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

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PETITIONERS' APPENDIX
VOLUME X

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CHRONOLOGICAL INDEX TO PETITIONERS' APPENDIX

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

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

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

ALPHABETICAL INDEX TO PETITIONERS' APPENDIX

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4/26/2019	City of Reno's Opposition to Distributor Defendants' Joint Motion to Dismiss and All Joinders	VI-VII	PA00710	PA00958
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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 X does not contain the social security number of any person.

Dated this 1st day of May, 2020.

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CERTIFICATE OF SERVICE

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

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In addition, in compliance with NRAP 21(a)(1) and Administrative Order 2020-05, a copy of this Petitioners' Appendix Volume X 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

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

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

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

Defendants.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

To convince the Court of the viability of its claims, the City asserts that "there are in excess of 900 cases pending nationwide in which cities, counties, and states have sued drug manufacturers, distributors, and pharmacies…. The courts in those cases have recognized the validity of the claims asserted against opioid distributors." Opp. 1. That is patently wrong. Courts in only about a dozen cases involving Distributors—out of more than 1,800 pending—have issued opinions addressing the same types of arguments that Distributors make here in support of dismissal of the City's claims. They are not all in plaintiffs' favor.

For example, earlier this year, the state court judge in charge of the consolidated opioid litigation in Connecticut dismissed the claims of 20 municipalities. That opinion is particularly instructive because it acknowledges that the problem of opioid abuse is real and acknowledges that local governments may have suffered in some indirect way as a result, but nevertheless recognizes that "under long-established law—[local governments] have no claims at all" because of the indirect and derivative nature of their claims. *City of New Haven v. Purdue Pharm, L.P., et al.*, 2019 WL 423990, at *1 (Ct. Super. Jan. 8, 2019). The court also expressly cautioned that, just because the opioid crisis is difficult and costly, and just because lots of plaintiffs like the City have lined up to sue manufacturers and distributors for that harm, courts cannot put aside the law to try to fashion a remedy for a "social problem." *Id.* at *7–8. ***The law*** "***must apply just as much in hard cases as in easy ones***," *id.* at *8,[1] and here, the law requires dismissal of the City's claims.

And just this month, a North Dakota court dismissed a state's claims against an opioid manufacturer and, in so doing, endorsed arguments made by Distributors in support of their motion to dismiss the City's complaint, including that "[t]he State's theory in this case depends on an extremely attenuated, multi-step, and remote causal chain" that cannot account for the "undisputed multiple layers of individualized decision-making by doctors and patients [and] other possible intervening causes" that have contributed to the opioid crisis. *See State of North Dakota ex rel.*

[1] All emphasis herein has been added, unless otherwise noted.

Stenehjem v. Purdue Pharma L.P. et al., Case No. 08-2018-CV-01300, at 20 (N.D. S. Central Dist. May 10, 2019) (attached as Ex. 1). That court also refused to extend the doctrine of public nuisance "to a situation where one party has sold to another a product that later is alleged to constitute a nuisance. *Id.* at 26 (emphasis in original). A Delaware court also dismissed that state's public nuisance claim against Distributors because the state had not alleged interference with a public right or that Distributors had control over the instrumentality of the nuisance at the time of the injury. *See State of Delaware v. Purdue Pharma L.P., et al.*, C.A. No. N18C-01-223 MMJ CCLD (Del. Super. Ct. Feb. 4, 2019) (attached as Ex. 2 to Br.).

These other opioid decisions are instructive,[2] but ultimately the County's claims must satisfy Nevada law and must adequately allege the elements of each cause of action pled. For the reasons stated in Distributors' opening brief and herein, however, the City has failed to satisfy this burden, and its claims should be dismissed in their entirety.

ARGUMENT

I. THE TORT CLAIMS FAIL AS A MATTER OF LAW FOR SEVERAL THRESHOLD REASONS.

A. The City Fails to Plead Proximate Causation.

The City contends that it pled proximate cause because it alleges that Distributors' "actions and inactions led to the increased opioid use in the City," which in turn caused the City's injuries. Opp. 20. The City never explains how the mere "availability"—under lock and key at licensed pharmacies—of opioid medications ***caused*** "opioid abuse, opioid addiction, opioid deaths, and opioid-related crimes," *id.*, but in the end, the City's contentions only prove that Distributors' causation argument is correct. Under a long line of precedent developed in the alcohol sales context, the Nevada Supreme Court has consistently reaffirmed that "***consuming*** [an intoxicating

[2] The opinions denying Distributors' motions to dismiss are of less persuasive value because they either contain no analysis at all and were conclusory denials (four of the 12 decisions), the court simply adopted the plaintiffs' proposed order (one of the 12 decisions), or the decisions are contrary to settled law in the state (four of the 12).

substance], and not furnishing [it], is the proximate cause of third party [substance]-related injuries." *Snyder v. Viani*, 110 Nev. 1339, 1341, 885 P.2d 610, 612 (1994); *see also, e.g.*, *Hinegardner v. Marcor Resports, L.P.V.*, 108 Nev. 1091, 1093–95, 844 P.2d 800, 802–03 (1992) (reaffirming the common-law rule that "courts refuse[] to recognize a cause of action arising out of the sale or furnishing of intoxicating beverages"); Br. 22. It is consumption (or, in the City's words, "increased opioid use") by the City's residents, not Distributors' actions in allegedly "furnishing" the market, that proximately caused the City's injuries. Indeed, the rationale underlying the alcohol sales cases applies with even greater force here. Distributors have much less control than a tavern keeper over who ultimately consumes the products they ship; Distributors promote the public good by distributing vital medicines; and the chain of causation connecting the use of the substance to the City's harms is much more attenuated than in the typical alcohol-fueled auto accident case.

The City has no response to this argument. Instead, it relies on two inapposite points. First, it notes that proximate cause typically is a jury matter. Opp. 19. While that generally may be true, in the specific context relevant here—tort claims stemming from the use of intoxicating substances—Nevada courts regularly grant motions to dismiss. *See Snyder*, 110 Nev. at 1341; *Hinegardner*, 108 Nev. at 1093. Second, the City argues that Distributors were wrong to rely on the *City of New Haven* decision because it was decided under Connecticut law. Opp. 20. That decision is but one of a long line of decisions, applying the law of many states, which recognize that proximate causation is absent when the causal chain between a defendant's alleged acts and a plaintiff's harm is too attenuated. *See* Br. 22–23. Just this month, a North Dakota court dismissed the state's claims against a manufacturer of opioid medications because "the State's theory … depends on an extremely attenuated, multi-step, and remote causal chain. The State's claims—no matter how styled—have to account for the independent actor (i.e. doctors) who stands between Purdue's alleged conduct and the alleged harm." Ex. 1. There are even more steps in the chain between the alleged misconduct of Distributors and the City's alleged harms than just the doctors, including the pharmacists who dispense the medications and the individuals who misuse the

medications. The logic of these decisions is persuasive, applies equally here, and is consistent with Nevada law. *See supra*.

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

The City does not dispute that it seeks to recover damages purely derivative of the alleged harm to its citizens. It argues that there is no derivative injury rule in Nevada, but the principle that a third party payor "has no direct cause of action in tort against one who injures the [payor's] beneficiary" is a venerable and widely recognized "common law rule." *United Food & Commercial Workers Unions, Emp'rs Health & Welfare Fund v. Philip Morris, Inc.*, 223 F.3d 1271, 1274 (11th Cir. 2000) (citing *Anthony v. Slaid*, 52 Mass. 290, 290–91 (1846)). And "the common law rule is the rule of decision in [Nevada] courts unless in conflict with constitutional or statutory commands." *Fitzgerald v. Mobile Billboards, LLC*, 134 Nev., Adv. Op. 30, 416 P.3d 209, 211 (2018).

Unable to show that Nevada has abrogated the common-law derivative injury rule, the City confuses it with the requirement to plead foreseeability. But "foreseeability and direct injury (or remoteness) are distinct concepts, both of which must generally be established by a plaintiff." *Laborers Local 17 Health & Benefit Fund v. Philip Morris, Inc.*, 191 F.3d 229, 236 (2d Cir. 1999). Pleading foreseeability therefore does "not substitute[] for alleging … a direct injury." *Id.* at 236–37.

Finally, there is no basis for the City's contention that discovery is needed before dismissing its claims.[3] No amount of discovery possibly could convert a fundamentally derivative

[3] *See, e.g.*, *Williams & Drake*, 1998 WL 35010423, at *2 ("The concept of 'remoteness' is … a legal doctrine, to be applied by the court to test the validity of the Complaint."); *Int'l Bhd. of Teamsters Local 734 Health & Welfare Tr. Fund v. Phillip Morris, Inc.*, 34 F. Supp. 2d 656, 661 (N.D. Ill. 1998) ("[T]he remoteness doctrine involves public policy concerns which are determined as a matter of law, and not fact …."); *see also City of New York v. Smokes-Spirits.Com, Inc.*, 911 N.E.2d 834, 839 (N.Y. 2009) ("[A]llegations of indirect or derivative injuries will not suffice."); *Perry v. Am. Tobacco Co.*, 324 F.3d 845, 851 (6th Cir. 2003) (similar); *Ala. Coushatta Tribe*, 46 F. App'x 225 (similar); *Independence County v. Pfizer, Inc.*, 534 F. Supp. 2d 882, 888–89 (E.D. Ark. 2008) (similar), *aff'd sub nom. Ashley County v. Pfizer, Inc*., 552 F.3d 659 (8th Cir. 2009); *Ass'n of Wash. Pub. Hosp. Dists. v. Philip Morris*

claim seeking the "costs related to diagnosis, treatment, and cure of addiction to opioids," Compl. ¶¶ 233, 253, into a cognizable claim.

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

The City gets it exactly backwards when it suggests the default rule is to ***allow*** recovery of public expenditures from tortfeasors. Although the City argues that the free public services doctrine "has never been adopted by the Nevada courts," Opp. 22, the doctrine inheres in the common law, which "prevails in this state except as specially abrogated or where unsuitable to our conditions," *State v. Hamilton*, 33 Nev. 418, 111 P. 1026, 1029 (1910); *see also Howard v. State*, 128 Nev. 736, 740–44, 291 P.3d 137, 140–42 (2012) (surveying decisions in federal courts and several other states to elucidate "common law applicable to Nevada"); *District of Columbia v. Air Fla., Inc.*, 750 F.2d 1077, 1080 (D.C. Cir. 1984) (free public services doctrine is "general common-law rule" that applies unless a state or locality makes a "legislative policy determination" to the contrary). The absence of express Nevada authority thus does not preclude the application of the doctrine to the City's claims. Indeed, the great weight of authority from other jurisdictions illustrates the well-established rule that the costs of providing public services cannot be recovered in tort absent a legislative enactment. Br. 25–26 & n.16.[4]

Moreover, the City concedes that the Nevada Supreme Court has adopted the firefighter's rule. Opp. 22–23; *Steelman v. Lind*, 97 Nev. 425, 427–28, 634 P.2d 666, 667–68 (1981) (adopting "fireman's rule" based on other jurisdictions' common-law decisions). Contrary to the City's

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Inc., 79 F. Supp. 2d 1219, 1224 (W.D. Wash. 1999) (similar), *aff'd*, 241 F.3d 696 (9th Cir. 2001).

[4] The cases that the City cites to show the inapplicability of the doctrine to the facts at issue here are outliers, and these minority rulings are irrelevant here. The trial court decision in *Clark County v. Purdue Pharma, L.P.*, No. A-17-765828-C (Nev. Dist. Ct. Mar. 15, 2019) is particularly unpersuasive and not binding on this Court. The *Clark County* court, without engaging in legal analysis or citing any law, summarily refused to apply the free public services doctrine because it "has not been adopted in the state of Nevada." Opp. Ex. 1 at 4. This well-established common law rule, however, also has not been *rejected* by the Nevada Supreme Court, and there is every reason to think that, if the Supreme Court considered the issue, it would follow the dominant approach.

assertion that the firefighter's rule "is based entirely on assumption of the risk principles," Opp. 23, the Supreme Court stated that "[t]he rule developed from the notion that taxpayers employ firemen and policemen, at least in part, to deal with future damages that may result from the taxpayers' own negligence," so "[t]o allow actions by policemen and firemen against negligent taxpayers would subject them to multiple penalties for the protection," *Steelman*, 97 Nev. at 427, 634 P.2d at 667. The cases on which *Steelman* relied similarly provided policy-based cost-spreading reasons for the firefighter's rule. *See Giorgi v. Pac. Gas & Elec. Co.*, 72 Cal. Rptr. 119, 122 (Cal. Ct. App. 1968) (adopting rule based on "policy consideration[s]" such as "spreading of the risk" and "efficient judicial administration," rather than on "assumption of the risk"); *Walters v. Sloan*, 571 P.2d 609, 613 (Cal. 1977) (maintaining the fireman's rule in part because "[w]hether the employee is ultimately compensated with money derived from taxes or from [private] insurance, the public pays the bill"). Because the firefighter's rule derives from the same policy considerations as the free public services doctrine, the Supreme Court's adoption of the former shows it would also adopt the latter. *See County of Erie v. Colgan Air, Inc.*, 711 F.3d 147, 151 (2d Cir. 2013) ("the free public services doctrine and fireman's rule are similar").

