IN THE SUPREME COURT OF THE STATE OF NEVADA

TEVA PHARMACEUTICALS USA, INC., MCKESSON CORPORATION, AMERISOURCEBERGEN DRUG CORPORATION, CARDINAL HEALTH, INC., CARDINAL HEALTH 6 INC., CARDINAL HEALTH TECHNOLOGIES LLC, CARDINAL HEALTH 108 LLC d/b/a METRO MEDICAL SUPPLY, CEPHALON, INC., ENDO HEALTH SOLUTIONS INC., ENDO PHARMACEUTICALS INC., ALLERGAN USA, INC., ALLERGAN FINANCE, LLC f/k/a ACTAVIS, INC. f/k/a WATSON PHARMACEUTICALS, INC., WATSON LABORATORIES, INC., ACTAVIS PHARMA, INC. f/k/a WATSON PHARMA, INC., ACTAVIS LLC, and MALLINCKRODT, LLC,

Petitioners,

v.

SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, in and for the County of Washoe, and the HONORABLE BARRY L. BRESLOW, DISTRICT JUDGE,

Respondents,

and

CITY OF RENO,

Real Party in Interest.

Supreme Court Case No.

District Court Case No. CV18-01895

PETITIONERS' APPENDIX
VOLUME III

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CHRONOLOGICAL INDEX TO PETITIONERS' APPENDIX

DATE	DOCUMENT	VOLUME	PAGE RANGE	
12/7/2017	Complaint and Demand for Jury Trial (Case No. A-17-765828-C)	I	PA00001	PA00050
5/15/2018	First Amended Complaint and Demand for Jury Trial (Case No. A-17-765828-C)	I	PA00051	PA00109
9/18/2018	Complaint (Case No. CV18-01895)	II	PA00110	PA00167
12/03/2018	First Amended Complaint (Case No. CV18-01895)	II	PA00168	PA00226
3/4/2019	Manufacturer Defendants' Joint Motion to Dismiss First Amended Complaint	III	PA00227	PA00264
3/5/2019	Distributors' Joint Motion to Dismiss First Amended Complaint	III	PA00265	PA00386
4/26/2019	City of Reno's Opposition to Manufacturer Defendants' Joint Motion to Dismiss and All Joinders Thereto	IV-V	PA00387	PA00709
4/26/2019	City of Reno's Opposition to Distributor Defendants' Joint Motion to Dismiss and All Joinders	VI-VII	PA00710	PA00958
5/28/2019	Reply in Support of Manufacturer Defendants' Joint Motion to Dismiss First Amended Complaint	VIII-IX	PA00959	PA01214
5/28/2019	Distributors' Joint Reply in Support of Motion to Dismiss First Amended Complaint	X	PA01215	PA01285

DATE	DOCUMENT	VOLUME	PAGE RANGE	
6/17/2019	Complaint (Case No. A-19-796755-B)	XI-XII	PA01286	PA01535
6/27/2019	First Amended Complaint (Case No. A-19-796755-B)	XIII-XV	PA01536	PA02049
7/3/2019	Order Directing Answer (Case No. 79002)	XVI	PA02050	PA02052
8/22/2019	Complaint (Case No. A-19-800695-B)	XVI	PA02053	PA02144
8/22/2019	Complaint (Case No. A-19-800697-B)	XVI	PA02145	PA02235
8/22/2019	Complaint (Case No. A-19-800699-B)	XVII	PA02236	PA02326
9/12/2019	Third Amended Complaint and Demand for Jury Trial (Case No. A-17-76828-C)	XVII	PA02327	PA02423
9/13/2019	City of Reno's Supplemental Briefing in Support of Oppositions to Defendants' Motions to Dismiss	XVIII	PA02424	PA02560
10/4/2019	Distributors' Response to Plaintiff's Supplemental Briefing re Motions to Dismiss	XVIII	PA02561	PA02566
10/4/2019	Manufacturer Defendants' Response to Plaintiff's Supplemental Briefing re Motions to Dismiss	XVIII	PA02567	PA02587
10/21/2019	Order Dismissing Petition (Case No. 79002)	XVIII	PA02588	PA02591

DATE	DOCUMENT	VOLUME	PAGE RANGE	
1/4/2020	City of Reno's Supplemental Briefing in Support of Oppositions to Distributors' Joint Motion to Dismiss	XVIII	PA02592	PA02602
1/7/2020	Transcript of Proceedings	XIX-XX	PA02603	PA02871
1/8/2020	Transcript of Proceedings	XXI	PA02872	PA03034
2/14/2020	Omnibus Order Granting In Part and Denying in Part Defendants' Motions to Dismiss; and Granting Leave to Amend	XXI	PA03035	PA03052

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4/26/2019	City of Reno's Opposition to Manufacturer Defendants' Joint Motion to Dismiss and All Joinders Thereto	IV-V	PA00387	PA00709
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8/22/2019	Complaint (Case No. A-19-800697-B)	XVI	PA02145	PA02235
8/22/2019	Complaint (Case No. A-19-800699-B)	XVII	PA02236	PA02326
9/18/2018	Complaint (Case No. CV18-01895)	II	PA00110	PA00167
12/7/2017	Complaint and Demand for Jury Trial (Case No. A-17-765828-C)	I	PA00001	PA00050
3/5/2019	Distributors' Joint Motion to Dismiss First Amended Complaint	III	PA00265	PA00386
5/28/2019	Distributors' Joint Reply in Support of Motion to Dismiss First Amended Complaint	X	PA01215	PA01285
10/4/2019	Distributors' Response to Plaintiff's Supplemental Briefing re Motions to Dismiss	XVIII	PA02561	PA02566
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5/15/2018	First Amended Complaint and Demand for Jury Trial (Case No. A-17-765828-C)	I	PA00051	PA00109
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1/8/2020	Transcript of Proceedings	XXI	PA02872	PA03034

AFFIRMATION

Pursuant to NRS 239B.030, the undersigned does hereby affirm that Petitioners' Appendix Volume III does not contain the social security number of any person.

Dated this 1st day of May, 2020.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of McDonald Carano LLP, and that on this 1st day of May, 2020, a copy of the foregoing Petitioners' Appendix Volume III was electronically filed with the Clerk of the Court for the Nevada Supreme Court by using the Nevada Supreme Court's E-Filing system (Eflex) and served via U.S. Mail, postage prepaid, on the following individuals:

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In addition, in compliance with NRAP 21(a)(1) and Administrative Order 2020-05, a copy of this Petitioners' Appendix Volume III was served upon the Honorable Barry Breslow, District Judge via electronic service and email to Christine.Kuhl@washoecourts.us.

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

CITY OF RENO,

Plaintiff,

vs.

PURDUE PHARMA, L.P. et al.,

Defendants.

Case No.: CV18-01895
Dept. No.: 8

MANUFACTURER DEFENDANTS' JOINT MOTION TO DISMISS FIRST AMENDED COMPLAINT

Oral Argument Requested

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INTRODUCTION

The City of Reno (the "City") seeks to hold manufacturers of certain FDA-approved opioid medications ("Manufacturer Defendants"[1]) liable for the entire spectrum of public costs arising from the abuse and illegal trafficking of opioids in the City. The City's claims fail in their entirety for a multitude of independent reasons.

First, the City lacks authority to bring this suit. Under settled Nevada law, the City's authority to act is limited to matters of local, not statewide, concern. Yet the City's own allegations, and the scope of the opioid abuse crisis, plainly reveal that the issues raised are statewide (indeed, nationwide) in nature. Moreover, the Nevada Attorney General, who alone is vested with authority to pursue litigation involving matters of statewide concern, has already brought suit seeking recovery for Nevada's opioid abuse crisis. The City's duplicative claims here not only exceed its limited grant of authority, but also impermissibly encroach upon the Attorney General's exclusive authority to regulate a matter of statewide concern. For this reason alone, all of the City's claims must be dismissed.

Second, the City's attempt to recoup governmental costs purportedly incurred because of the opioid crisis is barred by the municipal cost recovery rule. Under that rule, public expenditures made in the performance of governmental functions are not recoverable as a matter of law.

Third, the First Amended Complaint ("FAC") is replete with fatal pleading deficiencies. Rather than pleading a factual basis for each of its claims against the 30 named Defendants (as is required under Nevada law), the City repeatedly makes conclusory assertions against "Defendants"

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[1] "Manufacturer Defendants" refers to Purdue Pharma L.P.; Purdue Pharma Inc.; The Purdue Frederick Company Inc.; Purdue Pharmaceuticals, L.P.; Allergan Finance, LLC f/k/a Actavis, Inc. f/k/a Watson Pharmaceuticals, Inc.; Allergan USA, Inc.; Teva Pharmaceuticals USA, Inc.; Cephalon, Inc.; Watson Laboratories, Inc.; Actavis LLC; Actavis Pharma, Inc. f/k/a Watson Pharma, Inc.; Insys Therapeutics, Inc.; Johnson & Johnson; Janssen Pharmaceuticals, Inc.; Ortho-McNeil-Janssen Pharmaceuticals, Inc. n/k/a Janssen Pharmaceuticals, Inc.; Janssen Pharmaceutica, Inc. n/k/a Janssen Pharmaceuticals, Inc.; Mallinckrodt LLC; Endo Pharmaceuticals Inc.; and Endo Health Solutions Inc. The FAC originally also named Mallinckrodt Brand Pharmaceuticals Inc. and Mallinckrodt US Holdings, Inc. as Defendants, but on March 4, 2019, the City voluntarily dismissed without prejudice all claims against these entities.

collectively. The City's improper group pleading fails to satisfy even the most basic of pleading standards and falls far short of providing the particularity required under NRCP 9(b) for allegations of fraud like those asserted here.

Recently, at the pleading stage, another court dismissed substantially similar opioid-related lawsuits brought by cities. *City of New Haven v. Purdue Pharma, L.P.*, 2019 WL 423990 (Conn. Super. Ct. Jan. 8, 2019). Like the City here, the cities there sought to recover money allegedly spent on emergency response services and other municipal expenses. Faced with a motion to dismiss, the *New Haven* court dismissed the cities' claims, concluding that "these matters are ordinary civil damages cases and face the ordinary civil rules about who can sue for what." *Id.* at *1. The cities could not, held the court, "shrug off the burdens of being . . . ordinary civil plaintiffs" under controlling (Connecticut) law to "join the swelling chorus calling for justice" in the "mixed crowd of [opioid] cases assembling on courthouse lawns across the country." *Id.* at *7-8. As that court observed, "[i]f the courts are to be governed by principles and not passion, [controlling legal rules] must apply just as much in hard cases as in easy ones." *Id.* at *8.

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Here too, the "ordinary civil rules about who can sue for what" doom the City's claims. The Court should dismiss the FAC in its entirety as against the Manufacturer Defendants.[2]

DATED this 4th day of March, 2019.

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[2] Clark County District Judge Timothy Williams denied a motion to dismiss Clark County's similar opioid-related case (filed by the same private plaintiff's counsel), *Clark County v. Purdue Pharma L.P. et al.*, No. A-17-765828-C (Clark Cty. Dist. Ct.), on February 27, 2019. (A written order was not available at the time of this filing.) The Manufacturer Defendants respectfully submit that that nonbinding decision is contrary to the clear legal principles discussed herein.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. THE CITY LACKS STANDING BECAUSE ITS CLAIMS EXCEED ITS LIMITED SCOPE OF AUTHORITY TO ACT ON MATTERS OF LOCAL CONCERN AND USURP THE ATTORNEY GENERAL'S EXCLUSIVE ROLE AS THE STATE'S CHIEF LEGAL OFFICER

Cities are political subdivisions of the State whose powers are limited to those conferred by the Legislature. *See* NRS 268.001(6). Under well-established Nevada law, cities may *only* "address matters of local concern." *See id.* To be a "matter of local concern," the matter must, among other things, (1) "[p]rimarily affect[] or impact[] areas located in the incorporated city," (2) "not have a significant effect or impact on areas located in other cities or counties," *and* (3) "not concern . . . [t]he regulation of business activities that are subject to substantial regulation by a federal or state agency." NRS 268.003(1).

This fundamental limitation on the City's authority forecloses its claims. The "matter" the City seeks to regulate—the opioid abuse crisis—is anything but a "matter of local concern." As the City itself alleges, "[t]he abuse of opioids is a widespread problem in the State of Nevada" (FAC ¶ 2) and "has a profound impact on . . . communities *across our country*" (*id.* ¶ 17 (internal quotation marks omitted) (emphasis added)). Moreover, the Manufacturer Defendants' promotion of opioid medications is extensively regulated by federal agencies (*see* NRS 268.003(1)(c)(2); FAC ¶¶ 92, 94) and—as the City argued in moving to remand this case to state court—its negligence and nuisance claims "rel[y] upon . . . Nevada's classification of opioids as 'dangerous drugs.'"[3] Because the City seeks to address matters beyond the limited scope of its authority, all of the City's claims should be dismissed.

That the City seeks to recover its own (as opposed to statewide) monetary expenses does not transform the opioid abuse crisis into a matter of local concern. The City alleges that its expenses flow from the Manufacturer Defendants' "marketing campaign[]" that "falsely portray[ed] both the risks of addiction and abuse and the safety and benefits of long-term [opioid] use." FAC ¶ 8. There

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[3] Motion to Remand, *City of Reno v. Purdue Pharma L.P. et al.*, No. 3:18-cv-454 (D. Nev.), Dkt. No. 5 at 9–10.

is nothing "local" about this purported conduct or its alleged impact. The City expressly alleges that "Defendants employed . . . the same marketing plans and strategies and deployed the same messages in Nevada as they did nationwide" (*id.* ¶ 102), which has "unleash[ed] a healthcare crisis that has had far-reaching . . . consequences . . . throughout Nevada" (*id.* ¶ 23). Indeed, Clark County (represented by the same private attorneys as the City here) has filed a similar lawsuit against many of the same Manufacturer Defendants in an overlapping attempt to address the statewide opioid abuse crisis. *See Clark Cty. v. Purdue Pharma L.P. et al.*, No. A-17-765828-C (Clark Cty. Dist. Ct.). It is thus clear that the opioid abuse crisis—the "matter" that this lawsuit was brought to address—has "a significant effect or impact on areas" outside the City and does not "[p]rimarily affect[] or impact[] areas located in" the City. NRS 268.003(1).

If a matter of statewide concern could be transformed into a matter of local concern simply by characterizing the relief sought as city-specific, then Nevada's "local concern" statute would be meaningless, since each city and county could sue for the same business activities resulting in a patchwork of differing results across the state. By conflating the scope of relief with the "matter" to be regulated, cities thus could routinely expand their authority to act beyond matters of local concern. The Legislature could not have intended this outcome—the statute refers to the "matter" to be regulated, not the scope of relief sought.

Yet even if the scope of relief were dispositive (it is not), that still would not save the City's claims here. In addition to monetary relief, the City seeks abatement of the purported nuisance (FAC ¶ 193) and injunctive relief (*id.* Prayer for Relief ¶ 8), conduct-based remedies whose impacts would necessarily reach beyond the City given the scope of alleged wrongdoing, the conduct to be enjoined, and the harm to be abated. Notably, in its Prayer for Relief, the City seeks to enjoin "Defendants' promotion and marketing of opioids for inappropriate uses *in Nevada*[.]" *Id.* (emphasis added).

The City's claims not only exceed the limited scope of its authority to act, they also encroach upon the Attorney General's exclusive authority to address matters of statewide concern. The Attorney General, Nevada's Chief Legal Officer, "*shall be* the legal adviser[] on all state matters arising in the Executive Department of the State Government." NRS 228.110 (emphasis added). The Attorney General has already brought suit concerning this same subject matter—even naming

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certain of the same defendants—seeking recovery of statewide damages allegedly caused by the opioid abuse crisis, *State v. Purdue Pharma L.P.*, Case No. A-18-1774437-B, and is reportedly preparing to file yet another lawsuit that could result in even greater overlap with this litigation.[4] Allowing individual cities to bring individual suits aimed at statewide matters would not only result in wasteful and duplicative litigation (and risk inconsistent results) but would also usurp the Attorney General's exclusive authority and impermissibly seek to regulate a matter of statewide concern on a city-by-city basis. *See*, *e.g.*, NRS 228.170 (the attorney general "shall commence [an] action" when in his or her opinion "it is necessary" "to protect and secure the interest of the State"); NRS 228.117(2), (3) (giving attorney general supervisory powers over all district attorneys of the State and authority to take "exclusive" charge of and conduct any prosecution when in his or her opinion it is necessary).

II. THE CITY'S CLAIMS FOR RECOUPMENT OF GOVERNMENT EXPENDITURES ARE BARRED BY THE MUNICIPAL COST RECOVERY RULE

The City's claims for "recoupment of governmental costs" (FAC ¶ 192) fail under the municipal cost recovery rule. That rule, also known as the free public services doctrine, provides that public expenditures made in the performance of governmental functions are not recoverable. In the absence of an express statutory grant allowing such recovery, "the cost of public services for protection from . . . safety hazards is to be borne by the public as a whole, not assessed against the tortfeasor whose negligence creates the need for the service." *Flagstaff v. Atchison, Topeka & Santa Fe Ry. Co.*, 719 F.2d 322, 323 (9th Cir. 1983); *see also Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099 (Ill. 2004). Although Nevada courts have yet to address the doctrine, well-established Nevada legal principles like the firefighter's rule—which precludes firefighters from recovering for certain injuries caused by a third party's negligence in the performance of their official duties—support adoption of the doctrine. *See Moody v. Manny's Auto Repair*, 110 Nev. 320, 871 P.2d 935 (1994)

[4] *See* https://www.reviewjournal.com/news/politics-and-government/nevada/nevada-ag-gets-ok-to-hire-law-firm-to-sue-opioid-makers-1586173/.

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(discussing Nevada's Firefighter's Rule); *Steelman v. Lind*, 97 Nev. 425, 428, 634 P.2d 666 (1981) (same).

Numerous states preclude government entities from suing to recover public service costs.[5] The rule reflects principles of separation of powers and limited government. "[S]tate legislatures establish local governments to provide core services for the public and pay for these services by spreading the costs to all citizens through taxation." *Walker Cty.*, 643 S.E.2d at 327 (quotations omitted). "[T]he question of whether the costs of providing the public service should be spread among all taxpayers or reallocated in some other manner necessarily implicates fiscal policy, and, therefore, falls within the special purview of the legislature, not [the courts]." *Id*. at 328.

The City seeks to hold the Manufacturer Defendants liable for various governmental costs (*e.g.*, FAC ¶¶ 40, 192, 194) and asks the Court to require them to pay for the municipal costs of addressing *other* individuals' criminal conduct (*see id*. ¶ 194 (seeking recovery for "prosecution, corrections and other services")). That novel liability theory is contrary to law. *See Baker v. Smith & Wesson Corp.*, 2002 WL 31741522, at *5 (Del. Super. Ct. Nov. 27, 2002) ("[T]here remains an area where the people as a whole absorb the cost of such services—for example, the prevention and detection of crime. No one expects the rendering of a bill (other than a tax bill) if a policeman apprehends a thief." (internal quotation marks omitted)).

Nor can the City cast those alleged governmental costs as damages for "public nuisance." The reason is straightforward: "If such an exception were recognized, it would be the exception that swallows the rule, since many expenditures for public services could be re-characterized by skillful litigants as expenses incurred in abating a public nuisance." *Walker Cty.*, 643 S.E.2d at 328. Such a "murky" and "ambiguous" exception would open "the litigation floodgates," with public entities

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[5] *See*, *e.g.*, *District of Columbia v. Air Fla., Inc.*, 750 F.2d 1077, 1080-81 (D.C. Cir. 1984); *City of Flagstaff*, 719 F.2d at 323-24; *State v. Black Hills Power, Inc.*, 354 P.3d 83, 85-87 (Wyo. 2015); *Town of Freetown v. New Bedford Wholesale Tire, Inc.*, 423 N.E.2d 997, 997-98 (Mass. 1981); *Walker Cty. v. Tri-State Crematory*, 643 S.E.2d 324, 327-28 (Ga. App. 2007); *Penelas v. Arms Tech., Inc.*, 1999 WL 1204353, at *2 (Fla. Cir. Ct. Dec. 13, 1999); *Bd. of Supervisors of Fairfax Cty. v. U.S. Home Corp.*, 1989 WL 646518, at *1-2 (Va. Cir. Ct. Aug. 14, 1989).

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bringing suit for anything with even a remote impact on their budget. *Id*. at 328-29; *see also*, *e.g.*, *Bd. of Supers. of Fairfax Cnty.*, 1989 WL 646518, at *2.

III. THE FAC SUFFERS FROM MULTIPLE PLEADING FAILURES

A. The FAC Is Replete With Improper Group Pleading

The FAC fails because it is permeated with undifferentiated allegations against "Defendants" generally. *See generally* FAC ¶¶ 89-308. There are 30 named defendants in this action, and the City complains of alleged conduct that spans decades (*e.g.*, *id.* ¶¶ 7-8, 152), yet the City fails to differentiate between the Defendants, depriving Defendants of the ability to meaningfully defend themselves.

Courts consistently bar such group pleading, and this Court should do so here. *See Volcano Developers LLC v. Bonneville Mort.*, 2:11-cv-504-GMN-PAL, 2012 WL 28838, at *5 (D. Nev. Jan. 4, 2012) (granting motion to dismiss where plaintiffs "consistently fail to meaningfully distinguish between the parties in their factual allegations[,]" because "it is unreasonable for Plaintiffs to expect Defendants or this Court to guess which facts apply to which parties"); *McHenry v. Renne*, 84 F.3d 1172, 1174-75 (9th Cir. 1996) (dismissal proper where complaint failed to provide "any specification of which of the twenty named defendants or John Does is liable for which of the wrongs" and affirming district court's conclusion that "[g]iven the number and diversity of named defendants and the breadth of allegations, claims which vaguely refer to 'defendants' . . . will not suffice"); *Boyer v. Becerra*, 2018 WL 2041995, at *7 (N.D. Cal. Apr. 30, 2018) ("Courts consistently conclude that a complaint which lumps together multiple defendants in one broad allegation fails to satisfy the notice requirement of Rule 8." (alterations omitted)); *Tatone v. Suntrust Mortg., Inc.*, 2012 WL 763581, at *9 (D. Minn. Mar. 8, 2012) ("A complaint which lumps all defendants together and does not sufficiently allege who did what to whom, fails to state a claim for relief because it does not provide fair notice of the grounds for the claims made against a particular defendant."); *Kelley v. Rambus, Inc.*, 2007 WL 3022544, at *1 (N.D. Cal. Oct. 15, 2007) (dismissing complaint where, in essence, it

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"appear[ed] to be a statement that wrongdoing occurred, that all Defendants somehow were involved, and that Plaintiffs therefore are entitled to damages").[6]

B. The City Fails to Plead Its Fraud Allegations With Sufficient Particularity

As of March 1, NRCP 9(b) is identical to Fed. R. Civ. P. 9(b). The rule requires a plaintiff to "state with particularity the circumstances constituting fraud." NRCP 9(b); *see Rocker v. KPMG LLP*, 122 Nev. 1185, 1192, 148 P.3d 703, 707 (2006), *abrogated on other grounds by Buzz Stew, LLC v. City of North Las Vegas*, 124 Nev. 224, 228 n.6, 181 P.3d 670, 672 n.6 (2008). Under this heightened pleading standard, "[t]he circumstances that must be detailed include averments to the time, the place, the identity of the parties involved, and the nature of the fraud." *Brown v. Kellar*, 97 Nev. 582, 583-84, 636 P.2d 874 (1981).

This heightened pleading standard applies regardless of whether a claim requires proof of fraud as an element. Even "where fraud is not a necessary element of a claim," if a plaintiff "allege[s] a unified course of fraudulent conduct and rel[ies] entirely on that course of conduct as the basis of a claim," then "the claim is said to be 'grounded in fraud' . . . and the pleading of that claim as a whole must satisfy the particularity requirement of [federal] Rule 9(b)." *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1103-04 (9th Cir. 2003); *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125 (9th Cir. 2009) (same); *accord In re Anchor Gaming Sec. Litig.*, 33 F. Supp. 2d 889, 893 (D. Nev. 1999) ("[D]espite Plaintiffs' careful attempt to avoid use of the term 'fraud,' the . . . Complaint nonetheless clearly sounds in fraud" and "Defendants are entitled to the protections of [federal] Rule 9(b)." (emphasis omitted)).

No matter the legal label the City attaches to its causes of action, all of the City's claims against the Manufacturer Defendants sound in fraud and thus its allegations of fraud must meet the particularity standard. The City alleges that the Manufacturer Defendants used "deceptive means[] and one of the biggest pharmaceutical marketing campaigns in history" to "carefully engineer[] . . .

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[6] NRCP 8(a), which requires a "short and plain statement of the claim showing that the pleader is entitled to relief," is identical to Fed. R. Civ. P. 8(a)(2). "Federal cases interpreting the Federal Rules of Civil Procedure 'are strong persuasive authority[] because the Nevada Rules of Civil Procedure are based in large part upon their federal counterparts.'" *Executive Mgmt. Ltd. v. Ticor Title Ins. Co.*, 118 Nev. 46, 53, 38 P.3d 872, 876 (2002) (internal quotations omitted).

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the culture of prescribing opioids by falsely portraying both the risks of addiction and abuse and the safety and benefits of long-term use." FAC ¶ 8; *see also id.* ¶ 131 ("To convince prescribing physicians and prospective patients that opioids are safe, [Manufacturer] Defendants deceptively concealed the risks of long-term opioid use . . . through a series of misrepresentations."). These express allegations of fraud must be "state[d] with particularity[.]" NRCP 9(b). The City cannot circumvent this requirement by pleading causes of action (like negligence) that do not require proof of fraud. *Vess*, 317 F.3d at 1103-04; *Kearns*, 567 F.3d at 1125.

The FAC falls far short of satisfying the heightened pleading standard of NRCP 9(b). Despite more than 300 paragraphs of general and conclusory assertions that the Manufacturer Defendants engaged in a supposedly fraudulent campaign about the safety and efficacy of opioid medications, the City has not pleaded any facts showing false or misleading marketing made anywhere in the City as to any Manufacturer Defendant—much less with the requisite particularity. *Cf.* FAC ¶¶ 106-20 (no particularized details about allegedly misleading marketing scheme). For instance, the City does not allege:

- *who* made and *who* received any alleged false statements or omissions in the City, including any particular prescriber who purportedly prescribed any medically inappropriate opioid;
- *what* supposedly false statements or omissions each (or any) Manufacturer Defendant made to the City or to any prescriber in it;
- *where* or *when* any false statement or omission was made by any Manufacturer Defendant; and
- *how* any false statement or omission by any Manufacturer Defendant affected any prescription by a prescriber in the City, including why the unidentified prescriber(s) prescribed the opioids in question, what conditions the opioids were prescribed to treat, or whether the patient received a benefit from that prescription.

Instead, the City simply makes a series of conclusory assertions of false marketing by the Manufacturer Defendants, as a whole, unconnected to any prescription, prescriber, or injury anywhere in the City. The absence of these fundamental factual details warrants dismissal. *See* NRCP 9(b); *In re Amerco Derivative Litig.*, 127 Nev. 196, 223, 252 P.3d 681, 700 (2011) (noting the heightened pleading requirement of NRCP 9(b) for fraud claims); *see also Chicago v. Purdue Pharma L.P.*, 2015 WL 2208423, at *14 (N.D. Ill. May 8, 2015) (dismissing similar fraud-based

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claims where city failed to allege "the identities of doctors who, as a result of one or more of defendants' alleged misrepresentations, prescribed opioids for chronic pain to a City-insured patient or worker's compensation recipient whose claim for that prescription the City paid, or any other details about such claims"); *Chicago v. Purdue Pharma L.P.*, 211 F. Supp. 3d 1058, 1080 (N.D. Ill. 2016) (dismissing subsequent amended complaint for similar reasons); *Davenport v. Homecomings Financial, LLC*, 2014 WL 1318964, at *3 (March 31, 2014) ("Rather than identifying the time, place, and circumstances of Homecomings Financial's alleged deceptions, [plaintiff] lumped Homecomings Financial together with the other defendants and baldly declared that it defrauded him. These conclusory averments do not satisfy the requirements of NRCP 9(b)."); *Kenny v. Trade Show Fabrications West, Inc.*, 2016 WL 697110, at *4 (D. Nev. Feb. 18, 2016) (dismissing claims for failure to satisfy federal Rule 9(b) where "[t]he complaint groups multiple defendants together and fails to detail which defendants made which fraudulent statements and what statements were made.").

To the extent the City's theory is that the Manufacturer Defendants improperly influenced prescribers, the City must allege facts detailing each of the following: (i) a prescriber received an alleged misrepresentation from a Manufacturer Defendant; (ii) in reliance on the alleged misrepresentation, (iii) the prescriber wrote a prescription for a specific opioid medication to treat a patient for chronic pain; (iv) the prescriber's reliance was reasonable; (v) the prescription was ineffective or harmed the patient; and (vi) the City paid for the prescription. And to the extent the City's theory is that the Manufacturer Defendants improperly influenced the City, the City must allege facts detailing each of the following: (i) a City health plan agent received an alleged misrepresentation from a Manufacturer Defendant; (ii) a prescriber wrote a prescription for a specific opioid medication to treat a patient for chronic pain; (iii) the prescription was ineffective or harmed the patient; (iv) in reliance on the alleged misrepresentation, (v) the City health plan agent approved the reimbursement of the prescription; and (vi) the City paid for the prescription. The FAC fails to plead any of these facts as to even a single alleged misrepresentation by a single Manufacturer Defendant. *Davenport v. GMAC Mortg.*, 2013 WL 5437119, at *3 (September 25, 2013) (quoting *Swartz v. KMPG LLP*, 476 F.3d 756, 764-65 (9th Cir. 2007) (discussing FRCP 9(b)). This failure demands dismissal.

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IV. THE STATUTORY PUBLIC NUISANCE CLAIM FAILS (COUNT I)

A. The City Cannot Bring A Criminal Statutory Public Nuisance Claim

As an initial matter, the City's civil claim for statutory public nuisance fails because NRS 202 *et. seq*. is a *criminal* statute—it does not create a cause of action for *civil* liability. The statute, which is part of "Title 15. Crimes and Punishments" of the Nevada Revised Statutes, states that "[a] public nuisance is a crime against the order and economy of the State[,]" and a defendant convicted of such a crime "shall be guilty of a misdemeanor." NRS 202.450 and 202.470. While the statute does allow for abatement and civil penalties, they are only available as ancillary relief in "any proceeding for a violation of NRS 202.470"—that is, a criminal proceeding for a misdemeanor conviction. NRS 202.480.

The City cites no authority affording it a right to bring a civil action under a criminal statute. Indeed, "other than the criminal public nuisance statutes. . . , the only other nuisance cause of action recognized under Nevada law . . . is a civil cause of action for *private* nuisance [under] N.R.S. § 40.140." *Coughlin v. Tailhook Ass'n, Inc.*, 818 F. Supp. 1366, 1372 (D. Nev. 1993) (holding NRS 202.450 is a criminal statute and does not create a civil cause of action for statutory public nuisance), *aff'd sub nom.*, 112 F.3d 1052 (9th Cir. 1997) (emphasis added). The City has not alleged a nuisance under NRS 40.140. Accordingly, the City's statutory public nuisance claim fails as a matter of law.

