

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.

—**Electronically Filed**
May 04 2020 10:40 a.m.
District Court Case No. **Elizabeth A. Brown**
CV18-01815 of Supreme Court

PETITIONERS' APPENDIX
VOLUME XIX

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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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9/18/2018	Complaint (Case No. CV18-01895)	II	PA00110	PA00167
12/7/2017	Complaint and Demand for Jury Trial (Case No. A-17-765828-C)	I	PA00001	PA00050
3/5/2019	Distributors' Joint Motion to Dismiss First Amended Complaint	III	PA00265	PA00386
5/28/2019	Distributors' Joint Reply in Support of Motion to Dismiss First Amended Complaint	X	PA01215	PA01285
10/4/2019	Distributors' Response to Plaintiff's Supplemental Briefing re Motions to Dismiss	XVIII	PA02561	PA02566
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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 XIX 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 XIX 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 XIX 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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6 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

7 IN AND FOR THE COUNTY OF WASHOE

8 HONORABLE BARRY L. BRESLOW

9 CITY OF RENO,

10 Plaintiff,

11 vs.

Case No. CV18-01895

12 PURDUE PHARMA, L.P.; PURDUE Department No. 8

13 PHARMA, INC.; THE PURDUE

14 FREDERICK COMPANY, INC.,

15 dba THE PURDUE FREDERICK

16 COMPANY, INC.; PURDUE

17 PHARMACEUTICALS, LP; TEVA

18 PHARMACEUTICALS USA, INC.;

19 MCKESSON CORPORATION;

20 AMERISOURCEBERGEN DRUG

21 CORPORATION; CARDINAL HEALTH,

22 INC.; CARDINAL HEALTH 6, INC.;

23 CARDINAL HEALTH TECHNOLOGIES

24 LLC; CARDINAL HEALTH 108 LLC,

dba METRO MEDICAL SUPPLY;

DEPOMED, INC.; CEPHALON, INC.;

ENDO HEALTH SOLUTIONS, INC.;

ENDO PHARMACEUTICALS, INC.;

ALLERGAN USA, INC.; ALLERGAN

FINANCE LLC, fka ACTAVIS, INC.,

fka WATSON PHARMACEUTICALS, INC.;

WATSON LABORATORIES, INC.; ACTAVIS

PHARMA, INC., fka WATSON PHARMA,

INC.; ACTAVIS LLC; MALLINCKRODT

LLC; MALLINCKRODT BRAND

PHARMACEUTICALS, INC.; and

1 MALLINCKRODT US HOLDINGS, INC.;
ROBERT GENE RAND, M.D. and RAND
2 FAMILY CARE, LLC; DOES 1 through
100, ROE CORPORATIONS 1 through
3 100; and ZOE PHARMACIES 1 through
100, inclusive,

4 Defendants.

-----/

5 TRANSCRIPT OF PROCEEDINGS

Motions

6 January 7, 2020

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1 RENO, NEVADA, TUESDAY, JANUARY 7, 2020, 9:00 A.M.

2 THE COURT: Good morning, everyone.

3 Please be seated.

4 Welcome -- or for most of you, welcome back -- to
5 Department 8 of Nevada's Second Judicial District.

6 I'm Judge Breslow, presiding judge here.

7 Before we begin with the substance of the hearings
8 today and tomorrow, a couple pieces of information. And then
9 I would like everyone to please identify themselves on the
10 record, slowly, loudly, clearly, both your name, and who they
11 represent.

12 But a couple comments. First of all, a few days ago
13 the Court indicated, by way of a short minute order or
14 scheduling order, that this would be a sort of an
15 early-morning release, followed by resuming in the afternoon.

16 The conflict on the Court's schedule has been
17 resolved, so we will be on regular court days, both today
18 and, if necessary, tomorrow, which essentially means 9:00 to
19 5:00, with a lunch break and a few comfort breaks mixed in.
20 That's number one.

21 Number two, tomorrow -- I forgot to mention -- we
22 don't start till 10:00 a.m., because I do have some criminal
23 justice matters that do need attention between 8:50 and 10:00
24 a.m. So 10:00 a.m. start tomorrow.

1 Number three, I want to talk about a well-known rule
2 of professional conduct to all of us, Rule 3.6 (a). And just
3 as a reminder, it states, "A lawyer who is participating or
4 who has participated in the investigation or litigation of a
5 matter shall not make an extra-judicial statement that the
6 lawyer knows or reasonably should know will be disseminated
7 by means of public communication, and will have" -- this is
8 the key part for our purposes -- "a substantial likelihood of
9 materially prejudicing an adjudicative proceeding in the
10 matter."

11 That's the rule. Now, of course, there are
12 exceptions. 3.6 (b), notwithstanding sub (a), "A lawyer may
13 state" -- and then it enumerates them. Most important for
14 our purpose, "the claimed offense or defense involved and,
15 except when prohibited by law, the identity of the persons
16 involved."

17 Now, I don't know how this is all going to shake out.
18 I don't know if all or some of this case is going to survive
19 pre-trial motions. I don't know which portions, if any, will
20 make it to trial. And I don't know which portions of those
21 portions will make it before a jury.

22 But I do know this: If there is going to be a jury
23 trial here in Washoe County on a case of this magnitude, with
24 this much attention, both locally, statewide, and nationwide,

1 we need to make sure that we don't cross the line when we
2 make comments to interested parties about the case, the
3 claims, the defenses.

4 It's already going to be difficult enough to find an
5 impartial, fair jury, who either knows nothing about this
6 dispute, or knows about it, but has not made their mind up in
7 such a way that it impairs their ability to be fair and
8 impartial.

9 So I'm reminding all of us to be extremely judicious
10 in the manner in which we approach discussing this case with
11 the media or other third persons. Don't go over the line.
12 And I would encourage all of us not to get close to it.

13 Because if I feel that somebody is forgetting the
14 admonitions of Rule 3.6 (a), there will be consequences. And
15 nobody wants that. The Court doesn't want it, and counsel
16 and the parties don't want that.

17 So please just keep that at the front of your
18 thinking if you discuss what's going on in this case with
19 others.

20 Now, you know, this isn't Las Vegas, it's not
21 Oklahoma, it's not New York, it's not Chicago. That's of
22 less moment to the Court. But what happens in this county I
23 don't want in any way to impair our ability to impanel a
24 jury, if we get that far, or to influence any witness. So

1 enough said about that.

2 Next, there have been myriad pro hac vice
3 applications filed with the court. There have been many
4 filed and submitted on short notice. There have been many
5 filed and submitted that the Court has entered on less than
6 usual briefing. And I'm willing to do that. I understand
7 that this case is a bit dynamic and fluid, and there are a
8 lot of attorneys nationwide handling many claims, and that
9 sometimes a party needs to have a new counsel involved so
10 that he or she can represent to the Court the position being
11 advanced. So I will do what I can do to make that easier.

12 But if you're going to ask somebody to be admitted
13 very quickly, you need to, at a minimum, certify to the Court
14 that you've reached out to the opposing side, and there is no
15 objection.

16 If you just say, "I need to get John Doe or Mary Doe
17 in the case, and, please, there's a big hearing, shorten
18 time," if you don't give the Court something to base an order
19 on, I'm going to say no, without prejudice, to renew it.

20 So I'll do it quickly, I'll bend the rules a bit
21 here, under the circumstances; but at least advise the Court,
22 please, that there will be no objection.

23 And you might say, "Well, Judge, there's never an
24 objection, so can't you just assume that?" The answer is no,

1 because occasionally there are objections. It's rare, it's
2 exceptional, but it's not unprecedented. So call the other
3 side, reach out to them, and certify that they've advised
4 you, and you are advising the Court there will be no
5 objection, and I'll quickly sign an order allowing somebody
6 to address the Court.

7 Candidly, the Court was a bit -- I'm trying to
8 remember if this is the right word -- nonplused, a little bit
9 surprised and perplexed, by the supplemental briefing that
10 this hearing was really continued on, that occurred in the
11 fall.

12 I recognize that there was information that,
13 particularly, the plaintiff wanted to bring to the Court's
14 attention in opposition to the various motions that it
15 believed was developed by virtue of the Sixth Circuit, I
16 believe, directing Judge Polster, if I have that right, the
17 MDL judge in Cleveland, to allow the release of otherwise
18 previously designated confidential information, and that that
19 might be informative to the Court on some or all of the
20 claims or defenses being advanced in the motions.

21 And so with a level of consensus when we were here in
22 August -- a bit to the surprise, as I recall, of some of the
23 defendants -- but with general consensus, the Court agreed to
24 allow additional briefing and responses, and then have it

1 submitted, and then hearing today.

2 But I use the phrase "nonplused" because, candidly,
3 that information was very, very modestly informative to the
4 Court for purposes of challenging whether the claims here are
5 viable and can go forward.

6 Would they potentially have a different impact at a
7 different stage of the case? Maybe.

8 Would some or all of it be admissible at a trial in
9 front of a jury if the claims survived? Maybe.

10 But for purposes of what we're here to do, it had
11 marginal impact. Not none. It had some. But it didn't
12 exactly make more clear some of the areas of law that are
13 being addressed in this case and in these motions, didn't
14 further explain the jurisprudence, it didn't make a more
15 detailed analysis. It just provided -- I guess a way to
16 explain would be, some additional background information. So
17 it was briefed, presented to the Court, and here we are.

18 Now, let's talk about the elephant in the room for a
19 minute. I'm aware of the surreply that was filed, and the
20 strong objection to that by way of a motion to strike it.
21 Let's put that on the back burner just for a moment. We'll
22 get back to that shortly.

23 The Court is aware that, since we last spoke, there
24 has been at least one bankruptcy of one of the named

1 defendants in this case, that being Purdue Pharmaceutical,
2 that I'm interested in, and I'll hear from in a moment if
3 there have been others.

4 I'll recall from our meeting in August that there was
5 trial set in the fall, in Cleveland; seven weeks, maybe more,
6 maybe less. But I'm not apprised that that case went to
7 trial; and, if so, what happened. And I'd like to know what
8 the status of that case is.

9 I'm recalling from our meeting in August that it was
10 anticipated there would be additional cases filed in the
11 State of Nevada on behalf of different municipalities and
12 entities. The Court is interested to know what came of that.

13 I'm also particularly interested to know what came of
14 the writ petition that was brought challenging Judge
15 Williams' decision -- or decisions in the Clark County case.

16 I've heard from -- I can't remember the source --
17 that somebody removed the case to Federal Court, somebody
18 tried to send it back, before it was -- that was ruled on.
19 It was directed to the Eastern District of Ohio, or the
20 Northern District, MDL. So perhaps somebody can educate the
21 Court on the status of all that.

22 The Court is aware that former retired Justice
23 Michael Cherry has been appointed Special Master, as I
24 understand it, in the Clark County case. Perhaps somebody

1 can explain to the Court what he is appointed -- well, to
2 confirm that the Court's understanding is accurate; to
3 confirm, then, what his charge was, what was he to do; what
4 is he doing, if anything, at this point, in light of the
5 status of that case. These are things that the Court would
6 find beneficial to understand and know.

7 When we discuss all this, we'll come back to whether
8 the Court will strike the surreply or approach it another
9 way. And then when we're done with that, we'll proceed to
10 argue the cases in the order in which the Court identified in
11 its scheduling order consistent with the ask by plaintiff,
12 after clarification, which I understand was based on
13 collaboration.

14 So without further ado, starting with plaintiff, if
15 you would please identify your name, who you represent. Then
16 I'll hear from whoever would like to address the Court on the
17 status of the MDL case, the status of the Clark County case,
18 the status of other Nevada cases.

19 Why don't we start with Mr. Eglet.

20 MR. EGLET: Thank you, Your Honor.

21 Good morning, Your Honor.

22 Robert Eglet, on behalf of the City of Reno.

23 I can address these five issues very quickly, if
24 you'd like, right now, Your Honor.

1 THE COURT: Go ahead.

2 MR. EGLET: With respect to the case set for trial,
3 the first MDL case set for trial in Ohio, that case settled
4 the day before trial, so it did not go forward.

5 To my understanding, the next MDL bellwether case,
6 that I believe is a county out of West Virginia, I do not
7 think that a firm trial setting has been set for that case
8 yet.

9 THE COURT: Well, let's go back to the Ohio case.
10 How many plaintiffs were involved in that, roughly?

11 MR. EGLET: The Court trimmed the defendants down.
12 We're not exactly sure, but -- was it just distributors or --
13 it was just distributors or manufacturers?

14 MR. ADAMS: I believe it was just distributors.

15 MR. EGLET: It was either just distributors or just
16 manufacturers. The Court kind of narrowed the case down. So
17 it wasn't like all the defendants involved in the case. But
18 that portion of the case, at least my understanding is,
19 settled the day before trial.

20 THE COURT: Okay. Hold on.

21 Does anybody know any differently than that, or have
22 a different take? If so, please identify yourself and your
23 client.

24 MS. WEIL: Good morning, Your Honor.

1 I'm Rachel Weil, of Reed, Smith, and Doyle.

2 Again, I represent AmerisourceBergen.

3 I believe that's essentially accurate. By the time
4 the case was -- and I confess to not being completely
5 familiar, but I believe that it's true that, right before the
6 case was to go to trial, it had narrowed down to the three
7 distributor defendants, who were going to be at trial --
8 Cardinal, McKesson, and AmerisourceBergen -- and the case
9 settled between -- among those three distributors and
10 plaintiffs, settled the day before trial.

11 THE COURT: Okay. Thank you.

12 Please continue.

13 MR. EGLET: Your Honor, with respect to the writ
14 petition, yes, there was a writ petition filed by the
15 defendants in the Clark County case.

16 THE COURT: I remember that, because I got a copy of
17 the briefing, that I reviewed.

18 MR. EGLET: While it was in front of the Supreme
19 Court, one of the defendants removed -- there was an Amended
20 Complaint that was filed, and one of the new defendants
21 removed the case to Federal Court.

22 We immediately, within a day or two, filed a motion
23 for remand. It was in front of Judge Dawson.

24 MR. POLSENBERG: Ken Dawson.

1 MR. EGLET: Thank you, Dan.

2 And he did not hear the motion. Judge Polster put a

3 time limit on Judge Dawson to hear the motion before they

4 transferred it to the MDL.

5 THE COURT: Well, who transferred it?

6 MR. EGLET: Well, I don't know if it was just an

7 automatic transfer tagalong, or if Judge Dawson actually just

8 passed it off to Judge Polster to handle the remand. But the

9 remand motion is now pending in front of Judge Polster --

10 well, have we not filed that --

11 THE COURT: Please state your name.

12 MR. ADAMS: I'm sorry, Your Honor.

13 For the record, Robert Adams, on behalf of the City

14 of Reno.

15 THE COURT: Yes, Mr. Adams.

16 MR. ADAMS: So what happened was, it went to the

17 JPML. The JPML handled several of these issues, these remand

18 issues, as a group. They selected a few people to argue.

19 Unfortunately, we weren't selected to argue. And now our

20 case has been sent to the MDL in Ohio, the Clark County case.

21 THE COURT: Where it now stands?

22 MR. ADAMS: That's where it's at.

23 MR. EGLET: We will be filing a motion to remand.

24 THE COURT: Remand it first to --

1 MR. EGLET: The Federal Court in Nevada, and then
2 remand -- and then the motion to remand to state court, yes.

3 THE COURT: That's two steps.

4 MR. EGLET: That's the steps that had to take place.
5 So with that, the Supreme Court writ is just --

6 THE COURT: -- out there?

7 MR. EGLET: -- out there --

8 THE COURT: Hold on.

9 Mr. Polsenberg.

10 MR. POLSENBERG: Dan Polsenberg, for Cardinal Health.

11 It is typical for the Nevada Supreme Court to
12 administratively dismiss a case where either there is a
13 bankruptcy or a removal. So that's what the Supreme Court
14 did. They didn't want to have it active on their docket.

15 If the case ever came back to Judge Williams, the
16 Supreme Court would reactivate the case.

17 THE COURT: So it's not currently pending. It's been
18 dismissed, but without the level of prejudice to renew, if
19 and when it's brought before them again?

20 MR. EGLET: Okay.

21 Your Honor, the other related cases that have been
22 filed have been for the City of Las Vegas, the City of
23 Henderson, and the City of North Las Vegas. I don't believe
24 any more have been filed.

1 I think that it is our intention to file. Once we
2 receive the rulings from Your Honor on this case, we intend
3 to file the case on behalf of Washoe County and Sparks --

4 MR. ADAMS: And Douglas County.

5 MR. EGLET: -- Sparks, as well as Carson City, and
6 other counties up north, and other counties in the central
7 and southern part of the state.

8 THE COURT: Okay.

9 MR. EGLET: Justice Cherry was appointed as the
10 Special Master in the Clark County case. And Judge Gonzalez
11 has now appointed him as Special Master on behalf of the
12 State's case, reasoning that she wanted consistency with the
13 Special Master rulings for all the cases in Nevada, and she
14 felt that it was appropriate.

15 THE COURT: So what is he doing?

16 MR. EGLET: Right now --

17 THE COURT: Before you answer that question, was his
18 appointment by agreement? I mean, I saw Floyd Hale's name
19 mentioned somewhere. Was that disputed, and then somebody
20 had to make a decision?

21 MR. EGLET: It was not by agreement. Originally
22 Judge Williams made the decision on Judge Cherry, and Judge
23 Gonzalez made the same decision.

24 THE COURT: What exactly was he tasked to do?

1 MR. EGLET: He had been -- with the County case, and
2 now with the State case, he's been given full authority of a
3 Special Master, essentially the same as the Discovery
4 Commissioner. He's ruling on all the discovery issues. Of
5 course, everything is appealable to the District Court, just
6 like with Discovery Commissioners. But he has full authority
7 on discovery, scheduling of discovery, number of tracks of
8 depositions, et cetera. Assuming the Clark County case is
9 remanded back, assuming the other courts appoint him as the
10 Special Master throughout the state, it will be coordinated
11 discovery between all the cases that are filed within the
12 state, is our understanding here.

13 But he was active. We had several multiple hearings
14 in front of him, and rulings from Justice Cherry, some of
15 which were appealed to the District Court, and ruled upon.

16 THE COURT: By Judge Williams, or by Judge Gonzalez?

17 MR. EGLET: By Judge Williams. Judge Gonzalez was
18 just appointed recently. We have not had our initial
19 scheduled meeting with him on the State's case. We have
20 started discovery in the State's case. The Court ordered
21 discovery started in the State's case, under Rocker, for one
22 of the issues, and early discovery.

