IN THE DISTRICT COURT OF CLEVELAND COUNTY
STATE OF OKLAHOMA

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

STATE OF OKLAHOMA } S.S.
CLEVELAND COUNTY }
FILED
JUL 08 2019
In the office of the
Court Clerk MARILYN WILLIAMS

THE STATE'S RESPONSE TO MOTION FOR JUDGMENT OF DEFENDANTS JOHNSON & JOHNSON AND JANSSEN PHARMACEUTICALS INC.

Despite its label, Johnson & Johnson's[1] Motion for Judgment[2] is nothing more than a motion to reconsider. They raise nothing new—nothing this Court has not already rejected. They have merely regurgitated the same arguments this Court denied in their motions to dismiss, their *Daubert* motions, and their motion for summary judgment into a 120-page amalgamation of what they wish this case was about and what they wish the law to be. But—as this Court has repeatedly ruled—they are wrong. No matter how much they wish it were so, this is not a product-liability case. This is not a case about prior restraints on speech. This is not a request for damages. This is a nuisance case seeking abatement and is governed by Oklahoma statute. Johnson & Johnson has given this Court no new reason to prevent this case from going forward. Like all the other times these arguments were raised, this Motion should be denied.

I. Introduction

In response to Johnson & Johnson's Motion for Summary Judgment, the State told this Court exactly what it would prove at trial:

> The State will show that, prior to the mid-1990s, Defendants promoted opioids primarily for use in treating acute, post-surgical pain, or for end-of-life care; and that during that time the rates of prescribing, addiction, overdose and death remained relatively low and flat. Then, in 1997, Johnson & Johnson decided to change the way they promoted opioids. Armed with unsubstantiated and deceptive claims of safety and efficacy, Johnson & Johnson charted a course to expand the use of opioids into chronic, non-malignant pain states—things like chronic back pain and arthritis—just like Purdue. And their campaign worked; prescriptions skyrocketed with the vast majority of that growth coming in the new and emerging chronic, non-

[1] For purposes of this brief the State refers to all Johnson & Johnson Defendants collectively as "Johnson & Johnson."

[2] Hereafter "the Motion."

> malignant market. That success came at a price to Oklahoma; as the supply of prescription narcotics increased exponentially in Oklahoma, so too did rates of addiction, overdose and death until eventually the number of Oklahomans dying from opioid overdose surpassed the number of deaths from car accidents. In short, the State will show that it was Defendants' execution of that false and misleading promotion of opioids for use in chronic, non-malignant pain that caused the opioid crisis in Oklahoma.[3]

And, after weeks of testimony, charts, and documents—not to mention testimony from some of J&J's own witnesses[4] and the unrebutted expert testimony from the State establishing each and every element of its nuisance claim[5]—the State has proven just that.

Indeed, after combing through J&J's 120-page Motion (which at times reads more like a file-stamped press release than a serious court filing), it does not appear that J&J disputes whether the State has proven the case it intended to prove. Rather, as they have done throughout this litigation, Johnson & Johnson's only argument is that the State's claim simply cannot exist. In short: J&J does not contend that the State has failed to prove its case; they argue that, no matter how much evidence the State put forth, the State's case is not fit for a Court to decide.[6]

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[3] State's MSJ Resp. (May 3, 2019) at 3-4.

[4] *See, e.g.*, Trial Transcript (July 1, 2019 p.m.) at 6:08-7:08, 15:04-16:06, 80:22-81:22 (Testimony from Dr. Timothy Fong).

[5] Trial Transcript (June 13, 2019 p.m.) at 17:02-23:13 (Testimony from Dr. Andrew Kolodny); Trial Transcript (June 25, 2019 a.m.) at 100:03-07, 101:13-102:04, 105:14-108:03 (Testimony from Commissioner Terri White).

[6] Motion at 1 ("Janssen is committed to participating in this ongoing discussion, and to working with physicians, scientists, regulators, and lawmakers to find consensus on measures that account for both the risks and the benefits of opioid medications. ***But a courtroom is not the place—and a judge should not be thrust into the role of policymaker.***").

They are wrong. And this Court has said so—multiple times. In September of 2017, Defendants argued the State's case should be dismissed because it failed to identify any act or omission giving rise to a nuisance,[7] because its claims were preempted by federal law,[8] and because the State's theory of causation was too generic and too attenuated by the acts of unidentified third parties to impose liability.[9] But the Court denied that motion,[10] and the case proceeded to discovery. Then, after discovery concluded, J&J argued that it should be granted judgement because the pharmaceutical marketing the State identified was still not the kind of act or omission contemplated under Oklahoma's nuisance statute;[11] because federal law–including the First Amendment—still shielded them from state tort liability;[12] because the State's theory of causation was still too generic and attenuated;[13] and because the State's requested abatement remedy was legally unfit.[14] Again, however, this Court denied that motion,[15] and the case proceeded to trial.

Now, after this Court has spent weeks hearing and seeing evidence that Johnson & Johnson was a cause of the opioid crisis in Oklahoma, Johnson & Johnson has little, if anything, new to say. They are still arguing that this Court should be the first in history to

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[7] Defs' Jt. Mot. to Dismiss at 34.

[8] Defs' Jt. Mot. to Dismiss at 12-15.

[9] Defs' Jt. Mot. to Dismiss at 16-20.

[10] Dec. 6, 2017, Order.

[11] J&J MSJ (April, 23, 2019) at 12-23.

[12] J&J MSJ (April, 23, 2019) at 28-33.

[13] J&J MSJ (April, 23, 2019) at 24-28, 33-39.

[14] J&J MSJ (April, 23, 2019) at 20-24.

[15] May 13, 2019 Order.

cabin and ignore the plain text of Oklahoma's nuisance statute to apply only to disputes regarding real property. They are still arguing that the State must show "unlawful conduct" rather than the "unnecessary interference" that the Oklahoma Supreme Court and this Court have held is required.[16] They are still hiding behind the FDA, the DEA and the First Amendment to immunize their false and misleading statements. They are still parading their specious argument that, because they stopped marketing, there is nothing left in Oklahoma to "abate." And they are still arguing that—despite all the Oklahoma lives lost, families devastated, and communities disrupted—what is unfair about the opioid crisis is the notion that Johnson & Johnson could be forced to pay to clean it up.

Such absolute denial and woe-is-me mentality is perhaps the best proof that there is likely no institution *but this Court* capable of holding Johnson & Johnson accountable for the mess they helped create. The State has shown that Johnson & Johnson's narcotics took the lives of Oklahomans—it was clear as day, the word "Duragesic" stamped across an

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[16] *See Briscoe v. Harper Oil Co.*, 1985 OK 43, ¶ 10, 702 P.2d 33, 36 ("The fact that a person or corporation has authority to do certain acts does not give the right to do such acts in a way constituting an unnecessary interference with the rights of others. A license, permit or franchise to do a certain act cannot protect the licensee who abuses the privilege by erecting or maintaining a nuisance."); *Crushed Stone Co. v. Moore*, 1962 OK 65, ¶ 0, 369 P.2d 811 ("Where the facts show that a lawful business is being conducted in such a manner as to constitute a private and public nuisance, causing substantial injury to comfort, health, or property, a court is authorized to enjoin and abate such nuisance."); *Winningham v. Rice*, 1955 OK 108, ¶ 7, 282 P.2d 742, 744 ("Defendant's salvage yard business, though of itself lawful, was admittedly adjacent to a nice residential district and plaintiffs' evidence, though conflicting with defendant's evidence on the issues in some respects, substantiated their allegations as to the existence of a nuisance causing substantial injury to the health, comfort and property of the adjoining property owners."); *Reaves v. Territory*, 1903 OK 82, ¶ 27, 74 P. 951 ("[a] license to operate and engage in a business so long as conducted in a lawful manner would not protect them in maintaining a public nuisance, which is in violation of the law of the territory."); May 6, 2019, Hr'g Tr. at 30:1-13.

Oklahoma woman's body.[17] Yet in this Motion, Johnson & Johnson still proclaims that their drugs "could not and did not" contribute to the opioid crisis.[18] The State showed that, despite both internal warnings from its scientific advisors and external warnings from the FDA, Johnson & Johnson pushed false and misleading marketing messages to convince doctors that their drugs were safe.[19] Indeed, the State also showed that the very people whose science and opinions Johnson & Johnson cited have accused them of twisting their data, excerpting the parts that sounded good and repackaging them out of context in an effort to sell more drugs.[20] Yet in this Motion, Johnson & Johnson still proclaims they did nothing wrong—that the First Amendment protects that kind of deception.[21] The State also showed that, again despite FDA warning, Johnson & Johnson promoted its drugs as safe for the treatment of "chronic" pain when, in reality, it was indicated only for chronic-pain patients who met certain restrictions, such as those who "*require* continuous opioid analgesia for pain that *cannot be managed by lesser means.*"[22] And yet, once again, Johnson & Johnson has doubled down in its Motion and argued that promotion for "chronic

[17] Trial Transcript (June 18, 2019 p.m.) at 41:08-43:04.

[18] Motion at 2.

[19] *See* s0035 (Scientific Advisory Board Memorandum); s0038 (2004 Warning Letter).

[20] Trial Transcript (May 29, 2019 a.m.) at 89:15-16 (Dr. Russell Portenoy); Trial Transcript (May 29, 2019 p.m.) at 5:05, 12:23-13:08 (Dr. Russell Portenoy); Court Ex. 2 (Transcript of Dr. Russell Portenoy's Video Testimony) at 43:22-46:09, 268:17-271:18; Trial Transcript (June 7, 2019 p.m.) at 58:21-22 (Mr. Aaron Gilson); Court Ex. 44 (Transcript of Mr. Aaron Gilson) at 206:05-207:08, 329:21-332:02.

[21] *See* Motion at 25-27.

[22] s4128 (1998 Warning Letter).

non-cancer pain" is protected by federal law.[23] Indeed, Johnson & Johnson has the audacity to say in this Motion that Duragesic "delivers a safe and controlled dose of pharmaceutical fentanyl"—a statement again lacking any of the context or caveats necessary to actually conform to their FDA indication.

All of this—the unwavering refusal to accept responsibility, the desperate attempts to point the finger at everyone else, and the blatant and incessant disrespect for the State, its people, and this Court every time someone from J&J calls this case baseless—makes one thing abundantly clear: they will not stop until someone makes them. Johnson & Johnson's "commitment" to "find consensus on measures that account for both the risks and the benefits of opioid medications" is a hollow and dangerous proposition. We've seen what happens when Johnson & Johnson gets to insinuate itself into discussions about how best to utilize opioids; the result was the worst man-made health crisis in Oklahoma history (injury), and criticism from J&J for not enacting more restrictive measures sooner (insult). That is not the commitment we need. We need commitment like that of Commissioner White, Jessica Hawkins, and Dr. Kolodny—a commitment to actually end the crisis. We need help, and as Johnson & Johnson has made clear, that will not come from them unless this Court orders it.

Johnson & Johnson does not believe this crisis can be solved in a court room. The State can think of no better place. As the world has seen, Johnson & Johnson has done wrong. That wrong hurt the People of this State. Righting that wrong—fixing that mess—

[23] *See* Motion at 48-58.

is what this case is all about. It is about justice. And what better place can there be to obtain justice than inside a court in Oklahoma.

Accordingly, as with all of the prior attempts to dismiss the State's case, this Motion should be denied.

