant as a rebuttal to Defendants attempts to blame the State. S0463; *see also* FOF § F.2.b.(4). Ultimately, however, because I do not rely on Defendants' lobbying efforts as a basis for liability, I find their citation to those rights and the *Noerr-Pennington* doctrine is inapposite. *See United Mine Workers of Am. v. Pennington*, 381 U.S. 657, 670 n.3 (1965) (noting that *Noerr-Pennington* doctrine does not prohibit admission of evidence of

lobbying that "tends reasonably to show the purpose and character of the particular transactions under scrutiny" even if such evidence is "barred from forming the basis for a suit").

b. The Injurious Effect it Caused

108. The second element under Oklahoma's public nuisance law requires the State to show that Defendants' act or omission (the false and misleading marketing discussed above) either: (1) annoyed, injured or endangered the comfort, repose, health or safety of others; (2) offended decency; (3) unlawfully interfered with, obstructed or tended to obstruct, or rendered dangerous for passage, any lake or navigable river, stream, canal or basin, or any public park, square, street or highway; or (4) in any way renders other persons insecure in life, or in the use of property. 50 O.S. § 1. In essence, this requires the state to prove that Defendants' actions caused harm and that those harms are of the kind recognized under the statute.

109. In Oklahoma, a plaintiff claiming nuisance must show, first, that the Defendants' actions were the cause-in-fact of its injuries, which is a question for the finder of fact. A plaintiff "has the burden of producing evidence, satisfactory to the judge, that a reasonable person could believe in the existence of the causal link and that the evidence should be weighed by the" factfinder, and of "persuasion." *McKellips v. St. Francis Hosp., Inc.*, 1987 OK 69, 741 P.2d 467, 471. As explained above and discussed in more detail below, I find that the State has satisfied its burden of proof on that point. In addition, I also find that Defendants' actions were the "direct and proximate" cause of the State's injuries.

See Atchison, 1928 OK 256, ¶ 8; *City of Sayre v. Rice*, 1928 OK 499, ¶4.[109] A "direct cause" is defined as "a cause which, in a natural and continuous sequence, produces an injury and without which the injury would not have happened." *See* OUJI 9.6; *State ex rel. Okla. Dep't of Pub. Safety v. Gurich*, 2010 OK 56, ¶ 14, 238 P.3d 1, 4. In addition, to establish proximate cause, the plaintiff must show that the injury was a reasonably foreseeable result of defendant's conduct. *See id.*; *see also Atherton v. Devine*, 1979 OK 132, ¶ 4, 602 P.2d 634, 636.

110. There can be more than one direct cause for an injury. *See Cities Service Oil Co. v. Merritt*, 1958 OK 185, ¶ 14, 332 P.2d 677, 683 ("Where the separate and independent acts of several parties combine to produce a single injury, though concert of action is lacking, such parties are jointly and severally liable for the result even though the act of each other alone might not have caused the injury."); *see also* OUJI 9.7 ("There may be more than one direct cause of an injury."). In the case of concurrent causes, the plaintiff must show that a "defendant's act was a *contributing* (not *substantial)* factor in producing the plaintiff's injuries." *Lee v. Volkswagen of Am., Inc.*, 1984 OK 48, ¶ 29, 688 P.2d 1283, 1289 (emphasis in original); *see also Cities Service Oil Co.*, 1958 OK 185, ¶ 14, 332 P.2d at 683; OUJI 9.7 ("When an injury is the result of the combined negligence of two or more

[109] There was some debate as to whether proximate cause is required in a cases where the Plaintiff seeks only abatement. *See West*, 1931 OK 693, ¶ 15 ("While evil intent, or negligence importing a greater or less degree of moral blame, may and ordinarily does accompany the commission of a nuisance, it cannot be said that either is an essential element of the offence. . . . In other words, there may be cases where the party in the exercise of his legal rights is bound to afford absolute to all not themselves in fault, *from any evil consequence arising from his acts*." (emphasis added)). However, because I find the State has put forth evidence sufficient to establish proximate cause, I need not reach this question.

persons, the conduct of each person is a direct cause of the injury regardless of the extent to which each contributes to the injury."). Accordingly, under Oklahoma law, the plaintiff need only show defendant was a cause, not the sole cause, in order to impose liability. *See Cities Service Oil Co. v. Merritt*, 1958 OK 185, ¶ 14, 332 P.2d at 683; *see also Stevens v. Barnhill*, 1954 OK 29, ¶ 11, 266 P.2d 463, 465 ("[W]here the separate and individual acts of several persons combine to produce directly a single injury, ***each is responsible for the entire result*** even though the act of one person alone may not be the cause of the injury.") (citations omitted, emphasis added); *Northup v. Eakes*, 1918 OK 652, ¶ 9, 178 P. 266, 268 ("Where, although concert is lacking, the separate and independent acts or negligence of several combine to produce directly a single injury, each is responsible for the entire result, even though his act or neglect alone might not have caused it."). As explained in more detail below, I find that the State has met this burden and proven that Defendants' acts and omissions are a cause of the State's injuries.

111. I further find that no supervening causes interrupted the causal chain so as to defeat proximate cause. The independent intervening acts of others can break the causal chain necessary to establish defendant's conduct as a direct cause. *See Graham v. Keuchel*, 1993 OK 6, ¶ 9, 8447 P. 2d 342, 348; *see also* OUJI 9.8 ("An intervening cause is one that interrupts or breaks the connection between a defendants' act or omission and a plaintiff's injury."). Not every intervening cause is sufficient to break the causal chain. *Id.* ("Not every intervening cause insulates the original negligent actor from liability."). As discussed above, when causes combine to produce an injury or several causes operate to bring about the same result, each actor may be liable for the resulting harm. *See id.* ("When

a cause combines with another at or omission to produce the injury or several causes operate to bring about the same result, each negligent actor may be liable for the harm that evolves.").[110] "To rise to the magnitude of a supervening cause, which will insulate the original actor from liability, the new cause must be (1) independent of the original act, (2) adequate of itself to bring about the result and (3) one whose occurrence was not reasonably foreseeable to the original actor." *Graham v. Keuchel*, 1993 OK 6, ¶ 9, 847 P. 2d at 348 (citing *Thompson v. Presbyterian Hosp., Inc.*, 1982 OK 87, ¶¶15-16, 652 P.2d 264, 264; *Long v. Ponca City Hosp., Inc.*, 1979 OK 32, ¶10 593 P.2d 1081, 1084-85); *accord* OUJI 9.8 ("Defendant's act or omission would not be the direct cause of Plaintiff's injury if another event intervened between the two and that event was: 1. Independent of Defendant's act or omission; 2. Adequate by itself to cause Plaintiff's injury; and 3. Not reasonably foreseeable by Defendant."). Where an intervening act does not rise to the

---

[110] *See also Cities Service Oil Co. v. Merritt*, 1958 OK 185, ¶ 14, 332 P.2d at 683 ("Where the separate and independent acts of several parties combine to produce a single injury, though concert of action is lacking, such parties are jointly and severally liable for the result even though the act of each other alone might not have caused the injury."); *Stevens v. Barnhill*, 1954 OK 29, ¶ 11, 266 P.2d 463, 465 ("[W]here the separate and individual acts of several persons combine to produce directly a single injury, ***each is responsible for the entire result*** even though the act of one person alone may not be the cause of the injury.") (citations omitted, emphasis added); *Northup v. Eakes*, 1918 OK 652, ¶ 9, 178 P. 266, 268 ("Where, although concert is lacking, the separate and independent acts or negligence of several combine to produce directly a single injury, each is responsible for the entire result, even though his act or neglect alone might not have caused it.").

This analysis also applies to the intentional torts and criminal acts of third parties. *See Graham v. Keuchel*, 1993 OK 6, ¶ 13 & n. 37, 8447 P. 2d 342, 349 & n.37 ("The act of a third person in committing an intentional tort or crime is a superseding cause of harm to another resulting therefrom, although the actor's negligent conduct created a situation which afforded an opportunity to the third parson to commit such a tort or crime, ***unless the actor at the time of his negligent conduct realized or should have realized the likelihood that such a situation might be created, and that a third person might avail himself of the opportunity to commit such a tort or crime.***" (emphasis added))

level of a supervening cause, each act may be considered the proximate cause of plaintiff's injuries. *See Long v. Ponca City Hosp., Inc.*, 1979 OK 32, ¶10, 593 P.2d 1081, 1085 ("[I]n order to relieve the one guilty of the first act of negligence of responsibility, the intervening cause must entirely supersede the original negligence. In other words, it must be independent of the original act and adequate of itself to bring about the injurious result. Consequently, where an act of negligence is not superseded by a second cause, but continues to operate, so that the injury is the result of both causes acting in concert, each act may be regarded as the proximate cause thereof.").

112. To establish causation, the Court is to consider both direct and circumstantial evidence. Direct evidence is "proof which points immediately to a question at issue and which proves the existence of a fact without inference or presumption." OUJI 3.25. This includes "the testimony of a person who asserts actual, personal knowledge of a fact, such as the testimony of an eyewitness" and "may also be an exhibit such as a photograph which demonstrates the existence of a fact." *Id.* Circumstantial evidence is "the proof of facts or circumstances which gives rise to a reasonable inference of other connected facts." *Id.* "The law makes no distinction between the weight to be given to either direct or circumstantial evidence," and the Court is to consider both in arriving at its decision. *Id.*

113. The Court may also consider evidence in the form of expert testimony. An expert's opinion on causation need not prove causation by itself. *City of Tuscaloosa v. Harcros Chems., Inc.*, 158 F.3d 548, 564-65 (11th Cir. 1998) ("The expert's testimony does not have to prove the case by itself—it must merely constitute one piece of the puzzle that the party is attempting to assemble before the jury."). Moreover, an expert is not

required to "speak certain 'magic words' in establishing causation; rather, a conclusion on causation is a matter of "common sense and the evidentiary material." *Jones v. Mercy Heatlh Center, Inc.*, 2006 OK 83, ¶¶ 20, 22, 155 P.3d 9, 15. Experts can base their testimony on "professional studies or personal experience." *Christian v. Gray*, 2003 OK 10, ¶ 13 (citing *Kumho*, 526 U.S. at 153, 119 S.Ct. at 1176). Here, the State's experts based their opinions regarding Defendants' marketing on both. When opining on causation, an expert "need not 'rule out' every other potential cause," or show that Defendants' actions are "the *sole* cause." *Nelson v. Enid Med. Assoc., Inc.*, 2016 OK 69, ¶ 49, 376 P.3d 212, 228 (emphasis in original). Further, correlation evidence can constitute "some evidence of causality," and an "expert's opinion may rely on a temporal relationship between an alleged cause and subsequent injury as one factor to show causation." *Id.* ¶ 24. Indeed, "'under some circumstances, a strong temporal connection is powerful evidence of causation." *Id.* ¶ 24 n.66 (quoting *Bonner v. ISP Techs., Inc.*, 259 F.3d 924, 931 (8th Cir.2001), and discussing the Oklahoma Supreme Court's statement, in *Christian v. Gray*, *supra*, at ¶ 27, that an issue often discussed as part of a specific causation analysis involving external causation is the temporal, or time-based, relationship between the exposure and a plaintiff's injury).

114. Defendants have argued before that the State's experts' opinions should not be considered because they are merely "*ipse dixit.*" I disagree. "Where the expert states the reasons for his opinions and conclusions, they are not *ipse dixit.*" *Covel v. Rodriguez*, 2012 OK 5, ¶ 15, 272 P.3d 705, 712. Experts do not have to conduct regression analyses, individually survey doctors, or address all other potential causal factors in order to opine

on the effect of pharmaceutical marketing. *See Nelson v. Enid Med. Assoc.*, 2016 OK 69, ¶ 49, 376 P.3d 212, 228 (expert "opinion need not 'rule out' every other potential cause"); *cf. McKellips v. Saint Francis Hosp., Inc.*, 1987 OK 69, 741 P.2d 467, 475 (holding that "percentage probability testimony" by an expert on causation "is not required" to create a jury question on causation, because "a precise percentage increment" is "unnecessary"). Indeed, courts have specifically eschewed these restrictions. In *Smith v. Pfizer, Inc.*, plaintiff sued Pfizer over its marketing of Neurontin to treat chronic pain. 714 F. Supp. 2d 845, 848 (M.D. Tenn. 2010). Plaintiff offered an expert to testify on the effects of the defendants' marketing based on a review of "defendants' internal documents, government records, sales and industry data, and scholarly studies." *Id.* at 855. Defendants moved to exclude the expert, arguing that he "reaches his conclusions by mere *ipse dixit* and that he employs no ascertainable methodology at all." *Id.* at 856. In denying the defendants' motion to exclude the testimony, the court held that the expert's conclusions were reliable "despite the fact that he did not interview individual doctors to determine why they personally prescribed Neurontin." *Id.* Likewise, the court dismissed the defendants' argument that an expert must consider other explanations for the increase in prescriptions. *Id.* at 857 ("The defendants can address the relative magnitude of other potential factors on cross examination.").

115. According to these standards, Defendants' conduct was a direct cause of the State's harm. *See* FOF §§ G, H.

116. After Defendants re-launched Duragesic for chronic non-cancer pain and embarked on their multifaceted marketing campaign, the prescribing rates of opioids in

Oklahoma began to increase dramatically year after year. *See* FOF §§ G, H. And as the supply of prescription opioids in Oklahoma climbed, so too did the rates of, among others, Oklahomans dying from opioid overdoses, Oklahomans receiving treatment for OUD, and Oklahoma babies being born with NAS. *See* FOF §§ G – I. Such temporal evidence, in this context, is "powerful evidence of causation." *Nelson*, ¶ 24 n.66 (citation omitted and internal quotation marks omitted).

117. For example, in Oklahoma, there was an 11-fold increase in prescription fentanyl sales from 1997 to 2010. Trial Tr. (6/7/19 a.m., Nguyen) at 88:21-89:11. Oklahoma's prescription fentanyl sales rate far exceeded those of the rest of the country over this period. *Id.* From 2006 through 2017, Oklahoma ranked between 4th and 8th in the U.S. for opioid prescriptions. Trial Tr. (6/7/19 a.m., Nguyen) at 90:12-21. According to the Oklahoma Bureau of Narcotics ("OBN"), in 2017, 479 opioid prescriptions were dispensed every hour in Oklahoma. J-2951 at 16. From 1997 to 2013, there was a 9-fold increase in the rate of MMEs distributed per Oklahoman based on combined sales of oxycodone, hydromorphone, hydrocodone, meperidine, methadone, morphine, fentanyl and codeine. Trial Tr. (6/7/19 a.m., Nguyen) at 83:5-11; 86:13-87:5.

118. For the last 6 years, Oklahoma ranked first in the nation for prescription fentanyl sales. *Id.* From 2006 forward, Oklahoma was ranked in the top 5 in the nation for prescription fentanyl sales every year. *Id.* The pounds of fentanyl prescribed in Oklahoma continually increased from 2000 forward. Trial Tr. (6/13/19 p.m., Kolodny) at 12:14-16. There were 5 pounds of prescription fentanyl sold in 2001 in Oklahoma. Trial Tr. (6/7/19 a.m., Nguyen) at 90:5-11. That increased to 19 pounds of prescription fentanyl sold in

Oklahoma in 2010. *Id.* From 2010 to 2015, there were more than 19 pounds of prescription fentanyl sold in Oklahoma every year. *Id.*

119. From 2015 to 2017, 175 Oklahomans died from unintentional fentanyl-involved overdose. Trial Tr. (6/7/19 a.m., Nguyen) at 92:18-25. Prior to Defendants' re-launch of Duragesic, between 1994 and 1996, only 2 Oklahomans were reported to have died from an unintentional overdose involving fentanyl. *Id.*

120. From 1994 to 2006, there were 2,122 unintentional medication related overdose deaths, and 83% of them involved prescription opioids. Trial Tr. (6/7/19 a.m., Nguyen) at 76:19-25. From 2000 to 2017, more than 6,137 Oklahomans died from an unintentional overdose due to prescription opioids. *See* Trial Tr. (6/7/19 a.m., Nguyen) at 95:22-25; *see also* (Trial Tr. (6/25/19 a.m., Commissioner White) at 83:9-13. Between 2013 and 2017, on average 32 Oklahomans died every month from unintentional prescription opioid overdose. Trial Tr. (6/7/19 a.m., Nguyen) at 105:19-23.

121. In 2012, Oklahoma ranked 5th in the U.S. for unintentional poisoning deaths and 5th in the U.S. for the number of opioid prescriptions per 100 people. Trial Tr. (6/17/19 a.m., Nguyen) at 82:13-15; 83:22-25

122. These are not just numbers or "units" as one of Defendants' experts, Dr. Marais, called them, these are Oklahomans. The Court read reports of numerous Oklahomans who died as a result of prescription opioid overdose—including Oklahomans who died as a result of Defendants' branded opioid products—each tragic and each showing that the harm from this nuisance cannot be measured simply by statistics. *See, e.g.*, Trial Tr. (6/18/19 p.m., Pfeifer) at 34:21-94:8; S-4053A.

123. The evidence also shows that for every Oklahoman who lost their life, many more became addicted. *See, e.g.*, Trial Tr. (6/25/19 a.m., Commissioner White) at 68:10-20; Trial Tr. (6/17/19 p.m., Beaman) at 64:20-65:24. By 2009, at least 45 of every 100,000 Oklahomans over the age of 12 were admitted for treatment for substance abuse and mental health treatment due to non-heroin opiates and synthetics—an increase of at least three times the same rate from a decade prior in 1999. *See* S-4519 at 16.

124. The incidence of NAS in babies born on SoonerCare in Oklahoma has increased dramatically from 1996 through 2017. *See* Trial Tr. (6/25/19 a.m., Commissioner White) at 71:16-23; Trial Tr. (6/19/19 p.m., Ratcliff) at 24:23-25; 46:1-15; S-4054. While only a few babies on SoonerCare were born with NAS in 1996, approximately 500 babies were born with this syndrome in 2017. Trial Tr. (6/25/19 a.m., Commissioner White) at 71:16-23; Trial Tr. (6/19/19 p.m., Ratcliff) at 24:23-46:15.

125. The temporal evidence of causation is corroborated by Defendants' internal records indicating that their marketing campaign worked. The purpose of Defendants' marketing campaign was to "convince" doctors to prescribe more opioids. *See, e.g.*, S-0510. All opioids, not just Defendants' brand-named ones. Defendants knew the more they detailed doctors, the more prescriptions were written—their products were "promotionally sensitive." *See, e.g.*, S-0880; S-2358; S-2357. That was the intent and design of the plan to build the billion-dollar pain franchise. Defendants' call notes demonstrated that this causal relationship between detailing and prescribing existed here in Oklahoma. *See* FOF § F.4; S-2481 – S-2492. Numerous J&J call notes specifically documented the fact that doctors in Oklahoma prescribed Defendants' opioids in response to Defendants'

marketing. *See, e.g.,* Trial Tr. (5/31/19 a.m., J&J: Deem-Eshleman) at 24:14-20 ("She would try some nonmalignant patients"); Trial Tr. (5/31/19 a.m., J&J: Deem-Eshleman) at 30:20-23 ("Doctor said he would try more with these patients"); Trial Tr. (5/31/19 a.m., J&J: Deem-Eshleman) at 128:15-24 (agreed that, according to a call note, "the doctor says because of DAWN data, he will only prescribe your drug going forward"); Trial Tr. (6/3/19 a.m., J&J: Deem-Eshleman) at 44:21-45:06 (agreed that call note reflects a doctor agreeing to prescribe Duragesic in response to sales representative efforts).

126. According to a paper that Defendants' expert, Dr. Moskovitz, published in 2014, studies have "found that the single strongest predictor of opioid prescribing was a lower level of concern about the possible negative effects of opioids." Trial Tr. (6/28/19 p.m., Moskovitz) at 69:25-85:01. Defendants repeatedly downplayed the negative effects of opioids to Oklahoma doctors over the last two decades. *See* FOF §§ F.2-F.4.

127. The State's experts likewise concluded that Defendants' marketing caused prescriptions and the resulting epidemic to grow in Oklahoma. Commissioner White testified that Defendants' branded and unbranded marketing caused the sales of opioids and their negative consequences, including opioid addiction and overdose deaths, to "rise rapidly and significantly" in the State of Oklahoma over the last two decades. *See, e.g.*, Trial Tr. (6/26/19 p.m., Commissioner White) at 85:1-10, 94:12-95:21.

128. In Dr. Beaman's opinion, the misinformation campaign of the opioid industry, including Defendants, caused the opioid epidemic in Oklahoma. *See* Trial Tr. (6/17/19 p.m., Beaman) at 68:22-70:20, 80:18-81:23.

129. Dr. Kolodny testified that Defendants' marketing campaign was "a major cause" of Oklahoma's opioid crisis. *See* Trial Tr. (6/13/19 p.m., Kolodny) at 19:20-23:13.

130. The State's experts' opinions confirm the conclusion of Defendants' number one KOL, Dr. Portenoy, who testified that the conduct of opioid manufacturers, including Defendants, "in marketing without education about risk produced an increase of inappropriate and unsafe prescribing that contributed to" and was "a cause of" the opioid public health problem in the U.S. over the past two decades. *See* Ct. Ex. 2 (Portenoy) at 270:7-271:18.

131. Defendants' own experts made statements to the same effect. In his 2016 presentation, Dr. Fong, Defendants' expert witness, described what led to the opioid epidemic in the U.S. as follows:

> So you couple physician anxiety about treating pain with a lot more choices prescribed with a pharmaceutical industry that was very aggressive in promoted pain management treatment. So dinners and lunches like this, golf trips, massages. The drug reps, all that -- from 1998 onward till about mid-2000 saying, 'Hey, do me a favor. Prescribe this for me. I'll do you a solid.' So it was a combination of just what we saw in the housing industry -- Right? -- opportunity, greed, easy money, anxiety about losing what I have.

Ct. Ex. 0073 at 5:25-6:12.

132. Another of Defendants' expert witnesses, Dr. Terrell Phillips, gave a CME presentation to the Oklahoma State Medical Association in October 2016 about how to avoid addiction in pain management, in which Dr. Phillips stated:

> Everyone here knows how we got in this situation. They told us we were underprescribing. We need to prescribe more. It's the patient's rights to have pain medicine, so we all got on board. And when someone said they were hurting, we said, Okay, we are going to give you something. Now it's just the opposite. Not everyone deserves pain medicine."

Trial Tr. (7/12/19 a.m., Phillips) at 71:2-23; *see also* S-4743 at 7:20-7:48.

133. Another of Defendants' expert witnesses, Dr. Laurentius Marais, testified it was "almost self-evident" that the sales of opioids in Oklahoma were the result of the actions and conduct of the interested parties. Trial Tr. (7/11/19 a.m., Marais) at 129:17-130:5.

134. In his 2014 publication, Defendants' expert, Dr. Moskovitz, described the relationship between "increased opioid prescribing" and "higher rates of misuse, abuse, emergency room visits, and overdose" to be "more than circumstantial." Trial Tr. (6/28/19 p.m.) at 69:25-85:01.

135. The State's harm also was a foreseeable result of Defendants' conduct. *See* FOF §§ G, H. The increase in prescribing as a result of the marketing campaign was not only foreseen by Defendants, it was the purpose and goal of the marketing campaign. The State showed that the public health catastrophe resulting from the influx of opioids in Oklahoma was an inevitable consequence of dramatically increasing the supply of opioids in society. *See* FOF §§ B, C. The State showed that Defendants, in fact, knew that as a result of increasing prescriptions, incidence of abuse and overdose would also increase. *See, e.g.* S-0035. There were even reports circulating while Defendants' marketing campaign was in full swing that indicated the misleading marketing of pharmaceutical companies was contributing to the opioid crisis. *See, e.g.*, S-1067. By no later than 2001, Defendants admittedly were aware that the increase of prescription opioids was fueling a public health problem. *See, e.g.*, Trial Tr. (6/3/19 p.m., J&J: Deem-Eshleman) at 42:21-

43:01; Trial Tr. (6/11/19 a.m., Kolodny) at 86:7-20; S-0035. Yet despite all these warnings, Defendants persisted and indeed intended to continually expand the opioid market. *See, e.g.*, S-4128; S-0035; S-0038 (finding Defendants' Duragesic marketing false and misleading and warning Defendants that "by suggesting that Duragesic has a lower potential for abuse compared to other opioid products," Defendants' marketing "could encourage the unsafe use of the drug, potentially resulting in serious or life-threatening hypoventilation"); FOF §§ F.2 – F.4. Defendants even targeted their marketing messages to reach "high abuse-risk patients"[111] and designed marketing programs aimed at keeping patients on continued opioid therapy for the first 90 days after their first use,[112] despite the fact that research demonstrates that if a patient takes an opioid every day for 90 days, then more than half of those patients will still be on opioids five years later.[113]

136. No intervening causes supervened or superseded Defendant's acts and omissions as a direct cause of the State's injuries, or otherwise defeat a finding of direct and proximate cause. Defendants argued that the independent acts of physicians, patients and others diverting drugs, and criminal organizations importing counterfeit and other illicit narcotics were at fault here. The evidence, however, does not support a finding that any of these met the three elements necessary to constitute a supervening cause capable of supplanting Defendants' role in the nuisance. *See, e.g.*, *Graham v. Keuchel*, 1993 OK 6, ¶ 9, 8447 P. 2d 342, 348 ("To rise to the magnitude of a supervening cause, which will

---

[111] *See, e.g.*, S-1253; S-2375; Trial Tr. (6/11/19 p.m., Kolodny) at 96:1-13, 110:8-111:17.