23 And I expect that probably within the next week or
24 two, a couple weeks, that Justice Cherry will be noticing up

1 his first hearing in the State's case as a Special Master.

2 THE COURT: All right. Thank you.

3 Before we go round and further identify who is here
4 on behalf of which client, would anyone specifically like to
5 make comment on what Mr. Eglet just said with respect to the
6 other matters?

7 MR. POLSENBERG: Just a little bit.

8 Dan Polsenberg, for the Cardinal Health defendants.

9 "Full authority" might mislead the Court. What Judge
10 Gonzalez did was make clear that the Special Master would
11 rule on discovery disputes, but no legal disputes, and not
12 even issues of privilege.

13 MR. EGLET: That's correct.

14 MR. POLSENBERG: So the judge still retains control
15 over everything legal. And the Special Master is doing
16 discovery and disputes.

17 THE COURT: And she went ahead and appointed him --
18 I'm assuming there are pending dispositive motions in that
19 case; is that right?

20 MR. EGLET: I'm not sure there's any pending --

21 MR. POLSENBERG: Not sure --

22 MR. EGLET: We have already heard all the motions in
23 the state, the initial motion to dismiss. I think -- did the
24 defendants all answer now?

1 MR. ADAMS: No.

2 MR. EGLET: We're still waiting for a couple
3 defendants.

4 THE COURT: Did she take them under submission, or
5 did she rule?

6 MR. EGLET: She ruled. She denied all the motions to
7 dismiss.

8 She did order Rocker discovery on the false claims
9 claim in the State's case.

10 THE COURT: Was there supplemental briefing there, in
11 light of the --

12 MR. POLSENBERG: No.

13 THE COURT: -- historical data, as well, or --

14 MR. EGLET: No. The briefing, I think, in that all
15 occurred after the Sixth Circuit ruling. That data was
16 released this last summer, Your Honor.

17 THE COURT: No need to postpone that.

18 MR. EGLET: At the last hearing. We just had
19 distributors' motions on December 2nd. And then we had the
20 manufacturers' motions in late November, I believe.

21 THE COURT: Okay. All right. Thank you.

22 Anyone like to further comment on that particular
23 issue?

24 MR. LOMBARDO: Very briefly.

1 Good morning.

2 John Lombardo.

3 THE COURT: Yes.

4 MR. LOMBARDO: With respect to Special Master Cherry,
5 he was appointed one or two weeks ago in the State case. He
6 has not touched that case yet, so he's not been active at
7 all.

8 In the Clark County case, which is in the federal MDL
9 now, he had the most preliminary involvement. He began to
10 address foundational questions, like case management,
11 scheduling, protective order, ESI protocol. There were never
12 any substantive discovery motions that were presented --

13 THE COURT: Because he's waiting to see what happens
14 with the MDL, or he just hasn't gotten around to it?

15 MR. LOMBARDO: With respect to the Clark County case,
16 that would be right. He has been divested of jurisdiction
17 since the case is in Federal Court.

18 THE COURT: Can anyone give the Court here an
19 estimate of when you believe a determination will be made,
20 whether this Clark County case is ultimately returned to
21 Clark County and then back, writted to the Nevada Supreme
22 Court?

23 MR. EGLET: Unfortunately, Your Honor, in these MDLs,
24 once the case is transferred, it's kind of like no man's

1 land. It could take months; it could take years.

2 THE COURT: Let me ask you this. The MDL that was
3 transferred to was the one in Cleveland that Judge Polster
4 settled.

5 MR. EGLET: That was just -- Judge Polster is the MDL
6 judge for all the MDL cases. He happens to be the Northern
7 District of Cleveland, where the first case was set to go to
8 trial. So he, I believe, was the trial judge in that case.
9 He's not the trial judge in all the cases in the MDL. They
10 will go to trial in the jurisdictions where their cases are.
11 The West Virginia case, my understanding, will go to trial in
12 whatever Federal Court --

13 THE COURT: But he oversees all the MDLs; is that
14 right?

15 MR. EGLET: He is the MDL judge appointed by the JPML
16 to oversee the case.

17 THE COURT: He must have experience in the complex
18 cases to get this particular issue before him.

19 MR. EGLET: That's normally the situation. And Judge
20 Polster does have MDL experience.

21 THE COURT: He does?

22 MR. LOMBARDO: And there is only one opioid MDL. The
23 one assigned to Judge Polster has thousands of cases in front
24 of him.

1 The one other comment about the Special Master Cherry
2 that I wanted to touch upon was, I think I heard plaintiffs'
3 counsel say there was some understanding or expectation that
4 Special Master Cherry would have coordination beyond Clark
5 County and state case, and potentially for the other
6 municipality cases. That has never been --

7 THE COURT: No, I didn't hear that. I heard him say
8 between the two cases that are in the South, the State case
9 and the Clark County. Or maybe I misunderstood.

10 MR. LOMBARDO: I may have misheard.

11 MR. EGLET: And that's correct, Your Honor. We do
12 believe that it's appropriate for -- because we are going to
13 be filing all these cases in various counties.

14 THE COURT: Well, that makes sense. We don't want to
15 have different rules of engagement in the same locale with,
16 arguably, similar or overlapping issues.

17 MR. EGLET: Just let me comment on that.

18 While he did not hear any substantive discovery
19 disputes, because none had arisen yet in the Clark County
20 case, he did hear substantive argument on the case management
21 order, and ruled upon it. He did hear substantive argument
22 on behalf of the protective order, and did rule on it. And
23 he did hear substantive argument regarding the ESI protocol,
24 and did rule on it. So there were significant rulings made

1 by him as a Special Master.

2 It didn't get to the discovery level yet because we
3 hadn't actually started -- other than written discovery, we
4 had not actually had a situation where we had objections.
5 There have been no responses yet to the written discovery, I
6 don't believe, and so there have been no -- at that point,
7 there had been no disputes that had arisen with respect to --

8 THE COURT: Understood.

9 Yes, sir.

10 MR. POLSENBERG: Dan Polsenberg.

11 All those issues -- the ESI protocol, the protective
12 order, and case management order -- were all handled by Judge
13 Gonzalez in the first instance in the State case because
14 that's consistent with the idea of the judge establishing the
15 rules, and the Special Master only implementing them.

16 While Justice Cherry did address those issues, I was
17 under the belief that he was really just passing them along
18 to Judge Williams to make the rulings.

19 So that's as far as we got. We really got nowhere.
20 We just scratched the surface in the Clark County case.
21 We're just starting in the State case.

22 MR. EGLET: Well, I would have to disagree with my
23 good friend, Mr. Polsenberg's, statement on that.

24 There was hearings in front of Judge -- Justice

1 Cherry. He made rulings. To the extent it's the order from
2 the Special Master, they filed an objection to that order,
3 which it was in front of Judge Williams, when the case was
4 removed. It was a day before that hearing in front of Judge
5 Williams --

6 THE COURT: Okay.

7 MR. EGLET: -- when it was removed.

8 THE COURT: Thank you for explaining that.

9 You mentioned that the Complaint was amended. Was a
10 new defendant or defendants added, and one of those new
11 defendants --

12 MR. EGLET: Yes.

13 THE COURT: -- responded by removing the case to
14 Federal Court?

15 MR. EGLET: That's exactly what happened, Your Honor.

16 THE COURT: I'm trying to remember what I've heard or
17 learned, but did somebody then -- so the plaintiffs
18 immediately sought to remand. But did the removing defendant
19 essentially re-think his position and go along with the
20 remand request, or change its mind or --

21 MR. EGLET: No. What happened was the removing
22 defendant, Your Honor -- and we were not aware of this -- had
23 a federal contract with respect to opiates with the federal
24 government; therefore, if you sue them, it automatically goes

1 to Federal Court. We weren't aware of that. As soon as we
2 saw that in their removal, we immediately dismissed them from
3 the case.

4 THE COURT: Oh.

5 MR. EGLET: So they're no longer in the case. We're
6 just, as I said, going to have to try -- it didn't get
7 handled by Judge Dawson.

8 THE COURT: The party that removed it is no longer in
9 the case?

10 MR. EGLET: That's correct, Your Honor.

11 THE COURT: And yet the case is a couple of layers
12 above where it was.

13 MR. EGLET: Some of the other parties filed a joinder
14 of some kind in it, and so that's the status. Judge Dawson,
15 for whatever reason, chose not to hear it, and it got
16 transferred to the MDL.

17 THE COURT: Okay. Thank you.

18 You know, I was interested, like you all were, to see
19 what the Nevada Supreme Court's take would be on the -- among
20 other things -- Dillon's Rule question that -- I don't need
21 to use too strong of a word, but permeates many of the
22 important questions the Court is being asked to review and
23 determine here.

24 So like most of you, I was anticipating some

1 guidance. But that guidance is not going to be happening in
2 the near future, it appears.

3 As the Supreme Court has reminded this Court on more
4 than one occasion, it's a misnomer that the Nevada Supreme
5 Court makes the law. The district judges make the law. The
6 Supreme Court just settles the law. So that would likely be
7 true here.

8 But thank you for the overview. You've answered the
9 Court's questions.

10 Yes, sir.

11 Again, please state your name every time you make a
12 comment.

13 MR. LOMBARDO: Thank you.

14 John Lombardo.

15 I just want to quickly clarify one point with respect
16 to Judge Gonzalez's rulings on the motion to dismiss in the
17 State case.

18 With respect to the State's False Claim Act claim she
19 found that the claim was not adequately pled, and, as a
20 result, she authorized the State to take some preliminary
21 Rocker discovery. It was with the opportunity to amend that
22 pleading later.

23 THE COURT: If and when.

24 MR. LOMBARDO: If and when, which would be subject to

1 a further motion to dismiss at that point.

2 THE COURT: Thank you.

3 MR. EGLET: I don't believe Judge Gonzalez's order
4 said the claim was inadequately pled.

5 MR. ADAMS: Fully ordered.

6 MR. EGLET: What was it?

7 MR. ADAMS: Fully ordered.

8 MR. EGLET: Fully ordered. I don't believe her order
9 said that actual language.

10 THE COURT: What do you believe it said?

11 MR. EGLET: It just said that she's going to allow
12 Rocker discovery. And the false claims is specific to the
13 State's case. It's not a claim in any of the counties' or
14 cities' case. That's a claim that only the Attorney
15 General --

16 THE COURT: The mere fact that she allowed
17 discovery suggests to this Court that she had a concern that
18 there was an issue in the manner in which it had been
19 brought.

20 MR. EGLET: Right. But understanding that claim is
21 not in this case or in any of the counties' case. It's a
22 claim that's specific to the AG's Office that they have the
23 authority --

24 THE COURT: Thank you.

1 Again, anyone else want to address the Court on
2 anything we've discussed so far?

3 Seeing none, if everyone would please identify
4 yourself and your client for the record, starting over here
5 with those -- well, okay. Beg your pardon. We'll continue
6 with plaintiffs' counsel.

7 We have Mr. Eglet and Mr. Adams.

8 Ms.?

9 MS. CUMMINGS: Cassandra Cummings, on behalf of the
10 City of Reno.

11 THE COURT: Thank you very much. Welcome to
12 Department 8.

13 MR. HY: Rick Hy, on behalf of the City of Reno, Your
14 Honor.

15 THE COURT: Nice to see you.

16 MR. WENZEL: Mark Wenzel, on behalf of the City of
17 Reno.

18 THE COURT: Mr. Wenzel.

19 MR. POLSENBERG: Good morning, Your Honor.

20 Dan Polsenberg, for the four Cardinal Health
21 defendants.

22 With me, I have Suzanne Salgado. Hopefully you'll
23 hear her pro hac motion. And plaintiffs have agreed they
24 have no opposition.

1 And I also have Paul Matteoni with me, who I think is
2 soon to be the former State Bar president.

3 THE COURT: Mr. Matteoni, nice to see you.

4 MR. MATTEONI: Nice to see, you Your Honor.

5 THE COURT: Hi.

6 MR. SHAFROTH: Good morning, Your Honor.

7 Nate Shafroth, from Covington and Burling, for
8 McKesson.

9 THE COURT: Excellent. Thank you.

10 MS. SOLIS-RAINEY: Good morning, Your Honor.

11 Rosa Solis-Rainey, Morris Law Group, also on behalf
12 of McKesson.

13 THE COURT: Thank you.

14 And for my court clerk, if anyone is -- you're unable
15 to hear them, or they're speaking too quickly, don't hesitate
16 to let us know.

17 All right. Then in the back.

18 MR. HYMANSON: Good morning, Your Honor.

19 Phil Hymanson, on behalf of the Teva defendants.

20 THE COURT: Welcome again.

21 MR. CORRICK: Good morning, Your Honor.

22 Max Corrick, on behalf of the Allergan defendants.

23 THE COURT: Thank you.

24 Good morning.

1 MR. CIULLO: Zac Ciullo, on behalf of the Allergan
2 defendants.

3 THE COURT: Hello.

4 MS. RIVERA: Maria Rivera, also on behalf of
5 Allergan.

6 THE COURT: Thank you.

7 MR. RICKARD: Hello, Your Honor.

8 Jarrod Rickard, on behalf of AmerisourceBergen.

9 With me is Rachel Weil, from the Reed Smith firm.

10 THE COURT: Thank you.

11 MS. WEIL: Thank you, Your Honor.

12 THE COURT: Now, go ahead -- sorry.

13 MR. GUINN: Good morning, Your Honor.

14 Steve Guinn, on behalf of Mallinckrodt, LLC.

15 THE COURT: Thank you.

16 MR. LOMBARDO: Good morning.

17 John Lombardo, on behalf of the Endo defendants.

18 That's Endo Health Solutions, Inc., and then Endo

19 Pharmaceuticals, Inc.

20 MS. LUNDVALL: Pat Lundvall, from McDonald Carano,
21 also on behalf of the Endo defendants.

22 THE COURT: Excellent. Thank you.

23 Have there been any other parties that have filed for
24 bankruptcy protection since our last hearing, other than

1 Purdue Pharma, and its related entities?

2 All right. No one is aware of anyone. All right.

3 Good.

4 Is there anyone that wants to orally move for the pro
5 hac vice admission of a colleague?

6 Sounds like, Mr. Polsenberg, you do.

7 MR. POLSENBERG: Suzanne Salgado. We did one of
8 those rushed motions. And we apologize for that, Your Honor.

9 THE COURT: Yes.

10 MR. POLSENBERG: Mr. Adams says he has no objection.

11 MR. ADAMS: No objection, Your Honor.

12 MR. EGLET: And, Your Honor, we generally -- I
13 understand the Court's position on this -- we generally have
14 not objected and don't anticipate objecting to any pro hac
15 vices, unless it's something glaring that we see.

16 THE COURT: Well, you never know.

17 MR. EGLET: I'm just saying I understand why Mr.
18 Polsenberg assumed that, because we had kind of told him that
19 in the other cases.

20 THE COURT: The way I would say it is this. I'm
21 going to relax the rules, but they're not going to be totally
22 asleep. So what I need, at a minimum, is there's been some
23 level of dialogue, as opposed to a general, "We won't object,
24 unless we see something glaring." So a phone call or an

1 e-mail confirming to the applicant sponsor, who confirms to
2 this Court, that's all I'm asking for.

3 MR. POLSENBERG: And I understand the Court's
4 concern, and I think it's prudent.

5 Thank you.

6 THE COURT: Where are you licensed currently, please?

7 MS. SALGADO: In Washington, D. C., in Maryland.

8 THE COURT: All right. Are you in good standing?

9 MS. SALGADO: Yes, Your Honor.

10 THE COURT: All right. You're admitted to practice
11 before this court.

12 MS. SALGADO: Thank you, Your Honor.

13 MR. POLSENBERG: Thank you, Your Honor.

14 THE COURT: Thank you.

15 Now let's talk about the surreply, the request that
16 it be stricken.

17 MR. EGLET: Your Honor, Mr. Polsenberg and I had
18 discussed this previously to Your Honor taking the bench this
19 morning. And we would -- had hoped that we could get through
20 the manufacturers' motions and then deal with that right
21 before the distributors' motions.

22 THE COURT: Okay. Is the distributors' motion
23 second? Yes, it is.

24 MR. POLSENBERG: Yeah. Of course, I'll do whatever

1 you want to do, Your Honor.

2 THE COURT: If you want more time during the next
3 recess to discuss how you plan to address that with the
4 Court, I'll certainly give it to you. We don't have to
5 discuss --

6 MR. POLSENBERG: I think that's why I'm Mr. Eglet's
7 good friend this morning, because I had agreed to put that
8 off, if he wanted to.

9 MR. EGLET: Mr. Polsenberg has been my good friend
10 for 35 years. He knows that.

11 MR. POLSENBERG: There are five of them where I have
12 not been, Your Honor.

13 THE COURT: Now, let me say this, as well. Even
14 though we have scheduled comfort breaks, if somebody needs --
15 whose matter is not addressed by the Court at that time,
16 wants to stand up and quietly leave the courtroom to use the
17 restroom or do other business outside the courtroom, you
18 don't offend the Court by doing that. Just it would be much
19 appreciated if the cell phones are on off or mute, and if
20 you're going to leave the courtroom when the Court is on the
21 bench, try to do so as quietly as you possibly can.

22 All right. So the first matter -- let me back up.
23 Are there any other procedural matters, issues of engagement,
24 any other news items you want the Court to be apprised of

1 that would be informative to how this case proceeds that we
2 haven't already discussed?

3 All right. Good. Seeing none, then, the Court will
4 first entertain the manufacturers' joint motion to dismiss.

5 Who will argue that on behalf of the movants?

6 MR. LOMBARDO: Good morning.

7 John Lombardo will. And I've divided responsibility
8 with Mr. Guinn for that motion, if that's acceptable to the
9 Court.

10 THE COURT: It is.

11 And you can address the Court at that table, standing
12 or seated. We can get the lectern out -- actually, I see
13 it's here. You can take it, you can move it anywhere that
14 makes you most comfortable. But please proceed.

15 And if I'm going to allow more than one defendant to
16 address a motion, plaintiffs may, between their group, have
17 somebody argue it, then have somebody else reply, if that's
18 how they choose to approach it.

19 MR. LOMBARDO: As the Court has already alluded to,
20 the joint manufacturers' motion to dismiss was originally
21 filed by a group of manufacturers that included the Purdue
22 defendants, Insys, Johnson and Johnson/Janssen. Each of
23 those three manufacturer groups --

24 THE COURT: -- are out.

1 MR. LOMBARDO: -- are out. And so, at this point,
2 the manufacturer defendants who are the moving parties for
3 this motion are the Allergan defendants, the Endo defendants,
4 Mallinckrodt, and the Teva defendants. And so those are the
5 defendants on whose behalf I will be addressing this motion
6 this morning.

