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

IN THE DISTRICT COURT OF CLEVELAND COUNTY
STATE OF OKLAHOMA

STATE OF OKLAHOMA, ex rel., MIKE HUNTER, ATTORNEY GENERAL OF OKLAHOMA, Plaintiff, v. PURDUE PHARMA L.P., *et al.*, Defendants.	Case No. CJ-2017-816 Judge Thad Balkman William C. Hetherington Special Discovery Master

OPPOSITION TO AMICUS BRIEF AND MOTION FOR INTERVENTION OF GOV. KEVIN STITT, REP. CHARLES MCCALL, AND SEN. GREG TREAT

INTRODUCTION

The attempt by three Oklahoma politicians to inject themselves into a case where the Attorney General has been representing the State since the action was filed in 2017 is unnecessary, redundant, and unpersuasive. Indeed, the request by Governor Stitt, Speaker McCall, and President Pro Tempore Treat to participate as amici or intervene as of right serves no apparent purpose but to repeat arguments already made and intrude on the judicial process.

Procedurally, Applicants' motion should be denied because it lacks any valid purpose. Applicants rehash arguments that the Attorney General—their legal representative before this Court—has already mounted, and authorities that he has already cited. Because they have no different view and no different interest, Applicants fail to qualify as either amici or intervenors.

On the law, Applicants' position fails for the same reasons as the identical arguments made by the Attorney General. Applicants' misreading of the "complete relief" doctrine provides no support for their request to have the Court revisit and set aside its prior findings or the remedy in its Judgment. In selecting its remedy, this Court recognized the limits of both the trial evidence and the judicial role: It concluded that the State had failed to prove the necessity of its abatement plan beyond year one, and that any "additional programs and funding … over an extended period of time" is a "determination to be made by our legislators and policymakers." Hr'g Tr. (Aug. 26, 2019) at 6. Applicants and the State have presented no basis for the Court to reverse those conclusions.

I. APPLICANTS' REPETITION OF THE ATTORNEY GENERAL'S ARGUMENTS IS UNNECESSARY

Applicants' request to participate as amici or intervene as of right should be denied for a simple reason: the State's interests are already fully represented. Applicants each seek to participate in this case in their official capacity as State officers. (Applicants' Br. 1–2.) But the

State of Oklahoma is already represented by the Attorney General, who has a duty to defend "the interests of the state," 74 O.S. § 18b(A)(3), and "possesses complete dominion over every litigation in which he properly appears in the interest of the State." *State ex rel. Derryberry v. Kerr-McGee Corp.*, 1973 OK 132, ¶20, 516 P.2d 813, 818. The Attorney General has made the State's remedial objections clear, and Applicants' submission of a second brief on the State's behalf, rehashing the same arguments, serves no valid purpose—its sole function appears to be to pressure the Court to depart from the judgment it entered after a trial of more than seven weeks.

Applicants' submission does not even meet the basic criteria for participation. It fails to satisfy the requirements for amicus recognition, setting forth no "different views" that might justify Applicants' desire to appear. *Teleco, Inc. v. Corp. Comm'n of State of Okl.*, 1982 OK 93, ¶7, 649 P.2d 772, 774. Rather, it makes the exact same arguments, relies on the exact same authorities, and even repeatedly parrots the State's own brief.[1] If a J&J employee or board member were to file an amicus brief repeating Janssen's arguments, the State would not hesitate to label the submission as self-serving and unhelpful. Applicants' submission is no different.

Applicants likewise fail to satisfy the requirements for intervention as of right. Such intervention is permissible only where "the existing parties may not adequately represent the applicant's interest." *Brown v. Patel*, 2007 OK 16, ¶17, 157 P.3d 117, 124. Applicants do not even

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[1] *Compare* Applicants' Br. 5–6 (invoking "complete relief" doctrine and citing *Crushed Stone*, *Meinders*, *Speed*, and *Swann*) *with* State's Br. 4 (same); *compare* Applicants' Br. 6 ("Those cases show, particularly in the nuisance context, that Oklahoma district courts have the obligation and the power to monitor, evaluate and, if necessary, modify the abatement process until the nuisance is abated.") *with* State's Br. 4 (same, verbatim); *compare* Applicants' Br. 5–6 ("Oklahoma nuisance law is clear that a Court retains jurisdiction in an equitable abatement to oversee and provide complete relief") *with* State's Br. 4 (same, verbatim).

pretend they can satisfy this standard in a case where the Attorney General has already advanced the ***exact*** arguments they wish to make, often using the exact same sentences, word-for-word.[2]

II. PRINCIPLES OF EQUITY DO NOT SUPPORT APPLICANTS' OR THE STATE'S REQUEST FOR THE COURT TO EXPAND ITS REMEDY

Beyond the motion's procedural defects, Applicants (like the State before them) offer no justification for the Court to discard its selected remedy and usurp the policy responsibilities that it already recognized as the province of the legislature.