Nor does any purported exception to the doctrine apply. The City first tries to limit the doctrine to "isolated and discrete incidents, which merely require a single and typical emergency response." Opp. 24. To the contrary, however, the rationale for the doctrine is stronger "when the need for emergency services in response to an alleged nuisance is ongoing … because the legislature is better able to consider [the] need for cost-recovery legislation than in cases of sudden disaster." *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1147 (Ill. 2004). As the Ninth Circuit has explained, "it is the identity of the claimant and the nature of the cost that combine to deny recovery"—not the supposed length of the purported misconduct. *City of Flagstaff v. Atchison, Topeka & Santa Fe Ry. Co.*, 719 F.2d 322, 324 (9th Cir. 1983) (Kennedy, J.). For that reason, numerous courts have rejected the proposition that the free public services doctrine applies only to discrete negligent events, or to events considered "typical." *E.g.*, *Beretta*, 821 N.E.2d at 1146–47 ("we reject the distinction between single, discrete disasters, such as fires

and explosions, and the unfortunately frequent incidents of handgun violence"); *Baker v. Smith & Wesson Corp.*, 2002 WL 31741522, at *6 (Del. Super. Ct. Nov. 27, 2002) (rejecting purported exception for "atypical, ongoing or repetitive" costs, since "a municipality grappling with a persistent problem … is better able to employ injunctive or legislative solutions than is a municipality reacting to" a one-time event).[5]

The City next argues that the free public services doctrine does not preclude claims seeking abatement of a nuisance. Opp. 25–26. But a public nuisance exception "would be the exception that swallows the rule, since many expenditures for public services could be re-characterized by skillful litigants as expenses incurred in abating a public nuisance." *Walker County v. Tri-State Crematory*, 643 S.E.2d 324, 328 (Ga. Ct. App. 2007); *see also Colgan Air*, 711 F.3d at 152 (same). In any event, the damages that the City seeks to recover are money damages for alleged past injuries, not abatement costs. *E.g.*, Compl. ¶¶ 192–94 (seeking "recoupment of governmental costs" including "significant expenses for police, emergency, health, prosecution, corrections and other services"); *id.* ¶ 214 (seeking compensatory damages for expenses "***incurred and paid***"). Any public nuisance exception therefore would not apply. *See Beretta*, 821 N.E.2d at 1147 (dismissing complaint where "claimed damages do not represent the actual cost of abatement").

The free public services doctrine is firmly grounded in the common law, and no exception to the doctrine bars its application here.

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[5] *Accord City of Philadelphia v. Beretta U.S.A., Corp*., 126 F. Supp. 2d 882, 895 (E.D. Pa. 2000) ("The City routinely provides police and law enforcement to protect its citizens from criminals who use guns and some health services to victims of youth firearm violence. These unquestionably are municipal costs which cannot be recovered."); *Penelas v. Arms Tech., Inc*., 1999 WL 1204353, at *2 (Fla. Cir. Ct. Dec. 13, 1999), *aff'd*, 778 So. 2d 1042 (Fla. Dist. Ct. App. 2001) ("[T]he County's claim for damages, based on the costs to provide 911, police fire and emergency services effectively seeks reimbursement for expenditures made in its performance of governmental functions [in response to continuing gun violence]. Costs of such services are not, without express legislative authorization, recoverable by governmental entities.").

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

The City does not contest that the regulation of controlled substance distribution by wholesalers is an area of statewide concern. *See* Opp. 26–27. Therefore, "local control over [this] subject … ceases." *Lamb v. Mirin*, 90 Nev. 329, 333, 526 P.2d 80, 82 (1974).

The City argues that Dillon's Rule is inapplicable because it is acting through litigation rather than legislation. But the City cites no authority recognizing such an exception to Dillon's Rule, nor could it. The Nevada Legislature has "plenary authority … to restrict and limit the exercise of all municipal powers," *Crowley v. Duffrin*, 109 Nev. 597, 605, 855 P.2d 536, 541 (1993)," and, in codifying Dillon's Rule, it has made clear that a city government has "only the powers" allowed by the Legislature "***and no others***," NRS 268.001(3); *accord Ronnow v. City of Las Vegas*, 57 Nev. 332, 65 P.2d 133, 136 (1937) ("***All acts*** beyond the scope of the powers granted [to a municipality] are void.").[6] The City therefore cannot exceed the scope of its powers, whether by filing suit or otherwise. *See* Br. 28; *City of Philadelphia v. Beretta U.S.A., Corp.*, 126 F. Supp. 2d 882, 886, 889 (E.D. Pa. 2000) (barring the City of Philadelphia's "claims that the gun industry's methods for distributing guns are negligent and a public nuisance" because "[t]he United States Supreme Court has recognized that the judicial process can be viewed as the extension of a government's regulatory power" and "the City's instant action seeks to control the gun industry by litigation, an end the City could not accomplish by passing an ordinance") (citing *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 572 n.17, 116 S. Ct. 1589, 1597 n.17 (1996)). Moreover, this

[6] Because the Nevada Legislature has codified Dillon's Rule, the City's extended discussion of other states' interpretations of the rule is irrelevant. For instance, even if "[t]here have been debates in various jurisdictions regarding the viability of Dillon's Rule," Opp. 30, the Nevada Legislature has reaffirmed that "Dillon's Rule serves an important function in defining the powers of city government and remains a vital component of Nevada law," NRS 268.001(5). And regardless of whether Utah construes the rule strictly, Nevada law does. *Id.* ("a strict interpretation and application of Dillon's Rule" applies other than to "matters of local concern"). Moreover, even Utah's interpretation of Dillon's Rule would invalidate municipal action that "attempt[s] to regulate an area which by the nature of the subject matter itself requires uniform state regulation," *State v. Hutchinson*, 624 P.2d 1116, 1127 (Utah 1980), such as the wholesale distribution of controlled substances.

action seeks injunctive relief to alter "Defendants' promotion and marketing of opioids … in Nevada," Compl., Prayer for Relief, ¶ 8—relief which would strike at the heart of the State's extensive regulatory apparatus governing the distribution of controlled substances.

In fact, the City's suggestion that "the Nevada Attorney General has never objected to this lawsuit," Opp. 27, is contrary to the public record. *See Breliant v. Preferred Equities Corp.*, 109 Nev. 842, 847, 858 P.2d 1258, 1261 (1993) ("the court may take into account matters of public record, orders, items present in the record of the case, and any exhibits attached to the complaint when ruling on a motion to dismiss for failure to state a claim upon which relief can be granted"). On November 8, 2017, the Attorney General wrote the City's Mayor, urging her not to sue "separately" to address the "opioid epidemic" because "the Office of Attorney General represents all Nevadans in this area," and "the City of Reno's initiation of litigation may … undermine Nevada's position" in seeking to "uniformly address the opioid crisis in Nevada."[7] The Attorney General has since sued in response to the "opioid epidemic," Compl. ¶ 1, *State of Nevada v. Purdue Pharma L.P.*, Case No. A-18-1774437-B (Clark Cty. Dist. Ct. May 15, 2018) (Ex. 1 to Opp. to Manufacturers' Br.), seeking "relief for Nevada, and its municipalities and counties," *id.* ¶ 3; *see also id.* ¶ 4 (the Attorney General "represent[s] the public interest on behalf of the State, which includes its municipalities").

The City also attempts to style its claims as concerning only "matters of local concern." Opp. 26, 34. But the defining feature of a matter of local concern is that it "does not have a significant effect or impact on areas located in other cities or counties," NRS 268.003(1)(a), and the City "acknowledge[s] that it is not alone in its struggle to address the nationwide opioid epidemic," Opp. 26; *see also* Compl. ¶¶ 1–2 ("[o]pioid addiction and overdose in the United States … has reached epidemic levels" and the "abuse of opioids is a widespread problem in the State of Nevada"). In addition, a matter of local concern cannot include

[7] Letter from Nevada Attorney General Adam Paul Laxalt to City of Reno Mayor Hillary Schieve (Nov. 8, 2017), *available at* https://www.scribd.com/document/363980974/Laxalt-letter-to-Schieve-11-8-17#fullscreen&from_embed, attached hereto as Exhibit 2.

> (1) A state interest that requires statewide uniformity of regulation;
>
> (2) The regulation of business activities that are subject to substantial regulation by a federal or state agency; or
>
> (3) Any other federal or state interest that is committed by the Constitution, statutes or regulations of the United States or this State to federal or state regulation that preempts local regulation.

NRS 268.003(1)(c). Regulation of Distributors' business—the distribution of prescription drugs—implicates all three.

The City responds that "this lawsuit" does not significantly affect other cities or counties because the City seeks to recover only damages to "its own agencies," Opp. 35–36, but this reading of the doctrine would swallow the rule. A plaintiff may sue to recover only its own damages, *see Schwartz v. Lopez*, 132 Nev., Adv. Op. 73, 382 P.3d 886, 894 (2016) (standing requires proof of "personal injury" to plaintiff), not the damages "incurred by the State or any other municipality," *see* Opp. 27. If the City could avoid the doctrine by suing only for its own damages, the doctrine would never apply, and key provisions of the Dillon's Rule statute would be rendered meaningless. *See Arguello v. Sunset Station, Inc.*, 127 Nev. 365, 371, 252 P.3d 206, 210 (2011) ("Under well-established canons of statutory interpretation, we must not render any of the phrases of [a statute] superfluous.").

Finally, the City's standing argument is a meritless distraction. Dillon's Rule concerns not whether the City has traditional "standing" to address a cognizable injury, but whether the City has authority from the Nevada Legislature—the body that incorporated it—to bring claims that involve a matter of statewide concern. *See, e.g.*, *Cmty. Bd. 7 of Borough of Manhattan v. Schaffer*, 84 N.Y. 2d 148, 154–56 (N.Y. 1994) (distinguishing "capacity" to bring an action from "the concept of standing," explaining that "[g]overnmental entities created by legislative enactment … have neither an inherent nor a common-law right to sue. Rather, their right to sue, if it exists at all, must be derived from the relevant enabling legislation or some other concrete statutory

predicate."). Satisfying standing says nothing about whether the State granted the City authority to bring its claims. Because it did not, the claims should be dismissed.

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

Relying on cases that actually undercut the City's arguments, the Opposition fails to save the City's tort claims from the bar erected by Nevada's economic loss rule.

The Opposition begins by acknowledging the general principle, set forth in *Terracon Consultants W., Inc. v. Mandalay Resort Grp*., 125 Nev. 66, 68, 206 P.3d 81, 83 (2009), that recovery in tort is limited to "citizens … causing physical harm to others." Opp. 37. While the Opposition goes on to assert that the City's claims fall within "exceptions to the economic loss rule" recognized in *Terracon*, that decision in fact ***rejected*** the purported exceptions relied on by the City here. *Terracon* noted that several jurisdictions outside Nevada had "made exceptions to the economic loss doctrine to permit tort claims against design professionals when only economic loss is at issue." *Terracon*, 125 Nev. at 76, 206 P.3d at 88. But the *Terracon* court, "[g]uided" instead "by the doctrine's purpose—to shield [defendants] from unlimited liability for all of the economic consequences of a negligent act, particularly in a commercial or professional setting and thus to keep the risk of liability reasonably calculable," *id.*—"decline[d] to make [such] an exception …." 125 Nev. at 79, 206 P.3d at 90. 125 Nev. at 79, 206 P.3d at 90. Instead, the court emphasized that, except for "traditionally recognized exceptions for certain classes of claims," the economic loss doctrine "cuts off tort liability when no personal injury or property damage occurred." *Id.*

There is no "traditionally recognized exception" that permits a municipality to recover in tort for the costs of providing services to its residents. Nor has the City itself sustained property damage or personal injury, as the Opposition acknowledges. Opp. 38 ("This is not a product liability claim."). Nevertheless, the Opposition argues, the "underlying physical harm and injuries Defendants caused to the public show that there is more at stake here than purely economic damages …." *Id.* To the contrary, that is exactly what is "at stake here." If individuals have in fact suffered physical harm, they can sue, and their claims would not be barred by the economic

loss doctrine. But that does not change the fact that the City seeks to recover "purely economic damages" for alleged "excessive costs related to diagnosis, treatment, and cure of addiction to opioids" and costs of "care, treatment facilities, and enforcement services" for City residents, Compl ¶¶ 253, 269. Those are purely economic harms, and the economic loss bars the City's attempt to recover them in tort.

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

The City has failed to respond meaningfully to many of the public nuisance arguments raised in Distributors' Brief. It appears that the City copied and pasted the public nuisance section from its Opposition to the ***Manufacturers'*** Motion to Dismiss, thereby including several non-sequitur arguments and incorrect citations,[8] while failing to respond to the legal authority cited by Distributors.

As a result, the City has conceded at least one dispositive issue applicable to both its statutory public nuisance claim (Count I) and its common law public nuisance claim (Count II): the need to plead that Distributors had ***control*** of the drugs when they caused harm. The City has also conceded two additional dispositive issues applicable to its statutory public nuisance claim: (1) that the ***statute by its own terms*** applies to illicit drug dealing rather than licensed medications and; (2) that the statute defines a nuisance as a physical location. The failure of the City adequately to plead its claims for statutory public nuisance and common law public nuisance is clear, and the City's public nuisance claims should be dismissed.