B. The City Cannot Recover The Damages It Seeks

Even if NRS 202.450 provided for a civil cause of action for statutory public nuisance (it does not), the remedies the City seeks are not permitted under the statute. The City seeks, in addition to abatement of the alleged nuisance, to recover "compensatory damages, and punitive damages . . . attorney fees and costs, and pre- and post-judgment interest."[7] FAC ¶ 198. However, NRS 202 *et seq*. states that a defendant may be found guilty of a misdemeanor and be ordered to abate the public nuisance and/or "pay a civil penalty of not less than $500 but not more than $5,000" as a result of

[7] The City's statutory public nuisance action is against all Defendants, yet the City appears to only seek damages "from the Defendant Wholesale Distributors." FAC ¶ 198. To the extent the City seeks any damages from the Manufacturer Defendants, those are not recoverable under NRS 202.480.

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violating the statute. NRS 202.470 and 202.480. It is well settled that where "the statute's express provision of such remedies reflects the Legislature's intent to provide only those specified remedies, [courts] decline to engraft any additional remedies therein." *Stockmeier v. Nev. Dept. of Corrections*, 124 Nev. 313, 317, 183 P.3d 133, 136 (2008); *see also Builders Ass'n of N. Nev. v. Reno*, 105 Nev. 368, 370, 776 P.2d 1234, 1235 (1989) ("If a statute expressly provides a remedy, courts should be cautious in reading other remedies into the statute."); *Richardson Const., Inc. v. Clark Cty. Sch. Dist.*, 123 Nev. 61, 65, 156 P.3d 21, 24 (2007) ("Because N.R.S. 338.1381 provides this express remedy, we will not read any additional remedies into the statute."). Without any statutory authority expressly allowing the City to recover the damages it seeks, the statutory public nuisance claim is limited only to the criminal penalties available under Chapter 202.

The City's claim for damages is also barred by the economic loss doctrine. This doctrine "precludes recovery of purely economic damages in tort, whereby Plaintiff's claims sounding in negligence and nuisance do not state a claim for which relief may be granted pursuant to Rule 12(b)(5) of the Nevada Rules of Civil Procedure." *Sedona Condo., Homeowners Ass'n, Inc. v. Eagle Real Estate Grp.*, 2008 WL 8177908, at *3 (Nev. Dist. Ct. Clark Cty. June 30, 2008); *see also Calloway v. City of Reno*, 116 Nev. 250, 261, 993 P.2d 1259, 1266 (2000), *overruled on other grounds by Olson v. Richard,* 120 Nev. 240, 89 P.3d 31 (2004). The doctrine "expresses the policy that the need for useful commercial economic activity and the desire to make injured plaintiffs whole is best balanced by allowing tort recovery only to those plaintiffs who have suffered personal injury or property damage." *Terracon Consultants W., Inc. v. Mandalay Resort Grp.*, 125 Nev. 66, 75, 206 P.3d 81, 87 (2009). In barring tort liability for "pure financial harm," the economic loss doctrine avoids "incentives that are perverse" and "provides incentives . . . to engage in economic activity." *Id*. In accordance with these objectives, courts have dismissed nuisance claims where only economic damages were alleged. *See*, *e.g.*, *Sedona Condo*., 2008 WL 8177908, at *3.

Here, the City does not allege it suffered personal injury or property damage. FAC ¶ 41 ("[N]or does the City seek compensatory damages for death, physical injury to person, emotional distress, or physical damage to property."). Rather, the City contends the Manufacturer Defendants are liable for a compendium of pure economic losses, *e.g.*, "significant expenses for police,

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emergency, health, prosecution, corrections and other services" (FAC ¶ 194), "law enforcement expenditures, costs related to opioid addiction treatment and overdose prevention, and related costs" (*id*. ¶ 195), and "all prescription costs the City has incurred related to opioids due to Defendants' wrongful conduct," *id.* Prayer for Relief ¶ 5. These economic damages are barred by the economic loss doctrine. *See Terracon Consultants*, 125 Nev. at 74 ("Although the plaintiffs suffered financial injury, namely, lost wages, benefits, and union dues, they . . . suffered no accompanying personal injuries . . . that would permit them to recover in tort."). The City's statutory public nuisance claim should thus be dismissed.

V. THE COMMON-LAW PUBLIC NUISANCE CLAIM FAILS (COUNT II)

At common law, "[a] public nuisance is an unreasonable interference with a right common to the general public." Restatement (Second) of Torts § 821B(1);[8] *see Fogg v. Nevada C. O. Ry. Co.*, 10 Nev. 429, 23 P. 840, 843 (1890) (describing public nuisances as "an obstruction to the exercise and enjoyment of a right common to the public"). The City has failed to plead the Manufacturer Defendants interfered with a public right. Giving effect to that essential requirement of the common-law tort of public nuisance is critical, lest the cause of action morph into the limitless, standardless, all-purpose claim for retroactive regulation by litigation that the City suggests.

A. The City Fails To Plead Interference With A Public Right

The misconduct alleged in the FAC implicates only private rights, not public rights. The Restatement explains this key distinction: "A public right is one common to all members of the general public. It is collective in nature and *not like* the individual right that everyone has not to be assaulted or defamed *or defrauded or negligently injured*." Restatement (Second) of Torts § 821B cmt. g (emphasis added). "[T]here is no common law public right to a certain standard of medical

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[8] Courts applying Nevada law look to the Restatement in analyzing nuisance issues. *See Land Baron Invs., Inc. v. Bonnie Springs Family Ltd. P'ship*, 131 Nev. Ad. Op. 69, 356 P.3d 511, 521 (2015) (relying on Restatement (Second) of Torts § 929(1)(c) (1979) regarding private nuisance); *Layton v. Yankee Caithness Joint Venture, L.P.*, 774 F. Supp. 576, 577, 580 (D. Nev. 1991) (quoting Restatement (Second) of Torts §§ 821F, 822 (1979) in analyzing private nuisance claim).

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care . . . ." *State v. Lead Industries Ass'n, Inc.*, 951 A.2d 428, 454 (R.I. 2008) (citing Donald G. Gifford, Public Nuisance as a Mass Products Liability Tort, 71 U. Cin. L. Rev. 741, 815 (2003)).

The rights at issue here fall squarely into the Restatement's latter category—individual, private rights—as the City's allegations all involve individuals allegedly defrauded through misinformation and sustaining personal injuries from the use of a legal medication. Individual consumers' rights not to be misled or harmed by a lawful product are well established to be only *individual* rights—not public rights. The "allegation that defendants have interfered with the 'health, safety, peace, comfort or convenience of the residents of the [s]tate' standing alone does not constitute an allegation of interference with a public right." *Lead Indus.*, 951 A.2d at 453; *see also Beretta*, 821 N.E.2d at 1116 ("We conclude that there is no authority for the unprecedented expansion of the concept of public rights to encompass the right asserted by plaintiffs.").

Expanding the traditional concept of a public right to enable the City to regulate opioid medications through this lawsuit would also disregard the time-honored limits of public nuisance. As the Restatement instructs:

> [I]f there has been established a comprehensive set of legislative acts or administrative regulations governing the details of a particular kind of conduct, the courts are slow to declare an activity to be a public nuisance if it complies with the regulations. . . . The variety and complexity of a problem and of the interests involved and the feeling that the particular decision should be a part of an overall plan prepared with a knowledge of matters not presented to the court and of interests not represented before it, may also promote judicial restraint and a readiness to leave the question to an administrative agency if there is one capable of handling it appropriately.

Restatement (Second) of Torts § 821B cmt. f.

Here, federal and state laws and agencies extensively regulate the manufacture, promotion, sale, and use of prescription opioid medications. Not only has the FDA extensively regulated this area, but Nevada has authorized the State Board of Pharmacy to "adopt regulations . . . relating to the registration and control of the dispensing of controlled substances," NRS 453.221(1), and requires physicians to comply with those regulations, NRS 453.385(1). The state has also unambiguously permitted prescriptions of controlled substances for legitimate medical purposes, as determined by a physician. NRS 453.381(1); *see also* NRS 639.23913, 639.2391, and 639.23911. The Court should not permit the City to override, through a common-law public nuisance claim, the

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carefully balanced regulatory efforts of other state and federal agencies better suited to addressing the medical issues presented by the FAC. *Cf.* NRS 268.003(1)(c)(2) (cities have no authority to regulate "business activities that are subject to substantial regulation by a federal or state agency"). Indeed, the Restatement cautions that "[i]f a defendant's conduct in interfering with a public right does not come within one of the traditional categories of the common law crime of public nuisance or is not prohibited by a legislative act, the court is acting without an established recognized standard." Restatement (Second) of Torts § 821B cmt. e.

B. The City's Novel Theory Impermissibly Collapses Product Liability and Public Nuisance Law

The City's novel theory of common-law public nuisance finds no support in the case law and would collapse the critical distinction between nuisance and products liability law. Nevada's common law on nuisance is concerned with the misuse of, or interference with, land and real property. *See*, *e.g.*, *Jezowski v. City of Reno*, 71 Nev. 233, 240-41, 286 P.2d 257, 260 (1955) ("In an early case this court defined a nuisance and confined it to such unreasonable, unwarrantable or unlawful use by a person of his own property, or his improper, indecent or unlawful conduct which operates as an obstruction or injury to the right of another or to the public"). Public nuisance cases in Nevada have accordingly concerned the pollution of land or water, or the misuse of private real property. *See*, *e.g.*, *Diamond X Ranch LLC v. Atlantic Richfield Co.*, 2017 WL 4349223 (D. Nev. Sept. 29, 2017) (environmental contamination from acid mine drainage); *Bliss v. Grayson*, 24 Nev. 422, 56 P. 231 (1899) (dams built in waterway); *Jezowski*, 71 Nev. at 234 (municipal dump).

No Nevada case embraces the City's view that common-law public nuisance can encompass harm caused by the marketing and sale of allegedly harmful products. Rather, the City's claim stands far outside this legal tradition and does not remotely resemble the types of public nuisance claims permitted by Nevada courts. Its claim has nothing to do with the misuse of or interference with property. Instead, the City alleges that it has suffered economic damages for alleged expenses (*e.g.*, healthcare costs, criminal justice) arising from the marketing and sale of lawful products and injuries to consumers from those products. *See* FAC ¶¶ 214, 220-22. In other words, the City's claim sounds

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entirely in products liability, not nuisance. These are distinct bodies of law, and courts across the nation have held that they must remain that way.

Indeed, in another opioid-related action, a court recently dismissed at the pleading stage a materially identical public nuisance claim brought by the State of Delaware. *See State ex rel. Jennings v. Purdue Pharma L.P.*, 2019 WL 446382 (Del. Super. Ct. Feb. 4, 2019). Citing case law from around the country, the court explained that "[t]here is a clear national trend to limit public nuisance to land use" and that "[o]ther jurisdictions . . . have refused to allow products-based public nuisance claims." *Id.* at *12. Noting that "[t]he State ha[d] not alleged a product liability claim," had "only . . . alleged a public nuisance claim," and "ha[d] failed to allege a public right with which Defendants have interfered," the court dismissed the claim, holding that, "[i]n Delaware, public nuisance claims have not been recognized for products." *Id.* at *12-13. Numerous other decisions are in accord.[9]

VI. THE NEGLIGENCE CLAIM FAILS (COUNT III)

The City's negligence claim fails because the Manufacturer Defendants do not owe the City a duty to protect it from misconduct by third parties.

"An indispensable predicate to tort liability founded upon negligence is the existence of a duty of care owed by the alleged wrongdoer to the person injured." *Mangeris v. Gordon*, 94 Nev. 400, 402, 580 P.2d 481, 483 (1978) (citation omitted). Whether a duty of care exists and the scope of any such duty are questions of law for the Court. *See Sparks v. Alpha Tau Omega Fraternity, Inc.*, 127 Nev. 287, 296, 255 P.3d 238, 244 (2011).

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[9] *See Lead Indus.*, 951 A.2d at 456 ("[P]ublic nuisance and products liability are two distinct causes of action, each with rational boundaries that are not intended to overlap."); *Camden Cty. Bd. of Chosen Freeholders v. Beretta, U.S.A. Corp.*, 273 F.3d 536, 540 (3d Cir. 2001) ("[T]he courts have enforced the boundary between the well-developed body of product liability law and public nuisance law."); *Ashley Cty Ark. v. Pfizer, Inc.*, 552 F.3d 659, 671-72 (2009) (same); *City of Perry v. Procter & Gamble Co.*, 188 F. Supp. 3d 276, 291 (S.D.N.Y. 2016) ("The parties do not cite, and the Court is not aware of, any cases applying Iowa law that recognize a nuisance claim arising out of the sale or use of a product as opposed to the use of property."); *Detroit Bd. of Educ. v. Celotex Corp.*, 493 N.W.2d 513, 520 (Mich. Ct. App. 1992) ("The law of nuisance is fraught with conditional rules and exceptions that turn on the facts of individual cases, and the cases almost universally concern the use or condition of property, not products.").

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Under settled Nevada law, "no duty is owed to control the dangerous conduct of another or to warn others of the dangerous conduct" absent a "special relationship" between the defendant and either the third party or the injured party. *Sanchez ex rel. Sanchez v. Wal-Mart Stores, Inc.*, 125 Nev. 818, 825, 221 P.3d 1276, 1280 (2009); *see also Eagle Trace Spe Corp. v. Eighth Judicial Dist. In & For The County of Clark*, 2018 WL 3373132, at *2 (Nev. Ct. App. June 29, 2018) (unpublished disposition) ("It is well established that there is generally no duty to control a third party's dangerous conduct."). Here, the City expressly alleges that various third parties—distributors, pharmacies, doctors, and others—"played an integral role in the chain of opioid[]" distribution. FAC ¶¶ 68, 74; *see also id.* ¶¶ 67, 73, 76-80, 152-64, 261-86. Yet the City fails to plead any facts establishing a special relationship between the Manufacturer Defendants and either the City or third-party wrongdoers. *See Sparks*, 127 Nev. at 296-97, 255 P.3d at 244-45 (special relationships giving rise to a duty of care include "innkeeper-guest, teacher-student [and] employer-employee," "restauranteur and his patrons," "landowner-invitee, businessman-patron," "school district-pupil, hospital-patient, and carrier-passenger") (internal quotation marks and citations omitted). Nor can the City allege that the Manufacturer Defendants had a special relationship of control over these parties. *See id.*, 127 Nev. at 297, 255 P.3d at 244-45 (describing "the element of control" as "[a] crucial factor in establishing liability in the context of special relationships"); *Eagle Trace Spe Corp.*, 2018 WL 3373132, at *2 (landowner's duty to protect invitee does not extend to injuries "occurring outside of their premises"). To the contrary, the City alleges that "Defendant Distributors and Pharmacies are in *exclusive control* of the distribution management of opioids that [they] distributed and/or sold in Reno." FAC ¶ 280 (emphasis added).

Because the City has failed to allege any facts from which to infer that the Manufacturer Defendants owed it a duty of care, the negligence claim should be dismissed.

Finally, the negligence claim independently fails under the economic loss rule for the reasons set forth in § IV(B), *supra*. *See Terracon Consultants*, 125 Nev. at 74, 206 P.3d at 87 ("[U]nless there is personal injury or property damage, a plaintiff may not recover in negligence for economic losses." (footnote omitted)).

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VII. THE NEGLIGENT MISREPRESENTATION CLAIM FAILS (COUNT IV)

Nevada has adopted the definition of negligent misrepresentation in § 552 of the Restatement (Second):

> One who, in the course of his business, profession or employment, or in any other action in which he has a pecuniary interest, supplies false information for the guidance of others *in their business transactions*, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

Bill Stremmel Motors, Inc. v. First Nat'l Bank of Nevada, 94 Nev. 131, 134, 575 P.2d 938, 940 (1978) (quoting Restatement (Second) of Torts § 552(1) (1977)) (emphasis added).

The City's negligent misrepresentation claim suffers from a fatal pleading deficiency: the City does not and cannot allege that it engaged in a "business transaction" with any Manufacturer Defendant. *Barmettler v. Reno Air, Inc.*, 114 Nev. 441, 449, 956 P.2d 1382, 1387 (1998) ("[T]his tort only applies to business transactions" and is inapplicable to conduct that "does not fit squarely within a business or commercial transaction."). The City instead makes the unremarkable allegation that Manufacturer Defendants' marketing of opioid medications took place "[i]n the course and furtherance of [Manufacturer] Defendants' business." FAC ¶ 242. But that is not sufficient; the City must allege facts showing it engaged in a business transaction with the Manufacturer Defendants. The City's failure to make such allegations defeats the claim. *See Barmettler*, 114 Nev. at 449, 956 P.2d at 1387 (employer not liable for allegedly breaching a workplace confidentiality policy because disclosures about employee were not "squarely" related to a business or commercial transaction).

Moreover, "liability . . . is limited to loss suffered (a) by the person . . . for whose benefit and guidance [the defendant] intends to supply the information . . . and (b) through reliance upon it in a transaction that [the defendant] intends the information to influence." Restatement (Second) of Torts § 552(2). The FAC principally alleges information provided to physicians, not the City. *E.g.*, FAC ¶¶ 97, 244-45. And while the City makes the conclusory assertion that it "rightfully, reasonably, and justifiably rel[ied] upon Defendants' representations and/or concealments both directly and indirectly"—without identifying a single purported "representation and/or concealment" to which the City was exposed (*id.* ¶ 250)—the City nowhere alleges that the Manufacturer

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Defendants intended the information for the "benefit and guidance" of the City. These deficiencies further doom the City's negligent misrepresentation claim.

Finally, the claim independently fails under the economic loss rule for the reasons set forth in § IV(B), *supra*. *See Halcrow, Inc. v. Eighth Jud. Dist. Ct.*, 129 Nev. 394, 396, 302 P.3d 1148, 1150 (2013) (applying economic loss rule to bar negligent misrepresentation claim).

VIII. THE UNJUST ENRICHMENT CLAIM FAILS (COUNT VI)

To state a claim for unjust enrichment, the City must allege: (i) the City conferred a benefit on Manufacturer Defendants; (ii) Manufacturer Defendants appreciated such a benefit; and (iii) there is "acceptance and retention by the [Manufacturer Defendants] of such benefit under circumstances such that it would be inequitable for [them] to retain the benefit without payment of the value thereof." *See Certified Fire Prot. Inc. v. Precision Constr.*, 128 Nev. 371, 381, 283 P.3d 250, 257 (2012). The City fails to plead each of these elements.

Absent from the FAC is any allegation the City conferred a benefit on Manufacturer Defendants or even had a relationship with Manufacturer Defendants by which it *could* do so. The FAC contains no factual allegation that the City paid Manufacturer Defendants for a single prescription opioid medication. The FAC also fails to allege the City and Manufacturer Defendants engaged in even a single transaction or had any commercial relationship. Instead, the City relies upon conclusory assertions that it paid for "excessive" and "unnecessary" opioid prescriptions, *see* FAC ¶¶ 35, 40(a), while failing to identify to whom such payments were made, or the extent to which such prescriptions were supposedly excessive or unnecessary. Absent factual allegations, the unjust enrichment claim should be dismissed. *See Zalk-Josephs Co. v. Wes Cargo, Inc.*, 77 Nev. 441, 447, 366 P.2d 339, 342 (1961) (dismissing unjust enrichment claim that "[did] not involve any dealings of any nature whatsoever" between plaintiff and defendant).

Nor has the City alleged the circumstances surrounding a single prescription it purportedly reimbursed, or that it has stopped reimbursing for opioid prescriptions even after filing this lawsuit. There is thus no factual basis to infer that the City did not receive exactly what it paid for, and courts routinely dismiss similar complaints for failure to allege such facts. *See*, *e.g.*, *Rivera v. Wyeth-Ayerst Labs.*, 283 F.3d 315, 320 (5th Cir. 2002) (plaintiff who "paid for an effective pain killer, and . . .

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received just that" got "the benefit of her bargain" and could not allege any injury); *Travelers Indem. Co. v. Cephalon, Inc.*, 32 F. Supp. 3d 538, 555-56 (E.D. Penn. 2014) (dismissing claims against pharmaceutical manufacturer for failure to allege cognizable injury).

The FAC instead relies on conclusory assertions that the City's expenditures "helped sustain Defendants' businesses," and paid for Defendants' alleged externalities. FAC ¶ 289-90. These theories are unsupported by any adequately alleged *facts* and are far too conclusory and speculative to survive a motion to dismiss. *See Nika v. State*, 124 Nev. 1272, 1290, 198 P.3d 839, 852 (2008) (affirming dismissal of speculative claim).

While the City claims Manufacturer Defendants "made substantial profits" (*see* FAC ¶¶ 292-93), it does not claim that such profits "in equity and good conscience belong[] to another." *Unionamerica Mortg. & Equity Trust v. McDonald*, 97 Nev. 201, 212, 626 P.2d 1272, 1273 (1981). Manufacturer Defendants manufactured FDA-approved prescription opioids and provided physicians who were authorized by law to prescribe them with information relating to the products' risks and benefits. Physicians then determined whether prescription opioids were appropriate for their patients. There is nothing inequitable or unconscionable about Manufacturer Defendants retaining payment for medications physicians prescribed. The City's unjust enrichment claim must be dismissed.

IX. THE CITY'S PUNITIVE DAMAGES CLAIM AND ITS REQUEST FOR PUNITIVE, SPECIAL, AND EXEMPLARY DAMAGES AGAINST THE MANUFACTURER DEFENDANTS FAIL (COUNT VII)

The City's negligence, negligent misrepresentation, and unjust enrichment claims include requests for "punitive damages" and "special . . . damages." FAC ¶¶ 238, 255, 301. The City also purports to assert a separate claim for punitive damages in Count VII. No matter how framed, the City's request for punitive damages should be dismissed and/or stricken.

First, Nevada does not recognize a stand-alone cause of action for punitive damages. *Thompson v. Progressive Ins. Co.*, Case No. 57657, 2013 WL 210597, at *2 n.3 (Nev. 2013) (holding that appellant could not pursue a claim for punitive damages since it is not a separate or independent cause of action). This is consistent with other jurisdictions. *See*, *e.g.*, The Law of Torts § 483,

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Punitive damages and their bases, Dan B. Dobbs, Paul T. Hayden and Ellen M. Bublick (2d ed.) ("No cause of action exists for punitive damages as such.").

Second, the City's requests for "punitive" or "special" damages linked to its claims for negligence (Count III) (FAC ¶ 238), negligent misrepresentation (Count IV) (*id.* ¶ 255), and unjust enrichment (Count VI) (*id.* ¶ 301) should be stricken because Nevada law does not permit punitive damages for the types of conduct the City alleges.[10] As the Nevada Supreme Court has confirmed, "[a] plaintiff is never entitled to punitive damages as a matter of right." *Evans v. Dean Witter Reynolds, Inc.*, 116 Nev. 598, 612, 5 P.3d 1043, 1052 (2000) (quoting *Dillard Dept. Stores v. Beckwith*, 115 Nev. 372, 380, 989 P.3d 882, 887 (1999) (quotation omitted)). Instead, it must prove by clear and convincing evidence that the defendant engaged in "oppression, fraud or malice, express or implied." NRS 42.005(1). The statute requires intentional, wrongful conduct that evinces a culpable state of mind; negligence, even gross negligence or recklessness, is insufficient. *Countrywide Home Loans, Inc. v. Thitchener*, 124 Nev. 725, 742-43, 192 P.3d 243, 254-55 (2008) ("Since its language plainly requires evidence that a defendant acted with a culpable state of mind, we conclude that N.R.S. 42.001(1) denotes conduct that, at a minimum, must exceed mere recklessness or gross negligence."); *Ford v. Marshall*, 2013 WL 1092060, at ¶¶ 32-34 (January 7, 2013) ("Negligence claims exist for breaches of duty due to carelessness; if a mental state to cause injury existed, then the claim would be an intentional tort…Therefore, negligence-based claims alleged cannot, as a matter of law, support the 'culpable state of mind' necessary for punitive damages."). The City's claims for negligence and negligent misrepresentation (failure to exercise reasonable care in communicating allegedly false statements) and unjust enrichment (inequitable retention of a conferred benefit under the circumstances) do not involve willful, intentional, or knowing indifferent conduct, and, therefore, cannot support a claim for punitive damages.

Finally, the City has failed to allege facts showing oppression, fraud, or malice—the required "culpable state of mind"—by any of the Manufacturer Defendants. Indeed, most of the Manufacturer

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[10] The public nuisance counts (Counts I and II) expressly seek punitive damages only from other defendants. *See*, *e.g.*, FAC ¶¶ 198, 225.

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Defendants are not even specifically mentioned in the FAC beyond a cursory paragraph identifying them as defendants, with no factual allegations about these defendants to explain what they allegedly did that could even rise to the level of oppression, fraud, or malice under the statute.

Instead, the City merely parrots the statutory language without any factual support. *See*, *e.g.*, FAC ¶¶ 234-35, 254-55, 303-04. These conclusory assertions are insufficient to support punitive damages. *See Elliott v. Prescott Co., LLC*, 2016 WL 2930701, at *2-3 (D. Nev. May 17, 2016) (dismissing punitive damages claim based on Nevada law because complaint that alleged defendants "acted with conscious disregard of his safety or rights" relied on conclusory allegations and did not include sufficient facts to establish the requisite state of mind); *Desert Palace, Inc. v. Ace Am. Ins. Co.*, 2011 WL 810235, at *5 (D. Nev. Mar. 2, 2011) (dismissing punitive damages claim where the allegations did "little more than restate the common law elements of oppression, fraud, or malice by providing synonyms for the terms and providing no additional factual allegations").

CONCLUSION

For the foregoing reasons, the FAC should be dismissed with prejudice as against the Manufacturer Defendants.

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AFFIRMATION

The undersigned affirms that the preceding document does not contain personal information as described in WDCR 8.

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CERTIFICATE OF SERVICE

I hereby certify, under penalty of perjury, that I am an employee of McDonald Carano and that on this date, I served the within **MANUFACTURER DEFENDANTS' JOINT MOTION TO DISMISS FIRST AMENDED COMPLAINT** on the parties in said case by regular mail and electronically filing via the Court's e-filing system. The participants in this case are registered e-filing users and that service will be accomplished by e-filing to the following e-filing participants:

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I declare under penalty of perjury that the foregoing is true and correct.

Dated: March 4, 2019.

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF WASHOE

CITY OF RENO, Plaintiff, v. PURDUE PHARMA, L.P.; PURDUE PHARMA, INC.; THE PURDUE FREDERICK COMPANY, INC. d/b/a THE PURDUE FREDERICK COMPANY, INC.;	Case No.: CV18-01895 Dept. No.: 8 **DISTRIBUTORS' JOINT MOTION TO DISMISS FIRST AMENDED COMPLAINT**

PURDUE PHARMACEUTICALS, L.P.; TEVA PHARMACEUTICALS USA, INC.; McKESSON CORPORATION; AMERISOURCEBERGEN DRUG CORPORATION; CARDINAL HEALTH, INC.; CARDINAL HEALTH 6 INC.; CARDINAL HEALTH TECHNOLOGIES LLC; CARDINAL HEALTH 108 LLC d/b/a METRO MEDICAL SUPPLY;DEPOMED, INC; CEPHALON, INC.; JOHNSON & JOHNSON; JANSSEN PHARMACEUTICALS, INC.; JANSSEN PHARMACEUTICA, INC. n/k/a JANSSEN PHARMACEUTICALS, INC.;ORTHO-MCNEIL-JANSSEN PHARMACEUTICALS, INC. n/k/a JANSSEN PHARMACEUTICALS, INC.;ENDO HEALTH SOLUTIONS INC.; ENDO PHARMACEUTICALS, INC.; ALLERGAN USA, INC.; ALLERGAN FINANCE, LLC f/k/a ACTAVIS, INC. f/k/a WATSON PHARMACEUTICALS, INC.; WATSON LABORATORIES, INC.; ACTAVIS PHARMA,INC f/k/a WATSON PHARMA, INC.; ACTAVIS LLC; INSYS THERAPEUTICS, INC.,MALLINCKRODT, LLC:;MALLINCKRODT BRAND PHARMACEUTICALS INC.; and MALLINCKRODT US HOLDINGS, INC.; ROBERT GENE RAND, M.D. AND RAND FAMILY CARE, LLC; DOES 1 through 100; ROE CORPORATIONS 1 through 100; and ZOE PHARMACIES 1 through 100, inclusive,

Defendants.

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DISTRIBUTORS' JOINT MOTION TO DISMISS FIRST AMENDED COMPLAINT

COMES NOW, Defendants AmerisourceBergen Drug Corporation, Cardinal Health, Inc., Cardinal Health 6, Inc., Cardinal Health Technologies, LLC, Cardinal Health 108 LLC d/b/a Metro Medical Supply, and McKesson Corporation (collectively, "Distributors"), by and through their counsel of record, and hereby move this honorable Court to dismiss the First Amended Complaint ("Complaint"), pursuant to Nevada Rule of Civil Procedure 12(b)(5).

This Motion is made and based upon the following Memorandum of Points and Authorities, all papers and pleadings on file herein, and any oral argument this Court will entertain.

DATED this 4th day of March, 2019.

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MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

The problem of opioid abuse is real, but the attempt by the City to fix liability on Distributors—who neither promote opioids to doctors nor provide them to patients—is misplaced. The gist of the Complaint is that opioid manufacturers allegedly deceived doctors and the public by marketing opioid medications as non-addictive and effective for treating chronic pain. But the Complaint contains no factual allegations that ***Distributors*** misled doctors or the public about the risks, effectiveness, or addictive properties of opioid medications. And for good reason: Distributors are wholesalers, whose role in the pharmaceutical distribution chain is limited to filling orders placed by DEA-registered and state-licensed pharmacies. Distributors do not prescribe drugs to patients; doctors do that. Nor do Distributors provide drugs to patients; pharmacists do that. Against this backdrop, it is unsurprising that each of the City's claims against Distributors fails as a matter of law.

A. Regulatory Background

The manufacture, prescription, dispensing, and distribution of opioid medication are regulated extensively by multiple federal and state agencies:

Manufacturing. Under the federal Food, Drug, and Cosmetic Act, a prescription opioid may not be marketed or sold until the Food and Drug Administration has approved the drug as safe and effective for its intended use. 21 U.S.C. § 355(a)–(d). Once approved, if the drug is a schedule I or II controlled substance, the Attorney General is required to "establish production quotas … each calendar year to provide for the estimated medical, scientific, research, and industrial needs of the United States." 21 U.S.C. § 826(a); *see also* 21 C.F.R. §§ 1303.11, 1303.21.

Prescribing. Under the federal Controlled Substances Act ("CSA"), "no controlled substance in schedule II [including prescription opioids] … may be dispensed without the written prescription of a practitioner." 21 U.S.C. § 829(a). An opioid prescription "must be issued for a

legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice." 21 C.F.R. § 1306.04(a). "The responsibility for the proper prescribing and dispensing of controlled substances is upon the prescribing practitioner ...." *Id.*; *see also* NRS 639.23911.