7 I'd like to begin where our motion begins, and that's
8 with the threshold issue of law that the Court alluded to
9 earlier, cuts across all the individual causes of action, and
10 we believe that it requires the Complaint to be dismissed in
11 its entirety. And that is the issue of whether the City of
12 Reno has authority to maintain this action, which is an
13 action that it brought to address what it asserts is a public
14 health crisis of nationwide and statewide magnitude.

15 As the Court may recall, the issue was before the
16 Supreme Court, and we have no guidance, for the reasons
17 already discussed.

18 The analysis of this issue starts with a bedrock
19 legal principle that can't be denied, and that is that cities
20 in Nevada are creatures of the Legislature, and, as a result,
21 they derive all their powers, rights, and franchises from
22 legislative enactment or statutory implication. The Supreme
23 Court so said in the Ronow case, cited in the briefs.

24 Put another way, cities have no inherent powers

1 whatsoever, and as the Court elaborated in Ronow, neither a
2 city, nor its officers, can do any act not authorized, and --
3 quote -- "all acts beyond the scope of the powers granted are
4 void."

5 The scope of the City's powers are delineated by the
6 rule the Court alluded to earlier, Dillon's Rule, which has
7 been the controlling law in Nevada for over 80 years, and the
8 continuing vitality of which the Nevada Legislature confirmed
9 just four years ago, in a statute that we will spend time
10 with this morning.

11 So what does Dillon's Rule provide?

12 From its adoption in 1937, right up to its recent
13 codification in NRS 268.001, Dillon's Rule has always
14 provided the following. And now I'm reading from the
15 statute.

16 "As applied to City government, Dillon's Rule
17 provides that the governing body of an incorporated city
18 possesses and may exercise only the following powers, and no
19 others. A, those powers granted in express terms by the
20 Nevada Constitution, statute, or city charter; B, those
21 powers necessarily or fairly implied or incident to the
22 powers expressly granted; and, C, those powers essential to
23 the accomplishment of the declared objects and purposes of
24 the City, and not merely convenient, but indispensable."

1 Dillon's Rule also comes with a presumption, and that
2 presumption operates against the existence of a City power.

3 In the Legislature's words again -- quote -- "If
4 there is any fair or reasonable doubt concerning the
5 existence of a power, that doubt is resolved against the
6 governing body of an incorporated city, and the power is
7 denied." That's in NRS 268.001, Subsection (4).

8 This remains the generally applicable presumption to
9 this day because, in 2015, the Legislature expressly
10 reaffirmed that Dillon's Rule -- quote -- "remains a vital
11 component of Nevada law" -- close quote.

12 So any analysis on whether a city is empowered to do
13 an act must begin with Dillon's Rule, and it must start with
14 the question: Is the power expressly granted by the
15 Constitution, a statute, or a city charter, or is it
16 necessarily implied in or incidental to the expressly granted
17 powers?

18 Here the City does not mount a serious case that it
19 possesses a power that Dillon's Rule would recognize. For
20 starters, it does not point to any express term of the
21 Constitution or of the statute that expressly authorizes this
22 lawsuit. Nor does it contain that such an authority is
23 necessarily implied in, or incident to, such an express
24 granted power. Instead, the City points to its charter,

1 which states, rather unremarkably, that it was created --
2 quote -- "to provide for the orderly government of the City
3 of Reno and the general welfare of its citizens" -- close
4 quote. But that statement does not affirmatively grant the
5 City power to do anything.

6 The City also asserts, without citation, that its
7 city charter empowers Reno to -- quote -- "adopt and enforce
8 local health and safety measures." But this lawsuit does not
9 seek to enforce any municipal health or safety measures.

10 The First Amended Complaint makes no allegation along
11 those lines, instead asserting only common law, and one
12 statutory public nuisance claim.

13 In short, there's no express legislative grant of
14 authority to the City for this lawsuit, in the Constitution,
15 the statute, or the city charter. Dillon's Rule, thus,
16 recognizes no power to maintain the lawsuit.

17 And, indeed, if there were any reasonable doubt about
18 the existence of that power, that doubt would be resolved
19 against the City, under Dillon's Rule.

20 Now, against this backdrop, it's easy to see why the
21 City criticizes Dillon's Rule, calls it a dusty old relic,
22 with no current-day vitality.

23 The City cites a Law Review article in a Utah case to
24 support that argument. But the City would need to take those

1 grievances to the Legislature because, as I noted earlier,
2 four years ago, the Legislature reaffirmed that Dillon's Rule
3 remains a vital component of Nevada law.

4 The City also argues that Dillon's Rule only limits a
5 city's legislative power, meaning its power to pass
6 ordinances, but not its power to control conduct through
7 litigation.

8 But it cites no case anywhere that limits Dillon's
9 Rule in this matter. And such a narrow reading of Dillon's
10 Rule would ignore the Nevada Supreme Court's clear statement
11 in Ronow that -- quote -- "all acts beyond the scope of
12 powers granted to a city are void." All acts. Not all
13 legislative acts, not all ordinance-passing acts. All acts.

14 And the statutory computation of Dillon's Rule
15 likewise draws no distinction between passing ordinances and
16 maintaining lawsuits to regulate conduct.

17 Under the statute, a city government -- quote -- "may
18 exercise only the following powers, and no others" -- close
19 quote. Only the following powers. Not only the following
20 legislative powers, and no others.

21 And, of course, as this lawsuit demonstrates, a city
22 can attempt to regulate conduct just as effectively through
23 litigation as by passing an ordinance. The City here seeks
24 an injunction to -- quote -- "stop defendants' promotion of

1 marketing of opioids for inappropriate uses in Nevada
2 currently and in the future" -- close quote. That's at page
3 56 of the Complaint.

4 In the words of the U.S. Supreme Court -- quote --
5 "Regulation can be as effectively exerted through an award of
6 damages as through some form of preventative relief" -- close
7 quote.

8 In short, the Nevada Supreme Court statement of
9 Dillon's Rule, the Legislature's 2015 statement of Dillon's
10 Rule draw no distinction between ordinances and lawsuits.

11 The City cites no case confining Dillon's Rule to
12 legislative powers. And Dillon's Rule has, indeed, been
13 applied to deny localities the power to maintain lawsuits
14 where the issue has arisen in other states.

15 For example, the Missouri Supreme Court held that
16 Dillon's Rule barred a township from maintaining a public
17 nuisance claim because no statute expressly granted the
18 power. That's the Premium Standard Farms Case that is cited
19 in our reply to the supplemental briefing that the City
20 filed.

21 Now, the City can say, "Well, that's a Missouri
22 case." But the City has no case, from Nevada or anywhere,
23 refusing to apply Dillon's Rule where the power claimed by
24 the locality was the power to sue rather than the power to

1 adopt an ordinance.

2 Finally, the City makes the peculiar argument that
3 Dillon's Rule does not preclude this action -- quote -- "so
4 long as this litigation is not contrary to the laws of the
5 state or federal government, and so long as it does not
6 infringe on any state regulations" -- close quote.

7 That argument would turn Nevada law on its head
8 because, under Dillon's Rule, the City lacks authority to
9 take any action, unless the Legislature positively grants the
10 authority to act. And that hasn't happened here.

11 Now, as the Court knows, there's a second part to
12 this question of the City's authority, because at the same
13 time as the Legislature codified Dillon's Rule in 2015, it
14 also created a narrow exception to Dillon's Rule to give
15 cities and counties a power to address -- quote -- "matters
16 of local concern."

17 And, in fact, the Complaint invokes the City's
18 authority to address matters of local concern for this
19 lawsuit, in paragraph 45.

20 And that's why our motion began with that question.
21 And as the motion shows, the City's own description of the
22 opioid abuse crisis, which is the matter that the City is
23 addressing in this lawsuit, cannot be a matter of local
24 concern, as defined by statute.

1 So let's examine now the statutory definition of
2 "matter of local concern." To be a matter of local concern,
3 any matter must satisfy three requirements, three essential
4 conditions, under NRS 268.003, Subsection (1).

5 The matter must be one, that, A, primarily affects or
6 impacts areas located in the incorporated city, and does not
7 have a significant effect or impact on areas located in other
8 cities and counties.

9 And, B, is not within the exclusive jurisdiction of
10 another governmental entity.

11 And, C, does not concern, one, a state interest that
12 requires statewide uniformity of regulation; two, the
13 regulation of business activities that are subject to
14 substantial regulation by a federal or state agency; or,
15 three, any other federal or state interest that is committed
16 by the Constitution statutes or regulations of the United
17 States or this state to federal or state regulations that
18 preempts local regulation.

19 That's a mouthful. But the language itself is clear,
20 precise, and unambiguous. And that language clearly and
21 unambiguously does not describe the public health crisis, the
22 opioid abuse crisis that the City describes in the First
23 Amended Complaint. Here's why.

24 First, the City's own allegations directly negate the

1 requirement that the opioid abuse crisis primarily impacts
2 Reno, and not --

3 THE COURT: Wait. What's that word you just said?
4 "Primarily"?

5 MR. LOMBARDO: "Primarily."

6 THE COURT: Is that required? I mean, I didn't see
7 that in the exception. It's an area of local concern.
8 Didn't say "primarily."

9 MR. LOMBARDO: It does, Your Honor. NRS 268.003, the
10 definition of "matter of local concern," the first prong of
11 it, which I'll call the localized impact prong, Subsection
12 (1) (a), the matter must -- quote -- "primarily affect or
13 impact areas located in the incorporated city.

14 THE COURT: Okay. Thank you.

15 MR. LOMBARDO: And does not have a significant effect
16 or impact on areas located in other cities and counties.

17 THE COURT: Please continue.

18 MR. LOMBARDO: Focusing on just a few examples from
19 the Complaint, the City alleges that -- quote -- "The abuse
20 of opioids is a widespread problem in the State of Nevada."
21 That's paragraph 2.

22 The City alleges that the opioid abuse crisis --
23 quote -- "has a profound impact on communities across our
24 country." That's paragraph 17.

1 The City alleges that the defendants -- quote --
2 "helped unleash a healthcare crisis that has had far-reaching
3 consequences in the City of Reno and throughout Nevada."
4 That's paragraph 23.

5 The City alleges that the manufacturer defendants
6 deployed the same deceptive marketing plans and strategies in
7 Nevada as they did nationwide. That's paragraph 102.

8 And, finally, Reno seeks injunctive relief to change
9 the manufacturer defendants marketing and promotional
10 activities -- quote -- "in Nevada."

11 Now, the State of Nevada, through it's Attorney
12 General, and Clark County, and the Cities of Las Vegas, North
13 Las Vegas, and Henderson, all of whom are represented by the
14 same private law firm as the City here, have filed their own
15 remarkably similar Complaints, and belie any suggestion that
16 the opioid abuse crisis primarily impacts Reno, and does not
17 significantly impact the areas outside of Reno.

18 In addition, Reno's private counsel made repeated
19 statements, which we submitted to the Court, to localities
20 around the State to recruit and sign them up as plaintiffs,
21 telling them -- quote -- "The opioid epidemic has placed a
22 financial burden on every Nevada city and county" -- close
23 quote. That's Exhibit B, at page 37, in our reply. "Every
24 Nevada city and county," that's Reno's counsel's words.

1 That description could not be more diametrically
2 opposed to a matter that primarily impacts Reno, and that
3 does not significantly impact other areas.

4 In short, the City failed to plead facts satisfying
5 the first requirement, the localized impact requirement, of a
6 matter of local concern; and more than that, its own
7 allegations affirmatively negate that element.

8 Let's move to the third requirement now of the
9 definition of "matter of local concern," and that is, again,
10 that the matter must not concern the -- quote -- "regulation
11 of business activities that are subject to substantial
12 regulation by a federal or state agency."

13 Again, the Complaint fails to plead facts to satisfy
14 this requirement. And what's more, its allegations and
15 judicially noticeable pharmaceutical regulations
16 affirmatively negate the required element.

17 The business activity at issue in the Complaint is
18 the manufacturer defendants' marketing of prescription
19 opioids.

20 The U.S. Food and Drug Administration not only
21 substantially regulates, but pervasively regulates that
22 marketing. And we've cited the Court to parts of the code of
23 federal regulations that demonstrate the FDA's regulation of
24 the manufacture, marketing, sale of prescription opioid

1 medications.

2 The Complaint itself also acknowledges that
3 prescription opioids have been regulated by the U.S. Drug
4 Enforcement Administration. The DEA has controlled
5 substances since 1970.

6 The City here seeks an injunction to -- quote --
7 "stop, or at least fundamentally change that business
8 activity; that is, the marketing of prescription opioid
9 medications."

10 Indisputably, the goal of this lawsuit, if
11 successful, is to regulate business activity that is subject
12 to substantial regulation by a federal agency.

13 The opioid abuse crisis also implicates a -- quote --
14 "state interest that requires uniformity of regulation," the
15 language of NRS 268.003, Subsection (1) (c) (1). And that is
16 because the Nevada Legislature has declared that the practice
17 of pharmacy, which is statutorily defined to include
18 manufacturing and labeling of prescription medication, is
19 subject to protection and regulation by the State. That's in
20 NRS 639.213 and 639.0124.

21 The State's ability to protect and regulate the
22 practice of pharmacy would be undermined if each Nevada city
23 and county could impose its own unique view of how to
24 regulate the practice of pharmacy, through lawsuits or

1 otherwise, as the City is trying to do here.

2 So, in short, the Complaint's allegations of the
3 judicially noticeable pharmaceutical regulations of the
4 federal and state government demonstrate clearly that the
5 City cannot satisfy at least two of the three required
6 elements of the definition of "matter of local concern," the
7 localized impact requirement, and the "not a substantially
8 regulated business activity" requirement.

9 The alleged nationwide opioid abuse crisis and the
10 City's effort to use this lawsuit to stop or change the
11 manufacturer defendants' regulated marketing activities are
12 not a matter of local concern under the clear, unambiguous
13 language of NRS 268.003, Subsection (1).

14 Now, what is the City's response? It has five
15 arguments to try to evade the statutory language of "matter
16 of local concern."

17 Argument number one. It argues that, because it's
18 only seeking to recover its own financial losses, to protect
19 its own treasury, its claims are unique, and, thus, a matter
20 of local concern.

21 This argument asks the Court to ignore the clear
22 statutory definition that the Legislature crafted in NRS
23 268.003.

24 The City, in essence, is saying that, even though it

1 admits that the opioid abuse crisis is a nationwide and
2 statewide crisis, and even though pharmaceutical marketing
3 and promotion are highly regulated by federal and state
4 agencies, if we can show that we've suffered our own harm
5 from the national crisis, then we can maintain a lawsuit to
6 address that as a matter of local concern. But as should be
7 clear, the argument disregards the Legislature's carefully
8 chosen, clear language.

9 The Court -- the City -- pardon -- the City is asking
10 the Court to read into the statutory definition of "matter of
11 local concern" and judicially-created exception to allow
12 cities and counties to sue for localized impacts from matters
13 of nationwide and statewide concern.

14 The Court should not, and, respectfully, may not,
15 rewrite the statute to create that exception, as the Supreme
16 Court noted in the Cody H. case cited in our papers.

17 Quote, "We are unwilling to create an exception to
18 the statute when, based on its plain and ordinary meaning,
19 none exists."

20 In that scenario, the Court is required to --
21 quote -- "give the statutory language its ordinary meaning,
22 and not go beyond it." That's what the Supreme Court said in
23 the City Council of City of Reno case, cited in our papers.

24 And, indeed, the exception that the City seeks and

1 asks the Court to read into the definition of "matter of
2 local concern" would swallow the rule, and it would rob the
3 statutory definition of any limits, because by definition --
4 by definition -- any matter -- any crisis of nationwide or
5 statewide proportion is going to have a localized impact.
6 And so it's going to have an impact in Reno, it's going to
7 have an impact in every state. The Court should decline to
8 create an unwritten exception to the clear limits of the
9 "local concern" statute.

10 Second argument the City makes: Allowing this case
11 won't encroach on the authority of the Attorney General to
12 address the statewide opioid abuse crisis on behalf of the
13 entire state.

14 Why not? Because, according to the opposition, the
15 Attorney General in the State lawsuit has only sued Purdue,
16 doesn't seek to recoup Reno's losses, and hasn't objected to
17 Reno's lawsuit.

18 Now, as I'll explain in a moment, each part of that
19 statement is inaccurate. But more fundamentally, the clear
20 language of the "local concern" statute and the definition of
21 "matter of local concern," does not make a city's power hinge
22 on a Court's ad hoc, case-by-case evaluation of whether
23 granting the power would interfere with the State authority.

24 That simply isn't a factor or a relevant

1 consideration in how the Legislature defined "matter of local
2 concern."

3 So what one Attorney General or another may or may
4 not say about this lawsuit can't enlarge, expand or shrink
5 the City's powers to address a matter of local concern. The
6 statute NRS 268.003 controls that determination.

7 But in all events, as I noted, the City's specific
8 reasons why the patchwork of lawsuits filed by its private
9 counsel can all peacefully co-exist are incorrect.

10 The State, through the Attorney General, has filed a
11 new lawsuit, as you heard; has named as a defendant every
12 manufacturer defendant in this case, every distributor
13 defendant in this case. So there's no risk that the parties
14 here are not also targets of the Attorney General's statewide
15 enforcement authority. And the Attorney General's Office did
16 object to this lawsuit. It even tried to convince the City
17 not to file it.

18 This is seen in the letter to Mayor Schieve that is
19 Exhibit 8 -- Exhibit H -- excuse me -- to our reply brief.
20 In that letter, the Attorney General's Office wrote that the
21 opioid epidemic -- quote -- "like fire, recognizes no city,
22 county, or state boundaries. It threatens all residents of
23 Nevada" -- close quote.

24 The Attorney General's Office informs Mayor Schieve

1 that the appropriate level for addressing the crisis in
2 Nevada was -- quote -- "coordinated action at the statewide
3 level" -- close quote.

4 The Attorney General's Office noted that its goal was
5 to obtain injunctive relief and funding to help -- quote --
6 "the State of Nevada as a whole, and each of its residents,
7 municipalities and counties address the crisis" -- close
8 quote.

9 And the Attorney General's Office cautioned the
10 mayor, that -- quote -- "The City of Reno's initiation of
11 litigation may unintentionally undermine Nevada's position,
12 and could thwart our office's ongoing investigation."

