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 IV

PAT LUNDVALL (NSBN 3761)
AMANDA C. YEN (NSBN 9726)
McDONALD CARANO LLP
2300 West Sahara Avenue, Suite 1200
Las Vegas, Nevada 89102
Telephone: (702) 873-4100
Fax: (702) 873-9966
plundvall@mcdonaldcarano.com
ayen@mcdonaldcarano.com

JOHN D. LOMBARDO
JAKE R. MILLER
ARNOLD & PORTER KAYE SCHOLER LLP
777 S. Figueroa Street, 44th Floor
Los Angeles, CA 90017-5844
Telephone: (213) 243-4000
Fax: (213) 243-4199
john.lombardo@arnoldporter.com
jake.miller@arnoldporter.com
Pro Hac Vice

Attorneys for Petitioners
Endo Pharmaceuticals Inc. and Endo Health Solutions Inc.

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
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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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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
6/27/2019	First Amended Complaint (Case No. A-19-796755-B)	XIII-XV	PA01536	PA02049
12/03/2018	First Amended Complaint (Case No. CV18-01895)	II	PA00168	PA00226
5/15/2018	First Amended Complaint and Demand for Jury Trial (Case No. A-17-765828-C)	I	PA00051	PA00109
3/4/2019	Manufacturer Defendants' Joint Motion to Dismiss First Amended Complaint	III	PA00227	PA00264

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1/7/2020	Transcript of Proceedings	XIX-XX	PA02603	PA02871
1/8/2020	Transcript of Proceedings	XXI	PA02872	PA03034

AFFIRMATION

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

Dated this 1st day of May, 2020.

McDONALD CARANO LLP

By: */s/Pat Lundvall*

PAT LUNDVALL (NSBN 3761)
AMANDA C. YEN (NSBN 9726)
2300 West Sahara Avenue, Suite 1200
Las Vegas, Nevada 89102
Telephone: (702) 873-4100
Fax: (702) 873-9966
plundvall@mcdonaldcarano.com
ayen@mcdonaldcarano.com

John D. Lombardo
Jake R. Miller
ARNOLD & PORTER
KAYE SCHOLER LLP
777 S. Figueroa Street, 44th Floor
Los Angeles, CA 90017-5844
Telephone: (213) 243-4000
Fax: (213) 243-4199
john.lombardo@arnoldporter.com
jake.miller@arnoldporter.com
Pro Hac Vice

Attorneys for Petitioners
Endo Pharmaceuticals Inc. and
Endo Health Solutions Inc.

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 IV 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:

Robert T. Eglet
Robert Adams
Richard K. Hy
Cassandra S.M. Cummings
Eglet Prince
400 S. 7th Street, 4th Floor
Las Vegas, Nevada 89101

Bill Bradley
Bradley, Drendel & Jeanney
6900 S. McCarran Blvd., Suite 2000
Reno, Nevada 89509

Attorneys for Plaintiff City of Reno

Steve Morris
Rosa Solis-Rainey
Morris Law Group
411 E. Bonneville Ave., Suite 360
Las Vegas, Nevada 89101

Nathan E. Shafroth
Covington & Burling LLP
Salesforce Tower
415 Mission Street, Suite 5400
San Francisco, California 94105-2533

Attorneys for Defendant McKesson Corporation

Rand Family Care, LLC
c/o Robert Gene Rand, M.D.
3901 Klein Blvd.
Lompoc, California 93436

Robert Gene Rand, M.D.
3901 Klein Blvd.
Lompoc, California 93436

Philip M. Hymanson, Esq.
Hymanson & Hymanson PLLC
8816 Spanish Ridge Avenue
Las Vegas, Nevada 89148

Steven A. Reed, Esq.
Morgan, Lewis & Bockius LLP
1701 Market Street
Philadelphia, PA 19103

Collie F. James, IV, Esq.
Adam D. Teichter, Esq.
Morgan, Lewis & Bockius LLP
600 Anton Blvd., Ste. 1800
Costa Mesa, CA 92626-7653

Brian M. Ercole, Esq.
Morgan, Lewis & Bockius LLP
200 South Biscayne Blvd., Suite 5300
Miami, FL 33131

Attorneys for Teva Pharmaceuticals USA, Inc.; Cephalon, Inc.; Watson Laboratories, Inc.; Actavis LLC; and Actavis Pharma, Inc. f/k/a Watson Pharma, Inc.

Lawrence J. Semenza III
Christopher D. Kircher
Jarrod L. Rickard
Katie L. Cannata
SEMENZA KIRCHER RICKARD
10161 Park Run Drive, Suite 150
Las Vegas, Nevada 89145

Steven J. Boranian
Reed Smith LLP
101 Second Street, Suite 1800
San Francisco, California 94105

Sarah B. Johansen, Esq.
Reed Smith LLP
355 South Grand Avenue, Suite 2900
Los Angeles, California 90071

Rachel B. Weil
Reed Smith LLP
Three Logan Square
1717 Arch Street. Suite 3100
Philadelphia, Pennsylvania 19103

Attorneys for Defendant AmerisourceBergen Drug Corporation

Steven E. Guinn
Ryan W. Leary
Laxalt & Nomura, LTD.
9790 Gateway Dr., Suite 200
Reno, Nevada 89521

Rocky Tsai
Ropes & Gray LLP
Three Embarcadero Center
San Francisco, California 94111-4006

Attorneys for Defendant Mallinckrodt LLC; Mallinckrodt US Holdings, Inc.

Daniel F. Polsenberg
J. Christopher Jorgensen
Joel D. Henriod
Abraham G. Smith
Lewis Roca Rothgerber Christie LLP
3993 Howard Hughes Pkwy
Suite 600
Las Vegas, Nevada 89169-5996

Suzanne Marguerite Salgado
Williams & Connolly LLP
725 Twelfth Street, N.W.
Washington D.C. 20005

Attorneys for Defendants Cardinal Health, Inc.; Cardinal Health 6 Inc.; Cardinal Health Technologies LLC; Cardinal Health 108 LLC d/b/a Metro Medical Supply

Max E. Corrick II
Olson Cannon Gormley &
Stoberski
9950 W. Cheyenne Avenue
Las Vegas, Nevada 89129

Attorney for Defendants Allergan Finance, LLC f/k/a Actavis, Inc. f/k/a Watson Pharmaceuticals, Inc. and Allergan USA, Inc.

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

By: /s/ Pat Lundvall
An Employee of McDonald Carano LLP

2645
ROBERT T. EGLET, ESQ.
Nevada Bar No. 3402
ROBERT M. ADAMS, ESQ.
Nevada Bar No. 6551
RICHARD K. HY, ESQ.
Nevada Bar No. 12406
EGLET PRINCE
400 S. 7th Street, 4th Floor
Las Vegas, NV 89101
Tel.: (702) 450-5400
Fax: (702) 450-5451
E-Mail: eservice@egletlaw.com
-and-
BILL BRADLEY, ESQ.
Nevada Bar No. 1365
BRADLEY, DRENDEL & JEANNEY
6900 S. McCarran Blvd., Suite 2000
Reno, Nevada 89509
Telephone: (775) 335-9999
Email: office@bdjlaw.com
Attorneys for Plaintiff, the City of Reno

EGLET PRINCE

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., PURDUE PHARMA, INC.; THE PURDUE FREDERICK COMPANY, INC. D/B/A THE PURDUE FREDERICK COMPANY, INC.; 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 &

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

CITY OF RENO'S OPPOSITION TO MANUFACTURER DEFENDANTS' JOINT MOTION TO DISMISS AND ALL JOINDERS THERETO

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.

CITY OF RENO'S OPPOSITION TO MANUFACTURER DEFENDANTS' JOINT MOTION TO DISMISS

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Plaintiff, City of Reno, by and through the undersigned attorneys, files its Opposition to the Manufacturer Defendants' Joint Motion to Dismiss, and all joinders thereto. This Opposition is based upon the following Memorandum of Points and Authorities set forth herein, and argument to be made by counsel at the time of the hearing.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The motion filed by the Manufacturer Defendants ("Manufacturers") contains a laundry list of arguments seeking to dismiss the City's First Amended Complaint ("FAC") in an attempt to avoid any liability for their central role in the opioid epidemic. To support these arguments, Manufacturers mischaracterize the City's claims to suggest that Reno can never file suit against the manufacturer of a dangerous product for injuries caused to the City itself if any other county or municipality in the State was also injured. Manufacturers then argue that they are entirely immune from state tort liability because federal law preempts all such claims. Finally, Manufacturers attack each individual claim by raising a host of meritless arguments that misrepresent Nevada's pleading standards and ignore factual issues that cannot be addressed at this pleading stage. These arguments, which have already failed in opioid-related cases across the country and in this state[1], fail again here and the motion should be denied.

II. LEGAL STANDARD

A motion to dismiss for failure to state a claim is procedural and tests the sufficiency of the complaint. The standard of review for a dismissal under NRCP 12(b)(5) is rigorous as this Court must construe the pleading liberally, take all factual allegations in the complaint as true, and draw every fair inference in favor of the nonmoving party. *Vacation Village v. Hitachi America*, 110 Nev. 481, 484, 874 P.2d 744, 746 (1994). Dismissing a complaint is appropriate "only if it appears beyond a doubt that [the plaintiff] could prove no set of facts, which, if true,

[1] Order Regarding Defendants' Motion to Dismiss, *Clark County v. Purdue Pharma, L.P., et al.*, Eighth Judicial District Court Case No. A-17-765828-C (2017).

would entitle [the plaintiff] to relief." *Buzz Stew, Ltd. Liab. Co. v. City of N. Las Vegas*, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008). In considering a motion to dismiss under NRCP 12(b)(5), a court must accept the allegations set forth in the complaint as true and draw every fair inference in favor of the plaintiff. *Capital Mortgage Holding v. Hahn*, 101 Nev. 314, 315, 705 P.2d 126 (1985). Conclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss for failure to state a claim. *In re VeriFone Sec. Litig.*, 11 F.3d 865 (9th Cir. 1993).[2]

III. ARGUMENT

A. RENO HAS STANDING TO BRING THE CLAIMS SET FORTH IN THE FIRST AMENDED COMPLAINT

Manufacturers argue that the application of NRS 244.137 and the "local concern" doctrine can be used to strip Reno of its standing to bring a lawsuit to recover damages caused by Manufacturers' misleading marketing. "[T]he general standing rule requires the plaintiff to show a particular injury." Omer Kimhi, *Private Enforcement in the Public Sphere – Towards a New Model of Residential Monitoring for Local Governments*, 18 Nev. L.J. 657, 673 (Spring 2018). Standing is based on the theory that the person or entity filing the lawsuit must have suffered an injury and must be the appropriate party to recover damages related to that injury. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) (standing requires that the plaintiff suffered an 'injury in fact;' there must be a causal connection between the injury and the wrongful conduct at issue in the lawsuit; and it must be likely that the court's favorable decision will redress the injury).

In Nevada, standing is a judicially-created doctrine of convenience as opposed to a constitutional command, as in the federal courts. Although there is not a constitutional "case or controversy" requirement in Nevada, there is a history of requiring an actual justiciable controversy as a predicate to relief. *Kahn v. Dodds (In re Amerco Derivative Litig.)*, 127 Nev.

[2] In the Introduction to their Motion, Manufacturers raise the recent order issued in the *City of New Haven v. Purdue Pharma, L.P.* case (2019 WL 423990 (Conn. Super. Ct. Jan. 8, 2019), in which the court dismissed similar complaints against opioid manufacturers and distributors. The Connecticut order is based squarely on Connecticut law, specifically *Ganim v. Smith & Wesson*. Moreover, the Judge that issued the order is known for making sweeping orders on novel issues, but they do not generally hold up on appeal. Accordingly, the order should not be relied upon by Manufacturers, or any other defendant, as authority in this case.

196, 213 (2011). However, the judicially-created doctrine of standing in Nevada is similar to that in the federal courts as it requires an inquiry into whether the plaintiff has the right to enforce the claims asserted against the defendant and whether the plaintiff has a significant interest in the litigation. *Arguello v. Sunset Station, Inc.*, 127 Nev. 365, 369 (2011). The question of standing focuses on the party bringing the lawsuit rather than the issues being adjudicated. *Szilagyi v. Testa*, 99 Nev. 834, 838 (1983).

Moreover, pursuant to NRCP 17(a), "[a]n action **must** be prosecuted in the name of the real party in interest." (Emphasis added.) A real party in interest is the party possessing "the right to enforce the claim and who has a significant interest in the litigation." *Painter v. Anderson*, 96 Nev. 941, 943 (1980). The rule allows the defendant to assert all proper defenses and evidence against the real party in interest, which also assures the defendant of the finality of the judgment so that it is not concerned about the possibility of a later suit brought by the real party in interest alleging claims based on the same facts. *Id.* (internal citation omitted).

Manufacturers have conflated the issue of standing with the application of Dillon's Rule and the argument as to whether this case involves a matter of local concern. As will be discussed, *infra*, Dillon's Rule was created to prevent local governments from passing ordinances, regulations, and requirements that are antithetical to the state law. It was created at a time where there were no means of controlling local governments and they were bankrupting the states. This case does not involve Reno's decision to pass an ordinance or regulation preventing the distribution of prescription opioids in the City or levying a tax against companies that manufacture and distribute such medication within City lines. If that were the issue, the Dillon's Rule arguments would be well placed. Here, the question is whether Reno has the legal standing to bring claims to recoup damages Reno has suffered at the proverbial hands of opioid manufacturers, distributors, pharmacies, and physicians.

There is no other entity better situated to bring these claims on Reno's behalf. After all, legal standing requires an inquiry as to whether the Plaintiff has suffered an injury, which Reno has alleged; whether there is a causal connection between the wrongful conduct alleged in the complaint and the alleged injury, which Reno has pled with sufficiency; and finally whether a

favorable decision from the fact-finder would redress Reno's injury, which it would. There can be no question that the City has the legal standing to bring a claim for injuries caused to its programs, its entities, and its budget. No other Nevada city, county, or municipality has had to pay the increased costs of Reno's healthcare programs or law enforcement. The state of Nevada cannot claim that it is the real party in interest as it relates to the City's damages. Only a lawsuit filed by Reno can assure Manufacturers any finality as it relates to Reno's damages.

1. Dillon's Rule is Separate from the Issue of Standing

Manufacturers focus on NRS 244.137 through 244.146, Dillon's Rule, and whether the opioid crisis is a matter of local concern in an attempt to deprive Reno of standing. Dillon's Rule, on which NRS 244.137 is based, was never intended to prevent counties or municipalities from seeking redress for harms caused to their residents, local governments, and infrastructure. Dillon's rule "limits localities to exercise of those powers expressly delegated to them by the state legislature or necessary to implement or necessarily implied from express legislative grants." Clayton P. Gillette, *In Partial Praise of Dillon's Rule, or, Can Public Choice Theory Justify Local Government Law*, 67 Chi.-Kent L. Rev. 959, 963 (1991) (available at http://scholarship.kentlaw.iit.edu/cklawreview/vol67/iss3/14, accessed on April 4, 2019). The rule originated in the 1870s in the Iowa Supreme Court and is named after the former chief justice of that court, Justice John Dillon. Honorable John D. Russell & Aaron Bostrom, *Federalism, Dillon Rule and Home Rule*, White Paper, a Publication of the American City County Exchange, p. 2, January 2016 (available at https://www.alec.org/app/uploads/2016/01/2016-ACCE-White-Paper-Dillon-House-Rule-Final.pdf, accessed on April 4, 2019). It arose in a time where there were not any legal constraints on municipalities, leading them to incur "substantial debts for the questionable public function of financing railroad companies and other public improvements that subsequently failed, leaving taxpayers in fiscal straits." Gillette, *In Partial Praise of Dillon's Rule*, at 963.

Numerous states have adopted Dillon's Rule either in full or recognize a hybrid of Dillon's Rule and Home Rule. As of 1991, "courts [had] invoked the doctrine of limited municipal powers to achieve results as widespread as invalidation of municipal contracts to purchase energy

capacity in a decision that led to the largest default of municipal bonds in history, nullification of an ordinance requiring bottle deposits, and invalidation of municipal restrictions on the sale of condominium units." *Id.* at 964-965. There have been debates in various jurisdictions regarding the viability of Dillon's Rule, particularly as it has largely become the job of the courts to determine whether there has been an express or implied grant of power to the municipality at issue. *Id.* at 966; *see Early Estates v. Housing Bd. of Review*, 174 A.2d 117 (R.I. 1961) (in which the court in a single opinion interpreted the same statute to allow a city council to require hallway lights be provided in a condominium building, but could not enact any requirements that hot water be provided).

In fact, in cases where Dillon's Rule has been invoked, it has been in the context of seeking to invalidate some ordinance, requirement, or other action taken by a city or county. Neither the history of Dillon's Rule nor the cases in which the courts discuss Dillon's Rule support an argument that the Rule could be used to deny a county, city, or municipality from bringing a lawsuit to recoup damages caused by the wrongful acts of a third-party actor. For example, in the Virginia case of *Commonwealth v. County Bd.*, 217 Va. 558 (Va. Sup. Ct. 1977), the court considered whether "absent express statutory authority, a local governing body or school board can recognize a labor organization as the exclusive representative of a group of public employees and can negotiate and enter into binding contracts with the organization concerning the terms and conditions of employment of the employees." 217 Va. At 559. Virginia adheres to a strict construction of Dillon's Rule, so the court concluded that the school and county board did not have such authority absent express statutory authority language to that effect. *Id.* at 576-577; *but see Logie v. Town of Front Royal*, 58 Va. Cir. 527, 535 (Va. Cir. 2002) (where a statute explicitly confers a power upon a local government, the local government can use any reasonable method it deems appropriate to implement that power).[3]

[3] *See also Kansas-Lincoln, L.C. v. Arlington County Bd.*, 66 Va. Cir. 274 (Va. Cir. 2004) (case involves the plaintiff, Kansas-Lincoln, L.C.'s request for declaratory judgment against the County Board, declaring that amendments made by the board to a General Land Use Plan were invalid and unenforceable under Dillon's Rule); *Homebuilders Ass'n v. City of Charlotte*, 336 N.C. 37, 38 (N.C. Sup. Ct. 1994) (the homebuilders association requested an order declaring the city's imposition of user fees invalid because the city had not been explicitly granted the power to impose such fees and, thus, under Dillon's Rule, the fees were improper).

Nevada's Supreme Court has not issued any opinion relying solely on Dillon's Rule to find that a municipality, city, or county lacked standing to bring any lawsuit. Instead, the Court has recognized that "under Dillon's Rule, a local government can exercise powers that are necessarily or fairly implied in or incident to the powers expressly granted by the Legislature." *Flores v. Las Vegas-Clark Cty. Library Dist.*, 432 P.3d 173, 178 n.7 (Nev. 2018).

Like Nevada, Utah is a Dillon's Rule state. However, in 1980, the Utah Supreme Court discussed the problems created by a strict construction of Dillon's Rule. *See State v. Hutchinson*, 624 P.2d 1116 (Ut. Sup. Ct. 1980). The *Hutchinson* case concerned the validity of a county ordinance requiring candidates for county commissioner to file campaign statements and report campaign contributions. *Id.* at 1117. The court provided a detailed history of Dillon's Rule and the growing criticism concerning the Rule, "[t]he rule was widely adopted during a period of great mistrust of municipal governments." *Id.* at 1119. As discussed, *supra*, the Rule came into effect in the 1870s and, thus, the "validity of the rule has changed," as the nature of local government has changed. *Id.* Specifically, the Court stated "[i]f there were once valid policy reasons supporting the rule, we think they have largely lost their force and that effective local self-government, as an important constituent part of our system of government, must have sufficient power to deal effectively with the problems with which it must deal." *Id.* at 1120.

The discussion in the *Hutchinson* case focuses entirely on the impact of Dillon's Rule on a local government's ability to create ordinances, regulations, and requirements. The court acknowledged that local governments in Utah are prevented from passing any ordinance that conflicts with, or is prohibited by, the state law. *Id.* at 1121. But, the court also considered that it is more effective and efficient for a local government to address problems facing its constituents than it is for the state to do so. *Id.* Utah's statutes regarding a county's power includes what is known as a "general welfare provision," which permits the counties to "pass ordinances that are 'necessary and proper to provide for the safety, and preserve the health, promote the prosperity, improve the morals, peace and good order, comfort and convenience of the county and inhabitants thereof." *Id.* at 1122 (quoting §17-5-77 Utah Code Annotated). The court cited to cases from California, Kansas, Minnesota, New Jersey, New Mexico, New York, Pennsylvania, and

Washington that have all held that a general welfare clause "confers power in addition to and beyond that granted by specific statutory grants." *Id.* at 1124.

Perhaps most applicable when considering the issues in this case, is the court's statement that, "[t]he wide diversity of problems encountered by county and municipal governments are not all, and cannot realistically be, effectively dealt with by a state legislature which sits for sixty days every two years to deal with matters of general importance." *Id.* at 1122. Moreover, the court found that the state constitution established the counties as governmental entities and, in doing so, placed certain aspects of county government beyond the reach of the state legislature. *Id.* It also concluded that neither the state nor the courts would interfere with any ordinance enacted by a local government so long as it is not arbitrary and is not directly prohibited by, or inconsistent with, state or federal laws. *Id.* at 1126.

The strict construction of Dillon's Rule is outdated, particularly where the complexities facing local governments differ in type and degree from county to county and city to city. *Id.* Nevada's Legislature also recognized the problems facing the strict construction of Dillon's Rule, leading to the drafting of NRS 244.137(5) and (6) providing county commissioners "with the appropriate authority to address matters of local concern for the effective operation of county government." Local concern in Nevada's statutes "includes, without limitation . . . [p]ublic health, safety and welfare in the county." NRS 244.143(2)(a).

Dillon's Rule does not prevent a county, city, or municipality from pursuing litigation seeking redress for injuries suffered by the governmental entity. So long as this litigation is not contrary to the laws of the state or federal government and so long as it does not infringe on any state regulations, there can be no reason to prevent the case from moving forward. There is no concern more "local," than that of the injuries caused to a local government by a third-party, which is why such an analysis is neither appropriate nor necessary when considering a city's right to pursue litigation. Reno has standing to bring this lawsuit, regardless of whether the opioid crisis is a matter of local concern.

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A. The Opioid Crisis is a Matter of Local Concern

Even if Dillon's Rule can be applied to determine whether a local government has standing to bring a lawsuit for its damages, Reno still has standing in this matter because the opioid crisis's impact on the City is a matter of local concern. Reno has acknowledged that it is not alone in its struggle to address the nationwide opioid epidemic. In this action, however, Reno is only seeking redress for the financial burdens it has been forced to bear as a direct result of misconduct by the various the Defendants. Specifically, Reno seeks to recover costs incurred, including the City's "human services, social services, court services, law enforcement services, the office of the coroner/medical examiner and health services, including hospital, emergency and ambulatory services." *See* FAC at ¶ 35. Reno also seeks to recoup the "criminal justice costs, victimization costs, child protective services costs, lost productivity costs, and education and prevention program costs" it has incurred as a result of the Defendants' actions. *Id.* As such, this case is limited to matters of local concern affecting Reno's day to day operations and resources, and the City is not seeking to recover any costs incurred by the State or other municipality for injuries they have suffered.

Despite the narrow scope of this lawsuit, Manufacturers contend that Reno has no standing to bring this action. They argue that the City can only recover for its injuries through a lawsuit filed by the Nevada Attorney General because the County's claims, "impermissibly encroach upon the Attorney General's claims" and "usurp the Attorney General's exclusive authority and impermissibly regulate a matter of statewide concern on a city-by-city basis." Mot. at 1:12-14; 6:5-7. Manufacturers make this argument even though the Nevada Attorney General has never objected to this lawsuit or taken any action to intervene. Manufacturers' self-serving concern for the Attorney General is misplaced and ignores that Reno's lawsuit is limited to matters of local concern. Accordingly, this argument by Defendants should be soundly rejected.

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a. The "Statewide Concern" Doctrine Does Not Defeat Reno's Standing Because Nevada Law Empowers the City to Bring this Action.

Manufacturers first attack Reno's standing to bring this action via the "statewide concern" doctrine. The "statewide concern" doctrine relates to the scope of authority granted to municipalities by the State. Whether styled as "standing" or otherwise, the "statewide concern" doctrine does not preclude Reno from pursuing its claims here because Reno has statutory authority to bring this action to address matters of public health and safety as well as matters of local concern that impact the effective operation of City government. *See* NRS 268.001(6). *See also* FAC at ¶ 45 ("Plaintiff has standing to bring this litigation to provide for the orderly government of Reno and to address matters of local concern including the public health, safety, prosperity, security, comfort, convenience and general welfare of its citizens."). The City's authority includes the ability to pursue this action.

In 2015 the Nevada Legislature expressed concern that existing Nevada law based upon the adoption of Dillon's Rule "unnecessarily restrict[ed]" city governments from taking actions deemed necessary to address matters of local concern. NRS 268.001(5). The Legislature addressed that concern in NRS 268.001(6), by modifying Dillon's rule as follows:

> To provide the governing body of an incorporated city with the appropriate authority to address matters of local concern for the effective operation of city government, the provisions of sections 2 to 7, inclusive, of this act:
>
> (a) Expressly grant and delegate the governing body of an incorporated city all powers necessary or proper to address matters of local concern so that the governing body may adopt city ordinances and implement and carry out city programs and functions for the effective operation of city government; and
>
> (b) Modify Dillon's Rule as applied to the governing body of an incorporated city so that if there is any fair or reasonable doubt concerning the existence of a power of the governing body **to address a matter of local concern, it must be presumed that the governing body has the power unless the presumption is rebutted by an evidence of a contrary intent by the Legislature.**

See NRS 268.001(6) (emphasis added).

Accordingly, the Nevada Legislature made clear its intent to provide cities with more authority by changing the presumption *against* finding that the City has power to act to a presumption *in favor of* finding such power. In doing so, the Legislature highlighted the City's need to take action to address, "matters of local concern for the effective operation of city government." *Id.*

Moreover, the Reno City Charter was created to "provide for the orderly government of the City of Reno and the general welfare of its citizens." Reno City Charter, Article 1. Section 1.010(1). The City Charter empowers Reno to adopt and enforce local health and safety measures. As such, the Nevada Legislature has expressly defined the term "local concerns" as including "without limitation, any of the following matters of local concern: "Public health, safety and welfare in the city" as well as "[n]uisances and graffiti in the county." *See* NRS 268.001(2) (a) and (c). This lawsuit directly addresses matters related to public health, the ongoing nuisance created by the Defendants in the City of Reno, and the devastating impact their misconduct has had on the City's government operations and resources. More importantly, this lawsuit does *not* "have a significant effect or impact on areas located in other cities or counties." *See* NRS 268.001(1)(a).

Here, Reno is bringing state law tort and nuisance claims. Specifically, the City seeks to recover damages, including:

- restitution and reimbursement for all the costs City of Reno has incurred in paying excessive and unnecessary prescription costs related to opioids;

- restitution and reimbursement for all the costs expended by City of Reno for health care services and programs associated with the diagnosis and treatment of adverse health consequences of opioids use, including but not limited to, addiction;

- restitution and reimbursement for all the costs consumers have incurred in excessive and unnecessary prescription costs related to opioids;

- all costs incurred and likely to be incurred in an effort to combat the abuse and diversion of opioids in the City of Reno;

- recovering damages incurred as costs associated with the harm done to the public health and safety.

See FAC at ¶ 40.

To perform its role to protect public health, welfare, and safety, Reno must effectively operate and manage its own agencies including: law enforcement, health districts, coroners, and emergency services. Because the Legislature has expressed its intent to provide the City with authority to sue entities who have injured Reno's local operations and depleted its resources, the City has standing to bring this action regardless of whether Defendants caused similar damage elsewhere.

b. The Attorney General's Lawsuit Does Not Extinguish Reno's Standing to Bring its Own Lawsuit Against Manufacturers.

Manufacturers do not dispute that Reno has the capacity to file lawsuits. Instead, they argue that the statute making the Attorney General the Chief Legal Officer of the State necessarily strips the City of its own authority to file this lawsuit. Specifically, Manufacturers argue that because the Nevada Attorney General filed a lawsuit against the Purdue Defendants, Reno's only possible source of recovery is through that lawsuit. That is not the law.

To support their argument, the Manufacturers cite to NRS 228.110 which generally addresses the authority of the Attorney General to act as the legal adviser "on all state matters arising in the Executive Department of the State Government." They then cite to NRS 228.170 which gives the Attorney General authority to commence lawsuits to "protect and secure the interest of the State." Manufacturers fail to demonstrate, however, that these two powers work together to deprive Reno of authority to file its own lawsuit to see redress for damages caused to its own government operations and resources. Manufacturers further fail to articulate exactly how

Reno's lawsuit infringes upon those powers or in any way "usurps" the powers of the Attorney General.

Most importantly, the Nevada Attorney General, the chief legal advisor of the state, has never made this argument and has never disputed Reno's authority to file this type of lawsuit. The City filed its original Complaint on September 18, 2018. Since that time, the Attorney General has not objected, has not attempted to intervene, and has not challenged Reno's authority to file its own lawsuit against these Defendants. The Attorney General likely recognizes the expanded authority given to city governments within Nevada to take action to protect local interests. Pursuant to NRS 268.001 it is *presumed* that the City has authority to bring this action, and Manufacturers have failed to demonstrate otherwise.

Manufacturers also ignore the fact that the State's lawsuit is limited to a single opioid manufacturer defendant (Purdue). See **Exhibit "1"** attached hereto. Because the State's Complaint does not include claims against the other defendants who are responsible for injuries suffered by the City of Reno, the State's action will not provide Reno with the same relief sought here. No Nevada law prohibits the City from exercising its authority to pursue an action to recover for injuries to its resources and operations merely because the State has filed a lawsuit against a common defendant. The Attorney General has never challenged Reno's action, and Manufacturers provide this Court with no reason why Reno's lawsuit cannot proceed concurrently with the Attorney General's lawsuit.[4]

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[4]As an initial matter, this argument was just rejected by the Eighth Judicial District Court in Clark County's lawsuit against the opioid manufacturers, distributors, detailers, and pharmacies. *See* **Exhibit "2,"** Transcript from February 26, 2019 Motions to Dismiss Hearings, at pg. 93-95. Manufacturers do not provide the Court with any order from any opioid case in which this argument has succeeded. Notably, the MDL recently rejected this argument with regard to Summit County, Ohio. *See* **Exhibit "3"** at p.98. The Arkansas Attorney General did recently seek intervention from the state supreme court to block a lawsuit filed by cities and counties. See Petition attached as **Exhibit "4"** hereto. The Arkansas Supreme Court, however, *declined* to intervene, and the cases are now proceeding concurrently in state court. *See* **Exhibit "5"** hereto. In Tennessee, the Attorney General initially moved to intervene in various lawsuits filed by municipalities, however, those motions were later withdrawn by the Attorney General because he and District Attorney agreed to cooperate so that both cases could proceed concurrently. *See* **Exhibit "6."**

B. RENO'S CLAIMS ARE NOT BARRED BY THE MUNICIPAL COST RECOVERY RULE

Manufacturers next argue that this Court should adopt the municipal cost recovery rule to bar the County's claims for recoupment of government expenditures. *See* Mot. at 6:14-16. This argument should be rejected because the municipal cost recovery rule has never been adopted by the Nevada courts. Moreover, many courts, particularly those involved in the opioid litigation, have either rejected the rule altogether, limited the scope of the rule, or applied the rule's exceptions to allow recovery. *See e.g. City of Newark [James] v. Arms Tech., Inc.*, 820 A.2d 27 (N.J. Sup. Ct. App. Div. 2003) ("The rule should be eliminated because it shields industrial tortfeasors from liability..., constitutes a tort subsidy to industry and functions as an insurance scheme for industrial accidents paid for by taxpayers."); *see also City of Boston v. Smith & Wesson Corp.*, 12 Mass. L. Rptr. 225, 2000 WL 1473568 (Mass. Sup. Ct. July 13, 2000); *City of Gary ex. Rel King v. Smith & Wesson Corp.*, 801 N.E.2d 1222, 1243 (Ind. 2003).

1. Nevada Courts Have Not Adopted the Municipal Cost Recovery Rule.

As Manufacturers concede, Nevada courts have not adopted the municipal cost recovery rule, also known as the free public services doctrine, and for a good reason – the rule has been severely criticized, because it allows for tortious defendants to escape liability. To overcome this fatal defect to their argument, Manufacturers cite to *Moody v. Manny's Auto Repair*, 110 Nev. 320, 871 P.2d 935 (1994) and *Steelman v. Lind*, 97 Nev. 425, 634 P.2d 666 (1981) to suggest Nevada would adopt the municipal cost recovery rule. *See* Mot. at 6:21-7:2. Those cases discuss Nevada's "Firefighter Rule" which precludes a public officer from suing for physical injuries suffered while performing their job duties. The Firefighter Rule, however, is based entirely on assumption of the risk principles and that, by accepting the job, the plaintiff was "fully aware of the hazard created" by alleged negligence and "in the performance of his duty, confronted the risk." *Steelman*, 97 Nev. at 427, 634 P.2d at 667. Those cases also note that the subject officers willingly accepted the salary and benefits of the job with knowledge of those potential hazards. Id.; *Moody*, 110 Nev. at 324, 871 P.2d at 938.

The municipal cost recovery rule is not premised on assumption of the risk. Instead, the municipal cost recovery rule is based upon concerns about shifting the cost burden of emergency services from the government to private tortfeasors, and whether such a shift would essentially impose a tax without proper legislative action. *City of Flagstaff v. Atchison, Topeka & Santa Fe Ry. Co.*, 719 F.2d 322, 323 (9th Cir. 1983); *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099 (Ill. 2004). Manufacturers do not point to any Nevada cases discussing concerns about municipal recovery, or that otherwise suggest Nevada would be among the jurisdictions that adopt this rule. Judge Williams in the Eighth Judicial District Court refused to adopt the municipal cost recovery rule in Clark County's case against the Manufacturers.[5] Because Nevada adopted the Fireman's Rule based on entirely different principles, nothing in the cases cited by Manufacturers suggests that this Court should adopt the municipal recovery rule here.

2. Many Jurisdictions Adopting the Municipal Cost Recovery Rule Have Limited it to Typical, Single Event Emergency Situations.