Dispensing. Although the prescribing practitioner is responsible for the proper prescribing of controlled substances, federal law provides that "a corresponding responsibility rests with the pharmacist who fills the prescription." 21 C.F.R. § 1306.04(a). Prescriptions issued other than in the usual course of professional treatment are not considered legitimate prescriptions, "and the person knowingly filling such a purported prescription … shall be subject to the penalties provided for violations of the provisions of law relating to controlled substances." 21 C.F.R. § 1306.04(a).

Distributing. The CSA requires all wholesale distributors of controlled substances to obtain a registration from the DEA annually. 21 U.S.C. § 822(a)(1). In deciding whether to register an applicant, the DEA considers, among other things, whether the applicant maintains "effective control against diversion of particular controlled substances into other than legitimate medical, scientific, and industrial channels." *Id.* § 823(b). "Diversion" entails the "transfer of any legally prescribed controlled substance from the person for whom it was prescribed to another person for any illicit use."[1]

The CSA imposes two reporting requirements. It requires registered distributors to report to the Attorney General "***every*** sale, delivery or other disposal" of prescription opioids. 21 U.S.C. § 827(d)(1).[2] It also provides that distributors "shall design and operate a system to

[1] U.S. Dep't of Health & Human Servs., *Facing Addiction in America: The Surgeon General's Report on Alcohol, Drugs, and Health*, glossary at 2 (2016), https://addiction.surgeongeneral.gov/sites/default/files/surgeon-generals-report.pdf; *see also* Controlled Substances Quotas, 83 Fed. Reg. 32,784 (July 16, 2018) (defining diversion as the "redirection" of prescription opioids "into illicit channels."). The Distributors ask this Court to take judicial notice of this and the other government reports cited in the brief. *See* NRS 47.130, 47.140(8).

[2] All emphasis herein has been added and citations and quotation marks omitted, unless otherwise noted.

disclose to the registrant suspicious orders of controlled substances" and "inform [DEA] of suspicious orders when discovered by the registrant." 21 C.F.R. § 1301.74(b) (defining "suspicious orders" as "orders of unusual size, orders deviating substantially from a normal pattern, and orders of unusual frequency").

Nevada law mandates that Distributors "establish and maintain effective controls and procedures to prevent or guard against theft and misuse of controlled substances." *See* NAC 453.400 – Security of controlled substances. However, there is no requirement under Nevada law that distributors report "suspicious" orders to any State agency. Distributors likewise have no duty under Nevada statutes and regulations to determine the legitimacy of opioid prescriptions or to assess whether the total amount of prescription drugs entering the market as a whole or any given community is "excessive."

B. The City's Claims

The Complaint acknowledges that a distributor's role is a limited one: Distributors "purchased opioids from manufacturers … and distributed them to pharmacies throughout Reno." Compl. ¶ 67.[3] The City seeks to obscure this basic fact by frequently using the generic term "Defendants." But the Complaint makes clear that it is the Manufacturing Defendants that advertised and promoted prescription opioids, *id.* ¶¶ 86–130, not Distributors. And, unlike retail pharmacies, Distributors did not (and do not) "s[ell] opioids to residents of Reno." *Id.* ¶ 73.

The vast majority of the Complaint's factual allegations detail an "extensive marketing campaign" by the Manufacturing Defendants that caused physicians to prescribe opioids in greater and greater numbers, leading to the "the consequences of opioid over-prescription—including addiction, overdose, and death." *Id.* ¶¶ 170–71. Tellingly, the City does not allege

[3] In addition to Cardinal Health, Inc., the City named as defendants Cardinal Health 6 Inc. and Cardinal Health Technologies LLC, neither of which distribute opioids. The City also named as a defendant Cardinal Health 108 LLC d/b/a Metro Medical Supply, which also does not physically distribute opioids in Nevada. These entities therefore are not proper defendants in this action.

that ***Distributors*** made any such misrepresentations to doctors or the public. Regarding Distributors, the Complaint alleges only that they failed to report to DEA and halt shipment of "suspicious" pharmacy orders. *Id.* ¶ 188. But, the City fails to identify (i) a single pharmacy that placed a suspicious order or (ii) a single suspicious order that any Distributor should have reported and refused to ship. Indeed, there are no facts specific to Distributors' actions in Reno—or the State of Nevada—at all in the Complaint.

ARGUMENT

I. THE NEGLIGENT MISREPRESENTATION CLAIMS SHOULD BE DISMISSED.

To sustain a claim of negligent misrepresentation under Nevada law, a party must allege: (1) a false or misleading statement made in the context of a business transaction; (2) which is justifiably relied upon by the other party; (3) a failure to exercise reasonable care by the party making the statement; and (4) damages. *Bill Stremmel Motors, Inc. v. First Nat'l Bank of Nev.*, 94 Nev. 131, 134, 575 P.2d 938, 940 (1978); *see also Goodrich & Pennington Mortg. Fund, Inc. v. J.R. Wollard, Inc.*, 120 Nev. 777, 784, 101 P.3d 792, 796–97 (2004). The City cannot satisfy any of these elements.

First, the City does not allege that Distributors, as opposed to Manufacturers, made any misrepresentations. *See Halcrow, Inc. v. Eighth Jud. Dist. Ct.*, 129 Nev. 394, 400, 302 P.3d 1148, 1153 (2013) ("Liability is only imposed on a party who has supplied false information."). The City alleges that "Defendants, who, through deceptive means, and using one of the biggest pharmaceutical marketing campaigns in history, carefully engineered and continue to support a dramatic shift in the culture of prescribing opioids by falsely portraying both the risks of addiction and abuse and the safety and benefits of long-term use." Compl. ¶ 8. These allegations have nothing to do with Distributors. The sections of the Complaint titled "Defendants' Fraudulent Marketing" and "Defendants' Misrepresentations" describe exclusively the alleged advertising, marketing, and promotion of opioids by the Manufacturers. *See, e.g.*, Compl. ¶¶ 93–137. Distributors are not mentioned once. The substantive allegations against

Distributors pertain entirely to their alleged regulatory duties to monitor and report suspicious orders—duties that are not connected in any way to the marketing, advertising, or promotion of prescription opioids. *See, e.g.*, Compl. ¶¶ 152–53.

Second, given that the City has not alleged that Distributors made a false or misleading statement, the City also has not alleged that it relied on any misrepresentation by Distributors. Third, the tort of negligent misrepresentation cannot lie if the conduct at issue "does not fit squarely within a business or commercial transaction." *Barmettler v. Reno Air, Inc.* 114 Nev. 441, 449, 956 P.2d 1382, 1387 (1998); *see also Bill Stremmel Motors*, 94 Nev. at 134, 575 P.2d at 940 (adopting Section 552 of the Restatement (Second) of Torts).[4] The Complaint does not and cannot allege that Distributors made representations to the City "within the confines of a business transaction," as the City admits that Distributors' business transactions consisted exclusively of purchasing opioids from manufacturers and distributing them to pharmacies. Compl. ¶ 67. Under these circumstances, the negligent misrepresentation claim fails as a matter of law. *See, e.g.*, *Moretti v. Wyeth, Inc.*, 2009 WL 749532, at *3 (D. Nev. 2009) (granting summary judgment in favor of a drug manufacturer on a claim for negligent misrepresentation because there was no business transaction and the plaintiff never purchased a product from the defendant).

II. THE CITY'S PUBLIC NUISANCE CLAIM SHOULD BE DISMISSED.

"[I]n Nevada there is no private right of action for a public nuisance." *Diamond X Ranch LLC v. Atl. Richfield Co.*, 2017 WL 4349223, at *11 (D. Nev. Sept. 29, 2017). The City's civil public nuisance claim is not authorized by statute or the common law and is unprecedented under Nevada law. The Court therefore should dismiss the City's claim. Even if Nevada did recognize a civil public nuisance cause of action, the City's action would fail. The City seeks to

[4] Section 552 provides: "One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information." Restatement (Second) of Torts § 552 (1977).

regulate the entire prescription drug supply chain through a doctrine that Nevada courts never have extended to the licensed distribution of a lawful product.

A. The City's Statutory Public Nuisance Claim Fails.

The Complaint alleges that Distributors' conduct constitutes a statutory public nuisance under NRS 202 *et seq*. Compl. ¶ 179. But these statutes are enforceable only through criminal prosecutions, not civil suits. The statutes are under the criminal code, the violation of which is punishable by an order of abatement and penalties of up to $5,000—not compensatory damages. NRS 202.480; *see also* NRS 202.470 (person who "commit[s] or maintain[s] a public nuisance . . . shall be guilty of a misdemeanor"). The City cannot bring a civil public nuisance claim premised upon the criminal nuisance statute. *See Coughlin v. Tailhook Ass'n, Inc.*, 818 F. Supp. 1366, 1372 (D. Nev. 1993) ("there is no indication that § 202.450 et seq. was intended to create a private cause of action"). Nor is there an alternative means for bringing a civil public nuisance claim under Nevada law. "Other than the criminal public nuisance statute, the only . . . nuisance cause of action recognized under Nevada law … is a civil cause of action for private nuisance." *Coughlin v. Tailhook Ass'n, Inc.*, 818 F. Supp. 1366, 1372 (D. Nev. 1993). The City does not (and cannot) allege that Distributors created a private nuisance. The City's claim thus is an improper attempt to co-opt criminal nuisance statutes to recover civil tort damages and should be dismissed.

Even if there were a private right of action to enforce NRS 202.450, the City's claim still would fail. Since at least 1890, the Nevada Supreme Court has made clear that this statute incorporates (and does not relax) the elements of common law public nuisance. *See Fogg v. Nevada C.O. Ry. Co.*, 20 Nev. 429, 23 P. 840, 841–42 (1890) (rejecting argument that "section 251 of the civil practice act … changes the common–law" of nuisance). Thus, liability under NRS 202.450 can be found only if the claim satisfies the common law requirements of public nuisance and, for the reasons explained below, the City's common law nuisance claim fails as a matter of law. *See infra* Part II.B.

The City's statutory claim also fails on its own terms. The Complaint alleges that Distributors violated NRS 202.450(2)(e), which provides that ***the place*** "***wherein*** a controlled substance … is ***unlawfully*** sold, served, stored, kept, manufactured, used or given away … is a public nuisance." *Id.* The City does not state a violation of NRS 202.450(2)(e) for two reasons.

First, the provision plainly is directed at illicit drug dealing, and Distributors are licensed by DEA and the Nevada Board of Pharmacy to sell FDA-approved prescription opioids to licensed pharmacies. The Complaint does not allege that Distributors sold non-FDA-approved prescription opioids, sold prescription opioids to unlicensed pharmacies or other individuals, failed safely to store or transport prescription opioids, or even that Distributors' sale of prescription opioids violated any federal or state regulation. Rather, the City alleges that Distributors negligently failed to report and halt shipment of suspicious orders. But no Nevada court has ever found that a violation of Section 202.450(2)(e) is satisfied by allegations of negligence (particularly, the failure to follow a federal regulation where Congress has vested the agency with exclusive enforcement authority, as here).[5]

Second, even if NRS 202.450 could be satisfied when a DEA-licensed wholesale distributor negligently performs its duties with respect to reporting suspicious orders, the statute provides that the nuisance is the physical location where the sale occurs, not the sale itself. NRS 202.450 ("***Every place*** … wherein a controlled substance, immediate precursor or controlled substance analog is unlawfully sold, served, stored, kept, manufactured, used or given away … is a public nuisance."). For example, if a dealer sells cocaine from his home, the dealer's home constitutes a public nuisance. The City has not alleged that the physical locations where Distributors sold prescription opioids constitute a nuisance in and of themselves. Accordingly, the City's attempt to plead statutory public nuisance under Section 202.450(2)(e) fails.

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[5] *See infra* Part III.A.

B. The City's Common Law Public Nuisance Claim Fails.

The City's common-law nuisance claim fails because it does not allege that Distributors (1) interfered with a public right or (2) had control over the instrumentality of the nuisance at the time it was created.

1. Interference with a public right

Nevada courts, like those in every other jurisdiction, recognize that the common law public nuisance tort requires invasion of ***public*** rights. *See Fogg*, 20 Nev. 429, 23 P. at 842–43 (a public nuisance is an interference with a right "common to every person who exercises the right" and produces a "common injury"); *see also* Restatement (Second) of Torts § 821B (1979) ("A public nuisance is an unreasonable interference with a right common to the general public.").

Public rights are those rights that are shared equally by all members of the public, like access to air, water, or rights-of-way. Restatement (Second) of Torts § 821B cmt. g (stating that a public right "is collective in nature"); *see also State v. Lead Indus. Ass'n, Inc.*, 951 A.2d 428, 453 (R.I. 2008) ("A necessary element of public nuisance is an interference with a public right—those indivisible resources shared by the public at large, such as air, water, or public rights of way."). A private right, on the other hand, is an individual right or a right shared by a limited number of persons, such as "the individual right that everyone has not to be assaulted or defamed or defrauded or negligently injured." Restatement (Second) of Torts § 821B cmt. g; *see also City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1116 (Ill. 2004) (noting that "the [purported] public right asserted by plaintiffs is merely an assertion, on behalf of the entire community, of the individual right not to be assaulted").

The Complaint fails to identify a public right with which Distributors interfered. It is not any of the public rights discussed in the case law—not clean air and water, unobstructed sidewalks and streets, or quiet neighborhoods. It certainly cannot be any right having to do with prescription opioids because there is no commonly held right to use prescription drugs, particularly controlled substances. Only persons with a legitimate medical need can obtain opioids and, even then, only by prescription if a doctor determines that the benefits outweigh the

risks for that patient. And any right to be safe from defective products, including prescription drugs, is an individual right governed by product liability law. Restatement (Second) of Torts § 821B cmt. g ("Conduct does not become a public nuisance merely because it interferes with the use and enjoyment of land by a large number of persons."); *see Lead Indus.*, 951 A.2d at 448 (a public right is "more than an aggregate of private rights by a large number of injured people"); *City of Chicago v. Am. Cyanamid Co.*, 823 N.E.2d 126, 131 (Ill. App. Ct. 2005) (public nuisance is more than "an assortment of claimed private individual rights"). Nor is there any public right to be free from the use or misuse of prescription drugs by others. Any right to be free from harm inflicted by others due to drug use (or any other reason) is an individual right governed by product liability law. *See* Restatement (Second) of Torts § 821B cmt. g; *see also Lead Indus.*, 951 A.2d at 448 ("Products generally are purchased and used by individual consumers, … any harm they cause—even if the use of the product is widespread and the manufacturer's or distributor's conduct is unreasonable—is not an actionable violation of a public right."); *City of Chicago*, 821 N.E.2d at 1116 ("[W]e are reluctant to state that there is a public right to be free from the threat that some individuals may use an otherwise legal product … in a manner that may create a risk of harm to another.").

Nor does the fact that the opioid crisis is a pressing public health problem indicate that a public right is at issue; rather, such a crisis is actionable under nuisance law ***only if*** it results from the invasion of public rights. For example, the Rhode Island Supreme Court held that paint companies' marketing and distribution of lead-based paint did not interfere with a public right even though the court acknowledged that "lead poisoning constitutes a public health crisis that has plagued and continues to plague this country, particularly its children." *Lead Indus.*, 951 A.2d at 436. Many other courts similarly have rejected public nuisance claims in the face of undisputed and significant public health and public safety crises relating to lead paint, firearms, and asbestos, among others.[6] These holdings recognize that the threshold question of the public

[6] *See, e.g.*, *In re Lead Paint Litig.*, 924 A.2d 484 (N.J. 2007); *City of Chicago*, 821 N.E.2d 1099 (handguns); *Ganim v. Smith & Wesson Corp.*, 780 A.2d 98 (Conn. 2001) (same);

nuisance doctrine is whether the alleged conduct interferes with a public right. Only after that question is answered in the affirmative is the court to consider whether that interference is unreasonable, the test for which is whether "the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public inconvenience." Restatement (Second) of Torts § 821B.

Nor is a public right coextensive with the "public interest"; what might benefit (or harm) the public interest is a vastly broader category of conduct than only the conduct that violates a public right and it is the court's duty to maintain the distinction. *See Lead Indus.*, 951 A.2d at 448 (citing Gifford, *supra*, at 815). Otherwise, the concept of a "public right" would be "so broad and undefined that the presence of any potentially dangerous instrumentality in the community could be deemed to threaten it." *City of Chicago, Corp.*, 821 N.E.2d at 1116.

2. Control over the nuisance

It is hornbook law that a party cannot be held liable in nuisance unless the party controlled the instrumentality of the nuisance at the time it was created. *E.g., Lead Indus.*, 951 A.2d at 449 ("As an additional prerequisite to the imposition of liability for public nuisance, a defendant must have control over the instrumentality causing the alleged nuisance *at the time the damage occurs*." (emphasis in original)).[7] Here, the nuisance plainly occurred only after a

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Allegheny General Hosp. v. Philip Morris, Inc., 228 F.3d 429 (3d Cir. 2000) (tobacco); *Detroit Bd. of Educ. v. Celotex Corp.*, 493 N.W.2d 513 (Mich. Ct. App. 1992) (asbestos). *Ashley Cnty., v. Pfizer, Inc.*, 552 F.3d 659, 671–72 (8th Cir. 2009) (cold medicine).

[7] *See also Ashley Cnty., Ark. v. Pfizer, Inc.*, 552 F.3d 659, 663, 671 & n.5, 672 (8th Cir. 2009) (affirming dismissal of counties' public nuisance claim against distributors); *Traube v. Freund*, 775 N.E.2d 212, 216 (Ill. App. Ct. 2002) (noting that the "absence of a manufacturer's control over a product *at the time the nuisance is created* is generally fatal"); *Penelas v. Arms Tech., Inc.*, 1999 WL 1204353, at *4 (Fla. Cir. Ct. Dec. 13, 1999) ("[A] party cannot be held liable for nuisance absent control of the activity which creates the nuisance."), *aff'd*, 778 So. 2d 1042 (Fla. Dist. Ct. App. 2001); *Gelman Scis., Inc. v. Dow Chem. Co.*, 508 N.W.2d 142, 144 (Mich. Ct. App. 1993) ("Because a seller in a commercial transaction relinquishes ownership and control of its products when they are sold, it lacks the legal right to abate whatever hazards its products may pose."); *Camden Cnty. Bd. of Chosen Freeholders v. Beretta, U.S.A. Corp.*, 273 F.3d 536, 541 (3rd Cir. 2001) (finding that county "has failed to allege that the manufacturers exercise sufficient control over the source of the

Distributor delivered the medications to licensed pharmacies, and indeed, occurred only after pharmacies dispensed the medications to patients. Once Distributors have delivered the drugs to a licensed pharmacy, they have no control over the drugs or whether the patient gives the pills to family and friends, sells them, or leaves them unprotected in the bathroom medicine cabinet.[8]

C. The City's Claim Is an Unprecedented Expansion of Public Nuisance Law.

The City's public nuisance claim is unprecedented. Common law public nuisances are rarely found in Nevada, and when they are upheld, involve interference with or misuse of property, public resources, or public highways. No Nevada court has ***ever*** held that the distribution of a lawful product can constitute a public nuisance, let alone a product that is not distributed directly to consumers, not available to the public as a matter of right and does not interfere with public property, resources, or highways. The City's theory is extreme and would stretch public nuisance law in Nevada beyond the breaking point. *City of Philadelphia v. Beretta U.S.A. Corp.*, 126 F. Supp. 2d 882, 910 (E.D. Pa. 2000) ("The refusal of many courts to expand public nuisance law to the manufacturing, marketing, and distribution of products conforms with the elements of public nuisance law."), *aff'd*, 277 F.3d 415 (3d Cir. 2002).

Several states have denounced nuisance claims like these in a recent amicus brief to the United States Supreme Court:

> [I]n recent years, state and local governments have sought to use public nuisance lawsuits for a new purpose: to regulate broad societal problems through litigation or failing that, to enable mass transfers of wealth from industry to preferred groups. ***These new regulatory***

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interference with the public right"); *Tioga Pub. Sch. Dist. No. 15 of Williams Cnty. v. U.S. Gypsum Co.*, 984 F.2d 915, 920 (8th Cir. 1993) ("[N]uisance law does not afford a remedy against the manufacturer of an asbestos-containing product [because] a defendant who had sold an asbestos-containing material to a plaintiff lacked control of the product after the sale."); *City of Bloomington v. Westinghouse Elec. Corp.*, 891 F.2d 611, 614 (7th Cir. 1989) ("[A] manufacturer almost by definition cannot 'control' the product past the point of sale and is therefore automatically exculpated from liability for any event after the sale.").

[8] According to DEA, more than half of all adults who misused opioids obtained the opioids from family or friends. *See* U.S. Dep't of Justice, Drug Enf't Admin., *2017 National Drug Threat Assessment* 33–34 (2017), https://tinyurl.com/natldrugthreat.

> ***nuisance lawsuits drift far afield of the original common law understanding of public nuisance doctrine***. Instead of seeking to redress a particular injury caused by a particular defendant, they seek to enact societal change or massive wealth transfers through the court system by holding entire industries responsible for broad societal harms. In other words, such lawsuits seek to regulate (or at least punish) industry in the absence of legislative enactments.

Brief of Indiana et al., *ConAgra Products Company v. California*, Nos. 18-84 & 18-86 (U.S. Aug. 16, 2018) (attached as Exhibit 1) at 3–4, 15. *See also Lead Indus.*, 951 A.2d at 456 ("The law of public nuisance never before has been applied to products, however harmful."); *In re Lead Paint Litig.*, 924 A.2d 484, 505 (N.J. 2007) (rejecting public nuisance claim that would "permit these plaintiffs to supplant an ordinary product liability claim with a separate cause of action as to which there are apparently no bounds"); *Tioga Pub. Sch. Dist. v. U.S. Gypsum Co.*, 984 F.2d 915, 921 (8th Cir. 1993) ("Nuisance thus would become a monster that would devour in one gulp the entire law of tort.").[9]

A Delaware court recently rejected that State's attempt to apply public nuisance law to claims based upon Distributors' sales of opioid medications. *State of Delaware ex rel. Jennings*

[9] *See also Dist. of Columbia v. Beretta*, 872 A.2d 633, 650–51 (D.C. 2005) (declining to adopt a right of action for public nuisance applied to the manufacture and sale of guns generally, "where an effect may be a proliferation of lawsuits not merely against these defendants but against other types of commercial enterprises … in order to address a myriad of societal problems" (alterations omitted)); *People ex rel. Spitzer v. Sturm, Ruger & Co.*, 761 N.Y.S.2d 192, 196 (N.Y. App. Div. 2003)("[G]iving a green light to a common-law public nuisance cause of action today will … likely open the courthouse doors to a flood of limitless, similar theories of public nuisance … against a wide and varied array of other commercial and manufacturing enterprises."); *Detroit Bd. of Educ. v. Celotex Corp.*, 493 N.W.2d 513, 521 (Mich. Ct. App. 1992) (holding that "manufacturers, sellers, or installers of defective products may not be held liable on a nuisance theory for injuries caused by the defect"); *City of Philadelphia v. Beretta U.S.A. Corp.*, 126 F. Supp. 2d 882, 909 (E.D. Pa. 2000) (recognizing that "courts across the nation have begun to refine the types of cases amenable to a nuisance theory"); *Sills v. Smith & Wesson Corp.*, 2000 WL 33113806, at *7 (Del. Super. Ct. Dec. 1, 2000) ("Delaware has yet to recognize a cause of action for public nuisance based upon products."); *Penelas v. Arms Technology, Inc.*, 1999 WL 1204353, at *6 (Fla. Cir. Ct. Dec. 13, 1999) ("Public nuisance does not apply to the design, manufacture, and distribution of a lawful product. A separate body of law (strict product liability and negligence) has been developed to apply to the manufacture and design of products."); *see also* Ohio Rev. Code § 2307.71(A)(13) (abrogating product-based public nuisance claims).

v. Purdue Pharma L.P., C.A. No. N18C-01-223 (Del. Super. Ct. Feb. 4, 2019) (attached as Ex. 2). The court explained that most jurisdictions "have refused to allow products-based public nuisance claims," and dismissed the claim on that basis, as well as because the State failed to satisfy the elements of public right and control. *Id.* at 32–34.

D. The Remedies Sought Are Not Available in an Action for Public Nuisance.

The City seeks "compensatory damages[] and punitive damages … , attorney fees and costs, and pre- and post-judgment interest." Compl. ¶¶ 198, 225. But money damages are not available under the criminal statute invoked by the City, which limits recovery to penalties (of "not more than $5,000") and injunctive relief (i.e., an "order of abatement"). *See* NRS 202.480(1).

Nor are the monetary damages sought by the City—all of which relate to past costs incurred in treating addiction—available at common law for two reasons. First, abatement is a prospective remedy:

> ***An abatement order is an equitable remedy***, while damages are a legal remedy. An equitable remedy's sole purpose is to eliminate the hazard that is causing prospective harm to the plaintiff. ***An equitable remedy provides no compensation to a plaintiff for prior harm***. Damages, on the other hand, are directed at compensating the plaintiff for prior accrued harm that has resulted from the defendant's wrongful conduct. The distinction between these two types of remedies frequently arises in nuisance actions.

People v. ConAgra Grocery Prod. Co., 227 Cal. Rptr. 3d 499, 569 (Ct. App. 2017).

Second, where abatement costs are permitted, they are limited to the costs of abating the nuisance—or, in other words, eliminating or removing the conduct or condition that is interfering with the public's rights. *ConAgra* is again instructive. Despite endorsing an expansive conception of public nuisance, the court nevertheless mandated that "the abatement account would be utilized not to recompense anyone for accrued harm but solely to pay for the prospective removal of the hazards defendants had created." *Id.* The alleged nuisance is not addiction; rather, as pleaded, the purported nuisance is Distributors' alleged over-supply of

prescription opioids. Thus, the Counties' abatement costs do not include the treatment of addiction.

III. THE NEGLIGENCE CLAIM SHOULD BE DISMISSED.

A Nevada plaintiff must prove four elements to sustain a negligence claim: (1) the existence of a duty of care; (2) breach of that duty; (3) legal causation; and (4) damages. *Turner v. Mandalay Sports Entm't*, 124 Nev. 213, 217, 180 P.3d 1172, 1175 (2008). The gravamen of the City's Complaint is that Distributors breached a duty to monitor and report suspicious pharmacy orders. *See, e.g.*, Compl. ¶¶ 138–152, 263. This reporting requirement was the creation of the federal Controlled Substances Act ("CSA") and its implementing regulations. Because there is no private right of action to enforce the CSA, the City may not assert a negligence claim based on Distributors' purported federal regulatory violations. In the absence of such a private right of action, the City's negligence claim could survive only if Distributors had a common-law duty to report suspicious opioid orders. There is no such duty, and there is no evidence of any breach by Distributors. As such, the City's negligence claim fails as a matter of law.

A. The City Fails To Allege The Existence of a Duty.

The City's claims against Distributors are premised on alleged violations of duties arising under the federal CSA and the Nevada Uniform Controlled Substances Act, adopted by the Nevada legislature as NRS 453.005-453.730 ("Nevada CSA"). *See, e.g.*, Compl. ¶ 139. Because there is no private right to enforce those statutes, and because there is no independent common law duty to report or halt "suspicious" opioid orders, the City's claim fails as a matter of law.

1. No private right

There is no private right of action to enforce the federal CSA. The DEA is "the primary federal agency responsible for the enforcement of the Controlled Substances Act." DEA, *Practitioner's Manual, An Informational Outline of the Controlled Substances Act* 4 (2006 ed.). The courts recognize that "according to its plain terms, '[t]he [CSA] is a statute enforceable only

by the Attorney General and, by delegation, the Department of Justice.'" *Smith v. Hickenlooper*, 164 F. Supp. 3d 1286, 1290 (D. Colo. 2016) (alterations in original) (quoting *Schneller v. Crozer Chester Med. Ctr.*, 387 F. App'x 289, 293 (3d Cir. 2010) (per curiam)), *aff'd sub nom. Safe Sts. All. v. Hickenlooper*, 859 F.3d 865 (10th Cir. 2017). Nothing in the text or structure of the federal CSA suggests that Congress intended to confer legal rights—much less an enforceable private remedy—on the states (or any other political subdivision). *See Smith*, 164 F. Supp. 3d at 1290; *McCallister*, 164 F. Supp. 2d at 793 n.16 (finding no such "legislative intent"). Consequently, "federal courts"—including in the opioid litigation—"have uniformly held that the [federal] CSA does not create a private right of action." *Smith*, 164 F. Supp. 3d at 1290; *State of West Virginia v. McKesson Corp.*, No. 2:17-03555 (S.D. W. Va. Feb. 15, 2018) (ECF No. 21), at 14–15 (attached as Ex. 3); *McKesson Corp. v. Hembree*, 2018 WL 340042, at *5 (N.D. Okla. Jan. 9, 2018).

There likewise is no private right of action to enforce the Nevada CSA. As a threshold matter, the Nevada CSA does not require Distributors to report suspicious orders to any Nevada authority. Similar to its federal counterpart, the Nevada CSA authorizes civil penalties to "be recovered in a civil action, brought in the name of the State of Nevada by the Attorney General or by any district attorneys in a court of competent jurisdiction." NRS 453.553(1). It does not authorize civil tort actions to be brought against wholesale distributors by cities within Nevada.

Nor is there any basis under Nevada law to imply a private right of action to enforce the obligations set out in the federal or Nevada CSAs. In the absence of an explicit provision by the Legislature, the court determines whether a statute provides an implied private right of action by evaluating "(1) whether the plaintiffs are 'of the class for whose [ ] special benefit the statute was enacted;' (2) whether the legislative history indicates any intention to create or to deny a private remedy; and (3) whether implying such a remedy is 'consistent with the underlying purposes of the legislative [sch]eme.'" *Baldonado*, 124 Nev. at 958–959, 194 P.3d at 100–01.[10]

[10] *See generally Fangman v. Genuine Title, LLC*, 447 Md. 681, 702-03, 136 A.3d 772 (2016) (no implied private cause of action); *Baker v. Montgomery Co.*, 50 A.3d 1112, 1124–25

The City plainly is not in the "special class" for whose benefit the federal CSA was enacted. Nor is there any indication of a legislative intent to create a private right of action: as described above, the courts unanimously conclude that there was no intent on the part of Congress in enacting the federal CSA to create a private right of action and that doing so would not be consistent with the legislative scheme of the federal CSA.

Because the City has no express or implied right of action under either the federal or Nevada statute, the City cannot bring a negligence claim premised on a violation of either statute. *See Allstate Ins. Co. v. Thorpe*, 123 Nev. 565, 573 & n. 22, 170 P.3d 989, 996 (2007). In *Thorpe*, the Nevada Supreme Court held that no private right of action existed under the applicable statute, and that the plaintiff was obligated to seek administrative review of its claim. *Id.* at 573. The Supreme Court went on to conclude that the plaintiff was barred from filing a separate common law action for negligence "[b]ecause the [plaintiff's] negligence and other claims stemmed solely from" their alleged statutory violations. *Id.* at 573 n. 22; *see also Cardiello v. Venus Group, Inc.*, 2013 WL 7158504, at *1 (Nev. 2013) (upholding dismissal of negligence claim premised on employer-defendant's alleged violation of workers' compensation insurance coverage statute that "does not create a private right of action").