[112] *See, e.g.*, S-3961; S-3960; Trial Tr. (6/12/19 p.m., Kolodny) at 19:17-24:23.

[113] *See, e.g.* S-3961; S-3960; Trial Tr. (6/12/19 p.m., Kolodny) at 19:17-24:23.

insulate the original actor from liability, the new cause must be (1) independent of the original act, (2) adequate of itself to bring about the result and (3) one whose occurrence was not reasonably foreseeable to the original actor.").

137. From 2007 to 2012, the rate of prescription drug overdose death was approximately four times the rate of illicit drug overdose in Oklahoma. Trial Tr. (6/7/19 a.m., Nguyen) at 81:11-17. There were more deaths in that time period that involved either hydrocodone or oxycodone than alcohol and all illicit drugs combined. *Id.* In the 1990s and early 2000s, "illicit opioids" were not a "significant problem in the State" of Oklahoma, although illicit opioid problems have risen in recent years. Trial Tr. (6/25/19 p.m., Commissioner White) at 74:19-75:14.

138. This rise in illicit opioid use in Oklahoma was a result and consequence of the oversupply and overprescribing of prescription opioids, which in turn was caused by Defendants' efforts to expand the opioid market through misleading marketing. *See, e.g.*, Trial Tr. (6/25/19 p.m., Commissioner White) at 74:19-75:14, 85:11-86:18; Trial Tr. (6/7/19 a.m., Nguyen) at 93:7-94:6. This consequence of Defendants' conduct was reasonably foreseeable to Defendants. Studies show that four out of five heroin users began by using prescription opioids. *See* Trial Tr. (6/11/19 a.m., Kolodny) at 21:05-15. In his 2016 presentation, Dr. Fong, Defendants' expert witness, agreed, stating: "The vast majority of people who start using heroin don't pick up heroin right away. They pick up prescription pills first, and then when the pills run out or they no longer have access to pills, they turn to heroin." Ct. Ex. 0073 at 3:2-7. Dr. Fong's slideshow accompanying his

2016 presentation stated: "80% of heroin initiates used prescription opiates previously." Ct. Ex. 0060 at 12.

139. Another of Defendants' experts, Dr. Bruce Bagley, who studies the international illicit drug trade, opined that illicit drugs, such as heroin, illicit fentanyl, and counterfeit pills, smuggled from Latin America were a cause of the opioid crisis in Oklahoma. *See generally* Trial Tr. (6/6/19 a.m., Bagley). While Dr. Bagley has expertise in international drug cartels and affiliated gangs, he had no pre-existing expertise on the opioid crisis in Oklahoma specifically, had not researched Oklahoma at all until Defendants hired him to testify in this case, and had not reviewed any of Defendants' marketing materials. *See* Trial Tr. (6/6/19 a.m., Bagley) at 108:2-110:13, 187:4-17. Contrary to Dr. Bagley's testimony, reports from OBN have found that, with respect to Oklahoma: "In the 1990s, healthcare providers began prescribing opioid pain relievers at a high rate; consequently, the practice of overprescribing led to the widespread diversion and abuse of these medications." J-2951 at 15. The report further states that, in 2017 in Oklahoma, heroin represented an "emerging threat" that arose "likely due to changes in the supply and demand for other drugs, namely prescription opioids." J-2951 at 18. Dr. Bagley further opined that counterfeit opioid pills were a problem in Oklahoma, but he admitted he had no actual data to support this opinion. *See* Trial Tr. (6/6/19 a.m., Bagley) at 137:25-140:15, 141:21-25. The State's chief epidemiologist, Claire Nguyen, testified that she was not aware of any counterfeit fentanyl pills being manufactured and distributed in Oklahoma either. *See* Trial Tr. (6/7/19 a.m., Nguyen) at 120:6-25. The Court is unpersuaded by Defendants' and their experts' suggestions about illicit drugs, as the weight of the evidence

demonstrates the recent rise in illicit drugs in Oklahoma has been a result, not a cause, of the overprescribing of prescription opioids over the last two decades.

140. The evidence compels the same conclusion with respect to diversion of prescription opioids, which Defendants also have argued was a cause of the opioid problems in Oklahoma. From 1998 to 2018, incidences of diversion of opioids "grew exponentially" in Oklahoma. Trial Tr. (7/12/19 p.m., Hamilton-Fain) at 14:18-22. While in 1998, there were "maybe 25 cases" of diversion per year in Oklahoma, by 2008, the rate of diversion of opioids had tripled or quadrupled to "anywhere from 75 to a hundred cases per year." Trial Tr. (7/12/19 p.m., Hamilton-Fain) at 14:22-15:4. If "there wasn't a demand" for prescription opioids, "then there wouldn't be diversion." Trial Tr. (7/12/19 p.m., Hamilton-Fain) at 13:23-14:12. When this demand for opioids is not "met legitimately" through a prescription, individuals "resort" to illicit means of obtaining opioids—e.g., diversion of prescription opioids or the use of illicit drugs. *See, e.g.*, Trial Tr. (7/12/19 p.m., Hamilton-Fain) at 13:23-14:12. Ms. Hamilton-Fain, a former employee of the Oklahoma Board of Pharmacy who received diversion reports for over a decade, testified that Defendants' marketing and efforts to eliminate restrictions on opioid prescribing generated this demand for prescription opioids and that led to diversion as well. *See* Trial Tr. (7/12/19 p.m., Hamilton-Fain) at 14:13-17, 16:10-14. The Court agrees.

141. I conclude that the injuries the state has shown are the kinds contemplated in Oklahoma's nuisance statute. Indeed, while not necessary to establish a nuisance claim,[114]

[114] The categories of injury articulated in 50 O.S. § 1 are stated in the disjunctive, and therefore need not all be established in order to sustain a claim for nuisance.

I find that the State has put forth evidence sufficient to show injuries in several categories. First, that Defendants' conduct clearly annoyed, injured and endangered the comfort, repose, health and safety of Oklahomans. *See, e.g.*, FOF §§ G – I; Trial Tr. (6/25/19 a.m., Commissioner White) at 105:14-106:4; Trial Tr. (6/13/19 p.m., Kolodny) at 19:20-20:8. Second, the Defendants' conduct—particularly the false, misleading, and predatory way in which they marketed dangerous narcotics—offends decency. *See, e.g.*, FOF § F; Trial Tr. (6/25/19 a.m., Commissioner White) at 106:15-107:1; Trial Tr. (6/13/19 p.m., Kolodny) at 20:9-16. And, third, the State has proven that Defendants' conduct renders Oklahomans insecure in life, or in the use of property. *See, e.g.*, FOF §§ G – I; Trial Tr. (6/25/19 a.m., Commissioner White) at 107:16-108:3; Trial Tr. (6/13/19 p.m., Kolodny) at 20:17-22.

142. I also conclude, contrary to Defendants' prior contentions, that individualized proof of actual reliance by doctors is not a necessary element of public nuisance. Oklahoma's nuisance statute lists no such element. *See* 50 O.S. §§1-2. And I have been directed to no Oklahoma law that requires such in the public nuisance context. Indeed, to the contrary, I have found support for the conclusion that such reliance is not required in the decisions from this and other jurisdictions interpreting similar public nuisance statutes. *See* Statement of Decision, *California v. Atl. Richfield Co.*, Case No. 1-00-CV-788647 (Cal. Sup. Ct., Santa Clara Cty., Jan. 7, 2014) at 81 ("Reliance is not an element of a public nuisance cause of action."); *see also Balch v. State ex rel. Grigsby*, 1917 OK 142, ¶6 (affirming district court's decision in a nuisance case to allow generalized character evidence as proof that defendants' business "was a house of ill fame or one to which persons resorted for the purpose of prostitution," and noting that "[i]n a

prosecution for keeping a bawdy-house . . . The state is not required to show specific acts of lewdness or prostitution." (quoting *Jones v. State*, 10 Okla. Crim. 79)). For the reasons discussed discussed above, the State has sufficiently and reliably demonstrated causation.

143. Finally, I reject any suggestion by Defendants that due process requires a more strict causation standard than I have applied here. Defendants cite no authority holding that due process requires any particular causation standard. Their cited authority addresses the elimination of "common-law *procedure*," not substantive legal standards. *See Honda Motor Co. v. Oberg*, 512 U.S. 415, 430 & 432 n.10 (1994) (emphasis added). In fact, the U.S. Supreme Court has upheld civil liability under a statute that does not require a finding of common-law proximate causation, without any suggestion that doing so violated due process. *See CSX Transp., Inc. v. McBride*, 564 U.S. 685, 688 (2011) ("we conclude that the Act does not incorporate 'proximate cause' standards developed in nonstatutory common-law tort actions").

i. Learned Intermediary/Judgment of Doctors

144. In various ways, Defendants also seek to avoid liability by pointing the finger at the physicians they targeted. The Court is not persuaded by these arguments.

145. First, Defendants argue that they cannot be found to have caused Oklahoma's unprecedented increase in opioid prescribing because the physicians they detailed did not believe or otherwise rely upon anything Defendants told them. The Court already has found that reliance is not an element of the State's public nuisance claim and, thus, proof of individual reliance (or lack thereof) by a doctor who Defendants detailed is not essential.

146. Moreover, while Defendants elicited some testimony at trial from physicians who believed they would never have relied upon or could never have been influenced by the statements of a drug company's sales representative, the weight of the evidence makes clear that Defendants' marketing did cause many doctors to prescribe more opioids. For example, Dr. Toal rejected the idea that a physician could ever be influenced by a sales representative: "I don't even like the term marketing because it's – you're not marketing to a doctor. You don't market to the Pope." Trial Tr. (7/3/19 p.m., Toal) at 103:2-12. Dr. Toal is a cardiothoracic surgeon, not a primary care physician or pain specialist to whom Defendants targeted their sales force and marketing messages; he has never met with a sales representative promoting an opioid product; and he did not review any of Defendants' marketing or promotional materials. *See* Trial Tr. (7/3/19 p.m., Toal) at 6:5-23, 47:19-21, 89:16-90:12. Dr. Halford similarly testified that he considered drug reps to be nothing more than car salesman and had no interest in "listening to a sales pitch" while at his clinic. *See* Trial Tr. (7/8/19 p.m., Halford) at 44:8-45:13, 54:11-55:9. When Dr. Schick was asked whether a pharmaceutical sales representative ever influenced his prescribing behavior, he answered: "I probably got more comfortable with it in relation to the sales reps being around, yes." *See* Trial Tr. (6/28/19 p.m., Dr. Schick) at 179:4-13 (explaining also that Dr. Schick became more comfortable after attending the dinners and listening to the speakers give their presentations); *compare with* S-1246 at 1 (Defendants' marketing memorandum stating: "Physicians are becoming more ***comfortable*** using opioids in non-malignant pain. Our objective is to convince them that DURAGESIC is effective and safe to use in areas such as chronic back pain, degenerative joint disease, and osteoarthritis"). And, as

discussed above, Defendants' expert, Dr. Fong, specifically attributed the rise in opioid prescribing "from 1998 onward" to, among other things, "a pharmaceutical industry that was very aggressive in promot[ing] pain management treatment" and "drug reps" providing doctors with "dinners and lunches . . . golf trips [and] massages." Ct. Ex. 0073 at 5:25-6:12.

147. Defendants' own witnesses offered contradictory testimony on this point. Dr. Phillips testified that he was never influenced by sales representatives. Trial Tr. (7/12/19 a.m., Phillips) at 47:18-25. However, in 2016, Dr. Phillips offered a different explanation of the issue when speaking to the Oklahoma Medical Association:

> Everyone here knows how we got in this situation. They told us we were underprescribing. We need to prescribe more. It's the patient's rights to have pain medicine, so we all got on board. And when someone said they were hurting, we said, Okay, we are going to give you something. Now it's just the opposite. Not everyone deserves pain medicine."

Trial Tr. (7/12/19 a.m., Phillips) at 71:2-23; *see also* S-4743 at 7:20-7:48.

148. The State, meanwhile, presented substantial and consistent evidence demonstrating how Defendants' marketing did, in fact, influence and cause Oklahoma physicians to write prescriptions for opioids. For example, both Drs. Beaman and Mazloomdoost testified that the misinformation campaign by the opioid industry, including Defendants, influenced their practices and caused them to liberally and aggressively write opioid prescriptions they would never write today. *See, e.g.*, Trial Tr. (6/17/19 p.m., Beaman) at 40:22-41:13, 68:7-69:6, 79:1-81:23; Trial Tr. (6/6/19 a.m., Mazloomdoost) at 72:17-73:2.

149. Importantly, Defendants' own internal records confirm their contemporaneous analysis and belief that their marketing worked on doctors. There are also 35 boxes of over 100,000 calls notes the State offered into evidence that put Defendants' argument to rest. Many of these call notes explicitly documented the fact that doctors in Oklahoma prescribed Defendants' opioids in response to Defendants' marketing. *See, e.g.*, Trial Tr. (5/31/19 a.m., J&J: Deem-Eshleman) at 24:14-20 ("She would try some nonmalignant patients"); Trial Tr. (5/31/19 a.m., J&J: Deem-Eshleman) at 30:20-23 ("Doctor said he would try more with these patients"); Trial Tr. (5/31/19 a.m., J&J: Deem-Eshleman) at 128:15-24 (agreed that, according to a call note, "the doctor says because of DAWN data, he will only prescribe your drug going forward"); Trial Tr. (6/3/19 a.m., J&J: Deem-Eshleman) at 44:21-45:06 (agreed that call note reflects a doctor agreeing to prescribe Duragesic in response to sales representative efforts); *see also* S-2481-2492; FOF § F.4, *supra* (providing some of the many examples). Moreover, an abundance of Defendants' internal marketing documents demonstrate that Defendants' marketing worked. *See, e.g.*, S-1246 ("Due to your efforts, for the first time, DURAGESIC attained $400 million in 2000"); S-1358 ("Nothing is more important to our future success than maximizing the effectiveness of our sales force."). There are also published studies that show doctors often wrongly believe that marketing does not influence them. *See, e.g.*, S-1480 (De Jong, *et al.*, *Pharmaceutical Intustry-Sponsored Meals and Physician Prescribing Patterns for Medicare Beneficiaries*, 176:8 JAMA INTERN. MED. 1114-1122 (2016); Trial Tr. (6/13/19 a.m., Kolodny) at 40:12-41:05; *see also, e.g.*, Trial Tr. (6/17/19 p.m., Beaman) at 76:2-78:17.

150. In the end, the testimony of the State's marketing expert, Renzi Stone, is particularly fitting here: "[I]nfluence is the core of marketing. . . . [T]he best kind of influence is when a purchase decision has been made, and you didn't realize that you had been influenced." Trial Tr. (6/10/19 p.m., Stone) at 31:1-3, 32:9-11. To accept Defendants' argument that no doctors ever believed or relied upon Defendants' marketing messages would require the Court to disregard the weight of the evidence—including the content of 100,000-plus undisputed call notes—as well as "common sense," in contravention of Oklahoma law. *See, e.g., Jones v. Mercy Heatlh Center, Inc.*, 2006 OK 83, ¶¶ 20, 22, 155 P.3d 9, 15 (explaining causation as a function of "common sense and the evidentiary material"). If Defendants' marketing efforts truly did not work, it is inconceivable that they would have invested millions of dollars annually to research messaging that would most affect physicians.

151. Second, I reject Defendants' argument that they cannot be found to have caused the overprescribing of opioids in Oklahoma because doctors were a supervening cause that disrupts the causal chain between Defendants' messaging and the harm that resulted from it. The Court finds it difficult to reconcile Defendants' argument that doctors' intervening acts defeat proximate cause with the evidence in this case. For Defendants' theory to prevail, it must have been, among other things, unforeseeable to Defendants that physicians would prescribe opioids based on Defendants' misleading marketing and promotion. *See Graham v. Keuchel*, 1993 OK 6, ¶ 9, 847 P. 2d at 348 ("To rise to the magnitude of a supervening cause, which will insulate the original actor from liability, the new cause must be (1) independent of the original act, (2) adequate of itself to bring about

the result and (3) one whose occurrence was not reasonably foreseeable to the original actor."). That is a dubious proposition. The very purpose of Defendants' comprehensive marketing plans was "to ***convince***" doctors to prescribe more opioids for chronic non-cancer pain. *See, e.g.*, S-1246; S-0510; S-2365; FOF §§ F.2 – F.4. Defendants compensated their sales representatives based on the number of prescriptions their target-doctors wrote. *See, e.g.*, FOF § F.1. Defendants conducted research to determine which marketing messages would "have the most impact" on physicians' prescribing patterns and would most effectively cause a "behavior change" in doctors. *See, e.g.*, S-2364; S-1163; Trial Tr. (6/11/19 p.m., Kolodny) at 127:18-137:10 Trial Tr. (6/13/19 a.m., Kolodny) at 63:02-64:04. That doctors would fall for Defendants' deception and prescribe opioids based on Defendants' marketing was not only a foreseeable result of Defendants' acts and omissions, it was the intended result. The Court is not persuaded by Defendants' arguments on this front.

152. Third, to the extent that Defendants contend the "learned intermediary doctrine" absolves them of liability (it is unclear if they do), the Court disagrees. The learned intermediary doctrine has been adopted in Oklahoma in products-liability cases, asserting failure-to-warn claims. *See McKee v. Moore*, 1982 OK 71, ¶¶6–8, 648 P.2d 21. This equitable action to abate a public nuisance is not a products-liability case. Therefore, the Court finds this doctrine inapposite to the case at bar. But even if the learned intermediary doctrine did apply to the State's equitable claim, it would not shield Defendants from liability here. This doctrine allows manufacturers of prescription drugs to avoid liability only "if the manufacturer adequately warns the prescribing physicians of the

dangers of the drug." *Edwards v. Basel Pharms.*, 1997 OK 22, ¶8, 933 P.2d 298, 301. "To invoke a defense to liability under the learned intermediary doctrine, a manufacturer seeking its protection must provide sufficient information to the learned intermediary of the risk subsequently shown to be the proximate cause of a plaintiff's injury." *Tortorelli v. Mercy Health Ctr., Inc.*, 2010 OK CIV APP 105, ¶27, 242 P.3d 549. Here, the Court already has found that Defendants misled doctors about the risks of prescribing opioids. Accordingly, assuming *arguendo* that the learned intermediary doctrine is legally available to Defendants, the Court finds the doctrine does not immunize Defendants here due to their failure to adequately warn prescribing physicians of the dangers of their drug. *See, e.g.*, *Edwards*, 1997 OK 22 at ¶8.

c. The Number of Persons Affected

153. The final element required to show a public nuisance is that it "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. There can be no question that this nuisance effects entire communities, neighborhoods, or a considerable number of persons. This nuisance has ravaged the entire State.

154. Over 6,000 Oklahomans are dead. *See* Trial Tr. (6/7/19 a.m., Nguyen) at 95:22-25; *see also* (Trial Tr. (6/25/19 a.m., Commissioner White) at 83:9-13. Between 2013 and 2017, an average of 32 Oklahomans died every month from unintentional prescription opioid overdose. Trial Tr. (6/7/19 a.m., Nguyen) at 105:19-23. Tens of thousands of Oklahomans suffer from Opioid Use Disorder. *See, e.g.*, FOF § I. As Dr.

Beaman testified, this nuisance has "ruined families. It's ruined childhoods. It's stolen parents, It's stolen children." Trial Tr. (6/17/19 p.m., Beaman) at 65:17-20. Hundreds of children are born every year suffering from NAS. See Trial Tr. (6/25/19 a.m., Commissioner White) at 71:16-23. To say the State has established that this nuisance has impacted a "considerable number of persons" would be an understatement.

* * *

155. Accordingly, based on the evidence and the facts found above, I find and conclude the State has proven a claim for public nuisance for which Defendants are liable.

B. Defendants are Liable for the Entire Public Nuisance and Abatement Remedy

156. Joint and several liability is available to the State in this case. First, joint and several liability is clearly and traditionally available in nuisance cases involving more than one tortfeasor. *See, e.g., Phillips Petro, Co.*, 1942 OK 94, ¶¶ 10-13, 122 P.2d at 1022-23; *Town of Sentinel*, 1936 OK 6020, ¶¶ 20-22, 61 P.2d at 659. Second, the Oklahoma Legislature recently reaffirmed that "actions brought by or on behalf of the state" are subject to joint and several liability. 23 O.S. § 15(B) (statute abolished joint and several liability but specifically exempted actions brought by or on behalf of the state); *see also* 8 Okla. Prac., Product Liability Law § 3.10 (2017 ed.) ("If the state was a plaintiff in a cause of action against multiple defendants and established liability against those defendants, the state could employ the doctrine of joint and several liability and recover 100% of the damages suffered by the state against a defendant who was, for example, only 10% or 1% at fault.").

157. Because Defendants' conduct was both a cause in fact and a direct and proximate cause of Oklahoma's public nuisance, I conclude that Defendants are liable for the entirety of Oklahoma's public nuisance and the entirety of the abatement remedy. *See Phillips Petro. Co. v. Vandergriff*, 1942 OK 94, ¶¶ 10-13, 122 P.2d 1020, 1022-24 (nuisance action applying joint and several liability); *Town of Sentinel v. Boggs*, 1936 OK 6020, ¶¶ 20-22, 61 P.2d 654, 659 (same).

158. Defendants attempt to avoid this result by arguing: (1) the independent acts of other opioid manufacturers, Oklahoma physicians, patients and others diverting drugs, and criminal organizations importing counterfeit and other illicit narcotics were a cause of Oklahoma's public nuisance; (2) Defendants' branded opioid product share of the Oklahoma prescription opioid market was low; and/or (3) because many people died or became addicted as a result of many doctors being misled, this case has merely "bundle[d] a host of individual harms together."[115] None of these arguments change my conclusion.

159. It has long been the law in Oklahoma that a plaintiff harmed by a nuisance may elect to sue all, or merely one, of the parties that was a cause of the nuisance:

> Where several parties, acting together or acting independently of each other, purposefully or carelessly and negligently do such acts as to do injury resulting in damage to another, such injured party may maintain an action against all or against any one or more less than all such parties for the entire amount of damage done; and where such injured party brings action for the damage done against one of such parties, it is not error for the court to instruct the jury that, if they find from the evidence that the defendant, along with others, did the injurious acts resulting in damages, the plaintiff may recover from the one sued the entire amount of damage sustained by reason of such acts.

[115] Defs.' Renewed Mot. for Judgment at 28; *see also id.* ("Rather than presenting a single indivisible injury, the State's evidence shows a collection of separate harms.").

Town of Sentinel, 1936 OK 620, ¶¶ 21, 61 P.2d 654, 659; *see also Kirkpatrick v. Chrysler Corp.*, 1996 OK 136, ¶ 10, 920 P.2d 122, 126. This rule applies even if the conduct of the party sued is insufficient alone to create the nuisance:

> Where the concurrent acts of different persons, although acting independently, combine to produce a condition which is actionable negligence, each is responsible to one injured thereby for the entire result, even though the act or neglect alone of the one sued might not have produced the result.

Town of Sentinel, 1936 OK 620, ¶¶ 21, 61 P.2d 654, 659; *see also Kirkpatrick v. Chrysler Corp.*, 1996 OK 136, ¶ 10, 920 P.2d 122, 126.

160. Here, the State chose to sue and prosecute through trial a single claim of public nuisance against Defendants alone.[116]

161. Having concluded that Defendants are a cause of Oklahoma's public nuisance, and based on the foregoing, it is legally irrelevant for purposes of this litigation: (a) whether the concurrent acts of others may also have been a cause of the nuisance; and (b) whether the magnitude of Defendants' conduct was greater or less than that of other potential concurrent actors. Accordingly, neither Defendants' first or second argument alters the conclusion that Defendants are liable for the entirety of Oklahoma's public nuisance and the entirety of the abatement remedy.

162. Defendants' legal argument that the harm resulting from Oklahoma's public nuisance is divisible —by suggesting that because many people died or suffer from OUD

[116] Purdue and Teva are no longer parties to this action; the settlements involving those parties are to be reflected in the judgement by way of dollar-for-dollar offset. *See* 12 O.S. § 832(H).

as a result of many doctors being misled, this case has merely "bundle[d] a host of individual harms together"—is incorrect for at least two reasons.