13 The letter concludes by discouraging -- quote --
14 "patchwork litigation that has never been attempted in
15 Nevada" -- close quote. And emphasizes the importance of --
16 quote -- "speaking with one voice, and maintaining a unified
17 front."

18 THE COURT: Now, it's been a while since I've read
19 that letter, but was it deceptive trade practice violation
20 only, or all the types of claims that have now been raised
21 here?

22 MR. LOMBARDO: Sure. The general position and advice
23 and advocacy that the Attorney General's Office --

24 THE COURT: You say it applies either way; right?

1 MR. LOMBARDO: It applies either way.

2 One of the reasons given in the letter was the
3 Attorney General's particular power to enforce the Deceptive
4 Practices Act.

5 THE COURT: Okay.

6 MR. LOMBARDO: Now, the letter was signed by two
7 people: Former Attorney General Laxalt and Nevada Consumer
8 Advocate, Ernest Figueroa. Ernest Figueroa is one of the
9 counsel who filed the current Attorney General Complaint on
10 behalf of the State, along with the current Attorney General
11 Aaron Ford, who are co-counsel with plaintiffs' counsel here.

12 Now, again, what the Attorney General's Office says
13 or doesn't say doesn't determine what power a city has. The
14 clear definition of "matter of local concern" in NRS 268.003
15 determines that. The statutory definition is controlling.

16 But the City is incorrect to suggest that the
17 Attorney General's Office has not objected to this lawsuit.
18 It has. It warned about a patchwork litigation, and the need
19 for one voice at the statewide level to address a matter that
20 recognizes no city boundaries, and threatens all residents of
21 Nevada.

22 And as I noted, the City asserts that multiplicity of
23 lawsuits filed by its private counsel can't or won't threaten
24 defendants with conflicting results. And that assertion is,

1 again, irrelevant to the definition in the statute of "a
2 matter of public concern," but it's also incorrect.

3 It's incorrect because the City has not avoided a
4 collision in the claims that it asserts with the collision --
5 with the claims asserted in the other cases.

6 So just as examples, the State, in the Attorney
7 General lawsuit, seeks a statewide injunction to halt
8 allegedly deceptive practices. So does the City here.

9 The State Attorney General seeks to require
10 defendants to pay for abatement of the ongoing opioid abuse
11 crisis. So does the City here.

12 The State Attorney General seeks to recoup the
13 wrongfully-induced payments for opioid prescriptions through
14 government-funded insurance. So does the City here.

15 The State seeks to recover the alleged indirect costs
16 of the opioid abuse crisis, including law enforcement costs,
17 abuse treatment and prevention costs, and the like. So does
18 the City here.

19 And, of course, both seek to punish the manufacturer
20 defendants through punitive damages.

21 Now, of course, the State's Complaint seeks these
22 remedies on a statewide basis. It doesn't carve out the City
23 of Reno. So even if the City tried to limit its remedies to
24 its area, there would still be overlap. The State's case is

1 all-encompassing.

2 And just to underscore the point, all of these facts,
3 while interesting, are, of course, only tangentially
4 relevant. The statutory language controls. And the City has
5 admitted, through its allegations, that the lawsuit does not
6 seek to address "a matter of local concern" as defined in the
7 statute.

8 I'm moving now to the third and fourth arguments that
9 the City makes for avoiding the "local concern" statute.
10 Well, for claiming that it may proceed in this case as a
11 matter of local concern.

12 Both the third and fourth arguments advance a
13 misreading of the "local concern" statute.

14 The third argument is that the statute supposedly
15 makes the entire category of -- quote -- "public health
16 safety and welfare a matter of local concern."

17 The statute does this, the City asserts, in NRS
18 268.003, Subsection (2), which lists illustrative matters
19 that might qualify as matters of local concern. But the
20 City's argument that it can proceed directly under Subsection
21 (2), without first satisfying the threshold definition in
22 Subsection (1), ignores clear statutory language to the
23 contrary. Specifically, Subsection (3) clarifies -- quote --
24 "The provisions of Subsection (2) must not be interpreted as

1 either limiting or expanding the meaning of the term 'matter
2 of local concern' as provided in Subsection (1)."

3 So public health and safety are not categorically
4 matters of local concern. They can be matters of local
5 concern in appropriate circumstances if, but only if, they
6 satisfy all the requirements of Subsection (1).

7 The City's fourth argument likewise misreads the
8 statute. It argues that NRS 268.001 creates a new
9 presumption that the City has authority to bring this action.
10 It does no such thing. The statute preserves the Dillon's
11 Rule presumption that, if there is any fair or reasonable
12 doubt concerning the existence of a power, the doubt is
13 resolved against the City, and the power is denied. That
14 remains the general rule.

15 The statute then, in addition, modifies that rule so
16 that -- quote -- "if there is any fair or reasonable doubt
17 concerning the existence of a power to address a matter of
18 local concern" -- close quote -- then the data is resolved in
19 favor of the power's existence.

20 By this provision's plain terms, a presumption arises
21 in favor of the City only to resolve doubts over the
22 existence of a power to address -- quote -- "a matter of
23 local concern."

24 So here again, the City never gets to this

1 presumption without first satisfying the statutory definition
2 of "matter of local concern," which it cannot do. The
3 pre-condition for triggering the presumption the City wants
4 simply doesn't exist.

5 Final point on the question of the City's authority
6 here. It makes an argument under the heading of "Standing."
7 And it's the argument that Dillon's Rule is not an impediment
8 here because the City has standing to bring the case in the
9 generic sense of that word because the City claims it has
10 suffered an injury, and it is suing the real party in
11 interest.

12 The argument is a classic red herring. Traditional
13 standing requiring an injury suffered by the plaintiff,
14 fairly traceable to the defendant, that can be remedied in
15 the case, it's not an issue that the manufacturer defendants
16 raised in the motion.

17 The issue we raised is that the Legislature has not
18 granted the City the power to maintain this lawsuit. And,
19 respectfully, the Court should dismiss all of the claims
20 against the manufacturer defendants because the City lacks
21 that authority.

22 Unless the Court has questions on that point --

23 THE COURT: Well, here's what I think I'll do here.
24 Rather than hear the other reasons you believe your clients

1 should be dismissed here, if the plaintiffs are prepared to
2 address this issue right now, I'd like to hear from them
3 while it's fresh; and then, after that, you can reply to
4 their arguments; and after that, we'll take a short break,
5 and I'll let you come back, and you can continue argument on
6 the other issues.

7 Is the plaintiff ready to do that, or would you
8 rather do it all at once?

9 MR. EGLET: We are prepared to do it all at once,
10 Your Honor. Dillon's argument is permeated throughout my
11 argument, so I would have to give the whole thing.

12 THE COURT: Very good. Thank you.

13 Please continue.

14 MR. LOMBARDO: Thank you, Your Honor.

15 I'll address in much less time the second point that
16 our joint motion raises. And that is the Municipal Cost
17 Recovery Rule. The rule is widely followed, but is not the
18 subject of any reported appellate decision in Nevada, to our
19 knowledge. Neither side has cited a reported appellate
20 decision from Nevada adopting the rule.

21 The rule provides that public expenditures made in
22 performing City functions are not recoverable from an
23 individual whose conduct made the expenditures necessary.

24 As the Ninth Circuit put it --

1 THE COURT: Is that what's being claimed here?
2 Because as I understand it, that's what taxes go for. When
3 you're part of a community, they go for these types of
4 services. We don't usually charge back the person who caused
5 the need for the services in the first place, you know,
6 almost without -- almost without exception, no matter the
7 egregiousness or the culpability or the reason that the
8 services were needed.

9 And that seems to the Court to make sense, and that
10 seems to be the way most jurisdictions, as I understand it,
11 approach this. But you're right. There's a dearth as an
12 absence of any guiding pummel on Nevada or judicial
13 proclamation.

14 So the question is: Does that apply to the
15 allegations in this case; and, if so, how so?

16 MR. LOMBARDO: Absolutely. And I agree with you.
17 That is the prevailing rule in states across the country.
18 And the allegations in this case absolutely implicate that
19 rule because --

20 THE COURT: How so?

21 MR. LOMBARDO: -- because the damages that are sought
22 are damages measured by the expenditure for public
23 services: public services for health, for emergency service,
24 for policing, for law enforcement. And the prevailing rule,

1 as the Court noted, is that we don't charge a third party for
2 creating the need for those services.

3 THE COURT: Okay. But if you accidentally light your
4 house on fire, and then they -- the City or the County come
5 and put it out, we don't normally charge you back. But isn't
6 this a little bit different as alleged here? Isn't this sort
7 of off the grid of what this rule is normally designed to do?

8 MR. LOMBARDO: Well, certainly the case, as framed by
9 the City, alleges intentional and fraudulent conduct. But
10 the Municipal Cost Recovery Rule generally doesn't hinge on
11 that question about the tortfeasor's culpability and state of
12 mind. That's not really an argument the City has advanced
13 here, focusing on that particular issue.

14 And while there's a dearth of reported appellate case
15 law in California, there is reason to believe that, if the
16 issue is before the Nevada Supreme Court, it would follow the
17 majority lead. And that is, in particular, the fact that the
18 Nevada Supreme Court has endorsed the same or very similar
19 fundamental principle that underlies the Municipal Cost
20 Recovery Rule. And it's done so in the context of the
21 Firefighters Rule.

22 THE COURT: Moody's versus Manny's Auto Repair?

23 MR. LOMBARDO: And Steelman. That's right.

24 And as the Court explained there in Steelman, 97

1 Nevada 425 -- quote -- "The Firefighters Rule developed from
2 the notion that taxpayers employed firemen and policemen at
3 least in part to deal with future damages that may result
4 from taxpayers' own negligence. To allow actions by
5 policemen and firemen against negligent taxpayers would
6 subject them" -- the taxpayers -- "to multiple penalties for
7 the protection" -- close quote.

8 So, in other words, the taxpayers are already paying
9 for these services, and to charge them, when they make the
10 services necessary, only makes them pay twice for those
11 services.

12 And it is fundamental separation of powers principles
13 that animate both the Municipal Cost Recovery Rule and the
14 Firefighters Rule.

15 The Legislature -- the principle of separation of
16 powers that underlies these rules is that State Legislatures
17 establish local government to provide core services for the
18 public, and pay for these services by spreading the costs to
19 all citizens, through taxation.

20 And so the question of whether the costs of providing
21 the public service should be spread among all taxpayers or
22 reallocated in some manner necessarily implicates fiscal
23 policy, and, therefore, falls within the special purview of
24 the Legislature, not the courts.

1 We have cited this Walker County case in Georgia that
2 is explaining the justification for the Municipal Cost
3 Recovery Rule in that sense.

4 And I want to highlight some evidence of legislative
5 intent here that I think underscores that there is reason to
6 believe that there is no general right for a City to bring a
7 lawsuit to recover for its expenses of providing municipal
8 services. And that is --

9 THE COURT: Not just no right, there's no exception
10 implicated by the allegations of wrongdoing here. That's
11 what you're saying.

12 MR. LOMBARDO: I'm saying both; right.

13 THE COURT: The plaintiff is going to stand up and
14 say, "Judge, the law in Nevada is not as settled as the
15 defense suggests. And even if it were, if ever there was an
16 exception that needs to be made, this is the test case right
17 here." Right?

18 So, I mean, you don't find any difference between
19 what is alleged here and the cases that made their way to
20 reported decisions?

21 MR. LOMBARDO: I don't. Now, of course, again, we
22 are not talking about the Nevada reported decisions. But if
23 you look at the cases cited in the briefs, including in our
24 motion and in the reply, in our view, the better-reasoned

1 cases reject the limitations that the City advances here.

2 THE COURT: You were going to tell me about the
3 legislative intent, or that you said, "If we look back to,"
4 and I interrupted you. So go ahead.

5 MR. LOMBARDO: Sure. There are circumstances where
6 the Legislature has enacted statutes to authorize local
7 governments to recover certain municipal costs, but not
8 others.

9 And that strongly suggests that no general right to
10 recover those costs is authorized. Otherwise, the
11 Legislature wouldn't have had any need to enact the specific
12 statutes authorizing specific types of cost recoveries.

13 So the statutes, for example, NRS 475.230, authorizes
14 fire departments to recover expenses fighting fires on
15 state-owned land. NRS 405.230 authorizes county agencies to
16 recover expenses for removing obstacles placed on public
17 roads by private persons. And there's a medical lien statute
18 that the State has adopted that allows county-owned hospitals
19 to perfect and enforce a lien on healthcare expenses paid for
20 on behalf of a county resident where that resident obtains a
21 recovery from a third-party tortfeasor.

22 If there were a general right to bring a claim to
23 recover municipal services, none of those acts would have
24 been necessary.

1 And pivoting back to your point, the City's --

2 THE COURT: Again, I'm sorry to keep interrupting,
3 but the allegations here just seem so much different than the
4 specific instances that the Legislature addressed at our
5 Nevada court. Readily foreseeable, that are contemplated,
6 that somebody thought was a situation that may evolve. This
7 seems to the Court to be quite a bit different than that,
8 but --

9 MR. LOMBARDO: Understood, Your Honor. And the City
10 does argue that the rule doesn't apply in cases of ongoing
11 conduct. It only applies to isolated emergencies. And it
12 doesn't apply in cases where the plaintiff is seeking to
13 abate a public nuisance.

14 THE COURT: You're saying, absent clear direction
15 that that's allowed, the Court should decline to find that
16 the absence of the allowance should not let this case go
17 forward, at least on that ground.

18 MR. LOMBARDO: Right.

19 THE COURT: I didn't say that very well, but you know
20 what I'm trying to say.

21 MR. LOMBARDO: I do. And the case law that we
22 discussed, particularly in our reply, explains that denying
23 recovery is even more appropriate in cases of ongoing
24 conduct, because there the local government and its

1 Legislature can better predict, plan for and decide how to
2 finance and respond to those circumstances than in cases of
3 isolated emergencies. And, of course, the Complaint here
4 alleges conduct going back many, many years.

5 THE COURT: Okay.

6 MR. LOMBARDO: I'll move on now to the third point
7 that the joint motion raises, and that is that the First
8 Amended Complaint fails at the most fundamental level because
9 it fails to plead the facts, the facts that are necessary to
10 state a claim upon which relief can be granted as to any of
11 the manufacturer defendants.

12 The Complaint is long. It's 292 paragraphs, and 57
13 pages, and it's a heavy document to lift. Because of that,
14 there might be a temptation to assume that it's chockful of
15 facts about what the manufacturer defendants -- Allergan,
16 Endo, Mallinckrodt, and Teva -- did, what they said, what
17 deceptive statements they made, what their individual
18 tortious actions were to support the five causes of action
19 that are asserted against them.

20 That assumption would be incorrect. Reading the
21 Complaint paragraph by paragraph demonstrates it's incorrect.
22 And, accordingly, we submit that, under the applicable
23 pleading standards, which I'm about to discuss, the Complaint
24 fails to plead the necessary facts to state a claim upon

1 which relief can be granted as against any manufacturer
2 defendant.

3 So I want to start with the standard that's
4 applicable to this Complaint, which we submit is Rule 9 (b),
5 the standard for pleading fraud. Because when the
6 Complaint's allegations are given a fair, even-handed
7 reading, there's no escaping the conclusion that Reno has
8 asserted that the manufacturer defendants engaged in a
9 massive fraudulent marketing scheme based on deception and
10 concealment. Not a negligent marketing scheme, as Reno
11 states in its opposition. A fraudulent marketing scheme.

12 That's what the Complaint asserts. And I'm going to
13 walk through the specific allegations to show this in a
14 moment. But first let's start with the applicable pleading
15 standard, and that is Rule 9 (b). Nevada Rule of Civil
16 Procedure 9 (b) states, "In alleging fraud, a party must
17 state with particularity the circumstances constituting
18 fraud."

19 The rule is identical to Federal Rule of Civil
20 Procedure 9 (b), and the Nevada Supreme Court has looked to
21 and followed interpretations of Federal Rule 9 (b) to guide
22 its interpretation of Nevada Rule 9 (b).

23 Now, the critical question is: When does Rule 9 (b)
24 apply? That is, what kinds of allegations in a Complaint

1 trigger the burden to plead the factual particularity that 9
2 (b) requires? And I don't think there's much agreement about
3 what those rules state.

4 First -- and this is key -- quote -- "The pleading
5 requirements of Rule 9 (b) cannot be evaded simply by
6 meticulously avoiding the use of the magic word 'fraud' in
7 the Complaint" -- close quote.

8 That's the best case out of the Ninth Circuit that
9 both sides cite in this case. So it's not about magic words
10 triggering 9 (b). Instead, courts look to the substance and
11 reality of what is alleged in the pleading. And if --
12 quote -- "the affirmance in the Complaint necessarily
13 described fraudulent conduct, Rule 9 (b) applies to those
14 averments" -- close quote. That's Vess again.

15 So what does that mean? When do the averments in the
16 Complaint necessarily describe fraudulent conduct? Courts
17 have identified two types of allegations that necessarily
18 describe fraudulent conduct, even when fraud is not an
19 essential element of the cause of action asserted.

20 And I want to underscore that point. Rule 9 (b)
21 applies in these two circumstances even when fraud is not an
22 essential element of the cause of action, and even when the
23 magic word is not used.

24 So it's no answer here for Reno to point out that it

1 has not asserted a cause of action denominated fraud. It's
2 just not relevant, much less determinative.

3 So what are the types of allegations that trigger
4 Rule 9 (b)? I'm going to lay out the framework that Vess
5 establishes and that has been followed under Federal Rule 9
6 (b) in the Ninth Circuit for years.

7 Vess describes two scenarios where 9 (b) is
8 triggered, even though no fraud claim as such is -- no fraud
9 cause of action as such is pled.

10 The first scenario. Quote, "In some cases the
11 plaintiff may allege a unified course of fraudulent conduct
12 and rely entirely on that course of conduct as the basis of a
13 claim. In that event, the claim is said to be grounded in
14 fraud and to sound in fraud, and the pleading of that claim
15 as a whole must satisfy the particularity requirement of Rule
16 9 (b)."

17 So scenario one, the Complaint alleges a unified
18 course of fraudulent conduct, and relies entirely on that
19 course of conduct as the basis of a claim.

20 Scenario two. Quote, "In other cases, a plaintiff
21 may choose not to allege unified course of fraudulent conduct
22 in support of a claim, but, rather, to allege some fraudulent
23 and some non-fraudulent conduct. In such cases, only the
24 allegations of fraud are subject to Rule 9 (b)'s heightened

1 pleading requirements," close quote.

2 So scenario two, the plaintiff chooses to allege some
3 fraudulent and some non-fraudulent conduct. That's Vess, at
4 pages 1103 to '04.