[8] On page 15 of its Opposition, the City cites "Mot. at 16:7–17:12" and purports to quote language from Distributors' Brief stating that Reno is alleging a "novel theory" designed to "collapse the critical distinction between nuisance and products liability law." But the quoted language does not appear in Distributors' Brief. Similarly, on page 11 of its Opposition, the City cites "Mot. at p. 14" for the proposition that Distributors acknowledge that Nevada courts look to the Restatement. But that citation, too, does not correspond to the Distributors' Brief. Additionally, on page 14 of the Opposition, the City cites "Mot. at 14:18–15:11" regarding interference with a public right. While Distributors make a similar argument, the citation provided by the City corresponds to the Manufacturers' Brief, not the Distributors' Brief.

A. The City Has Conceded that it Failed to Allege that Distributors Had Control Over the Nuisance.

The City fails to address the control element of a public nuisance claim. As explained in Distributors' Brief, it is black letter law that a party cannot be liable in nuisance unless that party controlled the instrumentality of the nuisance—not just at any point in time—but at the time of the ***injury***. *See State v. Lead Indus. Ass'n, Inc.*, 951 A.2d 428, 449 (R.I. 2008) ("As an additional prerequisite … a defendant must have ***control*** over the instrumentality causing the alleged nuisance ***at the time the damage occurs***." (emphasis in original)); Br. 11–12. The lack of a showing of control is dispositive, requiring dismissal of the City's public nuisance claims. *Traube v. Freund*, 775 N.E.2d 212, 216 (Ill. App. Ct. 2002) (noting that the "absence of a manufacturer's control over a product ***at the time the nuisance is created*** is generally fatal" (emphasis added)).[9]

The City's Complaint alleges that the nuisance—if any—occurred only ***after*** a Distributor delivered the medications to licensed pharmacies, and indeed, only after pharmacies dispensed the medications to patients. The City does not plead that Distributors controlled the instrumentality of the nuisance at that time. *See* Compl. ¶¶ 178–202. Nor could the City so allege, because once a Distributor has delivered the medication to a licensed pharmacy, it has no control over whether

[9] *See also Ashley Cnty., Ark. v. Pfizer, Inc.*, 552 F.3d 659, 663, 671 & n.5, 672 (8th Cir. 2009) (affirming dismissal of counties' public nuisance claim against distributors); *Penelas v. Arms Tech., Inc.*, 1999 WL 1204353, at *4 (Fla. Cir. Ct. Dec. 13, 1999) ("[A] party cannot be held liable for nuisance absent control of the activity which creates the nuisance."), *aff'd*, 778 So. 2d 1042 (Fla. Dist. Ct. App. 2001); *Gelman Scis., Inc. v. Dow Chem. Co.*, 508 N.W.2d 142, 144 (Mich. Ct. App. 1993) ("Because a seller in a commercial transaction relinquishes ownership and control of its products when they are sold, it lacks the legal right to abate whatever hazards its products may pose."); *Camden Cnty. Bd. of Chosen Freeholders v. Beretta, U.S.A. Corp.*, 273 F.3d 536, 541 (3rd Cir. 2001) (finding that county "has failed to allege that the manufacturers exercise sufficient control over the source of the interference with the public right"); *Tioga Pub. Sch. Dist. No. 15 of Williams Cnty. v. U.S. Gypsum Co.*, 984 F.2d 915, 920 (8th Cir. 1993) ("[N]uisance law does not afford a remedy against the manufacturer of an asbestos-containing product [because] a defendant who had sold an asbestos-containing material to a plaintiff lacked control of the product after the sale."); *City of Bloomington v. Westinghouse Elec. Corp.*, 891 F.2d 611, 614 (7th Cir. 1989) ("[A] manufacturer almost by definition cannot 'control' the product past the point of sale and is therefore automatically exculpated from liability for any event after the sale.").

the patient uses it as directed, gives it to family and friends, sells it, or leaves it unprotected in the bathroom medicine cabinet.

The Opposition concedes the issue by its silence. *See Erickson v. Courtney*, 702 F. App'x 585, 588 (9th Cir. 2017) (noting that by failing to address the opposing party's contentions, the arguments are "effectively conced[ed]"). This alone is sufficient to dismiss both the City's statutory public nuisance claim (Count I) and its common law public nuisance claim (Count II). *See Fogg v. Nevada C.O. Ry. Co.*, 20 Nev. 429, 23 P. 840, 841–42 (1890) (noting that Nevada's public nuisance statute incorporates, and does not relax, the elements of common law public nuisance, rejecting the argument that "section 251 of the civil practice act … changes the common–law" of nuisance).

B. The City Fails to Plead Interference with a Public Right.

The City's statutory and common law public nuisance claims also should be dismissed because they do not allege that Distributors interfered with a public right. The City acknowledges that a public nuisance claim must involve invasion of a public right. Opp. 11. But it equates interference with a "public right" with interference with the public health, *id.* 11, 14—an equation that the City does not explain or support and that runs counter to common sense, the explanation of "public right" in § 821B of the Restatement (Second) of Torts, and the nation's leading opinion on public nuisance law and the public right element, *see Lead Indus.*, 951 A.2d at 448 ("lead poisoning constitutes a public health crisis," but does not involve public rights).

A public right, according to § 821B, must affect a right common to the public.[10] As the cases make clear, interference with a public right is inherently connected to the use of public space.

[10] Section 821B includes two independent elements. First, § 821B(1) provides that there must be interference with a public right (some "interference with a right common to all members of the general public." Second, § 821B(2) requires that the interference with a public right must be unreasonable, such as where an "interference with a public right . . . involves a significant interference with the public health, the public safety, the public peace, the public comfort, or the public convenience." The City's repeated reliance on allegations of interference with the public health, Opp. 14–15, speaks only to the second element (whether the interference is *unreasonable*), not whether the City has satisfied the threshold question of whether the interference affects a public right at all. In other words, a public nuisance claim can supply a

There is interference with a public right when any member of the public tries to enter or use a public space and cannot, or uses it and is exposed to harm. Thus, a public right is at stake when public roads and rights-of-way are obstructed, access to public waterways is impeded, the air and water are polluted or rendered noxious or toxic, or explosives or fireworks are stored in the midst of the city.[11]

The Restatement explains a "public right," in part, by what it is not. It is not a private right, which is the "individual right that everyone has not to be … negligently injured." Restatement (Second) of Torts § 821B cmt. g; *see also City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1116 (Ill. 2004) (noting that "the [purported] public right asserted by plaintiffs is merely an assertion, on behalf of the entire community, of the individual right not to be assaulted"). Thus, everyone has a right not to be injured by prescription drugs that are mis-labeled, deceptively marketed, or mis-prescribed, but that right is a private, not public, right. A public right might well be at stake if there were a contagion (such as the measles outbreak in Los Angeles) that prevents members of the general public from going about their daily business in public. This case, however, does not involve a contagious disease; it instead involves the individual decisions by numberless doctors to mis- or over-prescribe opioids (allegedly as a result of deceptive marketing) and by numberless patients to share or sell pills, and by those recipients, to mis-use the drugs. Thus, this case involves a private right—no matter how many people are affected. *See, e.g.*, Restatement

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remedy for acts that create a public health crisis, but *only if* those acts interfere with a public right. Conflating these two elements, the City incorrectly assumes that alleging inference with "public health" is enough. Opp. 14.

[11] *See Lead Indus.*, 951 A.2d at 453 ("A necessary element of public nuisance is an interference with a public right— those indivisible resources shared by the public at large, such as air, water, or public rights of way."); Cmt. B to Restatement (Second) of Torts, § 821B (listing exemplar public nuisance claims as including "the maintenance of a pond breeding malarial mosquitos" and "storage of explosives in the midst of a city or the shooting of fireworks in the public streets").

(Second) of Torts § 821B cmt. g (1979) ("[c]onduct does not become a public nuisance merely because it interferes with" the individual rights of "a large number of persons").

Because alleging an interference with public health is not enough to establish a public nuisance claim, the City's two public nuisance claims fail as a matter of law.

C. The City's Statutory Public Nuisance Claim Fails for Two Independent Reasons.

In addition to the City's concession that it has failed to allege the element of control and the City's failure to plead adequately interference with a public right, the Court should reject the City's statutory public nuisance claim for two independent reasons.

At the outset, the City mischaracterizes Distributors' argument about the applicability of NRS 202 *et seq*. Distributors do not assert that the threshold problem with the City's claim is that "Nevada's criminal public nuisance statute deprives Reno … of a civil claim for public nuisance." Opp. 4. After all, the mere existence of a criminal statute does not foreclose the existence of another statute creating an analogous civil cause of action. Rather, Distributors argued that the statute on which the City relies, NRS 202 *et seq.*, is a criminal statute that does not itself create a civil cause of action. Br. 7; *see* NRS 202 (titled, "***Crimes*** Against Public Health and Safety"). The City cannot bring a civil public nuisance claim premised upon the criminal nuisance statute. *Coughlin v. Tailhook Ass'n, Inc.*, 818 F. Supp. 1366, 1372 (D. Nev. 1993) ("there is no indication that § 202.450 et seq. was intended to create a private cause of action"). There is no alternative means for bringing a statutory civil public nuisance claim under Nevada law. "Other than the criminal public nuisance statute, the only … nuisance cause of action recognized under Nevada law … is a civil cause of action for ***private*** nuisance." *Id.*

Conceding that Nevada's public nuisance statute does not expressly provide for a civil cause of action, Opp. 4, the City next makes a tortured argument that the Court should invent a civil statutory public nuisance claim where none exists because a civil claim is "implied" in the statute. *See* Opp. 4–7. But all that the City can point to in support of this request is a case

concerning an inapposite statute. Opp. 5, citing *Neville v. Eighth Judicial Dist. Ct.*, 406 P.3d 499 (Nev. 2017) (analyzing a wage and labor statute). The statute at issue in *Neville* included a provision for recovering attorney's fees, while the public nuisance statute at issue here contains no comparable language signaling legislative intent to create a civil cause of action. And contrary to the City's assertion, Opp. 6, it makes no difference that one section of the criminal statute is titled, "Abatement of nuisance; civil penalty." NRS 202.480. As the text of that provision makes clear, that so-called civil penalty may be imposed only on individuals who faced a "proceeding for a violation of NRS 202.470," which criminalizes certain conduct as a misdemeanor. *See* NRS 202.480(1); NRS 202.470. There is no allegation, nor could there be, that any Distributor previously faced a misdemeanor proceeding under NRS 202.480.

Moreover, the Opposition makes no attempt to address Distributors' arguments that the City's statutory claim fails even if the statute did create a civil cause of action (which it does not). *See* Br. 8. The Complaint alleges that Distributors violated NRS 202.450(2)(3). That provision establishes that that ***the place*** "wherein a controlled substance … is ***unlawfully*** sold, served, stored, kept, manufactured, used or given away … is a public nuisance." *Id.* As explained in Distributors' Brief, the Complaint does not state a violation of this statute for two reasons, both of which the City has conceded through its silence.

First, the provision plainly is directed at illicit drug dealing ("unlawfully sold"), and Distributors are licensed by the DEA and the Nevada Board of Pharmacy to sell FDA-approved prescription opioids to licensed pharmacies. Br. 8. Second, the statute provides that the nuisance is the physical location where the sale occurs, not the sale itself. NRS 202.450 ("***Every place*** … wherein a controlled substance, immediate precursor or controlled substance analog is unlawfully sold, served, stored, kept, manufactured, used or given away … is a public nuisance."). The City has not alleged that the physical locations where Distributors sold prescription opioids constitute a nuisance in and of themselves. Br. 8. Like the necessary element of control addressed in Part II.A, *supra*, the City's complete silence on these two points amounts to a concession. The City's attempt to plead statutory public nuisance under Section 202.450(2)(e) fails.

D. The City's Claim is an Unprecedented Expansion of Public Nuisance Law.

The City's common law public nuisance theory remains extreme and would stretch public nuisance law in Nevada beyond the breaking point. *City of Philadelphia v. Beretta U.S.A. Corp.*, 126 F. Supp. 2d 882, 910 (E.D. Pa. 2000) ("The refusal of many courts to expand public nuisance law to the manufacturing, marketing, and distribution of products conforms with the elements of public nuisance law."), *aff'd*, 277 F.3d 415 (3d Cir. 2002). In the time since Distributors filed their Motion to Dismiss, one Nevada court has allowed public nuisance claims against opioid Distributors to proceed. *See Clark County v. Purdue Pharma, L.P., et al.*, Eighth Judicial District Court Case No. A-17-765828-C (2017). But that order, which contains no analysis, is hardly persuasive, let alone binding authority.