163. First, Defendants' argument is inconsistent with the very nature of a *public* nuisance. A public nuisance is distinguishable from a private nuisance precisely because its harms are felt by a large number of persons and despite the fact that "the extent of the annoyance or damage inflicted upon individuals may be unequal." 50 O.S. § 2.[117] Accordingly, the law of public nuisance is specifically designed to address cases with complex injuries that affect many people, sometimes in different ways or degrees.

164. Second, Defendants' argument is defeated by one of the categories of injury they note: cattle dying from drinking commingled water pollution.[118] Though not cited in Defendants arguments, *Tidal Oil Co. v. Pease*, 1931 OK 740, 5 P.2d 389, dealt with the very same sort of injury. *Id.* at ¶¶ 1-3, 5 P.2d at 390. In that case, there were two separate polluted streams and evidence connecting each defendant to only one of the streams. *See Id.* at ¶¶ 0, 9-10, 5 P.2d at 389, 391. Yet the Supreme Court held the following:

> Where two defendants acting independently wrongfully pollute two separate streams of water flowing through a tract of land owned by plaintiff and used by him for pasturing live stock by casting salt water in the streams, the one defendant polluting one stream and the other defendant polluting the other stream, and the action is for injury to the live stock from drinking salt water from both streams, defendants are jointly liable for such injury. . . . While the defendants were acting independent of each other, if their acts combined to produce the alleged injury to plaintiffs' live stock, as stated in *Northrup v.*

---

[117] *See also* 50 O.S. § 10 ("A private person may maintain an action for a public nuisance if it is *specially injurious to himself*, but not otherwise." (emphasis added)).

[118] *See* Renewed Mot. for Judgment at 28, n. 70 (citing *Selby Oil & Gas Co. v. Rogers*, 1923 OK 1003, ¶¶ 2-4, 7, 221 P. 1012, 1012-13).

> *Eakes, supra*, each so acting is responsible for the entire result ***even though the act of any one defendant might not have caused it.***"

Id. at ¶¶ 0, 14, 5 P.2d at 389, 391. *See also Delaney v. Morris*, 1944 OK 51, ¶ 8, 145 P.2d 936, 939 (describing *Tidal Oil Co.* as follows: "two separate watercourses on the land were polluted from different sources, but the action was for the death of cattle which died as the result of drinking, ***possibly*** from both streams, and the court held this was a single injury impracticable of apportionment or separation of causes . . . .").

165. While the magnitude of the harm here is very different from that in *Tidal Oil Co.*, the logic is the same. The evidence shows Defendants' acts were a direct and proximate cause of the State's injury such that Defendants should be responsible for the entire result. Attempting to apportion the State's harm amongst various causes is just as impractical here as it was there.

166. Even assuming, *arguendo*, that the State's harm was capable of division, there is no evidence supporting such an apportionment. To the contrary, the evidence demonstrates the opposite.

167. Nearly every witness who has testified agrees the harm Oklahoma has suffered during the opioid crisis is complex and cannot reasonably be apportioned amongst its causes. *See, e.g.*, Trial Tr. (6/10/19 p.m., Stone) at 158:6-11; Trial Tr. (6/26/19 a.m., Commissioner White) at 113:25-114:1; Trial Tr. (6/26/19 p.m., Commissioner White) at 29:25-30:20; Trial Tr. (6/17 p.m., Beaman) at 166:20-167:18; Trial Tr. (6/17/19 a.m., Kolodny) at 29:2-9; Ct. Ex. 2 (Portenoy) at 268:11-271:24; Trial Tr. (7/11/19 p.m., Bagley) at 165:3-17, 111:25-112:11. Even in those cases when it is clear that one of Defendants'

branded medications caused death, the evidence at trial established that—in the many instances when Defendants' opioid was one of multiple causes—there is no accurate way of apportioning that cause from the various other drugs found. *See, e.g.*, Trial Tr. (6/18/19 p.m., Pfeifer) at 16:20-17:5; Trial Tr. (6/7/19 p.m., Nguyen) at 19:15-18; Trial Tr. (7/11/19 p.m., Bagley) at 163:8-14.

168. Moreover, there is significant evidence in the record that shows Defendants engaged in activity that renders their market share an inappropriate and unreliable metric by which to measure their role in the opioid crisis. Defendants not only promoted their branded opioids but also engaged in unbranded marketing, which had the effect of increasing the market for everyone's opioid drugs (not just Defendants'). *See, e.g.*, S-0353; Trial Tr. (6/12/19 p.m., Kolodny) at 125:19-131:6; Trial Tr. (6/10/19 p.m., Stone) at 158:6-11 (explaining that it would be "impossible" to "separate out whether the rising tide lifted one ship versus another."). As such, Defendants' market share of total opioid prescriptions written in Oklahoma does not bear a reasonable relationship to their liability for the nuisance. To the contrary, the evidence shows that Defendants are responsible for more than just the harm caused by their branded medications; but how much of that additional harm is attributable to them as opposed to others is incalculable.

169. Finally, even if market share were a reasonable basis for apportionment, Defendant's evidence of market share was incomplete and unreliable. From 1996 until 2008, Defendants presented evidence of their market share that only accounted for a fraction of their total market (that from the State's Medicaid and state-employee insurance programs). *See, e.g.*, Trial Tr. (7/11/19 a.m., Marais) at 34:17-35:8; Ct. Ex. 201 (used in

Dr. Marais' testimony). Significantly, Defendants' market share analysis also omitted some of their branded opioid medications. *See, e.g.*, Trial Tr. (7/11/19 a.m., Marais) at 145:11-146:7. And it ignored, completely, that Defendants' own unbranded marketing had the potential to influence the sales of all opioids. Trial Tr. (5/30/19 a.m., J&J: Deem-Eshleman) at 64:22-65:3. When confronted with this fact, Defendants' market-share expert had to agree that the market share of all opioids is 100%. Trial Tr. (7/11/19 a.m., Marais) at 113:15-22. And while Defendants never showed any of their unbranded marketing to their own market-share expert, the evidence demonstrated that Defendants marketed all opioids.

170. In the alternative, I also find that joint and several liability is appropriate here because Defendants acted in concert with others in causing this nuisance. Joint liability may be imposed when "there is some concerted action" on the part of those causing injury—*i.e.*, "when there is some common purpose or design." *Kirkpatrick v. Chrysler Corp.*, 1996 OK 136, ¶ 10, 920 P.2d 122, 126. The record is replete with evidence showing Defendants partnered with others to spread their misleading message, all with the common goal of drastically expanding the market for opioids, including for example:

- Defendants called Purdue their "Partner" and said they sat "at same table for most partner meetings . . . includ[ing] Pain Care Forum" meetings. S-1439. Defendants entered into a co-development and co-promotional agreement with Purdue for Ultram SR in 1997. Ct. Ex. 0092 (Mashett) at 280:10-20; S-1069 at 1. And, though that agreement was terminated prior to approval of the product, Defendants entered into a licensing agreement with Purdue for Ultram ER in 2005, under which Defendants paid a royalty to Purdue for sales of Ultram ER. Ct. Ex. 0092 (Mashett) at 281:15-282:25; S-1069 at 1-2; Trial Tr. (6/12/19 p.m., Kolodny) at 35:22-25. This licensing agreement between Defendants and Purdue lasted until Defendants lost exclusivity on Ultram ER. Ct. Ex. 0092 (Mashett) at 281:15-282:25; S-1069 at 1-2. During the life of this licensing agreement, Defendants falsely and

misleadingly promoted Ultram ER and, as a result, sales of Ultram ER skyrocketed, benefitting both Defendants and their partner Purdue. This constitutes concerted action with Purdue.

- Defendants identified the APF as its "Go to Partner," and worked with the APF to support and promote materials that included misleading statements about the safety and efficacy of opioids. *See, e.g.*, S-1224; S-1191; Trial Tr. (6/3/19 a.m., J&J: Deem-Eshleman) at 104:05-105:23; S-1227; Trial Tr. (6/12/19 p.m., Kolodny) at 73:24-77:24. For example, Defendants used an APF brochure called the "Pain Resources Guide" that includes a section entitled "Setting the Record Straight on Addiction" which states: "Many people living with pain—and even some healthcare providers—falsely believe opioids are universally addictive. Studies and clinical practice have shown that the risk of addiction is small when these medications are appropriately prescribed and taken as directed." S-1227; Trial Tr. (6/12/19 p.m., Kolodny) at 78:21-79:17. The brochure further states: "Unless you have a past or current history of substance abuse, the chance of addiction is low when these medications are prescribed properly and taken as directed." S-1227; Trial Tr. (6/12/19 p.m., Kolodny) at 81:04-16. In December 2010, Defendants worked with the APF to reproduce and disseminate several APF "TARGET Chronic Pain" materials, including a "Notebook," "Provider Card" and "Top 10 Tips." *See* S-1249; Trial Tr. (6/12/19 p.m., Kolodny) at 81:24-86:18. The Provider Card states: "When prescribed by a healthcare professional and taken as directed, opioids are safe, effective and rarely lead to addiction." S-1249; Trial Tr. (6/12/19 p.m., Kolodny) at 81:24-86:18. Defendants also, at times, would use links on the APF's website to link back to their own opioid websites. *See* S-0973; Trial Tr. (6/12/19 p.m., Kolodny) at 87:10-90:08. This constitutes concerted action with the APF—an organization that shut its doors after a senate inquiry into APF receiving substantial funding from opioid manufacturers, including Defendants.

- Defendants actively promoted a "Consensus Statement" authored by two organizations Defendants funded, the AAPM and APS, that was full of false and misleading statements about opioids. *See, e.g.*, S-0760 ("According to the *Consensus Document* referenced above, studies indicate that the de novo development of addiction when opioids are used for the relief of pain is low."). Specifically, the Consensus Statement was written by a committee including David Haddox (former Purdue Pharma medical director), David Joranson (founder of PPSG), Richard Payne (KOL, co-leader of Defendants' NPEC program), Matthew Midcap (who had a financial relationship with Defendants), Daniel Carr (who had a financial relationship with Defendants), and Robert Angarola (outside counsel to Defendants in 1990 related to thebaine imports from Tasmania). Dr. Portenoy consulted on the Consensus Statement as well. Trial Tr. (6/11/19 p.m., Kolodny) at 41:03-44:24. The Consensus Statement suggests that pain is undertreated and doctors should prescribe more opioids. *See* S-0900; Trial Tr. (6/11/19 p.m.,

Kolodny) at 20:10-39:08. The Consensus Statement described a fear of addiction, regulatory action and diversion as "impediments" to the use of opioids. *See* S-0900; Trial Tr. (6/11/19 p.m., Kolodny) at 20:10-39:08. The Consensus Statement states that "Studies indicate that de novo development of addiction when opioids are used for the relief of pain is low." S-0900; Trial Tr. (6/11/19 p.m., Kolodny) at 20:10-39:08. After AAPM and APS issued the Consensus Statement, Defendants adopted and repeated its statements in their marketing materials, *see, e.g.*, S-0760, and increased their contributions to APS by almost eight hundred percent in 1996, and then increased them again in 1997. *See* S-1349; Trial Tr. (6/3/19 a.m., J&J: Deem-Eshleman) at 118:05-10. Defendants' payments to APS increased from $10,000 in 1995 to $480,000 in 1998. *See* S-1349; Trial Tr. (6/11/19 p.m., Kolodny) at 47:05-17. In total, Defendants paid approximately $1.895 million to the APS. Similarly, from 1995 to 1997, Defendants' payments to AAPM increased from $875 to $43,000. *See* S-1349; Trial Tr. (6/11/19 p.m., Kolodny) at 47:05-17. Defendants were also on the corporate council for the APS from 1994 to 2014. Trial Tr. (6/13/19 a.m., Kolodny) at 9:20-25. This demonstrates concerted action between Defendants and several KOLs and advocacy groups aimed at increasing opioid sales generally, which benefited Defendants financially.

- Defendants were also on the AAPM Corporate Council from 1996 to approximately 2013. *See* Trial Tr. (6/13/19 a.m., Kolodny) at 11:08-12:11, 14:19-25. Defendants created their misleading pro-opioid brochure "Finding Relief" (S-1247), discussed above in detail in concert with the AAPM and AGS, whose logos appear on the front cover and who are referred to as Defendants' "partners" inside the front cover. *See* S-1247 at 1-2. This is a specific example of concerted action among Defendants and advocacy groups they funded, which spread misleading information about opioids.

- Defendants controlled or wrote the content of certain journal articles that were intended to be published under KOLs' names, including Dr. Charles Argoff's name, and which were intended to increase sales of Defendants' opioids. *See e.g.*, S-0972; Trial Tr. (6/13/19 a.m., Kolodny) at 47:1-50:1. Dr. Argoff testified that that he did not see a problem with a drug company entirely drafting a quote on his behalf with a message benefiting the drug company to be put in a press release and published on the drug company's website. Ct. Ex. 175 (Argoff) at 301:5-15. Defendants worked in concert with KOLs in this regard to spread their false messaging.

- Defendants' internal documents identified one of Defendants' national advocacy and business plans for its pain franchise to be to "[c]ollaborate with The Pain Care Forum on policy issues and common strategies with key decisionmakers, such as HHS, surgeon general's office, CDC, state and federal legislators and regulators."

Ct. Ex. 0090 (Colligen) at 129:19-130:10; S-0304 at 6. The Pain Care Forum is a prime example of the nature and extent of Defendants' concerted actions with others in the opioid industry toward a common purpose—to disseminate self-serving falsities and misinformation about opioids for their own commercial benefit.

- Defendants' business plan for their pain franchise and internal update to their national advocacy strategy explained how Defendants' advocacy work would "mobilize partners" to advocate on priorities that include the undertreatment of pain and unbranded marketing; it also described other opioid manufacturers' use of the same groups and identifies this type of advocacy work as "evident in the top companies." *See* S-1217 at 2-3, 8.

These examples all demonstrate that Defendants acted in concert with others involved in the opioid crisis: to continue to increase the opioid market through false and misleading marketing and despite its known, deleterious consequences. The evidence also shows that this concerted activity did, in fact, directly contribute to the rise of opioid sales, oversupply, and attendant overdoses, deaths, and cases of addiction in the State.

1. The State's Conduct Does Not Bar Recovery Nor Defeat Joint and Several Liability

171. Defendants have also argued the State is at fault for causing the opioid crisis. They have asserted *Walters v. Prairie Oil & Gas Co.*, 1922 OK 52, 204 P. 906, for the propositions that (a) the State may only recover for the portion of harm attributable to Defendant's acts (as opposed to that attributable to Plaintiff's wrongdoing); and (b) where the State failed to "separate the amount of damage inflicted by the . . . defendants from the amount resulting from [its own] acts," the State cannot recover at all.[119] This argument is both legally and factually flawed.

[119] Renewed Mot. for Judgment at 25 (quoting *Walters*, 1922 OK 52, ¶ 4, 204 P. 906).

172. First, the doctrine of contributory negligence is inapplicable to a nuisance action. *City of Weatherford v. Luton,* 1941 OK 305, ¶¶ 4-5, 117 P.2d 765, 767 ("Where the owner of a creamery maintains a nuisance in that he deposits refuse in a running stream so that the waters are polluted as they pass the lower riparian owner, the fact that the lower owner had also, by his own independent act, cast foul or unwholesome material into the same stream during the same period, would not defeat his right to recover for so much of the damage as was fairly attributable to the wrong of the owner of the creamery, ***the doctrine of contributory negligence not being applicable to an action to recover for a nuisance.***" (emphasis added) (quoting *Bowman v. Humphrey*, 132 Iowa 234, 109 N.W. 714)). That is especially true where, as here, the State has no claim based on negligence. As such, any alleged negligence of the part of plaintiff does not act as a *per se* bar to its right to recover. *Id.*

173. Second, based on the wanton, willful and intentional character of Defendants' tortious conduct here, as found above, the doctrine of comparative negligence does not apply. The Oklahoma Supreme Court has held that, "while ordinary negligence may be used as a defense against gross negligence, it may not be considered as a defense against any form of conduct found to be willful and wanton or intentional." *Graham v. Keuchel*, 1993 OK 6, ¶52, 847 P.2d 342, 363; *See also* OUJI 9.17 ("[N]egligence is not a defense to conduct that is either willful and wanton or intentional. Therefore, if you find that the conduct of Defendant was willful and wanton or intentional, then you shall . . . not reduce the amount of Plaintiff's damages on account of any negligence of Plaintiff."). Accordingly, in light of the intentional, wanton and willful acts of Defendants, the

negligence of the State—if any—cannot serve as a means to reduce or defeat Defendants' liability, meaning any failure by the State to apportion such liability is moot.

174. Third, even if comparative fault was available here, I do not conclude from the record that the State's acts or omissions were a direct or proximate cause of the opioid crisis.[120] While Defendants have cited documents in the record showing certain State actions, no witness has testified that those acts (or inaction) were a cause of the State's injury. To the contrary, there has been credible fact and expert testimony that states—in no uncertain terms—that the State is not at fault for causing the opioid crisis:

> [W]hat was occurring in Oklahoma in 2001 was a host of intense marketing by [Defendants] pushing and pushing and pushing for doctors to prescribe more opioids while it appears that we have some of the State agencies stepping up to try to say, this is a problem, this is a problem. But there's no way we could win a tug-of-war when you drop $30 million into [Defendants' marketing] and that doesn't include your sales force. So if what you're trying to say to me with this yesterday and today, is that somehow [it is] the State's fault when [Defendants] were shooting bullets at the State of Oklahoma, that we didn't invest enough or act fast enough to buy Oklahomans enough bulletproof vests, or when you were dropping bombs on the State of Oklahoma that we didn't work fast enough or hard enough to build bomb shelters to save peoples' lives, I find that offensive and I completely disagree with it. . . . I find it incredibly offensive that what you would stand here and suggest is that as [Defendants] unleashed a series of bombs, as I have described to you already, across the United States of America that landed squarely in Oklahoma, that killed over 6,000 Oklahomans, without you telling us that you were going to do this,

[120] The facts of *Walters v. Prairie Oil & Gas Company* are strikingly different from those here. In *Walters*, "the evidence produced by the plaintiffs show[ed], not only that the [oil company] defendants polluted the stream as alleged, but that [plaintiffs'] tenant, engaged in the same business, also polluted the stream in a like manner with the consent of his landlord, or that such pollution resulted from the ordinary use of the premises by the tenant." 1922 OK 52, ¶ 5, 204 P. 906, 908. The court concluded that to allow the plaintiff to recover the full damages amount from the defendants under these circumstnaces "would be to allow the plaintiffs to mulct the defendants in damages, not only for their own acts, but for the acts of plaintiffs' tenants," *id.*, since the plaintiffs' tenant was causing the *exact same* injury as the defendants. Here, the State does not sell or market opioids – much less in a deceptive manner – and thus did not cause the opioid crisis.

> without you still accepting any responsibility today, that as we have worked as hard as we have worked and we are the only reason, the only reason that lives are being saved in this State, that what you say to us is, You didn't build bomb shelters fast enough, you didn't purchase enough bulletproof vests, you couldn't run from us fast enough. . .

Trial Tr. (6/26/19 p.m., Commissioner White) at 45:13-46:4, 47:17-48:19, 53:20-56:22, 65:17-22. Therefore, even if comparative negligence applied, I would not apportion any fault to the State because the State's actions did not proximately cause the opioid crisis. Additionally, Defendants have not cited any authority for holding a State liable for comparative negligence – or creating a public nuisance – resulting from its legislative or regulatory actions.[121]

175. As a factual matter, the State is not at fault based on this record; and as a legal matter, comparative negligence is not available based on the intentional nature of Defendants' tortious conduct. As such, Defendants' reliance on *Walters* as a bar to liability or as a way of defeating joint and several liability is misplaced.

2. The Imposition of Joint and Several Liability Does Not Violate the Due Process Clause

176. Defendants invocation of the Due Process clause is also misplaced. *First*, contrary to Defendants contentions, this case does not require an expansion of joint and

[121] Defendants essentially argue that the State should have taken (or not taken) certain legislative or regulatory actions that in hindsight might have mitigated the foreseeable – and in fact intended – consequences of Defendants' own deceptive marketing campaign. Of course, the State also took many actions that have reduced the scope of Defendnats' nuisance. *See, e.g.*, Trial Tr. (6/26/19 p.m., Commissioner White) at 45:13-46:4, 47:17-48:19, 53:20-56:22, 65:17-22. Even if in theory the State could be responsible for comparative negligence resulting from its own policymaking, comparative negligence would be particularly inappropriate in this case given Defendants' active lobbying of the State in support of more expansive opioid prescribing policies. *See* FOF § F.2.b.4.

several liability doctrine; as explained above, this Court has found the concerted action and indivisible injury historically required for such liability to apply. *Second*, Defendants' reliance on punitive-damages and penalty cases is unavailing. Defendants are not being penalized or required to pay damages of any kind—much less punitive damages. Rather, they are being required simply to remediate the public nuisance they helped create. Such an imposition is not disproportional to their wrongdoing; to the contrary, as the testimony regarding the State's abatement plan demonstrates, the costs and services requested for such remediation are both necessary and reasonable. Moreover, Defendants were afforded adequate process under the law to mitigate their liability when they were given the opportunity to join any party they thought responsible in accordance with the Court's Scheduling Order. The fact that they elected not to pursue that course does not indicate a lack of process, but rather the exercise of choice. As such, there is no due-process violation in holding Defendants jointly and severally liable for the abatement of the nuisance they helped create.

C. The State Has Shown it is Entitled to the Equitable Remedy of Abatement

177. There are three remedies available against a public nuisance: (1) Indictment or information; (2) a civil action; and (3) abatement. 50 O.S. § 8. "A public nuisance may be abated by any public body or officer authorized thereto by law." 50 O.S. § 11. The Attorney General, as "chief law officer of the state,"[122] is specifically authorized to "initiate or appear in any action in which the interests of the state or the people of the state are at

[122] 74 O.S. § 18.

issue." 74 O.S. § 18b(A)(3). At common law, the office of the Attorney General was empowered to "institute equitable proceedings for the abatement of public nuisances which affected or endangered the public safety or convenience and required immediate judicial interposition." *State ex rel. Cartwright v. Georgia-Pacific Corp.*, 1982 OK 148, ¶ 7, 663 P. 2d 718, 720-21. And that historic power exists in the Oklahoma office of the Attorney General today. *See State ex rel. King v. Friar*, 1933 OK 501, ¶¶ 7-14, 25 P.2d 620, 622-23; *Balch v. State ex rel. Grigsby*, 1917 OK 142, 164 P. 776 (same power vested in county attorney); Reaves *v. Territory*, 1903 OK 92, 74 P. 951; *see generally State ex rel. Cartwright v. Georgia-Pacific Corp.*, 1982 OK 148, ¶ 8, 663 P.2d at 721 ("Insofar as the law of Oklahoma is concerned, it appears well settled that the duties of the Attorney General embrace those duties and powers as were usually incident to the office of the attorney General in England under the common law, when not locally inapplicable.").

178. The law is clear: the Attorney General has the power to bring an action on behalf of the State to abate a public nuisance.

3. Abatement is An Equitable Remedy that Can Include the Payment of Costs Necessary to Abate a Nuisance

179. Defendants do not dispute the State's right or the Attorney General's power to bring an action to abate a public nuisance. Rather, Defendants argue that the method of abatement the Attorney General has proposed—a pre-funded abatement plan—is not abatement; they say this is a request for damages.[123] According to Defendants, "nuisance"

[123] Defendants also argue the State cannot recoup damages in a nuisance claim. This, of course, is a red herring given that the State dismissed its claims for damages before trial. But it also is wrong. Section 10 of Title 50 merely articulates the circumstances under which a private person

means "conduct"—the "unlawfully doing an act or omitting to perform a duty"; and, therefore, abatement may only be achieved through the imposition of a prohibitory injunction—an order telling them to stop whatever *conduct* they committed *en route* to causing the nuisance. Under Defendants' theory, because Defendants have already stopped their wrongful conduct (their misleading marketing of opioids), there is nothing left for the Court to abate. Defendants are incorrect.