II. The State Proved a Public Nuisance

The State has three qualified experts on record testifying to the presence of each and every element of public nuisance:

Dr. Andrew Kolodny:

> Q. Based upon all of those things, do you have an opinion whether the defendants, Johnson & Johnson and Janssen, promoted opioids generally in a way that broadened their product indication?
>
> A. Yes, I believe they did.
>
> Q. Do you have an opinion whether the defendants promoted their specific opioids in a manner that broadened their product indications?
>
> A. Yes. I have an opinion and it's that they did.
>
> Q. Let's take those in two parts. Do you have an opinion whether the defendants took data out of context with respect to their specific opioids?
>
> A. I know that they did.
>
> Q. Do you have an opinion whether the defendants took data out of context related to opioids, generally?
>
> A. Yes.
>
> Q. What is that opinion?
>
> A. That they did.
>
> Q. Do you have an opinion whether the defendants omitted material information related to the safety or efficacy of their specific opioids?

A. Yes, I do have an opinion. It's that they did omit important data.

Q. Do you have an opinion whether the defendants omitted material information related to the safety or efficacy of opioids, generally?

A. Yes.

Q. What is that opinion?

A. They did.

Q. Do you have an opinion whether the defendants made comparative efficacy claims about their opioids without substantial evidence?

A. Yes.

Q. What is that opinion?

A. They did.

Q. Do you have an opinion whether the defendants made overstatements as to the efficacy or safety of their opioids specifically?

A. Yes.

Q. What is that opinion?

A. They did.

Q. Dr. Kolodny, do you have an opinion whether these defendants made overstatements as to the efficacy or safety of opioids, generally?

A. Yes.

Q. On the board we see 2376. Do you see that, Dr. Kolodny?

A. I do.

Q. That's from a document that we have into evidence. It says, Examples of false and misleading. And all of the things I just asked you about --

A. Yes.

Q. -- do you see those reflected on that exhibit?

A. I do.

Q. What does it say at the top?

A. Examples of false and misleading.[24]

. . .

Q. Dr. Kolodny, I'm going to ask you another series of questions based on that same background and qualifications. Based on those things we just went over a minute ago. Do you have an opinion whether these defendants' acts or omissions injured or endangered the health and safety of Oklahomans?

A. I do.

Q. What is that opinion?

A. They did.

Q. Dr. Kolodny, do you have an opinion as to whether the acts or omissions of these defendants injured or endangered the comfort or repose of Oklahomans?

A. I do.

Q. What is that opinion?

A. They did.[25]

. . .

Q. Dr. Kolodny, do you have an opinion as to whether the acts and omissions of these defendants offend decency -- and let me phrase what that means here -- with respect to how opioids should be prescribed in a community like this. Do you have an opinion?

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[24] Tr. Transcript, June 13, 2019 (Afternoon Session), at 17:14 – 19:19.

[25] *Id.* at 19:20 – 20:8.

A. I do.

Q. What is that opinion?

A. They did.[26]

. . .

Q. Do you have an opinion whether defendants' acts or omissions rendered Oklahomans insecure in life here in Oklahoma?

A. I do.

Q. What is that opinion?

A. They did.[27]

. . .

Q. Do you have an opinion, Dr. Kolodny, as to whether all of these things that you've just opined about, the conduct of the defendants and the result of that conduct, have impacted a considerable number of persons in Oklahoma at the same time?

A. I do.

Q. What is that opinion?

A. They did.[28]

Commissioner Terri White:

Q. (By Mr. Whitten) Commissioner White, has the defendant in this case, and based upon all of your expertise, your professional opinions and the evidence you heard in this case -- have they annoyed, injured or endangered the comfort, repose, health, or safety of Oklahomans?

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[26] *Id.* at 20:9 – 20:16.

[27] *Id.* at 20:17 – 20:22.

[28] *Id.* at 20:23 – 21:4.

A. Yes.

Q. And have they offended the decency –

A. Can I add to my answer?

Q. Sure.

A. Yes. So when you talk about injuring the health and safety of Oklahomans, turning on the addiction circuitry in someone's brain and creating a lifelong disease, a chronic disease that Oklahomans can die from, is certainly a injury. And when you talk about -- when you use the word endanger the health and safety of Oklahomans, killing 6,137 Oklahomans absolutely endangers their health and safety.[29]

. . .

Q. (By Mr. Whitten) Based upon your experience, your education, your training, the fact you've been the Commissioner for Mental Health and Substance Abuse for 13 years, you've been fighting this battle on the front line -- based on all the evidence you're aware of and you heard in this trial, your expert opinion, have they offended the decency of Oklahomans?

A. Yes, absolutely. When you pray on a state that is vulnerable to addiction, that offends my decency. When you pray on a high risk school with a nonevidence-based prevention program, that offends decency. And in the courtroom, when I heard Ms. Deem-Eshleman testify they bore zero percent responsibility, that offends my decency.[30]

. . .

Q. Have they made it dangerous for Oklahomans to have passage on our roads, our streets, and other places here in the state, based on all of your experience and education and training?

A. Yes, absolutely. Driving while intoxicated -- and we have had -- we know this has happened firsthand in my agency, because one of the first Naloxone saves that was made, that was reported to us, was by a pastor who had prescribed prescription opioids. He was an elderly pastor, driving to his

[29] Tr. Transcript, June 25, 2019 (Morning Session), at 105:14 – 106:4.

[30] *Id.* at 106:15 – 107:1.

congregation and took too many, called 911, Tulsa PD, and was not – having trouble breathing, didn't know what to do, and was pulled over -- and was told to pull over. The Tulsa PD came. He was at that point no longer breathing, and they saved his life with Naloxone. It absolutely has endangered our roads, bridges and highways.[31]

. . .

Q. Commissioner White, based on your experience, education, training, and everything you've done for the last 20 years, has that defendant, in your professional opinion, rendered Oklahomans insecure in life or in property?

A. Absolutely. When you talk about the fact that people's addiction to circuitry gets turned on, we know that when people struggle with the disease of addiction and don't have access to treatment, sometimes decisions are made that wouldn't otherwise be made.

We know people's cars have been broken into to steal prescription medication. We know that prescription medication has been taken from people's homes. It absolutely affects property.[32]

Dr. Jason Beaman:

Q: Oklahoma, has it been hit by an opioid epidemic in your expert opinion?

A: Yes.

Q: Is there any doubt about that?

A: No, absolutely not. Before 1996, we did not have all of these dead bodies that had opioid-based products in them. Now we do. So dramatic uptick in overdoses, and overdose being the end result, so for every overdose, you should think about the hundreds of people that are suffering from opioid use disorder that haven't died yet. Absolutely, I think we're in the middle of an epidemic.

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[31] *Id.* at 107:2 – 15.

[32] *Id.* at 107:16 – 108:3.

Q: Well, let me ask you this: Let's take the number of people that died during the opioid epidemic in Oklahoma, are they just the tip of the iceberg, the deaths?

A: I believe so, yes.

Q: Are there far more people just suffering with addiction who have not yet died?

A: Yes.

Q: And now let's even expand that spiderweb out further. In addiction to the people who have actually gotten addicted to opioids, how have their families and their communities and the State of Oklahoma been affected?

A: I would say we've been decimated. Oklahoma has always been a little bit more modest in our resources, and this is not what we needed. It has ruined families. It's ruined childhoods. It's stolen parents. It's stolen children. And it's cost the State so much money that should have been better spent on education and helping ours tate advance, but we haven't been able to do that because we've been firefighting this epidemic, which has been costly.[33]

. . .

Q: Do you know the cause of the opioid epidemic in this state to your – in your opinion, your professional opinion?

A: Yes.

Q: And indeed, is that part of your going around the state trying to teach not only physicians and patients and people, but do you also teach your medical students this?

A: Yes.

Q: And indeed, are you now teaching narcotic conservatism in the med schools so we don't have another generation of young medical students coming out liberally prescribing opioids?

A: Absolutely. It's one of the most important fights in this epidemic is you have to cut off the pipeline.

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[33] Tr. Transcript, June 17, 2019 (Afternoon Session), at 64:20-65:24.

Q: Is that the only way to put that dam back up of narcotic conservatism?

A: Yes.

Q: Is that the only way to put the lion back in the den or the rattlesnake back in the den?

A: Yes.

Q: And if you're going to have med students or medical doctors pick up a rattlesnake, they've got to know the difference between that and a garden snake, don't they?

A: They do.

Q: So what is your professional opinion – please tell Judge Balkman your professional opinion of the opioid epidemic that has hit the state of Oklahoma?

A: It's my opinion that the cause of the opioid epidemic in Oklahoma is the misinformation campaign unleashed on our state, a vulnerable population, by the pharmaceutical manufacturers, including Johnson & Johnson and Janssen.[34]

. . .

Q: But before 1996, it was a flat line going back for decades and decades, wasn't it?

A: That is correct.

Q: So if – is there any way in science, that in your professional opinion, it could be a coincidence that these three lines went up in parallel?

A: No.

Q: So is it your professional opinion, they're causally related to the sale of opioids?

A: Yes, absolutely.

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[34] *Id.* at 67:25-69:06.

Q: Is it your professional opinion that the cause of the epidemic, also, is having too many opioids?

A: Yes. It's an oversupply of opioids and so there's a lot of talk about, you know, illicit drug use and heroin, and those are the overdoses. But those are opioid sales, right? So those are the prescriptions that were filled in pharmacies and sold in a legitimate manner. And so if there wasn't that oversupply, there wouldn't be those overdoses in the first place.[35]

. . .

Q: Well, Dr. Beaman, in your professional opinion, have the efforts of Commissioner White and all the hard-working people in her department and the State of Oklahoma, have they helped make that line, indeed, go down?

A: I think that they are responsible for that downward trend, yes.[36]

. . .

Q: Do you have an opinion, based on your medical education, your training, your experience as an expert in these fields that we have talked about, on whether the marketing caused the opioid epidemic?

A: As the end use of the marketing, it's my opinion that the marketing campaign of the pharmaceutical manufacturers, including Janssen and Johnson & Johnson, is cause of the opioid epidemic in Oklahoma.

Q: Doctor, can this epidemic, this opioid epidemic be abated in this state?

A: Absolutely.

Q: Can we return to pre-1996 levels?

A: We didn't have it in '96. We've already seen the improvement from the herculean efforts of the Department of Mental Health and the Department of Health in Oklahoma. We've already started to make some improvement. There's no reason –if we can just get the unbranded, unethical marketing

[35] *Id.* at 71:03-21.

[36] *Id.* at 74:17-22.

> campaign out of our state, if we can get a well-funded abatement plan, we should go back to 1996, pre-1996 levels.[37]
>
> . . .
>
> Q: And the treatment plan itself, is it reasonable and necessary, in your professional opinion?
>
> A: Yes. Not only reasonable and necessary, but critical. Without that, people will die.
>
> Q: And the medical education part of that plan, is it reasonable and necessary?
>
> A: Yes.[38]

That is just a portion of the State's evidence. And, to this day, that testimony stands unrebutted. Thus, the notion that the State has failed to prove its case is absurd.

Accordingly, J&J is left with the same tired legal arguments from their summary judgment motion to try to persuade this Court to reverse itself and re-write Oklahoma's nuisance statute. As the State demonstrated before, these arguments should be (and were properly) overruled.

Unlike what Defendants claim, Oklahoma's nuisance law is not limited to disputes about property. That law is plainly designed to right wrongs that threaten "health . . . safety . . . [or] life"—especially when those wrongs threaten the entire state-wide community. Sometimes, a wrong is too large, hurts too many citizens, for a private cause of action like

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[37] *Id.* at 80:18-82:09.