Even though Nevada has never adopted the rule, the Manufacturers urge this Court to adopt it now because it has been recognized by a few other jurisdictions. Mot. at 12:8-14. Many jurisdictions that have adopted the rule, however, limit its application to events which require typical emergency responses. Those courts differentiate between (i) cases with isolated and discrete incidents, which merely require a single and typical emergency response, and (ii) acts of protracted misconduct that were perpetrated over the course of several years. *See e.g. City of Cincinnati v. Beretta U.S.A. Corp.*, 768 N.E.2d 1136, 1149 (Ohio 2001); *see also City of Newark [James] v. Arms Tech., Inc.*, 820 A.2d 27 (N.J. Sup. Ct. App. Div. 2003); *City of Boston v. Smith & Wesson Corp.*, *infra*. For example, one court has held that protracted, and ongoing tortious conduct falls outside the scope of the rule – "Unlike the train derailment that occurred in the [seminal] case, which was a single, discrete incident requiring a single emergency response, the

[5] *See* Order Regarding Defendants' Motion to Dismiss at pg. 4, *Clark County v. Purdue Pharma, L.P., et al.*, Eighth Judicial District Court Case No. A-17-765828-C (2017), attached as **Exhibit "2."**

misconduct alleged in this case is ongoing and persistent. The continuing nature of the misconduct may justify the recoupment of such governmental costs..." *City of Cincinnati*, 768 N.E.2d, at 1149.

It is therefore unsurprising that nearly all of the cases the Manufacturers cite involved a typical, single event emergency situation. *See e.g. Flagstaff v. Atchison, Topeka & Santa Fe Ry. Co.*, 719 F.2d 322 (9th Cir. 1983) (railroad train carts derailed, forcing an evacuation of all persons within a certain distance of the train); *Walker Cty. v. Tri-State Crematory*, 643 S.E.2d 324 (Ga. App. 2007) (municipality improperly disposed of human remains). None of these cases, involved a situation where, as here, a City sought redress for its extensive expenditure of funds and resources to address ongoing, deceptive conduct by private entities.

Consequently, many courts involved in the opioid litigation have rejected the rule, including the Eighth Judicial District Court in Clark County's case against the drug manufacturers. *See e.g.* Order Regarding Defendants' Motion to Dismiss at pg. 4, *Clark County v. Purude Pharma, L.P., et al.*, Eighth Judicial District Court Case No. A-17-765828-C (2017); *City of Everett v. Purdue Pharma L.P., et al.*, 2:17-cv-00209-RSM, U.S. Dist. LEXIS 156653 (W.D. Wa. Sep. 25, 2017) at p. 14, attached as **Exhibit "6;"** *State of West Virginia v. Cardinal Health, Inc.*, Case No. 12-C-140 (January 1, 2018), slip. op. at 22 attached as **Exhibit "7;"** *see also* **Exhibit "3"** [*County of Summit, Ohio*] at pp. 19-22. Accordingly, even if this court is inclined to be the first in Nevada to adopt the municipal cost recovery rule, which it should not, the rule should not apply here where the alleged misconduct was not an isolated emergency incident, but instead involved tortious misconduct perpetrated over the course of several years.

3. <u>If the Municipal Cost Rule Applies, This Case Falls Within an Express Exception to the Rule.</u>

Finally, even if this Court adopts the municipal cost recovery rule, Reno's case would fall within a recognized exception to the rule. As is relevant here, the municipal cost recovery rule was first referenced by the U.S. Supreme Court in *U.S. v. Standard Oil of California*, 332 U.S. 201, 214 (1947), although not by that name. Later, the Ninth Circuit discussed the rule in *Flagstaff v. Atchison, Topeka & Santa Fe Ry. Co.*, 719 F.2d 322 (9th Cir. 1983). In *Flagstaff*, the Ninth

Circuit carved out several exceptions to the rule: (i) where statute or regulation permits recovery, (ii) where the government incurs expenses to protect its own property, and (iii) ***where the acts of a private party create a public nuisance which the government seeks to abate***. *Id.* at 324 (emphasis added). See **Exhibit "7"** *[State of West Virginia]* at pp. 23-24 (In addition to finding that the rule was never adopted in West Virginia, the court also noted the plaintiff satisfied an exception to rule by bringing a claim for public nuisance).

Here Reno's claims include statutory public nuisance and common law public nuisance claims, and it seeks to recoup governmental costs in order to abate the opioid crisis for which Manufacturers are responsible. This case therefore falls squarely within the public nuisance exception to the municipal cost recovery rule, which has been consistently applied to public nuisance claims. *See e.g. City of Cleveland [White] v. Smith & Wesson Corp.*, 97 F. Supp. 3d 816, 822 (N.D. Ohio 2000) (stating that acts of private parties which create public nuisances that the government seeks to abate are actionable and not covered by this new rule.); *see also City of Cincinnati v. Beretta U.S.A. Corp.*, *infra*; *City of Newark [James] v. Arms Tech., Inc.*, *infra*. Because Reno's nuisance claims fall under the express exceptions set forth in *Flagstaff* to prevent tortious defendants from escaping liability, Manufacturers' argument should be rejected.

C. RENO SUFFICIENTLY PLED ITS CLAIMS AGAINST MANUFACTURERS.[6]

Manufacturers next argue that Reno's Amended Complaint should be dismissed because it includes allegations directed at groups of Defendants instead of making the same allegations against each Defendant individually. Alternatively, Manufacturers argue that the City's fraud-based claims should be dismissed for failure to plead with sufficient particularity under NRCP 9(b). Both arguments lack merit and should be rejected.

As an initial matter, Reno's Amended Complaint is filed in Nevada state court and, thus, must comply with the pleading standards set forth in the Nevada Rules of Civil Procedure. NRCP 8(a) requires a complaint to contain "a short and plain statement of the claim showing that the

[6] Reno incorporates by express reference the arguments in its Opposition to the Joinder to this Motion filed by Defendant Mallinckrodt.

pleader is entitled to relief." Because Nevada is a "notice pleading" state, plaintiffs need only set forth sufficient facts to demonstrate the necessary elements of a claim and put the defendant on adequate notice of said claim. *Hall v. SSF, Inc.*, 112 Nev. 1384, 1391 (1996). Manufacturers cite only to federal decisions in support of its arguments against group pleading, completely ignoring Nevada's case law regarding Nevada's rules of civil procedure.

Specifically, there is no bar on group pleading in Nevada. Reno provides more than enough detail in the descriptions of each Defendants' role in the FAC to put the Defendants on notice of Reno's claims. As such, it is unsurprising that Manufacturers rely solely upon federal cases and cases from other jurisdictions requiring a higher standard of pleading than is required. Here, Reno made every effort to meaningfully distinguish between the conduct of the various types of Defendants. The City of Reno even quoted to certain published materials where possible. Manufacturers have been given sufficient notice of the claims alleged against them. In fact, their instant motion demonstrates that they understand the nature of claims against them as well as the underlying misconduct alleged. Nevada's courts have a preference for deciding cases on the merits. *Moon v. McDonald, Carano, & Wilson, LLP*, 126 Nev. 510, 520 (2010). Here, there is no legal basis for the dismissal of Reno's claims due to "group pleading," and such dismissal would be contrary to the well-settled policy to decide cases on the merits. *See also* **Exhibit "8"** *[State of Ohio]* at p. 4 (no specific rule against group pleading in Ohio, citing to Missouri case finding the same).

Next, Manufacturers seek to circumvent Rule 8 notice pleading standards by attempting to recast Reno's well-pled negligence and unjust enrichment claims into claims that all sound in fraud. *See* Mot. at 9:4-10. Additionally, Manufacturers once again try to subject the City's claims to federal pleading standards because as of March 1, 2019, the language of NRCP 9(b) is identical to that in the federal rule.[7] Of course, the requirements of NRCP 9(b) must only be met if the

[7] As of March 1, 2019, NRCP 9(b) requires that when a plaintiff alleges fraud or mistake, the plaintiff "must state with particularity the circumstances constituting fraud or mistake." The prior version of NRCP 9(b) provided that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Thus, NRCP 9(b) was modified to make it even more clear that the plaintiff must have alleged a cause

plaintiff has alleged a claim for fraud, mistake, or intentional misrepresentation. Reno has not included any such claims for relief in the Complaint.[8]

A claim "sounds in fraud" only if the plaintiff "allege[s] a unified course of fraudulent conduct and rel[ies] **entirely** on that course of conduct as the basis of a claim." *In re Daou Sys., Inc.*, 411 F.3d 1006, 1027 (9th Cir. 2005) (emphasis added). By contrast, "[i]n a case where fraud is not an essential element of a claim, only allegations of fraudulent conduct must satisfy the heightened pleading requirements of Rule 9(b)." *Id.* Allegations of non-fraudulent conduct need satisfy only the ordinary notice pleading standards of NRCP Rule 8(a). Here, Reno asserts only tort, unjust enrichment and nuisance claims. Because fraud is not an essential element to any of the City's claims, it only had to satisfy the notice pleading requirements of NRCP 8 – which the City has done.

To the extent this Court finds that one or more of Reno's claims sound in fraud, the FAC also provides particularized allegations and multiple examples of specific misrepresentations attributed to each Manufacturer, including those made through their Front Groups that appeared to be independent, and through their KOLs that were secretly paid by Manufacturers to promote their pro-opioid message. FAC ¶¶ 107-108. The City also provides detailed and specific examples of how Manufacturers misrepresented and disseminated false and misleading information about their products and otherwise misrepresented the risks and benefits of opioids to mislead doctors and the general public and dramatically increase the demand for opioids and the number of prescriptions written for them. Such allegations include: (i) quotes taken directly from source material regarding opioids and their use; (Id. at ¶ 106); (ii) the manner in which those misrepresentations were disseminated to doctors and the medical community through Front Groups, KOLs, continuing medical education programs, and speaker programs; (Id. at ¶¶109-120);

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of action for fraud or mistake (not merely make an averment) in order to be subjected to a heightened pleading standard.

[8] Judge Williams in the Eighth Judicial District Court recently stated in the hearings on the Motions to Dismiss in the Clark County Opioids case that the County was not required to meet the heightened pleading standards of NRCP 9(b) because the County has not asserted any fraud or mistake causes of action that would require such pleading. *See* Order Regarding Defendants' Motion to Dismiss at pg. 4, *Clark County v. Purdue Pharma, L.P., et al.*, Eighth Judicial District Court Case No. A-17-765828-C (2017), attached as **Exhibit "2."**

(iii) name-brand and generic advertising to promote their products directly to doctors and consumers; (Id. at ¶¶96-105); and (iv) funding, editing, and distributing publications that supported their misrepresentations. *Id.*

The details in the FAC go beyond the specificity required by Rule 9(b) and give adequate notice "to the defendant about the nature of the charges so that it may defend the claims without merely asserting a general denial." *Rocker v. KPMG LLP*, 122 Nev. 1185, 1192, 148 P.3d 703, 707-708 (2006) (reversed on other grounds). Moreover, the Nevada Supreme Court in *Rocker* recognized that, in certain cases, a plaintiff is unable to plead a fraud or mistake claim with the required particularity because the facts of the fraudulent activity are in the defendant's possession. In such cases, if the plaintiff pleads specific facts giving rise to an inference of fraud, the plaintiff should have an opportunity to conduct discovery and amend his complaint to include the particular facts. *Id.* Whether these alleged misrepresentations were actually false or misleading is an issue of fact.

Manufacturers' motion demands an untenable level of specificity above and beyond the pleading rules, and Reno cannot be expected to plead the minutiae of its case without the benefit of discovery. Accordingly, should the Court require further particularity in the FAC as to the facts that are in the possession of Manufacturers and other third parties, the City must be able to develop such facts during discovery under *Rocker*.

For example, Manufacturers argue that Reno must identify each and every prescribing doctor who heard a false statement and prescribed an opioid because of that false statement, and must identify the specific individuals who took the prescribed opioids and the result of the treatment. *See* Mot. at 11:14-24. This is plainly an impossible task in this case, and Manufacturers fail to provide any authority that such minute details are required in this case or in any other case involving such a complex, massive, multi-decade, multi-defendant, multi-dimensional, misrepresentation scheme. Further, it is obvious that the intended result of Manufacturers' massive scheme was to cause physicians to be misled into changing their prescribing habits; otherwise, Manufacturers' actions would be pointless. *See, e.g., United States ex rel. Brown v. Celegene Corp.*, No. CV 10- 3165, 2014 WL 3605896, at *8 (C.D. Cal. 2014) ("It is implausible

that a fraudulent scheme of the scope of that alleged [by the plaintiff] would be entirely feckless."). In short, Reno need not connect a particular doctor to a particular misrepresentation to satisfy its burden here. At the very least, if the City is required to meet the requirements of NRCP 9(b), it has alleged sufficient facts that give an inference of fraud, and under *Rocker* the City should be given an opportunity to uncover such facts through discovery.

Finally, Manufacturers' argument ultimately turns on what influenced physicians' and specific prescribers' states of mind. Rule 9(b) expressly states that claims alleging "Malice, intent, knowledge and other conditions of the mind of a person" may be alleged generally. NRCP 9(b); *see Occhiuto v. Occhiuto*, 97 Nev. 143, 625 P.2d 568 (1981). Other Courts who have recently considered this issue in connection with opioid-related cases have found that nearly identical claims were properly pled under Rule 9(b) and that the identity of prescribing physicians, if required, could be obtained through discovery. *See* **Exhibit "8"** *[State of Ohio]* at p. 6; *see also* **Exhibit "3"** [*County of Summit, Ohio*] at p. 25, fn. 9. This includes the Court in Clark County's case against these same Manufacturers.[9] At this early stage of the litigation, Reno's well-pleaded allegations are sufficient to put the Manufacturers on notice of the nature of the claims against them, and the Court should deny their motion.

D. RENO'S PUBLIC NUISANCE CLAIMS ARE VIABLE AND VALID AGAINST MANUFACTURERS

1. The City Can Bring a Statutory Nuisance Claim.

a. There is a Right to a Civil Claim Under Nevada's Public Nuisance Statute.

Manufacturers next claim that Nevada's criminal public nuisance statute deprives Reno, or anyone else, of a civil claim for public nuisance. This argument is inaccurate and contrary to Nevada's law. Reno can bring a statutory nuisance claim because Reno's ability to assert a civil cause of action for public nuisance is implied in the language of NRS 202.450 *et seq.* Where a statute does not expressly provide for a private cause of action, a plaintiff may still pursue such a claim if it can

[9] Order Regarding Defendants' Motion to Dismiss, *Clark County v. Purdue Pharma, L.P., et al.*, Eighth Judicial District Court Case No. A-17-765828-C (2017).

be implied after considering the statutory scheme, reason, and public policy at issue. *See Baldonado v. Wynn Las Vegas, LLC*, 124 Nev. 951, 958 (2008). Courts consider the following three factors when determining if an implied civil cause of action exists: (1) whether the plaintiffs are of the class for whose special benefit the statute at issue was enacted; (2) whether the legislative history indicates any intention to create or deny a private remedy; and (3) whether implying such a remedy is consistent with the underlying purposes of the legislative scheme. *Id.* at 958-959. Moreover, the factor given the most weight in any such determination is whether the Legislature intended to create a private judicial remedy. *Id.* at 959. An analysis of NRS 202.450 *et seq*, and the related legislative history, demonstrates there is an implied private cause of action for public nuisance in Nevada.

Here, Reno and its residents (i.e., the "public") undeniably are of the class for whose special benefit the public nuisance statute was enacted. It is difficult to understand any argument that Reno and its citizens would not be the intended beneficiaries of a statute that condemns and punishes the creation of a public nuisance. Further, the Nevada Supreme Court recently considered whether the labor statutes in NRS 608 *et seq.* would support an implied private cause of action for recovery of unpaid wages. *See Neville v. Eighth Judicial Dist. Ct.*, 406 P.3d 499 (Nev. 2017). Under the language of NRS 608.180, the Labor Commissioner has the power to enforce the provisions of all statutes within Chapter 608. *See id.* at 502. In determining the Legislature's intent behind the labor statutes, the Court observed that NRS 608.140 is titled "Assessment of attorney fees in action for recovery of unpaid wages." *Id.* at 503. The *Neville* Court ultimately found that the inclusion of the statute allowing for recovery of attorney fees indicated that the Legislature intended to create a private cause of action arising out of the violation of NRS 608 *et seq. Id.* Here, although Manufacturers claim that Reno is not entitled to a civil statutory cause of action arising out of NRS 202 *et seq.* because the statutes outline the criminal misdemeanor offenses, the language of the statutes, much like those in *Neville*, indicate a legislative intent to permit a private, civil cause of action arising out of public nuisance.

First, NRS 202.450(3) defines a public nuisance as "[e]very act unlawfully done and every omission to perform a duty, which act or omission: (a) Annoys, injures or endangers the safety, health, comfort or repose of any considerable number of persons; . . . (d) In any way renders a considerable

number of persons insecure in life or the use of property." The Legislature clearly elected to define a public nuisance broadly and did not strictly limit a public nuisance to any single definition. As such, Reno's FAC does not limit its allegations to any specific part of NRS 202.450.[10] Reno further alleges that Manufacturers contributed to and/or assisted in creating and maintaining a condition harmful to the health of Reno residents. *See* FAC, at ¶180. Manufacturers' narrow interpretation of NRS 202.450 is not in line with Nevada's law.

Second, NRS 202.480 is titled "Abatement of nuisance; civil penalty." (Emphasis added.) This title alone provides insight into the Legislature's intent to create a private cause of action by allowing recovery of a civil penalty. NRS 202.480 further states that "**[a]ny court or magistrate** before whom there may be pending **any proceeding** for a violation of NRS 202.470 [committing or maintaining a public nuisance] shall, in addition to any fine or other punishment which it may impose for such violation" issue orders for other forms of available punishment, including a civil penalty. NRS 202.480(1) (emphasis added). Similar to *Neville*, per the statute at issue here, "any court or magistrate" may hear cases alleging a public nuisance and such claims may be brought in "any proceeding."

Accordingly, the language of NRS 202.450 *et seq* does not provide for an exclusive criminal cause of action to be brought only by the State against those that create and maintain a public nuisance. Rather, the statutes broadly define a public nuisance and identify the penalties for maintaining such a nuisance in the event the State does bring a criminal action. A private cause of action for public nuisance can therefore be implied from a reading of NRS 202.450 *et seq.*, and there is no provision limiting the evaluation and penalization of a public nuisance to any particular agency. *Cf. Cort v. Ash*, 422 U.S. 66, 75 (1975) (a private right of action could not be implied in a statutory scheme where the Legislature had appointed a commission and established an administrative procedure for processing complaints of alleged statutory violations).

Manufacturers cite to *Coughlin v. Tailhook Ass'n*, 818 F.Supp. 1366 (D. Nev. 1993), in which a Nevada federal court found that NRS 202.450 did not expressly create a *private* cause of action for

[10] Contrary to the Manufacturers argument, NRS 202.450 is broad enough to include deceptive sales practices and unlawful marketing of controlled substances to Reno and its residents.

public nuisance. The *Coughlin* Court, however, did not conduct any evaluation or interpretation as to whether NRS 202.450 *et seq.* provided for an implied *civil* right of action brought by a governmental entity such as the City. The *Coughlin* Court also did not rule that there can never be a civil cause of action for public nuisance. As such, *Coughlin* is a narrow ruling, on a narrow issue, and is not binding upon this Court. Additionally, Manufacturers' argument that NRS 40.140 provides the only grounds for a civil cause of action for a *private* nuisance is not applicable, here, as the City is a public entity seeking recovery for damages caused by a public nuisance. Even if this Court elects to follow *Coughlin*, which it should not, it must only be followed only as it relates to whether there is an express, statutory private cause of action for public nuisance, and Manufacturers' motion must still be denied.

b. The City's Requested Damages are Available Under the Public Nuisance Statute.

Reno's requested damages are recoverable, and are not limited to the criminal penalties outlined in NRS 202.450 *et seq.* Manufacturers' actions contributed to the spread of the opioid epidemic in the City of Reno, and this public nuisance has dramatically impacted the health and welfare of Reno's citizens. Accordingly, Reno should not be prevented from pursuing appropriate damages from Manufacturers for their role in the creation of this nuisance. To that end, Reno has alleged sufficient facts against Manufacturers, that, if true, would support an implied private cause of action for public nuisance arising out of NRS 202.450 *et seq.* As discussed herein, the City is seeking to recover damages related to the abatement of the public nuisance created, even in part, by Manufacturers. Abatement orders and orders granting monetary damages for the costs of abatement are appropriate under a public nuisance claim, and Manufacturers do not point to any law or cases in Nevada that would prevent compensatory damages arising from the costs Reno incurred in dealing with the nuisance caused by Manufacturers.

Manufacturers' blanket assertion that the City cannot recover economic loss damages on any of the claims asserted in the FAC is unsupported by Nevada law. Pure economic loss is a legal term of art generally referring to the types of economic loss that would be recoverable as

damages in a suit for breach of contract. *Giles v. GMAC*, 494 F. 3d 865, 878 (9th Cir. 2007) (relying upon *Calloway v. City of Reno, 116 Nev. 250, 993 P.2d 1259 (2000) overruled on other grounds by Olson v. Richard,* 120 Nev. 240, 89 P.3d 31 (2004). In *Terracon Consultants W., Inc. v. Mandalay Resort Grp.*, 125 Nev. 66, 68 206 P.3d 81, 83 (2009), cited by Manufacturers, the Nevada Supreme Court described the economic loss doctrine as, "mark[ing] the fundamental boundary between contract law, which is designed to enforce the expectancy interests of the parties, and tort law, which imposes a duty of reasonable care and thereby generally encourages citizens to avoid causing physical harm to others." *Id.*

Nevada courts, however, have acknowledged exceptions to the economic loss rule. *Giles, Id.* at 878. The *Terracon* Court even referred to negligent misrepresentation as one such exception, and noted that, "exceptions to the doctrine apply in certain categories of cases when strong countervailing considerations weigh in favor of imposing liability." *Terracon*, 125 Nev. at 73, 79, 206 at 86, 89. Rather than providing an exhaustive list of claims subject to the economic loss doctrine, Nevada courts have adopted a "more reasoned method of analyzing the economic loss doctrine," which involves examining the policies in order to determine the boundary between the "duties that exist separately in contract and tort." *Calloway*, 116 Nev. 250 at fn 3.

Reno does not allege any breaches of contract between the parties and this is not a products liability case. This case involves claims for public nuisance (statutory and common law), negligence, negligent misrepresentation, and unjust enrichment - all based upon Defendants' deceptive and unlawful conduct in marketing, selling and distributing opioids in the City of Reno. Contrary to contract law, which enforces the expectancy interests of the party, "tort law is designed to secure the protection of all citizens from the danger of physical harm to their persons or to their property and seeks to enforce standards of conduct." *Calloway v. City of Reno*, 116 Nev. 250, 260 (Nev. 2000) (superseded by statute as it relates to construction defect claims in *Olson v. Richard*, 120 Nev. 240 (Nev. 2004)). Such standards of conduct are created, and imposed, by society. *Id.* Further, tort law has historically provided individuals with the ability to pursue claims for wrongs even if they caused only economic damages. *Giles*, 494 F.3d

at 875 (internal citations omitted). Nevada's economic loss doctrine does not apply to bar tort recovery "where the defendant had a duty imposed by law rather than by contract and where the defendant's intentional breach of that duty caused purely monetary harm to the plaintiff." *Id.* at 879.

Here, Reno has pled facts which, if proven, plausibly establish the existence of a common law tort duty. Reno alleges that Manufacturers committed, and continue to commit, numerous intentional and/or unlawful acts which resulted in the damages suffered by the City. As discussed above, the Complaint contains sufficient allegations regarding Manufacturers' conduct to provide them with notice that Reno is seeking damages related to such actions. Given the nature of these claims, and given the broad extent of the damage inflicted by Manufacturers' conduct, "strong countervailing considerations weigh in favor of imposing liability." *Terracon*, 125 at 73, 206 at 86.

Finally, although the City is not asserting personal injury claims on behalf of individual residents, the City's tort and nuisance claims address the City's own past, present, and future expenditures to address drug and addiction-related injuries that have plagued city residents as a result of Defendants' conduct. *See* e.g. FAC ¶¶ 40, 181, 197 and 269 ("Plaintiff has incurred substantial costs including but not limited ... addiction treatment, and other services necessary for the treatment of people addicted to prescription opioids."). The underlying physical harm and injuries Defendants caused to the public show that there is more at stake here than purely economic damages, and the economic loss doctrine should not be applied.

2. Common Law Public Nuisance Applies Here Because Manufacturers' Conduct Substantially Interferes with the Public Health.

Nevada law also recognizes actions for common law nuisance. *State ex. rel. Edwards v. Wilson*, 50 Nev. 141, 144 (1927) ("Whether the maintenance of a public nuisance is or is not punishable in the law courts as a crime is an immaterial incident so far as the preventive jurisdiction of equity is concerned, for equity ignores its criminality, and visits upon the offender no punishment as for a crime.") The mere existence of a criminal statute does not negate the potential

to bring a claim sounding in tort for the wrongdoing described in the statute. *Southern Pac. Co. v. Watkins*, 83 Nev. 471, 491-492 (Nev. 1967). The fact that legislation has been enacted that imposes criminal liability on those that violate the legislation, does not prevent the imposition of civil liability for the same liability. *Id.*

Although Nevada courts have not specifically stated that Nevada follows the definition of a public nuisance in *Restatement (Second) of Torts*, §821B, Manufacturers acknowledge that Nevada courts considering nuisance issues have looked to the Restatement for guidance. *See* Mot. at p. 14, fn. 8. Caselaw interpreting the Restatement as it relates to nuisances impacting the public health is therefore relevant and persuasive in determining the viability of Reno's claims here.

Section 821(B)(1) defines a public nuisance is "an unreasonable interference with a right common to the general public." An interference with a public right includes "conduct involv[ing] a significant interference with the **public health**, public safety, the public peace, the public comfort or the public convenience." *Id.* at §821(B)(2)(a) (emphasis added).[11] A public nuisance may also be continuing conduct, or conduct that has a permanent or long-lasting effect, that the actor knows, or has reason to know, would significantly impact the public right. *Id.* at §821(B) (2)(c). Any intentional conduct violating the public right must be considered a nuisance. *Id.* at Comment (e). Unintentional conduct violating the public right may also be considered a nuisance when considering the principles of negligence and recklessness, or treatment of abnormally dangerous activities. *Id.* Furthermore, acts unintentionally interfering with a public right will be considered a public nuisance if such acts are declared to be so by a specific statute, ordinance, or administrative regulation. *Id.*

Accordingly, the definition of a public nuisance set forth in the Restatement is extremely broad, and is not limited to an interference with property rights. *See also City of Cincinnati v. Beretta*, 768 N.E.2d 1136, 1142 (Ohio 2002) ("Contrary to appellees' position, there need not be injury to real property in order for there to be a public nuisance."). Under the Restatement's definition, the City should be permitted to bring a suit against Manufacturers of products that have

[11] Notably, NRS 202.450(3)(a) uses language similar to that of the Restatement by also broadly defining a public nuisance as acts that, "endangers the safety, health, comfort or repose of any considerable number of persons."

resulted in widespread harm and costs to the City and its residents. Indeed, representative public nuisance actions brought by governmental plaintiffs seeking equitable relief have been recognized for centuries. *See Mugler v. Kansas*, 123 U.S. 623, 672-673 (1887) (emphasis added). The Eighth Judicial District Court recently recognized the viability of such claims in Clark County's case against the same Defendants that have been sued in this case. As it relates to the public health, other courts have found non-property based public nuisances. For example, a Michigan court found the unlawful practice of medicine to be harmful to the public and, thus, constituted a public nuisance. *Michigan State Chiropractic Asso. v. Kelley*, 79 Mich. App. 789, 791 (Mich. App. 1977). The Supreme Court of New Mexico also applied common law public nuisance to a scenario in which an individual was practicing medicine without the appropriate license, stating that the individual was unskilled and ignorant as it related to the practice of medicine and, that in prescribing drugs and directing treatment, he was harming the public. *State ex rel. Marron v. Compere*, 44 N.M. 414, 421 (N.M. 1940) (importantly, the court also found that equity would allow for a civil injunction, despite the state statute imposing criminal penalties for practicing medicine without a license).

California also follows the Restatement approach to public nuisance. *See City of Los Angeles v. San Pedro Boat Works, et al.*, 635 F.3d 440, 2011 AMC 2303, 2319 (9th Cir. 2011); *see also People ex rel. Gallo v. Acuna*, 14 Cal. 4th 1090, 1105, 929 P. 2d 596, 604 (Cal. 1997)(explaining California follows the Restatement in defining a public nuisance as the substantial and unreasonable interference with a public right). A substantial interference with a public right requires proof of a "significant harm," which has been "defined as a 'real and appreciable invasion of the plaintiff's interests,' one that is 'definitely offensive, seriously annoying or intolerable.'" *See Gallo*, 14 Cal. 4th at 1105, 929 P. 2d 604 (quoting Restatement 2d. Torts, §821F, coms. c & d, pp. 105-106). The determination of whether an interference is unreasonable requires a comparison between the social utility of an activity and the severity of the harm inflicted by that activity. *Id.*

Here, Reno has adequately pled the elements of a public nuisance as it is defined in the Restatement. "The first element that must be alleged to state a claim for public nuisance is the existence of a right common to the general public. Such rights include the rights of public health, public safety, public peace, public comfort, and public convenience." *City of Chicago v. Beretta U.S.A. Corp.*, *Infra* (internal citations omitted). The City is seeking abatement of the public nuisance and recovery of the costs the City will incur abating the nuisance created by the Manufacturers. Additionally, Reno has alleged that the Manufacturers created or contributed to the creation of a public health hazard within Reno through deceptive sales practices and marketing of opioids in the City.

a. Reno Has Alleged an Interference with a Public Right

Reno's First Amended Complaint sets forth numerous factual allegations demonstrating the impact Manufacturers' actions have had on the public health. *See* FAC at ¶¶ 14, 15, 16, 17, 19, 28, 29, 31, 32, 165, 166, and 169. As discussed above, public health is considered a public right in the Restatement (Second) of Torts and under Nevada's statutes, Reno adequately alleged an interference with that public right, as required to make a claim for public nuisance.

Manufacturers ignore the language of the Restatement, Nevada's statutes, and rulings from courts around the country when they claim that the opioid epidemic cannot constitute a public nuisance because it does not interfere with a "public right." (Mot. at 14:18-15:11). Instead, they attempt to rewrite Reno's claims as private, personal injury claims suffered by City residents. This argument lacks merit for two (2) important reasons. First, as noted *supra*, this case does not seek to recover damages for personal injuries suffered by individual Reno residents. Instead, this case seeks redress for the widespread public harm and related costs to the City as a whole to address the epidemic. *See* FAC at ¶¶ 34, 35. Second, under the Restatement's definition of a nuisance, the sheer number of people affected can be sufficient to establish that a public nuisance exists.[12]

[12] In 2016, Nevada was ranked as the sixth highest state for the number of milligrams of opioids distributed per adult according to a study by the DEA. FAC at ¶ 167. Further, According to data from the Nevada Division of Public and Behavioral Health, the total number of opioid-related hospitalization in Nevada nearly doubled from 2010 to 2015; from 4,518 to 8,231 visits. *Id.*, at ¶168. Nevada has the fourth highest drug overdose mortality rate in the United

A public nuisance can be something that "affect[s] the health of so many persons as to involve the interests of the public at large." Restatement (Second) of Torts, §821B, Cmt. g. "It is not . . . necessary that the entire community be affected by a public nuisance, so long as the nuisance will interfere with those that come in contact with it in the exercise of a public right or it otherwise affects the interests of the community at large." *Id.* The opioid epidemic plaguing Reno fits squarely within this definition.

Other acts that significantly interfere with public health have been found to be public nuisances. *See Beretta*, 768 N.E.2d at 1142. In fact, the New York Supreme Court recently *rejected* the same "public right" argument in an opioid related matter, and found:

> ...it suffices to note the defendants' failure to establish why public health is not a right common to the general public, nor why such continuing, deceptive conduct as alleged would not amount to interference; it can scarcely be disputed, moreover, that the conduct at the heart of this litigation, alleged to have created or contributed to a crisis of epidemic proportions, has affected a considerable number of persons.

See **Exhibit "9"** *[New York Counties]* at p. 28 (internal citations omitted). The City has extensively outlined the acts by Manufacturers that interfered with the public health and their effects on the City and its residents, and Manufacturers' motion should be denied.[13]

3. Courts Across the Nation Recognize the Viability of Public Nuisance Claims in Opioid Litigation.

Manufacturers next suggest that Reno is alleging a "novel theory" designed to "collapse the critical distinction between nuisance and products liability law." Mot. at 16:8-17:12. As an

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States. *Id.*, at ¶ 169. From 2010 to 2015, approximately 2,800 deaths in Nevada have been attributed to opioid-related overdose. *Id.*

[13] Recently, the Eighth Judicial District Court allowed Clark County to proceed with its nuisance claims against these same Manufacturer Defendants, Order Regarding Defendants' Motion to Dismiss, *Clark County v. Purdue Pharma, L.P., et al.*, Eighth Judicial District Court Case No. A-17-765828-C (2017). Additionally, an order was issued in the Opioid MDL denying motions to dismiss those local governments' public nuisance claims. Opinion and Order at p. 28, 31, *In Re National Prescription Opiate Litigation, The County of Summit, Ohio, et al. v. Purdue Pharma L.P., et al.*, United States District Court, District of Ohio Eastern Division Case No. 1:17-md-2804 (2017) (Doc. No. 1203), attached as **Exhibit "3."**

initial matter, the fact that a legal theory is "novel" does not mean that it cannot be pursued or is somehow subject to immediate dismissal. Regardless, the City's nuisance claims are not novel, and public nuisance laws have never been restricted to apply only to property-based claims. Although Manufacturers cite to *Jezowski v. Reno*, 71 Nev. 233, 286 P.2d 257 (Nev. 1955) to suggest that public nuisance claims in Nevada are limited to interference with land or water, the Nevada Supreme Court broadly defined a public nuisance in that case as including "indecent or unlawful conduct" causing injury "to the right of another or to the public." Id. at 234, 257. Nowhere in that decision does the Court limit public nuisance claims to interference or misuse of property, or pollution of waterways, as Manufacturers suggest here. Indeed, the *Jezowski* Court further noted that, "[e]xcept in the rare cases in which something may be characterized as a nuisance as a matter of law, the determination of whether a particular operation constitutes a nuisance **remains a question of fact**." Id. (emphasis added). Such issues of fact remain and are not properly decided at this preliminary pleading stage, and the Manufacturers' motion should be denied.