A recent decision by a New York trial court in an opioid case also is instructive. *See Floyd v. Feygin, et al.*, 2018 WL 6528728 (N.Y. Sup. Ct. Dec. 06, 2018). There, an opioid addict sued the product's manufacturer for negligence, alleging that the manufacturer breached duties "by failing to design, implement, and operate a system to disclose suspicious orders of Oxycodone, and by failing to establish, implement, and follow an abuse and diversion detection program." The court began by noting that the obligation to report suspicious orders and maintain effective controls against diversion were set out in the federal CSA and "its New York State law equivalent"—and that neither statute contained a private right of action. While the plaintiff argued that the federal and state statutes created duties that the plaintiff could enforce via a

(2012); *Scull v. Groover, Christie & Merit, PC*, 76 A.3d 1186, 1189 (2013) (same); *Fangman v. Genuine Title, LLC*, 447 Md. 681, 702–03, 136 A.3d 772 (2016) (same).

negligence action, the court disagreed, holding that the state-law negligence claim was "preempted" by the statutes.

The same conclusion is warranted here. Distributors' alleged duty to report suspicious orders and maintain effective controls against diversion is a creature of the federal CSA, while both the federal CSA and its Nevada counterpart require Distributors to maintain effective controls against theft. Both federal and state regulators are empowered under those statutes to enforce their provisions. Neither statute, however, contains a private right of action. And neither authorizes the City to enforce the detailed regulatory regime governing the distribution of controlled substances via a common-law negligence action.

2. No duty

Because the City cannot assert a negligence claim based on alleged violations of the CSA, its negligence claim should be dismissed unless it can identify an independent common law duty that Distributors owe the City. The existence of a duty is a question of law. *Butler ex rel. Biller v. Bayer*, 123 Nev. 450, 461, 168 P.3d 1055, 1063 (2007). There is no such duty for several reasons.

First, the Complaint fails to allege any harm to the City that was "foreseeable" to Distributors. *See Ashwood v. Clark Cnty.*, 113 Nev. 80, 84, 930 P.2d 740, 742 (1997) ("Foreseeability of harm is, of course, a predicate to establishing the element of duty."). The City alleges that Manufacturers' marketing campaign "accomplished exactly what [manufacturers] set out to do: change the institutional and public perception of the risk-benefit assessments and standard of care" for long-term prescribing of opioids to treat chronic pain, Compl. ¶ 170, "fuel[ing] a new wave of addiction and abuse." *Id.* ¶ 172. Precisely because the standard of care changed, DEA authorized a 39-fold increase of the manufacturing quotas for prescription opioids between 1993 and 2015, based on its expert judgment that there was an increasing legitimate medical need for opioids throughout the United States.[11] But if the

[11] *See* 21 U.S.C. § 826(a); Letter from Senators Richard Durbin, *et al.* to Chuck Rosenberg, Acting Adm'r, DEA (July 11, 2017), https://www.durbin.senate.gov/imo/media/doc/

standard of care changed, then doctors cannot be faulted for prescribing in good faith pursuant to that new standard, nor pharmacies for filling those good-faith prescriptions, nor Distributors for supplying the pharmacies' orders. Thus, to claim that Distributors (who are not alleged to have any special knowledge regarding the thousands of different drugs they deliver) should have foreseen the City's alleged harm is to contend that they should have second-guessed both the City doctors who prescribed opioid medications and DEA.[12]

Second, Distributors have no duty to prevent the conduct of third parties who illegally divert opioids after they have left Distributors' custody. Under Nevada law, there is no duty to control the conduct of third parties in the absence of a "special relationship." *See, e.g., Sanchez ex rel. Sanchez v. Wal-Mart Stores, Inc.*, 125 Nev. 818, 824, 221 P.3d 1276, 1280 (2009). In *Sanchez*, the defendant pharmacy had ***actual notice*** that a patient had obtained thousands of hydrocodone pills, making it foreseeable that the patient might harm someone. The Nevada Supreme Court found that the pharmacy had no duty to prevent the patient from doing harm to others and that the pharmacist-patient relationship was not a "special relationship" giving rise to a duty. *Sanchez*, 125 Nev.at 824, 221 P.3d at 1280. The City has not pled any facts suggesting that Distributors have a "special relationship" with it—let alone with the doctors, pharmacists, or patients who criminally diverted the opioids that Distributors lawfully delivered to pharmacies within the City. Distributors cannot prevent individuals from doctor-shopping, taking pills from family or friends, or buying opioids on the black market.

Senate%20Ltr%20to%20DEA%20on%202018%20Opioid%20Production%20Quotas.pdf; Drug Enforcement Agency, Aggregate Production Quota History for Selected Substances 2003–2013 (Oct. 2, 2012), https://web.archive.org/web/20130904184612/http:/www.deadiversion.usdoj.gov/ quotas/quota_history.pdf.

[12] Even if the City's alleged harm were "foreseeable" to Distributors, which it was not, "foreseeability" is not always sufficient to create a duty. In *Ashwood*, the plaintiff asserted it was foreseeable that people would need access to a barn exit in the event of an emergency. The Nevada Supreme Court held that the defendant had no duty to provide an open exit, as the plaintiff's injury was not the sort "foreseeable harm" that would give rise to a duty. *Ashwood*, 113 Nev. At 84, 930 P.2d at 742.

Third, imposing a duty through the common law would thwart the objectives of the federal and state agencies charged with regulating wholesale distributors of controlled substances. Prescription opioids can bring vital pain relief to patients, but they can cause injury, addiction or death if misused. The charge of regulators is to balance the legitimate medical need of patients against the risk of diversion into illegitimate channels. How these regulators determine whether a controlled substance may be manufactured, prescribed, dispensed, or distributed directly affects the supply of prescription drugs. These regulators possess specific subject-matter expertise and the authority to promulgate rules that enable them to make these complex, policy-driven judgments. Allowing the City, through tort litigation, to use the blunt instrument of common law decision-making to determine the circumstances under which Distributors' conduct was reasonable or unreasonable would encroach on these federal and state regulatory enforcement prerogatives and insert the Court into a medical policy debate. The Court should avoid this risk and leave such matters to the responsible regulators.

Finally, even assuming that Distributors have a duty to report or prevent suspicious orders, the Complaint should still be dismissed because that duty does not run to the City. To state a claim for negligence, a complaint must plead that the "defendant owes the plaintiff a duty of care," which is a question of law. *Rodriguez v. Primadonna Company,* 125 Nev. 578, 584, 216 P.3d 793, 798 (2009). Distributors do not have any relationship with the City that conceivably could give rise to a duty; they purchase pharmaceuticals from manufacturers and sell them to licensed pharmacies.

B. The Complaint Fails To Allege that Distributors Breached Any Duty.

As an element of its negligence claim, the City must establish that Distributors breached a duty to it. *Turner,* 124 Nev. at 217, 180 P.3d at 1175 (2008). The Complaint fails to allege any facts suggesting that Distributors breached their purported duty to report and halt suspicious opioid orders: it does not identify any pharmacy that placed excessive orders with Distributors, and it does not identify any specific order that Distributors should have reviewed or refused to

fill, let alone tie any such order to the City's alleged injuries. For this reason, too, the negligence claim fails as a matter of law.

IV. THE TORT CLAIMS FAIL AS A MATTER OF LAW FOR ADDITIONAL REASONS.

A. The City Fails To Plead Proximate Causation.

Proximate causation is an element of the City's claims. *See, e.g.*, *Clark Cty. Sch. Dist. v. Richardson Const., Inc.*, 123 Nev. 382, 395, 168 P.3d 87, 96 (2007) (recognizing that, "[i]n tort actions," proximate cause is an "essential element of the plaintiff's claim"). An act is the proximate cause of an injury where "the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances." *Van Cleave v. Kietz-Mill Minit Mart*, 97 Nev. 414, 416, 633 P.2d 1220, 1221 (1981) (per curiam). The City fails adequately to plead that Distributors' actions were the proximate cause of any of the alleged harms underlying its claims.

To understand why this is so, it is important to consider the two ways in which City residents could be injured by opioid use, for which injuries the City alleges it ultimately foots the bill. First, an individual could suffer addiction or overdose after taking opioids pursuant to a valid, good-faith prescription.[13] Distributors do not cause these injuries at all; Distributors have no ability to prevent prescriptions from being filled, nor would anyone want them to. Nevada courts have recognized that pharmacies generally are not liable for filling prescriptions for individuals who go on to be injured by them. *See Klasch v. Walgreen Co.*, 127 Nev. 832, 837–38, 264 P.3d 1155, 1158–59 (2011). *A fortiori* Distributors, who have no choice in (or even knowledge of) which prescriptions are filled, are not liable if those prescriptions ultimately cause harm.

[13] The City alleges that doctors were deceived by Manufacturers' marketing into writing too many of these prescriptions, *see, e.g.*, Compl. ¶ 11, but that fact does not implicate Distributors' conduct at all.

Alternatively, the City could incur costs when a resident voluntarily chooses to abuse opioids. Distributors are not the proximate cause of these costs, either, because an individual who voluntarily chooses to abuse opioids is the sole proximate cause of the harms stemming from their own conduct. In the alcohol context, the Nevada Supreme Court has consistently followed the "common law rule that ***consuming*** alcoholic beverages, and not furnishing them, is the proximate cause of third party alcohol-related injuries." *Snyder v. Viani*, 110 Nev. 1339, 1342, 885 P.2d 610, 612 (1994). Employing similar reasoning, courts consistently have dismissed attempts by individuals who abuse drugs to recover for their own wrongful conduct. *See Price v. Purdue Pharma Co.*, 920 So. 2d 479, 486 (Miss. 2006) (en banc); *Kaminer v. Eckerd Corp. of Fla., Inc.*, 966 So. 2d 452, 453 (Fla. Dist. Ct. App. 2007); *Foister*, 295 F. Supp. 2d at 705; *Orzel by Orzel v. Scott Drug Co.*, 537 N.W.2d 208, 217–18 (Mich. 1995). That same logic applies equally here; individuals who abuse opioids are the sole proximate cause of the City's harms stemming from their abuse.

Proximate cause also is absent because the connection between Distributors' allegedly wrongful act and the City's alleged expenditures is too attenuated to satisfy the requirement. *See Van Cleave*, 97 Nev. at 417 (affirming summary judgment and finding "nothing to suggest" that defendants "had any reason to foresee" multi-step causal chain between sale of alcohol and auto accident); *see also, e.g.*, *Allegheny Gen. Hosp. v. Philip Morris Inc.*, 228 F.3d 429, 440 (3d Cir. 2000) (finding that causation chain between tobacco companies' alleged fraud and payors' injuries was "much too speculative and attenuated"); *Ass'n of Wash. Pub. Hosp. Dists. v. Philip Morris Inc.*, 241 F.3d 696, 707 (9th Cir. 2001) (same).

The court responsible for the coordinated opioid litigation in Connecticut recently dismissed the claims of municipalities against Distributors—claims that are identical to those of the City—for this very reason. *City of New Haven v. Purdue Pharma, L.P., et al.*, No. X07 HHC CV 17 6086134 (Conn. Super. Ct. Jan 8, 2019) (attached as Ex. 4). In its opinion, the Connecticut court explained that there are four steps—not even counting the pharmacist who

dispenses the medication—between the alleged conduct of Distributors and harm to the cities.[14] Given this lengthy causal chain, the court found that the "[b]lindingly complex" calculations needed to "sort out who caused what" were beyond the competency of a court to assess, and it accordingly dismissed the cases in their entirety. *Id.* The speculation required by the City's claims is particularly fraught given that multiple links in the chain of causation potentially include criminal actors, whose actions are frequently not foreseeable. *See Thomas v. Bokelman*, 86 Nev. 10, 13, 462 P.2d 1020, 1022 (1970); *Wood v. Safeway, Inc.*, 121 Nev. 724, 740–41, 121 P.3d 1026, 1037 (2005). For these reasons, the City has failed to plead proximate causation.

B. The Derivative Injury Rule Bars the City's Claims.

The City seeks to recover as damages the costs of providing medical, emergency, and law enforcement services to its citizens, including "costs related to diagnosis, treatment, and cure of addiction to opioids." Compl. ¶ 233; *see also id.* ¶¶ 40, 181, 253, 269. The City's alleged injuries thus are derivative: "Without injury to the individual [opioid users], the [City] would not have incurred any increased costs …." *Laborers Local 17 Health & Benefit Fund v. Philip Morris, Inc.*, 191 F.3d 229, 239 (2d Cir. 1999). The City is precluded from recovering for such derivative injuries—at least in the absence of a valid subrogation claim—as a matter of law.

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[14] Ex. 4 at 6–7 ("Link 1: The manufacturers make the opioids. Link 2: The manufacturers sell the opioids to the distributors. Link 3: The distributors sell the opioids to a pharmacy. Link 4: Doctors prescribe the opioids. Link 5: Patients take them. Link 6: Some patients become addicted. Link 7: The city must give emergency and social services to some addicts while the city's quality of life, property values and crime rate worsen from the spread of addiction, further straining city resources…. Link 8. Pills get loose and are sold on the black market creating other costly addicts. Link 9. Pills get too expensive or scarce for some addicts who turn to more accessible stocks of street fentanyl or heroin, creating costly addicts.").

There is also a second, equally attenuated chain of causation. Insofar as the State alleges that a Distributor was negligent for failing to report suspicious orders to the DEA or state regulatory authorities, the causal chain involves: (1) the report to DEA, (2) DEA's discretionary decision to investigate the order, (3) DEA's determination that the order signifies likely diversion, (4) DEA's discretionary decision to take enforcement action against the pharmacy or a physician, (5) DEA's successful prosecution of the action, and (6) a resulting change in the way the pharmacy dispenses or the physician prescribes.

"The usual common law rule is that a [third-party payor] has no direct cause of action in tort against one who injures the [payor's] beneficiary, imposing increased costs upon the [payor]." *United Food & Commercial Workers Unions, Emp'rs Health & Welfare Fund v. Philip Morris, Inc.*, 223 F.3d 1271, 1274 (11th Cir. 2000) (citing *Anthony v. Slaid*, 52 Mass. 290, 290–91 (1846)). Thus, "[f]or more than 100 years state and federal courts have adhered to the principle (under both state and federal law) that the victim of a tort is the proper plaintiff, and that insurers or other third-party providers of assistance and medical care to the victim may recover only to the extent their contracts subrogate them to the victim's rights." *Int'l Bhd. of Teamsters, Local 734 Health & Welfare Tr. Fund v. Philip Morris Inc.*, 196 F.3d 818, 822 (7th Cir. 1999).[15]

Association of Washington Public Hospital Districts v. Philip Morris Inc., 241 F.3d 696 (9th Cir. 2001), is instructive. There, public hospital districts—which were "political subdivisions" of the state—sought "to recover their increased costs for treating their patients' tobacco-related illnesses" from tobacco companies. *Id.* at 700. The Ninth Circuit affirmed dismissal of the claims, because the damages sought were "derivative of the injuries suffered by smokers." *Id.* at 703; *see id.* at 707. The hospital districts' allegation that, without the tobacco companies' conduct, their patients "might have suffered from fewer tobacco-related diseases, with the result that [they] might have incurred lower tobacco-related treatment costs" was "the very essence of a derivative injury." *Id.* at 704. *Accord Or. Laborers-Emp'rs Health & Welfare Tr. Fund v. Philip Morris Inc.*, 185 F.3d 957, 963 (9th Cir. 1999) (affirming dismissal of third-party payors' claims against tobacco companies, because "without any injury to smokers,

[15] *Accord E. States Health & Welfare Fund v. Philip Morris, Inc.*, 188 Misc. 2d 638, 646 (N.Y. Sup. Ct. 2000) ("[F]or more than one century, state and federal courts have adopted the theory that the victim of a tort is the appropriate plaintiff and that third-party providers of medical care may recover only pursuant to rights of subrogation."); *State v. Philip Morris Inc.*, 1997 WL 540913, at *9 (Md. Cir. Ct. May 21, 1997) ("At common law a plaintiff had no right to recover damages from a defendant tortfeasor as a result of the defendant's injuries, harm, or lack of care to a third person ….").

plaintiffs would not have incurred the additional expenses in paying for the medical expenses of those smokers").

The Connecticut court responsible for the consolidated opioid litigation in that state recently adopted the same view. *City of New Haven v. Purdue Pharma., L.P.*, 2019 WL 423990 (Conn. Super. Ct. Jan. 8, 2019). The court dismissed all claims brought by various municipalities against manufacturers and distributors of opioids, noting that the municipalities, like the City here, sought to recover for "indirect harm," including medical expenses resulting from the opioid crisis. Because the parties ***directly*** injured by the defendants' alleged conduct were the residents who used the opioid medicines, the court held that the municipalities' allegations were "too attenuated to support a claim." *Id.* at *4.

The same conclusion is warranted here. "[W]ithout any injury to [opioid users], [the City] would not have incurred the additional expenses" that it now seeks to recover. *Oregon Laborers*, 185 F.3d at 963. The City does not assert subrogation rights on behalf of its allegedly injured citizens. Accordingly, its claims to recover for the costs of providing opioid-related medical treatment, as well as other services to residents who are allegedly harmed by the opioid addictions of others, should be dismissed.

C. The Free Public Services Doctrine Bars the City's Claims.

The City seeks "recoupment of governmental costs," including "significant expenses for police, emergency, health, prosecution, corrections and other services" allegedly attributable to Defendants' conduct. Compl. ¶¶ 192, 194. Its claims thus are barred by the free public services doctrine (also sometimes referred to as the municipal cost recovery rule), which precludes municipalities from recovering in tort for the cost of providing public services to their citizens.

The "general common-law rule" is that, "absent authorizing legislation," the cost of public services "is to be borne by the public as a whole, not assessed against the tortfeasor whose negligence creates the need for the service." *District of Columbia v. Air Fla., Inc.*, 750 F.2d 1077, 1080 (D.C. Cir. 1984). Numerous jurisdictions apply the doctrine to preclude

governments from asserting claims seeking reimbursement of medical, police, and other costs incurred in the performance of public duties.[16]

City of Chicago v. Beretta U.S.A. Corp., 821 N.E.2d 1099 (Ill. 2004), is instructive. There, the Illinois Supreme Court held that the free public services doctrine barred claims brought by Chicago against gun manufacturers and distributors seeking to recover compensation for law enforcement and medical expenditures incurred as a result of gun violence. *Id.* at 1143–47. In so doing, the Court explained that the doctrine precludes claims by municipalities even

[16] *See, e.g., County of Erie v. Colgan Air, Inc.*, 711 F.3d 147, 149–51 (2d Cir. 2013) (doctrine barred claims against an airline for costs of responding to an airplane crash); *Canyon County v. Syngenta Seeds, Inc.*, 519 F.3d 969, 979–80 (9th Cir. 2008) (observing that "common law doctrine barring government recovery of the costs of public safety services in tort supports" holding that "costs of … law enforcement and public health care services are not recoverable damages under civil RICO"); *Air Fla.*, 750 F.2d at 1080 (adopting rule against recovery of municipal costs and noting that "where a generally fair system for spreading the costs of accidents is already in effect—as it is here through assessing taxpayers the expense of emergency services—we do not find the argument for judicial adjustment of liabilities to be compelling"); *City of Flagstaff v. Atchison, Topeka & Santa Fe Ry. Co.*, 719 F.2d 322, 324 (9th Cir. 1983) (barring recovery under Arizona law, absent express authorization by "statute or regulation," for the "normal provision of police, fire, and emergency services"); *State v. Black Hills Power, Inc.*, 354 P.3d 83, 85–86 (Wyo. 2015) ("[A]bsent specific statutory authorization, a governmental entity cannot recover the costs of providing public services from a tortfeasor whose conduct caused the need for such services."); *Walker County v. Tri-State Crematory*, 643 S.E.2d 324, 327 (Ga. Ct. App. 2007) ("Georgia, like many jurisdictions, has adopted the common-law free public services doctrine." (footnote omitted)); *Baker v. Smith & Wesson Corp.*, 2002 WL 31741522, at *4 (Del. Super. Ct. Nov. 27, 2002) (adopting "the general rule in force in other jurisdictions [] that public expenditures made in the performance of governmental functions are not recoverable from a tortfeasor in the absence of a specific statute" (footnotes omitted)); *Ganim v. Smith & Wesson Corp.*, 1999 WL 1241909, at *6 & n.7 (Conn. Super. Ct. Dec. 10, 1999) (noting "general rule prohibiting recoupment of municipal expenditures"), *aff'd*, 780 A.2d 98 (Conn. 2001); *Bd. of Supervisors of Fairfax Cty. v. U.S. Home Corp.*, 1989 WL 646518, at *2 (Va. Cir. Ct. Aug. 14, 1989) (adopting "general rule that a municipal corporation may not recover for emergency services rendered in situations caused by a private tortfeasor"); *County of San Luis Obispo v. Abalone All.*, 223 Cal. Rptr. 846, 851 (Cal. Ct. App. 1986) ("[A] government entity may not, as the County seeks to do in this case, recover the costs of law enforcement absent authorizing legislation."); *City of Pittsburgh v. Equitable Gas Co.*, 512 A.2d 83, 84 (Pa. Cmwlth. 1986) ("The cost of public services for protection from a safety hazard is to be borne by the public as a whole, not assessed against a tortfeasor whose negligence creates the need for the service").

where they allege "ongoing misconduct so pervasive that it creates a public nuisance." *Id.* at 1146. The court explained that where "[g]overnmental entities … currently bear the cost in question" and "have taken no action to shift it elsewhere," the "legislature and its public deliberative processes, rather than the court, is the appropriate forum to address such fiscal concerns." *Id.* at 1144–45 (quoting *City of Flagstaff*, 719 F.2d at 324).

There can be no doubt that the free public services doctrine bars recovery of the broad categories of damages the City seeks. The City seeks damages including "governmental costs" such as "expenses for police, emergency, health, prosecution, corrections and other services" allegedly arising from "[t]he diversion of opioids into the secondary, criminal market" and the increase in opioid addiction. Compl. ¶¶ 192, 194, 197(h); *see also, e.g.*, *id.* ¶¶ 35, 181, 195, 222, 233. These are plainly "police and other emergency services" costs that municipalities cannot recover under the rule without explicit statutory authorization. *Beretta*, 821 N.E.2d at 1145.

D. The Statewide Concern Doctrine Bars the City's Claims.

The City's claims are also preempted because they seek to encroach on enforcement authority vested solely in the State.

"The plenary authority of a legislature operates to restrict and limit the exercise of all municipal powers, whether public or governmental, proprietary or private." *Lamb v. Mirin*, 90 Nev. 329, 333, 526 P.2d 80, 82 (1974). "Whenever a legislature sees fit to adopt a general scheme for the regulation of [a] particular subject, local control over the same subject … ceases." *Id.* at 332, 82. Moreover, city governments are bound by "Dillon's Rule"—which "provides that if there is any fair or reasonable doubt concerning the existence of a power, that doubt is resolved against the [local government] ***and the power is denied***."[17] NRS 244.137(2), (4);

[17] The Nevada legislature recently modified Dillon's Rule for boards of county commissioners, but not for cities. NRS 244.137(7)(a) (the new statute "must not be interpreted to modify Dillon's Rule with regard to … [a]ny local governing body other than a board of county commissioners").

Ronnow v. City of Las Vegas, 57 Nev. 332, 65 P.2d 133, 136 (1937) (Dillon's rule applies to "municipal corporation[s]").

"In determining whether the legislature intended to occupy a particular field to the exclusion of all local regulation, the Court may look to the whole purpose and scope of legislative scheme." *Lamb*, 90 Nev. at 332, 526 P.2d at 82. "In no event may a [local government] enforce regulations which are in conflict with the clear mandate of the legislature." *Id.* at 333, 82. Nor may a city circumvent these restrictions by attempting to achieve through litigation what it could not do by regulation. *See Cleveland v. JP Morgan Chase Bank, N.A.*, 2013 WL 1183332, at *6 (Ohio Ct. App. Mar. 21, 2013) ("The [United States] Supreme Court has also held that the controlling effect of a money judgment stemming from common-law suits may constitute regulation in the federal preemption context." (citing *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 324–25, 128 S. Ct. 999, 1008 (2008)).

The Legislature has made clear that Nevada municipalities may regulate matters only of local concern. NRS 244.143 The statute, moreover, expressly states that a matter is ***not*** of local concern if it there is a need for uniform statewide standards or if the conduct is "subject to substantial regulation by a federal or state agency." *Id.* As described above, both Nevada and federal law impose detailed and comprehensive sets of regulations on the wholesale distribution of controlled substances under Chapter 639 of the Nevada Revised Statutes. *See supra* Part III.A; *see also* Compl. ¶ 158 ("The Nevada State Board of Pharmacy has been licensing and regulating the practices of pharmaceutical wholesalers in Nevada since 1967."); NRS 639.090 ("The members of the Board … are designated and constituted agents for the enforcement and carrying out of the provisions of this chapter …."); NRS 639.540(1) ("The Board shall ensure the safe and efficient operation of wholesalers and the integrity and propriety of transactions involving the purchase and sale of prescription drugs by wholesalers…."). This statutory framework "provide[s] compelling evidence that the Legislature intended to exclusively occupy this particular field," and thus that the City's claims are barred. *See Douglas Cty. Contractors Ass'n v. Douglas Cnty.*, 112 Nev. 1452, 1464, 929 P.2d 253, 260 (1996).

E. The Economic Loss Doctrine Bars the City's Claims.

In the absence of personal injury or injury to property, Nevada's economic loss doctrine bars a plaintiff from recovering "purely economic losses" as a result of an unintentional tort. *Terracon Consultants Western, Inc. v. Mandalay Resort Group*, 125 Nev. 66, 73, 206 P.3d 81, 86 (2009) (holding that the economic loss doctrine barred professional negligence claim for purely economic losses related to deficient engineering advice that caused foundation problems in resort building, citing *Local Joint Exec. Bd. v. Stern*, 98 Nev. 409, 411, 651 P.2d 637, 638 (1982)).

Additionally, in the absence of specific exceptions the City cannot allege, the economic loss doctrine bars negligent misrepresentation claims for purely economic losses. *See Halcrow, Inc. v. Eighth Jud. Dist. Ct.*, 129 Nev. 394, 400, 302 P.3d 1148, 1153 (2013), *as* corrected (Aug. 14, 2013) 129 Nev. At 400, 302 P.3d at 1153) (applying the economic loss doctrine to a negligent misrepresentation claim in the commercial construction context and noting that exceptions exist for negligent misrepresentation claims only in specific cases, such as: "defamation, intentionally caused harm, negligent misstatements about financial matters, and loss of consortium.").

The Nevada Supreme Court has explained that the policy underpinnings of the economic loss doctrine demand that the doctrine be applied in the negligence context:

> [A]llowing … plaintiffs to sue under a negligence theory for purely economic losses without accompanying personal injury or property damage would [defeat] the primary purpose of the economic loss doctrine: to shield a defendant from unlimited liability for all of the economic consequences of a negligent act, particularly in a commercial or professional setting, and thus to keep the risk of liability reasonably calculable.

Terracon, 125 Nev. at 74. The Court emphasized that its "conclusion about the … doctrine's application to negligence actions [was that,] unless there is personal injury or property damage, a plaintiff may not recover in negligence for economic losses." *Id.* (citation to *Stern* omitted).

The City denies that it is seeking to recover for any physical injury to its person or property. Compl. ¶ 41. Instead, it repeatedly references various economic harms, including

"excessive costs related to diagnosis, treatment, and cure of addiction to opioids," "bearing the massive costs of these illnesses and conditions by having to provide resources for care, treatment facilities, and law enforcement services" for City residents, and "using City resources in relation to opioid use and abuse." Compl. ¶¶ 253, 269. These are precisely the sort of claims that are barred by the economic loss doctrine.

V. THE CITY'S UNJUST ENRICHMENT CLAIM SHOULD BE DISMISSED.

The City's unjust enrichment claim fails for several reasons. First, the claim is based on the same alleged conduct underlying its other claims and should be dismissed as duplicative. *See United States ex rel. Benitez v. Galliano, LLC*, 2018 WL 2247279, at *13 (D. Nev. Jan. 26, 2018) (dismissing unjust enrichment claim as duplicative); *McFarland v. Long*, 2017 WL 4582268, at *3 (D. Nev. Oct. 7, 2017) (same).

Second, the Complaint fails to allege that the City conferred a benefit on Distributors, let alone a ***direct*** benefit. *Unionamerica Mortg. & Equity Tr. v. McDonald*, 97 Nev. 210, 212, 626 P.2d 1272, 1273 (1981); *see Tsambis v. Irvine*, 2018 WL 3186940, at *9 (D. Nev. June 28, 2018) (dismissing complaint where "[n]one of the[] allegations indicate that the plaintiff ***directly*** conferred a benefit on the defendants"). Rather, as the Complaint makes clear, the City's expenditures conferred a benefit directly on "its residents and employees." Compl. ¶ 35. The unjust enrichment claim therefore should be dismissed. *See, e.g.*, *Tropicana Entm't Inc. v. N3A Mfg., Inc.*, 2017 WL 1330197, at *4 (D. Nev. Apr. 5, 2017) (dismissing unjust enrichment claim where "complaint fails to allege that any money was specifically paid to any of the individual defendants"); *see also Sunrise Hosp. & Med. Ctr., LLC v. Ariz. Physicians IPA, Inc.*, 2018 WL 3419250, at *3 (D. Nev. July 13, 2018) (rejecting unjust enrichment claim seeking reimbursement from alleged third party payor of medical expenses); *Valley Health Sys. LLC v. Aetna Health, Inc.*, 2016 WL 3536519, at *4 (D. Nev. June 28, 2016) (same).[18]

[18] Several district court cases—usually in dicta—misread *Topaz Mutual Co., Inc. v. Marsh*, 108 Nev. 845, 839 P.2d 606 (1992), as holding that an indirect benefit can support an unjust enrichment claim. *See, e.g.*, *Villa v. First Guar. Fin. Corp.*, 2010 WL 2953954, at *5 (D. Nev. 2010). *Topaz* did not so hold. Instead, *Topaz* remanded for a new trial regarding "the

The City fares no better with its assertion that it paid for Distributors' "externalities." Compl. ¶ 290. That an economist can trace a cost incurred by A to the activities of B—and labels it an "externality"—does not mean that A's cost benefitted B. Nor does it mean that B has a legal duty to reimburse A. This is because "no rule of law requires persons whose acts cause harm to cover all of the costs, unless these acts were legal wrongs." *Int'l Bhd. of Teamsters, Local 734 Health & Welfare Tr. Fund v. Philip Morris Inc.*, 196 F.3d 818, 823 (7th Cir. 1999); *see City of Miami v. Citigroup Inc.*, 801 F.3d 1268, 1274, 1277 (11th Cir. 2015) (being "forced to pay for [a defendant's] externalities" does "not fit within an unjust enrichment framework").

An example may illustrate the point. The use and abuse of alcohol by City residents and visitors undoubtedly generates increased social costs or "externalities"—including increased health care expenses and crime, for example. But the City does not have a claim for unjust enrichment against liquor distributors because it does not confer any sort of benefit on those distributors when it incurs expenses relating to alcohol use and abuse within the City. There is absolutely no principled basis on which to distinguish claims against pharmaceutical distributors and liquor distributors. Thus, to hold that the City has a claim against Distributors based on the harms caused by the misuse and abuse of the products they sell would open the floodgates to claims against the sellers of all lawful products.