5 So how has this framework played out in cases where
6 fraud was not an essential element of a cause of action?

7 I want to look quickly at two cases. The first cited
8 in our papers is Kearns versus Ford Motor Company, 2009 case,
9 Ninth Circuit, under Federal Rule 9 (b).

10 In Kearns, a used-car buyer, on behalf of a putative
11 class, alleged that Ford deceptively marketed its certified
12 pre-owned vehicle program. He claimed that Ford and its
13 dealers made false and misleading statements about the safety
14 and reliability of CPO vehicles -- certified pre-owned
15 vehicles -- to get purchasers to believe that CPO vehicles
16 were more reliable and safer because of the certification
17 process.

18 Importantly, in Kearns, as here, fraud was not a
19 necessary element of the state law claims asserted in the
20 case. The Court says that at page 1125.

21 Nonetheless, the Court of Appeals held that the
22 plaintiffs' Complaint would be held to the heightened
23 pleading standard of 9 (b) because the Complaint was --
24 quote -- "grounded in fraud." The Court explained --

1 quote -- "Reviewing the Complaint, Kearns alleges that Ford
2 engaged in a fraudulent course of conduct. Kearns' Complaint
3 alleges that Ford Motor Company conspires with its
4 dealerships to misrepresent the benefits of its CPO program
5 to sell more cars and increase revenue. Kearns alleges that
6 Ford's marketing materials and representations led him to
7 believe that CPO vehicles were inspected by specially-trained
8 technicians and that the CPO inspections were more rigorous,
9 and, therefore, more safe."

10 The Court goes on. "Therefore, he alleges that Ford
11 engaged in a fraudulent course of conduct."

12 The Court affirmed the dismissal under 9 (b) of the
13 Complaint in that case. The reasons it gave: "Kearns fails
14 to allege the particular circumstances surrounding such
15 representations. Nowhere in the Complaint does Kearns
16 specify what the television advertisements or other sales
17 material specifically stated, nor does Kearns specify when he
18 was exposed to them, or which ones he found material. Kearns
19 also failed to specify which sales material he relied upon in
20 making his decision to buy a CPO vehicle. He does not
21 specify who made the statement, when the statement was made.
22 Kearns failed to articulate the who, what, when, where, and
23 how of the misconduct alleged."

24 That's at 1126 of the Kearns case.

1 Very similarly, a case out of the District of Nevada
2 U.S. District Court, Anchor Gaming Securities Litigation,
3 cited in the briefing, this was a securities class action
4 under Section 11 of the Securities Act of 1933. No scienter
5 is required for liability under that section. All that's
6 required is a securities registration statement contained an
7 untrue statement or admission of a material fact.

8 The Court, nonetheless, ruled that Rule 9 (b)
9 applied, because the Complaint was -- quote -- "rife with
10 insinuations and suggestions that defendants purposefully
11 omitted and misstated material information, intending to
12 benefit therefrom" -- close quote.

13 The Court explained that, despite the plaintiffs'
14 careful attempt to avoid use of the term "fraud," the
15 consolidated amended class-action Complaint, nonetheless,
16 clearly sounds in fraud.

17 And the Court underscored that that was the
18 plaintiffs' choice to plead its claims that way.

19 In the Court's words, the plaintiffs' Complaint could
20 have been drafted to simply allege, without embellishment,
21 that the prospectus contained materially false or misleading
22 statement or omissions. However, plaintiffs chose to do
23 more. By including allegations of fraudulent conduct,
24 plaintiffs brought the burden of Rule 9 (b) upon themselves.

1 That's at page 893 of the Anchor Gaming case.

2 Now, Your Honor, that is exactly what the City has
3 done here. It could have drafted the First Amended Complaint
4 simply to allege, without embellishment, that the
5 manufacturer defendants were negligent. In promoting their
6 medications, it chose to do more. It asserts in the First
7 Amended Complaint that the opioid abuse crisis was no
8 accident -- paragraph 7 -- but was the result of a knowing
9 and intentionally fraudulent marketing scheme.

10 So I would like to look at just a sampling of a few
11 specific assertions in the First Amended Complaint. They
12 bring this Complaint squarely within the pattern of Kearns
13 and Anchor Gaming. And as we'll see, the City's Complaint,
14 just like the Complaints in those cases, alleges a unified
15 course of fraudulent conduct as the basis of its claims
16 against the manufacturer defendants.

17 Now, if the Court -- if the Court will permit it, I
18 have some excerpts from the First Amended Complaint --

19 THE COURT: Go ahead.

20 MR. LOMBARDO: -- that I would like to hand to the
21 clerk.

22 And I've handed these to counsel for the City, as
23 well.

24 THE COURT: Well, the First Amended Complaint,

1 obviously, is part of the record, but if you're just asking
2 the Court to follow along, I'll follow along.

3 MR. LOMBARDO: Thank you, Your Honor.

4 THE COURT: Okay. So these are -- this is your
5 analysis of how these allegations play into the argument
6 you're making to the Court. That's different.

7 MR. LOMBARDO: Other than the title, this is entirely
8 quotes from the First Amended Complaint.

9 THE COURT: Okay. I'll follow along. I'm not going
10 to make this part of the record.

11 MR. LOMBARDO: Thank you, Your Honor.

12 THE COURT: I mean -- since you're presenting it to
13 the Court for review and consideration, I'll make it part of
14 the record; but I'll note that this is not just mirror copies
15 of those paragraphs, but it's set out in the manner in which
16 you've identified them.

17 Go ahead.

18 MR. LOMBARDO: Thank you.

19 As I noted initially, Reno's opposition, its basic
20 argument is, the City's claims are based on negligent
21 misrepresentation and negligent concealment, and do not
22 implicate intentional or fraudulent conduct. Its First
23 Amended Complaint belies that assertion.

24 The first several paragraphs just put into context

1 the -- quote -- "fraudulent marketing scheme that the City
2 has alleged here."

3 Paragraph 8 alleges that, "The manufacturer
4 defendants, through deceptive means, used one of the biggest
5 pharmaceutical marketing campaigns in history, carefully
6 engineered, and continue to support the dramatic shift in the
7 culture of prescribing opioids by falsely portraying the
8 risks of addiction and abuse."

9 The Complaint has an entire section called
10 "Defendants' fraudulent marketing." And looking down at
11 paragraph 131, "To convince prescribing physicians and
12 prospective patients that opioids are safe, defendants
13 deceptively concealed the risks of long-term opioid use,
14 particularly the risk of addiction. Through a series of
15 misrepresentations, defendants manipulated their promotional
16 materials and the scientific literature to make it appear
17 that these items were accurate, truthful, and supported by
18 objective evidence."

19 Turning to the second page, the Complaint also
20 contains a section called, "The consequences of defendants'
21 fraudulent scheme." In paragraph 176 in that section, it
22 refers to the impact of the defendants' -- quote --
23 "fraudulent advertising."

24 So, nonetheless, the City alleges that -- or contends

1 that its Complaint is merely a negligence Complaint, it's not
2 a fraud Complaint. And so I want to focus next on specific
3 allegations that clearly allege intentional or fraudulent
4 conduct.

5 Paragraph 12 alleges defendants knew that their
6 opioid products were addictive, subject to abuse, and not
7 safe or efficacious for long-term use.

8 Looking down at paragraph 106, the Complaint alleges
9 that the defendants presented information and instructions
10 that were contrary to, or, at best, inconsistent with,
11 defendants' own knowledge of the risks, benefits, and
12 advantages of opioids.

13 Paragraph 108 alleges that the defendants carried out
14 a common scheme to deceptively market the risks, benefits and
15 superiority of opioids to treat chronic pain; and that
16 participants in that alleged scheme knew this information was
17 false and misleading.

18 Turning to the last page, paragraph 248 of the First
19 Amended Complaint, it could not be more direct. Defendants
20 made these false representations and concealed facts with
21 knowledge of the falsity of their representations.

22 The other elements, typically, of course, of a fraud
23 claim is: Was the defendant intending to induce reliance,
24 intending to deceive the plaintiff?

1 And the last section of paragraphs here makes clear
2 that the City has alleged that and asserted that here.

3 Paragraph 249, in particular, the last allegation
4 shown here: "The defendants intended and had reason to
5 expect under the operative circumstances that the plaintiff
6 would be deceived by defendants' statements, concealments,
7 and conduct as alleged herein, and that plaintiff would act
8 or fail to act in reasonable reliance thereon."

9 The allegations could not be more clear. These
10 allegations, extensive as they are -- and those are just
11 examples -- were not an oversight or a typo in the First
12 Amended Complaint. They were the City's choice. The City
13 chose to bring the public stigma of fraud on the manufacturer
14 defendants. And that choice comes with a consequence for the
15 City. It has brought the burden of Rule 9 (b) upon itself,
16 as the Court said in Anchor Gaming. Now, in
17 arguing otherwise, and in asserting that the Complaint does
18 not allege intentional or fraudulent conduct, the City is
19 simply asking the Court to ignore the words it chose.

20 Words matter. Rule 9 (b) makes words matter. And
21 the Complaint asserts a unified course of fraudulent conduct
22 as the basis of the City's claims. It needs to plead the
23 who, what, where, why, when, and how of the fraudulent
24 marketing scheme. It hasn't done so. Not as to Allergan or

1 Endo or Mallinckrodt or Teva, the manufacturer defendants.

2 Now, when the City's counsel stands up here, he's not
3 going to be able to point the Court to any allegation in the
4 First Amended Complaint that describes a specific statement
5 made by a specific person, acting for a specific manufacturer
6 defendant, who said it, when it was said, how it was
7 communicated, why it was false, who in Reno heard or read the
8 statement, or any of the particular circumstances
9 constituting fraud. And that's what Rule 9 (b) requires.
10 The Nevada Supreme Court has so said in the Brown case, cited
11 in the papers.

12 Instead, the Complaint is spilling over with
13 generalized assertions that lump all the defendants or all
14 manufacturer defendants together and treat them as an
15 undifferentiated mass.

16 But Rule 9 (b) does not allow a Complaint to merely
17 lump multiple defendants together. It requires plaintiffs
18 to -- quote -- "differentiate their allegations when suing
19 more than one defendant, and inform each defendant separately
20 of the allegations surrounding his alleged participation in
21 the fraud."

22 The Ninth Circuit said so in the 2007 case of Swartz,
23 cited in the papers. Swartz versus KPMG, 476 F 3d, 756.

24 So where does the City go from here? It says, "Give

1 me a chance to take discovery, to see if I can plead -- if I
2 can find the facts and plead my fraud claim. And it relies
3 on a case, Rucker versus KPMG. And that case is in apodixis
4 under the allegations of the Complaint here.

5 Why is it in apodixis? Because the Rucker court found
6 that the plaintiffs in that case had alleged specific facts
7 in their Complaint that brought them within a narrow
8 exception to get an opportunity for discovery to plead fraud,
9 because those facts were exclusively and peculiarly within
10 the defendants' possession.

11 So, in particular, Rucker holds that, to invoke this
12 discovery opportunity, a plaintiff must, number one, state
13 facts supporting a strong inference of fraud in the
14 Complaint; and, number two, show in the Complaint that they
15 can't plead with more particularity because the required
16 information is in the defendants' possession.

17 Now, the Complaint in Rucker stated facts supporting
18 a strong inference of fraud because, unlike the Complaint
19 here, it set forth the representations in the Complaint, and
20 when they were made. That's at 1192 of Rucker. And the
21 Complaint showed that the plaintiffs could not plead with
22 more particularity because the fraud that they alleged in the
23 Rucker case was a complicated accounting fraud, an accounting
24 fraud that KPMG allegedly helped its clients perpetrate

1 behind closed doors, in confidence, outside the public eye.
2 The factual details of that fraud were, thus, uniquely in the
3 defendants' possession.

4 Neither condition is met here to trigger Rocker's
5 narrow exception. Unlike in Rocker, first, the City has not
6 pled the specific misrepresentations, and where they were
7 made, to support a -- quote -- "strong inference of fraud."
8 Indeed, no specific representations are alleged as to the
9 manufacturer defendants.

10 And, number two, unlike in Rocker, the City's own
11 allegations demonstrate that the facts needed to plead with
12 particularity cannot be exclusively in the manufacturer
13 defendants' control because this alleged fraud was, according
14 to the First Amended Complaint, both massive and out in the
15 open, in public, for all to see. In the City's own words,
16 the marketing fraud they're suing over was carried out --
17 quote -- "using one of the biggest pharmaceutical marketing
18 campaigns in history" -- close quote. Paragraph 8 of the
19 Complaint.

20 So there's nothing unique or local about the
21 fraudulent marketing that the City has alleged here compared
22 to the claims of the thousands of plaintiffs that have been
23 active in litigation in the federal MDL for years. And yet
24 the Complaint does not plead the facts required to bring it

1 within the narrow exception for Rucker discovery

2 Now this brings me to the supplemental brief. I'll
3 be brief about the supplemental brief because the Court has
4 already commented on that.

5 The supplemental brief does not supply any of the
6 missing facts that 9 (b) would require. Not a single one.
7 It doesn't identify any false or deceptive statement by a
8 manufacturer defendant. It doesn't identify any marketing or
9 promotional statement by a manufacturer defendant. It does
10 not supply the who, what, where, when, how, or why. And,
11 indeed, three of the four manufacturer defendants are not
12 even mentioned in the supplemental brief, including my
13 clients, the Endo defendants.

14 Now, all of that is why Rule 9 (b) supplies the
15 pleading standard applicable to the City's claims. And it's
16 our firmly held view that that is why the Complaint fails to
17 state a claim upon which relief can be granted.

18 But I would be remiss if I didn't add, as our motion
19 does, that even under the normal default pleading standard of
20 Rule 8 (a), the Complaint doesn't state a claim against the
21 manufacturer defendants because it fails to plead the facts
22 showing that the City is entitled to relief against each
23 manufacturer defendant.

24 Even under Nevada's notice pleading standard, a

1 Complaint must plead facts, those facts must show the City is
2 entitled to relief, and the facts must be sufficient to give
3 defendants fair notice of the nature and basis or grounds of
4 the claim, so that the defendant can intelligently admit or
5 deny them.

6 The First Amended Complaint here doesn't do so. It
7 pleads by broad category of conduct. It aggregates hundreds
8 of allegations against 30 defendants, spanning multiple
9 decades. And one searches in vain for factual allegations of
10 specific conduct by an individual manufacturer defendant, by
11 Allergan, Endo, Mallinckrodt, or Teva.

12 And as the City knows, these manufacturers of
13 prescription medications compete with one another. They sell
14 different medications. They create and carry out their own
15 marketing programs. It's not plausible for the City to
16 suggest they're an undifferentiated monolith.

17 So in evaluating the City's group-pleading approach,
18 I find it useful to ask whether, if the First Amended
19 Complaint only named one defendant, one of the manufacturer
20 defendants, would it state sufficient facts to plead a claim
21 against that defendant?

22 And I submit it would not because it doesn't plead
23 conduct by any of the individual defendants. Leveling the
24 same allegations against 30 defendants does not make them any

1 more adequate.

2 Unless the Court has questions, at this point, I'd
3 move on to the first particular cause of action that's
4 addressed in our joint motion to dismiss. That is the
5 statutory public nuisance cause of action.

6 THE COURT: Here's what I think we'll do. We're
7 going to take a 15-minute leg-stretch break. We'll take some
8 time, and we'll come back and continue at 11:00 o'clock.
9 We'll be in recess until that time.

10 (Recess.)

11 THE COURT: Okay. We're back on the record in
12 CV18-01895, continuing with oral argument on the joint
13 manufacturers' motion to dismiss the First Amended Complaint.

14 Please proceed.

15 MR. LOMBARDO: Thank you, Your Honor.

16 As my last trick before I cede the lectern to Mr.
17 Guinn, I'll address the two causes of action that the City
18 asserts for public nuisance. It asserts two.

19 It asserts a statutory public nuisance cause of
20 action under NRS 202.450 that's --

21 THE COURT: Common law.

22 MR. LOMBARDO: Common law; correct. And each is
23 legally defective for independent reasons.

24 First, with respect to the statutory public nuisance

1 cause of action, it's legally defective because the statute
2 on which the City relies is a criminal statute that does not
3 authorize a civil right of action.

4 THE COURT: One is not implied.

5 MR. LOMBARDO: One is not implied, because there's no
6 evidence in the statute that one is implied.

7 And the two Nevada Supreme Court cases that the City
8 relies on to argue that what is implied, Baldonado and
9 Neville, actually support the conclusion that a civil cause
10 of action is not implied in the public nuisance statute.

11 And I'll explain why right now, if the Court would
12 like me to.

13 THE COURT: Sure.

14 MR. LOMBARDO: So Baldonado and Neville both involve
15 labor laws. And in the first, Baldonado found no civil
16 cause -- no private right of action was implied in the labor
17 laws that were at issue in that case, which made it a
18 misdemeanor for an employee to take tips from a -- for an
19 employer to take tips from an employee.

20 The Court found no evidence that the Legislature in
21 that case intended those laws to be enforceable by private
22 right of action because there was no provision granting
23 private remedies, and those laws were to be administratively
24 enforced by the Labor Commissioner, according to the statute.

1 And the Nevada Supreme Court noted -- quote -- "The
2 absence of express provision providing for a private cause of
3 action to enforce a statutory right strongly suggests that
4 the Legislature did not intend to create a
5 privately-enforceable judicial remedy."

6 So the absence of an express provision is a critical
7 element of legislative intent that the Legislature did not
8 mean to create a civil cause of action.

9 Now, Neville, the second case, found that different
10 labor law provisions concerning unpaid wages did create a
11 private cause of action because of a critical factual
12 distinction between the laws in Neville and the tip laws in
13 Baldonado.

14 The wages laws in Neville expressly allowed for the
15 recovery of attorney's fees in a private cause of action for
16 unpaid wages. And in doing so, these laws clearly evinced
17 the Legislature's intention to create a private cause of
18 action for unpaid wages.

19 And so here's how the Neville court explained it.
20 Quote, "The determinative factor is always whether the
21 Legislature intended to create a private judicial remedy. It
22 would be absurd to think that the Legislature intended a
23 private cause of action to obtain attorney's fees for an
24 unpaid wages suit, but no private cause of action to bring

1 the suit itself," close quote. That's at 783 of Neville.

2 So the clear statutory evidence in the statutes at
3 issue in Neville was a provision that expressly granted a
4 right to recover attorney's fees in an action for unpaid
5 wages. What purpose would that provision have if there were
6 no private action to recover unpaid wages?