[38] *Id.* at 83:17-23.

negligence or products-liability to solve. This is precisely why Oklahoma's public nuisance law exists.

Accordingly, Johnson & Johnson has turned to snippets from individual private nuisance cases,[39] cases involving injury to property,[40] and cases from other jurisdictions with other laws in its attempt to avoid the plain text of Oklahoma's public nuisance statute and scare this Court into cabining Oklahoma's law. But none of those citations mandate the kind of limitation Defendants desire. Instead, the Oklahoma cases in Johnson & Johnson's Motion merely show that a nuisance *may* be based on use or enjoyment of property.[41] They do not, however, foreclose an action for nuisance based on the many other interests protected under the statute. Indeed, if anything, these cases simply demonstrate that Oklahoma Courts have faithfully upheld those parts of the nuisance law related to "comfort, repose . . . [and] the use of property." They are no support for ignoring those parts of the statute protecting "health . . . safety . . . [and] life."

Meanwhile, the foreign cases Johnson & Johnson has cited are only further evidence that Oklahoma's nuisance law is built for this case. None of those foreign cases were applying a statute like Oklahoma's. Those cases that did involve statutes dealt with

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[39] *See, e.g., Briscoe v. Harper Oil Co.*, 1985 OK 702 P.2d 33; *Laubenstein v. BoDe Tower, L.L.C.*, 2016 OK 118, ¶8, 392 P.3d 706, 709; *Nichols v. Mid-Continent Pipe Line Co.*, 1996 OK 118, 933 P.2d 727.

[40] *See, e.g., Morain v. City of Norman*, 1993 OK 149, 863 P.2d 1246; *Smicklas v. Spitz*, 1992 OK 145, 846 P.2d 362; *Crushed Stone Co. v. Moore*, 1962 OK 65, 369 P.2d 811.

[41] *See* Motion at n.3 (quoting *McCormick v. Halliburton Co.*, No. 11-1272-M, 2014 WL 1328352, at *3 (W.D. Okla. Mar. 31, 2014) ("It is clear under Oklahoma law that a nuisance claim may be stated based upon wrongful interference with the use or enjoyment of a person's rights or interests in land.").

provisions that were explicitly tied to the use of property or specifically targeted at the property or goods at issue:

> Texas: "The habitual use or the threatened or contemplated habitual use ***of any place*** for any of the following purposes is a public nuisance . . . ." Tex. Civ. Prac. & Rem. Code § 125.021 (1995) (repealed 2003).
>
> New York: "***Any weapon, instrument, appliance or substance*** specified in article two hundred sixty-five, when unlawfully possessed, manufactured, transported or disposed of, or when utilized in the commission of an offense, ***is hereby declared a nuisance***." N.Y. Penal Law § 400.05.
>
> New Jersey: "The presence ***of lead paint upon the interior of any dwelling or upon any exterior surface*** accessibly to children causing a hazard to the occupants or anyone coming in contact with such surfaces ***is hereby declared to be a public nuisance***. . . . When the board or health having primary jurisdiction hereunder finds that there is [such a hazard] ***it shall at once notify the owner that he is maintaining a public nuisance and order him to remediate the nuisance*** . . . ." N.J. Stat. §§ 24:14A-5, 14A-8.

And in the cases without express statutory causes of action, the courts were concerned about expanding their common-law torts and encroaching on the law-making role of the legislature[42]—concerns that do not exist here given the plain text of Oklahoma's statutory cause of action.

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[42] *See, e.g., Rhode Island v. Lead Indus. Ass'n*, 951 A.2d 428, 436 (R.I. 2008) ("This Court is powerless to fashion independently a cause of action that would achieve the justice that these children deserve. . . . [T]he creation of new causes of action is a legislative function."); *New York v. Sturm, Ruger & Co.*, 309 A.D.2d 91, 94, 101 (N.Y. App. 2003); *see also Camden Cnty. Bd. of Chosen Freeholders v. Beretta*, 273 F.3d 536, 541-42 (3d Cir. 2001) ("It is not the role of a federal court to expand or narrow state law in ways not foreshadowed by state precedent. Here, no New Jersey precedents support the County's public nuisance claim or provide a sound basis for predicting that the Supreme Court of New Jersey would find that claim to be valid. While it is of course conceivable that the Supreme Court of New Jersey may someday choose to expand state public nuisance law in the manner that the County urges, we cannot predict at this time that it will do so.").

Johnson & Johnson also overlooks the cases from around the country that support the application of nuisance law to the opioid crisis. First, of course, are the hundreds of other opioid cases currently pending against these Defendants in courts across America—many of which contain nuisance claims like the one here—including Arkansas's that just survived a motion to dismiss argued on many of the same grounds raised here.[43] Johnson & Johnson relies on Arkansas caselaw in its Motion, *see* Motion at n.17, but conveniently omits the Arkansas case that is actually analogous to the case a bar—a state-asserted, public nuisance case on the opioid crisis *where Johnson & Johnson's arguments failed.*

Then, there is the California lead-paint case, *California v. ConAgra Grocery Products Co.*, 227 Cal Rptr. 3d 499 (Cal. App. 2017), *review denied* 2018 Cal. LEXIS 1277 (Cal., Feb. 14 2018), *cert denied ConAgra Grocery Prods. v. California*, 139 S. Ct. 377 (U.S. Oct. 15, 2018). In that case, California held a group of lead paint manufacturers liable for the epidemic of childhood lead poisoning based on their "affirmative[] promot[ion of] lead paint for interior residential use while knowing of the public health hazard that such use would create." *Id.* at 536. Indeed, that case mirrors this one in many crucial respects: nuisance liability for promotion of a product; the use of third-party front groups to spread those misleading and deceptive messages; joint and several liability; and the creation of an abatement fund to remedy a public health crisis. Yet, despite all these obvious similarities, this case is also noticeably absent from Johnson & Johnson's Motion.

[43] *See* Ruling on Motions to Dismiss and Motion to Strike, *Arkansas ex rel. Rutledge v. Purdue Pharma L.P., et al.*, Case No. 60CV-18-2018.

Just like the text of Oklahoma's statute, the *ConAgra* case—the prevailing archetype for cases like this—terrifies them.

Johnson & Johnson also omits reference to the Oklahoma citations that prove Oklahoma's nuisance law means what it says. Title 63, section 1-106, for example, lists as one of the duties of the State Commissioner of Health the power to "abate any nuisance affecting injuriously the health of the public or any community." There is no language limiting that power to only where the nuisance results from the use of property. It says "any nuisance." Moreover, the Legislature gave that power to the State Commissioner of *Health*, not the County Tax Assessor or duly elected heads of Home Owners' Associations. Accordingly, this power is not about solving disputes between noisy neighbors; it is about protecting the public from the next epidemic—whether that be the smallpox outbreak referenced in the Restatement[44] or a man-made plague like the one in this case.

Another example is *Reaves v. Territory*, 1903 OK 92, 74 P. 951. In that case a county attorney brought an action on behalf of the Territory to abate a nuisance that had arisen from the operation of a theatre in Guthrie. *Id.* ¶1. The district court held a bench trial, found in favor of the Territory, and ordered the nuisance be abated by injunction. *Id.* In affirming that decision, the Supreme Court held that nuisance liability was properly imposed on a business licensed to sell a product where the "manner of running the business, the permitting of unlawful practices and violations of law, and the obligation to the public"

[44] *See* Restatement 2d of Torts § 821B, Cmt. g.

created a nuisance. *Id.* at ¶27.[45] And the Supreme Court was explicit in *Reaves* that "***no claim of damages to property rights***" existed. *Id.* at ¶29. Rather, *Reaves* was brought "only by reason of the injury to good morals and public decency, to refuse to enforce which rights would be unquestionably against public policy." *Id.* The nuisance law in place in *Reaves* is the same law in force today. *See id.* ¶20. Both are an explicit embodiment of Oklahoma's public policy—duly enacted by the people of this State. And, just as in *Reaves*, to refuse to protect the public rights at stake in this case would unquestionably be against that public policy.

The *Reaves* case also eviscerates Johnson & Johnson's "due process" argument that it lacked fair warning on the meaning of Oklahoma's nuisance law. As *Reaves* shows, this law has been on the books since before Oklahoma was a State, and the parts of the statute covering the conduct at issue here have remained unchanged. Oklahoma's law has always been aimed directly at rooting out threats to public health and safety, and it has always been available as a check on the wrongful operation of an ostensibly lawful business. Johnson & Johnson's argument that the meaning of this law is somehow "elusive" is simply a plea to cabin the plain text—to say that it can only apply to brick-and-mortar fact patterns and has no place in an age where the reach of business is no longer measured in terms of city blocks. That is wrong. The reach of Defendants' business in Oklahoma and the scale of

[45] *Reaves*, 1903 OK 92 , ¶ 27 ("It is not the sale of intoxicating liquors in a lawful manner which is authorized by their license, nor the conducting of a theatre in a lawful and peaceful manner, that is complained of, but it is the manner of running the business, the permitting of unlawful practices and violations of law, and the obligation to the public, that are complained of; therefore a license or licenses to operate and engage in a business so long as conducted in a lawful manner would not protect them in maintaining a public nuisance, which is in violation of the laws of the territory.").

the harm it has caused to the public health and safety is not too large for the nuisance law to fix. Johnson & Johnson has argued "the legislature must speak before courts use public nuisance to adjudicate lawsuits targeting controversial social harms." MSJ at 19-20. The Oklahoma legislature has spoken, and the words they used are more than sufficient to address this crisis.

Moreover, as the testimony in this case has demonstrated, Johnson & Johnson's role in causing this public nuisance was inextricably intertwined with the use of property. Sales reps were trained to spread false and misleading messages in their Oklahoma homes,[46] they used company cars to disseminate those messages,[47] and they as well as their paid speakers delivered those messages to doctors in their Oklahoma offices[48]—all of which involve the use of property. If Johnson & Johnson had a storefront in Oklahoma from which they orchestrated this campaign, this property argument would not exist. The fact that such a physical presence is no longer necessary to run a business should not render Oklahoma's nuisance law obsolete to address today's corporate wrongs.

In sum, Johnson & Johnson's argument that Oklahoma's nuisance law is limited to cases involving property is simply an invitation to this Court to commit error by rewriting Oklahoma's nuisance law and ignoring the many other rights plainly protected in 50 O.S.

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[46] *See* Trial Transcript (May 30, 2019 a.m.) at 44:13-46:17, 51:07-09 (Testimony from J&J Corporate Representative, Ms. Kimberly Deem-Eshleman).

[47] *See* Trial Transcript (July 2, 2019 p.m.) at 168:10-170:04 (Testimony from Drue Diesselhorst).

[48] *See, e.g.*, Trial Transcript (May 30, 3019 a.m.) at 52:20-53:03, 55:17-20, 62:12-22 (Testimony from J&J Corporate Representative, Ms. Kimberly Deem-Eshleman); Trial Transcript (July 2, 2019 p.m.) at 168:10-170:04 (Testimony from Drue Diesselhorst).

§ 1. If the People of Oklahoma wanted a law that addressed only interferences with waterways, public parks, or the right to use one's property, then they would have included only those parts of the Third and Fourth sections of the statute. But the People did not stop there; they included explicit protections for health, safety, and life. That law exists and has always existed in Oklahoma. Johnson & Johnson's Motion on this basis should be—again—denied.