180. First, the plain text of the statute confirms that a nuisance is more than just the act or omission. Defendants make much of the first part of Oklahoma's nuisance definition—"a nuisance consists in unlawfully doing an act, or omitting to perform a duty"—but, they ignore the rest of the statutory text defining a nuisance: "which act or omission either: [1] annoys, injures or endangers the comfort, repose, health, or safety of others; or [2] offends decency; or . . . [4] in any way renders other persons insecure in life, or in the use of property . . . ." According to Defendants' theory, any act or omission—regardless of whether it caused harm and regardless of whether that harm fell within the categories articulated in the statute—could be deemed a nuisance. That is nonsense. While Oklahoma Supreme Court precedent teaches that "any act" can *give rise* to a nuisance, that precedent also makes clear that what signifies a nuisance is the type of injury or injurious condition that act creates. *See Epps v. Ellison*, 1921 OK 279, ¶ 3, 200 P. 160, 161 ("Section 4250, Rev. Laws 1910 [(former numbering for 50 O.S. § 1)] defines a nuisance to be any

---

can bring an action for public nuisance; it does not state that public bodies are foreclosed from such an action. This section is simply an expression of the common law "different-in-kind" rule, limiting standing of private citizens to bring an action for public nuisance. *See generally* Restatement 2d of Torts § 821C.

act *which 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.*" (emphasis added)).

181. Indeed, Courts both here and in states with similar nuisance laws have described a nuisance as the "injurious" or "hazardous" ***condition*** created by the defendant's acts. *See Mid-Continent Petro. Corp. v. Fisher*, 1938 OK 483, ¶ 3, 84 P.2d 22, 23 (describing the nuisance created by oil-filed pollution as a "injurious condition"); *Town of Jennings v. Pappenfuss*, 1928 OK 61, ¶ 1, 263 P. 456, 457 (affirming judgment that the "odor and stench" from an overflowing septic tank was a "*condition* [that] was detrimental to plaintiff and endangered her comfort, health, and repose") (emphasis added); *People v. ConAgra Grocery Prods. Co.*, 17 Cal.App.5th 51, 91 (2017) ("A public nuisance cause of action is not premised on a defect in a product or a failure to warn but on affirmative conduct that assisted in the creation of a *hazardous condition.*" (emphasis added)).

182. American Jurisprudence on Nuisances also supports this understanding:

> A nuisance is a condition, and not an act or failure to action the part of the person responsible for the condition. If the condition exists, and the person charged therewith is responsible for its existence, he is liable for the resulting damages to others although he may have used the highest possible degree of care to prevent or minimize the deleterious effects.

58 Am. Jur. 2d *Nuisances* § 34 (1971).

183. This is also the only logical understanding of what it means to abate a "nuisance." In the environmental pollution context, for example, no one would seriously argue that once a polluter stops dumping hazardous chemicals into a water source the State

is suddenly powerless to seek an order requiring the polluter to clean the river.[124] If so, then a company that dumped millions of gallons of toxic waste into a river could render itself immune from the costs of clean-up by simply stopping its unlawful disposal practices before the State commenced its action. The same would also be true of any one-time offender: an oil well could explode, causing untold harm to the surrounding environment, but those responsible could avoid responsibility by simply saying "*it won't happen again.*" Defendants have tried this argument before, asking for instructions that would immunize them in exchange for promises to cease the injurious acts at issue; and Oklahoma courts have rightfully declined. *Town of Jennings v. Pappenfuss*, 1928 OK 61, ¶6, 263 P. 456, 457 ("We find no error in the court's refusal of the offered instruction to the effect that if defendant disclaims any intention to continue the acts constituting the alleged nuisance and is proceeding with diligence to remedy the situation as speedily as practical, then the jury should find for the defendant, for the reason there was no substantial evidence to support the same."). Rather, Oklahoma courts have defined these nuisances in terms of the pollution itself (the condition created), and have measured abatement in terms of remedying that condition—*i.e.*, purifying the stream. *See Oklahoma City v. West*, 1931 OK 693, ¶5, 7 P.2d at 890 (defining the nuisance as "discharging pollution into a stream" and describing abatement as the "purification" of the sewage); *Union Tex. Petroleum Corp. v. Jackson*, 1995 OK CIV APP 63, ¶19 (discussing the Corporation Commission's power

[124] But this is exactly what Defendants argue when they contend the State cannot pursue damages under Oklahoma's nuisance law—an argument that is otherwise nothing more than a red herring given the State has dismissed its damages claims here.

to "abate the *existing* contamination" of water sources, and not just to prevent future contamination). Any other conception of abatement would render it a meaningless remedy for these most quintessential nuisance examples.

184. Defendants would have this Court believe that "abatement" and "prohibitory injunction" are synonymous; under Defendants' theory, both are remedies whereby the court "forbids or restrains an act." *See* Black's Law Dictionary at 800 (8th ed. 2004) (describing "prohibitory injunction" as "the most common type of injunction); *see also* 12 O.S. § 1381 ("The injunction provided by this code is a command to refrain from a particular act."). Abatement, however, has its own definition: "The act of eliminating or nullifying," as in "abatement of a nuisance." Black's Law Dictionary at 3 (8th ed. 2004).[125] Moreover, the Legislature knows how to invoke both injunction and abatement in the nuisance context, *compare* 50 O.S. § 8 ("The remedies against a public nuisance are: 1. Indictment or information, or; 2. A civil action, or; 3. ***Abatement***;"); *with* 12 O.S. § 1397 ("An injunction may be granted in the name of the state to ***enjoin*** and suppress the keeping and maintaining of a common nuisance."). And the fact that both of those laws were part of the Revised Laws of 1910 shows the Legislature knew how to differentiate the two remedies at the time it enacted the nuisance law. Thus, the fact that the Legislature chose to use the word "Abatement" as one of the nuisance remedies—and not the word "injunction" or "enjoin"—requires those two words be given independent meaning. *See In re 2005 Tax Assessment of Real Prop.*, 2008 OK 7, ¶ 13, 187 P.3d 196 ("Where a word

[125] *See also id.* at xx (denoting the angular brackets (< >) surrounding "abatement of a nuisance" as a sign for "contextual illustrations").

or phrase is absent from a statute, we must presume that its absence is intentional."); *see also United States v. Bean*, 537 U.S. 71, 76, n.4 (2002) ("The use of different words within related statutes generally implies that different meanings were intended." (citation omitted)). Accordingly, by definition, abatement is more than just an order that "forbids or restrains an act"; it encompasses any act done to "eliminate or nullify" a nuisance.

185. This is not to say that abatement cannot be accomplished by prohibitory injunction, such as in a case like *Crushed Stone v. Moore*, 1962 OK 65, 369 P.2d 811, or that the two remedies cannot be fashioned together, such as in a case like *Town of Jennings v. Pappenfuss*, 1928 OK 61, 263 P. 456.[126] But even in those cases, the Court was clear that abatement was not synonymous or coterminous with injunction. In *Crushed Stone*, the Court was clear that the remedy was "abatement ***by*** injunction." 1962 OK 65, ¶ 12, 369 P.2d at 815-16. Indeed, in that case, the trial court first gave the business an opportunity to abate the nuisance before imposing the injunction, during which time the business expended funds and made changes in their operation in an attempt to reduce the dust, noise, and vibration that were causing injury to the plaintiffs. *Id.* at ¶ 8, 369 P.2d at 814. But, despite the change in defendant's business practice, the court found defendant's actions were "insufficient to show abatement of the nuisance." *Id.* And, "In *Town of Jennings v. Pappenfuss*, 129 Okla. 85, 263 P. 456, [the Supreme Court] held that the courts

[126] *See also Mead v. Vincent*, 1947 OK 295, ¶ 9, 187 P.2d 994, 996 ("In *Town of Jennings v. Pappenfuss*, 129 Okla. 85, 263 P. 456, we held that the courts may compel the abatement of a nuisance ***as well as*** restrain its continuance." (emphasis added)).

may compel the abatement of a nuisance ***as well as*** restrain its continuance." *Mead v. Vincent*, 1947 OK 295, ¶ 9, 187 P.2d 994, 996. That is, they are not always the same thing.

186. Moreover, in line with the teachings of both *Crushed Stone* and *Pappenfuss*, Oklahoma defines an abatable, or "temporary," nuisance as one that may be "abated by the expenditure of money or labor." *Oklahoma City v. West*, 1931 OK 693, ¶6, 7 P.2d at 890 (citing *City of Ardmore v. Orr*, 1913 OK 50, 129 P. 867; *City of Cushing v. High*, 1918 OK 538, 175 P. 229; *A, T & S.F. Ry. v. Eldridge*, 1914 OK 75, 139 P. 254; *St. Louis & S.F. Ry. v. Ramsey*, 1913 OK 345, 132 P. 478). Thus, implicit within the concept of abatement in Oklahoma is the notion that a responsible defendant may be required to expend funds. This, of course, resolves any doubt that remains of Defendants' argument that abatement stops with cessation of the unlawful conduct. If that were the case, then an abatable nuisance would simply be defined as one that can be abated by prohibitory injunction.

187. But this definition of an abatable nuisance also quashes Defendants' argument that a request to create an abatement fund is somehow an attempt to recover damages. Indeed, there is perhaps no better encapsulation of these principles than the *Pappenfuss* case, 1928 OK 61, 263 P. 456. There, the plaintiff brought her action "for an injunction to enjoin the plaintiff in error, defendant below, from maintaining a nuisance ***and*** to compel it to abate the same." *Id.* ¶1 (emphasis added). "She alleged that the overflow from a septic tank of the town sewer located upon her farm constituted a nuisance; that the town permitted the overflow upon her land and that the odor and stench was of such extent that it was practically impossible to live upon her farm; . . . [and] that said condition was detrimental to plaintiff and endangered her comfort, health, and repose." *Id.*

The court, in turn, found that defendant had been maintaining a nuisance "by permitting the overflow from the septic tank to flow into a ditch and over and upon the land of the plaintiff." *Id.* And the court, as a remedy, ordered "[1] a permanent injunction be granted the plaintiff against the defendant enjoining it from maintaining a nuisance of the overflow from the septic tank over the lands of the plaintiff, ***and*** [2] that defendant proceed at once to ***abate*** the nuisance ***and pay the cost***." *Id.* (emphasis added). Then, on appeal, the Oklahoma Supreme Court not only affirmed the judgment, but declared the whole matter—including the order to pay the costs of abatement—"to be an action in equity; the jury only acting in an advisory capacity, and the findings of fact and the judgment of the court in nowise dependent upon the jury's verdict nor the instructions given." *Id.* ¶¶ 6-7.

188. This very same argument was also rejected in the California lead paint case, *California v. ConAgra Grocery Products Co.*, 17 Cal. App. 5th 51 (2017). There, in response to the same argument, the Court held as follows:

> The abatement fund was not a "thinly-disguised" damages award. The distinction between an abatement order and a damages award is stark. An abatement order is an equitable remedy, while damages are a legal remedy. An equitable remedy's sole purpose is to eliminate the hazard that is causing the prospective harm to the plaintiff. An equitable remedy provides no compensation to a plaintiff for prior harm. Damages, on the other hand, are directed at compensating the plaintiff for prior accrued harm that has resulted from the defendant's wrongful conduct. The distinction between these two types of remedies frequently arises in nuisance actions. Generally, continuing nuisances are subject to abatement, and permanent nuisances are subject to actions for damages. As the [California statute] permits a public entity plaintiff to seek abatement of a public nuisance in a representative action, the trial court could properly order abatement as a remedy in this case.[127]

[127] 17 Cal. App. 5th 51, 132-33.

And as that Court noted, the Third Circuit has expressed a similar view on the scope of a court's equitable abatement powers:

> Damages are awarded as a form of substitutional redress. They are intended to compensate a party for an injury suffered or other loss. A request for funds for a diagnostic study of the public health threat posed by the continuing contamination and its abatement is not, in any sense, a traditional form of damages. The funding of a diagnostic study in the present case, though it would require monetary payments, would be preventive rather than compensatory. The study is intended to be the first step in the remedial process of abating an existing but growing toxic hazard which, if left unchecked, will result in even graver future injury[.][128]

189. The import of this precedent could not be clearer: (1) a nuisance is more than the acts at issue; (2) thus, the availability of the abatement remedy does not stop once the acts have ceased; and (3) the expenditure of funds is *by definition* a recognized part of the equitable abatement remedy.

4. The Actions Listed in the State's Abatement Plan Are Necessary to Abate the Nuisance and The Costs Are Reasonable

190. This Court must determine whether this nuisance can be abated and, if so, decide on a course of action that is reasonable and necessary to do so.[129] Based on the evidence in this case, and as explained below, it is clear that Oklahoma's opioid nuisance can be abated through the expenditure of funds and labor. And, in light of Defendants' conduct in precipitating this nuisance, I conclude the most reasonable way to facilitate

---

[128] *Id.* at 134 (quoting *United States v. Price*, 688 F.2d 204, 212 (3d Cir. 1982)).

[129] *See City of Oklahoma City v. Hoke*, 1919 OK 244, ¶¶ 22-23, 182 P. 692, 695; *see generally Foster v. Hoff*, 1913 OK 216, ¶ 15, 131 P. 531, 534 ("[E]quity, looking beyond the mere form of things to their substance, has power to decree such relief to the parties as appears just and right, and as best calculated to protect their rights under the situation presented by the record." (citation omitted)).

abatement is to order Defendants to expend the funds necessary rather than order them to perform the labor.

a. This Nuisance Is Temporary and Abatable

191. A nuisance is temporary when it may be abated through the expenditure of money or labor. *Oklahoma City v. West*, 1931 OK 693, ¶ 5, 7 P.2d 888, 890. At base, the question to be answered is whether the injurious condition is capable of being corrected. That question is fact specific and may be answered by common sense, through judicial notice of historical fact or by evidence that the injurious condition is susceptible to correction. The *West* opinion provides a helpful example. In *West*, the injurious condition complained of was the release of unpurified sewage into a river. *West*, 1931 OK 693, ¶ 1, 7 P.2d at 889. The Oklahoma Supreme Court took judicial notice "that modern science ha[d] advanced to the point where sewage is capable of purification...." *West*, 1931 OK 693, ¶ 5, 7 P.2d at 890. Based on that fact, the injurious condition was found capable of correction, *i.e.*, a nuisance abatable through the expenditure of money or labor. *West*, 1931 OK 693, ¶¶ 5-6, 7 P.2d at 890.

192. In this case the State alleges that the opioid crisis is temporary and abatable. Defendants' do not appear to contend the opioid crisis is permanent and offered no evidence, credible or otherwise, tending to establish this nuisance is a permanent one. To the contrary, the evidence established this nuisance is temporary and can be abated.

193. First, history instructs that opioid crises like the one in Oklahoma are abatable. The Country faced a similar opiate-addiction crisis around the American Civil War. *See* S-0035 at 9; Trial Tr. (5/29/19 a.m., Courtwright) at 23:2-88:20. That crisis,

which primarily involved addiction to morphine, arose in the late 19th century, in particular the 1870s through the 1890s, following a nationwide tripling of the per-capita consumption of medicinal opiates in the years before. Trial Tr. (5/29/19 a.m., Courtwright) at 23:2-12. The late-19th-century crisis was marked primarily by an epidemic of iatrogenic addiction—addiction caused as a result of a doctor's care. Trial Tr. (5/29/19 a.m., Courtwright) at 24:2-7. This epidemic affected people of every social class. Trial Tr. (5/29/19 a.m., Courtwright) at 24:14-23. The "liberal prescribing and use of opioids to treat pain by physicians" was "the primary cause" of this first U.S. epidemic. Trial Tr. (5/29/19 a.m., Courtwright) at 23:13-19.

194. This first U.S. opioid crisis was proven to be temporary and abatable. Abatement of this epidemic was accomplished by, among other things, implementation of narcotic conservatism, Trial Tr. (5/29/19 a.m., Courtwright) at 25:14-26:6; developing and providing alternatives to opioids for the treatment of chronic non-cancer pain, Trial Tr. (5/29/19 a.m., Courtwright) at 47:11-13; the requirement that makers of patent medications disclose the presence of opioids contained in their products, Trial Tr. (5/29/19 a.m., Courtwright) at 62:6-10; growing consumer awareness of the dangers of these drugs in the early 20th century, Trial Tr. (5/29/19 a.m., Courtwright) at 65:23-66:2; and the evolution of medical education that included the development of surgical improvements and techniques, public health reform, diagnostic procedures, and safer options for pain reliever medications. Trial Tr. (5/29/19 a.m., Courtwright) at 51:1-52:9. Although it took until the early 20th century, through these and other efforts, the U.S. was able to end the country's

first opioid crisis. Trial Tr. (5/29/19 a.m., Courtwright) at 26:7-27:24; *see also* Trial Tr. (5/29/19 a.m., Courtwright) at 70:8-19.

195. Second, the uncontroverted evidence in the record says that Oklahoma's public nuisance is abatable. Commissioner White, the "primary architect of the State's abatement plan," testified that the opioid crisis in Oklahoma can be and "must be abated." Trial Tr. (6/25/19 a.m., Commissioner White) at 89:15-16, 101:13-102:4; Trial Tr. (6/26/19 p.m., Commissioner White) at 129:19-130. Jessica Hawkins, the Senior Director of Prevention Services at ODMHSAS, and a principle developer of the State's Abatement Plan, testified that if the State implements the services and programs in the Abatement Plan, the nuisance will be abated. Trial Tr. (6/24/19 p.m., Hawkins) at 114:16-21. Dr. Beaman testified that, in his opinion, the opioid epidemic in Oklahoma "[a]bsolutely" can be abated. Trial Tr. (6/17/19 p.m., Beaman) at 81:24-82:1.

196. Third, the uncontroverted evidence in the record shows that the efforts of the State have helped to push back the crisis to some degree. The State, through many agencies like ODMHSAS, undertook substantial efforts to implement programs, plans and measures to combat and mitigate the consequences of the opioid epidemic in Oklahoma. *See, e.g.*, Trial Tr. (6/25/19 a.m., Commissioner White) at 35:15-36:24, 40:22-45:24, 46:12-56:25, 58:9-60:24, 69:5-70:2; Trial Tr. (6/26/19 p.m., Commissioner White) at 45:13-46:4, 47:17-48:19, 53:20-56:22, 62:1-23; Trial Tr. (6/20/19 p.m., Hawkins) at 91:20-105:1; 107:4; 108:7; *see also* S-4738 (listing representative examples of actions taken by the State to address the opioid epidemic). Ct. Ex. 97 at 1 (listing actions taken by the State through implementation of the State plans) and 2 (illustrating a timeline of actions the State has

taken to combat the crisis); & Ct. Ex. 116 at 676-692 (containing a detailed chart listing past actions the State had taken to combat the opioid crisis in Oklahoma).

197. For example: in 2012, the State formed a Prescription Drug Working Group that identified a series of recommendations and issues to address and implement and proposed a "State plan to address prescription drug abuse," Trial Tr. (6/25/19 a.m., Commissioner White) at 40:22-44:19; Trial Tr. (6/20/19 p.m., Hawkins) at 92:2-94:3; *see also* S-4736. In 2016, the State released a second prescription drug plan for "reducing prescription drug abuse in Oklahoma" and "a review of progress and updated State plans," Trial Tr. (6/25/19 a.m., Commissioner White) at 45:12-24, 46:12-56:25; Trial Tr. (6/20/19 p.m., Hawkins) at 95:8-96:4; S-4737; *see also* Ct. Ex. 97 at 1 (illustrating some of the accomplishments that came out of the two State plans). And in 2017, the Oklahoma Attorney General and Oklahoma Legislature assembled and convened the Oklahoma Opioid Commission, which issued a report that outlined detailed recommendations for policies, legislation, regulations and other programs aimed at "combatting the opioid crisis in the State of Oklahoma[.]" Trial Tr. (6/25/19 a.m., Commissioner White) at 58:9-60:24; Trial Tr. (6/20/19 p.m., Hawkins) at 108:1-7; *see also* S-210.

198. These efforts have succeeded in "making a dent," or bending the curve, in the rate of opioid overdose deaths in the State. Trial Tr. (6/25/19 a.m., Commissioner White) at 74:1-19; *see also, e.g.*, Trial Tr. (6/17/19 p.m., Beaman) at 73:20-74:22 (testifying that the State of Oklahoma's efforts have been "responsible for th[e] downward trend" in opioid overdose deaths in recent years); Trial Tr. (6/20/19 p.m., Hawkins) at

105:11-18 (The State's actions to address the nuisance were successful in reducing unintentional opioid overdose death by 43 percent).

199. Based on the foregoing—including the historical fact that the first U.S. opioid crisis was proven to be temporary and abatable, the uncontroverted testimony of those Oklahoma experts who testified that Oklahoma's public nuisance is abatable, and the uncontroverted evidence showing the State has already made some progress in pushing back against this crisis—I conclude that Oklahoma's opioid crisis is temporary and can be abated through the expenditure of funds and labor.

b. The State's Abatement Plan Is Reasonable and Necessary, and Is Reasonably Certain to Abate Oklahoma's Opioid Crisis

200. The State has proffered a detailed abatement plan setting forth the services, cost and time period(s) during which the services should be provided that the State believes are reasonable and necessary to abate Oklahoma's opioid crisis. *See, e.g.*, Trial Tr. (6/25/19 a.m., Commissioner White) at 100:3-7; Trial Tr. (6/26/19 p.m., Commissioner White) at 129:21-130:1 (testifying the State's Abatement Plan is reasonable and necessary to abate the nuisance in Oklahoma); *see also* FOF § I.1.

201. The State's Abatement Plan is entitled, "Costs to the State of Oklahoma of Abating the Opioid Crisis," is contained within the expert disclosures of Christopher J. Ruhm, Ph.D and was admitted into evidence as State's exhibit S-4734 ("State's Abatement Plan"). The State's Abatement Plan is comprised of six (6) major categories and 37 sub-categories of services, outlined as follows:

Brief Description	**First-Year Cost ($2019)**

Opioid Use Disorder Prevention, Treatment & Recovery Services	**729,301,392**
Addiction Treatment Services	232,947,710
Addiction Treatment – Supplementary Services	85,962,677
Addiction & Mental Health Helpline	4,094,400
Public Medication Disposal	139,883
Technical Assistance	945,806
Specialty Courts	15,865,800
Transportation Services	6,130,545
Universal Screening	89,975,632
Pharmacy Disposal	10,255,032
Pain Services	103,277,835
K12 Prevention	55,958,231
K12 Supplementary Prevention	68,156,406
Community Prevention	18,476,953
Higher-Ed Discretionary Prevention Funds	10,154,112
Public Education	26,690,370
Overdose Prevention & Response	**23,085,643**
Naloxone Distribution/Education	1,594,035
Grief Support Services	1,218,084
University Behavioral Health	20,273,524
Syringe Service Program	30,829,551*
Medical Education	**38,932,590**
Continuing Medical Education	843,446
Addiction Medicine Course	758,725
Medical Case Management/Consultation	3,953,832
Residency Training Programs	287,632
Academic Medicine	26,358,785
Counter-Detailing	4,094,400
Behavioral Health Workforce Development	2,635,770
Neonatal Abstinence Syndrome / Child Services	**34,618,221**
NAS Evaluation/Assessment	155,587
Prenatal Screening	10,250,305
Neonatal Treatment	24,212,329
Data Surveillance, Reporting, Research	**31,635,111**
Opioid Overdose Review Board	163,356
PMP System/Upgrades	1,727,269
Program Management Monitoring/Evaluation	2,334,219
Health Information Exchange	25,590,000
Epidemiological Staffing	798,370
Data Collection	832,339
NAS Reporting	189,558
Enforcement/Regulatory	13,283,599
2019 Total	**870,586,556**

* First-year costs are those projected for 2019 in all cases except the syringe service program, where they refer to 2020. Major category and overall total refer to 2019 costs and so exclude syringe services.

See S-4734 at 98. The first column displays the category and subcategories of programs or services and the second column sets forth overall cost of services for the category in the first year for which expenses will be incurred. *Id.* at 12.

202. The State's Abatement Plan provides significant detail regarding each subcategory and its components, the total costs for each subcategory, and the net present value of the total costs for each subcategory calculated over a 20-, 25- and 30-year period. *Id.* at 12, 19-30, 34-70 & 101-04. Adjustments to 2019 dollars, where needed, were obtained using percentage changes for the relevant price index over the most recent 12-month or other relevant period. *Id.* at 12. The State's Abatement Plan further sets forth the abatement costs for the six (6) major categories for each year through 2048. *Id.* at 99.