Finally, Manufacturers have failed to address the various jurisdictions around the country that have already held that governmental entities' public nuisance claims in opioid cases survive motions to dismiss. *See e.g.* **Exhibit "9"** *[New York Counties]* at pp. 27-28; **Exhibit "8"** *[State of Ohio]* at p.7; **Exhibit "10"** *[State of New Hampshire]* at p. 27; **Exhibit "7"** *[State of West Virginia]* at 27; **Exhibit "3"** *[County of Summit, Ohio]* at 28, 31; and **Exhibit "2"** *[Clark County, Nevada]* at p. 3-4. The creation of, and contribution to, the opioid epidemic is a public nuisance, and the public health has been impacted in dramatic measures, which has led to Reno's substantial expenditures to protect its residents and help them recover. Nevada courts have never rejected public nuisance claims in the face of a vast interference on the public health, and this Court should not do so now. At the very least, the City's allegations are such that, if taken as true, Manufactures should be liable for their role in the opioid epidemic, and the motion should be denied.

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E. MANUFACTURERS OWED A DUTY TO THE CITY OF RENO

Nevada law imposes a duty on all persons to act reasonably towards other persons. *Billingsley v. Stockmen's Hotel*, 111 Nev. 1033, 1037 (1995) (citing *Moody v. Manny*, 110 Nev. 320, 333 (1994)). An individual, or entity, must exercise reasonable care, which is the degree of care that a reasonable individual, or entity, would exercise in similar circumstances. *Driscoll v. Erreguible*, 87 Nev. 97, 101 (1971). The applicable duty of care requires a consideration of the risk of harm created by the conduct in question, here the distribution of opioid medications throughout Clark County. *See Merluzzi v. Larson*, 96 Nev. 409, 412 (1980) (overruled on other grounds by *Smith v. Clough*, 106 Nev. 568, 569 (1990)). The duty of care applies to prevent harm that is reasonably foreseeable. *Butler v. Bayer*, 123 Nev. 450, 464 (2007). A harm is foreseeable when "the level of probability" that the harm would occur is such that it "would lead a prudent person to take effective precautions" to prevent such harm. *Wood v. Safeway, Inc.*, 121 Nev. 724, n. 53 (2005).

In the mid to late 1990s, states, counties, and cities across the country filed lawsuits against gun manufacturers and sellers arising out of the harm impacted on the various communities from the rise in gun violence. Courts in Ohio and Massachusetts recognized that the lawsuits alleged that the defendants in those cases engaged in conduct (i.e. the manufacture and sale of firearms) that would result in foreseeable harm to the respective plaintiffs. *See City of Cincinnati v. Beretta U.S.A. Corp.*, 768 N.E. 2d 1136, 1144-1145 (Oh. 2002); *City of Boston v. Smith & Wesson*, 2000 Mass. Super. LEXIS 352, 12 Mass. L. Rptr. 225 (Mass. 2000). The methods by which the gun defendants created the gun market, without any regard to the likelihood of the damage they would cause, was determined to be sufficient evidence that it was foreseeable that communities would be plaintiffs in potential litigation. *Id.*

The cases from Ohio and Massachusetts provide helpful guidance here. Manufacturers created opioid medications, which are controlled substances classified as "dangerous drugs." They determined how those drugs would be introduced into the market. *See* FAC at ¶¶ 131, 132. They determined what type of marketing should be conducted in order to profit from the dangerous

drugs. *Id.* at ¶ 93. It was entirely foreseeable that, if not manufactured, advertised, and sold with care, the opioids could cause serious harm. *Id.* at ¶¶ 92, 94, 136. Manufacturers disregarded the dangers of the products they manufactured and, in fact, used false and misleading advertising to downplay the dangers of the medications, including the possibility of addiction. *Id.* at ¶ 137. The potential that opioids could cause significant harm to communities was so foreseeable that federal and state laws were enacted as an attempt to prevent such harms from occurring. *See Id.* at ¶ 92. Manufacturers were well aware that their false advertising and marketing schemes would lead to the market being flooded with dangerous opioid medications thereby putting communities at risk of increased addictions, crime, and deaths caused by opioid use. *Id.* at ¶ 92, 94, 136. The harms the City experienced were not only foreseeable, they were foreseen.

Contrary to Manufacturers' arguments, there is no requirement that a special relationship exist between Reno and the Manufacturers in order to find that the Manufacturers owed a duty of reasonable care to Reno. A special relationship is not required where, as here, Reno's claims are based on the Manufacturers' own negligent conduct, not the conduct of third parties. *See Scialabba v. Brandise Constr. Co.*, 112 Nev. 965, 968-969 (1996) (requiring a special relationship in order to establish an individual's duty to protect another from the criminal acts of a third-party). Reno is not alleging that Manufacturers failed to protect the City from harm caused by others. Rather, Reno alleges that Manufacturers engaged in negligent conduct, the foreseeable result of which was harm to the City. *Id.* at ¶ 233. As pled, the harms alleged by Reno were the result of the over-supply, over-prescription, and over-use of opioids, not only the opioid abuse. Manufacturers' own conduct caused these foreseeable risks.

As discussed in Section D(1)(b), *supra*, the economic loss doctrine does not apply to bar any of Reno's claims for relief in this case.

Accordingly, this Court should find that Reno has sufficiently alleged the existence of a common law duty owed by Manufacturers to Reno to put Manufacturers on notice of the wrongs for which they may be liable on a negligence theory.

F. RENO'S NEGLIGENCE MISREPRESENTATION CLAIM IS PROPERLY PLED.

Manufacturers next argue that Reno's Claim for Negligent Misrepresentation should be dismissed because the City does not allege it engaged in a "business transaction" with the Manufacturers. *See* Mot. at 19:10-12. To support this argument, they cite to §552(1) of the Restatement (Second) of Torts and suggest that the City must actually use the terms "business transaction" in its Complaint in order to properly plead a claim for negligent misrepresentation. This is not the law, and Manufacturers' argument should be rejected.

As an initial matter, the FAC alleges that each Manufacturer, was at all relevant times engaged in various business activities in Reno,

> ... regularly engaged in business in Washoe County. More specifically, Defendants were, and currently are, **in the business of designing, testing, manufacturing, labeling, advertising, promoting, marketing, and/or selling opioids throughout Washoe County**.

See FAC at ¶ 60. (emphasis added).

The FAC then describes in extensive detail Manufacturers' fraudulent and deceptive marketing campaign, including their use of "kickbacks, prior authorization systems, and the use of other incentives to encourage health care providers, to prescribe the opioid medication for chronic pain." *Id.* at 95. The FAC also describes specific misrepresentations Manufacturers made in marketing their products in Reno. *Id.* at ¶¶ 96-137. Accordingly, Manufacturers' suggestion that Reno failed to allege the Manufacturers were transacting business in Reno is without merit.

Manufacturers also assert that, because the City's claim is based on alleged misrepresentations made to third parties (i.e. physicians and their patients), it fails to plead the essential element of justifiable reliance. *See* Mot. at 19:25-28. In doing so, Manufacturers ignore the language in § 552(1) (a) that extends liability beyond just the person who initially relies upon the statement, to include "the person **or** one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it." Restatement (Second) of Torts § 552(1) (a) **(emphasis added).** Based on this language, courts

have interpreted § 552 to extend liability for a misrepresentation made to a third party. *McCamish v. F. E. Appling Interests*, 991 S.W.2d 787, 788 (Tex. 1999) (no reason to impose a privity requirement on a negligent misrepresentation cause of action under §552); *Fisher v. Comer Plantation, Inc.*, 772 So. 2d 455 (Ala. 2000) (allowing third party claim under §552). The Nevada Supreme Court has also found a party liable for misrepresentation where it communicates misinformation to the recipient with the intent of, or having reason to believe that, the recipient would communicate the misinformation to a third party. *Epperson v. Roloff*, 102 Nev. 206, 212, 719 P.2d 799, 803 (1986). Here, Reno avers that Manufacturers knowingly set out to convince physicians, patients and the public at large that false propositions regarding the safety and efficacy of opioids were true (FAC ¶¶ 96, 97, 98), and that they disseminated publications falsely minimizing the risks of addiction and abuse potential of the opioid drugs (FAC ¶¶106, 128, 129, 130). Because Nevada recognizes a theory of recovery based on false statements made to third parties, Reno's misrepresentation claim is properly pled.

Further, at least one Nevada court has interpreted Nevada law as equating concealment of important information with misrepresentation: "silence about material facts basic to the transaction, when combined with a duty to speak, is the functional equivalent of a misrepresentation or "supplying false information" under Restatement § 552." *Schnelling v. Budd (In re Agribiotech, Inc.)*, 291 F. Supp. 2d 1186 (D. Nev. 2003). Here, the FAC specifically alleges, "wrongful concealment" by Defendants resulted in **"Plaintiff's inability to obtain vital information underlying its claims."** *See* FAC ¶ 237 (emphasis added). Such allegations support a reasonable inference that Manufacturers intended to induce Reno to rely on their false assurances and omissions in order to deter potential liability for injuries such as those alleged in the FAC. Therefore, in addition to basing its claim on misrepresentations Manufacturers made to third parties (as discussed *supra*), Reno can also base its claims on Manufacturers' concealment of facts from the City which resulted in it not having notice of Manufacturers' potential liability and the City's possible legal claim. In sum, Reno has sufficiently pled justifiable reliance on alleged fraudulent statements and omissions by Manufacturers, and the motion to dismiss should be denied.

G. THE CITY'S UNJUST ENRICHMENT CLAIM IS ALSO PROPERLY PLED

The Manufacturers next assert that Reno's unjust enrichment claim should be dismissed because the City has not "conferred a benefit" on them. *See* Mot. at 21:16-17. However, as alleged in the FAC, "Plaintiff has conferred a benefit upon Defendants, by paying for what may be called Defendants' externalities- the costs of the harm caused by Defendants' negligent distribution and sales practices." *See* FAC ¶290 (emphasis added). In return, Manufacturers have made "substantial profits while fueling the prescription drug epidemic into Reno," and they continue to receive considerable profits from their sales in Reno. *Id.* at ¶¶ 292-293; *See also* ¶176. Meanwhile, Reno has been forced to carry the enormous costs of Manufacturers' misconduct. *Id.* at ¶¶28-29; 33.

The "externalities" specifically alleged in the City's FAC constitute a benefit for purposes of an unjust enrichment claim. *See City of Los Angeles v. JPMorgan Chase & Co.*, 2014 WL 6453808, at *10 (C.D. Cal. Nov. 14, 2014) ("Here, the City contends that the benefits it conferred upon Chase are the so-called 'externalities'-the costs of harm caused by Chase's discriminatory lending that the City has had to shoulder....This Court, in line with similar decisions from trial courts across the country, finds that the City has properly alleged a benefit."); *See also City of Cleveland*, 97 F. Supp. 2d at 829 ("the City has paid for what may be called the Defendants' externalities—the costs of the harm caused by Defendants' failure"). *See also Beretta*, 768 N.E.2d at 1148 (complaint sufficiently alleged pecuniary harm in the form of increased municipal expenditures as a direct result of defendants' bad acts).[14]

Moreover, in this case, the cost of Manufacturers' wrongful conduct in marketing opioids includes increased healthcare services and addiction treatment for opioid users, to name but a few

[14] Other courts agree. *See City of L.A. v. Wells Fargo & Co.*, 22 F. Supp. 3d 1047, 1061 (C.D. Cal. 2014) (plaintiff's claim "that the benefits it conferred on Defendants are the so-called 'externalities'—the costs of harm caused by Defendants' discriminatory lending that the City has had to shoulder" states an unjust enrichment claim); *City of Boston v. Smith & Wesson Corp.*, *infra*, (sustaining unjust-enrichment claim at pleadings stage based on "externalities" that the city covered due to gun manufacturer's actions); *City of New York v. Lead Indus. Ass'n, Inc.*, 190 A.D.2d 173 (N.Y. App. Div. 1993) (allowing restitution claim for "reasonable costs of [lead] abatement" to survive motion to dismiss).

categories. FAC at ¶ 35. These costs are part of Manufacturers' businesses, but they do not bear these costs. Indeed, Manufacturers essentially used the City and its resources to pay for their "negative externalities" – the cost of the harms caused by their wrongful practices. *McCloud v. Testa*, 97 F.3d 1536, 1551 n.21 (6th Cir. 1996)("Negative externalities occur when the private costs of some activity are less than the total costs to society of that activity," and thus the "private parties engaging in that activity essentially shift some of their costs onto society as a whole.")[15] Manufacturers therefore saved costs and expenses that allowed them to market and sell more opioids, and make more money, than if they had internalized the actual costs of their activities.

Although Manufacturers argue that there was "nothing inequitable or unconscionable" about its conduct in Reno, that argument raises issues of fact not appropriate for resolution at the pleading stage. Indeed, the MDL Court very recently ruled that an Ohio county properly pleaded a nearly identical claim for unjust enrichment, "Plaintiffs state a facially plausible unjust enrichment claim on the theory that they conferred a benefit upon all Defendants by alleging they paid for the cost of harm caused by defendant's conduct." Opinion and Order at p. 37-38, *In Re National Prescription Opiate Litigation, The County of Summit, Ohio, et al. v. Purdue Pharma L.P., et al.* , United States District Court, District of Ohio Eastern Division Case No. 1:17-md-2804 (2017) (Doc. No. 1203), attached as **Exhibit "3."** *See also* **Exhibit "2"** [*County of Summit, Ohio*] at p. 95; **Exhibit "10"** *[State of New Hampshire]* at p. 30. Accepting the allegations set forth in the Complaint as true, and drawing every fair inference in favor of the City, as this Court must do, the City has properly alleged a claim for unjust enrichment.

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[15] *See also Little Hocking Water Ass'n v. E.I. du Pont de Nemours & Co.*, 91 F. Supp. 3d 940, 986 (S.D. Ohio 2015) (a negative externality- under Ohio law a plaintiff whose property was used as a dumping site may plead unjust enrichment as an alternative theory of damages since "it would be unjust to allow Defendant to benefit from disposal of waste on a plaintiff's property without payment of any kind."). *See also Moore v. Texaco, Inc.*, 244 F.3d 1229, 1233 (10th Cir. 2001) ("The performance of another's statutory duty to remediate pollution can give rise to a claim for unjust enrichment."); *Evans v. City of Johnstown*, 96 Misc. 2d 755, 766-70 (N.Y. Sup. Ct. 1978) (holding that plaintiff could proceed on claim for unjust enrichment against municipalities for money saved by not properly disposing of waste materials); *United States v. Healy Tibbitts Const. Co., 607 F. Supp.* 540, 542-43 (N.D. Cal. 1985) (in case involving party refusing to clean up oil spill, court noted that the "portrait of [the defendant].

H. RENO SUFFICIENTLY ALLEGES ITS ENTITLEMENT TO PUNITIVE DAMAGES

Finally, Manufacturers assert that "Nevada law does not recognize a stand-along claim for punitive damages." *See* Mot. at 21:20-23. The City, however, included specific allegations for punitive damages in a separate claim in an abundance of caution, and to ensure Manufacturers were on notice of the City's intent to seek punitive damages.[16] Such a practice has never been expressly prohibited, and there is no prejudice to Manufacturers to style punitive damages as a claim as opposed to a remedy provided there are other claim for relief pled to support punitive damages.

Manufacturers also argue that Reno's claims for negligence and unjust enrichment cannot be the basis for punitive damages, and the Complaint contains "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. *See* Mot. at 22:3-23. To the contrary, the FAC is replete with references to specific, intentional misconduct committed by the Manufacturing Defendants – all of which are expressly incorporated into the negligence claims, unjust enrichment claims and punitive damages claims:

- Defendants continued to design manufacture, market, promote and sell opioids so as to maximize sales and profits at the expense of the health and safety of the public, in conscious disregard of the foreseeable harm caused by the opioid drug. ¶ 234

- Defendants' conduct exhibits such an entire want of care as to establish that their actions were a result of fraud, ill will, recklessness, or willful and intentional disregard of Plaintiff's rights, and, therefore, Plaintiff is entitled to punitive damages. ¶ 235

[16] Defendants cite to *Thompson v. Progressive Ins. Co.*, No. 57657, 2013 Nev. Unpub. LEXIS 85 (Jan. 17, 2013) which affirmed summary judgment on the only claim that could support punitive damages. That same year, however, the Nevada Supreme Court ordered the District Court to reinstate a separately pled claim for punitive damages in another unpublished opinion following reinstatement of a claim for which punitive damages could be awarded. *Davenport v. GMAC Mortg.*, No. 56697, 2013 Nev. Unpub. LEXIS 1457 (Sep. 25, 2013)(underline added).

- Defendants knew the prescription opioids have a high likelihood of being diverted. It was foreseeable to Defendants that where Defendants distributed prescription opioids without maintain effective controls against diversion, including monitoring, reporting, and refusing shipment of suspicious orders, that the opioids would be diverted, and create an opioid abuse nuisance in Reno. ¶189

- Defendants acted with actual malice because Defendants acted with a conscious disregard for the rights and safety of other persons, and said actions have a great probability of causing substantial harm. ¶191

- The acts, conduct and omissions of Defendants, as alleged throughout this complaint, were willful, malicious, oppressive and/or were done with conscious disregard of the rights and safety of Plaintiff and for the primary purpose of increasing Defendants' profits from the sale and distribution of the subject drug. ¶303

See FAC.

As is also discussed *supra*, "Malice, intent, knowledge and other conditions of the mind of a person" may be averred generally. NRCP 9(b); *see Occhiuto v. Occhiuto*, 97 Nev. 143, 625 P.2d 568 (1981). Although Defendants may deny their conduct rose to the level of oppression, fraud or malice, such an argument is purely factual and not appropriate at this stage of the proceedings. Reno has sufficiently pled allegations supporting punitive damages, and Defendants' motion should be denied.

I. RENO SHOULD BE GRANTED LEAVE TO AMEND

NRCP 15(a) provides that when a party seeks leave to amend a pleading after the initial responsive pleadings have been served, leave shall be freely given when justice so requires. *Nutton v. Sunset Station, Inc.*, 357 P.3d 966, 968, (Nev. App. 2015). "'[R]ule 15's policy of favoring amendments to pleadings should be applied with extreme liberality and amendment is to be liberally granted where ... the plaintiff may be able to state a claim'" *Select Portfolio Servicing, Inc. v. SFR Invs. Pool 1, Ltd. Liab. Co.*, 385 P.3d 59 (Nev. 2016). Should this Court find any alleged deficiencies with the City's pleading, which it should not, such deficiencies could be cured by amending the FAC. Leave to amend is particularly appropriate because Reno has "not yet had

the benefit of the Court's evaluation of the sufficiency of [its] claims." *Sathianathan v. Smith Barney*, 2004 WL 3607403 at *9 (N.D. Cal. June 6, 2005).

IV. CONCLUSION

Based on the foregoing, Reno respectfully requests the Manufacturers' Motion be denied in its entirety.

AFFIRMATION

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

DATED this 26th day of April, 2019.

EGLET PRINCE

/s/ Robert T. Eglet, Esq.
ROBERT T. EGLET, ESQ.
Nevada Bar No. 3402
ROBERT M. ADAMS, ESQ.
Nevada Bar No. 6551
ERICA D. ENTSMINGER, ESQ.
Nevada Bar No. 7432
CASSANDRA S.M. CUMMINGS, ESQ.
Nevada Bar No. 11944
400 S. 7th Street, 4th Floor
Las Vegas, NV 89101
Tel.: (702) 450-5400
Fax: (702) 450-5451
E-Mail: eservice@egletlaw.com
-and-
BILL BRADLEY, ESQ.
Nevada Bar No. 1365
BRADLEY, DRENDEL & JEANNEY
6900 S. McCarran Blvd., Suite 2000
Reno, Nevada 89509
Telephone: (775) 335-9999
Email: office@bdjlaw.com
Attorneys for Plaintiff, City of Reno

EGLET PRINCE

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of EGLET PRINCE, and that on April 26th, 2019, I caused the foregoing document entitled **CITY OF RENO'S OPPOSITION TO MANUFACTURER DEFENDANTS' JOINT MOTION TO DISMISS AND ALL JOINDERS THERETO** to be served upon those persons designated by the parties in the E-Service Master List for the above-referenced matter in the Second Judicial District Court eFiling System in accordance with the mandatory electronic service requirements of Administrative Order 14-2 and the Nevada Electronic Filing and Conversion Rules and by U.S. regular mail as follows:

Steven E. Guinn Ryan W. Leary LAXALT & NOMURA, LTD. 9790 Gateway Dr., Ste. 200 Reno, NV 89521 Rocky Tsai ROPES & GRAY LLP Three Embarcadero Center San Francisco, CA 94111-4006 William T. Davison ROPES & GRAY LLP Prudential Tower 800 Boylston Street Boston, MA 02199 *Attorneys for Mallinckrodt LLC; Mallinckrodt US Holdings, Inc.*	James J. Pisanelli Robert A. Ryan PISANELLI BICE 400 S. 7th Street, Ste. 300 Las Vegas, NV 89101 *Attorneys for AmerisourceBergen Drug Corp.*
Pat Lundvall Amanda C. Yen McDONALD CARANO LLP 100 W. Liberty Street, 10th Floor Reno, NV 89501 John D. Lombardo *(pro hac vice forthcoming)* Jake R. Miller *(pro hac vice forthcoming)* Tiffany M. Ikeda *(pro hac vice forthcoming)* ARNOLD & PORTER KAYE SCHOLER	Steve Morris Rosa Solis-Rainey MORRIS LAW GROUP 411 E. Bonneville Ave., Ste. 360 Las Vegas, NV 89101 Nathan E. Shafroth (pro hac vice pending) COVINGTON & BURLING, LLP One Front Street San Francisco, CA 94111

LLP 777 S. Figueroa St., 44th Floor Los Angeles, CA 90017-5844 *Attorneys for ENDO Health Solutions, Inc. & ENDO Pharmaceuticals, Inc.*	*Attorneys for McKesson Corporation*
Max E. Corrick II OLSON, CANNON, GORMLEY, ANGULO & STOBERSKI 9950 W. Cheyenne Ave Las Vegas, NV 89129 Martin Louis Roth Donna Marie Welch Timothy William Knapp Erica Zolner KIRKLAND & ELLIS, LLP 300 N. LaSalle Chicago, Illinois 60654 Jennifer Gardner Levy KIRKLAND & ELLIS, LLP 1301 Pennsylvania Ave., N.S. Washington, DC 20004 *Attorneys for Allergan USA, Inc. and Allergan Finance LLC fka Actavis Inc. fka Watson Pharmaceutic, Allergan USA, Inc.*	Jeffrey A. Bendavid Stephanie J. Smith MORAN BRANDON BENDAVID MORAN 630 S. 4th Street Las Vegas, NV 89101 Charles Lifland *(pro hac vice)* O'MELVENEY & MYERS LLP 400 South Hope St., 18th Floor Los Angeles, CA 90071 Stephen D. Brody O'MELVENEY & MYERS LLP 1625 Eye Street, NW Washington, DC 20006 Matthew T. Murphy O'MELVENEY & MYERS LLP 7 Times Square New York, NY 10036 *Attorneys for Janssen Pharmaceuticals, Inc.; Johnson & Johnson; Cardinal Health 6 Inc.; Ortho-McNeil-Janssen Pharmaceuticals, Inc. nka Janssen Pharmaceuticals, Inc.; Janssen Pharmaceutica, Inc. nka Janssen Pharmaceuticals, Inc.; Daiichi Sankyo, Inc.*
Chad Fears Kelly A. Evans Hayley E. Miller EVANS FEARS & SCHUTTERT LLP 2300 W. Sahara Ave, 3950 Las Vegas, Nevada 89102 Mark S. Cheffo Hayden A. Coleman Mara Cusker Gonzalez DECHERT LLP Three Bryant Park, 1095 Ave of the Americas	Abran Vigil Brianna Smith BALLARD SPAHR LLP One Summerlin 1980 Festival Plaza Dr., Suite 900 Las Vegas, Nevada 89135-2658 J. Matthew Donohue Joseph L. Franco Heidi A. Nadel HOLLAND & KNIGHT 2300 U.S. Bancorp Tower 111 S.W. Fifth Ave

New York, New York 10036-6797 *Attorneys for Purdue Pharmaceuticals, L.P.; The Purdue Frederick Company, Inc.; Purdue Pharma, Inc.; Purdue Pharma, L.P.*	Portland, Oregon 97204 *Attorneys for Insys Therapeutics, Inc.*
Lawrence Semenza III Christopher D. Kircher Jarrod Rickard Katie L. Cannata SEMENZA KIRCHER RICKARD 10161 Park Run Drive, Suite 150 Las Vegas, Nevada 89145 Scott D. Powers David Arlington BAKER BOTTS 98 San Jacinto Blvd Austin, Texas 78701 Kevin Sadler BAKER BOTTS 1001 Page Mill Road, Bldg. One, Ste. 200 Palo Alto, California 94304 *Attorneys for Assertio Therapeutics, Inc. fka Depomed, Inc.; Cardinal Health, Inc.; Mallinckrodt Brand Pharmaceuticals Inc.; Mallinckrodt, LLC; Ortho-McNeil-Janssen Pharmaceuticals, Inc. nka Janssen Pharmaceutica, Inc. nka Actavis, Inc, fka Watson Pharmaceuticals, Inc.; Abbvie, Inc.; Carindal Health 108 LLC dba Metro Medical Supply; Robert Gene Rand, MD; Rand Family Care, LLC*	Daniel F. Polsenberg J. Christopher Jorgensen LEWIS ROCA ROTHGERBER CHRISTIE LLP 3993 Howard Hughes Pkwy, Ste. 600 Las Vegas, Nevada 89169 *Attorneys for Cardinal Health, Inc., Cardinal Health 6, Inc.; Cardinal Health Technologies LLC; Cardinal Health 414 LLC; and Cardinal Health 200 LLC*
Philip M. Hymanson HYMANSON & HYMANSON PLLC 8816 Spanish Ridge Avenue Las Vegas, Nevada 89148 Steven A. Reed MORGAN, LEWIS & BOCKIUS LLP 1701 Market Street Philadelphia, Pennsylvania 19103 Collie F. James, IV	

MORGAN, LEWIS & BOCKIUS LLP 600 Anton Blvd., Suite 1800 Costa Mesa, California 92626-7653 Brian M. Ercole MORGAN, LEWIS & BOCKIUS LLP 200 South Biscayne Blvd., Suite 5300 Miami, Florida 33131 *Attorneys for Teva Pharmaceuticals USA, Inc.; Cephalon, Inc; Watson Laboratories, Inc.; Actavis LLC; and Actavis Pharma, Inc. fka Watson Pharma, Inc.*	

/s/ Crystal Garcia
An Employee of EGLET PRINCE

EGLET PRINCE

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EGLET PRINCE

EXHIBIT 1

COMPB
ADAM PAUL LAXALT
Attorney General
ERNEST FIGUEROA
Consumer Advocate
MARK J. KRUEGER (Bar No. 7410)
Chief Deputy Attorney General
JOANN GIBBS (Bar No. 5324)
Chief Deputy Attorney General
LAURA TUCKER (Bar No. 13268)
Senior Deputy Attorney General
State of Nevada
Office of the Attorney General
100 North Carson Street
Carson City, Nevada 89701-4717
(775) 684-1100 (phone)
(775) 684-1108 (fax)
mkrueger@ag.nv.gov
jgibbs@ag.nv.gov
lmtucker@ag.nv.gov

Attorneys for Plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

STATE OF NEVADA

Plaintiff,

vs.

PURDUE PHARMA L.P.; PURDUE PHARMA, INC.; THE PURDUE FREDERICK COMPANY; and ROE CORPORATIONS 1 through 100

Defendants.

Case No. : A-18-774437-B
Dept. No.: Department 27

JURY DEMAND
REQUEST FOR BUSINESS COURT
EXEMPT FROM ARBITRATION

COMPLAINT

I. INTRODUCTION

1. Purdue's drugs are killing Nevadans.[1] These deaths are a direct result of Defendants' campaign to bolster their corporate profits by deceptively encouraging health care professionals to flood the state with enough opioid prescriptions for 87 out of every

[1] OFFICE OF PUB. HEALTH INFORMATICS AND EPIDEMIOLOGY, DEP'T OF HEALTH AND HUMAN SERVS., NEV. OPIOID SURVEILLANCE 2010-2017 7 (2018).

100 Nevadans by 2016.[2] Primary care health care professionals are responsible for prescribing nearly half of all opioid prescriptions.[3] Defendants, each of them, through a series of visits and promoting to health care professionals in Nevada, deceptively misrepresented the addictive concerns, health consequences, and impact to lives that opioids have on Nevadans. Moreover, Defendants used specialists in the medical industry, referred to as key opinion leaders, to misinform and deceptively educate health care professionals on opioid prescribing practices. The impact can be seen through examples of health care professionals overprescribing in Nevada communities, such as Dr. Robert Rand, Reno's notorious "Pill Mill" case, and Lam's Pharmacy, the Las Vegas top five seller of OxyContin in the nation. The opioid epidemic today, originated because of Defendants' conduct and deceptive acts.

2. Defendants Purdue Pharma, L.P., Purdue Pharma, Inc., and the Purdue Frederick Company (collectively "Purdue") have been the leading force in the prescription opioid market, both nationwide and in Nevada, for over 20 years. Purdue was the leading manufacturer of opioids in its early form and now manufactures, markets, and sells extended-release opioids, profiting in the amount of an estimated $35 billion[4] since 1995 off a national crisis of epidemic proportions. Nevada's—and the entire nation's—opioid crisis is a direct result of a calculated business decision by Purdue designed to increase profits by getting Americans hooked on prescription drugs.

3. Plaintiff the State of Nevada, by and through Adam Paul Laxalt, Attorney General for the State of Nevada, and Ernest Figueroa, Consumer Advocate, files this Complaint on behalf of the State of Nevada to obtain permanent injunctive relief, fines, penalties, fees and costs and other equitable relief for Nevada, and its municipalities and

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[2] Nev. Div. of Pub. and Behavioral Health, *The Scope of Opioid Use in Nevada, 2016*, NEV. DIV. OF PUB. AND BEHAVIORAL HEALTH (DPBH), 1 (Oct. 18, 2017), http://dpbh.nv.gov/uploadedFiles/dpbhnvgov/content/Resources/opioids/Opioid%20Infographic.pdf.

[3] Deborah Dowell, Tamara M. Haegerich & Roger Chou, *CDC Guideline for Prescribing Opioids for Chronic Pain – United States, 2016*, 65 MORBIDITY AND MORTALITY WEEKLY REPORT 1, 3 (2016) [hereinafter *2016 CDC Guidelines*].

[4] Alex Morrel, *The OxyContin Clan: The $14 Billion Newcomer to Forbes 2015 List of Richest U.S. Families*, FORBES, July 1, 2015, https://www.forbes.com/sites/alexmorrell/2015/07/01/the-oxycontin-clan-the-14-billion-newcomer-to-forbes-2015-list-of-richest-u-s-families/#6255fcbf75e0.

counties, against Purdue for its acts or practices in violation of the Nevada Deceptive Trade Practice Act, NRS 598.0903 *et seq.*, ("Deceptive Trade Practices Act").

II. PARTIES

4. Plaintiff is a sovereign state of the United States of America. The State brings this action by and through its Attorney General, and its Bureau of Consumer Protection ("BCP") pursuant to NRS 228.310, 228.380, 228.390, and 598.0963(3). The Attorney General is the chief law enforcement officer in the State of Nevada with respect to violations of the Deceptive Trade Practices Act, and the Consumer Advocate within the BCP is vested with the authority to exercise the power of the Attorney General in areas of consumer protection, including enforcement of the Deceptive Trade Practices Act. The Consumer Advocate is vested, pursuant to NRS 228.390, with parens patriae authority to represent the public interest on behalf of the State, which includes its municipalities and counties.

5. Defendant Purdue Pharma, L.P., is a limited partnership organized under the laws of Delaware, with its principal place of business in Connecticut, and has been registered with the Nevada Secretary of State since October 14, 2008. At all times relevant to this Complaint, Purdue Pharma, L.P., has been in the business of designing, testing, manufacturing, labeling, advertising, promoting, marketing, selling, and/or distributing, or causing to be distributed, opioids in the State of Nevada.

6. Defendant Purdue Pharma, Inc., is a New York corporation with its principal place of business in Connecticut, and is the General Partner of Defendant Purdue Pharma, L.P. At all times relevant to this Complaint, Purdue Pharma, Inc., has been in the business of designing, testing, manufacturing, labeling, advertising, promoting, marketing, selling, and/or distributing, or causing to be distributed, opioids in the State of Nevada.

7. Defendant The Purdue Frederick Company is a Delaware corporation with its principal place of business in Connecticut. At all times relevant to this Complaint, The Purdue Frederick Company has been in the business of designing, testing,

manufacturing, labeling, advertising, promoting, marketing, selling, and/or distributing, or causing to be distributed, opioids in the State of Nevada.

8. The true names and the capacities, whether individual, agency, corporate or otherwise, of Defendant Roe Corporations 1 through 100, are unknown to Plaintiffs. Plaintiff will ask for leave of the Court to amend this Complaint to show the true names and capacities of these Defendants, when they become known to Plaintiffs, but are believed to be other manufacturer and distributors of prescription opioids. Plaintiffs believe each Defendant named as Roe Corporation was responsible for contributing to the misconduct alleged herein.

III. JURISDICTION AND VENUE

9. This Court has general subject matter jurisdiction over this action pursuant to state statute and Nev. Const. Art. 6, § 6.

10. Purdue's business includes the sale of opioids and other drugs in the State of Nevada, and the claims asserted herein arise from Purdue's business conducted in the State of Nevada.

11. Venue in the Eighth Judicial District in and for Clark County, Nevada, is proper pursuant to NRS 598.0989(3).

12. The exercise of personal jurisdiction over Purdue is consistent with due process.

IV. FACTUAL ALLEGATIONS

13. Purdue has been making and marketing opioids and extended-release opioids as the solution for chronic pain since the mid-1990s. From the early 2000s to the present, Purdue engaged in an extensive, well-crafted, and highly targeted marketing campaign of carefully curated third-party materials and branded and unbranded marketing to spread false and misleading messaging in Nevada. Purdue's intent was to convince the Nevada medical community to abandon prior caution and mislead healthcare providers into expanded and ongoing opioid-prescribing while playing down opioids' risks and exaggerating their benefits to increase Purdue's profits through the sale

of opioids, causing extensive public harm to Nevadans, the State, and its municipalities and counties.