Rather than respond to the specific scope of nuisance law arguments raised by Distributors, the City instead points to a handful of other courts that have erroneously allowed these claims to proceed in an effort to persuade this Court to avoid analyzing this issue altogether. *See* Opp. 16.[12] The City's public nuisance claims ought to be analyzed in light of the long tradition of public nuisance law. *See* Brief of Indiana et al., *ConAgra Products Company v. California*, Nos. 18-84 & 18-86 (U.S. Aug. 16, 2018) (describing local municipality public nuisance claims aimed at addressing societal problems as "new regulatory nuisance lawsuits" that "drift far afield of the original common law understanding of public nuisance doctrine"). Under that long tradition, the courts have overwhelmingly refused to extend the doctrine of public nuisance to the use of lawful products. *See, e.g.*, *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d at 1116 ("[W]e are reluctant to state that there is a public right to be free from the threat that some individuals may use an otherwise legal product … in a manner that may create a risk of harm to another."); *Lead Indus.*, 951 A.2d at 448 ("Products generally are purchased and used by individual consumers, and any harm they cause—even if the use of the product is widespread and the manufacturer's or distributor's conduct is unreasonable—is not an actionable violation of a public right.").

[12] The City also devotes space in its Opposition to the claim that "Distributors cite to *Jezowski v. Reno*…" Opp. 16. Distributors' Brief includes no such citation.

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

The remedies sought by the City are not available in an action for public nuisance, either for the City's attempted statutory public nuisance claim (Count I) or for the City's common law public nuisance claim (Count II). The City seeks "compensatory damages[] and punitive damages …, attorney fees and costs, and pre- and post-judgment interest." Compl. ¶¶ 198, 225.

First, the City asks the Court to ignore the plain language of the criminal public nuisance statute that the City relies upon in its Complaint on the grounds that "Reno should not be prevented from pursuing appropriate damages from Distributors for their role in the creation of this nuisance." Opp. 8. But by the plain language of the statute, money damages are not available; instead, recovery is limited to penalties (of "not more than $5,000") and injunctive relief (i.e., an "order of abatement"). NRS 202.480(1); *see People v. ConAgra Grocery Prod. Co.*, 227 Cal. Rptr. 3d 499, 569 (Ct. App. 2017) (explaining that abatement is an equitable remedy which "provides no compensation to a plaintiff for prior harm"). The City blindly asserts that "Distributors do not point to any law or cases in Nevada that would prevent compensatory damages arising from the costs Reno incurred …" Opp. 8. To the contrary, Distributors' Brief points to the Nevada law on which the City's Complaint relies, NRS 202.480(1), which sets out the remedies available under the statute. Br. 14. What the City now seeks goes far beyond that.

Second, the monetary damages sought by the City—all of which relate to past costs incurred in treating addiction—also are unavailable in the City's common law public nuisance claim, were that claim to survive dismissal. Abatement is a prospective remedy limited to the costs of eliminating or removing the conduct or condition that is interfering with the public's rights; abatement costs do not include payments for treating all the consequences of the alleged nuisance. *See ConAgra Grocery Prod.*, 227 Cal. Rptr. 32 at 569 (mandating that "the abatement account would be utilized not to recompense anyone for accrued harm but solely to pay for the prospective removal of the hazards defendants had created").

III. THE CITY'S NEGLIGENT MISREPRESENTATION CLAIM SHOULD BE DISMISSED.

In attempting to save the City's negligent misrepresentation claim, the Opposition instead underscores the Complaint's failure to satisfy the elements of this claim.

The Opposition asserts that Distributors are wrong in arguing that a claim for negligent misrepresentation requires the City to plead that it relied on false representations Distributors made to it. Instead, the Opposition argues, the City has adequately pled "misrepresentation by nondisclosure" under the definition set forth in the Restatement (Second) of Torts. Opp. 2–3. But, by its very terms, the Restatement definition requires that a defendant "supply false information"—whether affirmatively or by omission—"for the guidance of others in their business transactions." *Id.* (quoting Restatement (Second) of Torts). As the Opposition states, a misrepresentation by omission must consist of "silence about material facts basic to the [business] transaction." *Id.* at 3.

It is undisputed that Distributors did not engage in business transactions with the City and that Distributors' business transactions were limited to filling opioid orders placed by licensed and DEA-regulated pharmacies in the State of Nevada. Even if the City were correct that it could base its negligent misrepresentation claim on Distributors' allegedly false representations or omissions to third parties (it is not), there is no allegation that any Distributor "supplied false information" or was "silen[t] about material facts basic to" its business transactions with pharmacies. Nor did Distributors have—or breach—any duty "to disclose important information regarding the dangers of opioids and the proper uses of opioids." Opp. 4. Under Nevada's learned intermediary doctrine, the duty to warn of risks associated with prescription drugs runs from the manufacturer to the prescribing physician. *See, e.g.*, *Klasch v. Walgreen Co.*, 127 Nev. 832, 837 & n.8, 264 P.3d 1155, 1158 & n.8 (2011).

IV. THE CITY'S NEGLIGENCE CLAIM SHOULD BE DISMISSED.

The City now apparently concedes that it cannot base its negligence claim on Distributors' alleged violations of federal or state statutes, arguing instead that Distributors have a common-law duty "to exercise reasonable care, which is the degree of care that a reasonable … entity would

exercise in similar circumstances." Opp. 17. As for a common law duty of "reasonable care" to report or refuse to ship "suspicious orders," as Distributors explained in their opening brief, the very concept of a "suspicious order" is a creature of federal regulation, *see* 21 C.F.R. § 1301.74(b); there is no such thing as a "suspicious order" at common law. And while it can be argued that Distributors' duty of "reasonable care" requires them to distribute FDA-approved controlled substances only to state-licensed and federally-regulated pharmacies and to maintain the physical security of the medications while in Distributors' possession, there is (and can be) no allegation that Distributors breached any such duties. Distributors do not have any duties at common law to investigate their customers, to report their customers to the government, or to refuse to fill orders placed by their customers.

The City counters that Distributors have a duty to prevent "reasonably foreseeable" harm. Opp. 17. But, as Distributors have explained, the Complaint does not allege harm to the City that was "foreseeable" to Distributors. The City alleges that ***Manufacturers'*** deceptive marketing campaign changed the standard of care for long-term prescribing of opioids to treat chronic pain. *E.g.* Compl. ¶¶170, 172. Responding to the increased demand for opioids that resulted from this new standard of care, the DEA authorized a 39-fold increase of the manufacturing quotas of prescription opioids between 1993 and 2015.[13] The City's alleged harm thus was no more "foreseeable" to Distributors than it was to the DEA, and Distributors had no ability to second-guess the DEA or the Nevada doctors prescribing opioid medications according to the new standard of care.

Indeed, in further testament to the dangers of cutting and pasting, the Opposition acknowledges that any "foreseeability" argument is not properly directed at Distributors. The Opposition asserts that:

> ***Distributors*** created opioid medications, which are controlled substances classified as "dangerous drugs." See FAC at ¶¶ 131, 132. They determined how these drugs would be introduced into the market. They determined what type of marketing

[13] Br. 18 and n.11.

> 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 *Id.* at ¶¶ 92, 94, 136. ***Distributors*** disregarded the dangers of the products ***they manufactured*** and, in fact, used false and misleading advertising to down play the dangers of the medications, including the possibility of addiction.

Opp. 18. The City goes on to allege that "Distributors were well aware that their false advertising and marketing schemes would lead to the market being flooded with dangerous opioid medications …." *Id.* These allegations cite exclusively to paragraphs in the Complaint concerning Manufacturers. It is undisputed that Distributors did not "create" opioids, did not "introduce" them into the market, and did not "advertise" or "market" opioids to doctors or patients. Even if these activities rendered the City's alleged harm "foreseeable" to Manufacturers, they could not have rendered the harm "foreseeable" to Distributors.[14]

The City also argues that "there is no requirement that a special relationship exist" between it and Distributors in order to impose a common-law duty on Distributors because the City's "claims are based on Distributors' own negligent conduct, not the conduct of third parties." Opp. 18. But the City neglects to respond to Distributors' showing that Distributors' conduct—i.e., the delivery of FDA-approved medicines to State-licensed pharmacies—does not itself cause any harm to the City. In the absence of a doctor prescribing the medicine, a pharmacist dispensing it, and an individual consuming it, the pills delivered by Distributors would sit on pharmacy shelves,

[14] Plaintiffs' reliance on two out-of-state gun cases is also unavailing because those two cases represent a minority approach. Opp. 18. The vast majority of cases asserted by municipalities against the manufacturers and distributors of handguns were dismissed because the defendants had "no duty to the city … or its residents to prevent their firearms from 'ending up in the hands of persons who use and possess them illegally.'" *City of Chicago v. Beretta U.S.A. Corp*, 213 Ill. 2d 351, 356 (2004); *accord City of Philadelphia v. Beretta U.S.A. Corp.*, 277 F.3d 415, 425 (3d Cir. 2002) ("gun manufacturers are under no legal duty to protect citizens from the deliberate and unlawful use of their products"); *Hamilton v. Beretta U.S.A. Corp.*, 750 N.E.2d 1055, 1063 (N.Y. 2001) (refusing to "impose a general duty of care upon the makers of firearms … because of their purported ability to control marketing and distribution of their products"); *Ganim v. Smith & Wesson Corp.*, 780 A.2d 98, 116 (Ct. 2001) (declining to recognize "a duty not to manufacture and distribute handguns so as to supply and enhance the illegal market" in a claim brought by a municipality).

harming no one. Thus, when the City seeks to hold Distributors liable for diversion, it necessarily seeks to hold Distributors liable for the conduct of doctors, pharmacist, patients and/or others over whom Distributors have no control and with whom they have no relationship whatsoever—let alone a special one.

Finally, the negligence claim fails because the City has no duty running ***to the City***. To state a claim for negligence, a complaint must plead that the "defendant owes the plaintiff a duty of care," which is a question of law. *Rodriguez v. Primadonna Company*, 125 Nev. 578, 584, 216 P.3d 793, 798 (2009). As Distributors explained in their opening brief—in an argument to which the City tellingly fails to respond—Distributors do not have any relationship with the City that possibly could give rise to a duty to it.

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

Distributors' opening brief showed that the City's unjust enrichment claim failed to meet any of the required elements, and the City's Opposition does not show otherwise. First, the City does not dispute that its unjust enrichment claim is based on the same conduct underlying its other claims. Thus, the unjust enrichment claim should be dismissed as duplicative. *See* Br. 30.

Second, the City fails to demonstrate that it conferred a benefit on Distributors. The City argues that it "conferred a benefit upon Defendants, by paying for what may be called Defendant's externalities," Opp. 39, but no Nevada precedent supports this far-reaching theory. The City attempts to bolster its theory by asserting that "Distributors … saved costs and expenses." *Id.* at 40. But the Complaint is devoid of factual allegations supporting this contention. Absent an independent legal basis for asserting that Distributors had a duty to pay for their supposed "negative externalities," the City did not save them any cost or expense when it paid for "healthcare services and addiction treatment for opioid users." *See id.* The City's own cases are in accord. *See, e.g.*, *Moore v. Texaco, Inc.*, 244 F.3d 1229, 1233 (10th Cir. 2001) (barring unjust enrichment claim in the absence of a duty); *United States v. Healy Tibbitts Constr. Co.*, 607 F. Supp. 540, 542 (N.D. Cal. 1985) (unjust enrichment claim requires alleging a duty); *see also Or. Laborers Emp'rs Health & Welfare Tr. Fund v. Philip Morris, Inc.*, 185 F.3d 957, 968 (9th Cir. 1999) ("Without a

legal obligation on the part of defendants to pay, the payment by plaintiffs did not 'benefit' defendants.").

The City's reliance on *White v. Smith & Wesson*, 97 F. Supp. 2d 816, 829 (N.D. Ohio 2000) and its progeny is misplaced.[15] Not only has the Ohio Supreme Court effectively overruled that case, *see Johnson v. Microsoft Corp.*, 834 N.E.2d 791, 799 (Ohio 2005) (holding that in order for a plaintiff to confer a benefit on a defendant, an economic transaction must exist between the parties), but the reasoning of *White* also is fatally flawed on its own terms, as being "forced to pay for [a defendant's] externalities" does "not fit within an unjust enrichment framework," *City of Miami v. Citigroup, Inc.*, 801 F.3d 1268, 1274, 1277 (11th Cir. 2015); *see also City of Miami v. Bank Am. Corp.*, 800 F.3d 1262, 1288 (11th Cir. 2015) (noting that *White* failed to "cit[e] to a single Ohio state court case in its unjust enrichment analysis"), *vacated on other grounds by Bank of Am. Corp. v. City of Miami*, 137 S. Ct. 1296 (2017).[16]

More fundamentally, the City has failed to connect the externalities at issue to Distributors. The City argues that Distributors engaged in "wrongful conduct in ***marketing*** opioids," Opp. 40, but the Complaint alleges only that ***Manufacturers***—not Distributors—misrepresented the risks and benefits of opioid medications, *e.g.*, Compl. ¶¶ 96, 121, 124–30, 135; *see Korhonen v. Sentinel Ins., Ltd.*, 2014 WL 12789822, at *3 (D. Nev. Mar. 24, 2014) ("[I]t is axiomatic that the complaint may not be amended by the briefs in opposition to a motion to dismiss."). Thus, any externalities from treating opioid users who became addicted or overdosed as a result of a sea change in

[15] Other "externalities" cases that the City cites rely on *White*. *See City of Boston v. Smith & Wesson Corp.*, 2000 WL 1473568, at *18 (Mass. Super. Ct. July 13, 2000) (relying exclusively on *White*); *see also City of Los Angeles v. JPMorgan Chase & Co.*, 2014 WL 6453808, at *10 (C.D. Cal. Nov. 14, 2014) (relying on *White* and *City of Boston*); *City of Los Angeles v. Wells Fargo & Co.*, 22 F. Supp. 3d 1047, 1061 (C.D. Cal. 2014) (same); *Cincinnati v. Beretta U.S.A. Corp.*, 768 N.E.2d 1136, 1148 (Ohio 2002) (same).