Third, the Complaint fails to allege that Distributors sought a benefit from the City. *See Cox v. PNC Bank, Nat'l Ass'n*, 2017 WL 4544421, at *3 (D. Nev. Oct. 10, 2017). In *Cox*, the court dismissed an unjust enrichment claim against a bank in possession of property on which the plaintiff had made improvements at the request of the former owner. *Id.* The court explained that "the improvements were not made at the request of [the defendant bank], and the Complaint

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extent of … [any] unjust enrichment" where there was evidence that defendants "may have directly benefited" from loan proceeds used to postpone foreclosure and to fund improvements on their ranch. *Topaz*, 108 Nev. at 856, 839 P.3d at 613. The great weight of authority holds that a benefit conferred on a third party cannot support an unjust enrichment claim. *See, e.g.*, *Sunrise*, 2018 WL 3419250, at *3; *Tsambis*, 2018 WL 3186940, at *9; *Tropicana*, 2017 WL 1330197, at *4; *Valley Health*, 2016 WL 3536519, at *4.

does not allege that any communications occurred between [the bank] and Plaintiff at any time." *Id.* Likewise here, Distributors did not request that the City provide services to its residents or employees or otherwise communicate with the City.

Fourth, the Complaint does not allege that Distributors were aware of and appreciated the benefit allegedly conferred on them. *Unionamerica*, 97 Nev. at 212, 626 P.2d at 1273; *see also Allegiant Air, LLC v. AAMG Mktg. Grp., LLC*, 2015 WL 6709144, at *3 (Nev. Oct. 29, 2015) ("To appreciate a benefit, the party must have knowledge of the benefit."). The Complaint relies entirely on the allegation that "Defendants are aware of this obvious benefit." Compl. ¶ 291. "Such conclusory allegations are insufficient to state a plausible claim for relief based on unjust enrichment." *Ocwen Loan Servicing, LLC v. Borgert*, 2017 WL 2683680, at *4 (D. Nev. June 21, 2017).

Finally, the City has not alleged an injustice: one of its essential responsibilities is providing social services to its residents, and it "had no reasonable expectation of payment" for those services from Distributors. *See Allegiant*, 2015 WL 6709144, at *3.

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CONCLUSION

For the foregoing reasons, the City's claims against Distributors should be dismissed.

AFFIRMATION

I declare under penalty of perjury under the law of the State of Nevada that the foregoing document does not contain the Social Security number of any person.

Dated this 4th day of March, 2019.

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CERTIFICATE OF SERVICE

Pursuant to Rule 5(b), I hereby certify that on this date, the foregoing **DISTRIBUTORS' JOINT MOTION TO DISMISS FIRST AMENDED COMPLAINT** was filed electronically with the Second Judicial District Court of Nevada. Electronic service of the foregoing document shall be made in accordance with the E-Service list as follows:

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DATED this 4th day of March, 2019.

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EXHIBIT 1

EXHIBIT 1

Nos. 18-84, 18-86

IN THE
Supreme Court of the United States

CONAGRA GROCERY PRODUCTS COMPANY, ET AL.,
Petitioners,
v.
CALIFORNIA,
Respondent.

THE SHERWIN-WILLIAMS COMPANY,
Petitioner,
v.
CALIFORNIA,
Respondent.

On Petitions for Writ of Certiorari to the Court of Appeal of California

BRIEF OF INDIANA, LOUISIANA, TEXAS, UTAH, AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the Due Process Clause of the Fourteenth Amendment prohibits a State from arbitrarily imposing liability for lawful activity regardless of causation.

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INTEREST OF THE *AMICI* STATES[1]

The States of Indiana, Louisiana, Texas, Utah, and Wyoming respectfully submit this brief as *amici curiae* in support of Petitioners. At common law, the attorney general had the power to prevent and abate public nuisances. *See State v. Warren*, 180 So. 2d 293, 299 (Miss. 1965); *People v. Miner*, 2 Lans. 396 (N.Y. App. Div. 1868). Traditionally, that power included the ability to require a person having control over a public nuisance to abate it. More recently, however, some state and local governments have attempted to wield public nuisance lawsuits as a weapon against a variety of societal ills, regardless whether their chosen defendants caused the nuisance or have the ability to abate it in any meaningful way.

Amici are States that seek to police the boundaries of public nuisance lawsuits. Cases such as this that enable courts to impose liability arbitrarily with no proof that the defendants caused any harm or can abate it in any recognizable way denigrate the appropriate power of attorneys general to abate legitimate public nuisances and threaten to undermine the Anglo-American tradition of justice. For these reasons, Amici urge the Court to grant the petitions and reverse the judgment of the California Court of Appeal.

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[1] Pursuant to Supreme Court Rule 37.2(a), counsel of record for all parties have received notice of the Amici States' intention to file this brief at least 10 days prior to the due date of this brief.

SUMMARY OF THE ARGUMENT

This case concerns the Due Process limits on a State's ability to impose liability arbitrarily and retroactively as part of a broader scheme to remedy societal harms. California attempts to employ public nuisance law as a weapon for regulation of the paint industry—or, more precisely, to extract penalties for long-ago participation in a lead paint industry that no longer exists. In so doing, it has required Petitioners to pay damages for conditions that they neither caused nor have any control over. This theory of liability goes far beyond any traditional understanding of public nuisance law.

At common law and during the colonial years, public nuisance law was a method of tempering invasions on public rights, such as the use of public lands or the upholding of public morality. But during the Industrial Revolution, States began to experiment with using public nuisance law as a means of regulation. In more recent years, States have attempted to expand public nuisance law to deal with a variety of problems, from tobacco-related healthcare costs to global climate change. These theories of liability, exemplified by this case, dispose with traditional notions of causation in favor of requiring industry groups to abide by broad injunctions or pay large amounts of damages, theoretically to "abate" "nuisances," but really to substitute a deep-pocketed scapegoat for an actual responsible party.

In other contexts, this Court has imposed constitutional limitations on the ability of States and state

courts to arbitrarily assign liability. For instance, courts have rejected public nuisance claims that implicate political questions or have been displaced by statutory regulation. The Commerce Clause and the constitutional requirements of personal jurisdiction also impose limits on the ability of public nuisance lawsuits to regulate out-of-state conduct. And the Court has applied notions of "substantive" due process to limit the amount of punitive damages that courts may impose. This case presents an opportunity for the Court to consider another possible constitutional limitation on expansive and amorphous liability: whether due process prohibits the imposition of retroactive liability without proof of causation.

Amici urge this Court to grant certiorari in order to answer this important federal question.

REASONS FOR GRANTING THE PETITIONS

I. This Case Exemplifies a Recent Trend Where State and Local Governments Use Public Nuisance Lawsuits as Weapons for Wealth Transfers and Social Change

Public nuisance law is derived from hundreds of years of common law tradition. But in recent years, state and local governments have sought to use public nuisance lawsuits for a new purpose: to regulate broad societal problems through litigation or failing that, to enable mass transfers of wealth from industry to preferred groups. These new regulatory nuisance lawsuits drift far afield of the original common law

understanding of public nuisance doctrine. Yet previously-recognized constitutional restraints have proved insufficient to reign them in.

1. At twelfth-century English common law, public nuisance was a criminal offense for infringing on the rights of the Crown. Victor E. Schwartz & Phil Goldberg, *The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort*, 45 Washburn L.J. 541, 543 (2006). The offenses most commonly took the form of purprestures, or encroachments upon royal lands. Restatement (Second) of Torts § 821B (1979). The attorney general could bring suit for injunctive relief to abate the nuisance by stopping infringement and repairing damage to the King's property. Schwartz & Goldberg, *supra*, at 543.

Beginning in the fourteenth century, public nuisance law expanded to include not only the rights of the Crown itself, but also those of the general public, including "the right to safely walk along public highways, to breathe unpolluted air, to be undisturbed by large gatherings of disorderly people and to be free from the spreading of infectious diseases." *Id.* at 543–44 (internal citation omitted). Courts weighed the value of the conduct against the harm it caused to determine whether it merited criminal punishment. *Id.* at 544. And in 1535, nuisance law expanded to allow private damages for *individuals* who suffered an injury different in kind than that of the general public. *Id.*

The American colonies, and later the States, inherited the English common law tradition of public

nuisance. *Id.* at 545. Historically, American public nuisance lawsuits involved "non-trespassory invasions of the public use and enjoyment of land," "the obstruction of public highways and waterways," and "using property in ways that conflicted with public morals or social welfare," such as "gambling halls, taverns, or prostitution houses." *Id.*

During the Industrial Revolution, public nuisance evolved as a theory for seeking relief where legislatures could not keep up with changing technology. *Id.* at 545–46. Such lawsuits included claims against factories for water pollution and claims against railroads for noise and air pollution, the latter of which were largely unsuccessful as long as the railroad operated in accordance with the expectations of the legislature. *Id.* at 546.

In the early twentieth century, state legislatures began codifying nuisance law either by defining public nuisance broadly or by declaring specific activities to be nuisances, such as "engaging in the sale of intoxicating liquors," "conducting bawdy or assignation houses," or "maintaining gambling houses." Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. Cin. L. Rev. 741, 804 (2003) (internal citation omitted). These statutes made it easier for state attorneys general to bring criminal prosecutions for nuisance or suits for injunctive relief. *Id.* at 805. Private lawsuits for monetary damages were much less common. *Id.*

During the New Deal era, Congress and state legislatures began passing comprehensive statutory

schemes to regulate everything from railroads to alcohol sales. The new regulations lessened the need to use the common law of public nuisance as a means of addressing these problems. The use of public nuisance lawsuits for regulatory purposes tapered off. *Id.* at 805–06.

In the 1970s, fueled by the broad definition of public nuisance in the Second Restatement of Torts, courts experienced a resurgence of public nuisance lawsuits in the context of environmental regulation. Gifford, *supra*, at 806–09. In *Diamond v. General Motors Corp.*, 97 Cal. Rptr. 639, 641 (Cal. Ct. App. 1971), a class of property owners in Los Angeles County sued a group of automobile manufacturers, petroleum refiners, gasoline-filling stations, and owners of industrial plants seeking both damages and injunctive relief for air pollution. The case was the first of its kind seeking to hold product manufacturers, rather than the actual polluters, responsible for the amorphous problem of air pollution in Los Angeles County. *Id.* at 641–42; *see also* Gifford, *supra*, at 750; Schwartz & Goldberg, *supra*, at 548–49. The court rejected class certification, explaining that "[p]laintiff is simply asking the court to do what the elected representatives of the people have not done: adopt stricter standards over the discharge of air contaminants in this county, and enforce them with the contempt power of the court." *Diamond*, 97 Cal. Rptr. at 645.

In the 1980s, after courts refused to hold asbestos manufacturers strictly liable for the presence of asbestos in homes and schools, plaintiffs turned to public nuisance theory. Gifford, *supra*, at 751; Matthew

R. Watson, Comment, *Venturing into the "Impenetrable Jungle": How California's Expansive Public Nuisance Doctrine May Result in an Unprecedented Judgment Against the Lead Paint Industry in the Case of* County of Santa Clara v. Atlantic Richfield Company, 15 Roger Williams U.L. Rev. 612, 617–18 (2010). In *Detroit Board of Education v. Celotex Corp.*, 493 N.W.2d 513, 516 (Mich. Ct. App. 1992), a class of public and private schools sued manufacturers whose asbestos products were used in their buildings. As in *Diamond*, plaintiffs in *Detroit Board of Education* sought to hold manufacturers liable for damages to abate the nuisance even though they no longer retained control of their products. *Id.* at 517. The court held that public nuisance was not a viable theory because it would "significantly expand, with unpredictable consequences, the remedies already available to persons injured by products." *Id.* at 521. The court further explained that nuisance liability may not "be imposed on a party whose only act was to create the nuisance," *id.*, because "[d]efendants now lack the legal right to abate whatever hazards their products may pose," *id.* at 522.

But in the 1990s, States began turning to public nuisance theories to target manufacturers, and in particular to hold tobacco companies liable for state Medicaid expenditures on tobacco-related health problems. Gifford, *supra*, at 753; Schwartz & Goldberg, *supra*, at 554. Over forty States sued tobacco companies seeking Medicaid reimbursement under a variety of legal theories, including public nuisance. National Association of Attorneys General, *State Attorneys General Powers and Responsibilities* 387

(Emily Myers ed., 3d ed. 2013). However, these legal theories never faced a definitive test in court because the cases settled. *Id.* at 388.

Also during the late 1990s and early 2000s, States and municipalities sought to hold firearm manufacturers liable for gun violence by way of public nuisance law. Schwartz & Goldberg, *supra*, at 555–57. But unlike the environmental and asbestos lawsuits, some of the firearm cases were successful in court. For example, in *City of Gary ex rel. King v. Smith & Wesson Corp.*, 801 N.E.2d 1222, 1234 (Ind. 2003), the Indiana Supreme Court held that a City's public nuisance claim did not violate due process because "a nuisance claim may be predicated on a lawful activity conducted in such a manner that it imposes costs on others." *See also White v. Smith & Wesson*, 97 F. Supp. 2d 816 (N.D. Ohio 2000); *City of Boston v. Smith & Wesson Corp.*, 12 Mass. L. Rptr. 225 (Mass. Super. Ct. 2000); *City of Cincinnati v. Beretta U.S.A. Corp.*, 768 N.E.2d 1136 (Ohio 2002).

But more courts rejected the same theories. In *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1116 (Ill. 2004), the court first held that the right to be free from gun violence was not a public, but an individual, right. It then held that "the alleged public nuisance is not so foreseeable to the dealer defendants that their conduct can be deemed a legal cause of a nuisance that is the result of the aggregate of the criminal acts of many individuals over whom they have no control." *Id.* at 1138; *see also City of Philadelphia v. Beretta U.S.A. Corp.*, 277 F.3d 415 (3d Cir. 2002); *Camden Cnty. Bd. of Chosen Freeholders v.*

Beretta, U.S.A. Corp., 273 F.3d 536 (3d Cir. 2001); *Ganim v. Smith & Wesson Corp.*, 780 A.2d 98 (Conn. 2001); *Young v. Bryco Arms*, 821 N.E.2d 1078 (Ill. 2004).

2. States next sought to remedy the societal ill of deteriorated lead paint through public nuisance lawsuits, but courts largely rejected such theories for the lack of a causal connection as traditionally required by public nuisance law. *See* Watson, *supra*, at 619.

In *City of St. Louis v. Benjamin Moore & Co.*, 226 S.W.3d 110, 113 (Mo. 2007), the City brought a nuisance suit against lead paint manufacturers seeking damages for the costs of abating lead paint in private residences. The court rejected the suit because the City could not show that "the particular defendant actually caused the problem." *Id.* at 116.

Similarly, in *City of Chicago v. American Cyanamid Co.*, 823 N.E.2d 126, 128 (Ill. App. Ct. 2005), the City alleged that the defendant paint manufacturers had created a public nuisance by promoting lead-based paint for residential use. The court "conclude[d] that plaintiff has failed to allege sufficient facts to show that defendants were the cause in fact of the alleged nuisance." *Id.* at 136.

Then, in *In re Lead Paint Litigation*, 924 A.2d 484, 501 (N.J. 2007), the court rejected the public-nuisance claim brought by twenty-six New Jersey municipalities against lead paint companies because, even assuming "that the continuing presence of lead paint in homes qualifies as an interference with a common

right sufficient to constitute a public nuisance for tort purposes," "plaintiffs' complaints aim wide of the limits of that theory" because they seek to hold liable a defendant that has no control over the premises where the lead paint is found and thus, no ability to abate the nuisance. Moreover, the court also explained that an expansion of public nuisance law was not needed to address problems that the legislature had already addressed by a "careful and comprehensive scheme." *Id.* at 440.

Next, in *State v. Lead Industries Ass'n, Inc.*, 951 A.2d 428, 455 (R.I. 2008), the Rhode Island Supreme Court rejected a the State's public nuisance action against lead paint manufacturers because "the state's complaint . . . fails to allege any facts that would support a conclusion that defendants were in control of the lead pigment *at the time* it harmed Rhode Island's children" (emphasis added).

Finally, in *City of Milwaukee v. NL Industries, Inc.*, 691 N.W.2d 888, 890 (Wis. Ct. App. 2004), the City brought suit against paint manufacturers to recover the cost of abatement of lead paint in homes. The court held that an issue of material fact existed as to whether the defendants caused the harm alleged. *Id.* at 893. On remand, a jury found that defendants' conduct did not cause the nuisance. Watson, *supra*, at 627.

3. Despite these decisions, state and local officials continue to push the boundaries of public nuisance law by using it as a means for regulation or large-scale wealth transfers.

For instance, district courts dismissed two cases seeking relief from greenhouse-gas-emitting industries for harms allegedly arising from global climate change. In one case, an Alaskan village brought suit against twenty-four oil, energy, and utility companies "seek[ing] damages under a federal common law claim of nuisance, based on their alleged contribution to the excessive emission of carbon dioxide and other greenhouse gases which they claim are causing global warming." *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 868 (N.D. Cal. 2009), *aff'd*, 696 F.3d 849 (9th Cir. 2012). The court dismissed the village's claims for "abatement" of climate-cased coastal erosion, observing that "the allocation of fault—and cost—of global warming is a matter appropriately left for determination by the executive or legislative branch." *Id.* at 877.

In another case, the same court dismissed public nuisance claims against automakers for damages, recognizing "the complexity of the initial global warming policy determinations that must be made by the elected branches prior to the proper adjudication of Plaintiff's federal common law nuisance claim[,]"*California v. Gen. Motors Corp.*, No. C06-05755, 2007 WL 2726871 at *6, *16 (N.D. Cal. Sept. 17, 2007), and the "lack of judicially discoverable or manageable standards by which to properly adjudicate Plaintiff's federal common law global warning nuisance claim," *id.* at *16.

Even more recently, a federal district court in New York dismissed a public nuisance lawsuit against several gas and oil companies for damages alleging that production and sale of fossil fuels contributed to climate change. *See City of New York v. B.P. P.L.C.*, No. 18 Civ. 182 (JFK), 2018 WL 3475470 (S.D.N.Y. July 19, 2018). And in California, a federal court dismissed a similar lawsuit for lack of personal jurisdiction. *See City of Oakland v. BP P.L.C.*, Nos. C 17-06011 WHA, C 17-06012 WHA, 2018 WL 3609055 (N.D. Cal. July 27, 2018).

4. The plaintiffs' overwhelming success in this case, however, departs from cases where courts have kept public nuisance claims within traditional bounds.

A common law public nuisance claim has three elements: (1) unreasonable interference; (2) with a right common to the general public; (3) by those with control over the instrumentality alleged to have created the nuisance when the damage occurred. *See, e.g., State v. Lead Indus., Ass'n, Inc.*, 951 A.2d 428, 446 (R.I. 2008). California's lawsuit does not meet these requirements.

First, California has not shown that any of Petitioners' actions were unreasonable. Sherwin-Williams ran a single advertisement promoting its paints, some of which (certain outdoor paints) contained lead, at a time when lead paint was legal and contributed money to a trade association that promoted lead paint. App. 392a–95a, 399a. There is no

evidence that any of the paint manufacturers continued to promote lead paint once its harmful effects to the general public became known or that it ever promoted lead paint for residential interior use in California.

Second, Petitioners have not interfered with a right common to the general public. Lawful activity can occasionally be deemed unreasonable, but only if it "create[s] a substantial and continuing interference with a public right." *Lead Indus., Ass'n*, 951 A.2d at 447. For example, courts have held that chemical dumps causing fires, *Wood v. Picillo*, 443 A.2d 1244, 1245–48 (R.I. 1982), swine operations emitting bad odors, *Lapre v. Kane*, 36 A.2d 92, 94–95 (R.I. 1944), greenhouses emitting smoke, *Braun v. Ionotti*, 175 A. 656, 657 (1934), and construction equipment causing noise and vibration, *Blomen v. N. Barstow Co.*, 85 A. 924, 924–28 (R.I. 1913), to be public nuisances. Here the alleged nuisance is the mere *presence* of lead paint in thousands of individual dwellings across the State of California. Lead paint creates no substantial and continuing interference when left undisturbed. *See* EPA, Protect Your Family from Exposures to Lead, https://www.epa.gov/lead/protect-your-family-exposures-lead (explaining that undisturbed lead paint poses no hazard). California has not shown that these minor, decades-old actions have actually caused a public health crisis.

Regardless, even deteriorating lead paint inside a *private* residence is not a *public* nuisance. *See Lead Industries, Ass'n*, 951 A.2d at 454. Relying on "the longstanding principle that a public right is a right of

the public shared resources such as air, water, or public rights of way," *id.* at 455, the court in *Lead Industries* held that "[t]he right of an individual child not to be poisoned by lead paint" "falls far short of alleging an interference with a public right." *Id.* at 453. Because the nuisance that California alleges does not interfere with a public right, the damages that California seeks are merely a transfer of wealth, rather than a true abatement of a public nuisance.

Third, Petitioners do not have control over the instrumentality alleged to have created the nuisance. Petitioners do not own any of the residences where the lead paint was used, nor do Petitioners have the power to abate the nuisance by remediation. Instead, Petitioners have been ordered to pay millions of dollars in damages to an "abatement fund." App. 180a. In contrast, public nuisance suits were historically brought for injunctive relief to abate the nuisance by stopping infringement of the public right and repairing any damage to property. Schwartz & Goldberg, *supra*, at 546.

Yet the California Court of Appeal held three out of many former lead paint manufacturers jointly and severally liable for the ongoing presence of lead paint in California homes and apartment buildings. *See generally People v. ConAgra Grocery Products Co.*, 227 Cal. Rptr. 3d 499 (Cal. Ct. App. 2017). The court specifically stated that the defendants' actions "were not too remote to be considered a legal cause of the current hazard even if the actions of others in response to those promotions and the passive neglect of owners also played a causal role." *Id.* at 546. The

court simultaneously found that the promotions were "a very minor force" in creating the nuisance, *id.* at 545, while holding that requiring manufacturers to "clean up the hazardous conditions that [it] assisted in creating . . . is not disproportional to its wrongdoing." *Id.* at 559.

In so holding, the California court departed dramatically from traditional public nuisance law, which required a material causal link between the defendants' conduct and the alleged harm, particularly where liability is divined post hoc.

II. California's Expansive Public Nuisance Law Tests the Limits of Due Process

Recent developments in public nuisance law, especially theories like that of California in this case, distort the traditional purpose of civil lawsuits in the Anglo-American tradition. Instead of seeking to redress a particular injury caused by a particular defendant, they seek to enact societal change or massive wealth transfers through the court system by holding entire industries responsible for broad societal harms. In other words, such lawsuits seek to regulate (or at least punish) industry in the absence of legislative enactments. The question is whether those distortions transgress constitutional limits.

In the past, this and other courts have been willing to impose constitutional controls over distortions of the civil justice system in multiple contexts, including by way of the political question doctrine, displacement by statute, substantive rights under the Due

Process Clause, and extraterritoriality doctrine. This case presents an opportunity to consider whether the procedural safeguards of the Due Process Clause impose constitutional limitations on regulation or general wealth transfer through litigation.

1. First, courts around the country have rejected public nuisance and other tort claims that are in substance political and therefore nonjusticiable.

Longstanding Supreme Court precedent has established that a claim presents non-justiciable political questions if its adjudication would not be governed by "judicially discoverable and manageable standards" or would require "an initial policy determination of a kind clearly for non-judicial discretion." *Baker v. Carr*, 369 U.S. 186, 217 (1962). The political question doctrine arises from the Constitution's core structural values of judicial modesty and restraint. As early as *Marbury v. Madison*, Chief Justice Marshall stated that "[q]uestions in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court." 5 U.S. (1 Cranch) 137, 170 (1803). These questions, Marshall wrote, "respect the nation, not individual rights . . . ." *Id.* at 166. There, in the very case that establishes the power of judicial review, the political question doctrine received its judicial imprimatur.

With respect to public nuisance claims in particular, attempts to litigate climate change with public nuisance lawsuits have run headlong into the political question doctrine. *See Native Vill. of Kivalina v. Exxon Mobil Corp.*, 663 F. Supp 2d 863, 871 (N.D. Cal.

2009), *aff'd*, 696 F.3d 849 (9th Cir. 2012); *California v. Gen. Motors Corp.*, No. C06-05755, 2007 WL 2726871 at *6–16 (N.D. Cal. Sept. 17, 2007).

Similarly, a district court in Mississippi dismissed on political question grounds a lawsuit by Gulf of Mexico residents against oil and gas companies for damages from Hurricane Katrina, which plaintiffs alleged was strengthened by climate change. *Comer v. Murphy Oil,* No. 05-436, 2007 WL 6942285 (S.D. Miss. Aug. 30, 2007) (unpublished ruling), *appeal dismissed*, 607 F.3d 1049 (5th Cir. 2010), *mandamus denied*, No. 10-294 (U.S. Jan. 10, 2011).

More broadly, several Circuits and other federal courts have recognized that political questions may arise in cases that are nominally tort claims. *See, e.g.*, *Carmichael v. Kellogg, Brown & Root Servs., Inc.*, 572 F.3d 1271, 1280–96 (11th Cir. 2009) (finding tort claims arising from automobile accident were barred by the political question doctrine); *Antolok v. United States*, 873 F.2d 369, 383–84 (D.C. Cir. 1989) (noting that "[i]t is the political nature of the [issue], not the tort nature of the individual claims, that bars our review and in which the Judiciary has no expertise."); *Occidental of Umm al Qaywayn, Inc. v. A Certain Cargo of Petrol.*, 577 F.2d 1196, 1203–05 (5th Cir. 1978) (concluding tortious conversion claims were barred by the political question doctrine).

Thus, in some circumstances, structural constitutional restrictions have effectively restrained adventurous theories for expanding judicial power via common law claims.

2. Second, courts have rejected public nuisance claims as displaced by statutory regulation.

Most notably, in *American Electric Power Co., Inc. v. Connecticut*, 564 U.S. 410 (2011), eight States sued several private utilities alleging that carbon dioxide emissions had contributed to the public nuisance of global warming. Paul Nolette, *Federalism on Trial* 144–45 (2015). The district court dismissed the lawsuit on political question grounds, but the Second Circuit reversed, holding that the States had alleged a viable public nuisance claim under federal common law. *Id.* at 146–48. This Court reversed, holding that "the Clean Air Act and the EPA actions it authorizes displace any federal common law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired power plants." *Am. Elec. Power Co.*, 564 U.S. at 424.

Displacement of federal common law by statute represents the converse of the political question doctrine. In political question doctrine cases, courts choose not to define the parameters of liability, but to leave room for legislatures to do so; in displacement cases, courts recognize that the legislature has *already* done so. And in the state common law context, preemption by federal statute serves the same function.

3. Next, the Court has used constitutional doctrine to limit the use of punitive damages to regulate wholly extraterritorial conduct. In *Honda Motor Co. v. Oberg*, 512 U.S. 415, 430 (1994), the Court ex-

plained that "traditional practice provides a touchstone for constitutional analysis" under the Due Process Clause. It relied on "the well-established common law protection against arbitrary deprivations of property" to hold that Oregon's constitutional amendment prohibiting judicial review of punitive damages awards violates substantive rights under the Due Process Clause. *Id.* at 430.

Similarly, the Due Process Clause prevents States from assessing punitive damages for harms caused to the general public, rather than to the specific plaintiff bringing the suit. *See Philip Morris USA v. Williams*, 549 U.S. 346 (2007); *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003). The problem in the punitive damages cases was to claim a private remedy for a public harm. California here seeks a converse, yet similarly misaligned, outcome: a public remedy for a private harm (if that).

Both Due Process and Commerce Clause considerations, moreover, prohibit States from using punitive damages to punish out-of-state conduct. In *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 572 (1996), when an Alabama court attempted to alter BMW's nationwide policies by imposing punitive damages for wholly extraterritorial conduct, the Court decreed that "a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States."

4. Personal jurisdiction presents another constitutional limit to regulation via civil liability in state

court. "The Due Process Clause protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful 'contacts, ties, or relations.'" *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471–72 (1985). State courts may exercise personal jurisdiction over only those defendants who have "purposefully established 'minimum contacts' in the forum State." *Id.* at 474. Moreover, "these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with 'fair play and substantial justice.'" *Id.* at 476.

In the public nuisance context, in *City of Oakland v. BP P.L.C.*, Nos. C 17-06011 WHA, C 17-06012 WHA, 2018 WL 3609055 (N.D. Cal. July 27, 2018), where the City brought public-nuisance lawsuits to remedy global climate change against three companies who produced and sold fossil fuels, the court held that it lacked personal jurisdiction over the defendants because "global warming would have continued in the absence of all California-related activities of the defendants." *Id.* at *3. Consequently, personal jurisdiction serves as another constitutional limit to regulation by litigation.

5. As this case demonstrates, however, even these restraints are not enough to prevent vague and expansive tort liability theories as a means of regulating industry. The question remains whether the Due Process Clause requires some adherence to traditional limits on common law liability, particularly where

courts are employing broad theories of equitable relief rather than legislatively decreed remedies.

Here, Petitioners have been held jointly and severally liable because it advertised lead paint for lawful use over seventy years ago and contributed to a trade association. California has not even proved that any of the remaining lead paint in houses and apartment buildings (1) is harming anyone; (2) was manufactured by Petitioners or (3) that anyone relied on Petitioners' advertisements in deciding to use lead paint. Based on this scant evidence, the court below required Petitioners to pay for inspection and remediation of tens of thousands of California homes. This liability-without-causation approach substantially departs from traditional public nuisance doctrine which required plaintiffs to show causation.

In the Anglo-American tradition, the purpose of the civil court system is "to bring justice home to every man's door" by ensuring that injuries are "redressed in an easy and expeditious manner." 3 William Blackstone, Commentaries ch. 4. Yet civil justice also requires that "the claim is brought against and addressed to the one who has allegedly caused the harm." Jason M. Solomon, *What Is Civil Justice*, 44 Loyola of Los Angeles L. Rev. 317, 329 (2010). Thus, the justice system is designed to "vindicate[e] the right of the victim to hold the wrongdoer accountable." *Id.* *See also* 14 N.Y.Prac., New York Law of Torts § 8:2 ("[I]t would not seem fair to allocate losses onto those who have committed no wrongdoing."); Christopher H. Schroeder, Corrective Justice and Liability for Increasing Risks, 37 UCLA L. Rev. 439, 439

(1990) ("A fundamental feature of [corrective justice] is the causation requirement: an individual must have caused harm before he or she can be held liable in tort."); H.L.A. Hart & T. Honore, Causation in the Law lxvii (2d ed. 1985) ("The courts [have] further made it clear that in the civil law of negligence causal connection is a requisite of liability which is *additional* to the . . . [creation of foreseeable risks] of harm." (footnote omitted)). A court system that pays no heed to causation fails to fulfill this purpose.

Accordingly, amici urge the Court to grant certiorari to resolve the important question whether the Due Process Clause imposes any limits on the use of public nuisance lawsuits to achieve broad wealth transfer and regulatory ends by imposing retroactive liability on selected out-of-state manufacturers without proof of causation.