14. Opioids are a class of highly addictive synthetic drugs derived from opium—pharmacologically similar to heroin. Their effects are far-reaching and deadly; the Director of the Center for Disease Control ("CDC") has noted, "We know of no other medication routinely used for a nonfatal medical condition that kills patients so frequently."[5]

15. Purdue developed OxyContin, its flagship branded opioid, in the 1990s. OxyContin was initially prescribed for acute and palliative care. Purdue then promoted opioids prescribing for broader uses including pain management, particularly for chronic conditions, such as back pain, migraines, and arthritis. Purdue both fostered and capitalized on the concepts that pain was undertreated and that treatment should be a higher priority of health care professionals, which paved the way for increased prescribing of opioids for chronic pain.

16. Purdue spent hundreds of millions of dollars on promotional activities and materials that falsely denied or trivialized the risk of addiction and overstated the benefits of opioids. These activities, conducted nationally and in Nevada, included directly marketing Purdue opioids to health care professionals through advertising, websites, and in-person sales calls. Purdue also relied on continuing medical education ("CME") treatment guidelines and other publications and programs disseminated by patient advocacy groups, professional associations, and health care professionals, all of whom were funded and/or directed by Purdue but presented as independent third parties. The result was a calculated and deliberate increase to Purdue's profitability.

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[5] Thomas R. Frieden & Debra Houry, *Reducing the Risks of Relief—The CDC Opioid-Prescribing Guideline*, 374 NEW ENG. J. MED. 1501, 1053 (2016).

17. During the principal focus of this complaint, from 2007 to February 9, 2018, the date Purdue announced it would cease contacting health care professionals,[6] Purdue maintained and expanded the market for opioids in Nevada. Specifically, both before and since 2007, Purdue has: (1) minimized the risks and overstated the benefits of the long-term use of opioids; (2) downplayed the serious risk of addiction, claiming that signs of addiction are merely the result of undertreated pain; (3) advanced misleading statements on the efficacy of the use of opioids on a person's quality of life; (4) denied or failed to disclose the greater risks of opioids at higher doses; (5) exaggerated the effectiveness of abuse deterrent opioids to prevent abuse and addiction; (6) misleadingly promoted OxyContin as providing a full 12 hours of pain relief; and (7) overstated the effectiveness of health care professionals' ability to manage patients' addiction to opioids.

18. Purdue's deceptive conduct has dramatically affected Nevadans and caused extensive public harm to the State, and its municipalities and counties.

A. Purdue Manufactures and Sells Extended-Release Opioids, Narcotics Designed to Treat Severe Pain.

19. OxyContin is an opioid agonist tablet, a narcotic substance that is intended to relieve a person's pain without causing the loss of consciousness. OxyContin is a controlled-release form of oxycodone hydrochloride. Oxycodone is a very powerful prescription narcotic similar to morphine and is the active ingredient in OxyContin as well as oxycodone-combination drugs.

20. Purdue developed and manufactures OxyContin in all of its forms. OxyContin's controlled release of oxycodone purports to facilitate "12-hour dosing," which distinguishes it from other oxycodone tablets typically administered in four- to six-hour doses. Due in part to its controlled-release feature, OxyContin contains more oxycodone than other oxycodone-based narcotics.

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[6] *We Manufacture Prescription Opioids. How Could We Not Help Fight the Prescription and Illicit Opioid Abuse Crisis?*, PURDUE, http://www.purduepharma.com/wp-content/pdfs/Purdue_Pharma_Strong_Track_Record_of_Addressing_Prescription_Drug_Abuse_and_Diversion.pdf (last visited May 14, 2018).

21. Purdue manufactures, sells, distributes, and promotes other opioid agonists, including MS Contin, Dilaudid, Dilaudid HP, and Hysingla ER, as well as Targiniq ER, a combination product of oxycodone, and Butrans, an opioid partial agonist transdermal patch.

22. The federal Drug Enforcement Administration has long expressly acknowledged that opioids have an abuse profile and addictive qualities similar to morphine. Users initially experience euphoria, making the narcotic prone to abuse. Opioids can also cause physical dependence after a short period of use, ensuring the user will experience withdrawal symptoms upon cessation. Tolerance is also common, meaning that over time, dosage must increase in order to provide the same level of pain relief.

23. Purdue acknowledged the true nature of its opioid products in its federal trademark registration for Dilaudid HP, where it is registered as a "***narcotic*** analgesic for ***severe pain***."[7] Elsewhere, however, (and consistent with its other efforts to downplay the risks of opioid use), Purdue has trademarked its opioid products as general "analgesics," without reference to their narcotic nature or appropriateness in treating severe—not chronic—pain.

24. In sum, opioids cause physical dependence and are prone to abuse and addiction.

B. Purdue Created and Sustained the Market for Chronic Use of its Opioids Through a Long-Running Campaign of Deception.

25. In the late 1990s, Purdue presented OxyContin—and later its other opioids—as the solution to the problem of chronic pain. Prior to Purdue's launch of OxyContin in 1996, the medical community widely recognized opioids as being highly addictive, risky, relatively ineffective in long-term use, and most appropriate for severe pain and short-term use, except in cases of terminal illness.[8]

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[7] *See* DILAUDID – HP, Registration No. 1282055, https://www.uspto.gov.

[8] Andrew Rosenblum et al., *Opioids and the Treatment of Chronic Pain: Controversies, Current Status, and Future Conditions*, 16 EXPERIMENTAL & CLINICAL PSYCHOPHARMACOLOGY 405, 405-16 (2008), https://www.ncbi.nlm.nih.gov/pubmed/18837637.

26. Purdue realized that in order to increase its profits, it had to change the perception that opioids could only be used for the narrow purpose of end-of-life care. To that end, with the launch of OxyContin, Purdue also launched a deceptive and highly targeted marketing campaign designed to broaden the use of opioids to include the treatment of chronic pain. Through its deceptive marketing, Purdue convinced health care professionals that the risks of long-term opioid use were overblown and that the benefits, in reduced pain and improved quality of life, were proven. Purdue's marketing campaign targeted not only pain specialists, but primary care specialists as well (along with nurse practitioners and physician assistants), who were most likely to see and treat patients with chronic pain conditions.

27. As a result, by the mid-2000s, the medical community abandoned prior caution, and opioids were entrenched as the first appropriate treatment for chronic pain conditions. Purdue's deceptive marketing created a collective mindset within the medical community to first look for pain and then use opioids to treat it, and fostered an even larger belief among patients that all pain was unbearable and to actively seek out only those health care professionals willing to treat that pain with prescription opioids. Purdue set out to—and did—convince health care professionals that, while opioids are generally addictive, patients with legitimate pain under a health care professional's care will not become addicted. This became the cornerstone for the current epidemic of opioid abuse, injury, and death. It also provided the foundation upon which Purdue's equally deceptive, post-2007 marketing was built.

28. In launching its campaign, Purdue relied heavily on the work of Dr. Russell Portenoy, whose theories it later adopted, in supporting its expansion of opioids use. Portenoy argued in favor of expanding the use of opioids for pain management, citing evidence from opioid use among cancer patients. He believed that there was a population of patients without cancer who could benefit from long-term opioid use, but Portenoy

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admitted that his data was limited.[9] Nevertheless, Portenoy claimed that the lack of evidence should not stop health care professionals from prescribing opioids,[10] and proposed expanding the use of opioids for pain management and then monitoring patients to see what happened.[11]

29. Purdue latched on to Portenoy's theories and effectively launched a nationwide experiment on the American people by promoting opioids for uses other than cancer and end-of-life care. Purdue provided research support to Portenoy, who advocated that "opioid maintenance therapy [could] be a safe, salutatory and more humane alternative" to not treating patients with chronic pain.

30. Portenoy has since acknowledged that he gave lectures on opioids that reflected "misinformation" and were "clearly the wrong thing to do."[12] But by that time, Purdue's marketing strategy was in full effect, and chronic opioid use had already reached epidemic proportions.

31. In addition to branded promotion, Purdue also used general, unbranded materials, produced by Purdue or by alleged independent third parties, to build the market for chronic opioid use—a tactic Purdue used to market its opioids. These unbranded materials are generally more persuasive to health care professionals because they do not name a specific drug and therefore do not appear to be advertising. To that end, Purdue substantially funded the American Pain Society, headed by Portenoy, which pushed to make ***pain*** the "fifth vital sign"—an indicator that health care professionals should monitor alongside blood pressure, temperature, heartbeat, and breathing.

32. Purdue's campaign was further strengthened in 2001, when the Joint Commission on the Accreditation of Healthcare Organizations, which accredits hospitals and other health care programs across the United States, issued pain treatment

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[9] "The generalizability of these data are questionable due to the brief periods of treatment and follow-up." Russell K. Portenoy, *Opioid Therapy for Chronic Nonmalignant Pain: A Review of the Critical Issues*, 11 J. PAIN & SYMPTOM MGMT. 203, 204 (1996).

[10] *Id.* at 206.

[11] *Id.* at 212.

[12] Thomas Catan & Even Perez, *A Pain-Drug Champion Has Second Thoughts*, WALL ST. J., Dec. 17, 2012, https://www.wsj.com/articles/SB10001424127887324478304578173342657044604.

standards that called for assessment of pain in all patients and in each health care professional-patient interaction, and made accreditation decisions contingent on institutions having policies in place to accomplish this. This meant that once health care professionals asked about pain, they were obligated to treat it, and Purdue sales representatives were on hand to inform and reaffirm to health care professionals that opioids were the analgesic they should be using to treat patients' pain.

33. The Joint Commission on the Accreditation of Healthcare Organization licensed Purdue, alone, to distribute certain educational videos about how to comply with the new pain management standards and a book about pain management. These videos and book were also available for purchase from the Joint Commission on the Accreditation of Healthcare Organization's website. Purdue also funded and disseminated the publication *How to Meet JCAHO Pain Standards*, which encourages discussing opioids in positive terms and identifies several pro-opioid pain advocacy groups as resources.

34. Both campaigns have been widely integrated into medical practice, and are responsible for the use of opioids to treat chronic pain. Purdue's marketing deliberately set out to change health care professionals' attitudes and positions about opioids, and it was successful.

35. In 2007, Purdue entered into a plea agreement with the federal government to resolve criminal enforcement actions concerning opioids. Purdue pleaded guilty to the federal felony of misbranding of a drug with intent to defraud or mislead, admitting that it had lied to health care professionals about OxyContin's abuse potential, and paid $600 million in fines.

36. In 2007, Purdue also entered into a Consent Judgment (the "2007 Consent Judgment") with the State of Nevada and other states, agreeing to cease its fraudulent marketing, to no longer misrepresent the risk of addiction to OxyContin, to provide "fair balance" in conveying the risks and benefits of OxyContin, and to implement an abuse and diversion detection system to identify and address suspicious prescribing.

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37. In that 2007 Consent Judgment Purdue agreed, inter alia:

a. Not to market OxyContin with any claim that is false, misleading or deceptive;

b. Not to misrepresent the existence, non-existence, or findings of any medical or scientific evidence, including anecdotal evidence, relating to the Off-Label uses of OxyContin;

c. To establish, implement, and follow an OxyContin Abuse and Diversion Detection Program to internally report apparent pattern of excessive numbers of patients, atypical patterns of prescribing techniques or locations, information that a Health Care Professional or their patients are abusing or diverting medications, sudden unexplained changes in prescribing, disproportionate number of patients paying in cash, multiple allegations of overdose and "take such further steps as may be appropriate based on the facts and circumstances";

d. To provide written, non-branded education information to all health care professionals related to detecting and preventing abuse and diversion of opioid analgesics.

38. However, with a blind eye toward the intent and obligations of the Consent Judgment, Purdue's deceptive conduct did not end with those settlements.

C. Post-2007, Purdue Used Sophisticated Branded and Unbranded Marketing Targeted at Nevada Health Care Professionals and Patients to Boost Opioid Prescribing and its Own Profits.

39. From 2007 to the present, Purdue has built upon its deceptive marketing, which has established chronic opioid therapy as commonplace and reaped Purdue massive revenue from OxyContin and other opioids. Purdue continues to steer the discussion away from the serious risks associated with opioids and the lack of evidence supporting their long-term use, while affirmatively misrepresenting the risks and benefits of opioids—thereby failing to correct its prior deceptions, to its benefit.

40. Even after agreeing in 2007 to no longer misrepresent the risk of OxyContin and other opioids, Purdue engaged in a marketing campaign to deceive health care

professionals and patients into believing that opioids in general, and Purdue's in particular, were effective and safe, and therefore should be widely prescribed. Purdue did so through a two-pronged approach: 1) it created a force of health care professionals who faced blame for patients' addiction if they did not prescribe high-dose opioids for the treatment of pain; and 2) it encouraged a culture among patients to expect opioids for the treatment of pain and seek out health care professionals who were willing to dispense them. Purdue accomplished this goal with a combination of direct branded and unbranded marketing. Upon information and belief, Purdue centrally developed its marketing strategies and materials, which were deployed at the local level in Nevada and nationwide.

1. Purdue Used Sales Representatives to Engage in Deceptive In-person Marketing to Nevada Health Care Professionals.

41. To market its brand-name opioids, such as OxyContin, MS Contin, Butrans, and Hysingla, Purdue sent sales representatives directly to health care professionals, including into Nevada, who established personal relationships with those health care professionals they met. By establishing these relationships, Purdue's sales representatives were able to disseminate Purdue's misrepresentations in targeted one-on-one settings that allowed them to differentiate Purdue's opioids and to address any individual health care professional's concerns about prescribing opioids for chronic pain, 12-hour dosing, no-ceiling dosing, superiority, effectiveness, risk of addiction, management of addiction, the efficacy of abuse-deterrent properties, and to encourage the spread of the idea of pseudoaddiction—the idea that signs of addiction actually reflect undertreated pain that should be addressed with more opioids—rather than addiction, as discussed in more detail below.

42. Since the launch of its chronic opioids campaign, Purdue sales representatives have contacted, visited, and distributed promotional material to hundreds of health care professionals in the State of Nevada. Most health care professionals were visited frequently, often weekly, and some, almost daily.

43. Purdue knew that its in-person marketing worked. The effects of sales calls on prescribing behavior are well-documented in studies and other literature, including a 2009 study correlating the nearly ten-fold increase in OxyContin prescriptions between 1997 and 2002 to Purdue's doubling of its sales force and trebling of sales calls.[13] 2017 study found that health care professionals ordered fewer promoted brand-name medications and prescribed more cost-effective generic versions if they worked in hospitals that instituted rules about when and how pharmaceutical sales representatives were allowed to visit and promote sales to (also known as "detailing") health care professionals.[14] The changes in prescribing behavior appeared strongest at hospitals that implemented the strictest detailing policies and included enforcement measures.[15]

44. Purdue trained its sales representatives to minimize the risk of addiction, as well as exaggerate the health care professionals' abilities to manage patients' addiction to opioids. Sales representatives were carefully monitored to ensure that they did not stray from the message that opioids were safe and effective for treating long-term pain. To ensure that sales representatives delivered the desired messages to health care professionals, Purdue directed its sales representatives through detailed action plans, trainings, tests, scripts, role-plays, supervisor tag-alongs, and review of representatives' notes (also known as "notes" or "call notes") from each visit. Additionally, Purdue required sales representatives to use sales aids that were reviewed, approved, and supplied by the company and forbade them from using promotional materials not approved by the company's marketing and compliance departments. Furthermore, Purdue ensured marketing consistency nationwide through national and regional sales representative training.

45. In addition to addressing the concerns of health care professionals who were disinclined to routinely prescribe opioids, Purdue also sought to become a source of

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[13] Art Van Zee, *The Promotion and Marketing of OxyContin: Commercial Triumph, Public Health Tragedy*, 99 AM. J. PUB. HEALTH 221, 221-27 (2009).

[14] Ian Larkin et al., *Association Between Academic Medical Center Pharmaceutical Detailing Policies and Physician Prescribing*, 317 J. AM. MED. ASS'N 1785 (2017).

[15] *Id.*

information to which health care professionals looked to in making prescribing decisions. They did so by delivering and discussing the sort of deceptive unbranded materials described *infra* directly to Nevada health care professionals one-on-one.

46. Purdue's one-on-one marketing strategy not only encouraged the prescription of Purdue's branded opioids, but pushed the acceptance of prescribing opioids in general, thus creating and perpetuating their accepted use within the medical community.

2. Purdue Used Key Opinion Leaders, CMEs, and Medical Journals to Support its Campaign for Chronic Pain Use.

47. Sales visits were not Purdue's only marketing tactic. To enhance its message downplaying the risks and boosting the benefits of opioids for chronic pain treatment, Purdue also used "key opinion leaders" who were experts in the field to deliver paid talks and CMEs that provided information about treating pain and the risks, benefits, and uses of opioids to health care professionals. This strategy originally was pioneered by Arthur Sackler, one of the three Sackler brothers who founded Purdue, who is credited for first promoting pharmaceutical narcotics directly to health care professionals with clinical-looking ads in medical journals, visits to health care professionals' offices, and prominent medical thought-leaders. These key opinion leaders were particularly influential on the prescribing habits of their peers due to their professional reputations and the appearance of independent objectivity. Key opinion leaders received substantial funding and research grants from Purdue. Purdue often sponsored the CMEs. As a result, Purdue had considerable influence over the messenger, the message, and the distribution of the program.

48. In addition, Purdue employees and key opinion leaders identified, funded, published, and disseminated research that was designed to assist Purdue's marketing efforts and skewed or misreported the scientific evidence. For example, to substantiate its claims that opioids were rarely addictive, Purdue included in promotional and educational materials a citation to the prestigious *New England Journal of Medicine*, but

did not disclose its source was a letter to the editor.[16] This letter has since become a mainstay in scientific literature. Drug companies cited to this letter as evidence that opioid products posed little risk of addiction, "[b]ut that's not in any shape or form what we suggested in our letter," according to one of the authors, Dr. Hershel Jick.[17]

49. A recent analysis in the *New England Journal of Medicine* in June 2017 found that citation to the letter significantly increased after the introduction of OxyContin and "contributed to the North American opioid crisis by helping to shape a narrative that allayed prescribers' concerns about the risk of addiction associated with long-term opioid therapy."[18] In June 2017, the *Journal* took the rarely used step of adding this note to its electronic copy of the letter: "For reasons of public health, readers should be aware that this letter has been 'heavily and uncritically cited' as evidence that addiction is rare with opioid therapy." This letter continued to be widely cited in literature until the present day.

3. Purdue Used Third-party Groups to Influence Treatment Guidelines that Misrepresented the Risks and Benefits of Opioid Use for Chronic Pain Therapy.

50. In addition to giving talks and CMEs, Purdue's key opinion leaders also served on the boards of patient advocacy groups and professional associations that published guidelines for the use of opioids to treat chronic pain. Two such groups were American Pain Society and the American Academy of Pain Medicine, which both, upon information and belief, received substantial funding from Purdue.

51. Through a joint statement, *The Use of Opioids for the Use of Chronic Pain*, these societies endorsed opioids to treat chronic pain and claimed that the risk that patients would become addicted to opioids was low. The sole consultant for this statement was Portenoy. Dr. J. David Haddox, a key opinion leader at the time and a future senior

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[16] Jane Porter & Hershel Jick, Correspondence, *Addiction Rare in Patients Treated with Narcotics*, 302 NEW ENG. J. MED. 123 (1980).

[17] Taylor Haney & Andrea Hsu, *Doctor Who Wrote 1980 Letter on Painkillers Regrets That It Fed the Opioid Crisis*, NAT'L PUB. RADIO, June 16, 2017, https://www.npr.org/sections/health-shots/2017/06/16/533060031/doctor-who-wrote-1980-letter-on-painkillers-regrets-that-it-fed-the-opioid-crisi.

[18] Pamela T.M. Leung et al., Correspondence, *A 1980 Letter on the Risk of Opioid Addiction*, 376 NEW ENG. J. MED. 2194, 2194-95 (2017).

executive for Purdue, co-authored the statement. The statement remained on the internet from 1997 until 2011.

52. Treatment guidelines are used by health care professionals to guide decisions regarding the diagnosis, management, and treatment in specific areas of healthcare. As such, establishing favorable treatment guidelines for opioids was of particular importance to Purdue in bolstering their use of opioids in chronic pain therapy.

53. American Academy of Pain Medicine and American Pain Society issued treatment guidelines in 2009, which continued to recommend the use of opioids to treat chronic pain. These guidelines were particularly important to Purdue in securing acceptance for chronic opioid treatment. Of the 21 panel members who drafted the guidelines, six received support from Purdue, and eight others received support from other opioid manufacturers. Portenoy and Dr. Perry Fine (also a key opinion leader) were both on the panel.

54. The 2009 guidelines state that opioids are "safe and effective" for treating chronic pain and made "strong recommendations" despite "low quality of evidence" that the risk of addiction is manageable for patients, even those with a prior history of drug abuse.[19] One panel member, Dr. Joel Saper, Clinical Professor of Neurology at Michigan State University and founder of the Michigan Headache & Neurological Institute, resigned from the panel because of his concerns that the guidelines were influenced by contributions that opioid manufacturing companies, including Purdue, made to the sponsoring organizations and committee members. Dr. Gilbert Fanciullo, a retired professor at Dartmouth College's Geisel School of Medicine who also served on the panel, described the guidelines as "skewed" by Purdue and other opioid manufacturing companies and "biased in many respects," including its high presumptive maximum dose, lack of suggested mandatory urine toxicology testing, and claims of low risk addiction.

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[19] Roger Chou et al., *Clinical Guidelines for Use of Chronic Opioid Therapy in Chronic Noncancer Pain*, 10 J. OF PAIN 113 (2009).

55. Purdue incorporated and disseminated these guidelines without disclosing its contributions to both the American Academy of Pain Medicine and the American Pain Society. For example, Purdue's *Partner's Against Pain* website incorporated sections of a 2001 American Pain Society consensus statement about addiction to bolster Purdue's position that drug-seeking behavior in chronic pain patients should be interpreted as pseudoaddiction rather than addiction.

56. These guidelines are still available online and were printed in the *Journal of Pain*. They have been a particularly effective channel of deception and have influenced not only treating health care professionals, but also the body of scientific evidence on opioids.

57. Purdue also influenced guidelines from another organization, which advanced the idea of pseudoaddiction, the Federation of State Medical Boards. The Federation of State Medical Boards is a trade organization representing the various state medical boards in the United States. The member state boards of the Federation of State Medical Boards have the power to license doctors, investigate complaints, and discipline physicians. The Federation of State Medical Boards finances opioid- and pain-specific programs through grants from Purdue and other pharmaceutical manufacturers.

58. In 1998, the Federation of State Medical Boards produced *Model Guidelines for the Use of Controlled Substances for the Treatment of Pain* in collaboration with pharmaceutical companies, including Purdue. The guidelines described opioids as "essential" for the treatment of chronic pain, including as a first-line option, but did not mention the risks of respiratory depression and overdose, and addressed addiction only to state that "inadequate understandings" of addiction can lead to "inadequate pain control." The guidelines also warn health care professionals that they could face discipline if they do not adequately treat pain.

59. The claims are repeated in the 2007 book *Responsible Opioid Prescribing*. The book also claimed that opioids would improve patients' function and advanced the idea of pseudoaddiction.

60. The Federation of State Medical Boards website describes the book as the "leading continuing medical education (CME) activity for prescribers of opioid medications." In all, more than 163,000 copies of *Responsible Opioid Prescribing* were distributed to state medical boards.

61. In 2016, the Centers for Disease Control and Prevention Guidelines for Prescribing Opioids for Chronic Pain ("CDC Guidelines") rejected the concept of pseudoaddiction. Despite this rejection, the effects of more than a decade of misinformation is still being felt today.

62. Purdue funded and acted through these third-party groups because health care professionals were conditioned to trust them—more so than branded marketing material—when making prescribing decisions.

63. The third-party, unbranded materials, marketing messages, and scripts relied on by the Purdue sales representatives were not reviewed or approved by any regulatory agency. All of the messages referenced in the instant Complaint were disseminated to Nevada health care professionals and patients through sales representative visits, medical education programs, websites, and other sources.

64. Deploying in Nevada the same marketing tactics and messages it had deployed nationwide, Purdue has used its sales force, key opinion leaders, and third-parties to continue to misrepresent the risks and benefits of its opioids. Specifically, Purdue continued to misrepresent the risk and benefits of opioids in numerous ways, as set forth below.

D. Purdue Used Established Marketing Channels in Nevada to Misrepresent the Risks and Benefits of Opioids.

65. Since 2007, Purdue has perpetuated the idea among health care professionals that opioids should be the standard for chronic pain treatment, to its great reward and to the public's detriment. Despite the obligations in the Consent Judgment, Purdue has done little to nothing to correct its previous deceptions.

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66. s described above, Purdue pursued a two-pronged strategy for marketing opioids: first, Purdue targeted primary care physicians, physician assistants, and nurse practitioners. Purdue also promoted OxyContin, Butrans, and Hysingla for chronic non-cancer pain to the highest opioid prescribers, who often worked at "pain clinics" and who accounted for writing an outsized portion of opioid prescriptions. Additionally, as nurse practitioners and physicians assistants became more active in prescribing opioids, Purdue shifted its focus to market to them as well, including those in Nevada.

67. Second, Purdue marketed directly to patients using both third-party (unbranded) and Purdue-branded educational resources and promotional materials. These materials were designed to persuade patients through misleading statements that opioids were both effective and safe. Purdue created and disseminated promotional materials directly to patients, such as patient brochures and branded public-facing websites like *HysinglaEr.com*, encouraging patients to seek out Purdue opioids from their health care professionals. Upon information and belief, Purdue also disseminated branded promotional materials directed toward patient consumers, such as the website *In the Face of Pain, Partners Against Pain* "Pain Management Kits," patient comfort assessment guides, and other resources guiding and encouraging patients to use opioids. Similarly, as discussed below, various third-party groups produced patient guides and pamphlets that Purdue either distributed or sponsored.

68. The effectiveness of Purdue's deceptive marketing is apparent by the fact that Purdue has dominated the market for opioids promotion since the 1990s.

1. Purdue Advanced False and Misleading Statements on the Appropriateness of Long-term Opioid Use.

69. As set forth above, Purdue successfully convinced Nevada health care professionals and patients that opioids were appropriate for long-term use (generally understood to be "opioid therapy use on most days for > 3 months").[20] To do this, Purdue had to persuade health care professionals that there were significant benefits to using

[20] *2016 CDC Guidelines*, *supra* note 3, at 8.

opioids to treat chronic pain.

70. First, Purdue accomplished this by influencing professional organizations, as described above. Second, Purdue published misleading studies to enhance the perception that opioids are effective treatment for long-term chronic pain conditions. For example, one study asserts that OxyContin is safe and effective for the chronic pain condition osteoarthritis. The study, sponsored by Purdue, related to a chronic condition, but only provided opioids for 30 days. The authors acknowledge that the "results . . . should be confirmed in trials of longer duration to confirm the role of opioids in a chronic condition such as OA [osteoarthritis]."[21] Yet, the authors conclude that "[t]his clinical experience shows that opioids were well tolerated with only rare incidence of addiction and that tolerance to the analgesic effects was not a clinically significant problem when managing patients with opioids long-term."[22] This statement is not supported by the data—a substantial number of patients dropped out because of adverse effects; there was no reported data regarding addiction; and the study was not long term. Another Purdue study of a chronic pain condition only evaluated patients over seven days, but found oxycodone effective in its treatment.[23]

71. The OxyContin "Conversion and Titration Guide" distributed by sales representatives to Nevada health care professionals likewise misleadingly promotes long-term use. A 2007 version of that guide recommended that "the need for opioid therapy should be reassessed periodically (e.g., every 6 to 12 months) as appropriate for patients on chronic therapy," but did not disclose the absence of evidence supporting safety and efficacy for 6-12 months. The 2012 version of the guide distributed in Nevada omits the parenthetical "(e.g., every 6 to 12 months)," but it still conveys that chronic opioid therapy is appropriate without disclosing the lack of evidence for use beyond 12 weeks, and

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[21] Jacques R. Caldwell et al., *Treatment of Osteoarthritis Pain with Controlled Release Oxycodone or Fixed Combination Oxycodone Plus Acetaminophen Added to Nonsteroidal Antiinflamatory Drugs: A Double Blind, Randomized, Multicenter, Placebo Controlled Trial*, 266 J. OF RHEUMATOLOGY 862, 867 (1999).

[22] *Id.*

[23] Martin E. Hale et al., *Efficacy and Safety of Controlled-Release Versus Immediate-Release Oxycodone: Randomized, Double-Blind Evaluation in Patients with Chronic Back Pain*, 15 CLINICAL J. OF PAIN 179 (1999), https://www.ncbi.nlm.nih.gov/pubmed/10524470.

without correcting the previous misinformation Purdue conveyed to health care professionals.

72. However, the risk of addiction and negative consequences increases when opioids are administered long-term.[24] In 2013, the Food and Drug Administration ("FDA") noted that the data reflects that risk of misuse and abuse is greatest for extended release opioids and observed that these drugs are often used chronically.[25]

73. One study has shown that the duration of opioid treatment is a strong risk factor for opioid use disorder, even more important than daily dose (which is itself a strong predictor of continued opioid use).[26] In fact, a study published in 2015 found that 1 in 5 patients on long-term opioid treatment will develop opioid use disorder.[27]

74. The 2016 CDC Guidelines makes clear that there is "insufficient evidence to determine the long-term benefits of opioid therapy for chronic pain."[28] In fact, the CDC found that "[n]o evidence shows a long-term benefit of opioids in pain and function versus no opioids for chronic pain with outcomes examined at least 1 year later (with most placebo-controlled randomized trials ≤ 6 weeks in duration)"[29] and that other treatments were more or equally beneficial and less harmful than long-term opioid use. The FDA, too, has recognized the lack of evidence to support long-term opioid use. In 2013, the FDA stated that it was "not aware of adequate and well-controlled studies of opioids use longer than 12 weeks." As a result, the CDC recommends that opioids not be used in the first instance and only after health care professionals have exhausted alternative remedies.

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[24] *See, e.g.*, Wilson M. Compton & Nora D. Volkow, *Major Increases in Opioid Analgesic Abuse in the United States: Concerns and Strategies*, 81 DRUG AND ALCOHOL DEPENDENCE 103, 104 (2006) (noting increased risk for addiction for long-term administration of opioids).

[25] Letter from Janet Woodcock, M.D., Dir., Ctr. for Drug Evaluation and Research, to Andrew Kolodny, M.D. (Sept. 10, 2013) (on file with author), http://www.supportprop.org/wp-content/uploads/2014/12/FDA_CDER_Response_to_Physicians_for_Responsible_Opioid_Prescribing_Partial_Petition_Approval_and_Denial.pdf.

[26] Mark J. Edlund et al., *The Role of Opioid Prescription in Incident Opioid Abuse and Dependence Among Individuals With Chronic Noncancer Pain*, 30 CLINICAL J. OF PAIN 557 (2014).

[27] Louisa Degenhardt et al., *Agreement Between Definitions of Pharmaceutical Opioid Use Disorders and Dependence in People Taking Opioids for Chronic Non-cancer Pain (POINT): A Cohort Study*, 2 LANCET PSYCHIATRY 314 (2015).

[28] *2016 CDC Guidelines*, *supra* note 3, at 19.

[29] *Id.* at 15.

75. The CDC found that "[o]pioid pain medication use presents serious risks, including overdose and opioid use disorder"—a technical term for addiction.[30] The CDC emphasized that "continuing opioid therapy for 3 months substantially increases risk for opioid use disorder."[31]

76. Whether the patient meets the clinical definition of addiction or is simply dependent and unable to stop using opioids, once opioids are prescribed for even a short period of time, patients are addicted or dependent on opioids.

77. Nevertheless, building on its earlier marketing, Purdue has continued to tout the purported benefits of long-term opioid use, while falsely and misleadingly suggesting that these benefits were supported by scientific evidence.

2. Purdue Misrepresented that Opioids are Effective to Improve Everyday Functioning and Quality of Life.

78. Purdue falsely claimed and marketed—through branded and non-branded advertisements, promotional materials, and sales representatives—that long-term opioid use will help patients suffering from chronic pain resume their normal daily lives and work.

79. Purdue disseminated promotional materials in Nevada falsely stating or implying that long-term opioid use could help patients regain physical functionality and make it easier to conduct everyday tasks like working, walking, and exercising.

80. In one example, in 2012, Purdue published in medical journals and disseminated to health care professionals a series of ads titled "pain vignettes." Each "vignette" consisted of case studies describing patients with chronic pain conditions and recommended OxyContin for each. One ad described a "54-year old writer with osteoarthritis of the hands," and implied that opioids would help him work more effectively.

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[30] *Id.* at 2.
[31] *Id.* at 25.

81. Each of the ads deceptively and falsely implied that an OxyContin prescription would enable the chronic pain patients to return to work more effectively and that it would improve physical functioning and quality of life long term.

82. There is no competent medical evidence demonstrating that long-term opioid use can improve patients' ability to physically function, or cure long-term pain. To the contrary, generally accepted medical evidence indicates patients will likely complain of greater pain over the course of long-term opioid treatment, as they develop tolerance to opioids.

83. Purdue was aware of such medical evidence but deceptively failed to disclose it in its advertisements.

84. Purdue has additionally promoted deceptive messages through unbranded materials that it directly funded and authored.

85. In 2011, Purdue sponsored the development and distribution of the American Pain Foundation's[32] *A Policymaker's Guide to Understanding Pain and Its Management*, which claimed that "multiple clinical studies have shown that opioids are effective in improving daily function, psychological health, and health-related quality of life for chronic pain patients." The *Guide* was originally published in 2011 and is still available to Nevada patients online today.[33]

86. Purdue's statements that long-term use of opioids improves patient function and quality of life is unsupported by clinical evidence. There are no controlled studies on the use of opioids beyond 16 weeks, and there is no competent evidence that opioids improve patients' pain and function long-term. The CDC came to this determination in its 2016 CDC Guidelines (finding there is "insufficient evidence to determine the long-term benefits of opioid therapy for chronic pain.")[34]

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[32] At relevant times Purdue exerted considerable financial and contractual control over the American Pain Foundation, an ostensibly neutral patient advocacy group that disseminated false and misleading material regarding long term opioid therapy.