7 And so the import of these two cases, pled together
8 for the criminal public nuisance statute at issue here, is
9 clear. Baldonado controls here because here, as in
10 Baldonado, the statute contains no clear evidence that the
11 Legislature intended to create a private cause of action.
12 The State, through its prosecuting attorneys, is to enforce
13 the public nuisance statute, through criminal misdemeanor
14 suits, just as the Labor Commissioner was to enforce the tip
15 laws through administrative proceedings in Baldonado. The
16 normal ordinary presumption, thus, controls here, as in
17 Baldonado, that the absence of an express provision providing
18 for a private cause of action to enforce a statutory right
19 strongly suggests that the Legislature did not intend to
20 create a privately-enforceable judicial remedy.

21 And Neville, by contrast, is in apodictic here. The
22 City can't point to any provision in the public nuisance
23 statute here that resembles the clear evidence that existed
24 in the unpaid wages laws in Neville that the Legislature

1 intended to create a private cause of action; namely, that
2 provision that authorized the recovery of attorney's fees in
3 private suits.

4 So the City's cases prove our point. The Legislature
5 enacted a criminal statute in NRS 202.450, with no
6 indication -- none whatsoever -- that it intended to create a
7 private cause of action.

8 And, notably, the Legislature did create separately a
9 civil cause of action for private nuisance for property
10 owners whose use and enjoyment of their land is impaired by a
11 nuisance. That statute is NRS 40.140, et seq. And the
12 Legislature did that at the same time as it enacted the
13 criminal public nuisance statute in 1911.

14 The Legislature would have had no need to enact the
15 private nuisance measure if the criminal statute itself
16 created a civil cause of action for public nuisance.
17 So the Legislature's action in enacting the private nuisance
18 cause of action is itself clear evidence that NRS 202.450
19 does not imply a civil cause of action for public nuisance.
20 The statutory claim fails for that reason alone.

21 But independent of that reason, even if the public
22 nuisance statute authorized a civil cause of action -- and it
23 doesn't -- it doesn't reach a nuisance allegedly resulting
24 from the misuse or abuse of a lawful product. And that

1 result was recently reached by a court in North Dakota
2 interpreting that State's very similar public nuisance
3 statute.

4 The statutes are very similar. NRS 202.450 defines a
5 nuisance to embrace certain places, certain buildings, and
6 then also to embrace acts that injure or endanger health or
7 safety, or that render a considerable number of people
8 insecure in life or the use of property.

9 None of these activities constituting a nuisance
10 involves the sale of a lawful product that, when abused or
11 misused, results in societal harms, like the City alleges
12 here. No Nevada appellate court has applied the public
13 nuisance statute to the sale of a product.

14 And as I noted, in May, a North Dakota court ruled
15 that that State's public nuisance statute did not authorize
16 the State's suit against Purdue Pharma for the sale of opioid
17 medications. That statute, like NRS 202.450, defines a
18 nuisance to include acts that injure or endanger health or
19 safety, or that render persons insecure in life, or the use
20 of their property. That statute is NDCC, Section 42-1-1.

21 The Court dismissed the cause of action because --
22 quote -- "no North Dakota court has extended the public
23 nuisance statutes to cases involving the sale of goods."

24 We've provided that case as Exhibit A with our reply,

1 North Dakota versus Purdue Pharma. That discussion is at
2 page 27. The ruling is sound because the statute by its
3 terms does not encompass product sales, and because allowing
4 such claims would expand the statute's reach far beyond
5 reasonable limits. Every product sold that could possibly be
6 misused or abused after it is sold and is in the hands of a
7 third party could support a public nuisance claim, a criminal
8 claim for a misdemeanor, which is not what these statutes
9 appear to contemplate.

10 And, finally, there's a third defect with the
11 statutory public nuisance claim, and that is that it does not
12 authorize the remedies that the City seeks. The criminal
13 statute expressly authorizes criminal penalties; namely,
14 fines and other punishment, as well as the ancillary remedies
15 of abatement and civil penalties. It doesn't authorize
16 damages, either compensatory or punitive, as the City seeks
17 here. And those remedies are, accordingly, not available
18 under the well-established rule that -- quote -- "Where the
19 statute's express provision of remedies reflect the
20 Legislature's intent to provide only those specified
21 remedies, courts decline to engraft any additional remedies
22 therein."

23 That's the Nevada Supreme Court in the Stockmeier
24 decision, cited in the papers. Stockmeier is on all-fours

1 with the claims here. There the plaintiff claimed that the
2 State's Psychological Review Panel of the Department of
3 Corrections violated the open meeting law. And he sought
4 damages under the law. He's a registered sex offender. And
5 sought damages under the law. The law authorized declaratory
6 relief and injunctive relief only. And the Nevada Supreme
7 Court explained why damages were not available.

8 The open meeting law's -- quote -- "language is clear
9 and unambiguous. While declaratory and injunctive relief are
10 available, the Legislature provided no relief in the form of
11 damages because the statute's express provision of such
12 remedies reflect the Legislature's intent to provide only
13 those specified remedies. We decline to engraft any
14 additional remedies therein. Therefore, we conclude that
15 Stockmeier's remedies for any violation of the open meeting
16 law were limited to those of injunctive or declaratory relief
17 as set forth in the statute."

18 The City cites no contrary law and offers no
19 explanation that I can discern for why it can recover damages
20 through a statute that provides only for criminal punishment
21 abatement civil penalties. Stockmeier is controlling on the
22 issue. The statutory public nuisance claim should be
23 dismissed for all three independent reasons.

24 And, finally, the common law public nuisance claim.

1 The joint motion shows that that cause of action is legally
2 deficient. Two reasons. First, because the City has not
3 identified a public right, a right common to all members of
4 the public, that the manufacturer defendants have allegedly
5 violated. And, second, because the City's theory would
6 impermissibly collapse the laws of products liability and
7 public nuisance.

8 So addressing the public right point first, a public
9 right is -- quote -- "corrective in nature. It is a term
10 reserved for those indivisible resources shared by the
11 public, such as air, water, or public rights-of-way." And as
12 the Restatement explains, it's not like the individual right
13 that everyone has not to be insulted or defamed or defrauded
14 or negligently injured.

15 Interferences with public rights injure everyone in a
16 locality who is within the zone of exposure, such as by
17 exposure to environmental contaminations, obstructions of
18 waterways, and municipal dumps, or even pig farms.
19 The harms the City alleges here implicate only individual
20 rights: the personal rights of doctors and patients not to
21 be misled, the rights of patients not to be physically harmed
22 by a product they did not reasonably need. There is no
23 common law public right to a certain standard of medical
24 care. As a result, the City has not alleged the violation of

1 a public right in support of a common law public nuisance
2 claim.

3 Second, courts jealously guard the well-established
4 boundary between products liability law and public nuisance
5 law.

6 As a Delaware court explained in dismissing a very
7 similar public nuisance claim there -- quote -- "There is a
8 clear national trend to limit public nuisance to land use" --
9 close quote -- and, hence -- quote -- "other jurisdictions
10 have refused to allow products based upon nuisance claims."
11 That is State ex rel Jennings versus Purdue Pharma, which we
12 cited in the papers.

13 We've cited numerous decisions involving products
14 like lead paint, handguns, pseudoephedrine, which is used to
15 make methamphetamine, and other potentially harmful products
16 in which courts have dismissed public nuisance claims. Those
17 are cited in our motion at page 17, and footnote 9.

18 Now, the City cites some cases, including some opioid
19 cases, that survived motions to dismiss, including the Clark
20 County case before Judge Williams. But as this Court has
21 recognized, this case will stand and fall on its own merits,
22 and this Court must evaluate it independently, in the absence
23 of controlling case law dictating a particular result.

24 The manufacturer defendants respectfully submit that

1 this public nuisance claim and others like it ignored
2 established limits of nuisance law, and in abandoning those
3 limits' risks, letting the Doctrine of Nuisance morph into a
4 standardless all-purpose claim for retroactive regulation by
5 litigation, as the City seeks to accomplish here.

6 Both nuisance causes of action should, accordingly,
7 be dismissed for failure to state a claim, upon which relief
8 should be granted.

9 I'd like to thank the Court. Unless the Court has
10 any questions, I'll invite Mr. Guinn to take my place here.

11 THE COURT: All right. I have no additional
12 questions at this time.

13 Thank you very much.

14 Mr. Guinn.

15 MR. LOMBARDO: Thank you.

16 MR. GUINN: Thank you, Your Honor.

17 Just to kind of hit the reset button here for a
18 minute, and to put the defendants' arguments in a more global
19 perspective.

20 Before I start, my name is Steve Guinn. I represent
21 Mallinckrodt, LLC in this case.

22 And I should also note the two other Mallinckrodt
23 entities -- Mallinckrodt brand of Pharmaceuticals, Inc., and
24 Mallinckrodt U.S. Holdings, Inc. -- were both dismissed from

1 this case on March 4, 2019.

2 THE COURT: You're making argument now on behalf of
3 all the manufacturers?

4 MR. GUINN: Correct, Your Honor.

5 THE COURT: As to the other issues raised in the
6 motion to dismiss the First Amended Complaint, the negligence
7 claim, the other claims I can't --

8 MR. GUINN: Exactly, Your Honor. I'll be addressing
9 in a joint fashion four different claims brought in the joint
10 motion: negligence, negligent misrepresentation, unjust
11 enrichment, and punitive damages.

12 THE COURT: Got it.

13 MR. GUINN: I think most of the manufacturer
14 defendants have filed a form of joinder of separate motions
15 that will be heard later on.

16 THE COURT: Yes.

17 MR. GUINN: Also by way of preface, I'm deliberately
18 going to try to paint with a fairly broad brush here in a
19 manner -- and argue in a manner that pertains to all the
20 defendants, with the understanding that my client has its own
21 separate substantive joinder that will be heard separately.

22 THE COURT: Got it.

23 MR. GUINN: So I don't want the Court to think that
24 any omission of my claim in this argument is intentional.

1 It's deliberately reserved for that later argument.

2 THE COURT: Understood.

3 MR. GUINN: First of all, let me thank Mr. Lombardo
4 for doing such a thorough and comprehensive job. When we
5 were talking about how to divide up the argument in this
6 case, we saw a logical dividing line between sort of
7 over-arching, case-dispositive issues, the ones you just
8 heard from Mr. Lombardo, and claims-specific issues, which
9 I'm here to address.

10 Everybody in the room is familiar with negligence
11 claims. This may not be quite as glamorous as the argument
12 regarding Dillon's Rule. It may not be as weighty. But,
13 nonetheless, it's just as important, Your Honor, so I will
14 probably focus a little bit more on the nuts and bolts of a
15 claim and the facts supporting that claim, and much less on
16 the policy, the over-arching legal issues that Mr. Lombardo
17 has already addressed.

18 With that, let me start by a factual overview,
19 because sometimes I think we lose track of the actual facts
20 we're here to talk about.

21 The over-arching legal concept with respect to the
22 negligent misrepresentation and the unjust enrichment claims
23 is essentially causation or foreseeability, a concept
24 well-known to this Court, both from the bench and as a

1 practitioner.

2 I think it's important to understand the supply chain
3 in this case, the causation chain that's at issue, before we
4 address the actual application of the law to the facts in
5 this case.

6 And this is how the distribution or how the sale of
7 opioids works. I don't think there's any dispute about this.
8 But it starts with the manufacturers who make opioids.
9 There's no dispute about that. That process is rigorously
10 supervised and directed and regulated by the FDA and the
11 federal government.

12 THE COURT: Is all of it made in this country, or
13 made outside this country?

14 MR. GUINN: Both, I suspect, Your Honor.

15 And I can't speak for all the other defendants. I
16 know, in my client's case, they have operations outside this
17 country.

18 But the raw supply chain is regulated carefully by
19 the DEA.

20 The amount of opioids any one manufacturer can sell
21 is strictly regulated by the DEA. It's called the DEA quota.
22 This is obviously a highly-regulated industry.

23 What the manufacturers do, when they manufacture the
24 amount of opioids that you're allowed to manufacture per the

1 DEA's rules, is sell to distributors. Those are their
2 customers, the distributors. When they sell those opioids,
3 they go to a nationwide warehouse. They don't go to a
4 specific individual, an ultimate consumer, a patient, a
5 pharmacy. They go to a warehouse somewhere. And that is the
6 end of the manufacturers' involvement in the distribution
7 chain.

8 The distributors at that point, who are also strictly
9 regulated by the federal government, sell to pharmacies. How
10 they do that, why they do that, decisions they make about
11 that are not in the control of the manufacturers at this
12 point, who are now removed from the supply chain.

13 It's up to the discretion of the distributors, not
14 the manufacturers, as to what pharmacies or end-users get any
15 one opioid drug.

16 What happens next? Doctors prescribe opioids for any
17 number of reasons to their patients. The pharmacies cannot
18 dispense those opioids without a prescription from a doctor.
19 The pharmacies are highly regulated. They have to be
20 licensed. The doctors, obviously, have to be licensed, as
21 well. They have to use their own medical judgment as to how,
22 why, and when to prescribe opioids to patients for whatever
23 their patients' needs might be.

24 The patients eventually then get the opioids. And

1 what do they do with them? There are instances of abuse.
2 Some patients become addicted to opioids. Some sell the
3 opioids on the black market. Some become addicted to opioids
4 and end up moving into more illegal drugs because of that
5 addiction.

6 Only then -- and this is number six in the causal
7 link, by my count -- does the City's -- are the City's
8 potential damages claim in this case invoked. Only at that
9 point.

10 For example, if an ultimate user has an overdose, and
11 an ambulance has to respond to his house, that is the type of
12 municipal cost the plaintiffs are seeking to recover here.
13 Only at that point in the chain are the City's damages
14 invoked.

15 It's important to emphasize that that chain of
16 distribution is sort of what underlies this whole argument,
17 Your Honor. And it should be -- it can't be overstated that
18 it's all strictly federally regulated. Nobody is claiming
19 that any manufacturer in this case illegally violated the
20 federal rules when they were selling anything. It's not that
21 type of a claim.

22 With that, let me -- with that background, let me
23 focus on the specific causes of action that I have. And the
24 first one is the third cause of action, for negligence. It's

1 all of one page of the Complaint, Your Honor. You have to
2 get all the way to paragraph 230 to find it.

3 It is pled against the manufacturers and detailers.
4 I am addressing it on behalf of the manufacturers.

5 The negligence claim by the City of Reno says, at
6 paragraph 231, "That the manufacturers had a duty to exercise
7 reasonable care in manufacturing, marketing, promoting, and
8 selling opioids."

9 It's a very broad statement.

10 Paragraph 232, the First Amended Complaint, says,
11 "The manufacturers breached their duty by doing the foregoing
12 in an improper manner."

13 That's a direct quote from the Complaint: "an
14 improper manner."

15 I emphasize that because that is about as specific
16 the Complaint gets in terms of describing the conduct
17 manufacturers allegedly engaged in that now gives rise to the
18 plaintiffs' claims.

19 An important exception, an important clarification is
20 found in the First Amended Complaint about the nature of
21 plaintiffs' claims, and that is at paragraph 41. I will
22 paraphrase this, because it's a little bit wordy. But it
23 says, "Plaintiff does not bring claim for products liability
24 or seek compensatory damages for death, physical injury,

1 emotional distress, or property damage."

2 That's what we know from the plaintiffs' own
3 pleadings, plaintiffs' own words what the nature of the claim
4 is.

5 The problem is, Your Honor, that is where the
6 causation chain also breaks down.

7 The negligence claim in this case fails because the
8 plaintiff does not and cannot plead the necessary element of
9 causation, because the relationship between the defendants'
10 alleged conduct and the loss claimed by the plaintiff is so
11 attenuated it cannot establish a legal duty of care owing
12 from the manufacturers to the City.

13 Stated another way, no duty is owed by the
14 manufacturers to control the dangerous conduct of another or
15 third person, absent a special relationship between the
16 defendant and the third person or the injured party.

17 The Special Relationship Doctrine is articulated very
18 well in all the briefing in this case, and I don't intend to
19 recap that from start to finish. But what the law says is,
20 when there is a -- quote -- "special relationship" --
21 examples given are landowner-invitee, doctor-patient,
22 employer-employee, that type of thing, special, unique
23 relationship -- then there is some flexibility on negligence
24 causation. We can get out of the standard paradigm for

1 evaluating negligence causations.

2 The key issue for determining whether there's a
3 special relationship is control. What control do the two --
4 does the one entity have over the other entity?

5 The case law in this is pretty much undisputed, Your
6 Honor. This is a fairly-well-established doctrine in the
7 law, and is, again, fairly thoroughly discussed by both
8 parties in their briefs.

9 So the control -- taking that control element, when
10 we have an employer-employee, I don't think anyone would
11 dispute the notion that the employer has a certain level of
12 control -- probably quite a bit of control -- over his
13 relationship with the employee, by virtue of paying him to do
14 a job.

15 Same with a doctor and a patient. There's a unique
16 relationship there that's different than two third parties
17 who have no otherwise preexisting relationship.

18 There's no suggesting anywhere in the briefing,
19 anywhere in the case law, because there simply isn't any law,
20 that supports the notion that there's any type of special
21 relationship as required under the negligence causation rules
22 between the manufacturer of a drug and a municipality
23 somewhere in the United States who may have paid some money
24 to send an ambulance to somebody's house to deal with an

1 opioid problem.

2 Again, the simple facts, Your Honor, the simple
3 causation chain I articulated, in and of itself, has so many
4 links, it makes such a relationship almost impossible. To
5 suggest there might be a relationship in this case between
6 any manufacturer of opioids and the City belies everything we
7 are here today talking about. There's clearly no type of
8 relationship of any kind.

9 In fact, if there is a relationship in the sense --
10 in the context of this litigation, it's adversarial. There's
11 no suggestion in this case that a manufacturer somehow
12 communicated to the City of Reno any facts or information or
13 established any type of relationship that would give rise to
14 the special relationship exception to the ordinary rules of
15 causation in negligence.

16 Again, to re-emphasize, the DEA prescribes the
17 amounts of raw materials, and imposes the limits on sales.
18 There's a third-party intervening influence on the causation
19 chain.

20 The manufacturer can control who it sells to. They
21 can choose what distributors it sells to. But that's all it
22 can do.

23 Manufacturers can't control who the distributors sell
24 to. Manufacturers can't control who the doctors write

1 prescriptions for. The manufacturers can't control what
2 patients do with the prescriptions. That's the doctor's
3 responsibility. A manufacturer cannot control illegal use or
4 distribution of legal medicine. There's no connection.
5 There's no control.