III. The State Proved Johnson & Johnson Caused that Nuisance

Again finding themselves with nothing (other than the unqualified and transparently convenient statements of Dr. Kyle Toal) to rebut the State's causation evidence, J&J has once again turned to the same legal arguments raised in their *Daubert* Motions and Motion for Summary Judgment to persuade this Court to reverse itself and declare the State's theory of causation invalid.[49] For the third time now, this Court should reject those arguments.

First, Defendants' efforts to discredit the States' experts' causation testimony misapprehend both the relevant causation law and the Rules of Evidence. In the case of an indivisible public nuisance injury, the plaintiff must simply 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). And, an expert's opinion on causation need not prove causation by itself. *City of*

[49] These causation issues—and evidence demonstrating the folly of Defendants' argument—were discussed for hours during the *Daubert* hearings. Then the Court denied Defendants' motions. Accordingly, the State incorporates all arguments and evidence made at those hearings by reference here. *See, e.g.,* Tr. of April 26, 2019 Hr'g.

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.").

J&J attempts to impose a test for expert opinion reliability that does not exist. "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. Further, 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 base their opinions regarding Defendants' marketing on both. They 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 as J&J would have the Court believe.

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."). As was the case in *Smith*, J&J's alleged deficiencies go to weight, not admissibility.

Second, Johnson & Johnson's correlation argument is simply insulting. Essentially, their argument boils down to: opioids don't cause death and the idea that marketing increased prescribing "defies common sense."[50] Since J&J has trouble following the logic, the State will address those one at a time. As a threshold matter, let's start with the premise that the promotion of pharmaceutical products increases prescribing of them.[51] That is common sense, it's why J&J spent millions of dollars every year marketing their drugs, and it's confirmed by their own documents.[52] Next, let's distinguish opioids from ice cream. While it would be folly to presume that the increase in ice cream consumption in the summertime causes the simultaneous increase in the homicide rate, we can all probably agree that is, at least in part, because ice cream doesn't kill people. Opioids, on the other

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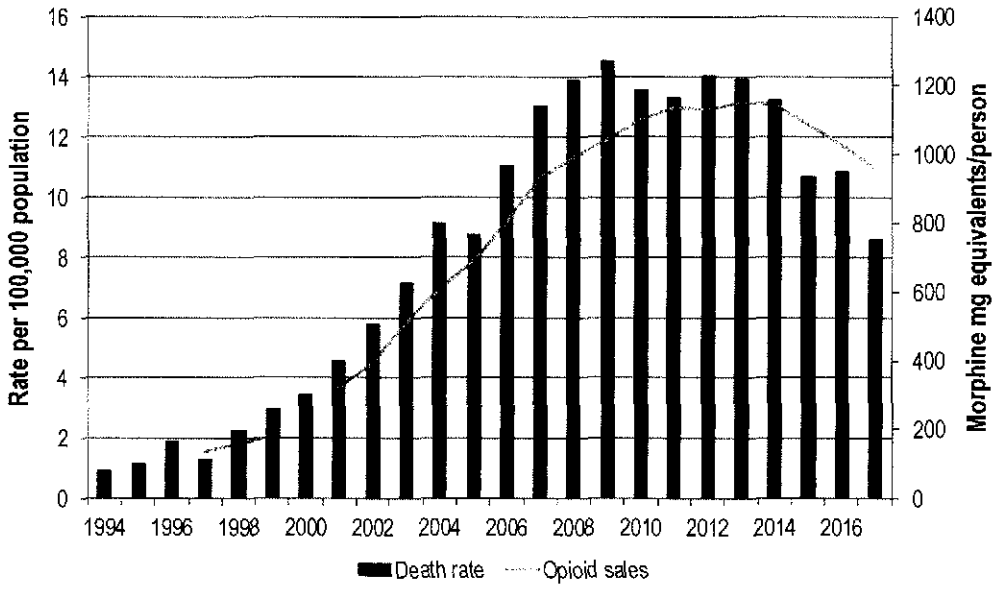
[50] *See* Motion at 76.

[51] *See, e.g.*, Trial Transcript (June 10, 2019 p.m.) at 27:11-20, 38:21-40:08, 44:09-20, 52:18-21, 56:-03-10 (Testimony from Mr. Renzi Stone); s2357 (Duragesic 2001 Business Plan); s1246 (275 Sales Force Memo); s1346 (Dec. 10, 2010 Email re OKC facilities "heavily influenced"); s1358 (2003 Business Plan Summary); s1728 (Nucynta Partnering Initiative in Oklahoma); s1730 (Jan. 23, 2012 Email re 1Q2012 Strategy); s2358 (2001 Pain Franchise Plan); s2359 (2003 Business Plan).

[52] *See, e.g.*, s2357 (Duragesic 2001 Business Plan); s1246 (275 Sales Force Memo); s1346 (Dec. 10, 2010 Email re OKC facilities "heavily influenced"); s1358 (2003 Business Plan Summary); s1728 (Nucynta Partnering Initiative in Oklahoma); s1730 (Jan. 23, 2012 Email re 1Q2012 Strategy); s2358 (2001 Pain Franchise Plan); s2359 (2003 Business Plan); *see also* Trial Transcript (May 30, 2019 a.m.) at 68:10-69:09 (Testimony from J&J Corporate Representative, Ms. Kimberly Deem Eshleman).

hand, are proven to kill people, even in small doses.[53] Thus, it would not be such a stretch to say that the increase in opioid consumption over the past two decades caused the concomitant increase in opioid-related abuse, overdose, and death. In fact, as this Court has seen repeatedly, that is exactly what happened:

Unintentional Prescription Drug-Related Overdose Death Rates[1] and Opioid Sales per Person[2], Oklahoma, 1994-2017



OSDH Fatal Unintentional Poisoning Surveillance System: Data Update, Claire Nguyen, MS, Injury Prevention Servie
Piercefield, E. *Increase in Unintentional Medication Overdose Deaths, Oklahoma, 1994-2006*, Am J Prev Med 2010; 39(4)357-363

Court's Exhibit 62.

[53] *See, e.g.*, Trial Transcript (June 5, 2019 a.m.) at 89:17-90:07; Trial Transcript (June 18, 2019 p.m.) at 19:10-18.

J&J's arguments here are also legally flawed. If J&J wants to point to things other than pharmaceutical marketing as the cause of the opioid crisis, it is welcome to do so.[54] But the fact that there may have been additional causes to the crisis (a) does not negate J&J's contribution, and thus does not excuse them from liability in a joint-and-several case; and (b) is not a basis for granting judgment in their favor at this juncture. As J&J's arguments here demonstrate, the State has proved Johnson & Johnson's false and misleading marketing of opioids for the treatment of chronic, non-malignant pain increased prescribing—exactly as it was designed to do[55]—and that increase in prescribing caused an increase in opioid abuse, overdose, and death—exactly as oversupply of opioids is known to do.[56] Accordingly, if anyone is entitled to judgment at this stage of the trial, it is certainly not Johnson & Johnson.

Third, as explained repeatedly, the learned-intermediary defense (to the extent J&J even raises it and is not just citing prescribers' independent judgment as another factor in the causal "equation") has not been shown to apply outside of the product-liability, failure-to-warn context.

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[54] This goes for J&J's proposition in part IV.A.3 as well. The State's experts are not performing a differential diagnosis to determine whether a patient's leukemia was caused by exposure to a specific carcinogen like in the *Hall* case, 248 F. Supp. 3d 1177—J&J's sole legal support for this section of their Motion. Accordingly, there is no reason for the State's experts to have to disprove the other things Johnson & Johnson argues are behind Oklahoma's opioid crisis in order for them to opine on what *did* cause the crisis. Johnson & Johnson can attempt to show other causes during its case should it so choose.

[55] *See, e.g.*, s1246 (275 Sales Force Memo).

[56] *See, e.g.*, Trial Transcript (May 29, 2019 a.m.) at 22:05-23:19, 77:13-78:24, 83:16-24 (Testimony from Dr. David Courtwright).

Finally, Oklahoma law does not required the kind of individualized proof Johnson & Johnson demands. None of the cases Johnson & Johnson cites for this proposition are public nuisance cases—let alone cases brought under Oklahoma's nuisance law.[57] Indeed, not a single one of those cases is even from Oklahoma. Rather, Johnson & Johnson's argument here is based entirely on out-of-state cases in which the plaintiffs (sometimes in class cases) were seeking to recoup damages (overpayments) as a result of unnecessary prescriptions, and the courts concerns centered on plaintiffs' ability to distinguish which prescriptions were damage-bearing from those that were not.[58]

Those concerns do not exist here. Even assuming these cases articulated the law in Oklahoma for cases seeking damages as a result of unnecessary or fraudulent prescriptions, this case is no longer about that. The State is no longer pressing claims to recoup the overpayments made as a result of unnecessary and fraudulent prescriptions. Accordingly the State need not engage in the exercise of showing which prescriptions were false and which were not; nor need the Court be concerned about calculating the costs of those unnecessary prescriptions. Instead, the State need only show that Johnson & Johnson's promotion caused an increase in prescribing and that such increase, "endangers the

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[57] *See UFCW Local 1776 v. Eli Lilly & Co.*, 620 F.3d 121 (2d Cir. 2010); *Ironworkers Local Union No. 68 v. AstraZeneca Pharm. LP*, 585 F. Supp. 2d 1339 (M.D. Fla. 2008); *In re Yasmin & Yaz*, 2010 WL 3119499 (S.D. Ill. 2010); *S.E. Laborers Health & Welfare Fund v. Bayer Corp.*, 655 F. Supp. 2d 1270, 1281 (S.D. Fla. 2009); *In re Bextra & Celebrex*, 2012 WL 3154957 (N.D. Cal. 2012); *In re Vioxx*, 2010 WL 11570867 (E.D. La. 2010).

[58] *See, e.g., UFCW*, 620 F.3d at 136 (expressing concern over the use of generalized proof "when some excess prescriptions may not have actually caused loss, given the likelihood of substitute prescriptions"); *S.E. Laborers*, 655 F. Supp. 2d at 1280-81 ("Calculation of Plaintiff's losses would be purely speculative.").

comfort, repose, health or safety"[59] of a "considerable number of persons." 50 O.S. §§ 1-2. And it has undoubtedly done so.

Moreover, in nuisance actions seeking abatement, the Oklahoma Supreme Court recognized long ago that generalized proof is sufficient. In *Balch v. State ex rel. Grigsby*, the defendant complained that the State used general evidence to show that defendants' business "was a house of ill fame or one to which persons resorted for the purpose of prostitution." 1917 OK 142, ¶6. And there, in affirming the decision to allow such evidence, the Court stated: "There is no longer any question in this state as to the admissibility of such testimony in cases of the character of the one at bar." *Id.* The Court also quoted an Oklahoma Court of Criminal Appeals decision, stating: "In a prosecution for keeping a bawdy-house . . . The state is not required to show specific acts of lewdness or prostitution." *Id.* (quoting *Jones v. State*, 10 Okla. Crim. 79). The same is true here. The State should not be forced to show specific instances of one doctor relying on one statement to write one prescription. The State should only be required to show that Defendants' misleading marketing campaign caused prescriptions to skyrocket generally—which, as Defendants' Motion demonstrates, the State has done.