[33] *See* Am. Pain Found., *A Policymaker's Guide to Understanding Pain & Its Management* (Oct. 2011), https://assets.documentcloud.org/documents/277603/apf-policymakers-guide.pdf.

[34] *2016 CDC Guidelines*, *supra* note 3, at 19.

87. Referencing and assessing existing science, the 2016 CDC Guidelines found that "there is no good evidence that opioids improve pain or function with long-term use, and . . . complete relief of pain is unlikely."[35]

88. To the contrary, the available evidence indicates opioids are not effective to treat chronic pain, and that it may be detrimental to patient health. Increasing the duration of opioid use is strongly associated with increasing incidence of mental health conditions (including addiction, dependence, depression, and anxiety) and greater health care utilization. As concluded in the 2016 CDC Guidelines, "[w]hile benefits for pain relief, function and quality of life with long-term opioid use for chronic pain are uncertain, risks associated with long-term opioid use are clearer and significant."[36]

89. These generally accepted medical conclusions have been widely known for the duration of Purdue's deceptive marketing scheme. The FDA has been warning opioid manufacturers for nearly a decade that claims of improved function and quality of life are misleading. In 2008, the FDA stated in a warning letter to a narcotic manufacturer that "[the claim that] patients who are treated with the drug experience an improvement in their overall function, social function, and ability to perform daily activities . . . has not been demonstrated by substantial evidence or substantial clinical experience."[37]

90. Purdue was aware, or should have been aware, that it was making false claims and omitting material facts about the effectiveness of opioids in improving daily functioning and quality of life, but made such claims and omissions anyway.

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[35] *Id.* at 20 (emphasis added).

[36] *Id.* at 18.

[37] Warning Letter from Thomas Abrams, Dir., FDA Div. of Mktg., Adver. & Commc'ns, to Brian A. Markison, Chairman, President and Chief Exec. Officer, King Pharmaceuticals, Inc. (March 24, 2008) (on file with author); *see also* Warning Letter from Thomas Abrams, Dir. FDA Div. of Mktg., Adver., & Commc'ns, to Doug Booth, CEO Actavis Elizabeth LLC (Feb. 18, 2010) (on file with author) (rejecting claims that opioid had "an overall positive impact on a patient's work, physical and mental functioning, daily activities, or enjoyment of life."). On information and belief, the FDA's warning letters were available to Purdue through the FDA's website.

3. Purdue Misleadingly Promoted OxyContin as Supplying 12 Hours of Continuous Pain Relief When it Knew, or Should Have Known, that, for Many Patients, This Was False.

91. Purdue has long marketed OxyContin as being unique among opioids in providing 12 continuous hours of pain relief from a single dose.

92. However, OxyContin does not last for 12 hours in a significant number of patients, information Purdue has known since clinical trials.

93. OxyContin's FDA-approved label directs twice daily—"Q12"—12 hour dosing. On information and belief, Purdue sought the 12-hour frequency labelling as a means to maintain a competitive advantage on more frequently dosed opioids. It utilized 12-hour dosing to promote OxyContin as providing continuous, around the clock pain relief. The 1996 press release for OxyContin touted it as providing "smooth and sustained pain control all day and all night."

94. To establish 12-hour dosing under FDA guidelines, however, Purdue merely had to show that OxyContin lasted for 12 hours in at least 50 percent of patients.

95. Purdue's marketing has consistently touted OxyContin as providing continuous, round-the-clock pain relief without having to take a third or fourth pill. In one chart, Purdue claims that OxyContin provides "Consistent Plasma Levels Over 12 Hours" and includes a chart depicting plasma levels on a logarithmic scale. However, the chart deceptively manipulates the scale of the chart's Y-axis to make 10 mg appear to be half of 100 mg, thus concealing the steep decline of OxyContin's effectiveness over 12 hours. Purdue's manipulation of the curve makes the absorption rate appear more steady or consistent than it really was.

96. According to its own research and development for OxyContin, Purdue knew that the opioid wore off in under six hours in one-quarter of patients, and in under 10 hours in more than half. In a 2008 letter, the FDA found that a "substantial number" of chronic pain patients taking OxyContin experience "end of dose failure" with little or no pain relief at the end of the dosing period. Dr. David Egilman, an expert on prescription drug warning labels, testified at a 2013 public hearing that Purdue wanted the 12-hour

dosing because it would "distinguish its drug from other short-acting narcotics," making it the "main marketing device to increase profits."[38] However, the data showed that at 10 milligrams, OxyContin release was effective "for less than six hours in at least 25 percent of patients."[39] The 20 and 30 milligram doses were effective for less than 10 hours in at least 50 percent of patients.[40] All of the Purdue studies permitted rescue or short-acting opioids to cover patients who had breakthrough pain before the end of the 12 hours.[41]

97. Because OxyContin suffers from end-of-dose failure, the drug is even more dangerous because patients begin to experience distressing psychological and physical withdrawal symptoms, followed by a euphoric rush with their next dose—leading to a cycle that fuels a craving for OxyContin. Dr. Theodore Cicero, a neuropharmacologist at the Washington University School of Medicine in St. Louis, has called OxyContin's 12-hour dosing "the perfect recipe for addiction."[42] To alleviate the withdrawal symptoms, patients will often take their next dose ahead of schedule or resort to a rescue dose of another opioid, increasing the overall amount of opioids they are taking and exacerbating this cycle.

98. Despite this, Purdue continued to market 12-hour dosing because it was the key to OxyContin's market dominance and comparatively high price. Without the 12-hour advantage, the drug has little to offer over less expensive, short-acting opioids. In a 2004 letter to the FDA, Purdue acknowledged that it had not pursued approval for a recommendation of more frequent dosing in the label because 12-hour dosing gave it a "significant competitive advantage."[43]

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[38] *Impact of Approved Drug Labeling on Chronic Opioid Therapy*, FDA CTR. FOR DRUG EVALUATION AND RESEARCH, PART 15 - PUBLIC HEARING, at 91:6-11 (Feb. 8, 2013) (testimony of David Egliman), https://wayback.archive-it.org/7993/20170113151848/http:/www.fda.gov/downloads/Drugs/NewsEvents/UCM342713.pdf.

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] Harriet Ryan et al., *'You Want a Description of Hell?' OxyContin's 12-Hour Problem*, L.A. TIMES, May 5, 2016, http://www.latimes.com/projects/oxycontin-part1/.

[43] Letter from Richard S. Morey, Counsel to Purdue Pharma L.P., to Dockets Management Branch, FDA, 12-13 (Apr. 14, 2014) (on file with author) (containing comments on citizen petition docket #2004P-0043), http://documents.latimes.com/purdue-response-fda-2004/.

99. On information and belief, Purdue has continuously claimed in marketing and sales communications to health care professionals in Nevada that OxyContin lasts for 12 hours and that 12-hour dosing is a key advantage of OxyContin, without disclosing that OxyContin fails to provide 12 hours of pain relief to many, and up to half, of patients prescribed OxyContin.

100. Purdue's misrepresentations are dangerous and deceptive to Nevadans. Inadequate dosing for pain relief can lead to "end-of-dose failure" and withdrawal symptoms as described above. Such symptoms often prompt health care professionals to recommend more frequent doses. Purdue conveyed to health care professionals in Nevada that the solution to end-of-dose failure is not more frequent dosing, but higher doses. Both practices substantially increase the risk of abuse and addiction.

101. Purdue's promotion of 12-hour dosing as 12-hour relief constituted a dangerous misrepresentation in the case of many patients. This misrepresentation in failing to disclose to health care professionals known information about OxyContin's actual duration was further perpetuated by Purdue's promotion of risky higher dosing as a solution to end-of-dose failure.

102. Purdue was aware that it was a common practice for health care professionals to prescribe OxyContin more frequently than every 12 hours to address end-of-dose failure experienced by the patients, often up to three or four doses per day. Purdue's proposed solution, to recommend dosages be higher in concentration, but stay on the 12-hour schedule, simply exacerbated or did nothing to address risks of overdose, dependence, and death. Higher dosages cause patients to experience greater highs and lows, increasing craving for the next dose.

103. Purdue's deceptive and misleading promises of 12-hour relief have directly contributed to the elevated frequency of opioid dosing and elevated dosage levels in patients in Nevada and elsewhere, dramatically increasing the risk of dependence, addiction, overdose, and death.

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4. Purdue Misrepresented the Risk of Addiction and Harms.

104. In an effort to convince Nevadans that opioids are safe, Purdue, through deceptive conduct, has continued to minimize and failed to disclose the risks of long-term opioid use, particularly the risk of addiction. The United States Department of Justice found in resolving criminal charges against Purdue in 2007, sales representatives had "falsely told some health care professionals that OxyContin has less euphoric effect and less abuse potential than short-acting opioids."[44] These misrepresentations reinforced one another and created the dangerously misleading impressions that: (1) patients receiving opioid prescriptions for pain would not become addicted; (2) even patients who seemed addicted were not; they had undertreated pain and just needed more opioids; (3) patients at greatest risk of addiction could be identified, that all other patients could safely be prescribed opioids, and that even high risk patients could be prescribed opioid if closely managed; (4) health care professionals could prescribe higher opioid doses indefinitely without added risk; and (5) the abuse-deterrent formulations of Purdue's opioids both prevent abuse and overdose and are inherently less addictive. Each of these misrepresentations has been debunked by the FDA and CDC.

105. As discussed previously, Purdue funded, influenced, and distributed third-party publications of health care professional and patient "educational" materials that misled their target audiences about the additional danger of prescription opioids. Many of these publications further sought to convince health care professionals who did not treat patients' pain complaints with opioids that they were failing their patients, while those who prescribed long-term opioid treatment were following the compassionate (and professionally less risky) approach. For example:

a. Upon information and belief, Purdue maintained a website, *In the Face of Pain*, from 2008 through 2015, which asserted that policies limiting access to opioids are

[44] *United States v. Purdue Frederick Co., Inc., et al.*, 1:07-cr-00029-jpj-1 (W.D. Va. 2007) (Criminal Information, ¶ 24).

"at odds with best medical practices" and encouraged patients to be "persistent" in finding health care professionals who will treat their pain. The website contained testimonials from several dozen health care professional "advocates" speaking positively about opioids. Eleven of those advocates received a total of $231,000 in payments from Purdue from 2008 to 2013.[45] However, Purdue omitted this information from the site.[46] Purdue deactivated *In the Face of Pain* during an investigation, and later settlement, with the New York Attorney General.[47]

b. Purdue sponsored American Pain Foundation's *Treatment Options: A Guide for People Living with Pain* (2007), which taught that addiction is rare and limited to extreme cases of unauthorized dose escalations, obtaining opioids from multiple sources, or theft. The *Treatment Options* guide also states "[d]espite the great benefits of opioids, they are often underused," and emphasized that "[r]estricting access to the most effective medications for treating pain is not the solution to drug abuse or addiction." The brochure also explained that opioids' "under-use has been responsible for much unnecessary suffering."

c. Purdue sponsored American Pain Foundation's *Exit Wounds* (2009), which was targeted to teach veterans that "[l]ong experience with opioids shows that people who are not predisposed to addiction are very unlikely to become addicted to opioid pain medications." Although the term "very unlikely" is not defined, the overall presentation suggests that the rate is "so low as to be immaterial."

d. Purdue sponsored American Pain Foundation's *A Policymaker's Guide to Understanding Pain & Its Management*, which inaccurately claimed that less than 1% of children prescribed opioids would become addicted.[48] It also misleadingly concluded that "[u]nfortunately, too many Americans are not getting the pain care they need and deserve. Some common reasons for difficulty in obtaining adequate care include. . .

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[45] *In re* Purdue Pharma L.P., Assurance No.: 15-151 (Aug. 19, 2015) (filed by the Attorney General of the State of New York), https://ag.ny.gov/pdfs/Purdue-AOD-Executed.pdf.

[46] *Id.*

[47] *Id.*

[48] *See* Am. Pain Found., *supra* note 33.

misconceptions about opioid addiction."[49]

e. *Providing Relief, Preventing Abuse*, a pamphlet published by Purdue in 2011 for health care professionals and law enforcement, includes pictures of the signs of injecting or snorting opioids—skin popping, track marks, and perforated nasal septa—under the headings "Indications of Possible Drug Abuse." However, it is uncommon for opioid addicts to resort to these extreme abuse examples; they more typically become dependent and addicted to swallowing pills, as Purdue designed and intended the drug to be ingested. Purdue sales representatives gave the pamphlet *Providing Relief, Preventing Abuse* to health care professionals in Nevada.

106. As many as 26% of opioid users and as many as 30% or even 40% of long-term opioid users experience problems with addiction. Purdue's representations that the risk of addiction was either low or acceptable were misleading and deceptive.

5. Purdue Overstated the Ability of Health Care Professionals to Manage Addiction and Failed to Disclose a Lack of Evidence that Suggested Management Strategies Work.

107. Purdue has falsely instructed Nevada health care professionals and patients that addiction risk screening tools, patient contracts, urine drug screens, and similar strategies allow health care professionals to safely prescribe opioids to patients, including patients predisposed to addiction, and has failed to disclose the lack of evidence that these strategies will mitigate addiction risk.

108. Such misrepresentations were designed to make health care professionals more comfortable prescribing opioids to their patients, and patients more comfortable starting chronic opioid therapy. These misrepresentations were especially insidious because Purdue aimed them at general practitioners and family physicians who did not primarily specialize in chronic pain management and were less likely to closely manage higher-risk patients on opioids. Moreover, these misrepresentations were critical to assure health care professionals, who were beginning to see or hear about the rising tide

[49] *Id.* This claim also appeared in a 2009 publication by Am. Pain Found., *A Reporter's Guide.*

of opioid addiction, that they could safely prescribe opioids in their own practices and that addiction was not unavoidable, but rather the result of other health care professionals failing to rigorously identify and manage problems.

109. In Nevada, Purdue conveyed these messages in its in-person sales visits.

110. Purdue also promoted screening tools as a reliable means to manage addiction risk in CME and scientific conferences attended by or available to Nevada health care professionals.

111. Purdue sponsored a 2011 CME taught by Dr. Lynn Webster, a prominent opioid advocate, titled *Managing Patient's Opioid Use: Balancing the Need and Risk.* This presentation deceptively instructed health care professionals that screening tools, patient agreements, and urine tests prevented "overuse of prescriptions" and "overdose deaths."

112. Purdue also funded a 2012 CME program called *Chronic Pain Management and Opioid Use: Easing Fears, Managing Risks, and Improving Outcomes.* The presentation deceptively instructed health care professionals that, by using screening tools, more frequent refills, and other techniques, high-risk patients showing signs of addictive behavior could be treated with opioids. This CME program was available to Nevada health care professionals.

113. Purdue used its involvement in an organization known as the College on Problems of Drug Dependence[50] to promote the idea that addiction risk can be managed. A Purdue employee served on the College on Problems of Drug Dependence board of directors. Purdue has been able to present a disproportionately large number of talks—with vastly different messages from non-Purdue talks—at each College on Problems of Drug Dependence conference. One of Purdue's consistent themes in its messaging is that "bad apple" patients, not opioids, are the source of the addiction crisis, and that once those patients are identified, health care professionals can safely prescribe opioids without patients becoming addicted. These were national conferences attended by hundreds of

[50] The College on Problems of Drug Dependence promotes scientific research and professional development to support addiction prevention professionals.

addiction treatment specialists and healthcare professionals from across the country, from 2006 to the present.

114. The 2016 CDC Guidelines confirm the misrepresentation of Purdue's claims about the utility of patient screening and management strategies in managing addiction risk. The Guidelines note that there are no studies assessing the effectiveness of risk mitigation strategies—such as screening tools or patient contracts—"for improving outcomes related to overdose, addiction, abuse, or misuse."[51] The Guidelines further found that available risk screening tools "show *insufficient accuracy* for classification of patients as at low or high risk for [opioid] abuse or misuse" and counsels that health care professionals "should not overestimate the ability of [those] tools to rule out risks from long-term opioid therapy."[52]

6. Purdue Deceptively Promoted the Concept of Pseudoaddiction to Minimize Signs of Addiction.

115. Purdue downplayed the problem of addiction by simply re-labeling it. According to Purdue, the signs of addiction are actually the product of untreated pain, which should be treated by prescribing even more opioids.

116. As stated previously, Dr. J. David Haddox coined the term "pseudoaddiction," and popularized it for opioid treatment for chronic pain by Purdue. Pseudoaddiction was meant to differentiate between "undertreated pain" and "true addiction"—as if the two were mutually exclusive.

117. Purdue promoted the concept of "pseudoaddiction" while failing to disclose that it was not substantiated by component scientific evidence. For example:

a. Purdue sponsored the Federation of State Medical Boards' *Responsible Opioid Prescribing* (2007), which claimed that behaviors such as "requesting drugs by name," "demanding or manipulative behavior," seeing more than one prescriber to obtain opioids, and hoarding, are not signs of genuine addiction, but only signs of

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[51] *2016 CDC Guidelines*, *supra* note 3, at 11.
[52] *Id.* at 28 (emphasis added).

"pseudoaddiction."

b. Purdue also posted an unbranded pamphlet entitled *Clinical Issues in Opioid Prescribing* on the *Partners Against Pain* website in 2005, and upon information and belief circulated this pamphlet after 2007. The pamphlet represented that conduct like "illicit drug use and deception" was not evidence of "true" addiction, but instead an indication of "pseudoaddiction" caused by untreated pain. It explained: "Pseudoaddiction is a term which has been used to describe patient behaviors that may occur when pain is untreated . . . Even such behaviors as illicit drug use and deception can occur in the patient's efforts to obtain relief. Pseudoaddiction can be distinguished from true addiction in that the behaviors resolve when the pain is effectively treated."

c. Purdue sponsored *A Policymaker's Guide to Understanding Pain & Its Management*,[53] which deceptively promoted the concept of "pseudoaddiction," by explaining that "[p]atients with unrelieved pain may become focused on obtaining medications and may otherwise seem inappropriately 'drug seeking,' which may be misidentified as addiction by the patient's physician."

d. A 2010 Purdue "Training Guide for Healthcare Providers" on OxyContin taught that "[b]ehaviors that suggest drug abuse exist on a continuum, and pain-relief seeking behavior can be mistaken for drug-seeking behavior."

e. Purdue disseminated the *Definitions Related to the Use of Opioids for the Treatment of Pain* section of an American Pain Society consensus through the *Partners Against Pain* website. American Pain Society defined pseudoaddiction in the same terms endorsed by Purdue:

> Physical dependence, tolerance, and addiction are discrete and different phenomena that are often confused . . . . Pseudoaddiction is a term which has been used to describe patient behaviors that may occur when pain is undertreated. Patients with unrelieved pain may become focused on obtaining medications, may "clock watch," and may otherwise seem inappropriately "drug seeking." Even such behaviors as illicit drug use and deception can occur in the patient's efforts

[53] *See* Am. Pain Found., *supra* note 33.

> to obtain relief. Pseudoaddiction can be distinguished from true addiction in that the behaviors resolve when pain is effectively treated. Physical dependence on and tolerance to prescribed drugs do not constitute sufficient evidence of psychoactive substance use disorder or addiction. They are normal responses that often occur with the persistent use of certain medications . . . . A patient who is physically dependent on opioids may sometimes continue to use these despite resolution of pain only to avoid withdrawal. Such use does not necessarily reflect addiction.

f. Purdue sponsored *Exit Wounds*, which sought to reassure veterans about addiction concerns by explaining that although they may become physically dependent on opioids, they will not become addicted:

> Physical dependence means that a person will develop symptoms and signs of withdrawal (*e.g.*, swearing, rapid heart rate, nausea, diarrhea, goose bumps, or anxiety) if a drug medication is suddenly stopped or the dose is lowered too quickly . . . . Physical dependence is normal. This does not mean you are addicted.
>
> Opioid medications can, however, be abused or used as recreational drugs, and some people who use drugs in this way *will* become addicted. Addiction is a disease state in which people can no longer control their use of a drug that is causing them harm.

(Emphasis in original)

g. Purdue directly disseminated material about "pseudoaddiction" to all Nevada health care professionals. Following the entry of the 2007 Consent Judgment, Purdue was obligated to provide information about abuse and diversion to prescribers. Under the guise of education, Purdue sent annual "Dear Healthcare Provider" letters to all Nevada health care professionals who prescribed opioids, and enclosed two copies of *Providing Relief, Preventing Abuse*. Purdue represented that "[t]he brochure contains important information" about topics like "definitions related to the use of opioids for the treatment of pain," as well as "[i]ndicators of possible abuse" and "[s]trategies for identifying opioid abusers." Various editions of *Providing Relief, Preventing Abuse* contained deceptive statements about pseudoaddiction.

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h. The 2008 edition of *Providing Relief, Preventing Abuse* explained that the term pseudoaddiction:

> describes the misinterpretation by members of the health care team of relief-seeking behaviors in a person whose pain is inadequately treated as though they were drug-seeking behaviors as would be common in the setting of abuse. The lack of appropriate response to the behaviors can result in an escalation of them by the patient, in an attempt to get adequate analgesia.

i. The 2008 edition of *Providing Relief, Preventing Abuse* further explained that "[p]seudoaddiction can be distinguished from addiction in that the behaviors resolve when pain is effectively treated."

j. By 2011, Purdue had revised the brochure, and the second edition of *Providing Relief, Preventing Abuse* explained that:

> [s]ome patients may exhibit behaviors aimed at obtaining pain medication because their pain treatment is inadequate. The term *pseudoaddiction* has emerged in the literature to describe the inaccurate interpretation of these behaviors in patients who have pain that has not been effectively treated. Pseudoaddiction behaviors can be distinguished from addiction by the fact that, when adequate analgesia is achieved, the patient who is seeking pain relief demonstrates improved function, uses the medications as prescribed, and does not use drugs in a manner that persistently causes sedation or euphoria.

k. By 2014, the term pseudoaddiction no longer appeared in *Providing Relief, Preventing Abuse*, but the brochure included an "Other Considerations" section that taught "[s]ome patients may exhibit behaviors aimed at obtaining pain medication because their treatment is inadequate. Such behaviors may occur occasionally even with successful opioid therapy for pain; a pattern of persistent occurrences should prompt concern and further assessment."

l. The 2007 Purdue-sponsored book *Responsible Opioid Prescribing* warns health care professionals to "[b]e aware of the distinction between *pseudoaddiction* and addiction."[54] It explains that "[p]atients who are receiving an inadequate dose of opioid

[54] SCOTT M. FISHMAN, RESPONSIBLE OPIOID PRESCRIBING 62 (2007) (emphasis in original).

medication often 'seek' more pain medications to obtain pain relief," and "[t]his is called pseudoaddiction because healthcare practitioners can mistake it for the drug-seeking behavior of addiction."[55]

i. Health care professionals were instructed to tell pseudo- from "true" addiction by "observing as closely as possible the function consequences of opioid use. Whereas pseudoaddiction resolves when the patient receives adequate analgesia, the addictive behavior does not.[56]

ii. In short, to tell whether a patient is addicted to opioids, health care professionals are to give the patient more opioids, and then see if he or she keeps engaging in "demanding or manipulative behavior" *after* his or her demands are met or the manipulation has achieved its desired result.[57]

iii. Other examples of addiction-seeking behavior listed in the book—such as "[b]ought medications from a street dealer" and "[t]ried to get opioids from more than one source"[58] are likely to cease if a single prescriber is willing to provide all the opioids the patient needs to satisfy his needs.

iv. Conversely, the more extreme examples of addiction-indicating behavior listed in the book—such as "[s]tole money to obtain drugs," "[p]erformed sex for drugs," and "[p]rostituted others for money to obtain drugs"—are more indicative of a patient's financial ability to buy prescription opioids than his or her underlying need for, and dependence on, opioids.

m. Thus, condensing Purdue's distinction, the difference between pseudoaddiction and true addiction is really whether the patient has (a) a prescriber willing to prescribe more opioids until "need" is met, and (b) the insurance or money to pay for those opioids without resorting to prostitution, theft, or other criminal conduct. Purdue's message was that as long as health care professionals follow Purdue's

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[55] *Id.*
[56] *Id.*
[57] *Id.*
[58] *Id.* at 63.

instructions and increase opioid doses, they will see very few patients who are "addicted" to opioids as Purdue trained them to understand the condition.

118. In 2012, Purdue key opinion leader Webster acknowledged: "[Pseudoaddiction] obviously became too much of an excuse to give patients more medication. It led us down a path that caused harm. It is already something we are debunking as a concept."[59]

119. In 2016, the CDC Guidelines rejected the concept of pseudoaddiction. Contrary to the Federation of State Medical Boards guidelines, the 2016 CDC Guidelines explain that "[p]atients who do not experience clinically meaningful pain relief early in treatment . . . are unlikely to experience pain relief with longer-term use,"[60] and that health care professionals should "reassess [ ] pain and function within 1 month" in order to decide whether to "minimize risks of long-term opioid use by discontinuing opioids" because the patient is "not receiving a clear benefit."[61] However, the effects of more than a decade of pseudoaddiction's influence are still felt today during the current crisis.

7. Purdue Deceptively Overstated the Nature and Efficacy of Abuse-deterrent Properties.

120. The risks of abuse and addiction to OxyContin were abundantly clear by the mid-2000s, and were the inevitable result of Purdue's misleading objective to convince health care professionals to routinely prescribe OxyContin for chronic pain. Yet, rather than scale back its marketing and profits ensuring the safety of patients, Purdue's solution was to (i) craft a narrative that abuse and addiction were primarily caused by diversion, with abusers snorting or injecting the drugs, and (ii) develop new features to make the drug more difficult to crush and unsuitable for injection.

121. The narrative created to explain the reasons for abuse and addiction is apparent on Purdue's website, which explains that abuse deterrent formulations "are

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[59] John Fauber & Ellen Gabler, *Networking Fuels Painkiller Boom*, MILWAUKEE WIS. J. SENTINEL, Feb. 19, 2012.

[60] *2016 CDC Guidelines*, *supra* note 3, at 13.

[61] *Id.* at 25.

designed to provide pain relief when taken as directed while also deterring abuse by snorting and injection," and are "intended to help deter the abuse, misuse, and diversion of these prescription pain medications—while ensuring that patients in pain continue to have appropriate access to these important therapies."[62]

122. Contrary to Purdue's emphasis on diversion, snorting and injection, the 2016 CDC Guidelines found no evidence or studies to support the notion that abuse deterrent formulations have any effectiveness as a risk mitigation strategy for deterring or preventing abuse.[63] And, to the extent abuse deterrent formulations curbed abuse by some patients, they simply switched to other opioids, including heroin.[64]

123. Purdue's narrative about abuse was also contradicted in a study published in the Clinical Journal of Pain in 2016, which suggests that only 10% to 20% of all opioid users snort or inject pills, and there is no evidence that orally administered opioids are less addictive.[65] Nevertheless, this same study found that Purdue's narrative was successful, as 46% of health care professionals surveyed erroneously stated that abuse deterrent formulations were less addictive than non-abuse deterrent formulations.[66] Essentially, Purdue's narrative gave health care professionals a false sense of security regarding the use of "abuse deterrent" formulations.[67]

124. In addition to serving as a disclaimer of liability, Purdue's narrative about abuse and addiction being caused by diversion provided another profit-making opportunity, indeed a brand new market, for Purdue. In 2010, Purdue introduced a reformulation of OxyContin—an abuse deterrent formulation—and discontinued marketing its original formulation.

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[62] *Opioids with Abuse Deterrent Properties*, PURDUE, http://www.purduepharma.com/healthcare-professionals/responsible-use-of-opioids/opioids-with-abuse-deterrent-properties/ (last visited Apr. 20, 2018).

[63] *2016 CDC Guidelines, supra* note 3, at 22.

[64] *Id.* at 14.

[65] Catherine S. Hwang et al., *Primary Care Physicians' Knowledge and Attitudes Regarding Prescription Opioid Abuse and Diversion*, 32 CLINICAL J. PAIN 279, 282 (2016).

[66] *Id.* at 281.

[67] *Id.* at 282.

125. Reinforcing the narrative that abuse and addiction were caused by diversion, rather than the natural consequence of routinely prescribing opioids for chronic pain, the abuse deterrent formulations were designed to make opioid pills harder to crush, dissolve, or otherwise manipulated for easy non-oral abuse.

126. Despite its features, the abuse deterrent formulation of OxyContin is still easily tampered with, as evidenced by websites and message boards[68] that explain how to successfully tamper with OxyContin and Hysingla ER, including through grinding, microwaving then freezing, or drinking soda or juice in which a tablet is dissolved. Thus, it is public knowledge that the abuse deterrent formulations of Purdue's opioids are easily altered for abuse by those determined to do so.

127. Even without tampering, the abuse deterrent formulations of Purdue's opioids are no less subject to abuse through oral intake. The 2016 CDC Guideline expressly found that abuse deterrent formulations "do not prevent opioid abuse through oral intake, ***the most common route of opioid abuse***, and can still be abused by nonoral routes."[69]

128. While there is no evidence that the abuse deterrent formulations of its products substantively mitigate abuse or addiction to these opioids, Purdue's sales representatives have routinely emphasized these features to distinguish Purdue products from competitors. These representations have taken many forms, including claims or assertions that (i) the abuse deterrent formulations prevent tampering, (ii) the abuse deterrent formulations prevent or reduce opioid abuse, diversion, and addiction, and (iii) Purdue's abuse deterrent opioids are safer than opioids products offered by competitors. Furthermore, the sales representatives routinely neglect to disclose that Purdue's abuse deterrent opioids do not prevent opioid abuse through oral intake, the most common route to opioid abuse.

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[68] *E.g.*, bluelight.org and reddit.com.

[69] *2016 CDC Guidelines*, *supra* note 3, at 21-22 (emphasis added).

129. The routine statements and omissions made by Purdue's sales representatives are contradictory to (i) the CDC's findings about the effectiveness of abuse deterrent formulations, (ii) the FDA-approved labels for Purdue's abuse deterrent formulations, and (iii) knowledge in the public domain that abuse deterrent formulations are readily altered for abuse. Accordingly, these statements and omissions are deceptive and promote a false narrative that abuse and addiction were, and are, caused by diversion, snorting, and injection, rather than being the natural consequences of routinely prescribing opioids to treat chronic pain.

8. Purdue Knew or Should Have Known, but Failed to Disclose, the Risks of Using Opioids in Higher Doses.

130. Purdue knew or should have known that prescribing higher doses of opioids increased the risks of addiction and overdose. Yet, Purdue ignored or downplayed these risks and encouraged health care professionals to prescribe higher doses of opioids to patients.

131. A study published in The Clinical Journal of Pain in 2014[70] provides insight into Purdue's strategy regarding higher dosages. This study found that higher daily doses and possible opioid misuse were (a) strong predictors of continued use, and (b) associated with higher risk of overdoses, fractures, dependence, and death. Furthermore, high daily doses is a strong predictor of continued opioid use, and prolonged duration of opioid therapy is a strong risk factor for opioid use disorder.

132. Purdue sought to obtain the financial benefits that would result from higher daily doses—continued use of its products for long periods of time—but deflect the significant adverse effects associated with higher doses and continued use.

133. Purdue's practices for the prescription of OxyContin illustrate its disregard for the greater risk of higher doses. Purdue knew that OxyContin frequently did not provide 12 hours of relief. Rather than endorsing the prescription of OxyContin more than twice per day, Purdue encouraged health care professionals to simply prescribe

[70] Mark J. Edlund et al., *supra* note 26, at 557-64.

higher doses of OxyContin.

134. In addition to in-person encouragement to prescribe higher doses, Purdue and Purdue-sponsored publications and CMEs available in Nevada also deceptively suggested there were no additional risks associated with higher opioid doses.

135. In a 2011 publication, *A Policymaker's Guide*, dosage escalations were conveyed as "sometimes necessary," even unlimited ones, but the publication did not disclose the risks from high-dose opioids. This publication was widely disseminated and is still available online.[71]

136. In 2013, Purdue sponsored a CME titled *Overview of Management Options*, which was edited by Portenoy, who also received research, support, honoraria and consulting fees from Purdue. This CME misled health care professionals by focusing on adverse effects associated with using nonsteroidal anti-inflammatory drugs ("NSAIDs") at high doses, but failing to disclose the risks associated with high-dosage use of opioids. This CME was presented online and continued to be available online via the American Medical Association through 2014.

137. Purdue presented this message to health care professionals in multiple ways to ensure health care professionals felt comfortable prescribing higher doses of opioids, to help avoid the risk of health care professionals not prescribing opioids to their patients.

138. Purdue's representations concerning higher doses have been debunked by scientific evidence. As confirmed by the 2016 CDC Guidelines, the "[b]enefits of high-dose opioids for chronic pain are not established," while the "risks for serious harms related to opioid therapy increase at higher opioid dose."[72] Furthermore, "there is now an established body of scientific evidence showing that overdose risk is increased at higher opioid dos[es]."[73]

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[71] Purdue and the American Pain Foundation, a non-profit that received significant funding from Purdue, collaborated on this publication.

[72] *2016 CDC Guidelines*, *supra* note 3, at 22-23.

[73] *Id.* at 24.

139. The 2016 CDC Guidelines also declared "an increased risk for serious harms related to long-term opioid therapy that appears to be dose-dependent."[74] In addition, higher opioid dosages are associated with risks of motor vehicle injury, opioid use disorder, and overdose.[75]

140. The 2016 CDC Guidelines reinforces earlier findings announced by the FDA.[76] For these reasons, the Guidelines advise health care professionals to "carefully reassess evidence of individual benefits and risks when increasing dosage to, or in excess of, 50 morphine milligram equivalents ("MME") per day, and should avoid increasing doses to, or in excess of, 90 MMEs per day."[77]

141. If Purdue's campaign of misinformation was not sufficient to convince all health care professionals, Purdue took the additional step of suggesting to patients that higher doses of opioids were acceptable. Through at least June 2015, Purdue's *In the Face of Pain* website promoted the notion that if a patient's health care professional did not prescribe what the patient considered a sufficient dose of opioids, the patient should find another health care professional who would.

142. Purdue's strategy and misrepresentation was clear: increase the volume of opioids taken per day, and on a continuing basis, by conveying the false and misleading message that higher dosage is medically sound; relay that same message to health care professionals in multiple ways; and at the same time, market that message directly to patients. If some health care professionals exercise independent judgment about the safety of higher doses, they lose patients to other health care professionals.