203. In addition, the State's Abatement Plan sets forth the net present value of the total abatement expenditures for each year through 2048, as shown below:

Net Present Value of Abatement Expenditure

YEAR	Total Abatement Cost	Discount Factor	Net Present Value (NPV) of Abatement Cost	Cumulative NPV of Abatement Cost
2019	870,586,556	1.000	870,586,556	870,586,556
2020	751,121,186	0.983	738,202,640	1,608,789,196
2021	744,240,161	0.966	718,859,914	2,327,649,109
2022	736,697,417	0.949	699,336,013	3,026,985,123
2023	738,165,840	0.933	688,678,099	3,715,663,222
2024	775,907,529	0.917	711,439,340	4,427,102,562
2025	729,308,471	0.901	657,210,889	5,084,313,451
2026	727,079,401	0.886	643,933,346	5,728,246,797
2027	725,672,794	0.870	631,633,998	6,359,880,795
2028	723,454,007	0.855	618,872,472	6,978,753,267

2029	764,295,713	0.841	642,565,264	7,621,318,531
2030	716,909,848	0.826	592,360,307	8,213,678,838
2031	718,477,390	0.812	583,445,226	8,797,124,064
2032	719,232,849	0.798	574,013,467	9,371,137,531
2033	720,810,914	0.784	565,378,779	9,936,516,310
2034	766,759,162	0.771	591,075,156	10,527,591,466
2035	723,165,633	0.758	547,882,076	11,075,473,542
2036	723,942,335	0.745	539,037,365	11,614,510,906
2037	725,541,743	0.732	530,936,866	12,145,447,772
2038	726,329,217	0.719	522,371,620	**12,667,819,392**
2039	773,169,617	0.707	546,495,288	13,214,314,680
2040	728,748,334	0.695	506,238,067	13,720,552,746
2041	730,385,299	0.683	498,648,859	14,219,201,605
2042	731,210,432	0.671	490,626,235	14,709,827,840
2043	732,858,422	0.659	483,274,693	**15,193,102,533**
2044	778,876,847	0.648	504,787,215	15,697,889,748
2045	735,353,749	0.637	468,383,347	16,166,273,094
2046	736,201,137	0.626	460,858,074	16,627,131,169
2047	737,871,487	0.615	453,959,415	17,081,090,584
2048	738,730,161	0.605	446,670,953	**17,527,761,537**

Note: All costs are in 2019 dollars. Total (undiscounted) abatement costs are obtained from the final column of Table 2. The real discount rate is assumed to 1.75 percent per year.

Id. at 100. The bolded values in the chart above represent the cumulative net present value of the expenditures necessary under the State's 20-year, 25-year and 30-year plans, respectively. *Id.*

204. Based on the findings of fact set forth above, as well as the conclusions reached below, I conclude that the services set forth in the State's Abatement Plan are necessary to abate the public nuisance here; that the costs set forth in the State's Abatement Plan for those services are reasonable and necessary; that the State's Abatement Plan is required for a period of thirty (30) years, except where noted, to abate the public nuisance;

and that the implementation of the State's Abatement Plan for a period of thirty (30) years is reasonably certain to abate this nuisance.

205. I further conclude that the calculations performed by Professor Christopher Ruhm, an expert in the field of health economics, regarding mathematical calculations for components of the plan and calculations regarding conversion to 2019 dollars, general and specific inflation rates and discounts to net present value are correct and were performed pursuant to a methodology generally accepted and used by experts in Professor Ruhm's area of expertise. *See* S-4734 at 12, 15, 99-100; FOF § I.1.g. Defendants do not contest Dr. Ruhm's qualifications, methodology or results.

206. I further conclude that the most reasonable and appropriate way to facilitate abatement of the nuisance is to order Defendants to pay **$17,172,761,537** into a state account designated by the Court. The amount ordered is net of the $355 million in settlement credits to which Defendants are entitled.

207. Finally, I conclude that, pursuant to agreement between the State and its Outside Counsel governing the Oklahoma Action, Outside Counsel is expressly entitled to collect attorneys' fees from the Abatement Fund as a result of the Judgement entered in this action, as well as compensation for all reasonable expenses incurred in prosecuting this action. The attorneys' fees owed to Outside Counsel are fair, reasonable and appropriate under Oklahoma law. Outside Counsel are entitled to payment of the contractually agreed amounts from the Abatement Fund without further order from this Court and may obtain such payment by presenting this judgment. Consistent with the terms

of that agreement, Outside counsel is also permitted to seek reimbursement of any future costs they may incur in prosecuting this action by subsequent application to this Court.

208. I now address each category and subcategory contained in the State's Abatement Plan.

i. Opioid Use Disorder Prevention, Treatment & Recovery Services

209. To abate the nuisance, there must be prevention of further OUD and treatment of current OUD. FOF § I.1.a. This includes, but is not limited to, expanded access to medical treatment, including medically assisted treatment ("MAT"), recovery services, significant and proper prevention services, all delivered by trained professionals who understand evidence-based prevention, treatment, overdose prevention. *Id.* The State's proposed Abatement Plan includes many programs and services designed to address the need for OUD prevention, treatment and recovery services, which are reasonable and necessary and also critical to the abatement of this nuisance. *Id.*

210. The State's Abatement Plan includes gold-standard, evidence-based prevention programs that have been proven through 20, 30, and sometimes 40 years of research and gold-standard clinical trials to decrease substance use and specifically, in some these cases, opioid use, by numbers as high as 65 percent. *Id.*; *see also* Trial Tr. (6/25/19 a.m., Commissioner White) at 94:22-96:12; Trial Tr. (6/26/19 p.m., Commissioner White) at 129:21-130:1.

211. The category of Opioid Use Disorder Prevention, Treatment & Recovery Services contains fifteen (15) distinct subcategories of services designed to prevent further

OUD in Oklahoma, to treat Oklahoman's with OUD and to ensure that Oklahoman's with OUD continue in their recovery. FOF § I.1.a; S-4734 at 98. These services are inclusive of services to treat and prevent OUD, prevent diversion of prescription opioid, treat Oklahomans suffering with pain and provide significant public education. *Id.*

(1). Addiction Treatment Services

212. These services will provide all Oklahoma residents with assessment and comprehensive treatment and recovery services based on the American Society for Addiction Medicine (ASAM) level of care needed, including early intervention; outpatient services; ambulatory detoxification; intensive outpatient treatment; partial hospitalization; residential care; medically managed detoxification; and necessary medication. *See* FOF §§ I, I.1, I.1.a & I.1.a.i; S-4734 at 19. The Addiction Treatment Services contained in the State's Abatement Plan were selected and have proven efficacy based on empirical studies and literature. *Id.*

213. The total yearly cost for these services in 2019 dollars is $232,947,710. The net present value of these costs over a 20-year, 25-year and 30-year period is $4,128,961,169, $5,003,978,362 and $5,823,895,409, respectively. *Id.*

214. I conclude these Addiction Treatment Services are a reasonable and necessary part of the services required to abate the nuisance. *See* FOF §§ I, I.1, I.1.a & I.1.a.i.

215. I conclude that the yearly cost for these services as expressed in 2019 dollars are a reasonable and necessary cost. *Id.*; *see also* S-4734 at 19.

216. I conclude that these Addiction Treatment Services will be required for a period of thirty (30) years to abate the nuisance. *Id.*

217. I conclude that implementation of these Addiction Treatment Services, in conjunction with the other services set forth in the State's Abatement Plan, for a period of thirty (30) years is reasonably certain to abate the nuisance. *See* FOF §§ I, I.1, I.1.a & I.1.a.i.

218. I conclude that the total net present value of the cost for these Addiction Treatment Services over a thirty (30) year period is $5,823,895,409 and that such costs are reasonable and necessary to abate the nuisance. *Id.*; *see also* S-4734 at 19.

(2). Addiction Treatment—Supplementary Services

219. These are supportive services related to addiction and recovery, including halfway housing; recovery housing; housing first; IPS (employment services); case management; peer recovery support; and healthcare services. Additional halfway house and residential facilities will be established in high need areas. *See* FOF §§ I, I.1, I.1.a & I.1.a.ii; S-4734 at 20. The Supplementary Services contained in the State's Abatement Plan were selected and have proven efficacy based on empirical studies and literature. *Id.*

220. The total yearly cost for these services in 2019 dollars is $85,962,677 for the first year and $30,157,678 for each subsequent year. The net present value of these costs over a 20-year, 25-year and 30-year period is $569,874,489, $672,851,768 and $767,272,927, respectively. *Id.*

221. I conclude these Supplementary Services are a reasonable and necessary part of the services required to abate the nuisance. FOF §§ I, I.1, I.1.a & I.1.a.ii.

222. I conclude that the yearly costs for these services as expressed in 2019 dollars are a reasonable and necessary cost. *Id.*; *see also* S-4734 at 20.

223. I conclude that these Supplementary Services will be required for a period of thirty (30) years to abate the nuisance. *Id.*

224. I conclude that implementation of these Supplementary Services, in conjunction with the other services set forth in the State's Abatement Plan, for a period of thirty (30) years is reasonably certain to abate the nuisance. FOF §§ I, I.1, I.1.a & I.1.a.ii.

225. I conclude that the total net present value of the cost for these Supplementary Services over a thirty (30) year period is $767,272,927 and that such costs are reasonable and necessary to abate the nuisance. *Id. see also* S-4734 at 20.

(3). Addiction and Mental Health Hotline

226. These services would provide a statewide, 24/7-live helpline (telephonic and text services) for Oklahomans, to deliver: crisis and de-escalation support; brief education on behavioral health topics; service referral; service navigation support; and follow-up services. *See* FOF §§ I, I.1, I.1.a & I.1.a.iii; S-4734 at 21. The Hotline Services contained in the State's Abatement Plan were selected and have proven efficacy based on empirical studies and literature. *Id.*

227. The total yearly cost for these services in 2019 dollars is $4,094,400. The net present value of these costs over a 20-year, 25-year and 30-year period is $69,793,375, $83,774,231 and $96,593,454, respectively. *Id.*

228. I conclude these Hotline Services are a reasonable and necessary part of the services required to abate the nuisance. FOF §§ I, I.1, I.1.a & I.1.a.iii.

229. I conclude that the yearly costs for these services as expressed in 2019 dollars are a reasonable and necessary cost. *Id.*; *see also* S-4734 at 21.

230. I conclude that these Hotline Services will be required for a period of thirty (30) years to abate the nuisance. *Id.*

231. I conclude that implementation of these Hotline Services, in conjunction with the other services set forth in the State's Abatement Plan, for a period of thirty (30) years is reasonably certain to abate the nuisance. FOF §§ I, I.1, I.1.a & I.1.a.iii.

232. I conclude that the total net present value of the cost for these Hotline Services over a thirty (30) year period is $96,593,454 and that such costs are necessary to abate the nuisance. *Id.*; *see also* S-4734 at 21.

(4). Public Medication Disposal

233. These services would expand and maintain the Safe Trips for Scripts medication-disposal program administered by the Oklahoma Bureau of Narcotics and Dangerous Drugs Control. *See* FOF §§ I, I.1, I.1.a & I.1.a.iv; S-4734 at 22. The Public Medication Disposal Services contained in the State's Abatement Plan were selected and have proven efficacy based on empirical studies and literature. *Id.*

234. The total yearly cost for these services in 2019 dollars is $139,883. The net present value of these costs over a 20-year, 25-year and 30-year period is $2,384,454, $2,862,102 and $3,300,064, respectively. *Id.*

235. I conclude these Public Medication Disposal Services are a reasonable and necessary part of the services required to abate the nuisance. FOF §§ I, I.1, I.1.a & I.1.a.iv.

236. I conclude that the yearly costs for these services as expressed in 2019 dollars are a reasonable and necessary cost. *Id.*; *see also* S-4734 at 22.

237. I conclude that these Public Medication Disposal Services will be required for a period of thirty (30) years to abate the nuisance. *Id.*

238. I conclude that implementation of these Public Medication Disposal Services, in conjunction with the other services set forth in the State's Abatement Plan, for a period of thirty (30) years is reasonably certain to abate the nuisance. FOF §§ I, I.1, I.1.a & I.1.a.iv.

239. I conclude that the total net present value of the cost for these Public Medication Disposal Services over a thirty (30) year period is $3,300,064 and that such costs are reasonable and necessary to abate the nuisance. *Id.*; *see also* S-4734 at 22.

(5). Technical Assistance

240. These services provide technical assistance and training in evidence-based practices for opioid assessment and treatment, including Medication Assisted Treatment/Therapy. *See* FOF §§ I, I.1, I.1.a & I.1.a.v; S-4734 at 23. The Technical Assistance Services contained in the State's Abatement Plan were selected and have proven efficacy based on empirical studies and literature. *Id.*

241. The total yearly cost for these services in 2019 dollars is $945,806. The net present value of these costs over a 20-year, 25-year and 30-year period is $16,122,263, $19,351,839 and $22,313,078, respectively. *Id.*

242. I conclude these Technical Assistance Services are a reasonable and necessary part of the services required to abate the nuisance. FOF §§ I, I.1, I.1.a & I.1.a.v.

243. I conclude that the yearly costs for these services as expressed in 2019 dollars are a reasonable and necessary cost. *Id.*; *see also* S-4734 at 23.

244. I conclude that these Technical Assistance Services will be required for a period of thirty (30) years to abate the nuisance. *Id.*

245. I conclude that implementation of these Technical Assistance Services, in conjunction with the other services set forth in the State's Abatement Plan, for a period of thirty (30) years is reasonably certain to abate the nuisance. FOF §§ I, I.1, I.1.a & I.1.a.v.

246. I conclude that the total net present value of the cost for these Technical Assistance Services over a thirty (30) year period is $22,313,078 and that such costs are reasonable and necessary to abate the nuisance. *Id.*; *see also* S-4734 at 23.

(6). Specialty Courts

247. These services will develop 60 family drug courts in Oklahoma to divert non-violent, eligible offenders from prison to structured, court-supervised treatment services. *See* FOF §§ I, I.1, I.1.a & I.1.a.vi; S-4734 at 24. The Specialty Courts Services contained in the State's Abatement Plan were selected and have proven efficacy based on empirical studies and literature. *Id.*

248. The total yearly cost for these services in 2019 dollars is $15,865,800. The net present value of these costs over a 20-year, 25-year and 30-year period is $270,449,327, $324,625,146 and $374,299,634, respectively. *Id.*

249. I conclude these Specialty Courts Services are a reasonable and necessary part of the services required to abate the nuisance. FOF §§ I, I.1, I.1.a & I.1.a.vi.

250. I conclude that the yearly costs for these services as expressed in 2019 dollars are a reasonable and necessary cost. *Id.*; *see also* S-4734 at 24.

251. I conclude that these Specialty Courts Services will be required for a period of thirty (30) years to abate the nuisance. *Id.*

252. I conclude that implementation of these Specialty Courts Services, in conjunction with the other services set forth in the State's Abatement Plan, for a period of thirty (30) years is reasonably certain to abate the nuisance. FOF §§ I, I.1, I.1.a & I.1.a.vi.

253. I conclude that the total net present value of the cost for these Specialty Courts Services over a thirty (30) year period is $374,299,634 and that such costs are reasonable and necessary to abate the nuisance. *Id.*; *see also* S-4734 at 24.

(7). Transportation Services

254. These services will develop a transportation program providing treatment and recovery transportation services for consumers. *See* FOF §§ I, I.1, I.1.a & I.1.a.vii; S-4734 at 25. The Transportation Services contained in the State's Abatement Plan were selected and have proven efficacy based on empirical studies and literature. *Id.*

255. The total yearly cost for these services in 2019 dollars is $6,130,545. The net present value of these costs over a 20-year, 25-year and 30-year period is $104,501,618, $125,435,154 and $144,629,376, respectively. *Id.*

256. I conclude these Transportation Services are a reasonable and necessary part of the services required to abate the nuisance. FOF §§ I, I.1, I.1.a & I.1.a.vii.

257. I conclude that the yearly costs for these services as expressed in 2019 dollars are a reasonable and necessary cost. *Id.*; *see also* S-4734 at 25.

258. I conclude that these Transportation Services will be required for a period of thirty (30) years to abate the nuisance. *Id.*

259. I conclude that implementation of these Transportation Services, in conjunction with the other services set forth in the State's Abatement Plan, for a period of thirty (30) years is reasonably certain to abate the nuisance. FOF §§ I, I.1, I.1.a & I.1.a.vii.

260. I conclude that the total net present value of the cost for these Transportation Services over a thirty (30) year period is $144,629,376 and that such costs are reasonable and necessary to abate the nuisance. *Id.*; *see also* S-4734 at 25.

(8). Universal Screening

261. These services will enable all primary care practices and emergency departments to enroll in the Screening, Brief Intervention, and Referral to Treatment (SBIRT) practice dissemination program for academic detailing, continuing education, electronic medical-record-integration consultation, and embedded practice facilitation services. *See* FOF §§ I, I.1, I.1.a & I.1.a.viii; S-4734 at 26-27. These services also will implement universal substance use patient screening and intervention for SoonerCare patients. *Id.* The Universal Screening Services contained in the State's Abatement Plan were selected and have proven efficacy based on empirical studies and literature. *Id.*

262. The total yearly cost for these services in 2019 dollars is based on a repeating 5-year cost structure, with a cost of $89,975,632 for the first year and $48,577,409 for each of years 2 through 5. The net present value of these costs over a 20-year, 25-year and 30-year period is $974,127,550, $1,169,262,657 and $1,348,184,483, respectively. *Id.*

263. I conclude these Universal Screening Services are a reasonable and necessary part of the services required to abate Oklahoma's nuisance. FOF §§ I, I.1, I.1.a & I.1.a.viii.

264. I conclude that the yearly costs for these services as expressed in 2019 dollars are a reasonable and necessary cost. *Id.*; *see also* S-4734 at 26-27.

265. I conclude that these Universal Screening Services will be required for a period of thirty (30) years to abate the nuisance. *Id.*

266. I conclude that implementation of these Universal Screening Services, in conjunction with the other services set forth in the State's Abatement Plan, for a period of thirty (30) years is reasonably certain to abate the nuisance. FOF §§ I, I.1, I.1.a & I.1.a.viii.

267. I conclude that the total net present value of the cost for these Universal Screening Services over a thirty (30) year period is $1,348,184,483 and that such costs are reasonable and necessary to abate the nuisance. *Id.*; *see also* S-4734 at 26-27.

(9). Pharmacy Disposal

268. These services will develop pharmacy-based medication take-back programs. *See* FOF §§ I, I.1, I.1.a & I.1.a.ix; S-4734 at 28. The Pharmacy Disposal Services contained in the State's Abatement Plan were selected and have proven efficacy based on empirical studies and literature. *Id.*

269. The total yearly cost for these services in 2019 dollars is $10,255,032 for the first year and $9,257,424 for each subsequent year. The net present value of these costs over a 20-year, 25-year and 30-year period is $158,800,183, $190,410,850 and $219,395,068, respectively. *Id.*

270. I conclude these Pharmacy Disposal Services are a reasonable and necessary part of the services required to abate the nuisance. FOF §§ I, I.1, I.1.a & I.1.a.ix.

271. I conclude that the yearly costs for these services as expressed in 2019 dollars are a reasonable and necessary cost. *Id.*; *see also* S-4734 at 28.

272. I conclude that these Pharmacy Disposal Services will be required for a period of thirty (30) years to abate the nuisance. *Id.*

273. I conclude that implementation of these Pharmacy Disposal Services, in conjunction with the other services set forth in the State's Abatement Plan, for a period of thirty (30) years is reasonably certain to abate the nuisance. FOF §§ I, I.1, I.1.a & I.1.a.ix.

274. I conclude that the total net present value of the cost for these Pharmacy Disposal Services over a thirty (30) year period is $219,395,068 and that such costs are reasonable and necessary to abate the nuisance. *Id.*; *see also* S-4734 at 28.

(10). Pain Services

275. These services will provide pain prevention and non-opioid pain management therapies, including Cognitive Behavioral Therapy for pain, physical therapy, and exercise programs. *See* FOF §§ I, I.1, I.1.a & I.1.a.x; S-4734 at 29-30. The Pain Services contained in the State's Abatement Plan were selected and have proven efficacy based on empirical studies and literature. *Id.*

276. The total yearly cost for these services in 2019 dollars is $103,277,835. The net present value of these costs over a 20-year, 25-year and 30-year period is $1,760,479,834, $2,113,135,316 and $2,436,489,548, respectively. *Id.*

277. I conclude these Pain Services are a reasonable and necessary part of the services required to abate the nuisance. FOF §§ I, I.1, I.1.a & I.1.a.x.

278. I conclude that the yearly costs for these services as expressed in 2019 dollars are a reasonable and necessary cost. *Id.*; *see also* S-4734 at 29-30.

279. I conclude that these Pain Services will be required for a period of thirty (30) years to abate the nuisance. *Id.*

280. I conclude that implementation of these Pain Services, in conjunction with the other services set forth in the State's Abatement Plan, for a period of thirty (30) years is reasonably certain to abate the nuisance. FOF §§ I, I.1, I.1.a & I.1.a.x.

281. I conclude that the total net present value of the cost for these Pain Services over a thirty (30) year period is $2,436,489,548 and that such costs are reasonable and necessary to abate the nuisance. *Id.*; *see also* S-4734 at 29-30

(11). K12 Prevention Services

282. These services will provide all K-12 schools with training, program materials, and support services from ODMHSAS to implement defined age-appropriate, evidence-based prevention programs, including Botvin LifeSkills Training, PAX Good Behavior Game and Penn Resiliency Program. *See* FOF §§ I, I.1, I.1.a & I.1.a.xi; S-4734 at 101-04. The K12 Prevention Services contained in the State's Abatement Plan were selected and have proven efficacy based on empirical studies and literature. *Id.*

283. The total yearly cost for these services in 2019 dollars is $55,958,231 for the first year and $16,298,844 for each subsequent year. The net present value of these costs

over a 20-year, 25-year and 30-year period is $317,490,406, $373,144,910 and $424,175,223, respectively. *Id.*

284. I conclude these K12 Prevention Services are a reasonable and necessary part of the services required to abate the nuisance. FOF §§ I, I.1, I.1.a & I.1.a.xi.

285. I conclude that the yearly costs for these services as expressed in 2019 dollars are a reasonable and necessary cost. *Id.*; *see also* S-4734 at 101-04.

286. I conclude that these K12 Prevention Services will be required for a period of thirty (30) years to abate the nuisance. *Id.*

287. I conclude that implementation of these K12 Prevention Services, in conjunction with the other services set forth in the State's Abatement Plan, for a period of thirty (30) years is reasonably certain to abate the nuisance. FOF §§ I, I.1, I.1.a & I.1.a.xi.

288. I conclude that the total net present value of the cost for these K12 Prevention Services over a thirty (30) year period is $424,175,223 and that such costs are reasonable and necessary to abate the nuisance. *Id.*; *see also* S-4734 at 101-04.

(12). K12 Supplementary Prevention Services

289. These services will provide discretionary prevention funds to all public and private K-12 schools to plan and implement supplementary and/or additional evidence-based prevention and intervention services. *See* FOF §§ I, I.1, I.1.a & I.1.a.xii; S-4734 at 34. The K12 Supplementary Prevention Services contained in the State's Abatement Plan were selected and have proven efficacy based on empirical studies and literature. *Id.*

290. The total yearly cost for these services in 2019 dollars is $68,156,406. The net present value of these costs over a 20-year, 25-year and 30-year period is $1,161,797,963, $1,394,526,798 and $1,607,918,784, respectively. *Id.*

291. I conclude these K12 Supplementary Prevention Services are a reasonable and necessary part of the services required to abate the nuisance. FOF §§ I, I.1, I.1.a & I.1.a.xii.

292. I conclude that the yearly costs for these services as expressed in 2019 dollars are a reasonable and necessary cost. *Id.*; *see also* S-4734 at 34.

293. I conclude that these K12 Supplementary Prevention Services will be required for a period of thirty (30) years to abate the nuisance. *Id.*

294. I conclude that implementation of these K12 Supplementary Prevention Services, in conjunction with the other services set forth in the State's Abatement Plan, for a period of thirty (30) years is reasonably certain to abate the nuisance. FOF §§ I, I.1, I.1.a & I.1.a.xii.

295. I conclude that the total net present value of the cost for these K12 Supplementary Prevention Services over a thirty (30) year period is $1,607,918,784 and that such costs are reasonable and necessary to abate Oklahoma's nuisance. *Id.*; *see also* S-4734 at 34.

(13). Community Prevention

296. These services will provide resources for every Oklahoma county to implement community-based prevention services, including developing/supporting at least one community-based coalition for prevention services; major population centers will be

provided resources for more than one community coalition program to implement the Communities That Care model, for a total of 79 community prevention programs, and regional health educators. *See* FOF §§ I, I.1, I.1.a & I.1.a.xiii; S-4734 at 35-36. The Community Prevention Services contained in the State's Abatement Plan were selected and have proven efficacy based on empirical studies and literature. *Id.*

297. The total yearly cost for these services in 2019 dollars is $18,476,953. The net present value of these costs over a 20-year, 25-year and 30-year period is $314,959,189, $378,051,127 and $435,900,916, respectively. *See* s4734 at 35-36; *Id.*

298. I conclude these Community Prevention Services are a reasonable and necessary part of the services required to abate the nuisance. FOF §§ I, I.1, I.1.a & I.1.a.xiii.

299. I conclude that the yearly costs for these services as expressed in 2019 dollars are a reasonable and necessary cost. *Id.*; *see also* S-4734 at 35-36.