The State also has shown that the public health crisis resulting from the influx of opioids in Oklahoma was a foreseeable consequence[60] of dramatically increasing the

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

[60] The State disputes that the "direct and proximate" standard applies in nuisance actions seeking only abatement; the caselaw indicates that such a standard applies where a plaintiff seeks to recover damages as a result of a nuisance. *See, e.g., Atchison*, 1928 OK 256, ¶ 8; *see City of Sayre v. Rice*, 1928 OK 499, ¶¶7-9; *see also West*, 1931 OK 693, ¶ 15 ("While evil intent, or negligence importing a greater or less degree of moral blame, may and ordinarily does accompany the

supply of opioids in society.[61] Johnson & Johnson's argument on proximate cause is simply that others—doctors, the FDA, and the State itself—are at fault, and that their conduct supersedes anything Johnson & Johnson did to cause the crisis. Not so. As the State has shown, not only was the increase in opioid prescriptions that fueled the crisis a "natural and continuous" consequence of J&J's false and misleading promotion—it was the intended consequence.[62]

IV. The State Proved Johnson & Johnson is Jointly and Severally Liable for the Nuisance

Operating under the pretext that their use of KOLs, lobbying efforts, and participation in front groups merely constitutes "ordinary business conduct," Defendants contend the State has failed to prove they bear joint and several liability for the opioid crisis in Oklahoma as the State has failed to show an indivisible injury and concerted conduct. For the umpteenth time in this litigation, Defendants misconstrue the nature of the State's argument and claims. Defendants either (1) have not been paying attention to the evidence and arguments developed throughout this case or (2) are being willfully obtuse. Neither scenario lends Defendants the benefit of the doubt in evaluating the good faith merits of their motion and it should be denied.

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commission of a nuisance, it cannot be said that either is an essential element of the offence. . . . In other words, there may be cases where the party in the exercise of his legal rights is bound to afford absolute to all not themselves in fault, *from any evil consequence arising from his acts*." (emphasis added)). Nonetheless, because the State can demonstrate the requisite causal nexus under any standard, the State will assume for purposes of this motion that it must prove Defendants' acts/omissions were a direct and proximate cause of the dangers to health and safety posed by the opioid crisis.

[61] *See, e.g.*, Trial Transcript (May 29, 2019 a.m.) at 22:05-23:19, 77:13-78:24, 83:16-24 (Testimony from Dr. David Courtwright)..

[62] *See, e.g.*, s0106 (PriCara Pain 2010 Incentive Compensation); s1246 (275 Sales Force Memo); Trial Transcript (June 10, 2019 p.m.) at 27:11-20, 38:21-40:08, 44:09-20, 52:18-21, 56:-03-10 (Testimony from Mr. Renzi Stone).

First, the concept of apportionment for joint and several liability—as framed by Defendants—applies to the award of *damages*. As the State has previously stated, and the Court has likewise determined, the State is seeking the *equitable remedy* of abatement—not damages. *See* Summary Order, Apr. 11, 2019 ("The State's remaining cause of action for nuisance ***is an equitable claim***, therefore there is no right to jury trial.") (emphasis added). The fact that the State's remedy involves the transfer of money does not alter the equitable nature of the claim. *See, e.g., Town of Jennings v. Pappenfuss*, 1928 OK 61, ¶ 1, 263 P. 456 (affirming judgment requiring defendant to abate nuisance and pay the cost thereof). Accordingly, Defendants' argument on this issue should be rejected at the onset as it is predicated on the false notion that the State is seeking an award of compensatory damages.

Nonetheless, although the State is seeking equitable relief in the form of abatement, joint and several liability remains appropriate and the abatement remedy—to the extent apportionment is applicable in this regard—cannot be apportioned. Under Oklahoma law, in order for joint and several liability to attach, all the State must show is Defendants are a cause—not the cause—of the opioid crisis. *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); *Cities Service Oil Co. v. Merritt*, 1958 OK 185, ¶ 14, 332 P.2d 677, 683 (same, finding joint and several liability in nuisance action); *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."); *Union Texas Petroleum Corp. v. Jackson*, 1995 OK CIV APP 63, ¶ 60, 909 P.2d 131, 149-50;

compare Nat'l Union Fire Ins. Co. v. A.A.R. Western Skyways, Inc., 1989 OK 157, ¶ 14, 784 P.2d 52, 56; 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.").[63]

"To make tortfeasors jointly liable, there must be a single injury, there must be community in the wrongdoing and the injury must be in some way due to their joint work." *Jackson*, 909 P.2d at 150 (citing *Harper–Turner Oil Company v. Bridge*, 1957 OK 124, 311 P.2d 947, 952). "It is not necessary that they be acting together or in concert if their concurring wrongful acts occasion the injury." *Id.* (citing *Harper–Turner Oil Company, supra*; *British–Am. Oil Prod. Co. v. McClain*, 1942 OK 89, 126 P.2d 530; *Indian Territory Illuminating Oil Co. v. Bell*, 1935 OK 597, 46 P.2d 481). Under these well-established principles of Oklahoma law, Defendants bear joint and several liability for the opioid crisis, irrespective of their degree of culpability.

A. The Opioid Crisis Constitutes A Single Indivisible Injury

The Oklahoma opioid crisis clearly constitutes a single indivisible injury. Nearly every witness who has testified agrees there is an opioid crisis in Oklahoma. There has been extensive testimony detailing—over the course of several years—the thousands of cases involving opioid fatalities, overdoses and addiction throughout the State. Since 2000, over 6,100 Oklahomans died from opioid overdoses. Tr. Testimony of Terri White at 67:18-23 (June 25, 2019, Morning

[63] The statutory limitation on joint and several liability is not applicable to "actions brought by or on behalf of the state." 23 O.S. § 15(B); *In re Amendments to the Okla. Unif. Jury Instructions-Civil (Second)*, 2014 OK 17 (Mar. 24, 2017) (stating joint liability instruction "should be used only if the action accrued before November 1, 2011, or was brought by or on behalf of the State of Oklahoma.").

Session). In 2011, opioid related deaths surpassed car accidents as the leading cause of accidental deaths in Oklahoma. Tr. Testimony of Terri White at 31:4-7 (June 25, 2019, Morning Session). From 1994 to 2006, prescription opioids (including Duragesic/Fentanyl) comprised six of the top ten drugs involved in overdose fatalities in Oklahoma. Tr. Testimony of Claire Nguyen at 72:17-25 (June 7, 2019, Morning Session).

An injury is indivisible due to an inability to divide the injury itself or because the plaintiff cannot divide the injury among the wrongdoers.[64] Thus, the basis for joint and several liability for indivisible injuries is not because one tortfeasor is responsible for the act of the other, but because the conduct of each is regarded as a cause of the injury. *Restatement (Second) of Torts* § 875 cmt. b (1979) ("If the tortious conduct of two or more persons has contributed to the harm in such a manner that each is a legal cause of it, the liability is not apportioned and each is liable for the entire harm."). Defendants contend the extent of their liability may easily be determined according to an individualized determination of their call notes. Motion at 94-95. However, this is a narrow, oversimplified, as well as incorrect, approach to evaluating the State's claims.

Defendants' responsibility for the opioid crisis is not subject to individualized proof. Defendants ignore the effect of immeasurable activities in causing the crisis, such as their efforts at unbranded marketing to promote the sale of branded opioids ("a rising tide lifts all boats")—which also entirely negate their attempts to tie liability to market share. Tr. Testimony of C. Renzi Stone at 39:12-25, 79-97 (June 10, 2019, Afternoon Session). Moreover, Defendants—through a web of foreign and domestic wholly owned J&J subsidiaries, including Tasmanian Alkaloids Pty

[64] Oklahoma courts have applied the "single injury" rule to public nuisance claims. *See, e.g., Jackson*, 909 P.2d at 149-50; *Tidal Oil Co. v. Pease*, 1931 OK 740, ¶ 14, 5 P.2d 389, 391; *Bell*, 46 P.2d at 482-83; *Okla. City v. Miller*, 1937 OK 164, ¶ 5, 65 P.2d 990, 991; *McClain*, 126 P.2d at 532.

Limited and Noramco, Inc.—created, grew, imported and supplied the narcotic raw materials necessary to manufacture the opioids at issue in this case. Lastly, the State's unintentional poisoning database does not include every individual who died while under the influence of a prescription opioid. Tr. Testimony of Claire Nguyen at 56:25—57:1-17 (June 7, 2019, Morning Session). Where multiple substances are found in a decedent, only those substances identified as the cause of death are recorded in the State's unintentional poisoning database, although the individual may have been addicted to other substances. Tr. Testimony of Claire Nguyen at 59:3-10 (June 7, 2019, Morning Session).

Although the State has utilized its best efforts to devise a plan to abate the nuisance that is the opioid crisis in Oklahoma, there is no price tag on addiction, overdose, death and pain caused by Defendants' products. Nonetheless, Defendants have wrought a single indivisible injury upon the State for which they share blame and responsibility.

B. Defendants Contributed To The Opioid Crisis through Concerted Action

Defendants next contend that the State has presented no evidence of concerted activity. This argument is predicated on the false premise there can be no liability for Defendants' alleged "lawful" participation in what they characterize as ordinary business activities. This argument fails for two reasons. First, substantial evidence has been presented showing Defendants participated in the same advocacy groups, lobbying efforts, and used the same KOLs with the shared purpose of downplaying the risk of opioid addiction and exaggerating the efficacy of their drugs. Second, to establish nuisance, even conduct that is presumably "lawful" may constitute a nuisance where it harms the health, safety, and welfare of a large number of people (here, the State of Oklahoma). Accordingly, Defendants' motion should be denied on this issue as well.

Defendants, expectedly, ignore the completely symbiotic nature of their relationship with one another. J&J participated in forming and met with other pharmaceutical companies as part of the Pain Care Forum to promote access to their products. Tr. Testimony of Dr. Andrew Kolodny at 86:10-24 (June 11, 2019, Afternoon Session). Defendants admit they used the same KOLs, front groups, and paid speakers. Motion at 96-98. Through these speakers and groups, Defendants: (1) engaged in a widespread marketing campaign and made false representations to healthcare providers and/or omitted material facts regarding the risks, efficacy, and medical necessity of opioids, (2) promoted the false concept of "pseudoaddiction," which Defendants used to convince prescribers that classic signs of addiction were actually signs of under-treated pain and should be treated with more opioid use, and (3) spread their misrepresentations, influenced the media, doctors and patients, and ensured opioids were widely available to be overprescribed.[65] Defendants also admit that they—through a web of foreign and domestic wholly owned J&J subsidiaries, including Tasmanian Alkaloids Pty Limited and Noramco, Inc.—created, grew, imported and supplied to J&J and other pharmaceutical companies, such as Purdue, the narcotic raw materials necessary to manufacture the opioid pain medications at issue. Motion at 96. Indeed, Johnson & Johnson itself admits that, with the launch of Purdue's OxyContin, J&J developed a

[65] Defendants also argue their conduct constitutes constitutionally protected speech. However, the First Amendment does not protect false and/or misleading statements of the type at issue in this litigation. *See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976) ("Untruthful speech, commercial or otherwise, has never been protected for its own sake.") (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) (further citations omitted); *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 638 (1985) ("The States and the Federal Government are free to prevent the dissemination of commercial speech that is false, deceptive, or misleading ....") (citations omitted); *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 249-50 (2010) (the Government has legitimate interest in preventing deception of consumers, thus statutes aimed at prohibiting misleading commercial speech were reasonable).

special poppy in anticipation of the new demand for oxycodone[66] and that their poppy "enabled the growth of oxycodone."[67] J&J called Purdue their "Partner" and said they sat "at same table for most partner meetings . . . include[ing] Pain Care Forum" meetings.[68] The concert in their action could not be clearer. And this concerted activity amongst the defendants directly contributed to the rise of opioid sales, oversupply, and attendant overdoses and deaths in the State. Tr. Testimony of Terri White at 62:16-25—63:5, 66:15-19.