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[74] *Id.* at 19.

[75] *Id.* at 23.

[76] In 2013, the FDA acknowledged "that the available data do suggest a relationship between increasing opioid dose and risk of certain adverse events," including risk of overdose and/or overdose mortality.

[77] *2016 CDC Guidelines, supra* note 3, at 16.

9. Purdue's Comparisons of the Risks and Benefits of Opioids Versus the Risks and Benefits of Alternative Forms of Pain Treatment Were Deceptive.

143. Not content with merely (i) creating a false narrative to explain abuse and addiction of opioids, and (ii) encouraging higher doses of opioids as medically sound, Purdue's deceptive strategy for profits at the expense of public health motivated it to present misleading comparisons of the risks and benefits of opioids versus other pain treatment methods.

144. In these comparisons, Purdue issued or contributed to marketing materials that omitted known risks of chronic opioid treatment, and emphasized or exaggerated the risks of competing products. The goal of these deceptive comparisons was to influence health care professionals and patients, increasing the chance they would favor opioids over other available treatments such as over-the-counter acetaminophen or over-the-counter prescription NSAIDs.

145. For example, Purdue sponsored the American Pain Foundation's *Treatment Options: A Guide for People Living with Pain* (2007), which claims that some opioids differ from NSAIDs in that they have "no ceiling dose as there is with the NSAIDs" and therefore opioids are the most appropriate treatment for severe pain. While *Treatment Options* attributed 10,000 to 20,000 deaths annually to NSAID overdose, the true figure was significantly lower at the time.[78] *Treatment Options* also warned that risks of NSAIDs increase if "taken for more than a period of months," but omitted any corresponding warning about the long-term use of opioids.

146. As mentioned *supra*, Purdue also sponsored the American Pain Foundation's *Exit Wounds* (2009), which omits warnings about potentially fatal interactions between opioids and anti-anxiety medicines called benzodiazepines, commonly prescribed to veterans with post-traumatic stress disorder; the target audience for *Exit Wounds*.

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[78] At least one article estimates the true number to be closer to 3,200. *See* Robert E. Tarone et al., *Nonselective Nonaspirin Nonsteroidal Anti-Inflammatory Drugs and Gastrointestinal Bleeding: Relative and Absolute Risk Estimates from Recent Epidemiologic Studies*, 11 AM. J. OF THERAPEUTICS 17 (2004).

147. As mentioned *supra*, Purdue also sponsored a CME titled *Overview of Management Options* in 2013, which was edited by Portenoy. This CME misled health care professionals by focusing on adverse effects associated with using NSAIDs at high doses, but failing to disclose the risks associated with high dosage use of opioids.

148. Purdue's comparisons between Purdue narcotics and other narcotics that represent or suggest that Purdue's narcotics are safer or more effective than its competitor are deceptive without evidence that the comparisons are supported by factually objective scientific, clinical or quantifiable evidence that substantiates the claims. Of note, Purdue's comparison misrepresentations made in *Treatment Options*, *Exit Wounds*, and other publications or presentations distributed or accessible in Nevada, were not supported by factually objective scientific, clinical, or quantifiable evidence.

149. Despite the lack of factually objective scientific, clinical, or quantifiable evidence to support these comparative claims, Purdue's marketing campaign was successful, and opioids replaced other options (often safer options) in health care professionals' pain treatment repertoires. For example, a 2013 study led by the Johns Hopkins Bloomberg School of Public Health found that between 2000 and 2010, opioid prescriptions nearly doubled, from 11% to 19%, while prescriptions for non-opioid treatments significantly decreased from 38% to 29%.[79] This swing in prescribing behavior occurred "despite a lack of evidence showing opioids are more effective or safer than non-opioid treatments for such pain."

E. Purdue Knew or Should Have Known About and Showed Willful Disregard to Suspicious Prescribing in the State of Nevada.

150. Purdue has a history of ignoring suspicious prescribing activity in Nevada. From at least 2007 until the present, Purdue has consistently continued to market and sell opioids to health care professionals who exhibited signs of contributing to diversion in Nevada, sometimes without alerting the proper authorities. This pattern of conduct

[79] *As Opioid Use Soars, No Evidence of Improved Treatment of Pain*, JOHNS HOPKINS BLOOMBERG SCH. OF PUB. HEALTH (Sept. 16, 2013), https://www.jhsph.edu/news/news-releases/2013/alexander-opiod-pain-use.html.

illustrates its willful disregard toward situations that threaten the public health but financially reward Purdue.

151. Purdue possesses a list it refers to as "Region Zero," which is a "confidential roster of health care professionals suspected of recklessly prescribing to addicts or dealers."[80] While Purdue knew that Region Zero contained more than 1,800 physicians, it admitted in a 2013 interview that only approximately 8% of the physicians on Region Zero had been reported to authorities.[81]

152. Purdue's willful disregard is illustrated through a history or pattern of conduct and include, but are not limited to, the following:

1. Dr. Robert Rand, Reno's Notorious "Pill Mill" Case

153. Dr. Rand was a Nevada-licensed family practitioner who practiced, owned and operated Rand Family Care, located at 6880 S McCarran Blvd. Ste. 14, Reno, Nevada.

154. Rand's practice included pain management and involved the prescription of opioids.[82] For example, one of Rand's patients, a victim of a car accident, received both OxyContin and oxycodone from Rand from approximately 2013 to 2016 to cope with the severe pain he continually experienced from his accident and subsequent surgeries.[83]

155. Rand would prescribe "rapidly escalating doses of oxycontin [sic] and other narcotics" without legitimate medical purposes and not in the usual course of his professional practice.[84]

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[80] Ryan et al., *More Than 1 Million OxyContin Pills Ended Up in the Hands of Criminals and Addicts. What the Drugmaker Knew*, L.A. TIMES, July 10, 2016, http://www.latimes.com/projects/la-me-oxycontin-part2/ [hereinafter *OxyContin Pills*].

[81] *Id.*

[82] Anjeanette Damon, *'Pill-Mill' Doctor Faces 74 Counts of Malpractice for Opioid Prescriptions*, RENO GAZETTE J., Feb. 2, 2017, http://www.rgj.com/story/news/2017/02/02/pill-mill-doctor-faces-74-counts-malpractice-opioid-prescriptions/97429086/ [hereinafter *Pill-Mill Doctor*].

[83] Ed Pearce, *Former Patients of Dr. Rand Finding Little Help from Medical Community*, KOLO 8 NEWS NOW, May 20, 2016, http://www.kolotv.com/content/news/Former-patients-of-Dr-Rand-finding-little-help-from-the-medical-community-380334441.html.

[84] Anjeanette Damon, *'Monster with a Stethoscope': Reno Pill Mill Doctor Robert Rand Gets 10 years in Prison*, RENO GAZETTE J., Nov. 20, 2017, http://www.rgj.com/story/news/2017/11/20/reno-pill-mill-lawyer-fighting-limit-dr-rands-prison-term/882992001/ [hereinafter *Monster with a Stethoscope*]; *see* Affidavit In Support of Complaint, p. 9, ¶ 20, filed as #176 in *USA v. Rand et al.*, Case 3:16-cr-00029-MMD-WGC.

156. Evidence showed that Rand was the highest prescriber of pain pills in Northern Nevada by approximately half a million pills in 2015.[85] However, Purdue had a financial incentive to ignore these red flags and did ignore these red flags.

157. Rand's abusive prescription practices prompted an investigation by the Drug Enforcement Agency and other state and federal agencies.[86]

158. On April 27, 2016, the United States Attorney filed a complaint against Rand and eight other defendants.[87] Rand, Richard Winston West II, aka Richie West, Omar Ahsan Ahmad, Joshua Ross Green, Clint Mitchell Bloodworth, Kathleen Griffin, Alan Russel Martinez, and Braden Kyle Riley, all of Reno, and Ryan Daniel Smith, of Carson City, were each charged in the complaint with conspiracy to distribute and possess with intent to distribute controlled substances, such as oxycodone.[88] Rand and West were also charged with engaging in a continuing criminal enterprise with at least five other persons in which Rand and West occupied positions of management.[89] Rand was also charged with distribution of a controlled substance resulting in death, and West was also charged with three separate counts of distribution of oxycodone.[90]

159. The Affidavit filed in support of the Complaint identified the Reno-based Drug Enforcement Agency's and Reno-based Federal Bureau of Investigation's investigatory efforts into a drug trafficking organization that included Rand and the other eight defendants in the areas of Reno, Nevada, and areas of Northern California that were close in proximity to Reno.[91]

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[85] *Id.*

[86] *See Reno Doctor Robert Rand And Eight Others Indicted On Federal Prescription Drug Distribution Charges*, DOJ, May 11, 2016, https://www.justice.gov/usao-nv/pr/reno-doctor-robert-rand-and-eight-others-indicted-federal-prescription-drug-distribution [hereafter *Reno Doctor Robert Rand*]; *see* Affidavit In Support of Complaint, pp. 6-11, filed as #176 in *USA v. Rand et al.*, Case 3:16-cr-00029-MMD-WGC.

[87] *See* Complaint, filed as #2 in *USA v. Rand et al.*, Case 3:16-cr-00029-MMD-WGC.

[88] *Reno Doctor Robert Rand, supra* note 86.

[89] *Reno Doctor and Eight Others Charged in Illegal Prescription Drug Distribution Case*, DOJ, Apr. 29, 2016, https://www.justice.gov/usao-nv/pr/reno-doctor-and-eight-others-charged-illegal-prescription-drug-distribution-case [hereinafter *Reno Doctor Charged*].

[90] *Id.*

[91] *See* Affidavit In Support of Complaint, p. 6, ¶ 13, filed as #176 in *USA v. Rand et al.*, Case 3:16-cr-00029-MMD-WGC.

160. Through the investigation, Rand was identified as a source of supply of the drug trafficking organization.[92] Beginning on about September 30, 2015, and continuing to about April 28, 2016, Rand would prescribe "substantial amounts of narcotics" to West, Ahmad, Smith, Bloodworth, Green, and Martinez, who, in turn would illicitly distribute the prescribed narcotics after filling the same at local pharmacies, based on the volume of narcotics they obtain pursuant to prescriptions from Rand.[93]

161. The Nevada Prescription Monitoring Program records provided evidence that Rand was prescribing the same co-defendants with a substantial amount of narcotics to help supply their drug trafficking enterprise involved in the illicit distribution of the same.[94]

162. The investigation further revealed that Rand was meeting with patients outside of regular business hours at his office in Reno, Nevada, to provide prescription narcotics illicitly to patients for substantial income, usually a $150 cash-only fee.[95]

163. The investigation also revealed that Rand would issue co-defendants involved in the drug trafficking organization prescriptions for narcotics for their distribution to others, at a substantial profit to the distributors.[96] Substantial income was generated from the distribution of these narcotics as prescribed by Dr. Rand to West, Ahmad, Smith, Bloodworth, Green, and Martinez.[97]

164. Rand personally generated substantial income from the criminal enterprise by issuing prescriptions for narcotics to West and other defendants, and by issuing prescriptions for narcotics to some of his patients for a $150 cash-only fee.[98]

165. Pursuant to the investigation, Rand and West were identified as leaders in the drug trafficking organization with Rand's leadership role being evidenced, in part, by

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[92] *Id.* at p. 7, ¶ 14.
[93] *Id.*; *see also Reno Doctor Charged, supra* note 89.
[94] Affidavit In Support of Complaint, p. 7, ¶ 15, filed as #176 in *USA v. Rand et al.*, Case 3:16-cr-00029-MMD-WGC.
[95] *Id.* at p. 9, ¶ 23.
[96] *Id.* at p. 10, ¶ 23.
[97] *Id.*
[98] *Id.* at p. 10, ¶ 24.

the (a) issuance of numerous prescriptions for narcotics to several of his patients that were overtly or grossly excessive, and (b) the issuance of prescriptions for narcotics to patients who paid Rand the $150 cash-only fee.[99]

166. The eight defendants were arrested in the Reno area on April 28, 2016, and Rand was arrested on April 29, 2016.[100]

167. In addition to the arrests, law enforcement agents executed federal search warrants at six locations, including two residences, two offices, and two vehicles connected to the defendants, and seized evidence related to the lawful distribution of controlled substances.[101]

168. On July 17, 2017, Rand pleaded guilty to involuntary manslaughter of a patient and unlawful distribution of oxycodone to another patient.[102]

169. According to admissions made in the plea agreement, Rand prescribed an excessive amount of oxycodone to a patient without a legitimate medical purpose and not in the usual course of professional practice that resulted in the patient's death from oxycodone intoxication. From the start of treatment, in June 2014, Rand prescribed the patient oxycodone. In September 2014, a physician spoke with Rand about the patient receiving 180 oxycodone pills per month from Rand and the patient's history. The patient was hospitalized twice. Despite phone calls, records, and encounters, Rand continued to prescribe oxycodone to the patient. In September 2015, Rand prescribed 45 dosages of oxycodone in 30 mg amounts, as well as Xanax, to the patient. One week later, Rand prescribed an additional 180 dosages of oxycodone in 30 mg amounts to the patient.[103]

170. Additionally, the plea agreement detailed that from March 2011 to April 2016, Rand prescribed another patient a total of 23,645 oxycodone 30 mg pills without a

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[99] *Id.* at pp. 10-11, ¶ 25.

[100] *Reno Doctor Charged, supra* note 89.

[101] *Id.*

[102] *Reno Doctor Robert Rand Pleads Guilty to Involuntary Manslaughter of Patient and Unlawful Distribution of Nearly 24,000 Oxycodone Pills*, DOJ, July 17, 2017, https://www.justice.gov/usao-nv/pr/reno-doctor-robert-rand-pleads-guilty-involuntary-manslaughter-patient-and-unlawful [hereinafter *Reno Doctor Pleads Guilty*].

[103] *Id.*

legitimate medical purpose.[104] Rand prescribed a number of opioids to this patient at the same time, including oxycodone in 5 mg, 10 mg, 20 mg, and 30 mg dosages, Percocet, hydrocodone, fentanyl, as well as other substances, such as carisoprodol and alprazolam.[105] The patient did not undergo any toxicology tests and Rand allowed another person to pick-up the oxycodone prescriptions for the patient.

171. At the sentencing hearing on November 20, 2017, a pharmacist testified that Rand disregarded the risks of overprescribing, which included pill distribution and addiction.[106] Additionally, one physician testified that when he tried to talk to Rand about the hostile behavior of one of Rand's patients who was seeking to fill multiple prescriptions at once, Rand responded by saying, "What these patients do when they leave my office is not my problem." Defendant West, himself, testified that Rand would provide him with a new opioid mixture whenever he would attempt to "transition to a drug that treats both pain and opioid addiction."[107]

172. At Rand's sentencing hearing, Judge Miranda Du overruled the plea agreement and increased Rand's sentence to 10 years in federal prison, stating that "Doctors like Dr. Rand . . . are enablers and contribute to the opioid crises in this community."[108]

173. Despite these clear indications of diversion that led to the arrest and conviction of Rand, Purdue, upon information and belief, continued to market to Rand and send sales representatives to his office to sell opioids up until shortly before Rand's arrest. Purdue chose to reap the profits from what turned out to be exactly what it looked like: an organized criminal enterprise to procure OxyContin and other Purdue opioids and products and distribute them on the black market, thereby poisoning an entire community and causing the death of at least one individual.

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[104] *Id.*; *see* Plea Agreement, filed as #598 in *USA v. Rand et al.*, Case 3:16-cr-00029-MMD-WGC.
[105] *Reno Doctor Pleads Guilty*, *supra* note 102.
[106] *See Monster with a Stethoscope*, *supra* note 84.
[107] *Id.*
[108] *Id.*

2. Lam's Pharmacy, Top Five Seller of OxyContin in the Nation

174. Lam's Pharmacy, Inc., was a Nevada Pharmacy located at 2202 W. Charleston Blvd., Las Vegas, Nevada, and managed by pharmacist Jason Smith.

175. Beginning at a date unknown, and continuing to approximately August 2010, Henri Wetselaar, David Litwin, and Jason Smith worked together to distribute large amounts of highly addictive prescription drugs in and around Las Vegas.[109] Dr. Wetselaar was a licensed physician in Nevada who represented himself to be a specialist in pain management.[110] David Litwin held himself out to be Wetselaar's medical assistant, but in fact had no verifiable credentials in the United States.[111]

176. Wetselaar and Litwin prescribed large quantities of highly addictive prescription drugs, including oxycodone, hydrocodone, Xanax and Soma without medical necessity.[112]

177. Wetselaar and Litwin directed their patients to Lam's Pharmacy where Smith, a licensed pharmacist in Nevada and the pharmacy manager, filled and directed his staff to fill the unnecessary prescriptions, knowing that the drugs would be illegally diverted. An overwhelming majority of Wetselaar and Litwin's "patients," including at least two known drug dealers, filled their prescriptions at Lam's Pharmacy by agreement with Smith.[113]

178. In 2009, Lam's Pharmacy prescribed so much OxyContin it was "one of the top five sellers of OxyContin in the nation." The number of opioid prescriptions was so excessive that a former employee of Purdue who visited Lam's Pharmacy in 2009

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[109] *See* Criminal Indictment, p. 1, ¶ 1, filed as #1 in *USA v. Wetselaar et al.*, Case 2:11-cr-00347-KJD-CWH.

[110] *Las Vegas Physician and Pharmacist Charged with Unlawful Sales of Large Quantities of Prescription Painkillers*, FBI Las Vegas Division, Sept. 29, 2011, https://archives.fbi.gov/archives/lasvegas/press-releases/2011/las-vegas-physician-and-pharmacist-charged-with-unlawful-sales-of-large-quantities-of-prescription-painkillers [hereinafter *Las Vegas Physician and Pharmacist*].

[111] *Id.*

[112] Criminal Indictment, pp. 1-2, ¶ 1, filed as #1 in *USA v. Wetselaar et al.*, Case 2:11-cr-00347-KJD-CWH.

[113] *Las Vegas Physician and Pharmacist, supra* note 110.

described the pharmacy's environment as a "drug-distribution operation."[114] However, while a phone tip and letter was provided to the Drug Enforcement Agency regarding Lam's Pharmacy, the former employee explained that Purdue "did not share the telltale sales data with the DEA or others in law enforcement" regarding what was actually occurring at Lam's Pharmacy.[115] Additionally, the former employee said that Purdue declined to completely cut off the supply of opioids to Lam's Pharmacy despite "telltale sales data" showing that it was furnishing pills to drug addicts.[116] In a *Los Angeles Times* article, the former Purdue employee recounted that he and his colleague sat in a rental car watching crowds of young people leave with pills.[117] While Purdue did eventually limit the amount of OxyContin that Lam's Pharmacy's wholesaler was receiving, it never stopped selling OxyContin to the wholesaler, thereby contributing to the "drug-distribution" environment at Lam's Pharmacy.[118]

179. On September 21, 2011, Wetselaar, Litwin, and Smith were indicted by the federal grand jury.[119] Each defendant was charged with one count of conspiracy to distribute oxycodone. Wetselaar was also charged with eight counts of distribution of oxycodone, one count of money laundering, and ten counts of structuring money transactions.[120] Litwin was also charged with eight counts of distribution of oxycodone and three counts of making a false statement to the Drug Enforcement Agency.[121]

180. However, by the time the defendants were indicted, Purdue had reaped its profits from the illicit sale and distribution of OxyContin, and the damage to the community had been done.

181. At Smith's trial, two "self-admitted drug dealers" testified that Lam's Pharmacy was the "go-to pharmacy" for filling multiple prescriptions obtained from

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[114] *OxyContin Pills*, *supra* note 80.
[115] *Id.*
[116] *Id.*
[117] *Id.*
[118] *Id.*
[119] *Las Vegas Physician and Pharmacist*, *supra* note 110.
[120] *Id.*
[121] *Id.*

Wetselaar by individuals who would simply pretend to be patients in order to obtain prescription narcotics.[122]

182. On March 23, 2017, Wetselaar was found guilty of conspiracy to distribute controlled substances (oxycodone), distribution of controlled substances, money laundering, and structuring of money transactions.[123] Litwin was found guilty of conspiracy to distribute controlled substances and distribution of controlled substances.[124] Smith's first trial ended in a mistrial and was rescheduled for late 2017.[125]

183. Despite the clear indications of diversion, Purdue continued to send sales representatives and market opioids to Lam's Pharmacy. Rather, Purdue chose to continue to reap the profits from a pharmacy supplying opioids to drug addicts.

F. Purdue's deceptive misconduct continued despite its 2007 Consent Judgment with the State of Nevada.

184. Purdue's purposeful misrepresentation of the risks and benefits of opioid use to health care professionals and patients and failure to disclose material facts regarding the health risks associated with opioid use to health care professionals and patients has contributed to Nevada's "pill problem."[126]

185. The 2007 Consent Judgment did not mark a change in Purdue's culture or conduct. Purdue continued to engage in false, misleading, or deceptive marketing practices of its products. Rather than correct its misrepresentations and reform its conduct, Purdue instead built upon the deceptive messaging that had established chronic opioid therapy as commonplace and reaped Purdue massive revenues. Since that time,

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[122] Jenny Wilson, *Las Vegas Pharmacist Testifies at His Federal Drug Trial*, LAS VEGAS REVIEW-J., March 13, 2017, https://www.reviewjournal.com/crime/courts/las-vegas-pharmacist-testifies-at-his-federal-drug-trial/.

[123] *Physician Sentenced to 10 Years in Prison for Distribution of Oxycodone*, DOJ, Aug. 1, 2017, https://www.justice.gov/usao-nv/pr/physician-sentenced-10-years-prison-distribution-oxycodone [hereinafter *Physician Sentenced to 10 Years*].

[124] *Id.*

[125] *Las Vegas Doctor Gets 10 Years in Opioid Pill Mill Conspiracy*, LAS VEGAS SUN, Aug. 1, 2017, https://lasvegassun.com/news/2017/aug/01/las-vegas-doctor-gets-10-years-in-opioid-pill-mill/.

[126] *See* Anjeanette Damon & Jason Hidalgo, *Over-prescribing Doctors Can Escape Scrutiny in Nevada*, RENO GAZETTE J., http://www.rgj.com/story/news/2016/05/14/over-prescribing-doctors-can-escape-scrutiny-nevada/84301800/ (last visited Dec. 8, 2017) [hereinafter *Over-prescribing Doctors*].

and up to the present day, Purdue has both continued its deceptive acts for which it was cited in 2007, as well as making other diverse misrepresentations. Purdue has continued to (i) omit discussion of the serious risks of opioids and lack of evidence supporting long-term opioid use, and (ii) affirmatively misrepresent the risks and benefits of opioids for the treatment of chronic pain. By these omissions and misrepresentations, Purdue has failed to correct its prior deceptions, at the expense of the public health and to its financial benefit.

186. Purdue has accomplished much of its deceptive acts through its Nevada sales force, the messages they verbally conveyed to health care professionals, and the materials they showed or distributed to health care professionals and patients of those health care professionals. Since the launch of OxyContin, Purdue has relied heavily on its sales representatives to market its opioids directly to health care professionals. By establishing personal relationships with health care professionals, Purdue's sales representatives were and are able to disseminate their misrepresentations in targeted, one-on-one settings.

187. Purdue's thirst for profit, misrepresentations, and failure to adequately alert authorities of signs of diversion allowed, and may have encouraged, health care professionals, including those mentioned above, to overprescribe opioids to Nevadans, which has impacted the health and safety of and led to the loss of numerous Nevadan lives.

188. Additionally, upon information and belief, Purdue's implementation of the OxyContin Abuse and Diversion Detection Program failed to meet minimal standards of diligence and effectiveness, and Purdue routinely failed to (a) detect or investigate potential abuse or diversion, and (b) take appropriate action to stop it.

189. Purdue failed to investigate and take action in instances that reasonably would raise an inference of abuse or diversion—in other words, where Purdue had information that its products were likely harming public health. Upon information and belief, Purdue continued to engage in deceptive conduct and make misrepresentations to

market opioids to health care professionals it had reason to believe were engaged in diversion, reaping the profits to the harm of Nevadans.

G. Opioids Have Severely Impacted Nevada.

190. In the past 10 years, prescription drug misuse, heroin use, and opioid-related overdoses have developed into the deadliest drug epidemic in United States history.[127] In 2014, the National Governor's Association proclaimed that "the abuse of prescription drugs is the fastest growing drug problem in the United States, and prescription drugs are now the second most abused drug after marijuana among teens."[128] Moreover, the "issue is even more severe in Nevada than other states."[129] The National Governor's Association found that the opioid epidemic is fueled by inappropriate opioid prescribing, but clarified that while "most opioid overdoses involve prescription opioids, an increasing number are linked to illicit opioids such as heroin and fentanyl."[130]

191. Last year, Nevada was ranked as the sixth highest state for the number of milligrams of opioids distributed per adult according to a study by the Drug Enforcement Agency.[131] As of August 10, 2017, a recent study estimates that opioid deaths "may be underreported nationally by as much as 24 percent."[132] Some of this underreporting is due to the lack of autopsies or toxicology reports, especially in rural areas.

192. The opioid epidemic exists in all counties in Nevada. Opioid-related hospitalizations have increased from 2010 to 2016 by 136% in emergency room encounters

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[127] Kelly Murphy et al., *Finding Solutions to the Prescription Opioid and Heroin Crisis: A Road Map for States*, NAT'L GOVERNORS ASS'N (July 2016), https://www.nga.org/files/live/sites/NGA/files/pdf/2016/1607NGAOpioidRoadMap.pdf.

[128] Nat'l Governors Ass'n Policy Academy on Prescription Drug Abuse Prevention, *State of Nevada Plan to Reduce Prescription Drug Abuse*, NEV. DIV. OF PUB. AND BEHAVIORAL HEALTH (DPBH), http://dpbh.nv.gov/uploadedFiles/dpbhnvgov/content/Programs/ClinicalSAPTA/State%20of%20Nevada%20Plan%20to%20Reduce%20Prescription%20Drug%20Abuse.pdf (last visited Apr. 17, 2018) [hereinafter *State of Nevada Plan*].

[129] *Id.*

[130] Kelly Murphy et al., *supra* note 127.

[131] *State of Nevada Plan*, *supra* note 128.

[132] Jeremiah Lindemann, *Why Data About the Opioid Epidemic Is So Unreliable*, SLATE, Aug. 10, 2017, http://www.slate.com/articles/technology/future_tense/2017/08/the_opioid_epidemic_might_be_even_worse_than_we_realize.html.

and 84% in inpatient admissions.[133] Of those, 26% of the emergency room encounters and 34% of inpatient admissions were people aged 55 and older.[134] Moreover, Naloxone/Narcan was administered by the hospital to 20.7% of patients with opioid overdoses who arrived in the emergency room.[135] While the total number of opioid-related deaths has decreased 12% from 2010 to 2016, 85% of all opioid-related deaths were deemed accidents.[136]

193. The incidents of opioid overdose and death in Clark County remains almost 70% higher than the national average.[137] The cost between 2013 and 2015 to Clark County for healthcare utilization and expenditure for opioid misuse and use in more than 1,700 emergency visits was $13 million, and the cost for 1,700 inpatient hospitalizations was $94 million.[138]

194. Reports from Nevada's Prescription Monitoring Program by the Nevada Division of Public and Behavioral Health on the number of opioids prescribed are staggering. In 2015, the total prescriptions written for Hydrocodone, Oxycodone, and Alprazolam was 2,371,134.[139] Compared to Nevada's population at that time of 2,890,845, that equates to a per capita prescription for these opioids of 82/100 residents.[140] In 2012, on a national level, providers wrote enough opioid prescriptions for every adult American to have a bottle of pills.[141] Moreover, in 2013, 35% of all Nevada high school students reported having taken prescription narcotics without a prescription.[142]

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[133] Nev. Div. of Pub. and Behavioral Health, *supra* note 2.

[134] *Id.*

[135] *Id.*

[136] *Id.*

[137] S. Nev. Health Dist., *Opioid Epidemic in Southern Nevada*, HEALTHY S. NEV., 1-2 (Feb. 3, 2017), http://www.healthysouthernnevada.org/content/sites/snhd/2017NVLeg_OpioidFactSheet.pdf.

[138] *Id.*

[139] Nev. Div. of Pub. and Behavioral Health, *supra* note 2. (Roughly 85% of all benzodiazepine-related overdose deaths also involve opioids).

[140] *Id.*

[141] Kelly Murphy et al., *supra* note 127.

[142] *Governor Brian Sandoval's Prescription Drug Abuse Prevention Summit, Summary of Findings*, Assemb. Comm.: Health and Human Servs.- Exhibit: G, 79th Sess. (Nev. 2017), https://www.leg.state.nv.us/Session/79th2017/Exhibits/Assembly/HHS/AHHS670G.pdf.

H. Purdue Greatly Contributed to and May Have Caused Nevada's Opioids Crisis.

195. Purdue's business model depends on creating addicts to fuel its sales of branded extended release opioids and opioid products. When dependent users are unable to obtain prescription opioids, they turn to illicit sources of opiates such as heroin.

196. As detailed in this Complaint, the impacts of opioids in and on Nevada are inextricably linked with Purdue's marketing campaign designed to convince health care professionals, patients, and the public that opioids were and are an effective medical solution for pain management.

197. When evidence of the widespread impacts opioids were having on Nevada and across the nation began to build, Purdue carefully packaged and targeted its messages to convince health care professionals that the risks of addiction were overstated and that addiction could be managed.

198. As a result of Purdue's deceptive business practices, opioid use, addiction, and death has grown to epidemic proportions, while Purdue continues to market and sell drugs that it knows or should know could be a health risk, dangerous, and deadly.

V. Causes of Action

FIRST CAUSE OF ACTION

(Violations of Nevada's Deceptive Trade Practices Act)

199. The State re-alleges and incorporates by reference each of the allegations contained in the preceding paragraphs as though fully alleged herein.

200. Purdue violated Nevada's Deceptive Trade Practices Act, NRS 598.0903, *et seq.*, by engaging in deceptive practices, misrepresentation, and the knowing concealment and omission of material facts in connection with the marketing, promotion and sale of goods within the State.

201. Pursuant to NRS § 0.039 and NRS § 598.0915, Purdue is a person for purposes of Nevada's Deceptive Trade Practices Act.

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202. NRS § 598.0915(5) renders it unlawful for a person to "[k]nowingly make [ ] a false representation as to the characteristics, ingredients, uses, benefits, alterations, or quantities of goods or services for sale or lease . . . ."

203. NRS § 598.0915(15) renders it unlawful for a person to "[k]nowingly make [ ] any [ ] false representation in a transaction."

204. NRS § 598.0923(2) renders it unlawful for a person to "[f]ail to disclose a material fact in connection with the sale or lease of goods or services."

205. Purdue engaged in misrepresentations and knowing omissions of material fact in violation of NRS § 598.0915(5) and (15) and NRS § 598.0923(2) in overstating the benefits of and evidence for the use of opioids for chronic pain and understated the very serious risks of opioids, including the use of opioids for pain management, the risk of addiction, overdose, abuse, and misuse, and in falsely promoting "abuse-deterrent" formulations, and in falsely claiming that OxyContin provides 12 hours of relief.

206. Purdue's specific misrepresentations include, but are not limited to:

a. Claims minimizing the risks of long-term opioid use, particularly the risk of addiction;

b. Claims that signs of addiction were "pseudoaddiction" reflecting undertreated pain, and should be treated by prescribing *more* opioids;

c. Claims that opioids are effective in curing long-term pain and improving physical functioning;

d. Claims that addiction is caused primarily by diversion, rather than being the natural consequence of routine, and long-term, use of opioids;

e. Claims that opioid doses can be increased until pain relief is achieved;

f. Claims misleadingly comparing the risks and benefits of opioids to those of alternative forms of pain treatment;

g. Claims that medical evidence supports the long-term use of opioids for chronic pain;

h. Claims that OxyContin provides a full 12 hours of pain relief; and

i. Claims that Purdue cooperates with authorities and supports efforts to prevent opioid abuse and diversion.

207. Purdue omitted to state material facts, in its labeling, advertising, promoting, marketing, selling and/or distributing, or causing to be distributed, of opioids that it had a duty to disclose, with the intent that others rely on its omissions, and failed to correct prior misrepresentations and omissions about the risks and benefits of short- and long-term opioid use, which omissions have rendered other seemingly truthful statements deceptive.

208. Purdue's specific omissions of material fact include, but are not limited to:

a. Failing to disclose evidence that opioids are highly addictive and that chronic use can result in addiction, overdose, or death;

b. Failing to disclose that high dosages of opioids subject the user to greater risk of addiction, other injury, or death;

c. Making claims regarding the benefits of opioid treatment, particularly to manage chronic pain, which lacked scientific support or were contradicted by scientific evidence;

d. Failing to disclose that Purdue's branded 12-hour OxyContin formulation fails to last a full twelve hours in many patients;

e. Failing to disclose that "abuse-deterrent" formulations are not designed to address, and have no effect on, the most common route of abuse and misuse (oral abuse);

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f. Failing to adequately report suspicious health care professionals, including those with high-volumes of opioid prescriptions, to law enforcement, Nevada medical regulators, Nevada pharmacy regulators, or other authorities;

g. Failing to disclose that the concept of "pseudoaddiction" and treatment for it is not supported by scientific evidence;

h. Failing to disclose evidence and facts regarding harmful side effects associated with the sudden cessation of use of opioids; and

i. In addition to the other acts and practices described herein, Purdue, through deception and misrepresentation, employed a sales incentive program which encouraged practices contributing to overprescription of opioids, resulting in increased incidence of opioid abuse, misuse, addiction, and overdose among Nevadans.

209. Purdue's deceptive conduct in the marketing, distribution, and sale of opioids to health care professionals and consumers in Nevada affects the public interest in that it caused injury to countless Nevadans, State, and its municipalities and counties, and contributed to a catastrophic public health crisis.

210. NRS § 598.0973 renders authority to impose heightened penalties for each instance of deceptive trade conduct directed toward an "elderly person or person with disability."

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211. Purdue, in violation of NRS § 598.0973, directed a significant amount of its deceptive conduct toward elderly persons or persons with a disability in the State, and its municipalities and counties.

212. In all matters alleged herein, Purdue acted in the course of its business or occupation within the meaning of NRS §§ 598.0903 to 598.0999.