6 Let's go back to what we're doing here. Today we're
7 here to hear a motion to dismiss under Rule 12. And the
8 First Amended Complaint itself goes to great lengths to
9 describe the involvement of all these third-party actors who
10 intervene in the process between the manufacturers and the
11 end-users and the City.

12 The distributors, the pharmacies, the doctors, and
13 the individual patients are all intermediaries. Many of them
14 are defendants in this case. Simply put, Your Honor, there
15 are no facts pled in the First Amended Complaint that would
16 support the notion of a special relationship.

17 One of the issues slightly peripheral to what I'm
18 talking about, but briefed in the papers, concerns
19 foreseeability. Foreseeability is undisputedly an issue in
20 determining causation in a negligence case. I think we all
21 remember that one from law school.

22 The plaintiffs take the concept of foreseeability and
23 sort of dumb it down to the point where it has no meaning at
24 all.

1 The question in this case isn't whether opioids might
2 cause addiction or might cause a municipal cost to be spent
3 to deal with the adverse effects of those.

4 The question in this case is whether the lawful
5 manufacture and sale of a tightly-regulated, FDA-approved
6 prescription medication, lawfully dispensed through at least
7 three intermediaries -- distributors, pharmacies, and
8 doctors -- would lead to a public health crisis, as claimed
9 by the plaintiff.

10 Nothing in the First Amended Complaint, the case law,
11 or the Nevada jurisprudence that has been briefed in this
12 case supports that claim of causation.

13 There's one independent ground that also applies to
14 the public nuisance claims that Mr. Lombardo addressed. And
15 I won't recap what he said. But an independent, standalone
16 basis to defeat the negligence claim is also in our briefs,
17 and it is the Economic Loss Doctrine, which applies both to
18 the nuisance claims and to the negligence claims.

19 The Economic Loss Doctrine bars tort recovery; i.e.,
20 negligence recovery, for purely economic damages; i.e.,
21 something that is not personal injury or property damage.
22 There's no question, based on paragraph 41 that I commented
23 on earlier, that the plaintiff in this case is not making a
24 claim or even coming close to making a claim for personal

1 injury or property damage. They're plainly and admittedly,
2 and undisputedly, in their own words, making a claim for
3 recovery of costs of purely economic damages.

4 The policy of that doctrine, Your Honor, I think is
5 important here, because it limits the scope of tort liability
6 to encourage economic commercial activity. That is the
7 underlying policy of the Economic Loss Doctrine. The
8 thinking being, if entities such as a manufacturer of a
9 product could ultimately be held liable at tort for the type
10 of costs the plaintiffs are seeking in this case, it would
11 discourage economic activity. It would virtually open up the
12 floodgates of potential plaintiffs in a case like this.

13 Most importantly for the purpose of the motion to
14 dismiss, Your Honor, is the City does not allege in this case
15 that it suffered personal injury or property damage. That's
16 a given.

17 And there's no dispute that the Economic Loss
18 Doctrine is good law in Nevada. Neither side makes that
19 contention. There's no dispute that it bars the plaintiffs'
20 claims here.

21 The negligent misrepresentation claim is related to
22 the negligence claim, but it's much more narrow and much more
23 specific. And something you're going to hear from Mr. Eglet,
24 when he has an opportunity to speak, over and over again, I

1 think, you'll actually hear two things.

2 Number one, Nevada is a notice pleading state.

3 That's Black Letter Law. I don't think anyone disputes that.

4 And, number two, this is very early in the case. He
5 should be having some opportunities to do some discovery,
6 generate some more facts that might beef up the allegations
7 of the First Amended Complaint.

8 Accepting that at face value, Your Honor, notice --
9 Nevada is a notice pleading state. And notice is exactly
10 what is lacking in the First Amended Complaint when it comes
11 to the negligent misrepresentation claim.

12 This is a very specific tort. It essentially
13 Claims -- it is a tort that embodies the notion of
14 misrepresentation -- a lie -- being made to somebody within a
15 business transaction that causes the other person damage.

16 It is defined by Section 552 of the Restatement. But
17 it recognizes the negligent misrepresentation claim only in
18 the context of a business relationship, meaning the plaintiff
19 and the defendant have to have a business relationship and
20 engage in a business transaction in order for a negligent
21 misrepresentation claim to even exist in the first place.

22 The Court is probably wondering what that business
23 relationship is in this case. And the First Amended
24 Complaint, unfortunately, doesn't tell us.

1 The facts and argument the Court has heard already
2 today make it clear that there is no business relationship
3 between the City of Reno and any manufacturer in this case,
4 who are now adverse in this litigation.

5 Most importantly, the First Amended Complaint does
6 not allege a single false statement or omission made by a
7 manufacturer to the City of Reno, whether it's in a business
8 transaction or business relationship or otherwise.

9 The plaintiffs, instead, take sort of a broad brush
10 to this and claim that the manufacturers were transacting
11 business in the City of Reno. That's a different animal
12 altogether. They may or may not have been. That's not for
13 us here to decide today. But that does not establish that
14 special relationship, it does not establish a business
15 transaction or a business relationship between a manufacturer
16 and the City of Reno.

17 There's a lot of entities that are doing business in
18 the City of Reno. I don't think they're all exposed to
19 liability simply for that reason.

20 Section 552 has been extended -- as the plaintiffs
21 point out, as I don't think the defendants disagree -- to
22 misrepresentations made to third persons. And the plaintiffs
23 try to bootstrap that into a claim here, claiming that the --
24 there is some type of misrepresentation made by manufacturers

1 to somebody else in that long supply chain I described
2 earlier, that somehow inured to the detriment of the City.

3 The problem, again, the First Amended Complaint does
4 not give us notice. It does not satisfy the notice pleading
5 requirement because it does not allege any type of
6 misrepresentation, at all. There's no third party
7 identified. We don't know what the misrepresentation was,
8 who it was made to.

9 The plaintiffs finally resort to a public-at-large
10 argument, meaning somehow the manufacturers made some type of
11 unknown representation to the -- quote -- "public at large,"
12 which somehow imposes liability on the manufacturers by the
13 City.

14 First of all, even if such representations were made,
15 whatever they may be, that's not specific enough.

16 And, secondly, the City was not an intended
17 beneficiary of such representation, and the City did not rely
18 on any such misrepresentation.

19 The connection is just too attenuated, Your Honor.

20 The reason the Court doesn't see a lot of case law on
21 this or a lot of discussion about similar cases is because
22 there aren't any. This is a novel, unique, unprecedented
23 attempt to broaden a fairly straightforward tort, a negligent
24 misrepresentation claim, a business transaction, way beyond

1 the bounds of anything recognized in the law.

2 Again, the claim couldn't be more vague. There is no
3 statement identified. There's no business transaction. The
4 City was not an intended beneficiary, and the City did not
5 rely on anything the manufacturer said. None of those
6 elements are pled in the First Amended Complaint.

7 If the plaintiffs' public-at-large exception was
8 adopted here, which would be the first time it's ever been
9 adopted, every single person would have a negligent
10 misrepresentation claim, rendering the limitations in Section
11 552 and in Nevada law meaningless.

12 The third cause of action, Your Honor, is a sixth
13 cause of action for unjust enrichment. This is towards the
14 end of the First Amended Complaint.

15 And this claim, like the other claims I've discussed
16 here today, is both unsupported by the allegations in the
17 First Amended Complaint, and ultimately unsupportable.

18 There are three elements to an unjust enrichment
19 claim, and in the context of this case they are this:

20 Number one, that the City conferred a benefit on the
21 defendant.

22 Number two, that the defendants, the manufacturers in
23 this case, appreciated that benefit.

24 And, number three, that it would be unfair for the

1 defendants, the manufacturers, to retain the benefit
2 conferred upon them

3 Two things. Number one, those elements are not pled,
4 implied, or even remotely referred to in the rather
5 conclusionary allegations in the unjust enrichment section of
6 the First Amended Complaint.

7 Number two, those elements cannot and will not ever
8 exist. There is no such relationship. That the
9 plaintiffs -- the plaintiffs' position is propped up on one
10 proposition that has never before been recognized by any
11 Nevada court, and that is that the City conferred a benefit
12 on defendants by paying for alleged "downstream costs" -- in
13 quotes -- defendants' alleged misconduct, somehow conferring
14 a benefit on defendant.

15 That again is a novel theory, and, frankly, the
16 manufacturers would submit, a fairly desperate and
17 far-reaching interpretation of the unjust enrichment claim.

18 The simple fact is, that supply chain we discussed
19 earlier virtually precludes, as a simple matter of common
20 sense, any such relationship, any such conferrence of a
21 benefit. And the fact that the City may have paid some costs
22 or claims that incurred some municipal costs in connection
23 with a drug crisis that some of the manufacturers might have
24 tangentially been involved in is not what that claim is

1 about, Your Honor.

2 The First Amended Complaint fails to allege a single
3 transaction or commercial relationship. It only has
4 conclusory statements about unnecessary or excessive
5 prescriptions, without identifying to whom the payments were
6 made, or whether the prescriptions were unnecessary or
7 excessive, or why they were unnecessary or excessive.

8 Number two. The First Amended Complaint only as a
9 conclusion states that the City's expenditures helped
10 defendants' businesses or paid for -- quote --
11 "externalities" -- close quote.

12 How that conferred a benefit on the defendants is not
13 clear in the Complaint because it is not pled in the
14 Complaint.

15 The fact that the defendants -- I suspect we'll hear
16 from the plaintiffs that the defendants realized a profit
17 from selling opioids. And they probably did. I don't think
18 we're here to argue that today, Your Honor. But that is not
19 an element of an unjust enrichment claim. Making a profit is
20 not an unjust enrichment.

21 The simple fact is that the defendants manufactured
22 an FDA-approved prescription opioid medication, and provided
23 doctors with information regarding its risks and benefits.
24 The doctors determined if they were appropriate for patients.

1 There's nothing inequitable about the defendants retaining
2 payment for the medications prescribed by doctors.

3 Plaintiffs' theory on unjust enrichment has no basis
4 in Nevada law, and should be rejected.

5 The last section, Your Honor, is the punitive damage
6 section. This is probably the easiest one, and certainly the
7 shortest.

8 The first question is whether punitive damages can be
9 pled as a separate cause of action in the State of Nevada.
10 The case law, both the Denasi and Thompson cases cited in our
11 briefs, establish conclusively they are not standalone causes
12 of action.

13 The Nevada jurisprudence now recognizes the fact that
14 punitive damages are recoverable, and may be pled in certain
15 cases, but only as a remedy, not as a separate cause of
16 action. So the seventh cause of action for punitive damages
17 against the manufacturers should be stricken on that basis
18 alone.

19 The second issue concerns whether the underlying
20 claims in this case support at the pleadings stage a claim
21 for punitive damages.

22 As the Court is aware, NRS 42.005 requires a showing
23 of oppression, fraud, or malice to succeed on a punitive
24 damage claim.

1 We're well-aware of the fact that we are still in the
2 pleadings stage, Your Honor, but the claims in this case,
3 which the Court has heard all about here today, do not
4 contain a claim for fraud. They do not -- the claims are
5 styled as negligence, a much lower level of culpability. And
6 the plaintiffs have disclaimed many times that they are
7 making a fraud claim in this case. In other words, if the
8 only level of culpability alleged in the First Amended
9 Complaint is negligence, that is insufficient to support a
10 claim for punitive damages alone.

11 THE COURT: Well, let me stop you there. Because I
12 hear what you're saying, but, you know, you can't -- defense
13 can't have it both ways.

14 Mr. Lombardo says, "If it quacks like a duck, walks
15 like a duck, wobbles like a duck, it's a duck." If it sounds
16 in fraud, it's essentially a fraud claim masquerading as a
17 non-fraud claim, but they should be held to the standard of
18 pleading.

19 So if the Court accepts that, then the argument you
20 just made that it's really not a fraud claim loses a little
21 bit of a steam.

22 If, on the other hand, I accept that it's not a fraud
23 claim that's being sought for relief here, then that might
24 impact the availability of the punitive damages as a form of

1 relief, but it would undermine, in some sense, the level of
2 pleading that the plaintiff would be held to.

3 So I guess it's a bit inconsistent, is what I'm
4 trying to say.

5 MR. GUINN: The Court's comments point out the very
6 problem the defendants are having in this case, Your Honor.
7 It's a -- the plaintiffs will disclaim a fraud claim when the
8 Complaint is full of allegations of fraud, using words like
9 "fraud."

10 So we're talking about --

11 THE COURT: Well, they used different words, but
12 words that, it was argued to the Court by Mr. Lombardo,
13 impart the same meaning.

14 MR. GUINN: If there is, in fact, a fraud claim in
15 this case, it would be very easy to make a cause of action
16 that says fraud against all defendants, plead all the
17 elements of fraud, and the particularity. Everybody would
18 understand what the exact claim was, and we could proceed
19 appropriately.

20 Something Mr. Lombardo said that struck a bell with
21 me was that the plaintiffs are the master of their pleading.
22 They wrote the First Amended Complaint. We didn't. We have
23 to respond to it.

24 And we are circling back to where I started, Your

1 Honor. We are entitled to notice of what these claims are.
2 We can't resort to, as a court or society, to the notion
3 that: Oh, come on. Everybody knows what we're talking about
4 here. And that's what this ultimately boils down to, Your
5 Honor.

6 These cases are well-publicized, they are in the
7 news, they're in the media, they're known to the public. But
8 that is not what we're here talking about. We're talking
9 about a level of specificity that needs to be provided to the
10 defendants in this case so they know how to defend this case.

11 If there's a fraudulent misrepresentation made by a
12 manufacturer in this case, it wouldn't be hard for the
13 plaintiffs to say: Here it is. This manufacturer said X.
14 The truth is Y. This is your representation. And we
15 proceed, understanding the claim and the notice pleading
16 aspect. And just clearing the pleadings and getting
17 everything squared away and starting the case off would be
18 much easier than where we stand now.

19 At any rate, at this point, nothing in the First
20 Amended Complaint is characterized in the sense of a cause of
21 action. None of the conduct of the manufacturer defendants
22 is characterized as intentional, willful, or knowingly
23 indifferent conduct. No facts are pled in that regard.

24 With that, Your Honor, I will look forward to Mr.

1 Eglet.

2 THE COURT: Thank you.

3 I think what we're going to do -- because I envision
4 the plaintiff spending some time in response to what the
5 Court has just heard, followed by the reply, I think we will
6 take our lunch recess now.

7 And I would suggest to everyone that we start as
8 close to 1:00 o'clock as we can. That will give enough time
9 for people to have lunch, stretch their legs, give some
10 thought to the argument.

11 Once the Court has argument from the plaintiff, and
12 then the response, we'll move on to the second motion.

13 So we'll be in recess until 1:00 o'clock.

14 (Recess.)

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1 RENO, NEVADA, TUESDAY, JANUARY 7, 2019, 1:00 P.M.

2 THE COURT: Thank you.

3 Please be seated.

4 We're back on the record.

5 Plaintiff may proceed with his opposition.

6 MR. EGLET: Thank you, Your Honor.

7 THE COURT: You're welcome.

8 MR. EGLET: Good afternoon, Your Honor.

9 Let me start by saying there's a significant amount
10 of overlap between the multiple motions to dismiss on your
11 calendar the next two days. As I proceed through these
12 arguments, I'm going to try to do my best not to repeat the
13 same argument I made in a prior motion to --

14 THE COURT: If you do, I won't hold it against the
15 plaintiffs. I understand that's the nature of a hearing of
16 this magnitude.

17 MR. EGLET: I'm going to try my best, Judge, not to
18 do that, Judge.

19 THE COURT: Sure.

20 MR. EGLET: But accepting all the facts alleged in
21 the Complaint as true, as the Court must do when considering
22 motions to dismiss, the City of Reno has alleged sufficient
23 facts to put the manufacturers on notice of the alleged -- of
24 the allegations asserted against them, and, thus, the motion

1 to dismiss should be denied in its entirety.

2 Let me start out with a couple of preliminary things
3 that came up in defendants' argument, Your Honor.

4 First of all, the City of Reno's case is different
5 than the State's case.

6 Counsel mistakenly indicated to the Court -- and I
7 don't think there's any purpose for nefarious intent behind
8 this -- but indicated that the defendants in the City of Reno
9 case are the same as those in the State of Nevada's case.
10 However, the following defendants in the City of Reno case
11 are not defendants in the State of Nevada case. And that
12 includes Cardinal Health Technologies, LLC, Cardinal Health,
13 Inc., Purdue Pharmaceuticals, Cephalon, Inc., Allergan, PLC,
14 aka Actavis, PLC, Actavis, Inc., Watson Pharmaceuticals,
15 Inc., Watson Laboratories, Inc., and Actavis, LLC. Those are
16 not defendants in the State's case.

17 Additionally, the State of Nevada Complaint contains
18 causes of action that are not pled in the City of Reno's
19 case, or the Clark County case, or any of the other cases
20 that we have filed so far.

21 To the extent that Mr. Lombardo was insinuating that
22 the City of Reno's case is the same as the State of Nevada's
23 case, that is just an error. It's not true, Your Honor.

24 Mr. Guinn outlaid for you the supply chain in

1 discussion. He failed to inform the Court of a couple of
2 important things that are involved in that supply chain.

3 First of all, it doesn't start at the manufacturer's.
4 Opiates is a controlled substance, which I think the Court
5 understands, and so it's a closed system. Everybody
6 operating within the system has to be licensed to either
7 produce the raw materials, manufacture the actual opiate
8 pills, distribute the pills, the pharmacy to fill the
9 prescriptions, and the doctors who prescribe the
10 prescriptions.

11 One of the things -- if I -- I don't have a
12 handout -- and Mr. Guinn is welcome to join me -- I need to
13 show him the diagram.

14 If I may approach, Your Honor.

15 THE COURT: Sure.

16 MR. EGLET: So I kind of drew this out.

17 It actually starts with the raw-material suppliers.

18 THE COURT: Mr. Guinn, you can approach.

19 MR. GUINN: Thank you.

20 MR. EGLET: Most of which comes from out of the
21 country, Your Honor, the raw-material suppliers.

22 J and J, for example, is a major raw-material
23 supplier for opiates. Johnson and Johnson.

24 Then the raw materials go to the manufacturers, who

1 then manufacture and produce opiates.

2 They then go to the distributors. It's not one
3 distribution center. Each of the distributors have regional
4 distribution centers around the country, where the pills get
5 shipped to.