Defendants' argument their conduct was ordinary, lawful, and/or administratively approved misses the mark entirely, because in evaluating nuisance claims the focus is upon the ***condition created*** and not the exercise of any particular care or skill by the defendant. *Knoff v. American Crystal Sugar Co.*, 380 N.W.2d 313, 317 (N.D. 1986) (superseded by statute on other grounds). Thus, a party pleading nuisance need not prove negligence or other culpable standard of care. *Oklahoma City v. West*, 1931 OK 693, ¶ 15, 7 P.2d 888, 893 (declining to ascertain *why* sewage was not sufficiently purified in constituting a nuisance, holding "[w]hile evil intent, or negligence importing a greater or less degree of moral blame may and ordinarily does accompany the commission of a nuisance, it cannot be said that either is an essential element of the offence."); *compare Hummel v. State*, 1940 OK CR 27, 99 P.2d 913, 917 (noting nuisance does not require "malicious or actual criminal intent") (citing 50 O.S. §§ 1, 2).

Indeed, Oklahoma courts have been uniform and overwhelmingly in accord that, with respect to nuisance claims, the challenged conduct need not be unlawful *per se* to constitute a

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[66] s0006.0006–7.

[67] s0340.

[68] s1439.

nuisance.[69] *See Briscoe v. Harper Oil Co.*, 1985 OK 43, ¶ 9, 702 P.2d 33, 36; *Winningham v. Rice*, 1955 OK 108, ¶ 7, 282 P.2d 742, 744; *Crushed Stone Co. v. Moore*, 1962 OK 65, ¶ 0, 369 P.2d 811, 816 (Syl.); *Dobbs v. City of Durant*, 1949 OK 72, ¶ 5, 206 P.2d 180, 182; *Champlin Refining Co. v. Dugan*, 1928 OK 322, ¶ 9, 270 P. 559, 561; *Theatre Estates, Inc. v. Village*, 1969 OK 183, ¶ 10, 462 P.2d 651, 653; *Brock v. Roskamp*, 1962 OK 86, ¶ 17, 371 P.2d 465, 468; *compare Erickson v. Sorensen*, 877 P.2d 144, 147 (Utah App. 1994) ("It is of no consequence that a business which causes a nuisance is a lawful business.") (quoting *Branch v. Western Petroleum, Inc.*, 657 P.2d 267, 274 (Utah 1982) (further citations omitted)).

The evidence presented in this case establishes an aggressive collective effort by Defendants, motivated by the ancient lure of greed and profit, to sell their opioids under the guise that the risk of addiction was low while the efficacy was high and could not be undersold. This collective effort created the opioid crisis at issue before the Court for which Defendants share joint and several liability.

C. Imposition Of Joint And Several Liability Would Not Violate Due Process

Imposition of joint and several liability under the circumstances here would not constitute a violation of due process. Defendants' motion is premature in this regard as no determination of liability or abatement has been made. Nonetheless, the remedy sought by the State is not "radical" by any objective measure. It is inconceivable how Defendants can argue the imposition of liability would be unjust where the evidence before the Court thus far has established (1) Defendants made false representations regarding the risks, efficacy, and medical necessity of their opioids; (2) Defendants promoted the false concept of "pseudoaddiction"; (3) Defendants spread their

[69] The aforementioned arguments and authority have been extensively briefed in the State's response to Defendants' motion for judicial notice, which is expressly adopted and incorporated herein for the sake of efficiency and brevity.

misrepresentations, influenced the media, doctors and patients, and ensured opioids were widely available to be overprescribed; and (4) Oklahoma law ***allows*** the imposition of joint and several liability and the remedy of abatement for a public nuisance. 23 O.S. § 15(B); 50 O.S. § 8.[70]

Moreover, Johnson & Johnson had ample process available to them to distribute the responsibility for abating the crisis they now face. They could have impleaded any or all of the manufacturers, distributers, doctors, pharmacists, or criminal organizations they ascribe blame to in argument. But they did not do so. Instead, they chose to sit back in utter denial, refusing to accept that the State's case had merit, until it was too late. This is not a lack of due process; it is a tactical failure. A party cannot sit back and refuse to protect itself and them claim the law refused to protect it.

This contention finds no support in either the facts or applicable law, and Defendants' motion should be denied on this ground as well.

V. The State Proved Abatement is a Fit and Proper Remedy

a. Abatement is not synonymous with injunction nor does it require a trial by jury, even when accomplished through the expenditure of funds

[70] Again, the fact that this case requests the equitable remedy of abatement also makes Johnson & Johnson's footnoted argument on the Eighth Amendment's Excessive Fines clause inapposite. Johnson & Johnson cites to no case where the Supreme Court has held that an abatement order constitutes damages, much less that such an abatement order ran afoul of the Excessive Fines clause. A nuisance may be remedied by a civil action for damages, criminal indictment, or abatement. And, while two of those (an action for damages and a criminal proceeding imposing fines) may recognize some limit under the Eight Amendment, Johnson & Johnson provides nothing that suggests the State's ability to abate on ongoing public nuisance is subject to such a limitation—which makes sense given that there is nothing punitive about a remedy designed to clean up an ongoing threat to public health.

Once again, Johnson & Johnson asks this Court to reverse itself and rule that, because they have stopped marketing opioids, there is no longer a nuisance to abate. Again, this nonsense should be denied.

First, the plain text of the statute confirms that a nuisance is more than just the act or omission. Johnson & Johnson makes 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, once again, they have entirely omitted 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 . . . ." Under Oklahoma law, a nuisance consists of both the action (cause) and the injurious condition created (effect). And, therefore, a nuisance cannot be truly abated—nullified or eliminated[71]—unless both are addressed.

This is also the only logical understanding of abatement. 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 take further action. 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

[71] Black's Law Dictionary at 3 (8th ed. 2004) (defining "abatement" as "The act of eliminating or nullifying <abatement of a nuisance>").

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 unlawful acts at issue; and Oklahoma courts have rightfully declined.[72] 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.[73] Any other conception of abatement renders it meaningless, both in terms of the remedy it affords (cessation of the act even though the harmful condition remains) and in terms of its ability to be distinguished from a simple injunction.

Moreover, Oklahoma defines an abatable 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.[74] 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, destroys any shred that remains of Johnson & Johnson's argument that abatement stops with cessation of the

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[72] *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.").

[73] *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 to "abate the *existing* contamination" of water sources, and not just to prevent future contamination).

[74] *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.

unlawful conduct. If that were the case, then an abatable nuisance would simply be defined as one that can be abated by prohibitory injunction. And it also destroys Johnson & Johnson's argument that a request to create an abatement fund is somehow an attempt to recover damages.

There is perhaps no better encapsulation of these principle than the case of *Town of Jennings v. Pappenfuss*, 1928 OK 61, 263 P. 456. In *Pappenfuss*, 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. This, of

course, also entirely negates Johnson & Johnson's argument that they have a right to a jury trial here.

The import of this precedent could not be clearer: (1) a nuisance is more than the acts at issue; (2) thus, abatement does not stop once the acts have ceased; (3) the expenditure of funds is *by definition* a recognized part of the equitable abatement remedy; and (4) thus, an award of funds for an abatement plan does not require a trial by jury.

b. This Court undoubtedly has the power to direct the abatement of the nuisance

Contrary to J&J's most recent attempt to frighten this Court from taking action, there is no constitutional crisis created by enforcing an abatement order on behalf of the State. Rather, that is exactly within the purview of the judiciary.

District Courts have the power to direct the abatement of a public nuisance.[75] Oklahoma law recognizes that abatement can be accomplished through the expenditure of money.[76] And Oklahoma law recognizes that, even where abatement is accomplished through the expenditure of money, an action seeking abatement sounds in equity.[77]

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[75] 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.").

[76] *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").

[77] *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.

Once a valid judgment is entered, the court that entered the judgment has the inherent power to enforce it.[78] This includes the power to disburse funds created pursuant to such a judgment.[79] Other tribunals applying Oklahoma law have recognized this continuing authority in the abatement context.[80] 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.

Johnson & Johnson's sole citation does not run counter to those fundamental judicial powers because it did not deal with remediation or the enforcement of a judgment. Rather, the *Oklahoma Education Association* case asked whether the judiciary had the power to direct how the *legislature* would appropriate State funds. *See* 2007 OK 30, ¶ 5. And the holding was as expected: the judiciary cannot "impos[e] mandates" on how the

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[78] *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).

[79] *See State ex rel. Crawford*, 1938 OK 455, ¶ 12.

[80] *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").

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.

Johnson & Johnson next asserts a rather novel theory—the State has barred itself from bringing suit to abate a public nuisance through the creation of an abatement fund. Johnson & Johnson argues the State has handcuffed itself in this manner through a three-step process: (1) 74 O.S. § 18b(A)(11) directs the Attorney General to pay monies received by him to the State Treasury; (2) once in the State Treasury, the Oklahoma Constitution requires the legislature to appropriate the funds in a single year; and (3) the Oklahoma Constitution prohibits the binding of future legislatures to a multi-year abatement plan. The end result, as the argument goes, is that "the only form of monetary award the Attorney General can pursue" is "an unconditional cash transfer to the treasury." That argument is, in a word, fantastical.

First, Johnson & Johnson cites no authority in support of this "argument," and none exists. 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.[81] And, nothing in that statutory authority limits the manner in

[81] *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 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.[82]

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 should give this court pause about its authority to render such an award and enforce it to fruition..

c. The State has shown that its plan will abate the nuisance.

Despite *five days* of expert testimony (June 20-26, 2019) establishing the necessity and cost of each element of the abatement plan, Johnson & Johnson contends the State has not shown the plan will abate the opioids crisis. Motion at 112. This coming from a recalcitrant corporation who has done virtually nothing to address the crisis it created, who arrogantly refused to submit its own abatement plan in this case. And since Johnson & Johnson failed to designate an expert on the subject or otherwise produce its own abatement

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which affected or endangered the public safety or convenience and required immediate judicial interposition").

[82] 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.

plan, this trial will end with a single unrebutted abatement plan in evidence—the State's. That is why Johnson & Johnson now desperately attacks it.

As the Court has seen, the State's abatement plan is the result of intense and tireless work by two highly-qualified experts and state employees, Jessica Hawkins and Commissioner Terri White, who in turn relied on several other subject-matter experts, such as Renzi Stone (marketing), Jason Beaman (addiction), Julie Croff (public health), and Chris Ruhm (health economics), among others. The Court has heard testimony from *all* of these experts related to the abatement plan, and the Court admitted the abatement plan itself into evidence at States' 4734. Tr. Transcript (6/21/19 Afternoon) at 55:5-7. These experts clearly testified that (1) the abatement plan will work and (2) the measure of success will be regaining pre-1996 levels of opioid abuse, addiction, overdose and related problems.

For example, Jessica Hawkins, the Senior Director of Prevention Services at the Oklahoma Department of Mental Health and Substance Abuse, was on the stand for *three days straight*. She addressed the rationale, necessity and cost of each element of the plan and concluded her direct examination as follows:

> 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 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.

Id. at 51:8-52:5. 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.

Id. at 67:22-68:3. Further, Terri White, Commissioner of the Oklahoma Department of Mental Health and Substance Abuse, provided the following expert testimony during her direct examination:

Q: Commissioner White, based upon all your experience, your education, the last 20 years you've been working for the State of Oklahoma, is that abatement plan reasonable and necessary, in your professional opinion?

A: It is absolutely reasonable and necessary.

. . .