This Court's ruling was clear: Although the State demanded decades of funding for its proposed abatement plan, the Court found that the State "did not present sufficient evidence of the amount of time and costs necessary, beyond year one, to abate the Opioid Crisis." Judgment After Non-Jury Trial at 41, ¶60. That finding recognized the gaps in the State's evidence and the Court's need to enter a decision consistent with and supported by its findings. The Court further concluded that the need for "additional programs and funding … over an extended period of time" is a "determination to be made by our legislators and policymakers."[3] Hr'g Tr. (Aug. 26, 2019) at 6.

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[2] A motion to intervene as of right also "must be timely." *Brown*, 2007 OK 16, ¶17, 157 P.3d at 124. This motion to intervene, which comes more than two years after the commencement of this lawsuit, nearly two months after the Court announced its judgment, and two weeks after the parties argued issues related to entry of a final judgment is untimely by any standard. *See Elliott Indus. Ltd. P'ship v. BP Am. Prod. Co.*, 407 F.3d 1091, 1103 (10th Cir. 2005) ("The timeliness of a motion to intervene is assessed in light of all the circumstances, including the length of time since the applicant knew of his interest in the case."); *Bank of Commerce v. Breakers, L.L.C.*, 2011 OK CIV APP 45, ¶18, 256 P.3d 1053, 1058 (holding that a motion to intervene filed nearly a year after the intervenor was put on notice of the proceedings was "untimely as a matter of law").

[3] In so doing, the Court recognized the widely accepted tenet that when a judge assumes long-term responsibility for government programs, "he will inevitably be required to make very broad empirical predictions necessarily based in large part upon policy views—the sort of predictions regularly made by legislators and executive officials, but inappropriate for the Third Branch." *Brown v. Plata*, 563 U.S. 493, 555 (2011) (Scalia, J., dissenting).

Dissatisfied with that ruling, the State contended for the first time after trial that principles of equity "obligate[]" this Court to hold decades of appropriations hearings to extract additional funding from Janssen. (State's Br. 28.) That demand represents a total reversal for the State, which for two years has insisted that it could prove Janssen's liability as a single lump-sum payment in one stroke. This turns the law of equity on its head, just as Applicants likewise get that law backward.

Equity is defined by remedial "flexibility." *Schnedler v. Lee*, 2019 OK 52, ¶11, 445 P.3d 238, 242. To that end, a court's "'[b]alancing of equities and hardships may lead the court to grant some equitable relief but not' the full measure requested." *Kansas v. Nebraska*, 574 U.S. 445, 465 (2015) (quoting Dobbs, Law of Remedies § 2.4(1) (2d ed. 1993)). That flexibility has historically taken the form of "a single simple act"—not indefinite jurisdiction. *Brown v. Plata*, 563 U.S. 493, 554 (2011) (Scalia, J., dissenting). As Justice Scalia explained, courts of equity eschewed "decrees which called for more than a single affirmative act." *Id.* (internal quotation marks omitted). "Once the document was turned over or the land conveyed, the litigant's obligation to the court ... ceased.... The court did not engage in any ongoing supervision of the litigant's conduct, nor did its order continue to regulate his behavior." *Id.*; *see Caldwell v. Taggart*, 29 U.S. 190, 199 (1830) (the decree of a court of equity "should terminate and not instigate litigation").

Here, the State requested precisely such a one-time remedy—a $17 billion payment—but failed to present evidence justifying "the full measure requested." *Kansas*, 574 U.S. at 465. This Court properly considered the State's demand, its trial evidence, and the separation of powers problems arising from long-term judicial control of government programs. Its decision to dispose of the case with "a single simple act," *Brown*, 563 U.S. at 554, that "'grant[s] some equitable relief but not' the full measure requested," *Kansas*, 574 U.S. at 465, conformed with historical equitable

remedies.[4] There is no merit to the State's (and Applicants') newfound contention that equity ***inflexibly*** compels the Court to take the helm of massive government programs for decades on end.

Applicants, like the State, base their argument for permanent, ongoing proceedings by mischaracterizing the "complete relief" doctrine. (*See* Applicants' Br. 5–6; State's Br. 4.) According to the State and Applicants, that equitable doctrine means this Court must assume open-ended authority for the State's abatement plan—it "cannot stop short of fully abating the temporary nuisance." (State's Br. 19; *see* Applicants' Br. 3 ("the Court cannot stop short of abating the nuisance").) What the doctrine actually holds is that a court sitting in equity has jurisdiction to issue all relief necessary—legal as well as equitable—to conclusively resolve the litigation. *See Pruitt v. Hammers*, 1955 OK 348, Syl. ¶1, 292 P.2d 157, 157 ("An action to quiet title and for possession is an equitable action, and a court of equity has jurisdiction to give complete relief, including damages, so as to avoid a multiplicity of suits."). The Court's judgment satisfied the "complete relief" doctrine by "settl[ing] all controversies growing out of the transaction forming the subject matter of the suit." *Pruitt*, 1955 OK 348, ¶9, 292 P.2d at 159. The principles of equity require nothing more.