[16] The City's reliance on pollution cases also is unavailing. For instance, *Little Hocking Water Association v. E.I. du Pont de Nemours & Co.*, 91 F. Supp. 3d 940, 986 (S.D. Ohio 2015), holds merely that a party may recover restitutionary-type relief for damage to its property where determining actual damages is not feasible—a scenario that is not relevant here. And *McCloud v. Testa*, 97 F.3d 1536, 1551 n.21 (6th Cir. 1996), was a First Amendment case that merely defined "negative externalities" in passing.

prescribing by physicians cannot be laid at the feet of Distributors, who are not alleged to have played any role in bringing about the alleged change.

Third, the City does not dispute that it failed to allege that Distributors sought a benefit from it. *See* Br. 31 (citing *Cox v. PNC Bank, Nat'l Ass'n*, 2017 WL 4544421, at *3 (D. Nev. Oct. 10, 2017)). The unjust enrichment claim fails for this independent reason.

Fourth, Distributors' opening brief (at 32) showed that the City failed to allege that Distributors appreciated the benefit allegedly conferred on them, as it was required to do. *See Unionamerica Mortg. & Equity Tr. v. McDonald*, 97 Nev. 210, 212, 626 P.2d 1272, 1273 (1981). The City does not dispute, and thereby tacitly admits, that it failed to meet this requirement.

Finally, the City does not dispute that it failed to allege an injustice. *See* Br. 32 (citing *Allegiant Air, LLC v. AAMG Mktg. Grp., LLC*, 2015 WL 6709144, at *3 (Nev. Oct. 29, 2015)). Instead, the City argues that whether Distributors' conduct was inequitable or unconscionable "raises issues of fact not appropriate for resolution at the pleading stage." Opp. 40. Not so: "To state an unjust enrichment claim, a plaintiff must plead … [a] benefit under circumstances such that it would be ***inequitable*** for him to retain the benefit without payment of the value thereof." *Lily Touchstone, LLC v. Nat'l Default Servicing Corp.*, 2017 WL 1383445, at *3 (D. Nev. Apr. 12, 2017). For this reason, too, the unjust enrichment claim should be dismissed.

CONCLUSION

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

AFFIRMATION

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

Dated this 28th day of May, 2019.

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CERTIFICATE OF SERVICE

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

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DATED this 28th day of May, 2019.

/s/ Jessie M. Helm
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Exhibit Index

Exhibit No.	Description	Page Count
1	Order Granting Defendants' Motion to Dismiss, *State of North Dakota ex rel. Wayne Stenehjem v. Purdue Pharma L.P., et al.*, Case no. 08-2018-CV-01300	27
2	Letter from Nevada Attorney General Adam Paul Laxalt to City of Reno Mayor Hillary Schieve (Nov. 8, 2017), *available at* https://www.scribd.com/document/363980974/Laxalt-letter-to-Schieve-11-8-17#fullscreen&from_embed	4

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EXHIBIT 1

EXHIBIT 1

STATE OF NORTH DAKOTA **IN DISTRICT COURT**

COUNTY OF BURLEIGH **SOUTH CENTRAL JUDICIAL DISTRICT**

State of North Dakota Ex Rel. Wayne Stenehjem, Attorney General,

Plaintiff,

v.

Purdue Pharma L.P.; Purdue Pharma, Inc., The Purdue Frederick Company, Inc., and Does 1 through 100, inclusive,

Defendants.

Case No. 08-2018-CV-01300

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

INTRODUCTION

[¶1] This matter is before the Court on the Defendants', Purdue Pharma L.P., Purdue Pharma Inc., and The Purdue Frederick Company Inc. (collectively "Purdue"), Motion to Dismiss for failure to state a claim. The State has sued Purdue in this matter seeking to essentially hold it liable for the impact of opioid overuse and addiction in North Dakota. The State asserts claims for alleged violations of the North Dakota Unlawful Sales or Advertising Practices statute, N.D.C.C. § 51-15-01 *et seq.* (Consumer Fraud law) (Counts 1 & 2) and the nuisance statute, N.D.C.C. § 42-01-01 *et seq.* (Count 3).

[¶2] In its Motion, Purdue argues the present case should be dismissed on the pleadings for various reasons, including the following:

1. The State's claims fail as a matter of law because it seeks to impose liability for Purdue's lawful promotion of FDA-approved medications for an FDA-approved use, i.e. the claims are preempted by federal law.
2. The State does not plead the essential elements of causation.
3. The State's statutory public nuisance claim fails because North Dakota

> courts have not extended that statute to cases involving the sale of goods, and, even it did apply, the State does not allege that Purdue unlawfully interfered with a public right in North Dakota.

[¶3] The Plaintiff, the State of North Dakota ex rel. Wayne Stenehjem, Attorney General ("the State"), resists the Motion arguing they have sufficiently pled their claims and Purdue's arguments mischaracterize the claims.

[¶4] A hearing was held on the Motion on February 26, 2019. Parrell Grossman and Elin Alm appeared on behalf of the State. Will Sachse appeared and argued on behalf of Purdue. Robert Stock also appeared on behalf of Purdue.

[¶5] The Court has extensively reviewed the parties' briefing on the present Motion, on more than one occasion, and has reviewed the oral arguments presented by both parties. The Court has also extensively reviewed the State's Complaint in this matter, paying careful attention to the allegations detailed therein, following oral argument.

FACTS

[¶6] The facts underlying this Action are detailed at length in the Complaint [DE 2], and in the parties' respective briefing on the present Motion to Dismiss [DE 13 & DE 34]. The Court will not restate the facts as outlined by the parties, but incorporates those facts by reference into this Order.

[¶7] The State of North Dakota filed this action against drug manufacturer, Purdue Pharma, alleging the opioid epidemic and a public health crisis in North Dakota were caused, in large part, by a fraudulent and deceptive marketing campaign intended by Purdue to increase sales of its opioid products. The State alleges it has paid and will continue to pay expenses for the medical care and law enforcement response of North Dakota's population due to overuse, addiction, injury, overdose, and death. The State

seeks damages, injunctive relief, and civil penalties.

[¶8] The State's Complaint asserts three causes of action: (1) violations of North Dakota's Consumer Fraud Law – Deceptive Practices (N.D.C.C. 51-15-01 et seq.); (2) violation of North Dakota's Consumer Fraud Law – Unconscionable Practices (N.D.C.C. 51-15-01 et seq.); and (3) statutory public nuisance.

[¶9] Purdue now seeks to dismiss the State's claims as a matter of law.

LEGAL STANDARD

[¶10] A motion to dismiss a complaint under N.D.R.Civ.P. 12(b)(6) test the legal sufficiency of the statement of the claim presented in the complaint. *Ziegelmann v. Daimler Chrysler Corp.*, 2002 ND 134, ¶ 5, 649 N.W.2d 556. "Because determinations on the merits are generally preferred to dismissal on the pleadings, Rule 12(b)(vi) motions are viewed with disfavor." *Id.* A complaint "should not be dismissed unless it is disclosed with certainty the impossibility of proving a claim upon which relief can be granted." *Id.* A court's scrutiny of the pleadings should be deferential to the plaintiff. *Id.*

[¶11] The Court notes at the outset that Purdue filed the present Motion as a Motion to Dismiss under Rule 12(b)(6). However, both parties have cited to multiple documents and sources outside of the pleadings and each relies heavily on these sources in their briefing. "When a motion to dismiss for failure to state a claim upon which relief can be granted is presented before the court and 'matters outside the pleadings are presented to and not excluded by the court, the motion should be treated as one for summary judgment and disposed of as provided in Rule 56.'" *Podrygula v. Bray*, 2014 ND 226, ¶7, 856 N.W.2d 791 (quoting *Livingood v. Meece*, 477 N.W.2d 183, 187 (N.D. 1991)).

[¶12] The Court does not intend to ignore or exclude the materials cited by the parties and incorporated in their briefing, which are technically outside the pleadings. Based on the parties framing of the issues, both in their briefing and at the hearing on the present Motion, and based upon Purdue's reliance on matters technically outside the pleadings, the Court will treat Purdue's Motion as a motion for summary judgment.

[¶13] Rule 56(c) of the North Dakota Rules of Civil Procedure directs a trial court to enter summary judgment "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

[¶14] The standard for summary judgment is well established:

> Summary judgment is a procedural device for the prompt resolution of a controversy on the merits without a trial if there are no genuine issues of material fact or inferences that can reasonably be drawn from undisputed facts, or if the only issues to be resolved are questions of law. A party moving for summary judgment has the burden of showing there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. . . . [W]e must view the evidence in the light most favorable to the party opposing the motion, and that party will be given the benefit of all favorable inferences which can reasonably be drawn from the record.

Golden v. SM Energy Co., 2013 ND 17, ¶ 7, 826 N.W.2d 610, 615 (quoting *Hamilton v. Woll*, 2012 ND 238, ¶ 9, 823 N.W.2d 754.

[¶15] "Although the party seeking summary judgment bears the initial burden of showing there is no genuine issue of material fact, the party opposing the motion may not simply rely upon the pleadings, but must present competent admissible evidence which raises an issue of material fact." *Black v. Abex Corp.*, 1999 ND 236, ¶ 23, 603 N.W.2d 182. "Summary judgment is appropriate against a party who fails to establish

the existence of a factual dispute on an essential element of her claim and on which she will bear the burden of proof at trial." *Id.*

ANALYSIS

A. Federal Preemption

[¶16] Purdue first argues the State's claims are improper because they seek to impose liability for lawful promotion of FDA-approved medications for an FDA-approved use. Specifically, Purdue argues that the FDA has approved opioid medications for long-term treatment of chronic non-cancer pain, and Purdue's promotion is consistent with the FDA-approved indications and labeling decisions. Because their promotion/marketing is consistent with FDA-approved labeling decisions and because the FDA has previously declined to alter the labeling and/or warnings, Purdue argues the State's claims are preempted.

[¶17] The Supremacy Clause of the United States Constitution makes federal law the supreme law of the land, and state law that conflicts with federal law is without effect. *Home of Economy v. Burlington N. Santa Fe R.R.*, 2005 ND 74, ¶ 5, 694 N.W.2d 840. Whether claims are preempted is a question of law that may be resolved at the pleading stage. *See NoDak Bancorporation v. Clarkson*, 471 N.W.2d 140, 142 (N.D. 1991). The North Dakota Supreme Court has described when federal law preempts state law under the Supremacy Clause:

> First, Congress can define explicitly the extent to which its enactments pre-empt state law. Pre-emption fundamentally is a question of congressional intent, and when Congress has made its intent known through explicit statutory language, the courts' task is an easy one.
>
> Second, in the absence of explicit statutory language, state law is pre-empted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively. Such an intent may be

> inferred from a "scheme of federal regulation ... so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," or where an Act of Congress "touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." Although this Court has not hesitated to draw an inference of field pre-emption where it is supported by the federal statutory and regulatory schemes, it has emphasized: "Where ... the field which Congress is said to have pre-empted" includes areas that have "been traditionally occupied by the States," congressional intent to supersede state laws must be "'clear and manifest.'"
>
> Finally, state law is pre-empted to the extent that it actually conflicts with federal law. Thus, the Court has found pre-emption where it is impossible for a private party to comply with both state and federal requirements, or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

Home of Economy v. Burlington N. Santa Fe R.R., 2005 ND 74, at ¶ 5.

[¶18] "The United States Supreme Court's framework for analyzing preemption claims starts with the assumption that Congress does not intend to displace state law." *Id.* at ¶ 6. "The assumption that Congress did not intend to displace state law is not triggered when a state regulated in an area where there has been history of significant federal presence." *Id.* (citing *United States v. Locke*, 529 U.S. 89 (2000)).