Q: And do you believe if this nuisance -- if the abatement plan to end this nuisance of opioid addiction is enacted, that we will save countless lives in the future?

A: Absolutely.

Q: Do you believe we will save countless people from getting addicted in the future?

A: Absolutely.
Q: And will we eliminate this terrible impact to the State of Oklahoma that you have described here today?

A: Yes, we will.

Trial Trans. (6/25/19 morning) at 100:3-7; 112:8-17. Following this testimony, Commissioner White endured a day and a half of cross-examination, which only strengthened the State's evidence that this plan is necessary and that it is well-founded.

All of this expert testimony is solid evidence that Johnson & Johnson *cannot* rebut because it refused to hire an abatement expert. Knowing it cannot rebut this evidence, Johnson & Johnson simply attacks it as not "coherent" or "credible." Motion at 113. Johnson & Johnson is wrong and its arguments are insulting to Ms. Hawkins, Commissioner White, and the countless other Oklahomans who have dedicated their lives to finding solutions to this crisis. Moreover, such tenuous credibility arguments should be saved for closing argument.

Again, an abatable nuisance is one that may be "abated by the expenditure of money or labor." *Oklahoma City v. West*, 1931 OK 693, ¶ 6. If Johnson & Johnson doesn't like the amounts of money and labor submitted by the State, they should have submitted their own abatement plan. But they did not. And the State has submitted literally days of evidence showing its abatement plan will work. The Court alone will decide the credibility of the State's evidence.

VI. The State did not cause the Opioid Crisis

This argument is as absurd as it is offensive.

First, there is no defense of contributory negligence in a nuisance claim based on intentional conduct like this. Prosser says so.[83] The Second Restatement says so.[84] Accordingly, the *Walters* case,[85] the first word of which is "Negligence," is inapposite—as is the contributory-negligence defense it offers.

Second, there is no evidence that the State is actually at fault for *causing* the opioid crisis. The State does not make opioids, the State does not promote opioids, the State does not sell opioids. As it stands, there is the testimony of Commissioner White rightfully proclaiming that the State of Oklahoma bears zero fault for causing this crisis.[86] And the only evidence on the other side are DUR packets, prosecutor case files, and J&J's counsel's commentary that those documents somehow show the State is at fault. No witness, much less one qualified to opine on causation, has testified that the State bears even 1% liability for causing the crisis.

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[83] Victor E. Schwartz et al., *Prosser, Wade, and Schwartz's Torts Cases and Materials* 866 (13th ed. 2015) ("When there is an intentional private nuisance, contributory negligence is not a defense, as in the case of other intentional torts." (internal citation omitted)).

[84] Restat 2d of Torts, § 840B (2nd 1979) ("Intentional nuisances. A nuisance may be intentional, either because the defendant has desired to cause it or because he has known that his conduct was resulting or was substantially certain to result in the nuisance and he has nevertheless continued to act. (See § 8A). When the nuisance is found to be intentional, the contributory negligence of the plaintiff is not a defense any more than it is a defense to any other action for harm intentionally inflicted.").

[85] 1922 OK 52.

[86] Trial Transcript (June 26, 2019 p.m.) at 53:20-55:10 (Testimony from Commissioner Terri White).

Accordingly, the State's liability is no basis on which to award judgment to Defendants.

VII. Federal Law Does not Immunize Johnson & Johnson for their False and Misleading Statements

a. The First Amendment does not protect false and misleading marketing

Once again attempting to manufacture legal issues where none exist, Johnson & Johnson has mischaracterized the State cases and re-written First Amendment jurisprudence in order to invent immunity for their false and misleading marketing. To be clear, the State is not seeking to impose a prior restraint on anyone's ability to speak the truth. Rather, the State's case seeks to impose tort liability as a result of *false and misleading* marketing statements Johnson & Johnson made in the past—not *potentially* misleading statements or statements and actions made by others. The State's case is about *actually* misleading statements made by Johnson & Johnson in marketing their deadly narcotics. Accordingly, the First Amendment is no refuge.

First, nothing about the First Amendment protects Defendants in making false and misleading statements to promote their products. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771-72 (1976); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 496 (1996) (plurality opinion).[87] "First Amendment

[87] *See also Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 250-51 (2010) (finding deception in "advertisements that hold out the promise of . . . relief without alerting consumers to its potential cost); *Donaldson v. Read Magazine*, 333 U.S. 178, 188 (1948) ("Advertisements as a whole may be completely misleading although every sentence separately considered is literally true. This may be because things are omitted that should be said, or because advertisements are composed or purposefully printed in such way as to mislead.").

rights may not be used as the means or the pretext for achieving substantive evils which the legislature has the power to control." *Cal. Motor Transport Co. v. Trucking Unltd.*, 404 U.S. 508, 515(1971) (internal citation omitted). "The fact that dissemination of information and opinion on questions of public concern is ordinarily a legitimate, protected and indeed cherished activity does not mean, however, that one may in all respects carry out that activity exempt from sanctions designed to safeguard the legitimate interests of others. . . . Federal securities regulation, mail fraud statutes, and common-law actions for deceit and misrepresentation are only some examples of our understanding that the right to communicate information of public interest is not unconditional." *Curtis Pub. Co. v. Butts*, 388 U.S. 130, 150 (1967) (plurality op.). "If the end result is unlawful, it matters not that the means used in violation may be lawful." *Cal. Mtr. Transport*, 404 U.S. at 515. And, make no mistake, as shown above, both the ends and means of Johnson & Johnson's campaign were unlawful.

Faced with this clear and long-settled precedent, Johnson & Johnson is left asking this Court to imagine a world with different law—to rewrite Supreme Court precedent to match what J&J wishes the law to be, rather than to apply what the law is. They first ask this Court to pretend that, simply because pharmaceutical marketing is related to the science of medicine, any statement made in the promotion of pharmaceutical products loses its character as commercial speech and is elevated to "fully protected" speech regarding "ongoing scientific controversy."[88] That is as absurd as it is dangerous. Taken to its logical

[88] *See* Motion at 23.

extreme, that would mean a company like Johnson & Johnson could say whatever it wanted—scientifically supported or not—so long as it was speech related to its pharmaceutical products. Not only would that entirely gut the commercial-speech doctrine in the pharmaceutical industry (a step that would require this Court to overrule Supreme Court precedent[89]), but it would also handcuff States—and the FDA—from being able to protect the public from statements like "you will not get addicted to opioids" or "opioids do not cause death." Indeed, if Johnson & Johnson wanted to start marketing cigarettes for a pharmaceutical purpose, there would be nothing stopping it from declaring "nicotine is not addictive" under this upside-down understanding of the First Amendment. There is a reason the Supreme Court has left states with the authority to regulate false and misleading pharmaceutical marketing—it helps save lives. Johnson & Johnson's invitation to upend that precedent should be declined.

Second, unlike the commercial speech cases J&J cites,[90] the speech at issue here has already happened—*i.e.*, this is not a prior-restraint case. This case is not seeking to restrict Johnson & Johnson from saying something, nor is the State seeking to enforce a ban on all pharmaceutical marketing regardless of its veracity. Rather, as the State has repeatedly explained, this case is about holding Johnson & Johnson liable for the consequences of false and misleading statements it has already made. Accordingly, this dichotomy between speech that is "inherently" versus "potentially" misleading is entirely inapposite. Those

[89] *See, e.g., Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011).

[90] *See* Motion section III.B.1.ii.

cases and that analysis are forward looking; they ask whether a message is capable of being conveyed in a non-misleading way in order to determine whether an outright ban on such a message is appropriately tailored or whether (if, for example, the statement was only potentially misleading) such a ban would restrict more speech than was necessary to fulfill the government's objective.[91] This case, on the other hand, is backward looking, seeking to impose liability—not restriction—on statements that were already made. Accordingly, it does not matter whether Johnson & Johnson *could* have conveyed their messages in a non-misleading way. The only question is whether the messages they conveyed were, in fact, misleading. And, according to the Supreme Court's definition of misleading,[92] as well as Johnson & Johnson's own definition of false and misleading,[93] those messages were certainly false and misleading.[94]

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[91] *See Pearson v. Shalala*, 164 F.3d 650, 654 (D.C. Cir. 1999) ("'Inherently misleading advertising may be prohibited entirely. But the States may not place an absolute prohibition on ... potentially misleading information ... if the information also may be presented in a way that is not deceptive.'" (quoting In re R. M. J., 455 U.S. 191, 203, 102 S. Ct. 929, 71 L. Ed. 2d 64 (1982)).

[92] *Donaldson v. Read Magazine*, 333 U.S. 178, 188 (1948) ("Advertisements as a whole may be completely misleading although every sentence separately considered is literally true. This may be because things are omitted that should be said, or because advertisements are composed or purposefully printed in such way as to mislead.").

[93] *See* S-2376 (providing examples of false and misleading statements including, broadening of product indication

taking data out of context, minimizing safety issues, omitting material information, making comparative efficacy or safety claims without substantial evidence, and overstating efficacy or safety)

[94] *See* S0038 (2004 FDA Warning letter explaining that Janssen's use of DAWN data to compare abuse rates of Duragesic with other drugs was "false and misleading); *see, e.g.,* Court Exhibit 0061 (excerpted from S-2482 – S-2492) (call notes showing J&J sales reps' use of DAWN data to tout relatively "low abuse potential" of Duragesic).

Finally, Johnson & Johnson once again completely mischaracterizes the significance of the State's citation to KOLs and front groups. The State does not seek to hold Johnson & Johnson liable based on its mere association with KOL's, front groups, and the Pain Care Forum. Rather, the State has shown that it was Johnson & Johnson's creation[95] and dissemination[96] of the false and misleading statements associated with these entities that caused the opioid crisis.

And Johnson & Johnson's claims about its "protected lobbying" entirely miss the mark. The State is not seeking to hold Johnson & Johnson liable merely because it lobbied for more favorable laws. Rather, Johnson & Johnson's infiltration of federal, state and local government is relevant because it shows the extent to which Johnson & Johnson went to influence prescribing. It is not that Johnson & Johnson petitioned the government; it is that Johnson & Johnson spread their false and deceptive message into government channels, seeking to influence doctors from all angles, that puts their conduct at issue. Moreover, Johnson & Johnson's "lobbying" efforts are particularly relevant given their continued attempts to prove that it was the State's inaction that caused the opioid crisis. While Johnson & Johnson has no defense for contributory negligence, to the extent they are allowed to argue the State caused the opioid crisis, then certainly the State should be

[95] *See, e.g.*, S975; S1358 (discussing J&J's role in launching NPEC and describing it as a "platform" that "serves to benefit not only DURAGESIC but also all future Janssen pain products").

[96] *See, e.g.*, S1246; S0954; S0974.

allowed to defend itself with evidence that Johnson & Johnson was there with "SWAT teams" designed to prevent the State from acting.[97]

b. The State's public nuisance claim is not preempted by federal law

J&J's preemption argument is once again hopelessly off-the-mark. On trial for contributing to the worst public health crisis in the history of this State, it appears that J&J either doesn't take the State's claims seriously or it has chosen to ignore what this entire case is about. Simply put, the State has never asserted ***anything*** that J&J claims as a basis for federal preemption. The State has never claimed J&J should not be able to market opioids for lawful use. *See* Motion at 49. The State has never claimed that J&J needed to modify its labels. *Id.* at 50. And the State has never claimed that J&J cannot promote its drugs consistent with its FDA-approved label. *Id.* at 54. As the State made clear in its response to Defendants' Motion to Dismiss almost two years ago, this case has never been about any of those issues. That hasn't changed.