300. I conclude that these Community Prevention Services will be required for a period of thirty (30) years to abate the nuisance. *Id.*

301. I conclude that implementation of these Community Prevention Services, in conjunction with the other services set forth in the State's Abatement Plan, for a period of thirty (30) years is reasonably certain to abate the nuisance. FOF §§ I, I.1, I.1.a & I.1.a.xiii.

302. I conclude that the total net present value of the cost for these Community Prevention Services over a thirty (30) year period is $435,900,916 and that such costs are reasonable and necessary to abate the nuisance. *Id.*; *see also* S-4734 at 35-36.

(14). Higher Education Discretionary Prevention Funds

303. These services will provide resources for Oklahoma institutions of higher education to plan and implement evidence-based substance use prevention services. *See* FOF §§ I, I.1, I.1.a & I.1.a.xiv; S-4734 at 37. The Higher Education Discretionary Prevention Fund Services contained in the State's Abatement Plan were selected and have proven efficacy based on empirical studies and literature. *Id.*

304. The total yearly cost for these services in 2019 dollars is $10,154,112. The net present value of these costs over a 20-year, 25-year and 30-year period is $173,087,569, $207,760,094 and $239,551,766, respectively. *Id.*

305. I conclude these Higher Education Discretionary Prevention Fund Services are a reasonable and necessary part of the services required to abate the nuisance. FOF §§ I, I.1, I.1.a & I.1.a.xiv.

306. I conclude that the yearly costs for these services as expressed in 2019 dollars are a reasonable and necessary cost. *Id.*; *see also* S-4734 at 37.

307. I conclude that these Higher Education Discretionary Prevention Fund Services will be required for a period of thirty (30) years to abate the nuisance. *Id.*

308. I conclude that implementation of these Higher Education Discretionary Prevention Fund Services, in conjunction with the other services set forth in the State's Abatement Plan, for a period of thirty (30) years is reasonably certain to abate the nuisance. FOF §§ I, I.1, I.1.a & I.1.a.xiv.

309. I conclude that the total net present value of the cost for these Higher Education Discretionary Prevention Fund Services over a thirty (30) year period is $239,551,766 and that such costs are reasonable and necessary to abate the nuisance. *Id.*; *see also* S-4734 at 37.

(15). Public Education

310. These services will develop and disseminate a sustained, universal marketing campaign related to: access to prevention and treatment services, stigma reduction, opioid education, and skills for preventing or managing pain. They further will develop and disseminate a public education campaign to reach specific high-risk/high-potential populations, including healthcare professionals, pain patients, young people, caring adults, and those at risk for overdose and addiction. They further will develop/disseminate a campaign created to inform the public of Good Samaritan protections for people calling for help and staying with a person who has overdosed. They further will provide internet ads and print material, including posters and rack cards for distribution by outreach teams, syringe-service programs, and other stakeholders. Finally, they will implement campaigns to utilize social/digital media, television, print, direct mail, outdoor advertising and news media. *See* FOF §§ I, I.1, I.1.a & I.1.a.xv; S-4734 at 38. The Public Education Services contained in the State's Abatement Plan were selected and have proven efficacy based on empirical studies and literature. *Id.*

311. The total yearly cost for these services in 2019 dollars is $26,690,370 for the first year, $24,464,040 for the second year, $16,275,240 for each of years 3 through 5, $9,355,704 for each of years 6 through 10, and $6,300,258 for each subsequent year. The

net present value of these costs over a 20-year, 25-year and 30-year period is $187,580,467, $209,093,510 and $228,819,089, respectively. *Id.*

312. I conclude these Public Education Services are a reasonable and necessary part of the services required to abate the nuisance. FOF §§ I, I.1, I.1.a & I.1.a.xv.

313. I conclude that the yearly costs for these services as expressed in 2019 dollars are a reasonable and necessary cost. *Id.*; *see also* S-4734 at 38.

314. I conclude that these Public Education Services will be required for a period of thirty (30) years to abate the nuisance. *Id.*

315. I conclude that implementation of these Public Education Services, in conjunction with the other services set forth in the State's Abatement Plan, for a period of thirty (30) years is reasonably certain to abate the nuisance. FOF §§ I, I.1, I.1.a & I.1.a.xv.

316. I conclude that the total net present value of the cost for these Public Education Services over a thirty (30) year period is $228,819,089 and that such costs are reasonable and necessary to abate the nuisance. *Id.*; *see also* S-4734 at 38.

ii. Overdose Prevention and Response Services

317. Expanded and targeted naloxone distribution and overdose prevention education to those at high risk of experiencing or witnessing overdose is necessary to abate the nuisance. FOF §§ I, I.1, I.1.a & I.1.b.i. This provides a much-needed safety net in our State for persons who are harmed through the toxicity of opioids. *Id.* Naloxone programs have been in existence in this country for more than 20 years and have demonstrated effectiveness. *Id.* Grief support services for those impacted by opioid overdose death also are necessary to abate the nuisance and must be in place for the duration of the Abatement

Plan because people are bereaved for life. FOF §§ I, I.1, I.1.a & I.1.b.ii. Five-Thousand (5,000) Oklahomans have died since 2007 and these Oklahomans have loved ones who need these grief services for the next 30 years. *Id.*

318. Further, clinical integration of licensed alcohol and drug counselors ("LADCs") to deliver screening and intervention services in Oklahoma institutions of higher education are necessary to abate the nuisance, FOF §§ I, I.1, I.1.a & I.1.b.iii, as are Collegiate Recovery Communities—sober living services and housing to support academic outcomes for individuals with OUD in recovery. *Id.* These CRC are required on Oklahoma's 5 largest universities for individuals recovering with OUD are necessary to abate the nuisance. *Id.*

319. The final component of overdose prevention and response is a syringe service program to reduce transmission of blood borne pathogens among persons who inject drugs by providing access to sterile injecting equipment; substance use referral treatment; and screening for infectious disease, which are necessary to abate the nuisance. FOF §§ I, I.1, I.1.a & I.1.b.iv. The provision of this component is particularly exigent as Oklahoma was recently declared second in the nation for Hepatitis C prevalence and first in the nation for Hepatitis C deaths. *Id.*

(1). Naloxone Distribution/Education

320. These services will provide targeted naloxone distribution and overdose prevention education to those at high risk of experiencing or witnessing overdose. Populations of focus will be determined through review of academic literature and epidemiological data; but will include, at a minimum, naloxone medication at behavioral-

health-provider agencies, county jails/state prisons/juvenile detention centers, emergency departments, hospitals, and pain and primary care offices. *See* FOF §§ I, I.1, I.1.a & I.1.b.i; S-4734 at 39-40. The Naloxone Distribution/Education Services contained in the State's Abatement Plan were selected and have proven efficacy based on empirical studies and literature. *Id.*

321. The total yearly cost for these services in 2019 dollars is $1,594,035 for the first year and $1,577,560 for each subsequent year. The net present value of these costs over a 20-year, 25-year and 30-year period is $29,498,410, $36,321,254 and $42,939,727, respectively. *Id.*

322. I conclude these Naloxone Distribution/Education Services are a reasonable and necessary part of the services required to abate the nuisance. FOF §§ I, I.1, I.1.a & I.1.b.i.

323. I conclude that the yearly costs for these services as expressed in 2019 dollars are a reasonable and necessary cost. *Id.; see also* S-4734 at 39-40.

324. I conclude that these Naloxone Distribution/Education Services will be required for a period of thirty (30) years to abate the nuisance. *Id.*

325. I conclude that implementation of these Naloxone Distribution/Education Services, in conjunction with the other services set forth in the State's Abatement Plan, for a period of thirty (30) years is reasonably certain to abate the nuisance. FOF §§ I, I.1, I.1.a & I.1.b.i.

326. I conclude that the total net present value of the cost for these Naloxone Distribution/Education Services over a thirty (30) year period is $42,939,727 and that such costs are reasonable and necessary to abate the nuisance. *Id.; see also* S-4734 at 39-40.

(2). Grief Support Services

327. These services will provide funds to allow Community Mental Health Centers to coordinate at least one grief support group in 17 service regions for those impacted by overdose death. *See* FOF §§ I, I.1, I.1.a & I.1.b.ii; S-4734 at 41. The Grief Support Services contained in the State's Abatement Plan were selected and have proven efficacy based on empirical studies and literature. *Id.*

328. The total yearly cost for these services in 2019 dollars is $1,218,084. The net present value of these costs over a 20-year, 25-year and 30-year period is $20,763,529, $24,922,834 and $28,736,553, respectively. *Id.*

329. I conclude these Grief Support Services are a reasonable and necessary part of the services required to abate the nuisance. FOF §§ I, I.1, I.1.a & I.1.b.ii.

330. I conclude that the yearly costs for these services as expressed in 2019 dollars are a reasonable and necessary cost. *Id.; see also* S-4734 at 41.

331. I conclude that these Grief Support Services will be required for a period of thirty (30) years to abate the nuisance. *Id.*

332. I conclude that implementation of these Grief Support Services, in conjunction with the other services set forth in the State's Abatement Plan, for a period of thirty (30) years is reasonably certain to abate the nuisance. FOF §§ I, I.1, I.1.a & I.1.b.ii.

333. I conclude that the total net present value of the cost for these Grief Support Services over a thirty (30) year period is $28,736,553 and that such costs are reasonable and necessary to abate the nuisance. *Id.; see also* S-4734 at 41.

(3). University Behavioral Health

334. These services will provide for the clinical integration of licensed alcohol and drug counselors to deliver screening and intervention services at health and mental health clinics on each campus. These services also will provide for the development of sober living opportunities for individuals in recovery for Oklahoma campuses with greater than 20,000 students. *See* FOF §§ I, I.1, I.1.a & I.1.b.iii; S-4734 at 42-43. The University Behavioral Health Services contained in the State's Abatement Plan were selected and have proven efficacy based on empirical studies and literature. *Id.*

335. The total yearly cost for these services in 2019 dollars is $20,273,524 with portions phased down beginning in year 7 and ending in year 12. The net present value of these costs over a 20-year, 25-year and 30-year period is $187,557,943, $197,464,079 and $206,547,139, respectively. *Id.*

336. I conclude these University Behavioral Health Services are a reasonable and necessary part of the services required to abate the nuisance. FOF §§ I, I.1, I.1.a & I.1.b.iii.

337. I conclude that the yearly costs for these services as expressed in 2019 dollars are a reasonable and necessary cost. *Id.; see also* S-4734 at 42-43.

338. I conclude that these University Behavioral Health Services will be required for a period of thirty (30) years to abate the nuisance. *Id.*

339. I conclude that implementation of these University Behavioral Health Services, in conjunction with the other services set forth in the State's Abatement Plan, for a period of thirty (30) years is reasonably certain to abate the nuisance. FOF §§ I, I.1, I.1.a & I.1.b.iii.

340. I conclude that the total net present value of the cost for these University Behavioral Health Services over a thirty (30) year period is $206,547,139 and that such costs are reasonable and necessary to abate the nuisance. *Id.; see also* S-4734 at 42-43.

(4). Syringe Services Program

341. These services will provide for the development of a comprehensive syringe-service program to reduce transmission of blood-borne pathogens among persons who inject drugs, by providing access to sterile injecting equipment; substance-use-disorder-treatment referral; and screening for infectious disease. *See* FOF §§ I, I.1, I.1.a & I.1.b.iv; S-4734 at 44-45. The Syringe Program Services contained in the State's Abatement Plan were selected and have proven efficacy based on empirical studies and literature. *Id.*

342. The total yearly cost for these services in 2019 dollars is $30,829,551 for the first year and $30,678,951 for each subsequent year. The net present value of these costs over a 20-year, 25-year and 30-year period is $492,424,198, $597,181,431 and $693,234,652, respectively. *Id.*

343. I conclude these Syringe Program Services are a reasonable and necessary part of the services required to abate the nuisance. FOF §§ I, I.1, I.1.a & I.1.b.iv.

344. I conclude that the yearly costs for these services as expressed in 2019 dollars are a reasonable and necessary cost. *Id.; see also* S-4734 at 44-45.

345. I conclude that these Syringe Program Services will be required for a period of thirty (30) years to abate the nuisance. *Id.*

346. I conclude that implementation of these Syringe Program Services, in conjunction with the other services set forth in the State's Abatement Plan, for a period of thirty (30) years is reasonably certain to abate the nuisance. FOF §§ I, I.1, I.1.a & I.1.b.iv.

347. I conclude that the total net present value of the cost for these Syringe Program Services over a thirty (30) year period is $693,234,652 and that such costs are reasonable and necessary to abate the nuisance. *Id.; see also* S-4734 at 44-45.

iii. Medical Education

348. There is a need in the State of Oklahoma to educate patients, physicians and the public about the risks and efficacy of opioids, the proper use of opioids, and proper pain treatment. FOF §§ I, I.1, I.1.a & I.1.c. The White House Commission on Combating Opioid abuse recognizes the importance of medical education in abating the nuisance finding "[t]he level of urgency is greater than ever" to provide guidance to clinicians treating pain. *Id.* Certain components of the State's Abatement Plan regarding medical training – addiction medicine courses, residency training programs, continuing medical education, and medical case management/consulting—were developed using curriculum mapping, which reinforces and builds on the training that came before it. *Id.*

(1). Continuing Medical Education

349. These services will provide for continuing education courses delivered in geographically diverse regions of Oklahoma. Course material shall be evidence-based and free from proprietary and pharmaceutical industry influence. Topics shall include pain

prevention, pain management, opioid management, non-pharmacological/non-opioid therapies, addiction/mental health, overdose, and the critical appraisal of medical evidence. *See* FOF §§ I, I.1, I.1.a, I.1.c & I.1.c.i; 4734 at 46. The Continuing Medical Education Services contained in the State's Abatement Plan were selected and have proven efficacy based on empirical studies and literature. *Id.*

350. The total yearly cost for these services in 2019 dollars is $843,446 with portions phased down beginning in year 10 and completion of the services in year 20. The net present value of these costs over a 20-year, 25-year and 30-year period is $5,568,868, $5,568,868 and $5,568,868, respectively. *Id.*

351. I conclude these Continuing Medical Education Services are a reasonable and necessary part of the services required to abate the nuisance. FOF §§ I, I.1, I.1.a, I.1.c & I.1.c.i.

352. I conclude that the yearly costs for these services as expressed in 2019 dollars are a reasonable and necessary cost. *Id.; see also* S-4734 at 46.

353. I conclude that these Continuing Medical Education Services will be required for a period of twenty (20) years to abate the nuisance. *Id.*

354. I conclude that implementation of these Continuing Medical Education Services, in conjunction with the other services set forth in the State's Abatement Plan, for a period of twenty (20) years is reasonably certain to abate the nuisance. FOF §§ I, I.1, I.1.a, I.1.c & I.1.c.i.

355. I conclude that the total net present value of the cost for these Continuing Medical Education Services over a twenty (20) year period is $5,568,868 and that such costs are reasonable and necessary to abate the nuisance. *Id.; see also* S-4734 at 46.

(2). Addiction Medicine Course

356. These services will provide for addiction medicine courses addressing drug use, recovery programs, legal aspects of controlled substances and physician addiction. The courses will be offered to a variety of health professionals such as medical students, dentists, physician assistants, nurses and physicians. *See* FOF §§ I, I.1, I.1.a, I.1.c & I.1.c.ii; S-4734 at 47. The Addiction Medicine Course Services contained in the State's Abatement Plan were selected and have proven efficacy based on empirical studies and literature. *Id.*

357. The total yearly cost for these services in 2019 dollars is $758,725. The net present value of these costs over a 20-year, 25-year and 30-year period is $12,933,269, $15,524,034 and $17,899,538, respectively. *Id.*

358. I conclude these Addiction Medicine Course Services are a reasonable and necessary part of the services required to abate the nuisance. FOF §§ I, I.1, I.1.a, I.1.c & I.1.c.ii.

359. I conclude that the yearly costs for these services as expressed in 2019 dollars are a reasonable and necessary cost. *Id.; see also* S-4734 at 47.

360. I conclude that these Addiction Medicine Course Services will be required for a period of thirty (30) years to abate the nuisance. *Id.*

361. I conclude that implementation of these Addiction Medicine Course Services, in conjunction with the other services set forth in the State's Abatement Plan, for

a period of thirty (30) years is reasonably certain to abate the nuisance. FOF §§ I, I.1, I.1.a, I.1.c & I.1.c.ii.

362. I conclude that the total net present value of the cost for these Addiction Medicine Course Services over a thirty (30) year period is $17,899,538 and that such costs are reasonable and necessary to abate the nuisance. *Id.; see also* S-4734 at 47.

(3). Medical Case Management/Consultation

363. These services will provide for the implementation of Project ECHO, which is a nationwide initiative providing consultation/education through regular video conference composed of brief educational sessions on high-yield clinical topics followed by case consultation and then real-world recommendations. The identified cost is that required to reach 9,014 primary care physicians, OBGYNs, nurse practitioners, and physician assistants. *See* FOF §§ I, I.1, I.1.a, I.1.c & I.1.c.iii; S-4734 at 48. The Medical Case Management/Consultation Services contained in the State's Abatement Plan were selected and have proven efficacy based on empirical studies and literature. *Id.*

364. The total yearly cost for these services in 2019 dollars is $3,953,832. The net present value of these costs over a 20-year, 25-year and 30-year period is $67,397,245, $80,898,114 and $93,277,230, respectively. *Id.*

365. I conclude these Medical Case Management/Consultation Services are a reasonable and necessary part of the services required to abate the nuisance. FOF §§ I, I.1, I.1.a, I.1.c & I.1.c.iii.

366. I conclude that the yearly costs for these services as expressed in 2019 dollars are a reasonable and necessary cost. *Id.; see also* S-4734 at 48.

367. I conclude that these Medical Case Management/Consultation Services will be required for a period of thirty (30) years to abate the nuisance. *Id.*

368. I conclude that implementation of these Medical Case Management/Consultation Services, in conjunction with the other services set forth in the State's Abatement Plan, for a period of thirty (30) years is reasonably certain to abate the nuisance. FOF §§ I, I.1, I.1.a, I.1.c & I.1.c.iii.

369. I conclude that the total net present value of the cost for these Medical Case Management/Consultation Services over a thirty (30) year period is $93,277,230 and that such costs are reasonable and necessary to abate the nuisance. *Id.; see also* S-4734 at 48.

(4). Residency Training Programs

370. These services will provide for an 8-hour Drug Abuse Treatment Act of 2000 ("DATA 2000") waiver training course for all second-year medical residents, which will educate and allow them to treat OUD identified in clinical settings. *See* FOF §§ I, I.1, I.1.a, I.1.c & I.1.c.iv; S-4734 at 49. The Residency Training Program Services contained in the State's Abatement Plan were selected and have proven efficacy based on empirical studies and literature. *Id.*

371. The total yearly cost for these services in 2019 dollars is $287,632. The net present value of these costs over a 20-year, 25-year and 30-year period is $4,902,991, $5,885,148 and $6,785,700, respectively. *Id.*

372. I conclude these Residency Training Program Services are a reasonable and necessary part of the services required to abate the nuisance. FOF §§ I, I.1, I.1.a, I.1.c & I.1.c.iv.

373. I conclude that the yearly costs for these services as expressed in 2019 dollars are a reasonable and necessary cost. *Id.; see also* S-4734 at 49.

374. I conclude that these Residency Training Program Services will be required for a period of thirty (30) years to abate the nuisance. *Id.*

375. I conclude that implementation of these Residency Training Program Services, in conjunction with the other services set forth in the State's Abatement Plan, for a period of thirty (30) years is reasonably certain to abate the nuisance. FOF §§ I, I.1, I.1.a, I.1.c & I.1.c.iv.

376. I conclude that the total net present value of the cost for these Residency Training Program Services over a thirty (30) year period is $6,785,700 and that such costs are reasonable and necessary to abate the nuisance. *Id.; see also* S-4734 at 49.

(5). Academic Medicine

377. These services will provide for the establishment of academic medicine departments at medical schools, attending to addiction disorders, providing education and utilizing a comprehensive approach to behavioral health via research, education and treatment. These departments will offer individualized, evidence-based substance use disorder treatment, including medication-assisted treatment and therapeutic services. *See* FOF §§ I, I.1, I.1.a, I.1.c & I.1.c.v; S-4734 at 50. The Academic Medicine Services contained in the State's Abatement Plan were selected and have proven efficacy based on empirical studies and literature. *Id.*

378. The total yearly cost for these services in 2019 dollars is $26,358,785 for the first year and $12,028,385 for each subsequent year. The net present value of these costs

over a 20-year, 25-year and 30-year period is $219,366,933, $260,439,404 and $298,099,268, respectively. *Id.*

379. I conclude these Academic Medicine Services are a reasonable and necessary part of the services required to abate the nuisance. FOF §§ I, I.1, I.1.a, I.1.c & I.1.c.v.

380. I conclude that the yearly costs for these services as expressed in 2019 dollars are a reasonable and necessary cost. *Id.; see also* S-4734 at 50.

381. I conclude that these Academic Medicine Services will be required for a period of thirty (30) years to abate the nuisance. *Id.*

382. I conclude that implementation of these Academic Medicine Services, in conjunction with the other services set forth in the State's Abatement Plan, for a period of thirty (30) years is reasonably certain to abate the nuisance. FOF §§ I, I.1, I.1.a, I.1.c & I.1.c.v.

383. I conclude that the total net present value of the cost for these Academic Medicine Services over a thirty (30) year period is $298,099,268 and that such costs are reasonable and necessary to abate the nuisance. *Id.; see also* S-4734 at 50.

(6). Counter-Detailing

384. These services will provide for a comprehensive direct-to-medical-care-professionals counter-detailing program, deploying detailers to all Oklahoma health care professionals, pharmacies and pharmacists, with targeted detailing visits. This counter-detailing program shall include training and compensating qualified personnel, mileage, visual aids, and patient/staff education material, as well as access to and analysis of medical care professional and pharmacy prescription data. *See* FOF §§ I, I.1, I.1.a, I.1.c & I.1.c.vi;

S-4734 at 51. The Counter-Detailing Services contained in the State's Abatement Plan were selected and have proven efficacy based on empirical studies and literature. *Id.*

385. The total yearly cost for these services in 2019 dollars is $4,094,400. The net present value of these costs over a 20-year, 25-year and 30-year period is $69,793,375, $83,774,231 and $96,593,454, respectively. *Id.*

386. I conclude these Counter-Detailing Services are a reasonable and necessary part of the services required to abate the nuisance. FOF §§ I, I.1, I.1.a, I.1.c & I.1.c.vi.

387. I conclude that the yearly costs for these services as expressed in 2019 dollars are a reasonable and necessary cost. *Id.; see also* S-4734 at 51.

388. I conclude that these Counter-Detailing Services will be required for a period of thirty (30) years to abate the nuisance. *Id.*

389. I conclude that implementation of these Counter-Detailing Services, in conjunction with the other services set forth in the State's Abatement Plan, for a period of thirty (30) years is reasonably certain to abate the nuisance. FOF §§ I, I.1, I.1.a, I.1.c & I.1.c.vi.

390. I conclude that the total net present value of the cost for these Counter-Detailing Services over a thirty (30) year period is $96,593,454 and that such costs are reasonable and necessary to abate the nuisance. *Id.; see also* S-4734 at 51.

(7). Behavior Health Workforce Development

391. These services will provide for the development of a loan-forgiveness and tuition-reimbursement program to incentivize mental health professionals, licensed or under supervision, and other practitioners in related disciplines to work in underserved and

high-burden communities. *See* FOF §§ I, I.1, I.1.a, I.1.c & I.1.c.vii; S-4734 at 52. The Behavior Health Workforce Development services contained in the State's Abatement Plan were selected and have proven efficacy based on empirical studies and literature. *Id.*

392. The total yearly cost for these services in 2019 dollars is $2,635,770. The net present value of these costs over a 20-year, 25-year and 30-year period is $44,929,485, $53,929,661 and $62,182,036, respectively. *Id.*

393. I conclude these Behavior Health Workforce Development services are a reasonable and necessary part of the services required to abate the nuisance. FOF §§ I, I.1, I.1.a, I.1.c & I.1.c.vii.

394. I conclude that the yearly costs for these services as expressed in 2019 dollars are a reasonable and necessary cost. *Id.; see also* S-4734 at 52.

395. I conclude that these Behavior Health Workforce Development services will be required for a period of thirty (30) years to abate the nuisance. *Id.*

396. I conclude that implementation of these Behavior Health Workforce Development services, in conjunction with the other services set forth in the State's Abatement Plan, for a period of thirty (30) years is reasonably certain to abate the nuisance. FOF §§ I, I.1, I.1.a, I.1.c & I.1.c.vii.