[¶19] Although there are three established types of federal preemption as detailed above, the parties in this case agree that "conflict preemption" is the only potential basis for preemption in this case. Conflict preemption exists where state law has not been completely displaced but is superseded to the extent that it conflicts with federal law. *Lefaivre v. KV Pharmaceutical Co.*, 636 F.3d 935, 939 (8th Cir. 2011). There are two types of conflict preemption, impossibility preemption and obstruction preemption. *Id.* "Impossibility preemption arises when compliance with both federal and state regulations is a physical impossibility. *Id.* (internal quotations omitted). "Obstruction

preemption exists when a state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.*

[¶20] "[T]he FDCA's treatment of prescription drugs includes neither an express preemption clause (as in the vaccine context, 42 U.S.C. § 300aa-22(b)(1)), nor an express non-preemption clause (as in the over-the-counter drug context, 21 U.S.C. §§ 379r(e), 379s(d))." *Mutual Pharmaceutical Co., Inc. v. Bartlett*, 570 U.S. 472, 493 (2013). "In the absence of that sort of 'explicit' expression of congressional intent, we are left to divine Congress' will from the duties the statute imposes." *Id.*

[¶21] In determining whether the State's claims against Purdue in this case are preempted in this case, the Court must review Congress' purpose and intent in enacting the Federal Food, Drug, and Cosmetic Act (FDCA). This was succinctly summarized by the 10th Circuit in *Cereveny v. Aventis, Inc.*, 855 F.3d 1091, 1096 (10th Cir. 2017):

> The Federal Food, Drug, and Cosmetic Act has long required a manufacturer to obtain approval from the FDA before the manufacturer can introduce a new drug in the market. 21 U.S.C. § 355(a). For brand-name drugs, a manufacturer must submit an application. *Mut. Pharm. Co. v. Bartlett*, 570 U.S. 472, 133 S.Ct. 2466, 2470–71, 186 L.Ed.2d 607 (2013). The application must include the proposed label, "full reports of investigations which have been made to show whether such drug is [safe and effective]," comprehensive information of the drug's composition and the "manufacture, processing, and packing of such drug," relevant nonclinical studies, and "any other data or information relevant to an evaluation of the safety and effectiveness of the drug product obtained or otherwise received by the applicant from any source." 21 U.S.C. § 355(b)(1); 21 C.F.R. § 314.50(c)(2)(i), (d)(1), (2), (5)(iv).
>
> If the FDA approves the application, the manufacturer generally is restricted from changing the label without advance permission from the FDA. 21 U.S.C. §§ 331(a), (c), 352; 21 C.F.R. § 314.70(a), (b). But an exception exists, allowing a manufacturer under certain circumstances to change the label before obtaining FDA approval. 21 C.F.R. § 314.70(c).4 But even when this exception applies, the FDA will ultimately approve the label change only if it is based on reasonable evidence of an

> association between the drug and a serious hazard. 21 C.F.R. §§ 201.80(e), 314.70(c)(6)(iii).

Cereveny v. Aventis, Inc., 855 F.3d 1091, 1096 (10th Cir. 2017).

[¶22] Purdue argues the FDCA "preempts state-law claims that seek to impose a duty to alter FDA-approved labeling or to market FDA-approved prescription medications in a way that conflicts with federal law." [DE 13 (Purdue's Brief in Support of Motion to Dismiss) at ¶ 20. Specifically, Purdue argues the State's claims are preempted because they require Purdue to include, either in the label for opioids or in its marketing of the opioids, a more extensive warning of the risks and benefits of Opioids than what has been approved by the FDA. Purdue contends federal law preempts such state law claims where they would require a pharmaceutical manufacturer to make statements about safety or efficacy that are inconsistent with what the FDA has required after it evaluated the available data.

[¶23] Similar issues were addressed by the United States Supreme Court in *Wyeth v. Levine*, 555 U.S. 555 (2009). At issue in *Levine* was the label warning and accompanying use instructions for Phenargen, an antihistamine approved by the FDA for the intravenous treatment of nausea. *Id.* at 559. The plaintiff argued the manufacturer violated its common law duty to warn of the risks associated with the injection of Phenargen, including the manner in which it is injected. *Id.* at 559-60. The manufacturer argued the claim was preempted because the FDA had previously approved the warning and use instructions for the drug's label. *Id.* at 560.

[¶24] The United States Supreme Court held that the state failure to warn claim was not preempted by FDA regulations. *Id.* at 581. The Court rejected the manufacturer's argument that, once a label is approved by the FDA, the manufacturer is not obligated

to seek revision of its contents. *Id.* at 570-71. The Court outlined that FDA regulations permit a drug manufacturer, without first obtaining FDA approval, to strengthen a warning contained in a label already approved by the FDA, if the manufacturer has evidence to support an altered warning. *Id.*

[¶25] The *Levine* Court established a "clear evidence" standard of proof required to support a claim of conflict preemption based on FDA labeling regulations. *Id.* at 571-72. *Levine* did not hold that impossibility preemption based on FDA labeling regulations is precluded in all cases. Rather, *Levine* established that the FDA labeling regulations do not preempt state law claims unless the manufacturer presents "clear evidence that the FDA would not have approved a change" to the drug's label or warning, thereby making it "impossible" for the manufacturer to comply with "both federal and state requirements." *Levine*, 555 U.S. at 571.

[¶26] The *Levine* Court did not define "clear evidence," and it did not establish the level of proof required to constitute such evidence. The Court simply held that in the circumstances of that case, there was no evidence that the manufacturer tried to alter the label to include additional warnings, and, therefore, the state law claims were not preempted by FDA regulations.

[¶27] In this case, the Court concludes the marketing practices of Purdue that the State claims are improper – including claims relating to OxyContin's appropriateness for long-term treatment of chronic pain [DE 2 (Complaint) at ¶¶107-08], maximum dosing [Complaint at ¶¶ 95, 115-16], and the use of screening tools [Complaint at ¶¶ 85-89], were consistent with the FDA-approved product labeling. *See generally* [DE 14-16 (Exhibits 1-3 to Purdue's Brief)].

[¶28] The State claims it is not pursuing an inadequate labeling theory, but simultaneously argues Purdue could have, and should have, strengthened its labeling and warnings to include additional risk information without prior FDA approval. [DE 34 (State's Opposition Brief) at 26-27]. The Complaint, however, contains no allegations of newly acquired information that could provide a basis for Purdue to change its labeling without prior FDA approval. Instead, consistent with the Supreme Court's decision in *Levine*, there is "clear evidence" that the FDA would not have approved changes to Purdue's labels to comport with the State's claims.

[¶29] In 2013, the FDA addressed the same issues raised by the State, and concluded that no modification to the product labeling was necessary. [DE 14-16 (Exhibits 1-3)]. In response to a 2012 citizen's petition from PROP, the FDA studied the available scientific evidence and concluded that it supports the use of ER/LA opioids to treat chronic non-cancer pain. [DE 17 (Exhibit 4)]. Therefore, the FDA has communicated its disagreement with the State's specific contention that Purdue "falsely and misleadingly touted the benefits of long-term opioid use and falsely and misleadingly suggested that these benefits were supported by scientific evidence," and therefore that it was improper to promote OxyContin for chronic pain. PROP and other commentators raised these same concerns as a reason to limit the indication for opioid medications, but the FDA rejected the request. [DE 17 (Exhibit 4) at 5]. Nor did the FDA direct Purdue to stop marketing the medications for long-term use. *Id.* at 14 ("FDA has determined that limiting the duration of use for opioid therapy to 90 days is not supportable.").

[¶30] As to certain risks that were already included in the labeling for Purdue's opioid medications, the FDA required Purdue to conduct additional studies and further assess those risks along with the benefits of use before any changes or additional warnings would be included. *Id.* at 11. The FDA is awaiting any new evidence to determine whether the medications' labeling should be revised to provide any different or additional information about those risks and benefits to physicians.

[¶31] The following allegations made by the State in its Complaint similarly conflict with statements the FDA has specifically approved:

[¶32] **Oxy Contin and 12-hour relief**: The State alleges "Purdue misleadingly promoted OxyContin as . . . providing 12 continuous hours of pain relief with one dose." [DE 2 (Complaint) at ¶ 115]. The FDA specifically addressed and rejected this claim. In a January 2004 citizen's petition, the Connecticut Attorney General requested labeling changes for OxyContin, asserting that OxyContin is not a true 12-hour drug and that using it on a more frequent dosing schedule increases its risk for diversion and abuse. In September 2008, the FDA denied the petition, and concluded the evidence failed to support that using OxyContin more frequently than every 12 hours created greater risk. *See* [DE 18 (FDA's September 2008 letter to Richard Blumenthal, Attorney General, State of Connecticut) at 14-17; cited by Complaint at ¶ 117). Since then, the FDA continues to approve OxyContin as a 12-hour medication. [DE 14 (Exhibit 1)].

[¶33] **Higher Doses**: The State alleges Purdue misrepresented the safety of increasing opioid doses. [DE 2 (Complaint) at ¶¶ 94-100]. This allegation is contrary to the FDA's labeling decision in response to the PROP Petition, which denied a request to limit the

dose of opioids. The FDA concluded "the available information does not demonstrate that the relationship [between opioid dose and risk of certain adverse events] is necessary a causal one." [DE 17 (Exhibit 4)].

[¶34] **Pseudoaddiction**: The State claims Purdue falsely promoted the concept of "psuedoaddiction" – drug seeking behavior that mimics addiction, occurring in patients who receive adequate pain relief – to diminish addiction concerns by implying this concept is substantiated by scientific evidence. [DE 2 (Complaint) at ¶¶ 77-84]. However, the FDA has approved labeling for Purdue's medications that embody this concept, both before and after the FDA's evidentiary review in response to the PROP petition. The FDA-approved labeling for extended-release opioid medications discusses "[d]rug-seeking behavior" in "persons with substance use disorders[,]" but also recognizes that "preoccupation with achieving adequate pain relief can be appropriate behavior in a patient with poor pain control." *See* FDA REMS, FDA Blueprint for Prescriber Education for Extended-Release and Long-Acting Opioid Analgesics at 3.

[¶35] **Manageability of Addiction Risk**: The State alleges Purdue misrepresented that addiction risk screening tools allow prescribers to identify and safely prescribe opioids to patients predisposed to addiction. [DE 2 (Complaint) at ¶¶ 85-89]. However, again, the State ignores that the FDA-approved REMS for Purdue's medications directs doctors to use screening tools and questionnaires to help mitigate opioid abuse. [DE 14 (Exhibit 1 - Oxy Contin Labeling)]. The FDA's response to the PROP Petition also clarified this distinction between physical dependence and addiction. [DE 17 (Exhibit 4) at 16 n.64 (the DSM-V "combines the substance abuse and substance dependence categories into a single disorder measured on a continuum, to try to avoid an

inappropriate linking of 'addiction' with 'physical dependence,' which are distinct issues.")].

[¶36] **Withdrawal**: The State alleges Purdue falsely claimed that "opioid withdrawal is not a problem." [DE 2 (Complaint) at ¶ 90]. The State contends symptoms associated with withdrawal can "decrease the likelihood that . . . patients will be able to taper or stop taking opioids." *Id.* However, the FDA approved Purdue's labeling, which informs doctors that physically dependent patients can be withdrawn safely by gradually tapering the dosage, and that addiction is "separate and distinct from physical dependence." [DE 14 (Exhibit 1 - Oxy Contin Labeling)].

[¶37] **Abuse-Deterrent Formulations**: The State alleges Purdue deceptively claimed that abuse-deterrent formulations of its opioid medications could "deter abuse," and "create false impressions that" abuse-deterrent formulations could "curb addiction and abuse." [DE 2 (Complaint) at ¶ 101]. The FDA-approved Oxy Contin labeling states that "OXYCONTIN is formulated with inactive ingredients intended to make the tablet more difficult to manipulate for misuse and abuse." [DE 14 (Exhibit 1 – OxyContin Labeling)]. Therefore, statements that abuse-deterrent formulations are designed to reduce the incidence of misuse, abuse, and diversion, [Compl. At ¶¶101-106], are consistent with the FDA-approved labeling and FDA policies. The State's allegations are also inconsistent with the FDA's 2013 "extensive review of the data regarding reformulated OxyConin" and the FDA's conclusion that reformulated Oxy Contin is "expected" to "make abuse via injection difficult," "reduce abuse via the intranasal route," and "deter certain types of misuse in therapeutic contexts." 78 Fed. Reg. 23273-01, 2013 WL 1650735 (Apr. 18, 2013).

[¶38] In other words, when presented with many of the same concerns the State alleges against Purdue in its Complaint regarding the enhanced risks of using opioids in high doses and for long durations, and with inadequate or misleading warnings, the FDA chose neither to impose those limits on opioid use nor to add warnings about those risks. The Court concludes this is "clear evidence" under *Levine* that the FDA would not have approved the changes to Purdue's labeling that the State contends were required to satisfy North Dakota law.

[¶39] "[T]he Court in *Levine* did not say that for evidence to be clear it must result from a formal procedure of approval or disapproval." *Rheinfrank v. Abbott Laboratories, Inc.*, 680 Fed. Appx. 369, 386 (6th Cir. 2017). The *Levine* Court concluded the claims were not preempted in that case because there was "**no** evidence in [the] record." *Wyeth*, 555 U.S. at 572. However, the Court noted that the claims in *Levine* "would have been preempted upon clear evidence that the FDA would have rejected the desired label change." *Cerveny v. Aventis, Inc.*, 855 F.3d 1091, 1098 10th Cir. 2017). "*Levine* did not characterize the proof standard as requiring a manufacturer in every case to prove that it would have been impossible to alter the drug's label." *Dobbs v. Wyeth Pharmaceuticals*, 797 F. Supp.2d 1264, 1279 (W.D. Okla. 2011). "[T]his court does not interpret *Levine* as imposing upon the drug manufacturer a duty to continually 'press' an enhanced warning which has been rejected by the FDA." *Id.*

[¶40] In this case, the Court concludes Purdue has met its burden under *Levine's* clear evidence standard. "[A] court cannot order a drug company to place on a label a warning if there is clear evidence that the FDA would not approve it." *Robinson v. McNeil Consumer Healthcare*, 615 F.3d 861, 873 (7th Cir. 2010). Given that the FDA

does not yet believe the state of the data supports additional warnings or altered labeling when presented with the issues asserted by the State in this case, it would have been impossible for Purdue to comply with what the State alleges was required under North Dakota law while still respecting the FDA's unwillingness to change the labeling and warnings, both on its labels for opioids and in its advertising.