Nor do any of the nuisance cases that Applicants and the State cite. Both *Crushed Stone Co. v. Moore*, 1962 OK 65, 369 P.2d 811, and *Meinders v. Johnson*, 2006 OK CIV APP 35, 134 P.3d 858, involved classic nuisance disputes limited to discrete pieces of real property. In the former, the trial court gave a quarry a short window to clean up its operations before ordering it to shut down. *Crushed Stone Co.*, 1962 OK 65, ¶8, 369 P.2d at 814 (cited at State's Br. 4–5, 14, 20–

[4] In noting that principles of equity allow a court to dispose of a case with a single act that grants only part of the relief requested, Janssen does not waive its argument that cash transfers to address the consequences of a nuisance constitute damages rather than nuisance abatement.

22, 27–28; Applicants' Br. 6). It did so only after a trial in which the plaintiffs proved that limestone dust from the quarry was blowing onto their property, and the relevant question resolved on appeal stands only for the proposition that the remedy must conform to the proof at trial. In the latter case, *Meinders*, dicta in a footnote quoted a trial court's order that pollution "cleanup of Plaintiff's property shall go forward in phases" while the court "retain[ed] continuing jurisdiction to supervise cleanup activities." 2006 OK CIV APP 35, n.1, 134 P.3d at 861 (cited at State's Br. 4, 19, 21–22, 27–28; Applicants' Br. 6). That ongoing jurisdiction—which the Court of Civil Appeals did not address—rested on the Oklahoma Environmental Quality Act, 27A O.S. § 2-6-102, which mandates remediation of pollution in surface and subsurface water cases and is inapplicable here. Nothing in either decision suggests that decades of cash extractions and judicial policymaking are a permissible, much less compulsory, remedy in a public nuisance case.

Indeed, even *People v. ConAgra Grocery Products Co.*, 17 Cal. App. 5th 51 (2017) (cited at State's Br. 29–30)—the most expansive application of public nuisance law in American history—stopped well short of awarding such relief. The court there ordered a single, lump-sum payment for the removal of residential lead paint and instructed that "any funds that had not been utilized for that sole purpose by the end of the four-year abatement period were to be returned to the defendants." *Id.* at 132–34. It did not assume indefinite and absolute responsibility for eradicating residential lead paint in California, let alone for programmatic administration of policy-based ideas for addressing complex social and public health problems for an indeterminate length of time.

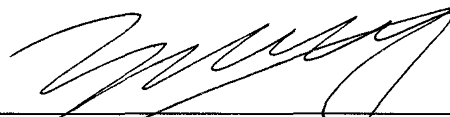
The school busing and prison reform cases that Applicants and the State rely on only underscore the practical limits to judicial intervention: Those attempts to engineer "remedies" are widely recognized as practical fiascos that overstepped the limits of judicial competence and

undermined the legitimacy of the courts. *See, e.g.*, *Lewis v. Casey*, 518 U.S. 343, 385 (1996) (Thomas, J., concurring) (reversing equitable prison injunction) ("We have here yet another example of a federal judge attempting to direct or manage the reconstruction of entire institutions and bureaucracies, with little regard for the inherent limitations on his authority.") (internal quotations and brackets omitted).

CONCLUSION

Applicants ask this Court to make that leap in the belief that placing the costs of an opioid-remediation strategy on the State's shoulders is unfair. (Applicants' Br. 8.) But there is no precedent in American jurisprudence for the remedy they now propose—one that the State raised for the first time only after the Court entered its post-trial findings and August 26, 2019 Judgment. This Court should adhere to its reasoned conclusion, based on the theories and evidence at trial, that "[w]hether additional programs and funding are needed for an extended period of time ... are determinations to be made by [Oklahoma] legislators and policymakers." Hr'g Tr. (Aug. 26, 2019) at 6. The law demands nothing less.

FOLIART, HUFF, OTTAWAY & BOTTOM



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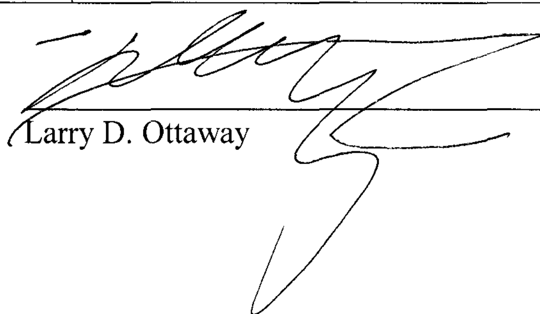

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