CONCLUSION

The Petitions should be granted.

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EXHIBIT 2

EXHIBIT 2

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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Delaware.

STATE of Delaware, EX REL. Kathleen JENNINGS, Attorney General of the State of Delaware, Plaintiff,
v.
PURDUE PHARMA L.P.; Purdue Pharma Inc.; The Purdue Frederick Company; Endo Health Solutions Inc.; Endo Pharmaceuticals Inc.; McKesson Corporation; Cardinal Health Inc.; AmerisourceBergen Corporation; Anda Pharmaceuticals, Inc.; H.D. Smith, LLC; CVS Health Corporation; and Walgreens Boots Alliance, Inc., Defendants.

C.A. No. N18C-01-223 MMJ CCLD
|
Submitted: November 15, 2018
|
Decided: February 4, 2019

Upon Defendants' Motions to Dismiss and Motion to Strike

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JOHNSTON, J.

PROCEDURAL CONTEXT

***1** The State of Delaware ("State"), ex rel. Kathleen Jennings, [1] Attorney General of the State of Delaware, brought this suit seeking compensatory, punitive, and other damages, as well as restitution, disgorgement, and civil penalties. Defendants are: Purdue Pharma L.P., Purdue Pharma Inc., The Purdue Frederick Company, Endo Health Solutions Inc., and Endo Pharmaceuticals Inc. (collectively, "Manufacturers"); McKesson Corporation, Cardinal Health, Inc., AmerisourceBergen Corporation, Anda Pharmaceuticals, Inc., and H.D. Smith, LLC (collectively, "Distributors"); and CVS Health Corporation and Walgreens Boots Alliance, Inc. (collectively, "Pharmacies").

As to the Manufacturers, the State argues that Manufacturers have duties to disclose accurately the risks associated with opioid medications, specifically, the high risk of addiction and subsequent misuse. The State contends that Manufacturers misrepresented those risks through multi-million-dollar advertising campaigns, and inaccurately claimed that those who were showing signs of addiction were not actually addicted. The State argues that these misstatements were targeted for maximum effect and to a specific audience. The State contends that Manufacturers knew or should have known that their statements were false and misleading. Because they knew the statements were misleading, Manufacturers violated their duties to disclose accurately the risks of using purportedly highly dangerous opioid medications.

As to Distributors, the State argues that Distributors have duties to actively prevent opioid diversion. [2] The State asserts that both Delaware and federal law have established the duties of care that Distributors must follow. The State argues that, as evidenced by prior regulatory actions against Distributors for failing to prevent diversion, Distributors have violated their duties.

Similarly, as to Pharmacies, the State argues that Pharmacies have duties to prevent opioid diversion and to report any suspicious orders. The State alleges that Pharmacies repeatedly have failed to report suspicious orders made obvious to them by certain "red flags," such as unusually large orders, repetitive orders, and improperly filled orders. The State argues that Pharmacies have violated their duties owed to the State, as evidenced by prior regulatory actions against Pharmacies.

The State argues that Defendants' collective misconduct has harmed and continues to harm the State of Delaware and its citizens. [3] The State alleges the following:

> Count I: Consumer Fraud (Against Manufacturer Defendants)
>
> Count II: Nuisance (Against Manufacturer Defendants)
>
> Count III: Negligence (Against Manufacturer Defendants)
>
> Count IV: Unjust Enrichment (Against Manufacturer Defendants)
>
> ***2** Count V: Consumer Fraud (Against Distributor Defendants and Pharmacy Defendants)
>
> Count VI: Nuisance (Against Distributor Defendants and Pharmacy Defendants)
>
> Count VII: Negligence (Against Distributor Defendants and Pharmacy Defendants)
>
> Count VIII: Unjust Enrichment (Against Distributor Defendants and Pharmacy Defendants)
>
> Count IX: Civil Conspiracy (Against Manufacturer Defendants, Distributor Defendants, Pharmacy Defendants).

Defendants have filed Motions to Dismiss. Manufacturers joined together to file one Motion to Dismiss. Four of the five Distributors filed Motions to Dismiss:

McKesson Corporation, Cardinal Health, Inc. and AmerisourceBergen Corporation have jointly filed one motion. Anda Pharmaceuticals, Inc. has separately filed its own motion. The remaining distributor, H.D. Smith, LLC, has not joined in or filed its own motion to dismiss, but did answer the complaint. The Pharmacies jointly filed one motion to dismiss. Oral Argument was heard over two days: October 24, 2018 and November 15, 2018.

MOTION TO DISMISS STANDARD

In a Rule 12(b)(6) Motion to Dismiss, the Court must determine whether the claimant "may recover under any reasonably conceivable set of circumstances susceptible of proof." [4] The Court must accept as true all well-pleaded allegations. [5] Every reasonable factual inference will be drawn in the non-moving party's favor. [6] If the claimant may recover under that standard of review, the Court must deny the Motion to Dismiss. [7]

ANALYSIS

NEGLIGENCE AND CONSUMER FRAUD

The State contends that all Defendants violated statutory and common law duties, which caused injury to the State. The State's claims vary slightly as to each class of Defendant.

Manufacturers

State's Allegations

The State argues that each Manufacturer Defendant has a legal obligation under Delaware statutory and common law to exercise reasonable care in the marketing, promotion, and sale of opioids. The State argues that Manufacturers' duties are established by 16 *Del. C.* § 3302, which states: "No person shall manufacturer, sell or trade in, within this State, any article of food or drugs which is ... misbranded ... within the meaning of this chapter." [8]

***3** The State argues that Manufacturers have breached their duties by misstating facts and by failing to disclose accurately the risks associated with the use of opioids. The State claims that Manufacturers have done this via a multi-million-dollar advertising campaign that is run through websites, promotional materials, live conferences, publications for doctors, and other vehicles. The State asserts that Manufacturers trained pharmaceutical salesmen to tell doctors that the risk of opioid addiction is less than 1%, which is contrary to Center for Disease Control ("CDC") findings that suggest that there are significant risks of serious opioid addiction and abuse. The CDC reports that about 26% of long term users experience problems with addiction or dependence. [9] The State claims although there are warning labels approved by the Food and Drug Administration ("FDA") on the bottles of medication, the content in the advertising campaign is inconsistent with those warning labels in that the advertising scheme significantly minimizes the risks.

Further, the State argues that Manufacturers stated that patients who showed signs of addiction were not actually addicted to opioids. The State claims that Manufacturers published a physician education pamphlet which suggested that patients who showed signs of addiction were actually in need of more medication, a phenomenon Manufacturers refer to as "pseudoaddiction." The State argues that "pseudoaddiction," a term coined by a Manufacturer, is a concept rejected by the CDC because it lacks scientific evidence. The State claims that Manufacturers advocate for increasing dosages regardless of a patient's actual prescribed dosage. The State contends that, through their web content, Manufacturers actually encourage patients, who believe they have not been prescribed an adequate dose, to seek a different doctor who will prescribe them the dose they feel they require. The State asserts that Manufacturers claim there is no risk of addiction when the dosage is increased.

The State argues that Manufacturers' conduct amounts to a breach of duty owed to the State.

Manufacturers' Response

Manufacturers argue first that the State's claims are preempted because the FDA has approved opioid medications for the treatment of pain. Manufacturers maintain that they have complied with the FDA's warning label requirements. Manufacturers argue that the State

cannot impose a duty to alter FDA-approved medicine. Further, Manufacturers assert that courts repeatedly have held that state law claims are preempted where they would require a manufacturer to make statements about safety or efficacy that are inconsistent with what the FDA has required.

Manufacturers also argue that the State has failed to allege causation. Manufacturers argue that the State has failed to identify any physician who heard the alleged misrepresentations and subsequently prescribed opioid medications in reliance on Manufacturers' statements. Manufacturers cite *Teamsters Local 237 Welfare Fund, et al., v. AstraZeneca Pharmaceuticals LP and Zeneca, Inc.*[10] in support of their argument that simply pleading deceptive advertising to the public generally is insufficient.[11] Manufacturers assert that ultimately there is no connection between the alleged misstatements and the harm to the State. Any misstatement is simply too attenuated to establish causation. Manufacturers argue that there is no fraud on the market. Further, as third-party payors, Manufacturers cannot be forced to cover costs incurred by the State because the State is not an insurer.

Manufacturers offer for support *State of Sao Paulo of Federative Republic of Brazil v. American Tobacco Co.*,[12] a case in which a municipality sought to recover medical expenses supposedly incurred as a result of its citizens' increased use of tobacco products.[13] Manufacturers ask the Court to adopt the reasoning in *Sao Paulo*, specifically that it would be "both unfair and unsound policy"[14] to allow a government to sue in its capacity as health care insurer or provider, and to pursue claims on which its injured citizens, had they sued directly, might not be entitled to recover. Manufacturers assert that this type of claim is something that the legislature should address and that the government should not be able to circumvent the burden of proving individual claims.

***4** This Court finds *Sao Paulo* distinguishable. The plaintiffs in *Sao Paulo* were foreign governments, not United States municipalities. As such, the plaintiffs lacked standing to sue as *parens patriae*.[15] The Court finds this distinction crucial in determining whether or not the State has standing in this case to sue in its capacity as *parens patriae*.

In support of the lack of causation argument, Manufacturers cite *Ashley County, Arkansas v. Pfizer Incorporated.*[16] In *Ashley*, Arkansas counties brought an action against manufacturers and distributors of over-the-counter cold and allergy medications containing ephedrine or pseudoephedrine.[17] The counties sought damages under the Arkansas Deceptive Trade Practices Act and the Arkansas crime victims civil liability statute, and under theories of public nuisance and unjust enrichment.[18] The court found that the defendants did not proximately cause plaintiffs' damages and dismissed the claim because "the Counties cite[d] no case, federal or state, that recognizes a cause of action available to a government entity to recover against pharmaceutical manufacturers for the legal sale of products containing pseudoephedrine based on the subsequent use of the product in the manufacture of methamphetamine."[19]

Manufacturers also argue that the State has failed to allege injury. Manufacturers contend that the State has failed to identify any prescription received by a patient that ultimately caused injury to the State. Further, Manufacturers argue that the State is only able to make broad allegations as to all Manufacturers, and cannot single out any wrongdoing by any individual Manufacturer. Manufacturers also argue that the State's claims are barred by the derivative-injury rule, municipal cost recovery rule, and economic loss doctrine.

The State Has Stated Prima Facie *Claims Against Manufacturers*

The Court finds that the State has met the notice pleading requirements as to its claims against Manufacturers. Under Delaware's notice pleading requirements, a plaintiff need only "state a short and plain statement of the claims showing that the pleader is entitled to relief."[20] The State has met this burden by putting the Manufacturers on notice of its claims of misrepresentations ("low risk" of addiction and understated risk) made in literature and during training. The State plead its claims with sufficient particularity to allow the case to move forward. The State's allegations of labeling inconsistent with FDA approvals ("pseudoaddiction," softening and minimization) are sufficient to survive dismissal on the grounds of

federal preemption. Therefore, Manufacturers' Motion to Dismiss must be denied.

Distributors

State's Allegations

The State argues that Distributors have common law, statutory, and regulatory duties to act reasonably as distributors of opioids. Specifically, the State claims that Distributors have a duty to prevent opioid diversion. The State cites several statutes and regulations which, it claims, establish relevant duties.[21] The State claims that the Delaware Controlled Substances Act ("CSA") "requires distributors of controlled substances to take precautions to ensure a safe system for distribution of controlled substances, including opioids, and to prevent diversion of those controlled substances into illegitimate channels."[22] The State claims that Delaware law has certain registration requirements for Distributors, and that in order to distribute in Delaware, the Distributors must "establish, maintain, and adhere to written policies and procedures for: identifying, records, and reporting losses or thefts" and have written policies for "reporting criminal or suspected criminal activities involving the inventory of a drug or drugs."[23] The State makes clear that it is not asserting a cause of action under these laws, but rather, is using the laws to argue that there are established, industry-wide duties.

***5** The State alleges that Distributors have the knowledge and expertise to identify issues relating to diversion and know how to minimize the risk of diversion. The State claims that Distributors have acknowledged these duties by making "statements assuring the public they recognize their duty to curb the opioid epidemic."[24] The State claims that despite acknowledging and understanding their duties to prevent diversion, Distributors have violated those duties. The State asserts that Distributors have failed to identify suspicious orders,[25] which could have led to the discovery and prevention of diversion.

The Drug Enforcement Agency ("DEA") supposedly has provided guidance on how to deal with suspicious orders. Since 2006, the DEA has briefed pharmaceutical distributors regarding "legal, regulatory, and due diligence responsibilities."[26] The DEA has pointed out the "red flags distributors should look for to identify potential diversion."[27] The DEA provided further information at conferences and in subsequent publications. The State claims that because Distributors have been educated on drug diversion, they have been put on notice of the problem of opioid diversion and the solution. Despite being put on notice, Distributors allegedly failed to prevent or address this issue.

The State argues that Distributors have negligently or recklessly allowed diversion. The State, as a basis for this allegation, points out that Distributors' conduct has resulted "numerous civil fines and other penalties recovered by government agencies - including actions by the DEA related to violations of the [Federal Controlled Substances Act]."[28] The State claims that Distributors have engaged in a consistent nationwide pattern and practice of illegally distributing opioids by allowing diversion to occur.

In sum, the State claims that the Distributors had duties to prevent opioid diversion, acknowledged and understood those duties, and violated those duties, resulting in injury to the State.

Distributors' Response

Distributors argue that the State has failed to plead a cognizable injury under Delaware law. Distributors assert that the State cannot recover damages belonging to individuals who allegedly have been personally injured by opioid addiction. Distributors argue that the State cannot recover on the basis of these indirect injuries.[29] Distributors further argue that the State may not recover the costs of normal public services. In support of this position, Distributors cite *Baker v. Smith & Wesson Corporation*,[30] in which the Court stated: "[P]ublic expenditures made in the performance of governmental functions are not recoverable from a tortfeasor in the absence of a specific statute."[31]

Distributors argue that the State has failed to allege a negligence claim. Specifically, Distributors argue that they do not owe a duty to the State to report or halt shipment of "suspicious" orders. Distributors maintain that there is

no common law or statutory duty to report these orders. Distributors also contend that there is no duty to the State because the State is not the customer. Distributors claim that their duties are solely to their customer, the pharmacies. Distributors assert that they act merely as middlemen between manufacturers and pharmacies, and that their responsibility is to take and fill orders. Distributors claim that the State has failed to allege that Distributors made any specific misrepresentations to pharmacies.

The State Has Stated Claims Against Distributors

***6** The Court finds that Distributors' duties are not limited to pharmacies. Pursuant to 6 *Del. C.* § 2513:

> (a) The act, use or employment by any person of any deception, fraud, false pretense, false promise, misrepresentation, or the concealment, suppression, or omission of any material fact with intent *that others rely upon* such concealment, suppression or omission, in connection with the sale, lease or advertisement of any merchandise, whether or not any person has in fact been misled, deceived or damaged thereby, is an unlawful practice... (*emphasis added*).

Because the language of the statute contemplates general reliance, the Court finds that the State need not limit its claims to misrepresentations made directly to pharmacies.

Drug diversion is a medical and legal concept involving the transfer of any legally prescribed controlled substance from the individual for whom it was prescribed to another person for any illicit use. The State claims that a purpose of the Delaware Consumer Fraud Act is to prevent diversion, and under this statute, Distributors have a duty to prevent diversion. Distributors maintain that the State's claims are barred by the safe harbor provided in 6 *Del C.* § 2513 which states:

> (b) This section shall not apply:
>
> (2) To any advertisement or merchandising practice which is subject to and complies with the rules and regulations, of and the statutes administered by, the Federal Trade Commission...

The Court finds that whether or not Distributors complied with "rules and regulations" cannot be determined without further discovery. The Court cannot find, as a matter of law, that Distributors fall within in this safe harbor provision at this stage in the litigation.

Distributors rely on *Baker* [32] to support the proposition that a municipality may not recover for its citizens' injuries. In *Baker*, the Mayor of Wilmington, on behalf of the City, sued several handgun manufacturers. [33] The lawsuit was part of a nationwide effort to force the handgun industry to make its products safer and to reduce gun violence. The plaintiffs in *Baker* were not the direct victims of injuries caused by firearms. The Court in *Baker* considered whether the City of Wilmington could recover the costs of municipal services, including police work and emergency response, in the absence of claims brought by direct victims. The issue was "whether the common law prohibition on municipalities recovering costs from tortfeasors...is the law in Delaware." [34] The Court granted the defendant's motion to dismiss, stating that "the court will not twist a jury trial involving municipal costs into a wildly expensive referendum on handgun control. The Mayor and the City must find another means to their ends." [35]

The Court finds that the municipal cost recovery rule does not apply in this case. In five separate courts, and in the multi-district federal litigation based in Ohio, judges have rejected the notion that the municipal cost recovery rule bars recovery for public costs. These courts reasoned that when the alleged conduct is ongoing and persistent (as opposed to a one-time event), the rule may be suspended. The Court finds that the conduct in this case is continuous. Thus, the municipal cost recovery rule does not apply.

***7** Under 16 *Del. C.* § 4733, manufacturers, distributors, and pharmacies must register and be licensed in order to dispense opioid medications. The applicant must have an underlying professional license in the State. The Secretary of State may deny registration to an

applicant if the Secretary "determines that the issuance of that registration would be inconsistent with the public interest." [36] The statute lists eight factors that the Secretary shall consider when determining whether an issuance of a registration would be inconsistent with the public interest:

> (1) Maintenance of effective controls against diversion of controlled substances into other than legitimate medical, scientific or industrial channels;
>
> (2) Compliance with applicable federal, state and local law, including but not limited to such requirements as having a license to practice as a practitioner or having documented training and continuing education as a drug detection animal trainer;
>
> (3) Any convictions of the applicant under any federal and state laws relating to any controlled substance;
>
> (4) Past experience in the manufacture or distribution of controlled substances and the existence in the applicant's establishment of effective controls against diversion;
>
> (5) Furnishing by the applicant of false or fraudulent material in any application filed under this chapter;
>
> (6) Suspension or revocation of the applicant's federal registration to manufacture, distribute, prescribe, dispense or research controlled substances as authorized by federal law;
>
> (7) Any professional license disciplined in any jurisdiction; and
>
> (8) Any other factors relevant to the public interest. [37]

The State argues that this statute imposes on Distributors (and Pharmacies) a duty to report, and that a breach of that duty could result in a revocation of license and registration. The State has not alleged any claims under this statute, but argues that Section 4733 creates a well-established duty to report in the opioid industry.

The Court finds that Section 4733 does not create a cause of action. However, the statute may be evidence of a standard of care.

Delaware recognizes the traditional "but for" definition of proximate causation. [38] "Most simply stated, proximate cause is [defined in Delaware as] that direct cause without which the accident would not have occurred." [39] To show proximate cause, there must be known and intentional consequences.

The State alleges that Distributors had actual or constructive knowledge that they were breaching common law duties and violating the Delaware Controlled Substances Act and Federal Controlled Substances Act. Distributors counter that any diversion and subsequent harm are intervening, superseding causes that extinguish their liability. A superseding cause is a new and independent act that breaks the causal connection between the original tortious conduct and the injury. [40] However, if the intervening negligence of a third party was reasonably foreseeable, the original tortfeasor is liable for negligence because the causal connection between the original tortious act and the resulting injury remains unbroken. [41]

In *Ashley County, Arkansas v. Pfizer Incorporated*, [42] the court determined that "criminal actions of the methamphetamine cooks and those further down the illegal line of manufacturing and distributing methamphetamine are 'sufficient to stand as the cause of the injury'...and they are 'totally independent' of the Defendants' actions of selling cold medicine to retail stores." [43] Distributors ask this Court to apply the reasoning in *Ashley County*.

***8** The Court finds *Ashley County* distinguishable. The State's allegations regarding proximate cause establish a *prima facie* case of reasonable foreseeability. The intervening causes that aid diversion and subsequent illegal activities are not "totally independent" from Distributors' conduct. The *Ashley County* court's finding that defendants' conduct was too attenuated to establish liability does not apply in this case.

The Court finds that the State has met its pleading requirements. Distributors' duties are not limited to pharmacy customers. The Court cannot determine, without discovery, whether Distributors are protected by the safe harbor provision in 6 *Del. C.* § 2513. The State has set forth a *prima facie* case of reasonable foreseeability and proximate cause. Therefore, Distributors' Motion to Dismiss the negligence and consumer fraud claims must be denied.

The State Has Stated Claims Against Anda

Distributor Defendant Anda Pharmaceuticals, Inc. ("Anda") has moved separately from other Distributors. Anda argues that the Complaint improperly lumps all of the Distributors together in group allegations, and that these allegations are conclusory. Anda echoes the arguments presented by other Distributors, but adds that the Complaint is not specific enough to put Anda on notice.

Superior Court Rule 9(b) requires that certain types of claims be plead with a heightened particularity. "The purpose of this Rule is to '(1) provide defendants with enough notice to prepare a defense; (2) prevent plaintiffs from using complaints as fishing expeditions to unearth wrongs to which they had no prior knowledge; and (3) preserve a defendant's reputation and goodwill against baseless claims.' "[44]

In order to plead negligence with the requisite particularity, "a defendant must be apprised of: (1) what duty, if any, was breached; (2) who breached it, (3) what act or failure to act breached the duty, and (4) the party upon whom the act was performed."[45] In its Complaint, the State repeatedly refers to specific statutory and common law duties, identifies defendant groups, points out the actions or inactions Defendants allegedly committed or omitted, and claims that Defendants' conduct caused injury to the State of Delaware.

At the pleading stage, a defendant in a group of similar defendants may attempt to distinguish its behavior from other defendants.[46] When given the opportunity at oral argument to distinguish itself from other Distributors, Anda only highlighted two differences: (1) that there were no enforcement actions against Anda initiated by the DEA; and (2) that there were no allegations of specific misrepresentations, unlike those in the Complaint against Cardinal and McKesson. Anda emphasized that the State only referenced Anda specifically a few times in its Complaint.

The Court finds that there is no meaningful or substantive distinction between Anda and other Distributor defendants at this stage of the proceedings. The Court's rulings apply to Anda in the same manner as to Distributors. Anda has failed to distinguish itself from other Distributor defendants. Therefore, Anda's Motion to Dismiss must be denied.

Pharmacies

State's Allegations

***9** The State argues that Pharmacies also have a duty to prevent diversion, and that Pharmacies have breached that duty by failing to address certain "red flags" when filling prescriptions. The State claims that at "the pharmacy level, diversion occurs whenever a pharmacist fills a prescription despite having reason to believe it was not being filled for a legitimate medical purpose."[47] The State claims:

> A prescription may lack a legitimate medical purpose when a patient is either a drug dealer or opioid-dependent, seeks to fill multiple prescriptions from different doctors, travels great distances between a doctor and a pharmacy to fill a prescription, presents multiple prescriptions for the largest dose of more than one controlled substance such as opioids and benzodiazepines, or when there are other red flags surrounding the transaction.[48]

The State alleges that "[o]n information and belief, Pharmacy Defendants regularly filled opioid prescriptions that would have been deemed questionable or suspicious by a reasonably-prudent pharmacy."[49] The State argues that Pharmacies have a duty under the Delaware CSA to take precautions to "ensure a safe system for distribution of controlled substances, including opioids, and to prevent diversion of those controlled substances into illegitimate channels."[50]

The State also argues that Delaware's Prescription Monitoring Program ("PMP") imposes certain duties on Pharmacies. Delaware's PMP is a reporting system that aims to monitor the sale and distribution of controlled substances in the State of Delaware. [51] The State claims that the PMP imposes a duty on Pharmacies to submit information related to dispensing prescription opioids. The State argues that "under Delaware law ' [w]hen a [pharmacy] has a reasonable belief that a patient may be seeking a controlled substance [including opioids] for any reason other than the treatment of an existing medical condition, the dispenser shall obtain a patient utilization report regarding the patient for the preceding 12 months from the [PMP] before dispensing the prescription.' " [52] The State argues that Delaware law requires that "[i]f a pharmacist believes he or she has discovered a pattern of prescription abuse, the local Board of Pharmacy and the DEA must be contacted." [53]

The State argues that despite industry-specific knowledge of the risks of opioid abuse, [54] Pharmacies breached their duties by failing to identify "red flags" and report those issues to the proper authorities. [55] The State contends that this breach caused injury to the State of Delaware and its citizens.

Prescription Monitoring Program

Delaware has promulgated comprehensive regulation of dispensing controlled substances. [56] Section 4735(b) of Title 16 sets forth an express purpose to prevent diversion in Delaware's PMP:

> (b) The Secretary, after due notice and hearing may limit, suspend, fine or revoke the registration of any registrant who:
>
> ***10** (1) Has failed to maintain effective controls against diversion of controlled substances into other than legitimate medical, scientific or industrial channels.... [57]

Regulation of prescription drug distribution also is contained in Delaware's Uniform Controlled Substances Act (16 *Del. C.* §§ 4701, *et seq.*), Uniform Controlled Substances Act Regulations (24 *Del. Admin. C.* CSA 1.0 *et seq.*), code sections regarding branding of drugs (*e.g.*, 16 *Del. C.* §§ 3302, *et seq.*), and numerous professional regulations related to persons who handle, prescribe, and dispense controlled substances. These provisions provide strict controls and requirements throughout the opioid distribution chain. Delaware law also incorporates and references Federal law regarding the marketing, distribution, and sale of prescription opioids, including the Federal Controlled Substances Act, 21 U.S.C. §§ 801 *et seq.*, and the Federal Food, Drug, and Cosmetic Act, 21 U.S.C §§ 321 *et seq.*

Delaware's Uniform Controlled Substances act is administered by the Secretary of State:

> The Secretary shall administer this chapter. Except as otherwise provided in this chapter, the Secretary may delete or reschedule substances enumerated in the schedules of controlled substances only if:
>
> (1) Such substances have been deleted from or rescheduled within the federal schedules of controlled substances by the Attorney General of the United States pursuant to 21 USC § 811, *et seq.*; and
>
> (2) The findings required by this chapter for placement of substances in the schedules of controlled substances have been made. [58]

Pharmacies' Response

Pharmacies argue that the PMP administration by Delaware's Secretary of State has exclusive jurisdiction over the regulation of prescription sales. Thus, no negligence claims may be brought by the State. However, Pharmacies concede: that the State has authority to prosecute criminal conduct; that the PMP does not prohibit medical negligence claims; and that common law negligence claims are possible. If negligence results in injury to a patient receiving a prescription, all "red flags" are coextensive with statutory and regulatory reporting obligations.

Pharmacies proffer *Doe v. Bradley* [59] in support of their argument that statutory duties to report misconduct do not give rise to common law negligence claims. In *Doe v. Bradley*, the Court considered "the scope of a physician's duty to report to appropriate authorities that another physician might be engaged in conduct that could

endanger the health, welfare or safety of that physician's patients or the public at large." [60] The Court found that the "[p]laintiffs' complaint did not allege facts that would allow the court to impose a common law duty upon the medical society defendants to prevent Dr. Bradley from causing harm to the [p]laintiffs." [61] Pharmacies argue that under *Doe v. Bradley*, the regulatory scheme and enforcement procedures under Delaware law prohibit a private cause of action.

The State Has Not Stated a Claim Against Pharmacies

***11** Delaware law requires that a medical negligence claim be accompanied by an Affidavit of Merit:

> (a) No health-care negligence lawsuit shall be filed in this State unless the complaint is accompanied by:
>
> (1) An affidavit of merit as to each defendant signed by an expert witness, as defined in § 6854 of this title, and accompanied by a current curriculum vitae of the witness, stating that there are reasonable grounds to believe that there has been health-care medical negligence committed by each defendant.... [62]

To the extent that the State's claims fall within the definition of medical negligence, the Complaint against Pharmacies must be dismissed without prejudice to provide the State an opportunity to obtain an Affidavit of Merit.

The Court finds that the remaining allegations against Pharmacies - breaches of duties to prevent diversion - are entirely speculative and conclusory. Additionally, Delaware's comprehensive pharmacy regulatory scheme and enforcement procedures, as well as federal regulations, preempt the claims alleged in the Complaint. Therefore, Pharmacies' Motion to Dismiss must be granted. The dismissal is without prejudice as to claims sounding in medical negligence, to allow the State an opportunity to submit an Affidavit of Merit.

NUISANCE

Under Delaware law, a public nuisance is "activity which produces some tangible injury to neighboring property or persons coming into contact with it and which a court considers to be objectionable under the circumstances." [63]

Distributors argue that the State's public nuisance claim is not cognizable under Delaware law. Distributors assert that Delaware Courts do not recognize products-based public nuisance claims, only property-based nuisance claims. Distributors rely on *Sills v. Smith & Wesson Corporation* [64] to support this position. [65] Distributors argue that the State has not identified or alleged a public right with which Distributors have interfered, claiming this as an essential element to a nuisance claim.

In *Sills v. Smith & Wesson Corporation*, [66] the Mayor of Wilmington sued twelve handgun manufacturers and three trade associations to recover money damages incurred by the City in connection with the design, marketing, and advertising of handguns. One of the nine counts alleged was a nuisance claim. The complaint alleged that "governmental entities may recover direct costs associated with protecting their citizens in the 'abatement of a public nuisance.' " [67] The Court stated that "Delaware has yet to recognize a cause of action for public nuisance based upon products. Delaware public nuisance claims have been limited to situations involving land use. While no express authority exists requiring public nuisance claims be restricted to those based on land use, Delaware courts remain hesitant to expand public nuisance." [68] The Court held that there was "no independent claim for public nuisance" and refused to recognize a public nuisance claim for products. [69]

***12** Other jurisdictions also have refused to allow products-based public nuisance claims. There is a clear national trend to limit public nuisance to land use. [70]

On December 28, 2018, the State submitted to the Court supplemental authority related to briefing on Defendants' Motions to Dismiss, attaching an opinion issued by MDL Judge Dan Aaron Polster of the United States District Court for the Northern District of Ohio. This Court concurs with Judge Polster as to the vast majority of his conclusions. However, the Court finds this supplemental authority distinguishable from the State's case regarding the public nuisance claim.

Judge Polster's Opinion discusses in great detail Ohio legislative history relating to product liability and nuisance claims. The Opinion determined that "in light of the legislative history, the Court finds it at least plausible, if not likely, that the 2005 and 2007 Amendments to the OPLA intended to clarify the definition of 'product liability claim' to mean 'a claim or cause of action [including any common law negligence or public nuisance theory of product liability...] that is asserted in a civil action...that seeks to recover compensatory damages...for [harm]....' " [71]

There is no comparable legislative history in Delaware.

The State only has alleged a public nuisance claim. The State has not alleged a product liability claim, nor has it asked the Court to determine whether Delaware product liability law contemplates a public nuisance claim. In Delaware, public nuisance claims have not been recognized for products. [72]

***13** The State has failed to allege a public right with which Defendants have interfered. A defendant is not liable for public nuisance unless it exercises control over the instrumentality that caused the nuisance at the time of the nuisance. [73] The State has failed to allege control by Defendants over the instrumentality of the nuisance at the time of the nuisance. Thus, all Defendants' Motions to Dismiss the nuisance claims must be granted.