[¶41] Accordingly, federal law preempts the State's state-law claims, which are based on the marketing of Purdue's medications for their FDA-approved uses, including for treatment of chronic, non-cancer pain. Those claims necessarily "conflict[] with the FDA's jurisdiction over drug labeling, and specifically its approval of" those indications. *Prohias v. Pfizer, Inc.*, 490 F.Supp.2d 1228, 1234 (S.D. Fla. 2007). Because Purdue has met its burden under *Wyeth v. Levine*, the court concludes the state law claims asserted by the State are preempted in this matter by federal law.

B. Consumer Fraud Law Claims

[¶42] In addition to the preemption arguments detailed above, Purdue also argues the State's Consumer Fraud Law claims (First and Second Causes of Action) should be dismissed because the State has failed to plead the essential element of causation. The State argues it is not required to allege causation to prevail under the Consumer Fraud Law.

[¶43] The Unlawful Sales or Advertising Practices Act prohibits deceptive or fraudulent conduct in the sale or advertising of merchandise:

> The act, use, or employment by any person of any deceptive act or practice, fraud, false pretense, false promise, or misrepresentation, with the intent that others rely thereon in connection with the sale or advertisement of any merchandise, whether or not any person has in fact been misled, deceived, or damaged thereby, is declared to be an unlawful practice. The act, use, or employment by any person of any act or

> practice, in connection with the sale or advertisement of any merchandise, which is unconscionable or which causes or is likely to cause substantial injury to a person which is not reasonably avoidable by the injured person and not outweighed by countervailing benefits to consumers or to competition, is declared to be an unlawful practice.

N.D.C.C. § 51-15-02.

[¶44] Purdue relies on *Ackre v. Chapman & Chapman, P.C.*, 2010 ND 167, 788 N.W.2d 344, for the argument that causation is an element the State must plead and prove to support its cause of action under the Consumer Fraud Law. *Ackre* involved a lawsuit brought under the private right of action in N.D.C.C. § 51-15-09. Because of this, the State argues "[w]hen the Court stated that the Plaintiff was required 'to show the putatively illegal action caused some threatened or actual injury to his or her legal rights and interests,' the Court was referring to what is required for a private plaintiff to have standing to bring a private right of action under N.D.C.C. § 51-15-09." [DE 34 (State's Response Brief) at ¶ 66]. Specifically, the State asserts "Consumer Fraud Actions brought by the Attorney General are civil law enforcement actions, not civil tort actions, and causation, and requirements applied to tort actions are, therefore, inapplicable to consumer fraud claims." [DE 34 (State's Response Brief) at ¶ 65].

[¶45] These arguments blatantly ignore the State's own Complaint and the types of damages it is seeking in this lawsuit.

[¶46] The State specifically alleges that "Purdue's conduct has resulted in a financial burden on the State of North Dakota." [DE 2 (Complaint) at ¶ 15]. It goes on to allege that the State and its Departments have "spent millions of dollars on opioid prescriptions for chronic pain and addiction treatment – costs directly attributable to the opioids Purdue unleashed on the State." *Id.* "Purdue's deceptive marketing of opioids

and the resulting opioid epidemic also has caused the State to incur additional cost for law enforcement, North Dakota Workforce Safety and Insurance, Department of Corrections, North Dakota Department of Human Services, and North Dakota Behavioral Health and other agencies." *Id.* at ¶ 16. "The State seeks injunctive relief, disgorgement and restitution for amounts the State's Medicaid program and other State agencies have paid for excessive opioid prescriptions." *Id.* at ¶ 17. The State also clearly asserts it is seeking "restitution for North Dakota consumers who, like the State, paid for excessive prescriptions of opioids for chronic pain." *Id.*

[¶47] The State's Complaint clearly includes requests for money damages for purported violations of the Consumer Fraud Law. For additional examples, the Complaint requests the Court to "restore any loss suffered by persons as a result of the deceptive acts or practices of Defendants as provided in N.D.C.C. § 51-15-07." [DE 2 (Complaint) at ¶ 186(d) (emphasis added)]. The State also alleges "Purdue is responsible for the claims submitted and the amount the State's Medicaid program and other State agencies spent on its opioids." *Id.* at ¶ 182. The Prayer for Relief also requests "[t]hat Purdue be ordered to pay restitution to the State, [and] State agencies, including the Department of Human Services." [DE 2 (Complaint – Prayer for Relief (E)].

[¶48] The plain language of § 51-15-07 requires proof that the money to be restored was acquired "by means of" the allegedly deceptive act. Whether styled as a claim for money damages or for restitution pursuant to § 51-15-07, the requirement is the same: The State must plead and prove causation, i.e. the loss of money occurred "by means of" the alleged deception. *Compare* N.D.C.C. § 51-15-09 (allowing claim "against any

person who has acquired any moneys or property by means of any practice declared to be unlawful un this chapter") (emphasis added) *with* N.D.C.C. § 51-15-07 (allowing restitution of money "that may have been acquired by means of any practice in this chapter . . . declared to be unlawful") (emphasis added).

[¶49] When the State makes a claim under the Consumer Fraud Law for out-of-pocket losses, it is no different than a private plaintiff's claim to recover actual damages suffered "by means of" the deception. *See* N.D.C.C. § 51-15-09. There is simply no basis in North Dakota law to conclude the "by means of" language in the private consumer section of the Consumer Fraud Act (51-15-09) has a different meaning than the "by means of" language in § 51-15-07.

[¶50] The State's Complaint fails to identify which losses occurred "by means of" – i.e., because of – any specific alleged deception or misrepresentation on the part of Purdue. The State does not allege that every opioid prescription in North Dakota was unlawful. In fact, the State expressly acknowledges that it does not seek an outright ban on the sale of opioids. [DE 34 (State's Response Brief) at 25]. The State acknowledges that "not every sale" of opioids "contributed" to the public health problem. *Id.* at 49. To put it succinctly, the State essentially alleges that there is an opioid problem in North Dakota that has caused the State and its citizens great "financial burden", and that the problem was the fault of Purdue and its marketing, but then completely fails to allege how Purdue's allegedly deceptive marketing actually caused the alleged great "financial burden."

[¶51] The State does not identify any North Dakota doctor who ever received any specific purported misrepresentation made by Purdue, or who wrote a medically

unnecessary prescription because of those alleged statements. The State also does not allege any false statement caused the State to reimburse prescriptions it otherwise would not have reimbursed. Under the State's theory, it can recover for reimbursements under the Consumer Fraud Act even if the State fails to show any such reimbursements were caused by a deception, and even when the State continued to pay for reimbursements with knowledge of the alleged deception.

[¶52] Rather than plead the requisite specifics, the Complaint offers only conclusory allegations that Purdue had "a marketing campaign" since the 1990s, which was "designed to convince prescribers and the public that its opioids are effective for treating chronic pain" and allegedly resulted in the routine prescription of opioids for long-term use. [DE 2 (Complaint) at ¶ 4]. These allegations are unconnected to any particular North Dakota doctor or prescription. Additionally, the State fails to plead how the alleged misstatements, most of which are alleged to have occurred over a decade ago, could have caused specific prescribing decisions to this day.

[¶53] A generalized "fraud-on-the-market" theory does not suffice to establish causation. In cases that assert claims for fraudulent or deceptive pharmaceutical marketing, "a fraud-on-the-market theory cannot plead the necessary element of causation because the relationship between the defendants' alleged misrepresentations and the purported loss suffered by the patients is so attenuated . . . that it would effectively be nonexistent." *In re Actimmune Mktg. Litig.*, 614 F.Sup.2d 1037, 1054 (N.D. Cal. 2009), aff'd, 464 F.App'x 651 (9th Cir. 2011).

[¶54] The State acknowledges that patients may not lawfully obtain Purdue's opioid medications without a valid prescription. [DE 2 (Complaint) at ¶ 11]. The State also

recognizes that doctors themselves have many resources available about Purdue's products, including FDA-approved labeling that discloses the risks Purdue allegedly concealed. *Id.* at ¶¶ 69-70, 72-73, 75-76, 83-84, 88, 93, 97-100, 104, 111-12, 117.

[¶55] Even assuming, for purposes of argument only, that Purdue had failed to disclose these risks, such a failure would not be the "proximate cause of a patient's injury if the prescribing physician had independent knowledge of the risk that the adequate warning should have communicated." *Ehlis v. Shire Richwood, Inc.*, 367 F.3d 1013, 1016 (8th Cir. 2004) (internal quotations and citations omitted) (concluding North Dakota would adopt the "learned intermediary" doctrine). The State's theory in this case depends on an extremely attenuated, multi-step, and remote causal chain. The State's claims – no matter how styled – have to account for the independent actor (i.e. doctors) who stands between Purdue's alleged conduct and the alleged harm. *Id.* In the face of information available to physicians, the State has not pleaded facts showing that Purdue's alleged misrepresentations – as opposed to the undisputed multiple layers of individualized decision-making by doctors and patients or other possible intervening causes – led to any relevant prescribing or reimbursement decision.

[¶56] A defendant is not liable for alleged injuries that either result from a superseding, intervening cause, or "if the cause is remote" from the injury. *Moum v. Maercklein*, 201 N.W.2d 399, 403 (N.D. 1972); *see also Price v. Purdue Pharma Co.*, 920 So.2d 479, 485-86 (Miss. 2006) (observing lack of proximate cause for claims of opioid addiction brought against Purdue, because injuries were the result of illegally obtained and improper use of opioids). "A superseding cause is an act of a third person or other force which by its intervention prevents the actor from being liable for harm to

another which his antecedent negligence is a substantial factor in bringing about." *Leistra v. Bucyrus-Erie Co.*, 443 F.2d 157, 163 n.3 (8th Cir. 1971) (internal quotations omitted).

[¶57] *Ashley County, Ark. v. Pfizer, Inc.*, 552 F.3d 659 (8th Cir. 2009), which was decided under analogous facts, is instructive. In *Ashely County*, Arkansas counties brought claims against pharmaceutical companies for, *inter alia*, public nuisance and deceptive trade practices, seeking "compensation to recoup the costs expended by the counties in dealing with the societal effects of the methamphetamine epidemic in Arkansas, with liability premised on the use of the Defendants' products in the methamphetamine manufacturing process. *Id.* at 663. The Eighth Circuit affirmed the dismissal of the complaint for failure to state a claim, and determined that "[p]roximate cause seems an appropriate avenue for limiting liability in this context . . . particularly 'where an effect may be a proliferation of lawsuits not merely against these defendants but against other types of commercial enterprises – manufacturers, say, of liquor, anti-depressants, SUVs, or violent video games – in order to address a myriad of societal problems regardless of the distance between the 'causes' of the 'problems' and their alleged consequences.'" *Id.* at 671-72 (quoting *Dist. of Columbia v. Beretta, U.S.A., Corp.*, 872 A.2d 633, 651 (D.C. 2005)).

[¶58] Similarly, in this case, the connection between the alleged misconduct and the prescription depends on multiple, independent, intervening events and actors. These intervening events and actors include: the doctor's independent medical judgment, the patient's decision whether and how to use the medication, the patient's response to the medication, and the State's own decision to reimburse the prescriptions. Additionally,

it is nearly impossible to trace any of the harms the State alleges back to solely Purdue's own medications, as opposed to other manufacture's opioids and other unlawful opioids. Holding Purdue solely responsible for the entire opioid epidemic in North Dakota is difficult to comprehend, especially given Purdue's small share of the overall market for lawful opioids. It is also difficult to comprehend given the large market for unlawful opioids.

[¶59] The State's claims that Purdue can, should, or should have in the past, "changed the message" regarding opioids to include stronger warnings and labeling is not taken well by the Court. Even if Purdue can and does "change the message," Purdue has absolutely no control over how doctors prescribe the drug and how patients choose to use the drug. Purdue also has no control over how other manufacturers of opioids promote the drugs. Doctors can be loose with their prescribing practices, and patients do not always follow their doctor's orders. The Court does not mean to suggest this is the sole cause of the opioid crisis in North Dakota. But the State has failed to allege facts which, if true, show that Purdue, alone, caused the opioid crisis for which the State seeks compensation. The causal chain the State attempts to allege is simply too attenuated.

[¶60] The State seems to acknowledge its attenuated theory of causation in its Complaint by identifying a number of behaviors that contribute to the opioid crisis, such as "doctor shopping, forged prescriptions, falsified pharmacy records, and employees who steal from their place of employment." [DE 2 (Complaint) at ¶ 151]. The State also clearly acknowledges the "high statistic of people that first get addicted after obtaining opioids free from a friend or relative." *Id.* at ¶ 145. These are not Purdue's

acts or misrepresentations, yet the State seeks to hold Purdue solely liable. The State's effort to hold one company to account for this entire, complex public health issue oversimplifies the problem.