6 And then, out of those regional distribution centers,
7 they go to the specific pharmacies that are -- for example,
8 the regional distribution center for, I think, McKesson, is
9 in Southern California, for Nevada. I think they have one up
10 in Sacramento. But I think most of them come from McKesson,
11 from the L.A. distribution center for McKesson.

12 So the distributors all have regional distributions.
13 There's not one distribution center for all of them in the
14 country. Just kind of a little confusing.

15 They get shipped from the distributors to the
16 pharmacies. And, of course, the pharmacies fill the
17 prescriptions, and sell them to the patient.

18 And the doctors, of course, are here.

19 And what Mr. Guinn left out is that the manufacturers
20 advertise not only in the TV commercials -- you see them on
21 TV where they're advertising to the public all these
22 medications, which they've been allowed to do now for years
23 -- they also directly market and advertise to the doctors.
24 And they do this through sales representatives or retailers

1 who go visit the doctors, talk about their drugs, why their
2 drugs are better, why their patients should be on these
3 drugs, et cetera, et cetera. They also provide them written
4 materials and brochures, et cetera; as well as some of the
5 stuff goes to patients.

6 They have trade organizations that they're involved
7 in that promote these drugs as an organization. And we'll
8 get into this a little later. Other ideas, with respect to
9 distributors, about how to avoid -- you know, reporting
10 suspicious orders, things like that.

11 These trade organizations of the manufacturers, the
12 distributors are also members of the same trade
13 organizations. They do CMEs -- continuing-medical-education
14 programs -- they sponsor for doctors, where they put on these
15 programs, and they have key opinion leaders, doctors in the
16 field, like maybe a nationally-known pain-management person
17 that's on the manufacturer's payroll, or on one of these
18 trade organization's payroll, who then touts opiates, or
19 whatever drug they're talking about, in the CMEs to these
20 doctors.

21 And then they have what are called KOL -- key opinion
22 leaders -- who are basically leaders in different fields of
23 medicine, whether it's pain management, general practitioner,
24 or whatever they become. They get payments, get on the

1 payroll, stipends from these manufacturers, to tout these
2 products to the doctors, to get them to prescribe their drugs
3 to their patients. This is an important element of this
4 closed system that was left out.

5 We'll talk, particularly when we talk about the
6 distributors' motions, how, when the distributors put a glut
7 of opiates in a particular market, ship way too many
8 suspicious orders -- or any suspicious orders, but supply a
9 lot of it, it ends up with a glut in the market, which the
10 population isn't even big enough to absorb the population.
11 That's when most of the time what we call diversion occurs,
12 where the drugs are diverted from the legal market out of the
13 pharmacies. They come in maybe in the front door of the
14 pharmacies, but much of them go out the back door to the
15 illicit market.

16 And that is kind of the whole chain we're talking
17 about here in this case.

18 So I will begin with the argument manufacturers raise
19 regarding Dillon's Rule and Reno's ability to file this
20 lawsuit.

21 Excuse me. I just spilled all over myself.

22 Thank you.

23 In an attempt to deprive Reno of standing,
24 manufacturers ask this Court to apply NRS 244.137 and

1 Dillon's Rule in a way in which they have never been applied.

2 Dillon's Rule was not created to limit a City's
3 standing to bring lawsuits against companies or individuals
4 that have caused harm to the City, or to limit their powers
5 in such a way that it would never be able to sue for its
6 damages.

7 Standing requires an inquiry into whether the
8 plaintiff has the right to enforce the claims asserted
9 against the defendant, and whether the plaintiff has a
10 significant interest in litigation.

11 The concept of standing is also related to the legal
12 concept of the real party in interest, which is defined in
13 NRCP 17 (a) as the party with the right to enforce the
14 claims, and has a significant interest in the outcome.

15 These legal concepts of standing and real party in
16 interest work together to allow the defendant a finality of
17 judgment, so there is no concern that the real party in
18 interest is still out there, waiting to litigate.

19 Dillon's Rule was created to prevent local
20 governments from passing ordinances, regulations, and
21 requirements that contradict state law at a time where there
22 were no means of controlling local governments. But this
23 case does not involve Reno's decision to pass an ordinance or
24 a regulation preventing the distribution of prescription

1 opiates in Reno, or levying a tax against companies that
2 manufacture and distribute opiates within Reno.

3 THE COURT: Well, if this case did involve that, you
4 would agree that the City would have no business doing
5 anything like that.

6 MR. EGLET: I would agree, Your Honor.

7 And here the City seeks to recoup damages it has
8 suffered as a result of defendants' wrongful actions.

9 There is no other entity better situated to bring
10 these claims on Reno's behalf.

11 Reno has alleged that it suffered injuries unique to
12 the City. Reno alleged the causal connection between its
13 injuries and defendants' wrongful conduct. And a favorable
14 decision from the fact-finder in this case would result in
15 redress for Reno's injuries. Reno has legal standing to
16 bring the claims asserted in this case.

17 Dillon's Rule is separate from the issue of standing
18 and capacity to bring lawsuits.

19 A number of states have adopted Dillon's Rule, in
20 full or in part, including Nevada. The rule has been invoked
21 to invalidate municipal contracts, nullify ordinances,
22 invalidate restrictions on property sales.

23 One area, however, where it has not been invoked is
24 in the case of determining whether a municipality has the

1 right or capacity to pursue litigation in order to recover
2 damages suffered by a municipality.

3 Nevada has never invoked Dillon's Rule in the way the
4 manufacturers suggest is appropriate. And I would argue that
5 the vast majority of other jurisdictions have not done so
6 either, Your Honor.

7 Because this issue has not been addressed by Nevada's
8 court, Reno looked to other jurisdictions where Dillon's Rule
9 has been discussed. And each of the cases cited in Reno's
10 opposition includes discussion of Dillon's Rule in the
11 context of a local government's creation of an ordinance,
12 regulation, tax, or rule. Not a local government standing or
13 capacity to file a lawsuit to recover damages that it has
14 incurred.

15 One case cited by Reno, Hutchison, out of Utah, the
16 Court discussed the problems associated with the strict
17 construction of Dillon's Rule, even in the context of
18 creating regulations or laws. The Court reasoned that --
19 quote -- "The wide diversity of problems encountered by
20 county and municipal governments are not all, and cannot
21 realistically be effectively dealt with by a State
22 Legislature, which sits for 60 days every two years to deal
23 with matters of general importance. The strict construction
24 of Dillon's Rule is outdated."

1 And, Your Honor, even where the rule has been
2 strictly enforced, it has not been used to deprive a local
3 government of standing or capacity to sue in cases to recover
4 damages caused to that government.

5 Reno's lawsuit does not infringe on any state
6 regulations, nor is this case contrary to any state or
7 federal laws.

8 Reno has standing and capacity to bring this lawsuit
9 to recover the substantial damages it has suffered as a
10 result of the defendants' wrongdoing. No other government
11 entity can properly assert the claims asserted by Reno.

12 The opiate crisis is a matter of local concern. Even
13 if Dillon's Rule applies to standing dismissal, it's still
14 inappropriate because the opiate crisis and its impact on
15 Reno is a matter of local concern to Reno.

16 Reno is only seeking redress for the financial
17 burdens it has been forced to bear as a proximate cause of
18 misconduct by the defendants.

19 The damages Reno seeks are outlined in the City's
20 Complaint, and include damages associated with law
21 enforcement costs dealing with the opiate crisis, health
22 costs dealing with the opiate crisis, investigation costs
23 dealing with the opiate crisis, social services costs dealing
24 with the opiate crisis, and education costs dealing with the

1 opiate crisis in Reno. As such, this case is limited to
2 matters of local concern affecting Reno's day-to-day
3 operations and resources.

4 Manufacturers incorrectly argue that Reno's desire to
5 recover Reno-specific damages encroaches upon the Attorney
6 General's claims on behalf of the State, and usurps the AG's
7 exclusive authority to regulate a matter of statewide
8 concern.

9 There's absolutely no support for this argument, Your
10 Honor. The current Attorney General is well-aware of Reno's
11 lawsuit, and has not objected to the lawsuit, or taken any
12 action to intervene.

13 On page 8 of the manufacturers' reply, they cite to a
14 State of Nevada Complaint. But that case and that Complaint
15 was dismissed on May 30th, 2019, of last year. The State
16 filed a new Complaint in early June, 2019, which makes clear
17 it is pursuing only damages unique to the State. Moreover,
18 Attorney General Ford has spoken of his desire for the State,
19 counties and cities to be united in their efforts against
20 these defendants. Thus, this argument made by manufacturers
21 carries no weight.

22 And the letter from former Attorney General Laxalt
23 says the AG has the power to file deceptive trade claims.
24 The entire letter is prefaced on the trade practices -- or

1 deceptive trade practices allegation. Nothing else.

2 So in addition to the obvious local nature of Reno's
3 claims, Reno has statutory authority to pursue this
4 litigation.

5 In 2015, the State Legislature expressed concern
6 regarding Dillon's Rule, and how it unnecessarily restricts
7 city governments from taking actions necessary to address
8 matters of local concern. As a result --

9 It's dryer up here than it is in Las Vegas. I didn't
10 think that was possible, Your Honor.

11 THE COURT: It's possible.

12 MR. EGLET: As a result, NRS 268.001 was modified to
13 provide cities with more power regarding matters of local
14 concern.

15 NRS 268.001 (6) (a) gives cities all powers necessary
16 or proper to address matters of local concern.

17 NRS 268.001 (6) (b) specifically modifies Dillon's
18 Rule so that, if there is any doubt regarding the power of
19 the City to address a matter of local concern, it must be
20 presumed that the City has the power, unless that presumption
21 is rebutted by evidence of contrary intent of the
22 Legislature.

23 This is a direct and intentional departure from the
24 classic Dillon's Rule, which has a presumption against local

1 government power.

2 There's no question that the State Legislature
3 intended to expand the powers of the cities within the State,
4 not reduce or limit their power.

5 This was in the 2015 Legislature, that was completely
6 controlled by the Republicans in both houses. And Governor
7 Sandoval, after the Bill passed, signed the Bill to become
8 law.

9 So manufacturers argue, on reply, that the allowance
10 for a city to handle matters of local concern is a narrow
11 exception to Dillon's Rule.

12 But the language of the statute itself makes clear
13 that the Legislature viewed this as an important and
14 necessary modification to the strict application of the
15 outdated Dillon's Rule.

16 It is not a narrow description. It is a broad
17 presumption in favor of a local government's power.

18 Additionally, Reno's charter grants the City the
19 power to provide for the welfare of its citizens.

20 Article 1 of the Reno city charter, in Section
21 1.0101, states -- quote -- "In order to provide for the
22 ordinary government of the City of Reno and general welfare
23 of its citizens, the Legislature hereby establishes this
24 Charter for the government of the City of Reno."

1 As stated, the Charter's purpose was to provide for
2 two things: the ordinary government of the City of Reno, and
3 provide for the general welfare of Reno's citizens.

4 Here, the City of Reno provides -- or brings this
5 action, as authorized in the Charter, to provide for the
6 welfare of the City and its citizens.

7 "A local concern" is specifically defined in NRS
8 268.003 to include matters of -- quote -- "public health,
9 safety, and welfare in the city, as well as nuisances."

10 This lawsuit alleges damages caused to the public
11 health, and the creation and welfare of the City, and the
12 creation of an ongoing nuisance created by the defendants.

13 The costs incurred by Reno do not impact any other
14 cities or counties. They are Reno's damages, incurred by
15 Reno's agencies only. There is no other party that can
16 pursue the damages Reno seeks through this lawsuit, other
17 than the City of Reno.

18 Reno has standing and capacity to sue, and is the
19 real party in interest to pursue this litigation regarding
20 this crucial matter of local concern.

21 Your Honor, there is a point of clarification I do
22 need to make that I noticed this past weekend in the
23 Complaint.

24 In the prayer for relief in the Complaint, paragraph

1 3, it states the City wants to stop their promotion and
2 marketing of opiates for inappropriate uses in Nevada.

3 This is an area, Your Honor, that should have been
4 revised to say "The City of Reno," and so we would be happy
5 to amend the Complaint, or to file an errata to the Complaint
6 to clarify that, whatever the Court's pleasure is.

7 In response to the September, 2019 supplement that we
8 filed, the manufacturers filed their supplement citing this
9 Premium Standards Farms case. The facts of this case were, a
10 township attempted to impose a setback requirement under a
11 statute on a farm. The farm sued the township, and the
12 township counterclaimed against the farm, the farmer.

13 In the holding, the Court found that there's no
14 counterclaim because the farms were explicitly excluded from
15 the statute regarding zoning, so the City didn't have the
16 power to do it. So the City can't bring public nuisance,
17 because no express authority to do so. The zoning charter
18 chapter didn't expressly grant the right to bring a public
19 nuisance, but limited the City to bring misdemeanor actions
20 for violation of the statutes, and to oppose zoning
21 regulations.

22 There's no reference to a statute similar to Nevada's
23 modifying Dillon's Rule, Your Honor.

24 Next, the manufacturers argue that the Municipal Cost

1 Recovery Rule bars the City's claims. But Nevada has not
2 adopted the Municipal Cost Recovery Rule. And for good
3 reason: because the rule allows tortious defendants to
4 escape liability.

5 Defendants attempt to define the Municipal Cost
6 Recovery Rule in the same terms as the Firefighter Rule,
7 which Nevada has adopted. But the two rules are very
8 different.

9 The Firefighter Rule prevents a public officer from
10 pursuing for physical injuries suffered while performing
11 their job duties, which is based on the concept of assumption
12 of the risk.

13 The Municipal Cost Recovery, on the other hand, is
14 not premised on the assumption of the risk. Instead, it is
15 intended to address concerns regarding shifting the cost
16 burden of emergency services from the government to private
17 tortfeasors.

18 But manufacturers do not point to any Nevada cases
19 discussing concerns about municipal recovery, or that
20 otherwise suggest Nevada would be among the jurisdictions to
21 adopt the rule.

22 Defendants' assumption that the rule applies here is
23 unsupported by Nevada law. And even jurisdictions that have
24 adopted the Municipal Cost Recovery Rule limit its

1 application to single-event emergencies.

2 For example, these cases often involved fire or train
3 derailments. Most jurisdictions distinguish between
4 individual incidents from situations involving protracted
5 misconduct, that were perpetrated over the course of several
6 years -- many years, like we have here in the opiates case.

7 Many courts in the opiate litigations have rejected
8 the request to apply this rule, including two Clark County
9 judges: Judge Williams and Judge Gonzalez.

10 Even if the Court were to adopt the Municipal Cost
11 Recovery Rule, this case would fall into an express
12 exception.

13 Most jurisdictions that have adopted the rule
14 recognize an exception where an act of a private party
15 creates a public nuisance, which the government seeks to
16 abate.

17 Reno has alleged causes of action against defendants
18 for creation of a statutory public nuisance, as well as a
19 common law public nuisance.

20 There's nothing to suggest that Nevada's courts
21 intend to adopt the Municipal Cost Recovery Rule, and there's
22 no reason to apply the rule in Reno's case.

23 Reno met the pleadings standard set forth in NRCP 8.
24 Reno has not alleged any fraud claims, and, thus, is only

1 required to meet the pleading requirements of NRCP 8, which
2 only requires the plaintiff provide a short and plain
3 statement of the claim, showing that the City is entitled to
4 relief.

5 Notice pleading, that's what our state is. There's
6 no question that Reno provided the manufacturers and all the
7 defendants with more-than-sufficient allegations to meet the
8 notice pleading requirements.

9 Manufacturers request the Complaint be dismissed in
10 part because they are of the impression that there is a ban
11 on group pleading. But Reno's claims are detailed enough to
12 provide each defendant with sufficient notice of Reno's
13 claims for relief. In fact, the manufacturers' own motions
14 demonstrate that they are aware of the claims asserted
15 against them by Reno.

16 THE COURT: Can I interrupt you just for a moment?

17 MR. EGLET: Sure.

18 THE COURT: What do you make of the defense argument
19 that: Judge, we should really look to the substance and the
20 gist of the allegations. And it really looks like a fraud
21 type of a claim here, or it sounds in fraud, grounded in
22 fraud, so you should require a heightened standard, and they
23 have not met that.

24 MR. EGLET: I would argue that the seminal case, or

1 the statute requires the claim only sounds in fraud if the
2 plaintiff alleges unified course of fraudulent conduct and
3 relies entirely on that course of conduct as the basis of a
4 claim, which we have not done here, Your Honor.

5 Yes, we have alleged some fraudulent conduct, but
6 it's not a unified course of fraudulent conduct, and the
7 claims do not rely entirely on the course -- that course of
8 conduct as a basis for the claim.

9 So it's not a fraud claim, so Reno does not need to
10 be pleading requirements of NRCP 9 (b) because it has not
11 alleged any claims for fraud, mistake, or intentional
12 misrepresentation, specific claims for that.

13 We've talked about some of that stuff in the
14 Complaint, but we have not made a specific complaint and
15 relied upon a unified course of fraudulent conduct entirely
16 for our claims here.

17 Here fraud is not an essential element of any of
18 Reno's causes of action. Accordingly, Your Honor, Reno must
19 meet only the notice pleading standard of NRCP Rule 8.

20 Now, the --

21 THE COURT: And to be clear, the plaintiff
22 says: Rule 8, if it's been met as to negligence, negligent
23 misrepresentation, unjust enrichment. And you heard Mr.
24 Guinn say: As to the negligent misrepresentation, who

1 misrepresented what to whom, when?

2 MR. EGLET: Well, the negligent misrepresentation,
3 that was the reason I went through that chart with you.
4 Because the negligent misrepresentations went from the
5 manufacturers, whether it's by their own sales rep, their
6 detailers, or through their advertising material, the
7 commercials on TV, the printed materials they sent to
8 doctors, or the seminars that they paid for the doctors to go
9 to, or their own key opinion leader, all of that stuff --

10 THE COURT: If I accept that has been alleged, that
11 being an element of the negligent misrepresentation claim, I
12 can see that Mr. Guinn will stand up on reply and say: Your
13 Honor, the negligent misrepresentation needs to be made to --

14 MR. EGLET: And I will get to that, Your Honor. He
15 can make it to a third party. Nevada law is clear on that.
16 And I'll get to that argument when I get to that issue, Your
17 Honor.

18 THE COURT: All right. Please proceed.

19 MR. EGLET: So with respect to the fraud in Rule 9
20 issues the defendants argue, they cite to this first -- they
21 cite to this Kearns case, where the plaintiff purchased a
22 single vehicle, one person, with one interaction. And
23 Kearns, the plaintiff, had the information, and chose not to
24 allege fraud in the Complaint, even though its entire course