CIVIL CONSPIRACY

To establish a valid claim for civil conspiracy, a plaintiff must prove: "(1) A confederation or combination of two or more persons; (2) An unlawful act done in furtherance of the conspiracy; and (3) Actual damage." [74] "In Delaware, 'civil conspiracy is not an independent cause of action...it must arise from some underlying wrong.' " [75]

The State argues that Manufacturers "have engaged, and continue to engage, in a massive marketing campaign to misstate and conceal the risks of treating chronic pain with opioids." [76] The State argues that "[w]ithout Manufacturer Defendants' misrepresentations, which created demand, Distributor Defendants would not have been able to sell to Pharmacy Defendants the increasing number of orders of prescription opioids for non-medical purposes throughout Delaware." [77] The State asserts that "[w]ithout Distributor Defendants' supply of prescription opioids, Pharmacy Defendants would not have been able to fill and dispense the increasing number of orders of prescription opioids for non-medical purposes throughout Delaware." [78] The State alleges that this chain of conduct lead to damages suffered by the State of Delaware and its citizens.

"There is no such thing as a conspiracy to commit negligence or, more precisely, to fail to exercise due care." [79] However, in *Nicolet, Inc. v. Nutt*, [80] the Delaware Supreme Court found allegations of intentional misrepresentation of fraudulent concealment sufficient to support the plaintiffs' claim that a manufacturer participated in an industry-wide conspiracy to conceal the health hazards of asbestos. [81]

In order to allege a *prima facie* case of fraudulent concealment, a plaintiff must show: "(1) deliberate concealment of a material fact or silence in the face of a duty to speak; (2) scienter; (3) intent to induce reliance upon the concealment; (4) causation; and (5) resulting damage." [82] In *Nicolet*, the Delaware Supreme Court found that the plaintiffs met these elements, reasoning:

> [P]laintiffs claim ... the conspiracy, which allegedly included [defendant], caused "to be positively asserted to plaintiffs in a manner not warranted by the information possessed by said defendants, ... that it was safe ... to work in close proximity to [the] [asbestos] materials" and ... suppressed "medical and scientific data and other knowledge, causing plaintiffs to be and remain ignorant thereof." The complaint clearly alleges scienter in that the participants "knowingly and willfully conspired" in the scheme ... [and] alleges an intent ... to induce ... reliance on false or incomplete material facts. In our opinion these allegations are sufficient to state a tort claim based on a theory of fraudulent concealment. [83]

***14** In this case, the Court finds that the State has not adequately alleged in its Complaint that Defendants engaged in a civil conspiracy similar to the allegations in *Nicolet*. The State has merely alleged parallel conduct by Defendants, making no claims that "the participants 'knowingly and willfully conspired' in the scheme" [84]

in order to induce reliance. The State has not alleged that the Defendants intended to conspire, but merely stated at oral argument that Defendants attended the same conferences. There are no allegations of a concerted action, an agreement to commit an underlying wrong, awareness of an agreement, or action in accordance with that agreement. The State argues that "Manufacturer Defendants, Distributor Defendants, and Pharmacy Defendants need not have expressly agreed to this course of action; concerted conduct itself is sufficient." This argument is not supported by Delaware law.

The Civil Conspiracy claims are hereby dismissed without prejudice. The claims may be added if evidence supporting a conspiracy surfaces during discovery.

UNJUST ENRICHMENT

Delaware law defines unjust enrichment as "the unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience." [85] Unjust enrichment requires the following: (1) an enrichment; (2) an impoverishment; (3) a relation between the enrichment and the impoverishment; (4) the absence of justification; and (5) the absence of a remedy provided by law. [86]

Under Delaware law, unjust enrichment is not a stand-alone claim in Superior Court. The claim must be brought in the Court of Chancery. In this Court, unjust enrichment may be asserted as a possible measure of damages. Therefore, the unjust enrichment claim must be dismissed.

ENDO PHARMACEUTICALS INC.'S MOTION TO STRIKE

Endo argues that to the extent that the State relies on references to a 2016 Assurance of Discontinuance (AOD) between the New York Attorney General and Endo, those allegations should be stricken or, at a minimum, cannot form the basis of the State's claims. Endo also argues that the AOD was made without Endo admitting to any of the findings of the New York Attorney General's investigation. The parties allegedly agreed that the AOD was not intended for use by any third party in any other proceeding and is not intended, and should not be construed, as an admission by Endo of any liability or finding set forth hererin." [87] Endo argues that the State is trying to use the settlement against Endo. Endo claims that many courts have stricken as immaterial and impertinent allegations that refer to or are derived from settlements and other preliminary or non-adjudicated proceedings, including governmental investigations.

The State claims that it is only using two findings from the New York Attorney General's investigation, which Endo did not admit. Further, the settlement is not an admission by Endo, but the statements quoted by the State in its Complaint are the New York Attorney General's findings, and the State has a right to use them. The State contends that it is not using the findings to establish Endo's liability, but to help refute Endo's contention that the State has not stated a claim. The State argues that pleadings are not evidence of liability and are more properly a subject of a motion *in limine*. [88]

***15** When ruling on a motion to strike, the Court considers: (1) whether the challenged averments are relevant to an issue in the case; and (2) whether they are unduly prejudicial. [89] "Motions to strike are not favored and are granted sparingly, and then only if clearly warranted, with doubt being resolved in favor of the pleading, and objectionable matter will be stricken only if it is clearly shown to be unduly prejudicial." [90]

The Court finds that the matters objected to in Endo's motion are relevant and have not been shown to be unduly prejudicial. Therefore, Endo's Motion to Strike Paragraph 83 of the Complaint must be denied.

CONCLUSION

The Court finds that the State of Delaware has established a *prima facie* case for Negligence and Consumer Fraud against the Manufacturer Defendants, Anda Pharmaceuticals, and the Distributor Defendants. However, the State of Delaware has not demonstrated a *prima facie* case for Negligence and Consumer Fraud claims against the Pharmacy Defendants. **Therefore, Manufacturer Defendants', Distributor Defendants', and Anda Pharmaceuticals' Motions to Dismiss the Negligence and Consumer Fraud claims are hereby DENIED.**

Pharmacy Defendants' Motion to Dismiss the Negligence and Consumer Fraud claims is hereby GRANTED.

The Court finds that the State of Delaware's nuisance claims fail as a matter of law. **Therefore, all Motions to Dismiss the Nuisance claims are hereby GRANTED.**

The Court finds that the State of Delaware has failed to adequately plead its civil conspiracy claim because the State only asserts parallel conduct by Defendants and has failed to establish a *prima facie* case involving concerted action, agreement, awareness of the agreement, and action in accordance with that agreement. **Therefore, all Motions to Dismiss the Civil Conspiracy claims are hereby GRANTED, without prejudice. Claims for Civil Conspiracy may be added if such evidence surfaces during discovery.**

The Court finds that the State of Delaware's unjust enrichment claim is not a stand-alone claim at law. This claim must be brought in the Court of Chancery. Unjust enrichment may be asserted as a possible measure of damages. **Therefore, all Motions to Dismiss the Unjust Enrichment claims are hereby GRANTED.**

The Court finds that the matter objected to in Endo Pharmaceutical's Motion to Strike Paragraph 83 of the Complaint has not been shown to be unduly prejudicial. **Therefore, Endo Pharmaceutical's Motion to Strike Paragraph 83 of the Complaint is hereby DENIED.**

IT IS SO ORDERED.

All Citations

Not Reported in Atl. Rptr., 2019 WL 446382

Footnotes

1 At the time the pending motions were heard, Matthew P. Denn was Attorney General.

2 Drug diversion refers to the transfer of any legally prescribed controlled substance from the individual for whom it was prescribed to another person for any illicit use.

3 In recent years, the frequency of opioid use for both chronic pain and non-medical purposes has grown dramatically, resulting in an epidemic of prescription opioid abuse. According to the Centers for Disease Control and Prevention ("CDC"), Delaware lost 669 people to drug overdose deaths between 2014 and 2016. The alleged "main driver" of such deaths was prescription and illicit opioids.

4 *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978).

5 *Id.*

6 *Wilmington Sav. Fund. Soc'v, F.S.B. v. Anderson*, 2009 WL 597268, at *2 (Del. Super.) (citing *Doe v. Cahill*, 884 A.2d 451, 458 (Del. 2005)).

7 *Spence*, 396 A.2d at 968.

8 *See* 16 *Del. C.* § 3308 ("For the purposes of this chapter, a drug is deemed to be misbranded: (1) If it is an imitation of or offered for sale under the name of another drug; (2) If the contents of the package as originally put up were removed, in whole or in part, and other contents were placed in such package or if the package fails to bear a statement on the label of the quantity or proportion of any alcohol, morphine, opium, cocaine, heroin, alpha or beta eucaine, chloroform, cannabis indica, chloral hydrate or acetanilide, or any derivative or preparation of any such substances contained therein; (3) If its package or label bears any statement, design or device regarding such article, or the ingredients or substances contained therein which is false or misleading in any particular way; (4) If it is included in the definition of misbranding in the Federal Food, Drug and Cosmetic Act.").

9 Deborah Dowell, Tamara Haegerich, & Roger Chou, *CDC Guideline for Prescribing Opioids for Chronic Pain - United States, 2016,* 65 Morbidity and Mortality Weekly Report 1 (2016), https://www.cdc.gov/mmwr/volumes/65/rr/rr6501e1.htm.

10 2015 WL 4111826 (Del. Super.).

11 *Id.* at *8.

12 919 A.2d 1116 (D. Del. 2007).

13 *Id.*

14 *Id.* at 1123.

15 *Id.* at 1122.

16 552 F.3d 659 (8th Cir. 2009).
17 *Id.* at 670.
18 *Id.*
19 *Id.* at 673.
20 Super. Ct. Civ. R. 8(a).
21 Delaware's Uniform Controlled Substances Act (16 *Del. C.* § 4701); Uniform Controlled Substances Act Regulations (24 *Del. Admin. C.* CSA 1.0); and "numerous professional regulations related to persons who handle, prescribe, and dispense controlled substances." Compl. ¶ 95.
22 Compl. ¶ 103.
23 Compl. ¶ 104-05 (quoting 24 *Del. Admin. C.* § 2500-8).
24 Compl. ¶ 141.
25 The State describes these orders as unusually large or frequent orders.
26 Compl. ¶ 134.
27 Compl. ¶ 134.
28 Compl. ¶ 145.
29 *See State of Sao Paulo of Federative Rep. of Braz. v. Am. Tobacco Co.*, 919 A.2d 1116, 1123 (Del. 2007)("State may not bring a direct action to seek damages for others' injuries without standing in their shoes as a subrogee").
30 2002 WL 31741522 (Del. Super.).
31 *Id.* at *4.
32 2002 WL 31741522 (Del. Super.).
33 *Id.* at *1.
34 *Id.*
35 *Id.* at *7.
36 16 *Del. C.* § 4733(a).
37 *Id.*
38 *See* *Duphily v. Delaware Electric Cooperative, Inc.*, 662 A.2d 821, 828 (Del. 1995)(citing *Laws v. Webb*, 658 A.2d 1000 (Del. 1995)); *Moffitt v. Carroll*, 640 A.2d 169, 174 (Del. 1994); *Culver v. Bennett,* 588 A.2d 1094 (Del. 1991).
39 *Culver v. Bennett*, 588 A.2d 1094 (Del. 1991)(quoting *Chudnofsky v. Edwards*, 208 A.2d 516 (Del. 1965)).
40 *Duphily*, 662 A. 2d at 829.
41 *Id.*
42 552 F.3d 659 (8th Cir. 2009).
43 *Id.* at 670.
44 *Greenfield for Ford v. Budget of Delaware, Inc.*, 2017 WL 729769, at *2 (Del. Super.)(quoting *In re Benzene Litigation*, 2007 WL 625054, at *6 (Del. Super.)(citing *Stuchen v. Duty Free Int'l, Inc.*, 1996 WL 33167249, at *5 (Del. Super.))).
45 *Myer v. Dyer*, 542 A.2d 802, 805 (Del. Super.).
46 *In re Benzene Litigation*, 2007 WL 625054, at *1 (Del. Super.)(In a mass tort case, the Court allowed defendants to isolate claims among a group of defendants. The defendants moved separately to distinguish behavior, and the court treated defendants as individual movants.).
47 Compl. ¶ 11.
48 Compl. ¶ 11.
49 Compl. ¶ 189.
50 Compl. ¶ 114.
51 16 *Del. C.* § 4798.
52 Compl. ¶ 120 (citing 16 *Del. C.* § 4798(e)).
53 Compl. ¶ 131.
54 The State argues that Pharmacies (along with other Defendants) have received extensive guidance on how to identify signs of illegal opioid use and how to prevent that use. The State claims that Pharmacies have received training from the DEA, "state pharmacy boards," and "national industry associations." Compl. ¶ 170.
55 Compl. ¶ 186.

56 16 *Del. C.* §§ 4701 *et seq.*
57 16 *Del. C.* § 4735(b)(1).
58 16 *Del. C.* § 4711.
59 2011 WL 290829 (Del. Super.).
60 2011 WL 290829, at *1.
61 *Id.* at *4.
62 16 *Del. C.* § 6853(a).
63 *Patton v. Simone*, 1992 WL 398478, at *9 (Del. Super.)(citing *State v. Hill*, 167 A.2d 738, 741 (Del. Ch. 1961)).
64 2000 WL 33113806 (Del. Super.).
65 *Sills v. Smith & Wesson Corp.*, 2000 WL 33113806 (Del. Super.)(holding that Delaware law does not recognize products-based nuisance claims).
66 2000 WL 33113806 (Del. Super.).
67 *Id.* at *2 (citing *City of Evansville v. Kentucky Liquid Recycling, Inc.*, 604 F.2d 1008, 1017 (7th Cir. 1979), *cert. denied*, 444 U.S. 1025 (1980)(costs of abating toxic waste public nuisance are recoverable); *U.S. v. Occidental Chem. Corp.*, 965 F.Supp. 408, 412—413 (W.D.N.Y. 1997) (exercise of police power to protect public health in abating toxic waste public nuisance are recoverable)).
68 *Id.* at *7.
69 *Id.*
70 *See, e.g.*, *Tioga Public School Dist. No. 15 of Williams County, State of N.D. v. U.S. Gypsum Co.*, 984 F.2d 915, 921 (8th Cir. 1993)("to interpret the nuisance statute in the manner espoused by Tioga would in effect totally rewrite North Dakota tort law"); *State v. Lead Industries, Ass'n, Inc.*, 951 A.2d 428, 456 (R.I. 2008)("[t]he law of public nuisance never before has been applied to products, however harmful"); *In re Lead Paint Litig.*, 924 A.2d 484, 505 (N.J. 2007) ("were we to permit these complaints to proceed, we would stretch the concept of public nuisance far beyond recognition and would create a new and entirely unbounded tort antithetical to the meaning and inherent theoretical limitations to the tort of public nuisance"); *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1116 (111. 2004)("there is no authority for the unprecedented expansion of the concept of public rights to encompass the right asserted by plaintiffs...the plaintiff's claim does not meet all of the required elements of a public nuisance action"); *People ex re. Spitzer v. Sturm, Ruger & Co., Inc.*, 761 N.Y.S. 2d 192, 196 (N.Y. App. Div. 2003)("giving a green light to a common-law public nuisance cause of action today will, in our judgment, likely open the courthouse doors to a flood of limitless, similar theories of public nuisance, not only against these defendants, but also against a wide and varied array of other commercial and manufacturing enterprises and activities").
71 *In re National Prescription Opiate Litigation*, No. 1:17-md-2804 (6th Cir. 2018), http://courtweb.pamd.uscourts.gov/courtwebsearch/ndoh/BOTExQ3LV4.pdf.
72 *Sills v. Smith & Wesson Corp.*, 2000 WL 33113806, at *7 (Del. Super.).
73 *Patton v. Simone*, 1992 WL 183064, at *13 (Del. Super.).
74 *Johnson v. Preferred Professional Ins. Co.*, 91 A. 3d 994, 1014 (Del. Super.)(citing *Nicolet, Inc. v. Nutt*, 525 A.2d 146, 149-50 (Del. 1987)(citing *McLaughlin v. Copeland*, 455 F.Supp. 749, 752 (D.Del. 1978), *aff'd*, 595 F.2d 1213 (3d Cir. 1979))).
75 *Id.* at 1014 (citing *Ramunno v. Cawley*, 705 A.2d 1029, 1030 (Del. 1998)).
76 Compl. ¶ 303.
77 Compl. ¶ 305.
78 Compl. ¶ 306.
79 *Szczerba v. American Cigarette Outlet, Inc.*, 2016 WL 1424561, at *3 (Del. Super.)(citing *Anderson v. Airco, Inc.*, 2004 WL 2827887 (Del. Super.)(citing *Ryan v. Eli Lilly & Co.*, 514 F.Supp. 1004, 1012 (D.S.C.1981))).
80 525 A.2d 146 (Del. 1987).
81 *Id.* at 149.
82 *Szczerba*, 2016 WL 1424561, at *3 (citing *Nicolet*, 525 A.2d at 149-50).

83 *Nicolet*, 525 A.2d at 149.

84 *Id.*

85 *Incyte Corporation v. Flexus Biosciences, Inc.*, 2017 WL 7803923, at *4 (Del. Super.)(citing *Nemec v. Shrader*, 991 A.2d 1120, 1130 (Del. 2010)).

86 *See Nemec v. Shrader*, 991 A.2d 110, 1130 (Del. 2010).

87 Assurance of Discontinuance ¶¶ 54, 67 (Endo requested in its Motion to Dismiss that the Court take judicial notice of the AOD, an executed copy of which is available on the NYAG's website.); *See* https://ag.ny.gov/pdfs/Endo_AOD_030116-Fully_Executed.pdf.

88 The State proffers *Johnson v. M & M*, 242 F.R.D. 187, 190 (D. Conn. 2007)("a complaint is not submitted to the jury" and "whether evidence of the prior investigations will be admissible at trial is an issue to be resolved at a later stage").

89 *See Shaffer v. Davis*, 1990 WL 81892, at *4 (Del. Super.)(citing *Pack & Process, Inc. v. Celotex Corp.*, 503 A.2d 646, 660-61 (Del. Super. 1990)).

90 *Pack & Process, Inc. v. Celotex Corp.*, 503 A.2d 646, 660-61 (Del. Super. 1985).

EXHIBIT 3

EXHIBIT 3

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

STATE OF WEST VIRGINIA, et al.,

Plaintiffs,

v. **CIVIL ACTION NO. 2:17-03555**

MCKESSON CORPORATION,

Defendant.

MEMORANDUM OPINION AND ORDER

Pending before the court is the plaintiff's motion to remand. (ECF No. 4.) On October 31, 2017, the court held a hearing on that motion. For the reasons set forth below, the motion is **GRANTED**.[1]

I. Background

Plaintiffs brought this case against defendant in the Circuit Court of Boone County, West Virginia, on January 8, 2016. In general terms, plaintiffs, on behalf of the State of West Virginia, allege that defendant McKesson Corporation, a national pharmaceutical drug distributor, did not take sufficient steps to monitor, report, and remedy purportedly suspicious shipments of

[1] On December 5, 2017, a Transfer Order was filed and the Judicial Panel on Multidistrict Litigation ("JPML") transferred this case to the United States District Court for the Northern District of Ohio for coordinated or consolidated pretrial proceedings. See ECF Nos. 16 and 17. On December 27, 2017, the JPML remanded the matter to this court so that it might decide the pending remand motion. The Clerk reopened the matter on January 19, 2018.

pharmaceuticals into West Virginia. Plaintiffs assert eight counts against McKesson: violation of the West Virginia Consumer Credit and Protection Act (Count I); unfair methods of competition and/or unfair or deceptive acts or practices (Count II); violations of the West Virginia Uniform Controlled Substances Act ("WVCSA") requiring injunctive relief (Count III); negligent violation of the WVCSA (Count IV); intentional violation of the WVCSA (Count V); public nuisance (Count VI); negligence (Count VII); and unjust enrichment (Count VIII).

On February 23, 2016, defendant removed the case to federal court alleging federal question jurisdiction existed over this matter. The case was assigned to Judge John T. Copenhaver, Jr. and assigned Civil Action No. 2:16-01772. With respect to the assertion that federal question jurisdiction existed, Judge Copenhaver summarized McKesson's argument as follows:

> Defendant responds that plaintiffs' complaint can be reduced in substance to a theory of the case in which defendant breached a single "duty to refuse to fill suspicious orders" of certain pharmaceutical drugs. See, e.g., Def.'s Resp. to Pls.' Mot. to Remand 6 (hereinafter "Def.'s Resp."). Defendant argues that the federal Controlled Substances Act ("federal CSA") alone can generate the duty that defendant is alleged to have breached. Def.'s Resp. 10 ("No court could issue the requested instructions without specifically concluding that McKesson violated federal law—i.e., the federal CSA."). According to defendant, the duty to refuse to fill suspicious orders does not arise directly from the federal CSA; instead, it arises, if at all, in the federal CSA "as interpreted by [the Drug Enforcement Agency ("DEA")]" in two letters, written in 2006 and 2007, from the DEA to all registered distributors. Id. 7, 15.

> The 2006 DEA letter stated that "in addition to reporting suspicious orders, a distributor has a statutory responsibility to exercise due diligence to avoid filling suspicious orders that might be diverted into other than legitimate . . . channels." Masters Pharmaceuticals, Inc., Decision and Order, 80 Fed. Reg. 55,418, 55,421. The 2007 letter warned distributors that "[r]eporting an order as suspicious will not absolve the registrant of responsibility if the registrant knew, or should have known, that the controlled substances were being diverted." Masters Pharmaceuticals, 80 Fed. Reg. at 55,421. Defendant argues that the two letters together generate a single duty to "refuse to fill suspicious orders" that forms the basis of all of plaintiffs' claims. See, e.g., Def.'s Resp. 6. Defendant also contends that removal is improper only if plaintiffs rely exclusively on state law claims, which defendant says they allegedly do not. Rather, defendant asserts that federal claims are present on the face of the complaint in Counts III, IV, and V in the references to "United States laws and regulations," and that all of plaintiffs' claims depend on a substantial federal question.

W. Va. ex rel. Morrisey v. McKesson Corp., Civil Action No. 16-1772, 2017 WL 357307, *4 (S.D.W. Va. Jan. 24, 2017).

On January 24, 2017, the court granted plaintiffs' motion to remand. Judge Copenhaver, after consideration of the test articulated by the Supreme Court in Grable & Sons Metal Prods., Inc. v. Darue Eng'g and Mfg., 545 U.S. 308 (2005)[2], concluded that plaintiffs' right to relief under state law did not require

[2] The Grable factors were recently summarized by the Supreme Court as follows: "[F]ederal jurisdiction over a state law claim will lie if a federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress." Gunn v. Minton, 568 U.S. 251, 258 (2013).

resolution of a substantial question of federal law in dispute between the parties. See id. at *8. As Judge Copenhaver noted:

> [P]laintiffs have not alleged violations of any specific federal laws or regulations, and no federal statute or regulation has emerged as an "essential element" of the underlying claim. Rather, plaintiffs have alleged numerous and substantial issues of state law in both their complaint and their motion. See, e.g., Compl. ¶¶ 377, 392; Pls.' Mot. 2.
>
> Consequently, it does not appear to the court that the only possible source of a putative duty to avoid filling suspicious orders lies in letters relied upon only by defendant, or that plaintiffs' claims necessarily rely on this duty. For one thing, there are no good reasons to believe that the letters have any binding effect upon distributors. Plaintiffs contend that "the DEA letter[s] do [ ] not create a binding effect upon distributors such as the defendant, and [are] to be construed as [ ] mere warning letter[s]." Pls.' Reply 7 (quotation marks omitted). Defendant concedes that the letters were not binding, but in apparent contradiction, insists that the letters generate an "obligation" that must be "heed[ed]." Def.'s Surreply to Pls.' Reply in Supp. of Mot. to Remand 2. To the extent that the letters prove relevant, their guidance may of course be marshalled in support of particular allegations. The agency itself, however, has found that the letters were "not intended to have binding effect but were simply warning letters." Masters Pharmaceuticals, 80 Fed. Reg. at 55,475. Of course, plaintiffs, not defendant, are "master[s] of the claim." Caterpillar, 482 U.S. at 392.
>
> Defendant cannot stipulate a single duty to refuse to fill suspicious orders, about which defendant is itself ambivalent, generated merely by DEA letters in order to bootstrap into federal court a complaint that alleges numerous specific state-law causes of action. "[F]ederal jurisdiction is disfavored for cases . . . which involve substantial questions of state as well as federal law." Bender, 623 F.3d at 1130. Plaintiffs have alleged violations of numerous West Virginia statutes and regulations, and the use of the catch-all "United States laws and regulations" does not operate

> to unlock the federal courts to the claims at issue here. Even were there some indication from the complaint—which there is not—that federal agency letters provided some binding and relevant duty, "any doubts concerning the propriety of removal should be resolved against removal." Barbour, 640 F.3d at 617. Defendant bears the burden of quieting such doubts and has not done so here. Strawn, 530 F.3d at 296. Defendant has therefore not made out a case under Grable that all of plaintiffs' claims necessarily hinge on the duty to refuse to fill suspicious orders, and as a consequence, the exercise of removal jurisdiction is improper.

Id.

This case now finds itself in federal court for a second time because, on July 7, 2017, McKesson once again removed the case to this court. In state court, McKesson moved for judgment on the pleadings asserting that McKesson has no duty under state law to refuse to ship suspicious orders. See ECF No. 1 at 1-2 and 4. In its opposition to McKesson's motion, plaintiffs asserted:

> McKesson fully comprehends its obligation to never distribute suspicious orders of addictive controlled substances. This is an inherent part of its duty to maintain effective controls and procedures to guard against diversion of controlled substances, a duty that would be rendered illusory if McKesson was not obliged to refrain from distributing suspicious orders of controlled substances. The Drug Enforcement Administration (DEA) for many years has instructed McKesson (and all other controlled substance distributors) that as part of its duty to maintain effective controls and procedures to guard against diversion (the identical duty imposed by West Virginia law), McKesson must not distribute suspicious orders of controlled substances. DEA letters, Ex. 5. Because West Virginia law identically requires effective controls and procedures to guard against diversion, it likewise bars McKesson from distributing suspicious

> orders. Thus, while this issue is not determinative of the State's claims, it is abundantly clear that by distributing suspicious orders of controlled substances into West Virginia, McKesson violates a legal duty owed to the State to refrain from doing so.

Notice of Removal at pp. 4-5 (ECF No. 1)(quoting Plaintiffs' Response to McKesson's Motion for Judgment on the Pleadings in Civil Action No. 16-C-1 at pp. 10-11 (June 30, 2017) (footnotes omitted) (attached as Exhibit A to Notice of Removal)). In support of their argument, plaintiffs attached the aforementioned DEA letters to their opposition brief. ECF No. 1 at 11.

According to McKesson, plaintiffs' position taken in state court is directly at odds with the position they took before Judge Copenhaver in order to obtain remand. Compare ECF No. 1 at 5 ("The Drug Enforcement Administration (DEA) for many years has instructed McKesson . . . that as part of its duty to maintain effective controls and procedures to guard against diversion (the identical duty imposed by West Virginia law), McKesson must not distribute suspicious orders of controlled substances. DEA letters, Ex. 5") with ECF No. 17 at p. 7 in Civil Action No. 2:16-cv-01772 ("[T]he defendant would have this Court rule that the DEA letter is now binding on distributors of controlled substances, simply in an attempt to create a binding duty where none exists. Because the federal Act does not purport [to impose] a legal duty upon the defendant to refuse to ship suspicious orders, it is impossible for [the federal CSA] to be

implicated simply because the State used the words "refuse" or "suspend" in its Amended Complaint. Thus, because the federal Act is not implicated, it also is not necessarily raised. . . ."); ECF No. 14 in Civil Action No. 2:16-cv-1772 at p. 18 ("The State can prove every element of every cause of action under state-based theories of law without relying on any federal standard or interpreting any federal law. Because the State can prove its right to relief without any court's ruling on a federal question, the State's claims do not "necessarily depend" on a "substantial" question of federal law."). Therefore, McKesson argues "[p]laintiffs' request to the state court to impose on McKesson a binding legal duty found in the DEA's interpretation of federal law in order to sustain their claims now establishes that at least some of Plaintiffs' claims depend on a substantial federal question" in turn creating federal jurisdiction. ECF No. 1 at 8.

II. Legal Standard

It is well established that the party invoking jurisdiction bears the burden of proof that all prerequisites to jurisdiction are satisfied, Mulcahey v. Columbia Organic Chems. Co., 29 F.3d 148, 151 (4th Cir. 1994)(citing Wilson v. Republic Iron & Steel Co., 257 U.S. 92 (1921)), and that any doubts about the propriety of removal are resolved in favor of state court jurisdiction and

remand, Mulcahey, 29 F.3d at 151 (citing Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100 (1941)).

"`Federal courts are courts of limited jurisdiction,' possessing `only that power authorized by Constitution and statute.'" Gunn v. Minton, 568 U.S. 251, 256 (2013) (quoting Kokkonen v. Guardian Life Ins. Co. of America, 511 U.S. 375, 377 (1994)). As is relevant here, "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. "[A] case can `arise[e] under' federal law in two ways. Most directly, a case arises under federal law when federal law creates the cause of action asserted. . . . But even where a claim finds its origins in state rather than federal law. . . we have identified a `special and small category' of cases in which arising under jurisdiction still lies." Gunn, 568 U.S. at 257-58 (quoting Empire Healthchoice Assurance, Inc. v. McVeigh, 547 U.S. 677, 699 (2006)).

> In outlining the contours of this slim category, we do not paint on a blank canvas. Unfortunately, the canvas looks like one that Jackson Pollock got to first.
>
> In an effort to bring some order to this unruly doctrine several Terms ago, we condensed our prior cases into the following inquiry: Does the "state-law claim necessarily raise a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities"? Grable, 545 U.S. at 314, 125 S. Ct. 2363. That is, federal jurisdiction over a

> state law claim will lie if a federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress. Where all four of these requirements are met, we held, jurisdiction is proper because there is a "serious federal interest in claiming the advantages thought to be inherent in a federal forum," which can be vindicated without disrupting Congress's intended division of labor between state and federal courts." Id. at 313-314, 125 S. Ct. 2363.

Id. at 258. In the case discussed above, Grable & Sons Metal Prods., Inc. v. Darue Eng'g and Mfg., 545 U.S. 308, 315 (2005), the court found federal question jurisdiction existed over a state quiet title action. The Court has cautioned that "it takes more than a federal element `to open the arising under' door." Empire Healthchoice Assurance, Inc. v. McVeigh, 547 U.S. 677, 701 (2006).

According to McKesson, this case falls under that "slim category" of cases discussed by the Court in Grable.

III. Analysis

A. *Motion to Remand*

The instant case is similar to the case of Merrell Dow Pharm., Inc. v. Thompson, 478 U.S. 804 (1986). In Merrell Dow, plaintiffs sued a drug manufacturer in Ohio state court alleging that the drug Bendectin caused birth defects. Plaintiffs sought recovery based on common law theories of negligence, breach of warranty, strict liability, fraud, and gross negligence. See id. at 805. Plaintiffs also alleged that Merrell Dow, the drug

manufacturer, misbranded Bendectin in violation of the federal Food, Drug, and Cosmetic Act ("FDCA") and that a violation of the FDCA created a rebuttable presumption of negligence. See id. at 805-06.