This case is about J&J's aggressive and deceptive marketing of opioids—contrary to and outside of FDA labels—that caused the devastating and deadly oversupply of opioids in Oklahoma. Astoundingly, J&J ignores the enormous amount of discovery, briefing, hearings, and 25-plus days of evidence at trial concerning its own deceptive marketing—***some of which the FDA expressly said was false and misleading***—and shamelessly proclaims that "[a] multi-billion dollar state-law judgment against Janssen for promotional statements that tracked its medications' labeling—and thus satisfied federal

[97] S0463.

requirements—would throw this scheme into disarray." Motion at 57. If J&J truly thinks it is on trial for satisfying federal requirements, it has not been listening. As the State made clear in October of 2017:

> The issue in this case is whether Defendants' past marketing misrepresented the risks, benefits, and superiority of opioids to treat pain—a determination this Court and a jury are well-equipped, and entitled, to make. No FDA labeling regulation, past or future, is dispositive of this issue.[98]

Like its Motion to Dismiss, J&J again attempts to mischaracterize the State's claims to fit its preemption defenses. For the same reasons the Court denied that motion in 2017, these same arguments fail again.

J&J first argues "the First Amendment bars the State from blocking promotion of opioids for a lawful use." Motion at 49. J&J claims simply, "the State faults Janssen for promoting opioids to treat non-cancer pain." *Id.* That of course is a gross oversimplification of the State's claims. As the Court has seen, J&J repeatedly made false and misleading statements to practitioners in the State of Oklahoma about the risks of opioids including hundreds of call notes, branded visual aids, and various means of unbranded marketing. This case is not simply about promoting opioids to treat non-cancer pain.

Second, J&J argues that "the State's theory is preempted because there is clear evidence the FDA would not have let Janssen modify its medications' labels." *Id.* at 50. J&J lost this argument the first time when it called it "implied preemption" or

[98] State's Omnibus Response to Joint Motion to Dismiss Based on Preemption, at 10. (Oct. 30, 2017).

"impossibility preemption."[99] As the State explained then, "because the State does not challenge Defendants' labeling, decisions by the FDA related to labeling cannot conflict with the State's claims." Resp. at 14. The State's claims have not changed. Nevertheless, J&J asks this Court to ignore everything it has heard about false and misleading marketing and buy into J&J's fantasy that "the State seeks to do exactly what federal law forbids: to find Janssen liable for promotional statements that ***match*** its medications FDA-approved labels." *Id.* at 51. (emphasis added). Anyone watching this case knows it is not about holding J&J liable for complying with FDA guidelines. J&J knows this too.

Finally, J&J argues that "[f]ederal obstacle-preemption rules preclude holding Janssen liable for promotional statements about opioid medications ***consistent*** with their FDA-approved labeling." *Id.* at 54 (emphasis added). Again, this is not what the State has alleged. That is not what this case has ***ever*** been about. While the Court now has thousands of improper call notes and volumes of deceptive marketing materials to choose from, it need only look at the warnings J&J received *from the FDA* to know this case isn't about marketing consistent with FDA-approved labeling. *E.g.*, S-4128.

J&J's preemption arguments failed at the Motion to Dismiss stage and they fail again here.

c. The State has not alleged that defendants are vicariously liable for Noramco and Tasmanian Alkaloids

J&J argues that it cannot be held vicariously liable for the actions of Noramco and Tasmanian Alkaloids. Motion at 40. To be clear, the State is not alleging vicarious liability.

[99] Defendants' Joint Motion to Dismiss, at 12 (September 22, 2017).

Rather, the evidence related to Noramco and Tasmanian Alkaloids exposes J&J's motive for deceptively promoting the broader use of ***all*** opioids—not just it's branded drugs—and thus J&J's true contribution to this public nuisance. As J&J's corporate representative and Director of State Government Affairs for Oklahoma admitted: barriers to prescribing opioids for which J&J supplied ingredients meant less money for J&J.[100]

J&J has argued repeatedly—including in this motion—that its branded drugs Duragesic and Nucynta did not contribute to this crisis and therefore J&J cannot be held responsible. Motion at 40. Not only is that notion false, it ignores J&J's sweeping unbranded marketing campaign designed to increase both the sales of J&J's own drugs and the sales of other opioids supplied with J&J ingredients. For 20 years, J&J promoted the broader use of ***all*** opioids by misrepresenting their risks and benefits through various channels of unbranded marketing.[101] And, for those same 20 years, J&J was one of the primary suppliers of opium in the United States. Indeed, the State showed that J&J was the critical supplier of Oxycodone for Purdue going back to 1994 when the two collaborated on the launch of Oxycontin.[102] And by 2015, J&J was the number one supplier of oxycodone, hydrocodone, codeine, and morphine in the United States.[103]

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[100] C-0095 (Ponder Depo. at 74:15–19).

[101] *E.g.*, S-1247 (Myths About Opioids); S-0948 (Tapentadol PR); S-0954 (Prescribe Responsibly); S-0760 (Duragesic Press Kit).

[102] S-0006.0006–7.

[103] S-1048.0022.

As the State has explained, and J&J has acknowledged, unbranded marketing drove the sales of ***all*** opioids.[104] And as the State's marketing expert Renzi Stone explained, "A rising tide lifts all boats."[105] Because J&J was both selling *and* supplying opioids, it benefitted from the sale of ***all*** opioids, not just Duragesic and Nucynta. J&J knew it—and it marketed and promoted accordingly. Thus, Noramco and Tasmanian Alkaloids are crucial to understanding J&J's motives for its aggressive unbranded marketing of ***all*** opioids and to show J&J's full contribution to the public nuisance in this State.

VIII. Oklahoma Law Does Not Excuse Johnson & Johnson from Liability Based on Their Federal Licenses

As for what Defendants' refer to as Oklahoma's "safe harbor" statute, 50 O.S. § 4,[106] this State has already demonstrated that that exception is incredibly narrow and certainly does not apply here. As the Oklahoma Supreme Court explained in *Oklahoma City v. West*:

> If the Legislature expressly authorizes an act which must inevitably result in public injury, what would otherwise be a nuisance may be said to be legalized; but if they authorize an erection which does not necessarily produce such a result, but such result flows from the manner of construction or operation, the legislative license is no defense. In order to justify a nuisance by legislative authority, it must be the natural and probable result of the act authorized, so that it may fairly be said to be covered by the legislation conferring the power.

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[104] Tr. Transcript, 5.30.19 (Morning Session), at 64:25 – 65:3.

[105] Tr. Transcript, 6.10.19 (Afternoon Session), at 80:6–16.

[106] That section states: "Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance."

1931 OK 693, ¶ 14 (quoting *Village of Pine City v. Munch*, 42 Minn. 342, 345-46). Moreover, as the *Reaves* case discussed above demonstrates, nuisance liability is properly imposed on a business licensed to sell a product where the "manner of running the business, the permitting of unlawful practices and violations of law, and the obligation to the public" create a nuisance. 1903 OK 92, ¶27.[107] This statutory "safe harbor" existed when both of those cases were decided. And, since then, Oklahoma has developed a long and unbroken line of cases saying that an ostensibly lawful business becomes an actionable nuisance when it infringes on the health, safety and rights of others.[108]

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[107] *Reaves*, 1903 OK 92 , ¶ 27 ("It is not the sale of intoxicating liquors in a lawful manner which is authorized by their license, nor the conducting of a theatre in a lawful and peaceful manner, that is complained of, but it is the manner of running the business, the permitting of unlawful practices and violations of law, and the obligation to the public, that are complained of; therefore a license or licenses to operate and engage in a business so long as conducted in a lawful manner would not protect them in maintaining a public nuisance, which is in violation of the laws of the territory.").

[108] *See Briscoe v. Harper Oil Co.*, 702 P.2d 33, 36 (Okla. 1985) ("The fact that a person or corporation has authority to do certain acts does not give the right to do such acts in a way constituting an unnecessary interference with the rights of others. *A license, permit or franchise to do a certain act cannot protect the licensee who abuses the privilege by erecting or maintaining a nuisance.* The reasonableness or necessity of the acts complained of are for the jury to decide.") (emphasis added); *Winningham v. Rice*, 282 P.2d 742, 744 (Okla. 1955) ("Defendant's salvage yard business, *though of itself lawful*, was admittedly adjacent to a nice residential district and plaintiffs' evidence, though conflicting with defendant's evidence on the issues in some respects, substantiated their allegations as to the existence of a nuisance causing substantial injury to the health, comfort and property of the adjoining property owners.") (emphasis added); *Crushed Stone Co. v. Moore*, 369 P.2d 811, 816 (Okla. 1962) (where facts showed a lawful business is being conducted in such a manner as to constitute a private and public nuisance, causing substantial injury to comfort, health, or property, court is authorized to enjoin and abate such nuisance); *Dobbs v. City of Durant*, 206 P.2d 180, 182 (Okla. 1949) ("No principal is better settled than that where a business is conducted in such a manner as to interfere with the reasonable and comfortable enjoyment by others of their property or which occasions material injury to the property, a wrong is done to the neighboring owners for which an action will lie *although the business may be a lawful one* and one useful to the public and although the best and most approved methods may be used in the conduct and management of the business.") (emphasis added); *Champlin Refining Co. v. Dugan*, 270 P. 559, 561 (Okla. 1928); *Theatre Estates, Inc. v. Village*, 462 P.2d 651, 653 (Okla.

Armed with that understanding, Johnson & Johnson cannot rely on its FDA and DEA licenses as a "safe harbor." If all Johnson & Johnson did was read its label and grow its poppies, then arguably these licenses would protect them from liability. Then again, if all Johnson & Johnson did was read its label and grow its poppies, there would be no crisis to abate. But that is not what happened. Johnson & Johnson consistently went beyond its label, spreading unsubstantiated claims about the safety and efficacy of its drugs. It also did far more than grow and sell poppies; it sold them—in increasing amounts year after year—to criminals that had been convicted for fraudulently promoting opioids. There is nothing about an FDA approval that requires Johnson & Johnson to misinform and deceive the public.[109] Nor is there anything about a DEA quota that requires Johnson & Johnson to get in bed with criminals. Those were decisions Johnson & Johnson made later, in determining the manner in which to operate their ostensibly lawful business. And the fact that there was no crisis of addiction, overdose or death in the initial years that Duragesic existed proves that the nuisance at issue here was not a necessary result of exercising their licenses. Accordingly, just as in *Reaves*, it is not the fact that Johnson & Johnson owned and operated this business that the State complains of, it is the manner in which they did

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1969) (defendant's lawful operation of sanitation plant with insufficient capacity and improper operation may constitute nuisance); *Brock v. Roskamp*, 371 P.2d 465, 468 (Okla. 1962).

[109] The State must also correct Johnson & Johnson's assertion that "pseudoaddiction" is acknowledged in its label. That is not true. At no time has Johnson & Johnson ever put forth a label that contains the word "pseudoaddiction." While the label may reference a "preoccupation with achieving adequate pain," at no time did the label authorize or require Johnson & Johnson to tell doctors that classic signs of addiction were not addiction, but were really signs of something called "pseudo"—fake—addiction. It is exactly that kind of deceptive and misleading statement that got us where we are today.

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it—"the permitting of unlawful practices and violations of law, and the obligation to the public"—that form the basis of the State's action. Therefore, just as in *Reaves*, Johnson & Johnson's licenses to operate their business in a lawful way will not protect them.

CONCLUSION

For the foregoing reasons, Johnson & Johnson's Motion should be denied.

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