213. In all requisite matters alleged herein, Purdue acted knowingly within the meaning of NRS §§ 598.0903 to 598.0999.

214. In all matters alleged herein, Purdue acted willfully in violation of NRS §§ 598, *et seq.*, as required by NRS § 598.0999(2).

215. In all matters alleged herein, consistent with NRS § 598.0953(1), Purdue's conduct and acts are evidence that a person has engaged in a deceptive trade practice and is further prima facie evidence of intent to injure competition and to destroy or substantially lessen competition in the State, and its municipalities and counties.

VI. PRAYER FOR RELIEF

216. WHEREFORE, the State respectfully requests that the Court:

a. Order permanently enjoining Defendants from continuing the unlawful acts and practices described in the Complaint;

b. Order requiring Defendants to pay a civil penalty in an amount not exceed $5,000 per violation pursuant to NRS § 598.0999(2);

c. Order Defendants to pay a civil penalty in a sum not to exceed $12,500 per violation for engaging in any method, act or practice declared unlawful under the above-cited statutes, that is directed toward an elderly person pursuant to NRS § 598.0793;

d. Order requiring Defendants to pay restitution pursuant to NRS § 598.0993;

e. Order Defendants to pay the costs and expenses of this action incurred by the State, including but not limited to, attorney's fees and costs pursuant to NRS § 598.0999(2);

f. Order Defendants pay damages in excess of $15,000;

g. Awarding such other, further, and equitable relief, as the Court may deem just and appropriate.

DATED: May 15, 2018.

SUBMITTED BY:

ADAM PAUL LAXALT
Attorney General
ERNEST D. FIGUEROA
Consumer Advocate

By: /s/ Mark J. Krueger
MARK J. KRUEGER (Bar No. 7410)
Chief Deputy Attorney General
Consumer Counsel

By: /s/ JoAnn Gibbs
JOANN GIBBS (Bar No. Bar No. 5324)
Chief Deputy Attorney General

By: /s/ Laura Tucker
LAURA M. TUCKER (Bar No. 13268)
Senior Deputy Attorney General

EXHIBIT 2

CASE NO. A-17-765828-C

DOCKET U

DEPT. XVI

DISTRICT COURT

CLARK COUNTY NEVADA

* * * * *

CLARK COUNTY,

Plaintiff,

vs.

PURDUE PHARMA, L.P.,

Defendant.

REPORTER'S TRANSCRIPT
OF
MOTION

BEFORE THE HONORABLE JUDGE TIMOTHY C. WILLIAMS

DISTRICT COURT JUDGE

DATED TUESDAY, FEBRUARY 26, 2019

REPORTED BY: PEGGY ISOM, RMR, NV CCR #541,

APPEARANCES:

FOR THE PLAINTIFF:

EGLET PRINCE
BY: ROBERT EGLET, ESQ.
BY: CASSANDRA CUMMINGS, ESQ.
BY: ROBERT ADAMS, ESQ.
BY: RICHARD HY, ESQ.
400 SOUTH SEVENTH STREET
SUITE 400
LAS VEGAS, NV 89101
(702) 450-5400
(702) 450-5451 Fax
REGLET@EGLETLAW.COM

FOR C&R PHARMACY:

COLLINSON, DAEHNKE, INLOW & GRECO
BY: PATRICIA DAEHNKE, ESQ.
2300 W SAHARA AVE, SUITE 680
BOX 32
LAS VEGAS, NV 89102
(702) 979-2132
(702) 979-2133 Fax
PATRICIA.DAEHNKE@CDIGLAW.COM

APPEARANCES CONTINUED:

FOR CARDINAL HEALTH:

LEWIS ROCA ROTHGERGER CHRISTIE
BY: DANIEL POLSENBERG, ESQ.
3993 HOWARD HUGHES PARKWAY
SUITE 600
LAS VEGAS, NV 89169
(702) 949-8200
(702) 949-8398 Fax
DPOLSENBERG@LRLAW.COM

FOR JOHNSON & JOHNSON AND JANSSEN PHARMACEUTICALS:

MORAN BRANDON BENDAVID MORAN LLC
BY: STEPHANIE SMITH, ESQ.
630 SOUTH FOURTH STREET
LAS VEGAS, NV 89101
(702) 384-8424
(702) 384-6568
S.SMITH@MORANLAWFIRM.COM

APPEARANCES CONTINUED:

FOR TEVA:

HYMANSON & HYMANSON
BY: PHILIP M. HYMANSON, ESQ.
8816 SPANISH RIDGE AVENUE
LAS VEGAS, NV 89148
(702) 629-3300
(702) 629-3332
PHIL@HYMANSONLAWNV.COM

AND

MORGAN LEWIS
BY: COLLIE JAMES, ESQ.
600 ANTON BLVD.
SUITE 1800
COSTA MESA, CA 92626
(949) 399-7199
(949)399-7001 Fax
COLLIE.JAMES@MORGANLEWIS.COM

APPEARANCES CONTINUED:

FOR ALLERGAN:

KIRKLAND & ELLIS LLP
BY: DONNA WELCH, ESQ.
200 EAST RANDOLPH DRIVE
CHICAGO, IL 60601
(312) 861-2219
DONNA.WELCH@KIRKLAND.COM

AND

OLSON, CANNON, GORMLEY ANGULO & STROBERSKI
BY: MAX E. CORRICK, II, ESQ.
9950 WEST CHEYENNE AVENUE
LAS VEGAS, NV 89129
(702) 384-4012
(702) 384-0701
MCORRICK@OCGAS.COM

AND

APPEARANCES CONTINUED:

KIRKLAND & ELLIS
BY: JENNIFER LEVY, ESQ.
655 FIFTEENTH STREET, N.W.
WASHINGTON, D.C. 20005-5793
(202) 879-5000
JENNIFER.LEVY@KIRKLAND.COM

FOR AMERISOURCEBERGEN:

REED SMITH
BY: STEPHEN BORANIAN, ESQ.
101 SECOND STREET
SUITE 1800
SAN FRANCISCO, CA 94105
(415) 659-5980
(415) 391-8269 Fax
SBORANIAN@REEDSMITH.COM

AND

APPEARANCES CONTINUED:

PISANELLI BICE PLLC
BY: JAMES J. PISANELLI, ESQ.
400 SOUTH SEVENTH STREET
SUITE 300
LAS VEGAS, NV 89101
(702) 214-2100
(702) 214-2101 Fax
JJP@PISANELLIBICE.COM

FOR MCKESSON:

MORRIS LAW GROUP
BY: ROSA SOLIS-RAINEY, ESQ.
411 E. BONNEVILLE AVE
SUITE 360
LAS VEGAS, NV 89101
(702) 474-9400
(702) 474-9422 Fax
RSR@MORRISLAWGROUP.COM

AND

APPEARANCES CONTINUED:

COVINGTON BURLEY LLP
BY: CHRISTIAN PISTILLI, ESQ.
ONE CITYCENTER
850 TENTH STREET NW
WASHINGTON, DC 20001-4956
(202) 662-6000
CPISTILLI@COV.COM

FOR ENDO HEALTH SOLUTIONS

MCDONALD CARANO WILSON, LLP
BY: PAT LUNDVALL, ESQ.
2300 WEST SAHARA AVENUE
SUITE 1000
LAS VEGAS, NV 89102
(702) 873-4100
(702) 873-9966 Fax
LUNDVALL@MCDONALDCARANO.COM

APPEARANCES CONTINUED:

FOR INSYS THERAPEUTICS:

BALLARD SPAHR, LLP
BY: ABRAN VIGIL, ESQ.
300 SOUTH FOURTH STREET
SUITE 1201
LAS VEGAS, NV 89101
(702) 471-7000
VIGILA@BALLARDSPAHR.COM

FOR MALLINCKRODT LLC:

ROPES & GRAY
BY: ROCKY TSAI, ESQ.
THREE EMBARCADERO CENTER
SAN FRANCISCO, CA 94111
(415)315-6300
(415) 315-6350
ROCKY.TSAI@ROPESGRAY.COM

AND

APPEARANCES CONTINUED:

LAXALT & NOMURA, LTD
BY: STEVEN E. GUINN, ESQ.
9600 GATEWAY DRIVE
RENO, NV 89501
(775) 322-1170
(775) 322-1865 Fax
SGUINN@LAXALT-NOMURA.COM

FOR ENDO:

ARNOLD PORTER
BY: JOHN LOMBARDO, ESQ.
44 FLOOR
777 S. FIGUEROA STREET
LOS ANGELES, CA 90017
(213) 243-4000
(213) 243-4199 Fax
JOHN.LOMBARDO@ARNOLDPORTER.COM

APPEARANCES CONTINUED:

FOR JAMES KUMLE:

CHESNOFF & SCHONFELD
BY: RICHARD A. SCHONFELD, ESQ.
520 SOUTH FOURTH STREET
LAS VEGAS, NV 89101
(702) 384-5563
(702) 598-1425 Fax
RSCHONFELD@CSLAWOFFICE.NET

FOR PURDUE ENTITIES:

DECHERT LLP
BY: HAYDEN COLEMAN, ESQ.
THREE BRYANT PARK
1095 AVENUE OF THE AMERICAS
NEW YORK, NEW YORK 10036
(212) 698-3551
(212) 698-3599 Fax
HAYDEN.COLEMAN@DECHERT.COM

AND

APPEARANCES CONTINUED:

EVANS FEARS & SCHUTTERT LLP
BY: CHAD FEARS, ESQ.
2300 W. SAHARA AVENUE
SUITE 950
LAS VEGAS, NV 89102
(702) 805-0290
CFEARS@EFSTRIALLAW.COM

FOR ASSERTIO THERAPEUTICS:

BAKER BOTTS LLP
BY: SCOTT POWERS, ESQ.
2001 ROSS AVENUE
DALLAS, TX 75201-2980
(214)953-6500
(214)953-6503
SCOTT.POWERS@BAKERBOTTS.COM

AND

APPEARANCES CONTINUED:

SEMENZA KIRCHER RICKARD
BY: JARROD RICKARD, ESQ.
10161 PARK RUN DRIVE
SUITE 150
LAS VEGAS, NV 89145
(702) 835-6803
(702) 920-8669 Fax
JLR@SKRLAWYERS.COM

FOR AIDA MAXSAM:

ASHCRAFT & BARR
BY: JEFFREY F. BARR, ESQ.
2300 W SAHARA AVENUE
SUITE 900
LAS VEGAS, NV 89102
(702) 631-7555
(702) 631-7556 Fax
BARRJ@ASHCRAFTBARR.COM

AND

APPEARANCES CONTINUED:

PORTER HEDGES
BY: JOSEPH COHEN, ESQ.
1000 MAIN STREET
36TH FLOOR
HOUSTON, TX 77002
(713) 226-6628
(713) 226-6228 Fax
JCOHEN@PORTERHEDGES.COM

* * * * *

12:47:51 Clark County's case is not seeking damages or redress for damages caused to any other Nevada municipality or state agency. Although other Nevada municipalities have incurred their own damages as a
12:48:06 result of the opiate epidemic, no other Nevada municipality is concerned with the cost Clark County has incurred for social services pertaining to health, safety, and welfare services for Clark County.

No Nevada case or statute holds that a county
12:48:26 can never sue a manufacturer of a dangerous product for damages caused to the county itself if other -- if other counties were also dangerous -- damaged. This broad view of the -- the statewide interest is not how this works in Nevada.

12:48:46 So the statewide concern doctrine does not defeat the county's standing because Nevada law empowers the county to bring this action.

It is significant, although counsel didn't seem to want to discuss this, that the Nevada Attorney
12:49:03 General has never objected to this lawsuit or taken any action to intervene. Neither Attorney General Laxalt or our new attorney general, Ford, as chief legal adviser of the state has ever made this argument and has never disputed the authority of Clark County or any
12:49:24 other municipality to file this type of lawsuit. The

Nevada AG has not attempted to intervene or challenge the county's authority to file its own lawsuit against these defendants.

And this is not surprising because the attorney general likely recognizes the expanded authority given to the Nevada counties to take action to protect local interests. And as pointed out by the manufactures, the Nevada AG has filed a lawsuit.

However, the manufacturers ignore the fact that the state's lawsuit is limited to a single opiate manufacturer, Defendant Purdue.

As such, the state's action will not provide the county with the same relief sought by Clark County.

Now, there is no Nevada law prohibiting the county from exercising its authority to pursue an action to recover for injuries to its resources and operations merely because the state has filed a lawsuit against a common defendant. There is no conflict of law with the county case proceeding concurrently with the AG's lawsuit.

Manufacturers show no reason why the county's lawsuit cannot proceed concurrently with the attorney general's lawsuit. Also, the manufacturers do not provide the court with any order from any opiate case in which this argument has been successful.

12:50:55 Although not persuasive, it is worth noting that the MDL judge recently rejected this argument with regard to the Summit County, Ohio, case. And that's an exhibit to our brief. And also in Arkansas and
12:51:10 Tennessee, the state cases and municipality cases are proceeding side by side. So for several reasons, Clark County's case must be permitted to go forward even though the Nevada AG has its own case.

Now, first, there is not a conflict between
12:51:33 the respective litigation positions of the state and Clark County.

Second, Clark County is not taking action that attempts to regulate opiates on a state level.

Third, the state action does not impact the
12:51:47 county's authority to act and to protect its own resources and operations in furtherance of public health and safety.

Fourth, each of the county's claims relates directly to damages suffered exclusively by Clark
12:52:05 County.

Specifically at paragraph 33 of the complaint, Clark County is seeking restitution and reimbursement for all the costs Clark County has incurred in paying excessive and unnecessary prescription costs related to
12:52:20 opiates;

REPORTER'S CERTIFICATE

STATE OF NEVADA)
:SS
COUNTY OF CLARK)

I, PEGGY ISOM, CERTIFIED SHORTHAND REPORTER DO HEREBY CERTIFY THAT I TOOK DOWN IN STENOTYPE ALL OF THE PROCEEDINGS HAD IN THE BEFORE-ENTITLED MATTER AT THE TIME AND PLACE INDICATED, AND THAT THEREAFTER SAID STENOTYPE NOTES WERE TRANSCRIBED INTO TYPEWRITING AT AND UNDER MY DIRECTION AND SUPERVISION AND THE FOREGOING TRANSCRIPT CONSTITUTES A FULL, TRUE AND ACCURATE RECORD TO THE BEST OF MY ABILITY OF THE PROCEEDINGS HAD.

IN WITNESS WHEREOF, I HAVE HEREUNTO SUBSCRIBED MY NAME IN MY OFFICE IN THE COUNTY OF CLARK, STATE OF NEVADA.

_____
PEGGY ISOM, RMR, CCR 541

EXHIBIT 3

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE: NATIONAL PRESCRIPTION OPIATE LITIGATION	)	**MDL 2804**
	)	
THIS DOCUMENT RELATES TO:	)	**Case No. 1:17-md-2804**
	)	
The County of Summit, Ohio, et al. v. Purdue Pharma L.P., et al., Case No. 18-op-45090	)	**Judge Dan Aaron Polster**
	)	
	)	**OPINION AND ORDER**

This matter is before the Court upon the Report and Recommendation ("R&R") of the United States Magistrate Judge. **Doc. #: 1025** (hereinafter cited as "R&R"). On November 2, 2018 Manufacturer,[1] Distributor, and Retail Pharmacy Defendants and Plaintiffs all filed Objections to various portions of the R&R. Doc. ##: 1082, 1079, 1078, and 1080. On November 12, 2018 Plaintiffs and Defendants filed Responses to the Objections. Doc. ##: 1115 and 1116. Upon a *de novo* review of the record, and for the reasons set forth below, the Court **ADOPTS IN PART** and **REJECTS IN PART** the Report and Recommendation.

I.

The District Court reviews proper objections pursuant to its duty under Federal Rule of Civil Procedure 72(b). Fed. R. Civ. P. 72(b) ("The district judge must determine *de novo* any part of the magistrate judge's disposition that has been properly objected to.") In a footnote, Manufacturer Defendants purport to object to "the entirety of the R&R." Doc #: 1082 at n.1. This

[1] Defendant Noramco, Inc. states that it joined in Manufacturers' Motion to Dismiss "to the extent applicable," Doc. #: 499-1 at 1 n.2, and requests clarification that it is included among the moving Manufacturer Defendants and is entitled to all applicable relief. Doc. #: 1082 at 1 n.1. The Court clarifies that Noramco is included among the moving Manufacturer Defendants and is entitled to all applicable relief.

objection is not proper insofar as it does not include any bases in or support from legal authority. Therefore, as there are no proper objections to the facts or procedural history, the Court adopts the facts and procedural history as stated in the R&R. Further, there are no objections to the R&R with respect to the following sections:

- Section III.B. Preemption
- Section III.H. Count Eight: Fraud
- Section III.L. Statewide Concern Doctrine
- Section III.M. Article III Standing[2]

The Court presumes the parties are satisfied with these determinations and adopts the R&R with respect to these sections. "Any further review by this Court would be a duplicative and inefficient use of the Court's limited resources." *Graziano v. Nesco Serv. Co.*, No. 1:09 CV 2661, 2011 WL 1131557, at *1 (N.D. Ohio Mar. 29, 2011) (citing *Thomas v. Arn*, 474 U.S. 140 (1985); *Howard v. Secretary of Health and Human Services*, 932 F.2d 505 (6th Cir.1991); *United States v. Walters*, 638 F.2d 947 (6th Cir.1981)).

II.

As an initial matter, Retail Pharmacy Defendants have asked the Court to clarify that the claims brought against them are only brought in their capacity as distributors, not as dispensers. *See* Doc. #: 1078 at 2. The Court understands that Plaintiffs have disclaimed any cause of action against Retail Pharmacies in their capacity as retailers or dispensers of opioids, *see* Doc. #: 654 at 75 n.47, and thus considers the parties' arguments while keeping in mind that the Retail Pharmacies may only be held liable as distributors.

[2] Pharmacy Defendants, in their objections, mention Article III standing only briefly in a section dedicated to the RICO claims. *See* Doc. #: 1078 at 2-3. They mischaracterize the R&R's analysis of the Article III standing directness requirement, rehash arguments already made in their motion to dismiss, and then move on to address their RICO analysis concerns. The Court finds this objection without merit, and therefore it is overruled.

A. Tolling of the Statute of Limitations

The R&R concluded that Plaintiffs have alleged sufficient facts "to raise a plausible inference that the applicable limitations periods are subject to tolling." R&R at 55-56. Manufacturer Defendants object, stating that Plaintiffs' Complaint indicates that they knew or should have known of both the Manufacturers' marketing practices and the costs Plaintiffs were incurring. Defendants argue that it follows that Plaintiffs, by their own allegations, did not act with sufficient diligence to support a fraudulent concealment theory. In addition to tolling under a fraudulent concealment theory, Plaintiffs also assert that the continuing violations doctrine should be applied to save their claims from the relevant statute of limitations.

1. Fraudulent Concealment

The R&R correctly states that "resolving a motion to dismiss based on statute-of-limitations grounds is appropriate when the undisputed facts 'conclusively establish' the defense as a matter of law." R&R at 54 (citing *Estate of Barney v. PNC Bank*, 714 F.3d 920, 926 (6th Cir. 2013); *Cataldo v. U.S. Steel Corp.*, 676 F.3d 542, 547 (6th Cir. 2012), *cert. denied*, 568 U.S. 1157 (2013)). "In order for Plaintiff's delay in filing to be excused due to Defendants' fraudulent concealment, Plaintiff must affirmatively plead with particularity: '(1) wrongful concealment of their actions by the defendants; (2) failure of the plaintiff to discover the operative facts that are the basis of his cause of action within the limitations period; and (3) plaintiff's due diligence until discovery of the facts.'" *Reid v. Baker*, 499 F. App'x 520, 527 (6th Cir. 2012) (quoting *Dayco Corp. v. Goodyear Tire & Rubber Co.*, 523 F.2d 389, 394 (6th Cir.1975)). However, as the R&R also points out, "courts should not dismiss complaints on statute-of-limitations grounds when there are disputed factual questions relating to the accrual date." *Am. Premier Underwriters, Inc. v. Nat'l R.R. Passenger Corp.*, 839 F.3d 458, 464 (6th Cir. 2016) (citing as examples of disputed factual questions, "claims that the defendant fraudulently concealed facts, thereby preventing the plaintiff

from learning of its injury . . . and complex issues about whether information in the plaintiff's possession sufficed to alert it of the claim").

Defendants' assertions that Plaintiffs were aware, at least since 2007, of their marketing practices and knew about the effects of the opioid crisis, effectively admitted in the Complaint,[3] are insufficient to *conclusively establish* that any of Plaintiffs' claims are time-barred by the statute of limitations. If Plaintiffs relied solely on Defendants' concealment of their marketing practices, Plaintiffs' assertion that the statutes of limitation were tolled due to fraudulent concealment would fail. However, Plaintiffs' allegations of fraudulent concealment do not rely solely on Defendants' alleged concealment of their marketing practices. Plaintiffs also allege that Defendants concealed their lack of cooperation with law enforcement and that they affirmatively misrepresented that they had satisfied their duty to report suspicious orders, concealing the fact that they had not done so. *See* Doc. #: 514 at 232-33 (hereinafter cited as "SAC").

Plaintiffs additionally point out that they could not have discovered "the nature, scope, and magnitude of Defendants' misconduct, and its full impact on Plaintiffs, and could not have acquired such knowledge earlier through the exercise of reasonable diligence," because until this Court ordered production of the ARCOS database in this litigation, Plaintiffs did not have access to that information. *Id.* at 233 (citing Doc. #: 233 at 6-7). Without access to the ARCOS data, Plaintiffs were forced to take Defendants at their word that they were complying with their obligations under consent decrees, statutes, and regulations. Plaintiffs inarguably knew about Defendants' marketing practices, but whether they had sufficient information, in the absence of

[3] *See, e.g.*, Doc. #: 514 at 238 ("In May 2007, Purdue and three of its executives pled guilty to federal charges of misbranding OxyContin in what the company acknowledged was an attempt to mislead doctors about the risks of addiction."); *see also Id.* at 212 ("the increase in fatal overdoses from prescription opioids has been widely publicized for years.").

the ARCOS data, to identify Defendants' alleged concealment and thus the scope or magnitude of Defendants' alleged misconduct is a disputed factual question.

2. Continuing Violations

Plaintiffs also assert that the applicable statute of limitations should be tolled under the continuing violations doctrine. *Id.* at 231. In the Sixth Circuit, a "'continuous violation' exists if: (1) the defendants engage in continuing wrongful conduct; (2) injury to the plaintiffs accrues continuously; and (3) had the defendants at any time ceased their wrongful conduct, further injury would have been avoided." *Hensley v. City of Columbus*, 557 F.3d 693, 697 (6th Cir. 2009) (citing *Kuhnle Bros., Inc. v. County of Geauga*, 103 F.3d 516, 521 (6th Cir.1997)). Although Ohio courts are generally reluctant to apply the doctrine outside the Title VII context, "this doctrine is rooted in general principles of common law and is independent of any specific action." *Id.* Further, the Sixth Circuit has noted that "no opinion has articulated a principled reason why the continuing-violation doctrine should be limited to claims for deprivations of civil rights and employment discrimination." *Nat'l Parks Conservation Ass'n, Inc. v. Tennessee Valley Auth.*, 480 F.3d 410, 416–17 (6th Cir. 2007). "Courts have allowed the statute of limitations to be tolled [under the continuing violations framework] when . . . there is a 'longstanding and demonstrable policy' of the forbidden activity." *Ohio Midland, Inc. v. Ohio Dep't of Transp*, 286 F. App'x 905, 912 (6th Cir. 2008) (citing *Trzebuckowski v. City of Cleveland*, 319 F.3d 853, 857 (6th Cir.2003).).

Here, taking the factual allegations in the Complaint as true, Plaintiffs have alleged a longstanding and demonstrable policy of misrepresentations and omissions on the part of Defendants sufficient to demonstrate their engagement in continuing wrongful conduct. In addition, whether further injury could have been avoided had Defendants ceased this conduct is another disputed factual question. Therefore, the Court finds that Plaintiffs have alleged facts sufficient to raise a plausible inference that the applicable limitations periods are subject to

tolling—under either a fraudulent concealment theory or a continuing violation theory—and that no claims should be dismissed on statute of limitations grounds at this early stage in the litigation.

B. RICO

After a lengthy discussion of RICO, the R&R concluded that Plaintiffs' RICO claims should survive Defendants' motions to dismiss. R&R at 11-44. "RICO was an aggressive initiative to supplement old remedies and develop new methods for fighting crime." *Sedima, SPRL v. Imrex Co., Inc.*, 473 U.S. 479, 498 (1985) (citing *Russello v. United States*, 464 U.S. 16, 26-29 (1983)). In *Sedima*, the Supreme Court acknowledged the Second Circuit's distress over the "extraordinary, if not outrageous," uses to which civil RICO claims had been applied. *Id.* at 499. "Instead of being used against mobsters and organized criminals, it had become a tool for everyday fraud cases brought against respected and legitimate enterprises." *Id.* However, in reversing the 2nd Circuit, the *Sedima* Court observed:

> . . . Congress wanted to reach both "legitimate" and "illegitimate" enterprises. *United States v. Turkette*, [452 U.S. 576 (1981)]. The former enjoy neither an inherent incapacity for criminal activity nor immunity from its consequences. The fact that § 1964(c) is used against respected businesses allegedly engaged in a pattern of specifically identified criminal conduct is hardly a sufficient reason for assuming that the provision is being misconstrued. Nor does it reveal the "ambiguity" discovered by the court below. "[T]he fact that RICO has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth." *Haroco, Inc. v. American National Bank & Trust Co. of Chicago*, [747 F.2d 384, 398 (1984)].

Id.

The RICO analysis is complicated because, "RICO's civil-suit provision imposes two distinct but overlapping limitations on claimants—standing and proximate cause . . . [a]nd as a matter of RICO law, the two concepts overlap." *Trollinger v. Tyson Foods, Inc.*, 370 F.3d 602, 613 (6th Cir. 2004). Defendants object to the R&R's conclusions regarding both "overlapping" limitations. Regarding standing, Defendants argue that Plaintiffs' injuries are 1) not to Plaintiffs'

"business or property" as required by the statute, and 2) derivative of a third-party's injuries (i.e. not direct). Regarding proximate cause, Defendants argue that Plaintiffs' injuries are too remote to hold Defendants liable under RICO (i.e. not direct). Manufacturing Defendants succinctly summarize the way "directness" applies to RICO analysis.

> For standing to exist, an injury must be "direct" in the sense of being both (1) non-derivative of some third party's injury (***the standing analysis***), *see Trollinger*, 370 F.3d at 614; and (2) having an uninterrupted, direct, and not overly attenuated causal chain from conduct to injury (***the proximate cause analysis***), *see Anza*, 547 U.S. at 457.

Doc. #: 1082 at 3 (citing *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451 (2006)) (emphasis in original). "Because Congress modeled [the RICO] provision on similar language in the antitrust laws (§ 4 of the Clayton Act and § 7 the Sherman Act) and because the antitrust laws have been interpreted to require that a private plaintiff show proximate cause in order to have standing to sue, RICO civil claims also require proximate cause. *Trollinger*, 370 F.3d at 612 (citing *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 267-68 (1992); *Sedima*, 473 U.S. at 496). Thus, although standing is a threshold issue, because proximate cause analysis is necessarily incorporated within the standing analysis, the Court begins with proximate cause.

1. Proximate Cause

In *Holmes*, the Supreme Court described proximate cause as "the judicial tools used to limit a person's responsibility for the consequences of that person's own act," and further stated "the notion of proximate cause reflects 'ideas of what justice demands, or of what is administratively possible and convenient.'" 503 U.S. at 268 (quoting W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts § 41, p. 264 (5th ed. 1984)). In a RICO claim, "[t]he proximate-cause inquiry . . . requires careful consideration of the 'relation between the injury asserted and the injurious conduct alleged.'" *Anza*, 547 U.S. at 462 (quoting *Holmes*, 503 U.S. at 268). "Though foreseeability is an element of the proximate cause analysis, it is distinct from the

requirement of a direct injury." *Perry v. Am. Tobacco Co.*, 324 F.3d 845, 850 (6th Cir. 2003) (citing *Holmes*, 503 U.S. at 268-69.). Additionally, the *Holmes* Court provided several reasons why "some direct relation between the injury asserted and the injurious conduct alleged" is so important to the proximate cause analysis. *Holmes*, 503 U.S. at 268. The Court stated:

> First, the less direct an injury is, the more difficult it becomes to ascertain the amount of a plaintiff's damages attributable to the violation, as distinct from other, independent, factors. Second, quite apart from problems of proving factual causation, recognizing claims of the indirectly injured would force courts to adopt complicated rules apportioning damages among plaintiffs removed at different levels of injury from the violative acts, to obviate the risk of multiple recoveries. And, finally, the need to grapple with these problems is simply unjustified by the general interest in deterring injurious conduct, since directly injured victims can generally be counted on to vindicate the law as private attorneys general, without any of the problems attendant upon suits by plaintiffs injured more remotely.

Id. at 269–70 (internal citations omitted). Thus, it is important to first carefully consider the relationship between the injury asserted by Plaintiffs and the alleged injurious conduct of Defendants and then further consider whether that relationship implicates any of the concerns highlighted by the *Holmes* Court.

Plaintiffs allege that "RICO Marketing Defendants . . . conducted an association-in-fact enterprise . . . to unlawfully increase profits and revenues from the continued prescription and use of opioids for long-term chronic pain" thereby creating the opioid epidemic.[4] SAC at 270. Plaintiffs further allege that RICO Supply Chain Defendants . . . formed an association-in-fact enterprise . . . for the purpose of increasing the quota for and profiting from the increased volume of opioid sales in the United States" thereby creating the opioid epidemic.[5] It is important to note that Plaintiffs never expressly define what they mean by the term "opioid epidemic." The term

[4] According to the Complaint, the RICO Marketing Defendants are "Purdue, Cephalon, Janssen, Endo, and Mallinckrodt." *See* Doc. #: 514 at 270.
[5] According to the Complaint, the RICO Supply Chain Defendants are "Purdue, Cephalon, Endo, Mallinckrodt, Actavis, McKesson, Cardinal, and AmerisourceBergen" *See* Doc. #:514 at 279.

may reasonably refer to the massive rate of addiction, overdose, and death associated with taking opioids. *See, e.g.*, *id.* at 214-15 ("Ohio is among the states hardest hit by the opioid epidemic. . . . Overdose deaths have become the leading cause of death for Ohioans under the age of 55.").

However, the term "opioid epidemic" may just as reasonably include black markets for diverted opioids. *See, e.g.*, *id.* at 284 ("[Defendants' violations] allowed the widespread diversion of prescription opioids out of appropriate medical channels and into the illicit drug market—causing the opioid epidemic."); *see also id.* at 7 ("The increased volume of opioid prescribing correlates directly to skyrocketing addiction, overdose and death [and] black markets for diverted prescription opioids.). Regarding their asserted injuries, however, Plaintiffs are more explicit. Plaintiffs expressly assert thirteen categories of damages. *See id.* at 285-86. Among these is, for example, the "costs associated with . . . attempts to stop the flow of opioids into local communities." *Id.*

Manufacturer Defendants argue that the chain of causation from conduct to injury is as follows:

> (i) a Manufacturer made deceptive claims in promoting its opioids (***the conduct***); (ii) some physicians were exposed to that Manufacturer's claims; (iii) which caused some of those physicians to write medically inappropriate opioid prescriptions they would not have otherwise written; (iv) which caused some of their patients to decide to take opioids; (v) which caused some of those individuals to become addicted to opioids; (vi) which caused some of those addicted individuals to need additional medical treatment, to neglect or abuse their families, to lose their jobs, and/or to commit crimes; (vii) which caused Plaintiffs to expend additional resources on emergency services, and to lose revenue from a decreased working population and/or diminished property values (***the injury***).

Doc. #: 1082 at 9-10 (emphasis in original). However, Plaintiffs have alleged sufficient facts to support a far more direct chain of causation: (i) RICO Marketing Defendants made deceptive claims in promoting their opioids in order to sell more opioids than the legitimate medical market could support (***the conduct***); (ii) the excess opioids marketed by the RICO Marketing Defendants

and distributed by the RICO Supply Chain Defendants were then diverted into an illicit, black market; (iii) Plaintiffs were forced to expend resources beyond what they had budgeted to attempt to stop the flow of the excess opioids into local communities and to bear the costs associated with cleaning them up. Under this potential chain of causation, the relationship between Plaintiffs' injury and Defendants' alleged conduct is less remote than prior Sixth Circuit precedent finding proximate cause, and is not too remote to support a finding of proximate cause here. *See, e.g.*, *Trollinger*, 370 F.3d at 619 (finding proximate cause where Tyson "hired sufficient numbers of illegal aliens to impact the legal employees' wages," having an "impact on the bargained-for wage-scale," which "allowed Tyson not to compete with other businesses for unskilled labor," and finally where "Tyson's legal workers did not 'choose' to remain at Tyson for less money than other businesses offered").

Thus, it is incumbent upon the Court to consider whether any of the *Holmes* Court's reasons for requiring directness are implicated. Here, Plaintiffs' alleged damages are not speculative, but concrete and ascertainable. No other party can vindicate the law and deter Defendants' alleged conduct because Plaintiffs' asserted damages are not recoverable by any other party. Finally, there is no potential for—and thus no reason for the Court to have to adopt complicated rules to prevent—duplicative recoveries. As none of the *Holmes* concerns are implicated in this case, the Court finds that Plaintiffs have sufficiently alleged proximate cause for their RICO claims.

2. Standing

Having determined that Plaintiffs have alleged sufficient facts to find that they do not stand at too remote a distance to recover, the Court now turns to standing. Title 18 of the U.S. Code, section 1964(c), has been deemed the standing provision of RICO. It provides that "[a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor . . . and shall recover threefold the damages he sustains and the cost of the suit, including

reasonable attorney's fee." 18 U.S.C. § 1964(c). The two operative portions of this section are the "business or property" limitation and the "by reason of" limitation.