Merrell Dow removed the cases to federal court, contending that the actions were "founded, in part, on an alleged claim arising under the laws of the United States." Id. at 806 (internal citation and quotation marks omitted). The district court denied plaintiffs' motion to remand. See id. The United States Court of Appeals for the Sixth Circuit reversed. See id. Acknowledging that the FDCA did not create or imply a private right of action for persons injured by violations of the Act, the court explained:

> Federal question jurisdiction would, thus, exist only if plaintiffs' right to relief depended necessarily on a substantial question of federal law. Plaintiffs' causes of action referred to the FDCA merely as one available criterion for determining whether Merrell Dow was negligent. Because the jury could find negligence on the part of Merrell Dow without finding a violation of the FDCA, the plaintiffs' cause of action did not depend necessarily upon a question of federal law. Consequently, the causes of action did not arise under federal law and, therefore, were improperly removed to federal court.

Id. at 807 (quoting 766 F.2d at 1005, 1006 (1985)).

The Supreme Court affirmed. See id. In so doing, the Court framed the issue as "whether the incorporation of a federal standard in a state-law private action, when Congress has intended that there not be a federal private action for

violations of that federal standard makes the action one `arising under the Constitution, laws, or treaties of the United States.'" Id. at 805 (quoting 28 U.S.C. § 1331). The Court concluded "that a complaint alleging a violation of a federal statute as an element of a state cause of action, where Congress has determined that there should be no private, federal cause of action for the violation, does not state a claim arising under the Constitution, laws, or treaties of the United States." Id. at 817.

Significantly, the Grable Court did not call the Merrell Dow holding into question. 545 U.S. at 305, 316. Acknowledging that the absence of a private cause of action in Merrell Dow was important to, but not dispositive of, the court's holding that federal jurisdiction did not exist, the Court specifically noted that "Merrell Dow disclaimed the adoption of any bright-line rule." Id. at 317. As such, the Court wrote

> Accordingly, Merrell Dow should be read in its entirety as treating the absence of a federal private right of action as evidence relevant to, but not dispositive of, the "sensitive judgments about congressional intent" that § 1331 requires. The absence of any federal cause of action affected Merrell Dow's result two ways. The Court saw the fact as worth some consideration in the assessment of substantiality. But its primary importance emerged when the Court treated the combination of no federal cause of action and no preemption of state remedies for misbranding as an important clue to Congress's conception of the scope of jurisdiction to be exercised under § 1331. The Court saw the missing cause of action not as a missing federal door key, always required, but as a missing welcome mat, required in the circumstances, when exercising federal jurisdiction over a state misbranding action would have attracted a horde of

> original filings and removal cases raising other state claims with imbedded federal issues. For if the federal labeling standard without a federal cause of action could get a state claim into federal court, so could any other federal standard without a federal cause of action. And that would have meant a tremendous number of cases.
>
> One only needed to consider the treatment of federal violations generally in garden variety state tort law. . . . A general rule of exercising federal jurisdiction over state claims resting on federal mislabeling and other statutory violations would thus have heralded a potentially enormous shift of traditionally state cases into federal courts. . . . In this situation, no welcome mat meant keep out. Merrell Dow's analysis thus fits within the framework of examining the importance of having a federal forum for the issue, and the consistency of such a forum with Congress's intended division of labor between state and federal courts.

Id. at 318-19.

With these principles in mind and having considered the Grable factors, the court concludes that this case should be remanded to state court once again. The earlier remand decision focused extensively on whether the alleged federal issue was necessarily raised and Judge Copenhaver rightly concluded that it was not.[3] However, even if, for purposes of this motion, the

[3] Our appeals court has counseled that "a claim `necessarily depends on a question of federal law only when every legal theory supporting the claim requires the resolution of a federal issue.'" Pressl v. Appalachian Power Co., 842 F.3d 299, 304 (4th Cir. 2016) (quoting Flying Pigs, LLC v. RRAJ Franchising, LLC, 757 F.3d 177, 182 (4th Cir. 2014) (emphasis in original)).

While McKesson argues that this case rises and falls on whether the DEA letters imposed a duty upon McKesson to refuse to fill suspicious orders, the Complaint "alleges violations of

court assumes both that a federal issue is raised in this case and that it is actually disputed, that does not end the court's inquiry. Any alleged "duty" found in the DEA letters is not substantial because, as Judge Copenhaver observed, "plaintiff's complaint alleges violations of numerous duties implicated by state law" that do not depend on this disputed duty found in federal law.[4] W. Va. ex rel. Morrisey v. McKesson Corp., Civil

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numerous duties implicated by state law." W. Va. ex rel. Morrisey v. McKesson Corp., Civil Action No. 16-1772, 2017 WL 357307, *8 (S.D.W. Va. Jan. 24, 2017) ("For example, the West Virginia State Board of Pharmacy's rules require that `[a]ll registrants shall provide effective controls and procedures to guard against theft and diversion of controlled substances.' W. Va. C.S.R. 15-2-4.2.1. The same rules require that a `registrant shall design and operate a system to disclose to the registrant suspicious orders of controlled substances. The registrant shall inform the Office of the Board of suspicious orders when discovered by the registrant.' W. Va. C.S.R. 15-2-4.4. As noted above, plaintiffs allege violations of numerous duties implicated by these regulations, including duties to `investigate, report, and cease fulfilling suspicious orders,' Compl. ¶ 24, to implement a `precise system of detecting and monitoring the supply of prescription medicine,' Compl. ¶ 346, `to adequately design and operate a system to disclose suspicious orders of controlled substances,' Compl. ¶ 406, and `to inform the State of suspicious orders,' id."). Based on the foregoing, it is difficult for the court to conclude that every legal theory supporting plaintiffs' claims requires resolution of whether federal law – as interpreted in the DEA letters – created a duty to refuse to ship suspicious orders.

Furthermore, if McKesson is indeed correct in its assertion that plaintiffs' case rests entirely on the guidance found in the DEA letters, the case should be easily disposed of in state court given that plaintiffs have conceded more than once that those letters do not create a duty.

[4] See, e.g., W. Va. ex rel. Morrisey v. McKesson Corp., Civil Action No. 16-1772, 2017 WL 357307, *4 (S.D.W. Va. Jan. 24, 2017) at *7 ("The complaint cites on numerous occasions to West

Action No. 16-1772, 2017 WL 357307, *8 (S.D.W. Va. Jan. 24, 2017).

> Furthermore, as the Supreme Court has explained
>
> [I]t is not enough that the federal issue be significant to the particular parties in the immediate suit; that will always be true when the state claim "necessarily raise[s]" a disputed federal issue, as Grable separately requires. The substantiality inquiry under Grable looks instead to the importance of the issue to the federal system as a whole.

Gunn v. Minton, 568 U.S. 251, 260 (2013) (emphasis in original). The federal courts have little interest in deciding cases involving West Virginia's Uniform Controlled Substances Act and West Virginia's negligence and public nuisance law, even if violation of a federal statute or standard is an element of those claims.

Finally, the court concludes that recognizing federal question jurisdiction over this case would disrupt the balance struck by Congress between state and federal judicial responsibilities. First the federal Controlled Substances Act

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Virginia regulations, which require, for example, that "[t]he registrant shall design and operate a system to disclose to the registrant suspicious orders of controlled substances." W. Va. C.S.R. 15-2-4.4. In Count III, plaintiffs allege that defendant "failed to diligently identify and report suspicious orders it received," Compl. ¶ 366, and "failed to develop a system sufficient to adequately identify suspicious orders," id. ¶ 367. Counts IV and V allege violations of West Virginia statutory provisions, including violations of West Virginia Code § 60A-3-308, 60A-4-401 through 403, and 60A-8-1, et seq. 6, that cannot be reduced simply to a duty to avoid filling orders. See, e.g., id. ¶¶ 377, 392.).

(CSA) does not create a private of action,[5] a factor which, even under Grable, weighs heavily in favor of remanding this case to state court. Even if the two DEA letters conferred a duty upon McKesson to refuse to ship suspicious orders, this alone is insufficient to bring traditional state law claims into federal court. The federal courts have little interest in exercising jurisdiction over claims alleging violation of state statutory and common law – even where resolution of such claims might involve a "federal element". To do so would shift a significant number of garden-variety state law claims into a federal forum, thereby upsetting the congressionally intended division between state and federal courts.

B. *Fees and Costs*

Plaintiffs also seek reimbursement of the costs and fees incurred in filing the instant motion. "An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." 28 U.S.C. § 1447(c). "[W]hen an objectively reasonable basis [for removal] exists, fees should be denied." Martin v. Franklin Capital Corp., 546 U.S. 132, 141 (2005). The court finds that McKesson had a reasonable basis for removal in this case given the representations made by plaintiffs in state court which, at

[5] See Welch v. Atmore Community Hosp., No. 17-11244, 704 F. App'x 813, 816 (11th Cir. Aug. 18, 2017) (and authorities cited therein).

times, seem to run counter to what they argued their first time in federal court. Therefore, the court will not award costs and fees.

III. Conclusion

For the aforementioned reasons, the court hereby **GRANTS** plaintiff's motion to remand and the case is **REMANDED** to the Circuit Court of Boone County. The motion for costs and fees is **DENIED.**

The Clerk is directed to send a certified copy of this Memorandum Opinion and Order to all counsel of record, the Clerk of the Circuit Court of Boone County, West Virginia, and the United States District Court for the Northern District of Ohio (MDL 2804).

It is **SO ORDERED** this 15th day of February, 2018.

ENTER:

David A. Faber
Senior United States District Judge

EXHIBIT 4

EXHIBIT 4

2019 WL 423990
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Connecticut,
Judicial District of Hartford, Complex Litigation Docket at Hartford.

CITY OF NEW HAVEN
v.
PURDUE PHARMA, L.P. et al.

X07HHDCV176086134S
|
January 8, 2019

Moukawsher, J.

1. Cities Suing Drug Companies Bear the Ordinary Burdens of Civil Plaintiffs

***1** Every year, opioid abuse kills more and more Americans. Annual deaths from opioid abuse are now in the tens of thousands. Many have attributed the rising death toll to drug company lies and the over-supply of these addictive pain killers. Federal prosecutors have been among those blaming the drug companies. They indicted the leaders of the Purdue Pharma organization, the maker of OxyContin. They accused the company of tricking doctors and the public into believing opioids were safe for long-term use. Ultimately, three company officials pled guilty to felonies and the company paid a $ 600 million fine. [1]

Law enforcement actions like the federal case against Purdue Pharma appear in all respects the righteous manifestations of government vindicating the public interest. Justly deserved fines and penalties in government enforcement cases are a public good; they punish the guilty and deter the tempted. And they are relatively easy to bring. The strict rules that govern who can sue in ordinary civil damages cases don't apply in enforcement cases. Specific statutes grant the state and federal government authority to bring these kind of suits without meeting the ordinary burdens of individual civil plaintiffs.

But the cities who have brought the lawsuits this court is considering, by contrast, have been granted no such authority. Yes, the cities are governments, and they are suing drug companies about opioid abuse. The defendants include Purdue Pharma and twenty-four other drug companies. [2] The trouble is that these matters are ordinary civil damages cases and face the ordinary civil rules about who can sue for what.

They are ordinary civil cases because without any special statutory authority, the thirty-seven cities in the cases on this court docket are seeking—not to vindicate the public interest as a whole—but to gain money solely for themselves. The cities want the money for the indirect harm they say the drug companies caused them. They say they have been forced to pay for addicts' social and medical needs and have suffered other indirect expenses the addicts themselves caused, including extra emergency-responder expenses, consequences from drug-related crimes, etc.

But because they are suing in an ordinary civil lawsuit their lawsuits can't survive without proof that the people they are suing directly caused them the financial losses they seek to recoup. This puts the cities in the same position in claiming money as the brothers, sisters, friends, neighbors, and co-workers of addicts who say they have also indirectly suffered losses caused by the opioid crisis. That is to say—under long-established law—they have no claims at all.

***2** Why should this be so? Haven't they suffered? Haven't we all suffered? At least in some indirect way? All probably true. But can all of us line up in court and ask for our personal share of the extra taxes, declining property values, rising crime rates and personal anguish we suffer from the addictions surrounding us?

Not if we want a rational legal system. To keep order in law, government enforcement agencies must represent the indirect public interest in court, not a flurry of individual plaintiffs—even when they are local governments.

To permit otherwise would risk letting everyone sue almost everyone else about pretty much everything that harms us. Connecticut rightly rejects this approach. It judges that allowing these kinds of lawsuits would lead to a wildly complex and ultimately bogus system that pretends to measure the indirect cause of harm to each individual

and fakes that it can mete out proportional money awards for it. In short, our courts have declined to get out of the business of reasoned judgment and into the business of irrational speculation.

These cases illustrate the problem. If they were allowed to proceed under ordinary civil rules, each of the twenty-five companies being sued here could be held responsible only for harms they themselves caused to each party suing. Even if they could, none of the complaints allege any form of civil conspiracy, so we don't have to worry about that issue.

This means proving the drug companies caused the specific extra expenses claimed would require a court or jury to calculate the impact on each of thirty-seven cities of the activities of each of the twenty-five defendants, as distinguished from each other, and as distinguished from the impact of all the other strains on municipal budgets. The strains the court would have to measure would inevitably include the impact on cities of other drug abuse, alcohol abuse, guns, the economy, government waste, cuts in state and federal aid, mandatory employee raises and pension contributions, rising medical expenses, businesses moving out of state, etc.

In the end, any precise number the court might purport to "calculate" would lead to absurd results that would have a court or jury declaring that a given drug company in a given city in a given year caused 3.6 percent of the increased cost of Narcan, 2 percent of the increased emergency services budgets, and 1 percent of the increased social service budget. This would inevitably require determining causation by conjecture. It would be junk justice.

Remember, the cities aren't asking the court to stop misleading advertising or the oversupply of drugs. They aren't asking the court to fine the companies under some law or regulation. The cities are asking the court to order allegedly guilty parties to pay for the damage they each allegedly caused each city. So to collect money from the drug companies the cities would have to prove both the amount of the damage and the degree of the cause.

The drug companies ask the court to dismiss these cases because they claim indirect damages that would turn on conjectural analysis of causes and effects. Because the companies are right, the court must accede to their request.

2. *Ganim v. Smith & Wesson* Mandates the Rejection of the Cities' Indirect Damages Claims

Our Supreme Court has long ruled claims like these impermissible. In legal parlance, it has held that the indirectly harmed have no "standing to sue" and that the courts may not hear, but instead must dismiss, these claims. The courts are said to have no "subject matter jurisdiction" over this kind of claim. And our Supreme Court has also said there must be no delay about identifying and dismissing cases that don't belong in court.

***3** In 1996 in *Federal Deposit Ins. Co. v. Peabody, N.E., Inc.,* our Supreme Court held that when a challenge is made to the court's subject matter jurisdiction "it must be immediately acted upon" by the court "before it can move one further step." [3] As our High Court held in 2000 in *Ramos v. Vernon,* this includes claims like this about "standing" where the people suing have only a claim that those they sue harmed them in an immeasurably indirect way. [4] Indeed, our Court has considered these issues in a case remarkably like these cases and has emphatically held that these claims don't belong in court.

That case was the 2001 Supreme Court decision in *Ganim v. Smith & Wesson Corp.,* a lawsuit by a city about the indirect consequences of gun violence. [5] *Ganim* holds that courts can't credibly consider cases derived from harms allegedly connected to defendants by lengthy, multifaceted chains of causation that must weigh their conduct while trying to separate that conduct from the myriad of independent factors that make up most broadly defined social crises like gun and opioid abuse. [6]

Ganim makes a policy judgment. The judgment is that the more direct the harm, the more justice there is in compensating for it. But it also assumes that the more theoretical the harm, the weaker the claim for compensation. The *Ganim* Court understood that our actions have indirect effects on others like the rock that ripples the pond or the butterfly that flaps its wings. But it is impossible to trace fairly every act to its utmost consequence.

So how does *Ganim* decide what's too indirect to sue over? *Ganim* adopts the approach of the 1992 United States Supreme Court's decision in *Holmes v. Securities Investor Protection Corp.*[7] *Holmes* said that to determine causes direct enough to sue over we must consider three factors:

> How indirect is the injury;
>
> How complicated is it to decide who gets what money;
>
> Whether directly injured parties could sue instead.

Let's consider these policies here. How indirect is the alleged injury? The *Ganim* Court said that the more links people have to make to prove the causation chain the less likely those people are to have a right to have standing to sue.[8]

The cities have many links to make here:

> Link 1: The manufacturers make the opioids.
>
> Link 2: The manufacturers sell the opioids to the distributors.
>
> Link 3: The distributors sell the opioids to a pharmacy.
>
> Link 4: Doctors prescribe the opioids.
>
> Link 5: Patients take them.
>
> Link 6: Some patients become addicted.
>
> Link 7: The city must give emergency and social services to some addicts while the city's quality of life, property values and crime rate worsen from the spread of addiction, further straining city resources.

Of course, the cities can't claim that every person harmed within their borders got the drugs from just one of the companies they are suing. There are further side sets of links they would have to rely on to explain some aspects of the problem:

> Link 8: Pills get loose and are sold on the black market creating other costly addicts.
>
> Link 9: Pills get too expensive or scarce for some addicts who turn to more accessible stocks of street fentanyl or heroin, creating costly addicts.

Unfortunately for the cities, these links look remarkably similar to the links rejected as too indirect in *Ganim*:

> Link 1: Manufacturers make the guns.
>
> Link 2: The manufacturers sell the guns to the distributors.
>
> Link 3: The distributors sell the guns to retail outlets.
>
> ***4** Link 4: The retailers sell consumers the guns.
>
> Link 5: The consumers use the guns.
>
> Link 6: Some consumers injure themselves or others with the guns.
>
> Link 7: The city must give emergency and social services to some of the wounded while the city's quality of life, property values and crime rate worsen, further straining city resources.

The city in *Ganim* also couldn't claim that every person harmed within its borders got the guns from one of the companies they were suing. As it is here there were further side sets of links needed to explain some aspects of the problem:

> Link 8: Guns get loose during the distribution chain and get sold on the black market, creating other costly incidents.
>
> Link 9: Guns get stolen or otherwise get into the hands of third parties creating costly incidents.

Measured link by link, this case is just like *Ganim* and *Ganim* held these links too attenuated to support a claim.

As in *Ganim,* complicated rules would also be required here to sort out who caused what. Blindingly complex ones.

Measuring blame in this part of the *Holmes* test means measuring money. The question is the relative complexity of deciding how much to pay to each plaintiff if the defendants are found liable. Here, this would mean engaging in the kind of rank speculation the court has been talking about. How much of the extra police expense is caused by increases in violence stemming from other drugs, from the proliferation of guns in the city, from trends in domestic violence, from cuts in state aid, from successful collective bargaining by police unions for

raises? Is the price of Narcan going up? Is the city's cost of medical care going up because of increased drug abuse or because of ever-increasing drug prices?

Assuming wrongs were found, it would be hard to look the defendants in the eye while pronouncing them each responsible for a specific percentage of blame for city expenses. We would have to suppose either that all cities are alike and potentially award the most money to the worst-managed city or analyze all of these factors for each city, for each year, for each increased expenditure.

The dizzying complexity and the ultimate need here for rank-guess work means the second *Holmes* factor disfavors finding the cities have standing to sue. Any distribution of money among the cities would look more like the distribution of alms from the community chest than like the judgment of a court of competent jurisdiction. Nothing in the common law stops federal or state law enforcers from seeking to distribute fine money in any way they want, but that is not how the ordinary civil system works.

The third *Holmes* policy is equally unhelpful to the cities. There are directly hurt people who can and have sued the drug companies in civil court. Those people are, of course, the addicts who have suffered, died, and whose concerns often get buried in the stampede to the courthouse. These cases aren't about them. They are about money to municipalities, not money for the many whose lives were allegedly ruined by a false belief that opioids were safe for long-term use.

***5** Many lawsuits have been brought in the names of these addicts. At first, some failed because self-righteous legal doctrines blamed the addicts and barred their claims for their own "wrongful conduct" in getting addicted. This thinking ignored the potential double decrease in free will the addicts claimed. [9] Those doped by fatally addictive opioids often claimed they were first duped by false assurances that the pills were safe for long-term use.

Fortunately, these restrictive cases began to be supplanted by better thinking in 2005. That year, the West Virginia Supreme Court in *Tug Valley Pharmacy, LLC v. All Plaintiffs Below in Mungo County* adopted the approach our own Connecticut law mandates by state statute for most tort claims: comparative negligence. [10] This approach means that where drug users know the risks, disregard them, and choose to destroy their own lives they can't recover money from any drug company. But where the statute applies and someone could prove their troubles were caused by being deceived by a defendant about the safety of a drug, they could recover any dollar damages they prove reduced by any percentage of their losses a jury finds is their own fault. Certainly, drug users are the "directly injured parties" the *Ganim* Court talked about.

Naturally, the cities will complain that the drug users can't recover the cities' expenses for them. But it is inherent in the *Ganim* judgment that in ordinary civil court we prefer recoveries *only* by those mostly directed injured and not just to prevent double recoveries by the addicts and the cities for the same damage. Instead, we prefer to compensate just the directly injured because it is sound judicial policy to hold people responsible only to the degree we can reasonably connect a legally prohibited act to a directly resulting harm. [11] In this regard, the addicts' claims are clearly superior claims.

And the addicts' claims aren't the only superior claims. Government regulators have been bringing civil and criminal charges against the drug industry for years and more are being filed all the time. [12] Enforcement claims are superior to the cities' claims because individual damages aren't at issue in those cases. This means they don't require the same causation analysis as ordinary individual lawsuits for compensatory damages. Unfair trade practices claims are a good example. Because of the absence of direct injury, *Ganim* explicitly bars unfair trade practices claims by the cities in this case. [13] But § 42-110m of the Connecticut Unfair Trade Practices Act authorizes the state (*not* cities) as a law enforcement agency to sue unscrupulous businesses. Most importantly, the statute directly declares that in these law enforcement cases "[p]roof of public interest or public injury shall not be required."

This means that from a causation standpoint government law enforcement agencies like the state are better situated than cities to sue allegedly corrupt drug companies. [14] And unlike privately suing addicts the state could potentially recover funds that might ease the burdens of cities. The state might share some of the money with cities or at least shore itself up and improve its chances of helping cities hurt by this epidemic.

***6** So there are two parties better situated to sue than the cities suing here. And thus the third *Holmes* factor, and thus all the factors, require this court to dismiss the cities' claims.

3. Ganim's Reasoning Isn't Undercut by Recent Rulings in Other Courts

Some courts have refused to dismiss cases like these. Of course, this court has to follow *Ganim* and not them. But it's worth noting that nothing in those cases distinguishes *Ganim* in any way that might call for a different outcome here.

Courts in New Hampshire, New York, Ohio, and Washington have given some thought to the subject of whether the claims allege causation directly enough to merit being heard. [15]

Some of them have discussed the notion of "proximate cause." [16] They appear sensibly to recognize that it might be proved that opioid companies should have known that misleading people into overuse of their products might lead to opioid addiction. And foreseeability is an element of proximate cause. But observing this doesn't solve the problem of *Ganim*'s central point: the impossibility of rationally calculating what part of the actual harm alleged—municipal expenses—was legally caused by what defendant.

In an ordinary Connecticut civil case, a person can be liable for "causing" something if the cause at issue is indispensable, foreseeable, and substantial to the harm claimed. [17] Notions of both "legal cause" and "proximate cause" are included in this formula.

Where the harm would have happened anyway a cause isn't indispensable. Where the harm at issue isn't a foreseeable result of the wrong then the wrong isn't a proximate cause. And the requirement of substantiality means that causes that play very small roles when compared to other concurrent causes aren't proximate.

Critically, each of these factors assumes a court can rationally measure any given defendant's conduct against any given harm complained of to see whether what each defendant has done was indispensable, foreseeable, and substantial to the harm complained of in the lawsuit. And this is where *Ganim* draws the line. It holds that there are circumstances where courts can't credibly make these measurements. Those circumstances include cases that pose questions like these cases do: Was the distributor who shipped extra pills to Bridgeport really responsible for Waterbury's increased police budget or the extra municipal medical expenses of Beacon Falls? If so, all of it? If not all of it, how much of it? If these ordinary civil cases are to stay in court, the other court decisions on opioid cases don't adequately consider that sooner or later someone has to make and measure these connections.

***7** The cases favoring the cities sensibly enough observe that when you trick people into overusing opioids you get more addicts. Harm to the addicts is obvious. But the cities aren't complaining about harm to the addicts. They are claiming about harm to themselves from the social spin off of rising addiction rates: increases in their social services, their police expenses, and their fire and ambulance expenses, along with their medical bills. [18]

As the *Holmes* analysis shows, these expenses are a long radius and many concentric circles away from the simple observation that promoting more addiction creates more addicts. To fairly measure the number of rings and the length of the radius between drug makers pumping out too many pills and police officers piling up too much overtime requires the guesswork already described.

Our gut instincts may tell us that the rise in addiction did cost cities money, but *Ganim* has decided it is fanciful to pretend we can credibly quantify the actual harm to cities and attribute that harm by individual percentage to over two-dozen defendants.

Ganim reflects that pretending we can do it would diminish courts as places of that reasoned, reliable, and replicable thing we call "justice." [19]

4. Voices at the Back of a Crowd

The cities haven't even suggested to the court a way it could rationally make the required connections. They admit as they must that none of the defendants is 100 percent responsible for causing 100 percent of rising city expenses. But the best one plaintiff could do was to suggest

the companies might be considered the cause of all wrongs in proportion to their share of the opioid market.

But that kind of measure would have nothing to do with measuring the harm an individual defendant directly caused to a specific city. It is the broader kind of analysis by which a court *might* fashion a penalty or a fine vindicating the entire public interest, but it isn't a way to fashion compensatory damages. In this context, it irrationally assumes that the cities have already accurately measured the impact of the actions of the individual defendants on the individual cities instead of identifying some rational way to do it.

Perhaps that's why most plaintiffs in this case didn't mention the market share idea during the multiple days this matter was argued. Instead, they did worse. They offered nothing.

It's certainly been a drag on the court's willingness to believe that there is a credible case for causation when, despite the court begging them for one, the plaintiffs couldn't suggest even a *possible* way to calculate the degree of individual causation in this case. A credible suggestion on measuring causation might have given the court some pause. But during the long hours spread over two days spaced amply apart during which this motion was argued in court and during which the plaintiffs knew what the court wanted, it became apparent that the plaintiffs filed these lawsuits without first thinking of a way to sort out the causation conundrum. Indeed, the best they could do was to say that in some other cases in some other place someone is said to be working on something about it.

And maybe that's why they didn't seem to think it was their responsibility to develop a theory before filing the lawsuits. These lawsuits are, after all, part of a mixed crowd of cases assembling on courthouse lawns across the country. Some of them are brought by individuals, some by cities, some by states, and some by the federal government. Some are civil actions like this. Some invoke regulatory powers. Some are criminal. But merely because these cases exist somewhere else doesn't relieve the cities of their burdens here.

***8** The cities can't just join the swelling chorus calling for justice and shrug off the burdens of being what they are—ordinary civil plaintiffs that must prove direct causation to recover compensatory damages. *Ganim* will not permit it.

5. Conclusion: Social Problems are Poor Candidates for Compensatory Damage Awards

It might be tempting to wink at this whole thing and add to the pressure on parties who are presumed to have lots of money and possible moral responsibility. Maybe it would make them pay up and ease straining municipal fiscs across the state. But it's bad law. If the courts are to be governed by principles and not passion, *Ganim* must apply just as much in hard cases as in easy ones.

Faced with lawsuits brought by parties without standing, this court can only declare that it has no subject matter jurisdiction to hear these claims.

Therefore, all of the cities' claims in all of the subject lawsuits are dismissed. [20]

All Citations

Not Reported in Atl. Rptr., 2019 WL 423990

Footnotes

1 United States v. Purdue Frederick Co., Inc., 495 F.Sup.2d 569 (2007).

2 The total calculations as to the number of plaintiffs and defendants includes all eight cases that are currently pending on this court's docket. Nevertheless, this decision only applies to the following matters: *New Haven v. Purdue Pharma, L.P.,* Docket No. X07 HHD CV 17 6086134; *New Britain v. Purdue Pharma, L.P.,* Docket No. X07 HHD CV 18 6087132; *Waterbury v. Purdue Pharma,* Docket No. X07 HHD CV 17 6088121; *Bridgeport v. Purdue Pharma, L.P.,* Docket No. X07 HHD CV 18 6088462. These are the only cases where the motions to dismiss were fully briefed and argued before the court on September 10, 2018 and November 7, 2018.

3 239 Conn. 93, 99.

4 254 Conn. 799, 808.

5 258 Conn. 313.

6 *Id.,* 345-65.

7 503 U.S. 258.

8 258 Conn. at 365.

9 See Tug Valley Pharmacy, LLC v. All Plaintiffs Below in Mingo County, 235 W.Va. 283; Let the Plaintiffs Sue-Opioid Addiction, The Wrongful Conduct Rule, and The Culpability Exception, 34 W.Mich. U.T.M. Cooley L. Rev. 33, 52 (2017).

10 General Statutes § 52-572h(b).

11 258 Conn. at 351.

12 See, e.g., *United States v. Purdue Frederick Co., Inc.,* 495 F.Sup.2d 569 (2007); *New Hampshire v. Purdue Pharma, L.P.,* New Hampshire Superior Court, Merrimack County, Docket No. 217-2017-CV-00402 (September 18, 2018, Kissinger, J.).

13 258 Conn. at 374.

14 And the state has now chosen to do so. *State v. Purdue Pharma, L.P.,* Superior Court, judicial district of Hartford, Docket No. CV 19 6105325.

15 See, e.g., *New Hampshire v. Purdue Pharma, L.P.,* New Hampshire Superior Court, Merrimack County, Docket No. 217-2017-CV-00402 (September 18, 2018, Kissinger, J.); *In re Opioid Litigation,* Supreme Court of New York, Suffolk County, Docket No. 400000/2017 (June 18, 2018, Garguilo, J.); *In re National Prescription Opiate Litigation,* United States District Court, Docket No. 1:18-op-45090 (N.D. Ohio, October 5, 2018); *Everett v. Purdue Pharma, L.P.,* United States District Court, Docket No. C17-209RSM (W.D.Wash., September 25, 2017).

16 *Id.*

17 Ruiz v. Victory Properties, LLC, 315 Conn. 320, 329 (2015).

18 See Complaint, p. 63-67.

19 258 Conn. at 352-53.

20 As stated previously, this decision only applies to the following cases: *New Haven v. Purdue Pharma, L.P.,* Docket No. X07 HHD CV 17 6086134; *New Britain v. Purdue Pharma, L.P.,* Docket No. X07 HHD CV 18 6087132; *Waterbury v. Purdue Pharma,* Docket No. X07 HHD CV 17 6088121; *Bridgeport v. Purdue Pharma, L.P.,* Docket No. X07 HHD CV 18 6088462.