397. I conclude that the total net present value of the cost for these Behavior Health Workforce Development Services over a thirty (30) year period is $62,182,036 and that such costs are reasonable and necessary to abate the nuisance. *Id.; see also* S-4734 at 52.

iv. NAS and Child Services

398. Parents, children and families alike suffer unimaginably as a result of opioid exposure, dependence and addiction. FOF §§ I, I.1, I.1.a & I.1.d. In addition to child death, child abandonment and parental overdose, opioid addiction can lead to NAS. *Id.* The "vast majority" of NAS is caused by opioid use. *Id.* Tramadol, the API in some of Defendants' branded drugs, was one of the most common opioid medications prescribed to pregnant women in Oklahoma. *Id.* NAS has life-long consequences for the children and families affected, with babies born with NAS needing short-term medical treatment for withdrawal and often long-term treatment for medical issues and developmental delays as they grow older. *Id.* OHCA reported 498 NAS births to Medicaid members in 2017, which was the last year with complete data. *Id.*; *see also* Trial Tr. (6/24/19 p.m., Hawkins) at 120:16-19,121:17-18 & 122:20-22; S-4054.

(1). NAS Evaluation/Assessment

399. These services will provide for the development and dissemination of NAS treatment evaluation standards, including continuing education courses. *See* FOF §§ I, I.1, I.1.a, I.1.d & I.1.d.i; S-4734 at 53. The NAS Evaluation/Assessment services contained in the State's Abatement Plan were selected and have proven efficacy based on empirical studies and literature. *Id.*

400. The total yearly cost for these services in 2019 dollars is based on a repeating 10-year cycle with costs of $155,587 for the first year and $102,360 for each of years 2 through 10 of each cycle. The net present value of these costs over a 20-year, 25-year and 30-year period is $1,842,811, $2,229,954 and $2,550,435, respectively. *Id.*

401. I conclude these NAS Evaluation/Assessment services are a reasonable and necessary part of the services required to abate the nuisance. FOF §§ I, I.1, I.1.a, I.1.d & I.1.d.i.

402. I conclude that the yearly costs for these services as expressed in 2019 dollars are a reasonable and necessary cost. *Id.; see also* S-4734 at 53.

403. I conclude that these NAS Evaluation/Assessment services will be required for a period of thirty (30) years to abate the nuisance. *Id.*

404. I conclude that implementation of these NAS Evaluation/Assessment services, in conjunction with the other services set forth in the State's Abatement Plan, for a period of thirty (30) years is reasonably certain to abate the nuisance. FOF §§ I, I.1, I.1.a, I.1.d & I.1.d.i.

405. I conclude that the total net present value of the cost for these NAS Evaluation/Assessment services over a thirty (30) year period is $2,550,435 and that such costs are reasonable and necessary to abate the nuisance. *Id.; see also* S-4734 at 53.

(2). Prenatal Screening

406. These services will enable all OBGYN practices and hospitals to enroll in the Screening, Brief Intervention and Referral to Treatment (SBIRT) practice-dissemination program for academic detailing, continuing education, electronic medical record consultation, and embedded practice facilitation services. These services will also provide for the Implementation of universal substance use screening for pregnant women. *See* FOF §§ I, I.1, I.1.a, I.1.d & I.1.d.ii; S-4734 at 54-55. The Prenatal Screening Services

contained in the State's Abatement Plan were selected and have proven efficacy based on empirical studies and literature. *Id.*

407. The total yearly cost for these services in 2019 dollars is based, in part, on a repeating 5-year cycle with costs of $10,250,305 for the first year and $6,469,382 for each of years 2 through 5 of each cycle. The net present value of these costs over a 20-year, 25-year and 30-year period is $123,618,499, $148,381,487 and $171,086,981, respectively. *Id.*

408. I conclude these Prenatal Screening Services are a reasonable and necessary part of the services required to abate the nuisance. FOF §§ I, I.1, I.1.a, I.1.d & I.1.d.ii.

409. I conclude that the yearly costs for these services as expressed in 2019 dollars are a reasonable and necessary cost. *Id.; see also* S-4734 at 54-55.

410. I conclude that these Prenatal Screening Services will be required for a period of thirty (30) years to abate the nuisance. *Id.*

411. I conclude that implementation of these Prenatal Screening Services, in conjunction with the other services set forth in the State's Abatement Plan, for a period of thirty (30) years is reasonably certain to abate the nuisance. FOF §§ I, I.1, I.1.a, I.1.d & I.1.d.ii.

412. I conclude that the total net present value of the cost for these Prenatal Screening Services over a thirty (30) year period is $171,086,981 and that such costs are necessary to abate the nuisance. *Id.; see also* S-4734 at 54-55.

(3). Neonatal Treatment

413. These services will provide medical treatment for infants born with neonatal abstinence syndrome or suffering from opioid withdrawal. *See* FOF §§ I, I.1, I.1.a, I.1.d & I.1.d.iii; S-4734 at 56. The Neonatal Treatment services contained in the State's Abatement Plan were selected and have proven efficacy based on empirical studies and literature. *Id.*

414. The total yearly cost for these services in 2019 dollars is $24,212,329 for the first year and $20,208,460 for each subsequent year. The net present value of these costs over a 20-year, 25-year and 30-year period is $360,731,754, $436,311,648 and $507,132,248, respectively. *Id.*

415. I conclude these Neonatal Treatment services are a reasonable and necessary part of the services required to abate the nuisance. FOF §§ I, I.1, I.1.a, I.1.d & I.1.d.iii.

416. I conclude that the yearly costs for these services as expressed in 2019 dollars are a reasonable and necessary cost. *Id.; see also* S-4734 at 56.

417. I conclude that these Neonatal Treatment services will be required for a period of thirty (30) years to abate the nuisance. *Id.*

418. I conclude that implementation of these Neonatal Treatment services, in conjunction with the other services set forth in the State's Abatement Plan, for a period of thirty (30) years is reasonably certain to abate the nuisance. FOF §§ I, I.1, I.1.a, I.1.d & I.1.d.iii.

419. I conclude that the total net present value of the cost for these Neonatal Treatment services over a thirty (30) year period is $507,132,248 and that such costs are reasonable and necessary to abate the nuisance. *Id.; see also* S-4734 at 56.

v. Data Surveillance, Reporting, Research

420. These components of the Abatement Plan provide for the creation and staffing of a specialty board that monitor trends, produce reports, and recommend interventions related specifically to opioid overdose fatalities, to upgrade and enhance the State's PMP system, to provide program management and coordinating intervention process and outcome evaluation services related to implementation of the State's Abatement Plan and related activities, to purchase and staff a centralized Health Information Exchange, to increase necessary epidemiological staffing, to improve data collection for key measures related to monitoring trends and measuring change is necessary to abate the nuisance, and to develop development of NAS as a required reportable condition. FOF §§ I, I.1, I.1.a, I.1.e & I.1.e.i-vii. Each of these components are necessary to abate the nuisance. *Id.*

(1). Opioid Overdose Review Board

421. These services will provide for two full-time professionals to coordinate the Oklahoma Opioid Overdose Fatality Review Board, prepare cases for review, produce reports and act on recommendations. *See* FOF §§ I, I.1, I.1.a & I.1.e.i; S-4734 at 57. The Opioid Overdose Review Board services contained in the State's Abatement Plan were selected and have proven efficacy based on empirical studies and literature. *Id.*

422. The total yearly cost for these services in 2019 dollars is $163,356. The net present value of these costs over a 20-year, 25-year and 30-year period is $2,784,576, $3,342,376 and $3,853,830, respectively. *Id.*

423. I conclude these Opioid Overdose Review Board services are a reasonable and necessary part of the services required to abate the nuisance. FOF §§ I, I.1, I.1.a & I.1.e.i.

424. I conclude that the yearly costs for these services as expressed in 2019 dollars are a reasonable and necessary cost. *Id.; see also* S-4734 at 57.

425. I conclude that these Opioid Overdose Review Board services will be required for a period of thirty (30) years to abate the nuisance. *Id.*

426. I conclude that implementation of these Opioid Overdose Review Board services, in conjunction with the other services set forth in the State's Abatement Plan, for a period of thirty (30) years is reasonably certain to abate the nuisance. FOF §§ I, I.1, I.1.a & I.1.e.i.

427. I conclude that the total net present value of the cost for these Opioid Overdose Review Board services over a thirty (30) year period is $3,853,830 and that such costs are reasonable and necessary to abate the nuisance. *Id.; see also* S-4734 at 57.

(2). PMP System/Upgrades

428. These services will provide for the Oklahoma PMP Aware program and the necessary administrative staff, including a full-time PMP Administrator, PMP support providers, and PMP system educators. These services will provide for the development of needed system enhancements including reports, alerts, and other requested features. These services will further provide for the employment of full-time data professionals to prepare PMP data for analysis, analyze PMP data, develop special reports and analyses, and link data sets such as health outcome data and claims data. *See* FOF §§ I, I.1, I.1.a & I.1.e.ii; S-

4734 at 58-59. The PMP System/Upgrade services contained in the State's Abatement Plan were selected and have proven efficacy based on empirical studies and literature. *Id.*

429. The total yearly cost for these services in 2019 dollars is $1,727,269 for the first year and $1,645,381 for each subsequent year. The net present value of these costs over a 20-year, 25-year and 30-year period is $28,129,146, $33,747,511 and $38,899,061, respectively. *Id.*

430. I conclude these PMP System/Upgrade services are a reasonable and necessary part of the services required to abate the nuisance. FOF §§ I, I.1, I.1.a & I.1.e.ii.

431. I conclude that the yearly costs for these services as expressed in 2019 dollars are a reasonable and necessary cost. *Id.; see also* S-4734 at 58-59.

432. I conclude that these PMP System/Upgrade services will be required for a period of thirty (30) years to abate the nuisance. *Id.*

433. I conclude that implementation of these PMP System/Upgrade services, in conjunction with the other services set forth in the State's Abatement Plan, for a period of thirty (30) years is reasonably certain to abate the nuisance. FOF §§ I, I.1, I.1.a & I.1.e.ii.

434. I conclude that the total net present value of the cost for these PMP System/Upgrade services over a thirty (30) year period is $38,899,061 and that such costs are reasonable and necessary to abate the nuisance. *Id.; see also* S-4734 at 58-59.

(3). Program Management Monitoring/Evaluation

435. These services will provide program management and coordinate intervention process and outcome evaluation services related to implementation of State's abatement plan and related activities. *See* FOF §§ I, I.1, I.1.a & I.1.e.iii; S-4734 at 60. The

Program Management Monitoring Evaluation services contained in the State's Abatement Plan were selected and have proven efficacy based on empirical studies and literature. *Id.*

436. The total yearly cost for these services in 2019 dollars is $2,334,219. The net present value of these costs over a 20-year, 25-year and 30-year period is $39,789,229, $47,759,721 and $55,067,965, respectively. *Id.*

437. I conclude these Program Management Monitoring Evaluation services are a reasonable and necessary part of the services required to abate the nuisance. FOF §§ I, I.1, I.1.a & I.1.e.iii.

438. I conclude that the yearly costs for these services as expressed in 2019 dollars are a reasonable and necessary cost. *Id.; see also* S-4734 at 60.

439. I conclude that these Program Management Monitoring Evaluation services will be required for a period of thirty (30) years to abate the nuisance. *Id.*

440. I conclude that implementation of these Program Management Monitoring Evaluation services, in conjunction with the other services set forth in the State's Abatement Plan, for a period of thirty (30) years is reasonably certain to abate the nuisance. FOF §§ I, I.1, I.1.a & I.1.e.iii.

441. I conclude that the total net present value of the cost for these Program Management Monitoring Evaluation services over a thirty (30) year period is $55,067,965 and that such costs are reasonable and necessary to abate the nuisance. *Id.; see also* S-4734 at 60.

(4). Health Information Exchange

442. These services will provide for the technology and staff to support connectivity among the state agencies' HIE and private HIEs. These services will also increase HIE use and adoption by healthcare providers through public education via a contract with a marketing firm. *See* FOF §§ I, I.1, I.1.a & I.1.e.iv; S-4734 at 61. The Health Information Exchange services contained in the State's Abatement Plan were selected and have proven efficacy based on empirical studies and literature. *Id.*

443. The total yearly cost for these services in 2019 dollars is $25,590,000 for startup in the first year, $38,896,800 for each of years 2 and 3, and $30,708,000 for each subsequent year. The net present value of these costs over a 20-year, 25-year and 30-year period is $534,289,814, $639,146,239 and $735,290,410, respectively. *Id.*

444. I conclude these Health Information Exchange services are a reasonable and necessary part of the services required to abate the nuisance. FOF §§ I, I.1, I.1.a & I.1.e.iv.

445. I conclude that the yearly costs for these services as expressed in 2019 dollars are a reasonable and necessary cost. *Id.; see also* S-4734 at 61.

446. I conclude that these Health Information Exchange services will be required for a period of thirty (30) years to abate the nuisance. *Id.*

447. I conclude that implementation of these Health Information Exchange services, in conjunction with the other services set forth in the State's Abatement Plan, for a period of thirty (30) years is reasonably certain to abate the nuisance. FOF §§ I, I.1, I.1.a & I.1.e.iv.

448. I conclude that the total net present value of the cost for these Health Information Exchange services over a thirty (30) year period is $735,290,410 and that such costs are necessary to abate Oklahoma's opioid crisis. *Id.; see also* S-4734 at 61.

(5). Epidemiological Staffing

449. These funds will provide for new epidemiologists to develop public-health surveillance and descriptive studies with fatal/nonfatal injury, addiction, risk/protective factor, health record/claim, and other data. These services also will support the development of web-based data query/reporting systems. *See* FOF §§ I, I.1, I.1.a & I.1.e.v; S-4734 at 62. The Epidemiological Staffing services contained in the State's Abatement Plan were selected and have proven efficacy based on empirical studies and literature. *Id.*

450. The total yearly cost for these services in 2019 dollars is $798,370. The net present value of these costs over a 20-year, 25-year and 30-year period is $13,609,060, $16,335,198 and $18,834,827, respectively. *Id.*

451. I conclude these Epidemiological Staffing services are a reasonable and necessary part of the services required to abate the nuisance. FOF §§ I, I.1, I.1.a & I.1.e.v.

452. I conclude that the yearly costs for these services as expressed in 2019 dollars are a reasonable and necessary cost. *Id.; see also* S-4734 at 62.

453. I conclude that these Epidemiological Staffing services will be required for a period of thirty (30) years to abate the nuisance. *Id.*

454. I conclude that implementation of these Epidemiological Staffing services, in conjunction with the other services set forth in the State's Abatement Plan, for a period of thirty (30) years is reasonably certain to abate the nuisance. FOF §§ I, I.1, I.1.a & I.1.e.v.

455. I conclude that the total net present value of the cost for these Epidemiological Staffing services over a thirty (30) year period is $18,834,827 and that such costs are reasonable and necessary to abate the nuisance. *Id.; see also* S-4734 at 62.

(6). Data Collection

456. These services will provide for the addition of indicators in existing surveys and development of new sources of data collection for key measures related to monitoring trends and measuring change of opioid-related items, as well as the employees necessary to implement and perform those data collections. *See* FOF §§ I, I.1, I.1.a & I.1.e.vi; S-4734 at 63. The Data Collection services contained in the State's Abatement Plan were selected and have proven efficacy based on empirical studies and literature. *Id.*

457. The total yearly cost for these services in 2019 dollars is $832,339 for even numbered years and $423,673 for odd numbered years. The net present value of these costs over a 20-year, 25-year and 30-year period is $10,735,238, $13,019,274 and $14,857,481, respectively. *Id.*

458. I conclude these Data Collection services are a reasonable and necessary part of the services required to abate the nuisance. FOF §§ I, I.1, I.1.a & I.1.e.vi.

459. I conclude that the yearly costs for these services as expressed in 2019 dollars are a reasonable and necessary cost. *Id.; see also* S-4734 at 63.

460. I conclude that these Data Collection services will be required for a period of thirty (30) years to abate the nuisance. *Id.*

461. I conclude that implementation of these Data Collection services, in conjunction with the other services set forth in the State's Abatement Plan, for a period of thirty (30) years is reasonably certain to abate the nuisance. FOF §§ I, I.1, I.1.a & I.1.e.vi.

462. I conclude that the total net present value of the cost for these Data Collection services over a thirty (30) year period is $14,857,481 and that such costs are reasonable and necessary to abate the nuisance. *Id.; see also* S-4734 at 63.

(7). NAS Reporting

463. These services will provide for the implementation of neonatal abstinence syndrome as a required reportable condition, including OSDH and hospital-level management and infrastructure costs. *See* FOF §§ I, I.1, I.1.a & I.1.e.vii; S-4734 at 64. The NAS Reporting services contained in the State's Abatement Plan were selected and have proven efficacy based on empirical studies and literature. *Id.*

464. The total yearly cost for these services in 2019 dollars is $189,557 for the first year, $181,369 for each of years 2 through 4, $184,439 for year 5, and thereafter on a repeating 5-year cycle at $181,369 for each of the 1st through 4th years and $184,439 for each 5th year. The net present value of these costs over a 20-year, 25-year and 30-year period is $3,107,578, $3,729,056 and $4,298,896, respectively. *Id.*

465. I conclude these NAS Reporting services are a reasonable and necessary part of the services required to abate the nuisance. FOF §§ I, I.1, I.1.a & I.1.e.vii.

466. I conclude that the yearly costs for these services as expressed in 2019 dollars are a reasonable and necessary cost. *Id.; see also* S-4734 at 64.

467. I conclude that these NAS Reporting services will be required for a period of thirty (30) years to abate the nuisance. *Id.*

468. I conclude that implementation of these NAS Reporting services, in conjunction with the other services set forth in the State's Abatement Plan, for a period of thirty (30) years is reasonably certain to abate the nuisance. FOF §§ I, I.1, I.1.a & I.1.e.vii.

469. I conclude that the total net present value of the cost for these NAS Reporting services over a thirty (30) year period is $4,298,896 and that such costs are reasonable and necessary to abate the nuisance. *Id.; see also* S-4734 at 64.

vi. Enforcement and Regulatory Services

470. Oklahoma law enforcement agencies, licensure boards and OCME have been overwhelmed by cases related to opioids and the need to conduct investigations and do not have the necessary staffing and resources in place to respond to this nuisance. FOF §§ I, I.1, I.1.a & I.1.f. This component of the plan allows these agencies, offices and boards to be responsive to the nuisance, and also to be proactive and reduce their caseloads so they can deeply evaluate each case and make necessary recommendations. *See* FOF §§ I, I.1, I.1.a & I.1.f; S-4734 at 65-70. The Enforcement/Regulatory Services contained in the State's Abatement Plan were selected and have proven efficacy based on empirical studies and literature. *Id.*

471. The total yearly cost for these services in 2019 dollars is $13,283,599 for the first year, $11,512,541 for each of years 2 through 5, and $10,335,401 for each subsequent year. The net present value of these costs over a 20-year, 25-year and 30-year period is $183,635,585, $218,927,145 and $251,286,418, respectively. *Id.*

472. I conclude these Enforcement/Regulatory Services are a reasonable and necessary part of the services required to abate the nuisance. FOF §§ I, I.1, I.1.a & I.1.f.

473. I conclude that the yearly costs for these services as expressed in 2019 dollars are a reasonable and necessary cost. *Id.; see also* S-4734 at 65-70.

474. I conclude that these Enforcement/Regulatory Services will be required for a period of thirty (30) years to abate the nuisance. *Id.*

475. I conclude that implementation of these Enforcement/Regulatory Services, in conjunction with the other services set forth in the State's Abatement Plan, for a period of thirty (30) years is reasonably certain to abate the nuisance. FOF §§ I, I.1, I.1.a & I.1.f.

476. I conclude that the total net present value of the cost for these Enforcement/Regulatory Services over a thirty (30) year period is $251,286,418 and that such costs are reasonable and necessary to abate the nuisance. *Id.; see also* S-4734 at 65-70.

c. Defendants' Challenges to the State's Abatement Plan Are Legally and Factually Defective

477. Defendants challenge the State's abatement plan on the following bases: (1) the Oklahoma nuisance statute does not allow the state to abate harms or injuries (only conduct); (2) the State's abatement plan "does not remotely resemble" the injunctive decrees ordered by other Oklahoma courts (and thus is apparently improper); (3) the State has offered no credible evidence it's plan will abate the nuisance; (4) because the cost of

the plan does not decrease over time, the State concedes it will be ineffective; and (5) the State offers no mechanism to measure the effectiveness of its proposed plan.[130]

478. Regarding challenges (1) and (2), I previously addressed and rejected those challenges in COL § III.A., *supra*. Those analyses and conclusions are incorporated herein and will not be restated. That leaves Defendants' challenges to the sufficiency of the evidence. In sum, Defendants argue the record evidence is insufficient to prove that the State's abatement plan "will abate anything" and, as such, judgment in favor of Defendants is required.[131] Defendants' challenges are legally and factually defective.

479. *First*, Defendants' arguments misunderstand the authority of this Court sitting in equity. "A court of equity looking beyond the mere form of things to their substance, has power to decree such relief to the parties as appears just and right, and as best calculated to protect their rights under the situation presented by the record." *Foster v. Hoff*, 1913 OK 216, ¶ 15, 131 P. 531, 534; *see also Town of Jennings v. Pappenfuss*, 1928 OK 61, ¶ 0 ("Courts of equity have power to give relief against...public...nuisances by compelling the abatement...of the existing nuisance."). Having concluded that Defendants are a cause of Oklahoma's opioid crisis, and that such nuisance is temporary, and having reached an understanding regarding the scope of the nuisance as demonstrated by the record, this Court possesses the power to render judgment and order that abatement proceed according to a plan the Court believes is just, right and best calculated to abate the nuisance. Even if the State had not offered an abatement plan, this Court possesses the

[130] *See* Mot. For Judgment at 112-16; Renewed Mot. for Judgment at 37-39.
[131] *See* Mot. For Judgment at 112-13.

power to fashion an abatement remedy it believes is just and right. As such, any suggestion that legal or factual insufficiency in the State's proposed plan should result in judgment for Defendants is plainly incorrect. The State is entitled to an abatement remedy even if their proposed version is imperfect.

480. *Second*, Defendants' evidentiary challenges entirely ignore significant testimony from the individuals who have battled, and will continue to battle, this public nuisance. Defendants' factual challenge to the abatement plan boils down to the notion that Commissioner White's and Jessica Hawkins's testimony was "conclusory," and that is was untrustworthy because it came from "the very governmental administrators whose budgets the Plan would massively inflate."[132] Both characterizations are flawed.

481. The evidentiary record—including testimony from the professionals *in Oklahoma* who are best suited to understand the crisis and what works and will work to abate it—is sufficient to establish both the necessity and effectiveness of the State's abatement plan. *See* FOF § I. Indeed, Ms. Hawkins alone was on the stand for nearly three full days, during which time she addressed virtually every element of the State's abatement plan and testified in great detail about the rationale, necessity and cost of each, as well as the evidence-based research on which she based her opinion that the State's abatement plan will abate the nuisance. *See* FOF § I. Ms. Hawkins concluded her testimony by opining on the ultimate questions regarding the abatement plan:

> Q Ms. Hawkins, today we went through each of the – almost every component of the plan. Based on your education, qualifications, your skills, and experience, do you believe that each of the programs and

[132] Renewed Mot. for Judgment at 38.

services that are set forth in this -- in the abatement plan that you developed and Commissioner White developed, are necessary to abate the Oklahoma opioid crisis?

A Yes.

Q And do you have an opinion as to whether each of the costs in the plan associated with those services and programs are reasonable and necessary expenses to implement this abatement plan?

A Yes, they are reasonable and necessary. And in many cases, as I've tried to note throughout, particular areas where I think they're conservative. We've talked about some of those areas. For example, the NAS medical treatment cost component of the plan. In addition, the opioid use disorder treatment services come -- have gone into the plan.

There are many areas where, you know, candidly, it should probably be increased in some cases, including pain services for SoonerCare members that may not be afforded to all Oklahomans in this case. So, yes, they are reasonable and, in fact, probably are leaning more on the side of conservative.

Trial Tr. (6/21/19 p.m., Hawkins) at 51:8-52:5. Ms. Hawkins ultimate opinions were entirely appropriate and do not render any of her prior testimony conclusory. Moreover, when asked on cross-examination when abatement will be achieved, Ms. Hawkins stated:

> I have confidence that through this abatement plan at the 30-year interval, that this problem can be abated, at least back to the pre-1996 levels. So through the selection of those interventions, seeing their outcomes in other states, other settings, I do think with some certainty that the State can realize those achievements in that 30-year period.

Trial Tr. (6/21/19 p.m., Hawkins) at 67:22-68:3. Thus, contrary to Defendants' additional suggestion that Ms. Hawkins was unsure of the required length of time for the abatement

plan,[133] she clearly expressed confidence in her testimony regarding the 30-year period. This testimony is far from conclusory.