"The 'by reason of' limitation . . . bundles together a variety of 'judicial tools,' some of which are traditionally employed to decide causation questions and some of which are employed to decide standing questions." *Trollinger*, 370 F.3d at 613 (citing *Holmes*, 503 U.S. at 268.). As it pertains to standing, the "by reason of" limitation is used to analyze whether a plaintiff is asserting an injury that was borne directly by that plaintiff or whether the injury was "derivative or passed-on" to the plaintiff by some intermediate party. *See id.* at 614.

a. The "by reason of" Limitation (Direct Versus Passed-On Injury)

Defendants claim that Plaintiffs' asserted injuries are "necessarily derivative of harms to individual opioid users." Doc. #: 1082 at 4. They state that "it is the opioid user who (if anyone) was directly harmed, and it is only as a result of this harm—in the aggregate—that Plaintiffs can claim to have experienced additional public expenditures, lost tax revenue, and diminished property values." *Id.* Defendants cite *Perry* as a paradigmatic example from the Sixth Circuit of the distinction between derivative and non-derivative injuries. Defendants characterize *Perry* as follows: "Plaintiffs [in *Perry*] were individual insurance plan subscribers who alleged that because of the tobacco manufacturers' conduct, they paid increased premiums to account for medical care provided to smokers in the same insurance pool." *Id.* at 4-5 (citing *Perry*, 324 F.3d at 847) (internal citations omitted).

Defendants' characterization of *Perry* is correct, but *Perry* is factually distinct from this case. In *Perry*, tobacco users suffered smoking-related injuries which increased healthcare costs. That is where the similarities with the present case end. In *Perry*, the increased healthcare costs were borne by insurance companies who then passed-on those costs to individual insurance plan subscribers in the form of higher insurance premiums. The non-smoking individual subscribers

then sued the tobacco companies for the costs passed-on to them by the insurance companies. *See Perry*, 324 F.3d at 847. Thus, *Perry* represents a classic case of "passed-on" economic injury. Here, as described above, Plaintiffs have alleged a plausible claim that their injuries are the direct result of Defendants' creation of an illicit opioid market within their communities.[6] Plaintiffs' asserted economic injuries are borne by them and not passed-on by any intermediate party standing less removed from Defendants' actions.

The tobacco cases, in general, are factually distinct from the present case for an additional reason. In the tobacco cases, no one asserted, nor could they have, that tobacco defendants created an "illicit cigarette market" the attendant consequences of which might have caused the government plaintiffs to expend their limited financial resources to mitigate. This "opioid epidemic as an illicit market" concept is an important distinction underlying many of Plaintiffs' allegations. *See, e.g.*, SAC at 150-51. Therefore, assuming as it must that Plaintiffs can prove their allegations, the Court finds it plausible that Plaintiffs' asserted injuries were directly caused "by reason of" Defendants' injurious conduct.

b. The "business or property" Limitation

Even if Plaintiffs' asserted injuries were proximately and directly caused "by reason of" Defendants' alleged injurious conduct, Plaintiffs still may not bring a RICO claim if the injuries asserted were not to their "business or property." 18 U.S.C. § 1964(c). As a general principal, "money, of course, is a form of property." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 338 (1979). It is also true that, "[a] person whose property is diminished by a payment of money wrongfully

[6] Plaintiffs allege that "Congress specifically designed the closed chain of distribution to prevent the diversion of legally produced controlled substances into the illicit market.. . . All registrants—which includes all manufacturers and distributors of controlled substances—must adhere to the specific security, recordkeeping, monitoring and reporting requirements that are designed to identify or prevent diversion." Doc. #: 514 at 150-51 (citing 21 U.S.C. § 823(a)-(b); 21 C.F.R. § 1301.74).

induced is injured in his property." *County of Oakland v. City of Detroit*, 866 F.2d 839, 845 (6th Cir. 1989) (quoting *Chattanooga Foundry and Pipe Works v. City of Atlanta*, 203 U.S. 390, 396 (1906)). Plaintiffs assert thirteen categories of expenditures that they contend represent a substantial monetary loss, and are therefore an injury to their property. *See* SAC at 285. Defendants contend that none of the monetary costs asserted by Plaintiffs are the type of property injury anticipated (and thus permitted) by the RICO statute.

(i) Personal Injuries

The Sixth Circuit has held that "personal injuries and pecuniary losses flowing from those personal injuries fail to confer relief under § 1964(c)." *Jackson v. Sedgwick Claims Mgmt. Servs., Inc.*, 731 F.3d 556, 565-66 (6th Cir. 2013). "Courts interpreting RICO have remained faithful to this distinction [between non-redressable personal injury and redressable injury to property] by excluding damages '*arising directly out of*' a personal injury, even though personal injuries often lead to monetary damages that would be sufficient to establish standing if the plaintiff alleged a non-personal injury." *Id.* (emphasis added).

The *Jackson* court's holding that RICO claims that allege damages "arising directly out of a personal injury" are not redressable adds another layer to the "directness" requirement summarized by Defendants above. As stated previously, Defendants explained two ways in which RICO allegations must be sufficiently direct to maintain a RICO claim. First, the relationship between the asserted injury and the alleged injurious conduct must have a *direct* causal connection. (the proximate cause analysis). And second, the asserted injury must also be borne *directly* by Plaintiffs and not passed-on to them by intermediate parties (the standing "by reason of" analysis). Under *Jackson*, there is an additional element of *directness* to consider—whether Plaintiffs' alleged injury arises *directly* out of a personal injury. While the first two analyses require closeness

of the relationship between injury and injurious conduct, the *Jackson* analysis requires separation between personal injury and pecuniary losses that arise therefrom.

To determine what type of pecuniary losses arise directly out of personal injury, the Court first looks to the facts of *Jackson* itself. In *Jackson*, former employees who suffered personal injuries at work sued their employer for a RICO violation. They alleged that their employer's workers' compensation administrator and physician engaged in a fraudulent scheme to avoid paying workers' compensation benefits to them, causing them to suffer monetary losses (i.e. receiving less money from their personal injury claim than they felt they were entitled to). *See id.* at 561-62. The *Jackson* court rejected the plaintiffs' theory that their workers' compensation benefits created an intervening legal entitlement to money, which is property under RICO. *See id.* at 566. The *Jackson* court also cites several examples where other circuits have considered when a pecuniary harm arises directly out of a personal injury. *See, e.g., id.* at 564 n.4. Reviewing these cases, the Court determines that their unifying character is that pecuniary losses "arise directly out of" a personal injury when the alleged RICO injury merely acts as an alternate theory for recovering damages otherwise available in a tort claim for personal injury and is asserted by the plaintiff him- or herself.[7]

In other words, damages that result from a personal injury to a plaintiff (such as attorney fees, lost wages, lost workers' compensation benefits, or medical expenses), that are recoverable

[7] Footnote 4 of the *Jackson* opinion cites the following exemplary cases: *Evans v. City of Chicago*, 434 F.3d 916 (7th Cir.2006) (false imprisonment causing loss of income not an injury to "business or property"); *Diaz v. Gates*, 420 F.3d 897 (9th Cir.2005) (*en banc*) (false imprisonment causing loss of employment and employment opportunity ***is*** an injury to "business or property"); *Hughes v. Tobacco Inst., Inc.*, 278 F.3d 417 (5th Cir.2001) (assault claim against tobacco company causing wrongful death of smoker not an injury to "business or property"); *Hamm v. Rhone–Poulenc Rorer Pharm., Inc.*, 187 F.3d 941 (8th Cir.1999) (retaliatory firing causing damage to reputation not an injury to "business or property"); *Bast v. Cohen, Dunn & Sinclair, PC*, 59 F.3d 492, 495 (4th Cir.1995) (surreptitiously recorded phone calls causing mental anguish not an injury to "business or property"); *Doe v. Roe*, 958 F.2d 763 (7th Cir.1992) (coercion into sexual relationship by attorney causing emotional harm not an injury to "business or property"); *Drake v. B.F. Goodrich Co.*, 782 F.2d 638, 644 (6th Cir.1986) (exposure to toxic chemicals during employment with defendant causing personal injuries not an injury to "business or property").

in a typical tort action are not recoverable in RICO, even if caused by a defendant's racketeering activity. These are costs that arise directly out of the plaintiff's personal injury, and are not injuries to plaintiff's "business or property" under the statute.

Defendants contend that Plaintiffs are attempting to recover the pecuniary losses resulting directly from their addicted residents' physical injuries, citing *Jackson*. Plaintiffs respond that their economic losses are not pecuniary losses resulting from their addicted residents' personal injuries; rather, they are concrete economic losses to the cities and counties resulting directly from Defendants' relinquishment of their responsibility to maintain effective controls against diversion of Schedule II narcotics. *See, e.g.*, 21 U.S.C. § 823(a)-(b).

Plaintiffs have the better argument. None of Plaintiffs' thirteen categories of costs arise directly out of a personal injury to Plaintiffs themselves. *See* Doc. #: 654 at 36-37 ("Plaintiffs' damages claims are not for personal injuries, but police and fire services, lost taxes, revenue and funding."). Even if *Jackson* can be read to preclude a RICO claim by a plaintiff who is tasked to protect the well-being of a third-party where the asserted economic harm is created by a personal injury to that third-party, it still does not follow that all thirteen categories of damages asserted by Plaintiffs arise directly out of such personal injuries. In that scenario, it would still be crucial to determine whether Plaintiffs' alleged injuries result directly from the personal injuries sustained by their citizens.

Plaintiffs assert the following injuries:

> a. Losses caused by the decrease in funding available for Plaintiffs' public services for which funding was lost because it was diverted to other public services designed to address the opioid epidemic;
>
> b. Costs for providing healthcare and medical care, additional therapeutic, and prescription drug purchases, and other treatments for patients suffering from opioid-related addiction or disease, including overdoses and deaths;

c. Costs of training emergency and/or first responders in the proper treatment of drug overdoses;

d. Costs associated with providing police officers, firefighters, and emergency and/or first responders with naloxone—an opioid antagonist used to block the deadly effects of opioids in the context of overdose;

e. Costs associated with emergency responses by police officers, firefighters, and emergency and/or first responders to opioid overdoses;

f. Costs for providing mental-health services, treatment, counseling, rehabilitation services, and social services to victims of the opioid epidemic and their families;

g. Costs for providing treatment of infants born with opioid-related medical conditions, or born dependent on opioids due to drug use by mother during pregnancy;

h. Costs associated with law enforcement and public safety relating to the opioid epidemic, including but not limited to attempts to stop the flow of opioids into local communities, to arrest and prosecute street-level dealers, to prevent the current opioid epidemic from spreading and worsening, and to deal with the increased levels of crimes that have directly resulted from the increased homeless and drug-addicted population;

i. Costs associated with increased burden on Plaintiffs' judicial systems, including increased security, increased staff, and the increased cost of adjudicating criminal matters due to the increase in crime directly resulting from opioid addiction;

j. Costs associated with providing care for children whose parents suffer from opioid-related disability or incapacitation;

k. Loss of tax revenue due to the decreased efficiency and size of the working population in Plaintiffs' communities;

l. Losses caused by diminished property values in neighborhoods where the opioid epidemic has taken root; and

m. Losses caused by diminished property values in the form of decreased business investment and tax revenue.

SAC at 285-286. Perhaps it can be said that items b and e above (the provision of medical treatment and emergency response services) arise directly out of the personal injury of the citizens because they are effectively claims to recoup the costs of medical expenses. However, there are other categories of costs, for example item h (the costs associated with "attempts to stop the flow of

opioids into [Plaintiffs'] communities . . . [and] prevent the current opioid epidemic from spreading and worsening"), that cannot be said to arise directly out of Plaintiffs' residents' personal injuries. *Id.* Thus, under no reading of *Jackson* can it be maintained that *all* of Plaintiffs' asserted injuries arise directly out of a personal injury, and it is more likely, in this Court's opinion, that most do not.

(ii) Sovereign Capacity

Finally, Defendants argue that regardless of the above, Plaintiffs cannot recover injury to their property to the extent they seek to recover costs associated with services provided in Plaintiffs' sovereign or quasi-sovereign capacities, which Defendants argue, accounts for the entirety of Plaintiffs' claimed injuries. Doc. #: 1082 at 6-7. Defendants implore the Court to follow the Ninth Circuit's holding in *Canyon County v. Syngenta Seeds, Inc.*, 519 F.3d 969 (9th Cir. 2008). Defendants claim that *Canyon County's* holding that "money 'expended on public health care and law enforcement services' by a city or county does not constitute injury to 'business or property' under RICO" is applicable to the present case. *See* Doc. #: 1079 at 6 (quoting *Canyon County*, 519 F.3d at 971). Defendants point out that the Sixth Circuit has previously relied on *Canyon County* (albeit for its analysis of the proximate cause requirement of RICO and not for its "business or property" analysis) in *City of Cleveland v. Ameriquest Mort. Sec., Inc.*, 615 F.3d 496 (6th Cir. 2010). The R&R declined to follow *Canyon County*, however, stating that, "Defendants . . . have not identified any Supreme Court or Sixth Circuit case directly on point with the facts of this case."

The R&R is correct because there has never been a case with facts analogous to those alleged by Plaintiffs here. It cannot be stressed strongly enough that the prescription opiates at

issue in this case ***are Schedule II controlled substances***.[8] Plaintiffs have alleged a wanton disregard for public health and safety exhibited by Defendants with respect to their legal duty to try to prevent the diversion of prescription opioids. With the privilege of lawfully manufacturing and distributing Schedule II narcotics—and thus enjoying the profits therefrom—comes the obligation to monitor, report, and prevent downstream diversion of those drugs. *See* 21 U.S.C. § 823(a)-(b). Plaintiffs allege that Defendants have intentionally turned a blind eye to orders of opiates they knew were suspicious, thereby flooding the legitimate medical market and creating a secondary "black" market at great profit to Defendants and at great cost to Plaintiffs.[9] Plaintiffs must shoulder the responsibility for attempting to clean up the mess allegedly created by Defendants' misconduct.

In *Canyon County*, the County brought a RICO claim against four defendant companies for "knowingly employ[ing] and/or harbor[ing] large numbers of illegal immigrants within Canyon County, in an 'Illegal Immigrant Hiring Scheme.'" *Canyon County*, 519 F.3d at 972. The County claimed that it "paid millions of dollars for health care services and criminal justice services for the illegal immigrants who [were] employed by the defendants in violation of federal law." *Id.* Based on these facts, the Ninth Circuit concluded that "when a governmental body acts in its sovereign or quasi-sovereign capacity, seeking to enforce the laws or promote the public well-

[8] "Since passage of the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. § 801 *et seq.* ("CSA" or "Controlled Substances Act"), opioids have been regulated as controlled substances. As controlled substances, they are categorized in five schedules, ranked in order of their potential for abuse, with Schedule I being the most dangerous. The CSA imposes a hierarchy of restrictions on prescribing and dispensing drugs based on their medicinal value, likelihood of addiction or abuse, and safety. Opioids generally had been categorized as Schedule II or Schedule III drugs; hydrocodone and tapentadol were recently reclassified from Schedule III to Schedule II. Schedule II drugs have a high potential for abuse, and may lead to severe psychological or physical dependence. Schedule III drugs are deemed to have a lower potential for abuse, but their abuse still may lead to moderate or low physical dependence or high psychological dependence." SAC at 16 n.5.

[9] For example, Plaintiffs allege that "between 2012 and 2016, Summit County estimates that it spent roughly $66 million on costs tied to the opioid crisis. Those costs are projected to add up to another $89 million over the next five years, representing a total cost to the County of $155 million over the ten year period "simply trying to keep up with the epidemic.'" Doc. #: 514 at 226.

being, it cannot claim to have been 'injured in [its] . . . property' for RICO purposes based *solely* on the fact that it has spent money in order to act governmentally." *Canyon County*, 519 F.3d at 976 (emphasis added). As stated above, neither the Sixth Circuit nor the Supreme Court have adopted the holding in *Canyon County*, and certainly not for the broad proposition that governmental entities are *barred* from seeking RICO claims for services provided in their sovereign or quasi-sovereign capacities. Not even *Canyon County* established such a bright-line rule. The *Canyon County* court held that governmental entities are not injured in their property based *solely* on the expenditure of money to act governmentally. Use of the word "solely" implies that governmental entities might be able to assert an injury to their property based on the expenditure of money plus something else, perhaps, for example, the assumption of a statutory burden relinquished by a defendant.

In this case, the scope and magnitude of the opioid crisis—the illicit drug market and attendant human suffering—allegedly created by Defendants have forced Plaintiffs to go far beyond what a governmental entity might ordinarily be expected to pay to enforce the laws or promote the general welfare. Plaintiffs have been forced to expend vast sums of money far exceeding their budgets to attempt to combat the opioid epidemic. The Court thus concludes that while Cities and Counties cannot recover ordinary costs of services provided in their capacity as a sovereign, Cities and Counties should be able to recover costs greatly in excess of the norm, so long as they can prove the costs were incurred due to Defendants' alleged RICO violations.

Additionally, the Ninth Circuit held in *Canyon County* that governmental entities can, in fact, recover in RICO for the costs associated with doing business in the marketplace. *See, e.g., id.* ("government entities that have been overcharged in commercial transactions and thus deprived of their money can claim injury to their property.").

It is Defendants' position that *all* of Plaintiffs' costs responding to Defendants' alleged misconduct are sovereign or quasi-sovereign public services derivative of their residents' opioid problems, for which they cannot recover. *See* Doc. #: 1082 at 7. The Court disagrees. Certainly, some of Plaintiffs' alleged costs are costs associated with the ordinary provision of services to their constituents in their capacity as sovereigns. *See, e.g.*, SAC at 285 (asserting injury due to the provision of emergency first responder services). These costs cannot be recovered unless Plaintiffs can prove they go beyond the ordinary provision of those services. However, some of Plaintiffs' alleged costs are clearly associated with Plaintiffs' *participation in the marketplace*, and for those costs, Plaintiffs can undoubtedly recover. *See, e.g.*, *id.* (asserting injury due to the costs associated with purchasing naloxone to prevent future fatal overdoses).

Therefore, under the broadest reading of Sixth Circuit precedent, the Court finds that Plaintiffs may recover damages based on the provision of governmental services in their capacity as a sovereign to the extent they can prove the asserted costs go beyond the ordinary cost of providing those services and are attributable to the alleged injurious conduct of Defendants. Under a more restrictive reading of *Jackson*, Plaintiffs still may recover those costs associated with preventing the flood of these narcotics into their communities, which do not directly arise from the personal injuries of their citizens (e.g. providing medical care, addiction treatment, etc.). Lastly, Plaintiffs have sufficiently alleged that at least some of their claimed injuries are recoverable under RICO due to Plaintiffs' participation in the marketplace. Thus, the Court concludes that it is not appropriate to dismiss the RICO claims at this early stage in the litigation.

C. Civil Conspiracy

The R&R concluded that Plaintiffs sufficiently pled a claim for civil conspiracy. R&R at 95-98. Distributor Defendants object, stating that the Complaint "alleges no facts to support the assertion that Distributors participated in the marketing of opioids [or] . . . in applying or lobbying

for increased opioid production quotas from DEA, . . . [and] no facts to support the claim that Distributors conspired not to report the unlawful distribution practices of their competitors to the authorities." Doc. #: 1079 at 2-3 (emphasis removed). Pharmacy Defendants also object, arguing that to the extent a civil conspiracy is alleged through Defendants' participation in industry groups, the Complaint is deficient with respect to the Retail Pharmacies, because it does not allege their participation in those groups.

The R&R correctly identifies the elements of a cognizable conspiracy claim as: "(1) a malicious combination; (2) two or more persons; (3) injury to person or property; and (4) existence of an unlawful act independent from the actual conspiracy") *Hale v. Enerco Grp., Inc.*, 2011 WL 49545, at *5 (N.D. Ohio Jan. 5, 2011) (citation and internal quotation marks omitted). Distributor Defendants take exception to the R&R's finding of independent unlawful acts. Pharmacy Defendants object to the R&R's finding of a malicious combination. Defendants miss the forest for the trees.

Distributor Defendants characterize the R&R's finding of unlawful acts as "(1) fraudulently marketing opioids; (2) fraudulently increasing the supply of opioids by seeking increased quotas; and (3) failing to report suspicious orders." Doc #: 1079 at 2. This mischaracterizes the R&R's actual finding that "the statutory public nuisance, Ohio RICO, and injury through criminal acts claims" would all suffice to "fulfill the underlying unlawful act element." R&R at 96. The Court agrees that any of these claims is sufficient to satisfy the underlying unlawful act element.

Pharmacy Defendants assert that, because the Complaint fails to expressly allege their participation in industry groups such as the Healthcare Distribution Alliance and Pain Care Forum, that Plaintiffs failed to adequately plead a civil conspiracy claim, at least regarding them. However,

the R&R did not rely on industry group participation to find a malicious combination. The R&R concluded that:

> Pleading the existence of a malicious conspiracy requires "only a common understanding or design, even if tacit, to commit an unlawful act." *Gosden v. Louis*, 687 N.E.2d 481, 496-98 (Ohio Ct. App. 1996). "All that must be shown is that . . . the alleged coconspirator shared in the general conspiratorial objective." *Aetna Cas. & Sur. Co. v. Leahey Const. Co., Inc.*, 219 F.3d 519, 538 (6th Cir. 2000) (citation and internal quotation marks omitted).

Id. at 97. In other words, the R&R concluded that even absent evidence of participation in industry groups, alleging a "shared conspiratorial objective" is sufficient to demonstrate a "malicious combination" and thus survive Pharmacy Defendants' motion to dismiss. Plaintiffs allege "*all Defendants* took advantage of the industry structure, including end-running its internal checks and balances, to their collective advantage." SAC at 229 (emphasis added). Additionally, with respect to Retail Pharmacy Defendants specifically, Plaintiffs assert, "instead of taking any meaningful action to stem the flow of opioids into communities, they continued to participate in the oversupply and profit from it." *Id.* at 184. Thus, the R&R concluded, and this Court agrees, that Plaintiffs adequately pled that Defendants shared a general conspiratorial objective of expanding the opioid market and that there was a common understanding between all Defendants to disregard drug reporting obligations to effectuate that goal. Therefore, the Court adopts the R&R with respect to section III.K.

D. Abrogation of Common Law Claims Under the Ohio Products Liability Act

The R&R concluded that Plaintiffs' Statutory Public Nuisance and Negligence Claims are not abrogated by the Ohio Product Liability Act ("OPLA").[10] R&R at 58-60, 61-62. As further

[10] Pharmacy Defendants argue, without any legal analysis, that Plaintiffs' Unjust Enrichment Claim is abrogated by the OPLA. Doc. #: 1078 at 11. The R&R does not address whether Plaintiffs' Unjust Enrichment Claim is abrogated by the OPLA, likely because the Pharmacies merely made a similarly undeveloped argument in their motion to dismiss, and only rehash them here. Due to the conspicuous lack of legal development in either Pharmacy Defendants' Motion to Dismiss or Objections to the R&R, the Court finds this objection improper. Regardless, per the analysis below, the Court finds that Plaintiffs' Unjust Enrichment Claim is not abrogated by the OPLA.

discussed below, the Court concurs with and adopts the R&R's recommendation and reasoning with respect to these findings. However, the R&R also concluded that Plaintiffs' Common Law Absolute Public Nuisance Claim is abrogated by the OPLA. *Id.* at 62-65. The Court disagrees.

1. Abrogation of the Common Law Public Nuisance Claims

The Ohio Product Liability Act, Ohio Rev. Code § 2307.71 *et seq.*, was enacted in 1988. It was amended in 2005 and amended again in 2007. Despite the General Assembly's attempts to clarify the language and intent of the statute's definition of "product liability claim," the Court finds that the definition remains ambiguous, and thus reviews the legislative history pursuant to Ohio Rev. Code § 1.49(C) ("If a statute is ambiguous, the court, in determining the intention of the legislature, may consider among other matters: . . . The legislative history.").

The OPLA, at the time of its enactment, did not explicitly state that it was intended to supersede all common law theories of product liability. It was also ambiguous regarding whether it superseded common law claims seeking only economic loss damages. The Ohio Supreme Court attempted to clarify these ambiguities in two cases, *Carrel v. Allied Prods. Corp.*, 677 N.E.2d 795, 799 (1997) (holding that "the common-law action of negligent design survives the enactment of the Ohio Products Liability Act.") and *LaPuma v. Collinwood Concrete*, 661 N.E.2d 714, 716 (Ohio 1996) (holding that "although a cause of action may concern a product, it is not a product liability claim within the purview of Ohio's product liability statutes unless it alleges damages other than economic ones, and that a failure to allege other than economic damages does not destroy the claim, but rather removes it from the purview of those statutes.").

In 2005, the General Assembly added the following provision to the OPLA ("the 2005 Amendment"): "Sections 2307.71 to 2307.80 of the Revised Code are intended to abrogate all common law product liability causes of action." 2004 Ohio Laws File 144 (Am. Sub. S.B. 80)

(codified at Ohio Rev. Code § 2307.71(B)). The associated legislative history of the 2005 Amendment states:

> The General Assembly declares its intent that the amendment made by this act to section 2307.71 of the Revised Code is ***intended to supersede the holding of the Ohio Supreme Court in Carrel v. Allied Products Corp.*** (1997), 78 Ohio St.3d 284, that the common law product liability cause of action of negligent design survives the enactment of the Ohio Product Liability Act, sections 2307.71 to 2307.80 of the Revised Code, and to abrogate all common law product liability causes of action.

Id. (emphasis added). Notably, the General Assembly cited the *Carrel* holding while conspicuously omitting the contemporary *LaPuma* holding. The Court therefore interprets the General Assembly's inclusion of *Carrel* to imply the intentional exclusion and therefore the tacit acceptance of the Ohio Supreme Court's holding in *LaPuma*.

In 2007, the Ohio Legislature further amended section 2307.71(A)(13) of the OPLA ("the 2007 Amendment") to add the following to the definition of "product liability claim:"

> "Product liability claim" ***also includes*** any public nuisance claim or cause of action at common law in which it is alleged that the design, manufacture, supply, marketing, distribution, promotion, advertising, labeling, or sale of a product unreasonably interferes with a right common to the general public.

2006 Ohio Laws File 198 (Am. Sub. S.B. 117) (emphasis added). The associated legislative history of the 2007 Amendment further states:

> The General Assembly declares its intent that the amendments made by this act to sections 2307.71 and 2307.73 of the Revised Code are ***not intended to be substantive but are intended to clarify the General Assembly's original intent*** in enacting the Ohio Product Liability Act, sections 2307.71 to 2307.80 of the Revised Code, as initially expressed in Section 3 of Am. Sub. S.B. 80 of the 125th General Assembly, to abrogate all common law product liability causes of action ***including*** common law public nuisance causes of action, regardless of how the claim is described, styled, captioned, characterized, or designated, including claims against a manufacturer or supplier for a public nuisance allegedly caused by a manufacturer's or supplier's product.

Id. (emphasis added). Senate Bill 80 of the 125th General Assembly (the 2005 Amendment) was a "tort reform" bill that was enacted to create limitations on various types of non-economic

damages. *See* 2004 Ohio Laws File 144 (Am. Sub. S.B. 80). Both the 2005 and 2007 Amendments demonstrate the General Assembly's intent to limit non-economic damages on all common law theories of product liability regardless of how the claim was characterized.

Throughout these amendments, however, the overarching substantive definition of a "product liability claim" has not changed much from the original 1988 OPLA definition. To fall within the statute's definition a plaintiff's product liability claim must 1) seek to recover compensatory damages 2) for death, physical injury to a person, emotional distress, or physical damage to property other than the product in question (*i.e.* "harm" as defined by the statute).[11] The subsequent amendments make clear that any civil action concerning liability for a product due to a defect in design, warning, or conformity—including any common law public nuisance or common law negligence claim, regardless of how styled—that 1) seeks to recover compensatory damages 2) for "harm" is abrogated by the OPLA. Conversely, a claim *not* seeking to recover compensatory damages or seeking to recover solely for "economic loss" (*i.e. not* "harm") does not meet the definition of a product liability claim and is not abrogated by the OPLA. The OPLA is explicit that "Harm is not 'economic loss,'" and "Economic Loss is not 'harm.'" Ohio Rev. Code § 2307.71(A)(2) and (7). This reading of § 2307.71(A)(13) is consistent with the legislative intent, the holding in *LaPuma*, and with § 2307.72(C) which states:

> Any recovery of compensatory damages for economic loss based on a claim that is asserted in a civil action, other than a product liability claim, is not subject to sections 2307.71 to 2307.79 of the Revised Code, but may occur under the common law of this state or other applicable sections of the Revised Code.

Ohio Rev. Code § 2307.72(C).

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[11] Section 2307.71(A)(13) of the OPLA also requires that the claim allegedly arise from any of:

(a) The design, formulation, production, construction, creation, assembly, rebuilding, testing, or marketing of that product;
(b) Any warning or instruction, or lack of warning or instruction, associated with that product;
(c) Any failure of that product to conform to any relevant representation or warranty.

Ohio Rev. Code § 2307.71(A)(13).

Further, by defining a "product liability claim" in terms of damages, the OPLA does not provide for any form of equitable remedy.[12] To conclude that all public nuisance claims, including those seeking equitable remedies, are subsumed by the OPLA would effectively be a substantive change in the law in contravention of the General Assembly's express intent that the amendment *not* be substantive. In other words, if all public nuisance claims, including those only seeking equitable relief, were abrogated by the OPLA, a party merely seeking an equitable remedy to stop a public nuisance would be forced instead to sue for compensatory damages under the OPLA, a result that appears completely at odds with the legislative intent to limit non-economic compensatory damages. Therefore, a claim seeking only equitable relief is not abrogated by the OPLA.

The R&R concluded that the 2007 Amendment added public nuisance claims as a second category of actions that fall under the definition of a product liability claim. *See* R&R at 58 n.37. In support of this conclusion, Defendants cite *Mount Lemmon Fire Dist. v. Guido*, 139 S. Ct. 22 (2018). *See* Doc. #: 1116 at 3. In *Mount Lemmon*, the Supreme Court interpreted Congress' addition of a second sentence to the definition of "employer" under the ADEA.[13] The Supreme Court held that the phrase "also means" adds a new category of employers to the ADEA's reach. *Mount Lemmon* is factually inapposite, and the R&R's conclusion is incorrect for two reasons. First, there is a substantive difference between the phrases "also means" and "also includes." The term "means" is definitional, while "the term 'including' is not one of all-embracing definition, but connotes simply an illustrative application of the general principle." *In re Hartman*, 443 N.E.2d

[12] Defendants identify section 2307.72(D)(1) as expressly carving out abatement relief for contamination of the environment as an indication that the OPLA supersedes all other forms of equitable relief. *See* Doc. #: 1116 at 4. However, a far more natural reading of this section is the carving out of all forms of relief for pollution of the environment from preemption by federal environmental protection laws and regulations.

[13] Under the ADEA, "the term 'employer' means a person engaged in an industry affecting commerce who has twenty or more employees . . . . The term *also means* (1) any agent of such a person, and (2) a State or political subdivision of a State . . . ." 29 U.S.C. § 630(b) (emphasis added).

516, 517–18 (Ohio 1983) (quoting *Federal Land Bank of St. Paul v. Bismarck Lumber Co.*, 314 U.S. 95, 100 (1941)). In this case, the general principal is that to be a product liability claim, a plaintiff's cause of action must seek compensatory damages for harm. Thus, a public nuisance claim—to be "also include[d]" as a "product liability claim" under the OPLA—must likewise seek compensatory damages for harm. Ohio Rev. Code § 2307.71(A)(13).

Second, as the *Mount Lemmon* opinion points out, "Congress amended the ADEA to cover state and local governments." *Mount Lemmon*, 139 S. Ct. at 23. This amendment to the ADEA certainly amounts to—and was intended to be—an intentional, substantive change in the law. As highlighted above, however, the 2007 Amendment to the OPLA was not intended to be a substantive change.

Therefore, 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] . . . ." This definition is the most consistent with the statute, the legislative history, and the caselaw. *See LaPuma v. Collinwood Concrete*, 661 N.E.2d 714, 716 (Ohio 1996) ("Failure to allege other than economic damages . . . removes it from the purview of [the OPLA].") (intentionally not overruled by the 125th General Assembly); *Volovetz v. Tremco Barrier Sols., Inc.*, 74 N.E.3d 743, 753 n.4 (Ohio Ct. App. Nov. 16, 2016) ("We recognize that a claim for purely economic loss is not included in the statutory definition of 'product liability claim,' and, consequently, a plaintiff with such a claim may pursue a common-law remedy."); *Ohio v. Purdue Pharma,* Case No. 17 CI 261 (Ohio C.P. Aug. 22, 2018) (finding that the Plaintiff's common law nuisance claim not seeking compensatory damages is not

abrogated under the OPLA.); *see also*, 76 Ohio Jur. 3d Claims Within Scope of Product Liability Act § 1 ("Ohio's products liability statutes, by their plain language, neither cover nor abolish claims for purely economic loss caused by defective products.").

Using this definition, Plaintiffs' absolute public nuisance claim, at least insofar as it does not seek damages for harm,[14] is not abrogated by the OPLA. Section III.E of the R&R is rejected to the extent it held that Plaintiffs' absolute public nuisance claim is abrogated by the OPLA.

2. City of Akron's Ability to Bring a Statutory Public Nuisance Claim

The R&R concluded that Plaintiffs' statutory public nuisance claim was not abrogated. R&R at 62. No party objected to this conclusion, therefore the Court adopts the R&R with respect to this finding. The R&R further concluded that the City of Akron lacked standing to bring a statutory public nuisance claim, and that the County of Summit, which had standing, was not limited only to injunctive relief under the statute. The Pharmacy Defendants object to the R&R's conclusion that § 4729.35 of the Ohio Revised Code does not limit the remedy that can be sought under the statute to an injunction, and Plaintiffs object to the R&R's conclusion that § 4729.35 limits who may maintain a nuisance action. The issue then, is whether § 4729.35 is limiting and if so, to what extent.

The operative statutes involved in Plaintiffs' Statutory Public Nuisance Claim are:

Ohio Rev. Code § 715.44(A) (emphasis added):[15]

> A municipal corporation may abate ***any nuisance*** and prosecute ***in any court of competent jurisdiction***, any person who creates, continues, contributes to, or suffers such nuisance to exist.

[14] "'Harm' means death, physical injury to person, serious emotional distress, or physical damage to property other than the product in question. Economic loss is not 'harm.'" Ohio Rev. Code § 2307.71(A)(2).
[15] Page's Ohio Revised Code Annotated, Title 7: *Municipal Corporations*, Chapter 715: *General Powers*, §§715.37-715.44: Health and Sanitation, §715.44: Power to abate nuisance and prevent injury.