[¶61] The Court concludes the State's causal theory is too attenuated and requires dismissal of the State's Consumer Fraud Law Claims as a matter of law. If the State can proceed on the causation it has alleged in this lawsuit against Purdue, it begs the question of how far the causal chain can go. There are a seemingly limitless number of actors who could have "tried harder" under the State's theory and claims. Purdue is no higher up in the causal chain under the facts alleged by the State than any other actor who could be held liable. The State has not pleaded facts that Purdue's alleged misrepresentations caused North Dakota doctors to write medically unnecessary prescriptions or that Purdue's alleged misrepresentation caused the State to reimburse prescriptions.

[¶62] Because the State has failed to adequately plead causation, its Consumer Fraud Law claims fail as a matter of law and must be dismissed.

C. Public Nuisance

[¶63] Purdue additionally argues the State's Third Cause of Action for public nuisance must be dismissed because no North Dakota court has extended the public nuisance statutes to cases involving the sale of goods. Because the State's nuisance claim in this case revolves around the effects of a product (opioids) sold and used in North Dakota, Purdue argues the State's public nuisance claim fails.

[¶64] The State's claim for public nuisance is brought under N.D.C.C. § 42-01-01 *et seq.* (nuisance) and 42-02-01 *et seq.* (abatement of common nuisance). A nuisance is defined by N.D.C.C. § 42–01–01, which provides:

> A nuisance consists in unlawfully doing an act or omitting to perform a duty, which act or omission:
>
> 1. Annoys, injures, or endangers the comfort, repose, health, or safety of others;
> 2. Offends decency;
> 3. Unlawfully interferes with, obstructs or tends to obstruct, or renders dangerous for passage, any lake, navigable river, bay, stream, canal, basin, public park, square, street, or highway; or
> 4. In any way renders other persons insecure in life or in the use of property.

N.D.C.C. § 42-01-01.

[¶65] "A public nuisance is one which at the same time affects an entire community or neighborhood or any considerable number of persons, although the extent of the annoyance or damage inflicted upon the individuals may be unequal." N.D.C.C. § 42–01–06. The N.D.C.C. § 42–01–01 definition of nuisance applies to public nuisance claims. *Kappenman v. Klipfel*, 2009 ND 89, ¶ 36, 765 N.W.2d 716.

[¶66] In response to Purdue's argument on this issue, the State attempts to characterize its claims as focusing only on Purdue's marketing conduct, and not on the actual sale of opioids. The State alleges "[t]he Complaint does not identify Purdue's sale of the opioids as the public nuisance; instead, the nuisance is Purdue's misrepresentations and deceptive promotion of their risks and benefits." [DE 34 (State's Response Brief) at ¶ 73]. This argument, again, ignores the clear allegations in the State's Complaint.

[¶67] The State specifically alleges a public nuisance in this case in that "Purdue's conduct unreasonably interfered with the public health, welfare, and safety of North Dakota residents by expanding the opioid market and opioid use through an aggressive and successful marketing scheme that relied on intentional deception and misrepresentation regarding the benefits, safety and efficacy of prescription opioids." [DE 34 (State's Response Brief) at ¶ 72; and DE 2 (Complaint) at ¶¶ 4, 7, & 9]. The State further alleges that Purdue's conduct "caused and maintained the overprescribing and sale of opioid for long-term treatment of chronic pain at such volumes and degrees as to create an epidemic." [DE 2 (Complaint) at ¶ 201].

[¶68] The State cannot escape the true nature of the nuisance claim it has pleaded. The "overprescribing and sale" of opioids manufactured by Purdue are directly at the heart of the State's nuisance claim, regardless of how it otherwise now tries to characterize its claim.

[¶69] Purdue is correct, as the State concedes, that North Dakota courts have not extended the nuisance statute to cases involving the sale of goods. [DE 34 (State's Response Brief) at ¶ 74; DE 13 (Purdue's Brief in Support of Motion) at ¶ 45]. Such a situation was addressed by the Eighth Circuit Court of Appeals in *Tioga Pub. Sch. Dist. No. 15 of Williams Cty. State of N. Dakota v. United States Gypsum Co.*, 984 F.2d 915, 920 (8th Cir. 1993). Although *Tioga* was a federal case, in the absence of binding North Dakota Supreme Court decisions interpreting North Dakota law, federal court decisions are given deference. *N. Dakota Fair Hous. Council, Inc. v. Peterson*, 2001 ND 81, ¶¶ 20-24, 625 N.W.2d 551, 559 (N.D. 2001).

[¶70] In *Tioga*, the 8th Circuit concluded that the North Dakota Supreme Court would not extend the nuisance doctrine to cases involving the sale of goods. *Tioga*, 984 F.2d at 920. The Court reasoned:

> Tioga has not presented us with any North Dakota cases extending the application of the nuisance statute to situations where one party has sold to the other a product that later is alleged to constitute a nuisance, nor has our research disclosed any such cases. North Dakota cases applying the state's nuisance statute all appear to arise in the classic context of a landowner or other person in control of property conducting an activity on his land in such a manner as to interfere with the property rights of a neighbor

Id. (emphasis added).

[¶71] The State urges this Court to distinguish *Tioga* "because it does not arise from a direct injury to a private individual from the use of the product purchased, and it's not a product liability or warranty type claim." [DE 34 (State's Response Brief) at ¶ 74]. However, the statutory definition of nuisance applies equally to public and private nuisances. Additionally, as the Eighth Circuit warned in *Tioga*:

> [T]o interpret the nuisance statute in the manner espoused by Tioga would in effect totally rewrite North Dakota tort law. Under Tioga's theory, any injury suffered in North Dakota would give rise to a cause of action under section 43–02–01 regardless of the defendant's degree of culpability or of the availability of other traditional tort law theories of recovery. Nuisance thus would become a monster that would devour in one gulp the entire law of tort, a development we cannot imagine the North Dakota legislature intended when it enacted the nuisance statute.

Tioga, 984 F.2d at 921.

[¶72] This Court agrees with the reasoning of the Eighth Circuit in *Tioga*. The State is clearly seeking to extend the application of the nuisance statute to a situation where one party has sold to another a product that later is alleged to constitute a nuisance. *Id.* at 920 (emphasis added). The reality is that Purdue has no control over its product after it

is sold to distributors, then to pharmacies, and then prescribed to consumers, i.e. after it enters the market. Purdue cannot control how doctors prescribe its products and it certainly cannot control how individual patients use and respond to its products, regardless of any warning or instruction Purdue may give.

[¶73] No North Dakota court has extended the public nuisance statutes to cases involving the sale of goods. The Eighth Circuit Court of Appeals, while applying North Dakota law, expressly declined to do so, and this Court declines to do so in this case. The State does not have a cause of action for nuisance against Purdue since its nuisance claim arises from the "overprescribing and sale" of opioids manufactured by Purdue. Therefore, the State's claim for public nuisance must be, and is, dismissed.

CONCLUSION

[¶74] Based upon the foregoing, the Court concludes that the State has not adequately pleaded its causes of action against Purdue. Therefore, for all the reasons stated above, Purdue's Motion to Dismiss is, in all respects, hereby **GRANTED.**

[¶75] Counsel for Purdue is tasked with the responsibility of drafting a judgment consistent with this memorandum.

IT IS SO ORDERED.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated this 10th day of May, 2019.

BY THE COURT:

James S. Hill

James S. Hill, District Judge
South Central Judicial District

cc:

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EXHIBIT 2

EXHIBIT 2

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November 8, 2017

Via Electronic Mail: schieveh@reno.gov

Hillary Schieve, Mayor
City of Reno
1 E. First Street
City of Reno, Nevada 89501

Re: City of Reno Potential Opioid Litigation by Contingency Plaintiff's Counsel

Dear Mayor Schieve:

Thank you for your email on November 6, 2017 in response to the Attorney General's Office's inquiry regarding the City of Reno's discussion and presentation concerning potential litigation against the opioid industry. As you know, the State of Nevada, through key stakeholders including the Governor, the Attorney General, and numerous agencies at the State and local levels are committed—like you—to addressing the opioid crisis in Nevada. As we speak, coordinated action is taking place at the appropriate statewide level—to balance and utilize all resources in a manner that benefits all Nevadans, municipalities, counties, and the State.

The opioid epidemic, like fire, recognizes no city, county, or state boundaries; it threatens all residents of Nevada. Governor Sandoval's opioid taskforce has brought public agencies and private organizations together in a manner that demonstrates the unity that has strengthened Nevada from its battle-born inception in 1864. We invite you, in that spirit of strength, to commit to battle Nevada's opioid crisis with our office, in a unified front, not separately.

This is what Nevada law provides. The Legislature granted the Attorney General primary jurisdiction to investigate and litigate deceptive trade practices, claims, and violations. *See* NRS 598. For that reason, among others,

the Office of Attorney General represents all Nevadans in this area. This is doubly true when it comes to bipartisan multistate litigation, where this office is particularly experienced. The Attorney General's Office, through its Bureau of Consumer Protection, has successfully resolved hundreds of deceptive trade practice investigations and lawsuits in Nevada, for the benefit of all Nevadans. These include global resolutions in the National Tobacco Settlement, the National Mortgage Settlement, and, most recently, the Volkswagen Emissions Settlement. In each case, court-ordered injunctive relief stopped deceptive conduct against all Nevadans. And money awarded helped establish programs that continue to benefit constituents statewide, including (i) the Millennium Scholarship, which has been awarded to thousands of Nevada's students, (ii) the Home Again Program, which benefited the entire State during the housing crisis, and (iii) the Prescription for Addiction initiative, which brings together law enforcement, non-profits, and victim-service providers from throughout the State, respectively.

Having one entity – the Office of the Nevada Attorney General – take the lead on deceptive trade cases for the entire State is not only consistent with the longstanding legislative intent of the Nevada's Deceptive Trade Practices Act, but it has ensured that lawyers in our office have developed unrivaled expertise and institutional knowledge to best serve all Nevadans. The law in other states may differ. For instance, Ohio's Deceptive Trade Practices Act expressly allows a "government subdivision," like a city, to bring a deceptive trade practices suit. *See* http://codes.ohio.gov/orc/4165. Likewise, in the State of Washington, recent case law permits cities and counties to sue for deceptive trade practices. Nevada's deceptive trade practices law has no such provision. Therefore, Reno's ability to file a meritorious suit under this statute – the most powerful legal theory available in Nevada – is dubious. *See* NRS 0.039. Although there may be other novel legal theories available to the City, including public nuisance claims, the consequence of asserting those actions has the potential to harm the bipartisan multistate investigation that is currently underway.

Practically speaking, the Nevada Attorney General has been actively involved in its bipartisan multistate investigation against manufacturers and distributors in the opioid industry for more than a year. Like other multistate investigations, the bipartisan coalition of states involved in this investigation has the resources to handle this type of investigation. Included in the investigation is significant pre-complaint discovery, ongoing review of millions

of documents, nationally coordinated subpoenas, and multiple interviews. This coalition has leverage that individual cities, alone, may not. The ultimate goal behind the investigation is to find a global resolution. This would impose injunctive relief to keep the opioid crisis from getting worse, as well as assist with funding to help the State of Nevada as a whole, and each of its residents, municipalities, and counties, address the crisis.

This office commends your determination to protect the futures of the residents of Reno. You are right to consider all possible measures. Your initiative is a credit to all Nevadans.

And of course, we share your goals. That's why we want to tell you that our office is convinced that the City of Reno's initiation of litigation may, unintentionally, undermine Nevada's position in the multistate investigation our office has been actively participating in for over a year. More specifically, we believe that a lawsuit by the City of Reno could thwart our office's ongoing investigation, any potential discussions with opioids manufacturers, and any potential agreements that could uniformly address the opioid crisis in Nevada. We are sure you intend no such consequences, which is what prompts us to write.

Another potential unintended consequence of retaining outside counsel, as you are considering, may be that the City of Reno remains mired in costly litigation long after the Attorney General's Office resolves its claims on behalf of the rest of the State. In other words, this means the City of Reno could be expressly excluded by the targets of the investigation in any settlement with the multistate. Such patchwork litigation has never been attempted in Nevada and I am sure we agree that the stakes are too high to start now. For instance, one danger is that the City of Reno, even if successful in its own behalf, could undermine a full and fair recovery for the rest of the State.

We understand that the City of Reno is concerned about recovery for its constituents, but as public servants we owe it to Nevada's families to speak with one voice. We should avoid actions that would let the companies under investigation pit Nevadans against Nevadans. For that reason, we want to assure you that a full and fair recovery by the Attorney General's Office will vindicate the rights of all Nevadans, stopping deceptive conduct in its tracks and potentially resulting in future funding for statewide programs, just as it has in the past. This will benefit the City of Reno and its residents. We look

forward to working with you to maintain a unified front through the ongoing bipartisan multistate investigation into the opioid industry.

Sincerely,

/s/ Adam Paul Laxalt
Adam Paul Laxalt
Nevada Attorney General

/s/ Ernest D. Figueroa
Ernest D. Figueroa
Nevada Consumer Advocate
Chief of Consumer Protection