482. And the fact that much of the funds and programs provided for in the State's plan were government programs is far from evidence of bias. To the contrary, the fact that these public servants were in Court advocating for funds that would go to public institutions and programs—rather than their own pockets—is evidence of their sincere devotion to fix this problem and their confidence in themselves and the other public servants in Oklahoma to do just that. They were paid nothing but their government salary for their testimony. And the record is devoid of anything that shows they stand to gain a dime if their plan is implemented. To say these witnesses, and their testimony, are credible and trustworthy would be an understatement.

483. *Third*, Defendants' evidentiary challenges presume a level of precision that is neither required nor possible. For example, despite Defendants' acknowledgement that fixing the opioid crisis is a complex problem,[134] they attack the State's abatement plan because the plan does not identify the exact date on which the crisis will be abated, it does not identify what the acceptable number of Oklahoman's suffering with OUD will be when abatement occurs, and it does not provide benchmarks for an acceptable number of opioid overdose deaths or NAS babies born.[135]

---

[133] *See* Renewed Mot. for Judgment at 38.
[134] Renewed Mot. for Judgment at 39.
[135] *See generally*, Mot. For Judgment at 112-16; Renewed Mot. for Judgment at 37-39.

484. The State's burden of proof is to establish that it is "more probably true than not true"[136] that the State's abatement plan is necessary to abate Oklahoma's opioid crisis, the State's abatement plan will abate the nuisance, and that the funds required to implement the State's abatement plan are reasonable and necessary. As discussed in FOF § I and COL § B, the State has met its burden of proof. The Court is unaware of any authority, and Defendants have not identified any, requiring the State to predict the future with the clarity Defendants' suggest.

485. *Fourth*, Defendants' complaints about the dollar amounts in the State's abatement plan not decreasing over time are unavailing. The State showed the Court what was *necessary* to abate the nuisance and, in doing so, repeatedly reminded that these cost and service figures were conservative. FOF § I. That the State could have asked for more funding up front or front-loaded more of those costs as opposed to spreading them out equally over time is another quibble with the State's plan that—given Defendants provided no alternative solution of their own—is utterly unpersuasive. It is not, as Defendants suggest, proof that the State's plan fails to account for its own effects over time or that it is not truly designed with a gradual abatement in mind. This is especially true given Jessica Hawkins' expert opinion that, to ensure the crisis is truly abated, the State should fully fund these services from the start and then not "take its foot off the gas" until the plan reaches maturity. FOF § I. Again, the State's experts testified that this methodology was appropriate and necessary to effectively—and completely—abate the nuisance, and

[136] OUJI No. 3.1.

Defendants provided no expert testimony or other evidence to say otherwise. This pedal-down approach from the State also resonates with the evidence, both from the State's abatement experts and elsewhere, that any solution to the opioid crisis must think in terms of generations, and not just in terms of those affected now. FOF § I.

486. The components that comprise the injurious condition that is the opioid crisis—an artificially inflated demand for prescription opioids, an oversupply of prescription opioids, the overprescribing of prescription opioids, and the pervasive misinformation regarding the health risks and purported benefits of opioids; as well as the public health and societal conditions arising from that inflated demand, oversupply and misinformation including, but not limited to: opioid use disorder; accidental non-fatal and fatal opioid overdoses; neonatal-abstinence-syndrome births; youth misuse of prescription opioids; child removals within the child welfare system due to parental opioid use or death; prescribing patterns caused by misinformation about the health risks and purported benefits of opioids that expose patients to an unjustified risk of addiction, overdose, or death; and diversion of prescription opioids and related criminality—are things that cannot be reversed overnight.

487. The current oversupply of drugs perhaps might be quick to correct, but the artificially inflated demand and overprescribing that perpetuates it will require years of training, education, and re-education to rebuild the dam of narcotic conservatism. Similarly, as the evidence showed, addiction is a life-long disease that requires a life-long approach. FOF § I. Indeed, one need look no further than the children born to parents

suffering from addiction or to those babies born with NAS to know that this is a generational problem that requires a generational solution. FOF § I.

488. Finally, to the extent the State was required to describe the finish line of abatement as Defendants argue,[137] Commissioner White testified—and the State established it is more probably true than not true—that the opioid crisis will be abated when levels of opioid-related negative consequences generally return to the levels at which they existed prior to the late 1990s, when the opioid-oversupply-through-overprescribing trend began and continued to steadily increase. Trial Tr. (6/26/19 a.m., Commissioner White) at 111:20-113:9. The State has met its burden of proof in this regard.

489. In the end, Defendants' evidentiary challenges complain that the State's abatement plan, and the evidence in support of it, fail to meet the level of precision desired by Defendants to solve with absolute certainty a complex problem of Defendants' own making. The law does not require what Defendants request. And, most certainly, principles of equity and justice would not stand to allow perfection to become the enemy of the good. "The courts of justice of the State shall be open to every person, ***and speedy and certain remedy afforded for every wrong***." OKLA. CONST. art. II, § 6 (emphasis added). Defendants admit there is a crisis, and they do not argue that it is incapable of fixing. Yet they have never proposed a solution for how to fix it. Defendants failed to propose an alternate plan. Thus, there is no alternate plan.

[137] Renewed Mot. for Judgment at 38-39.

490. The State has provided a plan; and while Defendants may not like it or think they could have done it better, none of that changes the fact that the State's plan is reasonable and reasonably certain to provide relief from the nuisance Defendants caused—a remedy for their wrong. As such, and because the State's plan stands unrebutted, this Court concludes the State's plan is the "best calculated to protect their rights under the situation presented by the record"[138] and adopts it in full.

5. The Equitable Abatement Remedy Provided Here is Consistent with Both the Oklahoma and the Federal Constitutions

491. Defendants' final argument is that the abatement order entered in this case violates the Oklahoma and U.S. Constitutions. They are wrong here as well.

a. Right to a Jury

492. Oklahoma law is clear: Abatement is an equitable remedy for which there is no right to trial by jury. *State ex rel. Brown v. Armstrong*, 1952 OK 70, ¶¶ 11-12, 241 P.2d 959, 961 ("'In an action by the state to abate a public nuisance, the defendant is not entitled to a jury trial.' *Balch v. State ex rel. Grigsby, Co. Atty..*, 65 Okla. 146, 164 P. 776. In *Gragg v. State ex rel. Selby, Co. Atty.*, 73 Okla. 132, 175 P. 201, we said that the proceeding was equitable in nature and that the parties were not entitled to a jury, either as a constitutional or statutory right, and we followed the holding in the *Balch* case."). Defendants have argued they are entitled to a jury trial in this case because, according to the Defendants, the State's requested remedy is not truly abatement, but is really a request for damages. Defendants argue that the State's abatement plan seeks damages because it

[138] *Foster v. Hoff*, 1913 OK 216, ¶ 15, 131 P. at 534.

requires Defendants to spend money—that is, it requires Defendants to fund the actions and services the State's experts have testified are necessary to abate the opioid crisis in Oklahoma. Defendants argue requiring them to fund such abatement makes this "an action for the recovery of money," which under 12 O.S. § 556 entitles them to a trial by jury.[139] That is incorrect.

493. The fact that the State proposes to abate this nuisance through actions requiring the expenditure of funds does not transform this into an action "for the recovery of money." First, as explained above, the definition of a temporary—i.e., *abatable*—nuisance, is one that "can be abated by the expenditure of money or labor." *See Oklahoma City v. West*, 1931 OK 693, ¶¶ 5-6, 7 P.2d 888, 890 ("We have repeatedly held such a nuisance to be temporary under the rule that where a nuisance can be abated by the expenditure of money or labor, it shall be considered temporary. . . . Cases holding a nuisance to be only temporary nuisance when it may be abated by the expenditure of money or labor are: *City of Ardmore v. Orr*, 35 Okla. 305 129 P. 867; *City of Cushing v. High*, 73 Okla. 151, 175 P. 229; *A., T. & S. F. Ry. Co. v. Eldridge*, 41 Okla. 463, 139 P. 254; *St. L. & S. F. R. Co. v. Ramsey*, 37 Okla. 448, 132 P. 478."). In other words, abatement—by definition—contemplates the expenditure funds.

494. Second, the Oklahoma Supreme Court has been clear that, in those instances when a party receives funding to accomplish abatement, an action seeking abatement is

[139] 12 O.S. § 556 ("Issues of law must be tried by the court, unless referred. Issues of fact arising in actions for the recovery of money, or of specific real or personal property, shall be tried by a jury, unless a jury trial is waived, or a reference be ordered, as hereinafter provided.").

still one sounding in equity—where no right to a jury attaches. Specifically, in *Town of Jennings v. Pappenfuss*, the Supreme Court affirmed a trial court's decision ordering the defendant to "abate the nuisance ***and pay the cost.***" 1928 OK 61, ¶ 1, 263 P. 456, 457. And, in response to a challenge to certain jury instructions given below, the Supreme Court held "the whole matter to be an action in equity; ***the jury only acting in an advisory capacity, and the findings of fact and the judgment of the court in nowise dependent upon the jury's verdict nor the instructions given.***" *Id.* at ¶ 6. That *Pappenfuss* was decided while 12 O.S. § 556 was in full force and effect,[140] is further support for the conclusion that an action seeking abatement, regardless of whether abatement is to be accomplished by funds or labor, is an action in equity where no right to a jury exists.

495. The court also notes that traditional equitable remedies include restitution and disgorgement, which are monetary payments. *See In re State ex rel. T.L.B.*, 2009 OK CIV APP 70, ¶¶ 3-4, 218 P.3d 534, 535-36 ("trial court's failure to provide a jury trial" in hearing that awarded monetary restitution did not violate right to a jury trial under Oklahoma constitution); *see also Tull v. United States*, 481 U.S. 412, 424 (1987) (observing that disgorgement is a traditional equitable remedy).

496. Further, this Court finds it persuasive that federal courts, in interpreting the 7th Amendment to the U.S. Constitution, have also concluded that government actions seeking abatement—even where the government is seeking the recovery of its abatement

[140] Section 556 traces its origin to the 1910 Revised Statutes of Oklahoma. R.L. 1910, § 4993. The same law was also included in the 1893 Statutes of the Territory of Oklahoma. Stat. Okla. Terr. 1893, § 4156. The text of the law in today's section 556 is the same as it was in 1893.

costs—are actions in equity when no right to a jury trial attaches. *See United States v. Price*, 688 F.2d 204, 213-14 (3d Cir. 1982) (reimbursement of abatement costs under RCRA as equitable relief); *United States v. Conserv. Chem. Co.*, 619 F. Supp. 162, 201 (W.D. Mo. 1985); *United States v. Mottolo*, 605 F. Supp. 898, 912-13 (citing another seven cases that characterize recovery of response costs under CERCLA as equitable relief); *Developments*, 99 HARV. L. REV. at 1492 & nn. 46-47)); *NAACP v. Acusport Corp.*, 226 F. Supp. 2d 391, 397 ("Actions to enjoin a public or a private nuisance and for the recovery of costs incurred in abatement are equitable." (citing *In re Debs*, 158 U.S. 564, 587-93 (1895); *Mugler v. Kansas*, 123 U.S. 623 (1887); *Conner v. City of Santa Ana*, 897 F.2d 1487 (9th Cir. 1990); *United States v. Wade*, 653 F. Supp. 11, 13 (E.D. Pa. 1984); 8 Moore's Federal Practice – Civil § 38.30[3] (2019) ("Even a claim for recovery of costs incurred in abatement of the nuisance has been deemed in the nature of equitable restitution, not giving rise to the right to a jury trial."))).

497. The outcome under Oklahoma's constitutional jury-trial provision, OKLA. CONST. art. 2, § 19, is the same. The Oklahoma Supreme Court holds that this provision "only applies to those causes of action which were recognized under the common law as entitling the parties thereto to a jury trial at the time of adoption of the Oklahoma Constitution." *Massey v. Farmers Ins. Grp.*, 1992 OK 80, ¶ 24, 837 P. 2d 880, 885. This mirrors the interpretation of the federal right secured under the 7th Amendment. *See Tull v. United States*, 481 U.S. 412, 417 (1987) ("The Court has construed [the Seventh Amendment] to require a jury trial on the merits in those actions that are analogous to 'Suits at common law.' Prior to the Amendment's adoption, a jury trial was customary in suits brought in

the English *law* courts. In contrast, those actions that are analogous to 18th-century cases tried in courts of equity or admiralty do not require a jury trial."). Accordingly, the fact that actions seeking abatement are classically considered actions in equity is dispositive under both the Oklahoma and federal jury-trial provisions. *See also Mugler v. Kansas*, 123 U.S. 623, 670, 672-73 (1887) (explaining, of a section of a statute authorizing the state attorney general to "maintain an action in the name of the State to abate and perpetually enjoin" newly declared nuisances, that "untenable is the proposition that proceedings *in equity* for the purposed indicated in the thirteenth section of the statute are inconsistent with due process of law. 'In regard to public nuisances,' Mr. Justice Story says, 'the jurisdiction of courts of equity seems to be of a very ancient date, and has been distinctly traced back to the reign of Queen Elizabeth.'").

498. Defendants' cases involving awards of money to compensate a plaintiff for losses sustained as a result of a nuisance, such as "permanent depreciation of market value," *Oklahoma City v.* Page, 1931 OK 764 ¶ , 6 P.2d at 1035; "difference in market value" of land, *Oklahoma City v. Stewart*, 1919 OK 303, 184 P.779, or "permanent unabatable injury" to farmland, *Briscoe v. Harper Oil Co.*, 1985 OK 43, 702 P.2d 33 are factually distinguishable because the State does not seek compensation for past losses, and are not persuasive because none of them considered, let alone issued a holding, on the constitutional argument Defendants advance here. The fact that the State currently pays for some of the costs that, moving forward, would be covered by the abatement plan, does not transform the claim for abatement into one for damages.

499. Accordingly, the Court finds and concludes that the State's requested abatement remedy, though it involves the expenditure of funds, is not an action for the recovery of damages, but is an action in equity that seeks an equitable remedy: abatement of a public nuisance. Thus, under Oklahoma statute, the Oklahoma Constitution, and the United States Constitution, Defendants were not entitled to a trial by jury.

b. Separation of Powers

500. Contrary, to Defendants' separation-of-powers argument, there is no constitutional crisis created by enforcing an abatement order on behalf of the State. Rather, that is inherently within the purview of the judiciary.

501. District Courts have the power to direct the abatement of a public nuisance. 50 O.S. § 8; *Simons v. Fahnestock*, 1938 OK 264, ¶ 0, ("As a general rule, courts of equity have power to give relief against either public or private nuisance by compelling the abatement or restraining the continuance of the existing nuisance, or enjoining the commission or establishment of a contemplated nuisance."); *Meinders v. Johnson*, 2006 OK CIV APP 35 § 29 ("There can be little doubt that a district court possesses jurisdiction and authority to direct abatement of a public nuisance."). Oklahoma law recognizes that abatement can be accomplished through the expenditure of money. *See Oklahoma City v. West*, 1931 OK 693, ¶ 6 (defining an abatable nuisance as one that may be "abated by the expenditure of money or labor"). And Oklahoma law recognizes that, even where abatement is accomplished through the expenditure of money, an action seeking abatement sounds in equity. *See Town of Jennings v. Pappenfuss*, 1928 OK 61, ¶¶ 1, 6-7 (District Court issued a permanent injunction "***and*** that defendant proceed at once to abate the

nuisance and pay the cost" (emphasis added); and Supreme Court held "the whole matter to be an action in equity"). Accordingly, this Court has the power to enter a judgement ordering the Defendants to abate this public nuisance through the expenditure of funds.

502. Once a valid judgment is entered, the court that entered the judgment has the inherent power to enforce it. *Bowles v. Goss*, 2013 OK CIV APP 76 ¶ 18 ("The district court has the inherent power to do all things 'necessary to the exercise' of its enumerated powers . . . One long recognized inherent power is the power to enforce the court's judgments. . . . From these authorities we conclude that every court, including the district court in this case, that has the jurisdiction to render a judgment has the inherent power to enforce that judgment." (quoting *Winters By and Through Winters v. Oklahoma City*, 1987 OJ 63, ¶ 8); *see also State ex rel. Crawford v. Corp. Comm'n*, 1938 OK 455, ¶ 12 (holding that the Corporation Commission, as the judicial body whose judgement created certain funds, had the power to disburse those funds "incident to its power to enforce its judgments"); *Barker v. Bond*, 1941 OK 85, ¶¶ 9-12 (holding that such power was exclusive to the Corporation Commission, as it was the judicial body that entered the judgment). This includes the power to disburse funds created pursuant to such a judgment. *See State ex rel. Crawford*, 1938 OK 455, ¶ 12. Other tribunals applying Oklahoma law have recognized this continuing authority in the abatement context. *See Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 938-39 (10th Cir. 2001) (upholding, under Oklahoma law, an arbitration panel's decision to establish a "three-million dollar escrow fund for the abatement of the nuisance," and noting that the arbitration panel "appointed a special master to administer the funds and oversee the abatement plan"). Accordingly, if this Court

enters a judgment ordering Defendants to pay the costs of abating the nuisance, the Court would have the power to enforce that judgment and oversee the execution of the abatement plan.

503. Defendants' cited authority does not run counter to those fundamental judicial powers because it did not deal with remediation or the enforcement of a judgment. Rather, *Oklahoma Education Association v. State ex rel. Okla. Legislature* considered whether the Oklahoma legislature "fail[ed] to adequately fund education," a claim that required the court to answer whether the judiciary has the power to direct how the *legislature* would appropriate State funds. 2007 OK 30, ¶ 5. And the holding was as expected: the judiciary cannot "impos[e] mandates" on how the Legislature appropriates State funds without running afoul of the separation of powers doctrine; such a task is not "proper for [the Court's] adjudication." *Id.* at ¶ 25. Of course, that case said nothing about how a court may direct funds paid pursuant to a judgment, i.e., facilitate remediation in a case that *is* properly before the court—a power that, as discussed above, is inherently held by the judiciary.

504. Defendants have also argued that a court-administered abatement plan is inappropriate here because (1) 74 O.S. § 18b(11) directs the Attorney General to "pay into the State Treasury, immediately upon its receipt, all monies received by the Attorney General belonging to the State"; and (2) once in the State Treasury, the Oklahoma Constitution requires the legislature to appropriate the funds in a single year and prohibits the binding of future legislatures to a multi-year abatement plan. The end result,

Defendants submit, is that "the only form of monetary award the Attorney General can pursue" is "an unconditional cash transfer to the treasury." This argument also fails.

505. First, Defendants cite no authority in support of this "argument," and the Court has found none. Second, this argument is plainly inconsistent with the Attorney General's express authority to bring suit on behalf of the State to abate a public nuisance. *See* 74 O.S. § 18b(A)(3); 50 O.S. § 11.[141] And, nothing in that statutory authority limits the manner in which the Attorney General may accomplish that abatement. Third, as discussed above, this argument ignores long-standing Oklahoma case law establishing this Court's authority both to enter a judgement ordering Defendants to pay the costs of abating the nuisance and to enforce that judgement and oversee the execution of the abatement plan. Fourth, unlike the *OEA* case discussed above, the funds created here are not general revenue funds set for appropriation. Rather they are funds created for the purpose of funding a court-ordered abatement plan. As such, they are also funds that do not have to go to the treasury for purposes of appropriation but may be held for distribution as directed by the Court.[142]

---

[141] *See also State ex rel. Cartwright v. Georgia-Pacific Corp.*, 1982 OK 148, ¶¶ 7-10 ("[T]he powers and duties of the Attorney General under the Constitution of the State of Oklahoma carries with it the duties and powers as were usually incident to the office under the English common law...." which included the power to "institute equitable proceedings for the abatement of public nuisances which affected or endangered the public safety or convenience and required immediate judicial interposition").

[142] This also means that these would not be "monies received by the Attorney General" under 74 O.S. § 18b(11), and thus that there would be no duty to deposit them into the treasury as there would be for a damages award.

506. The Court is also unpersuaded by Defendants' reliance on out-of-state cases such as *State v. Black Hills Power, Inc.*, 354 P.3d 83, 85-87 (Wyo. 2015), that apply a "public services doctrine" to bar a governmental entity's claims to recover the cost of an accident. Defendants have cited no Oklahoma case applying this doctrine, and the cases Defendants cite describe the doctrine as a common-law rule premised on fairness, not a limitation on the power of the judiciary. *See District of Columbia v. Air Florida, Inc.*, 750 F.2d 1077, 1080 (D.C. Cir. 2004) ("Where emergency services are provided by the government and the costs are spread by taxes, the tortfeasor does not anticipate a demand for reimbursement," but "settled expectations must sometimes be disregarded when new tort doctrines are needed to remedy an inequitable allocation of risks and costs."). The court instead finds persuasive the cases that have held that the doctrine does not apply to a state's claim to "remedy public harm caused by an intentional, persistent course of deceptive conduct," rather than a single "accident or emergency situation." *In re Opioid Litig.*, 2018 WL 4827862 at *5 (Sup. Ct. N.Y. July 17, 2018); *Nat'l Prescription Opiate Litig. In re.* MDL No. 1:17-cv-02804, 2018 WL 4895856, at *9 (N.D. Ohio Oct. 5, 2018) (doctrine does not bar recovery in cases involving "a wanton disregard for public health and safety).

507. In sum, nothing about the award of money to fund an abatement plan or the fact that the State is the one seeking such an award is inconsistent with this Court's authority to fashion an abatement remedy and enforce it to fruition.

c. Excessive Fines

508. Defendants' final, constitutional argument attempts to characterize the State's abatement remedy as a penalty in violation of the Eighth Amendment's Excessive Fines clause. The Excessive Fines Clause applies only to "punishment." *Austin v. United States*, 509 U.S. 602, 610 (1993). Defendants cite no case where the Supreme Court held that an abatement order constitutes damages, a fine, or a penalty of any kind—much less that an abatement order constituted an *excessive* fine in violation of the Eighth Amendment. A nuisance may be remedied by a civil action for damages, criminal indictment, or abatement. And, while two of those (an action for damages seeking punitive damages or a criminal proceeding imposing fines) may recognize some limit under the Eighth Amendment, Defendants provide nothing that suggests the State's ability to abate on ongoing public nuisance is subject to such a limitation.

509. Such a complete lack of authority is unsurprising. Abatement, after all, is remedial and preventative by its very nature. The purpose of an abatement order is to "eliminate or nullify" the injurious condition Defendants' caused. And, as the abatement plan here demonstrates, every penny demanded from Defendants is designed with a remedial purpose in mind: to facilitate a program or service the State's experts have shown is necessary to abate the opioid crisis in Oklahoma.

510. Naturally, the remedy sought by the State is substantial. No one has argued otherwise. The cost of treating thousands of Oklahomans with opioid-use disorder to prevent their addiction from resulting in another death; the cost of re-educating patients, doctors, and the public at large to prevent future incidence of addiction and overdose; and

the cost to research and monitor the crisis to better understand it and end it all enormous burdens. But the fact that these costs are great does not make them excessive. Although the State has made impressive strides in their efforts to combat this crisis, the evidence shows there are still thousands of lives that stand to suffer or cease if more is not done—if these heavy burdens are not shouldered. Because both the facts and the law compel it, I conclude Defendants should be the ones to bear that weight.

* * *

511. The State's burden here is to prove its case by a preponderance of the evidence. *Patterson v. Roxana Petroleum Co.*, 1925 OK 224, ¶¶ 12-13, 234 P. 713, 716 (endorsing the preponderance standard in the nuisance context); *see also McPherson v. First Presbyterian Church*, 1926 OK 214, ¶ 18, 248 P. 561, 566 (noting that the clear-and-convincing standard applies where the plaintiff seeks to enjoin a "***threatened*** nuisance"—*i.e.*, to prevent the defendant from doing some act that "*would be a nuisance*" as opposed one that already exists). Indeed, Defendants admit as much. *See* Defs.' Renewed Mot. for Judgment at 38 (noting the State's burden is "to prove *by a preponderance of the evidence* that its [abatement] plan is either sufficient or necessary to end the opioid abuse crisis"). After, considering all the evidence in the case, I find that the State has proven its case and its entitlement to its requested remedy under the preponderance standard. However, even if measured under the clear-and-convincing standard, I find that the State has proven its case and its entitlement to its requested remedy under that standard as well. That is, after my review of all the evidence, I am firmly convinced that the State has proven that it is: (a) "more probably true than not true" that Defendants caused a public nuisance for which the

State is entitled to its requested abatement remedy; and, indeed, (b) "highly probable and free from serious doubt" that Defendants caused a public nuisance for which the State is entitled to its requested abatement remedy. *See* OUJI 3.1 & 3.2; *see also In re C.G.,* 1981 OK 131, ¶17, n.12, 637 P.2d 66, 71 ("Clear and convincing evidence is that measure or degree of proof which will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegation sought to be established.").

IT IS SO ORDERED.

DATED THIS ___ DAY OF _____.

_____

Honorable Thad Balkman, District Judge